

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

IN THE MATTER OF THE APPLICATION )  
OF PUBLIC SERVICE COMPANY OF NEW )  
MEXICO FOR APPROVAL TO ABANDON )  
SAN JUAN GENERATING STATION UNITS )  
2 AND 3, ISSUANCE OF CERTIFICATES )  
OF PUBLIC CONVENIENCE AND )  
NECESSITY FOR REPLACEMENT POWER )  
RESOURCES, ISSUANCE OF ACCOUNTING )  
ORDERS AND DETERMINATION OF )  
RELATED RATEMAKING PRINCIPLES AND )  
TREATMENT, )  
 )  
PUBLIC SERVICE COMPANY OF NEW )  
MEXICO, )  
 )  
Applicant )  
 )  
 )

Case No. 13-00390-UT

**PUBLIC SERVICE COMPANY OF NEW MEXICO'S  
POST-HEARING BRIEF-IN-CHIEF**

Benjamin Phillips, Associate General Counsel  
Stacey J. Goodwin, Deputy Associate General Counsel  
PNM Resources, Inc.  
Corporate Headquarters -- Legal Department  
Albuquerque, NM 87158-0805  
(505) 241-4836 (Phillips)  
(505) 241-4927 (Goodwin)  
[Ben.Phillips@pnmresources.com](mailto:Ben.Phillips@pnmresources.com)  
[Stacey.Goodwin@pnmresources.com](mailto:Stacey.Goodwin@pnmresources.com)

Richard L. Alvidrez  
Miller Stratvert P.A.  
500 Marquette NW, Suite 1100  
P.O. Box 25687  
Albuquerque, New Mexico 87125  
(505) 842-1950  
[ralvidrez@mstlaw.com](mailto:ralvidrez@mstlaw.com)

Patrick T. Ortiz  
Cuddy & McCarthy, LLP  
1701 Old Pecos Trail  
P.O. Box 4160  
Santa Fe, New Mexico 87502-4160  
(505) 954-7323  
[portiz@cuddymccarthy.com](mailto:portiz@cuddymccarthy.com)

*Attorneys for Public Service Company of New Mexico*

February 16, 2015

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES ..... iv

I. INTRODUCTION .....1

    A. Summary of Material Proceedings.....1

    B. The Stipulation is in the Public Interest and Should Be Approved  
    (Response to Briefing Order Issue No. 1).....5

II. A CONTESTED STIPULATION WILL BE APPROVED WHERE  
IT RESULTS IN A REASONABLE RESOLUTION OF THE ISSUES  
IN THE CASE .....16

    A. Commission Standards for Review of a Contested Stipulation .....16

    B. Approval of a Contested Stipulation Based on the Record  
    As a Whole Does Not Require a Litigated resolution of Each Issue .....17

    C. The Withdrawal of Certain Signatories Does Not Affect the Standards  
    for Approval of Contested Stipulation  
    (Response to Briefing Order Issue No. 2).....19

III. THE COMMISSION DOES NOT HAVE AUTHORITY TO  
MODIFY A STIPULATION OVER THE OBJECTION OF  
STIPULATING PARTIES .....19

IV. APPROVAL OF APPLICATIONS FOR CCNS AND FOR AUTHORITY  
TO ABANDON PUBLIC UTILITY PLANT IS BASED ON A NET  
BENEFITS ANALYSIS. ....21

    A. Standards for Approval of a CCN and Relationship with IRP Rule  
    (Response to Briefing Order Issue No. 3).....22

V. ABANDONMENT OF SJGS UNITS 2 AND 3 IS IN THE PUBLIC  
INTEREST BECAUSE THE STIPULATION IDENTIFIES AND  
PROVIDES FOR ADEQUATE, RELIABLE AND COST EFFECTIVE  
REPLACEMENT POWER .....24

    A. It is in the Public Interest to Predicate Abandonment of SJGS on the  
    Acquisition of Replacement Power as Stipulated .....24

