

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

**IN THE MATTER OF THE APPLICATION OF
PUBLIC SERVICE COMPANY OF NEW MEXICO
FOR APPROVAL TO ABANDON SAN JUAN
GENERATING STATION UNITS 2 AND 3,
ISSUANCE OF CERTIFICATES OF PUBLIC
CONVENIENCE AND NECESSITY FOR
REPLACEMENT POWER RESOURCES,
ISSUANCE OF ACCOUNTING ORDERS AND
DETERMINATION OF RELATED RATE-MAKING
AND TREATMENT, NMPRC CASE NO. 13-00390-UT**

NEW ENERGY ECONOMY, INC.

Appellant,

vs.

Docket No. 35,697

**NEW MEXICO PUBLIC REGULATION
COMMISSION,**

Appellee,

And

**PUBLIC SERVICE COMPANY OF NEW MEXICO,
NEW MEXICO INDUSTRIAL ENERGY CONSUMERS, and
WESTERN RESOURCE ADVOCATES,
Intervenors-Appellees.**

**REPLY BRIEF IN CHIEF OF
APPELLANT NEW ENERGY ECONOMY**

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STATEMENT OF COMPLIANCE

This document was prepared using Microsoft Word for Mac 2011. The body of this brief does not exceed four thousand four hundred (4,400) words, excluding the cover page, table of contents, table of authorities, statement of compliance, signature block, and certificate of service. It was printed using 14-point Times New Roman, a proportionally-spaced typeface. Undersigned counsel certifies that it complies with Rule 12-213 NMRA.

I. INTRODUCTION

The Commission's Order approving PNM's CCNs is arbitrary and capricious because it did not adhere to New Mexico laws and PRC regulations that require PNM to prove the cost-effectiveness of the acquired resources with substantial evidence. *New Mexico Exch. Carrier Group v. N.M. Pub. Regulation Comm'n*, 2016-NMSC-015, ¶¶ 11, 13, 18, 21, 28. Cost-effectiveness is shown by comparing the costs of all available resources on a "consistent and comparable basis." NMSA 1978, § 62-17-10 (2005); 17.7.3 *et seq.* PNM agrees that it is required to select the most cost-effective resources and evaluate all feasible alternatives on a consistent and comparable basis and take into consideration risk and uncertainty. PNM pp. 34-38. Furthermore, PNM does not deny that in selecting from among reasonably available resources, it is required to "prefer" resources that minimize environmental impacts. PNM pp. 32-33; 17.7.3.6 and 17.7.3.9 G (1) NMAC The record establishes that PNM failed to comply with these statutory and regulatory requirements. New Energy Economy (NEE) Brief pp. 1-3, 6, 16-18, 25-28, 32-35, 40, 44, 49-52. By approving the CNNs, the Commission waived important legislative and regulatory safeguards that protect the public from unnecessary costs, risks and uncertainty.

PNM argues it demonstrated superior cost-effectiveness of its own coal and nuclear resources that it sought to add to rates to replace SJGS Units 2 and 3. It

also argues that PRC approval was reasonable and lawful. PNM pp. 3-6, 13, 16, 22-23, 39. PNM, the PRC, and Stipulating Parties rest these assertions on PNM's "Strategist" portfolio comparisons, whose inputs PNM controlled. As PNM concedes, the cost PNM input for each resource in portfolios under consideration was significantly different depending on whether it was being considered in the portfolio PNM preferred or in a non-preferred portfolio. PNM pp. 34-38. PNM argues that using different costs for PV3 valuation and stranded asset recovery for the closure of SJGS 2 & 3 was appropriate because it was willing to accept lower prices/cost recovery if it received the portfolio it preferred, via the Stipulation. PNM pp. 34, 36-37. Nonetheless, the record demonstrates that PNM assigned costs to the non-preferred portfolios that were indefensibly high, thereby artificially inflating the non-preferred portfolios' costs. Once these manipulations are eliminated, PNM's claim that the Stipulation resources are most cost effective evaporates. *See Point II B below.*

Finally, PNM failed to confront environmental issues associated with its resource selection, as New Mexico law requires. The PRC similarly failed to address environmental impact when it approved the Stipulation (stating there was no reason to do so because the resources PNM claimed to have compared were not "equivalent") **75 RP 49486**, despite the record evidence that when these resources are treated on a consistent and comparable basis the costs are equivalent and the

law applies. PNM and PRC staff¹ testify that emphasis on environmental and public concerns are PRC's policy and practice.

