

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

<b>IN THE MATTER OF THE APPLICATION OF</b>	)	
<b>PUBLIC SERVICE COMPANY OF NEW MEXICO</b>	)	
<b>FOR REVISION OF ITS RETAIL ELECTRIC RATES</b>	)	
<b>PURSUANT TO ADVICE NOTICE NO 533,</b>	)	
	)	<b>Case No. 16-00276-UT</b>
	)	
<b>PUBLIC SERVICE COMPANY OF NEW MEXICO,</b>	)	
<b>Applicant.</b>	)	

**NEW ENERGY ECONOMY'S BRIEF-IN-CHIEF**

**September 8, 2017**

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## I.

## INTRODUCTION

Public Service Company of New Mexico (PNM) originally requested a \$791.6 million test-period non-fuel revenue requirement in its application for a rate increase.<sup>1</sup> The Revised Stipulation provides for \$754.7 million test-period non-fuel revenue requirement.<sup>2</sup> This is a mere \$36 million reduction— 4.7% less than the original request.

The evidence at the hearing established that the \$754.7 million stipulated agreement between PNM and others, was not based on anything other than those parties' desire to accommodate one another. There is no evidence that the PRC Staff, or any intervening party except NEE, analyzed the underlying basis for more than \$656 million of PNM's \$754 million rate increase.<sup>3</sup> WRA, CCAE, and Sierra Club's experts did not investigate the underlying basis of the \$148 million capital expenditures requested with respect to Four Corners, and there is no evidence that those experts scrutinized any of the other requests for cost recovery.<sup>4</sup> Nor is there evidence in the record that any of the other parties, the AG, NMIEC, City of Albuquerque, etc.,

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<sup>1</sup> PNM Exhibit 7, Gerard Ortiz, Direct Testimony in Support of Revised Stipulation, p.3.

<sup>2</sup> *Id.*

<sup>3</sup> TR., 8/16/17 DeCesare, pp. 1838-1844 (None of the eight full-time PRC Staff scrutinized PNM's request for \$78 million in technology and general service capital expenses or the \$384 million in transmission and distribution capital expenditures or the \$148 million in Four Corners capital expenditures or the \$46 million in capital expenditures requested by PNM. Neither did the PRC Staff review PNM's request for cost recovery for litigation expenses or advertising expenses. Out of the \$751 million in the black box settlement, PRC staff did not analyze the more than \$656 million of PNM's requested capital expenditures that form the underlying basis for the settlement.) PRC Staff Attorney attempted to rehabilitate Mr. DeCesare by claiming that PRC Staff had no time to investigate the rate case "[b]ecause we were ordered [by the Commission] to" participate in settlement negotiations. At pp. 1845-1846. But if the PRC had not analyzed PNM's case, how could it know whether the proposed settlement comported with applicable law regarding cost recovery and, therefore, what position they should take during settlement negotiations.

<sup>4</sup> TR., Effross, 8/11/17, p. 1048. ("No, I have not investigated PNM's prudence or lack thereof with respect to the decision to reinvest and extend the life of Four Corners".) TR., Pierce, 8/10/17, pp. 855-856.

investigated the underlying basis for the many hundreds of millions of dollars of capital expenditures requested in this case. This staggering \$754.7 million settlement has not been shown to be grounded in prudent decision-making. The words “prudence” or “prudent” are noticeably absent from the Revised Stipulation. Indeed, the Revised Stipulation contains no language whatever that even implies that prudence was a factor in its adoption by the parties.<sup>5</sup> PNM and the Signatories are requesting approval from the New Mexico Public Regulation Commission of New Mexico (“NMPRC” “PRC” or “the Commission”) for a black box settlement “that has some light in it”<sup>6</sup> for a non-fuel base rate revenue increase of \$62.3 million.<sup>7</sup> New Energy Economy’s position, supported by the law, is that parties to a rate case cannot stipulate to an increase that has not been shown to be fair, just and reasonable, and in the public interest. Approving such a rate increase violates New Mexico law and cannot be legitimized by stipulation.

The Revised Stipulation as a whole is *not* fair, just and reasonable, and in the public interest. “A stipulation provides net benefits if the benefits provided by the stipulation outweigh the costs or detriments of the stipulation.” Certification of Stipulation, 13-00390-UT, Apr. 8, 2015, p. 67, adopted by Final Order, Dec. 16, 2015, *citing In re TECO Energy Inc.*, Certification of Stipulation, Case No. 13-00231-UT, Mar. 12, 2014, p. 79, approved in Final Order, Aug. 13, 2014; *In re Public Service Co. of New Mexico and New Mexico Gas Co.*, Certification of Stipulation, Case No. 08-00078-UT, Nov. 24, 2008, pp. 101-102, approved in Final Order Partially Approving Certification of Stipulation, Dec. 11, 2008.

As discussed in greater detail below, the evidence fails to establish, and in fact disproves,

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<sup>5</sup> TR., Effross, 8/11/17, p. 1049.

<sup>6</sup> TR., 8/16/17 Gunter, pp. 1861.

<sup>7</sup> PNM Exhibit 7, Gerard Ortiz, Direct Testimony in Support of Revised Stipulation, p.3

that the Revised Stipulation as a whole produces net benefits to the public.

### **Four Corners Power Plant Costs Should Be Denied**

Fundamental to the Commission's review is the determination of whether the proponents of a rate increase have proved by substantial evidence that the rate increase would be fair, just, and reasonable, would be in the public interest and would produce net benefits to the public. PNM failed to prove why ratepayers should be required to compensate the company for any costs, including \$148 million of capital expenditure costs, to fund the continuing operation of the Four Corners Power Plant ("Four Corners" or "FCPP") until 2031, the expiration date of the FCPP coal supply agreement ("CSA"),<sup>8</sup> or until 2041, the coterminous expiration date of the operating and co-tenancy and lease agreements.<sup>9</sup> PNM's decision to significantly invest and extend the life of FCPP in December 2013 was not prudent when made, and PNM's decision to continue to expend operating funds, which is the subject of this rate increase proceeding, is not prudent now.

The Signatories to the Revised Stipulation argue that there is a benefit to the ratepayers because PNM agreed to a "concession" of \$3.1M revenue reduction. In Paragraph 9 of the Revised Stipulation, PNM agrees "to use a debt return instead of weighted average cost of capital return" on the SCR pollution controls.<sup>10</sup> However, these assertions fail to address whether PNM incurred the expenses prudently *at all*. If Four Corners is no longer used and useful, how is an insignificant revenue adjustment sufficient, by itself, to establish that the rate increase is fair, just, and reasonable for ratepayers? It isn't. But, the PRC utility chief argues that it must be a

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<sup>8</sup> TR., Olson, 8/15/17, pp. 1604-1605.

<sup>9</sup> TR., Olson, 8/15/17, p. 1617.

<sup>10</sup> TR., Gunter, 8/16/17, pp. 1860-1861.

benefit if the parties agreed to it: “It was something less than the weighted average cost of capital that normally would be the return, and it was a concession the parties agreed to.”<sup>11</sup> It is noteworthy that the PRC utility chief does not assert that this reduction was based on substantial evidence that showed the expenditure prudent to begin with. A concession to pay “something less” than an entire amount can only be a concession if the costs are fundamentally legitimate to begin with. Moreover, the concession is insignificant given the enormous cost burden on ratepayers of the plant.<sup>12</sup>

PNM did not meet its burden of proof to show that its decision in 2013 to continue to invest in the operation of the aging, “poor performing”<sup>13</sup> climate-altering Four Corners coal plant was cost effective for ratepayers. PNM’s decision-making process lacked any contemporaneous financial analysis or risk evaluation and as a result PNM’s decision-making was inconsistent with the reasonable standard of care in the utility industry and regulatory principles and practices. PNM bases its claim of prudence on obsolete, 19-month-old Strategist scenarios,

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<sup>11</sup> TR., Gunter, 8/16/17, pp. 1862.

<sup>12</sup> Paragraph 3 of the Revised Stipulation states that the RICOS “does not represent an agreement among the Signatories, or Commission precedent, on any cost of service item or treatment *that is not specifically identified in this Revised Stipulation.*” (Emphasis added.) Because paragraph 9 of the Revised Stipulation provides for the inclusion in PNM’s rate base of a return of and “embedded cost of debt” return *on that entire* capital investment in SCR at Four Corners, it may be relied on by PNM as “Commission precedent” and may not be challenged by any of the Signatories in this case or in any future PNM ratemaking, IRP or Four Corners abandonment proceedings. In other words, to obtain whatever benefits they contend the Revised Stipulation provides to PNM’s customers and the public interest, the non-PNM Signatories have agreed in this proposed settlement to relinquish their right to challenge the prudence of PNM’s continuing reliance in its Application on Four Corners as part of its most cost-effective resource portfolio to serve its retail customers in New Mexico. That “bargain” will have negative long-term consequences for PNM’s customers, public health and the environment in this State, is not a good one for PNM’s customers or the public interest. Nor does it reasonably balance the interests of PNM’s customers and investors.

<sup>13</sup> NEE Exhibit 42, PNM Response to NEE Interrogatory 1-7 (7-6-17 Supplemental), Page 290 of 1254 (Email of August 29, 2013 – discussing Four Corners’ “poor operating performance.”)

which were flawed because they entirely omitted capital expenditures that were known at that time. But even taking the Strategist runs at face value without factoring in the omitted capital costs, there is only a 0.4% difference in cost between the scenario that retires the Four Corners coal plant compared to the scenario that continues investment in Four Corners.<sup>14</sup> Had PNM chosen to exit Four Corners when it had the opportunity and, instead, adhered to the most cost effective resources selected by PNM's own 2012 Strategist scenario, PNM would have added: 50 MW of solar, 15 MW of geothermal, and a 40 MW gas plant between 2012-2016.<sup>15</sup> This was not simply a matter of choice; PNM had the legal obligation to do so. As stated in 17.7.3.6 NMAC: "For resources whose costs and service quality are equivalent, the utility should prefer resources that minimize environmental impacts." Had PNM's management acted properly and in accordance with the law, its consideration of the 2012 Strategist scenarios on a risk-adjusted basis would have retired Four Corners and invested in solar, geothermal, and gas generation resources that minimize environmental impacts.

But we know now that the Strategist runs were just window dressing. Though PNM points to the Strategist run as evidence of their financial analysis, PNM's chief negotiator admitted that he had not even considered the analysis before agreeing to invest more than a billion dollars of expenses at Four Corners.<sup>16</sup>

As Exhibit 6 establishes, it appears that the reason PNM re-upped its contractual and financial obligations at Four Corners was not its clumsy and negligent failure to follow the data that was staring it in the face but, rather management's determination that leaving FCPP because it was not cost effective at the same time PNM was seeking a CCN to acquire more coal capacity

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<sup>14</sup> TR., O'Connell, 8/9/17, p. 505

<sup>15</sup> NEE Exhibit 24.

<sup>16</sup> TR., Olson, 8/15/17, p. 1497.



in the neighboring, equally risky San Juan Generating Station (SJGS) would have undermined its decision to add additional San Juan capacity. This was verified by Senior Vice President & General Counsel of PNM Resources, Patrick Apodaca, who stated internally that “[a]mong 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 at SJGS.”<sup>17</sup> “There was a reason why they didn’t do that fulsome analysis and share it with the board. There were other things going on that they did not want all the information laid [out] at that time.”<sup>18</sup> New Energy Economy’s expert, Steven M. Fetter, former Chairman of the Michigan Public Utility Commission, Managing Director for Fitch bond rating agency (utility securitization team), attorney, and three-time expert witness *for* PNM, called PNM’s actions with respect to Four Corners: “utility management malpractice.”<sup>19</sup>

The fact that PNM’s attention was focused elsewhere (on SJGS) is hardly a justification for imprudent decision-making regarding Four Corners and does not comport with legal requirements to evaluate the cost effectiveness, on a risk adjusted basis, of its investments if it wants cost recovery from ratepayers. It is not fair, just, or reasonable for ratepayers to pay the costs of PNM decisions that are not grounded in sound business judgment.<sup>20</sup> Ratepayers should be held harmless.<sup>21</sup> All costs associated with Four Corners should be disallowed.

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<sup>17</sup> NEE Exhibit 6, PNM Exhibit NEE 1-7 (7-12- 17 Supplemental) Page 13 of 22.

<sup>18</sup> TR., Fetter, 8/11/17, pp. 978-979.

<sup>19</sup> *Id.*

<sup>20</sup> NEE Exhibit 35, Direct Testimony & Exhibits of David Van Winkle, pp. 20 (Ratepayers should not have to pay for the bad decisions of PNM management.); TR., Effross, 8/11/17, p. 1049. (Ratepayers should not be stuck with the cost of unsound and imprudent business decisions of PNM management.)

<sup>21</sup> Corrected Recommended Decision, 15-00261-UT, Aug. 15, 2016, pp. 88; Final Order Partially Adopting Corrected Recommended Decision, Sept. 28, 2106, p. 34, ¶109.

## San Juan Generating Station Capital Expenditure Costs Should be Denied

When PNM filed this rate increase application on December 7, 2016, PNM had stated its intent to run its coal plant, the San Juan Generating Station (“SJGS” or “San Juan”), indefinitely or until 2053.<sup>22</sup> Consequently, PNM asked in this case for cost recovery from ratepayers of \$46,339,162 million for capital expenditures at SJGS.<sup>23</sup> Seven months later, on July 6, 2017, PNM filed its Integrated Resource Plan (“IRP”). In its plan of record, PNM states that the most cost-effective plan is to retire the San Juan coal plant by 2022.<sup>24</sup> PNM’s 2<sup>nd</sup> Supplemental Response to NEE’s Discovery, 7-1 (NEE, Exhibit 16), states, in part, that:

On February 24, 2017, the Board of Directors for PNM Resources, Inc. discussed a financial forecast that compares a San Juan Generating Station (“SJGS”) shutdown scenario to the continued operation of the plant. That forecast as it relates to Public Service Company of New Mexico (“PNM”) included the following:

- A capital plan that demonstrated a SJGS shutdown scenario that includes \$532 million of incremental capital spending on new resources.
- Earnings per share (“EPS”) annual growth is 5-6% during the 2017-2023 period under both continued operations and shutdown scenarios.
  - Earnings growth is driven by increased recovery from rate cases.
  - Higher rate base earnings result from significant capital investment - SJGS replacement power, renewables and other resource additions.
- Higher annual rate base growth of 3.5% in shutdown scenario results from additional capital investment.

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<sup>22</sup> TR., Ortiz, 8/8/17, p. 262; NEE Exhibit 12, San Juan Coal Company Reclamation Costs Review for 2053 Closure Plan, submitted to PNM, dated Oct. 2016; *see also* NEE Exhibit 35, Direct Testimony & Exhibits of David Van Winkle, pp. 23-25.

<sup>23</sup> PNM Exhibit 21, Olson, 12/7/2016, p. 24.

<sup>24</sup> TR., Ortiz, 8/8/17, p. 384; TR., O’Connell, 8/9/17 pp. 457-458 NEE Exhibit 30, Direct Testimony and Exhibits of Steven M. Fetter, p. 22 (“Key Findings: The most significant finding of the IRP is that retiring PNM’s 497MW share of SJGS in 2022 would provide long-term cost savings for PNM’s customers. The retirement will provide the opportunity to move from the fixed costs and baseload operation associated with coal plants to resources that better match varying loads and are better equipped to work with renewable energy.” PNM’s 2017-2036, Integrated Resource Plan, Executive Summary, p. 1.)

- Shutdown scenario provides for transitioning of PNM Generation portfolio to fewer baseload resources and more opportunities in renewable, gas, and newer generation technology.

Given that PNM's Board of Directors had calculated in early 2017 that a SJGS shutdown would be more profitable for the company than continued operation and PNM's 2017-2036 IRP also indicated that the most cost-effective portfolio for ratepayers included a SJGS shutdown, it is puzzling that PNM would find it reasonable to spend \$46 million in a plant that will be retired by 2022. There is no evidence that PNM ever did a cost benefit analysis to determine if the investment of \$46 million in SJGS capital expenditures was necessary or worthwhile. And, given the new closure date, it was imprudent of PNM not to assess whether, in light of the changes in its IRP, the expenditure of those funds on San Juan was prudent. But there is no evidence that PNM performed any analysis at all to determine if the expenditures were needed, used and useful.<sup>25</sup> For this reason, the PRC should deny all of the \$46,339,162 million for capital expenditures at SJGS until PNM performs a cost-benefit analysis to justify their inclusion in rates.

There are a number of other provisions contained in the Revised Stipulation that settles matters in such a way as to violate important regulatory principles and practices and/or are inconsistent with existing Commission policies and precedent. These are more fully described

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<sup>25</sup> NEE Exhibit 30, Direct Testimony and Exhibits of Steven M. Fetter, pp. 22-23 ("According to PNM's, July 3, 2017 preliminary Integrated Resource Plan, PNM plans to shutter SJGS by 2022. Given these facts, it seems reasonable that all expenditures should be evaluated to determine if they are necessary. PNM has not done this. There are no cost-benefit analyses to determine whether the individual expenditures that add up to more than \$46M are 'worth' the cost. Because of this failure to produce such evidence, the Commission should not allow these costs to be recovered from customers until such a proper analysis is completed."); NEE Exhibit 35, Direct Testimony & Exhibits of David Van Winkle, pp. 23-25.

below. Unfortunately, fully understood and from a balancing of interests perspective, the Revised Stipulation, provides too much “give” by the non-PNM Signatories and too much “take” by PNM for its investors.

The short- and long-term costs of the Revised Stipulation and its impacts on PNM’s customers are unreasonably high. NEE therefore opposes the Revised Stipulation even though it believes that most of the apparent “benefits” for various non-PNM Signatories provided in the Revised Stipulation could have been justified and adopted by the Commission without so much “give” by them to PNM, either in a more reasonable and balanced settlement or by litigating their merits.

## **II. LEGAL STANDARD**

### **A. Burden of Proof**

Under the Public Utility Act (“PUA”), the PRC has “general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulation and in respect to its securities . . .” NMSA 1978, § 62-6-4. The PUA requires that public utility rates be just and reasonable. NMSA § 62-8-1 offers no guidance to the Commission for achieving this goal nor does it specify procedures. However, another section of the PUA does establish “very specific” procedures for setting rates, including requiring utilities to bear the burden of proof to show that an increase in rates is just and reasonable. An applicant for a rate increase must support its request with substantial evidence. Corrected Recommended Decision, 15-00261-UT, Aug. 15, 2016, pp. 14-15.

To set a just and reasonable rate, the Commission must balance the investor’s interest against the ratepayer’s interest. As the New Mexico Supreme Court concluded in *In the Matter of*

*the Rates and Charges of Mt. States Tel., v. Corporation Commission*, 653 P.2d 501, 507, (N.M. 1982), “The ratemaking process involves a balancing of investor and consumer interests. Neither is paramount. To argue that the consumer interest is best served by focusing solely on the investor interests ignores the Commission's duty to set rates.” *Id.*, The Final Order Partially Adopting Corrected Recommended Decision, Sept. 28, 2106, did not alter the Hearing Examiner’s legal standards for ratemaking in any manner.<sup>26</sup>

## **B. Contested Stipulation**

The Commission has consistently applied the following standard when reviewing contested stipulations:

- (a) the parties and Staff had notice and an opportunity to be heard on the stipulation; (b) substantial evidence in the record as a whole supports the Commission’s conclusion that the stipulation is fair, just and reasonable and in the public interest; (c) the stipulation is in accordance with applicable law.

Certification of Stipulation, 13-00390-UT, Apr. 8, 2015, pp. 26-29, adopted by Final Order, Dec. 16, 2015; Final Order Approving Stipulation, 10-00086-UT, July 28, 2011, p. 6; *Attorney General v. New Mexico Public Service Commission*, 111 N.M. 636, 640, 808 P.2d 606, 610 (N.M. 1991); *New Mexico Industrial Energy Consumers v. New Mexico Public Service Commission*, 104 N.M. 565, 570-571, 725 P.2d 244, 249-250 (N.M. 1986).

