

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

<b>IN THE MATTER OF THE APPLICATION</b>	)	
<b>OF PUBLIC SERVICE COMPANY OF NEW</b>	)	
<b>MEXICO FOR REVISION OF ITS RETAIL</b>	)	<b>Case No. 22-00270-UT</b>
<b>ELECTRIC RATES PURSUANT TO ADVICE</b>	)	
<b>NOTICE NO. 595</b>	)	
	)	
<b>PUBLIC SERVICE COMPANY OF NEW MEXICO,</b>	)	
	)	
<b>Applicant</b>	)	
_____	)	

**MOTION FOR DECLARATORY ORDER AND SUPPORTING BRIEF**

*Motion for Declaratory Order*

‘COMES NOW the New Mexico Attorney General (“NMAG”) and Western Resource Advocates (“WRA”), (collectively “Movants”), and pursuant to rule 1.2.2.21 NMAC move<sup>1</sup> the New Mexico Public Regulation Commission (“Commission” or NMPRC”) for a declaratory order that the Public Service Company of New Mexico’s (“PNM”) plan to delay issuing energy transition act bonds to the fourth quarter of 2023 – well over a year after abandoning the San Juan Generating Station (“SJGS”) Units 1 & 4 – does not conform to the *Financing Order* received from the Commission on April 1, 2020 in Case No 19-00018-UT, and on separate and independent grounds, is contrary to the Energy Transition Act (“ETA”) and would be detrimental to ratepayers.<sup>2</sup> The requested declaratory order is necessary to

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<sup>1</sup> Commission rule 1.2.2.21 NMAC refers to a “petition” rather than a “motion” for declaratory order. Because this issue and controversy arise in the context of PNM’s rate case, the request is styled as a motion in that case rather than as petition in a new proceeding. This pleading otherwise conforms to rule requirements.

<sup>2</sup> NMSA 1978, §§ 62-18-1 to -23 (2019).

prevent PNM from delaying the issuance of the bonds in a manner that would deprive its customers of the savings intended by the *Financing Order*. Further, delayed issuance of the bonds would risk undermining not only the ETA but securitization as a tool intended to help reduce costs to customers. The ETA expressly authorizes the Commission to act to ensure the ETA's objectives are achieved.<sup>3</sup> Such action is requested and necessary now.

1. Movants seek swift action on this *Motion* because PNM plans to begin the securitization process in mid-2023 and issue the bonds toward the end of this year, before a final order is expected to be issued in this general rate case proceeding.<sup>4</sup> Moreover, the outcome of this *Motion* may have an impact on the issues in this proceeding.

2. Movants seek to prevent issuance of the bonds contrary to the *Financing Order* and the ETA in order to protect consumers from the consequences of PNM's unlawful delay. The Public Utility Act establishes a balancing of interests between consumers and investors as the policy of the state.<sup>5</sup> The ETA incorporates this balancing of interests,<sup>6</sup> and it is reflected in the *Financing Order*. PNM's decision to delay issuance of the ETA bonds has disrupted the balance achieved by the *Financing Order* to the detriment of ratepayers in at least two ways. First, the delay has had the effect of allowing PNM to retain approximately \$134 million in revenues attributable to San Juan cost savings that would have otherwise

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<sup>3</sup> "The provisions of this section shall not be construed to limit the authority of the commission to:...(2) issue such further orders as may be necessary to effectuate the provisions of the Energy Transition Act." NMSA 1978, § 62-18-5(M)(2) (2019).

<sup>4</sup> See the *Procedural Order* issued on January 6, 2023.

<sup>5</sup> NMSA 1978, § 62-3-1 (2008)

<sup>6</sup> See *Citizens for Fair Rates & the Env't v. N.M. Pub. Regulation Comm'n*, 2022-NMSC-010, ¶ 42, 503 P.3d 1138.

been credited to customers.<sup>7</sup> Second, interest rates have risen significantly since the time of the *Financing Order* and may continue to increase even more before PNM's planned issuance of the bonds. As a result, consumers would ultimately pay considerably more than was contemplated under the *Financing Order* and the ETA.

3. Movants state the following pursuant to the particular requirements of rule

1.2.2.21(A) NMAC:

(1) An interpretation of the *Financing Order*, and related laws and orders to the extent necessary, including the ETA, is being requested.

(2) The uncertainty is whether it is lawful for PNM to issue energy transition bonds<sup>8</sup> (a/k/a "ETA bonds") at the end of this year. PNM's unilateral actions and inconsistent representations concerning not only when bonds will be issued, but also the Company's obligations under the ETA to issue the bonds soon after abandonment, has created the uncertainty necessitating this *Motion*. PNM's testimony in this docket is that it intends to issue energy transition bonds at the end of this year.<sup>9</sup> Movants believe this is outside the authority granted in the *Financing Order*, contrary to the ETA, and therefore unlawful. PNM, however, has taken the position that it is under no obligation to issue the bonds within any specific time period. PNM's refusal to recognize that the *Financing Order* and the law preclude issuance of the bonds long after abandonment has created the need for Movants to request a declaratory order from the Commission.

