BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

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

DIRECT TESTIMONY AND EXHIBITS

OF

CHRISTOPHER K. SANDBERG

ON BEHALF OF

NEW ENERGY ECONOMY

June 23, 2023

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Background and Experience

Q. Please state your name and business address.

A. My name is Christopher Sandberg, and my business address is 2324 14th St. SE, Rio Rancho, NM 87124.

Q. On whose behalf are you testifying in this proceeding?

A. I am testifying on behalf of New Energy Economy ("NEE").

Q. Please summarize your educational background.

A. I have a Juris Doctor degree from the University of Minnesota School of Law.

I also attended the annual Regulatory Studies Program taught at the College of Social Science at Michigan State University under the auspices of the Institute of Public Utilities and the National Association of Regulatory Utility Commissioners. I subsequently attended a multi-day program on utility ratemaking.

As an attorney licensed in Minnesota, I took a minimum of 45 hours of Continuing Legal Education courses each three-year period.

For over 20 years, I taught at the undergraduate, graduate, and law school levels, presenting classes on telecommunications legal and policy issues, online privacy issues, intellectual property law, alternative dispute resolution, non-incorporated business entities, and contract drafting. I have also taught accredited Continuing Legal Education courses.

Q. What background do you have related to regulatory issues?

From 1974 through 1977, I worked in Metro Marketing for what was then Northwestern Bell Telephone Company in Minneapolis. In the course of my work consulting with business clients on their communication needs, I worked on several occasions with the NWB staff responsible for interfacing with the state utility regulator, (then known as the Minnesota Public Service Commission) on developing special pricing for business services which departed from the approved tariffs on file with the MPSC. That was my initial education on the rate-setting process and the practices of regulators and the regulated.

Q. What did you do after working at NWB?

I started law school in 1977, and at the beginning of second year in the Fall of 1978, took a position as a law clerk for the MPSC. At that time, the MPSC was transitioning from having five elected commissioners to have five Governor-appointed commissioners. Three new commissioners had joined the body that year, none of whom had prior experience in utility regulation. In addition, the MPSC at that point had no dedicated professional support staff, but only had the services of staff members delegated to the MPSC by the Minnesota Department of Public Service (the general public advocate in utility matters) on a case-by-case basis. That meant there was extremely limited institutional memory of what the MPSC had done in prior cases, forcing the body to rely on the representations of the parties appearing before it.

The MPSC had been regulating telephone companies since 1915, but had been given oversight of gas and electric utilities in 1974. The new members of the MPSC wanted to have a better and more organized understanding of that body's decisions and the bases for those decisions. They tasked me and my fellow law clerk, Terry Karkela, with creating a reference work containing accurate summaries of Commission rulings on all the key issues in preceding rate cases as well as analyses of the underpinnings of those issue decisions. We spent the next nine months reviewing all the general rate cases that had been decided since 1974 for gas and electric utilities and further back for telephone companies. We deliberately created a work that resembled legal treatises such as Corpus Juris Secundum or a West Digest, that included the general components of rate case decisions, specific rulings on the pieces that were assembled into rate case decisions, and summaries of the reasons expressed by the Commission in its orders for those decisions.

To create that document, in addition to reading Commission decisions, we read Hearing Examiner reports and the testimony of witnesses which were used in those decisions. We also consulted with the professional staff who had advised the Commission on those cases where we needed a more complete understanding of how a particular decision was reached. After we had created the historical document, the Commission tasked Mr. Karkela and me with building summaries of witness testimony in current cases which were used for briefing commissioners, and with updating the

document as new cases were decided. I continued in that role until I graduated in 1979 and passed the bar.

Q. What did you do after finishing law school?

In 1980, the Commission succeeded in getting legislative authority to hire its own professional staff. Once admitted to practice, I accepted a full-time position with the MPSC as its first-ever staff attorney. In that role, I worked with the technical staff on analyzing witness testimony, organizing briefing materials, and managing the production of written orders. I also managed the rule making activities of the Commission.

In 1983, I became a member of the Minnesota Attorney General's staff, first as an attorney in the Utility Division and subsequently as the manager of that Division. My responsibilities included:

- analyzing utility rate filings for the technical staff at my client, the Minnesota Department of Public Service (later renamed the Minnesota Department of Commerce),
- assisting technical staff in identifying issues on which their testimony would be needed,
- working with technical staff as they created and served discovery, drafted their direct testimony, and prepared their rebuttal testimony,
- preparing technical staff for their on-the-stand testimony,
- defending staff during their cross-examination,
- cross-examining other parties' witnesses,

- drafting the Department's briefs to the Commission,
- presenting oral argument to the Commission, and
- handling appeals of Commission decisions.

I also supported a dedicated group within the Department which intervened in matters at the Federal Energy Regulatory Commission and prepared the Department's positions and arguments to that agency and on appeal. I continued in that role for 10 years.

Q. What further relevant experience do you have?

After leaving State service, I was an associate and partner in a top-25 Minnesota law firm, where I lead the firm's Utilities and Technology Law practice area, emphasizing regulatory issues, business development, administrative law, and civil litigation. I represented regulated entities seeking operating authority from a majority of state utility commissions, utility companies and telecom carriers seeking authority to merge and acquire other regulated entities, business and public-sector clients with disputes of rates, terms of service, and choice of providers, applicants for new transmission facilities for wind power development and system capacity/reliability upgrades, and proper pricing of customer-generated electricity.

I advised private-sector clients on a range of investment and finance-related issues, including private issuances of securities, business acquisitions and valuation, bankruptcy, and franchising.

I also served as a member of two state-wide task forces developing public policy on key issues—the Minnesota Information Policy Task Force and the Minnesota Government Information Access Council.

Q. Why are you qualified to present your testimony in this matter?

My educational background includes course work in administrative law and policy, and my subsequent training has focused on utility issues including utility ratemaking and rate design.

My 38 years of practice in legal and policy matters at the state and Federal level has given me a broad and deep understanding of the issues surrounding PNM's filing in this matter. Working with witnesses in all aspects of utility ratemaking—revenues, expenses, rate of return, rate base, rate design, and merger issues—has provided me with the substantive basis for the issues I will address in this testimony. Finally, working as lead counsel for the state agency charged with advancing the public interest in utility matters at both the state and Federal levels gave me a deep understanding of often-complex process of developing and implementing public policy related to utilities.

Q. Have you appeared before the New Mexico Public Regulation Commission ("Commission" or "NM PRC") before?

A. Yes. I submitted testimony last year on behalf of NEE in Commission Case No. 20-00121-UT and submitted direct testimony, rebuttal testimony, and testimony in opposition to the PNM/Avangrid/Iberdrola merger and stipulation in Commission Case No. 20-00222-UT. I also testified in

Commission Case No. 21-00017-UT; in that case I provided direct and rebuttal testimony. I've attached my resume as Exhibit CKS-1.

Q. Are you appearing here as counsel for NEE?

A. No. Upon retiring from my law firm in 2017, I took non-practicing status with the Minnesota Supreme Court, and in 2020 the Minnesota Supreme Court granted my Petition to Resign as a practicing attorney. I have not sought attorney registration in New Mexico. My appearance here is as a regulatory policy witness, and I will refer to controlling legal precedents where appropriate to support my opinions.

Executive Summary

I have reviewed the rate case filing by the Public Service Company of New Mexico ("PNM" or the "Company") in this Case. From an overall perspective, this case provides an opportunity for the Commission to take remedial action. By that, I mean that there are a series of improper actions taken by PNM, some for an extended period of time, for which the Commission should now fashion and impose remedies.

To that end, my testimony falls into the following general areas:

- PNM has attempted to ignore or evade some of the fundamental principles of utility regulation: only plants that are currently used and useful can be included in rate base; a utility can only be permitted to receive a return of and a return on prudent investments which meet that test, and only

reasonable expenses related to providing utility service can be recovered from ratepayers. PNM's rate recovery requests related to its Four Corners Power Plant ("FCPP" or "Four Corners"), its San Juan Generating Station ("SJGS" or "San Juan"), and its Palo Verde Nuclear Generating Station ("PVNGS" or "Palo Verde")" must all be viewed through both the used and useful and prudence lenses. Based on these regulatory principles, my expert opinion is that the Commission should make the following adjustments to PNM's proposed new rates and make the following findings in order to protect PNM's ratepayers from excessive rates going forward:

Regarding the Four Corners Power Plant:

1. PNM's life extension and investments in FCPP were imprudent post June 30, 2016. PNM performed no proper contemporary analysis before it invested in FCPP, and failed to evaluate whether continuing its participation in FCPP and pursuing additional pollution controls investment and capital improvements was cost effective.

2. PNM's investment in FCPP pre-2016 was deemed prudent. Therefore, I recommend PNM receive 50% of FCPP undepreciated investments made before June 31, 2016, depreciated over three years at PNM's weighted average cost of capital.

3. PNM's post-June 21, 2016 continuation at FCPP was imprudent. I recommend that PNM be denied all future costs on those FCPP investments: the Commission should deny any recovery for FCPP and

FCPP should be entirely removed from rate base. To the extent PNM continues to rely on FCPP, the associated fuel and operational costs should only be recovered through the fuel adjustment clause.

Regarding Palo Verde Nuclear Generating Station:

4. I recommend removing the costs for 114 MW of leased capacity in the PVNGS, due to the expiration of the associated leases, denying recovery for the 104.01 MW leased interests in PVNGS Unit 1 (in the estimated amount of $87,861,281), and denying recovery for the 10.42 MW Unit 2 leased interests in PVNGS Unit 2 (in the estimated amount of $7,389,674.) The $95,255,955 should be removed because those leases relate to a plant that is no longer used and useful. In addition, because PNM continued to collect these costs from customers over the past year, I recommend that the full amount associated with the leases plus the return of and on those leases be returned to customers over a one-year period.

5. I recommend a determination that customers are subject to increased risk for nuclear decommissioning costs, as the only "penalty" that was associated with PNM's imprudent repurchase of 64 MW of PVNGS Unit 2 and the extension of the PVNGS leases for 114 MW in Units 1 and 2. PNM's imprudence for repurchasing and lease extension was found by the Hearing Examiner in Case No. 15-00261-UT, was upheld by the Commission in its *Final Order Partially Adopting Corrected*

Recommended Decision (reversed on remedy for imprudence), and was further upheld by the New Mexico Supreme Court (reversed the Commission on remedy for imprudence). This is a balanced and reasonable protection for customers from PNM's failure to evaluate resource alternatives before PNM's management made costly and imprudent decisions to repurchase and extend the PVNGS leases.

Regarding San Juan Generating Station:

6. I recommend excluding San Juan Generation Station investments and expenses from rates to reflect the coal plant's abandonment. PNM may not be seeking recovery here, but the Commission needs to foreclose that possibility taking place in any other forum.

7. I recommend a Commission finding that PNM did not adhere to the Energy Transition Act ("ETA") or the Commission's Financing Order, and that as a result the authority granted by the Financing Order to issue bonds promptly upon abandonment has expired under its own terms. As a result, no authority exists in the Financing Order to issue bonds at PNM's leisure and PNM has foregone its opportunity to issue ETA bonds. Additionally, as a result, the SJGS undepreciated investments must be addressed in this case. PNM recovery of SJGS undepreciated investments should be at 50% of $283 million, or $141.5 million, at cost of debt instead of WACC, depreciated over 10 years. This is due to PNM untruthfully testifying that further

investments would be cost-effective for 20 years, when it knew or should have known that they were not, and the PNM Board and senior management deciding to shutter the plant just 14 months after the *Final Order* in 13-00390-UT (issued on Dec. 16, 2015) in Feb. 2017. PNM may not be seeking recovery here, but the Commission needs to foreclose that possibility taking place in any other forum.

8. I recommend a Commission find that PNM was imprudent in the rate adjustment and ETA bond delay. PNM appears to have engaged in the rate adjustment and ETA bond delay for its own business interest (including the Avangrid/PNM merger), without any contemporaneous financial evaluation of how this decision would impact ratepayers (again), and that as a result $98.3 million/per year be returned as an unjustified SJGS collection in rates post Unit 1 and Unit 4 abandonment on the respective dates of July 1, 2022 and October 1, 2022. This should be returned over the course of one year, the same time period over which it was taken from ratepayers.

- Because PNM has failed to reflect the materially reduced risks of its operations due to PNM's automatic adjustment mechanisms in its requested rate of return on common equity, I recommend that its ROE be set at no more than 8.9%.

- The one specific rate adjustment I recommend is an approximately $6.7 million manual adjustment decrease to PNM's 2024 future test year

banded revenue requirement for Community Solar Recovery.

Principles of Utility Regulation and How They Apply to This Rate Case

Q. Are there bedrock principles of utility regulation that underpin your analysis?

A. Yes. Let me start with the concept of "used and useful."

> One widely accepted principle is that rates must be determined only on investments actually providing service to the ratepayer or on property that is "used and useful." The used and useful test protects the ratepayer from investment in unnecessary or excessive facilities while allowing investors a return on the capital which they have reasonably devoted to public use. The used and useful principle provides a flexible test which serves to measure how much property is devoted to the public's benefit for which a return can be expected.

NM PSC, *Final Order*, Case No. 2146 PART II, April 5, 1989, at 47-48.

In my experience, utility commissions uniformly apply the "used and useful" test to determine what investments qualify to be included in rate base, where both a return of the investment and a return on that investment can be allowed.

Q. Has this issue come up with respect to PNM in the past?

A. Yes. When the Commission was called upon to determine how to deal with PNM's excess capacity in PVNGS, PNM argued the Commission could not exclude capacity without its consent, arguing that "regulatory principles, the New Mexico Public Utility Act, and constitutional principles

entitle the Company to receive a full return on its prudent investment in generating plant." The Commission disagreed, explaining, "PNM's position, therefore, is that the Commission may only exclude assets from rates with PNM's consent. We disagree." Final Order at 35. *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, Public Service Company, Applicant*. NMPSC, Case No. 2146 Part II (April 5, 1989.)

The Commission continued by finding that PNM was incorrect that applying the "used and useful test" would amount to a taking of PNM's property in violation of the 5th and 14th Amendments. *Id.,* at 36. After an extensive review of the Constitutional law sanctioning the used and useful test, the Commission concluded, "Courts and utility commissions have made clear that the used and useful test, although not constitutionally mandated, is a permissible regulatory tool for protecting the interests of ratepayers in paying only for the costs of a facility actually providing service." *Id.* 46.

Q. So do all investments that are actually providing utility service qualify to be included in rate base?

A. No. Parallel to the core principle of "used and useful" is the concept of prudence. Applying the "the 'Prudent investment' concept - only plant prudently purchased or constructed is includable in rate base." Tariff Development I: The Basic Ratemaking Process, D. Tiejen, "Briefing for the

NARUC/INE Partnership", at slide 24, attached hereto as Exhibit CKS - 2. That quote neatly sets out the requirement that an investment sought to be placed into rate base must have been prudently acquired or built.