The Commission has also approved a Hearing Examiner’s decision to determine the merits of specific stipulation issues contested by the parties citing the requirement that a

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<sup>26</sup> The Hearing Examiner in 15-00261-UT states that this Section is taken from the Corrected Recommended Decision of the Hearing Examiner in the *2007 SPS Rate Case*. This Section omits citations supporting the discussion, which are included in the discussion in the *2007 SPS Rate Case* Corrected Recommended Decision.

settlement be in accordance with applicable law and not violate any important regulatory principles. Certification of Stipulation, 13-00390-UT, Apr. 8, 2015, pp. 28-29, adopted by Final Order, Dec. 16, 2015; Final Order Partially Approving Stipulation, 10-00086-UT, July 28, 2011, p. 10, *citing* Final Order, Case No. 2567, Nov. 28, 1994, p. 18; Final Order Conditionally Approving Stipulation, 08-00273-UT, May 28, 2009, pp. 10-11; Final Order Partially Adopting Certification of Stipulation, 10-00315-UT, June 26, 2012 (extensive discussion of contested stipulation provisions' lack of compliance with applicable law).

In 10-00086-UT, the Commission stated that if the Commission finds that a stipulation as a whole should not be approved, it does not have to reject it. It reasoned that a stipulation may provide benefits that cannot be achieved outside the context of a stipulation, and the Commission can choose to give the parties the opportunity to preserve those benefits by modifying other provisions of the stipulation that are contrary to law or Commission policy. Final Order Partially Approving Stipulation, 10-00086-UT, July 28, 2011, pp. 12, 13, (if the record shows that substantial evidence would not support a finding that a stipulation, taken as a whole, is just and reasonable, then modifying it in ways that render it just and reasonable is consistent with the Commission's mandated role and responsibility to protect the public interest, ensure that a utility's rates are fair, just, and reasonable, and is not second-guessing the stipulating parties), *citing New Mexico Industrial Energy Consumers v. New Mexico Public Service Commission*, 104 N.M. 565, 570-571, 725 P.2d 244, 249-250 (N.M. 1986). This was also cited favorably more recently in the Certification of Stipulation, 13-00390-UT, Apr. 8, 2015, pp. 29-31.

Rejection of a Stipulation or rejection of Suggested Modifications to a Stipulation is consistent with the Commission's supervisory authority under NMSA 1978, § 62-6-4, which provides: "general and exclusive power and jurisdiction to regulate and supervise every public

utility in respect to its rates and service regulations ... all in accordance with the provisions and subject to the reservations of the PUA.” NMSA 1978, § 62-3-3.H defines the term “rate” very broadly to mean “every rate, tariff, charge or other compensation for utility service rendered or to be rendered by a utility and every rule, regulation, practice, act, requirement or privilege in any way relating to such rate, tariff, charge or other compensation and any schedule or tariff or part of a schedule or tariff thereof.” Further, this is also consistent with the requirements of NMSA 1978, § 62-8-1 (2006) (Every rate made by a public utility shall be just and reasonable.)

### **C. Prudence**

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

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

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

Prudence is that standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time decisions had to be made. In determining whether a judgment was prudently made, only those facts available at the time judgment was exercised can be considered. Hindsight review is impermissible.

Imprudence cannot be sustained by substituting one’s judgment for that of another. The prudence standard recognizes that reasonable persons can have honest differences of opinion without one or the other necessarily being ‘imprudent.’

Case No. 2087, Order on Burden of Proof and Specific Issues to be Addressed (10-4-98), *cited*, in the Final Order of 10-00086-UT, p. 61. The New Mexico Supreme Court has affirmed this definition of prudence. *In re Petition of PNM Gas Servs.*, 2000-NMSC-012, 129 N.M. 1, 1 P.3d 383, 405 (N.M. 2000); *see also* Corrected Recommended Decision, 15-00261-UT, Aug. 15, 2016, pp. 88-89.

#### **D. Failure to Consider Alternatives**

PNM's failure to consider any alternatives before re-upping and increasing its investments in Four Corners is a prime example of the magnitude of PNM's imprudence. In the PNM Ojo Line Extension ("*OLE*") Case No. 2382,<sup>27</sup> for example, the PRC affirmed PNM's obligation to reasonably identify and evaluate all of its feasible resource alternatives in a resource acquisition case to satisfy its burden of proof even earlier and prior to issuance of its IRP Rule. The Hearing Examiner in a recent resource procurement case stated that the Commission's Final Order in PNM's *OLE* case "established a precedent pertinent to the use of RFPs in CCN cases" that, "in the absence of other statutory or regulatory guidance ... should be applied to the facts of similar cases."<sup>28</sup> Order Partially Granting PNM's Motion to Vacate and Addressing Joint Motion to Dismiss ("December 22, 2015 Order"), Case No. 15-00205-UT. As summarized in that Order, the Commission restated the holding in the PNM *OLE* case as follows:

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

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<sup>27</sup> *In Re Public Service Co. of New Mexico*, 166 P.U.R. 4<sup>th</sup> 318, 337, 355-356 (1995).

<sup>28</sup> Case No. 15-00205-UT, December 22, 2015 Order, p. 10.



PNM considered. Thus even assuming a need on the transmission system for the sake of argument, the Commission remains unconvinced that the public convenience and necessity require or will require the OLE Project as the proper response to such a need.” Recommended Decision, pp. 98, 102, 166 P.U.R. 4<sup>th</sup> at 355-356. The Commission found that it has the authority to examine alternatives to utility proposals to satisfy needs identified by a utility, that there may be various solutions for such needs and that it would not be in the public interest for the Commission to grant a CCN for a proposed project which might meet a utility’s needs but is the worst among a range of alternatives. Recommended Decision, p. 49, 166 P.U.R. 4<sup>th</sup> at 337.<sup>29</sup>

The Hearing Examiner’s December 22, 2015 Order in Case No. 15-00205-UT stated:

Instead of specifying in advance the alternatives that a utility must analyze to support its CCN application, the Commission’s practice has been to allow utilities to develop and attempt to justify the reasonableness of their proposals. After receiving the proposal, the Commission holds hearings in which the reasonableness of the utility’s proposal is evaluated, with input from Staff and Intervenors.

Applying the OLE analysis to the facts of this case, it is possible that the restrictive nature of the RFP recently issued by PNM may unreasonably limit the alternatives to be evaluated and compared to PNM’s proposal. Although no statutes or rules currently require the use of RFPs in resource acquisition cases, the use of RFPs appears to be becoming *a reasonable practice to ensure compliance with the standard in OLE*. In some cases, such as the San Juan abandonment case at Case No. 13-00390-UT, the use of RFPs may not be needed due to time constraints or the demonstrated narrow nature of the resource need to be satisfied. In other cases, it might be found that the failure to use an RFP or the use of an unreasonably restrictive RFP may unreasonably limit the alternatives evaluated by the utility.

... PNM carries the burden of proof to show that its proposed resource is the most cost effective choice among feasible alternatives to serve PNM’s resource needs.<sup>30</sup>

The Commission affirmed the Hearing Examiner’s Recommendation Order in Case No. 15-00205-UT.<sup>31</sup> In 2016, PNM re-filed and then again withdrew its second CCN for a gas plant (after NEE filed opposition testimony). The Hearing Examiner’s Recommendation Order again allowed for withdrawal and again the Commission adopted the Hearing Examiner’s decision and

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<sup>29</sup> *Id.*, pp. 10-11. The “most cost effective” test in utility CCN cases addressed by the Commission in the *OLE* case was subsequently incorporated into the Commission’s IRP Rules, 17.7.3.6, 17.7.3.7.I and 17.7.3.9.G(1) NMAC.

<sup>30</sup> *Id.*, p. 12.

<sup>31</sup> Case No. 15-00205-UT, Final Order, May 18, 2016.

stated unequivocally: “The Commission reiterates that PNM bears the burden of demonstrating that its proposed resource choice is the most cost effective resource among feasible alternatives.”<sup>32</sup>

### **E. Failure to Consider Risks**

PNM did not consider any risks at all when it decided to enter into new contracts and continue its participation in Four Corners.<sup>33</sup> This is in contrast to another investor-owned electric monopoly in New Mexico, El Paso Electric, that considered the risks of continued investment *at the same plant, at the same time* that PNM made its investment decision. Those risks included litigation risk, regulatory risk, decommission and reliability risk, and operational and fuel supply risk. El Paso Electric performed its analysis pursuant to its obligation under prevailing Commission rules.<sup>34</sup>

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<sup>32</sup> Case No. 16-00105-UT, Final Order, May 24, 2017, ¶ 10.

<sup>33</sup> TR., O’Connell, p. 524: (“Q: Is there anything in the record, at all, that shows that between the 2012 Strategist run and the December 30th, 2013, decision to sign 14 contracts to extend the life of Four Corners, is there anything that shows that PNM did a risk analysis of Four Corners? A. What’s -- no.”); *see also* NEE Exhibit 35, Direct Testimony & Exhibits of David Van Winkle, pp. 8-9 (PNM did not provide in testimony any risk and uncertainty analysis regarding the extension of the life of FCPP beyond mid-2016.)

<sup>34</sup> NEE Exhibit 30, Direct Testimony and Exhibits of Steven M. Fetter, pp. 17-20 (“Without such a risk analysis, I find it hard to see that PNM was acting with due diligence in making its investment decision. ... EPE considered that divestment of its shares at FCPP would avoid expensive contested litigation. [] The Signatories, which included EPE, the AG, and NMPRC Staff, also agreed that divestment would also benefit the public, not just by quantifiable net benefits, but would also provide EPE and its customers with non-quantifiable benefits through avoidance of future increased costs and risks and liability of coal-fired generation, along with being consistent with EPE’s Commission-accepted 2009 and 2012 IRPs. ... These risks not only included the potential for increases in costs to comply with environmental regulations, such as SCR, but also included the financial and legal risk of having to shut down the plant prior to the end of the proposed life extension. Based on this extensive analysis, EPE concluded there was a high risk of incurring increased costs and litigation and environmental risks if the company were to continue to participate in FCPP beyond July 6, 2016. ... Even assuming that the two companies are not the same because of different resource portfolios and different needs, the

Commission rules require that a utility consider the cost of risk and uncertainty when identifying and determining the most cost-effective resource portfolio and alternative portfolios:

(1) To identify the most cost-effective resource portfolio, utilities shall evaluate all feasible supply and demand-side resource options on a consistent and comparable basis, and *take into consideration risk and uncertainty* (including but not limited to financial, competitive, reliability, operational, fuel supply, price volatility and anticipated environmental regulation). The utility shall evaluate the cost of each resource through its projected life with a life-cycle or similar analysis. The utility shall also consider and describe ways to mitigate ratepayer risk.

17.7.3.9 G (1) NMAC. (emphasis supplied.)

#### **F. Coal Investments Are Antithetical to the Public Interest**

WRA's expert witness, Mr. Effross, testified that burning coal is a health hazard.<sup>35</sup> Mr. Van Winkle's testimony<sup>36</sup> was unchallenged with respect to coal being the single greatest driver of climate change:

Climate change: Coal is a dying industry, and for good reason. Emissions from burning coal for heat and energy fuel a warming climate, making coal the single greatest threat to our climate. Additionally, coal mining is also a source of methane, an extremely potent global warming gas.<sup>37</sup> PNM admits in its April

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critical factors (environmental risks, litigation risks, and costs of future capital expenditures) that influenced EPE's choice to walk away from the renewal contract equally pertained to PNM. By not undertaking a deliberative process, like EPE, there was no way for PNM to know what the true economic picture of continued ownership of FCPP would be."); Also, see Exhibit SMF-3, with particular attention to pp. 13-17, 30-31, 36-38.

<sup>35</sup> Tr., at p. 1061; Mr. Effross also testified, at p. 1053: "Coal-burning power plants produce expensive electricity, degrade air quality, and cause human health problems." Further at p. 1061: "[T]here is quite a bit of pollution caused by coal-burning power plants. As I go on to state in the rest of the paragraph, you have various criteria pollutants and particulate matter that's released. Q. And you're talking about lung disease and heart disease; correct? A. Yes, I do."

<sup>36</sup> NEE Exhibit 35, Direct Testimony & Exhibits of David Van Winkle, p. 20.

<sup>37</sup> <https://www.epa.gov/ghgemissions/global-greenhouse-gas-emissions-data>; <https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions>; <https://thinkprogress.org/james-hansen-coal-is-the-single-greatest-threat-to-civilization-and-all-life-on-our-planet-8d6fcaa6b85>;

2017 10Q, at p. 101, that: “management has identified multiple risks and opportunities related to climate change, including potential environmental regulation, technological innovation, and availability of fuel and water for operations, as among the most significant risks facing the Company.”

A recent decision, *Sierra Club, et al., v. Federal Energy Regulatory Commission*, 16-1329, (D.C. Cir. 2017),<sup>38</sup> is instructive on the necessity for utilities to factor health and environmental risks into resource procurement decisions. In the *Sierra Club* case, Florida Power & Light, Duke Energy, and others sought a “certificate of public convenience and necessity” (CCN) for a natural gas pipeline, in part, because “natural gas will make it possible for utilities to retire older, dirtier coal-fired power plants.” A grant of a CCN required a finding that the project would serve the public interest, a finding also required by the Signatories to the Revised Stipulation in this case. The D.C. Circuit Court held that FERC failed to meet the “public benefit” test because the agency did not evaluate the project’s climate-change impacts.<sup>39</sup> The Court considered and decided “that gas will be burned in those power plants” and “[t]his is not just reasonably foreseeable, ... it is the project’s entire purpose, as the pipeline developers themselves explain” and that the burning of fossil fuel “will release into the atmosphere the sorts of carbon compounds that contribute to climate change” and therefore the agency must evaluate the total carbon emissions and evaluate “both beneficial and detrimental effects”:

The phrase “reasonably foreseeable” is the key here. Effects are reasonably foreseeable if they are “sufficiently likely to occur that a person of ordinary prudence would take [them] into account in reaching a decision.” *EarthReports, Inc. v. FERC*, 828 F.3d 949, 955 (D.C. Cir. 2016) (citation omitted).

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<http://www.businessinsider.com/coal-fired-power-is-dying-solar-wind-renewable-energy-future-projections-2017-6>

<sup>38</sup> Attached as Exhibit B.

<sup>39</sup> At p. 21.

FERC will balance “the public benefits against the adverse effects of the project,” *see Minisink Residents for Envtl. Pres. & Safety v. FERC*, 762 F.3d 97, 101-02 (D.C. Cir. 2014) (internal quotation marks omitted), including adverse environmental effects, *see Myersville Citizens for a Rural Cmty. v. FERC*, 783 F.3d 1301, 1309 (D.C. Cir. 2015). Because FERC could deny a pipeline certificate on the ground that the pipeline would be too harmful to the environment, the agency is a “legally relevant cause” of the direct and indirect environmental effects of pipelines it approves. *See Freeport*, 827 F.3d at 47. *Public Citizen* thus did not excuse FERC from considering these indirect effects.

...

Without such comparisons [quantification that would permit the agency to compare the total greenhouse gas emissions in this project to other projects], it is difficult to see how FERC could engage in “informed decision making” with respect to the greenhouse-gas effects of this project, or how “informed public comment” could be possible. *See Nevada*, 457 F.3d at 93; *see also WildEarth Guardians*, 738 F.3d at 309 (accepting an agency’s contention that the “estimated level of [greenhouse-gas] emissions can serve as a reasonable proxy for assessing potential climate change impacts, and provide decision makers and the public with useful information for a reasoned choice among alternatives”).

...

In other words, when an agency thinks the good consequences of a project will outweigh the bad, the agency still needs to discuss both the good and the bad.

...

Our discussion so far has explained that FERC must either quantify and consider the project’s downstream carbon emissions or explain in more detail why it cannot do so.<sup>40</sup>

Yet PNM’s record testimony fails to include even *one* word about the risks and uncertainties of the use of coal, let alone that its evaluation process *at that time* considered such factors. It is unclear how PNM could have engaged in an “informed decision-making process” otherwise. It was incumbent upon PNM to quantify carbon emission and other toxic pollutant risks or explain in more detail to the Commission why it could not do so. But here the record is

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<sup>40</sup> At pp. 22-26.

silent about cost risks and uncertainties, contrary to Commission requirements (though PNM has advised its investors of them).<sup>41</sup> Compare that to the 70 persons delivering public comment in this case, who implored this Commission to consider the adverse impacts of further risky investments in coal (and nuclear) and reject cost recovery for those perilous investments.<sup>42</sup>

Wholly aside from the carbon/climate issues, PNM, as we have emphasized here and during the hearing, has provided no contemporaneous financial analysis at all, much less any analysis on which a reasoned investment decision could have been made, to justify the investment decisions that underlie this rate case. Accordingly, it has failed to prove its rate increase request with substantial evidence. As defined by the New Mexico Supreme Court, substantial evidence is “relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” *Rinker v. State Corp. Comm’n*, 84 N.M. 626, 506 P.2d 783 (N.M. 1973), affirmed in *New Mexico Exchange Carrier Group v. New Mexico Public Regulation Com’n*, 2016 WL 1063125, citing *New Mexico Indus. Energy Consumers v. New Mexico Public Regulation Com’n*, 2007-NMSC 053, 142 N.M. 533.

Without evidence in the record to justify, support, or substantiate the financial soundness of PNM’s decisions to rate base the short- and long-term Four Corners contracts, all costs associated with this plant should be treated as imprudent, unreasonable and unlawful. *Zia Natural Gas*, 2000-NMSC-011, ¶ 13, 128 N.M. 728, 998 P.2d 564. The Commission is not free to disregard its own rules and prior ratemaking decisions or “to change its position without good

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<sup>41</sup> NEE Exhibit 22 (“Impact of Proposed Environmental Regulation,” Feb. 29, 2012) and NEE Exhibit 31 (“PNM Impact of Environmental Regulation – Four Corners,” June 2017): Compliance Cost Exposure Costs Relative to at least: Clean Air Act, Mercury Rule, Clean Water Act.

<sup>42</sup> Excerpts attached as Exhibit A.

cause and prior notice to the affected parties.” *Hobbs Nat. Gas v. NMPSC*, 115 N.M. 678, 681, 858 P.2d 54, 57 (1993)

### **G. Duty of Non-Discrimination in Ratemaking**

The New Mexico Legislature has imposed duties and restrictions on electric utilities with respect to non-discriminatory ratemaking:

No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any corporation or person within any classification or subject any corporation or person within any classification to any unreasonable prejudice or disadvantage. No public utility shall establish and maintain any unreasonable differences as to rates of service either as between localities or as between classes of service. Nothing shall prohibit, however, the commission from approving economic development rates and rates designed to retain load or from approving energy efficiency programs designed to reduce the burden of energy costs on low-income customers pursuant to the Efficient Use of Energy Act.

62-8-6. Discrimination. (2008)

## **III. ARGUMENT**

### **A. PNM’s Decision To Significantly Reinvest And Extend Its Position In The Four Corners Coal Plant Was Not Prudent.**

PNM’s decision to significantly reinvest and extend its position in the 50-year-old Four Corners coal plant was not prudent. PNM failed to introduce substantial evidence that its decisions, now or when made, were cost effective or the plant used and useful. The Four Corners has garnered widespread opposition, is an affront to the public interest, and cost recovery for PNM’s expenditures with respect to that facility will not result in fair, just, and reasonable rates as the law requires.

Under NM PRC precedent, it is unlawful to shift the economic burden of imprudent utility decisions onto the ratepayers.<sup>43</sup> Thus a central issue in this case is whether current customers should pay for ill-conceived investments by PNM. Should the consequences of imprudent investments/actions be borne by the least able to afford it?<sup>44</sup> The PRC has already answered that question, and the answer is No. Those consequences must be borne by PNM.

The prudent investment theory provides that ratepayers are not to be charged for negligent, wasteful or improvident expenditures, or for the cost of management decisions which are not made in good faith. In other words, ratepayers are not expected to pay for management's lack of honesty or sound business judgment.

