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, ISSUAND 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.

AMENDED BRIEF IN CHIEF OF APPELLANT NEW ENERGY ECONOMY

Oral Argument Requested

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I. INTRODUCTION

This appeal arises from the Public Regulation Commission's (PRC or the Commission) approval of a contested stipulation that grants the Public Service Company of New Mexico (PNM) permission to acquire additional coal and nuclear resources on behalf of the ratepayers of New Mexico as replacement power for the lost generation capacity from the closure of two of the four units of the San Juan Generating Station (SJGS) in 2018.

The PRC has granted PNM a Certificate of Convenience and Necessity (CCN) for its proposed acquisition of 132 megawatts of additional coal shares in SJGS unit 4 (SJ4) and 134 megawatts of additional nuclear capacity from unit 3 at the Palo Verde Nuclear Generating Station (PV3) without first requiring PNM to identify and then compare the costs and risks of these replacement resources with other available resources as New Mexico law and regulations require. NMSA 1978, § 62-17-10; 17.7.3, et seq., NMAC.

In order to protect ratepayers from undue cost and risk, the law requires that utilities "identify the most cost-effective resource portfolio" when acquiring generation resources and states that in so doing they *shall* "evaluate all feasible supply and demand-side resource options *on a consistent and comparable basis*, *and take into consideration risk and uncertainty* (including but not limited to financial, competitive, reliability, operational, fuel supply, price volatility and

anticipated environmental regulation) and….*consider and describe ways to mitigate ratepayer risk*." IRP Rule, 17.7.3.7.I and J and 17.7.3.9.F(1) NMAC. (Emphasis added).

These regulatory protections are critically important in a context where the monopoly status of the public utility might otherwise lead to the preferential treatment of self-serving resource selections. The PRC recently ruled that"[t]he public interest is to be given paramount consideration; desires of a utility are secondary" in a resource acquisition case. The Commission's statutory duty is to protect the public interest in such cases *by ensuring that the utility satisfies its burden of proof* by demonstrating with reliable evidence that it has reasonably identified all feasible alternatives to satisfy its service needs and that its proposed resource is necessary and its most cost-effective option. *In Re Public Service Company of New Mexico*, Case No. 2382, 166 P.U.R.4th 318 (1995), p. 39

The record shows that PNM failed to meet its burden of proof to satisfy the legal standards of cost-effectiveness. Instead of identifying and evaluating all feasible alternatives, PNM limited its presentation of alternative scenarios to only those that included the transfer of its money-losing nuclear interest in PV3 merchant plant into rate base (**26 RP 16156-16160**) and "pick up" coal interest in SJ4 that other co-owner utilities at SJGS are abandoning. In so doing, PNM gave preference to scenarios that turned PV3 profitable and absorbed unwanted shares

in SJ4 as a necessary step to make SJGS's partnership agreement viable.[1] PNM selected these scenarios without any legitimate (or reasonable) effort to compare the costs of these resources with other available resources, including those that have less environmental impacts, as 17.7.3.6 NMAC, IRP Rule requires.

PNM's selections will saddle PNM's ratepayers with the rising fuel costs and environmental liabilities of coal, the enormous expense, risks and liabilities associated with nuclear, and a greater share of the decommissioning costs at two aging plants to the benefit of shareholders at the expense of New Mexico's ratepayers.

PNM preferred these resources at a time when evidence shows that reliable, non-polluting renewable resources are cheaper (with prices continuing to drop steadily), and are reliable and feasible alternatives as evidenced by the widespread transition to these resources by other utilities and states.[2]

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[1] PNM conceded that it was in 2012 that it chose the resources it wanted, which predated its analyses of their costs compared with other available resources. For example, PNM Senior Vice President Ron Darnell admitted that acquisition of the 132 MWs of SJGS had more to do with making the partnership at SJGS work than as a good system resource for the benefit of the public. **26 RP 16193-5.** "In order to facilitate [the SJGS partnership] agreement, that's my understanding, that you know, PNM accepted the 132 megawatts. *Now*, it's cost-effective." **26 RP 16200-1.** (Emphasis supplied.)

[2] As Ron Lehr, former Colorado Commissioner testified, "I recommend that the New Mexico commission encourage regulated utilities to get with, and stay with, the rapidly emerging state of the art with regard to integrating renewable energy at least cost; this is consistent with the desire of the New Mexico legislature to encourage the dispatch of renewable energy resources, Renewable Energy Act,

These acquisitions have far reaching implications for the energy future of the state. The CCN for SJ4 is indefinite, and PNM has this unit depreciated out until 2053; the CCN for PV3 is indefinite and the Nuclear Regulatory Commission permit expires in 2047. **64 RP 41416; 69 RP 44918; 74 RP 49115**.

The PRC's decision to grant these CCNs without sufficient evidence that these acquisitions were the "most cost-effective resources" or "most economical choices among feasible alternatives" or that risks to ratepayers had been analyzed and mitigated, was arbitrary and capricious and contrary to law. The PRC failed to protect ratepayers from undue cost and risk and failed to demonstrate a preference for less polluting resources when the cost to ratepayers of polluting and non-polluting resources is "equivalent." 17.7.3.6 NMAC. Its decision further abdicated the PRC's responsibility to uphold regulatory law by closing the pending Integrated Resource Planning (IRP) docket without further action (**61 RP 39611-39628**, ¶ 12) and granting PNM a "variance to Commission rules, including 17.6.450 NMAC" to allow the settlement to be carried out. (*Id*., ¶ 13).

NMSA 1978 Section 62-16-1 *et. seq*. Benefits can flow to New Mexico consumers in the form of long term least generation costs if resource planning and competitive market acquisitions can lead to new, large scale wind and solar plants that replace retired fossil units and an older PNMR-owned nuclear unit at a savings and, importantly without the associated risks and liabilities. If the commission staff and the utility incorporate the best new information about least cost integration in their work, the transition to clean, renewable energy with no fuel cost, risk, or liabilities can happen. That's what's happening in Colorado and Nevada, so we have to assume that it can also happen in New Mexico." **9 RP 6328**.

In so doing, the PRC missed the opportunity to move New Mexico's electrical generation away from archaic, harmful, risky and expensive coal and nuclear toward renewable energy sources. 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. **64 RP 41354-41359.**

The PRC's decision was made in a context in which evidence showed that 4 of 5 commissioners prejudged the outcome of this case and, in some cases, engaged in improper ex parte contact with PNM regarding this case. *NEE v. Lyons, et al.,* No. S-1-SC-35533. As a consequence, this Court, in its order of November 9, 2015 held that the standard of review in this case would include "heightened scrutiny" of the PRC's decision. NEE respectfully submits that if this case were decided under the traditional "deferential" standard for appeals from administrative agencies, the PRC's decision would be determined to be unlawful. Under heightened scrutiny, there is no reasoned basis to sustain the PRC's decision, as NEE explains below.

II. SUMMARY OF PROCEEDINGS

A. The Nature of the Case

The PRC proceeding below has its genesis in the Environmental Protection Agency's (EPA's) determination that one of New Mexico's largest coal-fired

generating stations with high levels of pollution, the San Juan Generation Station, would be in violation of EPA's Haze Rule by 2016 and had to reduce its emissions in order to comply with the law. Initially EPA required PNM, the operator, and all the other co-owners to install extremely costly pollutions controls.[3] (This plan was known as the "Federal Implementation Plan" or "FIP"). As an alternative, PNM and the other owners of SJGS agreed to close two of its four units in order to reduce SJGS pollution by roughly 50%, thereby avoiding the cost of installing expensive pollution controls (SCR) and replacing the less costly pollution controls, known as Selective Non Catalytic Reduction (SNCR) on SJ1 & SJ4, that would achieve the same result. This plan is known as the "Revised State Implementation Plan" or "RSIP." The closure of Units 2 and 3 (total of 836 megawatts) will result in PNM losing 418 megawatts of its current generating capacity. All parties in the proceeding below, including NEE, supported PNM's abandonment of service request, which is not at issue in this appeal. PNM was required by law to demonstrate that its customers would not be adversely affected by the abandonment and accordingly proposed replacement resources. NMSA 1978, § 62-9-5. The contested issues below relate to PNM's selection of resources to replace the lost capacity.

B. Course of the Proceedings

[3] Known as Selective Catalytic Reduction, ("SCR"), at SJGS.

This proceeding began on December 20, 2013, when PNM applied to abandon its interests in San Juan units 2 and 3 and to add two replacement resources that it asserted it had determined to be most "cost effective": (i) 78 MW, subsequently increased to 132 MW,[4] of "baseload" coal capacity at San Juan Generating Station Unit 4 (SJ4), and (ii) 134 MW of "baseload" nuclear capacity from Palo Verde 3 (PV3). PNM would acquire the SJ4 capacity for $0 from its current co-owners, who wanted to abandon it, PNM would be responsible for the costs of the pollution controls required to comply with the RSIP on SJ1 & SJ4 and PNM would assume the risks and liabilities associated with that plant that the departing owners wished to shed. PNM proposed to include its SJ4 acquisition in rates at a base value of $52.5 million. As to PV3, PNM proposed to add it to rate base at a value of $2,500/kW, which would make its cost to rate payers more than twice as much as its net book value (NBV) as of January 1, 2018. **1 RP 513 and 13 RP 7434-A, 7456-A**.

