

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE JOINT APPLICATION OF)
AVANGRID, INC., AVANGRID NETWORKS, INC., NM)
GREEN HOLDINGS, INC., PUBLIC SERVICE COMPANY)
OF NEW MEXICO AND PNM RESOURCES, INC. FOR)
APPROVAL OF THE MERGER OF NM GREEN) Case No. 20-00222-UT
HOLDINGS, INC. WITH PNM RESOURCES, INC.;)
APPROVAL OF A GENERAL DIVERSIFICATION PLAN;)
AND ALL OTHER AUTHORIZATIONS AND APPROVALS)
REQUIRED TO CONSUMMATE AND IMPLEMENT THIS)
TRANSACTION)

**NEW ENERGY ECONOMY’S STATEMENT OF OPPOSITION
TO INITIAL AND AMENDED STIPULATION**

New Energy Economy (“NEE”), in accordance with 1.2.2.20.B(1), (2), (3), (5)(a) NMAC, and the Hearing Examiner’s *Order Requiring Statements of any Grounds for Opposition to Initial Stipulation*, April 21, 2021, summarizes in this Statement its grounds (to date) for opposing the Initial Stipulation filed after hours on April 20, 2021 in this case and Amended Stipulation (as of 10:48 am on this 23rd day of April).

General Grounds

NEE opposes the Stipulation and urges the Commission to refrain from approving it because neither the Initial or Amended Stipulation satisfies the Commission’s established standards for approval of contested settlement stipulations. *See, e.g.,* Case No. 13-00390-UT, April 8, 2015 Certification of Stipulation, pp. 26-29, supplemented in November 16, 2015 Certification of Stipulation, pp. 12-13, adopted in Final Order.¹

¹ The April 8, 2015 Certification notes: “Because a stipulation is no more than the sum of its parts, the Commission must determine...whether the manner in which the Stipulation proposes to resolve those issues, especially those opposed by other parties, is reasonable,” citing Final Order, Case No. 10-00086-UT, p.14, and prior Orders.

Regarding Contested Stipulations, Section 20 (B) (3) of the Commission's Rules state as follows:

(3) The commission or presiding officer shall schedule the stipulation for public hearing and review unless it is determined that the nature and extent of the opposition is such that hearing the stipulation will not materially conserve commission, staff, and party resources. In the event this determination is made, the commission or presiding officer may refuse to entertain the stipulation. *The commission or presiding officer also has the discretion to combine a public hearing on a contested stipulation with the public hearing on the merits of any substantive issues not addressed by the stipulation.*

(Emphasis supplied.)

Further Section 20 (B) (5) (a) states that the Hearing Examiner may:

(a) decide that the settlement stipulation should not be certified to the commission at all, in which event the hearing examiner may indicate to the parties and staff whether additional evidence or legal argument in support of the stipulation or amendments to the stipulation might meet the hearing examiner's reservations about the stipulation

A settlement must be "fair, just and reasonable" or "in the public interest."² A stipulated settlement's short- and long-term impacts on the utility and its customers must be considered "as a whole" and must provide a net benefit to customers and the public interest.³

Neither the initial nor the amended settlement provide a net benefit to customers nor is either in the public interest. In a number of respects, the Stipulation also is not "in accordance with applicable law" and violates a number of "important regulatory principles and practices."⁴

² NM PRC Case No. 16-00276-UT, *Order Rejecting Stipulation in Current Form*, May 12, 2017, fn. 2.

³ *Id.* ("[T]he Commission has observed on numerous occasions, the "substantial evidence as a whole" aspect of the standard for testing contested stipulations goes to whether the Commission's decision is supportable if challenged pursuant to the Supreme Court's appellate standard of review, which is just that – substantial evidence in the record." Citing Certification of Stipulation, Case No. 14-00310-UT (Apr. 20, 2015) at 22 n. 70.)

