

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)	Case No. 22-00270-UT
ELECTRIC RATES PURSUANT TO ADVICE)	
NOTICE NO. 595)	
)	
PUBLIC SERVICE COMPANY OF NEW MEXICO,)	
)	
Applicant)	
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**NEW ENERGY ECONOMY’S RESPONSE IN SUPPORT OF MOTION FOR
DECLARATORY ORDER TO DETERMINE FINANCING ORDER TO BE NO
LONGER IN FULL FORCE AND EFFECT & STATEMENT OF ADDITIONAL
GROUNDS BARRING PNM FROM SJGS SECURITIZED BOND ISSUANCE**

New Energy Economy (“NEE”) hereby submits its Response to the Motion for Declaratory Order filed by the New Mexico Attorney General and Western Resource Advocates to issue a declaratory order stating that because PNM failed to issue Energy Transition Act (“ETA”) securitized bonds pursuant to the terms and conditions set forth in the April 1, 2020 *Financing Order* for San Juan Generating Station (“SJGS”), in particular, the authorization to issue securitized bonds at the time of or shortly after SJGS abandonment, the *Financing Order* is no longer in effect, has expired by its own terms, and that PNM’s planned issuance of the ETA securitized bonds for SJGS at some later date in time, is, therefore, unlawful.

In support of this Response, New Energy Economy states that it is critical that the Commission enforce the *Financing Order*, which it is authorized to do pursuant to the Energy

Transition Act, NMSA 1978, § 62-18-5 M.¹

I. BACKGROUND

1. On July 1, 2019, PNM filed its application requesting abandonment of the remaining Units 1 and 4 of the San Juan Generating Station (“SJGS” or “San Juan”), NMPRC Docket 19-00018-UT/ 19-00195-UT.

2. On April 1, 2020, the Commission granted PNM’s request to abandon SJGS. PNM abandoned Unit 1 on July 1, 2022 and Unit 4 on October 1, 2022.

3. On April 1, 2020, the Commission also approved, at PNM’s request, a *Financing Order* which allowed PNM to securitize its SJGS undepreciated investments along with other costs allowed for by the Energy Transition Act by issuing Energy Transition bonds pursuant to NMSA 1978, §§ 62-18-1 *et seq.* (“ETA”). 19-00018-UT, *Final Order on Request for Issuance of a Financing Order*.

4. In that *Recommended Decision* agreeing to PNM’s *Financing Order*, the Hearing Examiners found, and the Commission agreed, that the ETA bonds “would include the full \$283 million estimate of undepreciated investment in the units [and that the] bonds would be issued *shortly after the abandonment* of PNM’s interest in the units on July 1, 2022.” The amount included in the bonds were based in most significant part on “the undepreciated investment in the San Juan coal plant as of the time of the proposed abandonment (the “Undepreciated Investment”),” 19-00018-UT, *Recommended Decision on PNM’s Financing Order*, respectively at p. 20-21 and p. 113, ¶10, fully adopted by the Commission’s April 1, 2022 *Final Order on Request for Issuance of a Financing Order*. (Emphasis supplied.)

¹ The provisions of this section shall not be construed to limit the authority of the commission to [...] (2) issue such further orders as may be necessary to effectuate the provisions of the Energy Transition Act.

5. On February 28, 2022, Western Resources Advocates, the Coalition for Clean Affordable Energy and Prosperity Works filed their Joint Motion for Order to Show Cause and Enforce Financing Order in NM PRC Case No. 19-00018-UT. (“Show Cause Motion”).

6. The Hearing Examiners, after the Show Cause hearing determined that:

- a. Pursuant to the ETA, PNM’s Application and request for a *Financing Order* to address the recovery of costs associated with abandonment of the remaining SJGS Units 1 and 4, and the Commission-approved April 1, 2020 *Financing Order*, that relied on PNM’s Application and testimony in 19-00018-UT, anticipated that five events would take place at about the same time – (1) the abandonments of the plants, (2) the issuance of the bonds and utilities’ receipt of the bond proceeds, (3) the charges to be paid by ratepayers for the debt service on the bonds, (4) the removal of the plants’ costs from rates, and (5) the distribution of the portion of the bond proceeds to benefit the displaced workers and affected communities. The Commission held, however, that PNM had failed to adhere to the terms of the *Financing Order*.²
- b. Without informing the Commission or any of the parties to these proceedings, PNM developed a new plan that changed the order of those five events *to its advantage* and to the detriment of ratepayers.³
- c. PNM decided not to issue the energy transition bonds at the time of the SJGS abandonment and not to remove the costs of Units 1 and 4 from rates in 2022.⁴

² 19-00018-UT, *Recommended Decision in Show Cause Proceeding*, June 17, 2022, at 9, 59.

³ *Id.*, at 9, 50-51.

⁴ *Id.*, at 22-23.

- d. PNM made a unilateral, undisclosed decision to de-link the abandonment of SJGS Units 1 and 4 from the securitized bond issuance and rate adjustment.⁵
- e. The “Legislature intended for the timing of the bond issuance, not how the Company, through guileful manipulation of the ETA’s provisions, could elide its failure to satisfy the Legislature’s intent. Consequently, reading pertinent provisions of the ETA in *pari materia*, the Hearing Examiners find that the language of Section 16 complements and informs the applicable language of Sections 2, 4, and 5 and that the ETA was intended to require the issuance of the energy transition bonds at an unspecified time but certainly close to the abandonment of the qualifying facilities.”⁶
- f. “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 – will not achieve the purpose of Section 16, that the revised plan is not reasonable, and *the revised plan violates the ETA.*”⁷ (Emphasis supplied.)
- g. In the New Mexico Supreme Court and in testimony, PNM had promised “customer savings” from the abandonment and rate adjustment of SJGS Units 1 and 4,⁸ but

⁵ *Id.*, at 2, 22, 50, 71, 75, 84-84, 87-88.

