BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF NEW MEXICO FOR REVISION OF ITS RETAIL ELECTRIC RATES PURSUANT TO ADVISE NOTICE NO. 595,	)	**Case No. 22-00270-UT**
PUBLIC SERVICE COMPANY OF NEW MEXICO,	)	
Applicant.	)	

NEW ENERGY ECONOMY'S EXCEPTIONS TO THE HEARING EXAMINERS' RECOMMENDED DECISION

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I. INTRODUCTION

Pursuant to the Commission Order of December 8, 2023, New Energy Economy ("NEE") files the following Exceptions.

At the outset, NEE recognizes the monumental task the Hearing Examiners had before them and we express our gratitude to them.

The Hearing Examiners painstakingly and methodically detail the history of PNM's imprudence with regard to its imprudent investment and life extension in the Four Corners Power Plant ("FCPP") for 106 pages before they even address the evidence presented in this case or remedy. The Hearing Examiners correctly find that PNM's expert Mr. Graves[1] "ex post remedy analysis is fatally flawed."[2]

It should be noted at the outset that the Hearing Examiners also correctly find that because PNM was imprudent when it conducted no contemporaneous resource analysis before it invested in Palo Verde Nuclear Generating Station ("PVNGS" or "Palo Verde") assets, even though the assets were in rate base between 2016-2023/4, PNM is not entitled to recover *any* undepreciated investments (or CWIP) post imprudent investment.[3,4] Factual predicate for the

[1] Graves was paid at least $838,769 for his testimony in 21-00017-UT and his nearly identical testimony presented in this case. NEE Exhibit 12 (PNM Response to NEE 16-9 and 16-10).

[2] 22-00270-UT, *Recommended Decision* ("RD"), at 157, December 8, 2023.

[3] *Id.,* at 212. (As to the "$45 million [undepreciated investments], PNM should be ordered to remove any return on that investment as well as any CWIP.") See also at 214-216. ("The regulatory liability should be authorized, and PNM should refund to rate payers monies collected for the non-existent lease. … PNM collected revenue for a lease that does not exist. It is not arbitrary to order the company to refund that money to ratepayers. PNM loses nothing. What is extracted should never have been earned.")

[4] Case No. 2761, *Final Order*, 11/30/98 at 31. (Utility assets must be depreciated over their useful lives to avoid stranded assets which are a measure of inefficiency. The Commission has previously held there is no *entitlement* to recovery of stranded costs. ". . . PNM repeatedly asserts

Hearing Examiners' recommendation was: a) PNM's inactions were inconsistent with responsible management of a regulated utility, *i.e.*, the driver of the decision was to expand rate base, and b) the need to protect customers from that utility mismanagement.

> NEE also recommends that the Commission deny PNM's request for the regulatory asset. NEE offers a variety of arguments to support this assertion. Principal among them is that the "the underlying 114MWs were extended imprudently because PNM provided no evidence that they were cost effective" and the units are not "used and useful." Again, this is consistent with the other intervenors' arguments and factual assertions.[5]
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> …
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> At the core of the intervenors' position that PNM should not be permitted to recoup the undepreciated investment in the PVNGS units is the assertion that the hearing examiner and Commission determined that the undepreciated investment relate to assets the leases of which the hearing examiner and commission found were imprudently extended.[6]
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> …
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> The evidence already considered by the Commission in prior cases and affirmed on appeal is that PNM performed no resource-alternatives analysis and proceeded upon the assumption that the leases should be extended regardless of the consequence for customers. The hearing examiner and Commission's writing on this indicate that the driver of the decision was PNM's desire to expand rate base.
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> Failure to perform an analysis of a major resource renewal cannot be cured by post hoc justifications. It is the failure to perform analysis itself that constitutes a cognizable violation of the utility's obligation to ratepayers that it serves under a state-recognized charter.[7]

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that this is not a stranded cost case. We agree that this is not a stranded cost case, because recovery of stranded costs are unlawful in New Mexico; therefore, we need not reach issues related to their calculation or recovery. We have previously held, in Cases Nos. 2867 and 2868 that, as a matter of law, utilities in New Mexico may not recover stranded costs. We reaffirm that holding here. Under New Mexico law, the utility duty to render efficient service precludes the recovery of stranded costs, which are, by definition, a measurement of inefficiency. Having never had an entitlement to recover inefficient costs, a utility may not claim an unconstitutional taking when not allowed recovery of inefficient costs.")

[5] *Id.,* at 209-210. (Citation omitted.)

[6] *Id.,* at 210.

[7] *Id.,* at 211.

II. **NEE Exception #1 – NEE takes exception to the Recommended Decision's denial of PNM's request to accelerate depreciation of gas plants to 2040, at pp, 313 to 317. The RD's holding that "PNM's proposal imposes costs on present customers based on an aspiration rather than a legal mandate" is contrary to public policy that seeks to encourage and incentivize utilities to exceed the legal requirements to decarbonize its system, and violates sound depreciation policy.**

PNM requests to change the depreciation schedules for Afton, La Luz, Lordsburg and Luna, four PNM-owned natural gas plants, to align depreciation with their terminal dates of 2040. Their current terminal dates range from 2042 to 2055.[8] PNM states in its Brief-in-Chief, "It is prudent for PNM to set its depreciation rates to align with the expected service life of its gas generation facilities, and it is sound policy to align depreciation rates and terminal lives of fossil generation units with the State and PNM's emissions reduction goals."[9]

PNM witness Watson testified in support of updating depreciation for these plants, "It is important that periodic review and approval be made to depreciation rates to reflect the changes in investment and the underlying life and net salvage parameters required to achieve intergenerational equity for PNM's customers based on current and future operations of its depreciable assets.[10] Existing depreciation rates were last approved in Case No. 15-00261-UT.[11] Those depreciation rates approved 8 years ago were "based on a study with a base year ending 12/31/2013,"[12] thus the current depreciation rates are ten years old.

[8] PNM Ex. 22 at 12:13-13:4. (Heffington Direct).

[9] PNM Brief-in-Chief at 184.

[10] PNM Ex. 15 at 10:1-6. (Watson Direct).

[11] PNM Ex. 15 at 9:15-16. (Watson Direct).

[12] NEE Ex. 1 at Exhibit CKS-10 at 2.

PNM submitted substantial evidence in support of its request to accelerate the depreciation of its gas plants to 2040. PNM witness Watson testified, "Intergenerational inequities" is a "regulatory term and concept used to describe the fact that customer rates should be set to reflect an appropriate share of costs for the benefits received. Without periodic depreciation studies, more costs may be borne by customers who do not receive an equitable share of the benefit."[13] An appropriate level of depreciation is necessary to allow full recovery of investments by the customers served by the investment. "Depreciation is important because, as the definition below describes, depreciation expense enables PNM to recover in a timely manner the capital costs related to its plant- in-service benefiting PNM's customers (and avoiding intergenerational inequity). Appropriate depreciation rates will allow recovery of PNM's investments in depreciable assets over a life that provides for full recovery of the investments, less net salvage. Without the appropriate recovery of depreciation costs, PNM ultimately will not be able to meet its financial obligation related to the continued provision of service to customers. Furthermore, the inclusion of the appropriate level of depreciation recovery in revenue requirements serves to reduce overall costs (total of depreciation and return) to customers as opposed to a situation where an inadequate level of annual depreciation expense is collected in rates."[14]

Watson used "interim retirement curves" for the natural gas plants PNM plans to retire in 2040, for which PNM is seeking to update depreciation rates. An interim retirement curve reflects assets that would not survive to the end of their life that should be depreciated on a straight-line method, to depreciate them more quickly. The depreciation study updated "terminal

[13] PNM Ex. 15 at 10:8-13. (Watson Direct).