On October 1, 2014, before the evidentiary hearing, PNM announced that it had reached a settlement with some parties to acquire the replacement assets it wished, but at reduced values. **12 RP 7518-7537**. It conceded that it had not yet reached agreement on a future coal supply for SJGS and had not reached

[4] In May 2014, PNM increased its CCN request to add MWs because another co-owner at SJGS chose *not* to acquire 54 MWs of unwanted shares from SJGS unit 4, and no other entity would purchase those coal shares. **6 RP 3785**.

agreement with SJGS co-owners on ownership restructuring. PNM requested approval based on the settlement's "significant cost reductions to PNM's customers relative to PNM's proposal prior to the Application." **14 RP 7833**. In other words, the Stipulation provided value to ratepayers simply because PNM had lowered its demands.

On October 14, 2014, NEE, and others filed oppositions to the 2014 Stipulation for various reasons, including, significantly for this appeal, PNM's failure to identify and evaluate all feasible alternatives to the SJ4 and PV3 replacement resources as required by PRC regulations and the corollary failure to show its preferred resources were most "cost effective." **12 RP 7613-7624; 12 RP 7584-7602; 12 RP 7603-7612**. NEE and other parties provided opposition testimony.

The Hearing Examiner presided over a public hearing from January 5-27, 2015 in which thousands of people provided public comments in live testimony or written submissions that were overwhelmingly opposed to PNM's procurement of more coal and nuclear. During the hearing, PNM disclosed that the City of Farmington, one of the co-owners of SJGS, had changed its mind and would not purchase its allocated shares (65 MW) of the excess coal capacity in SJ 4 left by the departing owners. **24 RP 14717-14742**. Farmington told PNM that its decision was based, *inter alia,* "upon… the already protracted nature and on-going status of

negotiations to the detriment of the City's ability to develop *alternate generation resource options, capacity acquisition economics [], significant degradation in San Juan Unit 4 reliability performance*, uncertainty and likely unfavorable economics regarding future fuel supply, uncertainty pertaining to operations and ownership structure post-2022 and other evaluated liabilities unacceptable to the City." (Emphasis supplied.) **24 RP 14731-2**. As a result, a number of the settling parties withdrew support from the Stipulation.[5] When PNM indicated that it would simply absorb the 65 MW that Farmington had declined, a principal market analyst of PNM's stock, *Jefferies,* downgraded it from a "buy" to a "hold" because the analyst saw the acquisition as uneconomic. **42 RP 26895-26906**.

On April 8, 2015, the Hearing Examiner issued his opinion ("Certification of the Stipulation" or "April Certification") recommending rejection of the settlement, principally because the values PNM was claiming for the assets it wanted to add were still grossly inflated and inconsistent with regulatory principles.[6] **48 RP 31042-31217, 31103-4, 31176-84**. Further, because the coal supply and restructuring agreements were not final it was unreasonable to ask the Commission to approve the acquisition of more coal at SJ4 when the San Juan co-owners were

[5] **32 RP 21117-21120; 40RP 25262-25269; 32 RP 20431-20436; 32 RP 20460-20470**.

[6] "Neither of PNM's approaches, however, is consistent with the ratemaking principles used by the Commission to value rate base assets. Neither satisfies the Commission's standards for acquisition adjustments." **48 RP 31184**.

not "ready and willing to approve." *Id*., at **31119-31133**. The Hearing Examiner expressed concern that, "[a]s additional San Juan owners seek to relinquish their interests, PNM will face increasing pressure to increase its ownership share—to protect its investments in the facility, to avoid having to build or acquire other capacity or to avoid take-or-pay liabilities under a coal supply agreement," adding that "[a]s PNM acquires increasing shares, it will be increasingly reluctant to retire a plant even as it grows uneconomic," leading to PNM becoming "the owner of last resort" and "a version of the 'too big to fail' syndrome." *Id*., at **31132-31133**. Of particular significance is the Hearing Examiner's adoption of the legally-flawed and factually unsupported assumption that PNM had reasonably identified all feasible alternatives to SJ4 and PV3 which, as explained below, was without support in the record. NEE objected to the Hearing Examiner's Certifications of Stipulations in NEE's Exceptions of April 20 and November 30, 2015. **48 RP 32004-32025 and 75 RP 49232 – 49272**, respectively. This faulty underlying assumption by the Hearing Examiner persisted throughout and is a principal reason for the current appeal.

The PRC never voted on the Hearing Examiner's April Certification of Stipulation and, on May 27, 2015, voted to re-open the record to allow PNM to file coal supply and San Juan Generating Station ownership restructuring agreements, and remanded the case for another hearing on the merits, requiring PNM to file

accompanying testimony.[7] Although the Commission ordered PNM to file the agreements in the public record, PNM did not comply with the Commission's orders of May 27, and June 24, 2015 and filed them under seal instead. [8] The Commission acquiesced.

On August 13, 2015, before the PRC addressed Hearing Examiner's April Certification, PNM and certain other parties submitted a second settlement agreement, which NEE opposed. **61 RP 39763 - 39780**. The "Supplemental Stipulation" modified and supplemented the earlier Stipulation. **61 RP 39611-39628.** In it (¶ 10), PNM agreed to further reduce the rate base valuation of PV3 to its NBV (approximately $1,100/kW), as had been recommended by the Hearing Examiner in his (then still pending) April Certification, and to further reduce the rate base valuation of the 132 MW from SJ4 from $26 million to $0, exclusive of SNCR pollution controls and any further emissions-related or other capital investments by PNM for that plant. The Supplemental Stipulation (¶ 7) also required the PRC to approve PNM's acquisition of 65 MW of SJ4 as a "merchant plant" outside its rate base.

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[7] The May 27, 2015 Order required a showing of "cost-effectiveness" and "the sufficiency of alternative generation resources to replace the capacity of SJGS Units 2 and 3." **53 RP 34600-34610**, ¶C

[8] **53 RP 34600-34610** and **54 RP 34906-34917**; Despite that these were made public when the PRC tendered these documents to the *Santa Fe New Mexican* they still remain in the confidential part of this record. **19 RP 56590-56892**.

The Supplemental Stipulation (¶ 12) also required that pending Case No. 14-00128-UT, which the PRC previously had docketed to address protests of PNM's most recent (2014) Integrated Resource Plan by NEE, and other parties, "be closed without further Commission action in that docket." Further, the signatories agreed to grant PNM a "variance to Commission rules, including 17.6.450 NMAC" to allow the settlement to be carried out. (¶ 13) 17.6.450 NMAC governs Class I and Class II financial transactions by utilities.

On September 2, 2015, based on new evidence of prejudgment and bias, by Commissioners Lyons, Montoya, Jones and Lovejoy, NEE filed renewed motions requesting that those commissioners recuse themselves. **62 RP 40472-40702**. After they refused, NEE petitioned this Court on October 5, 2015 for a writ of mandamus to force the recusals. This Court's November 9, 2015 Order in *NEE v. Lyons, et al.*, No. S-1-SC-35533, denied NEE's Petition without prejudice, admonished the Commissioners that "comments by a Commissioner which constitute prejudgment may constitutionally taint any subsequent hearing so as to invalidate the ensuing order of the Commission," citing Judge Minzner's ruling in *In re Comm'n Investig. into 1997 Earnings of US West Comm., Inc.*, 1999-NMSC-016, 127 N.M. 254, 260 (N.M. 1999), and held that "on direct appeal the merits of the entire case will be reviewed under a heightened scrutiny standard."

On November 16, 2015, after the second evidentiary hearing, which addressed the Supplemental Stipulation, the Hearing Examiner issued his "Certification" of the Modified Stipulation (November Certification), recommending approval. **74 RP 49086-49216**. On December 16, 2015, the PRC voted 4 to 1 (Commissioner Espinoza dissenting) to adopt the November Certification, issued its Final Order approving the settlement and issued CCN's for the SJ4 and PV3 resource acquisitions.

C. Summary of Facts Relevant to Issues Presented for Review

The facts that are relevant to the core issue in this appeal relate to whether PNM identified all feasible generation resources and evaluated the relative costs of those resources "on a consistent and comparable basis," taking into consideration risks and regulatory costs in the selection of the most cost-effective resources, as required by law. **1 RP 16**.

1. Constrained Alternative Portfolios

All parties in the proceeding below acknowledged that, in order for PNM to obtain CCNs for its proposed replacement resources, it needed to prove that they were "the most economical choice among feasible alternatives" to meet PNM's projected service needs for the next twenty years in accordance with the resource selection criteria in the IRP Rule and the PRC's established standards for reviewing CCN applications. **1RP 84**.

In its initial submission, in December 2013,[9] PNM submitted evaluations of four alternative portfolios to justify its selection of resources as "most cost-effective". **1 RP 425**. To assess their relative costs, PNM used a proprietary software program, Strategist®, to evaluate the alternative portfolios. Strategist® is a "black box" modeling tool for resource selection. It is based on inputs selected by the user (such as prices for solar, gas, wind, coal and nuclear chosen by the person using the program) and then models various resource portfolios, based on those inputs, to identify the "most cost effective" portfolio. Strategist® is a costly software program licensed to PNM by Ventyx. PNM's Director of Planning and Resources, Patrick O'Connell, testified that Strategist® is a "comprehensive, long-range resource planning tool". (**1 RP 405**.) PNM's original testimony included four scenarios that were modeled in Strategist®:

1) The PNM-preferred scenario which entailed closing units SJ2 & SJ3, purchasing 78 MW at SJ4, installing less costly pollution controls at SJ1 and 4, and transferring PNM's interest in Palo Verde 3 (PV3) into rates. PNM named this Strategist® run the "Revised State Implementation Plan" (RSIP);

2) The RSIP without PV3;

[9] When PNM had adequate time to assess replacement power alternatives well before the required implementation date of January 1, 2018.

