NMPRC Case No. 22-00270-UT; PNM Rate Case

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Fri 12/8/2023 8:00 AM

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1 attachments (8 MB)

22-00270-UT-12-08-2023-Recommended Decision.pdf;

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF NEW MEXICO FOR REVISION OF ITS RETAIL ELECTRIC RATES PURSUANT TO ADVICE NOTICE NO. 595)

PUBLIC SERVICE COMPANY OF NEW MEXICO,)

APPLICANT.)

Case No. 22-00270-UT

Good morning,

Please find attached for filing in the record and service to the parties the ***Recommended Decision*** issued by the Hearing Examiners in the above-referenced case today.

Anthony F. Medeiros
Chief Hearing Examiner
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https://www.nm-prc.org/

NEW MEXICO
PUBLIC REGULATION
COMMISSION

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8 December 2023

TO PARTIES OF RECORD IN CASE NO. 22-00270-UT

Enclosed please find the ***Recommended Decision*** of Hearing Examiners Christopher P. Ryan and Anthony F. Medeiros in the above-referenced case before the New Mexico Public Regulation Commission ("Commission"). Unless and until the Commission considers the matter and votes to approve it, the Recommended Decision has no legal effect. This matter will be considered at a future Open Meeting of the Commission. To confirm when the matter will be considered, please see the Commission's Open Meeting agenda, which is posted on the Commission's website at least 72 hours before each Open Meeting at: https://www.nm-prc.org/nmprc-open-meeting-agenda/.

Parties to the proceeding may file exceptions to the Recommended Decision as provided in Rule 1.2.2.37(C) NMAC of the Commission's Procedural Rules and any specific Order of the Commission on exceptions. Other interested persons may submit written comments in the record of this proceeding before the Commission takes final action in the matter.

The Commission may hold a deliberative meeting to address this matter in closed session in advance of the Open Meeting at which the matter will be considered, in accord with Section 10-15-1(H)(3) of the Open Meetings Act. NMSA 1978, § 10-15-1(H)(3) (2013). In such event, notice of the deliberative meeting will be posted on the Commission's website 72 hours in advance of the deliberative meeting at the https address set forth above.

Anthony F. Medeiros

Anthony F. Medeiros
Chief Hearing Examiner

Attachment: ***Recommended Decision*** (12/08/2023)

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF NEW MEXICO FOR REVISION OF ITS RETAIL ELECTRIC RATES PURSUANT TO ADVICE NOTICE NO. 595	)	
PUBLIC SERVICE COMPANY OF NEW MEXICO,	)	**Case No. 22-00270-UT**
APPLICANT.	)	

RECOMMENDED DECISION

Before
Anthony F. Medeiros
Chief Hearing Examiner

and

Christopher P. Ryan
Deputy Chief Hearing Examiner

12/08/2023

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TABLE OF AUTHORITIES

This Recommended Decision uses short-form citations to some authorities. The following table shows the full citation for the short-form citations.

Short-form Citation	**Full Citation**
	Federal Court and Regulatory Cases
Bluefield	*Bluefield Waterworks and Improvement Co. v. Pub. Svc. Comm'n*, 262 U.S. 679 (1923)
Hope	*Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944)

Duquesne Light Co.	*Duquesne Light Co. v. Barasch*, 488 U.S. 299, 309 (1989)
Jersey Central Power Co.	*Jersey Central Power Co. Fed. Energy Reg. Comm'n*, 810 F.2d 1168 (D.C. Cir. 1987).
Connecticut Yankee	*Connecticut Yankee Atomic Power Co.*, Docket No. ER97-913-000, 84 FERC P 63009 (F.E.R.C. 8/31/98), 1998 WL 656747)
	New Mexico Court Cases
Egolf	*State Exh. rel. Egolf v. N.M. Pub. Regulation Comm'n*, 2020-NMSC-018, 476 P.3d 896.
Hobbs Gas Co.	*Hobbs Gas Co. v. New Mexico Public Service Commission*,1980-NMSC-005, 94 N.M. 731, 616 P.2d 116.
Hobbs Gas Co. II	*Hobbs Gas Co. v. N.M. Pub. Serv. Comm'n*, 1993-NMSC-032, 115 N.M. 678
Otero County Electric Coop., Inc.	*Otero County Electric Cooperative, Inc. v. N.M. Public Serv Comm 'n*, 1989-NMSC-033, 108 N.M. 462, 774 P.2d 1050)
PNM Gas Services	*In re PNM Gas Services*, 2000-NMSC-012, 3, 129 N.M 1.
Public Serv. Co. of N.M	*Public Serv. Co. of N.M. v. N.M. Public Reg. Comm'n*, 2019-NMSC-012, 444 P.3d 460, Util. L. Rep. P. 27,465
Zia Natural Gas Co.	*Zia Natural Gas Co. v. N.M. Pub. Utility Comm'n*, 2000-NMSC-011, 121 N.M. 728, 998 P.2d 564.
	New Mexico Regulatory Cases
Case No. 2146, Part II, *Final Order*	*Re Pub. Serv. Co. of N.M.*, 101 P.U.R. 4th 126, 1989 WL 418588 (NMPSC 04/05/1989)
Case No. 2087	*In the Matter of the Prudence of Costs Incurred by Public Service Company of New Mexico in Construction of Palo Verde Nuclear Generating Station*, Case No. 2087, *Final Order Approving Stipulation* (NMPSC 03/06/1990)
Case No. 2382	*In the Matter of the Application of Public Service Company of New Mexico for Approval to Construct, Own, Operate and Maintain the Ojo Line Extension and for Related Approvals*, *Recommended Decision*, Case No. 2382, 166 P.U.R. 4th 318 (NMPUC 07/05/1995), *Final Order Approving Recommended Decision* (NMPUC 11/20/1995).
2007 PNM Electric Rate Case	Case No. 07-00077-UT, *Recommended Decision* (NMPRC 03/06/2008), partially approved in *Final Order Partially Adopted Recommended Decision* (NMPRC 09/25/2008)

2007 SPS Rate Case	Case No. 07-00319-UT, *Corrected Recommended Decision* (NMPRC 07/31/2008), *Final Order Adopting Recommended Decision* (NMPRC 8/26/2008).
2015 EPE Abandonment Case	Case No. 15-00109-UT, *Certification of Stipulation* (NMPRC 4/22/16), approved by Final Order (NMPRC 6/15/2016).
2015 PNM Rate Case	Case No. 15-00261-UT, *Corrected Recommended Decision* (NMPRC 8/15/16), *Final Order Partially Adopting Corrected Recommended Decision* (NMPRC 09/28/2016).
Certif. of Stip.	Case No. 16-00276-UT, *Certification of Stipulation* (NMPRC 10/31/2017), *Revised Order Partially Adopting Certification of Stipulation* (NMPRC 01/10/2018)
2020 EPE Rate Case	Case No. 20-00104-UT, *Recommended Decision* (NMPRC 04/06/2021), partially approved in *Order Adopting Recommended Decision with Modifications* (NMPRC 06/23/2021)
RD on FCPP Finc'g Order	Case No. 21-00017-UT, *Recommended Decision on PNM's Request for Issuance of a Financing Order* (NMPRC 11/12/2021), rejected on other grounds in *Order on Recommended Decisions* (NMPRC 12/15/2021)
RD on FCPP Sale and Abandonment	Case No. 21-00017-UT, *Recommended Decision on PNM's Request for Approval of the Sale and Abandonment of its Interest in the Four Corners Power Plan and to Recover Non-Securitized Costs* (NMPRC 11/12/2021), rejected on other grounds in *Order on Recommended Decisions* (NMPRC 12/15/2021)

Cases from other States and Regulatory Jurisdictions

Ariz. Pub. Serv. Co.	*Ariz. Pub. Serv. Co. v. Ariz. Corp. Comm'n,* 91 Ariz. Cases Dig., 526 P.3d 914 (Az. Ct. App. 03/7/2023)
Indianapolis Power & Light	*In re Indianapolis Power & Light*, IURC Docket 44242, Order (IURC 08/14/2013)
PacifiCorp	*In re PacifiCorp*, UE 246, Order No. 12-493 at 26-27, 2012 WL 6644237 (Or. P.U.C. 12/20/2012)
PacifiCorp II	*In re PacifiCorp*, UE 374, Order No. 20-473, 2020 WL 7658074 (Or. PUC 12/18/2020)
WUTC Pacific Power Order	*Washington Utilities and Trans. Comm'n v. Pacific Power & Light Company*, Docket UE-152253, Order 12 (Final Order, Redacted Version), 332 P.U.R. 4th 1, 2016 WL 7245476 (WUTC 09/01/2016)

Other Authorities

Bonbright	Bonbright, James C., *Principles of Public Utility Rates* (1961)
Kahn	Alfred Kahn *The Economics of Regulation: Principals and Institutions*, Vol. I. (1970)

ABBREVIATIONS, ACRONMYS, and DEFINED TERMS

2015 Rate Case	Case No. 15-00261-UT (PNM Rate Case)
2016 Rate Case	Case No. 16-00276-UT (PNM Rate Case)
3S1WCP	Three summer/one winter coincident peak allocator
4CP	Four coincident Peak
ACC	Arizona Corporation Commission
ABCWUA or Water Authority	Albuquerque Bernalillo County Water Utility Authority
ADIT	Accumulated deferred income taxes
AMI	Advanced metering infrastructure
App.	Appendix
Application	PNM's Application in this case for Revision of Retail Rates (12/05/2022).
APS	Arizona Public Service Company
Attach.	Attachment
Bd.	Board
BART	Best available retrofit technology
BernCo or County	Bernalillo County
BR or B.R.	Bench Request
Br.	Brief-in-chief or initial brief
CapEx	Capital expenditure
CAPM	Capital asset pricing method
CCAE	Coalition for Clean Affordable Energy
CCN	Certificate of Public Convenience and Necessity
CCSA	Coalition for Community Solar Access
Col. or Cols.	Column(s)
Comm'n	Commission
Comm'r	Commissioner

Commission or NMPRC	New Mexico Public Regulation Commission
COS	Cost of service
County	Bernalillo County
CP	Coincident peak
CSA	Four Corners Coal Supply Agreement
Co-tenancy agreement	Four Corners Project Co-Tenancy Agreement
CPI	Consumer price index
Cross-exam.	cross-examination
CUSTEXP	Customer expense allocator
CWIP	Construction Work in Process
D&O insurance	Director and officer liability insurance
DCF	Discounted cash flow
ECAPM	Enhanced capital asset pricing method
EDIT	Excess deferred income taxes
EIM	Energy Imbalance Market
EPA	Environmental Protection Agency
EPE	El Paso Electric Company
ESA	Energy storage agreement
ETA	Energy Transition Act
FAS	Financial Accounting Standards
FASB	Financial Accounting Standards Board
FERC	Federal Energy Regulatory Commission
Finc'g	Financing
FMV	Fair market value
FPCC or Four Corners	Four Corners Power Plant
FPPCAC or fuel clause	Fuel and purchased power cost adjustment clause
GAAP	Generally accepted accounting principles
GW	gigawatt
GWh	gigawatt-hour
HE or HEs	Hearing Examiner or Hearing Examiners
JOA	Four Corners joint ownership agreements

Jt.	Joint
LED	Light emitting diode
kV	kilovolt
kW	kilowatt
kWh	kilowatt-hour
l. or ll.	line or lines
MDS	Minimum Distribution System
MW	megawatt
MWh	megawatt-hour
NCP	Maximum non-coincident peak
NMAC	New Mexico Administrative Code
NMAG	New Mexico Attorney General
NM AREA	New Mexico Affordable Reliable Energy Alliance
NMPSC	New Mexico Public Service Commission, predecessor to NMPRC
NMPUC	New Mexico Public Utilities Commission, predecessor to NMPRC
NMSC	New Mexico Supreme Court
NBV	Net book value
NPV	Net present value
NTEC	Navajo Transitional Energy Company
Obj.	objection
O&M	Operations and maintenance
P. or Pp.	page or pages
Palo Verde or PVNGS	Palo Verde Nuclear Generating Stations
PNM	Public Service Company of New Mexico
PPA	Purchased power agreement
PUA	New Mexico Public Utility Act
PUC	Oregon Public Utilities Commission
PURPA	Public Utility Regulatory Policies Act of 1978
PV	Photovoltaic
REA	Renewable Energy Act

Reb.	Rebuttal testimony
Reg. Asset	Regulatory asset
Reg Liab.	Regulatory liability
Resp.	Response
Resp. Br.	Response brief
Return *of*	E.g., return *of* capital investment costs
Return *on*	E.g., return *on* capital investment costs or return on rate base
Rev. Rqmt.	Revenue requirement
ROE	Return on equity
ROR	Rate of return
SCR or SCR controls	Selective catalytic reduction pollution control system
SJGS	San Juan Generating Station
SNCR	Selective non-catalytic reduction technology
SO2	Sulfur dioxide
SPS	Southwestern Public Service Company
SRP	Salt River Project Agricultural Improvement and Power District
Staff	Staff of the Utility Division of the NMPRC
Supp.	Supplemental
Sur.	Surrebuttal testimony
Sur-sur.	Sur-surrebuttal testimony
SWEEP	Southwest Energy Efficiency Project
TEP	Tucson Electric Power
TOD	Time of day
Tr.	Transcript
WACC	Weighted average cost of capital
WRA	Western Resource Advocates
WUTC	Washington Utilities and Transportation Commission

1. EXECUTIVE SUMMARY

There are many issues in this case. This should be obvious from the length of the table of contents. What follows are the recommended adjustments in this writing in simple list form. This list is intended to assist the confidential panel that will assist the HEs in producing rates flowing from the recommendations. The adjustments are also provided here in simple list form for quick reference for individuals only interested in the proposed recommended conclusions of the issues.

- Four Corners Power Plant (FCPP):
  - Disallowance for findings of imprudence around PNM's decision to retain Four Corners – The HEs find PNM was imprudent in deciding to continue its participation in Four Corners as extensively analyzed under Section 8.1.4 below. The HEs disallowance for PNM's imprudence, addressed in ensuing Section 8.15, is founded on a cash flow analysis of Sierra Club witness Dr. Jeremy Fisher's recommended remedy that eliminates PNM's return *on* Four Corners undepreciated capital costs incurred between July 1, 2016 and June 30, 2022 (totaling approximately $172.8 million, 2024 net book value or NBV) and sets PNM's return *on* Four Corners costs incurred after June 30, 2022 (estimated at approximately $46.4 million NBV) to reflect PNM's cost of debt. The impairment ($84.8 million pre-tax) resulting from Dr. Fisher's proposed remedy is then expressed as a disallowance that reduces PNM's total Four Corners NBV test year plant by 32.4% ($84.8 million).

- Palo Verde:
  - $96.3 million undepreciated investment regulatory asset – $51.3 million of undepreciated investment may be treated as a regulatory asset as PNM proposes in its application. With respect to the remaining $45 million, PNM may not receive a return on that investment or CWIP associated with it. Apart from these modifications, the regulatory asset should be approved as proposed including that PNM may amortize and collect the total sum of the asset over twenty years as proposed.
  - $38.4 million regulatory liability – Approved but not as to carrying costs.
  - Decommissioning Costs – There are presently no additional decommissioning costs and, thus, this is a hypothetical problem the Commission need not decide.
  - SRP transaction costs regulatory asset – Approve as proposed in application.
  - PVNGS Replacement Resources regulatory asset – Approve as proposed in application.

- ROR:
  - ROE – 9.26%
  - Cost of Debt – 3.72%
  - Capital Structure – 49.61% equity, 50.10% debt, and 0.29% preferred stock.
- SJGS
  - Non-securitized San Juan Plant Decommissioning Costs Regulatory Asset – Approve as proposed in application.
  - SJGS Replacement Resources Regulatory Asset – Approve as proposed in application.
  - SJGS External Legal Expenses Regulatory Asset – Approve as proposed in application.
  - SJGS Obsolete Inventory Regulatory Asset – Approve as proposed in application.
  - Unamortized balances of Undepreciated Investments in SJGS Units – Approve as proposed in application.
- Cost of Service Adjustments
  - Net Plant in Service - Accept NMAG's proposed adjustment. This results in a $7,895,619 adjustment to PNM's non-fuel revenue requirement.
  - Government Affairs Casita – Approve as proposed in application.
  - Staff's 12-MW-Battery Storage Regulatory Liability – Reject Staff's request.
  - Customer deposits – Approve as proposed in application.
  - Legacy Meters – Defer any decision on subject to Case No. 22-00058-UT.
  - ADIT – PNM's request to modify based on any cost-of-service adjustments should be granted.
- Operating Expense Adjustments
  - Non- Labor Escalation Factor - Authorize a 4% escalation for non-labor expenses in 2023 but only a 3.0% escalation for 2024.
  - Labor Escalation Factor – Approve as proposed in application.
  - Payroll Adjustment – Approve as proposed in application.
  - Outage Normalization – Accept NMAG's proposed adjustment of $1,392,845.
  - Wildfire Mitigation, Vegetation Management, and Infrastructure Expenses – Approve as proposed in application and direct Staff to determine additional reporting requirements that will ensure appropriate oversight of programs.
  - Proposed Disallowance of Various O&M Expenses
    - Severance Expense – Approve as proposed in application.
    - Board of Directors Compensation – Approve as proposed in application.
    - Director & Officer Insurance Expense – Approve as proposed in application.
    - Investor Relations – Approve as proposed in application.
    - Group Incentive and Wholesale Power Marketing Plans – Adjust the GIP consistent with Staff's recommendation. Authorize 60% recovery of

PNM's requested $6,262,795 for the GIP. Adjust the WPMP consistent with the Water Authority's recommendation. Reduce WPMP by $86,870.
    - Incremental Labor O&M Expense for Distribution Operations – Approve as proposed in application.
    - Property Tax Expense – Approve as proposed in application.
  - Depreciation
    - Depreciation Study – Approve as proposed in application.
    - Accelerated Depreciation of Gas Plants – Reject proposal.
  - Litigation Expenses – Approve as proposed in application.

- Regulatory Assets and Liabilities
  - EIM Implementation regulatory asset – Approve as proposed in application.
  - Rate Case Expenses – Approve with modifications proposed by intervenors. Allow cost identified by PNM. Amortize expenses over five years. The expenses may be included in rate base and earn a return on investment.
  - Covid 19 Regulatory Asset & Liability – Approve as proposed in application.
  - SO2 Allowance Regulatory Liability – Approve as proposed in application.
  - EDIT Regulatory Liability – Approve as proposed in application.
  - TOD Pilot Regulatory Asset – Defer to 22-00058-UT.

- FPPCAC – Approve as proposed in application initially filed in Case No. 22-00166-UT.

- Rate Design
  - TOD Pilot – Defer to 22-00058-UT.
  - Banding – Maintain existing banding and address in supplemental proceedings.
  - Customer Charge – Maintain existing customer charge and address in supplemental proceedings.
  - ESAs
    - Modified 3S1WCP – Withdrawn. No longer requires decision.
    - Functionalization of ESA Costs to Transmission – Approve as proposed in application.
  - MDS - Any objection to PNM's proposals in this case based on application or non-application of the MDS should be rejected. PNM is compliant.
  - CUSTEXP Allocator – Approve as proposed in application.
  - Uncontested Rate Design issues that should be approved
    - Revision to Rider No. 45, Economic Development Rider.
    - Modification to street lighting Rate Schedule 20.
    - Modification to Rate Schedule 6 Private Area Lighting.
    - Eliminating Rider No. 27, SO2 credit.
    - Continuation of and minor modifications to Rider No. 8, PNM's IIPR, in response to the Commission's direction in 15-00261-UT and 16-00276-UT to assess in this case the usefulness of the rider and whether it should continue to exist.

  - Lowering of the load factor for Rate Schedule 36B.
  - PNM's proposed ratemaking for the BB2 line.

- Fee-Free Program – Reject proposal.
- Sales and Demand Forecast – Approve as proposed in application.

The impact of the HE adjustments – each determined independently of every other one – on PNM's revenue requirement is shown in the table below. PNM's test period existing retail revenues total $847,364,795. In its Application, PNM is requesting a $63.8 million increase in revenues (the $63.8 million revenue deficiency claim in the table) for the 2024 calendar year test period. The HEs' adjustments result in a $57.6 million (90.4%) reduction in PNM's claimed revenue deficiency, resulting in a recommended revenue deficiency of $6.1 million.[1] The total test period retail revenues are reduced by 0.05% from $847.4 million to $846.9 million.[2]

	PNM	Hearing Examiners
Existing Non-Fuel Revenues at Current Rates	$727,314,365	$726,784,5700
Proposed Test Year Non-Fuel Revenue Requirement	$790,979,680	$732,904,556[3]
Percentage Impact on Proposed Test Period Non-Fuel Revenue Requirement	$63,765,315 = 8.8%	-$58,075,124 = 0.8%[4]
Existing Fuel Revenues	$141,421,852	$141,421,852
Proposed Test Year Fuel (FPPCAC) Revenue Requirement	$120,150,430	$120,150,430
Total Proposed Test Period Retail Revenues/Revenue Requirement	$911,130,110	$853,054,986%[5]

[1] *See* Appendix C (Schedule A-1).

[2] *Id.* App. C, Col. J, l. 39.

[3] *Id*. App. C, Cols. H, K, l. 34.

[4] *Id*. App. C, Col. I, l. 34.

[5] *Id*. App. C, Cols. H, K, l. 35.

Appendices B and C to this Recommended Decision show the dollar and percentage impacts of each of the HEs' recommended adjustments to PNM's proposed cost of service and rate base.

Appendix D shows the test period cost of service revenue requirement in light of the HEs' adjustments reflected in this decision. For comparison purposes, please refer to PNM's proposed test period cost of service attached to PNM witness Kyle Sanders' direct testimony as PNM Exhibit KTS-3.

Appendix I compares monthly bills for customers under current rates and those proposed by the Hearing Examiners in this decision. Under the HEs' recommended rates, residential customers will realize a decrease in their monthly bill between 3%. and 4%. For example, the average residential customer using 600 kWh per month will see a seasonally adjusted rate decrease of 3.36% on monthly bills.[6] Similarly, small business customers will see an average decrease of 4% on their monthly bills.[7]

2. PRELIMINARY COMMENTS ABOUT THIS WRITING

PNM's application is 1,833 pages. The company produced eighteen witnesses who filed 1,067 pages of direct testimony. Those 1,067 pages does not count the attachments that accompany that testimony. When attachments are included, the number more than triples, roughly estimated.

The intervenors and their twenty-four witnesses submitted 1,231 pages of direct testimony. Again, this number does not include any attachments. When attachments are included, the number also balloons. Attached to this decision as Appendix A is a list of the party's witnesses and exhibits.

[6] *See* Appendix I, pp. 1, 2, of 28.

[7] *See id*. App. I, pp. 1, 5 of 28.

PNM filed 714 pages of rebuttal testimony and intervenors filed seventy pages of rebuttal testimony. Again, this excludes attachments.

There are 834 pages of initial briefs. PNM's initial brief makes up 364 pages of that total. There are 1,660 footnotes in PNM's initial brief.

There are 275 pages of response briefs. PNM's response comprises 184 of those pages. That document has 848 footnotes.

All of this is cataloged to give the reader a sense of the scale of this case and perspective on what the HEs and Commission are asked to accomplish in the limited time the Commission has to decide this rate case.[8]

This information is also highlighted to make clear that it is not possible for the HEs in this document or the Commissioners in their final order to summarize or restate every factual assertion contained in the voluminous testimony and exhibits filed in this case. Nor is there time to expressly resolve every single argument in briefing or explore every fact the parties' arguments are predicated upon. It is questionable whether addressing or restating every fact in testimony and post-hearing argument would benefit anyone. The answer to 1,000 pages of briefs should not and cannot be 1,500 pages of decision.

The law must constantly confront the inherent tension between timely and concise decisions and thorough and comprehensive treatment of dense issues predicated upon voluminous testimony. These two concerns exist in an endless tug of war the resolution of which generally flows from the exigencies and demands placed on the tribunal by the constraints of allowed time.

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[8] NMSA 1978, § 62-8-7(C) (2011) (allowing the Commission to suspend the rates proposed in a utility application for revision of rates "not for a longer initial period than nine months beyond the time when the rates would otherwise go into effect, unless the commission finds that a longer time will be required, in which case the commission may extend the period for an additional three months.").

Given the sheer size of the task here, the HEs and Commissioners can only state what they believe are the correct resolution of the many disputed issues, state the factual foundations for that emphasizing the facts offered by the applicant or intervenors, address the most significant counterforces to the proposed outcome, and then assume a reviewing court will treat the evidence not explicitly discussed or identified as having been considered but rejected. There is no other path for the HEs and Commissioners in this matter that also ensures the Commission's work is completed within statutory time limits. Therefore, to the extent a specific argument is not reflected in this RD it should be deemed resolved consistent with the HEs' determination of the issue or matter to which such argument was made.

3. DUPLICATIVE PARTY POSITIONS

In many instances, the parties take overlapping or at times identical positions on issues. Below, the reader will find in many instances that only one party's arguments are used to guide discussion. This is not intended to signal the favoring or disfavoring of any party's specific claims. This choice is made purely for efficiency. The crush of time demanded that all time-saving strategies be utilized in producing a timely written decision. Using one expression of an idea as a stand in for all parties asserting the idea is one such strategy. There is not time to or benefits flowing from stating duplicative party positions.

4. ORGANIZATION OF THIS WRITING & RECORD CITATIONS

The outlining conventions utilized in this writing are intended to facilitate ease of use so that the varying persons who will examine this document may do so efficiently.

Some issues presented in this case elicited much writing from the applicant and intervenors. In those instances, this document states PNM's position, then the intervenors and Staff positions,

then provides analysis by the HEs, and then a proposed recommendation is provided stating the practical outcome of the HEs' analysis.

The reader will note that this RD often does not cite to the specific pages in briefing from which the parties' arguments come. Again, the crush of time did not allow for production of extensive footnoting in all sections of this decision. Moreover, the thousand-plus pages of briefing and the thousands of footnotes contained in that writing make clear that the parties are well aware of what their adversaries state in briefs and should have no difficulty locating the sources of the evidence and arguments addressed here.

5. PROCEDURAL HISTORY

Only the broadest sketch of the important procedural dates is offered here. What is set out below is intended to further show how this case is unusually dense even by Commission standards.

On December 5, 2022, PNM filed its application for revision of rates. In that application, the company asked the Commission to take final action on the proposed rates by no later than December 1, 2023.

On December 14, 2022, the Commission filed an initial order suspending the proposed rates and assigning HEs to preside over the case. The Commission suspended PNM's proposed rates for nine months beginning January 4, 2023.

On December 16, 2022, the HEs issued an order setting a prehearing conference for January 4, 2023. That prehearing conference occurred as scheduled.

On January 6, 2023, an initial procedural order was issued. That procedural order noted that the Commission had suspended rates for nine months. The order set a public hearing to commence on June 20, 2023, and to continue through June 30, 2023, as necessary. The order dealt with the many other subjects that procedural orders generally address.

A prehearing motion to vacate the proceedings on grounds PNM's application was deficient was filed. The HEs denied it.

In early February 2023, the HEs issued a recommended decision advising the Commission to extend the suspension period for PNM's proposed rates to the fullest extent permitted by law. The HEs emphasized that the case involves many significant, contested issues that they knew would require much time to work through. Moreover, the case addressed several matters the Commission previously concluded would be addressed in PNM's next rate case. PNM waited six years to file a rate case. Other matters that were initiated only recently were also consolidated with this case. In short and to speak plainly, this case is bursting at the seams.

In March 2023, the Commission entered an order accepting the HEs' recommendation to extend the suspension period for an additional three months, the statutory maximum. PNM's rates remain suspended until Thursday, January 4, 2024.

After the Commission extended the suspension period, intervenors filed a joint motion to modify the procedural schedule to provide all involved in the case additional time to litigate it. Just as the Hearing Examiners argued in their recommended decision to the Commission, the intervenors argued to the Hearing Examiners that the many complex and disputed issues in the case would surely require considerable dedication of time from them.

The public hearing was later moved in a second procedural order to September 5, 2023. It was scheduled to continue through September 22, 2023. The varying filing deadlines for the applicant and intervenors were also amended consistent with the intervenors' joint motion requesting this.

The parties filed many prehearing motions relating to the admissibility of evidence and other legal matters bearing on issues in the case. These were all addressed in prehearing orders.

As the hearing date approached and the parties filed their prehearing memoranda, it became clear that the parties anticipated and requested significant cross-examination time that exceeded the total time allotted for hearing. Even though the hearing was scheduled for more than two full work weeks, the HEs had to reduce all parties' cross-examination times by twenty percent to ensure adequate all participants to the case (including the HEs and Commissioners) had the minimum time for necessary cross examination and questioning. Additional days of hearing were added.

Hearing was conducted between September 5 and September 22, 2023.

The parties were provided the full period of time provided by rule for post-hearing initial briefs. This was deliberate and the purpose for allowing this full amount of time and not reducing the time was to enable the parties the maximum time to review the massive record and fully craft arguments in initial briefs. It is clear, given the length of initial briefs, that the parties availed themselves of the opportunity to comprehensively state their positions on the evidence and their views about the legal significance of that evidence.

The parties were alerted and (as all appear before the Commission regularly and are familiar with rules and statutory time limits in rate cases) must have understood that giving them the maximum time for initial briefs would likely require curtailment of other deadlines post briefing and post recommended decision. This is just the natural consequence of the Legislature's deadlines in rate cases and the decision to provide the parties a generous amount of time to review the record, craft arguments, and submit their initial briefs.

Initial briefs were due and supplied on October 18, 2023. Response briefs were due and supplied on October 31, 2023.

6. APPLICABLE LEGAL STANDARDS IN RATE CASES

The Legislature delegated to the Commission "the power and authority to regulate utilities."[9] Under the New Mexico Public Utility Act (PUA)[10] the Commission has "general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulation and in respect to its securities . . . ."[11] The PUA requires that public utility rates be "just and reasonable."[12]

A utility requesting a rate revision bears the burden of proof to show that an increase in rates is just and reasonable.[13] The utility's application must be supported by substantial evidence.[14]

The New Mexico Supreme Court explained the ratemaking process in *Hobbs Gas Co. v. New Mexico Public Service Commission*, 1980-NMSC-005, 94 N.M. 731, 616 P.2d 116 ("*Hobbs Gas Co*."). What follows is an overview of the process.

"The traditional elements of the ratemaking process and the establishment of the total revenue requirement are[:] (1) determination of the costs of the operation, (2) determination of the rate base which is the value of the property minus accrued depreciation, and (3) determination of

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[9] *Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n*, 1980-NMSC-005, ¶ 4, 94 N.M. 731, 616 P.2d 1116 (citing NMSA 1978, 62-6-4 (1967, as amended through 2003) ("*Hobbs Gas Co.*").

[10] NMSA 1978, §§ 62-1-1 to -7 (1909, as amended through 1993), 62-2-1 to -22 (1887, as amended through 2013), 62-3-1 to -5 (1967, as amended through 2019), 62-4-1 (1998), 62-6-4 to -28 (1941, as amended through 2018), 62-8-1 to -13-16 (1941, as amended through 2021). *See Tri-State Generation and Transmission Ass'n v. N.M. Pub. Reg. Comm'n*, 2015-NMSC-013, ¶ 8 n. 1, 347 P.3d 274 (listing the foregoing statutory provisions of the "entire PUA" and noting that § 62-13-1 specifies "the range of articles in Chapter 62 that comprised the PUA in 1993.").

[11] NMSA 1978, § Section 62-6-4(A).

[12] NMSA 1978, § Section 62-8-1.

[13] Case No. 07-00319-UT, *Corrected Recommended Decision* at 17 (NMPRC 07/31/08) ("*2007 SPS Rate Case Corrected RD*") (citing *Otero County Electric Cooperative, Inc. v. N.M. Public Serv Comm 'n*, 1989-NMSC-033, 108 N.M. 462, 774 P.2d 1050) ("*Otero County Electric Coop., Inc.*").

[14] *Id.* (citing *Re Gas Company of New Mexico*, 28 PUR4th 20, 23 (NMPSC 1978)).

the rate of return." This "process involves decisions as to whether certain utility investments or expenditures should be included or excluded under the above elements."[15]

The Commission is expressly tasked with carrying out a broad policy mandate: it must serve and support the "public interest." A statute gives necessary content to better comprehend this amorphous phrase. Any summary of that statue (reproduced below) would be unhelpful as summary requires interpretation. Better that the exact words themselves be considered.

> It is the declared policy of the state that the public interest, the interest of consumers and the interest of investors require the regulation and supervision of public utilities to the end that reasonable and proper services shall be available at fair, just and reasonable rates and to the end that capital and investment may be encouraged and attracted so as to provide for the construction, development and extension, without unnecessary duplication and economic waste, of proper plants and facilities and demand-side resources for the rendition of service to the general public and to industry.[16]

"The law also charges the Commission with the responsibility of [e]nsuring that every rate made or received by a public utility shall be just and reasonable."[17]

The statutes governing utilities and empowering the Commission to regulate them "offers no guidance to the Commission" as to how it is to ensure that rates are just and reasonable.[18] Case law on the subject makes clear that the Commission must balance an array of divergent interests.

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[15] *2007 SPS Rate Case Corrected RD* at 18.

[16] NMSA 1978, § 62-3-1(B).

[17] *Hobbs Gas Co.*, 1980-NMSC-005, ¶ 4 (citing NMSA 1978, § 62-8-1).

[18] *Otero County Electric Coop., Inc.*, 1989-NMSC-033, ¶ 8.

"To set a just and reasonable rate, the Commission must balance the investor's interest against the ratepayer's interest."[19] What is crucial to understand is that "[n]either [interest] is paramount . . . ."[20]

The balancing the Commission must perform necessarily requires policy and discretionary decision making. For this reason, courts have recognized that when a regulatory commission like the PRC "must exercise wide-ranging discretion in its decision-making, the breadth of agency discretion is, if anything, at its zenith . . . ."[21] This point is one central to administrative law at both the state and federal levels.

To speak more plainly, rate-setting is an exercise in identifying and then executing what is just and reasonable for a broad array of stakeholders to arrive at a conclusion that will likely please no one. This is a true and accurate statement given that rate setting is ultimately a legislative act. Legislative acts necessarily require compromise. No one wants to compromise. This axiomatic fact is why politics is famously described as the art of the possible. Rate setting, as a legislative act, bears all these hallmarks as well. The point being made here is well illustrated by several simple sentences offered by the Washington Supreme Court.

"[T]the setting of electrical rates involves weighing individual factors" and "it can hardly be said . . . that the final decision is for A and against B." Such a view misses the heart of the endeavor. "Both A's and B's interests must be considered in rendering the final balance, but the

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[19] *Behles v. New Mexico Public Service Commission*, 1992-NMSC-047, ¶ 29, 114 N.M. 154, 836 P.2d 73.

[20] *Matter of Rates & Charges of Mountain States Tel. & Tel. Co.*, 1982-NMSC-127, ¶ 2, 99 N.M. 1, 653 P.2d 501.

[21] Case No. 07-00077-UT, *Recommended Decision* at 53-54 (03/06/2008) ("*2007 PNM Electric Rate Case RD*") (quoting *Niagara Mohawk Power Corp. v. Fed. Power Comm'n*, 379 F.2d 153, 159 (D.C. Cir. 1967).

ultimate consideration . . . is what balance of all the ratepayers' interests best serves the community."[22]

This thought is all already embedded in Commission practice. It is well established that, "[o]nly when a rate falls within a 'zone of reasonableness ... between utility confiscation and ratepayer extortion' can the rate be 'just and reasonable.'"[23] The phrase "zone of reasonableness" is the formal label that recognizes the varying points just articulated and that gives the Commission discretion to exercise judgment and policy preferences in its work.

That a zone of reasonableness exists gives rise to a host of questions: how broad is the zone of reasonableness? What constitutes fairness in the balancing? At what point does protecting ratepayers constitute confiscation of utility property? At what point does privileging the financial interests of the utility cause extortion? There are many other questions the answer to which will surely require balancing and discretionary judgment.

For these reasons, it is safe to say that rarely (if ever) will the rate setting exercise be an exercise in binary judgment; rather, rate setting necessarily requires the Commission to engage in nuanced balancing, to sort priorities, to privilege some objectives over others, and to pick winners and losers under the aegis of maximizing available resources for the greatest social utility. These are just different words to express what the Washington Supreme Court said.

What is just and reasonable for one rate class will strike another as patently objectionable. This is an inevitable outcome. The Commission cannot, to borrow a familiar phrase, satisfy all stakeholders all of the time, and the mere fact that a party to a Commission rate case objects to the

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[22] *Earle M. Jorgensen Co. v. City of Seattle*, 99 Wash. 2d 861, 867, 665 P.2d 1328, 1332 (1983)

[23] *Attorney Gen. v. New Mexico Pub. Regulation Comm'n*, 2011-NMSC-034, ¶ 13, 150 N.M. 174, 258 P.3d 453.

outcome of rate setting in no way establishes that the Commission has acted in violation of the broad discretion conferred to it to make the difficult choices it must.

These principles are not distant musings. PNM itself made just this kind of assertion in this case. Discussing allocation, the company noted that "[c]ost allocation is not an exact science and involves judgment on myriad facts. The cost allocation method chosen, in many cases, is based on a subjective perception of fairness and equity."[24] This point is not one that apples in only the isolated context in which it was made. The entire rate-setting process is one in which myriad facts demand the weighing of interests and the exercise of practical wisdom to achieve socially desirable ends.

The standards articulated above (broad though they are) must be considered in still a broader context. The Commission is not delegated discretionary power to impose preferences unattached to any larger project. The standards applied in rate cases exist within a broader scheme that is the regulatory field itself. That field has a purpose.

The fundamental purpose of the regulation of monopolistic utilities is to act as a surrogate for competition in controlling retail rates. Our Supreme Court expressed the thought in these words: "[t]he NMPUA expresses a clear intent to displace competition with regulation in the area of utility service."[25]

NM AREA correctly and persuasively cites to treatises addressing these matters and explains that "in a competitive market, the seller sets its prices disciplined by the marketplace. In a fully regulated environment . . . the regulator is tasked with enforcing price discipline by setting

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[24] PNM Br. at 319.

[25] *City of Albuquerque v. New Mexico Pub. Serv. Comm'n*, 1993-NMSC-021, ¶ 39, 115 N.M. 521, 854 P.2d 348

cost-based rates." This principal, NM AREA adds, "is what is meant by the statutory mandate requiring the Commission to set rates that are just and reasonable."[26] The task NM AREA identifies is the broadest animating concern underlying the Commission's work.

7. APPLICABLE EVIDENTIARY STANDARDS

The following summary of the applicable evidentiary burden here is derived from Case No. 21-00267-UT.[27]

The rule in administrative proceedings generally, and adjudications before this Commission in particular, is that unless a statute provides otherwise, the proponent of an order or moving party has the burden of proof.[28] The burden of proof is two-prong: it includes both the prima facie burden of adducing sufficient evidence to go forward with a claim and the burden of ultimate persuasion.

The quantum of proof in administrative adjudications is, again unless expressly provided otherwise, a preponderance of record evidence.[29] Preponderance of the evidence means the greater

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[26] NM AREA Br. at 43.

[27] Case No. 21-00267-UT, *Certification of Stipulation* at 24-25 (11/10/2022).

[28] DAVIS, KENNETH CULP, ADMINISTRATIVE LAW TREATISE § 16.9 at 255-57 (2d ed. 1980). *See Int'l Minerals and Chemical Corp. v. N.M. Pub. Serv. Comm'n*, 81 N.M. 280, 283, 466 P.2d 557, 560 (1970) ("Although the statute does not specifically place any burden of proof on [complainant] International, the courts have uniformly imposed on administrative agencies the customary common-law rule that the moving party has the burden of proof.").

[29] See DAVIS, *supra*, § 16.9 at 256 ("One can never prove a fact by something less than a preponderance of the evidence") (emphasis in original); See *El Paso Electric Co. et al. v. N.M. Pub. Serv. Comm'n*, 1985-NMSC-085, ¶ 12 ("This Court, however, does express its deep concern regarding the reasonableness of this heightened standard of proof ['clear and convincing evidence'], especially since a 'preponderance of evidence' standard is customary in administrative and other civil proceedings.") (emphasis added); *Re Southwestern Public Service Co*., Case No. 2678, *Recommended Decision of the Hearing Examiner* (11/15/1996) ("No matter how the Commission describes its standard of review, SPS bears the burden of proof in this case. SPS must demonstrate that a preponderance of evidence exists in the record on which to base approval of the requested authorizations surrounding the merger.").

weight of the evidence.[30] That is, evidence that – when weighed with that opposed to it – has more convincing force. It has superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.[31] It is crucial to emphasize here how these standards apply and in this case.

It is well settled that "[a]dministrative judges have an affirmative duty to elicit the facts necessary to determine the interest of the public as well as the private parties. They must develop a record comprehensive and accessible record so that the agency and ultimately a court can review the whole case with minimal activity."[32] This simple statement takes on degrees of complexity when the administrative record and the case itself expands to a point of excess. There is simply not time in this case and given the time limits for resolution of rate cases for the HEs to comb the voluminous record and meditate on all the evidence supplied. This would almost surely preclude timely decision and require dedication of time and human capital the HEs do not have. There are always other cases that demand attention.

The HEs relied on PNM's and intervenors' initial and response briefs to illuminate what evidence justified approval of a proposal, modification of a proposal, or outright rejection of a proposal. In other words, party presentation[33] has meaningful significance in this case given that

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[30] *Campbell v. Campbell*, 1957-NMSC-001, ¶ 24, 62 N.M. 330, 310 P.2d 266.

[31] BLACK'S LAW DICTIONARY 1431 (11th ed. 2019).

[32] CHARLES H. KOCH, JR. & RICHARD MURPHY, ADMINISTRATIVE LAW AND PRACTICE, 2 ADMINISTRATIVE LAW & PRACTICE, § 5.25, Responsibilities of the Administrative Judges at the Hearing (3d ed.).

[33] *See Greenlaw v. United States*, 554 U.S. 237, 243 (2008) ("[Courts] do not, or should not, sally forth each day looking for wrongs to right. We wait for cases to come to us, and when they do we normally decide only questions presented by the parties."). The concept of party presentation does not have equal force in the administrative context but does have application. *See Fernandez v. Farmers Ins. Co. of Arizona*, 1993-NMSC-035, ¶ 8, 115 N.M. 622, 857 P.2d 22 ("Arbitration is a process by which parties submit their disputes to an

"[a]dministrative judges perform many of the same functions as conventional judges" and are subject to the same time constraints and given that this present case is one dubbed by newspapers as a "monster."[34]

Moreover, this is not a case where important interests are without advocates. The stakeholders are all capably represented. The parties to this matter fought bitterly over each and every issue and presented abundant evidence bearing on the issues.

8. DISCUSSION

The scope of this case makes it impractical to attempt any roadmap here. The reader must refer back to the table of contents as a guide to the subjects addressed and the order in which they are addressed. To the greatest extent possible, this writing organizes treatment of issues on a topical basis. For instance, all matters involving SJGS are addressed in the section dedicated to SJGS regardless of the nature of the specific issue.

8.1. Four Corners Power Plant

The prudence of PNM's decision a decade ago to continue as a participant in the Four Corners Power Plant ("Four Corners" or FCPP) remains a contentious issue that must finally be resolved in this case. Specifically at issue is the prudence of PNM's decision-making process in the 2012-2013 timeframe to extend the FCPP coal supply agreement (CSA) and joint ownership

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impartial private tribunal for a final and binding decision based upon the parties' presentation of arguments and evidence.

[34] Nicholas Gilmore, *Combined PNM rate case later this year could settle many disputed investments*, SANTA FE NEW MEXICAN, July 23, 2023, at A1 ("Whether Public Service Company of New Mexico's more than half a million customers across the state will be on the hook for controversial investments and financing strategies for the transition to renewable energy and a revamped grid could be settled later this year in *one monster rate case* pending before the state Public Regulation Commission.") (emphasis added); *see also* Tr. (Vol. 5) 1484 (Medeiros) ("We can all acknowledge this is a very complex and stressful case. Indeed it has been described colorfully, but nonetheless accurately, as a 'monster rate case' with a lot at stake for many stakeholders.").

agreements (collectively JOA) instead of abandoning its share of Four Corners by the end of 2016 and deciding, instead, to invest nearly $150 million in a selective catalytic reduction (SCR) pollution control system, or "SCR controls," and other life-extending capital expenditures in the Four Corners plant.[35] Also at issue is the remedy that should be imposed given as set forth below the Hearing Examiners' findings of imprudence in PNM's decision-making process and related life-extending investments in the FCPP.

8.1.1. Background: History behind the Four Corners Prudence dispute

8.1.1.1. The Four Corners Power Plant

The Four Corners Power Plant ("Four Corners" or FCPP) is a coal-fired power plant located near Fruitland, New Mexico. The Four Corners plant is located within the Navajo Nation. It is operated by Arizona Public Service Company (APS). In its current configuration, the FCPP is comprised of two 770-MW units, Units 4 and 5, which came on-line in 1969 and 1970.[36] The plant formerly consisted of five coal-fired generation units. Units 1, 2 and 3 – in which PNM had no ownership interest – were retired in 2010 for purposes of compliance with the Environmental

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[35] *See* Case No. 21-00017-UT, *Recommended Decision on PNM's Request for Issuance of a Financing Order* ("*RD on FCPP Finc'g Order*") at 45-46 (NMPRC 11/12/2021) ("PNM represents that the actual capital additions of $131.3 million during this period [July 1, 2016 to Dec. 31, 2018] are consistent with the projected $148.7 million capital additions that PNM is currently earning a debt-only return on pursuant to the Commission's *Revised Final Order* and the follow-up *Order on Notice of Acceptance* in Case No. 16-00276-UT, ... The disputed capital investments . . . include PNM's $90.1 investment in SCR controls and approximately $58 million in additional life-extending capital improvements that the Hearing Examiners determined PNM imprudently incurred in the *Certification of Stipulation* in Case No. 16-00276-UT, but on which the Commission subsequently deferred the prudence determination in PNM's next general rate proceeding in the *Revised Final Order*."); *see also* Case No. 16-00276-UT, *Certification of Stipulation* ("*Certif. of Stip.*") at 47 ("PNM was imprudent in not conducting updated analyses of the cost-effectiveness of extending its participation in Four Corners and in pursuing the SCR and other capital improvements after the Board of Directors' decision in October 2013 and prior to the extension of the ownership and operating agreements in March 2015."); *id* 39 ("The Hearing Examiners also find that PNM was imprudent in not updating the May 2012 analysis prior to the Board's decision in October 2013 to continue PNM's participation in Four Corners.").

[36] Case No. 21-00017-UT, *RD on FCPP Finc'g Order* at 14 (citing PNM Exh. 4 (Fallgren Dir.) 4, PNM Exh. TGF-5 at 1 of 2).

Protection Agency's (EPA) Regional Haze Rule.[37] The other current owners of Four Corners include the Salt River Project Agricultural Improvement and Power District (SRP), the Navajo Transitional Energy Company (NTEC), and Tucson Electric Power (TEP).[38] PNM owns a thirteen percent share of FCPP Units 4 and 5 representing 200 MW, which PNM acquired in 1969 and 1970 respectively.[39] PNM's share in Four Corners is a certificated resource used to serve customers.[40] The fuel for FCPP is provided by a dedicated coal mine owned and operated by NTEC, under the Coal Supply Agreement (CSA) between NTEC and the other joint owners of FCPP.[41]

The four FCPP agreements comprising the JOA include (i) the CSA; (ii) the co-tenancy agreement that establishes the terms and conditions relating to ownership and operation of FCPP, (iii) the operating agreement that sets the terms, covenants, and conditions that govern the operating work of FCPP, and (iv) an underlying lease with the Navajo Nation were initially executed in the late 1960s among the current owners and two previous owners, Southern California Edison (SCE) and El Paso Electric Company (EPE).[42] SCE and EPE decided in the early 2010s to exit their FCPP participation and ultimately sold their shares to APS or its affiliate. These transactions were eventually carried out in December 2013 and July 2016 respectively. The terms of the current CSA were negotiated over the course of 2012 and 2013, and the CSA was executed in December 2013 and amended in July 2018 to supply coal to FCPP until July 2031. Prior to the extension of the CSA in 2013, the terms of the CSA and the JOA were set to expire in July of

[37] *Id.* (citing Fallgren Dir. 5; Amended Application 9).

[38] PNM Exh. 17 (Graves Dir.) at 8.

[39] PNM Exh. 22 (Heffington Dir.) at 9.

[40] PNM Exh. 22 (Heffington Dir.) at 52.

[41] PNM Exh. 17 (Graves Dir.) at 8.

[42] *See* Case No. 21-00017-UT, *RD on FCPP Finc'g Order* at 15.

2016.[43] The current planned operating life of the plant is through 2031, concurrent with the coal supply agreement with NTEC.[44]

PNM asserts that in the years since PNM decided to continue as a participant, Four Corners has been and remains an important baseload resource in PNM's generation portfolio and has continued to serve customers.[45] PNM reports that Four Corners had a summer equivalent availability factor of 89.6% in 2021, and it had an equivalent availability factor of 93.2% in the summer of 2022. PNM considers Four Corners plant to be, in its words, "part of a diversified generation resource portfolio and, its role has been critical in supplying customer needs during extreme weather events."[46] PNM maintains, in sum, that "customers have greatly benefitted from PNM having Four Corners as part of its generation portfolio and Four Corners remains needed to safely and reliably serve PNM's customers."[47]

8.1.1.2. Regulatory History Related to the Four Corners Prudence Issue

Because PNM's decision over a decade ago to continue as a participant in the FCPP has been in controversy before the Commission since at least 2016, a summary of the regulatory history related to the Four Corners prudence issue is necessary.

Concerns regarding PNM's decision-making to remain a participant in Four Corners were first raised in PNM's 2015 Rate Case, Case No. 15-00261-UT. NEE challenged PNM's extension of the CSA, arguing that PNM's FCPP coal supply costs should have been disallowed because

43 PNM Exh. 17 (Graves Dir.) at 8-9.

44 Case No. 21-00017-UT, *RD on FCPP Finc'g Order* at 15 (citing Fallgren Dir. at 7).

45 PNM Br. at 204-05 (citing PNM Exh. 22 (Heffington Dir.) at 3-4, 9, 52-54).

46 PNM Br. at 204 (citing PNM Exh. 22 (Heffington Dir.) at 53-54).

47 PNM Br. at 204-05 (citing PNM Exh. 22 (Heffington Dir.) at 54).

PNM had not performed an updated analysis to show whether FCPP was the most cost-effective resource, claiming that events since a 2012 evaluation comparing it to the next-best alternative of a new combined cycle natural gas plant for 2017 had made that earlier finding obsolete. CCAE similarly argued, for the first time in exceptions, that PNM had not provided evidence that its decision to extend its investment in FCPP, including extending the CSA, was prudent.[48] The Commission rejected these arguments based on the lack of sufficient evidence and found that the terms of the CSA were reasonable.[49] The New Mexico Supreme Court upheld the Commission's decision.[50]

In PNM's 2016 Rate Case, Case No. 16-00276-UT, certain parties challenged PNM's decision to extend its participation in FCPP, seeking disallowances of the SCR controls and other life-extending capital investments for continued plant operations. PNM entered into a contested Stipulation with eleven parties, including CCAE and Staff, whereby PNM agreed to a debt-only return on the at-issue FCPP investments. NEE contested the Stipulation and fully litigated the merits of FCPP prudence and disputed FCPP investments. The Hearing Examiners found in their October 31, 2017 *Certification of Stipulation* that PNM's decision in October 2013 to extend its participation in the Four Corner plant to July 2041, a decision that was not formally effectuated

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[48] Case No. 15-00261-UT, *Final Order Partially Adopting Corrected Recommended Decision* ("*Final Order*") at 67-69, ¶¶ 194-197 at 67-69 (NMPRC 9/28/16).

[49] Case No. 15-00261-UT, *Final Order* at 71, ¶ 202. However, in the 2016 Rate Case, the Hearing Examiners rejected PNM and NMIEC's (now NM AREA) argument that the doctrine of *res judicata* prevented the re-litigation of the issue of prudence of PNM's decision to extend its participation in Four Corners, finding the cause of action in the 2016 case was different from the issue in Case No. 15-00261-UT. Case No. 16-00276-UT, *Certif. of Stip.* at 70-75. The Commission rejected the parties' exceptions raising *res judicata* as a bar to its consideration of the prudence of PNM's decision to continue the operation of the FCPP in its January 10, 2018 *Revised Order Partially Adopting Certification of Stipulation* at 21-22, ¶¶ 61-64.

[50] *Public Serv. Co. of N.M. v. N.M. Public Reg. Comm'n*, 2019-NMSC-012, ¶¶ 90-95, 444 P.3d 460.

until March 2015, was imprudent.[51] Consequently, the *Certification of Stipulation* recommended disallowance of all costs associated with the capital investments that were necessary to extend the life of the plant – consisting of $90.1 million in SCR controls and $58 million in additional life-extending improvements – and ordered that the stipulation must be modified to reflect this treatment for Commission approval.[52]

In its December 20, 2017 *Order Partially Adopting Certification of Stipulation*, the Commission found that "PNM's imprudence extended not just to the decision to install SCR and make additional improvements in FCPP, but to PNM's determination that continued use of FCPP as base load was necessary."[53] The Commission determined that the *Certification of Stipulation's* limited remedy of disallowing PNM's return on the SCR controls and other Four Corners capital expenditures was an appropriate remedy for that phase of the Commission's review "based on the scope of the Revised Stipulation, the limited record that was developed based on the limited scope of this proceeding, and the restricted time to conduct further proceedings in light of the statutory suspension period."[54] The Commission thus concluded that the ratemaking treatment of Four

[51] *See* Case No. 16-00276-UT, *Certif. of Stip.* at 30, 47. While PNM executed an amended Four Corners coal supply agreement (the 2016 coal supply agreement) in December 2013, it was not until March 15, 2015 that PNM and the other co-owners signed amended co-tenancy and operating agreements that extended the term of the agreement to July 7, 2041. *Id.* 28-29, 47-48, 73.

[52] The Hearing Examiners found that the disallowance in the revised stipulation was not a sufficient or reasonable remedy for PNM's imprudence in extending its participation in Four Corners and pursuing the SCR controls and additional capital improvements. The stipulation had limited the return on the $90.1 million in SCR investment to PNM's embedded cost of debt but allowed a ***return of*** that investment plus a full ***return of and on*** the $58.1 million in additional life-extending capital improvements. *Certif. of Stip.* at 66-67.

[53] Case No. 16-00276-UT, *Order Partially Adopting Certification of Stipulation* at 19-20, ¶ 66. The Commission added that the determination to continue to use the Four Corners plant as baseload generation was "especially concerning in light of evidence adduced at the hearing . . . concerning FCPP's poor operating performance and impaired availability rate, as well as PNM's prior representations to the Commission in Cases 13-00390-UT and 15-00261-UT concerning the necessity for acquiring and retaining baseload generation capacity at Palo Verde Nuclear Generating Station in [those cases]." *Id.* 20, ¶ 66.

[54] *Id.* 20, ¶ 67.

Corners plant costs not addressed in Case No. 16-00276-UT would be determined either in a continuation of the case if the Signatories did not accept the modifications approved by the Commission or in PNM's next rate proceeding.[55] However, having subsequently granted motions for rehearing and entertained oral argument on January 10, 2018, the Commission issued its *Revised Final Order* later that day in which it decided "to defer the issue of imprudence to PNM's next rate case" if certain modifications were accepted by the Signatories to the revised stipulation. The Commission explained that:

> deferring, for the limited duration of the period that the revised Stipulation will be in effect, a finding on the issue of PNM's prudence in its continued participation and investment in FCPP until PNM's next rate filing … will permit consideration of the issue with the full participation of all parties without any constraints that may be placed on such Signatories associated with their current role as proponents of the proposed settlement, while also permitting a more full opportunity for the Commission to consider the necessity and scope of any remedy in light of PNM's alleged imprudence; an option the Certification noted was not currently available to the Commission in light of the limited record on that issue developed in this proceeding. In the subsequent proceeding, administrative notice will be taken of the evidence on the issue of prudence admitted in the current proceeding.[56]

The Commission's modifications allowed a return of the $148.7 million in SCR controls and additional life-extending FCPP capital investments but limited the return on the entire amount to PNM's embedded cost of debt. The modifications also included, in light of "the magnitude of the potential benefit to PNM of deferring the issue," an increase of $9.1 million to the $16.5 million that the Hearing Examiners referred to as "unspecified" revenue reductions that were negotiated to reach the stipulated revenue increase of $62.3 million (PNM's rate application sought a $99.2 million increase). The Commission determined that this further "unspecified" revenue reduction

55 *Id.* 20, ¶ 68.

56 *Revised Final Order* at 23, ¶ 66.

would be necessary "to balance the interests of ratepayers and the utility."[57] PNM and the other Signatories expressly accepted the Commission's modifications,[58] filed a Modified Revised Stipulation on January 23, 2018,[59] and PNM implemented the approved stipulated rates effective February 1, 2018.[60]

The Commission therefore expressly conditioned its authorization for PNM to recover the Four Corners SCR controls and additional capital investments at the reduced rate of PNM's embedded cost of debt with the proviso that a finding or determination of imprudence in the subsequent proceeding would subject or expose PNM to any appropriate remedy if PNM failed to carry its burden of proving in the subsequent proceeding that the investments were prudent and

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57 *Id.* 23-24, ¶ 67; *see also Certif. of Stip.* at 13, 155, 173-176. The Commission's $9.1 million in further "unspecified" reductions was later adjusted downward to $4.4 million, for a total final revenue increase of $57.9 million. *See Order on Notice of Acceptance* (Jan. 17, 2018) at 3 ¶ A.

58 Joint Notice by All Signatories of Acceptance of Commission's Modifications to Revised Stipulation ("Joint Notice") (Jan. 19, 2018).

59 Paragraph 8 of the Modified Revised Stipulation states:

> 8. [Renumbered from original paragraph 9] The Signatories agree that PNM shall include in its rate base the return of its capital investment of $90 million in SCR equipment installed at Four Corners and the additional $58 million in capital investments at Four Corners proposed for recovery in PNM's Application (referenced collectively as the "$148 Million Investment"). PNM shall only collect a return on its Four Corners ~~SCR Investment~~ $148 Million Investment equal to PNM's embedded cost of debt. Any accounting requirements under generally accepted accounting principles ("GAAP") affecting the valuation of these assets on PNM's financial statements that may result from this Paragraph shall not affect the rate base value of ~~SCR equipment~~ the $148 Million Investment at Four Corners for purposes of setting retail service rates. For purposes of demonstrating the base rate non-fuel revenue requirement in future rate cases, PNM shall separate out the presentation of the return on rate base, showing the return on the Four Corners ~~SCR investment~~ $148 Million Investment at the embedded cost of debt and the return on the remaining rate base investments based on future weighted average cost of capital determinations. If Four Corners is no longer used to serve PNM's retail customers, the Signatories reserve the right to take any position with regard to the recovery of the undepreciated balance of the Four Corners ~~SCR investment~~ $148 Million Investment.

Comm'n AN Exh. 67 (Modified Revised Stip.).

60 Advice Notice No. 545.

reasonable. The Commission thus authorized the recovery of the contested investments in rates only temporarily, until PNM's next rate case when continued recovery would be subject to further review of issues relating to prudence, with PNM bearing the burden of proof, and any appropriate remedies. PNM accepted these modifications and conditions and did not appeal the Commission's *Revised Final Order* and follow-up *Order on Notice of Acceptance.*

Subsequently, on January 8, 2021, PNM filed an application for approval to abandon the Four Corners Power Plant (FCPP or "Four Corners") and issuance securitized financing order. The abandonment and securitization application was docketed as Case No. 21-00017-UT. PNM sought in the application the Commission's approval to abandon its ownership share in the amount of 200 megawatts (MW) of retail coal-fired generation resources at the FCPP, to transfer the resources to NTEC, and to issue energy transition bonds (ETBs) pursuant to the recently enacted Energy Transition Act (ETA).[61]

In addressing pre-hearing motions to dismiss filed by certain intervenors and responses to his February 21, 2021 order requesting briefing on the sufficiency of PNM's application in Case No. 21-00017-UT, the Hearing Examiner determined in his February 26, 2021 order on the sufficiency of PNM's application and the scope of issues to be addressed in the proceeding that, subject to starting the nine-month statutory review period under the Energy Transition Act to commence anew with its amended filing, PNM should be permitted to file an amended application in this docket by March 15, 2021 supported by direct testimony that, among other things, addressed the statutory standard for approval of the proposed transfer of the PNM's interest in the FCPP to NTEC. Further, regarding the scope of issues to be covered in PNM's supplemental testimony,

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[61] NMSA 1978, §§ 62-18-1 to -23 (2019).

the Order adhered to the Commission's Order on Sierra Club's Motion to Re-open Docket to Implement the Revised Final Order in Case No. 16-00276-UT.[62] In denying Sierra Club's motion to reopen Case No. 16-00276-UT to conduct "the prudence review of certain [FCPP] expenditures that the Commission deferred in its Revised Order Partially Adopting Certification of Stipulation" (*Revised Final Order*) issued in Case No. 16-00276-UT (the 2016 Rate Case) on January 10, 2018,[63] the Commission concluded that its order was not intended

> to reach beyond the immediate request that the Commission order a prudence review to pre-empt PNM's possible recovery of its undepreciated investments in FCPP. Such issues as whether the terms of the ETA may provide an opportunity for consideration of the prudence of undepreciated investments requested to be include in a financing order as energy transition costs or what the effect of the 'black box' rates approved in the Revised Final Order may have on determining energy transition costs are properly raised and considered in Case No. 21-00017-UT consistent with the due process requirements that all parties to that case have full notice and opportunity to be heard on those issues.[64]

Accordingly, in the February 26th Order the Hearing Examiner required PNM to address in supplemental testimony to be filed with the amended application the prudence of undepreciated investments for which PNM sought recovery in a financing order as energy transition costs as well as corollary issues such as the effect that the rates authorized by the *Revised Final Order* in Case No. 16-00276-UT might have on determining energy transition costs in the case.[65]

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[62] Case No. 16-00276-UT, *Order on Sierra Club's Motion to Re-open Docket to Implement the Revised Final Order* ("*Order on Motion to Re-open*") (Feb 10, 2021).

[63] *Order on Motion to Re-open* at 1, ¶ 1. The Commission also noted, at 1, ¶ 2, that Sierra Club had requested, in the alternative, "an order providing 'that the deferred prudence review be conducted, and given effect as appropriate, in [PNM's] Four Corners abandonment filing.'"

[64] *Id.* 7-8, ¶ 25.

[65] *See* Feb. 26, 2021 Order at 22-25 (In sum, the Feb. 26th Order: delineated the scope of supplemental testimony the Hearing Examiner ordered PNM to file; instructed PNM to formally move to withdraw its original application in conformity with 1.2.2.10(E) NMAC; declined to re-institute the remainder of the procedural schedule tentatively set at the January 28, 2021 pre-hearing conference, as suggested by PNM, and indicated a

After receiving evidence over 7 days of hearings and considering the post-hearing briefs, the Hearing Examiner issued companion recommended decisions on November 12, 2021 recommending, *inter alia*, that the Commission approve PNM's application to abandon FCPP, approve the sale and transfer of PNM's FCPP interests to NTEC, and issue the requested financing order. However, concerning the asserted Four Corners imprudence, the Hearing Examiner found in his recommended decision on the financing order the record developed in the proceeding "insufficient to support a conclusion either way on the issue of prudence" and thus recommended "that the Commission adhere to its original plan and perform the prudence review of PNM's decision to continue using Four Corners as base load generation, its investments in the SCR controls, and the other FCPP life-extending expenditures in PNM's next general rate case.[66]

In its Final Order in Case No. 21-00017-UT, the Commission rejected the recommendations of the Hearing Examiner with respect to PNM's abandonment and sale of its interests in FCPP to NTEC and the financing order. With respect to PNM's 2012-2103 decision-making process, the Final Order ruled that FCPP prudence issues should be addressed and resolved either in a re-filed abandonment case or in a separate proceeding.[67] PNM appealed the Commission's Final Order, which was upheld by the New Mexico Supreme Court in its opinion issued on July 6, 2023. In rejecting PNM's challenge to deny the Commission's application for abandonment on the basis that PNM failed to adequately identify potential replacement resources under Section 62-18-4(D) of the ETA and otherwise summarily affirming the Commission's Final Order, the

procedural schedule for this case would be developed after consulting with the parties at the prehearing conference, scheduled by separate Order issued on that date, for March 18, 2021.).

[66] Case No. 21-00017-UT*, RD on FCPP Finc'g Order* at 85-86.

[67] Case No. 21-00017-UT, *Order on Recommended Decision on Requests for Approval of the Sale and Abandonment of PNM's Interest in the Four Corners Power Plant and Issuance of a Securitized Financing Order* at 13, ¶¶ C, E, and G (NMPRC Dec. 15, 2021).

Supreme Court expressly affirmed the Commission's decision to defer "the prudence issues reserved in Case No. 16-00276-UT and raised in the proceedings below."[68]

In this case, resolving to avoid the evidentiary lapses and mishaps experienced in Case No. 21-00017-UT,[69] the Hearing Examiners embraced the difficult task of compiling and cataloging the numerous pieces of evidence comprising the substantial record developed in Case No. 16-00276-UT on the Four Corners prudence issue. Consequently, just before the evidentiary hearing in this case began, they issued the *Hearing Examiners' of Taking Administrative Notice of Portions of the Record in Case No. 16-00276-UT* ("*Notice*").[70] The *Notice* lists with pinpoint citations each piece of relevant FCPP prudence evidence, which consists of 74 testimonial and other exhibits as well as pertinent passages extracted from the eight-volume transcript taken in Case No. 16-00276-UT.[71] Given the voluminous nature of the record on the issue of prudence from Case No. 16-00276-UT, the exhibits and transcript extracts listed in the *Notice* were uploaded to the Commission's Dropbox folder for this case and the parties were able to access them there for use at hearing and citation in post-hearing brief. At the hearing, when the Hearing Examiners formally admitted the evidence on the issue of FCPP prudence set forth in the *Notice* into the evidentiary record of this case, no party objected to the substance or process through which the 16-00276-UT

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68 *Pub. Serv. Co. of N.M. v. N.M. Pub. Regul. Comm'n*, S-1-SC-39138, ¶ 1, n. 1, ___-NMSC-___, __ P.3d __ (N.M. July 6, 2023), 2023 WL 4360572.

69 *See, e.g.*, Case No. 21-00017-UT, *RD on FCPP Finc'g Order* at 86 ("Although the Hearing Examiner developed early on in this case a streamlined procedure to have parties take administrative notice of evidence on the issue of prudence admitted in Case No. 16-00276-UT in observance of the Revised Final Order's instruction, the process did not go smoothly.") (internal citations omitted).

70 *Hearing Examiners' Notice of Taking Administrative Notice of Portions of the Record in Case No. 16-00276-UT* (08/31/2023) ("*Notice*").

71 *See Notice* at 3-8. Due to an inadvertent typographical error, the seventy-four Commission AN Exhibits are numbered Comm'n AN Exh. 1 through AN Exh. 75 (i.e., what would have been AN Exh. 49 was accidentally omitted). *See* Tr. (Vol. 2) 385-87.

record on the prudence issue was compiled and entered in the record of this case through the taking of administrative notice in conformity with 1.2.2.35(D) NMAC.[72] As seen below and in the post-hearing briefs of the parties engaging the prudence issue, the evidentiary record in Case No. 16-00276-UT and the *Certification of Stipulation* analyzing it, inform this decision, which is bolstered and guided by the additional evidence adduced in this case.

8.1.2. Legal Standards Guiding Commission's Prudence Review

In PNM's appeal of the Commission's final order in the 2015 Rate Case, *Public Serv. Co. of N.M. v. N.M. Public Reg. Comm'n*, 2019-NMSC-012, 444 P.3d 460 ("*Public Serv. Co. of N.M.*"), the New Mexico Supreme Court adopted in its discussion of the Commission's finding of imprudence regarding PNM's retention of certain Palo Verde Nuclear Generating Station (PVNGS or "Palo Verde") assets the standard of prudence in the Hearing Examiner's August 15, 2016 *Corrected Recommended Decision*.[73] That standard of prudence is grounded in the prudent investment theory[74] and the used and useful test, which are joined together as the standard of

[72] Tr. (Vol. 2) 383-405.

[73] Case No. 15-00261-UT, *Corrected Recommended Decision* (NMPRC 08/15/16) at 88-89 ("*2015 PNM Rate Case Corrected RD*"), approved in part by *Final Order Partially Adopting Corrected Recommended Decision* (NMPRC 9/28/2016).

[74] In a 1985 decision addressing the allocation of the costs of Unit 2 at the Seabrook nuclear power plant in New Hampshire, which was canceled at 24% of completion with $811 million already spent, the Maine Public Utilities Commission (PUC) addressed the history of the prudent investment theory. The Main PUC found that the "theoretical underpinnings" of the concept of imprudence "lie in the work of those concerned with assuring that regulation, as the surrogate for competition, lead to economic efficiency. Since a competitive environment would penalize imprudent management, regulation should do no less. Thus, a 1917 article by Professor Edwin C. Goddard stated:

> 'The basis for all dealing involving purchase and rate making should be . . . what has been well called the efficient investment' – i.e., the amount honestly and prudently invested in the utility under normal conditions – no more, no less. The 'efficient investment' theory eliminates all consideration of losses due to mismanagement. Those must be charged to stockholders. . . .
>
> 'It is also in the public interest to assure, as far as possible, to the investor in public utilities, a return on what is really put into the utility in good faith and with prudence and good judgment. Such a condition would do much to substitute for the antagonism and often unreasonable suspicion now existing between the public and public service companies that harmonious and

prudence in the New Mexico Public Service Commission's (NMPSC) April 5, 1989 final order in Case No. 2146, Part II, which is cited by the Supreme Court as *Re Public Service Company of New Mexico.*[75] As set forth in that NMPSC order, for rate base inclusion utility plant expenditures must (1) have been prudently incurred; and (2) be used and useful.[76] In rejecting the "sole reliance" on the first element in the two-part standard, the PSC observed that the prudent investment theory

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> understanding relation based on mutual respect for rights and observance of duties that is so needed to make public service satisfactory.'"

Re Seabrook Involvements by Maine Utilities, Docket 84-113 (Phase II), 67 P.U.R. 4th 161, 1985 WL 1205843 *164-65 (Me. PUC 5/28/85) (quoting Goddard, Public Utility Valuation, 15 Michigan Law Review, 203, 223, 224 (1917)).

The last quoted paragraph of the 1917 Michigan Law Review article, invoking as it does the "public interest" in fostering a "harmonious understanding" between the public and public service companies "based on mutual respect for rights and observance of duties that is so needed to make public service satisfactory," calls to mind the regulatory compact that was being developed in the early 1900s alongside the prudent investment theory. To wit, in her rebuttal testimony in Case No. 19-00018-UT, PNM witness Lauren Azar, who served as a Commissioner at the Public Service Commission of Wisconsin and later as a senior advisor in the U.S. Department of Energy in the Obama administration, described the regulatory compact as follows:

> When electric utilities were first emerging in the early 1900s, the states agreed to provide them with protection from competitors if the utilities agreed to provide safe and reliable service at a reasonable cost to all customers within a specified service territory. In return, the utilities agreed that the states could regulate them. This agreement was called the regulatory compact. Under the compact, regulators ensure that the utilities do not abuse their market power as a monopoly. 'The essence of regulation is the explicit replacement of competition with governmental orders as the principal institutional device for assuring good performance.' Alfred Kahn *The Economics of Regulation: Principals and Institutions*, Vol. I. p. 20 (1970). The regulatory compact balances the public interest of customers with the business interests of the utility through, among other things, the following:
>
> - ensuring that the utility's service and rates are just, reasonable and non-discriminatory; and
> - providing the utilities an opportunity to recover prudently expended costs plus a reasonable return on their investments.
>
> The regulatory compact protects both customers and the utilities.

Case No. 19-00018-UT, Rebuttal Testimony of Lauren Azar, PNM Exh. 8 at 9-10.

[75] *Re Pub. Serv. Co. of N.M.*, 101 P.U.R. 4th 126, 148-53, 1989 WL 418588 (NMPSC 4/05/89) ("Case No. 2146, Part II, *Final Order*").

[76] Case No 2146 Part II, *Final Order* at 53 ("'[F]or rate base inclusion expenditures must satisfy not only the necessary condition of prudent investment but also must be 'used and useful' in providing service.'") (quoting *Tennessee Gas Pipeline Co. v. Fed. Energy Reg. Comm'n*, 606 F.2d 1094, 1123 (D.C. Cir. 1979); *see Accounting for Pub. Utils.*, § 4.03. Thus, the Supreme Court in *Public Serv. Co. of N.M. v. N.M. Public Reg. Comm'n*

> provides that ratepayers are not to be charged for negligent, wasteful or improvident expenditures, or for the cost of management decisions which are not made in good faith. In other words, ratepayers are not expected to pay for management's lack of honesty or sound business judgment.[77]

In her *Corrected RD,* the Hearing Examiner noted the U.S. Supreme Court's holding in *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 309 (1989) that a utility should only receive a profit n "prudent investments at their actual cost when made … [and is] limited to standard rate of return.…"[78] Accordingly, as the Hearing Examiners found in their *Certification of Stipulation* in considering the issue of prudence on Four Corners the first time around, "PNM should not earn a profit on its imprudent investments."[79]

Hence, in expressly adopting the "most artful expression" of the proposition that utility commissions should rely on the two-part prudently incurred/used and useful test in reviewing the prudence of utility plant expenditures, the NMPSC quoted the concurring opinion of Judge Starr in *Jersey Central Power Co. v. Fed. Energy Reg. Comm'n*[80] as follows:

> The two principles [prudence and used and useful] thus provide assurances that ill-guided management or management that simply proves in hindsight to have been wrong will not automatically be bailed out from conditions which government did not force upon it. That is, government forced upon the utility an obligation to provide service, but that obligation, as we have seen, is the quid pro quo for a protected area of service (and eminent domain authority). What is fundamental is that government did not force upon the utility a specific course of action for achieving the mandated goal.

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observed that "[i]n prior cases, the Commission has considered whether expenditures were prudently incurred and whether the asset is used-and-useful in providing service when determining the ratemaking treatment of expenditures on utility plants." 2019-NMSC-012, ¶ 16 (citing *Re Pub. Serv. Co. of N.M.*, 101 P.U.R. 4th, 126, 148-53, 1989 WL 418588).

[77] Case No 2146 Part II, *Final Order* at 50 (citations omitted).

[78] *2015 PNM Rate Case Corrected RD* at 88.

[79] Case No. 16-00276-UT, *Certif. of Stip.* at 67.

[80] *Jersey Central Power Co.*, 810 F.2d 1168 (D.C. Cir. 1987).

> Indeed, it would be curious if the Constitution protected utility investors entirely from business dangers experienced daily in the free market, the danger that managers will prove to have been overly sanguine about business prospects or the danger that a particular capital investment will not prove successful. In the face of anticipated demand, an airline may acquire additional aircraft, only to face unhappy consequences when passenger traffic does not meet expectations, perhaps due to economic factors entirely beyond management's control. Utilities are not exempt from comparable forces.[81]

Thus, as acknowledged by the Supreme Court in *Public Serv. Co. of N.M.*, the standard of care for prudence is as follows:

> Prudence is that standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time decisions had to be made. In determining whether a judgment was prudently made, only those facts available at the time judgment was exercised can be considered. Hindsight review is impermissible.
>
> Imprudence cannot be sustained by substituting one's judgment for that of another. The prudence standard recognizes that reasonable persons can have honest differences of opinion without one or the other necessarily being imprudent.[82]

In the 2015 Rate Case, after establishing the requirements for including a utility's expenditures in rates, the Hearing Examiner concluded that PNM's decisions to extend five PVNGS leases and purchase 64.1 MW of PVNGS Unit 2 capacity were imprudent. Her conclusion was based upon finding that PNM failed to show by a preponderance of evidence that it reasonably examined alternative courses of action and that the decision to extend the leases and purchase the capacity were its most cost-effective resource choices, and adequately and timely notified the Commission of its decisions.[83]

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[81] Case No 2146 Part II, *Final Order* at 54-55. The NMPSC then concluded the "foregoing analyses are quite consistent with New Mexico law" in starting its discussion of New Mexico law. *Id.* 55 (quoting *Jersey Central Power Co*., 810 F.2d at 1190-91).

[82] 2019-NMSC-012, ¶ 29 (quoting *2015 PNM Rate Case Corrected RD* at 89, which in turn quotes Case No. 2087, *Order on Burden of Proof and Specific Issues to be Addressed* at 4-5) (NMPSC 10/04/1988).

[83] *Id.* 89, 99.

In its *Final Order*, the Commission did not agree that PNM's decision to extend the PVNGS leases and acquire the PVNGS capacity was necessarily imprudent because PNM didn't timely and adequately notify the Commission in advance of making the decisions.[84] More importantly, the Commission did agree that PNM failed to justify a finding that it acted prudently in renewing the Palo Verde leases[85].

Subsequently, on appeal of the final order in the 2015 Rate Case, the New Mexico Supreme Court addressed in its opinion, among other things such as PNM's unsuccessful challenge of the Commission's decision to deny recovery of $52.3 million for the installation of balanced draft technology at San Juan Generating Station,[86] PNM's challenge to the Commission's conclusion that repurchase of the 64.1 MW and the lease renewals were imprudent.[87] The Supreme Court noted as indicated above that the prudence standard found in the *Corrected RD* accurately articulated the prudence standard the Court had previously recognized in *PNM Gas Services*, 2000-NMSC-012, ¶ 63, 129 N.M 1.[88] This standard encapsulates the following: in determining whether a judgment was prudently made, only those facts available at the time judgment was exercised can be considered; hindsight review is impermissible; and imprudence cannot be sustained by substituting one's judgment for that of another.[89]

Pausing before concluding its analysis of PNM's challenge, the Court determined that

> it was not inappropriate for the Commission to address whether PNM had demonstrated Palo Verde to be cost-effective or the lowest cost alternative. We

[84] Case No. 15-00261-UT, *Final Order* at 33.

[85] *Id.* 37, 38.

[86] *Public Serv. Co. of N.M.*, 2019-NMSC-012, ¶¶ 78-89.

[87] *Id.* ¶¶ 26-38.

[88] *Id.* ¶ 29.

