

**1/4/17 DRAFT
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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. S-1-SC35697

NEW ENERGY ECONOMY, INC.,

Appellant,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee,

And

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

Intervenors-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.**

REPLY BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT

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STATEMENT OF COMPLIANCE

This document was prepared using Microsoft Word 2010. The body of this brief is less than 35 pages long. It was printed in 14-point Times New Roman, a proportionally-spaced typeface. Undersigned counsel certifies that it complies with Rule 12-213 NMRA.

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I. INTRODUCTION

This Reply Brief is filed on behalf of the City of Santa Fe and 37 non-profit organizations including national, regional, and New Mexico environmental organizations; Native American, civil rights, faith-based, community, and social justice organizations; and physicians, nurses, and veterans organizations that share a common interest in the urgent need for immediate mitigation of the causes and catastrophic environmental and human costs of climate change.¹ The Reply Brief is limited to three issues at the heart of this Appeal. Each is related to the indisputable facts set out in the Amicus Brief that man-made climate change is real, is getting worse every day, and presents an immediate, existential challenge to the planet and to the people and water of New Mexico.

II. NEW ENERGY ECONOMY DID NOT ABANDON PRC'S FAILURE TO ANALYZE OR EVALUATE THE REGULATORY, ECONOMIC, OR ENVIRONMENTAL COSTS AND RISKS OF CLIMATE CHANGE

New Mexico Public Regulation Commission (PRC) and Public Service Company of New Mexico (PNM) both contend that this Court should disregard the Amicus Brief because NEE did not sufficiently address climate change and environmental issues in its Brief-in-Chief. *See*, Answer Brief of New Mexico Public Regulation Commission to Brief of Amici Curiae (PRC Answer Brief) at p.

¹ No counsel for any party authored this Reply Brief in whole or in part. No party, counsel for a party, or any other person made a monetary contribution intended to fund the preparation or submission of this Reply Brief.

2., Answer Brief of Public Service Company of New Mexico to Brief of Amici Curiae (PNM Answer Brief) at p. 4. Not only is this argument unfounded, it is particularly odd, as all Appellees tout the purported environmental benefits to the climate and environment of the August 13 Supplemental Stipulation. In fact, NEE’s Amended Brief-in-Chief and the Amicus Brief make substantially similar and overlapping legal arguments and based on the same legal authorities regarding PRC’s failure to compare the costs and risks of environmental and climate change impacts of coal to renewable solar and wind energy.

Amici argue at p. 5 [CHECK FOR ADDITIONAL CITES] of the Amicus Brief that the PRC failed to compare and analyze risks posed by a number of factors including environmental regulation. 17.7.3.9(B) (12), (G)(1) NMAC, to compare and prefer resources that minimize environmental impacts when the cost and service quality of such resources are equivalent. 17.7.3.6 NMAC, and to consider and compare the environmental risks and the related risks of uncertainty of fuel supply, and price volatility risks of supply-side resources—in this case coal—as required by the Efficient Use of Energy Act. NMSA 1978, § 62-17-10. In addition, Amici argued that the PRC did not comply with NMSA 1978, §§ 62-16-1 to -10 (the “Renewable Energy Act”).

These are the same statutes, regulations cited and relied on by NEE. See, Amended Brief-in-Chief: (17.7.3.9.G (1)(2)(3) NMAC at pp. 17, 18, 25, 28, 34,

50; (17.7.6 NMAC) at pp. 3, 6, 40, 52; Efficient Use of Energy Act. NMSA 1978, § 62-17-10 at pp. 1, 25, 28, 32, 33, 35, 44, 52; NMSA 1978, §§ 62-16-1-10 Renewable Energy Act at pp. 3, 35. PNM and PRC ignore explicit references to climate change in the Amended Brief in Chief “Renewable alternatives have become less costly than coal, far less costly than nuclear, are just as reliable as either, and lack the catastrophic climate and environmental impacts of coal and the enormous risk of nuclear. Amended Brief-in-Chief at p. 5. Coal caused climate risk and impacts are also cited at p. 54.

The simple fact is that the core argument made by NEE is that the coal and nuclear replacement resources were not evaluated on a consistent and comparable basis with wind and solar because the PRC did not analyze or consider the environmental and public health impacts of climate change and related economic risks and costs of coal, as required by law.

III. THERE IS NO RECORD EVIDENCE THAT THE PRC ANALYZED OR COMPARED THE REGULATORY, ECONOMIC, OR ENVIRONMENTAL COSTS AND RISKS OF CLIMATE CHANGE IN EVALUATING THE REPLACEMENT PORTFOLIO

Only PNM and PRC attempted to respond to Amici’s central argument that there is no record evidence (let alone substantial evidence) that PRC analyzed and evaluated the costs, risks and impacts of climate change when evaluating the replacement portfolio. Neither PRC or PNM make any reference to the Final Order of the PRC. As noted in the Amicus Brief, the Final Order does not contain words

“climate change” and does not directly or indirectly address the climate change risks and costs posed by coal.

PNM attempts to dismisses the lack of record evidence in two sentences by a reference to the November Stipulation. PNM notes that the Hearing Examiner summarized Dr. McCally’s testimony in the November Stipulation. PNM then states: “Thus, the Amici’s claims that the Final Order failed to address these issues is without merit.” PNM Answer Brief at p. 16. PNM then proceeds to make claims about the environmental benefits of shutting down San Juan Units 2 and 3. The speculative and illusory environmental benefits of the August 13 Supplemental Stipulation claimed are addressed in Section IV, *infra*.

