BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF NEW MEXICO FOR APPROVAL OF THE ABANDONMENT OF THE FOUR CORNERS POWER PLANT AND ISSUANCE OF A SECURITIZED FINANCING ORDER	)	**Case No. 21-00017-UT**
PUBLIC SERVICE COMPANY OF NEW MEXICO,	)	
Applicant.	)	

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

12 November 2021

TABLE OF CONTENTS

GLOSSARY OF ACRONYMS AND DEFINED TERMS

Acronym/Defined Term	Meaning
2015 Rate Case	Case No. 15-00261-UT
2016 Rate Case	Case No. 16-00276-UT
ABCWUA	Albuquerque Bernalillo County Water Utility Authority
ACC	Arizona Corporation Commission
APS	Arizona Public Service Company
Agreement or PSA	Four Corners Purchase and Sale Agreement between PNM and NTEC dated as of Nov. 1, 2020
Application or App.	Amended Application filed by PNM on March 15, 2021
Attorney General or NMAG	State of New Mexico, *ex rel*. Hector H. Balderas, Attorney General
Avangrid	Avangrid Networks, Inc. and Avangrid, Inc., collectively
Br.	Brief in chief or initial brief
City	City of Albuquerque, New Mexico
County	Bernalillo County, New Mexico
CCAE	Coalition for Clean Affordable Energy
CCN	Certificate of Public Convenience and Necessity
CCR	Coal combustion residuals or coal ash
CCSD	Central Consolidated School District
CERCLA	Comprehensive Environmental Response, Compensation, and Liability Act
CFRE	Citizens for Fair Rates and the Environment
CSA	Four Corners Coal Supply Agreement
Certification of Stipulation	Certification of Stipulation in Case No. 16-00276-UT issued Oct. 31, 2017

Acronym/Defined Term	Meaning
CO_2	Carbon dioxide
Commission or NMPRC	New Mexico Public Regulation Commission
Community Groups	SJCA, Diné C.A.R.E., Tó Nizhóní Aní, and NAVAEP
COVID-19	Coronavirus disease
Cumbre	Cumbre Court Reporting Services, L.L.C.
DG	Distributed Generation
Diné C.A.R.E.	Diné Citizens Against Ruining Our Environment
EIA	U.S. Energy Information Administration
EPA	Environmental Protection Agency
EPE	El Paso Electric Company
ETA	Energy Transition Act
ETCs	Energy transition charges
Exh.	Exhibit
FCPP or Four Corners	Four Corners Power Plant
FCPP Assets	PNM's 13% interest in FCPP and associated PNM-owned assets such as the FCPP switchyard, inventory, and fuel inventory)
FERC	Federal Energy Regulatory Commission
FPA	Federal Power Act
GWh	Gigawatt-hour
IRP	Integrated resource plan
Iberdrola	Iberdrola, S.A., a corporation (*Sociedad Anónima*) organized under the Laws of the Kingdom of Spain and ultimate parent company of Avangrid.
kW	Kilowatt

Acronym/Defined Term	Meaning
Legislature	New Mexico Legislature
LOLE	Loss of Load Event
MWh	Megawatt-hour
Merger case or proceeding	Case No. 20-00222-UT, *In the Matter of the Joint Application of Avangrid, Inc., Avangrid Networks, Inc., NM Green Holdings, Inc., Public Service Company of New Mexico and PNM Resources, Inc. for Approval of the Merger of NM Green Holdings, Inc. with PNM Resources, Inc., Approval of General Diversification Plan; and All Other Authorizations and Approvals Required to Consummate and Implement this Transaction*
Modified Revised Stipulation	Modified Revised Stipulation in Compliance with and Conforming to Commission's Orders Granting Conditional Approval in Case No. 16-00276-UT filed Jan. 23, 2018
NAVAEP	NAVA Education Project
NEE	New Energy Economy
NMAC	New Mexico Administrative Code
NM AREA	New Mexico Affordable Reliable Energy Alliance
NMCA	New Mexico Court of Appeals
NMPSC	New Mexico Public Service Commission
NMPUC	New Mexico Public Utility Commission
NMSA	New Mexico Statutes Annotated
NMSC	New Mexico Supreme Court
NO_x	Nitrogen Oxide
NPV	Net present value
NPVRR	Net present value revenue requirements
NREL	National Renewable Energy Laboratory
NTEC	Navajo Transitional Energy Company, LLC

Acronym/Defined Term	Meaning
NTEC Operating Agreement	Amended and Restated Operating Agreement of the Navajo Transitional Energy Company, LLC.
Nation	Navajo Nation
O&M	Operations and maintenance
OEH or Onward Energy	Onward Energy Holdings, LLC
PSA	Purchase and Sale Agreement between PNM and NTEC
PV	Photovoltaic
Procedural Order	Procedural Order issued in this case by the Hearing Examiner on March 17, 2021
PNM	Public Service Company of New Mexico
PNMR	PNM Resources, Inc., a New Mexico corporation that wholly owns PNMR Services Company, which provides shared services to PNMR and its active subsidiaries, including PNM
PPA	Purchased power agreement
PUA	Public Utility Act
PVGNS	Palo Verde Nuclear Generating Station
RAP	Regulatory Assistance Project
REA	Renewable Energy Act
RECs	Renewable Energy Certificates
Resp.	Response
Revised Final Order	*Revised Order Partially Adopting Certification of Stipulation* in Case No. 16-00276-UT issued Jan. 10, 2018.
ROO	Recommended opinion and order
RPS	Renewable portfolio standard
S.B. 489	Senate Bill 489

Acronym/Defined Term	Meaning
SCR	Selective catalytic reduction pollution control system or "SCR controls"
SJGS	San Juan Generating Station
SJCA	San Juan Citizens Alliance
SPE	Special purpose entity
SPS	Southwestern Public Service Company
SRP	Salt River Project Agricultural Improvement and Power District
STEM	Science, technology, engineering, and mathematics
San Juan County or SJC	Board of County Commissioners of San Juan County, New Mexico
Staff	Commission's Utility Division Staff
TEP	Tucson Electric Power Company
TNA	Tó Nizhóní Aní
Tr.	Transcript of the evidentiary hearings conducted in this case
Vol.	Volume, as in Volumes I-VII of the evidentiary hearings held in this case between Aug. 31 – Sept. 9, 2021
WACC	Weighted average cost of capital
WRA	Western Resource Advocates
Zoom	Zoom videoconferencing platform

Anthony F. Medeiros, Hearing Examiner in this proceeding, submits this Recommended Decision to the New Mexico Public Regulation Commission ("Commission" or NMPRC) pursuant to NMSA 1978, § 8-8-14 and NMPRC Rules of Procedure 1.2.2.29(D)(4) and 1.2.2.37(B) NMAC. The Hearing Examiner recommends that the Commission adopt the following statement of the case, background, discussion, findings of fact, conclusions of law, and ordering paragraphs in an order.

I. STATEMENT OF THE CASE

On January 8, 2021, Public Service Company of New Mexico (PNM or "Company") filed an Application for the Approval of the Abandonment of the Four Corners Power Plant and Issuance of a Securitized Financing Order. 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 Four Corners Power Plant ("Four Corners" or FCPP), transfer the resources to the Navajo Transitional Energy Company, LLC (NTEC), and issue Energy Transition Bonds (ETBs) pursuant to the Energy Transition Act (ETA).[1] PNM's application expressly sought approval for two actions: (1) abandonment of PNM's 200 MW share of Four Corners, representing a minority interest of thirteen percent (13%) of the total generation capacity at the plant, and; (2) securitized financing of plant abandonment and financing costs along with funding for state-administered tribal and community programs.

On January 19, 2021, the Commission issued its Initial Order in this case. The Commission's Order initiated this abandonment proceeding pursuant to Section 62-9-5[2] of the Public

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

[2] NMSA 1978, § 62-9-5 (1941, as amended through 2005).

Utility Act (PUA);[3] extended the review of PNM's application under NMSA 1978, § 62-18-5 for an additional three months for a total of nine months; and appointed the undersigned as Hearing Examiner to preside over this matter.

On January 26, 2021, Sierra Club filed a Motion for an Order Requiring PNM to File Supplemental Testimony Addressing the Prudence of Four Corners, or, in the alternative, to Dismiss PNM's Application. Relatedly, New Energy Economy (NEE) and Citizens for Fair Rates and the Environment (CFRE) filed on January 28, 2021 their Joint Movant's Motion to Dismiss Application and Supporting Brief.

On January 28, 2021, the Hearing Examiner held a prehearing conference in this case via a Zoom videoconference. The prehearing conference was attended by representatives of PNM, the Albuquerque Bernalillo County Water Utility Authority (ABCWUA), the City of Albuquerque ("City"), Bernalillo County ("County"), CFRE, Central Consolidated School District (CCSD), Coalition for Clean Affordable Energy (CCAE), Diné C.A.R.E. and San Juan Citizens Alliance (SJCA), Interwest Energy Alliance, NEE, New Mexico Affordable Reliable Energy Alliance (NM AREA), the New Mexico Attorney General ("Attorney General" or NMAG), Onward Energy Holdings, LLC (Onward Energy or OEH), the Board of County Commissioners of San Juan County ("San Juan County" or SJC), Sierra Club (SC), Western Resource Advocates (WRA), and Staff of the Commission's Utility Division ("Staff").

[3] 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. Regulation 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.").

On February 1, 2021, the Hearing Examiner issued an Order Requesting Briefing on Sufficiency of PNM's Application and Scope of Issues in Proceeding. The Order instructed the parties to brief the following issues:

> 1) whether PNM's Application is sufficient as plead (i.e., whether the request for approval of the proposed abandonment can be granted without also requesting approval in the Application of the transfer of PNM's interest in the FCPP pursuant to NMSA 1978, §§ 62-6-12(A)(4) and 62-6-13);
>
> 2) whether, in the absence of a request in the Application for approval of the transfer of PNM's interest in the FCPP pursuant to NMSA 1978, §§ 62-6-12(A)(4) and 62-6-13, PNM's Application for approval of the proposed abandonment can be granted (i.e., or should be dismissed);
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> 3) whether the Commission's consideration of PNM's Application for approval of the proposed abandonment should be conditioned upon its filing of an amended application in which it also requests approval of the transfer of PNM's interest in the FCPP pursuant to NMSA 1978, §§ 62-6-12(A)(4) and 62-6-13;
>
> 4) whether the statutory review period for the Commission's review of PNM's Application for both the abandonment and securitization approvals should start anew upon the filing of an amended application;
>
> 5) whether, in the alternative to starting the statutory review period anew upon the filing of an amended application, the statutory review period should be extended for some specific and reasonable period of time to account for the filing of an amended application to address the deficiencies in the current Application or, at the very minimum, to account for the additional time required to address the matters implicated herein;[4]
>
> 6) address the scope of issues that should be covered in PNM's supplemental testimony inasmuch as a) there was already discussion at the prehearing conference over whether the parties should brief the scope of issues, b) PNM has already broached its interpretation of issues to be addressed, and c) the Commission is set to consider at its February 3, 2021 Open Meeting potential orders addressing Sierra Club's related Motion to Reopen Docket No. 16-00276-UT to Implement the Revised Final Order and NEE's formal complaint against PNM in Case No. 20-00210-UT for the Company's alleged "Continued

[4] The February 1st Order also found, at 8 n. 21, that "given among other things the potential due process considerations inhering, the Hearing Examiner's self-imposed deadline to issue the Notice of Proceeding and Hearing ("Notice") in this case by February 2, 2021 in order to ensure timely publication in six newspapers of general circulation by February 12, 2021 and allow sufficient time for PNM to mail the Notice to its customers has already been compromised."

Reliance on Expensive and Climate-Altering [FCPP] Coal resulting in Unfair, Unreasonable, and Unjust Rates;" and

7) any other comments or concerns regarding PNM's proposed notice in its revised form.[5]

Subsequently, after intervenors and Staff filed briefs and PNM filed a consolidated response to those briefs and the Sierra Club and NEE/CFRE motions, the Hearing Examiner determined in his Order on Sufficiency of PNM's Application and Scope of Issues in Proceeding issued February 26, 2021 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 Company's interest in the FCPP to NTEC. Further, regarding the scope of issues to be covered in PNM's supplemental testimony, 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.[6] 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,[7] 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

[5] Feb. 1, 2021 Order, at 7-8.

[6] *In the Matter of the Application of Public Service Company of New Mexico for Revisions of its Retail Electric Rates Pursuant to Advice Notice No. 533*, 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).

[7] 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.'"

> 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.[8]

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 seeks inclusion 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 may have on determining energy transition costs in this case.[9]

On March 15, 2021, PNM filed its Amended Application for Approval of the Abandonment of through the Sale of Four Corners Power Plant and Issuance of a Financing Order Pursuant to the Energy Transition Act ("Application" or "Amended Application"). The Amended Application is discussed in the next section of this decision. PNM also filed on that date a motion to withdraw its original application filed January 8, 2021 and supplemented its direct testimonies filed January 8, 2021, which PNM expressly incorporated by reference in the Amended Application, with the supplemental testimonies of Mark Fenton, Thomas G. Fallgren, Thomas S. Baker, Michael J. Settlage, and Frank C. Graves.[10]

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[8] Order on Motion to Re-open, at 7-8, ¶ 25.

[9] *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 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.).

[10] *See* App. at 34-35, ¶¶ 58-59. The direct testimonies included those of Mark Fenton, Charles N. Atkins II, Thomas S. Baker, Thomas G. Fallgren, Nicholas L. Phillips, Lauran E. Sanchez, and Michael J. Settlage. PNM (*Cont'd on next page*)

On March 18, 2021, the Hearing Examiner held a second prehearing conference in this case via a Zoom videoconference. The prehearing conference was attended by representatives of PNM, ABCWUA, the City, Bernalillo County, CFRE, CCAE, Diné C.A.R.E., SJCA and Tó Nizhóní Aní, NEE, the Attorney General, Onward Energy, SJCA, San Juan County, Sierra Club, WRA, and Staff. The Hearing Examiner and the prehearing conference participants discussed, among other things, the pending motions to dismiss or for alternative relief,[11] PNM's proposed form of notice filed on March 15, 2021, a procedure for the expedited electronic service of filings and discovery requests and responses, and the development of a procedural schedule.

On March 19, 2021, the Hearing Examiner issued a Procedural Order for this proceeding. The Procedural Order established, *inter alia*, the following schedule and requirements: (i) PNM was required to publish the Notice of Proceeding and Hearing ("Notice") appended to the Procedural Order in the *Alamogordo Daily News*, *Albuquerque Journal*, *Farmington Daily Times*, *Las Cruces Sun News*, *Navajo Times, Santa Fe New Mexican*, *Silver City Sun News*, and *Union County Leader* by April 5, 2021; (ii) PNM was required to post a copy of the Notice on its public website (http://www.PNM.com/regulatory) by April 5, 2021; (iii) PNM was instructed to send , the Notice by certified mailing to the Navajo Nation Tribal authorities listed in Attachment 2 to the Procedural Order by April 5, 2021; (iv) PNM was ordered to mail to its customers (by bill stuffer or separately) a copy of the Notice by no later than May 10, 2021; (v) made motions to intervene

(*Cont'd from previous page*)

subsequently filed errata to the Baker and Fallgren direct testimonies on July 1, 2021 and the Phillips direct testimony on July 27, 2021.

[11] Regarding the pending motions, during the March 18th prehearing conference Counsel for Sierra Club concurred that its January 26, 2021 motion was rendered moot by virtue of the Hearing Examiner's February 26, 2021 Order and PNM's subsequent filing of supplemental testimony. For their part, NEE acknowledged that the NEE/CFRE joint motion to dismiss had been superseded by PNM's filing of the Amended Application. The Hearing Examiner therefore suggested that if NEE and CFRE decided to file a motion to dismiss the Amended Application, they should also file a motion to withdraw the joint motion to dismiss pursuant to 1.2.2.10(E) NMAC.

due by May 17, 2021; (vi) made all dispositive motions and supporting legal briefs due by May 17, 2021, and responses to such motions due by May 31, 2021; (vii) required that Staff and intervenor testimony be filed by July 12, 2021; (viii) required parties requesting that administrative notice[12] be taken of parts of the evidentiary record in Case 16-00276-UT in direct testimony or otherwise to file by July 12, 2021 a pleading designating those particular portions of the record for which administrative notice is requested;[13] (ix) provided for the filing of rebuttal testimony by August 12, 2021 and, again, required that any party requesting that administrative notice be taken of parts of the evidentiary record in Case 16-00276-UT in rebuttal testimony file such designation by August 2, 2021; (x) set a prehearing conference via the Zoom videoconference platform ("Zoom") for August 26, 2021; (xi) set an oral comment hearing on August 30, 2021 to be conducted, due to the ongoing COVID-19 pandemic, via the Zoom and simultaneously livestreamed through YouTube; and (xi) set the evidentiary hearings in this matter conducted via Zoom (and also livestreamed on YouTube) beginning on August 31, 2021 and continuing, as necessary, through September 14, 2021.

The following 16 parties intervened in this proceeding:

ABCWUA
Attorney General
Bernalillo County
CCAE
CFRE
City of Albuquerque

[12] *See* 1.2.2.35(D) NMAC.

[13] The Hearing Examiner noted that "particular portions" meant that each respective designation in the pleading shall pinpoint the page and line numbers of the Case 16-00276-UT transcript or testimony or the page numbers of identified testimony or freestanding exhibits. The Hearing Examiner also provided by way of example "and illustrated . . . strictly for proper format: Tr. (9/8/2017) 322:15-325:8 (Ortiz); PNM Exh. 12 (O'Connell Reb.) at 1:2-27:9; PNM Exh. 12 (O'Connell Reb.), Exh. PJO-4, pp. 1-14; PNM Exh. 21 (Olson Stip. Dir.), Exh. CMO-3 Stip., p. 1 of 1; NEE Exh. 21 (PNM Resp. to 12th Interrogs. and RFPs), p. 2 of 2; NEE Exh. 31 ("Investor Meetings" June 2017), pp. 6, 7, 16, 46." Procedural Order at 7, ¶ A(4), and n. 10.

New Energy Economy
NM AREA
Onward Energy Holdings
San Juan Citizens Alliance, Diné C.A.R.E, NAVA Education Project, and Tó Nizhóní Aní (referenced as the "Community Groups")
San Juan County
Sierra Club
WRA

On February 2, 2021 the Hearing Examiner issued an Order granting PNM's Motion for Entry of Protective Order. The Protective Order issued was identical in substance to the Protective Order issued previously in Case No. 20-00222-UT.[14]

The Hearing Examiner issued an Order Establishing the Official Service List for this proceeding on May 18, 2021. That order was revised five times during this proceeding, i.e., on June 14, 2021, July 13, 2021, August 2, 2021, August 16, 2021, and November 12, 2021.

On June 14, 2021, the Hearing Examiner issued an Order denying the motions to dismiss PNM's Amended Application filed by CCAE and Joint Movants NEE and CFRE.[15] The Hearing Examiner also issued on this date an Order granting PNM's motion to withdraw its original application in this case.

On July 12, 2021, PNM and NEE filed pleadings designating portions of the record in Case No. 16-00276-UT for which they respectively proposed administrative notice be taken.

[14] *See* Case No. 20-00222-UT, *In the Matter of the Joint Application of Avangrid, Inc., Avangrid Networks, Inc., NM Green Holdings, Inc., Public Service Company of New Mexico and PNM Resources, Inc. for Approval of the Merger of NM Green Holdings, Inc. with PNM Resources, Inc., Approval of General Diversification Plan; and All Other Authorizations and Approvals Required to Consummate and Implement this Transaction*, Protective Order (Jan. 14, 2021) ("Avangrid/PNMR merger" case or proceeding).

[15] The Order also granted Joint Movants' motion to withdraw their Jan. 28, 2021 motion to dismiss PNM's original application.

On July 12-13, 2021, the following individuals filed direct testimony on behalf of the respective parties: Andrea C. Crane for the Attorney General; Brendon J. Baatz for WRA;[16] Jeremy I. Fisher for Sierra Club; Christopher K. Sandberg for NEE; Craig N. Johnston, Jessica Keetso, and Carol Davis for Community Groups; James R. Dauphinais for NM AREA; and Gabriella Dasheno, Marc A. Tupler, and Eli LaSalle on behalf of Staff.

On July 15, 2021, PNM filed a Request for Confidential Treatment of PNM discover exhibits SC-3-2, SC-4-2, SC-4-4, and SC-5-2. Sierra Club and WRA filed responses in opposition on July 21 and 22, 2021 respectively. The Hearing Examiner issued an Order denying PNM's request for confidential treatment on July 29, 2021. PNM filed unredacted copies of the documents pursuant to the July 29th Order on August 3, 2021.

On August 2, 2021, the following individuals filed rebuttal testimony on behalf of the respective parties: Elisabeth Eden, Thomas G. Fallgren, Laura E. Sanchez, Thomas S. Baker, and Frank C. Graves for PNM;[17] Christopher K. Sandberg for NEE; and Brendon J. Baatz for WRA.

On August 11, 2021, Sierra Club filed a motion to take administrative notice of a recommended opinion and order (ROO) of an administrative law judge of the Arizona Corporation Commission finding, *inter alia*, that Arizona Public Service Company's (APS) decision to install a selective catalytic reduction pollution control system on the FCPP and order APS to investigate early retirement of the plant.

On August 12, 2021, Sierra Club filed a motion to strike the rebuttal testimony of PNM witness Laura Sanchez. Community Groups also filed on this date a motion to strike certain

[16] WRA filed a notice of errata to the direct testimony of Brendon Baatz on July 15, 2021.

[17] PNM filed errata to the rebuttal testimonies of Frank Graves and Michael Settlage on August 18 and 25, 2021 respectively.

exhibits from, and portions of, the rebuttal testimony of PNM witness Thomas Fallgren. NEE filed responses in support of the motions to strike and PNM filed a response opposing the motions on August 19 and 20, 2021.

On August 16, 2021, Sierra Club filed an untimely, but nevertheless accepted, motion for leave to file surrebuttal testimony in response to the rebuttal testimony of PNM witness Frank Graves. PNM filed a response opposing the motion for surrebuttal on August 20, 2021.

The Hearing Examiner issued an Order addressing the foregoing August 12 and 16, 2021 prehearing motions of Sierra Club and Community Groups on August 24, 2021.

On August 16, 2021, the Hearing Examiner issued an Order regarding prehearing memoranda and the August 26, 2021 prehearing conference.

On August 17, 2021, NEE filed an application requesting the issuance of a subpoena to Charles Eldred, Executive Vice President, Corporate Development and Finance for PNM Resources, Inc. (PNMR). On August 24, 2021, responses in support of NEE's Application were filed by ABCWUA and Sierra Club and in opposition to the application by PNM. The Hearing Examiner issued an Orde denying NEE's application on August 27, 2021.

On August 26, 2021, the Hearing Examiner conducted a prehearing conference with counsel for the parties over Zoom.

On August 27, 2021, the Hearing Examiner issued a Prehearing Order.

On August 30, 2021, Sierra Club filed the surrebuttal testimony of Jeremy I. Fisher. PNM filed the sur-surrebuttal testimony of Frank C. Graves on September 3, 2021.

The Commission held a public comment hearing in this case on August 30, 2021. Sixteen people provided oral comment during this hearing, which was conducted via Zoom and livestreamed on YouTube. The transcript of the August 30, 2021 public comment hearing was filed

by Cumbre Court Reporting Services, L.L.C. ("Cumbre") on September 2, 2021. Written comments were filed by 8 individuals and several entities of the Navajo Nation as of the date of this decision.[18]

The evidentiary hearings were conducted in this case over seven days from August 31, 2021 to September 3, 2021 and September 7-9, 2021. The Commission received testimony from the following twenty witnesses:

PNM
Mark Fenton
Thomas G. Fallgren
Laura E. Sanchez
Nicholas L. Phillips
Charles N. Atkins
Thomas S. Baker
Michael J. Settlage
Elisabeth A. Eden
Frank C. Graves

Attorney General
Andrea C. Crane

Community Groups
Carol Davis
Craig N. Johnston
Jessica Keetso

New Energy Economy
Christopher K. Sandberg

NM AREA
James R. Dauphinais

Sierra Club
Jeremy L. Fisher

WRA
Brendon J. Baatz

[18] Specifically, letters or resolutions were filed by the Navajo Nation President and Vice President, the 24th Navajo Nation Council, the Northern Navajo Agency Council, the District 13 Council, and the Nenahnezad Chapter.

Staff
Eli LaSalle
Marc A. Tupler
Gabriella Dasheno

The transcripts of the evidentiary hearings presented in seven volumes were filed by Cumbre between September 2-10, 2021.[19]

On September 13, 2021, the Hearing Examiner issued a Briefing Order. The Order set forth a series of ten issues, several with subparts, that the parties were directed to address. The Order also confirmed the schedule for post-hearing briefs and other submissions established at the end of the hearings. The schedule, which acknowledged the parties' participation in other proceedings such as the Avangrid/PNMR merger proceeding pending in Case No. 20-00222-UT and additional PNM proceedings such as Case Nos. 21-00083-UT and 21-00143-UT, required briefs in chief and suggested transcript corrections by October 1, 2021 and response briefs by October 13, 2021.[20]

On October 1, 2021, PNM filed a pleading containing suggested corrections to the transcript of proceedings. The Hearing Examiner issued an Order Partially Approving PNM's Suggested Corrections to the Transcript of Proceedings on November 12, 2021.

Parties filed posting briefs in chief or initial briefs ("Br.") on October 1, 2021.[21] Response briefs ("Resp.") were filed on October 13, 2021.

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[19] E.g., Volume ("Vol.") I of the transcripts reflects day 1 of the evidentiary hearings through Vol. VII, which reflects the final day of hearings, Sept. 9, 2021.

[20] Tr. (Vol. VII) 1789-94.

[21] The Attorney General filed its initial brief on October 4, 2021 and on that date also filed a motion for leave to file its brief out of time. The motion should be deemed granted. In addition, it should be noted that Community Groups brief-in-chief is misnumbered, starting with page 1 as the cover page and then beginning again with page 1 ("II. Legal Standards to be Applied") on what would be page 2 of the body text of the brief; thus, in citing to that brief this decision uses Community Groups' pagination. The pagination glitch is not repeated in Community Groups' response brief, however.

On November 19, 2021, NEE filed a "Motion for Limited Reply to Refute PNM's Claims in its Response Brief." NEE's reply should be deemed accepted into the record.

II. BACKGROUND AND LEGAL FRAMEWORK

A. PNM's Proposed Sale and Abandonment of the Four Corners Power Plant

Pursuant to its Amended Application, PNM requests that the Commissioner approve the following actions:

(1) Abandonment of PNM's 200 MW share of the Four Corners Power Plant, representing a minority interest of thirteen percent (13%) of the total generation capacity of the plant;

(2) Sale and transfer of PNM's ownership interest in the FCPP to the Navajo Transitional Energy Company, LLC (NTEC) pursuant to the Purchase and Sale Agreement ("Agreement" or PSA);

(3) Securitized financing of abandonment and financing costs along with funding for state-administered tribal and community programs.

Unlike the abandonment of the San Juan Generating Station (SJGS) approved in Case No. 19-00018-UT, PNM is not requesting approval of replacement resources in this proceeding along the lines of the replacement resources for the SJGS subsequently approved by the Commission in Case Nos. 19-00195-UT[22] and 20-00182-UT.[23] PNM's claims that it has demonstrated with sufficient certainty that replacement resources can be deployed prior to abandonment of Four Corners.[24] That claim, contested by some parties, is addressed below.