Q. Are the "used and useful" and "prudence" concepts identical?

A. No. "Unlike the prudent investment test, the used and useful test does not make a finding of fault a prerequisite to exclude an asset from rate base. Richard J. Pierce, Jr., The Regulatory Treatment of Mistakes in Retrospect: Cancelled Plants and Excess Capacity, 132 U. Pa. L. Rev. 497, 513 (1984) retrievable at https://scholarship.law.upenn.edu/cgi/viewcontent.cgi?article=4621&context=penn_law_review. In Case No. 2146, the Commission said, "[T]he determination of what property should be included in rates cannot solely rely on a prudence analysis.…The Supreme Court has long held that prudently incurred property could be excluded from rates.)" Part II, *Final Order* at 51 (April 5, 1989.)

But prudence alone is not sufficient. "It does not follow that a unit prudently constructed must always be included in the rate base." *Philadelphia Elec. Co. v. Pennsylvania Pub. Util. Comm'n*, 433 A.2d 620, 623 (Pa. Commw. Ct. 1981). That case was cited in *Recommended Decision*, Case No. 17-00255-UT (June 29, 2018), at 50.

Q. What is the public policy basis for the prudence requirement?

A. It is a key component of the necessary balancing of utility owner and

ratepayer interests. The prudence test protects ratepayers against negligent, wasteful, or otherwise improvident expenditures; it solidifies the need for utility management to make decisions with sound judgement and in good faith. "[R]atepayers are not expected to pay for management's lack of honesty or sound business judgment." Case No. 2146, Part II, *Final Order* at 50; *Public Serv. Co. of N.M. v. NMPRC*, 2019-NMSC-012, ¶ 21, 39, 444 P.3d 460, 470, 474.

Q. Has the Commission provided a working definition of prudence?

A. Yes. The Commission has explained:

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

Case No. 2087, *Order on Burden of Proof and Specific Issues to be Addressed,* Oct. 4, 1998), cited in the *Final Order Partially Approving Certification of Stipulation*, Case No. 10-00086-UT, June 21, 2011, at 61. That decision was upheld by the *New Mexico Supreme Court in Public Serv. Co. of N.M. v. NMPRC*, 2019-NMSC-012, ¶¶ 21, 29-30, 39, 444 P.3d 460, 471. ("PNM does not disagree with the prudence standard articulated above[.]")

Q. Does New Mexico require a utility to demonstrate prudence for an asset to qualify for inclusion in rate base?

A. Yes. The Commission has been clear about the applicability of the prudence requirement: "To be included in rates, expenditures on utility plant must (1) have been prudently incurred; and (2) be used and useful." Case No. 2146, Part II, *Final Order* at 53. And our Supreme Court has approved that Commission's use of prudence in rate reviews, such as in *In re Petition of PNM Gas Service.*, 2000-NMSC-012, 129 N.M. 1, 1 P.3d 383, 405 (N.M. 2000), and repeated its approval in *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012, 444 P.3d 460, 470, citing *Pub Serv. Co. of N.M.* (PNM), 101 P.U.R. 4th 126, 62, 1989 WL 418588 (N.M. Pub. Serv. Comm'n 1989). ("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.")

It is the combination of sound decisions about what plant to put into service plus the need for that plant to be actually involved in providing service which protects ratepayers from overbuilt, wasteful, unnecessary, or extravagant utility investments.

I. PNM's Demonstrated Imprudent Actions On Its Four Corners Power Plant Must Finally Be Cured With Appropriate Remedies.

Q. Can you quickly discuss the history of the issue of the prudence of PNM's continued participation in the Four Corners Power Plant ("FCPP")?

A. I can, but my main focus is on the appropriate remedies that should finally be applied as a result of PNM's imprudence. The Hearing Examiners provided a summary of that history in their June 16 *Order Denying PNM Motion To Remove Or Dismiss Four Corners Power Plant Prudence Issues And Granting Joint Motion For Commission To Take Administrative Notice Of Portions Of The Record In Case No. 16-00276-UT*, ("Motion Order"), and I will use their helpful verbiage as the starting point for my answer.

In PNM's 2016 rate case, Case No. 16-00276-UT, the question of the prudence of PNM's continued participation in FCPP was squarely presented. NEE contended that PNM's decision to continue participating in the FCPP was imprudent and premised on flawed analyses. The arguments that NEE and other parties raised were never fully addressed because parties reached a stipulated resolution to the case. That stipulation included a provision designed to head off full consideration of the prudence question on the merits. In return for removing that question, the stipulation limited PNM's return on the investments in FCPP, which PNM stated would result in a benefit to customers exceeding $3,000,000 and require PNM to "write off"

approximately $21,000,000.

The Hearing Examiners in that case agreed with NEE and recommended that the Commission disallow PNM a return on a much larger portion of the FCPP investments than the stipulating parties proposed. The Commission then issued two Final Orders. Those orders reached different outcomes on the FCPP prudence issue. In the Initial Order, the Commission agreed with the Hearing Examiners and concluded that PNM's investments and continued participation in the FCPP were imprudent. The Commission said that disallowing PNM from earning a return on the larger portion of the FCPP investments - as recommended by the Hearing Examiners - was an appropriate, but not complete, remedy. The Commission held that a full consideration of what should be disallowed given PNM's imprudence should be addressed in PNM's next rate case.

However, the Commission changed course in its Revised Order. There, the Commission, at PNM's request, concluded that it would make no decision about the prudence of PNM's investments or continued participation in FCPP, and determined that it was necessary to defer ruling on the question of the prudence of PNM's investments and continued participation in FCPP until PNM's next rate case, where a full record on the issue could be developed.

The Commission made clear that all evidence admitted in Case No. 16-00276-UT bearing on the FCPP prudence issues would be admitted through

administrative notice in that next rate case, and that has now been done.

The next case where the FCPP issue arose was Case No. 21-00017-UT, in which PNM sought authority to abandon FCPP and securitize its undepreciated investments in that plant. Parties, including NEE, filed testimony on the prudence issue; I submitted prefiled direct and rebuttal testimony on behalf of NEE, as did witness Graves for PNM.

However, the Commission did not reach the prudence issue while denying PNM's request to abandon FCPP. The Commission explained:

> … the issues in [Sierra Club's] argument do underscore the need to serve the public interest by rendering a final decision on the merits of the prudence issues concerning the expenditures on SCR and other improvements reserved to this case by the Commission's orders in the 16-00276-UT case which the HE was unable to resolve and issue a recommendation on due to the deficiencies outlined in his RD.
>
> Accordingly, the prudence issues concerning the expenditures on SCR and other improvements reserved to this case by the Commission's orders in the 16-00276-UT and which have not been resolved by this proceeding should be addressed in any subsequent proceeding on an application by PNM for abandonment of FCPP and request for approval of replacement resources filed in accordance with this order and NMSA 1978, Section 62-18-4 D.

Order on Recommended Decision, December 15, 2021, at 11-12 (emphasis added.) PNM appealed that Order, docketed as S-1-SC-39138.

Q. Aren't PNM's life extension and SCR investments for the Four Corners Power Plant already in rate base as a result of the Commission's decision to allow their inclusion in NMPRC Case No. 16-

00276-UT, and if so, doesn't that mean that the Commission already determined their prudence?

A. No. The Commission's Orders in that docket specified that the further life extension and SCR investments could only come into rates temporarily for the duration of time that the stipulation in that case was in effect, which is reasonably understood to mean until new rates are approved. NMPRC Case No. 16-00276-UT, *Revised Order Partially Adopting Certification of Stipulation*, (1/10/2018) ¶ 66.

Q. What is the significance of the Commission's decision to only approve inclusion of FCPP SCR and life extension investments in rates on a temporary basis?

A. PNM was clearly on notice, because in the 16-00276-UT docket, PNM (and other signatories) filed their *Joint Notice By All Signatories of Acceptance of Commission's Modifications to Revised Stipulation*, January 18, 2018, accepting all the modifications to the *Revised Order Partially Adopting Certification of Stipulation* issued on January 18, 2018, which included "the issue of PNM's prudence in continuing its participation in FCPP shall be deferred until PNM's next rate case filing." Decretal Paragraph B.

Q. What has happened procedurally about the FCCP prudence issue in this case?

A. PNM has attempted to have its cake and eat it too, by advancing its positive case for prudence with testimony while obstructing NEE's attempts

at discovery necessary for NEE to appropriately respond.

Q. How has PNM done that?

A. PNM advanced a witness – Frank Graves – whose prefiled direct testimony attempted – again – to support a finding that PNM had been prudent in its FCPP decisions. At the same time, PNM steadfastly refused to respond to any discovery related to FCPP, asserting:

> 5. PNM objects to any Interrogatories requesting information relating to the prudence of PNM's decision to remain a participant in the Four Corners Power Plant ("FCPP" or "Four Corners") after 2016. This issue was previously litigated in NMPRC Case Nos. 15-00261-UT and 21-00017-UT. Case No. 21-00017-UT is currently on appeal before the New Mexico Supreme Court in Case No. S-1-SC-39138, which has jurisdiction over this matter. *Corbin v. State Farm Insurance Co.*, 1990-NMSC-014, ¶ 10, 109 N.M. 589 ("The taking of appeal divests the district court of jurisdiction of the cause of action and transfers it to the appellate court.").

PNM's Objections And Responses To Albuquerque Bernalillo County Water Utility Authority's Tenth Set Of Interrogatories And Requests For Production Of Documents, attached hereto at Exhibit CKS - 3.

Q. In your opinion, is that fair?

A. No. PNM apparently believes it is the only party allowed to develop facts and positions on its prudence in extending FCPP contracts, through Mr. Graves' testimony.

Q. Has PNM attempted any other maneuvers to avoid having the prudence issue finally determined here?

A. Yes. On March 27, 2023, PNM filed a motion to remove or dismiss the

FCPP prudence issues from the case, to permit PNM to withdraw Mr. Graves' testimony, and to preclude intervenors in this case from supplying testimony on the FCPP prudence issue.

Q. Did other parties request rulings on the FCPP prudence issue?

A. Yes. On April 7, NEE, Bernalillo County, and Western Resources Advocates asked that the Commission to take administrative notice of the evidence adduced in Case No. 16-00276-UT bearing upon the FCPP prudence issues. PNM responded that the Commission cannot and should not take administrative notice of such evidence.

Q. Have those motions been ruled upon?

A. Yes. On June 16, 2023, the Hearing Examiners issued their *Motion Order*, in which they (1) denied PNM's motion to dismiss the FCPP prudence issues, and (2) granted the motion that the Commission take administrative notice of the 16-00276-UT prudence evidence, finding that "[t]he Commission should consider that evidence in its decision making about the prudence of PNM's investments and continued participation in the FCPP." *Motions Order* at 2 (emphasis added.)

Q. Did the Hearing Examiners directly say how FCPP prudence had been addressed?

A. Yes. They explained that PNM's current rates for electric service were authorized by the Commission in the approvals set forth in its *Order Closing Docket* issued on January 31, 2018, in the 2016 Rate Case, NM PRC Case

No. 16-00276-UT, subject to a future rate case determination on any imprudence and how much. *Motions Order* at 7.

Q. So where does that leave the issue of FCPP prudence?

A. Squarely before the Commission, with all the prudence evidence from Case No. 16-00276-UT available to it to be used as part of the record in this case. NEE and the other moving parties have already provided relevant documents from and specific citations to the record in Case. No. 16-00276-UT, and the Hearing Examiners have specified the process to be used in admitting the material from that case. *Motions Order* at 16. In addition, the Commission will have the testimony and exhibits which parties bring forward here.

Q. What evidence has PNM presented on the prudence issue at this point?

A. In a nutshell, PNM witness Graves has attempted – as he did in Case No.21-00017-UT, to justify PNM's actions on FCPP by a collection of post hoc justifications for those actions.

Q. What did witness Graves do in Case No. 21-00017-UT?

A. He admitted that PNM had made numerous, significant errors and omissions in its FCPP decision-making process, and then attempted to construct ways in which PNM could have made its FCPP decisions, rather than how it did make them in 2012-2013. But there was no evidence that anything he said was done, could have been done, or would have been done.

The fatal flaw in witness Graves' testimony in that case was that he effectively asks how PNM could have approached the decisions rather than how it did. Additionally, Graves admitted that he did not use Strategist, a financial modeling tool, that PNM relied on at that time, and has repeatedly relied on, to conduct and justify their economic analyses.

Q. What has witness Graves done now, in this case?

A. Essentially the same thing. He admits that PNM left out capital costs and skewed its analysis, but then comes up with a new batch of issues that PNM could have considered at the time, which he asserts would overcome the failure to include capital costs. But that is exactly the same attempt at post hoc justification as he presented in Case No. 20-00017-UT.

Q. Why is that approach improper?

A. His attempt through that testimony to rewrite history has been rejected by the New Mexico Supreme Court:

> We pause, before concluding our analysis of this argument, to note that it was not inappropriate for the Commission to address whether PNM had demonstrated Palo Verde to be cost-effective or the lowest cost alternative. We observe that there is a meaningful relationship from the perspective of the ratepayers between the consideration of alternatives and the cost of the chosen generation resource. The goal of the consideration of alternatives is, of course, to reasonably protect ratepayers from wasteful expenditure. PNM, 101 P.U.R. 4th at 151. The failure to reasonably consider alternatives was a fundamental flaw in PNM's decision-making process. See *In re PacifiCorp* (PacifiCorp), UE 246, Order No. 12-493 at 26-27, 2012 WL 6644237 (Or. P.U.C. Dec. 20, 2012) (stating, in the context of analyzing a utility's failure to reasonably consider alternatives, that the decision-making process of the utility is properly included in the prudence analysis).

Public Serv. Co. of N.M. v. NMPRC, 444 P.3d 460, 474, ¶32 (emphasis added.)

Speculation now about what PNM might have been able to do in the past cannot change what PNM actually did and failed to do. Graves' testimony is once again a hindsight review, despite that approach having been rejected by the Commission and our Supreme Court. "The Commission considers only those facts known or knowable by a utility at the time of the decision, and it eschews any form of hindsight review.… [W]e conclude that the Commission's determination that PNMGS was imprudent in extending the take-or-pay clause in GP 11560 is supported by substantial evidence." *In re Petition of PNM Gas Servs.*, 2000-NMSC-012, 129 N.M. 1, 1 P.3d 383, 405 (N.M. 2000.) I also note this approval of only using "at the time" analysis: "The Commission adopted the hearing examiner's conclusion that PNM's decisions were imprudent on the basis that PNM had failed to demonstrate that <u>it considered alternative courses of action</u>.") *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012, ¶¶ 27- 38, 444 P.3d 460, 470. Just as Mr. Graves can propose a way that PNM could have approached its FCPP decisions in a way that would have made its decision prudent, I or any other expert could propose <u>other</u> ways in which PNM could have approached those decisions and reached the conclusion that it would be imprudent to renew those contracts because it would result in ratepayers facing needlessly excessive rates.