Corrected Recommended Decision, 15-00261-UT, Aug. 15, 2016, p.88, *citing* Case No. 2146, Part II, Final Order 50 (4-5-89).

**1. The PRC Should Disallow FCPP Cost Recovery Because PNM Failed To Meet Its Burden Of Proof That Its Expenditures Were (1) Prudently Incurred, And (2) Used And Useful.**

**a) PNM's Decision With Respect To FCPP Was Not Prudently Made.**

PNM relies on its 2011 IRP analysis and its May 2012 Strategist runs to assert the prudence of its decision to reinvest in and extend the life of Four Corners.<sup>45</sup> In the last rate case,

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<sup>43</sup> Corrected Recommended Decision, 15-00261-UT, Aug. 15, 2016, p. 110 (“A disallowance due to imprudence is, however, quite different; and to consider financial harm in determining a disallowance founded in the utility being imprudent would, in essence, be rewarding a utility for its imprudent acts.”)

<sup>44</sup> NEE Exhibit 8, 22,485 people “number of actual disconnects” from PNM’s electricity.

<sup>45</sup> TR., 8/9/17, O’Connell, p. 500: “[W]ould it be fair to say that PNM relied on the 2012 Strategist runs for its December 2013 determination to significantly reinvest and extend the life of Four Corners? A. It would be fair to say that that was one of many things that PNM relied upon. Q. What else is in the record that PNM relied on between May 2012 and December 30<sup>th</sup>, 2013 – that that – for that decision in December 2013?

A. Well, what’s in the record is that the 2012 analysis was a second look at the 2011 Integrated Resource Plan.”



the PRC correctly determined PNM could not rely on the 2011 IRP to support a prudence determination because it was “stale by the time of PNM’s decision.” Case No. 15-00261-UT, Final Order, Sept. 28, 2016, p. 32 ¶103. “The Commission also finds that PNM may not rely on the 2011 IRP to establish the prudence of its decision in this case. ... [T]he probative value of the 2011 IRP was limited as it was never accepted as compliant with the Commission’s IRP rule due to the closure of Case 11-00317-UT; a closure which PNM never sought to counter.” *Id.*, pp. 32, 33 ¶104.

The Strategist<sup>®</sup> software is a tool for analyzing various approaches to a business problem by comparing alternative scenarios.<sup>46</sup> The user can manipulate the economic effects of alternative courses of action as an aid in making optimal business decisions. Of course, numerous assumptions need to be entered into the program at the outset, and the accuracy of the output depends on the validity of the assumptions originally entered.<sup>47</sup> Strategist is not the only tool that a resource planner uses to discern the resource portfolio -- or the resource choices going forward.<sup>48</sup> “[Plant] Reliability is the result of performance” and is another factor to be

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<sup>46</sup> Mr. O’Connell provided written testimony that: “The Strategist<sup>®</sup> model utilizes a proprietary, dynamic programming algorithm to conduct a rigorous evaluation of up to 5,000 unique resource portfolios and selects and ranks the resource portfolios based on various user-specified criteria.” PNM Exhibit 12, Rebuttal Testimony in Support of Revised Stipulation & Exhibits of Patrick J. O’Connell, p. 4. But under cross-examination Mr. O’Connell corrected his own testimony, stating that he needed to be “clear on terminology” and that he was “inflexible about that” and “the program can create up to 5,000 different combinations of resources that meet user-defined criteria.” TR., O’Connell, 8/9/17, pp. 489-490.

<sup>47</sup> TR., Sommer, 8/14/17, p. 1196 “[I]t’s not Strategist making those assumptions. It is the modeler that is making those assumptions.”; TR., Sommer, 8/14/17, p. 1205 (Discussing whether Strategist is an effective predictor depends on the correct input assumptions of the modeler: “As the saying goes, garbage in, garbage out, so, yeah.”); *see also*, TR., O’Connell, 8/9/17, pp. 585.

<sup>48</sup> TR., O’Connell, 8/9/17, pp. 497, 505.

considered.<sup>49</sup>

Mr. Olson attached CMO-3 to his Testimony in Support of the Revised Stipulation, which allegedly reflected a comparison of the retirement of Four Corners with ongoing operations (and differing future coal prices).<sup>50</sup> In 2012 and 2013, Mr. Olson was PNM's main negotiator with respect to the negotiations at FCPP and he actually signed the majority of the 15 contracts on behalf of PNM.<sup>51</sup> But Mr. Olson admitted that he did not know about the specific FCPP Strategist runs that form the basis of PNM's claim of prudence.<sup>52</sup> In an attempt at rehabilitation, Mr. Olson reconfirmed that he hadn't seen the FCPP Strategist runs, but "at some point in time, I spoke to Mr. O'Connell. And I just asked him, point blank, "Is -- does this make sense to continue operation with Four Corners, based on what, you know, we see?" And he said, "Absolutely. And particularly in the context of shutting down two coal units at San Juan 2 and 3."<sup>53</sup>

Such an admission by PNM's chief negotiator is shocking. He admitted that he didn't look at the financial analysis that was being used to justify a billion-dollar resource investment. Rather than do the work required, he depended on a two-sentence statement, made without *any* specificity, that has never been disclosed heretofore or confirmed in the thousands of pages of

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<sup>49</sup> TR., O'Connell, 8/9/17, p. 498.

<sup>50</sup> PNM Exhibit 23, Rebuttal Testimony in Support of Revised Stipulation & Exhibits of Chris Olson, p. 10 and CMO-3; *see also* NEE Exhibit 17.

<sup>51</sup> TR., Olson, 8/15/17, p. 1458; NEE Exhibit 39.

<sup>52</sup> TR., 8/15/17, Olson, p. 1497: "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." Also at, p. 1616: "Q. Now, you were also asked a question by Ms. Nanasi about whether, I guess, in the course of the negotiations of the amendments to the Four Corners co-tenancy agreement, operating agreement, and the execution of the 2016 coal agreement, whether you had reviewed any Strategist runs. Do you recall that question? A. I do. Q. And I believe -- was your answer, "No"? A. That's correct."

<sup>53</sup> TR., Olson, 8/15/17, p. 1616-1617.

written testimony or admitted in discovery by Mr. O’Connell. This convenient and incredible “point blank” query was never disclosed when NMIEC or NEE asked about what the basis was for PNM’s December 2013 decision. The Strategist files were created in May 2012 before Mr. O’Connell even began working in the resource planning department,<sup>54</sup> so his terse and emphatic comment to Olson regarding the economic desirability of continuing with FCPP, even if it could possibly reflect a prudent decision-making process that is not in the record, cannot reasonably be considered substantial evidence of prudence. There is nothing in the record to reflect what Mr. O’Connell has called “forensic accounting”<sup>55</sup> or that O’Connell’s statement to Olson, assuming he made it, could or should have satisfied Mr. Olson’s unease. At a minimum, it is an insufficient basis on which to impose, as prudently-incurred, hundreds of millions of costs on the ratepayers.

Mr. Olson testified that he knew *nothing* about the Strategist runs<sup>56</sup> depicted in the graph, attached to and introduced through testimony as CMO-3 Rebuttal, and didn’t know when CMO-3 was produced.<sup>57</sup> “Well, again, I couldn’t even tell you that [CMO-3] was -- these are Strategist runs; because there’s nothing here that indicates – that even says the word “Strategist.” So I don’t know.”<sup>58</sup>

Further, Mr. O’Connell made some other striking admissions about CMO-3, specifically regarding the description of the terms contained therein, such as the following (refer to color copy of CMO-3, NEE Exhibit 17):

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<sup>54</sup> TR., O’Connell, 8/9/17, pp. 455 and 601.

<sup>55</sup> TR., O’Connell, 8/9/17, p. 588.

<sup>56</sup> TR., Olson, 8/15/17, pp. 1486, 1490-1492. (“I don’t know the basis for it.” Mr. Olson didn’t know if the Strategist runs depicted in CMO-3 included a cost for SCR pollution controls, didn’t know why CMO-3 started at \$7,850,000,000 instead of zero, didn’t know what made up the \$7,850,000,000, didn’t know when the runs were performed, didn’t know why “Eval C” wasn’t included in the chart, what resources would be added if FCPP would have been retired.)

<sup>57</sup> TR., Olson, 8/15/17, p. 1486.

<sup>58</sup> TR., Olson, 8/15/17, p.1488.

1) “base system cost is whatever was left over after all these costs were subtracted from the Strategist NPV.” “So, no, we didn’t start with base system cost. It was -- or PNM didn’t start with base system cost. It was the output of subtracting off these other things that are identified.”<sup>59</sup>

2) the May 2012 Strategist runs used an undepreciated book value for Four Corners as of 12/31/2010.<sup>60</sup>

3) unreasonable transmission costs,<sup>61</sup> and most significantly,

4) “*stranded costs, the transmission interconnection costs and decommissioning costs - were **not** costs that were included in the Strategist model.*” (emphasis supplied.)

*Mr. O’Connell testified that what was shown on CMO-3 does not accurately comport with what was actually included in the 2012 Strategist runs.* “So you’ve got apples and oranges going on in this graph.”<sup>62</sup> “Stranded costs, transmission costs, and decommissioning costs are not specifically included in the Strategist analysis in input files.”<sup>63</sup> Yet, on CMO-3 the graph erroneously includes these costs as if those specific costs were included!

Mr. O’Connell testified that “[t]here may be up to 5,000 combinations of different resources that could have produced a reliable portfolio for each one of these four different scenarios.”<sup>64</sup> But when probed, Mr. O’Connell admitted that he “doubt[ed]” that there were

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<sup>59</sup> TR., O’Connell, 8/9/17, pp. 587-588.

<sup>60</sup> TR., O’Connell, 8/9/17, pp. 589-590. (Mr. O’Connell couldn’t explain why the stranded assets number that was inputted was from 2010 and not either from 2012 in 2012 or 2016 when the contracts were set to expire and “[t]here would have been more depreciation” hence the stranded assets would have been less. But Mr. O’Connell didn’t know.)

<sup>61</sup> TR., O’Connell, 8/9/17, pp. 590-594.

<sup>62</sup> TR., O’Connell, 8/9/17, p. 599.

<sup>63</sup> TR., O’Connell, 8/9/17, pp. 599-600. (“Q. But part of the bar is the-- the top part of the bar, the \$40 million, wasn’t part of the Strategist run? Or was it? A. No.”)

<sup>64</sup> TR., O’Connell, 8/9/17, p. 491.

actually 5,000 combinations.<sup>65</sup> He admitted further that regarding Strategist run “Eval B”, “Eval D”, and “Eval E” – all shown on Mr. Olson’s CMO-3 chart— the actual number of combinations for those different scenarios were: 696, 467, and 467, respectively.<sup>66</sup> PNM told the Commission, by implication, that PNM produced 5,000 “unique resource evaluations.” This was simply not true. First, there were not 5,000 “unique resource evaluations” there were 4 or 5. Second, the average number of those combinations produced is 543. PNM misled the Commission and the parties when it claimed “up to 5,000 combinations.” That figure is nine times higher than what was actually evaluated. To understand the percentage range of difference in net present value (“NPV”) within the various combinations for a particular scenario Mr. O’Connell testified: “that would mean that that portfolio is 1.47 percent more expensive than the least expensive.”<sup>67</sup> He testified that the percentage range of difference in all the combinations “Eval B”, “Eval D”, and “Eval E” were respectively as follows: 1.47%, 1.04% and 1.01%.<sup>68</sup>

One of the critical assumptions that should have been included in the May, 2012 Strategist® runs but was not was the inevitable incurrence of capital expenditures required to extend the life of Four Corners.<sup>69</sup> All industrial plants have an average useful life, and there is nothing in the record to suggest that Four Corners is an exception. This is not to say that, in any

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<sup>65</sup> TR., O’Connell, 8/9/17, p. 493.

<sup>66</sup> TR., O’Connell, 8/9/17, p. 497; *see also* NEE Exhibits 18, 19, 20.

<sup>67</sup> TR., O’Connell, 8/9/17, pp. 494-495.

<sup>68</sup> TR., O’Connell, 8/9/17, pp. 494-497; Also, *see*, NEE Exhibits 18, 19, 20.

<sup>69</sup> TR., Sommer, 8/14/17, p. 1254.

Q. Would there ever be a reason to consider less than the utility’s full costs?

A. No, I can’t think of any reason why you would consider less.

And at pp. 1256-1257:

Q. Would there ever be a reason to use a rate other than a rate that is somehow related to the cost of capital?

A. None that I can think of, no.

particular case, the plant in question must be scrapped or retired at the end of its nominal useful life.<sup>70</sup> The point is that, after a period of time, repair and maintenance costs to keep the asset in useful operation rise exponentially, making alternative arrangements increasingly economically desirable.<sup>71</sup> This means that a plant like Four Corners will require continuing and increasing capital investments,<sup>72</sup> especially in an era where environmental concerns are paramount and SCRs have become mandatory. PNM's management was well aware of these considerations, yet the company intentionally failed to include assumptions for continued capital requirements in any Strategist<sup>®</sup> run that assessed continued operation of Four Corners with shutting the plant down.<sup>73</sup>

The Hearing Examiner asked NEE expert, Ms. Sommer, about the relevance of inputting capital expenditures in Strategist to determine an accurate picture of FCPP retirement versus continued operation:

Q. If you had a plant that was, let's say, in the area of 40 to 45 years old would you include in your inputs any projected capital expenditures that would be required to continue to operate that plant past the date where you had to make the decision to continue or not?

A. Well, I would certainly include them in the case where I continued to participate in that unit, where I continued to run that unit. The point -- the only way you get a valid result out of Strategist is to include all going-forward costs. So to the extent you have ignored some

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<sup>70</sup> WRA Exhibit 1: "The coal industry's decline has been a long time coming, thanks to the aging fleet of power plants."

<sup>71</sup> TR., O'Connell, 8/9/17, pp. 573-575 – discussion of older plants requiring more O&M and more capital expenditures. (At p. 574: "As plants age, their maintenance needs change."); Also see, NEE Exhibit 35, Direct Testimony & Exhibits of David Van Winkle, pp. 12-13: "[The] Strategist<sup>®</sup> runs were flawed anyway, as they omitted ongoing capital expenditures of \$532M that PNM admitted was an error in August 2014 in 13-00390-UT."

<sup>72</sup> Olson oversees PNM's generation capital budgeting process, including how priorities are established and how capital budgets are monitored and controlled. PNM is requesting \$300 Million in capital expenditures for San Juan Generating Station, Four Corners, and Palo Verde. (TR., Olson, 8/15/17, pp. 1468, 1470) ("Increased expenditures will increase revenue requirements; so, yes.")

<sup>73</sup> TR., O'Connell, 8/9/17, pp. 572-575.

costs associated with continued operation of a unit, then your result is no longer valid. It is really important to have things like capital expenditures associated with older units included in your Strategist modeling.<sup>74</sup>

...

Q. [I]f you didn't include those capital -- projected capital costs, and you did not do it because you, generally, don't incorporate capital cost improvements for the rest of your portfolio, would that make a difference?

A. Oh, absolutely, yeah.<sup>75</sup>

Q. Explain that.

A. Yeah, I don't -- that doesn't strike me as good practice in resource planning. Strategist is, basically, making choices about new systems to add or retire, assuming you give it that option on the basis of going-forward costs. You should ignore some costs, so you appropriately do not include, you know, plant amortized balances, for example. But you should definitely include costs that your customers will face going forward. So the model can say, okay, these are the costs of resource A, and these are all of the costs of resource B, and choose whichever path is the least cost. That is kind of basic good practice in integrated resource planning.

Q. Is there, essentially, a canceling out of costs that occurs if you don't consider any capital cost that with improvements for either the system or the plant you have to make the decision about continuing or not?

A. That seems like a risky proposition to me, because there's no way -- well, it seems unlikely that the capital expenditures for resource A are going to be identical to the capital expenditures for resource B. So why not take the more transparent path, which is to include all the costs for all resources into your modeling.<sup>76</sup>

Q. Does the fact that the resource that you're making the decision about is nearly 40 to 45 years old, have any relevance in that analysis?

A. Yeah. In fact, I think that would make it more urgent to include potential capital expenditures, because when you're getting to that lifetime, whether you're talking about a coal-fired power plant or wind turbines, it seems likely that you're going to have to do some major maintenance. Whether that is replacing the turbines on either a wind farm, or coal-fired power plant, or something less expensive than that. So it seems to me that not only would you want to make sure that those capital expenditures are included in your Strategist modeling, but you would want to make sure that your testing, whether continuing to spend money on that power plant at all, or continuing to operate it effectively, makes any sense. Because unless you give Strategist the option to retire the plant, it is not going to say

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<sup>74</sup> TR., Sommer, 8/14/17, pp. 1266-1267.

<sup>75</sup> TR., Sommer, 8/14/17, p. 1267.

<sup>76</sup> TR., Sommer, 8/14/17, pp. 1267-1268.

-- it's not going to flag for you, you are going to spend \$100 million on this plant. Does that make sense? You have to give Strategist the explicit option to evaluate that particular scenario.<sup>77</sup>

One reason for this omission is likely because ongoing capital expenditures are critical to PNM's business model. The model, as made repeatedly clear to investors, is that investing in "Core Capital" leads to increasing the rate base revenue, from which follows growth in earnings and growth in dividends for shareholders. (See (i) NEE Exhibit 1: "2012 Analyst Day," Dec. 7, 2012; (ii) NEE Exhibit 2: "Investor Meetings," Mar. 2013, pp. 7, 8 & 10; (iii) NEE Exhibit 3: "Q2 2013 Earnings Presentations," Aug., 2, 2013, p. A-3; (iv) NEE Exhibit 4: "EEI Financial Conference,"<sup>78</sup> Nov., 2013, pp. 6 & 7; (v) NEE Exhibit 5: "2014 Earnings Guide Presentation," Dec. 6, 2013, p. 13; (vi) NEE Exhibit 22: "2011 Earnings Presentation," Feb. 29, 2012, pp. 12, A-5, A-6; (vii) NEE Exhibit 23: "Q1 2012 Earnings Presentation," May 4, 2012, pp. 13, A-3, A-4) and (viii) NEE Exhibit 31: "Investor Meetings," June 2017, pp. 6, 7, 16.)

Thus, it is undisputable that increased capital expenditures (Core Capital) are a key part of the PNM business model.<sup>79</sup> Of course, this model only works if PNM is able to have these capital expenditures included in the rate base through applications for rate increases, such as in

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<sup>77</sup> TR., Sommer, 8/14/17, p. 1269

<sup>78</sup> TR., Ortiz, 8/7/17, p. 175 (Pat Vincent-Collawn, PNM CEO, is also the chair of the Edison Electric Institute and before that she was the vice chair.

<sup>79</sup> TR., Olson, 8/15/17, pp. 1493-1495. At p. 1494: "It does demonstrate that PNM generation capital expenditures is a piece of the overall capital plan."; TR., Ortiz, 8/7/17, p. 176 ("The long-term goal is to provide top quartile total return to shareholders.") At p. 177 ("[G]iven the projected capital needs of the business, we identify that we will have rate base growth and that will come from forecasting and renewable core capital and environmental control and replacement power. And if there's rate base growth, then that creates a potential for earnings growth and that can create the potential for dividend growth.") At p. 178 ("Rate Base Growth: Sources of Core Rate Base Growth." The projected core capital plan for 2013 through 2017 for PNM Resources is 1.8 billion.") At p. 179 ("[W]e have a lot of capital needs at our generating facilities.")



the instant proceeding.