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[22] *See In the Matter of Public Serv. Co. of New Mexico's Consolidated Application for Approvals of the Abandonment, Financing, and Replacement for San Juan Generating Station Pursuant to the Energy Transition Act*, Case No. 19-00915-UT, Recommended Decision on Replacement Resources – Part II (June 24, 2020), *adopted by* Final Order (July 29, 2020).

[23] *See In the Matter of the Application of Public Serv. Co. of New Mexico for Approval of Renewable Power Agreements and Energy Storage Agreements and Proposal for Demand Response Plan Pursuant to Final Order in Case No. 19-00195-UT*, Case No. 20-00182-UT, Recommended Decision (Nov. 13, 2020), *adopted by* Order Adopting Recommended Decision (Dec. 2, 2020).

[24] PNM Br. 32.

1. The Four Corners Power Plant

The Four Corners plant is a coal-fired generation facility located near Fruitland, New Mexico within the Navajo Nation. The plant is comprised of two 770-MW units, Units 4 and 5, which came on-line in 1969 and 1970.[25] 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 Protection Agency's (EPA) Regional Haze Rule.[26] Since it began operating in 1963, FCPP has been and continues to be a major source of revenue as well as employment for the Navajo Nation and its members.[27]

Four Corners has been serving PNM customers since PNM acquired a 200 MW share in Units 4 and 5 in 1969 and 1970, respectively, which represents a current 13% share.[28] Arizona Public Service Company (APS) is the majority owner and operator of Four Corners. The other owners in Units 4 and 5 are APS, the Salt River Project Agricultural Improvement and Power District (SRP), Tucson Electric Power Company (TEP), and NTEC. Four Corners obtains coal exclusively from the adjacent Navajo Mine in what is referred to as a "mine mouth" configuration. The Navajo Mine has no other customers for this coal other than Four Corners.[29]

From its inception, the Four Corners project has been set up as a tenancy in common ownership. The current plant ownership is as follows: APS (63%); NTEC (7%); SRP (10%); TEP (7%); and PNM (13%). Each of the participants holds an individual undivided interest in their

[25] PNM Exh. 4 (Fallgren Dir.) 4, PNM Exh. TGF-5, p. 1 of 2.

[26] Fallgren Dir. 5; Amended Application 9.

[27] Fallgren Dir. 4.

[28] *Id*.

[29] Fallgren Dir. 4-5.

separate shares of Four Corners. The current planned operating life of the plant is through 2031, concurrent with the coal supply agreement with NTEC.[30]

Four Corners is governed pursuant to the following main agreements: (1) Co-Tenancy Agreement, which establishes the terms and conditions relating to ownership and operation of FCPP; (2) Operating Agreement, which sets the terms, covenants, and conditions that govern the operating work of FCPP; (3) Coal Supply Agreement (CSA), which provides for NTEC to be the exclusive coal supplier until July 6, 2031; and (4) Navajo Nation Lease Agreement, which grants rights-of-way and easements within the Navajo Nation that allowed for the construction and operation of FCPP and its associated transmission system and expires on July 6, 2041.[31]

2. Proposed sale of PNM's ownership interest to NTEC

In PNM's 2016 Rate Case (Case No. 16-00276-UT), PNM along with eleven intervenors and Staff entered into a Modified Revised Stipulation in Compliance with and Conforming to Commission's Orders Granting Conditional Approval ("Modified Revised Stipulation") filed in conformity with the Commission's January 17, 2018 *Order on Notice of Acceptance* and the Hearing Examiners' *Certification of Stipulation*.[32] In regard to the Four Corners plant, the Modified Revised Stipulation included the following requirement:

> PNM shall perform a cost-benefit analysis as part of its 2020 Integrated Resource Plan, on the impact of an early exit from Four Corners as a

[30] Fallgren Dir. 7.

[31] *See* Fallgren Dir. 7-10 (providing a brief description of each agreement).

[32] Case No. 16-00276-UT, Modified Revised Stipulation in Compliance with and Conforming to Commission's Orders Granting Conditional Approval, at 9, ¶ 10 (Jan. 23, 2018). The cover letter to the Modified Revised Stipulation states that "[i]n compliance with the [*Order on Notice of Acceptance*] and Paragraph B of the Certification of Revised Stipulation [which stated, "B. If the Revised Stipulation is modified in the form of Attachment B within seven days after issuance of the Order, the Modified Stipulation is approved."], PNM is submitting a *Modified Revised Stipulation in Compliance with and Conforming to Commission's Order Granting Conditional Approval*." (emphasis in original).

> participating owner, as of 1) 2024, and 2) 2028, that includes an analysis of the cost recovery of and return on PNM's undepreciated investments in Four Corners together with full recovery of all existing contractual obligations, including default payments and penalties.[33]

PNM maintains that, in accordance with the Modified Revised Stipulation, the Company sought an opportunity to accomplish an early exit from Four Corners in 2024. An early closure and permanent shut down of Four Corners plant require unanimous agreement of participants without an interest in the coal mine. Because the stated intent of other participants is to continue operating the plant, absent a transfer of its interest, PNM would be subject to default payments and penalties if PNM attempted to unilaterally cease its participation in Four Corners.[34] Under the current agreements, PNM would be obligated to pay for its share of operating and fuel costs through 2031.[35] PNM claims that if it defaulted in this way and ceased using Four Corners, replacing it with other resources, customers would be responsible for unavoidable ongoing costs, as well as the costs of the new resources, a result which PNM contends would be an uneconomic outcome. PNM thus asserts that without a potential alternative such as the transfer of ownership to NTEC, it would not have been feasible for PNM to exit Four Corners in 2024. According to PNM's Vice President of Generation, Thomas G. Fallgren, the same is true for a 2028 exit. Without an agreement like the sale and transfer to NTEC, Mr. Fallgren stated at hearing, "[i]n 2028, there was not a credible exit plan."[36] As will also be seen below, PNM's claims regarding the origin and basis for the proposed sale to NTEC is contested by several parties, some of whom allege the impetus for and timing of the proposed Four Corners sale and abandonment is being driven by PNMR's proposed merger with Avangrid pending in Case No. 20-00222-UT.

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[33] Modified Revised Stipulation, at 9, ¶ 10.

[34] Fallgren Dir. 11.

[35] PNM Exh. 8 (Fallgren Reb.) 25.

[36] Tr. Vol. II (Fallgren) 409.

In any event, PNM asserts that "with the negotiation of the sale and transfer of PNM's interests to NTEC and the avoidance of contractual default payments and penalties, the 2024 exit from Four Corners is more beneficial for customers than remaining a plant participant until 2031. These benefits are solidified with the agreement that PNM's shareholders will absorb the costs of the $75 million payment to NTEC related to obligations under the CSA."[37]

3. The proposed transferee: Navajo Transitional Energy Company, LLC

"NTEC was created," according to PNM witness Fallgren's testimony, "in a pioneering effort by the Navajo Nation to achieve sovereignty over its natural resources. NTEC was established under Navajo Nation law and operates as an autonomous commercial entity with an independent board of directors."[38] NTEC's operations are determined by a board of directors with a fiduciary responsibility to its sole shareholder, the Navajo Nation.[39] NTEC owns the Navajo Mine and currently holds a 7% interest in Four Corners. It also owns and operates mines in Montana and Wyoming.[40] Mr. Fallgren described NTEC's mission as being

> to serve as a reliable, safe producer of coal while diversifying the Navajo Nation's energy resources to create economic and environmental sustainability for the Navajo people, and to develop and operate an energy company that values the Navajo Nation, its people and its resources, now and in the future. NTEC's operation currently provides approximately 1,300 jobs; supports numerous community benefit initiatives including vital free

[37] PNM Br. 5. *See also* Fallgren Supp. 14.

[38] Fallgren Dir. 12.

[39] *See* PNM Exh. 39 (NTEC Amended and Restated Operating Agreement) 13, Art. III, Sec. D ("The Management Committee shall have all the authorities and responsibilities of general management, and oversight over the Company, as a Board of Directors has over a Corporation.") and 16, Sec. D.ii.b (stating that the Management Committee and its Members shall "[h]ave the rights and responsibilities of directors of similar for-profit companies pursuant to general corporate law or policy …"); Tr. Vol. II (Fallgren) 420-21 ("It would be my understanding that the Management Committee operates much like a Board of Directors that establishes the day-to-day operations of the facilities. The Navajo Nation is a shareholder or the single shareholder of NTEC. However, the Navajo – the Management Committee would have a fiduciary responsibility, obviously, as the Board of Directors – [to] act in the best interests of their shareholder, which is the Navajo Nation.").

[40] Fallgren Dir. 12.

> coal distribution to the Navajo and Hopi Nation for home heating; and promotes STEM fields (science, technology, engineering, and mathematics) in education and vocational training for Navajo Nation students.[41]

4. The Four Corners Purchase and Sale Agreement

Under the terms of the Four Corners Purchase and Sale Agreement dated November 1, 2020, NTEC will assume all of PNM's operating and capital ownership interests and obligations in Four Corners effective January 1, 2025.[42] PNM thereafter will not be a purchaser under any long-term energy contracts with NTEC for power from Four Corners. PNM is selling its entire 13% (200 MW) share of Four Corners to NTEC for $1, with NTEC thereafter assuming all ongoing plant operating and capital requirements with that transfer.[43] For a payment of $75 million, NTEC will assume all of PNM's obligations under the Four Corners CSA pursuant to the Coal Supply Agreement Assignment, in the form attached as Exhibit H to the PSA.[44] As indicated in the quote above, PNMR shareholders are paying the entire $75 million.[45]

Pursuant the PSA, PNM will retain its current plant decommissioning and coal mine reclamation obligations. Other assets are being transferred as part of the PSA. Specifically, the limited portion of the associated FCPP switchyard equipment necessary to transport the energy from the plant across the 500kV and 345kV switchyards is also included in this transfer.[46] Fallgren assured

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[41] *Id.*

[42] Fallgren Dir., PNM Exh. TGF-2.

[43] Fallgren Dir. 12, 13.

[44] PNM Exh. 5 (Fallgren Supp.) 14. Mr. Fallgren notes that under Section 3.3 of the PSA, 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.

[45] PNM Supp. 14.

[46] *See* Fallgren Dir., Exh. A ("Acquired Interests") to PSA (PNM Exh. TGF-2) for a list of the assets and corresponding percentages proposed for transfer to NTEC, as such assets are defined in the Facilities Co-Tenancy Agreement.

that the switchyard assets as part of the proposed transfer "are associated with PNM's share of Four Corners and do not impact PNM's ability to deliver PNM or other market resources used to serve PNM customers."[47]

5. Four Corners seasonal operations agreements

According to agreements the Four Corners co-owners entered into during this proceeding, only a single FCPP unit will operate on a year-round basis beginning in the fall of 2023.[48] Both Units 4 and 5 will operate during the summer peak season from June through October when customer needs are the highest. Mr. Fallgren stated that seasonal operations afford APS, SRP, and TEP more flexibility in operating the plant, while allowing NTEC access to its ownership share year-round. PNM has estimated that carbon emissions from Four Corners will be reduced by 20-25%.[49] The finalized agreements facilitating seasonal operations are incorporated as amendments to the Four Corners operating, co-tenancy, and coal supply agreements and they are attached to PNM witness Fallgren's rebuttal testimony.[50]

As part of the agreements for seasonal operations, the Four Corners co-owners have agreed to increase the notice period for possible early shutdown of Four Corners from two years to four years, with the opportunity to reduce the notice period upon payment for the shortened notice period.[51] The agreements for seasonal operation amend Section 20 of the Four Corners CSA so the

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[47] Fallgren Dir. 13-14.

[48] Fallgren Supp. 2.

[49] Fallgren Supp. 28.

[50] *See* Fallgren Reb., PNM Reb. Exhs. TGF-2, TGF-3, TGF-4, TGF-5, TGF-6, and TGF-7. PNM also filed the agreements in the docket in compliance with the Hearing Examiner's order denying the documents confidential treatment.

[51] NTEC is restricted from voting on early plant closure and termination of the CSA under section 9.15 of the Four Corners co-tenancy agreement. "This restriction is based," according to Mr. Fallgren "on an understanding that NTEC would have a conflict of interest because it also serves as the supplier of fuel for the plant. Fallgren Supp. 26.

owners would not vote for a closure of Four Corners to be effective prior to January 1, 2027. While the Four Corners owners agreed to provide four years notice for an early closure, they retain the right to give a two-year notice of early closure (the current length of the notice period) on or after January 1, 2027 by paying $200 million, and a three-year notice of early closure on or after January 1, 2028 upon payment of $100 million.[52] PNM claims the four-year notice is in alignment with the request of the Navajo Nation for adequate notice as outlined in Navajo Nation President Jonathan Nez's January 24, 2020 letter to the Arizona Corporation Commission (ACC) regarding the TEP rate case. President Nez's letter states: "The Nation recommends the ACC require utilities to provide a five-year advanced notice of any planned power plant closure."[53]

Mr. Fallgren asserted at hearing that it is highly unlikely that any agreement to operate Four Corners seasonally can be accomplished without the sale of PNM's interest to NTEC.[54] PNM maintains that the PSA between PNM and NTEC is a condition precedent to the agreements on seasonal operations, meaning that the parties to the agreements on seasonal operations believe that the changes that will occur as part of PNM's sale to NTEC are necessary to facilitate operations on a seasonal basis.[55] Fallgren explained that the negotiations on seasonal operations were delicate and contentious with five different parties negotiating their interests. Yet, despite the parties' differences, the combination of PNM's and NTEC's interests achieves the minimum load requirements of a single unit, thereby facilitating seasonal operations.[56] PNM submits that while the

[52] Fallgren Supp. 31; Fallgren Reb., PNM Reb. Exh. TGF-7, pp. 12-13 (CSA "2022/2025 Amendment," Art. III, "Early Termination for Plant Shut Down," Sec. 20.2).

[53] Fallgren Supp. 31 (citing https://docket.images.azcc.gov/E000004596.pdf).

[54] Tr. Vol. II (Fallgren) 477 ("Seasonal Operation[s] cannot stand on its own" without the Purchase and Sale Agreement to NTEC moving forward.); *id.* 478.

[55] PNM Br. 8. However, in a footnote addressing the matter in his rebuttal testimony, Mr. Fallgren calls the PSA "a condition *subsequent* to the seasonal operations agreement.") Fallgren Reb. 29, n. 29 (emphasis added).

[56] Tr. Vol. II (Fallgren) 478-81.

Commission is not required to approve the agreements encompassing seasonal operations, the Commission's approval of the PSA, which facilitates the transition to seasonal operations,[57] will result in net benefits to New Mexico and the public at large by reducing Four Corners emissions as of 2023.[58]

B. Legal Standards Applicable to Sale and Abandonment of the FCPP

1. Energy Transition Act

The Energy Transition Act was enacted into law as part of Senate Bill (S.B.) 489 in 2019. In passing Senate Bill 489, which is also entitled "Energy Transition Act,"[59] the Legislature devised a comprehensive policy to transition the State of New Mexico away from fossil fuel burning generation sources to renewable energy and other zero-carbon resources.[60] The Energy Transition Act being applied in this proceeding establishes mechanisms to facilitate the abandonment of PNM's interests in two coal-fired generating plants – the remaining Units 1 and 4 of the San Juan Generating Station (SJGS) in 2022 and PNM's interests in the FCPP in 2031. The San Juan station and Four Corners plant are the only facilities in New Mexico that satisfy the ETA's definition of "qualifying generating facility."[61] The ETA provides for the use of bonds, i.e., securitization, to recover for PNM (i) the undepreciated costs of its interests in the two plants; (ii) the estimated

[57] Fallgren Reb. 25.

[58] PNM Br. 8-9.

[59] S.B. 489 (2019 N.M. Laws, ch. 65) and the ETA are often considered one and the same piece of legislation. However, the ETA is only one part of Senate Bill 489. S.B. 489 consists of 82 pages of double-spaced provisions. It contains primarily a new 49-page chapter of the PUA (i.e., the ETA proper), major revisions to the REA, an amendment to the Air Quality Control Act, NMSA 1978, § 74-2-5 (1967, as amended through 2019), and several other related amendments to the PUA.

[60] NMSA 1978, §§ 62-16-4(A)(2)-(6) (amending the renewable portfolio standard (RPS) to requiring that renewable energy comprise the following minimum percentages of each public utility's total retail sales to New Mexico customers: (i) 20% by Jan. 1, 2020; (ii) 40% by Jan. 1, 2025; (iii) 50% by Jan. 1, 2030; and (iv) 80% by Jan. 1, 2040; and (iv) by Jan. 1, 2045, "zero carbon resources shall supply" 100% of all retail sales of electricity in New Mexico).

[61] NMSA 1978, § 62-18-2(S).

costs of decommissioning and reclamation; (iii) the estimated costs of severance and job training for affected employees at the plants and mines; (iv) financing costs associated with the securitization; and (v) payments required to the state-administered funds for Indian affairs, energy transition economic development, and the assistance of displaced workers. The bonds would be issued by a wholly owned subsidiary of PNM newly created as a special-purpose entity (SPE).

The ETA then provides for the establishment of non-bypassable charges, i.e., energy transition charges (ETCs),[62] to be paid by PNM customers to cover the bonds' debt service costs over the estimated 25-year life of the bonds. The ETA also provides for ratemaking mechanisms designed (1) to eliminate the costs of the abandoned facilities at the time the ETC rates are first collected (upon the abandonment of the units), (2) to recover for PNM, separately from the ETCs, the difference between the estimated costs recovered through the bonds and PNM's future actual costs, and (3) to adjust the ETCs throughout the life of the bonds to ensure the full and timely payment of the bonds' debt service payments.

Pursuant to the ETA, to obtain a financing order that authorizes the issuance of energy transition bonds and other actions,[63] a qualifying utility must obtain approval to abandon a qualifying generating facility pursuant to Section 62-9-5 of the Public Utility Act.[64] In addition, because this matter involves both a proposed abandonment and divestment of utility plant through sale and transfer, two provisions of the Public Utility Act with different but congruous standards of

[62] NMSA 1978, § 62-18-2(G) (defining "energy transition charge" as a "non-bypassable charge paid by all customers of a qualifying utility for the recovery of energy transition costs."). "Non-bypassable," in turn, "means that the payment of any energy transition charge may not be avoided by an electric service customer located within a utility service area and shall be paid by the customer that receives electric utility service from the qualifying utility imposing the charge for as long as the energy transition bonds secured by the charge are outstanding and the related financing costs have not been recovered in full." NMSA 1978, § 62-18-2(P).

[63] A "financing order," as defined in the ETA, "means an order of the commission that authorizes the issuance of energy transition bonds, authorizes the imposition, collection and periodic adjustments of the energy transition charge and creates energy transition property.") NMSA 1978, § 62-18-2(L).

[64] NMSA 1978, § 62-18-4(A).

proof apply in this case, the "net public benefit" standard under Section 62-9-5 and the "no net detriment" test applicable to the transfer of utility plant or property pursuant to Sections 62-6-12 and -13 of the PUA.[65] The standards for abandonment and the sale and transfer of utility plant are addressed in the next subsection.

As already indicated, the Commission approved the abandonment of the SJGS in Case No. 19-00018-UT in its Final Order issued April 1, 2020.[66] The Commission simultaneously issued that case its Final Order approving PNM's request for issuance of a financing order to facilitate PNM's abandonment of the SJGS.[67]

2. Standards governing abandonment and sale and transfer of PNM's interest in FCPP

Since this case involves both a proposed abandonment and disposition of utility plant through sale and transfer, two provisions of the Public Utility Act with different standards of proof apply in this case.[68]

First, a utility must receive Commission approval before abandoning all or any portion of its facilities subject to the jurisdiction of the Commission, or any service rendered by means of such facilities pursuant to Section 62-9-5. That section of the PUA provides that

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[65] NMSA 1978, §§ 62-6-12 and -13.

[66] *In the Matter of Public Service. Co. of New Mexico's Abandonment of San Juan Generating Station Units 1 and 4*, Case No. 19-00018-UT, Recommended Decision on PNM's Request for Authority to Abandon its Interest in San Juan Units 1 and 4 and to Recover Non-Securitized Costs (Feb. 21, 2020) (*Recommended Decision on SJGS Abandonment*), *adopted by* Final Order on Request of Public Service Company of New Mexico for Authority to Abandon its Interests in San Juan Generating Station Units 1 and 4 and to Recover Non-Securitized Costs (April 1, 2020).

[67] Case No. 19-00018-UT, Recommended Decision on PNM's Request for Issuance of a Financing Order (Feb. 1, 2020) (*Recommended Decision on SJGS Financing Order*), *adopted by* Final Order on Request for Issuance of a Financing Order (Apr. 1, 2020).

[68] *Application of the Fort Selden Water Company to Abandon All Regulated Utility Service and to Transfer Assets and Operation to Dona Ana Mutual Domestic Water Consumers Association*, *Recommended Decision*, Case No. 10-00226-UT, at 14 (July 5, 2011), adopted by *Final Order* (Aug. 4, 2011) ("*Fort Selden Order*").

> The commission shall grant such permission and approval, after notice and hearing, upon finding that the continuation of service is unwarranted or that the present and future public convenience and necessity do not otherwise require the continuation of the service or use of the facility; . . . In considering the present and future public convenience and necessity, the commission shall specifically consider the impact of the proposed abandonment of service on all consumers served in this state, directly or indirectly, by the facilities sought to be abandoned.[69]

A denial of abandonment therefore means the Commission has concluded that continuation of service is warranted, or that the present and future public convenience and necessity require the continuation of service or use of the facility. Additionally, "[t]he Commission has found that its 'touchstone' in abandonment proceedings is to advance the 'public convenience and necessity, *i.e.*, the public interest.'"[70] In so finding, the Commission stressed that the public interest is to be given paramount consideration; desires of the utility are secondary."[71] Public utility requests for abandonment thus are measured against a "net benefit to the public," or net public benefit, standard.[72]

The Commission has applied the four factors used in *Commuters' Committee v. Pennsylvania Pub. Util. Comm'n*[73] in determining whether the proposed abandonment is consistent with the public convenience and necessity. The Commission's consideration of the *Commuters*

[69] NMSA 1978, § 62-9-5.

[70] *Fort Selden Order* at 16 (citations omitted).

[71] Case No. 2296, Final Order (Aug. 3, 1990), at 2 (citing Matter of Rule Radiophone Service, Inc., 621 P.2d, 241, 246 (Wyo. 1980)).

[72] *In the Matter of the Application of Central New Mexico Electric Cooperative, Inc. (CNMEC) for Approval of the Transfer and Sale of Certain Assets to Tri-State Generation and Transmission Association, Inc. (Tri-Sate) and for CNMEC's Abandonment of Such Assets and Service in Favor of Tri-State's Continued Wholesale Service to CNMEC from such Assets*, Case No. 18-00251-UT, Recommended Decision (Dec. 3, 2018), at 3, adopted by Final Order (Jan. 23, 2019) (citing Case No. 3577, Corrected Recommended Decision, at 6 (Oct. 16, 2001), adopted by Final Order (Jan. 15, 2002).

[73] 88 A.2d 420, 424 (Pa. Super. Ct. 1952).

Committee factors in Case No. 2296 was upheld by the New Mexico Supreme Court in *Public Service Co. v. N.M. Public Serv. Comm'n*.[74] The factors consist of:

> (1) the extent of the carrier's loss on the particular branch or portion of the service, and the relation of that loss to the carrier's operation as a whole;
>
> (2) the use of the service by the public and prospects for future use;
>
> (3) a balancing of the carrier's loss with the inconvenience and hardship to the public upon discontinuance of service; and
>
> (4) the availability and adequacy of substitute service.[75]

More recently, the Commission found and concluded in Case No. 19-00018-UT that the "abandonment of San Juan Units 1 and 4 will produce a net public benefit, is consistent with the *Commuters' Committee* standards and should be approved as in the public interest, subject to the Commission's approval of sufficient replacement resources in Case No. 19-00195-UT."[76] The Commission therefore applies the *Commuters' Committee* standards to abandonment proceedings, to the extent applicable.[77]

Second, before selling or divesting utility assets, a public utility must receive Commission approval pursuant to NMSA 1978, §§ 62-6-12 and -13. Section 62-6-12 provides, in pertinent part,

> A. With the prior express authorization of the commission, but not otherwise:
>
> (4) any public utility may sell, lease, rent, purchase or acquire any public utility plant or property constituting an operating unit or system or

[74] 1991-NMSC-083, 112 N.M. 379, 815 P.2d 1169.

[75] *In the Matter of the Application of Public Service Co. of New Mexico for Regulatory Abandonment and for Decertification of its 26.10% Undivided Interest in San Juan Unit Generating Station Unit 4, and in Certain Related Common Facilities*, Case No. 2296, Final Order (Aug. 3, 1990), at 6.

[76] Case No. 19-00018-UT, Recommended Decision on Abandonment and Non-Securitized Costs, at 34, ¶ 1.

[77] In Case No. 18-00251-UT, the Commission declined to apply the *Commuters' Committee* factors consistent with Commission precedent declining to apply the factors cited in the Recommended Decision, at 4, and "because the factors mostly bear no relevance to the facts of this case." *Id*.

> any substantial part thereof; provided, however, that this paragraph shall not be construed to require authorization for transactions in the ordinary course of business.[78]

Section 62-6-13, in turn, provides:

> Application shall be made by the interested public utility by written petition containing a concise statement of the proposed transaction, the reason therefor and such other information as may reasonably be required by the .commission. Upon the filing of such application, the commission shall promptly investigate the same, with such hearing and upon such notice as the commission may prescribe, and unless the commission shall find that the proposed transaction is unlawful or is inconsistent with the public interest, it shall give its consent and approval in writing.[79]

As stated in the *Fort Selden Order*, Section 62-6-13 requires the Commission "to give its consent and approval for the transfer of utility plant or property, unless it finds the proposed transaction is unlawful or inconsistent with the public interest."[80] This "not inconsistent with the public interest" standard was established by the Commission in its Final Order in consolidated Case Nos. 1891 and 1892, where the Commission observed:

> The 'not inconsistent with the public interest' standard is applicable to commission approvals of transfers of utility property . . .. This standard requires that we find that there is likely to be a net detriment to the public interest before we may withhold our approval of proposed transfers of utility property . . . under our jurisdiction. If the sale of assets . . . is merely neutral, or equally balanced as to the benefit and detriment to the public interest, we are compelled to approve such requests.[81]

In addressing this standard, this Hearing Examiner found in the *Fort Selden Order* that the "no net detriment" test, where the Commission must find a "net public detriment if [it is] to

[78] NMSA 1978, § 62-6-12(A)(4).

[79] NMSA 1978, § 62-6-13.

[80] *Fort Selden Order* at 15.