⁴ *Id.* ("The Commission has approved a Hearing Examiner's decision to determine the merits of specific stipulation issues contested by the parties, citing the requirement that a settlement be in accordance with applicable law and *not violate any important regulatory principles.*") (Emphasis

These laws and commission practices are binding.”⁵ “The Commission is not free to disregard its own rules and prior ratemaking decisions or ‘to change its position without good cause and prior notice to the affected parties.’” *Pub. Serv. Co. of New Mexico v. New Mexico Pub.*

Regulation Comm’n, 2019-NMSC-012, 444 P.3d 460, 468 ¶11, citing, *PNM Gas Servs.*, 2000-NMSC-012, ¶ 9, 129 N.M. 1, 1 P.3d 383 (quoting *Hobbs*, 1993-NMSC-032, ¶ 12, 115 N.M. 678, 858 P.2d 54).⁶ “Although a Commission should be able to change its procedure, it should not arbitrarily or capriciously⁷ do so without good reasons.” *Hobbs Gas Co. v. N.M. Pub. Serv. Comm’n*, 1993-NMSC-032, ¶ 8, 115 N.M. 678, 858 P.2d 54, 57, citing, *Southern Union Gas Co. v. New Mexico Pub. Serv. Comm’n*, 84 N.M. 330, 333, 503 P.2d 310, 313 (1972). “Thus, regulatory treatment which ‘radically departs from past practice without proper notice’ will not

supplied.)

⁵ NM PRC Case No. 16-00276-UT, *Order Rejecting Stipulation in Current Form*, May 12, 2017, fn. 2. (“The Commission has approved a Hearing Examiner’s decision to determine the merits of specific stipulation issues contested by the parties, citing the requirement that a settlement be in accordance with applicable law and *not violate any important regulatory principles*.”) (Emphasis supplied.)

⁶ See, *Atlixco Coalition v. Maggiore*, 965 P.2d 370, 375, 125 N.M. 786, 1998-NMCA (An administrative agency is required to act in accordance with its own regulations and standards.); *Atlixco Coalition v. County of Bernalillo*, 984 P.2d 796, 800, 127 N.M. 549, 1999-NMCA; *Hobbs Gas Co. v. N.M. Pub. Serv. Comm’n*, 1993-NMSC-032, ¶ 8, 115 N.M. 678 (explaining that the NMPRC is bound by and limited to its existing rules and regulations); *City of Albuquerque v. State Labor & Indus. Comm’n*, 81 N.M. 288, 290, 466 P.2d 565, 567 (1970) (“The Labor Commissioner, as any other administrative agency, is bound by its own rules and regulations.”); see also *Miller v. City of Albuquerque*, 89 N.M. 503, 506, 554 P.2d 665, 668 (1976) (reversing city’s zoning decision due to its acting “contrary to its own established procedures for accepting zone change applications”), cited in *West Old Town Neighborhood Ass’n v. City of Albuquerque*, 1996-NMCA-107, ¶ 26, 122 N.M. 495, 927 P.2d 529; cf. *Planning & Design Solutions v. City of Santa Fe*, 118 N.M. 707, 712, 885 P.2d 628, 633 (1994) (reversing city’s contract award where it “changed the rules in the middle of the game”).

⁷ *New Energy Economy v. N.M. Pub. Regulation Comm’n*, 2018-NMSC-024, ¶24, 416 P.3d 277, citing *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm’n* (NMIEC), 2007-NMSC-053, ¶ 13, 142 N.M. 533, 168 P.3d 105 (The Court reviews a PRC decision to determine whether it is “arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency’s authority, or otherwise inconsistent with law [.]”)

be sustained.” *Id.*, citing, *General Tel. Co. v. Corporation Comm’n*, 98 N.M. 749, 755-56, 652 P.2d 1200, 1206-07 (1982).

The “important regulatory principles and practices” violated by the Stipulation include the Commission’s obligation under the New Mexico Public Utility Act (“PUA”) to *reasonably* balance the interests of a utility’s customers with those of its investors. “By statute, the Commission must balance

the interest of consumers and the interest of investors ... to the end that reasonable and proper services shall be available at fair, just and reasonable rates ... without unnecessary duplication and economic waste[.]

NMSA 1978, § 62-3-1(B) (2008).” *Pub. Serv. Co. of New Mexico v. New Mexico Pub.*

Regulation Comm’n, 2019-NMSC-012, *supra*, ¶10. Unfortunately, fully understood and from a balancing of interests perspective, the Initial and Amended Stipulation provides too much “give” by the non-PNM Signatories and too much “take” by PNM for its investors and senior management.

When the Hearing Examiner in her *Amended Certification of Stipulation*, NM PRC Case No. 19-00234-UT, approved unanimously by the Commission, *Final Order Adopting Amended Certification of Stipulation*, March 11, 2020, found that the recent EPE/JP Morgan merger was “fair, just and reasonable and in the public interest”⁸ and recommended approval of the Amended Certification she noted the following commitments and benefits that are either absent or are grossly inadequate compared to the level in the Initial and Amended Stipulation:

Absent:

1. A commitment to a rate freeze;⁹
2. No adverse impact on utility’s existing rates;¹⁰

⁸ 19-00234-UT, *Amended Certification of Stipulation*, February 12, 2020, p. 62.