⁶ *Id.*, at 49. (Also, at 48: “the Legislature appears to have intended that the funds be provided at the approximate time of the abandonment, and, to make that occur, the Legislature also apparently intended that the energy transition bonds that would be used to fund those transfers would also be provided at the approximate time of the abandonment. The Legislature does not appear to have intended that the bonds would be issued and the proceeds be provided to the energy transition funds years later at the discretion of the utility.)

⁷ *Id.*

⁸ *Id.*, at 16 (Affidavit of Notices in Customer Bills and Notice of Proceeding and Hearing on San Juan Abandonment and Securitization of Energy Transition Costs (Sept. 4, 2019): “savings of \$7.11 for a residential customer using an average of 600 kWh per month[.]”); (PNM Application at 28: “estimates that the energy transition charges for the initial full year (2023) following issuance of the energy transition bonds will be approximately \$23 million.”); (Settlege testimony

PNM’s plan guarantees that the opposite will take place.⁹ *What after all, is the point of authorizing the issuance of low-interest bonds to supplant utility financing if not to save customers money? The failure to timely issue bonds now undermines and reverses the intended savings to ratepayers.*

7. PNM did not issue the ETA securitized bonds at the time or shortly after abandonment as required by the Financing Order that PNM submitted for approval.¹⁰

II. THE ETA PEGGED SECURITIZATION TO ABANDONMENT

at 3: “[f]or example, if the bonds were issued on July 2, 2022, PNM anticipates the energy transition charge would become effective on August 1, 2022 and would be assessed for electric service provided thereafter.”) There are many more examples, including, PNM’s Answer Brief in No. S-1-SC-38247, *Citizens for Fair Rates and the Environment and New Energy Economy, Inc. v. NMPRC*, pp. 7, 9. In fact, PNM told the Supreme Court: “[t]he bonds will be issued in 2022,” explaining that:

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

(Emphasis added.)

On April 22, 2019, in an Earth Day speech at the Indian Pueblo Cultural Center, with New Mexico’s top officials surrounding her PNM’s CEO, Pat Vincent-Collawn, [said the planned closing of the aging coal-fired San Juan Generating Station near Farmington in 2022 will result in savings of \\$6 to \\$7 a month on the average residential electric bill](#), according to the utility’s “analysis.”

⁹ 19-00018-UT, *Recommended Decision in Show Cause Proceeding*, June 17, 2022, at 80-81 (PNM’s net income could potentially increase by \$98.3 million per year.)

¹⁰ 19-00018-UT, *Recommended Decision in Show Cause Proceeding*, June 17, 2022, at 22-23, adopted in full by the Commission’s June 29, 2022, *Final Order Adopting Recommended Decision with Additions*.

8. Pursuant to the ETA:

“‘energy transition cost’ means *the sum of abandonment costs*, which for a qualifying generating facility shall not exceed the lower of three hundred seventy-five million dollars (\$375,000,000) or one hundred fifty percent of the undepreciated investment in a qualifying generating facility being abandoned, as of the date of the abandonment. ...” NMSA §62-18-2H(2) (2019).

Undepreciated investments in the plant are locked in “as of the date of abandonment. ...” NMSA §62-18-2 H(2)(C)

“‘qualifying generating facility’ means a coal-fired generating facility in New Mexico that may be composed of multiple generating units that if operated by a qualifying utility prior to the effective date of the Energy Transition Act, is *to be abandoned prior to January 1, 2023*.” NMSA §62-18-2S(3) (2019).

A. 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*.

B. An application for a financing order shall include:

(1) a description of *the facility that the qualifying utility proposes to abandon* or for which abandonment authority was granted after December 31, 2018;

(2) an estimate of the energy transition costs and shall:

- (a) identify the severance pay and job training expenses for affected employees losing their jobs as a result of *an abandoned qualifying generating facility* and any associated mine that only services *the abandoned qualifying generating facility*;
- (b) identify costs not previously collected from the qualifying utility's customers for plant decommissioning and mine reclamation costs, subject to any limitations ordered by the commission prior to January 1, 2019 and affirmed by the New Mexico supreme court prior to the effective date of the Energy Transition Act, *associated with the abandoned qualifying generating facility*; and

...

(7) *an estimate of timing of the issuance* and term of the energy transition bonds, or series of bonds; provided that the scheduled final maturity for each bond issuance shall be no longer than twenty-five years;

...

F. If a qualifying utility does not recover energy transition costs pursuant to the Energy Transition Act, the energy transition costs may be recovered pursuant to other applicable provisions of the Public Utility Act [Chapter 62, Articles 1 to 6 and 8 to 13 NMSA 1978].

NMSA §62-18-4 (2019). (Emphasis supplied.)

III. PNM'S TESTIMONY PEGGED SECURITIZATION TO ABANDONMENT

9. PNM's testimony at hearing confirms that the ETA and *Financing Order* contemplated that SJGS rate adjustment and securitized financing was pegged to SJGS abandonment.

- a. Mr. Monroy admitted that: "that at the time it filed its Consolidated Application for the Financing Order that it anticipated it would issue the energy transition bonds near the time of the abandonment of San Juan."¹¹
- b. Ms. Sanchez, attorney, ETA co-author, and policy lead for PNM testified: "the primary purpose or one of the major goals of the ETA was transitioning out of coal. ... [T]he utility had an interest in recovering stranded costs, and securitization was a low-cost mechanism to do that with."¹²
- c. Sanchez testified: "we had many conversations and discussed throughout all of our discussions that there [would be] customer savings."¹³
- d. Sanchez testified: that the ETA *definition* of energy transition costs are undepreciated investments "as of the date of abandonment on the qualifying utility's books and records; right."¹⁴

¹¹ 19-00018-UT, *Show Cause Proceeding*, Monroy Testimony and Exhibits, April, 20, 2022, p. 4.

¹² 19-00018-UT, *Show Cause Proceeding*, Vol. II, 5/24/2022, Sanchez, pp. 536-7.

