BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF NEW MEXICO FOR APPROVAL OF THE ABANDONMENT OF THE FOUR CORNERS POWER PLANT AND ISSUANCE OF A SECURITIZED FINANCING ORDER	)	**Case No. 21-00017-UT**
PUBLIC SERVICE COMPANY OF NEW MEXICO, **Applicant.**	)	

NEW ENERGY ECONOMY'S RESPONSE BRIEF

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I. INTRODUCTION

In this Reply to PNM's Brief-In-Chief, New Energy Economy ("NEE") addresses and briefly rebuts each of PNM's major points. NEE will not attempt in this introduction to summarize each of the points below except by saying that PNM has spent many pages of argument attempting to plausibly explain why the PRC should approve PNM's abandonment of its interest in the Four Corners Power Plant ("Four Corners" or "FCPP") and allow PNM what it regards as its "entitlement" of $300,000,000 from ratepayers *vis a vis* the Energy Transition Act ("ETA"). PNM argues that the PRC should disregard its former agreement and notice to evaluate the utility's imprudence in incurring the costs represented by those many millions of dollars and grant "abandonment" of FCPP— even though doing so will ensure the continuation of coal burning, contrary to the purpose of the ETA to "decarbonize" New Mexico. PNM claims that it has provided a sufficient public benefit to justify PNM management and its shareholders washing their hands of FCPP and going on their merry ways.

Not so fast.

Most of PNM's arguments in favor of abandonment are misleading or incorrect and its argument that the ETA is a magic carpet that allows for its right to an unregulated getaway is simply incorrect. As NEE explains below, New Mexico Supreme Court case law still requires that PNM establish the prudence of these costs to ensure that rates are just and reasonable and show that the abandonment will result in a net public benefit before the PRC can approve abandonment and issue a financing order. *See,* pp. 4-5, 8-16, below. Given how much is known about the background and circumstances of PNM's investment in Four Corners and the role these hundreds of millions of dollars are playing in PNM's ability to sell itself at an enormous

premium to Iberdrola/Avangrid, the fundamental question before the PRC is simply this: "Will PNM get away with it?"

For the reasons set forth below and in reply to PNM's brief-in-chief, NEE respectfully submits that the answer should be "No."

II. ISSUES RAISED BY PNM AND NEE'S RESPONSE

1. **FOSSIL FUEL TRANSITION**: PNM states: "The exit from Four Corners six-and-a-half years earlier than expected is a result of the New Mexico Legislature's efforts to entirely decarbonize New Mexico's delivery of electric energy through the ETA." PNM Post-Hearing Brief ("PNM Brief") at 1. PNM presents the abandonment of Four Corners Power Plant as a significant part of this decarbonization process. Except that PNM fails to acknowledge that a) if it hadn't extended the life of FCPP and reinvested in it, FCPP likely would have closed in 2016[1] (*that* would have been "early"); and b) the purpose of the Energy Transition Act ("ETA") was to transition the state from its dependence on coal,[2] but FCPP will continue to operate "after the date of abandonment in this Application."[3] This is due to the fact that PNM is selling its interest in FCPP, not arranging for the plant to close, as it suggested during consideration of the ETA.

[1] When EPE announced to the other co-owners in 2013 that it would exit "TEP and SRP would not agree to acquire more MW [including their respective pro-rata percentage of EPE's shares." (NEE Exhibit 22); *See also,* NEE Exhibit 31, (Exhibit 10 from 16-00276-UT) "Patrick [Apodaca] asked if we intended to make it explicit that PNM is not in the deal unless all the participants are in the deal. The latest draft continues with the thought that TEP is not a party to the transaction."
[2] TR., Sanchez, 9/2/2021, p. 662.
[3] *Id*.

2. **PNM'S SALE TO NTEC IS A NET PUBLIC DETRIMENT AND CONTRARY TO COAL TRANSITION OBJECTIVES**: PNM argues that the PRC has No Authority to Modify Terms in the Purchase and Sale Agreement Between PNM and NTEC. PNM Brief at 116-117. Assuming *arguendo*, that the PRC has no authority to modify the terms contained within the PSA between the PNM and NTEC[4] and it is undisputable that the PSA allows FCPP coal to burn longer, then the Commission must deny abandonment because the sale is contrary to the state of New Mexico policy to transition from coal.[5]

3. **USING INDIGENOUS PEOPLE**: Allegedly to prove that Native peoples want to continue the burning of coal, PNM cites a letter from Navajo Nation President Jonathan Nez (outside the record). Therein, Nez cites a study from Strategen Consulting, "Arizona Coal Plant Valuation Study: Economic assessment of coal-burning power plants in Arizona and potential replacement options," September 2019. PNM Brief at 1. President Nez states that the "2019 study by Strategen Consulting suggests closing Four Corners and utilizing the freed-up transmission capacity for renewable resources could save Arizona ratepayers hundreds of millions of dollars in avoided costs." (At p. 5 of his letter.) In addition to the evidence cited by experts in the case at bar[6] regarding the likelihood of FCPP closure *before* 2031, this letter cited by PNM is another data point that suggests that a) other involved stakeholders, including Navajo Nation leadership, believe that FCPP will close before 2031 and have understood this since at