⁹ *Id.*, p. 23 (citing Case No. 08-00078-UT), 40, 47,

¹⁰ *Id.*, p. 23 (citing Case No. 3712, *Recommended Decision* at 23 (7-22-02), adopted by *Final Order* (8-20-02); Case No. 3103, *Recommended Decision* at 20 (1-10-00), adopted by *Final Order* (1-18-00))

3. No recovery of transaction costs from ratepayers;¹¹
4. Commitment to hold customers harmless from negative impacts of transaction¹²
5. A Majority Disinterested Independent Board of Directors¹³

In light of the foregoing deficiencies 1-4, that taint the proposed settlement, the proposed settlement necessarily raises the most fundamental question that hangs over a proceeding such as this: How can the “public interest” required in the Section 62-6-13 standard be satisfied if immediately after the merger is approved PNM/Avangrid is free to file a rate increase for hundreds of millions of dollars? How can the public interest be satisfied if the settlement allows Avangrid to collect \$300 million plus interest, amortized over 25 years in securitized financing for the imprudence-riddled Four Corners Power Plant and its “abandonment”? It can’t. That’s *why* failure to adhere to these Commission legal standards is not a mere exercise but will have far-reaching economic consequences and must be remedied. NEE submits that, when assessing the reasonableness of the Stipulation and whether it reasonably balances the interests of PNM’s customers and investors and will result in a “net benefit” to customers and the public interest, the Commission must consider not only the immediate impacts of the Stipulation on PNM’s customers, but also the longer-term impacts of the Stipulation’s costs, especially regarding Four Corners.

In terms of its impact on PNM’s residential customers, for example, the fact that Avangrid/Iberdrola require as a condition precedent of the merger the divestiture and

¹¹ *Id.*, p. 23 (citing Case No. 3103, *Recommended Decision* at 22; Case No. 04-00315-UT, *Certification of Stipulation* at 42; Case No. 11-00085-UT, *Recommended Decision* at 27 (12-2-11))

¹² *Id.*, p. 23 (citing Case No. 2678, *Recommended Decision* at 85 (11-15-96), adopted by *Final Order* (1-28-97); Case No. 3103, *Recommended Decision* at 23; Case No. 3116, *Recommended Decision* at 40 (5-4-00), adopted by *Final Order* (5-9-00))

¹³ *Id.*, pp. 10, 34, 35, 53,

securitization of the Four Corners Power Plant (FCPP),¹⁴ because of the Energy Transition Act (ETA) under which PNM has calculated its securitized demand at \$300 million.¹⁵ Even with its supposed monetary benefits for ratepayers, the Initial and Amended Stipulation leaves ratepayers at least at a \$250 million deficit,¹⁶ plus interest and amortized for 25 years, on their monthly electric utility bills in a “non-bypassable” utility rate increase for imprudent costs.¹⁷ This means

¹⁴ See, Sierra Club’s *Direct Testimony of Jeremy Fisher, passim*, ABCWUA’s Rebuttal testimony of Mark E. Garret, pp. 9-14; NEE’s *Direct and Rebuttal Testimony of Christopher Sandberg*, respectively, pp. 32-37 and pp. 14-21; and CCAE’s *Direct Testimony of Noah Long*, p. 5-6.

¹⁵ 21-00017-UT, *Application*, January 8, 2021, p.6. (“recovery of abandonment costs and related energy transition costs as defined in the ETA of approximately \$[300] million.”)

¹⁶ \$300 million FCPP securitized amount - \$50 million rate credit, *Initial Stipulated Regulatory Commitments*, p.1, equals a minimum negative \$250 million that ratepayers will owe PNM/Avangrid.

