IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NEW ENERGY ECONOMY, INC., Cause No. 35,697

Appellant,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee,

and

PUBLIC SERVICE COMPANY OF NEW MEXICO, NEW MEXICO INDUSTRIAL ENERGY CONSUMERS, and WESTERN RESOURCE ADVOCATES,

Interveners-Appellees.

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 Principles and Treatment; NMPRC Case No. 13-00390-UT

ANSWER BRIEF OF INTERVENER-APPELLEE PUBLIC SERVICE COMPANY OF NEW MEXICO

Oral Argument Requested

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November 2, 2016

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

New Mexico Constitution

New Mexico Cases

New Mexico Regulatory Cases

Cases from Other Jurisdictions

New Mexico Statutes and Rules

Other Authorities

STATEMENT OF COMPLIANCE WITH RULE 12-213(F)(3)

This Answer Brief complies with the type-volume limitation imposed by Rule 12-213(F)(3) NMRA. The word count feature of the word processing system (Microsoft Word, Version 2013) used to prepare the brief indicates a word count of ten thousand nine hundred thirty-one [10,931], excluding the cover page, table of contents, table of authorities, statement of compliance, signature block, and certificate of service.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 12-214 NMRA, PNM respectfully requests oral argument to facilitate the Court's understanding of the extraordinarily lengthy record in this case which includes highly technical evidence adduced in support of, and in opposition to, the various positions of the parties below.

I. INTRODUCTION

This case arose from successful efforts by Public Service Company of New Mexico ("PNM"), the New Mexico Environment Department, the Environmental Protection Agency ("EPA") and other parties to devise a less costly alternative to the Federal Implementation Plan ("FIP") for compliance with the EPA's Regional Haze Rule under the Clean Air Act. **[13 RP 7463-A through 7480-A].** The FIP required installation of expensive selective catalytic reduction ("SCR") emission control technology on all four units of the coal-fired San Juan Generating Station ("SJGS") to reduce emissions that contribute to regional haze, such as nitrogen oxides and sulfur dioxides. The successful alternative, the Revised State Implementation Plan ("RSIP"), required abandonment of SJGS Units 2 and 3, which reduced the amount of coal-fired generation in New Mexico by 836 megawatts ("MW"), and installation of the lower cost selective non-catalytic reduction ("SNCR") emission controls on SJGS Units 1 and 4. **[13 RP 7273-A, 7464-A]**. PNM could not abandon SJGS 2 and 3 without approval from the New Mexico Public Regulation Commission ("Commission" or "NMPRC"). NMSA 1978, § 62-9-5 (2005). PNM's customers needed the power and capacity supplied by SJGS 2 and 3. Consequently, PNM was required to show that replacement power supplies could reliably serve customers at lower cost than compliance with the FIP. **[14 RP 8194-8196]**.

PNM filed an Application with the Commission for approvals necessary to implement the RSIP. PNM and other parties settled the difficult resource replacement issues posed by the RSIP through stipulations that not only achieved compliance with the Regional Haze Rule but also reduced carbon emissions and produced other environmental benefits. The Commission adopted the recommendation of the Hearing Examiner to approve a Supplemental Stipulation modifying the Original Stipulation (together "Modified Stipulation") which resolved all issues in the case, including concerns raised by the Hearing Examiner regarding the Original Stipulation. The Modified Stipulation is shown in red-line format at **62 RP 40371-40387**. The Supplemental Stipulation resulted from a settlement facilitation to which all parties were invited. **[74 RP 49098]**. Eight of the original nineteen parties (seventeen intervenors), including the Commission's Utility Division Staff, joined in the Supplemental Stipulation. **[74 RP 49092, 49099]**. Four parties initially opposed the Supplemental Stipulation, but two later withdrew their opposition. One party withdrew its opposition to the Original Stipulation and took no position on the Supplemental Stipulation. One party withdrew its intervention. **[74 RP 49100]**. Only New Energy Economy ("NEE") now opposes the Final Order approving the Modified Stipulation.

The record is voluminous, technical, and complex. Sixteen days of hearings in January 2015 addressed the Original Stipulation. Six more days of hearings in

October 2015 vetted the Supplemental Stipulation. The enormous amount of information in the record reflects the numerous refinements to resource scenarios and modeling to deal with evolving circumstances and needed corrections. The Commission's approval of the Modified Stipulation cleared the way for PNM to comply with the RSIP and the Regional Haze Rule as applied to SJGS. The record confirms that the Modified Stipulation results in a reasonable resolution of the generation resource issues in this case, with significant benefits for the public and PNM's customers, including benefits that could not be achieved in the absence of settlement.

II. SUMMARY OF THE PROCEEDINGS

A. Nature of the Case.

NEE challenges the Commission's approval of the Modified Stipulation, which resolved complex resource replacement issues stemming from the RSIP.

B. Course of Proceedings, Relevant Facts.

From the beginning, PNM's efforts to identify a more cost-effective Regional Haze Rule compliance alternative included modeling and analysis of many different scenarios. Initial modeling showed that PNM could accomplish less expensive solutions for PNM's customers if PNM could avoid the SCR investment at SJGS, even if that meant the closure of some units coupled with appropriate replacement resources. When SJGS capacity was reduced in the

modeling, it became clear that Palo Verde Nuclear Generating Station Unit 3 ("PVNGS 3") was a cost effective replacement base load resource with the additional benefit that it is a carbon-free resource. **[66 RP 43258, 43262-43264]**. Additional modeling during the 2014 Integrated Resource Plan ("IRP") process and in the proceeding below proved in every instance that additional capacity in SJGS 4 and PVNGS 3 were part of the most cost-effective replacement portfolio ("Stipulation Portfolio"), notwithstanding corrections, modeling adjustments, and changed circumstances. This modeling confirmed the resilience, or "robustness," of these resources to changed conditions, an essential attribute of any long-term resource plan, given the unpredictability of future conditions. **[65 RP 42282-42284; 66 RP 43270-43278]**.

The Commission granted a Certificate of Public Convenience and Necessity ("CCN") for PVNGS 3 in 1977, but decertified it in 1990 in NMPSC Case No. 2285. Abandonment of PVNGS Unit 3 terminated Commission jurisdiction and PNM retained its share of PVNGS 3 for wholesale market sales. **[14 RP 8210-8212]**. PNM was not required to seek a new CCN unless it was assured that the valuation placed on PVNGS 3 for rate base purposes fairly compensated investors for the lost opportunity to receive revenues from wholesale market transactions. **[13 RP 7479-A to 7480-A].**

Abandonment of SJGS 2 and 3 eliminates 418 MW of coal-fired generation from PNM's supply portfolio and 836 MW in New Mexico. PNM's acquisition of the additional 132 MW of SJGS 4 is merely the transfer of existing capacity from other owners and does not increase coal generation in New Mexico. PNM's jurisdictional coal generation is instead reduced by a net 286 MW. **[13 RP 7275-A to 7276-A]**. PNM's acquisition preserved the availability of SJGS Units 1 and 4 as low cost, reliable generation for customers by facilitating the SJGS ownership restructuring necessary to comply with the RSIP. **[13 RP 7282-A, 7487-A to 7488-A]**.

Modeling continued up to the October 2015 hearings on the Modified Stipulation and consistently confirmed that the 134 MW of PVNGS 3 and the 132 MW of SJGS 4 were part of the most cost-effective and reliable replacement power supplies for SJGS 2 and 3. Compared to the next lowest cost feasible compliance alternative under the Regional Haze Rule, which is the retirement of all four SJGS units, PNM's customers will save an estimated $290 million on a net present value ("NPV") basis over the applicable twenty-year planning horizon, applying the most recent data available at the time of the October 2015 hearings. **[65 RP 42319]**. The advantage of the Stipulation Portfolio in the near term, *i.e.*, the 2018 revenue requirement impact on customers, is even more dramatic. The incremental revenue requirement in 2018 under the Stipulation Portfolio is approximately $11 million,

corresponding to a 2018 bill impact of $10.29 per year - less than one dollar per month - for residential retail customers using 600 kilowatt-hours ("kWh") per month. By comparison, the 2018 incremental revenue requirement of a four-unit shutdown would be approximately $114 million. **[62 RP 40226]**. AG witness Crane performed her own revenue requirements analysis of the Stipulation Portfolio for 2018 which showed similar results, with an estimated bill impact of $11.4 million in 2018. She calculated the impact to the average residential customer to be approximately $10.97 per year. **[62 RP 40057, 40066-40067]**.