Despite the obvious importance of “maintenance capital” expenditures in modeling the comparison of shutting down Four Corners and keeping the plant operational until 2031, PNM answered NEE Interrogatory 12-1 that: “Prior to August 2014, PNM did not include ongoing maintenance capital in Strategist modeling.” PNM’s answer to Interrogatory 12-1 continued: “Of that total Four Corners Power Plant (“FCPP”) Unit 4 capital cost expenditures were \$46.9M and Unit 5 capital cost expenditures were \$41.6M. The sum of the FCPP capital cost expenditures equals \$88.5M.”<sup>80</sup> The \$88.5M does not include ongoing Operation and Maintenance (“O&M”).<sup>81</sup> The ongoing O&M costs were included in the 2012 Strategist runs but the ongoing capital expenditures were not.<sup>82</sup> This, despite the fact that PNM was aware in 2012 that those \$88.5M dollars in capital costs would need to be expended to continue with Four Corners.<sup>83</sup> The \$88.5M was PNM’s estimate in 2014 for ongoing capital expenditures at FCPP, and in 2012 the actual cost of ongoing capital expenditures would have been higher.<sup>84</sup>

The May 2012 Strategist<sup>®</sup> runs performed by PNM indicate cost savings of \$33M for “Eval D” and \$44M for “Eval C,”<sup>85</sup> (not shown on CMO-3, but shown on PNM Exhibit 12, O’Connell Rebuttal, PJO-3), respectively, to continuing operation of Units 4 and 5 at Four Corners. When aggregate capital costs of \$88.5M are added, as they should have been originally,

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<sup>80</sup> NEE Exhibit 21.

<sup>81</sup> TR., O’Connell, 8/9/17, p. 571. At p. 572 (“The ongoing O&M costs are captured in the O&M category. The \$88.5 million is just any capital investment that needs to be made; not the cost to maintain that investment after it’s been made.”)

<sup>82</sup> TR., O’Connell, 8/9/17, p. 572.

<sup>83</sup> TR., O’Connell, 8/9/17, p. 573.

<sup>84</sup> TR., O’Connell, 8/9/17, p. 583.

<sup>85</sup> No one can explain why “Eval C” was omitted from the CMO-3 chart. TR., O’Connell, 8/9/17, p. 488; TR., Olson, 8/15/17, p. 1492. “Yeah I believe Eval C is the closest to what actually happened.” TR., O’Connell, 8/9/17, p. 511.

the result is that continuing the Four Corners operation is \$55M and \$44M more costly, respectively, than closing those units. It is now unrefuted that PNM relied on the May 2012 Strategist<sup>®</sup> runs to determine that it would continue its position at Four Corners, yet those runs demonstrate that it was more cost effective to retire Four Corners than to continue operation. These missing maintenance capital expenditures which are the subject of this rate case include capital expenditures that are now much larger than originally projected.<sup>86</sup> Even if one excludes capital expenditures, which NEE does not concede is fair, reasonable, or appropriate given PNM's public claim to investors that capital expenditures play a central role in its "earnings growth trajectory,"<sup>87</sup> there is *less than a half-a-percent difference* (out of an eight billion dollar calculation) between the retire FCPP scenario and the continued operations scenario. A prudent utility manager would have carefully scrutinized this close call.<sup>88</sup> These figures are so close to equivalency on a total \$8 billion decision (0.4%) that it should have triggered a more in-depth analysis. NEE submits that if other PRC-required considerations of risk and uncertainty had been evaluated, the decision to invest further in FCPP was not a close call at all.

Mr. Gould, attorney for NMIEC, asked Ms. Sommer if a single financial run should be outcome determinative:

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<sup>86</sup> TR., Van Winkle, 8/14/16, pp. 1371: "So this is every major facility -- thermal units have significant ongoing capital expenditures to keep their plants operational for additional environmental reasons, or for safety reasons, that they have to spend every year. I mean, Palo Verde has spent, I think, if I remember right, \$3 billion in the last 20 years on ongoing capital expenditures. Large thermal units break, and things need to be replaced because of the thermal cycling. It is a significant cost part of the business that PNM has, and it is also a significant part of their overall business model, that ongoing capital expenditures are a very significant part of their overall rate base."

<sup>87</sup> NEE Exhibit 22, p. 12, and NEE Exhibits 1-5, 23 and 31, including to EEI, which the PNMR/PNM CEO is now also the chair of EEI (TR., Ortiz, 8/7/17, p. 175), communicating vociferously about how to increase capital, to increase rates, to increase earnings growth for investors.

<sup>88</sup> TR., O'Connell, 8/9/17, p. 505.

Q. “[W]ould it be proper, in your mind, for a utility to base a resource decision on a single [Strategist] run?

A. As a general matter, probably not, no.”

...

“[T]ypically, utilities don’t say this is the model result. This is exactly what we’re going to do. So there is a little bit of a disconnect there between decision-making and modeling. And you initially talked about a -- doing a single Strategist run, and then you switched to talking about making a decision about a resource. And those are related things, certainly, but not exactly the same thing.”<sup>89</sup>

Further, PNM has admitted that there were major changes between 2012 and the time of its decision to continue Four Corners in December, 2013. These changes include load forecast, natural gas pricing, outlook for replacement resource cost (solar and wind), and the impact of distributed generation – i.e., rooftop solar, peak demand, energy sales, costs of pollution control and other matters.<sup>90</sup> The prudence standard requires one to stand in the shoes of the decision maker at the time the decision was made and take into consideration all factors that were known, or should have been known, to the decision maker at the time and considered. PNM made its decision in December, 2013, relying on a 19-month-old Strategist<sup>®</sup> run that it knew or should have known omitted capital expenditures that PNM intended to rely on to boost its stock price, and without updating the run with revised assumptions about changed conditions that PNM knew existed.<sup>91</sup> Basing a 15- to 25-year decision of this magnitude on such inaccurate and flawed

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<sup>89</sup> TR., Sommer, 8/14/17, p. 1207

<sup>90</sup> TR., O’Connell, 8/9/17, pp. 456-461, and 466.

<sup>91</sup> TR., Van Winkle, 8/14/17, p. 1409: “Everything could have changed. I mean, the load forecast, the peak demand, energy sales, carbon, natural gas prices -- any variable you can think of, could have changed. I don’t know if they exactly did, but I haven’t compared item per item,

information goes beyond imprudence to the point of recklessness or intentional avoidance of the legal requirements for ratemaking. Certainly an inference can be drawn from PNM's decision not to include FCPP capital expenditures in its Strategist runs that its intent was to create the wholly false appearance that Four Corners would be part of a "least cost" portfolio, with the ensuing salutary effect on PNM's share price and the negative effect on the wallets of the ratepayers.

Asked by the Hearing Examiner what are the generally-accepted standards for how to run Strategist. Ms. Sommer answered:

I think if I were to evaluate Strategist modeling, I would be really interested in how well documented the inputs and outputs are, how well documented the analytical and decision-making processing that the modelers went through is.

I would be really interested in the types of resources that were evaluated. I would be of interested in the specific settings of the Strategist model that might influence the outputs, because there are certainly ways to make the model tell you the answer that you want it to tell you.

So, I guess, the bottom line is transparency above all, would be the best way to judge whether somebody is doing a quality job of Strategist modeling or not.<sup>92</sup>

PNM had no interest in making an informed decision prior to reinvesting and extending the life of FCPP. Consequently, that information could not be conveyed in a transparent way with the Commission, so it could, in turn, make an informed decision, consistent with its obligation to meet the public interest standard. Not only did PNM rely on outdated Strategist data, PNM chose not to issue an RFP<sup>93</sup> or take any other reasonable steps to determine

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but, yes, there are huge changes. I mean, we talked about this earlier. We've seen twice, where in a year and a half things have changed hugely. I mean, just from the end of 13-00390 to now, we've seen San Juan become un-cost effective, and that's not a very long period of time. So there are huge changes that can take place in these analyses."

<sup>92</sup> TR., Sommer, 8/14/17, pp. 1254-1255.

<sup>93</sup> TR., Olson, 8/15/17, p. 1474: "I'm not disputing that soliciting competitive bids isn't a good practice."; TR., O'Connell, 8/9/17, p. 519.

replacement power possibilities as alternatives to a significant reinvestment in Four Corners.<sup>94</sup> Nor did PNM conduct a formal appraisal of Four Corners to know if it was getting good value before it signed the dozen or so contracts.<sup>95</sup> PNM also didn't hire a market analyst to assess the market value<sup>96</sup> of Four Corners before signing those contracts to extend the life of Four Corners.<sup>97</sup>

Mr. O'Connell testified that PNM made the decision in May of 2012 to remain in Four Corners based on the Strategist analyses done at that time.<sup>98</sup> A comparison of the contemporaneous PNM Board memos from June 5, 2013 and October 22, 2013 (NEE Exhibit 41) and the PNM Board of Directors Resolutions of those same dates confirms this admission. (NEE Exhibit 43). Side by side, the memos, four months apart, show absolutely no change in analysis and no re-evaluation. Prudent utility management would not have relied on a 19-month-old financial analysis for a billion dollar financial commitment.

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<sup>94</sup> TR., O'Connell, 8/9/17, p. 519.

<sup>95</sup> TR., Olson, 8/15/17, p. 1568.

<sup>96</sup> Traditionally, New Mexico Courts make a determination based on a comparison of value between market price and actual price. *Hickey v. Griggs*, 738 P. 2d 899, 902, 106 NM 27 - NM: Supreme Court, 1987; *Jeffers v. Doel.*, 99 N.M. 351, 658 P.2d 426 (N.M. 1982); *Aboud v. Adams*, 84 N.M. 683, 507 P.2d 430 (N.M. 1973); *Conley v. Davidson*, 35 N.M. 173, 291 P. 489 (N.M. 1930). Anyone who has ever bought a house wants to know what the "prices are for comparable properties" ("comps" are, what the "comparables" are. What do other three bedrooms," in the same area sell for? What does a larger or smaller house in a similar neighborhood with a better public school sell for? What is the short-term rental like? These, and perhaps other factors, are to be considered.) In essence, *it is always prudent to evaluate the difference in values*. Here, absent any comparison of values it is impossible to assess or judge if PNM's 15- to 25 -year investment was based on fair market value. Here there was NO contemporaneous comparison of values and no evidence on which this Commission can determine cost effectiveness.

<sup>97</sup> TR., Olson, 8/15/17, p. 1567.

<sup>98</sup> TR., O'Connell, 8/9/17, pp. 577-578 and p. 601; Also, *see also* NEE Exhibit 17 and PNM Exhibit 12, Rebuttal Testimony in Support of Revised Stipulation & Exhibits of Patrick J. O'Connell, PJO-3.

**b) FCPP Is Not “Used And Useful”**

The Commission’s prior ruling in Case No. 2019 Phase II addressed the meaning of “used and useful”:

*Mere use alone, however, is insufficient to justify full rate base treatment, for a utility conceivably “use” much more capacity than necessary to provide reliable service by underutilizing each portion of its property. Implicit in a utility’s legal obligation to provide service at reasonable rates is the legal duty to provide efficient and economical service.*

Case No. 2019, pp. 76-77 (emphasis added).

In determining whether FCPP is used and useful under this definition, one must ask a series of questions, such as:

**(1) Does The Plant Run Efficiently?**

No.<sup>99</sup> The Hearing Examiners allowed expert testimony addressing the issue of whether Four Corners is used and useful<sup>100</sup> and addressing the corollary issue of the extent to which, in light of FCPP’s maintenance costs, it should be included in the rates that PNM seeks in this case to increase. On this issue, Mr. Olson testified: “I see the forced outage rates by year for Four Corners 4 and 5. And so I see values from 18 percent to 33 percent during that period of time.”<sup>101</sup>

“Q. [Y]ou just told us that it’s not available, between those years, 18 percent of the time to 33 percent of the time; is that right?

A. Yes.

Q. Okay. So that if the average is 25 percent between those numbers, does that mean that the plant is only available three-quarters of the time that PNM needs it; because other

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<sup>99</sup> NEE Exhibit 35, Direct Testimony & Exhibits of David Van Winkle, pp. 16-20.

<sup>100</sup> TR., 8/15/17, Olson, p. p.1535: “I don’t dispute -- PNM has not been happy with performance. ... I was given the impression that a lot of money would be required.” 1538: “again, I’m not disputing that -- that the system health process is intended to improve the reliability of the facility.”

<sup>101</sup> TR., 8/15/17, Olson, p. 1529.

times, it's forced out, something broke, something's not working, it's not available for electricity, you said.

A. Yes.”<sup>102</sup>

Mr. Olson further explained that:

“[B]ecause of the uncertainty leading to the coal agreement, Southern Cal Edison's departure and all those things, that the owners were reluctant to continue to invest in that facility until it got -- those items got cleared. ... [T]here is a lot of catch-up to be done at this point in time, because a lot of maintenance had been deferred because of the uncertainty; and that's occurring now. ... [T]here is a lot of catch-up to be done at this point in time, because a lot of maintenance had been deferred because of the uncertainty; and that's occurring now.”<sup>103</sup>

...

“Q. I'm going to show you what's been marked as New Energy Economy 42. And I think that this confirms what you said, which is that this is an e-mail from the other owners. And you're included on that.

And it indicates here that the Four Corners Coordinating Committee, which was -- which was made up of the co-utility owners, were concerned about the plant's poor performance in August of 2013; right?

A. Without question.”<sup>104</sup>

As explained in Mr. Olson's testimony, PNM was deferring needed plant investment to keep FCPP running and safe because all other co-owner utilities refused to spend the money given the uncertainty, in 2012 and 2013, of whether the plant would actually continue past 2016 and with unified participation.<sup>105</sup>

Mr. Olson agreed that Four Corners needed serious capital investment to prop it up and keep it operational:

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<sup>102</sup> TR., 8/15/17, Olson, p. 1531.

<sup>103</sup> TR., 8/15/17, Olson, p. 1532.

<sup>104</sup> TR., 8/15/17, Olson, pp. 1533-1534.

<sup>105</sup> TR., 8/15/17, Olson, p. 1532; *see also*, NEE Exhibit 42.

-- refers the reader to 47 and 48 of your Direct Testimony, talking about the capital expenditures required to -- to help this plant perform; right? You call it a -- APS's system health process; right?

A. Yes.

Q. And so this system health process is \$58 million dollars of capital expenditures in this case; right?

A. Yeah. I don't know if all those are specifically around improving the reliability. But there is certainly a substantial piece to improve the reliability portion."<sup>106</sup>

Based on Mr. Olson's testimony, PNM would be hard pressed to show that Four Corners is used and useful. Given the plant's lack of reliability (generating only 75% of the time without disruption due to breakdowns and outages) and the admitted need for a large infusion of capital to improve its poor performance, PNM can hardly make the case that FCPP provides efficient and economical service.

## **(2) Is FCPP An Appropriate Resource To Meet Customer Load?**

To determine if a resource is efficient one must not only evaluate operational efficiency but also evaluate if the resource mix supports customer energy requirements (i.e., does it provide operational efficiency?) and does the resource itself match the profile of peak demands (i.e., is FCPP coal an appropriate resource to meet peak need?)

PNM's customer requirements are becoming "peakier"<sup>107</sup> and, consequently, we need flexible resources to meet peak demands.<sup>108</sup> FCPP is not an appropriate resource to meet PNM's changing customer load profile.<sup>109</sup> Mr. Olson testified that FCPP does not have quick start

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<sup>106</sup> TR., Olson, 8/15/17, pp. 1536-1537.

<sup>107</sup> TR., Van Winkle. 8/14/17, pp. 1365, 1400.

<sup>108</sup> NEE Exhibit 16 (PNM's Board of Directors cites the need for "transitioning of PNM Generation portfolio to fewer baseload resources.")

<sup>109</sup> NEE Exhibit 35, Direct Testimony & Exhibits of David Van Winkle, pp. 16-20.



capability.<sup>110</sup> He further testifies that Luna and Afton have ramp rates 2 to 3 times faster than FCPP.<sup>111</sup>

New Energy Economy challenges the operational efficiency of Four Corners. Mr. Olson claims in his rebuttal testimony that FCPP “performs well based on its vintage”<sup>112</sup> but that is contradicted by his live testimony which confirms that in the 2012-2013 timeframe, and before PNM recommitted to Four Corners, PNM was not happy with the performance of the plant. As proof of the recognized need to improve FCPP’s efficiency, \$58M of the capital expenditures requested by PNM is to make the plant operate more reliably and the other approximately \$90.1M is to pay for SCR pollution controls.<sup>113</sup>

The inadequate EFOR performance at FCPP<sup>114</sup> means that PNM must run gas plants more or buy more energy from neighboring utilities to meet customer peak demands, thus increasing costs to ratepayers.<sup>115</sup> It also means that the 200 MW at FCPP is insufficient and cannot be relied upon to serve customer summer peak demands.<sup>116</sup> These two consequences of poor reliability at FCPP cause “unnecessary duplication and economic waste.” *See State ex rel. Sandel v. NMPUC*, 980 P. 2d 55, 62-65, 127 NM 272 (N.M. 1999); § 62-8-1 NMSA (“Every rate made, demanded or received by any public utility shall be just and reasonable.”); § 62-8-2 NMSA (“Every public utility shall furnish adequate, efficient and reasonable service.”) The Commission has an obligation to balance the interest of consumers and the interest of investors “... to the end that reasonable and proper services shall be available at fair, just and reasonable

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<sup>110</sup> TR., Olson, 8/15/17, p. 1568.

<sup>111</sup> TR., Olson, 8/15/17, pp. 1568.

<sup>112</sup> PNM Exhibit 23, Olson Rebuttal, p. 10.

<sup>113</sup> TR., 8/15/17, Olson, p. pp. 1483-1484, 1533-1534, and 1536-1539.

<sup>114</sup> NEE Exhibit 35, Direct Testimony & Exhibits of David Van Winkle, pp. 16-20.

<sup>115</sup> TR., 8/15/17, Olson, p. pp. 1528-1529.

<sup>116</sup> *Id.*

rates, ... without unnecessary duplication and economic waste.” *In re Petition of PNM Gas Servs.*, *supra*, at 391, *citing* NMSA 1978, § 62-3-1(B); §62-3-2 A (2) NMSA (“It is the declared policy of the state” to provide service without “unnecessary duplication,” and “economic waste.”)

The Four Corners Coal Plant is no longer used and useful because the capacity generated from this plant is not needed to meet customer load, it is the wrong resource because it’s not flexible to meet the shift towards a “peakier” load profile, it underperforms, and is unreliable during the times it is most needed by PNM for ratepayers. Case No. 1440, Order on Cost of Capital and Revenue Requirements 17-19 (12-29-78) (finding plant to no longer be used and useful because of reduced service to customers).

FCCP’s unreliability and age is of a piece with PNM’s failure to include the plant’s anticipated capital expenditure requirements in PNM’s Strategist runs. If one considers the following factors, however, the true picture emerges: 1) The plant is old and unreliable, with a great deal of deferred maintenance; 2) The plant’s condition will require hundreds of millions of dollars in capital expenditures to keep it running, for which PNM will seek reimbursement from the ratepayers; 3) In performing its stale analysis of FCCP’s cost effectiveness, PNM withheld capital costs from its Strategist runs, resulting in a deliberately false perception that FCCP is a cost-effective resource as compared with competing resources that are not decrepit and will not require enormous capital investments over the coming years; 4) PNM’s strategy for its investors includes constantly looking for ways to increase capital expenditures on which it will obtain guaranteed returns, driving up its profits and driving up its stock price. Its understandable why PNM had an interest in extending the life of Four Corners. The question is will the Commission protect the ratepayers from PNM’s insatiable greed.

**c) Explicit Violation of Commission Order**

On November 24, 1982, the Commission issued an Order to PNM stating as follows:

Herinafter should PNM: (1) receive a written notification which allows PNM or any other party to acquire any additional undivided percentage interest in any San Juan Unit or Four Corners Unit, (2) acquire, modify or clarify any right of first refusal in any existing Four Corners, San Juan, or Arizona Nuclear Power Project unit, or (3) grant or modify any right of first refusal in any existing Four Corners, San Juan or Arizona Nuclear Power Project unit, then PNM shall within ten (10) days from the date of receipt of any such notice, acquisition or any such right, the giving, modification or clarification of any such right, file a copy of same with the Commission, the AG and counsel for SRIC.