¹⁷ A review of the bases for the Hearing Examiners’ Finding of Imprudence in Case No. 16-00276-UT demonstrates:

- a) PNM has a 13% interest in Four Corners coal plant. In the fourth quarter of 2013, the PNM Board approved three agreements, plus 11 additional agreements not requiring Board approval.¹⁷ The coal agreements were executed in 2013, and the Co-Tenancy Agreement was signed in March 2015, together extending the life of the Four Corners Power Plant. 16-00276-UT, 10/31/2017, *Certification of Stipulation*, p. 29.
- b) PNM Board’s decision to approve the agreements was based on flawed Strategist (financial) computer modeling in PNM’s Integrated Resource Plan and PNM’s “second look” of modeling conducted in May 2012. *Id.*, pp. 47-48.
- c) PNM also conducted no further analyses in the 17 months between May 2012 and October 2013 when further events indicated that such further analyses should have been performed. *Id.*; pp. 39-45.
- d) The May 2012 Strategist runs (as well as the 2011 runs) included a fundamental modeling error. The runs that anticipated PNM’s extended participation in Four Corners excluded the capital costs of anticipated future capital improvements required to extend Four Corners’ life, except for the estimated cost of the Selective Catalytic Reduction (SCR) pollution controls. PNM was aware of the magnitude of the need for capital improvements. PNM included the anticipated operating and maintenance costs associated with the improvements in the Strategist runs but omitted the capital improvement costs. *Id.*, p. 32.
- e) PNM acknowledged the omission of going forward capital costs in the summer of 2014 during the hearings in Case No. 13-00390-UT, but PNM did not re-do any Strategist runs at that date to determine the impact of the mistake upon the cost-effectiveness of continuing to participate in Four Corners. *Id.*, pp. 32-33.

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- f) El Paso Electric (EPE), another monopoly electric utility in NM, and a co-owner at the plant, did perform contemporaneous Strategist financial modeling that included the ongoing costs of capital expenditures and determined that it was not cost effective to remain in Four Corners. *Id.*, p. 35; pp. 41-45.
- g) The exclusion of the costs of ongoing capital improvements contrasts sharply with the repeated emphasis PNM places on the importance of such costs to earnings for PNM's stockholders. *Id.*
- h) PNM's description of its May analysis was confusing, frustrating and at times contradictory. PNM's description draws into question what PNM actually considered. *Id.*, p. 36.
- i) Despite "forensic accounting," PNM's witnesses, Vice President of Generation, Olson, and Director of Planning and Resources, O'Connell, could not accurately explain the documents that allegedly formed the basis for PNM's decision to re-invest in FCPP. *Id.*, pp. 36-39.
- j) Increasingly poor performance at FCPP: Beginning in 2013, the forced outage rate at Four Corners started climbing significantly, and the units' availability declined. This meant that the plant was only available for customer reliance 72.8% of the time in 2013, 68.1% of the time in 2014, and 78.2% of the time in 2015. *Id.*, p. 45.
- k) Co-owners were reluctant to invest in an unreliable plant. There was uncertainty, as other co-owners were considering exiting the plant. Maintenance had been deferred and "a lot of money would be required" for capital expenditures to increase performance. *Id.*, pp. 46-47.
- l) Despite cost-changing events that occurred during the delay PNM never conducted a further analysis between October 2013 and March 2015: *Id.*, p. 49.
- Including whether PNM might be required to absorb other co-owners' exiting MW shares. *Id.*, pp. 49-52. PNM did not re-run the Strategist analyses it had been using for its decision to extend its participation in Four Corners, despite PNM's awareness, as early as May 2012, of the need for a NPV of \$88.5 million in future capital improvements. *Id.*, p. 53.
 - Dramatically increasing cost estimates for SCR pollution controls. *Id.*
 - The impact on reliability and the increased rate of outages also pointed to the need for additional capital improvements. *Id.*, p. 54.
 - No evidence that PNM attempted in January 2014 or at any time to compare the costs of retirement to the costs of PNM's extended participation in the plant. In fact, the testimony shows that PNM did not seriously evaluate the option of exiting Four Corners. *Id.*, p. 55.
 - The January 2014 single Strategist run was conducted without sensitivity analyses, failing to consider a variety of assumptions and risks. *Id.*, pp. 57-58.
- m) The 2011 and 2014 Integrated Resource Plans, relied on by PNM, were not accepted by the Commission. Further, the costs inputs per metric ton of CO₂ were inconsistent and failed to abide requirements set forth in Case No. 06-00448-UT. If carbon costs were consistently applied the Strategist run would have favored PNM's exit from FCPP. *Id.*, pp. 58-60.
- n) The load forecasts compared to actual data (in light of actual sales) were overly optimistic. *Id.*, p. 61.

that there is an adverse impact on utility's existing rates; ratepayers will be stuck for 25 years with exorbitant transaction costs based on PNM's legacy imprudence for its investment in and life extension of Four Corners Power Plant as a result of Avangrid's merger requirement. The claim by Joint Applicants that they will hold customers harmless from negative impacts of the transaction is false. Not only should part of the merger require that rates not increase for some reasonable period of time, but it would also address PNM's undeniably scandalous machinations involving its indefensible renewal of its Four Corners interest and contracts, its almost immediate decision to abandon its interest and its demand, contrary to the overarching provisions of the Public Utility Act and numerous Supreme Court Decisions that it cannot extract imprudently-incurred costs from ratepayers. It is no exaggeration to say that as to Four Corners, its decisions descended to a level far below mere imprudence.