Significantly, the record reflects that a four-unit shutdown in 2018 would threaten cost-effective, reliable service. NEE witness Van Winkle admitted that it was too early to pursue a four-unit shutdown and much more work needed to be done before considering it. **[41 RP 26128-26137; 73 RP 48205]**. Acquiring enough replacement power for a four-unit retirement by 2018 would have been very difficult. **[28 RP 17324]**. Crane agreed that a four-unit shutdown was not preferable, given the substantially higher near term revenue requirement impacts. **[38 RP 24050-24054, 24091-24095]**; **[62 RP 40226]**; *see also* **[28 RP 17348-17349]**. And, a four-unit shutdown at the end of 2017 would not comply with the RSIP because SNCR had to be placed on Units 1 and 4 by January 31, 2016. **[28 RP 17344-17345]**.

Following the January 2015 hearings on the Original Stipulation, the Hearing Examiner issued his Certification of Stipulation in April 2015 ("April Certification") recommending denial of the Original Stipulation unless the signatories agreed to substantial modifications. **[48 RP 31042-31217]**. The April Certification cited the lack of final SJGS ownership restructuring agreements and uncertainties about a post-2017 coal supply agreement as the primary reasons for concluding that the Original Stipulation did not provide net benefits to the public. **[48 RP 31154]**.

The April Certification also stated that a lower value on PVNGS 3 would help compensate customers for taking on nuclear risks "[t]o the extent that risks remain…." **[48 RP 31179]**. However, the April Certification recognized that the Original Stipulation already contained provisions to address the risks associated with nuclear power. **[48 RP 31175-31176]**. The April Certification recommended that PVNGS Unit 3 should be valued at net book value ("NBV") because it would be "more cost effective" for customers. **[48 RP 31173]**.

Before the Commission ruled on the April Certification, PNM completed negotiations for restructuring ownership of SJGS and for a new, post-2017 coal supply agreement. PNM and other parties entered into the Supplemental Stipulation to modify the Original Stipulation and address the concerns raised in the April Certification and resolved all contested issues in the case. The new coal

agreements not only resolved the uncertainties about a future coal supply, but also yielded substantial fuel cost savings for PNM's customers because they became effective earlier than anticipated. **[60 RP 39124]**.

The Modified Stipulation also addressed the rate base valuation matters raised in the April Certification for PNM's proposed interest in SJGS 4 and inclusion of PVNGS 3 as a retail jurisdictional asset. The Modified Stipulation gave the 132 MW of SJGS 4 an initial rate base value of zero to reflect PNM's actual acquisition cost, and gave the 134 MW interest in PVNGS 3 an initial rate base value equivalent to its NBV as of January 1, 2018, estimated to be $1,118 per kilowatt ("kW"), including transmission and other related assets. **[62 RP 40343-40344]**.

On November 16, 2015, the Hearing Examiner issued his Certification of Stipulation ("November Certification"), analyzing the requirements for approval of contested stipulations and recommending approval of the Modified Stipulation. **[74 RP 49086-49216]**. On December 16, 2015, the Commission issued its Final Order adopting the November Certification and approving the Modified Stipulation. **[75 RP 49479-49509]**. NEE appealed.

III. ARGUMENT

A. NEE's Amended Brief-in-Chief ("BIC") Improperly Omits the Evidence Supporting the Commission's Decision and Attempts to Evade the Court's Order on Page Limits.

A brief-in-chief must summarize the facts relevant to the issues presented for review. Rule 12-213(A)(3) NMRA. Violation of this rule results in waiver of substantial evidence challenges. *Id.* NEE's brief does not summarize all the relevant facts supporting approval of the Final Order.

In *Martinez v. Southwest Landfills, Inc.,* 1993-NMCA-020, 115 N.M. 181, the appellant "selectively set forth evidence which would support a different result" in both the summary of proceedings and the argument portion of the brief in chief. *Martinez,* 1993-NMCA-020, ¶ 5. It was left to the appellee to provide the missing evidence. *Martinez*, 1993-NMCA-020, ¶ 6.

The Court pointed out that compliance with the briefing rule involves a two-step process: setting forth "the substance of *all* evidence bearing upon the proposition" and then demonstrating "why, on balance, the pertinent evidence fails to support the finding made." *Martinez*, 1993-NMCA-020, ¶¶ 9, 10 (emphasis in original; internal citations omitted). The two step process allows a reviewing court "to rely entirely on the appellant's brief-in-chief in canvassing all the evidence bearing on a finding or a decision, favorable or unfavorable…. Neither the appellee

nor the reviewing court should have to supplement the appellant's presentation of the evidence." *Martinez,* 1993-NMCA-020, ¶ 13.

Compliance with Rule 12-213(A)(3) requires "a high degree of forthrightness. The party must abandon the role of advocate for facts that were argued below and rejected, and assume the role of advocate for the law." *Martinez,* 1993-NMCA-020, ¶ 14. These briefing requirements "fully apprise the reviewing court of the fact-finder's view of the facts and its disposition of the issues, and . . . help the court decide the issues on appeal." *Martinez,* 1993-NMCA-020, ¶ 15; *see also Gila Res. Info. Project v. New Mexico Water Quality Control Comm'n*, 2015-NMCA-076, ¶ 56, 355 P.3d 36, *cert. granted*, 2015-NMCERT-007, 355 P.3d 2 (following *Martinez,* rejecting appellant's substantial evidence challenge because appellant omitted facts supporting agency decision and presented the record in the light most favorable to itself).

NEE's brief ignores these requirements. Despite a significant page extension, NEE's brief barely touches on the facts supporting the Final Order. NEE entirely disregards the record refuting the evidence it relies on. *See* Part III.C.1., below.

The record in this case is massive. Consequently, NEE's violation of Rule 12-213(A)(3) puts an extreme burden on this Court's time and resources and amply justifies rejecting NEE's appeal. *See, e.g., Yedidag v. Roswell Clinic Corp.*, 2013-

NMCA-096, ¶ 28, 346 P.3d 1136, *aff'd*, 2015-NMSC-012 (refusing to consider argument that failed to present the facts necessary for review); *see also Martinez*, 1993-NMCA-020, ¶ 16 (noting that judicial resources simply do not permit the Court to search the entire record for relevant facts; that responsibility lies with the appellant); *Gila Res.*, 2015-NMCA-076, ¶ 56 (noting that appellant's failure to follow Rule 12-213(A)(3) left to the court the task of digging through the voluminous record to determine whether substantial evidence supported the agency action, and stating "[t]his we will not do.").

NEE's failure to recount the evidence supporting the Commission's ruling is particularly unacceptable because of the length of NEE's brief. The Court ordered that the BIC was limited to fifty-five pages. NEE ostensibly complied with this limit, but the BIC contains many long, single-spaced footnotes. This practice violates the spirit of the briefing rules and the Court's Order. If the footnotes had been placed in the text, the BIC would exceed the page limit imposed by the Court. *See Murken v. Solv-Ex Corp.*, 2005-NMCA-137, ¶¶ 17, 19-20, 138 N.M. 653; *Schmidt v. St. Joseph's Hosp.*, 1987-NMCA-046, ¶¶ 15-16, 105 N.M. 681.

B. Substantial Evidence Supports Approval of the Modified Stipulation and the Final Order.

STANDARD OF REVIEW: Approval of a contested stipulation will be affirmed if the Commission afforded non-stipulating parties an opportunity to be heard on the merits of the stipulation and if the Commission makes an independent

finding, supported by substantial evidence in the record, that the stipulation resolves the matter in dispute "in a way that is fair, just and reasonable, and in the public interest." *Attorney General v. New Mexico Pub. Serv. Comm'n*, 1991-NMSC-028, ¶ 15, 111 N.M. 636.