3) The Federal Implementation Plan (FIP) (which all parties agreed should not be considered), in which all four units at SJGS continue to operate until 2053, with cost-prohibitive pollution controls (SCR);[10] and

4) A 4-unit shutdown of SJGS – meaning total closure of SJGS, with PV3 added. **1 RP 425**.

The Strategist® results showed PNM's preferred choice, the RSIP with PV3, as the least cost of the scenarios at $6,640,253,862.

After its application, PNM added one more portfolio to its analysis: a "0 MW at SJGS" Strategist® run (i.e., add PV3 but take no more coal shares at SJGS) which first appeared in PNM's testimony on October 31, 2014,[11] then on July 31, 2015,[12] and only appeared in testimony in one other round of runs, on August 28, 2015.[13]

The PRC required PNM to run one additional analysis, a *three*-unit shutdown scenario, in a bench request issued during the January, 2015 hearings. **32 RP 21102-21116**.

All of the "alternative portfolios" that PNM included in its application and later testimony included either both PV3 and SJ4 or one of them. No scenario

[10] This was an untested and unrealistic "strawman" that no party advocated for but was so expensive that every other scenario was cheaper.
[11] **14 RP 7881**.
[12] **59 RP 39142-3**.
[13] **62 RP 40147**.

excluded both of these resources. PNM thus artificially constrained the alternatives to always include both or one or the other of the resources that PNM wanted to acquire. Both of the Hearing Officer's Certifications of Stipulations, and the PRC's Final Order accepted PNM's constraints. NEE objected that this was inconsistent with Commission rules: 17.7.3.9.F(1) NMAC, "In identifying additional resource options, the utility shall consider all feasible supply side and demand side resources" and 17.7.3.9.G(1) NMAC "To identify the most cost-effective resource portfolio, utilities shall evaluate all feasible supply and demand-side resource options on a consistent and comparable basis, and take into consideration risk and uncertainty []." **50 RP 31999-32061; 75 RP 49232-49277**.

2. Testimony Challenging PNM's Failure To Consider Existing Alternatives

a. PRC Expert Witness, David C. Rode

At taxpayer expense of $54,094, PRC Staff hired an expert, David C. Rode, a Managing Director of DAI Management Consultants, Inc., a "valuation and risk management consulting firm" to examine "PNM's risk analysis and optimal portfolio selection, with specific emphasis on the following areas: PNM's risk analysis obligations under PRC Rule 17.7.3 (in particular 17.7.3.9(D)(2) and 17.7.3.9(G)(1))" **17 RP 10269-10294**.

In Rode's evaluation of PNM's submissions he explained the resource alternatives identification requirements and selection criteria in the PRC's IRP

Rule for determining whether the replacement resources proposed by PNM "are consistent with the public convenience and necessity." **8 RP 5252-5612, 5257-64**. He concluded: "PNM has not demonstrated convincingly that the proposed RSIP with PV3 is the most cost-effective portfolio." *Id.,* at **5263**. Rode testified "the limitations imposed on the set of possible portfolios by PNM's modeling process and how those limitations render suspect PNM's assertion that SJ4 and PV3 appear in virtually all leading portfolios." *Id*., at **5264**

Rode explained how PNM had defined the "baseload capacity" it said it needed in a manner that effectively made its preferred SJ4 and PV3 resources its "*only* feasible" baseload options and did not "seriously" consider "other baseload alternatives," such as power purchase agreements (PPAs) that could "significantly reduce the potential risk exposure" associated with PNM's proposals. *Id*., at **5264**. (Emphasis in original). Rode's direct testimony *Id*., at **5259-5270**, also explained why PNM's constraints in its economic modeling and portfolio comparisons on the capacity addition alternatives PNM considered were "problematic" as follows:

> The most consequential aspect of this case, in my opinion, is PNM's proposal to bring SJ4 and PV3 into rates. Not only is considerable expense involved, but *because PNM itself is taking both sides of these transactions (i.e., "selling" from the non-regulated side to the regulated side), it seems worthy of heightened scrutiny*. The fact that PNM seems to have included no other options in its analysis but yet labeled the path "most cost effective" strikes me as potentially inappropriate, given that PNM has a clear interest in bringing PV 3 into rate base at the highest possible valuation. …My issue is that we cannot know unless other possible paths are examined. And incidentally, this is not simply my opinion. I believe it is required by the IRP

> Rule itself Section 17.7.3.9(G)(1) requires that 'utilities shall evaluate all feasible supply and demand-side resource options.' This does not appear to have been done. (Emphasis supplied). *Id.*, at **5259-5270**.

Rode's direct testimony concluded with his expert opinion that "it was unreasonable for PNM to limit the possible baseload capacity choices to only SJ4 and PV3, given that other options are clearly available, and [a]s a result, I believe PNM has presented an incomplete analysis." *Id.*, at **5272**.

Although Staff had hired Mr. Rode as an independent expert, once Staff signed onto the first settlement, whose wisdom was effectively challenged by Rode's pre-filed testimony, Staff, as well as PNM and certain other supporters of the October 2014 settlement, moved to exclude Rode's expert analysis and opinions.[14] The Hearing Examiner nonetheless, admitted Rode's testimony as substantive evidence. **48 RP 31060,** fn 3. Yet, in his April Certification he did not address Rode's opinions regarding PNM's failure to identify and evaluate feasible alternatives and the risks and uncertainties of its preferred resources. (**48 RP 31042-31217**).

In its April 20, 2014 Exceptions to the 2014 Certification, NEE argued that neither PNM nor any of the other proponents of the 2014 Stipulation had rebutted the credibility of Staff witness Rode or his testimony challenging PNM's failure to

[14] **15 RP 8635-8643; 15 RP 8682-8690; 16 RP 9578-9585; 16 RP 9586-9607; 16 RP 9562-9565; 16 RP 9718-9727; 17 RP 9811-9847; 17 RP 10244-10268; 19 RP 11236-11246**.

meet its burden of proof that the replacement portfolio was the most cost effective, least risky, and the best choice among alternatives. **50 RP31999-32061**[15]

b. NEE Expert Witness David Van Winkle

Mr. Van Winkle, an electrical engineer and a former Vice President at Texas Instruments, filed testimony on August 29, 2014 provided evidence showing that PNM avoided considering and assessing resources such as wind, solar and gas, despite the fact that they are less costly and less risky than coal or nuclear. Van Winkle explained that PNM's SJ4 and PV3 baseload capacity proposals effectively displaced any reasonable evaluation by PNM or the PRC of resource portfolio alternatives that relied on a combination of more flexible resource technologies despite the fact that renewable resources would be more cost-effective, reliable, and less risky for PNM and its customers to meet its projected service needs. **8 RP 4941-5101, 4957-4962**. Van Winkle then proposed a less costly alternative to PNM's replacement power scenario that "would be less exposed to many risks: carbon regulation, coal ash disposal costs, nuclear decommissioning risks, natural gas price fluctuation, and coal fuel price increases. Further, it facilitates attainment of the [Renewable Portfolio Standard] RPS in 2020 and reduces water usage." *Id*, at **4961-4963, 4969-4970**.

[15] We urge the Court to review Sections III.E.2 and III.G.3.b of the 2014 Certification in their entirety. We address below the deficiencies in that legal analysis re-adopted in the Hearing Examiners' November Certification of the Modified Stipulation adopted in the PRC's Final Order.

During the first hearing, discovery from PNM showed that PNM had re-run Strategist® with corrections NEE witnesses had identified. Strategist® results showed that Van Winkle NEE alternative portfolio was more cost effective than PNM's Stipulation portfolio:

1) PNM's "RSIP" is: 134 MW of PV3, 132 MW of SJ4, SNCR pollution controls on SJ1 & SJ4, 50% stranded asset cost recovery and capital expenditures included[16]) The 20-year NPV = $7672 million. **28 RP 17614**.

2) Van Winkle NEE's Alternative is: 260 MW solar and 400 MW wind, SNCR pollution controls on SJ1 & SJ4, 50% stranded asset cost recovery and capital expenditures included – with no added coal and nuclear) The 20-year NPV = $7627 million. **28 RP 17615**. The NEE Alternative was $45 million cheaper.

Before the second hearing, Mr. Van Winkle provided new written testimony on September 25, 2015, with *three* additional power replacement alternatives and used a revenue requirement analysis to show that all three alternatives were cheaper, feasible and less risky in comparison with PNM's RSIP, even with the lower costs for SJ4 and PV3 contained in the Modified Stipulation. **64 RP 41349-41695, 41387-93**. Van Winkle, who was criticized at the first hearing for using a

[16] PNM included capital expenditures but titled it "maintenance capital".

"levelized"[17] method of comparing various generous resources on a consistent and comparable basis, offered another method: "When the [revenue requirement] analysis is corrected, at least three alternatives are more cost effective than PNM's replacement plan. Each of the three alternatives labeled VWx, utilize more wind and solar are less expensive than PNM's Supplemental Stipulation." *Id.*, at. 37-42) Mr. Van Winkle used all PNM's cost valuations for the various resources to conservatively highlight the cost effectiveness of his alternatives. *Id*. at, p. 40.

c. NEE Expert Witness Ronald Lehr

Former PUC Colorado Commissioner, Ronald Lehr, testified that the issuance of a Request For Proposal (RFP) was the industry standard and most sure way to determine whether in fact PNM's proposal was the most cost effective among available alternatives. "PNM should immediately issue an RFP for power to replace the coal plants it proposes to retire at San Juan. As my previous testimony suggested, without testing today's market for lower cost, cleaner alternatives, the PNM proposed acquisitions of coal and nuclear resources cannot be justified. In my view, PNM consumers deserve to know whether there are any better alternatives than the coal and nuclear resources the company is proposing. Only a market test can provide the answer." **64 RP 41893** And in fact, PNM's

[17] Levelized cost is the average cost over the 20 year planning time period comprehending the time value of money to produce a comparable metric for various generation resources.