This two-sentence reference is not evidence that the PRC analyzed the environmental and regulatory risks and costs of climate change and compared the PNM replacement portfolio with solar and wind energy on a consistent and comparable basis.

The PRC’s only citation to the record proper of any purported analysis or evaluation of the environmental costs and risks of climate change is contained at pp. 5-6 of the Answer Brief of New Mexico Public Regulation Commission in Answer to Amicus Brief (PRC Amicus Answer). However, it is clear from the language quoted and review of the context in the record proper that the Hearing

Examiner merely summarized the testimony of NEE expert witness Dr. McCally without any comment or analysis. The language quoted at p. 5 of the PRC Amicus Answer Brief is all there is in the record [74 RP 49124]. At p.6 of the PRC Amicus Answer, the PRC merely quotes the Hearing Examiner's summary of an argument made by NEE in its Brief in Chief. There is not a scintilla of evidence cited by PNM or PRC or in the record that that addressed the environmental and public health costs and risks including climate change raised in testimony of Dr. McCally.

Like PNM, and Western Resources Advocates (WRA), PRC then goes on to quote the Hearing Examiner's summary of the purported environmental benefits of the settlement at p. 6. This summary deals with the benefits of the shutdown of San Juan Units 2 and 3. All parties agreed that shutdown of San Juan Units 2 and 3 was necessary to comply with EPA's Clean Air Act Order regarding haze. The shutdown of San Juan Units 2 and 3 is not the issue in this appeal. The issue is whether the PRC followed the law and evaluated the competing replacement resources on a consistent and comparable basis. On its face the quoted language is not an analysis and comparison of the relative costs of the replacement resources at issue. Suffice it to say that this summary does not in any way constitute record evidence that the PRC considered, compared, or analyzed the environmental, public health costs, regulatory risks of climate change caused by using coal.

IV. APPELLEES ARGUMENTS ABOUT THE PURPORTED ENVIRONMENTAL BENEFITS OF THE AUGUST 13, 2015 SUPPLEMENTAL STIPULATION SETTLEMENT ARE NOT RELEVANT TO THE CENTRAL ISSUE IN THIS APPEAL AND ARE SPECULATIVE AND MISLEADING

WRA, PNM and PRC all tout the environmental benefits of the closure of San Juan Units 2 and 3 as a reason to approve the August 13 Supplemental Stipulation; they all try to bolster their arguments that climate change is not an issue regarding the coal component of the replacement portfolio by emphasizing the environmental benefits from the shutdown Units 2 and 3 as being the best possible environmental outcome for the people of New Mexico. However, Appellees conflate the environmental benefits of the closure of Units 2 and 3 with the separate issue of the purported environmental benefits of the August 13 Stipulation. This is misleading, and, in any event, is not relevant to whether there is any evidence in the record that PRC evaluated the indisputable environmental impacts and costs of climate change.

A brief analysis of WRA's curious contention that the Amicus Brief "should have been filed in support of *Modified Stipulation* rather in opposition" [add footnote that this refers to the August 13 Supplemental Stipulation] and its speculative and misleading characterization of the August 13 Stipulation shows that WRA's contention the Final Order "provides a superior environmental

outcome” WRA Brief at pp. 7, 17-28 is dubious at best. [add footnote that PNM and PRC have clearly left this argument to WRA]

The first problem with WRA’s claim is that any benefits that flow from the August 13 Stipulation will occur in 2020 and after June 30, 2022, if they take place at all. The August 13 Stipulation contains an agreement that there will be a further regulatory proceeding that will be commenced no later than December 31, 2018 to determine whether San Juan Generating Station will continue to serve PNM Customers after June 30, 2022. [add cite].

In addition, paragraph 8 of the August 13 Stipulation provides that if EPA’s Clean Power Plan (CPP) is in effect in 2020 then PNM is required to purchase \$7 million in ERC credits (not renewable energy). [add footnote about NM renewable energy REC credits] WRA Brief at p. 18

This claim rests on a highly speculative assumption that the EPA’s Clean Power Plan will ever become effective and be in effect in 2020. It ignores the following facts: (1) Twenty-nine states have sued EPA in the District of Columbia Circuit challenging EPA’s authority to adopt the CPP. Lead counsel in this case is Oklahoma Attorney General Scott Pruitt. (2) On February 9, 2016 the United States Supreme Court by a 5-4 vote stayed implementation of the CPP. (3) On February 13, 2016 Justice Antonin Scalia who had voted for the stay died. (4) President-elect Donald Trump has nominated Scott Pruitt, a vocal climate change

“skeptic” to be Administrator of the EPA. President-elect Trump has repeatedly promised to roll back environmental regulations on coal and other fossil fuels, has called climate change a “Chinese hoax” and promised to appoint a Justice in the mold of Justice Scalia to fill the vacancy on the Supreme Court. Based on these developments, it is highly probable that the CPP will never be implemented and the “most important benefits” of the August 13 Stipulation (See WRA Brief at pp. 22, 28029) are illusory and misleading.

CONCLUSION

For the foregoing reasons as well as the reasons set forth in the NEE Briefs and the Amicus Brief, the Final Order should be reversed and the case should be remanded for further proceedings.

DATED: this 9th of January, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

On this 9th day of January, 2017, a true and correct copy of the above and foregoing was forwarded to all counsel of record, listed below, via email.

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