[89] *Id.*

observe that there is a meaningful relationship from the perspective of the ratepayers between the consideration of alternatives and the cost of the chosen generation resource. The goal of the consideration of alternatives is, of course, to reasonably protect ratepayers from wasteful expenditure. *PNM*, 101 P.U.R. 4th at 151. The failure to reasonably consider alternatives was a fundamental flaw in PNM's decision-making process. *See In re PacifiCorp* (*PacifiCorp*), UE 246, Order No. 12-493 at 26-27, 2012 WL 6644237 (Or. P.U.C. Dec. 20, 2012) (stating, in the context of analyzing a utility's failure to reasonably consider alternatives, that the decision-making process of the utility is properly included in the prudence analysis).[90]

However, the Court proceeded to note in *dicta* that[91]

even if a utility company was imprudent because it failed to prospectively consider alternatives, that imprudence may be mitigated by a demonstration that the decision of the utility nevertheless protected ratepayers from excess cost. *See PacifiCorp*, UE 246, Order No. 12-493 at 26, 2012 WL 6644237 ("It is possible that the utility may be able to present sufficient information from external sources . . . to establish that its ultimate decision was prudent – regardless of what internal decision-making process was used[.]"). Conversely, even if a utility reasonably considered alternatives but then chose to pursue an unreasonable alternative, the consideration of alternatives may be insufficient. *Cf. id*. (stating that although the prudent investment standard does not require optimal results, it does require that the utility's action was objectively reasonable).[92]

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[90] *Id.* ¶ 32.

[91] The Court expressly said it was *dicta* in indicating at the end of this discussion that "[i]n the context of the case before use, *we need not and do not fully address these issues*. We therefore conclude that the Commission did not apply a new 'least cost alternative' test without notice, as PNM contends, but instead reasonably applied the prudence standard previously established by the Commission and recognized by this Court." 2019-NMSC-012, ¶ 32 (emphasis added).

[92] *Id.* In the *PacifiCorp* Order discussed at length by the Supreme Court, omitted was the paragraph after the "information from external sources (what it should have known)" discussion in the Oregon PUC order under the heading "Prudence Standard for Utility Investments." That following paragraph reads as follows

That order [Order No. 02-469, where the "imprecisely worded" standard was clarified by the PUC] should not, however, be interpreted as saying that a utility's decision is not relevant to a prudence determination. Contrary the language in docket UM 995, the process used by the utility is highly valuable in determining whether the utility's actions were reasonable and prudent in light of the circumstances which then existed. The prudence standard examines all actions of the utility – including the process that the utility used to make a decision. Although there may be circumstances where a utility is able to overcome the inability to explain its

Ultimately, the *PacifiCorp* mitigation standard embedded in the final quoted passage, and of which PNM strives to make much of in this case, was expressed by Supreme Court in *dicta* as the Court found that the Commission did not depart from the established standard of prudence and held that the "Commission's determination that PNM's decisions were imprudent was supported by substantial evidence, was not arbitrary or capricious, was not contrary to law, and was thus lawful and reasonable."[93]

The *PacifiCorp* case from Oregon alluded to above was, along with another analogous case litigated before the Washington commission, were evaluated closely in the 2016 Rate Case and were briefed again in this case by PNM and NEE.[94] In both cases, the Oregon and Washington and commissions held that utilities installing SCR pollution controls were imprudent for failing to conduct updated computer modeling immediately prior to committing themselves to the significant costs of SCR investments. Those two cases remain worthy of discussion, as does a subsequent decision also addressing the prudency of SCR investments issued by the Oregon PUC in 2020.

In the 2012 *PacifiCorp* order, the Oregon Public Utility Commission held that the utility PacifiCorp, dba, Pacific Power, was imprudent (1) for not considering legitimate alternative options and timing to comply with the emission reductions of the EPA's Regional Haze rule and (2) for not updating its computer modeling performed three to six months before executing installation contracts and approving the start of construction for SCR and other pollution controls

> internal decision-making processes, ***a utility's actions are generally a primary consideration in a prudence review***.

PacifiCorp, UE 246, Order No. 12-493 at 26 (emphasis added).

93 *Id.* ¶ 38.

94 *See, e.g.*, PNM Br. at 229-31; NEE Br. at 46, 67, 86, 92.

at seven of the utility's 19 coal-fueled generation units. Pacific Power was seeking recovery of the $170 million of the Oregon portion of $661 million total cost of the investments.[95]

For each investment, Pacific Power performed a present value revenue requirement differential (PVRR(d)) analysis, which compared the expected costs of installing the proposed emissions control equipment and continuing to operate a plant through the end of its depreciable life versus idling or closing the plant and replacing the power with market purchases. The PVRR(d) analyses were usually conducted three to six months before executing contracts but were not reevaluated before the start of construction.

The Oregon commission found that Pacific Power was imprudent because (1) it only compared the cost of continued operations against the cost of market purchases (i.e., not against the cost of alternative resources) and (2) it failed to perform appropriate analyses to determine the cost-effectiveness of the investments. One of the problems cited was Pacific Power's failure to update its PVRR(d) analyses:

> Failure to update analyses: While we do not expect a utility to engage in a never-ending process of reconsideration of its investment decisions, ***with major resource investments such as these, a reasonable utility would consider changing conditions that significantly impact the financial viability of the investments. The evidence in the record shows substantial changes in the economics of Pacific Power's investments if assumptions had been updated just prior to the time of at least two significant milestones: contract signing and the start of construction***. With updated analyses, Pacific Power would have had more refined estimates of market prices, gas prices, capital costs, and costs of other regulations, among other factors. Sierra Club and CUB have shown substantial changes to the economics of the investments with properly updated analyses. For example, CUB and Sierra Club showed that if Pacific Power had conducted analyses for Naughton Units 1 and 2 before signing a contract in May 2009 to upgrade the units, and before beginning construction in June 2010, on each date the updated results would have shown a substantial negative PVRR(d) result for the proposed retrofits. As CUB and Sierra

[95] *PacifiCorp*, UE 246, Order No. 12-493 at 17, 27-32, 2012 WL 6644237 Order No. 12 493 UE 246, 2012 WL 6644237 (Or. PUC 12/20/12).

Club point out, updated analyses for these plants would have raised "red flags" which would have merited a slow-down in decision-making and further analyses.[96]

Significantly, too, for the PNM resource analyses scrutinized in this case, Pacific Power included known and reasonably anticipated future capital investments in determining the expected costs of continued operation, as well as assumptions regarding national economic conditions, natural gas prices, and future carbon risk.[97] Ultimately, for Pacific Power's demonstrated imprudence, the Oregon PUC imposed a 10% disallowance of the $170 million cost of the investment. The commission ordered Pacific Power to file a tariff rider crediting ratepayers with the $17 million disallowance during the upcoming calendar year.[98]

In the more recent Oregon commission *PacifiCorp* decision addressing PacifiCorp's request to include in rate base SCR system investments ($56.9 million gross plant value on an Oregon-allocated basis) in Jim Bridger Units 3 and 4, the Oregon PUC concluded that PacifiCorp[99]

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[96] *PacifiCorp* at 30 (italicized emphasis added). The Oregon commission also criticized Pacific Power's failure to conduct meaningful sensitivity and scenario analyses, finding at 29,

> Lack of meaningful sensitivity and scenario analyses: Major resource decisions should not rely largely on single point forecasts, but should instead be shown to be robust over a wide range of futures/scenarios and input assumptions. As CUB's and Sierra Club's analyses showed, the economics of the utility's projects changed significantly based on changes in the assumptions about single variables such as wholesale prices or closure date. This alone signals that all of the investments should have been stress-tested against a wide range of futures and varied input assumptions and that a second stage of more rigorous analyses were merited for a number of the investments. The *ad hoc* analyses that were conducted during this case cannot substitute for the depth and breadth of analyses that should have occurred at the time of the decision.

[97] *Id.* 20.

[98] *Id.* 32.

[99] In the 2020 order, the Oregon commission switched from using the subsidiary operating division's name (Pacific Power) as it had in the 2012 order to its parent corporation's name, PacifiCorp. According to Wikipedia, the parent of PacifiCorp is Berkshire Hathaway Energy. PacifiCorp's owners are Berkshire Hathaway (92%) and the Walter Scott Jr. family (8%). *See* https://en.wikipedia.org/wiki/PacifiCorp.

had not adequately considered alternatives to SCR for compliance with Regional Haze Rules.[100] PacifiCorp had argued that the even if the SCRs had not remained the most cost-effective path, they were bound to the SCR path due the Wyoming Department of Environmental Quality's implementation of Regional Haze Rules. The Oregon commission did not find PacifiCorp's justification persuasive because the record showed that the utility had "failed to demonstrate proactive exploration of alternatives – both at the beginning and the end of the environmental regulatory process, and in the face of significant changes in economic value."[101] In assigning a remedy, the Oregon PUC decided a full disallowance was not called for "because of (1) . . . there was some uncertainty about what would have occurred had PacifiCorp acted prudently to explore and evaluate alternative options, and (2) . . . it was most likely that alternative compliance pathways would have still resulted in some material compliance costs."[102] The PUC also declined Staff's recommendation to impose a 10% management disallowance to the Oregon-allocated gross book value of the investments, a proposal that echoed the Commission's action in the 2012 *PacifiCorp* remedy. Instead, the Oregon PUC adopted a remedy that allowed the Oregon-allocated remaining book value of the investment into rates but did not allow PacifiCorp to include a return on equity in its "return on" the investment. PacifiCorp's return on the investment thus was limited to its cost of long-term debt, which would apply to the entire remaining investment.[103]

In the 2016 Washington case involving Units 3 and 4 of the Jim Bridger power plant, the Washington Utilities and Transportation Commission (WUTC) found that Pacific Power was

[100] *In re PacifiCorp*, UE 374, Order No. 20-473 at 65-81, 2020 WL 7658074 (Or. PUC 12/18/2020) ("*PacifiCorp II*").

[101] *Id.* 80.

[102] *Id.* 80-81.

[103] *Id.* 81.

imprudent for not updating its computer modeling in the six months between (1) May 2013 when it initially performed computer modeling and signed on May 31, 2013 a limited notice to proceed on an engineering, procurement and construction services contract to install SCR pollution controls and (2) December 1, 2013 when it issued a final notice to proceed (FNTP) on the installation.[104] Pacific Power used its System Optimizer model (SO model) in May 2013 to produce a present value revenue requirement differential (PVRR(d)) analysis between the installation of SCR and other alternatives.[105] Based on the SO model analysis, Pacific Power made the decision to install SCR, and on May 31, 2013, the Company signed a limited notice to proceed (LNTP) on an engineering, procurement, and construction services contract for the SCR installation.[106]

The WUTC found that that Pacific Power's use of the SO model leading up to the LNTP in May 2013 constituted a thorough analysis of its options at that time and that its initial decision was prudent. But the WUTC also found that Pacific Power should have updated its analysis before finally committing to the project in December 2013:

> However, our inquiry does not end there. Simply because a decision to begin a project is initially prudent does not, *ipso facto*, make the continuation or actual completion of the project prudent. ***We have required that companies "continually evaluate a project as it progresses to determine if the project continues to be prudent from both the need for the project and its impact on the company's ratepayers." For that reason, we must ask, based on what Pacific Power knew or should have known from May 2013 when it entered into the LNTP, through December 1, 2013, when it signed the FNTP and committed itself to the installation, whether a reasonable board of directors or company management would have continued the SCR project***. Based on the evidence, or lack thereof, in

[104] *Washington Utilities and Trans. Comm'n v. Pacific Power & Light Company*, Docket UE-152253, Order 12 (Final Order, Redacted Version) at 25, 38, 40, 332 P.U.R. 4th 1, 2016 WL 7245476 (WUTC 9/01/2016) ("*WUTC Pacific Power Order*").

[105] *Id.* 24.

[106] *Id.* 25. The SCR system on Unit 3 went into service in November 2015, and, as of the date of the Commission's decision, the SCR system on Unit 4 was under construction and scheduled to go into service in November 2016. *Id.*

> the record, and as discussed below, we find that the Company has failed to present the requisite contemporaneous documentation to show that the continued implementation of the SCR systems was ultimately prudent.[107]

The WUTC found little evidence in the record to indicate that Pacific Power reconsidered its earlier analysis in light of declining natural gas prices and potentially increased coal costs. Pacific Power did not re-run its SO model, and there were no documents describing the decision-making leading to the actual FNTP decision. The WUTC noted that it was presented with statements from Pacific Power witness of what the company said its employees did or thought at the time, but Pacific Power provided no supporting contemporaneous documentation. The only document in the record describing the decision to move forward with the final notice to proceed was a December 5, 2013 memo that was prepared after the final decision to proceed was made. The WUTC found that the memo could not be shown to have played a part in the Pacific Power's decision-making.[108]

The WUTC therefore determined that Pacific Power had failed to meet its burden of demonstrating that its final decision to continue with the SCR installations on Units 3 and 4 was prudent. The WUTC found that, "considering the significant economic changes in both coal costs and natural gas pricing between May and December 2013, the decision to continue the SCR installation project was not sufficiently demonstrated by [Pacific Power to be prudent in all respects, and the full costs of its decision should not be borne by the ratepayers in Washington."[109] Consequently, while the WUTC authorized Pacific Power to recover the expenses for Unit 3 in the first year of the two-year rate plan and the expenses for Unit 4 in the second year, the commission

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[107] *Id.* 34-35 (emphasis added).

[108] *Id.* 36.

[109] *Id.* 38.

did not authorize (disallowed) Pacific Power to collect *any return* on either investment as a result of the WUTC's findings and conclusions.[110]

The decisions in the Oregon and Washington are consistent with rulings of the New Mexico Commission and the Supreme Court in applying the prudence standard. In sum, as the authorities just summarized instruct, this and other Commissions have held in addressing the prudency of utility resource acquisitions and extensions that utilities must conduct reasonable alternatives analyses before selecting resources. Deficiencies in the analyses may warrant non-recovery of all or a portion of the costs of resources imprudently selected.[111]

8.1.3. Parties' Positions on Prudence and Remedies

Parties briefing the Four Corners issue of prudence and taking positions to various degrees of commitment on the prudence issue and remedies for asserted imprudence include PNM, intervenors ABCWUA, NMAG, Bernalillo County, NM AREA, NEE, Sierra Club, and Staff. The parties' positions are summarized below and the issues they raise are discussed in the succeeding analysis sections on prudence and remedies. Due to the length of the decision and time constraints, to the extent any of the myriad arguments on the Four Corners prudence issue or remedies for imprudence set forth in the post-hearing briefing is not expressly noted in the text below, the Hearing Examiners have considered them and, accordingly, such unaddressed issues should be

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[110] *Id.* 40.

[111] *See, e.g.*, *2015 PNM Rate Case Corrected RD* at 89 (PNM's decisions to extend five Palo Verde leases and purchase a 64.1 MW interest in Palo Verde Unit 2 were imprudent because PNM failed to show by a preponderance of the evidence that it reasonably examined alternative courses of action and that its decisions to extend the leases and purchase the 64.1 MW were its most cost effective resource choices), approved in *Final Order Partially Adopting Recommended Decision* (9/18/2016), *affirmed on appeal* in *Public Serv. Co. of N.M. v. N.M. Public Reg. Comm'n*, 2019-NMSC-012, ¶¶ 38. *See also* Case No. 2382, *Recommended Decision*, Case No. 2382, 166 P.U.R. 4th 318, 98, 102 (NMPUC 7/05/1995) (PNM's alternatives analysis was not sufficiently reliable to determine whether the OLE transmission line project was in fact the best alternative among those presented by PNM) approved in *Final Order Approving Recommended Decision* (NMPUC 11/20/1995).

deemed disposed of consistent the Hearing Examiners' analyses and recommendations that follow this recitation of the parties' positions.

8.1.3.1. PNM

The only party in this case that affirmatively maintains PNM's decision to extend the company's participation in Four Corners beyond 2016 was prudently taken is PNM. PNM argues its decision to remain a participant in Four Corners was prudent and customers have benefitted from this decision. PNM asserts the plant has been used and useful, supplying over 4.95 million MWh of energy since 2017.[112] PNM states that Four Corners has been a "critical part of supplying customer needs during extreme weather events, such as those in California in the summer of 2020 and the polar vortex in the southwest in 2021."[113] PNM thus predicts that unless and until abandonment is authorized along with approval of necessary replacement resources, Four Corners will continue to be needed to safely and reliably serve PNM's customers.[114]

In PNM's view, to conclude that its decision to remain in FCPP was imprudent requires more than a showing that the decision-making process was "imperfect."[115] To PNM, it requires a showing that there was a "clear alternative, given the circumstances known at the time."[116] The evidence, PNM argues, "shows that is not the case."[117] But even if one accepts the argument that the decision was imprudent and chooses to ignore the significant benefits of reliable electricity

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[112] PNM Br. at 201.

[113] PNM Br. at 201-02 (citing PNM Exh. 22 (Heffington Dir.) at 53-54).

[114] PNM Br. at 202 (citing PNM Exh. 22 (Heffington Dir.) at 54).

[115] *Id.*

[116] *Id.*

[117] *Id.*

FCPP has provided, PNM contends the testimony shows that consumers have had greater economic benefit from the extension than they would have received from alternatives.

Curiously but unsurprisingly given the assertions reported in the last paragraph, while the long established principles for including utility expenditures in rates, i.e., the prudent investment theory and prudence standard, have been applied and elaborated on by this Commission and the New Mexico Supreme Court for many decades,[118] PNM articulates in its brief-in-chief a seemingly untested standard for the prudence review being conducted here:

> A prudence analysis ***can be viewed*** in three parts: first, whether a reasonable decision-making process was undertaken; second, whether the ultimate decision reasonably would have changed if there were no failings in the decision-making process; and third, whether there was a financial harm in the form of excessive costs to customers as a result of the decision that was made, such that a financial remedy is necessary.[119]

The phrase "can be viewed" is emphasized in the quoted text because PNM does not identify what, if any, legal authority "views" or defines a prudence analysis in the precise framework articulated by PNM. PNM's three-part standard, the second part apparently inspired by *dicta* from the 2019 *Pub. Serv. Co. of N.M.* decision, which itself was referencing *dicta* in the 2012 *PacifiCorp* Oregon PUC Order,[120] appears manufactured to reach a preordained conclusion

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[118] *See supra* Section 8.1.2 (setting forth the prudence review standards).

[119] PNM Br. at 203 (emphasis added).

[120] As discussed in Section 8.1.2 above in setting forth the prudence standard, in *Pub. Serv. Co. of N.M.* the Supreme Court summarized the following *dicta* from the Oregon PUC's *PacifiCorp* order toward the end of the Court's discussion of the prudence standard:

> However, even if a utility company was imprudent because it failed to prospectively consider alternatives, that imprudence may be mitigated by a demonstration that the decision of the utility nevertheless protected ratepayers from excess cost. *See PacifiCorp*, UE 246, Order No. 12-493 at 26, 2012 WL 6644237 ("It is possible that the utility may be able to present sufficient information from external sources . . . to establish that its ultimate decision was prudent – regardless of what internal decision-making process was used[.]"). Conversely, even if a utility reasonably considered alternatives but then chose to pursue an unreasonable alternative, the consideration of alternatives may be insufficient. *Cf. Id.* (stating that although the prudent

that PNM's decision was prudent based on its outside consultant's methodologically flawed counterfactual reconstruction, a contrary to fact re-engineering of a utility resource decision that even the hired consultant concedes was the product of faulty decision-making on PNM management's part.[121] The Commission needn't decide in this case whether PNM's unattributed three-part mitigation standard is ***the*** standard for analyzing the prudence of utility resource decisions.[122] The correct legal standards for the prudence review underway have already been articulated in Section 8.1.2 and they are applied to the facts as demonstrated below. As far as this case is concerned, the debate over applicable standards is moot because even under PNM's stilted

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> investment standard does not require optimal results, it does require that the utility's action was objectively reasonable).

2019-NMSC-012, ¶ 32.

But what the Supreme Court and PNM left out of their discussions of the *PacifiCorp* Order was, as already noted above but restated here so the key element in a prudence review is not forgotten, the Oregon PUC's concluding point in stating the prudence standard for utility investments that

> That order [Order No. 02-469, where the "imprecisely worded" standard was clarified by the PUC] should not, however, be interpreted as saying that a utility's decision is not relevant to a prudence determination. Contrary the language in docket UM 995, the process used by the utility is highly valuable in determining whether the utility's actions were reasonable and prudent in light of the circumstances which then existed. The prudence standard examines all actions of the utility – including the process that the utility used to make a decision. Although there may be circumstances where a utility is able to overcome the inability to explain its internal decision-making processes, ***a utility's actions are generally a primary consideration in a prudence review***.

PacifiCorp, UE 246, Order No. 12-493 at 26 (emphasis added).

[121] *See, e.g.*, Tr. (Vol. 3) 806, 808-09, 930-31, 948, 951-52 (Graves).

[122] The Hearing Examiners caution the Commission against setting in stone dubiously applied and seemingly contradictory principles that haven't been applied by Courts or regulatory agencies in analogous circumstances; at least none have been brought the Hearing Examiners' attention by PNM or another party and the Hearing Examiners could find no suitable precedent in their research.

mitigation standard that insidiously invites improper hindsight and subjectivity[123] back into the prudence review,[124] the *post hoc* prudence analysis performed by company witness Frank Graves fails PNM's own test, as shown in Section 8.1.4.1.4 below.[125]

8.1.3.1.1. PNM's Position that its 2012-2013 Decision to Remain in FCPP was Prudent

In defense of the asserted prudence of the company's decision to extend its participation in the Four Corners plant beyond 2016, PNM makes three principal arguments. First, the evidence presented by PNM in this case and the 2016 Rate Case supporting a finding of prudence. Second, the company's outside consultant retained in this case and Case No. 21-00017-UT "independently confirmed" that PNM's decision to continued participating in Four Corners was "prudent and reasonable." And third, the contemporaneous FCPP analyses by other co-owners in the plant confirm that Four Corners is a "viable utility resource."[126]

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[123] In terms of manipulating selective datasets skewed to reach a foreordained conclusion of "prudence," i.e., *post-hoc* "backfilling" curated data "that the Company executives did not consider" to reach "an after-the-fact rationalization." Tr. (Vol. 10) 3290-91 (Sandberg).

[124] *See* Water Authority Br. at 17 ("Mr. Graves approach to the analysis of the prudence of PNM's decision to extend its participation in the FCPP was a proxy analysis of what PNM could have done when it decided whether to extend its participation. This approach is directly at odds with the law set out by the New Mexico Supreme Court. As stated above, the Court's standard for a prudence review includes the following: in determining whether a judgment was prudently made, only those facts available at the time judgment was exercised can be considered; hindsight review is impermissible; and imprudence cannot be sustained by substituting one's judgment for that of another.").

[125] Furthermore, as the analyses of the imprudence and remedies evidence in this decision make abundantly clear, the Hearing Examiners further find, Sierra Club is correct in asserting in its Response Brief that

> [i]t is unnecessary for the Commission to decide whether PNM's three-part standard is the correct standard, because Sierra Club has already pointed to record evidence that satisfies all three parts of PNM's standard. Sierra Club has cited evidence compelling the conclusion that (1) PNM's decision-making process was imprudent; (2) PNM's substantive decision was imprudent, based on what PNM knew or should have known at the time it acted; and (3) PNM's customers have and will suffer over $200 million in excess costs as a result of PNM's imprudent decision.

Sierra Club Resp. Br. at 1. These findings and conclusions are reflected in Section 8.1.4.1.5 below.

[126] *See* PNM Br. at 207-18.

First, regarding PNM's assessment of the evidence from Case No. 16-00276-UT and this case that support a finding of prudence, PNM argues that the company's decision resulted in a reasonable fuel cost under the coal supply agreement and prudently incurred plant investments that have provided reliable and needed base-load power at a reasonable cost to customers. PNM claims it introduced substantial evidence in this proceeding confirming the prudence of its decision to stay with Four Corners, based on the studies of its outside consultant, Frank C. Graves of the Brattle Group, "supplementing," as PNM puts it, PNM's original planning record and showing that other parties' criticisms and challenges are not sufficient to alter the prior findings that FCPP was "the reasonably preferred resource at that time."[127]

Regarding the evidentiary record developed on the FCPP prudence issue in Case No. 16-00276-UT, PNM's highly selective review[128] begins with its argument that the administratively noticed evidence confirms that PNM's decision to retain its interest in Four Corners was prudent. PNM contends it showed in Case No. 16-00276-UT that the company conducted multiple financial and resource planning analyses before deciding to extend its participation in Four Corners. PNM says it analyzed Four Corners in 2008, 2009, 2011 and 2012, inclusive of two IRPS, all of which showed that FCPP was the preferred resource option.[129] Due to what it describes as "high fuel

[127] PNM Br. at 207-08.

[128] PNM's patently limited reading of the evidence on prudence from Case No. 16-00276-UT led one intervenor, ABCWUA, to observe that "PNM's arguments are just as *notable for what they do address as much as for what they don't*. In its discussion of the 2016 Rate Case, PNM does not address the findings in the Certification of Stipulation that support the finding of imprudence and the recommended remedy. PNM references the testimony of Patrick O'Connell, yet it does not address the related issues identified in the Certification of Stipulation." Water Authority Resp. Br. at 9-10. Indeed, while PNM witness O'Connell is referenced selectively, PNM fails to mention any of the testimony of its other prominent witness on the issue of prudence in the 2016 Rate Case, Chris Olson. Mr. Olson was PNM's vice president of generation during the 2013 negotiations and PNM's primary negotiator of the extended FCPP ownership and operating agreements. Water Authority Resp. Br. at 9-10.

[129] PNM Br. at 208 (citing Comm'n AN Exh. 70 (Tr. Vol. 3, 8/9/2017) O'Connell at 479-80).

price volatility and capital costs for a new resource," PNM concluded that "carbon costs would need to be higher than modeled to justify the retirement of existing coal resources in favor of either additional nuclear or combined cycle natural gas resources."[130] PNM states that its 2011 IRP found that in abandoning PNM's 200 MW share in Four Corners, the next least-cost resource would be a 252 MW combined cycle natural gas plant, which resulted in a projected $190 million more in expense on a net present value (NPV) basis than continued use of PNM's interest in Four Corners.[131]

PNM states that in May of 2012, the company "updated" its 2011 IRP analysis with additional assumptions, including a high, medium, and low coal price forecast after receiving new pricing for a CSA extension beyond 2016 which was below the forecast prices.[132] This allowed PNM to take a so-called "second look" at the 2011 IRP with updated information.[133] PNM represents that the updated coal prices made the May 2012 analysis "even more favorable toward retaining Four Corners because the proposed new CSA was lower cost than three of the four coal cost scenarios used in the earlier analysis."[134] PNM notes that the May 2012 analysis also modeled updated environmental compliance costs, including SCR and a carbon price of $20 per ton, with an escalation of 2.5% per year.[135] In the end, PNM's May 2012 analysis concluded a combined cycle natural gas plant would be $33.5 million to $44 million more expensive, on an NPV basis,

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[130] *Id.* (citing Comm'n AN Exh. 59 (O'Connell Reb. Test. in Support of Revised Stip. (July 21, 2017) (hereinafter "O'Connell Reb.") at PNM Exh. PJO-4 Reb. at 1-4 of 14).

[131] PNM Br. at 208-09 (citing Comm'n AN Exh. 59 (O'Connell Reb.) at PNM Exh. PJO-4 Reb. at 1-2 of 14).

[132] PNM Br. at 209 (citing Comm'n AN Exh. 59 (O'Connell Reb.) at 3, 6, 11.

[133] *Id.* (citing Comm'n AN Exh. 59 (O'Connell Reb.) at 3).

[134] *Id.* (citing Comm'n AN Exh. 59 (O'Connell Reb.) at 12).

[135] *Id* (citing Comm'n AN Exh. 59 (O'Connell Reb.) at 3, 7).

than remaining with Four Corners.[136] PNM then notes that in October of 2013, the PNM Board formally approved entering into the new CSA, and the new CSA was executed in December 2013, thereby allowing PNM and the remaining other FCPP co-owners to extend the ownership agreements.[137]

In analyzing proposed changes to its resource portfolio in January 2014, PNM states that it updated the May 2012 analysis using the actual coal prices from the CSA to be entered in 2016 while adjusting downward expected carbon prices and forecast peak demand.[138] PNM says the January 2014 analysis showed a benefit of $132 million from remaining with Four Corners, which only confirmed the PNM's decision in the fourth quarter of 2013.[139] While forecasted peak demand was decreased in the January 2014 analysis, PNM notes that the company had filed Case No. 13-00390-UT in December 2013 to abandon San Juan Units 2 and 3 as part of its compliance with the U.S. Environmental Protection Agency's (EPA) best available retrofit (BART) environmental requirements, which was expected to result in a reduction of 340 MW firm baseload capacity in PNM's generation portfolio.[140]

PNM next asserts that during the 2016 Rate Case, PNM witness Patrick O'Connell explained why NEE's criticisms of its decision-making process were unpersuasive. According to PNM, Mr. O'Connell explained that the lack of an updated assessment in 2013, between the May 2012 and January 2014 analyses, did not show imprudence because NEE's witnesses did not

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[136] *Id.* (citing Comm'n AN Exh. 59 (O'Connell Reb.) at 10).

[137] *Id.* (citing Case No. 16-00276-UT, *Certif. of Stip.* at 28 (discussing PNM Board's decision to extend CSA and co-tenancy agreement)).

[138] *Id.* (citing Comm'n AN Exh. 59 (O'Connell Reb.) at 14-15).

[139] PNM Br. at 209-10 (citing Comm'n AN Exh. 59 (O'Connell Reb.) at 14).

[140] PNM Br. at 210 (citing Comm'n AN Exh. 59 (O'Connell Reb.) at 15).

actually quantify what an updated assessment would have shown and there were no significant changes to resource drivers necessitating such an update.[141] Regarding updates in carbon pricing, PNM says O'Connell explained that carbon pricing inputs in an updated analysis would have matched the inputs from PNM's 2014 IRP, which used a lower $13.40 per ton beginning in 2020 rather than $20 per ton beginning in 2013.[142] And the changes in the natural gas market, PNM maintains, also would not have had a controlling effect, alluding to the updated gas prices in 2014 (similar, PNM says, to gas prices that would have been used in a 2013 analysis), which showed higher forecasted natural gas prices than the prices used in the May 2012 analysis.[143] PNM points out that Mr. O'Connell also noted that PNM already had planned to retire 340 MW of coal baseload and that it simply did not make sense to impose other major changes on the system at that same time.[144] Indeed, avoidance of such risks to customers by changing the system all at once without a regulatory or legislative mandate may have itself been imprudent. Similarly, the retirement of the 340 MW of capacity at the San Juan also counterbalanced any impact of a lower load forecast on the decision to stay with Four Corners.[145] Based on the foregoing facts, PNM states that Mr. O'Connell concluded that an updated analysis in 2013 would not have changed the decision to continue with Four Corners. PNM thus maintains the evidence shows that the company "was aware of relevant shifts in the prevailing market conditions but also understood that they did not

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[141] *Id.* (citing Comm'n AN Exh. 59 (O'Connell Reb.) at 13-14).

[142] *Id.* (citing Comm'n AN Exh. 59 (O'Connell Reb.) at 14-15).

[143] *Id.* (citing Comm'n AN Exh. 59 (O'Connell Reb.) at 16 and PNM Exh. PJO-2 Reb. at 3 of 3).

[144] PNM Br. at 210-11 (citing Comm'n AN Exh. 59 (O'Connell Reb.) at 13).

[145] PNM Br. at 211 (citing Comm'n AN Exh. 59 (O'Connell Reb. at 15).

alter the earlier findings, even without running complex system planning models to reach that insight."[146]

Attempting to account for the lack of ongoing capital costs at Four Corners used in PNM's May 2012 analysis, PNM maintains that PNM witness Patrick O'Connell explained that correcting the omission in a late 2013 analysis again would not have changed the outcome of PNM's analysis because it likely would have been offset by the countervailing effects of the lower assessed carbon price.[147] "This result," PNM continues "is confirmed" by the "updated analysis" performed by PNM witness Frank Graves.

In sum, PNM asserts that the foregoing facts and analyses support the reasonableness of PNM's 2012-2013 decision to extend its participation in Four Corners, which included the SCR investments to keep Four Corners running in compliance with the EPA's BART determination.[148]

Second, turning to the alleged confirmatory analysis conducted by its outside expert witness, Frank Graves of the Brattle Group, PNM states that Mr. Graves reviewed the evidentiary records in Case Nos. 13-00390-UT, 15-00261-UT, and 16-00276-UT in order to evaluate the prudence of PNM's decision-making with respect to Four Corners. PNM maintains that Mr. Graves' evaluation and analysis are consistent with the holding of the New Mexico Supreme Court that "imprudence may be mitigated by a demonstration that the decision of the utility nevertheless protected ratepayers from excess cost."[149]

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[146] *Id.*

[147] *Id.* (citing Comm'n AN Exh. 59 (O'Connell Reb.) at 17).

[148] *Id.*

[149] PNM Br. at 212 (quoting *Public Serv. Co. of N.M.*, 2019-NMSC-012, ¶ 32). As addressed in fuller context above, *see* Section 8.1.2 *supra*, in the opinion from which the *dicta* regarding mitigation is quoted above, the Supreme found the Commission did not depart from the established standard of prudence in determining

For context, PNM explains that Mr. Graves noted that that there is no single objective notion of sufficient thoroughness in resource planning because it is a sophisticated and complex, time- and resource-consuming exercise, and in principle, every such study (IRP) could have been done more thoroughly.[150] This observation, PNM submits, is in keeping with the standard that reasonable persons can disagree on a process without one or the other's approach being imprudent. PNM further explains Mr. Graves' observation that resource planning has evolved significantly since 2013 with the development of ever more sophisticated planning tools. Graves points out that a finding of prudence does not require agreeing with all the assumptions or methods of the utility. The goal of the review, PNM continues, is not to substitute an intervenor's view (or even the Commission's view) of how it would have managed the analysis. It is instead, PNM postulates, to determine that there was reasonable use of the information available at the time of the decision

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PNM acted imprudently in repurchasing 64.1 MW of PVNGS capacity and to renew five leases on the remaining PVGNS capacity for 8 years at 50% of the original cost). as follows:

> We observe that there is a meaningful relationship from the perspective of the ratepayers between the consideration of alternatives and the cost of the chosen generation resource. The goal of the consideration of alternatives is, of course, to reasonably protect ratepayers from wasteful expenditure. *PNM*, 101 P.U.R. 4th at 151. The failure to reasonably consider alternatives was a fundamental flaw in PNM's decision-making process. *See In re PacifiCorp* (*PacifiCorp*), UE 246, Order No. 12-493 at 26-27, 2012 WL 6644237 (Or. P.U.C. Dec. 20, 2012) (stating, in the context of analyzing a utility's failure to reasonably consider alternatives, that the decision-making process of the utility is properly included in the prudence analysis). However, even if a utility company was imprudent because it failed to prospectively consider alternatives, that imprudence may be mitigated by a demonstration that the decision of the utility nevertheless protected ratepayers from excess cost. *See PacifiCorp*, UE 246, Order No. 12-493 at 26, 2012 WL 6644237 ("It is possible that the utility may be able to present sufficient information from external sources . . . to establish that its ultimate decision was prudent – regardless of what internal decision-making process was used[.]"). Conversely, even if a utility reasonably considered alternatives but then chose to pursue an unreasonable alternative, the consideration of alternatives may be insufficient. *Cf. Id.* (stating that although the prudent investment standard does not require optimal results, it does require that the utility's action was objectively reasonable).

Pub. Serv. Co. of N.M., 2019-NMSC-012, ¶ 32.

[150] PNM Br. at 212 (citing PNM Exh. 18 (Graves Reb.) at 10).

with sound methods of analysis.[151] PNM thus contends it evaluated "the plausible future conditions and found FCPP more cost effective compared to other alternatives (with at least $33.5 million in present value customer savings)."[152]

PNM witness Graves also "updated," as PNM puts it, the company's May 2012 analysis to address the criticisms that were lodged against the analysis in PNM's 2016 Rate Case. Mr. Graves concluded that even after consideration of the claimed omissions, FCPP would still have been selected over the alternative combined cycle gas plant. In doing so, he noted that a primary criticism of PNM's May 2012 analysis was that PNM failed to take into account ongoing FCPP capital expenditures. This criticism, Graves opined, is "one-sided" and "fails to also account for the fact that certain omitted costs and saving that would affect FCPP would have also affected the alternative combined cycle natural gas plant."[153] PNM thus concludes that even if PNM did not address every component of costs under each option (in part because some components costs were the same or similar constants under each option), the expert opinion of PNM witness Graves shows the resulting decision was still a reasonable one.[154]

According to Mr. Graves, a reasonable analysis should recognize that a significant portion of the ongoing FCPP capital costs ($23 million) being examined in 2012-2013 would be incurred through the plant exit in 2016 in all circumstances. In addition, Graves propounded there would be ongoing capital expenditures associated with the combined cycle gas plant ($24 million). Graves reckoned that these two adjustments partially offset the omitted $75 million in FCPP capital

[151] PNM Br. at 212-13 (citing PNM Exh. 18 (Graves Reb.) at 10).

[152] PNM Br. at 213.

[153] *Id.* (citing PNM Exh. 17 (Graves Dir.) at 20-21).

[154] *Id.* (citing PNM Exh. 18 (Graves Reb.) at 10-11).

costs by $47 million.[155] PNM adds that Mr. Graves further noted that there would be other residual cost obligations associated with the exit from FCPP in 2016 which would include accelerated plant decommissioning and other costs which were conservatively estimated to be $3 million for PNM's share.[156] After accounting and adjusting for these criticisms asserted against the May 2012 analysis, Mr. Graves concluded that staying in FCPP would have been more cost effective for customers by $9 million on a PVRR basis.[157]

PNM points out that Mr. Graves also addressed the impacts of the claim that PNM's May 2012 analysis should have been updated to late 2013, which was closer in time to when the final decision was made to remain in FCPP. Among the variables Graves analyzed for "updating" were gas, coal, and carbon prices.[158] He figured that at the extreme ends of the analysis, factoring in the uncertainty associated with forecasted factors, that the potential saving to customers could range from as high as $180 million to a deficit of $34 million.[159] In PNM's estimation at least, Mr. Graves' "measured analysis was that the combined impact of an updated analysis in late 2013 would show FCPP would be found to be more cost effective by $46 million when compared to the alternative."[160] Hence, PNM concludes, "Graves' independent review confirmed PNM witness

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[155] PNM Br. at 213-14 (citing PNM Exh. 17 (Graves Dir.) at 21-23).

[156] PNM Br. at 214 (citing PNM Exh. 17 (Graves Dir.) at 23-26).

[157] *Id.* (citing PNM Exh. 17 (Graves Dir.) at 26, 27 PNM Fig. FG-4). Parenthetically, PNM explains that "PVRR means the Present Value of Revenue Requirements. Revenue requirements are the sum of the costs of operating the system plus paying taxes and earning the allowed returns (for debt and equity) on and of the net (depreciated) investment costs in the underlying assets. It is the same thing as the costs used as the basis for setting rates. Thus, it is the measure of what customers will pay for the use of the system assets, year by year, into the future if a particular slate of assets is chosen in the resource plan." *Id.* (citing PNM Exh. 17 (Graves Dir.) at 14).

[158] *Id.* (citing PNM Exh. 17 (Graves Dir.) at 28-33, 33-37).

[159] *Id.* (citing PNM Exh. 17 (Graves Dir.) at 38, 39 PNM Fig. FG-10).

[160] *Id.* (citing PNM Exh. 17 (Graves Dir.) at 37-38).

O'Connell's conclusions that an understanding of the shifts in market conditions did not necessitate a formal modeling update to the 2012 analysis in 2013."[161]

In addition to addressing the criticisms lodged against PNM's original analyses, PNM writes that Mr. Graves addressed certain criticisms that were made in Case No. 21-00017-UT.[162] As described by PNM, these criticisms centered around the claimed need to update assumptions to reflect an outlook as of late 2013 on load forecasts, cost of building a new combined cycle natural gas plant and FCPP's availability factor. With regard to load forecasts, Mr. Graves noted that PNM's load forecasts in the 2014 IRP were lower than in the May 2012 analysis. Nevertheless, Graves' review of the 2014 IRP supply plan and a reconstruction of PNM's total available supply, as illustrated in PNM Fig. FG-12 at page 44 of the Graves Direct Testimony, indicated that despite these load changes, PNM would scarcely have any margin of excess capacity for the period 2014 through 2017. Therefore, PNM maintains that it needed FCPP's capacity, or some replacement of the kind PNM was already considering, to adequately meet customer needs.[163]

According to PNM, Mr. Graves also confirmed, through the use the Energy Information Administration's estimates in 2012 and 2013, that the replacement cost estimates for a combined cycle natural gas plant were reasonable when PNM conducted its analysis.[164] Likewise, Graves found that the FCPP's availability assumptions were reasonable at the time the studies were conducted because the information available by late 2013 did not support assuming a lower future availability for the plant. His calculations indicated that the historical average equivalent

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[161] PNM Br. at 214-15.

[162] PNM Br. at 215 (citing PNM Exh. 17 (Graves Dir.) at 40-48).

[163] *Id.* (citing PNM Exh. 17 (Graves Dir.) at 41-43).

[164] *Id.* (citing PNM Exh. 17 (Graves Dir.) at 44-45).

availability factor for FCPP between 2007 and 2013 was 79%, about 4 percent below the national average for plants of similar size, and it was reasonable at the time to expect that the plant would sustain similar performance going forward. Similarly, he found that FCPP's capacity factor from 2009-2013 averaged nearly 80%, which Mr. Graves represented was typical at the time for coal power plants of that size and vintage.[165] PNM thus maintains these other criticisms leveled against PNM's analysis are "unfounded."[166]

Finally, PNM further asserts that Mr. Graves also dispelled the claim that PNM should have further updated its analysis between January 2014 and March 2015 when PNM and the other FCPP owners executed the amendment to the FCPP co-tenancy agreement. As PNM would have the Commission see it, Mr. Graves

> confirmed that complex decisions such as a plant life-extension transaction or plant replacements generally need to be made months, or possibly years, in advance of the execution. The operative decision point revolved around securing the coal supply and the CSA was executed in 2013. The fact that the formal execution of other ownership agreements that followed the CSA was deferred until the issue of who would acquire EPE's interest in FCPP was finally resolved did not bear on the timing for determining whether to continue PNM's participation in the plant.[167]

Third, PNM states that other FCPP co-owners also conducted similar contemporaneous analyses of the pros and cons of continuing their participation at the FCPP plant. Addressing the argument of some parties that PNM should have exited FCPP based on the decision by EPE to do so, PNM claims that EPE's circumstance was very different from PNM's. PNM says it would have required a replacement resource for Four Corners whereas EPE had already gained approvals for four new gas-fired plants located in EPE's service area, two of which were already online in

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[165] *Id.* (citing PNM Exh. 17 (Graves Dir.) at 45-48).

[166] PNM Br. at 216.

[167] PNM Br. at 216 (citing PNM Exh. 17 (Graves Dir. at 50-52).

March 2015, as well as for 50 MW of long-term solar power purchase agreement.[168] PNM notes that the *Certification of Stipulation* in the 2015 EPE abandonment case (Case No. 15-00109-UT) observed that EPE had been planning to exit Four Corners since 2009, noting specifically EPE's intent to shift its generation sources closer to its load.[169] Likewise, SCE decided in 2010 to exit from FCPP because California's greenhouse gas emissions standards limited the cost recovery for affected baseload resources.[170] Again, PNM asserts, "SCE's circumstances were very different from what PNM was facing."[171]

PNM maintains, moreover, that it is noteworthy that a majority of the FCPP owners decided to continue their participation in the plant based on their respective analyses. PNM points out that in its 2012 IRP, TEP found that continued participation in FCPP would save $115 million over the 2012-2027 period instead of retiring FCPP and replacing it with a combined cycle natural gas unit. PNM adds that APS determined that acquiring SCE's 48 percent stake in FCPP Units 4-5 (or 739 MW) would be more economic than upgrading Units 1-3 or building a new gas combined cycle plant (PVRR savings of about $500 million).[172] PNM reports that the Arizona Corporation

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[168] PNM Br. at 217 (citing PNM Exh. 17 (Graves Dir) at 11-12).

[169] *Id.* (citing Case No. 15-00109-UT, *Certification of Stipulation* at ¶¶ 14-15 (NMPRC 4/22/2016), approved by Final Order (NMPRC 6/15/2016). To PNM, "[t]his demonstrates that PNM and El Paso had fundamentally different trajectories and needs for Four Corners, making El Paso's decision carry little relevance for PNM's decision. In 2009, natural gas prices were indisputably higher, and yet El Paso still planned to exit its share." PNM Br. at 217, n. 1035.

[170] *Id.* (citing PNM Exh. 17 (Graves Dir) at 11-12).

[171] *Id.*

[172] *Id.* PNM notes that the Arizona Court of Appeals recently reversed the ACC's finding of imprudence and associated disallowance with respect to APS share of the costs for SCR emission controls at Four Corners. *See Ariz. Pub. Serv. Co. v. Ariz. Corp. Comm'n,* 91 Ariz. Cases Dig. ¶¶ 32-37, 526 P.3d 914 (Az. Ct. App. 3/7/2023) ("*Ariz. Pub. Serv. Co.*"). PNM relates these are the same SCR emission controls that are subject to a prudence challenge in this case. PNM notes this Arizona intermediate appellate court opinion but doesn't make any more of it, most likely because it is readily distinguishable from the facts in evidence in this case. In *Ariz. Pub. Serv. Co.*, the court vacated the ACC decision disallowing $215.5 million of SCR capital investment. The court found that an Arizona regulation requires the ACC to determine whether investments are prudent "*at the time such investments were made*." *Ariz. Pub. Serv. Co.*, 526 P.3d at 922 (citing A.A.C. R14-2-103(A)(3)(l))

Commission (ACC) authorized APS to pursue the transaction because the utility's acquisition of SCE's share and plan to retire FCPP Units 1-3 would "[preserve] its existing interest in a reliable, low-cost generation resource as well as the substantial economic benefits to the Navajo Nation and surrounding communities."[173] Further, as Mr. Graves indicated, PNM adds that the proposed plan would result in lower emissions and environmental improvements while preserving the balance of APS' diverse resource portfolio.[174] "If FCPP were a *per se* bad plant," PNM concludes, "the majority of the co-owners would not have decided to continue in the plant. In fact, APS and TEP are still indicating that they will continue to rely on FCPP until 2031."[175]

8.1.3.1.2. PNM's Position that there are no Grounds to Impose any Disallowance of FCPP investments

PNM takes the position that there are no proper grounds in this case to impose any disallowance of FCPP investments. This is true, PNM argues, even if PNM's 2012-2103 decision was found to be imprudent based on a flawed analysis. PNM contends the Commission's adoption of any proposals that would disallow recovery of PNM's investments and costs for FCPP to remedy the alleged imprudence "can only be considered a punitive measure for the purpose of penalizing PNM, and not a legally proper remedy."[176] PNM asserts that it is entitled to full recovery of its Four Corners investments and costs because PNM witness Frank Graves confirmed PNM's decision-making was prudent. PNM thus believes there should be no disallowance of FCPP

(emphasis added). The court vacated the Arizona commission's disallowance because all the evidence the ACC acknowledged it relied on to make its imprudence finding occurred *after* the SCR construction at Four Corners was completed in 2018. *See Ariz. Pub. Serv. Co.*, 526 P.3d at 922-23.

[173] PNM Br. at 218 (citing Case No. 15-00109-UT, *Certification of Stipulation* at 32-33).

[174] *Id.* (citing PNM Exh. 17 (Graves Dir.) at 49-50).

[175] *Id.* (citing PNM Exh. 17 (Graves Dir.) at 54).

[176] PNM Br. at 224 (citing PNM Exh. 6 (Monroy Reb.) at 66).

investments or costs because, as Mr. Graves claims to have shown in his prudence analysis, customers would have faced a similar range of investments and costs if PNM would have invested in gas fired replacement facilities. Because customers were not subjected to excessive costs for reliable power, PNM should be allowed to recover its FCPP capital investments, including a return on those investments.[177] Moreover, Mr. Graves rejects any notion that disallowances should be imposed even if FCPP becomes uneconomical compared to other newer resources because, Graves opines, that would be contrary to established regulatory standards for cost recovery for a utility operating under cost-based ratemaking with a duty to serve.[178]

PNM alleges that it provided "uncontested evidence" that its FCPP investments are reasonably and prudently incurred.[179] It points to PNM witness R. Brent Heffington's testimony discussing the long-standing review and approval process for capital investments that is adhered to by the FCPP owners. Mr. Heffington testified that the investments in the plant since PNM's 2016 Rate Case have been proven to be necessary to maintain the safe and reliable operation of the plant and to meet environmental and other statutory requirements required to operate FCPP.[180] PNM claims that no party challenged the evidence presented by PNM regarding the reasonable and prudent nature of these additional investments that are included in PNM's proposed cost of service and, PNM further claims, no party submitted evidence that contravenes the thoroughness of the owners' review process for ensuring expenditures at FCPP are necessary and reasonable.[181]

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[177] PNM Br. at 225 (citing PNM Exh. 17 (Graves Dir.) at 52).

[178] *Id.*

[179] *Id.*

[180] *Id.* (citing PNM Exh. 22 (Heffington Dir.) at 51-54).

[181] *Id.*

PNM makes the argument that the remedy for PNM's decision to remain with Four Corners, if determined to be imprudent, should reflect the actual negative impacts, if any, customers experienced from that decision. PNM notes here the New Mexico Supreme Court's 2019 *Pub. Serv. Co. of N.M.* decision discussed above where, in addressing the Commission's several findings of imprudence around Palo Verde and SJGS, the Court upheld the Commission's approach that followed the 2012 Oregon PUC *PacifiCorp* decision[182] on crafting a remedy after a finding of imprudence.[183] PNM emphasizes the Court's conclusion that the Commission had reached a just and reasonable result in concluding that the "proper remedy for a utility's imprudence 'should equal the amount of unreasonable investment' in order *to* '*hold ratepayers harmless from any amount imprudently invested*[.]'"[184]

PNM states that in considering the issue of potential disallowances of FCPP costs due to asserted imprudence, the Commission resolved the dispute in the 2016 Rate Case, as already discussed above, by approving a debt-only return for PNM's proposed FCPP investments for the SCR pollution control equipment and life-extending projects made from July 2016 through December 31, 2018, which has resulted in an annual revenue reduction of $4.7 million. This $4.7 million annual reduction has been in place since 2018 with a cumulative reduction of $33.1 million through 2024. PNM incorporated the continued debt-only return on those investments in the cost-of-service study in this case.[185] PNM contends that the disallowances recommended by NEE and

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[182] *See PacifiCorp supra*, UE 246, Order No. 12-493, 2012 WL 6644237.

[183] *Pub. Serv. Co. of N.M.*, 2019-NMSC-012, ¶¶ 42, 46.

[184] PNM Br. at 226 (quoting *Pub. Serv. Co. of N.M.*, 2019-NMSC-012, ¶ 42, which, in turn, is quoting *PacifiCorp*, UE 246, Order No. 12-493 at 21, 2012 WL 6644237) (emphasis in PNM's brief-in-chief).

[185] PNM Br. at 226. (citing *Pub. Serv. Co. of N.M.*, 2019-NMSC-012, ¶ 21 (quoting *Hobbs Gas Co. v. N.M. Pub. Serv. Comm'n*, 1993-NMSC-032, ¶ 8, 115 N.M. 678) ("*Hobbs Gas Co. II*")).

Sierra Club in this proceeding result in additional negative financial impacts to PNM that do not reflect the reasonable cost of providing power to customers from FCPP.[186]

Because the Commission "is bound by, and limited to . . . previously established methods of ratemaking," PNM states that the Commission should employ the same approach for determining a proper remedy here.[187] PNM acknowledges that the Commission may depart from a previous method, but only if there is "a change in circumstances peculiar to the company and the pending case, making it necessary that there be a departure from established method."[188] PNM submits that no such change in circumstances exists here, and the Commission should not deviate from the *PacifiCorp* approach followed in *Pub. Serv. Co. of N.M.*, which is intended to hold customers harmless from excessive costs.[189]

In addition to addressing prudence principles the Supreme Court dealt with in *Pub. Serv. Co. of N.M.*, PNM asserts the Public Utility Act compels the "actual-impact" approach when in assessing a remedy for imprudence.[190] PNM points out that Section 62-3-1(B) of the PUA not only provides for just and reasonable rates but also provides that capital and investment should be encouraged and attracted. Thus, PNM intones, the Commission must balance the interests of customers and investors. Imposing a disallowance that is greater than any impact suffered by customers, PNM postulates, would run afoul of such a balancing by benefitting customers for a harm they did not suffer. Such a disallowance, PNM further claims, would also allow customers

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[186] *Id.* (citing PNM Exh. 6 (Monroy Reb.) at 65-66).

[187] PNM Br. at 227.

[188] *Id.* (citing *Public Serv. Co. of N.M.*, 2019-NMSC-012, ¶ 21 (quoting *Hobbs Gas Co. II*, 1993-NMSC-032, ¶ 8)).

[189] *Id.*

[190] *Id.*

to benefit from a generation resource that was not fully paid for.[191] PNM suggests a similar "balancing approach" is additionally supported by analogous case law in New Mexico relating to damages stemming from breach of contract claims.[192] Here, PNM propounds, the disallowance proposals of the intervenors bear no relation to the size of any claimed analytical mistake found and confirmed to be present in the original decision-making, nor to the realized consequences of having not pursued the then next best alternative of a combined cycle gas plant.[193] PNM argues the intervenors do not even have a principled position or agreement on what is the alternative they would have liked to have seen pursued by PNM instead of extending FCPP. Consequently, PNM believes, there is no "but-for" position against which to measure and redress any harm.[194] Instead, PNM contends, the proposed disallowances are purely punitive for PNM for having reached a conclusion that turned out well in terms of reliable and reasonably priced power to serve customers but was not reached in the "right" way.[195]

A "hold harmless" approach, PNM posits, is also consistent with remedies imposed by other state regulatory commissions when a utility is determined to have acted imprudently[196] and

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[191] *Id.*

[192] *Id.* (citing as *Sonntag v. Shaw*, 2001-NMSC-015, ¶ 38, 130 N.M. 238 (reversing and remanding damages award that would place plaintiff "in a better position than if the contract had been performed"); and *Bd. of Educ. v. Jennings*, 1985-NMSC-054, ¶¶ 11-15, 102 N.M. 762 (construing statute to avoid paying damages to a plaintiff when the plaintiff would be made better off than if no breach had occurred)).

[193] PNM Br. at 227-28.

[194] PNM Br. at 228.

[195] *Id.* (PNM's quotes around the adjective "right").

[196] *Id.* (citing *Investigation of Inclusion of Acadia Substation in Rates Pertaining to Emera Maine*, Docket No. 2017-00018, *Order* at 27 (Me. P.U.C. June 25, 2018) ("The substation options and cost estimates contained in the record in this case, however, provide the Commission a basis for assessing the costs associated with the Company's imprudent management of this project. This is done by evaluating the cost of feasible alternatives to the Prospect Avenue substation had Emera acted in a prudent manner."); *PacifiCorp II*, Docket No. UE 374, Order No. 20-437 at 39 ("[W]e adopt Staff's proposed disallowance of [redacted] *which is based on the difference between the design estimate and the actual costs incurred*." (emphasis added)); *Canal Elec. Co.; Montaup Elec. Co., E. Edison Co., and Blackstone Valley Elec. Co.*, 57 F.E.R.C. P63,016, 65104 (F.E.R.C.

is further supported by state courts.[197] In this respect, PNM notes, when commissions cannot assess a precise level of harm to customers, they do not assign the largest disallowance possible. PNM states that the 2019 *Pub. Serv. Co. of N.M.* decision provides an example like that, where the Commission refused to enter a full disallowance for the Palo Verde investments in question and instead tethered the disallowance more closely to a calculable likely harm that customers suffered.[198] PNM notes that other jurisdictions likewise seek to assess the harm customers suffered as a result of the imprudence before imposing any remedy.[199]

Still, PNM acknowledges that *Pub. Serv. Co. of N.M.* states that "total disallowance may be an appropriate remedy for . . . imprudence in some circumstances."[200] However, PNM contends, the facts show that this is not one of those cases. PNM maintains that Four Corners has been used and useful for decades. Since PNM decided to continue as a participant, Four Corners has been and remains an important baseload resource in PNM's generation portfolio and has continued to

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12/06/1991) ("In the final analysis, . . . even if imprudence had been proven (and none has been proven here) there would be no demonstrated measure of damages or costs resulting from that imprudence.").

[197] *Id.* (citing *Gulf States Utils. Co. v. La. Pub. Serv. Co.*, 578 So. 2d 71, 96 (La. 1991) ("[T]he damages resulting from the decision to build River Bend should be measured as the difference between the cost of the nuclear unit and the cost of the prudent alternative."); *State ex rel. Associated Natural Gas Co. v. Pub. Serv. Comm'n*, 954 S.W.2d 520, 529 (Mo. App. W.D. 1997) ("[I]n order to disallow a utility's recovery of costs from its ratepayers, a regulatory agency must find both that (1) the utility acted imprudently [and] (2) such imprudence resulted in harm to the utility's ratepayers . . . . It would be beyond the [commission's authority] to make a decision on the recoverability of costs, based upon a prudency analysis of gas purchasing practices, without reference to any detrimental impact of those practices on [the utility]'s charges to its customers").

[198] PNM Br. at 228-29 (citing *Pub. Serv. Co. of N.M.* 2019-NMSC-012, ¶¶ 22-24).

[199] PNM Br. at 229 (citing *WUTC Pacific Power Order*, *supra*, at 40, 332 P.U.R. 4th 1, 2016 WL 7245476 (explaining that the WUTC has in the past disallowed a return on an asset when a utility failed to fully evaluate lower cost options and disallowing any return on rate base for SCR investments); *In re Indianapolis Power & Light*, IURC Docket 44242, Order at 35-36 (IURC 8/14/13) ("*Indianapolis Power & Light*") (imposing a $10 million disallowance because the utility failed to present production cost modeling on a $511 million investment); *PacifiCorp*, *supra*, at 31-32, 2012 WL 6644237 (finding that the utility failed to reasonably examine alternative courses of action and perform adequate analysis to support its investments and imposing a $17 million disallowance, which was only 10 percent of the total Oregon-allocated share of investment).

[200] PNM Br. at 229 (quoting *Pub. Serv. Co. of N.M.* 2019-NMSC-012, ¶ 47).

serve customers. Four Corners has supplied PNM's customers with over 4.95 million MWh of energy since 2017. Customer energy demand varies seasonally and in the summer months, when demand on PNM's system is greatest, Four Corners continues to deliver a consistent supply of needed energy with a summer equivalent availability factor of 89.6% in 2021 and 93.2% in the summer of 2022. Four Corners has also been used to supply customer needs during extreme weather events as already discussed.[201] PNM thus concludes that Four Corners "was needed to safely and reliably serve PNM's customers."[202] PNM points out that in the 2012 *PacifiCorp* case, the Oregon PUC rejected a full disallowance because the investments at the generation units in question had been used to provide service to customers.[203] PNM asserts that the same is true with respect to Four Corners which, from PNM's perspective, precludes any notion of a complete or even partial disallowance.

Harkening back to *Certification of Stipulation* from Case No. 16-00276-UT, PNM disagrees with the conclusion that as "discrete capital improvements, similar to the balanced draft costs in Case No. 15-00261-UT," a full disallowance of the Four Corners SCR and life-extending investments is appropriate.[204] Though, in fact, the SCR and life-extending investments were discrete capital improvements, PNM maintains that fact is not relevant to the disallowance analysis. First, PNM points out, the Commission did not base its full disallowance decision in Case No. 15-00261-UT on the fact that the balanced draft investment was a "discrete capital improvement." Instead, the Commission concluded that the investment was not required for any

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[201] PNM Br. at 229.

[202] *Id.* (citing PNM Exh. 22 (Heffington Dir.) at 54).

[203] *PacifiCorp*, UE 246, Order No. 12-493 at 21, 2012 WL 6644237.

[204] PNM Br. at 231 (quoting Case No. 16-00276-UT, *Certif. of Stip.* at 68).

environmental compliance reasons.[205] The Certification of Stipulation also observed, PNM continues, that the decision in Case No. 15-00261-UT allowed partial recovery for PNM's imprudent extended participation at Palo Verde because the Palo Verde capacity had long been considered used and useful.[206] Next, PNM adds, the Certification of Stipulation cited the Oregon and Washington *PacifiCorp* cases concerning SCR investments where, as already discussed above, both commissions chose not to impose a full disallowance after recognizing that the SCR investments were part of used and useful generating units.[207] PNM states that no party denied in the 2016 Rate Case or denies here that the SCR investment was required to continue operations at Four Corners under the BART compliance pathway established by the EPA and the Arizona courts have held that the SCR investment was prudently incurred to meet environmental obligations.[208] PNM claims that the *Certification of Stipulation* in the 2016 Rate Case ignored the necessity of the SCR and life-extending investments for continuing operations at a certified resource in conducting its analysis, and instead relied on a "discrete capital improvement" rationale that was untethered to the reasoning for the full disallowance on the balanced draft investment in Case No. 15-00261-UT.[209]

PNM believes the more recent Oregon PUC *PacifiCorp II* decision, already discussed above and also addressed SCR investments, is instructive of the fact that a full disallowance is a

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[205] PNM Br. at 231 (citing Case No. 16-00276-UT, *Certif. of Stip.* at 64 n.145 (discussing findings in Case No. 15-00261 concerning necessity and use of balanced draft system)).

[206] PNM Br. at 231 (citing Case No. 16-00276-UT, *Certif. of Stip.* at 65).

[207] PNM Br. at 231 (citing Case No. 16-00276-UT, *Certif. of Stip.* at 62-63 (discussing FERC decision relied on by the Washington Commission that noted the recognition of a plant providing service for most of its life)).

[208] PNM Br. at 231-32.

[209] PNM Br. at 232.

disproportionately harsh remedy when the alleged imprudence stems from failing to fully consider other alternatives (that still would have been costly in their own right) and when the disputed generating unit will be used to serve customers. As indicated above, the Oregon PUC concluded that PacifiCorp had not adequately considered alternatives to SCR for compliance with Regional Haze Rules. However, as also discussed above, the Oregon PUC did not impose a full disallowance.[210] Instead, PNM reminds again, the Oregon PUC "limit[ed PacifiCorp's] return on the investment to [PacifiCorp's] cost of long-term debt . . . ."[211]

Finally, PNM argues that customers have not been financially harmed by the company's continued reliance on FCPP and that the intervenors' proposed punitive disallowances are not supported by the law or facts.[212] Because they are extensively discussed below, PNM's arguments on these remedy issues are considered under Section 8.1.5 below.

In summary of its position on the Four Corners prudence issues in this case, PNM concludes:

> PNM's decision-making with respect to Four Corners was not imprudent, and there is no basis to impose any disallowances with respect to PNM's Four Corners investments or costs. However, in the event the Commission determines that PNM was imprudent, it must be recognized that PNM has already been subject to significant financial disallowances making additional disallowances unnecessary and punitive. In addition, the law requires that any disallowance must be tied to the financial harm to customers flowing from the imprudence. PNM is the only party to present an analysis of potential harm to customers and has demonstrated that customers have not been harmed, even if it is assumed that PNM was imprudent. The other imprudence 'remedies' proposed in this case are not based in

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[210] *PacifiCorp II*, *supra*, UE 374, Order No. 20-473 at 80-81. PNM thinks [t]he same," no full disallowance, "is true here." PNM claims, inaccurately as demonstrated below, that "there is no dispute in this case that the likely alternative combined cycle nature gas plant would have resulted in material costs for customers." "The dispute over what the alternative resources would have been," PNM submits, "demonstrates uncertainty about what PNM would have chosen if it had conducted an additional analysis in late 2013." PNM Br. at 232, n. 1088.

[211] PNM Br. at 232 (quoting *PacifiCorp II*, *supra*, UE 374, Order No. 20-473 at 81).

[212] *See* PNM Br. at 233-41.

> any way on harm to customers. They should be rejected as contrary to the law, punitive and damaging to PNM's financial integrity.[213]

8.1.3.2. New Energy Economy

NEE continues to believe, as it has since as far back as the 2015 Rate Case, that PNM acted imprudently in deciding to remain in Four Corners after 2016. In this case, NEE focuses first on the omission of capital expenditures and decommissioning costs from PNM's 2012 Strategist runs. NEE notes that PNM now admits that it was, and still is, standard industry practice to include such expenditures in utility analyses of resource alternatives.[214] NEE asserts that PNM's failure to conduct a contemporaneous assessment prior to the Board's 2013 decision to continue PNM's participation in Four Corners manifested an imprudent management decision.[215]

NEE maintains that Four Corners increasingly poor performance in 2013 when the FCPP forced outage rate started climbing significantly should have prompted a further analysis by PNM and its related need for significant life-extending capital expenditures.[216] NEE contends that Four Corners was not used and useful in the relevant time period as PNM witness Chris Olson's testimony in the 2016 Rate Case showed.[217] In this regard, NEE challenges the contemporaneous operational efficiency of Four Corners, again being mindful that a 2023 hindsight review factoring in more recent plant performance is irrelevant and inappropriate in a prudence review.[218] As NEE concludes, the "Four Corners Coal Plant was *at that time* and is no longer used and useful because

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[213] PNM Br. at 241.

[214] NEE Br. at 61-66.

[215] NEE Br. at 66-70.

[216] NEE Br. at 71-76.

[217] NEE Br. at 73-74.

[218] NEE Br. at 75-76.

the capacity generated from this plant is not needed to meet customer load, it is the wrong resource because it's not flexible to meet the shift towards a 'peakier' load profile, it underperforms, and is unreliable during the times it is most needed by PNM for ratepayers.[219]

NEE next asserts that particularly damaging to PNM's position is the admission by PNM's chief contract negotiator in the relevant time period, PNM vice president of generation Chris Olson, that he knew nothing about the May 2012 Strategist runs. The fact that the company's chief negotiator and signatory to most of the pertinent Four Corners contracts is, to NEE, not only evidence of imprudence, but it's also "shocking."[220]

NEE maintains that the fact that EPE, facing the same decision confronting PNM on Four Corners, did perform a detailed financial and risk analysis and then decided it should exit the plant at significant savings to customers in the range of $124.6 million and $170.4 million is further strong evidence that PNM failed to conduct a reasonable and prudent process of determining whether it should commit ratepayers to a billion dollars' worth of costs at Four Corners.[221]

Finally, as discussed in more detail under Section 8.1.5.1.3 below, NEE asserts through the testimony and exhibits of NEE witness Christopher Sandberg that the appropriate remedy for PNM's imprudence in remaining at Four Corners is the complete removal of FCPP from rate base. NEE claims that the Strategist runs conducted in the 2016 Rate Case by PNM for NEE upon granting a motion to compel a Strategist analysis showed $445 million in harm to ratepayers resulting from PNM's imprudence. NEE therefore recommends that PNM receive 50% of its

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[219] NEE Br. at 76.

[220] NEE Br. at 78.

[221] NEE Br. at 78-80 (citing Case No. 15-00109-UT, *Certification of Stipulation* (NMPRC 4/22/16) and *Final Order Approving Application* (NMPRC 6/15/16).

undepreciated FCPP investments made before June 31, 2016, which results in an approximate $29 million recovery for PNM of those older investments.[222] NEE also proposes that PNM be denied all future costs for FCPP investments because, NEE believes, there would have been better resources available.[223] NEE argues the remaining investment in FCPP should be entirely removed from rate base and, to the extent PNM continues to rely on FCPP, the associated fuel and O&M costs should only be recovered through the fuel adjustment clause.[224]

8.1.3.3. Sierra Club

Sierra Club, like some other interested parties, started its argument looking back at the two prior times the FCPP issue of prudence, Case No. 16-00276-UT, where the prudence issue was fully litigated to a decision of imprudence subsequently deferred, and Case No. 21-00017-UT, where for reasons explained above the Commission deferred the issue again to this rate case.

Sierra Club asserts that the weight of evidence adduced in Case No. 16-00276-UT supported a finding of imprudence, based on multiple defects in PNM's decision-making process, which are thoroughly assessed and explained in the Certification of Stipulation. Sierra Club points out that PNM's expert witness in the current proceeding and Case No. 21-00017-UT acknowledges that the process PNM used in 2012-13 was flawed. Further, Sierra Club contends, PNM makes no attempt to put any new evidence about PNM's actual, contemporaneous analyses and decisions into the current record. Instead, Sierra Club submits, PNM's case on Four Corners in the current proceeding relies entirely on the testimony of that single expert witness, Frank Graves, who had no involvement in any of the original PNM analyses or decisions about whether to extend

[222] NEE Exh. 1 (Sandberg Dir.) at 33; Tr. (Vol. 5) 1501 (Sanders).

[223] NEE Exh. 1 (Sandberg Dir.) at 34.

[224] NEE Br. at 93-94.

participation in Four Corners beyond 2016.[225] "In fact," Sierra Club notes, "the analyses Mr. Graves attempts in his testimony highlights things PNM failed to do contemporaneously."[226]

Sierra Club states that PNM witness Graves tries to protect PNM from the consequences of its flawed decision-making process in 2012-13 with two after-the-fact arguments. First, Sierra Club explains, Mr. Graves attempts to show that, if PNM had done a sufficient analysis in 2012-13, it would have come to the same result as it in fact did (the "*post hoc*" analysis). Second, Graves and PNM attempt to argue that, even if PNM was imprudent, ratepayers have not been harmed by that imprudence (the "damages" or "remedy" assessment). Sierra Club submits that "it is highly questionable whether PNM and Graves' positions on either of the *ex-post facto* justifications for the imprudent decision have support in controlling law, but in any event, both of Mr. Graves' analyses have indicia of unreliability and are, in fact, wrong in the results they produce."[227]

While Sierra Club believes that PNM's arguments for *ex-post facto* rehabilitation of a clearly imprudent decision lack legal merit, Sierra Club urges the Hearing Examiners to make findings under alternative legal standards for both prudence and the remedy for imprudence, to minimize the legal vulnerability of the decision. Specifically, Sierra Club recommends that the Hearing Examiners state how they resolve the prudence issue under two different prudence standards: a standard that focuses only on PNM's decision-making process; and a standard that

[225] Sierra Club Br. at 1-2.

[226] Sierra Club Brief at 2, n. 7 (citing Tr. (Vol. 10) 3289-90, 92 (NEE witness Sandberg, agreeing with and elaborating on the Hearing Examiner's characterization)).

[227] Sierra Club Br. at 3.

focuses only on the reasonableness of PNM's substantive decision (regardless of the process by which PNM arrived at its decision).

In other words, the first standard looks at PNM's decision-making process to see if it acted as reasonable utility under the circumstances in resolving to retain Four Corners. The second standard assesses whether or not PNM's decision to retain Four Corners left ratepayers better off or caused material harm irrespective of whether the company management's decision-making process was imprudent. As already noted, the Hearing Examiners are considering both the process and substantive standards below.

Sierra Club asserts that the evidence shows that PNM's customers have been materially harmed by more than $200 million by the PNM's imprudent decision to extend its participation in Four Corners. Therefore, Sierra Club maintains customers are entitled to a remedy, and several different remedies have been proposed in this case. Sierra Club advises that "in order to minimize the legal vulnerability of the decision," that "the Hearing Examiners state which remedy they select after examining two different standards: one in which the remedy cannot exceed the amount of the unreasonable investment; and one in which the remedy cannot exceed the amount of actual economic damages that customers have and will incur as a result of the utility's imprudence."[228]

Sierra Club explains that making findings under different legal standards for both prudence and the remedy for imprudence is appropriate in this case, because the ultimate conclusion would be the same under the different legal standards. Sierra Club reasons that PNM's decision was imprudent, regardless of whether the legal test focuses on PNM's decision-making process or its substantive decision. Similarly, Sierra Club recommends a remedy for imprudence that satisfies

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[228] Sierra Club Br. at 3-4.

both potential standards for the remedy. The impairment that PNM would take from Sierra Club's remedy is less than the amount of the unreasonable investment, and also less than the amount of damages to customers from PNM's imprudent decision.[229]

Sierra Club closes with one further, "important consideration" with respect to remedies.[230] Sierra Club's witness, Dr. Fisher, recommended a remedy that would deny PNM all returns on most of the Four Corners investments flowing from the imprudent decision, and debt-only returns on the remainder. Sierra Club notes that the Attorney General's witness, Ms. Andrea Crane, had similar remedy recommendations that focused on a reduced return. Within the boundaries of the present case, Sierra Club believes Dr. Fisher's primary recommendation is just and reasonable, and appropriate. However, Sierra Club is "looking forward to the possibility – if not likelihood – that PNM will again apply for an abandonment and ETA financing order for Four Corners, any remedy that leaves the imprudent investments being recovered in rates in any manner (e.g., only as depreciation with no return) will support a future argument by PNM that all of these costs are eligible for recovery without impairment in an ETA financing order."[231] Sierra Club is concerned that "given that a future ETA financing order has the potential to make PNM's imprudent Four Corners investments spring back to life as if there never was an imprudence finding, the Commission should consider imposing a disallowance equal to the impairment PNM would take under Dr. Fisher's recommendation for a reduced rate of return."[232]

[229] Sierra Club Br. at 4.

[230] *See* Sierra Club Br. at 4-5.

[231] Sierra Club Br. at 4-5 (citing Tr. (Vol. 1) 198-99, 213-14 (Monroy); Tr. (Vol. 12) 4006 (Crane)).

[232] *See* SC Exh. 1 (Fisher Dir.) at 62-67 (discussing disallowances as an alternative remedy); Tr. (Vol. 12) 4016-17 (Crane).

Sierra Club therefore requests that the Hearing Examiners find that PNM acted imprudently and that they adopt a remedy that is robust regardless of whether there is a subsequent application for an ETA financing order, based on the magnitude of Dr. Fisher's recommended remedy.[233]

8.1.3.4. NMAG & Bernalillo County

The NMAG and Bernalillo County filed a joint brief-in-chief. In the brief's section covering Four Corners, the NMAG acknowledges that he originally recommended, consistent with NMAG witness Andrea Crane's proposed remedy, that the Commission continue to apply a debt-only return on all investment made since June 30, 2016, including all future test year investment included in this case. The NMAG's initial recommendation, however, was premised on two factors at the time testimony was filed: first, that FCPP is currently being used to provide service to New Mexico customers; second, that the Supreme Court could overturn the Commission's decision in Case No. 21-00017-UT, but if the Court didn't overturn the decision, the Commission could simply defer addressing the stranded cost recovery issue until PNM filed its next abandonment application for FCPP. However, since filing of testimony, the Supreme Court issued its decision rejecting PNM's Appeal, and furthermore, during the hearing phase of the proceeding, parties raised concerns whether deferring a final resolution on the question of stranded cost recovery until the abandonment proceeding would limit the Commission's ability to prevent PNM from recovering imprudent investments from customers.[234]

The NMAG believes that there is ample evidence to conclude that PNM's decision to continue its participation in FCPP was imprudent. The NMAG notes that PNM is once again relying primarily on the testimony of Frank Graves to justify its actions with regard to FCPP. The

[233] Sierra Club Br. at 5.

[234] NMAG. Br. at 33-34.

NMAG states that much of PNM's testimony in support of the FCPP is identical to the testimony he submitted in Case No. 21-00017-UT. The NMAG agrees with Mr. Graves that any analysis would have been heavily dependent upon the assumptions that were utilized in the 2012-2013 time frame. The NMAG contends that PNM did not conduct a thorough analysis when it had the opportunity to exit the FCPP. The NMAG points out that two of the original FCPP owners, SCE and EPE, did conduct such an evaluation and decided to terminate their participation in Four Corners in December 2013 and July 2016 respectively. "In this case," the NMAG concludes, "Mr. Graves is attempting to reconstruct the analysis that should have been conducted ten years ago."[235]

Therefore, while the NMAG initially recommended that FCPP investment from July 1, 2016 through the future test year be included in rate base at a debt-only return, the NMAG is now recommending that all investment from July 1, 2016, be disallowed. If investment made between July 1, 2016 and December 31, 2018 was not prudently-incurred, the NMAG reasons that "due to PNM's failure to adequately evaluate its continued participation in FCPP and the fatal flaws in its modeling, then the investments after 2018 are also, at least in part, the result of the same imprudence."[236] The NMAG continues to recommend that investment made prior to July 1, 2016, be included in rate base, and earn a full return, until such time as that investment is no longer serving New Mexico ratepayers. At that time, any stranded costs should be shared equally (50/50) between ratepayers and shareholders, consistent with the treatment of stranded costs in the San Juan proceeding.[237]

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[235] NMAG Br. at 35.

[236] *Id.*

[237] *Id.*

8.1.3.5. ABCWUA

ABCWUA starts the section of its brief-in-chief on the Four Corners prudence issue recalling the history of the issue going back to the 2015 Rate Case.[238] ABCWUA then provides a primer on the prudence standard and the Supreme Court's 2019 *Pub. Serv. Co. of N.M.* decision.[239] ABCWUA next provides a helpful point-by-point synopses of the Hearing Examiners' findings of imprudence in the *Certification of Stipulation* in Case No. 16-00276-UT.[240] ABCWUA believes that the Hearing Examiner's determination in the 2016 Rate Case that PNM's 2013 decision to extend PNM's participation in Four Corners was imprudent is well supported. Alluding to the *Corrected Recommended Decision* in the 2015 Rate Case, ABCWUA observes that ratepayers should not be expected to pay for management's lack of honesty or sound business judgment. ABCWUA asserts that PNM's Board of Directors failed to use sound business judgment in their 2013 FCPP extension decisions.[241]

Regarding PNM witness Graves' *post hoc* prudence analysis, ABCWUA contends that his proxy analysis approach focusing on what PNM could have done when it decided whether to extend its participation is directly at odds with the law set out by the New Mexico Supreme Court. ABCWUA states that the Court's standard for a prudence review includes the following: "in determining whether a judgment was prudently made, only those facts available at the time judgment was exercised can be considered; hindsight review is impermissible; and imprudence

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[238] *See* Water Authority Br. at 6-11.

[239] *See* Water Authority Br. at 11-13.

[240] *See* Water Authority Br. at 13-15.

[241] Water Authority Br. at 15-16.

cannot be sustained by substituting one's judgment for that of another."[242] Additionally, ABCWUA notes that the Graves' *post hoc* analysis only considered one alternative, gas-fired generation. ABCWUA argues that Graves' focus on a solitary alternative is contrary to the *Pub. Serv. Co. of N.M.* decision, which in paragraph 32 states that consideration of alternatives was appropriate and failure to reasonably consider alternatives was a fundamental flaw in PNM's decision-making process regarding Palo Verde.[243]

In any case, ABCWUA argues that Mr. Graves analysis that was intended to show that PNM prudently extended its participation in Four Corners is "fatally flawed."[244] Consequently, ABCWUA maintains there is no evidence in this case that refutes the decision of the Hearing Examiners in Case No. 16-00276-UT that PNM imprudently extended its participation in the FCPP and the determination of imprudence from 16-00276-UT remains in place. ABCWUA asserts that Mr. Graves' *post hoc* analysis fails to undue that determination. "Subsequently," ABCWUA concludes, "there is nothing in the records of Case Nos. 21-00017-UT or 22-00270-UT to refute the decision of the Hearing Examiners in Case No. 16-00276-UT that PNM imprudently extended its participation in the FCPP."[245]

Regarding the appropriate remedy for PNM's demonstrated imprudence, ABCWUA submits that multiple factors must be considered when determining the appropriate remedy for PNM imprudent decision to extend its participation in Four Corners. Those factors include, from ABCWUA's perspective, does it matter whether there was an incorrect analysis, or no analysis

[242] Water Authority Br. at 17.