In a filing to the Commission dated June 16, 2014, PNM reported that it had received a letter on June 4, 2014 from El Paso Electric Company (EPE) regarding Four Corners, specifically giving notice of EPE's intent to assign its interest in Four Corners Units 4 and 5 to Arizona Public Service Company (APS), and APS's intent to acquire such interest. Such notice by EPE triggered the right of first refusal by which PNM had the right to participate in the purchase under Section 13 of the Four Corners Project Co-Tenancy Agreement.<sup>117</sup>

This filing was intended to be in compliance with PNM's obligation under the Order to notify the Commission within ten days of receiving written notice of intent by PNM, or any other party, to acquire an additional undivided interest in Four Corners, or modify or clarify any right of first refusal in Four Corners.

But PNM had known about this transaction long before this June 16, 2014 notice to the Commission. In a memorandum to the Board of PNM, dated December 18, 2013, Patrick Apodaca, Esq., Senior Vice President and General Counsel of PNM, informed the Board as follows:

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<sup>117</sup> NEE Exhibit 6.

1. PNM management had reported to its Board in November 2013 that EPE had announced to PNM, and the other owners, its intention to exit the Four Corners project.<sup>118</sup>

2. Subsequently, APS had taken the position, which was communicated to PNM, that, of the options that were then available, it advocated the acquisition of EPE's interest by other owners, including PNM.<sup>119</sup>

3. Since the Board meeting PNM had been working with APS and other owners to reach terms to acquire EPE's interest with PNM maintaining it would buy its pro-rata share (15MWs of EPE's 108 MWs).<sup>120</sup>

4. On December 17, 2013, APS had informed PNM that it would be acquiring the entire EPE interest<sup>121</sup> as the owners (other than PNM) had declined participation.<sup>122</sup>

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<sup>118</sup> NEE Exhibit 6, PNM Exhibit NEE 1-7 (7-12- 17 Supplemental) Page 13 of 22 ("We reported at the Board meeting that, in late November, El Paso [Electric] announced to the other owners that it will exit from the project in 2016 and that it will not sign any of the proposed extension amendments.")

<sup>119</sup> *Id.*, see also NEE Exhibit 9 and NEE Exhibit 11. (The subject line is "RE: El Paso's 7%").

<sup>120</sup> NEE Exhibit 6, PNM Exhibit NEE 1-7 (7-12- 17 Supplemental) Page 13 of 22 "Throughout these discussions PNM maintained that it would buy its pro rata share (15 MWs) of El Paso's 108 MWs.); NEE Exhibit 11 (Email from Madonna Bixby on December 20, 2013, at 3:58pm: "I called Sherri [Durand, senior Corporate Counsel, Tucson Electric Power Company, another co-owner utility] to let her know that, while I hadn't been able to confirm with Chris [Olson], my understanding was that PNM was probably less concerned about (sic) this issue than TEP because a failure of EPE and APS to reach agreement would likely just put PNM back in the position of acquiring 15 MWs.")

<sup>121</sup> NEE Exhibit 6, PNM Exhibit NEE 1-7 (7-12- 17 Supplemental) Page 13 of 22 ("Yesterday afternoon APS advised the owners that it plans to buy all of the El Paso MWs, presumably because of Tucson and SRP's reluctance to participate and El Paso's intransigence on various terms that made reaching agreement among other owners difficult.")

<sup>122</sup> NEE Exhibit 40 ("TEP and SRP would not agree to acquire more MW."); NEE Exhibit 10 (email from Leonard Sanchez to Senior Corporate Counsel, Madonna Bixby: "Patrick [Apodaca] asked if we intended to make explicit that PNM is not in the deal unless all the participants are in the deal. The latest draft continues with the thought that TEP is not a party to the transaction." And email from Madonna Bixby to Leonard Sanchez: "I also thought I should clarify my last statement. I should have said that, although we need to know what's in the newest redlines *and make our positions clear*, there's minimal value in sending back our redlines until we know who

5. Mr. Apodaca concluded that this was a “positive outcome” for PNM with the implication that PNM would not be exercising its right of first refusal.<sup>123</sup>

NEE Exhibit 40 states: “ISSUES: PNM’s ROFR [Right of First Refusal]<sup>124</sup> are preserved. Until there is a sales agreement, NMPRC does not need to be notified.”

This is a clear violation of PNM’s notice obligation under the Order. The Order states that once PNM has received “written” notice of the event triggering the notice requirement an event that “allows PNM or any other party to acquire any additional undivided percentage interest in any San Juan Unit or Four Corners Unit”, it must, within 10 days, so notify the Commission. The Order calls for action if PNM, “or any other party” receives the requisite notice. It is clear that PNM and APS were on notice as of November 2013 of the opportunity that PNM, APS, and the other owners had to acquire the EPE interest in Four Corners. Notice of this opportunity was not given to the Commission until after the fact, *over six months later*, with PNM’s filing on June 16, 2014. PNM is in direct violation of the Order.

The PRC should issue a Rule to Show Cause why PNM should not be held in contempt and why sanctions should not be issued for failure to adhere to an explicit Order of the Commission.

**d) PNM’s Decision Not To Abandon Four Corners Was Driven By Tactical Reasons Rather Than Its Legal Obligation To Make Prudent Investment Decisions And Consider The Public Interest.**

The preponderance of the evidence shows that when PNM decided to extend its

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the parties are and the owners have agreed on the fundamental terms for going forward with the proposed transfer.”) (emphasis in the original.)

<sup>123</sup> NEE Exhibit 6, PNM Exhibit NEE 1-7 (7-12- 17 Supplemental) Page 13 of 22.

<sup>124</sup> TR., Olson, 8/15/17, p. 1508.

ownership of the 200 MW at Four Corners it never seriously considered other alternatives to significantly investing and extending its contractual commitment. It simply decided to keep Four Corners and adopted an earlier, flimsy and misleading analysis that had been manipulated so that keeping Four Corners appeared to be most cost effective. Even then, the best that could be shown was that keeping Four Corners, without inclusion of capital costs, was less than half a percent more economically favorable to ratepayers than simply shutting it down. The record evidence in this case establishes without contradiction that the costs of shutting down FCPP versus keeping it open were as equivalent as could possibly be, given the magnitude of the numbers involved, thus triggering PNM's obligation to select less environmentally harmful resources than a decrepit coal plant. After including capital costs, there is no contest. Shutting FCPP was most cost-effective. But PNM didn't elect to close it, instead electing to keep it open and invest more in it.

A December 2013 email from PNM's Senior Vice President and General Counsel, Patrick Apodaca, to PNM's senior management and the PNMR Board of Directors, explains why PNM wasn't interested in determining if its position to remain at Four Corners was cost effective for ratepayers.<sup>125</sup> In essence, it would have been problematic for PNM to exit Four Corners on the ground that coal generation was uneconomic because the company was simultaneously arguing for the purchase of *more* coal in its San Juan BART filing before the PRC (abandonment and replacement power in Case No. 13-00390-UT) case, which it filed after Apodaca's email.).

Further investment in FCPP, regardless of ratepayer cost consequences, was consistent with PNM's repeated statements that retention of all of its Four Corners shares were:

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<sup>125</sup> NEE Exhibit 6, PNM Exhibit NEE 1-7 (7-12- 17 Supplemental) Page 13 of 22, "Among other things, maintaining our same level of ownership at Four Corners avoids a possible distraction with out BART filing with the PRC next week and our negotiations with the owners at SJGS."

- 1) integral to investments in required ongoing core capital expenditures (pollution controls, etc.) at a 50-year old coal plant for maintenance and the plant to operate safely and “reliably,” which also equates with increased rate base growth and increased earnings and concomitant investor/shareholder dividend growth;<sup>126</sup> and
- 2) avoiding the regulatory spotlight for abandonment (disinvestment) in an uneconomic coal plant that is ten miles away from another mine mouth coal plant when PNM was simultaneously requesting both abandonment for half of the San Juan Generating Station (“SJGS”) coal plant AND certificate of convenience and necessity (“CCN”) approval from the same regulatory body of more coal shares at another aging and underperforming coal plant.<sup>127</sup>

Sometimes, the truth comes bubbling up: Mr. O’Connell testified in response to the Hearing Examiner’s questions that the choice was made by PNM to remain in FCPP in May 2012<sup>128</sup> and thereafter there was no reconsideration:

[A]t that time, since we were retiring San Juan, Four Corners was also more valuable. So abandoning Four Corners and replacing with a Natural Gas Combined Cycle is essentially an option that could have been considered. But the first step was should we abandon Four Corners? And the answer to that is, “No.”

...

Q. So the -- the January 2014 Strategist run, did that not involve a -- a Combined Cycle plant?

A. I believe it did, if you also retired Four Corners.

Q. And that’s the option you were evaluating; right?

A. We weren’t evaluating that option, because it was more expensive. So we didn’t go take the step of saying, “How, if I’m retiring Four Corners...” -- because retiring Four

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<sup>126</sup> See NEE Exhibits 1, 2, 3, 4, 5 and 22, 23 and 31.

<sup>127</sup> TR., O’Connell, 8/9/17, pp. 592-593.

<sup>128</sup> TR., O’Connell, 8/9/17, pp. 578, 601.

Corners already had been shown many times to be something that was more expensive.<sup>129</sup>

...

Q. Did you consider at that time [December 2013] doing a run that did not involve the continuation of Four Corners?

A. No, I did not.

Q. Did you have any discussions with anyone at PNM in December [2013] about whether to do a Strategist run that involved the retirement of Four Corners?

A. I don't remember, specifically, discussions about Strategist. But I do know that obviously, 2012, that was a big topic of discussion. Then later in 2012, the focus became regional haze at San Juan, with all the work that we had done in Strategist up to that point. And just the concept would be if you're retiring a baseload plant out of your portfolio, that makes the other baseload plants in your portfolio more valuable. So that would have been at least a conclusion, if not the discussion.<sup>130</sup>

Mr. Gould, counsel for NMIEC, probed NEE's expert, Steven Fetter, about his opinion regarding PNM management's lack of contemporaneous consideration given the magnitude of the decision and why Mr. Fetter compared El Paso Electric's process path to PNM's and didn't look at any other utility's process path leading up to the decision.<sup>131</sup>

"Well, Mr. Gould, let me tell you: Had I not looked at El Paso, had I looked at nothing other than what PNM did -- I've served on a board of a regulated utility for 15 years now. It went through a relatively large merger, taken over by Fortis of Canada about four years ago. Any material fact during that four- or five-month consideration that management learned about was communicated to the board, either in person, by telephone, or by confidential e-mail structure setup.

I'm just very surprised that there was not a full provision of information to the PNM board in the November-December time frame of 2013. And what struck me was, it just didn't ring right to me.

What -- what would have led there not to be such a sharing of information with the board? And I-I- recall, there's an old Sherlock Holmes story in which the key piece of evidence was that -- the dog that didn't bark.

Q. "The Hound of the Baskervilles"?

A. Well, this one was something called a Sylvan [sic] Blaze, about a racehorse named Sylvan Blaze, and the horse was stolen, and they were -- Sherlock Holmes was trying to figure out why the dogs didn't bark. And it turns out that the horse was stolen by its own

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<sup>129</sup> TR., O'Connell, 8/9/17, p. 593.

<sup>130</sup> TR., O'Connell, 8/9/17, pp. 604-605.

<sup>131</sup> TR., Fetter, 8/11/17, pp. 983-984.



trainer that the dog knew. And so I said to myself, Why didn't the dog bark in November or December of 2013? And in reviewing the evidence, I found NEE Exhibit 6 -- and I have part of it in front of me. And it's a memo from Patrick Apodaca to the board of PNM, and a sentence about -- most of the way down he states to the board:

"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 SJ -- owners of SJ -- San Juan -- "SJGS.""

And to me, I found the dog that didn't bark. There was a reason why they didn't do that fulsome analysis and share it with the board."

...

Q. So from your answer, I take it that your concern about imprudence is entirely based on this one sentence from an e-mail between the chief counsel, who was a member of the board, and whoever he was communicating to in that e-mail.

You think that's sort of the pivot point of your decision-making process about whether or not PNM exhibited prudence?

A. Not at all.

Q. Okay.

A. What leads me to feel that the process was imprudent was the total lack of interaction with the Commission, either at Commission level or Staff level, of these pending issues, followed by -- from what I can see, the last major examination of the potential to proceed with Four Corners was in May 2012.

To me, as a current board member and former regulator, I almost find that to be utility management malpractice -- [] -- not to provide such a full examination contemporaneous with the time that the decision has to be made by the board."<sup>132</sup>

#### **e) PNM Never Considered Alternatives To Four Corners Power Plant**

Under PRC precedent, a utility must consider alternatives before going forward with a project, and a new resource will not be approved if a better alternative is available. *In re Public Service Co. of New Mexico*, Case No. 2382, adopted by Final Order, 166 P.U.R. 4<sup>th</sup> 318 (1995);

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<sup>132</sup> TR., Fetter, 8/11/17, pp. 977-978, 1030-1031 ("This memo says to me, maintaining our same level of ownership at Four Corners to avoid a possible distraction with other matters, that I'm guessing were important to management and the board, as opposed to adding more or subtracting all. It was to avoid a possible distraction. And as a board member, to me, that says that's why materials weren't provided which could have supported the decision to possibly get rid of Four Corners going forward.")

Recommended Decision 98 (7-5-95), adopted by Final Order (11-20-95), *cited* in Corrected Recommended Decision, 15-00261-UT, Aug. 15, 2016, pp. 89-99.

The preponderance of the evidence shows that when PNM decided in May 2012 to continue its position in FCPP it never adequately, much less seriously, considered ending its use of Four Corners following the expiration of its coal contract and co-tenancy agreements in 2016. With just 0.4% difference between the two Strategist runs (showing the costs of PNM's portfolio both with and without FCPP), a prudent utility manager certainly would have considered operational efficiency, reliability, current and anticipated environmental regulations, etc. in the calculation of the decision.

The June and October 2013 Memos and Resolutions, NEE Exhibits 41 and 43, from PNM management to the Board of Directors that recommended re-investing at Four Corners was based on stale information and no adequate evaluation of resource generation alternatives. Those same documents considered and then dismissed the need to inform the PRC. This is consistent with Mr. O'Connell's statement that: "The point there is PNM is planning for Four Corners to be there ... so it is -- the number that we plug into the model for the capacity we expect, for solar, Four Corners, wind, all of that, is what drives the planning analysis."<sup>133</sup>

NEE Exhibit 24 is the only information in the record regarding any substantive "alternatives" analysis. What it shows is that Strategist chose to install 50 MW of solar, 15 MW of geothermal and a 40 MW aeroderivative (gas plant).<sup>134</sup> Had PNM chosen to use those recommended resources from 2012-2016, our entire energy path would have been different, including, most importantly, less costs for ratepayers as well as much less environmentally

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<sup>133</sup> TR., O'Connell, 8/9/17, p. 523.

<sup>134</sup> TR., O'Connell, 8/9/17, p. 518.

irresponsible. There would not be a \$148M request in this case for capital expenditures just to keep these antiquated plants functional.<sup>135</sup>

PNM's analysis included only retiring FCPP, in Eval B, or retaining its non-performing existing resource (at different coal prices). Essentially that means PNM looked at *only two* different possibilities. This can hardly meet the definition of evaluation of "all feasible resources" on a consistent and comparable basis, taking into consideration risk and uncertainty (with preference given to resources that minimize environmental impact). NMSA 1978, § 62-17-10; §17.7.3.6, §17.7.3.9.F (1), and §17.7.3.9.G (1) (2) (3) NMAC. Aside from PNM's significant omission of capital expenditures, this "alternatives analysis" is not only insufficient but lacking even with respect to an analysis of whether to continue FCPP.

While PNM denies that it continued its ownership at FCPP to increase its rate base and earnings, this denial is contradicted by repeated public statements made by PNM senior management not only to investors but to an association of utility executives about how to increase earnings by investing in generation plants so as to increase rate base, including adding pollution controls and other capital-intensive plant expenditures.<sup>136</sup> At what point will PNM be required to be consistent when its statements to shareholders are compared with its statements to the New Mexico PRC?

In fact, PNM had several incentives to retain its interests in FCPP, as more fully discussed above, because 1) it could increase capital expenditures in rate base that would

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<sup>135</sup> NEE understands that the capital expenditure cost numbers are current. Nevertheless, the point must be made that there was no consistent and comparable assessment of various feasible generation resources in 2013 (even like the 2009 Board report, attached as PNM Exhibit 12, O'Connell Rebuttal, PJO-6).

<sup>136</sup> NEE Exhibits 1-5, 22-23, and 31.

increase earnings growth and dividend growth; and 2) it did not want to undermine its position with the PRC regarding what it deemed more important at the time— its SJGS abandonment and CCN request for more coal capacity.

This Commission has consistently upheld the regulatory principle and practice “PNM bears the burden of demonstrating that its proposed resource choice is the most cost effective resource among feasible alternatives.”<sup>137</sup> And in the last rate case, the Hearing Examiner wrote a thorough explanation of the requirement that a utility prove that it considered alternatives *before* it made a significant investment for which it seeks cost recovery. Corrected Recommended Decision, 15-00261-UT, Aug. 15, 2016, pp. 89-99. Other state commissions have ruled similarly. *See e.g., BP Pipelines (Alaska) Inc.*, Docket No. IS09-395-004 *et al.*, 2014 WL 897389, ¶ 130 (AL Reg. Comm’n 2-27-14) (“[W]hile the Carriers need not consider *every possible* alternative, they should consider the more reasonable options and provide some rationale for selecting one option over the other.”), *corrected on other grds. by* Errata (3-7-14).

There was no way for PNM to know if FCPP was still cost-effective in 2013 without doing a reliable economic analyses, including resource comparisons, and the record is devoid of such evidence. Record testimony showed that PNM failed to do any contemporaneous economic analysis to determine whether the FCPP with the new CSA was cost-effective, with the necessary risk-adjusted economic analyses, and, thus, economic, reasonable, and in the public interest.

“We expect a utility to fully evaluate all major investments that have implications for the utility’s resource mix—including those where the investment will extend the useful life of an asset and where a plant shutdown is an option.” *In re PacifiCorp*, 2012 WL 6644237, UE 246,

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<sup>137</sup> Case No. 16-00105-UT, Final Order, May 24, 2017, ¶ 10.

Order No. 12 493, § IV(C)(3)(e) (Or. P.U.C. 12-20-12). PNM made no such financial evaluations to determine the cost-effectiveness of its decision to exit ownership versus double-down. In *PacificCorp*, the OPUC faulted Pacific Power’s analyses which had been done *three to six months* before contract execution, finding that a prudent utility would have reevaluated where there was a material reason to do so. Here, PNM relied on an analysis done **19 months** before it executed at least a billion-dollars worth of contracts that have short- and long-term consequences.

**f) PNM Never Considered the Ongoing Financial Risks Associated with the Four Corners Power Plant Coal Supply Agreement**

In addition to the cost increase from the coal contract there were associated cost risks of continued FCPP operation including, but not limited to, increasing costs of pollution controls, costs from regulatory compliance, and costs of litigation.<sup>138</sup> Mr. Olson admits under cross-examination: SCR pollution control costs at FCPP have risen from \$66M (O’Connell Rebuttal p. 9)<sup>139</sup> in 2012 to \$75.4 million in 2013<sup>140</sup> to \$90.1 million today— a 52% increase from 2012-2017.<sup>141</sup> PNM provided no evidence that it took these foreseen cost increases into consideration or that they assessed future capital expenditures for Four Corners. By failing to mention the subject of risk

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<sup>138</sup> NEE Exhibit 35, Direct Testimony & Exhibits of David Van Winkle, p. 22 (“Yet, when PNM was presented with a 15-year coal contract with costs that would rise by 128% over the period, significant pollution control costs, continuously rising costs for capital expenditures just to keep an old plant operational and safe, litigation exposure, decommissioning and reclamation cost risks, and more, PNM did not do an evaluation to determine if the reinvestment in FCPP was reasonable against alternatives.”)

<sup>139</sup> TR., O’Connell, 8/9/17, p. 589. Though PNM’s Investor Meetings in February (NEE Exhibit 22, p. A-19) and May of 2012 (NEE Exhibit 22, p. A-15) state that the cost of SCR is \$69 million.