[81] *Fort Selden Order* at 15-16 (quoting *In re Southern Union Co.*, N.M. Pub. Serv. Comm'n, Case Nos. 1891/1892, Final Order, at 15-16 (Dec. 12, 1984).

withhold [its] approval," is different and less stringent[82] than the standard applicable to abandonments under Section 62-9-5.[83] Nevertheless, judged together, the sale and abandonment should result in a net public benefit. The Commission has defined the net public benefit standard in cost-benefit terms: "'We believe that the proper review is an overall assessment of whether, upon a balancing of the benefits and costs to the public of the proposed transactions there is a net benefit to the public likely to be realized' if the abandonment is granted."[84] This cost-benefit analysis also has been stated as "one of 'net benefit' to the public interest, where quantifiable and unquantifiable benefits must outweigh the costs of the action."[85] An application for approval of an abandonment must make a factual showing that a net benefit to the public is likely to be realized by the proposed abandonment.[86]

Accordingly, in considering applications for combined approvals for transfer and abandonment, the Commission applies the same standard applicable to abandonments: "If the applicant

[82] The Commission explained the difference in *In Re Southern Union Co*.: "Again, [like the abandonment standard], a balancing of benefit and cost or detriment to the public is required, but the result of that *balancing is tested against* a *different standard*. For the abandonment of service . . ., we must *find the affirmative existence of a net public benefit before giving the transaction our approval*. For the sale of assets . . ., we must *find a net public detriment if we are to withhold our approval*." (emphasis added). Final Order, at 16 (emphasis added).

[83] *Fort Selden Order* at 16. So, while it acknowledges that the net public benefit test applies to the entirety of the Amended Application, PNM nevertheless emphasizes that "it is important to acknowledge the applicable legal standard for transfers of utility assets in light of the PSA with NTEC." PNM Resp. 37.

[84] *Fort Selden Order* at 16-17 (quoting *In re Southern Union Co.*, at 15).

[85] *Application of Northern Rio Arriba Electric Coop., Inc. (NORA) for Approval of the Sale of Certain Assets to Jicarilla Apache National and for NORA's Abandonment of Such Assets and Service Therefrom upon Sale, Final Order*, Case No. 13-00395-UT, Final Order (Feb. 26, 2014), at 11, ¶ 21 ("*NORA Order*") (citing *Application of Thunder Mountain Water Company and EPCOR Water New Mexico Inc. for Abandonment of CCN, Issuance of CCN, and Approval of EPCOR to Charge Existing Thunder Mountain Rate*s, Case No. 13-00285-UT, (Nov. 20, 2013).

[86] *NORA Order* at 11-12, ¶ 21.

demonstrates that there is a net public benefit, the Commission should approve the proposed sale and abandonment of public utility property."[87]

3. Order on Sale and Abandonment of PNM's Interest in the FCPP and costs ineligible for securitization

The issues addressed in this decision involve PNM's request for approval to transfer and abandon its interest in the Four Corners plant to NTEC and corollary issues raised by the parties that pertain, in varying degrees, to the proposed abandonment and transfer. The ETA, however, requires the Commission to address the securitization issues and all other issues in separate orders. It thereby avoids delaying the implementation of a financing order waiting for the appellate resolution of issues unrelated to the securitization.[88]

Accordingly, the Hearing Examiner is issuing today a separate Recommended Decision on PNM's request for a Four Corners financing order pursuant to the ETA issued contemporaneous with this decision. It is referred to as the *Recommended Decision on FCPP Financing Order.*[89] This Recommended Decision concerns PNM's requests to approve the abandonment and sale and transfer of its interest in the Four Corners Power Plant and the recovery of costs ineligible for securitization that are subject to traditional ratemaking treatment.

4. Evidentiary Standards

As the applicant in this administrative adjudication, the PNM's burden of proof is established as a matter of law.[90] The rule in administrative proceedings in general, and adjudica-

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[87] Case No. 18-00251-UT, Recommended Decision, at 3.

[88] NMSA 1978, § 62-18-8(A).

[89] *See* Case No. 21-00017-UT, Recommended Decision on PNM's Request for Issuance of a Financing Order (Nov. 12, 2021) (*Recommended Decision on FCPP Financing Order*).

[90] *See, e.g., Southwestern Public Service Company's Application Requesting: (1) Acceptance of its 2014 Annual Energy Efficiency and Load Management Report; (2) Approval of its 2016 EE/LM Plan and Associated Programs; (3) Approval of its Cost Recovery Tariff Rider; and (4) a Determination Whether a Separate Process*

(*Cont'd on next page*)

tions 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.[91] The burden of proof is two-pronged: 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.[92]

III. INTRODUCTION

A. Summary of Parties' Positions

Because the record of this case is relatively large and the numerous parties to this case are far from uniformly aligned on the merits of PNM's Amended Application and make myriad arguments for and against particular aspects the relief requested, this introductory section memorializes, for the record, the general positions of each party on the merits.[93]

(*Cont'd from previous page*)

Should be Established to Analyze a Smart-Meter Pilot Program, Case No. 15-00119-UT, Certification of Stipulation, at 16 (Dec. 18, 2015) (*citing Gray v. State ex rel. Wyoming Workers' Safety and Compensation Div.,* 193 P.3d 246, 251 (Wyo. 2008)). *See also* NMSA 1978 § 62-8-7(A) ("At any hearing involving an increase in rates or charges sought by a public utility, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the utility.").

[91] 3 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.").

[92] *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 (Nov. 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.").

[93] If a particular argument is not addressed in this decision or the *Recommended Decision on FCPP Financing Order*, it should be deemed resolved or disposed of consistent with the Hearing Examiners' findings, conclusions, and recommendations in the companion decisions.

1. PNM

PNM, naturally, urges the Commission to grant the Amended Application without modification. PNM states that the exit from Four Corners six-and-a-half years earlier than expected is a result of the New Mexico Legislature's efforts to entirely decarbonize New Mexico's delivery of electric energy through the ETA, which provides a framework for utilities to exit aging coal-fired generation facilities by giving the Commission "the tools to accelerate the state's transition away from coal plants to a significantly cleaner and more diverse energy mix for customers."[94] PNM submits that approval of the Amended Application not only will significantly reduce PNM's carbon footprint associated with serving its customers, but will also reduce emissions more broadly for the state as a whole. PNM states that the ETA also gives the Commission authority to directly address the resulting impact on tribal and local communities in the Four Corners area through "Just Transition" funding not otherwise contemplated by the Public Utility Act.[95] PNM asserts that the "transformational" Energy Transition Act "paves the way for New Mexico to more quickly and responsibly transition out of coal generation completely, while supporting the communities that have contributed to PNM's provision of reliable resources for many years by working at and providing fuel for the coal-fired generation plants."[96]

PNM observes that while this case may signal the end for PNM's coal portfolio, at its core, the approvals sought in the Amended Application are about saving customers money. PNM maintains that abandonment of PNM's interest in the FCPP and replacement with more flexible

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[94] PNM Br. 1.

[95] *Id*. Explaining the so-called "Just Transition," PNM notes that "[w]hile the ETA does not characterize the funding for tribal and local communities as "Just Transition" funding, this term is used by several parties in this proceeding to refer the various tenants for the Navajo Nation to transition away from coal. Navajo Nation President Nez set forth the tenents [*sic*] of a "Just Transition" in a letter to the Arizona Corporation Commission regarding a recent Tucson Electric Power Company rate case." *See* https://docket.images.azcc.gov/E000004596.pdf.

[96] PNM Br. 1-2.

and clean energy resources is expected to result in customer savings of $30 million to $300 million on a net present value basis. Therefore, "approval of each of the components of the Amended Application," PNM concludes, "results in net benefits to PNM's customers, New Mexico residents, and the communities detrimentally affected by the transition away from coal-fired generation."[97]

Addressing the challenges to the claimed public benefits of the sale and abandonment discussed in detail below, PNM characterizes the intervenor and Staff criticisms as ranging from "pure speculation as to the future of Four Corners and the financial condition of the purchaser to adoption of a narrow view of the facts that is not supported by the record in this case."[98] While PNM acknowledges the environmental benefits that would result from an earlier retirement and shutdown of the Four Corners plant, PNM submits the facts simply do not support denial of its request to abandon its interest in Four Corners in favor of "a speculative gamble that other owners will agree to an early closure of the whole plant."[99] PNM emphasizes that an early retirement of the entire plant is not on the table, but the Company's exit here with net benefits to customers is. PNM advises that the quantifiable benefits that PNM's customers will receive from the component approvals included in the Amended Application are not worth trading for a belief that a better deal is out there. "Indeed," PNM concludes, "the failure to take the benefits to customers available here would result in the peculiar outcome of PNM staying in coal, its customers paying for more expensive coal-fired power than alternatives, and the default scenario of that situation persisting until Four Corner's planned closure date of 2031."[100]

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[97] PNM Br. 2.

[98] PNM Br. 9.

[99] PNM Br. 10.

[100] *Id*. n. 22.

2. Intervenors

Of the parties taking definitive positions on the Amended Application[101] only one, WRA, expresses direct support for the Amended Application, concluding "that abandonment is in the economic interests of PNM and its customers." Nonetheless, WRA's support of the Amended Application comes with conditions opposed by PNM. WRA recommends that the Commission approve PNM's request to abandon FCPP on December 31, 2024 with the following conditions: (1) PNM's request to obtain a financing order to securitize energy transition costs, but limiting approval to $230 million based on certain recommended adjustments considered in the Hearing Examiner's companion *Recommended Decision on FCPP Financing Order*; and (2) approve the sale and transfer of PNM's interest in FCPP to NTEC only if PNM files an amended purchase and sale agreement that strikes or modifies the language contained in Article 6.1(d)(i) of the PSA (conduct pending closing, addressed in Section IV.B.3 below) so that it does not limit the other facility owners' ability to vote for early closure of the plant.

The Attorney General recommends that if the Commission approves PNM's Amended Application, any securitized costs be limited to $29.3 million. PNM should not be allowed to securitize costs and expenses found imprudent in the Certification of Stipulation in Case No. 16-00276-UT (the $148.7 million in Four Corners capital additions between July 1, 2016 and December 31, 2018) because, the Attorney General argues, the abandonment of FCPP and scheme to foist costs upon ratepayers substantial costs that should be subject to a prudence review in

[101] The very first provision of the Hearing Examiner's Briefing Order asked the parties to provide in the briefs in chief their respective recommendations on the Amended Application. *See* Briefing Order, at 1, ¶ A(1) ("Please provide your recommendation on [PNM's] . . . Amended Application for abandonment of the Four Corners Power Plant . . . and issuance of a securitized financing order pursuant to the Energy Transition Act . . . .").

PNM's next rate case is a precondition of PNMR's merger with Iberdrola/Avangrid.[102] Since the issue of prudence on findings made by the Hearing Examiners in Case No. 16-00276-UT relate to what undepreciated investments in Four Corners may or may not be securitizable, the Attorney General and other parties' arguments that the ETA should not apply to certain undepreciated investments are addressed in the companion *Recommended Decision on FCPP Financing Order*. Whether the proposed PNMR merger with Iberdrola/Avangrid pending in Case No. 20-00222-UT pertains, if at all, to this proceeding is addressed in section IV.A.13 below.

NM AREA declined to state a position the "threshold issues" in this matter, electing instead to brief three limited issues addressed in the testimony of its witness James R. Dauphinais, who takes position on issues that would appear to assume the Amended Application is approved.[103] Mr. Dauphinais' issues are addressed in the *Recommended Decision on FCPP Financing Order* accompanying this decision.

Turning now to the parties who explicitly oppose the Amended Application, San Juan County does not support the PNM's proposed abandonment of the FCPP without first settling the issue of the location of replacement resources following abandonment or the replacement of lost property taxes to the county. Except as San Juan County's specific concerns relate to two questions in the Hearing Examiner's Briefing Order (Questions 1 and 10), San Juan County takes

[102] NMAG Br. 6-8. In relating its position on the merits, the Attorney General either forgot to acknowledge or tries to elide the fact that its witness, Andrea C. Crane, took the position *for the Attorney General* in her testimony and at hearing that the Attorney General *supports the abandonment of FCPP if the Avangrid/PNMR merger is approved*. *See* Tr. Vol. IV (Crane) 856 ("I support the abandonment aspect of the Application provided that the proposed merger is approved. In my view the abandonment is an integral part of the merger, *and the Attorney General is a signatory to the merger*. So if the merger is approved, then yes.") (emphasis added); *id.* NMAG Exh. 1 (Crane Dir.) 6-7, 35.

[103] NM AREA Br. 1-2.

no positions on the remaining eight questions posed in the Briefing Order.[104] Since its concerns relate to certain provisions of the ETA, San Juan County's issues are addressed in the companion *Recommended Decision on FCPP Financing Order*.

Intervenors taking thoroughly steadfast positions in opposition to PNM's Amended Application on grounds too numerous to summarize in this introduction include ABCWUA, Bernalillo County, CCAE, Community Groups, NEE, and Sierra Club. Their arguments are sorted out, as germane, either below or in the companion *Recommended Decision on FCPP Financing Order*.[105]

3. Staff

In its post-hearing brief, Staff opposes the Amended Application on the sole ground that PNM's alleged "failure to identify sufficient justification for the Commission to deny the abandonment[106] – a position, incidentally, which is at odds with the opinion of its witness on this very issue as well as his opinion on the merits of the Amended Application.[107] In any event, Staff's argument is addressed in section IV.A.11 below. Staff's other argument – that the $148.7 million in FCPP capital additions found imprudent in the Certification of Stipulation should not be securitized

[104] SJC Br. 1.

[105] For instance, the constitutional challenges centered on the ETA posed by ABCWUA/County (filing a joint initial and response briefs) and NEE are addressed, as they were in Case No. 19-00018-UT, in the *Recommended Decision on Financing Order*. Likewise, the intervenors' arguments that the doctrines of estoppel or waiver bar pnm from asserting the ETA applies to the contested undepreciated investments in the FCPP are considered in the *Recommended Decision on Financing Order*.

[106] Staff Br. 2.

[107] As discussed in section IV.A.11 *infra*, Staff witness Eli LaSalle testified that PNM's identification of potential replacement resources met the statutory requirements of the ETA "given that adequate potential new resources are identified in the application for abandonment," and he concluded that that there was a net public benefit to granting PNM's abandonment application. Staff Exh. 1 (LaSalle Dir.) 9, 10, 12. Staff witness Marc A. Tupler also concluded that "Staff recommends approval of the Application, subject to the proposed Staff modifications." Staff Exh. 2 (Tupler Dir.) 16.

– is covered, like the numerous intervenors' related arguments on that contentious issue, in the *Recommended Decision on FCPP Financing Order* issued today.[108]

IV. DISCUSSION, ANALYSIS, AND RECOMMENDATIONS

A. Abandonment of PNM's Interest in the Four Corners Power Plant

This decision first discusses and analyzes PNM's case for abandonment of the Four Corners plant and the intervenor and Staff arguments on an issue-by-issue basis. The process is repeated in the next section, IV.B below~~IV.B~~, for PNM's proposed sale and transfer of its interest in Four Corners to NTEC.

PNM asserts the Commission's approval of the abandonment and sale and transfer of its interest in Four Corners will result in the following concrete benefits to PNM customers and, as applicable, the public at large:

> (1) quantifiable savings to customers;
>
> (2) increased flexibility on PNM's system given the types of replacement resources that will be deployed;
>
> (3) furtherance of PNM's progress toward reducing its portfolio emissions consistent with the ETA;
>
> (4) reduced overall emissions from Four Corners via the agreements encompassing seasonal operations;
>
> (5) a reduction in abandonment costs by using securitization;
>
> (6) consistent with the Navajo Nation's call for a Just Transition, preservation of a strong Navajo Nation voice in the future of Four Corners by transferring PNM's interest in the plant to NTEC, an arm of the Navajo Nation; and
>
> (7) mitigation of adverse economic impacts to the local workforce and community.[109]

[108] LaSalle Dir. 9-10.

[109] PNM Br. 9.

PNM's first five claims, most but not all of them vigorously challenged, and several additional matters – i.e., issues emanating from the parties' briefs or the record that relate in one fashion or another to the abandonment portion of the Amended Application but do not fit precisely elsewhere – are addressed in the following subsections. Because items 6 and 7 pertain to asserted beneficial attributes of PNM's transfer of its interest to NTEC, those claims are analyzed in section IV.B below.

1. Claimed savings to customers

PNM asserts that the abandonment and sale of its interests in the Four Corners plant will result in a net public benefit through cost savings to customers, estimating the overall twenty-year savings to customers on a net present value basis is estimated to range from $30 million to $300 million.[110] The median expected savings is approximately $143.7 million.[111]

PNM's Four Corners abandonment analysis was presented by PNM witness Nicholas Phillips, the Company's Director of Integrated Resource Planning.[112] Mr. Phillips stated that the general methods used to evaluate the "FCPP Assets" (i.e., PNM's 13% interest in the plant and associated PNM-owned assets like the FCPP switchyard, inventory, and fuel inventory) follow similar protocols to those used in the recent SJGS abandonment analysis used in Case Nos. 19-00018-UT and PNM's 2017 IRP.[113] Phillips examined two primary paths that compared the long-term costs of the retention of the 200 MW of capacity at Four Corners with the costs of abandoning the FCPP Assets, including terms of the sale of the assets, and replacing that capacity and energy

[110] Fallgren Supp. 17-18 (citing PNM Exh. 9 (Phillips Dir.) 3); Fallgren Reb. 3.

[111] Phillips Dir. 3.

[112] Phillips Dir. 1.

[113] Phillips Dir. 2, 11.

with other sources. Phillips studied both scenarios under a wide range of input assumptions, including a range of different system loads, combustion turbine price forecasts, carbon emission prices, and costs for replacement resources. He stressed that in all scenarios analyzed PNM required the resulting portfolio to meet all required laws and regulations – such as the updated renewable portfolio standard (RPS) and portfolio carbon emission requirements prescribed by the ETA, as well as PNM's planning criteria for reliability.[114]

PNM measured long-term cost savings by comparing the net present value of costs required to meet retail customer loads over a 20-year planning period under two primary scenarios: (i) assuming the continued operations of the FCPP Assets through 2031, and (ii) assuming the FCPP Assets are transferred under the terms of the proposed NTEC transaction and resources are obtained to replace the FCPP Assets.[115] Mr. Phillips said this approach is consistent with the requirement in the Commission's IRP Rule, 17.7.3 NMAC, to consider resource portfolio costs over a 20-year planning period. PNM's calculation of long-term cost savings included the following:

- Cost to operate and maintain existing resources over 20 years,
- Cost to build, operate, and maintain any resources added in the 20-year study period, and
- Costs associated with retiring any resources during the 20-year study period.[116]

[114] Phillips Dir. 11-12 (noting that rules for measuring and verifying compliance with the CO2 emissions limits for generation and sources of energy procured pursuant to PPAs by a qualifying utility that has received a financing order pursuant to Section 62-18-10(D) of the ETA have not been promulgated).

[115] Phillips Dir. 12

[116] *Id*.

Additional details regarding PNM's modeling, such as system reliability metrics, software and modeling tools, key assumptions, environmental and regulatory requirements, load and commodities forecasts, and other model design factors are discussed in Mr. Phillips' testimony.[117]

The results of Mr. Phillips' analysis are presented in the graph depicted below, which is PNM Figure NLP-3 in his direct testimony.[118] The figure shows a histogram and approximated probability density of the potential future scenarios analyzed. The area beneath the probability curve sums to 100%. Phillips concludes that summing the area left of the breakpoint between customer savings and customer costs results in a 98.5% likelihood that customers will be "better off due to exiting FCPP in 2025."[119] Beneath the x-axis on what Phillips describes as the "rug" of the plot are color coded marks showing where the individual cases analyzed fall in the savings spectrum.[120]

Mr. Phillips, continuing, explained that within each color-coded grouping in the graph are multiple cases that examined different future load, commodity forecast, and technology cost combinations. The main groupings consist of technology restrictions – "high replacement cost" (HRC) and "low replacement cost (LRC) combinations. Phillips noted that the "no new combustion" cases assumed that no non-carbon emitting fuel is expected to materialize and

[117] *See* Phillips Dir. 13-20 (for example, PNM's analysis factored in RPS requirements and carbon intensity limits of 400 lbs/MWh and 200 lbs/MWh in 2023 and 2032 respectively; required each portfolio to meet a target planning reserve margin to approximate Loss of Load Event (LOLE) metrics; used EnCompass software in its resource model runs; used a June 2020 load forecast prepared by Itron, Inc.; used a wholesale fuel commodity and carbon emission price forecast prepared by PACE Global being used in PNM's 2020 IRP; used National Renewable Energy Laboratory (NREL) and U.S. Energy Information Administration (EIA) public data and non-public data from the San Juan RFPs and other private data sources; and modeled the portfolio (CCAE-1) approved by the Commission in Case Nos. 19-00195-UT and 20-00182-UT.

[118] Phillips Dir. 23, PNM Fig. NLP-3.

[119] Phillips Dir. 21.

[120] *Id.*

consequently no combustion turbines (or other carbon emitting resources) are allowed for replacement resources. He observed that the no new combustion cases are generally more costly for customers than cases where technology type selection is neutral; however, they do still produce net savings in Phillips' analysis. Phillips said the technology neutral cases generally produce marginal increases in carbon emissions compared to the no new combustion cases, but all cases meet or exceed the ETA carbon emission requirements discussed further below.[121]

Phillips explained that the HRC set of assumptions is a combination of assumptions intended to account for a high technology cost curve for replacement resources, high gas prices, and low carbon emission prices. This combination of assumptions would tend not to favor the early exit from FCPP. Indeed, when the HRC assumptions are combined with no new combustion, the savings to customers resulting from the proposed transaction diminish and approach a break-even when compared to PNM retaining its interest in FCPP. Conversely the LRC assumptions include low technology cost curves for replacement resources, low gas prices, and high carbon emission prices. The results of Mr. Phillips' analysis are encapsulated in Figure NLP-3 below: [122]

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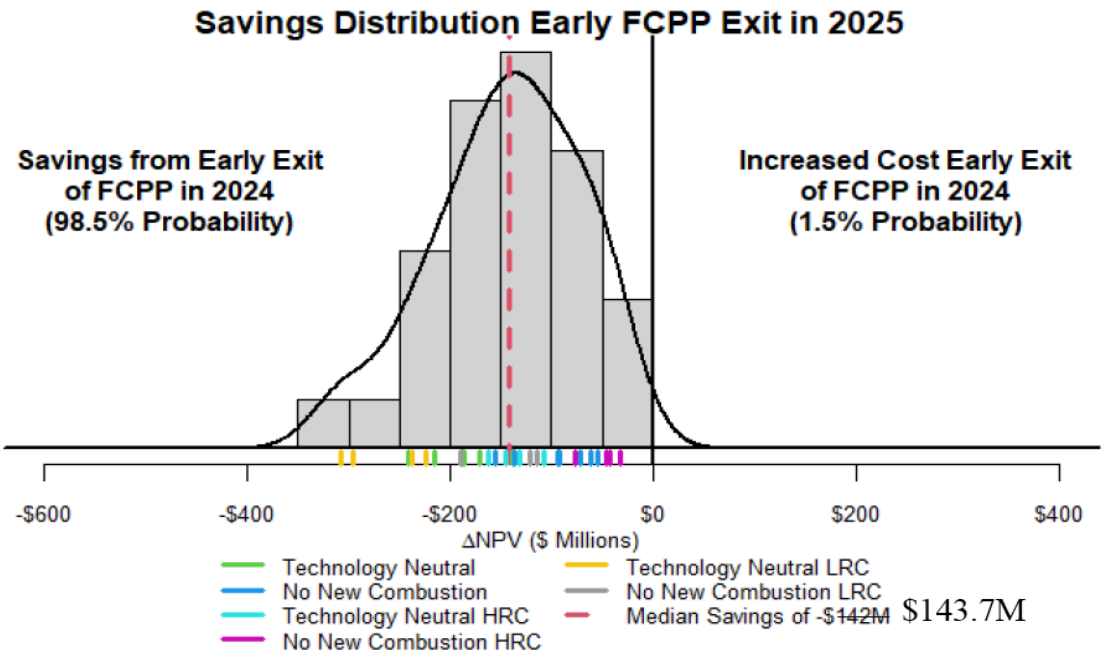
[121] Phillips Dir. 21-22 (Phillips noted that PNM Figure NLP-4 presented later in his testimony, at 29, depicts the carbon intensity of the reference case portfolios for both technology restricted and unrestricted cases.).

[122] Phillips Dir. 23, PNM Fig. NLP-3 (corrected per errata). PNM Exhibit NLP-5 to Phillips' direct testimony shows a complete list of modeled futures and sensitivities in his analysis. According to Mr. Phillips, the data in the Figure NLP-3 below

> are the differences in NPV cost between pairs of model simulations in which FCPP Assets continue operation through 2031 and in which FCPP Assets are transferred and replaced at the end of 2024. Different pairs of simulations were modeled based on external conditions defined by the following factors:
>
> - Presence or absence of a restriction on the types of technologies eligible for replacement resources
> - Mid, low, or high load forecast
> - Mid, low, or high gas price forecast
> - Presence or absence of carbon emissions prices

(*Cont'd on next page*)

PNM Figure NLP-3



Phillips determined that the results of the analysis show that the early exit from FCPP will provide savings to PNM customers under all potential future scenarios that PNM analyzed. However, given that a few cases do approach the breakeven point, Phillips concedes that his analysis "results in a non-zero probability that customers could face an increased cost, but such an outcome is highly unlikely."[123] Nevertheless, Phillips concluded that "[t]he key takeaways from the figure show that in all cases PNM considered, there are net customer savings provided by the

(*Cont'd from previous page*)

- Mid, low, or high forecasts of cost declines for renewable and energy storage resources

This range of simulations is meant to test the robustness of our conclusions to external factors uncontrolled by PNM."

Phillips Dir. 23-24.

[123] Phillips Dir. 24.

proposed NTEC transaction, which allows PNM to abandon its FCPP interest under favorable circumstances for customers."[124]

The composition of the proxy replacement portfolios that resulted from Mr. Phillips' analysis are presented in his PNM Table NLP-1, which is also reproduced below. In general, Phillips' model runs selected resources that provide "flexible power and capacity, with a resulting system energy mix that helps meet future increasing RPS requirements."[125] While the actual replacement portfolio will not be determined until PNM has completed its RFP evaluation process, Phillips believed that the results of his analysis using what he termed the "generic placeholders" provides reliable insight into what a potential replacement portfolio might look like and cost; under its "Current Trends and Policy" assumptions, i.e., those which reflect PNM's view of the most likely set of conditions in the future, Phillips started out with gas, wind, solar and energy storage technologies as replacement options.[126] PNM's resulting replacement portfolios were primarily combinations of solar photovoltaic (PV), energy storage, and flexible combustion turbine resources that are expected to convert to hydrogen fuel (or some other non-carbon emitting fuel) by 2040. The levels of each type of resource depend upon the assumptions surrounding technology restrictions as well as the resources that would be brought online in 2023/2024 as replacements to the 114 MW of Palo Verde Nuclear Generating Stations (PVGNS) leases being returned.[127]

In aggregate, Phillips estimated that over the Palo Verde and FCPP replacement period (2023-2025), PNM would expect to add approximately 80 MW of storage, 50 MW of solar, and

[124] *Id*.

[125] Phillips Dir. 26.

[126] *Id*.

[127] *Id*.

