BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF PUBLIC SERVICE COMPANY OF NEW MEXICO'S ABANDONMENT OF SAN JUAN GENERATION STATION UNITS 1 & 4	)))	Case No. 19-00018-UT

NEW ENERGY ECONOMY'S POST HEARING BRIEF

January 8, 2020

Table of Contents

I. Introduction

PNM is finally seeking to abandon the San Juan Generating Station ("SJGS"), and this is welcome news. PNM's abandonment results from its inability to meet its burden of proof to demonstrate to the New Mexico Public Regulation Commission ("PRC" or "Commission") that continuing to operate SJGS is financially beneficial compared to other resource alternatives. It also results from a two-year old determination that PNM can make more money shuttering the plant. To the detriment of ratepayers, PNM acknowledged this evidence only *after* committing to pollution controls and other capital expenditures, on behalf of ratepayers – just to keep the plant "compliant" with regulatory standards, operational and safe, and reinvesting in new capital resources.

When the PRC approved PNM's certificate of convenience and necessity ("CCN") for more coal at SJGS, on December 16, 2015, it was pursuant to a Modified Stipulation. That stipulated settlement, at ¶19, required PNM to initiate a filing between July 1, 2018 and December 31, 2018 that would catalyze a proceeding to determine the future of SJGS. According to PNM's regulatory expert, with 40+ years of experience, Frank Graves, who read the *Final Order* in Case No. 13-00390-UT, his understanding was that PNM was "to demonstrate the economic credibility of [that] plan, you would submit some system simulations that show the benefits compared to alternatives, and they would be subject to review in a public process." [1] PNM and stakeholders were to have a public hearing to determine how to address the future of coal-fired generation at SJGS versus other replacement power resources, including their relative financial attributes and to determine if SJGS should continue to serve retail customers based on that information.

---

[1] 19-00018-UT, TR., 12/11/2019, Frank Graves, p. 545.

Instead, PNM made a "compliance filing" on December 31, 2018, testifying that there were no contractual obligations in place to continue SJGS operations post 2022 thus it would pursue the shut down of SJGS, and called it done.[2] The parties, including ratepayers, expected the 2018 review hearing, based on the commitments in the modified stipulation agreement but were denied that right.

Essentially, the PRC said *hold on a second* you are not allowed to abandon SJGS without the regulatory body's prior approval under NMSA 1978 §62-9-5, *we don't think you complied with your contractual obligation under the stipulated settlement,* and we are opening up a case, 19-00018-UT, to *determine how to address the myriad of issues surrounding SJGS abandonment* (financing, replacement power alternatives, clean-up, etc.).

Case No. 19-00018-UT was born as a result of PNM's failure to meet its obligation under the stipulated settlement and because PNM was pursuing abandonment and dictating a procedural schedule for the PRC, not the other way around.

Case No. 19-00018-UT was a pending case before the Energy Transition Act ("ETA") was even filed at the legislature, let alone became law.

The ETA, however, dictates and pre-determined the rights, duties and obligations of ratepayers on the basis of PNM's desires, ignoring existing legal standards[3] and relevant facts.[4]

---

[2] *Pub. Serv. Co. of New Mexico v. New Mexico PRC*, 2019-NMSC-012, 444 P.3d 460, ¶81 and ¶88 (as this Court noted, "PNM's argument ignores that it agreed in Case No. 13-00390-UT that it would bear the burden of affirmatively demonstrating [evidence]. Given this prior stipulation …the Commission [and parties were] … entitled" to expect and rely on PNM's required filing).

[3] *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012, 444 P.3d 460, ¶¶8-11: requiring the PRC to determine whether rates are "just and reasonable," whether they balance consumer and investor interests, and whether costs are prudently incurred in the first place, citing, NMSA 1978, §§ 62-6-4(A), 62-8-1, 62-8-7(A) and 62-3-1(B). Also at ¶21: "the Commission has considered whether expenditures were prudently incurred and whether the asset is used-and-useful in providing service when determining the ratemaking treatment of expenditures on utility plants. The prudent investment theory provides that ratepayers are not to

The details of the ETA, developed principally by PNM[5] behind closed doors at the legislature, without the ability for stakeholders, including most importantly, ratepayers, to have any opportunity to present a claim or defense to PNM's requested amount – a violation of due process protected by the New Mexico and United States Constitutions – anointed PNM with 100% of its requested amount to be collected through a financing order that will appear on customers' bills in a "non-bypassable charge" for 25-28 years. Further, PNM's requested amount, $361M plus an unknown interest rate, can be amended, at the request of the utility, to include an "upward adjustment." ETA§7.

Without ETA limitation, PNM can take the $361M and give those funds to senior management and Wall St. shareholder investors and then issue debt to purchase other capital resources, contrary to the public interest.[6] In fact, announced today, PNM is issuing more common shares to yield gross proceeds of $260.7M![7]

---

be charged for negligent, wasteful or improvident expenditures, or for the cost of management decisions which are not made in good faith. 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." (citations omitted.)

[4] The development of the factually-specific portions of the securitization provisions of the ETA is not a proper legislative function and is instead a proper quasi-judicial function: factual determinations based on an application and facts developed at a public hearing. *Albuquerque Commons P'ship v. City Council of City of Albuquerque*, 2008-NMSC-025, ¶ 32, 144 N.M. 99, 109, 184 P.3d 411, 421.

[5] 19-00018-UT, TR., 12/10/2019 Ronald N. Darnell, PNM Senior Vice President, pp.117-118.

[6] 19-00018-UT, TR., 12/19/19, Gorman, pp. 2005-2006.

[7] https://seekingalpha.com/news/3530319-pnm-resources-prices-upsized-common-stock-offering-forward-component?dr=1&utm_medium=email&utm_source=seeking_alpha#email_link: "*PNM Resources prices upsized common stock offering with a forward component*," 1/8/2020, Seeking Alpha. "PNM Resources (NYSE:PNM) has priced an upsized underwritten public offering of 5.375M (up from 4.9M) common shares yielding gross proceeds of ~$260.7M in connection with the forward sale agreements. Closing of the offering is expected to occur on or about January 10, 2020. [PNM Resources] expects to use the net proceeds for general corporate purposes, which may include repayment of borrowings under its unsecured revolving credit facility or other debt."

The ETA was predicated on the assumption that there was an economic benefit to ratepayers. However, the evidence demonstrates that:

a. The Energy Transition Act would cost ratepayers at least $25 million more compared to traditional ratemaking that was deployed in 13-00390-UT, SJGS abandonment of Units 2 & 3.[8]

b. While one of the ETA's primary purported benefits is a lower-interest rate secured via AAA bond rating, PNM's draft financing order includes language beyond the law's specifications. PNM testified that if they remove the paragraphs in order to comport with the law's specifications, the bond may not be eligible to earn AAA bond rating, hence the benefit of the lower interest rate would not be realized.[9]

c. Ratepayers could be stuck with an "extremely steep yield curve where -- where interest rates in the longer years are quite, quite high."[10]

According to the ETA, if the PRC doesn't reject the financing order based on ETA §4, contents of the application, the company's financing order proposal is deemed approved by April 1, 2020.[11]

---

[8] 19-00018-UT, TR., 12/17/2019, WRA expert witness, former Commissioner Douglas J. Howe, p. 246.
[9] 19-00018-UT, TR., 12/13/2019, Charles Atkins, PNM's expert witness on securitization, pp.1106-1118.
[10] 19-00018-UT, TR., 12/13/2019, Charles Atkins, PNM's expert witness on securitization, pp.1056-1057.
[11] Vice President and Treasurer of PNM Resources, Elisabeth A. Eden testified as follows: Q. (Nanasi) "If the PRC fails to act by April 1st, 2019, the financing order is simply deemed

But the ETA should not apply to Case No. 19-00018-UT because it violates the NM Constitution. Because the ETA changes the evidence and procedure in a pending case it interferes with ratepayers' vested rights and negatively impacts the rights and remedies and changes the procedure[12] of ratepayers in violation of N.M. Const. Art. IV §34. Additionally, because the ETA legislatively impairs a contract (the stipulated settlement, particularly ¶19, and the obligations therein) the ETA violates N.M. Const. Art. II §19 and therefore should not apply to Case No. 19-00018-UT.

If the ETA does not apply, as New Energy Economy advocates, PNM should receive a *maximum* of 50% of its undepreciated investments at its weighted average cost of capital ("WACC").[13] However, New Energy Economy submits that a fairer distribution would be 50% of PNM's undepreciated investments at San Juan at the cost of debt, as was done in 16-00276-UT (based on a similar justification), but that amount ($141,500 M) should be deducted by all PNM's imprudent capital expenditures spent on SJGS between 12/2015 and 6/2022, after a determination at hearing is made.[14]

---

approved by operation of law. Is that correct?"
A. (Eden) "That's what the Energy Transition Act specifies, yes."
19-00018-UT, 12/13/2019 TR., p. 961; See, also, 19-00018-UT, TR. 12/19/19, Gorman, p. 1996.

[12] NEE Exhibit 22, Direct Testimony of Mark A. Hutson, p. 3 ("My ability to form opinions about environmental impacts at these facilities has been hindered by a lack of documents and information. Typically, I am provided numerous documents and data sources that I review to identify information useful in forming opinions about the impacts of a facility. This evaluation typically occurs over a period of two to three months after receiving the data. A site visit is generally performed after reviewing the available data so that knowledge about the data can inform decisions about what areas of facility should be targeted for field observation and/or sample collection. In this case I have had neither the information nor the time required to fully evaluate the situation and form many opinions.")

[13] 13-00390-UT, *Final Order*, p.21, ¶56: "The claim that PNM should not be allowed to recover 50 percent of the undepreciated value of SJGS Units 2 and 3, as recommended in the April and November certifications is rejected. … [T]he certification's recommendation of 50 percent is reasonable, perhaps even generous."

[14] In 19-00018-UT, New Mexico Attorney General expert witness, Andrea Crane, testified:

Lastly, and significantly, there should be NO transference of any dollars from ratepayers to PNM for plant decommissioning and mine reclamation until there is a comprehensive assessment of what damage has been caused to the land, air and water by SJGS and what measures must be undertaken to remediate that damage. PNM's proposal is that they be compensated now for a "retire in place" scenario and are under no obligation to begin clean-up for 25 years. This is unacceptable. New Energy Economy, consistent with the requests from the public and concerns expressed by a number of witnesses, respectfully requests that this Commission ask its sister agencies, the New Mexico Environment Department and the Energy Minerals Natural Resource Department, to perform a formal study, for the plant and mine respectively, to determine the extent of the damage and develop a remediation plan, so this Commission can fairly allocate clean-up costs and safeguard the public from contamination and harm.

II. Relevant Historical Facts

In December 2013, PNM filed an Application with the New Mexico Public Regulation Commission to close half the San Juan Generating Station (Units 2 & 3), install pollution

---

"I recommend that the NMPRC approve the abandonment of SJGS Units 1 and 4, but deny the Company's request to recover 100% of its stranded costs from ratepayers. In fact, a possible result is that 100% of any stranded costs are allocated to shareholders, rather than New Mexico ratepayers."
New Mexico Attorney General, Exhibit 1, p.57.
Sierra Club expert witness, Jeremy Fisher, also testified: "While the Company's going-in position is that ratepayers should bear 100% of all stranded costs, ratepayers going-in position should be that the Company bears 100% of all stranded costs." Sierra Club, Exhibit 1, JIF-2, p.15.
When questioned about the fairness of customers bearing 100% of the burden for PNM's wrong decision, testifying in late 2015 that further investment in SJGS was economic yet in early 2017 admitting that SJGS is uneconomic, WRA expert witness, former PRC Commissioner, Douglas Howe, testified: "They should have some responsibility for that bad bet." 19-00018-UT, 12/17/2019 TR. p.147.

controls, purchase more coal from fleeing co-owners and more nuclear at Palo Verde Generating Station Unit 3. After the first Stipulation was not approved on April 8, 2015,[15] PNM entered into a Supplemental Stipulation, which was also not approved,[16] but the Modified Stipulation was approved by *Final Order* on December 16, 2015. The PRC approved PNM's purchase of 132 MW at SJGS and 134 MW of nuclear at Palo Verde Nuclear Generating Station ("PVNGS" or "Palo Verde"), and required that pollution controls (SNCR) required to operate SJGS to meet environmental standards be depreciated by 2022. Additionally, and among other things, PNM was "allowed recovery of 50% of the undepreciated value of Units 2 and 3."[17] The case was instigated when the Environmental Protection Agency ("EPA") determined that PNM's SJGS violated the federal Clean Air Act. PNM and the EPA agreed to close the plant and add pollution controls to the remaining two units to address regional haze.[18] PNM testified and the PRC based its approval of PNM's CCN for more coal, at least in part, because PNM's replacement power portfolio was the "most cost-effective portfolio."[19] PNM testified "[w]e are seeking a CCN that will *continue indefinitely* with this 132 megawatts [at SJGS]."[20] (emphasis supplied) Even then, NEE challenged PNM's claims vociferously, propounding evidence that San Juan Generating

---

[15] NMPRC Case No. 13-00390-UT, *Certification of Stipulation* (Apr. 18, 2015), p. 148.
[16] 13-00390-UT, *Certification of Stipulation* (Nov. 16, 2015), p. 102.
[17] 13-00390-UT, *Certification of Stipulation* (Apr. 18, 2015), p. 147; *Id* p. 114 ("the recovery of one half of PNM's undepreciated investment in San Juan Units 2 and 3 after the units' abandonment reflects a reasonable balancing of the interests of investors and ratepayers.")
[18] *New Energy Economy v. New Mexico Public Regulation Commission*, 2018-NMSC-024, 416 P.3d 277, ¶3.
[19] 13-00390-UT, *Certification of Stipulation* (Nov. 16, 2015), p. 29.
[20] NEE Exhibit 2, 13-00390-UT, TR., PNM Vice President of Regulatory Affairs, Ortiz (Oct. 13, 2015), pp. 4059-4060.

Station was not cost effective and that there were cheaper and more environmentally responsible replacement resources.[21]

Furthermore, under ¶19 of the stipulated settlement, (also known as the "modified stipulation") PNM committed to file, between July 1, 2018 – December 31, 2018, its proposal for the long-term future of SJGS.[22] PNM agreed to provide firm coal pricing and other terms for coal supply, incorporate information from recent RFPs, provide stakeholders and parties access to its economic modeling, comparisons of alternative replacement power scenarios among other things.[23]

One year after PRC approval of PNM's CCN for more coal at SJGS, PNM's own financial modeling demonstrated that a shutdown of SJGS was more cost effective for ratepayers than continued operation.[24] PNM Senior Vice President Ronald N. Darnell testified regarding the Strategist® runs: "in each of the scenarios, it was cheaper to retire San Juan." As a result, on February 24, 2017, PNM's Board of Directors determined that a "shutdown scenario provides for transitioning of PNM Generation portfolio to fewer baseload resources and more opportunities in renewable, gas, and newer generation technology" and predicted that "higher rate base earnings result from significant capital investment - SJGS replacement power, renewables and other resource additions."[25]

---

[21] *See* Testimony of Jeremy Fisher, Sierra Club Exhibit JIF-2, p. 5 ("I believe that the Company knows that San Juan is a liability today"). Mr. Fisher's testimony in 13-00390-UT on behalf of New Energy Economy showed that the value of San Juan Units 1 and 4 without other components of the stipulation was -$224 million. *Id.*

[22] 13-00390-UT, *Public Service Company of New Mexico's Verified Compliance Filing Pursuant to Paragraph 19 of the Modified Stipulation,* 12/31/2018, TGF-2, attached to the "compliance filing."

[23] 13-00390-UT, Modified Stipulation, ¶19.

[24] 19-00018-UT, 12/10/2019, TR., PNM Senior Vice President Ronald N. Darnell, p. 106.

[25] 19-00018-UT, 12/10/2019, TR., PNM Senior Vice President Ronald N. Darnell, pp. 72-73; (16-00276-UT, NEE Exhibit #16, (PNM's response to NEE Discovery 7-1)).19-00018-UT,

Following the PNM Board determination, PNM went public with the "about-face" position that customers would save more money retiring San Juan rather than continuing to operate it; there was wide-spread national coverage after PNM's news release,[26] including front page news in New Mexico.[27]

Within a month, in April 2017, PNM prepared a document comparing "securitization" financing (Energy Redevelopment Bonds") versus "traditional" ratemaking, in anticipation of abandonment of SJGS Units 1 & 4, and in preparation for the 2018 Legislative session seeking securitization in SB 47/Energy Redevelopment Bond Act.[28]

In both PNM's preliminary IRP (April 18, 2017) and filed IRP (July 3, 2017) its key finding was that coal was no longer economically competitive: "The most significant finding of

---

12/17/2019 TR. 46 (Attorney General Witness Andrea Crane) pp. 45- (stating that she doesn't think PNM is retiring San Juan because it will save customers money "I honestly don't," "I don't think PNM is sitting there making its decision because you ultimately think it's in the best interest of ratepayers;" "If you look at your investment presentations" they all talk about "how you're gonna grow earnings … by increasing ratebase" "you're telling your shareholders that you're going to grow rate base and that is going to result in an increase in earnings per share" "in my view that is the driver behind most of PNM's actions.")