¹³ *Id.*, p. 537.

¹⁴ *Id.*, p. 538.

- e. Sanchez testified: that the ETA *definition* of financing costs is “the costs, fees, and expenses [that] can also be attributed to obtaining an order approving abandonment of a qualified generating facility.”¹⁵
- f. When asked to which coal facilities does the ETA apply, Sanchez testified: “if operated by a qualifying utility prior to the effective date of the Energy Transition Act, is to be abandoned prior to January 1, 2023. ... That has been interpreted to apply to San Juan Generating Station.”¹⁶
- g. Ms. Sanchez was asked: “All of the definitions regarding financing costs and the purpose of the Energy Transaction Act refer to PNM abandonment of San Juan and Four Corners; is that – that’s what it’s pegged back to?” Ms. Sanchez answered: “I don’t think that’s been in dispute. We’ve been talking about abandonment.”¹⁷

IV. PNM’S REVISED UNILATERAL UNDISCLOSED PLAN IS NOT ONLY CONTRARY TO THE ETA & THE FINANCING ORDER, BUT IS ALSO OUTSIDE THE ZONE OF REASONABLENESS

10. PNM states in testimony that its current intention is to issue the energy transition bonds in the fourth quarter of 2023, to start assessing the energy transition charges shortly after the bonds’ issuance, and to delay the removal of the units’ costs from rates expected in “January 2024”.¹⁸

¹⁵ *Id.*, p. 539.

¹⁶ *Id.*, p. 540.

¹⁷ *Id.*, p. 542.

¹⁸22-00270-UT, Greinel Direct, at 25-26. “PNM will issue the San Juan securitization bonds following several required pre-issuance steps and an active marketing process conducted by the underwriters PNM selects for the transaction. This process is estimated to take up to 13 weeks to complete but may take longer if delays occur. The energy transition bonds will be issued in the debt capital markets. However, there are known periods when the capital markets, while technically open, may not have adequate demand to support a robust and competitive marketing process. ... PNM plans to begin the broader securitization process in mid-2023 with the goal of completing the pre-marketing transaction execution steps by the end of September. The one-to-two-week marketing process and bond issuance may then take place as early as October 2023,

11. PNM’s new plan is unauthorized, and inconsistent with the four corners of the April 1, 2020 *Financing Order*, and therefore is unlawful. Pursuant to the ETA, and specifically the April 1, 2020 *Financing Order*, PNM was authorized to issue securitized bonds at SJGS abandonment. PNM unilaterally decided not to avail itself of the authority granted to PNM by the *Financing Order*, to issue ETA bonds at the time of abandonment of the SJGS.

12. The ETA contemplates a utility may decide not to issue Energy Transition Bonds by providing that the utility’s “decision not to issue energy transition bonds” allows the utility to recover its “energy transition costs in an otherwise permissible fashion.” NMSA §62-18-11C (2019). PNM’s decision not to issue Energy Transition Bonds authorized by the *Financing Order* was such a decision. When PNM decided not to issue bonds at abandonment – as required by the *Financing Order* – the reason for PNM’s decision was irrelevant, because it did not notify the Commission, Staff or intervenors and did not seek to amend the *Financing Order*.

13. Performance of all of the terms of the *Financing Order* has become impossible, as the *Financing Order* contemplated five events that were to occur simultaneously (supra, ¶ 6) the concurrence of which resulted in a balance of benefits for all of the parties.

14. PNM is no longer authorized to issue Energy Transition Bonds under the terms and conditions of the *Financing Order* because that authority has lapsed, expired, and the full

which would provide a six-to-seven-week window to access the market before Thanksgiving, after which there may be less investor engagement. Having this window provides accommodation for a potential delay in the initial transaction execution steps and flexibility to wait out periods of extreme market volatility or market distress. Further, issuing the bonds during that period would align with PNM’s stated intent to issue near the time when new base rates go into effect, expected in January 2024.”

Monroy Direct, at 3, 13, 19-22: (“PNM intends to issue SJGS energy transition bonds in the fourth quarter of 2023 to align as closely as possible with the date rates are effective for this rate case. These securitized bonds will recover the energy transition costs as defined and authorized by the Commission’s *Financing Order* in Case No. 19-00018-UT.”)

intent of the Order as evidenced by its terms can no longer be carried out. All of this is the result of PNM's decision not to issue bonds as authorized by the terms and conditions of the *Financing Order*.

15. “As described in the Consolidated Application, including the Supporting Testimony, PNM expects to cause the issuance of the Energy Transition Bonds as promptly as possible after the last of the following events have occurred: (1) issuance of a final, non-appealable financing order acceptable to the Company; (2) the abandonment of the San Juan coal plant; (3) delivery of any necessary SEC approvals under the Securities Act of 1933; and (4) completion of the rating agency process. PNM estimated that the issuance of the Energy Transition Bonds would occur in 2022. (*Financing Order* ¶28).” Conditions 1 and 2 above have occurred but as a result of PNM's non-feasance conditions 3 and 4 have not occurred. Neither has the estimated time of issuance “in 2022” or “at the time of abandonment.”

16. The ETA and *Financing Order* (as confirmed by the show cause order) only authorized PNM to issue bonds at the time of abandonment. That window has closed as of January 1, 2023.¹⁹ Therefore, ETA bonds PNM would try and issue from here forward would be non-compliant and unlawful, and the terms and conditions are now impossible to perform. PNM has already retained for itself the savings intended for ratepayers that would have occurred upon abandonment and securitization under the authorities, terms and conditions of the *Financing Order*.

¹⁹ NMSA §62-18-2S(3) (2019). “‘qualifying generating facility’ means a coal-fired generating facility in New Mexico that may be composed of multiple generating units that if operated by a qualifying utility prior to the effective date of the Energy Transition Act, is to be abandoned prior to January 1, 2023.”