[4] PNM Brief at 116. ("the Commission's authority under Section 62-6-12(A) extends only to matters affecting the public interest, and does not reach the purely private interests of litigants.")
[5] TR., Sanchez, 9/2/2021, p. 662. (The purpose of the ETA "was to transition the state from its dependence on coal.")
[6] Sierra Club's Dr. Fisher, WRA's Baatz, and NEE's expert Anna Sommer in the 16-00276-UT case, cited generously in Commission Exhibit 1, 16-00276-UT *Certification of Stipulation*, 10/31/2017.

least 2019, which contradicts PNM's testimony that there is no credible alternative exit plan; and b) Navajo Nation leadership has been well aware of FCPP's poor economics because of the feasibility of low-cost renewables.

4. **GREENWASHING 'JUST TRANSITION'**: "The ETA also gives the Commission authority to directly address the resulting impact on tribal and local communities in the Four Corners area." PNM Brief at 1.[7] PNM's suggestion that this is a reasonable part of its decision to abandon FCPP under the ETA is incorrect and disingenuous. First, NMSA 62-18-16 L (1) defines the "'affected community' [as] a New Mexico county located within one hundred miles of a New Mexico facility producing electricity that *closes*[.]" (Emphasis supplied.) Because, FCPP will not be closing the affected community is ineligible for the funds. Second, if PNM's professed concern for the affected communities was in fact genuine - they would have supported legislation for just transition funds without attempting to tie that funding to their own self interests -- to recover the enormous, imprudently-incurred costs associated with its coal plants. Third, PNM has withheld money for impacted communities[8] despite requesting and receiving the Hearing Examiners' and the Commission's approval to pre-fund severance and job training costs at the San Juan Generating Station ("San Juan" or "SJGS") prior to the plant's closure. Additionally, if such advance payments are made "PNM [is allowed] to create regulatory assets to preserve its ability to recover the costs if PNM chooses to make the payments as it proposes."[9] PNM argues that the funding to impacted communities should be weighed positively when evaluating if its abandonment and sale results in a net public benefit.

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[7] *See also*, PNM Brief at 9. ("mitigation of adverse economic impacts to the local workforce and community," *citing*, PNM Ex. 5 (Fallgren Supp.) at 17.)
[8] TR., Sanchez, 9/2/2021, pp. 657-658.
[9] 19-00018-UT, *Recommended Decision on PNM's Request for Issuance of A Financing Order*, 2/21/2021, p. 102. Adopted by Final Order.

Yet, even when it was granted PRC authorization in the San Juan case, NM PRC Case No. 19-00018-UT,[10] to pre-fund the energy transition funds for the impacted community and create a regulatory asset, giving PNM financial protection in advance, it refused to disburse the funds. Given this history, PNM's position should be seen as essentially extortionate.

5. **CORE PURPOSE—SAVINGS MONEY FOR RATEPAYERS?**: PNM claims: "While this case signals an end for PNM's coal portfolio, at its core, the approvals sought here are about saving customers money." PNM Brief at 2. If this case were truly about "saving customers money," PNM would never have extended the life of FCPP and reinvested in it in the first place; would not now be trying to stick ratepayers for $300M of undepreciated investments resulting from utility management's malpractice; and would agree to remove all FCPP-related costs from rate base and invest prudently in renewables plus storage.

6. **PNM'S ADHERENCE/REPULSION FOR STIPULATION COMMITMENTS**: PNM cites the Modified Revised Stipulation in 16-00276-UT as the "origin" of PNM's sale to NTEC and compliance with the Stipulation as the reason for its "abandonment" in 2024. PNM Brief at 4-5. Yet, according to the plain language of the Stipulation, PNM was required to conduct "a cost benefit analysis of an early exit" but that is not included in the record and Mr. Phillips testified that he began that cost-benefit analysis in 3/2021, six months *after* PNM signed the PSA with NTEC.[11] If at its core this application was

[10] *Id*., pp. 99-100.