[14] PNM Ex. 15 at 11:18-12:7. (Watson Direct).

retirement dates" to align depreciation with the year the assets are retiring (2040).[15] "The depreciation rates were designed to recover the total remaining undepreciated investment, adjusted for net salvage, over the remaining life of PNM's property on a straight-line basis."[16]

Utility assets must be depreciated over their useful lives to avoid stranded assets which are a measure of inefficiency. The Commission has previously held there is no *entitlement* to recovery of stranded costs. ". . . PNM repeatedly asserts that this is not a stranded cost case. We agree that this is not a stranded cost case, because recovery of stranded costs are unlawful in New Mexico; therefore, we need not reach issues related to their calculation or recovery. We have previously held, in Cases Nos. 2867 and 2868 that, as a matter of law, utilities in New Mexico may not recover stranded costs. We reaffirm that holding here. Under New Mexico law, the utility duty to render efficient service precludes the recovery of stranded costs, which are, by definition, a measurement of inefficiency. Having never had an entitlement to recover inefficient costs, a utility may not claim an unconstitutional taking when not allowed recovery of inefficient costs."[17]

The Recommended Decision denied PNM's request on several grounds. First, the RD criticized PNM for not providing information about the cost of replacement resources so the Commission could compare costs. The RD concluded that the Commission should not approve PNM's proposal because it did not have clarity on the replacement resources or their costs, rendering the Commission unable to "balance the costs of the energy transition

[15] PNM Ex. 15 at 17:1-6 (Watson (Heffington Direct) and at Exhibit DAW-2 at 20, 21.

[16] PNM Ex. 15 at attached Exhibit DAW-2 at 1.

[17] Case No. 2761, *Final Order*, 11/30/98 at 31.

intergenerationally."[18] This is a pointless requirement considering that the 2040 replacement date is 17 years away. Any information the utility might provide will have no reliable basis in fact, as what new technology will be available in almost 20 years to replace a gas plant let alone its cost is presently unknown and highly speculative. By the time "clarity" of replacement resources and their costs are ascertained, the time to spread out the costs over the life of the asset and those who benefit from it - will have elapsed.

The Hearing Examiners' concern about the costs to ratepayers also seems disingenuous based upon their complete failure to even mention let alone consider PNM response to Bench Request 2, the revenue impact of accelerated depreciation of PNM's gas plants. PNM witness, Mr. Sanders, testified the revenue impact of accelerated depreciation of all 4 gas plants would be approximately $2.5 million per year.[19] The RD failed to consider and address the impact of these costs on customers, simply characterizing the request as "impos[ing] costs on present customer."[20] Apparently no amount of costs would be deemed reasonable, if the RD did not feel it necessary to even consider the rate impact and the reasonableness of the known costs of PNM's request to ratepayers.

The requirement to identify replacement resources is <u>not</u> required for a utility to update its depreciation rates under the Commission's depreciation rules.[21] The Commission just approved Southwestern Public Service Company's (SPS's) request to shorten the depreciable

[18] *RD* at 316.

[19] Tr. Vol 2 at 457:17-458:7.

[20] *RD* at 316.

[21] *See*, Rule 17.3.340 NMAC.

lives of several gas plants, however SPS was not required to and did not identify replacement resources.

In approving SPS's request to accelerate deprecation of its gas plants one of the factors relied upon by the Commission was that, ". . . the stipulated depreciation rates will facilitate the transition to carbon-free generation, which is reasonable given the ETA's requirements."[22] Yet when PNM requested to accelerate depreciation on its gas plants the Hearing Examiners held, "PNM's proposal imposes costs on present customers based on an aspiration rather than a legal mandate." Applying different policies to SPS and PNM is arbitrary and capricious.

The RD further states it would be "unwise to accelerate depreciation now given recent experience with renewable integration. PNM has been obligated to keep carbon-emitting plants slated for closure open for reliability purposes. Whether this will also occur with the gas plants for which accelerated depreciation is requested right here and right now remains a fully open and unanswerable question at this time." This statement conflates depreciation with abandonment. If PNM needs to keep one or more of its gas plants running after 2040 it may do so. The RD both criticizes PNM for seeking accelerated depreciation for not being part of an abandonment plan but then claims an abandonment plan would be problematic from a reliability standpoint. Nothing about accelerated depreciation requires PNM to abandon its gas plants in 2040; having costs in rates paid off by 2040 simply removes PNM's incentive to keep their carbon-emitting resources operating longer than necessary to fully recover their costs. Is this not also the premise of the Energy Transition Act? Allowing a utility to securitize fossil fuel plants and get them off

[22] NM PRC Case No. 22-00286-UT, *Final Order Adopting Certification of Stipulation*, 10/19/2023, *Certification of Stipulation*, at 63-65, Decretal ¶13, 9/6/2023, determining that the change in depreciation rates to align cost recovery with the revised shortened operating life would result in fair, just and reasonable rates.

their books will encourage early retirement? That is what PNM is seeking to do here, accelerate cost recovery on gas plants so they can be replaced with carbon-free resources. Requiring PNM to depreciate its gas plants until 2045 defeats PNM's aspirations to be carbon-free in 2040, while recognizing this exact policy as a virtue when offered by SPS.

The denial of acceleration of PNM's gas plants to 2040 is arbitrary and capricious insofar as the RD completely discounted the potential environmental benefits of allowing PNM to do so, failed to even address whether the costs were reasonable, and applied the exact opposite policy to SPS's early retirement of gas plants, holding a shortened depreciation period would benefit to a carbon-free transition. On the other hand, the Hearing Examiners held PNM should not be allowed to accelerate depreciation on its gas plants because, "setting a 2040 terminal date . . . predate[s] the state-mandated zero-carbon generation target and increase[s] costs for current customers. This is a legitimate concern and reason alone to reject the request for accelerated depreciation. PNM's proposal imposes costs on present customers based on an aspiration rather than a legal mandate."

For the foregoing reasons, the Commission should allow PNM to accelerate depreciation on its natural gas plants.

III. NEE Exception #2: PNM was imprudent when it invested in Four Corners and has never proven that Four Corners is an economic resource; in order to hold ratepayers harmless, the remedy for PNM's management malpractice should be the removal of Four Corners from rate base and to the extent PNM continues to rely on Four Corners customers pay for fuel and O&M

The Hearing Examiners recommend removing "$84.8 million or [a] 32.4% disallowance"[23] for PNM's FCPP imprudence even though they also found that FCPP is detrimental to the environment and has not been and is not an economical resource.

[23] *RD,* at 175.

> While the coal-fired plant has been used for decades, had PNM not imprudently extended its participation in Four Corners beyond 2016, PNM would not have exposed ratepayers to substantial harm credibly quantified in this case as leading to net costs to ratepayers of $238.7 million between 2017 and 2036. In addition to the detrimental environmental impacts of remaining a participant in FCPP, the evidence on harm in this case shows that Four Corners is an uneconomic resource. It is axiomatic that, for rates to be fair, just, and reasonable as required by the Public Utility Act, ratepayers should not be forced to pay for uneconomic resources. The record in this case demonstrates that Four Corners is an uneconomic resource. It follows that while Four Corners has been and is being used by PNM to serve customers, its use is no longer reasonable and beneficial to ratepayers being harmed by PNM's imprudent decision to retain the coal-fired plant.[24]

Essentially, not only was PNM imprudent in its investment in Four Corners, the investment has not been "used and useful".[25] Additionally, a critically important fact, is that FCPP would've likely closed if PNM performed the required financial analysis and decided to exit; that is what happened when former co-owner, El Paso Electric ("EPE"), who had a smaller percentage share in the plant, did and decided based on the evidence it analyzed.[26] (EPE invested in solar and gas instead of FCPP at lesser cost and risk.[27]) EPE's exit caused all the owners to face the possible decision to shutter the entire plant, based on the negotiations and real-time emails, if PNM would have done the alternatives analysis it was required to do and exited the plant it would have closed.[28] This caused grave and irreparable harm to the environment.

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[24] *Id.,* at 185-186. (Citations omitted.)