<sup>140</sup> NEE Exhibit 44.

<sup>141</sup> TR., Olson, 8/15/17, p. 1483-1485; also, see, NEE Exhibit 31, p. 46 stating in June 2017 that the cost of SCR is \$94M.

almost entirely, PNM was hoping to “fly under the radar” and avoid PRC scrutiny of actual litigation risk, regulatory risk, or any other risks.<sup>142</sup> Other than the rising costs of SCR pollution controls, PNM omitted mentioning the “impact of environmental regulation” to the Commission. Its investors, on the other hand, would certainly be informed as they potentially earn a return on these pollution mitigation “investments.” *See* Clean Air Act - National Ambient Air Quality (NAAQS), Mercury Rules, Resource Conservation and Recovery Act – Coal Ash, Clean Water Act – 316(b), Effluent Limitation Guidelines (Wastewater Discharge), Clean Power Plan.<sup>143</sup> PNM tried to rehabilitate Mr. Olson by indicating that the above-cited regulatory risks were not an issue in 2012--2013,<sup>144</sup> however PNM’s own investor presentations from 2012 contradict Mr. Olson, at least with respect to the Clean Air Act – Regional Haze, Mercury Rules, and Clean Water Act – 316(b).<sup>145</sup>

It requires no close analysis to establish PNM’s failure to exercise due care when investing in an aging plant. PNM evaluated nothing. It identified the plant as a sponge for capital investment for the benefit of shareholders and assiduously avoided the type of analysis which would have demonstrated the obvious; that ratepayers would be far better off, for many reasons, if Four Corners were closed. The evidence is only that PNM performed misleading, incomplete and stale Strategist, and did no further risk analysis.

PNM failed to exercise reasonable care or due diligence. The Company failed to appreciate or consider the particular risks of its inherently dangerous activity. PNM failed to recognize in any way that its continued dependence on coal for rate base would not only be

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<sup>142</sup> TR., Olson, 8/15/17, pp. 1523-1528.

<sup>143</sup> TR., Olson, 8/15/17, pp. 1527-28; NEE Exhibit 31, p. 46.

<sup>144</sup> TR., Olson, 8/15/17, pp. 1615-1616.

<sup>145</sup> NEE Exhibit 22, p. A-19 and NEE Exhibit 23, p. A-15.

economically detrimental, compared to the alternatives, but is also deleterious to the health and public welfare of New Mexicans and therefore contrary to the statutory requirement that it prefer environmentally less harmful resources.

In the August 2017 case, *Sierra Club, et al., v. Federal Energy Regulatory Commission*, *Id.*, attached hereto, the U.S. Court of Appeals for the District of Columbia Circuit held that for a project to meet the public interest or net public benefit test the agency must consider the public benefits against the adverse effects of the project in order for the agency to make an informed decision. This “public benefit” yardstick is the right one given what we now know of the health and environmental impacts of carbon emission. Changing times require New Mexico to follow this standard as well.

There is no evidence that PNM actually considered the applicability of carbon policy, climate change impacts, regulatory costs, environmental hazards, and vulnerability of water shortage.<sup>146</sup> Though, again, it apprises its investors that these risks and vulnerabilities are real.<sup>147</sup> There is also no evidence that PNM tried to eliminate the health, environmental, or cost risk exposure to ratepayers.

Environmental scientists do not equivocate when it comes to known environmental and climate impacts of burning coal. It is not a surprise to these scientists and other climate change trackers that we are experiencing “unprecedented” and deadly storms and hurricanes (Harvey/Irma), prolonged drought, mega wild-fires (1 million acres have been/are burning in Montana, 940,000 acres burning in Oregon) toxic air and water contamination, and serious health consequences for people and animals living in close proximity to the source of pollution. Yet,

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<sup>146</sup> NEE Exhibit 47.

<sup>147</sup> NEE Exhibit 35, Direct Testimony & Exhibits of David Van Winkle, pp. 14-18; NEE Exhibit 30, Direct Testimony & Exhibits of Steven M. Fetter, pp. 17-22, and SMF-3.

despite the predictable devastating toll on human and environmental health, PNM chose to go forward with FCPP, having done NO evaluation or real assessment of risks. This negligence or intentional disregard of common industry practice by PNM management, which was known by PNM but not revealed to the Commission, cannot be rewarded at the expense of ratepayers. The New Mexico Supreme Court has continually upheld the Commission's right to oversee and regulate utility practice and has concluded "that the public interest was best served by continued regulation." *Public Service Co. v. New Mexico PSC*, 815 P. 2d 1169, 1177 (1991). There is no question that the circumstances presented here require the PRC to use the authority that it has been given to strictly enforce its regulations and control a utility that has acted and continues to act without restraint.

**g) EPE's Decision-Making Process Was Prudent**

When another utility, El Paso Electric Company (EPE), was facing the same decision confronting PNM, regarding investment in the same plant, at the same point in time, EPE did a detailed financial and risk analysis and determined that they should exit the plant at significant savings for customers.<sup>148</sup> Again, applying the Commission's definition of prudence, PNM failed to exercise a reasonable and prudent process of determination before committing ratepayers to a billion dollars' worth of costs. In its defense, PNM claims that EPE was granted authority for the sale of its interest in Four Corners based on facts and circumstances unique to EPE, such as service territory, customer composition, demand and consumption patterns, transmission capabilities and constraints, and resource portfolio. Consequently, according to PNM, EPE's

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<sup>148</sup> *Id.*



decision to vacate Four Corners has no relevance to the decision by PNM to continue participation at Four Corners until 2031.

Granted, each utility is unique in its own way. Yet, in this changing environment where coal is increasingly under price and environmental pressures from natural gas, solar and wind, and now storage, every utility that relies primarily on coal is faced with the identical challenge of how to transition its portfolio to cheaper and more environmentally friendly sources. EPE was faced with such challenge in connection with its continued participation in Four Corners, as was PNM in 2013 (and PNM is today). While PNM points out various differences when comparing the situations of EPE and PNM, it disregards the similarities that faced the managements of both utilities when considering the path forward at FCPP.<sup>149</sup> Finally, beyond saying “we’re different than EPE” PNM fails to detail why those supposed differences justify its decision to continue in Four Corners. Can a utility, when faced by a thorough analysis of costs and risks by another utility at the same facility, satisfy its burden to justify a contrary decision without analysis? By merely saying “we’re different”?

Viewed in this light, the way EPE and PNM each addressed this common problem is relevant to a prudence inquiry and can legitimately be compared. NEE has demonstrated that the path chosen by EPE is clearly relevant to whether the management of PNM made a prudent decision in 2013 not to exit Four Corners until 2031/2041. Moreover, PNM continues to refuse to review the validity of that decision under circumstances existing today.

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<sup>149</sup> Id., *see also*, TR., Fetter, 8/11/17, pp. 975-977, 1012, 1014 (At 976: “The burden is on PNM to show why what I believe is a faulty process path was actually not. And they are free to study the four entities that stayed; they’re free to put the legal and regulatory jurisdictional information about those parties on the record, in an attempt to meet their burden. I’ve held up a proper path. They’re free to say why EPE should have just moved ahead without putting all this information before its board and considered by its management. I think PNM made a mistake.”)

PNM's decision to reinvest in FCPP and saddle ratepayers with the associated costs, risks and liabilities, was not only unjust and unreasonable, it deviated from accepted industry norms that require a demonstration of economic benefit, a consideration of alternatives, and an analysis of known and foreseeable risks in order for the utility to be rewarded cost recovery from ratepayers. *In Re S.C. Elec. & Gas Co.*, 2013 WL 1362425 (S.C.P.S.C. Feb. 14, 2013).

**h) The Magnitude of the Opportunity – “Beyond Reasonable”<sup>150</sup> Strategist Runs**

PNM fought harder against providing contemporaneous Strategist runs for a current financial analysis of Four Corners than they fought against inclusion of any other information in this case. NEE has learned over the years that the more the utility protests investigation, the more an investigation is likely to yield valuable data.

While PNM claims erroneously that an alleged \$33M benefit (out of \$8 billion total generation portfolio package) was enough justification in May 2012 to continue FCPP operation until 2041, all of a sudden a \$445 million benefit (out of a \$7 billion total generation portfolio package) is “irrelevant and unreliable.”<sup>151</sup> Regarding reliability: These Strategist runs are reliable for what they demonstrate. There may be assumptions that PNM doesn't agree with, but these outcomes are significant and must be reckoned with. \$445.7 Million is a significant amount and the Commission and ratepayers deserve answers. Regarding relevance: Whether the earlier decision by PNM is ruled prudent or not, this contemporaneous information evidences such a huge opportunity to exit Four Corners, even if its just for shareholders, it demonstrates an

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<sup>150</sup> Order of June 27, 2017.

<sup>151</sup> PNM Exhibit 12, Rebuttal Testimony in Support of Revised Stipulation & Exhibits of Patrick J. O'Connell, p. 21.

opportunity for hundreds of millions of dollars of savings. It's hardly irrelevant – it's more like, the truth is painful, but its time to face it.

PNM challenges the assumptions that went into the NEE 6-1 required runs, suggesting that they apply unrealistic and inaccurate assumptions with respect to inputs for the requested analysis, but this just isn't so. The heft of the assumptions,<sup>152</sup> actually come from PNM: 2017 Most Cost-Effective Portfolio (“2017 MCEP Base Case Starting Point”) includes retirement of SJGS in 2022, retirement of FCPP in 2031, and includes lease purchases of 114MW of Palo Verde. This scenario has a NPV of \$7,220,436,359. NEE 6-1D, attached to the NEE Exhibit 34, Direct Testimony & Exhibits Anna Sommer, AS-2. NEE 6-1A uses the same assumptions as NEE 6-1D, except that in this scenario, PNM has been required to exit FCPP in 2017. NEE 6-1A has a NPV of \$6,774,754,266. These results show that retirement of FCPP in 2017 is \$445,682,093 (\$445.7 million) less costly than continuing to operate the facility through 2031. This is a huge opportunity to save money and transition to less risky and harmful environmental resources.

It is true that the assumptions in 6-1A were designated by NEE in connection with its desire to produce meaningful comparisons. Such designated assumptions include the assumption in the 6-1A run that PNM had not signed the 15 contracts on December 30, 2013. These assumptions would institutionalize that ratepayers are NOT responsible for the inept (or worse, avaricious) decisions by PNM management to reinvest in FCPP. These assumptions are consistent with NEE's position in this case that PNM has failed to meet its burden of incurring

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<sup>152</sup> These assumptions determined and supplied by PNM included “load forecast, prices for solar, gas, and wind; any MW restraints for any resource; the amount of stranded assets for each resource and the NPV for the stranded assets; costs associated with take-or-pay coal contract; and costs associated with exiting the participating agreement early (before 2031).”

FCPP prudently. This goes to the heart of why PNM fought tooth and nail against providing this information to NEE, yet was coyly reluctant, but secretly overjoyed to perform a 2020 analysis for 2024 and 2028 for the early closure of FCPP, Revised Stipulation paragraph 10, when other co-owners will be more than ready for a shut-down of FCPP. The purpose of the 6-1A, exit FCPP in 2017, assumption was to supply a baseline of comparison to facilitate an understanding of the opportunities available for New Mexico's energy trajectory.

NEE's Expert, Ms. Sommer, was asked by WRA attorney, Mr. Michel, essentially what's the point of a full disallowance of Four Corners, will it really matter?

Q. I'm talking about real world operations. If PNM exits the plant, or is denied cost recovery in the plant, but the plant keeps operating, just as it always has, and say PNM's share becomes merchant capacity instead of rate-based capacity, that has no CO<sub>2</sub> or water benefit right?

A. It might. It would depend on the economics of Four Corners. If operation of that unit – of what might be considered typical capacity factors is no longer economic, you could certainly see reductions in generation and therefore reductions in water consumed and discharged and CO<sub>2</sub> emitted as a result.

Q. These numbers assume retirement of the plant right?

A. These numbers assume that PNM is exiting Four Corners. Again, the Strategist model is not looking at the specific treatment of Four Corners-- of the Four Corners unit. It is looking at how what happens if PNM is a partner, or taking electricity from the Four Corners units or not.<sup>153</sup>

“6-1A assumes that PNM would have no further costs related to fuel costs for Four Corners operations, capital expenditures, O&M.”<sup>154</sup> “I think what [the Strategist 6-1 A v. 6-1D] says for the Commission is that there is reason to think that there's an alternative apart from the path that PNM seems to be on that would be more economic for ratepayers and that it's worth looking into that alternative.”<sup>155</sup>

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<sup>153</sup> TR., Sommer, 8/14/17, p. 1222-1223

<sup>154</sup> TR., Sommer, 8/14/17, p. 1235

<sup>155</sup> TR., Sommer, 8/14/17, p. 1222-1223

In point of fact, other than its flawed “analysis” in 2012 PNM never performed any contemporaneous financial evaluations with respect to its decision to extend the life of Four Corners to 2031.<sup>156</sup> No such financial analyses scenarios were performed until PNM was compelled to do so. The reason for such a lack of curiosity may be that PNM did not want the Commission or parties to know the answer.

PNM did not perform any contemporaneous rigorous evaluation prior to PNM’s decision in December 2013 (when 15 significant contracts became due<sup>157</sup>) to extend its participation in 200 MW at FCPP for at least the next 15 years. Essentially, this decision was of such financial consequence that it was similar to PNM investing in a new plant for which a CCN is required. PNM’s failure to perform these necessary financial analyses was outside normal business practices, irresponsible and unreasonable, and hence imprudent.

Even if PNM’s had prudently incurred FCPP, PNM has an obligation to continue to monitor the validity of the decision in light of changing circumstances. *Investigation into Vermont Elec. Utilities’ Use of Smart Metering & Time-Based Rates*, 2009 WL 4024900, at \*1 (Vt. P.S.B. Nov. 16, 2009) (Our determination that a Plan is acceptable will not shield a utility from a subsequent investigation and potential disallowance based upon the economic used-and-useful principle if events following approval should have led to an alteration of the [] deployment.).

Asked by the Hearing Examiner about potential opportunities that might arise if there was a required exit of Four Corners and Ms. Sommer testified:

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<sup>156</sup> PNM performed another flawed and uninspiring run in 2014, after its 2031/2041 FCPP re-commitment, with the same institutional inadequacies that don’t deserve credence, for all the reasons stated herein.

<sup>157</sup> NEE Exhibit 39.

So, there's a couple of possibilities. One is, like I said during my cross-examination, the unit would actually operate less, because there would not be the demand for that unit and/or it would not be economic. The other, depending on the arrangement of ownership among all of the different units, would be that the remaining owners would agree to consolidate their ownership around a certain number of units and retire one of the units. So, it is hard to say exactly what the real world implications are of PNM exiting from that contract. But I think it is fair to say it is not likely that business as usual would just sort of continue.<sup>158</sup>

...

Q. Let's assume that PNM had a choice to exit Four Corners on a certain date. What kind of model would you prepare for that?

A. So I would want to make sure that my model was set up so that I could -- or my modeling process was set up so that I could evaluate all of the resources that I think would reasonably meet any deficit that is created by exiting from that contract, or exiting from that unit whatever the situation is.

And you would want to do a number of different scenarios looking at not just all of those scenarios types of resources that you think are feasible, but also how those resources behave under kind of reasonable assumptions about variances in some of the key inputs into Strategist. And that would be things like load growth. So you might have a high, you know, sort of business-as-usual and load forecast, where you would test different portfolios under those sensitivities. You might do the same thing for fuel prices for coal and natural gas prices.

There are some things that are unique to the utility system that you would want to include in the sensitivities, but the idea throughout would be to make sure that your process is well documented, so you can justify your decision-making not just to other stakeholders who might disagree with it, but to the Commission in particular, because the Commission needs that information in order to sort of rule on the prudence of that decision-making process.<sup>159</sup>

NEE has proven in total that FCPP was not demonstrated by PNM and the Signatories to be prudently incurred and used useful.<sup>160</sup> The discovery produced pursuant to 6-A vs. 6-1D and

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<sup>158</sup> TR., Sommer, 8/14/17, pp. 1299-1300

<sup>159</sup> TR., Sommer, 8/14/17, pp. 1256-1266.

<sup>160</sup> TR., Van Winkle, 8/14/16, pp. 1331-1332: "The FCPP resource in total was not demonstrated to be cost effective.

What we've seen in this case is the only financial analysis that they did in two and a half years prior to this decision, was in May of 2012.

That analysis showed that if you did include capital expenditures, it was only \$33 million favorable to keeping the plant running. When you included ongoing expenditures of \$88 million,

the subsequent Strategist runs require pro-active decision-making by the PRC to require the closure of coal and the transition to less costly and more environmentally-friendly resources. The time is now.

**B. PNM's Request For Costs Associated With San Juan Generating Station Should Be Denied And Excluded Because The Company Failed To Justify That These Capital Expenditures Are Prudent, Reasonable, Necessary And Cost Effective For Ratepayers.**

PNM's Olson, Vice President of Utility Operations,<sup>161</sup> testifies: "These capital expenditures are not intended to extend the San Juan plant life."<sup>162</sup> But that is what PNM's bare assertion for the 46 million dollars for capital expenditures is based on.

Q. When PNM filed its application on December 7th, 2016, it assumed San Juan would run till 2053; correct?

A. Yes.<sup>163</sup>

...

Q. But you would -- subject to check, would you agree that PNM's IRP plan, its most cost-effective plan, includes the retirement of San Juan by 2022 and the retirement of Four Corners?

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it said it was \$55 million favorable to retire it. That is the only analysis they did in two half years, prior to making that decision.

They had 19 months to run Strategist again and make comparisons, and they didn't. There were huge changes going on in the marketplace.

Patrick O'Connell testified there were big changes in peak demand and energy sales. And none of that was ever considered in a comparative analysis using Strategist in the last 19 months prior to the decision.

So they could have done it; they didn't. They did no contemporaneous analysis in the last six months of -- prior to the decision to sign up for another 15 years of coal plant -- signing the coal contract, and the other dozen or so contracts that they signed in December of 2013."

<sup>161</sup> TR., Olson, 8/15/2017, pp. 1577

<sup>162</sup> PNM Exhibit 23, Rebuttal Testimony in Support of Revised Stipulation & Exhibits of Chris Olson, p. 14.

<sup>163</sup> TR., Olson, 8/15/17, p. 1562.

A. Yeah, I'm hesitant to exactly suggest exactly how it's phrased. But there's no question that PNM has talked about the possibility of shutting down San Juan in 2022 and Four Corners in 2031.<sup>164</sup>

...

Q. Has what been discussed? The closure of San Juan in 2022 and the closure, or the retirement in 2031 at Four Corners?

A. Certainly, that has been discussions.

Q. So as Vice President of Generation, is it your expectation that that's the path that PNM is following, that that's its trajectory?

A. I don't know. You know, I think as we have indicated, there's study -- a lot of study left to be done.

Q. And that study was produced, in part, and filed with this Commission on July 7th, 2017; right?

A. Are you referring to the IRP?

Q. I am.

A. I don't think the IRP is the -- is the final say and decision about the future of San Juan or Four Corners.

Q. I understand that it's not the final say, because you have to go through an abandonment proceeding. But at the moment, this is PNM's proposed plan of record, is it not?

A. I think I've answered the question.

Q. What is that answer?

A. I think the answer is that it may be in our customers' best interest to shut down San Juan in 2022.

Q. And has PNM, or you, in particular, or anybody under your authority, done any subsequent cost-benefit analysis from the time of the application to the time of this filing of the IRP -- 2017 IRP in July, or afterward, up until today, to decide if any of the requested capital expenditure costs at San Juan are necessary or worthwhile?

A. So we are in discussions and negot- -- discussions with other owners about what is the proper level of spending going forward, based on what the results of the IRP is telling us.

Q. And other than your testimony right now, is there anything in the record that substantiates or justifies the cost that you are asking for in this case, \$46 million more for capital expenditures at San Juan?

A. Well, again, that request was filed in December of '16 with the intent of running the facility to 2022, with the potential to go to 2053.