[11] "[T]he RFP that is being used to evaluate the Four Corners resources was issued on March 8th [2021]. We received the bids on June 7th [2021]." TR., 9/2/2021, Phillips, 747-8; That means contrary to the 16-00276-UT Stipulation, contrary to PNM's alleged motivation for investigating abandonment, contrary to PNM's testimony, NO economic analysis exists which includes a cost benefit analysis of a FCPP 2024 or 2028 exit with actual costs of the coal supply, co-tenancy, and operating agreements, etc., with and without (or a partial disallowance of) undepreciated investments consistent with the Stipulation requirements, replacement power alternatives, or a variety of other meaningful inputs, or sensitivity analyses.

about saving ratepayers money why was the cost-benefit analysis performed *after* PNM filed the Application, unless there was another reason for its Application? The "other reason" is its merger with Iberdrola/Avangrid. Further, it should be noted that PNM cherry-picks the parts of the Stipulation to which it chooses to adhere, relying on it for an alleged justification for its current abandonment application, but discarding it for the requirement to conduct a prudence review.

7. **SEASONAL OPERATIONS AGREEMENT—A HINDERANCE TO FCPP CLOSURE**: "As part of the agreements for seasonal operations, the Four Corners co-owners have agreed to increase the notice period for possible early shutdown of Four Corners from two years to four years, with the opportunity to reduce the notice period upon payment … of $100 million, and a two-year notice (the current length of the notice period) by paying $200 million." PNM Brief at 7-8. "While the Commission is not required to approve the agreements encompassing seasonal operations, the Commission's approval of the PSA, which facilitates seasonal operations, will result in net benefits to New Mexico and the public at large by reducing Four Corners emissions as of 2023." PNM Brief at 8-9. What is clear from PNM's Brief, the PSA, and the Seasonal Operations Agreement, is that *the PNM/NTEC sale extends the earliest date that Four Corners could close*. This is contrary to Commission precedent,[12] the orders of the NM Supreme Court,[13] the ETA,[14] and even PNM's prior legal position to the New Mexico

[12] Case No. 19-00195-UT, *Recommended Decision on Replacement Resources, Part II*, 6/24/2020, pp. 82-86; Case No. 19-00349-UT, *Recommended Decision*, pp. 46 (n.100), 62 (ns.145 & 146) & 77, adopted by *Final Order*.

[13]PNM's Amended Application requests that the Commission act contrary to the New Mexico Renewable Energy Act ("REA"), NMSA § 62-16-4.B(4) and §62-16-4(D)(2019), as amended by the ETA, Senate Bill 489, NMSA §§ 62-18-1 to 23 (2019)) and beyond its lawful authority under those statutory provisions by requesting Commission approval of PNM's proposed sale of its ownership interest in the FCPP to another entity, the NTEC, as a means of complying with the renewable portfolio standard ("RPS") requirements.

[14] § 62-16-4.B (4) and § 62-16-4(D) (2019)

Supreme Court.[15] Of additional – and perhaps utmost—significance – is that PNM presented its ETA to the legislature and the public as the end of coal. It didn't say, "PNM will be getting out of coal but selling its FCPP so it will continue operating." New Mexicans and the legislature undoubtedly supported the ETA not because PNM itself would be selling electricity from non-coal resources, but because they didn't want to *keep burning coal in our back yard.* If a corporation could wink, it would be doing so now. PNM gets rid of FCPP by selling its unprofitable, decrepit interest in a coal plant and the coal just keeps burning.

8. **ANOTHER CLOSURE DEAL IS PROBABLE**: "Early retirement of the whole plant is not on the table." PNM Brief at 10. "The deal with NTEC is real and is now; it is unlikely another deal will come along that would provide benefits to PNM's customers." PNM Brief at 30. Except that now another deal is not only possible it is extremely likely! Of course, PNM downplays the significance of the recent Recommended Opinion and Order ("ROO") issued by an Administrative Law Judge in Arizona, which rejected cost recovery of $484M for SCRs and associated costs at FCPP. "[A] utility has a duty to monitor the economics of its investments and the market consistently to determine whether it should alter its prior choices for the benefit of itself and its shareholders, its ratepayers, and/or the public at large."[16] "[The] evidence suggests that APS may have willfully maintained ignorance concerning whether it would be beneficial (at least from a ratepayers' perspective) to change direction[.]"[17] "By willfully failing to reevaluate its choices concerning the SCRs installations, APS failed to meet

