**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

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

# POST HEARING BRIEF

**ON BEHALF OF**
**COALITION FOR CLEAN AFFORDABLE ENERGY,**
**NEW ENERGY ECONOMY,**
**PROSPERITY WORKS,**
**SIERRA CLUB**

**JUNE 3, 2022**

## TABLE OF CONTENTS

**I. INTRODUCTION ..... 1**

**II. ARGUMENT ..... 5**

1. THE FINANCING ORDER DID NOT AUTHORIZE PNM TO ISSUE ENERGY TRANSITION BONDS WHENEVER IT WANTS TO; THE FINANCING ORDER PRESCRIBED THE TIMING FOR BOND ISSUANCE. 5
2. NEITHER THE ETA NOR THE FINANCING ORDER CONTAINS AN EXPRESS OR IMPLIED TERM GRANTING PNM "FLEXIBILITY" TO DELAY ISSUING THE BONDS. ..... 9
3. THE ETA REQUIRES REASONABLE ACTIONS TO COMPLY WITH ALL OF THE TERMS AND CONDITIONS OF THE FINANCING ORDER. ..... 9
4. THE LEGISLATURE INTENDED FOR AND GAVE THE COMMISSION AUTHORITY TO ENFORCE THE FINANCING ORDER ..... 12
5. PNM'S REVISED PLAN IS UNJUST, UNREASONABLE, AND VIOLATES THE EXPRESS TERMS AND CONDITIONS OF THE FINANCING ORDER THAT ORDERED ALL SJGS COSTS REMOVED FROM RATES UPON ABANDONMENT ..... 13
6. PNM'S ARGUMENTS RELATED TO CUSTOMER BENEFITS FROM ALLEGED RATE CASE DELAY IS SPECULATIVE AT BEST. ..... 17

**III. RESPONSE TO BRIEFING QUESTIONS ..... 19**

1. WHETHER, BASED ON THE RECORD IN THIS CASE, THE COMMISSION IS JUSTIFIED IN DEPARTING FROM THE COMMISSION'S GENERAL POLICY AGAINST PIECEMEAL RATEMAKING? ..... 19
2. WHETHER THE ETA OCCUPIES THE FIELD TO ELIMINATE THE COMMISSION'S AUTHORITY TO ESTABLISH A RATEMAKING METHOD TO REMOVE THE COSTS OF SAN JUAN UNITS 1 AND 4 FROM RATES UPON THEIR ABANDONMENT BUT BEFORE THE ISSUANCE OF THE ENERGY TRANSITION BONDS AND THE ASSESSMENT OF ENERGY TRANSITION CHARGES? ..... 23
3. BASED UPON THE EVIDENCE IN THIS CASE AND ASSUMING THE COMMISSION DECIDES TO ORDER THE REMOVAL OF THE COSTS OF SAN JUAN UNITS 1 AND 4 FROM RATES UPON THEIR ABANDONMENT, DESCRIBE YOUR POSITION ON WHETHER THE COMMISSION SHOULD ORDER PNM TO ISSUE RATE CREDITS, ORDER THE ESTABLISHMENT OF A REGULATORY LIABILITY, OR ORDER A DIFFERENT REMEDY? ..... 25
4. IF THE COMMISSION ORDERS THE REMOVAL OF THE COSTS OF SAN JUAN UNITS 1 AND 4 BY WHATEVER REMEDY, SHOULD SUCH REMEDY BE INSTITUTED IN SUCCESSIVE PHASES IN CONFORMITY WITH THE STAGGERED ABANDONMENT OF SAN JUAN UNITS 1 (ON OR ABOUT JUNE 30, 2022) AND 4 (ON OR ABOUT SEPTEMBER 30, 2022)? ..... 26
5. DOES PNM'S REVISED PLAN CONSTITUTE A "MORAL HAZARD" THAT IS RELEVANT TO THE COMMISSION'S DECISION IN THIS PHASE OF THE PROCEEDING?. ..... 27
6. DOES THE ELEMENT OF PNM'S REVISED PLAN THAT WOULD TRANSFER THE FULL AMOUNT OF THE SECTION 16 PAYMENTS BEFORE AND INDEPENDENT OF THE BOND ISSUANCE CONTRAVENE APPLICABLE PROVISIONS OF THE ETA AND THE FINANCING ORDER? ..... 32
7. DOES THE REQUIREMENT IN SUBSECTION J OF SECTION 16 OF THE ETA THAT A QUALIFYING UTILITY TRANSFER SPECIFIED PERCENTAGES OF THE FINANCED AMOUNT OF THE ENERGY TRANSITION BONDS WITHIN THIRTY DAYS OF RECEIPT OF ENERGY TRANSITION BOND PROCEEDS FOR THE PURPOSES OF SECTION 16 INDICATE THAT THE LEGISLATURE INTENDED TO REQUIRE THE

QUALIFYING UTILITY TO ISSUE THE ENERGY TRANSITION BONDS AT THE TIME OF ABANDONMENT AND THAT, WHEN SECTIONS 4, 5, 16 AND THE REST OF THE ETA ARE READ *IN PARI MATERIA*, THE ETA REQUIRES QUALIFYING UTILITIES TO DO SO?.....33

**IV. PROPOSED FINDINGS.....35**

## TABLE OF AUTHORITIES

### NEW MEXICO CONSTITUTION

N.M. Const. Art. XI, §2 ..... 12

### NEW MEXICO CASES

*Citizens Finance Co. v. Cole,* 47 N.M. 73, 134 P.2d 550 ..... 18
*Citizens for Fair Rates & the Env't v. N.M. Pub. Regulation Comm'n*, 2022-NMSC-010 ..... 17, 22
*Lytle v. Jordan,* 2001-NMSC-016 ..... 18
*Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000-NMSC-033 ..... 4
*Pub. Serv. Co. of N.M. v. N.M. Pub. Regul. Comm'n*, 2019-NMSC-012 ..... 22, 28
*Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012 ..... 26
*Qwest Corporation v. New Mexico PRC,* 2006-NMSC-042 ..... 20, 23
*State ex rel. Egolf v. New Mexico Pub. Regulation Comm'n*, 2020-NMSC-018 ..... 12
*White v. Valley Land Co.,* 64 N.M. 9, 322 P.2d 707 ..... 18

### NEW MEXICO REGULATORY CASES

NMPRC Case No. 15-00261-UT ..... 27
NMPRC Case No. 16-00276-UT ..... 26
NMPRC Case No. 19-00195-UT ..... 23
NMPRC Case No. 20-00104-UT ..... 23
NMPRC Case No. 20-00222-UT ..... 2
NMPRC Case No. 21-00083-UT ..... 23

### REGULATORY CASES FROM OTHER JURISDICTIONS

*In Re: Investigation into the Establishment of Operations Support Systems Permanent Performance Measures for Incumbent Local Exchange Telecommunications Companies,* 2001 WL 1104733 (Fla.P.S.C.) ..... 27

### NEW MEXICO STATUTES AND RULES

NMAC 1.2.2.11 A (3) ..... 7
NMAC 1.2.2.11(A) ..... 8
NMAC 1.2.2.7 P (3) ..... 7
NMRA 12-601(B) ..... 33
NMSA 1978, §12-2A-18 ..... 35
NMSA 1978, §12-2A-19 ..... 35
NMSA 1978, §55-1-201(B)(20) ..... 11
NMSA 1978, §55-1-205 ..... 11
NMSA 1978, §62-2-1 *et seq* ..... 1, 36
NMSA 1978, §62-3-1(B) ..... 22, 36
NMSA 1978, §62-6-4 ..... 36
NMSA 1978, §62-8-1 ..... 36

NMSA 1978, §8-8-4(A) ..... 23
NMSA 1978, §8-8-4(B)(5) ..... 23
NMSA 1978, §62-10-1 ..... 23
NMSA 1978, §62-18-1 *et seq* ..... *passim*
NMSA 1978, §62-18-2(H)(2)(c) ..... 33
NMSA 1978, §62-18-4(B) ..... 33
NMSA 1978, §62-18-4(B)(11) ..... 24
NMSA 1978, §62-18-4(B)(7) ..... 6
NMSA 1978, §62-18-5 ..... 33
NMSA 1978, §62-18-5(F)(11) ..... 23, 24
NMSA 1978, §62-18-8(A) ..... 33
NMSA 1978, §62-18-11(B) ..... *passim*
NMSA 1978, §62-18-16 ..... *passim*
NMSA 1978, §62-18-16(A) ..... 32
NMSA 1978, §62-18-16(D) ..... 32
NMSA 1978, §62-18-16(G) ..... 32
NMSA 1978, §62-18-16(J) ..... 32, 33, 34

**OTHER AUTHORITIES**

Securities Act of 1933, 15 USC §§ 77a-77mm (1934) ..... 5, 31

## I. INTRODUCTION

Why is this Show Cause proceeding taking place? The parties are here because the Public Service Company of New Mexico ("PNM") made decisions related to the abandonment of the San Juan Generating Station ("SJGS") that, if implemented, will impose millions of dollars in phantom "costs" on PNM's customers and provide PNM with enormous undeserved, unearned and unlawful profits, contrary to the Financing Order approved in this docket. PNM's decisions would not only cheat customers out of their benefit of the bargain in the Financing Order approved by the Public Regulation Commission ("PRC" or "Commission") but would also violate the Public Utility Act, the Energy Transition Act, and the most fundamental precepts of monopoly utility regulation, including the requirement that a utility's customers can only be charged fair, just and reasonable rates.

