IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. S-1-SC-39440

PUBLIC SERVICE COMPANY OF NEW MEXICO,

Appellant,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee,

and

WESTERN RESOURCE ADVOCATES,
COUNTY OF BERNALILLO,
NEW MEXCO OFFICE OF THE ATTORNEY GENERAL,
NEW ENERGY ECONOMY,
NEW MEXICO AFFORDABLE RELIABLE ENERGY ALLIANCE,
COALITION FOR CLEAN AFFORDABLE ENERGY, and PROSPERITY WORKS,

Intervenors-Appellees.

In the Matter of Public Service Company of New Mexico's Abandonment of San Juan Generating Station units 1 and 4,
NMPRC Case No. 19-00018-UT.

NEW ENERGY ECONOMY'S MOTION AND BRIEF FOR REHEARING AND TO LIFT STAY

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NEW ENERGY ECONOMY'S MOTION FOR REHEARING AND TO LIFT STAY

COMES NOW Intervenor-Appellee New Energy Economy ("NEE"), by and through their attorneys listed below and, in accordance with Rule 12-404 NMRA, files this Motion for Rehearing of the Amended Order issued by the New Mexico Supreme Court on November 4, 2022, staying "the portion of PRC's final order requiring PNM to issue rate credits remains…pending the final resolution of this appeal."

New Energy Economy respectfully request that the Court lift the stay it granted to Public Service Company of New Mexico ("PNM") for the following reasons, as explained more fully in NEE's brief, attached hereto:

1. The stay is allowing and, unless lifted, will continue to allow PNM to collect almost $100,000,000 per year from ratepayers to "compensate" PNM for San Juan Generating Station ("San Juan") operating costs that PNM is no longer incurring because the plant is abandoned and closed. This allows PNM to violate, at the expense of ratepayers, the most fundamental principle of utility regulation, as enunciated by this Court, that a utility cannot collect money from ratepayers for regulatory assets that are not providing service. *See*, Brief In Support, Introduction and Point III.
2. PNM misleadingly and incorrectly assured this Court in its Motion for Stay that if PNM keeps track during this appeal of its collection of its now non-

existent San Juan costs through a "regulatory liability" account it will be able to fully protect ratepayers from overpayments after the PRC hears PNM's next rate case following the conclusion of PNM's appeal in this case. It will be a process that will take at least two years and, depending on when PNM requests its "following rate case," may take many years longer. PNM's assurance is not only misleading, it is essentially impossible to accomplish. *See*, Brief In Support, Point I.

3. To compound the stay's impact, PNM is now citing this Court's Stay in another case now before the PRC that involves PNM's nuclear generation assets at Palo Verde Nuclear Generating Station ("PVNGS"), NMPRC Case No. 21-00083-UT. There, PNM is arguing that this Court's entry of a stay in this case demonstrates that this Court endorses PNM's right to continue to collect from ratepayers non-existent costs associated with abandoned/closed generation plants simply because those costs were included in rates when the plants were operating. As a result, the PRC should permit PNM to continue to collect the "costs" of PVNGS even though PNM no longer incurs them because it has divested its shares in PVNGS by selling them to a third party, thus abandoning them. *See*, Brief In Support, Point II.

4. In its Motion for Stay and supporting brief, PNM wholly failed to establish that a stay in this case would meet the test this Court requires be met in order

to justify staying a regulatory order. In particular, PNM failed to establish any basis to conclude that it will suffer irreparable injury, that the parties and PNM's ratepayers will not suffer harm and that its extraordinary overreach will prevail on the merits. *See,* Brief In Support, Point III.

5. PNM drafted the ETA Financing Order for San Juan, which the PRC adopted and this Court approved on appeal, providing that PNM would issue the securitized bonds "shortly after the abandonment of the plant on July 1, 2022," just as the ETA contemplates.[1] In August 2021, however, PNM internally and unilaterally decided to reinterpret the requirements of the ETA and delay the issuance of bonds for years, contrary to the dictates of the Financing Order and *Final Order on Request for Issuance of a Financing Order*, with the result that PNM could continue to collect the costs of San Juan indefinitely even though they wouldn't exist, effectively turning San

[1] 19-00018-UT, *Recommended Decision on PNM's Request for Financing Order*, February 20, 2021, at 20-21. *Final Order on Request for Issuance of a Financing Order*, April 1, 2020. Upheld by this Court, *Citizens for Fair Rates & the Env't v. N.M. Pub. Regulation Comm'n*, 2022-NMSC-010, ¶4, affirming the Commission's Order; ¶10, ("the hearing examiners issued a recommended decision extensively reviewing the law, arguments and evidence … and recommended that the Commission approve PNM's application with several modifications to the terms and language of the financing order as proposed by PNM… [and] the Commission … adopted the findings, conclusions, and orders of the recommended decision in its final order."; ¶50. ("The ETA permits '[a] qualifying utility that is abandoning a qualifying generating facility [to] apply to the [C]ommission for a financing order... to recover all of its energy transition costs through the issuance of energy transition bonds.' Section 62-18-4(A)."

Juan's former operating costs into pure profit. PNM was unable via its maneuvering to convince the same Hearing Examiners and the Commission that it was adhering to the ETA or the Financing Order.[2] The PRC correctly found PNM's ploy to be indefensible and ordered PNM to remove San Juan costs from rates following the plant's closure, when PNM stopped incurring those costs. Now PNM has obtained a stay, based on a claim that the profits it would lose if it couldn't continue to charge its customers for non-existent costs presented an "emergency." In other words, PNM told this Court that its inability to bill its customers for non-existent costs that were literally doubling PNM's profits presented an emergency necessitating immediate Court intervention. PNM's conduct is predatory and unlawful. *See,* Brief In Support, Point IV.

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[2] 19-00018-UT, *Recommended Decision in Show Cause Proceeding*, June 17, 2022, pp. 50-51. ("It is also evident that PNM's new plan contradicts the representations the Company made in its Application and its witness attested to in the initial phase of this proceeding. PNM's representations were material to the findings and conclusions made in the *Financing Order*, which, … clearly provides for the removal of the San Juan energy transition costs through the issuance of securitized bonds upon or shortly after the abandonment of San Juan Units 1 and 4. Even still, of most significance to the Commission's ultimate resolution of this matter, what this investigation has revealed is that PNM's new plan has broken the fundamental linkage in the Energy Transition Act between a qualifying generating facility's abandonment and the securitization of energy transition costs and collection of energy transition charges; that fundamental relationship at the core and operation of the ETA[.]")