1. The Record Amply Demonstrates that the Modified Stipulation Achieved a Fair, Just, and Reasonable Resolution of Disputed Resource Replacement Issues and Provides Significant Public Benefits.

The evidence presented by PNM and other parties strongly supports the Modified Stipulation. Staff witness Gunter noted that the signatories to the Supplemental Stipulation represent a broad spectrum of interests, that the Supplemental Stipulation provides substantial net benefits to the public, and that it should be approved. **[62 RP 40189-40190]**. AG witness Crane stated that PNM's customers will receive replacement power at reasonable rates and that the replacement portfolio is diverse, including coal, nuclear and gas generation. She recommended that the Commission approve the Supplemental Stipulation. **[62 RP 40063-40065]**. New Mexico Industrial Energy Consumers ("NMIEC") witness Dauphinais similarly concluded that the Supplemental Stipulation provides substantial benefits to PNM's customers and that it should be approved. **[62 RP 40130]**. Western Resource Advocates ("WRA") witness Dirmeier testified that the Supplemental Stipulation, among other things, provides "a good consumer outcome that reduces SJGS fuel costs in the short term, lowers the agreed-to

PVNGS 3 and SJGS-4 acquisition costs, and protects customers from future, unnecessary costs that might otherwise have been incurred and recovered." **[62 RP 40302]**. WRA witness Howe testified that the Modified Stipulation helps PNM comply with the EPA's Clean Power Plan Rule ("CPP") and would benefit customers and the environment because, among other things, it would be effective regardless of when or if the CPP becomes effective. **[62 RP 40319-40321].** The U. S. Supreme Court stayed the effectiveness of the CPP pending disposition of the petition for review in the D. C. Circuit Court of Appeals. *Chamber of Commerce v. Environmental Protection Agency,* 136 S.Ct. 999 (Feb. 9, 2016).

To resolve all doubt about the impacts of a new rate case load forecast and the loss of the Navopache Electric Cooperative wholesale contract on the need for additional capacity in SJGS 4 and PVNGS 3, PNM conducted Strategist® runs using these assumptions for the October 2015 hearings. The results once again confirmed that these two resources remain essential elements of the most cost-effective resource portfolio. **[65 RP 42295, 42319]**.

The evidence shows that the Stipulation Portfolio reduces base load capacity, but maintains an amount sufficient to assure reliable, cost-effective service to customers on a round-the-clock and year-round basis. This conclusion was supported by the Strategist® model which analyzes the most economic energy dispatch from PNM's system over a 20-year planning period. After correcting his

testimony, NEE witness Luckow admitted that PVNGS base load dispatches first as the most economical resource, followed by SJGS. **[65 RP 42309-42310; 67 RP 43581-43584]**. The evidence shows the necessity for base load generation capacity which provides power for PNM's customer needs all day and every day. There were no other base load resources available at lower cost than the proposed additional capacity in SJGS 4 and PVNGS 3. **[65 RP 42287-42289].** The evidence shows that it would not be prudent to replace all of the lost base load capacity for SJGS 2 and 3 with only variable generation. **[66 RP 433375]**.

The restructuring agreements and the new coal agreement result in significant savings to customers. Over the term of the new coal agreement (January 1, 2016, through June 30, 2022), PNM customers will save an estimated $340.5 million on SJGS fuel expenses**. [57 RP 37042]**. The table below shows the estimated annual savings under the new restructuring and coal agreements:

Period	**Savings ($ in millions)**
2016	$46.5
2017	$56.8
2018	$47.1
2019	$45.1
2020	$49.2
2021	$55.2
2022	$40.6
Total	$340.5

[57 RP 37045].

The Modified Stipulation achieves compliance with the Regional Haze Rule and other significant environmental benefits, a significant reduction in coal generation, reliable and economical replacement power, and large fuel savings for PNM customers. The advantages of the Modified Stipulation, as recounted in the November Certification **[74 RP 49086-49216],** demonstrate that the Commission had good reasons to conclude that it was fair, just and reasonable, and in the public interest.

2. The Record Demonstrates That PNM Considered All Feasible Alternatives.

NEE's appeal focuses on the accusation that PNM inadequately analyzed alternative resource portfolios. This accusation ignores the record. The Commission specifically acknowledged in its Final Order that PNM's case included exhaustive analysis of alternative resource scenarios. **[75 RP 49486, ¶¶ 15, 16]** (noting that PNM performed "extensive resource planning modeling" and that "Strategist modeling evaluated thousands of potential combinations of [resource mixes]."); *accord* **[75 RP 49500]** ("PNM thoroughly analyzed alternative resources"). NEE has not demonstrated that these determinations lack support in substantial evidence. The record instead confirms PNM's comprehensive analysis of alternatives.

PNM's generation resource modeling identified PVNGS 3 and additional capacity in SJGS 4 as components of the most cost-effective resource portfolio to serve customers beginning in 2018, properly considering risk and reliability in addition to cost. PNM's resource modeling used an IRP approach consistent with the Commission's IRP Rule to develop the portfolio. **[14 RP 7860-7861]**. PNM considered other possible alternatives, but none were as beneficial and protective of customer interests as the Stipulation Portfolio. **[14 RP 7851-7855]**; **[65 RP 42282-42289, 42319]**; s*ee also,* **[60 RP 39149-39182]; [62 RP 40139]**.

PNM's Strategist® analyses included rigorous vetting of literally thousands of potential combinations of resources under a wide spectrum of reasonable inputs and assumptions, including energy efficiency, demand-side alternatives, storage technologies, renewable and thermal generating units, various types of power purchase and sales agreements and the electricity market. Strategist® identifies the least-cost resource portfolio according to the NPV of total cost that meets applicable requirements such as reserve margin, loss of load hours, emissions mandates, and construction limitations. These results are then verified against a Monte Carlo statistical simulation which provides a sensitivity analysis of how portfolios respond to volatility and variability of assumed conditions. This helps assure the validity of the portfolio analysis. **[14 RP 7851-7855]**; s*ee also,* **[60 RP 39149-39182]**.

PNM measured the Stipulation Portfolio against various portfolios that performed the best in the rigorous and extensive resource modeling described above, including a four-unit shutdown. *See, e.g.*, **[60 RP 39149-39182]**. In addition to ignoring this evidence, NEE fails to cite any authority requiring that the thousands of scenarios evaluated must be placed on the record and so its argument should be disregarded. *Matter of Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764. It is sufficient that PNM provided evidence that it has extensively and properly explored alternatives and provided comparisons of representative scenarios. **[14 RP 7849-7861]**; **[60 RP 39149-39182]**. There is absolutely no evidence to suggest that a reasonable alternative exists that was not considered.

3. Even Under a Heightened Scrutiny Standard, the Court Should Affirm the Final Order.

The result of NEE's unsuccessful attempt to remove four of the five Commissioners is a more rigorous standard of review. NEE's accusations of bias were rebutted by the four Commissioners and PNM. On September 11, 2015, PNM filed its Response to Renewed Motion for Recusal of PRC Commissioners, refuting in detail each allegation of misconduct lodged by NEE. **[63 RP 41135-41188]**. A panel of the Court denied NEE's petition, with one Justice dissenting regarding one Commissioner, but determined that heightened scrutiny would apply on appeal.

The record in this case more than suffices to satisfy the "heightened scrutiny" standard. The apparent originator of the heightened scrutiny standard was Professor Davis, an authority on administrative law. He suggested that, when a body invokes the "rule of necessity," requiring that a biased decision maker participate in a ruling, the resulting decision should be reviewed on appeal under a more exacting standard of review. *See, e.g., Gay v. City of Sommerville*, 878 S.W.2d 124, 128 (Tenn. Ct. App. 1994) (discussing and adopting Professor Davis' suggestion that "[w]henever the rule of necessity is invoked and the administrative decision is reviewable, the reviewing court, without altering the law about the scope of review, may and probably should review with a special intensity." (quoting 3 Davis, *Administrative Law Treatise*, § 19.9 (2d Ed. 1980))); *Fitzgerald v. City of Maryland Heights*, 796 S.W.2d 52, 61 (Mo. App. 1990) (accord); *Southwestern Bell Tel. Co. v. Okla. Corp. Comm'n*, 873 P.2d 1001, 1009-1010 (Okla. 1994) (accord).