[15] NO. S-1-SC-38247, PNM's Answer Brief (in the appeal of NM PRC Case No. 19-00018-UT), 10/5/2020. At p. 18: "Moreover, the ETA does not divest the Commission of jurisdiction over public utilities. Rather, the ETA sets the legislative policy that the Commission is to follow with respect to the early retirement of coal-fired plants[.]"; At p. 8: "The ETA also includes several provisions intended to ameliorate the economic impacts to coal plant and coal mine workers and local communities as a result of the plant and mine closures[.]" (Emphasis supplied.)
[16] Docket No. E-01345A-19-0236 (Ariz. Corp. Comm'n) p. 112, in Dropbox as NEE Exhibit 14.
[17] *Id.*

the expected standard of due care."[18] It's one thing if ratepayers are being overcharged – senior utility management and shareholders don't fuss because *they* are still making money plus a return on equity, but if cost recovery is denied and shareholders are required to foot the bill for high-cost coal and imprudent associated capital expenditures then the equation shifts. Shareholders don't like to lose money and so senior management will move swiftly to change operations to stop the bleeding.[19] FCPP won't be operating much longer if shareholders are required to absorb hundreds of millions of dollars in imprudently incurred cost decisions made years ago. Senior management will become quite attentive and uncharacteristically critical of *future* capital expenditure investments if they know that cost recovery is uncertain, or worse, improbable. PNM's assumption, under these circumstances, that it will be able to pass along the $300,000,000 FCPP "asset" to Avangrid as a part of the purchase price in a deal under which PNM management and shareholders will profit enormously is, to put it mildly, scandalous.

9. **ABANDONMENT IN THE CONTEXT OF THE ETA**: PNM acknowledges, "The Commission also must consider abandonment in the context of the ETA. The New Mexico Supreme Court has found that the Commission has broad authority to interpret whether the standards of abandonment are met," citing *Public Serv. Co. of N.M. v. N.M. Pub. Serv. Comm'n,* 1991-NMSC-083, ¶ 11, 112 N.M. 379, 382 (1991). P. 35. PNM Brief at 35. Also, "[t]he "test to fit the regulatory climate" in the context of coal retirements is satisfaction of the

[18] *Id.* at 114.

[19] Q. (WRA, Steve Michel) "I'm talking about real world operations. If PNM exits the plant, or is denied cost recovery in the plant, but the plant keeps operating, just as it always has, and say PNM's share becomes merchant capacity instead of rate-based capacity, that has no CO_2 or water benefit right?
A. (NEE, Anna Sommers) It might. It would depend on the economics of Four Corners. If operation of that unit ~ of what might be considered typical capacity factors is no longer economic, you could certainly see reductions in generation and therefore reductions in water consumed and discharged and CO_2 emitted as a result." NM PRC Case No. 16-00276-UT, TR., 8/14/2017, Sommer, pp. 1221-1222.

terms of the ETA." *Id.* Further, "[t]he ETA seeks to reduce carbon emissions, while mitigating impacts to local communities." *Id.* at 37. "Thus, it is reasonable to consider the impact to 'all consumers' in New Mexico, not just PNM's customers. Past cases have not analyzed a broader net public benefit because the facts did not present themselves. Where the circumstances present it, a broader analysis is allowed." *Id.* "Put simply, this is in an ETA case and the terms of the ETA apply." *Id.* at 51. YES, New Energy Economy agrees the ETA applies, it is the law,[20] and that's why PNM's Application fails: PNM cannot meet its burden of proof under NMSA §62-18-5 E, which requires compliance "with the requirements of Section 4 of the Energy Transition Act." (Emphasis supplied.) According to the relevant part of NMSA §62-18-4A: "a qualifying utility shall obtain approval to abandon a qualifying generating facility pursuant to Section 62-9-5 NMSA 1978."[21] Why does Section NMSA 62-9-5 abandonment fail? Because it foists costs onto ratepayers that are not theirs! Because it is not a net public benefit, or frankly, any benefit to ratepayers. Because it is a heist – coal burns contrary to the climate crisis,[22] Indigenous people

[20] PNM Brief 76-80.

[21] When construing individual statutory sections contained within an act, courts examine the overall structure of the act and consider each section's function within the comprehensive legislative scheme. *Britton v. Office of Atty. General,* 2019-NMCA-002, ¶ 27, 433 P.3d 320, 330, *citing, Faber at* ¶9. "To determine legislative intent, we look not only to the language used in the statute, but also to the purpose to be achieved and the wrong to be remedied." *Hovet v. Allstate Ins. Co.,* 2004-NMSC-010, ¶10, 135 N.M. 397, 89 P.3d 69. "A construction must be given which will not render the statute's application absurd or unreasonable and which will not defeat the object of the Legislature." *State ex rel. Newsome v. Alarid,* 1977-NMSC-076, ¶ 9, 90 N.M. 790, 568 P.2d 1236, *superseded on other grounds by statute as stated in Republican Party of N.M. v. N.M. Taxation and Revenue Dep't,* 2012-NMSC-026, 283 P.3d 853.