New Energy Economy assumes that the Court likely granted PNM's Motion for Stay because it was persuaded by PNM that entering a stay would have no significant impact on ratepayers and the public. For the reasons set forth in the accompanying Brief in Support of this Motion for Reconsideration, NEE respectfully urges the Court to re-examine whether PNM's assertion is defensible and whether PNM's Motion for Stay can possibly be said to have met this Court's standards for granting such a motion, particularly in light of the PRC's thorough factfinding and analysis of those factors in its order denying PNM's request below for a stay. *City of Las Cruces v. N.M. Pub. Regulation Comm'n*, 2020-NMSC-016, ¶ 23, 476 P.3d 880.

Pursuant to Rule 12-309(C) NMRA, NEE sought the position of the parties in this proceeding and is advised that this Motion is opposed by PNM; New Mexico Public Regulation Commission, New Mexico Office of the Attorney General, and County of Bernalillo support the Motion; Western Resource Advocates ("WRA"), Coalition for Clean Affordable Energy ("CCAE"), and Prosperity Works support the relief requested in the Motion; New Mexico Affordable Reliable Energy Alliance ("NM AREA") has no objection to the Motion.

For the foregoing reasons and based on the further arguments and authorities set forth in the accompanying Brief in Support, New Energy Economy respectfully requests that the Court reconsider its entry of a stay of the PRC's order that required PNM to stop charging ratepayers for the costs that PNM no longer incurs but continues to collect from ratepayers.

Respectfully Submitted,

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PUBLIC SERVICE COMPANY OF NEW MEXICO,

Appellant,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,

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WESTERN RESOURCE ADVOCATES,
COUNTY OF BERNALILLO,
NEW MEXCO OFFICE OF THE ATTORNEY GENERAL,
NEW ENERGY ECONOMY,
NEW MEXICO AFFORDABLE RELIABLE ENERGY ALLIANCE,
COALITION FOR CLEAN AFFORDABLE ENERGY, and PROSPERITY WORKS,

Intervenors-Appellees.

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San Juan Generating Station units 1 and 4,
NMPRC Case No. 19-00018-UT.

NEW ENERGY ECONOMY'S BRIEF IN SUPPORT OF MOTION FOR REHEARING AND TO LIFT STAY

The Court's order granting PNM's Motion to Stay relieved PNM of the New Mexico Public Regulation Commission's ("PRC" or "Commission") order requiring Public Service Company of New Mexico ("PNM") to issue rate credits to its customers so that its customers will no longer have to reimburse PNM through rates for the costs that PNM used to incur when it operated the San Juan Generating Station ("San Juan" or "SJGS") but, now that San Juan is closed, no longer incurs. The simple logic underlying the PRC's order was that if PNM is no longer incurring the almost $100,000,000/year in SJGS operating costs, PNM must stop collecting them from its customers. PNM complains that this is being irreparably harmed by the PRC's order because it has the effect of cutting into PNM's profits.[3] Of course, it is. It would cut into any utility's profits if they were charging their customers for millions of dollars in non-existent costs and had to stop. What could possibly be more profitable to a utility than millions of dollars in revenue, cost-free?

The Court's stay of the PRC's order allows PNM to continue to collect these "costs", plus a profit on them, indefinitely. This is a significant and unjust

[3] *Emergency Motion and Brief of Appellant* Public Service Company of New Mexico *for Partial Stay of Final Order Pending Appeal,* July 25, 2022, p. 25.

imposition on ratepayers, who must continue to pay PNM what is essentially "free money" for the duration of this appeal or, according to PNM, until it chooses to initiate its next rate case, which may be years after this appeal is concluded.[4]

For the following reasons, NEE respectfully requests that the Court reconsider its order staying the PRC's order and lift the stay.

Introduction

PNM's appeal from the PRC's order, its Motion for Stay, and the outcome of NEE's Motion for Reconsideration are controlled by the following legal principles:

1. It is the PRC's duty to assure, and has broad authority to assure, that a utility's customers are charged only rates that are "fair, just and reasonable."

[4] *Id.*, p. 31, ¶3. ("To assure that customers would not be harmed by a stay if this appeal is unsuccessful, PNM agreed that if a stay is granted, *it would establish a regulatory liability to account for the benefits of the rate credits[.] … PNM will record the regulatory liability if it receives a final determination from the New Mexico Supreme Court affirming the Commission's decision.* Those accumulated regulatory liability amounts, plus carrying charges, ***would be reconciled in PNM's following rate case***.") (Emphasis supplied.)

NMSA §62-3-1 B[5]; §62-6-4(A)[6] § 62-8-1[7]; *Citizens for Fair Rates & the Env't v. N.M. Pub. Regulation Comm'n*, 2022-NMSC-010, ¶ 35, (Energy consumers have "an entitlement to 'reasonable and proper service at fair, just and reasonable rates'."); *PNM Elec. Servs. v. N.M. PUC (In re PNM Elec. Servs.)*, 1998-NMSC-017, ¶ 20, 125 N.M. 302, 961 P.2d 147.

2. Pursuant to its duty to assure fair, just and reasonable rates, the PRC has plenary power to regulate a utility's rates. NMSA § 62-6-4. This includes the power to impose an interim rate reduction on a utility. *In re Comm'n Investigation v. N.M. State Corp. Comm'n,* 1999-NMSC-016 ¶16, 127 N.M. 254, 980 P.2d 37.

3. In ensuring that rates meet the foregoing criteria, the PRC must determine whether costs that a utility wishes to include in rates were prudently incurred. *Pub. Serv. Co. v. N.M. Pub. Regulation Comm'n*, 2019-NMSC-012, ¶ 86, 444 P.3d 460. ("*PNM v. NMPRC*"). This principle is based on the unremarkable assumption that costs, in order to be prudently-incurred, must actually exist. See #4, below.

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[5] "It is the declared policy of the state that the public interest, the interest of consumers and the interest of investors require the regulation and supervision of public utilities to the end that reasonable and proper services shall be available at fair, just and reasonable rates[.]"

[6] PRC has "general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations.