    B. Alternative Proposals for Abandonment Without the Stipulated  
    Replacement Power Are Not in the Public Interest .....26

VI. THE COMMISSION SHOULD NOT REQUIRE A NEW RFP PROCESS FOR REPLACEMENT POWER UNDER THE CIRCUMSTANCES OF THIS CASE (Response to Briefing Order Issue No. 6).....	30
VII. PNM HAS ESTABLISHED PROPER GROUNDS FOR ISSUANCE OF A CCN FOR AN ADDITIONAL 132 MW INTEREST IN SAN JUAN UNIT 4.....	32
A. PNM’s Acquisition of an Additional 133 MW in San Juan Unit 4 is in the Public Interest .....	32
B. The Addition of 132 MW of San Juan Unit 4 is Consistent with PNM’s 2014 Integrated Resource Plan (“IRP”) .....	34
C. San Juan Unit 4 is in Compliance with Applicable Environmental Requirements.....	35
D. There is No Valid Opposition to the CCN for San Juan Unit 4.....	38
1. PNM is not increasing its coal generation portfolio by acquiring the additional 132 MW interest in San Juan Unit 4 .....	38
2. Any questions relating to the San Juan ownership restructuring can be addressed by the conditional granting of a CCN for the 132 MW in San Juan Unit 4.....	39
3. Any questions concerning a post-2017 fuel supply for San Juan can be addressed through appropriate conditions for the issuance of a CCN for the 132 MW of San Juan Unit 4.....	40
4. The other issues raised in opposition to the issuance of a CCN for the 132 MW of San Juan Unit 4 are not valid grounds for denial .....	42
VIII. PNM HAS ESTABLISHED PROPER GROUNDS FOR THE ISSUANCE OF A CCN FOR 134 MW INTEREST IN PALO VERDE UNIT 3.....	45
A. PNM’s Acquisition of an Additional 134 MW in Palo Verde 3 is in the Public Interest.....	45
B. The Addition of 134 MW of Palo Verde Unit 3 is Consistent with PNM’s 2014 IRP.....	47
C. Palo Verde Unit 3 is in Compliance with Applicable Environmental Requirements.....	47

D. There is No Valid Opposition to the CCN for the 134 MW in Palo Verde Unit 3 .....	47
IX. ALL NECESSARY CONDITIONS FOR ISSUANCE OF THE CCNS ARE PROVIDED IN THE STIPULATION AND PNM'S AGREED CONDITIONS WITH RESPECT TO THE CCN FOR THE 132 MW INTEREST IN SAN JUAN UNIT 4.....	49
X. THE APPROVAL OF THE SNCR PROJECT BY THE COMMISSION IS NOT AT ISSUE IN THE PROCEEDING AND THE COMMISSION HAS THE AUTHORITY TO APPROVE STIPULATION PARAGRAPH 28. (Response to Briefing Order Issue No. 4).....	50
XI. THE ALLOWANCE OF RECOVERY OF 50% OF THE UNDEPRECIATED INVESTMENT IN SJGS UNITS 2 AND 3 AS OF DECEMBER 31, 2017, AFTER TRANSFERRING \$26 MILLION IN VALUE TO THE ADDITIONAL CAPACITY IN SJGS UNIT 4 PROVIDES SUBSTANTIAL BENEFITS TO CUSTOMERS, IS WITHIN THE AUTHORITY OF THE COMMISSION TO ALLOW AND DOES NOT VIOLATE ANY REGULATORY PRINCIPLE .....	56
XII. THE COMMISSION IS NOT LIMITED TO VALUING RATE BASE ASSETS AT NET BOOK VALUE. THE COMMISSION IS REQUIRED TO TAKE ALL APPROPRIATE FACTORS INTO CONSIDERATION WHEN IT ASSIGNS A RATE BASE VALUATION. IT IS THUS APPROPRIATE UNDER THE CIRCUMSTANCES OF THIS CASE THAT PALO VERDE UNIT 3 BE VALUED AT \$221 MILLION AND THE ADDITIONAL CAPACITY IN SJGS UNIT 4 BE VALUED AT \$26 MILLION (Response to Briefing Order Issue No. 5) .....	70
XIII. CONCLUSION .....	77

