BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

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

NEW ENERGY ECONOMY'S POST HEARING BRIEF-IN-CHIEF

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October 1, 2021

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I. Introduction

Eight years ago, Public Service Company of New Mexico ("PNM" or the "Company") renewed the Four Corners Power Plant ("FCPP" or "Four Corners") contracts for nearly a billion dollars without any sound economic or legally justification. PNM falsely told the PRC that it would remain cost-effective for many years. The Hearing Examiners and the PRC found, to no one's surprise, that PNM had acted imprudently and that ratepayers should be protected from PNM's rash and costly decision to renew the contracts, especially the "take-or-pay" fifteen-year coal obligation.

Having been found to have acted imprudently, and looking at half-a-billion-dollars' worth of red ink, PNM cajoled the PRC into deferring any consequences for PNM's imprudence until the next rate case, assuring the PRC and the parties that there would be an adequate opportunity to address the imprudence issue. The PRC and the parties reluctantly agreed that the issue of how to protect the ratepayers from the Four Corners renewal could appropriately be taken up "then" and that a formal determination of imprudence would be deferred as well.

It is now apparent what PNM had in mind. If it could just get past the PRC's determination of imprudence in Case No. 16-00276-UT by promising to face the consequences in the next proceeding, it could escape those consequences by going to the legislature and the governor and promising "the end of coal" if they would just agree, without knowing it, that PNM would face no consequences for its imprudent renewal of the Four Corners contracts.

Ultimately, the New Mexico Supreme Court will decide if the PRC is correct that PNM cannot escape its promise to face the consequences of its imprudence or if PNM is correct that the Energy Transition Act, ("ETA"), notwithstanding its requirement that PNM comply in this case

with the abandonment provisions of NMSA §62-9-5, has provided it with a "get out of jail free" card. At this moment, however, the issue of PNM's imprudence is squarely before the Hearing Examiner for decision and recommendation and, as explained below, the abandonment of Four Corners under the circumstances illuminated in this proceeding is no more in the public interest than was PNM's imprudent renewal of the Four Corners contracts.

PNM now claims that there is a non-discretionary duty to apply the ETA and award them 100% cost recovery of undepreciated investments— even for imprudently incurred resources.

Under the ETA, NMSA §62-18-5 E, the "commission shall issue a financing order approving the application if the commission finds that the qualifying utility's application for the financing order complies with the requirements of Section 4 of the Energy Transition Act." The requirement specifically articulated in NMSA §62-18-4 A includes abandonment approval pursuant to the Public Utility Act: NMSA §62-9-5 which requires an assessment based on net public benefit.

The facts of the case prove that PNM's abandonment proposal and sale to Navajo Transitional Energy Company, LLC ("NTEC") is not in the public interest and would be a net detriment. The Commission should deny the application and send the case back to the utility as required.

Lastly, because PNM has explicitly admitted that Four Corners is an uneconomic resource, between $30 million and $300 million more costly than feasible resource alternatives, it should be removed from rate base. PNM imprudently invested in FCPP, ratepayers have been overcharged ever since, and it is incumbent that the PRC stop the bleeding.

PNM was on notice that it would bear the burden of proving FCPP prudence in a future proceeding because it had explicitly agreed that it would do so. That future proceeding is this one

and PNM's ex ante analysis actually makes what PNM did arguably even worse, even more troubling, even more disturbing. Testimony has revealed that a prudent utility executive could have known what he should have been analyzing rigorously,[1] but didn't because there was something else afoot; something else motivating their decision. This testimony revealed that PNM's $400,000 expert was kept in the dark,[2] and therefore couldn't consider the significance of this crucial piece of the puzzle: PNM Senior Vice President Patrick Apodaca's explanation to the PNM board about why PNM would extend the life and invest 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."[3] There is no clearer case of imprudence and excess cost being foisted onto ratepayers resulting from the actions of utility mismanagement made in bad faith and solely for company profit.

In another act of PNM's imprudence, with another resource at a different plant, the New Mexico Supreme Court found that ratepayers should be held harmless for the imprudent actions of utility management and the disallowance should equal the imprudence, including the possibility of total disallowance. That is the just remedy given the facts at bar.

II. Applicable Legal Standards

A. The Commission's Authority

1. Article XI, Section 2 of the New Mexico Constitution, entitled "Responsibilities of Public Regulation Commission," provides:

[1] TR., 9/7/2021, Graves, pp. 1321-1323.
[2] *Id.,* pp. 1217-1221.
[3] Commission Exhibit 1, 16-00276-UT, *Certification of Stipulation,* 10/31/2017, p. 43; p. 51.

> The public regulation commission shall have responsibility for regulating public utilities as provided by law. The public regulation commission may have responsibility for regulation of other public service companies in such manner as the legislature shall provide.

2. Central to this case is the law relating to the setting of rates and the rights of ratepayers. It begins with the policy that underlies all utility regulation: "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 …" NMSA 1978, §62-3-1 B. "Rates" include "every rate, tariff, charge or other compensation for utility service …" NMSA 1978, §62-3-3 H.

3. It is the Public Regulation Commission's duty to regulate electric utilities. *Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Commission*, 90 N.M. 325, 563 P.2d 588, 593 (N.M. 1977) (The words "shall ... be charged with the duty" indicate that the provision is mandatory rather than discretionary.) The legislature is obligated to set up the ground rules for that regulation, and it has done so by enacting the Public Utilities Act ("PUA"). When reviewing the duties of the Commission, the New Mexico Supreme Court found that this duty was not only "clear," but "all-inclusive," stating:

> It is difficult to conceive of a more clear and all-inclusive grant of power to a governmental agency. The Commission has a duty to be a prime mover in the procedure to see that the public interest is protected by establishing reasonable rates and that the utility is fairly treated so as to avoid confiscation of its property. Considering this broad mandate it could hardly be envisioned that the Commissioners would sit as spectators, like Roman Emperors in the coliseum, and simply exhibit a "thumbs-up or thumbs-down" judgment after the dust of battle settles in the arena.

Id. at 594.

4. The Commission's oversight of "public utility facilities is the cornerstone of New Mexico's regulatory scheme. In return for monopoly market power in its industry, the utility must submit to Commission regulation." *In re Pub. Serv. Co.,* 815 P.2d 1169, 1176-1177 (N.M. 1991).

5. The Commission has expansive power under the New Mexico Constitution and the Public Utility Act to supervise and regulate public utilities. The Commission has "general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations ... all in accordance with the provisions and subject to the reservations of the Public Utility Act . . . and to do all things necessary and convenient in the exercise of its power and jurisdiction." NMSA 1978, § 62-6-4(A).

6. The Public Utility Act requires that public utility rates be just and reasonable. NMSA 1978, § 62-8-1. "Section 62-8-1 offers no guidance to the Commission for achieving this goal, nor does it specify procedures." *Otero County Electric Cooperative, Inc. v. New Mexico Public Service Commission*, 108 N.M. 462,464, 774 P.2d 1050, 1052 (N.M. 1989). "To set a just and reasonable rate, the Commission must balance the investor's interest against the ratepayer's interest." *Behles v. New Mexico Public Service Commission*, 114 N.M. 154, 161, 836 P.2d 73 (N.M. 1992). As the Supreme Court has concluded, "Neither [interest] is paramount ... we cannot focus solely on investor interests." *Mountain States Tel. & Tel. Co. v. New Mexico State Corporation Commission*, 99 N.M. 1, 7-8, 653 P.2d 501 (N.M. 1982).

7. Rates may only be the product of regulation. "[R]egulation protects a utility's customers. Because it is a monopoly the utility must be regulated so that it cannot take advantage of its position or its customers." *Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n,* 1995-NMSC-062, ¶54, 120 N.M. 579, 591, 904 P.2d 28, 40 (N.M. 1995). (Emphasis supplied.) This rule is of long standing because it is self-evident that "without regulation, utility

companies could unilaterally set rates." *Fed. Power Comm'n v. Hope Nat. Gas Co.,* 320 U.S. 591, 601 (1944) (internal citation omitted).

8. Under the PUA any "increase in rates or charges sought by a public utility, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the utility." NMSA 1978, § 62-8-7(A). Although setting a particular rate is quasi-legislative, the question of whether a rate is just and reasonable is "a question of fact for the agency to decide." *Texas Ass'n of Long Distance Tel. Companies (TEXALTEL) v. Pub. Util. Comm'n of Texas*, 798 S.W.2d 875, 887 (Tex. Ct. App. 1990), writ denied (Mar. 20, 1991).

9. The process of arriving at a just and reasonable rate requires that the regulatory authority balance competing interests. The regulatory authority must "set utility rates that are evidence based, cost based, and utility specific…[and] must balance investors' interests against ratepayers' interests when determining whether a utility rate is just and reasonable." *New Mexico Atty. Gen. v. N.M. Pub. Regulation Comm'n*, 2013-NMSC-042, ¶ 16, 309 P.3d 89, 95 (N.M. 2013). The regulating authority is not bound to a particular formula. To be just and reasonable the rate must be "within a zone of reasonableness…between utility confiscation and ratepayer extortion." *Attorney General v. PRC*, 2011-NMSC-034, ¶13, 150 N.M. 174, 258 P. 3d 453, 457 (N.M. 2011).

10. As the D.C. Circuit explained in reviewing a rate order, "courts must determine whether or not the end result of that order constitutes a reasonable balancing, based on factual findings, of the investor interest in maintaining financial integrity and access to capital markets and the consumer interest in being charged non-exploitative rates." *Jersey Cent. Power & Light Co. v. F.E.R.C.,* 810 F.2d 1168, 1177–78 (D.C. Cir. 1987).

11. The finding of facts and application of discretion by the regulatory authority is how the ratepayers are protected from the monopoly in ratemaking, including the related issue of utility property valuation. See, e.g. *Hobbs Gas Co. v. New Mexico PRC*, 1980-NMSC-005, ¶ 4, 94 N.M. 731, 733, 616 P.2d 1116, 1118 (N.M. 1980).

B. Prudence

1. The Commission has adopted the following definition of "prudence": To be included in rates, expenditures on utility plant must (1) have been prudently incurred; and (2) be used and useful. Case No. 2146, Part II, Final Order 53; Accounting for Pub. Utils., § 4.03.

The prudent investment theory provides that ratepayers are not to be charged for negligent, wasteful or improvident expenditures, or for the cost of management decisions which are not made in good faith. "In other words, ratepayers are not expected to pay for management's lack of honesty or sound business judgment." Case No. 2146, Part II, Final Order 50 (4-5-89).

A utility only receives a profit on "prudent investments at their actual cost when made . . . [and is] limited to a standard rate of return." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 309 (1989).

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

Case No. 2087, Order on Burden of Proof and Specific Issues to be Addressed (10-4-98), cited, in the Final Order of 10-00086-UT, p. 61. The New Mexico Supreme Court affirmed this definition

of prudence. *In re Petition of PNM Gas Servs.,* 2000-NMSC-012, 129 N.M. 1, 1 P.3d 383, 405 (N.M. 2000); see also Corrected Recommended Decision, 15-00261-UT, Aug. 15, 2016, pp. 88-89. In 2019, our supreme court once again upheld this definition of prudence *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n,* 2019-NMSC-012, ¶¶ 27-38, 444 P.3d 460 (N.M. 2019) ("PNM does not disagree with the prudence standard articulated above[.]") *Id.* at ¶ 30.

C. Consideration of Alternatives

1. It was incumbent upon PNM to consider all feasible alternatives before it extended the life of the plant and financially re-committed nearly a billion dollars in FCPP. An alternatives analysis was required before the company signed 14 contracts, including the take-or-pay coal contract, and made significant capital investments, including the Selective Catalytic Reduction ("SCR") pollution controls, and the "system health process" costing $58 million in capital expenditures (to improve plant performance and reliability)[4] in the nearly 45-year-old unit coal plant.[5]

2. In the PNM Ojo Line Extension ("OLE") Case No. 2382,[6] for example, the Commission affirmed PNM's obligation to reasonably identify and evaluate all of its feasible resource alternatives, as follows:

> … a utility carries the burden in a resource acquisition case to show that the resource it proposes is the most cost-effective among feasible alternatives. The Commission there rejected PNM's request for a CCN for a transmission line based on the Commission's determination that "PNM's alternatives analysis is not sufficiently reliable" and that "PNM has not properly

[4] NEE Exhibit 29, Excerpt of Transcript from 16-00276-UT, Olson, 8-15-2017, pp. 1536-1538. (At p. 1538: "But, again, I'm not disputing that -- that the system health process is intended to improve the reliability of the facility.")
[5] PNM Exhibit 4, Direct Testimony of Thomas Fallgren, p. 4. (Units 4 and 5, representing 200 MW, came on line in 1969 and 1970, respectively.)
[6] *In Re Public Service Co. of New Mexico*, 166 P.U.R. 4th 318, 337, 355-356 (1995).).

> shown that OLE is the best alternative even among those alternatives that PNM considered. Thus even assuming a need on the transmission system for the sake of argument, the Commission remains unconvinced that the public convenience and necessity require or will require the OLE Project as the proper response to such a need." Recommended Decision, pp. 98, 102, 166 P.U.R. 4th at 355-356. The Commission found that it has the authority to examine alternatives to utility proposals to satisfy needs identified by a utility, that there may be various solutions for such needs and that it would not be in the public interest for the Commission to grant a CCN for a proposed project which might meet a utility's needs but is the worst among a range of alternatives. Recommended Decision, p. 49, 166 P.U.R. 4th at 337.[7]

In Case No. 16-00105-UT, the PRC held: "The Commission reiterates that PNM bears the burden of demonstrating that its proposed resource choice is the most cost effective resource among feasible alternatives."[8] This bedrock consumer protection principle has been articulated and reiterated by the PRC repeatedly: 15-00312-UT, 3/19/2018, *Recommended Decision*, p. 104, unanimous approval in Final Order, 4/11/2018. See also, Case No. 18-00261-UT, *Recommended Decision*, 3/18/2019, unanimously adopted by *Final Order,* 3/27/2019. ("Utilities also need to show that the proposed project is the most cost-effective alternative to satisfy utilities' needs.")

In *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, supra, the court held that consideration of resource alternatives to determine cost-effectiveness is part of the prudence analysis to protect consumers from "wasteful expenditures":

> [A] reasonable person under the circumstances faced by PNM's management would have adequately considered alternatives to retaining the [] assets. The Commission adopted this conclusion by reference. By requiring PNM to demonstrate that its management adequately considered alternatives when it decided to repurchase the [assets], the hearing examiner and Commission reasonably applied the prudence standard to PNM's decisions.

Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n, 2019-NMSC-012 at ¶ 31.

> We pause, before concluding our analysis of this argument, to note that it was not inappropriate for the Commission to address whether PNM had demonstrated [the assets]

[7] *Id*., pp. 10-11. The "most cost effective" test in utility CCN cases addressed by the Commission in the *OLE* case was subsequently incorporated into the Commission's IRP Rules, 17.7.3.6, 17.7.3.7.I and 17.7.3.9.G(1)) NMAC.
[8] Case No. 16-00105-UT, *Final Order*, May 24, 2017, ¶ 10.

> to be cost-effective or the lowest cost alternative. We observe that there is a meaningful relationship from the perspective of the ratepayers between the consideration of alternatives and the cost of the chosen generation resource. 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. (in the context of analyzing a utility's failure to reasonably consider alternatives, that the decision-making process of the utility is properly included in the prudence analysis). However, even if a utility company was imprudent because it failed to prospectively consider alternatives, that imprudence may be mitigated by a demonstration that the decision of the utility nevertheless protected ratepayers from excess cost.
>
> …
>
> [T]he Commission did not apply a new "least cost alternative" test without notice, as PNM contends, but instead reasonably applied the prudence standard previously established by the Commission and recognized by this Court.

Id. at ¶ 32. (internal citations omitted.)

D. Abandonment:

1. The abandonment statute, Section 62-9-5, provides in pertinent part that "[n]o utility shall abandon all or any portion of its facilities subject to the jurisdiction of the commission . . . without first obtaining the permission and approval of the commission." The New Mexico Supreme Court has held that the Legislature's delegation of authority to the New Mexico Public Regulation Commission over utility abandonment is broad (*Pub. Serv. Co. of N.M. v. N.M. Pub. Serv. Comm'n*, ("PNM v. PSC") 1991-NMSC-083, ¶ 12, 112 N.M. 379 (N.M. 1991).

2. NMSA 1978 Section 62-9-5 provides that the standard for facility abandonment is "whether present and future public convenience and necessity requires continued use of the

facility."[9] The Commission has interpreted "public convenience and necessity" as requiring a showing of a "net benefit to the public."[10]

3. In analysis of whether abandonment of utility plant results in a net public benefit under Section 62-9-5, the NMPRC applies the following factors from *Commuters' Committee v. Penn. Pub. Util. Comm'n.*, 88 A.2d 420, 424 (Pa. Super. Ct. 1952).[11] The *Commuters' Committee* factors are: (1) the extent of the carrier's loss on the particular branch or portion of the service and the relation of that loss to the carrier's operations as a whole; (2) the use of the service by the public and the prospects for future use; (3) balancing of the carrier's loss with the inconvenience and hardship to the public upon discontinuance of service; and (4) the availability and adequacy of substitute service. *Commuters' Comm.,* 88 A.2d at 424. The New Mexico Supreme Court upheld the Commission's use of these factors in *PNM v. PSC*, 1991-NMSC-083, ¶¶ 10-12.