[7] "Every rate made, demanded or received by any public utility shall be just and reasonable."

4. A utility may not charge its customers for costs that it hasn't incurred. *In re PNM Gas Servs.*, 2000-NMSC-012, ¶ 73, 129 N.M. 1, 1 P.3d 383 (holding that a utility bears a burden of demonstrating that costs were "actually incurred." *See also, Pub. Util. Com. v. Hous. Lighting & Power Co.*, 748 S.W.2d 439, 441, 31 Tex. Sup. Ct. J. 153 (1987), citing, *Federal Power Commission v. United States Pipeline Co.*, 386 U.S. 237, 87 S. Ct. 1003, 18 L. Ed. 2d 18 (1967); ("To insure that its rate is just and reasonable, a utility must prove that all operating expenses have been actually incurred."); *Ind. Office of Util. Consumer Counselor v. Lincoln Utils.*, 784 N.E.2d 1072, 1075 (Ind. Ct. App. 2003) (Indiana public utility act "excludes construction costs from [inclusion in rates] unless such costs were actually incurred and paid…").

5. A utility may only impose costs on its customers that are associated with a plant that is "used and useful." "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." *PNM v. NMPRC,* 2019-NMSC-012*,* ¶21, 444 P.3d 460.

6. A party seeking to stay a regulatory order on appeal must demonstrate to the appellate court that is likely to prevail on the merits of its appeal; that it will suffer irreparable harm if the stay is not granted; that no substantial harm will result to others, and; that there will be no harm to the public interest. *City of Las*

Cruces v. N.M. Pub. Regulation Comm'n, 2020-NMSC-016, ¶ 23, 476 P.3d 880 (applying standards set forth in *Tenneco Oil Co. v. New Mexico Water Quality Control Commission*, 1986-NMCA-033, 105 N.M. 708, 736 P.2d 986.) "[T]hree of these four factors concern the determination of harm, questions of fact rather than law." *City of Las Cruces, supra, at id.*

7. Economic harm does not suffice to establish irreparable harm to the party moving for a stay unless the movant demonstrates that it will suffer *disabling* losses and will have no remedy at law to recover them. *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674, 244 U.S. App. D.C. 349 (D.C. Cir. 1985), and its progeny.

8. The Supreme Court will not substitute its judgment for the PRC's in the regulation of utilities unless the PRC acted arbitrarily and capriciously or contrary to law. *Garrett Freight Lines, Inc. v. State Corp. Comm'n*, 1957-NMSC-058, ¶ 1, 63 N.M. 48, 312 P.2d 1061("[I]t is not for the court to substitute its judgment for that of the Commission. To do so would be an invasion of the administrative and legislative functions of the Commission by the judiciary."); *Greyhound Lines, Inc. v. N.M. State Corp. Comm'n*, 1980-NMSC-071, ¶ 9, 94 N.M. 496, 612 P.2d 1307 ("It is not within our province to retry the case or substitute our judgment for that of the Commission."); *N.M. AG v. N.M. Pub. Regulation Comm'n*, 2015-NMSC-032, ¶ 1, 359 P.3d 133 (accord).

Principles 1 through 5, above, establish, categorically, that PNM cannot continue to charge its customers for costs that had been associated with a plant that is not just "not used and useful" but is permanently closed and the burden of its costs on PNM ended.

The PRC found, correctly, that PNM's effort to continue to impose SJGS's costs on its customers was indefensible and ordered it to cease and desist. This Court's stay of the PRC's order violated its own settled precedents and the fundamental regulatory principles that protect ratepayers from a utility like PNM's overreach at the expense of ratepayers and the public. 19-00018-UT, *Order Denying PNM's Emergency Motion for Stay of Rate Credits and Motion to Strike Certain Portions of Monroy's Affidavit*, July 12, 2022, ¶ ¶ 10, 13.

I. PNM's Assurance to the Court that it will establish a "regulatory liability" account in its books to protect its customers and the public is inadequate to do so and does not justify avoiding application of the "Tenneco" factors.

In its Order granting PNM's motion for a stay of the most significant portion of the PRC's order of November 4, 2022, the Court did not state its reasons. NEE assumes, without certainty, that since PNM failed to demonstrate any irreparable harm, any likelihood of success on the merits or the absence of harm to the public or the other parties inherent in having to stop collecting non-existent costs from its customers, the Court likely granted PNM's motion because it relied on PNM's

assurance that it could grant PNM's request for stay without inflicting any harm and/or risk of harm to the other parties, ratepayers or the public. NEE believes the Court may have erroneously relied in this regard on the assurance PNM provided when it moved for a stay:

> [If the Court grants PNM's Motion for Stay, PNM] would establish a regulatory liability to account for the benefits of the rate credits subject to the period during the stay, with a carrying charge calculated on the amounts of the rate credits subject to the stay. PNM will record the regulatory liability if it receives a final determination from the New Mexico Supreme Court affirming the Commission's decision. Those accumulated regulatory liability amounts, plus carrying charges, would be reconciled in PNM's *following rate case*. Pursuant to the terms of the Financing Order as reflected on page 99 of the Financing RD, the carrying charge will be calculated based on PNM's cost of debt. The regulatory liability will ensure that customers are made whole in the event that PNM's appeal is rejected. (Monroy Aff. ¶ 20).

(Emphasis supplied.) *See, Emergency Motion and Brief of Appellant* Public Service Company of New Mexico *for Partial Stay of Final Order Pending Appeal* (hereinafter "PNM Motion"), p. 31, ¶3. If the Court relied on this assurance from PNM, NEE respectfully suggests that it was mistaken. As NEE explains in greater detail immediately below, PNM's assurance is inadequate to protect ratepayers and the public from the consequences of PNM's collecting $98 million per year in unincurred "costs," going forward indefinitely, that were formerly associated with PNM's closed San Juan Generating Station ("San Juan" or "SJGS").