## TABLE OF AUTHORITIES

### Federal Cases

*Carmell v. Texas*,  
529 U.S. 513, 120 S.Ct. 1620 .....55

*Town of Norwood v. Fed. Energy Regulatory Comm'n*,  
80 F.3d 526 (D.C.Cir. 1996) .....61, 65, 66, 68

### New Mexico Cases

*Albuquerque Bernalillo County Water Utility Authority v. New Mexico Pub.  
Regulation Comm'n*,  
2010-NMSC-013, 148 N.M. 21 .....55, 56

*Attorney General v. New Mexico Pub. Serv. Comm'n*,  
1984-NMSC-081, 101 N.M. 549 .....13, 52, 63

*Attorney General v. New Mexico Pub. Serv. Comm'n*,  
1991-NMSC-028, 111 N.M. 636 .....5, 16, 18, 19

*Attorney General v. New Mexico Pub. Util. Comm'n*,  
2000-NMSC-008, 128 N.M. 747 .....20

*Bass Enters. Prod. Co. v. Mosaic Potash Carlsbad, Inc.*,  
2010-NMCA-065, 148 N.M. 516 .....55

*Duke City Lumber v. New Mexico Env'tl. Improvement Bd.*,  
1980-NMCA-160, 95 N.M. 401 .....52

*El Vadito de los Cerrillos Water Ass'n v. New Mexico Pub. Serv. Comm'n*,  
1993-NMSC-041, 115 N.M. 784 .....30

*Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n*,  
1980-NMSC-005, 94 N.M. 731 .....73, 74, 75

*Mountain States Telephone & Telegraph Co. v. Corp. Comm'n*,  
1982-NMSC-127, 99 N.M. 1 .....60

*Moyston v. New Mexico Pub. Serv. Comm'n*,  
1966-NMSC-062, 76 N.M. 146 .....63

*Nat'l Council on Compensation Ins. v. New Mexico State Corp. Comm'n*,  
1988-NMSC-036, 107 N.M. 278 .....55

<i>New Mexico Indus. Energy Consumers v. New Mexico Pub. Serv. Comm'n,</i> 1986-NMSC-059, 104 N.M. 565 .....	10, 19, 59, 60, 69
<i>Otero County Elec. Coop., Inc. v. New Mexico Pub. Serv. Comm'n,</i> 1989-NMSC-033, 108 N.M. 462 .....	18
<i>PNM Gas Servs. v. New Mexico Pub. Util. Comm'n,</i> 2000-NMSC-012, 129 N.M. 1 .....	13, 52, 63
<i>Plains Elec. Gen. &amp; Trans. Coop, Inc. v. New Mexico Pub. Util. Comm'n,</i> 1998-NMSC-038, 126 N.M. 152 .....	30
<i>Pub. Serv. Co. of New Mexico v. New Mexico Pub. Serv. Comm'n,</i> 1991-NMSC-083, 112 N.M. 379 .....	23, 24
<i>State v. White,</i> 2010-NMCA-043, 148 N.M. 14 .....	55
<i>United Rentals Northwest, Inc. v. Yearout Mech., Inc.</i> 2010-NMSC-030, 148 N.M. 426 .....	31
<i>Zia Natural Gas Co. v. New Mexico Pub. Util. Comm'n,</i> 2000-NMSC-011, 128 N.M. 728 .....	56, 62, 63