E. Public Interest:

1. In NM PRC Case No. 19-00018-UT, when PNM sought to abandon its interest in the San Juan Generating Station (which was approved by the Hearing Examiners in their Recommended Decision on Abandonment and Non-Securitized Costs), the Hearing Examiners cited the following when determining public interest: "Fenton also said environmental

[9] *Recommended Decision on Abandonment and Non-Securitized* Costs Case No. 19-00018-UT,, February 21, 2020 p. 26.
[10] *Id.*, (citing *Alto Lakes water Corporation*, Recommended Decision, Case No. 07-00398,, February 6, 2008, p. 6, approved in final Order (Feb. 14, 2008); *Re Valle Vista Water Co. Inc.*, Recommended Decision, Case No. 3571, March 18, 2001, p. 6-7, approved in Final Order (June 19, 2001; *Re Southwestern Public Service Co.*, Corrected Recommended Decision, Case No. 2678, (Nov. 25, 1996), p. 19-20 approved in Final Order (Jan. 28, 1997), *New Energy Economy, In. v. Pub. Regulation Comm'n*, 2018-NMSC-024, ¶ 14, 416 P.3d 277.
[11] *See e.g. Recommended Decision on Abandonment and Non-Securitized* Costs Case No. 19-00018-UT, February 21, 2020 p. 26

considerations are relevant to determining whether there is a net public benefit to retiring the San Juan coal plant. … Fenton maintained the retirement will further the public interest and the public policy under the ETA. He said the ETA makes clear that there will be public benefits arising from abandonment of coal-fired generation[.]"[12] Additionally, the Hearing Examiners noted the import of CO_2 emissions reductions, associated environmental and public health benefits,[13] and the cost risk of meeting the statutory limit of CO_2 emissions in considering whether retirement is in the public interest.[14]

III. Background

PNM filed its Application for the Approval of the Abandonment of the Four Corners Power Plant and Issuance of a Securitized Financing Order (the "Application") pursuant to the Energy Transition Act, NMSA 1978, §§ 62-18-1 to -23 (2019) ("ETA") to "abandon" and sell its 200 MW share of Four Corners Power Plant, representing a minority interest of thirteen percent (13%) of the total generation capacity and to transfer that interest to the Navajo Transitional Energy Company, LLC ("NTEC"), and seek full recovery of its undepreciated investments in FCPP by securitizing $300 million. The ETA financing order would require a portion of that $300 million plus interest to appear on each PNM's ratepayers' bill in a non-bypassable charge for 25 years (at minimum). The net impact for the residential class would be $9,176,849 for the first year and depending on usage would be a cost of $1.32 per month up to $3.44 per month, depreciating

[12] *Recommended Decision on PNM's Request for Authority to Abandon Its Interest in San Juan Units 1 and 4 and to Recover Non-Securitized Costs*, 2/21/2020, p. 21, which was approved unanimously by the Commission on 4/1/2020.
[13] *Id.,* p. 24.
[14] *Id.,* p. 22.

over time, but for 25-28 years.[15] Initially, in the February Order, the Hearing Examiner found that PNM's January 8, 2021 original Application was deficient because it did not plead and adequately support PNM's request to transfer its interest in FCPP to NTEC under Sections 62-6-12(A)(4) and 62-6-13 of the PUA.[16]

Normally, the Hearing Examiner would have dismissed PNM's case without prejudice,[17] but in the instant case the Hearing Examiner gave PNM another chance because the company volunteered to file an amended application and supporting testimony and agreed to extend the deadline for Commission action on the amended application to December 15, 2021.[18]

Pursuant to the New Mexico Public Regulation Commission's Order of 2/10/21, the PRC would consider the prudence of PNM's investments from FCPP in Case No. 16-00276-UT ("2016 Rate Case") to be heard in the application case herein.[19]

The Hearing Examiner specifically reserved the right to review whether PNM has

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[15] PNM Exhibit 13, Settlage Direct, PNM Exhibits MJS-6 and MJS-7; TR., 9-3-21, pp. 1092-1093.
[16] *Id.,* pp. 19-20.
[17] *Id.,* p. 21.
[18] *Id.*
[19] 16-00276-UT,, *Order on Sierra Club's Motion to Re-Open Docket to Implement the Revised Final Order*, 2-10-21, pp. 7-8, ¶¶ 24-25 ("[I]ssues related to PNM's abandonment application and request for a financing order should be litigated in Case 21-00017-UT. . . .. Such issues as whether the terms of the ETA may provide an opportunity for consideration of the prudence of undepreciated investments requested to be included in a financing order as energy transition costs or what effect the "black box" rates approved in the Revised Final Order may have on determining energy transition costs are properly raised and considered in Case 21-00017-UT consistent with the due process requirements that all parties to that case have full notice and opportunity to be heard on those issues."): *Order on Sufficiency of PNM's Application and Scope of Issues in Proceeding*, 2-26-2021, pp. 21-25.

identified adequate potential new resources for replacement resources.[20] He also observed that two of the issues raised in Motions to Dismiss the Amended Application could rebut one or more of the elemental presumptions after a hearing on the merits and post-hearing analysis in briefs that apply prevailing law and regulatory principles to the facts adduced from the evidence. They were: (1) "Joint Movants' assertion that PNM's alleged deliberate failure to disclose that the merger with Avangrid/Iberdrola proposed in Case No. 20-00222-UT was the purported driving force for the FCPP divestiture which may or may not provide a basis to reject the Amended Application, and (2) CCAE's contention that the proposed transfer and divestment from the FCPP would not terminate future liability to the potential disadvantage of PNM ratepayers and could lead a factfinder performing the necessary investigation under Section 62-6-13 of the PUA to conclude the proposed FCPP divestiture would pose an unreasonable risk to ratepayers and thus result in a net public detriment."[21]

In its amended application, PNM has failed to meet its burden to prove that "abandonment" is in the public interest or that it will not result in a net public detriment. PNM's Application requests that the Commission violate the legislative directive in NMSA § 62-16-4.B (4) and § 62-16-4(D) (2019), as provided in Section 29 of the ETA that PNM witness Fenton acknowledges "establishes the comprehensive framework for PNM's requested approvals in this case"[22]) by approving PNM's proposed sale of its ownership interest in the FCPP to NTEC. The sale puts PNM's abandonment application at odds with the intent of the Energy Transition Act as it indisputably would not reduce or limit the operation of the FCPP, will not accelerate the

[20] *Order on Sufficiency of PNM's Application and Scope of Issues in Proceeding*, 2-26-2021, p. 20.
[21] *Order Denying Motions to Dismiss Amended Application*, 6/14/2021, pp. 19-20.
[22] PNM Exhibit 2, Direct Testimony of Mark Fenton, p. 7.

reduction of CO_2 or other greenhouse gas ("GHG") emissions from electricity-generating resources in New Mexico, and will not accelerate New Mexico's transition from coal as an electric generation resource to more sustainable resources. PNM witness Sanchez acknowledges that the purpose of the ETA is to accelerate the elimination of coal-fired generation from the state of New Mexico and the Application of the ETA in this case will not in fact accelerate the elimination of coal-fired generation.[23] Even with the "seasonal-operations" agreement, touted by PNM as reducing emissions by 20-25%,[24] there is ample evidence that the seasonal operations agreement will in fact prolong the timeframe for the burning of coal and hence increase emissions overall.[25]

Despite having voluntarily agreed in PNM's last rate case to the Modified Stipulation, NM PRC Case No. 16-00276-UT, that "the issue of apparent imprudence with respect to PNM's continued use of FCPP should be reserved and litigated in a separate future hearing,"[26] PNM now claims that all costs, regardless of imprudence, should be governed by the ETA, contrary to the NM Constitution and decisional law. However, "PNM's argument ignores that it agreed in Case No. 13-00390-UT that it would bear the burden of affirmatively demonstrating the prudence of the balanced draft costs in its general rate case (which it did not do). Given this prior stipulation and the evidence" and that its investments were voluntary, "it was lawful for the Commission to

[23] TR., 9/4/2021, Sanchez, pp. 703-705.
[24] TR., 9/1/2021, Fallgren, pp. 462.
[25] TR., 9/7/2021, Baatz, pp. 1140-1141 (At p. 1140: [T]he effect of [the Seasonal Operations Agreement] will likely be to keep the plant operational longer, which we caution as a problem for the Seasonal Operations Agreement and the continued operations of Four Corners. In fact, it's actually better if the Seasonal Operations Agreement is not approved, if abandonment is approved.); TR., 9/9/2021, Fisher, pp. 1705-1706.
[26] *Revised Order Partially Adopting Certification of Stipulation issued on January 10, 2018,* at 22-23, ¶65.

reject PNM's argument that the balanced draft costs were entitled to a presumption of prudence." *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012, supra at ¶88. (Emphasis supplied.)

IV. PNM's Imprudent Life Extension and Significant Capital Investments in the Four Corners Power Plant

A. Utility Management Malpractice During the Relevant Time Period

1. A review of the bases for the Hearing Examiners' Finding of Imprudence in Case No. 16-00276-UT:

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.[27] 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.[28]
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.[29]
c) PNM also conducted no further analyses in the 19 months between May 2012 and October 2013 when significant events and market trends indicated that such further analyses should have been performed.[30]
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.[31]
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.[32]

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[27] Commission Exhibit 1, 16-00276-UT, *Certification of Stipulation*, 10/31/2017, p. 29.
[28] *Id.,* pp. 47-48.
[29] *Id.,* p. 30.
[30] *Id.;* pp. 39-45.
[31] *Id.,* p. 32.
[32] *Id.,* pp. 32-33.

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.[33]
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.[34]
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.[35]
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.[36]
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. [37]
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.[38]
l) Despite cost-changing events that occurred during the delay PNM never conducted a further analysis between October 2013 and March 2015:[39]

- Including whether PNM might be required to absorb other co-owners' exiting MW shares.[40] 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.[41]
- Dramatically increasing cost estimates for SCR pollution controls.[42]
- The impact on reliability and the increased rate of outages also pointed to the need for additional capital improvements.[43]
- 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.[44]

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[33] *Id.,* p. 35; pp. 41-45.
[34] *Id.*
[35] *Id.,* p. 36.
[36] *Id.,* pp. 36-39.
[37] *Id.,* p. 45.
[38] *Id.,* pp. 46-47.
[39] *Id.,* p. 49.
[40] *Id.,* pp. 49-52.
[41] *Id.,* p. 53.
[42] *Id.*
[43] *Id.,* p. 54.
[44] *Id.,* p. 55.

- The January 2014 single Strategist run was conducted without sensitivity analyses, failing to consider a variety of assumptions and risks.[45]

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 CO_2 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.[46]
n) The load forecasts compared to actual data (in light of actual sales) were overly optimistic.[47]
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."[48]
p) 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."[49]

Relying on this evidence, the Hearing Examiners reached the only logical conclusion:

> 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.[50]

(Emphasis supplied.)

[45] *Id.,* pp. 57-58.
[46] *Id.,* pp. 58-60.
[47] *Id.,* p. 61.
[48] *Id.,* p. 43; p. 51.
[49] *Id.,* p. 44.
[50] *Id.,* p. 68.

2. Extraordinary Evidence from 16-00276-UT:

There is extraordinary evidence that NEE wishes to highlight from the 16-00276-UT case that was not cited but may have been considered in the Certification of Stipulation that demonstrates and reinforces PNM's hubris in its decision to extend the life of FCPP and invest hundreds of millions of dollars in the aging coal plant without consideration of alternatives.

a) Illuminating the utter disregard for actual analysis to inform decision-making by utility management:

PNM's O'Connell, Integrated Resource Planning Group in 2012:[51]

Q. And the May 2012 Strategist runs were 19 months before prior to PNM signing the Four Corners 14 contracts and reinvesting and extending the life of that plant; is that right?

A. The 2012 -- May 2012 Strategist runs were the relevant runs in terms of when PNM had to make a decision whether to proceed with Four Corners or not.[52]

PNM's Vice President, (now Senior Vice President) Olson:[53]

Q. I want to talk to you about your involvement in the negotiations. Is it true that PNM is relying on the May 2012 Strategist runs as evidence of prudence and cost-effectiveness for its decision in December of 2013 to reinvest in Four Corners and --

A. I don't know. I heard Mr. O'Connell testify to those questions, and I don't recall what he had said.[54]

Q. So when you were negotiating in 2013, did you not know about the 2012 Strategist run?

A. I did not know about specific Strategist runs, that's correct.

[51] NEE Exhibit 26, 16-00276-UT, Excerpt of Transcript (O'Connell) 8-9-17, p. 455.
[52] NEE Exhibit 26, 16-00276-UT, Excerpt of Transcript (O'Connell) 8-9-17, p. 478.
[53] NEE Exhibit 29, 16-00276-UT, Excerpt of Transcript (Olson) 8-15-17, p. 1496.
[54] NEE Exhibit 29, 16-00276-UT, Excerpt of Transcript (Olson) 8-15-17, p. 1497.

While PNM's resource "evaluator" O'Connell testified that the outdated (19 months' earlier) Strategist runs "formed the basis" of the life extension and PNM capital expenditure investment in FCPP, the actual PNM negotiator, Vice-President Olson, admitted that he gave two hoots for the "analysis" (and didn't know what it indicated) before he committed the company, but more importantly PNM ratepayers, to nearly $1 billion for a non-performing, environmentally detrimental coal plant.

b) The Hearing Examiners in their Certification of Stipulation, NM PRC Case No. 16-00276-UT, decried that PNM "did not include capital expenditures that were certainly known to be ultimately necessary or updated market prices for alternative resources, including costs of gas, solar, and wind."[55]

3. What information did PNM senior management inform Securities & Exchange Commissioners investors of but withhold from PRC regulators?

> The Four Corners participants' obligations to comply with EPA's final BART determinations, coupled with the financial impact of possible future climate change regulation or legislation, other environmental regulations, and other business considerations, *could jeopardize the economic viability of Four Corners or the ability of individual participants to continue their participation in Four Corners*.[56]

(Emphasis supplied.)

Why is this so important? Because in real time, PNM shared the financial risks with investors (noting that FCPP may be a short-term bonanza but a long-term financial danger) and

[55] Commission Exhibit 1, NM PRC Case No. 16-00276-UT, *Certification of Stipulation,* 10/31/2017, p. 41.
[56] NEE Exhibit 30, (16-00276-UT, Notes to PNMR Consolidated Financials, December 31, 2013, Exhibit #7, in 16-00276-UT, PNM Exhibit 7-25, BR-5, p. 2 of 5, p. B-93).

withheld those capital expenditures and cost risks from its regulator with the intent to avoid consumer protection scrutiny.[57]

B. El Paso Electric's Analysis and Prudent Path

1. PNM did not conduct the fulsome analysis that was required when a utility must make a decision to extend the life of a plant and invest nearly $1 billion. This was feasible. El Paso Electric, another investor-owned-utility in New Mexico did just that. FCPP Co-Owner, El Paso Electric ("EPE") performed an exit analysis and those evaluations, containing multiple scenarios, pointed to a clear path to exit coal, saving ratepayers money, avoiding (at that time) future environmental regulation risk, and escaping financial and legal risk of having to shut-down the plant prior to the end of the proposed life extension.

As articulated in the Certification of Stipulation approving EPE's abandonment, in Case No. 15-00109-UT, the Hearing Examiner found, at pp. 16-17:[58]

> **EPE'S ECONOMIC ANALYSIS SUPPORTING EXIT DECISION**
>
> EPE witness David Carpenter testified that at the time of EPE's decision in 2013 to not participate in a life-extension project for Four Corners, he was a member of EPE's senior management. He participated in the discussions and analyses that management and the Board of Directors undertook with respect to EPE's continued participation in Four Corners. Factors considered included:
>
> 1. The economic analysis by EPE witness Scott Wilson showing no clear advantage to continuing with Four Corners versus alternative generation. This analysis took into account the Four Corners expected future capital and operating

[57] Commission Exhibit 1, NM PRC Case No. 16-00276-UT, *Certification of Stipulation*, 10/31/2017, p. 36 "NEE introduced into the record seven presentations to investors from 2012 through 2014 and a final presentation in 2017, in which PNM regularly spelled out in detail its capital spending plans and the impact the spending would have on earnings."
[58] NEE Exhibit 19, NM PRC Case No. 15-00109-UT, *Certification of Stipulation,* EPE CCN case, pp. 16-17.

costs, including costs to install SCR required to comply with existing environmental regulations.

2. The risks associated with potential future environmental regulations and litigation that could ensue if EPE continued as a co-owner. *These risks have become particularly acute over the last several years as coal has become an embattled resource. This factor clearly favored alternatives to the coal-fired Four Corners.*

3. The addition of locally-located generation capacity that EPE has built and is planning that will allow EPE to continue to provide reliable service absent the remote Four Corners capacity. This factor supported a decision to exit Four Corners because reliability would not be impaired, and operational flexibility would be enhanced.

4. After Four Corners was constructed, the Company added a 15.8 percent or 633 MW ownership interest in the Palo Verde Nuclear Generating Station ("PVNGS") in Arizona, which provides the Company and its customers with a substantial base load generating resource that provides fuel diversity. In addition, EPE had contracted for the purchase of almost 100MW of solar photovoltaic generation, which provides additional fuel diversity. Generation from PVNGS in 2014 represented over 50% of the energy generated by the Company in 2014.

Mr. Carpenter further testified that EPE reasonably identified and weighed the various factors to be considered in a decision such as this. *EPE's analyses not only looked at the foreseeable economic impact of not participating in the life extension but also included extensive analysis of the potential environmental regulations and litigation, transmission impacts, and other litigation risks. These risks not only included the potential for increases in costs to comply with environmental regulations but also included the financial and legal risk of having to shut-down the plant prior to the end of the proposed life extension.* The conclusion of this extensive analysis was that there was a high risk of incurring significant increased costs and litigation and environmental risks if the Company continued to participate in Four Corners beyond July 6, 2016.

(Emphasis supplied.)

V. Impermissible Hindsight Review (Commission Issue # 6):

1. PNM's expert witness, Graves admitted: that his "rebuttal testimony is a hindsight review, that's correct."[59]
2. Yet, our supreme court has held that "hindsight review is impermissible."[60]
3. What did PNM testify in the 2016 rate case that constituted "hindsight review" at that time?

> Q. (Nanasi) You state, on Page 2, line 18, actually why don't you read that full sentence beginning with, "In summary...?
> A. (PNM's O'Connell) "In summary, NEE relies on hindsight review to create hypothetical scenarios for past abandonment of Four Corners, effective with this rate case."
> Q. So could you tell me what you mean by "hindsight review"?
> A. The testimony that I'm rebutting in my testimony I filed here is testimony that was provided by three NEE witnesses. The testimonies' arguments were based on going back and saying, "Well, gee. What if something that didn't happen in the past did happen?" And that is a hindsight review.
> Q. So are you referring to the NEE 6-1 Strategist runs that you ran? Is that what you're referring to there?
> A. No. I'm referring broadly to the testimonies of Fetter, Van Winkle, and Sommer.
> Q. Well, what, specifically, in those testimonies, other than 6-1 and all the Strategist runs, were hindsight review?
> A. Well, 6-1 is certainly hindsight review. And then any other implications that are drawn from that is what I'm talking about.
> …
>
> Q. Okay. Well, I'm trying to figure out what -- the basis for your statement that New Energy Economy relies on hindsight review. And I want to know specifically what you're referring to.
> A. What I'm referring to is any testimony that says that because things are different now, PNM should have retired Four Corners.
> Q. And is that -- is the only testimony that is proffered by New Energy Economy relative to what you just said regarding 6-1 and all the Strategist runs relative to that?

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[59] TR., 9/7/2021, Graves, p. 1309.
[60] *In re Petition of PNM Gas Servs.*, 2000-NMSC-012, 129 N.M. 1, 1 P.3d 383, 405 (N.M. 2000); *See also* Corrected Recommended Decision, 15-00261-UT, Aug. 15, 2016, pp. 88-89; upheld in *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012, ¶¶ 27-38, 444 P.3d 460.

A. Well, certainly, any testimony relative to that is hindsight. I haven't sat here and done an analysis, line by line, of those three pieces of testimony. I'm guessing I could find more.
Q. This is the first case to review the imprudence of PNM's SCR; is that right?
A. Could you be more specific?
Q. There's been no other case that's been filed by PNM that has included the SCR costs at Four Corners, is there?
A. I don't believe there's been a rate review that includes SCR investment at Four Corners.[61]

NANASI: Okay. Sir, I've placed before you New Energy Economy Exhibit No. 21.
Q. (O'Connell) This is your response to our interrogatory. Here, you admit that PNM did not include capital expenditures when you ran -- "you," meaning PNM -- ran the 2012 Strategist runs; correct?
A. Correct.
Q. And the difference, according to you, for the capital expenditures, was -- what you say is the sum of Four Corners' capital cost expenditures for Units 4 and 5 at Four Corners was $88.5 million; right?
A. Yes.
Q. So if you added $88 million to Eval D, which you knew, or should have known, because capital expenditures are core to PNM's business model, what would the difference be? Instead of $33 million benefit to keeping Four Corners running, it would have been a $55 million deficit; is that correct?
A. That's the math. The work that was done in 2012 was a reasonable estimation of the cost, using everything PNM knew at that time. And as I'm point -- so by doing the analysis you just described and we talked earlier about it, that's an example of hindsight -- so if we're going to sit here today and go back and correct, with the benefit of hindsight, the reasonable work that was done in 2012, there are more things that are different than just that.[62]

Q. It's not hindsight to include something that you were telling the entire world was the basis for PNMR growth, is it? This is what you said, that in 2000 - -- that you said that capital expenditures at Four Corners was $88.5 million. And if you add $88.5 million to Eval D, it is no longer -- it is no longer cheaper than retiring it in Eval_B, is it?
A. It absolutely is, hindsight of PNM's resource planning analysis.
Q. Why is that?
A. Because as I already explained, that up until sometime in 2014, that was standard practice in PNM's resource planning, to not include a number that would wash out in comparison of other cases.[63]

[61] NEE Exhibit 26, 16-00276-UT, TR, O'Connell, 8/9/2017, pp. 470-472.
[62] NEE Exhibit 26, 16-00276-UT, TR, O'Connell, 8/9/2017, pp. 509-510.
[63] NEE Exhibit 26, 16-00276-UT, TR, O'Connell, 8/9/2017, pp. 516-517.