[26] https://www.pnm.com/031617-irp)

[27] 19-00018-UT, TR., (PNM Senior Vice President Ronald N. Darnell), 12/10/2019, pp. 72-73, acknowledging the news coverage. For instance, *"PNM considering San Juan power plant shutdown,"* Santa Fe New Mexican, https://www.santafenewmexican.com/news/local_news/pnm-considering-san-juan-power-plant-shutdown/article_427f868e-0a95-11e7-855d-4bee7b9239a2.html; and *"Shutting San Juan plant in 2022 could benefit customers, PNM resource plan says,"* S&P Global Market Intelligence, https://www.spglobal.com/marketintelligence/en/news-insights/trending/5psguisfgtjrqbjqbhgava2.
("While PNM is required to file an IRP every three years, this plan is part of a settlement agreement and a PRC order regarding the plant near Farmington, N.M. The agreement requires PNM to submit two resource scenarios, one with and one without the plant in operation after 2022.")

[28] 19-00018-UT, TR., (PNM's Controller, Utility Operations, Henry E. Monroy), 12/10/2019, pp. 740-741; Also Albuquerque Bernalillo County Water Utility Authority ("ABCWU") Exhibit #2 (PNM Exhibit NEE 2-33(1) (10-16-19 Supplemental)

the IRP is that retiring PNM's…share of SJGS in 2022 would provide long-term cost savings for PNM's customers [.]"[29]

Given this assessment, PNM sought to pass SB 47, the "Energy Redevelopment Bond Act," in the New Mexico's 53rd Legislature (2018). Essentially, SB 47 sought to recover from PNM ratepayers 100% of its "undepreciated investments" to shutter SJGS, PNM ownership of all replacement power, and severely limit PRC's authority going forward.[30] PNM feared that its abandonment and financing case would be reviewed unfavorably before the PRC for the following reasons:

a) The most likely result PNM would obtain from a PRC ruling to shutter SJGS would be a maximum of 50% of its undepreciated investments;[31]

b) The Commission might exact further disallowances because it relied on PNM's testimony that SJGS would "continue indefinitely" and its investment on behalf of ratepayers would be "cost effective" for twenty-years even though the real reason why PNM purchased the 134MW and *increased* its SJGS liability is because, according to PNM Senior Vice President Darnell, "I am personally unaware of any other path forward than PNM assuming the 132-megawatt ownership."[32] Did the

---

[29] PNM's IRP Results, Case No. 17-00174; 19-00018-UT, TR., 12/10/2019, PNM Senior Vice President Ronald N. Darnell, p.73.

[30] 19-00018-UT, 12/10/19, TR., Senior Vice President of PNM Ronald N. Darnell, p. 74, (stating support for SB 47; "I certainly recall 100% recovery of the asset"). See Commission Exhibit #5.

[31] Not only was there precedent for a "balancing of the interests of investors and ratepayers" in 13-00390-UT, but the Hearing Examiner in that case also cited to *Re Public Service Company of New Mexico*, Case No. 2146, Pt. II, 101 P.U.R.4th 126, 176, 179 (1989) ("Often, a fair result is a sharing of the costs [] between investors and ratepayers.") 13-00390-UT, *Certification of Stipulation* (April 8, 2015), p. 113.

[32] See NEE Exhibit 1; According to Frank Graves, PNM's regulatory expert, even if a utility purchased more megawatt shares in a plant the utility would still have the burden of proof to demonstrate that the CCN was cost effective for ratepayers and requires the appropriate scrutiny by the Commission. 19-00018-UT, TR., 12/11/2019, (Graves), p. 541.

company purposefully create wasteful expenditure?[33] (The Hearing Examiner referred to PNM as the "owner of last resort" in his Certification of Stipulation, rejecting the CCN for coal at SJGS.[34]) Almost immediately after investing in pollution controls (and other capital expenditures worth $145M, that rewarded senior management and Wall St. shareholder investors with a 9.575% ROE) the company determined that it could make more money closing the plant in 2022 and investing in new capital. Perhaps, the Commission might decide that PNM, not consumers, should bear more of the responsibility for the poor (if not deceitful) decision-making of senior management to invest in[35] and extend the life of the plant;[36]

c) The Commission might be troubled by PNM's withholding of pertinent evidence during the 2015 hearing with respect to information regarding Westmoreland's inability to purchase the mine. In quick succession: PNM's first certification of stipulation (in April 2015) was rejected at least in part because PNM had no post 2017 coal supply agreement.[37] On July 1, 2015 PNM announced it entered into a coal supply agreement with Westmoreland. Between July 1, 2015 and December 30, 2015 PNM learned that Westmoreland was unable to buy the coal mine from BHP Billiton so PNMR created a subsidiary, NM capital, that borrowed $125M from the bank of Tokyo and lent the $125M to Westmoreland so it could buy the mine from BHP

---

[33] "[T]he Commission *must* balance the interest of consumers and the interest of investors… to the end that reasonable and proper services shall be available at fair, just and reasonable rates … without unnecessary duplication and economic waste [.]" NMSA 1978, §62-3-1(b) (2008). (emphasis supplied.)

[34] 13-00390-UT, *Certification of Stipulation* (April 8, 2015), pp. 90-93.

[35] See NEE Exhibit #10, capital expenditures at San Juan of more than $145M from 12/2016 to 6/2019.

[36] [T]he decision-making process of the utility is properly included in the prudence analysis." *Pub. Serv. Co. of New Mexico v. New Mexico PRC,* 2019-NMSC-012, 444 P.3d 460, ¶32.

[37] 13-00390-UT, *Certification of Stipulation* (April 8, 2015) pp. 80-86.

Billiton and be the coal supplier but *PNM never informed the PRC of the PNMR-Westmoreland-BHP deal* until after the PRC approved PNM's CCN;[38]

d) The Commission might exact further disallowances by re-considering the other flaws in PNM's analysis and mischaracterized financial model outcomes that the Commission had initially believed to be honest errors. Whether it was the list of analytical errors that amounted to $1.2 Billion provided by Sierra Club's expert witness, Jeremy I. Fisher, in his testimony, JIF-2, on pp. 31-32, or PNM's wholly incorrect forecast for solar, wind and gas prices (testify to and using inputs in its economic modeling that had those three resources increasing in cost when in reality, there have been dramatically declining prices for all three of those resources) admitted to by PNM Senior Vice President Darnell.[39]

On January 18, 2018, SB 47, the Energy Redevelopment Bond Act failed in the Senate. Between May – July 2018 all owners (PNM, TEP, UAMPS, and Los Alamos County, except Farmington) gave notice to each other that they 1) didn't want to extend the coal supply agreement and 2) decided not to continue the SJGS partnership agreement (aka "Exit Date Agreement").[40] PNM did not notify the Commission regarding it's or any of the other co-owners' positions on SJGS abandonment.

---

[38] 19-00018-UT, 12/10/19 TR. Senior Vice President Ronald N. Darnell, p. 55. Q. (Nanasi) "And that – and so when did PNM first inform the Commission of that arrangement, that – that it formed NM Capital company, that it borrowed $125 million from the Bank of Tokyo, and that it lent that money to Westmoreland to buy the mine from BHP Billiton?"
A. (Darnell) "I am unaware of any communication. It could have been, but I am unaware of any communication to the letter that I have before me dated February 1st, 2016."

[39] 19-00018-UT, 12/10/2019, TR., PNM Senior Vice President Ronald N. Darnell, pp. 106-107.

[40] *13-00390-UT, Public Service Company of New Mexico's Verified Compliance Filing Pursuant to Paragraph 19 of the Modified Stipulation,* 12/31/2018, Exhibits TGF-4 - TGF-7, attached by Affiant, PNM's Vice President of Generation, Thomas G. Fallgren.

Undoubtedly, PNM stalled its ironically-labeled "compliance filing" until the very last day to allow for passage of its Energy Transition Act (ETA),[41] which would guarantee that there would be no scrutiny of the amount that PNM would seek as compensation for the abandonment, resulting in 100% recovery of hundreds of millions of dollars that the PRC would be powerless to scrutinize and that ratepayers would be powerless to avoid paying. Predictably, in its "compliance filing," PNM informed the PRC that the promised hearing was "essentially moot" and that it would file for abandonment later in 2019.[42] In its filing, PNM stated at p. 4: "PNM does not propose to pursue a new coal supply agreement that would allow SJGS to continue serving PNM customers post -2022, and has so informed the coal supplier [.]" At p. 6: "PNM does not propose to continue operating SJGS and has no actual negotiated coal supply or other plant operating agreements that extend beyond 2022 [.]" See also, *Affidavit of Thomas G. Fallgren in Support of Public Service Company of New Mexico's Verified Compliance Filing Pursuant to Paragraph 19 of Modified Stipulation,* (attached to PNM's Compliance Filing). At p. 2: "Because the majority of SJGS owners have given notice not to continue SJGS operations and there are no agreements that would allow it to operate beyond 2022, SJGS will not be available to serve PNM customers after 2022. As a result, PNM is not seeking any approvals in its Compliance Filing that would allow PNM to continue to use SJGS after June 2022 to serve retail customers and the issue presented under Paragraph 19 of the Modified Stipulation is essentially moot."; At p. 5: "Under the terms of the Exit Date Agreement, because a majority of the Participants have decided not to continue SJGS operations beyond June 2022, and there has been no sale or transfer of the SJGS ownership interests to Farmington or any third-parties, the Participants are contractually required to proceed with planning for an orderly shutdown of SJGS in 2022."

---

[41] 19-00018-UT, 12/10/2019, TR., Ronald N. Darnell, PNM Senior Vice President, pp.117-118.
[42] *Id.*, at p.2.

PNM's decision to ignore the settlement agreement, specifically the 2018 Review Hearing, was driven, *without doubt,* by the fact that it had co-drafted the ETA and expected it would be able to push it through the legislature, which turned out to be correct.

When asked under oath if the proceeding pursuant to ¶19 of the modified stipulation ever occurred, Senior Vice President of PNM, Ronald N. Darnell, testified as follows: "That's not what we're in now?"[43,44]

On 1/10/19, a few days after receiving PNM's "sleight of hand" filing, the PRC initiated a docket to determine PNM's compliance with ¶19 of the modified stipulation, and because "PNM has essentially irrevocably committed itself to the abandonment of SJGS over six months ago," to determine whether the Commission "should not delay the proceeding any longer and should instead set a procedural schedule [ ] requiring PNM to file testimony in support of already pending abandonment of SJGS."[45] On January 17-18, 2019, eleven parties respond to the PRC's

---

[43] 19-00018-UT, 12/10/2019 TR. p.81. (After statements from Chairwoman Becenti-Aguilar Mr. Darnell stated as follows: At pp. 83-84: "I'm not disputing that there was not a proceeding. I'm simply saying that the -- what was supplied on December 31st, 2018, met the requirements of the stipulation coming out of 13-00390, and we have now had before the Commission this abandonment application, and I think this is where parties and the public, as in yesterday, had their opportunity to vet their positions, and it's in this docket, 00195, that we are determining abandonment." Chairwoman Becenti-Aguilar stated: "Your Honor, thank you very much for the opportunity to ask my questions. My constituents are very, very important in the process. It is very important that they have a voice in the process, and the opportunity to set those public hearings did not occur, and I want to put that in the record. Thank you very much."

[44] 19-00018-UT, TR., 12/17/2019 Andrea Crane, p. 14.
Q. (Nanasi) The review hearing never happened; correct?
A. (Crane) Well, if by review hearing, you're talking about the compliance filing or what came after the compliance filing, is that what you're calling the review hearing? Q. Correct.
A. Well, I suppose in a way this is an extension of that, so I -- I don't know -- I mean, I'm not aware of a separate hearing that occurred in that piece of the docket, if that's your question.
Q. The December 31st compliance filing was the genesis of this case. Isn't that true?
A. That's correct.

[45] *13-00390-UT & 19-00018-UT Order Requesting Response to PNM's December 31, 2018 Verified Compliance Filing Concerning Continued Use of San Juan Generating Station to Serve New Mexico Customers Pursuant to Paragraph 19 of the Modified Stipulation,* 1/10/2019, p. 10.

Order raising various issues, including, but not limited to, the issue that there was no reason to delay an abandonment proceeding: NM Attorney General, NM PRC Staff, Albuquerque Bernalillo County Water Utility Authority, New Mexico Industrial Energy Consumers (now known as "New Mexico Affordable Reliable Energy Alliance" ("NM AREA")), Coalition for Clean Affordable Energy, New Energy Economy, PNM, San Juan County Entities, Sierra Club, Southwest Generation Operating Company, WRA. Most, if not all, of the same above parties, plus Interwest Energy Alliance, filed responses to the issues raised in the January 17th and 18th filings. *See*, 19-00018-UT docket.

On 1/30/2019, after receiving filings from a dozen respondents,[46] the PRC ordered "an abandonment proceeding under NMSA 1978 §62-9-5[47] of the Public Utility Act … to address the abandonment of PNM's interest in SJGS Units 1 and 4. The scope of the proceeding shall include all issues relevant to an abandonment proceeding under NMSA 1978 §62-9-5 and any other applicable statutes and NMPRC rules, including §62-6-12." 19-00018-UT, *Order Initiating Proceeding On PNM's December 31, 2018 Verified Compliance Filing Concerning Continued Use of And Abandonment of SJGS*, 1/30/2019, ¶A. PNM was ordered to file testimony relating to SJGS abandonment, including "the proper treatment and financing of undepreciated investments, decommissioning costs and reclamation costs," and replacement resources. The Commission

---

[46] 1.2.2.7 Q NMAC "**party** means a person who initiates a commission proceeding by filing an application, petition or complaint, or *whom the commission or presiding officer names as a respondent*, or whom the commission or presiding officer grants leave to intervene; unless the context indicates otherwise, the term "party" may also refer to counsel of record for a party; *staff shall have the status of a party*, without being required to file a motion to intervene, but shall not have a right to appeal." (emphasis supplied.)

[47] Abandonment is not to proceed without PRC approval, NMSA 1978 §62-9-5: "No utility shall abandon all or any portion of its facilities subject to the jurisdiction of the commission, or any service rendered by means of such facilities, without first obtaining the permission and approval of the commission. The commission shall grant such permission and approval, after notice and hearing…"

ordered PNM to file its abandonment application by 3/1/2019. *Id.*, at ¶B, ¶B5, and ¶¶B11-13.

On 2/7/2019, the ETA, which PNM had been apparently been working on for months, was introduced in the Senate.

PNM appealed the PRC Order to the New Mexico Supreme Court in an Emergency Petition for Writ of Mandamus, S-1-SC-37552. PNM's Executive Policy committee, made up of the CEO and all the senior vice presidents (including Mr. Darnell), read the emergency writ before it was filed.[48] PNM mislead the Supreme Court by stating that: "No compelling or exigent circumstances require PNM to immediately apply for abandonment" (p.4); "no 'irrevocable' steps have been taken to abandon SJGS"(pp. 7-8) which was in direct conflict with the unequivocal and definitive statement by PNM affiant Thomas Fallgren that because there were: "no agreements that would allow it to operate beyond 2022, SJGS will not be available to serve PNM customers after 2022."[49,50] PNM further claimed in its Emergency Petition that the PRC's Order should be invalidated because the PRC had exceeded its legal authority when the order was issued, and that it infringed on its First Amendment rights. Lastly, PNM argued that the PRC 1/30 Order disregarded the PRC's own requirements and policies regarding abandonment and usurped the role of the legislature, which was considering the ETA at the time.[51] *See*, 19-00018-UT docket.

On March 1, 2019, the NM Supreme Court issued a stay preventing NM PRC from taking further action in Commission Case 19-00018-UT, and orders responses to PNM Writ.

---

[48] 19-00018-UT, TR., 12/10/2019 Ronald N. Darnell, PNM Senior Vice President, pp.84-85.
[49] *Attached Affidavit of Thomas G. Fallgren in Support PNM's Verified Compliance Filing Pursuant to Paragraph 19 of Modified Stipulation,* p.2.
[50] 19-00018-UT, TR., 12/10/2019 Ronald N. Darnell, PNM Senior Vice President, pp.88-99.
[51] Case No. S-1-SC-37552, *PNM v. NMPRC, Emergency Verified Petition of Public Service Company of New Mexico for Writ of Mandamus, Request for Emergency Stay, and Request for Oral Argument* (Feb. 27, 2019). Included in the 19-00018-UT docket.

On March 22, 2019 SB 489, the Energy Transition Act was signed into law, effective June 14, 2019.

PNM's argument in January and February of 2019, in the case herein[52] and before the NM Supreme Court (as described more fully above), was that there was no rush – PNM claimed that "no compelling or exigent circumstances" exists that warrants investigation of SJGS abandonment issues. Yet in a letter written June 5, 2019 to "stakeholders" PNM Senior Vice President Darnell directly contradicts this argument and confirms the concern argued by the PRC (and NEE)[53] – that PNM will stall and then rush the filing through to the detriment of ratepayers and the public interest.