[25] *Public Serv. Co. of N.M. v. N.M. Public Reg. Comm'n*, 2019-NMSC-012, 444 P.3d 460 ¶21 ("To be considered 'used and useful,' [a] property must either be used, or its use must be forthcoming and reasonably certain; and it must be useful in the sense that its use is reasonable and beneficial to the public."); *See also*, Case No. 1440, *Order on Cost of Capital and Revenue Requirements* 17-19 (12-29-78) (finding plant to no longer be used and useful because of reduced service to customers).

[26] *Id.,* at 111-114. (Citations omitted.)

[27] *Id.,* at 100; *See also*, Case No. 15-00109-UT, *Certification of Stipulation* (NMPRC 4/22/16).

PNM omitted the analysis in service of its own interest and ignored ratepayers' interest. PNM Senior Vice President and General Counsel Patrick Apodaca, in his own words, explained why PNM omitted the analysis:

> "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."[29]

Meanwhile PNM customers have been overcharged for the last seven years, paying on an uneconomic plant.[30] In the last rate case PNM told the Commission that rates would be in place for only a short period of time and the Commission relied on that representation in its Final Order.[31] Yet, captive customers have been paying and PNM profits have been soaring since its Four Corners re-investment[32] and although the Hearing Examiners surmise that the 32.4% disallowance will be an adequate incentive to avoid future recklessness[33] there's no reason to

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[28] AN 14 at p. 8 of 9 pdf; Tr. Vol. 13 (9/7/2023) at 909-910 (Graves), (At 919: "Well, I can only extrapolate from the letter, or from the memo, which seems to say that the whole plant had to be co-owned by somebody or else they were going to shut down the last two units.")

[29] *RD* at 101, 113.

[30] PNM has admitted that FCPP is NOT cost effective and that a FCPP exit, plus the cost of replacement power, would result in customers savings between $30 - $300 million! PNM Ex. 17, (Direct Testimony of Frank Graves, (December 5, 2022)) at PNM Ex. FCG-2, Page 2 of 3, citing the Direct Testimony of Nicholas Phillips in NM PRC Case 21-00017-UT.

[31] NM PRC Case No. 16-00276-UT, *Revised Order Partially Adopting Certification of Stipulation*, ¶ 66. ("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[.]"

[32] PNM's re-investments in Four Corners between 2017 – 2022 has been more than $194 million. (Tr. (Vol. 1) 269-271 (Monroy).) At the time PNM made the re-investment decision its goal was to: "to provide above-average dividend growth to investors." (Tr. (Vol. 1) 253 (Monroy).)

[33] *RD* at 187. ("[I]mposing a disproportionately harsh penalty along the lines of the disallowance of all FCPP investment costs that NEE, ABCWUA, and NMAG advocate to varying degrees [] serves as a deterrent to future acts of imprudence by PNM management as a strong signal that the Commission expects utilities subject to its regulatory oversight to make decisions guided by

assume that is true. PNM has and will still profit from its imprudence regardless and *that* is the message this regulatory decision is sending, despite "an extensive record of substandard and negligent company decision-making."[34] No accountability, just a haircut, but the company's profits will still grow. The continued extraction of coal has and will not only result in climate warming environmental pollution[35] (when there were less costly feasible clean energy alternative resources) but customers will be stuck with paying the other 67.6% plus profit, and earn a windfall on PNM's imprudent and uneconomic investment, and PNM's intentional disregard of the law.

If regulation is intended to function as a proxy for market forces for vertically integrated monopoly utilities, what are the consequence of allowing the utility to operate in a risk-free environment when imprudence has been proven (once again) and the plant is not economic and has never been shown to be? Can profit at all cost, without any reasonable alternatives assessment to protect customers, deliberate and intentional inaction based on an unlawful

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reasonable decision-making practices, which in turn increases the chances that the utility will serve the best interests of ratepayers that, it should never be forgotten, it serves under a regulatory compact.")

[34] *RD* at 198.

[35] PNM admits that it was known at the time that coal plants were shuttering nationally given their climate and environmental harms. Tr. Vol. 3, (9/7/2023) at 909-910 (Graves).

motivation[36] — evident in PNM's utility management malpractice[37] with regard to Four Corners — result in a 32% regulatory consequence or must the regulatory compact require 100% disallowance given the circumstances at bar? NEE suggests that only removal of Four Corners from rate base fairly protects ratepayers, holds them harmless, and holds PNM accountable for its mismanagement, lack of honesty or sound business judgment.[38]

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[36] Graves admitted that "would **be bad for customers and it would be bad for regulatory approval**" if it were true what PNM Senior Vice President and General Counsel Apodaca memorialized as the reason PNM gave for maintaining it's "same level of ownership at Four Corners": to avoid[] a possible [PRC] distraction" from its own business interests at San Juan. Tr. Vol. 3, 9/7/2023 at 920-921 (Graves); **PNM's expert also acknowledged that failure to include capital expenditures in an evaluation of resource selection is contrary to standard industry practice.** *Id.,* at 847-8 (Graves). This is especially true when PNM was boasting to investors, and other utilities, the critical role capital investment plays in growing rate base to further advance investor earnings: "PNM management's attention was keenly focused on developing 'rate base growth' to produce 'earnings growth' to result in 'dividend growth' for shareholders." *RD* at 92-93, citing, Comm'n AN Exh. 9 (NEE Exh. 1, "2012 Analyst Day," 12/07/12) at 11, 37; Comm'n Exh. AN 10 (NEE Exh. 2, "Investor Meetings," 3/2013 at 7, 8); Comm'n AN Exh. 11 (NEE Exh. 3, "Q2 2013 Earnings Presentations," 8/2/13 at A-3, A-4); Comm'n AN Exh. 12 (NEE Exh. 4,"EEI Financial Conference," 11/2013 at 6-7); Comm'n AN Exh. 13 (NEE Exh. 5, "2014 Earnings Guide Presentation," 12/6/13 at 13); Comm'n Exh. 28 (NEE Exh. 22,"2011 Earnings Presentation," 02/29/12) at 12, A-5, A-6, A-19; Comm'n AN Exh. 29 (NEE Exh. 23,"Q1 2012 Earnings Presentation," 5/4/12) at A-3, A-4, A-15; Comm'n AN Exh. 34 (NEE Exh. 31: "Investor Meetings," 6/2017) at 6, 7, 16, 46.

[37] *RD* at 98, 102.

[38] NEE Exhibit 3, Sandberg Surrebuttal at 12-13. ("This really is a seminal issue in utility regulatory policy: utility management oversight must include a prudence evaluation and appropriate remedies. 'In determining whether a utility has set reasonable rates, we have held that the PSC must evaluate the economic consequences of a utility's actions **so that ratepayers may be protected from the utility's imprudent acts'** (*see, Niagara Mohawk Power Corp. v Public Serv. Commn., supra, at 369; Matter of Abrams v Public Serv. Commn., supra* [applying the prudent investment test])." *In the Matter of Rochester Telephone Corporation v. Public Service Commission of the State of New York et al.,* 87 N.Y.2d 17, 29 (1995), 660 N.E.2d 1112 (emphasis added.) It is precisely that core principle that the Commission must uphold here: fundamental ratepayer protection. And that oversight is for a critical reason. 'Imputation of imprudence encourages vigilant oversight by those who have delegated their responsibilities.' *Commonwealth Electric Company v. Department Of Public Utilities*, 397 Mass. 361, 369 (1986), 491 N.E.2d 1035. PNM's executives must have a reason to guide the company in a manner which appropriately balances ratepayer and shareholder interests.") (Emphasis in the original.)