Q. What post-hoc arguments does witness Graves present this time?

A. He starts by finding other capital expenditures which PNM could have, but did not, consider in its May 2012 study. Graves Direct at 21-27. His listing of the expenditures is purely hindsight, of the sort rejected by the Commission. Incidentally, when witness O'Connell testified in the 16-00276-UT rate case for PNM, he defended recovery of costs for FCPP and their previous decision-making process by objecting: "NEE relies on hindsight review to create hypothetical scenarios for past abandonment of Four Corners." (16-00276-UT, O'Connell, TR., August 9, 2017, pp.470-471, 509-510, 515-517.) Now Graves, obviously defending PNM's alleged prudence, is imposing a hindsight analysis that PNM decried in 2017 was impermissible.

Q. What is his next argument?

A. That PNM could have considered other changes in the prices of gas and coal and "future carbon." Graves Direct at 27-40. At no time in that testimony does witness Graves present evidence that PNM actually did any of those analyses, so his protracted argument is just as faulty as his first.

Q. Are there other post hoc arguments in witness Graves' testimony.

A. Yes. He brings up the issue of changes in load forecasts, but admits he had to look at PNM's 2014 IRP and "reconstruct[] PNM's total available supply…" Graves Direct at 42-43. If PNM had actually done such an analysis, witness Graves would have had those data available. PNM did not,

and analyses now are unavailing.

Q. Any other arguments?

Y. Yes. Witness Graves asserts that PNM's capital cost estimate for the new gas CC option was credible because it now can be seen to come close (when all of witness Graves' adjustments are factored in) to an EIA estimate made 11 months after PNM's 2012 study. Graves Direct at 44-45. PNM clearly did not include and could not have included a 2013 report in its May 2012 study.

Q. Is there another argument?

A. Yes. Witness Graves tries to introduce 2013 data regarding the availability of FCPP, asserting that from "the 2012 and 2013 perspective" PNM could have expected FCPP to maintain performance similar to historic patterns. Graves Direct at 45-47. Once again, PNM did not have a "2013 perspective" in May of 2012, and his argument continues to have the same obvious flaw.

Q. Is there an overall problem with witness Graves' analyses?

A. Yes. The 20-year horizon Graves used in his analysis to try to reconstruct the supposed economics of PNM's decision by comparing the alternative to continuing to participate in the FCPP—his after-the-fact justification—is arbitrary. Graves asserts that PNM, in comparing resources back in 2012, used a 20-year planning horizon (2012 – 2033) to compare retaining FCPP to alternatives, so he should also use a period out to 2033 for his

computations. But the damages arising from PNM's ill-fated decision are not limited to a 20-year period; damages occur whenever and however they may, including the damages resulting from stranded assets. Damages resulting from the things PNM failed to consider in 2012 cannot be neatly shoehorned in that 20-year window. The consequences of PNM's decision extends well beyond witness Graves' 20 year comparison period, and doesn't begin to take account of the additional harm to the environment resulting from the failure of the plant to close in 2016 because of PNM's decision. Damages resulting from PNM's decision cannot adequately be captured by a limited, 20-year analysis, particularly when the participation agreement was extended to 2041.

Q. Lastly, is there an issue with witness Graves' math?

A. Yes. A small point, perhaps, but his math on page 26 of his Direct Testimony – where he sums up what he presents as savings – is wrong. He asserts there would be a net savings of $9 million, when the figure he uses actually add up to $8 million. That may be a rounding error, but it raises the question of how witness Graves presents his arguments.

Q. Is there evidence to show that PNM did not make its FCPP decision based upon ratepayer benefits, but just for its own corporate benefit?

A. Yes. A contemporaneous memo from PNM's Senior Vice President Patrick Apodaca to the Board of PNM reveals the actual reason PNM extended the life and invested further in FCPP: "Among other things, maintaining our

same level of ownership at Four Corners avoids a possible distraction with our BART filing with the PRC next week and our negotiations with the owners of San Juan Generating Station." December 18, 2013, Apodaca memorandum, attached hereto as Exhibit CKS – 4 (highlight added.). That demonstrates the true depth of imprudence on PNM's part: abandoning its duty to customers to only charge just and reasonable rates in favor of getting past the Commission a proposal on SJGS.

Q. Why is this so significant?

A. Because the evidence showed that when PNM made its decision to re-up in FCPP it ignored all the evidence in plain sight, which is very briefly mentioned here but is more fully memorialized in the documents for which administrative notice has been taken. PNM was not concerned with the FCPP and the benefit or harm to ratepayers or the environment, it was concerned with its SJGS plant and getting Commission approval in 13-00390-UT.

1) The May 2012 Strategist runs (as well as the 2011 runs) included a fundamental modeling error. The runs that anticipated PNM's extended participation in Four Corners excluded the capital costs of anticipated future capital improvements required to extend Four Corners' life, except for the estimated cost of the Selective Catalytic Reduction (SCR) pollution controls. PNM was aware of the magnitude of the need for capital improvements. PNM included the anticipated operating and maintenance

costs associated with the improvements in the Strategist runs but omitted the capital improvement costs. The exclusion of the costs of ongoing capital improvements contrasts sharply with the repeated emphasis PNM places on the importance of such costs to earnings for PNM's stockholders because of the large return it expected to reap on the capital costs it would incur in making the improvements.

2) El Paso Electric (EPE), another monopoly electric utility in New Mexico, and a co-owner at FCPP, did perform contemporaneous Strategist financial modeling that included the ongoing costs of capital expenditures. EPE determined that it was not cost effective to remain in Four Corners, and EPE's exit nearly shut down FCPP. Exhibit CKS – 4.

3) Increasingly poor performance at FCPP: Beginning in 2013, the forced outage rate at Four Corners started climbing significantly, and the units' availability declined. This meant that the plant was only available for customer reliance 72.8% of the time in 2013, 68.1% of the time in 2014, and 78.2% of the time in 2015. 16-00276-UT, *Certification of Stipulation*, p. 45, citing NEE's expert, David Van Winkle's Exhibit 6. The EAF, Equivalent Availability Factor, became even worse between 2016-2018, and even though the plant became more available between 2019-2022 it is still below the national average, making the plant an unreliable investment. (PNM Exhibit NEE 1-12, attached as Exhibit CKS - 5). Mr. Olson testified the poor operating performance of the plant was "without question." 16-00276-

UT, TR. August 15, 2017, Olson,1530-1535, attached as Exhibit CKS - 6); See also, 16-00276-UT, *Certification of Stipulation*, pp. 46-47.

4) The 2011 and 2014 Integrated Resource Plans, relied on by PNM, were not accepted by the Commission. Further, the cost inputs per metric ton of CO_2 were inconsistent and failed to follow the requirements set by the Commission in Case No. 06-00448-UT. If carbon costs were consistently applied, the Strategist run would not had favored PNM's extended participation in FCPP. 16-00276-UT, *Certification of Stipulation*, pp. 58-60.

5) The most important of all: Despite "forensic accounting," PNM's witnesses, Vice President of Generation, Chris Olson, and Director of Planning and Resources, Patrick O'Connell, could not accurately explain the documents that allegedly formed the basis for PNM's decision to re-invest in FCPP. In fact, PNM's resource "evaluator" O'Connell testified that the outdated (19 months' earlier) Strategist runs "formed the basis" of the life extension and PNM capital expenditure investment in FCPP, yet PNM's Vice President, (now Senior Vice President) Olson admitted:

> Q. I want to talk to you about your involvement in the negotiations. Is it true that PNM is relying on the May 2012 Strategist runs as evidence of prudence and cost-effectiveness for its decision in December of 2013 to reinvest in Four Corners and –
>
> A. I don't know. I heard Mr. O'Connell testify to those questions, and I don't recall what he had said.
>
> **Q. So when you were negotiating in 2013, did you not know about the 2012 Strategist run?**

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

NEE Exhibit 29, 16-00276-UT, Excerpt of Transcript (Olson) August 15, 2017, p. 1496-7 (emphasis added), Exhibit CKS - 6.

Once again, witness Graves' testimony is irrelevant. There was no contemporaneous evaluation because the results of an evaluation were beside the point. The actual PNM negotiator for FCPP, Vice-President Olson, admitted that he did not know about the "analysis" (and it didn't matter to the company because it re-invested in FCPP, and at one point would've even gone as far as absorbing the shares EPE was shedding, for its own business interests – ie., the neighboring SJGS plant) before he committed the company, but more importantly PNM ratepayers, to nearly $1 billion for a non-performing, environmentally detrimental coal plant. Investing in a plant because the company didn't want to create a PRC distraction from its SJGS re-organization, closure, and re-investment in coal shares from exiting co-owners is not a justifiable reason to saddle ratepayers with hundreds of millions of dollars in a non-performing, environmentally hazardous plant. *See*, "Poisonous Coverup", November 3, 2022, Executive Summary, Table of Contents, part of Appendix A, Appendix C, and part of Appendix D: Analysis of Four Corners Power Plant by Geo-Hydro, Inc. attached as Exhibit CKS - 7; the full report can be found here: https://earthjustice.org/wp-content/uploads/coal-ash-report_poisonous-coverup_earthjustice.pdf "[R]atepayers are not expected to pay for management's lack of honesty or sound business judgment." Case No. 2146, Part II, *Final Order* at 50; *Public*

Serv. Co. of N.M. v. NMPRC, 2019-NMSC-012, *supra*, ¶ 21. The proper remedy for a utility's imprudence "should equal the amount of the unreasonable investment" in order to "hold ratepayers harmless from any amount imprudently invested[.]" *Id.*, ¶ 31.

Q. What is your overall conclusion about witness Graves' testimony?

A. There may be many ways in which PNM could have improved its process; the issue before the Commission is what the actual decision-making process was. And nothing that Witness Graves can speculate about now can change the fact that PNM's process was imprudent.

Q. Given that PNM had adduced nothing to show that – at the time in 2012 – it did the sort of analysis which could reasonably justify continuing with FCPP, what remedies should the Commission apply in response to that imprudence?

A. First, PNM's investment pre-2016 was deemed prudent. Therefore, I recommend that PNM receive 50% of its undepreciated FCPP investments which were made before June 31, 2016. That would be consistent with the Commission's decision made six months earlier in Case No. 13-00390-UT, *Final Order*, (December 16, 2015), at 21 ("the Certification's recommendation of 50% [split] is reasonable, even generous.")

Q. What would that amount to?

A. According to PNM's supplemental response to NEE Interrogatory 8-1

(attached as Exhibit CKS - 8), the remaining undepreciated investment as of January 6, 2024 is $58 million. Half of that amount is $29 million. I recommend that PNM be allowed to recover the $29 million of those undepreciated investments, depreciated over three years at PNM's weighted average cost of capital ("WACC").

Q. What next?

A. PNM's post-June 21, 2016 continuation at FCPP was imprudent and yet PNM has been recovering a full return on its post-2016 undepreciated investments and all of its capital investments at a debt return, for the last 7 years. I recommend that PNM be denied all future costs for FCPP investments. Continuation in FCPP was imprudent, and the plant is no longer cost effective, based on PNM's own testimony in Case No, 21-00017-UT. (Excerpt of PNM's Phillips testimony, attached hereto as Exhibit CKS - 9). Therefore, while FCPP has been used—when it has actually been operating—the plant has not been useful for ratepayers, because there are and have been cheaper, more reliable, and far better alternative resources, ones which do not have the negative climate and environmental consequences that coal generation presents. As a result, the Commission should deny any recovery for FCPP post-2016 investments. The remaining investment in FCPP should be entirely removed from rate base. To the extent PNM continues to rely on FCPP, the associated fuel and operational costs should only be recovered through the fuel adjustment clause.

II. Removing the costs for 114 MW of leased capacity in the PVNGS due to the expiration of the associated leases, and Requiring ratepayer repayment for the over-recovery of the $95,255,955 leases after the leases were sold and no longer used and useful, and Permanent disallowance of recovery for contributions to the nuclear decommissioning trusts as a remedy for PNM's imprudent actions in the repurchase of 64 MW and the 114 MW lease extensions at PVNGS without any financial analysis are all necessary to protect ratepayers from PNM management's action made in bad faith.

Q. What is the issue raised by PNM related to the Palo Verde Nuclear Generation Station?

A. In a nutshell, PNM is seeking approval to continue charging ratepayers for an extended period of time for stranded assets resulting from capital improvements made to the PVNGS that, at of the end of PNM's leases, revert to the lessor and will no longer serve ratepayers. In addition, there are issues resulting from PNM's prior decisions regarding PVNGS lease repurchases that the Commission ordered be heard in PNM's next rate case following a Supreme Court remand, involving whether ratepayers were exposed to additional financial liability resulting from PNM's imprudent decisions in repurchasing PVNGS leased interests, and the proper remedy for those imprudent decisions.

Q. Is PNM seeking recovery for leasehold improvements that have become stranded assets at the expiration of the PVNGS leases?

A. Yes. In 2021, in Case No. 21-00083-UT, PNM and five intervenors brought competing proposals to the Commission about the proper ratemaking treatment for PNM's PVNGS leased interests upon the expiration of the leased interests. PNM sought approval of a regulatory asset for

undepreciated investments in the PVNGS improvements, while the other parties sought a regulatory liability to preserve the right to a refund for PVNGS costs being recovered in rates when those costs would cease to be incurred by PNM at the lease expirations.

Q. What did the Commission do in response to those proposals?

A. It granted what it termed "pure accounting orders":

> Therefore, the Commission finds that both PNM and the Joint Movants' respective requests for accounting orders should be approved, but only as pure accounting orders that do not prejudge the ultimate ratemaking treatment of those accounts. Determination of the appropriate ratemaking treatment with respect to those accounts should be deferred to PNM's rate case in Case 22-00270-UT. Approval solely of the creation of the regulatory asset and regulatory liabilities accounts, without any decision on their ratemaking treatment, will not violate PNM's due process rights.

Order on Joint Motion for Accounting Order ("Accounting Order"), Case No. 21-00083-UT (Nov. 18, 2022) at ¶18.