> **Now for the crunch…**
>
> I am writing to personally inform you of our plans for abandonment and replacement resources for the San Juan Generation Station, our timeline, and the confluence of events **that has created a narrow window** for when PNM must apply. **Because the window is small and quickly approaching,** we wanted to open a clear channel of communication.

---

[52] *Motion and Supporting Brief of Public Service Company of New Mexico for Rehearing on Commission Order Initiating Proceeding and Request for Oral Argument*, February 7, 2019, for example:

a. "There are *no* proper legal or factual bases to require PNM to involuntarily initiate an abandonment proceeding on March 1, 2019." At p. 4. (emphasis supplied.)
b. "No irrevocable steps have been taken that require the abandonment of SJGS, just as no irrevocable steps have been take that require its continued operation."[52] At p. 6
c. "No actual or irrevocable abandonment of SJGS is currently pending or underway. All that has occurred is the exchange of preliminary contractual notices, which are subject to further contractual obligations and Commission approvals." At p. 12.

[53] 19-00018-UT, *Order Initiating Proceeding On PNM's December 31, 2018 Verified Compliance Filing Concerning Continue Use of And Abandonment of San Juan Generating Station*, 1/30/2019, pp. 11-12, ¶18. (At p. 12: "This potentially legitimizes the concerns raised by NEE that PNM may be seeking to gain an advantage and box in parties that oppose PNM's choices with a time limit.")

> The plan PNM must file with the PRC **is time sensitive** in large part **to ensure that full use of the renewable tax credits may be utilized in resources used to serve our customers.**
> ...
> These two factors create **the narrow window which PNM must navigate through, regardless of how small the opening is and how large the task at hand.**
> ...
> **On or about June 28th we will be filing our application with the PRC.**
>
> I want to take this opportunity to say we fully understand that **this gives little time for input before the filing,** but the filing is only the beginning of this process.
> ...
> **[We want to] hit the ground running immediately after our filing. Once we meet the demands of the narrow window to file our abandonment application, replacement resource plan and financing plan [.]**

(emphasis added.) *See*, NEE Exhibit 8.[54]

On June 26, 2019, the NM Supreme Court denied PNM's Emergency Petition and lifted the stay of the Commission's 1/30 Order.

Then, on July 1, 2019, PNM filed its Consolidated Application in a new docket, Case 19-00195-UT, rather than in the existing docket in Case No. 19-00018-UT.[55] Relying on the ETA, PNM requested recovery of ETA-defined abandonment and other energy transition costs estimated to be $360.1 million, including $283 million in undepreciated investments, the vast majority of the cost recovery from ratepayers. The ETA also imposes an accelerated review schedule,[56] leaving inadequate time to investigate, discover, and prepare testimony to show the poisoning of the land and water by PNM for decades, including Arsenic, Boron, Cadmium,

[54] 19-00018-UT, 12/10/2019 TR. Ronald N. Darnell, PNM Senior Vice President, pp.101-102.
[55] *See* PNM's Application, herein.
[56] 19-00018-UT, 12/17/2019 TR. Howe, pp.160. "If this Commission believes the ETA does not apply, I think it would have been more efficient for that decision to have been made up-front. We could have, then had this hearing on a -- on a -- more-relaxed, as it turns out, they wanted schedule."

Chromium, Selenium, Molybdenum, Lead, and Uranium, among other metals.

III. PNM Should Be Permitted to Abandon San Juan Generating Station

New Energy Economy firmly supports abandonment of the San Juan Generating Station. It is absurd that despite our awareness of impending climate catastrophe for decades that New Mexico has continued to rely on coal power for this long. We have a responsibility to our environment, our children, and future generations to abandon all fossil fuel use, especially dirty, expensive coal-fired electricity generation. New Energy Economy urges the Commission to accept PNM's abandonment of San Juan Generating Station. Anything less would be irresponsible in light of the urgency of climate action.

New Energy Economy supports evaluation of this matter from a "cost of carbon" standpoint.[57] As stated by CCAE witness Mr. Schwartz, application of the social cost of carbon would support the Commission's decision and would communicate to the public and other governments the climate benefits of abandoning fossil fuel resources like San Juan Generating Station.[58]

New Energy Economy opposes NMPRC Staff's position that PNM's abandonment application should be denied because PNM did not evaluate carbon capture (CCS/CCUS) technology. NEE does not believe that PNM's failure to include CCS evaluation in its initial Application is a fatal flaw in that application. As described by Sierra Club witness David Schlissel, continuing to operate SJGS after being retrofitted for CCS is not financially or economically feasible.[59] As he describes, it would be almost impossible for SJGS to operate at a

---

[57] 19-00018-UT, TR., 12/18/19, Schwartz, p. 1792.
[58] 19-00018-UT, TR. 12/18/2019, Schwartz, pp. 1863-64.
[59] Rebuttal Testimony of David Schlissel (Nov. 15, 2019), p. 3.

high enough capacity factor to capture enough carbon to vindicate the 45Q tax credits that are proposed to finance the $1.3 billion CCS retrofit project.[60] There are also many regulatory hurdles to CCS.[61] Moreover, CCS technology is used to mine additional fossil fuels, so it does not actually decrease carbon emissions by that much.[62] CCS technology also would not eliminate other harmful emissions from SJGS, including Sulfur Dioxide, and it in fact creates a new amine waste stream.[63] In general, a CCS retrofit of San Juan is an expensive and absurd idea that would postpone the necessary transition to zero-emissions generation technology.

The overwhelming majority of public comments before the PRC support abandonment.[64] In addition to the ample evidence propounded throughout this case to support abandonment, it is clear based on the public comments that the PRC has a popular mandate to approve SJGS

---

[60] *Id* p. 7.

[61] 19-00018-UT, TR., Hank Adair, 12/18/19, pp. 1892-93, Q (by Mr. Herrmann) "Okay. I guess, I'm trying to understand the process of once you get an agreement among the owners, what government approvals would be needed to finalize the transfer?"
A (Mr. Adair): "You will have the FERC approves [sic] and things like that as well … and with that, I don't know the others, frankly.
Q: "FERC, NMED, and a few others?"
A: "I did mention the NMED as part of the air permitting …"

[62] *See* Schlissel Testimony, p. 53 ("The use of captured CO2 for EOR produces additional oil that, in turn, is burned or used as a chemical feedstock, both of which can be expected to release CO_2 into the atmosphere. For example, *Power Magazine* estimates that every ton of CO_2 used in EOR will bring up roughly 0.76 to 0.91 tons of equivalent CO_2 that will ultimately end up in the atmosphere. And even this might not capture all of the CO_2 emitted by the additional oil produced with EOR.")

[63] *See Rebuttal Testimony of Jeremy Fisher* (Nov. 15, 2019), p. 24.

[64] *See, e.g.,* Comment of Stefi Weisburd, Transcript of Public Hearing p. 17 (Dec. 9, 2019) ("I'm a ratepayer who would like all of my electricity to come from clean sources. Coal is no longer financially or morally tenable."); Comment of Ward McCartney, *id* p. 20 ("… we only really have really eight and a half years to get off fossil fuels. My oldest daughter is going to have our first grandkid Christmas Day, and we have to have a future for our kids and our grandkids. And we have to do it in a time frame that's applicable to their future, and that means we have 10 years or less to get off fossil fuels); Comment of Erin Pang, *id* p. 102 ("But despite that fear, what I do know is that we have to continue moving forward as soon as possible toward energy systems that will provide for a clean and sustainable future, and allowing PNM to retire the San Juan coal plant is a step forward.")

abandonment and begin the transition toward 100% renewable energy in New Mexico.

IV. The Energy Transition Act Should Not Apply to this Case

a. There was already a pending case in this docket when the Energy Transition Act was passed.

This docket was opened on January 10, 2019 in response to PNM's December 31, 2018 "Verified Compliance Filing."[65] Pursuant to the Modified Stipulation in 13-00390-UT, PNM was required to hold a public hearing during 2018 to determine whether it would continue operating San Juan Generating Station when its Coal Supply Agreement ended in 2022.[66] In essence, the 13-00390-UT Stipulation vested ratepayers with the right to continue participating in the San Juan decision-making process. Yet, no review hearing was held during 2018.[67] Instead, PNM made its "compliance filing" on December 31, 2018 that disclosed that all SJGS co-owners except for the City of Farmington had provided notice to one another that they did not intend to renew their participation in SJGS beyond 2022.[68] In fact, on June 29, 2018 PNM had informed

---

[65] Case No. 19-00018-UT, *Order Initiating Proceeding on PNM's December 31, 2018 Verified Compliance Filing Concerning Continued Use of and Abandonment of San Juan Generating Station* (Jan. 30, 2019) at ¶ 19.

[66] 13-00390-UT, Certification of Stipulation (Nov. 16, 2015), adopted by Final Order (Dec. 16, 2015), upheld unanimously in *New Energy Economy v. New Mexico Public Regulation Comm'n*, 2018-NMSC-024, 416 P.3d 277.

[67] 19-00018-UT, TR., 12/10/19, Senior Vice President Ronald N. Darnell, pp. 83-84.
Q. (Commissioner Becenti-Aguilar): "My question is the proceeding that's being questioned in this hearing, is it my understanding that parties or the obligation for individuals that want to have a process set in place so that their voice can be heard regarding the 2018 final order, I don't think that the other parties were given the opportunity to express what they would like to state. Is that what I'm hearing during this hearing? PNM did not allow the parties to have a public say. That is my question."
A (Ronald Darnell): … "Chairwoman Becenti-Aguilar, I'm not disputing that there wasn't – I'm not disputing that there was not a proceeding."
Q. "My constituents are very, very important in this process. It is very important that they have a voice in the process, and the opportunity to set those public hearings did not occur, and I want to put that in the record. Thank you very much."

[68] NMPRC Case No. 13-00390-UT, *Verified Compliance Filing* (Dec. 31, 2018).

all other SJGS co-owners that it would abandon SJGS in 2022,[69] but did not seek to abandon it before the PRC at that time. Based on PNM's compliance filing, the PRC found that "PNM has essentially irrevocably committed itself to the abandonment of SJGS over six months ago and is currently already involved in the steps necessary under its Exit Agreement … to proceed with an orderly closure of SJGS …"[70] On January 30, 2019, the Commission issued an order in newly opened docket 19-00018-UT, requiring PNM to file an abandonment application by March 1, 2019.[71] The application was to address all relevant issues, including: the basis for abandonment, costs of abandonment and the amount of cost recovery, and proposed treatment of undepreciated investments, decommissioning costs, and reclamation costs.

b. The Energy Transition Act negatively affects the rights and remedies of ratepayers in this case.

N.M. Const. Art. IV, § 34 states: "No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case." This constitutional provision equally applies to administrative agency proceedings. *In re Held Orders of U S West Communications, Inc.*, 127 N.M. 375, 379 (1999).

If applied, the ETA would affect the "rights and remedies" and "change the rules of evidence or procedure" for ratepayers in this litigation, which, as described above, was ongoing when the statute was signed into law.[72] Ratepayers' "rights and remedies" will be affected

---

[69] *See Id*, PNM Exhibit TGF-4.
[70] 13-00390-UT and 19-00018-UT, *Order Requesting Response to PNM's December 31, 2018 Verified Compliance Filing Concerning Continued Use of SJGS to Serve New Mexico Customers Pursuant to Paragraph 19 of the Modified Stipulation* (Jan. 10, 2019), p. 4.
[71] 19-00018-UT, *Order Initiating Proceeding On PNM's December 31, 2018 Verified Compliance Filing Concerning Continued Use of And Abandonment of SJGS* (Jan. 30, 2019), ("1/30 Order").
[72] According to the docket on the Public Regulation Commission's website (http://nmprc.state.nm.us), as of the ETA's passage, 11 parties made 21 filings before the PRC

because the ETA has stripped the PRC of any regulatory oversight in several important areas, including the ability for the Commission to amend, based on its discretion, utility requests for cost recovery embedded in a financing order(s). The adverse effect of the ETA on ratepayers is evident: PNM gets to determine the amount it seeks from ratepayers. The Commission has no ability to determine if the amount requested is legitimate, just and reasonable, in the public interest, or if it is a "fair" balancing of interests between shareholder investors and ratepayers, or if the investment was based on a prudent determination. Rather than making an equitable determination of undepreciated assets for the remaining two SJGS units (previously determined by the PRC to be 50/50 for Units 1 & 4 in 13-00390-UT[73]), PNM now may recover 100% under the ETA—no questions asked. Whatever the proper percentage for undepreciated assets, this is an issue that prior to the ETA the PRC had the discretion to decide— not the utility. The ETA violates art. IV, §34 of the N.M. Constitution because it changes the rights and remedies of ratepayers, predetermining the resulting rates in an action pending action before the Commission. Thus, all provisions changing PRC oversight procedure should be found unconstitutional. *Edwards v. City of Clovis*, 1980-NMSC-039, ¶7, 94 N.M. 136.

---

in this litigation, and 19 public comments were submitted. The filings concerned such substantive matters as whether PNM had committed to abandon, requesting detailed discovery, and whether PRC control over abandonment timing was consistent with the PRC's responsibilities and public interest. See, e.g., NMPRC Case No. 19-00018-UT, *Southwest Generation Operating Company Reply to Responses to PRC 1/10/2019 Order* (Jan. 22, 2019); *Attorney General's and Joint Respondents' Response to Commission Order Requesting Response* (Jan. 17, 2019); *New Energy Economy Pleading Pursuant to PRC Order of 1/10/2019* (Jan. 18, 2019).

[73] When PNM abandoned SJGS Units 2 and 3, PNM was allowed 50% of its undepreciated investments. Cost sharing "fairly balances the interests of investors and ratepayers and is reasonable." 13-00390-UT, *Certification of Stipulation* (Nov. 16, 2015), p. 124, adopted by *Final Order* (Dec. 16, 2015), upheld unanimously in *New Energy Economy v. NM Public Regulation Commission*, 2018-NMSC-024, 416 P.3d 277. Direct Testimony of Andrea Crane, p. 25 (50% recovery "reflected a more reasonable sharing of abandonment costs").

Under NMSA 1978 § 62-8-1, "[e]very rate made, demanded or received by any public utility shall be just and reasonable." In particular, the PRC's role has been to balance the interest of consumers and the interest of utility investors in abandonment cases. *Pub. Serv. Co. of New Mexico v. New Mexico PRC*, 2019-NMSC-012, 444 P.3d 460, ¶ 10, *citing* NMSA 1978, §62-3-1(B). This also meant that the PRC had the power to deny recovery that was based on imprudent investments. *Id* at ¶¶ 29-33. In prior cases, the Commission has considered whether expenditures were prudently incurred and whether the asset is used-and-useful in providing service when determining the ratemaking treatment of expenditures on utility plants. *PNM v. NMPRC*, S-1-SC-36115 p. 12 (May 16, 2019).[74] In contrast, the ETA states that "[t]he commission shall issue a financing order approving the application if the commission finds that the qualifying utility's application for the financing order complies with the requirements of Section 4 of the Energy Transition Act." ETA § 5(E). ETA §4 does not include a determination of the justness, prudence, used-and-useful, or reasonableness of recovery, nor does it demand a balancing of investor and ratepayer interests. It merely contains a set of clerical requirements such as "a description of the facility that the qualifying utility proposes to abandon," "an estimate of the energy transition costs," and descriptions of securitization financing. None of the requirements of § 4 even hint at the due process considerations underlying the PRC's ratepayer-protective procedures.

The ETA actually anticipates its application to pending cases. ETA § 4(E) addresses this explicitly:

---

[74] *See also* NMPRC Case No. 2146, *Final Order* (Apr. 5, 1989), p. 54 ("utility regulatory commissions must not rely solely on the prudence standard … 'the two principles (prudence and used and useful) thus provide assurances that ill guided management or management that simply proves in hindsight to be wrong will not automatically be bailed out from conditions which government did not force upon it"), quoting *Jersey Central Power Co. v. Federal Energy Regulatory Commission*, 810 F.2d 1168 (D.C. Cir. 1987).

> If an application for approval to abandon a qualifying generating facility is pending before the commission on the effective date of the Energy Transition Act, the qualifying utility may file a separate application for a financing order, and the commission may join or consolidate the application for a financing order with the pending proceeding involving abandonment of the qualifying generating facility, with the consent of the applicant. On such joinder or consolidation, the time periods prescribed by the Energy Transition Act shall become applicable to the joined or consolidated case as of the date of the joinder or consolidation.

From this it can only be assumed that the legislators intended the ETA to affect cases that were ongoing at the time of its passage, despite N.M. Const. Art. IV, § 34.[75]

c. The Energy Transition Act changes the rules of evidence and procedure that would apply to this case.