Three aspects of the heightened scrutiny standard warrant emphasis. First, the standard normally applies where the rule of necessity has been invoked and yielded a decision by biased decision makers. *See Gay*, 878 S.W.2d at 128; *Fitzgerald*, 796 S.W.2d at 61; *Southwestern Bell*, 873 P.2d at 1009. Heightened scrutiny is not applicable, conversely, when the rule of necessity has not been triggered. In this case, none of the Commissioners were disqualified, meaning that

the rule of necessity was not invoked. Nonetheless, the panel which denied NEE's mandamus petition determined that heightened scrutiny will apply.

Second, courts applying a more exacting standard of appellate review to a decision yielded due to the rule of necessity recognize that heightened scrutiny is not a *de novo* standard. *See, e.g., Southwestern Bell*, 873 P.2d at 1010; *Gay*, 878 S.W.2d at 128; *Fitzgerald*, 796 S.W.2d at 61. Heightened scrutiny must comport with statutorily prescribed standards of review. *Southwestern Bell*, 873 P.2d at 1010; *Barker v. Sec'y of State's Office*, 752 S.W.2d 437, 441 (Mo. App. 1988). "Accordingly, the decision of a biased administrative agency acting under the Rule of Necessity should be upheld if the evidence presented at the administrative hearing would have entitled an objective decision maker to reach the same conclusion." *Gay*, 878 S.W.2d at 128 (quoting *Fitzgerald*, 796 S.W.2d at 61).

Third, the heightened scrutiny standard used as a remedy to counter the effects of the rule of necessity bears no resemblance to the heightened scrutiny applied as a stricter alternative to the rational basis test in analyzing statutes or government acts under equal protection or due process standards. *See, e.g., Marrujo v. N.M. State Highway Dept.*, 1994-NMSC-116, ¶ 11, 118 N.M. 753 (explaining that heightened scrutiny applies where legislation impinges on an important, but not fundamental, individual interest, or legislation which uses sensitive, rather than suspect, classifications). NEE is incorrect in suggesting that

heightened scrutiny of the kind described in *Marrujo* is relevant in this case. **BIC 32**.

In this case, the record would entitle an objective decision maker to arrive at the conclusion that the Modified Stipulation should be approved under the standards governing Commission approval of contested stipulations. The Hearing Examiner, whose impartiality has never been challenged, arrived at precisely that conclusion in the November Certification **[74 RP 49086-49216]**. He explained in detail the ways the record and the applicable law supported approval of the Modified Stipulation. His recommendations enjoy a presumption of fairness and regularity, absent evidence to the contrary. *See, e.g., Wing Pawn Shop v. Taxation and Revenue Dep't*, 1991-NMCA-024, ¶ 29, 111 N.M. 735 (recognizing that, without contrary evidence, reviewing courts presume administrative regularity and that all proper procedures necessary for fairness were followed). NEE provides no basis for questioning the impartiality of the Hearing Examiner. The November Certification demonstrates that the record entitles an objective decision maker to conclude that the Modified Stipulation should be approved.

C. The Record and the Applicable Law Demonstrate that NEE's Challenges on Appeal Are Meritless.

1. NEE's Brief-In-Chief Improperly Omits Any Account of the Factual or Legal Shortcomings in NEE's Positions.

NEE compounds the mistake of omitting any account of the evidence supporting the Final Order by presenting an improperly one-sided version of NEE's case. The record reflects significant shortcomings in the evidence and legal reasoning on which NEE relies. The BIC does not summarize the record reflecting these shortcomings.

a. Rode Testimony.

NEE's categorical, exaggerated statement that "[n]one of [Rode's] challenges to PNM's limited evaluation process and self-serving adoption of SJ4 and PV3 was ever addressed by the Hearing Examiner or the Commission" is false. The Commission expressly found that reliance on Rode's testimony was misplaced because it did not address PNM's analyses performed for the Original Stipulation or for the Modified Stipulation. Rode also refuted NEE's preferred resources. **[75 RP 49489]**. The record shows that Rode never provided an opinion on the Modified Stipulation nor on the revised resource modeling. He never addressed the effect the substantially reduced valuation for PVNGS 3 had on any concerns he raised. Crane testified that Rode's concerns were resolved in the Original Stipulation. **[18 RP 11019-11025].** Further, the record shows that Rode's criticisms about PNM's

Strategist® runs and risk analysis were meritless. PNM's resource modeling approach complied with industry norms. **[14 RP 7847-7861; 18 RP 11108-11113]**.

Rode's testimony supports replacing SJGS Units 2 and 3 with base load capacity. He acknowledged that "the cost to ratepayers would almost certainly be higher" to replace it with non-base load capacity. **[8 RP 5266]**. "[I]ntermittent capacity, such as solar or wind, is wholly inappropriate to serve as baseload capacity for reliability reasons even though they are 'must take' resources." **[8 RP 5269]**. The record refutes his speculation that PNM did not sufficiently explore alternative base load options. **[8 RP 5268; 14 RP 7860-7861]**.

b. Van Winkle Testimony.

The primary thrust of Van Winkle's testimony was that a resource portfolio comprised primarily of renewable resources is more cost-effective than the Stipulation Portfolio. NEE omits the evidence that shows that his analysis is based on incomplete and erroneous assumptions and that the Commission properly rejected his recommendations.

Van Winkle opined on an expansive array of issues. However, the record reflects that he lacks the requisite education and experience to reliably support the vast majority of his opinions. The areas in which he demonstrably lacked qualifications included utility generation systems, utility rate design, the design of utility transmission or distribution systems, utility load modeling or projections,

utility system dispatch, utility generation plant operations, the decommissioning of either coal or nuclear power plants, buying and selling capacity and energy in the electric energy trading markets, Strategist® and PROMOD modeling, utility regulatory legal matters, utility plant valuation, coal mine reclamation, and customary terms and conditions in coal supply agreements. **[72 RP 47784-47798].** It would have been error for the Commission to accept his non-expert opinions over the opinions of experts. *Bokum Resources Corp. v. New Mexico Water Quality Control Comm'n*, 1979-NMSC-090, ¶ 51, 93 N.M. 546; *Alto Village Services Corp. v. New Mexico Public Serv. Comm'n*, 1978-NMSC-085, ¶¶ 14-17, 92 N.M. 323.

He claimed that he developed three alternative resource portfolios that are more cost-effective than the Stipulation Portfolio. However, he provided no supporting analysis to show that his proposed portfolios could or would provide reliable service. He failed to include all the operational costs associated with each of his proposed portfolios. He did not include any costs associated with transmission upgrades that would be required to implement his portfolios. He proposed to retire a very large quantity of existing coal-fired capacity while simultaneously adding an unprecedented amount of renewable resources on PNM's system. While he admitted the need to control renewable resources operations within the system, he failed to address the costs associated with maintaining the

necessary operating reserves for purposes of the required system regulation. He proposed adding 400 MW of wind resources to PNM's system based on an unverified bid for 40 MW of wind power that PNM received, but failed to account for costs associated with transmission required for an additional 400 MW of wind resources. **[65 RP 42304-42305]**.

He did not provide any sensitivity analysis to test the validity of his proposals. To compound the shortcomings in his approach, much of his analysis was driven by a single hour's peak demand in certain months. But the record shows that a proper resource plan must provide resources that provide cost-effective and reliable service year-round over a long period of time and under a variety of load and other conditions. He failed to consider how his proposed resources could be integrated into PNM's system. The absence of these critical considerations from his resource analysis rendered it unreliable. **[65 RP 42284-42285].**

Van Winkle suggested allowing additional capacity in SJGS 4 with a net zero energy restriction, but he offered no support for its feasibility. He simply assumed that, if the Commission placed this restriction on power operations, PNM would have to figure out how to deal with it. He did not evaluate the impacts of his ideas in terms of costs to PNM's customers or how they impact PNM's ability

to maintain reliable service. He also failed to take into account the loss of off-system sales that benefit PNM's customers. **[72 RP 47890-47894]**.