PNM's request to recover the regulatory assets through base rates was denied. The Commission directed PNM to track and account for all costs currently borne by ratepayers associated with the PVNGS leases during the pendency of the rate case then pending (Case No. 22-00270-UT), subject to a later determination of any ratemaking treatment, including refund to ratepayers, for those costs. Ordering Paragraph A. PNM's request to recover the regulatory assets through base rates was denied. Ordering Paragraph B. Consideration of any other PVNGS issues was to be addressed in Case No.

22-00270-UT, including whether PNM's imprudent decisions to renew the five leases and repurchase 64.1 MW of Unit 2 capacity exposed ratepayers to additional financial liability and whether PNM should be denied recovery of any future decommissioning expenses as a remedy for that imprudence. Order Paragraph C.

In addition, the Commission directed that the parties in Case No. 22-00270-UT address the requirement that costs to be included in a regulatory asset be "unusual" or "infrequently occurring", and to address the issue of whether PNM should be entitled to recover its undepreciated investments when PNM will no longer own the undepreciated investments. Ordering Paragraphs D and E.

Q. What has PNM testified to in this case?

A. PNM has stated, "At this time, PNM is not seeking recovery in rates for any Palo Verde NDT contributions related to the PVNGS Units 1 and 2 because their trusts are adequately funded." Greinel Direct at 17. However, PNM has also stated, "PNM should be able to recover any additional reasonable costs from customers in the event the NDTs require additional funding in the future." Greinel Direct at 19.

As to the Palo Verde NDT for PVNGS unit 3, PNM testified that those decommissioning costs are currently included in rates pursuant to the Commission's approvals in Case No. 13-00390-UT so that PNM has

included $1.3 million of Unit 3 costs annually in its proposed rates, and is allowed to recover in rates 50% of any additional amount above $1.3 million. "No additional amounts are being requested or are necessary at this time." Greinel Direct at 20.

Q. Did PNM address the issues outlined in the Accounting Order?

A. Yes. "It is PNM's position that the extension of the PVNGS leases and the acquisition of the 64.1 MW of PVNGS Unit 2 did not expose PNM customers to any additional financial liability for nuclear decommissioning expense and that there should be no disallowance of any recovery for nuclear decommissioning costs now or in the future. PNM witness Miller addresses this issue in detail in his direct testimony. As he indicates, under the terms of the leases approved by the Commission, PNM ultimately remains responsible for PVNGS decommissioning, regardless of PNM's decision to extend the leases and repurchase the 64.1 MW interest in PVNGS Unit 2." Greinel Direct at 18-19.

Q. What did witness Miller testify to on the PVNGS issues?

A. That "PNM's proposal to recover the residual costs associated with the Palo Verde Units 1 and 2 lease agreements is reasonable, prudent and is the appropriate course of action in light of the ongoing costs of operation as compared to the cost of procuring alternatives." Miller Direct at 1.

He also concluded that, "…PNM did not expose customers to additional financial liability beyond that to which they would have been exposed had PNM chosen to abandon the leased PVNGS capacity. My conclusion is based on evidence which demonstrates that PNM would have retained responsibility for its share of the ultimate PVNGS decommissioning costs regardless of whether the assets continued to be in PNM's generation portfolio." Miller at 7.

Q. What did he recommend?

A. He focused on the costs for capital improvements that have been incurred or will be incurred after PNM's last general rate case (Case No. 16-00276-UT), up until the time of the lease expirations. He testified that PNM, as the lessee under the PVNGS leases, is required and will continue to be required to make capital investments in PVNGS up until the time leases expire. Miller Direct at 28. He asserted that recovery of these regulatory assets for 20 years is reasonable and an appropriate method of recovery for these costs that are no longer in service, under the theory that the "regulatory compact" requires the recovery of these assets to keep incentives aligned between PNM shareholders and PNM customers. Miller Direct at 29-31.

He argued that GAAP does not include a requirement that regulatory assets be "usual" or "infrequently occurring", and the Commission has not applied such a standard to regulatory assets in the past. Miller Direct at 31-32.

He also testified that under the "used and useful" standard, recovery is warranted even though the assets will not be used in the future; PVNGS has been "used and useful" for PNM customers for over 30 years so that customers have received the benefits of the transactions without having fully paid yet for those benefits under the depreciation rates for PVNGS set by the Commission. Once a lease is abandoned, it is appropriate that the associated leasehold improvements be removed from plant in service, but a mechanism for their continued recovery is needed. Miller Direct at 43-44.

Finally, he opined that allowing the Palo Verde leases to expire was a prudent decision by PNM and was the appropriate course of action in light of the ongoing costs of operation as compared to the cost of procuring alternatives. Miller Direct at 64.

Q. Are Mr. Miller's arguments persuasive?

A. No. His central assertion that there is a "regulatory compact" binding or limiting regulators' ability to oversee utility investments and determine cost recovery is simply wrong. The regulatory compact does not provide any guiding principles in this instance. PNM has never had a reasonable expectation of recovery of PVNGS costs at the expiration of the leased interests. The Commission in prior orders has made it abundantly clear that PNM is not guaranteed recovery for any unrecovered costs at the end of the leases, and that the used and useful principle would be applied to PNM's Palo Verde Interests. While the regulatory compact is often cited by the

NMPRC, there are specific principles the Commission has consistently applied to the PVNGS, therefore there is no need to resort to the vagaries of the so-called regulatory compact. At the highest level, New Mexico law frames the matter simply: "services shall be available at fair, just and reasonable rates…" NMSA 62-3-1(B). "Every rate made, demanded or received by any public utility shall be just and reasonable." NMSA 62-8-1. The Commission is empowered to act as necessary to ensure that PNM's rates are and remain just and reasonable, and no "regulatory compact" limits the Commission's reasoned actions to achieve that statutory requirement. "If public utilities law can be said to have a single underlying mandate, it is that regulators must serve the public interest, and the public interest is best served by striking a 'just and reasonable' balance between the interests of ratepayers and utility investors. This balancing must always be done in context, including taking into account the utility's own behavior and the behavior of its managers. But far from applying strict formulas to determine how much utilities are owed, courts give states a great deal of deference when it comes to striking the appropriate balance." C. May, "Parsing the Legal Facts and Fictions of Stranded Assets and Cost Recovery" (Jan 18, 2021), available at (https://www.cleanenergyaction.org/blog/regulatorycompact-xh24b)

Q. What is the policy flaw in PNM's request?

A. A principle of fundamental fairness in utility regulation is that ratepayers who benefit from a utility's investment should be the ones to pay rates based upon that investment. Witness Miller tacitly acknowledges this principle when he suggests that customers who have been on PNM's system in the past have received the benefits of the lease transactions. That may be true for those historical customers, but the flaw in proposing 20 more years of rate recovery for those transactions is that customers who do not even exist yet would be forced to pay for those leases without any benefit from the leases whatsoever.

Professor Bonbright identifies one of the three primary objectives in creating rate structures as the fair-cost-apportionment objective, which seeks to distribute the revenue requirement "fairly among the beneficiaries of the service." Bonbright, J, Principles of Public Utility Rates (1961) at 292 (emphasis added)(available at https://www.raponline.org/knowledge-center/principles-of-public-utility-rates/). Imposing costs from decades past on present and future ratepayers who receive no benefit from those historical investments is a blatant violation of that fairness principle.

Q. Is this related to the "used and useful" principal as well?

A. Very much so. The leases and the generation to which they relate cease to be used and useful when the leases end. There is no longer any property devoted to public use post-leases. Witness Miller attempts to dodge this

inconvenient fact when he acknowledges that, once a lease is abandoned, it is appropriate that the associated leasehold improvements be removed from plant in service. To get around that disabling fact, he postulates that "a mechanism for their continued recovery is needed." Miller Direct at 44.

No doubt PNM believes that such an alternative mechanism should be allowed as its witness contends. But no such replacement mechanism is appropriate here. Permitting the artful dodge suggested by witness Miller would subvert the "used and useful" requirement for rate recovery by changing the label on an accounting entry while retaining the contents of that entry, and should not be allowed.

Q. Does PNM address the issue of GAAP requiring that regulatory assets be "unusual" or "infrequently occurring"?

A. Mr. Miller just asserts that "GAAP does not include a requirement that regulatory assets be "usual" or "infrequently occurring." Miller Direct at 32. He provides no citation or other support for his assertion, and as a result I have given it no weight.

His fallback argument is that no one could have anticipated that PNM is facing increasing pressure to radically transform their generating systems from large central generation, principally fossil and nuclear powered, to the diverse, distributed, principally renewable focused generation system that utilities are seeking to create today. Miller at 35-36. That claim mis-

identifies the nature of PNM's exit from the PVNGS leases: PNM made the choice to allow them to expire at a time—the beginning of 2020—when it knew where public policy on electric generation was headed.

Q. What about the fact that the depreciation schedule for PVNGS extends beyond the end date of the leases?

A. Depreciation rates for PVNGS were set back in 2015 in Case No. 15-00261-UT. It was incumbent upon PNM to update and change the depreciation schedule at the point PNM management knew or should have known that it was removing PVNGS from its generating mix. PNM must have known that prior to January 15, 2020, when it provided notice that it would return the leased interests to the lessors. As PNM admits, "While that is the goal of depreciation expense is to recover the cost of an asset as well as any removal cost over the life of an asset, there may be circumstances that occur that would not allow that goal to be fully met." PNM Response to "Interrogatory NEE 9-6. That management failed to recognize changed circumstances at an appropriate time is not a basis for shifting costs to ratepayers.

Q. Does PNM adjust its depreciation lives?

A. Yes, it does so regularly. See, for example, PNM Exhibit ABCWUA 3-34 (attached hereto as Exhibit CKS - 10) in which PNM sets out changes to be applied in its 2022 depreciation study. There was no reason for PNM not to timely make similar adjustments for PVNGS.

Q. Was PNM on notice that the Commission could review all its decisions related to the PVNGS leases?

A. Very much so. In Case No. 1995, the docket in which PNM sought approval of the sale/leaseback transaction for PVNGS, the Commission gave PNM clear and unequivocal notice that it was retaining oversight into the future:

> The Commission retains full authority over the Facilities, and over all issues of ratemaking treatment for the lease payments, the costs of and any gains or losses from the sale and leaseback concerning said Facilities, including the authority to <u>disallow any or all of the lease expenses and transaction costs on a used-and-useful basis, on the basis of imprudency in the cost of the Facilities, or on any other lawful basis</u>, and the approval of the Lease Transactions granted by this Order is contingent on the Commission's retention of such full authority."

Final Order at 7 (11/27/1985) (emphasis added.)

Q. What is your recommendation?

A. That the Commission reject PNM's request to impose historic costs for terminated leases on future ratepayers. I recommend denying recovery for the 104.01 MW leased interests in PVNGS Unit 1 (in the estimated amount of $87,861,281), and denying recovery for the 10.42 MW Unit 2 leased interests in PVNGS Unit 2 (in the estimated amount of $7,389,674.) The $95,255,955 should be removed because those leases relate to plant that is no longer used and useful. In addition, because PNM continued to collect these costs from customers over the past year, I recommend that the full amount associated with the leases plus the return of and on those leases be returned to customers over a one-year period.

Lastly, I recommend a determination that customers are subject to increased decommissioning cost risk for PNM's imprudent repurchase of 64 MW of PVNGS Unit 2 and the extension of the PVNGS leases for 114 MW in Units 1 and 2, and that as a result, PNM shareholders bear the burden of funding the nuclear decommissioning trusts, not PNM ratepayers. See, 15-00261-UT, *Corrected Recommended Decision*, pp. 84-106.

The *Corrected Recommended Decision* addressed the nuclear decommissioning cost risk issue at length: At p. 92: "In fact, PNM had an incentive to retain its interests in PV Units 1 and 2. PNM will continue to be responsible for decommissioning costs of PV Units 1 and 2 even if PNM had relinquished its rights to the units and the lessors/investors sold the units to a third party. PNM would also be responsible for the capital project costs on projects pending at the date of the lease expiration." At 104: "In this case, NEE witness Van Winkle attached excerpts from the Direct Testimony of David C. Rode filed on behalf of PRC Staff in the San Juan Case that emphasized significant risks of nuclear ownership. … PNM had a substantial financial incentive to buy the 64.1 MW. Mr. Ortiz conceded that if PNM did not buy the beneficial interest in this capacity, there was some risk that PNM, not ratepayers, would bear the cost of non-depreciated capital improvements and decommissioning expenses associated with the capacity after expiration of the leases. Although Mr. Ortiz downplayed the risk that PNM, rather than ratepayers, would pay for non-depreciated

capital improvements and decommissioning costs, this issue has not been decided. In Case No. 1995, the Hearing Examiner found that:

> It is the policy of the commission that ratepayers should not be responsible for decommissioning costs associated with Palo Verde Nuclear Generating Station Unit 1 associated with that portion of the life of such unit during which it is not owned or leased.

Recommended Decision 19, ¶ 19. … More specifically, the PRC said:

> The case described in paragraph 24 of the Findings and Conclusions should include, but not necessarily be limited to determining:
>
> ….
>
> b. what responsibility, if any, ratepayers should bear for decommissioning costs associated with PVNGS Unit 1 (and related common facilities) associated with that portion of the life of such Unit during which it is not owned or leased by PNM[.]

Id. at 8, ¶ 25."

At p. 105: "In Cases Nos. 1995 and 2019, the PRC clearly preserved its authority to rule on this issue. The Stipulation approved in the San Juan Case is consistent with the policy expressed in Case No. 1995. The PRC adopted the parties' agreement that ratepayers only bear responsibility for decommissioning costs for PV Unit 3 in proportion to the amount of time the plant is used for retail purposes. The PRC ruled that if the Unit operates to the 2047 expiration of its renewed license, PNM's retail customers will be responsible for about one-half of PNM's 10.2% share of the Unit's decommissioning costs. *Certification of Stipulation* 25 (11-16-15)."

III. PNM Agreed To And Advocated For A Financing Order to Issue A Rate Adjustment & ETA Bonds At The Time Of SJGS Abandonment Yet Utterly Failed To Make Good On Its Bargained-For Commitment; The Financing Order Is No Longer Valid; The Issue of SJGS Undepreciated Investments Must Be Determined in this Rate Case; And Because PNM's Actions Were Imprudent the $98M/per year that PNM Has Been Collecting Must Be Returned to Ratepayers

Q. What are the issues regarding the abandonment of the San Juan Generating Station?

A. The simple version is: after being granted approval in Case No. 19-00018-UT to abandon SJGS Units 1 and 4, PNM was also granted approval via a Financing Order that gave the company 100% of its undepreciated assets in the form of "Energy Transition Bonds [to be issued] as promptly as possible after the last of the following events have occurred: (1) issuance of a final, non-appealable financing order acceptable to the Company; (2) the abandonment of the San Juan coal plant; (3) delivery of any necessary SEC approvals under the Securities Act of 1933; and (4) completion of the rating agency process. PNM estimated that the issuance of the Energy Transition Bonds would occur in 2022." 19-00018-UT, *Recommended Decision on Financing Order*, Feb. 21, 2020, pp. 120-21. PNM defended this Order on Appeal to the New Mexico Supreme Court, S-1-SC38247. The first two of the four events happened, but the last two have not, because PNM has not sought necessary SEC approvals or done anything to complete the rating agency process, as PNM witnesses admitted on cross-examination in Case No. 19-00018-UT. I do not believe the failure of the company to delay

issuance of the ETA bonds and adjust rates as promptly as possible after abandonment was prudent.