At the heart of this proceeding is PNM's predatory decision to continue for years to collect from its customers all of its SJGS costs after PNM abandons that plant and it is no longer providing service to customers, despite the fact that the timing for removal of these costs from rates was already litigated, decided and appealed. PNM's tortured explanation for delaying issuance of the bonds is that even though it had told all concerned that its issuance of SJGS-related ETA bonds would be contemporaneous with the plant's abandonment, PNM will not issue the bonds until its next general rate case is concluded, no matter how long it is before PNM requests one, and however many years it takes to conclude it. PNM believed that indefinitely pushing off the date for SJGS bond issuance allows PNM to continue to charge its customers as though the plant were still operating.

PNM came to this decision, on its own, during negotiations in the Avangrid merger case when PNM offered the benefit of a rate freeze to other signatories to join the stipulation in Case

No. 20-00222-UT.[1] PNM did not communicate this decision to anyone other than PNMR board of directors.[2] PNM's management concluded that even though PNM had informed the parties and the Commission that the date of the bond issuance was tied to the date of SJGS abandonment, that PNM would instead tie the bond issuance and rate credit to a future rate case. This meant that by this simple maneuver, PNM could continue to charge its customers for all SJGS costs until such time as PNM, ***at PNM's discretion,*** decided to issue the SJGS energy transition bonds. This maneuver, however, was contrary to the express terms of the Financing Order at ¶28 that required bond issuance and rate credit promptly after the last of four events had occurred, as will be discussed further below.

The term "moral hazard" aptly defines the situation that PNM has created, although the circumstances here are significantly worse for ratepayers than any moral hazard in the traditional sense. It is a term in economics that has been succinctly explained:

> Moral hazard can lead to personal, professional, and economic harm when individuals or entities in a transaction can engage in risky behavior because the other parties are contractually bound to assume the negative consequences.[3]

The term's use in the insurance context exemplifies how a party's level of care is related to the level of perceived risk.[4] If you do not have insurance, you exercise a higher level of care about what you do because a loss will fall on you. If you have insurance, you exercise a lower level of care because a loss will fall on the insurance company, not on you. Here, PNM acted as if its customers would serve as insurance: PNM believed that the cost of its decision

[1] Vol. II, Tr., 5/24/2022, Tarry, p. 349-352.
[2] Id at 351.
[3] https://www.masterclass.com/articles/what-is-moral-hazard
[4] https://www.investopedia.com/ask/answers/042415/what-difference-between-moral-hazard-and-adverse-selection.asp

to delay issuing the bonds would fall on customers, not PNM's shareholders. A frequent ingredient in the creation of a moral hazard is that one party has superior knowledge of the factors at play in a business relationship than the other party. In the case of PNM, its superior knowledge – which largely determines what risks will be imposed on ratepayers and what they will have to pay – is not knowledge regarding events external to PNM, but internal to PNM itself and consists of the undisclosed decisions it made and the plans it has laid to increase its profits by not issuing the rate credit and energy transition bonds promptly after abandonment. Neither the ratepayers nor the PRC have access to this information until PNM chooses to disclose it.

Unbeknownst to the rest of the world, including the Commission and the other parties to this case, PNM internally attached a contingency to the financing schedule: the securitized bonds would be issued and the rate credit begun upon the retirement of the San Juan units, *but only if this was also coterminous with the effective date of a new rate case*.[5] The rest of the world did not learn of PNM's secret contingency until discovery documents in April 2022 revealed PNM's revised ploy; on August 31, 2021 the PNMR Board of Directors presentation stated as follows:

> "Adjust the timing of PNM Rate cases. Next general rate case delayed for one year due to merger.
> Issuance of San Juan securitization bonds delayed to coincide with general rate case.
> Rate riders implemented to provide rate path through generation transition period and avoid back-to-back rate cases."[6]

On the basis of its own decision to delay the rate case, PNM now intends to withhold the rate adjustment from its customers until January 2024 – and to continue to earn a shareholder

[5] *Id.*
[6] NEE-SC-2-2, NEE #2 – PNM Exhibit NEE 12-11, page 2 of 4.

profit on the retired San Juan plant through that date. PNM's conduct would be a no-go, even in the world of non-regulated entities. *Ponder v. State Farm Mut. Auto. Ins. Co.*, 2000-NMSC-033, ¶11 (contract law does not give effect to a party's "undisclosed intentions"). As a regulated utility, PNM withholding material facts from the Commission about its plans to delay the energy transition bond issuance and rate credits, crossed a very clear line and cannot be condoned.

This context frames the issue of whether PNM has taken *reasonable* actions to satisfy the terms and conditions of the Financing Order. Are PNM's delays reasonable?

Instead of behaving responsibly and transparently in light of PNM's intention to delay issuing the energy transition bonds, in January of 2022 PNM hired a public relations firm to develop messaging to convince customers and stakeholders that what was in PNM's mind but not communicated to anyone else, that PNM had a right to delay the Commission-Ordered rate credit included in the Financing Order by delaying issuing the energy transition bonds, and that PNM's decision to withhold the rate credit was fair and in customers' best interest.[7] PNM executives acknowledged the risk this strategy posed: "PNM is trying to avoid paying the bonds and savings to customers, this may be viewed as a corporation that breaking [sic] promises that we made."[8] PNM was correct that if the PR spin didn't work that their actions would "run the risk of looking like a complete shell game, eroding [their] … credibility for future proposals and planning." Customer rate shock was really only a concern to PNM because it might make "next year's rate case a taller hurdle." In delaying the rate credit, PNM acknowledged the risk the "[i]mpression of the company could have long-term implications for their reputation, brand and trustworthiness here – not only for customers but also for regulation."[9]

[7] CCAE-SC-15, PNM Exhibit CCAE 14-6
[8] CCAE-SC-15, PNM Exhibit CCAE 14-6, p. 16 of 21, "Securitization Messaging,"1/10/22.
[9] *Id.*

PNM's internal securitization messaging was correct, at least in this respect: "PNM stated savings to customers in closing SJGS. People expect to see some reward, somewhere. May be viewed as PNM leadership is breaking promises made to New Mexicans."[10] PNM has broken its promises made to New Mexicans by failing to engage in reasonable actions to implement the terms of the Financing Order, actions that were intended to and would have benefited New Mexicans, actions that were part of the deal struck by the Financing Order. PNM cannot pick and choose which portions of the Financing Order to implement.

PNM is delaying issuing the Energy Transition Bonds to avoid paying the SJGS savings to customers after the plant is abandoned. That is what this Show Cause proceeding is about. PNM's various claims about protecting ratepayers from rate shock and any other justification for departing from the terms of the Financing Order should be viewed through this lens.

## II. ARGUMENT

### 1. The Financing Order did not authorize PNM to issue Energy Transition Bonds whenever it wants to; the Financing Order prescribed the timing for bond issuance.

The Financing Order provides:

> As described in the Consolidated Application, including the Supporting Testimony, PNM expects to cause the issuance of the Energy Transition Bonds as promptly as possible after the last of the following events have occurred: (1) issuance of a final, non-appealable financing order acceptable to the Company; (2) the abandonment of the San Juan coal plant; (3) delivery of any necessary SEC approvals under the Securities Act of 1933; and (4) completion of the rating agency process. PNM estimated that the issuance of the Energy Transition Bonds would occur in 2022. (Financing Order ¶28).

[10] *Id.,* p. 17 of 21.