Regarding deficiency #5, the argument is rather simple: will the future "disinterested" independent Board be acting in the best interest of PNM and its ratepayers or will it be acting to

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- o) A contemporaneous memo from PNM's Senior Vice President Patrick Apodaca to the board of PNM reveals the actual reason PNM extended the life and invested further in FCPP: "Among other things, maintaining our same level of ownership at Four Corners avoids a possible distraction with our BART filing with the PRC next week and our negotiations with the owners of San Juan Generating Station." *Id.*, p. 43; p. 51.
 - p) Relying on NEE expert witness, Steven Fetter, former Chairman of the Michigan Public Service Commission, former bond rater for Fitch, former general counsel for the Michigan State Senate, and former three-time PNM expert witness, characterized PNM's decision to extended the life and invest further in FCPP as "utility management malpractice." *Id.*, p. 43.

"The Hearing Examiners find that the appropriate remedy for PNM's imprudence in extending its participation in Four Corners and pursuing the \$90.1 million of the SCR investment and the \$58 million of the additional life-extending capital improvements is the disallowance of all costs associated with the investment and improvements. This follows the precedent established in PNM's last rate case as a remedy for PNM's imprudence on the balanced draft investment, and, as such, it would likely be the appropriate remedy if this case were being tried on its merits." *Id.*, p. 68.

materially increase the financial goals of its 81.5% owner, global energy giant Iberdrola.¹⁸

Budget and financing decisions are the primary drivers of a utility's costs of service, and without the oversight of independent Board directors, who are not beholden to a foreign corporation's directives, ratepayers will be at risk.

Grossly inadequate benefits:

1. Rate Credit:

The rate credit, that has moved from \$24.6 million to \$50 million; \$6 million for residential customer arrearages; \$2 million for assisting electricity to new customers in remote areas; and \$15 million for low-income energy efficiency;¹⁹ is still inadequate compared to the recommendations of the following witnesses:

- a) NMAG witness Crane: rate credit of \$85 million²⁰
- b) NEE witness Sandberg: rate credit between \$75 million and \$125 million²¹
- c) Bernalillo County witness Reno: rate credit of \$100 million²²

2. Economic Development:

The Joint Applicants will dedicate \$100 million to promote economic development in EPE's service territory.²³ Of that amount, \$20 million will be allocated to EPE's New Mexico service territory and disbursed through an independent fund to which Sun Jupiter will contribute

¹⁸ 20-00222-UT, *Joint Application*, p. 3.

¹⁹ CCAE's *Direct Testimony of Noah Long*, p. 11. CCAE requested \$15 million of shareholder funds per year for three years for energy efficiency totaling \$45 million, but settled for \$15 million total over a five-year period. *Amended Stipulation*, filed on this April 23, 2021.

²⁰ NMAG's *Direct Testimony of Andrea Crane*, April 2, 2021, p. 53.

²¹ NEE's *Direct Testimony of Christopher Sandberg*, April 2, 2021, p. 49.

²² Bernalillo County's *Rebuttal Testimony of Maureen Reno*, April 21, 2021, p. 6 ("the Joint Applicants should increase the proposed rate credit to \$100 million.")

²³ 19-00234-UT, *Amended Certification of Stipulation*, February 12, 2020, p. 8, 24, 40, 41.