360 MW of flexible combustion turbine resources, if there are no technological restrictions placed on the proxy replacement portfolio. However, if there are technological restrictions such as the exclusion of potential hydrogen resources such that only renewable resources and energy storage resources are available, Phillips estimated the aggregate replacement resources in the 2023-2025 timeframe would then be approximately 460 MW of storage and 210 MW of solar resources. Phillips concluded that while both proxy portfolios would provide a net benefit to customers, the technology neutral proxy portfolio would cost approximately $300 million less on a 20-year NPV basis.[128]

PNM Table NLP-1[129]

Line	Years	Resource Type	Technology Neutral (Scenario 1) Exit FCPP 2024 Incremental Capacity (MW)	Technology Neutral (Scenario 1) Exit FCPP 2031 Incremental Capacity (MW)	No New Combustion (Scenario 2) Exit FCPP 2024 Incremental Capacity (MW)	No New Combustion (Scenario 2) Exit FCPP 2031 Incremental Capacity (MW)	Line
1	2023-2024	Combustion Turbine	280	240	0	0	1
2		Storage	24	53	305	311	2
3		Solar	(1)	9	125	53	3
4		Wind	0	0	0	0	4
5		Nuclear	(114)	(114)	(114)	(114)	5
6		Coal	(497)	(497)	(497)	(497)	6
7	2025	Combustion Turbine	80	0	0	0	7
8		Storage	57	0	156	0	8
9		Solar	57	0	95	0	9
10		Wind	0	0	0	0	10
11		Nuclear	0	0	0	0	11
12		Coal	(200)	0	(200)	0	12
13	NPV (2021$)($M)		$6,933	~~$7,105~~ $7,106.7	$7,240	~~$7,335~~	13
14	Total 2040 Capacity (MW)		5,941	5,869	6,401	6,401	14
15	CO2 (Tons)(M)		28.4	32.9	26.1	31.7	15

$7,336.7

Turning now to the matter of PNM's share of ongoing costs to operate Four Corners, PNM witness Thomas Fallgren testified that customers are released, as of 2025, from the obligation of future ongoing costs for operating the plant, including costs associated with capital investments,

[128] Phillips Dir. 27.

[129] Phillips Dir. 27, PNM Table NLP-1 (corrected per errata).

operations and maintenance, and coal supply for the plant.[130] Customers also benefit, Fallgren adds, from a PNM shareholder payment of $75 million to the buyer, NTEC. That payment also absolves PNM's customers from any further costs associated with the CSA for Four Corners.[131] "The result," PNM's witness Phillips, concludes, "is a one-time opportunity that allows PNM to accelerate its exit from FCPP," while PNM's customers and the impacted communities realize concrete benefits pursuant to the ETA and its securitization process and funding for local communities.[132]

PNM has estimated the range of revenue requirement reductions of between $49 million to $58.8 million for the first year (2025) as a result of the abandonment and sale of PNM's interest in the FCPP and its replacement with lower cost resources.[133] PNM witness Thomas J. Settlage, noting that Residential 1A and Small Power 2A rate schedules account for over 99% of all customer bills, projected customer bill impacts to range from an increase of $1.32 to a decrease of $19.31 per month for Residential 1A customers, and an increase of $2.89 to a decrease of $133.12 per month for Small Power 2A customers.[134] PNM concludes these estimates provide quantifiable customer cost savings, resulting in a net public benefit.[135] Denial of abandonment in this case would cost customers, Mr. Fallgren contended, "the only available exit plan for PNM to exit Four Corners."[136]

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[130] Fallgren Reb. 3.

[131] Fallgren Reb. 4.

[132] Phillips Dir. 6 (as corrected by errata).

[133] Fallgren Supp. 18 (citing PNM Exhibit 10 (Baker Dir.) 36, PNM Table MSB-7).

[134] PNM Exh. 13 (Settlage Dir.) at 24. Mr. Fallgren noted that the "estimated savings will depend on usage and the assumptions concerning the final composition of replacement resources."). Fallgren Supp. 18.

[135] Fallgren Supp. 18.

[136] Tr. Vol. II (Fallgren) 385.

Sierra Club was the only party that attempted to discredit PNM's cost savings analysis.[137] Sierra Club argues that PNM's has not proven that abandonment will result in a net economic benefit to customers and has improperly inflated the relative savings of its abandonment application by:[138] (i) failing to update its include PNM's increased costs associated with the June 25, 2021 seasonal operations amendments to the Four Corners agreements, thus rendering PNM witness Nicholas Phillips' economic analysis stale;[139] (ii) not accounting for $146 million in customer savings in a scenario in which abandonment is denied and that amount (capital costs incurred between 2016 and 2020) is disallowed from rates;[140] (iii) assuming an unrealistic, "worst-case"

[137] In fact, certain other intervenors strongly opposed to the proposed sale and abandonment accept or assume that PNM's estimated savings are accurate or at least in the ballpark. *See* ABCWUA/County Br. 3 ("PNM has demonstrated that the plant cannot continue to operate in a cost-effective manner to the benefit of the public – an undisputed fact evinced by PNM's estimate that closure of the plant *and replacement with almost any replacement portfolio will result in savings* to rate payers.") (emphasis added); Community Groups Br. 25-26 ("PNM estimates that it would save $30 to $300 million, on a net present value basis, by substituting other resources for the Four Corners power plant between 2025 and 2031. It is likely other utility owners could also realize commensurate savings by exiting the Four Corners plant.) (citation omitted); NEE Br. 57 ("Mr. Fallgren testifies that, 'the overall twenty-years savings . . . ranged from $30 to $300 million.' . . . This is an explicit admission that Four Corners is uneconomic for ratepayers.") (internal citation and footnote omitted).

[138] *See generally* Sierra Club Br. 5, n. 5, 26-34.

[139] Sierra Club Br. 22-25. Sierra Club maintains that the June 25th amendment to the operating agreement, Amendment 21, "significantly changes PNM's entitlement, obligations, and costs at Four Corners, and thus PNM's costs of owner Four Corners prior to exiting at the end of 2024." Sierra Club Br. 23. Sierra Club concludes that: "PNM is trying to have it both ways: PNM wants to use Amendment 21 to claim that there are net emissions reductions from abandonment and that the agreement provides flexibility to its partners; but PNM ignores Amendment 21 in its economic analysis of abandonment and the inflexibility in PNM's ability to decrease output from Four Corners. . . . The result is a fatally flawed record: PNM's economic evidence predates the June 25 amendments; but PNM's environmental evidence postdates the June 25 amendments." Sierra Club Br. 24-25.

[140] Sierra Club Br. 26-28. Sierra Club later argues, relatedly, that based on alleged flaws in PNM's calculated customer savings, the relative savings would shift from "$0 to $100 million." Sierra Club Br. 34. The derivation of this "$0 to $100" million is unclear, but as PNM points out in its response brief, at 21-22, it might be based on Sierra Club's estimate of what customer savings might be if PNM had not included new natural gas units in its replacement portfolios. Sierra Club postulates that granting PNM's application would impose $146 million in costs, the figure Sierra Club anticipates the Commission will or should disallow for imprudence. Reconciling these numbers (shifting from $0 to $100 million in savings to $146 million in costs), Sierra Club states that "on a net basis, granting PNM's application results in a net cost to customers ranging from $46 to $146 million[,]" but based on more realistic assumptions of the replacement portfolio, the net benefits probably range from "a negative $46 to $116 million." Sierra Club Br. 34. As PNM points out, it is unclear precisely how Sierra Club

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baseline scenario in which PNM owns Four Corners until 2031 if this abandonment application is denied;[141] and (iv) considering "technologically neutral" portfolios that include new gas plants, despite the high hurdles PNM faces in building new gas.[142]

PNM disagrees with Sierra Club on every point and endeavors to refute each criticism. Responding, first, to Sierra Club's argument that Mr. Phillips economic analysis is stale because it failed to consider the increased costs associated with the June 25, 2021 modifications to the CSA and operating agreements for seasonal operations, PNM asserts there is no credible record evidence to support a finding that PNM's costs will change as a result of seasonal operations. In fact, PNM maintains it did not have any reason to update its calculated customer savings since, according to Mr. Fallgren, there are no anticipated significant cost differences expected from seasonal operations, and seasonal operations does not require PNM to operate differently than it does now. Mr. Fallgren also addressed in his rebuttal testimony why Sierra Club witness Fisher's assumptions regarding the costs associated with these amended agreements were mistaken.[143]

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calculated $0 to $100 million in savings to derive the $46 million to $146 million range or how $146 million shifted to "$116 million." PNM Resp. 22. Sierra Club repeats this *unattributed* "net cost to customers of $46 to $146 million" based on a $0 to $100 million "potential benefit") in its Response Brief, at 8. Whatever the derivation of the calculations – which is precisely the point because it is unclear who or what they are derived from – because Sierra Club does not appropriately source or adequately explain the figures that are the basis of its new savings or "potential benefit" estimates from any specific testimony or other record cite, the Commission cannot accept Sierra Club's novel, unexplicated, and unsourced argument.

[141] Sierra Club Br. 28-30.

[142] Sierra Club Br. 31-33. In this argument, Sierra Club suggests that the Commission is more likely to approve non-combustion portfolio than a new portfolio with new gas, noting that the Commission rejected PNM's request to build new gas plants to replace the SJGS in Case No. 19-00195-UT and also rejected El Paso Electric's (EPE) bid to build a new gas plant, citing the ETA's carbon-free goals in Case No. 19-00349-UT. Sierra Club Br. 32.

[143] *See* Fallgren Reb. 37-38 ("Sierra Club Witness Fisher incorrectly assumes that PNM and NTEC would have to carry 85 percent of the operating cost when in single unit operation. The only modifications to cost allocations is that each party will pay their individual variable costs of chemicals, and there is no requirement for PNM to take on any additional ownership obligation for non-variable costs. In fact, there is a potential that PNM customer O&M costs could decrease with the ability to perform planned unit outages with an extended timeline

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According to Mr. Fallgren, PNM did analyze the issue and concluded that seasonal operations does not require PNM to utilize the plant differently than it does now.[144] More specifically, seasonal operations will not change the overall manner in which PNM must schedule generation from Four Corners. While the other co-owners will have some increased flexibility from Unit 5 being "layed-up" (turned off) during the spring and winter seasons, PNM will be operating under the status quo by dispatching 26% from Unit 4 in the same manner that it dispatched its 13% from Units 4 and 5 before. Since PNM is maintaining the status quo of both its total percentage take and its dispatch order, PNM expects no material cost differences.[145] PNM therefore contends there were no grounds to re-run the financial analysis calculating expected customer savings from the sale and transfer of PNM's interest in Four Corners to NTEC.[146]

Second, addressing Sierra Club's assumption that a $146 million disallowance should have been factored into PNM's cost modeling, PNM says it has consistently argued that, inasmuch as this is an ETA proceeding, prudence is not at issue. PNM adds that the Hearing Examiners' *Certification of the Stipulation* in Case No. 16-00276-UT was not adopted by the Commission and there is no record evidence to indicate that in this case or any other case that the Commission would decide that a $146 million disallowance would be the result of a current or future prudence review, and thus, should have been the crux of PNM's modeling.[147]

Third, concerning Sierra Club's argument that PNM should have assumed that FCPP would close before 2031 to calculate customer savings, PNM responds that modeling a pre-2031 closure

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potentially resulting in lower overtime costs. PNM does not anticipate any material changes to its operating costs during the seasonal operation time period.").

[144] *Id.*

[145] PNM Resp. 32-33.

[146] PNM Resp. 8, 30.

[147] PNM Resp. 17-18.

would amount to nothing more than an exercise in sheer speculation or, as PNM put it, "picking a date out of a hat."[148] PNM states that the current, legally operative date for FCPP closure is 2031, and there is no concrete evidence in the record that FCPP will close on any date other than 2031. PNM maintains it has no factual basis to choose another date to determine customers savings, and even Sierra Club has not decided what that date should be. PNM notes that at various points in its brief, Sierra Club speculates FCPP could close in 2023, 2027, or 2029.[149] PNM contends that "the Commission should reject Sierra Club's efforts to introduce speculative dates for Four Corners closure, and then claim PNM's evidence is lacking because PNM did not make the same guess as Sierra Club."[150]

Regarding Sierra Club's fourth criticism that Mr. Phillips should not have included new natural gas plants in his replacement scenarios, PNM states that the foundation of Sierra Club's arguments is more speculation. Defending PNM's commitments to decarbonize its generation fleet, PNM insists Mr. Phillips' modeling already accounts for this issue.[151] Because the replacement resources for Four Corners are likely to remain in PNM's portfolio beyond the date on which PNM must be carbon-free, PNM says it limited the replacement alternatives in its analysis to resources that may viably contribute to a carbon emissions-free portfolio. Hence, Phillips modeled solar, wind, energy storage, and flexible combustion turbine resources under an expecta-

[148] PNM Resp. 6.

[149] *Id*. (citing Sierra Club Br. 5 n. 7, 41-42.)

[150] PNM Resp. 6.

[151] PNM Resp. 9 (Here, citing Phillips' direct testimony, at 26, PNM notes that "Mr. Phillips' modeling in his direct testimony assumed that natural gas replacement resources would have to covert to hydrogen fuel (or some other non-carbon emitting fuel) by 2040." PNM continues, '[a]t hearing, Mr. Phillips explained that given commitments made in the PNM/Avangrid merger to decarbonize by 2035, he expected that natural gas turbines that would be converted to hydrogen by 2035 would 'come into the portfolio on a least-cost basis, predominantly because of that firm capacity they provide at a low cost.'" *Id*. n. 28 (citing Tr. Vol. III (Phillips) 808-09.

tion that new gas units would be converted to burn a non-carbon emitting fuel, such as hydrogen.[152] PNM claims the results of Mr. Phillips' analysis show that an early exit from FCPP will provide savings to customers in all potential future scenarios.[153] As such, PNM insists its calculations of customer savings already account for the company's future commitments to be carbon-free. PNM lastly argues that past Commission decisions about gas replacement resources should have no bearing on the actual factual record that PNM presents to the Commission in its replacement resources case. PNM believes that if it can prove that the only means to reliably serve customers includes a gas peaker in the portfolio, the Commission will base its decision on the record before it and not on prior decisions.[154]

Having closely evaluated the evidence, the Hearing Examiner finds PNM's modeling and analyses sufficiently credible to support a finding that the proposed FCPP abandonment should result in a significant benefit to customers through quantifiable cost savings, on an NPV basis over twenty years, in the range of $30 million to $300 million. In addition, PNM's systematic refutation of Sierra Club's unsubstantiated criticisms reinforces the demonstration of customer savings

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[152] Phillips Dir. 17.

[153] *Id*. at 21:3-5.

[154] PNM Resp. 10. Additionally, related to the discussion in n. 140 *supra* regarding Sierra Club's postulation that customer savings would shift from $0 to $100 million to $146 million in costs, PNM rebuts Sierra Club's assumption that if natural gas has been left out that "the median savings from PNM's proposed abandonment would be less than $143 million[,]" but, "Sierra Club reaches this conclusion by stating that 'the savings from most of the no-combustion portfolios are less than $143 million." PNM Resp. 10. PNM observes that Sierra Club's "statement is an assumption and is not supported by the factual record," noting that PNM witness Phillips responded to Sierra Club's attorney that "It would be tough to say [whether the no new combustion resources would be less than the median of $143 million] without performing the analysis, given the technology-neutral cases." PNM Resp. 10 (quoting Tr. Vol. III (Phillips) 78. Taking the assumption further, Sierra Club states that "the no-combustion portfolios have expected savings in the $30 million to $100 million range." Sierra Club Br. 33 (citing Phillips Dir. 23, PNM Fig. NLP-3). "It seems," PNM deduces, "that Sierra Club has reached this conclusion by eyeballing the color coding in PNM Figure NLP-3. Sierra Club could have factually supported its attempted arguments by asking PNM discovery questions about these issues earlier in the case, but instead has clouded the Commission record by making assumptions and guesses as to the actual facts in its brief."). PNM Resp. 10.

associated with the Company's proposal to abandon Four Corners. Moreover, performing a net present value revenue requirements (NPVRR) modeling analysis that compared the potential costs to ratepayers of abandoning Four Corners at year-end 2024 against PNM maintaining its ownership share through 2031 under numerous procurement scenario runs, WRA witness Brendon Baatz found customer savings in his analysis ranging from ranging from $95.7 to $305.2 million, depending on the replacement resource portfolio and assumptions.[155] Mr. Baatz's findings, which corroborate PNM witness Phillips' results, support the demonstration of the significant costs savings to ratepayers in PNM exiting the Four Corners plant in 2024.

2. Increased flexibility on PNM's system

PNM states that while baseload resources have served its system requirements well in the past, the growing penetration of renewable resources requires PNM's system to become more flexible to maximize the deliverability of renewable resources and reliably serve PNM's "net load."[156] PNM notes that because renewable resources like wind and solar are intermittent by nature and there are requirements about how much energy on the system must be served by those types of resources, the planning paradigm shifts from gross load planning to net load planning. "Net load," Mr. Phillips explained, is characterized as the gross system load less expected renewable output (and potentially minimum requirements of inflexible generators). It follows that more flexible resources are needed because net load is much more volatile.[157]

PNM thus asserts that the sale and abandonment of Four Corners will facilitate PNM's replacement of inflexible baseload generation with lower cost and more flexible resources on

[155] *See* WRA Exh. 1 (Baatz Dir.) 6-7, 18-19, Exh. BJB-8.

[156] PNM Br. 12.

[157] Phillips Dir. 7; *see also* Tr. Vol. III (Phillips) 761.

PNM's system.[158] In addition to wind and solar resources, Mr. Fallgren observed that "flexible generation resources" include combustion generation and energy storage, technologies that are, in his expert opinion, important reliability resources as PNM deploys additional renewable resources.[159]

While some parties opposed to or even supporting the Amended Application may take issue in a future proceeding with PNM including combustion generation as a replacement resource for abandoned FCPP generation (while presumably being less likely to object to energy storage), no party seriously disputed the imperative to transition from gross load planning to net load planning as resources with more volatile load patterns are increasingly added to PNM's system energy mix. From this perspective, then, the abandonment of an inflexible generator like the Four Corners plant will result in a benefit to PNM's customers and the public interest.[160]

3. Progress towards reducing portfolio emissions consistent ETA goals

PNM claims that it will effectuate the goals of the ETA by transitioning the energy used for its retail sale of electricity away from coal in favor of a more sustainable generation portfolio. PNM maintains that, in compliance with the ETA, the carbon emissions associated with PNM's generation portfolio used to serve customers will be significantly reduced by the end of 2024 if the Commission approves the Amended Application.[161] Mr. Phillips modeled the proxy replacement resource portfolios discussed above based on potential new resources because PNM will file a separate case for approval of its replacement resources, as PNM is allowed to do pursuant to the

[158] Fallgren Supp. 19; Fallgren Reb. 7.

[159] Fallgren Supp. 19. Fallgren adds that "[r]eliability is a fundamental part of providing utility service to customers." *Id*.

[160] *See also* n. 172 and accompanying text regarding Mr. Fallgren's discussion of the necessity for flexibility as more renewables are integrated into the PNM system.

[161] Fallgren Reb. 6.

ETA.[162] Phillips demonstrated in his modeling that any of the proxy replacement portfolios will lead to significant decreases in emissions from PNM's portfolio of generation resources between 2025 and 2031.[163]

Intervenors' arguments that net emissions will increase due to the seasonal operations amendments[164] and the PSA material adverse effect provision prohibiting PNM from voting for early closure of Four Corners[165] are considered below. However, focusing on this particular emissions reduction-related benefit PNM is claiming, WRA argues that PNM should not be allowed to claim emission benefits pursuant to the ETA because the REA – which as noted above was amended in conjunction with certain other statutes amended in S.B. 489 through which ETA was enacted[166] – prohibits simply transferring assets for compliance. WRA relies on Section 62-16-4(B)(4) of the REA, which provides that the Commission shall "prevent carbon dioxide emitting electricity-generating resources from being reassigned, redesignated or sold as a means of complying with the standard [80% renewable resources of retail sales by 2040 and zero carbon resources by 2045]."[167] This provision, WRA contends, weighs against Commission approval of the sale of PNM's share of Four Corners NTEC if considered as a means of complying with the ETA.[168]

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[162] *See infra* section IV.A.11.

[163] *See* Phillips Dir. 28 and 29 (PNM Fig. NLP-4).

[164] *See* Sierra Club. Br. 34-35, 36-42.

[165] *See* Sierra Club Br. 35-36; Community Groups Br. 4-6.

[166] *See supra* n. 59 and accompanying text.

[167] NMSA 1978, § 62-16-4(B).

[168] WRA Resp. 1-2.

Setting aside the fact that attempting to claim compliance with the 2040 and 2045 RPS at this time would be an attenuated proposition,[169] while the Hearing Examiner agrees with WRA that selling an ownership interest in a coal-fired plant and replacing the power with a more climate-friendly generation portfolio should not be counted as *compliance* with the ETA, that does not appear to be what PNM is claiming here. What the Hearing Examiner understands PNM's claim to be is that by achieving a generation portfolio that satisfies the carbon limits specified in Section 62-18-10(D) of the ETA for the qualifying utility's generation and sources of energy procured pursuant to a purchased power agreement (PPA) after receiving approval of a financing order,[170] "PNM is furthering," as Mr. Fallgren explained in his rebuttal testimony, "the ETA goals by transitioning the energy used for its retail sales of electricity away from coal in favor of a more sustainable generation portfolio."[171]

On this claim, no party challenged, through credible counter-analysis or otherwise, PNM's assessment that transitioning PNM's generation portfolio away from a coal-fired power plant to

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[169] *See* Case No. 21-00017-UT, Order Denying Motions to Dismiss Amended Application (June 14, 2021), at 22 ("The express directive of Section 62-16-4(B) that the Commission prevent CO_2 emitting electricity-generating resources from being sold or transferred as a means of complying with RPS standards kicking in *nineteen* to *twenty-four years* from now is an attenuated proposition even if this were an RPS proceeding.")

[170] WRA did not address Section 62-18-10 of the ETA in making its argument. That section, which specifies four "qualifying utility duties," states in pertinent part:

> D. For a qualifying utility that receives approval of a financing order and issues sources of energy transition bonds, the qualifying utility's generation and sources of energy procured pursuant to power purchase agreements with a term of twenty-four months or longer, and that are dedicated to serve the qualifying utility's retail customers, shall not emit, on average, more than four hundred pounds of carbon dioxide per megawatt-hour by January 1, 2023, and not more than two hundred pounds of carbon dioxide per megawatt-hour by January 1, 2032 and thereafter. Compliance shall be measured and verified every three years with the first period commencing on January 1, 2023. The commission shall adopt rules to implement the requirements of this subsection.

NMSA 1978, § 62-18-10(D).

[171] Fallgren Reb. 6.

combustion-free or even technologically-neutral resource mixes will significantly decrease CO_2 emissions from the PNM system.[172] Therefore, progress toward implementing the ETA goal of limiting the qualifying utility's portfolio emissions should be factored in as a benefit of the proposed FCPP abandonment through substantially reducing CO_2 *on the PNM system*.[173]

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[172] Mr. Fallgren was asked by counsel for ABCWUA a question regarding a similar issue: "[i]f the technological-neutral scenario plays out, the combustion turbines were added to PNM's system, would that increase the amount of carbon emitted by – it would offset the carbon-reduction that PNM would enjoy from exiting the Four Corners plant? Fallgren answered the question "two ways," as follows:

> Again, if you look at Mr. Phillips' testimony . . . there's a chart on page 29 . . . that clearly shows that with either one of the scenarios, there's a *substantial reduction in CO_2 on the PNM system*. If I answer a different way, if you look at PNM's exit from Four Corners, and let's say you postulate there's a potential for PNM replacement of gas, Four Corners continues to operation. If you look at that scenario, and you do some quick math, the Seasonal Operation[s] provides for a 20 to 25 percent reduction in emissions from the plant. That's the equivalent of almost a 400 megawatt coal plant being shut down in 2023. That's the equivalent, again, of a 400 megawatt coal plant that's date-certain in 2023, being shut down. If we did some math on the carbon emissions reductions on that, let's say a gas plant conservatively is half the carbon emissions of the coal plant, that's 800 megawatts of [a] gas plant. If we do a comparison on the capacity factors, so again the aeroderivative that Mr. Phillips is talking about are generally on the order of a 5 to 10 percent capacity factor. So, if you take the capacity factor of a 400-megawatt coal plant being shut down and a 5 to 10 percent capacity factor on an aeroderivative, you would have to add nearly 8,000 megawatts of aeroderivative to equal the equation. I would contend that the PNM system emission will see substantial reductions reflected in NLP-4, Mr. Phillips' testimony, and the example we just went through, the overall emissions for the state and the public in general is going to see substantial benefits. The speculation that some gas, aeroderivative gas would offset emissions reductions at Four Corners, it would require 8,000 megawatts of aeroderivative additions, which again, would be completely outside of reasonableness.

Asked next whether he would agree "that there would be some gas emissions from the combustion turbine, and you have explained that it is very small compared to the amount of emission due to Seasonal Operation[,] Fallgren answered:

> I would. And I would also point out, if you look at the Palo Verde case that we have, and you look at those scenarios, the necessity for flexibility on our system to integrate more renewables is spelled out pretty well in that case. And what you'll see actually, when you look at the scenarios for that, adding aeroderivatives can actually result in less carbon emissions than not adding aeroderivatives, because what it does is gives you the opportunity to then maximize the use of the solar in particular on your system. So again, just to speculate that a carbon emission – so that an aeroderivative is going to just increase emissions, you've got to factor into the entire modeling that show how you're going to meet system needs. And again, the increased flexibility that aeroderivatives bring can actually result in reductions in your overall carbon emissions.

Tr. Vol. II (Fallgren) 461-64 (emphasis added).

[173] Tr. Vol. II (Fallgren) 461.

4. Reduced overall emissions from Four Corners via seasonal operations

PNM asserts that carbon emissions reductions for the Four Corners plant are achieved via the separate agreement amendments that provide for seasonal operations. As indicated above, the FCPP co-owners expect the shift to seasonal operations to reduce emissions by 20 to 25 percent starting in 2023.[174] Mr. Fallgren testified that the 20 to 25% reduction in emissions from seasonal operations is nearly equivalent to a 400-megawatt coal plant being shut down in 2023 with no adverse impacts to the local communities.[175] 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.[176] PNM therefore submits that the emissions reductions brought about by seasonal operations of Four Corners is a benefit to all New Mexicans and the public at large.[177]

Sierra Club and WRA dispute with PNM's claimed emissions reductions. Sierra Club argues that seasonal operations will actually increase net emissions over time because the PSA and the June 25th amendments effectuating seasonal operations would increase the earliest possible plant closure date by "at least four years (from 2023 to 2027), and more likely six years (from 2023 to 2029)."[178] Based on those premises, Sierra Club thus deduces the PSA and Amendment 21 [to the operating agreement] would increase the minimum life of Four Corners by 200% to 300%.[179] Sierra Club's reasoning is as follows:

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[174] Fallgren Reb. 6.

[175] Tr. Vol. II (Fallgren) 462-63.

[176] Tr. Vol. II (Fallgren) 462. *See supra* n. 172.

[177] PNM Br. 13 (citing Fallgren Reb. 6).

[178] Sierra Club Br. 41.

[179] *Id*.