This language ties the timing of bond issuance to the "four events" enumerated above, and requires PNM to issue the bonds "as promptly as possible after the last of the [4] . . . events have occurred." The estimate of the timing of bond issuance does not include a date certain, it includes events certain to occur – if PNM acts reasonably and in good faith to satisfy the conditions precedent in its exclusive control. PNM must *seek* the SEC approvals and *complete* the rating agency process for those events to occur.[11] PNM provided through discovery that nothing is preventing PNM from issuing the Energy Transition Bonds except its own failure to commence the rating agency process and obtain SEC approvals.[12]

The Financing Order term for the date of bond issuance is tied to the timing of the completion of the four events: after the four events are completed, bond issuance must occur promptly. The standard applicable to PNM's performance of the prompt issuance requirement is the requirement PNM take "reasonable actions." "Reasonable actions taken by a qualifying utility to comply with the financing order shall be deemed to be just and reasonable for ratemaking purposes." (NMSA §62-18-11(B)). PNM must take reasonable actions to ensure the conditions precedent in its exclusive control are satisfied, including taking reasonable actions to ensure the prompt issuance of the bonds.

The ETA requires a utility to provide an "estimate" of the time of bond issuance (NMSA §62-18-4(B)(7)) – but nothing about the word "estimate" in context of the ETA's framework implies that the "estimate" is void of legal significance. The estimate of timing of bond issuance "shall" be included in a utility's application, vetted for ETA compliance,[13] rejected and modified

[11] Vol. II, Tr., 5/24/2022, Tarry, p. 359:20.
[12] *See*, CCAE-SC1, Response Testimony of Noah Long, attachment NL-3 – PNM's Response to WRA Interrogatory 9-5.
[13] *See,* CCAE SC1 Response Testimony of Noah Long at 11:7-13:2 (explaining the Commission's role in vetting the terms and conditions of a utility's ETA Financing Order

if non-compliant, and included as a term of the Financing Order. It is an ETA-approved, material term.[14] PNM's argument is that it has authority to issue bonds whenever it wants, and that the terms of the Financing Order in no way restrict PNM's discretion to issue the ETA bonds whenever it wants to.[15]

The process that resulted in the Financing Order commenced with PNM filing its application. PNM provided the language at page 34, Paragraphs 53, 54 and 55 of its application that became Paragraph 28 of the Financing Order - the four events and prompt bond issuance thereafter. Five PNM witnesses swore under oath in discovery in this docket that PNM intended that portion of its application to be its estimate of the time of bond issuance term in its application.[16]

The Commission, and all of the parties in the case, relied upon PNM's estimated time of bond issuance included on page 3, of PNM's application. The Commission had a legal right to rely, and did in fact, rely on the information in PNM's application. 1.2.2.11 A (3) NMAC.[17] Providing that the rate credit should appear on customers' bills at the time the ETC go into effect

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application for ETA compliance and noting PNM's Revised Plan's timing for bond issuance in which PNM will issue the bonds at its discretion has not undergone this vetting process).

[14] NEE-SC-1, Fetter, p. 18. "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."

[15] Mr. Atkins testified he didn't think the timing of bond issuance term in PNM's application was binding on PNM. He testified if he had been made aware how important the "rate case" contingency was to PNM for timing of bond issuance, "I don't know if I would have made that recommendation because I think that there was already flexibility with the estimated—with the qualified estimate of time, so I don't think that would be necessary. Vol. II, TR., 5/24/2022 Atkins, p. 466:16-467-13.

[16] CCAE EX-SC-1, Response Testimony of Noah Long, Attachment NL-1.

[17] Any pleading before the Commission including applications, 1.2.2.7 P (3) NMAC, 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.)

was administratively convenient and acknowledged that these events would occur at the same time as abandonment. But nothing about that timing was intended to give PNM the ability to unilaterally modify the terms of the Financing Order to change the bargain and balance of benefits between PNM and ratepayers.

PNM also stated in testimony that it intended to file a rate case that would coincide with the commencement of the energy transition charges. Such a statement did not provide notice that if PNM did *not* file the intended rate case, PNM did *not* intend to issue the Energy Transition Bonds. PNM certainly did not indicate this "intent" in the place that it mattered: PNM's Application for a Financing Order. The reason a utility must include its request in its application is simple: the Commission must rely on and is entitled to rely on the authorizations requested in the utility's Application. The Application is the pleading to which the Commission looks to determine what the utility's request is for which the utility is seeking approval. *See*, NMAC 1.2.2.11(A).

In addition, in its application and supporting testimony for a Financing Order, PNM provided no analysis of the additional costs to ratepayers of delaying issuance of the energy transition bonds. All analysis provided by PNM compared the costs to ratepayers of traditional ratemaking versus issuing ETA bonds at the time San Juan was abandoned. None of those estimates placed the cost of the delay on the ETA bond side of the equation. In sum, in applying for a Financing Order, PNM provided no notice of the possibility of delaying bond issuance well after San Juan is abandoned and no analysis of the cost impacts of such delay.

The ETA's framework requires the Commission to analyze the Section 4 terms included in a utility's application for a Financing Order for compliance with the ETA. Only non-compliance with the ETA permits the Commission to require a modification. If the terms of

Section 4 and 5 comply with the ETA, the Commission must approve the application. PNM argues that a rate case is a pre-condition to bond issuance, i.e., PNM is not required to issue the bonds until it files a rate case. However, PNM is incorrect. Because this term was not included in PNM's application, it did not become a term of the Financing Order.

PNM is arguing that the Commission should invent a 5th "rate case" pre-condition in paragraph 28 of the Financing Order. PNM's argument not only contradicts but nullifies the express terms of the Financing Order.

**2. Neither the ETA nor the Financing Order Contain an Express or Implied Term Granting PNM "Flexibility" to Delay Issuing the Energy Transition Bonds.**

PNM claims the ETA and Financing Order provide "flexibility," but the pertinent inquiry is flexibility to do what? *If* an implied intent of flexibility were in the ETA, such flexibility would be expected to allow the utility to act in furtherance of the ETA's objectives. But PNM's plan to delay bond issuance is not in furtherance of a legitimate ETA objective. It is claimed in order to permit PNM to avoid paying the SJGS savings to customers, and to use flexibility as a sword to defeat the rate credit provision of the Financing Order inserted to protect ratepayers. PNM has failed to demonstrate that any flexibility built into the ETA permits PNM to ignore the Financing Order's express terms or otherwise justifies PNM's delaying issuing the ETA bonds to avoid paying the savings from the San Juan Generating Station to customers as ordered by the Financing Order.

**3. The ETA Requires Reasonable Actions to COMPLY With ALL of the Terms and Conditions of the Financing Order.**

It is both shocking and inconsistent with PNM's position as a regulated utility that PNM would undertake to defeat a portion of the Financing Order, the rate credit inserted therein for

the benefit of ratepayers, through its own silence and inaction when it had an obligation to comply with ALL of the terms and conditions of the financing order.

If PNM felt the terms and conditions of the Financing Order were unfair, PNM's remedy was a Supreme Court appeal. The case did in fact go up on appeal and PNM supported the Commission's decision to issue the Financing Order including all terms and conditions therein. The Financing Order is now post-appeal, and irrevocable, and all decisions therein are Final**.**

PNM has no right to complain about the terms in the Financing Order it did not appeal, including the rate credit, and has no further remedy therefrom. Since PNM had no relief from the terms of the Financing Order, PNM responded with non-performance of actions PNM was required to take under the terms and conditions of the financing order, by not completing the agency rating process or seeking the SEC approvals required for a timely bond issuance that complies with Paragraph 28 of the Financing Order. Testimony by Mr. Atkins indicated that it would take approximately 5.5 months to complete the processes required for bond issuance, and PNM has not started this process.[18]

The Commission should not entertain any complaints from PNM that the rate credit ordered by the financing order is unfair to PNM while PNM 1) avails itself of the protection of its undepreciated investments in the SJGS from Commission scrutiny afforded to PNM by the Financing Order and application of the ETA to its undepreciated investments; 2) failed to appeal any "unfairness" when it had an opportunity to do so; 3) attempted through its inaction when it had a duty to act, to delay and thereby avoid paying ratepayers the savings from the abandonment of the San Juan Generating Station; 4) kept silent on its decision not to issue the bonds knowing that the Commission and Intervenors were not aware of its "revised plan," and

[18] Vol. II, TR. 5/24/2022, Atkins, pp. 479:3-484:14.

did so to gain an advantage over the Commission and stakeholders and prevent a timely bond issuance and concomitant rate credit that complies with Paragraph 28 of the Financing Order.

New Mexico has adopted the Uniform Commercial Code. Commercial transactions include a requirement of "good faith" which means "honesty in fact and the observance of reasonable commercial standards of fair dealing." NMSA 1978 §55-1-201(B)(20). PNM has failed to meet this standard of conduct. The Commercial Code also speaks to what is a "reasonable time" to take a required action. It states, "(a) Whether a time for taking an action required by the Uniform Commercial Code is reasonable depends on the nature, purpose and circumstances of the action. (b) An action is taken seasonably if it is taken at or within the time agreed or, if no time is agreed, at or within a reasonable time." NMSA 1978 § 55-1-205.