The record shows that Van Winkle's proposed alternatives are also not feasible in several other respects. His alternatives included a scenario where SJGS 1 is retired in 2017 along with Units 2 and 3. The evidence shows that a three-unit shutdown at SJGS is not feasible or cost effective. **[32 RP 21102-21116]**. His proposed three-unit shutdown was based on his speculation that Tucson Electric Power ("TEP"), the other co-owner of SJGS 1, will simply walk away from its 170 MW interest in SJGS 1 at the end of 2017 at no cost. The record, however, shows that TEP has confirmed its commitment to SJGS 1 by entering into the ownership restructuring agreements which run through mid-2022. **[65 RP 42213]**. Further, in relying on a single page from TEP's 2014 IRP for the proposition that TEP's interest in SJGS 1 may be at risk for early retirement, Van Winkle ignored that, in that same IRP, TEP included SJGS 1 in its preferred resource portfolio through at least 2028. The reason TEP included SJGS 1 in the at-risk category was that, at the time, TEP was still waiting for approval of the EPA's BART determination, *i.e.*, the RSIP which has now been approved. **[72 RP 47884-47888]**.

Van Winkle also speculated that a forty percent reduction in coal volume from the San Juan Coal Mine due to the early retirement of SJGS 1 would result in only a twenty percent increase in the cost per ton for coal. However, if three units

are shut down at the end of 2017, there is no assurance that the cost increase would be only twenty percent, or that any miner would be interested in such a coal supply agreement. **[65 RP 42214]**.

A second operational scenario proposed by Van Winkle involved the operation of SJGS 4 as a "peaker." The record showed that this is not feasible from either an operational or economic standpoint. **[65 RP 42211-42212].**

Finally, in each of the three portfolios presented, Van Winkle made the unwarranted assumption that capacity from PVNGS 3 would be available pursuant to a purchased power agreement ("PPA") at a value equivalent to its estimated net book value as of December 31, 2017. He ignored the evidence that PNM has no interest in providing capacity from PVNGS 3 pursuant to a PPA. He also failed to elaborate on the essential PPA terms and conditions that would necessarily have to be agreed upon in such an arrangement and which would impact contract pricing. **[62 RP 42182-42183]**; *see also* **[69 RP 44815-44828]**; **[73 RP 48508-48525]**.

Van Winkle also alleged poor quality of coal from the San Juan Coal Mine, alleged unreliable operations at the San Juan Coal Mine and alleged risks stemming from the WildEarth Guardians' lawsuit involving the San Juan Coal Mine. Those allegations were refuted. **[65 RP 42205-42206]**. NEE refers to unidentified "potential and ongoing" litigation in footnote 42. **[BIC 50]**. It refers to the WildEarth Guardians litigation in footnote 30 and to a Sierra Club lawsuit.

[BIC 28]. NEE's record citation contains no mention of the litigation. The Sierra Club lawsuit has been settled with a Consent Decree. *Sierra Club v. San Juan Coal Company*, 10-cv-00332-MCA-LAM, Consent Decree (D.N.M., March 28, 2012).

A recent order of the United States District Court in New Mexico regarding the WildEarth Guardians litigation is a further demonstration of the reasonableness of the 2018 review discussed below at III.C.8. The federal court allowed the Office of Surface Mining ("OSM") a three-year period to September 1, 2019, to conduct a more extensive environmental impact statement ("EIS") regarding the San Juan Coal Mine. In doing so, the federal court allowed the original plan modification to remain in effect and mining operations to continue pending the development of the EIS. *WildEarth Guardians v. U.S. Office of Surface Mining*, No. 1:14-CV-00112-RJ, Order Granting Federal Defendants' Motion for Voluntary Remand at 12 (D.N.M., Aug. 3, 2016).

c. Lehr Testimony.

NEE witness Lehr claimed that PNM should be required to issue an all-resource request for proposals ("RFP") for generation resources to replace the lost capacity from SJGS Units 2 and 3. **[66 RP 43419-43420]**. Evidence in the record, ignored by NEE, refuted Mr. Lehr's testimony. NEE also disregards the legal flaws in Mr. Lehr's position.

The Hearing Examiner rejected NEE's flawed legal argument that an open-ended RFP is necessary to support a CCN request: "Neither the IRP provisions in the Efficient Use of Energy Act nor the Commission's IRP rule requires the use of competitive RFPs." [**48 RP 31162]**. NEE fails to cite to any case wherein a requested CCN was denied for failure to use an RFP process. The Commission has issued a CCN where other evidence supported the application. *E.g.* Case No. 13-00004-UT, Recommended Decision at 8-13 (May 23, 2013) (2013 WL 8621324) (describing evidence supporting CCN application that did not include RFPs), *adopted by* Final Order on Recommended Decision (June 26, 2013). NEE does not cite any statute or rule that requires use of an open-ended RFP in support of a CCN application. As such, it may be assumed that NEE has been unable to find any supporting authority and its argument should be disregarded. *Adoption of Doe*, 1984-NMSC-024, ¶ 2.

In this case, an all-resource RFP was unnecessary to demonstrate that the CCNs for PVNGS 3 and the additional capacity in SJGS 4 are the best replacement resources for SJGS 2 and 3. PNM already had the relevant market information through other recent RFPs and had performed extensive resource planning modeling to know that they are the most economical options. O'Connell fully explained the bases for his expert opinion that an RFP process was unnecessary and would be unlikely to identify more cost-effective resources. In addition, an all-

resource RFP can be undesirable because of the lack of specificity involved. As a general proposition, an RFP process is appropriate once a particular type of resource is identified. **[18 RP 11103-11107**]. An RFP would not have yielded useful responses in this case as the resources for which CCNs were sought are not available on the market. **[29 RP 17955]**. Crane testified that an RFP is not always the best solution in resource planning and probably was not the best approach in this case given the circumstances. **[38 RP 23988-23991]**. Therefore, the evidence was sufficient to support the granting of the CCNs without an RFP.

NEE's criticism of the November Certification's rejection of NEE witness Lehr's recommendation for an RFP process ignores that the November Certification relied on Lehr's own testimony that an RFP process would not be appropriate at this time. **[74 RP 49135-49137]**. Other reasons support rejecting Lehr's recommendations. Although his recommendations were based on his experience in Colorado, Lehr attempted to downplay the fact that, in a situation very similar to the facts in this case, where large amounts of coal generation had to be retired and replaced due to compliance with the federal Clean Air Act, Colorado did not require the elaborate RFP process he recommends. Lehr testified that Public Service Company of Colorado, the utility owning those facilities, was presented with a "grand bargain" that allowed full recovery of stranded costs, so the retired coal plants could be removed from rate base at little or no harm to the

utility. **[34 RP 21724-21725, 21729, 21731-21732]**. Lehr further testified that the coal capacity was not shut down all at once because of the need for a "practical transition," stating that "[y]ou don't make changes on a flash-cut basis in a big system like this. . . . [i]t's not something you can do overnight." **[34 RP 21751-21753]**.

d. Luckow Testimony

NEE witness Luckow claimed that a shutdown of all four SJGS units would be less costly than the Stipulation Portfolio, focusing his analysis on raw Strategist® results and how the analysis should be performed. Significantly, Luckow did not take into consideration reliability issues associated with a four-unit shutdown. **[67 RP 43583-43585]**. He ignored that reliability is an important factor, *e.g.*, how the portfolio is impacted by operating reserves or system balancing requirements. **[29 RP 17986-17988]**. Although Luckow adjusted Strategist® inputs to exclude benefits associated with the Supplemental Stipulation, he admitted that those benefits could be considered as "add-ons" to the Strategist® results. **[67 RP 43524, 43539-43540]**. Once those "add-ons" are considered, Luckow's conclusions fail. The evidence shows that the raw Strategist® results must be adjusted to account for the accurate and applicable costs attributable to each of the different scenarios. **[28 RP 17326-17328]**.

Further, the record shows that Luckow's analyses were flawed in other ways. **[67 RP 43538-43542, 43577-43578, 43584]**; **[65 RP 42247-42250, 42308-42314]**. For example, he testified that PNM should have assumed that the EPA would grant a one-year extension to keep SJGS 1 and 4 operating through 2017 without SNCR in return for a four-unit shutdown at that time. **[64 RP 41870-41871]**. Among other things, this hypothetical scenario did not take into account that a four-unit shutdown at the end of 2017 may jeopardize reliability on the system. **[28 RP 17892]**. His assumption about the feasibility of a four-unit shutdown in 2018 was not supported in the record. **[67 RP 43564-43575]**.

e. NEE's Access to Strategist®.