**NMPRC Cases**

<i>Re PNM Gas Services,</i> 176 P.U.R.4 <sup>th</sup> 89, (NMPUC Case No. 2662, 1997) .....	63
<i>Re Pub. Serv. Co. of New Mexico,</i> 50 P.U.R.4 <sup>th</sup> 416, (NMPSC Case No. 1693,1982).....	63
<i>Re Pub. Serv. Co. of New Mexico,</i> 101 P.U.R.4 <sup>th</sup> 126, (NMPSC Case No. 2146 Pt. II, 1989).....	60, 61, 62
<i>Re Pub. Serv. Co. of New Mexico,</i> 110 P.U.R.4 <sup>th</sup> 69 (NMPSC Case No. 2087, 1990).....	16, 17, 18, 19
<i>Re Pub. Serv. Co. of New Mexico,</i> 119 P.U.R.4 <sup>th</sup> 48 (NMPSC Case No. 2296, 1990).....	23
<i>Re Pub. Serv. Co. of New Mexico,</i> 157 P.U.R.4 <sup>th</sup> 540 (NMPUC Case No. 2567, 1994).....	17, 19, 60

*Re Southern Union Company,*  
64 P.U.R.4th 17 (NMPSC 1984) .....21

*Re Zia Natural Gas Co.,*  
2011 WL 2573133 (NMPRC Case No. 10-00272-UT).....75, 76

*In the Matter of the Application of Pub. Serv. Co. of New Mexico (Farmington),*  
Case No. 1693 .....68

*In the Matter of the Prudence of Costs Incurred by Pub. Serv. Co. Of New Mexico in Construction of Palo Verde Nuclear Generating Station,*  
Case No. 2087 .....63

*In the Matter of the Application of Pub. Serv. Co. of New Mexico for Approval to Construct, Own, Operate and Maintain the Ojo Line Extension and for Related Approvals,*  
Case No. 2382 .....22, 25

*In the Matter of the Application of Pub. Serv. Co. of New Mexico (Anaheim),*  
Case No. 2408 .....68

*In the Matter of the Application of Pub. Serv. Co. of New Mexico (UAMPS),*  
Case No. 2553 .....68

*In the Matter of the Application of the City of Santa Fe, New Mexico, for Approval of the Purchase Price and the Issuance of Revenue Bonds for the Purpose of Financing The Purchase of Assets of Sangre de Cristo Water Company,*  
Case No. 2588 .....71, 72

*In the Matter of the Application of Pub. Serv. Co. of New Mexico for Revision of Its Retail Electric Rates Pursuant to Advice Notice No. 334,*  
Case No. 07-00077-UT .....74

*In the Matter of the Applications of Pub. Serv. Co. of New Mexico and New Mexico Gas Co., Inc., for the Abandonment, Purchase and Sale of Gas Utility Assets and Services and for Related Authorizations and Variances,*  
Case No. 08-00078-UT .....10, 11, 12, 22, 66, 68, 69

*In re Application of CDS Rainmakers Utils., L.L.C.,*  
Case No. 09-00245-UT .....76

*In the Matter of the Application of Pub. Serv. Co. of New Mexico for Revision of Its Retail Electric Rates Pursuant to Advice Notice Nos. 397 and 32 (Former TNMP Services),*  
Case No. 10-00086-UT .....18, 20, 57, 58, 66

*In the Matter of the Application of Pub. Serv. Co. of New Mexico  
for a Certificate of Public Convenience and Necessity  
Determination of Ratemaking Principles and Treatment,  
for Class II Transaction Approval and for Related Approvals  
and Variances in Connection with the Company's Acquisition  
and Operation of the Delta Person Generating Station,*  
Case No. 13-00004-UT .....21

*In the Matter of Pub. Serv. Co. of New Mexico's Application  
For a Certificate of Public Convenience and Necessity and  
Related Approvals for the La Luz Energy Center,*  
Case No. 13-00175-UT .....31