In the first case to review the prudence of PNM's investments in FCPP, PNM witness O'Connell argued that using the exact same PNM criteria and PNM Strategist inputs but including capital expenditures that were already identified and anticipated at that time was hindsight review. That review revealed that once capital expenditures were included, FCPP was not the most cost-effective alternative.

4. In this case, PNM's expert Graves testified as follows:

- "Certainly agree that the early analysis was inadequate, and had flaws in it."[64]
- Admitted that as a general rule ratepayers should not tolerate information from a financial analysis that was done a year and a half prior to the time of actual decision-making; "The updated information is of course very helpful."[65]
- Admitted that in his post hoc analysis he did not use Strategist.[66]
- Did not remember using load forecasts from the 2016 rate case.[67]
- Agreed that there is a general perspective on the serious financial consequences of global warming, including hundreds of billions of dollars to the U.S. economy.[68]
- Wasn't familiar with the fact that El Paso Electric's decision to exit Four Corners almost caused the Four Corners Power Plant to shut down.[69] Did not read the Exhibits containing emails between the FCPP co-owners from the relevant time period in 2013.[70]
- Did not know that Tucson Electric Power and Salt River Project ("SRP") refused to take any more shares in the plant, including EPE's shares.[71] Did not know that that PNM's position was that if Tucson Electric Power and SRP were not going to sign the FCPP contracts PNM wouldn't either.[72]

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[64] TR., 9/7/21, Graves, p. 1197.
[65] *Id.,* p. 1201.
[66] *Id.,* p. 1202.
[67] *Id.,* p. 1204.
[68] *Id.,* p. 1204.
[69] *Id.*
[70] *Id.,* p. 1207.
[71] *Id.*; *See also,* NEE Exhibit 22 from 16-00276-UT, (Exhibit 40) "TEP and SRP would not agree to acquire more MW."
[72] *Id.,* p. 1208; *See also,* NEE Exhibit 31 from 16-00276-UT, (Exhibit 10) "Patrick [Apodaca] asked if we intended to make it explicit that PNM is not in the deal unless all the participants are in the deal. The latest draft continues with the thought that TEP is not a party to the transaction."

- Admitted that PNM failed to include capital expenditures in its modeling and failed to produce contemporaneous modeling and there were at least seven additional reasons for the Hearing Examiners finding of imprudence, including:

    a) PNM's description of its May 2012 analysis was confusing, frustrating, and at times contradictory and they were certainly were also frustrated with the analysis itself.[73]
    b) There were a "family of concerns that the analysis was poorly done and presented."[74]
    c) "There had been a decline in maintenance expenditures on the plant, and that would have to be remedied."[75]
    d) Dramatically increasing cost estimates for SCR pollution controls.[76]
    e) No sensitivity analyses that were conducted.[77]
    f) 2011 and 2014 IRPs were not accepted by the Commission that were allegedly relied on by PNM.[78]
    g) The cost inputs per metric ton of CO_2 were inconsistent and failed to abide requirements set forth in case number 06-00448-UT, and that if carbon costs were consistently applied, the strategist's run would have favored PNM's exit from Four Corners.[79]

- Admitted that environmental regulations that PNM was concerned about during that time period included emerging EPA regulations, and possible CO_2 regulations, national ambient air quality standards, mercury rules, Clean Water Act. "Yes, those were many and ongoing."[80]

- Admitted that "I did not consider alternative future costs for the SCRs, which would have been the BART technology there, I believe, so the answer is no." Despite the fact that PNM was warning its investors in its SEC filings that risk from environmental regulation "could jeopardize the economic viability of Four Corners, or the ability of individual participants to continue their participation in Four Corners."[81]

- Coal ash is "an ongoing environmental issue at coal plants" and mercury, but admitted that these were not issues he looked at in conducting his analysis.[82]

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[73] *Id.,* p. 1210.
[74] *Id.,* p. 1211.
[75] *Id.,* p. 1212.
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] *Id.*
[80] *Id.,* p. 1221.
[81] *Id.,* p. 1224; See also, NEE 30 from 16-00276-UT, (Exhibit 7).
[82] *Id.,* p. 1225.

- Didn't know who the chief negotiator for PNM was during that 2012-2014 for the contract extensions at Four Corners.[83]

- Didn't know how many contracts were being negotiated, 14, or who signed the contracts.

- Didn't read the testimony in 16-00276-UT.[84]

- Other than the Strategist runs, and whatever PNM did for the earlier IRPs (that were not accepted by the Commission) there was no other analyses that PNM conducted to evaluate the prudence of Four Corners.[85]

- **Admitted that if PNM's reasoning for investing in the Four Corners plant was to avoid a possible distraction with the BART filing regarding the San Juan Generating Station that would not be a good enough reason for saying PNM didn't look at other things.**[86]

- Didn't know that the chief negotiator for PNM admitted that he never even looked at the strategist runs before he re-committed to Four Corners Power Plant and signed the contracts.[87]

- **Admitted that if the basis for their life extension and investment in Four Corners was the Strategist financial runs and that if the chief negotiator "was truly oblivious to the findings and the extent to which they supported the decision he was going to make, that would seem inappropriate."**[88]

Although Mr. Graves' post hoc analysis was far more thorough than what PNM did at the time, and is an admission of what PNM knew or could have known at the time if it had done the work, and was capable of performing, the Graves analysis cannot be relied on to show "no harm" because Mr. Graves did not use load forecasts from the relevant time period, did not include environmental risks (at all, including SCR), did not use Strategist, did not read the testimony or exhibits from that time period and more. What we do know is that PNM was focused on its

[83] *Id.,* p. 1225.
[84] *Id.,* pp. 1236-37.
[85] *Id.,* pp. 1238-39.
[86] *Id.,* p. 1219; *See also,* NEE Exhibit 3, specifically NEE 3-5 ("Mr. Graves does not know the full context of [Patrick Apodaca's] statement and cannot comment on its significance.")
[87] *Id.,* p. 1234; NEE Exhibit 29, 16-00276-UT, Excerpt of Transcript (Olson) 8-15-17, p. 1496.
[88] *Id.,* p. 1235.

flagship operation at San Juan and was concerned that if PNM exited Four Corners that would raise eyebrows at the Commission about the economics and risk of further investment in coal. Mr. Graves conceded that if that were the reason for PNM's actions and inactions that would be "inappropriate"; hence imprudent.

VI. Commission Decisions - (Commission Issue # 2):

The PRC initially adopted the Certification of Stipulation except that it increased sanctions on PNM for imprudently extending the life and investment in FCPP.[89] PNM moved for reconsideration of the imprudence findings and sanctions. In the Commission's 1/10/2018 Revised Order Partially Adopting Certification of Stipulation it agreed to remove and defer its imprudence finding, but added a further, small reduction to PNM's revenue.[90] "The issue of PNM's prudence in continuing its participation in FCPP shall be deferred until PNM's next rate case."[91] According to the PRC, deferral would permit consideration of sanctions independent of a settlement process and would provide "a full opportunity for the Commission to consider the necessity and scope of the remedy in light of PNM's alleged imprudence."[92]

NEE appealed, but withdrew its appeal after all other parties took the position that the Commission's Order deferring the imprudence/sanctions issue would "suffice to protect ratepayers for the limited time that the Revised Stipulation would remain in effect before the need

[89] Ordering "a further inquiry into the full scope of potential further disallowances." Case No. 16-00276-UT, *Order Partially Adopting Certification of Stipulation,* 12/20/17, p. 33, ¶112.
[90] 16-00276-UT, *Revised Order Partially Adopting Certification of Stipulation*, 1/10/2018, pp. 22-24, 35, ¶¶B-C.
[91] *Id.*
[92] 16-00276-UT, *Revised Order Partially Adopting Certification of Stipulation*, 1/10/2018, p. 35, B.

for any additional disallowances can be addressed." No. S-1-SC-36870, Joint Response Brief of Albuquerque Bernalillo County Water Utility Authority, City of Albuquerque, Bernalillo County, and New Mexico Industrial Energy Consumers, 10/12/2018, p. 13. Answer Brief of Intervener – Appellee PNM, 10/12/2018, p. 12.

Thus, the issue of imprudence and sanctions was left pending, with PNM facing the possibility, with explicit notice that the Commission could find in the next proceeding, cause for a full disallowance of the FCPP costs. *PNM v. NMPRC*, 2019-NMSC-012, ¶¶ 9, 10, 21, 32, 35, 38-42, 47, 52 (full disallowance of imprudently incurred costs a possibility where necessary to protect ratepayers). Also, at ¶¶ 81-83: The stipulating parties agreed that the question of certain investments would be subject to a further prudence review, including the reasonableness of those decisions, and PNM would have the burden to make an affirmative demonstration that incurrence of the costs was prudent and reasonable. The Commission declined to give the assets the presumption of prudence and rejected PNM's reliance on its demonstration of the prudence of the costs. First the Commission did not exceed its authority.[93] Second, [s]uch a decision is squarely within the authority of the Commission under Section 62-6-4(A) to regulate the rates of public utilities and the obligation of the Commission under Section 62-8-1 to ensure that those rates are just and reasonable.[94] Third, the utility decision was voluntary and under its control and it agreed that it would bear the burden of affirmatively demonstrating the prudence of the asset costs in a future proceeding, per its prior stipulation.[95]

[93] *PNM v. NMPRC*, 2019-NMSC-012, *supra* at ¶ 84, *citing*, Section 62-6-4(A); *see also* N.M. Const., art. XI, § 2.
[94] *Id.,* at ¶ 86.
[95] *Id.,* at ¶ 88.

In the 16-00276-UT, Revised Order Partially Adopting Certification of Stipulation the Commission stated,

> The Commission finds merit in the Signatories' arguments that the benefits to ratepayers under the Revised Stipulation are so significant that the Commission is justified in deferring, for the limited duration of the period that the revised Stipulation will be in effect, a finding on the issue of PNM's prudence in its continued participation and investment in FCPP until PNM's next rate filing. Deferring such ruling will permit consideration of the issue with the full participation of all parties without any constraints that may be placed on such Signatories associated with their current role as proponents of the proposed settlement, while also permitting **a more full opportunity for the Commission to consider the necessity and scope of any remedy in light of PNM's alleged imprudence**; an option the Certification noted was not currently available to the Commission in light of the limited record on that issue developed in this proceeding. In the subsequent proceeding, administrative notice will be taken of the evidence on the issue of prudence admitted in the current proceeding.

16-00276-UT, Revised Order Partially Adopting Certificate of Stipulation, 1/10/2018, at ¶ 66. (Emphasis Supplied.)

In its Order on Sierra Club's Motion to Re-Open docket to Implement the Revised Final Order the Commission stated,

> [I]ssues related to PNM's abandonment application and request for a financing order should be litigated in Case 21-00017-UT. . . . Such issues as whether the terms of the ETA may provide an opportunity for consideration of the prudence of undepreciated investments requested to be included in a financing order as energy transition costs or what effect the "black box" rates approved in the Revised Final Order may have on determining energy transition costs are properly raised and considered in Case 21-00017-UT consistent with the due process requirements that all parties to that case have full notice and opportunity to be heard on those issues. (16-00276-UT, Order ¶ 24-25, 2/10/21).

Consequently, this docket, 21-00017-UT, is the "subsequent proceeding" contemplated by paragraph 66 of the Revised Order Partially Adopting Certificate of Stipulation in which the Hearing Examiner is directed by the Commission to take administrative notice of evidence on the issue of prudence that was admitted into the record in 16-00276-UT.

Notable from the Commission's final order in 16-00276-UT referenced hereinabove is what the Commission deferred: A finding on the facts. "[T]he Commission is justified in deferring, for the limited duration of the period that the revised Stipulation will be in effect, a finding on the issue of PNM's prudence." The Commission noted that it would have "a more full opportunity for the Commission to consider the necessity and scope of any remedy in light of PNM's alleged imprudence."

VII. Factual Timeline Relevant to FCPP Divestiture from Late 2017 until Now and the Impact of the Iberdrola/Avangrid Merger with PNMR/PNM

In his Order Denying Motions to Dismiss Amended Application, in the case herein, the Hearing Examiner stated: "Joint Movants' assertion that PNM's alleged deliberate failure to disclose that the merger with Avangrid/Iberdrola proposed in Case No. 20-00222-UT was the purported driving force for the FCPP divestiture may or may not provide a basis to reject the Amended Application." [96] (Emphasis in the original.) PNM maintains that it's regulatory proceeding for the abandonment and securitization of the Four Corners Power Plant is separate from the NMPRC docket for approval of PNM's merger with Avangrid. Mr. Fallgren argues that because he was the lead FCPP negotiator and he was unaware of the ongoing merger negotiations, that warrants the dismissal of Intervenors' claims that the Avangrid/Iberdrola merger was a driving force of the abandonment and securitization proceeding. "Because I was the lead negotiator for PNM and had no knowledge of any potential merger with Avangrid, this argument

[96] *Order denying Motions to Dismiss Amended Application*, 6/14/2021, pp.20-21.

does not indicate at all that PNM was being pushed by Avangrid[.]"[97] Regardless of Mr. Fallgren's personal knowledge, the facts and admissions of witness, Pedro Azagra Blazquez, "the Chief Development Officer and a Member of the Executive Committee of Iberdrola, S.A. ("Iberdrola") and also a member of the Board of Directors for Avangrid, Inc. ("Avangrid"),"[98] PNMR documents[99] and the statements of PNMR Senior Vice President Charles Eldred demonstrate the exact opposite. The below evidence proves that the timing of the abandonment and this particular transfer of PNM's Four Corners interests to NTEC was a condition precedent of the merger and played a central role in the merger negotiations -- including the presumption that PNM is "entitled" to recovery of 100% of its undepreciated assets, regardless of imprudence. PNM attempted to conceal the fact that the merger was a driving force perhaps because they didn't think that would be a legally justifiable posture consistent with their burden of proof obligation for abandonment. It is a similar strategy to their "inappropriate" and non-legally justifiable reason for investing in Four Corners (to avoid a PRC distraction from the San Juan abandonment and CCN case). The problem for PNM is it taints the credibility of the witnesses that claim the merger had nothing to do with abandonment and securitization filing because the

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[97] PNM Exhibit 6, Fallgren Rebuttal Testimony, p. 51. (At pp. 41-54: "PNM has been moving forward with analysis and planning to abandon the FCPP *entirely independent* of the merger.") (Emphasis supplied.); "They asked who was the decision-maker, but ultimately the head of our department is Ron Darnell, and he was very much involved in determining the timing of this merger, or, I'm sorry, this abandonment case -- a really bad Freudian slip there." TR., Sanchez, 9/2/2021, p. 651-652. "Q. Would you agree that one of the harms would be to the potential merger?
A. That's not one of the harms that should be considered in this case; the two are distinct. I expect, just given all the back-and-forth on the documents in this merger -- why do I keep saying that -- *in this abandonment about the merger*[.]"*Id.,* p. 673. (Emphasis supplied.)

[98] 20-00222-UT, *Order Granting Joint Motion for Joinder of Iberdrola, S.A. for Just Adjudication*, 6/8/2021, p. 4.

[99] For example, PNM Exhibit 5, TGF-3 (3-15-21 Supplemental) Pages 1 and 2 of 6; NEE Exhibit 5A, Exhibits to the Direct Testimony of Christopher K. Sandberg, Exhibit CKS-12.

evidence is plain and overwhelming; "The [witnesses] doth protest too much methinks."[100]

DATE	EVENT
October 31, 2017	Certification of Stipulation filed, Case No. 16-00276-UT.
December 20, 2017	Order Partially Adopting Certification of Stipulation, Case No. 16-00276-UT.
December 29, 2017	SB 47 Energy Redevelopment Bonding Act introduced, but died in Senate Conservation Committee.
January 10, 2018	Revised Order Partially Adopting Certification of Stipulation, Case No. 16-00276-UT.
January 19, 2018	Joint Notice by All Signatories of Acceptance of Commission's Modifications to Revised Stipulation, Case No. 16-00276-UT.
Mid-2018	Mr. Fallgren's initiates exit discussions but were dropped and later revived in early 2019.[101]
February 3, 2019	Email from PNMR Senior Vice President Charles Eldred to Iberdrola's Chief Development Officer Pedro Azagra Blazquez, who also sits on Avangrid's board of directors: "Attached is the updated presentation covering PNMR's plans for exiting coal and becoming coal free, Hopefully this captures a better understanding our key messages and execution plans. …As you know our Board meeting starts Thursday and its important to provide a perspective and status of Project Road Runner." NEE Exhibit 15 (PNM Exhibit NEE 1-57 (July 14 Supp) Page 26 of 139).
March 12, 2019	The ETA which included amendments to the Renewable Energy Act (REA) and the Air Quality Control Act was passed by the New Mexico Legislature and signed into law on March 22, 2019, with an effective date of June 14, 2019. (Senate Bill 489) ("SB 489")
Early November 2019	From PNM's SEC Proxy Statement: "In early November 2019, Mr. Azagra Blazquez inquired of Mr. Eldred as to the amount of electric power generation PNMR owns that is based on coal

[100] Queen Gertrude, *Hamlet*, William Shakespeare.
[101] PNM Exhibit 5, Fallgren's Supplemental Testimony at page 10.

	usage and indicated that this could be a significant transaction concern for Iberdrola and Avangrid." NEE Exhibit 5A, Exhibits to the Direct Testimony of Christopher K. Sandberg, Exhibit CKS-12, p. 39.
November 8, 2019	From PNM's SEC Proxy Statement: "On November 8, 2019, the PNMR board met telephonically in executive session, with Mr. Eldred, representatives of Troutman Pepper and Evercore participating. PNMR management updated the PNMR board on recent discussions with Mr. Azagra Blazquez, including its request for information about PNMR's coal usage. The **PNMR board** reviewed possible benefits of a combination with Avangrid for PNMR's shareholders and other PNMR constituencies but **expressed concern about Mr. Azagra Blazquez's raising a new issue concerning PNMR's coal-fired generation at this point in the negotiations.** The PNMR board also expressed its concern with the delay in discussing merger agreement terms since terms were last discussed on October 22, 2019." (Emphasis supplied.) NEE Exhibit 5A, Exhibits to the Direct Testimony of Christopher K. Sandberg, Exhibit CKS-12, p. 39.
November 20, 2019	From PNM's SEC Proxy Statement: "On November 20, 2019, Mr. Eldred and a representative of Evercore met in New York City with Mr. Azagra Blazquez and a representative of BNP Paribas. They discussed questions about PNMR's coal-fired generation and transaction valuation matters." NEE Exhibit 5A, Exhibits to the Direct Testimony of Christopher K. Sandberg, Exhibit CKS-12, p. 39.
December 2, 2019	From PNM's SEC Proxy Statement: "On December 2, 2019, Mr. Eldred and PNMR's General Counsel and a representative of Evercore participated in a conference call with Mr. Azagra Blazquez and representatives of BNP Paribas and Latham & Watkins in which they discussed PNMR's coal-fired generation. Following the call, PNMR provided Iberdrola with additional information regarding ongoing activities related to its existing strategy for exiting from Four Corners and transitioning to clean energy." NEE Exhibit 5A, Exhibits to the Direct Testimony of Christopher K. Sandberg, Exhibit CKS-12, p. 40.
December 5-6, 2019	From PNM's SEC Proxy Statement: "On December 5-6, 2019, the PNMR board met at a regularly scheduled meeting. Following review of management's recent discussions with