The record demonstrates that NEE's attempt to have PNM perform additional Strategist® runs just before hearings were scheduled to begin was untimely and otherwise inappropriate. NEE failed to take advantage of opportunities afforded it to work with PNM on Strategist® runs or to gain access to Strategist® by working with the owner of the Strategist® program. After failing to take advantage of these opportunities, NEE could provide no justification for continuing to complain about affordability and access. **[66 RP 42835-42863; 67 RP 43699-43714]**.

2. NEE's Arguments Rest on Misconceptions About Applicable Law.

NEE's arguments about the applicable legal framework misapprehend and mischaracterize the law controlling this case. The Efficient Use of Energy Act ("EUEA") requires the filing of IRPs by utilities to assist in identifying the most cost-effective portfolio of resources to serve customers, but does not require Commission approval of the filing. NMSA 1978, § 62-17-10 (2005). The November Certification correctly determined that neither the EUEA nor 17.7.3 NMAC changed the standard for issuance of a CCN. Neither made issuance of a CCN contingent upon prior acceptance of an IRP. **[74 RP 49183-49185]**. A demonstration of material changes warranting a different course of action from that contained in an accepted IRP dispenses with the requirement for a showing of consistency with an accepted IRP. 17.7.3.12(B) NMAC. In this case, the approval of the RSIP by the New Mexico Environmental Improvement Board and the EPA constituted a material change that warranted deviation from past IRPs. **[14 RP 8208]**.

NEE's discussion of the Legislature's preference for renewable energy contained in the Renewable Energy Act ("REA") fails to mention that this preference does not exist regardless of cost. The REA does not require use of renewable energy to comply the Renewable Portfolio Standard ("RPS") if the cost of adding the renewable energy exceeds a reasonable cost threshold. NMSA 1978, §§ 62-16-2(B)(3) (2007), 62-16-4(B) (2011). Thus, the Commission's

consideration of cost differences in identifying replacement power accords with the REA. *See also* 17.7.3.6 NMAC (resources that minimize environmental impacts are preferred if costs and service quality are equivalent).

3. The Evidence Refutes NEE's Reliance on Levelized Costs.

NEE resorts to a discredited "levelized cost" analysis to compare the costs of different resources. **[BIC 41-42]**. NEE admits that its primary witness abandoned this approach for the hearing on the Modified Stipulation after he was criticized for misusing the approach regarding the Original Stipulation. **[BIC 20-21]**; **[65 RP 42307].** Although a levelized cost analysis may be appropriate when comparing resources of similar technologies, *e.g.*, renewables to renewables, it skews the results improperly when comparing technologies with different production profiles, such as dispatchable generation to variable or intermittent generation. **[18 RP 10700-10702, 11096-11101; 29 RP 17976-17977, 18051-18052; 38 RP 24054-24056; 42 RP 26758-26761]**. Other commissions have recognized the significant limitations associated with resource comparisons based on levelized costs. *See In the Matter of the Petition of N. States Power Co. d/b/a Xcel Energy for Approval of Competitive Res. Acquisition Proposal & Certificate of Need*, 2014 WL 3401042, at *32 (Minn. PUC) (levelized cost analysis does not consider effect of a new resource on existing resources; levelized cost comparisons across technologies are problematic and misleading in assessing economic competitiveness of various

generation alternatives). NEE's "levelized cost" comparison is unreliable and should be disregarded.

4. The Commission Properly Considered the Benefits of the Modified Stipulation in Comparing the Resource Alternatives.

NEE continues to assert its logically flawed argument that, in order to evaluate alternative resource portfolios on a consistent and comparable basis, all inputs must be made the same even if they are actually different. NEE argues that the benefits of the Modified Stipulation must be applied to all alternative portfolios, thus attempting to co-opt for its use the benefits realized as parties gave up litigation positions. Specifically, NEE criticizes PNM's four-unit shutdown analysis because (a) PNM prices the interest in PVNGS 3 at $2,500 per kW, and (b) it includes full recovery of PNM's undepreciated investment in all four SJGS units. **[BIC 43-44]**.

NEE ignores the fact that the reduced price for PVNGS 3 and PNM's recovery of only half of its undepreciated investment in SJGS 2 and 3 are due solely to the terms of the Modified Stipulation. These benefits are not applicable under the four-unit shutdown scenario. In the April Certification, the Hearing Examiner determined that it was not "improper for PNM to subtract the cost savings resulting from the Stipulation from the costs of the replacement portfolio encompassed in the Stipulation…" and that "it was not unreasonable for PNM to subtract from the cost of the Stipulation portfolio the value PNM was foregoing by

agreeing to seek recovery of 50% of the undepreciated costs of San Juan Units 2 and 3." **[48 RP 31161]**. The November Certification correctly reached the same conclusions. **[74 RP 49134-49135]**. PNM conducted a reasonable resource portfolio comparison of the Stipulation Portfolio by accounting for the savings to customers under the Modified Stipulation, but not applying those same savings to the four-unit shutdown scenario.

NEE's fallacious theory that, in order to be consistent, identical values have to be assigned in Strategist® scenarios, ignores that different circumstances should incorporate actual differences for accurate comparisons. NEE's illogical approach may lead to unrealistic scenarios and flawed conclusions. **[67 RP 43524, 43539]**. By trying to force identical costs upon all scenarios, even though the actual costs associated with the scenarios were different, it is NEE that fails to compare alternatives on a consistent and comparable basis. Comparison on a consistent and comparable basis as required by Section 62-17-10 and 17.7.3.9(G)(1) NMAC means that each scenario must be modeled using the costs that are applicable and attributable to each scenario, not manipulating the scenarios to assume cost benefits that are not actually applicable. **[28 RP 17329-17330, 17415-17416; 37 RP 23264, 23266**]. The record shows that the PVNGS 3 valuation in the Modified Stipulation and the recovery of only 50% of the undepreciated investment in SJGS

2 and 3 are benefits of the Modified Stipulation that are not attributable to non-stipulation scenarios.

NEE ignores the risks of litigation and the potential that PNM could have prevailed in its original application that included full recovery of its undepreciated investment in SJGS 2 and 3 and a valuation for PVNGS 3 at $2,500 per kW. Crane testified about the very real prospect that, had this case been litigated, the outcome for customers could have been less favorable than the Modified Stipulation. *See* **[38 RP 24068-24072; 62 RP 40060**]. Her view of the benefits of the Modified Stipulation is supported in the law. *See New Mexico Indus. Energy Consumers v. New Mexico Pub. Serv. Comm'n*, 1986-NMSC-059, ¶ 34, 104 N.M. 565 (noting that, because Commission had authority to include entire investment in excess capacity in rate base, substantial evidence supported determination that alternative to full inclusion or full disallowance was more in the interest of ratepayers).

In the same vein, public policy favors settlement of disputes and using cooperative approaches to reconciling the interests of the parties, even if all parties do not agree to the settlement. *Attorney General*, 1991-NMSC-028, ¶13. NEE's position overlooks the policy favoring settlement of disputed regulatory issues.

PNM's requests relating to these matters were fully supported by testimony. *See* **[1 RP 75-78, 673-696]**. NEE's contention regarding PNM's full recovery of

its undepreciated investment in SJGS 2 and 3 is undercut by its own regulatory policy witness, Lehr. He testified that, in circumstances where it made sense to retire a coal resource in favor of a less expensive alternative, it was good regulatory policy to allow the utility to recover all of its stranded investment. **[67 RP 43642-43644]**. This result is supported by Commission precedent: "As a general rule, utilities are able to recover from its ratepayers the cost of a facility that is prematurely retired...." *Re Pub. Serv. Co. of New Mexico,* 2008 WL 5744189, ¶ 10 (NMPRC Case No. 08-00078-UT). Therefore, PNM's agreement to limit its recovery of its undepreciated investment in SJGS 2 and 3 in return for the benefits of the Modified Stipulation as a whole, is a benefit that can only be attributed to the Stipulation Portfolio.