"compliance" filing of June 1, 2016, in this case, confirms Commissioner Lehr's testimony.[18]

3. Inconsistent And Unreliable Data Skews PNM's outcomes in favor of its preferred resources

It was NEE's and other intervenors' positions throughout the proceeding that PNM was manipulating the costs it claimed should be attributed to various replacement resource acquisition scenarios in order to favor its preferred resources. NEE and other intervenors supplied evidence that PNM inflated the costs for resources that deviated from PNM's preferred selection and lowered the costs attributable to its preferred scenario. PNM refused to permit any intervenors access to its Strategist software, asserting that its license would not permit it. **17 RP 10006-10013**. NEE leased the Strategist® software itself from Ventyx at a cost of $17,000 per four-month period.[19] This allowed NEE to understand PNM's

[18] PNM issued a "renewable" RFP in January 2016 as required by the settlement and the actual market costs for both wind and solar are far lower than what PNM had assumed for them in all its Strategist® runs. **1 Second Supp RP 56895** PNM used a solar price of 6.8¢/kWh in the Strategist® runs (**8 RP 5051**) but PNM received bids for solar at 4.2¢/kWh, (**1 Second Supp RP 56935**), 39% lower than PNM's Strategist® input for solar. The bidders all stated that the costs remain in effect until December 2016 and that "the projects could be added as system resources in 2017", at p. 4. **1 Second Supp RP 56898, 56909**.

[19] In order to assess the appropriateness of assumptions, comprehensiveness of the analysis, and accuracy of the answers provided by PNM, NEE requested access to the Strategist® software program so it could replicate the modeling runs. **17 RP 10006-10013**. The Hearing Examiner denied NEE's Motion to Compel PNM to pay for NEE's use of Strategist®. **48 RP 31190-2**.

Strategist® runs and re-run PNM's scenarios with what NEE asserted were correct inputs for SJGS, and eliminate constraints used by PNM in its Strategist® modeling. NEE introduced evidence to show that the results of NEE's lease of Strategist®, plus extensive discovery, showed that PNM's use of Strategist® had inconsistent or erroneous data inputs including:

a. **Underestimation of Coal Fuel Cost:** NEE's expert showed, and PNM admitted, that PNM's Strategist® inputs included a $367 million underestimation by PNM of future coal fuel costs at San Juan.[20] PNM admitted Dr. Fisher was correct. **18 RP 11083**.

b. **Omission of Capital Expenditures:** In assessing the costs of its preferred portfolios, PNM "omitted known on-going capital expenditures at all of its generation facilities and omitted all decommissioning and reclamation costs," which are ongoing necessary capital maintenance costs. **14 RP 7820-**

[20] NEE Expert, Dr. Jeremy Fisher, Synapse Energy Economics, also testified that "this change in [PNM's] modeling reduces PNM's estimated benefit of maintaining San Juan plant (vs. retiring all four units) by 74% - from $334 million to $88 million. This change does not only impact the relative difference between the portfolios, but also increases the absolute cost of the portfolios by a sizable fraction." **19 RP 11871-11939, 11902**
Dr. Fisher further testified: "[PNM's] O'Connell has performed significant manipulations to arrive at a value above zero." **Id. at 11875**. "[I]f we are willing to accept a series of constructed manipulations then San Juan has bare minimum value. If we remove Mr. O'Connell's *post-hoc* adjustments, we see that the intrinsic value of San Juan is a customer liability of -$224 million, not a benefit. And the concessions offered by PNM in [the] stipulation do not negate, or even significantly mitigate, this liability." *Id*, at p. 5

7920.When PNM included the costs, the net present value of PNM's preferred portfolio increased by $532 million.[21] PNM admitted this and had to rerun its Strategist® scenarios (**14 RP 7820-7920**.); and

c. **Inconsistent Assumptions and Data Inputs for PV3**: PNM "used internally inconsistent and inappropriate [input] assumptions." **15 RP 8916**. PNM valued PV3 at $1100/kW in PNM's preferred portfolios and more than double, $2500/kW for PV3, for PNM's non-preferred portfolios.[22] PNM agreed that it had done this, but argued that it was acceptable for PNM to assign varying values to the same assets, because it was a benefit attributable to settlement negotiations. The Hearing Examiner agreed. **74 RP 49187, 49189**.[23] NEE argued that doing so violated statutory and regulatory requirements because the evaluations had not been performed on a "consistent and comparable basis" and that there was no basis in the regulations justifying PNM's approach to supporting its resource choices by changing their values, portfolio by portfolio, to favor the one it preferred. NMSA 1978, § 62-17-10; 17.7.3.9 G (1) NMAC

[21] **8 RP 4950**.

[22] Despite the Hearing Examiner's opinion in the April Certification that a valuation for PV3 at $2500kW was inconsistent with regulatory principles and practice PNM continued to input this value in all its non-preferred Strategist portfolios. **59 RP 39142-3, 62 RP 40147, 65 RP 42316-9**

[23] "The April 8, 2015 Certification found that the net book value of the 134 MW of Palo Verde Unit 3 was the proper rate base value for that plant, after concluding that the proponents of the Original Stipulation had failed to prove the reasonableness of the acquisition adjustment proposed there." **74 RP 49189**

d. **Inconsistent Data Inputs for Stranded Asset Recovery:** In Strategist® runs involving its preferred portfolio, PNM provided for a 50% recovery of stranded assets from the abandonment of SJ 2 and 3, versus 100% recovery in disfavored portfolios, thereby driving up the costs for non-preferred portfolios. According to NEE expert, Dr. Fisher, this imposed a false penalty of $130 million on PNM's non-preferred, four-unit retirement portfolio, thereby imposing a bias in favor of the Stipulation portfolio. **19 RP 11930**. NEE expert Mr. Luckow asserted that the stranded asset recovery percentage should be consistent across scenarios.[24]

e. **Biased Wind & Solar Costs:** PNM "overstate[d] the cost of solar and wind." Solar increased in Strategist from 6.8¢/kWh to 10.5¢/kWh in 2033.[25] Wind increased at an indefensible 2.5% yearly escalation rate when actual prices are in steep decline; and PNM "artificially constrained the ability of Strategist® to select wind options" to 100 MWs over the 20-year planning horizon. (**15 RP 8793**).

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[25] **64 RP 41363**

f. **Inconsistent Data Inputs – Closure Date:** PNM used an unrealistic closure date for SJGS in the Four Unit shutdown portfolio, which caused unnecessary cost liability for take-or-pay penalties to be incurred.[26]

g. **Faulty Load Forecast Prognostication:** PNM overstating its projected energy sales in Strategist®, inconsistent with PNM's own filing 8 months earlier in PNM's rate case,[27] and included alleged need for baseload generation resources from large customers (Navopache and Intel) that skewed actual PNM need. [28] On October 6, 2015, PNM filed its tenth set of testimony in the case and allegedly rebutted Mr. Van Winkle by claiming that he "has provided alternative portfolios with no analysis" **65 RP 42304**. In the same rebuttal testimony Mr. O'Connell provided its newest Strategist® runs, which corrected all six runs to be consistent with PNM's rate case energy sales forecast, and

[26] "When the stipulation reviews the retirement of all four San Juan units in compliance with the regional haze rule, it retires the units at the end of 2016. [][A] closure of the San Juan units at the end of 2017 would be legal, less expensive and more practical than the December 2016 retirement assumed in Strategist [by PNM]." **15 RP 8939-40**.

[27] PNM testified in case 14-00332-UT in December 2014 that energy sales would decline through 2021, but used an increasing energy sales forecast in Strategist runs through August 2015.

[28] "It is quite possible that the combination of general weak demand, the reduction of Intel, and defection of Navopache could combine to a total reduction of energy usage of 25% versus the customer energy demand forecasted in Strategist®. Thus if PNM's CCNs are granted PNM's remaining residential and industrial consumers will be saddled with the bill for costs of unneeded base-load." **64 RP 41370-6**.

then ran three of the six runs without Navopache.[29] Interestingly, the last round of Strategist® runs, with corrected load forecasts did NOT include a take "0 MW at SJ4" scenario.

What was discovered when some of the manipulations were corrected was that a four-unit shutdown was more economic for ratepayers than further investment in San Juan. Luckow concluded: "If all the modeled scenarios used a consistent assumption about stranded asset recovery, it would be possible for the Commission to adequately compare these different scenarios. PNM's failure to do so makes this a challenge, but we can estimate the impact by removing these post-hoc adjustments and correcting mistakes related to end-effects[], leaving the Stipulation portfolio only $76 million dollars more cost effective than the *4 Unit Shutdown* case. This represents about 1% of the 20 year [net present value] NPV of the Stipulation portfolio, and would be less after appropriate treatment of variable costs. [] [If other improper] cost adjustments would be [corrected it would] make the Stipulation portfolio a net liability to PNM's ratepayers." **64 RP 41876-41877**.