\$1 million annually for 20 years[.]²⁴

El Paso Electric has 100,000 customers in New Mexico.²⁵ PNM has 530,000 customers.²⁶ Although Avangrid/Iberdrola is a \$36 billion dollars international conglomerate,²⁷ Avangrid is offering \$7.5 million in economic development funds. It is also offering \$2.5 million each year for five years for a total of \$12.5 million to impacted indigenous community groups in the Four Corners region.²⁸

The New Mexico Attorney General and PRC staff witnesses have suggested that Avangrid/Iberdrola's commitment to economic development is inconsistent with the public interest and recommend the following:

- a) NMAG witness Crane: Economic Development support of \$80 million²⁹
- b) PRC Staff John Reynolds: \$114 million over 20 years³⁰

The short- and long-term costs of the Initial and Amended Stipulation to PNM's customers are unreasonably high. NEE therefore could not, and cannot, in good faith support the Initial and Amended Stipulation, not that it was ever asked, even though it believes that there are some "benefits" for various non-PNM Signatories provided in the Stipulation that are reasonable, they can't justify or outweigh the threshold issue of the merger: Four Corners divestiture and securitization.³¹

The Initial and Amended Stipulation (as of 10:48 am on this 23rd day of April) also

²⁴ *Id.*, p. 25.

²⁵ <https://www.abqjournal.com/1323640/el-paso-electric-to-be-sold-for-43-billion.html>

²⁶ 20-00222-UT, *Joint Application*, p. 4.

²⁷ *Id.*, p. 2.

²⁸ 20-00222-UT, *Initial Stipulated Regulatory Commitments*, p. 2.

²⁹ NMAG's *Direct Testimony of Andrea Crane*, April 2, 2021, p. 54; *Also see*, p. 25: ("This 'benefit' also pales in comparison to the economic development benefit of \$100 million over 20 years provided in the recent EPE acquisition case.")

³⁰ PRC Staff's *Direct Testimony of John Reynolds*, April 2, 2021, p. 32.

³¹ Sierra Club's *Direct Testimony of Jeremy Fisher*, *passim*.

violates the important regulatory principles that require prejudgment of the Four Corners Power Plant issues. The signatories to the Amended Stipulation “believe [it]: a) is fair, just and reasonable; b) meets the statutory test for approval pursuant to Sections 62-6-12 and 62-6-13 that the proposed merger of NM Green with PNMR, and the subsequent transfer of PNMR’s stock to Networks, is neither unlawful nor inconsistent with the public interest”³² even though the “abandonment,” sale of the FCPP to the Navajo Transitional Energy Company (NTEC)³³ and the securitization of those undepreciated assets and capital expenditure costs for \$300 million³⁴ is embedded in and is a key element of the merger.³⁵

Notwithstanding the statements in paragraph 52 of the Amended Stipulation, the provisions contained therein (addressed further below) implicitly ask for Commission approval of the securitization of undepreciated investments and additional capital expenditures for FCPP, and improperly pre-judge the costs, location and reliability issues of FCPP replacement power,³⁶ and materially impact the outcome of PNM’s currently challenged 2020 IRP, NM PRC Case No. 21-00033-UT. In effect, PNM/Avangrid and non-PNM Signatories are asking the Commission to bake the resource costs location and reliability issues of FCPP replacement power addressed in the Amended Stipulation and reach outside of the scope of this case, regardless of the needs of

³² 20-00222-UT, *Amended Stipulation*, April 23, 2021, p. 2.

³³ 21-00017-UT, *Application*, January 8, 2021, pp. 1-2, 8, 9.

³⁴ *Id.*, pp. 4, 5, 13, 17, 18.

³⁵ See, Sierra Club’s *Direct Testimony of Jeremy Fisher*, *passim*, ABCWUA’s Rebuttal testimony of Mark E. Garret, pp. 9-14; NEE’s *Direct and Rebuttal Testimony of Christopher Sandberg*, respectively, pp. 32-37 and pp. 14-21; and CCAE’s *Direct Testimony of Noah Long*, p. 5-6.

³⁶ 20-00222-UT, *Amended Stipulation*, April 23, 2021, p. 19, ¶48: PNM shall propose one or more renewable energy and/or energy storage FCPP replacement resources on Navajo Nation land of no less than 200 MW.

ratepayers, whether it complies with the ETA, and would affect PNM's customers in future rate cases for years to come.

NEE shares the goal of abandonment of its interest in FCPP. NEE believes also that PNM, and potentially Avangrid, owe reparations to the impacted communities on and adjacent to FCPP. However, rather than replicating the same kind of colonial relationship of a foreign owner extracting clean energy *this time* from the Navajo, as opposed to the legacy dirty energy, NEE would have rather seen monetary reparations so that the local communities could actually economically benefit from owning 20 5MW community solar projects, for instance.