Q. Was there a quid pro quo explicit in the SJGS Financing Order?

A. Yes. In exchange for PNM receiving 100% undepreciated investments in ETA bonds, ratepayers were to receive a rate adjustment no longer charging them for SJGS, and an ETA securitized bond (compensating the company for the undepreciated investments) at the time or promptly after SJGS abandonment.

Q. Did this happen?

A. No. PNM did abandon the plant, but PNM refused to implement a rate adjustment and did nothing to effectuate the ETA securitized bonds.

Q. When parties learned of PNM's new plan what did they do?

A. In early 2022, several parties moved the Commission for an order requiring PNM to show cause why its rates should not be reduced at the time SJGS is abandoned and to otherwise enforce the Financing Order in NM PRC Case No. 19-00018-UT.

In response to that motion, the Commission directed Hearing Examiners to conduct an expedited hearing; that hearing was held on May 23-26, 2022. On June 17 2022, the Hearing Examiners released their Recommended Decision. Exceptions were subsequently received by the Commission.

The Commission's June 9, 2022, *Final Order Adopting Recommended Decision With Additions*, in 19-00018-UT ("Final Order") adopted the

provisions of the Recommended Decision that required:

A. PNM shall file an Advice Notice by July 1, 2022 that revises PNM's rates to remove all of the costs of San Juan Unit 1 from rates and issues rate credits to customers using the allocation and rate design methodology approved for the ETCs in the Financing Order, as described above.

B. PNM shall file an Advice Notice by October 1, 2022 that revises PNM's rates to remove all of the costs of San Juan Unit 4 and the San Juan common facilities from rates and issues rate credits to customers using the allocation and rate design methodology approved for the ETCs in the Financing Order, as described above.

Final Order at 12; 5-6. In addition, the *Final Order* directed PNM to file a report by October 15, 2022, with a record of all its costs incurred in that proceeding to enable a review of the prudence of those costs. It also required compliance filings by October 15, 2022, establishing the interest rates in place at the time of abandonment versus those on the dates of actual bond issuance to enable a review of PNM's prudence in delaying bond issuance. Finally, the *Final Order* explicitly directed an immediate rate credit to take effect immediately upon the abandonment of SJGS Units 1 and 4. *Final Order* at 13.

Q. Has PNM done as the *Final Order* required?

A. No. PNM did not issue the rate adjustment (or the ETA Bonds) for SJGS as required in the *Final Order*.

Q. When should PNM have issued those credits?

A. July 2022 and October 2022 or shortly after abandonment.

Q. Do you have an understanding of about PNM's reasons for failing to comply with those Commission orders?

A. As testified by PNM's CFO Don Tarry, the decision was directly tied to the proposed acquisition of PNM by Avangrid/Iberdrola. PNM's own Board of Directors documents confirm that the decisions to delay the SJGS rate adjustment and ETA bond issuance were made during the time frame of the merger case before the Commission (Case No. 20-00222-UT), to advance PNM's own business interests, and were unrelated to concern for rates and ratepayers.

That can be seen in PNM's own records. In early March, 2021, while discovery was underway in the merger case, PNM presented its "2021-2024 Long Range Plan Update" to its Board of Directors. It notes, "No change to securitization revenues for San Juan." (March 5, 2021 presentation, PNM Exhibit NEE 12-12E in Case No. 19-00018-UT, attached hereto as Exhibit CKS - 11, at 4.) That Plan was revised six months later, at the end of August. In that "Updated Long Range Plan 2021-2025", the deferrals are explicitly identified: "Next general rate case delayed one year due to merger. Issuance of San Juan securitization bonds delayed to coincide with general rate case." PNM Exhibit NEE 12-11 at 3 in Case No. 19-00018-UT (attached hereto as Exhibit CKS - 12.) On August 31, 2021, PNM was still in the thick of its merger-request proceeding before the Commission.

Q. What have you concluded?

A. My conclusion is that PNM had planned to issue the SJGS rate adjustment and bonds on time, but changed course as it worked towards the requested merger and decided to put off both Commission-directed actions in favor of getting approval for the requested merger. That conclusion is supported by PNM's admission that, "PNM also delayed the filing of its case that was anticipated to be filed around June 2022 in consideration of the proposed PNM Resources Inc. ('PNMR') merger with Avangrid, Inc.…." PNM Response to Interrogatory ABCWUA 8-16(A), attached hereto as Exhibit CKS - 13.

I also note that there was no notice of that deferral provided to the Commission, only to its intended merger partner, Avangrid. and PNM did not calculate the financial impact of those deferrals on ratepayers. 19-00018-UT, Transcript of Show Cause Proceedings, Vol. II (May 24, 2022) at 351-352; 359 (attached hereto at Exhibit CKS - 14. PNM did not consider the impact on ratepayers from the SJGS rate adjustment deferrals; this is a fundamental break in corporate responsibility and legal and ethical duties. PNM promised the Commission, the New Mexico Supreme Court, the Legislature, and the public that the ETA would result in customer savings from SJGS abandonment even with 100% recovery of its undepreciated investments, due to a prompt rate adjustment and a low-cost securitized bond issuance. But in 2021, after the *Financing Order* was blessed by the Supreme Court, PNM abandoned course, for its own business interests,

outside the four corners of the publicly agreed-upon ETA *Financing Order*, and unilaterally decided not to fulfill its contractual obligations to issue a customer rate adjustment and make the ETA bond issuance. 19-00018-UT, *Recommended Decision in Show Cause Proceeding*, June 17, 2022, p. 51, fn. 146: "[U]nder PNM's new plan, the abandonments are taking place independent from the securitization process established in the ETA." (19-00018-UT, Show Cause Hearing, Vol. II, 5/24/2022, PNM's Sanchez, p. 537. (Ms. Sanchez, attorney, ETA co-author, and policy lead for PNM testified: "we had many conversations and discussed throughout all of our discussions that there [would be] customer savings.") In the appeal of the ETA Financing Order, PNM told the Supreme Court that "[t]he bonds will be issued in 2022", explaining to the Court that:

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

PNM's Answer Brief in No. S-1-SC-38247, *Citizens for Fair Rates and the Environment and New Energy Economy, Inc. v. NMPRC* (entered on October 5, 2020 in NMPRC Case No. 19-00018-UT case record), pp. 7, 9 (emphasis added.)

I believe that if PNM had planned to delayed the rate credits and bond issuance for mutually (customer and shareholder) beneficial reasons, it

would have notified the Commission of its intentions. In anticipation of blowback, PNM manufactured a public relations campaign to address possible exposure. 19-00018-UT, *Recommended Decision in Show Cause Proceeding*, June 17, 2022, pp. 61-63.

Q. What is the effect of PNM's protracted failure to issue rate credits?

A. According to PNM witness Henry Monroy, PNM's non-fuel retail revenue requirement is $98 million/year. See, *Recommended Decision in Show Cause Proceeding*, Case No. 19-00018-UT (June 17, 2022), at 73.

Q. Has PNM addressed the directives of the *Final Order* in this case?

A. Only the issue about the timing of the issuance of the energy transition bonds. PNM testified that it made its initial compliance filing with the estimated bond interest rates as of the first benchmark date in Case No. 19-00018-UT on October 14, 2022. In that filing PNM noted that it was not possible to provide the estimated bond interest rates for the second benchmark date of October 28, 2022, because that benchmark date had not yet occurred as of the October 15, 2022 filing deadline. PNM filed its estimated bond interest rates for the second benchmark date on November 15, 2022. Greinel Direct at 21-22.

PNM asserts that customers were not harmed by its decision to delay issuance of the bonds past the time of abandonment and out to the effective date of rates in this case. Direct Testimony of Henry Monroy at 20-24.

Q. What is the basis for witness Monroy's assertion?

A. It is a self-serving and circular argument. Witness Monroy says, "PNM delayed two earlier rate cases with proposed increases, which benefited customers by keeping base rates at the same level since 2019. Customers have not been harmed by PNM's decision to delay its request to increase customer rates, which also delayed the bond issuance, because customers have not begun to pay the ETC and therefore have not had to pay twice for SJGS investments…" In other words, he is saying that because PNM didn't file rate cases which would have increased rates, customers were benefitted and shouldn't care that they did not get the rate adjustment as was promised and ordered in the *Financing Order*. Linkage of those two actions is nonsensical: nothing prevented PNM from proceeding with the rate adjustment while it held off preparing and filing general rate cases. The Commission's directives on rate adjustment - and bond issuance - were not tied to a general rate case but were based solely upon the abandonment of the SJGS units. The deferral was solely a decision made by PNM to benefit PNM.

Q. What do you recommend as remedies for PNM's failures?

A. First, as to the Commission-directed rate adjustment, I recommend a Commission find that PNM was imprudent, because PNM engaged in the rate adjustment delay for its own business interests (including the Avangrid/PNM merger), without any contemporaneous financial evaluation of how this decision would impact ratepayers. The Commission should find

that this amounted to an unjustified collection in rates post SJGS Unit 1 and Unit 4 abandonments, on July 1, 2022, and October 1, 2022, respectively. As a result, the $98.3 million per year that should have been removed from rates should now be returned to ratepayers over the course of one year, parallel to the amount of time it was improperly taken from ratepayers.

Second, I recommend the Commission find that PNM was imprudent in the ETA bond delay, and that PNM engaged in the ETA bond delay for its own business interest, a unilateral and undisclosed decision without any care for or consideration of the impact to ratepayers, contrary to the requirements of the Public Utility Act, which requires a balancing of interests between shareholders and ratepayers. I recommend the Commission find that PNM did not adhere to the ETA or to the Commission's *Financing Order*, and that as a result the authority granted by the *Financing Order* to issue bonds promptly upon abandonment has expired under its own terms. As a result, the Commission should conclude that no authority now exists from the *Financing Order* to issue bonds and that PNM has foregone its opportunity to issue ETA bonds.

Third, as a result of

- PNM untruthfully testifying that further investments in SJGS would be cost-effective for 20 years (see, testimony of PNM's O'Connell in Case No. 13-390-UT, May 22, 2014, attached hereto at Exhibit CKS - 15), when they

were not, and

- the PNM Board and senior management deciding to shutter the plant just 14 months after the *Final Order* in 13-00390-UT (issued on Dec. 16, 2015) in Feb. 2017, 2017 to 2023 Long Range Plan, PNM Board of Directors, Feb. 24, 2017, Case No. 16-00276-UT (attached hereto at Exhibit CKS - 16), PNM should only be allowed to recover its undepreciated SJGS investments at 50% of $283 million, or $141.5 million, at cost of debt instead of WACC, depreciated over 10 years. While PNM is not seeking recovery of San Juan capital undepreciated investments in this case, the Commission must foreclose that possibility now."

Fourth, all current San Juan Generation Station investments and expenses should be excluded from rates to reflect the coal plant's abandonment. Again, while PNM is not seeking recovery of San Juan capital expenditures in this case, any future possibility must be foreclosed.

IV. PNM's Rate Of Return On Common Equity Should Be Set At No More Than 8.9%.

Q. Do you have a recommendation on the appropriate rate of return on common equity PNM should receive?

A. Yes. Let me start with some background.

Q. Is the presentation of recommendations regarding return on common equity an objective process?

A. No. From my experience in numerous general rate cases where I reviewed and analyzed ROE testimony, prepared ROE witnesses, and cross-examined ROE witnesses, it is clear that presenting an option on a proper rate of return on common equity is a subjective process, regardless of how a rate of return witness may frame his or her testimony. If it were otherwise, every ROE witness in a particular case would recommend the same rate of return. Obviously, they do not.

"Determining the fair ROE for a utility is one of the more subjective tasks of the Commission. 2007 PNM Electric Rate Case, *Final Order* at 9, ¶ 23." *Recommended Decision*, El Paso Electric, Case. No. 20-00104-UT (April 6, 2021) at 76.

Q. Can you elaborate.

A. For example, a major ingredient in the calculation involves identifying other companies with comparable levels of risk and seeing what return they must provide to attract investors. Selecting which businesses should be included in a set of "companies with comparable risk" requires subjective decisions about a number of factors, such as what risk factors to consider, what time frames to use, and what characteristics to use to determine a group of comparables.

This is an acknowledged issue. "Seemingly objective methods like the capital asset pricing model cannot provide a definitive answer on the cost of equity. … [A] range of plausible input assumptions can lead to widely divergent

estimates of the cost of equity. When incorporating evidence from these methods regulators need to have the expertise to understand their limitations and push back on the assumptions utilities put forward when using them." "Rate of Return Regulation Revisited", K. Werner and S. Jarvis, Energy Institute WP 329, Sept. 2022, at 36, available at https://haas.berkeley.edu/wp-content/uploads/WP329.pdf.

A recent decision in Arizona is illustrative of the inherent subjectivity of ROE analysis. In Arizona Public Service Company's most recent rate case, four parties presented testimony on a proper rate of return. Three of the four parties used the same 14-company proxy group and the fourth used a group with 12 of those 14 companies. Despite that "near consensus" when the parties completed their analyses, their witnesses testified to prepared ROE levels ranging from 5.7% to 12.16%! *Arizona Pub. Serv. Co. v. ACC*, CA-CC 21-0002, at 8-9 (Mar. 7, 2023), attached hereto as Exhibit CKS – 17.

In this case, PNM witness McKenzie has also applied his subjective opinions in the course of developing what he presents as an empirical analysis. For example, after assembling data on COE estimates from his utility group, he removed 17 of the 84 data points – 20% - because he found it "inconceivable that investors are not requiring a substantially higher rate of return for holding common stock… low-end DCF estimates in the 7% range are assuredly far below investors' required rate of return." McKenzie Direct

Testimony at 40. That degree of subjectivity permits an analyst to drive a result in his or her desired direction.

Q. Are there benchmarks that provide direction in setting a return on common equity?

A. Yes. The starting point must be the U.S. Supreme Court's directions in its *Hope* and *Bluefield* decisions. In *FPC v. Hope Nat. Gas Co.*, 320 U.S. 591 (1944), the Court provided the fundamental standard: "…the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks." 320 U. S. at 604.