Luckow argued that the provision for 50% recovery of the undepreciated investment in SJGS 2 and 3 should not be attributed solely to the Stipulation Portfolio because the Commission might impose a 50% disallowance outside the Modified Stipulation. **[64 RP 41862-41863]**. However, he agreed that it was an important factor for the Commission to consider if the investment being prematurely retired was prudent and reasonable and if the decision is based on providing economic benefits to customers. **[67 RP 43560-43561]**. And he agreed that PNM was proposing to abandon SJGS 2 and 3 to comply with a government mandate and that abandoning those units was more economical for customers than

continuing operations with SCR installed on all four units. **[67 RP 43563-43564]**. Under these circumstances, full recovery of undepreciated investment should be allowed. *Town of Norwood v. Fed. Energy Regulatory Comm'n*, 80 F.3d 526, 532 (D.C. Cir. 1996); *Citizens Action Coalition v. Northern Indiana Pub. Serv. Co.*, 485 N.E.2d 610, 616 (Ind. 1985) (determining that allowance of amortization of abandoned plant investment that had been used and useful was proper in that it encouraged utilities to remove obsolete plants and property from rate base, benefitting consumers).

NEE's position on the proper valuation of PVNGS 3 for portfolio comparison purposes is also flawed. PVNGS 3 is non-jurisdictional plant and PNM is not required to include PVNGS 3 in rate base if it is not satisfied that the valuation allowed by the Commission is fair. **[62 RP 40060]**. *See Southern Union Gas Co. v. New Mexico Pub. Util. Comm'n*, 1997-NMSC-056, ¶ 9, 124 N.M. 176. Thus, all the benefits associated with inclusion of PVNGS 3 at a valuation of $1,118 per kW would be lost to customers if the Commission did not adopt a fair valuation properly balancing customer and shareholder interests so that PNM could agree to include PVNGS 3 as a jurisdictional resource. *See* **[48 RP 31173-31176]**. PNM was willing to abandon its original valuation in order to obtain the overall benefits of the Modified Stipulation.

5. Requiring an Opposing Party to Present Evidence After a *Prima Facie* Case is Made Does Not Shift the Burden of Proof.

NEE incorrectly asserts that the Commission improperly shifted the burden of proof to NEE. **[BIC 46-49]**. PNM presented substantial evidence required to meet well-established standards for issuance of a CCN. Requiring opponents to come forward with contrary evidence supporting their positions does not result in an impermissible shifting of the burden of proof. *Albuquerque Bernalillo County Water Util. Auth. v. New Mexico Pub. Regulation Comm'n*, 2010-NMSC-013, ¶ 83, 148 N.M. 21. The rejection of Van Winkle's analysis as unreliable because it did not properly consider all costs did not result in improperly shifting the burden of proof. Once the *prima facie* case supporting the Modified Stipulation had been made by the Signatories, the burden of going forward with reliable contradictory evidence shifted to opponents. Through rebuttal testimony, cross-examination and legal argument, NEE's contradictory evidence was completely refuted and demonstrated to be wholly unreliable. Therefore, the proponents of the Modified Stipulation met their burden of proof.

6. Any Risks Associated with a CCN for the 132 MW in SJGS 4 Are Either Speculative or Have Been Mitigated.

The evidence refutes NEE's claims about SJGS being unreliable. SJGS has been a cost-effective and reliable generation resource for PNM's customers for many years. SJGS 4 had an Equivalent Availability Factor of 83.8% over the

period from 2005 through 2014, which is favorable when compared to the national average. **[65 RP 42208]**. The acquisition of additional capacity in SJGS 4 obviates the need for the construction of new generation capacity. SJGS 4 is an existing resource and PNM's acquisition of the additional 132 MW will not result in any additional environmental impact. **[14 RP 8209]**.

The variability in the quality of delivered coal under the prior coal agreement, which impacted overall SJGS performance in 2013 and 2014 was a transitory circumstance due to a particularly narrow coal seam in the San Juan underground coal mine. Following discussions with San Juan Coal Company ("SJCC"), coal quality and variability improved. **[19 RP 11360]**. The new coal agreement addresses this issue by providing for a baseline heat content requirement for the first year and further provides for a collaborative approach to establish an annual heat content target. SJCC, under new ownership, now has a general obligation to maximize coal quality and minimize quality variation. Further, the new coal agreement requires SJCC to install and operate certain additional equipment and implement other measures that are designed to improve the average quality and limit the variability of the coal delivered to SJGS. SJCC will also be required to conduct coal sampling throughout the mine to develop detailed mapping of geologic conditions and coal quality trends. The stockpiles will also

be monitored regularly to aid in the coal grade control program. PNM can reject coal that does not meet the agreed quality specifications. **[57 RP 36556-36557]**.

Use of coal ash from SJGS for reclamation purposes is specifically authorized by the OSM and there are cost savings because SJCC does not have to procure reclamation fill material from elsewhere. **[40 RP 25507-25509]**. Van Winkle removed coal ash disposal costs from his earlier analyses after the EPA issued its coal ash rule. His testimony about coal ash risk was impeached because he omitted key information contradicting his testimony from an exhibit on which he relied. **[41 RP 26090-26092**; **42 RP 26710-26718]**.

7. PVNGS Risks Have Been Mitigated.

WRA witness Dirmeier testified that nuclear risks are addressed by a significantly reduced valuation for the interest in PVNGS 3 from PNM's originally proposed $2,500 per kW and other provisions of the Original Stipulation which were retained in the Modified Stipulation. He supported a valuation of $1,650 per kW. **[14 RP 8083-8087]**. The Modified Stipulation provides an even more beneficial valuation for customers of $1,118 per kW. **[62 RP 40209].**

NEE's reliance on the average decommissioning costs for other nuclear plants is misplaced. There is a wide disparity among the projected costs with several projections being lower than the projections for PVNGS 3 (ranging from a low of $359 per kW to a high of $2,254 per kW). **[15 RP 8862]**. There is no

evidence to demonstrate that this group of nuclear plants is a reasonable proxy for a site-specific projection of decommissioning costs for PVNGS 3. For example, one of the plants included in the group that is projected to cost more to decommission than PVNGS 3 is Vermont Yankee. It is not comparable to PVNGS and has no relevance regarding future decommissioning costs for PVNGS 3. It is a very small, older plant with poor production economics operating in a very different market with no support on a going forward basis. **[31 RP 20026-20027]**.

In contrast to NEE's data regarding other nuclear plants, PNM's funding reserves are based on a site specific decommissioning study prepared by TLG Services, Inc. ("TLG"), the premier engineering expert in the nation on nuclear decommissioning that performs 65 percent of the decommissioning studies in the country. TLG serves as consultants for the Nuclear Regulatory Commission ("NRC"), the Nuclear Energy Institute and the Department of Energy. TLG estimates are reviewed by all the PVNGS owners and their own technical experts who have confirmed they are appropriate. The estimated cost to decommission PVNGS 3 is funded more than adequately assuming normal inflation rates. The funding exceeds NRC requirements. **[27 RP 16722-16724, 16733-16735**].

PNM witness Reed testified that the risk that the decommissioning costs will far exceed what is in the decommissioning trust "is a very minute risk…." **[31 RP 19962-19963]**. He considered all the facts regarding decommissioning liabilities,

the decommissioning trust and the decommissioning funding assumptions and assigned them a net zero value in his valuation analysis. He believed, however, that the overall decommissioning terms are favorable to customers and that they actually have a positive impact on the value of the unit. **[31 RP 19959-19962]**.

PVNGS has a secure water supply in that the bulk of its water needs are met by treated effluent from Phoenix and surrounding communities. The water supply contract for PVNGS extends through its current license. **[13 RP 7336-A]**.