*In the Matter of Pub. Serv. Co. of New Mexico's Renewable Energy  
Portfolio Procurement Plan for 2015 and Proposed 2015  
Rider Rate Under Rate Rider No. 36,*  
Case No. 14-00158-UT .....23, 24, 35

*In the Matter of the Protest to PNM's 2014 Integrated Resource Plan,*  
Case No. 14-00228-UT .....23

**Cases from Other Jurisdictions**

*Attorney General v. Dept. of Pub. Utils.,*  
455 N.E.2d 414 (Mass. 1983) .....59, 60

*Citizens Action Coalition v. Northern Indiana Pub. Serv. Co.,*  
485 N.E.2d 610 (Ind. 1985) .....61, 66

*Citizens Util. Bd. v. Illinois Commerce Comm'n,*  
651 N.E.2d 1089 (Ill. 1995) .....56, 62

*Dept. of Pub. Advocate v. New Jersey Bd. of Pub. Utils.,*  
503 A.2d 331 (N.J.Super. Ct.App.Div. 1985) .....20

*In re Alabama Power Co.,*  
2011 WL 4826138 (Alab.PSC).....62, 64

*In re Cincinnati Gas & Elec. Co.,*  
71 P.U.R.4<sup>th</sup> 140 (Oh.PUC 1985) .....18

*In re Cleveland Elec. Illuminating Co.,*  
99 P.U.R.4<sup>th</sup> 407 (Oh.PUC 1989) .....16

<i>In re Pacific Gas &amp; Elec. Co.,</i> 99 P.U.R.4 <sup>th</sup> 141 (Cal.PUC 1988) .....	16, 17
<i>In the Matter of the Petition of N. States Power Co.</i> <i>d/b/a Xcel Energy for Approval of Competitive Res.</i> <i>Acquisition Proposal &amp; Certificate of Need,</i> 2014 WL 3401042 (Minn.PUC) .....	29, 30
<i>Office of Consumer Advocate v. Utils. Bd.,</i> 449 N.W.2d 383 (Iowa 1989) .....	60, 61
<i>Office of Consumer Advocate v. Util. Bd.,</i> 452 N.W.2d 588 (Iowa 1990) .....	20
<i>People's Org. for Washington Energy Resources v. Washington Util. and Transp. Comm'n,</i> 711 P.2d 319 (Wash. 1985).....	60, 61
<i>Re Application of Arizona Pub. Serv. Co.,</i> 2012 WL 1455090 (Az.CC).....	76, 77
<i>Re GASCO, Inc.,</i> 132 P.U.R.4 <sup>th</sup> 352 (Haw. PUC 1992).....	59
<i>Re Salem Nuclear Generating Station,</i> 70 P.U.R.4 <sup>th</sup> 568 (Pa. PUC 1985) .....	63
<i>Re U.S. WEST Communications, Inc.,</i> 1993 WL 542786 (Minn.PUC) .....	11, 70
<i>State of Missouri ex rel. Assoc. Natural Gas Co. v. Pub. Serv. Comm'n</i> 954 S.W.2d 520 (Mo.App. 1997) .....	52, 53, 63, 64
<i>Wisconsin Pub. Serv. Corp. v. Pub. Serv. Comm'n of Wisconsin,</i> 325 N.W.2d 867 (Wis. 1982).....	60, 61
 <b><u>New Mexico Statutes and Rules</u></b>	
NMSA 1978 §§ 62-1-1 to 62-6-28 and 62-8-1 to 62-13-15 (1909, as amended through 2013) (Public Utility Act).....	passim
NMSA 1978, § 62-6-14(A) (2009) .....	59, 71
NMSA 1978, § 62-9-1 (1967 version).....	21
NMSA 1978, § 62-9-1(B) (2005) .....	22, 70

NMSA 1978, § 62-9-5 (1983 version) .....21

NMSA 1978, § 62-9-6 (1967) .....22, 49

NMSA 1978, §§ 62-16-1 to -10  
(2004, as amended through 2007) (Renewable Energy Act) .....15