First, PNM's promise, even if it were enforceable without an order, is that if it loses its appeal it will make its ratepayers whole by adjusting its rates in a

"following rate case" – i.e., following the conclusion of this appeal. Thus the date for reimbursement, if it could be accomplished, is left to PNM's discretionary decision as to when to file for a change in rates. The last time PNM filed a rate case was in 2016 which means that the rate case that *follows* the resolution of this appeal, which PNM has not yet filed, could be in 6-8 years from now. Even if PNM loses this appeal and the Court orders it to immediately give back to ratepayers what can only be described as ill-gotten gains, it could well take a year or two before that happens, during which time PNM will be harvesting many millions of dollars without overheads, expenses or investment. During that time, the Court's stay will result in the imposition of unjust, unfair and unreasonable rates, which the law forbids. The PRC, in its factual findings, found as much. 19-00018-UT, *Order Denying PNM's Emergency Motion for Stay of Rate Credits and Motion to Strike Certain Portions of Monroy's Affidavit*, July 12, 2022, ¶¶ 10-15.

Second, PNM is arrogating to itself the calculation of what amounts will make its customers whole and that amount is likely to be in dispute, particularly when it is combined with other regulatory ingredients in a future rate case and its associated bargaining process, when all parties will have their customary arguments about how a new rate should be established and, in the process, factoring in any "rate credits" and all other factors that go into rate setting.

Third, over the period that the stay is in place, plus the years before PNM proposes a new rate hearing, plus the years it may take to finally set the new rates, many thousands of ratepayers will move out of PNM's service area after having paid PNM for costs that PNM is not now and will not be incurring and which, if PNM's appeal is unsuccessful, those ratepayers will not have owed. Conversely, many customers will move into PNM's service area and be compensated for overcharges that they did not incur and to which they are not entitled. Further, customers will move within PNM's service area with the result that their electrical usage changes significantly. How will PNM compensate all of these categories of customers? It is hardly as simple a situation as PNM makes it by saying, in effect, "don't worry, we'll make sure people get their money back if we lose." The Court need look no further than an Alaska case, *United States v. RCA Alaska Commc'ns*, 597 P.2d 489, 510-12 (Alaska 1978), to understand that PNM's blithe assurance that all refund issues will be easily addressed in a forthcoming rate case – whether a year from now or 6-8 years from now – is misleading and indefensible. The PRC found as much. 19-00018-UT, *Order Denying PNM's Emergency Motion for Stay of Rate Credits and Motion to Strike Certain Portions of Monroy's Affidavit*, July 12, 2022, ¶¶ 10-15.

The "status quo" is that PNM's current and future customers are protected by the PRC's order from enormous, imaginary "costs," as required by common

sense, the Public Utility Act's requirement that a utility's customers not be charged for costs not incurred or regulatory assets not in use, and this Court's decisions affirming as much.[8] This is to say nothing of the fact that the only harm PNM conjured for itself in its Motion for Stay was its inability to take money from its ratepayers, as pure profit, to which it has no entitlement because it no longer has to pay San Juan's "costs." Furthermore, restoring the status quo after this appeal is concluded or after the next rate case is resolved will be beyond the reach of this Court and PNM, not just because of the interim injury inflicted on low and moderate-income ratepayers resulting from unlawful overcharges, but because it will be impossible to allocate reimbursements among ratepayers who have moved away, moved in, or moved to different residences or business locations within PNM's service area. This is to say nothing of the injury inherent in allowing a utility to collect what the law forbids: "Reimbursement" for costs that didn't exist.

Fourth, even if PNM's offer that it will "establish a regulatory liability" were sufficient to protect ratepayers, the public and the parties, there is no order in place, either by this Court or the PRC requiring that PNM do so. There is, in other words, nothing other than PNM's offer that it will be in a position to protect, or will protect the ratepayers who will pay PNM, over the coming years, the hundreds of millions of dollars in non-existent San Juan costs that will be ***entirely*** profit.

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[8] *PNM v. NMPRC,* 2019-NMSC-012*,* ¶21, 444 P.3d 460, quoted above at p. 11.

This Court's order staying the PRC's order relies on PNM's vague offer, but PNM has shown its lack of good faith already, by arguing below and here that it should be able to collect San Juan costs from ratepayers even though they don't exist.

As the PRC found[9], PNM's promise to compensate customers is illusory and will not ameliorate the present ongoing harm of unjust, unfair and unreasonable rates. As stated above, there is no order in place requiring a credit if PNM loses its appeal or, for that matter, an order requiring that PNM keep track of SJGS "costs" that it will continue to impose on ratepayers. The provisions of NMSA 62-11-6 which allows the Court to require a bond of a party seeking a stay of a PRC order, would not solve the Gordian Knot of how to refund overcharges if PNM fails to prevail. Requiring a supersedeas bond[10] at the rate of $100,000,000 per year would impose a burden of the appropriate magnitude on PNM, but it would simply defer or, more likely, avoid entirely the mechanisms and complexity of distributing the refunds of overcharges to PNM's customers, past, present and future. NEE respectfully requests that this Court not take PNM at its word that refunds can be made easily and will be available in the event it does not prevail in this appeal.

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[9] 19-00018-UT, *Order Denying PNM's Emergency Motion for Stay of Rate Credits and Motion to Strike Certain Portions of Monroy's Affidavit*, July 12, 2022, ¶¶ 10-15.

[10] NMRA 12-207.

II. PNM is presently invoking this Court's stay order as a precedent that the PRC should follow in deciding whether to allow PNM to collect many millions in phantom costs associated with nuclear assets that it no longer owns and is no longer provide service to PNM's customers.

Because the Court's order granting the stay does not include its reasoning, NEE has assumed that the Court did not intend it as indicative of the Court's view of the merits of PNM's appeal. PNM, however, has taken the opposite view in another case, NMPRC Case No. 21-00083-UT, presently pending before the PRC regarding PNM's abandoned interests in the Palo Verde Nuclear Generating Station ("PVNGS"):

> The New Mexico Supreme Court has granted a stay of the ordered rate credits pending the conclusion of the appeal. …
>
> While the New Mexico Supreme Court did not provide a discussion in its orders concerning the bases for granting a stay of that decision, there are certain relevant conclusions that can be inferred based on applicable law and the Rules of Appellate Procedure. … Significantly, an essential element for a stay pending appeal is a showing of a likelihood that the applicant will prevail on the merits. It is unlikely the Court would have granted the stay absent a determination that PNM met one or more of the foregoing strict standards.

NM PRC Case No. 21-00083-UT, *Verified Response of Public Service Company of New Mexico to Joint Motion for Accounting Order*, November 7, 2022, pp. 10-11.