8. The Final Order Did Not Remove or Delay PRC Oversight .

The Commission did not abdicate its oversight responsibility. It exercised that responsibility in accord with the evidence and approved a stipulation that provides for a further review of SJGS operations in 2018. The final executed SJGS restructuring agreements and coal agreements provide certainty for SJGS operations through June 30, 2022, and paragraph 19 of the Modified Stipulation provides a means to assess operations after that date when more up-to-date information relevant to the decision about continuing SJGS operations will be available. The timing of the 2018 review generally coincides with the notice and negotiation period for any proposed extension of the new coal agreement and the notice by the SJGS owners regarding their intentions beyond June 30, 2022. **[62 RP 40288-40291, 40349-40350]**. Therefore, there will be ample opportunity to address the continued desirability of SJGS as a generation resource in 2018. By

that time, the Commission will have firm information concerning post-2022 coal costs, the implementation of the CCP in New Mexico, the interest of the remaining SJGS owners in continuing to participate in the plant post-2022, the results of the RFP for other resource options, and the OSM's environmental impact statement on the San Juan Coal Mine, referenced above. **[74 RP 49137-49138**].

Placing an expiration date on the CCN could have disrupted timely implementation of the SJGS restructuring agreements and the new coal agreement, to the detriment of customers. The restructuring agreements would not become effective until and unless the Commission issued an unconditional CCN for the additional interest in SJGS 4. And the new coal agreement would not become effective until the restructuring agreements became effective. **[65 RP 42198-42199]**. Thus, the Commission's decision to issue the CCNs and establish a future proceeding to determine the future operations of SJGS when more contemporaneous information is available is clearly reasonable and within its authority. *See Otero County Elec. Coop., Inc. v. New Mexico Pub. Serv. Comm'n,* 1989-NMSC-033, ¶ 12, 108 N.M. 462.

NEE's discussion about the IRP process and how it relates to this case is confusing and inaccurate. **[BIC 52-53]**. An IRP is an aid to the CCN process and not an indispensable element. 17.7.3.12(B) NMAC. It is in a CCN case where

specific additional resources are identified. The November Certification correctly determined that neither the EUEA nor the Commission's IRP Rule made issuance of a CCN contingent upon prior acceptance of an IRP. The record shows that PNM filed IRPs as required by the IRP Rule. Further, the review of the CCNs requested in this case was more extensive than would usually be required for a filed IRP, which does not require a public hearing to be accepted. **[74 RP 49182-49185]**; 17.7.3.12(A) NMAC. PNM's resource modeling used an IRP approach consistent with 17.7.3 NMAC to develop the Stipulation Portfolio, properly considering risk and reliability in addition to cost. **[14 RP 7849-7858]**. Van Winkle agreed on cross-examination that there would be no purpose in going to hearing on the 2014 IRP if the outcome is determined in this case. **[72 RP 47880]**.

NEE argues that the Commission should not have granted a variance from 17.6.450.10 NMAC because the Commission found that PNM had engaged in a Class II transaction without prior approval. NEE's statement is false. It selectively quotes from the Commission's Final Order which, essentially, was discussing a hypothetical situation based on assumptions as opposed to findings or conclusions. The Commission clearly stated: "The Commission assumes, but **does not determine or decide**, that Anaheim and M-S-R are persons and therefore also assumes, but **does not determine or decide**, that this was a Class II transaction…." **[75 RP 49497]** (emphasis added).

Any determination by the Commission that a Class II transaction had occurred would have been erroneous. **[61 RP 39456-39476; 75 RP 49349-49350, 49353-49355]**. In any event, the Commission properly determined that the scope of the review in this case provided the necessary oversight over the Capacity Option Funding Agreement ("COFA"), with PNM having to meet a higher standard of proof than if it were seeking approval to engage in a Class II transaction. NEE's statement that the Commission's determination is neither legally or factually justified is not supported by any citation to authority.

The high standard of review applicable to CCNs and authority to abandon used by the Commission looks to both the present and future public convenience and necessity. The test for approval under the public convenience and necessity standard requires a demonstration of a net public benefit. The test for approval of a general diversification plan, which is required by Commission rule but not by statute, before entering into a Class II transaction, is much lower, requiring only a showing that the proposed Class II transaction or its resulting effect on the financial performance of the utility will not materially and adversely affect the utility's ability to provide reasonable and proper utility service at fair, just and reasonable rates. NMSA 1978, § 62-6-19(C)(2) (1982); 17.6.450.10(C) NMAC. Because the November Certification determined that the higher standard of public convenience and necessity has been met, it follows that any applicable lower

standard was also met. *Re Southern Union Co.*, 64 P.U.R.4th 17, 23-24 (NMPSC Case Nos. 1891/1892, 1984); NMPRC Case No. 13-00004-UT, Recommended Decision at 4. Further, the COFA has no effect on PNM's customers. **[62 RP 40364]**.

9. NEE's Request for "Certain Protections" on Remand Asks This Court to Exceed Its Authority.

NEE requests, if there is a remand for further proceedings: (a) heightened scrutiny on any appeal; (b) a rigorous all-resource RFP for replacement resources and an independent evaluator to oversee the process; (c) cost comparisons with consistent and comparable application of all cost factors; (d) Strategist® for all to ensure the analysis is transparent and defensible; (e) a presumption in favor of non-polluting resources. **[BIC 55]**. NEE's so-called "protections" are not supported legally or factually.

It is fundamental that on appeal the Court is acting judicially, not legislatively. It has no power to amend or modify the Commission's order. *Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n*, 1993-NMSC-032, ¶ 6, 115 N.M. 678 (internal citations and quotation marks omitted); NMSA 1978, § 62-11-5 (1982).

With regard to item (a), in order for the Court to implement a "heightened scrutiny" standard on any appeal, the Court must first find that enough Commissioners have engaged in conduct that would require disqualification but for the rule of necessity. *E.g.*, *Gay*, 878 S.W.2d at 128. NEE's request at this juncture

assumes that the Commission will not comport itself properly in future proceedings. NEE must demonstrate improper conduct to invoke appellate "heightened scrutiny" for any future appeals.

With regard to item (b), the Court's opinion would have to agree with NEE's argument that New Mexico law requires use of an RFP process with an independent evaluator in a CCN case despite NEE's failure to demonstrate any basis in the law to support its argument.

With regard to item (c), the Commission on remand would, without this "protection", comply with the Court's opinion reversing the Final Order. Imposition of item (c) on remand would require that the Court agree with NEE's flawed argument that "consistent and comparable" means assigning costs and benefits to each scenario whether those costs and benefits are actually applicable to each scenario. Such an approach would force the Commission to ignore resource planning realities and is not legally or factually justified.

With regard to item (d), NEE has not disputed that it failed to make any showing that it is entitled to access to Strategist® or that PNM must pay for NEE's access. NEE completely ignores the controlling statute, which states: "Except as otherwise provided by law, in all proceedings before the commission and in the courts, each party to the controversy shall bear his own costs and no costs shall be taxed against either party." NMSA 1978, § 62-13-3(A) (1993). The Commission's

authority is granted by statute and it cannot exercise authority it does not have. N.M. Const., Art. XI, § 2; *El Paso Elec. Co. v. New Mexico Pub. Regulation Comm'n*, 2010-NMSC-048, ¶ 11, 149 N.M. 174. NEE failed to identify any statute that allows the Commission or this Court to shift costs in a Commission proceeding from one party to another. As such, it may be assumed that NEE has been unable to find any supporting authority and its argument should be disregarded. *Adoption of Doe*, 1984-NMSC-024, ¶ 2.

NEE also fails to disclose to the Court that PNM is prohibited by its Strategist® license from allowing third parties to use the proprietary software, and any violation could have serious adverse consequences. **[21 RP12756-12872**].

With regard to item (e), renewable energy resources should not be favored regardless of cost and service quality differences. "For resources whose costs and service quality are equivalent, the utility should prefer resources that minimize environmental impacts." 17.7.3.6 NMAC. Nothing in the REA is to the contrary. *See* NMSA 1978, §§ 62-16-1 through 62-16-10 (2004 as amended through 2011). Indeed, the REA specifically provides that one of its purposes is to "protect public utilities and their ratepayers from renewable energy costs that are above a reasonable cost threshold." NMSA 1978, §62-16-2(B)(3) (2007).

IV. CONCLUSION

The Court should affirm the Final Order.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was e-mailed on November 2, 2016 to the following individuals:

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