NMSA 1978, § 62-17-5(E) (2013)..... 31

1.2.2.20(B) NMAC .....16

1.2.2.20(B)(4) NMAC .....17

17.3.580 NMAC.....1, 52

17.7.3.12(B) NMAC .....23

**Other Authorities**

Hahne and Aliff, *Accounting for Public Utilities*, § 4.04[2]  
Matthew Bender, 1991) .....76

## I. INTRODUCTION

### A. Summary of Material Proceedings

On December 20, 2013, Public Service Company of New Mexico (“PNM”) filed its Application in this case requesting the following approvals:

(1) abandonment of San Juan Generating Station (“SJGS” or “San Juan”) Units 2 and 3 by December 31, 2017, with an accounting order allowing full recovery of the undepreciated investment in SJGS Units 2 and 3 as of the date of retirement through a regulatory asset amortized over twenty years with a carrying charge equivalent to PNM’s pre-tax weighted average cost of capital (“WACC”) on the unamortized balance;

(2) issuance of a certificate of public convenience and necessity (“CCN”) to include Palo Verde Nuclear Generating Station (“PVNGS”) Unit 3 as a supply resource to serve New Mexico retail customers effective January 1, 2018, at a value for ratemaking purposes of \$335 million (\$2,500/kW) and recovery of the costs associated with funding the decommissioning trust for PVNGS Unit 3 on a prospective basis;

(3) issuance of a CCN and any other necessary approvals for the acquisition of an additional 78 megawatts (“MW”) of capacity in SJGS Unit 4 effective January 1, 2015, at a value for ratemaking purposes of approximately \$52.5 million in exchange for an equal amount of capacity in SJGS Unit 3;

(4) recovery of the costs of selective non-catalytic reduction equipment (“SNCR”) together with balanced draft on SJGS Units 1 and 4 to be installed by January 31, 2016, not to exceed \$82 million, with any cost overruns recovered in rates only after a Commission determination in a future rate case that they were prudently incurred, using 17.3.580 NMAC (“Rule 580”) to guide the process;

(5) issuance of an accounting order allowing PNM’s cost of compliance with the Best Available Retrofit Technology (“BART”) determination for SJGS under the August 21, 2011, Federal

Implementation Plan (“FIP”) issued by the U.S Environmental Protection Agency (“EPA”) to be placed in a regulatory asset for future recovery in a rate case, with a determination in this proceeding that such costs are reasonable and were prudently incurred; and,

(6) issuance of an accounting order allowing PNM’s costs of litigating and negotiating an alternative to the FIP to be placed in a regulatory asset for future recovery in a rate case, subject to PNM demonstrating in that future rate case that the amount of costs incurred was reasonable and prudent, including the costs associated with this Application.

PNM stated that these approvals were either necessary for, or facilitate, compliance with environmental requirements under the Clean Air Act (“CAA”) for SJGS associated with a Revised State Implementation Plan (“Revised SIP”) issued by the New Mexico Environmental Improvement Board (“EIB”), which was pending approval by the U. S. Environmental Protection Agency (“EPA”).

On May 22, 2014, PNM filed a Motion for Leave to File Supplemental Testimony, informing the Hearing Examiner of certain developments affecting consideration of the original Application and the approvals sought. Specifically, PNM proposed to file supplemental testimony to address the following matters:

(a) Negotiations regarding revisions to SJGS continue and are now in mediation. Based on the current status of the negotiations, it has become evident that the additional capacity in SJGS Unit 4 proposed for certification would no longer be obtained through an exchange of an equivalent amount of capacity in SJGS Unit 3. Despite the fact that there would no longer be an exchange of capacity in SJGS Unit 3 for additional capacity in SJGS Unit 4, PNM was proposing the same valuation for its proposed acquired interest in Unit 4. Thus, the additional capacity in SJGS Unit 4 would still be valued at approximately \$52.5 million. Likewise, the amount of undepreciated

investment in SJGS Units 2 and 3 proposed to be amortized and recovered in rates would also remain at approximately \$205 million because some of the value of SJGS Unit 3 will essentially be attributed to the additional capacity in SJGS Unit 4. PNM would require an accounting order from the Commission establishing the proper valuation for book and ratemaking purposes for the additional SJGS Unit 4 capacity that will be acquired.