Thus, PNM's claim in the Palo Verde case now before the PRC is that this Court's one-sentence stay order indicates that the Court agrees with PNM's position, *on the merits*, that it must be allowed to continue to collect PVNGS

"costs" from ratepayers, plus profit on them, even though PNM sold its shares in PVNGS to a different owner with the result that the PVNGS 114 MW asset will therefore no longer be providing service to PNM ratepayers and PNM will no longer be incurring those costs. In other words, PNM is using this Court's one-sentence stay order as way of multiplying the stay's harm to ratepayers by urging the PRC to ignore the PRC's and this Court's heretofore uncontroversial holdings that "[o]ne widely accepted principle is that rates must be determined only on investments actually providing service to the ratepayer or on property that is 'used and useful.'" NMPRC Case 2146 Part II at 47. This is mirrored in this Court's holding in *PNM v. NMPRC*, 2019-NMSC-012, ¶ 21, that ratepayers may not be charged for assets that are not "used and useful" and that "[t]o be considered 'used and useful,' a property must either be used, or its use must be forthcoming and reasonably certain…"

What is particularly galling about PNM's stated position in the PVNGS case is that PNM has invoked the stay order herein to avoid the parties' request that, during the period before any final determination on PVNGS charges, the PRC simply require PNM to account for whatever it is charging its customers in PVNGS "costs" after the sale of its interests to a third pard party so that an effective order can be entered *if* the PRC ultimately decides that PNM should not have imposed them on its customers. PNM's position is that *it shouldn't even be*

required to keep track of those PVNGS charges. Why? Because this Court's stay order, according to PNM, shows that the Court agrees with PNM on the subject of whether or not PNM may extract phantom costs from ratepayers until the next rate case. Accordingly, PNM is using this Court's stay order as justification for not maintaining the very type of liability account for PVNGS costs that it offered to keep as to SJGS costs as a way of persuading this Court, in this case, to forego imposing on PNM the accepted requirements for justifying a stay.[11] In the PVNGS case, the Commission has not yet made a decision on the merits of whether PNM must provide a rate credit for PVNGS costs. This is in contradistinction to the case at bar, involving SJGS "costs", in which the PRC has decided the merits and has required PNM to issue a rate credit to its customers to prevent them from being burdened by enormous, non-existent costs.

Thus, PNM is invoking this Court's stay as an indication that this Court agrees that PNM should be permitted to collect unincurrred costs until such time as PNM gets around to asking the PRC to convene a rate case (which may be years from now). The implications of PNM's argument is that by entering the stay, this Court has effectively overruled its decisions in *PNM v. PRC*, 2019-NMSC-012 and *In re PNM Gas Servs.*, 2000-NMSC-012, ¶ 73, 129 N.M. 1, 1 P.3d 383, along with the PRC's many decisions that have held that ratepayers must not be required to

[11] 21-00083-UT, *Joint Motion for Accounting Order*, November 1, 2022, p. 7.

pay for costs of assets that are not in use or for costs not actually incurred. This is not just wrong on PNM's part it is an alarming indication that PNM believes this Court, simply by granting an unexplained stay in this case, has opened the floodgates for charges that PNM, before the stay, could not possibly have justified imposing on its customers. NEE means no disrespect to the Court, but its one-line stay has resulted in a regulatory train wreck that will cause PNM's profits to soar skyward and its customers to pay costs that no regulatory authority would reasonably countenance.

III. This Court Should Reconsider its Stay Order Because PNM transparently failed to meet the "Tenneco" factors that this Court has held must be met in order to justify a stay of a regulatory order.

For reasons set forth above regarding the inadequacy of PNM's offer to establish a "regulatory liability" account as a way of protecting ratepayers and the public, NEE respectfully requests that the Court apply its accepted test for determining whether PNM's application for a stay of the PRC's is legally sufficient. That test is set forth in the Court of Appeals' decision in *Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n*, 1986-NMCA-033, ¶ 7, 105 N.M. 708, which this Court applied in *City of Las Cruces v. N.M. Pub. Regulation Comm'n*, 2020-NMSC-016, ¶ 23, 476 P.3d 880. It requires that a party seeking a stay of an administrative order establish likelihood of success on the merits,

irreparable harm unless the stay is granted, absence of harm to other parties and no harm to the public interest. *Id.* NEE respectfully refers the Court to the responses to PNM's motion, which NEE incorporates by reference.[12] NEE will briefly summarize those arguments. The PRC methodically analyzed PNM's motion for stay, applying the *Tenneco* factors, and denied PNM's application for a stay on that basis.[13]

A. First, PNM's Motion for Stay did not meet the requirement that it show it would suffer irreparable harm if a stay were not granted; Economic loss does not, in and of itself, constitute irreparable harm.

PNM's argument for a stay, boiled down to its undeniable essence, is that unless the Court stayed the PRC's order, PNM would not be able to continue to

[12] Bernalillo County's and New Mexico Office of the Attorney General's Response to PNM's July 25, 2022 Second Emergency Motion and For Partial Stay of Final Order Pending Appeal; New Mexico Affordable Reliable Energy Alliance's Response to PNM's Emergency Motion and Brief For Partial Stay of Final Order Pending Appeal; New Energy Economy's Response to Appellant PNM's Second Emergency Motion and For Partial Stay of Final Order Pending Appeal; Response of New Mexico Public Regulation Commission to PNM's July 25th Second Emergency Motion and For Partial Stay of Final Order Pending Appeal; Response of Intervenors Prosperity Works and Coalition for Clean Affordable Energy In Opposition to Emergency Motion of Public Service Company of New Mexico and For A Stay of Final Order; Response of Western Resource Advocates to PNM's July 25th Emergency Motion and For Partial Stay of Final Order Pending Appeal.

[13] 19-00018-UT, *Order Denying PNM's Emergency Motion for Stay of Rate Credits and Motion to Strike Certain Portions of Monroy's Affidavit*, July 12, 2022, ¶¶ 10-15.

collect the SJGS phantom "costs" and that its profits would suffer.[14] PNM's argument – that if the PRC makes PNM stop collecting an extra $100,000,000 a year in overcharges from ratepayers, PNM's profits will suffer – is self-defeating on its face. But even if it weren't, it is well settled that economic loss, without some extraordinary additional impact - does not constitute irreparable harm. *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674, 244 U.S. App. D.C. 349 (D.C. Cir. 1985). As that court held:

> The key word in this consideration is *irreparable*. Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation weighs heavily against a claim of irreparable harm.