(3) The uncertainty created by PNM's delay in issuing the bonds specifically affects Movant NMAG because his office is statutorily charged with representing the interests of residential and small business consumers in matters

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<sup>7</sup> Case 19-00018-UT, *Final Order Adopting Recommended Decision with Additions* (issued June 29, 2022), p. 11.

<sup>8</sup> NMSA 1978, § 62-18-2(F).

<sup>9</sup> Monroy Direct, p. 19, lines 6-11; Greinel Direct, p. 25, lines 18-22.

before the Commission.<sup>10</sup> The estimated \$361 million<sup>11</sup> to be recovered by PNM through the issuance of Energy Transition Bonds would be direct ratepayer debt, meaning it is directly repaid by PNM’s customers as a non-bypassable separate line item charge on bills<sup>12</sup> for up to twenty-five (25) years.<sup>13</sup>

Movant WRA is affected by this uncertainty because WRA has been a staunch proponent of the ETA, defending it on appeal as balancing “the interests of the environment and future generations, utility ratepayers, utilities, and the communities affected by early plant retirements by loss of employment and tax base” and as providing “a securitized financing mechanism that materially reduces the cost of abandoning a polluting coal plant.”<sup>14</sup>

Both Movants are further affected by PNM’s plan to delay issuing Energy Transition Bonds into the fourth quarter 2023 because the uncertainty it has created will likely have a negative impact on bond marketability.<sup>15</sup> So long as this uncertainty remains, the issuance of potentially unlawful bonds could result in: (1) legal challenges should PNM attempt to collect energy transition

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<sup>10</sup> NMSA 1978, § 8-5-17(A). The Attorney General’s role is especially critical in this matter because no party with a fiduciary duty to ratepayers will be participating in or overseeing the bond structuring, marketing and pricing processes to ensure that PNM uses “commercially reasonable efforts to obtain the lowest cost objective”, as required by the ETA. NMSA 1978, § 62-18-4(B)(12). The PRC never retained the bond counsel authorized by the *Financing Order* and the ETA for this purpose. *Financing Order*, p. 111; NMSA 1978, § 62-18-5(K); *see also* Case 19-00018-UT, *Recommended Decision in Show Cause Proceeding*, p. 108, fn. 308.

<sup>11</sup> Sanders Direct, attached PNM Exhibit KTS-4 (page 642 of 651).

<sup>12</sup> NMSA 1978, § 62-18-5(F)(3) (“imposed through a non-bypassable energy transition charge as a separate line item on the qualifying utility’s customer bills”); *see also* NMSA 1978, § 62-18-9(C).

<sup>13</sup> Monroy Direct, p. 13, lines 19-21; Greinel Direct, p. 23, lines 19-20 referring to “the bond transaction’s 25-year total scheduled principal payment period.” *See also* Case No. 19-00018-UT, *Financing Order*, pp. 21, 65 (“PNM estimates the need to collect \$23 million per year for 25 years to pay the debt service on the Energy Transition Bonds.” At the time of this estimate, interest rates were projected to be approximately 3.38%, blended. (Atkins Direct (filed in Case 19-00195-UT on July 1, 2019, attached PNM Exhibit CNA-4))).

<sup>14</sup> *Answer Brief of Western Resource Advocates, Coalition for Clean Affordable Energy, and Sierra Club*, pp. 1-2 (October 5, 2020), *CFRE; and New Energy Economy v. NMPRC*, NM Supm. Ct. No. S-1-SC-38247. This *Answer Brief* and other documents pertaining to appeals from Commission orders to the New Mexico Supreme Court can be found in the Commission’s Edoockets records for Case 19-00018-UT.

<sup>15</sup> Case 19-00018-UT, Howe Rebuttal (filed November 15, 2019), p. 19, lines 9-11 (“...it is unlikely that the financial community would agree to float a securitization that is not fully and entirely bound by the law that creates it. And even if it did, the interest rate would be higher, reflecting a rightfully perceived riskiness of such an offering.”) PNM’s own expert witness, Charles Atkins, testified that every bond issuance involves a legal opinion as to its compliance with the Financing Order and the ETA, further testifying that the bonds would not issue if it does not conform to the Financing Order authorizing the issuance. Case 19-00018-UT, Transcript of Proceedings Volume II (May 24, 2022), pp. 440-441.

charges (“ETC”)<sup>16</sup> from customers to pay off the bonds; and 2) the market demanding a risk premium that results in interest rates so high as to defeat the benefit of securitization.<sup>17</sup> Already, we know PNM’s plan to issue the bonds in the time-frame PNM posits will result in interest rates far in excess of those presented by PNM and considered by the Commission in issuing its *Financing Order*.<sup>18</sup> In addition, the unlawful bond issuance may jeopardize PNM’s credit-worthiness, with a potential adverse effect on rates and service.<sup>19</sup> Finally, failure to resolve this dispute at this time could create a situation where PNM’s recovery of approximately \$283 million in SJGS stranded costs, and other costs to be included in the bond principal,<sup>20</sup> remains unresolved, creating costly uncertainty for both PNM customers and shareholders. Because Movants believe that PNM has forgone its opportunity to issue ETA bonds, PNM must seek stranded cost recovery, if at all, through Section 62-18-11(C), which states that a utility failing to issue ETA bonds may recover its “energy transition costs in an otherwise permissible fashion.”