The ETA dramatically changes procedure for abandonment cases before the Commission. Before the ETA, proceedings were not constrained by a specific time limit, and there was ample time for research, testimony, and record-development. For example, NMPRC Case No. 13-00390-UT, the case which concerned PNM's application to abandon Units 2 and 3 of SJGS, was filed on December 20th, 2013,[76] and the final order was issued on December 16th, 2015,[77]

---

[75] In fact, Senator Joseph Cervantes explicitly stated that the legislature was unconcerned with the pending cases clause's effect on the Energy Transition Act during the November 7, 2019 meeting of the New Mexico Legislature's Water and Natural Resources Committee:

> *There's been an argument made that we are constitutionally prohibited from passing laws that affect pending cases, we do that all the time.* It's hard to imagine any law we pass that does not affect pending cases. ... If that was not true then you're exactly right, everyone would simply file cases before a legislative session so that we can't do anything and then make the argument that because there's a pending case we're limited or restricted from doing so. That would be an absurd result, *so frankly, let's be honest about it, we ignore that part of the constitution. And there are many others that we ignore all the time*, sometimes with good reason. (emphasis supplied)

NM Legislature, Water and Natural Resources Committee (Nov. 7, 2019), video available at http://sg001-harmony.sliq.net/00293/Harmony/en/PowerBrowser/PowerBrowserV2/20191107/-1/62974 (at 11:23:33).

[76] See NMPRC Case No. 13-00390-UT, Application of Public Service Company of New Mexico for Approval to Abandon San Juan Generating Station Units 2 and 3, Issuance of CCN's for

almost exactly two years later. In contrast, the ETA states that

> If a hearing is held, the commission shall issue an order granting or denying the application for the financing order to a qualifying utility that is abandoning a qualifying generating facility and an order on an accompanying application of the qualifying utility for approval to abandon the qualifying generating facility *within six months from the date the application for the financing order is filed* with the commission. For good cause shown, the commission may extend the time for issuing the order for an additional three months. ETA § 5(A) (emphasis supplied).

Worse yet, "[f]ailure to issue a financing order within the time prescribed by Subsection A of this section shall be deemed approval of the application for a financing order and approval to abandon the qualifying generating facility ..." ETA § 5(B).[78] Thus, the PRC must run proceedings on an extremely truncated schedule, or risk having the abandonment be approved by default when the six month time limit expires. This is a dramatic procedural change from the deliberative timescale of previous proceedings.

V. Even if ETA applies, PNM's application fails to meet its requirements.

a. The memorandum included with Charles Atkins' testimony does not constitute attestation by a firm as required by ETA 4(B)(5).

Even if the Commission finds that the ETA applies to Case No. 19-00018-UT, the Commission may not issue a financing order approving the application because PNM's application for the financing order does not comply with the requirements of Section 4 of the ETA, specifically the criteria outlined in §§4B (5) and 4B (11).

No portion of PNM's application is an attestation by a securities firm "that the proposed

---

Replacement Power Resources, Issuance of Accounting Orders and Determination of Ratemaking Principles And Treatment (Dec. 20, 2013).

[77] NMPRC Case No. 13-00390-UT, Final Order (Dec. 16, 2015)

[78] 19-00018-UT, TR. 12/13/19, Elizabeth Eden, p. 961. Q. (Nanasi): "If the PRC fails to act by April 1st, 2019, the financing order is simply deemed approved by operation of law. Is that correct?"
A. (Eden): "that's what the Energy Transition Act specifies, yes."

issuance satisfied the current published AAA rating or equivalent ..." The testimony of Charles Atkins, attached to PNM's exhibit, comes the closest, but Atkins states that "this preliminary structure and pricing information is illustrative and subject to change, and the actual structure and pricing will differ, and may differ materially from this preliminary structure." TR., *Direct Testimony of Atkins* at p. 21. Thus, there is no attestation. Furthermore, the Guggenheim Securities Firm explicitly disclaims Atkins' testimony and the attached memorandum:

> This Presentation does not constitute financial advice or create any financial advisory, fiduciary or other commercial relationship. In addition, this Presentation does not constitute and should not be construed as (i) a recommendation, advice, offer, or solicitation by Guggenheim Securities, its affiliates ... with respect to any transaction or other matter, or with respect to the purchase or sale of any security ... or addressing ... (b) the relative merits or any such transaction or matter as compared to any alternative business or financial strategies that might exist for any party, (c) the financing of any transaction, or (d) the effects of any other transaction in which any party might engage. *The views expressed herein are solely those of the author(s) and may differ from the views of other Representatives of Guggenheim securities.* PNM Exhibit CNA-4 p. 15 (emphasis supplied).

ETA §4B(5) requires "a memorandum with supporting exhibits from a securities firm" (emphasis supplied). Yet the memorandum in the application goes out of its way to disavow any responsibility for Guggenheim, in violation of the ETA.

b. The securitization proposal laid out in Mr. Atkins' testimony is not designed to satisfy the lowest cost objective.

ETA §4B(11) requires that the application include " a statement from the qualifying utility committing that the qualifying utility will use commercially reasonable efforts to obtain the lowest cost objective." ETA §2N defines "lowest cost objective" such that "the structuring, marketing and pricing of energy transition bonds results in the lowest energy transition charges consistent with prevailing market conditions at the time of pricing of energy transition bonds and the structure and terms of energy transition bonds approved pursuant to the financing order."

Atkins' testimony directly contravenes the requirements of § 4(b)(11). Where 4(b)(11) requires that utilities seek the "lowest cost objective," Atkins testified that "My testimony … describes how the proposed securitization is structured to achieve *the highest possible credit ratings and price at the lowest market-clearing interest costs consistent with investor demand and market conditions* at the time of pricing." TR. Atkins at 1 (emphasis supplied). The concern Atkins identifies with meeting the "lowest market-clearing cost" does not reflect PNM's obligation to make the bonds as inexpensive for ratepayers as possible. This is not at all the same thing as the "lowest cost objective" required by the ETA. The concern Atkins identifies with meeting the "lowest market-clearing cost" does not reflect PNM's obligation to make the bonds as inexpensive for *ratepayers* as possible. Atkins acknowledges that the securitization financing is a financial decision for Guggenheim (or whatever security firm ultimately issues the bond), not a decision that meets the consumer protection standards the ETA requires. The fiduciary duty of security firms like Guggenheim is to make the most money possible and that directly conflicts with the PRC's obligation to protect ratepayers by having the lowest possible interest rates. Specifically, Atkins and Guggenheim's concern is likely that they not be left 'holding' any of the bonds at the end—they want to sell them at market rather than be forced to underwrite them. However this reflects the best interests of *Guggenheim*, not New Mexico ratepayers, who are supposed to be the primary concern under the ETA. Likewise, Atkins later testifies that

> Based on the strength of the book, the underwriter(s) may adjust the pricing levels lower (or tighter). … [This process] is done to ensure maximum distribution of the Bonds at *the lowest bond yields reasonably consistent with a market conditions*. If a tranche is oversubscribed, the underwriter(s) may continue to lower the pricing level (thus improving execution for the issuer), provided that this adjustment does not decrease the aggregate investor interest below the size of the tranche. If a tranche is undersubscribed, the pricing level may be adjusted higher until the tranche is fully subscribed. TR Atkins at 35 (emphasis supplied).

Essentially, this means that the bond issuer will continue to increase the interest rate until

all of the bonds have been purchased, regardless of whether that actually represents a fair cost for PNM ratepayers. Thus PNM has clearly not met the "lowest cost objective" anticipated by the ETA, which was premised on securitization being cheaper than traditional recovery.

c. The interest rate is unknown because of timing, market conditions, and estimated costs and therefore ratepayer "savings" are entirely speculative.

During his trial testimony, Atkins admitted that the interest rate propounded by PNM was purely speculative. He stated that "[t]here could possibly be a different [interest rate] structure. You could have an extremely steep … yield curve—where interest rates in the longer years are quite, quite high … And so you just don't know until you get closer to the time."[79]

PNM's primary argument in favor of securitization is that the predicted 3-4% interest rate will save ratepayers money over the conventional WACC rate of 7.23%.[80] However, what is being proffered as the securities firm opinion—Atkins' testimony and the Guggenheim memorandum—actually indicate that the interest rate under securitization is far from guaranteed. In fact, it could be much higher than the WACC. Even if it is not higher than the WACC, it does not appear that the securitization proposed by PNM is going to save ratepayers money compared to traditional ratemaking. The testimony of WRA witness Dr. Douglas Howe originally seemed to show that securitization was cheaper for ratepayers.[81] However, when Dr. Howe was cross examined at hearing by Hearing Examiner Schannauer, it was revealed that securitization would

---

[79] 19-00018-UT, TR., 12/13/19, Charles Atkins (PNM's securitization expert), pp. 1056-57.

[80] *See, e.g.,* 19-00018-UT, TR., 12/13/19 (Henry E. Monroy, PNM accounting expert), p. 956:
Q. (Nanasi) "But how can PNM know that the ETA is more beneficial to customers if we don't know how the PRC would use those traditional tools to determine appropriate cost recovery for the company?"
A. (Monroy) "Well, again, we have a cost of capital about 7.2 percent, and compared to the expected interest rate that we're getting on these bonds, which is about 3.38 or 3.4, and so that's significantly lower than using the company's weighted average cost of capital."

[81] *See* WRA Exhibit DJH-2.

be at least 25 million dollars *more expensive* over time than traditional recovery.[82]

In addition to the fact that the interest rates themselves are speculative, the underlying costs on which interest will be charged are also mere estimates. This has been repeatedly admitted by PNM staff.[83] Thus, if the PRC were to approve a financing order in this case, it would be yoking ratepayers to costs which are not guaranteed, and on which they will be charged an equally unknown interest rate.

d. PNM's application does not satisfy the location mandate in ETA section 3(F).

PNM's application also fails to satisfy the location mandate expressed by ETA § 3(F). Its proposed replacement resources under "Scenario 1" include the Arroyo Solar project, and the Jicarilla Solar project, neither of which is located within the San Juan school district. To be clear—NEE supports the inclusion of these resources as replacements, but they do not comply with the Energy Transition Act's location mandate. As discussed *supra*, NEE thus urges the Commission to find that the location mandate is special legislation that is detrimental for the Commission to apply given the requirement of satisfying the most cost effective resource and in consideration of the "public interest." The Commission is required to fairly balance the interest of customers and shareholders in an energy context, not mandate the acquisition of and generation of energy in a location that makes no economical or energy sense. (New Energy Economy would support economic development in the Four Corners region that is practical.)

---

[82] 19-00018-UT, TR., 12/17/19, (WRA witness and former PRC Commissioner Douglas Howe), pp. 245-46.

[83] See, e.g., 19-00018-UT, TR., 12/13/19 (Elizabeth Eden, PNM Human Resources), pp. 986-87.
Q. (NM AREA attorney Peter Gould) "Would you agree with me that this list of 10 costs, that these can vary, and I think you have admitted this in your testimony. These can vary between today's date and the date of actual issuance."
A. (Eden) "They are estimated costs, and by default, estimated costs can vary."

VI. If ETA applies PNM will be empowered to set its own energy transition charges to ratepayers without Commission ability to modify or adjust those costs based on "prudence or reasonableness."

Pursuant to Hearing Examiners' December 27, 2019 *Briefing Order No. 2*, NEE responds that the Energy Transition Act ensures that PNM's proposed financing order will be approved as written, with whatever ratemaking procedures PNM proposes. Worse yet, the financing order makes it so that PNM may recover additional costs it incurs in the abandonment process, without opportunity for the Commission to disallow them.

ETA § 5(F)(8) requires approval of the ratemaking process that is proposed by the utility. The framework imposed by the ETA is that if all of the requirements of ETA Section 4 are met, then pursuant to ETA § 5(E), the Commission "shall approve" the proposed financing order. The language does not provide for any discretion for the Commission to deny or modify any requests made by PNM. The ETA makes the financing order irrevocable; it creates a property interest, and will be deemed valid even if there is a determination later that it should be vacated.[84] As stated by PNM witness Eden, "the Energy Transition Act specifies the role of the Commission and what needs to be—the conclusion needs to be a non-appealable financing order."[85]

ETA § 4(B)(10) provides that an application for a financing order should propose a ratemaking process to adjust for the difference between estimated costs in the application and actual costs incurred. There is no provision in that section, or anywhere else in the ETA, that

---

[84] 19-00018-UT, TR., 12/13/19 (Eden) p. 968. Q. (Nanasi) "If the ETA's provisions are applied in this case, the PRC's approval will be ministerial only. Essentially, if the requirements of Section 4 are met, then the Commission has no choice but to issue a financing order. Is that correct?"
A. (Eden) "Well, the Energy Transition Act specifies the role of the Commission and what needs to be -- the conclusion needs to be a non-appealable financing order, yes."

[85] *Id* p. 959.

states that costs may be disallowed based on a finding that they are unreasonable or imprudent. When read in parallel with other ETA provisions, it becomes clear that the ETA does not intend for the Commission to have discretion to adjust PNM's cost requests based on a "prudence" or "reasonableness" determination. For example, ETA §7 provides that the utility has the sole power to request modifications of the financing order. The amended financing order can include new energy transition costs to be financed by the bond, based on updated estimates or actual costs. This provision does not provide for disallowance based on a finding or imprudence or unreasonableness of incurred costs. ETA §31(C) makes this explicit with regard to decommissioning costs, stating that there can be no disallowance by the Commission whatsoever of claimed decommissioning costs.

This situation in which PNM determines the costs to be recovered and can modify them without PRC oversight is disastrous for ratepayers. Ratepayers depend on the PRC to protect them from unreasonable rates imposed by this monopoly utility. Additionally, under this framework, PNM may be able to incorporate charges into its "energy transition costs" that the Commission would never reasonably allow if it had discretion. For example, while NEE witness and former Michigan Public Service Commissioner Steven Fetter was being cross-examined by CCAE counsel, this exchange took place:

> Q. (CCAE Attorney) There's nothing in the ETA that prevents somebody from suing PNM for negligence or a tort of some type associated with -- with its conduct of activities at San Juan, is there?
> A. (Fetter) Well, that -- that's an interesting thought. If someone sued them related to the safety or operation of a plant, and they had to pay out in tort, whether they could assign that cost to the plant and then put it through the ETA, I think -- I think you've raised an interesting legal question there, whether it would have been a cost of doing business and, therefore, a cost that would come under

the ETA, either for recovery under securitization or for recovery in the absence of Energy Transition Bonds.

Q. That's not –

A. Since the Commission would not be allowed to review that cost if it was put towards a financing order.[86]

Therein lies the problem with the only securitization law in the country that removes from the Commission its central role to continue regulation in reviewing and approving the financing order. The ETA merely allows the Commission the ministerial function of preparing the documents necessary for a financing order that will support issuance of long-term debt, whose structure cannot be modified in any way or for any reason, for the life of the securitization bonds.

VII. The Energy Transition Act is unconstitutional.[87]

a. The Energy Transition Act denies ratepayers due process rights by committing them to pay rates without meaningful opportunity to be heard.

Under the New Mexico Constitution, the PRC has a duty to regulate public utilities. N.M. Const. Art. XI, § 2. That duty requires the Commission to review proposed rates to ensure that those rates are just and reasonable. NMSA 1978 § 62-8-1; § 62-6-4 (2003) ("The Commission shall have general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations"). "Our Constitution mandates that a public regulation commission set utility rates." *Blake v. Pub. Serv. Co. of New Mexico*, 2004-NMCA-002, ¶ 22, 134 N.M. 789, 795, 82 P.3d 960, 966. The ETA destroys PRC's ability to regulate

---

[86] 19-00018-UT, Tr. 12/16/19, pp. 1334-35.

[87] NEE incorporates its October 18, 2019 *Memorandum of Law on the Applicability of Energy Transition Act to these Proceedings*, with respect to other arguments regarding unconstitutionality and unlawfulness of the ETA.

utilities. Once a utility applies for a financing order, the PRC must approve it, or the order is deemed approved by operation of law. ETA § 5. Furthermore, when the Commission issues a financing order, it is irrevocable except under narrow ministerial circumstances pursuant to §ETA 4, creates a property interest, and any actions taken pursuant to the order are legally valid, even if it is later vacated. ETA §§ 5E; 7A-C; 12A; 22. Under the ETA, it does not matter what facts or evidence are presented to the Commission. In fact, it does not matter what facts or conclusions the Commission draws at all.

The ETA not only ties the hands of the PRC, it fatally undermines the very legal framework that governs modern energy law in New Mexico. That framework, sometimes referred to as the regulatory compact, provides utilities with a monopoly over a particular service and an exemption from the anti-trust laws, in return for government regulation and oversight of utility decision-making and investment. See, e.g., *Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n*, 1995-NMSC-062. The Public Regulation Commission's constitutional duty to regulate utilities requires the Commission to conduct review and exercise discretion over proposed rates to ensure that they are "just and reasonable." NMSA 1978 § 62-8-1. In particular, the "[t]he rate-making process involves a balancing of investor and consumer interests." *Matter of Rates & Charges of Mountain States Tel. & Tel. Co.*, 1982-NMSC-127, ¶ 26. This balance has resulted in the PRC denying or adjusting utility applications in various contexts. For example, when PNM requested ratemaking treatment for its Advanced Metering Infrastructure Project, the PRC ultimately denied, stating that "PNM's requests for the approval of regulatory assets to recover the undepreciated costs of the existing meters that PNM intends to replace and the estimated costs of a customer education program do not, in the context of PNM's current plan, fairly balance the interests of investors and ratepayers." NMPRC Case No. 15-00312-UT,

Recommended Decision p. 96 (adopted unanimously by Final Order (Apr. 11, 2018). In contrast, Section 5 of the ETA does not allow for interest balancing and effectively requires the Commission to approve an application for a financing order as proposed by the utility. Section 31C then allows PNM to obtain cost recovery for any undepreciated investments and decommissioning costs for all its gas plants and nuclear investments, as well as coal plants, without the opportunity for meaningful review by the PRC or for ratepayers to be heard. The Commission must allow recovery of any undepreciated investments or decommissioning costs by a utility, no matter if they were imprudently incurred or result in rates that do not meet the just and reasonable standard. ETA § 31C. NEE expert witness Steven M. Fetter, former Chairman of the Michigan Public Service Commission, former bond rater for Fitch, former general counsel for the Michigan State Senate, and former PNM expert witness, states in his testimony in 19-00018-UT:

> I view the ETA as a significant departure from other 'securitization' laws in a way that undermines the core of the PRC's fundamental purpose and role – to regulate on behalf of the public to 'reasonably protect ratepayers from wasteful expenditure … [It] has allowed a regulated utility to determine the costs it wishes to recover through securitization, with no ability of the regulator to ensure that such costs are appropriately recoverable prior to being locked in through a financing order and bond issuance. Such a process would allow New Mexico public utilities to hold unprecedented power. In essence – intended or not – the ETA serves as a deregulation law.