While it is not clear that the provisions of the Uniform Commercial Code apply to the Commission's Financing Order, the point is that there must be a standard for PNM's reasonable performance of actions contemplated by the Financing Order. Otherwise, PNM's unreasonable actions lead to a moral hazard: PNM's failure to act reasonably allow PNM to defeat the benefits of the agreement to other parties (i.e., customers) while the benefits of PNM's unreasonable actions accrue to the non-performing party (i.e., PNM).

The ETA sets the standard for utility performance of Financing Order terms and conditions. The utility is affirmatively required to comply with a Financing Order, and to do so in a way that is *reasonable*: "Reasonable Actions taken by a qualifying utility to comply with the financing order shall be deemed just and reasonable for ratemaking purposes." (62-18-11(B)). PNM has not taken reasonable actions to comply with the terms and conditions of the Financing

Order, particularly the terms that benefit ratepayers.[19] The Commission must enforce all of the Financing Order's terms, including the term PNM is attempting to control and defeat through its nonfeasance, the bill credit.

### 4. The Legislature Intended For and Gave the Commission Authority to Enforce The Financing Order

The Commission has a constitutional duty to regulate public utilities "in such manner as the legislature shall provide." N.M. Const. art. XI, § 2. In the instant case, the ETA serves as the statutory scheme that the Legislature provided for abandonment proceedings. The Commission therefore had a nondiscretionary obligation to apply the ETA to the San Juan abandonment proceedings. (*State ex rel. Egolf v. New Mexico Pub. Regulation Comm'n*, 2020-NMSC-018, ¶ 33, 476 P.3d 896, 904, denied (Sept. 4, 2020)).

The Commission is further to authorized to "require compliance" and impose "regulatory sanctions" for failure to comply with the terms and conditions of the Financing Order.

> B. Reasonable actions taken by a qualifying utility to comply with the financing order shall be deemed to be just and reasonable for ratemaking purposes. Nothing in the Energy Transition Act shall:
>
> (1) prevent or preclude the commission from investigating the compliance of a qualifying utility with the terms and conditions of a financing order and requiring compliance therewith;
>
> (2) prevent or preclude the commission from imposing regulatory sanctions against a qualifying utility for failure to comply with the terms and

[19] NEE-SC-1, Fetter, p. 19. "The concept of securitization from a regulatory perspective is to take difficult issues and resolve them in one action, placing them in the rear-view mirror. Leaving the recovery issues incomplete just allows them to fester with uncertainty remaining into the future. While it appears interest rates will be going up — making such securitization transaction more costly — no one knows for sure. Thus, the certainty that is a hallmark of securitization would be delayed for no good reason – and would stand out of line when compared to prior utility securitization transactions. Creating this financial uncertainty for ratepayers is unreasonable, especially given the current unsettled state of the capital markets and the investor-friendly nature of utility securitization transactions."

conditions of a financing order or the requirements of the Energy Transition Act; NMSA §62-18-11(B).

Whether ratepayers are further harmed by any delay in bond issuance will not be known until PNM issues the bonds, and therefore the issue of further harm to ratepayers resulting from PNM's delay in issuing the bonds in accordance with all of the term and conditions of the financing order should be reserved to a future proceeding.[20] PNM should also be required to track all of its costs of this Show Cause Proceeding the prudence of which the Commission expressly reserves the right to review.

**5. PNM's Revised Plan is Unjust, Unreasonable, and Violates the Express Terms and Conditions of the Financing Order that Ordered ALL SJGS Costs Removed from Rates Upon Abandonment**

The Financing Order contains the deal that was struck between PNM, PRC, affected Communities, and ratepayers. PNM has already benefited from the Financing Order by having the ETA shield its undepreciated investments in the San Juan Generating Station from a prudence review, consideration of the "used and useful" principle, and potential disallowance when PNM filed for abandonment. A balance was struck in the Financing Order and anything other than the promised rate credit changes that balance, and is therefore not fair to ratepayers.

[20] Vol. II, Tr., 5/24/2022, Tarry, p. 352:1, 359:7; NEE-SC-1, Fetter, p. 19-20. "Frankly, in my current role of utility board member, I would not have been supportive of an action such as this, with enormous financial consequences for the company, and customers, without a proper financial assessment of the impact of the company's unilateral deferral. To my knowledge, the parties and the Commission have not seen anything official from the Company that it investigated and reasonably determined that delay of the rate adjustment and securitized bond issuance was a prudent course of action. Such unprecedented unilateral action by PNM may create unrest among investors wondering what the future will hold with regard to the Company's stranded assets. Such uncertainty may make investors skittish and could have a negative impact on PNM's reputation within the financial markets."

PNM's failure to file a rate case is not an issue in this case, except to the extent PNM argues it was a pre-condition for bond issuance (it is not) and then further argues it should be excused from fulfilling this pre-condition, and that somehow all of PNM's non-actions should render compliance with the terms and conditions of the financing order unjust and unreasonable. A utility has a remedy for unjust and unreasonable rates, file a rate case. PNM should not be heard to complain it is harmed by its own failure to do so.

The "changed circumstances" since the issuance of the Financing Order is that Covid-19 has hit ratepayers hard. The "changed circumstances" PNM cites to do not rise to the level of a legal defense excusing PNM from performing fully the terms and conditions of the Financing Order. PNM has not provided evidence that would constitute impossibility, commercial frustration, a force majeure, or any other condition that prohibits PNM from issuing the Energy Transition Bonds or would excuse PNM's failure to perform as required by the Financing Order. But what these changed circumstances do demonstrate is that PNM customers, particularly low-income customers, will most benefit from the Commission enforcing the Financing Order to give them what was promised to them: no more payments for San Juan Generating Station related costs after abandonment.

It is not just or reasonable for PNM to unilaterally deviate from the terms and conditions of the Financing Order so that PNM may continue to earn revenue on San Juan Units 1 and 4 until the next rate case – avoiding the rate credit ordered in the Financing Order by delaying bond issuance. The table below is what the Financing Order requires (referred to by PNM as "Parties' Proposal") versus PNM's Revised Plan:

**Table MJS Rebuttal-1: 600 kWh Residential Customer Impacts of Parties' and PNM Proposed Scenarios**

| Date | Change Description | Base Rate Bill ($) | Bill Impact ($) | Bill Impact (%) |
|---|---|---|---|---|
| Parties' Proposal | | | | |
| 7/1/2022 | Current base rate bill | $58.88 | - | - |
| 8/1/2022 | Proposed credit for San Juan Unit 1 | $57.12 | ($1.76) | -3.0% |
| 10/1/2022 | Proposed credit for balance of San Juan | $50.69 | ($6.42) | -11.3% |
| 1/1/2024 | Removal of proposed credits, impact of rate case and ETC | $64.47 | $13.78 | 27.2% |
| PNM Proposal | | | | |
| 1/1/2024 | Estimated impact of rate case and ETC | $64.47 | $5.59 | 9.5% |

PNM Exhibit SC-7, Rebuttal Testimony of Michael J. Settlage, May 18, 2022 p. 4.

As between PNM and its customers, the issue is who is entitled to the benefits of the San Juan Generating Station savings upon the plant's abandonment. Rather than issuing a credit to customers for $8.19 per month for the average residential customer as required by the Financing Order, PNM proposes to instead retain the SJGS for itself and not refund it to customers to "protect" customers from any rate shock that might result from a future rate case. As can be seen from Table MJS Rebuttal-1 (above) neither PNM's Revised Plan nor the Financing Order would have an impact on 2024 rates, as PNM has not proposed a regulatory liability to apply the SJGS savings in the future to lower future rates.