(4) The facts and grounds prompting this Motion are PNM’s stated intention in this docket to proceed to issue ETA bonds at the end of 2023 (well over a year after the abandonment of the facilities whose stranded costs the bonds were intended to recover) despite the recent Commission finding in Case 19-00018-UT, the San Juan Generating Station (“SJGS” or “San Juan”) abandonment and financing docket, that PNM’s revised plan to delay bond issuance violates the ETA.<sup>21</sup> All facts underlying this *Motion* contain record

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<sup>16</sup> NMSA 1978, § 62-18-6.

<sup>17</sup> Case 19-00018-UT, Howe Rebuttal, p. 19, lines 14-16 (“A higher-risk issuance, with a correspondingly high interest rate, defeats the whole purpose of securitization, which is to provide a financially secure investment opportunity that carries a very low interest rate.”)

<sup>18</sup> At the time of the *Financing Order*, interest rates were projected to be approximately 3.38%, blended. (Atkins Direct (filed in Case No. 19-00195-UT on July 1, 2019, attached PNM Exhibit CNA-4)). Interest rates have since risen to 4.675% as of July 29, 2022 and 5.92% as of October 28, 2022. (Case 19-00018-UT, PNM’s Verified Compliance Report (filed October 14, 2022) and PNM’s Supplemental Verified Compliance Report (filed November 15, 2022). (This is despite PNM expert witness Atkins testifying on April 20, 2022 that securitization bond underwriters take Aaa corporate bond yields into account and that Moody’s forecasts such yields to decline to 3.81% in June 2022, 3.46% in September 2022, 3.21% in December 2022, 2.80% in December 2023, and 2.71% in June 2024. Case 19-00018-UT, Atkins Direct in Response to April 1, 2022 Procedural Order, p. 14.)

<sup>19</sup> Case 19-00018-UT, Howe Rebuttal, p. 17 (degradation of PNM’s credit-worthiness may translate into higher costs for customers).

<sup>20</sup> *Financing Order*, p. 29, PNM Table HEM-2.

<sup>21</sup> Case 19-00018-UT; *Recommended Decision in Show Cause Proceeding* (issued June 17, 2022), p. 49. While PNM has appealed the *Final Order* issued on June 29, 2022 adopting this *Recommended Decision*, the issues on appeal are limited to whether the Commission had authority to implement a rate credit removing San Juan costs

support in this docket and Case 19-00018-UT orders, decisions and verified testimony. Movants have provided citations as appropriate.

(5) Movants are not aware of any persons involved in or affected by this controversy that are not already represented as parties to this rate case proceeding.

4. Pursuant to rule 1.2.2.12(E) NMAC, Movants have requested the positions of the parties to this case, with the following responses: PNM opposes the *Motion*, New Energy Economy supports it, and City of Albuquerque and Staff do not oppose it.

### ***Brief in Support of Motion for Declaratory Order***

#### ***Introduction***

PNM's plan to issue ETA bonds well over a year after abandoning San Juan units 1 and 4 is manifestly unreasonable and contrary to both New Mexico law and Commission orders. The ETA was designed to benefit four stakeholder interests: ratepayers, utilities, communities impacted by coal plant closures, and the environment. The ETA allows a utility to issue bonds upon its abandonment of a coal-fired power plant. Those bonds are to provide funds to pay off the abandoned plant's outstanding costs (often referred to as "stranded costs") and to ease the economic transition for communities impacted by a coal plant closure. At the same time, customers of the utility are to receive a rate credit reflecting the utility's reduced expenses from the plant closure and elimination of stranded costs.<sup>22</sup> Bond issuance, rate benefits and

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from rates prior to the issuance of bonds and outside a general rate case proceeding. *See* PNM's *Statement of Issues* (August 1, 2022), pp. 2-3, *PNM v. NMPRC*, N.M. Supm. Ct. No. S-1-SC-39440. The Court's *Order* issued on November 1, 2022 made it clear that its stay of the Commission's *Final Order* applies only to "the portion of PRC's final order requiring PNM to issue rate credits.

<sup>22</sup> *CFRE*, 2022-NMSC-010, ¶ 42 (discussing the balancing of interests reflected in the ETA).

economic relief to impacted communities are all to occur at the time of abandonment. To delay any or all of these features well beyond the date of abandonment not only is unlawful but, equally important, negates the balance and benefits that the ETA was carefully designed to achieve.

While PNM can elect not to issue ETA bonds,<sup>23</sup> it cannot lawfully delay the issuance and rate benefits by months or years – as it is doing – with the effect of diverting the ETA’s ratepayer benefits to PNM shareholders.<sup>24</sup> Given that abandonment of San Juan Generating Station (“SJGS” or “San Juan”) occurred over six months ago, there are no means by which PNM can issue bonds now, much less at the end of the year, that would comply with the requirement that issuance be at the time of abandonment. PNM has, by operation of law, elected to forgo bond issuance, which leaves the recovery of stranded costs to be decided as part of this rate proceeding.