II. REPLY ARGUMENT

A. The Parties Agree On Standard of Review

The parties concede that, under this Court's Order of November 9, 2015,² the Court will apply "heightened scrutiny" to the PRC's Final Order. This "heightened scrutiny" directive is a result of NEE's claim that four PRC Commissioners had previously acted improperly in reviewing this case. PNM concedes that application of this standard means that this Court will scrutinize the administrative record with "special intensity" and "with a more critical eye than usual." PNM p. 18.

B. The Record Establishes PNM Failed to Demonstrate it Selected the Most Cost-Effective Portfolio to Replace SJGS 2 & 3

Intense judicial scrutiny is most needed on the issue of whether PNM actually proved that the Stipulation portfolio is most cost-effective for ratepayers.

¹ "PNM must demonstrate consistency with the its most recent IRP that has been accepted by the Commission" *and* "that [PRC] Staff applies the following standards to its review of CCN applications: "(1) there is a need for the facility; (2) the facility is the most economical choice among feasible alternatives; (3) no environmental violations are noted; and (4) no valid public opposition is received or the applicant is able to mitigate valid public concerns and impacts, thus making the project in the public interest ..." **14 RP 8208-8209.**

² *NEE v. Lyons, et al.*, No. S-1-SC-35533.

1. PNM concedes that it used different costs for the same resource depending on whether or not it was in its preferred portfolio.

The applicable statute states:

Utilit[ies] *shall* evaluate ... supply-side resources on a consistent and comparable basis and take into consideration risk and uncertainty of fuel supply, price volatility and costs of anticipated environmental regulations in order to identify the most cost-effective portfolio of resources to supply the energy needs of customers.

NMSA 1978, § 62-17-10 (2005) (emphasis supplied); 17.7.3 *et seq.* NMAC

(adopted by the PRC to implement NMSA § 62-17-10 (2005)).

PNM insists that the values and costs ascribed to its preferred versus non-preferred resource “scenarios” reflect reality and to modify them would be to manipulate them. PNM p. 35. This is incorrect: The law requires that “resources” (not “scenarios”) be assessed on a “consistent and comparable basis.” Further, the only costs based on a discernable “reality” reflected in the record, are the costs reflected in the Stipulation, which *approximate* an actual arm’s-length transaction, compared to costs and values ascribed by PNM to non-preferred scenarios. The costs PNM assigned to non-preferred scenarios are not tethered to reality and are based solely on PNM’s desires.

The Court is referred to the table below:

PNM Exhibit PJO-2 (October 6, 2015 Rebuttal) - 2015 Rate Case Forecast (No NEC)