[22] NEE Exhibit 5, Direct Testimony of Christopher K. Sandberg, pp. 7, 11 ("PNM's proposed sale of its ownership interest in FCPP to NTEC will continue the burning of coal, which is a public health, environmental and climate hazard.") Also, at pp. 25-26: It is, according to the New York Times "clear that the prevention of lowering heat-trapping carbon emissions to be baked into an electric utility contract is *not* in the public interest. (PNM's current FCPP contract with NTEC limits the possibility of early closure of FCPP.) https://www.nytimes.com/interactive/2021/05/12/climate/climate-change-_weather-noaa.html")

are harmed and local communities suffer[23] and "just transition" funds won't be dispersed until the plant closes.[24] There is no corporate accountability. In summary, PNM's abandonment plan fails because it makes a mockery of state policy, public advocacy, and the rule of law.

10. **LEGISLATURE WAS KEPT IN THE DARK ABOUT PNM'S FCPP IMPRUDENCE**: "[T]he Legislature is presumed to have been aware of the prudence concerns the Commission had regarding Four Corners." PNM Brief at 45. "While the Commission deferred the issue of Four Corners prudence to PNM's next rate case, such deferral cannot be construed as a pending adjudicative proceeding, because the Commission issued a final order establishing rates that expressly included Four Corners investments and costs." PNM Brief at 46-47. N.M. Const. Art. IV, § 34 addresses both pending cases AND vested rights.[25] First, there is

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[23] Community Exhibit 3, Direct Testimony of Jessica Keetso, pp. 4, 14-18; NEE Exhibit 5, Direct Testimony of Christopher K. Sandberg, pp. 25-26.

[24] NMSA 62-18-16 L (1).

[25] *State ex rel. Edwards v. City of Clovis,* 1980-NMSC-039, ¶7, 94 N.M. 136, the Court began an art IV, § 34 analysis in a way that suggests the constitutional principle would apply to legislative acts affecting a "pending case" before an administrative agency. *Phelps Dodge Corp. v. Revenue Div.* 1985-NMCA-055, 103 N.M. 20 (applying art. IV, § 34 to an adjudicative administrative tax rebate proceeding).

In commenting on, the *Phelps Dodge Corp.* case, the court in *Brazos Land v. Bd. Of Cty. Com'rs*, noted:

> [w]hile the taxpayer's request was pending, the legislature enacted a bill which affected the outcome of the taxpayer's request. The administrative proceeding . . . was tantamount to the legislature trying to adjudicate a particular case to directly interfere with the outcome. Therefore, application of article IV, section 34 was consistent with policy underlying the constitutional provision.

1993-NMCA-13, ¶ 15, 848 P. 2d 1095, 1098. Where that is not clearly the case, however, the *Brazos* Court maintained that "a vested rights analysis is the better reasoned approach rather than further semantic refinement of the meaning of 'pending' for purposes of a rigid article IV, section 34 analysis." *Id.*, ¶ 16.

In one such case, *Chilili Corp. Ass'n v. Sundance Mountain Ranches, Inc.* 1988-NMCA-026, 107 N.M. 192*,* a county commission had approved a subdivision and adopted new regulations while a district court case over Sundance's right to subdivide was pending. The court applied a vested rights analysis, even though a pending case existed, and declined to retroactively apply the new

no evidence of PNM's statement. Actually, there may be evidence to the contrary. If legislators knew that PNM was not going to shutter coal and that the 100% recovery of undepreciated investments was based on the acquisition of imprudently incurred investments they would have never agreed to the quid pro quo of "we'll give PNM 100% undepreciated investments in exchange for CLOSING COAL, because we are IN a climate crisis." If the legislators understood that this "bargain" was about "abandonment" from rate base, NOT actual closure, no burning, shuttering, caput, it is unlikely they would have agreed to such a deal. If the legislators had any idea of the flim-flam "evidence" that PNM relied on before it re-invested nearly a billion dollars in a polluting, climate-altering, poisonous, non-performing, unreliable Four Corners, especially when cheaper renewables were feasible and available at the time, they would likely never have sanctioned such a rip off of New Mexicans. PNM knows the legislators didn't know, and it actively participated in the cover-up. The PRC and Intervenors knew this too. Perhaps PNM's argument overreach should impact their credibility. Legislators (primarily through legislative council services) may be required to be knowledgeable about other laws, but there is no evidence

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regulations. The court determined that the property owner had *reasonably relied* on the county's grant of approval and had *incurred extensive obligations in reliance* upon the approval. *Id.*, ¶ 9. Did Signatories and the public reasonably rely on obligations/regulatory commitments to their detriment?

The vested rights approach was used to determine whether a new zoning ordinance may be applied retroactively rather than the more traditional "pending case" approach; this is determinative with respect to the effect of ETA after becoming law on other pending matters before the PRC. This legal approach requires reliance on the old law, a regulatory commitment, and a substantial change of position based on that reliance must be subordinate. *See Santa Fe Trail Ranch II v. Bd. of Co. Comm'rs of San Miguel Co,* 1998-NMCA-099, ¶ 8, 125 NM. 360.