NEE Exhibit 20, *Direct Testimony and Exhibits of Steven M. Fetter*, August 6, 2019, at pp. 4, 17. The ETA conflicts with the PRC's constitutional duty to regulate public utilities. ETA §§ 2H, 2S, 5, 11C, and 31C require the PRC to approve financing orders for costs of abandonment of all gas and coal plants and nuclear investments in PNM's portfolio, depriving it of its right to conduct meaningful oversight of these costs. Section 31C expressly prohibits the Commission from disallowing cost recovery for any undepreciated investments and decommissioning costs in PNM's gas and nuclear plants. These provisions put PNM in charge of deciding rates and

deprive ratepayers of due process and regulatory protections intended under the Constitution.

New Mexico Constitution Art. II § 18 states, in parallel with U.S. Const. Amendment 14, that "No person shall be deprived of life, liberty or property without due process of law ..." These constitutional provisions have been interpreted to guarantee that no individual shall have property taken from them by the government or using government processes without opportunity for hearing. "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U. S. 385, 394 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U. S. 545, 552 (1965).[88] At the absolute minimum, this requirement means that members of the public whose rights will be affected by the outcome of a case must have the ability to affect the outcome of the case. The ETA does not provide for this.

Section 5 of the ETA effectively requires the Commission to approve an application for a financing order as proposed by the utility. Section 5A states that the Commission may approve or deny an application, but this turns out to be an illusory choice because Section 5E states the Commission "shall issue a financing order approving the application" as long the utility complies with ETA abandonment requirements." ETA §§ 4, 5E (emphasis added). Section 5B is clear:

> Failure to issue an order approving the application or advising of the application's noncompliance pursuant to Subsection E of this section . . . shall be deemed approval of the application for a financing order . . .. (emphasis supplied).

The ETA further violates due process because of its short window for review. The ETA strips the

---

[88] See also *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012, *supra*, at ¶63 ("It is well settled that the fundamental requirements of due process in an administrative context are reasonable notice and opportunity to be heard and present any claim or defense").

PRC of most of its regulatory power, including its ability to balance remedies in the public interest, and makes it so that the PRC must approve utility filings within six months (or nine months with extension for "good cause"). ETA § 5. This is a wholly inadequate amount of time for discovery, hearings, consultation with local communities, and decision by the PRC. Yet all of these must be provided to ratepayers and parties in order for the requirements of due process to be satisfied. In particular, six months (or even nine months) are an impossible span of time to develop the record in this case, especially concerning cleanup of environmental contaminants on the site of New Mexico's largest and oldest-running coal plant (SJGS). This violates the PRC's duty to review, the Supreme Court's right to judicial review under separation of powers doctrine (discussed infra), and ratepayers' due process rights.

b. The Energy Transition Act is special legislation that only applies to PNM's investments, and was specifically drafted to avoid PRC oversight of the San Juan Generating Station Abandonment.

Article IV, Section 24 of the New Mexico Constitution prohibits special legislation "where a general law can be made applicable." *Thompson v. McKinley County*, 112 N.M. 425, 816 P.2d 494, (1991) *See also, Keiderling v. Sanchez*, 91 N.M. 198, 199, 572 P.2d 545, 546 (1977) ("The evil inherent in special legislation is the granting to any person or class of persons, the privileges or immunities which do not belong to all persons on the same terms.").

Section 2(S) makes it clear that the ETA's securitization financing is special legislation. While Section 2R defines "public utility", Section 2S narrows the use of securitization financing only to PNM, because PNM is the only monopoly utility that "operates" a coal-fired generating in NM (Section 2S (3)) and is the only monopoly utility in New Mexico invested in coal. Among other things, the ETA authorizes PNM to issue bonds to pay for the retirement of coal-fired generating facilities, SJGS and the Four Corners Power Plant ("Four Corners" or "FCPP") as

follows: PNM may recover up to $375,000,000 per generating facility in abandonment costs, including decommissioning costs and mine reclamation costs, and an unspecified amount in undepreciated investments and legal compliance costs. ETA §§ 2H, 2S 5A, B, D and E. These costs and past investments, as well as other costs, are then recovered through electricity rate increases as a "non-bypassable charge" to customers for twenty-five years. The ETA requires customers pay the charge even if they later change energy providers or the Commission determines these charges are wasteful, excessive, imprudent, or inconsistent with law. ETA §§ 2G, H; 4 A, B; 5; 11C; 31C. This legislation seems specially targeted to ensure that PNM gets the maximum payoff for its abandonment without real oversight of their cleanup plans. In fact, legislators have explicitly acknowledged the special legislation concerns and stated that the ETA is in fact special legislation.[89]

One particular aspect of the ETA that constitutes special legislation is the location mandate imposed by ETA § 3(F). Section 3(F) defines replacement resources for abandoned facilities such that the resources must be "located in the school district in New Mexico where the abandoned facility is located, are necessary to maintain reliable service, and are in the public interest as determined by the Commission." This requirement means that any replacement for a facility abandoned by PNM must be built in the same school district as the previous facility. This does not allow administrative or judicial determinations of what is "the most cost effective resource portfolio" among feasible alternatives. This was the Pre-ETA standard for determining

---

[89] NM Legislature, Water and Natural Resources Committee (Nov. 7, 2019) "This [Energy Transition] act was written with a limited application to two coal plants, and you're right about that. There is some constitutional language that suggests that we shouldn't do that, but we do it all the time." At 11:23:02. "There's been an argument made that we are constitutionally prohibited from passing laws that affect pending cases, we do that all the time. … [L]et's be honest about it, we ignore that part of the constitution." At 11:23:33.

public interest, intended to protect ratepayers.[90] In a real sense, this law makes it so that utilities can (and perhaps even must) build new resources on the site of the old ones without serious review and consideration of efficiency or ratepayer pocketbooks. It also may be that the ETA § 3(F) provision is impossible to apply—the PRC cannot simultaneously require that all replacement resources be on the site of the abandoned plant, are reliable, and are cost effective and in the public interest. After all, the public interest requires at minimum that the PRC find that utilities are satisfying the most cost effective objective,[91] that rates are just and reasonable, that recovery balances the interests of shareholders and ratepayers, and that rates are based upon prudent investments.[92] This location preference per se excludes wind resources, despite the fact

---

[90] *New Energy Economy v. New Mexico Public Regulation Commission*, 2018-NMSC-024, 416 P.3d 277, ¶13 (2018).

[91] In Case No. 16-00105-UT, *Order Recommending Grant of PNM's Motion to Withdraw Application*, the Hearing Examiner stated: "The Commission has stated that a utility carries the burden in a resource acquisition case to show that the resource it proposes is the most cost effective resource among feasible alternatives." *Citing, Corrected Recommended Decision*, Case No. 15-00261-UT, August 15, 2016, pp. 89, 96-99, *approved in Final Order Partially Adopting Corrected Recommended Decision*, Case No. 15-00261-UT, September 28, 2016; *Final Order*, Case No. 13-00390-UT, December 16, 2015, pp. 5-11; *Order Partially Granting PNM Motion to Vacate and Addressing Joint Motion to Dismiss*, Case No. 15-00205-UT, December 22, 2015, pp. 10- 11; *In Re Public Service Company of New Mexico*, Case No. 2382, 166 P.U.R.4th 318, 337, 355- 356 (1995). The Commission adopted the Hearing Examiner's decision in it's final order and stated in Case No. 16-00105-UT, *Order Granting PNM's Motion to Withdraw Application*, 5/24/2017, ¶10: "[T]he Commission reiterates that PNM bears the burden of demonstrating that its proposed resource choice is the most cost effective resource among feasible alternatives." This bedrock consumer protection principle has been articulated and reiterated by the PRC repeatedly: 15-00312-UT, Recommended Decision, p. 104, unanimous approval in Final Order, 4/11/2018. *Also See*, Case No. 18-00261-UT, *Recommended Decision*, 3/18/2019, pp. 5-6, unanimously adopted by Final Order, 3/27/2019. ("Utilities also need to show that the proposed project is the most cost effective alternative to satisfy utilities' needs.") This standard was affirmed recently by our Supreme Court *Pub. Serv. Co. of New Mexico v. New Mexico PRC*, 2019-NMSC-012, 444 P.3d 460, ¶32.

[92] Public interest is "a striking of the proper balance between the interests of all ratepayers and all investors." NMPRC Case No. 2087, *In the Matter of the Prudence of Costs Incurred by the Public Service Company of New Mexico in Construction of Palo Verde Nuclear Generating Station, Final Order* p. 85 (affirmed by *Attorney Gen. of State of N.M. v. New Mexico Pub. Serv. Comm'n*, 1991-NMSC-028, ¶ 28).

that they are cheapest. The area around San Juan Generating Station is not a good candidate or efficient selection for wind power.[93] The San Juan area is also among the worst areas in New Mexico for solar generation.[94] PNM's Application properly takes this into account, proposing the Jicarilla solar PPA and the Arroyo PPA in locations far from San Juan.[95] Moreover, the San Juan area is not where most ratepayers live—the majority of ratepayers live far from the San Juan site. Requiring that replacement resources be built at that location increases transmission costs unnecessarily compared to resources that can be sited closer to population centers. Overall, it is clear that ETA § 3(F) constitutes special legislation that attempts to dictate the outcome in a pending case, because it does not allow for consideration of relevant issues, instead hamstringing replacement resources by requiring them to be in the same school district as the abandoned facility.

c. The Energy Transition Act violates separation of powers by infringing the PRC's constitutional duty to regulate utilities, and by restricting judicial review and rendering it irrelevant.

The New Mexico Constitution, Art. III, § 1 provides for three distinct departments of government: the legislative, the executive, and the judicial. Some overlap of government functions is permissible, and the Court has held the adjudication of cases by certain

---

[93] *See* National Renewable Energy Laboratory, *Wind Atlas* p. 109, *available at* https://www.nrel.gov/gis/assets/pdfs/wind-atlas.pdf. As the map demonstrates, the area surrounding Farmington, NM, has only weak wind power. "Class 3 and 4 annual average wind power is found on the high plains and uplands of eastern Colorado and eastern New Mexico. … Plains areas farther west that are within the sheltering influence of the Rocky Mountains and river drainages generally have less wind power." Id at 104. In contrast, "Class 3 average wind power is estimated for the Rio Grande Valley corridor in the vicinity of Santa Fe, New Mexico." Id at 105.

[94] *See* National Renewable Energy Laboratory, *Direct Normal Solar Resource of New Mexico*, available at https://www.nrel.gov/gis/solar.html.

[95] The Jicarilla PPA would also support clean-energy development in an Indigenous community, the Jicarilla Apache nation. This is a laudable policy goal that New Energy Economy strongly supports.

administrative agencies to be constitutional. *See e.g., Wylie Corp. v. Mowrer*, 1986-NMSC-075, 104 NM 751, 753, 726 P.2d 1381, 383. At the same time: "The judiciary . . . must maintain the power of check over the exercise of judicial functions by quasi-judicial tribunals in order that those adjudications will not violate our constitution. The principle of check requires that the essential attributes of judicial power, vis-a-vis other governmental branches and agencies, remain in the courts." *Board of Educ. v. Harrell*, 118 N.M. 470, 484, 882 P.2d 511, 525 (1994). It is fundamental to administrative law that the courts be able to meaningfully review regulatory decisions. The entire American system of administrative decision-making depends on there being an avenue to the courts from any significant regulatory decision that affects property rights or liberty rights, otherwise it would violate separation of powers. In essence, the only way administrative agencies can be permitted to make decisions affecting the property, rights, and remedies of ratepayers is if meaningful judicial review is available.

The ETA violates separation of powers because it eliminates judicial and quasi-judicial assessment of what PNM is entitled to receive from ratepayers when it abandons the SJGS. This issue involves the rights of individuals in a specific property context, not a matter of general policy. This Court has described the distinction between a properly judicial function and a properly legislative function as follows:

> [L]egislative action reflects public policy relating to matters of a permanent or general character, is not usually restricted to identifiable persons or groups, and is usually prospective; quasi-judicial action, on the other hand, generally involves a determination of the rights, duties, or obligations of specific individuals on the basis of the application of currently existing legal standards or policy considerations of past or present facts developed at a hearing conducted for the purpose of resolving the particular interest in question.

Albuquerque Commons P'ship v. City Council of City of Albuquerque, 2008-NMSC-025, ¶ 32, 144 N.M. 99, 109, 184 P.3d 411, 421. Under the ETA, ratepayers simply pay up, without oversight, analysis, application of legal standards,[96] or any other safeguard.

Furthermore, the ETA violates separation of powers because it impairs the obligation of the contract PNM entered into when it agreed to the Stipulation in 13-00390-UT and agreed to initiate a hearing, before the end of 2018, to determine the future of SJGS. Settlement agreements are contracts. As the New York Court of Appeals explained:

> Stipulations of settlement are favored by the courts and not lightly cast aside. It is well settled that a stipulation of settlement is an independent contract subject to the principles of contract interpretation and a party will be relieved from the consequences of a stipulation made during litigation only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident. Municipalities are treated no differently from private parties with respect to contractual obligations.

Ecogen Wind LLC v. Town of Prattsburgh Town Bd., 112 A.D.3d 1282, 1284–85, 978 N.Y.S.2d 485, 487–88 (2013) (citations omitted).

Legislation that has the effect of setting aside a settlement agreement or setting aside the decision of a court violates our constitution's Art. II §19[97] because it impairs the obligation of a contract, and violates separation of powers.

A settlement will not be set aside just because it later proves to have been unwise or unfortunate for one party to enter into the agreement. *Envtl. Control, Inc.*, 2002–NMCA–003, ¶ 19, 131 N.M. 450, 38 P.3d 891. Once a settlement is negotiated, the parties are bound by its

---

[96] *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012, *supra* at ¶¶8-11: requiring the PRC to determine whether rates are "just and reasonable," whether they balance consumer and investor interests, and whether costs are prudently incurred in the first place, citing, NMSA 1978, §§ 62-6-4(A), 62-8-1, 62-8-7(A) and 62-3-1(B).

[97] N.M. Const. Art. II, §19: "No…law impairing the obligation of contracts shall be enacted by the legislature."

provisions and must accept both the burdens and benefits of the contract. *Montano v. NM Real Estate Appraiser's Bd.*, 2009-NMCA-009, ¶ 12, 145 N.M. 494, 497, 200 P.3d 544, 547.

In *Wayne J. Stellhorn, et al., Plaintiffs, v. The Allen County Council, et al., Defendants.*, 2001 WL 35965194 (Ind.Cir.) the Court held that the Order of Relief is a final decree, approved by the parties and entered by the Court, and any application of subsequent legislation to overturn or set aside the Order of Relief would violate the prohibitions in the Constitution of the State of Indiana against the infringement of and encroachment upon one tribunal branch of government upon another, (See, Article 3, Sec. 1); *see* also *Thorpe v. King,* 227 N.E.2d 169 (Ind. 1967) (statute cannot be applied to set aside court's final judgment); *Progressive Improvement Assoc. of Downtown Terra Haute v. Catch All Corp.*, 258 N.E.2d 403 (Ind. 1970) (legislature may not impair court's control over judgments).

The terms of the Order of Relief were agreed to by the parties and adopted by the Court, and subsequent legislation does not moot it, make it disappear, authorize Defendants to violate it, or make continued compliance with the terms of the Order of Relief illegal or contrary to public policy. *Id.*

The Order of Relief is a judgment which constitutes a contract. *Heath v. Fennig,* 40 N.E.2d 329 (Ind. 1942). Application of subsequent legislation to invalidate or circumvent the Order of Relief would violate the mandate of Article 1, Section 24 of the Constitution of the State of Indiana requiring that "No *ex past facto* law, or law impairing the obligation of contracts, shall ever be passed" and of Article 10, Section 1 of the Constitution of the United States that "No state shall... pass any... law impairing the obligations of contracts." *See Pulos v. James,* 302 N.E.2d 768 (Ind. 1973) (while legislature may prohibit contracts against public policy it may not impair vested rights under contract).