In *Bluefield Water Works v. Public Service Comm'n*, 262 U.S. 679 (1923), the Court explained, "A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding, risks and uncertainties, but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures." 262 U. S. at 693-694.

Q. What do those cases mean in practical terms?

A. That a careful analysis of the risks actually faced by a utility under rate review must be made.

Q. Are there reasons to think that utility commissions are over-compensating utilities compared to their risks?

A Yes. Last Fall, a thoughtful analysis was released which concluded that. "…the current approved average return on equity is substantially higher than various benchmarks and historical relationships would suggest. These results are necessarily uncertain, and depending on our chosen benchmark for the cost of equity the premium ranges from 0.5–5.5 percentage points. Put another way, even our most conservative benchmarks come in below the allowed rates of return on equity that regulators set today." "Rate of Return Regulation Revisited", noted above, at 35.

Commentary on that analysis agreed that commissions have likely been over-compensating utilities compared to their risk and the market for alternative investments. That commentary noted that, "[T]he real (inflation-adjusted) return regulators allow equity investors to earn has been pretty steady over the last 40 years, while many different measures of the actual cost of capital have been declining." "What Does Capital Really Cost a Utility?", S. Borenstein, Energy Institute at Haas, October 3, 2022, available at https://energyathaas.wordpress.com/2022/10/03/what-does-capital-really-cost-a-utility/.

"[A]warded returns for public utilities have been above the average required market return since 1990.… [W]hen awarded ROEs for utilities are below the market cost of equity, they more closely conform to the standards set

forth by *Hope* and *Bluefield* and minimize the excess wealth transfer from ratepayers to shareholders." Direct Testimony of David Garrett, Case No. 20-00104-UT, at 25-27.

There is also a particular flaw with using other utilities in a proxy groups:

> Because awarded ROEs are often based primarily on a comparison with other awarded ROEs around the country, the average awarded returns effectively fail to adapt to true market conditions, and regulators seem reluctant to deviate from the average. Once utilities and regulatory commissions become accustomed to awarding rates of return higher than market conditions actually require, this trend becomes difficult to reverse.

C. Griffey, "When 'What Goes Up' Does Not Come Down: Recent Trends in Utility Returns," White Paper (February 2017), attached hereto as Exhibit CKS – 18.

Q. What do you infer from those data?

A. That utilities have been successful in maintaining higher-than-needed rates of return on common equity even as they have found ways to reduce their risks.

Q. Can you explain?

A. Utilities have been successful in significantly reducing risk through the use of numerous "rate riders." These are rate provisions which permit automatic changes in retail rates outside of a rate review process. Typical examples include fuel clauses and purchased power clauses.

Q. Why are these an issue for rate of return?

A. From a regulatory policy perspective, those riders contradict and can destroy a basic principle of rate of return regulation. As the U.S. Supreme Court explained in 1944, "[W]e stated in the *Natural Gas Pipeline Co.* case that 'regulation does not insure that the business shall produce net revenues.' 315 U.S. p. 315 U. S. 590." *Federal Power Commission et al v. Hope Natural Gas Co.*, 320 U. S. at 604. It is a tenet of utility regulation - adopted by the New Mexico Supreme Court - that utilities have no guarantee of a specific level of financial success. "Once the Commission determines a utility's revenue requirement, including a reasonable rate of return, it establishes a rate structure that provides the utility a reasonable opportunity to recover its revenue requirement…." *In re Petition of PNM Gas Services*, 2000-NMSC-012, ¶89.

Q. How do those automatic adjustment clauses impact the regulatory process?

A. Historically, utility commissions went through a series of steps in response to a utility 's request for higher rates: the dollar value of those investments found to be used and useful in rendering service would the determined - the utility's rate base; the utility's overall cost of capital, including an appropriate rate of return on common equity would be computed; the rate base would be multiplied by the overall rate of return to compute a gross revenue requirement; the utility's reasonable expenses and its revenues for the test period would be analyzed; the level of expected test

period earning would be compared to the revenue requirement to see if an increase in retail rates was needed; if so, an allocation of the increase - rate design - would be made and retail rates set.

In that process, there was understood that there was no guarantee that a utility would actually earn the commission-determined revenue requirement. The risk that a utility would take in less than the revenue requirement in any given year was squarely on the utility, its managers, and its investors. If the utility earned less than the revenue requirement, there would not be any automatic adjustment to retail rates; if the utility determined the under-earning was too great, it would have to file a new rate case. Retail rates would change only if the utility filed that new case and persuaded the commission that higher rates were needed.

Since the 1970s, utilities including PNM have worked consistently and diligently to shift the risk of their operations from their owners to their customers, through a panoply of “riders”, “trackers”, and “automatic adjustment clauses”. All have had (and have) the same goal: to turn the opportunity to earn a commission-determined level of revenues into a guarantee that the utility will not fall short on that revenue goal.

Those clauses all have a common feature: to insulate the utility from the ordinary and to-be-expected departures from the projected levels of income and expense set in a rate case. A significant part of the rationale for these clauses has been the move to replace historic test years - where there are

actual facts about investments, revenues, expenses, and costs of capital - with future test years where all those components that go into computing a revenue requirement are guesses. Expert witnesses for the utility and intervenors present their estimates of what may happen in that chosen future test year. PNM's chosen test period year - calendar 2024 - is an example of how far removed from factual bases the claims regarding investments, revenues, expenses, and costs of capital have come.

In that framework of guesses about future operation results, utilities have concocted a wide variety of methods to hedge and eliminate their business risks, thus insulating their management and investors from bad business decisions, changes in the marketplace, customer preferences, competing sources of energy, updates in public policy regarding environmental protection, and other extrinsic factors.

Now, utilities and their advocates will argue that these sorts of clauses are harmless and actually in consumers' best interests, since they avoid the need for a utility to file a rate case when its managers are not able to operate as effectively and efficiently as their witnesses swore they would in their factual testimony. Supposedly, consumers would rather have their rates go up by smaller, more regular amounts than face the possibility that the utility will be able to prove up higher costs and secure a rate increase after hearing. I do not agree with that claim.

There is also the argument that the relevant commission always has the ability to "check up" on the utility's use of these clauses. That is theoretically true, since state utility statutes usually require that rates be just and reasonable and give their commission power to investigate rates. But as a practical matter, such oversight of automatic adjustment clauses is limited by the resources allocated to regulators by state legislatures.

Q. What are some examples of automatic adjustment clauses?

A. Among the longest-standing automatic adjustment clauses for electric utilities (natural gas LDCs have their own methods of dampening risk) have been fuel adjustment clauses and purchased power adjustment clauses. More recently, there has been the emergence of "decoupling" schemes

- fuel adjustment clauses - electric utilities purchase fuel, typically coal, natural gas, or fuel oil, for their fossil fuel fired generation facilities. The anticipated costs of those fuels are an element of the utility's expenses testified to in a rate case. A fuel adjustment clause removes the possibility that the actual costs of those fuels will be higher than the testified-to anticipated costs of those fuels. Each month, the utility computes what it paid for fuels, and if those costs have drifted from the costs determined by the commission based upon sworn testimony of the utility's witness(es), the utility unilaterally changes retail rates to factor in the difference between fuel costs set in the preceding rate case and whatever costs the utility accepted in its fuel purchases that month. Among the deleterious effects of

fuel adjustment clauses is the removal of incentive for utility management to secure the lowest-possible costs of fuel. “[U]tilities that are allowed to pass fuel price increases on to their customers without holding formal rate hearings will tend to pay a higher average price for the fuel input than those utilities that are not.” The Impact of the Automatic Adjustment Clause on Fuel Purchase and Utilization Practices in the U. S. Electric Utility Industry. D. Kaserman and R. Tepel. Southern Economic Journal 48, no. 3 (1982). at 699, available at https://www.jstor.org/stable/1058660, relevant pages attached hereto as Exhibit CKS - 19.

- purchased power clauses - these allow electric utilities to choose to purchase power from other generators rather than run their own generating facilities at various times. Again, while the costs of internal electric generation were sworn to in utility witness testimony and determined as a factual matter by the commission, if those costs of third-party generation are different from the rate case figures, the utility just adjusts its retail rates to push those changes in costs out to its customers.

- decoupling schemes - the most recent addition to the list of automatic rate change clauses is the most pernicious, it that it insulates a utility from the changes going on in the real world. Under a “decoupling” approach, it no longer matters to the utility how much energy and capacity it sells - it gets to collect the same level of revenues regardless of how much consumers value and use its services. These schemes may be labelled as “full

decoupling" or "partial decoupling", but they all have the same effect: shifting the risk of reduced demand from utility managers and owners onto the consumers who continue to take service from the utility.

Q. How do automatic adjustment clauses impact rate of return?

A. When a rate of return for a utility is set based upon the utility's level of business risk, clauses which alter the degree of business risk must be reflected in any rate of return determination. The common features of automatic adjustment clauses are that they guarantee the utility a level of revenues despite events which change the assumptions used in the utility's prior rate case about sales, revenues, and expenses. When a utility removes more and more uncertainty about whether it will be able to actually earn the rate of return set in a general rate case by means of automatic adjustment clauses, which guarantee a level of revenues despite variances in operations, it reduces its overall level of risk.

Q. Has PNM been able to use automatic adjustment clauses to reduce its risk?

Yes. PNM now insulates a significant portion of its retail revenues through automatic adjustment clauses. For the test year, PNM expects that almost a third - 31% - of its total revenues will come from "rider revenue".

PNM Table NEE 9-8.
2024 Estimated annual rider revenue as a percentage of total revenue

	2024 Estimates		Rider Revenue	Rider Percentage
1	Fuel Adjustment Clause Rider No. 23	$	193,447,883	17%
2	Renewable Rider No. 36	$	77,590,035	7%
3	Transportation Electrification Rider No. 53	$	12,351,283	1%
4	San Juan Securitization Charge Rider No. 51	$	22,868,663	2%
5	Grid Modernization Year 1 Rider No. 58	$	9,794,037	1%
6	Revenue for EE Rider No. 16	$	1,088,367,712	
	Energy Efficiency Rider No. 16	$	36,960,968	3%
	Total Rider Revenue	$	353,012,868	**31%**
	Total Base Rate Revenue	$	790,979,679	**69%**
	Total Base Rate and Rider Revenue	$	1,143,992,548	**100%**

[1] Rate 36B is subject to 100% of projected Fuel Rider No. 23 @ $0.0231413/kWh
[2] Rate 36B is not subject to projected Renewable Rider No. 36 @ $0.0075619/kWh
[3] Annual TEP Rider No. 53 revenue requirement
[4] Annual San Juan Securitization Rider No. 51 revenue requirement
[5] Annual Year 1 Grid Modernizer Rider No. 58 Revenue requirement
[6] Rate 36B is not subject to Energy Efficiency Rider No. 16 @ 3.396%

PNM response to Interrogatory NEE 9-8, PNM Table NEE 9-8.

The fuel adjustment clause alone represents 17% of PNM's total revenue, and has been between 17% and 19% for recent years. PNM response to Interrogatory NEE 9-9, PNM Table NEE 9-9, attached hereto as Exhibit CKS - 20.

PNM Table NEE 9-9

Annual rider revenue as a percentage of total revenue

2020		Rider Revenue	Rider Percentage
Fuel Adjustment Clause	$	172,797,545	17%
Energy Efficiency	$	29,165,517	3%
Renewable Rate Rider	$	59,756,662	6%
Total Revenue	$	1,004,991,919	

2021		Rider Revenue	Rider Percentage
Fuel Adjustment Clause	$	192,629,768	18%
Energy Efficiency	$	34,088,650	3%
Renewable Rate Rider	$	65,797,710	6%
Total Revenue	$	1,050,389,617	

2022		Rider Revenue	Rider Percentage
Fuel Adjustment Clause	$	197,064,121	19%
Energy Efficiency	$	33,135,413	3%
Renewable Rate Rider	$	55,081,019	5%
Total Revenue	$	1,058,302,531	

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PNM Table ABCWUA 5-6

	Year	FERC Class	Total Sales Revenue ($)	Rider No. 23 Fuel and Purchased Power Revenue ($)	Rider No. 16 Energy Efficiency Revenue ($)	Rider No 36 Renewable Energy Revenue ($)	Total Rider Revenue ($)	Rider Revenue Percentage
	2018	440 RESIDENTIAL	433,009,314	53,938,541	13,662,261	20,501,370	88,102,172	20%
	2018	A. COMMERCIAL	408,333,123	64,239,037	12,538,727	21,135,695	97,913,459	24%
	2018	B. INDUSTRIAL	87,882,887	16,391,353	1,121,521	2,259,973	19,772,847	22%
	2018	444 PUBLIC STREET & HWY	7,812,748	808,388	15,154	300,801	1,124,343	14%
	2018	445 OTHER SALES-PUBLIC	13,874,788	3,529,297	436,678	426,002	4,391,977	32%
[1]	**2018**	**Total**	**950,912,860**				**211,304,798**	**22%**
	2019	440 RESIDENTIAL	427,882,725	47,271,530	13,405,298	22,199,660	82,876,488	19%
	2019	A. COMMERCIAL	396,986,547	55,408,611	12,067,399	23,991,340	91,467,350	23%
	2019	B. INDUSTRIAL	95,357,938	16,530,907	1,112,479	1,017,061	18,660,447	20%
	2019	444 PUBLIC STREET & HWY	7,303,141	637,514	14,675	295,588	947,777	13%
	2019	445 OTHER SALES-PUBLIC	13,018,395	3,145,417	404,966	396,082	3,946,465	30%
[2]	**2019**	**Total**	**940,548,746**				**197,898,527**	**21%**
	2020	440 RESIDENTIAL	482,852,238	72,693,337	15,300,752	25,604,681	113,598,770	24%
	2020	A. COMMERCIAL	392,257,156	73,083,200	12,229,189	25,383,998	110,696,387	28%
	2020	B. INDUSTRIAL	106,756,470	22,252,329	1,095,212	7,072,269	30,419,810	28%
	2020	444 PUBLIC STREET & HWY	6,493,085	819,580	15,285	282,502	1,117,367	17%
	2020	445 OTHER SALES-PUBLIC	16,632,970	3,949,099	525,079	1,413,212	5,887,390	35%
[3]	**2020**	**Total**	**1,004,991,919**				**261,719,724**	**26%**
	2021	Residential Sales	484,719,537	80,256,942	17,469,804	28,371,878	126,098,624	26%
	2021	Commercial Sales	419,250,666	83,977,705	14,660,725	29,093,005	127,731,435	30%
	2021	Industrial Sales	123,699,662	23,244,709	1,363,058	6,406,033	31,013,800	25%
	2021	Public Street and Highway Lighting Sales	6,620,648	921,365	17,827	320,052	1,259,244	19%
	2021	Other Sales to Public Authorities	16,099,104	4,229,047	577,236	1,606,742	6,413,025	40%
[4]	**2021**	**Total**	**1,050,389,617**				**292,516,128**	**28%**
	2022	2022 FERC Form 1 has not been published yet.						