[243] *Id.*

[244] ABCWUA Br at 18.

[245] *Id.*

conducted? Also, if regulation is intended to function as a proxy for market forces for vertically integrated monopoly utilities, what are the consequence of allowing the utility to operate in a risk-free environment? Another factor is the policy of deterring imprudent management decisions and incentivizing good processes is another.

Still another factor, ABCWUA argues, is that the evidence in this case shows that PNM's bad process for determining whether to extend its interest in Four Corners "was not accidental."[246] ABCWUA explains that in resource acquisition cases, the Commission has held for years that utilities are required to conduct reasonable alternatives analysis before selecting resources. It is apparent, ABCWUA states, that PNM was aware of this requirement because it was a participant in Case No. 2382, Case No. 08-00305-UT, and Case No. 13-00390-UT in which the Commission so held.[247] In fact, ABCWUA points out, in both Case No. 08-00305-UT and Case No. 13-00390-UT PNM submitted evidence of its consideration of alternative resource with its request for approvals.[248]

Additionally, harm to ratepayers is another factor that ABCWUA believes needs to be considered. On the quantification of harm, ABCWUA notes with approval Sierra Club witness Dr. Fisher's remedy analysis, which shows $238.7 million in harm to ratepayers, and NEE witness Sandberg's estimate of harm, which is based on the Strategist runs performed by PNM for NEE in the 2016 Rate Case that indicated retiring FCPP in 2017, including replacement power, would have been $445,682,093 less costly than retiring FCPP in 2031.[249] ABCWUA also acknowledge

[246] Water Authority Br. at 19.

[247] *Id.* (citing *2015 PNM Rate Case Corrected RD* at 95, 96, 97).

[248] *Id.*

[249] Water Authority Br. at 19-20.

NMAG witness Crane's original recommendation of a debt only return on FCPP investment made since June 30, 2016, but surmised, correctly as it turns out, that based on Ms. Crane's hearing testimony, her debt-only return recommendation "may not be the last word from the NMAG on the remedy for PNM's imprudent decision to extend its participation in the FCPP."[250]

Ultimately, because the evidence in this case shows that PNM ignored industry standards in conducting its limited analysis regarding whether to extend its participation in Four Corners, ABCWUA supports the remedy proposed by NEE, which is based on Mr. Sandberg's testimony. ABCWUA recommends that the Commission adopt the disallowances proposed by Mr. Sandberg, which would have the Commission order a complete disallowance of FCPP investment after June 30, 2016, and a 50% recovery of capital investments made prior to July 1, 2016, through a regulatory asset amortized over 3 years at $9.8 million per annum.[251]

8.1.3.6. NM AREA

NM AREA, as is its right and privilege in this case, does not take a firm position on whether PNM prudently extended its participation in the FCPP. But NM AREA does recommend that in conducting this prudence review the Commission should strictly adhere to the standard set out in Case No. 2087 for determining the prudence of a utility management's decision.[252] The established standard cited by NM AREA is that: 1) only facts available at the time a judgment is made can be considered, and, 2) no hindsight review is permissible.[253] Notably, this standard was also

[250] Water Authority Br. at 21.

[251] Water Authority Br. at 23.

[252] NM AREA Br. at 32.

[253] NM AREA Br. at 32 (citing Comm'n Exh. 2 Supp.).

referenced in Case Nos. 15-00261-UT and 16-00276-UT. And it is set forth above in stating the legal principles guiding this prudence review.

Regarding the issue of the appropriate remedy if PNM is found imprudent again, NM AREA cautions that if the Commission orders a full disallowance as recommended by NEE witness Sandberg an appeal is likely to follow. NM AREA estimates that an appeal would delay a final resolution of the Four Corners issues for at least a year after a Commission final order. NM AREA agrees that it is in the public interest to finally put these issues to rest in this case. But NM AREA recommends that if the Commission decides that PNM acted imprudently when it continued its participation in Four Corners, that the Commission adopt the remedy recommended by NMAG witness Andrea Crane. As noted, Ms. Crane's proposal would allow a debt-only return on all Four Corners investments made after June 30, 2016. NM AREA believes that this would be a balanced remedy that would protect both the ratepayers and PNM shareholders as required by the Public Utility Act.[254]

8.1.3.7. Staff

Similar to NM AREA, Staff takes no position regarding the prudence of PNM's decision to extend its participation in the FCPP. Staff says it "seeks to make it abundantly clear that it is essential and in the public interest that regulated utilities apply the most comprehensive and scrutable methodologies in their decision-making."[255] Staff acknowledges that "[d]eficient investment analysis could be, in and of itself, grounds for a finding of imprudence. If this is in fact the sole issue being contemplated in the instant matter, and a retrospect[ive] analysis is deemed not to be germane in these proceedings, Staff's [*sic*] would accept the determination of imprudence

[254] NM AREA Br. at 33-35.

[255] Staff Br. at 21.

based solely on PNM's incomplete FCPP investment analysis leaving the investments in question – e.g., the selective catalytic reduction (SCR) investments – subject to disallowance."[256]

8.1.4. HE Recommendation: PNM Acted Imprudently in (a) Extending the Company's Participation in Four Corners Beyond 2016 and, in the Process, (b) Improvidently Investing Hundreds of Millions of Dollars in Life-extending Capital Expenditures

8.1.4.1. HE Analysis: It was a Bad Decision-making Process that Culminated in PNM's Improvident Resolution to Retain Four Corners

A bad process. "It was a bad process" is how PNM's own outside consultant, Frank Graves, who was hired in this case and before in Case No. 21-00017-UT to defend PNM's position on the issue of FCPP prudence, described the company's decision-making process in continuing at Four Corners after 2016.[257] To illustrate at the beginning of this analysis how objectively "bad" PNM's

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[256] *Id.*

[257] To confirm that Mr. Graves is not being quoted out of context, the full Q&A wherein Graves allowed it was a "bad process" that led to PNM remaining in Four Corners is set forth in the colloquy below with counsel of NEE:

> Q: Okay.··If PNM omitted capital expenditures before it made its December 2013 decision, and we now know what the capital expenditures are and have been since July 2016 to December 2022, isn't that one way to calculate the disallowance?
>
> A: Well, it certainly provides some numbers that you can consider, but the omission of the capital expenditures didn't, by itself, make the original decision flawed.··It changes the relative amount of value it had, but it doesn't prove it was an imprudent decision. ***It was a bad process***, but the result, which was also assessed in a fairly normal, but limited way, was sustained in my view. You can't just 'Well, here is a chunk of what they didn't include, and that must have been the harm.' I don't accept that.

Tr. (Vol. 3) 930-31 (Graves) (emphasis added). A little later on in the September 7, 2023 hearing session, Mr. Graves conceded that PNM's FCPP decision-making wasn't an "entirely bad process, but an *incomplete process* would be a better description." Tr. (Vol. 3) 948 (Graves) (emphasis added). Mr. Graves then agreed when asked by the Hearing Examiner whether a "'bad process' is an *unsatisfactory process*," answering "Sure, that sounds consistent." *Id.* (emphasis added). After that, Mr. Graves stated that "it was bad [PNM's decision-making process] but a better analysis wouldn't have reached a different conclusion. The result is it was prudent ***even though it wasn't prudently evaluated***." Tr. (Vol. 3) 952 (Graves) (emphasis added).

Indeed, almost exactly two years earlier, Mr. Graves, described the PNM decision-making process at issue as a "bad process" at hearing on the precise same issue in Case No. 21-00017-UT. Tr. (Vol. 3) 951-52 (Graves). There, entirely unprompted, Mr. Graves concluded an answer to the Hearing Examiner's observation that the witness had earlier in his testimony shifted out of his *ex-ante* analysis to his *ex post* analysis with, "I don't think it was an imprudent decision. ***It was a bad process***, but it wasn't an imprudent decision. But I think even if it

decision-making process actually was, in its brief-in-chief, ABCWUA provides a point-by-point summary of the Hearing Examiners' findings that led them to their well-supported determination[258] that PNM acted imprudently in extending the company's participation in the Four Corners plant. Because as is about to be shown, the contested Four Corners prudence issue is so fact-intensive and requires many pages to analyze, ABCWUA's helpful synopsis is incorporated as a guide to the Hearing Examiner's findings of imprudence as follows:[259]

1. In resource acquisition cases, the Commission has held that utilities are required to conduct reasonable alternative analyses before selecting resources and that deficiencies in the analyses may warrant non-recovery of all or a portion of the costs of resources imprudently selected;
2. PNM's Board of Directors decision to approve the various agreements related to the FCPP was based upon the Strategist computer modeling in PNM's 2011 IRP and PNM's "second look" of modeling conducted in May 2012;[260]
3. PNM's 2011 and May 2012 Strategist modeling included a fundamental error. The runs that anticipated PNM's extended participation in the FCPP excluded the capital cost of anticipated future capital improvements required to extend the plant's life, except for the estimated cost of the SCR pollution controls;
4. PNM acknowledged the mistake of not including the capital cost of anticipated future capital improvements required to extend the plant's life in the summer of 2014 but did not re-do any Strategist runs to determine the impact of the mistake upon the cost-effectiveness of continuing to participate in Four Corners. This was not accepted practice at that time or since;
5. PNM was aware in May 2012 of the need for ongoing capital improvements at Four Corners with a net present value of $88.5 million, in addition to the SCR controls. If that amount were applied to the result of the May 2012 Strategist runs, the $44 million savings attributed to the extended operation of Four Corners would reverse;

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was a bad decision, the harm is very small or is zero." Case No. 21-00017-UT, Tr. (Vol. V) 1326 (Graves) (emphasis added).

[258] Water Authority Br. at 15 ("The Hearing Examiners' determination in Case No. 16-00276-UT, that PNM's 2013 decision to extend PNM's participation in Four Corners, is well supported.").

[259] *See* Water Authority Br. at 13-15 (quoted with light editing and corrections).

[260] *Id.* 30.

6. In its 2013 analysis performed by EPE, on which it based its decision to exit Four Corners, EPE included the ongoing costs of capital improvements projected for Four Corners;

7. Both the Washington and Oregon commissions held that utilities installing SCR pollution controls were imprudent for failing to conduct updated computer modeling immediately prior to committing themselves to significant costs of SCR investments;

8. PNM's description of its May 2012 analysis was confusing, frustrating, and at times contradictory. PNM's rendition of the facts calls into question what PNM actually considered;

9. PNM was imprudent in not updating the May 2012 analysis prior to the Board's decision in October 2013 to continue PNM's participation in Four Corners;

10. EPE was a party to the lease extension for the Four Corners plant in 2011 and it was able to revisit its initial decision and determine in November 2013 to exit the plant;

11. An example of a development in the October 2012 time frame that should have prompted a further analysis is the increasingly poor performance of Four Corners (which continued into 2015) and its related need for capital improvements;

12. PNM was imprudent in not conducting an updated analysis of the cost-effectiveness of extending its participation in Four Corners and in pursuing the SCR and other capital improvements after the Board of directors' decision in October 2013 and prior to the extension of the ownership and operating agreements in March 2015 to evaluate whether it was still cost-effective under conditions current at any time during that period to extend its participation in Four Corners;

13. In late November 2013, after the PNM Board of Directors approved the new Four Corners coal supply agreement and the extension of the ownership agreement, EPE notified PNM and the other Four Corners owners that it would not extend its participation in the Four Corners project beyond the then-current expiration date in 2016. EPE's notice triggered intensive negotiations to determine by the end of December 2013 whether any of the other owners or any third parties were willing to acquire all or a portion of EPE's ownership interest. PNM considered a variety of options in the negotiations but did not conduct a reanalysis of its May 2012 Strategist runs to help inform its actions;

14. In May 2012 when PNM conducted its "second look" at the Strategist analysis from the 2011 IRP, it had only preliminary estimates for the cost of the SCR work. The preliminary cost estimates were updated and increased several times before the Four Corners owners authorized the actual engineering work. The increased estimates were substantial, but none prompted PNM to conduct a further analysis of the cost-effectiveness of extending its participation in Four Corners; and

15. PNM conducted Strategist run in 2014 but this was not a re-evaluation of the cost-effectiveness of PNM's extended participation in Four Corners. The January 2014 Strategist run included costs for the retirement of Four Corners, but there is no evidence that PNM attempted at that time to compare the costs of retirement to the costs of PNM's extended participation in the plant.

Those enumerated findings that supported a finding of imprudence are firmly grounded in what PNM knew or should have known[261] at the time and what PNM actually did and didn't do in deciding to retain its interest in Four Corners. As demonstrated in the analysis below, those findings and conclusions remain as salient today as when they were first made. To cut to the chase, PNM's Board of Directors demonstrably failed to use sound business judgment in their 2013 decisions. PNM's strategy in this case and in Case No. 21-00017-UT before this to have PNM witness Frank Graves endeavor to reconstruct management's decision-making to show what PNM could have done if it had applied other then-known or knowable information to try to cast PNM's decision-making in a more favorable light only makes PNM's actual decision-making process look worse than it did when the Hearing Examiners vetted the issue of prudence in the 2016 Rate Case.

It necessarily follows that, as is discussed at length under Section 8.1.5 below in establishing an appropriate remedy for PNM's imprudence, ratepayers should not be required to absorb the substantial harm resulting from PNM management's lack of sound business judgement.

8.1.4.1.1. The October 2013 Decision to Extend PNM's Participation in Four Corners and the Related Decisions to Pursue Further Life-Extending Capital Improvements were Imprudent

8.1.4.1.1.1. PNM's October 2013 Decision

On October 22, 2013, PNM's Board of Directors approved the execution of three agreements relating to Four Corners – the Amended and Restated 2010 Four Corners Coal Supply

[261] *See PacifiCorp*, UE 246, Order No. 12-493 at 26, 2012 WL 664237 ("Prudence is determined by what a utility 'knew or should have known' at the time the decision was made.").

Agreement, the Four Corners 2016 Coal Supply Agreement, and Amendment No. 8 to the Four Corners Project Co-Tenancy Agreement. The Amended and Restated 2010 Four Corners Coal Supply Agreement was prepared to accommodate the closure of Four Corners Units 1-3 and the Navajo Nation's purchase of the mine that supplies coal to the plant, while maintaining the July 6, 2016 expiration date of the existing coal supply agreement.[262]

The Four Corners 2016 Coal Supply Agreement (CSA) was prepared to replace the 2010 agreement upon the latter's expiration on July 6, 2016. The execution of the new coal supply agreement was a condition to a related sale of the 48% interest of Southern California Edison Company (SCE) in Units 4 and 5 to the operating agent at Four Corners, Arizona Public Service Company (APS). The new agreement would increase the price of coal by approximately 26% and expire on July 6, 2031.

Amendment No. 8 to the Four Corners Project Co-Tenancy Agreement was intended to extend the term of the co-tenancy agreement from its then-current expiration date of July 6, 2016 to July 7, 2041. The co-tenancy agreement is the underlying agreement that establishes the rights and duties of the six owners, which in 2013 included SCE (48%), APS (15%), PNM (13%), Salt River Project Agricultural Improvement and Power District (SRP) (10%), EPE (7%), and Tucson Gas & Electric Company (TEP) (7%). The agreement establishes a governance structure and decision-making processes for capital additions, transfers of ownership interests, and the resolution of disputes. The proposed extension was intended to make the term coterminous with the term of

[262] Comm'n AN Exh. 63 (PNM Exh. 23, Olson Reb. Test. in Support of Rev. Stip. (7/21/2017) ("Olson Reb.")) at Exh. CMO-2 Reb.

the Four Corners lease with the Navajo Nation. The lease was extended on March 7, 2011 to July 2041.[263]

The presentation to the PNM Board indicated that the three agreements, plus 11 additional agreements not requiring Board approval, would be executed in the fourth quarter of 2013.

The Board's decision to approve the agreements was based on the Strategist computer modeling[264] in PNM's 2011 Integrated Resource Plan (IRP) and PNM's "second look" of modeling conducted in May 2012.[265]

For the reasons set forth below, the Hearing Examiners find that PNM's October 22, 2013 decision to continue its participation in Four Corners and the related decisions to pursue the SCR investment and the additional life-extending capital improvements were not prudent. The decisions were based upon flawed Strategist computer modeling in PNM's 2011 IRP and in PNM's "second look" at that modeling in May 2012. PNM failed to reasonably consider prospective alternatives to retaining its ownership interest in Four Corners. PNM also conducted no further analyses in the 17 months between May 2012 and October 2013 when further events indicated that such further analyses should have been performed.

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[263] A further related agreement, the Four Corners Project Operating Agreement, which designates APS as the Four Corners operating agent and establishes detailed procedures for budget approvals, capital additions, operational issues and the allocation and payment of expenses, continues by its own terms until the expiration or termination of the co-tenancy agreement.

[264] Strategist is a proprietary planning software application used by electric utility companies at the time that PNM made the decision to retain Four Corners. Strategist is a probabilistic production cost simulation model used to evaluate the relative costs of alternative resource plans and portfolios. Each Strategist run estimates the NPV of the cost to the utility of pursuing a set of generating resources over a specified time period. PNM generally used a 20-year time horizon in its Strategist analyses. PNM, like other utilities, now uses the industry-standard EnCompass capacity expansion and production cost model developed by Anchor Power Solutions. Tr. (Vol. 3) 853.

[265] Comm'n AN Exh. 62 (Olson Test. in Support of Revised Stip. (6/16/2017) ("Olson Stip.")) at 10-11.

8.1.4.1.1.2. PNM's 2011 IRP Analysis

The Four Corners retirement scenario in the Strategist runs performed for the 2011 IRP assumed that SCRs or similar pollution controls would be installed ***before*** Four Corners would be retired.[266] Thus, whether the 2011 assumption was reasonable or not, the 2011 retirement scenarios included costs for pollution controls that, by May 2012 and October 2013, PNM knew could be avoided with the plant's retirement. In addition, the 2011 IRP and its cost assumptions were never approved by the Commission.[267]

8.1.4.1.1.3. PNM's Exclusion of Future Capital Improvements in the May 2012 Analysis

In May 2012, PNM updated the Strategist analysis from the 2011 IRP with new cost data and with the revised assumption that the pollution controls could be avoided with PNM's exit from Four Corners. PNM witness Patrick O'Connell said the most significant update of the 2011 IRP in the May 2012 analysis involved the impact of the anticipated prices in the new coal supply agreement that was then being negotiated for Four Corners. Mr. O'Connell said the May 2012 analysis evaluated several scenarios of future coal costs, and it updated natural gas prices, carbon emission pricing, capital costs for new gas resources and new solar resource costs based on data in PNM's most recent renewable energy plan filing. He said the result showed that replacing Four Corners with a combined cycle natural gas unit interconnected to PNM's northern New Mexico transmission system would be $44 million more expensive than continued operation of Four

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[266] *Id.*; *see also* Comm'n AN Exh. 63 (Olson Reb.) at 5.

[267] In PNM's 2015 rate case, the Commission held that PNM could not rely on the 2011 IRP to establish the prudence of its decisions to acquire and renew leasehold interests in Palo Verde Units 1 and 2. The Commission stated that "the probative value of the 2011 IRP was limited as it was never accepted as compliant with the Commission's IRP rule due to the closure of [the case addressing the protests to PNM's 2011 IRP] Case 11-00317-UT; a closure which PNM never sought to counter. The Commission made no finding on whether the submitted IRP complied with requirements of 17.7.3 NMAC or was deficient." Case No. 15-00261-UT, *Final Order* at 32-33.

Corners at a Four Corners coal price slightly higher than the agreement APS ultimately negotiated for the plant.[268]

However, the May 2012 runs (as well as the 2011 runs) included a fundamental modeling error that transgressed standard industry practice. The runs that anticipated PNM's extended participation in Four Corners nevertheless excluded the capital costs of anticipated future capital improvements required to extend Four Corners' life, except for the estimated cost of the SCR pollution controls.[269] PNM was aware of the magnitude of the need for capital improvements. In fact, PNM included the anticipated operating and maintenance costs associated with the improvements in the Strategist runs.[270] PNM excluded the capital improvements based upon the

[268] Comm'n AN Exh. 59 (O'Connell Reb. Test. in Support of Revised Stip. (7/21/2017) ("O'Connell Reb.")) at 17. Inexplicably, Mr. O'Connell's prepared testimony referred to a $44 million comparison from a Strategist run that was not included in what was purported to be the May 2012 summary in Exhibit CMO-3 Stip attached to Mr. Olson's direct testimony. The Strategist run used for the $44 million comparison was also not the Strategist run that used a coal price closest to the eventual coal price in the 2016 coal supply agreement.

Scenario Name	Strategist File Date	Strategist Filename	Strategist NPV ($000s)	Savings to Continue in Four Corners vs. PNM Exit ($000s)
Base+Retire FCPP, no SCR at FCPP, Replace with CC	5/10/2012	FC_Eval_B	$8,089,219	---
Base w/APS Pricing-$2.34/MMBtu Index, 3% esc	5/4/2012	FC_Eval_C	$8,045,252	$43,967
Base w/APS Pricing-$2.42/MMBtu Index, 3% esc	5/10/2012	FC_Eval_D	$8,055,750	$33,469

Excerpted from Comm'n AN Exh. 59 (O'Connell Reb.) at Exh. PJO-3 Rebuttal. The eventual average coal price in the new coal supply agreement was $2.55/MMBtu, meaning that the $33 million cost differential would be even less. The more appropriate comparison would have been the Strategist run that used the price of $2.42/MMBtu with a cost differential of $33.4 million.

[269] Comm'n AN Exh. 59 (O'Connell Reb.) at 17.

[270] Comm'n AN Exh. 70 (Tr. Vol. 3, 8/9/2017) 572 (O'Connell).

mistaken assumption that the rate at which ongoing capital costs were needed was relatively similar among PNM's generating plants and that the costs would cancel out in a Strategist analysis.[271]

PNM acknowledged the mistake in the summer of 2014 during the hearings in Case No. 13-00390-UT, but PNM did not re-do any Strategist runs at that date to determine the impact of the mistake upon the cost-effectiveness of continuing to participate in Four Corners. In the 2016 Rate Case, PNM argued that the exclusion of ongoing capital costs for Four Corners in PNM's May 2012 analysis should be measured against "the standard practice at that time and it would be improper hindsight review to impose a new standard now."[272] Now, however, PNN argues in this case that PNM witness O'Connell testified in the 2016 Rate Case that correcting the fundamental omission in a late 2013 analysis again would not have changed the outcome of PNM's analysis because it likely would have been offset by the countervailing effects of the lower assessed carbon price. PNM alleges that its "result" is confirmed in the updated *e post* analysis conducted by PNM witness Graves.[273]

PNM's rationalizations are unavailing for several reasons. To start, the record demonstrates that the accepted utility practice at all relevant times is what prevails today: to include the costs of necessary capital improvements in performing resource modeling analyses. Speculation over potential "countervailing effects" will not paper over the fundamental error. Nor does Mr. Graves' unreliable *post hoc* prudence analysis, evaluated below, confirm a conjectural "result" to the contrary.

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[271] *Id.* 573-75.

[272] Case No. 16-00276-UT, PNM Resp. Br. at 22-23.

[273] PNM Br. at 211.

Moreover, common sense dictates – as the convincing evidence in the 2016 Rate Case confirms – that production cost and capacity expansion models and simulators produce results that are only as valid as the data inputted enable them to be. NEE's cost production witness, Anna Sommer, an expert in the use of Strategist, confirmed in the 2016 Rate Case that PNM's analysis should have included a projection of the costs of capital improvements needed for Four Corners in its May 2012 Strategist runs. Ms. Sommer observed in her testimony at hearing in the 2016 Rate Case that

> the only way you get a valid result out of Strategist is to include all going-forward costs. So to the extent you have ignored some costs associated with continued operation of a unit, then your result is no longer valid. It is really important to have things like capital expenditures associated with older units included in your Strategist modeling.[274]

Further, Ms. Sommer testified that the exclusion of future capital costs is not "good practice in resource planning."[275] Sommer explained that "Strategist is, basically, making choices about new systems to add or retire, assuming you give it that option on the basis of going-forward costs."[276] She said "you should definitely include costs that your customers will face going forward. So the model can say, okay, these are the costs of resource A, and these are all of the costs of resource B, and choose whichever path is the least cost. That is kind of basic good practice in integrated resource planning."[277] Moreover, refuting PNM's argument on this issue, Ms. Sommer stated that it is not likely that there will be a canceling out of costs if the utility does not include capital cost improvements for both the plant being reviewed and the rest of the utility's

[274] Comm'n AN Exh. 73 (Tr. Vol. 6, 8/14/2017) 1267 (Sommer).

[275] *Id.* 1268.

[276] *Id.*

[277] *Id.*

resources. "That seems like a risky proposition to me, because there's no way – well, it seems unlikely that the capital expenditures for resource A are going to be identical to the capital expenditures for resource B. So why not take the more transparent path, which is to include all the costs for all resources into your modeling."[278]

Significantly, too, Ms. Sommer said the inclusion of ongoing capital costs is particularly important for an older plant and particularly, too, for a utility's analysis of whether to continue operating it:

> In fact, *I think that would make it more urgent to include potential capital expenditures*, because when you're getting to that lifetime, whether you're talking about a coal-fired power plant or wind turbines, it seems likely that you're going to have to do some major maintenance. Whether that is replacing the turbines on either a wind farm, or coal-fired power plant, or something less expensive than that.
>
> So it seems to me that not only would you want to make sure that those capital expenditures are included in your Strategist modeling, but you would want to make sure that your testing, *whether continuing to spend money on that power plant at all, or continuing to operate it effectively, makes any sense*.[279]

In accord with Ms. Sommer's expert testimony in the 2016 Rate Case, the evidence in this case shows that the failure to include any capital costs that would be incurred after Four Corners were retrofitted with SCRs in May 2012 departed from standard industry practice. PNM witness Frank Graves testified that over the course of his career that dates back well before 2012, he is not aware of another utility committing the error that PNM made in omitting ongoing capital expenditures from its May 2012 analysis.[280] Similarly, opining on PNM's omission of future capital costs in its May 2012 analysis, Sierra Club witness Dr. Jeremy Fisher testified that

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[278] *Id.*

[279] *Id.* 1269 (emphasis added).

[280] Tr. (Vol. 3) 847-48 (Graves).

> PNM's May 2012 study assumed that after SCR would be installed on Four Corners, there would be no future capital costs at the plant through 2031. In other words, PNM assumed that a large coal-fired power plant that had already operated for more than for decades would have no future capital costs after SCR was installed. *This assumption was wrong at the time, and violated the industry standard for modeling resource planning decisions*.[281]

Thus, the record demonstrates that in May 2012 PNM was cognizant of, but still somehow failed to account for, ongoing capital improvements at Four Corners with a NPV of $88.5 million, in addition to the costs of the SCR controls.[282] If that amount were applied to the results of the May 2012 Strategist runs, the $44 million savings (in the May 2012 Strategist run titled "FC_Eval_C" below) attributed to the extended operation of Four Corners reverses. The result would be a $44.5 million savings from PNM's exit from Four Corners and its replacement with a natural gas combined cycle unit.[283] If the $88.5 million were applied to the results of the May 2012 Strategist runs, the $33.5 million savings (in the Strategist run titled "FC_Eval_D" below) attributed to the continued operation of Four Corners at that time also reverses. The result would be a $55 million savings attributed to PNM's exit from Four Corners and its replacement with a natural gas combined cycle unit.[284]

May 2012 Strategist Runs Corrected to Include $88.5 Million in Ongoing Four Corners Capital Costs (NPV, expressed in $000s)						
Scenario Name	**Strategist File Date**	**Strategist Filename**	**May 2012 Strategist Runs NPV ($000s)**	**May 2012 Savings from Extended Participation**	**$88.5 Million Ongoing Costs to Extend Participation**	**Savings Due to Exit from Four Corners**

[281] Sierra Club Exh. 1 (Fisher Dir.) at 12 (emphasis added).

[282] Comm'n AN Exh. 59 (O'Connell Reb.) at 17; Comm'n AN Exh. 70 (Tr. Vol. 3, 8/9/2017) 573.

[283] Comm'n AN Exh. 70 (Tr. Vol. 3, 8/9/2017) 512-13 (O'Connell).

[284] *Id.* 509-10.

Base+Retire FCPP, no SCR at FCPP, Replace with CC	5/10/2012	FC_Eval_B	$8,089,219	---	---	---
Base w/APS Pricing-$2.34/MMBtu Index, 3% esc	5/4/2012	FC_Eval_C	$8,045,252	$43,967	+ $88,500	$44,533
Base w/APS Pricing-$2.42/MMBtu Index, 3% esc	5/10/2012	FC_Eval_D	$8,055,750	$33,469	+ $88,500	$55,031

Consistent with the industry standard, in the 2013 analysis performed by EPE, on which the utility based its decision to exit Four Corners, EPE included the ongoing costs of capital improvements projected for Four Corners.[285] In addition, even in the 2012 *PacifiCorp* case discussed above, where the Oregon commission determined that Pacific Power was imprudent for failing to update its computer modeling, Pacific Power included the projected capital costs of continuing the operate the plant in its computer modeling.[286]

Finally, PNM's exclusion of the costs of ongoing capital improvements from the May 2012 analysis contrasts sharply with the repeated emphasis PNM placed on the importance of such costs to earnings for PNM's stockholders. NEE introduced into the record seven presentations to investors from 2012 through 2014 and a final presentation in 2017, in which PNM regularly spelled out in detail its capital spending plans and the impact the spending would have on earnings.[287]

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[285] *See* Comm'n AN Exh. 33 (Fetter Dir. Test., 7/07/2017), Exh. SMF-3 (Case No. 15-00109-UT, *Certification of Stipulation* (NMPRC 4/22/16), at 16; *see Id.* 19 ("As a result of EPE's deliberative process and economic analyses, the Company decided not to participate in the proposed life extension of Four Corners.").

[286] *PacifiCorp*, UE-246, Order 12-493, at 28, 2012 WL 664237.

[287] *See* Comm'n AN Exh. 9 (NEE Exh. 1, "2012 Analyst Day," 12/07/12) at 11, 37; Comm'n Exh. AN 10 (NEE Exh. 2, "Investor Meetings," 3/2013 at 7, 8); Comm'n AN Exh. 11 (NEE Exh. 3, "Q2 2013 Earnings Presentations," 8/2/13 at A-3, A-4); Comm'n AN Exh. 12 (NEE Exh. 4, "EEI Financial Conference," 11/2013 at 6-7); Comm'n AN Exh. 13 (NEE Exh. 5, "2014 Earnings Guide Presentation," 12/6/13 at 13); Comm'n Exh. 28 (NEE Exh. 22, "2011 Earnings Presentation," 02/29/12) at 12, A-5, A-6, A-19; Comm'n AN Exh. 29 (NEE Exh.

More succinctly stated, instead of focusing intently on applying standard industry practice to its resource modeling analyses on which it based consequential investment decisions, PNM management's attention was keenly focused on developing "rate base growth" to produce "earnings growth" to result in "dividend growth" for shareholders.[288]

In sum, PNM's May 2012 analysis was demonstrably deficient. PNM failed to perform the rigorous review that a prudent utility should have performed prior to making a significant resource retention decision and incurring substantial life-extending expenditures in the process.[289]

8.1.4.1.1.4. PNM's Confusing, Frustrating, and Contradictory Descriptions of its May 2012 Analysis

During the evidentiary hearings in the 2016 Rate Case, PNM's description of its May 2012 analysis was confusing, frustrating, and at times contradictory. PNM's description calls into question what PNM actually considered. PNM witness Chris Olson, PNM's vice president of generation during the 2013 negotiations and PNM's primary negotiator of the FCPP agreements, testified that the May 2012 analysis indicated that retaining ownership in Four Corners with SCR and the new coal price was less expensive than the retirement alternative. As support, he attached to his testimony a bar chart entitled "Four Corners Coal Pricing and Retirement Scenarios (5/14/2012)" as PNM Exhibit CMO-3 Stip.[290] However, Mr. Olson joined PNM as Vice President of Generation in December 2012 after the performance of the May 2012 analysis and was unable

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23, "Q1 2012 Earnings Presentation," 5/4/12) at A-3, A-4, A-15; Comm'n AN Exh. 34 (NEE Exh. 31: "Investor Meetings," 6/2017) at 6, 7, 16, 46.

[288] Comm'n AN Exh. 34 (Investor Meetings, June 2017) at 6.

[289] *See PacifiCorp*, UE-246, Order 12-493 at 28, 2012 WL 664237.

[290] Comm'n AN Exh. 62 (Olson Test. in Support of Rev. Stip. ("Olson Stip."), 6/16/2017) at 10-11; *see also* Comm'n AN Exh. 63 (Olson Reb.) at 5.

to answer any questions about Exhibit CMO-3 Stip.[291] For example, Mr. Olson did not know whether the document was prepared in May 2012 or for this case.[292]

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[291] Q. Mr. Olson, could we turn to your CMO-3 Stip, which is the Exhibit No. 3 of your Testimony in Support of the Revised Stipulation?

A. Yes.

Q. Do these Strategist runs that appear on this document include SCR?

A. I don't know. I – Mr. O'Connell was – was examined thoroughly on this diagram. It is attached to my testimony. I don't know the basis for it. It – it preceded the time when I joined PNM. So, again, Mr. O'Connell, I think, was – was examined thoroughly on this diagram.

Q. So do you know, as you sit there, whether this includes – whether any of these Strategist runs from 2012 include SCR or not?

A. I don't know.

Q. Could you tell me what this second column, where it's -- well, why don't you first just describe what CMO-3 Stip is?

A. Well, it's a chart that is titled, "Four Corners Coal Pricing and Retirement Scenarios," from 5/14/2012.

Q. When was this produced?

A. I don't know. I see the label that says "5/14/2012."

Q. Was it produced in 2012? Was this document in 2012?

A. Again, I don't know. It's labeled "5/14/2012." I don't – I can't testify to when it was produced.

Q. Do you know if it was produced for this case?

A. Well, if it was produced in 5/14/2012, it would have been done way in advance of this case.

Q. Well, it references the Strategist runs that were performed in May 2012; but I don't know when this document was produced. And I'm asking you, is it possible that this document was produced for this case about those Strategist runs?

A. Well, again, I couldn't even tell you that it was – these are Strategist runs; because there's nothing here that indicates – that even says the word "Strategist." So I don't know.

Comm'n AN Exh. 74 (Tr. Vol. 7, 8/15/2017) 1486-88 (Olson).

Q. Why did this chart of yours start at $7,850,000,000, instead of starting at zero?

A. I don't know the answer.

Q. What makes up the $7,850,000,000?

A. I don't know the answer.

Q. Were all these runs run on the same day?

A. I don't know the answer.

PNM witness, Patrick O'Connell, Director of Planning and Resources starting in July 2012, also had difficulty explaining what was shown in Exhibit CMO-3. Mr. O'Connell said that he was not involved in the May 2012 analysis but that he did "forensic accounting" to determine what was represented in Exhibit CMO-3 Stip.[293] O'Connell stated that it appeared that someone constructed bars that showed the NPV of costs calculated in various Strategist runs conducted in May 2012 and superimposed upon the bars cost items, some of which were included in the Strategist runs (such as base system cost, incremental system cost and SCR cost) and some of which were not included in the Strategist runs (such as stranded costs, transmission costs and decommis-

Q. And I would guess that you don't know the answer about why Eval_C is not included in CMO-3 Stip; is that right?

A. I don't know the answer, correct.

Q. And you heard Mr. O'Connell say that he didn't perform the Strategist runs that appear on CMO-3 stip, either.

A. I don't remember what he said.

Id. 1492.

[292] *Id.* 1488.

[293] Mr. O'Connell described his general understanding of the exhibit as follows:

> Doing forensic accounting on this exhibit, what we realized is these NPVs on the bars match the NPVs on the Strategist results. And so this looked to be just a way to illustrate order of magnitude within your base -- your total Strategist NPV, some of the things that were changing within there.

Comm'n AN Exh. 70 (Tr. Vol. 3, 8/9/2017) 588 (O'Connell).

sioning).[294] To sum up, then, in Mr. O'Connell's own words, PNM management's descriptions of its own May 2012 analysis were "confusing,"[295] at best.

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[294] Q. Well, take the results on line 4 of PJO-3. That's the Four Corners Evaluation_B file name. And the total -- what you have listed there as a Strategist NPV is – what? – $8,089,219,000. And I think you testified earlier that that's the total when you add up all the numbers in the second set of bars on NEE Exhibit 17.

A. I believe that what I was – the information I was trying to convey in the response to the Bench Request is that the magnitude of all the colors on the bar is the Strategist NPV. Everything on here adds up to the $8.089 billion. And then these other things are costs associated with that run, and they just are subdivisions of that total, whether they were in Strategist or not.

Q. So was the Strategist run the – an amount smaller than what's in the bar? And then you added the additional amounts for stranded costs, transmission costs, and decommission costs?

A. No. The Strategist analysis run is the entire bar. And then all these other costs were subtracted from the Strategist run. Whatever was left over got called "Base system cost."

Q. I'm sorry; because I'm having trouble.

A. *No, it's confusing*.

Q. Commission Exhibit 6 says that, "Stranded costs, transmission costs, and decommissioning costs are not specifically included in the Strategist analysis in input files." Are you saying that they're included in the output files?

A. They're not included in Strategist, period. So you've got apples and oranges going on on this graph. It starts with a Strategist value. And then some things that are in Strategist – let's see – like this Incremental System cost, are subdivided. Other things that aren't in Strategist, like stranding costs, are subdivided. So that's where that mixed bag of what is on this graph comes from. The magnitude of the bar is the Strategist NPV.

Q. But part of the bar is the – the top part of the bar, the $40 [verbatim], was not part of the Strategist run? Or was it?

A. No.

Q. No, it wasn't?

A. Yeah. It – going back to the Bench Request – or Commission Exhibit 6 – last sentence, it says, "Stranded costs, transmission costs, and decommissioning costs are not specifically included in the Strategist input file."

So that $40 million is a cost that was estimated to be in addition to the cost of the system that was modeled in Strategist. The $40 million then wasn't added back to the Strategist NPV for the purposes of this graph.

I think, like stranded costs, that's another example of something that probably, if you're trying to estimate the total cost of making that choice, should have been added to that $8.089 billion; but it wasn't, for the purposes of this graph.

Q. It's included in the $8.08 billion; right?

A. The $8.08 billion is a result that comes from a model that did not contemplate that cost.

8.1.1.4.1.5. PNM's Failure to Update its Strategist Analyses Between May 2012 and October 2013

The Hearing Examiners further find that PNM was imprudent in not updating the May 2012 analysis prior to the Board's decision in October 2013 to continue PNM's participation in Four Corners.

PNM witness Patrick O'Connell asserted in the 2016 Rate Case that it was not imprudent of PNM not to have updated its May 2012 Four Corners analysis in December 2013 to account for the claimed dynamic nature of the electric power production market. Mr. O'Connell observed that PNM remained informed of relevant changes in the generation market.[296]

PNM witness Chris Olson, PNM's primary negotiator for the Four Corners coal supply and extended ownership agreement, conceded in the 2016 Rate Case that he did not review any Strategist runs in the course of the negotiations for the 2016 coal supply agreement and the amendments to the co-tenancy and operating agreements. Mr. Olson could only manage to state that at some point he asked Mr. O'Connell "point blank, 'Is – does this make sense to continue operation with Four Corners, based on what, you know, we see?' And he said, 'Absolutely. And particularly in the context of shutting down two coal units at San Juan 2 and 3[.]'"[297]

Q. But if you add the numbers in this bar, you come up with $8.08 billion.

A. You sure do. *And it is confusing*.

Comm'n AN Exh. 70 (Tr. Vol. 3, 8/9/2017) 598-600 (O'Connell) (emphasis added).

[295] *Id*. 599, 600.

[296] Comm'n AN Exh. 59 (O'Connell Reb.) at 13-14.

[297] Comm'n AN Exh. 73 (Tr. Vol. 7, 8/14/2017) 1616-17 (Olson).

Both the Washington and Oregon commissions found that similar ad hoc undocumented analyses were insufficient to prove the utility's prudence when making decisions on resources with costs of such magnitude as those at issue in this review.[298]

In the 2016 Rate Case, NEE witness Steven Fetter (a former chairman and commissioner with the Michigan Public Service Commission, current Chairman of the Governance and Human Resources Committee of the Board of Directors of Central Hudson Gas & Electric Corporation, and a former director with the credit rating agency, Fitch, Inc.) testified that it was almost "utility management malpractice" for PNM not to have undertaken an update of the May 2012 analysis before approving PNM's extended participation in Four Corners in October 2013. He testified that PNM's "process path" was "faulty."[299]

Mr. Fetter said that PNM had not shown that it did the customary financial and risk analyses to support its decision to sign the Four Corners contract documents, nor did PNM show that it had explored other reasonable and comparable alternatives to the use of a 50-year coal-fired plant to generate energy for New Mexico.[300] Mr. Fetter suggested that the reason was PNM's pre-

[298] *See WUTC Pacific Power Order* at 33, 36-37, 332 P.U.R. 4th 1, 2016 WL 7245476 (stating, at 37, "Importantly, provides no explanation based on contemporaneous documents for why, in the face of falling natural gas prices and a reversal of mining operations, it decided there was no need to produce a more rigorous mine fueling plan in the fall of 2013. Instead, the Company's decision to sign the FNTP on December 1, 2013, was based on its earlier May economic analysis that used coal costs derived from mine operations that it knew no longer represented how coal would be mined or procured over the remaining expected life of the Bridger generating units."); *PacifiCorp*, UE-246, Order 12-493 at 29-30, 2012 WL 664237 (concluding, at 30, "there is nothing in the record that shows [the utility] conducted resource portfolio analyses at the time of its decisions that back up any of its assertions.").

[299] Comm'n Exh. 72 (Tr. Vol. 5, 8/11/2017) 972-73, 976 (Fetter).

[300] Comm'n AN Exh. 33 (Fetter Dir.) at 8-9.

occupation with and desire not to complicate the San Juan abandonment case that PNM was preparing to file in December 2013.[301]

Mr. Fetter criticized PNM's continued reliance on analyses conducted in 2009, 2011 and May 2012, observing as follows,

> Based upon my prior experience as a regulator and as a member of the financial community, I find reliance on analyses from 2009 and 2011 when making such a significant financial decision four years or two-and-a-half years later completely unacceptable. PNM also attempted to support its decision with stale Strategist runs that were performed 19 months earlier, in May 2012, but those did not include the price of the new coal contract, did not include capital expenditures that were certainly known to be ultimately necessary, or updated market prices for alternative resources, including costs of gas, solar, and wind.[302]

"Putting aside any regulatory requirements," Fetter continued, "mere common sense would call for a utility to undertake, complete, and factor in a *timely* analysis before committing to a significant increase in capital investment.[303] He said "no business would rely on outdated cost numbers to justify current investment decisions, especially within the energy sector where circumstances can change within a matter of months, even weeks, due to fuel volatility or utility industry setbacks."[304]

Further, Mr. Fetter noted that had PNM agreed to extend its participation in Four Corners despite the knowledge that two of the six owners, EPE and SCE, chose not to renew, and despite known and impending extensive future capital and operating costs, including significant costs to install SCR pollution controls to comply with existing environmental regulations.[305]

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[301] Comm'n Exh. 72 (Tr. Vol. 5, 8/11/2017) 978-80 (Fetter).

[302] Comm'n AN Exh. 33 (Fetter Dir.) at 10.

[303] *Id.* (emphasis in original).

[304] *Id.* 15.

[305] *Id.* 7.

Mr. Fetter also compared PNM's review to the more extensive contemporaneous review that EPE undertake as the basis for its decision in November 2013 to exit Four Corners. Fetter noted that EPE conducted an independent economic analysis in 2013 to determine whether to participate in an extended operating life for Four Corners beyond 2016, or whether to exit. Based upon the analysis, the Hearing Examiner in EPE's ensuing abandonment proceeding found that abandonment and sale of its Four Corners stake would result in "substantial net public benefits in the range of $124.6 million to $170.4 million."[306]

Mr. Fetter stated that PNM faced the same choice that EPE faced in 2013: whether to renew the FCPP participation agreement or exit. Fetter asserted that the evidence supports the conclusion that PNM's decision was not made as a result of a deliberative process, such as used by EPE.[307]

Mr. Fetter maintained that "[a] reasonable utility manager would have recognized this moment as a significant decision-making point requiring updated analysis – as in fact EPE did."[308] Fetter said that "[e]ven assuming that the two companies are not the same because of different resource portfolios and different needs, the critical factors (environmental risks, litigation risks, and costs of future capital expenditures) that influenced EPE's choice to walk away from the renewal contract equally pertained to PNM. By not undertaking a deliberative process, like EPE, there was no way for PNM to know what the true economic picture of continued ownership of FCPP would be."[309]

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[306] Case No. 15-00109-UT, *Certification of Stipulation* at 48 (NMPRC 4/22/16).

[307] Comm'n Exh. 33 (Fetter Dir.) at 19.

[308] *Id.* 20.

[309] *Id.*

Mr. Fetter cited his own particular experience as a member of the board of directors of Central Hudson Gas & Electric Corporation as the utility was being acquired by Fortis of Canada in 2013. Fetter said that the utility's management kept the board of directors fully informed and up to date on "any material facts" that occurred during the acquisition process, and that he was surprised by the lack of information presented to the PNM board of directors during the November-December 2013 timeframe:

> A . . . Had I not looked at El Paso, had I looked at nothing other than what PNM did – I've served on a board of a regulated utility for 15 years now. It went through a relatively large merger, taken over by Fortis of Canada about four years ago. Any material fact during that four- or five-month consideration that management learned about was communicated to the board, either in person, by telephone, or by confidential e-mail structure setup.
>
> I'm just very surprised that there was not a full provision of information to the PNM board in the November-December time frame of 2013. And what struck me was, it just didn't ring right to me. What – what would have led there not to be such a sharing of information with the board?
>
> And I – I recall, there's an old Sherlock Holmes story in which the key piece of evidence was that – the dog that didn't bark.[310]

Mr. Fetter suggested that PNM's management was preoccupied with the filing it was preparing for December 2013 to abandon San Juan Units 2 and 3 and bring Palo Verde Unit 3 into PNM's retail rates:

> A . . . And so I said to myself, Why didn't the dog bark in November or December of 2013? And in reviewing the evidence, I found NEE Exhibit 6 – and I have part of it in front of me. And it's a memo from Patrick Apodaca to the board of PNM, and a sentence about – most of the way down states to the board:
>
> "Among other things, maintaining our same level of ownership at Four Corners avoids a possible distraction with our BART filing with the PRC next week and our negotiations with the owners of SJ" – San Juan – "SJGS."

[310] Comm'n Exh. 72 (Tr. Vol. 5, 8/11/2017) 977-78 (Fetter).

> And to me, I found the dog that didn't bark. There was a reason why they didn't do that fulsome analysis and share it with the board. There were other things going on that they did not want all the information laid on the board at that time.
>
> And I think that's a – as a current board member, I would be very upset not to have all this information before such a series of a dozen or so contracts were signed by management.
>
> * * *
>
> A What leads me to feel that the process was imprudent was the total lack of interaction with the Commission, either at Commission level or Staff level, of these pending issues, followed by – from what I can see, the last major examination of the potential to proceed with Four Corners was in May of 2012.
>
> To me, as a current board member and former regulator, I almost find that to be utility management malpractice --
>
> **Q So you don't –**
>
> A – not to provide such a full examination contemporaneous with the time that the decision has to be made by the board.[311]

In fact, Mr. O'Connell confirmed that PNM was planning for a significant change to its resource portfolio in late 2013 – the retirement of 340 MW of coal baseload at the San Juan Generating Station. PNM's position in that case was that the most cost-effective portfolio following that retirement included nuclear baseload capacity and the continued reliance on Four Corners.[312]

For its part, PNM argues that during the 2016 Rate Case, Mr. O'Connell explained that the lack of an updated assessment in 2013, between the May 2012 and January 2014 analyses, did not show imprudence because NEE's witnesses did not actually quantify what an updated assessment would have shown and there were no significant changes to resource drivers necessitating such an

[311] *Id.* 978-80.

[312] *See* Comm'n Exh. AN 59 (O'Connell Reb.) at 13-14.

update.[313] Regarding updates in carbon pricing, PNM says that Mr. O'Connell explained that carbon pricing inputs in an updated analysis would have matched the inputs from PNM's 2014 IRP, which used a lower $13.40 per ton beginning in 2020 rather than $20 per ton beginning in 2013.[314] And, PNM maintains, the changes in the natural gas market also would not have had a controlling effect. PNM states that updated gas prices in 2014, which would be similar to gas prices that would have been used in a 2013 analysis, showed higher forecasted natural gas prices than the prices used in the May 2012 analysis.[315] PNM adds that Mr. O'Connell also noted that PNM already had planned to retire 340 MW of coal baseload[316] and that it simply did not make sense to impose other major changes on the system at that same time. PNM thus postulates that the avoidance of such risks to customers by changing the system all at once without a regulatory or legislative mandate may have itself been imprudent.[317] PNM contends that the retirement of the 340 MW of capacity at the San Juan also counterbalanced any impact of a lower load forecast on the decision to stay with Four Corners.[318] PNM asserts that from the foregoing alleged "facts," Mr. O'Connell concluded that an updated analysis in 2013 would not have changed the decision to continue with Four Corners.[319] PNM submits that "[T]he evidence shows that PNM was aware

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313 PNM Br. at 210 (citing Comm'n AN Exh. 59 (O'Connell Reb.) at 13-14).

314 *Id.* (citing Comm'n AN Exh. 59 (O'Connell Reb.) at 14-15).

315 *Id.* (citing Comm'n AN Exh. 59 (O'Connell Reb.) at 16 and PNM Exh. PJO-2 Reb., p. 3 of 3).

316 *Id.* (citing Comm'n AN Exh. 59 (O'Connell Reb. Test. in Support of Revised Stip. (July 21, 2017)) at 13:17-19.

317 PNM Br. at 211.

318 *Id.* (citing Commission AN Exh. 59 (O'Connell Reb) at 15).

319 *Id.*

of relevant shifts in the prevailing market conditions but also understood that they did not alter the earlier findings, even without running complex system planning models to reach that insight."[320]

PNM's argument is unpersuasive. It asks that the Commission accept an inflexibility in planning that EPE and the Oregon and Washington commissions rejected. EPE was a party to the lease extension for the Four Corners plant in 2011, and it was able to revisit its initial decision and determine in November 2013 to exit the plant. The Oregon PUC found that Pacific Power was imprudent because it failed to update its analyses both before it signed an installation contract in May 2009 and between the May 2009 contract signing and the June 2010 start of construction.[321] Pacific Power had been working with state regulators from 2006 to 2009 to determine the best compliance option.[322] The Washington commission determined that PacifiCorp was imprudent for failing to update its analysis between the May 31, 2013 signing of a limited notice to proceed on an engineering, procurement, and construction services contract for SCR installation and the December 1, 2013 issuance of a full notice to proceed.[323]

In sum, consistent with EPE's contrary example and the Oregon and Washington commission decision on this essential issue, PNM's failure to update its Strategist analyses between May 2012 and October 2013 was imprudent.

8.1.4.1.1.6. Four Corners' Increasingly Poor Performance During PNM's Decision-making Process

An example of a development in the May 2012-October 2013 time frame that should have prompted a further analysis is the increasingly poor performance of Four Corners in the relevant

[320] *Id.*

[321] *PacifiCorp*, UE 246, Order No. 12-493 at 30, 2012 WL 664237.

[322] *Id.* 19.

[323] *WUTC Pacific Power Order* at 34-38, 332 P.U.R. 4th 1, 2016 WL 7245476

contemporaneous time period and its related need for life-extending capital improvements. Beginning in 2013, the forced outage rate at Four Corners started climbing significantly, and the units' availability declined.[324]

Four Corners Unit 4	2007	2008	2009	2010	2011	2012	2013	2014	2015
EAF=Equivalent Availability Factor	81.0	92.1	88.6	60.2	82.8	80.2	**74.8**	**76.0**	**79.5**
EFOR=Equivalent Forced Outage Rate	7.5	7.9	6.2	20.6	7.7	18.9	**18.5**	**21.2**	**17.8**
Four Corners Unit 5	**2007**	**2008**	**2009**	**2010**	**2011**	**2012**	**2013**	**2014**	**2015**
EAF=Equivalent Availability Factor	76.1	65.6	86.7	89.9	78.9	80.9	**70.9**	**60.2**	**76.8**
EFOR=Equivalent Forced Outage Rate	23.9	12.4	10.4	10.2	16.1	10.2	**24.3**	**33.0**	**20.7**
Four Corners Units 4 + 5									
EAF=Equivalent Availability Factor	78.5	78.8	87.6	75.0	80.9	80.5	**72.8**	**68.1**	**78.2**
EFOR=Equivalent Forced Outage Rate	15.7	10.1	8.3	15.4	11.9	14.5	**21.4**	**27.1**	**19.3**

Indeed, one of the other Four Corners owners, TEP raised concerns about the "poor operating performance" of the plant in an August 29, 2013 e-mail to the Four Corners operating agent, APS (and cc'd to PNM). The e-mail was sent in response to an August 27, 2013 e-mail from APS asking the owners' representatives to the Four Corners Coordinating Committee about the timing of each owner's ability to execute the coal supply and related agreements. The TEP representative expressed concerns about the uncertain status of the negotiations and asked that several questions be covered at the upcoming Coordinating Committee meeting. The questions included the status of the coal supply agreement, how long SCE is willing to delay closing "before they pull the plug," whether the "deal" is "over" if the Arizona commission does not provide a "clear answer of retail competition by October 31, whether APS and the owners are willing to

[324] The table below is derived from Comm'n Exh. AN 38 (Van Winkle Dir. Test. (7/7/2017) at Exh. DVW-6.

approve SCR (or at least the engineering for SCR) before the NEPA review is completed," and what "steps APS is taking to address the poor operating performance of the plant. I was given the impression that a lot of money would be required, is there a plan and have these amounts been added to the budgets?"[325]

When asked about this at the 2016 Rate Case hearing, Mr. Olson stated that APS indicated that,

> because of the uncertainty leading to the coal agreement, Southern Cal Edison's departure and all those things, that the owners were reluctant to continue to invest in that facility until it got – those items got cleared. And you can see that in the capital spend history, as well. And that's why I have no reason to doubt APS's contention is the capital spend has increased dramatically for good reasons. One is that there is a lot of catch-up to be done at this point in time, because a lot of maintenance had been deferred because of the uncertainty; and that's occurring now."[326]

Continuing, Mr. Olson said "I don't dispute – PNM has not been happy with performance. And, again, you can see from Mr. Manfield's note from Tucson, is he wants more information about the steps APS is taking. And I was given the impression that a lot of money would be required. Is there a plan? And we have that plan from APS, and that is the basis for our capital request [in this case]."[327]

The record shows that PNM dismissed the issues at the time, however, without analysis of the cost-effectiveness of proceeding with the additional capital improvements and extending its participation. Mr. Olson described what he considered Four Corners' good performance historically and his view that, with sufficient capital investment, it could again become a good

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[325] Comm'n AN Exh. 45 (4C Coordinating Committee. Agenda e-mails, 8/27 and 8/29/13).

[326] Comm'n Exh. 74 (Tr. Vol. 7, 8/15/2017) 1532 (Olson).

[327] *Id.* 1535.

performer.[328] But it is undisputed that PNM never included in any Strategist runs – in May 2012 through October 2013 (and, as discussed below, again not in January 2014) – the cost of the capital improvements required to do so.

8.1.4.1.2 PNM Should Have Conducted a Further Review of its Decision to Extend its Participation in Four Corners between October 2013 and March 2015

8.1.4.1.2.1. The Ownership and Operating Agreement Extensions were not Signed until March 2015

The Hearing Examiners further find that PNM was imprudent in not conducting updated analyses of the cost-effectiveness of extending its participation in Four Corners and in pursuing the SCR and other capital improvements after the Board of Directors' decision in October 2013 and prior to the extension of the ownership and operating agreements in March 2015. The presentation to the PNM Board of Directors in October 2013 indicated that all three of the agreements approved by the PNM Board at that time, including the extension of the ownership agreement, would be executed by the end of 2013 – in "Q4 2013."[329] In fact, however, only the coal supply agreements were executed by the end of December 2013.

The third agreement approved by the PNM Board in October 2013, the extension of the co-tenancy agreement, was not signed until March 15, 2015. On that date, PNM and the remaining owners signed Amendment No. 9 to the co-tenancy agreement, which extended the term of the co-tenancy agreement to July 7, 2041.[330]

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[328] *Id.* 1532-33, 1535-36.

[329] *See* Comm'n AN 63 (Olson Reb.) at Exh. CMO-2 Rebuttal, p. 2 of 10.

[330] The extension of the term of the co-tenancy agreement signed on March 25, 2015 as Amendment No. 9 was originally titled as Amendment No. 8 when it was approved by the PNM Board in October 2013. A further amendment also executed on March 15, 2015 to remove EPE from the co-tenancy agreement was denoted as Amendment No. 8.

PNM has never articulated a rational reason for the gaping delay in signing the amendment to the co-tenancy agreement, other than to argue the delay didn't matter as already discussed and addressed below. In point of fact, at the hearing in the 2016 Rate Case, confusion was engendered over the actual date that PNM extended its participation in Four Corners. PNM's witnesses generally referred to the execution of the 2016 coal supply agreement "and related agreements" in December 2013.[331] When asked at the hearing, the PNM witnesses presenting the company's position on the prudence of its decision to extend the ownership agreement testified that the extension was signed in December 2013.[332] Even Mr. Olson, *who actually signed the March 15,*

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[331] As an example, the "timeline of activities leading up to executing the *new agreements*, many of which are interrelated," set out in Mr. Olson's rebuttal testimony described the agreements executed in December 2013 as follows: "December 2013: The 2016 CSA and the *related agreements* were executed by APS, TEP, SRP and PNM." Comm'n AN Exh. 63 (Olson Reb.) at 7 (emphasis added).

[332] Q. Do you know when the ownership agreement was actually extended?

A. I believe that's in Mr. Olson's testimony. I believe that they were actually -- you should probably ask Mr. Olson that. *I'd be guessing. I believe that they were all in December of 2013, is when they were actually signed*.

Comm'n AN 69 (Tr. Vol. 2, 8/8/2017) 325 (Ortiz) (emphasis added).

Q. Okay. The operating agreement. That -- when was that extended at Four Corners?

A. *Subject to check, I think it was extended the same time the co-tenancy agreement was executed in December of 2013*.

Q. I think your testimony indicates that the operating agreement was executed in March 15, 2015; do you recall that?

A. I don't recall. There were a number of documents, of course, that were signed and executed in December of 2013. And there were amendments being made to deal with the El Paso Electric departure later on. So it could have been to reflect that change.

Comm'n AN Exh. 74 (Tr. Vol. 7, 8/15/2017) 1588 (Olson) (emphasis added).

Q. . . . Why did PNM do the January 2014 Strategist run?

A. I believe it was part of the analysis for the 2014 IRP.

Q. *But according to you, the company already decided to go ahead with Four Corners; right*?

A. *Right*. And that – I don't have any documentation of anything other than we ran it in January 2014.

Comm'n AN Exh. 70 (Tr. Vol. 3, 8/9/2017) 600-01 (O'Connell) (emphasis added).

2015 extension agreement, testified that he believed the agreement was signed in December 2013. In his rebuttal testimony, Mr. Olson presented a "timeline of activities leading up to executing the new agreements, many of which are interrelated."[333] The timeline ended in December 2013 with Mr. Olson's bulleted statement that "[t]he 2016 CSA and the related amendments were executed by APS, TEP, SRP and PNM."[334]

Despite the potentially cost-changing events that occurred during the delay (discussed below), PNM never conducted a further analysis between October 22, 2013 and March 15, 2015 to evaluate whether it was still cost-effective under conditions current at any time during that period to extend its participation in Four Corners. Instead, PNM's attention turned to the December 2013 filing with the Commission and ensuing proceeding in which PNM sought to comply with the EPA's Regional Haze Rule by seeking approval for the abandonment of San Juan Units 2 and 3 (and the recovery of the undepreciated costs of the units) and their replacement with the 132 MW of Palo Verde Unit 3 and an increased portion of San Juan Unit 4 (and the recovery of the costs associated with those units).[335] Mr. O'Connell stated that Four Corners was a big topic of discussion in 2012, but later in 2012, the focus shifted to regional haze at San Juan.[336] The San Juan proceeding was started with the filing of PNM's Application in Case No. 13-00390-UT on December 20, 2013, and the proceeding continued until the issuance of the Commission's final order on December 22, 2015.

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[333] Comm'n AN Exh. 63 (Olson Reb.) at 6.

[334] *Id.* 7.

[335] *See, e.g.,* Comm'n Exh. AN 70 (Tr. Vol. 3, 8/9/2017) 500-01 (O'Connell).

[336] *Id.* 604-05.

Sidestepping the notable confusion over when key agreements extending PNM's participation in FCPP were executed by the manager responsible for executing them and other PNM executives, as noted above, PNM asserts the "operative decision point," according to Mr. Graves, centered on securing the coal supply when 2016 coal supply agreement CSA was executed in 2013.[337] PNM thus maintains the fact that the formal execution of other ownership agreements that followed the CSA was deferred until the issue of who would acquire EPE's interest in FCPP was finally resolved did not bear on the timing for determining whether to continue PNM's participation in the plant. This after-the-fact rationalization elides at least two critical flaws in PNM's position. First, management's negligence in handling the Four Corners retention decision is evinced by their inability to adequately address and explain issues fundamental to the decision, such as when significant legal contracts binding PNM to an aging and poorly performing carbon emitting plant for an additional quarter century or more. Second, as already found, PNM failed its duty to conduct updated analyses of the cost-effectiveness of extending its participation in Four Corners and in pursuing the SCR and other capital improvements after the Board of Directors' decision in October 2013 and prior to the extension of significant ownership and operating agreements in March 2015.[338] PNM's cavalier attitude in assuming Four Corners would be

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[337] PNM Br. at 216 (citing PNM Exh. 17 (Graves Dir.) at 50-52).

[338] *PacifiCorp*, UE 246, Order No. 12-493 at 30, 2012 WL 664237 (finding that Pacific Power was imprudent because it failed to update its analyses both before it signed an installation contract in May 2009 and between the May 2009 contract signing and the June 2010 start of construction); *WUTC Pacific Power Order* at 34-38, 332 P.U.R. 4th 1, 2016 WL 7245476 (finding that PacifiCorp was imprudent for failing to update its analysis between the May 31, 2013 signing of a limited notice to proceed on an engineering, procurement, and construction services contract for SCR installation and the December 1, 2013 issuance of a full notice to proceed).

retained without rigorous evaluation of alternatives is demonstrated in both fundamental failures and others chronicled in this decision.[339]

8.1.4.1.2.2. EPE's November 2013 Notice of its Intent to Exit Participation in Four Corners

In late November 2013, after the PNM Board approved the new Four Corners coal supply agreements and the extension of the ownership agreement, EPE notified PNM and the other Four Corners owners that it would not extend its participation in the Four Corners project beyond the then-current expiration date in 2016. EPE's notice triggered intensive negotiations to determine by the end of December 2013 whether any of the other owners or any third parties were willing to acquire all or a portion of EPE's ownership interest and become a party to the extended coal supply agreement.

In a Friday, November 22, 2013 e-mail to the other Four Corners owners, APS called for an in person emergency coordinating committee meeting to take place in Phoenix the following Tuesday. The purpose of the meeting was to identify options available to allow the coal supply agreement to be executed by the end of the year or proposed shutdown timelines:

> In response to El Paso's e-mail yesterday, I am calling for a coordinating committee meeting for this coming Tuesday. *The purpose of the meeting will be to identify any and all options available to allow the CSA to be executed this year, or in the absence of any such options, the notifications, timing of notifications, and proposed shutdown timelines*. Please limit your attendees to your Coordinating Committee Rep and/or their alternate. There will be no call in line for this meeting.[340]

[339] *See Public Serv. Co. of N.M.*, 2019-NMSC-012, ¶ 32 ("The failure to reasonably consider alternatives was a fundamental flaw in PNM's decision-making process.") (citing *PacifiCorp*, UE 246, Order No. 12-493 at 26-27, 2012 WL 6644237).

[340] Comm'n AN Exh. 16 (Emergency Coord. Cmte. Meeting e-mail, 11/22/13) (emphasis added).

PNM considered a variety of options in the forthcoming negotiations, but it did not conduct a re-analysis of its May 2012 Strategist runs to help inform its actions. In a December 18, 2013 update to the PNM Board, PNM's General Counsel reported on the still ongoing negotiations. Mr. Apodaca stated that, after EPE's November announcement, APS took the position that two options are available for Units 4 and 5: (1) either a third party, possibly an arm of the Navajo Nation, or the remaining owners, must purchase El Paso's 7 % interest, or (2) Units 4 and 5 must be shut down by 2016, with decommissioning activities having to begin as early as the next year. APS also viewed coming to a decision by the end of the year as critical, in order to be able to close its purchase of SCE's interest.[341]

General Counsel Patrick Apodaca reported further that the prospect of reaching an agreement with the Navajo Nation within the tight timeframe seemed be fading and that the owners should consider a third option in which PNM and the other owners would each acquire a share of EPE's interest in proportion to each owner's proportional interest in the plant. Apodaca wrote that, throughout the discussions, PNM maintained that it would buy its pro rata share (15 MW) of El Paso's 108 MW but that other owners, initially Tucson and then SRP, signaled that they would not participate in buying El Paso's share.[342]

Mr. Apodaca reported finally that, on the previous day, APS advised the owners that it planned on buying all of the El Paso MWs, presumably because of Tucson and SRP's reluctance to participate and El Paso's intransigence on various terms that made reaching agreement among the other owners difficult. Apodaca said that documents would need to be finalized to execute on

[341] Comm'n AN Exh. 14 (e-mail dated 12/18/13 from Patrick Apodaca re Four Corners, in NEE Exhibit 6).

[342] *Id.*

APS's acquisition of all of the El Paso MWs, but APS believed it could finalize the transaction in 2014 and still close on the SCE purchase on December 30, 2013.[343]

Mr. Apodaca concluded it was a positive outcome for PNM. "Among other things, maintaining our same level of ownership at Four Corners avoids a possible distraction with our BART filing with the PRC next week and our negotiations with the owners at SJGS."[344]

PNM witness Gerard Ortiz testified in the 2016 Rate Case that he was not aware of a PNM analysis regarding the acquisition of PNM's proportional 15 MW share of EPE's interest.[345] Mr. Ortiz said further analysis based upon EPE's notice of its intent to exit was premature at that point. He maintained the issue was resolved in line with PNM's intentions prior to EPE's announcement.[346]

But APS's "agreement" to buy EPE's share was not final, and at least two other owners continued to have concerns. Tucson Electric's Senior Corporate Counsel wrote to PNM and other owners on December 20, 2013 – two days after Mr. Apodaca's optimistic report to the PNM Board – asking whether PNM

> also had concerns about APS not being able to confirm that there is an agreement between APS and EPE to buy EPE's share. What this means for all of us is that if next March EPE and APS cannot agree, and EPE steps out, we could be as a matter of course required to step up and jointly be responsible for EPE's share of costs. I understand . . . that [APS] is not able to provide any assurances on an agreement."[347]

The Senior Attorney for the Salt River Project responded on the same day that

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[343] *Id.*

[344] *Id.*

[345] Comm'n AN Exh. 68 (Tr. Vol. 1, 8/7/2017) 206 (Ortiz).

[346] Comm'n AN Exh. 69 (Tr. Vol. 2, 8/8/2017) 250 (Ortiz).

[347] Comm'n AN Exh. 18 (NEE Exh. 11, PNM Exh. NEE 1-7, 7-12-17 Supp., e-mail string regarding El Paso's 7%, 12/20/13).

> [t]his is a concern for SRP as well. SRP had proposed to APS that APS provide the other owners with a side letter confirming that APS would pick up EPE's 7% share of the Four Corners plant and fuel expenses even if the EPE sale didn't go through. During a conversation with Jim Pratt earlier this afternoon, Dave Hansen [of APS] indicated that APS wouldn't agree to such a request."[348]

Counsel for PNM, Madonna Bixby, reported to PNM personnel later that day that she called the counsel for Tucson Electric saying that her understanding was that PNM was "probably less concerned" about the issue than Tucson Electric "because a failure of EPE and APS to reach agreement would likely just put PNM back in the position of acquiring 15 MWs."[349]

APS and EPE were not able to reach an agreement on the acquisition until February 17, 2015. Nevertheless, PNM, conducted no further analyses of the cost-effectiveness of extending its participation in Four Corners.

8.1.4.1.2.3. PNM's Recognition of Error in Summer 2014 of Excluding Future Four Corners Capital Improvements

As discussed earlier, PNM excluded the costs of ongoing capital improvements in the Strategist runs it conducted for the 2011 IRP, in the May 2012 "second look," and (as discussed below) in January 2014. In August 2014, in response to arguments raised by NEE in the San Juan proceeding at Case No. 13-00390-UT, PNM acknowledged its mistake and re-ran the Strategist runs it was using in that case to incorporate the ongoing capital expenditures it anticipated for the resources at issue there. PNM did not re-run the Strategist analyses it had been using for its decision to extend its participation in Four Corners, despite PNM's awareness, as early as May 2012, of the need for a NPV of $88.5 million in future capital improvements.

[348] *Id.*

[349] *Id.*

8.1.4.1.2.4. Increasing Cost Estimates for SCR work

In May 2012, when PNM conducted its "second look" at the Strategist analyses from the 2011 IRP, it had only preliminary estimates for the cost of the SCR work. The preliminary cost estimates were updated and increased several times before the Four Corners owners authorized the actual engineering work. The increased estimates were substantial, but none prompted PNM to conduct a further analysis of the cost-effectiveness of extending its participation in Four Corners.

Date	Total SCR Cost Estimate	PNM Share
2010	$435 million	$61.8 million (plus/minus 25%)[1]
October 2013	$512 million	$66-70 million[2]
January 2014	$548 million	$78 million[3]
August 2014	$826 million	$118 million[4]

[1] Comm'n AN Exh. 74 (Tr. Vol. 7, 8/15/2017) 1475-1476, 1581 (Olson).
[2, 3] *Id*. 1479.
[4] *Id*. 1482, 1584.

Mr. Olson testified in the 2016 Rate Case that detailed engineering work began in the 2015 time frame. Olson explained the reason was that the utilities "were still dealing with the final rule on Regional Haze. There was a NEPA process that would indicate what other kind of controls needed to be put on that facility. There were a lot of things still in flux."[350]

By June 2015, the total cost estimate was $635 million, and PNM's share was estimated at $90.8 million.[351] In a June 2017 investor presentation, PNM's share of the SCR costs was estimated to be $94 million.[352]

[350] Comm'n AN Exh. 74 (Tr. Vol. 7, 8/15/2017) 1479 (Olson).

[351] *Id.* 1583-84.

[352] *Id.* 1483.

The SCR installation was scheduled to be completed on Unit 5 by December 19, 2017, and on Unit 4 by April 24, 2018.[353] Both SCR installations were completed on time.[354] PNM's share of the actual costs of the SCR installations at Four Corners turned out to be, according to Mr. Graves supplemental testimony in Case No. 21-00017-UT, $88.7 million.[355]

8.1.4.1.2.5. Increased Forced Outages

The increased rate of forced outages at the Four Corners plant first noticed in 2013 continued into 2015.[356]

Four Corners Unit 4	**2011**	**2012**	**2013**	**2014**	**2015**
EAF=Equivalent Availability Factor	82.8	80.2	**74.8**	**76.0**	**79.5**
EFOR=Equivalent Forced Outage Rate	7.7	18.9	**18.5**	**21.2**	**17.8**
Four Corners Unit 5	**2011**	**2012**	**2013**	**2014**	**2015**
EAF=Equivalent Availability Factor	78.9	80.9	**70.9**	**60.2**	**76.8**
EFOR=Equivalent Forced Outage Rate	16.1	10.2	**24.3**	**33.0**	**20.7**
Four Corners Units 4 + 5					
EAF=Equivalent Availability Factor	80.9	80.5	**72.8**	**68.1**	**78.2**
EFOR=Equivalent Forced Outage Rate	11.9	14.5	**21.4**	**27.1**	**19.3**

In addition to the impact on reliability, the increased rate of outages also pointed to the need for additional capital improvements. *See* discussion in Section 8.1.4.1.1.6 above.

[353] Comm'n AN Exh. 62 (Olson Stip.) at 7.

[354] *In Re Ariz. Pub. Serv. Co. Rates*, ACC Docket No. E-01334A-19-0236, Opinion and Order (8/02/2021) at 89 ("The outage to tie-in Unit 5 began in September 2017, and the SCRs for Unit 5 went into service on December 17, 2017. . . . The outage to tie-in Unit 4 began in January 2018, and the SCRs for Unit 4 went into service on April 24, 2018.") (internal citations omitted).

[355] PNM Exh. 17 (Graves Dir.) at PNM Exh. FCG-3, p. 3 of 6.

[356] The table below was derived from Comm'n AN Exh. 38 (Van Winkle Dir.) at DVW-6.

8.1.4.1.3. PNM's January 2014 Strategist Run was not a Reevaluation of the Cost-effectiveness of Four Corners

8.1.4.1.3.1. The January 17, 2014 Strategist Run did not Compare the Costs of PNM's Exiting Four Corners with the Costs of Extending PNM's Participation

PNM argues that a Strategist run PNM conducted in January 2014 confirms the reasonableness of PNM's previous analyses and PNM's decision to extend its participation in Four Corners. PNM states that the January 2014 analysis showed a benefit of $132 million from remaining with Four Corners, "which only confirmed the PNM's decision in the fourth quarter of 2013."[357] In the 2016 Rate Case, PNM witness O'Connell stated that PNM performed an analysis on January 17, 2014, just one month after PNM entered into the 2016 coal supply agreement and the other related agreements. Mr. O'Connell said the 2014 analysis, which assumed the abandonment of San Juan Units 2 and 3, indicated that Four Corners was more economic to keep in the portfolio as compared to retirement by an NPV differential of $132 million. O'Connell also indicated that, if PNM had performed an updated analysis in December 2013, PNM would have used the same data that it used in the January 2014 analysis, which are the 2014 IRP assumptions. He stated that updated market conditions in late 2013 would not have changed the conclusion of PNM's previous analysis.[358]

The January 2014 Strategist run, however, was not a re-evaluation of the cost-effectiveness of PNM's extended participation in Four Corners.[359] The January 2014 Strategist run included costs for the retirement of Four Corners, but there is no evidence that PNM attempted at that time

[357] PNM Br. at 209-10 (citing Comm'n AN Exh. 59 (O'Connell Reb.) at 14.

[358] Comm'n AN Exh. 59 (O'Connell Reb.) at 14.

[359] Mr. O'Connell also agreed that the NPV values calculated in the January 2014 run should not be compared to the NPV values calculated in the May 2012 runs. Mr. O'Connell agreed that they contain completely different peak demand, energy sales, gas, solar, and wind prices and that new resources were added in that time frame. Comm'n AN Exh. 70 (Tr. Vol. 3, 8/9/2017) 466 (O'Connell).

to compare the costs of retirement to the costs of PNM's extended participation in the plant. In fact, the testimony shows that PNM did not seriously evaluate the option of exiting Four Corners.

The January 17, 2014 Strategist run did not, in and of itself, make a comparison of the costs of retiring or exiting Four Corners versus PNM's continued participation in the plant. The January 2014 run merely calculated the estimated cost in NPV dollars of retiring the plant. Whether the estimated costs of retirement or exit were more or less expensive than continued participation could only be determined by comparing the results of the January 2014 run to another run that calculates the plausible costs of PNM's extended participation. Here, PNM chose to compare the results of the January 17, 2014 run to a Strategist run conducted a month earlier on December 16, 2013.

However, PNM could not explain how or why it decided to conduct the January 17, 2014 Strategist run that assumed PNM's exit from Four Corners (after PNM purports to have decided to extend its participation). Mr. O'Connell, whose Integrated Resource Planning group performed the January 2014 analysis, said he "believe[d] it was part of the analysis for the 2014 IRP,"[360] but he could not explain why it was done after PNM already decided to go ahead with Four Corners. "Right. And that – I don't have any documentation of anything other than we ran it in January 2014."[361] "I'm sure it was to answer a question," O'Connell continued, "whether it was a question for the IRP or just a PNM, 'Let me see that answer one more time' question, I'm not sure."[362]

PNM has never been able to explain how or why the company chose the December 16, 2013 Strategist run as the run to compare with the Strategist run of January 17, 2014. Mr.

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[360] *Id.* 601.

[361] *Id.* 601-02.

[362] *Id.* 602.

O'Connell testified that he was the person inside PNM who decided to do the December 16, 2013 run, but he said he was not sure why he did so. He said initially that the December 16, 2013 Strategist run was done for the San Juan case *and* the 2014 IRP but, considering the December 20, 2013 filing date for the San Juan case, he said the run was likely done for the IRP. O'Connell stated that, at the time he conducted the December run, he did not consider the idea of conducting a comparative run to analyze PNM's potential exit from Four Corners. He also said he did not recall or have a record of any draft Strategist runs between May 2012 and January 2014 involving the retirement of Four Corners.[363]

Moreover, the titles of the two Strategist runs ("2014IRP_A05D" and "2014IRP_A05V") indicate that at least 17 additional runs may have been conducted between December 16, 2013 and January 17, 2014.[364] Mr. O'Connell stated that PNM did approximately 170 strategist runs in the course of preparing the 2014 IRP and that about 150 survived to make it into the IRP.[365]

Finally, a serious comparison – as is done in an IRP and was performed to some (still unsatisfactory) extent in May 2012 – would have involved the performance of a variety of Strategist runs[366] with a sensitivity analysis that considers a variety of assumptions. For example, consider the various sensitivity and risk analyses conducted in the 2011 IRP for the Four Corners retirement option in O'Connell Reb., Exhibit PJO-4 Rebuttal. Here, however, PNM compared a

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[363] *Id.* 604-05.