As the Hearing Examiners point out the Commission is vested with discretion to determine rates that are just and reasonable as long as it is based on substantial evidence.[39] In the New Mexico's Supreme Court review of the last litigated rate case of 15-00261-UT, *Public Serv. Co. of N.M. v. N.M. Public Reg. Comm'n*, 2019-NMSC-012, 444 P.3d 460, it upheld "three different imprudence remedies in PNM's 2015 Rate Case, adapting the remedy to the nature of the decision determined imprudent."[40] A closer look at each of the determinations is instructive:

1. Regarding balance draft the NM Supreme Court held that the Commission's full disallowance of balanced draft except for an amount ($300,000 per year) equal to the annual O&M savings was upheld.[41]
2. Regarding Palo Verde assets, *after* a finding by the Commission that Palo Verde had been long used and was useful,[42] the Commission found that a full disallowance was not necessary to protect ratepayers, which was upheld by the NM Supreme Court.[43]
3. Regarding the remedy of disallowing no future decommissioning liability costs to be recovered from ratepayers as a result of PNM's imprudence, the NM Supreme Court held that the remedy violated PNM's due process because it was first raised during

[39] NMSA 1978 §62-6-14(A); *Matter of Rates & Charges of Mountain States Tel. & Tel. Co.*, 1982-NMSC-127, ¶ 2, 99 N.M. 1, 653 P.2d 501; *Public Serv. Co. of N.M.*, 2019-NMSC-012, ¶¶ 9, 41, 46.

[40] *RD* at 137-140.

[41] *RD* at 138; *Public Serv. Co. of N.M. v. N.M. Public Reg. Comm'n*, 2019-NMSC-012, ¶¶ 78-89.

[42] *RD* at 139; Case No. 15-00261-UT, *Final Order, at 35.*

[43] *RD* at 139-140; *Public Serv. Co. of N.M. v. N.M. Public Reg. Comm'n*, 2019-NMSC-012, ¶¶ 33-38, 51, 52, 59.

Commission deliberations and PNM had no opportunity to respond. It was a decision on procedural grounds, not substantive grounds.[44] (See Exception #2 below.)

The reason that a full disallowance is appropriate here, and the decision is most like the balance draft scenario described directly above, is because PNM did not have to re-up its investment and life extension in Four Corners — PNM voluntarily made that choice, for private company benefit and intentionally disregarded the negative financial customer impact of its decisions.[45] This was not a situation where the government forced the utility to undertake a specific course of action, to achieve a mandated goal (like the 2016 *WUTC Pacific Power Order* and the Oregon PUC's *PacifiCorp II* decisions relied on by the Hearing Examiners[46] and discussed in more detail below). Also, unlike the Commission decision regarding the PVNGS assets, the Hearing Examiners have found in no uncertain terms that Four Corners is not used and "useful" — it is not an economic resource.[47] And also unlike the remedy of disallowing no future decommissioning liability costs, PNM was made fully aware of its burden of proof

[44] *RD* at 139 ("The Commission found that PNM renewed the leases in part to shift the burden of decommissioning cost responsibility from its shareholders to ratepayers and that the renewals exposed ratepayers to decommissioning costs that likely would not have been incurred had an alternative resource other than nuclear been selected."); Case No. 15-00261-UT, *Final Order* at 38; *Public Serv. Co. of N.M. v. N.M. Public Reg. Comm'n*, 2019-NMSC-012, ¶¶ 51, 52, 59.

[45] See fn. 20 above.

[46] *RD* at 133-174.

[47] *RD* at 185-186. ("The record in this case demonstrates that Four Corners is an uneconomic resource. It follows that while Four Corners has been and is being used by PNM to serve customers, its use is no longer reasonable and beneficial to ratepayers being harmed by PNM's imprudent decision to retain the coal-fired plant.")

regarding prudence and the concomitant potential remedies, in 16-00276-UT,[48] by the Commission in 21-00017-UT,[49] and by the New Mexico Supreme Court in the appeal of 21-00017-UT.[50]

Another reason that a full disallowance, removal from rate base with fuel and O&M charges continuing as long as PNM continues to use Four Corners to serve ratepayers, that NEE, NMAG, ABWUA, and Bernalillo County urged in post hearing briefing, is that this remedy comes closest to the actual harm that ratepayers have and will continue to suffer. *See*, graph produced by Sierra Club's expert Dr. Fisher and reproduced here and relied on by the Hearing Examiners in the RD,[51] entitled "**Comparison of Damages vs. Impairments/Write-offs from**

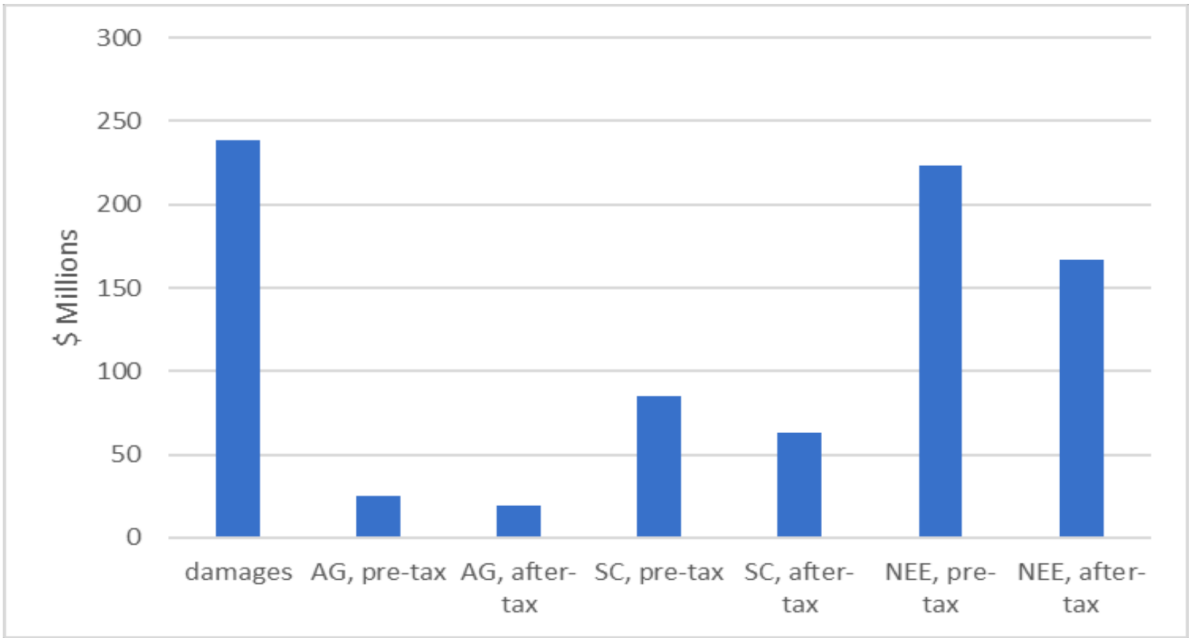
[48] NM PRC Case No. 16-00276-UT, *Revised Order Partially Adopting Certification of Stipulation*, ¶ 66. ("The Commission finds merit in the Signatories' arguments that the benefits to ratepayers under the Revised Stipulation are so significant that the Commission is justified in deferring, for the limited 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. …permitting a more full opportunity for the Commission to consider the necessity and scope of any remedy in light of PNM's alleged imprudence[.]")

[49] NM PRC Case No. 21-00017-UT, *Order on Recommended Decisions on Request for Approval of the Sale and Abandonment of PNM's Interest in the Four Corners Power Plant and Issuance of a Securitized Financing Order*, Dec., 15, 2021, at 13, ¶E and G; NM PRC Case No. 21-00017-UT, Order Reaffirming "*Order on Recommended Decisions on Request for Approval of the Sale and Abandonment of PNM's Interest in the Four Corners Power Plant and Issuance of a Securitized Financing Order" and Closing Docket*, at 3, ¶6.

[50] *RD* at 190; *Pub. Serv. Co. of N.M. v. N.M. Pub. Regul. Comm'n*, S-1-SC-39138, ¶ 1, n. 1, __ P.3d ___ (N.M. July 6, 2023), 2023 WL 4360572 (The Commission has decided to defer final action on the prudence issues reserved in Case No. 16-000276-UT and raised in the proceedings below. *We affirm the Commission's decision to defer final resolution of these prudence issues*.") (emphasis added).