Nevertheless, PNM persists in its intention to carry out that unlawful and unauthorized plan. Because PNM has taken the position that it is under no obligation to issue the bonds by any date certain, Movants request that the Commission declare that PNM has exceeded any reasonable duration of the authority to issue bonds granted by the *Financing Order* through its own purposeful inaction.

In this *Brief*, Movants will explain why PNM’s plan to issue energy transition bonds towards the end of 2023 is unlawful. Movants will: 1) identify the PNM testimony about its

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<sup>23</sup> NMSA 1978, § 62-18-11(C).

<sup>24</sup> PNM’s decision to delay issuance of the ETA bonds had the effect of allowing PNM to retain approximately \$134 million in revenues attributable to San Juan cost savings that would have otherwise been credited to customers. Case 19-00018-UT, *Final Order Adopting Recommended Decision with Additions* (issued June 29, 2022), p. 11.

plan to issue bonds, prompting the need for this *Motion*; 2) show that PNM's plan does not conform to the *Financing Order* and is otherwise outside the scope of the authorization that it requested and received pursuant to that order; and 3) show that PNM's plan would violate the ETA.

1. PNM states that it intends to issue energy transition bonds toward the end of 2023, and forgo other cost recovery opportunities in reliance on that plan.

PNM has testified to its end-of-2023 bond-issuance plan extensively in this docket, and has not requested SJGS stranded cost and other cost recovery because of its reliance on that plan. That testimony, which has triggered this *Motion* and the need for declaratory relief, includes:

PNM witness Monroy testifies at page 19, lines 4-11:

**Q. PLEASE DESCRIBE PNM'S PLANS AROUND ISSUANCE OF ENERGY TRANSITION BONDS AND SECURITIZATION OF SJGS COSTS.**

**A.** PNM intends to issue SJGS energy transition bonds in the fourth quarter of 2023 to align as closely as possible with the date rates are effective for this rate case. These securitized bonds will recover the energy transition costs as defined and authorized by the Commission's Financing Order in Case No. 19-00018-UT. PNM will begin the broader securitization process in mid-2023 to achieve the planned issuance date in the fourth quarter of 2023.

PNM witness Greinel testifies at pages 25-26:

**Q. CAN YOU COMMENT ON THE SECURITIZATION PROCESS PNM PLANS TO BEGIN IN 2023 TO FACILITATE ISSUANCE OF THE BONDS IN THE FOURTH QUARTER OF 2023?**

**A.** PNM will issue the San Juan securitization bonds following several required pre-issuance steps and an active marketing process conducted by the underwriters PNM selects for the transaction. This process is estimated to take up to 13 weeks to complete but may take longer if delays occur. The energy



transition bonds will be issued in the debt capital markets. However, there are known periods when the capital markets, while technically open, may not have adequate demand to support a robust and competitive marketing process. Among other times of year, investors of utility-issued asset-backed securities (“ABS”) like PNM’s securitization bonds are not typically very active in the ABS market between Thanksgiving and year end. Further, during periods of extreme market volatility or market distress, the capital markets, including the ABS market, may experience periods of no capital availability.

To ensure access to the ABS market during a period of active investor engagement, PNM plans to begin the broader securitization process in mid-2023 with the goal of completing the pre-marketing transaction execution steps by the end of September. The one-to-two-week marketing process and bond issuance may then take place as early as October 2023, which would provide a six-to-seven-week window to access the market before Thanksgiving, after which there may be less investor engagement. Having this window provides accommodation for a potential delay in the initial transaction execution steps and flexibility to wait out periods of extreme market volatility or market distress. Further, issuing the bonds during that period would align with PNM’s stated intent to issue near the time when new base rates go into effect, expected in January 2024.

PNM witness Watson testifies at page 29:

**Q. WHY DID PNM DIRECT YOU TO EXCLUDE THE SJGS UNITS FROM THE DEPRECIATION STUDY?**

**A.** The assets were excluded from the Depreciation Study because they will be addressed in other proceedings related to the Energy Transition Act. New Mexico’s Energy Transition Act allows utilities to abandon certain coal-fired generating facilities and securitize related energy transition costs, including undepreciated investments in the facilities. PNM received authority to abandon its interest in SJGS Units 1 and 4 and securitize its undepreciated investments through the issuance of energy transition bonds in Case No. 19-00018-UT. Because the undepreciated assets will be securitized as discussed above, PNM excluded the SJGS Units from the present Depreciation Study.

PNM witness Sanchez testifies at pages 17-18:

**Q. ARE ANY OF THE LEGAL COSTS RELATED TO THE SHOW CAUSE PROCEEDING AND APPEAL INCLUDED IN THE LITIGATION EXPENSES IN YOUR EXHIBITS OR THE MORE GENERAL LEGAL EXPENSES INCLUDED IN PNM’S COST OF SERVICE IN THIS CASE?**

A. No. These costs are removed from PNM’s cost of service in this case. The legal costs related to the show cause proceeding are separately accounted for as part of the energy transition costs under Section 62-18-2(K) of the Energy Transition Act. These costs [\$734,390] will be included in the amount to be securitized in PNM’s energy transition bonds to be issued under the Financing Order in Case No. 19-00018-UT.