[364] PNM's Strategist runs appear to have been named sequentially through the order of the alphabet. Mr. O'Connell's Exhibit PJO-3 Rebuttal listed the results of seven Strategist runs. Five of the runs have dates from May 2012 and Strategist Filenames that run from "FC_Eval_A" through "FC Eval_E." The December 16, 2013 and January 17, 2014 Strategist runs have Strategist Filenames are named – "14IRP_A05***D***" and "14IRP_A05***V***" – leaving 17 additional runs between those dates. (emphasis added).

[365] Comm'n AN Exh. 70 (Tr. Vol. 3, 8/9/2017) 603-04.

[366] Acknowledging that PNM now employs EnCompass modeling software.

single Strategist run conducted on January 17, 2014 based on a single set of assumptions to a single Strategist run conducted on December 16, 2013 based on a single set of assumptions. There is no indication in the record of the 2016 Rate Case or this one that any other cost or load scenarios were analyzed nor where the assumptions rank in terms of low, medium, or high likelihood. PNM indicated that the assumptions were the ones used in the 2014 IRP, but the IRP rule requires the evaluation of base case, high growth, and low growth scenarios and the risks attendant to its cost assumptions.[367] Indeed, the Oregon PUC cited the utility's failure to conduct sensitivity analyses as one of the reasons for its finding that the utility's SCR decision in that case was imprudent.[368]

8.1.4.1.3.2. The Assumptions in the January 2014 Strategist Run were Protested and Never Accepted by the Commission

The cost data and load forecasts used in the January 2014 Strategist run were not the same data used in the May 2012 analysis. The January 2014 Strategist run used the cost data and load forecasts that PNM adopted for its 2014 IRP filed in July 2014.

However, as occurred with the 2011 IRP, the 2014 IRP was protested. The underlying cost assumptions and load forecasts were never evaluated or approved, and the 2014 IRP was not accepted by the Commission. The coal prices used in the 2014 IRP forecast were similar to the prices used in the May 2012 analysis.[369] The assumptions for forecast peak demand and annual energy were "somewhat lower" than those used in the May 2012 analysis. The January 2014 run assumed higher natural gas prices than the prices used in May 2012.[370] In addition, as in the May

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[367] *See* 17.7.3.9 NMAC.

[368] *See PacifiCorp*, UE 246, Order No. 12-493 at 29-30, 2012 WL 664237 ("Lack of meaningful sensitivity and scenario analyses").

[369] *See* Comm'n AN Exh. 59 (O'Connell Reb.) at Exh. PJO-2 Reb.

[370] *Id.* 15-16.

2012 analysis, the January 2014 run continued to exclude PNM's estimated $88.5 million in ongoing capital costs for Four Corners.

Perhaps most important, PNM changed the cost assumptions used for carbon in its January 2014 analysis. Mr. O'Connell stated that the $20 per metric ton carbon cost used in the May 2012 analysis was consistent with what he referred to as the Commission's "rule" requiring the use of standardized carbon costs in IRP NPV calculations.[371] The rule to which Mr. O'Connell referred was the requirement established in Case No. 06-00448-UT. The final order in that case established, pursuant to 17.7.3.9(G)(2)(c) NMAC, the following standardized carbon costs to be used in IRPs:

> 2. With respect to fossil-fuel resources that emit CO2 gas, electric utilities will use the following standardized prices for carbon emissions when filing their Integrated Resource Plan:
>
> > a. $8 per metric ton of CO2 emissions for the utility's low price sensitivity analysis;
> >
> > b. $20 per metric ton of CO2 emissions for the utility's medium price sensitivity analysis;
> >
> > c. $40 per metric ton of CO2 emissions for the utility's high price sensitivity analysis; and
> >
> > d. Additionally, an electric utility may propose and utilize other CO2 emissions prices for the utility's price sensitivity or other approaches that are fair and reasonable and consistent with the overall purpose of 17.7.3 NMAC.[372]

The Order stated that the standardized prices will be analyzed as an operating cost starting in 2010 and will be escalated at 2.5% annually starting in 2011.[373]

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371 *Id.* 14-15.

372 Case No. 06-00448-UT, *Recommended Decision* (NMPRC 5/16/2007) at 2-3, approved in *Order Approving Recommended Decision and Adopting Standardized Carbon Emissions Costs for Integrated Resource Plans*, Case No. 06-00448-UT (NMPRC 5/19/2007).

373 *Id.*

Instead of using the $20 per metric ton price escalated at 2.5% annually starting in 2011 (as was done in the May 2012 analyses), PNM's January 2014 Strategist run used a lower price of $13.40 per metric ton, and it started counting the costs only in 2020.[374] The assumptions were not consistent with the requirements set forth in Case No. 06-00448-UT. The Order in Case No. 06-00448-UT allowed utilities to use additional prices for the purpose of price sensitivity analyses, but PNM's January 2014 Strategist run only used an alternative price. The January 2014 run also started counting carbon costs only in 2020. As a result, no carbon costs were assumed for the period 2014 through 2019. Both assumptions were contrary to the Commission's Order in Case No. 06-00448-UT.

PNM's assumptions were significant. For example, at the rate of $20 per metric ton and PNM's 1,189,707 metric ton share of the carbon dioxide emitted from Four Corners in 2015, the annual carbon cost would approximate $23.8 million per year.[375]

Mr. O'Connell asserted in the 2016 Rate Case that the $132 million advantage in the January 2014 run in favor of continuing PNM's participation in Four Corners provided a cushion of conservatism as to the prudence of PNM's decision.[376] But O'Connell also stated that the inclusion of carbon costs, as was done PNM's May 2012 analysis, increased the cost of the Four Corners portfolio by approximately $170 million.[377] If it had been proper to include $170 million

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[374] PNM Br. at 210 (citing Comm'n AN Exh. 59 (O'Connell Reb) at 14-15.

[375] Comm'n AN Exh. 38 (Van Winkle Dir.) at 19 (citing EPA emissions data).

[376] Mr. O'Connell referred to the carbon costs as a "carbon tax," which never materialized and which was not likely to materialize soon in 2017 and remains true in 2023. Comm'n AN Exh. 59 (O'Connell Reb.) at 7, 14-15. PNM acknowledged in the testimony of Gerard Ortiz that the estimated carbon costs are a proxy for potential future environmental costs. Comm'n AN Exh. 68 (Tr., Vol. 2, 8/8/2017) 266, 268 (Ortiz); Comm'n AN Exh. 56 (Ortiz Reb.) at 15.

[377] Comm'n AN Exh. 59 (O'Connell Reb.) at 7.

of carbon costs in a Strategist run performed to compare the costs of PNM's extended participation in Four Corners against the January 2014 Strategist run which estimated the costs of PNM's exit, the $132 million advantage in favor of extending PNM's participation would have been substantially narrowed or reversed.

Moreover, the cost case in favor of PNM's exit would have been further substantiated if the Strategist run evaluating PNM's extended participation would have, as it should have, included the $88.5 million in previously excluded ongoing capital improvements needed to extend PNM's participation.

The load forecasts used in the January 2014 Strategist run were also optimistic in comparison to actual data reported in the 2016 Rate Case. PNM had been experiencing declining sales since 2011. Total sales dropped by 10.4 % from 2011 to 2014.[378] The drop is significant for PNM's repeatedly stated conclusion that Four Corners became more valuable with the upcoming retirement of 340 MW of baseload capacity at the San Juan Generating Station.[379] Mr. O'Connell testified that the load forecasts for peak demand and annual energy were "somewhat lower in the [January 2014] analysis compared to the 2012 analysis" and that the updated information suggested that PNM would not need as much baseload generation, such as Four Corners.[380] Nonetheless, PNM did not perform a further Strategist run to re-evaluate its continued need for the baseload capacity provided by Four Corners in light of the reduction in sales. PNM simply

[378] Comm'n AN Exh. 35 (Case No. 15-00261-UT, NEE Exh. 32 (Faruqui Dir., 8/27/15) at 44.

[379] For instance, Mr. O'Connell testified that the analysis PNM conducted in late 2013 showed that if the two coal units at San Juan were being retired, the baseload capacity at Palo Verde was part of most cost-effective resource portfolio. He said "[a]nd so, *by inference*, you also – *that shows that Four Corners is more valuable in late 2013*." Comm'n AN Exh. 70 (Tr. Vol. 3, 8/9/2017) 500-01 (emphasis added).

[380] Comm'n AN Exh. 59 (O'Connell Reb.) at 15.

concluded that the anticipated abandonment of 340 MW of baseload coal generation at the San Juan Generating Station would need to be replaced with the equivalent capacity of the 200 MW of Four Corners and the 132 MW of Palo Verde Unit 3.[381]

In conclusion, PNM's failure to reasonably consider alternatives to retaining its interest in Four Corners was a fundamental flaw in the decision-making process. In *Public Serv. Co. of N.M.*, the Supreme Court observed in addressing a similar instance of imprudence on the part of PNM in retaining Palo Verde assets,

> there is a meaningful relationship from the perspective of the ratepayers between the consideration of alternatives and the cost of the chosen generation resource. The goal of the consideration of alternatives is, of course, to *reasonably protect ratepayers from wasteful expenditure*.[382]

As the next sections demonstrate, PNM's decision to retain its interest in Four Corners and make substantial life-extending investments in the plant was a costly, wasteful expenditure. What this section demonstrates conclusively is that PNM's decision to retain its interest in Four Corners, from an objective perspective informed by relevant precedents, was not reasonable.[383]

8.1.4.1.4. PNM Witness Graves' *Post Hoc A*nalysis Makes PNM's Decision-making "Process," in his own words, "Look Worse" and, in any event, Fails to Establish PNM's Substantive Decision to Retain Four Corners was Prudent

This analysis began with the finding that PNM's decision to retain its ownership interest in Four Corners was founded on a *bad* decision-making *process*. Most egregiously, in

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[381] *Id.*

[382] *Public Serv. Co. of N.M.*, 2019-NMSC-012, ¶ 32 (citing Case No. 2146, Part II, *Final Order* at 59 (citing *Mountain States Telephone and Telegraph Co. v. N.M. Pub. Serv. Comm'n*, 90 N.M. 325, 331, 563 P.2d 588 (1977)).

[383] *Public Serv. Co. of N.M.*, 2019-NMSC-012, ¶ 32 (emphasis added). ("stating that although the prudent investment standard does not require optimal results, it does require that the utility's action was objectively reasonable.") (discussing *PacifiCorp*, UE 246, Order No. 12-493 at 26, 2012 WL 6644237).

contravention of prevailing industry standards, PNM failed to include ongoing capital expenditures incurred after Four Corners was retrofitted with SCRs in its May 2012 Strategist runs and then failed to update its analysis before it made the FCPP retention decision in October 2013. These consequential facts are undisputed.[384] Not even PNM witness Frank Graves, retained by PNM, in part,[385] to reconstruct the 2012-2013 decision-making process with counterfactual then-available information management *could have considered* and then render his opinion on the prudency of the inevitable "outcome" (remaining in Four Corners), acknowledges those weighty facts.[386] Indeed, Mr. Graves agreed that PNM's failure to consider then-available factors company management could have and perhaps should have applied in making its decision to retain its

[384] In point of fact, a *post hoc* counterfactual analysis that backfills information PNM executives could have considered but didn't to reach an engineered conclusion of prudence would not be required if the fundamental flaws in PNM's decision-making process were not so evident. The flaws are so conspicuous that even Mr. Graves conceded in his rebuttal testimony in Case No. 21-00017-UT that "some of the omissions in the May 2012 study were material and should have been considered at the time." Case No. 21-00017-UT, PNM Exh. 17 (Graves Reb.) at 9.

[385] PNM also waited to present Mr. Graves' *ex post* remedy analysis, examined at length below, until Graves' rebuttal testimony in this case. *See* PNM Exh. 18 (Graves Reb.) at 19-28; *Order on Sierra Club's Motion to Strike Portions of Frank Graves' Rebuttal Testimony or, in the Alternative, Leave to File Surrebuttal Testimony* at 11-12 ("Still, knowing the centrality of the remedy analysis to a thoroughgoing Four Corners prudence review, PNM once again waited until the filing of Mr. Graves' rebuttal testimony to include a quantitative analysis that is conceptually indistinguishable, albeit with a different title and updated assumptions, to the "damages" or "harm" analysis Graves presented in his rebuttal testimony in Case No. 21-00017-UT. . . . But, given all PNM knew and reasonably should have known about the centrality of the prudence remedy issue, in this reboot of the precise same controversy it is difficult to not view PNM's conduct as anything other than precisely that: gamesmanship. As it did the first time, PNM waited to spring the *ex post* remedy analysis until the last possible moment in the evidentiary cycle of the proceeding. The Graves remedy analysis does not directly rebut the points made by witnesses Fisher and Sandberg. In fact, Mr. Graves observes at the end of Section III that, unlike himself, Sierra Club witness Fisher did not "prescribe an *exact method to measure harm*, and only critiques my previous harm analysis, which no longer applies." PNM does not dispute that Graves' quantitative study is a novel and distinct (i.e., new) analysis.") (emphasis in original; internal citations omitted).

[386] Tr. (Vol. 3) 809 (Graves). Recall, again, Mr. Graves' concession in Case No. 21-00017-UT that "*some of the omissions* in the May 2012 study *were material and should have been considered at the time*." Case No. 21-00017-UT, PNM Exh. 17 (Graves Reb.) at 9 (emphasis added).

interest in Four Corners make the process PNM actually employed makes that bad "process," in Mr. Graves words, "look worse."[387]

The stubborn facts and Frank Graves' admissions notwithstanding, PNM's primary defense of the prudence of its decision to retain Four Corners remains that, if PNM had done a proper analysis (which it did not in fact do), PNM would have reached the same ultimate conclusion: that it was economically beneficial to retain Four Corners. PNM's argument hinges on Mr. Graves' *post hoc* analysis conducted many years after PNM actually decided to retain Four Corners. Mr. Graves claims that his *post hoc* theorizing shows that a proper analysis in 2012 would have showed a net benefit of retaining Four Corners of $46 million under base case assumptions.[388]

The legal grounds for PNM's *post-hoc* reconstruction is founded on *dicta* in the New Mexico Supreme Court's *Public Serv. Co. of N.M.* decision, quoting the Oregon PUC's *PacifiCorp* order's observation, also in *dicta* given the PUC's subsequent finding of imprudence against the utility, Pacific Power, that "[i]t is possible that the utility may be able to present sufficient information from external sources (what it should have known) to establish that its ultimate decision was prudent – regardless of what internal decision-making process was used (what it knew)."[389] PNM thus argues that regardless of the process by which it made its decision to retain Four Corners, its ultimate decision was reasonable, as purportedly confirmed by Mr. Graves' *post-hoc* analysis. In essence, then, PNM contends this case presents, as the Oregon PUC put it, the

[387] *Id.*

[388] PNM Exh. 17 (Graves Dir.) at 39 (PNM Figure FG-10). As already noted, even if Mr. Graves' contention that a proper May 2012 analysis would have shown a net benefit to retaining Four Corners of $46 million could be accepted at face value, a reasonable utility would have updated that analysis prior to committing, more than a year later, to extend its participation in Four Corners for a quarter century or more.

[389] *PacifiCorp*, UE 246, Order No. 12-493 at 26, 2012 WL 664237, *compare with Public Serv. Co. of N.M.*, 2019-NMSC-012, ¶ 32.

"unique circumstances where a utility is able to overcome the inability to explain its internal decision-making processes[.]"[390] PNM is mistaken because the unique circumstances it hoped to manufacture through Mr. Graves' *post hoc* analysis are not supported in this case.

Even if the Commission strayed from the "primary consideration in a prudence review," which generally is the "utility's actions"[391] (it shouldn't stray), Mr. Graves' counterfactual remedy analysis cannot be endorsed because it has serious flaws and reaches the wrong conclusion, as demonstrated in Sierra Club witness Dr. Jeremy Fisher's testimony – and by Mr. Grave's own admissions in cross-examination. When the errors are corrected, retaining Four Corners would have been a net liability of $27.9 million compared to exiting Four Corners under the reference case.[392] A reasonable utility, when faced with a net liability of $27.9 million, and given the increasing pressures on coal plants at the time, would at least have updated its analysis prior to deciding to extend the coal supply agreement, or would have elected to exit Four Corners. Thus, even under the standard alluded to in *dicta* in *Public Serv. Co. of N.M.*, the substantive decision PNM made was imprudent, because the credible evidence shows that a proper, objective analysis in 2012 would have revealed that it was less expensive to exit Four Corners than to retain Four Corners. That evidence comes primarily in the form of Sierra Club witness Jeremy Fisher's identification and correction of major flaws in Mr. Graves' *post hoc* prudence analysis. Dr. Fisher's corrections fall into four categories.

First, the evidence shows that Mr. Graves incorrectly estimates Four Corners' capital costs by assuming that the capital additions in each year would be depreciated over 30 years. However,

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[390] *PacifiCorp*, UE 246, Order No. 12-493 at 26, 2012 WL 664237.

[391] *Id.*

[392] Sierra Club Exhibit 1 (Fisher Direct) at 6 (Table 1).

if Four Corners is to be retired in 2031, as Mr. Graves otherwise assumes, then his analysis must account for recovery of the substantial stranded asset costs (undepreciated plant balances) that will remain when Four Corners is assumed to retire in 2031 (or to have depreciated the capital additions over useful lives ending in 2031). Instead, Mr. Graves assumed that all of the Four Corners' undepreciated plant balance would zeroed-out in 2031. This error significantly understates the actual costs accruing from PNM's capital addition commitments from 2016 through 2031.[393]

Second, in his *post hoc* analysis, Mr. Graves used the historical costs at the Afton plant to develop costs for his hypothetical gas replacement plant, without adjustment for the difference in size between Afton (230 MW) and PNM's share of Four Corners (200 MW).. Given the difference in size between Afton and Four Corners, Mr. Graves should have either scaled the costs of the Afton plant down to 200 MW (to reflect the size of PNM's share of Four Corners), or assigned a monetary value to the surplus 30 MW of capacity.[394] But even though Mr. Graves acknowledged this flaw in his analysis under cross-examination in Case No. 21-00017-UT, he repeated the same error in his testimony in this case, again overestimating the cost of replacing Four Corners.[395]

Third, in his *post-hoc* analysis, Mr. Graves uses gas price forecasts higher than the forecasts made in 2013, which is the time period that Mr. Graves uses in his analysis to show what an analysis might have looked like in late 2013, prior to the Board's vote on the coal supply agreement. However, gas price forecasts from 2013 were lower than what Mr. Graves used, reflecting analysts' views that the boom in shale gas and fracking would lead to sustained lower

[393] *See* Sierra Club Exh. 1 (Fisher Dir.) at 36-40.

[394] *Id.* 40-41.

[395] Tr. (Vol. 3) 859-61 (Graves); *see Id.* 860 ("The answer is no, I didn't adjust it[,]" the "it" being the capacity difference between the proxy plant and Four Corners).

prices.[396] Thus, by overestimating the gas price forecasts from 2013, Mr. Graves overestimated the costs of the replacement gas plant.

Fourth and finally, Mr. Graves incorrectly assumed that the carbon price that PNM would have used in a 2013 analysis would have been lower than it would have assumed in 2012, based on reports written by Synapse Energy Economics in 2012-2013. Dr. Fisher worked at Synapse in 2012-2013, consulted on the 2012 report, and authored the 2013 Synapse report. As Dr. Fisher persuasively explains, Mr. Graves misinterpreted the Synapse reports and used a carbon price that is too low.[397]

The table below, derived from Dr. Fisher's direct testimony, summarizes the impact of each of Dr. Fisher's corrections and then shows the aggregate impact in three scenarios. Under low gas prices, retaining Four Corners would have been a net liability of $128.1 million. Under reference gas prices, retaining Four Corners would have been a net liability of $27.9 million. And under high gas prices, retaining Four Corners would have been a net benefit of $14.2 million.[398]

[396] Sierra Club Exh. 1 (Fisher Dir.) at 43-55.

[397] *Id.* 55-60.

[398] *Id.* 61 (Table 1).

Table 1. Adjusted May 2012 Four Corners assessments, corrections to Graves. Valuation of Four Corners, present value (Millions 2012$)[138]

May 2012 Adjustments	Low	Reference	High
Original Estimate of Savings from FCPP Continuation	$33.5	$33.5	$33.5
Ongoing CapEx at FCPP (2014-2033)	-$100.2	-$100.2	-$100.2
Ongoing CapEx at FCPP (2014-2016)	$24.7	$24.7	$24.7
Ongoing CapEx at New Gas CC	$30.7	$30.7	$30.7
Timing Difference of Decommissioning	$3.4	$3.4	$3.4
Net Impact	-$7.9	-$7.9	-$7.9
December 2013 Updates			
Starting Point	-$7.9	-$7.9	-$7.9
Lower gas prices	-$79.9	-$67.2	-$32.7
Lower coal prices	$20.7	$20.7	$20.7
Lower CO2 prices	-$61.0	$26.4	$34.0
Valuation of Four Corners	**-$128.1**	**-$27.9**	**$14.2**

Dr. Fisher's analysis therefore shows that even if prudence is assessed based on what a proper 2012-2013 analysis should have shown (rather than based on the analyses PNM actually conducted and relied upon prior to making its decision), PNM's decision would be imprudent. A proper analysis would have shown that under the most likely scenario (the reference case), retaining Four Corners was a net liability. And even though in the high gas price case there were potential savings from retaining Four Corners, the downside to customers to staying with Four Corners under the low gas scenario was significantly worse. Moreover, the costs of the high gas scenario are likely overstated by the analytical approach that Mr. Graves selected, which was to make static adjustments to the results of PNM's 2012 Strategist runs, instead of re-running the dynamic Strategist expansion model itself, which has the capability of modeling mitigation of high gas prices by altering unit dispatch if lower cost resources are available.[399]

[399] *See* Sierra Club Br. at 13, 16. *See also* Sierra Club Exh. 2 (Fisher Sur.) at 10-12 (value of using dynamic capacity expansion and production cost models versus Mr. Graves static spreadsheet approach).

PNM's arguments challenging Dr. Fisher's criticisms of the Graves *post hoc* analysis are set forth on pages 218 to 222 of its brief-in-chief. The Hearing Examiners have considered PNM's arguments and find them unavailing. As Sierra Club points out in its response brief, PNM fails to come to grips with the fact that, as Dr. Fisher pointed out, Mr. Graves' assessment "results in Four Corners' undepreciated plant balance disappearing into thin air at the assumed 2031 retirement date."[400] Moreover, PNM's argument that Dr. Fisher's criticism of Mr. Graves' use of the costs of a 252 MW gas plant as an alternative is invalid. As Mr. Graves himself admitted, he should have either scaled back the hypothetical plant's costs or given credit for the additional capacity benefits.[401] Those were unreasonable and dispositive mistakes that, in itself, renders the Graves *post hoc* assessment utterly unreliable.

In addition, PNM's argument that its decision was prudent because Four Corners was not a bad plant *per se*, as evinced by the majority of co-owners deciding to continue in the plant, misses its mark. PNM was aware before its Board voted to amend the CSA in October 2013 that other owners intended to exit Four Corners. PNM has either elided or ignore this significant fact at turns in this case. The significance is that, knowing what it knew about two of the co-owners' (EPE and SCE's) intentions to exit the plant in 2016,[402] it behooved PNM, if it were acting like a prudent utility under the circumstances, to conduct a rigorous analysis (like EPE in fact did perform) as to whether it made sense to retain the company's interest in Four Corners. As discussed at length

[400] Sierra Club Resp. Br. at 4.

[401] *Id.* 5 (citing Case No. 21-00017-UT (Graves Sur.) at 14; Tr. (Vol. 3) 860-61.

[402] *See* Sierra Club Exh. 1 (Fisher Dir.) at 8 ("Two other owners of Four Corners announced that they were exiting Four Corners. El Paso Electric and Southern California Edison Company decided to exit Four Corners in 2016 rather than renew their interests in the plant.19 This should have caused PNM to undertake a rigorous analysis of whether it made sense for PNM to extend its ownership of Four Corners past 2016.") (internal citation omitted).

above, the record demonstrates that PNM failed to perform a robust analysis that conformed to standard industry practices. Among other errors and omissions, PNM failed to include essential data in its modeling (CapEx after Four Corners was retrofitted with SCRs in May 2012 analysis) and PNM failed to update its analysis between October 22, 2013 and March 15, 2015 to determine whether it would still be cost-effective under conditions current at any time during that period to extend its participation in Four Corners. PNM's additional arguments against Dr. Fisher's criticisms of the Graves *post hoc* analysis also lack merit, as the findings and conclusions below indicate.

Therefore, the Hearing Examiners find and conclude, having closely considered the evidence and arguments, that Mr. Graves *post hoc* analysis fails in its endeavor to mitigate PNM's manifest imprudence in deciding to retain Four Corners, i.e., what the PNM executives knew or should have known and what they did and did not do. In fact, Graves' counterfactual reconstruction, incorporating factors that PNM could have known and should have considered, makes the bad decision-making process PNM actually employed look worse. The evidence thus shows that PNM's decision to retain Four Corners did not protect ratepayers from "excess cost."[403] To the contrary, PNM's decision has forced ratepayers to bear increased costs relative to exiting Four Corners in 2017. PNM's decision therefore failed "to reasonably protect ratepayers from wasteful expenditure[s]."[404]

[403] *Pub. Serv. Co. of N.M.*, 2019-NMSC-012, ¶ 32 (citing *PacifiCorp*, UE 246, Order No. 12-493 at 26, 2012 WL 6644237 for the following: "It is possible that the utility may be able to present sufficient information from external sources . . . to establish that its ultimate decision was prudent – regardless of what internal decision-making process was used[.]").

[404] *Id.*

8.1.4.1.5. PNM Failed to Meet its Prudence Burden

As the applicant seeking to include its FCPP capital investments in rate base, PNM bears the burden of demonstrating its decision to remain at Four Corners and make life-extending capital expenditures in the plan was prudent. As the proponent of an order requesting hundreds of millions of dollars in rate recovery, PNM's burden of proof is established as a matter of law.[405] That burden is set forth in Section 62-8-7(A) of the Public Utility Act,[406] which establishes '"very specific" procedures for setting rates, including requiring utilities to bear the burden of proof to show that an increase in rates is just and reasonable."[407]

In addressing the burden of proof in utility prudence reviews, the Commission succinctly ruled in Case No. 2087 that, "[c]learly, the burden of proof concerning the prudency of PNM's investment in PVGNS and the management decisions related thereto rests with PNM."[408] This "prudence burden" is commonly acknowledged and applied by other utility commissions.[409] And

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[405] *See, e.g., 2015 PNM Rate Case Corrected RD* at 14-16; Case No. 19-00018-UT, *RD on SJGS Finc'g Order* at 18-19.

[406] NMSA 1978, § 62-8-7(A).

[407] *2007 SPS Rate Case Corrected RD* (quoting *Otero County Electric Coop.,* 1989-NMSC-033, ¶ 8, 108. As was done in the *2015 PNM Rate Case Corrected RD*, at 14-16, this decision incorporates by reference the detailed discussion of the legal standards for ratemaking delineated in the *2007 SPS Rate Case Corrected RD* at 16-21. *See* Section 7 *supra*.

[408] Case No. 2087, *Order on Burden of Proof and Specific Issues to be Addressed* at 2 (NMPSC 10/04/1988) ("*Order on Burden of Proof*").

[409] *See, e.g., WUTC Pacific Power Order at* 33, 332 P.U.R. 4th 1, 2016 WL 7245476 ("Pacific Power bears the ***specific burden*** of demonstrating that its decision to proceed with the installation of SCRs, as opposed to alternatives, was prudent with respect to recovery of such costs from Washington ratepayers."); *PacifiCorp II*, UE 374, Order No. 20-473 at 74, 2020 WL 7658074 ("The utility bears the burden to demonstrate the prudence of a capital investments."). (emphasis added).

that specific burden of proof "cannot shift"[410] and "does not shift."[411] The standard of proof is, unless expressly provided otherwise, a preponderance of record evidence.[412]

Having closely reviewed the evidentiary record developed in this case, which includes among other documents the substantial record of evidence from the 2016 Rate Case on the issue of prudence that the Hearing Examiners took administrative notice of before the hearing in this case,[413] the Hearing Examiners find and conclude that PNM has failed to meet its burden of demonstrating the company's decision to extend its participation in Four Corners was prudent. As the record shows by an overwhelming preponderance of the evidence, PNM's decision-making process in deciding to retain its participatory interest in Four Corners did not meet the standard of care of a reasonable utility under the circumstances encountered by the company's management when it made the investment decisions and life-extending capital expenditures under review. Moreover, as the record shows by an equally overwhelming weight of the evidence, PNM's substantive decision to retain Four Corners did not meet the standard of care of a reasonable utility under the circumstances presented.

Remaining to be decided, then, is what remedy, if any, is appropriate considering the evidence adduced and totality of circumstances presented in this case.

[410] Case No. 2087, *Order on Burden of Proof* at 9, ¶ 6.

[411] *Id.* 10, ¶ A.

[412] *See* Section 7 *supra*.

[413] *See Hearing Examiners' Notice of Taking Administrative Notice of Portions of the Record in Case No. 16-00276-UT* (8/31/23). *See* Tr. Tr. (Vol. 2) 383-405 (admitting into evidence Commission AN Exhibits 1-75).

8.1.5. Remedy for PNM's Imprudence

8.1.5.1. Legal Standards Guiding this Remedy Analysis

The precedents discussed in Section 8.1.2 above in setting forth the prudence standard provide similar guidance in conducting a remedy for imprudence assessment. In its 2012 *PacifiCorp* order, the Oregon PUC was addressing and imprudent utility decision similar to PNM's in this case. The Oregon commission considered three alternative remedies. The commission rejected the first alternative – total disallowance of the investment – because the affected plants continued to operate and provide service. It rejected the second alternative – calculating the harm to ratepayers for the utility's decision to make the SCR investments instead of pursuing other, least-costly options – because there was insufficient time to do so under the remaining statutory suspension period. The Oregon PUC approved the third alternative – the disallowance of 10%, $17 million, of the $170 million cost of the investment. The PUC acknowledged "that this disallowance is not a precise result." It stated that "[t]his is not uncommon in ratemaking, however, as '[t]he economic judgments required in rate proceedings are often hopelessly complex and do not admit to a single correct result.'"[414] Rather than placing the investments in rate base at reduced amounts, however, the Oregon commission directed Pacific Power to credit ratepayers the $17 million disallowance during the following calendar year.[415]

In the more recent 2020 *PacifiCorp II* Order, the Oregon PUC addressed PacifiCorp's request to include in rate base SCR system investments ($56.9 million gross plant value on an Oregon-allocated basis) in Jim Bridger Units 3 and 4. The PUC concluded that PacifiCorp had

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[414] *PacifiCorp*, UE 246, Order 12-493 at 32, 2012 WL 6644237 (quoting *Duquesne Light Co.,* 488 U.S. 299, 314).

[415] *Id.*

not adequately considered alternatives to SCR for compliance with Regional Haze Rules.[416] In assigning a remedy for PacifiCorp's imprudence this time around, the Oregon PUC declined Staff's recommendation to impose the same 10% management disallowance to the Oregon-allocated gross book value of the investments applied in the 2012 *PacifiCorp* order. Instead, the Oregon PUC adopted a remedy that allowed the Oregon-allocated remaining book value of the investment into rates but did not allow PacifiCorp to include a return on equity in its "return on" the investment. PacifiCorp's return on the investment thus was limited to its cost of long-term debt, which would apply to the entire remaining investment. The Oregon PUC concluded

> [t]his remedy is appropriate because PacifiCorp did not diligently enough undertake its decision-making process in order to protect ratepayers from unwarranted costs, and should not be entitled to profit in the typical manner from the investments it made as a result of that process.[417]

In the 2016 *WUTC v. Pacific Power & Light Co.* case, the Washington commission recognized the general ratemaking principle that ratepayers should not bear any costs for which the company has failed to demonstrate prudence, up to and including the full costs of the investment.[418] The WUTC stated further that, in cases of imprudence or failure to meet the prudence burden, the Commission typically disallows the difference between the cost of the chosen project and the cost of the least cost option.[419] However, it also stated, similarly what the Oregon PUC observed in *PacifiCorp*, that the inadequacies of the utility's analysis provided scant guidance for determining the lower cost option in calculating a disallowance.[420]

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[416] *In re PacifiCorp*, UE 374, Order No. 20-473 at 65-81, 2020 WL 7658074 (Or. PUC 12/18/20) ("*PacifiCorp II*").

[417] *Id.* 81.

[418] *WUTC Pacific Power Order* at 38, 332 P.U.R. 4th 1, 2016 WL 7245476.

[419] *Id.* 39.

[420] *Id.*

The WUTC therefore allowed Pacific Power a recovery of the SCR capital expenditures but disallowed any return on them. The commission stated that it would not

> Reward the Company recovery in rates of that portion of return on the Company's regulated rate base associated with the SCR investment since Pacific Power did not demonstrate the prudence of this particular compliance option, nor did the Company provide documentation that would satisfy its responsibility to continually evaluate alternative compliance options prior to its execution of the [final notice to proceed on the SCR installation contract] in December 2013.[421]

The WUTC also cautioned the utility that any potential future investments by the company in the units at issue will be subject to the same prudence standard based on the specific evidence before the commission.[422]

The WUTC noted that at the federal level, the Federal Energy Regulatory Commission (FERC) has also disallowed the return on an asset when a company failed to demonstrate its investment was prudent.[423] That FERC decision involved the premature closure of the Haddam Neck nuclear generating station caused in part by the imprudent management and operation of the facility in recent years. The FERC found that the utility should be allowed recovery *of* the remaining unamortized investment in recognition of the plant's service for most of its life, but it completely denied any return *on* the investment, as a proper balancing of customer and investor interests.[424]

The New Mexico Commission adopted three different imprudence remedies in PNM's 2015 Rate Case, adapting the remedy to the nature of the decision determined imprudent. First,

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[421] *WUTC Pacific Power Order* at 40, 332 P.U.R. 4th 1, 2016 WL 7245476.

[422] *Id.*

[423] *Id.* (citing *Connecticut Yankee Atomic Power Co.*, Docket No. ER97-913-000, 84 FERC P 63009 (F.E.R.C. 8/31/98), 1998 WL 656747) ("*Connecticut Yankee*").

[424] *Connecticut Yankee*, 84 FERC P 63009 at **30 (FERC ALJ Decisions and Reports), 1998 WL 656747 at *65113-14.

the Commission denied the recovery of the costs associated with the installation and operation of a balanced draft system that PNM installed at the San Juan Generating Station as part of the installation of Selective Non-Catalytic Reduction (SNCR) controls (a pollution control less expensive than the SCR controls at issue in Oregon, Washington, and Four Corners) to comply with the EPA's Regional Haze Rule. The Commission had previously determined in Case No. 13-00390-UT that the costs of the SNCR project could be recovered from ratepayers, but it left for a future case the issue of whether the balanced draft portion of the SCR project was prudent. In Case No. 15-00261-UT, the Commission found that PNM's decision to install the $52.3 million balanced draft system was imprudent.[425] The Commission disallowed the recovery of all costs of the balanced draft system, except for an amount ($300,000 per year) equal to the annual O&M savings that PNM showed it avoided with the system's installation.[426]

The Commission adopted other remedies for PNM's imprudence in extending its participation in the Palo Verde Units 1 and 2 without conducting an alternatives analysis before making and executing the extensions. The remedy for PNM's acquisition of the 65 MW of an expiring leasehold interest in Palo Verde Unit 2 was the denial of PNM's proposed acquisition adjustment for the purchase price. The Commission cited to the Oregon PUC's *PacifiCorp* order discussed above, where the PUC determined that the continuing use of the imprudent investment was nevertheless in the public interest, that the purpose of a prudence review is to hold ratepayers

[425] The air quality permit for the SNCR controls issued by the New Mexico Environment Department (NMED) required the installation of the balanced draft system, but a memo from the NMED Bureau Chief showed that the balanced draft system had been included solely because PNM had voluntarily requested its inclusion, not because it was required by any environmental reasons. Case No. 15-00261-UT, *Final Order* at 40 (NMPRC 9/28/16). PNM submitted no studies or analyses in the 2015 Rate Case showing any health, environmental or workplace safety benefits. *2015 PNM Rate Case Corrected RD* at 121.

[426] Case No. 15-00261-UT, *Final Order* at 52.

harmless from any amount imprudently invested, and that the proper remedy was to determine a disallowance that reasonably penalizes the utility for its imprudence.[427] The Commission found that, under the facts and circumstances in 15-00261-UT, it would not be in the public interest to require the complete disallowance of the capital investment in Palo Verde Unit 2 or the abandonment of the Palo Verde interests, because the Palo Verde capacity being purchased had always been certificated capacity and long been found to be used and useful.[428]

The remedy for PNM's renewal of expiring leasehold interests in Palo Verde Units 1 and 2 was the requirement that PNM bear any additional funding requirements for the decommissioning of the interests. The Commission found that PNM renewed the leases in part to shift the burden of decommissioning cost responsibility from its shareholders to ratepayers and that the renewals exposed ratepayers to decommissioning costs that likely would not have been incurred had an alternative resource other than nuclear been selected.[429]

On appeal PNM's appeal of the Commission's *Final Order* in the 2015 Rate Case, the New Mexico Supreme Court held, among things in its 2019 opinion in *N.M. Pub. Serv. Co.*, that the Commission's prior authorization in Case Nos. 1995 and 2019 for PNM to exercise its options to either renew leases on nuclear generators or repurchase Palo Verde capacity did not relieve PNM of the burden of establishing that retaining the capacity was prudent.[430] The Court concluded that Commission did not depart from the established prudence standard for costs of facilities that PNM

427 *Id.* 35.

428 *Id.*

429 *Id.* 38.

430 *Public Serv. Co of N.M.*, 2019-NMSC-012, ¶ 28.

could include in its rate base calculation.[431] The Court held that the Commission's determination that PNM's decision to repurchase the 64.1 MW of Palo Verde capacity and lease renewals on the remaining capacity was imprudent was supported by substantial evidence.[432] The Court concluded that the Commission's decision to limit utility's recovery for the amount it paid to purchase capacity to the net book value of $1,306/kW for the repurchased 64.1 MW and to allow PNM to recover costs of five renewed leases was not arbitrary and capricious but reasonable and lawful instead.[433] The Supreme Court ruled, however that the Commission violated PNM's due process rights by denying the company the ability to recover all future nuclear decommissioning costs in its rates without providing PNM notice and an opportunity to be heard on the matter.[434] The Court found that the Commission's decision not to allow PNM to separately recover costs of leasehold improvements the company contributed to in Palo Verde was not contrary to prior Commission practice or the law.[435] Finally, the Supreme Court held that Commission's denial of PNM's recovery for the costs of converting SJGS Units 1 and 4 to a balanced draft system did not exceed the Commission's statutory authority to regulate and supervise public utilities by finding that PNM was not required to convert Units 1 and 4 to balanced draft in order to comply with relevant environmental regulations.[436]

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[431] *Id.* ¶ 32.

[432] *Id.* ¶¶ 33-38.

[433] *Id.* ¶¶ 51, 52, 59.

[434] *Id.* ¶ 65.

[435] *Id.* 70.

[436] *Id.* 89.

8.1.5.2. Recapping the Parties' Positions on Remedies

The complexity, detail, and length of the discussion leading to this point makes it worthwhile at the outset of this analysis to recap the parties' positions on remedies for imprudence that are described in more detail at the beginning of this section.[437]

PNM asserts there is no proper basis in law or fact to impose any disallowances on what it repeatedly contends are "punitive" remedies centered on PNM's decision to continue as a participant in Four Corners.[438] PNM maintains that its even in the absence of a finding of imprudence by the Commission, PNM has already been subject to a disallowance for potential imprudence through a debt-only return on its post-2016 FCPP investment in the total amount of $33.1 million through 2024, with a continuing annual penalty of $4.7 that will persist until such time as PNM abandons its interest in FCPP.[439] PNM argues in its response brief that NEE and ABCWUA's proposed $445 million exclusion from rate base is unconscionable and based on an "outdated" and "discredited" Strategist analysis generated by PNM for NEE in the 2016 Rate Case.[440] PNM argues Sierra Club's proposed remedy is not based on harm to customers and its supporting analysis is "unreliable."[441] PNM argues that the remaining parties who advocate for a disallowance based on alleged FCPP imprudence (NMAG and Bernalillo County, NM AREA, and Staff) performed no remedy analysis, but instead just arbitrarily propose varying remedies that are comprised of some sort of disallowance or combination of disallowances.[442] Finally, PNM makes

[437] *See* Section 8.1.3 above.

[438] *See* PNM Br. at 224-41; PNM Resp. Br. at 103-113.

[439] PNM Br. at. 226, 236, 237; PNM Resp. Br. at 103.

[440] PNM Resp. Br. at 106-09.

[441] PNM Resp. Br. at 109-11.

[442] PNM Resp. Br. at 111-13.

for the first time in its response brief that this is not the proper proceeding to determine the treatment of undepreciated investments pursuant to the Energy Transition Act.[443]

For their part, of the intervenors who addressed the Four Corners prudence issue, each party as well as Staff recommends some form of remedy.

NEE recommends that PNM receive 50% of its undepreciated FCPP investments made before June 31, 2016 through a regulatory amortized over 3 years, which works out to be approximately to $29 million according to Commission Exhibit 2 Supplemental.[444] NEE also proposes that PNM be denied all future costs for FCPP investments on the theory that there would have been better resources available.[445] NEE argues the remaining investment in FCPP should be entirely removed from rate base and, to the extent PNM continues to rely on FCPP, the associated fuel and O&M costs should only be recovered through the fuel adjustment clause.[446] ABCWUA adopts the disallowances proposed by NEE witness Sandberg, which would result in $445 million exclusion of FCPP costs from rate base.[447]

Sierra Club witness Dr. Fisher recommends that the Commission eliminate PNM's return <u>on</u> Four Corners capital costs incurred between July 1, 2016 and June 30, 2022 and set PNM's return on Four Corners costs incurred after June 30, 2022 to PNM's cost of debt. Alternatively, given concerns over PNM's potential securitization of FCPP undepreciated investments in a future abandonment proceeding, Sierra Club recommends that the Commission order a disallowance that

[443] PNM Resp. Br. at 113-16.

[444] NEE Exh. 1 (Sandberg Dir.) at 33; Tr. (Vol. 5) 1501, 1507-08 (Sanders).

[445] NEE Exh. 1 (Sandberg Dir.) at 34.

[446] NEE Br. at. 93-94.

[447] Water Authority Br. at 20, 22-23.

is financially equivalent to Dr. Fisher's originally recommended remedy[448] and order a disallowance of $84.8 million (pre-tax)/$63.3 million (after-tax).[449]

The NMAG's witness, Andrea Crane, recommended that the Commission apply a debt-only return on all investment made since June 30, 2016, including all future test year investments included in this rate case.[450] However, post-hearing, the NMAG, joined by Bernalillo County, now recommends a disallowance of all FCPP investment after June 30, 2016 and that no rate of return be applied to FCPP investment made after that date, including investment projected for the future test year.[451] The NMAG continues to support PNM's full recovery of its pre-July 2016 investments, but now, given concerns that a future abandonment proceeding might limit the Commission's ability to prevent PNM from recovering imprudent investments through securitization under the Energy Transition Act, the NMAG proposes that PNM's recovery of any undepreciated investments remaining upon the abandonment of FCPP be limited to just 50%.[452]

NM AREA favors a "moderate and balanced approach" in any disallowances for FCPP alleged improvements.[453] NM AREA supports the original remedy proposal advanced by the

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448 Sierra Club Exh. 1 (Fisher Dir.) at 73-74.

449 Sierra Club Br. at 15-16, 22. Notably, in neither its brief-in-chief nor response brief does Sierra Club include in its list of recommended remedies Dr. Fisher's final recommendation or, at least suggestion, "that the Commission the Commission require or at least recommend that PNM continue exploring, and reporting back to the Commission on, mechanisms to exit and/or close the Four Corners power plant as expediently as feasible. PNM has suggested that Four Corners is a liability to its customers." Sierra Club Exh. 1 (Fisher Dir.) at 74. The Hearing Examiners construe Sierra Club's omission of the final recommendation to be intentional. Therefore, that recommendation is not addressed in this decision.

450 NMAG Exh. 1 (Crane Dir.) at 42-43.

451 NMAG Br. at 15, 34-35.

452 NMAG Br. at 32-34.

453 NM AREA Br. at 55.

NMAG which would limit PNM's recovery of all of its FCPP investments to a debt-only return since June 2016.[454]

Staff states that if the sole issue being contemplated in this FCPP prudence review is that a deficient investment analysis is, in and of itself, grounds for a finding of imprudence and PNM's retrospective analysis is deemed not germane to these ratemaking proceeding, Staff would accept a determination of imprudence and disallow PNM's investments in the SCR installed at FCPP.[455]

In its brief-in-chief, PNM produced tables showing the relative impacts to PNM's 2024 non-fuel annual revenue requirement of each of the proposed disallowances as set forth in PNM's Response to Bench Request 3.[456] Those tables are reproduced on the next two pages. As PNM points out, the following proposed intervenor reductions are in addition to the $4.7 million annual reduction to which PNM is already subject as a result of the Modified Revised Stipulation to which PNM was a signatory in Case No. 16-00276-UT.[457]

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[454] NM AREA Br. at 5, 33.

[455] Staff Br. at 20-21.

[456] *See* PNM Br. at 237-38 (citing Comm'n Exh. 2 (PNM Resp. to BR 3)).

[457] PNM Exh. 6 (Monroy Reb.) at 65.

REDUCTIONS TO PNM'S 2024 NON-FUEL ANNUAL REVENUE REQUIREMENTS	
NMAG Proposal	**($ 4,341,628)**
Sierra Club Proposal	**($10,613,144)**
NEE Proposal[458]	**($6,475,141)**

In addition to the reduction to PNM's test year revenue requirements shown above, if the proposed disallowances are imposed, PNM says it will need to perform an impairment analysis under generally accepted accounting principles (GAAP), which will result in an impairment loss. Under GAAP, PNM explains that if the Commission provides less than a full return, then PNM would be required to perform a net present value analysis, comparing the cash flows approved by the Commission (at a rate lower than the utility's full cost of capital) to the cash flows assuming a return at the utility's full cost of capital. The difference in those calculations results in an impairment that the utility must charge to earnings.[459] PNM asserts this impairment is for GAAP purposes only and is disregarded for purposes of ratemaking and from PNM's regulatory books and records. Nevertheless, PNM states that the charge to earnings for GAAP still reduces PNM's equity balance. PNM claims the reduction in equity balance would result "in additional harm to PNM that is unwarranted."[460]

[458] Under NEE's proposal, fuel associated with FCPP along with operating costs will be collected through PNM fuel adjustment clause (FPPCAC). PNM has not attempted to identify the operating costs included in the table above that NEE would propose to be recovered in PNM's FPPCAC. PNM has included the operating costs in as part of the non-fuel revenue requirement. The table is intended to reflect in total the impact to revenue requirements and does not attempt to quantify the difference between fuel and non-fuel revenue requirement impacts.

[459] PNM Br. at 237-38.

[460] PNM Br. at 238 (citing PNM Exh. 6 (Monroy Reb.) at 67).

The following table, based on PNM's Response to Bench Request 3 and Supplemental Response to BR 3 and then presented in PNM's brief-in-chief on page 238, shows the estimated impairment write-off that PNM avers it "will suffer" under each of the proposed disallowances.

IMPAIRMENT CHARGES PRE-TAX AND AFTER-TAX	
NMAG Proposal	**Pre-Tax ($25,430,589)**
	After Tax ($18,971,219)
Sierra Club Proposal	**Pre-Tax ($84,840,259)**
	After Tax ($63,290,833)
NEE Proposal	**Pre-Tax ($223,347,015)**
	After Tax ($166,616,873)

The financial accounting impact of the intervenors proposed remedies expressed in dollar figures in the table above are derived from Commission Exhibit 2 and Commission Exhibit 2 Supplemental. Those exhibits include, respectively, PNM's Sept. 5, 2023 Response to Bench Request 3 and PNM's Sept. 11, 2023 Supplemental Response to Bench Request 3. The Hearing Examiners issued Bench Request 3 on the first day of hearings.[461] They issued the request for the supplemental response on the fifth day of hearings.[462] The genesis of the Commission-initiated disallowance scenarios in the 2016 Rate Case is explained below toward the end of this section in refuting PNM's new argument made for the first time in its response brief that at least one of the scenarios advanced by Sierra Club is a "belated" and "completely new punitive and unlawful" remedy proposal.[463]

461 Tr. (Vol. 1) 360-66 (Monroy).

462 Tr. (Vol. 5) 1503-04 (Sanders).

463 PNM Resp. Br. at 87, 109-10, 113.

As for the intervenors' recommending specific disallowance scenarios, the conversion or monetization of their proposed remedies to estimated "impairment/write-off" figures is shown on lines 99 and 100 of PNM's response to Bench Request 3, which was produced by PNM,[464] sponsored by PNM witness Frank Graves, and admitted into evidence as Commission Exhibit 2 without objection.[465] Bench Request 3 was subsequently expanded upon in by PNM in producing its September 11, 2023 Supplemental Response to Bench Request 3, which was sponsored by Kyle T. Sanders, includes the same impairment figures on lines 99 and 100 of Attachment A, page 2 of 3, and was also admitted into evidence without objection as Commission Exhibit 2 Supplemental.[466] Bench Request 3 was the subject of cross-examination of PNM witness Kyle Sanders by several intervenors and re-direct examination by PNM on the fifth day of hearings in this case.[467] Mr. Sanders patiently explained how each of the three estimated financial impairment analyses were calculated. Regarding the potential Attorney General impairment, upon which portions of the Sierra Club remedy follow the "exact same" cash-flow stream analysis,[468] Sanders stated that

> Under ASC, Accounting Standards Codification, ASC 980-360-35, and I believe it is section 35.12, as PNM has already taken the impairment on balances from July 1, 2016, through December 31, 2018, that analysis focuses on January 1, 2019, through the end of my Test Period, December 24th. As those items are not currently reflected in rates, and have not gone through an initial Rate Case, they fall under that recently completed plant standard for that, in which there is built out a cash flow analysis based on the cash flows that you would receive under the proposed debt-only return, compared to the cash flows received.

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464 Tr. (Vol. 5) 1503-04 (Sanders).

465 *See* Tr. (Vol. 1) 360-66 (Monroy); Tr. (Vol. 12) 4059.

466 Tr. (Vol. 12) 4060.

467 Tr. (Vol. 5) 1488-1532 (Sanders).

468 Tr. (Vol. 5) 1497 (Sanders).

> Under achieving a full return of those investments, you net present both of those cash flows back to current value, and the difference between those cash flows becomes your impairment under that scenario.[469]

As for Sierra Club's impairment analysis, Mr. Sanders explained that

> Sierra Club's is based on a cash flow stream. It's discounted at – or portions of it are discounted at debt, and portions at your full WACC, based on the piece that from July 1, 2016, through December 2018, it falls actually under a to-be-abandoned accounting standard of 35.1, because it has gone through an initial Rate Case. The other portions of it follow that exact same analysis.[470]

Regarding NEE's proposed imprudence remedy, Mr. Sanders proceeds to explain that the impact of NEE's remedy "is just a complete disallowance, it is not a cash flow analysis, it is truly a difference of the $29 million established for the Regulatory Asset versus the projected book values, which becomes your writeoff effectively."[471]

8.1.5.3. Quantifying the Impact of PNM's Imprudence

Because the purpose of a prudence review is to hold ratepayers harmless from any amount imprudently invested, the proper remedy for a utility's imprudence should equal the amount of the utility's unreasonable investment in order to hold ratepayers harmless from any amount imprudently invested.[472] This approach requires the Commission to quantify the impact of the imprudence with as much precision as possible given the record presented,[473] bearing in mind the

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[469] Tr. (Vol. 5) 1496-97 (Sanders).

[470] Tr. (Vol. 5) 1497 (Sanders). This is essentially a more detailed variation of PNM's explanation of the GAAP impairment analysis in its Brief-in-chief at 237-28. It is also reflected in Appendix E to this decision (PNM Exh. BR-3, 9/05/2023 BR – Updated for Hearing Examiner Disallowance Scenarios).

[471] *Id.*

[472] *Public Serv. Co. of N.M.*, 2019-NMSC-012, ¶¶ 39, 40, 42 (discussing the Commission's adoption in the 2016 Rate Case of the approach applied by the Oregon PUC in the 2012 *PacifiCorp* order).

[473] *Id.* ¶ 46 (noting the Commission's treatment of the 64.1 MW and the renewed leases in the 2015 Rate Case was "necessarily imprecise because, as in *PacifiCorp*, the very behavior that caused the need for a remedy – PNM's failure to consider alternatives – impaired the Commission's ability to quantify the potential harm to ratepayers from PNM's imprudence) (citing *PacifiCorp*, UE 246, Order No. 12-493 at 31, 2012 WL 6644237). In fact, in the 2020 *PacifiCorp* order, the Oregon Commission complained that, "as in 2012, the absence of

Oregon Commission's apt observation in conducting a prudence review similar to this one that "[t]he economic judgments required in rate proceedings are often hopelessly complex and do not admit to a single correct result."[474]

The parties who attempted to quantify the harm to ratepayers – if any harm in the case of PNM – include PNM, NEE, and Sierra Club. The Hearing Examiners turn now to evaluating the respective quantification analyses and resulting recommendations of the parties sponsoring them, starting with PNM's.

8.1.5.1.1 PNM Witness Graves' Remedy Analysis and "No Harm, No Foul" Conclusion

In Section III his rebuttal testimony, PNM witness Frank Graves poses the question he asked at the beginning of Section III of his very similar rebuttal testimony reporting the results of his quantitative remedy analysis on the same issue in Case No. 21-00017-UT (Mr. Graves called the study an *ex post* analysis in that case).[475] Both times, Mr. Graves phrases the question exactly the same and in the subjunctive mood: "If there *were* a finding of imprudence, what should the remedy be?"[476] The subjunctive mood is apparently used to emphasize Mr. Graves' position that

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adequate analysis by PacifiCorp means that we do not have the necessary information to calculate a precise disallowance based on the difference between the company's chosen course and an alternative, least-cost option. However, that imprecision is due to an incomplete evidentiary record caused by PacifiCorp's imprudence in its decision-making process." *In re PacifiCorp*, UE 374, Order No. 20-473 at 59, 2020 WL 7658074 (Or. PUC 12/18/20). Later, the PUC found "[t] The record in this case does not allow us to determine the precise amount by which customers are harmed because of PacifiCorp's actions, primarily because the company failed to perform appropriate analyses at the time. We find that it is still appropriate, however, to impose an adjustment to rates to protect customers, and that a company's failure to perform adequate analysis cannot form a bar to the Commission's ability to make an adjustment where prudence has not been established.") *Id.* 81.

[474] *PacifiCorp*, UE 246, Order No. 12-493 at 32, 2012 WL 6644237.

[475] In Case No. 21-00017-UT, Mr. Graves' *ex post* assessment compared the net present value of two exit scenarios: (1) PNM having ended its participation in the FCPP in 2016 and replaced Four Corners with a new natural gas combined cycle facility versus (2) PNM's proposed exit from the FCPP at the end of 2024 combined with replacing Four Corners with solar and gas combustion turbines. Case No. 21-00017-UT, PNM Exh. 17 (Graves Reb.) at 14.

[476] PNM Exh. 18 (Graves Reb.) at 19 (emphasis added), *compare with* Case No. 21-00017-UT, PNM Exh. 17 (Graves Reb.) at 14.

he "refute[s] and reject[s]" the intervenors' premise that PNM acted imprudently in electing to continue participating in Four Corners after 2016.[477] But, "as a hypothetical," Graves explains he evaluated "what harm there has been from not choosing a 2017 gas CC [combined cycle plant] instead of" PNM "extending its commitment to FCPP."[478] In other words, as he explains later in his testimony,

> In the event of an imprudence finding from the Commission, the next step is to investigate and remedy the extent of harm to customers that has actually ensued from choosing the wrong investment in question. Any remedy levied against PNM needs to reflect an amount equal to the past and projected harm from retaining FCPP (instead of exiting it for a gas CC in 2017).[479]

But, Mr. Graves then asks, "[w]hat should be the remedy for making an imprudent decision that ultimately results in no harm?"[480] "Even if there were some imprudence in choosing or sustaining that asset," he continues, "the alternative that should have then been preferred may also have lost value in relation to the same market conditions that have undermined the original, chosen asset, and it might involve even more future out-of-the-money costs than the allegedly imprudent asset now imposes (e.g., the replacement gas CC plant asset becomes stranded because of the ETA)."[481] "In that case," Graves concludes, "there would be a 'no harm, no foul' situation. If so, disallowance should not put consumers in a better position than they would have been had the more prudent alternative been chosen."[482]

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[477] PNM Exh. 18 (Graves Reb.) at 19.

[478] *Id.*

[479] PNM Exh. 18 (Graves Reb.) at 27.

[480] *Id.*

[481] PNM Exh. 18 (Graves Reb.) at 27-28.

[482] PNM Exh. 18 (Graves Reb.) at 28.

Within his theoretical framework, Mr. Graves compares the historic and future costs of two scenarios: one represents the choice PNM actually made, which was to continue to own Four Corners after 2016; and a counterfactual scenario in which PNM had decided to exit Four Corners after 2016 and construct a new gas-fired combined cycle plant. Graves created a spreadsheet-based analysis to calculate the cost difference between these two scenarios. He claims that PNM's customers suffered no harm – actually, in his estimation they received a minor benefit – from PNM's decision to extend the coal supply agreement in 2013 and remain an owner of Four Corners. Thus, Mr. Graves and PNM conclude, the Commission should not disallow any Four Corners costs or reduce PNM's rate of return on such costs because PNM's decision caused no harm to customers.

Delving a little more deeply into his remedy analysis, Mr. Graves constructed two alternative scenarios in a spreadsheet. The first scenario portrays the costs of the scenario that actually occurred in which PNM agreed to renew the coal supply agreement in 2013 and maintained its ownership share of the Four Corners coal plant (what Mr. Graves calls the "2031 Retirement Plan" in his rebuttal testimony and the "Extend CSA"2 scenario in his spreadsheets).[483] The second posits a counterfactual scenario in which PNM had instead exited Four Corners in 2017 (what Mr. Graves calls the "2017 Gas CC Plan" in his rebuttal testimony and the "Expire CSA" scenario in his spreadsheets).[484] Neither scenario portrays the cost, value, or operations of any resource beyond Four Corners or its hypothetical replacement resource.[485]

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[483] *Id.*

[484] *Id.*

[485] Sierra Club Exh. 2 (Fisher Sur.) at 2.

In the 2031 Retirement Plan, Mr. Graves compiles the fuel and operational costs of Four Corners through 2031, where 2017-2022 are based on historic operations and 2023-2036 are based on cost forecasts for FCPP apparently modeled by PNM.[486] Graves adds to this scenario an amortized stream of estimated ongoing capital costs at Four Corners that are carried forward to 2036.[487] After the assumed retirement of Four Corners in 2031, he replaces the energy output of the plant with solar resources "to help comply with the requirements to reduce carbon emissions under the Energy Transition Act." But Mr. Graves does not assign a cost to the solar energy, under the assumption that "this cost is the same under both the 2031 Retirement Plan and 2017 Gas CC Plan."[488] Graves then assesses the capacity contribution of that solar energy (78 MW) and makes up the remainder required to meet the effective capacity of Four Corners with a 91 MW combustion turbine (CT).[489] Mr. Graves does not explain the basis for assuming Four Corners would be replaced in 2031 with 78 MW of solar and 91 MW of combustion turbines, be it a specific resource planning analysis conducted by PNM or some other reference.

In the 2017 Gas CC Plan counterfactual, Mr. Graves assumes that had PNM exited Four Corners after 2016, PNM would have replaced its 200-MW share of Four Corners with a 252-MW gas combined cycle (NGCC) plant in 2017. Graves uses a 2012-vintage estimate for the capital cost of the NGCC, which he amortizes through 2036, and uses PNM's share of Luna Energy Facility as a proxy for the cost of fuel and operations for his notional NGCC.[490] However, as Sierra

[486] PNM Exh. 18 (Graves Reb.) at 22.

[487] PNM Exh. 18 (Graves Reb.) at 21.

[488] PNM Exh. 18 (Graves Reb.) at 22, n. 18.

[489] PNM Exh. 18 (Graves Reb.) at 22.

[490] PNM Exh. 18 (Graves Reb.) at 22-23.

Club witness Dr. Jeremy Fisher points out, rather than assuming that the new NGCC would run at the actual or projected capacity factor of a combined cycle plant, Mr. Graves forces the gas plant to deliver the same amount of energy as Four Corners.[491] Similar to the 2031 Retirement Plan scenario, as already noted, Graves assumes that PNM will build sufficient solar capacity to cover what Four Corners would have produced in 2031 had it existed. He then assumes that the replacement gas CC plant stops operating and produces no energy after 2031 but continues to incur both ongoing capital expenditures and fixed O&M costs from 2032 through 2036.[492]

At the conclusion of his analysis, Mr. Graves estimates that if PNM had built a new gas CC plant in 2017 to replace Four Corners, PNM ratepayers would have incurred $15 million more in costs (2023 present value) compared to his FCPP 2031 Retirement Plan.[493] Graves breaks his estimate into two time periods (2017-2022 and 2023-2036). His FCPP 2031 Retirement Plan claims $25.9 million in cost savings from 2017 to 2022 for ratepayers relative to the 2017 Gas CC Plan. From 2023 to 2031, he estimates the 2017 GC Plan would have $24.1 million lower costs; but from 2032. But the present value costs for the 2017 GC Plan are $13.3 million higher during the period 2032 to 2036. The table below, which is derived from Mr. Graves rebuttal testimony, shows the quantified results of his remedy analysis.[494]

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[491] Sierra Club Exh. 2 (Fisher Sur.) at 3.

[492] PNM Exh. 18 (Graves Reb.) at 23-24.

[493] PNM Exh. 18 (Graves Reb.) at 24.

[494] *See* PNM Exh. 18 (Graves Reb.) at 25. The corrected figures in legislative format (redline and strikeout) are reflected in Mr. Graves corrected rebuttal testimony admitted into evidence at hearing.

PNM Table FCG-1 (Rebuttal – CORRECTED)
Customer Cost Savings Claimed from PNM's Decision in Late 2013 to Extend FCPP Participation

		Total (2017 - 2022)	Total (2023 - 2031)	Total (2032 - 2036)	**Total (2017 - 2036)**
2031 Retirement Plan	*(2012 $ Mil)*	$242.3	$201.2	$26.9	**$470.5**
2017 Gas CC Plan	*(2012 $ Mil)*	$~~251.9~~ 252.6	$~~189.4~~ 191.7	$~~31.3~~ 32.2	**$~~472.7~~** 476.5
Savings	*(2012 $ Mil)*	$~~9.6~~ 10.3	-$~~11.8~~ -9.6	$~~4.4~~ 5.3	**$~~2.2~~** 6.0
2031 Retirement Plan	*(2023 PV $ millions)*	$611.0	$507.4	$67.9	**$1,186.2**
2017 Gas CC Plan	*(2023 PV $ millions)*	$~~635.2~~ 636.8	$~~477.6~~ 483.3	$~~78.9~~81.2	**$~~1,191.7~~** 1,201.3
Savings	*(2023 PV $ millions)*	$~~24.2~~ 25.9	-$~~29.7~~-24.1	$~~11.0~~13.3	**$~~5.5~~** 15.0

The record shows that PNM witness Graves' remedy analysis is methodologically flawed. It contains several major errors that, taken as a whole, render the analysis unreliable. Since Sierra Club witness Dr. Fisher detected and then proceeded to adjust those errors to find that the analysis PNM commissioned in this case and Case No. 21-00017-UT to show no harm actually reveals substantial harm to ratepayers in an amount approximating $240 million, the Hearing Examiners' findings on both the Graves remedy analysis and Dr. Fisher's corrected version of that otherwise defective analysis are discussed together immediately below.

8.1.5.1.2. Sierra Club Witness Dr. Fisher's Remedy Analysis Corrects Fundamental Errors in the PNM/Graves Analysis

In his surrebuttal testimony, Sierra Club witness Dr. Jeremy Fisher exposed numerous major flaws in Mr. Graves' static spreadsheet remedy analysis, which considered as whole, are fatal to the PNM/Graves harm (i.e., no harm) analysis.[495] Dr. Fisher starts by pointing out that the hypothetical nature of the Graves analysis "is, "by its very nature, speculative."[496] It is also not

[495] In his surrebuttal testimony, NEE witness Christopher Sandberg also roundly criticized Mr. Graves' remedy analysis. *See* NEE Exh. 3 (Sandberg Sur.) at 1-2, 7, 10-12, 14-15, 16, 20-22.

[496] Sierra Club Exh. 2 (Fisher Sur.) at7.

what a prudent utility with "an impending capacity (and energy) shortfall" deciding whether to exit a coal plant like Four Corners or not would have done. What a prudent utility likely would have done, Dr. Fisher opined, is issue one or more requests for proposals (RFPs), evaluate opportunities to acquire new or existing capacity, and then propose a portfolio that met its needs at lowest costs.[497] So, "[w]ithout a contemporaneous RFP or analysis, it is difficult to know which resources PNM would have required to replace its share of Four Corners."[498]

Dr. Fisher's assessment suggests a deeper methodological flaw in the Graves' remedy analysis in that it conflates an abandonment analysis with a replacement resource analysis, which are "separate regulatory processes."[499] In an abandonment analysis, which is essentially a cost-benefit analysis (the net public benefit standard),[500] the utility need only show that an existing resource is more expensive or less viable than the alternative. A replacement resource analysis, which follows the abandonment process (assuming it is successful), would consider the best portfolio to meet customer and system requirements given the choice to abandon the existing resource. This two-step process is illustrated, as Dr. Fisher points out, in the bifurcated San Juan Generating Station (SJGS) abandonment (19-00018-UT) and replacement resource (19-00195-UT and 20-00182-UT) proceedings. To show the abandonment of SJGS was warranted, PNM compared the costs of the coal plant to a portfolio of solar, battery storage, and combustion turbine peakers in Case No. 19-00018-UT. But in the subsequent replacement resource proceedings, after thorough and careful consideration the Commission rejected the portfolio PNM used in justifying

[497] *Id.*

[498] *Id*

[499] Sierra Club Exh. 2 (Fisher Sur.) at 13.

[500] *See, e.g.,* Case No. 21-00017-UT, *RD on FCPP Sale and Abandonment*, 23-38 (discussing standards governing abandonment and sale and transfer of PNM's interest in FCPP).

abandonment, opting instead to approve the all-renewables CCAE 1 portfolio that included 650 MW of solar resources and 300 MW of battery storage resources.[501]

Another flaw in the Graves remedy analysis, which Mr. Graves effectively conceded on cross-examination,[502] is that unlike dynamic production-cost or capacity expansion models like Strategist or Encompass (the latter of which PNM operates and uses now), the static "one dominant

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[501] Case No. 19-00195-UT, *Order on Recommended Decision on Replacement Resources – Part II* (NMPRC 7/29/2020).

[502] Tr. (Vol. 3) 854-55 (Graves). There, the most telling passages of Mr. Graves's answers on this topic are the following:

> Q: In the real world, isn't it true that increasing gas prices would impact the utility's decision on how and when to dispatch a gas combined-cycle plant?
>
> A. Abundantly correct. In a more time and resource rich environment to evaluate this, you could have reevaluated future dispatch, and maybe the gas plant wouldn't have run as much, and possibly some other things would have gotten built eventually. I didn't do a system analysis, I did an equivalent analysis. Tr. (Vol. 3) 854.
>
> Q: Your damage analysis spreadsheet does not consider the interaction of fuel prices and dispatch, or any of the other resources available to PNM during the study period; correct?
>
> A: Yes. I guess another way of saying that, again, is it is a replacement-in-kind analysis that says if you took what you were going to get from the coal plant as now understood, because we have modeling for, and you replaced it with what you would have gotten from a gas plant, what would you difference had been?
>
> You are correct in that there are adjustments that would be likely made if you actually did have that gas plant to the way you're going to operate it and so on. *That's the analysis we didn't do, ore would we have the time to do I think*. Tr. (Vol. 3) 855.

Considering that Mr. Graves essentially performed the same reconstructive and counterfactual analyses for PNM in Case No. 21-00017-UT, it strains credulity to accept the claim at face value that between his work for PNM in 21-00017-UT (Mr. Graves filed supplemental testimony on Mar. 15, 2021; rebuttal testimony on Aug. 2, 2021; and sur-surrebuttal on Sept. 3, 2021) PNM and its expert witness did not have the "time" or "resources" between when Mr. Graves performed his work in that case and his work in this one to perform the dynamic production-cost modeling analyses that a prudent utility would have conducted under the circumstances of determining whether to exit a major baseload plant like FCPP. In fact, as Dr. Fisher notes, in the 2016 Rate Case, PNM witness Patrick O'Connell stated that by January 2014, "things had changed," in PNM's assessment of how to replace coal resources, such that PNM was no longer considering nature natural gas CC plants due to cost. In fact, by the time PNM was considering replacement resources for the San Juan Generating Station in 2014 "things had changed," quoting witness O'Connell, "to the point that we were proposing Palo Verde, solar, and peaking capacity; not Natural Gas Combined Cycle." Comm'n AN Exh. 70 (Vol. 3, 8/9/2017) 593 (O'Connell). Nevertheless, evincing the company's imprudence in addressing the neighboring Four Corners plant, in the January 2014 Strategist run discussed at length above, O'Connell conceded that Strategist run did involve a natural gas CC plant, which was "a more expensive" option . . . "than a gas peaking plant or a solar facility." *Id.* 593-94.

resource versus another" assessment Mr. Graves did does not capture the interactions between fuel prices, availability of other resources, and unit dispatch.[503] Consequently, Mr. Graves' spreadsheet analysis fails to capture reflect that had PNM had Four Corners and replaced it with a gas plant, PNM would have been able to mitigate gas prices by adding lower-cost wind and solar resources, which in fact the company subsequently did do.[504] By its nature, then, Mr. Graves' static spreadsheet analysis overstates the cost of the alternative to Four Corners and is unreliable.

Turning now to scrutinizing the data inside the static spreadsheet analysis, the record shows the Graves remedy analysis is fatally flawed. To start, Mr. Graves repeated errors in his remedy analysis in this case that he had expressly acknowledged in his *ex post* analysis in Case No. 21-00017-UT.[505] Yet, inexplicably, he failed to correct the errors in his methodologically similar remedy analysis this time around.[506] When all the errors are corrected, as Dr. Fisher demonstrated in his sur-rebuttal testimony, the $15 million in savings (2017-2036) Mr. Graves estimated become $238.7 million in damages suffered by ratepayers due to PNM's imprudent decision to remain at Four Corners.

In his evaluation of the Graves spreadsheet analysis, Dr. Fisher found that Mr. Graves made four fundamental errors and several other material errors. Dr. Graves quantified the impact of each fundamental error, but he did not monetize the other material errors. The fundamental and material errors Dr. Fisher detected and corrected are summarized below. As shown in the table toward the

[503] Sierra Club Exh. 2 (Fisher Sur.) at 10-12.

[504] Sierra Club Exh. 2 (Fisher Sur.) at 10-11.

[505] Case No. 21-00017-UT, PNM Exh. 35 (Graves Sur-sur.) at 14 ("I do agree that an adjustment is needed to put the total capacity of the two plans on a more equal footing, through either some kind of cost reduction in the 2017 CC plan or an avoided future capacity credit given to it.").

[506] Sierra Club Resp. Br. at 16-17.

end of this discussion, when the fundamental errors are quantified correctly, consistent with Dr. Fisher's credible assessment the $15 million in savings (2017-2036) Mr. Graves estimated become $238.7 million in damages suffered by ratepayers due to PNM's imprudent decision to remain at Four Corners.

The first two fundamental errors in the Graves remedy analysis regard his use of historical costs at the Luna gas plant to estimate costs for the hypothetical gas plant that Mr. Graves assumes would have replaced Four Corners if PNM had exited Four Corners in 2017. To begin, there is an unexplained inconsistency in which PNM gas plant Mr. Graves used as the basis for estimating costs for the hypothetical replacement gas plant in his two analyses: in his *post-hoc* prudence analysis in this case, Mr. Graves used the Afton plant; but in his remedy assessment, Mr. Graves used the Luna plant as the proxy. Mr. Graves does not explain this inconsistency.

Setting that inconsistency aside for now – yet which PNM ironically tries to exploit in criticizing Dr. Fisher's analysis, as noted below – Mr. Graves incorrectly assumed that PNM's share of the Luna plant is smaller than it in fact is. That mistaken assumption led Mr. Graves to estimate a higher dollar-per-megawatt cost that should be applied to the hypothetical gas plant in his analysis. Mr. Graves assumed PNM's ownership share in the Luna plant is 185 MW (30.3%), rather than PNM's actual nameplate capacity of 190 MW (33%). This mistaken assumption resulted capital expenditures for the 2017 Gas CC plant being overstated by 2.7%, or $1.3 million on a present value basis (2023 dollars).[507]

Dr. Fisher also shows that Mr. Graves incorrectly characterized all of Luna's costs as variable costs, mixing both variable and fixed costs into an "average" per-MWh cost that he scales

[507] Sierra Club Exh. 2 (Fisher Sur) at 17-18.

up to the output of the hypothetical gas plant in his analysis. By incorrectly treating fixed costs as variable costs, he incorrectly assumes that fixed costs would increase when output increases, and thereby overstates the cost of the hypothetical replacement gas plant by $63.8 million (NPV 2017-2036 in 2023 dollars).[508]

Dr. Fisher shows that Mr. Graves' largest error was to assume that PNM would have replaced its 200 MW share of Four Corners with a 252 MW gas plant – at a time when PNM was already "long on," (i.e., had excess) capacity.[509] This is a critical mistake, because Mr. Graves's spreadsheet analysis assumes that PNM would incur capital and non-fuel operating costs for gas plant that was larger than the Four Corner's interest it was replacing. At a minimum, Mr. Graves should have either assumed that the size of the replacement gas plant would be exactly the same size as PNM's share of Four Corners (i.e., 200 MW) to enable an apples-to-apples comparison, or Mr. Graves should have given the replacement scenario credit for the value of the 52 MW of excess capacity from the 252 MW gas plant relative to the scenario with 200 MW of Four Corners capacity.

Dr. Fisher confirmed that Mr. Graves did neither of these things, which arbitrarily and unreasonably increased the cost of the replacement scenario by $152.7 million (NPV 2017-2023, 2023 dollars).[510] In Case 21-00017-UT, as already noted, Mr. Graves expressly admitted that this was an error and needed to be adjusted, stating that "I do agree that an adjustment is needed to put the total capacity of the two plans on a more equal footing, through either some kind of cost

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[508] *Id.* 18-21.

[509] Sierra Club Br. at 18 (citing Sierra Club Exh. 2 (Fisher Sur.) at 21-27).

[510] Sierra Club Exh. 2 (Fisher Sur.) at 27.

reduction in the 2017 CC plan or an avoided future capacity credit given to it."[511] Yet, in this case, Mr. Graves repeated an error that he had already admitted to in Case No. 21-00017-UT.

As for the fourth fundamental error, Dr. Fisher demonstrated that Mr. Graves erred by treating the capacity value of solar inconsistently in the two scenarios he analyzed.[512] In the scenario in which Four Corners is retained, Mr. Graves assigns a capacity value to solar, but fails to do so in the scenario in which Four Corners is replaced. This inconsistency results in overestimating the cost of exiting Four Corners relative to the scenario in which Four Corners is retained by $36.0 million (NPV 2017-2036, 2023 dollars).[513]

When four fundamental errors are corrected in Mr. Grave's spreadsheet[514], the overall results reverse dramatically in the direction of harm to ratepayers. Contrary to Mr. Graves' claim that retaining Four Corners has and will result in a net benefit to customers of $15 million, Dr. Fisher shows quite the opposite is true: PNM's imprudent decision to retain Four Corners has and will result in $238.7 million in extra costs relative to PNM having exited Four Corners in 2017. This is shown in the table below, which is derived from Dr. Fisher's surrebuttal testimony.[515]

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[511] Case No. 21-00017-UT, PNM Exh. 35 (Graves Sur-sur.) at 14.

[512] Sierra Club Exh. 2 (Fisher Sur.) at 27-29.

[513] Sierra Club Exh. 2 (Fisher Sur) at 5 (Table 1).

[514] Sierra Club points out that in addition "to errors which could be identified and corrected within Mr. Graves' spreadsheet, it is apparent that Mr. Graves' assumption that the replacement gas plant would produce the same exact amount of energy that Four Corners produces in his spreadsheet model is a very risky simplification. Mr. Graves did not conduct an optimization model that could capture PNM's entire system, and how that system would adjust in the scenario with Four Corners versus in a scenario without Four Corners. Instead, he assumed that PNM would produce the same exact energy from the hypothetical replacement gas plant as obtained from Four Corners each year, regardless of the level of gas prices." Sierra Club Br. at 19 n. 54.

[515] Sierra Club Exh. 2 (Fisher Sur) at 5 (Table 1), 34 (Table 3).

Table 2: Dr. Fisher's Corrections to Mr. Graves' Remedies Assessment

	Correction (2017-2036)	Value to Customers of Four Corners Extension (2017-2036)	Value to Customers of Four Corners Extension (2017-2022)
Graves remedy analysis, as presented		$15.0	$25.9
Corrections			
Luna capacity	$(1.3)	$13.8	$26.6
Fixed vs. variable at Luna	$(63.8)	$(50.0)	$(38.1)
Capacity of replacement CC	($152.7)	($202.7)	($115.5)
Value of solar capacity in 2032	($36.0)	($238.7)	($115.5)
Total	**($253.7)**	**($238.7)**	**($115.5)**

The import of Dr. Fisher's astute study should be lost on the reader: According to *PNM's own* experts' remedy analysis as accurately quantified, ratepayers have suffered, and will suffer, approximately $240 million in harm between 2017-2036 attributable to PNM's imprudent decision to remain at Four Corners.

PNM's sole critique of Dr. Fisher's assessment, discussed below, misses its mark. Notably too, PNM tries to flip only one of the four fundamental errors in the Graves remedy analysis back in the company's favor. PNM's silence on the three other fundamental errors *in its own remedy analysis* speaks volumes. That silence amounts to $86 million in uncontested harm to ratepayers according to Mr. Graves corrected remedy analysis, as explained below.

PNM ridicules Dr. Fisher's assessment of its witness Graves' remedy analysis, calling Dr. Fisher's remedy analysis "contrived" and "inflated."[516] However, one cannot easily let go of the sticky fact that the analysis PNM calls "contrived" is simply a corrected quantification of the remedy analysis PNM continues to stand by in this case to claim, "no harm, no foul."[517] Logically, if Dr. Fisher's remedy analysis is contrived (it isn't, as the findings in this discussion manifest),

[516] PNM Resp. Br. at 110.