4. Failure To Adequately Assess And Mitigate Risks

Several witnesses were critical of PNM's refusal to adequately assess the risk in its coal and nuclear replacement plan consistent with statutory and

[29] Days after the hearing PNM admitted to investors that it had lost its wholesale business with Navopache. NEE sought to supplement the record with this information, but the Hearing Examiner denied that request. **73 RP 48526-48547**.

regulatory requirements. Staff witness Rode's testified: "PNM's risk analysis is too limited in scope. It excludes a variety of important variables and alternate scenarios from probabilistic analysis and therefore PNM's risk measure necessarily understates the true risks in the company's proposal." (**8 RP 5252-5612, 5264**.) Rode's testimony, *Id.,* at **5272-5286** described problems with PNM's "risk analysis" including PNM's failure to model coal price variability in that analysis, which "potentially biases the risk analysis conclusions to suggest that risks are lower than they actually are in the scenarios presented by PNM." Summarizing his opinion on that aspect of PNM's Strategist®-based modeling process, he concluded at *Id.,* at **5286** that "PNM has made a number of modeling choices that render suspect not only their most cost effective portfolio conclusions, but also the risk analysis required by 17.7.3(G)(1)." Rode's testimony continued in a similar vein, challenging the reasonableness and credibility of PNM's "underestimation" of the risks associated with its coal-fired SJ4 and nuclear PV3 replacement resource proposals presented by PNM's O'Connell. *Id.,* at **5287-5307**.

NEE argued that the Stipulation was replete with risk, expense and exposure, and, rather than resolving issues, it invites litigation, pending[30] and forthcoming.

[30] *WildEarth Guardians v. OSM*, Case No. 1:14-cv-00112-RJ-CG, a lawsuit alleging NEPA violations during the permitting of the San Juan mine *See*, **3 RP 50773-50777**; **15 RP 8771**. And *Sierra Club v. San Juan Coal Company, et al.,*No. 10-cv-00332-MCA-LAM, regarding water quality contamination at San Juan, **3 RP 50773-50777.**

Mr. Van Winkle noted the difference between what PNM filed with the Securities & Exchange Commission (10Q) addressing environmental cost risk associated with methane, ozone, coal ash, the unquantified residual environmental liabilities, decommissioning costs at San Juan and the nuclear decommissioning cost risk at Palo Verde and the omission of those risks in its filing with the PRC. **64 RP 41427-33, 41438**

In the Hearing Examiner's April Certification the only "risks" he addresses are 1) coal supply and partnership restructuring agreement; and 2) availability and cost of coal; and 3) "the Clean Power Plan, future capital investments, escalating operational costs, coal mine hazards and regulations and other circumstances that may dictate production curtailments at San Juan" **48 RP 31140** and concludes that the "conditions proposed [] for the grant of the CCN are not sufficient to mitigate these risks." *Id.,* at **31143** In the November Certification the Hearing Examiner states that the coal supply and partnership restructuring agreements are resolved and the "uncertainties" mentioned in the earlier April Certification are addressed via the "value" of the "meaningful opportunity to review the future of San Juan in 2018" **74 RP 49172**. (with slight modifications to this 2018 Review process). *Id. at* **49133-49137.** The only mention by the Hearing Examiner addressing regulatory risk is regarding the Clean Power Plan (CPP) and he finds that the $7 million a year transference from ratepayers to PNM for the purchase of Renewable Energy

Credits (RECs) to accomplish PNM's compliance with the CPP "may help encourage renewable energy development." *Id., at* **49142-49148**. The Hearing Examiner also mentions that NOx, SO2 and CO emissions and water consumption will be reduced (*Id., at* **49176-49177)** but these reductions are a result of the SJ2 & SJ3 abandonment which were accepted by all parties in the case and have nothing to do with replacement power options, the critical issue in this case. *Id.,at* **49107**.

III. THE STANDARD OF REVIEW

In the ordinary appeal from an agency decision such as the PRC's in this case, this Court would review the PRC's order to determine if its decision was "arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency's authority, or otherwise inconsistent with law." *Attorney Gen. of State of N.M. v. N.M. Pub. Regulation Com'n.,* 2011-NMSC-034, ¶ 9, 150 N.M. 174; *New Mexico Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n.,* 2007-NMSC-053, ¶ 13. The Court is required to review the whole record, both in favor of and contrary to the PRC's decision, when determining if its decision is supported by substantial evidence and, ordinarily, reviews the evidence in the light most favorable to the PRC's decision. *New Mexico Exch. Carrier Group v. N.M. Pub. Regulation Comm'n*, 2016-NMSC-015, ¶ 28; *Bass Enterprises Prod. Co. v. Mosaic Potash Carlsbad, Inc.*, 2010-NMCA-065, ¶ 28, *cert. denied* June 21, 2010 ("favorable evidence is not viewed in a vacuum that disregards contravening

evidence"). Substantial evidence is "'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Id*. As explained herein, however, the proceeding below was extraordinary in numerous respects.

An arbitrary and capricious action by an agency "'is the result of an unconsidered, willful, and irrational choice of conduct and not the result of winnowing and sifting process.'" *Id*., quoting *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*." *Id.* (emphasis supplied), *quoting N.M. Mining Ass'n v. N.M. Water Quality Control Comm'n*, 2007-NMCA-010, ¶ 22, 141 N.M. 41.

With respect to constitutional issues, the Court reviews an agency's decision *de novo. TW Telecom of N.M. v. N.M. Pub. Regu. Comm'n,* 2011-NMSC-029, ¶ 15, 150 N.M. 12. The Court will customarily give some deference to an agency's interpretation of law falling within the agency's particular area of expertise, "and its determination of fundamental policies within the scope of the agency's statutory function...However, the court is not bound by the agency's [legal] interpretation and may substitute its own independent judgment for that of the agency because it is the function of the courts to interpret the law." *Morningstar Water Users Ass'n*

v. New Mexico Pub. Util. Comm'n, 1995-NMSC-062, 120 N.M. 579, 583, 904 P.2d 28, 32. Citations omitted.

These customary standards of review, however, do not apply in this case in light of this Court's November 9, 2015 Order in *NEE v. Lyons, et al.,* No. S-1-SC-35533, in which it held that "the merits of…[this] entire case will be reviewed under a heightened scrutiny standard because of the important concerns raised by petitioner." The Court has explained that, under this standard of review, it does not accord the deference traditionally accorded to governmental action and the burden is on the party maintaining the validity of its action to prove it was lawful. *Marrujo v. New Mexico State Highway Transp. Dept.*, 118 N.M. 753, 887 P.2d 747, 751-52 (1994).

IV. ARGUMENT

A. The Statutory and Regulatory Framework Governing a Utility's application to add resources to its portfolio

1. A utility's acquisition of resources for inclusion in its rate base is governed by both statute and regulation:

(a) Under NMSA 1978, § 62-17-10, and regulation, 17.7.3 NMAC, utilities must engage in a planning process, addressed and approved every three years, called "Integrated Resource Planning" (IRP). In addition to requiring a utility to plan in advance for its future needs, and obtain PRC approval for its plans, there

are specific provisions, both within and without the IRP process that are relevant to this proceeding. NMSA 1978, § 62-17-10 requires that electric public utilities file periodic, long-term integrated resource plans with the PRC so that it can determine if requests for PRC approval of specific resource acquisitions are consistent with the current IRP. That statute provides, in pertinent part, that such plans "shall evaluate renewable energy, energy efficiency, load management, distributed generation and conventional 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*." (Emphasis added).

To satisfy the requirement in § 62-17-10 that a public utility identify its "most cost-effective" resource portfolio to meet its projected service needs for its customers, the IRP Rule, 17.7.3.7.I and J and 17.7.3.9.F(1) NMAC, requires that a public utility identify all of its "feasible" resource options to meet its projected service needs over a 20-year "planning period," providing in pertinent part that "the utility shall consider all feasible supply-side and demand-side resources" and "shall describe in its plan those resources it evaluated for selection to its portfolio and the assumptions and methodologies used in evaluating its resource options, including, as applicable: *life expectancy of the resources*, the recognition of

whether the resource is replacing/adding capacity or energy, *dispatchability*, lead-time requirements, *flexibility and efficiency of the resource*." (Emphasis added). Further, the IRP Rule, 17.7.3.9.G(1) NMAC, provides:

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

The "Objective" section of the IRP Rule, 17.7.3.7 NMAC, similarly provides "The purpose of this rule is to set forth the commission's requirements for the preparation, filing, review and acceptance of integrated resource plans by public utilities supplying electric service in New Mexico in order to identify the most cost effective portfolio of resources to supply the energy needs of customers." It states further: "For resources whose costs and service quality are equivalent, the utility should prefer resources that minimize environmental impacts." All parties acknowledged that, in accordance with the foregoing resource selection criteria in the IRP Rule and the PRC's established standards for reviewing CCN applications, in order for PNM to obtain CCNs for its proposed replacement resources, it needed to prove that they were "the most economical choice among feasible alternatives" to meet PNM's projected service needs for the next twenty years. **1 RP 84**; and

(b) When a utility wishes to procure a resource, it must obtain CCN authority, pursuant to NMSA 1978, §§ 62-9-1.A and B, which is consistent with the "most cost-effective resource portfolio" planning and resource selection criteria and the most recent PNM Integrated Resource Plan ("IRP") "accepted" by the Commission as set forth in NMSA 1978, § 62-17-10 and the Commission's IRP Rule; and

(c) A public hearing shall be conducted to determine whether a contested stipulation (settlement) shall be approved by the PRC, pursuant to 1.2.2.20.B(4) NMAC; and

(d) The requirements of the Renewable Energy Act evince the Legislature's preference for renewables and the concomitant economic and environmental benefits NMSA 1978 Section 62-16-1:

> The generation of electricity through the use of renewable energy presents *opportunities* to promote energy *self-sufficiency*, preserve the state's *natural resources* and pursue an *improved environment* in New Mexico" and can bring "*significant economic development and environmental benefits* to New Mexico." (Emphasis supplied.)