In sum, PNM has plainly stated that it intends to issue energy transition bonds in late 2023, before a final order is expected to be issued in this rate case proceeding and, in reliance on that plan, forgo other cost recovery opportunities that would otherwise be available in a rate case.

2. PNM’s plan does not conform to the *Financing Order*.

PNM’s plan to issue energy transition bonds just before the expected conclusion of this rate case in late 2023 is unlawful because it does not conform to the *Financing Order*. Section 62-18-5(F)(1) of the ETA provides that “[a] financing order shall include ... approval for the qualifying utility or assignee to issue energy transition bonds as requested in the application.” (Emphasis added.) PNM’s application for a financing order stated that “[t]he bonds are to be issued at or around the time the San Juan coal plant is closed.”<sup>25</sup> The *Financing Order* recognized that PNM’s application for a financing order provided that abandonment and bond issuance were to occur at the same time: “As described in the Supporting Testimony, upon

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<sup>25</sup> *Public Service Company of New Mexico’s Consolidated Application for the Abandonment, Financing and Replacement of the San Juan Generating Station Pursuant to the Energy Transition Act* filed on July 1, 2019 in Case No. 19-00195-UT, pp. 8, 21. (On July 10, 2019, the Commission issued a Corrected Order on Consolidated Application, whereby the Commission bifurcated the review of PNM’s Application into two separate proceedings. The abandonment and securitization approval requests were addressed in Case No. 19-00018-UT. The replacement resources were addressed in Case No. 19-00195-UT.)

abandonment of the San Juan coal plant, the SPE<sup>26</sup> will issue the Energy Transition Bonds.”<sup>27</sup>

The *Financing Order* referenced and approved PNM’s description of the timing of the bond issuance, as required by the ETA.<sup>28</sup> PNM described that timing as occurring “as promptly as possible” after abandonment:

As described in the Consolidated Application, including the Supporting Testimony, PNM expects to cause the issuance of the Energy Transition Bonds as promptly as possible after the last of the following events have occurred: (1) issuance of a final, non-appealable financing order acceptable to the Company; (2) the abandonment of the San Juan coal plant; (3) delivery of any necessary SEC approvals under the Securities Act of 1933; and (4) completion of the rating agency process. PNM estimated that the issuance of the Energy Transition Bonds would occur in 2022.” (Emphasis added.)<sup>29</sup>

The first of these described events occurred on January 10, 2022, with the New Mexico Supreme Court’s affirmance of the Commission’s decision.<sup>30</sup> The second event occurred on June 30, 2022, and September 30, 2022. The third and fourth events could have been initiated prior to abandonment as asserted in the application, but PNM deliberately chose not to initiate these events in order to delay issuing the bonds. PNM’s choice not to fulfill the necessary preconditions following abandonment is not an excuse for delaying issuance of the bonds. Moreover, the *Financing Order* adopted a sense of urgency through the language “as promptly

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<sup>26</sup> SPE stands for special-purpose entity, a wholly owned subsidiary of PNM, that is formed for the purpose of issuing and servicing the bonds (*see Financing Order*, pp. 13, 64-65)

<sup>27</sup> *Financing Order*, p. 127, par. 44.

<sup>28</sup> NMSA 1978, § 62-18-4(B)(7) (“An application for a financing order shall include: ... (7) an estimate of timing of the issuance.”)

<sup>29</sup> *Financing Order*, pp. 120-21, par. 28; *see also* PNM’s *Consolidated Application*, p. 34, and Direct Testimony of Elisabeth Eden, p. 15 (both filed on July 1, 2019 in Case No. 19-00195).

<sup>30</sup> Case No. S-1-SC-38247.

as possible,” yet PNM ignored this requirement and now claims it has the unfettered discretion to “time[ ] its financing transactions to correspond with its capital and business needs.”<sup>31</sup>

In the underlying abandonment and financing proceedings, it was understood and unquestioned that the abandonment and refinancing would occur at the same time. In its *Financing Order*, the Commission accepted the recommendation of the Hearing Examiners “that the Commission adopt the substance of the proposals of Dr. Howe and Mr. Dauphinais.” NM-AREA witness Dauphinais proposed “that the Commission require that PNM file a rate adjustment mechanism that will automatically remove the revenue requirement in base rates associated with the San Juan units starting on the date of abandonment.” (Emphasis added.)<sup>32</sup>

In fact, the abandonment date and financing date were used interchangeably during the proceedings for approval of both. In the *Abandonment Order*,<sup>33</sup> the Commission recognized that bond issuance was to occur at the time of abandonment: “The ETA also provides for ratemaking mechanisms designed (1) to eliminate the costs of the abandoned facilities at the time the ETC rates [for bond repayment by customers] are first collected (upon the abandonment of the units) ....” (Emphasis added.)<sup>34</sup> The *Financing Order* is replete with references to the concurrence of bond issuance with abandonment in describing the scope and

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<sup>31</sup> Greinel Direct, p. 23, lines 6-8.

<sup>32</sup> *Financing Order*, p. 82.