> The net emission increase from the increase in the minimum life of Four Corners can be calculated with simple math based on the evidence in the record regarding: at the time PNM's application was filed, the minimum lifetime of Four Corners under the prior coal supply agreement (which was 2023); the increased minimum lifetime of Four Corners under the new coal supply agreement signed on June 25, 2021 (which is 2027, and more likely 2029); and the projected plant-wide CO_2 emissions once seasonal operations begins in 2023 (which PNM estimates as 75% of prior emissions, based on a 25% decrease in emissions). The calculation is analogous to concluding that if an item originally costs $10, and the price increases to $15, the new price is 150% of the original price. Based on this evidence in the record, net CO_2 emissions will increase 150% as a result of the June 25 contract amendments requiring the plant to operate until at least January 1, 2027. Net CO_2 emissions may increase as much as 225% as a result of the June 25 contract amendments because the new contract penalizes closing the plant before January 1, 2029, by significantly increasing the payments required to NTEC if the plant closes before 2029.[180]

Sierra Club's calculations are founded on the major assumption that Four Corners can close "as early as 2023," the first year that the FCPP contracts allowed the plant to close prior to the execution of the PSA and the June 25th amendments.[181] Hence, Sierra Club appears to be modeling a 2023 FCPP shutdown against the potential January 1, 2027 (but "more likely" 2029) closure date identified in the seasonal operations agreements. And, as PNM points out, Sierra Club presents these calculations, purportedly "based on evidence in the record," for the first time in this case in its post-hearing brief.[182]

[180] Sierra Club Br. 41-42 (internal notes excluded; however, those notes provide two calculations, first for the 150% CO2 emission increase, Sierra Club's calculation in n. 124 is "New emissions – prior emissions)/(prior emissions), which is ((4 years x 0.75% emissions/year) + 2 years x 100% emissions - 2 years x 100% emissions)/2 years x 100% emissions=1.5, which is a 150% net increase in emissions." For the second 225% increase, the calculation in n. 125 is: "(New emissions – prior emissions)/(prior emissions), which is ((6 years x 0.75% emissions/year) + 2 years x 100% emissions - 2 years x 100% emissions)/2 years x 100% emissions= 2.25, which is a 225% net increase in emissions.").

[181] Sierra Club Br. 5, nn. 7-8, 41-42.

[182] PNM Resp. 21.

WRA argues, for the first time in its response brief, that emissions benefits from seasonal operations that are contingent on PNM's abandonment are speculative. WRA alleges that both its witness, Mr. Baatz, and Sierra Club witness Jeremy Fisher testified that the seasonal operations agreements "***could*** prolong the life of Four Corners, thereby negating the purported emissions benefits of seasonal operations."[183] WRA adds that the only reason for the abandonment proposal, which it supports, "is economic – the analysis performed by WRA's expert witness, Mr. Baatz, confirms PNM's finding that abandonment is in the economic interest of PNM and its customers. In fact, this analysis shows that PNM customers are economically much better off having PNM abandon the plant under a variety of assumptions and sensitivities."[184] WRA therefore urges the Commission to "disregard PNM's claim of emissions benefits that facilitate ETA compliance and approve PNM's abandonment, adjusting the amount to be securitized as recommended by WRA, on the basis of cost savings to customers."[185]

PNM, which responded only to Sierra Club's hypothesis, describes the novel modeling as "a perfect example of Sierra Club layering speculation to reach a desired conclusion. To accept that the agreements implementing seasonal operations would increase the life of Four Corners, we have to assume that the current co-owners can (from a reliability perspective) and will (from a regulatory or political perspective) get out of Four Corners in 2023."[186] PNM asserts there is "absolutely no evidence that PNM and the other co-owners could close Four Corners by 2023. Rather than play this layered speculation game, PNM asks that the Commission base its decision

[183] PNM Resp. 2 (WRA's emphasis).

[184] *Id*.

[185] *Id*.

[186] PNM Resp. 16.

on the record evidence: seasonal operations is expected to reduce emissions by 20 to 25 percent, which is equivalent to a 400-megawatt coal plant being shut down in 2023."[187]

PNM's points are well-taken in refuting Sierra Club's conjectural analysis and they apply with equal force to WRA's observation, which is based solely on the *belief* of Mr. Baatz – who was not qualified in this proceeding as an engineering or scientific expert[188] – that the seasonal operations agreements "*could* delay early closure of FCPP, which would eliminate or significantly reduce the possible environmental benefits associated with the . . . agreements."[189] The only credible evidence in the record, founded as it is on the unrebutted expert analysis of PNM witness Fallgren, is that seasonal operations should reduce emissions between 20 to 25 percent, which equates to closing a 400 MW coal-fired plant.[190] This salutary effect of seasonal FCPP operations should also be factored in as a quantifiable benefit of the FCPP abandonment proposed in this case.

5. Reduction in abandonment costs using securitization

PNM asserts that the early exit from the FCPP pursuant to the ETA's securitized financing provisions fulfills the Legislature's public interest directive to accelerate the departure from coal plants and to balance the impacts and benefits of the state's transition away from coal among customers, the environment, local communities, and shareholders.[191] PNM showed that by using the ETA's financing tool to abandon PNM's interest in Four Corners, customers stand to save approximately $17.1 million in 2025 compared to traditional rate recovery of the return-on and

[187] *Id*.

[188] Mr. Baatz, a Vice President at Gabel Associates, Inc. was, however, well-versed as an expert to opine on economic, environmental, and utility regulatory policy issues and has testified before the Federal Energy Regulatory Commission (FERC) and numerous state utility commissions. *See* Baatz Dir. 2-3, Exh. BJB-1.

[189] WRA Exh. 1 (Baatz Dir.) 14 (emphasis added).

[190] *See, e.g.,* n. 172 *supra*; Fallgren Supp. 2, 28; Fallgren Reb. 6, 13, 28-29.

[191] Fallgren Supp. 19 (citing PNM Exh. 7 (Sanchez Dir.) 37).

return-of a regulatory asset.[192] PNM, further, emphasizes that the credit-favorable financing mechanism under the ETA for accelerated removal of coal-fired generation comes with a duty for the utility, which includes forgoing an equity return and ensuring that emissions associated with its retail generation portfolio are within the limits set out in Section 62-18-10(D) of the ETA.[193]

The value of securitization in facilitating the early retirement of coal plants was not reasonably disputed by any party to the proceeding. Parties taking positions meriting serious attention on the matter of securitization either opposed the sale and abandonment proposal in its entirety for a host of other reasons or, alternatively, opposed the securitized financing of certain undepreciated investments in the FCPP like the $148.7 million in FCPP capital additions between 2016 and 2018 or other cost items treated in the companion *Recommended Decision on FCPP Financing Order*. A balanced statement of the latter position that recognizes the advantage of securitization is volunteered by the Attorney General's witness, Andrea Crane, when Ms. Crane observes in her testimony:

> At any given level of investment, securitization is likely to be less expensive for ratepayers then recovery of that investment under traditional, rate base, rate of return ratemaking mechanisms. This is because traditional rate-making assumes that utility investment is financed by a combination of both debt and shareholder equity, while securitization is based solely on debt financing. Debt financing is almost always less expensive than equity financing because equity financing is riskier for investors. This is especially true when equity financing is compared to debt that is highly-rated, such as securitized debt, which carries a low interest rate.
>
> However, in the absence of the ETA, there are other alternatives available to the NMPRC that could be less costly for ratepayers. For example, the Commission could require PNM's shareholders to absorb all

[192] Fallgren Supp. 18 (citing Baker Dir. 4); Fallgren Reb. 4-5. The estimated savings takes into account that PNM earns a debt-only return on stranded capital investments made between July 2016 and December 2018, consistent with the final order in Case No. 16-00276-UT. Fallgren Reb. 5.

[193] Fallgren Reb. 5-6.

> or a portion of any stranded costs. In addition, even if the NMPRC authorized PNM to recover some portion of stranded costs from ratepayers, the Commission could limit carrying charges on these costs during the recovery period. Therefore, in the absence of the ETA, there would be other options available to the Commission that could provide a greater benefit to New Mexico ratepayers. Nevertheless, if the NMPRC determines that securitization is the least expensive option, I am not opposed to the use of securitization to recover the prudently-incurred costs that the Commission determines should be recovered from ratepayers[.][194]

WRA expresses a similarly nuanced perspective regarding the benefit of securitizing abandonment costs to ratepayers. Even though it opposes securitization of certain costs PNM has included in its financing order request, WRA asserts that the "[t]he ETA gives the Commission a powerful tool to accomplish this objective by providing for the securitization of abandonment costs and other energy transition costs. Applying the ETA and allowing for the securitization of these energy transition costs will benefit ratepayers from a long-term perspective."[195]

Consequently, based on the uncontroverted record, the Hearing Examiner finds that the substantial savings afforded through the securitization of investments authorized by the Legislature through the ETA should be counted as another quantifiably positive factor in the cost-benefit analysis of PNM's abandonment of FCPP.

[194] Crane Dir. 26-27.

[195] WRA Br. 10.

6. Future environmental impacts in the cost-benefit equation

Community Groups assert that in weighing the quantifiable and non-quantifiable benefits of the proposed abandonment and transfer against the costs of those actions, PNM failed to quantify the costs of its chosen approach. The costs of not pursuing another approach favored by Community Groups and other intervenors – early closure of Four Corners – include in Community Groups' estimation: ongoing air pollution emissions, and groundwater contamination, the associated impacts to the health and well-being of nearby communities, and the social cost of carbon from ongoing greenhouse gas emissions.[196] Community Groups reason that since the net public benefit standard involves a weighing of the benefits and costs of the abandonment and transfer and PNM has failed to acknowledge, much less quantify or otherwise take into account or disclose the many costs associated with its chosen approach, the Amended Application is incomplete.[197]

PNM, focusing on Community Groups' preferred outcome, i.e., early closure of Four Corners, reminds that closing Four Corners requires a unanimous vote of all the utility co-owners of the plant. PNM, as a minority owner of Four Corners, only has limited influence it can bring to bear in moving its co-owners toward full closure. Because PNM cannot force a closure of the plant – although it is on record trying to negotiate an early retirement of Four Corners[198] – PNM contends it would be exceptional for the Commission to weigh the continued operation of Four

[196] Community Groups Br. 30-31 (citing Case No. Case No. 19-00915-UT, *Recommended Decision on Replacement Resources – Part II*, at 124, regarding the social cost of carbon ("The difference, moreover, may be substantially less and may be reversed if the Commission considers the social costs of CO_2 emissions that would be incurred with the 11 new natural gas units in PNM Scenario 2 or any of the other portfolios that incorporate natural gas turbines.").

[197] Community Groups Br. 31.

[198] Fallgren Reb. 10-11.

Corners as a cost of the abandonment in the net public benefit test. PNM has demonstrated that the abandonment benefits its own customers significantly. While PNM acknowledges there may be ongoing impacts to the public at large from Four Corners staying open, those impacts are not, PNM insists, within the control of PNM, its customers, or the Commission.[199]

Moreover, to the extent that Community Groups view continued operation of Four Corners as a cost, PNM asserts there are benefits that the Commission must weigh in this equation. From this perspective, PNM notes that seasonal operations is expected to reduce emissions at Four Corners by 20 to 25 percent, the equivalent of closing a 400 MW coal plant. Moreover, PNM adds there are other benefits of keeping Four Corners open for now in that Navajo Nation keeps its current jobs and revenue from the plant and is guaranteed four years of advance notice of closure or additional payments to NTEC if the notice for closure is shorter than four years. Thus, turning the inquiry around, PNM maintains that the cost-benefit analysis of Four Corners remaining open must be balanced and account for the quantifiable and unquantifiable benefits in the record.[200]

The Hearing Examiner's weighing of the quantifiable and unquantifiable benefits of the sale and abandonment of FCPP is reflected at various points in this decision and are summarized in his recommendations on the merits below.

7. Decommissioning and remediation obligations

Community Groups also take PNM to task for allegedly neglecting to identify and address concerns around decommissioning and remediation costs associated with Four Corners, arguing that PNM had not quantified the scope or taken into account the deleterious impacts of pollutants like coal ash (a/k/a coal combustion residual or CCR) on customers and local communities or the

[199] PNM Resp. 51-52.

[200] PNM Resp. 52.

scope of its joint and several liability under the federal Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601, *et seq*.[201] By not adequately weighing the "quantifiable and non-quantifiable" risks, harms, and costs to nearby communities, ratepayers, and the broader public interest associated with past and ongoing contamination from FCPP, Community Groups contend, PNM has failed to meet the net public benefit standard.[202]

PNM believes Community Groups' concerns are misplaced. In terms of PNM's ongoing decommissioning and reclamation obligations, PNM asserts that the PSA with NTEC strikes the appropriate balance given the more than 50 yeas of certificated service in Four Corners that has benefitted PNM's customers.[203] The PSA sets forth the liabilities that PNM is retaining from Four Corners[204] as well as the "Assumed Liabilities" that NTEC as purchaser of the plant will take on after closing.[205] As part of the negotiations for PNM to transfer its interests to NTEC, PNM agreed to retain its obligations for both mine reclamation and plant decommissioning costs.[206]

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[201] *See* Community Groups Br. 31-37.

[202] Community Groups Br. 37.

[203] *See* PNM Br. 26-30.

[204] Fallgren Dir., PNM Exh. TGF-2, pp. 26-28, Sec. 2.4. As set forth in Section 2.4, PNM as "Seller" retains certain liabilities and obligations after the closing, defined as "Excluded Liabilities." In that section, PNM retains several Excluded Liabilities that include Landfill Obligations (other than "Post-Closing Environmental Liabilities"), decommissioning costs, and "Pre-Closing Environmental Liabilities." *See also* PNM Exh. 8 (Sanchez Reb.) 34-35 ("The PSA's Sections 2.4(f) through (h) affirm that PNM is obligated to pay for all remediation costs related to the landfill, facility decommissioning, and for any Pre-Closing Environmental Liabilities (as defined in the PSA). The overall import of these provisions is that the PSA specifically provides that PNM retains responsibility for its decommissioning and remediation costs, and PNM is not using the transfer to NTEC as a means to side-step any liability.").

[205] *See* Fallgren Dir., PNM Exh. TGF-2, pp. 18-19, Sec. 2.3(a). The Assumed Liabilities include Post-Closing Environmental Liabilities and some Pre-Closing Environmental Liabilities if the environmental laws are changed after closing. Remediation liabilities, arising in connection with decommissioning, are excluded from Pre-Closing Environmental Liabilities that NTEC may be responsible for pursuant to the PSA. "Remediation" is defined at Sec. 1.1.66. *Id.* PNM Exh. TGF-2, pp. 16-17, Sec. 1.1.66.

[206] Fallgren Dir. 23.

Regarding decommissioning, Four Corners is located on Navajo Nation land pursuant to terms of the Navajo Nation Land Lease. As a condition of locating, constructing, and operating the plant on Navajo Nation land, the lease requires that upon termination, all facilities, equipment, buildings, and other structures must be dismantled and removed from the site unless otherwise requested by the Navajo Nation.[207] Therefore, the estimated decommissioning costs assume a full plant dismantling and disposal. PNM's current obligation for decommissioning costs for Four Corners Units 4 and 5 comes from a December 2020 decommissioning study, which was included as Exhibit TGF-4 to Mr. Fallgren's direct testimony.[208]

The co-owners of the plant also have certain mine reclamation obligations under the CSA. PNM remains responsible for its share of costs associated with mine reclamation under the PSA. NTEC and PNM will complete a Reclamation Study in 2024 that will provide the latest final mine reclamation cost payment to NTEC based on the Reclamation Study. The Reclamation Study ensures that the latest cost estimates are fully satisfied and that the full costs for final mine reclamation are provided to NTEC. Any additional mine reclamation costs attributable to PNM that come out of the Reclamation Study will not be charged to PNM customers, given PNM has reached its cap on the amount of surface mine reclamation it can recover from customers pursuant to prior Commission orders.[209] Therefore, any additional Four Corners surface mine reclamation obligations will be funded by PNM shareholders.

Given that PNM's customers received the benefits of the plant, PNM believes it is appropriate that the Company retain certain liabilities that arose from over a half-century of PNM's

[207] Fallgren Dir. 20.

[208] Fallgren Dir. 21 and PNM Exh. TGF-4.

[209] PNM Exh. 10 (Baker Dir.) 9-10.

pre-closing ownership interest. PNM believes it is also appropriate that post-closing liabilities be assumed by NTEC. Since PNM will no longer be a co-owner and will have no say in how the plant operates, neither PNM nor its customers should be responsible for the costs associated with the post-closing liabilities.[210]

Regarding the matter of ongoing liabilities associated with the sale and abandonment of FCPP, the Hearing Examiner finds that a reasonable balance has been struck between the liabilities PNM retains and the liabilities that NTEC assumes. For example, while PNM customers are no longer responsible for any reclamation costs, as provided in the *Recommended Decision on FCPP Financing Order*, customers will pay up-front for reasonably estimated decommissioning costs through securitized financing, but will only pay the final, actual decommissioning costs after PNM has shown the prudence and reasonableness of the costs in the reconciliation ratemaking process pursuant to Section 4(B)(10) of the ETA. PNM and its customers do not assume any post-closing environmental liabilities. But, to ensure that Navajo Nation land is returned to the condition envisioned in the Navajo Nation Land Lease, PNM retains its decommissioning liabilities. Therefore, from the perspective of both PNM customers and the Navajo Nation, for purposes of reasonably balancing ongoing liabilities, the net public benefit standard is addressed and satisfied.

8. PNM's alleged failure to perform a cost-benefit analysis of an early exit from Four Corners pursuant to the stipulation in Case No. 16-00276-UT.

Although most of the issues stemming from Case No. 16-00276-UT are addressed in the companion *Recommended Decision on FCPP Financing Order*, one that should be considered in this space is an argument made by Sierra Club that involves PNM's alleged violation of the Commission's Final Order in the 2016 rate case by failing to conduct cost-benefit analyses of

[210] PNM Resp. 54.

exiting Four Corners in 2024 and 2028 that PNM agreed to perform in the Modified Revised Stipulation.

To fully understand the argument, some background is required. In Case No. 16-00276-UT, the Commission approved modifications to the revised stipulation the parties reached. Pursuant to that Modified Revised Stipulation filed on January 23, 2018, among the things PNM committed to do or submit to was the following cost-benefit analysis:

> 10. PNM shall perform a cost-benefit analysis as part of its 2020 Integrated Resource Plan, on the impact of an early exit from Four Corners as a participating owner, as of 1) 2024, and 2) 2028, that includes an analysis of the cost recovery of and return on PNM's undepreciated investments in Four Corners together with full recovery of all existing contractual obligations, including default payments and penalties.[211]

Sierra Club argues that PNM has flouted its obligation to analyze exiting Four Corners in 2024 and 2028 by breaching its existing Four Corners contracts. Nowhere in PNM's 2020 IRP does PNM present the cost-benefit analysis required by the stipulation the Commission approved in Case No. 16-00276-UT. Similarly, in this case, PNM witness Phillips acknowledged that PNM did not present cost-benefit analyses that involve breaching its Four Corners obligations.[212]

Sierra Club contends that PNM's alleged violation of the Commission's *Revised Final Order* in Case No. 16-00276-UT is directly relevant here. Sierra Club posits that if PNM had complied with its order, the Commission and parties would have had two other base cases against which it could measure PNM's proposed sale and abandonment. Hence, Sierra Club argues that PNM's failure to perform the cost-benefit analyses called for in the Modified Revised Stipulation

[211] Case No. 16-00276-UT, Modified Revised Stipulation at 9, ¶ 10.

[212] Tr. Vol. III (Phillips) 798-99.

"has enabled PNM to present a worst-case, and unrealistic, baseline scenario in which PNM remains in Four Corners until 2031."[213]

Responding to Sierra Club's breach option, PNM maintains that if its simply walked away without any deal, its breach of contractual obligations would carry a significant cost. PNM contends that one cannot reasonably assume that this is a practical or acceptable option, or that relative savings between PNM's proposal and a pre-2031 abandonment attempt would be less than when the plant's contracts expire in 2031. As alternative scenarios for abandonment go, PNM states, "premising a 'better' abandonment deal on a contractual breach by PNM is neither realistic or [*sic*] availing."[214]

PNM insists that without an agreement like the sale and transfer to NTEC, there is no viable option for PNM to exit Four Corners. Because the stated intent of the other co-owner utilities is to continue operating the plant, PNM would be subject to default payments and penalties if it attempted to unilaterally cease its participation at Four Corners.[215] Under the current agreements, PNM also would be obligated to pay for its share of operating and fuel costs through 2031.[216] If PNM defaulted in this way and ceased using Four Corners, replacing it with other resources, customers would have to pay both for the ongoing costs at FCPP (without getting the power), as well as the costs of the new resources. PNM asserts this would be an uneconomic outcome, and PNM could not demonstrate that there was a net public benefit to such a proposal.[217] Without the transfer of ownership to NTEC, PNM claims it would not be possible for it to exit

[213] Sierra Club Br. 31.

[214] PNM Resp. 13.

[215] Fallgren Dir. 11.

[216] Fallgren Reb. 25.

[217] PNM Resp. 13.

Four Corners in 2024, 2028, or any year before 2031. In short, quoting Mr. Fallgren's observation at hearing, without an agreement like the sale and transfer to NTEC, PNM concludes "[i]n 2028, there was not a credible exit plan."[218]

To accept the premise that a more beneficial abandonment proposal could hinge on PNM deliberately breaching substantial contractual obligations to the other FCPP co-owners, the Commission has to assume that: (i) PNM would be exposed to significant default payments and penalties; (ii) PNM would still remain bound to continue paying operating and fuel costs while the coal plant supplies electricity for the benefit other utilities' customers; (iii) PNM's customers, who would still be on the hook for ongoing FCPP costs but who no longer share the benefit of power produced from the plant, would also have to pay the cost of replacement resources to serve their electricity needs; and (iv) affected communities surrounding and related to the plant by employment or the local economy would be deprived of the transition funds afforded by the ETA. Considering the foregoing factors, the Hearing Examiner finds that requiring PNM to conduct a contractual breach option analysis would not be a worthwhile or sensible exercise. Moreover, to the extent that an abandonment-by-breach would leave impacted communities without ETA transition funding, the drastic scheme to induce an early closure of Four Corners would not be in the public interest. The Commission, therefore, should find PNM's Amended Application and evidentiary showing in this case substantially satisfied its obligation under Paragraph 10 of the Modified Revised Stipulation to perform a cost-benefit analysis of exiting Four Corners at the end of 2024.

[218] PNM Resp. 13-14 (quoting Tr. Vol. II (Fallgren) 409).

9. Four Corners closure date: 2031 or earlier?

As suggested in the just concluded abandonment-by-breach discussion, some intervenors, particularly Sierra Club but also Community Groups, seem to assume, repeating the mantra of "early closure,"[219] that as discussed above if the proposed sale and abandonment is rejected the Four Corners plant can still close before 2031, perhaps as early as 2023, or 2027, or 2029.[220] They further postulate that the PSA and agreements encompassing seasonal operations will prolong the life of Four Corners, requiring the other co-owners to stay in coal longer than they otherwise would and contributing to the negative effects of climate change, as well as increased costs, an issue dealt with above.[221] While an early closure is possible – and, as found in section IV.B.3 below the Commission should not endorse any provision that would thwart it – the Commission cannot make decisions in the realm of the possible based on circumstantial speculation or conjecture.[222] It must, instead, determine cases on the basis of the evidence adduced. The reliable evidence adduced in this case indicates that Four Corners will close in 2031, when the coal supply agreement expires.[223] As PNM witness Fallgren accurately observed: "The only concrete and quantifiable date this Commission has for the other co-owner's plans is a 2031 retirement: APS, TEP, and SRP all have made filings approximately within the last year that they intend to stay with the plant until

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[219] *See* Sierra Club Br. 16, 35, 36, 38, 46, 47; Community Groups Br. 7, 9, 19, 20, 25, 28, 30, 43.

[220] Sierra Club Br. 3, 5 n. 7, 9, 22, 25-26, 29, 63; Community Groups Br. 19, 43 ("The Commission's decision in this case will be judged not through balance sheets and parsed language, but against the weight of history and *opportunity to leverage the early closure of Four Corners*.") (emphasis added).

[221] Sierra Club Br. 1, 63; Community Groups Br. 30-31. WRA witness Brendon Baatz expressed a similar concern. *See* Baatz Dir. 14 ("The provision may also increase the cost of early retirement by extending the closure notice to 48 months because of the payments required to NTEC.").

[222] For instance, Sierra Club witness Dr. Jeremy I. Fisher only points to circumstantial indicators that Four Corners might close early, like the value of the sale of Four Corners by PNM to NTEC and the proposed move to seasonal operations. *See* Sierra Club Exh. 1 (Fisher Dir.) 29-30.

[223] Fallgren Dir. 7; Fallgren Supp. 4-7; Fallgren Reb. 4, 6, 9, 11, 14, 15, 23, 24-25, 33.

2031."[224] For its part, the operator of the plant, APS, recently has maintained to the Arizona Corporation Commission (ACC) that it needs the Four Corners plant to operate until 2031, which is apparently regarded as an "early closure" date in APS's most recent general rate proceeding before the ACC.[225]

Regarding the intervenors' concerns over the PSA and the agreements effectuating seasonal operations preventing an early closure of Four Corners, there is nothing in the record to indicate any other FCPP co-owner is seeking to exit the plant or advocate for an early closure of the plant. Any vote to close the plant early would have to be unanimous. A unanimous vote would signify, as PNM points out, that all co-owners would be on equal footing in terms of not needing the energy and capacity from the plant and firm in their belief that their regulatory environment supports early closure.[226] To the contrary, as Mr. Fallgren's testimony disclosed, the co-owners' public and private discussions regarding Four Corners all indicate that APS, TEP, and SRP are committed to staying in Four Corners through 2031.[227] Fallgren explained, moreover, that the co-owners' commitments

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[224] Fallgren Reb. 33.

[225] *See In the Matter of the Application of Arizona Pub. Serv. Co. for a Hearing to Determine the Fair Value of the Utility Property of the Company for Ratemaking Purposes, to Fix a Just and Reasonable Rate of Return Thereon, to Approve Rate Schedules Designed to Develop Such Return*, ACC Docket No. E-01345A-19-0236, Recommended Opinion and Order of Administrative Law Judge (Aug. 2, 2021), at 26 ("On August 11, 2020, Chairman Burns filed a letter requesting that APS performing analyses using four different methods of cost recovery for the stranded costs resulting from *early closure* of the 4CPP in 2031[.]"). Later in the recommended opinion and order (ROO), the ACC administrative law judge states that:

> When APS filed its application in this matter on October 31, 2019, APS indicated that the *4CPP would not shut down earlier than earlier than 2038*. Only a few months thereafter, APS made its Clean Energy Commitment, indicating that it would exit coal generation by 2031. During this matter, APS consistently emphasized the importance of Units 4 and 5 to the reliability of APS's service, particularly during peak summer months, and the need to keep Units 4 and 5 in service until 2031.

Id. 112 (emphasis added).

[226] PNM Br. 17.

[227] Fallgren Supp. 6-7.

to rely on FCPP through the remaining contract term to 2031 are not trivial, as such commitments are related to each utility's ability to reliably serve its customers.[228] He noted, in particular, that APS, the Four Corners operator, is already closing a significant amount of coal capacity and planning to add between 1,500 and 2,200 MW of battery storage by 2026.[229] For APS, an early closure of Four Corners would require 970 MW of additional firm capacity during the same period of significant transition and resource additions on its system.[230] Therefore, in the recent rate case, APS asserted to the ACC in rebuttal testimony that retiring Four Corners would jeopardize system reliability.[231]

In short, while an early closure of the Four Corners plant is conceivable and even provided for in the agreements for seasonal operations that align with the Navajo Nation's Just Energy Transition,[232] the preponderance of the evidence in this case – in fact, the only probative evidence

[228] Fallgren Supp. 4-6. Fallgren explains, at 4-5, that "Arizona's economy," the state where all the other co-owners are located, "has recovered more quickly than New Mexico's. Load increases in Arizona are projected to continue to rise approximately 2.5% annually. Both the [SRP] and the APS systems are much larger than PNM's system. Therefore, this increase results in the need for additional firm capacity of approximately 175 MW per year on the APS system alone. In addition, other baseload plants in APS' and SRP's systems have been shutting down. One such closure was the Navajo Generating Station which in turn has put immediate economic pressure on the Navajo Nation economy. In addition, APS is planning to close the Cholla coal plant in 2025.").