Economic loss rarely rises to the level of irreparable injury. In *National Mining Association v. Jackson,* 768 F. Supp. 2d 34, 53-54 (D.D.C. 2011) coal mining companies objected to regulation and sought an injunction against additional permitting conditions claiming that they would be out of business within 18 months. The United States District Court, citing *Wis. Gas Co.* held that economic loss, even if it may be unrecoverable, does not rise to the level of irreparable injury, which means "such imminence that there is a 'clear and present need' for

[14] *Id.,* ¶ 6.

equitable relief to prevent irreparable harm . . . . [and] second, the plaintiff's injury 'must be beyond remediation.'" Courts across the country have upheld and reiterated the high bar the party seeking injunctive relief must show for irreparable harm. *See*, *Pinson v. Pacheco*, 397 Fed. Appx. 488, 489 (10th Cir. 2010); *Allied Servs., LLC v. Smash My Trash, LLC*, No. 21-cv-00249-SRB, 2021 U.S. Dist. LEXIS 80929, at *8 (W.D. Mo. Apr. 28, 2021); *Pers. Wealth Partners, LLC v. Ryberg*, No. 21-cv-2722 (WMW/DTS), 2022 U.S. Dist. LEXIS 9981, at *9 (D. Minn. Jan. 18, 2022); *Ohio v. Becerra*, 577 F. Supp. 3d 678, 699 (S.D. Ohio 2021)[15]; *Brady v. NFL*, 640 F.3d 785, 794-95 (8th Cir. 2011); *Slamen v. Slamen*, 254 So. 3d 172, 176 (Ala. 2017); *U.S. Legal Support, Inc. v. Hofioni*, No. 2:13-cv-01770-MCE-AC, 2015 U.S. Dist. LEXIS 1698, at *6 (E.D. Cal. Jan. 6, 2015).

Our courts have addressed irreparable harm in the context of injunctions and have emphasized the necessity, when irreparable injury is claimed, that there is

[15] *Ohio ex rel. Celebrezze v. Nuclear Regulatory Com.*, 812 F.2d 288, 291 (6th Cir. 1987). Where the economic loss is "irrecoverable," however, it "may constitute irreparable injury" but "a party asserting such a loss is not relieved of its obligation to demonstrate that its harm will be 'great.'" *N. Air Cargo v. U.S. Postal Serv.*, 756 F. Supp. 2d 116, 125 n.6 (D.D.C. 2010); *see also, e.g., Allina Health Servs. v. Sebelius*, 756 F. Supp. 2d 61, 67-68 (D.D.C. 2010) (noting that "an inability to recover lost profits or payments does not always constitute irreparable harm" and collecting cases); *Converdyn v. Moniz*, 68 F. Supp. 3d 34, 49 (D.D.C. 2014) ("Otherwise, a litigant seeking injunctive relief against the government would always satisfy the irreparable injury prong, nullifying that requirement in such cases.").

no adequate remedy at law. *See, e.g., Amkco, Ltd., Co. v. Welborn*, 2001-NMSC-012, ¶ 9, 21 P.3d 24; *see also*, *State ex rel. State Highway & Transp. Dep't v. City of Sunland Park,* 2000-NMCA-044, ¶ 9, 3 P.3d 128. It is not enough that the party seeking injunctive relief merely claim irreparable harm; the party must come forth with evidence of the irreparability of his harm or inadequacy of *any* remedy, and to do otherwise was an abuse of discretion. *Id.* at ¶ 19. (Emphasis added.)

Here, the very nature of the underlying issues in this appeal demonstrates the absence of irreparable harm. It is difficult to imagine how PNM's surprising arrogance could be more vividly on display than through its claim that it will be irreparably harmed if it is prevented by its regulatory authority from overcharging its customers.

Additionally, there are alternative remedies available to PNM; the company could have issued securitized bonds before the Financing Order's authorization expired or can request interim rate relief. PNM has failed to show that harm is certain and great and of such imminence that there is a clear and present need for equitable relief.

Because PNM has failed to substantiate its claim of irreparable harm, and because the PRC's authority and responsibility to prevent a utility from continuing to recover millions of dollars in costs that disappeared when a plant closed, its request for stay should be denied.

Finally, even if PNM could establish irreparable harm as a result of being denied the ability to overcharge its customers, it would still have to meet the other prongs of the *Tenneco* test: Likelihood of success on the merits and no harm to its customers or the public and it can't.

B. Second, PNM failed to demonstrate that it is likely to prevail on the merits, i.e., that it is likely to persuade this Court that the PRC acted arbitrarily and capriciously or illegally in ordering PNM to cease charging its customers for millions of dollars in costs that PNM will never incur.

The stay has had and will continue to have the effect of imposing on ratepayers many millions of dollars of unlawful charges in their monthly bills that represent costs that PNM used to incur but no longer incurs because the coal plant with which those costs used to be incurred is closed and PNM is no longer incurring them. This will result in not only an extraordinary, undeserved windfall overpayment to PNM, it will impose overcharges on many thousands of ratepayers who struggle to pay their bills and, as to all ratepayers who move during the pendency of this litigation, the overcharges will be unrecoupable. *See also,* footnote 11 above, and 19-00018-UT, *Order Denying PNM's Emergency Motion for Stay of Rate Credits and Motion to Strike Certain Portions of Monroy's Affidavit*, July 12, 2022, ¶¶ 8-15.

C. Third, PNM failed to demonstrate that a stay would not result in harm to the other parties to the case or to the public.

As set out in Intervenors' responses to PNM's motion for a stay, the nature of the issues underlying this appeal establish that the parties, PNM's customers and the public will be harmed if PNM is permitted to collect, in the form of rates, hundreds of millions of dollars in unincurred costs that, under the precedents cited above, are unlawful and contrary to the most elemental principle of utility regulation, i.e., that a utility's customers cannot be charged rates that are not fair, just and reasonable and that a utility may not lawfully charge its ratepayers for costs that it did not incur. The parties' interests are in the protection of ratepayers, particularly those who have difficulty paying their utility bills and for whom a difference of ten dollars a month has real impact. It is axiomatic that excessive, unjust and unreasonable rates will harm all ratepayers, particularly the poor and will harm the public because of the impact on New Mexico's economy of inflated rates for electricity. PNM has failed to provide the Court with any basis to conclude otherwise, other than PNM's unsecured and inadequate offer to keep track of the overcharges while they occur and to account to ratepayers at an unspecified date in future if it loses this appeal. This is not an adequate basis to avoid what this Court requires of a party seeking a stay of an administrative order, which include establishing that a stay will not harm PNM's customers or the

public. How can a stay in this case ***not*** harm them?