The Constitution is concerned with means as well as ends. The Government has broad powers, but must use them "consist[ent] with the letter and spirit of the constitution." *McCulloch v. Maryland,* 4 Wheat. 316, 421, 4 L.Ed. 579 (1819). As Justice Holmes noted, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way." *Pennsylvania Coal,* 260 U.S., at 416, 43 S.Ct. 158. *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2428, 192 L. Ed. 2d 388 (2015).

The ETA cannot be construed to nullify a stipulated settlement relied upon and upheld by this Court, because it would constitute legislative interference with ratepayers' vested rights or pending case application of Art. IV §34 or legislative impairment of a stipulated settlement under Art. II §19.

ETA § 8B provides for a ten-day time limit to file a notice of appeal after denial of an application for rehearing or issuance of a financing order. The time period for notice of appeal is an unconstitutional limit on judicial review and violates Article III, Section 1 of the N.M. Constitution. Under the Public Utility Act, an appeal from a Commission order must be within thirty days of the final order. NMSA 1978, §62-11-1. The ETA, apparently in an effort to frustrate any effort by any injured party to seek court intervention, shortens that period to ten days. Section 22 of the ETA, titled "VALIDITY ON ACTIONS IF ACT HELD INVALID," provides that "if any provision of that act is invalidated, superseded, replaced, repealed or expires for any reason, that occurrence shall not affect the validity of any action allowed pursuant to that act that is taken by the commission, a qualifying utility, . . . or any other person ..." This means that any action taken pursuant to the ETA will remain valid even if the ETA, its provisions, or a financing order is later invalidated by the PRC or by a court. Thus, the statute makes it impossible for courts to craft appropriate remedies in the event of overreach. This

unacceptably usurps judicial power, violates the separation of powers, and is unconstitutional. In fact, this provision of the ETA renders the ETA and decisions pursuant to it unreviewable. If no remedy can be created in response, then any attempt to appeal would be moot.

d. The Energy Transition Act amends the Public Utility Act without notice.

The title of the ETA violates the constitutional prohibition against so-called log-rolling, or "hodge-podge" legislation, because it fails to include essential terms and fails to alert the public that it effectively amends long-standing provisions of New Mexico's Public Utility Act. N.M. Const. Art. IV, § 16. The purpose of the rule against log-rolling is to ensure that the legislature and the public have adequate notice about the contents of legislation. *Martinez v. Jaramillo*, 1974-NMSC-069, 86 N.M. 506, 508, 525 P.2d 866, 868. Even a bill whose subject is stated in only general terms may well be sufficient to satisfy Section 16, but it may not be misleading, as the ETA is, by including some topics and omitting others. See *City of Albuquerque v. State*, 1984-NMSC-113, ¶ 9, 102 N.M. 38, 40, 690 P.2d 1032, 1034.

Its title, while verbose,[98] fails to identify ETA's purpose and its significant amendments

---

[98] ETA's title: AN ACT RELATING TO PUBLIC UTILITIES; ENACTING THE ENERGY TRANSITION ACT; AUTHORIZING CERTAIN UTILITIES THAT ABANDON CERTAIN GENERATING FACILITIES TO ISSUE BONDS PURSUANT TO A FINANCING ORDER ISSUED BY THE PUBLIC REGULATION COMMISSION; PROVIDING PROCUREMENT OF REPLACEMENT RESOURCES, INCLUDING LOCATION OF THE REPLACEMENT RESOURCES; AUTHORIZING THE COMMISSION TO IMPOSE A FEE ON THE QUALIFYING UTILITY TO PAY COMMISSION EXPENSES FOR CONTRACTS FOR SERVICES FOR LEGAL COUNSEL AND FINANCIAL ADVISORS TO PROVIDE ADVICE AND ASSISTANCE FOR PURPOSES RELATED TO THE ACT; PROVIDING PROCEDURES FOR REHEARING AND JUDICIAL REVIEW; PROVIDING FOR THE TREATMENT OF ENERGY TRANSITION BONDS BY THE COMMISSION; CREATING SECURITY INTERESTS IN CERTAIN PROPERTY; PROVIDING FOR THE PERFECTION OF INTERESTS IN CERTAIN PROPERTY; EXEMPTING ENERGY TRANSITION CHARGES FROM CERTAIN GOVERNMENT FEES; CREATING THE ENERGY TRANSITION INDIAN AFFAIRS FUND, THE ENERGY TRANSITION ECONOMIC DEVELOPMENT ASSISTANCE FUND AND THE ENERGY TRANSITION DISPLACED

to the Public Utility Act, violating N.M. Const. Art. IV, §18[99]includes no mention of how it alters PRC procedures, including its elimination of PRC regulatory authority over recovery of undepreciated investments and decommissioning costs, its impact on rates, its change of the time for appeal, and more. Hearing testimony below addresses how the ETA, without identifying its amendments of the PUA, effectively amends it: Hearing testimony below addresses how the ETA, without identifying its amendments of the PUA, effectively amends it:

> Elisabeth A. Eden, Vice President and Treasurer of PNM Resources, testified:
> Q. (Nanasi) "The ETA has a long title, but doesn't reference its amendment to the Public Utility Act, and specifically 62-6-6, the requirement to file a separate financing application. Is that also correct?"
> A. (Eden) "Yes."[100]

In short, by omission of key provisions in the title of the ETA it seems calculated to mislead. The title includes no reference to recovery of "rates", "undepreciated investments" or

---

WORKER ASSISTANCE FUND; PROVIDING FOR NONIMPAIRMENT OF ENERGY TRANSITION CHARGES AND BONDS; PROVIDING FOR CONFLICTS IN LAW; PROVIDING THAT ACTIONS TAKEN PURSUANT TO THE ENERGY TRANSITION ACT SHALL NOT BE INVALIDATED IF THE ACT IS HELD INVALID; REQUIRING THE PUBLIC REGULATION COMMISSION TO APPROVE PROCUREMENT OF ENERGY STORAGE SYSTEMS; PROVIDING NEW REQUIREMENTS AND TARGETS FOR THE RENEWABLE PORTFOLIO STANDARD FOR RURAL ELECTRIC COOPERATIVES AND PUBLIC UTILITIES; AMENDING CERTAIN DEFINITIONS IN THE RENEWABLE ENERGY ACT AND RURAL ELECTRIC COOPERATIVE ACT; REQUIRING THE HIRING OF APPRENTICES FOR THE CONSTRUCTION OF FACILITIES THAT PRODUCE OR PROVIDE ELECTRICITY; ALLOWING COST RECOVERY FOR EMISSIONS REDUCTION; PROVIDING POWERS AND DUTIES FOR THE PUBLIC REGULATION COMMISSION OVER VOLUNTARY PROGRAMS FOR PUBLIC UTILITIES AND RURAL ELECTRIC COOPERATIVES; REQUIRING THE PROMULGATION OF RULES TO IMPLEMENT THE RENEWABLE ENERGY ACT; REQUIRING THE ENVIRONMENTAL IMPROVEMENT BOARD TO PROMULGATE RULES TO LIMIT CARBON DIOXIDE EMISSIONS OF CERTAIN ELECTRIC GENERATING FACILITIES.

[99] N.M. Const. Art. IV §18 states: "No law shall be revised or amended, or the provisions thereof extended by reference to its title only; but each section thereof as revised, amended or extended shall be set out in full."

[100] 19-00018-UT, TR., 12/13/2019, Eden, p. 960.

"decommissioning" costs, "nuclear" or "deregulation". Thus, the title does not provide reasonable notice that the ETA will authorize without the possibility of amendment any utility-defined rate increases for undepreciated investments and decommissioning costs.

The ETA amends several sections of existing law without notice, in violation of N.M. Const. Art. IV §16 and Art. IV §18. At least the following provisions of the current PUA are repealed or amended by the ETA: NMSA 1978 § 62-3-3(B) (Policy of New Mexico is that the public interest requires the regulation and supervision of utilities) PRC); NMSA 1978 § 62-3-4(A); (PRC "shall have general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates…and its securities…"); NMSA § 62-2-6(A) (Utility issuance of securities is subject to supervision and control of PRC); NMSA 1978 62-6-7 (PRC to hold hearings on utility securities to determine if issuance is consistent with the public interest, etc."); NMSA 1978 § 62-6-14 (valuing utility property requires utility to provide all information utility needs to investigate the value ascribed by utility); NMSA 1978 § 62-8-1 (rates made or demanded by utility "shall be just and reasonable."); NMSA § 62-10-1 (any person may complain that any utility "rate" or "practice" is "unfair" or "unjust" and the commission may proceed to hold hearings on the complaint); NMSA § 62-10-2 (PRC may conduct "such other hearings" as may be required in the administration of its duties"); NMSA § 62-10-5 (PRC must give "at least twenty days' notice" of all its hearings at which any matters determined).

VIII. If this Commission finds the Energy Transition Act does not apply, PNM should not be entitled to recover the full requested amount.

a. PNM has known that it would abandon San Juan Generating Station for several years now but deliberately misled regulators and the public to avoid scrutiny.

PNM has been aware since November and December 2016 and January 2017 that it could not meet its burden to show that further operation of SJGS was cost effective for ratepayers.

Armed with this information on February 24th, 2017, just shy of 14 months from the date of PRC approval of PNM's CCN at SJGS, its Board of Directors discussed the preliminary economic findings showing and determined that the company would make more money retiring the plant and increasing rate base earnings through the purchase of new resources.[101] In fact, PNM had notice of this much earlier. In 13-00390-UT, then-New Energy Economy witness Jeremy Fisher's direct testimony stated "I believe that the Company [PNM] knows that San Juan is a liability today."[102] His analysis showed that the "implied value" of San Juan Generating Station during 13-00390-UT, separate from the other components of the stipulation, was -$224 million.[103] He stated that even PNM's modeling runs in 13-00390-UT showed a "negative valuation" of continuing to operate SJGS when separated out from the rest of the stipulation.[104] Additionally, other San Juan co-owners were aware that San Juan was uneconomic in 2015. During 13-00390-UT, several co-owners dropped out, and the City of Farmington declined to absorb new shares, in part because of "significant degradation in SJGS Unit 4 reliability performance, uncertainty and likely unfavorable economics regarding future fuel supply, uncertainty pertaining to operations and ownership structure post-2022 and other evaluated liabilities unacceptable to the City."[105]

At any rate what is clear is that PNM was fully aware that SJGS was no longer cost effective to operate at least as early as February 2017. Yet PNM did not file its abandonment case then. Instead, it delayed filing to pursue securitization bills that would grant it 100% cost recovery without PRC oversight. In the 2018 legislative session, PNM supported the Energy

---

[101] *See* 19-00018-UT, TR., 12/10/19, Senior Vice President Ronald N. Darnell p. 72.
[102] 19-00018-UT, Direct Testimony of Jeremy Fisher on behalf of Sierra Club, Exhibit JIF-2 p. 5.
[103] *Id.*
[104] 19-00018-UT, TR., 12/17/2019, Jeremy Fisher, on behalf of Sierra Club, p. 272.
[105] 19-00018-UT, PNM Exhibit 29.

Redevelopment Act, which, like the ETA, would have given PNM 100% recovery of its undepreciated investments in San Juan, without opportunity for review by the PRC.[106] When that bill failed, PNM supported and helped co-author the Energy Transition Act during the 2019 legislative session.[107]

b. SJGS investments made since 2015 are imprudent.

Despite the fact that it has had evidence before it that San Juan Generating Station was uneconomic, PNM has made a staggering number of investments in the plant since 2015. In total, the cost of all capital projects that cleared to plant-in-service between December 2015 and June 2019[108] is $145,128,692. That number represents more than half of the undepreciated investments that PNM is claiming in this case. Given that PNM was under notice as early as 2015 that San Juan Generating Station would not continue to be economic, those expenses are clearly imprudent. These costs have been incurred since the 13-00390-UT *Final Order* and have not been the subject of a general rate case. Thus there is still very much a question of their prudence. In this case, the Hearing Examiners should find that these costs are subject to a "prudence" determination and therefore PNM should not be allowed to recover any undepreciated investments until these capital expenditures are scrutinized and only the proper amounts are recovered from ratepayers. It is neither prudent nor just and reasonable for ratepayers to be responsible for PNM gold-plating a power plant which it has known for years it

---

[106] 19-00018-UT, TR., 12/10/19, Senior Vice President Ronald N. Darnell, p. 74.
[107] *See, e.g.,* 19-00018-UT, TR., 12/13/19, Charles N. Atkins, PNM's securitization expert, p. 1047. Q. (Nanasi): "Did you, as part of your services for PNM, help author parts of the ETA?" A (Atkins): "I did advise on what were – what were key elements in terms of helping to achieve AAA ratings, and so I was involved in the overall working group. It was a large working group."
[108] Tendered to NEE as PNM Exhibit NEE 3-1 and admitted into the record as NEE Exhibit 10.

would abandon.[109] It is contrary to law, to reimburse a regulated utility for wasteful expenditure.

c. Full recovery of PNM's undepreciated investments does not fairly balance the interests of PNM shareholders and ratepayers.

Under the circumstances present, where PNM has known that this power plant was not cost effective for years but has continued to put capital expenditures into it, it is not reasonable for PNM to expect full recovery of its undepreciated investments. In 13-00390-UT, PNM assured this Commission that San Juan would continue to operate for an additional 20 years. As Sierra Club witness Jeremy Fisher has stated, "There is no particular reason to believe that this Commission would grant 100% recovery of stranded investments to PNM."[110] Even 50% recovery is not a clear win for ratepayers: "It could equally be portrayed as a 50 percent loss by ratepayers because the company is not accepting a hundred percent responsibility for sunk costs."[111] Given that the undepreciated investments do not represent any service that ratepayers receive, it seems that "there is no reason why ratepayers should be responsible for any of these costs, once these units are no longer being used to provide regulated utility service."[112] NEE notes that, as stated by Attorney General witness Andrea Crane, "In fact a possible result is that 100% of any stranded costs are allocated to shareholders, rather than New Mexico ratepayers."[113] If the Commission determines that some costs should be allocated to ratepayers, NEE insists that it should not include more than 50% of PNM's undepreciated investments in San Juan, at its cost of debt (as was done in 16-00276-UT). There is no reason whatsoever that PNM or its

---

[109] At the absolute minimum, all of the capital expenditures identified in NEE Exhibit 10 that were incurred since the beginning of 2017 should be disallowed, if not all capital expenditures since 2015.
[110] 19-00018-UT, Rebuttal Testimony of Jeremy Fisher, (Nov. 15, 2019), p. 15.
[111] *Id* at 15.
[112] 19-00018-UT, Exhibit NMAG-1, Direct Testimony of Andrea Crane, (Oct. 18, 2019) p. 53.
[113] *Id* p. 57.

shareholders should make a profit on investments that were not used to provide utility service.[114] NEE is not opposed to a clean securitization provision, as long as it preserves the rights and remedies of ratepayers.

As the Commission is considering which of these options is the most responsible, given the utility's further investment in and life extension of San Juan Generating Station, it is incumbent that the Commission consider the decision-making process of the utility. Former Commissioner Douglas Howe testified in this case that it is a proper aspect of prudence analysis to evaluate the decision-making process of the utility.[115] The New Mexico Supreme Court confirmed this in *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012, *supra*, at ¶32, when it stated "the decision-making process of the utility is properly included in the prudence analysis." In his testimony in 13-00390-UT,[116] Sierra Club witness Jeremy Fisher documents extensive errors in PNM's decision-making process around San Juan. For example, he stated that "[o]ver the course of this docket, PNM has corrected numerous flaws in the initial analysis, committed additional analytical errors, and mischaracterized model

---

[114] PNM's main argument is that it requires a return on its investment to continue attracting investors. *But see* Hearing TR. 12/19/19 (Cross of NM AREA witness Dauphinais) p. 1985 Q. (by PNM attorney Mr. Gifford) "Now, if a utility only were authorized to earn its return of debt on regulatory assets, would you expect anyone to invest in that utility as an equity investor?" A. (Mr. Dauphinais): "Well, be careful with that question. I'll say no, but be very careful. That's—we're assuming it—all the utility's net plant would be [denied recovery on its investment] in that situation. … So in that extreme circumstance, that would be a problem. But if there's a portion of the utility's investment that is only allowed to basically recover investment, but not recovered on that investment, that doesn't necessarily present a problem.")

[115] 19-00018-UT, TR., 12/17/19, Former PRC Commissioner Douglas Howe, p. 168.
Q. (Nanasi): "Would you agree that a utility's decision-making process is part of a prudence analysis?"
A. (Mr. Howe): "Yes."