[229] Fallgren Supp. 5 (noting that the closure of the Navajo Generating Station "put immediate economic pressure on the Navajo Nation economy" and adding that APS is planning to close the Cholla coal plant in 2025).

[230] *Id*. (indicating that APS's 2020 IRP showed an expected reliability need of over 6,000 MW of capacity by 2035).

[231] *Id*.

[232] As discussed in section II.A.5 above, the seasonal operation agreements amend Section 20 of the Four Corners CSA so the owners would not vote for a closure of Four Corners to be effective prior to January 1, 2027. While the Four Corners co-owners agreed to provide four years notice for an early closure, they retain the right to the right to give two-years' notice of early closure (the current length of the notice period) on or after January 1, 2027 by paying $200 million, and three-years' notice of early closure on or after January 1, 2028 upon payment of $100 million. This four-year notice tracks the request of the Navajo Nation for adequate notice as outlined in President Nez's January 24, 2020 letter to the ACC regarding the TEP rate case, which states: "The Nation recommends the ACC require utilities to provide a five-year advanced notice of any planned power plant closure." Fallgren Supp. 31 (citing https://docket.images.azcc.gov/E000004596.pdf).

of record – indicates that Four Corners will continue to operate until 2031, irrespective of PNM's early departure pursuant to the proposed sale and abandonment.

10. *Commuters' Committee* factors

PNM addressed the *Commuters' Committee* factors in the direct testimony of PNM witness Mark Fenton. As he testified regarding the SJGS abandonment in Case No. 19-00018-UT, Mr. Fenton asserted that the first factor, the extent of the carrier's loss on the particular branch or portion of the service and the relation of that loss to the carrier's operation as a whole, is not directly applicable to the abandonment of Four Corners because the plant is currently being used to serve customers, has been in rate base for more than 50 years, and PNM's current rates recover a representative amount of the company's annual revenue requirement associated with the investments and O&M expenses associated with the plant.[233]

Mr. Fenton agreed, however, that the second factor, the use of the service by the public and prospects for future use, is applicable and that PNM fulfills it. Fenton refers here to Mr. Fallgren's testimony that PNM expects FCPP will continue operating and providing power to electric utility customers other than PNM's beyond its exit on December 31, 2024. However, Fenton asserts, PNM's analyses show that it will be beneficial to PNM's customers if FCPP is abandoned through an early exit in 2024 and replaced with other resources.[234]

As to the third *Commuters' Committee* factor, balancing of the carrier's loss with the inconvenience and hardship to the public upon discontinuance of service, Mr. Fenton posited that factor is directly related to the fourth factor, availability and adequacy of substitute service. Citing the testimonies of PNM witnesses Phillips, Baker, and Fallgren, Mr. Fenton said PNM has

[233] PNM Exh. 2 (Fenton Dir.) 13.

[234] *Id*.

determined that it is economically beneficial for customers if FCPP is abandoned in 2024 and replaced with more flexible and lower carbon emitting replacement resources. He asserted analyses performed by PNM witness Phillips "clearly illustrate a savings and net benefit for PNM's customers."[235] Fenton further maintained that the ETA and the amendments to the REA are also relevant to this analysis because abandonment of FCPP will eliminate PNM's reliance on coal generation and facilitate PNM's deployment of lower carbon emitting resources.[236]

Mr. Fenton also asserted that the last three *Commuters' Committee* factors, properly analyzed, should account for the net public benefit of abandoning FCPP in the form of cost savings for customers. Fenton cited the PNM analyses, discussed at length already, that show the abandonment of FCPP by the end of 2024 and its replacement with more flexible and lower carbon emitting replacement resources saving customers significant money over the long-term. He also highlighted the fact that PNM's shareholders, and not its customers, would be paying NTEC $75 million to relieve PNM of its ongoing obligations under the Coal Supply Agreement.[237]

Only two parties besides PNM addressed the *Commuters' Committee* factors in the context of the proposed abandonment.[238] Those parties were NEE and Staff.

NEE argues that PNM has not met any of the *Commuters' Committee* factors. Regarding PNM's alleged failure to meet the first factor, NEE asserts that although it "believes there will be replacement resources that will meet or increase resource adequacy requirements to benefit 'operations as a whole', [*sic*] this is the first abandonment case that NEE is aware of that has not

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[235] Fenton Dir. 14.

[236] *Id*.

[237] Fenton Dir. 14-15.

[238] For example, ABCWUA and the County alluded to the *Commuters' Committee* factors, but did not analyze them, in the context of "foisting imprudent assets on ratepayers." ABCWUA/County Br. 11.

included actual replacement power packages for the Commission's review[.]"[239] NEE infers this is "because PNM was rushed to apply for abandonment because of the Iberdrola/Avangrid merger."[240]

NEE contends PNM has not satisfied the second and third *Commuters' Committee* factors because PNM's abandonment proposal could extend the life of the plant through the sale to NTEC and prevent PNM and the other co-owners from reaching agreement to close the FCPP earlier than it would otherwise.[241]

Lastly, NEE maintains the fourth factor has not be met because there is adequate and available service, pointing to the replacement resources PNM is proposing to replace nuclear power from the Palo Verde Nuclear Generating Station abandonment and returning to the theme that this is the first case that NEE could find where the proposed abandonment is not coupled with "actual replacement power packages" for Commission review.[242]

Staff argued in its post-hearing brief that PNM failed to meet the first *Commuters' Committee* factor, yet Staff does nothing more than make the statement, neglecting to explain how PNM failed to meet the factor. What's more, on this matter as well as the issue addressed in the next section, Staff is at odds with its own witness, Eli LaSalle. Mr. LaSalle contended in his direct testimony that PNM had not adequately addressed the first factor and opined that there would be no real harm to PNM if the abandonment were not approved because PNM would continue to recover on its investments in FCPP in rates.[243] However, at hearing, Mr. LaSalle testified that he

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[239] NEE Br. 62-63.

[240] NEE Br. 63.

[241] NEE Br. 63-64.

[242] NEE Br. 64.

[243] Staff Exh. 1 (LaSalle Dir.) 7. PNM witness Lauren Sanchez refuted Mr. LaSalle's "no harm" contention in her rebuttal testimony. *See* PNM Exh. 8 (Sanchez Reb.) 18 ("PNM's customers will suffer harm if the (*Cont'd on next page*)

did not be believe this one factor "to be a substantive difference, or to affect the adequacy of the Application," as the *Commuters' Committee* factors "have been viewed holistically" in net public benefit analyses in prior Commission cases.[244]

Whatever the case, consistent with the findings in foregoing sections of this decision that factor into finding a net public benefit in PNM's abandonment of the FCPP, the Hearing Examiner finds PNM has satisfied the *Commuters' Committee* factors. To the extent replacement resource adequacy is applicable to any of those factors, that issue is resolved in the section immediately below.

11. Adequacy of replacement resources pursuant to the Energy Transition Act

Similar to NEE's argument that PNM failed to put forward "actual replacement power packages," Staff argues that PNM's failure to identify sufficient generation resources to replace its abandoned interest in Four Corners provides sufficient justification for the Commission to deny abandonment.[245] While Staff acknowledges that PNM is expressly permitted to defer its replacement resource portfolio filing pursuant to Section 62-18-4(D) of the ETA, "the lack of known replacement facilities flatly should prevent the Commission from granting approval to abandon the FCPP."[246] Staff asserts that the issue is "especially critical at this time," where recently, PNM has had to brief the Commission on delays in constructing generation facilities intended to replace the

(*Cont'd from previous page*)

abandonment is not approved. PNM Witness Nicholas Phillips at page 3 of his Direct Testimony has determined that the magnitude of customer savings from the early divestiture of the FCPP assets ranges from approximately $30 million to $300 million on a net present value basis. Customers are released, as of 2025, from the obligation of future ongoing costs for operating the plant, including costs associated with capital investments, operations and maintenance, and coal supply for the plant. These are quantifiable benefits that customers will forego if abandonment is denied.").

[244] Tr. Vol. VI (LaSalle) 1516.

[245] Staff Br. 3.

[246] *Id*.

SJGS abandonment. Staff thus concludes that "given the difficulties in constructing resources approved some time ago, it would be irresponsible for the Commission to authorize PNM to abandon its interest in FCPP without confidence that the generation from the abandoned facility would be adequately replaced."[247]

PNM, in response, notes that Staff's position in briefing contradicts its own witness's testimony on the adequacy of replacement resources ***and*** the merits of the proposed abandonment. In fact, Mr. LaSalle testified that PNM's identification of potential replacement resources met the statutory requirements of the ETA "given that adequate potential new resources are identified in the application for abandonment," and he concluded that that there was a net public benefit to granting PNM's abandonment application.[248]

Apart from the contradiction, PNM asserts that Staff's new position is also inconsistent with the problem it identifies because, in PNM's view, denying abandonment would likely increase the possibility of a delay in bringing forward replacement resources for Four Corners by the end of 2024. PNM explains that it sought to abandon its Four Corners interest with an adequate time runway to conduct an RFP for replacement resources to have them online prior to exiting the plant.[249] PNM thus emphasizes the importance of bringing forward an abandonment request early so that the need for the replacement resources may be adequately established, and PNM can then turn to securing the regulatory approvals required to obtain replacement resources.[250]

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[247] *Id*.

[248] LaSalle Dir. 9-10.

[249] PNM Resp. 55 (citing Fallgren Reb. 45-46 where Mr. Fallgren proclaims "[t]his filing is not too soon; rather, the timing of this filing provides adequate margin to ensure a smoother transition and acquisition of replacement resources.").

[250] PNM Resp. 56.

The Hearing Examiner finds, consistent with related findings above[251] and the testimony of its director of integrated resource planning at hearing,[252] that PNM has reasonably demonstrated that replacement resources can be deployed prior to its abandonment of Four Corners. The IRP director, Nicholas Phillips, testified that PNM has already conducted an RFP for replacement resources for Four Corners.[253] Mr. Phillips said that PNM will file its replacement resource case in the first quarter of 2022. And, assuming a Commission order in the replacement resources case occurs by the end of 2023, Phillips estimated that developers will have the better part of two years to bring resources online before the summer peak of 2025.[254] He also noted that any projects chosen from this RFP will have a much longer lead time to complete construction as compared to the developers of replacement resources for the SJGS.[255] The evidence adduced by PNM on the issue of potential resource adequacy, therefore, is sufficient to satisfy the Company's deferral of an application for Four Corners replacement resources pursuant to ETA Section 62-18-4(D).[256]

12. Whether Section 62-18-3 of the ETA is applicable to this case

San Juan County argues that the Commission should deny abandonment because PNM refuses to acknowledge that all the requirements of the ETA are applicable to these proceedings.[257] In particular, San Juan County asserts that Section 62-18-3 of the ETA, which contains the location

[251] *See* sections IV.A.1 and IV.A.3 *supra*.

[252] Tr. Vol. III (Phillips) at 785-78, 823-24, 828-30.

[253] Tr. Vol. III (Phillips) 779.

[254] *Id*.

[255] Tr. Vol. III (Phillips) 778-80.

[256] That section of the ETA explicitly permits the utility to "defer applications for needed approvals of new resources to a separate proceeding; provided that the applicant identifies adequate potential new resources sufficient to provide reasonable and proper service to retail customers." NMSA 1978, § 62-18-4(D).

[257] SJC Br. at 1.

of replacement resources or "resource development" provisions of the act, is applicable to PNM's Amended Application.[258] Section 62-18-3(A) of the ETA provides:

> A. For a qualifying utility that abandons a qualifying generating facility in New Mexico prior to January 1, 2023, the qualifying utility shall, no later than one year after approval of the abandonment, apply for commission approval of competitively procured replacement resources. As part of that competitive procurement, and in addition to the criteria set forth in Subsections B and C of this section, projects shall be ranked based on their cost, economic development opportunity and ability to provide jobs with comparable pay and benefits to those lost due to the abandonment of a qualifying generating facility.[259]

Due to the tax revenue implications of resource development to replace the abandoned plant interest and tax revenues accruing from the plant pre-abandonment,[260] San Juan County places greatest emphasis on the definition of "replacement resources" in Section 12-18-3(F):[261]

> F. As used in this section, "replacement resources" means up to four hundred fifty megawatts of nameplate capacity identified by the qualifying utility as replacement for a qualifying generating facility, and may include energy storage capacity; provided that such resources are located in the school district in New Mexico where the abandoned facility is located, are necessary to maintain reliable service and are in the public interest as determined by the commission.[262]

Reading the provisions of Section 62-18-3 relating to replacement resources as "effective and mandatory" in this case, San Juan County thus argues by having opted to not apply for

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[258] *Id*. at 2, 4.

[259] NMSA 1978, § 62-18-3(A).

[260] Section 62-18-4(E) provides that replacement resources "shall be subject to local property taxes or a binding commitment to make an equivalent payment in lieu of taxes." NMSA 1978, § 62-18-3(E). San Juan County maintains that the consequence of the abandonment to the county "is that it will lose critical tax revenue due to NTEC's non-taxable status as an arm of the sovereign Navajo Nation. . . . This loss of tax revenue is an additional reason that Section 62-18-3(F) must be given effect because the ETA plainly contemplates minimizing disruption to tax revenue." (citations omitted).

[261] San Juan County asserts "First, any construction of Section 62-18-3 must begin, not with subsection A, [*sic*] but with Subsection F, which defines 'replacement resources.'" SJC Br. 5.

[262] *Id.* § 62-18-3(F).

approval of competitively procured replacement resources in this case, the Amended Application must be rejected. Acknowledging that Section 62-18-13(A) contains a statutory cut-off date for abandonment of a qualifying facility occurring prior to January 1, 2023, San Juan County argues that the same cut-off date is not restated in Subsections B through F of the act and nothing in those subsections indicates that the January 1, 2023 cut-off date applies to those provisions.[263]

Still, mindful that the statutory cut-off date may apply to only one of the two qualifying generating facilities that the qualifying utility is the operator (the San Juan Generating Station operated by PNM) and for which replacement resources have already been approved in Case Nos. 19-00195-UT and 20-00182-UT, San Juan County also argues that the ETA would constitute unconstitutional special legislation if PNM's position on the application of Section 62-18-3 is accepted: "PNM's position comes perilously close to a contention that the statute is unconstitutional as written. Article IV, Section 24 of the New Mexico Constitution prohibits special legislation "where a general law can be made applicable."[264] That constitutional challenge to the ETA is disposed of along with those made by other parties in the companion *Recommended Decision on FCPP Financing Order* issued today.

As for the argument at hand, PNM's counter is relatively straightforward. Applying a "plain meaning" construction of the statute discussed below, PNM reads Section 62-18-3 of the ETA to apply to "a qualifying utility that abandons a qualifying generating facility in New Mexico prior to January 1, 2023." Since the abandonment proposed in the Amended Application will occur after January 1, 2023, PNM reasons that this section of the ETA does not apply to the Four Corners

[263] SJC Br. 5.

[264] SJC Br. 3.

abandonment, as it had applied to the SJGS abandonment.[265] PNM adds that the Legislature, in drafting the ETA expressly contemplated that an abandonment could occur after January 1, 2023 pursuant to Section 62-18-2(S)(4), which provides that the qualifying utility could abandon a qualifying generating it did not operate before the effective date of the act, "prior to January 1, 2032."[266]

In interpreting a statute as the Commission must do to resolve this issue, the Supreme Court has observed the "guiding principle is to determine and give effect to legislative intent."[267] To determine the Legislature's intent, the Commission is "aided by classic canons of statutory construction."[268] In New Mexico law, there are "two themes or approaches . . . relating to how a court [and, by extension, the Commission] performs the task of applying a statute when the parties to a case disagree over the statute's meaning."[269]

The first approach is often simply called the "plain meaning" rule. Pursuant to the plain meaning rule, "statutes are to be given effect as written and, where they are free from ambiguity, there is no room for construction; where the meaning of the statutory language is plain, and words used by the legislature are free from ambiguity, there is no basis for interpreting the statute[.]"[270] Under this approach, the Commission should not "depart from the plain wording of a statute,

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[265] PNM Resp. 58-59.

[266] PNM Resp. 59.

[267] *N.M. Indus. Energy Consumers (NMIEC) v. N.M. Pub. Reg. Comm'n,* 2007-NMSC-053, ¶ 20, 142 N.M. 533, 168 P.3d 105) (citing *Pub. Serv. Co. of N.M. v. N.M. Pub. Util. Comm'n (NMPUC)*, 1999-NMSC-040, ¶ 18, 128 N.M. 309, 992 P.2d 860).

[268] *NMIEC*, 2007-NMSC-053, ¶ 20.

[269] *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 2, 117 N.M. 346, 871 P.2d 1352. Writing for the Court, Chief Justice Seth Montgomery observed that the two "approaches, though probably intended to be complementary, often seem to work at cross purposes and to call for different answers to the question." *Id*.

[270] *Gallegos*, 1994-NMSC-023, ¶ 2 (internal quotation marks and citation omitted).

unless it is necessary to resolve an ambiguity, correct a mistake or an absurdity that the Legislature could not have intended, or to deal with an irreconcilable conflict among statutory provisions."[271]

Under the second "rejection-of-literal-language" approach, "where the language of the legislative act is doubtful or an adherence to the literal use of words would lead to injustice, absurdity or contradiction, the statute will be construed according to its obvious spirit or reason, even though this requires the rejection of words or the substitution of others."[272]

In this instance, application of the plain meaning rule resolves the issue. While Section 62-18-3(F) defines "replacement resources" as used in that section, the replacement resources are for a "qualifying utility that abandons a qualifying generating facility in New Mexico prior to January 1, 2023."[273] Section 62-18-3 therefore does not apply to an abandonment that will occur *after* January 1, 2023.

Moreover, the Legislature expressly provided for the abandonment of one of the two coal-fired plants covered by the ETA *after* January 1, 2023 by including in the definition of "qualifying generating facility" an abandonment that could transpire prior to January 1, 2032. That provision, Subsection (S)(4) of § 62-18-2 states:

> S. "qualifying generating facility" means a coal-fired generating facility in New Mexico that may be composed of multiple generating units 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*[.][274]

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[271] *Regents of Univ. of N.M. v. N.M. Federation of Teachers*, 1998-NMSC-020, ¶ 28, 125 N.M. 401, 962 P.2d 1236.

[272] *Gallegos*, 1994-NMSC-023, ¶ 3 (internal quotation marks and citation omitted).

[273] *Id*.

[274] NMSA 1978, § 62-18-2(S)(4) (emphasis added).

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. Coincidentally or not, the provision immediately above, Subsection (S)(3), states that the qualifying generating facility "*operated* by the qualifying utility," may be "abandoned *prior to January 1, 2023*[,]" which leads one back to where this discussion began with Section 62-18-3(A).

Because the Hearing Examiner finds that Section 62-18-3 is not applicable to the abandonment proposed in this case, it is unnecessary to address San Juan County's argument that PNM is suggesting that the county's tax revenue lost to the transfer of its interest to NTEC, which apparently possesses "non-taxable status as an arm of the sovereign Navajo Nation," can be addressed by funds appropriated under Section 62-18-16 of the ETA, a claim the Hearing Examiner does not understand PNM to have expressly made in any event.[275]

13. PNMR's proposed merger with Avangrid as the purported "driving force" for the FCPP abandonment and transfer

ABCWUA and Bernalillo County and NEE argue that the Amened Application is not in the public interest and should be rejected because, among other reasons, PNMR's proposed merger with Avangrid subsidiary NM Green Holdings, Inc. pending before the Commission in Case No. 20-00222-UT is, allegedly, the deliberately hidden yet poorly concealed "driving force" for the

[275] *See* SJC Br. 6-8. San Juan County's only apparent evidentiary support for the argument is Mr. Fallgren's observation at hearing, quoted below, in response to SJC counsel's question "[D]oes PNM have any plan for what to do if it turns out that NTEC is going to claim potentially sovereign immunity status with respect to *state and local taxes*, if the transfer is approved?"

> I think that's the beauty of the Energy Transition Act, where our abandonment provides $16.5 million in local economic development opportunities, so I think that's through state funding, so I think that's the beauty of the Energy Transition Act in this case, and one of the net benefits to the public of going through with the abandonment.

Tr. Vol. I (Fallgren) 185 (emphasis added).

abandonment and securitization proposed in this case.[276] ABCWUA and the County assert that since the abandonment is such a such a critical component of, as put by NEE and the Attorney General, a "condition precedent" of the merger,[277] PNM's undepreciated investments in the Four Corners plant should be treated as a cost of the merger not eligible for recovery through securitized financing.[278] The Attorney General, essentially aligned with ABCWUA and the County's position, alleges that "costs included in [the Amended Application] include imprudently incurred expenses and costs associated with the merger."[279]

PNM strenuously denies the allegations and staunchly opposes the intervenors' arguments and requested modification of merger-related obligations. PNM asserts that there is no direct evidence that the proposed merger is conditioned on Commission approval of PNM's Amended Application in this case. No evidence to corroborate the merger-focused claims notwithstanding, PNM nevertheless contends that the parties' claims should be rejected because: (a) whether FCPP abandonment is a critical component or condition precedent of the merger has no legal bearing on PNM's requested approvals in this case; (b) it would violate the due process rights of Avangrid and other interest parties that were not put on notice that the merger agreement and the parties'

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[276] *See* ABCWUA/County Br. 14-19, 22; NEE Br. 32-63.

[277] NEE Br. 32; NMAG Br. 6.

[278] ABCWUA/County Br. 18-19, 22. ABCWUA and the County therefore propose proposed the following language in the Commission's order in this case:

> PNM will book an offsetting regulatory liability out of retained earnings in the same amount as any awarded securitized financing for abandonment of FCPP. The liability will accrue a carrying charge at the same rate of the securitized funds. The regulatory assets will be amortized into the regulatory liability over the life of the associated securitized debt. This treatment will hold ratepayers harmless for any of the FCPP costs.

Id. 18-19.

[279] NMAG Br. 8.

obligations under the agreement would be considered in this case; (c) the parties' claims are based on circumstantial evidence and evidence that is not part of the record in this case;[280] and (d) the only competent record evidence presented by the chief negotiator of a FCPP abandonment, PNM witness Fallgren, demonstrates that FCPP abandonment is not a critical component or condition precedent of the merger.

While the Hearing Examiner agrees that addressing merger-related agreements and cost obligations in this case would violate the due process rights of Avangrid and aligned parties in Case No. 20-00222-UT and would be wholly inappropriate without adequate notice and an opportunity to be heard – neither of which has been afforded in this proceeding – it is unnecessary to base his ruling on due process considerations or to entertain both sides' evidence related to the mergers in disposing of this issue. Simply put, even if the merger-related evidence is viewed in the intervenors' best light, whether the abandonment and sale and transfer is required by the merger has no bearing on the legal standards applicable to the proposed abandonment and transfer proposed in this proceeding, which as discussed at length above,[281] is governed by provisions of the PUA and the ETA. As PNM points out, the PUA does not prescribe a different standard for approval of an abandonment and transfer that may be required by a utility merger and the ETA does not contain any provisions that address qualifying generating facility abandonment and securitization in the context of a merger.[282] Therefore, being fundamentally irrelevant and immaterial to the matter under review, the merger-related claims and evidence should not be considered in this case.

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[280] *But see* NEE's "Limited Reply to Refute PNM's Claims in its Response Brief," at 1-2.

[281] *See supra* sections II.B.1 and II.B.2.

[282] PNM Resp. 91.

B. Sale and Transfer of PNM's Interest in the Four Corners Power Plant to NTEC

As indicated at the beginning of section IV above, because PNM's two remaining claimed benefits of the Four Corners sale and abandonment relate to the transfer of its interest to NTEC, those claims are analyzed against the no net detriment standard applicable to the sale and divestment of utility assets pursuant to Sections 62-6-12 and -13 of the PUA.[283]

1. Preservation of Navajo Nation voice in future of Four Corners through transfer of the plant to NTEC

By acquiring PNM's 13% interest, NTEC will increase its minority interest in Four Corners to 20%. PNM asserts that NTEC's acquisition of PNM's interest enhances NTEC's ability to participate in decisions impacting the Navajo Nation's interests.[284] PNM emphasizes that as part of increasing its interests, NTEC has committed that it will not transfer any of its interests to a third-party in order to block a closure vote by the other owners.[285]

PNM explains that the plant and associated Navajo Mine are important economic drivers in the area and employ approximately 700 employees, over 600 of whom are Navajo Nation members. Royalties and taxes generated by the sale of coal from the Navajo Mine total approximately $40 million to $45 million per year and account for an estimated 23.9% of Navajo Nation Fiscal Year 2021 General Fund Revenue.[286]

PNM witness Fallgren testified that the sale of PNM's interest in Four Corners, coupled with the subsequent agreements for seasonal operations, help to address the Navajo Nation's seven

[283] Of course, evaluated as a whole, the proposed sale and abandonment must also meet the net public benefit standard.

[284] Fallgren Supp. 20.

[285] Fallgren Reb. 38.

[286] Fallgren Supp. 20; Fallgren Reb. 19-20.

recommendations for achieving a Just Energy Transition as outlined in President Nez's January 24, 2020 letter to the ACC regarding the TEP rate case.[287]

The Navajo Nation leadership, including duly elected or appointed leaders, favor PNM's sale of its interest to NTEC. PNM Witness Fallgren attached to his rebuttal testimony three official documents demonstrating Navajo Nation support: the first is a resolution by the District 13 Council of the Navajo Nation (PNM Rebuttal Exhibit TGF-11); the second is a resolution by the Northern Navajo Agency Council of the Navajo Nation (PNM Rebuttal Exhibit TGF-12); and the third document is a letter from the Navajo Nation executive and legislative leadership – President, Vice President, and the 24th Navajo Nation Council Speaker and Chairman of the Resource and Development Committee – to the Commission in support of the PSA (PNM Rebuttal Exhibit TGF-13). PNM thus maintains that the abandonment and transfer of its 13% interest to NTEC are in alignment with the Navajo Nation's transition to clean energy.[288] PNM contends these resolutions and letter demonstrate clearly that the Navajo Nation leadership has been informed throughout the process and that they view the PSA as positive for the Navajo Nation and directly in alignment with a Just Transition. PNM observes, in concluding, that the Navajo Nation is the community most impacted by operations at Four Corners and its position on the PSA is best represented by its current elected leadership.[289]

Sierra Club and Community Groups argue that a sale to NTEC of PNM's interest in Four Corners will not result in a net public benefit.[290] Their criticisms of the proposed sale and transfer

[287] Fallgren Supp. 21 (citing https://docket.images.azcc.gov/E000004596.pdf).

[288] *See* Fallgren Reb., PNM Reb. Exh. TGF-13.

[289] Fallgren Reb. 60-61.