[1] Source 2018 FERC Form 1 Page 304
[2] Source 2019 FERC Form 1 Page 304
[3] Source 2020 FERC Form 1 Page 304
[4] Source 2021 FERC Form 1 Page 304

1

PNM Table ABCWUA 5-6 (May 16, 2023 Supplemental)

Year	FERC Class	Total Sales Revenue ($)	Rider No. 23 Fuel and Purchased Power Revenue ($)	Rider No. 16 Energy Efficiency Revenue ($)	Rider No. 36 Renewable Energy Revenue ($)	Total Rider Revenue ($)	Rider Revenue Percentage
2022	Residential Sales	$ 484,699,080	$ 81,768,328	$ 16,903,081	$ 23,321,615	$ 121,993,024	25%
2022	Commercial Sales	$ 422,162,449	$ 84,698,679	$ 14,454,223	$ 24,472,770	$ 123,625,672	29%
2022	Industrial Sales	$ 130,110,850	$ 25,910,684	$ 1,240,697	$ 5,818,164	$ 32,969,545	25%
2022	Public Street and Highway Lighting Sales	$ 6,188,599	$ 665,600	$ 16,347	$ 207,727	$ 889,674	14%
2022	Other Sales to Public Authorities	$ 15,141,553	$ 4,020,832	$ 521,065	$ 1,260,744	$ 5,802,641	38%
[1] **2022**	**Total**	**$ 1,058,302,531**				**$ 285,280,556**	**27%**

[1] Data are from the 2022 FERC Form 1, page 304

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3

PNM Response to Interrogatory ABCWU 5-6; Supplemental Response, attached hereto as Exhibit CKS – 21.

Also, I note that PNM not only recovers all the increased costs of fuel, it also collects carrying costs on those amounts. PNM response to Interrogatory ABCWUA 8-2, attached hereto as Exhibit CKS - 22.

Q. How do PNM's rate riders impact customer bills?

A. For a non-summer, Rate Schedule 1A customer, a representative sample bill with total charges of $92.72 (for 600 kWh of use) is comprised of $58.23 for base rates, $25.32 for rate riders, and $9.17 for state, county, and city taxes and fees. PNM Response to NEE Interrogatory 8-2, PNM Exhibit NEE 8-2, attached hereto as Exhibit CKS - 23. Excluding the 10% of the bill which is pass-through by PNM to other authorities, 30% of the billed revenues go to riders.

Q. Are you proposing elimination of automatic adjustment clauses?

A. No. Rather, I am recommending that the effect of those clauses - reduction in PNM's risk - be factored into a determination of a proper rate of return on common equity.

PNM witness McKenzie acknowledges that automatic adjustment clauses have the effect of reducing a utility's risk. Direct Testimony at 11-12. He notes that the utilities in his proxy group "operate under a wide variety of cost adjustment mechanisms…" He goes on to opine, "While the Company's existing and proposed regulatory clauses would be regarded as supportive,

in contrast to many of the specific operating companies associated with the firms in the Utility Group, PNM does not operate under a revenue decoupling mechanism. Thus, PNM's continued exposure to the uncertainties of revenue variability and regulatory lag would imply a greater level of risk than is faced by other utilities, including the firms in the Utility Group." Direct Testimony at 13-14. However, he does not identify which of the companies in the utility proxy group actually have the sort of revenue decoupling mechanism in place which would impact risk. Also, while it is true that PNM has not historically operated under a revenue decoupling mechanism, in Case 20-00212-UT, PNM was allowed to implement partial decoupling, and the company has appealed the case to the New Mexico Supreme Court in S-1-SC-39406, and argued that it is entitled to full decoupling along with no reduction in its return on equity.

A review of the public statements by those utilities shows that only 12 of the 21 report they have even some form of decoupling in place for some portion of their operations for some customers.

- Allete: Constructive Regulatory Framework with forward test year, interim rates, current cost recovery riders, fuel adjustment clause, Conservation Improvement Program (CIP). Mizuho Midcap Utilities Conference, June 8, 2023, at 14.
- Ameren – partial decoupling in one operating company. Ameren 10-K (Feb. 23. 2022) at 98.
- Avista – has decoupling in three states, in 2022 had to rebate $19 million to customers. 2022 Annual Report at 104.

- Black Hills Corp. – reports revenue decoupling in one of its seven operating units. Presentation at 2023 AGA Financial Forum (May 2023) at 37.

- CenterPoint – reports decoupling in one jurisdiction (Minnesota) that represents 21% of its natural gas customers; natural gas provides 45% of CenterPoint's income. 2022 Annual Report/10-K at 7; 64.

- CMS Energy – "Supportive Energy Law: Timely recovery of investments; Forward-looking test years; 10-month rate cases; Earn authorized ROEs; Monthly fuel adjustment trackers (PSCR/GCR). Investor Meetings presentation (June 2023) at 12.

- Dominion Energy – residential and small business natural gas customers in UT and WY have revenue decoupling; residential and small business electric customers in NC have a decoupling mechanism. 2022 Annual Report/10-K at 22; 122.

- DTE Energy – Michigan gas utility has partial revenue decoupling with ROE of 9.9%. "Fitch Affirms DTE Energy, DTE Electric Co. and DTE Gas Co.'s Ratings; Outlook Stable", (Nov. 7, 2022).

- Duke Energy – decoupling in 2 of 6 states, hope to be 20% of retail volumes when fully implemented. "Q1 / 2023 Earnings Review and Business Update (May 9. 2023) at 17.

- Edison International – has revenue decoupling in CA. "Business Update" (May 3, 2023) at 3; 7.

- Emera Inc. – none disclosed in "Management's Discussion & Analysis" (May 12, 2023).

- Entergy Corp. – none disclosed in "Pathway to Premier Entergy Corporation First quarter 2023 earnings call" (April 26, 2023).

- Hawaiian Electric – has decoupling "Rates & Regulations", https://www.hawaiianelectric.com/billing-and-payment/rates-and-regulations/decoupling

- IDACORP, Inc. - Idaho residential and small commercial customers are under partial decoupling, nothing noted for Oregon. 1Q2023 10-K at 52.

- NorthWestern Corp. - a pilot decoupling plan for Montana was deferred at utility request, no others reported. 2022 10-K at 21; 30.

- OGE Energy – none reported in "Letter to Shareholders and Form 10-K 2022".

- Otter Tail Corp. - decoupling mechanism for most residential and commercial customer rate groups with a cap of 4% of annual base revenues. 2022 Annual Report at 31.
- Pinnacle West Capital – none disclosed – APS is major subsidiary
- Public Service Enterprise Group – only refers to a Conservation Incentive Program decoupling. 1Q2023 10-Q at 59.
- Sempra Energy – none disclosed in 2022 Annual Report or in First Quarter 2023 Earnings Results (May 4, 2023).
- Southern Company – none disclosed in 2022 Annual Report, but Fitch says its gas LDCs have "different forms of revenue decoupling or normalization…NICOR Gas is not full decoupled…" "Fitch Affirms Southern Company's and Subsidiaries Ratings", (Oct. 4, 2022).

Q. What do you conclude from those data?

A. That almost one-half of the companies in the utility group do not appear to have a decoupling mechanism in place which would impact their financial results. The other utilities report a wide range of partial decoupling mechanisms. So, asserting that PNM has a quantifiable, higher degree of risk than the group seems to be a questionable assertion.

Q. Will PNM change its risk exposure in the future?

SEE CONFIDENTIAL TESTIMONY AND EXHIBIT OF CHRISTOPHER SANDBERG FILED ON JUNE 23, 2023

Excerpt of PNMR 2023-2026 Long Range Plan at 6, CONFIDENTIAL PNM Exhibit NM AREA RFP 4-5(A), attached hereto as CONFIDENTIAL Exhibit CKS - 24

As I noted in an earlier response, PNM is also pursuing an appeal of the Commission's rejection of its most recent decoupling request, in the hopes of removing risk due to decreased demand for its services by insulating it from any and all factors causing it to lose revenues. NM Supreme Court Case No. S-1-SC-39406, Consolidated with No. S-1-SC-39401.

Taken together, I see these plans and actions by PNM as intended to continue to reduce its risk, with at least some of those taking effect during the test year.

Q. What ROE has PNM requested here?

A. PNM has proposed a range for ROE of 10.0% to 11.3%, and lands on an ROE of 10.25% in the test year. McKenzie Direct at 3.

Q. How does that compare with PNM's recent financial performance?

A. It would be an increase of about 100 basis points from PNM's recent earned ROEs, which would be a huge jump. The 2022 "true earned" ROE of 10.173% (598 basis points above PNM's authorized ROE) suggests that PNM's current rates are already producing an ROE comparable to the rate proposed by witness McKenzie (and above its authorized rate of return of 9.575%.)

PNM Table NMAG 1-9 (Supplemental) PNM Retail Earned Returns		
	Allowed ROE	Actual Earned Return
2018	9.575%	9.183%
2019	9.575%	9.622%
2020	9.575%	9.428%
2021	9.575%	9.149%
2022*	9.575%	10.173%
2023	9.575%	Not Available

*2022 reflects the true earned ROE. This ROE is reduced to 10.075% by the refund of the excess pre-tax earnings through PNM's Renewable Rider ("Rate Rider 36"). Please refer to PNM's compliance filing made on March 31, 2023 in NMPRC Case No. 12-00007-UT for further details.

PNM 2nd Supplemental Response to Interrogatory NMAG 1-9, attached hereto as Exhibit CKS - 25.

Q. Is witness McKenzie's specific recommendation reasonable compared to recent allowed ROE for other utilities?

A. No. The most recent data relied on by witness McKenzie's analysis in PNM Exhibit MM-9 at page 3, shows authorized returns in 2020 and 2021 averaged 9.39%. PNM response to Interrogatory NM AREA 4-6(A), attached hereto as Exhibit CKS - 26. Even the most recent national average authorized ROE data for 2022 was 9.52%. PNM response to Interrogatory NM AREA 4-6(B), attached hereto as Exhibit CKS - 26. Those all fall below the bottom of witness McKenzie's proposed range. Those data support a conclusion that witness McKenzie's overall range is inflated and that an ROE below 10% is reasonable.

Q. Do you have a recommendation about how the Commission should approach setting an ROE for PNM?

A. I believe the Commission should set an ROE which reflects both the current level of risk protection and PNM's planned further increases in risk protection.

Q. Do you have a specific proposed ROE?

A. I recommend the Commission look carefully at two recent decisions.

Q. What are those decisions?

A. The first is the recent decision of the Arizona Corporation Commission, upheld on appeal, for Arizona Public Service Company ("APS"). APS (through its parent Pinnacle West Capital) is one of the utilities which witness McKenzie presents as showing similar risk to PNM. APS has been a partner with PNM in the Four Corners generating plant, operates in the same geographic portion of the U.S., and faces similar pressures to adapt its infrastructure. Pinnacle West Capital also reports no decoupling plans in place. The Arizona Commission was upheld three months ago in its decision to set APS' ROE at 8.9%. *APSC v. ACC* at ¶27, Exhibit CKS – 17. I would urge the Commission to use that 8.9% as the upper limit on a reasonable ROE for PNM.

Q. What is the other decision?

A. Case No. 20-00104-UT, *Order Adopting Recommended Decision with Modifications*, involving El Paso Electric Company. In that case, the

Commission recognized the "echo chamber" effect noted above, and adopted the Hearing Examiner's recommended ROE of 9.0%. That analysis regarding utility risk strongly suggests a similar ROE – 8.9% - should be adopted here.

Q. What are you recommending for an ROE?

A. 8.9%

Q. What impact would that change have on PNM's requested revenue requirement in this case?

A. It would lower the revenue requirement by $24.6 million.

Q. What is the basis for that statement?

A. I changed the requested ROE in PNM's COS model from 10.25% to 9.8%, and PNM's model reported that decrease in the revenue requirement.

V. Community Solar Recovery Should Be Denied Because PNM Has Not Met Its Burden of Proof.

Q. Are you testifying on PNM's general proposals on rate design?

A. No. I am not taking any positions on overall rate design, but I do have one rate adjustment that I believe is important to make.

Q. What is that?

A. PNM witness Pitts explains that PNM makes "[m]anual adjustments . . . to the total banded revenue requirement to be collected from certain customer classes in order to recover costs associated with providing

Community Solar Bill Credits." She states that the manual adjustment is "necessary to ensure PNM collects its total revenue requirement." She makes these adjustments to three customer classes: 1A Residential, 2A Small Power, and 4B Large Power Service because, she believes, "the majority of the community solar subscribers will be concentrated in these three customer classes." Direct Testimony of Heidi M. Pitts at 13-14 (Dec. 5, 2022). These "manual adjustments" total $6.7 million.

Q. What are you recommending regarding this "manual adjustment" for Community Solar?

A. Those additions to the revenue requirement for Classes 1A, 2A, and 4B should be removed.

Q. Why is that?

A. PNM has not met its burden of proof that it is entitled to "Community Solar Recovery" and therefore the Commission should deny that attempt to recover costs for community solar from those three Classes. I base that on three primary reasons:

1. the costs are unsubstantiated;

2. the $6.7 million is purely speculative and not supported by reliable data; and

3. the Commission has not yet determined the specific community solar bill credit determinants.

Q. Can you explain each of those reasons?

A. Yes. First, the Commission's rules require substantiation of adjustments such as proposed here:

> The future test year period estimates shall be fully explained and linked to the historic base period and any linkage data.
>
> A. For any material changes between base period and future test year period, cost drivers shall be separately identified, explained and justified as well as linked to the historical base period and any linkage data
>
> …
>
> C. Staff and other parties in rate cases should be able to retrace projections back to their historical source, or the new basis for the estimate should be fully understandable.

N.M. Code R. § 17.1.3.17(A) and (C). PNM's Community Solar Recovery costs are not "explained and justified", have not been "linked to the historic vase period", and therefore cannot be "fully understandable."

Q. What do you mean?

A. Witness Pitts' workpapers indicate that PNM added a total of $6,718,924 to its banded revenue requirement for "Community Solar Recovery", split among the three customer classes. Exh. HMP-2, "Tab: Allocation", at 4. This entry for "Test Year Other Revenue" is all PNM provided in its Application regarding the $6.7 million manual adjustment. As witness Pitts noted, "Community Solar Bill Credits are established in this proposed Original Rider No. 56. At the time of the filing of this case, the Commission has not acted on Advice Notice No. 594." Pitts Direct at 14, footnote 5. In fact, PNM witness Chan admitted that "the Community Solar Bill Credit Rate, will

need to be updated after the Commission approves the rates in this rate case. In particular, the Base Bill Credit Rate and the Distribution Cost Component must be updated. As of the filing of this rate case, Rider No. 56 had not yet been approved by the Commission." Direct Testimony of Stella Chan, at 32. The amount of Community Solar Recovery cannot be categorized as "substantiated" when PNM admits that basic components of that request remain so uncertain.