Summary of Regional Haze Compliant Portfolio Comparisons			
Scenario Description	Revised SIP with PV3 + 132 MW to SJ4 + Supplemental Stipulation	Revised SIP w/o PV3 + 132 MW to SJ4	FIP ("4-Unit Shutdown at SJ")
Gas Pricing	Escalated PACE Reference Case	Escalated PACE Reference Case	Escalated PACE Reference Case
CO2	Escalated PACE Ref Case (\$11 in 2020)	Escalated PACE Ref Case (\$11 in 2020)	Escalated PACE Ref Case (\$11 in 2020)
Energy Efficiency Forecast	2015 Rate Case (no NEC)	2015 Rate Case (no NEC)	2015 Rate Case (no NEC)
PV DG Forecast	2015 Rate Case (no NEC)	2015 Rate Case (no NEC)	2015 Rate Case (no NEC)
Demand Response Forecast	June 2013	June 2013	June 2013
Resource Alternative Database	Escalated EPRI TAG	Escalated EPRI TAG	Escalated EPRI TAG
Renewable Procurements	Escalated 2015 REPP	Escalated 2015 REPP	Escalated 2015 REPP
Palo Verde 3 Available	\$1,118/kW	No	\$2,500/kW
NOx Control at San Juan	SNCR's on 1 & 4	SNCR's on 1 & 4	None
San Juan O&M Harvest Savings	Units 2 & 3	Units 2 & 3	Units 1-4
San Juan Investment Recovery	(\$63,958,652)	\$16,611,418	\$133,936,852
SI Settlement Fuel Inventory Cost	\$0	\$0	\$0
SI Settlement Common Capital Cost	\$8,964,595	\$0	\$0
Nuclear Decommissioning Trust Credit	(\$2,615,097)	\$0	\$0
SI Retirements	Units 2 & 3 (Dec 2017)	Units 2 & 3 (Dec 2017)	Units 1-4 (September 2016)
2016	Maintenance/Outage Capital	Maintenance/Outage Capital	Maintenance/Outage Capital
	Aeroderivative (40 MW)	Aeroderivative (40 MW)	Aeroderivative (40 MW)
	Solar PV Tier 1 (40 MW)	Solar PV Tier 1 (40 MW)	Solar PV Tier 1 (40 MW)
2017	San Juan BART	San Juan BART	San Juan BART
			Palo Verde 3 (134 MW)
			Large GT (187 MW)
			Large GT (143 MW)
			1x1 NGCC Participation (250 MW)
			Wind (100 MW)
2018	Palo Verde 3 (134 MW)	Large GT (187 MW)	
2019	Solar PV Tier 2 (20 MW)		
2020	Solar PV Tier 2 (40 MW)		Solar PV Tier 2 (80 MW)
2021	Solar PV Tier 2 (20 MW)	Solar PV Tier 2 (40 MW)	Solar PV Tier 3 (80 MW)
2022	Solar PV Tier 3 (40 MW)		
2023	Solar PV Tier 3 (40 MW)	Solar PV Tier 2 (40 MW)	Solar PV Tier 3 (20 MW)
2024	Wind (100 MW)		
2025	Large GT (187 MW)	Solar PV Tier 3 (60 MW)	
2026		Solar PV Tier 3 (80 MW)	
2027	Solar PV Tier 3 (60 MW)	Large GT (187 MW)	Large GT (187 MW)
2028	Large GT (187 MW)		Solar PV Tier 3 (40 MW)
2029		Large GT (187 MW)	
2030			
2031	Small GT (85 MW)	2nd Aeroderivative (40 MW)	
2032	2nd Aeroderivative (40 MW)	Aeroderivative (40 MW)	Small GT (85 MW)
2033	Reciprocating Engines (93 MW)	Small GT (85 MW)	2nd Aeroderivative (40 MW)
2034			
20-Year LOLH	25.05	25.67	23.96
Average NPV (Risk)	\$6,878,327,909	\$6,963,959,217	\$7,168,614,115
5% Tail NPV	\$174,453,893	\$214,812,882	\$284,613,418
Average NPV Difference	\$0	\$85,631,308	\$290,286,206

PNM's key exhibit above, **65 RP 42319**, purports to demonstrate that its preferred resource acquisitions are most cost-effective.³ Line 45 is a comparison of an average Net Present Value (NPV) for PNM's Stipulation portfolio (Column A) with the cost of a Four-Unit Shutdown portfolio (Column C). It shows for PNM's

³ PNM ultimately revised its Strategist portfolio comparisons in response to testimony of NEE Expert, David Van Winkle, who criticized PNM for failure to include updated load forecasting data that PNM filed in rate case, 15-00261-UT, 10 months prior and his projection that PNM would lose the last of its wholesale customers, Navopache. **64 RP 41370-41377; 73 RP 48526-48547.**