[517] PNM Exh. 18 (Graves Reb.) at 28.

the remedy analysis on which it is entirely based is necessarily contrived as well. Were this true, PNM's "contrived" remedy analysis would put the Commission in the position that it found itself in the 2015 Rate Case, where the Commission's ability to quantify the potential harm to ratepayers from PNM's imprudence regarding Palo Verde was "hindered by the very actions that underlay it finding of imprudence – the utility's *inadequate analysis* and decision-making."[518] In that unhelpful situation, given the considerable discretion conferred on the Commission in determining a utility's rate base under Section 62-6-14(A) and its obligation to ensure that rates are just and reasonable under Section 62-8-1,[519] the Commission would be left to its own devices again to establish an imprecise remedy for PNM"s imprudence consistent with general ratemaking principles, as it did with respect to PNM's imprudence around Palo Verde in the 2015 Rate Case and the Oregon PUC did in the *PacifiCorp* order.[520] Fortunately, the Commission does not find itself in that predicament again here because Dr. Fisher's intuitive remedy assessment is sound. (NEE witness Sandberg's remedy analysis, assessed below, is an entirely different matter that is better is left aside for the time being.)

Indeed, Dr. Fisher's assessment is sufficiently sound that that the only material argument PNM makes against it focuses solely on one of the four fundamental errors that Dr. Fisher corrected. PNM is silent on the other three, perhaps because its own witness who sponsored the study previously acknowledged in Case No. 21-00017-UT the methodological errors that he

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518 *Public Serv. Co. of N.M.*, 2019-NMSC-012, ¶ 46 (emphasis added).

519 *Id.* (citing NMSA 1978, §§ 62-8-1 and 62-6-14(A)).

520 *See Id.* 2019-NMSC-012, ¶¶ 40-46. Regarding the Commission's Palo Verde imprudence remedy, the Court found, "[d]espite this [the utility's inadequate analysis and decision-making], the Commission established valuations for the 64.1 MW and the renewed leases which it considered appropriate to protect ratepayers and result in just and reasonable rates. Such an approach is a lawful and reasonable exercise of the Commission's authority to determine the rate base of a utility under Section 62-6-14(A) and its obligation to ensure that rates are just and reasonable under Section 62-8-1." *Id.* ¶ 46.

repeated in this study needed "adjustment."[521] Perhaps it was simply an oversight, or some combination of the two. Whatever the case, PNM argues that Dr. Fisher erroneously criticizes and adjusts Mr. Graves selection of the 230 MW Afton gas plant as a proxy to replace the 200 MW of FCPP. "This adjustment alone," PNM states, counts for $150 million of Sierra Club's inflated damage figure."[522] PNM notes that its May 2012 analysis identified a new gas combined cycle plant with a capacity of 252 MW as the replacement for PNM's share in FCPP. Therefore, PNM reasons, the estimate for the ongoing capital expenditures for the alternative gas plant should reflect a plant sized at 252 MW, not just PNM's share of 200 MW at FCPP as claimed by Sierra Club. The use of the slightly smaller Afton plant (230 MW capacity) as a proxy for the new combined cycle gas plant (252 MW), PNM thus maintains, was "conservative."[523] Therefore, PNM's argument concludes, had Dr. Fisher "replicated his scaling analysis with a capacity adjustment of 252 MW instead of 200 MW (using his cash cost method), he would arrive at a higher (less favorable) present value of $38.7 million (EOY 2012 PV) for the alternative gas plant instead of his original $30.7 million."[524] "On the issue of the appropriate size of the proxy gas plant," PNM thus contends, "it is Sierra Club witness Fisher who is mistaken, not PNM witness Graves."[525]

PNM's attempt to discredit Dr. Fisher's remedy assessment elides two key facts. First, it ignores the fact that at the relevant time in the study (circa 2017), PNM already had excess capacity

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[521] Case No. 21-00017-UT, PNM Exh. 35 (Graves Sur-sur.) at 14.

[522] PNM Resp. Br. at 111.

[523] *Id.* PNM previews this responsive argument with almost identical phrasing its brief-in-chief at 221-22.

[524] PNM Resp. Br. at 111.

[525] *Id.*

and an additional 52 MW is, as Dr. Fisher observed, "a substantial amount of excess capacity, given the size of PNM's system."[526] Second, it ignores that Mr. Graves himself admitted that he should have either scaled back is proxy plant's costs or given credit for the additional capacity benefits.[527] Consequently, PNM's principal argument against Dr. Fisher's remedy assessment fails. Dr. Fisher's capacity adjustment is reasonable and consistent with sound utility practice in resource decision-making.

Finally, as already emphasized, PNM concentrated exclusively on one of four fundamental errors in the Graves analysis that, when corrected, shows an overstatement of costs of the 2017 Gas CC proxy plan by $152.7 million. Consequently, assuming for the sake of argument that one reversed the $152.7 million correction in favor of the Graves analysis, i.e., removed the $152.7 million from Dr. Fisher's quantification of harm, the legitimate value of harm suffered by PNM ratepayers according to the company's *own methodology*, as properly corrected by Dr. Fisher, is $86 million. That value, less the contested $152.7 million,[528] is composed of the sum of the overstated values of $1.3 million for Luna capacity; $63.8 million for the mischaracterization of fixed costs as variable at Luna; and $36 million in failing to assign a capacity value to solar in the scenario in which Four Corners is replaced. Accordingly, the results of Dr. Fisher's solid remedy assessment reveal a minimum of $86 million in functionally uncontested[529] harm and $238.7

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[526] Sierra Club Exh. 2 (Fisher Sur.) at 22. Dr. Fisher proceeds to note that, "[i]n fact, by 2017, this 52 MW of excess capacity would have represented 2.2% of PNM's total capacity, pushing the utility from an estimated 17.5% reserve margin to a 20% reserve margin." *Id.*

[527] Sierra Club Resp. Br. at 4-5 (citing Case No. 21-00017-UT, Graves Sur-sur.) at 14; Tr. (Vol 3) 860-61 (Graves)).

[528] That is, simply stated: $238.7 million - $152.7 million = $86 million.

[529] The $86 million in harm is "uncontested" in the sense that PNM failed to martial tangible counter-evidence to rebut Dr. Fisher's correction of three of four fundamental flaws in the Graves harm analysis. At least the Hearing Examiners were unable to locate any such evidence in the record.

million in total harm to ratepayers if the $152.7 million is added back into the harm assessment, as the Hearing Examiners believe it should, consistent with the foregoing analysis of the evidence and party positions.

8.1.5.1.3. NEE Witness Sandberg's Remedy Analysis

Through NEE witness Christopher Sandberg surrebuttal testimony, NEE quantifies the harm to ratepayers in PNM electing to remain at Four Corners at $445 million. NEE's quantification of harm is founded on data NEE received from PNM through an interrogatory (Interrogatory 6-1) submitted and contested in Case 16-00276-UT.[530] In that case, NEE was authorized to ask PNM to produce, and PNM was compelled to perform, Strategist runs relating to the retirement of Four Corners.[531] Mr. Sandberg testified that PNM used Strategist during the

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[530] ABCWUA, which supports NEE's quantification of harm and proposed remedy, misattributes the case in which the data were developed. The Strategist analysis was produced in the 2016 Rate Case, not Case 13-00390-UT. *See* Water Authority Br. at 20.

[531] *See* Case No. 16-00276-UT, *Order Partially Granting and Partially Denying NEE's Second Motion to Compel* (June 27, 2017). PNM was ordered to respond to NEE Interrogatory 6-1, in which NEE requested that PNM perform the following exercise:

> Please run Strategist® retiring Four Corners Power Plant in the following years:
>
> A. 2017 – run it as if PNM did not sign participation agreement and the coal contract in 2013, which means $0 coal fuel costs, $0 O&M costs, $0 costs for ongoing capital expenditures, including Selective Catalytic Reduction ('SCR') costs. Please include 100% costs for stranded assets.
>
> B. Perform a Strategist® run on the impact of an early exit from Four Corners as a participating owner, as of 2024, and 2028. This cost-benefit analysis shall include full cost recovery of and return on PNM's undepreciated investments in Four Corners at the time of the early exit date together with full recovery of all existing contractual obligations, including default payments and penalties, through a 2031 operation date.
>
> C. For all three above scenarios please tell us the input assumptions used in the runs, including load forecast, prices for solar, gas, and wind; any MW restraints for any resource; the amount of stranded assets for each resource and the NPV for the stranded assets; costs associated with take-or-pay coal contract; costs associated with exiting the participating agreement early (before 2031).
>
> D. Please provide the comparable Strategist® run with the *same exact* input assumptions: load forecast, prices for solar, gas, and wind, and any MW restraints for any resource (used in

relevant time period as a basis for its San Juan abandonment and replacement resources Case No. 13-00390-UT, so it is known and knowable what inputs (gas forecasts, solar and wind costs, etc.) PNM was using.[532] PNM produced five documents in response to Interrogatory 6-1 on July 5, 2017: PNM Exhibits NEE 6-1(A), NEE 6-1(B)(1), NEE 6-1(B)(2), 6-1(C), and 6-1(D).[533] Mr. Sandberg said that four of the documents (NEE 6-1(A), NEE 6-1(B)(1), NEE 6-1(B)(2), and 6-1(D)) are summaries of Strategist runs,[534] while NEE-6-1(C) "contains many thousands of pages of Excel files, pdf files, REP files, and Strategist input files."[535] The Strategist runs were addressed in the supplemental testimony of NEE witness David Van Winkle in the 2016 Rate Case. Mr. Van Winkle concluded there that comparing scenario NEE 6-1(A), wherein FCCP retires in 2017 and adds a 187 MW gas peaking unit in 2018, with scenario NEE 6-1(D), wherein FCPP retires in 2031, the scenario that retires FCPP in 2017 is less costly than retiring FCPP in 2031 by $445,682,093.[536] Mr. Sandberg adopts in this case Mr. Van Winkle's $445 million conclusion in the 2016 Rate Case.[537]

Asked whether the $445 million could be "used without any adjustments," Mr. Sandberg says "[i]t appears not," alluding to PNM witness Patrick O'Connell's testimony in the 2016 Rate

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> the above three scenarios) that includes Four Corners (associated fuel, O& M, and all capital expenditures).

Id 3.

[532] NEE Exh. 3 (Sandberg Sur.) at 16.

[533] NEE Exh. 3 (Sandberg Sur.) at 17-18.

[534] The summaries of Strategist runs are attached to the testimony of Anna Sommer in Case No. 16-00276-UT as Exhibit AS-2. That testimony was admitted in this case as Commission AN Exhibit 37 (Summer Test. 7/14/2017).

[535] NEE Exh. 3 (Sandberg Sur.) at 18.

[536] Comm'n AN Exh. 37 (Van Winkle Supp. at 1 (7/14/2017)).

[537] NEE Exh. 3 (Sandberg Sur.) at 18 (citing Comm'n AN Exh. 37 (Van Winkle Supp.) at 1).

Case that the $445 million quantification was "unreliable." To Mr. O'Connell's first point that PNM didn't know if it could break the coal contract, and if it could, how much it cost ratepayers,[538] Mr. Sandberg responds that he disagrees "that it should be assumed that the coal contract should be a ratepayer cost as opposed to a PNM shareholder cost."[539] Sandberg notes that in Case No. 21-00017-UT, PNM shareholders agreed to pay NTEC $75 million to assume PNM's Four Corners coal contract obligations.[540] So, Mr. Sandberg reasons, even if it is assumed that buying out FCPP coal contract costs were shifted to ratepayers, there would have been "plenty of room in the $445 million of savings to absorb some or all the cost of that contract obligation and still deliver enormous savings to ratepayers."[541]

To Mr. O'Connell's second point that he thought the $445 savings estimate was unreliable due to, among other things, the timeline for construction of gas replacement power assumed in the NEE 6-1(A) scenario (where the 187 MW gas peaker is brought online in 2018) being too short,[542] Sandberg notes that Mr. Van Winkle acknowledged in the 2016 Rate Case that NEE 6-1(A) was too optimistic in assuming the gas peaker would come online in 2018 because the cycle to build a 187 MW gas peaker is longer than one year. Hence, suggesting an alternative to fill the shortfall in the analysis, Van Winkle surmised the shortfall could be replaced by using FCPP capacity and energy through a purchased power agreement "or other financial instrument during the short period of time needed until the 187MW gas peaker becomes feasible."[543] "All other options," Van Winkle

538 Comm'n AN Exh. 70 (Vol. 3, 8/9/2017) 531-37 (O'Connell).

539 NEE Exh. 3 (Sandberg Sur.) at 19.

540 *Id.*

541 NEE Exh. 3 (Sandberg Sur.) at 19.

542 Comm'n AN Exh. 70 (Vol. 3, 8/9/2017) 534-36 (O'Connell).

543 Comm'n AN Exh. 37 (Van Winkle Supp.) at 3.

concluded, "are feasible."[544] Thus, bringing Mr. Van Winkle's conclusion into this case, Mr. Sandberg states his expectation "that any resulting change to the $445 million of savings from utilizing FCCP capacity and energy through a purchased power agreement or other financing instrument during the short period of time – approximately an additional six months –needed to bring the 187 MW gas CC unit online would still leave scenario 6-1A [FCPP retires in 2017] the less costly alternative."[545]

PNM argues that NEE and ABCWUA's (through adoption of NEE's position) proposed $445 million exclusion of FCPP costs from rate base is "unconscionable and based on an outdated and discredited analysis."[546] Focusing specifically for purposes of determining the quantification of harm, PNM notes that, regarding the Strategist run from the 2016 Rate Case that, PNM witness O'Connell characterized the subject Strategist runs as the "worst" produced in response to the motion to compel which led to their development. In fuller context, PNM witness O'Connell observed:

> 6-1 is particularly flawed. It's probably the worst of the runs that we have produced under the Motion to Compel, because had PNM retired Four Corners, it would be replaced. And that's the reality of the situation. Just wiping it off the face of the earth in 2017 and then saying that is a reflection of what was a possibility for PNM is a flawed premise.[547]

PNM contends the analysis incorrectly assumes that PNM could simply walk away from its legal and contractual obligations with respect to Four Corners and that PNM would not need or would not incur necessary costs for replacement resources to serve customers. PNM accuses NEE

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[544] *Id.*

[545] NEE Exh. 3 (Sandberg Sur.) at 19.

[546] PNM Resp. Br. at 106.

[547] Comm'n AN Exh. 70 (Vol. 3, 8/9/2017) 533-34 (O'Connell).

of "misleadingly fail[ing] to note in its Brief any of the lengthy and comprehensive caveats and criticisms that are set forth in the PNM interrogatory response pursuant to which the subject Strategist runs were produced." Even NEE witness Sandberg agrees, PNM points out, that adjustments would have to be made to the $445 million calculation although his adjustments are unspecified and unquantified and would not be sufficient to cure the fundamental flaws in the subject Strategist runs.[548]

Applying the same close degree of scrutiny, the Commission has applied to examine the Graves' remedy analysis and Dr. Fisher's corrections to that analysis, NEE's $445 million in claimed harm to ratepayers from PNM not exiting FCPP in 2017 does not pass this examination. Indeed, given the ambiguities inherent in the respective remedy analyses for concededly different types of methodological defects, the NEE remedy analysis and PNM's Graves analysis could be considered the mirror image of each other.

PNM persuasively identifies numerous serious flaws in NEE 6-1(A). The flaws in NEE 6-1(A) include omissions of material assumptions; missing but necessary cost estimates associated with exiting Four Corners prior to the end of its operating life; and vague and inaccurate assumptions regarding model inputs.[549] Tellingly, NEE witness Sandberg tries to patch up some of the larger holes in the Strategist run by speculating that some unspecified and unquantified resource[s] would fill the shortfall until 187 MW gas peaking unit would be online and running. The one concrete figure Mr. Sandberg does summon is the $75 million PNM shareholders agreed to pay NTEC to assume PNM's obligations under the Four Corners coal supply agreement, but

[548] PNM Resp. Br. at 107.

[549] *See* PNM Resp. Br., 106-07 and n. 517.

that is a mismatched figure; the $75 million was to be paid in 2022,[550] *not* 2017 as under NEE's dubious NEE 6-1(A) scenario. So, while there conceivably could be "plenty of room" in the $455 million of purported savings to absorb FCPP exit costs and still yield ratepayer savings, NEE failed to describe that room in enough necessary detail to qualify NEE 6-1(A) as an accurate benchmark for quantifying the harm to ratepayers resulting from PNM's imprudence in not exiting FCPP.

8.1.5.4. HEs' Determination on the Quantification of Harm

The Hearing Examiners have found that Sierra Club witness Dr. Fisher thoroughly discredited PNM witness Graves' remedy analysis. By the same token, they have found that NEE's $445 million remedy does not withstand close scrutiny given the irremediable flaws in the Strategist run used to generate that figure in the 2016 Rate Case. Nonetheless, the elimination of those two polar opposite analyses – that are also, ironically, mirror images – does not leave the Commission casting in the dark for a divined imprecise remedy unsupported by the law or facts as PNM insists.[551] To the contrary, Dr. Fisher's incisive harm analysis, deploying PNM witness Graves' own spreadsheet-based analysis, reliably showed in his meticulously articulated study harm to PNM ratepayers of $238.7 million (2023 dollars) from 2017 through 2036 on a present value basis, with $115 million of the harm having already been realized in 2017-2012.[552] As explained above, even if the Commission accepted PNM's erroneous argument that Dr. Fisher overstated the costs of the 2017 Gas CC proxy plan by $152.7 million, the *specifically* unrefuted

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[550] *See* Case No. 21-00017-UT, *RD on FCPP Finc'g Order* at 19 and n. 45 ("[PNM witness] Thomas G. Fallgren notes that under Section 3.3 of the [Purchase and Sale Agreement], PNM paid NTEC a refundable payment of $15 million at the time of execution of the Agreement and will pay the balance of $60 million following the receipt of Commission approval in this case. NTEC will also release PNM from further obligations under the coal supply agreement pursuant to the Coal Supply Release attached as Exhibit G to the Agreement.").

[551] *See* PNM Br. at 236-41.

[552] Sierra Club Exh. 2 (Fisher Sur.) at 4-5, 34.

legitimate value of harm suffered by PNM ratepayers adhering to PNM's own remedy methodology, accurately adjusted, is $86 million.

In conclusion, the record demonstrates by a preponderance of the credible evidence that PNM's decision to remain at Four Corners resulted in approximately $240 million dollars of harm to ratepayers. Stated in opportunity cost (or foregone savings) terms, PNM's decision to retain Four Corners resulted in approximately $240 million in unrealized savings for ratepayers.

8.1.5.5. HEs' Recommended Disallowance

Having quantified the harm to ratepayers resulting from PNM's imprudent decision to renew its participation in Four Corners, the key task remaining to be accomplished is to establish a fair and appropriate remedy that bears a reasonable relationship to the harm inflicted on ratepayers.[553] The Hearing Examiners determine that a fair and measured remedy that removes of the risk of harm to ratepayers but also weighs in countervailing factors that counsel against the imposition of a full $238.7 million penalty is for the Commission to order a 32.4% ($84,840,058) disallowance of PNM's Four Corners test year capital investments.[554] The Hearing Examiner's reasoning supporting our recommended disallowance is as follows.

The Hearing Examiner's recommended disallowance converts an "impairment," which in accounting terms expresses the same concept that a rate base disallowance in rate-setting represents – *a permanent reduction in the value of a company asset or asset group*.[555] Thus, the

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[553] *Public Serv. Co. of N.M.*, 2019-NMSC-012, ¶ 41 (citing *PacifiCorp*, UE 246, Order No. 12-493 at 32, 2012 WL 6644237).

[554] *See* Comm'n Exh. 2 (Attach. A at 1 of 2, Col. F, ll. 99 and 100); Comm'n Exh. 2 Supp. (Attach. A (9-11-2023 Supp.) at 2 of 3, Col. F, ll. 99 and 100).

[555] The description of "impairment" is taken verbatim from *Investopedia*, https://www.investopedia.com *at* https://www.investopedia.com/terms/i/impairment.asp#:~:text=In%20accounting%2C%20impairment%20is%20a,with%20its%20current%20book%20value, Alicia Tuovila, *What Does Impairment Mean in Accounting? With Examples* (updated July 8, 2023). According to the Financial Accounting Standards Board (FASB), an impairment condition exists when the carrying amount of a long-lived asset exceeds its fair (recoverable) value. An impairment loss is recognized only if the carrying amount of a long-lived asset (or asset group) is not recoverable

Hearing Examiners propose to adapt an impairment, based on the cash flow analysis of Sierra Club's proposed remedy, as the imprudence disallowance in applicable test year rate base. The company asset group "impaired"[556] is, of course, PNM's undepreciated capital investments in Four Corners. In compliance with GAAP, PNM must charge the impairment to earnings.[557] The charge to earnings for GAAP reduces PNM's equity balance.

The impairment (or write-off)[558] the Hearing Examiners are utilizing as a disallowance is derived from the cash flow analysis of Sierra Club witness Dr. Fisher's recommended remedy. To recap, Dr. Fisher recommends that the Commission ***eliminate PNM's return <u>on</u>*** Four Corners undepreciated capital costs incurred between July 1, 2016 and June 30, 2022 (totaling $172.8 million, 2024 net book value or NBV) and ***set PNM's return <u>on</u>*** Four Corners costs incurred after

and exceeds its fair value. The carrying amount of a long-lived asset is not recoverable if it exceeds the sum of the undiscounted cash flows expected to result from the use and eventual disposition of the asset. An impairment loss is measured as the amount which the carrying amount of a long-lived asset exceeds its fair value. FASB, Statement of Financial Accounting Standards No. 144 (FAS 144), *Accounting for the Impairment or Disposal of Long-Lived Assets* (Aug. 2001) at 9, ¶ 7 (Recognition and Measurement of an Impairment Loss). The impairment loss recognized on a long-lived asset to be held and still used is included in income from continuing operations in the company's income statement. *Id*. 13, ¶ 25 (Reporting and Disclosure).

[556] As indicated above, under GAAP an asset is considered impaired when its fair value falls below its book (or recoverable) value. The asset considered impaired must be recognized as a loss on the company's income statement. Financial Accounting Standards Board (FASB), *Statement No. 144: Accounting for the Impairment or Disposal of Long-Lived Assets*.

[557] PNM Br. at 237-38.

[558] A "write-off" expresses in accounting terms a reduction (loss) in the recorded amount of an asset. Technically, then, a write-off is an accounting standard that reduces the value of an asset while simultaneously debiting a liabilities account. The loss is subtracted from gross income or gross adjusted income on the company's income statement. Thus, the impairment is charged to earnings. However, generally speaking, recorded losses also lower a company's annual tax liability. *See, e.g.*, https://www.investopedia.com/terms/w/write-off.asp.

June 30, 2022 (estimated at $46.4 million NBV) to reflect PNM's cost of debt.[559] PNM's statement of FCPP capital investments is reflected in the table below.[560]

PNM Table NEE 8-1 FCPP Capital Investments (in millions)			
	Capital Investment	Estimated 2024 NBV	ETA Reference
Investments made as of 6/30/2016	$ 181.1	$ 58.0	Section 2(H)(2)(c)
Investment made between 7/1/16 and 12/31/18	130.3	125.1	Section 2(H)(2)(c)
Investment made between 1/1/19 and 6/30/20	21.4	20.4	Section 2(H)(2)(d)
Investment made between 7/1/20 and 6/30/22	28.4	27.3	Section 2(H)(2)(d)
Projected Investments made between 7/1/22 and 12/31/23	19.2	18.9	Section 2(H)(2)(d)
Projected Investments made between 1/1/24 and 12/31/24	27.6	27.5	Section 2(H)(2)(d)
Total FCPP Investments	408.0	277.2	
13-month average adjustment		(14.7)	PNM Exhibit KTS-4, WP Plant 1
Test Period Net Book Value		262.4	
Remove Projected ARC Asset NBV at 12/31/24		(4.1)	Section 2(H)(2)(a)
Add: CWIP Balance at 12/31/24		3.4	Section 2(H)(2)(d)
Add: Retail Share FCPP Switchyard Assets Transferred to NTEC		1.0	Section 2(H)(2)(c)
FCPP Estimated 12/31/24 NBV		$ 277.4	

Dr. Fisher's recommended remedy, upon which the disallowance is founded, is consistent with sound and long-held regulatory principles: (i) a utility that has acted imprudently shouldn't profit on that imprudence; and (ii) the harm to ratepayers ensuing from the improvident utility decision-making should be redressed in a reasonably balanced manner. The Sierra Club remedy is also consistent with the approach taken by the Washington commission in the 2016 *WUTC Pacific Power Order*, discussed above, in which the WUTC disallowed Pacific Power any return

[559] Sierra Club Exh. 1 (Fisher Dir.) at 68, 73-74. Dr. Fisher notes that for FCPP capital costs incurred before July 2016, PNM receives a full return on and of investment at the weighted average of 7.20%. Pursuant to the Modified Revised Stipulation in the 2016 Rate Case, PNM receives a debt-only return of 4.86% on capital costs incurred between July 1, 2016 and December 31, 2018. *Id.* 67 (citing PNM Resp. to SC 1-3).

[560] At least two intervenor witnesses included PNM Table NEE 8-1 in their direct testimony. The table appears on page 64 of Dr. Fisher's direct testimony and is included in NEE witness Sandberg's direct testimony as Exhibit CKS-8. The total test year period NBV for FCCP investments in PNM Table NEE 8-1 is $262.4 million. That figure is reduced very slightly in PNM's subsequent response and supplemental response to B.R. 3. In Commission Exh. 2 and Commission Exh. 2 Supp., total test period plant is estimated at $262,125,689 (NBV). *See* Comm'n Exh. 2 Supp., Attach. A, p. 1 of 3, l. 21 (Total Net Plant).

on its SCR investments in Bridger Units 3 and 4 and allowed only a return of (i.e., depreciation) those investments in the two-year rate plan.[561] In essence, Dr. Fisher's proposed remedy combines, temporally, the WUTC's Pacific Power disallowance for the period of July 2016 to June 2022 with the Oregon PUC's *PacifiCorp II* decision and the Modified Revised Stipulation in the 2016 Rate Case in setting PNM's return on capital expenditures incurred after June 30, 2022 at PNM's embedded cost of debt.

According to the cash flow analysis reflected in Commission Exhibits 2 and 2 Supplemental, Dr. Fisher's imprudence remedy results in $84.8 million (pre-tax) impairment/write-off and a $63.3 million (after-tax) impairment/write-off. His imprudence remedy would result in a $10,613,144 reduction to PNM's 2024 non-fuel annual revenue requirement.[562] It would result in a 12.2% reduction in PNM's retained earnings. It would also reduce the portion of test year total FCPP net plant on which PNM earns some return (full or debt only)[563] by approximately 66%.[564]

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[561] *WUTC Pacific Power Order* at 38, 332 P.U.R. 4th 1, 2016 WL 7245476.

[562] *See* Comm'n Exh. 2 Supp., Attach. A at 2 of 3, Col. F, l. 97 ("Difference from as Filed).

[563] Under the Sierra Club (SC) recommendation, according to the figures in PNM's Supplemental Response to B.R. 3 (Comm'n Exh. 2 Supp.), PNM's total FCPP test year net plant on which it earns a full return is reduced by ≈ 59% (from $144,152,272 [PNM] to $58,552,061 [SC]); PNM's total FCPP test year net plant on which PNM earns a debt only return decreases by ≈ 75% (from 117,973,417 [PNM] to $29,410,894 [SC]). Comm'n Exh. 2 Supp., Attach. A at 1 of 3 (comparing PNM Col. D, ll. 11, 15 with Sierra Club Col. F, ll. 11, 15).

[564] To arrive at the ≈ 66% decrease in FCPP test year net plant on which PNM earns some return under the Sierra Club recommendation, in PNM Supplemental Response to B.R. 3 (Comm'n Exh. 2 Supp.), Attachment A at 1 of 3, one needs to compare the effect of Sierra Club's reductions to test period 2024 net plant in column F to PNM's "as filed" figures in column D. Subtracting PNM's total net plant (full return on) in line 11, $144,152,272, from the impact of Sierra Club's recommendation, ($58,552,016), equals $85,600,211. Next, subtracting PNM's total net plant (debt only return on) in line 15, $117,973,417, from the impact of Sierra Club's corresponding recommendation, ($29,410,894), equals $88,562,523. The sum of those two figures in bold equals the total net plant on which PNM earns no return according to Sierra Club's recommendation (Col. F, l. 19), which is $174,162,734. Next, adding $58,552,016 (Sierra Club full return on) and $29,410,894 (Sierra Club debt only return) equals $87,962,955. That is the total amount on which PNM earns *some return* (full or debt only) under Sierra Club's recommendation, which equals ≈ 34% of total test year net plant. Therefore, in SC column F: $174,162,734 (no return, l. 19) + $87,962,955 (some return, ll. 11 & 15) = $262,125,689 (total net plant, l. 21, NBV). Dividing $174,162,734 by $262,125,689 equals 0.664425, or ≈ 66%.

Our recommended disallowance takes the financial impairment calculated through the cash flow analysis of Dr. Fisher's proposed remedy (no return on undepreciated plant from July 2016 to June 2022 and return on net plant at the cost of debt after June 2022) and expresses that impairment charge, again, a *permanent reduction in the value of a company asset*, as a percentage of undepreciated net plant reduction, or disallowance. The *result* (the $84.8 million or 32.4% disallowance) of the Hearing Examiner's methodology is consistent with the Oregon PUC's 10% ($17 million) emission control investment disallowance in the *PacifiCorp* decision. However, as the Oregon PUC conceded, the 10% disallowance was not arrived at in an analytically exact way.[565] In fact, the PUC "readily acknowledge[ed] that [its] disallowance is not a precise result."[566] Nevertheless, in exercising its discretion in determining rate base, the PUC concluded that "a 10 percent disallowance is reasonable in relationship to the potential harm to customers[,]" and further concluded "that the effect of this disallowance, combined with the other decisions made in [its] order, results in rates that are just and reasonable."[567]

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565 Readily acknowledging "that this disallowance is not a precise result[,]" the Oregon PUC stated that "[t]his is not uncommon in ratemaking, however, as '[t]he economic judgments required in rate proceedings are often hopelessly complex and do not admit to a single correct result.'" *PacifiCorp*, UE 246, Order 12-493 at 32, 2012 WL 6644237 (quoting *Duquesne Light Co.* 488 U.S. 299, 314). The PUC explained more fully that it was:

> unable to easily calculate the precise amount of a proper disallowance in this case, however. Quantifying the impact of Pacific Power's imprudence has been hindered by the very actions that underlie our finding of imprudence – the utility's inadequate analysis and decision-making. Had Pacific Power reasonably considered other compliance alternatives and performed proper and robust analyses, we would have the information necessary to calculate the harm to ratepayers for the utility's decision to proceed with its investments rather than pursuing other, least-costly, options. Without that information, we are left with determining a disallowance that reasonably penalizes Pacific Power for its imprudence, while acknowledging our inability to assess a precise amount.

Id. 31.

566 *PacifiCorp*, UE 246, Order No. 12-493 at 32, 2012 WL 6644237.

567 *Id.*

The Hearing Examiners submit their approach, utilizing an accounting impairment *based on a remedy for imprudence* as a rate-setting disallowance, is more methodical than merely settling on a percentage reduction in investment as the Oregon PUC did in *PacifiCorp*;[568] that is, the $84.8 million impairment loss, a permanent reduction in the value of PNM's Four Corners asset based on a cash flow analysis of Dr. Fisher's remedy proposal, is expressed as a disallowance. Pared to essentials, then, the disallowance does for rate-setting purposes what the impairment does for accounting: its expresses the permanent reduction in the value of a utility asset. Besides, assuming for the sake of argument that the Hearing Examiner's disallowance were not more firmly rooted methodologically than the *PacifiCorp* disallowance, it is nonetheless entirely congruent with the Oregon PUC precedent in establishing a percentage disallowance (32.4%) that bears a reasonable relationship to the harm to ratepayers.

As acknowledged above, the Commission has already implemented a debt-only return on the SCR costs at Four Corners pursuant to the Modified Revised Stipulation in Case No. 16-00276-UT, to which PNM was a signatory. That agreement has resulted in $4.7 million annual reduction in PNM's revenue requirements based on the debt-only return.[569] As shown in the diagram below, the cash flow analysis accounts for (i.e., deducts) the amount PNM's revenue requirement has been annually reduced. That amount, presently $28,355,490, reduces what otherwise would be a total disallowance of $113,195,548 were the cash flow analysis of Dr. Fisher's remedy followed to its logical conclusion.

[568] *See also Indianapolis Power & Light*, IURC Docket 44242, Order at 35-36 (wherein the Indiana commission imposed a $10 million disallowance because the utility failed to present production cost modeling on a $511 million investment).

[569] PNM Br. at 236.

	Previous Disallowance Impact(1)	Current Proposed Disallowance(2)	Total Disallowance
FCPP Imprudence Disallowances	$ 28,355,490	$ 84,840,058	$ 113,195,548

(1) Based on the Impact for the Debt Only adjustment for FCPP investments in NMPRC Case No. 16-00276-UT. Annual disallowance of $4,725,915 for six years (2018 through 2023).

(2) Based the recommended disallowance to FCPP Net Plant Balances as supported in the recommended decision.

Accordingly, the Hearing Examiner's recommended disallowance is a $84.8 million reduction in FCPP test year total net (undepreciated) plant. This disallowance results in a 32.4% diminution in FCPP test year total net plant.[570] The 32.4% disallowance results in a $1,816,888 reduction to PNM's 2024 non-fuel annual revenue requirement.[571] And the disallowance thus removes $84,130,728 from the amount of FCPP plant that PNM will earn a return ***of*** and ***on***.[572]

Alternatively, the *after-tax* equivalent disallowance the Commission could impose in its discretion in determining rate base pursuant to NMSA 1978, § 62-6-14(A)[573] would be a 24% ($63.3 million) diminution in test year net plant.[574] However, the Hearing Examiners strongly advise against using the after-tax impairment figure as the disallowance. Ironically, it turns out that a 24% disallowance of plant would result in ***$144,698 increase*** to PNM's as-filed position.[575]

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570 *See* Comm'n Exh. 2 Supp., Attach. A, p. 2 of 3, Col. F, ll. 99, 21 ($84,840,259 ÷ $262,125,689 = 0.323663 or 32.4%).

571 *See* Appendix B, l. 10 (Summary of Impacts for Recommended Decision).

572 *See* Appendix D (Test Period COS Rev. Rqmt. with RD Adjustments), Adjustment 1 (FCPP imprudence), p. 37 of 72, Col. S, ll. 10, 12, 24, p. 38 of 72, Col. S., l. 75.

573 *See Public Serv. Co. of N.M.*, 2019-NMSC-012, ¶ 21 (quoting *Hobbs Gas Co.*, 1980-NMSC-005, ¶ 6, 94 N.M. 731, 616 P.2d 116, "Neither New Mexico case law nor the Public Utility Act imposes any one particular method of valuation upon the Commission in ascertaining the rate base of a utility.").

574 *See* Comm'n Exh. 2 Supp., Attach. A, p. 2 of 3, Col. F, ll. 100, 21 ($63,290,833 ÷ $262,125,689 = 0.241452 or 24%).

575 *See* Appendix E, p. 2 of 3, Col. J, l. 97.

It would also *reverse* the proposed revenue requirement substantially, resulting in a ***$1.96 million increase*** to the revenue requirement recommended through the adjustments in this decision ($6,119,986), which is a larger magnitude change in position than the revenue requirement impact of the HEs' disallowance ($1,816,888).[576] The Commission Exhibit 2 and Exhibit 2 Supp. analyses (based on PNM's responses to BR-3) are updated in Appendix E to reflect the HEs' disallowance scenarios in Appendix updates the analyses set forth in Commission Exhibit 2 and Exhibit 2 Supplement to reflect the. The document reveals that the 24% reduction would replace the debt-only adjustment that PNM included in its Application. So, while the $63.3 reduction to plant would result in a decrease of approximately $4.6 million, the removal of the debt-only adjustment on the investments made from July 1, 2016 through December 31, 2018 offsets the decrease as it would now assume that all remaining plant earns its full return.[577] Consequently, the $63.3 after-tax impairment figure (and, frankly, any percentage reduction south of that 24% reduction in plant; *see* the discussion of Ms. Crane's original remedy recommendation below) is an absolute non-starter in terms of a fair and appropriate remedy for PNM's imprudence; indeed, it would be counter-productive and would do a grave disservice to the interests of ratepayers.

Getting back to the Hearing Examiners' recommendation, an intriguing aspect of the disallowance that warrants emphasizing is that the 32.4% ($84.8 million) write-down recovers virtually all (96%) of the actual costs of the SCR installations at Four Corners, which ultimately came in at $88.7 million.[578] The Commission therefore could simply treat the Hearing Examiner's

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[576] *Comparing* Appendix B (Summary of RD impacts of HE adjustments in RD), Col. C, l. 10 *with* Appendix E., Cols. I and J, l. 95 (p. 2 of 3) and Note 3 (page 3 of 3).

[577] *See id* Appendix E.

[578] PNM Exh. 17 (Graves Dir.) at PNM Exh. FCG-3, p. 3 of 6.

recommended remedy as the recoupment for ratepayers of the imprudently incurred Four Corners SCR expenditures.

In any event, viewed as a percentage of the harm suffered by ratepayers due to PNM's imprudent decision to retain Four Corners, the $84.8 million disallowance approximates 35.5% of the total harm demonstrated by a preponderance of the credible evidence[579] and 98.6% of the $86 million in harm that PNM overlooked or ignored or elected to not specifically challenge in post-hearing briefing with tangible counter-evidence.[580]

While at first blush a 35.5% of total harm remedy may seem too low given, as shown above, the magnitude of conspicuously improvident utility management decision-making and the ensuing harm to ratepayers, as described below, there are several countervailing factors that warrant the balanced approach inherent in the 32.4% disallowance recommended in this decision.

Before addressing the countervailing factors that advise against assessing a total disallowance and recovery of 100% of the $238.7 million in harm to ratepayers demonstrated in the record, the Hearing Examiners pause to acknowledge that there are myriad other disallowance approaches the Commission could impose in its considerable discretion in determining rate base.[581]

On the high side of the remedy spectrum, the Hearing Examiners counsel against the Commission imposing New Energy Economy's excessive and unreliably founded total disallowance plus partial claw back recommendation. That is, NEE's proposed remedy would

[579] $84,800,000 ÷ $238,700,000 = 0.355257 or 35.5%.

[580] $84,800,000 ÷ $86,000,000 = 0.986046 or 98.6%. The rationale for a $84.8 million is reasonable in that it closely approximates quantum of harm that, as already discussed in Section 8.1.5.1.2 above, PNM failed to *specifically* attempt to rebut, apart from vague and unsubstantiated assertions that the Fisher corrections of the Graves harms analysis are "inflated," "contrived" and substitute "unrealistic inputs to reach a claimed 'damage' amount of $238.7 million." PNM Resp. Br. at 110. In other words, besides its argument against the contested $152.7 capacity of replacement gas CC, PNM does not explicitly articulate why or how the other Fisher "inputs" to the Graves remedy analysis may be "unrealistic."

[581] *Pub. Serv. Co. of N.M.*, 2019-NMSC-012, ¶¶ 9, 46.

unfairly take back a portion of FCPP investments incurred prior to 2016. There is no dispute over the prudence of pre-2016 investments.[582] Arguably, the "claw back" aspect of the remedy is legally unsound as it invites charges such as retroactive ratemaking. Moreover, the NEE remedy is founded on an unreliable harm analysis indicating $445 million in conjectural harm. Thus, the pre-tax ($223,347,015) and post-tax ($166,616,873) impairment/write-off figures in Commission Exhibit 2 Supplemental (Column G, ll. 99, 100) are based on faulty premises that likely would not survive scrutiny on appeal if implemented in the Commission's final order in this case.[583]

On the too lenient side of the remedy spectrum, NMAG witness Crane's recommendation, which only NM AREA still advocates at this point – not even the NMAG, which is now advocating that 100% of FCPP investment from July 1, 2016 be disallowed and only 50% recovery of "stranded costs" upon abandonment[584] – results in impairment/write-off estimates of $25.4 million (pre-tax) and $18.9 million (after-tax). In comparison to the Hearing Examiners' 32.4% ($84.8 million) disallowance, Ms. Crane's remedy would translate to an approximate 10% (pre-tax)[585] and 7% (after-tax)[586] disallowance. This proposal is a wholly insufficient remedy considering the magnitude of negligent PNM decision-making shown and the ensuing substantial harm to ratepayers (i.e., unrealized savings or opportunity cost) that management's imprudence engendered. Most concerning from a sound regulatory perspective, it affords PNM undeserved returns on its imprudently incurred FCPP expenditures between July 1, 2016 and June 30, 2022

[582] *See* Case No. 21-00017-UT, *RD on FCPP Finc'g Order* at 60 (PNM met the "normal burden" or the "heightened burden" with respect to FCPP capital investments made before the 2016 Rate Case).

[583] *See* NM AREA Br. at 33 (NEE's "proposal goes too far and creates an appealable issue[,]" and ". . . a full disallowance will delay a final resolution of the Four Corners issues for at least a year after a Commission order.").

[584] NMAG Br. at 34.

[585] *See* Comm'n Exh. 2 Supp., Col. E, ll. 21, 99 ($25,430,589 ÷ $262,125,689 = 0.097016 or 10%).

[586] *See* Comm'n Exh. 2 Supp., Col. E, ll. 21, 100 ($18,971,219 ÷ $262,125,689 = 0.072374 or 7%).

(totaling $172.8 million, 2024 NBV). In fact, the Crane remedy allows PNM a debt only return on more FCPP plant ($203,765,435) than under PNM's original (as filed) proposal ($117,973,417).[587] And, at 11% of the proven harm (pre-tax)[588] and 8% (after-tax), it is a negligible remedy in comparison to the harm to ratepayers attributable to PNM management's imprudence. Inasmuch as this "remedy" would result in a partial undeserved return for PNM on imprudent expenditures made between July 2016 and June 2022, the Crane proposal does not uphold the policy of deterring future acts of imprudence by PNM management and admonishing the utility for failing to serve ratepayers in accord with the regulatory compact through which it obtained a regulated monopoly service territory. Indeed, as ABCWUA points out with apparent justification given the NMAG's ultimate FCPP imprudence recommendation in this case, it is doubtful whether even Ms. Crane stands by her original remedy in light of some of her testimony at hearing.[589]

A different approach that theoretically could end up in the range the Hearing Examiner's recommended, depending on the percentage of FCPP rate base disallowance, is Dr. Fisher's third suggested option, which would involve reducing PNM's overall cost recovery in an amount equal to the "damages" PNM's ratepayers have suffered as a result of PNM's imprudent decision to

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[587] *See* Comm'n Exh. 2 Supp., Attach. A, p. 1 of 3, *comparing* Col. D, l. 15 (Total Net Plant – Debt Only Return On) *with* Col. E, l. 15.

[588] $25,430,589 ÷ $238,700,000 = 0.106537 or 11%

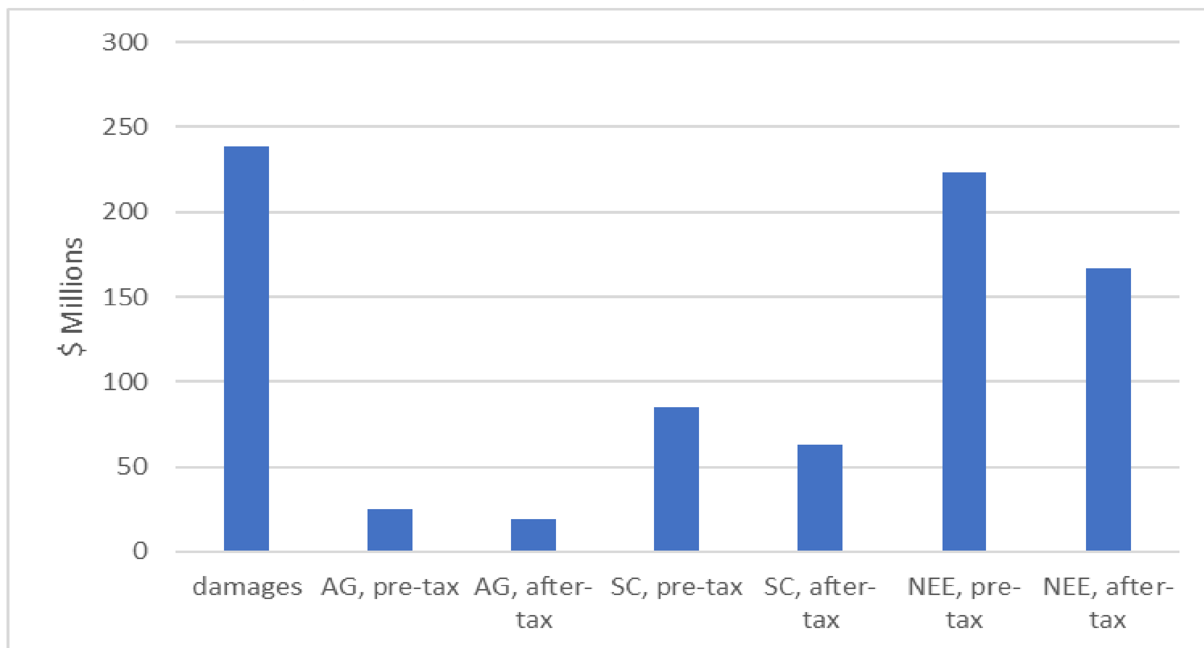
[589] As ABCWUA presciently observes,

> Two things are notable about this recommendation. First, Ms. Crane's testimony in this case was filed in June of 2023. She did not have the benefit of being able to review the testimonies of Mr. Fisher and Mr. Sandberg, or the Court's Opinion issued in the Case No. 21-00017-UT appeal. Second, when Ms. Crane testified at the hearing in this case, it was after having the opportunity to review the relevant testimonies filed concurrently with her testimony, subsequent to her testimony and the Court's opinion issued in the Case No. 21-00017-UT appeal. Based on her hearing testimony, the ABCWUA believes what Ms. Crane recommends in her testimony regarding a debt only return on all FCPP investment made since June 30, 2016 may not be the last word from the NMAG on the remedy for PNM's imprudent decision to extend its participation in the FCPP.

Water Authority Br. at 21.

renew its involvement in Four Corners.[590] As established, Dr. Fisher's study shows $237.8 million in damages or harm (or foregone savings or opportunity cost) to ratepayers. In Dr. Fisher's estimation, a remedy for imprudence can, in part, serve the policy interest of seeking "to make ratepayers whole, or more whole relative to any damages customers incurred from the utility's imprudent action."[591] To paint a fuller picture, the intervenors' respective remedy recommendations detailed in Commission Exhibit 2 Supplemental show the pre-tax and after-tax impairments/write-offs in comparison to the $238.7 million in harm or "damages" quantified in this case:

Comparison of Damages vs. Impairments/Write-offs from Intervenors' Proposed Remedies[592]



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[590] Sierra Club Exh. 1 (Fisher Dir.) at 69-73.

[591] Sierra Club Exh. 1 (Fisher Dir.) at 62. The second purpose Dr. Fisher thinks a remedy for imprudence can serve is signaling "to the utility that regulators expect the utility to make decisions based on following reasonable decision-making practices – because doing so maximizes the chances that the utility will serve the best interests of its captive ratepayers." *Id.*

[592] The Table is reproduced from Table 3 on page 21 of Sierra Club's brief-in-chief. In Table 3, the $238.7 million in damages comes from Dr. Fishers surrebuttal testimony (Sierra Club Exh. 2) at 5 (Table 1) and 34 (Table 3). The pre- and after-tax impairments are from Comm'n Exh. 2 Supp. (PNM's Supplemental Response to Bench Request 3), Attach. A at 2 of 3 (rows 99-100).

Making ratepayers whole, or as whole as is reasonable under the circumstances, is a valid policy interest; it certainly is factored into the Hearing Examiners' reasoning here. Under the PUA, however, the Commission must always balance the interests of ratepayers with the interests of utility shareholders consistent with the regulatory compact; this too is factored in to the Hearing Examiner's reasoning.[593]

While a disallowance for the full measure of harm suffered by ratepayers is supported in the record in an amount approaching $240 million, the Hearing Examiners believe a more balanced approach to the remedy for PNM's imprudence is called for in this case. We find a more restrained approach that carefully weighs the equities of the stakeholders is consistent with sound regulatory policy. Thus, the measured approach we recommend to the remedy for demonstrated imprudence takes into consideration several moderating factors.

First, the Commission should factor in the sheer passage of time since the issue of prudence was first fully litigated before the Commission in 2017 but deferred by a former Commission to PNM's next rate case. In between the 2016 Rate case and this case, when the prudence issue was flagged by a subsequent Commission (the composition of Commissioners had changed in the interim)[594] for resolution in Case No. 21-00017-UT, the parties were unable to establish a sufficient record on the issue of prudence in what was, concededly, a complicated case involving numerous difficult, contested issues. The delay in reaching this conclusion at the end of year 2023 is not the fault of PNM. Nor is delay the fault of any one party in particular. Still, the fact remains, as the Hearing Examiners forewarned in their *Certification of Stipulation* in the 2016 Rate Case, that

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[593] NMSA 1978, § 62-3-1(B).

[594] Serving on the Commission in 2017 were Commissioners Espinoza, Hall, Jones, Lovejoy, and Lyons. Only one of those Commissioners (Hall) was serving in 2021 along with Commissioners Becenti-Aguilar, Byrd, Fischmann, and Maestas.

> [i]f findings are not made in this case, the issue of prudence would have to be re-litigated in the future if parties intend to challenge further life-extending capital investments at Four Corners. If a finding of imprudence and a disallowance for the $58 million of life-extending investment are not made here, it is possible that full recovery might be allowed for additional life-extending capital investments at Four Corners throughout the remainder of its service life.[595]

Another constraining factor that supports some degree of diminution in the FCPP imprudence remedy is the fact that PNM has already tried, unsuccessfully, to abandon its interest in FCPP in Case No. 21-00017-UT. Had PNM been successful in exiting Four Corners as planned in that case, ratepayer exposure to FCPP costs extending into an indefinite period of participation in the coal plant would have been reduced, perhaps substantially if the estimated savings accepted in that case turned out to be accurate.[596] Thus, PNM's share in Four Corners remains a certificated resource used to serve customers.[597] Until Four Corners is abandoned by PNM, as the carbon emitting plant eventually will be by all the owners with interests in the plant, PNM will use FCPP as a baseload resource to serve customers in ordinary circumstances and some extraordinary ones, like extreme weather events.[598]

That said, to find that Four Corners is *used* by PNM does not also mean that it is *useful*, according to the legal test guiding this analysis. The used and useful test is a "flexible tool to measure how much property is devoted to the public for which a return appropriate."[599] "To be

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[595] Case No. 16-00276-UT, *Certif. of Stip.* at 69.

[596] In Case No. 21-00017-UT, PNM estimated that abandoning its interests in FCPP would save customers on a net present value basis between $30 million and $300 million over twenty years, with median expected savings over that time period of approximately $143.7 million. *See* Case No. 21-00017-UT, *Recommended Decision on PNM's Request for Approval of the Sale and Abandonment of its Interest in the Four Corners Power Plant and to Recover Non-Securitized Costs* at 36-49 (NMPRC 11/12/2021) ("*RD on FCPP Sale and Abandonment*").

[597] PNM Exh. 22 (Heffington Dir.) at 52.

[598] PNM Br. at 201-02 (citing PNM Exh. 22 (Heffington Dir.) at 53-54).

[599] Case No. 2146, Part II, *Final Order* at 76.

considered 'used and useful' the Commission stated in Case No. 2146, "property must either be used, or its use must be forthcoming and reasonably certain; and it must be useful in the sense that its use is *reasonable and beneficial to the public*."[600] As ABCWUA correctly observes in rebutting PNM's argument that a total disallowance of its investment in FCPP is not appropriate in this case because the FCPP "has been used and useful" for decades,[601] PNM is conflating "used" and "useful."[602] While the coal-fired plant has been used for decades, had PNM not imprudently extended its participation in Four Corners beyond 2016, PNM would not have exposed ratepayers to substantial harm credibly quantified in this case as leading to net costs to ratepayers of $238.7 million between 2017 and 2036.[603] In addition to the detrimental environmental impacts of remaining a participant in FCPP,[604] the evidence on harm in this case shows that Four Corners is an uneconomic resource. It is axiomatic that, for rates to be fair, just, and reasonable as required

[600] *Id.* (emphasis added).

[601] PNM Br. at 229. In its *Final Order* in Case No. 2146, the Commission, responding to PNM's allegation that applying the used and useful test alone would amount to a taking of its property in violation of the 5th and 14th Amendments of the U.S. Constitution, observed, "[a] review of the history of United States Supreme Court decisions shows that the used and useful principle is, in fact, a constitutionally permissible regulatory tool, and as such is far more accommodating to regulatory realities than PNM claims." Case No 2146 Part II, *Final Order*, at 53.

[602] Water Authority Resp. Br. at 15.

[603] Sierra Club Exh. 2 (Fisher Sur.) at 5-6, 33-34.

[604] The evidence in Case No. 21-00017-UT showed that carbon emissions associated with PNM's generation portfolio would have been significantly by 2024 had PNM's abandonment application been approved. PNM's modeling indicated that any of the proxy replacement portfolios would have led to significant decreases in emissions from PNM's generation portfolio between 2025 and 2031. This in turn would further the carbon emission reductions goals in the Energy Transition Acts by transitioning energy used for retail sales of electricity away from coal in favor of a more environmentally sound and sustainable generation portfolio. *See* Case No. 21-00017-UT, *RD on FCPP Sale and Abandonment* at 50-53. PNM showed, moreover, that providing for seasonal operations at Four Corners, as PNM and the FCPP co-owners agreed to do as part of PNM's exit strategy, would have substantially reduced carbon emissions from Four Corners. PNM witness William Fallgren credibly showed in Case No. 21-00017-UT that a 20 to 25% reduction in emissions resulting from shifting to seasonal operations would be nearly equivalent to a 400-megawatt coal plant being shut down in 2023. Fallgren added that, assuming conservatively that carbon emissions from a gas plant are half that of a coal plant, seasonal operations would provide the equivalent of an 800 MW gas plant. *Id.* 54, 57.

by the Public Utility Act, ratepayers should not be forced to pay for uneconomic resources. The record in this case demonstrates that Four Corners is an uneconomic resource. It follows that while Four Corners has been and is being used by PNM to serve customers, its use is no longer reasonable and beneficial to ratepayers being harmed by PNM's imprudent decision to retain the coal-fired plant. Thus, it is appropriate to end this application of the used and useful principle by repeating the trenchant D.C. Circuit observation quoted by the Commission in its *Final Order* in Case No. 2146, this time with emphasis:

> The two principles [prudence and used and useful] thus provide assurances that ill-guided management or management that simply proves in hindsight to have been wrong will not automatically be bailed out from conditions which government did not force upon it. That is, government forced upon the utility an obligation to provide service, but that obligation, as we have seen, is the quid pro quo for a protected area of service (and eminent domain authority). What is fundamental is that government *did not force upon the utility a specific course of action for achieving the mandated goal*.
>
> Indeed, *it would be curious if the Constitution protected utility investors entirely from business dangers experienced daily in the free market, the danger that managers will prove to have been overly sanguine about business prospects or the danger that a particular capital investment will not prove successful*. In the face of anticipated demand, an airline may acquire additional aircraft, only to face unhappy consequences when passenger traffic does not meet expectations, perhaps due to economic factors entirely beyond management's control. *Utilities are not exempt from comparable forces*.[605]

In sum, the foregoing extenuating circumstances like the latter "still in use but no longer useful" dichotomy[606] are factored into remedy theory underlying the disallowance, which by virtue of the impairment the remedy produces, is expressed as a reduction in "impaired" rate base as the Commission is vested with discretion to do, as a specifically targeted rate base diminution, i.e.,

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[605] Case No 2146 Part II, *Final Order* at 55 (emphasis added).

[606] *See, e.g.*, *PacifiCorp*, UE 246, Order No. 12-493 at 31 ("With regard to a total disallowance, even [intervenor the Citizens' Utility Board of Oregon] acknowledges the difficulty of excluding from rate base investments that enable plants to continue to operate and provide service to customers.").

32.4 percent (or $84,130,728)[607] of PNM's undepreciated capital investments in Four Corners. And PNM is still allowed a return on the remaining 67.6 percent of its undepreciated FCPP investments. In addition, despite its improvident decision to retain Four Corners, PNM is still allowed the recovery of its costs on those investments (i.e., depreciation), plus O&M and fuel costs through its FPPCAC going forward.

Therefore, the $84.8 million (or 32.4% of net plant) disallowance the Hearing Examiners recommend effectively prevents PNM from *unduly* profiting on an imprudent and wasteful resource decision while also factoring into the remedy equation the extenuating factors militating against a full disallowance in the neighborhood of $240 million. Our recommended remedy is fairly calibrated to the facts in evidence. It protects captive ratepayers from the substantial harm resulting from being bound to Four Corners after 2016. Ratepayers are recompensed for the improvidently executed utility management decision to retain Four Corners. It closely weighs the equities on both sides of the disputed investment decision to arrive at a reasonable financial correction for demonstrably imprudent decision-making. But it avoids imposing a disproportionately harsh penalty along the lines of the disallowance of all FCPP investment costs that NEE, ABCWUA, and NMAG advocate to varying degrees. And it serves as a deterrent to future acts of imprudence by PNM management as a strong signal that the Commission expects utilities subject to its regulatory oversight to make decisions guided by reasonable decision-making practices, which in turn increases the chances that the utility will serve the best interests of ratepayers that, it should never be forgotten, it serves under a regulatory compact.[608] In short, the

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[607] *See* Appendix D (Test year COS Rev. Rqmt. with RD Adjustments), Adjustment 1 (FCPP Imprudence), p. 38 of 72, Col. S., l. 75 (Total Net Plant).

[608] *See supra* n. 74 discussing, among other principles, the regulatory compact.

disallowance we recommend is measured and fairly calibrated to the totality of circumstances presented.

Finally, in its response brief, PNM interjects – for the first time in this case – a new argument that, based on a purportedly the "new 'remedy' element" allegedly "introduced by the Hearing Examiners at the last minute during the hearing," certain parties have subsequently "adopted a *completely new* punitive and unlawful proposals [*sic*] to reduce PNM's ability to securitize FCPP undepreciated investments in a future abandonment proceeding under the ETA."[609] From, the contrived premise (as shown shortly) that the Hearing Examiners belatedly interposed the "completely new" remedy element on the last day of hearings emerges the misplaced argument that it would violate the due process rights of PNM and other unspecified stakeholders to determine in this case the impact of any finding of imprudence on PNM's rights to securitize undepreciated investments in FCPP in possible future abandonment and securitization proceeding.[610] "However," PNM's argument concludes, if the "Commission proceeds to make a determination, it must follow the ETA and not impose any reductions to PNM's authorized energy transition costs."[611] While PNM does not say it explicitly, implicit in PNM's argument appears to be the suggestion that *any* FCPP capital investment disallowance ordered in this rate case for proven imprudence would violate PNM's rights under the Energy Transition Act, specifically under Section 62-18-2(H)(2) of the ETA,[612] which states in pertinent part that the capital investments for which PNM ***may*** seek securitization as "energy transition costs" include:

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[609] PNM Resp. Br. at 87 (emphasis added).

[610] PNM Resp. Br. at 113-16.

[611] PNM Resp. Br. at 116.

[612] *See* PNM Resp. Br. at 115 ("[T]he question of whether there can be *any reduction in the amounts that can be securitized is controlled by the ETA*). *See also* PNM Resp. Br. at 116 ("A ruling to reduce the amount of funds available pursuant to Section 62-18-16 would also be inconsistent with the Commission's final order in the Show Cause proceeding in Case No. 19-00018-UT. In the Recommended Decision, the Hearing Examiners

> (c) undepreciated investments as of the date of abandonment on the qualifying utility's books and records in a qualifying generating facility that were either being recovered in rates as of January 1, 2019 or are otherwise found to be recoverable through a court decision; and
>
> (d) other undepreciated investments in a qualifying generating facility incurred to comply with law, whether established by statute, court decision or rule, or necessary to maintain safe and reliable operation of the qualifying generating facility prior to the facility's abandonment[.][613]

The ETA provides that the qualifying utility (PNM) that is abandoning a qualifying generating facility (the San Juan Generating Station or Four Corners) *may* apply to the Commission for a financing order to recover all of its energy transition costs through the issuance of energy transition bonds." However, in order to obtain the financing order, the qualifying utility must first "obtain approval to abandon" the qualifying generating facility under Section 62-9-5 of the Public Utility Act.[614]

In approaching this issue, it must be observed at the outset that PNM's "new and punitive remedy" argument is a red herring. It is built on a false and misleading premise, and it seems to have been devised to deploy the Energy Transition Act as a shield against any disallowance remedy in this case.[615] PNM's argument strains to conflate the potential remedy analyses *requested of PNM by the Commission pursuant to a bench request on the first day of hearings* with a separate

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noted the intent of these Section 16 funds is to mitigate the negative impacts associated with the abandonment of SJGS.554 Based on this reasoning, interpreting Section 62-18-2(H)(2) of the ETA to prohibit securitization of the defined abandonment costs works against the interests outlined in Section 62-18-16 to help mitigate the negative impacts from PNM's abandonment of FCPP[.]" [*sic*]).

[613] NMSA 1978, §§ 62-18-2(H)(2)(c)-(d).

[614] NMSA 1978, § 62-18-4(A).

[615] PNM tips its hand when it argues earlier in its response brief that NEE's "punitive overreach in its remedy selection" would, among other things, "also violate the ETA Act which allows qualifying utilities such as PNM to securitize the undepreciated investments included in rates as of January 1, 2019." PNM Resp. Br. at 107. Further, PNM contends "it is premature to consider additional disallowance for undepreciated investments when FCPP has not been abandoned." *Id.* Similarly, PNM subsequently argues that Sierra Club's "alternative proposal is not 'financially equivalent' as it has implications in terms of PNM's recovery of future undepreciated investments in FCPP in a future abandonment and financing order case under the ETA." PNM Resp. Br. at 110.

concern unrelated to those remedies. That unrelated issue was expressed by one of the Hearing Examiners on the final day of the hearings. It is that issue that PNM conflates. The extraneous issue addressed whether an imminently filed PNM application for FCPP abandonment and securitization under the Energy Transition Act might theoretically be used by PNM as an "intriguing maneuver" to *preempt the Commission's determination* on the Four Corners prudence issue under the pending case doctrine set forth in Article IV, Section 34 of the New Mexico Constitution.[616] That idle issue,[617] which the Hearing Examiner musingly described as a "reverse *Egolf*" ploy, went nowhere in the hearing and has no bearing whatsoever on setting the appropriate remedy in this decision.

Still, it is certainly true that "certain parties"[618] like Sierra Club[619] and the Attorney General[620] are recommending "alternative" remedies over their concerns that PNM might

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[616] Tr. (Vol. 12) 4038-39. *See State Exh. rel. Egolf v. N.M. Pub. Regulation Comm'n*, 2020-NMSC-018, 476 P.3d 896 ("*Egolf*").

[617] This issue was effectively resolved for the time being by the Supreme Court in allowing this precise prudence review in this rate proceeding in its affirmance of the Commission's decision to reject PNM's abandonment and securitization application in Case No. 21-00017-UT. *Pub. Serv. Co. of N.M. v. N.M. Pub. Regul. Comm'n*, S-1-SC-39138, ¶ 1, n. 1, __ P.3d ___ (N.M. July 6, 2023), 2023 WL 4360572 (The Commission has decided to defer final action on the prudence issues reserved in Case No. 16-000276-UT and raised in the proceedings below. *We affirm the Commission's decision to defer final resolution of these prudence issues*.") (emphasis added).

[618] *See* PNM Resp. Br. at 113 ("Now certain parties are attempting to capitalize on this issue and argue that the Commission should impose disallowances on some or all of PNM's rate base investment in order to forestall PNM's ability to securitize FCPP undepreciated investments pursuant to the ETA in the future.").

[619] *See* Sierra Club Br. at 15-16, 22 ("If, in a future proceeding, the Commission were to approve abandonment of PNM's interest in Four Corners and approve a request for a financing order for the remaining Four Corners costs, the financing order would effectively nullify Dr. Fisher's remedy for PNM's imprudence (and also Ms. Crane's), because, under a financing order, PNM would no longer be receiving a return on its Four Corners costs. If the Commission shares this concern, it could adopt a disallowance that is equal to the impairment represented by Dr. Fisher's recommendation, i.e., the Commission could order a disallowance of $84.8 million (pre-tax)/$63.3 million (after-tax). This would have the same overall financial impact on PNM as Dr. Fisher's recommended reductions to PNM's return on its Four Corners capital costs, but would ensure that any future securitization does not undermine the Commission's remedy in this case.") (internal citations omitted).

[620] As discussed above, the Attorney General's proposal that PNM's recovery of any undepreciated investments remaining upon the abandonment of Four Corners be limited to 50% out of concern, in light of the

eventually "get away with" recovering undepreciated investments found imprudent through a future abandonment and securitization proceeding under the Energy Transition Act. But this issue was not broached on the last day of hearings. Much earlier in the evidentiary proceedings than PNM pretends, questions over what portions of Four Corners rate base might be securitizable and/or subject to rate base reduction were raised by certain parties. At the beginning of the fifth day of hearings, for instance, counsel for Sierra Club cross-examined PNM witness Sanders on this precise issue over PNM's overruled objection.[621] WRA's counsel also asked Mr. Sanders

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Supreme Court's affirmance of the Commission's denial of PNM's request for abandonment of FCPP in Case No. 21-00017-UT, that PNM may seek recovery of its undepreciated investments in Four Corners in a future abandonment proceeding under the Energy Transition Act. NMAG Br. at 32. NMAG witness Crane testified on this especially contentious issue at the hearing, too. Ms. Crane was adamant that her recommendation would have been different if the FCPP was no longer in service. Tr. (Vol. 12) 4014-15 (Crane). She also anticipated that the NMAG would oppose recovery of securitization of the imprudently extended FCPP. Tr. (Vol. 12) 4033-34 (Crane). Finally, she states "if you can resolve the Four Corners issue in this case, you're better off doing it here." Tr. (Vol. 12) 4034 (Crane).

[621] Tr. (Vol. 5) 1499-1501. The colloquy between counsel for Sierra Club, Mr. Marks, and PNM witness Kyle Sanders went as follows:

> Q. If, instead of the adjustments, for example, that Sierra Club and the Attorney General recommended, which are to change the rate of return on these assets, and the Commission ordered just a straight writeoff, say 50% of the post-2016 investments, or 25% or some percentage, would the impairment just be the amount of assets that are ordered withdrawn from Rate Base?
>
> A. I believe so, yes.··That would just fall under something similar to NEE's, where it is a complete disallowance, and that would be a writeoff.
>
> Q. *Do you know if it's PNM's continuing position that any portion of Four Corners Rate Base that is included in rates in any way, even at a reduced rate of return, would be eligible for inclusion in an ETA Financing Order if there was an approved abandonment of the plant*?
>
> MS. TERWILLIGER: Objection; calls for a legal conclusion.
>
> MR. MARKS: I asked him if he knew PNM's position.
>
> HEARING EXAMINER: That [PNM's objection] is overruled.
>
> THE WITNESS: I don't know our position on that necessarily. I assume outcomes like this would play into a potential analysis. I am not familiar exactly with the language of the ETA and what could or couldn't qualify either, I don't think I'm in the right position to give you even my opinion or position on that.

Tr. (Vol. 5) 1498-99 (Sanders).

questions related to the "21-00017 Four Corners case," around PNM's request for securitization recovery that included the reversal of the impairment PNM took as a result of the 16-00276-UT, and whether PNM's response to Bench Request 3 included any assumptions about reversal of impairments for write-offs and "future requests for reversals or securitization recovery of the effect of the reversals."[622] And even much earlier than all that, in their June 23, 2023 direct testimony, Sierra Club witness Dr. Fisher and NEE witness Sandberg included PNM Table NEE 8-1 (reproduced toward the beginning of this section) either in the text of the testimony (Dr. Fisher at page 64) or as an exhibit (Sandberg's CKS-8). One sees in the fourth column of the table that PNM had already expressly tied the FCPP capital investment tranches to their corresponding "ETA Reference," i.e., the parts of Section 2(H)(2) of the ETA pursuant to which PNM is apparently laying its *pre*-authorized energy transition cost claims.

Nevertheless, the advice on alternative remedies – however well-intentioned Sierra Club, WRA, Attorney General, and likely other intervenors' concerns over the impact of an imprudence remedy on FCPP undepreciated investments in a hypothetical abandonment/ETA securitization proceeding may be – is also misplaced in this case because the issue is not justiciable here. It belongs in a future abandonment and securitization application proceeding brought, if ever filed by PNM, in part pursuant to the Energy Transition Act. And to be abundantly clear, the impact of any remedy on PNM's theoretical securitization plans is immaterial to the Hearing Examiners' recommendation on the appropriate disallowance for PNM's imprudence. This conclusion is borne out by the record of this case as amplified by PNM's last rate case, where the approach to the specific disallowance recommended in this case was developed.

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[622] Tr. (Vol. 5) 1527.

In point of fact, PNM neglects to acknowledge that the recommended disallowance and especially the methodology through which it was derived are based on closely analogous cash flow analyses and calculations generated by PNM in response to Hearing Examiner bench requests in the 2016 Rate Case. That being irrefutably true, the proposed remedies, which follow the same pattern and process as when the FCPP prudence issue was fully litigated in the 2016 Rate Case, are not "completely new" or "belatedly raised" proposals. Quite the contrary, they are Commission-inspired optional disallowance mechanisms for imprudence that predate the passage of Energy Transition Act by almost two years, if not much longer back than that.

In the 2016 Rate Case, PNM presented analogous disallowance analyses in response to an oral bench request, which in itself expanded on detailed sets of questions in their July 25, 2017 Bench Request to PNM.[623] The remedies for PNM's imprudence around its Four Corners decision-

[623] Case No. 16-00276-UT, Tr. (Vol. II) 424-27 (Monroy). For example, querying PNM witness Henry Monroy on 7-12 BR-12, the Hearing Examiner asked Mr. Monroy ". . . what if you disallowed the entire equity return?" . . . . Could you calculate what the number would be for line 20? *Id.* Eventually, after having the witness run some further calculations on the record, the Hearing Examiner asked Mr. Monroy whether he could provide an updated exhibit the reflected the adjustments to BR-12 and BR-13. *Id.* 427. BR-12 and BR-13 were multi-part requests issued in the July 25, 2017 Bench Request to PNM. The requests sought information from PNM regarding disallowance scenarios for the contested SCR capital expenditures at Four Corners (BR-12) and the $148 million in capital improvements at issue in the 2016 Rate Case (BR-13). BR-12 asked PNM to provide responses to the following regarding the SCR capital expenditures:

> 12. Provide the test period non-fuel revenue requirement for the SCR capital expenditures at the Four Corners Power Plant (Olson Direct (12/7/16) at 42-46) in the format of Monroy Direct (12/7/16), Exhibit HEM-5 under each of the following potential scenarios (assume WACC agreed to in the Revised Stipulation):
>
> a. Disallowance of recovery for the equity return for the SCR capital expenditures at issue in this case.
>
> b. Disallowance of recovery for the debt and equity return for the SCR capital expenditures at issue in this case.
>
> c. Disallowance of recovery for the depreciation expense and debt and equity return for the SCR capital expenditures at issue in this case.
>
> d. Total disallowance of recovery for all capital and operation and maintenance costs for the SCR capital expenditures at issue in this case.

making were founded on PNM Exhibit 28, which expanded on the 7-25 BR-12 and 7-72 BR-13 bench requests delineated in the last footnote. Thus, in the *Certification of Stipulation* in Case No. 16-00276-UT, the Hearing Examiners considered revenue requirement disallowances founded on PNM Exhibit 28.[624] In that case, the Hearing Examiners recommended a disallowance of all costs

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PNM BR-13, in turn, asked PNM to respond to the following questions regarding the $148 million in capital improvements at issue in the 2016 Rate Case:

> 13. Provide the test period non-fuel revenue requirement for the Four Corners Power Plant in the format of Monroy Direct (12/7/16), Exhibit HEM-5, under each of the following potential scenarios (assume WACC agreed to in the Revised Stipulation):
>
> a. Disallowance of recovery for the equity return for the $148 million in capital improvements at issue in this case (Olson Direct (12/7/16) at 24, Table CMO-2).
>
> b. Disallowance of recovery for the debt and equity return for the $148 million in capital improvements at issue in this case.
>
> c. Disallowance of recovery for the depreciation expense and debt and equity return for the $148 million in capital improvements at issue in this case.
>
> d. Total disallowance of recovery for all capital and operation and maintenance costs for the $148 million in capital improvements at issue in this case.

The original PNM responses to BR-12 and BR-13 are included in the record of this case as Commission AN Exhibit 5. PNM's updated 7-25 BR-12 and 7-25 BR-13 tables were admitted into evidence as PNM Exhibit 28 at the hearing held Aug. 16, 2017. Tr. (Vol. VIII) 1673-74.

[624] *See* Case No. 16-00276-UT, *Certif. of Stip.* at 67-68. As set forth on the referenced pages, the Hearing Examiners found:

"PNM calculated the following costs of potential revenue requirement disallowances for the $90.1 million costs of the SCR project:

	Debt Only Return (Rev. Stip. ¶9)	**Weighted Debt Only Return**	**No Return on Capital Investment**	**No Return on or Of Capital Investment**	**Total Disallowance (No Return and no O&M expenses)**
$90.1 million SCR costs	-$3,073,702	-$4,502,987	-$5,932,329	-$7,035,039	-$8,322,111

PNM Exhibit 28. The denial of a return on the SCR investment would produce an annual disallowance of $5,932,329 -- approximately $2.9 million more than the disallowance in the stipulation ($5,932,329 - $3,073,702). The denial of all cost recovery would produce an annual disallowance of $8,322,111 -- approximately $5.2 million more than the disallowance in the stipulation ($8,322,111 - $3,073,702). These

(no return and no O&M expenses) associated with the SCRs and the additional life-extending capital improvements, estimated then at $148.1 million.[625] Thus, having recommended a denial of *all* capital investment costs at issue in the 2016 Rate Case, it was unnecessary for the Hearing Examiners to employ the methodology utilized in this case to determine a fair, just, and reasonable disallowance for PNM's imprudence.

In turn, the potential remedies presented in this case, expressed as dollar figures or percentages of potential FCPP capital investment disallowances, are quite deliberately patterned on the analogous write-off scenarios prompted by the Commission, as evinced in PNM Exhibit 28 from the 2016 Rate Case.[626] In this rate case, the impairment/write-off scenarios related to Four Corners in the test period are, of course, set forth in PNM's response to the Sept. 5, 2023 Bench Request 3, admitted as Commission Exhibit 2, and PNM's supplemental response to the Sept. 5, Bench Request 3, admitted as Commission Exhibit 2 Supplemental. Once more, these potential disallowances were: *Requested by the Commission* on the first day of hearings;[627] created and

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figures compare to the total annual revenue requirement for Four Corners in this case of $38,234,342. Commission Exhibit 5.

PNM did not provide a similar list of costs of potential disallowances for the additional $58 million in capital expenditures at Four Corners. Based upon the relative magnitudes of the $58 million and $90.1 million investments, the revenue requirement disallowances for the $58 million in capital expenditures can be extrapolated to equal approximately two-thirds of the amounts calculated in the above table."

Compare with Comm'n Exh. AN 5 (PNM Resp. to July 25, 2017 Bench Request, Resp. to BR-10 through BR-13) *and* Comm'n Exh. AN 64 (PNM Exh. 28, PNM Resp. to Oral BR re Revised PNM Exhs. 7-25 BR-12 and 7-25 BR-13).

[625] *See* Case No. 16-00276-UT, *Certif. of Stip.* at 68.

[626] PNM Exhibit 28 is evidence of record in this case as well, having been admitted as Commission AN Exhibit 64 (PNM Resp. to Oral BR re Revised PNM Exh. 7-25 BR-12 and BR-13). The estimated write-offs are shown for the respective remedy scenarios in columns D-I on lines 42 (estimated write-off pre-tax) and 43 (estimated write-off after-tax). The percentages of retained earnings taken as a result of write-off appear on line 46.

[627] Tr. (Vol. 1) 360-66 (Monroy). The Hearing Examiner expressly requested that PNM "take . . . all the disallowance methodology recommendations made by the Intervenors . . . and update [the] disallowances in a similar set of tables" to those in PNM Exhibit 28/Commission Exhibit AN 64. Tr. (Vol. 1) 363. The same PNM

submitted by PNM; fairly vetted at hearing, as explained above;[628] and subsequently briefed by the parties. The Commission, which as already discussed, is conferred wide discretion to quantify imprudence remedies consistent with its rate-setting authority under the Public Utility Act, assuredly is afforded considerable discretion and flexibility to fashion an appropriate financial disallowance that bears a reasonable relationship to the harm ratepayers suffered as a result of the utility's imprudence demonstrated in the record.[629]

It suffices it to say, as was extensively analyzed before in Case No. 21-00017-UT and is expressly incorporated into this decision by reference to save space and time, in enacting the ETA the Legislature did not intend to thwart, forbid, or preempt the Commission from performing a prudence review and make findings of imprudence on the SCRs and other life-extending FCPP capital investments in rates as of January 1, 2019.[630] And extending that analysis to its logical conclusion, nor did the Legislature arrogate to itself or curb the Commission's authority to make findings of imprudence on expenditures in the successive tranches of investments made after 1/1/19 and the projected investments set forth in PNM Table NEE 8-1 (above) and impose an appropriate remedy within its rate-setting discretion. Thus, the Hearing Examiner concluded in Case No. 21-00017-UT and reiterates here:

> [I]f the Legislature intended to alter the PUA's rate-setting paradigm to provide that hundreds of millions of dollars in coal plant costs on which the Commission's determination of prudence has been expressly deferred are to be automatically deemed just and reasonable – foreclosing any opportunity to

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witness who sponsored PNM Exhibit 28 in the 2016 Rate Case, Henry Monroy, clearly understood the assignment to make "similar adjustments [using test period values] on the various recommendations from the Attorney General, from Sierra Club, [and] from NEE[.]" Tr. (Vol. 1) 364 (Monroy).

[628] *See supra* n. 467 and accompanying text (PNM witness Sanders' explanation of the calculations quoted at length above).

[629] *See, e.g., Public Serv. Co. of N.M.*, 2019-NMSC-012, ¶¶ 9, 41, 46.

[630] Case No. 21-00017-UT, *RD on FCPP Finc'g Order* at 73-84.