Are there things, in retrospect, that we should look at and need to look at in that request? Yes, there are. ***I think that's the prudent thing to do.*** And we are in discussions with owners about that possibility.

All that aside, I also testified that capital requests at PNM always exceed what our abilities are to fund. And if there are opportunities to shift dollars to other parts of the

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<sup>164</sup> TR., Olson, 8/15/17, p. 1564.



business, we always look for that. We look for that every year during the course of the year as projects underrun and projects overrun. So there's nothing new about that.

Q. So if you recall -- are you saying, by implication there, that if this Commission awards you the \$46 million for San Juan, and later on, you and the other owners decide, "Oh, well, some percentage of it doesn't really need to be spent," you'll just take that-- those dollars and spend it somewhere else?

A. That possibly could happen."<sup>165</sup> (emphasis supplied.)

Mr. Olson concurs with NEE's experts, David Van Winkle and Steven M. Fetter, that "the prudent thing to do" is to review "capital requests at PNM" to determine if those capital expenditures are in fact needed given PNM's plan to "shut [] down San Juan in 2022." Olson admitted that if the \$46 million request is not spent at San Juan it will be spent somewhere else. To spend money approved by the PRC for one purpose and then used for another is arbitrary and capricious and legally adverse to how costs are to be recovered in rate cases from consumers. NMSA 2008, §62-3-1 A &B., (A. Public utilities are affected with the public interest in that, among other things: (1) a substantial portion of public utilities' business and activities involves the rendition of essential public services to a large number of the general public; (2) public utilities' financing involves the investment of large sums of money, including capital obtained from many members of the general public; and 3) the development and extension of public utilities' business directly affects the development, growth and expansion of the general welfare, business and industry of the state. B. It is the declared policy of the state that the public interest, the interest of consumers and the interest of investors require the regulation and supervision of public utilities to the end that reasonable and proper services shall be available at fair, just and reasonable rates and to the end that capital and investment may be encouraged ... without unnecessary duplication and economic waste.) *See also* NMSA 2006, §62-3-2 A.(2)

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<sup>165</sup> TR., Olson, 8/15/2017, pp. 1564-1567 (emphasis supplied.)

Cost recovery from ratepayers must be based on a substantiated need for the specific expenditures. There is no precedent for the PRC approving cost recovery for a utility's specific capital expenditures and then the utility just spending the money on "whatever." Unsubstantiated opinions are not substantial evidence. *Atilixco Coalition v. County of Bernalillo*, 1999-NMCA-088, 984 P.2d 796 (N.M. Ct. App. 1999), *see Dick v. City of Portales*, 118 N.M. 541, 544, 883 P.2d 127, 130 (N.M. 1994)(Council had a "duty" to provide "positive evidence.") *Santa Fe Exploration Co. v. Oil Conservation Comm'n of N.M.*, 114 N.M. 103, 115 (An agency action is arbitrary "if there is no rational connection between the facts found and choices made, or necessary aspects of consideration or relevant facts are omitted.").

### **C. Discriminatory Rates Are Against the Law**

#### **1. PNM's Orwellian Argument: *Pro-Rata* is Proportional and a Just Distribution Rate Increase**

In George Orwell's famous dystopia, *1984*, the author uses the slogans of the dominant Party: "War is Peace. Freedom is Slavery. Ignorance is Strength." These slogans describe the Party's reality of accepting two mutually opposing beliefs simultaneously as correct. These slogans chanted like mantras were at the heart of the Party's program Party to promote "double think."

While New Energy Economy is not equating PNM to Oceania there are certain unavoidable similarities. PNM's Julio Aguirre testifies repeatedly that the "pro-rata" share increase is designed to be "fair" and "reasonable"<sup>166</sup>: "The Signatories settled on a class revenue allocation that *fairly moderates the impacts of allocation* of the stipulated revenue requirement

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<sup>166</sup> The words "pro-rata" "fair" and "reasonable," or a combination thereof, appear on nearly every page of Mr. Aguirre's Direct Testimony in Support of Revised Stipulation, PNM Exhibit 15.

among the rate classes *on a proportional basis* based upon the Test Period revenue at current rates (also referred to as “pro rata”).” (PNM Exhibit 15, Julio C. Aguirre Direct Testimony in Support of Revised Stipulation, p. 5, emphasis supplied.) In some world this might be true except here that allocation is not allocated on a proportional basis. “[T]he Signatories of the Revised Stipulation is based on the application of a *pro-rata* increase to revenues under existing rates using the Test Period billing determinants” AND “PNM’s recommendation in this case is to approve **the *pro-rata* rate design presented in the Revised Stipulation for all customer classes**, including Rate 3B – General Power. (PNM Exhibit 16, Julio C. Aguirre Rebuttal, pp. 4, 10 (emphasis in the original and the bold is emphasized by NEE). Further:

The *pro-rata* rate design increases all rate elements within a rate class by the class average percentage of the non-fuel increase. For Rate 3B – General Power, the *pro-rata* rate design increases all rate elements over existing rates by 4.46% in Phase I and by 8.79% in Phase II. ... Approving the *pro-rata* rate design presented in the Revised Stipulation for Rate 3B – General Power will help maintain the relative economics of this general power schedule when compared other rate schedules such as Rate 3C – General Power (Low Load Factor), and Rate 4B – Large Power. That is, approval of a *pro-rata* rate design will maintain the same relationship in rates and rate structures that align with the current tariff definitions and qualification criteria applied under each rate schedule.

PNM Exhibit 16, Julio C. Aguirre Rebuttal, p. 10. (emphasis in the original.)

Despite the “guiding principle” of fairness and the moderation of impacts of the stipulated revenue requirement on the various rate classes on a proportional basis, the Revised Stipulation actually included an “allocation subject to some adjustments.”<sup>167</sup> There is a reduction to Rate 11B, water and sewage of \$100,000 and another reduction to Rate 20, streetlighting, of \$200,000; this is an annual contribution by either PNM or PNMR (not ratepayers) to these

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<sup>167</sup> TR., Aguirre, 8/10/17, pp. 728-729

entities “going forward until base rates are reset in a subsequent rate case.”<sup>168</sup> The “nonfuel revenue increase is 9.04%,” once the contributions are accounted for the “overall nonfuel increase is reduced to 8.99 percent.”<sup>169</sup> Rate 11B increase is 4.73 percent. Rate 20, streetlighting is 2.98 percent.<sup>170</sup> “[T]he signatories to the stip agree that that was a reasonable outcome to be applied to [one customer, Albuquerque Bernalillo Water Utility Authority, in Rate 11B in recognition of those historical load shifting capability” even though there is no evidence that indicates that that Rate 11B customer needs a special incentive to continue to produce load shifting actions in the future.<sup>171</sup> Mr. Aguirre argues that this specialized price discount for the Albuquerque Bernalillo Water Utility Authority acts as a price signal to encourage other customers to adjust to off-peak times, except the fallacy in his argument is that there is no evidence that any other 11B customers necessarily know about this unique advantage.<sup>172</sup> Mr. Aguirre doesn’t testify that there is substantial evidence for this special rate treatment or any true basis for the disproportionate rate treatment — it is just what the signatories agreed to.<sup>173</sup>

## **2. RIDER NO. 8 – Incremental Interruptible Power Rate “IIPR”**

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<sup>168</sup> TR., Aguirre, 8/10/17, pp. 732-734

<sup>169</sup> TR., Aguirre, 8/10/17, p. 731

<sup>170</sup> TR., Aguirre, 8/10/17, p. 734

<sup>171</sup> TR., Aguirre, 8/10/17, pp. 737-743

<sup>172</sup> TR., Aguirre, 8/10/17, pp. 757-758 (Mr. Aguirre is not aware of any discussions about adjusting electricity usage to off-peak times with any of the other 164 accounts in Rate 11B.)

<sup>173</sup> TR., Aguirre, 8/10/17, pp. 746-747, 907-909 (In the past the Company has not made similar contributions or offered specific concession to certain rate classes. “[A]t least from the settlement perspective, is that that was part of the overall agreement. So as long as it’s contained within the -- the -- what all the signatories agreed to, I consider it to be part of the -- the deal in the give and take negotiation. ... It was just included as part of the overall agreement, I guess, among the signatories.” At p. 909)

The theory behind the interruptible power rate is that in return for agreeing to be interrupted on notice, a customer receives a discount in the monthly demand billing rate<sup>174</sup> from the utility which would allow the utility to defer or avoid capital expenditures for peaking capacity or avoid purchase of high cost power during peak load periods. However, there is no evidence that this legacy rate structure actually

provides all retail customers with reliability benefits. ... Given the evidence that PNM made no power interruptions in 2014 and 2015 or in the Base Period under the IIPR and projects no interruptions in the Test Period, parties and Staff are put on notice that the PRC will consider in PNM's next rate case whether the IIPR should be discontinued. If PNM proposes to continue the IIPR in its next rate, it shall file direct testimony justifying why it should continue.

Corrected Recommended Decision, 15-00261-UT, August 15, 2016, pp. 208-209. The Final Order Partially Adopting Corrected Recommended Decision, Sept. 28, 2106, did not alter the Hearing Examiner's requirement regarding testimony as to the continued viability of IIPR rates.

Paragraph 17 of the Revised Stipulation essentially ignores the Commission's Order in 15-00261-UT and for all practical purposes continues the status quo, even though PNM's direct testimony in support of the application advocated for a modification of the terms and conditions of Rider 8 to a Transitional IIRP because the current Rider 8 no longer serves the original purposes contemplated.<sup>175</sup> PNM's plan was to supersede or do away with the current rider and substitute it with this transitional rider, and PNM gave notice to that affect, but the Revised

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<sup>174</sup> The primary goal of Rider 8 is emergency interruptions, but PNM never availed itself of the interruptions in 2015 and only performed two testing interruptions in 2016. TR., Aguirre, 8/10/17, pp. 885-888

<sup>175</sup> TR., Chan, 8/11/17, p. 1125.

Stipulation undoes that effort and postpones evaluation of the IIPR in contravention of the Commission's Order in 15-00261-UT.<sup>176</sup>

PNM defends the use of the IIPR on the basis, with no specific factual support that without preferential rate discount treatment those business entities would leave the state. This is a grandiose economic development argument that on the surface sounds compelling but there is no substantial evidence that the Commission can point to that justifies this disparate treatment. Some customers within a class know about the specialized IIPR rate discount and others are kept in the dark.<sup>177</sup> Other than a brief reference from Mr. Aguirre to a meeting in which one business stated that it was sensitive to an increase in the cost of electricity, there is no evidence that a business would take the drastic step of relocating if it didn't receive special dispensation that the IIPR rate provides.<sup>178</sup> Essentially, PNM's Aguirre concluded that the Signatories agreed to the IIPR rate discount and that agreement is the basis for the continuation of the unequal IIPR rate treatment.<sup>179</sup>

### **3. No Notice With Respect To Pilot Rate Studies**

The provisions in paragraph 20 of the Revised Stipulation, proposing that PNM conduct a "load research study" limited to municipalities and counties currently served under PNM Rate Nos. 3B and 3C to determine if those customers should be permanently served under separate new rate classes beginning with PNM's next general rate case, violate the anti-discrimination policy in NMSA 1978, § 62-8-6 by excluding public schools served under those rate schedules

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<sup>176</sup> TR., Chan, 8/11/17, p. 1124-1126.

<sup>177</sup> TR., Aguirre, 8/10/17, pp. 750-751

<sup>178</sup> TR., Aguirre, 8/10/17, pp. 753-754 (On redirect PNM's Aguirre testified that seven other businesses "expressed a concern about the potential loss of the IIPR discount." At p. 899 But what customer would *want* to see its rates increase?)

<sup>179</sup> TR., Aguirre, 8/10/17, pp. 751-755, 884-888.

from that study. The fact that public schools lack the resources because of the State's ongoing budget problems to intervene and participate in this case to protect their interests does not reasonably justify such discriminatory rate design treatment.

Furthermore, PNM is proposing two new tariffs for Rate 3B and Rate 3C general power pilot tariffs under the Revised Stipulation without notice in the Application.<sup>180</sup> There is no evidence, let alone substantial evidence, to substantiate the exclusionary practice that benefits certain customers and discriminates against others, like schools.<sup>181</sup> "I think it was just part of the settlement discussions at that time. Somebody must have bring up or brought up this issue and it was included as part of the settlement."<sup>182</sup>

#### **D. Baking In Many Hundreds Of Millions Of Dollars Of Capital Expenditures Without Any Transparency Or Scrutiny**

The Revised Stipulation improperly bakes in many hundreds of millions of dollars of capital expenditure costs that have not been properly vetted and will have short-- and long--term rate consequences for customers. The important regulatory (burden of proof) principle applies to the Revised Stipulation's silent, but embedded, acceptance by the Signatories (in the revenue requirements in the RICOS) as "prudent and reasonable" of approximately \$83.5 million of additional capital expenditures for its continued reliance on the Palo Verde Nuclear Generating Station,<sup>183</sup> \$78.1 million for corporate technology and general service capital expenditures,<sup>184</sup> \$384,489,455 million of transmission and distribution infrastructure additional capital

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<sup>180</sup> TR., Aguirre, 8/10/17, pp. 889-893.

<sup>181</sup> TR., Aguirre, 8/10/17, pp. 889-890, 893-894, 903-904.

<sup>182</sup> TR., Aguirre, 8/10/17, p. 892.

<sup>183</sup> Olson Direct, p. 24.

<sup>184</sup> TR., Mendez, 8/15/17, pp. 1637.

expenditures<sup>185</sup> described in PNM's Application. The Signatories' implicit request is that the Commission also determine that these investments included in the Revised Stipulation be deemed prudent and reasonable. PRC Staff has admitted that it did NO specific analysis of the underlying value to customers of more than \$656 million of *ongoing* capital expenditures in this case, to the obvious detriment of ratepayers.<sup>186</sup> The record is devoid of any other party's scrutiny of these costs.<sup>187</sup>

An example, of the burden of proof problem is that none of the \$78.1M of administrative technology upgrades were verified by either an internal or external evaluator.<sup>188</sup> The testimony is that PNM sets a capital target to be spent in any given time period and then PNM spends the amount set if not on one item on another.<sup>189</sup> When probed about some of the specifics of the corporate technology and general service capital expenditures PNM's witness could not answer:

A. "SJ DWDM Upgrade Second Quarter 2014; Clearings of \$540,054. Replace the current San Juan Generating Station SJGS fiber multiplexing unit, DWDM, system with the -- with the FNM Fujitsu DWDM standard system."

Q. What is that?

A. Not as familiar with the actual details or the integral parts of this particular project.

Q. Do you have any idea what it is? I was not directly involved with this

Q. A. I was not directly involved with this project itself.<sup>190</sup>

...

Q. ... you talk about downtown building improvements correct?

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<sup>185</sup> TR., Mechenbier, 8/15/17, p.1089.

<sup>186</sup> TR., 8/16/17 DeCesare, pp. 1838-1844.

<sup>187</sup> TR., Mechenbier, 8/15/17, p.1090. PNM is requesting more than \$384M of capital expenditures for T&D infrastructure and Mr. Mechenbier answered somewhere between "Top of my head half – or two dozen" interrogatory questions from more than a dozen intervenors and staff.

<sup>188</sup> TR., Mendez, 8/15/17, pp. 1639-1640.

<sup>189</sup> TR., Mendez, 8/15/17, pp. 1642-1644. (At 1642: "My estimate would be pretty much what we've asked for, because as we've -- I've stated in here, the process is we -- although we may trade-off projects throughout the year based off of business need, resource requirements, et cetera, we do not exceed what our target capital budget has been allocated to us.")

<sup>190</sup> Id., at 1644.



A. Yes.

Q. And PNM has spent over \$1.8 million doing that?

A. I don't know what the actual spend is; but that was the projected budget.

Q. And so you got a new elevator?

A. As far as I know, downtown; yes, they have been working on those.

Q. What was wrong with the old elevator?

A. I don't know.<sup>191</sup>

The issue here is that Commission approval of those additional capital expenditures are based on the sort of “black box” settlement proposed, without proper Commission vetting of their prudence and reasonableness. The computer technology and the elevator expense are not isolated examples. For instance, PNM testifies that its annual total expected losses from transmission in 2018 is 177.6 MW, which is almost the same exact capacity of PNM's share of San Juan unit 1 (at 170 MW). Why is there no investigation into the 10% transmission loss on PNM's system and what PNM can do to improve it, and at what cost?<sup>192</sup> Could an improvement be more cost effective than buying/building a new generation resource? PNM is spending \$384M on T&D upgrades, and transmitting at least 1000MW of new wind *all* for California markets and PNM customers will not receive 1 MW of new wind.<sup>193</sup> Why is that? PNM's Mechenbier testified that “this case” (NEE's one hour of cross-examination?) is the extent of “oversight” to determine if ratepayers are getting/paying their fair share of these transmission service agreements.<sup>194</sup>

Because specific capital costs are not delineated in the RICOS, there is no method of providing transparent and complete information to the public and Commission in order to specifically explain, support and justify the rate increase. Without understanding key specific and

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<sup>191</sup> TR., Mendez, 8/15/17, pp.1652-1653.

<sup>192</sup> TR., Mechenbier, 8/15/17, pp.1086-1088.

<sup>193</sup> TR., Mechenbier, 8/15/17, pp.1097-1099. 1103.

<sup>194</sup> TR., Mechenbier, 8/15/17, p.1105.

detailed information no one, other than PNM, will know or be able to fully explain the basis for the significant and material rate increase that will occur within the rate base period. From a public interest point of view, these hundreds of millions of dollars of new and long-lasting capital expenditures<sup>195</sup> will have cost (bill) impacts on PNM's customers that will extend beyond the 2018-2019 impacts addressed in the RICOS filed with the Stipulation. The PRC should deny these hundreds of millions of dollars in capital expenditures because they have not been adequately vetted, and as the holding in *Sierra Club v. FERC* requires, the Commission cannot make an informed decision that meets the standard of the public interest test based on the thin evidence in this record. Without a thorough investigation mandated by the PRC, recovery of these amounts would be tantamount to giving PNM a blank check.

#### **E. PRC Should Deny Reimbursement of Litigation Expenses**

PNM is seeking reimbursement in this case for an aggregate of \$2,145,339 in litigation expenses projected to be incurred over the Test Period ending in 2018, based on an escalation for inflation of actual litigation expenses incurred by the company in the Base Period from July 1, 2015 through June 30, 2016. These figures were presented in the direct testimony of Leonard D. Sanchez, Esq., Associate General Counsel of PNM. Mr. Sanchez testified to the reasonableness of these litigation expenses based on the prudence of their incurrence by PNM. "Prudence is that

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<sup>195</sup> It's important to note that if one reviews historical PNM capital spending, see NEE Exhibits 1-5 and NEE Exhibits 22-23 and compare that with current projected capital spending, generation capital *was* the focus and single largest spend in PNM's capital plan, but now and future projected capital includes more investment in transmission. Because of this major shift in capital spending the PRC should require specific investigation and oversight of these hundreds of millions of dollars (which is on top of the hundreds of millions already received from ratepayers in PNM's last rate case for T&D), *see* NEE Exhibit 31. *See also* TR., Mechenbier, 8/15/17, p.1092.

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.” *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 309 (1989). As stated by Mr. Sanchez, under the Public Utility Act and Rule 530.7P “there is no presumption of prudence for litigation expenses” and the “prudence of these expenses must be separately demonstrated.”<sup>196</sup>

In measuring the prudence of litigation expenses by a regulated utility, the governing regulatory body, in this case NM PRC, should be especially mindful that the usual controls on litigation expenses incurred by a non-regulated public or private company are not present in the regulatory sphere. When litigation expenses are ultimately borne by the shareholders of a corporation, the shareholders have a remedy if such expenses become unreasonable. Shareholders have the power to remove the board of directors and, thereby, ultimately the management of the company. In a less extreme case, the shareholders have the power of “voting with their feet” by selling their shares with the corresponding depressing effect on share price that has the ultimate effect of raising the cost of capital for the company. This also can cause other consequences, among which may be reduction in the overall incentive compensation of executives. Ratepayers have no such remedy if litigation expenses are passed along to them. The ratepayers’ only protection is vigilant perusal of these expenses by an informed and aggressive public regulatory body.