[51] *RD* at 182.

Intervenors' Proposed Remedies"



As demonstrated in the above graph, and in real life, the actual damages that ratepayers have and will continue to experience as a result of PNM's imprudence is more than NEE's remedy, meaning even NEE's "excessive and unreliably founded"[52] remedy won't make ratepayers whole, but the remedy "is a reasonable outcome, that will hold the company accountable for its management malpractice."[53]

There is nothing *excessive and unreliably founded* about NEE's remedy. In fact, it was what the Hearing Examiners suggested was appropriate in 16-00276-UT for PNM's FCPP imprudence:

> "*[T]he 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] 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***

[52] *RD* at 179.

[53] NEE Ex. 3 (Sandberg Surrebuttal), at 25.

***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.*"[54]**

(Emphasis supplied.)

Removal of all costs *associated with the investment and improvements* going forward follows the past recommendation in 16-00276-UT and established precedent.

The Hearing Examiners in this case misapprehend the purpose of citing NEE's harms analysis[55] and incorrectly rely solely on the $445 million analysis performed by PNM in 16-00276-UT,[56] and authorized by the Hearing Examiners there,[57] instead of addressing NEE's actual proposed remedy in this case on the merits. NEE was forthcoming then and now that even though data from those Strategist runs are the best evidence the Commission had and has, indicating the severity of the harm of remaining in FCPP — they showed a ratepayer savings benefit of $445 million to discontinue FCPP participation[58] — NEE admitted that 1) it was a "hindsight" review, 2) that there were some limitations to full reliance on the Strategist runs without human adjustments (the computer model needed additional human input, *i.e.,* to know for instance that a gas plant couldn't be actually on line serving customers within a year's time)

[54] Case No. 16-00276-UT, *Certification of Stipulation*, at 68. (October 31, 2017). (Emphasis supplied.)

[55] *RD* at 165 – 170.

[56] *Id.*

[57] *See* Case No. 16-00276-UT, *Order Partially Granting and Partially Denying NEE's Second Motion to Compel* (June 27, 2017).

[58] NEE Ex. 3 at 14-19 (Sandberg Surrebuttal); AN 37, NEE Exhibit 34 (Sommer Test.) (July 14, 2017); AN 39, NEE Exhibit 36 (Van Winkle Supp. Test.) (July 14, 2017).

and 3) NEE didn't quantify the absorption of FCPP exit costs from the coal contract. The Hearing Examiners overlooked the real import of the Strategist runs that NEE had PNM run, that NEE raised in testimony and briefing in both 16-00276-UT and the case herein; it is to demonstrate the magnitude of PNM's imprudence and the harm that customers have endured as a result. NEE did not and does not rely on the Strategist runs for its proposed remedy in this case (nor did we in 16-00276-UT); NEE relies instead on utility law, the Hearing Examiners' own close-in-time analysis in 16-00276-UT and precedent about what should be done in situations like these:

1. Ensure that the utility's service and rates are just, reasonable and non-discriminatory;[59]
2. Provide the utilities an opportunity to recover prudently expended costs plus a reasonable return on their investments;[60]
3. Remove FCPP from rate base charge customers only fuel and O&M to the extent PNM continues to rely on the plant to serve customers;[61]
4. PNM should not earn a profit on its imprudent investments;[62]

[59] The Commission has the obligation to ensure that "[e]very rate made, demanded or received by any public utility [is] just and reasonable." NMSA 1978, § 62-8-1 (1941). The utility seeking an increase in rates bears the burden of demonstrating that the increased rate is just and reasonable. NMSA 1978, § 62-8-7(A) (2011).

[60] NMSA 1978, § 62-3-1(B) (2008); Case No 2146 Part II, *Final Order* at 53 ("'[F]or rate base inclusion expenditures must satisfy not only the necessary condition of prudent investment but also must be 'used and useful' in providing service.'"); *RD* at 31.

[61] Case No.15-00261-UT, *Corrected Recommended Decision* at 108-9. (August 15, 2016).

[62] Case No. 16-00276-UT, *Certification of Stipulation* at 67. (October 31, 2017).

5. Making ratepayers whole, or as whole as is reasonable under the circumstances, is a valid policy interest.[63]

A. The Law and Justice Support Removal of PNM's FCPP Imprudent Costs from Rate Base, 32.4% is Insufficient to Prevent PNM from Continuing to Profit from the Imprudence and Far from Making Ratepayers Whole, Captive Customers will be Disproportionately Harmed by the Hearing Examiners Suggested Remedy Proposal

Commissioner Ellison asked NMAG expert Crane about a fair resolution for PNM's imprudence:

> Q. (Commissioner Ellison) I guess, Ms. Crane, when you were preparing this testimony you were not thinking about the Four Corners prudency issues. Do you have any thoughts about what a fair resolution of that issue might be?
>
> A. (NMAG expert Andrea Crane) Well, as we've indicated in other testimony on this issue, we have concerns about the process that was used with regard to decision-making at Four Corners. I think that there's reasonable evidence -- and I'm not talking as a lawyer, but as a policy witness -- that investment made after 2016 could be deemed to be imprudent. If that were the case, then I would think it would not be subject to recovery. I think that to the extent there is a stranded investment in Four Corners, again, the Attorney General has, you know, generally been opposed to stranded cost recovery. We have entered into stipulations that resulted in a 50/50 sharing between shareholders and ratepayers, and we perhaps would entertain something like that with regard to prudent investment.
> With regard to imprudent investment, I don't think there should be any recovery from ratepayers. I don't think that any imprudently incurred cost should be eligible for securitization. I don't think any imprudently incurred costs should be recoverable at all.[64]

The Hearing Examiners also revisited the relevant law in their RD with regard to imprudent expenditures by a regulated utility and how those investments should be treated.

In PNM's appeal of the Commission's final order in the 2015 Rate Case, *Public Serv. Co. of N.M. v. N.M. Public Reg. Comm'n*, 2019-NMSC-012, 444 P.3d 460 ("*Public Serv.*

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[63] *RD* at 183.

[64] Tr. Vol. 12, 9/22/2023 at 4053-4 (Crane.)

Co. of N.M."), the New Mexico Supreme Court adopted in its discussion of the Commission's finding of imprudence regarding PNM's retention of certain Palo Verde Nuclear Generating Station (PVNGS or "Palo Verde") assets the standard of prudence in the Hearing Examiner's August 15, 2016 *Corrected Recommended Decision*. That standard of prudence is grounded in the prudent investment theory and the used and useful test, which are joined together as the standard of prudence in the New Mexico Public Service Commission's (NMPSC) April 5, 1989 final order in Case No. 2146, Part II, which is cited by the Supreme Court as *Re Public Service Company of New Mexico.* As set forth in that NMPSC order, for rate base inclusion utility plant expenditures must (1) have been prudently incurred; and (2) be used and useful. In rejecting the "sole reliance" on the first element in the two-part standard, the PSC observed that 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.

In her *Corrected RD,* the Hearing Examiner noted the U.S. Supreme Court's holding in *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 309 (1989) that a utility should only receive a profit on "prudent investments at their actual cost when made … [and is] limited to standard rate of return.…" Accordingly, as the Hearing Examiners found in their *Certification of Stipulation* in considering the issue of prudence on Four Corners the first time around, "**PNM should not earn a profit on its imprudent investments**."