B. Relevant PRC and appellate precedent applying the foregoing comparatives analysis requirements.

Addressing NEE's argument that PNM had failed to reasonably identify and evaluate all feasible alternatives to its SJ4 and PV3 CCN proposals, the November Certification, **74 RP 49181** began by acknowledging that, in *In Re Public Service Company of New Mexico*, Case No. 2382, 166 P.U.R.4th 318 (1995), addressing

PNM's application for a CCN for its proposed Ojo Line Extension (OLE), the PRC had rejected PNM's request based on its determination that "PNM's alternatives analysis is not sufficiently reliable." *Id.,* at **49184**. The Commission made it clear in the OLE case, which had environmental and long-term cost implications for its customers, that a utility cannot satisfy its burden of proving that a particular resource is in the public interest unless it *reasonably identifies all feasible alternatives* to satisfy its service needs. "The Commission also has the authority to do all things necessary and convenient in the exercise of its power and jurisdiction. NMSA 1978 Section 62-6-4(A). Such authority necessarily extends to the examination of alternatives. Even if needs exist, there may be various solutions for such needs. It would not be in the public interest for the Commission to grant a CCN for a proposed project which might meet needs but is the worst among a range of alternatives. Such determinations cannot be made in a vacuum." *Id*, at **49135** "PNM has not properly shown that OLE is the best alternative even among those alternatives that PNM considered."[31] *Id*, at **49188**.

C. The PRC's order violates NM statutes and PRC regulations

The Final Order allows PNM to acquire generation resources without having established that PNM's preferred resources were the most cost-effective when

[31] The "OLE" case was decided by the PRC prior to its issuance of its IRP Rule which, as noted earlier, expressly requires that public utilities reasonably identify all feasible alternatives to their resource proposals.

compared with other feasible alternatives and, in addition, without consideration of risks and environmental impacts, as required by New Mexico law.

1. The PRC accepted PNM's limited "alternatives" in violation of the law

PNM's O'Connell testified that PNM had ran "thousands" of Strategist® "combinations"[32] and the Hearing Examiner apparently accepted this blanket assertion as sufficient to carry PNM's burden. **75 RP 49486**. But neither O'Connell nor any other PNM witness put these "thousands of runs" in evidence. Nothing in the record shows what the results or inputs were of these undisclosed portfolios. There is nothing in evidence to suggest that they were anything other than minor variations on the five portfolios that PNM modeled throughout, with the same skewed inputs that were used for the portfolios that are in the record.

Nevertheless, the Commission's Final Order relies, in bold, on O'Connell's unsubstantiated claim about thousands of unidentified Strategist® runs as sufficient to carry PNM's burden of proof to identify and assess the comparative costs of all available resources. **75 RP 49486, ¶ 16**.

PRC Staff spent taxpayer funds to hire Rode specifically to address the core issue of whether PNM reasonably identified all feasible alternatives to PV3 and SJ 4 because its Staff lacked the expertise to do so. Rode explained why PNM had not met their burden to compare alternatives, and addressed some potential

[32] **14 RP 7849-50**

alternatives, such as a Purchased Power Agreement as a substitute for shifting the costly and risky PV3 capacity to ratepayers, and potential gas turbine options, and why, due to conflict of interest, PNM's selections of PV3 and SJ 4 were "worthy of heightened scrutiny" by the Commission. **8 RP 5269**. The Final Order dismissed Rode's testimony as "not especially relevant as to the particulars at issue during the past 14 months" and that Rode contradicts "NEE's views as to viable replacement resources." **75 RP 49489, ¶ 22**. But these conclusions are unsupported because: 1) the SJ4[33] and PV3 replacement resources PNM selected never changed after PNM's December 2013 Application; and 2) Rode offered many replacement alternatives, some of which NEE would have preferred and some not, but that is irrelevant to his opinion that PNM's replacement portfolio was too limited by its own preferences and inconsistent with regulatory requirements; and 3) Rode challenged PNM's biased risk analysis; and 4) It was neither Rode's nor NEE's, but PNM's burden to provide alternatives. None of this PRC's witness'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.

The record further shows that PNM failed to satisfy their burden of proof to reasonably identify and evaluate all feasible alternatives to PNM's preferred SJ4 and PV 3 proposals because it unilaterally decided to not investigate the market

[33] The coal interest PNM absorbed grew from 78 MW (Application) to 197 MW (**75 RP 49479-49509**).

through an appropriate competitive Request For Proposals ("RFP") process to identify such alternatives. If the RFP process had been conducted the costs and benefits of those alternatives could reasonably be evaluated by the Commission. PNM unilaterally made that decision even though, as shown in the record here and in past Commission cases, such an RFP process is the normal, well-established and Commission-accepted method for utilities to show that their resource proposals are the most cost-effective options available to satisfy a demonstrated service need.[34]

Because of the absence of any evidence of the results of an appropriate competitive RFP processes that investigated the market to identify if any feasible resources alternatives to PNM's SJ 4 and PV 3 proposals are currently available to PNM, the Commission lacked reliable "substantial evidence" to reasonably conclude PNM proposals were the most cost-effective options currently available to satisfy PNM's service needs, considering its latest declining load forecast. For the same reason, the Commission lacked substantial evidence to reasonably conclude that the resource alternative identification and evaluation process used by PNM to support its CCN requests constituted a good faith effort to comply with the "objective" of the Commission's IRP Rule, 17.7.3.6 NMAC, that "[f]or resources whose costs and service quality are equivalent, the utility should prefer resources that minimize environmental impacts."

[34] For example: 15-00205-UT; 14-00158-UT.

Yet the Commission accepted the November Certification's recommendation to reject the expert opinion by NEE witness Lehr to employ that market standard due to the current "late stage" of this case and the uncertain outcome of such a process. There is no evidence in the record that even at this "late stage" PNM couldn't issue an RFP for replacement power. In fact, PNM admitted that this is possible. **48 RP 48672; 8 RP 5095**. PNM made a unilateral decision to forego an RFP process in 2013. By granting CCNs to PNM for SJ4 or PV3 without requiring PNM to investigate the market through an appropriate RFP process, the Commission failed to exercise its authority under NMSA 1978, § 62-9-6 to reasonably protect the public interest. *Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Commission*, 90 N.M. 325, 563 P.2d 588, 594 (1977) ("The Commission has a duty to be a prime mover in the procedure to see that the public interest is protected by establishing reasonable rates and that the utility is fairly treated so as to avoid confiscation of its property. Considering this broad mandate, it could hardly be envisioned that the Commissioners would sit as spectators, like Roman Emperors in the coliseum, and simply exhibit a 'thumbs up or thumbs down' judgment after the dust of battle settles in the arena.")

a. There was substantial record evidence suggesting that PNM failed to consider or reasonably assess resources such as wind, solar and gas, which are less costly and less risky than coal or nuclear.

Solar and wind generation facilities produce energy at a lower cost than coal-fired and nuclear power plants, provide valuable system benefits, and have been shown that large amounts of renewable energy can be integrated without reliability degradation. **64 RP 41408-41412**.

Palo Verde 3 produces energy at a levelized cost of 7.3 cents/kWh when valued at $1118/kW as in this case. **64 RP 41349-41695, 41387**. Nuclear energy is expensive because nuclear facilities require large amounts of ongoing capital expenditures to keep them running and safe. In the past 20 years, total Palo Verde spent $3 Billion on these costs. *Id*., Exhibit DVW-26.

SJGS produces energy at a levelized cost of 7.4 cents/kWh. *Id*., at **41386** SJGS cost is so high due to the high cost of coal fuel, large costs for pollution controls, and poor operational availability. SJGS unplanned forced outages are 12.4% in 2005-2014 and are 63% higher than the national average for similar facilities. *Id*., at **41424.** Even availability during the summer peak hours has been 17% below capacity for 2009-14 and 25% below capacity for 2014. *Id*., at **41411**. Solar produces energy at a levelized cost of below 5 cents/kWh. PNM installed 40 MW of solar in 2015 at a levelized cost of 6.8 cents/kWh. **8 RP 41605-6** However, PNM's most recent RFP of January 2016 was at 4.2 cents/kWh. 6/1/16, PNM Compliance with Modified Stipulation – NMPRC Case 13-00390-UT, Appendix 2, p.1 **1 Second Supp RP 56935**. Other utilities are installing solar at below 5

cents/kWh: Southwestern Public Service (SPS serving NM) 140 MW at 4.2 cents/kWh, **64 RP 41408.** Austin Energy at 4 cents/kWh, *Id*. at **41407**, Nevada Energy 200 MW at 4.7 cents/kWh. **72 RP 47882-3** In addition to producing low cost energy, solar provides reliable contribution to summer peak demands. Van Winkle testified that his analysis of PNM**, 64 RP 41349-41695, 41605** 9/25/15, DVW, Exhibit DVW-43 (Sept 2015) SPS, *Id*., Exhibit DVW-44 (Sept 2015) and EPE *Id*., Exhibit DVW-45 (Sept 2015) data over multiple years demonstrates that solar output is correlated with summer peak hours. "It is as simple as this: Peak demand occurs during the summer when heat from the sun raises temperatures inside homes and buildings. This is the same time that solar facilities are at their most productive." *Id*., at **41361**.