The Amended Stipulation proposes that the Commission take action that will materially impact other pending dockets and issues not currently before it, invites the Commission to improperly bind future Commissions, and raises notice and due process issues.³⁷ **Contrary to law, approval of the Amended Stipulation and merger approves PNM/Avangrid's right to full recovery of its demanded undepreciated investments and capital expenditures costs at Four Corners plus interest pursuant to the ETA, and the right of PNM/Avangrid to sell its 200 MW shares to NTEC.** These provisions provide substantial financial benefit to PNM/Avangrid and its investors because they would eliminate the risk that the Commission may find its expenditures on Four Corners imprudent and award zero dollars.³⁸

The Amended Stipulation *implicitly* asks the Commission to approve the prudence and reasonableness of those Four Corners expenditures and sale to NTEC even though those requests

³⁷ NM PRC Case No. 16-00276-UT, *Order Rejecting Stipulation in Current Form*, May 12, 2017, pp.6-9.

³⁸ *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012, 444 P.3d 460, ¶ 32: "The goal of the consideration of alternatives is, of course, to reasonably protect ratepayers from wasteful expenditure. The failure to reasonably consider alternatives was a fundamental flaw in PNM's decision-making process." The Court found that "*the purpose* of a prudence review is to hold ratepayers harmless from any amount imprudently invested, a disallowance should equal the amount of the unreasonable investment." *Id.* at ¶40 and ¶42.

will continue the burning of coal which is not in the public interest. The PNM-NTEC deal to sell FCPP is contrary to law because:

1. it is contrary to the ETA. The Amended Stipulation requests that the Commission act contrary to the New Mexico Renewable Energy Act (“REA”), NMSA § 62-16-4.B(4) (2019), as amended by the Energy Transition Act (“ETA,” Senate Bill 489, NMSA §§ 62-18-1 to 23 (2019)) and beyond its lawful authority under those statutory provisions by requesting Commission approval of PNM’s proposed sale of its ownership interest in the FCPP to another entity, the Navajo Transitional Energy Company, LLC (“NTEC”), as a means of complying with the renewable portfolio standard (“RPS”) requirements in subparagraphs (5) and (6) of NMSA § 62-16-4.A (2019), as amended by the ETA.

2. due to NMSA § 62-16.4.B(4) (2019), providing that “[i]n administering the standards required by Paragraphs (5) and (6) of Subsection A of this section, the commission shall prevent carbon dioxide emitting electricity-generating resources from being reassigned, redesignated or sold as a means of complying with the standard,” PNM’s Application and supporting direct and supplemental testimony cannot satisfy the Commission’s requirement for approval of abandonment of an existing generation resource by showing that PNM’s proposed abandonment of the FCPP and sale of that CO₂ emitting electric generation plant to NTEC will result in a “net public benefit” or is in the public interest.

3. as testified to by Noah Long, “it is contrary to the public interest for PNM to negotiate an agreement with NTEC that includes provisions impeding an early closure of the plant by other parties in other states, which would effectively block other states from reducing their own emissions.

The New Mexico Legislature passed Senate Bill 489 (2019) not just to get utilities to

“exit coal” but to reduce emissions overall, not just in utilities’ own territories, as evidenced by the inclusion of this provision in the Renewable Energy Act:

Upon a motion or application by a public utility the commission shall, or upon a motion or application by any other person the commission may, open a docket to develop and provide financial or other incentives to encourage public utilities to produce or acquire renewable energy that exceeds the applicable annual renewable portfolio standard set forth in this section; results in reductions in carbon dioxide emissions earlier than required by Subsection A of this section; *or causes a reduction in the generation of electricity by coal-fired generating facilities, including coal-fired generating facilities located outside of New Mexico.* NMSA § 62-16-4(D).

The legislature did not intend emissions reductions to be on paper only, yet that is an apt characterization of the situation presented here, where PNM proposes to exit the Four Corners Power Plant by investing \$73 million more to keep it running and entering into agreements to ensure its continued success— while offering to build a new gas plant to generate ratepayer savings. The Joint Petitioners should revise or rescind the sale to NTEC and exit Four Corners in a way that promotes, rather than hinders, early closure of the plant.”³⁹ (citations omitted.)

4. preventing the reduction or cessation of coal burning is a net detriment to the public interest. (*See, also*, 19-00195-UT, *Recommended Decision on Replacement Resources, Part II*, 6/24/2020, pp. 82-86. Noting, “the problem of climate change and the role of CO₂ emissions from electric generating resources as major contributors to the climate change problem.”)

³⁹ CCAE’s *Direct Testimony of Noah Long*, p. 8-9.