> determine whether the utility's investment decisions and expenditures were either prudently made or attributable, on the other hand, to mismanagement – then the Legislature could have expressed its intention plainly and unequivocally by stating, as it did in another context in the ETA, that "undepreciated investments . . . being recovered in rates as of January 1, 2019 shall be deemed just and reasonable for ratemaking purposes." It did not include such a preclusive determination in Section 62-18-2(H)(2)(c) of the ETA; given the potentially unjust financial exposure to ratepayers and other significant considerations like fair treatment of the Signatories to the Modified Revised Stipulation and the public interest, the missing legislative determination should not be presumed to be there.
>
> Accordingly, for the foregoing reasons, as provided for in the Revised Final Order in Case No. 16-00276-UT, the Commission may proceed to perform the prudence review PNM agreed to submit to in its next rate case and apply whatever remedy, if any, is appropriate and reconcile any difference between estimated abandonment costs financed by energy transition bonds and the actual, final costs incurred by PNM pursuant to 62-18-4(B)(10) of the ETA.[631]

Pared to its essentials, what this section of the decision provides is that the Commission retains the authority under the Public Utility Act and the ETA, read in harmony,[632] to perform the

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[631] *RD on FCPP Finc'g Order* at 84 (referencing in footnote 239 the prudence standard set forth in *Public Serv. Co. of N.M*, 2019-NMSC-012, ¶ 29).

[632] The basic principles of statutory construction guiding the Commission's reading of the Public Utility Act and the Energy Transition Act in harmony are set forth in the *RD on FCPP Finc'g Order* at 73-78 and is incorporated by reference as is set forth in this decision. Applying those principles to read the PUA and ETA in harmony, the Hearing Examiner also found,

> PNM's position rests entirely on a seemingly anodyne gerund phrase appearing precisely once in the ETA, specifically in Section 62-18-2(H)(2)(c): "being recovered in rates as of January 1, 2019." PNM stretches this phrase to mean the Legislature deliberately and conclusively "modified," in PNM's discreet description, but more accurately vitiated, limited, removed, or even arrogated the Commission's supervisory authority over substantial and disputed costs placed provisionally in rates subject to a future determination of prudence and reasonableness to which PNM submitted in the process of having other parties sign on to the Modified Revised Stipulation. PNM's strained interpretation of Section 62-18-2(H)(2)(c) creates an unwarranted conflict between that statute and the Commission's broad regulatory authority under the PUA. Simply put, PNM's position carries an unacceptable and avoidable financial risk to ratepayers and is contrary to the public interest because, reading the ETA in harmony with the PUA so that all related statues are read to operate effectively, it becomes readily apparent that acceptance of PNM's position would lead to a grave injustice ***if***, i.e., assuming without deciding, well over $100 million in coal plant investments and costs otherwise found, after a full and fair hearing, to have been imprudently incurred were nevertheless improvidently foisted on ratepayers in final, actual abandonment costs.

RD on FCPP Finc'g Order at 80 (emphasis added).

prudence review of PNM's decision to continue participating in Four Corners and make life-extending capital expenditures in the plant; render well-supported findings of imprudence founded on an extensive record of substandard and negligent company decision-making; and order a fair and appropriate disallowance remedy that redresses the harm caused to ratepayers by PNM's imprudence.[633] To this extent, then, the Hearing Examiners concur in PNM's averment that "this is not the appropriate proceeding to determine the impact of any finding of imprudence on PNM's rights to securitize undepreciated investments in FCPP in possible future abandonment and securitization proceeding"[634]

On the foregoing grounds, then, beyond the Commission's findings of imprudence and imposition of a fairly balanced imprudence remedy that protects ratepayers from substantial harm in this case, it is unnecessary to address matters that should be vetted in a future FCPP abandonment proceeding under Section 62-9-5 of the Public Utility Act,[635] which *could be* at PNM's election, combined again in an abandonment application with a request for a financing order under the Energy Transition Act, as in Case No. 21-00017-UT.[636] The disallowance thus recommended by the Hearing Examiners in this decision is a fairly calibrated and proportionate remedy irrespective of when and whether PNM decides to seek FCPP abandonment under Section 62-9-5 of the PUA and perhaps also seeks securitization under the ETA, or decides instead to

[633] See *RD on FCPP Finc'g Order* at 78-84. That analysis is also incorporated herein by reference as if set forth herein.

[634] PNM Resp. Br. at 116.

[635] NMSA 1978, § 62-9-5 (1941, as amended through 2005).

[636] The ETA forbids the Commission from "ordering or requiring a qualifying utility to issue energy transition bonds to finance any costs associated with abandonment of a qualifying generating facility." NMSA 1978, § 62-18-11(C). In addition, the "utility's decision not to issue energy transition bonds shall not be a basis for the commission to refuse to allow a qualifying utility to recover energy transition costs in an otherwise permissible fashion, or as a basis to refuse or condition authorization to issue securities pursuant to Sections 62-6-6 and 62-6-7 NMSA 1978." *Id.*

continue its participation in the Four Corners beyond 2031 (if the plant's current expected life is expanded beyond that date),[637] in which case PNM would no longer have the option of securitizing abandonment costs under the Energy Transition Act, as currently written.[638] In sum, the Commission's treatment of FCPP energy transition costs, and the determination within such treatment of what constitutes legally recoverable energy transition costs, remains to be performed in some future appropriate proceeding. PNM did not request that determination in this rate case.[639]

Accordingly, for the reasons stated, having demonstrated that PNM acted imprudently in extending its participation in Four Corners and that its ratepayers suffered significant harm as a result of the company's improvident decision-making, the Hearing Examiners find and recommend that the fair, principled, and appropriate remedy for PNM's imprudence is a disallowance of 32.4% ($88.4 million) of Four Corners undepreciated capital investments.[640]

8.2. Palo Verde

All parties dedicated time and energy to summarizing the long history of PNM's involvement at the Palo Verde Nuclear Generating Station (PVNGS). That is some nearly sixty

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[637] *See RD on FCPP Finc'g Order* at 15 ("The current planned operating life of the plant is through 2031, concurrent with the coal supply agreement with NTEC[,] . . . which provides for NTEC to be the exclusive coal supplier until July 6, 2031[.]").

[638] PNM's ability to seek a FCPP financing order under the ETA expires on January 1, 2032. *See* NMSA 1978, § 62-16-2(S)(4) (a "qualifying generating facility that. . . . (4) if not operated by a qualifying utility prior to the effective date of the Energy Transition Act, is to be abandoned prior to January 1, 2032[.]"). *See* Case No. 21-00017-UT, *RD on FCPP Sale and Abandonment* at 81 (11/12/2021, *rejected on other grounds*) ("Logically and grammatically, Subsection (S)(4) appears tailor made for the Four Corners plant, which is not operated by the "qualifying utility," and a coal supply agreement, to which the "qualifying utility" is a party, that terminates in July 2031.").

[639] The ETA provides that "[i]f a qualifying utility does not recovery energy transition costs pursuant to the Energy Transition Act, *the energy transition costs may be recovered pursuant to other applicable provisions of the Public Utility Act*." NMSA 1978, § 62-18-4(F) (emphasis added).

[640] *See* Comm'n Exh. 2 (Attach. A at 1 of 2, Col. F, ll. 99 and 100); Comm'n Exh. 2 Supp. (Attach. A (9-11-2023 Supp.) at 2 of 3, Col. F, ll. 99 and 100).

years. Given the number of issues in this case and the writing necessary to decide all those issues, the HE will not here restate what the parties have laid out in briefs. The reader can refer to the parties' briefs to review that history to the extent that is deemed necessary.

All that need be said here is that PNM's CCN for Pale Verde was granted in 1977. In January 2023, PNM's ownership in Unit 1 was reduced from 10.2% to 2.266667%, reflecting the expiration of 104 MW of leased capacity.[641] In January 2024, PNM's ownership in Unit 2 will be reduced from 10.2% to 9.406667%, reflecting the expiration of 10 MW of leased capacity. PNM's ownership in Unit 3 will be unchanged. In total, PNM's remaining ownership interest in PVNGS will be 288 MW once the final PVNGS Leases expire in 2024.[642]

In this present case, there are five matters concerning PVNGS that must be decided.

1. PNM's request for authorization of a $96.3 million regulatory asset for PVNGS stranded costs.
2. Intervenors' request for authorization of a $38.4 million regulatory liability for PVNGS Unit 1 revenues collected after expiration of the lease for that unit.
3. Whether PNM should be directed to fund future, unspecified, and at this time uncertain decommissioning costs associated with PVNGS.
4. PNM's request for authorization of a $280,000 (approximately) regulatory asset for unplanned SRP transaction costs
5. PNM's request for authorization of a $1.6 million regulatory asset for costs accrued to procure PVNGS replacement resources.

These issues are addressed in turn below.

[641] Water Authority Br. at 23.

[642] PNM Br. at 245.

8.2.1. $96.3 million Regulatory Asset

8.2.1.1. PNM's Proposal

PNM explains that its decision to forgo repurchase of the underlying PVNGS interests has resulted in PNM incurring undepreciated investments in leasehold improvements totaling $96.3 million, of which $88.9 million is associated with the 104.2 MW leasehold interest in PVNGS Unit 1 and the remainder with the 10.4 MW leasehold interest in PVNGS Unit 2.[643]

In Case No. 21-00083-UT, the Commission authorized PNM to create a pure-accounting-order regulatory asset for the $96.3 million in undepreciated investments. That accounting order specifically contemplated ratemaking in this proceeding.

PNM proposes that the $96.3 million "be amortized and collected from customers over twenty years beginning in January 2024." That regulatory asset would secure PNM the recovery of and a return on the undepreciated investments.[644]

PNM witness Miller helpfully explains why this issue of undepreciated investment even exists. He notes that the "Commission approved the extended depreciation schedules for the PVNGS investments in PNM's 2008 rate case . . . to match the extended life of PVNGS, instead of the lease period."[645] Because the Commission-approved depreciation schedules for the PVNGS-leasehold improvements extend beyond the PVNGS-lease expiration dates, PNM has not fully recovered (and customers have not fully paid for) the costs of these leasehold improvements. This is why PNM has undepreciated investments as of the leases' expiration dates in 2023 and 2024.

[643] PNM Br. at 242.

[644] PNM Br. at 250.

[645] PNM Exh. 19 (Miller Dir.) at 52.

Witness Miller also helpfully notes why it is that PNM is terminating the leases.[646] He explains that "PNM calculated in Case No. 21-00083-UT . . . that there would be customer savings on an NPV basis of abandoning the 114 MW of Palo Verde leased interests of approximately $171M at the time the notice to the lessors was provided. For purposes of this case, PNM asserts that abandoning the leases and replacing the lost capacity with other resources results in a reduction of $3.9 million of PNM's first full year revenue requirement.

These broad considerations are the context within which PNM witness Miller's argument why PNM should be permitted to recover the undepreciated investments through the regulatory asset must be viewed. His specific argument has six steps.[647]

First, the Commission approved the terms of the leases, and the leases impose upon PNM responsibility for leasehold improvements. Witness Miller explains that the PVNGS sale-leaseback transactions approved by the Commission in the 1980s benefited PNM's customers in the form of reduced rates. That came at a cost (as all things must).

The approved leases "specifically require PNM to be responsible for capital improvements for the PVNGS leased assets and to maintain the facilities in commercial operating condition during the lease terms." Witness Miller explains further that "[t]hese requirements were necessary for the consummation of the sale-leaseback transactions."

Second, the investments were and are necessary for PNM customers to receive the benefits of the sale-leaseback transactions. As indicated immediately above, capital improvements are necessary for regulatory compliance and to ensure PVNGS is available to serve load through the end of the lease terms.

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[646] *Id.* 54.

[647] *Id.* 6-7.

Third, the investments were prudently incurred and necessary for Palo Verde to provide safe and reliable service to PNM customers through the end of the lease terms. Witness Miller explains that the investments were all scrutinized under a "vetting process" to ensure the investments were reasonable and a benefit to customers.

Fourth, the Commission previously approved rates based on the inclusion of these investments in rate base as well as the applicable depreciation schedules.

Fifth, allowing PNM to recover the undepreciated investments provides the appropriate incentive for PNM to make appropriate decisions on behalf of customers when newer and lower cost energy resources become available.

And sixth, even with recovery of the undepreciated investments, PNM customers will still realize a cost savings compared to PNM repurchasing the Palo Verde lease interests.

The basic point underlying these claims is that commitments were made (the leaseback agreements) for the benefit of customers that necessarily required PNM to incur costs. PNM did incur those costs. PVNGS did serve customers reliably. Customers did receive reduced costs. The depreciation schedules do not match the leases due to decisions rendered fifteen years ago when the transition to a fully renewable power system was not an obligation that PNM labored under as it does today. PNM now asks, reasonably (from its perspective) to be able to recover those costs.

Witness Miller goes on to explain that, whatever decisions PNM made, it remains an immovable fact that the PVNGS units were used to serve PNM's customers. He explains that "[w]hile the Commission concluded" in previous rate cases that "PNM's decision-making was

flawed, it concluded that the PVNGS interests remained certificated, used and useful plant necessary to service customers."[648]

In subsequent sections of his testimony, witness Miller explains that, "where an asset has been placed into service, or is "in use," it is generally considered used and useful; this "used and useful" plant in service is recovered in a utility's rate base." He then states that "PNM is not asking that the undepreciated investments remain in rate base as plant in service; it is requesting authorization to create regulatory assets and recover the as yet unrecovered costs over a period of years." According to witness Miller, "[t]his is standard procedure for assets that have been used and useful but are no longer in service and have not been fully depreciated."[649]

Witness Miller addresses directly the assertion that PNM's imprudence in deciding to extend the leased interests should foreclose PNM from collecting the undepreciated investment. This would not be correct, witness Miller contends, because "the PVNGS leased interests remained certificated, used and useful plant necessary to service customers." Additionally, the reduced payment amount for the 114 MW of Leased Interests had been pre-approved by the Commission and was reasonably recovered in rates, along with the associated leasehold improvement investments for those interests.

In briefing, PNM correctly notes that the Commission must balance the interests of investors and ratepayers and contends that denying PNM's recovery of the PVNGS regulatory asset would not work the appropriate balance.[650] The company argues that the PV Leases have

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[648] PNM Exh. 19 (Miller Dir.) at 27.

[649] *Id.* 43.

[650] PNM Br. at 254.

been relied on by customers for over thirty years, and the investments to be recovered in the regulatory asset were necessary for the safe and reliable operation of the plant.

The company argues that, if the Commission denies the regulatory asset, customers will reap a $96.3 million windfall at the expense of PNM's investors, and the customers would reap this windfall already having enjoyed the lower costs resulting from PNM's decision to enter into the leases which necessarily required PNM to incur undepreciated investment.

As witness Miller did, PNM directly addresses in briefing whether the finding of imprudence in the 2015 rate case (as a factual and legal matter) should have any impact on whether the regulatory asset should be granted. The company contends that the answer is plainly no.

First, PNM points out that the parties who seek to preclude PNM from recovering the PVNGS Regulatory Asset on grounds of imprudence ignore that a majority of the undepreciated investment relates to investment that pre-dates the finding of imprudence. The company explains that the value of undepreciated investments that were made prior to the original lease extension in 2015 for PVNGS Unit 1 and 2016 for PVNGS Unit 2 represent $51.3 million of the total undepreciated investments in PVNGS Units 1 and 2.

Second, the company contends that whatever imprudence may have occurred, it should have no effect on the company's ability to be authorized the regulatory asset. PNM points out that it was specifically authorized to continue to utilize the Palo Verde leases to serve customers and to recover the costs of the leases in rates in Case No. 15-00261-UT, including leasehold improvements. Accordingly, there is no basis to conclude that approved costs incurred to serve customers are unreasonable, imprudent, or unnecessary.

Third, PNM notes that it has already paid a penalty for imprudence. The Commission in Case No. 15-00261-UT reduced PNM's purchase recovery of the $2550/kW purchase price for the 64.1 MW to $1306/kW, and this resulted in a disallowance of approximately $80 million.

8.2.1.2. NMAG

To understand the NMAG's position on these matters it is necessary to first review the Commission's treatment of the PVNGS leases in past cases.

In Case No. 15-00261-UT, the hearing examiner there concluded that PNM "did not provide any quantitative analysis in this case demonstrating the benefits of extending the five PV leases over alternatives."[651] She added that the company "performed no Strategist runs, economic modeling, or financial analysis . . ." and concluded that "the only evidence that PNM submitted to support the prudency of its decisions was testimony that PNM believed that extending the five leases was a better alternative than purchasing those [l]ease [a]ssets and that purchasing the 64.1 MW was a better alternative than extending those leases."

These facts all mattered, the hearing examiner explained, because "[u]nder PRC precedent, a reasonable utility must consider alternatives before going forward with a project, and a new resource will not be approved if a better alternative is available." This is an unremarkable proposition premised on core foundations of utility regulation. The hearing examiner was persuaded that PNM had flouted these principles.

The Commission accepted the hearing examiner's analysis in Case No. 15-00261-UT of the prudence question and reiterated that PNM had demonstrated a singular concern with its "self-interest in expanding rate base so as to benefit shareholders."[652] The Commission went on and

[651] *2015 PNM Rate Case Corrected RD* at 90.

[652] Case No. 15-00261-UT, *Final Order* at 38.

said that PNM's "decision to move forward on the PV leases without due consideration of alternatives" burdened ratepayers and benefited shareholders.

Returning now to the present case, the NMAG's position here is that PNM did not analyze whether, and to what extent, it would be responsible for the cost of any pending capital projects if it had relinquished its interests in the leased assets and, according to the NMAG, the Company simply assumed that ratepayers would pay the full cost of any capital projects associated with the leased capacity during the extension period.[653] Given this managerial failure, the NMAG asks the Commission to deny the Company's request to recover stranded costs.

The NMAG emphasizes that the PVNGS assets with which the costs are associated are no longer being used to serve PNM's customers.[654] The NMAG also emphasizes that PNM's choices and actions with the leases "is the opposite of prudent management decision making . . . in that it foreclosed information that a reasonable utility manager would have sought and considered." The NMAG states quite plainly that "ratepayers should not be required to pay stranded costs for th[e] investment" now that the leases have expired.[655]

The NMAG makes clear that it is not here attempting to go back in time and apply a hindsight-driven prudence inquiry.[656] The record is clear, the NMAG argues, that there was no analysis of alternatives by PNM. This is just a settled fact. Nor was there any consideration of the possibility of disallowed costs.

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[653] NMAG Exh. 1 (Crane Dir.) at 27.

[654] NMAG Br. at 15.

[655] *Id.* 27.

[656] NMAG Exh. 1 (Crane Dir.) at 28.

One core feature of the "regulatory compact," the NMAG argues, is that "utility management will act responsibly in evaluating operating decisions—including decisions regarding supply resources." The NMAG's position is that this was not done here, and the Commission has already found that PNM acted imprudently in deciding to extend the leases.[657] For these reasons, the NMAG contends that the regulatory asset should be denied. The practical impact of that outcome is a non-fuel revenue requirement adjustment of $12,608,639.[658]

8.2.1.3. Staff

Staff's brief explains that, whatever PNM might contend about how the leases were used to serve customers, this does nothing to change the fact that "PNM extended the PVNGS leases without demonstrating the benefit, if any, to customers."[659] Staff is aligned with the NMAG on this. Staff also highlights that "PNM no longer owns the undepreciated investments, and no longer has the rights to the assets, and these investments are no longer providing service to customers."

From Staff's perspective, PNM's failure to take any action to ensure the leases would be economical before renewing them does give the Commission authority "to disallow the costs associated with these investments, especially when accounting for the prudency of renewing the leases."[660] Staff points out that "[i]mprudent investments are typically excluded from rate base."

Staff is not, however, recommending "so harsh a remedy." Rather, Staff advocates that the regulatory asset be granted but PNM be disallowed from earning a return on investment for the

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[657] *Id.*

[658] NMAG Br. 29.

[659] Staff Br. 8.

[660] *Id.* 9.

undepreciated investments and that any funds associated with CWIP for the units be removed from the regulatory asset. In Staff's view, this is an acceptable result of PNM's imprudence.

Denying PNM CWIP associated with the units is correct, Staff argues, because when Staff asked PNM in discovery about this subject, "PNM failed to provide the evidentiary support required by Schedule B-4 of the CWIP amounts in the Unit 1 and Unit 2 regulatory assets." Staff contends that "absent clear information describing what the CWIP amounts comprise, Staff recommends that CWIP be removed."[661]

8.2.1.4. Water Authority

The Water Authority argues that the Commission should reject PNM's request for the $96.3 million regulatory asset as the PVNGS leases were imprudently acquired assets that are no longer used and useful.[662] This position resembles the NMAG's. The Water Authority further notes that the Commission has already determined that the Company's decision to extend the Palo Verde Unit 1 and 2 leases, and to repurchase 64.1 MW of capacity, was imprudent. If the Commission rejects the regulatory asset request, as the Water Authority thinks it should, the annual impact on rates is (according to the Water Authority) about $13.7 million.

8.2.1.5. NEE

NEE also recommends that the Commission deny PNM's request for the regulatory asset. NEE offers a variety of arguments to support this assertion. Principal among them is that the "the underlying 114MWs were extended imprudently because PNM provided no evidence that they

[661] Staff Br. at 10.

[662] Water Authority Br. at 33-34.

were cost effective" and the units are not "used and useful."[663] Again, this is consistent with the other intervenors' arguments and factual assertions.

8.2.1.6. NM AREA

NM AREA declined to take a position on the question of the regulatory asset and stranded costs;[664] however, NM AREA asserts that "at the very least," the Commission should allow PNM to recover "$51.3 million of the undepreciated investments in Palo Verde as these investments were made prior to the time the Commission had determined PNM had acted imprudently."[665]

8.2.1.7. HE Analysis

At the core of the intervenors' position that PNM should not be permitted to recoup the undepreciated investment in the PVNGS units is the assertion that the hearing examiner and Commission determined that the undepreciated investment relate to assets the leases of which the hearing examiner and commission found were imprudently extended.

PNM and NM AREA are correct that, to the extent the request to deny undepreciated investment hangs on a finding of imprudence, it makes no sense to conclude that investments made prior to the imprudence should be denied. There is simply no logical underpinning for denial.

PNM's testimony in this case does show that $51.3 million of the undepreciated investments were made prior to the lease extensions in 2015 and 2016. These monies cannot be withheld from PNM on grounds that PNM acted imprudently as these investments predate that finding.

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[663] NEE Br. at 50-51.

[664] NM AREA Br. at 5.

[665] *Id.*

For this reason, the $51.3 million should be included in the regulatory asset as requested by PNM and recouped by PNM exactly as requested. As regards the remaining $45 million ($96.3 mil – $51.3 mil = $45 mil), the Hearing Examiner recommends as follows.

The evidence already considered by the Commission in prior cases and affirmed on appeal is that PNM performed no resource-alternatives analysis and proceeded upon the assumption that the leases should be extended regardless of the consequence for customers. The hearing examiner and Commission's writing on this indicate that the driver of the decision was PNM's desire to expand rate base.

Failure to perform an analysis of a major resource renewal cannot be cured by post hoc justifications. It is the failure to perform analysis itself that constitutes a cognizable violation of the utility's obligation to ratepayers that it serves under a state-recognized charter.

Staff's proposal to deny PNM a return on investment is sensible as the Commission found it was PNM's interest in expanding rate base that drove the imprudence. The denial of a return on is the penalty best suited to match the motivations that generated the penalty. But, it is not sensible that PNM be denied a return on the entire investment. It should be denied a return on only the $45 million as the $51.3 million investment predated the imprudence finding.

Additionally, the Commission should credit Staff's conclusion that PNM has not proved its entitlement to CWIP and all CWIP associated with any of the $45 million should also be denied. The HE is aware that PNM's position on this subject is that "PNM is not requesting recovery of any amount of CWIP as of the end of the Test Period in base rates."[666] PNM can further explain

[666] PNM Resp. Br. at 143-44.

this conclusion in exceptions to illuminate for the Commission how Staff is so fundamentally wrong about this. Staff should brief this matter further in exceptions as well.

8.2.1.8. Recommendation

PNM's proposed regulatory asset for the undepreciated investments in the units should be approved in modified form. PNM should be authorized $51.3 million in exactly the form requested. As to the remaining $45 million, PNM should be ordered to remove any return on that investment as well as any CWIP. PNM's request to amortize and collect these monies from customers over twenty years beginning in January 2024 should be approved.

8.2.2. $38.4 Million Regulatory Liability

The Accounting Order in Case No. 21-00083-UT required PNM to establish a pure-accounting-order regulatory liability to track and account for all costs currently borne by ratepayers associated with the leased capacity at Palo Verde after the Unit 1 lease expired January 15, 2023. PNM reports that the regulatory liability is calculated to be $38.4 million through December 31, 2023. The question for the Commission is whether the regulatory liability should be approved.

8.2.2.1. PNM's Position

PNM contends that the regulatory liability is "unprecedented" and "cannot be implemented." In PNM's view, the liability exists as a tracker only because "certain parties attempt to further exploit PNM's decision to allow the PVNGS leases to expire to benefit customers."[667] According to PNM, these parties "ask the Commission to require PNM to retroactively refund, through a regulatory liability approved by the Commission . . . the amount of

[667] PNM Br. at 243.

the PVNGS lease payments associated with the 104.2 MW leasehold interest in PVNGS Unit 1 that expired in January 2023 which total $38.4 million through the end of December 2023."

According to PNM, this amounts to an attempt "to isolate a single cost element in PNM's approved rates, to the exclusion of all else, for a retroactive refund." Doing this would, PNM argues, violate "several well-established tenants of regulatory policy and law, including the filed rate doctrine, retroactive ratemaking, [and] piecemeal ratemaking" and be "an abrupt departure from long standing precedent without cause[.]"

8.2.2.2. Intervenor Positions

The Water Authority contends that when the facts are examined with care, there is little doubt the regulatory liability should be granted.

The Water Authority's argument, at the most basic level, is that the money in dispute here is dollars that PNM collected for a lease that had expired. In other words, it is revenue collected to cover expenses that no longer exist. The Water Authority uses strong language to describe this. It notes that "PNM was fully aware of when its leases expired and the issue around the continued collection of leased assets . . . ."[668] The Water Authority goes on to say that "[u]tilities should not be rewarded for trying to game the timing of rate cases to not coincide with major investments coming out of rate base."

The Water Authority recommends the liability amount be set at $44.5 million not ($38.4 million) as this includes $6.1 million for carrying costs. The Water Authority advises that the funds be returned to customers over a five-year period.

[668] Water Authority Br. at 31.

The NMAG recommends that the Commission grant the regulatory liability and require PNM to return the sum over a period of five years.[669] The NMAG's argument for this result is straightforward and much like the Water Authority's: "ratepayers should not be responsible for continuing to pay lease costs once the lease expires[.]"

NEE asks the Commission to determine that the regulatory liability is $44.5 Million—NEE agrees with the Water Authority's argument and evidence about carrying costs—and asks that the Commission order PNM to return this amount to ratepayers over an amortization period of one year which is consistent with the period it was taken from ratepayers.[670]

Staff asks the Commission to authorize the regulatory liability.[671] Staff does not ask for carrying costs as other intervenors do. Staff's position is that the regulatory liability should be returned to customers through a rider over a two-year period.

8.2.2.3. HE Analysis

The HE agrees with the intervenors. The regulatory liability should be authorized, and PNM should refund to rate payers monies collected for the non-existent lease. This is the correct policy and legal determination.

Ordering PNM to do this is not a violation of the prohibition on retroactive ratemaking because, as the Water Authority explains, "[w]hen regulators issue accounting orders that provide for the deferral of costs or savings to the utility's next general rate proceeding, the prohibition

[669] NMAG Br. at 29.

[670] NEE Br. at 56.

[671] Staff Br. at 10.

against retroactive ratemaking is effectively stayed with respect to the deferred costs."[672] This is what occurred here.

The Water Authority points out that its witness M. Garrett "provides myriad examples" of authority disproving PNM's contention that authorizing the liability would constitute retroactive ratemaking.[673] It is unnecessary to reproduce that writing. It is enough to point out that the HE's independent research indicates that the Water Authority's position on this subject is correct.

An accounting order, the Missouri Court of Appeals explained, "allows current losses . . . to be separately accounted, thus preserving the uncollected, deferred fees until the next rate case. At that time the losses in combination with any other factors may be considered in determining a new rate."[674] The court explains that "[t]his is not retroactive ratemaking, because the past rates are not being changed so that more money can be collected from services that have already been provided; instead, the past costs are being considered to set rates to be charged in the future." Again, this is exactly the scenario before this Commission in this case with the accounting order for the regulatory liability at issue here.

Granting the regulatory liability is also not piecemeal ratemaking. As the Water Authority explains, PNM's piecemeal ratemaking claim is "puzzling" given that "we are actively in the middle of a rate case where all of the Company's expenses are being reviewed."[675] Given this, there is nothing "piecemeal" about any portion of the present issue.

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[672] Water Authority Br. at 31.

[673] *Id.*

[674] *State ex rel. Missouri Gas Energy v. Pub. Serv. Comm'n*, 210 S.W.3d 330, 336 (Mo. Ct. App. 2006).

[675] Water Authority Br. at 29.

Lastly, granting the regulatory liability would not be an arbitrary or capricious act. An administrative determination is arbitrary or capricious when it has no rational foundation in fact.[676] Other cases describe the standard as "unreasoned action" executed "without proper consideration" or "in disregard for the facts and circumstances."[677]

PNM contends that it has made many investments that benefit ratepayers and that imposing the regulatory liability arbitrarily dismisses that fact. This is unpersuasive.

The more accurate way to view the facts is that PNM collected revenue for a lease that does not exist. It is not arbitrary to order the company to refund that money to ratepayers. PNM loses nothing. What is extracted should never have been earned. The Water Authority is expressing this idea when it refers to the monies as "overcollection." This is a coherent and comprehensible thought and the correct outcome according to several parties to this case.

8.2.2.4. Recommendation

The $38.4 million regulatory liability should be authorized. The Hearing Examiner does not recommend that any additional carrying charges be added to this figure. It is unclear that the Commission's accounting order sufficiently apprised PNM this would be a possibility.

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[676] *See The Regents of Univ. of California v. New Mexico Water Quality Control Comm'n*, 2004-NMCA-073, ¶ 35, 136 N.M. 45, 94 P.3d 788.

[677] *Perkins v. Dep't of Human Services*, 1987-NMCA-148, ¶ 20, 106 N.M. 651, 748 P.2d 24.

8.2.3. Decommissioning Costs

8.2.3.1. PNM's Proposal

PNM explains that it "is not seeking any recovery of decommissioning costs with respect to PVNGS Units 1 and 2 in this case because the associated nuclear decommissioning trusts are adequately funded."[678]

With respect to "whether PNM has somehow exposed customers to increased exposure for nuclear decommissioning costs, the answer according to PNM is no. The company provides two justifications for this answer.

First, the original terms of the sale-leaseback agreements approved by the Commission require PNM to retain all ultimate decommissioning liability for the PVNGS assets regardless of whether the leases were extended, or the assets repurchased. PNM emphasizes that it entered into the sale-leaseback agreements and the Commission authorized PNM to enter into them for the benefit of PNM's customers.

Second, the decommissioning fund is fully funded. Whether this will change, and additional costs will be incurred, is a matter that is "currently unknowable[.]" PNM explains that "there is no way to determine whether PNM may ever need to seek further recovery for additional nuclear decommissioning costs for PVNGS Units 1 and 2."

8.2.3.2. HE Analysis

There is agreement that "the PVNGS decommissioning fund is adequately funded."[679] Whether PNM should pay for decommissioning costs that may or may not exist in the future is a hypothetical issue at this juncture. This is dispositive.

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[678] PNM Br. at 244.

[679] Water Authority Br. at 35.

The Commission was reversed once on this issue on due process grounds. Our Supreme Court concluded that penalizing PNM with future decommissioning costs (to the extent any unfunded costs may exist) deprived PNM of due process. The justification was that the Commission first raised the possibility of and imposed a penalty in the final order. The thinking here is, presumably, that PNM would have filed evidence and argument to refute the assertion the penalty was appropriate or lawful if it had known this would be an issue. It did not know it was an issue and had no reason to know this as the issue was raised for the first time in a final order. This denied the company an opportunity to present evidence and argument. This was problematic and obviously so.

As noted above, we are dealing with a hypothetical problem at this juncture. There are no additional decommissioning costs. It is difficult to see how the Commission can resolve now, without evidence a problem exists, what outcome should govern. PNM and all other parties should have the opportunity to litigate whether actual decommissioning funding shortfalls need to be recouped and from whom. They should be permitted to present evidence in the context of an actual problem. To reach a determination on a purely abstract matter where evidence cannot be offered just perpetuates the possibility of due process problems.

8.2.3.3. Recommendation

The Commission should not adjudicate a hypothetical problem but should wait until an actual problem presents and let the parties supply evidence and argument when and that occurs. No determination on presently-non-existent additional decommissioning costs should be rendered.

8.2.4. SRP Transaction Costs

8.2.4.1. PNM's Proposal

SRP is acquiring the capacity associated with the expired leases, and PNM is selling its ownership interest in certain associated switchyard, transmission, and other related assets to SRP.[680]

PNM originally believed that the proceeds of the SRP sale would be sufficient to recover the net book value of the related assets; however, the Company is now projecting a shortfall. It seeks to recover that shortfall in the form of a regulatory asset from ratepayers over a 20-year period with carrying costs.

8.2.4.2. Intervenor Objections

The NMAG argues that the Commission should deny PNM recovery in the form of a regulatory asset as "it is undisputed that these assets are no longer being used to serve PNM's customers."[681]

Staff recommends that PNM be denied partial recovery of the additional costs and that the Commission remove "the true-up of the PVNGS SRP transaction proceeds regulatory asset . . . from rate base" and allow PNM to amortize the sum "as an expense" as this would prevent PNM from earning a "return on investment" associated with these funds.

As explained by Staff witness Dasheno, "since the PVNGS investments in question are no longer used and useful in the provision of safe and reliable electricity for PNM ratepayers, then

[680] NMAG Br. at 24. *See also* PNM witness Sanders direct testimony (PNM Exh. 7) at page 120.

[681] NMAG Br. at 29.

the regulatory asset for the true-up of transaction proceeds should not be allowed to earn a return on investment (i.e., they should be removed from rate base and amortized as an expense)."[682]

8.2.4.3. HE Analysis

PNM asserts that Staff's proposal is problematic because "[t]he return on component, or carrying charge, reflects recovery of PNM's actual financing costs to be incurred to carry the cost of the deferred expenses recorded to the regulatory asset." The recovery of financing costs is a necessary cost of service component to ensure PNM recovers its actual costs."

Staff's position that PNM is not entitled to these financing costs is predicated upon the assertion that the related assets are no longer used and useful for PNM ratepayers. This ignores that the assets were used and useful and the only reason they are no longer is due to the sale.

The HE sees no good reason to deny PNM the regulatory asset for the transaction costs. PNM's answer to intervenors is persuasive.

8.2.4.4. Recommendation

The Commission should approve PNM's request for the regulatory asset associated with the SRP transaction costs.

8.2.5. Costs to Procure PVNGS Replacement Resources

8.2.5.1. PNM's Proposal

PNM asks that it be granted a regulatory asset for costs it incurred to obtain replacement resources for the abandoned PVNGS leases. PNM witness Sanders explains that the company "incurred $1.6 million to obtain replacement resources" and that this sum includes expenditures

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[682] Staff Exh. 3 (Dasheno Dir.) at 20.

for "external legal counsel, outside consultants, and administrative costs for witness testimony, postage, publications, and other costs . . . "[683]

PNM argues in post-hearing briefing that it is proper to allow it a regulatory asset to collect these cost because it "is required to provide safe and reliable service to its customers," "the costs associated with replacement resource evaluation for the expired leases are directly related to this provision of safe and reliable service," and "if the resulting resources were utility owned, these costs would typically be capitalized as the cost of acquiring the new asset."[684]

8.2.5.2. Staff & Intervenor Objections

Staff asks that the Commission to reduce the total amount of the asset to exclude some specific costs totaling approximately $6,100 and then "reduce the remaining value of the PVNGS replacement resource regulatory asset by 32.58%, which represents the percentage of PVNGS replacement resource projects (by MW) that have been terminated as of February 22, 2023."

Staff witness Dasheno explains that the percentage reduction is justified for two reasons. First, "the terminated replacement resource projects that the percentage figure references were not, are not, and will never be used and useful in the provision of safe and reliable electricity . . . ."[685] Second, "PNM ratepayers should not be fully liable for the costs of defunct resource development projects that themselves will require replacing through the incursion of additional costs."

NMAG contends that "the Commission should reject PNM's request to recover costs associated with replacement resources." It provides no analysis or explanation in briefing to support this assertion.

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[683] PNM Exh. 7 (Sanders Dir.) at 129.

[684] PNM Br. at 283-84.

[685] Staff Exh. 3 (Dasheno Dir.) at 22.

8.2.5.3. HE Analysis

PNM should be granted the regulatory asset for the costs to procure PVNGS replacement resources. The HEs do not agree that the costs to procure replacement resources should be so finely sifted as to carve out some percentage based on events that come to pass long after the events themselves occur. The process to procure the PVNGS replacement resources was complex and vigorously litigated. PNM's costs were legitimate and necessary.[686]

8.2.5.4. Proposed Recommendation

PNM's request for a $1.6 million regulatory asset for the PVNGS replacement resources should be approved as requested.

8.3. SJGS

It is unnecessary and there is not time to fully review the regulatory history associated with SJGS. A reader desiring additional background is directed to Case No. 19-00018-UT to the extent background on the subject is needed.

PNM correctly notes that "[t]he [o]rder on [r]emand fully resolves any ETA Bond issuance, rate credits, rate treatment proposals and prudence issues raised during the course of PNM's pending rate case.'" These matters are not discussed here.

The company contends that a number of limited issues concerning SJGS must be resolved in this present rate case. These are addressed below.

[686] It is important to note that one of the HEs assigned to this case presided over the replacement resource case for PVNGS. That case involved a substantial amount of litigation, much of it originating with the owners of the Valencia gas plant. Much energy and work was done by all in that case to assess the merits of the replacement resource portfolio PNM proposed. That proposal necessitated inquiry into highly complex resource modeling that is designed to identify reliability metrics for high levels of renewable energy. This issue is one the entire power system in the United States is working very hard to better understand.

8.3.1. Non-securitized San Juan Plant Decommissioning Costs Regulatory Asset

On November 9, 2021, the Board of County Commissioners of San Juan County approved and adopted Ordinance No. 121. The ordinance requires full demolition and remediation of coal-fired electric generating facilities in San Juan County upon retirement of the facility.

Before Ordinance No. 121 was approved, the joint owners of the SJGS planned for a retirement-in-place decommissioning option. Obviously, following enactment of the ordinance, that is no longer possible. As a result of the new ordinance, the estimated costs to decommission SJGS increased by approximately $18.7 million as of September 30, 2022.

PNM seeks recovery of the incremental cost related to Ordinance No. 121 in this rate case. The total $18.7 million of the decommissioning amount has been deferred to the regulatory asset as approved in Case No. 19-00018-UT, and PNM has included this amount in its cost of service in this case.

PNM notes that these amounts are estimates. The Company will continue to true-up final decommissioning costs and request additional cost increases or decreases the true-up amounts collected from customers.

No party opposes PNM's requested regulatory asset for SJGS decommissioning ordinance costs. The NMAG and County recommend approval of this request as they contend "these costs are reasonable, even though they were not part of the settlement and were not requested."

This regulatory asset should be approved.

8.3.2. SJGS Replacement Resources Regulatory Asset

8.3.2.1. PNM's Proposal

The SJGS Replacement Resources regulatory asset reflects the $8.3 million in one-time costs incurred by PNM to procure replacement power resources. PNM spent considerable time

and effort to develop the San Juan replacement resources that were proposed and litigated before the Commission. The work involved for developing the replacement resources included engaging third party vendors of different replacement technologies, modeling different generation mixes, and determining the optimum replacement resource plan, as well as analyzing and modeling alternative portfolios presented in the replacement resources proceedings.

8.3.2.2. Intervenor and Staff Positions

The NMAG accepts PNM's proposal and "recommends that the Commission authorize PNM to recover costs of $8.3 million associated with obtaining approval for San Juan replacement resources."[687] The NMAG explains that the San Juan proceedings were "complex" especially the replacement-resources component of the case.

Staff proposes three modifications to this regulatory asset.[688] The first is to remove the SJGS replacement resource regulatory asset from rate base to preclude PNM from earning a return on investment. According to Staff, the nature of the expenses incurred for the SJGS replacement resources are more typical of O&M costs than of traditional rate base items. Staff adds that "the itemized expenses are predominantly consultant and legal fees."

The second modification Staff proposes is to disallow "other expenses totaling $767,740 identified by PNM but not clearly and completely accounted for in the [company's a]pplication." There is no explanation in briefing provided for this request beyond this statement.

The third proposed modification is to reduce the requested regulatory asset value by 13.68% to account for those replacement resource projects that have been abandoned by PNM.

[687] NMAG Br. at 50.

[688] Staff Br. at 12.

PNM answers each of these proposals with persuasive evidence and argument.[689]

As to the claim that the expenses are more like normal operating and maintenance costs and the company should not earn a return on them, PNM contends that this is flatly wrong. The company explains that the expenditures "occurred outside the normal course of PNM's business." This seems a correct assertion given that plant abandonment is not a regular occurrence. Moreover, the costs reflect the company's efforts to abandon a resource *and* find adequate replacement resources. These too are not regular business activities. Again, this is a sensible claim.

As to the approximately $767,000 modification, the Company argues that it fully supported all cost components associated with SJGS replacement resources. PNM points to the fact that the NMAG supports PNM's recovery of the regulatory asset as proof of this. The company's seems to be suggesting that Staff's belief that there is insufficient evidence presented does not necessarily mean Staff is correct about this.

Lastly, the company contends that "there is no basis for Staff's recommended 13.68% reduction to the regulatory asset[.]" PNM argues that Staff's proposal stems from "subsequent decisions or actions of third-party power producers," and further argues that "those actions are not relevant to PNM's" incurred costs. This also seems right.

The costs at issue were all necessary to develop a resource replacement portfolio. This included issuing an RFP, evaluating bids, negotiating contracts, and filing for Commission approval. Whatever happened after this commitment of resources cannot be excluded as it is not logically tied to the cause for the expense in the first place.

PNM's answers to Staff's arguments sufficiently rebut them as a matter of fact and logic.

[689] PNM Resp. Br. at 72.

8.3.2.3. Recommendation

PNM's request regarding the SJGS replacement resources regulatory asset should be granted as proposed.

8.3.3. SJGS External Legal Expenses Regulatory Asset

The SJGS external legal expenses regulatory asset reflects $0.1 million of external legal costs incurred by PNM for due diligence to negotiate with other SJGS participants the exit and closure of SJGS Units 1 and 4. PNM estimated $1.2 million in external legal costs. The actual end cost of $0.1 million is quite lower.

PNM contends that the NMAG opposes this regulatory asset.[690] It is not clear that is the case. While testimony was provided by the NMAG opposing this regulatory asset, the issue is not addressed in the section of the NMAG's brief dealing with SJGS regulatory assets.

As there is no opposition to the request for the regulatory asset, PNM's request for this regulatory asset should be granted.

8.3.4. SJGS Obsolete Inventory Regulatory Asset

The SJGS Obsolete Inventory regulatory asset reflects the $6.4 million of PNM's share of the net book value of inventory in materials and supplies, net of salvage, that were still present at SJGS at the time of abandonment. PNM was authorized to record this regulatory asset in NMPRC Case No. 19-00018-UT.

Netting the inputs for attrition of spare parts and the auction sales of remaining inventory, PNM now estimates a remaining balance of $6.4 million versus the Company's original $6.3 million estimate that will need to be recovered from customers as the result of the abandonment.

[690] PNM Br. at 61.

The NMAG recommends full disallowance of this request. The NMAG's brief states that "managing inventory is a part of a utility's underlying on-going operation and to the extent that the Company is left with unrecovered costs, then these costs should be considered stranded costs and absorbed by shareholders."[691]

Staff asserts in briefing that "[t]he nature of PNM's obsolete inventory is such that it is no longer used and useful in the provision of safe and reliable electricity to PNM customers." For this reason, "[t]he obsolete inventory should be removed from rate base, PNM should not receive a return on investment."[692]

These contentions mirror the arguments made about PVNGS and the undepreciated investments. SJGS was abandoned as part of the energy transition. This was a complex series of events. The NMAG's argument that PNM should be able to manage inventory to avoid stranded cost suggests that PNM has full freedom to manage the resource as it sees fit. To suggest this is the case oversimplifies the complex set of events around closure. The NMAG's argument for denying the regulatory asset should be rejected.

Staff's contention that the obsolete inventory is not presently used and useful ignores the fact that SJGS materials and supplies were at one time used and useful.

The Commission should grant PNM's request for the regulatory asset for obsolete inventory.

[691] NMAG Br. at 50.

[692] Staff Br. at 14.

8.3.5. Unamortized balances of Undepreciated Investments in SJGS Units

PNM included in its rates the unamortized balances related to the 50% of the undepreciated investments in SJGS Units 2 and 3 as authorized in Case No. 13-00390-UT. This is discussed briefly at PNM witness Sander's direct testimony at page forty-six.

The NMAG and County assert that this request is "consistent with the agreement orders from the Commission on the share between PNM and customers established in prior proceedings before the Commission on the closures."[693] This is a difficult sentence. In any case, it is clear the NMAG supports the request.

PNM's brief indicates that there is additional discussion of this subject in its initial brief. The HE could not find that discussion. It may or may not be somewhere in PNM's 346 page initial brief.

Inclusion of the unamortized balances in rates should be approved.

8.3.6. Staff's Proposed Regulatory Liability for SJGS/PVNGS Replacement Resources

Staff correctly points out that PNM seeks to include $45.1 million of battery demand charges in 2024 future test year base rates. This is for the recovery of energy system storage costs that help replace the abandoned SJGS generation and expiring PVNGS leases. Staff notes further that PNM has experienced delays in obtaining replacement resources and certain replacement resource projects have been abandoned or terminated. This is true and an uncontestable point.

Because of these facts, Staff is concerned that there may be timing discrepancies between when customers begin paying for the replacement resources through base rates for the battery

[693] NMAG Resp. Br. at 17.

demand charges and when customers receive the benefit from those payments in the form of safe and reliable electricity.

Staff's concern is understandable, but PNM persuasively rebuts the concern. The company emphasizes that it incurred costs prior to the date the resources will be paid for in rates, and PNM is not seeking those costs. PNM contends that, if the Commission approves Staff's request for the liability then it is only fair and proportional that PNM receive authorization of a regulatory asset for costs it incurred. This is a legitimate request.

The best answer to this disagreement is that Staff's request should be denied. Both parties incur risk that necessarily flows from the timing of investments and the filing of a rate case.

8.4. ROR/WACC

"Among the most heavily contested matters in rate case proceedings is the determination of a fair rate of return, or weighted average cost of capital."[694] The broad legal principles that guide inquiry into setting PNM's ROR and ROE are discussed here. The specific concerns that have guided the Commission in its application of these broad principles are set out in a subsequent section after the parties' positions are laid out.

"[C]ost of capital for an investor-owned utility consists of two main components: return on long-term debt capital and return on equity capital."[695] Staff correctly observes that "[f]rom the perspective of an investor, long-term debt is typically considered less risky than equity and is generally the safest financing instrument issued by a company that an investor can acquire."[696] Staff notes further that "[c]onversely, investors will require a higher rate of return for equity

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[694] *2007 SPS Rate Case Corrected RD* at 22.

[695] *Id.*

[696] Staff Br. at 37.

investments, such as common stock, to account for the greater degree of risk relative to long-term debt."[697] These are uncontroverted principles.

"To obtain the cost of capital (or authorized rate of return) used for ratemaking purposes, the weighted average of the individual rates on long-term debt, preferred stock (if applicable) and common equity are used."[698] It is understood that "ascertaining the costs of long-term debt and preferred stock are . . . relatively uncontroversial matters[;] however, the same cannot be said for establishing a utility's return on common equity."[699] That is the matter to which we turn.

<u>8.4.1. ROE</u>

A company's cost of equity is the "investor-required" return. A company's estimate of its cost of equity should be forward looking. This is consistent with classical valuation theory which holds that the value of a financial asset is determined by its earning power, its ability to generate future cash flows. The actual return earned by a company is not the investor-required return. An earned return is historical, while the cost of equity is forward looking.[700]

The particular legal principles that set the framework for determination of rate of return are well settled.[701] The principles "originate from cases decided by the United States Supreme Court

[697] *Id.*

[698] *2007 SPS Rate Case Corrected RD* at 22.

[699] *Id.* 22-23.

[700] Case No. 20-00104-UT, *Recommended Decision* at 42 (NMPRC 04/06/2021) ("*2020 EPE Rate Case RD*"), partially approved in *Order Adopting Recommended Decision with Modifications* ("*Final Order*") (NMPRC 06/23/2021).

[701] *2007 PNM Electric Rate Case RD* at 54.

many decades ago."[702] These principles have been articulated and reaffirmed in many Commission rate cases.[703] They are set out again here for convenience.

At the outset, it is important to note that "[i]t is axiomatic that the determination of a fair rate of return for a utility in the course of the ratemaking process is one of the more subjective tasks of this and other state utility commissions."[704] This is because a fair rate of return is not susceptible to precise mathematical calculation or to any certain formula and is, instead, dependent on the exercise of informed and rational judgment.[705]

The Commission is not bound by or limited to any one method of determining a fair rate of return. It is the "end result" rather than the methodology used that matters.[706]

A cost of service study is a fundamental tool in establishing rates that are neither confiscatory nor extortive, i.e., in setting just and reasonable rates within a zone of reasonableness.[707] As Professor James C. Bonbright explains,

> one standard of reasonable rates can be fairly said to outrank all others in the importance attached to it by experts and the public alike-the standard of cost of service, often qualified by the stipulation that the relevant cost is necessary cost or cost reasonably or prudently incurred .... Rates found to be far in excess of cost are at least highly vulnerable to a charge of 'unreasonableness.' Rates found well below cost are likely to be tolerated, if at all, only as a necessary and temporary evil.[708]

[702] *2007 SPS Rate Case Corrected RD* at 23.

[703] *See e.g.*, *2020 EPE Rate Case RD* at 37.

[704] *2007 PNM Electric Rate Case RD* at 53.

[705] *Id.* 56.

[706] *Id.* 53.

[707] *2007 SPS Rate Case Corrected RD* at 22.

[708] *Id.*

In *Bluefield Waterworks and Improvement Co. v. Pub. Svc. Comm'n*, 262 U.S. 679, 693 (1923) ("*Bluefield*"), the Supreme Court of the United States proclaimed that a utility's return should be sufficient to assure confidence in the financial soundness of the utility, to maintain its credit, and to raise the money necessary to properly discharge its public duties.[709] A little over twenty years later the Supreme Court clarified what constitutes an appropriate rate of return.

The Court explained that "the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks."[710] Thus, the U.S. Supreme Court established in *Bluefield* and the subsequent *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) ("*Hope*") a market-oriented test for rate of return.

Nevertheless, the Court has made it clear that public utility commissions may not rely solely on a determination of investor interests in setting an ROE; rather, setting an ROE requires a balancing of both investor and consumer interests.[711] We can see the inherent tension in this balancing through the Commission's own words on rate setting and ROE.

The Commission has explained that "a utility's return should be sufficient to assure confidence in the financial soundness of the utility, to maintain its credit and to raise the money necessary to properly discharge its public duties."[712] There is no dispute that the reliable and efficient delivery of electrical services is a task of the highest importance in modern society, and the provision of reliable electric service in a modern society is a capital intensive and endlessly complex task. At the same time, though, the utility's return cannot be singularly focused on capital

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[709] *2007 PNM Electric Rate Case RD* at 54.

[710] *2007 SPS Rate Case Corrected RD* at 14 (citing *Hope*, 320 U.S. at 603)).

[711] *2007 PNM Electric Rate Case RD* at 55.

[712] *2007 SPS Rate Case Corrected RD* at 23.

markets and creditworthiness.[713] "The Commission cannot confine its inquiries either to the computation of costs of service or to conjectures about prospective responses of the capital markets[.]" Setting a rate of return requires the Commission to "give due regard to the interests of both shareholders and ratepayers."

The Commission is "obliged at each step of its regulatory process to assess the requirements of the broad public interest entrusted to its protection . . . ."

The end-result of the Commission's ROR-setting process must be measured as much as by the success with which the Commission protects the public interest as by the effectiveness with which the Commission ensures a utility will be able to maintain its credit rating and attract capital.

Given all of this, it is unsurprising that there is no empirically definite and objectively certain ROE or ROR. There can only be "a zone of reasonableness within which the Commission is free to set a fair rate of return." This flows from the fact that the balancing of interests never reaches a static equilibrium but will ebb and flow over time.

The Court in *Hope* found appropriate criteria by inquiring whether "the return to the equity owner (is) commensurate with returns on investments in other enterprises having corresponding risks, and whether the return was sufficient to assure confidence in the financial integrity of the enterprise[.]"[714] These are important as this is what allows a utility to "maintain its credit and to attract capital." In the very next sentence, however, the Court made clear that these criteria "remain pertinent, but they scarcely exhaust the relevant considerations."

In sum, there is a zone of reasonableness within which the Commission is free to set a fair ROE which in turn is instrumental to setting the rate of return when evaluated with other

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[713] *Id.* 24.

[714] *2007 SPS Rate Case Corrected RD* at 24.

appropriate criteria.[715] The key consideration is not whether the data and assumptions underlying the choice of a fair ROE are unassailable, but whether the choice is just and reasonable. The determination requires balancing investor and consumer interests. Neither is paramount. As a result, an optimal return on equity from the viewpoint of investors is not required.[716]

8.4.1.1. Constant Growth DCF Method

In contested rate cases involving PNM, EPE and SPS, ROR witnesses have consistently estimated cost of equity using multiple methods including the discounted cash flow (DCF) method, the capital asset pricing method (CAPM), the risk premium method, and the expected earnings method.[717] That is also the case here.

Despite this, "the Commission has emphasized . . . that its preferred method to determine the [ROE] is the traditional constant growth DCF model."[718] As was explained in the final order in Case No. 20-00104-UT ("*2020 EPE Rate Case*"), the Commission prefers the DCF test over others primarily for the reason that "the DCF method is a market-based measure of return, meaning it assumes that the current market price of the stock incorporates all investor expectations regarding risk, dividend growth[,] and earnings growth."[719] As our Supreme Court has acknowledged, a foundational thought underlying capital markets is that "[t]he current price of [a] stock is reflective of all investment opportunities at the time."

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[715] *See 2007 PNM Electric Rate Case RD* at 56-57.

[716] *2020 EPE Rate Case RD* at 76-77.

[717] *Id.* 39.

[718] *2007 SPS Rate Case Corrected RD* at 54.

[719] *2020 EPE Rate Case Final Order* at 4 (citing *Zia Natural Gas Co. v. New Mexico Pub. Util. Comm'n*, 2000-NMSC-011, ¶ 15, 128 N.M. 728) ("*Zia Natural Gas Co.*").

The primacy of the constant growth DCF method in New Mexico is apparent. Authority explains that "[t]he Commission has traditionally relied on the DCF model in determining cost of capital issues."[720] The dates associated with the authorities just cited in preceding sentences should be carefully reviewed. When they are, it is clear that the DCF model "is well-entrenched in this jurisdiction, having been in use for at least fifteen years."[721] In fact, we are nearly a quarter-century beyond the time the New Mexico Supreme Court described the DCF method as "well entrenched" in this jurisdiction. Very recently, the Commission again made clear that the DCF method is preferred.

In the *2020 EPE Rate Case*, the Commission agreed with the hearing examiner who "reiterated" that "the traditional DCF method, without the use of a nominal GDP growth factor, provides the sound basis to determine the ROE."[722]

The long pedigree of the constant growth DCF method is emphasized here because the New Mexico Supreme Court very recently instructed this Commission that it cannot make significant changes to the analysis it employs to answer issues implicating the Commission's discretionary authority without making clear that this is a possibility and allowing stakeholders meaningful process to challenge such a move.[723] Our Supreme Court expressed this in very clear terms.

Some explanation of the DCF method is now necessary.

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[720] *2007 SPS Rate Case Corrected RD* at 26 (citing *Zia Natural Gas Co.*, 2000-NMSC-011, ¶ 18 ("The parties are in agreement that the DCF model is well-entrenched in this jurisdiction, having been in use for at least fifteen years.").

[721] *Zia Natural Gas Co.*, 2000-NMSC-011, ¶ 18.

[722] *2020 EPE Rate Case Final Order* at 68.

[723] *El Paso Elec. Co. v. N.M. Pub. Regulation Comm'n*, Nos. S-1-SC-38911, S-1-SC-38911 (NMSC 05/01/23), ___-NMSC-___, ___ P.3d ___, 2023 WL 3166936.

The principles underlying the DCF model are well known and discussed in full in previous recommended decisions by the Commission's hearing examiners and in final orders by the Commissioners. A few recent RDs collecting and summarizing existing discussion of the DCF principles is used below to layout the principles. Staff witness Dunn reiterates much of what is said below in his testimony in this case. The other ROE witnesses in this case do the same.

"The DCF method estimates an equity return from a proxy group by adding estimated dividend yields to investors' expected long-term dividend growth rate."[724] The "classic DCF equation is expressed as follows: Cost of equity = expected dividend yield + expected dividend growth. This can be expressed as a formula: $K_e = Y_1 + g$. "Ke" is the cost of equity, "Y_1" is the expected dividend yield, and "g" is the expected dividend growth. This is the formula most recently applied by the Commission in determining ROEs.

"There are three primary inputs into the DCF method: (1) stock price; (2) dividend; and (3) long-term growth rate."[725] The Commission has "consistently estimated growth rates using an average among analysts' forecasts and sustainable growth rates."[726]

The phrase "constant growth" refers to the "consensus, or mean, of professional securities' analysts' earnings growth estimates" which function as "a proxy for investors' dividend growth rate expectations."[727] The averages are derived from financial information sources including

[724] *2015 PNM Rate Case Corrected RD* at 37.

[725] *2020 EPE Rate Case RD* at 40.

[726] *Id.* 62.

[727] NM AREA Exh. 5 (Walters Dir.) at 39.

Zacks, S&P Capital Market Intelligence, and Yahoo! Finance. The end result is "a simple average, or arithmetic mean, of analysts' forecasts."[728]

8.4.1.2. Proxy Group

"The components of the DCF equation are not generally directly available for an individual utility because most investor-owned utilities are subsidiaries of larger companies and thus are not publicly traded."[729] Therefore, the normal practice is to use proxy companies, or a population of publicly traded companies with significant utility business that are considered similar enough to the utility in question to use as benchmarks in determining what investors will expect out of the utility in question.[730]

Often, "the crux of the controversy over ROEs resides in utility peer group selection and the dramatic impact that a group's composition can have on ROE estimates."[731] The Commission has before noted that "[s]electing a proxy group is not an exact science and none of the proxy groups developed by the witnesses" is subject to attack that it is "clearly incorrect."[732]

In this case, the parties are largely in agreement about the proxy group question. As will become clear during the discussion that follows, PNM and the intervenors either used the same companies in their respective proxy groups or nearly the same companies.

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728 *Id.* 40.

729 *2015 PNM Rate Case Corrected RD* at 38.

730 *2020 EPE Rate Case RD* at 51-52.

731 *2007 SPS Rate Case Corrected RD* at 45.

732 *2020 EPE Rate Case RD* at 42.

8.4.1.3. Overview of ROE Proposals and Impact on Claimed Revenue Deficiency

Before setting out the parties proposed ROEs here, it is useful to reiterate that PNM's current authorized ROE is 9.575%.[733] PNM's recent actual ROE exceeded this authorized percentage. County witness Reno provided a graphic in her direct testimony showing PNM's actual ROE over the past several years. It is reproduced here for convenience. This chart also appears in the testimony of NEE witness Sandberg.

TABLE 3. ALLOWED AND ACTUAL ROES[48]

Year	Allowed ROE at Year End	Actual ROE at Year End
2013	10.000%	9.4000%
2014	10.000%	7.245%
2015	10.000%	6.916%
2016	9.575%	8.103%
2017	9.575%	9.442%
2018	9.575%	9.183%
2019	9.575%	9.622%
2020	9.575%	9.428%
2021	9.575%	9.149%
2022	9.575%	10.173%

[733] Case No. 22-00270-UT, Application at 2.

The proposed ROE for PNM by party is as follows:

Party	Proposed ROE
PNM	10.25%
NM AREA	9.55%
Staff	9.45%
Bern County	9.26%
NMAG	9.25%
ABCWUA	9.0%
NEE	8.9%

The question that naturally arises is what impact each ROE proposal has on PNM's ROR and its claimed rate deficiency. The answer to that question cannot be considered apart from the parties varying proposals on PNM's capital structure. The following graphic shows the impact of each parties proposed ROE and capital structure proposal.

Party	Proposed ROE	Proposed Cap Structure	Proposed ROR	Impact on Revenue Deficiency
PNM	10.25%	52% equity	7.12%	-
NM AREA - Walters	9.55%	49.61% equity	-	($18.4 Mil.)
Staff – Dunn	9.45%	51.99% equity	6.70%	($14.5 Mil.)
Bern County - Reno	9.26%	49.61% equity	6.47%	($23.4 Mil.)
NMAG – Woolridge[734]	9.25%	52.00%	6.60%	($18.2 Mil.)
ABCWUA – Garrett	9.0%	45.50%	6.13%	($33.0 Mil.)
NEE – Sanders	8.9%	-	-	($24.6 Mil.)

[734] The NMAG supplied initial testimony on ROE but, after hearing, joined the County and advocated that the Commission accept the "evidence presented in Ms. Reno's testimony" including proposed ROE and capital structure.

8.4.1.4. PNM's Proposed ROE

"PNM is proposing an ROE of 10.25%." This "is based on a cost of equity range of 10.0% to 11.3%, with a 10.65% midpoint. Within that range, PNM's recommended ROE is conservative but sufficient to compensate PNM's investors and maintain PNM's financial integrity."[735] PNM clarifies, however, that setting its ROE at 10.25% "understates investors' required rate of return."

PNM witness McKenzie attached the following graphical depiction of the results of the various empirical ROE analyses he performed.

Method	Result
DCF	
Value Line	8.8%
IBES	10.2%
Zacks	9.1%
Internal br + sv	8.5%
CAPM	
Current Bond Yield	11.8%
Projected Bond Yield	11.9%
ECAPM	
Current Bond Yield	12.1%
Projected Bond Yield	12.1%
Utility Risk Premium	
Current Bond Yield	10.6%
Projected Bond Yield	10.7%
Expected Earnings	11.1%

Recommendation			
Cost of Equity Range	10.0%	--	11.3%

[735] PNM Br. at 28.

Some additional focus on McKenzie's DCF results is necessary as the DCF guides our inquiry here. Witness McKenzie provided the following summation of his DCF analyses.

DCF RESULTS – UTILITY GROUP

Growth Rate	Average	Midpoint
Value Line	8.8%	9.0%
IBES	10.2%	10.3%
Zacks	9.1%	9.7%
br + sv	8.5%	8.5%

To calculate stock price, McKenzie used a thirty-day average.[736] He drew dividend data from Value Line.[737] He performed constant growth and sustainable growth DCF estimates.[738]

It is worth pointing out what is clear from the DCF-result chart immediately above: McKenzie's DCF calculations range as low as 8.5% and three of the four DCF estimates are well below 10%. In fact, two of the four are below 9.0%. The average or mean of the four estimates is 9.15% ((8.8 + 10.2 + 9.1 + 8.5) ÷ 4). The median is 8.95% ((8.8 + 9.1) ÷ 2).

Even though Commission precedent is clear that the DCF method is the preferred tool to calculate an ROE, and even though the New Mexico Supreme Court has made it clear that the Commission cannot depart from past practice on significant issues of policy in case adjudications without meaningful notice and process, PNM contends that the DCF method should not have primacy here. McKenzie contends that "[n]o single method can be regarded as definitive; each respective approach has advantages and shortcomings."[739] He adds, citing FERC, that "[t]he determination of rate of return on equity starts from the premise that there is no single approach or

[736] PNM Exh. 11 (McKenzie Dir.) at 34.

[737] *Id.*

[738] *Id.* 35-37.

[739] PNM Br. at 29.

methodology for determining the correct rate of return." This point, he contends, holds true for the DCF model.

McKenzie in fact goes further and contends that while the DCF is a recognized approach to estimating ROE, it is not without shortcomings and does not eliminate the need to ensure the end result is fair.[740] He cautions that the DCF method is only one theoretical approach to gain insight into the return investors require. Numerous other methods exist, and the ranges produced by the different approaches can vary widely.

McKenzie determined that the CAPM[741] approach implies an average ROE for the utility group of 11.8%.[742] McKenzie produced an ECAPM[743] analysis which suggested that PNM's ROE should be set at 12.1%. McKenzie also performed a utility risk premium[744] analysis and expected earnings[745] analysis. The risk premium method resulted in an ROE of 10.58%. The expected earnings analysis indicated that PNM's ROE should be set at 11.1%.

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[740] *Id.*

[741] The CAPM model determines a stock's required return as a function of the risk-free rate, plus a risk premium that is scaled to reflect the relative volatility of a firm's stock price. McKenzie asserts that this method "is considered the most widely referenced method for estimating the cost of equity among academics and professional practitioners.

[742] PNM Exh. 11 (McKenzie Dir.) at 45.

[743] The ECAPM takes into account that empirical tests of the CAPM have shown that low-beta securities earn returns somewhat higher than the CAPM would predict, and high-beta securities earn less than predicted.

[744] A risk premium analysis surveys previously authorized ROEs. Authorized ROEs presumably reflect regulatory commissions' best estimates of the cost of equity, however determined, at the time they issued their final order. Such ROEs should represent a balanced and impartial outcome that considers the need to maintain a utility's financial integrity and ability to attract capital.

[745] An expected earnings analysis operates from the premise that investors compare each investment alternative with the next best opportunity. If the utility is unable to offer a return similar to that available from other opportunities of comparable risk, investors will become unwilling to supply the capital on reasonable terms.

McKenzie also performed a DCF of non-utility proxy companies.[746] He did so because, in his view, the basic thought underlying ROE analysis is opportunity cost. He notes that "[u]tilities must compete for capital, not just against firms in their own industry, but with other investment opportunities of comparable risk."[747] The results of this analysis are midpoints of 10.6%, 10.9%, and 11.2% depending on which growth rate is utilized.[748] According to witness McKenzie, this analysis provides "an important benchmark in evaluating a just and reasonable ROE for PNM."[749]

8.4.1.5. Intervenors' Proposed ROEs

Time constraints do not allow for a comprehensive restatement here of all testimony supplied by the intervenors on ROE. If that was attempted, this document would be far too lengthy. Only the most salient points offered by the intervenors on ROE germane to the HEs' ultimate analysis are emphasized here.

8.4.1.5.1. NM AREA

NM AREA witness Walters asserts that a reasonable and appropriate ROE for PNM is 9.55%.[750]

Walters relied on the same proxy group that PNM witness McKenzie proposed with one exception: Walters declined to include Emera in his proxy group. He explained that Emera is a Canadian company listed on a Canadian stock exchange. In witness Walters's view, this fact

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746 PNM Exh. 11 (McKenzie Dir.) at 57.

747 *Id.*

748 *Id.* 60.

749 *Id.*

750 NM AREA Br. at 17.

establishes that "Emera has inherent risks that are not applicable to PNM, namely foreign country risk and foreign currency risks."[751]

Walters concludes that "the Company's current market cost of equity to be in the reasonable range of 9.20% to 9.90%."[752] This is shown in chart form (that was supplied with Walters' testimony) below.

TABLE CCW-12

Return on Common Equity Summary

Description	Results
DCF	9.20%
Risk Premium	9.90%
CAPM	9.60%

He recommends that the Commission authorize PNM an ROE of 9.55%, which is the midpoint of his recommended range.

Walters clarifies, however, that this recommendation is conditioned upon the Commission approving a capital structure in which PNM's equity ratio is set at 49.61%. If the Commission allows the utility a higher ratio of equity, then Walters contends that the ROE should be set at the lower end of his range: between 9.20% and 9.55%.

751 NM AREA Exh. 5 (Walters Dir.) at 35.

752 *Id*. 69.

Walters' DCF analysis incorporated the following data. For stock price, he used the average of weekly high and low stock prices of utilities in the proxy group over a thirteen-week period. For the dividend, he examined each proxy company's most recently paid quarterly dividend as reported in Value Line. Walters annualized the dividends and adjusted for next year's growth. For growth, Walters provided both constant growth and sustainable growth inputs to reach his DCF recommendation.

Walters performed three types of DCF analyses. Those analyses are shown in the graphic below.

TABLE CCW-8

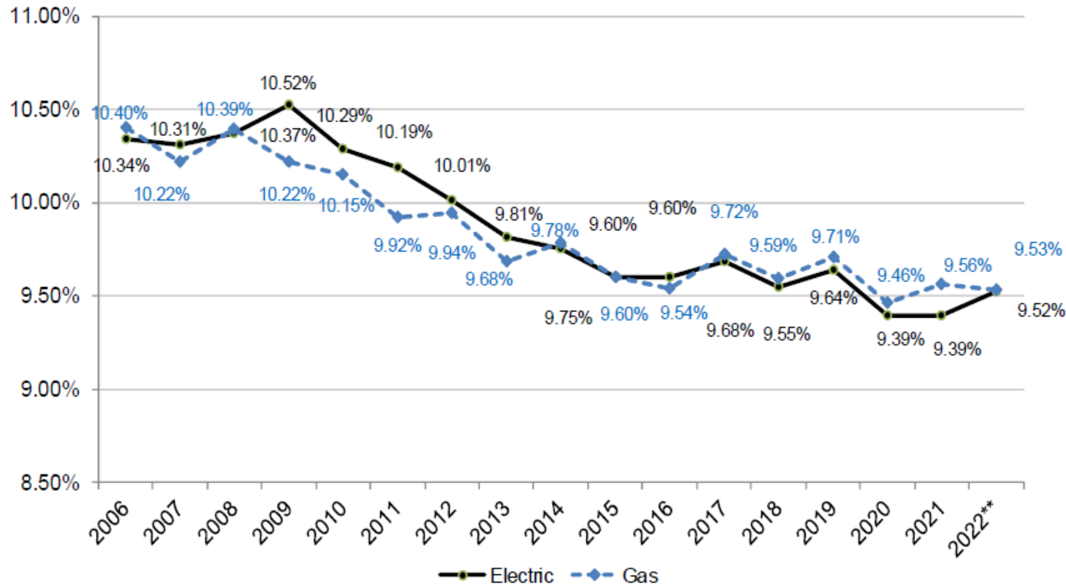
Summary of DCF Results

Description	Proxy Group Average	Proxy Group Median
Constant Growth DCF Model (Analysts' Growth)	10.08%	10.03%
Constant Growth DCF Model (Sustainable Growth)	9.06%	8.93%
Multi-Stage DCF Model	8.46%	8.39%

He concludes, based on these analyses, that "a reasonable ROE based on the DCF results . . . is 9.20%."[753]

Walters pointed to additional evidence to support his ROE recommendation. He contends that "the trend in ROEs has declined over the last several years and has recently remained below 10%." He supplied a helpful graphic showing this trend.

753 *Id*. 51.



Walters emphasizes what the above chart makes apparent: "since 2016, the majority of authorized ROEs in the utility industry have been below 9.7%, with many of those being below 9.5%."

8.4.1.5.2. Staff

Staff witness Dunn recommends that the commission authorize PNM an ROE of 9.45%. Staff applied the DCF methodology to determine the ROE and the CAPM methodology as a check on (or verification of) the DCF result.

Staff used a much smaller group of proxy utilities to estimate PNM's ROE. The six companies Staff relied upon are Allete, Inc., Avista Corp., Black Hills Corp., NorthWestern Corp., Otter Tail Corp., and Portland General Electric Co. All of these companies except for Portland General are part of PNM witness McKenzie's proxy group.

Staff explained why its proxy group is comprised of only six companies.[754] In short, "Staff believes that a proxy group that more accurately reflects the characteristics of the Company will result in better recommendations for the Company's ROE." According to Staff, a smaller group of proxy companies that are all comparable to PNM will produce "a better analysis."

Staff contends that its "final recommendation" rests upon empirical "analysis of ROE trends, historic decisions, and recent outcomes for rate cases in New Mexico and other jurisdictions."

Staff's principal empirical test is the DCF method. "Staff's DCF analysis provided an estimate of 9.34% for PNM's ROE using Staff's proxy group."[755]

For stock price, Staff witness Dunn used 30 day year end average stock prices.[756] As to dividends, he annualized the most-recent dividend payment issued.[757] For the growth factor, he averaged earnings growth rate estimates from Zacks, Yahoo Finance, and Value Line.[758]

As noted, Staff utilized the CAPM method to "check" Staff's DCF results.[759] That analysis produced an ROE of 9.66%.[760]

Staff makes clear that its ROE recommendation is also predicated upon industry-wide ROE trends, the ROE PNM was assigned in its most-recent rate case, and ROEs awarded to other New Mexico investor-owned utilities in recent rate cases.

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[754] Staff Br. at 46.

[755] *Id.* 52.

[756] Staff Exh. 5 (Dunn Dir.) at 35.

[757] *Id.* 36-37.

[758] *Id.* 38.

[759] Staff Br. at 53.

[760] *Id.* 54-55.

Staff pointed to evidence that ROEs for electric utilities have been on a downward trajectory since 1990. This downward trajectory also applies to New-Mexico utility ROE determinations.[761] According to Staff, ROE awards in New Mexico rate cases have also trended downward in the last decade.

Staff also emphasizes the results of commission-authorized ROEs for electric utilities that filed rate cases in 2022. The ROEs awarded in that time ranged from 8.57% to 10.50% with a group average of 9.70%.[762]

Lastly, Staff argues in briefing that SPS, one of the three investor-owned utilities functioning in New Mexico, stipulated to an ROE of 9.5% in Case No. 22-00286-UT.

Most broadly, Staff asserts that "PNM's authorized ROE has been at a comparable level to the ROE[s] of other regulated electric IOUs in" New Mexico.[763] Staff witness Dunn very helpfully compiled the data upon which this claim is based into a succinct chart.

PNM		SPS		EPE	
Case No.	Authorized ROE	Case No.	Authorized ROE	Case No.	Authorized ROE
10-00086-UT	10%	12-00350-UT	9.96%	03606 (2001)	12%
14-00332-UT	10.5%	17-00255-UT	9.4%	03-00302-UT	Unspecified
15-00261-UT	9.575%	19-00170-UT	9.45%	06-00258-UT	Unspecified
16-00276-UT	9.575%	20-00238-UT	(Limited Application) 9.350%	09-00171-UT	Unspecified
				15-00127-UT	9.48%
				20-00104-UT	9%

[761] *Id.* 58.

[762] *Id.* 57.

[763] Staff Exh. 5 (Dunn Dir.) at 45.

8.4.1.5.3. NMAG & County

The NMAG and County supplied independent prefiled witness testimony on the ROE issue. After hearing, they submitted a single brief in which they argued that the Commission should adopt County witness Reno's recommendation that PNM be authorized an ROE of 9.26%. NMAG witness Woolridge initially recommended that the Commission set PNM's ROE at 9.25% but, as noted, adopted witness Reno's recommendation of 9.26% post-hearing.

County witness Reno relied on the same proxy group PNM witness McKenzie utilized to form her recommendations. She was satisfied with his choice of proxy companies.

The results of her DCF analysis are as follows.

TABLE 4. RENO CONSTANT GROWTH DCF RESULTS (MEDIAN RESULTS)

Estimated Return on Equity	**ROE**		
DCF Methodology	30-Day Stock Price	90-Day Stock Price	Average
Constant Growth DCF (EPS Growth)	9.49%	9.52%	
Constant Growth DCF (DPS, EPS and BVPS)	8.51	8.49	
Sustainable Growth DCF	8.75	8.72	
DCF Range (Min. & Max.)[1]	**8.49%**	**9.52%**	**9.01%**

[1] ROE range (minimum and maximum values) for the 30-day and 90-day DCF results.

The stock price utilized in her DCF analyses are both 30 and 90 day averages.[764] As to dividends, she looked at annual dividend per share over the next 12 months divided by the stock price. Reno then applied the growth rate component to capture year-ahead yields.[765] As is obvious

[764] BernCo Exh. 1 (Reno Dir.) at 35.

[765] *Id.* 36.

from the chart immediately above, she then applied both a constant and sustainable growth rate. Reno's DCF range (as can be seen above) is 8.49% to 9.42%.

Apart from their DCF estimate, the NMAG and County make four arguments why their 9.26% ROE should be adopted, and PNM witness McKenzie's 10.25% ROE rejected.

First, they assert that "McKenzie's analysis, ROE results, and recommendations are based on assumptions of higher interest rates and capital costs."[766] The NMAG and County reject this position and argue that "[o]ver the next year, inflation, as measured by the Consumer Price Index, is expected to fall from 3.4% in 2023 to 2.5% in 2024, close to the Federal Open Market Committee's goal of 2.0% inflation." NMAG witness Woolridge persuasively explained in his direct testimony why investors anticipate that interest rates will decline in the near future.[767] There is no need to reproduce all that writing here. The reader can go to the source and review it there.

Second, the NMAG and County contend that PNM witness McKenzie skewed the results of his DCF analysis" by "eliminat[ing] ROE results that he considered 'too low' without also eliminating results that are 'too high.'"[768] They note that, had he not done this, his ROE analysis would have aligned with the NMAG's and County's witnesses' recommendations.[769] PNM witness McKenzie does acknowledge he eliminated certain results from his DCF analysis.[770]

Third, they argue that PNM witness McKenzie wrongly challenges the "primacy of the DCF model in determining [PNM's] ROE and urge[s] the Commission to consider multiple

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[766] NMAG Br. at 39. Note that Bernalillo County and NMAG filed a joint initial brief. It is referred to here as the NMAG initial brief because the NMAG filed that joint document.

[767] NMAG Exh. 3 (Woolridge Dir.) at 10-15.

[768] NMAG Br. at 39.

[769] *Id.* 39-40.

[770] PNM Exh. 11 (McKenzie Dir.) at 39.

financial models."[771] The NMAG and County correctly observe that Commission precedent makes abundantly clear that the DCF model is preferred and that the Commission is "wary of reaching a decision on the ROE" through averages of varying analytic approaches. The Commission stated that averaging varying analytic approaches is "merely a compromise among highly subjective ROEs, each one of which is predictably skewed in the direction favored by the party presenting it."[772]

Fourth, the NMAG and County note that PNM's ROE should reflect the fact that it has structured itself to minimize risk exposure. They support this assertion with the following points.[773]

- PNM is relying on a future test year in this case which enables it to mitigate risk.
- PNM can out-earn its ROE and then must only share extra earnings.
- PNM has a variety of revenue-collection mechanisms—automatic adjustment mechanisms or riders—and this mitigates the risk it faces.