	Mr. Azagra Blazquez, the PNMR board discussed terminating discussions with Iberdrola and Avangrid. The PNMR board expressed its belief that Avangrid's continued delay in making progress in negotiations by raising new concerns with PNMR's coal-fired generation and by not providing a new draft of the merger agreement[.]" NEE Exhibit 5A, Exhibits to the Direct Testimony of Christopher K. Sandberg, Exhibit CKS-12, p. 40.
December 2019	Project Roadrunner Powerpoint: "Upon abandonment of Four Corners, PNM will be entitled to recovery of its investment through the ETA. Abandonment completes PNM's exit from coal generation" NEE Exhibit 15 (PNM Exhibit NEE 1-57 (July 14 Supp) Page 28 of 139).
December 10, 2019	From PNM's SEC Proxy Statement: Ms. Collaw informed Mr. Azagra Blazquez that PNMR was terminating discussions. NEE Exhibit 5A, Exhibits to the Direct Testimony of Christopher K. Sandberg, Exhibit CKS-12, p. 40.
Date Unknown, before June 2020	Document Title: "**Four Corners Exit**" PNM is completing plans to exit Four Corners on December 31, 2024, to execute its transition plan to be coal free; while lowering costs to customers by $90M. Under the ETA, PNM can securitize its undeoreciated investments in Four Corners. PNM is negotiating two related transactions to allow an early exit on December 31, 2024. Transactions benefit PNM and Navajo Nation… Provides an opportunity for PNMR or Avangrid Renewables to partner with the Navajo Nation to develop renewable energy resources on Navajo lands. NEE Exhibit 15 (PNM Exhibit NEE 1-57 (July 14 Supp) Page 127 of 139).
January 17, 2020	From PNM's SEC Proxy Statement: "**While acknowledging that Iberdrola's and Avangrid's focus on clean energy may preclude them from considering a transaction with PNMR** on an acceptable timeline, the PNMR board whether Avangrid would be interested in starting new discussions in light of the many possible benefits that would be offered by a PNMR-Avangrid merger." (Emphasis supplied.) NEE Exhibit 5A, Exhibits to the Direct Testimony of Christopher K. Sandberg, Exhibit CKS-12, p. 40.
January 30, 2020	From PNM's SEC Proxy Statement: "…Mr. Azagra Blazquez confirmed Iberdrola/Avangrid's interest in again pursuing a transaction, but indicated that PNMR's exposure to coal remained

	an issue for Iberdrola and Avangrid. They discussed how the issue could be resolved in light of PNMR's ongoing initiative to pursue a strategy to exit from its interest in Four Corners early, by 2024. NEE Exhibit 5A, Exhibits to the Direct Testimony of Christopher K. Sandberg, Exhibit CKS-12, p. 40.
February 4, 2020	Email from PNMR Senior Vice President Charles Eldred to Iberdrola's Chief Development Officer Pedro Azagra Blazquez: "We are working on the MOU for Four Corners but as I mentioned a Plan B should be reviewed. I asked Thomas if we could have a call later this week to learn more about possibilities he mentioned so we can focus on applicability to our regulatory process and the ETA. The right answer is the MOU bit a Plan B if feasible needs to be understood as well. **If neither option works then I'll need to answer the question with our Board is this deal contingent on resolving Four Corners?** (Emphasis supplied.) … In particular PNMR has removed significant overhang from equity needs and the Supreme Court decision to apply the ETA to San Juan Coal Plant abandonment. NEE Exhibit 15 (PNM Exhibit NEE 1-57 (July 14 Supp) Page 23 of 139).
February 7, 2020	Email from PNMR Senior Vice President Charles Eldred to Iberdrola's Chief Development Officer Pedro Azagra Blazquez: Pedro….just wrapped up discussion with Thomas on Four Corners. We addressed in more detail our plans with the Navajo deal I'm bringing Patrick Apodaca our General Counsel with me so was hoping Schwartz can be at the meeting. It's important that David understands how the ETA will apply to Four Corners Abandonment which Patrick can talk lawyer about it. … My Team is working diligently on Plan A to address a Four Corners deal with the Navajos… objective is MOU followed with contracts so PNM can file a regulatory case for Abandonment. NEE Exhibit 15 (PNM Exhibit NEE 1-57 (July 14 Supp) Page 14 of 139).
March 12, 2020	Email from PNMR Senior Vice President Charles Eldred to Iberdrola's Chief Development Officer Pedro Azagra Blazquez: The Special Committee of the Board's "direction was to shift to resolving the PSA and address the Regulatory Concessions as soon as possible. It's my understanding Latham is address an issues list on the PSA and we can expect a turn this weekend. We are continuing our strategy on exiting coal and have no added the owners on

	Four Corners in on the discussion with APS. …Pat and I look forward to merging our companies and fulfilling our strategic alignment." NEE Exhibit 15 (PNM Exhibit NEE 1-57 (July 14 Supp) Page 13 of 139).
March 12, 2020	PNMR announces: "**PNM Underscores ESG Strategy with Additional Plan to Reduce Emissions at Four Corners Power Plant**" In PNM's Application and its Supplemental Testimony there is no mention of the merger except tucked away in in the hundreds of pages of pages of Mr. Falgren's exhibits, is a PNMR press release announcing their "ESG Strategy" [Environmental, Social, Governance] and "additional plans for seasonal operations." In the last full paragraph in that press release they mention the merger. They also mention Avangrid in the Safe Harbor Statement under the Private Securities Litigation Reform Act of 1995, included at the bottom of the press release. PNM Exhibit 5, TGF-3 (3-15-21 Supplemental) Pages 1 and 2 of 6
March 23, 2020	Email from PNMR Senior Vice President Charles Eldred to Iberdrola's Chief Development Officer Pedro Azagra Blazquez: "…I'm seeing progress and feel we are getting closer to a short list of items we can resolve. The call on the Regulatory Concessions was helpful and allowed a more transparent understanding of the approach… we expect Latham to suggest some new language to get us closer to resolution, Our coal Strategy exit plans continue to advance but slowly due to the distractions from parties focusing on the Coronavirus. However, Pat and I have another idea for a positive public message about our plans to exit all coal. Specifically we expect a PSC order on April 1st to approve the abandonment of San Juan … we will have an IR press release on this decision but now planning to make additional comments on our next step to accelerating plans to exit Four Corners. This will get the commitment out publicly and a well aligned message that eventually will coincide nicely with the strategic merger[.]" NEE Exhibit 15 (PNM Exhibit NEE 1-57 (July 14 Supp) Page 12 of 139).
March 30, 2020	Email from PNMR Senior Vice President Charles Eldred to Iberdrola's Chief Development Officer Pedro Azagra Blazquez: "…we expect the Commission to approve the San Juan Abandonment Weds so we are commenting on it plus added a statement to address next steps to exit Four Corners. We feel stating our intentions publicly in this manner will raise eyebrows we must be actively addressing plans and are committed towards accelerating our carbon free goal, This statement will tee up the strategic alignment with the merger and add credibility to execute this next step to be coal free." NEE Exhibit 15 (PNM Exhibit NEE 1-57 (July 14 Supp) Page 11 of 139).
April 1, 2020	Commission approval of SJGC Units 1 and 4 abandonment in Case No. 19-00018-UT.

April 1, 2020	Email from PNMR Senior Vice President Charles Eldred to Iberdrola's Chief Development Officer Pedro Azagra Blazquez: "Today the New Mexico Commission unanimously approved the abandonment of PNM's San Juan Coal plant. A major step in a long journey from adopting new legislation (Energy Transition Act), regulatory hearings, Governor and Supreme Court intervention to say the least. A great step and victory for the company! Attached is our IR Press Release…now on to the next and final step towards developing firm plans to exit Four Corners the only remaining coal interest by PNM." NEE Exhibit 5A, Exhibits to the Direct Testimony of Christopher K. Sandberg, Exhibit CKS-11, Page 10 of 139.
April 16, 2020	Email from PNMR Senior Vice President Charles Eldred to Iberdrola's Chief Development Officer Pedro Azagra Blazquez: "…discussion focused on PSA [Purchase and Sale Agreement] … Latham received the PSA agreement yesterday and will discuss with Troutman today. …Thomas also has been updated on the Four Corners coal exit deal." NEE Exhibit 15 (PNM Exhibit NEE 1-57 (July 14 Supp) Page 4 of 139).
April 23, 2020	Email from PNMR Senior Vice President Charles Eldred to Iberdrola's Chief Development Officer Pedro Azagra Blazquez: "Given our upcoming Board meeting on Monday….its important to touch base. The meeting purpose is a current update similar to the last discussion with the Board Special Committee. I need the discussion with the Board to show continued momentum and communicate how close we are to announcing." NEE Exhibit 15 (PNM Exhibit NEE 1-57 (July 14 Supp) Page 4 of 139).
April 30, 2020	Email from PNMR Senior Vice President Charles Eldred to Iberdrola's Chief Development Officer Pedro Azagra Blazquez: "Talk tomorrow… we have a separate call with Latham to update on Four Corners deal. I'll give you a general update as well on our separate call." NEE Exhibit 15 (PNM Exhibit NEE 1-57 (July 14 Supp) Page 1 of 139).
June 5, 2020	From PNM's SEC Proxy Statement: "[T]he PNMR board met telephonically in executive session. … Management provided the PNMR board with an update on New Mexico operational matters, including plans to exit Four Corners." NEE Exhibit 5A, Exhibits to the Direct Testimony of Christopher K. Sandberg, Exhibit CKS-12, p. 44.
August 13, 2020	From PNM's SEC Proxy Statement: "On August 13, 2020, representatives of PNMR, Troutman Pepper and

	Latham & Watkins discussed the status of PNMR's process for exiting Four Corners." NEE Exhibit 5A, Exhibits to the Direct Testimony of Christopher K. Sandberg, Exhibit CKS-12, p. 45.
August 20, 2020	From PNM's SEC Proxy Statement: "On August 20, 2020, representatives of Troutman Pepper and Latham & Watkins discussed key regulatory-related terms for a possible transaction. … The draft letter stressed the importance to Iberdrola and Avangrid of having definitive documentation in place for PNMR's exit from Four Corners." NEE Exhibit 5A, Exhibits to the Direct Testimony of Christopher K. Sandberg, Exhibit CKS-12, p. 45.
August 25, 2020	Proposal Letter from Pedro Azagra Blazquez The Iberdrola proposal letter from Mr. Azagra Blazquez to PNM CEO, Pat Vincent Collawn "Iberdrola and Avangrid are committed to strong ESG policies that do not allow for the purchase of any coal assets and have refused to undertake other transactions that had coal in their generation mix." NEE Exhibit 18, p. 9.
September 8, 2020	Email from PNMR Senior Vice President Charles Eldred to Iberdrola's Chief Development Officer Pedro Azagra Blazquez: "It's the process we need to see through leading to our Four Corners Abandonment filing in early January 2021. Below is a public statement in one of our IR releases when we received approval to abandon San Juan. As you can see we are clear of our commitment to exit earlier than 2031. We can emphasize same message maybe add some further support of the strategy from Avangrid merger announcement. This hopefully gives you added comfort and clarity solidifying our plans approved by PNMR Board. We are just short of announcing the actual deal to stay away from politics prompted by the expected Governor campaign to seek constitutional referendum for an appointed commission. … Once the election in November is over we can go public on the full deal." NEE Exhibit 15 (PNM Exhibit NEE 1-57 (July 14 Supp) Page 136 of 139).
September 8, 2020	From PNM's SEC Proxy Statement: "On September 8, 2020, representatives of Iberdrola/Avangrid, Latham & Watkins and BNP Paribas held a conference call with representatives of PNMR, Troutman Pepper and Evercore. During this call, the PNMR representatives reviewed the next steps in the Four Corners exit process."

	NEE Exhibit 5A, Exhibits to the Direct Testimony of Christopher K. Sandberg, Exhibit CKS-12, p. 46.
September 14, 2020	From PNM's SEC Proxy Statement: "[O]n September 14, 2020, Latham & Watkins sent a new draft of the merger agreement and a draft of the Avangrid Shareholder Agreement to Troutman Pepper. **The merger agreement contained a revised covenant and a closing condition providing for PNMR's entering into definitive agreements providing for the exit from Four Corners**." (Emphasis supplied.) NEE Exhibit 5A, Exhibits to the Direct Testimony of Christopher K. Sandberg, Exhibit CKS-12, p. 46.
September 19, 2020	Email from PNMR Senior Vice President Charles Eldred to Iberdrola's Chief Development Officer Pedro Azagra Blazquez: "**I strengthen the comment on the coal exit for Four Corners** and used a 30 day VWAP to lower the premium." (Emphasis supplied.) NEE Exhibit 15 (PNM Exhibit NEE 1-57 (July 14 Supp) Page 139 of 139).
September 19, 2020	From PNM's SEC Proxy Statement: "On September 19, 2020, Mr. Azagra Blazquez discussed with Mr. Eldred how he was concerned that the divergence in stock prices might cause Avangrid to reconsider the proposed exchange ratio. He also referred to the importance of PNMR's having agreements in place to exit from Four Corners. Mr. Eldred updated Mr. Azagra Blazquez on the already ongoing initiatives by PNMR to exit Four Corners." NEE Exhibit 5A, Exhibits to the Direct Testimony of Christopher K. Sandberg, Exhibit CKS-12, p. 46.
October 14, 2020	Investor Presentation Preparation: **18. I noticed that having definitive agreements to exit Four Corners is a condition to closing. Why is this the case? What is the status of agreements? Are you in discussions with anyone currently? How confident are you that you'll be able to enter into these agreements? What are the consequences for the transaction if you cannot?** • Based on preliminary discussions with potential counterparties we are highly confident we'll be able to sign definitive agreements to exit Four Corners prior to closing of the merger transaction. As you know, earlier this year we had already announced our intention to exit Four Corners earlier than the scheduled 2031 exit date. Exiting Four Corners also is important to Iberdrola and Avangrid in light of their no carbon fuel policies. NEE Exhibit 15 (PNM Exhibit NEE 1-57 (July 14 Supp) Page 133 of 139).

October 20, 2020	Agreement and Plan of Merger transaction was consummated between Avangrid, Inc., NM Green Holdings, Inc. and PNM Resources ("PNMR"). NEE Exhibit 5A, Exhibits to the Direct Testimony of Christopher K. Sandberg, Exhibit CKS-8, p. 1.
November 1, 2020	PNM executed the NTEC Purchase and Sale Agreement.[102]
February 2021	Impetus for seasonal operation was accelerated after the Hearing Examiner found that PNM's Application was insufficient on February 26, 2021.[103]
March 8, 2021	Request for Production ("RFP") for Four Corners replacement resources.[104]
March 12, 2021	Seasonal Operation Agreement in Principle: public media release by PNM and APS dated March 12, 2021, copies of which are attached as PNM Exhibit TGF-3 (3-15- 21 Supplemental).[105]
March 15, 2021	PNM's Supplemental Testimony Filed.
June 25, 2021	Seasonal Operation Agreement signed.[106]

[102] PNM Exhibit 4, Direct Testimony of Thomas Fallgren, PNM Exhibit TGF-2, p. 1.
[103] *Order on Sufficiency of PNM's Application and Scope of Issues in Proceeding*, 2/26/2021.
[104] TR. 9/2/2021, Fallgren, p. 470.
[105] PNM Exhibit 4, Direct Testimony of Thomas Fallgren, PNM Exhibit TGF-3 (3-15- 21 Supplemental).
[106] TR. 9/1/2021, Fallgren, p. 484.

VIII. The Avangrid/Iberdrola Merger is a Driving Force in PNM's Four Corners Application for Abandonment & Securitization

The exchange between the top brass at PNMR and Iberdrola/Avangrid reveals that in the merger courtship one thing was clear: PNM had to figure out an exit from Four Corners because Iberdrola/Avangrid could not tolerate an acquisition that included coal assets and contradicted its ESG (Environmental Social Governance) Wall St. driven goals. In addition to the raw material discovered and included in this case, cited above as a "thumbnail" sketch, there are the following excerpts from documents and admissions that accentuate the condition precedent of FCPP divestiture.

As Andrea Crane explained:

> The Merger Agreement contains a provision that requires PNM to (a) enter into definitive agreements providing for exit from all ownership interest in the FCPP and (b) make all applicable regulatory filings and take all commercially reasonable actions in order to obtain required approvals from applicable Governmental Entities, all with the objective of having the closing date for such exit to occur as promptly as practicable but in any event no later than December 31, 2024. In response, PNM filed its Initial Application in this case, which was subsequently replaced by the Amended Application.[107]

The removal of FCPP from PNM's books is embedded in the Avangrid/Iberdrola/PNM Agreement and Plan of Merger.[108]

Merger §6.19 requires:

> ...the Company agrees that, as soon as reasonably practicable following the date of this Agreement, PNM, shall (a) enter into definitive agreements providing for exit from all ownership interests in the Four Corners Power Plant ... and (b) make all applicable regulatory filings and take all commercially reasonable actions in order to obtain required approvals from applicable Governmental Entities, all with the objective of having the

[107] NMAG Exhibit 1, Testimony of Andrea Crane, pp. 18-19. (Ms. Crane cites to: Merger Agreement provided in JA Exhibit PAB-3, Section 6.19 in Case No. 20-00222-UT.)
[108] NEE Exhibit 5A, Exhibits to the Direct Testimony of Christopher K. Sandberg, *citing*, Relevant portions of the Agreement and Plan of Merger.

closing date for such exit to occur as promptly as practicable but in any event no later than December 31, 2024.

Merger §7.2G requires:

Four Corners Divestiture. Each of the Four Corners Divestiture Agreements shall have been duly executed and delivered by each of the parties thereto, and shall be in full force and effect as of the Closing, and PNM shall have made all applicable regulatory filings to obtain required approvals from applicable Governmental Entities, including for abandonment authority and securitization from the NMPRC.

Merger §6.5 requires:

(d) …for the purposes of determining whether a Burdensome Effect exists … (or could reasonably be expected to exist), in respect of a Specified Required Regulatory Approval only those terms, conditions, liabilities, obligations, commitments, or undertakings related to or arising out of rate concessions (including rate reductions and rate credits) to customers required to obtain such Specified Required Regulatory Approval will be taken into account.

Taken together, those parts of the Agreement and Plan of Merger contradict the position of PNM that merely filing for abandonment of FCPP is sufficient, because the Agreement requires not only the application for abandonment but also that the FCPP Divestiture Agreements shall "shall be in full force and effect as of the Closing" of the merger. §7.2G.

And there's more evidence.

Before your Honor had issued your ruling on the Motions to Dismiss the following sworn statements were made:

1) **Q. ARE THERE ANY OTHER CONTINGENCIES THAT MUST BE SATISFIED UNDER THE MERGER AGREEMENT?**

A. Yes. Avangrid is committed to moving as quickly as possible to the clean generation of power. To that end, the Merger Agreement requires that prior to consummation of the Merger, PNM must execute agreements to divest itself of its ownership interest in the Four Corners Power Plant, and file for the necessary regulatory approvals to abandon that interest. PNM has executed an agreement with the Navajo Transitional Energy Company that will allow PNM to divest its 13% interest in the Four Corners Power Plant in 2024. I understand that PNM is preparing the necessary applications

for regulatory approval in a separate proceeding. Joint Applicants are not seeking any approvals in this proceeding with respect to the Four Corners Power Plant.

Direct Testimony of Pedro Azagra Blazquez 11/23/2020, in Case No. 20-00222-UT, at 14, See,

NEE Exhibit 5A, Exhibits to the Direct Testimony of Christopher K. Sandberg, Exhibit CKS-9.