17. The ETA locks in the plant balance to be securitized on the date of abandonment, NMSA §62-18-2 H(2)(C) (2019). PNM unilaterally delayed its ETA securitized bond issuance past the authority and purpose of the ETA and *Financing Order*. The terms of the ETA and *Financing Order* were based on PNM's testimony,²⁰ were not ambiguous, and the language therein "must be construed in the light of the context in which it is used." *Security Mut. Cas. Co. v. O'Brien*, 662 P.2d 639, 642 (1983).

18. Timing of bond issuance is governed by the express terms of the *Financing Order*, NMSA §62-18-4 B(7) (2019), and the mutual intent and understanding embodied therein, including PNM's intent that Paragraph 28 of the *Financing Order* be binding on PNM²¹ and control the timing of bond issuance.²² Evidence adduced in the 19-00018-UT, *Request for Issuance of a Financing Order* hearing showed PNM supported, understood, and intended that Paragraph 28 of the *Financing Order* was to control the timing of bond issuance.

²⁰ 19-00018-UT *Recommended Decision in Show Cause Proceeding*, June 17, 2022, at 50-51. ("PNM's representations were material to the findings and conclusions made in the *Financing Order*, which [] clearly provides for the removal of the San Juan energy transition costs through the issuance of securitized bonds upon or shortly after the abandonment of San Juan Units 1 and 4.")

²¹ NM PRC Case No. 19-00018-UT, *Compliance Filing of Public Service Company of New Mexico with Conforming Amendments to Consolidated Application Pursuant to Final Order* ("Compliance Filing"), April 6, 2020. (At p. 2: "PNM's Consolidated Application is hereby amended as reflected in the attached Addendum, and PNM fully accepts and adopts the findings, conclusions and ordering paragraphs of the Final Order.")

²² It is undisputed that PNM's Application and Testimony stated that bonds would be issued in 2022 and the scheduled final maturity for each bond issuance shall be no longer than twenty-five years. 19-00018-UT *Recommended Decision in Show Cause Proceeding*, June 17, 2022, at 12, 16-17, 37, 46, 57. (At 57: "The ETA's provisions and the representations PNM made in its Application in this case – and on which the Commission's April 2020 *Financing Order* was based – anticipated that PNM would abandon the San Juan units, issue energy transition bonds and start collecting ETCs at about the same time, in July and August of 2022.")

19. Nothing in the ETA “prevent[s] or preclude[s] the [Commission] from investigating the compliance” of [PNM] with the terms and conditions”²³ of the *Financing Order*.

20. According to *Attorney General v. Public Regulation Com’n*, 2011-NMSC-34, ¶13, 258 P. 3d 453:

When the PRC sets a rate, that rate must be “just and reasonable.” NMSA 1978, § 62-8-1 (1941). The declared policy of the PUA is “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) (2008) (emphasis added). Under the PUA, a rate is “just and reasonable” when it balances the investor's interest against the ratepayer's interest. *See In re PNM*, 2000-NMSC-012, ¶ 8, 129 N.M. 1, 1 P.3d 383. Only when a rate falls within a “zone of reasonableness... between utility confiscation and ratepayer extortion” can the rate be “just and reasonable.” *Behles v. N.M. Pub. Serv. Comm’n (In re Application of Timberon Water Co.)*, 114 N.M. 154, 161, 836 P.2d 73, 80 (1992).

Not only has PNM violated the authorization of the *Financing Order* because it failed to issue bonds at the time of or shortly after SJGS abandonment, but condoning PNM’s malfeasance would result **in fact** in rates that are outside the *zone of reasonableness...* and result in *utility confiscation and ratepayer extortion*. Here is how:

- a. While there may be no specific date required in the ETA/Financing Order for securitized bond issuance,²⁴ there **is** a specific date required for San Juan

²³ NMSA 1978, § 62-18-11(B)(1); 19-00018-UT *Recommended Decision in Show Cause Proceeding*, June 17, 2022, at 50.

²⁴ According to PNM Response to NEE 1-33, from Henry Monroy, in part, after objection: “Moreover, neither the Financing Order nor the underlying Recommended Decision in Case No. 19-00018-UT specify a date for issuance of the energy transition bonds as confirmed by the New Mexico Public Regulation Commission (“Commission”) in its ruling on PNM’s notice for the extension of operations of San Juan Unit 4 where it is stated that the Financing Order “does not

Generating Station abandonment.²⁵ For San Juan Generating Station, at issue here, abandonment must occur before January 1, 2023.²⁶ Therefore, the end date for bond issuance (the goal post), is an interpretation consistent with legislative intent,²⁷ meaning that securitized bond issuance must happen at the time of or shortly after abandonment²⁸ and the explicitly stated SJGS

require that PNM issue the Energy Transition Bonds authorized by that order by any specific date.” Order on Notice, ¶ 26 at 9.”

²⁵ NMSA §62-18-2S(3) (2019) (A qualifying generating facility means a coal-fired generating facility in New Mexico that may be composed of multiple generating units that... [is] operated by a qualifying utility prior to the effective date of the Energy Transition Act, [and] is to be abandoned prior to January 1, 2023); 19-00018-UT, *Recommended Decision on Financing Order*, February 21, 2020, upheld on April 1, 2020, *Final Order on Request for Issuance of a Financing Order*, p. 13, fn. 18. (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).)

²⁶ *Id.*

²⁷ *N.M. Indus. Energy Consumers (NMIEC) v. N.M. Pub. Reg. Comm’n*, 2007-NMSC-053, ¶ 2023, 142 N.M. 533, 168 P.3d 105 (“In ascertaining legislative intent, the provisions of a statute must be read together with other statutes in pari materia...); *Marbob Energy Corp. v. N.M. Oil and Conservation Comm’n*, 2009-NMSC-013, ¶ 11, 146 N.M. 24, 206 P.3d 135 (quoting *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-50, ¶ 5, 126 N.M. 413, 970 P.2d 599). (The Supreme Court has provided that “where several sections of a statute are involved, they must be read together so that all parts are given effect.”) *See, Bishop v. Evangelical Good Samaritan Soc’y*, 2009-NMSC-036, ¶ 11, 146 N.M. 473, 212 P.3d 361 (“We also consider the statutory subsection in reference to the statute as a whole and read the several sections together so that all parts are given effect.”). *See also, El Paso Electric Co. v. Real Estate Mart, Inc.*, 1979-NMSC-023, ¶ 13, 92 N.M. 581, 592 P.2d 181. (“As is the case with the Supreme Court, it is the duty of the Commission, “so far as practicable, to reconcile different provisions so as to make them consistent, harmonious, and sensible.”)