Wind produces energy at a levelized cost of less than 4 ¢/kWh. The results of PNM's RFP filed in 14-00158-UT had wind cost at 3.7 cents/kWh (**8 RP 5050)** and PNM's most recent RFP of January 2016 has wind costs at 3.3 ¢/kWh. **1 Second Supp RP 56936.**

The Brattle Group, a utility industry consulting company, reports "Public Service Company of Colorado and SPS have demonstrated that wind can produce 20% of their energy without significant issues to the grid reliability. [] [I]ntegration of large amounts of wind energy, up to 30% of total generation, is

technically and economically feasible, with integration costs generally less than 10% of the cost per MWh of wind and often significantly less." **64 RP 41409**

2. PRC fails to uphold the requirement that PNM consider resources on a consistent and comparable basis

It is impossible to examine PNM's submissions and find any explanation or quantification of the relative costs of feasible resources, as the law requires. The only cogent, accurate and understandable assessment of relative generation resource costs on a consistent and comparable basis in the record was provided by NEE's David Van Winkle. (**15 RP 8789-90; 8 RP 4963-64**.) When PNM derived scenarios from Strategist® like the "4-unit shutdown", "3-unit shutdown", "two-unit shutdown with the 0-MWs at SJ4", and even the "Van Winkle NEE replacement plan," PNM uniformly failed to apply consistent and comparable inputs within its "pure" Strategist® portfolios and continually added differing post- Strategist® "adjustments" to those outcomes. The result is that PNM never provided the Commission with cost assessments "on a consistent and comparable basis" as the PRC's regulation requires.

In his November Certification of Stipulation, the Hearing Examiner addressed NEE's objection to PNM's use of differing values for PV3 and stranded asset recovery in different portfolios by using low costs in PNM's internally preferred portfolio ($1100/kW for PV3 and 50% stranded asset recovery for SJ2 & SJ3) and high costs in PNM's internally disfavored portfolios ($2500/kW for PV3

and 100% stranded asset recovery for SJ2 & SJ3). NEE's position was that such an approach cannot comport with NMSA 1978, § 62-17-10; 17.7.3 et seq., NMAC which requires that cost evaluations of different resources be calculated on a "consistent and comparable basis." The Hearing Examiner accepted PNM's inconsistent valuations, however, holding that "it is reasonable to consider cost savings realized under the stipulations solely for the stipulation portfolio. []The Hearing Examiner finds that such cost savings are appropriately considered when evaluating the replacement portfolio in the stipulation." **74 RP 49186-7**.

But in the April Certification, the Hearing Examiner ruled that PV3 should be valued at the net book value, disallowing PNM's requested acquisition premium, stating that the $1100/kW net book value for PV3 was consistent with regulatory practices and principles. **48 RP 31176-84**.

That is why Mr. Van Winkle used the $1100/kW for the PV3 inputs in his portfolios. However, in his November Certification the Hearing Examiner dismisses Mr. Van Winkle's cost effective alternatives stating that Mr. Van Winkle's alternatives are not "more cost effective than the stipulation" because Mr. Van Winkle inputted PV3 at the value agreed to in the Supplemental Stipulation,[35] rather than the PV3 value PNM used "outside the Supplemental Stipulation." **74**

[35] In his own April Certification, the Hearing Examiner concluded that PNM's ascribing a value of $2500/kW to PV3 was indefensible and violated regulatory practices and principles. **48 RP 31176-84**.

RP 49126-49127. In other words, on their face Mr. Van Winkle's alternatives are more cost effective than the Supplemental Stipulation but the Hearing Examiner added his own post hoc inconsistent inputs, applying the very same $2,500/kW PV3 value to Van Winkle's alternative that he himself had ruled to be an unlawful price, to arrive at his unreasonable conclusion. This was fundamental error for the following reasons:

1. The requirement that resource cost comparisons be "on a consistent and comparable basis," "taking into consideration risk and uncertainty" is to assess relative costs of resources on a transparent basis so regulators and ratepayers can see how a utility assigns costs to resources, in an "apples to apples" comparison.
2. The consequence of the Hearing Examiner's approach is to eliminate the regulation's "consistent and comparable" requirement in any circumstance in which the utility has the ability to adjust the cost of a resource depending on its preference. Whether or not the Hearing Examiner believes that this should be permitted in a context such as this one, he dispensed with "consistent and comparable basis" and substituted "as the utility pleases." There has been no party other than PNM that has ever agreed to $2500/kW valuation for PV3[36]

[36] **9 RP 5916-7**.

and 100% cost recovery for stranded assets at SJ2 & SJ3.[37] There is substantial testimony in the record that these assumptions are unreasonable. The Hearing Examiner found that PNM should be allowed 50% cost recovery for SJ2 & SJ3, not 100%. **48 RP 31194**. Yet, he allowed PNM to input $2500/kW for PV3 and 100% cost recovery into PNM's disfavored Strategist runs and called it "reasonable."[38] **48 RP 31176-84; 74 RP 49189**.

3. The PRC unlawfully shifted the burden of proof

The hearing examiner effectively excused PNM's failure to carry its burden of proof regarding cost and feasibility by concluding (incorrectly) that ***NEE witness*** Van Winkle failed to prove the existence of other feasible options.

When NEE pointed out the mistakes in PNM's evidence, PNM ran new portfolios with corrected information and alternatives portfolios presented. There was the Van Winkle NEE portfolio presented in the first hearing (that used levelized costs and Strategist confirmed that the Van Winkle NEE alternative was less costly) and the three Van Winkle portfolio that were presented in the second hearing (that used a revenue requirement analysis and were also less costly than PNM's portfolios). **28 RP 17615** & **64 RP 41387-94** PNM dismissed NEE's alternative portfolios, stating that Van Winkle was naïve to consider reliance on

[37] **8 RP 5134-5**.

[38] Would any number the company wanted to insert in the other scenarios be acceptable? What is the limit on this?

Strategist®, doing an "about face" from its own earlier reliance on Strategist® arguing that there were many other factors to be entertained. O'Connell challenged the reliability of the alternatives presented and the ability to integrate large quantities of renewable energy (needing "more operating and regulating reserves" and "transmission upgrades"). **65 RP 42304-5**. However, PNM failed to quantify these alleged factors and compare these equally across alternatives. When NEE requested that PNM rerun Strategist® to evaluate Van Winkle's alternative proposals,[39] because NEE no longer had access to the license, PNM refused. When NEE filed an Emergency Motion to Compel Compliance with Commission Orders of May 27, June 24, July 17, and September 18, 2015 To Evaluate Alternative Proposals through Strategist® **65 RP 42411-7** and a Motion to Reconsider the Denial of the Motion to Compel 66 RP 42816-34, the Hearing Examiner denied them. **67 RP 43699-714**.

The Hearing Examiner's November Certificate of Stipulation (**74 RP 49130-2**)[40] and Final Order (**75 RP 49488**) accepted PNM's dismissal of the Van Winkle alternatives and by doing so shifted the burden from PNM to NEE. If PNM's criticisms were valid, which NEE does not accept, then these additional,

[39] **65 RP 42411-17, 66 RP 42816-34**

[40] The Hearing Examiner also dismissed the alternative that shuttered another unit at SJGS because Mr. Van Winkle hadn't discussed this possibility with Tuscon Electric Power (TEP), a co-owner of unit 1. Mr. Van Winkle is not privy to those kinds of discussions. Mr. Van Winkle did in fact include in his testimony that TEP stated in its own IRP that SJGS unit 1 was "at risk for early closure". **8 RP 4956**

supposedly unconsidered factors should have been quantified by PNM in its scenarios and applied on a consistent basis to all available resources to determine which portfolio was the cheapest.

Although NEE provided extensive testimony regarding the availability of other options, it is the utility's burden to evaluate all other options, not NEE's burden. The Commission's adoption of the Hearing Examiner's Certification of Stipulation effectively turned the regulatory process case on its head, making PNM the regulator, by allowing PNM to decide what alternatives it is going to present to the Commission and allow it to consider, while dismissing any effort by an intervenor to suggest that other alternatives should be considered.

The PRC's reliance on PNM's Strategist®-based comparison of the cost of the five resource portfolios it analyzed to show that PNM had reasonably identified and evaluated all feasible alternatives to SJ4 and PV3 did not comport with applicable law because it effectively and improperly switched the ultimate burden of proof (i.e., persuasion) on that issue from PNM and the proponents of the Modified Stipulation to NEE. The PRC could not lawfully shift that burden of proof to NEE, or to any other party. *See, e.g.*, *International Min. & C. Corp. v. New Mexico P.S. Com'n*, 81 N.M. 280, 283, 466 P.2d 557 (1970); *see also Duke City Lumber Co. v. N.M. Env. Imp. Bd.*, 95 NM 401, 622 P.2d 709 (Ct. App.1980), *cert. denied* Jan. 19, 1981 ("burden of persuasion," as distinguished from "burden

of going forward" with evidence, "never shifts from one party to the other"; when one party "has peculiar knowledge or control of the evidence as to" a negative fact, the burden rests on that party to produce such evidence); 1.2.2.20.B(4) NMAC (proponents of a stipulation have "burden of supporting the stipulation with sufficient evidence and legal argument to allow the commission to approve it.").

Neither NEE nor any other party in a utility resource acquisition case, or the PRC itself for that matter, has the ability to conduct a need-appropriate competitive RFP process to identify all of a utility's feasible resource alternatives for evaluation by the utility or the Commission. Only a utility applicant can conduct such a process so that its results, including all associated transmission and other costs, are presented to the PRC.

4. The PRC Did Not Require PNM to Adequately Assess and Mitigate Ratepayer Risks In Violation of 17.7.3.9 NMAC G (1)

Although there are a number of significant substantive issues that should have precluded PRC's approval of PNM's coal and nuclear resources, one issue is overarching: PNM failed to identify, quantify, "consider and describe ways to mitigate ratepayer risk." 17.7.3.9 NMAC G (1) (2) (3)[41] Significant unknowns and

[41] 17.7.3.9 NMAC G (3) "Alternative portfolios. In addition to the detailed description of what the utility determines to be the most cost-effective resource portfolio, the utility shall develop a reasonable number of alternative portfolios by altering risk assumptions and other parameters developed by the utility and the public advisory process."

unquantified risks[42] that include financial, reliability, operational, and anticipated environmental regulations exist with both San Juan coal and Palo Verde nuclear and were virtually ignored, contrary to NM statute and PRC regulation.