preferred scenario an NPV of \$6,878,327,909, which is less than the shutdown cost of \$7,168,614,115, by \$290,286,206 (\$290M). But that difference results from PNM's input of wholly different assumptions for the same resources, depending on the "scenario." Line 8 is the cost for PV3 in the preferred Stipulation scenario (Column A) of \$1118/kW, but PNM assigns more than twice that cost, \$2500/kW, for the same resource in the non-preferred scenario (Column C). This results in an increased NPV of \$118M for the Four-Unit Shutdown, *for the same resource*.⁴ Line 11 is the cost for San Juan Investment Recovery in the preferred Stipulation scenario (Column A) of minus \$63M (a "savings" to the ratepayers) while in the non-preferred scenario, the Four-Unit Shutdown (Column C), PNM assumes a cost recovery of \$134M (a cost increase to ratepayers), resulting in \$196M more than PNM's preferred scenario.⁵ PNM's disparate assumptions for the same resources result in a total disparity of \$314M (\$118M + \$196M = \$314M). If these two "costs" were based on consistent assumptions, allowing them to be comparable as required by law, the Four-Unit Shutdown scenario would actually be \$24M *more cost-effective* than the Stipulation scenario, over the 20-year horizon prescribed by PRC Rules and indicated by **65 RP 42319**.⁶

⁴ **66 RP 43358**.

⁵ **66 RP 43359-60**.

⁶ § 17.7.3.7.J NMAC; **66 RP 43369**.

NEE showed that PNM's calculations were deficient due to other biased assumptions, including: 1) unrealistic solar energy costs;⁷ 2) unrealistic wind energy costs;⁸ 3) imposition of a 2.5% yearly escalator for solar and wind energy when costs are declining;⁹ 4) constraining wind power additions to 100 MW during the entire 20-year planning period;¹⁰ 5) preferring PNM-owned resources to less costly Power Purchase Agreements ("PPAs").¹¹ Changing these to reflect realistic and consistent assumptions results in the Four-Unit Shutdown being hundreds of millions of dollars more cost-effective than PNM's Stipulation portfolio.¹²

Consequently, based on PNM's own "comparative" portfolio evidence, if consistent values are input, a Four-Unit Shutdown is more cost effective,¹³ reliable,¹⁴ and far better for our health and environment.¹⁵

⁷ PNM input solar costs at 6.8 ¢/kWh. **8 RP 41605-6**. However, PNM's own RFP indicated a market price of 4.2 ¢/kWh. **1 Second Supp RP 56935**. Other utilities installed solar at below 5 ¢/kWh: Southwestern Public Service (SPS serving NM) 140 MW at 4.2 ¢/kWh; Austin Energy at 4 ¢/kWh; Nevada Energy 200 MW at 4.7 ¢/kWh. **64 RP 41408-9; 41615**.

⁸ PNM input wind costs at 4.4 ¢/kWh. **66 RP 43361** However, O'Connell testified in 14-00158-UT, that PNM's own RFP indicated a market price of 3.7 ¢/kWh (including transmission). **66 RP43315-7** SPS purchased 700 megawatts of wind for 2.3 ¢/kWh, saving ratepayers \$590M. **64 RP 41407; 66 RP 43322-5**.

⁹ **66 RP 43231-3; 43351**.

¹⁰ **66 RP 43350**.

¹¹ **8 RP 5265-71**.

¹² **15 RP 8938; 64 RP 41877**.

¹³ **66 RP 43358-61**; NEE's cross-examination focused on O'Connell's exhibit PJO-1 from his 10/6/15 testimony, **65 RP 42317**. At that time, it was unknown to intervenors that Navopache, a wholesale customer, had defected from PNM (**73 RP 48526-47**). Regardless, PNM's inputs for PV3 and stranded asset recovery are

Loss of load hours (LOLH) is an output of the Strategist model, representing generation adequacy; the smaller the percentage number the more efficient and reliable the portfolio. **29 RP 18008-9; 18064-6.** As shown above on **65 RP 42319**, Line 44, a Four-Unit Shutdown (Column C) has a smaller LOLH than the Stipulation portfolio (Column A), making it more reliable.

exactly the same in **65 RP 42317** and **65 RP 42319**. In fact, the difference between the Supplemental Stipulation and the Four-Unit Shutdown if *only* these two inputs were made consistent in **65 RP 42317** is 0.1 percent or a difference of \$7 million over 20 years, **66 RP 43358-9**, (the equivalent of about 2¢ per month per residential customer), and in **65 RP 42319** (more accurate picture) ratepayers save \$24 million. *See also*, **15 RP 8938; 64 RP 41877**.