²⁸ “[T]he *Financing Order*, which ... clearly provides for the removal of the San Juan energy transition costs through the issuance of securitized bonds upon or shortly after the abandonment of San Juan Units 1 and 4.” 19-00018-UT *Recommended Decision in Show Cause Proceeding*, June 17, 2022, at 50-51.

abandonment date must be before January 1, 2023, to be ETA eligible.

Further, anticipated bond final maturity for each bond issuance will be more than twenty-five years post abandonment (if issued in 2024 or thereafter). Any securitized bond issuance outside of the explicitly stated January 1, 2023 date is beyond the *zone of reasonableness*. Any securitized bond issuance for SJGS has expired, is outside the zone of reasonableness, hence unlawful.

- b. Additionally, the Legislature has determined that the ultimate price ratepayers must pay for the abandonment of the San Juan Generating Station and the Four Corners Power Plant is \$375 million in securitized bonds.²⁹ PNM’s current “plan” includes SJGS securitized bonds of \$367 million plus the continued collection of San Juan Generating Station costs of \$98 million per year.³⁰ PNM plans to issue bonds in January 2024,³¹ but according to the company, it doesn’t have to.³² And according to PNM it can issue the bonds, pursuant to the ETA & Financing Order whenever it wants.³³ This PNM

²⁹ NMSA 1978, § 62-18-2(H) (2). “energy transition cost” means the sum of abandonment costs, which for a qualifying generating facility shall not exceed the lower of three hundred seventy-five million dollars (\$375,000,000)[.]

³⁰ 19-00018-UT *Recommended Decision in Show Cause Proceeding*, June 17, 2022, at 66, citing PNM’s Monroy (4/20/22) (Corrected), Exhibit HEM-2 (corrected).

³¹ *See*, fn. 18, herein, citing, 22-00270-UT, Greinel Direct, at 25-26 and Monroy Direct, at 3, 13, 19-22.

³² 19-00018-UT *Recommended Decision in Show Cause Proceeding*, June 17, 2022, at 36-37 (“PNM insists that the ETA does not dictate when energy transition bonds should be issued, and in doing so, the ETA provides flexibility in this respect.”), 38-39, 100 (“PNM will provide those funds at the time San Juan is abandoned regardless of when the bonds are issued.” Citing, Monroy (4/20/22) (Corrected) at 6.)

³³ *Id.*

interpretation is contrary to law. Double recovery from the continued collection of SJGS rates, when PNM has no SJGS costs because the plant has closed + PNM's ability to issue securitized bonds for \$367 million at whatever interest rate, is beyond the "zone of reasonableness," more than the \$375 million that legislators agreed to when they passed the ETA (outside the *quid pro quo*: \$375M max for coal abandonment per plant), and results in utility confiscation and ratepayer extortion. It means that the company has ignored the \$375M cap imposed by the Legislature: bond + continued SJGS overcollection for a closed plant (for how many years?), at this point exceeding the authorized limit by at least \$134M,³⁴ equaling \$505 million. Pursuant to PNM's absurd interpretation it is not bound by any (abandonment) time or financial limits and could proceed in perpetuity; there is nothing in the ETA or *Financing Order*, according to PNM, that can restrain the company, from continued collection for a closed plant for 5 or 10 years and then bond issuance for \$367 million in 2024, 2028 or 2032. This is a preposterous interpretation that is outside the zone of reasonableness, and results in utility confiscation and ratepayer extortion, hence unlawful.

³⁴ 19-00018-UT *Recommended Decision in Show Cause Proceeding*, June 17, 2022, at 8 ("\$134 million of savings that were intended to go to ratepayers under the Energy Transition Act"), 9, 58, 63 fn. 175, 66, 69 ("ratepayers will pay PNM approximately \$134 million related to San Juan between the date of abandonment and the effective date of new rates"), 74.

21. The facts of this Motion are not in dispute. The evidence adduced demonstrates that PNM's non-issuance of bonds had to do with an agreement with Avangrid,³⁵ and had no causal relationship with the ETA and *Financing Order*.³⁶ PNM's non-issuance of bonds had nothing to do with what the ETA and the *Financing Order* states, what costs are reasonable and just for ratepayers,³⁷ or what was explicitly promised by PNM in the press³⁸ or to the Commission³⁹ or to the Supreme Court.⁴⁰

³⁵ 19-00018-UT, *Show Cause Proceeding*, Vol. II, Tr., 5/24/2022, Tarry, at 349-352.

³⁶ 19-00018-UT *Recommended Decision in Show Cause Proceeding*, June 17, 2022, at 50 fn. 145, 60-61.

³⁷ 19-00018-UT, *Show Cause Proceeding*, Vol. II, Tarry, 5/24/2022, p.351, 363-364. (PNM's CFO, Joseph Don Tarry admitted that PNM also performed no financial analysis to determine the economic impact on ratepayers of its decision, contrary to the requirement of timely analysis as a minimal requirement for prudent utility decision-making processes.)

³⁸ On April 22, 2019, in an Earth Day speech at the Indian Pueblo Cultural Center, PNM's top executive, Pat Vincent-Collawn, [said the planned closing of the aging coal-fired San Juan Generating Station near Farmington in 2022 will result in savings of \\$6 to \\$7 a month on the average residential electric bill](#), according to the utility's "initial analysis."