It was the PRC's obligation to require substantial evidence from PNM regarding the associated risks and liabilities that come with increased ownership, much of which remains unquantified, as a result the PRC failed to protect ratepayers from this exposure.

5. The Final Order that Approved the Modified Stipulation was arbitrary and capricious because it removed PRC oversight or postponed it

The PRC abdicated its responsibility to apply the law in this case. The PRC's authority to regulate utilities is derived from the New Mexico State Constitution Art. XI, Sec. 1, and cannot be abrogated. The November Certification postponed PRCs' regulatory obligations to assess the risks associated with PNM's SJ4 and PV3 acquisitions to a "2018 review" of SJGS, *after the PRC has granted a*

[42] Financial and health risks associated with coal that are cited in the record and excluded from consideration include: methane regulation, potential and ongoing litigation, mine reclamation costs, decommissioning costs, degraded coal supply quality effecting reliability, potential regulation for ozone, coal ash (SJGS generates 1.8 million tons of coal ash per year), and water effluent standards, legacy environmental liabilities, escalating costs of pollution controls, and more. Financial risks associated with nuclear that are cited in the record and excluded from consideration include: decommissioning costs could be much higher than estimated, major equipment failure, potential water shortages and rising price of water for Palo Verde which requires high levels of water consumption (between 2018-33 its use was 12 billion gallons).**64 RP 41426-33, 41438-9.**

CCN that is effective until 2053 and 2047, respectively[43] forgoing assessments until after the decision to bring the asset into rates has been irrevocably made. **74 RP 49166**. The Commission's Final Order does not address "risk" whatsoever in terms of PNM's CCNs for SJ4 and PV3. The Hearing Examiner dismisses risks that were raised in the hearings and acknowledged in the April Certification but expresses satisfaction because there is a "meaningful opportunity to review the future of San Juan in 2018".[44] April Certification and November Certification. *Id.,*. However, the ratepayer protections (RFPs, Strategist®, stakeholder engagement through a robust IRP process, etc.) that are guaranteed in the Modified Stipulation were all supposed to have been applied *in this proceeding*. The Hearing Examiner and the PRC allowed these ratepayer safeguards to be waived. Not only should they have been applied in this proceeding, the fact that they were not is cause to question why this Court should be convinced that they will be applied in 2018? An example of the settlement's hollow "benefits" is demonstrated by the initial Stipulation's[45] requirement that PNM issue an RFP for 50 MW of renewable resources in 2015 and file a "compliance filing" as a result. PNM performed the RFP. PNM received low solar (4.2¢/kWh) and wind bids (3.3¢/kWh), but chose

[43] PV3 will not be addressed at all in the 2018 Review so the risks raised regarding Palo Verde have never been adequately considered.
[44] He does acknowledge that "uncertainties" still exist from PNM's increased ownership at SJGS. **74 RP 49179-80**
[45] The initial Stipulation and the Supplemental Stipulation was ultimately merged into the Modified Stipulation.

not to take advantage of these resources therefore, this provision did not produce any additional benefit to PNM's customers. **12 RP 7518-7537**, ¶ 31; **1 Second Supp RP 56935-56936**.

The Stipulating parties acknowledged the requirement that the standards of the IRP were to be followed in this case, but eliminated the PRC's oversight of PNM resource planning by dismissing the IRP protest proceeding and allowing PNM to go another two years without an approved IRP. (**61 RP 39618**) It is mandatory[46] that PNM perform an IRP process every three years with stakeholder and public input in order "to identify the most cost effective portfolio of resources to supply the energy needs of customers". 17.7.3.6 NMAC; NMSA § 62-17-10 Eight years have passed since the last IRP was approved in 2008. (The 2011 IRP and 2014 IRP were protested). As argued by the Hearing Examiner in his final order, the CCN rules don't expressly require an approved IRP as a pre-condition to the issuance of a CCN, yet the PRC dismissed the pending IRP protests in this case. The effect is that the PRC treated the CCN hearing as a replacement for the required IRP stakeholder engagement and resource evaluation process. This is an end run around the law.

[46] "It is widely accepted that when construing statutes, 'shall' indicates that the provision is mandatory, and we must assume that the Legislature intended the provision to be mandatory absent an[y] clear indication to the contrary." *Marbob Energy Corp. v. Oil Conservation Comm'n* 139 2009-NMSC-013, 146 N.M. 24, 206 P.3d 135, 143; *Anadarko Petroleum Corp. v. Baca,* 117 N.M. 167, 169, 870 P.2d 129, 131 (1994)

In order to effectuate the Modified Stipulation, both the Hearing Examiner and the PRC needed to "grant a variance to Commission rules" and specifically the requirement to comply with the legal procedure for financial risks undertaken by a utility that might pose to ratepayers, NMAC Rule 17.6.450 et seq.[47] (Supplemental Stipulation ¶13) The Hearing Examiner doesn't find that PNM engaged in a Class II Transaction but the Commission does,[48] but both waive the ratepayer protections regardless. "The Commission does not condone PNM's behavior and cautions PNM to follow the letter and spirit of Rule 17.6.450.10 NMAC in the future." **75 RP 49497**. The Commission states that the issuance of a CCN "has a higher standard" than Rule 17.6.450.10 and that the CCN process in essence enveloped the Class II Transaction ratepayer protections, but neither is this legally or factually justified. **75 RP 49498**.

[47] In passing the Public Utilities Act, the legislature took care to make sure that any undertaking by a utility that could affect the utility's financial health or have an impact on the ratepayers was subject to PRC review in advance. NMSA §§ 62-3-3, 62-6-19, NMAC Rule 17.6.450. Its purpose was to implement the PRC's duty "to assure reasonable and proper utility service at fair, just, and reasonable rates." NMAC Rule 17.6.450.6 It requires a public utility that engages in a Class II transaction (such as PNM's financial agreement with co-owners, City of Anaheim and M-S-R Public Power Agency, to buy their 197 MW in SJGS) to "first obtain[] written approval of a general diversification plan from the Commission" that provides "an explanation of how ratepayers will be protected and insulated from any risks, costs, or other adverse and material effects attributable to Class II transactions or their resulting effects." NMAC Rule 17.6.450.10 A, B(10)

[48] The Commission's ruling varies slightly from the Hearing Examiner regarding Class II Transactions and whether the exiting SJGS owners, Anaheim and M-S-R, are considered "persons" as defined by NMSA 1978 62-3-3 (L) and (E).

V. CONCLUSION

The PRC's failure to uphold the regulatory rules of their agency and state laws is not unique to this case.[49] Yet this appeal is particularly important to PNM's customers, the State of New Mexico and the public interest due to the long-term costs to PNM's customers and public health and environmental effects associated with the CCNs for the coal-fired and nuclear-powered replacement resources at issue. NEE cannot overstate the importance of this appeal. It comes at a time when few, if any, electric utilities in this country are acquiring coal-fired or nuclear generation resources with their attendant long-term costs, risks and impacts on the environment and climate. Major financial institutions and credit markets have indicated that investments in those power generation technologies are too risky for investors, and large coal companies are filing for or edging toward bankruptcy, exposing the public to the costs of their toxic legacies. *See e.g.*, **66 RP 43097; 24 RP 14731-32.** Ratepayers' only protection against bad business decisions by PNM is the PRC's duty to determine if PNM has proven its investment decisions are the

[49] For example: *Albuquerque Bernalillo County Water Utility v. N.M. Public Reg. Comm'n*, 2010-NMSC-013, 229 P.3d 495; *TW Telecom of NM v. NMPRC*, 2011-NMSC-029, 256 P.3d 24; *Attorney Gen of State v. N.M. Pub. Regulation Comm'n*, 2011-NMSC-034, 150 N.M. 174; *Albuquerque Cab Co. v. N.M. Pub. Regulation Comm'n*, 2013-NMSC-__, 317 P.3d 837; *Bernalillo Cnty. Health Care Corp. v. N.M. Pub. Regulation Comm'n*, 2014-NMSC-008, 319 P. 3d 1284; *Living Cross Ambulance Serv., Inc. v. N.M. Pub. Regulation Comm'n,* 2014-NMSC-036, 338 P.3d 1258; *Tri-State Generation & Transmission Ass'n, Inc. v. N.M. Pub. Regulation Comm'n* (No. 34,182, April 6, 2015), __-NMSC-__, 347 P.3d 274; *New Mexico Exchange Carrier Group v. NMPRC,* 2016-NMSC-015

most cost-effective. The evidence clearly shows that PNM did not meet their burden to prove the "cost-effectiveness" of the PV3 or SJ4 resources nor their burden to compare those resources on a consistent and comparable basis with all feasible alternatives, giving preference to those with the least environmental impact. Therefore, NEE respectfully requests the overturning of the PRCs Final Order.

New Energy Economy respectfully requests that the case be remanded to the PRC with certain protections in place that will remedy the issues raised in this appeal as well as the Petition for Writ of Mandamus, which we ask the Court to take judicial notice of and incorporate herein, including:

a. Heightened scrutiny on any appeal;
b. A rigorous all-resource RFP for replacement resources;
c. An independent evaluator to oversee the process;
d. Cost comparisons with consistent and comparable application of all cost factors;
e. Strategist® for all to ensure the analysis is transparent and defensible;
f. Favor non-polluting resources.

Respectfully submitted this 4th day of November 2016,

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