### **(1) Calculation of Test Period Litigation Expenses**

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<sup>196</sup> PNM Exhibit 27, Direct Testimony & Exhibits of Leonard Sanchez, pp. 1-3; NMSA 1978, Section 62-13-3 of the NM PUA.

Mr. Sanchez testified on page 7 of his direct testimony that PNM incurred \$2,113,635 in litigation expenses for the Base Period of July 1, 2015 to June 30, 2016, as set forth in Table LDS-1. At page 14 of his direct testimony, Mr. Sanchez testified that: “PNM’s Test Year cost of service on a total electric basis includes \$2,145,339 of litigation expense.” This figure was obtained by “appropriate escalation” of the Base Period actual expenditures with an inflation factor. In Redirect Examination by Mr. Alvidrez, Mr. Sanchez testified:

“The purpose of my testimony is to establish the prudence of the litigation expenses for the test period, and I developed Exhibits to identify representative litigation expenses during the base period that the company might reasonably expect to incur during the test period.”<sup>197</sup>

Among the total Base Period expenditures is included \$941,830 in Tort and Litigation Expenses as set forth in Table LDS-2. Among the cases listed in Table 2 is the case of *Smith v. PNM*, a lawsuit alleging wrongful termination, retaliation, breach of contract and violation of the New Mexico Fraud Against Taxpayers Act. This one case had Base Period legal costs of \$787,166. Of the total of \$2,113,635 of Base Period legal expenditures, fully thirty-seven percent (37%) were consumed by this one case. Unless it is PNM’s contention that the *Smith* case is the type of case likely to re-occur in the Test Period or in a future year, it would be improper to include that amount, “appropriately adjusted,” in estimates for legal expenditures likely to be incurred by PNM in the Test Period. Nor should that amount be included in PNM’s Test Year Cost of Service. NEE requests that PNM’s estimated Test Period litigation expenses be reduced by \$787,161.

**(2) Costs in Connection with Case Nos. 15-0205-UT and 16-00105-UT**

By Order dated May 24, 2017, the PRC granted to PNM the right to withdraw its

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<sup>197</sup> TR., Sanchez, 8/16/17, p. 1763.

Application for Approval of a Certificate of Public Convenience and Necessity and Related Approvals to construct and operate an 80 MW natural-gas fired aero-derivative peaking generator located at the San Juan Generating Station. The plant was to go into operation by June, 2018. Despite a finding by the Hearing Examiner that “[t]he cases have caused considerable expense to Staff, to Intervenors, to the Commission and potentially to ratepayers,” the Hearing Officer and the Commission denied a request by NEE that litigation expenses arising from these cases not be allowed.

In NEE Interrogatory 1-10,, NEE asked if any costs associated with 15-00205-UT or 16-00105-UT were included in the costs in this case. The answer by PNM’s Henry Monroy was: “No costs associated with either case are included in this case.”<sup>198</sup>

Nevertheless, on pages 2 and 4 of Exhibit LDS-5, Mr. Sanchez specifically includes litigation expenses, aggregating \$26,462, related to 15-00205-UT and 16-00105-UT as costs to be reimbursed by ratepayers to PNM in this case. The Hearing Examiners should deny these costs outright.

### **(3) Treatment of BHP/Westmoreland Transaction Costs Should Be Rejected & NOT Treated as a Regulatory Asset**

In determining reimbursement of legal consulting fees in connection with corporate transactions, the requirement of prudence takes on a more serious concern if the fees are to be treated as “Core Capital,” having the additional advantage that the expended funds are returned to the utility plus a guaranteed return of approximately 10%. Continuing capital expenditures are critical to PNM’s business model. The model, as made repeatedly clear to investors, is that

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<sup>198</sup> NEE Exhibit 49, NEE Interrogatory 1- 10.

investing in “Core Capital” leads to increasing the rate base, from which follows growth in earnings and growth in dividends for shareholders.<sup>199</sup> It is incontrovertible that increased capital expenditures are an integral part of the PNM business model. Of course, this model only works if PNM is able to have these capital expenditures included in the rate base through applications for rate increases such as in the instant proceeding.

The incentives to limiting legal and transaction expenses are actually perverse. Increased transaction costs added to Core Capital increase profits and dividends. And all these amounts are paid by the ratepayers who have no recourse other than to pay their bills.

In his Direct Testimony, Mr. Monroy describes an aggregate of \$2,747,476 in transaction costs to negotiate, analyze, and facilitate the completion of a coal agreement with the San Juan Coal Company (“SJCC”), now under ownership of Westmoreland Coal Company (“Westmoreland”), in the context of a change of ownership of SJCC from BHP Billiton Ltd. to Westmoreland.<sup>200</sup> PNM is seeking recovery of these one-time costs through “establishment and amortization of a regulatory asset.”<sup>201</sup> Not only are ratepayers required to reimburse PNM for the entire transaction costs of these over-complicated transactions, PNM is asking to capitalize the amounts so that it can recover an almost 10% return on legal and consulting fees. The rationale for this treatment is the “substantial benefits that customers began receiving through our fuel clause ... not necessarily all within one base period or one test period, but rather over a period of time.”<sup>202</sup> Perhaps this argument could be made for costs of directly negotiating a long-term coal sales contract but, in this case, PNM apparently acted as a facilitator for a transaction between

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<sup>199</sup> NEE Exhibits 1-5, 22-23, and 31.

<sup>200</sup> PNM Exhibit 10, Direct Testimony & Exhibits of Henry E. Monroy, p. 65.

<sup>201</sup> PNM Exhibit 10, Direct Testimony & Exhibits of Henry E. Monroy, p. 66.

<sup>202</sup> TR., Monroy, 8/16/17, p. 373.

two unrelated companies. The Hearing Examiners should deny regulatory asset status to these one-time expenditures.

#### **(4) Human Resources Litigation**

The critical nature of regulatory oversight of litigation expenses, set forth in Section 1 above, Legal Standard, is even more evident when a regulated utility such as PNM is subject to recurring litigations of a similar type. Table LDS-3<sup>203</sup> presented with Mr. Sanchez's Direct Testimony records \$514, 442 in litigation expenses relating to Human Resources matters. A review of the Table and Mr. Sanchez's testimony fails to disclose the necessary details of this litigation expense, i.e., amounts paid in settlement or costs of litigating adverse actions. The Table only listed: (i) twenty-one workers' compensation claims, aggregating \$136,992 in litigation expenses; and (ii) fifteen discrimination claims, including race, sex or age discrimination, aggregating \$83,127 in litigation expenses. These expenses were incurred in the Base Year, and according to PNM practice, were "appropriately escalated" for calculating the Test Year.<sup>204</sup> When all these expenses (and payment of the underlying claims) are routinely passed on to ratepayers, PNM's shareholders bear no risk and management has no incentive to institute training or other ameliorative programs that would reduce the level of the claims. Actual expenditures in the Base Year are routinely escalated to estimates for the Test Year, with no incentive to remedy the underlying problems. The Hearing Examiners should reduce the level of these expenses that are approved as a way to encourage PNM to take steps to reduce the number of Human Resources claims over time. To do otherwise would be contrary to the public interest.

#### **(5) Litigation Expenses Relating to Facebook Matter**

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<sup>203</sup> PNM Exhibit 27, Direct Testimony & Exhibits of Leonard Sanchez.

<sup>204</sup> PNM Exhibit 27, Direct Testimony & Exhibits of Leonard Sanchez, p. 14.

Among the litigation expenses included for reimbursement on Table LDS-5,<sup>205</sup> is a case labeled as Javelin PPA, described as an application for two new service rates: (i) a purchase power agreement with a PNM affiliate; and (ii) a special service contract with a new customer, Facebook. Base Period litigation expenses are listed in the Table as \$50,969. When asked in his cross-examination to admit that the Facebook case was “uncontested,” Mr. Sanchez replied, “I don’t believe so. I believe there were intervenors in the case and there were matters that were litigated.”<sup>206</sup>

Commission Rule 530.7 P states that litigation is defined as all “contested matters before regulatory commissions [and other specified bodies]”. While Mr. Sanchez is correct that there were intervenors in the case, none of them contested PNM’s filing. Consequently, this case does not meet the definition of “contested litigation” per the Commission’s Rule, and expenses associated with it cannot be included as litigation expenses. This is true for the Base Period and the Test Period extrapolation of Base Period expenses. The Hearing Examiner should disallow reimbursement for these expenses as outside the scope of the Commission’s Rule.

#### **F. Advertising Expenses Must Comport With PRC Rules Or Be Denied**

As Meaghan J. Cavanaugh testified in her direct testimony, Rule 350.9.B lists the kinds of advertising expenses that are Allowable for reimbursement.<sup>207</sup> The total of Energy Works costs listed on Table MJC – 3, page add up to \$80,748 costs of printing and production as allocated on Page 1 of MJC – 3, page 1. PNM seems to have no consistent or verifiable system for allocating these costs. Page 7 of Exhibit MJC-3 includes an advertisement for Power Up

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<sup>205</sup> PNM Exhibit 27, Direct Testimony & Exhibits of Leonard Sanchez, p. 4.

<sup>206</sup> TR., Sanchez, 8/16/17, p. 1751.

<sup>207</sup> PNM Exhibit 24, Direct Testimony & Exhibits of Meaghan Cavanaugh, p. 3.



Grants with an allocation of 88% for a total allocated cost on Page 1 on MJC – 3 of \$8,473. Ms. Cavanaugh admitted in her cross-examination that “this particular [Power Up] section ... may not fall underneath Rule 50.”<sup>208</sup>

Further, with respect to Isotope tickets Ms. Cavanaugh stated a range of allocation factors from 63% to 88% to 100%.<sup>209</sup> Ms. Cavanaugh testified that Isotope tickets included in “energy works” were sometimes included in allowable cost and sometimes not included, and inclusion of part of Isotopes tickets in allowable cost might be an “oversight.”<sup>210</sup> The NPRC should require an accurate system for allocating these costs that is transparent and verifiable. The Hearing Examiner should disallow a percentage of Energy Works costs sought by PNM to fairly account for Power Up and Isotope tickets costs.

### **G. Cost-Based Rates**

As the Commission is aware, some of the items included in the RICOS filed in support of the Revised Stipulation result from items previously approved by the Commission in Case Nos. 13-00390-UT and 15-00261-UT, both of which are currently on appeal and pending before the New Mexico Supreme Court. The Supreme Court has made it clear that all rates approved by the Commission must be “cost-based.” *See, e.g., Attorney General v. NMPRC*, 2011-NMSC-034, ¶ 18, 150 N.M. 174.

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<sup>208</sup> TR., Cavanaugh, 8/15/17, p. 1623.

<sup>209</sup> TR., Cavanaugh, 8/15/17, p.1625 lines 2-4, 63% included; p. 1626 lines 1-2, 100% included, p. 1626 lines 6 -9, 88% included, p. 1626, lines 16 – 18, 100% included.

<sup>210</sup> TR., Cavanaugh, 8/15/17, p. 1626.

If the Supreme Court reverses either or both of the Commission’s final orders in those cases and remands them back to the Commission for further action consistent with its decisions, the Commission will need to understand how such further actions will affect the rates proposed in the Revised Stipulation, i.e., so that Commission approval of the Revised Stipulation does not circumvent those potential appellate decisions and PNM’s rates will be “cost-based.”

#### **IV. CONCLUSION**

The Revised Stipulation should be rejected as not in accordance with law. It is not just, fair, reasonable or in the public interest. When a monopoly utility has not conducted business prudently or consistent with reasonable utility practices, the Commission is obligated to protect the ratepayers from the consequences of such unscrupulous or imprudent decisions. After all, it is the shareholders of the utility who are responsible for selecting management and they should be the ones to take “the hit” for bad decisions— *not* the ratepayers. “In other words, ratepayers are not expected to pay for management’s lack of honesty or sound business judgment.” Case No. 2146, Part II, Final Order 50 (4/5/89)

##### **Remedy for Four Corners:**

NEE’s position is that FCPP was not prudently incurred and is not used and useful.

All costs associated with FCPP should be entirely excluded<sup>211</sup> (except PNM should be compensated for the provision of electricity between July 2016 and the date of the final

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<sup>211</sup> TR., Van Winkle, 8/14/16, p. 1426 (“Q. Four Corners should be excluded from rate base; is that right? A. Yes.

Q. Do you think that the company should be rewarded for imprudent acts?  
A. No.”)

decision at the market cost of electricity).<sup>212</sup>

FCPP should be decertified from rate base.<sup>213</sup>

PNM can apply to the Commission for replacement power should it actually need it and in the meantime produce a PPA with itself for one year at FCPP or another short-term PPA for purchased energy on the open market, or any other feasible choice, whichever is cheaper and better for ratepayers on a risk-adjusted basis, until it can issue an all-source RFP to replace that lost capacity and apply for a CCN for replacement capacity.<sup>214</sup>

If at that time FCPP can compete and is the most cost effective resource on a risk adjusted basis PNM can try to bring that resource back into rate base. It is similar to what Hearing Examiner Glick stated in the Corrected Recommended Decision in 15-00261-UT: p. 111 “PNM in its next base rate case filing can attempt to show that the PV repurchase and lease extensions are the most cost effective resources among available alternatives to meet customers’

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<sup>212</sup> TR., Van Winkle, 8/14/16, p. 1418 (“So if you take Four Corners out, now that means that there’s been electricity supplied to customers, what it should have been at, and I would say it is at the market price, which might be half of what they currently pay. Mr. O’Connell said it was 5 cents per kilowatt hour to run Four Corners. And the going [market] rate is like two and a half cents. So in terms of dollars per year, that’s taking out \$60 million per year, and adding back 30. So it is \$30 million savings per year. So that is the short term.”) See also, pp1355, 1358.

<sup>213</sup> TR., Van Winkle, 8/14/16, p. 1410 (“Q. So it is your recommendation in this case that the Commission order that PNM’s 200-megawatt interest in Four Corners be decertified? A. Excluded from rates, yes.”)

At pp.1331-1332: (“My remedy is to exclude all of Four Corners. And then you would need to determine, you know, how much ratepayers should have paid in the last several years -- well, since 2016, and then figure out the solution going forward.”)

<sup>214</sup> TR., Van Winkle, 8/14/16, p. 1427-1428: (“And PNM would then need to come forward with a plan to, essentially, replace that lost capacity in energy, as it’s needed. It may not be needed. It is possible that when you looked at the new peak demands and energy sales, they are so low you don’t even need it. But there might be some resources -- and in the plan put forward in 6-1A, there was a gas plant of 187 megawatts in 2018. That’s not an unrealistic date to get approval and implement and build an RFP, a gas plant of that nature. So, PNM would need to have a short-term supply plan, if that was the plan they were going to move forward with, and they were asking for the CCNs that are appropriate to do that alternative approach.”)

needs at that time.”

How PNM shareholders weather FCPP being treated as a merchant facility is up to them and is not the burden of ratepayers.<sup>215</sup>

### **Unleashing the Energy Potential**

Asked about potential opportunities that might arise if there was a required exit of Four Corners and Ms. Sommer testified:

So, there’s a couple of possibilities. One is, like I said during my cross-examination, the unit would actually operate less, because there would not be the demand for that unit and/or it would not be economic. The other, depending on the arrangement of ownership among all of the different units, would be that the remaining owners would agree to consolidate their ownership around a certain number of units and retire one of the units. So, it is hard to say exactly what the real world implications are of PNM exiting from that contract. But I think it is fair to say it is not likely that business as usual would just sort of continue.<sup>216</sup>

Regarding the other issues addressed by NEE in the brief herein we request as follows:

- 1) deny all of the SJGS \$46 million capital expenditures until such time PNM provides actual cost-justification (a cost-benefit analysis), especially given its new potential retirement date by 2022;
- 2) deny transmission and distribution and all technology capital expenditures and Order the PRC staff to exercise its power of investigation to study these expenses, especially the technology and distribution requested capital expenditures, to discern if these costs

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<sup>215</sup>TR., Van Winkle, 8/14/16, pp. 1423-1424. I think one of the things that PNM and – is that if the issue is owned by the shareholders, they see that as a bigger problem than if it’s the costs that are being passed along to customers.

And so, if they have a plant that is losing money, which it probably would be, it’s going to cost 5 cents per kilowatt hour to generate electricity, and the open market is two half cents, then they’ll be losing money. And they will figure out a way to stop that bleeding.

<sup>216</sup> TR., Sommer, 8/14/17, pp. 1299-1300

that might be paid by PNM customers can be justified relative to the out-of-state benefits delivered;

- 3) deny all of the litigation and advertising expenses as violative of PRC Rules;
- 4) require a Request for Proposal for all Replacement Resources moving forward;
- 5) require that should the NM Supreme Court reverse 13-00390-UT or 15-00261-UT make those ratepayer refunds immediate, so as not to undermine the rule of law;
- 6) require all future applications to actually comport with the findings herein and Commission rules:
  - a. cost effective;
  - b. risk-adjusted;
  - c. consider alternative resources on a consistent and comparable basis; and
  - d. minimize environmental impact.

PNM appears to be locked into a business construct of high-risk coal pursuits despite the opportunity of available and affordable New Mexico solar and wind that would also create thousands of new jobs, attract clean energy businesses, reduce waste and pollution, recharge the economy, minimize water consumption, and create a more diverse and less vulnerable financial energy system. Renewables do not involve massive use of New Mexico's limited water supply as do coal and nuclear.

This proceeding has followed what is by now a familiar pattern: PNM makes a business decision that is favorable to its shareholders and then "backs into" an analysis to show that it is good for ratepayers as well. Whether it is a CCN or a rate case, the result appears to be the same: The ratepayers and the environment take a back seat to the shareholders.

Most interveners are unwilling to hold PNM to the legal requirements necessary to justify cost recovery through rate increases, or to justify a CCN, because they are unwilling to spend the time and money necessary to challenge PNM's smoke and mirrors. The result is that they demand that PNM take a bit of a haircut on its economic demands, demand that PNM give a "tip of the hat" to critical environmental issues, and PNM agrees to give a discount or promises ephemeral concessions (like the filing of a separate rate design case without any environmental or economic benefits for ratepayers – who keep on bearing the brunt of PNM's runaway rate increases and charges), such as "we'll probably close this belching coal plant in fifteen years." While such a process is fully acceptable among private parties, it is not acceptable where the agreement involves a monopoly public utility as to which regulation with a capital "R" is the sine qua non of good government. The threshold of regulation cannot be crossed, and the utilities demands accepted, modified, accommodated or rejected, until the determination is made that the utility has complied with the legal requirements that constrain rate increases and the common good. As explained above, PNM has thumbed its nose at the statutory and regulatory requirements which require that utilities refrain from making resource selections and financial commitments without first honestly and rigorously assessing the economic implications of feasible alternatives, the risks associated with those alternatives, as well as the environmental implications of the alternatives. As explained above, PNM performed no honest, much less diligent or prudent analysis of the alternatives to continuing in the Four Corners plant, nor did it honestly assess the actual cost risks, including climate disruption, of its decision to continue Four Corners. Because PNM did not comply with the legal requirements imposed on a regulated utility, the PRC should not approve the Revised Stipulation. Instead, it should decline to approve the Stipulation, deny PNM its requested rate increase and issue an Order to PNM requiring it to

show cause why Four Corners should remain in rates at all, given the apparent availability of cost-equivalent, less polluting, harmful and risky alternatives.

**WHEREFORE**, New Energy Economy respectfully requests this Commission reject approval of the Revised Stipulation because it is not fair, just and reasonable, and in the public interest. Further, New Energy Economy requests this Commission deny PNM all costs associated with Four Corners and deny PNM cost recovery for all other capital expenditure requests and litigation and advertising requests as more fully stated above, and initiate necessary investigations consistent with the interest of the public as more fully described above.

Dated this 8th September of 2017.

Respectfully submitted,

**New Energy Economy**

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