[116] Incorporated into the record in this case as Exhibit JIF-2 to the Rebuttal Testimony of Jeremy Fisher (Nov. 15, 2019), at pp. 30-33.

outcomes."[117] Those include that "PNM failed to include standard ongoing maintenance expenditures at existing baseload facilities (biasing towards the selection of San Juan) an error worth $532 million," "PNM erroneously calculated base fuel prices at San Juan (biasing toward the selection of San Juan) an error worth $366 million," "PNM double-count[ed] their expected stranded cost recovery on San Juan 1 & 4 in the retirement case, assigning a false penalty of $130 million to the retirement case (and biasing towards the selection of San Juan)," and "PNM has attributed unrelated negotiated elements of the settlement to the value of San Juan, inappropriately ascribing $67.6 million of value to the plant."[118] When these errors were corrected, "[t]he intrinsic value of San Juan [as of 2015] is a customer liability of -$224 million, not a benefit."[119] In the expert opinion of Sierra Club witness Jeremy Fisher, PNM's 2015 investment in San Juan was not the most cost effective resource for 20 years, contrary to PNM's position, "ratepayers can procure the same power and services at San Juan … every year that San Juan operates, ratepayers lose the opportunity to acquire lower cost and lower environmental impact energy."[120] Given that PNM was on notice of this at least as early as 2015, ratepayers should not be responsible for PNM's irresponsible economics errors, its double-counting, and its general lack of rigor or its faulty and unrealistic prices for comparable resource alternatives with less environmental impact (as New Energy Economy had advocated for in 13-00390-UT). When questioned about the fairness of customers bearing 100% of the burden for PNM's wrong decision, testifying in late 2015 that further investment in SJGS was economic yet in early 2017

[117] *Id* at 31.
[118] *Id* pp. 31-32.
[119] *Id* at p. 5.
[120] *Id* at 10.

admitting that SJGS is uneconomic, WRA expert witness, former PRC Commissioner, Douglas Howe, testified: "They should have some responsibility for that bad bet."[121]

If PNM wanted to receive all of its undepreciated investments, it should have conducted its analysis both then and now prudently and rigorously.

d. PNM & WRA distort the alleged negative impact of a "write off."

PNM states that it would be "punitive" to shareholders and cause "adverse impacts on shareholders and the financial health of the Company."[122] "It would be poor and short-sighted regulatory policy, that will harm customers in the long run, to penalize PNM by requiring a write-off when their proposal to abandon SJGS is an economically efficient decision that will environmentally and economically benefit ratepayers even with full cost recovery of and on their undepreciated costs," testified WRA expert, former Commissioner Doug Howe.[123] However, this perspective fails for at least three reasons:

1) Rewarding the Company for ill-advised investments, when alternative existed that were less expensive and far safer for the environment,[124] sends the wrong signal to the utility because a "utility should not be rewarded for its imprudent failure to reasonably consider alternatives and acknowledge that total disallowance may be an appropriate remedy for such imprudence in some circumstances, acknowledging the possibility of a full disallowance while concluding that a 'disallowance should equal the amount of unreasonable investment.'" *Pub. Serv. Co. of New Mexico v. New Mexico PRC,* 2019-NMSC-012, 444 P.3d 460, ¶47. (citations omitted.)

---

[121] 19-00018-UT, TR., 12/17/2019, Howe, p.147.
[122] 19-00018-UT, *Rebuttal Testimony of Ronald N. Darnell* (November 15, 2019), p. 25.
[123] Howe rebuttal, p. 15.
[124] 17.7.3.6 NMAC ("For resources whose costs and service quality are equivalent, the utility should prefer resources that minimize environmental impacts.")

2) PNM Senior Vice President Darnell testified that "The suggestion that the Commission overturn decades of its own precedent and require the Company to split the costs of providing service with ratepayers might have superficial appeal, but it wouldn't result in a balancing of interests under these circumstances."[125] However, Mr. Darnell is incorrect about PRC precedent: "PNM's argument that regulatory principles and the New Mexico and United States Constitutions, entitle the Company to a full and complete return on all its prudent investment has absolutely no basis in either the law or in sound regulatory principles." *In the Matter of the Adjudication of Alternatives to the Inventorying Ratemaking Methodology, And/Or Plans for the Phasing in of Public Service Company of New Mexico's Excess Generating Capacity*, April 5, 1989, p. 58 "[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." Many states, including New Mexico, have also recognized the used and useful *test* as a necessary complement to an analysis of prudence. *Id.*, at p. 53. (citations omitted.) "[U]tility regulatory commissions must not rely solely on the prudence standard." *Id.*, at p. 54. … 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." (citations omitted) This last sentence is particularly instructive because when the government did force, or it could be argued, that the EPA instigated the first closure of SJGS Units 2&3, PNM agreed to a 50/50 sharing of the burden of undepreciated assets. But here, there is not "outside" force or unforeseeable cause – PNM is shuttering the plant because it can't meet its burden to prove that SJGS is economic compared to other renewable + battery resources. If PNM shuttered the entire plant "early" like

---

[125] 19-00018-UT, *Rebuttal Testimony of Ronald N. Darnell* (November 15, 2019), p. 24.

in 2015 or before, as did other utilities, according to PNM's regulatory expert,[126] then maybe it could reasonably argue for 100% recovery, but not in this instance, when PNM dug in its heels in the face of widespread and vociferous opposition. There must be accountability for its bad bet – PNM should not be "bailed out" when customers got nothing, not even climate causing, and environmentally polluting electricity.

3) NMAG expert Crane testified about PNM's motivation for the SJGS closure: "I don't really think that PNM is proposing to retire San Juan because it's going to save customers money. … It's becoming more and more uneconomic for the company, and you have a lot of other investment opportunities out there that you can grow your rate base in other ways. And so I don't think that PNM's sitting there making this decision because you think it's ultimately in the best interests of ratepayers.

That might be a part of your decision-making, but I don't think that's the primary driver behind your decision to retire San Juan. … [A]ll PNM's investor presentations talk about how you're going to grow earnings. And how are you going to grow earnings? You're going to grow earnings by increasing rate base. … [PNM tells its shareholders that it will] grow rate base, and that is going to result in an increase in earnings per share."[127] In fact, NEE Exhibit #18, PNM's presentation to the Edison Electric Institute from November 2019, confirms exactly what Ms. Crane stated: that PNM's plan is to have "consistent delivery of dividend growth at or above industry average" with a 53-56% "payout" to shareholders every year starting in 2019 and

---

[126] According to PNM's regulatory expert with 40+ years of experience: Between 2013 and 2015, or "a little earlier," "when many utilities were coping with emerging environmental regulations" Mr. Graves conducted a couple of studies that demonstrated that investing in alternative resources than continuing investment in coal was less risky. 19-00018-UT, TR., 12/11/2019, (Graves), pp.537-538; Also see FG-1, p. 6 of 39, bullet 2.

[127] 19-00018-UT, TR., 12/17/2019, Andrea C. Crane, pp. 45-47.

continuing until at least 12/22. PNM tells shareholders "expect future dividend growth to mirror earnings growth (approximately 5-6%)", at p. 9.

Ms. Crane discusses the fact that "rating agencies take a multitude of factors into account when determining the rating for a particular company. … Moreover, credit rating agencies as well as stock analysts are generally less concerned about one-time events than they are about future prospects and future uncertainty. Thus, it is by no means certain that the Company's credit rating would fall if PNM is required to write-down the undepreciated investment associated with San Juan Units 1 and 4. … [I]t may be better for ratepayers to pay less in stranded costs, and slightly higher debt costs, then to pay for recovery of 100% of stranded investment." [128] It may prove, as it did in fact prove with PNM, that shedding itself of a toxic asset, even with a write-down, was more profitable for the company because it provided certainty (of cleaner resources) and a path forward. That is surely what PNM's stock trajectory shows:

[128] 19-00018-UT, TR., NMAG Exhibit 1, Direct Testimony of Andrea C. Crane (Oct. 18, 2019), pp. 57.

PNM Resources Inc

NEE #7

NYSE: PNM

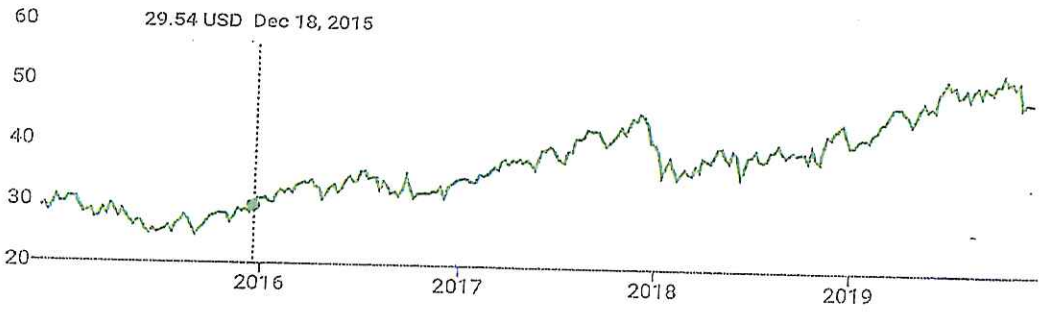
+ Follow

Overview News Compare Financials

48.35 USD -0.11 (0.23%)

Closed: Nov 25, 5:50 PM EST · Disclaimer
After hours 48.35 0.00 (0.00%)

1 day 5 days 1 month 6 months YTD 1 year 5 years Max



Open	48.53	Div yield	2.40%
High	48.70	Prev close	48.46
Low	48.24	52-wk high	52.98
Mkt cap	3.85B	52-wk low	39.52
P/E ratio			

The Monday following PRC's approval of closure of SJGS Units 2 & 3, including a write-down (due to a sharing of the burden between customers and investors of undepreciated investments) PNM's stock rose!

And it has continued to rise, over 60% between December 2015, with a share price of $29.54 to, the then all-time high share price of $47.30 – the day Governor Lujan Grisham signed the ETA. With the ETA it's likely that investors were thrilled with the promise of 100% recovery for undepreciated investments, not only for San Juan, but *all* of PNM's coal & nuclear investments and gas plants with the Commission unable to issue an order disallowing cost

recovery for decommissioning, as well. ETA §31C. What a "deal"! Investors get a risk premium, a guaranteed ROE of 9.575% and no risk – a 100% bailout of all undepreciated investments and decommissioning costs. With a 100% recovery, shareholders "don't have to take the risk that they're not going to recover that investment in the future, so they basically have all their dollars up-front. And they actually have another investment pot where they can turn around and reinvest those dollars in. And, in fact, that the reinvestment pot, one could argue, is less risky than investment in a coal plant given, you know, the environmental challenges that we face today."[129]

[129] 19-00018-UT, TR., 12/17/2019, Andrea C. Crane, p. 58.

e. PNM's request for 100% of severance costs is inappropriate because PNM only has a 58% ownership share in SJGS.

As described extensively in the direct testimony of Andrea Crane, PNM's requested severance and job training costs are excessive. NEE supports Ms. Crane's recommendation that the severance costs be reduced by $5.4 million.[130] As she describes, PNM only requested 58.7% of the estimated severance costs for its own employees, but included 100% of the severance costs for PNMR employees.[131] Instead, these costs should be adjusted to reflect PNM's 58.7% ownership share of the power plant and mine. PNM objects that the San Juan ownership agreement does not provide for other owners to pay for severance costs. If that is true, that still does not provide a legitimate basis for ratepayers to be responsible for 100% of those costs. PNM ratepayers do not receive 100% of the electricity generated by San Juan, and should therefore not be responsible for 100% of the severance costs for mine workers. The fact that PNM failed to account for that in its ownership agreement is PNM's own responsibility. As New Energy Economy has argued time and time again, PNM's carelessness and lack of attention to detail is its own fault, and PNM should shoulder the burden of any costs that it has irresponsibly incurred, rather than foisting them onto captive ratepayers.[132]

f. New Energy Economy Recommends that No Costs Be Allocated in this Matter be Allocated until Closer to the Abandonment Date, as All Costs in PNM's Application are Estimates.

Throughout the public hearing in this case it was made abundantly clear that all of the

[130] 19-00018-UT, Exhibit NMAG-1, *Direct Testimony of Andrea C. Crane* (Oct. 18, 2019), p. 28.
[131] *Id* at 30.
[132] "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. … What is fundamental is that government did not force upon the utility a specific course of action for achieving the mandated goal." *Jersey Central Power Co. V. Federal Energy Regulatory Commission*, 810 F.2d 1168, 1190-91 (D.C. Cir. 1987), quoted in NMPRC Case No. 2145, *Final Order*.

costs requested by PNM were speculative.[133] For one thing, the City of Farmington is attempting to purchase San Juan Generating Station and continuing to run it, and it will not be clear whether they have done so until June 30th, 2022.[134] The testimony of PNM's own securitization expert, Charles Atkins, has clarified that the interest rate for securitization is far from certain as well.[135] As NM AREA witness Mr. Gorman testified, "where ultimate use of securitization bonds will be approved for the utility, that there needs to be a clear understanding of whether or not the cost to be securitized qualify under the Energy Transition Act and whether or not those costs are reasonably known or can be reasonably estimated based on the information presented to the Commission."[136] It is plain that the costs here are not reasonably known to the Commission, and that PNM is asking the Commission to blindly approve a financing order for $361 million with an unknown interest rate and the possibility of an utility amendment for an upward adjustment. Basing the financing order on speculative costs and speculative interest rates grants far too much discretion to PNM, and relies far too heavily on their numbers, which time and time again have been shown to be inaccurate. It would be inappropriate, therefore, for the Commission to approve an amount to be securitized before the costs are more definitely known.

---

[133] *See, e.g.*, 19-00018-UT, TR., 12/13/19 (Cross of Elizabeth Eden, PNM economics expert), pp. 988-89. Q. (by NM AREA Attorney Mr. Gould) "But you recognize, and you've stated this several times in your testimony, I think you've got a whole section starting on page 18, where you call these securitized—these proposed securitized costs as estimates. You—you've already accepted that they are estimates, and they could vary."
A. (Ms. Eden) "They are estimates, yes."
[134] 19-00018-UT, TR., 12/18/19, Adair, p. 1894.
[135] 19-00018-UT, TR., 12/13/19, Atkins, p. 1056.
[136] 19-00018-UT, TR., 12/19/19, Gorman, p. 1994.

IX. There must be a comprehensive, independent environmental evaluation before ratepayers pay for any decommissioning costs.

a. There is ample evidence of environmental contamination on the San Juan site, and damages to environmental and public health in the surrounding communities.

PNM will have operated this poisonous coal-fired power plant for nearly 50 years when it closes. It would be inconceivable that there is no environmental contamination onsite, and in fact ample evidence in this case shows that San Juan Generating Station has caused tremendous pollution and health impacts to the surrounding air, water, land, and people. Members of the public who live near San Juan Generating Station testified extensively to the horrific scale of pollution and contamination. The Navajo-lead Health Impact Assessment showed that "61 percent of community members we surveyed … have experienced or have immediate family members who have experienced serious health issues. The issues most commonly reported by respondents were asthma, cancer, lung disease, heart disease."[137] Overall, the call was "to request that the PNM Generating Station [referring to SJGS] be held accountable for their unethical actions and for the physical state and the cost to the area within the contamination. Said actions have led to the near-complete deterioration of all inhabitants of the Navajo Nation as a whole … We see this undeniable unbalance in the physical, emotional, mental, and spiritual struggles that our Nation faces today: respiratory diseases, skin disorders, fertility issues, developmental complications with fetuses and infants …"[138] The Commission has been asked to consider "the quality of the air, land, and water, which all need to be repaired by PNM, who has polluted and

[137] 19-00018-UT, TR. 12/9/19, (Testimony of Kim Smith) p. 155.
[138] 19-00018-UT, TR. 12/9/19, (Testimony of Emily Lee-Allen) p. 164.

abused the land."[139]

The concerns that members of the public have expressed are substantiated by the record in this case. Since 2014, PNM has reported 14 major spills of contaminants on the San Juan site to the New Mexico Environment Department (NMED).[140] These do not even account for the worst spills—PNM witness Hale testified that the biggest spill of the last ten years, a spill of process water contaminants from San Juan's North Evaporation Pond, was not reported to NMED.[141] That leak first detected in 2010, continued until 2017, when the North Evaporation Pond was finally decommissioned.[142] Even then, there is a plume of nitrate contaminants in the groundwater at San Juan that was caused by that leak.[143] PNM is not doing anything about this—pursuing a policy which it characterizes as "monitored natural attenuation," but which does not actually follow Federal EPA guidelines on that procedure.[144] In an attempt to prevent spills from leaking into surface and groundwater that is used for drinking by members of the Navajo Nation and other local people, PNM has installed two "recovery systems," named the Shumway Recovery System and the Groundwater Recovery Trench.[145] However, these systems are wholly ineffectual, as they do not go down far enough to intercept groundwater.[146]

---

[139] 19-00018-UT, TR., 12/9/19, (Testimony of Remy Fredenberg) p. 161.
[140] NEE Exhibit 14.
[141] 19-00018-UT, TR., 12/12/19 (PNM Environmental Manager John Hale) Q. (by NEE attorney Mr. El Sabrout) p. 869: "So does that mean that it [NEE Exhibit 14] includes the north evaporation pond spill that began in 2010?"
A. (Hale) "That – that is not identified on this list."
[142] *Id* at 877.
[143] *Id.*
[144] *Id* at 878.
[145] *Id* at 870, 884.
[146] 19-00018-UT, TR., 12/12/19, (PNM Environmental Manager John Hale) pp. 882-83 Q. (by NEE Attorney Mr. El Sabrout) "Do you have any data about how deep the plume is currently?" A (Hale): "Well, I don't have it in front of me, but I think it's probably around 100 feet depth to water in that area."