¹⁴ PNM emphasizes that Van Winkle admitted: “it was too early to pursue a Four-unit shutdown and much more work needed to be done before considering it.” (PNM p.6) However, Van Winkle never said that a Four-Unit Shutdown could not be accomplished. He testified in January 2015, “that a four unit closure [was] the most cost effective solution” and would take work. **41 RP 26127-9**. PNM’s O’Connell testified that it might take work but could be accomplished reliably. PNM’s attorney questioned O’Connell:

Q. And have you done an analysis as to the reliability of the system for a four-unit shutdown?

A. I prepared portfolios for a four unit shutdown, and in the portfolio preparation, I tried to make sure each resource option was a resource that could be reliably added to the system at the cost provided. The calculator used, Strategist, does do some evaluation portfolio reliability. So am I done with reliability analysis of a four unit shutdown, no, but I do believe that the four unit shutdown portfolios I have presented have a reasonable expectation of producing a reliable system.

66 RP 43373-4.

¹⁵ O’Connell testimony:

Q. And you know that there would be greater health benefits, greater environmental benefits, and greater climate benefits with a four-unit shutdown?

A. What I know is the emissions would be less.

66 RP 43364.

PNM argues, however, that making costs of resources “consistent and comparable” should not require “forc[ing] identical costs upon all scenarios.” PNM p.35 Yet there is no wiggle room in the statutes and PRC rules¹⁶ – they are clear and prescriptive. They do not require cost assessment of resources on a “consistent and comparable basis” *except when a utility deems them “unrealistic.”* PNM p.35. It is only through these impermissible cost manipulations that PNM and the Stipulating Parties can argue that the Stipulation portfolio is “most cost-effective.”

PNM argues that the higher costs it uses in the non-preferred scenarios merely reflect the “risk of litigation and the potential that PNM could have prevailed” in persuading the PRC to give it more money for its PV3 interests and compensate it for SJGS stranded assets, and that “public policy favors settlement of disputes.” According to PNM, the inconsistent inputs are merely a way of recognizing the Stipulation’s “benefits.” PNM p. 36. The Hearing Examiner (“HE”) concurred: it was not “improper for PNM to subtract cost savings resulting

¹⁶ “Agencies are created by statute, and limited to the power and authority granted or necessarily implied by those statutes.” *Qwest Corp. v. NMPRC*, 143 P. 3d 478, NMSC – 2006, *citing PNM Elec. Servs. v. Pub. Util. Comm’n*, 1998-NMSC-017, ¶ 10, 125 N.M. 302, 961 P.2d 147; *Pub. Serv. Co. v. Pub. Util. Comm’n*, 1999-NMSC-040, ¶ 14, 128 N.M. 309, 992 P.2d 860 (“Our primary concern is to determine and give effect to legislative intent, looking first to the plain language of the statute.”) *Id.* ¶ 18. *New Mexico Indus. Energy Consumers v. N.M. Pub. Regulation Comm’n.*, 2007-NMSC-053, ¶ 20-22 (“we begin with the plain language of the statute, giving the words their ordinary meaning to ascertain legislative intent.”).

from the Stipulation from the costs of the replacement portfolio encompassed in the Stipulation.” **48 RP 31161**.

Even if PNM and HE were correct about applying inconsistent costs to arrive at NPV, PNM’s cost-effectiveness analysis still fails because PNM improperly inputted *arbitrary and exaggerated* costs so as to make the Stipulation scenario appear most cost-effective. To justify differing costs, PNM *must* show a reasonable or rational basis,¹⁷ or a clear nexus to “actual” costs, reliably and customarily shown by market tests, an appraisal, or proposals from market participants based upon Requests For Proposals (“RFPs”). The record is devoid of any of these customary means of establishing costs. Here, the only reason PNM gives for higher inputs in its non-preferred scenarios is that they reflect a price that PNM “offered.” **66 RP 43357-8**. The HE and the PRC accepted this as reasonable but, in so doing, the HE approved costs that he had earlier ruled *unlawful or unreasonable*.¹⁸ The HE had cautioned: “[I]f cost savings are anticipated to occur

¹⁷ *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.”).