³⁹19-00018-UT, *Notice of Proceeding and Hearing on San Juan Abandonment and Securitization of Energy Transition Costs*, September 4, 2019, which was provided to all PNM customers, stated: "PNM estimates the net bill impact of these charges and credits will be a savings of \$7.11 for a residential customer using an average of 600kWh per month in 2023, the first full year PNM expects the resources in PNM's recommended replacement resource portfolio will be in service."

⁴⁰ In fact, PNM told the New Mexico Supreme Court: "[t]he bonds will be issued in 2022," explaining that:

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

(Emphasis added.)

22. If the determination is made that in fact that the ETA *Financing Order* for San Juan Generating Station has expired on its own terms – that the ETA securitized bonds were not issued at the time of abandonment, and such delay was without any reasonable or lawful basis or excuse within the contemplation of the *Financing Order*, then ETA bond issuance would be unlawful and the question of SJGS undepreciated investments and costs may be addressed in this rate case.

V. PNM’S ANTICIPATED DEFENSE THAT THE FINANCING ORDER IS “IRREVOCABLE” AND THEREFORE THE NMAG/WRA MOTION FOR A DECLARATORY ORDER SHOULD FAIL IS UNPERSUASIVE

23. PNM’s authorization to issue bonds has expired by operation of law, because PNM did not follow the terms and conditions set forth in the ETA and *Financing Order*, and its plan to issue bonds in late 2023 is unlawful because is outside the scope of the authorization granted by the *Financing Order*.

24. PNM may raise the defense that the Commission cannot take action to protect the public from harm because of the “irrevocability” of the *Financing Order*. NMSA § 62-18-7. However, PNM’s likely claim will be that it is immune from PRC regulation and oversight, despite undisputed evidence that the company unilaterally chose not to abide the terms and conditions of the Commission authorized *Financing Order*, and that inaction has caused manifest injustice and financial harm to millions of New Mexicans, due to the shield of the irrevocability language. Should PNM’s defense be credited it would leave ratepayers without a remedy – ratepayers be damned. But the law says otherwise. *Rivera v. American General Financial Services, Inc.*, 2011-NMSC-033, ¶¶ 39-48, 150 N.M. 398, 259 P.3d 803, *citing*, *Cordova v.*

PNM’s Answer Brief in No. S-1-SC-38247, *Citizens for Fair Rates and the Environment and New Energy Economy, Inc. v. NMPRC*, at 7, 9.

World Finance Corp. of N.M., 2009-NMSC-021, ¶ 21, 146 N.M. 256, 208 P.3d 901 (explaining that unconscionability may render a contract unenforceable, especially when it is “grossly unreasonable and against our public policy.”).

25. This is incorrect for at least two reasons: the “irrevocability” of the *Financing Order* pertains to the protection of bond holders – providing iron-clad assurance that, once issued, the bonds must be paid. But the bonds have not been issued (the crux of the problem). Hence, the *purpose* for irrevocability, investor certainty, has not been triggered due to PNM’s unilateral decision to refrain from issuing the bonds at the time of abandonment.

26. Further, the “irrevocability” of the *Financing Order* works both ways: PNM ratepayers gave up the right to challenge utility cost recovery of 100% of undepreciated investments at SJGS in exchange for the utility’s agreement to issue securitized bonds at the time of abandonment and adjust rates to remove the continuing costs of SJGS. PNM promised that this would result in customer savings as more fully articulated above. Yet, PNM only wants the ratepayers’ obligation to reimburse the company for 100% of its undepreciated investments – that part of the bargain to remain irrevocable. As to PNM’s half of the obligation to issue securitized bonds and adjust rates at the time of abandonment, PNM and Avangrid altered the bargain after the fact, in August 2021, retroactively;⁴¹ the company self-servingly claims that the timing of securitized bond issuance and rate adjustment is flexible. Yet, the PRC has already

⁴¹ 19-00018-UT, *Show Cause Proceeding*, Monroy Rebuttal Testimony, May 18, 2022, pp. 17-19 (the proposed merger between PNMR and Avangrid, Inc. was also a factor in the delay of PNM’s rate case and bond issuance, which were tied together); 19-00018-UT, *Show Cause Proceeding*, Vol. II, Tr., 5/24/2022, Tarry, at 349-352.

determined that there was a limit to the ETA and *Financing Order* “flexibility” and that is “at the approximate time of the abandonment.”⁴²

27. What’s sauce for the goose is sauce for the gander. PNM chose to disregard the terms and conditions set forth in the *Financing Order*, namely the issuance of rate adjustment and ETA bonds at the time of abandonment, not for any reason intrinsic to the ETA or the bonds themselves, but because of PNM’s desire to coordinate issuance with the Avangrid/PNM merger, which had nothing to do with the ETA and *Financing Order*. Setting aside the increased costs of the bonds to ratepayers as a result of skyrocketing interest rates during the delay, this has resulted in \$98.3 million per year in costs for ratepayers,⁴³ which translates into excess undeserved profits for PNM shareholders. It has also resulted in higher interest rates on bonds eviscerating any customer savings that bond securitization was to ensure. When PNM applied for its *Financing Order* it relied on the testimony of its witness Charles Atkins, who testified that the benchmark interest rate was 2.24%.⁴⁴ According to PNM, as of October 28, 2022 the interest rate was 5.92%.⁴⁵

28. When asked whether PNM conducted any financial analysis to determine the impact the delay of bond issuance and rate adjustment would cause for ratepayers, PNM testified

⁴² 19-00018-UT *Recommended Decision in Show Cause Proceeding*, June 17, 2022, at 48. (“The Legislature does not appear to have intended that the bonds would be issued and the proceeds be provided to the energy transition funds years later at the discretion of the utility.”)

⁴³ 19-00018-UT *Recommended Decision in Show Cause Proceeding*, June 17, 2022, at 63, 66, 80-81, 98.

⁴⁴ 19-00195-UT/19-00018-UT Atkins Direct, July 1, 2019, at 23.