Nothing in witness Pitts' testimony even attempts to link the proposed Recovery to an historic base period or to provide any linkage data as required in N.M. Code R. § 17.1.3.17(A). That failure alone defeats PNM's attempt to add the Community Solar Recovery.

Q. Why is the Recovery proposal speculative and not supported by reliable data?

A. PNM has had witness Pitts state, "PNM calculated the forecast lost revenues by first calculating a lost revenue $/kWh rate and multiplying it by the forecast energy subscription level for each rate schedule." PNM Response to CCSA Interrogatory 1-2, attached hereto as Exhibit CKS - 27. That means the specific forecasted energy subscription level for each of the three impacted rate schedules is an essential element in the calculation of the Recovery amount for that schedule. No support for those subscription level forecasts was provided by witness Pitts, so we are left with just the assertion that some sorts of forecasts were made.

That simply does not meet the required evidentiary standard. The New Mexico Supreme Court upheld the Commission when it rejected a filing due to it being "patently [] deficient in form or a substantive nullity" because, when it failed "to set forth all data relevant to the necessity and reasonableness of the relief requested." *In the Matter of the Rates and Charges of U.S. West Communications, Inc. v. New Mexico State Corp. Comm'n*, 1993-NMSC-074, ¶10, 865 P.2d 1192, 1194, 116 N.M. 548. Here, PNM has presented a proposal with relevant data - the alleged forecasts of subscription levels – missing. Without those forecasts, the Commission cannot evaluate the reasonableness of the proposed Recovery through those three rate schedules.

Q. What is your final point?

A. As witness Pitts admitted, the Commission has not yet determined the specific Community Solar bill credit determinants. This is just another missing piece of "all data relevant" to a determination of the reasonableness of the proposed Recovery.

Q. What is your recommendation?

A. That the Commission reject the requested imposition of $6.7 million on ratepayers in those three rate schedules, and remove the "manual adjustments" made to implement the Recovery proposal.

VI. An Attempt to flow through my recommendations for recovery and disallowances via PNM's COS model proved incomplete; only PNM is uniquely qualified to perform adjustments post Hearing Examiners' ruling on the specific determinations

Q. Is there an unusual item in the Hearing Examiners' directions for this case?

A, Yes. In the *Second Procedural Order* at Ordering Paragraphs D and E, intervening parties are directed to include in their direct testimony certain specific rates and bills, as well as revenues, associated with their proposed adjustments to PNM's filed case.

Q. Have you proposed specific retail rates as a result of your recommendations?

A. I have followed the directions in the *Second Procedural Order* to the best of my ability. To that end, I attended two training sessions on PNM's Cost of Service Functional Model ("COS") and its rate design model – COST™. As a result of meeting with PNM, I understood the fundamentals of the model, but I also understood that while some parts of the COS model are automated, significant issues, such as taxes, depreciation, and ADIT, require manual adjustments to be made when rate base items and expenses are changed. I also had a subsequent discussion with PNM witness Sanders on making specific adjustments within COS.

Q. What have you done subsequent to those meetings?

A. I have worked with the COS model to quantify the effect of two of my recommendations on PNM's revenue requirement.

Q. What are those effects?

A. The reduction in ROE to 8.9% reduces the requested revenue requirement by $24,586,575.

The removal of undepreciated PVNGS amounts reduces the requested revenue requirement by $7,658,297.

For each of those adjustments, I used worksheets within PNM's COS to remove or reduce the requested amounts related to that adjustment. The result of each adjustment was saved on the "Test Change Log" tab of the "PNM Exhibit KTS-3 WP COS" sheet of the COS.

Q. Do you believe those to be accurate figures?

A. I cannot testify to the complete accuracy of those figures, because I cannot track through all the potential adjustments which might be made elsewhere in the panoply of COS worksheets, including any adjustments which would need to be made manually. I am sure PNM will point out in rebuttal each instance where there are tweaks to my numbers needed.

Q. Have you proposed specific rates for PNM's customers as a result of those two adjustments?

A. No, because I have not testified to any rate design changes, and do not intend that any of my reductions in revenue requirement alter the allocations and assignments made in COST. COST starts with PNM's requested non-fuel revenue requirement from the COS worksheets, and then does the allocations which end up in specific rates. I have changed that non-fuel revenue requirement from the $790,979,697 used in COST to $758,734,808, which is the non-fuel revenue requirement resulting from those two adjustments. As noted earlier, I have saved the COST model with those removals as a new document, which I believe contains all the specific rates.

Q. What about your recommendations on FCPP and SJGS?

A. I inquired further of PNM's witness Kyle Sanders, to identify where in the COS model those adjustments should properly be made.

Q. What did you learn about the FCPP adjustments?

A. I inquired further of PNM's witness Kyle Sanders, to identify where in the COS model those adjustments should properly be made.

Q. What did you learn about the FCPP adjustments?

A. That there is nothing explicit in the COS model which would allow segregation of the pre-June 2016 and post-2016 investments for FCPP. In order to try to compute a revenue requirement effect, one would have to

work backwards from the data in the model to June 2016, would have to make assumptions in more than one place in the model, and would have to "gross up" some of the effects of those assumptions.

Q. What did you conclude from that discussion with witness Sanders?

A. That any attempt I might make to convert my policy recommendations into rates would almost certainly result in erroneous figures. As a result, I have not attempted to provide what I believe would be misleading information.

Q. What did you learn about the SJGS adjustments?

A. That, since PNM has not sought requested recovery of undepreciated investments in this case, confirmed in PNM's Answer to NEE's Interrogatories 11-2, the COS model does not have any amounts for SJGS in its base period starting point.

Q. What did you conclude from that portion of your discussion with witness Sanders?

A. That I would have to make such major changes to the COS model that witness Sanders described as "tricky." As with FCPP, I do not believe I could add to and manipulate the COS model with a degree of accuracy which would produce meaningful results for a revenue requirement or for rates.

As a result, I am not presenting revenue requirement effects for my FCPP or SJGS adjustments, and have not flowed any such effects into PNM's COS model.

Q. What about the Community Solar issue?

A. I was informed in my second meeting with PNM that the Community Solar Recovery additions to the three rate classes was done solely in COST, and are not in the COS model. As a result, I went as directed by PNM staff to "PNM Exhibit HMP-2 Rate Design Model. Row 55/Line 33 is labelled, "Community Soar Recovery." There are three entries: $2,86,370 under 1A, $1,310,466 under 2A, and $2,540,088 under 4B. I changed those three entries to $0. I was assured that once I did that, COST would automatically reflect those adjustments in specific retail rates.

Based upon that, I believe my three removals were reflected appropriately in the model. I then saved that worksheet as "Copy of PNM Exhibit HMP-2 Rate Design Model", so as not to alter the original worksheet. While I recommend that those Community Solar Recovery amounts not be added to the costs assigned to those three classes, I am not recommending any changes to PNM's overall cost of service modelling or rate design as a result.

Q. Have you attached the COS and COST worksheets as Exhibits to this testimony?

A. No, for two reasons: they are all Excel worksheets which would not be useful if printed out, and they are voluminous. Instead, I have placed those

files into a Dropbox folder, located at https://www.dropbox.com/scl/fo/lkjbnpoe7jpg8vmt9ehpf/h?dl=0&rlkey=l3wl9ih71j0fs1k21110ub0yj. The files, as I saved them, are all there.

Q. Do you believe you have complied with the *Second Procedural Order*?

A. To be clear, I have never before seen a case where that level of research and computation has been required of intervening parties. In my experience, commissions make decisions on specific, contested issues in a rate case and then direct the petitioning utility to prepare a compliance filing which embodies those decisions. Nevertheless, I have complied with that provision to the best of my ability. Any failure on my part to develop specific rates for customer classes or customers cannot be deemed to reduce the integrity of my policy recommendations; those recommendations must be reviewed on their merits, and not on the basis of calculations in a large, complex, and opaque pair of models in which I had no hand in developing. Additionally, NEE requests a variance from the *Second Procedural Order* associated with the COS model based on the above stated testimony.

Conclusion

Q. Does this conclude your direct testimony?

A. Yes, it does.

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

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

SELF AFFIRMATION

CHRISTOPHER K. SANDBERG, expert witness for New Energy Economy, upon penalty of perjury under the laws of the State of New Mexico, affirm and state: I have read the foregoing Direct Testimony of Christopher K. Sandberg and it is true and correct based on my own personal knowledge and belief.

Dated this 23rd day of June, 2023.

/s/ Christopher K. Sandberg
CHRISTOPHER K. SANDBERG

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

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

CERTIFICATE OF SERVICE

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

DIRECT TESTIMONY AND EXHIBITS
OF
CHRISTOPHER K. SANDBERG
ON BEHALF OF
NEW ENERGY ECONOMY

issued June 23, 2023 was emailed on this date to the parties listed below.

PRC Records Management Bureau	prc.records@prc.nm.gov;
Ana Kippenbrock	ana.kippenbrock@prc.nm.gov;
ABCWUA	
Nann M. Winter	nwinter@stelznerlaw.com;
Keith Herrmann	kherrmann@stelznerlaw.com;
Dahl Harris	dahlharris@hotmail.com;
Charles Kolberg	ckolberg@abcwua.org;
Andrew Harriger	akharriger@sawvel.com;
Mark Garrett	mgarrett@garrettgroupllc.com;
David Garrett	dgarrett@resolveuc.com;
Ed Farrar	edfarrarcpa@outlook.com;
Bernalillo County	
Jeffrey H. Albright	ja@jalblaw.com;
Amanda Edwards	ae@jalblaw.com;
Natalia Sanchez Downey	ndowney@bernco.gov;
Maureen Reno	mreno@reno-energy.com;
CCAE	
Cara Lynch	lynch.cara.NM@gmail.com;

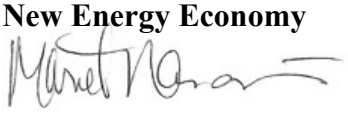
Charles de Saillan	desaillan.ccae@gmail.com;
Don Hancock	sricdon@earthlink.net;
Justin Brant	jbrant@swenergy.org;
Michael Kenney	mkenney@swenergy.org;
CCSA	
Lee Ewing	lewing@keyesfox.com;
Joseph Yar	joseph@velardeyar.com;
Shawna Tillberg	shawna@velardeyar.com;
Kevin Cray	kevin@communitysolaraccess.org;
City of Albuquerque	
Julie Park	jpark@cabq.gov;
Jennifer Lucero	jenniferlucero@cabq.gov;
Larry Blank, Ph.D.	lb@tahoeconomics.com;
Kroger Co.	
Joseph Yar	joseph@velardeyar.com;
Kurt J. Boehm	kboehm@bkllawfirm.com;
Jody Kyler Cohn	jkylercohn@BKLlawfirm.com;
Justin Bieber	jbieber@energystrat.com;
NEE	
Mariel Nanasi	mariel@seedsbeneaththesnow.com;
Stephanie Dzur	stephanie@dzur-law.com;
Christopher Sandberg	cksandberg@mac.com;
NMAG	
Gideon Elliot	gelliot@nmag.gov;
Keven Gedko	kgedko@nmag.gov;
Sydnee Wright	swright@nmag.gov;
Andrea Crane	ctcolumbia@aol.com;
Doug Gegax	dgegax@nmsu.edu;
NM AREA	
Peter J. Gould	peter@thegouldlawfirm.com;
Kelly Gould	kelly@thegouldlawfirm.com;
Katrina Reid	office@thegouldlawfirm.com;

PNM	
John Verheul	john.verheul@pnmresources.com;
Stacey Goodwin	stacey.goodwin@pnmresources.com
Debrea Terwilliger	dterwilliger@wbklaw.com;
Richard L. Alvidrez	ralvidrez@mstlaw.com;
Carey Salaz	carey.salaz@pnm.com;
Phillip Metzger	phillip.metzger@pnm.com;
Mark Fenton	mark.fenton@pnm.com;
Raymond L. Gifford	rgifford@wbklaw.com;
PNM Regulatory	pnmregulatory@pnm.com;
Steve Schwebke	steven.schwebke@pnm.com;
PRC Advocacy Staff	
Bradford Borman	bradford.borman@prc.nm.gov;
John Bogatko	john.bogatko@prc.nm.gov;
Gloria Regensberg	gloria.regensberg@prc.nm.gov;
Elizabeth Jeffreys	elizabeth.jeffreys@prc.nm.gov;
Elisha Leyba-Tercero	elisha.leyba-tercero@prc.nm.gov;
Georgette Ramie	georgette.ramie@prc.nm.gov;
Jack Sidler	jack.sidler@prc.nm.gov;
Gabriella Dasheno	gabriella.dasheno@prc.nm.gov;
Ed Rilkoff	ed.rilkoff@prc.nm.gov;
Richard Martinez	richard.martinez@prc.nm.gov;
Jonah Mauldin	jonah.mauldin@prc.nm.gov;
Christopher Dunn	christopher.dunn@prc.nm.gov;
Agata Malek	agata.malek@prc.nm.gov;
Bryce Zedalis	bryce.zedalis1@prc.nm.gov;
Evan Evans	evan.evans@integritypower.net;
Marc Tupler	marc.tupler@prc.nm.gov;
Peggy Martinez-Rael	peggy.martinez-rael@prc.nm.gov;
Elizabeth Ramirez	elizabeth.ramirez@prc.nm.gov;

PRC Advisory Staff	
Michael C. Smith	michaelc.smith@prc.nm.gov;
Robert Lundin	robert.lundin@prc.nm.gov;
Sierra Club	
Jason Marks	lawoffice@jasonmarks.com;
Brittany Blinder	brittany.blinder@sierraclub.org;
Matthew Gerhart	matt.gerhart@sierraclub.org;
Walmart	
Randy S. Bartell	rbartell@montand.com;
Jocelyn Barrett-Kapin	jbarrettkapin@montand.com;
Steve W. Chriss	stephen.chriss@wal-mart.com;
WRA	
Cydney Beadles	cydney.beadles@westernresources.org;
Caitlin Evans	caitlin.evans@westernresources.org;

REFILED, DATED this **23rd** day of **June 2023**.

New Energy Economy



Mariel Nanasi, Esq.
300 East Marcy Street Santa Fe, NM 87501
(505) 469-4060
mariel@seedsbeneaththesnow.com