[290] *See, e.g.,* Sierra Club Br. at 43; Community Groups Br. at 9.

of PNM's interest to NTEC fall into three interrelated categories: (i) PNM's assertion that the sale and transfer will promote Navajo self-determination inappropriately conflates NTEC, a private corporation, with the entire Navajo Nation and government; (ii) the sale and transfer will not serve the interest of the Navajo people; and (iv) NTEC's intent to keep Four Corners open until 2031 mean that the sale and transfer cannot serve the public interest.

First, Sierra Club expresses the following concerns about NTEC: none of NTEC's senior management is a member of the Navajo Nation; nearly all of NTEC's senior management are people who worked at other coal companies; NTEC derives most of its revenues from coal mining; the Navajo Nation's elected government does not have direct control over the day-to-day business decisions of NTEC; NTEC does not need pre-approval from the Navajo Nation government to do anything; NTEC does not always act in ways that reflect the views of the Navajo Nation's elected government;[291] and NTEC will likely use money from the $75 million transaction to fund Wyoming coal mines, not to advance a transition to clean energy.[292]

Except for the last point regarding how NTEC might use transaction proceeds, which Sierra Club apparently asserted for the first time in its response brief, PNM responds that Sierra Club's concerns are largely addressed in the contractual agreement between the Navajo Nation and NTEC, which is the Amended and Restated Operating Agreement of the Navajo Transitional Energy Company, LLC ("NTEC Operating Agreement").[293]

The NTEC Operating Agreement states that the company's purpose is to "operate to support and improve the economic, financial, tax, and revenue interests of the Navajo Nation and

[291] Sierra Club Br. 43-44.

[292] Sierra Club Resp. 20-21.

[293] PNM Exh. 39.

the Navajo People through management and development of the Navajo Nation's resources and new sources of energy, power, transmission, and attendant resources and facilities . . .."[294] The Navajo Nation, as a sovereign entity,[295] owns NTEC. To facilitate communications with the Navajo Nation, the Navajo Nation Council is charged with establishing a Member Representative Group that consists of five representatives with one member from each of the five standing committees of the Navajo Nation Council.[296] The Member Representative Group exercises oversight of NTEC, including monitoring NTEC as an asset of the Navajo Nation.[297] While the Member Representative Group does not exercise management control over NTEC's day-to-day operations, it does have authority to remove any Management Committee Member for cause by a majority vote.[298]

NTEC's day-to-day operations are overseen by the Management Committee. The Management Committee has the authorities and responsibilities of general management and oversight of NTEC, "as a Board of Directors has over a Corporation."[299] The Management Committee members are required to perform their "responsibilities in a manner reasonably believed to be in the best

[294] PNM Exh. 39, p. 9, Art. III(A).

[295] *Id.* 8, Art. II, Definitions (defining "Navajo Nation" to mean "the sovereign governmental entity, institution, and federally acknowledged Nation or Indian Tribe that executed the Treaty between the United States of America and the Navajo Tribe ofIndians, [*sic*] Aug. 12, 1868, 15 Stat. 667, . . . when referring to the body politic; or when referring to governmental territory, all land within the territorial boundaries of the Navajo Nation, Navajo Indian Country, and the Navajo Reservation, including, without limitation, the Navajo Partitioned Land, Eastern Navajo Agency lands, the Alamo Chapter, the Tohajiilee Chapter, the Ramah Chapter, Navajo dependent Indian communities, including without limitation all lands within the Navajo Chapter governments, as-well-as all lands held in trust by the United States for the Navajo Nation, or restricted by the United States or otherwise set aside or apart under the superintendence of the United States for the Navajo Nation[.]").

[296] *Id*. 11, Art. III(C) (Navajo Nation Membership Interest and Member Representative Group).

[297] *Id*.

[298] *Id*. 12, Art. III(C)(i) (Authorities and Functions of Member Representative Group).

[299] *Id*. 13, Art. III(D) (Management Committee's Authorities, Duties, Responsibilities, Incidental Powers, and Qualifications).

interests of [NTEC] and in accordance with such standards of care, loyalty, and competence set forth in the 'Fiduciary Duties and Responsibilities and Standards of Care' adopted by NTEC."[300] Moreover, members of the Management Committee are subject to the obligation of good faith and fair dealing and have fiduciary obligations to NTEC.[301] Members of the Management Committee are required to have substantial knowledge, understanding, and competency of the energy industry, "with particular knowledge, understanding, and competency in coal and solar resources for power and energy."[302] Also, a majority of the Management Committee members must be enrolled in the Navajo Nation.[303] However, to ensure that the Navajo Nation's elected government does not have direct control over the day-to-day business decisions of NTEC, no member of the Management Committee of NTEC is permitted to be a public official of the Navajo Nation, including a Navajo Nation Council delegate, Chapter official, commissioner, or an official or employee of the federal government, or any state, county, or municipality.[304]

Given the foregoing NTEC Operating Agreement provisions, PNM argues that Sierra Club is incorrect in supposing that NTEC does not need preapproval from the Navajo Nation government to do anything. In this respect, PNM notes that the NTEC Operating Agreement sets forth very specific limitations on the authority of the Management Committee. For example, pursuant to Article III(G) of the agreement, prior approval of the Navajo Nation Council is required for NTEC's Management Committee to complete any act that would "substantially change the business of [NTEC] or make it difficult, not economically feasible, or impossible to carry on the

[300] *Id*. 22, Art. III(H) (Liability for Certain Acts).

[301] *Id*. 16-17, Art. III(D)(ii)(a), (q).

[302] *Id*. 18, Art. III(D)(iv).

[303] *Id*. 19, Art. III(D)(iv)(g).

[304] *Id*. 19, Art. III(D)(iv)(h), (i).

business of NTEC;" to exchange or transfer "all or substantially all of the assets of" [NTEC]; and to dissolve NTEC.[305]

Second, Community Groups assert that the proposed sale of PNM's interest to NTEC will not serve the interest of the Navajo people, that NTEC lacks transparency, and for those reasons and others already discussed regarding alleged impediments to beginning FCPP's closure and full decommissioning "as soon as possible," the transfer of PNM's interest would be detrimental to the public interest and will not result in a net public benefit.[306] In fact, arguing for an "expansive view of the public interest,"[307] Community Groups declare outright that "NTEC *and the Navajo Nation* Do Not Represent the Public Interest;"[308] they later appear to qualify that statement, asserting that "NTEC and the Navajo Nation are not synonymous," and urge the Commission to "resist PNM's attempt at conflation and recognize that NTEC aims to serve its corporate interests alone, and not those of the public or Navajo peoples and communities."[309] Even still, Community Groups conclude that "NTEC is not a proxy for the Navajo Nation, and neither NTEC *nor the Navajo Nation* are proxies for the public interest."[310] Sierra Club doesn't go quite so far, allowing that "[i]f PNM were proposing to transfer its interest in Four Corners directly to the Navajo Nation government, then PNM might plausibly claim that it was promoting Navajo self-determination."[311]

[305] *Id*. 22, Art. III(G) (Limitations on Authority of Management Committee).

[306] Community Groups Br. 19-20.

[307] Community Groups Br. 3.

[308] Community Groups Br. at 8, 13-14 (emphasis added).

[309] Community Groups Br. 13.

[310] Community Groups Br. 19 (emphasis added).

[311] Sierra Club Br. 44.

On the matter of promoting Navajo self-determination, PNM responds that Sierra Club and the Community Groups have set up a false dichotomy. PNM states that the Navajo Nation established NTEC for the very purpose of carrying out the Navajo Nation's interests related to resource management and energy production and further contends that contrary to Sierra Club and Community Groups' "uncited or unspecified opinions that NTEC does not always carry out the Navajo Nation's interest," the factual record demonstrates that by its charter NTEC has a fiduciary duty to the Navajo Nation.[312] PNM argues that anecdotal evidence from Community Groups witness Jessica Keetso about how she perceives NTEC to operate "in practice" does not overcome the weight of the evidence on NTEC's contractual obligations and the jobs and revenue benefits that accrue to the Navajo Nation from NTEC operations.[313] PNM adds that any potential concerns over whether PNM's transaction with NTEC furthers Navajo Nation interests are allayed because the Navajo Nation leadership expressed direct support for the transaction at issue in this case.[314] The Navajo Nation, PNM emphasizes, is the most directly impacted by operations at Four Corners, and the Navajo Nation's position on the PSA is represented by its current elected leadership, who have offered record support.[315]

Third and finally, Sierra Club and Community Groups argue that NTEC's motivation to keep Four Corners open until 2031 dictates that a sale by PNM of its interests to NTEC cannot serve the public interest.[316]

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[312] PNM Resp. 40.

[313] PNM Resp. 40-41 (quoting Community Groups Br. 11-12).

[314] PNM Resp. 41 (citing Fallgren Reb., PNM Reb. Exh. TGF-13).

[315] *Id*. (citing Fallgren Reb. 60-61).

[316] *See, e.g.,* Community Groups Br. 9 (citing Fisher Dir. 29); Sierra Club Br. at 17 ("PNM understood that NTEC wants to keep Four Corners open until 2031, and that the [PSA] would have the effect of keeping the plant open.").

PNM responds that NTEC's motivations are transparent – it has an interest in preserving jobs, economic activity, and revenue for the Navajo Nation.[317] PNM cautions, however, that preserving jobs and revenue for the Navajo Nation should not be regarded as contrary to the public interest. On this point, PNM recites the statistics set out above regarding the centrality of the Four Corners plant and the Navajo Mine to the Navajo Nation: NTEC's operation currently provides approximately 1,300 jobs;[318] the plant and mine are important economic drivers in the Four Corners area, employing employ approximately 700 employees, over 600 of whom are Navajo Nation members; royalties and taxes generated from the sale of coal from the mine total $40 million to $45 million per year and account for almost 24% of Navajo Nation revenue in 2021.[319] Given the importance of Four Corners and the Navajo Mine in terms of employment and revenue for the Navajo Nation, PNM observes that "it should come as no surprise that Navajo Nation President Nez recommends a five-year advanced notice of any planned power plant closure."[320]

The Hearing Examiner's determination of the contested issues regarding NTEC and Navajo Nation self-determination is set forth in section IV.B.4 below after addressing the benefit in mitigating the adverse economic impact of the Navajo Nation transitioning from coal and the "material adverse effect" provision in the PSA, Article 6(1)(d)(i), that among other things precludes PNM from voting to close Four Corners even if all the other co-owners with a voice in the matter unanimously agree that operations at the plant should permanently cease.

[317] Vol. II (Fallgren) 369, 499-501; PNM Exh. 39.

[318] Fallgren Dir. 12-13.

[319] Fallgren Supp. 20; Fallgren Reb. 19-20.

[320] PNM Resp. 42 (citing Fallgren Supp. 31).

2. Mitigation of adverse economic impact to local workforce and community through ETA's Section 16 funds

Section 16 of the ETA establishes three energy transition funds in the state treasury: (1) the "energy transition Indian affairs fund;"[321] (2) the "energy transition economic development assistance fund;"[322] and (3) the "energy transition displaced worker assistance fund."[323] Section 16 also requires a qualifying utility to transfer a certain percentage of bond proceeds to each fund within "thirty days of receipt of energy transition bond proceeds."[324] The proceeds to be transferred to the funds created by Section 16 are energy transition costs included in the amount to be recovered by a qualifying utility through securitized financing.[325]

PNM claims that a public benefit of the proposed sale and abandonment is provided by the ETA's securitization funds, as described in Section 16 of the ETA, for state-administered tribal and community programs that otherwise would not be available to help affected communities. Specifically, PNM proposes to transfer the following funds in accordance with the ETA: (i) $1.5 million of the proceeds of the Energy Transition Bonds for deposit in the Energy Transition Indian Affairs Fund; (ii) $5 million of the proceeds of the Energy Transition Bonds for deposit in the Transition Economic Development Assistance Fund; and (iii) $10 million of the proceeds of the Energy Transition Bonds for deposit in the Energy Transition Displaced Worker Assistance Fund.[326] Therefore, because the abandonment is being requested pursuant to the ETA, the local community will benefit from an estimated $16.5 million in funding to the Navajo Nation and its

[321] § 62-18-16(A).

[322] § 62-18-16(D).

[323] § 62-18-16(G).

[324] § 62-18-16(J).

[325] § 62-18-2(H)(4).

[326] Fallgren Reb. 7-8 (citing Sanchez Dir. 34-35).

communities through state agency programs that are intended to assist in workforce transitions and economic development.[327] PNM emphasizes that these benefits would not be available outside of abandonment pursuant to the ETA.[328]

The Community Groups contend that allowing PNM to benefit from ETA-authorized securitization without closure of the Four Corners runs counter to the ETA. While PNM touts ETA Section 16 funds as a benefit of its application, Community Groups declaim the fact that the transition funding would be made available not after closure of FCPP, but after abandonment of PNM's share in the plant and transfer to NTEC, who wants to keep running into 2031.[329] And, even if Section 16 funds were made available after abandonment instead of closure, Community Groups point out that the bonds likely would not be issued until January of 2025.[330] Community Groups also do not like the fact that the transition funds, distributed to the state agencies charged with administering them under the ETA, are not disbursed directly to affected community members and groups. Community Groups allege that use and availability of the transition funding may not be limited to impacted workers and communities and, as they put it, "there are likely several entities that do not necessarily represent local interests who would also seek to benefit from these funds."[331] "Some of these private interests," Community Groups continue, "may use Section 16 funding to engage in activities that are *contrary* to a just transition – such as the development of hydrogen as a fuel source that still relies on fossil fuels for production, or carbon capture and

[327] Fallgren Supp. 21(citing Fallgren Dir. 28-29 and Sanchez Reb. 11-12).

[328] PNM Br. 16.

[329] Community Groups Br. 24.

[330] *Id*.

[331] *Id*.

storage ('ccs') projects."[332] In any event, the bottom line for Community Groups is that the continued operation of Four Corners via transferring PNM's interest in the plant to NTEC would be "contrary to a just transition, contrary to the purpose of the ETA, and contrary to the public interest."[333] Resultantly, given the limitations on Section 16 funds they dislike, Community Groups "would rather see early closure of the Plant – and the environmental and economic justice benefits, and benefits to the health of people, communities, and the land—that early closure would entail."[334]

Sierra Club, for its part, while not denying the substance of PNM's claims regarding the nature and amount of transition funds, nevertheless points out, as the Community Groups did, that under PNM's proposal the earliest that any transition funds would be available is January 2025.[335]

A close review of PNM's response brief indicated that PNM apparently did not see the need to address Sierra Club and Community Groups' concerns with the Section 16 payments, except to observe, as it had already done in its brief in chief, that the ETA gives the Commission authority to directly address the resulting impact of a coal plant closure on local communities in the Four Corners area, including the Navajo Nation, through 'Just Transition' funding not otherwise contemplated by the Public Utility Act[,][336] and to also note that some of the positions taken by intervenors in propounding an early closure would not be in the public interest to the extent such

[332] Community Groups Br. 24-25 (emphasis in original).

[333] Community Groups Br. 25

[334] *Id*. (quoting, in n. 72, Keetso Dir. 17: "The pollution and emissions from FCPP and other coal plants and fossil fuel facilities degrade the overall region's environmental quality and directly impact the people who live on the land, including members of the Navajo Nation. The quality of our air and water, and the health of our land should be a priority. Long-term improvements in air pollution reduce mortality rates and closing FCPP, especially an early closure, would be a permanent long-term improvement.").

[335] Sierra Club Br. 44-45.

[336] PNM Resp. 1. *See* PNM Br. 1.

proposed closures would deprive affected communities irrefutably beneficial transition funding available under the ETA.[337]

3. PSA Article 6.1(d)(i) – PNM's compulsory veto of plant owners' potential unanimous consensus to cease operations or reduce production at Four Corners

As noted above, while WRA supports the proposed sale and abandonment, its support is conditional. One of WRA's conditions is the recommendation that Article 6.1(d)(i) of the PSA be stricken or modified to provide that the Four Corners plant owners should continue to have the ability to vote for early closure of the plant at any time.[338] The provisions of the PSA at issue is a material adverse effect clause that prevents PNM, pending closing of the agreement and without the consent of NTEC, from voting with the other facility co-owners (besides NTEC, which as mine owner sole supplier of coal to the plant is perceived to have a conflict of interest)[339] to either permanently shut down or reduce production from Four Corners prior to the end of the coal supply agreement term in July 2031:

> (d) **Conduct Pending Closing**. Prior to consummation of the transactions contemplated hereby or the termination or expiration of this Agreement pursuant to its terms, and except to the extent approved by Purchaser or otherwise contemplated by this Agreement, Seller shall:
>
> (i) Not: (A) sell, lease, transfer or dispose of, or make any contract for the sale, lease, transfer or disposition of, any assets or properties which would be included in the Assets, other than sales in the ordinary course of business which would not, individually or in the aggregate, have a Material Adverse Effect, (but Seller shall use Commercially Reasonable efforts to

[337] PNM Resp. 13 (noting that Sierra Club's "'breach' option would provide for no transition funds pursuant to the ETA to the affected communities.").

[338] Baatz Dir. 20.

[339] Fallgren Supp. 26 ("NTEC is restricted from voting on early plant closure and termination of the Coal Supply Agreement under Section 9.15 of the FCPP Co-Tenancy Agreement. This restriction is based on an understanding that NTEC would have a conflict of interest because it also serves as the supplier of fuel for the plant.").

> tender the Acquired Interests upon Closing under circumstances that will allow continued operation and generation of the Plant under the Facilities Contracts through the duration of the Coal Supply Agreement, which efforts shall include, for the avoidance of doubt, *making no affirmative vote as a Facilities Owner to reduce the production from or cease the operation of the Plant prior to the end of the Coal Supply Agreement term*)[.][340]

In his briefing order, the Hearing Examiner asked the parties to consider, in addressing WRA's recommendation whether the provision quoted above that effectively constitutes a compulsory "veto of a vote for early retirement" of FCPP[341] prior to the PSA's closing date (Dec. 31, 2024 or "on such other date . . . as agreed to by" PNM and NTEC):[342]

> is or is not inconsistent with the spirit and intent of the [ETA] and contrary to the public interest, particularly if early retirement of the plant is feasible or at least conceivable, i.e., all the other FCPP co-owners (APS, TEP, and SRP) unanimously vote to retire the FCPP early."[343]

WRA, joined in post-hearing briefing by CCAE, Community Groups, and Sierra Club,[344] asserts that the veto provision is inconsistent with the public interest. WRA maintains that the plant co-owners should continue to have the ability to vote for early closure of FCPP at any time and a potential early closure should not be limited because of the PSA. If the remaining plant owners agree it is in the best interest of their customers to cease operations at FCPP, they should be able to initiate an early closure. WRA further maintains that PNM customers and the public interest would

[340] Fallgren Dir., PNM Exh. TGF-2, p. 45 of 135 (emphasis added).

[341] Fallgren Dir. 21 (noting that "any veto of a vote for early retirement arises only if *all* co-owners change their current positions and vote to retire the FCPP early.") (emphasis in original).

[342] Fallgren Dir., PNM Exh. TGF-2, p. 32 of 135, Art. 3.1 ("Closing"). Section 6.2(a) of the PSA states that "no Party shall make application to FERC pursuant to sections 203 or 205 of the Federal Power Act [FPA] prior to January 1, 2023, or such other date as mutually agreed by the Parties." *Id*. PNM Exh. TGF-2, p. 47 of 135. FERC approval pursuant to Section 203 of the FPA is one of "Seller's Required Regulatory Approvals" per Schedule 1.1.73 of the PSA. *Id*. PNM Exh. TGF-2, p. 88 of 135.

[343] Briefing Order, at 6-7, ¶ 8(b).

[344] *See* CCAE Br. 13-14; Community Groups Br. 4-6; Sierra Club Br. 2, 18-19; Sierra Club Resp. 2, 10-11.

also benefit from an early closure of FCPP based on its witness's, i.e., Mr. Baatz's, review of the costs and environmental impacts of continued operation of the plant.[345]

Based on Commission precedent, WRA asserts that the Commission may have authority to approve the PSA and that such approval may be necessary for the Commission to authorize the transfer of PNM's interests in FCPP to NTEC.[346] WRA does not believe that the Commission approval is required for seasonal operations amendments, noting that Commission did not exercise approval authority over new restructuring and coal supply agreements for San Juan Generating Station in Case No. 13-00390-UT.[347] WRA believes, however, that the Commission has plenary authority to consider the impact of those amendments on PNM's rates and service and on the public interest. As they are written now, with extended periods of advance notice and substantial penalties for early closure, WRA contends they are not in the public interest.[348] WRA thus suggests that the Commission consider approving abandonment only if those amendments are modified and filed within 30-60 days of a Commission order approving abandonment.[349]

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[345] WRA Br. 21-22.

[346] WRA Br. 22 (citing *Fort Selden Order*, at 37, ¶ C (expressly approving the purchase agreement that involved a sale by a Commission-regulated water utility to an unregulated entity, the difference being that the same customers would be served by the unregulated entity)).

[347] *Id*. (citing *In the Matter of the Application of Public Service Company of New Mexico to Abandon San Juan Generating Units 2 and 3, Issuance of Certificates of Public Convenience and Necessity for Replacement Power Resources, Issuance of Accounting Orders and Determination of Related Ratemaking Principles and Treatment*, Case No. 13-00390-UT, Certification of Stipulation (Nov. 16, 2015), at 38-39 (The Commission did not exercise authority despite recognizing that "[t]he agreements are interrelated and are contingent upon the Commission approvals sought in the stipulations. The effectiveness of the restructuring agreement is subject to the Commission's approval of the abandonment of San Juan Units 2 and 3 and the issuance of a CCN for the additional 132 MW in Unit 4. The effective date of the coal supply agreement is subject to the effectiveness of the restructuring agreement.") (internal citations omitted).

[348] *Id*.

[349] WRA Br. 22-23. While the Hearing Examiner agrees that the Commission has the plenary authority WRA suggests that the Commission exercise, the Hearing Examiner declines to recommend that the seasonal operations agreements be modified as WRA suggests because, similar to the Commission's decision not to exercise approval over the new restructuring and coal supply agreements in Case No. 13-00390-UT, the seasonal operations

(*Cont'd on next page*)

PNM opposes WRA's recommended modification to the PSA. While PNM acknowledges that Article 6.1(d)(i) of the PSA prohibits PNM from making an affirmative vote as a facilities owner to reduce the production from or cease the operation of Four Corners prior to the end of the CSA term unless NTEC – the mine mouth owner whose sole customer is the plant – waives the material adverse effect provision, PNM nevertheless argues there is no evidence in the record that any other Four Corners' co-owner is seeking to exit the plant or push for an early closure of the plant and there is no evidence in the record that NTEC would accept a modification to the PSA removing this term. PNM claims that Section 6.1(d)(i) is "standard contract language that protects NTEC by providing that its expected benefit of the transaction may not be materially altered by PNM prior to the transaction closing."[350] Quoting PNM witness Fallgren's testimony, "[t]o conclude that PNM could unilaterally negotiate out standard agreement language that left NTEC exposed to potential asset modifications without any input from them prior to the execution date is simply non-sensical and contrary to standard contract provisions."[351]

PNM next points out that Section 6.1(d)(i) does not prohibit an early closure of the plant because NTEC could agree to a waiver of the provision. PNM suggests there is reason to believe NTEC would agree to such a waiver because its interest as a company is in preserving the jobs and the revenue to the Navajo Nation as opposed to continuing FCPP operations at any cost. PNM

(*Cont'd from previous page*)

agreements are interrelated, collectively comprise a condition subsequent to the PSA, and address the obligations of the Four Corners co-owners in operating the plant primarily, but not only, post-abandonment, i.e., after the closing date of the PSA. In a related vein, the Hearing Examiner also rejects, for the reasons elucidated by Mr. Fallgren at the hearing (*see* Tr. Vol. I (Fallgren) 188-200), CCAE's misplaced and unwarranted recommendation that the Commission not approve Article 7.4 of the PSA (entitled "CSA True-Up Payment Calculation," Fallgren Dir., PNM Exh. TGF-2, p. 55 of 135), and instead "require PNM to amend the agreement to require PNM to place the CSA True-Up Payment in Escrow along with the rest of the rest of the funds due and owing to NTEC for its reclamation obligations." CCAE Br. 15.

[350] PNM Br. 114.

[351] *Id*. (quoting Fallgren Reb. 16-17).

adds that despite Section 6.1(d)(i), NTEC did agree to the reduced operations of FCPP required by the seasonal operations agreement because the reduced operations maintain jobs on the Navajo Nation and revenues.[352] Quoting Mr. Fallgren again:

> [I]f that was available and the parties wanted to close the plant earlier, they could approach NTEC then to negotiate, and again those key parameters available in the negotiation, and I would represent, I believe that NTEC would engage and participate in those conversations for a further early closure as long as those jobs and revenue requirements were provided for.[353]

Moreover, reading the PSA and the agreements encompassing seasonal operations together, PNM notes that the closure of Four Corners is possible as early as January 1, 2027, which is wholly consistent with the amount of forewarning required by a just energy transition.[354] Thus, PNM reasons that no amendment to the PSA or seasonal operations agreement is required to achieve an earlier plant closure. Rather, PNM submits, plant closure will be driven by the needs of the plant's public utility co-owners for adequate capacity and energy to serve their customers and NTEC's interest in maintaining jobs and revenues on the Navajo Nation.[355]

Lastly, PNM asserts the PSA and seasonal operations agreements are wholly consistent with the carbon reduction goals of the ETA. PNM maintains that not only will approval of PNM's Amended Application result in the complete removal of coal generation from its portfolio by 2025,

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[352] *Id*. (citing Tr. Vol. II (Fallgren) 500).

[353] *Id*. (citing Tr. Vol. II (Fallgren) 501).

[354] PNM Br. 15. That is, as discussed in section II.A.5 above, a full plant closure as of January 1, 2027 could occur by providing notice in 2023 for a January 1, 2027 closure. Such a notice would require NTEC to waive the material adverse effect provision in the PSA, permitting PNM to vote for an early closure. A full plant closure could also occur on January 1, 2027, with only a two-year notice requiring a payment to NTEC of $200 million from the remaining co-owners. *See* Fallgren Reb., TGF-7, p. 12 of 27, Sec. 11, Amendment to Section 20. Advance written notice of 24 months will result in a full plant shutdown by January 1, 2027 and require a $200 million payment to NTEC. Advance written notice of 36 months will result in a full plant shutdown by January 1, 2028 and require a $100 million payment to NTEC. Advance written notice of 48 months, with a full plant shutdown on January 1, 2029, requires no additional payment to NTEC. *Id.*

[355] PNM Br. 115.

it will, with seasonal operations implemented, reduce emissions in the state equivalent to the closure of a 400 MW coal facility. Supposed inconsistency with the ETA, PNM concludes, provides no ground on which to deny or amend the Amended Application.[356]

As noted above, the Hearing Examiner's assessment of this issue focuses strictly on Article 6.1(d)(i) of the PSA; it does not cover the seasonal operations agreements that raise a host of intricate interrelated issues, comprise a condition subsequent to the PSA, and for the most part relate temporally to post-abandonment obligations among the other plant owners. Focusing, then, on the Purchase and Sale Agreement provision at hand, contrary to PNM's suggestion that Article 6.1(d)(i) represents "standard agreement language," the proposed agreement between PNM and NTEC is not a run-of-the-mill bilateral contract between private corporations. Indeed, unlike most commercial contracts that are not subject to regulatory review, PNM is requesting that the Commission approve the PSA in this case. The PSA, in short, is subject to evaluation under the PUA and, therefore, is invested with the public interest.