Moreover, the doctrine of equitable estoppel precludes not only PNM's sale to NTEC, but PNM has waived any claim to recover imprudent costs through securitization or otherwise, and parties to an approved stipulation, and the Commission, have vested rights pursuant to that agreement, can enforce the terms of an approved stipulation. *Qwest v. NMPRC*, 140 N.M. 440, 143 P.3d 478 (2006). The Commission is charged with the responsibility for enforcing these commitments and the violation of these commitments has serious implications for the public interest. *Duke Power Co. v. F.E.R.C.*, 864 F.2d 823, 830 (D.C. Cir. 1989) (citations omitted)." *Id.*, p. 5, ¶7.)

"Having acquiesced to Commission authority to continue and conclude a prudence review of certain FCPP investments, PNM is now estopped from challenging the legitimacy of that review just three years later—irrespective of an intervening law that provides an opportunity for PNM to pursue a position in contravention of their previous agreement. *Johnson v. Lindon City Corp.*, 405 F. 3d 1065, 1069 (10th Cir. 2005) "[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." (Internal citation omitted.)" *Id.*, pp. 5-6, ¶8. PNM the Modified Stipulation and signed a Notice of Acceptance, attached, which included the Modified Stipulation and subsequent Commission conditions, that included the requirement to engage in a "prudence review" of investments in and life extension of FCPP. Therefore PNM is estopped from using the ETA to receive 100% of undepreciated investments.

Lastly, the Amended Stipulation's request that the Commission approve those proposed changes to PNM's abandonment, sale and securitization violates another important regulatory

(and constitutional) principle: procedural due process. Commission approval of it would be inconsistent with the constitutional principle of procedural due process. *See, e.g., TW Telecom of New Mexico v. New Mexico Pub. Regu. Comm'n*, 211-NMSC-029, 256 P.3d 24.

The Amended Stipulation approval of the prudence and reasonableness of those Four Corners expenditures is the lynchpin of this case. Commission determinations are not and cannot be justified by the other alleged “benefits” in the Stipulation. Acceptance of those Commission determinations would violate important regulatory principles and practices, and would improperly and prematurely pre-judge the results, and the merits of any potential determinations in future cases.

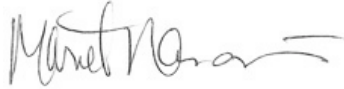
There is also a moral, climate, and economic outrage here: How can PNM and Avangrid, come before this Commission, with straight faces, and argue that the PRC should approve a settlement that relies on the ETA to extract 300 million dollars plus interest from ratepayers but that, in another paragraph, asks the Commission to ignore not only the provisions of the ETA, but its very purpose, i.e., the transition from burning coal?

WHEREFORE, NEE respectfully requests that the Hearing Examiner reject the Initial and Amended Stipulation, as untimely, without appropriate consultation of the parties, and fundamentally inconsistent with law and regulatory principles and practice. If pursuant to Section 20 (B) (3), the Hearing Examiner in his discretion chooses to combine a public hearing on a contested stipulation with the public hearing on the merits NEE reserves its right to oppose the foregoing provisions and any other provisions in the Initial and Amended Stipulation on additional grounds after it has had a full opportunity to obtain discovery regarding the Stipulation and read the testimony submitted by some the Signatories in support of the Stipulation.

DATED this 23rd day of April 2021.

Respectfully Submitted,

New Energy Economy



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BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE JOINT APPLICATION OF)
AVANGRID, INC., AVANGRID NETWORKS, INC., NM)
GREEN HOLDINGS, INC., PUBLIC SERVICE COMPANY)
OF NEW MEXICO AND PNM RESOURCES, INC. FOR)
APPROVAL OF THE MERGER OF NM GREEN) **Case No. 20-00222-UT**
HOLDINGS, INC. WITH PNM RESOURCES, INC.;)
APPROVAL OF A GENERAL DIVERSIFICATION PLAN;)
AND ALL OTHER AUTHORIZATIONS AND APPROVALS)
REQUIRED TO CONSUMMATE AND IMPLEMENT THIS)
TRANSACTION)

CERTIFICATE OF SERVICE

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

**NEW ENERGY ECONOMY'S STATEMENT OF OPPOSITION
TO INITIAL AND AMENDED STIPULATION**

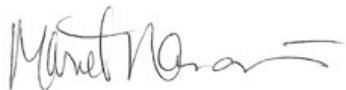
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Respectfully submitted this 23rd day of April, 2021.

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