Hence, in expressly adopting the "most artful expression" of the proposition that utility commissions should rely on the two-part prudently incurred/used and useful test in reviewing the prudence of utility plant expenditures, the NMPSC quoted the concurring opinion of Judge Starr in *Jersey Central Power Co. v. Fed. Energy Reg. Comm'n* as follows:

> The two principles [prudence and used and useful] thus provide assurances that ill-guided management or management that simply proves in hindsight to have been wrong will not automatically be bailed out from conditions which government did not force upon it. That is, government forced upon the utility an obligation to provide service, but that obligation, as we have seen, is the quid pro quo for a protected area of service (and eminent domain authority). What is fundamental is that government did not force upon the utility a specific course of action for achieving the mandated goal.
>
> Indeed, it would be curious if the Constitution protected utility investors entirely from business dangers experienced daily in the free market, the danger that managers will prove to have been overly sanguine about business prospects or the danger that a particular capital investment will not prove successful. In the face of anticipated demand, an airline may acquire additional aircraft, only to face unhappy consequences when passenger traffic does not meet expectations, perhaps due to economic factors entirely beyond management's control. Utilities are not exempt from comparable forces.

Thus, as acknowledged by the Supreme Court in *Public Serv. Co. of N.M.*, the

standard of care for prudence is as follows:

> Prudence is that standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time decisions had to be made. In determining whether a judgment was prudently made, only those facts available at the time judgment was exercised can be considered. Hindsight review is impermissible.
> Imprudence cannot be sustained by substituting one's judgment for that of another. The prudence standard recognizes that reasonable persons can have honest differences of opinion without one or the other necessarily being imprudent.[65]
>
> …
>
> The Supreme Court noted as indicated above that the prudence standard found in the *Corrected RD* accurately articulated the prudence standard the Court had previously recognized in *PNM Gas Services*, 2000-NMSC-012, ¶ 63, 129 N.M 1. This standard encapsulates the following: 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; and imprudence cannot be sustained by substituting one's judgment for that of another. [66]

(Citations omitted.) (Emphasis supplied.)

When there is a finding of imprudence as was explicitly demonstrated here, ratepayers are to be held harmless for the actions of utility management by not including imprudently incurred costs in rate base. NEE's remedy to remove FCPP from rate base is consistent with the law cited by the Hearing Examiners, the testimony of Christopher Sandberg, the live testimony of Ms. Crane and past PRC precedent. When PNM imprudently incurred Balanced Draft costs – PNM failed to conduct an economic analysis or cost-benefit analysis or produce evidence that the Balanced Draft System was required (as PNM claimed) pursuant to environmental regulation

[65] *RD* at 30-33.

[66] *RD* at 34.

– the Hearing Examiner recommended denial of cost recovery in Case No. 15-00261-UT,[67] which was approved by the Commission,[68] and upheld by the New Mexico Supreme Court.[69]

FCPP should be excluded from PNM's rate base for the same reasons. To the extent PNM continues to use FCPP to serve ratepayers, ratepayers should pay for fuel and O&M.[70]

An imprudence finding is the A+ of utility law. And the regulatory remedy must match the finding; the protection for the most vulnerable customers, should also be an A+, not a C.

The Hearing Examiner in the last contested rate case examined how the Commission should address the difference between utility cost disallowance depending on whether the basis of the disallowance was based on imprudence or the "used-and-useful" standard:

> [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

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[67] Case No. 15-00261-UT, *Corrected Recommended Decision*, Aug. 15, 2016, at 111-121. (At 121: "PNM's decision to install balanced draft was imprudent and the $52,277,041 cost of balanced draft should be excluded from PNM's rate base.").

[68] Case No. 15-00261-UT, *Final Order Partially Adopting Corrected Recommended Decision*, at 47- 52, ¶¶ 139-149. (At p. 51-52, ¶¶148-149: "PNM had failed to show the prudence of the BD [Balanced Draft] System's costs. Without evidence showing the costs of possible alternative solutions, there is no basis in the record to give PNM any recovery for the BD System costs. … [T]he record in this case supports allowing PNM to recover $300,000 per year BD System costs, which recognizes the maximum O&M costs that are avoided by the BD System's installation. Because that amount reflects the cost savings resulting from the BD System installation, PNM should not be allowed to recover any other O&M expenses associated with the BD Systems in future rate cases.")

[69] *PNM v. PRC,* 2019-NMSC-012, ¶¶ 78-89.

[70] Case No. 15-00261-UT, *Corrected Recommended Decision*, Aug. 15, 2016, at 108-09. ("Since PV Units 1 and 2 will continue to serve ratepayers, ratepayers should continue to pay some costs associated with these assets, such as fuel and O&M expenses and unrecovered costs of previous capital improvements and common plant that have been previously approved as reasonable.")

> 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.[71]

Removing PNM's FCPP from rate base *is* consistent with the regulatory principles that the Hearing Examiners tout as "valid" and does balance the interests of ratepayers with the interests of utility shareholders: make ratepayers whole for a utility's mismanagement and improvident actions, or as whole as is reasonable under the circumstances.[72] As more fully stated above removing FCPP from rate base won't make them whole (or compensate non-PNM customers for all the coal pollution) but it is the most reasonable remedy under the circumstance.

Not only is this the law in New Mexico, but the law found in many jurisdictions across the nation. In the case of *Washington Utilities and Transportation Comm'n v. Pacific Power & Light Co.*, Docket UE-152253, 332 P.U.R. 4th 1, 2016 WL 7245476 (Wash. U.T.C.) (slip op. Sept. 1, 2016) is instructive. There, as in *Pacificorp*,[73] the Washington Public Utility Commission ("WPUC") reviewed the prudence of Pacific Power's decision to install an SCR system. WPUC observed that the "general ratemaking principle is that ratepayers should not bear *any* costs for which the company failed to demonstrate prudence, up to and including the full costs of investment . . ." 2016 WL 7245476 at *82. (Emphasis supplied.) The Hearing Examiners note that their preferred disallowance remedy is "virtually all (96%) of the actual costs of the SCR installations at Four Corners, which ultimately came in at $88.7 million."[74] But that accounts for

[71] *Id*. at 110.

[72] *RD* at 183.

[73] *In re Pacificorp*, 2012 WL 6644237 (Or. P.U.C. Dec. 12, 2012).

[74] *RD* at 178.

only a third of the expenditures PNM has already made, let alone what it seeks to make, in a non-performing, carbon polluting expensive plant.[75]

Numerous jurisdictions uphold the regulatory principle/practice that imprudent investments require complete disallowance of investment. 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:

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[75] RD at 18-124; see also, fn. 17.

> 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. 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. In considering whether to include KCPL's newly completed Iatan coal facility into rate base,

> the Commission found from the evidence that at least by early 1976, company management knew there would be excess capacity in 1980, when Iatan Unit No. 1 was scheduled to be completed. The company then proceeded to arrange a capacity sale to its nonjurisdictional customers at a loss without regard to the costs such sales would impose on its ratepayers. Further, the company acted to derate its generating capacities to create a reserve margin which would fall within reasonable bounds and prove the need for additional capacity. In addition, although the company ordered studies to assist it in developing a construction program which would be beneficial to both the company and its ratepayers, it then ignored the conclusions of those studies which laid out a variety of least cost options which did not include the construction schedule pursued.

Based on the foregoing, the Commission found 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

Iatan in its rate base and that Iatan Unit No. 1 would not be included in the company's rate base as well as the Iatan-Craig 345-kv transmission line and recent additions to the Craig substation made to accommodate such 345-kv line, or any operating and maintenance expenses attributable to Iatan Unit No. 1. 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**.") (Emphasis supplied). Mimicking the basis for NEE's proposed remedy; *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 exclusion from rate base of the cost of Four Corners, its associated capital expenditure expenses and profit return. The principles set forth in the Washington case cited above apply with even more force here. 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.[76] PNM's investment decision in FCPP

[76] NEE Ex. 6 (PNM Response to NEE 4-31) and NEE Ex. 7 (capital additions by work order for the period of July 1, 2016 through December 31, 2022 equaling more than $194).