The amount of savings to PNM's residential customers over the 15 month period of time in which PNM plans to delay the bond issuance to delay the bill credit is substantial. At different levels of usage, 300, 600 and 1,200 kWh/month, customer savings from the Financing Order's required rate credit would equal two to three months bills at the new rates PNM

estimates for 2024 – the equivalent of free electricity for up to three months.[21] To understand what this means to residential customers put three months' free electricity in context of how poor this State is:

> - Over 19% of the population in New Mexico lives in poverty – that is a family of 4 lives on $69 a day or $25,185.00 (gross) per year.
>
> - Of the 2 million people in New Mexico, that means over 413,000 live in poverty; and
>
> o 17.5% or 367,500 people of our population are over the age of 65. Most of these 367,500 elders live on fixed incomes.
>
> - Therefore, almost half of the State of New Mexico is on a fixed income or lives in poverty. . . . a large portion of PNM's territory includes areas and customers who earn $39,380 per year, which is less than 200% of the federal poverty line for a family of three.[22]

At the same time, PNM's profits are skyrocketing:

> - PNM reported net earnings available for PNM common stock in the 2021 Form 10-K for 2020 of $145,473 (in thousands). Please see PNM Exhibit HEM-11 (April 20, 2022).[23]
>
> - PNM reported net earnings available for PNM common stock in the 2021 Form 10-K for 2021 of $155,541 (in thousands). Please see PNM Exhibit HEM-11 (April 20, 2022).[24]

It would not be just and reasonable to deprive customers of the substantial SJGS stations promised to them in the Financing Order and allow PNM to re-write the agreement and

[21] Vol. II, Tr., 5/26/2022, Chan, p. 644:21-651:8.
[22] CCAE-SC2 Porter Response Testimony 2:3-12.
[23] NEE-SC-3, NEE 14-9.
[24] NEE-SC-3, NEE 14-10.

divert the savings to itself. This issue was already decided in customers' favor. As Ona Porter stated, "low-income populations benefit from savings now, not in the future."[25] Under PNM's Revised Plan however there are no future savings planned for customers to make up for the delay in bond issuance and rate credit. PNM will keep that money, the equivalent of three-months electric bills, at a time when its customers are suffering the impact of Covid-19 and need the rate relief. That is neither just nor reasonable, and is contrary to the express terms of the Financing Order.

### 6. PNM's arguments related to customer benefits from alleged rate case delay are speculative at best.

Whether ratepayers have benefited from a delay in the filing of a rate case is immaterial. (Crane Responsive Direct, p. 15.) Whether ratepayers will incur other costs due to PNM's unrelated expenditures in a future rate case is also immaterial, speculative and mere conjecture.[26]

PNM has provided no substantial evidence of the outcome of a future rate case. "[We] review the [Commission's] determinations to decide whether they are arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency's authority, or otherwise inconsistent with law, with the burden on the appellant to make this showing." *Citizens for Fair Rates & the Env't v. N.M. Pub. Regulation Comm'n*, 2022-NMSC-010, ¶12 citing, *New Energy*

[25] CCAE-SC2 Porter Response Testimony 2:18.

[26] PNM's future rate case numbers have not been vetted by Intervenors, subject to discovery, or been approved by a Hearing Examiner or the Commission, and are therefore hypothetical. Vol. IV, Tr. 5/26/2022, Chan, pp. 633-635, 658-659. "I testified to the presumption that PNM is making about the under-recoveries that they are alleging. I think those are subject to scrutiny and discovery and review by Staff and Intervenors and Hearing Examiners and the Commission. And so that is an open question. And so it's speculative at this point to draw too many conclusions from the outcome of a future rate case." Vol. IV, Tr. 5/26/2022 Reynolds, p. 689.

*Econ., Inc. v. N.M. Pub. Regul. Comm'n,* 2018-NMSC-024, ¶24, 416 P.3d 277 (internal quotation marks and citation omitted).

"To be substantial, it must be such relative evidence as a reasonable mind is willing to accept as adequate support for a conclusion, and it must amount to more than mere speculation or conjecture." *State v. Smino,* S-1-SC-36275, (Supreme Court of New Mexico, 2019), citing, *Lytle v. Jordan,* 2001-NMSC-016, ¶ 50, 130 N.M. 198, 22 P.3d 666

Our Supreme Court has repeatedly held that findings may not rest upon mere speculation and conjecture. *Fitzgerald v. Fitzgerald,* 369 P.2d 398, 70 N.M. 11 (1962), *citing, Petrakis v. Krasnow,* 54 N.M. 39, 213 P.2d 220*; Southern Union Gas Co. v. Cantrell,* 56 N.M. 184, 241 P.2d 1209. Expert testimony founded upon mere surmise, guess or conjecture is not substantial to support a finding of fact. *Citizens Finance Co. v. Cole,* 47 N.M. 73, 134 P.2d 550; *White v. Valley Land Co.,* 64 N.M. 9, 322 P.2d 707.

All PNM references to an alleged benefit ratepayers have received or will receive from a yet to be filed or awarded rate case is based on speculation and conjecture and should be given little if any weight as that testimony is immaterial and lacking in substantial evidence, therefore prejudicial.[27]

In fact, PNM admitted that the swings in rates, that the Company is so altruistically seeking to save us from, are actually exacerbated by PNM's failure to issue the energy transition bonds.[28]

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[27] NEE-SC-1, Fetter, p. 21-22. "PNM argues that PNM ratepayers are not entitled to the interim rate credit because the company plans to request cost recovery for unrelated costs in its next rate case, which exceed the combined SJGS costs. The ETA is about the transition from PNM's coal at SJGS and Four Corners, not speculative transmission costs, which have no bearing on this case. Those other (transmission) costs are unproven claims that PNM has not yet had to justify or explain, nor have they been approved by the PRC."

[28] Vol. IV, Tr. 5/26/2022, Chan, pp. 659-660.

## III. RESPONSE TO BRIEFING QUESTIONS

### 1. Whether, based on the record in this case, the Commission is justified in departing from the Commission's general policy against piecemeal ratemaking?

*RESPONSE:* Initially, it should be noted that everything in the Financing Order was already decided by this Commission and appealed to the Supreme Court of New Mexico, including whether the rate credit in the Financing Order constitutes piecemeal making. Thus, the Commission has already decided, in the Financing Order, that it is proper to issue a rate credit when SJGS is abandoned. PNM should have appealed the adverse decision if PNM believed its rights were in any way being violated by the provisions of the financing order, including the rate credit.[29]

In addition, by enacting the ETA, the legislature already decided that it is appropriate to address costs associated with abandoning San Juan through piecemeal ratemaking. As Andrea Crane testified, securitization is piecemeal ratemaking, Securitization treats the costs of San Juan separately from all of PNM's other costs. As the New Mexico Attorney General's witness, Andrea Crane, aptly synthesized:

**Q. Do you agree with Mr. Monroy?**

A. I agree with Mr. Monroy that an adjustment related to San Juan is piecemeal

[29] NEE-SC-1, Fetter, p. 21. "My understanding is that PNM waived its right to argue against piecemeal ratemaking and/or retroactive ratemaking when Mr. Monroy testified that the Company would provide ratepayer relief if there was a timing difference between commencement of the collection of the energy transition charge from customers when the bonds are issued, and the SJGS abandonment. Additionally, and more significantly, when the Hearing Examiners added the ratepayer protection of an interim rate credit in their modification to the Financing Order and PNM filed their Compliance filing, the Company did not file Exceptions, or appeal the issue, thus relinquishing its right to object to an interim rate credit to protect customers from inappropriately higher rates."

ratemaking, but I disagree that it is "improper". In fact, PNM promoted piecemeal ratemaking when it lobbied for passage of the ETA and when it requested authorization to securitize stranded San Juan investment. Securitization, by definition, is single-issue ratemaking.

Securitization involves a very specific mechanism to address stranded costs associated with a specific facility. By requesting securitization, PNM proposed that these assets be handled in piecemeal fashion -- independent from what was happening with regard to other investments or costs. Through the ETA and securitization, PNM guaranteed that these assets would be treated differently from other rate base components. Therefore, it is disingenuous for PNM to now claim that a prohibition against piecemeal ratemaking prohibits the Company from providing a rate credit, or any rate relief, to ratepayers.[30]

**Q. Does Mr. Monroy also claim that a rate credit or regulatory liability would result in retroactive ratemaking?**

A. Yes, on page 34 of his testimony, Mr. Monroy states that a "rate credit or imposition of a regulatory liability related to San Juan costs would violate well-established regulatory ratemaking principles against piecemeal ratemaking and retroactive ratemaking". Neither of these claims has any merit. As noted, securitization, by definition, is piecemeal ratemaking involving the recovery of a single asset. That fact did not bother PNM when it proposed that shareholders recover 100% of stranded costs through securitization. With regard to retroactive ratemaking, this proceeding is addressing costs after abandonment of the units, which is projected to be June 30, 2022 for San Juan Unit 1 and September 30, 2022 for San Juan Unit 4. We are not seeking any adjustments to amounts previously collected from ratepayers. As long as the NMPRC issues an order prior to abandonment, retroactive ratemaking does not apply. In the event that the Commission does not act prior to abandonment, then I recommend that any proposed rate adjustment begin on the date of the Commission's order rather than on the date of abandonment.[31]

In *Qwest Corporation v. New Mexico PRC,* 2006-NMSC-042,140 N.M. 440, ¶17, the utility argued that the Commission order "violates the rule against retroactive remedies." The Court disagreed that the credit or refund was not an impermissible retroactive remedy[32] and 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

[30] NMAG-SC-1, Crane, p. 12.
[31] *Id.,* p. 18-19.
[32] *Id.,* ¶29.

dealt with Qwest's non-compliance with AFOR plan terms."[33] 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."[34] 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 that the PRC had the implied statutory authority to order the credit or refund incentive in this case."[35]

**PNM does not have the right to unilaterally change the terms and conditions of the Financing Order. PNM must issue an interim rate credit for all costs associated with SJGS unit 1 and all costs and common plant for unit 4 at the time of abandonment.** PNM has voluntarily made the decision and it is within its control *not* to issue energy transition bonds in 2022. PNM has voluntarily made the decision and it is within its control *not* to file a rate case.