⁴⁵ 19-00018-UT, *PNM’s Supplemental Verified Compliance Report*, November 15, 2022.

that, in effect, such an impact was none of its concern: CFO Don Tarry testified as follows: “I don’t know anything about the -- any analysis done on the customer side, no.”⁴⁶ He testified that no securities firm or financial analyst of any kind outside PNM or Avangrid was consulted about the financial impact a change in bond issuance date would have on PNM ratepayers.⁴⁷ Mr. Tarry also testified that neither PNM’s Executive Policy Committee nor its Board of Directors calculated the financial impact of the delay on ratepayers.⁴⁸ PNM’s failure to conduct any financial analysis before making a decision of this magnitude that was going to impact the rates of half a million customers for 25 years was imprudent *per se*.⁴⁹

29. Rather callously, PNM testifies: “PNM does not attempt to time the market in an effort to capitalize on lower interest rates or avoid higher interest rates. Rather, the Company times its financing transactions to correspond with its capital and business needs.”⁵⁰ That was hardly the tune PNM was singing when it told the legislature and the public that ETA customer savings were at the heart of its desire to pass the ETA.⁵¹

⁴⁶ 19-00018-UT, *Show Cause Proceeding*, Vol. II, Tr., 5/24/2022, Tarry, at 359.

⁴⁷ *Id.*, at 352.

⁴⁸ *Id.*

⁴⁹ *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm’n*, 2019-NMSC-012, ¶¶ 27-38, 444 P.3d 460. (¶32: “The goal of the consideration of alternatives is, of course, to reasonably protect ratepayers from wasteful expenditure. The failure to reasonably consider alternatives was a fundamental flaw in PNM’s decision-making process.”) *See also*, Case No. 15-00312-UT, 3/19/2018, *Recommended Decision*, p. 104, unanimous decision by the PRC in its *Final Order*, 4/11/2018. (“The failure to evaluate alternatives prevents the Commission from determining that PNM’s plan is the most cost effective option of feasible alternatives.”)

⁵⁰ 22-00270-UT, Greinel Direct, at 23.

⁵¹ <https://www.abqjournal.com/1305833/pnm-to-be-carbon-free-five-years-sooner.html>, *PNM to be carbon free five years sooner*, 4/22/2019, “In fact, PNM says shutting San Juan will immediately result in a \$6 to \$7 per month savings on an average customer’s bill because of the

30. It would be substantively unconscionable to allow PNM to ignore the interests of ratepayers, whose interests have been in the getting the bonds issued at the time of plant closure, simply because PNM's unspecified "capital and business needs" are best served by delaying the bond issuance while interest rates triple and, in addition, while the delay "allows" PNM to continue to charge ratepayers for San Juan costs it is no longer incurring. Therefore, to still allow PNM to benefit even though it did not conform its actions to the contract terms and conditions it authored is not reasonable and fair, and is contrary to public policy. *Straussberg v. Laurel Healthcare Providers, LLC*, 2012-NMCA-006, ¶¶31-34, 269 P. 3d 914, (the analysis should whether the contract terms and conditions it authored unreasonably benefitted one party over the other, whether the terms were one-sided, and other similar public policy concerns.) citing, *Rivera v. Am. Gen. Fin. Servs., Inc.*, 2011-NMSC-033, ¶ 45, 150 N.M. 398, 259 P.3d 803 (quoting *Cordova*, 2009-NMSC-021, ¶ 22, 146 N.M. 256, 208 P.3d 901).

31. In New Mexico, a contract provision that unreasonably benefits one party over another is substantively unconscionable. *Rivera*, 2011-NMSC-033, ¶ 46, 150 N.M. 398, 259 P.3d 803. If PNM is not allowed to issue securitized bonds for SJGS because of its own inaction it will not be harmed; it can avail itself of traditional ratemaking opportunities for cost recovery in

lower cost of replacement resources.”; <https://www.cbsnews.com/news/new-mexico-passes-a-mini-green-new-deal/>, *New Mexico passes a mini-Green New Deal*, 3/22/2019, “Advocates for the bill in the legislature argued that it would lower consumers’ electric bills, while opponents said it would increase those costs. PNM's own analysis shows that closing the San Juan plant and moving consumers to renewable resources would save them an average of \$3 to \$4 a month.” <https://apnews.com/article/58c8b81fa2a347748ff77db2534c2f69>, *New Mexico governor signs landmark clean energy bill*, 3/23/2019, “The company also said customers will realize savings in their bills through the refinancing of bonds related to the San Juan plant and the production of more electricity from renewable sources.”

this case, just as it did in Case No. 13-00390-UT. In contrast, there was an almost simultaneous removal of the costs of San Juan Units 2 and 3 from rates when they were abandoned.⁵²

32. A contract or provision is procedurally unconscionable where there is such gross inequality in bargaining power between the parties that one party's choice is effectively non-existent. *Straussberg v. Laurel Healthcare Providers, LLC*, 2012-NMCA-006, ¶12, 269 P. 3d 914, citing, *Guthmann v. La Vida Llena*, 103 N.M. 506, 510, 709 P.2d 675, 679 (1985)

VI. PRINCIPLES OF EQUITABLE ESTOPPEL PREVENT PNM'S ANTICIPATED CLAIM THAT THE PRC IS PROHIBITED FROM EXERCISING ITS CONSTITUTIONAL DUTY TO PROTECT RATEPAYERS FROM UTILITY CONFISCATION AND RATEPAYER EXTORTION

32. PNM deliberately failed to disclose that it had decided in August 2021, years after the *Financing Order* was approved by the Commission, that it had devised a new plan: to not issue securitized bonds at the time of abandonment in furtherance of its own business interests and unrelated to the goals, purposes or provisions of, and in violation of, the ETA and *Financing Order*.⁵³ The Commission has already found that PNM's silence, misrepresentation, omission,

⁵² 19-00018-UT *Recommended Decision in Show Cause Proceeding*, June 17, 2022, at 81.