IV. The Context in which the Dispute over PNM's Motion for Stay Arose is Significant.

The dispute over the Court's entry of stay arises in the context of extraordinarily manipulative behavior by PNM due to its self-serving unilateral and incorrect interpretation of the Energy Transition Act ("ETA").[16] That Act contemplates, as PNM said when it drafted it and proposed it to the Legislature, that PNM will abandon its coal burning plants and, upon abandonment, issue "Energy Transition Bonds." The ETA provided the authority for PNM to include in securitization bonds the $360.1 million PNM estimates as the amount due it from ratepayers upon closure of the remaining San Juan Generating Station units, (SGJS units 1 and 4), including all costs and 100% recovery of the full $283 million estimate of undepreciated investment in the units. As the ETA contemplates, PNM

[16] https://sourcenm.com/2022/11/07/pnm-customers-continue-to-pay-for-san-juan-coal-plant-thats-no-longer-operating/?eType=EmailBlastContent&eId=227902ee-a7e3-48fb-b611-6caa2573a1b1
(PNM's "Sandoval said this situation has really been a misunderstanding. He said the utility assumed officials would know bond issuance would be delayed when the rate reviews were delayed.
'If we had to do it over again, I think we would have made sure rather than assuming the parties thought that once we moved the rate case that we would move to bonds,' he said. 'I think we would have made that very, very clear from the beginning.'")

informed the Commission and stated in the financing order that it – PNM-drafted, would issue securitized bonds "shortly after the abandonment of PNM's interest in the units on July 1, 2022."[17]

When PNM closed the first two units at SJGS, units 2 and 3, PNM, via a settlement it promoted, it received 50% of its still undepreciated investments, $257 million.[18] Half of the burden of the remaining undepreciated investments was assigned to shareholders and the other half to ratepayers, a division the PRC called "generous" to PNM.[19]

Simply put, the ETA was a deal – PNM would receive 100% recovery on its undepreciated investments, not a regulated outcome of 50% (or another amount) as it did when it closed the first two SJGS units. In return, ratepayers would *save money* by not being required to compensate PNM for those undepreciated investments at the full weighted average cost of capital ("WACC") or 7.2%, but at an interest rate that would be lower because of triple A securitized bonds.[20] PNM

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[17] 19-00018-UT, *Recommended Decision on PNM's Request for Financing Order*, February 20, 2021, at 20-21.

[18] NM PRC Case No.13-00390-UT, *Final Order*, December 16, 2015, p. 21, ¶ 56. This Court upheld that determination in *New Energy Economy v. Pub. Regulation Comm'n,* 2018-NMSC-024, 416 P.3d 277.

[19] *Id*.

[20] 19-00018-UT, *PNM Direct Testimony of Henry Monroy*, July 1, 2019, p. 5. ("Financing the abandonment of the San Juan coal plant using securitization saves

used 2.24% for its "benchmark" interest rate calculation in its testimony.[21] Bonds were to be issued at the time of abandonment and PNM rates would be adjusted to stop the collection of SJGS costs when the plant closed.[22] PNM promised customer savings at the time of SJGS abandonment.[23]

Even though PNM co-authored the ETA and proposed the Financing Order which is the legal instrument that authorized the issuance of securitized bonds, PNM didn't adhere to its part of the bargain; despite SJGS closure on June 30, 2022 for unit 1 and September 30, 2022 for unit 4, PNM hasn't issued securitized bonds, has deferred their issuance indefinitely and has refused to adjust its rates to account for the elimination of the costs of San Juan that PNM no longer incurs. PNM came up with a new twist, however, during the pendency of the Avangrid merger case (NM PRC Case No. 20-00222-UT, now on appeal before this Court,

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customers an estimated additional $22 million in 2023. These savings are generated by achieving a favorable credit rating under securitization to finance the undepreciated investment, which is lower than PNM's traditional weighted average cost of capital.")

[21] 19-00018-UT, *PNM Direct Testimony of Charles N. Atkins II*, July 1, 2019, p. 20.

[22] 19-00018-UT, *Recommended Decision in Show Cause Proceeding*, June 17, 2022, p. 56.

[23]PNM's Ms. Sanchez, attorney, ETA co-author, and policy lead for PNM testified: "we had many conversations and discussed throughout all of our discussions that there [would be] customer savings."

S-1-SC-39152). PNM decided in August, 2021, but did not disclose until February 2022, that it would ***not*** issue the San Juan securitized bonds when it closed San Juan, or adjust its rates to reflect the $100,000,000/year reduction in costs that PNM experienced upon closure, until an unspecified future date, perhaps in January 2024, at the conclusion of a rate case it has not yet filed.[24] PNM's plan, which this case before the PRC addressed, was that if it deferred the issuance of bonds until long after the closure of San Juan, ***it could keep charging its customers for San Juan's costs!*** In other words, it is PNM's view that by deferring the date the bonds were issued by a year or two, PNM would have the opportunity to keep collecting $100,000,000 a year in San Juan operating costs even though it wasn't operating, and despite the legal requirement that it only bill its customers for costs that it had actually incurred.

On November 15, 2022 PNM testified that the current benchmark bond rate is 5.92%.[25] Thus the customer savings that PNM promised, upon SJGS

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[24] 19-00018-UT, *Recommended Decision in Show Cause Proceeding*, June 17, 2022, p. 49 ("The Hearing Examiners thus find that PNM's new plan – to issue the bonds in January or February 2024, at least 18 months after the abandonment of Unit 1 and 15 months after the abandonment of Unit 4 – will not achieve the purpose of Section 16, that the revised plan is not reasonable, and that the revised plan violates the ETA.")