[33] *Id.,* ¶30.
[34] *Id.*
[35] Id., ¶31.

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 Financing 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. The Commission has the authority to review and disallow PNM's expenditures at SJGS post abandonment by adjusting PNM's base rates.

Requiring rate relief is consistent with the Commission obligations to protect the public.[36] The New Mexico Supreme Court in *Citizens for Fair Rates & the Env't v. N.M. Pub. Regulation Comm'n* emphasized "once again" that:

A. The Commission is "constitutionally tasked with the responsibility for regulating public utilities"[37];
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"[38];
C. The Commission must "balance the interests of a utility and energy consumers"[39];

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[36] *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.
[37] *Citizens for Fair Rates & the Env't v. N.M. Pub. Regulation Comm'n*, 2022-NMSC-010, ¶45.
[38] *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.
[39] *Id.*

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."[40]

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, contrary to the Financing Order. "PNM admits that it controls the timing of its next rate case."[41] "PNM has repeatedly refused to state when it will file its next general rate case."[42] The Commission does not need PNM's permission to require an interim rate credit for any overcollections of the costs of PNM's SJGS Interests post abandonment.[43] NMSA 1978 §62-10-1 (The Commission has the authority to 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).

**2. Whether the ETA occupies the field to eliminate the Commission's authority to establish a ratemaking method to remove the costs of San Juan Units 1 and 4 from rates upon their abandonment but before the issuance of the energy transition bonds and the assessment of energy transition charges?**

*RESPONSE:* This question concerns Section 62-18-5(F)(11) which requires the utility to propose a "ratemaking method to account for the reduction in the qualifying utility's cost of service

[40] *Id.*
[41] 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.
[42] *Id.*
[43] *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).

associated with the amount of undepreciated investments being recovered by the energy transition charge at the time that charge becomes effective…."

The evil the requirement in 62-18-5(F)(11) sought to avoid is double billing. It is a ratepayer protection, not a right in favor of PNM that guarantees their ability to continue to charge customers for the balance of undepreciated investments to be securitized after abandonment. By delaying bond issuance past abandonment while continuing to collect the costs associated with PNM's undepreciated investments which PNM will collect in full when it issues the bonds, creates a double billing situation.

A ratemaking method that removes the costs of San Juan Units 1 and 4 from rates upon their abandonment but before the issuance of the energy transition bonds and the assessment of the energy transition charges is consistent with the intent of this provision as a ratepayer protection mechanism. A ratemaking mechanism that would remove the costs associated with the undepreciated investments before the actual bond issuance would never have been an issue but for PNM's failure to faithfully perform its duties under the financing order. PNM's creation of a moral hazard has created the need for the Commission to order the rate credit rather than wait for PNM to execute the bonds. In that sense, enforcement of the Financing Order requires the rate credit as the only remedy to prevent PNM from further, unilaterally delaying the bond issuance.

In order to guard against this risk, the Hearing Examiners amended the Financing Order to specifically include this provision:

> Paragraph 61 of the Consolidated Application is amended by interlineation as follows:
>
> 61. As required by Section 4(B)(11) of the Energy Transition Act, PNM's proposed ratemaking method to account for the reduction in the qualifying utility's cost of service

associated with the amount of undepreciated investments being recovered by the energy transition charge at the time that charge becomes effective is included in the testimony of PNM Witness Monroy. 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 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.

PNM agreed in its Compliance filing to be bound by the Hearing Examiners' amendments,[44] but then attempted a work-around by delaying bond issuance outside of the parameters of ¶28 of the Financing Order.

**3. Based upon the evidence in this case and assuming the Commission decides to order the removal of the costs of San Juan Units 1 and 4 from rates upon their abandonment, describe your position on whether the Commission should order PNM to issue rate credits, order the establishment of a regulatory liability, or order a different remedy?**

*RESPONSE:* The Commission should order PNM to issue rate credits on the day after each San Juan unit is abandoned (see response below to question 4). Had PNM faithfully performed its obligation to act reasonably to carry out all of the terms and conditions of the financing order, ratepayers would receive a rate credit when San Juan is abandoned. PNM should not be allowed to deprive ratepayers of what they were promised under the Financing Order. A regulatory liability does not put ratepayers in the position they would have been if PNM had faithfully and

[44] *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. 3. ("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.") *See also*, ATTACHMENT A, ADDENUDUM at 5, ¶F.

reasonably performed its own obligations under the Financing Order. This issue has already been decided by the Commission in the Financing Order. (See, above answer to Question 2.)

Furthermore, rate shock is not a concern at this time because the outcome of any future rate case is sheer speculation. Should there be a large increase in the future, the Commission is well-equipped to address that issue if it arises at that time, but until then this issue is not ripe for consideration. The rate credit was already promised to ratepayers in the Financing Order and there is no good reason to deviate from that promise. Due to Covid and inflationary conditions, ratepayers can no doubt use the rate relief.

**4. If the Commission orders the removal of the costs of San Juan Units 1 and 4 by whatever remedy, should such remedy be instituted in successive phases in conformity with the staggered abandonment of San Juan Units 1 (on or about June 30, 2022) and 4 (on or about September 30, 2022)?**

*RESPONSE:* Yes, the rate credits should be issued in successive phases to mirror the dates on which Units 1 and 4 are abandoned. For reasons more fully stated above, ratepayers are entitled to have a full credit in the amount of its cost of service determined in NM PRC Case No. 16-00276-UT to begin on July 1, 2022 for Unit 1 and on October 1, 2022, for common plant and SJGS Unit 4, because this was included in the Financing Order and the SJGS plant will no longer be providing service, and is no longer "used and useful."[45]

[45] *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 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:

**5. Does PNM's revised plan constitute a "moral hazard" that is relevant to the Commission's decision in this phase of the proceeding? See, e.g., the definition of "moral hazard" adopted by the Florida Public Service Commission in In Re: Investigation into the Establishment of Operations Support Systems Permanent Performance Measures for Incumbent Local Exchange Telecommunications Companies, 2001 WL 1104733 (Fla.P.S.C.): ". . . moral hazard is a form of gaming by which one party to a plan or contract may act in ways -- within the framework of the existing plan -- that allow it to gain an unanticipated competitive or financial advantage at the expense of the other party."3 See also Investopedia, Understanding the Difference Between Moral Hazard and Adverse Selection, https://www.investopedia.com/ask/answers/042415/what-difference-between-moral-hazard-and-adverse-selection.asp ("Moral hazard occurs when there is asymmetric information between two parties and a change in the behavior of one party occurs after an agreement between the two parties is reached. Asymmetric information refers to any situation where one party to a transaction has greater material knowledge than the other party. Moral hazard frequently occurs in the lending and insurance industries, but it can also exist in employee-employer relationships. Any time two parties come into an agreement with each other, moral hazards can be present.").**

*RESPONSE:* Yes, PNM's Revised Plan is fraught with moral hazard. A moral hazard is "a form of gaming by which one party to a plan or contract may act in ways -- within the framework of the existing plan -- that allow it to gain an unanticipated competitive or financial advantage at the expense of the other party." Dr. Heidi Pitts, a former Staff economist, explained, "Moral hazard is an economics concept whereby a party will engage in riskier behavior once it is protected against risk of failure." (15-00261-UT, *Final Order Partially Adopting Corrected Recommended Decision* at ¶ 240). The following subsections explain why a moral hazard exists here.

1) PNM decided not to issue the bonds when the San Juan Generating Station is abandoned in the summer of 2022 and not notify the Commission.[46] PNM also performed no financial

"[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."