PRC Case No. 16-00276-UT, may well be a "pending case" within the meaning of art. IV, § 34 because it promised future ratepayer remedies (for a prudence review and to be free of those possible disallowances made by irresponsible utility management). Additionally, might this case raise other questions concerning whether the ETA affects "rights or remedies," or "changes rules of evidence or procedures." Art IV, § 34 must apply to instances where a new statute obviates an entire case, because in doing so it necessarily obviates all prior substantive and procedural rights with respect to that case, including some or all undepreciated investments in Four Corners.

in law or in fact that Legislators were aware that PNM was required to undertake a prudence review of their life extension and capital expenditure investments of FCPP, previously determined by PRC Commission Orders, agreed to by PNM (and other Signatories to the Stipulation) in its last rate case.[26] Second, as more fully argued in New Energy Economy's Post Hearing Brief-in-Chief, Section XI and XII, p. 59 – 74, the New Mexico Constitution, Public Utility Act, ETA, and decisional law must be read in conjunction and harmonized to create the most confidence in law and the greatest protections for all New Mexicans.[27] PNM agrees that "New Mexico's constitutional provisions are to be interpreted harmoniously."[28] Third, ratepayers have a vested right in the PNM agreement, and the PNM/PRC approved Modified Stipulation. Those agreements included a future proceeding for prudence review of FCPP life extension and capital expenditure investment.[29]

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[26] Lamenting just how ill-equipped legislators actually are "Reps. Patty Lundstrom, D-Gallup, and Kelly Fajardo, R-Los Lunas, offered lobbying advice. Both women emphasized the importance of bringing a concise and coherent request to lawmakers and their staffers, who all are unpaid and have limited time to respond to a hodgepodge of questions and concerns. The state has a long history of not paying its legislators who, in turn, often are understaffed. *A changing climate for New Mexico's oil and gas industry*, 10/9/2021, https://www.santafenewmexican.com/news/local_news/a-changing-climate-for-new-mexicos-oil-and-gas-industry/article_e7cab668-2543-11ec-8948-8bc6e86a55f6.htmls

[27] *State v. Smith,* 98 P. 3d 1022, 1026, 136 N.M. 372, 2004-NMSC-032 ("Whenever possible, we must read different legislative enactments as harmonious instead of as contradicting one another. [] Finally, when a statute is ambiguous, we may consider the clear policy implications of its various constructions." (internal citation and quotations omitted.))
State v. Rivera, 82 P. 3d 939, 942, 134 N.M. 768, 2004-NMSC-001, ("In considering the statute's function in relation to related statutes passed by the Legislature, [w]henever possible... we must read different legislative enactments as harmonious instead of as contradicting one another." (internal quotations omitted.)); *State v. Herrera*, 522 P. 2d 76, 78, 86 N.M. 224 (1974), (construction we have placed on them effectuates the legislative intent in a reasonable and harmonious way); *See also*, CCAE Brief-in-Chief, pp. 2-3.

[28] *See Denish v. Johnson*, 1996-NMSC-005, ¶¶ 31-32, 121 N.M. 280 ("We presume the drafters of the Constitution intended to construct a synchronous and stable foundation for the State's legal system.").

[29] 16-00276-UT *Revised Order Partially Adopting Certification of Stipulation* (Jan. 10, 2018).

11. **GRASPING AT LEGAL STRAWS, PNM IGNORES ITS CONTRACTUAL AGREEMENT TO REVIEW PRUDENCE**: PNM again raises the issue of *res judicata* as a bar to the prudence review, PNM Brief at 58-62, though they acknowledge that this argument has previously been rejected by both the Hearing Examiners and the Commission.[30] Further, this argument wholly ignores that PNM "agreed in Case No. [16-00276-UT] that it would bear the burden of affirmatively demonstrating the prudence of the [FCPP life extension and capital expenditure] costs in its general rate case. Given this prior stipulation and the evidence indicating that [PNM's investment] was voluntary and [done to avoid a distraction at the PRC due to its concern with SJGS], it was lawful for the Commission to reject PNM's argument that the [] costs were entitled to a presumption of prudence." *Public Serv. Co. of N.M. v. N.M. Pub. Serv. Comm'n,* 2019-NMSC-012, *supra*, ¶88; *See*, the whole discussion at ¶¶ 78-89.

12. **ENERGY TRANSITION COSTS DEFINED AT THE TIME OF ABANDONMENT**: PNM claims that "the Commission may not perform a prudence review of the undepreciated investments made in Four Corners." PNM Brief at 81. PNM uses the Definition in 2(H)(2)(c) to support its argument that the Commission-promised and noticed prudence review from NM PRC Case No. 16-00276-UT has been preempted by the ETA. However, in doing so PNM disregards the actual definition of an "energy transition cost," which

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at pp. 22-23, ¶¶ 65, 66. Decretal Paragraph B: "If the provisions of this Order modifying the Revised Stipulation are approved by the Signatories, *the provisions of the Certification shall be modified to incorporate the Commission's finding in this order that the Certification's findings of imprudence with respect to PNM's continued participation and investment in FCPP shall be vacated and consideration of the issue of PNM's prudence in continuing its participation in FCPP shall be deferred until PNM's next rate case filing*." At. p. 35. (Emphasis supplied.) *See, also*, ¶C, p. 35.