<sup>33</sup> Case 19-00018-UT, *Recommended Decision on PNM’s Request for Authority to Abandon its Interests in San Juan Units 1 and 4 and to Recover Non-Securitized Costs*, February 21, 2020 (collectively, with the April 1, 2020 *Final Order on Request of Public Service Company of New Mexico to Abandon its Interests in San Juan Generating Station Units 1 and 4 and to Recover Non-Securitized Costs*, referred to and cited as the “*Abandonment Order*”)

<sup>34</sup> *Abandonment Order*, p. 14.

implementation of bond issuance authorization that PNM requested, described and received.

These references include:

In rebuttal, PNM agreed to the recommendations of Dr. Howe and Mr. Dauphinais for an immediate credit for ratepayers upon the abandonment of the San Juan plant. PNM agreed to create a rate mechanism to adjust customers' bills immediately after PNM begins collecting the ETC for customers. (Emphasis added.)<sup>35</sup>

...

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) ... (Emphasis added.)<sup>36</sup>

and

The Recommended Decision, if approved by the Commission, would address five main issues. First, it would allow PNM to include in bonds (securitization) to be issued by a PNM affiliate (a special purpose entity) the \$360.1 million PNM estimates as the costs to abandon its interest in the remaining San Juan Units (San Juan Units 1 and 4). This would include the full \$283 million estimate of undepreciated investment in the units. The bonds would be issued shortly after the abandonment of PNM's interest in the units on July 1, 2022. (Emphasis added.)<sup>37</sup>

Based on these statements, the Commission clearly understood that PNM's request and plan was to issue bonds at abandonment.

It is important that the *Financing Order*, which incorporated by reference the *Recommended Decision on PNM's Request for Issuance of a Financing Order*,<sup>38</sup> has since

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<sup>35</sup> *Financing Order*, p. 83.

<sup>36</sup> *Financing Order* at p. 13.

<sup>37</sup> *Id.* at pp. 20-21.

<sup>38</sup> Rule 1.2.2.37(A)(2) NMAC provides: "The Commission may adopt a hearing examiner's recommended decision. If a recommended decision is adopted in its entirety the commission's order shall so state." The Final Order issued in this case adopted the Recommended Decision in its entirety, stating that "The Recommended

been upheld and affirmed by the New Mexico Supreme Court<sup>39</sup> and is the law in this case. PNM's application for a financing order requested to issue bonds at the time of abandonment, and not more than a year later as PNM now plans. The *Financing Order* granted approval to issue bonds "as requested in the application."<sup>40</sup> Timing is therefore intrinsically part of the *Financing Order*. PNM's authorization to issue bonds has therefore expired by operation of law, and its plan to issue bonds in late 2023 is unlawful because it is outside the scope of the authorization granted by the *Financing Order*.

3. PNM's plan is contrary to and would violate the Energy Transition Act.

On separate and independent grounds, PNM's plan to issue bonds in late 2023 is also unlawful because it is contrary to and would violate the ETA. The *Show Cause Order* in Case 19-00018-UT<sup>41</sup> determined that PNM's plan to issue bonds at the conclusion of this rate case was unlawful, and violated the ETA. The same is true here. As such, PNM is no longer authorized to issue bonds. While PNM has appealed the *Show Cause Order* to the New Mexico Supreme Court and that appeal is currently pending, only the rate credit requirement of that

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Decision on Public Service Company of New Mexico's (PNM) Request for Issuance of a Financing Order, including the Statement of the Case, Discussion, Findings of Fact and Conclusions of Law, Decretal Paragraphs and the Financing Order recommended by the Hearing Examiner, are well taken and are hereby incorporated by reference as if fully set forth in this Final Order, and are ADOPTED, APPROVED, and ACCEPTED as the Findings, Conclusions and Orders of the Commission." Page 10, ordering paragraph A.

<sup>39</sup> *Citizens for Fair Rates and the Environment v. NMPRC*, 2022-NMSC-1138, 503 P.3d 1138.

<sup>40</sup> NMSA 1978, § 62-18-5(F)(1).

<sup>41</sup> *Recommended Decision in Show Cause Proceeding*, June 17, 2022 (collectively, with the June 29, 2022 *Final Order Adopting Recommended Decision with Additions*, referred to and cited as the "*Show Cause Order*").

Order has been stayed.<sup>42</sup> Therefore, the remainder of the *Show Cause Order*, which found PNM’s plan to delay the bond issuance to be unlawful, remains in full force and effect.

Specifically, the *Show Cause Order* determined that “the ETA was intended to require the issuance of the energy transition bonds at an unspecified time but certainly close to the abandonment of the qualifying facilities.”<sup>43</sup> The Commission also found that “PNM’s new plan – to issue the bonds in January or February 2024, at least 18 months after the abandonment of Unit 1 and 15 months after the abandonment of Unit 4 – will not achieve the purpose of Section 16 [of the ETA], that the revised plan is not reasonable, and that the revised plan violates the ETA.”<sup>44</sup> The fact that PNM intends to issue bonds at the end of 2023, rather than early 2024, does not render the plan lawful. PNM’s plan would not comply with the ETA’s requirement to issue bonds at a time “close to the abandonment of the qualifying facilities.”