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 decided to fabricate a questionable rationale. Nor is this first time the PRC has found PNM imprudent in its investment decisions; a lesser remedy is not appropriate based upon PNM's continued disregard of ratepayer interests. PNM's conduct should not be viewed as "business as usual" but requires the PRC to deter PNM from continuing these practices. If there is not a remedy that protects ratepayers in a meaningful (but not full) way then PNM will continue its behavior, (as it has done and keeps on repeating) because the company will build in a calculation that includes an imprudence finding, profit, and then slightly discount that portion which includes a profit haircut (if it is caught). The public interest requires meaningful regulation and that's what NEE's proposed remedy will accomplish.

To the extent PNM customers still will be receiving capacity from FCPP customers should only pay for fuel and O&M. If the Commission adopted the remedy that holds ratepayers harmless, as is the goal of a remedy for utility imprudence, and removes FCPP from rate base and only charges ratepayers for fuel and O&M for the cost of FCPP while PNM still relies on it to serve ratepayers then ratepayers won't be charged for ongoing capital improvements and decommissioning costs, the very large ticket items PNM omitted from its 2012 "analysis."

B. 50% Recovery of Pre-2016 Undepreciated Assets at full WACC (similar to the resolution, six months earlier at SJGS on 12/16/2015, a decision that fairly balanced the burden between ratepayers and investors, which was upheld by NM Public Regulation Commission and NM Supreme Court)

PNM's FCPP investment pre-2016 was deemed prudent. Therefore, consistent with the regulatory practice *at that time* and New Mexico's past legal precedent forbidding the recovery of stranded assets,[77] cost recovery for 50% of its undepreciated FCPP investments which were made prior to June 31, 2016, is reasonable. In Case No. 13-00390-UT, which concluded on December 16, 2015, via a settlement PNM promoted, when PNM closed the first two units at the San Juan Generating Station, it received 50% of its still undepreciated investments, $257 million.[78] Half of the burden of the remaining undepreciated investments was assigned to shareholders and the other half to ratepayers, a division the PRC called "generous" to PNM.[79]

[77] Case No. 2761, *Final Order*, Nov. 30, 1998, at 31. ("Much of PNM's case is predicated on the assertion of an entitlement to recovery of stranded costs, even though PNM repeatedly asserts that this is not a stranded cost case. We agree that this is not a stranded cost case, because recovery of stranded costs are unlawful in New Mexico; therefore, we need not reach issues related to their calculation or recovery. We have previously held, in Cases Nos. 2867 and 2868 that, as a matter of law, utilities in New Mexico may not recover stranded costs. We reaffirm that holding here. Under New Mexico law, the utility duty to render efficient service precludes the recovery of stranded costs, which are, by definition, a measurement of inefficiency. Having never had an entitlement to recover inefficient costs, a utility may not claim an unconstitutional taking when not allowed recovery of inefficient costs.").

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

[79] *Id*.

IV. NEE Exception #3: Future Decommissioning Costs for Imprudently Purchased 64MWs and Imprudent Lease Extension of 114MWs is PNM's Responsibility NOT Ratepayers

Here is what the Commission ordered in NM PRC Case No. 21-00083-UT regarding future decommissioning liability cost analysis:

> Consideration of any issues raised by PNM's application in this case that have not been resolved by this order *shall* be addressed as in Case 22-00270-UT. This includes the issue of whether PNM's decisions to renew the five leases and repurchase 64.1 MW of PVNGS Unit 2 capacity (which were found to be imprudent in Case No. 15-00261-UT) exposed ratepayers to additional financial liability beyond that to which ratepayers would have been exposed had PNM chosen to not renew the leases and not to repurchase the 64.1 MW of PVNGS Unit 2 capacity and whether PNM should be denied recovery of any future decommissioning expenses as a remedy for PNM's imprudence.[80] (Emphasis added.)

The word "shall" is mandatory,[81] not permissive. Yet PNM blew off the Commission. The Hearing Examiners permit PNM's malfeasance and recommend, "there is agreement that 'the PVNGS decommissioning fund is adequately funded' and 'decommissioning costs that may or may not exist in the future is a hypothetical issue at this juncture' [and therefore] [t]his is dispositive."[82]

NEE does not agree that PVNGS decommissioning fund is adequately funded based on PNM's Sabrina Grienel's Direct at 21,[83] which admits that the decommissioning fund depending on the PVNGS unit is somewhere between 83% and 96% funded. Additionally, Staff's expert testimony, David Rode in NM PRC Case No. 13-00390-UT, cited again in 15-00261-UT, testified that the decommissioning fund is woefully underfunded.

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[80] NM PRC Case No. 21-00083-UT, *Order on Joint Motion for Accounting Order*, Decretal ¶ C, 11/18/2022.

[81] *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶22.

[82] *RD* at 217.

[83] PNM Exhibit 13, Direct Testimony of Sabrina Grienel at 21.

PNM imprudently repurchased the PV 64 MW and extended the 114MW leases without financial analysis. "[T]here 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."[84] The Commission fashioned a remedy for PNM's fundamental flaw: "To disallow future decommissioning liability recovery from customers."[85] In its application,[86] testimony (both written and live),[87] PNM sought to reinstate decommissioning liability recovery from customers. But in its briefing PNM did an about face and took the position that it was unnecessary for the Commission to determine whether PNM or PNM customers are responsible for future decommissioning costs.[88] This is contrary to what the former Commission ordered[89]

[84] *PNM v. PRC,* 2019-NMSC-012, ¶ 32.

[85] Tr. Vol. I, 9/5/2023 at 286-287 (Monroy).

[86] PNM Ex. 1 at 8, ¶ 10i (Application for Revision of Retail Electric Rates).

[87] PNM Ex. 19, at 56-58, 63-64. (Miller Direct) (At 58: "PNM as Lessee is solely responsible for all costs associated with the underlying assets, including lease payments, capital investments, O&M expenses, and decommissioning liabilities."; At 63-64: "Should the need arise, do you believe PNM should be allowed the opportunity to seek additional decommissioning funds associated with the owned and leased interests that are subject in this case? Yes. … I believe PNM should be allowed the opportunity to seek additional funds for the owned and leased interests that are subject in this case in order to maintain trust funds at the level determined by the decommissioning costs, and when actual decommissioning costs are known in the future.") Tr. Vol. 8 (9/18/ 2023) for instance, at 2606-7 (Miller). *See also*, Grienel Direct at 18-21.

[88] PNM Brief-in-Chief at 244.

[89] NM PRC Case No. 21-00083-UT, *Order on Joint Motion for Accounting Order*, Decretal ¶ C, 11/18/2022.

and even what the Commission addressing PNM's PVNGS asset repurchase and lease extension found.[90]

The decision should be made, because the Commission ordered it to be made. Furthermore, because PNM failed to adhere to the order's detailed requirements[91] and meet its burden of proof it should be decided now. Insulation from future decommissioning liability is the only remedy the Commission prescribed for PNM's imprudent repurchase of the 64MW and lease extension of the 114MW. PNM tries to reframe the $80M write down for the 64MW as already being a sufficient remedy and shouldn't that suffice?! But the actual decision regarding the $80M write down was decided because PNM failed to prove that its ridiculously imprudent negotiations, 2-3 emails (NM Supreme Court Justice Chavez referred to the emails as the "Christmas emails"), without any independent evaluation, appraisal or market analysis constituted fair market value or an arms-length transaction.[92] The $80M write down from acquisition adjustment down to net book value was part of the remedy, for PNM's sloppy and wholly unprofessional "negotiations"; the insulation from future decommissioning liability was a remedy for PNM's failure to evaluate the PVNGS assets (both repurchase and lease extension)

[90] RD at 139. ("The remedy for PNM's renewal of expiring leasehold interests in Palo Verde Units 1 and 2 was the requirement that PNM bear any additional funding requirements for the decommissioning of the interests. The Commission found that PNM renewed the leases in part to shift the burden of decommissioning cost responsibility from its shareholders to ratepayers and that the renewals exposed ratepayers to decommissioning costs that likely would not have been incurred had an alternative resource other than nuclear been selected.")