[46] Vol. II, Tarry, 5/24/2022, p.351, 363-364.

analysis to determine the economic impact on ratepayers of its decision, contrary to the requirement of timely analysis as a minimal requirement for prudent utility decision-making processes.[47] By withholding information, PNM gamed the system to its advantage in order to delay the Ordered bill credit by failing to provide notice to the Commission or anyone else that it did not intend to issue the ET bonds upon abandonment, and was not taking the steps required for a timely bond issuance. By doing so, PNM deprived the Commission, intervenors, and other stakeholders of an opportunity to oppose PNM's decision to ignore the express terms of the Financing Order and seek redress for PNM's unauthorized delay of the bond issuance, contrary to the express terms of the Financing Order.

2) The Law, i.e. the Energy Transition Act, and the Financing Order presented impediments to PNM's plans to delay bond issuance so it could delay the rate credit. Such delay would effectively nullify the existing terms in the financing order the Commission had already approved. Pursuant to the ETA the Financing Order is irrevocable and can only be amended for limited purposes which do not include amendments to the estimated time of bond issuance. So PNM had a problem because its Revised Plan was inconsistent with the terms and the conditions of the financing order, and the ETA did not include a provision permitting a utility to amend the estimated time of bond issuance.

But PNM could *ipso facto* delay the ETA bond issuance through its own inaction including failing to take reasonable steps to satisfy the pre-conditions to bond issuance in its

[47] *Pub. Serv. Co. of N.M. v. N.M. Pub. Regulation Comm'n,* 2019-NMSC-012, ¶32. (citations omitted.) ("[T]here is a meaningful relationship from the perspective of the ratepayers between the consideration of alternatives and the cost of the chosen [course of action]. The goal of the consideration of alternatives is, of course, to reasonably protect ratepayers from wasteful expenditure. ... [T]he failure to reasonably consider alternatives was a fundamental flaw in PNM's decision-making process.")

control, and by withholding information from the Commission and stakeholders that PNM did not intend to issue the bonds upon abandonment.

3) Satisfaction of two of the conditions for bond issuance were in PNM's exclusive control. Section 11(B) of the ETA imposes upon PNM the obligation to take "reasonable actions" in complying with the financing order. PNM was required to take reasonable actions to achieve satisfaction of the preconditions to bond issuance, and to do so in the manner contemplated by the Financing Order – with haste. The ETA contemplates a prompt bond issuance as the proceeds of the bonds are the source of the Section 16 payments (the utility must pay them to the agencies within 30 days) and facilitates this end via an expedited Supreme Court appellate process. PNM's reasonable actions to satisfy the conditions precedent to bond issuance require reliance on PNM's good faith REASONABLE ACTIONS, because this is a situation where Ratepayers have no knowledge as to whether PNM is performing reasonably and without undue delay; PNM can drag its feet in obtaining the SEC approval and rating agency process unbeknownst to anyone. Ratepayers must necessarily rely on the utility acting reasonably to carry out the steps necessary to bring about the completion of the agency rating process and SEC approvals, for a timely bond issuance. PNM has taken advantage of ratepayers and the Commission's lack of knowledge about PNM's progress in obtaining satisfaction of these prerequisites to bond issuance. The more PNM drags its feet the more PNM benefits. All of the risk of PNM's behavior is on ratepayers and Section 16 recipients.

4) PNM's failure to take reasonable actions necessary for a timely bond issuance as authorized by the terms of the Financing Order have exposed ratepayers to a price risk they did not assume – a higher interest rate on the date of any delayed bond issuance. The ETA required that Ratepayers assume any interest rate-risk associated with a bond issuance between the date of

the Financing Order and abandonment, but it did place on ratepayers the risk of higher interest rates due to an unauthorized delay in bond issuance not related to any flexibility needed to achieve the purposes of the bond issuance. Neither the ETA or the Financing Order authorized PNM to issue Energy Transition Bonds whenever it wanted; bond issuance was not unlimited or boundless. In fact, PNM is not authorized to issue bonds relative to SJGS if not abandoned prior to January 1, 2023. PNM benefits from the delay while exposing ratepayers to double recovery for SJGS costs[48] and the risk of higher interest rates on the bonds in a volatile market now,[49] and perhaps in the future. Ratepayers are harmed by the delay in a rate credit in the amount of $98.3M per year.[50] Ratepayers may also be harmed by being exposed to a risk that a timely bond issuance would not expose them to, the risk of higher prices past the contemplated abandonment time, due to PNM's self-serving delay.

By assuming it had the unilateral right to delay issuance of the Energy Transition Bonds contrary to the express terms in ¶28 of the Financing Order, PNM ignored the very mechanism in the Financing Order that avoided the Moral Hazard by removing PNM's discretion to time the bond issuance to its own advantage instead of towards fulfillment of the purposes embedded in the Energy Transition Act – to lower costs to ratepayers and provide transition assistance to affected communities.

PNM claims that it has the authority to issue bonds whenever it wants despite the lack of such authority in the Financing Order. If correct it would allow PNM to control the very timing that will commence the customer savings; if PNM can delay bond issuance, PNM can enrich itself. A rate credit must issue at the time of SJGS abandonment to protect customers, as the

[48] Vol. IV, Reynolds cross, 5/26/2022, pp. 690:7-691.
[49] Vol. II, Tarry, 5/24/2022, pp. 374, 376-379.
[50] Vol. II, Monroy, 5/23/2022, pp. 261-264.

regulatory balance has been upset by PNM's declaration that it will not take reasonable actions to perform *all* of the terms and conditions of the Financing Order, particularly Paragraph 28. PNM has a vested interest in not issuing the bonds, and PNM profits by not doing so, at customers' expense. PNM's interpretation of its authority regarding timing of bond issuance in the Financing Order creates the moral hazard.

PNM is required to take reasonable actions to comply with the financing order for its actions to be deemed just and reasonable for ratemaking purposes. NMSA §62-18-11(B). This includes reasonable actions to comply with paragraph 28 of the Financing Order in any bond issuance. (ASAP after the Four Events).

Paragraph 28 of the Financing Order was THE MECHANISM that avoided the moral hazard by providing not an exact date, being difficult to predict, but instead conditions certain: four events upon the conclusion of the last of which, PNM was required to issue the bonds "as promptly as possible."

> "As described in the Consolidated Application, including the Supporting Testimony, PNM expects to cause the issuance of the Energy Transition Bonds as promptly as possible after the last of the following events have occurred: (1) issuance of a final, non-appealable financing order acceptable to the Company; (2) the abandonment of the San Juan coal plant; (3) delivery of any necessary SEC approvals under the Securities Act of 1933; and (4) completion of the rating agency process. PNM estimated that the issuance of the Energy Transition Bonds would occur in 2022."

This mechanism nevertheless relied on PNM acting in good faith and taking reasonable actions, but PNM has not done so.

6) The Moral Hazard <u>will continue to exist</u> because PNM has not yet fulfilled its obligations to bring about the conclusion the two events within its control: the SEC approvals and the rating agency process. Furthermore, PNM ultimately decides whether to issue the Energy Transition

Bonds at all, the Commission cannot require bond issuance. PNM cannot be trusted further to faithfully comply with the terms of the Financing Order. This alone justifies the immediate interim rate credit as the only way to enforce the financing order and put ratepayers in the position they would have been in had PNM complied in good faith with the financing order's terms in issuing the ETA bonds. Had PNM complied reasonably and in good faith, reasonable delays out of PNM's control would not have been cause for ratepayers to complain. But any delays now are due to PNM's failure to take reasonable actions to comply with the terms of the Financing Order. The ONLY way to protect ratepayers is to require issuance of the rate credits upon abandonment. This is a regulatory issue that has resulted from PNM's disregarding the express terms of the Financing Order and engaging in a moral hazard.

6. **Part of PNM's original plan included making the so-called "Section 16 payments" to the three state agency-administered energy transition funds created in the Energy Transition Act (ETA) with the proceeds of the issuance of energy transition bonds upon the Section 16 of the ETA establishes three energy transition funds in the state treasury: (1) the "energy transition Indian affairs fund;" (2) the "energy transition economic development assistance fund;" and (3) the "energy transition displaced worker assistance fund." NMSA 1978, §§ 62-18-16(A), 16(D), and 16(G). Section 16 requires a qualifying utility (a/k/a PNM) to transfer a certain percentage of bond proceeds to each fund within "thirty days of receipt of energy transition bond proceeds." Id. § 62-18-16(J). The proceeds to be transferred to the funds created by Section 16 are "energy transition costs" included in the amount to be recovered by a qualifying utility through abandonment of San Juan Units 1 and 4. Does the element of PNM's revised plan that would transfer the full amount of the Section 16 payments before and independent of the bond issuance contravene applicable provisions of the ETA and the Financing Order?**

*RESPONSE:* This is another demonstration that the ETA and Financing Order pegged bond issuance to abandonment. This is another quandary caused by PNM's bond issuance delay. NMSA § Section 16(J) provides, "Within thirty days of receipt of energy transition bond proceeds, a qualifying generating facility located in New Mexico shall transfer the following

percentages of the financed amount of energy transition bonds as follows…." Transference of the full amount of the Section 16 payments before and independent of the bond issuance does contravene applicable provisions of the ETA and the Financing Order. Nevertheless, Section 16 recipients should not bear the burden of PNM's malfeasance.