That bonds are to be issued upon abandonment is evident from other directly-related provisions of the ETA. The transition assistance that the ETA provides to the workers and neighboring communities impacted by the closure of the coal plant is to be funded “[w]ithin thirty days of receipt of energy transition bond proceeds.”<sup>45</sup> PNM’s voluntary gesture to

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<sup>42</sup> New Mexico Supreme Court Case S-1-SC-39440, *Amended Order* (issued November 4, 2022): “the portion of PRC’s final order requiring PNM to issue rate credits remains STAYED pending the final resolution of this appeal.”

<sup>43</sup> *Show Cause Order*, p. 49.

<sup>44</sup> *Id.* (See also p. 48: “the Legislature appears to have intended that the [transition] funds be provided at the approximate time of the abandonment, and, to make that occur, the Legislature also apparently intended that the energy transition bonds that would be used to fund those transfers would also be provided at the approximate time of the abandonment. The Legislature does not appear to have intended that the bonds would be issued and the proceeds be provided to the energy transition funds years later at the discretion of the utility.”)

<sup>45</sup> NMSA 1978, § 62-18-16(J).

advance those payments out of its own funds<sup>46</sup> does not negate the legal effect of that language. Moreover, the ETA sets the amount of stranded capital that PNM is authorized to recover via the bonds as the undepreciated investment “as of the date of abandonment.”<sup>47</sup> PNM’s position – that it alone controls the timing of issuance simply because the ETA requires that financing applications include an “estimate of the timing”<sup>48</sup> – is unreasonable and contrary to legislative intent. The New Mexico Uniform Statute and Rule Construction Act requires that “[a] statute or rule [be] construed, if possible, to: (1) give effect to its objective and purpose; (2) give effect to its entire text; and (3) avoid an unconstitutional, absurd or unachievable result.”<sup>49</sup> Moreover, all of the provisions of a statute, together with other statutes *in pari materia*, must be read together to ascertain the legislative intent.<sup>50</sup> The ETA as a whole shows that the Legislature did not intend to allow PNM to delay issuance of the bonds at its own discretion well past the time of abandonment. Thus, issuance within a short period of time after the closure of the qualifying coal plant is necessary for lawful and proper implementation of the ETA.<sup>51</sup>

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<sup>46</sup> *Show Cause Order*, p. 49 (citations omitted).

<sup>47</sup> NMSA 1978, § 62-18-2(H)(2).

<sup>48</sup> According to PNM’s Vice-President, Regulatory and Corporate Controller, Henry E. Monroy, “there’s nothing in the Financing Order that set a date specific for when the bonds need to be issued.” Case 19-00018-UT (show cause proceeding), Transcript of Proceedings, Vol. I (May 23, 2022), p. 140, lns. 17-19. “Like I said, I do not believe there’s any requirements that I’m aware of to notify the commission” of a decision to delay the bond issuance. p. 143, lns. 2-5. *See also* Case 19-00018-UT (show cause proceeding), PNM’s Post Hearing Brief in Chief (June 3, 2022), pp. 7-8: “The use of the word ‘estimate’ in Section 62-18-4(B)(7) ... confirms that PNM is not required to provide a date certain by which the energy transition bonds are to be issued.”

<sup>49</sup> NMSA 1978, § 12-2A-18(A) (1997).

<sup>50</sup> *Pub. Serv. Co. of N.M. v. N.M. Pub. Util. Comm’n*, 1999-NMSC-040, ¶¶ 22-23, 128 N.M. 309.

<sup>51</sup> *See* testimony of Laura E. Sanchez, PNM’s Ex. Dir. of Government and Public Affairs and PNM Resources, Inc.’s Chief Policy and Legal Advisor, in Case 21-00017-UT (Four Corners Power Plant abandonment and



The plain language and purposes of the ETA establish a legislative intent to require PNM to refinance upon abandonment. Any other interpretation creates an absurd result because the ETA locks in the amount to be financed as the undepreciated plant balance on the date of abandonment. PNM's delay, however, would allow the Company to continue collecting San Juan costs in rates, at its full cost of capital, after the plant has been abandoned and then, at its discretion, issue securitized bonds at some future date. Conceivably, by PNM's reading of the law, the Company could issue the bonds after a period that would allow full depreciation of its stranded asset, effectively allowing it to recover its stranded costs twice.<sup>52</sup> Indeed, by PNM's reading of the law, it could once again unilaterally change its plan for when to issue the bonds, and would again be under no obligation to inform the Commission of its decision, let alone seek its authorization.

PNM's position fails to explain why the amount of stranded costs would be locked in at the time of abandonment. Nor can PNM explain how it could be consistent with the ETA for it to wait an indefinite amount of time, whether eighteen months or even eighteen years after abandonment, to issue bonds which are designed to satisfy the objectives of the ETA.