[91] Case No. 21-00083-UT, *Order on Joint Motion for Accounting Order*, Decretal ¶ C, 11/18/2022.

[92] Case No. 15-00261-UT, *Corrected Recommended Decision*, 8/15/2016, at 104 ("Ms. Crane aptly and concisely summed up the evidence when she said that "in no way, shape or form did [PNM] justify the market value.")

without an alternatives analysis and the Commission recognized PNM's self-interest in trying to shift these decommissioning liability costs from PNM shareholders to ratepayers.[93] When PNM once again,[94] refused to obey the Commission's order, in this case to perform a risk and cost analysis, it concedes an inability to meet its burden of proof. The Commission required PNM to perform this analysis and present it in this case but PNM declined, instead preferring to offer some gobbledygook about how the analysis would reveal nothing but that ratepayers were obligated to pay decommissioning costs regardless so PNM voluntarily excused itself from

[93] Case No. 15-00261-UT, *Corrected Recommended Decision*, 8/15/2016, at 103-106 (At p. 103-104: "responsibility for decommissioning costs [is] a major factor in determining a FMV." …

104-105: "PNM had a substantial financial incentive to buy the 64.1 MW. Mr. Ortiz conceded that if PNM did not buy the beneficial interest in this capacity, there was some risk that PNM, not ratepayers, would bear the cost of non-depreciated capital improvements and decommissioning expenses associated with the capacity after expiration of the leases.") *Final Order Partially Adopting Corrected Recommended Decision*, Sept. 28, 2016 at 38, ¶ 117. ("The PRC should also deny any future decommissioning costs for PNM's imprudently purchased 64MWs and its imprudent lease extension because "the Commission cannot ignore the apparent role of PNM's self-interest in expanding rate base to benefit shareholders and shifting the burden of decommissioning responsibility from its own shareholders to ratepayers in its decision to move forward on the PV leases without due consideration of alternatives. The Commission notes that a result of this failure is that PNM's actions in renewing and reacquiring the leases have exposed ratepayers to costs associated with decommissioning responsibilities that likely would not have been incurred had an alternative resource other than nuclear been selected.")

[94] For example, Case No. 13-00390-UT and 19-00018-UT PNM violated Paragraph 19 of the Modified Stipulation to hold a 2018 Review hearing, see Order Initiating Proceeding on PNM's December 31, 2018 Verified Compliance Filing Concerning Continued Use of And Abandonment of San Juan Generating Station, 1/30/2019. (Even though the *Egolf* case, *State ex rel. Egolf v. New Mexico Public Regulation Commission,* 2020-NMSC-018, ¶ 28, 476 P.3d 896, determined that the Commission could not compel PNM to file an abandonment proceeding, it did recognize that the Commission was not without enforcement power "to prevent a public utility from undermining its authority.") *See also*, NMPRC Case No. 19-00018-UT, *Recommended Decision in Show Cause Proceeding*, 6/7/2022. (Requiring that PNM issue a rate credit at the time of abandonment. At 49: "The Hearing Examiners thus find that PNM's new plan – to issue the bonds in January or February 2024, at least 18 months after the abandonment of Unit 1 and 15 months after the abandonment of Unit 4 – will not achieve the purpose of Section 16, that the revised plan is not reasonable, and that the revised plan violates the ETA.")

compliance. The Hearing Examiners excuse PNM (the company didn't ask for a variance from the Order) without comment. PNM argued that the Commission need not address this issue, but that is not the company's decision to make; unfortunately, contrary to law, the Hearing Examiners punt on this issue. NEE asks that PNM's compliance failure mean that PNM, **not** PNM ratepayers, be subject to all future decommissioning cost liability from August 27, 2015 (the date PNM filed its 15-00261-UT rate case) forward for the 64 MW and 114MW.

V. CONCLUSION

PNM performed a depreciation study in this case and is requesting to align its depreciation rates for its gas plants with their expected remaining life to avoid the possibility of stranded costs;[95] NEE supports this proactive adjustment and accordingly understands that this will be more costly, but it is reasonable and the early retirement plan reduces fossil fuel emissions from PNM's portfolio.

It is axiomatic that important decisions cannot be considered prudent if PNM made them without first determining what the alternatives are and weighing them. The NM legislature and the New Mexico Public Regulation Commission have incorporated these very principles into law and regulation.

[95] Tr. Vol. I (9/5/ 2023) at 68-69 (Monroy). ("The depreciation rate at which we set the service life or the terminal life is a key input in setting those rates, so by establishing a terminal date that reflects the period over which we expect to use those assets, in this case through 2040, that will increase the depreciation rate, which will lower the likelihood of stranded costs, as we fully depreciate those investments basically from the period now through 2040, to try to minimize those stranded costs."); PNM Exhibit 15, Direct Testimony of Dane Watson, DAW-2, at 1. ("The purpose of this study is to develop functional depreciation rates … designed to recover the total remaining undepreciated investment, adjusted for net salvage, over the remaining life of PNM's property on a straight-line basis.").

To recite this need for comparison and evaluation is but to emphasize a given: the failure to consider alternatives when making major capital investments is the epitome of imprudence.[96] If a utility makes an imprudent investment, the Commission must craft a reasonable remedy to protect ratepayers in order to set just and reasonable rates.[97] When a utility ignores these basic principles it violates its compact with the public because it is making decisions that any business that does not enjoy a monopoly would not make, and that a business that is a regulated monopoly[98] is not permitted to make.

PNM acted imprudently when it decided to: (1) extend the life and reinvest hundreds of millions in the coal-generating Four Corners facility without any contemporaneous financial analysis at a time when coal plants were shuttering nationwide due to climate, environmental and cost concerns;[99] and the consequences of the company's actions and inactions should match its imprudence, otherwise it will repeat the utility mismanagement (as it has done) because its profits include a regulatory discount if it is caught. This is not how the regulatory compact envisioned fairness — given PNM's consistent disregard of the law there is no justification for a 32.4% disallowance; only the removal of FCPP from rate base will do. Otherwise, PNM has admitted[100] it plans to profit from its utility management malpractice.[101]

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[96] *PNM v. PRC,* 2019-NMSC-012, ¶ 32.
[97] *Id.* at ¶¶ 41-42.

[98] "In return for monopoly power in its industry, the utility must submit to Commission regulation." *Public Service Co. v. NM Public Service Comm'n*, 1991-NMSC-83, 112 N.M. 379, 387, 815 P.2d 1169, 1177 (1991).

[99] NEE Ex. 1 at 17-35 (Sandberg Direct); NEE Ex. 3 (Sandberg Surrebuttal), *passim*.

[100] (Tr. (Vol. 1) 213-214, 351-352 (Monroy).)

[101] *Id*.

Lastly, because PNM failed to comply with the Commission's Order in 21-00083-UT and has not proved that PNM customers were not exposed to any additional financial liability for future nuclear decommissioning expenses compared to other resources, the Commission should require PNM to be held responsible for all nuclear decommissioning costs now and in the future associated with the decision to extend the 114 MW leases and repurchase the 64.1 MW interest in PVNGS Unit 2.

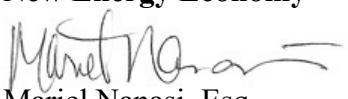
Consumers are looking to this Commission to hold the utility accountable for its repeated acts of imprudence and to take care of them — to protect them from what can only be meaningfully characterized as exploitation.

Now, is the time for PNM to be held accountable.

Dated this 15th day of December, 2023.

Respectfully submitted,

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 REVISION OF ITS RETAIL ELECTRIC RATES PURSUANT TO ADVICE NOTICE NO. 595	)	
PUBLIC SERVICE COMPANY OF NEW MEXICO,	)	**Case No. 22-00270-UT**
APPLICANT.	)	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing:

NEW ENERGY ECONOMY'S EXCEPTIONS

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