2) Mr. Azagra Blazquez affirmed in his answer to CCAE 1-1, on December 11, 2020:

> Avangrid's internal policies precluded Avangrid from pursuing this transaction with PNMR in the absence of a clear and achievable path for PNM out of its ownership and operation of coal-fired generation." Avangrid determined that the planned imminent retirement of the remaining San Juan Generating units, which has already received abandonment authorization from the Commission was consistent with its internal policies. However, a continued minority interest in the Four Corners Power Plant (even if only for a 200 MW stake) was inconsistent with Avangrid's policies. Accordingly, Avangrid made it clear to PNMR that it would not agree to the Merger in the absence of PNM having a clear and achievable plan to exit the Four Corners Plant by no later than 2024.
>
> There are a number of conditions to closing in the Merger Agreement, including the conditions in Section 7.2(g) that "Each of the Four Corners Divestiture Agreements shall have been duly executed and delivered by each of the parties thereto, and shall be in full force and effect as of the Closing, and PNM shall have made all applicable regulatory filings to obtain required approvals from applicable Governmental Entities, including for abandonment authority and securitization from the NMPRC." While Section 7.2(g) is the only contingency provision in the Merger Agreement specific to the Four Corners Power Plant, Avangrid notes that there are also other conditions, including that all Required Regulatory Approvals are obtained without a Burdensome Effect and that no Material Adverse Effect on PNMR shall have occurred.
> Avangrid believes that abandonment authorization is a critically important part of the divestiture process, as divestiture cannot occur without abandonment authorization. Avangrid cannot speculate on the impacts of a hypothetical denial of abandonment authorization on the Merger Agreement. However, denial of abandonment would be inimical to the publicly stated intent of both Avangrid and PNMR to have PNM exit coal by divesting from the Four Corners Power Plant earlier than originally planned.[109]

3) Recently during the merger hearing Mr. Azagra Blazquez was cross-examined:

> Q. BY MS. NANASI: Could you please read – I'm going to ask you the question, and if you could please read your response. "Is the divestiture of Four Corners Power Plant a requirement for the proposed transaction in this matter to close?" Please read your response to NEE Interrogatory 5-3, the question that I just posed.

[109] NEE Exhibit 13, Joint Applicants Response to CCAE 1-1 in Case No. 20-00222-UT.

A. (Mr. Azagra Blazquez): Okay. Again, I'm not sure if this is the document or not, but the answer that I have in front of me is that: "The requirement in the merger agreement is to have definitive agreements for the sale of PNM's interest in Four Corners continue to be in full force and effect as of closing, and for PNM to have made all regulatory filings to obtain approvals for the sale of Four Corners, including abandonment and securitization."[110]

…

Q. You discuss Iberdrola/Avangrid's focus on ESG that doesn't allow Iberdrola and Avangrid to have any investments in coal assets; correct?
A. Correct.
Q. And that was true in August of 2020, and it's still true today; right?
A. Yes, we have the same vision right now in not owning stakes or assets of certain types.[111]

Further, during the merger hearing, Mr. Azagra Blazquez was asked about the email that is included in this record as NEE Exhibit 15 (PNM Exhibit NEE 1-57 (July 14 Supp) Page 14 of 139), cited above on p. 36, and he testified:

(Mr. Azagra Blazquez): I think what this means is PNM, in the case of Chuck, has been updating, you know, what PNM was doing in connection with Four Corners. I think they have updated our financial advisor, Mr. Thomas Rosen, and they were going to update my legal advisor, Mr. Dave Schwartz, and potentially David Gurtzwild on both the general Four Corners matter, but also on the ETA matter. So that's what it means.[112]

Additionally, there was another relevant exchange:

Q. (Nanasi) The question is: I notice that having definitive agreements to exit Four Corners is a condition to closing. Why is this the case? Why is the status of agreements -- excuse me, what is the status of agreements? Are you in discussion with any one currently? How confident are you that you will be able to enter into those agreements? What are the consequences for the transactions if you cannot? Could you please read the answer?

A. (Mr. Azagra Blazquez) The answer is: Based on preliminary discussions with potential counter parties, we are highly confident we will be able to sign definitive agreements to exit Four Corners prior to closing of the merger transaction. As you know, earlier this year, we had already announced our intention to exit Four Corners earlier than the scheduled 2031 exit date. Exiting Four Corners also is important to Iberdrola and Avangrid, in light of their no carbon fuel policies.

[110] NEE Exhibit 16, Excerpt from the 20-00222-UT hearing, TR., 8/11/2021, p. 185.
[111] NEE Exhibit 16, Excerpt from the 20-00222-UT hearing, TR., 8/11/2021, p. 196.
[112] NEE Exhibit 16, Excerpt from the 20-00222-UT hearing, TR., 8/11/2021, p. 170.

Q. Is there anything about that answer that you believe to be incorrect?
A. No.[113]

At this point there is little dispute that: 1) Iberdrola/Avangrid internal policies forbid coal in its portfolio[114]; and 2) Even if PNM was seeking an exit from FCPP in 2018[115], just mere months after it deceitfully overstated the value of participating in FCPP to the Commission, and was permitted to extend the life of that plant and invest significant capital expenditures thereafter the merger with Iberdrola/Avangrid accelerated those efforts to exit[116]; and 3) that Joint Applicants are counting on the ETA to bail them out of their imprudence at FCPP[117]; and 4) that the Commission could deny Four Corners Divestiture based on the ETA, Public Utility Act, and the fact that there will be a net detriment from PNM's proposed sale to NTEC and securitization of imprudent undepreciated investments,[118] and because it is contrary to the public interest.

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[113] *Id*., pp. 180-182.
[114] NEE Exhibit 13, JA Response to CCAE 1-1; NEE Exhibit 18 (August 25, 2020 proposal letter from Iberdrola to PNMR CEO, pp. 9-10.); NEE Exhibit 16: TR., 8/11/2021, Azagra Blazquez, p. 196; also, *See* above repeated ESG requirements articulated specifically and required explicitly throughout negotiations as documented in PNMR's SEC filing.
[115] PNM Exhibit 5, Fallgren's Supplemental Testimony at page 10.
[116] NEE Exhibit 15, a series of emails and presentations from Chuck Eldred to Pedro Azagra Blazquez updating him on PNM's exit of FCPP. *See also*, SC-1, Direct Testimony of Dr. Jeremy Fisher, pp. 8-15.
[117] NEE Exhibit 15, p. 28 of 139, Project Roadrunner presentation sent from Chuck Eldred to Pedro Azagra Blazquez updating him on PNM's exit of FCPP.
[118] NMSA §62-18-5 E requires in relevant part "If the commission finds that a qualifying utility's application does not comply with Section 4 of the Energy Transition Act, the commission shall advise the qualifying utility of any changes necessary to comply with that section and provide the applicant an opportunity to amend the application to make such changes." According to the relevant part of NMSA §62-18-4A: "To obtain a financing order, a qualifying utility shall obtain approval to abandon a qualifying generating facility pursuant to Section 62-9-5 NMSA 1978.". PNM has not met its burden of proof under Section 62-9-5 NMSA 1978 that abandonment is a net public benefit because the sale to NTEC will prolong the burning of coal, contrary to the ETA's purpose and the policy of the State of New Mexico. An additional subject that is being considered in that 21-00017-UT is the prudence of the FCPP investments and any associated disallowance. *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012*,* ¶¶ 32,

IX. The "Necessity And Scope Of Any Remedy In Light Of PNM's Alleged Imprudence"[119] (Commission Issue #5)

A. Holding Ratepayers Harmless for the Imprudent Acts of Utility Management Requires A Complete Disallowance of Capital Expenditures at FCPP Post- 2016

In its 2016 rate case, 16-00276-UT, PNM requested cost recovery for all of its FCPP pollution control and capital improvements.[120] NEE and others objected.[121] The Hearing Examiners agreed with the objectors, finding that PNM's decision to continue participating in FCPP without any contemporaneous economic analysis, risk evaluation, or consideration of alternatives, and PNM's related decisions to invest in costly pollution controls and capital improvements had not been prudent.[122] The Hearing Examiners stated that "the appropriate remedy for PNM's imprudence in extending its participation in Four Corners and pursuing the $90.1 million investment in the SCR [Selective Catalytic Reduction] and the $58 million of the additional life-extending capital improvements is the disallowance of all costs associated with the investment and improvements."[123] In light of a proposed stipulated settlement, however, the Hearing Examiners agreed that a "lesser disallowance might be reasonable in the context of a stipulation," and recommended that instead of its usual return on equity (9.575%), PNM should receive only cost of debt (3+%) on the investments and a further disallowance of a percentage on

35, 38-42, 47, 52, 444 P.3d 460. (full disallowance of imprudently incurred costs a possibility where necessary to protect ratepayers).

[119] 16-00276-UT, *Revised Order Partially Adopting Certificate of Stipulation,* 1/10/2018, at ¶ 66.

[120] *Id*.

[121] *Id.*, pp. 19-69.

[122] *Id.*, p. 69.

[123] *Id.*, p. 68.

the capital investments.[124]

It is indisputable that PNM did not demonstrate the rigorous review that a prudent utility should have performed prior to making these significant investments. It is also plainly clear that PNM failed to perform appropriate analyses to determine the cost-effectiveness of the FCPP investment. During this time frame, there were clear indications that would have warned a prudent utility manager to run from this investment, as others did (i.e., El Paso Electric). For example, during this time period, the forced outage rate at Four Corners started to climb significantly, and the units' availability declined. According to the Hearing Examiners, this development "should have prompted a further analysis" as to the "increasingly poor performance of Four Corners and its related need for capital improvements." 16-00276-UT, Certification of Stipulation at p. 45. The utility's imprudent and inadequate analysis and decision-making put ratepayers at risk.

While acknowledging that calculating the precise amount of proper disallowance was not necessarily easy, as exemplified by the Oregon Public Utility Commission's well-reasoned decision in *In re Pacificorp*, 2012 WL 6644237 (Or. P.U.C. Dec. 12, 2012),[125] OPUC provided the following example in which a total disallowance was warranted:

> For example, we recently concluded that a utility had failed to establish that it acted prudently in building a natural gas pipeline years ahead of demonstrated need for the project. Finding there was no persuasive evidence that the pipeline was needed to serve customers at this time, we excluded the entire amount from rate base.

Id. at *19, citing *In re Application of Northwest Natural for a General Rate Revision*, Docket No. UG 221, Order No. 12-437 at 18 (Nov. 16, 2012). Distinguishing that situation, which required

[124] *Id*. At pp. 68, 179-180.
[125] Cited with approval by our New Mexico Supreme Court in *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012*,* ¶¶ 32, 39, 41-42, 46-47, 444 P.3d 460.

complete disallowance, from the treatment of pollution controls installed by Pacific Power, OPUC found that the pollution control investments had value in that they "enable[d] the affected plants to continue to operate and provide service to customers" and "significant investments in [Pacific Power's] coal fleet were necessary." *Id.* at *19 (Emphasis supplied). **Here, there was no demonstrated need** (*at that time* or in Graves' testimony). The OPUC recognized that Pacific Power "was required to take action to comply with the mandate that the region achieve reasonable progress toward the RHR's air quality goals" and, therefore, "some investment action would have been required." *Id.* at *18.

Significantly, OPUC found that "Pacific Power [had] acted prudently in initiating efforts to address air quality . . ." *Id*. OPUC recognized "the difficulty of excluding from rate base investments that enable affected plants to continue to operate and provide service to customers." *Id*. at *21. For these reasons, OPUC ultimately decided to disallow 10% of the $170 million cost of the investment.

In contrast, PNM's investment decision was not simply whether to put $90.1 million into SCR and $58 million into life-saving capital improvements at Four Corners but involved the fundamental question of whether or not PNM should even extend its participation in Four Corners at all, with all of these attendant expenses and changing economic circumstances, and the fact that "coal ha[d] become an embattled resource"[126] during that time period in which coal plants were closing around the United States. PNM's expert Graves performed studies during the same time period to assess the economics "in relation to those trends and in relation to environmental expenditures,"[127] however PNM did virtually nothing because it was focused elsewhere. This is

[126] TR., 9/7/2021, Graves p. 1340.
[127] TR., 9/7/2021, Graves p. 1238.

what NEE's expert described as "utility management malpractice."[128] PNM's uninformed decision to extend participation in Four Corners was exactly like the Oregon utility's choice to build a pipeline without showing a demonstrated need, requiring the exclusion of the entire investment from rate base.

While PNM was facing a milestone decision to continue ownership in Four Corners, Pacific Power was assessing an investment in legally required pollution controls. Unlike Pacific Power's decision to purchase the SCR system, which met a government requirement that unquestionably involved some expenditure for whatever pollution control option was ultimately chosen, PNM faced a voluntary decision to extend its participation in a coal generation facility. Part and parcel of that investment was the need for future SCR expenditures and hugely expensive capital improvements. This fundamental investment decision is clearly distinguishable from a decision to pay for an add-on, like SCR, to an established and on-going generation facility.

In crafting a proper remedy, NEE urges the PRC to recognize that PNM acted with deliberate indifference to its obligations under the law. This is not the first time that PNM has been challenged for imprudent investments made without proper analyses and then been forced to fabricate a questionable rationale. Nor is this first time the PRC has found PNM imprudent in its investment decisions.[129] PNM's conduct should not be viewed as "business as usual" but requires

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[128] Commission Exhibit 1, 16-00276-UT, *Certification of Stipulation*, 10/31/2017, p. 44.
[129] The Hearing Examiner and the Commission found PNM to be imprudent in its purchase and lease extension of nuclear assets in 15-00261-UT,, which was affirmed in *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012*,* ¶¶ 32, 39, 41-42, 46-47, 444 P.3d 460.. The Hearing Examiner and the Commission found PNM imprudent in its investment in balanced draft costs. *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012*, supra at* ¶88.

the PRC to deter PNM from continuing these practices.

Ratepayers must be held harmless from any amount imprudently invested and a disallowance should equal the amount of unreasonable investment. *In re Pacificorp*, 2012 WL 6644237 (Or. P.U.C. Dec. 12, 2012), cited with approval by this PRC by our New Mexico Supreme Court in *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012, ¶¶ 32, 39, 41-42, 46-47, 52, 444 P.3d 460 (N.M. 2019) (the central issue facing the Commission—how to protect ratepayers from PNM's failure to consider alternatives.)

1. Numerous Jurisdictions Uphold the Regulatory Principle/Practice that Imprudent Investments Require Complete Disallowance of Investment

A review of caselaw throughout the country shows that the regulatory principles expressed in Pacificorp and the Washington Utilities cases (cited by the Hearing Examiners in their Certification of Stipulation, p. 44) regarding the remedy for imprudent decision-making by utilities is deeply rooted in public utilities law. These cases support NEE's position that a full disallowance is necessitated by the substantial evidence on the record that PNM was not prudent in its decision to extend its participation in Four Corners. NEE is not an outlier in requesting that the PRC follow the well-accepted rate-making principle "that ratepayers should not bear any costs for which the company failed to demonstrate prudence, up to and including the full costs of investment . . .." *Washington Util. & Transp. Comm'n v. Pacific Power & Light Co*., Docket UE-152253, 332 P.U.R. 4th 1, 2016 WL 7245476 at *82 (Wash. U.T.C.) (Slip Op. Sept. 1 2016).

The following selection of jurisdictions are merely a sample of courts and public utility commissions that abide by the principle that a "unit may be properly excluded from a utility's rate base if the investment in that unit is found to be a result of managerial imprudence occurring at

the time the decision to invest was made." *Philadelphia Elec. Co. v. Pennsylvania P.U.C.,* 61 Pa. Comm. Ct., 325, 433 A.2d 620 (Pa. Comm. Ct. 1991). The rationale that ratepayers should be held harmless from any amount imprudently invested is clearly evident in these decisions.

The Louisiana Supreme Court in *Entergy Gulf States, Inc. v. Louisiana Pub. Serv. Comm'n,* 726 So. 2d 870 (La. 1999), Util. L. Rep. 26,708, 98-0081 (La. 1/20/99) affirmed the PSC's Order requiring the utility to refund $34.24 million in fuel adjustment clause charges to its customers, with interest, because it found multiple acts of imprudence. The Court discussed the prudence standard and noted that "When the Commission reviews a utility's rates it is required to apply the 'prudence' standard." 723 So. 2d at 873, citing *Gulf States Util. Co. v. Louisiana Pub. Serv. Comm'n,* 578 So. 2d 71, 85 (La. 1991). The Court explained that "[t]he utility must demonstrate that its decisions and actions are prudent in order to counterbalance the monopolistic effects on ratepayers who do not have a choice about which company provides their utility service." *Id.* at 873-74. Approving of the expressed rationale of the Gulf States case, the Court quoted:

> Because customers of monopolistic enterprise do not have the choice to take their business to a more efficient provider, market forces provide no incentive for utilities to act prudently. Therefore, a utility's only motivation to act prudently 'arises from the prospect that imprudent costs' may be disallowed.

Id. at 874, quoting *Gulf States Util. Co. v. Louisiana Pub. Serv. Comm'n*, 96-2046, p. 12 (2/25/97), 689 So. 2d 1337, 1345 at n. 9 (citing *In Re Long Island Lighting Co*., 71 P.U.R. 4th 262 (N.Y.P.S.C. 1985).

Especially of interest is the Court's discussion in Entergy regarding the basis for the PSC's disallowance of fuel charges related to its nuclear fuel retention decisions and excessive coal costs. As for the first disallowance, the Court upheld the Commission's decision because the

utility provided no evidence to support the prudence of its decision not to dispose of more uranium after three of its nuclear units were canceled. Nor did the company provide studies, memoranda, or other documents to support the prudence of its decisions during the relevant time period. The Commission also found the company's expert to be unfamiliar with the utility's decision-making processes during the period under review and he did not know who made the decisions and had no personal knowledge of the utility's assumptions or expectations as to the benefit or detriment of holding onto excess uranium. *Entergy*, supra, 726 So. 2d at 887. "No other testimony was introduced to illuminate the Company's reasons for acquiring additional uranium under existing circumstances, or for retaining fuel in an amount in excess of its needs once the other three plants were cancelled." *Id*. Based on the company's failure to demonstrate a reasonable basis for its nuclear retention decisions, the Court affirmed the Commission's finding of imprudence and disallowed the excess expense caused by retention of excess uranium.

Regarding the Commission's disallowance of excessive coal costs associated with the utility's imprudence regarding its Nelson 6 coal station the Court upheld the Commission's disallowance, finding that the Commission had a reasonable basis for its finding of imprudence. The Commission based its disallowance of the utility's imprudent price renegotiation of its coal supply contract, which consequently made operation of its coal plant more expensive, at a time when cheaper resources were available. The Commission found that the utility presented no witnesses that could attest to the company's decision-making process during the relevant period. Witnesses produced "after the fact" explanations, which the Court found did not withstand scrutiny. Because the company could not supply contemporaneous documentation of any of its decision-making processes with respect to the coal contract decisions, which a prudent utility would do, the Court agreed that the utility failed to carry its burden under the prudence inquiry to

show a reasonable decision-making process. *Id*. at 889. The excessive cost of the contract was disallowed.

In *Association of Businesses Advocating Tariff Equity v. Public Serv. Comm'n*, 527 N.W.2d 533, 158 P.U.R.4th 431 (Mich. Ct. App. 1995), the utility sought to recover costs related to the development and construction of a 2-unit nuclear plant. By the time the project was ultimately cancelled in 1984, the plant was 85% completed and the utility had invested $4.2 billion. The utility sought to recover the entire investment in the project. The Public Service Commission ("PSC") reviewed the facts which showed that a July 2, 1980 Board decision, which it had approved the continued construction of the plant, was so "unrealistic as to be imprudent." The Public Utility noted that the utility had "adopted a path that was virtually certain to fail and was unduly influenced by its relationship with Dow [a participating investor] at the expense of its obligations to ratepayers." This priority of retaining Dow's participation "distorted the company's ability to fairly and objectively analyze the implications related to its duty to serve ratepayers." *Id*. at 255.