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securitization) that "pursuant to the ETA, we would be proposing, as part of our Application, that the transition funds be funded when the bond proceeds are issued. That's what's required in the ETA. That is at the time of abandonment. I'm not referring to the time of approval of abandonment, but I'm talking about at the time of abandonment. The bonds are -- and Mr. Atkins can give more information about this in his testimony -- but they are anticipated to be issued as close as possible to when the abandonment occurs. Right now it's expected to occur 12-31-2024. The bonds would be issued very soon thereafter, but it's a holiday, of course, New Year's, New Year's Day, so sometime in very early January 2025." Transcript of Proceedings (Day 2) (September 1, 2021), p. 551, ln. 20 – p. 552, ln. 7.

<sup>52</sup> Show Cause Order, pp. 63-64: "PNM could, under its logic, continue to change its plans and extend the dates for the bond issuance without further Commission review and approval and continue indefinitely to recover from ratepayers the costs of abandoned units that are no longer providing service. There is no indication that the Legislature intended to eliminate the Commission's authority to address this situation."

The *Financing Order* was entered with due consideration of the interest rates applicable at that time and the need for financial assistance to affected communities to assist in the transition away from the abandoned plant at the time of abandonment.<sup>53</sup> The source of that financial assistance is proceeds from the bond issuance. Despite PNM's voluntary gesture to advance those funds at abandonment, an interpretation of the ETA that would allow transition funding to occur months or years after a plant closure is contrary to the Legislature's intent to provide funding for transition assistance. The purpose of the ETA in allowing utilities, customers and communities to economically transition away from coal-fired generation in New Mexico would be frustrated unless bonds are issued upon abandonment.

Likewise, the ETA's requirement that a utility's application for a financing order include "an estimate of timing of the issuance and term" of the bonds necessarily incorporates the importance of timing into the approval of an application. PNM's position that it can issue bonds at any time would render this part of the ETA surplusage, contrary to established rules of statutory construction.<sup>54</sup>

Beyond the language and purpose of the ETA supporting a requirement of issuing bonds at or near the time of abandonment, PNM's suggestion that it has complete discretion over the timing of bond issuance would lead to absurd results. Under this construction of the ETA, the Commission would be powerless to enforce its financing orders with respect to a

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<sup>53</sup> NMSA 1978, § 62-18-16.

<sup>54</sup> "No part of a statute should be construed so that it is rendered surplusage." *Whitely v. N.M. State Pers. Bd.*, 1993-NMSC-019, ¶ 5, 115 N.M. 308.

statutorily-required part of the application. This is inconsistent with assuring ETA compliance and another established rule of statutory construction.<sup>55</sup>

PNM's delayed issuance of the bonds is contrary to the *Financing Order* and the ETA. The Commission should declare that PNM lacks legal authority to issue bonds this long after abandonment.

### ***Conclusion***

As described in this *Motion*, a declaratory order is needed to avoid the extraordinary economic uncertainty caused by PNM's undeterred plan to issue ETA bonds well over a year after San Juan's abandonment. This issue should be resolved expeditiously because of its substantial economic consequences and potential impact on this rate case. As the New Mexico Supreme Court has held, issues that can have substantial economic consequences if left unresolved should be decided expeditiously.<sup>56</sup> Without the Commission's expeditious enforcement of the *Financing Order* and the ETA, PNM will recover all of its San Juan stranded costs without the associated customer benefits that were required by the ETA and represented to the Commission when the *Financing Order* was issued.

**WHEREFORE**, for the foregoing reasons, Movants pray for a Commission order declaring that PNM no longer has legal authority to issue ETA bonds because the issuance of bonds so far from the time of abandonment are not authorized by the *Financing Order* or the ETA. To the extent PNM decides to otherwise seek SJGS stranded cost recovery, the

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<sup>55</sup> See, e.g., *Chavez v. Bridgestone Ams. Tire Operations*, 2022-NMSC-006, ¶ 40, 503 P.3d 332 (stating that courts avoid construing statutes in a manner that would result in an absurd or unreasonable application).

<sup>56</sup> *State ex rel. Egolf v. New Mexico Public Regulation Commission*, 2020-NMSC-018, ¶ 18, 476 P.3d 896.

Commission can take up that issue at the time PNM makes such a request. Finally, if PNM persists in its plan to issue ETA bonds despite Commission orders to the contrary, the Commission should request the Attorney General to seek to enforce the NMPRC orders in district court.<sup>57</sup>

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<sup>57</sup> *State ex rel. Egoif*, 2020-NMSC-018, ¶ 29 (“If the Commission was of the opinion that PNM was violating Paragraph 19, or any Commission directive, then the appropriate procedure would have been to request the Attorney General to seek an injunction from the district court compelling PNM to file an application for abandonment.”); *see also* NMSA 1978, § 62-12-5.

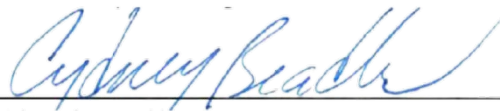
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**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

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

Case No. 22-00270-UT

PUBLIC SERVICE COMPANY OF NEW )  
MEXICO, )

APPLICANT. )

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**CERTIFICATE OF SERVICE**

I hereby certify that a true and correct copy of the foregoing *OAG's Motion for Declaratory Order and Supporting Brief* was e-mailed on this date to parties listed below.

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**DATED** this 10<sup>th</sup> day of **March 2023**.

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