The NMAG and County also take the position that PNM's risk exposure is identical to many other utilities. They note the following:

- PNM faces the same risks as any other utility vis a vis climate change and the energy transition.
- PNM faces the same inflation risks as other utilities.
- PNM has similar business risks as numerous other utilities.
- PNM has similar business risks and a similar credit rating as other utilities.
- PNM's regulatory risk is no greater than many other utilities.

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771 NMAG Br. at 40.

772 *2020 EPE Rate Case Final Order* at 3.

773 NMAG Br. at 41-44.

For these reasons, witness Reno contends that her ROE recommendation of "9.26% is in line with current allowed ROEs issued by regulatory commissions across the country."[774] Given PNM's unremarkable risk profile, it is appropriate that PNM's ROE be consistent with other utilities across the country. She goes on to note that PNM witness "McKenzie's recommended ROE of 10.25% is closer to returns allowed over a decade ago." According to witness Reno, "if the Commission granted Mr. McKenzie's recommended ROE, it would be an extreme outlier relative to the average allowed ROE for electric utilities throughout the U.S."[775]

8.4.1.5.4. Water Authority

The Water Authority proposes that PNM be authorized an ROE of 9.0%. This recommendation is "derived from a legal and technical analysis of the utility's cost of equity" and, according to the Water Authority, "is more than generous when compared with" the Water Authority's conclusion that PNM's actual cost of equity is 7.8% to 8.8%.[776]

The Water Authority notes that the evidence they provided at hearing establishes that "ROE's have declined since 1990."[777]

The focus of the analysis should, the Water Authority claims, "be based on mathematical modeling related to risk" and not on the "unrelated" concern of "what an investor expects a commission awarded ROE to be."

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[774] NMAG Exh. 1 (Crane Dir.) at 62.

[775] BernCo Exh. 1 (Reno Dir.) at 51.

[776] Water Authority Br. at 35.

[777] *Id.* 36.

Witness D. Garrett performed a variety of analyses to reach his 7.8% to 8.8% range. His results are captured in a graphic supplied with his direct testimony which is reproduced immediately below.

Figure 1:
Cost of Equity Model Summary

Model	Cost of Equity
CAPM (at Proxy Debt Ratio)	8.8%
Hamada CAPM (at Company-Proposed Debt Ratio)	8.3%
DCF Model (Analyst Growth)	7.9%
DCF Model (Sustainable Growth)	7.8%
Average	**8.2%**
Range	**7.8% - 8.8%**

Witness D. Garrett's analyses were predicated upon the same proxy group identified by PNM witness McKenzie.[778] For the stock price, witness D. Garett used 30-day averages of stock prices for each company in proxy group. For the dividend, he utilized forward looking annualized dividends. According to witness D. Garrett, there is "no statistically significant difference" between his stock and dividend inputs and those used by PNM witness McKenzie.[779]

Witness D. Garrett utilized a sustainable-growth rate, the projected long term GDP growth. His results are predicated upon what he believes to be an irrefutable truth: "the long-term growth

[778] Water Authority Exh. 2 (D. Garrett Dir.) at 21.

[779] *Id.* 33.

rate of a domestic firm cannot outpace the growth rate of the aggregate economy in which it operates . . . ."[780]

His analyst growth rate is the "projected short-term dividend growth rate estimates published by Value Line."

Witness D. Garrett made effort to explain the differences between the analyst and sustainable growth models. The analyst growth model relies on "short term projections of earnings growth published by institutional research analysts . . . ."[781] Witness D. Garrett's sustainable growth rate model involves assessment of real and nominal GDP growth and load and customer growth on PNM's system.[782]

His DCF range is 7.8% and 7.9%.[783]

According to witness D. Garrett, PNM witness McKenzie's DCF analysis is fundamentally flawed because it relies "exclusively" on "short term, quantitative growth estimates published by analysts." This, according to witness D. Garrett, injects unreasonably high and unsustainable growth rates into the DCF analysis.[784] Witness D. Garrett provides an example.

He notes that PNM witness McKenzie assigned one proxy-group company a 9.0% growth rate.[785] This means that witness McKenzie accepts that the company's "earnings will quantitatively increase by 9.05% each year over the next several years." In witness D. Garrett's view, "this assumption is simply not realistic . . . ." According to D. Garrett, this error occurs

[780] *Id.* 40.

[781] *Id.* 35.

[782] *Id.* 38-39.

[783] *Id.* 41.

[784] *Id.* 46-47.

[785] *Id.* 47.

several times in witness McKenzie's DCF analysis and, for that reason, results in a "generally overstated" DCF cost-of-equity estimate.

According to the water authority, witness McKenzie makes a similar error in calculating his CAPM estimate.[786]

Additionally, the Water Authority contends that witness McKenzie's equity risk premium "is significantly higher than the average [equity risk premium] estimated by thousands of other experts around the country."[787]

8.4.1.5.5. NEE

NEE asks the Commission to authorize PNM an 8.9% ROE.[788] NEE contends that an 8.9% ROE is "reasonable, not punishment."[789]

NEE's recommendation is not based upon the application of the DCF, CAPM, Utility Risk Premium, or Expected Earnings methodologies. NEE witness Sandberg instead predicates his recommendation on PNM's current and projected "level of risk protection."

NEE explains that "PNM has organized itself in such a way that it can deflect risk through automatic adjustment riders, requests for regulatory assets, and a whole host of other mechanisms (trackers, automatic adjustment clauses) that reduce the Company's risk exposure . . . ."[790] For this reason, NEE contends, "it is appropriate to also reduce [PNM's] ROE, because the overall risk assumption by the Company has actually declined."

[786] Water Authority Br. at 37.

[787] Water Authority Br. at 37.

[788] NEE Br. at 100.

[789] *Id.* 101.

[790] NEE Br. at 103.

NEE witness Sandberg contends that that thirty-one percent of PNM's revenue will come from riders. This enables PNM to "insulate" itself from risk in that it has sources of guaranteed revenue.[791]

Witness Sandberg offers several graphics that show PNM's annual rider revenue in proportion to PNM's total revenues.[792] Sandberg clarifies that he is no way proposing elimination of riders or critiquing this revenue-collection mechanism; rather, his point is that PNM's ROE must reflect the risk-reduction mechanisms the company has implemented.[793]

8.4.1.6. HE Analysis of ROE

The Commission should, as it has, rely on the constant growth DCF method to set PNM's ROE. As was noted earlier, the New Mexico Supreme Court very recently instructed the Commission to adhere to precedent when deciding meaningful discretionary matters and made clear that the Commission must provide meaningful process when departing from past practice. This is a sensible rule that has obvious implication here.

Many of the intervenors—Staff included—focused their ROE analyses on the constant growth DCF method. This is understandable as the Commission has for decades relied on this method. To change practice without a process that would have alerted the intervenors (like Staff) well in advance of hearing that the Commission intended to change practice would raise due process problems. For this reason, PNM's contention that "FERC and other state regulatory commissions have recognized the potential for any application of the DCF model to produce unreliable results" is unpersuasive.

[791] NEE Exh. 1 (Sandberg Dir.) at 68-71.

[792] *Id.* 69-71.

[793] *Id.* 72.

PNM is correct that "[t]here are numerous other methods for estimating the cost of capital and the ranges produced by the different approaches can vary widely." This is uncontroversial.

What would be controversial and problematic would be to decide these numerous other methods will be the touchstone for Commission analysis without having made clear (prior to hearing) that this is what the Commission intends. Several parties to this case (understandably) designed their evidentiary presentation on ROE based on Commission precedent on ROE. The Commission is without authority to pull the proverbial "rug" from under their feet.

Additionally, as was the case in the *2020 EPE Rate Case*, there is not "sufficient justification [for the Commission] to depart from Commission precedent indicating that the results of the Constant Growth DCF method should be used to determine a reasonable range of ROEs in this case."

Staff is correct that the other empirical ROE methodologies should function at most as a check on the constant growth DCF methodology.

The other concerns identified by several intervenors—PNM's capacity to insulate itself from risk through automatic adjustment mechanisms, ROE trends in New Mexico rate cases, PNM's historically approved ROEs, and the other considerations mentioned in the summation of the parties' positions above—should factor into the assessment of the cost of PNM's equity investment. The Commission made clear in the *2020 EPE Rate Case* and many earlier cases that these considerations do have impact.

8.4.1.6.1. Preliminary Conclusions

It is possible to identify and dispose of certain problematic analytical steps in the parties' ROE analyses and proposals.

Water Authority witness D. Garrett's DCF analysis limited long-term growth to projected U.S. GDP growth.[794] In past cases, the Commission has not accepted this limitation. The Commission explained that it "believes the better approach . . . is to proceed with [the] time-tested practice of using the traditional DCF model, without the use of a nominal GDP growth factor, to determine the return on equity."[795] Witness D. Garrett's 7.8% recommendation is premised on a GDP-growth limitation the Commission rejected. The 7.8% recommendation will not be incorporated into the HE's analysis.

Staff used a proxy group consisting of six companies.[796] Utilizing a small proxy group has potential for downside consequence. "[T]the small size of the . . . peer group renders it vulnerable to anomalous events associated with any one of the companies in the narrow group."[797] Put more simply, the smaller the proxy group the larger any aberration will distort the overall picture. This is a logical and coherent thought.

This is not to say that Staff's attempt at limiting the proxy group to the companies *most* like PNM is without coherence or legitimacy. To the contrary, it is an understandable analytic move. It is, however, inconsistent with Commission practice.

Additionally, the value derived from use of a larger proxy group cannot be ignored. The Commission has previously explained that "it is not necessary that each utility in the group share the exact same or even substantially identical risk characteristics as the utility in question."[798]

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[794] Water Authority Br. at 37.

[795] *2007 SPS Rate Case Corrected RD* at 58.

[796] Staff Br. at 46.

[797] *2015 PNM Rate Case Corrected RD* at 39.

[798] *Id.* 40.

What is more crucial is that the "group as a whole be risk comparable to th[e] utility" applicant. "This is because the results for the proxy group stem from an average of that group and will not be distorted if more or less risky members of the group cancel each other out." In other words, a greater number of companies is conducive to a more reliable average.

At one point or another, all the parties reference nationwide ROE trends and make arguments about what impact those trends should have in this case. The Commission has previously explained that "the Commission's decision should not be determined by the returns granted elsewhere, but must be determined relying on the Commission's expert judgment and guided by the record evidence in the case."[799] Nationwide trends in ROE are relevant as a check on the results of the constant-growth DCF. The trends are not independent grounds for setting PNM's ROE.

PNM witness McKenzie provided a DCF estimate based on a proxy group of companies that are not utilities.[800] The results of that analysis ranged from 10.6% to 11.2%. This analysis is unpersuasive as "[t]his Commission has consistently restricted proxy group companies to utilities."[801] The 10.%6 to 11.2% DCF estimate for the non-utility proxy group will not factor into the HEs' analysis.

With these preliminary determinations behind us, we turn to the necessary analysis.

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[799] *2020 EPE Rate Case RD* at 76 (quoting Case No. 06-00710-UT, *Final Order*, at 7 ¶ 15 (06/29/07) ("This Commission should follow its practice of authorizing an ROE . . . based on the evidence in this case, not authorized returns nationwide.").

[800] PNM Exh. 11 (McKenzie Dir.) at 56-60.

[801] *2020 EPE Rate Case RD* at 52.

8.4.1.6.2. Proxy Group

The parties to rate cases generally do not agree about what companies belong in the proxy group in the DCF analysis.[802] That is not the case here.

NM AREA, the County, and the Water Authority used the same proxy group PNM witness McKenzie utilized. The NMAG used almost the same group of companies, and it is important to recall that the NMAG and County are aligned on ROE post-hearing. Staff used companies that PNM identified just far fewer of them.

The proxy group proposed by PNM witness McKenzie is appropriate.

8.4.1.6.3. DCF Inputs

In the Commission's most recent electric-utility rate case, the Commission stated that the authorized ROE should be set considering the Constant Growth DCF method with the following inputs:

- A 30-day average trading period to determine stock price
- A full year's growth to adjust dividend yield; and
- Analyst growth rates from Value Line, Zacks and First Call.

The HEs are persuaded that County witness Reno has most closely followed this guidance and the results of her DCF analysis are credited. This is not to say that her analysis is correct while all others are wrong. As was made clear earlier, setting the ROR and ROE is not something amenable to binary analysis. Rather, the HE is only saying that her analysis is consistent with Commission guidance and points toward what the HE perceives to be the most-correct answer based on accepted analytic criteria.

[802] *See id.*

8.4.1.6.4. County Witness Reno's Testimony is Persuasive

County witness Reno's analysis focused on expected year-ahead dividend yields.[803] The dividend yield in her DCF analysis "is the annual dividend per share over the next 12 months, divided by the stock price average for different historical periods ended May 31, 2023. She states that she calculated "the dividend yields using the 30-day average of closing stock prices" and also used "a 90-day average of closing stock prices for capturing longer market trends."

The analyst services she utilized to set the growth rate include Value Line, Yahoo Finance, Zacks, and CNN Money. She explains why these specific services were selected.

She states that "[t]he Yahoo Finance, Zacks, and CNN Money websites, which are publicly available, report results incorporating forward-looking surveys of securities analysts' EPS projections." She notes that "Value Line, in contrast, uses a historical base period average value for 2019-2021 and a forecast of 2026-2028 to calculate its growth rates, and it is not a survey."

Witness Reno's DCF analysis yielded the following conclusions.

Summary			
DCF-Based ROE Average			9.01
DCF-CAPM-Based ROE Average			9.22
	Min	**Max**	**Midpoint**
ROE Range	9.01	9.52	9.26
Recommended ROE (%)			**9.26**

As the graphic above makes clear, her constant growth DCF range is 9.01% to 9.52%. The midpoint of that range is 9.26%. It is understandable that witness Reno recommends the Commission adopt a figure in the middle of her range.

[803] BernCo Exh. 1 (Reno Dir.) at 36.

"To determine the ROE, as the Commission has stated in past cases, it may take the averages of various growth rates when, in the Commission's judgment, the use of averages is appropriate to determine the ROE in a case."[804] The Commission may also "mix and match testimony and evidence to set a reasonable return that is not a figure any single witness recommends."

County witness Reno points out that if PNM witness McKenzie's own DCF analyses are averaged, this leads to a conclusion different than his final DCF recommendation. She notes that PNM witness McKenzie's "DCF model using Value Line EPS growth rates yield an average ROE of 8.8%, and his DCF analysis using Zacks growth rates derive an average ROE of 9.1%." She notes further that "the average of all his DCF results is 9.1%, but only one of his DCF derived results, which uses IBES EPS growth, of 10.2% meets his cost of equity range of 10.0% to 11.3%."[805]

These are all persuasive observations.

8.4.1.6.5. PNM's Objections to Reno

PNM objects to County witness Reno's ROE recommendation and will surely object to the Hearing Examiner's recommendation that it be credited. Those objections are addressed here.

First, PNM contends that at a basic and intuitive level, there are no legitimate grounds to reduce PNM's ROE at this time. The company writes that, "[d]espite the evidence documenting an increase in capital costs, each of the opposing witnesses is recommending a reduction in PNM's authorized ROE."[806] PNM contends that this is inexplicable. "There is no basis," the company

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[804] *2007 SPS Rate Case Corrected RD* at 66.

[805] County Exh. 1 (Reno Dir.) at 40.

[806] PNM Br. at 37.

writes, "to reduce PNM's ROE when other capital costs have increased significantly." The company points to its existing ROE of 9.575% and argues that, if this "was a fair ROE for PNM in December 2017, the just and reasonable ROE under current conditions is now higher—not lower."

This argument ignores the position outlined by NMAG witness Woolridge. He notes that public utilities "have taken advantage of the low interest rate and capital cost environment of recent years and raised record amounts of capital in the markets."[807] Inflation has contributed to cost increases, but this has been recent and sudden.[808] Inflation and interest rate increases are expected to decline and there is a possibility of a recession.

For these reasons, it is erroneous to point to present macro-economic conditions as support for the assertion that utilities authorized ROEs must now be more than they were several years ago when PNM last filed a rate case. Witness Woolridge notes that utility authorized ROEs did not decline as quickly as did interest rates and further notes that the trend in authorized ROEs has been downward with only a minimal increase in average authorized ROEs in 2022.[809] These are persuasive answers to PNM's first objection to the County and witness Reno's analysis.

Second, PNM objects that County witness Reno's empirical analysis "ignores the results of her CAPM and ECAPM analyses." PNM claims that her "sole reliance on the DCF approach is a significant shortcoming in her analysis." This argument is rejected. As was discussed in preceding sections of this RD, the Commission has instructed parties to rely on the DCF method in just the fashion witness Reno has. The Commission is free to privilege one method or another

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[807] NMAG Exh. 3 (Woolridge Dir.) at 11.

[808] *Id.* 17.

[809] *Id.* 19-20.

on policy grounds and is, as our Supreme Court recently reminded us, obligated to abide by policy judgments expressed in precedent as parties appearing before the Commission will rely on precedent to craft their evidentiary presentations. There are due process considerations underlying this proposition.

PNM next argues that witness Reno has utilized averages in a way that skews her DCF results downwards. This is unpersuasive.

Witness Reno's principal critique of PNM witness McKenzie's DCF analysis is that he has massaged data that skews his DCF results upward. NMAG Woolridge made this same point. He contends that witness McKenzie engaged in "asymmetric elimination of low-end DCF results" to distort his DCF ROEs.

The varying experts that appear in a rate case and provide testimony on ROE and ROR will invariably emphasize different data that drives the ROE one way or another. This is why the Commission has long recognized that setting an ROE in a rate case is a "subjective" endeavor that produces only a zone of reasonableness. The assertion that witness Reno's testimony on ROE is not credible because her inputs are biased is a claim that can be lobbed at any ROE witness in this case. It is not a persuasive assertion.

8.4.1.6.6. Additional Concerns Bearing on HEs' Proposed ROE

Application of the constant growth DCF method will produce a range. In this case, County witness Reno, whose testimony should be credited, reached a range of 9.01% to 9.52%.

The question becomes how is the Commission to resolve where in this range the appropriate authorized ROE lies? Commission precedent identifies "[s]everal considerations."

One consideration is whether the applicant utility is a riskier investment compared to the proxy group average. Resolution of this question turns on comparative assessment of credit ratings and other criteria.[810]

According to PNM, "[t]he average S&P credit rating corresponding to the Utility Group is slightly higher than PNM's ratings, indicating somewhat less risk for the Utility Group compared to PNM."[811] In other words, PNM witness McKenzie believes PNM is a riskier investment than companies in the utility proxy group. The intervenors' experts persuasively rebut this claim.

It is unnecessary and needlessly redundant to point to each instance where an intervenor witness offered evidence rebutting PNM's claim that it is a greater investment risk.[812] There is abundant testimony from several intervenor witnesses on this subject. Here, witness Reno and witness Sandberg's testimony is used to show how PNM's claims fail. Convenience and efficiency of presentation drive the decision to use just these two witnesses' testimony for this purpose.

Witness Reno argues that "PNM does not face greater financial risk than the proxy group because it has similar issuer credit ratings to the proxy group."[813] She further notes that "PNM's most recent published credit rating reports state that the 'outlook' for PNM from Moody's is 'stable' and from S&P is 'positive.'" She explains further that "current inflation[ary] trends are shared by all regulated utilities and, as a result, are reflected in [her]proxy group's calculated costs of equity."

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[810] *2020 EPE Rate Case RD* at 79.

[811] PNM Exh. 11 (McKenzie Dir.) at 11.

[812] For instance, NEE witness Sandberg discusses these and additional ways in which PNM has reduced business risk. What he says need not be repeated here and is summarized in the section of writing above where NEE's ROE position is outlined.

[813] BernCo Exh. 1 (Reno Dir.) at 29.

As to business risk, witness Reno persuasively contends that PNM faces the same risk as any other utility. She claims that any heightened business risk PNM faces is the result of PNM's managements' own actions and decisions. Witness Reno points to several concrete examples including the circumstances surrounding the abandonment of the SJGS units 1 and 4 and the rate credit, PNM's decision to wait many years to file a rate case, and the circumstances surrounding abandonment of the PVNGS leases and the litigation concerning the regulatory asset and liability stemming from that decision. She correctly points out that no utility should be authorized an increased ROE because mismanagement demands that outcome. This would create an undesirable cycle of incentives.

Witness Reno also notes that PNM has recently out-earned its authorized ROE. The point of this observation appears to be that it is difficult to credit PNM's claim that it requires an increase in ROE to attract necessary investment if it is having no difficulty attracting capital under present levels and is, in fact, earning above its authorized ROE.

Witness Reno also points out that recent New Mexico legislation greatly assists PNM's capacity to mitigate risk. She explains that the ETA allows PNM to recover "AAA-rated securitized bonds' and debt service charges via a non-by-passable charge to customers . . . ." More simply, PNM will be able to abandon legacy coal plants and have guaranteed recovery of the costs. In a similar vein, witness Reno points out that PNM has arranged its revenue collection so that riders and automatic adjustment mechanisms insulate PNM from risk.

She also correctly observes that PNM's current rate-revision application is predicated upon a future test year which allows PNM to mitigate risk. She explains that a "future test year allows a utility to forecast costs forward into the first full year when the proposed new rates will be in effect so that rates can be matched to costs." In other words, PNM benefits from the flexibility of

the future test year with regards to cost prediction. Whether those come to be or not is a separate matter altogether. She further notes that a future test year "also narrows regulatory lag, which is the time between when a utility incurs costs and when it recovers cost through rates."[814]

PNM's rejoinder to all of these claims is that authorizing it an ROE that is less than appropriate drives up costs which will ultimately be paid for by ratepayers. This is a legitimate response, but it is not one that should drive the outcome here given that PNM has just earned beyond its authorized ROE. At present, the Commission should be less concerned with the company's ability to attract equity investment (it seems to be having no problem there) and more concerned with the company's ability to minimize costs to ratepayers who are coping with inflation and cost increases and do not have the same tools a regulated utility does to adjust to those circumstances. That is the appropriate balance of ratepayer and shareholder interests at this time.

8.4.1.7. Proposed Recommendation on ROE

An ROE of 9.26% is fair and reasonable. In fact, setting PNM's ROE at 9.26% authorizes PNM a return above the average of the figures produced by PNM's own expert's DCF analyses. Averaging the four DCF results witness McKenzie offers (8.8%, 10.2%, 9.1%, and 8.5%) leads to an outcome of 9.15%. PNM cannot legitimately protest an outcome, 9.26%, that is above the average of its witness's own analysis.

8.4.2. Cost of Debt

PNM Proposes that its cost of debt be set at 3.72%. The request incorporates the company's projections for coming debt issuances. No party objects to this proposal.

[814] BernCo Exh. 1 (Reno Dir.) at 32-33.

Staff recommends that the Commission update PNM's cost of debt after the company completes any debt issuances. PNM opposes this recommendation and argues that it is not appropriate to change "a single assumption for the forecasted [t]est [p]eriod, as there may be offsetting changes in other costs."

There are many issues to address in PNM's cost of service. Staff's recommendation regarding the company's cost of debt is just one more additional issue. It should be rejected.

8.4.3. Capital Structure

"Capital structure is the relationship between a company's debt and equity. It influences overall cost of capital because capital is more expensive than debt."[815] A utility's capital structure can be undisputed.[816] That is not the case here. What capital structure the Commission should authorize for PNM is vigorously disputed.

8.4.3.1. PNM proposal

The company cites to the testimony of PNM witness Greinel to illuminate what PNM perceives as the broad concerns at stake. She explains that "[a] properly balanced utility capital structure is one that is comprised of debt and equity in proportions that are balanced to minimize the long-term, after-tax cost of capital for the benefit of customers."[817]

PNM asserts that it "has maintained a capital structure of approximately 48% debt and 52% equity to support its capital expenditure program that includes the energy transition." The company asks the Commission to authorize "a capital structure of 47.72% long-term debt, 0.29% preferred stock, and 52.00% common equity . . . ."

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815 *2015 PNM Rate Case Corrected RD* at 30.

816 *2007 SPS Rate Case Corrected RD* at 73.

817 PNM Br. at 22.

PNM witness Greinel reports on PNM's actual, current capital structure. She explains that "PNM increased its equity ratio to approximately 52% beginning in 2020 to support PNM's capital expenditure program" and adds that "PNM's actual capital structure as of June 30, 2022, consisted of 47.62% long-term debt, 0.31% preferred stock, and 52.07% common equity."

PNM then cites to witness McKenzie's testimony and asserts that he "independently analyzed PNM's proposed capital structure" beginning with an examination of the capital structure of the utilities in his proxy group. Witness McKenzie "found that common equity ratios . . . ranged from 39.7% to 60.5% and averaged 51.0%." He concludes that PNM's proposed capital structure of 52% common equity "falls within the range of capital structures approved for other electric utilities."

8.4.3.2. Staff

Staff emphasizes the importance of correctly setting a utility's capital structure and observes that "[w]eighting the capital structure too heavily in favor of either equity or debt can have detrimental impacts for both the Company and its customers."[818] Staff explains that, if a utility's operations rely too heavily on equity investment, this "can result in higher costs for [the company] and ultimately for the Company's customers." On the other hand, "while debt financing can provide benefits relative to equity in the form of lower financing costs and reduced tax burdens, carrying too much debt can lead" investors and the credit rating agencies to perceive a utility as more risk intensive.

Staff's capital-structure witness examined "data from S&P Capital IQ, rate case decisions for vertically integrated utilities decided between 2021-2023" and found that "authorized capital

[818] Staff Br. at 38.

structures rang[ed] from a low of 37.75% equity to a high of 58.22% equity, with a median of approximately 52% and an average of approximately 49%."[819]

Ultimately, Staff concluded that PNM's proposed 52% equity ratio "is within the range established by . . . recent rate case decisions for vertically integrated utilities in the US and does not excessively favor equity or debt financing."

8.4.3.3. The NMAG and the County

The NMAG, the County, and NM AREA all recommend that PNM's capital structure be set at 49.61% equity.[820] The focus of the discussion here is on the NMAG's and the County's joint position. NM AREA's arguments in support of the position are discussed in the subsequent section of writing.

The NMAG initially accepted PNM's proposed 52% equity proposal but changed positions after hearing. PNM's initial brief claims, wrongly, that the NMAG accepts PNM's proposed capital structure. This is incorrect.

The NMAG and County's joint brief argues that the Commission's previous determinations on PNM's capital structure should have bearing here. The NMAG and County note that in Case No. 15-00261-UT the Commission set PNM's equity ratio at 49.61% and that this ratio was maintained in the stipulation in Case No. 16-00276-UT.[821] The point of this observation is, presumably, that preserving the status quo is uncontroversial and necessarily principled as the status quo is itself predicated on judgment tested by time.

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[819] *Id.* 39.

[820] NMAG Br. at 35-36; NM AREA Br. at 20.

[821] NMAG Br. at 36.

The County and NMAG also contend that a 49.61% equity ratio is appropriate as evidence was supplied at hearing that "PNM recently reported an equity ratio of 49.31%[.]" Specifically, the NMAG and County note that NM AREA witness Walters provided testimony that "the Company's currently authorized equity ratio[,]" the ratio set in PNM's two previous rate cases, "is consistent with its most recently reported equity ratio over the last several quarters." Walters states that "at March 31, 2023, PNM's FERC-reported equity ratio was 49.31%."[822]

The NMAG and County also argue that PNM's 52% equity-ratio proposal is wrong for several reasons. They claim that PNM's 52% ratio "is inconsistent with the annual average equity ratios approved by regulatory commissions for regulated electric utilities since 2018, which are in the range of 49% to 50%" and inconsistent "with the average equity ratio approved by public utility commissions for regulated electric utilities in 2022 which was 50.36% and Q1 2023 which was 49.36%.[823] It is worth noting that the NMAG's and County's reference to a settling point within a range is appropriate as PNM witness McKenzie himself recognized that setting a capital structure necessarily involves finding an appropriate point within a range.

The NMAG and County also argue that PNM's 52% equity ratio request is inconsistent with the equity ratio of PNM's parent company and that this is significant and should persuade the Commission to reject PNM's 52% equity-ratio proposal.[824]

Lastly, the NMAG and County contend that approving PNM's 52% equity ratio would place an undue burden on PNM's ratepayers. They explain that "[a]s the equity ratio increases,

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[822] NM AREA Exh. 5 (Walters Dir.) at 34.

[823] NMAG Br. at 36.

[824] *Id.* 36-37.

the utility's revenue requirements increase, and the rates paid by customers increase."[825] This latter point is uncontested and one that PNM witness Greinel acknowledges (albeit at a high level and in a very generalized way) in her testimony.[826]

8.4.3.4. NM AREA

NM AREA's factual arguments are nearly identical to those advanced by the County and the NMAG. NM AREA asserts that the PNM has failed provide sufficient justification to allow the Commission to increase the company's currently authorized capital structure.[827]

NM AREA asserts that "PNM's proposed equity ratio of 52.0% significantly exceeds the equity ratio for the proxy group used to estimate the cost of equity for PNM." NM AREA points out that "the proxy group has an average common equity ratio of 41.0% (including short term debt) and 44.6% (excluding short-term debt)."

As noted above, NM AREA's witness Walters observed and reported that PNM's FERC-reported equity ratio was 49.31% as of March 31, 2023.

8.4.3.5. HE Analysis of Capital Structure

In a recent Commission rate case, the hearing examiner noted that "[i]n approving utilities' capital structures, the Commission has relied on a utility's actual capital structure at the end of the T[est]Y[ear]P[eriod]."[828] This case is based on a future test year, and it is unclear how this pronouncement should guide the present case.

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[825] *Id.* 37.

[826] PNM Exh. 13 (Greinel Dir.) at 9 ("A properly balanced utility capital structure is one that is comprised of debt and equity in proportions that are balanced to minimize the long-term after-tax cost of capital for the benefit of customers.").

[827] NM AREA Br. at 20.

[828] *2020 EPE Rate Case RD* at 35.

It is undeniably significant that three intervenors are here advocating that the Commission leave PNM's capital structure as it is. PNM contends that these parties' proposed equity ratio should not be credited as they are predicated upon erroneous data. Specifically, PNM contends that data underlying the calculation does not produce an "apples-apples comparison" and that PNM has supplied the Commission "more appropriate data" that supports PNM's proposed equity ratio.

To the extent PNM is arguing that three intervenors and their experts have all erred in identifying PNM's most recent equity ratio, this argument is not credible. To the extent PNM is arguing that its data is superior, this claim is rejected.

PNM argues that one shortcoming of the position of those intervenors who argue against PNM's proposed 52% equity ratio is this: deviating from this ratio downward does not take into account PNM's risk profile. PNM argues that credit rating agencies have "assigned PNM a credit rating that is only two notches above speculative-grade" and that "other utilities with similar capital structures to PNM enjoy higher credit ratings because, on balance, investors consider them less risky." This is offered as justification for PNM's greater equity ratio proposal.

In the course of the discussion of what ROE PNM should be authorized, there was discussion about the varying ways PNM has insulated itself from risk. Intervenors in this case have persuasively shown that PNM has organized itself to mitigate risk considerably. As PNM itself acknowledges that a utility's risk profile should play a role in setting the capital structure, it must necessarily accept that the Commission's assessment of its risk profile has consequence here. The Commission should find that the facts here cut against PNM. PNM's risk profile merits a decrease in the equity ratio. About this, the intervenors are correct.

In this case, the intervenors have the better argument. PNM's risk profile merits a decrease in the equity ratio. By leaving PNM's authorized capital structure alone – not adjusting it from

what it was set at in Case No. 15-00261-UT and by stipulation in Case No. 16-00276-UT – PNM's capital structure is fairly if not generously set.

8.4.3.6. Recommended Capital Structure

The Commission should authorize PNM a capital structure of 49.61% equity, 50.10% debt, and 0.29% preferred stock.[829]

8.4.4. Recommended Test Period WACC

Applying the Hearing Examiners' recommended return on equity of 9.26%, their recommended components of capital structure, and PNM's cost of long-term debt results in the following test period overall capital structure:[830]

Capital Component	Total Capitalization Test Period	Percentage of Total Capitalization	Component Cost	Weighted Average Cost
Long Term Debt	1,929,345	50.10%	3.72%	1.86%
Preferred Stock	11,529	0.29%	4.62%	0.01%
Common Equity	2,102,333	49.61%	9.26%	4.59%
Total	4,043,207	100%		**6.47%**

The allowed rate of return for ratemaking purposes, also known as the overall rate of return, is the weighted average cost of capital (WACC). PNM's allowed rate of return is 6.47%.

[829] Note that this recommendation on preferred stock assumes that it is a variable not subject to change, and that it remains constant at 0.29% while only equity and debt are adjusted upward or downward. If this assumption is incorrect, the parties may address this in post-recommended decision briefing.

[830] *See* Appendix F (Summary of Total Capitalization and Weighted Average Cost of Capital).

8.5. Cost of Service Adjustments

8.5.1. Net Plant in Service

8.5.1.1. PNM Proposal

PNM calculated a thirteen-month average of the monthly net plant in-service balances (from December 2023 through December 2024) to develop the rate base amount included in the test period.[831] PNM witness Sanders produced this table which shows projected net plant in service.

PNM Table KTS-7
Summary of Capital clearings July 2022 through December 2024

Category	Documented Projects	Projects < $25,000	Total
Corporate	$ 125,264,048	$ 19,354	$ 125,283,403
Distribution	497,212,278	156,793	497,369,071
Generation	180,570,646	80,078	180,650,724
Transmission	502,318,531	76,522	502,395,054
Total	**$ 1,305,365,503**	**$ 332,747**	**$ 1,305,698,251**

Additional information about the justification for PNM's net plant in service proposal is presented in the HEs' analysis below.

8.5.1.2. Intervenors' Objections

NMAG witness Crane proposes a $79.1 million reduction to PNM's projected net plant-in-service balance.[832] Similarly, Water Authority witness M. Garrett recommends that the Commission reduce rate base by $90.3 million to reflect what he calculates to be PNM's over-projection.[833] Each of these positions is addressed in more detail below.

[831] PNM Br. at 70-71.

[832] *Id.* 71. Note that the HE here relied on PNM's summary of the total consequence of NMAG witness Crane's proposed adjustment. It was difficult to find a total figure to attach to her recommendations.

[833] *Id.* Note that the same comment as made immediately above also applies here.

8.5.1.3. NMAG

The NMAG argues that the Commission should adjust PNM's plant-in-service projections for the FTY to reflect the shortfall in the Company's actual monthly utility plant in service through March 2023.[834] To quote witness Crane directly, she explains that "PNM provided actual monthly projected utility plant-in-service balances" in response to NMAG discovery requests, and the information supplied "shows that the Company's net plant was approximately $90.6 million below projections at March 31, 2023 on a total Company basis."[835]

The NMAG acknowledges that there are a variety of understandable reasons why PNM may be hindered in adding plant at the rate anticipated. The NMAG writes that "[s]upply chain issues, operational resource issues, financial constraints, weather, permitting delays and general economic conditions are all factors that can, and recently have, influenced the timing of project completion."[836]

In other words, the NMAG and witness Crane take the position that the FTY projections should reflect the pace at which PNM *actually* added plant in the runup to the FTY. Past experience should guide future projection. In the NMAG's view, this adjustment is necessary because "even if the Commission rejects the specific calculation proposed by the Attorney General, the Commission needs to determine some way to evaluate a utility's projects for plant additions during a Future Test Year."[837] If this is not done, then there is "no critical review of millions of dollars

[834] NMAG Br. at 71.

[835] NMAG Exh. 1 (Crane Dir.) at 21.

[836] NMAG Br. at 70.

[837] *Id.* 72.

for projected plant additions that may in fact, never be incurred, or which will not provide service to ratepayers during the Future Test Year." This is a valid and important point.

NMAG witness Crane limited her adjustment to the shortfalls in transmission, distribution, and general plant. She made no adjustment to PNM's projected production plant given that investment in production is "lumpy." And, she made no adjustment to corporate plant as PNM's actual investment there lined up with projections.

8.5.1.4. Water Authority

Water Authority witness M. Garrett made suggestions like the NMAG's with regard to plant in service projections. His explanation of the problem and justification for the adjustment are helpful.

Witness M. Garrett notes what witness Crane does: there is a disconnect between recent actual clearings and projected clearings. He puts the point this way:

> PNM included an increase of $866 million in projected plant additions from the end of the base period, June 30, 2022, through the end of the test period, December 31, 2024, however, the data available for the period July 2022 through March 2023 indicates that net plant additions are much less than PNM had forecasted.[838]

Witness M. Garrett identifies the difference between actual and forecasted in the period of time that just passed. He notes that "PNM projected an increase in plant balances of $116.2 million for that 9-month period, but the actual data shows an increase of only $30.1 million." This is, self-evidently, a significant difference.

Witness M. Garrett notes further that "PNM similarly underestimated the increase in accumulated depreciation for these nine months, with projections of a $30.2 million increase compared to the actual increase of $34.5 million."

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[838] Water Authority Exh. 1 (M. Garrett Dir.) at 54.

Witness M. Garrett then identifies the impact of both items discussed immediately above. He explains that "[t]ogether[,] these changes show that the PNM net plant increased $90.3 million less than projected during this period." This is substantial, and witness M. Garrett helpfully demonstrates how much so.

The difference, he explains, "results in an error rate of more than $10 million dollars per month." He explains further that "[i]f that projection error rate continues through the end of the test year, then the test period ending net plant balance would be overstated by $300 million, or $240 million based on an average accumulated error during the test period."

8.5.1.5. HE Analysis

PNM's answer to the NMAG and the Water Authority is that witnesses Crane and M. Garrett have no factual basis to question PNM's plant projections and are, in fact, engaged in speculation.

PNM contends that company witness Sanders showed conclusively that neither witness Crane nor Garrett could demonstrate "why they believe variances would be carried forward into the Test Period."[839] In Sanders' view, both intervenor witnesses wrongly rely on data from a single point in time to project outward. This is wrong, Sanders contends.

He writes that it is error to assume that "PNM's actual plant balances should currently match what is being projected in the linkage data and Test Period." He adds that "[b]oth witnesses rely on variances to plant in service at a single point in time to justify their plant in service adjustments." PNM then notes how problematic this is by referencing a specific example: the Manzanita project.

[839] PNM Br. at 71.

Witness Sanders utilizes this project and the project delays occurring there that led to less plant in service clearing than anticipated by a certain time to illustrate that a significant and specific shortfall in discrete plant-additions can, if allowed to stand-in for broader trends, wrongly skew projections.

PNM also contends that actual plant-in-service balances rarely match projections and that NMAG witness Crane is well aware of this fact.

The company also asserts that "its most recent quarterly reforecast" supplied in rebuttal testimony "reflects that the clearings will be caught up by the end of 2023." In fact, PNM reports that it "now expects to have a higher-level of clearings by the end of 2023 than was reflected in the linkage data" and it "has recently increased its capital forecast above the amounts requested in this proceeding." This response is comprehensible but is not persuasive.

The basic point the intervenor witnesses are making is that there is factual support (recent data) underlying their assessment that PNM overstates the amount of plant that will be added to rate base. Their point is simply that PNM's view is overly optimistic. They have concrete evidence to support this claim. This is a coherent and fact-based assertion.

PNM's answers—(1) a single point in time cannot be predictive of the future, (2) it is unremarkable that intervenors identified shortfalls in expected plant clearings as this is routine and normal, (3) PNM's data should assure the Commission its projections are accurate—are not persuasive.

At the core of the parties' disagreement is an immutable fact: FTYs involve projections the merits of which cannot be empirically proved or guaranteed. The intervenors' position is that recent experience indicates that PNM has an overly optimistic view of future plant clearings. PNM's response in part asks the Commission to credit that optimism not because there is certainty

projections will be borne out, but that PNM is confident in its own projections and has data that purportedly disproves the intervenors' position. The intervenors' position is the better one.

PNM also contends that the Commission should reject the NMAG and Water Authority's reductions to projected net plant because a similar argument was made in Case No. 15-00216-UT and rejected there. This is not a persuasive claim when this feature of the 2015 Rate Case is scrutinized.

The Hearing Examiner in that case concluded that a 30% reduction to PNM's net plant "is not sufficiently cost-based." The statement is offered as though it is self-proving. No analysis beyond this statement was offered.

What the AG is advocating is looking to what has been to anticipate what will be. This is hardly a novel move when making predictions. For instance, judgment about the future of interest rates is a crucial consideration when thinking broadly about an appropriate ROR. Projections about where interest rates will go are guided, in part, by past and recently past interest rates. The NMAG s making the same appeal in this circumstance and arguing that past plant clearing gives us insight into what will be cleared.

The NMAG and Water Authority's witnesses are validly asserting that recent data proves PNM has been unable to add plant at the anticipated pace. PNM's projection is just that, a projection. To conclude that PNM's projection is cost based but intervenors' contention that reality has not aligned with projections and future projections must grapple with the reality that has played out is somehow speculation and generates rates that are not cost based makes little sense.

Uncertainty is an immovable feature of the resolution of the question under consideration here. The Commission best resolves the uncertainty in favor of experience. Intervenors' recommendations to adjust the plant in service should be approved.

8.5.1.6. Proposed Recommendation

The Commission should adopt NMAG witness Crane's proposed adjustment to net plant in service and reduce this by $76.1 million. As an annual figure, the NMAG indicates this amounts to a $7,895,619 adjustment to PNM's non-fuel revenue requirement. To the extent this determination impacts other aspects of PNM's application—depreciation for instance—PNM should be ordered to identify and make those adjustments.

8.5.2. Government Affairs Casita

8.5.2.1. PNM Proposal

PNM asks for authorization to include in rates costs "associated with the renovation of PNM's Government Affairs Casita in the amount of $805,380."[840] Staff takes issue with this request.

8.5.2.2. Staff Objections

Staff argues that "the costs associated with the renovations of the . . . Casita should not be included in the cost of service, as the only customer benefit listed by PNM is having a PNM team appropriately housed in Santa Fe."[841] Staff argues that a renovated casita does little to provide "utility service to the consuming public," is a nonutility allocation of plant, and that the casita's purpose seems to be for lobbying endeavors at the Legislature and these are costs that cannot be recovered in rates.

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[840] PNM Br. at 73.

[841] Staff Br. at 27.

8.5.2.3. HE Analysis

PNM answers these assertions by arguing that Staff is effectively claiming that PNM cannot recover in rates the costs of having offices. PNM claims that this position is absurd. The company writes that Staff's objection to the casita renovation being in rates "is akin to claiming that office buildings in general are not capable of providing utility service, which ignores the total scope of serving customers."[842]

PNM's rejoinder to Staff is an example of reductio ad absurdum.[843] PNM argues that if you take Staff's argument to an extreme, the argument is baffling. The trouble with this move is that it assumes Staff would in fact adopt the extreme position and has no answer to why the extreme will not manifest. This is misleading.

Staff has not argued that PNM cannot recover in rates the costs of having offices. An office is a necessary expense of conducting a business (in most if not all cases). Staff is instead arguing that PNM should not be able to include in rates a very specific building that is separate and apart from PNM's offices in Albuquerque. This is not an argument against offices generally.

Still, PNM's rejoinder is valid. Utilities are obligated to have offices. In New Mexico, the population is heavily weighted towards Albuquerque and PNM's principal offices are there. Yet, most of the apparatus of state government exists in Santa Fe including the Commission and our State Supreme Court which has original jurisdiction of all Commission appeals. PNM makes just these points.

[842] PNM Br. at 74.

[843] BLACK'S LAW DICTIONARY (11th ed. 2019) ("reductio ad absurdum": "In logic, disproof of an argument by showing that it leads to a ridiculous conclusion."); THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE 1465 (4th ed., Houghton Mifflin Company 2000) ("reductio ad absurdum": "Disproof of a proposition by showing that it leads to absurd or untenable conclusions.").

PNM witness Sanders testified at hearing that Santa Fe casita "serves as an office and meeting space for PNM employees in Santa Fe, including employees responsible for customer relations in PNM's northern service areas and for other employees whose duties benefit customers." Witness Sanders also explained that "[t]he building serves as a means for both customers and PNM employees to attend open meetings and provides a way for PNM to effectively communicate with stakeholders and regulators alike, an essential function to providing safe, affordable, reliable service to customers."

Moreover, PNM notes that it "recognizes the building serves multiple functions and, therefore, it allocates only a portion of the costs to PNM retail customers." The company clarifies that "PNM uses the shared service and jurisdictional allocator to attribute only 60.8% of these costs to retail customers."

Staff's concern about the casita and its request for an adjustment is legitimate and understandable. PNM's evidence and arguments refutes Staff's concern.

8.5.2.4. Proposed Recommendation

PNM should be permitted to include the casita in rates as proposed by the company. Staff's request for an adjustment should be denied.

<u>8.5.3. Staff's Proposed 12-MW-Battery-Storage Regulatory Liability</u>

In its initial brief, Staff argues that the Commission should "consider the provisional establishment of an additional regulatory liability for construction costs associated with the 12 MW of battery storage requested by the Company in Case No. 23-00162-UT."[844] Staff notes that PNM is requesting cost recovery for this project *in this case*, and that this means there is a

[844] Staff Br. at 19.

possibility that the Commission could approve cost recovery here and then deny the CCN in 23-00162-UT which would result in ratepayers paying for nothing.

PNM answers this argument by asserting that the Commission should be guided by consistency and proportionality. The company writes that "[i]f the Commission adopts Staff witness Dasheno's proposal," then to assure balance "PNM should be permitted to record a regulatory asset for the non-fuel revenue requirement related to any additional BESS project capital investments made that were not included in PNM's Test Period." This is an understandable and persuasive claim.

It is unnecessary for the Commission to resolve this issue. Perusal of the filings in Case No. 23-00261-UT reveals that no party opposes the battery storage project proposed there.[845]

Staff's request for the regulatory liability should be rejected.

8.5.4. Customer Deposits

8.5.4.1. PNM Proposal

PNM reduced its rate base by $5,128,824 to account for customer deposits.[846] This figure was calculated using the thirteen-month average balance for customer deposits from June 2021 to June 2022 which is the base period in this case.

Customer deposits are a source of capital that is supplied by ratepayers and not shareholders. The deposits are available to the Company as a source of funding. Accordingly, rate base is generally reduced by the amount of customer deposits held by the utility.[847]

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[845] Case No. 23-00162-UT, PNM's Post Hearing Brief, at 2-3 (11/01/23) ("None of the witnesses filing direct testimony . . . opposed issuance of the CCN as requested by PNM.").

[846] PNM Br. at 76.

[847] NMAG Exh. 1 (Crane Dir.) at 64.

8.5.4.2. Intervenor Objections

In briefing, the NMAG explains that it determined that the most accurate way to calculate the appropriate adjustment for customer deposits was to use the June 30, 2022, balance rather than a thirteen-month-average balance. Why did the NMAG did this is explained below. The NMAG's position is comprehensible but should be rejected.

NMAG witness Crane explains that her review of historical customer balances including the balance in the base period reveals a clear trend: the deposits did not fluctuate between higher and lower numbers. The number grew steadily.

This is significant, she argues, because when a data is comprised of numbers that are sometimes higher and sometimes lower than some baseline, then it makes sense to average to reach an expected number moving forward. That was not the case with customer deposits. They continuously increased.

Witness Crane pointed out that the customer deposits consistently increased. Witness Crane supplied the graphic atop the next page that illustrates her point about steady increase.

Date	Customer Deposits Balance
June 2021	$4,751,763
July 2021	$4,616,158
August 2021	$4,649,122
September 2021	$4,875,556
October 2021	$4,878,622
November 2021	$4,959,890
December 2021	$5,094,886
January 2021	$5,182,417
February 2021	$5,195,631
March 2021	$5,364,342
April 2021	$5,629,857
May 2021	$5,597,842
June 2021	$5,878,620
13-Month Average Balance	$5,128,824
Recommended Adjustment	$749,796

The NMAG argues what can be readily gleaned from this graphic: "[C]ustomer deposits generally increased during the [b]ase [p]eriod." For this reason, NMAG witness Crane concluded that the June 2021 balance should serve as the baseline for the customer deposits. She recommends adding $749,796 to PNM's proposal so that customer deposits are at least equivalent to the June 2021 balance.

8.5.4.3. HE Analysis

The NMAG's arguments are persuasive and seem intuitively correct.

PNM responds by asserting that NMAG witness Crane's proposed adjustment to customer deposits would result in an inequitable and inconsistent adjustment made solely for the purposes of reducing the revenue requirement. This argument is unpersuasive.

NMAG witness Crane's point is that customer deposits have almost uniformly increased month on month from June 2021 to present. In the few instances where there was a reduction from one month to the next, succeeding months increased to once again return the trend to an upward climb. NMAG Crane has indeed identified a trend. She is not merely attempting to reduce rate base. Argument to the contrary is unavailing.

PNM's second argument is persuasive. The company explains that its "rate base includes other items for which the Company used a 13-month average to derive" test period balances. The company argues that the Commission must exercise consistent practice. PNM argues that if it were to apply the method witness Crane applied to customer deposits to other rate base items that increased "during the Base Period" that action would more than offset NMAG witness Crane's proposed adjustment. In other words, if PNM applied the analysis and method witness Crane did in the customer deposit context PNM could achieve an outcome more beneficial to its interests.

PNM's proportionality argument is an appeal to basic fairness. The Commission must here impose just and reasonable rates. Fairness is an obvious consideration in that decision making. NMAG witness Crane's point about customer deposits is well taken but, unlike the net-plant in service issue, the adjustment amount that the NMAG seeks is not significant enough to justify deviation from the averaging PNM has applied throughout its application.

8.5.4.4. Recommendation

PNM's proposed customer deposits should be approved. The NMAG's request to adjust the customer deposits should be denied.

8.5.5. Legacy Meters

PNM addresses Staff witness testimony concerning AMI and legacy-meter cost adjustment. Staff did not make arguments in briefing about legacy meters and AMI. Moreover, this is a matter that is better addressed in the grid modernization context. The Commission need not address this subject in any way here.

8.5.6. ADIT

PNM emphasizes that "any rate base or depreciation adjustments approved by the Commission should include the related ADIT and (where applicable) EDIT impacts to PNM's non fuel revenue requirement, as discussed by PNM witnesses Morris and Sanders."[848] The HE agrees and will work with the confidential-advisor panel to ensure that this is the case. Any final order should account for this as well.

8.6. Operating Expense Adjustments

8.6.1. Non-Labor Escalation Factor

8.6.1.1. PNM's Proposal

PNM proposes escalating non-labor O&M expenses in the adjusted base period using a 4.0% escalation. According to PNM, this percentage escalation captures the impacts of higher inflation in the current market.[849]

[848] PNM Br. at 79.

[849] PNM Br. at 85.

As support for 4.0% escalation, PNM explains that "[t]he Consumer Price Index . . . escalations show 2022 is expected to see an increase of 6.1% to the CPI." PNM also states that "[t]he Compound Annual Growth Rate . . . of the CPI from 2020 to 2023 is increasing 4.6%."[850]

PNM concedes that there is one error in its testimony and workpapers regarding the non-labor escalator for shared services. PNM explains that NMAG witness Crane correctly points out that PNM witness Sanders uses a 4% escalation factor in 2023 and 2024 for shared services non-labor costs but then in the Company's workpapers these costs are escalated using a 5% escalation factor. PNM explains that this was an inadvertent error and the workpapers should have reflected a 4% escalation.

8.6.1.2. Intervenor Objections

The NMAG and County accept PNM's proposed 4% escalation for non-labor expenses in 2023 but do not agree that the same percentage should apply in 2024. For 2024, they propose an escalation factor of 3.0%.

NMAG witness Crane points out that PNM's own witness offered data that suggested a reasonable range for 2023 is 3.10% and then 2.40% in 2024. Moreover, witness Crane emphasized that there is agreement inflation is poised to decrease and this can be seen both in the projected CPI and personal consumption expenditure index. The NMAG also argues that the escalation factor for PNM's shared services escalator should be 3% and not 4%. Ms. Crane's position is that there should be no difference between the varying baskets of expenses whether shared or not.

NM AREA similarly argues that while "inflation is higher than it has been for many years, PNM's 4% figure overstates its impact in the 2024 Test Year period." Like the NMAG and County,

[850] *Id.*

NM AREA points to the CPI, notes that PNM incorporated the CPI into its inflation assessment, and argues that all expect the CPI to decline in 2023 and 2024 from the very high levels seen in 2021 and 2022.

Moreover, NM AREA points out that there is uncontested evidence that PNM has been able to successfully manage inflation and keep expenses below inflation levels. Thus, it is proper to anticipate PNM can keep doing this and correct to set PNM's non-labor escalation below the levels PNM is recommending.

8.6.1.3. HE Analysis

The evidence and arguments offered by the NMAG are persuasive and constitute a compromise path between PNM on the high end and NM AREA on the low end. It is clear to all that inflation has been a persistent issue in recent times. Yet, as was stated in the analysis of PNM's ROE, there is evidence in the record and good reason to suspect that inflation will decline.

For these reasons, the NMAG's willingness to accept PNM's proposed 4% escalation in 2023 makes sense; but, it is also clear inflation is on a downward trend. The evidence supplied by the NMAG and NM AREA makes this clear. For this reason, the 3% recommendation by NMAG witness Crane for 2024 should be approved. These numbers should apply uniformly to non-shared and shared services as NMAG witness Crane asserts.

Lastly, the HEs agree with PNM that the nonlabor escalation should apply to the revenue credits. As PNM argues, this is balanced and fair.

8.6.1.4. Proposed Recommendation

PNM should be authorized a 4% escalation for non-labor expenses in 2023 but only a 3.0% escalation for 2024.

8.6.2. Labor Escalation

PNM escalated base labor and overtime expense from the adjusted base period using a 5.0% annual labor escalator for non-union employees effective April 2023, and 5.0% effective April 2024. For union employees, PNM applied a 5.0% labor escalator in 2023 and a 5.0% labor escalator in 2024, effective May of each year.

PNM also applied a 15% increase to all engineering employee base salaries in November 2022.

NM AREA contests the company's decision to apply a 5% escalator. According to NM AREA, its witness Meyer demonstrated that PNM's labor expenses have only escalated at a rate of 1.86% in the 2019 to 2022 time period. NM AREA is recommending that the Commission use 1.86% to adjust PNM's base O&M payroll for both 2023 and 2024.

The Commission should reject NM AREA's proposed reduction to the labor escalator. All know that prices for everything have risen dramatically in the past several years. Commission employees (like the rest of the employees of the State of New Mexico) themselves received necessary salary adjustments to align pay with inflation. PNM itself makes this very argument in this case.

The company explains that "NM AREA's backward-looking approach ignores known current and anticipated labor market conditions, which reflect significant long-term shifts resulting from the global pandemic and other socio-economic factors."[851] This is persuasive.

Moreover, the company emphasizes that its "compensation policies are based on uncontested benchmark market data, which support a labor escalation rate of 5% annually" and

[851] PNM Resp. Br. at 55.

that this is what is needed "[t]o remain competitive[.]" This is similarly a sensible and persuasive argument.

PNM's labor escalation proposals should be granted. The evidence and argument PNM supplied on the subject are credible and coherent. NM AREA's challenge to the labor escalation should be rejected.

8.6.3. Payroll Adjustment

PNM provided minimal discussion of this issue in its initial brief. It writes there that "PNM includes in its filing adjustments to the Company's payroll expense."[852] The company then directs the HEs to work papers of PNM witness Sanders.

After doing this, PNM then turns to the Water Authority's arguments in opposition to its proposal. This produces difficulty in assessing the merits of the arguments.

The Water Authority recommends reducing PNM's payroll cost for the effect of annual turnover to mitigate the impact of pay increases and to limit the non-bargaining increases to 3.8% in 2024.[853] According to the Water Authority, this is appropriate because of significant employee turnover in recent years ranging from 8.17% in 2020 to a high of 33.01% in 2022. The Water Authority states that new employees are generally ineligible for general pay increases, and for this reason the five percent pay increase used by PNM is excessive even with the high inflation rate seen in 2022. Additionally, the Water Authority contends that the five-percent level exceeds what has been experienced in the industry which has been closer to three percent.

PNM answers these arguments by explaining that the Water Authority exists in a state of misunderstanding. PNM did account for employee turnover in developing its test period expense.

[852] PNM Br. at 91.

[853] Water Authority Br. at 43.

It normalized the base period labor expense by annualizing the last pay period in the base period. This ensured that vacant positions PNM had at the end of its base period were considered. According to PNM, this disproves the Water Authority's claim that PNM did not account for vacancies in its labor expense.

The Water Authority also contends that PNM's payroll adjustment is unreliable because PNM witness Pino stated at hearing that she based the conclusion that the pandemic contributed to employee turnover on no concrete analysis or data.

PNM responds that this claim in no way invalidates witness Pino's testimony or conclusions. This is correct. Witness Pino is stating a fact that is generally known. The pandemic did have a nationwide impact on employment. There is nothing remarkable or debatable about this position. The Water Authority did not respond to these arguments in its response brief.

PNM's payroll adjustment proposal should be approved.

8.6.4. Outage Normalization

PNM normalized generation O&M costs related to baseload planned power plant outages over a six-year period to calculate test year O&M expenses.

The NMAG correctly points out that doing so necessarily entangles PNM in a problem: July 2017-June 2018. The following graphic the NMAG supplied does much work to illustrate why that time frame is an issue.

July 2016-June 2017	$870,096
July 2017-June 2018	$10,241,911
July 2018-June 2019	($233,936)
July 2019-June 2020	$2,397,125
July 2020-June 2021	$2,905,916
July 2021-June 2022	$1,274,867

The NMAG correctly observes what the graphic makes plain: "the maintenance costs incurred at FCPP for the period July 2017-June 2018 do not appear to be representative of future operations." In fact, the costs for that period are significantly different than the costs for any other annual period.

The presence of this outlier in the dataset produces a problem. The NMAG states the problem well: "Relying on a calculation that includes a large outlier is contrary to the purpose of a using a multi-year average to determine normalized maintenance outage expense[.]" The purpose of averaging and normalization, the NMAG adds, "is to smooth out variations that occur from year-to-year, particularly when there is an activity that does not occur on an annual basis." Significant outliers will necessarily detract from any smoothing. This is all sensible.

The NMAG also points out that projected maintenance costs from the end of the base period to the end of the future test year at FCPP are projected to be $1,913,271. This information drives home the point, from the NMAG's perspective, that the outlier really is an outlier.

To get around the outlier problem, NMAG witness Crane took the following steps. Instead of using the actual July 2017 to June 2018 expense, she utilized an estimated normalized expense level of $3 million for major maintenance expense at the FCPP. She then escalated the $3 million through the end of the Base Period using the 1.5% escalation factor proposed by PNM.

This process resulted in a base period adjustment of $3,416,015 instead of the $2,115,749 included by the Company in the adjusted base period. Witness Crane then escalated this adjustment by 4% in 2023 and by 3% in 2024, consistent with the escalation factors discussed earlier, to calculate the total Future Test Year adjustment. NMAG witness Crane then incorporates escalation factors to arrive at a recommended adjustment of $1,392,845.

PNM makes several arguments in briefing why Ms. Crane's method of calculating the adjustment is incorrect.[854] Those arguments are unpersuasive as they never address the legitimate and real problem the NMAG identified: the outlier in PNM's dataset.

The NMAG's adjustment should be approved.

8.6.5. Wildfire Mitigation, Vegetation Management, and Infrastructure Expenses

These subjects are addressed together as each of these programs are similar and the objections to them by the NMAG are similar.

PNM requests $900,000 be incorporated into the Company's revenue requirement to reflect its forecasted incremental wildfire mitigation expenses. $225,000 of that amount requested is for wildfire mitigation transmission costs and $675,000 is for wildfire mitigation distribution costs.

PNM supplied evidence showing that PNM must increase its wildfire spending because "New Mexico has experienced numerous catastrophic wildfires over recent years, and a significant number of catastrophic wildfire ignition by electric utilities is due to vegetation, equipment failure and wildlife contact." Advancements in fire prevention including remotely sensed data collection for all distribution and transmission facilities in high-risk areas, using a helicopter collection platform, and mitigation of wildlife ignitions using remotely sensed data all have costs.

PNM requests $2,000,000 be incorporated into the Company's revenue requirement to reflect its vegetation management costs. PNM supplied testimony showing that "[a]verage annual vegetation management costs have increased by about 9% per year, causing PNM to increase its spending to reduce the risk of outages and wildfires caused by electric infrastructure.

[854] PNM Br. at 94.

PNM requests a $1.5 million incremental increase to its infrastructure maintenance expense. Of that amount, $500,000 pertains to increased transmission maintenance, $300,000 pertains to overhead distribution line maintenance, and $700,000 pertains to underground distribution line maintenance. PNM supplied testimony showing that cost increases in this category are caused by aging infrastructure that requires increased patrolling activities. The company explains that use of new technology to perform that patrolling increase costs.

To each of these items, the NMAG and witness Crane contend that PNM provided inadequate details of why the increased costs are necessary and how, specifically, the funds will be spent.

The objections to PNM's lack of specificity are reasonable, but it is simply the case that utilities operating in Western and arid states must do all they can to ensure catastrophic wildfires do not occur as just one of these events is too many. The Commission must do all it can to support utilities in their efforts to mitigate wildfire. The Commission must then also make all efforts to verify that authorized funds for these programs are being effectively utilized.

The answer to the NMAG's criticisms of these items is not to reject the proposal but to impose increased reporting requirements. The Commission should approve PNM's request for the funds for the programs mentioned but direct PNM to supply updated reports on how this money is spent. The Commission should direct Staff to propose reporting requirements that Staff deems acceptable.

Also, to the extent there is presently within the agency efforts to ensure greater oversight and Commission participation in wildfire and vegetation management, the Commission should consider ways to align the proposals here by PNM with any broader efforts undertaken by the

Commission and the other utilities. Again, this is something about which Staff should be given time to consider and then offer guidance.

8.6.6. Proposed Disallowance of Various O&M Expenses

8.6.6.1. Severance Expenses

PNM seeks $153,713 in severance pay and associated payroll taxes. PNM contends that "severance plans are an integral part of a holistic compensation program and are customary for many employers, including those that PNM competes with for talent."[855]

Testimony at hearing indicated that severance programs "encourage employees to remain at their workplace and help ease the transition out of the workplace." Many employers offer these plans including PNM's. PNM also notes that "severance benefits for union employees are included as part of PNM's collective bargain agreement, so the Company is obligated to provide this benefit."

The Water Authority asks the Commission to reject PNM's request "because severance pay provides no benefit to PNM's customers."[856] The Water Authority also contends that offering employee severance packages does not function to attract or retain employees because "the truth behind severance pay is self-evident, it i[s] only needed after something goes awry."

The Commission should reject ABCWUA's objections to the severance pay issue. PNM has shown it is needed to attract employees and that it is required to provide it to some employees. Moreover, the Water Authority's contention that severance pay has no impact on attracting or

[855] PNM Br. at 101.

[856] Water Authority Br. at 45.

retaining employees is expressly rooted upon what the Water Authority argues is a "self-evident truth." There is no reason to credit what is really just an assumption by the Water Authority.

PNM's request should be approved as requested.

8.6.6.2. Board of Directors Compensation

PNM requests board of directors' compensation of $539,655. The Water Authority asks the Commission to reduce that figure by 50 percent to $269,827 on grounds that it is appropriate for the Commission to allocate compensation for PNM Resources' board members on a 50/50 basis between shareholders and ratepayers.

The Water Authority contends that its recommendation "is consistent with similar Commission precedent" and that the adjustment is necessary "to achieve just and reasonable rates." The precedent the Water Authority points to is the *2020 EPE Rate Case*. It is unclear Case No. 20-00104-UT is solid support for the Water Authority's position.

The hearing examiner in *2020 EPE Rate Case* explained that "the cost of board of directors compensation should be shared 50%/50% between shareholders and ratepayers" for the "same reasons that the cost of [directors and officers] insurance should be shared 50%/50% between shareholders and ratepayers." In the section of writing in the RD in the *2020 EPE Rate Case* on directors' and officers' insurance, the hearing examiner noted that there was "persuasive state public utility commission" authority from the New York Public Service Commission supporting the proposition that 100% of the cost of directors' and officers' insurance should be collected through rates. This, of course, is inconsistent with the simple conclusion offered in the sentence that begins this paragraph.

Basic logic dictates that if the justification for requiring shareholders and ratepayers to split board of directors compensation is the same justification for requiring them to split directors' and

officer insurance costs, and there is persuasive authority that directors' and officers' insurance may be collected 100% from ratepayers, then we are basically at a standstill.

In short, the RD in the *2020 EPE Rate Case* offers reasons for and against collecting board of directors' compensation from shareholders and ratepayers. Simply pointing to the case is not enough.

Looking now at the evidence and argument presented by the Water Authority in this case, it identified two reasons why shareholders and ratepayers should equally shoulder board of directors' compensation. First, "the [b]oard of [d]irectors are selected by PNMR's shareholders, represent the shareholders, and have fiduciary duties of care and loyalty to shareholders, which supersede its responsibility to the Company's customers." Second, "the Board of Directors are motivated to take actions that will increase the value of their holdings, which may have marginal bearing on the provision of service to customers."

PNM responds that the Water Authority mistakenly assumes "that customer interests and shareholder interests are fundamentally misaligned." This is not so, according to PNM. The company contends that "[c]ustomers expect safe, reliable, affordable service and shareholders expect a return on their investment that funds the achievement of these goals for customers." In PNM's view, these interests are compatible.

Even if the statement above is too generalized to have any force, PNM also produced evidence at hearing that competent directors ensure the reliable and efficient provision of service. Competent directors will anticipate compensation. PNM also points in briefing to New Mexico statutes governing boards of directors where it is contemplated that director actions should and may benefit a company's customers.

The thrust of PNM's response is that a well-run company benefits ratepayers. This is hardly a novel assertion. It should be accepted.

The Water Authority's request to adjust the board of directors' compensation should be denied. PNM's proposal for board of directors' compensation should be approved as requested.

8.6.6.3. Director & Officer Insurance Expense

The Water Authority asks the Commission to adjust PNM's claimed expenses for director and officer insurance. The Water Authority points to Case No. 20-00104-UT and claims that Commission precedent supports this outcome. The Water Authority also argues that "recovering 100% of the cost of D&O insurance from ratepayers would not result in just and reasonable rates because ratepayers and shareholders at least equally benefit from the utility having D&O liability insurance."[857] This argument is unpersuasive.

Authority cited in the *2020 EPE Rate Case* explains that "D&O Insurance is an ordinary, typical business expense and it seems highly unlikely that a utility could attract adequately experienced and competent directors and senior management at reasonable compensation levels without the risk protection provided by D&O Insurance or a cost-effective alternative indemnification method."[858] Accordingly, a utility's "[f]ailure to maintain or fund D&O Insurance might increase Board compensation expense and drive up the required return on equity in the longer run." This is logical and sensible.

In the present case, PNM supplied evidence that "D&O insurance . . . is vital to attracting qualified individuals to guide the Company and ensure its efficient management, which benefits customers." This factual assertion should be credited.

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[857] Water Authority Br. at 47.

[858] *2020 EPE Rate Case RD* at 167.

The Water Authority's requested adjustment to PNM's D&O insurance expense should be rejected. PNM's proposal should be approved as requested.

8.6.6.4. Investor Relations

The Water Authority argues that the Commission should require PNM to split the cost of the Company's investor relations expenses between ratepayers and shareholders. In the Water Authority's view, "[s]hareholders and customers benefit when the Company incurs expenses to disseminate information about PNMR'S current and future earnings and investments to the larger investment community in a timely manner."

PNM argues that this assertion ignores that fact that timely and transparent communication about PNM's finances itself benefits ratepayers as it engenders investment given that investors expect transparency and thorough and timely financial reporting.

PNM's point is meritorious. The Commission should reject the Water Authority's proposed adjustment to PNM's proposed investor relations expenses. PNM's proposed investor relations expense should be approved as requested.

8.6.6.5. Group Incentive Plan and Wholesale Power Marketing Plan

8.6.6.5.1. PNM Proposal

PNM requests recovery of its retail share of costs relating to the Group Incentive Plan which comes to $5,443,246. The company explains that "[t]he total cost of the GIP is $6,262,795 on a Company-wide basis, but PNM seeks recovery only of its retail share amount." The purpose of the GIP is "to motivate and reward eligible non-union employees for achieving operational metrics and to promote collaboration and teamwork to achieve specified business area performance metrics."

PNM also requests recovery of its Wholesale Power Marketing Incentive Plan. The cost is estimated to be $511,935. Similar to the GIP, the WPMP is intended to motivate and reward employees and is an essential tool PNM uses to recruit and retain employees who serve customers, specifically in the Wholesale Power Marketing Department. That department is responsible for all wholesale purchases and sales of electricity and natural gas by PNM used in electric generation.

PNM emphasizes that the WPMP is benchmarked against the market median for similar job classifications using available compensation survey data and is capped at a specified maximum amount for the award pool that is based on the market median. Awards are paid under the WPMP only if employees achieve performance targets.

8.6.6.5.2. Intervenor Objections

Staff and the Water Authority propose adjustments.

Staff recommends that the Commission authorize 60% recovery of PNM's requested $6,262,795 for the GIP. Staff believes company shareholders should share the costs associated with the GIP along with rate payers. Staff makes several arguments for its proposed adjustment. It is only necessary to summarize and discuss one of those arguments as it is persuasive.

The Water Authority recommends that the WPMP be reduced by $86,870 due to the impact of employee turnover and further to implement a sharing of the WPMP cost between ratepayers and shareholders. This proposal should be approved for the same reasons the GIP costs should be shared. This is explained below.

8.6.6.5.3. HE Analysis

Staff identifies a valid structural reason why the costs for the GIP program (and, logically, the WPMP program) should be shared between ratepayers and shareholders. Staff contends that the GIP is likely to be more effective if there is consequence to the company to offer the program

and, thus, incentive for the company to pay the awards which would necessarily mean that employees are exceeding work expectations.

Staff notes what is true: PNM has requested that ratepayers fund the entirety of the GIP program. If employee groups fail to meet the necessary criteria for awards, the Company need not and will not pay the GIP awards; but, the company is still collecting the requested GIP amounts through rates. PNM has the money whether paid out or not. This is problematic, from Staff's perspective.

Staff does not expressly say so but is implicitly arguing that the GIP will be more effective if the company itself experiences consequence for offering the awards and penalty if the awards are not distributed. Put slightly differently, the company must take something from shareholders and then prove that the productivity or benefits stemming from the thing taken are greater than the thing taken. In simplest terms, the company should have incentive to ensure the GIP program works and works well. If the GIP program is just a guaranteed stream of payments from ratepayers that need not ever be distributed, there is no financial incentive for PNM to ensure the program is effective. This is Staff's point. It is a valid concern.

Other arguments are made in opposition to PNM's GIP proposal. They will not be addressed here for purposes of efficiency and given time constraints.

As noted above, the Water Authority's adjustment to the WPMP is predicated upon (among other things) the assertion that ratepayers and shareholders should share the cost of the program. For the reasons just stated regarding the GIP and Staff's arguments about the merits of sharing costs, the same thought and analysis applies to the WPMP.

8.6.6.5.4. Proposed Recommendation

PNM's proposal for its GIP and WPMP should be modified consistent with the adjustments recommended by Staff and the Water Authority.

8.6.6.6. Incremental Labor O&M Expenses for Distribution Operations

8.6.6.6.1. PNM's Proposal

PNM proposes approximately $2.0 million in incremental labor O&M expenses for its distribution system, resulting in the addition of 50 new full-time personnel. According to PNM, the incremental labor expenses are based on the need to increase headcount to support the growth and increasing maintenance needs of the electric system, as well as to support proposed infrastructure improvement projects.

8.6.6.6.2. Intervenor Objections

The NMAG argues that "PNM's application did not include underlying support for the 50 additional distribution employees."[859] The NMAG goes on and states that "even if [PNM] had provided a detailed proposal demonstrating the need for these additional employees, it's questionable PNM could identify, hire, train and retain these employees by January 1, 2024." In other words, the NMAG critiques PNM (once more) for being overly optimistic with its expectations. In this case, the over optimism relates to the hiring of personnel for distribution operations. PNM convincingly answers this argument (as explained below).

8.6.6.6.3. HE Analysis

The company explains that "even without having fully hired the new distribution employees that are projected to be needed for the [t]est [p]eriod, when the actual distribution O&M

[859] NMAG Br. at 60.

spend is compared against the projected O&M for the linkage period, including the requested increases, PNM's actual O&M distribution costs are already exceeding the projected amounts."

By PNM's estimates, the distribution O&M for the 12-months ending June 30, 2023, was supposed to be $31.3 million. The actual distribution for that period was $33.6 million. PNM points to these facts as evidence that spending for distribution O&M is presently ahead of the projections for costs expected to be incurred during the linkage period. For this reason, there is no reason to credit the NMAG's assessment that PNM has over projected. These are persuasive claims.

Additionally, there was much discussion in 22-00058-UT, the grid mod case, about how the distribution system will be changing and about PNM's need for that additional resources to support those changes. The grid mod case is about the transformation of PNM's distribution system. The determination here must account for and factor into those broader concerns. Approvals given here can and will be accounted for in the grid mod proceeding which is currently underway.

8.6.6.6.4. Proposed Recommendation

PNM's proposal for incremental O&M expenses for distribution operations should be approved. The NMAG's proposed adjustment to PNM's incremental O&M distribution operations should be rejected.

8.6.6.7. Property Tax Expense

8.6.6.7.1. PNM's Proposal

PNM seeks approval in this case of a future test year property tax expense of $44,688,084, of which $31,485,688 is allocated to PNM's retail jurisdiction.

8.6.6.7.2. Intervenor Objections

Like the outage normalization issue discussed earlier, the NMAG points out that the company's calculations incorporate an undesirable outlier. The NMAG offered a graphic of PNM's "actual property tax expense over the past five years, as well as for the Base Period, on both a total Company basis and a PNM Retail Jurisdictional basis[.]" Here is that graphic.

	Total PNM	Retail Jurisdiction
2017	$30,006,361	$25,489,452
2018	$31,049,326	$26,901,894
2019	$32,156,833	$26,802,792
2020	$32,036,803	$26,909,421
2021	$32,692,703	$26,777,552
Base Period	$32,966,517	$24,126,044
Test Year Claim	$44,688,084	$31,485,688

The NMAG observes what is plain from a casual perusal of this graphic: "[t]he actual tax expenses over the past five years show the increases in property tax expenses have been relatively moderate over this period, increasing by less than 10% from 2017 through the Base Period."[860] The point of this observation is to demonstrate that the test year claim is just too high.

The Water Authority makes a similar argument. It recommends that PNM's property taxes be adjusted "without escalating the already high rates found in 2021."[861] The Water Authority argues further that "[e]ven if there were an upward trend in New Mexico's tax rate, it would not be appropriate to apply it to the high composite rate for 2021 because the data provided by PNM demonstrates that the following years are as likely to be lower."

[860] NMAG Br. at 74-75.

[861] Water Authority Br. at 47.

8.6.6.7.3. HE Analysis

PNM explains how it reached the number in the test year. That writing is reproduced here in full without an attempt at interpretation. Interpretation would necessarily require modification of the words and it is important PNM's own justification for the test year figure be reviewed. The company explains as follows:

> To derive the property tax in the Test Period, PNM multiplied the taxable plant in-service balance of the prior year balance times the expected property tax rates for the period. As part of its property tax expense calculation in the Test Period revenue requirement, PNM escalated its property tax rates to estimate 2024 rates. PNM determined this escalation rate by calculating the average increase in New Mexico property tax rates over 2017 through 2021, expressed as a percentage of that rate. PNM's calculated escalation rate is 0.71%. Using this escalation rate, PNM escalated the 2021 property tax rates for FCPP, Reeves, Afton, Luna, Lordsburg, Algodones, and La Luz to determine the estimated rates for 2022, 2023, and 2024.

In response to the NMAG's arguments, PNM contends that NMAG witness Crane's proposed adjustment "is baseless and does not reflect the growth in PNM's plant balances throughout the linkage and Test Period."[862] The company goes on and says "that NMAG witness Crane's testimony does not claim PNM's approach violates taxing rules or principles." She also, the company argues, "does not address occurrences in the Test Year that account for the increased property tax." Her analysis, according to the company, is little more than "a surface-level comparison of the PNM's Test Year property tax expense and its expenses from the past five years without any further discussion."

PNM also argues that the Commission should reject the Water Authority's proposed adjustment. The company claims the Water Authority disregards actual increased tax rates" and notes that "the 2022 mill rates have increased by a factor of 0.81% compared to 2021." The

[862] PNM Br. at 114.

company points out that its proposed escalation factor is 0.71% and closely reflects this latest mill rate increase."

Neither the NMAG nor the Water Authority responded to the arguments PNM offered to refute their positions. The HEs see no reason to credit the NMAG and Water Authority's positions on these subjects.

8.6.6.7.4. Proposed Recommendation

The Commission should accept PNM's proposed property tax expense and reject the intervenors' proposed adjustments.

8.6.7. Depreciation

8.6.7.1. PNM'S Proposed Depreciation Study

PNM proposes to revise the depreciation rates for all its production, transmission, distribution, and general and intangible property accounts to become effective coincident with the effective date of revised base rates approved in this case. The company explains that "[d]epreciation rates must be periodically reviewed and approved to reflect the changes in investment and the underlying life and net salvage parameters required to achieve intergenerational equity for PNM's customers based on current and future operations of its depreciable assets."[863]

PNM provided credible and reasonable evidence explaining why it applied the simulated plant method and in other instances the actuarial analysis to analyze the mortality of its assets. Over the course of roughly twenty pages of briefing (that will not, purely for efficiency purposes, be repeated here) PNM explains why PNM witness Watson utilized the methods he did and why the intervenors' attempts to cast doubt on the merits of Watson's methods should be rejected. The

[863] PNM Br. at 160.

discussion in PNM's initial brief at pages 164 to 184 are highly technical, and any attempt at reproduction of the facts asserted there would be reproduction for reproduction's sake.

All that need be said is that the company's description of its deprecation study appears sensible and supported by both facts and sound policy judgments. The intervenors do not see it that way.

The Water Authority, NM AREA, and the NMAG disagree with PNM's proposed depreciation rates as set forth in PNM witness Watson's depreciation study for various plant accounts. The objections of the parties are provided below.