7. **Does the requirement in Subsection J of Section 16 of the ETA that a qualifying utility transfer specified percentages of the financed amount of the energy transition bonds within thirty days of receipt of energy transition bond proceeds for the purposes of Section 16 indicate that the Legislature intended to require the qualifying utility to issue the energy transition bonds at the time of abandonment and that, when Sections 4, 5, 16 and the rest of the ETA are read *in pari materia*, the ETA requires qualifying utilities to do so?**

*RESPONSE*:

Yes. The Energy Transition Act 1) Permits the utility to securitize or "refinance" **an amount that is fixed at the date of abandonment** (NMSA 62-18-2(H)(2)(c)); 2) Requires a utility to provide the terms and conditions for which it seeks Commission authorization in its application for a financing order ("An application for a financing order **shall include…**") (Section 4(B) of the ETA); 3) Requires the Commission to determine if Section 4 of the utility's application complies with the ETA or require modification pursuant to Section 5 of the ETA; – including the utility's estimate of the time of bond issuance; 4) Requires aggrieved parties to file a Notice of Appeal in a shortened 10 day period rather than the customary 30 days for a Notice of Appeal[51] and requires the Supreme Court to "hear and determine the appeal as expeditiously as practicable;"[52] and 5) Requires "Within thirty days of the receipt of energy transition bond proceeds, a qualifying generating facility located in New Mexico shall transfer the following

[51] NMRA Rule 12-601(B).
[52] NMSA 62-18-8(A)

percentages of the financed amount of energy transition bonds as follows [to Section 16 recipients]."[53]

The Section 16 recipients are:

(1) one-half percent to the Indian affairs department for deposit in the energy transition Indian affairs fund;

(2) one and sixty-five hundredths percent to the economic development department for deposit in the energy transition economic development assistance fund; and

(3) three and thirty-five hundredths percent to the workforce solutions department for deposit in the energy transition displaced worker assistance fund.

As should be self-evident from the purpose of these funds, they are to assist in the Energy Transition, which is the title and the objective of the Energy Transition Act. They are needed at the time PNM is abandoning the plant. PNM recognized the urgency of the need for transition assistance by requesting pre-funding for 25% of the transition assistance in its Application for a Financing Order.

What should also be evident from looking at the different sections of the Energy Transition Act in *pari materia* is that by requiring a utility to include its estimated time of bond issuance in its application and by requiring the Commission to vet the provisions in Application for ETA compliance, the Legislature intended to ensure that the Energy Transition Act's objectives, including prompt assistance to affected communities with funds financed by the bond issuance, became an enforceable terms of the Financing Order, to ensure the availability of funds for the Energy Transition.

[53] NMSA 62-18-16(J)

How urgent did the Legislature believe getting the Energy Transition Funds to the affected communities was? A delay of 30 was too long to delay transition assistance – as evidenced by the shortening of the Notice of Appeal period from 30 to 10 days. That was the urgency the legislature had in mind. The legislature did not intend to lop 20 days off of an aggrieved party's time to appeal and require the Supreme Court to act expeditiously on an appeal – to then allow a utility to delay bond issuance to avoid implementing other portions of the Financing Order. This is inconsistent with the urgency expressed in the ETA to get transition assistance to the Community promptly after abandonment.

The Rules of Statutory Construction provide:

> **NMSA § 12-2A-18. Principles of construction; presumption**
> A. A statute or rule is construed, if possible, to:
> (1) give effect to its objective and purpose;
> (2) give effect to its entire text; and
> (3) avoid an unconstitutional, absurd or unachievable result.
>
> **NMSA § 12-2A-19. Primacy of text**
> The text of a statute or rule is the primary, essential source of its meaning.

The text of the Energy Transition Act evidences an intent to promptly fund section 16 payments from bond proceeds. PNM's Revised Plan for bond issuance does not respect this most basic tenant of the Energy Transition Act: to Transition.

## IV. PROPOSED FINDINGS

Joint Movants and Intervenors are requesting that the Hearing Examiners make the following findings:

1. That the purpose of the Energy Transition Act was to encourage PNM to abandon its coal interests by offering the utility a method for financing undepreciated investments and other abandonment costs while saving customers money from AAA rated Energy Transition Bonds. That energy transition costs are tied to abandonment and that

securitized financing for SJGS was only available if SJGS was abandoned prior to January 1, 2023.

2. That the Financing Order required energy transition bond issuance at the time of SJGS abandonment or promptly thereafter. That the Financing Order required an immediate rate adjustment for SJGS Units 1 and 4 at the time of SJGS abandonment.
3. PNM's revised plan to issue energy transition bonds to coincide with the conclusion of PNM's next rate case is unreasonable and non-compliant with the ETA, the Financing Order, and Final Order. Further, PNM's energy transition bond issuance delay is voluntary, unilateral, and a self-imposed pre-condition that has no basis in the ETA, the Financing Order, or Final Order and is therefore an illegitimate excuse for non-compliance.
4. PNM's revised plan not to issue energy transition bonds at the time of abandonment of San Juan Generating Station Units 1 and 4 is unreasonable and imprudent, and non-compliant with the ETA, the Financing Order, or Final Order.
5. PNM's revised plan not to issue an immediate rate adjustment for SJGS Units 1 and 4 at the time of SJGS abandonment is unreasonable and imprudent, and non-compliant with the ETA, the Financing Order, Final Order, and is violative of the Public Utility Act, specifically, NMSA 1978 §§ 62-3-1(B), 62-6-4, and 62-8-1.
6. PNM has not taken any measures to date to obtain each of the Securities and Exchange Commission (SEC) and rating agency approvals required to issue the bonds authorized by the Financing Order.
7. PNM testified that it will take approximately five and a half to six months to obtain the necessary SEC and rating agency approvals.[54] PNM's failure to commence the processes for obtaining these approvals constitutes a failure to take the "reasonable actions" contemplated by NMSA §62-18-11(B). PNM's inaction has made a timely bond issuance highly unlikely if not impossible, especially in light of the fact that PNM has not indicated that it intends, even now, to start these processes.
8. PNM shall implement an immediate credit to customers for the full revenue requirement in the amount of its cost of service related to SJGS Units 1 and 4 (including capital, operations and maintenance, and all other expenses) respectively on July 1, 2022 and October 1, 2022, equal to a total amount of $98 million per year which shall be divided by twelve such that the entire $98 million bill credit is returned to customers over a 12 month period and continuing each month thereafter until PNM removes all San Juan related costs fully and completely from rates.
9. PNM shall report on a bi-weekly basis in this docket on any steps it takes to obtain each of the Securities and Exchange Commission (SEC) and rating agency approvals to issue energy transition bonds.

[54] Vol. II, 5/24/2022, Atkins, pp. 483-484. "I would say that entire process from the start, to collect historical data to closing, is about six months. … Yes. I would say about six months, also minus the two to three weeks. So it's a little bit less than the six months. Q. So like 5-1/2 months? A. Yeah."

10. PNM shall track all of its costs of this Show Cause Proceeding the prudence of which the Commission expressly reserves the right to review in PNM's next general rate case.

**WHEREFORE**, for the foregoing reasons, Joint Movants and Intervenors request a Commission order granting the show cause motion by implementing a rate credit that includes the full value of the revenue requirement of the abandoned facilities (SJGS Unit 1 in the billing cycle following its abandonment on June 30, 2022 and Unit 4 in the billing cycle following its abandonment on September 30, 2022) to be applied until the conclusion of the first general rate case that includes the full cost impact of the abandonment in PNM's base rates, make the above stated findings, and provides such other and further relief as the Commission deems just and proper.

DATED: June 3, 2022

Respectfully submitted,

COALITION FOR CLEAN AFFORDABLE ENERGY

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**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

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

**CERTIFICATE OF SERVICE**

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

**POST HEARING BRIEF**

**ON BEHALF OF**
**COALITION FOR CLEAN AFFORDABLE ENERGY,**
**NEW ENERGY ECONOMY,**
**PROSPERITY WORKS,**
**SIERRA CLUB**

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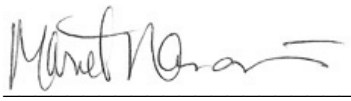
**DATED** this 3rd day of June, 2022.

New Energy Economy,



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