Based on these findings, the Commission found that a full acknowledgement of the risks of continuing the project, evaluated in light of the best interests of the Company's ratepayers, would have compelled the conclusion that maintaining the strategy of completing both units to meet the Dow target date was no longer a prudent course of action." *Id.* The Commission harshly criticized the company's decision-making process:

> The company's approach to forecasting, planning, and decision-making, viewed in a most favorable light, reflects willful indifference to known circumstances and indicators of risk. Viewed less favorably, it is certainly plausible, if not likely, that the company deliberately engaged in a policy of obfuscation, distortion, concealment, and deception. Regardless of which explanation best characterizes the subjective deliberations of the company's management and Board of Directors, it is objectively evident that their decision in mid-1980 were completely divorced from the reality of the project's circumstances.

527 N.W.2d at 539.

The Commission used the prudent investment test to determine the extent of the utility's recovery of its investment in the cancelled nuclear plant. Based on its finding that its July 2, 1980 decision was imprudent at the time, it concluded that all expenditures after July 2, 1980 were imprudent and, therefore, the Commission disallowed recovery of those expenditures.

On review, the Michigan Appeals Court explicitly stated that its review was of the reasonableness of the PSC's decision—not whether there is any reasonable person who would have concluded that the utility acted prudently. Ultimately, the court found sufficient evidence to support the PSC's finding of imprudence from July 2, 1980 and complete disallowance of those costs.

In *Appeal of Conservation of Law Foundation of New England, Inc.*, 507 A.2d 652, 127 N.H. 606 (N.H. 1986), the New Hampshire Supreme Court reviewed a decision on appeal taken from an order of the Public Utilities Commission authorizing the electric utility to issue and sell bonds to finance completion of the first unit of a planned 2-unit nuclear power facility. While a prudence inquiry was not central to this case, the Court explained the importance of prudence, "which essentially applies an analogue of the common-law negligence standard for determining whether to exclude value from rate base," as a principle that serves to place appropriate limits on adjustments to rate base. Id. at 674 (internal cites omitted). As the Court explained:

> While the scope of the prudence principle is by no means clear, . . . it at least requires the exclusion from rate base of costs that should have been foreseen as wasteful. . . . If the entire investment in a given asset was foreseeably wasteful, the entire investment must be excluded; if only some of the constituent costs attributable to a given asset were foreseeably wasteful, the value for rate base purposed of the investment in this asset must be reduced accordingly.

Id. (Emphasis supplied).

In *In re Kansas City Power & Light Co.,* 1980 WL 642585, 38 P.U.R.4th 1 (Mo. P.S.C. 1980), the Missouri Public Service Commission observed that the Legislature had given it general supervisory powers over utilities and, among those powers, was the power to require utilities to provide adequate service at reasonable rates. The Commission found that imprudent management caused excess capacity to be excluded from rate base, among other things, because management knew there would be excess capacity when the plant was completed and the company sold capacity at a loss to non-jurisdictional customers, without regard to the costs such sales would impose on its ratepayers.

The Commission determined that the company's actions fell short of rational planning and management prudence. Consequently, the Commission found that the company had not satisfied its burden of proof as to the reasonableness of its request to include the plant in its rate base as well as the associated transmission line and recent additions to the substation made to accommodate such 345-kv line, or any operating and maintenance expenses attributable to the resource. The entire cost of the plant was disallowed with the possibility that need could be shown at a later time.

See also *Indiana-American Water Co., Inc. v. Indiana Office of Utility Consumer Counselor,* 844 N.E.2d 106, 116 (Ind. Ct. App. 2006) ("While the utility may incur any amount of operating expenses it chooses, the Commission is invested with broad discretion to disallow for ratemaking purposes any excessive or imprudent expenditures."); *Pennsylvania Power & Light Co. v. Pennsylvania Pub. Util. Comm'n,* 101 Pa. Comm. Ct. 370, 516 A.2d 426, 430 (Pa. Comm. Ct. 1986) (adjustments to a utility's rate base required exclusion of "a unit found to be a result of managerial misconduct.")

As is evident from the above cursory survey, there is clear support for a complete

disallowance of capital expenditure costs of Four Corners and its associated expenses.

2. Explicit Admission that Four Corners is Uneconomic and Therefore Deserving of Removal from Rate Base

Mr. Fallgren testifies that, "the overall twenty-year savings to customer[s] on a net present value basis is estimated to range from $30 million to $300 million."[130] (citing, Phillips Direct, at 3.) This is an explicit admission that Four Corners is uneconomic for ratepayers. "The failure to reasonably consider alternatives was a fundamental flaw in PNM's decision-making process." *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012, ¶¶ 32, 444 P.3d 460 (N.M. 2019). In addition to the exclusion of capital expenditure costs, as part of the remedy for PNM's imprudence, the Commission should exclude the FCPP resource from rate base:

> [W]hether the Commission should consider the financial effects of a prudence disallowance is questionable. A used and useful disallowance may be appropriate even if a utility is prudent. And under the circumstances of a used and useful test, the Commission should balance the interests of shareholders and ratepayers and determine just and reasonable rates that are in the public interest. In addressing the interests, the Commission may appropriately consider financial effects on the utility. A disallowance due to imprudence is, however, quite different; and to consider financial harm in determining a disallowance founded on the utility being imprudent would, in essence, be rewarding a utility for its imprudent acts.
>
> However, the disallowances of costs from PNM's revenue requirement in this case, as a result of the findings of imprudence, are not necessarily permanent disallowances. PNM in its next base rate case filing can attempt to show that the PV repurchase and lease extensions are the most cost effective resources among available alternatives to meet customers' needs at that time. PNM did not attempt to make that showing in this case. In PNM's next base rate case, the PRC will consider any evidence and arguments submitted as to what type of resources are needed and represent the most cost effective alternatives at that time. At a minimum, any such evidence presented by PNM shall include the average cost per kWh of each option considered.
>
> Because PNM's decisions to extend the five PV leases and purchase the 64.1 MW of

[130] PNM Exhibit 5, Fallgren Supplemental at p. 18, *citing*, Phillips Direct, at 3.

> PV2 were not prudent, it is not necessary to address whether these PV capacities are used and useful, whether PNM's request for an acquisition adjustment should be approved, or the NBV of the 64.1 MW.

Corrected Recommended Decision (Aug. 15, 2016) in NM PRC Case No. 15-00261-UT, at 110-111.

"Absent the creation of such a regulatory liability, PNM will continue to recover through rates the costs of [FCPP] until those costs are removed from PNM's revenue requirement in PNM's next general rate case."[131] New Energy Economy requests that if in its Final Order the Commission agrees to remove FCPP from rate base, that it create a reverse deferral account for any costs associated with FCPP from that date to the date of the Final Order in PNM's next rate case.[132] This would assure that the interests of investors and ratepayers are balanced.

X. How to Address the Four Buckets in PNM Baker's Testimony (Commission Issue # 4):

PNM Exhibit 11, Baker Supplemental p. 2.

PNM Table TSB-1 (3-15-21 Supplemental)			
FCPP Capital Investments			
(in millions)			
	Capital Investment	Estimated 2024 NBV	ETA Reference
Investments made as of 6/30/2016	$ 184.1	$ 61.2	Section 2(H)(2)(c)
Investment made between 7/1/16 and 12/31/18	131.3	118.0	Section 2(H)(2)(c)
Investment made between 1/1/19 and 6/30/20	23.0	20.8	Section 2(H)(2)(d)
Projected Investments made between 7/1/20 and 12/31/24	73.0	70.5	Section 2(H)(2)(d)
Total FCPP Investments		270.5	
Remove Projected ARC Asset NBV at 12/31/24		(3.6)	Section 2(H)(2)(a)
Add: CWIP Balance at 12/31/24		3.4	Section 2(H)(2)(d)
Add: Retail Share FCPP Switchyard Assets Transferred to NTEC		1.0	Section 2(H)(2)(c)
FCPP Estimated 12/31/24 NBV - PNM Table TSB-4		$ 271.3	

[131] 21-00083-UT, *Recommended Decision on Motions to Dismiss*, 7/28/2021, p. 23.
[132] *Id.,* ("The Commission does not need PNM's permission to create a reverse deferral account for any overcollections of the costs of PNM's PVNGS Leased Interests.")

We don't know what the 2021 Estimated NBV is, but here's how NEE believes these costs should be treated:

1. Investments made before 6/30/2016: $61.2M –The amount owing at the time of the Final Order in this case should be balanced between shareholders and ratepayers,[133] and there should be a 50/50 split.[134]
2. Investments made between 7/1/2016 and 6/30/3030 $118 + 20.8 – cap ex between 7/1/16 and 6/30/2020 – these capital expenditure costs resulted from imprudent investments and they should be denied in full.
3. Investments made between 7/1/20 – 12/31/24 - $73M cap ex going forward – if the Commission finds that FCPP should be removed from rate base this cost should be denied in full; if the Commission finds that FCPP should continue to be included in rate base these costs should be decided in next rate case.
4. CWIP Balance – denied in full, imprudent or decided in next rate case.

XI. Harmonizing the Public Utility Act, the ETA, the N.M. Constitution, and Applicable Law (Commission Issues # 3 and 5):

A. The ETA's purpose: Transition from Coal

In determining the scope of the NMPRC's authority, the Court looks to the PUA as a whole. *See*, *State v. N.M. Pub. Util. Comm'n* ("Sandel"), 1999-NMSC-019, ¶13, 127 N.M. 272 (N.M. 1999). The NMPRC has general and exclusive power and jurisdiction to regulate and supervise public utilities with respect to rates and service. NMSA 1978, § 62-6-4 (2003); see e.g., *Plains Elec. Generation & Transmission Co-op., Inc. v. N.M. Pub. Util. Comm'n*, 1998-NMSC-038, 126 N.M. 152; Sections 62-1-2, 62-12-1, 62-6-4. These general powers include the authority

[133] *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, *supra*, 2019-NMSC-012, ¶10, citing, NMSA 1978, § 62-3-1(B)) (2008)
("the Commission must balance the interest of consumers and the interest of investors.")
[134] 13-00390-UT, *Final Order*, December 16, 2015, p. 21 of 27, ("the Certification's recommendation of 50% [split] is reasonable, even generous.")

to issue orders to assure implementation of and compliance with the PUA, to conduct investigations, and conduct necessary hearings in the administration of its authority. NMSA 1978, § 8-8-4(B)(5), (7) (1999); NMSA 1978, § 62-10-2 (1941).

When PNM filed its Emergency Verified Petition of PNM for Writ of Mandamus Request for Emergency Stay and Request for Oral Argument, to the New Mexico Supreme Court, No. S-1-SC-37552, February 27, 2019, it acknowledged that "the NMPRC can assess the prudence of a utility's actions in determining whether to abandon or continue operating a given resource[.]" PNM footnoted this sentence as follows: *See*, NMPRC Case No. 16-00276-UT, *Revised Order Partially Adopting Certification of Stipulation*, ¶ 66 at 23. (reviewing PNM's alleged imprudence in continued participation and investment in the Four Corners Power Plant).

B. PNM's Sale to NTEC Under the Public Utility Act's Abandonment § 62-9-5 and Decision Law under the Commuter Committee Case Fails

PNM bears the burden of proving that it is entitled to abandonment. *PNM v. PSC*, 1991-NMSC-083, ¶ 10. NMSA 1978 Section 62-9-5 provides that the standard for facility abandonment is "whether present and future public convenience and necessity requires continued use of the facility."[135] The Commission has interpreted "public convenience and necessity" as requiring a showing of a ""net benefit to the public."[136]

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[135] *Recommended Decision on Abandonment and Non-Securitized* Costs Case No. 19-00018-UT,, February 21, 2020 p. 26

[136] *Id.*, (citing *Alto Lakes water Corporation*, Recommended Decision, Case No. 07-00398,, February 6, 2008, p. 6, approved in final Order (Feb. 14, 2008); *Re Valle Vista Water Co. Inc.*, Recommended Decision, Case No. 3571,, March 18, 2001, p. 6-7, approved in Final Order (June 19, 2001; *Re Southwestern Public Service Co.*, Corrected Recommended Decision, Case No. 2678,, (Nov. 25, 1996), p. 19-20 approved in Final Order (Jan. 28, 1997), *New Energy Economy, In. v. Pub. Regulation Comm'n*, 2018-NMSC-024, ¶ 14, 416 P.3d 277..

Here, PNM's sale of its FCPP stake to NTEC defeats the purpose of the ETA and runs counter to the public interest by contributing to climate change.[137] PNM witness Fenton stated, "the Energy Transition Act [] establishes the comprehensive framework for PNM's requested approvals in this case."[138] PNM witness Sanchez admitted that the requested abandonment is not consistent with the purpose of the ETA.[139] Ms. Sanchez, worked on the ETA as an advocate for PNM, and stated in her testimony that one of the purposes of the ETA is "to accelerate the removal of coal fired generation [] through securitization.[140] However, under the current abandonment proposal, PNM seeks the benefit of securitization, while also selling its portion of FCPP to NTEC. NTEC will continue to burn coal under its new ownership interest, defeating the ETA's purpose.

The present case is analogous to a recent recommended opinion and order ("ROO") by an Administrative Law Judge for the Arizona Corporation Commission ("ACC") who found the Arizona Public Service Company ("APS") was imprudent in its failure to reevaluate its FCPP investments and perform economic analyses, with regard to SCRs.[141] Here, it appears that PNM exercised the same "willful ignorance" of changing conditions that the ACC found in its ROO regarding APS's imprudence.

In deciding whether the abandonment of utility plant results in a net public benefit under Section 62-9-5, the NMPRC also consistently applies the four factors used in *Commuters'*

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[137] The Hearing Examiner in Case No. 20-00222-UT recently took administrative notice of climate change. *See Order Granting Joint Motion to Take Administrative Notice of Climate Change, it Causes and its Likely Consequences*, Case No. 20-00222, June 21, 2021.
[138] PNM Exhibit 2, Direct Testimony of Mark Fenton, January 8, 2021, p. 7.
[139] TR., September 2, 2021, (Sanchez) p. 705.
[140] TR., September 2, 2021, (Sanchez) pp. 701-703.
[141] Docket No. E-01345A-19-0236 (Ariz. Corp. Comm'n)) p. 114, in Dropbox as NEE Exhibit 14.

Committee v. Penn. Pub. Util. Comm'n., 88 A.2d 420, 424 (Pa. Super. Ct. 1952).[142] These factors have been upheld by the New Mexico Supreme Court. *PNM v. PSC*, 1991-NMSC-083, ¶¶ 10-12. The *Commuters' Committee* factors are: (1) the extent of the carrier's loss on the particular branch or portion of the service and the relation of that loss to the carrier's operations as a whole; (2) the use of the service by the public and the prospects for future use; (3) balancing of the carrier's loss with the inconvenience and hardship to the public upon discontinuance of service; and (4) the availability and adequacy of substitute service. *Commuters' Comm.,* 88 A.2d at 424.

PNM would suffer no harm if the Commission does not approve its application for abandonment. Therefore, the FCPP abandonment does not meet the first *Commuters' Committee* factor. PNM's witness Mark Fenton stated that the first factor "is not directly applicable to the abandonment of FCPP [because] [t]he plant currently being used to serve customers and has been in rate base for more than fifty years."[143] However, as Staff witness LaSalle points out, "this factor is relevant in this case[.][144] NEE agrees that factor number one is applicable. PNM witness Phillips testified that there under the various scenarios he ran "the illustrative portfolios [for replacement power] above are all designed to meet the increasing resource adequacy requirements of a highly renewable and decarbonizing system as well as continuing to meet or exceeding all Energy Transition Act requirements."[145] While NEE believes that there will be replacement resources that will meet or increase resource adequacy requirements to benefit "operations as a whole", this is the first abandonment case that NEE is aware of that has not included actual

[142] *See e.g. Recommended Decision on Abandonment and Non-Securitized* Costs Case No. 19-00018-UT, February 21, 2020 p. 26.
[143] PNM Exhibit 2 Direct Testimony of Mark Fenton, January 8, 2021, p. 13.
[144] Staff Exhibit 1, Direct Testimony of Eli LaSalle, July 12, 2021, p. 7.
[145] PNM Exhibit 9 Direct Testimony of Nicholas Phillips, p. 28.

replacement power packages for the Commission's review; *See*, Section, XV below at pp. 83-86. This we infer is because PNM was rushed to apply for abandonment because of the Iberdrola/Avangrid merger.

Although the public currently uses FCPP, its prospects for future use are limited. At most, it will be in operation through 2031. However, it is likely that FCPP will close before then.[146] Therefore, Factor 2 does not weigh in favor of this abandonment proposal, because the current proposal could extend the life of the plant through the sale to NTEC. As Dr. Fisher stated in his testimony, "I believe the Commission's acceptance of this Application absolutely completely precludes any potential that Four Corners could shut down prior to, in this case, 2027 and likely the end of the CSA." On the other hand, if the Commission denies this proposed abandonment, the plant would likely close sooner than the end of the CSA. Dr. Fisher testified, "To make the supposition that you're putting forward [PNM remaining in FCPP until a 2031 retirement] we would have to believe several relatively absurd truths."[147] Dr. Fisher's opinion was that PNM and the other owners of FCPP operating the plant until 2031 "does not comport with any reasonable form of reality."[148]

Balancing the carrier's loss with the hardship to the public under Factor 3 supports rejecting the proposed abandonment. If the Commission does not approve PNM's abandonment proposal, PNM will not have a loss, and the status quo will remain. Additionally, Sierra Club Witness Fisher explained that rejecting this proposal would allow PNM to seek a different abandonment plan in the future, that would likely be part of an agreement by the current owners

[146] TR., September 9, 2021, Fisher, pp. 1696-1697.
[147] *Id.* p. 1697.
[148] *Id*.

to close FCPP earlier than it would otherwise.[149] However, if the Commission does approve the proposed abandonment, ratepayers will be stuck paying for the securitization of PNM's undepreciated assets, while NTEC continues to burn coal at FCPP after its purchase of PNM's interest in the plant.

Under the fourth factor, there is adequate and available substitute service. In its abandonment of 114 MW at the Palo Verde Nuclear Generating Station, PNM replaced nuclear power with available renewables at a lower cost.[150] NEE believes that there will be adequate replacement resources that compare more favorably on cost, reliability, and environmental standards than FCPP, this is the first abandonment case that NEE is aware of that has not included actual replacement power packages for the Commission's review; *See*, Section, XV below at pp. 83-86.