¹⁸ Regarding a 50/50 split, the HE stated it “reflects a reasonable balanc[ing] of the interests of investors and ratepayers.” **48 RP 31160-1**; “[F]airly balances the interests of investors and ratepayers and is reasonable.” **48 RP 31171**. *See* Case No. 2146, Part II, 137 P.U.R.4th at pp. 9-10 (“sharing of benefits and burdens appears to have been discounted by PNM and the other parties to the Stipulation.”). Regarding acquisition adjustment, the HE stated: “Neither of PNM’s approaches [to valuing PV3 at a higher amount than net book value] is consistent with

independently of the Stipulation and the savings will occur under other portfolios, the savings should be reflected in the modeling conducted for *all* of the portfolios affected.” (emphasis supplied.) **48 RP 31161**.

It is more reasonable¹⁹ for all portfolios to include a PV3 valuation at net book value of \$1118/kW, *independent of the Stipulation*. The valuations should be the same because an acquisition adjustment for a greater valuation is limited to arms-length transactions (and here PNM is self-dealing), where it benefits ratepayers,²⁰ and the Commission’s “traditional approach” excludes acquisition adjustments from rate base.²¹ It is also more reasonable to require the stranded asset recovery to be the same in both scenarios: a 50/50 split between shareholders and ratepayers is consistent with prior PRC precedent that recognizes, “a fair result is a sharing of the costs of excess capacity between investors and ratepayers.” *Re Public Service Company of New Mexico*, Case No. 2146, Pt. II, 101 P.U.R.4th 126, 163 (1989). The PRC approved these CCNs based on information that it knew was

ratemaking principles used by the Commission to value rate base assets. Neither satisfies the Commission’s standards for acquisition adjustments.” **48 RP 31180**. This raises the question whether a non-net book value (without any other basis) is could be other than arbitrary and capricious?

¹⁹ NMSA §62-11-5 (1982) (The supreme court shall vacate and annul the order complained of if it is made to appear to the satisfaction of the court that the order is unreasonable or unlawful.)

²⁰ PNM chose a value for PV3 to compensate for a 1993 write-down. **1 RP 477-479**. Even PNM’s \$700/hr. witness, Reed, stated that \$2500/kw for PV3 was uneconomic for ratepayers in the short term and “would be unprofitable” until at least the 2020s. **31 RP 19971-4, 20011**.

²¹ **48 RP 31103-4, 31176-31184**.

inherently faulty. *Serv. Employees Int'l Union, AFL-CIO v. Gen. Services Admin.*, 830 F. Supp. 5, 10 (D.D.C. 1993) (“[U]nsubstantiated assumptions” cannot support agency decision-making.”) (citing, *Motor Vehicle Mfrs. Ass’n, supra*, 463 U.S. 29). Because the PRC’s decision was not cost-effective for ratepayers and its decision unsupported by evidence, this Court should reverse and remand to determine the lowest-cost, lowest-risk portfolio consistent with New Mexico laws and PRC regulations.

C. There is no record evidence that PNM evaluated “thousands” of combinations of resources in creating its preferred portfolio.

PNM argues it adequately evaluated alternative resource portfolios by performing “thousands of potential combinations of [resource mixes]” that included “rigorous vetting ... of reasonable inputs and assumptions ...” PNM pp. 15-16. The HE and PRC agreed. **75 RP 49486**. PNM’s contention that “it has extensively and properly explored alternatives and provided comparisons of representative scenarios” (PNM p. 17) was limited to *five* scenarios, all of which included PNM preferred owned or operated (and then owned) aging resources among its portfolio “alternatives.” NEE Opening Brief p. 44.

The PRC and PNM acknowledge that PNM had the burden to provide an alternatives assessment. *In Re Public Service Company of New Mexico*, Case No. 2382, 166 P.U.R.4th 318 (1995) pp. 48-49, 88, 97-104. Yet, there is no record

evidence of alternatives *without* PNM’s preferred resources— except alternatives introduced by NEE. PNM ran Van Winkle’s scenario, which PNM admitted was less costly, **28 RP 17615**, and PNM ran the Four-Unit Shutdown with inconsistent and inappropriate values assigned.