⁵³ 19-00018-UT *Recommended Decision in Show Cause Proceeding*, June 17, 2022, at 50-51: "The Commission's investigation has revealed PNM's new plan to issue the energy transition bonds approximately 15 months after PNM's full and final abandonment of the San Juan plant. This investigation has also revealed that PNM did not feel under any duty or compulsion to disclose – and indeed did not voluntarily disclose – its new plan to substantially delay the \$360.1 million securitized bond issuance to the Commission, to the parties to this case, or the ratepayers who would be eventually bound to pay the non-bypassable charge on their bills. It is also evident that PNM's new plan contradicts the representations the Company made in its Application and its witness attested to in the initial phase of this proceeding. PNM's representations were material to the findings and conclusions made in the *Financing Order*, which ... clearly provides for the removal of the San Juan energy transition costs through the issuance of securitized bonds upon or shortly after the abandonment of San Juan Units 1 and 4."

and concealment constituted a “moral hazard.”⁵⁴ Further, “PNM went to great lengths including retaining a Colorado public relations firm to conduct a \$7,500 customer survey, to develop a ‘securitization messaging’ narrative designed to persuade customers and stakeholders to believe that the abandonment savings PNM was plotting to withhold from customers was for altruistic rationalizations[.]”⁵⁵

33. Our Supreme Court held in *Continental Potash v. Freeport-McMoran*, 858 P. 2d 66, 73, 115 N.M. 690:

Estoppel precludes one party from asserting a right when another party has relied to his detriment upon the acts or conduct of the first party and when asserting that right would prejudice the other who has acted thereon in reliance. *Garcia v. Garcia (In re Estates of Salas)*, 105 N.M. 472, 475, 734 P.2d 250, 253 (Ct.App. 1987). As we stated in *Capo v. Century Life Insurance Co.*, 94 N.M. 373, 610 P.2d 1202 (1980):

The essential elements of equitable estoppel as related to the party estopped ... are: (1) conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that facts are otherwise than, and inconsistent with, those which the party subsequently attempts to assert; (2) intention that such conduct shall be acted upon by the other party ...; and (3) knowledge, actual or constructive, of the real facts.... As related to [the party claiming] estoppel, the essentials are: (1) lack of knowledge and of means of knowledge of the truth as to the facts in question ...; (2) reliance upon the conduct of the party estopped ...; and (3) action based thereon of such character as to change its position prejudicially.

Id. at 377, 610 P.2d at 1206; *Stuckey's Stores, Inc. v. O'Cheskey*, 93 N.M. 312, 324, 600 P.2d 258, 270 (1979), *appeal dismissed*, 446 U.S. 930, 100 S.Ct. 2145, 64 L.Ed.2d 783 (1980).

We find particularly significant here the requirements of lack of knowledge and the lack of means by which knowledge might be obtained by the party asserting estoppel. *See*

⁵⁴ 19-00018-UT *Recommended Decision in Show Cause Proceeding*, June 17, 2022, at 88: “The extraordinary circumstances brought about by PNM’s unilateral, undisclosed decision to de-link the abandonment of San Juan Units 1 and 4 from the securitized bond issuance and [occasioned] the moral hazard to ratepayers[.]”

⁵⁵ 19-00018-UT *Recommended Decision in Show Cause Proceeding*, June 17, 2022, at 61-64.

Garcia, 105 N.M. at 475, 734 P.2d at 253. In addition, the party asserting estoppel must show that he relied upon conduct, and such reliance must have been reasonable. *C & L Lumber & Supply, Inc. v. Texas Am. Bank/Galeria*, 110 N.M. 291, 297-98, 795 P.2d 502, 508-09 (1990).

34. Here, all the elements of estoppel are met. Under the ETA, the structure and purposes were to encourage PNM to abandon coal-fired generation in New Mexico and offer financial assistance to impacted communities to help them transition when a coal plant is abandoned – simply the ETA does not work unless PNM issues its Commission-authorized bonds upon abandonment. Under PNM’s Application, its sworn testimony and under the *Financing Order*, that PNM itself drafted, the SJGS bonds would be issued at or near the time of San Juan closure. The Commission’s reliance on these representations is reflected conclusively on the fact that it issued the order that PNM requested. And yet, we know that here, in the case of San Juan, it did not.

35. What would the Commission have done if PNM had sought to amend the *Financing Order* and disclosed that its plan was to delay issuing the bonds so it could continue to collect non-existent San Juan costs through rates and because it had other business reasons – apparently related to its merger negotiations with Avangrid – to put off issuing them?

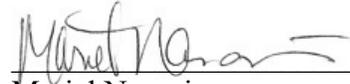
Wherefore, New Energy Economy requests the Commission determine that the authorization for the issuance of Energy Transition Act securitized bonds pursuant to the April 1, 2020 Commission *Financing Order* for San Juan Generating Station is no longer in full force and effect because it has expired by its own terms; and that PNM’s issuance of the ETA securitized bonds for SJGS would be untimely, outside the zone of reasonableness, inequitable and therefore unlawful and that, in addition, principles of equitable estoppel preclude the

issuance of bonds under the present circumstances, including the extreme cost to ratepayers that PNM's delay will impose.

If said determination is made then treatment of and any compensation for undepreciated investments and other related outstanding costs at San Juan Generating Station can be litigated in this rate case in the ordinary course.

Date: March 23, 2023.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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

**NEW ENERGY ECONOMY’S RESPONSE IN SUPPORT OF MOTION FOR
DECLARATORY ORDER TO DETERMINE FINANCING ORDER TO BE NO
LONGER IN FULL FORCE AND EFFECT & STATEMENT OF ADDITIONAL
GROUNDS BARRING PNM FROM SJGS SECURITIZED BOND ISSUANCE**

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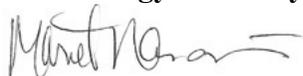
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DATED this **23rd** day of **March 2023**.

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