The Hearing Examiner finds that it would be inconsistent with the public interest to approve a contractual provision that precludes a public utility subject to its jurisdiction and actively seeking authorization to divest its interests in a major CO_2 emitting generation plant from vetoing before its exit a unanimous vote of the other co-owners to retire the plant or reduce production from the plant and thereby curtail emissions even beyond the reductions promised by seasonal operations. In short, if the other co-owners find it beneficial to their customers and shareholders to close Four Corners or curtail production from the plant before PNM abandons its interest, the Commission should not empower PNM to stand in their way, contrary to the public interest.

[356] *Id.*

Moreover, to the extent PNM is touting the emissions reductions equivalent to closing a 300 MW coal plant by virtue of seasonal operations, allowing PNM to retain veto power over the retirement of up to 1540 MW of coal plant capacity – since Units 4 and 5 each have 770 MW net maximum capacities – would be contrary to the carbon reduction goals of the ETA by prolonging generation from a regional coal-fired power plant that, ironically, the co-owners no longer needing the energy and capacity from the plant might unanimously desire to shut down.

Finally, if it is as unrealistic as PNM represents that a vote among the co-owners for closure of FCPP before 2025 is forthcoming, then, considering the tangible and less tangible relief at stake in this case, it should not constitute such a leap of faith or compromising of NTEC's vital interests for the mine owner to agree to modifying or striking the offending provision.

4. Hearing Examiner's application of the "no net detriment" standard to PNM's sale and transfer of its interest in Four Corners to NTEC

Having carefully evaluated this matter of substantial public interest, the Hearing Examiner finds that the proposed sale and transfer of PNM's interest in Four Corners to NTEC should be approved. Among other benefits of the bargain, the sale and transfer will strengthen the Navajo Nation's position in determining the future of a plant that, it should not be forgotten, has been operating on its sovereign soil and producing electricity for non-indigenous consumers and far-flung communities for nearly sixty years.[357] While NTEC, as a private corporation, does not speak for the Navajo Nation leadership or its people, it is an arm of the Navajo Nation charged with managing the Nation's energy production, whose obligations to and relationship with the Navajo Nation are defined in the NTEC Operating Agreement. As explained above, the Member Representative Group, consisting of representatives from each of the five standing committees of

[357] *See* Fallgren Reb. 61 ("The Navajo Nation is the most impacted community at Four Corners . . .." and PNM Reb. Exhs. TGF-11, TGF-12, TGF-13).

the Navajo Nation Council, oversees NTEC for the benefit of the Navajo Nation. After PNM's interest is transferred pursuant to the Purchase and Sale Agreement, NTEC adds to its existing 7% interest in Four Corners for a total 20% interest in the plant. Consequently, considering that Four Corners represents nearly a quarter of Navajo Nation general fund revenue, NTEC's 20% interest in Four Corners will provide the Navajo Nation, through NTEC, a stronger voice in a plant that is indisputably an important economic driver for the Navajo Nation.[358]

The Hearing Examiner also recognizes that even though NTEC's share of the plant will increase with the closure of the PSA, the mine mouth owner has made material concessions as part of the final bargain struck. The decision to close Four Corners early requires a unanimous vote, but as owner of the mine and the sole supplier of fuel to the plant, NTEC is not permitted to participate in such a vote.[359] Just as significantly, the seasonal operations amendments will prohibit NTEC from selling its and PNM's share without the other co-owners' consent. "This ensures," Mr. Fallgren explained, "that any potential new owner's interest as to a retirement date for Four Corners would match the existing co-owners' interests," and prevents NTEC from transferring some of its ownership interest to a third party as a ploy to block a unanimous vote of the other co-owners to retire the plant before 2031.[360] "In other words," Fallgren concluded, "if the trend becomes that APS, TEP, and SRP are all seeking early closure of FCPP, these co-owners would be unlikely to give consent to a new buyer that would seek to keep the plant open."[361]

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[358] Fallgren Reb. 68 and TGF-12 ("The Northern Navajo Agency Council understands the transfer of PNM's shares to NTEC[] gives a Navajo Enterprise and the Nation a bigger voice in future plant operations[.]")

[359] *See supra* n. 339 and accompanying text.

[360] Fallgren Reb. 38.

[361] Fallgren Reb. 38-39.

While Sierra Club and Community Groups express support for the interests of the communities surrounding the plant, their advocacy for full closure and decommissioning of the coal plant as soon as possible – which is logical from an environmental and climate benefits perspective – fails to acknowledge the Navajo Nation's expression of support "with a clear voice"[362] for PNM's sale to NTEC and the need for a planned and just transition away from coal-fired power that supports the Nation's economy and revenues.[363] Their early closure approach would also deny affected communities the $16.5 million in ETA transition funds that PNM has pledged to contribute as part and parcel of the abandonment proposal. Moreover, as found above, seasonal operations will result in meaningful emissions reductions from Four Corners so long as the plant remains in operation; this too would be a benefit denied the public at large if an abrupt closure without guardrails path were taken.

Therefore, assuming PNM and NTEC see fit to revise Section 6.1(d)(i) of the PSA to provide that PNM, while still an outgoing owner, may not unilaterally block the remaining co-owners' election to retire Four Corners early or curtail production from the plant and thereby reduce emissions even beyond the rate resulting from seasonal operations, there should be no net detriment to the public interest in approving the sale and transfer of PNM's interest in Four Corners to NTEC. In fact, when the concrete benefits of the sale and abandonment such as bolstering the Navajo Nation's position in matters vital to its core interests and the substantial economic development assistance for tribal and other locally impacted communities afforded under the ETA are factored into the larger abandonment equation – i.e., the net public benefit standard – the

[362] Fallgren Reb., PNM Reb. Exh. TGF-13.

[363] Fallgren Reb. 60-61.

preponderance of the evidence supports an affirmative finding that the proposed sale and transfer is in the public interest.

C. Recovery of Costs Ineligible for Securitization

1. PNM's proposal to recover non-securitized costs through regulatory assets

As in Case No. 19-00018-UT involving the SJGS abandonment, in addition to recovery of energy transition costs through the securitization process, PNM has identified certain one-time activities and cost items that will not be recovered through the Energy Transition Charge but will be reflected in PNM's future cost of service studies filed in general rate cases. These items include: (1) a reduction to rate base by the Accumulated Deferred Income Tax (ADIT) liability that results from the abandonment, which PNM estimates to result in an $8.3 million net benefit to ratepayers; and (2) one-time costs for recovery of stranded inventory balances and external legal counsel costs associated with contractual due diligence and negotiations to the abandonment of PNM's interest in FCPP, which will result in a 2025 revenue requirement balance of approximately $434,000. Subtracting the one-time costs from the benefit results in an estimated net benefit of approximately $7.9 million to ratepayers, according to PNM witness Thomas S. Baker's calculations.[364]

Regarding the first item, ADIT liability, Mr. Baker explained that at the time of abandonment, PNM's interest in Four Corners will be retired for tax purposes, resulting in a write-off of the remaining tax basis in the facility at that time. Baker detailed the ADIT process as follows. PNM will also remove the net book value associated with its interest in FCPP from rate base as the facility will no longer be used and useful. The abandonment of PNM's interest in FCPP for book and tax purposes will cause the associated ADIT liability to be reversed, as the deferred balances

[364] Baker Dir. 28.

will become currently payable. However, a regulatory asset will be recorded equal to the net book value that will be recovered under the Energy Transition Charge. The creation of this regulatory asset will also produce an ADIT liability balance equal to the net book value times the combined statutory tax rate because the regulatory asset will have zero tax basis. As PNM customers are paying for the Energy Transition Charge that recovers the net book value through the energy transition property, the ADIT generated from this transaction will reverse. Similar to the treatment approved by the Commission in the Case No. 19-00018-UT, PNM will include the ADIT liability balance in rate base, which will lower the Company's overall rate base and lower revenue requirements. PNM will also include the ADIT liability created associated with the other energy transition property transferred to the special-purpose entity (SPE) as a reduction to rate base. Finally, PNM will continue to return the excess deferred income taxes associated with PNM's interest in FCPP to customers through base rates, including the unamortized balance as a rate base reduction, and the return of the excess deferred income taxes as a reduction to income tax expense in future cost of service studies.[365] Mr. Baker's calculation of the 2025 ADIT benefit associated with PNM's interest in FCPP abandonment is shown in the table on the next page.[366]

[365] Baker Dir. 29.

[366] Baker Dir., PNM Exh. TSB-7.

	A	B	C
1	**PNM Exhibit TSB-7**		
2	ADIT Benefit Related to Four Corners Power Plant Abandonment		
3	*($ in millions)*		
4			
5			
6		**Recovery of Abandonment Costs**	**2025**
7		Average Principal Balance of the Energy Transition Bonds	$ 295.6
8		Combined Statutory Tax Rate	25.40%
9		ADIT (line 7 x line 8 x -1)	(75.1)
10		FCPP Related Excess Deferred Income Tax	(12.2)
11		Total ADIT Rate Base	$ (87.3)
12		Pre-Tax WACC (16-00276-UT Phase II)	8.82%
13		Return On ADIT and Income Taxes	(7.7)
14		Amortization of FCPP Related Excess Deferred Income Tax	(0.7)
15		Total ADIT Benefits Related to Abandonment of Four Corners Power Plant	$ (8.3)
16			
17		Assumptions:	
18		- Excess Deferred Income Tax balance at the end of 2024 will be amortized over	
19		the life of the bonds which is 25 years.	

Regarding the one-time costs related to Four Corners not recoverable through Energy Transition Charge, PNM's interest in the plant currently has inventory balances consisting of tools, spare equipment, and other materials and supplies that are necessary to have on hand to operate the plant. Mr. Baker said that PNM will transfer its rights to the inventory balances to NTEC at the time of the abandonment. Baker estimates a remaining balance of $3.3 million that will need to be recovered from customers as the result of the abandonment of PNM's interest in FCPP.[367]

Mr. Baker added that PNM estimates that $800,000 in external legal counsel costs associated with the abandonment of PNM's interest in FCPP will be needed to facilitate the necessary contractual negotiations with NTEC and remaining owners over the abandonment of PNM's interest in FCPP and all costs associated to the transfer of assets.[368]

[367] Baker Dir. 30.

[368] *Id*.

PNM is requesting to establish a regulatory asset for these one-time costs. PNM is proposing to recover the regulatory assets for stranded inventory and external legal costs associated with the exit of PNM's interest in Four Corners over the same period PNM will collect the energy transition charges. PNM will include the unamortized balance in rate base in its general cost of service studies.[369] The revenue requirement associated with these one-time costs is broken out in the table below:[370]

	A	B	C	D
1	**PNM Exhibit TSB-8**			
2	**One-Time Costs Related to Four Corners Power Plant Not Recovered Through Energy Transition Charge**			
3				
4		**Regulatory Asset for Stranded Inventory**	**Regulatory Asset for Legal Costs**	**Total**
5	Regulatory Asset	$ 3,328,196	$ 800,000	$ 4,128,196
6	Accumulated Amortization	(133,128)	(32,000)	(165,128)
7	Net Regulatory Asset Balance	3,195,068	768,000	3,963,068
8	Average Regulatory Asset Balance	3,261,632	784,000	4,045,632
9	Average ADIT at 25.40%	(828,454)	(199,136)	(1,027,590)
10	Total Average Rate Base	2,433,177	584,864	3,018,041
11	WACC (16-00276-UT Phase II)	7.20%	7.20%	7.20%
12	Return on Rate Base	175,189	42,110	217,299
13	Amortization (25 years)	133,128	32,000	165,128
14	Income Taxes and Revenue Tax	41,431	9,959	51,389
15	**Total 2025 Revenue Requirement**	**$ 349,747**	**$ 84,069**	**$ 433,816**

PNM's proposed treatment of the ADIT liability balance was not opposed by any party. PNM's proposed treatment of ADIT liability is reasonable and should be approved.

However, PNM's proposed recovery of the one-time stranded or obsolete inventory and legal costs was challenged by one party, NM AREA.

[369] Baker Dir. 31.

[370] Baker Dir., PNM Exh. TSB-8.

2. Analysis of contested issues and recommendations

a. Stranded materials and supplies

NM AREA witness James R. Dauphinais recommended that PNM's request for a regulatory asset be approved, but that the carrying costs "be based on PNM's cost of debt to ensure PNM does not earn a return on the costs in question just like it will not earn a return on the portion of its abandonment costs that are being funded by its energy transition bonds."[371] PNM is seeking to recover these costs at its weighted average cost of capital (WACC), which would include a return to its shareholders. NM AREA argues that given the fact that PNM will not be earning any return on the remainder of its transition costs, and the further fact that these items of utility plant would no longer be used and useful, Mr. Dauphinais' proposal is reasonable and should be adopted.[372]

Although the Hearing Examiner was unable to locate PNM's position on this issue in its post-hearing brief, PNM witness Baker did address it in his rebuttal testimony. Baker asserted that debt-only carrying charges do not represent the cost to the utility to carry materials and supplies as a regulatory asset on its balance sheet. Further, he observed that NM AREA appears to be applying the ETA standard of securitization financing to a regulatory asset that does not fall under the definition of energy transition costs in the ETA and, therefore, does not qualify for recovery through securitization financing. These assets, Baker averred, are currently in PNM's rate base at a full WACC return.

The Hearing Examiner finds that a debt-only return on stranded materials and supplies would not be reasonable given the manner this item is ordinarily treated in rate base. PNM's proposed treatment of this item as a regulatory asset is consistent with the treatment of one-time

[371] Dauphinais Dir. 7.

[372] NM AREA Br. 5.

obsolete inventory costs in Case No. 19-00018-UT;[373] it should be accorded the same treatment in this case.

b. External legal costs

Mr. Dauphinais also objected to PNM's proposed recovery of $800,000 in one-time external legal costs associated with the abandonment of Four Corners. Mr. Dauphinais asserted that these estimated costs are relatively minor in the context of the proposed $300 million transaction and should not be treated as an exception to the normal rate treatment accorded such out-of-period expenses.[374]

PNM once again appears to have not covered this issue in its post-hearing briefs, but Mr. Baker did address this one too. Mr. Baker observed these legal costs are incremental to any external legal expenses that are currently included in PNM's base rates. The fact that these costs had not yet been incurred or estimated to be incurred at the time of PNM's last rate case proves, Mr. Baker contended, that they are not included in PNM's current base rates. Baker also noted that a similar regulatory asset was approved in Case No. 19-00018-UT for external legal costs associated with the SJGS abandonment.

Consistent with the Commission's analogous approval in Case No. 19-00018-UT, the Hearing Examiner recommends that PNM be authorized to create a regulatory asset to preserve its ability to recover these one-time external legal costs in a future general rate case.[375]

Finally, consistent with the qualification emphasized in Case No. 19-00018-UT, the Hearing Examiner recommends that the authority to create the regulatory assets addressed in this

[373] *See Recommended Decision on SJGS Abandonment*, 28, 32-33.

[374] NM AREA Br. 5-6.

[375] *See Recommended Decision on SJGS Abandonment*, 28, 32-33.

decision only extend to the recording of the costs and that it not be considered an approval of any ratemaking treatment. As in Case No. 19-00018-UT, the expenses related to stranded materials and supplies and outside legal expenses have not yet been incurred, and it is appropriate to place the burden on PNM to justify the prudence and reasonableness of the costs to be incurred and to provide an incentive to minimize the costs.[376]

D. Hearing Examiner's Recommendations on the Proposed Sale and Abandonment

The Hearing Examiner finds that PNM's request to abandon and transfer through sale its interest in the Four Corners Power Plant to NTEC should be approved. Consistent with the foregoing findings, PNM has established by a preponderance of the evidence that the proposed abandonment satisfies the net public benefit and *Commuters' Committee* standards.[377] PNM has also shown that there should be no net detriment to the public interest in approving the proposed sale and transfer of its FCPP interest to NTEC; to the contrary, when the benefits of the sale and transfer are objectively weighed, the proposed transfer should produce a net public benefit.[378]

Regarding the proposed abandonment evaluated pursuant to Section 62-9-5 of the PUA, the record demonstrates that the quantifiable and non-quantifiable benefits substantially outweigh the costs associated with the proposal. The credible modeling conducted by PNM shows that the abandonment will cost ratepayers significantly less over the next 20 years than continuing in FCPP until 2031, with cost savings between $30 and $300 million on a 20-year NPV basis and expected median savings of approximately $143.7 million. If, as WRA contends, "the only reason for abandonment is economic," then the substantial savings alone should be sufficient grounds for

[376] *Id*. 32-33.

[377] *See supra* sections IV.A.1 through IV.A.11.

[378] *See supra* sections IV.B.1 through IV.B.4.

approval, as WRA's analysis confirms "under a variety of assumptions and sensitivities."[379] In fact, roughly replicating the conclusions of PNM witness Nicholas Phillips' analysis, the results of WRA's analysis indicated NPV revenue requirements savings ranging from $95.7 to $305.2 million under all the scenarios its witness, Brendon Baatz, considered.[380] Moreover, the substantial savings afforded through the securitization of investments authorized by the Legislature through the ETA is positive factor in the cost-benefit analysis of PNM's abandonment of Four Corners.

While acknowledging WRA's thesis on the economics benefits being dispositive, the Hearing Examiner nevertheless finds additional significant benefits of the proposed abandonment. For instance, offloading the inflexible generator that the Four Corners plant represents will advance PNM's position in transitioning from gross load planning to net load planning as resources with more volatile load patterns are increasingly added to PNM's system energy mix. The Four Corners abandonment will also advance PNM's progress toward implementing the ETA goal of limiting portfolio emissions through substantially reducing CO_2 on its system. Additionally, on the matter of reducing CO_2 emissions, the evidence shows that the seasonal operations effected by the June 25, 2021 amendments to the Four Corners agreements should reduce emissions at the plant between 20 to 25% beginning in the fall of 2023.

Regarding the proposed sale and transfer to NTEC pursuant to the Purchase and Sale Agreement, assuming PNM and NTEC submit a modified Section 6.1(d)(i) of the PSA to provide that PNM, while still an outgoing owner, may not unilaterally block the remaining co-owners' election to retire Four Corners early or curtail production from the plant and thereby

[379] WRA Resp. 2.

[380] *See* Baatz Dir. 6-7, 18-19, Exh. BJB-8.

reduce emissions even beyond the beneficial rate resulting from seasonal operations, the record demonstrates that there should be no net detriment to the public interest in approving the sale and transfer. In fact, expressed affirmatively, when benefits of the transfer like strengthening the Navajo Nation's position in matters intrinsic to vital interests and the significant economic development assistance for tribal and other locally impacted communities afforded under the ETA are factored into the abandonment equation, the preponderance of the evidence supports a positive finding that the proposed sale and transfer is in the public interest.

On the other hand, addressing the speculation among certain intervenors that disapproval of the abandonment could somehow spur or precipitate the early closure of Four Corners in 2023[381] or 2027 or some other year, the record does not sustain their suppositions. While the Hearing Examiner acknowledges that early closure is possible, and indeed the co-owners have crafted contractual arrangements providing for early closure as soon as 2027, barring unforeseen circumstances, the probative evidence adduced in this case indicates that Four Corners will continue to operate until 2031. In contrast to the intervenors' fervent guesswork, the quantifiable

[381] Setting aside the Navajo Nation's plea for a just energy transition, the Hearing Examiner is doubtful that a 2023 retirement of Four Corners is a realistic option. PNM has emphasized the importance of keeping Four Corners capacity and energy on its system through 2024 and has stressed that it needs the time to ensure replacement resources are available and online by the summer of 2025. *See* Tr. Vol. III (Phillips) 778-79; Fallgren Reb. at 45, 46 ("As evidenced by the recent delays in bringing San Juan replacement resources coming online, providing adequate review time and also providing adequate margin for replacement resource developers to bring resources on-line in a non-expedited manner is critical to continuing PNM's transition to a coal-free grid without jeopardizing system reliability. This [abandonment] filing is not too soon; rather, the timing of this filing provides adequate margin to ensure a smoother transition and acquisition of replacement resources.") (internal citation omitted). What's more, if retirement of the plant is not an option for PNM, it is exceedingly unlikely that a 2023 shutdown of FCPP would be viable for the other co-owners, who unlike PNM, apparently have not initiated processes to acquire replacement resources. This is consistent with the findings above that indicate the majority owner and operator of Four Corners, APS, would need 970 MW of additional firm capacity during the same period of transition and resource additions on its system and maintained in its most recent rate case before the ACC that retiring FCPP (or "4CPP" as it's known in the ACC case) would jeopardize system reliability. *See, e.g.*, Fallgren Supp. 4-5.

and unquantifiable benefits "of the action"[382] proposed include substantial savings to ratepayers, reducing PNM's portfolio emissions, reducing New Mexico and regional emissions through seasonal operations, facilitating the Navajo Nation's just transition away from coal, and providing affected communities $16.5 million in ETA transition funding. So, "while there's always a hypothetical possibility" that PNM could figure a way out of Four Corners before 2031, as PNM witness Nicholas Phillips observed, what the Commission has before it in the proposed sale and abandonment is "an actual opportunity[,]" a situation where "one in the hand is better than two in the bush."[383]

Furthermore, while the abandonment of Four Corners still would be possible in 2031 under the ETA, the benefit of the early divestiture of Four Corners through PNM's transfer to NTEC would be lost and the delay would eliminate financial benefits to customers; it would also delay by at least six years the economic development and ETA transition funding to the Navajo Nation and local communities and thus squander critical benefits that the early abandonment and transfer affords. Moreover, while PNM would still be able to comply with the REA's increasing RPS mandates and carbon requirements if FCPP continued to serve customers through 2031, the early divestiture provides benefits from the early reduction of the carbon emissions associated with PNM's generation portfolio used to serve customers between 2025 and 2031.[384]

Accordingly, for the reasons stated, the Hearing Examiner recommends that the Commission approve the abandonment and sale and transfer of PNM's interest in the Four Corners

[382] As noted above, the Commission has expressed the cost-benefit analysis to be "one of 'net benefit' to the public interest, where quantifiable and unquantifiable benefits must outweigh the costs *of the action*." *NORA Order*, at 11, ¶ 21 (emphasis added).

[383] Tr. Vol. III (Phillips) 803-04.

[384] *See* Phillips Dir. 25-26.

Power Plant proposed in the Amended Application consistent with and controlled by the following findings and conclusions.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Statement of the Case, Background, Discussion, Analysis, and all findings and conclusions contained therein, whether or not separately stated, numbered, or designated as findings and conclusions, are incorporated by reference herein as findings and conclusions. Based on the foregoing Statement of the Case, Background, and Discussion and Analysis, the Hearing Examiner recommends that the Commission further **FIND** and **CONCLUDE** as follows:

1. PNM is a New Mexico corporation that owns, operates, and controls public utility plant, property, and facilities, including generation, transmission, and distribution facilities that provide retail and wholesale electric service in New Mexico. PNM is a public utility subject to the jurisdiction of the Commission pursuant to the Public Utility Act.

2. The Commission has jurisdiction over the subject matter of this case.

3. Reasonable, proper, and adequate notice of this matter has been given.

4. PNM's continued use of the Four Corners Power Plant is unwarranted, and the present and future public convenience and necessity do not otherwise require PNM's continued use of and participation in the plant.

5. PNM's proposed abandonment of its interest in the Four Corners Power Plant results in a net public benefit, is consistent with the *Commuters' Committee* standards, and should be approved as in the public interest consistent with the provisions and requirements of this Order.

6. If the Purchase and Sale Agreement between PNM and NTEC is modified as addressed in section IV.B.3 above and required below, PNM's proposed sale and transfer of its

interest in the Four Corners Power Plant to NTEC is not unlawful nor is it inconsistent with the public interest and should be approved as in the public interest under NMSA 1978, § 62-6-13.

7. As written, Article 6.1(d)(i) of the Purchase and Sale Agreement is contrary to the public interest, at least to the extent that if all the other FCPP co-owners with a vote in the matter (APS, TEP, and SRP) wish to vote to retire or reduce production from the Four Corners Power Plant before the agreement's closing date PNM should not be permitted to block or veto such a vote.

8. PNM should provide in this docket shortly after entry of the Commission's Final Order in this case an amendment to Article 6.1(d)(i) that either strikes the offending provision from the Purchase and Sale Agreement or is modified to affirm that if the other FCPP co-owners, besides NTEC, vote unanimously to reduce the production from the plant or cease its operation before the closing date of the agreement, PNM will not have the power to veto or otherwise block the ability of the other facility co-owners to take such action.

9. PNM's request for approval to create regulatory assets to recover the costs addressed above that are not eligible for securitization under the ETA should be approved as recommended in Section IV.C above. PNM should be authorized to create regulatory assets to record the costs for which it requests recovery, but the ratemaking determinations on PNM's right to recover the costs and any associated carrying charges should be reserved until the general rate case in which PNM seeks the recovery of the costs.

VI. DECRETAL PARAGRAPHS

Based upon the Findings of Fact and Conclusions of Law set forth herein and the record as a whole, the Hearing Examiner recommends that the Commission **ORDER** as follows:

A. The findings, conclusions, analyses, determinations, and rulings made and construed herein are hereby adopted and approved as the findings, conclusions, analyses, determinations, and rulings of the Commission.

B. PNM's request for approval to abandon and sell and transfer its interest in the Four Corners Power Plant to NTEC is approved, subject to PNM fulfilling the requirements of this Order with regard to filing an amended Purchase and Sale Agreement.

C. PNM shall file in this docket within 7 days of entry of this Order an amendment to Article 6.1(d)(i) which affirms the principle that if the other Four Corners Power Plant co-owners besides NTEC unanimously desire to reduce the production from the plant or cease its operation before the closing date of the Purchase and Sale Agreement, PNM shall not have the power to block or veto the ability of the other facility co-owners to take such action.

D. Provided that the Purchase and Sale Agreement is amended and re-submitted as provided in Paragraph C above, the Purchase and Sale Agreement between PNM and NTEC shall be approved.

E. PNM's request for approval to create regulatory assets to recover the costs that are not eligible for securitization under the ETA is approved. PNM is authorized to create regulatory assets to record the costs for which it requests recovery, but the ratemaking determinations on PNM's right to recover the costs and any associated carrying charges is reserved until the general rate case in which PNM seeks the recovery of the costs.

F. In accordance with 1.2.2.35(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.

G. This Order is effective immediately.

H. A copy of this Order shall be served on all parties listed on the official service list for this case.

I. This docket is closed.

ISSUED at Santa Fe, New Mexico this **12th** day of **November 2021**.

NEW MEXICO PUBLIC REGULATION COMMISSION

Anthony F. Medeiros

Anthony F. Medeiros
Hearing Examiner

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE APPLICATION OF PUBLIC SERVICE COMPANY OF NEW MEXICO FOR APPROVAL OF THE ABANDONMENT OF THE FOUR CORNERS POWER PLANT AND ISSUANCE OF A SECURITIZED FINANCING ORDER	))))))	**Case No. 21-00017-UT**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this date I caused to be sent to the individuals listed below, via e-mail only, a true and correct copy of the ***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*** issued November 12, 2021.

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DATED this **12th** day of **November 2021**.

NEW MEXICO PUBLIC REGULATION COMMISSION

Anthony F. Medeiros

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Hearing Examiner