Therefore, the “thousands” claim is made without *any* substantiation in the record. Unsubstantiated opinions are not substantial evidence. *Atilixco Coalition v. County of Bernalillo*, 984 P.2d 796 (N.M. Ct. App. 1999), 1999-NMCA-088; *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.”).

The reason an assessment of alternatives is required to protect the public interest is clear:

Explicitly assessing how alternatives compare . . . could help utilities and regulators identify investment alternatives on both cost and non-cost objectives that are likely to result in the broadest range of societal benefits. Increasing transparency regarding the value choices . . . can elucidate those inherent choices and also demonstrate the breadth of options available under the least cost framework.

Maximizing Utility in Electric Utility Regulation, 43 Fla. St. U. L. Rev. 135, 2015.

D. The PRC-approved Settlement Waived Ratepayer Safeguards in Contravention of the Law and the Public Interest

One of the questions before this Court is whether it was lawful for the PRC to approve a Final Order based on a Stipulation that waives ratepayer protections²² guaranteed by statute and implemented through regulation. NEE submits that it was not.

PNM argues that this Court should not overturn the PRC's approval of the Stipulation because the Attorney General, PRC Staff, and other Intervenors support it. The Signatories testified that they believed the Stipulation was in the public interest. PNM pp. 12-13. That these parties accepted PNM's preferred portfolio does not magically transform an illegal result into a legal one: PNM's choice of resources and manner of selection does not comport with New Mexico statutes and regulations. In fact, the Stipulation sets bad precedent for New Mexico, acting as a stamp of approval for PNM's and the PRC's flaunting of utility law.

The Legislature and the PRC itself crafted specific laws and regulations designed to safeguard the public, whether by requiring an integrated resource

²² NMSA 1978, § 62-17-10 (2005) and 17.7.3 NMAC (utilities required to evaluate resources on a consistent and comparable basis and consider risk and uncertainty, choosing the most cost-effective resource); NMSA 1978, § 62-6-19 (1982) and 17.6.450 NMAC (Commission's requirements for Class I and II transactions by public utilities; assure reasonable and proper utility service at fair, just, and reasonable rates; require reasonable access to the utility's books and records so that such assurances can be made; assure appropriate cost allocations; assure no cross-subsidization occurs between the utility and an affiliated interest. 17.6.450.6); **61 RP 39601**.

planning process for future utility resources or the assurance of “reasonable and proper utility service at fair, just and reasonable rates” for Class II transactions. NMSA 1978, § 62-17-10 (2005) and NMSA 1978, § 62-6-19 (1982) These public obligations were not properly waived by the Stipulating Parties. *Brooklyn Sav. Bank v. O’Neil*, 324 U.S. 697 (S. Ct. 1945) (A statutory right conferred on a private party, but affecting public interest, may not be waived if such waiver contravenes statutory policy.); *Nall v. Mal-Motels*, 723 F.3d 1304, (11th Cir. 2013); *Pereira v. State Bd. Of Educ.*,²³ 37 A.3d 625, 654-655, (Conn. 2012) (“The public interest may not be waived.”); *Brannock v. Brannock*, 1986-NMSC- 042, 104 N.M. 385 (Any privilege or right which a person has by statute can be waived “provided it is intended for his sole benefit, and does not infringe upon the rights of others, and such waiver is not against public policy.”).

As to the Stipulation Parties’ motives for joining the Stipulation, the Attorney General’s expert, Ms. Crane, implied that it was driven by the settling parties’ belief that this might be the best ratepayers could do before the PRC.²⁴

²³ “Parties may not waive statutory rights where a question of public policy is involved. Likewise, a law established for a public reason cannot be waived or circumvented by a private act or agreement.” 37 A.3d at 667, *citing* 28 Am.Jur.2d Estoppel and Waiver, at § 200. “Waivers of statutory rights are not favored” *Pereira* at 649.