[30] *See* Case No. 16-00276-UT, Revised Order Partially Adopting Certification of Stipulation, at ¶¶ 61-64, and Certification of Stipulation, at 70-75.

is what's on PNM's books and records "*as of the date of abandonment*," not on January 1, 2019. PNM's testimony is that the "date of abandonment" is December 31, 2024.[31]

ETA Section 2(H)(c) is clear:

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

Only the amount of undepreciated investment that is on PNM's books and records at the time of abandonment by definition can qualify as an "energy transition cost" under section 2(H)(2)(c). If the Commission disallows cost recovery for all or part of its FCPP undepreciated investment, then as a result, said amount will not be on PNM's books and records on December 31, 2024. PNM has had notice of that possibility.

The ETA does not arrogate or override the agency's ratemaking authority to review and determine the prudence of investments on a utility's books. It is illogical to take *a limitation* on what qualifies as an energy transition cost—and apply that limitation to circumscribe the Commission's authority to argue implied preemption of its explicit authority to determine just and reasonable rates. *Public Serv. Co. of N.M. v. N.M. Pub. Serv. Comm'n*, 2019-NMSC-012, 444 P.3d 460, 484, ¶86. (The Commission did not exceed its authority when it made a "finding specifically concerning the reasonableness of costs PNM was seeking to include in its rate base. Such a decision is squarely within the authority of the Commission under Section 62-6-4(A) to regulate the rates of public utilities and the obligation of the Commission under Section 62-8-1 to ensure that those rates are just and reasonable.")

[31] TR., 8/31/2021, Fenton, pp. 51, 75, 76, 80; PNM Brief at pp. 5, 13, 21, 112.

Therefore, the Commission should fulfill its promise to ratepayers to determine if PNM was prudent when it extended the life and reinvested in FCPP, and, if imprudent, then the amount of disallowance. If the Commission further finds that PNM's investment was imprudent in 2013 and continues to be uneconomic now, then the Commission should determine if PNM should be required to remove FCPP and its costs from rate base.

13. **CRY WOLF**:[32] PNM claims it was denied "the opportunity to present evidence and cross-examine witnesses on the impact of the evidence from the separate case." PNM Brief at 54. PNM was not denied due process; PNM could have and did provide any evidence it wanted. It could have included any portions of the 16-00276-UT case it wanted and did so without objection. It could have cross-examined any witness regarding prudence of its FCPP life extension and investment in capital expenditures, could have subpoenaed WRA expert/former PNM planner Patrick O'Connell or presented its current Senior Vice President Chris Olson, and could have provided a thorough and responsible Strategist economic analysis that included what was known or should have been known at that time about investing nearly a billion dollars (for which it now expects compensation from ratepayers) regarding load forecasts, high/medium/low alternative resource costs, regulatory obligations (pollution controls, and also requirements for mercury, and other environmental standards reported to the SEC, etc.), take-or-pay coal 15-year-contracts, sensitivity analyses, the possibility of early closure, litigation costs, and more.[33] Let us

[32] To **cry wolf** means to raise a false alarm, derived from the fable *The Boy Who Cried Wolf*.
[33] The Commission's clear directive was to categorically take administrative notice of *all evidence regarding prudence that was admitted into evidence in 16-00276-UT*. "In the subsequent proceeding, administrative notice will be taken of the evidence on the issue of prudence admitted in the current proceeding." (16-00276-UT, Revised Order Partially Adopting Certificate of Stipulation at ¶ 66). PNM could have objected to any evidence only on the basis that it was not related to prudence, which it didn't. PNM also included hindsight analysis of Mr. Graves, and it could have offered other evidence it thought was persuasive, but it did not.

not forget, PNM was on notice that the Commission was going to take administrative notice of the 16-00276-UT evidence on prudence and it not only did not object, it agreed to, signed, and filed the Stipulation. PNM waived this argument in January 2018.