Worse yet, PNM is storing its coal ash from the generating station in the unlined San Juan Mine pits.[147] NEE's expert witness Mark A. Hutson discovered that "[c]olumn leach tests of the CCR [coal combustion residuals] being placed in the mine pits … showed that aluminum, arsenic, boron, barium, calcium, selenium, silicon, and vanadium, at a minimum, will leach from the waste when exposed to water."[148] And it is inevitable that it will be exposed to water, as PNM witness Cowin testified that the mine pits would be infiltrated by both rainwater and groundwater over time. Consistent with the public's reports of health impacts, these chemicals cause health impacts like cancer, respiratory illnesses, and birth defects.[149]

b. PNM's application does not propose an adequate plan to address environmental contamination at the San Juan site, or health impacts in the San Juan area.

Both PNM's decommissioning study (Burns & McDonnell) and its mine reclamation study (Golder Report) do not address environmental contamination onsite at all. Moreover, as described above, PNM plans to leave CCRs stored in the unlined mine pits indefinitely, after merely putting a few inches of *coal mine overburden* (which may contain the same contaminants in it as the CCRs) and topsoil over it.[150] None of this will prevent infiltration by groundwater or

---

Q: "Okay. And just to check back, what's the depth of your recovery system? Is it about 35 feet?"
A: "The Shumway Arroyo recovery system, yeah, that ranges from 5 feet to 40 feet below ground surface."

[147] 19-00018-UT, TR., 12/12/19 (Cross of PNM environmental compliance manager John Hale) p. 893 ("Coal ash from San Juan Generating Station is deposited in the San Juan Mine pits to be used as -- for reclamation as is approved by the mine's permit.")

[148] Case No. 19-00018-UT, Direct Testimony of Mark A. Hutson (Nov. 6, 2019) p. 6.

[149] Tr. Hearing 12/18/19 (Cross Examination of Adella Begaye), p. 1715. Q. (by Mr. El Sabrout) "So my recollection is that community members reported elevated rates of cancer, asthma, birth defects, and reduction in biodiversity. Does that square with your testimony and your understanding?"
A. (Ms. Begaye): "I have seen those, yeah."

[150] *See*, 19-00018-UT, TR. 12/12/19 (Cross Examination of Douglas Cowin, PNM's geology expert), p. 807.

rainwater.[151] PNM also has not indicated how long it plans to monitor the contaminant plume from the North Evaporation Pond spill,[152] despite the fact that, as evidenced by NEE Exhibit MAH-2, it may continue to leach toward sources of surface water over the next several thousand years.

Worse, PNM's decommissioning study recommends a "retirement-in-place" scenario where PNM simply shuts down operations at SJGS without full plant decommissioning, and then 25 years later it would fully decommission and reclaim the plant. Undoubtedly, PNM would attempt to seek the costs of this decommissioning at that time. This proposal is horrifically irresponsible. For one thing, there may be no such thing as the Public Service Company of New Mexico 25 years from now, in which case no one would have responsibility for this mothballed power plant which has been leaching contamination into the surroundings for years now. Additionally, this does not represent a fair outcome for ratepayers 25 years from now, who may have never received any service from San Juan Generating Station but may find themselves paying for its demolition anyway. PNM doesn't see it that way, stating that what it feels is "fair" is that it provide "the lowest cost option for our customers."[153] But over the long term, retirement

---

[151] 19-00018-UT, TR. 12/12/19, (Cross Examination of Douglas Cowin, PNM's geology expert), pp. 799-800.

[152] 19-00018-UT, TR., 12/12/19, (Cross of John Hale) pp. 887-89. Q. (by Mr. El Sabrout) "How long has PNM committed to continue monitoring and preventing the expansion of the nitrate plume?"

A. (Hale) "Well, again, we're committed to doing what is required in the best interests of the environment, and that is dictated by the appropriate regulatory agency and relevant regulations … Right now there is not a specific time period …

Q. "Okay. So how much longer does PNM anticipate monitoring that groundwater?"

A. "I don't know."

[153] Q. (Nanasi)"But do you think it's fair, a word that Mr. Darnell used was "intergenerational equity," to put off the full comprehensive cleanup for 25 years to people maybe who are not even born yet?"

in place is not the "lowest cost option," it cannot possibly be so. As PNM's decommissioning study[154] demonstrates, a "retire-in-place" scenario simply kicks the can down the road, eventually imposing more costs than immediate full demolition would.

Table 1-10. Net Present Value for 10-year Delay for Demolition

Cost Category[1]	Retirement-in-Place (Option 1)	Add-on for Full Demolition (Option 1)	OPTION 1 TOTAL[2]	Retirement-in-Place (Option 2)	Add-on for Full Demolition (Option 2)	OPTION 2 TOTAL[2]
RIP in 2023 with Demo after 10 years (starting 2031)	$ 47,177,000	$ 91,187,000	$ 138,364,000	$ 107,751,000	$ 101,666,000	$ 209,417,000

1. Costs include direct, indirect, contingency and estimated SJGS Ownership costs, annual costs and asset recovery credit (2 % Annual Inflation, 4% Annual Discount rate)
2. Costs are in Net Present Value

Table 1-11. Net Present Value for 25-year Delay for Demolition

Cost Category[1]	Retirement-in-Place (Option 1)	Add-on for Full Demolition (Option 1)	OPTION 1 TOTAL[2]	Retirement-in-Place (Option 2)	Add-on for Full Demolition (Option 2)	OPTION 2 TOTAL[2]
RIP in 2023 with Demo after 25 years (starting 2046)	$ 71,866,000	$ 55,213,000	$ 127,079,000	$ 130,513,000	$ 62,325,000	$ 192,838,000

1. Costs include direct, indirect, contingency and estimated SJGS Ownership costs, annual costs and asset recovery credit (2 % Annual Inflation, 4% Annual Discount rate)
2. Costs are in Net Present Value

Table 1-4. Summary of Full Demolition Option Costs

Cost Category*	Full Demolition	Annual Site Costs
Base Case (Option 1)	$ 118,490,000	$ 591,000
Upper Bound (Option 2)	$ 134,380,000	$ 591,000

** - Costs include direct, indirect, contingency and estimated SJGS Ownership costs and scrap metal credit (in 2019 Dollars)*

As these tables show, "retire-in-place" may initially appear cheaper than full demolition, but when the later demolition costs are added on, simply leaving the plant to languish empty for ten or twenty-five years proves to be a much more expensive option.

c. Plea for PRC to make an agency-to-agency request that NMED and EMNRD

A. (PNM Senior vice President Darnell) "I think it's fair that we provide the lowest cost option for our customers." 12/10/2019 Darnell, p. 287

[154] NEE Exhibit 13, Burns & McDonnell Decommissioning Report.

perform a comprehensive audit of environmental conditions at the San Juan Generating Station site.

Members of the public have issued this PRC a clear mandate: an independent, comprehensive audit of environmental conditions must be conducted at San Juan Generating Station before any funding for decommissioning or reclamation is issued to PNM.[155] It is wholly inadequate to leave the evaluation of cleanup to the entity that has been contaminating the land, air, and water for fifty years now. PNM has no incentive whatsoever to do a full cleanup and to ensure that the surrounding communities, including members of the Navajo Nation, are left with healthy water, soil, and air, and that their human health needs, and that the community's traditional land-based practices be able to resume. PNM's incentive is to take ratepayers' money and run.

WHEREFORE, because there was a case pending and ratepayers had a vested interest in the agreement pursuant to the modified stipulation in 13-00390-UT the ETA should not be applied to this case because to do otherwise would violate the N.M. Constitution Art. IV §34, Art. II §19, and Art. II, §18. If the Commission votes to apply the ETA, it should reject PNM's application as insufficient and contrary to the public interest. The ETA's greatest selling point is that it will decrease costs for ratepayers through a low interest rate and actual savings to ratepayers compared to traditional ratemaking, neither of which has been borne out at hearing. Actually, the opposite has come to light – there is a frightening likelihood that the costs, which will be set in stone for the next 25-28 years will cause rate shock and will result in

---

[155] *See, e.g.,* 19-00018-UT, 12/9/19 TR. (Testimony of Kim Smith) pp. 155-56 ("in closing, when [members of the public were asked as part of a Navajo-lead Health Impact Assessment] what their priority demands in the closing process are, 83 percent want more soil, air, and water quality studies. Our community deserves to know the extent of the contamination from this site and has – it has to be assured that cleanup will be comprehensive … We need an independent assessment of the impacts of the plant and mine and what it will take to clean it up right.")

intergenerational inequity.[156] PNM's entire case is based on estimates[157] and "the costs are very preliminary" with the ability for amendment by the utility to recover costs far in excess and without limitation of what the utility demonstrated to the Commission. (ETA§7) In order to "provide necessary customer protections" the financing order must be rejected.[158]

Respectfully submitted this 8th day of January 2020,

New Energy Economy

Mariel Nanasi, Esq.
Aaron El Sabrout, Legal Assistant
343 East Alameda St.
Santa Fe, NM 87501-2229
(505) 469-4060
mariel@seedsbeneaththesnow.com

---

[156] 19-00018-UT, TR., 12/10/2019, Darnell, pp. 108-109. Mr. Darnell admits that if a child born today would be paying for SJGS undepreciated investments when s/he became 18 years of age for the next 7 or more years even though that adult would receive no electricity from SJGS. Mr. Darnell stated: "Look, there is no perfect solution to this. To avoid that position, prior rates would -- would have to have been substantially higher to recover higher depreciation costs." The problem with this inequity other in addition to cost is PNM's utter failure to acknowledge their responsibility in keeping their coal prices artificially low and setting a depreciation schedule out until 2053, when there is no coal plant in the history of the U.S. that has run for 85 years. PNM must be held accountable for its poor financial planning.

[157] "Given (PNM's) shaky prognosticating history, there is good reason to be skeptical of all of PNM's load forecasts," and noted that one reason PNM's forecast "inspires no more confidence in [its] accuracy.., than in some of its predecessors" is its preparation "in the midst of litigation in which PNM was well aware of the importance of reserve margins." "This discrepancy has not been justified, and undermines PNM's needs analysis." (*Ojo Line Extension*, Case No. 2382, Final Order Approving Recommended Decision, November 20, 1995)

[158] 19-00018-UT, TR. 12/19/19, Gorman, pp. 1995-1999.

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF PUBLIC SERVICE COMPANY OF NEW MEXICO'S ABANDONMENT OF SAN JUAN GENERATION STATION UNITS 1 & 4	)))	19-00018-UT

CERTIFICATE OF SERVICE

I CERTIFY that on this date I sent to the parties and individuals listed here, via email only, a true and correct copy of

NEW ENERGY ECONOMY'S

POST HEARING BRIEF

issued on January 8, 2020.

Stacey Goodwin	Stacey.Goodwin@pnmresources.com;
Ryan Jerman	Ryan.Jerman@pnmresources.com;
Richard Alvidrez	Ralvidrez@mstlaw.com;
Dan Akenhead	DAkenhead@mstlaw.com;
Mark Fenton	Mark.Fenton@pnm.com;
Carey Salaz	Carey.salaz@pnm.com;
Steven Schwebke	Steven.Schwebke@pnm.com;
Heather Allen	Heather.Allen@pnmresources.com;
Mariel Nanasi	Mariel@seedsbeneaththesnow.com;
David Van Winkle	Davidvanwinkle2@gmail.com;
Aaron El Sabrout	Aaron@newenergyeconomy.org;
Joan Drake	jdrake@modrall.com;
Lisa Tormoen Hickey	lisahickey@newlawgroup.com;
Jason Marks	lawoffice@jasonmarks.com;
Matthew Gerhart	matt.gerhart@sierraclub.org;
Katherine Lagen	Katherine.lagen@sierraclub.org;
Ramona Blaber	Ramona.blaber@sierraclub.org;
Camilla Feibelman	Camilla.Feibelman@sierraclub.org;
Michel Goggin	MGoggin@gridstrategiesllc.com;
Nann M. Winter	nwinter@stelznerlaw.com;
Keith Herrmann	kherrmann@stelznerlaw.com;
Dahl Harris	dahlharris@hotmail.com;
Peter Auh	pauh@abcwua.org;
Jody García	JGarcia@stelznerlaw.com;
Andrew Harriger	akharriger@sawvel.com;
Donald E. Gruenemeyer	degruen@sawvel.com;
Joseph A. Herz	jaherz@sawvel.com;
Steven S. Michel	smichel@westernresources.org;
	April.elliott@westernresources.org;
Anna Sommer	ASommer@energyfuturesgroup.com;
Chelsea Hotaling	CHotaling@energyfuturesgroup.com;
Tyler Comings	tyler.comings@aeclinic.org;
Don Hancock	sricdon@earthlink.net;
Stephen Curtice	stephen@youtzvaldez.com;
Shane Youtz	shane@youtzvaldez.com;
James Montalbano	james@youtzvaldez.com;
Barry W. Dixon	bwdixon953@msn.com;
Kyle J. Tisdel	tisdel@westernlaw.org;
Erik Schlenker-Goodrich	eriksg@westernlaw.org;
Thomas Singer	Singer@westernlaw.org;
Mike Eisenfeld	mike@sanjuancitizens.org;
Sonia Grant	sonia@sanjuancitizens.org;
Carol Davis	caroljdavis.2004@gmail.com;
Robyn Jackson	chooshgai.bitsi@gmail.com;
Thomas Manning	cfrecleanenergy@yahoo.com;
Debra S. Doll	Debra@doll-law.com;
Katherine Coleman Thompson & Knight	Katie.coleman@tklaw.com; Tk.eservice@tklaw.com;
Jeremy Cottrell	jcottrell@westmoreland.com;
Jane L. Yee	jyee@cabq.gov;
Larry Blank, Ph.D.	lb@tahoeconomics.com;
Saif Ismail	sismail@cabq.gov;
David Baake	david@baakelaw.com;
Germaine R. Chappelle	Gchappelle.law@gmail.com;
Senator Steve Neville	steven.neville@nmlegis.gov;
Senator William	bill@williamsharer.com;

April Elliott	pat.oconnell@westernresources.org;
Pat O'Connell	dhowe@highrocknm.com;
Douglas J. Howe	bthroneatty@newmexico.com;
Bruce C. Throne	witwerr@southwestgen.com;
Rob Witwer	JA@Jalblaw.com;
Jeffrey Albright	AE@Jalblaw.com;
Amanda Edwards	mikgarcia@bernco.gov;
Michael I. Garcia	greg@sonnenfeldconsulting.com;
Greg Sonnenfeld	Noble.ccae@gmail.com;
Charles F. Noble	Stephanie@Dzur-law.com;
Stephanie Dzur	Vortiz@montand.com;
Vicky Ortiz	pgouldlaw@gmail.com;
Peter J. Gould	kellydarshan@gmail.com;
Kelly Gould	jdauphinais@consultbai.com;
Jim Dauphinais	mgorman@consultbai.com;
Michael Gorman	rbartell@montand.com;
Randy S. Bartell	sshaheen@montand.com;
Sharon T. Shaheen	jmcintyre@montand.com;
John F. McIntyre	Marvin.Griff@thompsonhine.com;
Marvin T. Griff	DOrtiz@montand.com;
David Ortiz	jbreakell@fmtn.org;
Jennifer Breakell	ltalley@montand.com;
Lorraine Talley Sharer	
Rep. James Strickler	jamesstrickler@msn.com;
Rep. Anthony Allison	Anthony.Allison@nmlegis.gov;
Rep. Rod Montoya	roddmontoya@gmail.com;
Rep. Paul Bandy	paul@paulbandy.org;
Patrick J. Griebel	patrick@marrslegal.com;
Richard L. C. Virtue	rvirtue@virtuelaw.com;
Carla R. Najjar	Csnajjar@virtuelaw.com;
Philo Shelton	Philo.Shelton@lacnm.us;
Robert Cummins	Robert.Cummins@lacnm.us;
Kevin Powers	Kevin.Powers@lacnm.us;
Steven Gross	gross@portersimon.com;
Martin R. Hopper	mhopper@msrpower.org;
Cholla Khoury	ckhoury@nmag.gov;
Gideon Elliot	gelliot@nmag.gov;
Robert F. Lundin	rlundin@nmag.gov;
Elaine Heltman	Eheltman@nmag.gov;
Andrea Crane	ctcolumbia@aol.com;
Douglas Gegax	dgegax@nmsu.edu;
Michael C. Smith	Michaelc.smith@state.nm.us;
Bradford Borman	Bradford.Borman@state.nm.us;
John Bogatko	John.Bogatko@state.nm.us;
Marc Tupler	Marc.Tupler@state.nm.us;
Beverly Eschberger	Beverly.Eschberger@state.nm.us;
Georgette Ramie	Georgette.Ramie@state.nm.us;
Dhiraj Solomon	Dhiraj.Solomon@state.nm.us;
Anthony Sisneros	Anthony.Sisneros@state.nm.us;

DATED this 8th day of January, 2020.

New Energy Economy

Mariel Nanasi, Esq.
343 East Alameda St.
Santa Fe, NM 87501-2229
(505) 469-4060
mariel@seedsbeneaththesnow.com