[25] 19-00018-UT, *Supplemental Verified Compliance Report of Public Service Company of New Mexico in Response to Commission Final Order Adopting Recommended Decision With Additions*, November 15, 2022, p. 3.

abandonment, have vanished.[26] Not only are customers *not* going to enjoy any savings resulting from the closure of SJGS, they are going to continue to get soaked by PNM for San Juan's enormous operating costs, even though they don't exist, because PNM interprets the ETA as allowing PNM to continue to collect those non-existent operating costs after the plant closes, until PNM gets around to issuing the bonds it promised to issue when the plant closed. With its broken promises and misreading of the ETA, PNM has set about to create its own enormous windfall at the expense of its customers and the public. The PRC quite

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[26] In fact, PNM told this Court: "[t]he bonds will be issued in 2022," explaining that:

> [b]y securitizing, abandonment costs, the utility foregoes its authorized rate of return on the investments recovered through the bonds *so that it makes no further profit* on these investments. Because the authorized rate of return is typically significantly higher than bond interest rates, customers save money compared to standard rate-of-return recovery. *The estimated net savings to customers as a result of abandonment of [San Juan Generating Station] and its replacement with lower carbon resources is approximately $80 million in 2023 alone*.

(Emphasis added.)

PNM's Answer Brief in No. S-1-SC-38247, *Citizens for Fair Rates and the Environment and New Energy Economy, Inc. v. NMPRC*, pp. 7, 9. *See also*, the *Notice of Proceeding and Hearing on San Juan Abandonment and Securitization of Energy Transition Costs*, which was provided to all PNM customers, stated: "PNM estimates the net bill impact of these charges and credits will be a savings of $7.11 for a residential customer using an average of 600kWh per month in 2023, the first full year PNM expects the resources in PNM's recommended replacement resource portfolio will be in service." 19-00018-UT, September 4, 2019.

properly stepped in to prevent this.

The evidence is plain and the Hearing Examiners and PRC found that PNM did not follow or avail itself of the ETA or Financing Order and are just out to convert the straightforward goal of the ETA into an opportunity to massively overcharge its customers.[27] In order to protect ratepayers from being gouged, the PRC rightfully found that PNM should not be allowed to continue to collect fictional costs for an inoperable plant: "[I]n redressing the extraordinary circumstances presented now in this matter, the authority of the Commission to grant rate relief in the form of the staggered rate credit mechanism established in this Order is a power firmly grounded in the Commission's express statutory authority to regulate the rates of jurisdictional utilities in New Mexico and act in the public interest to prevent substantial and lasting harm to ratepayers."[28]

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[27] 19-00018-UT *Recommended Decision in Show Cause Proceeding*, June 17, 2022, p. 57. ("The ETA's provisions and the representations PNM made in its Application in this case – and on which the Commission's April 2020 *Financing Order* was based – anticipated that PNM would abandon the San Juan units, issue energy transition bonds and start collecting ETCs at about the same time, in July and August of 2022. That is no longer true. PNM has now de-linked these events.") And at p. 110, ¶6. ("PNM's new plan severs the fundamental linkage in the Energy Transition Act between a qualifying generating facility's abandonment and the securitization of energy transition costs and imposition of ETCs.")

[28] 19-00018-UT *Recommended Decision in Show Cause Proceeding*, June 17, 2022, p. 91.

Now PNM, is simply telling this Court, in effect, "No worries. We'll keep track of the San Juan cost charges so that ratepayers will be protected if we don't win this appeal on the merits." For reasons set forth above, NEE respectfully requests that this Court, like the PRC, not countenance PNM's imposition of enormous overcharges on its customers. The PRC, whose careful explanation of its decision reflects and illuminates its expertise, relied on its understanding of the facts and law. As this Court explained in *City of Las Cruces v. N.M. Pub. Regulation Comm'n*, 2020-NMSC-016, ¶ 23, 476 P.3d 880, the issue of irreparable harm is one fact and the PRC found the facts after developing a record bursting with evidence of what PNM is up to.

As the PRC found,[29] the public will be irreparably harmed if PNM is permitted to continue to recover as all profit, without any SJGS costs, from customers on a shuttered facility. This Court has held that "[t]he public interest is to be given paramount consideration; desires of a utility are secondary". *Public Service Co. of New Mexico v. New Mexico Public Service Comm'n, 112 N.M. 379, 815 P.2d 1169, 1173 (1991)*, citing, *Telstar Communications, Inc. v. Rule Radiophone Serv., Inc.,* 621 P.2d 241, 246 (Wyo. 1980).

[29] 19-00018-UT, *Order Denying PNM's Emergency Motion for Stay of Rate Credits and Motion to Strike Certain Portions of Monroy's Affidavit*, July 12, 2022, ¶¶ 8-15.

New Energy Economy respectfully requests that Court reconsider its order staying the PRC's decision and apply to PNM's motion for a stay the requirements it has held must be applied to such injunctive relief and has imposed on other litigants. As the issue of harms to PNM and the public are issues of fact and as the PRC, acting as the factfinder, has found PNM's claim of harm inadequate to justify a stay.[30]

[30] 19-00018-UT, *Order Denying PNM's Emergency Motion for Stay of Rate Credits and Motion to Strike Certain Portions of Monroy's Affidavit*, July 12, 2022, p. 8. ("PNM has not made the required threshold showing of irreparable harm. The credit to ratepayers is carefully calculated to reflect costs PNM will no longer be incurring once San Juan is abandoned.")

WHEREFORE, New Energy Economy respectfully requests that this Honorable Court reconsider its order, protect ratepayers from manifestly unjust, unfair and unreasonable rates, and lift the stay.

Respectfully submitted this 21st day of November, 2022,

New Energy Economy,

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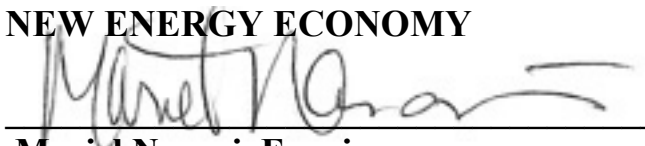
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *New Energy Economy's Motion and Brief for Rehearing and to Lift Stay* was electronically served on all counsel of record through the New Mexico Supreme Court's Odyssey filing system and on the PRC Records in NM PRC Case No. 19-00018-UT on November 21, 2022.

DATED: 21st day of November, 2022.

NEW ENERGY ECONOMY



Mariel Nanasi, Esquire