8.6.7.1.1. Water Authority

The Water Authority dedicates a page-and-a-quarter to explaining why its witness's position on depreciation is superior to PNM witness Watson's.[864] The Water Authority's brief claims, as a general matter, that Water Authority witness D. Garrett's "depreciation rates . . . pose a better fit to PNM's actual depreciation." The truth and validity of this assertion is purportedly established by the Water Authority's claim that "the Iowa curves provided by" D. Garrett more closely "fit" the actual observed lifespans of "associated plant."

The Water Authority then points out that PNM witness Watson was confronted at hearing with the fact that witness D. Garrett's curves matched plant life spans more closely, and witness Watson "struggled to justify" his modeling. The Water Authority's arguments why witness D. Garrett's depreciation study is superior to PNM's end there.

The above is in no way a criticism of the Water Authority's advocacy. The Hearing Examiners are simply unpersuaded that D. Garrett's positions are plainly superior to PNM's on

[864] Water Authority Br. at 49-50.

the question of depreciation. What constitutes the most accurate lifespan for utility plant is a question of some complexity a finder of fact will require some aid resolving. The HE cannot discern from the Water Authority's facts and arguments that PNM's treatment of these issues is patently wrong and the water authority's patently right.

The Water Authority's general claim that witness D. Garrett's "depreciation rates . . . pose a better fit to PNM's actual depreciation" is unproved. There are insufficient grounds for the HEs to conclude that this is so.

8.6.7.1.2. NM AREA

NM AREA contests one discrete aspect of PNM's proposed depreciation study. NM AREA explains that PNM has proposed that the Commission reduce the current ten-year life of the assets in FERC Account 391.3 - Office Furniture & Equipment - to five years.[865] NM AREA argues that this request should not be authorized. It contends that the Commission should "keep the current ten-year average service life as that better reflects the actual useful life of these assets." The grounds for these claims are as follows.

NM AREA notes that it acquired in discovery a "list of the equipment that is included in FERC Account 391.3 that is still being used by the Company." NM AREA contends that "a significant amount of the equipment in that account is over five years old and is still being used." In NM AREA's view, "[t]his exhibit clearly shows that assigning a five-year in-service life to these assets is not supported by the evidence and that a ten-year life is more realistic." PNM persuasively answers NM AREA's argument.

[865] NM AREA Br. at 26-27.

PNM explains that NM AREA "fundamentally misunderstands" how assets in account 391.3 are treated.[866] PNM explains that it utilizes Accounting Release-15 or AR-15 for depreciation purposes for this account. AR-15 requires the Company to do as follows. The company does not "retire the dollars in this account for 10 years, regardless of whether the assets are physically out of service much earlier." For example, "a computer could be replaced after 3 years but the cost would be amortized over 10 years and would still show on the books until it reaches age 10." PNM explains that "[t]he age of the dollars in the account are no indication of the life of the computer equipment." For this reason, the company argues that "NM AREA's claim that the Account shows assets that are greater than five years old is irrelevant."

The company goes on and explains that "the Company explicitly" informed NM AREA about these matters; yet, at hearing NM AREA witness Meyer stated, "that he did not know about AR-15." For this reason, PNM argues that NM AREA simply has "failed to consider all the facts" on the issue and "its recommended depreciation rate for FERC Account 391.3 must be rejected."

The HEs have no reason to doubt PNM's assertions on this subject. They do not credit NM AREA's witness's views. PNM argues that NM AREA's arguments on depreciation should be rejected. This is correct.

8.6.7.1.3. NMAG

As NMAG witness Crane recommended an adjustment to the Company's claim for plant additions, she made a corresponding adjustment to remove depreciation expense associated with the plant that she excluded from rate base. This recommendation should be approved as a natural consequence of the Commission's decision to adjust net plant in service consistent with the

[866] PNM Resp. Br. at 30-31.

NMAG's recommendations. The focus here is on other objections the NMAG makes to PNM's proposed depreciation schedules.

The NMAG accepts the Company's proposed depreciation rates for production plant but recommends that the Commission maintain the current depreciation rates for transmission, distribution plant, and general plant.[867] The NMAG explains that "[a] significant portion of the adjustments proposed for" transmission, distribution, and general plant "relate[] to just one account, computer hardware[.]" The NMAG states that the Company is proposing "to more than double" the depreciation rates related to computer hardware in this rate case. This is not appropriate or correct, the NMAG argues, because the ETA should focus PNM and intervenors on production plant, and maintaining the current depreciation rates for transmission, distribution, and general plant mitigates the impact of the depreciation rate increase in production plant.

In the NMAG's view, authorizing the change in depreciation rates for production but maintaining the existing rates in the other categories "strikes a reasonable compromise that allows the [c]ompany to implement approximately 55% of the depreciation rate changes that are being requested in this case."

Like the Water Authority, the NMAG dedicates only a few pages (two) of briefing to explain why the Commission should credit witness Crane's recommendations on depreciation rather than accept PNM's proposal.

PNM's responds to these arguments by pointing out that "NMAG witness Crane's proposal violates sound depreciation policy and would push the costs of the assets onto future customers to pay for long after the assets in question are retired."[868] Additionally, the company contends that

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[867] NMAG Br. at 18, 73.

[868] PNM Response Brief at 32.

witness Crane provides inadequate support for her proposals and that, really, her proposals are premised on the suggestion that what she is arguing constitutes a "reasonable compromise." The company insists that this is no substitute for "factual data" and "analysis."

The HEs credit PNM's position on this matter. The NMAG, like the other intervenors, has not provided adequate support to cast doubt on the propriety of PNM's depreciation study and the results the company offers.

8.6.7.1.4. Proposed Recommendation

The Hearing Examiners recommend that the Commission adopt PNM's depreciation study and the adjustments to depreciation rates the study prompts PNM to propose. This in no way constitutes guidance on PNM's accelerated depreciation proposal for certain gas plants. That is the subject addressed immediately below.

8.6.7.2. Request for Accelerated Depreciation of Gas Plants

8.6.7.2.1. PNM's Proposal

PNM asks the Commission to authorize accelerated depreciation schedules for the Afton, La Luz, Lordsburg, and Luna gas plants. PNM contends that "[i]t is prudent for PNM to set its depreciation rates to align with the expected service life of its gas generation facilities, and it is sound policy to align depreciation rates and terminal lives of fossil generation units with the State and PNM's emissions reduction goals."[869]

As the foregoing quote makes clear, PNM concedes (as it must) that the question whether it should be permitted accelerated depreciation of the gas plants is a "policy" decision. The company also conceded that there are "policy" considerations that justify requiring "future

[869] PNM Br. at 184.

customers" to share reasonably in the costs of undepreciated investments for generating plant that is abandoned before the end of its depreciable life.[870] PNM states that it is here proposing what it perceives as best policy. It proposes to "minimize[] stranded investment[]" and "more closely align[] the costs associated with these units with the customers that receive the benefits of them."

8.6.7.2.2. Intervenor Objections

The Water Authority identifies four reasons why the Commission should reject PNM's request for accelerated depreciation.[871] First, the request is not made pursuant to an approved abandonment or resource plan.

Second, the request seeks retirement of plants by 2040 rather than the 2045 zero carbon requirement of the New Mexico Renewable Energy Act.

Third, given PNM's experience with the abandonment of SJGS and FCPP—these plants were required to continue operating beyond proposed abandonment dates—adjustment now would be unnecessary and premature.

Fourth, accelerated depreciation to meet state or federal environmental requirements is bad public policy. Forcing current ratepayers to pay accelerated costs of early plant retirements is "poor public policy" as future ratepayers are the primary beneficiaries of early plant retirements, and spreading costs into the future will give regulators the opportunity to offset these costs with other savings from improved or better technologies, increased operating efficiencies, load growth, or merely with the passage of time.

[870] PNM Br. at 187.

[871] Water Authority Br. at 38-43.

8.6.7.2.3. HE Analysis

PNM's responses to the Water Authority's arguments are unpersuasive.

As to the point that the accelerated depreciation proposal is not accompanied here by an abandonment proposal, PNM states what is obvious: it "is not asking to abandon the gas plants at this time and is not requesting approval of any replacement resources."[872] This is true but misses the point.

The Water Authority's position is that the Commission should not act now and modify depreciation rates in a way that requires current ratepayers to absorb more costs until there is greater clarity about what will replace the gas plants, what the cost of those replacements will be, when those replacements will come online, how the costs of those replacement resources will be borne, and on and on. The questions are too many to attempt a comprehensive statement of them.

These are all legitimate concerns that accompany and are inseparable from the question of whether PNM should *right now* be permitted to accelerate depreciation and eliminate the potentiality for stranded costs. It is entirely unclear whether PNM's proposal minimizes cost and maximizes resources for the greatest social utility. The Commission must of course consider those concerns and would be in a far better position to do so if it had a clearer understanding about abandonment of the gas plants and what replacement resources will fill the generation gap when they are abandoned.

With respect to the fact that PNM is seeking accelerated depreciation based on a terminal date of 2040 rather than 2045 when the law actually requires generation come from fully-zero-carbon resources, PNM again states that this is "not [a] valid argument[] for why PNM should not

[872] PNM Br. at 185.

be allowed to set depreciation rates that match the expected service lives of its gas assets."[873] PNM states that it "is only requesting to shorten the service lives of these plants, not abandon them, so that depreciation rates reflect energy transition expectations." These are unpersuasive assertions as the Commission should find that setting a 2040 terminal date does indeed predate the state-mandated zero-carbon generation target and increase costs for current customers. This is a legitimate concern and reason alone to reject the request for accelerated depreciation. PNM's proposal imposes costs on present customers based on an aspiration rather than a legal mandate.

As to the assertion that it is bad policy to accelerate depreciation on the gas plants, PNM contends that "the New Mexico Legislature and governor have made it clear that a carbon-free generation portfolio is the appropriate public policy for New Mexico electric utilities and their customers."[874] This may well be an accurate statement of policy at the broadest and most general level, this does little to inform the Commission about the most effective way to balance the costs of the energy transition intergenerationally. Broad policy goals do not translate into requiring the Commission to permit action regardless and without care for the costs of that action.

It is also notable that PNM does not answer the Water Authority's contention that it would be unwise to accelerate depreciation now given recent experience with renewable integration. PNM has been obligated to keep carbon-emitting plants slated for closure open for reliability purposes. Whether this will also occur with the gas plants for which accelerated depreciation is requested right here and right now remains a fully open and unanswerable question at this time.

8.6.7.2.4. Proposed Recommendation

PNM's request for accelerated depreciation of the gas plants should be rejected.

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[873] *Id.* 186.

[874] *Id.* 187.

8.6.8. Litigation Expense

PNM included in its cost of service $1.3 million in litigation expenses during the test period.[875] This number was calculated using $1.2 million in litigation expenses PNM booked and incurred during the base period across four categories: (1) Tort Litigation ($194,120); (2) Human Resources Litigation ($254,667); (3) NMPRC Litigation ($637,685); and (4) Commercial Litigation.

Base period litigation expenses have been escalated to arrive at the amount of litigation expenses included in the test period. The proposed test period annual litigation expenses exclude litigation costs not allocated to PNM's retail jurisdiction, rate case expenses, legal expenses related to the Avangrid merger, and legal expenses for the San Juan Show Cause proceeding. Costs associated with this rate case are not part of this expense.

It does not appear that any party contests PNM's proposed litigation expenses. They should be approved.

8.7. Regulatory Assets & Liabilities

8.7.1. Intervenors' Broad Concerns About Regulatory Assets and Liabilities

PNM proposes in this case to establish and/or to begin amortizing and recovering certain regulatory assets and liabilities.[876] PNM accurately points out that the NMAG objects as a general matter to the number of regulatory assets and liabilities the Commission has authorized.

According to the NMAG, the proliferation of regulatory assets and liabilities the Commission has authorized is a deviation from the basic principles underlying utility regulation.[877]

[875] PNM Br. at 117.

[876] *Id.* 119-56.

[877] NMAG Br. at 44-47.

The NMAG argues that "traditional ratemaking methodology provides a better incentive for effective cost management than a reimbursement system, the premise on which regulatory assets are based."[878] The NMAG adds that "[r]egulation is supposed to be a substitute for competition," and "[i]n a competitive environment, companies are not guaranteed recovery of past costs from future customers."

The NMAG's points have merit, but there is simply not time to resolve the question of the propriety of whether PNM should or should not have been granted or be granted regulatory assets and liabilities as an abstract question. There is far too much to decide here already.

The Commission should take no position on what broad principles apply when it decides whether to authorize a regulatory asset or liability besides what has already been stated in previous Commission precedent. This should be offered as a policy determination to enable the Commission to maintain the status quo until there is time and resources to meaningfully probe the question.

Similarly, Staff witness Dasheno makes recommendations about whether certain regulatory assets should receive a return on rate base. Again, a careful parsing of Staff's arguments would require significant research. There is simply not time to do that here.

Putting these broad issues aside, each of the regulatory assets and liabilities proposed by PNM are considered in turn.

[878] *Id.* 46.

8.7.2. Energy Imbalance Market Implementation Regulatory Asset

PNM requests authority to include the EIM regulatory asset in rate base and start amortization and recovery of the deferred costs, including carrying charges.[879] PNM proposes to amortize the regulatory asset over a 5-year period.

No party opposes PNM's recovery of this regulatory asset. The request should be granted.

8.7.3. Rate Case Expenses

8.7.3.1. PNM's Proposal

PNM is seeking recovery of $3,544,858 in projected rate case expenses.[880] PNM proposes to establish a regulatory asset to recover these costs over a 2-year amortization period. According to PNM, a 2-year amortization period appropriately balances the timely recovery of these costs by PNM with customer impacts.

PNM provided an itemized description of its estimated rate case expenses. That description is not reproduced here but can be viewed at PNM witness Sanders' direct at KTS-4 work paper ORB-12 which is page 310 of the 651 pages that comprise that exhibit. The company acknowledges that its rate case costs are "significant" but contends that this is unsurprising as many of the issues in this rate case were contested and vigorously so.

PNM explains that the outside consultants it utilized to prepare the rate filing "are necessary for the preparation of a comprehensive electric rate case" as it is typical to seek outside consultants for support for a proposed ROE as well as to undertake specific studies or analyses including lead-lag and depreciation.

[879] PNM Br. at 62, 130.

[880] *Id.* 144.

8.7.3.2. NMAG

According to the NMAG, PNM's rate case costs are "excessive."[881] The NMAG provides a helpful graphic depicting the source of the costs. It is reproduced here for convenience.

Consultants:	Estimated Costs
Itron, Inc.	$100,000
MCR Performance Solutions LLC	$125,000
Alliance Consulting Group (Depreciation)	$45,060
Towers Watson Delaware Inc.	$120,000
FINCAP, Inc., (ROE Witness)	$125,000
Scott Madden Inc, (Capital Documentation)	$94,799
Price Waterhouse Coopers LLP	$185,000
KPMG	$150,000
The Brattle Group	$250,000
E3 (EIM Savings Study)	$100,000
PWC (Lead Lag)	$145,000
Pegasus – Joe Miller	$150,000
Other External Witness Support	$75,000
Total Consultants	**$1,664,858**
Outside Legal Counsel:	
Wilkinson Barker Knauer LLP	$900,000
Troutman Sanders LLP	$30,000
Miller Stratvert PA	$650,000
Total Outside Legal Counsel	**$1,580,000**
Other Costs (Notices, Publications, Postage)	**$300,000**
Total Rate Case Cost Claim	**$3,544,858**

The NMAG takes issue with PNM's use of counsel from three different law firms and notes that hourly rates from one of those firms was $700 an hour. The NMAG questions why a lead lag study costs $1450,000, and the NMAG does not believe the $250,000 to the Brattle Group is reasonable and emphasizes that PNM witness Graves (from the Brattle Group) provided testimony similar to what was offered here in earlier cases.

[881] NMAG Br. at 68.

To solve this excessive request, the NMAG suggests the Commission use the average costs of PNM's last three rate cases.[882] The NMAG notes that those proceedings were equally as complex as this one. The average of those three cases is $2.27 million. The NMAG recommends this cost be amortized over three years and not be included in rate base.

8.7.3.3. Staff

Staff argues that PNM's rate case regulatory asset should be reduced by $794,799 to $2,750,060.[883] These reductions are, for the most part, the result of eliminating consultant costs. Some of the consultant costs Staff finds objectionable are the same costs the NMAG protests.

Staff argues further that the permitted $2.75 million rate case costs should be amortized over a three-year period. A three-year time frame is more appropriate, in Staff's view, given that PNM's last filed a general rate case in 2016.

Lastly, Staff advocates that the regulatory asset not be included in rate base so that it cannot earn a return on investment. The justification for this last suggestion is, according to Staff, that PNM's rate case costs "are more in line with O&M expenses rather than traditional rate base items" and for this reason PNM should not be allowed to earn a return on this investment.

8.7.3.4. Water Authority

The Water Authority accepts PNM's $3.54 million rate case costs but asks that the Commission authorize a longer amortization period.[884] Specifically, the Water Authority argues that the regulatory asset should be amortized over a five-year period "[g]iven the historic time that

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[882] *Id.* 69.

[883] Staff Br. at 15.

[884] Water Authority Br. at 48.

has lapsed between PNM [rate] cases." The Water Authority asserts that "[a] two-year amortization is unnecessarily short."

8.7.3.5. HE Analysis

All intervenors who supplied testimony and argument on this issue suggest that the Commission increase the amortization period of the regulatory asset. The Hearing Examiners recommend the Commission adopt this suggestion.

It is uncontroverted that the cost of this rate case exceeded by a third the cost of PNM's previous rate cases. The complexity of the case stems in part from the amount of time that has transpired between rate cases. The intervenors' solution to this long passage of time between cases is to spread out the amortization period. This is proportional and prudent.

PNM's contention that "reasonably and prudently incurred rate case and litigation expenses are properly recoverable through rates" is also not contested. This proposition does not mean, however, that the Commission must ignore its concomitant duty to balance rate payer and shareholder interests. The NMAG states the point well when it says that PNM's "right to collect reasonable rate case costs should not be interpreted as a blank check and this Commission should not abrogate its responsibility to ensure that all costs recovered from ratepayers are reasonable."[885]

Extending the amortization period to five years—as suggested by the Water Authority—achieves a reduction in revenue requirement while simultaneously permitting PNM its identified rate case costs. This is the compromise result the Commission should embrace. It is unnecessary to accept Staff's proposal to remove the costs from rate base.

[885] NMAG Br. at 69.

Lastly, the Water Authority also sensibly argues that if PNM does not file another rate case until after the five years of amortization have passed and PNM is still collecting rate case costs in rates, then that money should be put into a regulatory liability to be returned to customers. This is a reasonable and sensible outcome.

8.7.3.6. Proposed Recommendation

The rate case expenses PNM has identified should be approved. They should be amortized over five years. They may be included in rate base and earn a return on investment. The condition mentioned proposed by the Water Authority—if there is delay in PNM's next rate case filing to the point that PNM's is collecting in rates costs above those expended here—should also be approved. At a minimum, this should provide some slight prompt to the company to not wait another six years before filing a rate case.

8.7.4. Covid 19 Regulatory Asset & Liability

8.7.4.1. PNM Proposal

PNM requests approval to include $1.8 million as a regulatory asset in the test period revenue requirement for COVID-19-related bad debt expense.[886] PNM also seeks authorization to include a regulatory liability of $0.9 million for savings identified as a result of the COVID-19 pandemic. The asset and liability net to $0.9 million. PNM proposes to amortize both over a two-year period so that both are dealt with in the same time frame.

These requests have their genesis in Case No. 20-00069-UT where the Commission gave PNM authorization to track expenses and savings flowing from the pandemic.

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[886] PNM Br. at 137.

8.7.4.2. Intervenor Objections

The NMAG recommends that the Commission disallow the COVID-19 regulatory asset and regulatory liability.[887] The NMAG makes two arguments as justification for its recommendation.

First, the net deferral of $0.9 million is not material to the Company's financial condition. Second, total weather normalized sales declined by about 1.3% in 2020 relative to 2019, but in 2021 weather normalized sales exceeded 2019 levels by 2.2%. For this reason, "it does not appear that the net impact of the COVID-19 pandemic warrants the extraordinary ratemaking treatment being requested by PNM."

8.7.4.3. HE Analysis

The Commission should reject the NMAG's challenge to the regulatory asset. It should not here decide that PNM has overutilized regulatory assets or liabilities. As noted previously, there is no time to do the detailed legal and analytical work necessary to reach that conclusion.

The NMAG's point about weather-normalized sales seems to be a suggestion that PNM was not harmed by any losses incurred as a result of Covid. This claim is unpersuasive as Covid occurred and had profound impacts on many aspects of daily life and business. The company experienced consequences from the pandemic regardless of whatever played out weather-wise during the pandemic.

8.7.4.4. Recommendation

The Commission should authorize the Company's requests for the regulatory asset and liability related to Covid.

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[887] NMAG Br. at 52-54.

8.7.5. Community Solar Cost Recovery Regulatory Asset

In PNM's application, the company manually adjusted the total banded revenue requirement for community solar cost recovery.[888] CCSA opposed this and recommended removal of community solar cost recovery from PNM's revenue requirement.[889] Other intervenors objected to the request as well.

Post-hearing, PNM now agrees with CCSA's recommendation to remove the manual adjustments.[890] PNM states that it accepts this position so long as the Commission authorizes PNM to create a regulatory asset solely to track lost revenue associated with community solar bill credits amounts with a carrying charge. Ratemaking treatment of the costs can be determined in Case No. 23-00071-UT.

In response, CCSA states that it "recommend[s] that the Commission approve this path forward and that the Commission consider deferring approval for community solar regulatory assets in general for the Community Solar Proceeding."[891]

The Commission should accept the compromise and permit PNM a regulatory asset for tracking purposes only. No other decision need be made here.

8.7.6. SO2 Allowance Regulatory Liability

The SO2 (Sulfur dioxide) Allowance regulatory liability reflects the outstanding liability balance associated with SO2 emissions allowance sales that are returned to customers via PNM's

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[888] PNM Br. at 152.

[889] *Id.*

[890] *Id.* 153.

[891] CCSA Resp. Br. at 4.

1st Revised Rider No. 27. PNM was authorized to record this regulatory liability in Case No. 08-00273-UT.

PNM has reflected the return of the SO2 regulatory liability in the test period proposed non-fuel revenue requirement. PNM calculated a return on and return of the regulatory liability and allocated 100 percent to PNM's retail customers. PNM is proposing to amortize this regulatory liability over one year.

The NMAG opposes the Commission authorizing PNM this regulatory liability on grounds that "[t]he amount is too small to justify inclusion of this liability in rates."[892] This particular objection is consistent with the NMAG's broader critique of PNM's alleged misuse of regulatory assets and liabilities. No determination is offered here on that broader question given the press of time.

The Commission should approve PNM's request regarding this regulatory liability.

8.7.7. Excess Deferred Income Tax Regulatory Liability

This proposed regulatory liability to return money to customers is unopposed. The regulatory liability at issue here reflects the excess ADIT as a result of the TCJA which was enacted in 2017. PNM is proposing to amortize the remaining unprotected excess ADIT over five years beginning in 2024. The request for this regulatory liability should be approved.

8.7.8. TOD Pilot Program Regulatory Asset

PNM seeks authorization to record a regulatory asset for the potential under-recovery of costs associated with the company's proposed TOD pilot program. The HEs recommend that the

[892] NMAG Br. at 53.

Commission defer judgment about the TOD pilot and deal with TOD proposals (of all and any kind) in the grid mod proceedings.

If this recommendation is approved, then the request for a TOD pilot regulatory asset is presently moot. No decision need be made. It can be deferred.

8.8. Fuel and Purchased Power Cost Adjustment Clause

In June 2022, PNM filed its application to renew its FPPCAC. That filing was given docket number 22-00166-UT.

By regulation, PNM must file an application to continue its FPPCAC every four years.[893] PNM's existing FPPCAC was authorized in Case No. 18-00096-UT.

The continuation application PNM filed states that "PNM seeks to continue the use of its current FPPCAC . . . without changes or modifications . . . . ."[894]

NM AREA and the Water Authority intervened in Case No. 22-00166-UT and expressed concerns about PNM's FPPCAC given changes in PNM's generation portfolio. They argued that "PNM is increasingly using its approved [FPPCAC], its Rider No. 23, to collect generation costs that should be properly collected in its base rates."[895] They stated further that PNM's growing reliance on PPAs to procure power and use of the FPPCAC to collect those costs produced improper subsidies that would have been avoided had PNM procured generation through rates. NM AREA and the Water Authority argued that the Commission must address this problem as the Commission retains the discretion to determine "which costs should be included in an adjustment clause . . ."

[893] 17.9.550.17(A) NMAC.[893]

[894] Case No. 22-00166-UT, Application at 2, ¶ 5 (6/17/2022).

[895] Case No. 22-00166-UT, Jt. Reply to Staff's Resp. at 2, ¶ 3 (8/11/2022).

Because parties were challenging in Case No. 22-00166-UT which costs should be collected in rates and which through the fuel clause and offering arguments that there were adverse consequences to PNM's choices as to cost collection, the Hearing Examiner in Case No. 22-00166-UT recommended that the Commission consolidate the fuel clause renewal case with this rate case so that a comprehensive picture of PNM's rates could be gleaned and decision about the fuel clause application reached with the benefit of that comprehensive view. This seemed the best way to holistically evaluate the propriety of PNM's position to leave its FPPCAC as it stands.

The Commission agreed with that recommendation and consolidated the fuel clause proceeding with this rate case.[896]

Evidence was supplied during this rate case on PNM's fuel clause and whether it should be amended in some way.

In briefing, NM AREA concludes that it believes the question whether PNM's FPPCAC should be modified in some way "is better addressed holistically with the many other transition rate issues in PNM's ongoing Pricing Advisory Committee . . . meetings and no longer seeks the Commission's review of the Company's FPPCAC in the context of this rate case."[897]

The Water Authority made no express argument in its briefs about the FPPCAC issue.

Staff's initial brief recommends that "PNM's FPPCAC be approved with non-substantive revisions based on PNM's current rider."[898]

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[896] Case No. 22-00166-UT, *Final Order Adopting Recommended Decision on Consolidation of Case Nos. 22-00166-UT and 22-00270-UT* (NMPRC 3/01/2023).

[897] NM AREA Br. at 13-14.

[898] Staff Br. at 22.

Because PNM does not propose to make any changes to its FPPCAC and because the parties focused on PNM's fuel clause have agreed to attempt to resolve their disagreements in the PRAC, the Commission should approve the FPPCAC continuation filing submitted in 22-00166-UT. Doing that leaves the status quo in place.

8.9. Rate Design

8.9.1. TOD Pilot

PNM proposes an opt-in TOD pilot for residential and non-residential customers.[899] TOD rates are essential to the energy transition, PNM explains, as the most important question for the electric system of the future will be not how much energy is used but when energy is used. PNM's pricing needs to reflect this changing reality and to begin to set signals that will cause customers to shift load.

According to PNM, its TOD pilot is an essential part of its modern rate design strategy and New Mexico's clean energy transition. The HEs agree, but that is where the agreement ends.

In the first few pages of PNM's discussion of its TOD pilot, the company references the proceedings currently underway addressing PNM's inaugural grid modernization application. That is Case No. 22-00058-UT. One of the HEs assigned to this rate case is the presiding officer assigned to that grid mod case. One major component of that case is proposed investment in advanced metering infrastructure (AMI). Advanced meters will allow PNM and its ratepayers insight into consumption of power not previously available.

As a pure matter of policy and in a desire to protect PNM's ratepayers, the Commission should deny the TOD pilot proposal in this case and address the matter in 22-00058-UT. Doing

[899] PNM Br. at 328.

this will allow the Commission to verify that investments in grid modernization (the technology needed for that purpose) are accompanied by maximally beneficial rate designs intended to achieve the shared purposes of grid mod and TOD rates. All of the testimony presented in this case about the TOD pilot should be admitted through administrative notice in 22-00058-UT. This applies to both PNM's and intervenors' testimony.

Importantly, this determination would not suspend or otherwise stall PNM's efforts to enact TOD rates. The grid mod case is underway, and PNM just filed (on Wednesday, November 22, 2023) the benefit-costs-analysis results of its grid modernization proposals.

This suggested course of action is correct as PNM acknowledged that the meters it requires to implement the TOD pilot proposed here are not the same meters the company is proposing to acquire in Case No. 22-00058-UT. PNM attempted to assure the Commission that any investment in the meters for the TOD pilot will be integrated into grid modernization investments as much as is possible. This is desirable, but not a sufficiently integrated approach to TOD rates and grid modernization.

The Commission should conclude that as a matter of policy and public interest, grid modernization generally and AMI specifically are inseparably connected to TOD rates. Any investment in grid mod and AMI must be accompanied by a TOD proposal for the former investments to have values for PNM's customers. This is because the granular usage data that grid mod and AMI investments will permit PNM's customers has import and value (in concrete terms for PNM's customers) if customers can do something with that data. That "something" that customers will do is change consumption to nonpeak hours which will (in the aggregate) reduce peak loads for the utility and reduce costs for all customers.

In Case No. 22-00058-UT there was much focus on the absence of a TOD proposal there. Now, we are confronted with a request to institute a TOD pilot separate from grid mod and AMI investments. Having one foot in either proceeding makes no sense. Walking requires the coordination of both feet. Running entails an entirely different level of coordination. The best policy decision is to consider AMI and TOD rates together.

In conclusion, the TOD pilot proposal should be pushed into the currently ongoing Case No. 22-00058-UT proceedings. This resolution addresses any intervenor arguments about failings or benefits surrounding the TOD pilot and how that pilot should be amended. No more need be said on the subject.

8.9.2. Banding

Banding is a method of limiting the customer class revenue requirement increase to a given percentage above or below the average system impact. It is a mechanism commonly used by utilities to allocate the revenue deficiency across all customer classes, and it is a tool that supports the long-accepted principle of rate gradualism. It does this by moderating or mitigating unusually disparate responsibilities for revenue deficiencies by class.[900]

PNM proposed banding in this case to "keep bill impacts for residential customers more limited by banding the impact of the $63.8 million revenue deficiency."

The intervenors also proposed banding. Some of those proposals were based on the Commission imposing a revenue decrease rather than a revenue increase. The decrease necessarily shifts the question of how best to apportion a rate increase to how best to apportion savings.

[900] PNM Br. at 319.

What is most notable is that PNM's initial 364-page initial brief dedicates only two pages to the banding issue.[901] Its response brief dedicates a similar amount of writing to the issue.[902]

The fact that PNM dedicated minimal writing to this controversial issue in briefing is in no way a criticism of the company. In fact, PNM rightly states in briefing there that "[u]ltimately, . . . the Commission will have to make a determination that fosters its intended policy outcome." PNM adds that, from the company's perspective, the ideal course of action is for the Commission to allow the stakeholders to meaningfully engage with one another on the issue. PNM writes that "the PRAC is the appropriate forum for intervenor parties and other stakeholders to work collaboratively with PNM to revise its rate design and banding processes on a forward-looking basis."

The HEs agree with PNM. The intervenors who offered argument on banding made statements suggesting that they too agree that resolution of the banding issue is best reached through a collaborative, intervenor-centric process.

NM AREA writes that past decisions on banding have generated undesirable subsidies and that this problem will not "be corrected in a single rate case." NM AREA states that it "is committed to working with PNM and other stakeholders in the ongoing PRAC process to craft future solutions for modern rate design that better reflect cost-causation principles."[903] The Commission should not get in the way of this.

Similarly, the NMAG and County proposed two alternative banding proposals reflecting understandable uncertainty whether the Commission would grant PNM a revenue increase or

[901] PNM Br. at 319-20.

[902] PNM Resp. Br. at 176-78.

[903] NM AREA Br. at 47.

approve intervenors' positions that a revenue decrease is appropriate. Allowing supplemental proceedings after determination of a revenue requirement will enable the NMAG to assert a position more effectively.

Staff questioned why PNM did not provide any information regarding the percentage of customers in the small power rate class that may be financially challenged businesses despite having identified concern for financially challenged customers as a major driver in PNM's banding proposal. If the Commission authorizes supplemental proceedings after issuance of a final order, then Staff can further explore these matters.

If, in the course of supplemental proceedings, if the applicant and intervenors cannot reach agreement, then the Commission can take supplemental testimony and argument presented there and issue an order to settle what the parties could not. The Commission will be in a better position to render judgment at that time given that a revenue requirement will be settled.

The overarching thought here is to permit the parties to be the chief drivers of the banding question and maximize participation of stakeholders.

In the interim, PNM will maintain the banding established in the last rate case and which are utilized in rate collection right at this moment to calculate rates after taking into consideration the revenue requirement determinations and other authorizations granted here. This judgment reflects a desire to maintain the status quo until the parties can reach agreement.

8.9.3. Customer Charge

The HE recommends that the Commission defer ruling on this matter, leave the current customer charge already active in place, and address what the new customer charge should be in the supplemental proceedings where banding will be addressed. The NMAG's testimony and arguments makes plain why this is a prudent and necessary course of action.

The NMAG's approach to this case was to first determine PNM's base revenue requirement. The NMAG reached a lower number than PNM. The NMAG's rate design witness Dr. Gegax then imposed banding based on the revenue decrease. His proposal was meant to fairly spread the benefits of the base revenue decrease among the classes. Witness Gegax then made a series of rate design changes to the residential class that involve policy determinations. Those determinations include judgments about pricing for energy blocks and setting the customer charge.

What the NMAG's witness testimony makes plain is that the determination on revenue requirement necessarily impacts banding. Banding then necessarily influences energy charges. Energy charges then necessarily influence the customer charge. All of these things orbit one another and hang together. Adjustments to all of these variables are necessary to reach just and reasonable rates as modification to one component necessarily demands an analyst modify other components.

For this reason, any amendment to the customers charge should be addressed in supplemental proceedings where banding will be addressed.

8.9.4. ESAs

8.9.4.1 ESAs & Modified 3S1WCP Allocator

Initially, PNM proposed "a new allocation methodology specific to storage resources, the modified three-summer/one-winter Coincident Peak . . . allocator."[904] This engendered opposition from intervenors.

For instance, the Water Authority argues in its initial brief that "PNM's proposal to allocate the production component of ESA resources using a modified 4CP allocation method ("Modified

[904] PNM Br. at 308.

4CP") should be rejected."[905] The Water Authority contends that "PNM should continue to utilize the using the Unmodified 4CP allocator." This opposition was grounded in legitimate concern.

The Water Authority explains that the difference between application of the unmodified and modified allocation method "results in a 67% increase of ESA costs, or an additional $267,107, to rate 11B." The Water Authority further argued that application of the modified allocator "penalizes" the Water Authority "as a user that has made operational changes to utilize as much off-peak energy as possible . . . ."[906]

In briefing, PNM announced that it is no longer requesting authorization of the modified 3S1WCP allocator.[907] The company explains that "after review of the scope of the issues in this proceeding and as part of PNM's effort to be transparent with its stakeholders regarding changes in rate design as part of the energy transition, PNM believes it is more appropriate to holistically consider PNM's proposed new allocation methodology for energy storage with its stakeholders outside of a contested regulatory proceeding."

Other intervenors also objected to the modified allocator. It is unnecessary to summarize their objection given PNM's decision to withdraw the modified allocator.

PNM's decision to abandon the modified allocator (for the time being) resolves this dispute. As a withdrawn issue, there is nothing to decide. Any issues associated with or flowing from the dispute should be treated consistent with the parties' decision to withdraw the issue from the case.

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[905] Water Authority Br. at 51.

[906] *Id.* 52-53.

[907] PNM Br. at 309.

8.9.4.2. Functionalization of ESA Costs to Transmission

8.9.4.2.1. PNM's Proposal

PNM's test period revenue requirement includes ESAs. Costs associated with these ESAs need to be functionalized and classified. PNM's proposed functionalization of the ESAs proceeds from the proposition that energy storage can provide multiple benefits to PNM's system across one or more functions including production, transmission, and distribution.[908]

PNM explains that battery energy storage systems differ from other assets because they are "not a production asset that can generate electricity," nor are they assets "that can transmit or distribute energy to customers." Unlike any other resource, battery storage "can be used at any given time to support multiple functions, including putting energy on the grid or supplying voltage support by taking energy off the grid when needed." Batteries, the company writes, "provide flexibility to act as both load and generation to meet system conditions."

Given this, PNM functionalized the ESA costs into three categories: (1) production; (2) transmission; and (3) distribution. Then, the company classified the costs as 67% production-demand, 30% transmission-demand, and 3% distribution demand.

To determine what percentages to apportion to production and transmission, PNM analyzed the amount of energy storage actually dispatched in the peak storage dispatch hours relative to what could have been dispatched but was instead held back for ancillary services. PNM found that approximately 30% of the potential energy storage output was withheld and contributed to its ancillary services related to transmission.

[908] PNM Br. at 308.

8.9.4.2.2. Intervenor Objections

NM AREA takes issue with this process. It proposes functionalization of ESA costs as 97% production and 3% distribution.[909]

NM AREA explains that functionalizing the $45,172,557 revenue requirement associated with ESA costs 30% to transmission shifts $13.6 million dollars to the transmission function. According to NM AREA, PNM has failed to demonstrate that this is a reasonable functionalization. NM AREA offers several arguments in support of this claim.

First, NM AREA argues that withholding a portion of a battery's dispatchable capacity so that it provides ancillary services does not mean that PNM can designate the batteries as serving a transmission function. That PNM can modulate the amount of energy dispatched just means, NM AREA argues, that the battery is capable of production when production is needed. The battery can be "deployed to provide energy following sudden upward swings in load, sudden downward swings in load or the sudden tripping offline of another resource." These are all, NM AREA asserts, production functions.

NM AREA argues that providing energy to meet system swing is a "core production function" that must "be performed by generation resources, energy storage resources[,] or demand response resources to continuously maintain the balance between supply and demand in real-time." Transmission facilities cannot produce or discharge energy. They can only transmit energy.

NM AREA also notes that traditional production units supply the ancillary services PNM claims the ESAs will serve and that PNM cannot identify any transmission investments that will be avoided due to the ESAs.

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[909] NM AREA Br. at 36-37.

Second, NM AREA contends that PNM's proposal to functionalize the ESAs as transmission violates FERC rules as "FERC does not permit transmission providers, such as PNM, to functionalize the costs of providing ancillary services, such as those claimed by PNM of the ESAs, as transmission costs under its FERC-jurisdictional OATT that applies to wholesale transmission customers."

Third, NM AREA takes issue with PNM's use of probabilistic modeling software to determine the functionalization percentages.

8.9.4.2.3. HE Analysis

PNM describes NM AREA's arguments as having "no merit." PNM asserts that NM AREA is just wrong that the ESAs are not supporting a transmission function when their dispatchable capacity is withheld to serve ancillary services. PNM points to the definition of ancillary services provided in this case by PNM witness Phillips.

Witness Phillips explains that "[a]ncillary services are all services required by the transmission or distribution system operator to enable them to maintain the integrity and stability of the transmission or distribution system as well as power quality, all of which are necessary to support the transmission of electric power from generators to consumers."[910] PNM argues that the evidentiary record in this case more than adequately supports the conclusion that the very type of activities NM AREA itself acknowledges batteries can provide demonstrates batteries can serve a transmission function.

[910] PNM Exh. 49 (Phillips Reb.) at 16.

The HE agrees with PNM and its refutation of NM AREA's assertion that PNM is really just calling something "transmission" that is definitively not a transmission function. The company has shown that batteries can support a transmission function.

PNM responds to NM AREA's second claim—FERC does not permit PNM to functionalize the ESAs as transmission—by explaining that "none of the costs associated with the ESAs are being recovered from wholesale transmission customers" and, thus, the FERC rules NM AREA contends PNM is violating are inapplicable.[911] This is equally persuasive, and NM AREA does not respond to this argument.

Lastly, PNM persuasively argues that NM AREA's critique of the use of probabilistic modeling to determine functionalization is misguided. PNM notes that it has no hard data to glean how batteries will function on its system given that it has no batteries on its system. The modeling software PNM utilized in this case gives valuable insight into how the battery storage is likely to be used. PNM can extrapolate from there how that battery use is best functionalized. In other words, PNM used the tools it has to solve a new problem for which there is presently no hard data. This is patently reasonable.

8.9.4.2.4. Proposed Recommendation

PNM's proposal to functionalize the ESA costs as 30% transmission should be approved. The company has demonstrated a reasonable basis for the proposal. Batteries can support ancillary services. The evidence the company supplied supports the conclusion that ancillary services support a transmission function. NM AREA's objection to the functionalization can be revisited

[911] PNM Br. at 312-13.

in future cases when the data exists. For the moment, the Commission should credit PNM's testimony on this subject and authorize the ESA functionalization proposed.

8.9.5. Minimum Distribution System

8.9.5.1. PNM's Proposal

This is an issue held over from previous rate cases.[912] Given the constraints of time under which the HEs are operating, a full restatement of the history of this issue is not provided here. An interested reader may refer to PNM's initial brief at pages 313 to 315 and NM AREA's initial brief at pages forty to forty-three to review the history associated with this issue.

PNM explains that "[c]onsistent with the 2015 [*Corrected RD*], PNM reported in its 2016 Rate Case that it had chosen to use the minimum-intercept cost of facilities method . . . and it had started gathering the necessary data required to conduct the zero-intercept method."[913] Review of PNM witness Casas' rebuttal testimony confirms this assertion.[914]

8.9.5.2. Intervenor Objections

NM AREA argues that "PNM preformed, but did not use, the results of its MDS Study when doing its CCOSS." According to NM AREA, ["t]his failure not only violates the Commission [f]inal [o]rder in Case 15-00261-UT, but it also distorts the results of the CCOSS" in this case. For this reason (and others not pertinent in this section of discussion), NM AREA argues that the Commission should utilize NM AREA's class cost of service study.

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912 *See* PNM Br. at 314.

913 *Id.*

914 PNM Exh. 44 (Casas Reb.) at 18-19.

NM AREA argues further that PNM should have utilized the MDS method in this case as the Commission articulated a policy judgment in the 2015 and 2016 PNM rate cases that PNM utilize the MDS to allocate distribution costs. This assertion is unpersuasive.

8.9.5.3. HE Analysis

PNM and NM AREA fundamentally disagree about what it is PNM was required to do given directions in past rate cases. PNM's view of the facts is superior.

As noted, PNM believes it has complied with directions in past cases about the MDS. Moreover, it explains in briefing (and points to testimony filed in this case) that use of the MDS would increase the customer charge for the residential class.

NM AREA does not challenge this assertion; rather, it argues that this point is irrelevant as the Commission should be privilege cost-based rates and the CCOS should reflect the truest and most accurate picture of costs. To quote NM AREA directly, it explains that fear or concern that use of the MDS would work a hardship on a particular class of customers (low income) within the residential class by assigning them high fixed costs "confuses the purpose of the CCOSS analysis with the Commission's eventual rate determination in this case."[915] NM AREA argues that "the CCOSS should be used to provide the Commission with an objective starting point for its rate determinations."

PNM responds to this by explaining that it did perform a CCOS with the minimum intercept version of the MDS, and that the results were unsurprising: using the MDS method (regardless of the variant) will result in significantly more distribution costs being classified as customer-

[915] NM AREA Br. at 42.

related.[916] And, "[m]ost of these costs will be assigned to PNM's customer class with the most distribution facilities, which is the residential customer class."

There is much controversy and disagreement about the propriety of the customer charge for the residential class. PNM correctly points to WRA's position and the testimony of its witness Baatz as illustrative of this point. The question of what constitutes an appropriate customer charge implicates itself a host of issues: equity among ratepayers of different socioeconomic statuses, how to promote energy conservation, how to ensure individuals with DG systems are paying their share of costs for the distribution system, and many others. These are subjects discussed at length during the hearing in varying contexts and for different purposes.

NM AREA's assertion that PNM erred in some way by not utilizing the MDS regardless of the consequences because PNM was ordered to do so by the Commission is unpersuasive. PNM did run an MDS study for illustrative purposes. According to PNM, that study illuminates that application of the MDS gives rise to difficulties there is no reason to compound. This is correct.

8.9.5.4. Proposed Recommendation

PNM should be deemed compliant with any directions given the company by the Commission in previous cases concerning the MDS and how it should be utilized. To the extent PNM declined to apply an MDS method in this case out of concern it would impact the residential customer charge, this judgment should be credited and permitted. Any objection to PNM's proposals in this case based on application or non-application of the MDS should be rejected as a matter of policy.

[916] PNM Br. at 314.

8.9.6. CUSTEXP Allocator

8.9.6.1. PNM's Proposal

PNM explains that "[t]he weighted CUSTEXP allocator is a customer class allocator that PNM uses to allocate expenses associated with serving the Company's customers, including expenses for PNM's customer call center and account management services that are provided to PNM's largest and most complex business customers.[917] It is "derived using an 80:20 split, with 80% based on the number of customers in each customer class and 20% based on the energy usage of each customer class."

8.9.6.2. Intervenor Objections

NM AREA takes issue with the weighting and argues that "[t]he CUSTEXP allocator should be calculated using 100% weighting for the number of customers and 0% weighting for energy which is the appropriate and transparent way to allocate these fixed costs."[918] NM AREA contends that the costs the CUSTEXP allocator addresses are fixed costs that do not vary by energy usage. Examples of the types of costs incurred include utility "activities like billing, meter reading, customer service, and the maintenance and administration of each account." PNM persuasively rebuts this argument.

8.9.6.3. HE Analysis

Embedded within NM AREA's argument that the CUSTEXP allocator weighting is unfair is the assumption that all customers use the services the CUSTEXP allocator pays for equally. PNM shows this assumption is incorrect.

[917] PNM Br. at 316.

[918] NM AREA Br. at 39.

PNM explains that "[a] portion of the costs that are allocated by CUSTEXP allocator are directly related to overall services that are provided by PNM to support its customers, including customer service representatives who primarily serve large industrial and business customers." PNM adds that "10% of the total costs that are allocated pursuant to the CUSTEXP allocator [are] used for customer service representatives who primarily serve large industrial business customers."[919]

PNM's testimony reveals the weighting embedded in the CUSTEXP allocator reflects that some customers use the services paid for by the CUSTEXP allocator more. Those customers are the industrial customers.

8.9.6.4. Proposed Recommendation

NM AREA's objections to PNM's CUSTEXP allocator should be rejected. The proposed allocator should be approved. Note that there are additional justifications offered by PNM to reject NM AREA's arguments. Those are not summarized here for efficiency purposes.

8.9.7. Uncontested Rate Design Matters

PNM contends that no party has contested its proposals for the following:

a) revision to Rider No. 45, Economic Development Rider;
b) modification to Street lighting Rate Schedule 20 modifications;
c) modification to Rate Schedule 6 Private Area Lighting;
d) eliminating Rider No. 27, SO2 credit;
e) continuation of and minor modifications to Rider No. 8, PNM's IIPR, in response to the Commission's direction in 15-00261-UT and 16-00276-UT to assess in this case the usefulness of the rider and whether it should continue to exist;
f) lowering of the load factor for Rate Schedule 36B;
g) PNM's proposed ratemaking for the BB2 line.

[919] PNM Br. at 317.

These uncontested matters are indeed uncontested and should all be approved. They are not discussed in any further detail in this writing.

8.10. Fee-Free Program

8.10.1. Proposal

PNM "seeks to improve customer payment option[s] with a fee-free credit card program[.]"[920] This means that the company "proposes implementing a fee-free payment option model for residential and small business customers, eliminating the service fees customers currently pay when they pay their bills with a credit or debit card." To explain this proposal, some additional information about payment options at PNM must be provided.

PNM currently offers customers different ways to pay their bills. This includes online payment via the "PNM.com" website; payment by phone via an interactive voice response system; and payment by credit card, debit card, or automated clearing house (ACH).

Customers who pay via website and as a "guest" are assessed a $2.00 service fee regardless of whether they pay by credit card, debit card, or ACH. Approximately $0.20 of this fee subsidizes PNM's free ACH payment option.

Customers paying via the PNM website when logged into their account and paying by ACH pay no fee at all. This is the free ACH option.

PNM proposes a fee free payment option for customers who wish to pay by credit and debit cards for residential (1A/1B) customers and small power (2A/2B) customers. This program will also allow fee-free-guest-ACH payments to all customers, including residential and small power customers.

[920] PNM Br. at 188.

The purpose of this proposal is to resolve what PNM thinks is an inequity: there are costs associated with offering customers the ability to pay for free via ACH. Those fees are paid for by customers who pay the $2.00 credit/debit card service fee. It is important to repeat once more that Customers paying by ACH when logged into their "My Account" rather than acting as a guest on the PNM.com website do not pay the $2.00 service fee. Customers who pay by credit card or via ACH as a guest pay the $2.00 fee.

PNM clarifies that "[f]or customers other than residential and small power customers, PNM is not proposing eliminating credit/debit card payment fees but is proposing to increase the cap on credit/debit card payments by these customers from $2,000 to $25,000 per payment."

PNM proposes to pay for this fee-free service by embedding the cost of the program in rates, specifically as an operations and maintenance cost. PNM estimates the program will cost roughly $2.5 million for the first year of implementation. The cost will increase to roughly $3.0 million per year beginning with the year following the test period. This assumes that credit/debit card payments will increase by 25% per quarter and will begin to level off in year two of implementation.

PNM's proposal is, the company states, intended to benefit low-income customers. The data available to PNM indicates that there is a significant number of customers that are low income and that rely on a credit card to make a payment. The fee that these low-income customers incur is a burden that uniquely impacts low-income customers who are least capable of absorbing what other ratepayers may deem an insignificant cost. The reasons low-income customers utilize credit card payments and incur fees are various including that some customers do not have access to the banking system.

8.10.2. Intervenor Objections

It is notable that the NMAG opposes the fee-free proposal.[921] This is notable as it is the NMAG's responsibility to represent the interests of ratepayers in Commission proceedings, and there is every reason to believe that the NMAG (like all in this case) is aware of and concerned with the socioeconomic instability within which a sizeable chunk of PNM's ratepayers exist. The NMAG's opposition is not rooted in indifference to this problem. The NMAG is persuaded that PNM's proposal is an unconvincing policy response to a meaningful problem.

The NMAG explains that "[w]hile the NMAG supports fee-free payment options for ratepayers," the NMAG is not persuaded that "the fee-free credit card program proposed by the Company is . . . the most efficient way to enable ratepayers to pay their electric utility bills." The NMAG points out that incentivizing use of credit cards produces its own problems for low-income customers.

If those customers are encouraged to finance utility bills with credit cards that typically charge high interest rates, then low-income customers will end up paying more—when the cost of service plus the interest the customers will accrue to finance utility service with a credit card is taken into consideration—than if they paid by some other method. The NMAG puts the string of thoughts underlying this point succinctly: "removing credit card fees will increase the number of customers that use credit cards." This will, in turn, "increase the debt burden for low-income customers and other[s] than don't or can't pay off their credit card bills each month." In effect, the Commission would incentivize a system whereby low-income persons accrue more debt

[921] NMAG Br. at 65.

pushing them further down the socioeconomic ladder. To the extent this thought is credited, it reveals something patently undesirable.

The NMAG also observes that there is yet another good reason to reject PNM's proposal. The NMAG correctly concludes that a fee-free credit card payment program would likely incentivize higher income customers to increase credit card usage to maximize the rewards many if not all credit cards offer. This is equally undesirable. The NMAG writes that "[i]f credit card fees are 'socialized' then higher-income customers who can afford to pay off their credit card bills each month receive a net financial benefit." Again, to the extent this thought is credited, it reveals something patently undesirable about PNM's proposal.

The NMAG acknowledges, as PNM made clear at hearing, that PNM will not benefit from the fee free program and, as was stated earlier, PNM's intention is to remove a burden that low-income customers face. The NMAG is not here arguing that PNM is engaged in a ploy for self-benefit. The NMAG accepts that the company is legitimately attempting to address a problem. The NMAG's position is that intention alone should not guide major policy decisions.

The NMAG correctly points out that PNM did not "solicit bids from other third[-]party vendors to determine if less expensive credit card processing options are available." The NMAG also contends that PNM did not "include any adjustment to reflect lower uncollectible costs or other processing cost savings in its analysis." In short, the company presented one path that has readily discernible downside potential. That is not, the NMAG's point seems to be, a desirable decision-making framework.

Despite what has just been said, the NMAG does support elimination of fees at Western Union payment locations. Eliminating these fees would be helpful to customers that are unable to utilize the Company's website to make free ACH payments, perhaps because they do not have a

bank account or a computer. The NMAG notes that PNM estimates that eliminating the Western Union payments will cost the Company approximately $410,000 annually. The NMAG thus recommends that the PRC reduce the Company's FTY from $3.1 million (the cost of the fee-free program as proposed) to $410,000 (so that the company has funds to account for elimination of fees at Western Union).

8.10.3. HE Analysis

Unsurprisingly, PNM disputes the NMAG's positions. The company claims that the NMAG's "speculative and anecdotal statements about how low-income customers should manage their own money is not evidence for [the] NMAG's conclusion that customers will be worse off[.]" This contention is unpersuasive.

There is no way to perfectly predict how every low income or high-income earner will react to the free fee credit card payment proposal. Inferences must be drawn about how customers will respond to signals. The NMAG's basic point is that if you tell all ratepayers they can use their credit card without cost to pay utility bills, this will incent low income and high income customers alike to use credit cards. The NMAG rightly notes that this is not necessarily a desirable outcome, and the NMAG lays out plainly why. The NMAG's arguments are summarized above.

PNM's argument that the NMAG has no "facts" to prove that an incentive will influence behavior is not a persuasive argument. It demands specific evidence of a general phenomenon that is axiomatic. In other words, the Commission can credit the NMAG's assertion that offering fee free credit payment will obviously cause more customers to pay by credit card. PNM acknowledges this and has accounted for the increase in credit-card payments the program would likely generate. The Commission does not need specific evidence that people respond to incentives and elimination of costs.

Moreover, the Commission can exercise judgment to avoid "possible" or even "potential" downside risks. Neither PNM nor the NMAG can precisely predict what behavior will flow from any given structural change within the provision of utility service. The Commission must envision the full range of both upside and downside consequences and reach judgment based on a balancing of them.

For instance, the Commission can never know (nor can PNM or anyone else) the precise chain of events that could or will lead to an electrical-line induced forest fire. That uncertainty does not mean that the Commission is without authority to authorize funding for PNM to take action to avoid wildfires and to award those funds over the objection of intervenors. In that context, the suggestion preventative measures that produce cost are actions predicated on mere unfounded "speculation" are patently unpersuasive.

The point of the comparison is that the Commission may act to resolve what it perceives as risks. The potentiality that a fee-free credit card program would drive low-income people to charge more to a credit card and carry costly and unwise debt is a legitimate risk the Commission is free to act to avoid.

PNM's contention that the NMAG's position is counter to the evidence it has which indicates that "[e]xtensive research and PNM customer feedback demonstrate that fee-free payments are a payment service our customers expect" is also unpersuasive.

While it is surely the case that PNM's customer base expects fee free billing options, this does not mean they would support a program in which customers could procure private benefit from switching from fee-free ACH payments to paying with a credit card that would provide consumer benefits like free flights or hotel rooms. Support for the former does not mean PNM's ratepayers are interested in supporting the latter.

Lastly, PNM's argument that the NMAG is again engaged in unfounded speculation by suggesting that "there may be less expensive credit card processing options" is unpersuasive. The NMAG's point is clearly that the Commission should consider the widest set of possible solutions to remove the burden the $2.00 surcharge imposes on certain customers before acting. This is the cautious and prudent approach, and that is self-evident. It is understandable that the NMAG would want a fuller sense of the total possibilities to address the $2.00 fee. The Commission should too.

Other parties have raised additional facts and argument both supporting and attempting to cast doubt upon the merits of the fee free program. The dialog between PNM and the NMAG produces a sufficient basis to reach a conclusion on the issue.

8.10.4. Proposed Recommendation

The Commission should deny PNM's request to implement the fee-free program.

8.11. Sales and Demand Forecast

8.11.1. PNM's Proposal

The simplest way to discuss PNM's sales and demand forecast is by reproducing a series of graphs and tables PNM witness McMenamin included in his testimony on the subject. That is what is supplied below. It is useful to understand at the outset where the analysis leads.

PNM reports that "the forces driving the changes in sales are complicated" and include base-period weather impacts, customer growth, adoption of PV, and adoption of electric vehicles ("EVs"). Additionally, improvements in energy efficiency and changes in appliance and equipment-saturation levels play a role. Overall, for the Residential customer class, overall sales are projected to decline by 2.9% from the base period to the test period despite positive customer growth.

PNM witness McMenamin produced a useful table showing the impact for sales in the residential class caused by adoption of solar-PV systems and energy efficiency improvements. Here is that table.

PNM Table SM-5: Change in Sales from the Base Period to the Test Period

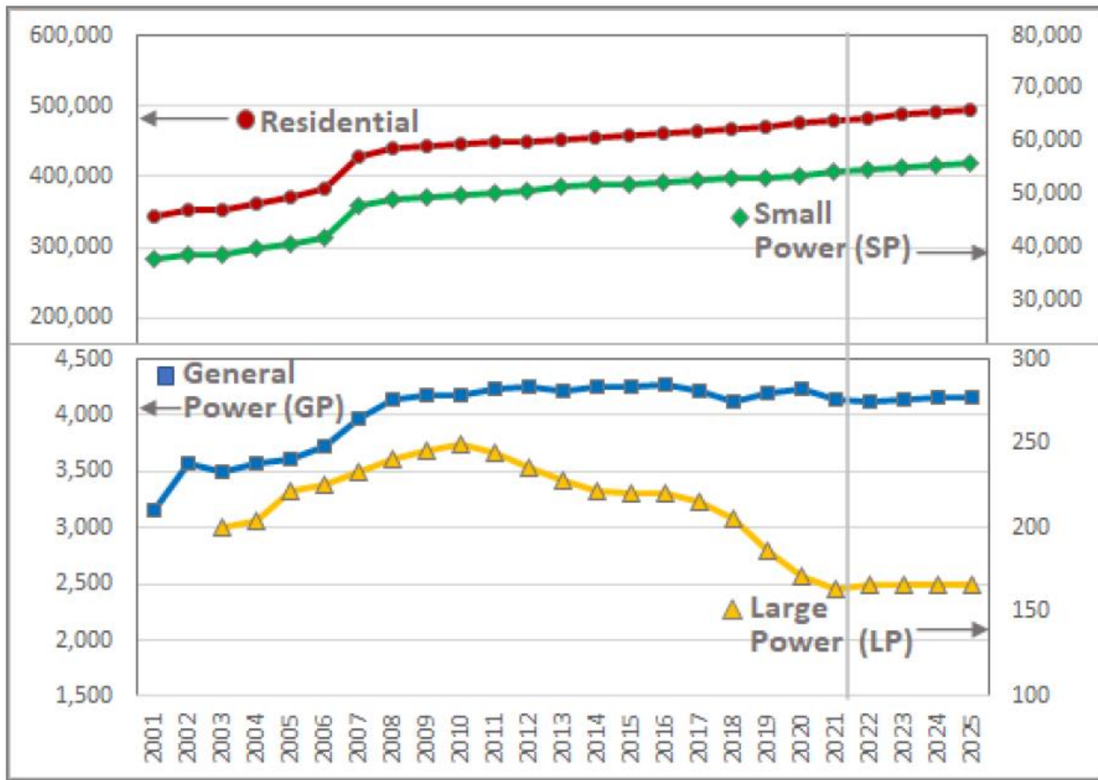
Class Definition	Customer Class	Rate Schedules	Base Period Sales (GWh)	Test Period Sales (GWh)	Change in Sales (GWh)	Percent Change in Sales (%)
Residential	Res	1	3,348.9	3,251.9	-97.0	-2.9%
Small Power	SP	2	927.3	928.4	1.2	0.1%
General Power	GP	3	1,863.2	1,810.5	-52.7	-2.8%
Large Power	LP	4,35	1,082.2	1,145.1	62.9	5.8%
Large Service	LS	5,15,30,33	534.7	793.1	258.5	48.3%
Irrigation	Irr	10	20.6	24.1	3.5	16.9%
Water and Wastewater	Water	11	177.4	181.9	4.5	2.5%
Private Area Lighting	PAL	6	13.8	13.3	-0.5	-3.5%
Streetlights	SL	20	34.6	33.1	-1.5	-4.2%
Total All Classes			**8,002.6**	**8,181.5**	**178.9**	**2.2%**

As should be evident from above, sales to the residential class are projected to decline by 2.9% from the base period to the test period. This is despite positive customer growth.

PNM projects that commercial class sales will not be as heavily impacted by PV adoption. Sales increase slightly for the small power class as customer growth and the rebound from Covid slightly outweigh sales reductions from efficiency gains.

PNM supplied a graph of historical and forecast data for customer growth. As can be seen below, the graph shows a stable historical growth pattern and extension of that pattern into the test period.

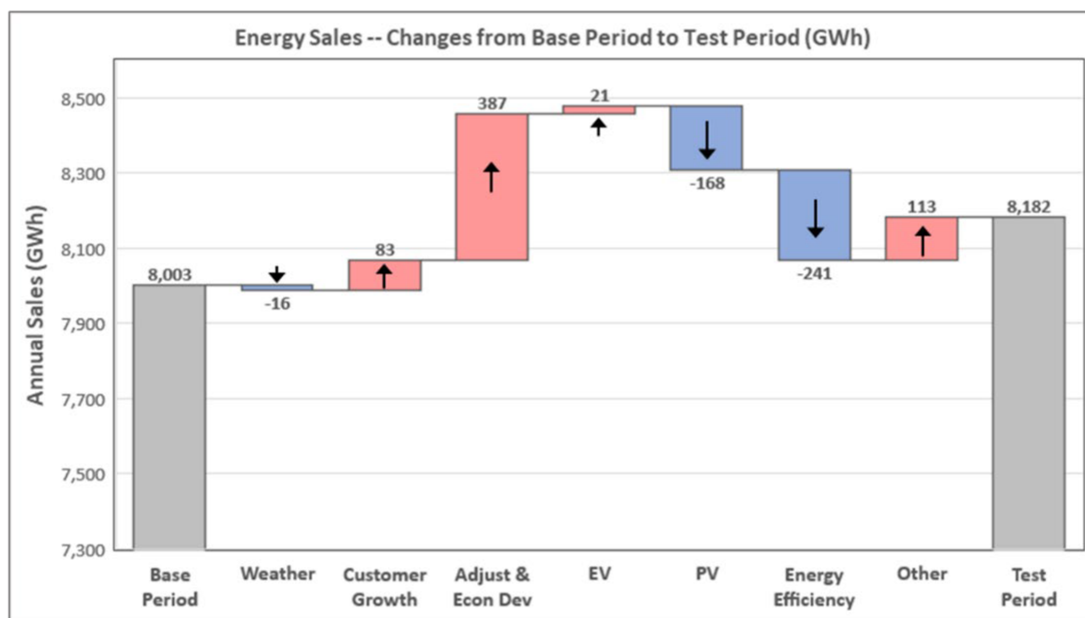
PNM Figure SM-5: PNM Customers: History and Forecasts



The growth rate for the residential class averages 0.8% per year. The growth rate for the small power class averages 0.7% per year.

Despite the decline in residential sales, the overall forecast for test-period sales is 8,182 GWh, which is approximately 2.2% higher than base-period sales. PNM witness McMenamin produced a helpful graphic showing how various factors work together to produce this outcome. The graphic is reproduced atop the next page.

PNM Figure SM-6: Components of Change – Base Period to Test Period



PNM witness McMenamin also provided more granular data to understand the dynamics functioning within these broad trends. That data indicates to PNM that it can anticipate a decline in sales to block 3 customers. This reflects, in part, continued high adoption of PV systems by larger residential energy users. This is shown here:

PNM Table SM-9: Base Period and Test Period Sales by Usage Block

Class Definition	Customer Class	Rate Schedule	Description	Base Period	Test Period	Percent Difference
Residential	Res	1A	Sales (GWh)	3,346	3,248	-2.9%
			Block 1 Sales (GWh)	1,959	1,966	0.4%
			Block 2 Sales (GWh)	839	855	1.9%
			Block 3 Sales (GWh)	548	427	-22.0%
			Block 1 Percent (%)	58.5%	60.5%	2.0%
			Block 2 Percent (%)	25.1%	26.3%	1.2%
			Block 3 Percent (%)	16.4%	13.2%	-3.2%

In another table provided by PNM witness McMenamin directed at granular questions, PNM shows the percent change in customers and sales in each of the classes. According to PNM witness McMenamin, the forces driving changes in sales are complicated, and include base period

weather impacts, customer growth, the adoption of PV and EV, improvements in energy efficiency, and other factors such as changes in appliance and equipment-saturation levels.

PNM Table SM-8: Sales and Customers by Rate Schedule

Class Definition	Customer Class	Rate Schedule	Description	Base-Period Customers	Test-Period Customers	Percent Difference (%)	Base-Period Sales (GWh)	Test-Period Sales (GWh)	Percent Difference (%)
Residential	Res	1A	Energy Blocks	482,103	491,775	2.0%	3,345.6	3,248.4	-2.9%
		1B	Time of Use	120	121	1.0%	3.4	3.5	4.9%
Small Power	SP	2A	Energy	53,513	54,447	1.7%	912.8	913.3	0.1%
		2B	Time of Use	899	896	-0.3%	14.5	15.1	4.6%
General Power	GP	3B Sec	Secondary	2,985	3,029	1.5%	1,423.1	1,392.4	-2.2%
		3B Pri	Primary	93	93	0.4%	111.0	109.2	-1.6%
		3C Sec	Secondary, LLF	769	738	-4.1%	181.7	165.8	-8.7%
		3C Pri	Primary, LLF	12	13	8.2%	12.0	11.5	-4.9%
Municipal General Power	GP	3D Sec	Secondary	188	190	1.5%	110.2	107.9	-2.1%
		3D Pri	Primary	15	15	0.4%	10.0	9.9	-1.4%
		3E Sec	Secondary, LLF	75	72	-4.1%	15.0	13.7	-8.6%
		3E Pri	Primary, LLF	1	1	0.0%	0.1	0.1	0.0%
Large Power	LP	4B	Utility Owned	56	57	1.9%	248.4	311.3	25.3%
		4B COT	Customer Owned	109	108	-0.8%	652.1	648.8	-0.5%
Large Power (>3MW)		35B	Industrial	4	4	0.0%	181.7	185.0	1.8%
Large Service (>8MW)	LS	5B	Mining	2	3	50.0%	60.1	28.9	-51.9%
Large Service UNM		15B	UNM	1	1	0.0%	53.2	48.5	-8.7%
Large Service (>30MW)		30B	Industrial	1	1	0.0%	418.1	712.4	70.4%
Large Service Stn Pwr		33B	Station Power	2	2	0.0%	3.1	3.3	6.9%
Water and Wastewater	Water	11B	Time of Use	155	155	0.0%	177.4	181.9	2.5%
Irrigation	Irr	10A	Energy	106	106	0.0%	3.1	4.2	38.5%
		10B	TOU	208	208	0.1%	17.6	19.9	13.2%

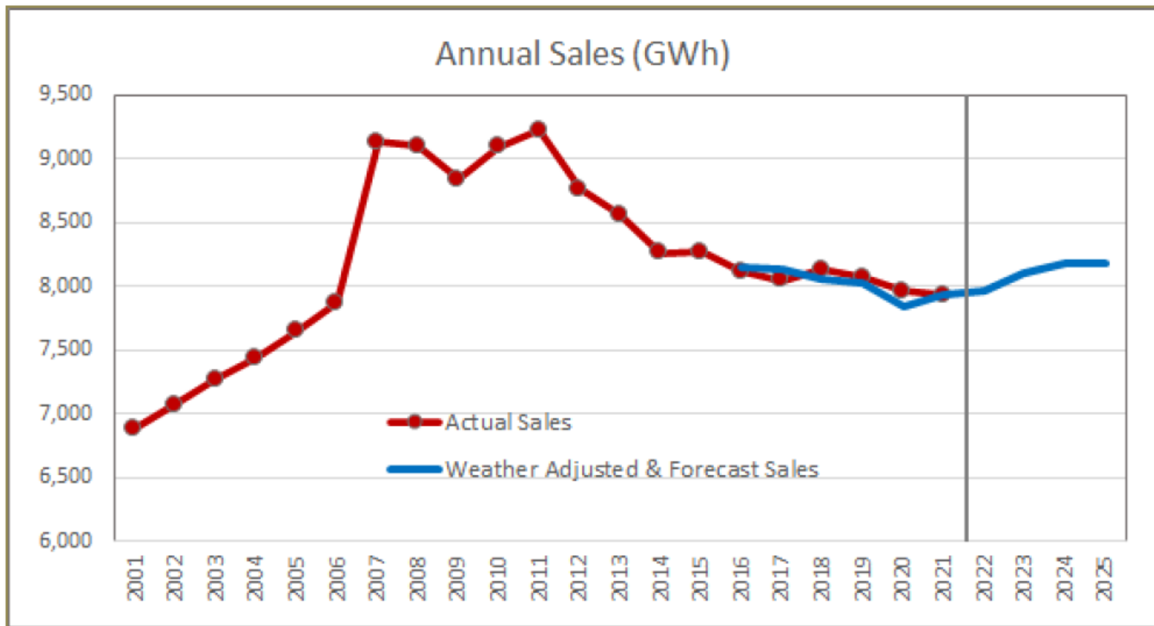
PNM's analysis also accounts for weather impacts. The results of PNM's inquiry are shown below.

PNM Table SM-4: Summary of Base Period Weather Adjustments

Class Definition	Customer Class	Rate Schedules	Base Period Sales (GWh)	Weather Adjust (GWh)	Adjust Percent (%)	Adjusted Sales (GWh)	Percent of Adjusted Sales (%)
Residential	Res	1	3,348.9	-3.23	-0.10%	3,345.7	41.89%
Small Power	SP	2	927.3	-2.70	-0.29%	924.6	11.58%
General Power	GP	3	1,863.2	-6.12	-0.33%	1,857.1	23.25%
Large Power	LP	4,35	1,082.2	-3.50	-0.32%	1,078.7	13.51%
Large Service	LS	5,15,30,33	534.7	-0.59	-0.11%	534.1	6.69%
Irrigation	Irr	10	20.6	0.00	0.00%	20.6	0.26%
Water & Wastewater	Water	11	177.4	0.00	0.00%	177.4	2.22%
Private Area Lighting	PAL	6	13.8	0.00	0.00%	13.8	0.17%
Streetlights	SL	20	34.6	0.00	0.00%	34.6	0.43%
Total			8,002.6	-16.16	-0.20%	7,986.4	100.00%

PNM witness McMenamin provided a helpful graphic showing weather impacts as charted by a line and compared to an actual-sales line.

PNM Figure SM-7: PNM Annual Sales in GWh – History and Forecast



8.11.2. NM AREA

NM AREA asks the Commission to reject PNM's proposed sales and demand forecast. NM AREA contends that PNM has understated residential sales per customer. PNM's projected residential usage in 2024 is 6605 kWh per customer in 2024. NM AREA emphasized that this level is less than any year going back to 2017.

NM AREA recommends that the Commission use a two-year average of usage per customer for the years 2021 and 2022 to annualize residential revenues. The two-year average usage per customer is 6,962.96 kWh. This average is almost identical to the usage per customer levels for 2021 and 2022, meaning the usage per customer in those years has been stable.

Utilizing these determinants, the annualized 2024 residential revenues are approximately $365.3 million rather than the $348.7 million used by PNM. NM AREA asks the Commission to deduct $16.6 million from PNM's claimed revenue deficiency in the 2024 test year.

NM AREA's critique of PNM's sales and demand projection is rooted in skepticism of the testimony and conclusions of PNM witness McMenamin who emphasizes the downward impact (in terms of demand and sales) of efficiency and rooftop solar adoption. NM AREA believes witness McMenamin fails to adequately account for trends that will increase residential usage such as home electrification and EV penetration.

NM AREA notes that PNM's projections indicate that energy efficiency and rooftop solar will have 20 times the downward impact than the projected upward impact of EV adoption on demand and sales. From NM AREA's perspective, this is patently wrong and fails to properly account for transportation electrification.

NM AREA provides a table showing usage per residential customer going back to 2017. According to NM AREA, the table on the next page shows the historic relationship between customer levels and usage per customer and demonstrates how unreasonable PNM's proposed sales level is as compared to historic sales.

TABLE GRM-3

Historic Usage Per Residential Customer

Year	Customers	Usage (MWh)	Usage per Customer (kWh)
2017[1]	464,271	3,146,228	6,776.71
2018[1]	468,143	3,229,976	6,899.55
2019[1]	471,819	3,226,448	6,838.32
2020[1]	476,405	3,414,182	7,166.55
2021[1]	480,700	3,350,265	6,969.55
2022[2]	483,951	3,366,541	6,956.37
PNM Proposed[3]	491,775	3,248,357	6,605.37

Sources:
[1]PNM's Responses to Staff's Second Set of Discovery "PNM's Exhibit Staff 2-29".
[2]PNM FERC Form 1
[3]Calculated from PNM Exhibit HMP-2. 5,901,300 bills / 12 = 491,775 customers.

NM AREA notes that PNM's proposed residential sales (3,248,357 MWh) are less than every year dating back to 2019. When customer growth is figured in, NM AREA is confident that PNM is underestimating.

NM AREA contends that, prior to 2020, PNM served 20,000 fewer customers than the Company estimates for 2024. If 20,000 customers were added to those years (2017-2019), the annual sales totals for those years would exceed the level proposed by PNM for 2024. In NM AREA's view, this *proves* that PNM's proposed consumption per customer level is significantly understated.

In sum, NM AREA's challenge to PNM is based on the straightforward proposition that efficiency and rooftop solar have not caused the level of single-year reductions in residential demand that PNM is speculating will occur in 2024.

8.11.3. HE Analysis

The principal point of disagreement between PNM and NM AREA is, as the discussion above makes clear, whether PV adoption and energy efficiency will dampen (and by how much) the impact of electrification.

It is impossible to prove that either PNM or NM AREA is right or that the other wrong. Both are making projections that incorporate complicated questions like how rapidly New Mexico residents will electrify much of their lives, how much energy efficiency and PV adoption will occur, and how many EVs will be sold. No one can predict with total accuracy how these matters will play out, and the Commission need not try and decide these matters definitively.

It is enough for present purposes that PNM has supplied an adequate factual basis for its projections. NM AREA is asking good questions and pointing out problems in PNM's analysis, but more data is needed to conclude that NM AREA's perspective on these matters is right and that PNM's sales and demand forecast should be rejected as inaccurate.

8.11.4. Proposed Recommendation

The HEs recommend that the Commission approve PNM's sales and demand forecast.

9. FINDINGS OF FACT & CONCLUSIONS OF LAW

The Hearing Examiners Recommend that the Commission **FIND AND CONCLUDE** as follows:

1. The discussion and all findings and conclusions contained in this Recommended Decision are hereby incorporated by reference as findings of fact and conclusions of law of the Commission.

2. PNM is a public utility as defined by Section 62-3-3(G) and is subject to the jurisdiction of the Commission under the PUA.

3. The Commission has jurisdiction over the parties to and subject matter of this case.

4. Reasonable, proper, and adequate notice of this case was provided as required by law.

5. The tariffs filed under Advice Notice No. 595 contain rates that are not fair, just, and reasonable.

6. PNM should implement new rates which conform to all applicable terms and conditions stated in this Recommended Decision.

7. Any new rates will be effective only after Commission Staff verifies that they comply with the recommendations and directives set out in this Recommended Decision.

8. PNM should be required to implement rates for service rendered on and after the compliance approval.

9. PNM should file, as and where applicable, under a new advice notice new and revised service rules that conform to all applicable terms and conditions of this Recommended Decision.

10. Any finding not expressly mentioned here but stated in the body of this writing is embraced by the Commission. Similarly, and fact rejected in the body of this writing not expressly identified here is rejected by the Commission.

10. DECRETAL PARAGRAPHS

The Hearing Examiners recommend that the Commission **ORDER** as follows:

A. The findings, conclusions, decisions, rulings, and determinations in this Recommended Decision will be carried out.

B. PNM's rates as filed under Advice Notice No. 595 are disapproved.

C. PNM shall file new rates and rules consistent with this Recommended Decision and with the rules, regulations, and any orders of the Commission.

D. The new rates PNM will file will become effective following their approval as to form and content by Staff.

E. PNM will comply with all requirements placed on it in this case including matters involving future cases before the Commission.

F. PNM's request to renew its fuel and purchased power cost adjustment clause as contained in the application in 21-00166-UT which was consolidated with this proceeding is approved. Any other requests made in that case and consistent with this order are also approved.

G. The issues arising in 21-00083-UT and which the Commission stated it would address in this matter are resolved consistent with the writing in the body of this Recommended Decision.

H. Supplemental proceedings will be conducted over the next 60 days to address banding and the customers charge. Only the issues just identified will be addressed in those supplemental proceedings.

I. All matters raised by PNM and the intervenors dealing with TOD rates will be addressed in Case No. 22-00058-UT. All evidence supplied here by PNM's regarding its TOD pilot and all intervenor evidence on that subject will be admitted in Case No. 22-00058-UT through administrative notice.

J. Within ten (10) business days of a Commission final order in this case, Staff will supply the Commission a recommendation regarding the additional reporting requirements imposed here on PNM for its wildfire mitigation, vegetation management, and infrastructure request proposals.

K. Any other conclusion or recommendation included in this writing not specifically stated herein is adopted by the Commission as if it were and the full legal consequence of those conclusions or orders is imposed.

L. Consistent with 17.1.2.37(D) NMAC, the Commission has taken administrative notice of all Commission orders, rules, decisions, and other relevant materials in all Commission proceedings cited in this Order.

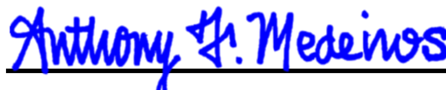
M. Any matter not specifically ruled on during the hearing or in this Recommended Decision is resolved consistent with this decision.

N. Copies of this Recommended Decision will be provided to the official service list per the Commission's electronic filing and service rules.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico this **8th** day of **December 2023**.

NEW MEXICO PUBLIC REGULATION COMMISSION

Christopher P. Ryan
Deputy Chief Hearing Examiner



Anthony F. Medeiros
Chief Hearing Examiner

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF NEW MEXICO FOR REVISION OF ITS RETAIL ELECTRIC RATES PURSUANT TO ADVICE NOTICE NO. 595	)	
PUBLIC SERVICE COMPANY OF NEW MEXICO,	)	**Case No. 22-00270-UT**
APPLICANT.	)	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the ***Recommended Decision*** issued December 8, 2023 was e-mailed on this date to the parties listed below.

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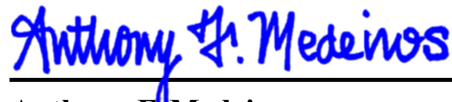
DATED this **8th** day of **December 2023.**

NEW MEXICO PUBLIC REGULATION COMMISSION



Anthony F. Medeiros
Chief Hearing Examiner