Here, the abandonment will not provide a net benefit to the public. If the Commission approves the abandonment and securitization of PNM's FCPP undepreciated assets, coal will still burn at the plant under NTEC's ownership, and New Mexico ratepayers may be stuck paying for PNM's imprudent investment in the plant. Sierra Club witness Fisher testified about this at the formal hearing and stated "I think there is actually a substantial benefit to ratepayers for staying in Four Corners, and then exiting at another time when the entire plant can be retired."[151] Dr. Fisher also testified that the FCPP abandonment would not provide a net benefit to ratepayers[152] and explained that rejecting PNM's abandonment application "allows Four Corners to be retired at a

[149] TR., September 9, 2021, Fisher, pp. 1692-1701.
[150] WRA Exhibit 1, Brendon Baatz Direct Testimony, pp. 6-14 and Exhibit BJB-2; NEE Exhibit 5 and 5A, Direct Testimony of Christopher Sandberg, pp. 20-21, and Exhibit CKS-3.
[151] TR., September 9, 2021 (Fisher) p. 1692.
[152] *Id.* p. 1694.

much earlier date by all of the co-owners, or for PNM to pursue another abandonment that does not result in all of these awful things happening to Four Corners."[153]

PNM's Amended Application and supporting 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 CO_{2-} emitting electric generation plant to NTEC will result in a "net public benefit" or is in the public interest. As discussed herein preventing the reduction or cessation of coal burning **is** a net detriment to the public interest. (See also, Case No. 19-00195-UT, *Recommended Decision on Replacement Resources, Part II*, 6/24/2020, pp. 82-86, which noted, "the problem of climate change and the role of CO_2 emissions from electric generating resources as major contributors to the climate change problem.")

The Commission previously repeatedly cited the above-quoted legislative directive to the Commission in the ETA, codified in the REA as NMSA § 62-16-4 B(4) (2019), in Case No. 19-00349-UT, where it assessed and denied a post-ETA request by El Paso Electric Co. ("EPE") for approval of a new natural gas-fired resource with a useful life that would extend beyond the January 1, 2045 "zero carbon resources" requirement standard in NMSA § 62-16-4.A(6) (2019). Case No. 19-00349-UT, *Recommended Decision*, pp. 46 (n.100), 62 (ns.145 & 146) & 77, adopted by *Final Order*.

[153] *Id*. p. 1701.

C. PNM's Amended Application requests that the Commission act contrary to the New Mexico Renewable Energy Act ("REA"), NMSA § 62-16-4.B(4) and §62-16-4(D)(2019), as amended by the Energy Transition Act, 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 FCPP ownership interest to NTEC, as a means of complying with the renewable portfolio standard ("RPS") requirements

NMSA § 62-16.4.B(4) (2019), provides 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." NMSA § 62-16-4(D) (2019), provides that:

> 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.

(Emphasis supplied.)

PNM's Amended Application and supporting 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 CO_2- emitting electric generation plant to NTEC will result in a "net public benefit" or is in the public interest. As discussed herein, preventing the reduction or cessation of coal burning **is** a net detriment to the public interest.

Due to the clear and unambiguous legislative directive to the Commission in NMSA §§ 62-16.4.B(4) and 62-16-4(D) (2019) and PNM's prior participation in the drafting of and support

for passage of the ETA, PNM knew that its Amended Application asks the Commission to approve a sale of its existing FCPP generation resource that the Commission is expressly prohibited by that statute from approving. PNM cannot rely on the parts of the ETA it likes, for instance, deferral of the filing of replacement resource portfolio, (§ 62-18-4(D), Amended Application, p. 4, and timeframe, and Commission decision on the consolidated requests within the nine-month period beginning March 15, 2021, (§§ 62-18-5(A) and (C), Amended Application, p. 5, but then dismiss the ETA's prohibitions and its clear intent for the reductions of emissions overall, including the resale of coal to other entities, NMSA §§ 62-16-4.B(4) and 62-16-4(D)(2019). For that reason, Joint Movants also request that the Commission find in its order dismissing PNM's Amended Application that none of the costs incurred by PNM in connection with its original Application, Amended Application, or proposed sale of the FCPP to NTEC were prudent or reasonable for purposes of any PNM request to recover those costs from its customers in any future rate case.

1. Seasonal Operations Agreement Does Not Decrease Carbon Emissions But Ensure the Continuation of Coal Burning

PNM knew that they had a problem in the Four Corners case: how were they going to turn their sale of Four Corners to NTEC that will guarantee the continued burning of coal into a "net benefit". PNM came up with an idea that at first blush looks good: PNM entered into a Seasonal Operations Agreement with the other owners at Four Corners.

This is PNM's testimony regarding the Seasonal Operations Agreement:

Under seasonal operations, only a single FCPP unit will operate on a year-round basis, but both units 4 and 5 will operate during the summer peak season from June through October when customer needs are highest. Based on these operational characteristics, it is estimated that carbon emissions will be reduced by 20 to 25 percent.[154]

Who wouldn't want 20-25% reduction in emissions? No one. PNM's Seasonal Operations Agreement however is not as good as it appears, and may in fact be a net public detriment. According to WRA expert Baatz:

> [T]he effect of the Seasonal Operations Agreement is that it extends the life of this power plant. So as the Operating Agreement currently exists, plant owners can vote unanimously to close the plant, which starts a 24-month clock to end the coal contract or the coal supply agreement without penalty. If the transfer agreement is approved as drafted, and PNM transfers this plant to NTEC on January 1, 2025, then let's just say hypothetically that day the owners vote to close Four Corners, then the earliest it could close without penalty would be January 1, 2027.
> But if the Seasonal Operations Agreement is approved with the provisions that we have on the table now, that 24-month clock that I just spoke of turns into a 48-month clock.
> So the owners decide on January 1,2025 to close Four Corners and vote unanimously to do so, the plant could close on January 1,2027, but then NTEC would need a $200 million payment. Then if you wait another year, it turns into a $100 million payment, and in my opinion, that's going to keep the plant open longer, which would -- it would really kind of peel back the benefit of the Seasonal Operations Agreement if the plant operated another year or two because of it. And then there is the question of who pays the $200 million? Would it be APS ratepayers? Would it be TEP ratepayers? I do quite a bit of work in Arizona, and I just don't know how that is going to go over with the Arizona Commission.[155]

If the language in the Seasonal Operations Agreement, and associated updates to those agreements, that extends the life of the Four Corners plant, is not struck by the Commission then WRA withdraws its support for abandonment.[156] The $100 or $200 million payment to NTEC

[154] PNM Rebuttal Fallgren, pp. 27-28. (footnotes omitted.)
[155] TR., 9/7/2021, Baatz, pp. 1141-1142.
[156] TR., 9/7/2021, Baatz, pp. 1165-1166.

will make closure more difficult.[157]

Expert witness Dr. Fisher elaborates further:

> So from PNM's perspective, actually the default, imprudent as it is, is actually a better operations outcome than the Seasonal agreement. As I've both stated in my testimony, and as you're sort of implying here, while Four Corners itself may run slightly less during that time period under the Seasonal Operations Agreement as it stands, PNM will actually have an obligation to operate at an equivalent of a 100 percent capacity factor during two full seasons of the year, and substantially more than it would today.[158]

Consistent with the spirit and intent of the ETA, it is more likely that FCPP will close, especially given the recent recommended opinion and order in Arizona, Docket No. E-01345A-19-0236 (Ariz. Corp. Comm'n), declaring that APS, the plant operator's investment in pollution controls was imprudent and denying cost recovery for those expenditures, if abandonment and the sale to NTEC were denied.

D. PNM Has Not Met the Financing Order Burden Of Proof under the ETA – the Case Is Rejected and Sent Back to the Utility – NEE's Recommendation on PNM's Abandonment Application of FCPP and Issuance of A Securitized Financing Pursuant to the ETA (Commission Issue # 1 and 9)

As the Hearing Examiners found in their Recommended Decision on PNM's Request for Issuance of a Financing Order, on February 21, 2020, NM PRC Case No. 19-00018-UT: "The ETA establishes mechanisms to facilitate the abandonment of PNM's interests in two coal-fired generating plants – the remaining Units 1 and 4 of the San Juan Generating Station in 2022 and PNM's interests in the Four Corners Generating Station in 2031."[159]

[157] TR., 9/7/2021, Baatz, pp. 1166-1167.
[158] TR., 9/9/2021, Fisher, pp. 1705-1706.
[159] The San Juan and Four Corners stations are the only facilities in New Mexico that satisfy the ETA's definition of "qualifying generating facility." NMSA 1978, § 62-18-2(S).).

PNM claims that there is a non-discretionary duty to apply the ETA.[160]If we agree arguendo,[161] the PNM Application fails; here is why:

According to NMSA §62-18-5 E:

> The commission shall issue a financing order approving the application if the commission finds that the qualifying utility's application for the financing order complies with the requirements of Section 4 of the Energy Transition Act. **If the commission finds that a qualifying utility's application does not comply with Section 4 of the Energy Transition Act, the commission shall advise the qualifying utility of any changes necessary to comply with that section and provide the applicant an opportunity to amend the application to make such changes.** Upon those changes being made, the commission shall issue a financing order approving the application.

(Emphasis supplied.)

According to the relevant part of NMSA §62-18-4A:

> A qualifying utility that is abandoning a qualifying generating facility may apply to the commission for a financing order pursuant to this section to recover all of its energy transition costs through the issuance of energy transition bonds. **To obtain a financing order, a qualifying utility shall obtain approval to abandon a qualifying generating facility pursuant to Section 62-9-5 NMSA 1978.** The application for the financing order may be filed as part of the application for approval to abandon a qualifying generating facility.

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[160] TR., 9-2-2021, Sanchez, pp. 672- 673: ("the Supreme Court has already said that there is a non-discretionary duty to apply the ETA to an Application like this. The ETA further says that if there is a denial of the financing Application, that there will be an opportunity to go back and cure whatever the deficiency is and be able to reconsider that. So it's complicated.") *State ex rel Egolf v. New Mexico Public Regulation Commission*, 2020-NMSC-018, 476 P.3d 896, ¶¶20, 31-33.

[161] In *State ex rel Egolf v. New Mexico Public Regulation Commission*, 2020-NMSC-018, 476 P.3d 896, ¶20 it upheld the vested rights of parties in an administrative context but denied that that the Commission had the authority to initiate a case, vacated the case and therefore it was not "pending." Article IV, Section 34 provides: "No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case." The intent of this constitutional provision "is to prevent legislative interference with matters of evidence and procedure in cases that are in the process or course of litigation in the various courts of the state[.]" *Stockard v. Hamilton,* 1919-NMSC-018, ¶ 9, 25 N.M. 240, 180 P. 294.
A lawfully commenced proceeding before an administrative tribunal is a "pending case." *See US West Commc'ns, Inc., v. Pub. Regulation Comm'n*, 1999-NMSC-024, ¶ 13, 127 N.M. 375, 981 P.2d 789.

(Emphasis supplied.)

Because PNM has not met its burden of proof under Section 62-9-5 NMSA 1978 that abandonment is a net public benefit, see above, PNM's application must fail under the ETA. The language in §62-18-5 E is clear that if PNM's "application does not comply with **Section 4** of the Energy Transition Act" it must be returned to the utility with explanation. (Emphasis supplied.) "Section 4" means all of Section 4, A and B. Both. *Cf. Burroughs v. Bd. of Cty. Comm'rs of Cty. of Bernalillo,* 1975-NMSC-051, ¶ 14, 88 N.M. 303, 540 P.2d 233 (stating that this Court "will not read into a statute or ordinance language which is not there, particularly if it makes sense as written"). To interpret the statute otherwise would read into the statute a considerable amount of authority that the Legislature did not provide. *See*, *Blancett v. Dial Oil Co.,* 2008-NMSC-011, ¶ 11, 143 N.M. 368, 176 P.3d 1100 ("When a statute's meaning is clear from its plain language, we must apply the statute as written by the Legislature.").

XII. N.M. Constitution Art. II Section 19 forbids impairing the obligations of and Art. IV Section 34 forbids legislative interference with ratepayers' vested rights (Commission Issues # 2 and 4):

The ETA cannot nullify a stipulated settlement relied upon and upheld by this tribunal because it would constitute legislative interference with ratepayers' vested rights, or alter a

pending case, in violation of Art. IV §34.[162] Art. IV, §34 applies to administrative proceedings.[163] The ETA also cannot ,[164] or it would impair a contractual settlement in violation of Art. II §19. To hold otherwise would usurp the judicial function. *Thorpe v. King*, 248 Ind. 283, 285, 227 N.E.2d 169, 170 (1967).

PNM ratepayers have a vested right in the FCPP prudence review agreed to in the Modified Stipulation in which PNM was a signatory;[165] this was established before the ETA became law.[166] The contractual (settlement) agreement,[167] is a determination that requires the PRC to hold ratepayers harmless for PNM's imprudence in FCPP investments[168] and to fashion

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[162] *Stockard v. Hamilton,* 1919-NMSC-018, ¶9, 25 N.M. 240, 242-245, 180 P. 294, 295; quoted with approval in *US West Commc'ns, Inc., v. Pub. Regulation Comm'n*, 1999-NMSC- 024, ¶13, 127 N.M. 375, 379, 981 P.2d 789, 793. *See, also,* 19-00159-UT, *Recommended Decision*, 12/2/2019, p. 42.

[163] *See US West Commc'ns, Inc., v. Pub. Regulation Comm'n*,1999-NMSC-024, ¶13, 127 N.M. 375, 379, 981 P.2d 789, 793 (holding that Art. IV, §34 applies to administrative proceedings); *Edwards v. City of Clovis*, 1980-NMSC-039, ¶7, 94 N.M. 136. ("City cannot, by enacting an ordinance, affect or change what would be the result of a pending action before the City Council or Commission or the result of a pending case in court[.]") *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, *supra*, 2019-NMSC-012, ¶88.

[164] *Stockard v. Hamilton,* 1919-NMSC-018, ¶9, 25 N.M. 240, 242-245, 180 P. 294, 295; quoted with approval in *U.S. West Communications, Inc. v. N.M. Pub. Regulation Commission,* 1999-NMSC- 024, ¶13, 127 N.M. 375, 379, 981 P.2d 789, 793. *See, also,* 19-00159-UT, *Recommended Decision*, 12/2/2019, p. 42.

[165] NEE Exhibit 5, Direct Testimony of Christopher K. Sandberg, p. 42. ("PNM committed to a prudence review when it became a signatory to the Modified Stipulation in 16-000276-UT. *Joint Notice by All Signatories of Acceptance of Commission's Modifications to Revised Stipulation*, Case No. 16-00276-UT, 1/19/2018, at 1. That Notice accepted all of the Commission's determinations its *Revised Order Partially Adopting Certification of Stipulation*, including the Commission's direction that a finding on the issue of PNM's prudence in its continued participation and investment in FCPP would only be deferred until PNM's next rate filing. *Revised Order at* 23 (¶66.)")

[166] N.M. Const. Art. IV, §34.

[167] *Jones v. United Minerals Corp*., 1979-NMSC-103, 93 N.M. 706, 604 P.2d 1240 (settlement agreement is an enforceable contract).

[168] *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, *supra*, 2019-NMSC-012, ¶¶ 40, 42, 78-89 (At ¶ 86: "Such a decision [to deny PNM full recovery for imprudently incurred balanced draft cost] is squarely within the authority of the Commission under Section

an appropriate remedy. The decision by the PRC to address in future how to protect ratepayers from PNM's imprudence in extending the life of FCPP and associated investments was included (multiple times) in the Modified Stipulation, and the specific agreement by PNM provides adequate notice of potential disallowances.

When the New Mexico Supreme Court affirmed PRC's denial of cost recovery for balanced draft expenditures it held: "PNM's argument ignores that it agreed in Case No. 13-00390-UT that it would bear the burden of affirmatively demonstrating the prudence of the balance draft costs in its general rate case. Given this prior stipulation …it was lawful for the Commission to reject PNM's argument that the balanced draft costs were entitled to a presumption of prudence."). *PNM v. NMPRC*, 2019-NMSC-012, ¶88. That finding concerned the disallowance of one capital expenditure (more than $50M of imprudent expenses).

Essentially what the New Mexico Supreme Court was saying was that PNM had been placed on notice in the previous case that it would bear the burden of affirmatively demonstrating prudence because it had agreed to do just that. In 16-00276-UT, just like in 13-00390-UT, PNM also had agreed that the prudence of "PNM's continued use of FCPP should be reserved and litigated in a separate future hearing." *Revised Order Partially Adopting Certification of Stipulation* (Jan. 10, 2018) ¶¶ 65, p. 22.

The Commission explicitly carved out this issue of prudence for future consideration. This issue was not tucked away in some obscure footnote; PNM was aware from the time that the Contested Hearing was set in 16-00276-UT that prudence was **the** issue in the case, the main

62-6-4(A) to regulate the rates of public utilities and the obligation of the Commission under Section 62-8-1 to ensure that those rates are just and reasonable.")

topic in the Certification of Stipulation, and discussed throughout the subsequent orders. Before the Case was closed there was a 16-00276-UT filing specifically entitled: ***Notice by All Signatories of Acceptance of Commission's Modifications to Revised Stipulation***, Jan. 19, 2018.

The ETA should not be read to eliminate New Mexico Constitutional protections, under Art. IV §34 and Art. II §19, including prior agreements and undoing PRC and Supreme Court decisions. The ETA must be harmonized with the New Mexico Constitution, the PUA and precedent and it can. If applied as PNM argues, then the ETA would have to ignore and supersede contractual agreements, the NM Constitution, the legislature's and court's insistence that utility investments be prudent and ratepayers are to be protected from wasteful expenditures. To do otherwise would trample on consumer protections: "The prudent investment theory provides that ratepayers are not to be charged for negligent, wasteful or improvident expenditures, or for the cost of management decisions which are not made in good faith." *PNM v. NMPRC*, 2019-NMSC-012, supra, ¶¶21, 29-32.

New Energy Economy's interpretation is consistent with the Hearing Examiners' finding, approved by the Commission, that "The ETA preserves PNM's ability to recover certain costs that the Commission has or appears to have previously determined to have been reasonable and prudently incurred." *See, In the Matter of Public Service Company of New Mexico's Abandonment of San Juan Generating Station Units 1 and 4*, Case No. 19-00018-UT, *Recommended Decision on Financing Order* (Feb. 21, 2020), at 94, *Adopted by Final Order on Request for Issuance of a Financing Order* (Apr. 1, 2020).

XIII. Applicable Law: Estoppel and Waiver (Commission Issues # 2 and 7):

On January 19, 2018, PNM, along with 13 other signatories, explicitly accepted the terms of a Revised Stipulation in Case 16-00276-UT ("the Revised Stipulation"). *Joint Notice by All Signatories of Acceptance of Commission's Modifications to Revised Stipulation*, Case No. 16-00276-UT, 1/19/2018.

By accepting the Revised Stipulation in *toto*, PNM assented to an essential provision of the Stipulation: that the Commission would defer "for the limited duration of the period that the revised Stipulation will be in effect, a finding on the issue of PNM's prudence in its continued participation and investment in FCPP until PNM's next rate filing." *Revised Order Partially Adopting Certification of Stipulation*, Case No. 16-00276-UT, 1/10/2018, p. 23, ¶ 66, ("the Revised Order").

Nearly four years later, PNM comes before the PRC requesting, among other things, that it issue a financing order under the ETA to allow it to recover, on a securitized basis, the costs of FCPP abandonment. Those costs were temporarily set and incorporated into rates by agreement of the signatories and the PRC in the Revised Final Order, rates to be effective as of February 1, 2018. The Revised Order made no finding that the costs of undepreciated FCPP investments included in rates were prudent or that FCPP itself was a prudent investment. Rather, the Revised Order provided for a future prudence inquiry (in the next rate case) to consider the prudence of not only those cost allowances but PNM's initial investment in FCPP. While the ratepayers are still waiting for this next rate case (anticipated but not realized in 2019, or 2020 but instead filed a decoupling case) and concomitant prudence review, PNM has attempted an end run around the legal requirements of the Revised Order so as to win PRC approval to unload its uneconomic, polluting asset and avoid the consequences of an expected unfavorable imprudence determination.