²⁴ **38 RP 24069-73.**

E. Deflection

By attempting to focus this Court on the supposed flaws in NEE's witnesses and PRC Rode's expert testimony, PRC, PNM and other Intervener-Appellees seek to deflect from the principle reason requiring reversal: The PRC's Final Order was arbitrary and capricious because it approved, without substantial evidence, the Stipulation wherein PNM failed to meet its burden of proving the cost-effectiveness of its resource selection through an evaluation of costs on a consistent and comparable basis and failed to take into account risk, uncertainty, and environmental impact of its preferred portfolio as required by law.

F. NEE has not Abandoned the Reason for Intervention: Climate Change and Environmental Risks Have Been Addressed

In their Responses to *Amici's* Brief, PNM and the PRC assert that NEE abandoned the environmental argument on appeal, requiring this Court to disregard *Amici's* climate change assertions. PNM Amici Response p. 4; PRC Amici Response p. 2.²⁵ However, both below and in NEE's Opening Brief, NEE repeatedly pointed to PNM's resource selection as violative of regulations

²⁵ WRA does not concur that NEE abandoned the issue: "NEE is exactly right about the importance of this case and its impact to consumer, environmental and public health concerns." WRA p. 17.

requiring consideration of environmental impacts and a preference for resources with less environmental impact.²⁶

G. Fair Reflection of the Case and Footnotes

PNM argues at pp. 9-11 that NEE ignored page limit and footnote rules.

NEE tried to represent the facts accurately – the record is more than 56,000 pages, spanning two years. It wasn't NEE's intent to disparage or misrepresent; it provided footnotes for additional information on subjects in the main text without elaboration.

H. PRC's Abdication of Oversight is Not Remedied by Stipulation "Safeguards" that Guarantee a 2018 Evaluation Applying Legal Requirements Ignored Here.

PRC and WRA tout the Stipulation for placing limitations on PNM's future coal plant acquisition to avoid "an uneconomic perpetuation of those facilities," suggesting that a "2018 proceeding to evaluate the continued usefulness of SJGS is an important safeguard against that concern." PRC p. 41; WRA pp. 18-21.

The PRC ignored the cost-effectiveness analysis required by law in *this* case, and the Stipulating Parties waived these ratepayer safeguards. Yet, we are now asked to take comfort that the 2018 review will "*be informed with bids from*

²⁶ For example: NEE Opening Brief at pp. 5, 54; **24 RP 14731-32; 45 RP28643, 28652-60; 46 RP 29446-56, 29461-29463, 29465, 29470-3; 64 RP 41423, 41427-8, 41431-3, 41459, 41465; 64 RP 41354-9, 41369-70, 41385-41414, 41422-44; 66 RP 43097; 74 RP 48652-48654; 74 RP 49040-3, 49048-51, 49058; 75 RP49238, 49240, 49244, 49254-6, 49258, 49266-70.**

competitive RFPs,” “results of the 2017 IRP,” and in 2018 PNM will have the burden to identify the *“most cost effective portfolio”* and the “opportunity to address the continued desirability of SJGS.” PNM p.43 (emphasis supplied).

The law requires evaluation of resources and ratepayer protections *before* resources are acquired— *not after*.

With absolutely no authority, the Stipulating Parties effectively deferred to 2018 PRC responsibilities to abide by regulatory standards. The Commission cannot freely disregard its own rules and prior ratemaking decisions without good cause and prior notice to the affected parties. *In re PNM Gas Services*, 2000-NMSC-012, ¶ 9, 129 N.M. 1. This is the essence of “arbitrary and capricious.”

III. CONCLUSION

The attendant risks and liabilities associated with increased ownership at SJ4 and PV3 are not worth the financial cost and harm to ratepayers. As NEE has shown, solar and wind resources are less costly, are feasible today, and will greatly benefit our economy and environment. Had PNM followed the law, these benefits would have been starkly evident and this proceeding wholly unnecessary.

This Court has recognized that utility regulation “prevents utilities from using their monopoly power to harm ratepayers” and protects ratepayers against a

monopoly utility's overinvestments in resources that have high fixed costs and risks. *Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n*, 1995-NMSC-062, 120 N.M. 579, 583, 904 P.2d 28, 39-40. The PRC's approval of PNM's CCNs does not comport with the law and meet these ratepayer protections and therefore, are arbitrary and capricious. This Court should reverse and remand.

Respectfully submitted this 9th day of January 2017,

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