14. **PNM'S WILLFUL DISREGARD IS CONTRARY TO THE STANDARD UTILITY REQUIREMENT OF DUE CARE**: Contrary to record evidence and previous findings PNM argues, unconvincingly, "As the record from Case No. 16-00276-UT demonstrates, PNM conducted multiple financial and resource planning analyses before PNM decided to extend its participation in Four Corners." PNM Brief at 64-76. New Energy Economy relies on its argument, detailed in New Energy Economy's Post Hearing Brief in Chief, *passim*, to refute PNM's hollow claims. PNM's utter disregard for its responsibility to ratepayers is manifest in this case; if this case is not "Exhibit A" for imprudence and holding ratepayers harmless for utility management's "negligent, wasteful or improvident expenditures, or for the cost of management decisions which are not made in good faith,"[34] then no other facts stand a chance and ratepayers will be fleeced without consequence.

> Prudence is that standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time decisions had to be made. In determining whether a judgment was prudently made, only those facts available at the time judgment was exercised can be considered. Hindsight review is impermissible.
>
> Imprudence cannot be sustained by substituting one's judgment for that of another. The prudence standard recognizes that reasonable persons can have honest differences of opinion without one or the other necessarily being "imprudent."[35]

Further, NEE designated the portions of the record from 16-00276-UT on July 12, 2021. PNM did not respond, and did not object until a few days before hearing.

[34] *Public Serv. Co. of N.M. v. N.M. Pub. Serv. Comm'n,* 2019-NMSC-012, 444 P.3d 460, ¶21.

[35] *Id.,* at ¶29.This definition of Prudence upheld in *Public Serv. Co. of N.M. v. N.M. Pub. Serv. Comm'n,* 2019-NMSC-012.

III. CONCLUSION

Even PNM's $400,000 expert witness had to acknowledge that PNM's FCPP decision-making was inappropriate[36] and lacked rigor.[37] Despite having such bad facts, PNM's lawyers have done an impressive job raising every kind of legal argument, chockablock with smoke and mirrors and distractions to avoid the painfully obvious: PNM produced no competent evidence to justify their life-extension of Four Corners and significant investments; hence it was imprudent. The facts since then have only gotten worse: we are facing a climate crisis of grave proportions with consequences as dire as any consequence that can be imagined, short of a massive exchange of nuclear bombs or another meteor striking our planet. PNM ignored renewables in which it could have invested *at the time* and saved ratepayers many millions of dollars. Instead, ratepayers are facing an exorbitant bill for PNM's share in a plant that it agreed, five months after receiving PRC approval to allow FCPP in rates (a nanosecond in this regulatory context), had miraculously become uneconomic.

PNM's conduct harmed ratepayers from every perspective: cost (of the resource and capital expenditure investments), environment, water, pollution, missed opportunity to invest in a green economy and the creation of jobs. Today, in the land of the sun Zia, PNM's renewable penetration is at a shockingly low 10-12%. The only harm that is most easily remedied here is one of cost: PNM ratepayers have been overcharged, and the Commission has the authority and the obligation to hold them harmless. It can do so by addressing PNM's Four Corners imprudence and

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[36] TR., Graves, 9/7/2021, p. 1235.

[37] TR., Graves, 9/7/2021, p. 1322. Q. (Hearing Examiner Medeiros) "Wouldn't a prudent utility executive have, should have known, or have known of those data pieces that you articulate or bring forward in your ex ante analysis?

A. (Graves)Yes, and, you know, I'm not, by any means, endorsing the rigor of their analysis in May of 2012, or at the end of 2013."

And at 1325: (Graves) "I think it would have been a better analysis to use things be more comparable to mine, and, in principle, to use even more analytic techniques, but, you know, they are under time constraints, and other reasons for what they did. I'm not able to judge the full context."

disallowing cost recovery and denying abandonment pursuant to NMSA §62-9-5, *which the ETA requires.* NMSA §62-18-4A. New Energy Economy respectfully requests that:

1. All remaining undepreciated investments still on the books from before 7/1/2016 be split 50/50 between shareholders and ratepayers.
2. All costs post 7/1/2016 be disallowed cost recovery as imprudent investments.
3. FCPP be removed from rate base because it is an uneconomic resource.
4. If in its Final Order the Commission agrees to remove FCPP from rate base, that it create a reverse deferral account for any costs associated with FCPP from that date to the date of the Final Order in PNM's next rate case.
5. That pursuant to the ETA, the financing order be denied because PNM has not proven that abandonment is a net public benefit and is in fact a net detriment, and the application be returned to the utility.

Respectfully submitted this 13th day of October, 2021.

New Energy Economy

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BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF NEW MEXICO FOR APPROVAL OF THE ABANDONMENT OF THE FOUR CORNERS POWER PLANT AND ISSUANCE OF A SECURITIZED FINANCING ORDER	)	**Case No. 21-00017-UT**
PUBLIC SERVICE COMPANY OF NEW MEXICO, **Applicant.**	)	

I HEREBY CERTIFY that on this date I caused to be sent to the individuals listed below, via e-mail only, a true and correct copy of

NEW ENERGY ECONOMY'S RESPONSE BRIEF

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