PNM should not be allowed to recover its FCPP abandonment costs and other undepreciated investments, set by the 2016 rate case and included in rates as of January 1, 2019, without adhering to the entire Revised Order—which requires a prudence determination that could result in complete disallowance. NEE argues that this is no more than what PNM explicitly agreed to when it signed its Acceptance of Commission's Modifications to Revised Stipulation. PNM responds that the PRC should accept the costs set by the Commission in 2016 and "should reject efforts to adjust PNM's estimated undepreciated investments in FCPP that were in rates prior to January 1, 2019 based on alleged imprudence." Consolidated Response of Public Service Company of New Mexico, Feb. 18, 2021, p. 22.

The *Revised Order Partially Adopting Certification of Stipulation*, which set aside the PRC's previous determination that PNM's investment in FCPP was imprudent, deferred a prudence review, and set rates for 2018, evolved from concessions and compromises. The PRC underscored that "the Stipulation and its benefits should be viewed as a whole and within the context of the Commission's longstanding policies favoring settlement of cases." *Revised Order*, ¶ 65, p. 22. Thus, the Revised Order must be adhered to in the same way it was created: as "whole cloth" and not picked apart by its strands, as PNM wishes to do, choosing only to abide by those strands that serve it purposes. The imprudence issue affected the ultimate concessions and compromises made; the allowances allowed into rates by the Revised Order reflect such bargained-for concessions. Such was recognized by the PRC when it pointed out that "in light of the potential consequences of a finding of imprudence, it appears that this concern drove many of the other concessions in the Revised Stipulation, including concessions in the stipulated rate design proposal." *Revised Order*, ¶ 51, pp. 17-18. Two signatories (WRA/CCAE) to the Revised Stipulation similarly noted that "the Signatories were well aware of the issue [imprudence], and

bargained for a settlement that did not include any findings regarding the prudence of the plant, and which did not foreclose further litigation on the issue." *Revised Order*, ¶ 52, p. 18.

Moreover, the PRC acknowledged that the benefits to ratepayers of the Revised Stipulation were such that deferring a prudence inquiry made sense. NEE, for one, agreed to waive its rights of appeal of the Revised Order based on the PRC's assurance that a prudence inquiry would only be delayed—not denied. Similarly, other signatories relied on the deferral provision, understanding that the PRC had essentially promised that PNM would ultimately have to address and defend the prudence of its FCPP investment.

The Commission justified the deferral provision of the Revised Stipulation:

> [T]he benefits to ratepayers under the Revised Stipulation are so significant that the Commission is justified in deferring, for the limited duration … that the revised Stipulation will be in effect, a finding on the issue of PNM's prudence in its continued participation and investment in FCPP until PNM's next rate filing. Deferring such ruling will permit consideration of the issue with the full participation of all parties . . . while also permit[ing] a more full opportunity for the Commission to consider the necessity and scope of any remedy in light of PNM's alleged imprudence . . .. In the subsequent proceeding, administrative notice will be taken of the evidence on the issue of prudence admitted in the current proceeding.

Revised Order, ¶ 66, p. 23.

Moreover, while the PRC stated that the Signatories recognized the "significant" benefit to ratepayers of agreeing to the Revised Stipulation, it was the "magnitude of the potential benefit to PNM of deferring the issue of PNM's FCPP prudence" that led to the other modifications of the terms of the Revised Stipulation "to balance the interests of ratepayers and the utility." Id. at ¶¶ 66, 67.

Thus, as is evident, the antecedents to this present litigation provide the clearest window into the intentions and understandings of the parties' motivations which led to the ultimate acceptance of the Revised Stipulation and the Commission's Revised Order adopting the Revised

Stipulation. The PRC intended this Stipulation to be of "whole cloth," consisting of intertwined provisions that finely balanced the interests of the parties, the ratepayers, and the utility. In calculating the rates set by the Revised Order, the PRC specifically noted that PNM received a maximum benefit through deferring the prudence review. *Id.* at ¶ 67.

PNM waived any claim to recover imprudent costs through securitization or otherwise when it accepted the modifications to the Revised Stipulation. Parties to an approved stipulation, and the Commission, have vested rights pursuant to that agreement, and can enforce the terms of an approved stipulation. *Qwest v. NMPRC*, 2006-NMSC-042 ¶21, 140 N.M. 440, 143 P.3d 478 (N.M. 2006) (citing Public Regulatory Commission Act § 8-8-4(A). 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)."[169]

As is evident from the above discussion, cost recovery provisions evolved and signatories changed position in reliance on the deferral of the imprudence determination, all predicated on an express understanding and expectation that the numbers would be fine-tuned in a later imprudence review. The ratepayers also benefited by the timely settlement of litigation. PNM signed this Revised Stipulation, did not appeal the deferral provision, and agreed to be bound by the terms of the Revised Order. While the PRC did not specify a date certain for a prudence inquiry in PNM's next rate case, it did specify that a prudence determination be made. However, PNM changed the law[170] before its next rate case, counting on ETA provisions to control a

[169] NM PRC Case No. 21-00017-UT, *Response of Western Resource Advocates to the Joint Movants' Motion to Dismiss Application and Supporting Brief and to Sierra Club's Motion for an Order Requiring PNM to file Supplemental Testimony Addressing the Prudence of Four Corners Investments, or in the Alternative, to Dismiss PNM's Application*, February 18, 2021, p. 5, ¶7.
[170] SB 489 (the 'Energy Transition Act' or 'ETA'), Chapter 65, §§ 1 through 36.

utility's abandonment costs. It should be remembered that PNM received a significant benefit when the PRC set aside its acceptance of the Hearing Examiners' imprudence determination; it accepted that undeserved windfall along with the other provisions of the Revised Stipulation. PNM now claims it need only abide by the rate provisions of the Revised Order and not the entire Revised Stipulation.

Aside from an obvious breach of contract principles[171] and commonsense fair play, there are many legal theories in New Mexico that operate to prevent PNM from circumventing its obligations under the Revised Stipulation. The principle of waiver should be applied because once PNM accepted the Revised Stipulation, it waived its right to complain it should not be subjected to a deferred prudence review. After all, PNM knowingly signed the Acceptance of the Revised Stipulation and has acquiesced in its terms since 2016—accepting the rates set forth therein. Waiver can be implied by a course of conduct. *Brown v. Taylor*, 120 N.M. 302, 901 P.2d 720 (N.M. 1995).

Moreover, having gladly accepted the benefits of the Revised Stipulation, PNM should be estopped from contesting the application of provisions that may now be to its detriment. *Sisneroz v. Polanco,* 1999-NMCA-039 ¶ 12, 126 N.M. 779, 975 P.2d 392 (N.M. Ct. App. 1999).

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[171] Because a settlement agreement is a species of contract, we also recognize and give effect to the intersecting 'strong public policy of freedom to contract' that has been enforced in New Mexico. *Udall v. Colonial Penn Ins. Co*., 112 N.M. 123, 126, 812 P.2d 777, 780 (1991) (internal quotation marks and citation omitted). Our courts have consistently enforced clear contractual obligations. *United Props. Ltd.*, 2003-NMCA-140, ¶12, 134 N.M. 725, 82 P.3d 535. *See Nearburg v. Yates Petroleum Corp.*, 1997-NMCA-069, ¶31, 123 N.M. 526, 943 P.2d 560 ("Parties to a contract agree to be bound by its provisions and must accept the burdens of the contract along with the benefits.") *Builders Contract Interiors v. Hi Lo Indust. Inc.*, 2006-NMCA- 053 {8}, 139 N.M. 508, 134 P.3d 795 (N.M. Ct. App, 2006).

The doctrine of judicial estoppel may also apply here. This is a rule which estops a party from playing "fast and loose" with the court during the course of litigation. *Chapman v. Locke*, 63 N.M. 175, 315 P.2d 521 (1957). It is not, however, strictly a question of estoppel. Judicial estoppel simply means that a party is not permitted to maintain inconsistent positions in judicial proceedings. Where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him. Citizens *Bank v. CH Construction*, 89 N.M. 360 (N.M. Ct. App, 1976) (citing *In re Madison* (Appeal of Marron), 32 N.M. 252, 255 P. 630 (1927); *Clay v. Texas-Arizona Motor Freight*, 49 N.M. 157, 159 P.2d 317 (1945); *Ollman v. Huddleston*, 41 N.M. 75, 64 P.2d 97 (1937).

Historically, New Mexico cases applied the doctrine of judicial estoppel in cases involving a single legal proceeding. However, more recent cases suggest that the doctrine has been applied to inconsistent positions taken in separate proceedings. See *Guzman v. Laguna Dev. Corp*., 2009-NMCA-116, ¶¶ 11-13, 147 N.M. 244, 219 P.3d 12 (applying judicial estoppel when a party took a position in its case before the Workers' Compensation Administration that was inconsistent with the position it later took in the district court).

The U.S. Supreme Court decision in *New Hampshire v. Maine*, 532 U.S. 742, 750, 121 S. Ct. 1808, 149 L.Ed.2d 968 (2001), clarified several factors which other courts have typically used to determine when to apply judicial estoppel: (1) a party's later legal position must be clearly inconsistent with its earlier position; (2) the party succeeded in persuading a court to accept that party's earlier position, so that judicial acceptance of an inconsistent position in a later proceeding would create the perception that either the first or the second court was misled; and (3) whether the party seeking to assert an inconsistent position would derive an unfair advantage or impose an

unfair detriment on the opposing party if not estopped. New Hampshire, 532 U.S. at 751, 121 S. Ct. 1808.

Arguably, the elements of judicial estoppel are present in the current case to prevent PNM from now asserting before the PRC that it is not legally subject to a prudence review of the FCPP investment. Having affirmatively agreed to abide by the PRC Revised Order requiring a deferred prudence review, PNM now argues a contrary position: that the PRC lacks authority to conduct an imprudence review as requested by the Responding Parties. Consolidated Response of Public Service Company of New Mexico, Feb. 18, 2021, p. 22 ("[the PRC] could not disallow recovery of these costs based on alleged imprudence that occurred prior to these other investments being made.") The other signatories to the Revised Stipulation, who accepted the Revised Stipulation with the inclusion of the deferred prudence review, are now unfairly prejudiced by PNM's change of position.

Having acquiesced to Commission authority to continue and conclude a prudence review of certain FCPP investments, PNM should now be judicially estopped from challenging the legitimacy of that review – irrespective of an intervening law that provides an opportunity for PNM to pursue a position in contravention of its previous agreement. PNM should not be allowed to play "fast and loose" with the Commission.

XIV. The Timing of PNM's Rate Cases are In Its Control

When this Hearing Examiner determined the scope of this case he found:

[I]n its Order on Motion to Re-open in Case No. 16-00276-UT, the Commission plainly expressed its preference that issues such as whether the ETA may provide an opportunity to consider the prudence of undepreciated FCPP investments including in a financing order should be considered in this case.

> With regard to the scope of the supplemental testimony the Hearing Examiner is ordering PNM to file with the understanding that PNM is not waiving its legal positions in filing such testimony, and in accord with the Commission's Order on Motion to Re-open and the parties' input, the supplemental testimony shall, at a minimum,
>
> 1) address the prudence of all undepreciated investments in the FCPP for which PNM seeks inclusion in a financing order as energy transition costs…
> …
>
> 2) address and defend with particularity the prudence of the FCPP investments for which the Commission deferred the "issue of imprudence" or "potential imprudence" in Case No. 16-00276-UT.
>
> 3) address whether or not the FCPP investments for which the Commission deferred the issue of imprudence, or framed obversely, the determination of prudence, were in PNM's rates after the issuance of the Revised Final Order in Case No. 16-00276-UT and, thus, were being recovered in PNM's rates as of January 1, 2019.

Order on Sufficiency of PNM's Application and Scope of Issues in Proceeding, 2/26/2021, pp. 21-22.

As the Hearing Examiners stated in their *Recommended Decision, Part II, Replacement Resources*, in NM PRC Case No. 19-00195-UT, at p. 168: "PNM's plan for the 2020 rate case appears to have changed, but the facts remains that PNM controls the timing of its base rate increase requests, such that the timing of the recovery of the capacity costs is within PNM's

control."

As another Hearing Examiner remarked in her *Recommended Decision on Motions to Dismiss*, 21-00083-UT, 7/28/2021, p. 23, "PNM admits that it controls the timing of its next rate case. PNM has repeatedly refused to state when it will file its next general rate case." (citations omitted.) The Signatories (and the Commission) believed that the 16-00276-UT rates would be in effect "for the *limited duration* … until PNM's next rate filing." Revised Order, Case No. 16-00276-UT, 1/10/2018, p. 23, ¶ 66. (Emphasis supplied.) Yet, PNM has not filed a rate case for the last five years, potentially because it did not want to face the FCPP prudence review, and instead in 2020 filed a decoupling matter, 20-00121-UT. Given PNM's delay, the Commission was not handcuffed to only take up the issue of FCPP imprudence in a "rate case", for it stated in the *Revised Order,* pp. 22-23 ¶ 65: "Those Signatories propose that the Commission's concerns about the long-term impact of FCPP and the issue of apparent imprudence with respect to PNM's continued use of FCPP should be reserved and litigated in a separate future hearing." The kind of proceeding was less important than that the prudence review occur to protect consumers from long-term excess costs.

XV. Cases when Investor Owned Utilities Filed for Abandonment and Replacement Power

"It is important to note that PNM has not filed for approval of a specific replacement portfolio. Therefore, all of its projections are based on assumptions regarding replacement resources, as well as on other assumptions regarding sales, natural gas prices, wholesale electric

energy prices, carbon emission forecasts, and future capital costs for the FCPP."[172]

Mr. Baatz testified: "From [Mr. Phillip's] table, it is difficult to ascertain exactly what resources PNM assumed would replace the capacity and energy production currently provided by FCPP."[173] Even though PNM acknowledges the continued declining costs of solar, wind and storage,[174] which is positive, it does not mean that PNM won't try to replace FCPP with more fossil fuel resources (gas or hydrogen). It is unprecedented to have an abandonment filing that does not specify the particular resources. The last factor in the Commuters Committee case speaks to this very requirement and as seen below not only has this been PNM's practice, PNM has argued to our Supreme Court that without specific replacement portfolio options for the Commission review it could not adequately meet its burden of proof for abandonment.

- 13-00390-UT, PNM San Juan Abandonment and Replacement Power, December 2013.
- 19-00195-UT, PNM San Juan Abandonment and Replacement Power, July 1, 2019.
- 21-00083-UT, PNM Palo Verde Nuclear Generating Station Abandonment and Replacement Power, April 12, 2021.

In PNM's Emergency Writ to the Supreme Court, No. S-1-SC-37552, 2/27/2019, at p. 16, PNM stated the following:

> "PNM cannot adequately meet its burden of proof under the Commuters' Committee test as part of a March 1 application because the impacts of discontinuance of service are still being developed, and service from SJGS remains warranted unless adequate replacement resources are identified and available. The NMPRC has previously denied abandonment of generation facilities where, as here, a utility could not demonstrate the availability of adequate replacement resources. *See*, Case No. 13-00390-UT, *Certification of Stipulation*, at 121-22 (NMPRC April 8, 2015); *PNM v. PSC*, 1991-NMSC-083, ¶ 10.

[172] NMAG Exhibit 1, Testimony of Andrea Crane, p. 16.
[173] WRA Exhibit 1, Brendon Baatz, Direct Testimony, p.6.
[174] PNM Exhibit 9, Testimony of Nicholas L. Phillips, p. 30. ("PNM has witnessed a trend of declining pricing/costs for renewable energy and battery storage. PNM expects that trend to continue.")

> The Abandonment Order nonetheless requires PNM to file an incomplete application on the basis that deficiencies can be cured through amended or additional applications at later dates. In so ordering, the NMPRC improperly disregards its own rules and precedent. *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)." (footnote omitted.)
>
> Based on past NMPRC standards, PNM cannot file a complete or defensible application for abandonment because PNM does not presently have the necessary information to do so. Although not yet finished, PNM has been diligently pursuing, and continues to diligently pursue, the actions and tasks necessary to present a complete application for SJGS abandonment by updating cost analyses, and identifying and selecting necessary replacement resources to be proposed to the NMPRC. To that end, PNM has been evaluating, with the assistance of an outside consultant, more than 300 bid proposals received for numerous replacement resources and pursuing the studies and evaluations that need to be completed before PNM can provide the NMPRC with reliable estimates and costs related to SJGS abandonment and replacement resources. pp.21-22.
>
> It is not within the NMPRC's purview to try to force PNM to do the impossible. *See Com. Dep't of Envtl. Res. v. Pennsylvania Power Co.,* 461 Pa. 675, 696 (1975). (recognizing that the regulated entity was unable to comply with the agency order and impossibility was a defense to sanctions). Similarly, in the context of civil contempt, the contemnor must have "an ability to comply." *In re Hooker*, 1980-NMSC-109, ¶ 4, 94 N.M. 798. The Abandonment Order and its associated filing requirements are impossible for PNM to adequately comply with through the filing of a complete and defensible application by the set deadline. p. 22.
>
> PNM also must file a case that could be found deficient on its face because it does not demonstrate what replacement resources may be available and does not allow PNM to adequately account for changing energy policies that impact those choices. Because PNM cannot meet its burden of proof and satisfy the requirements for an abandonment application by March 1, PNM faces an unfair and arbitrary regulatory process, and faces the risk of non-compliance with the Order with attendant consequences.
> pp. 24-25.

PNM has explicitly stated that without the company's affirmative production of replacement power scenarios it is "legally impossible" to proceed with abandonment: it cannot present a "complete or defensible application". "PNM cannot meet its burden of proof and satisfy the requirements for an abandonment application." So, it must be true. PNM cannot meet its burden of proof without actual replacement power scenarios that can meet reliability, cost, environmental standards and adequately accommodate the whole of operations. PNM's current

legal position is clearly inconsistent with its earlier position regarding its ability to fulfill its abandonment requirement obligations; therefore, the Commission must deny PNM's abandonment application.

WHEREFORE if PNM had done any reasonable analysis it would have concluded that exiting coal at Four Corners was the best thing for ratepayers' pocketbooks and the environment. If PNM would have exited the Four Corners Power Plant, as it should have, that would have most likely shut down that climate-altering polluting plant. El Paso Electric's exit nearly did.

New Energy Economy requests that this Honorable tribunal re-affirm the imprudent finding against Public Service Company of New Mexico for its life extension and re-investment in Four Corners Power Plant capital expenditures. Further, because PNM invested imprudently, all its capital expenditures, whether for pollution controls or for propping the plant up to actually perform, be denied. The outstanding undepreciated investments as of 2016 should be balanced[175]; no more than a 50/50 split between shareholders and consumers. All the remaining undepreciated investments, whether due to pollution controls because of environmental regulation or performance or reliability measures to help keep the FCPP operational, or "operation and maintenance" should be denied because PNM's life extension and major capital re-investments resulted from imprudence.

What does holding ratepayers harmless mean? The utility's inactions were objectively unreasonable. Therefore, the Commission should require the removal of the uneconomic assets

[175] *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, *supra*, 2019-NMSC-012, ¶10,, citing, NMSA 1978, § 62-3-1(B) (2008))
("the Commission must balance the interest of consumers and the interest of investors.")

from rate base, because as explicitly admitted by PNM, ratepayers are overpaying for these assets compared to other feasible alternatives.

Abandonment in this context does not equate with closure and hence is not in the public interest because the coal will still burn.

Respectfully submitted this 1st day of October, 2021.

New Energy Economy

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BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

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

CERTIFICATE OF SERVICE

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

NEW ENERGY ECONOMY'S POST HEARING BRIEF-IN-CHIEF

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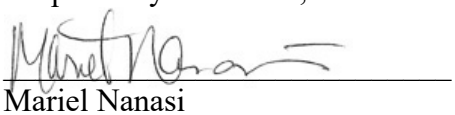
DATED this **1st** day of **October 2021**.

Respectfully submitted,



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