(b) There is a growing possibility that PNM will acquire an additional 132 MW capacity in SJGS Unit 4 rather than the proposed 78 MW. If that were to occur, PNM would apply for a CCN in a subsequent filing for the additional capacity over the 78 MW that had been the subject of this proceeding. PNM continued to request a CCN for an additional 78 MW of capacity in SJGS Unit 4 and the ratemaking principles and treatment for the additional capacity described in subparagraph 1(a), above. It is expected that the effective date for procurement of the additional capacity will be December 31, 2017. Any capital expenditures by PNM for SNCR, balanced draft and other capital improvements related to additional capacity in SJGS Unit 4, would be added to the requested rate base value of \$52.5 million.

(c) PNM further proposed that the value of any additional capacity in SJGS Unit 4 above 78 MW be included in the original valuation of the 78 MW such that the approximate \$52.5 million valuation would apply to all the additional capacity, whether 78 MW or 132 MW. Therefore, the amount of undepreciated investment in SJGS Units 2 and 3 in the approximate amount of \$205 million would also remain unchanged. The additional costs to PNM due to its increased ownership share in SJGS Unit 4 associated with installation of SNCR and balanced draft and other capital investments would be addressed in the subsequent filing.

(e) PNM's supplemental testimony also presented two new modeling scenarios, one for an additional 78 MW in SJGS Unit 4 and one for an additional 132 MW in SJGS Unit 4, that incorporate the following revisions:

(i) updated energy and demand forecast to reflect that PNM will not provide wholesale service to the City of Gallup after June 29, 2014, and to incorporate refinements to PNM's forecasting methodology;

(ii) updated information reflecting reduced solar prices resulting from bids received pursuant to a recent request for proposals;

(iii) updated solar resource modeling resulting from the Integrated Resource Plan ("IRP") process; and,

(iv) exhibits summarizing the modeling analyses, including net present value analysis, that show that PNM's proposed portfolio recommendation to comply with the Revised SIP remains the most reasonable and cost effective supply portfolio even with the updated and revised information and analysis.

The Motion was granted on June 11, 2014, with directions to file additional information by July 1, 2014, and supplemental testimony by July 15, 2014. Order (1) Partially Granting PNM Motion, as Supplemented, For Leave to File Supplemental Testimony, to Extend Procedural Schedule and for Shortened Response Time and (2) Denying PNM Motion for Leave to File Reply in Support of Motion for Leave to File Supplemental Testimony. PNM complied.

Staff and Intervenor testimony regarding PNM's Application as updated by the July 15 supplemental testimony confirming the changes anticipated by the May 22 filing was filed on August 29, 2014.

On September 25, 2014, PNM, Staff, the Attorney General and the New Mexico Industrial Energy Consumers (“NMIEC”) filed a Joint Motion notifying the Hearing Examiner of settlement discussions that would likely lead to a stipulation and requesting modification of the procedural dates to accommodate the settlement discussions. The Joint Motion was granted by Order dated September 29, 2014. The Stipulation, signed by Staff, PNM, the Attorney General, Western Resource Advocates (“WRA”), the New Mexico Independent Power Producers (“NMIPP”) and the Renewable Energy Industries Association (“REIA”), was filed on October 1, 2014. On October 14, 2014, NMIEC filed its Notice of Joinder in the Stipulation.

**B. The Stipulation is in the Public Interest and Should be Approved.  
(RESPONSE TO BRIEFING ORDER ISSUE NO. 1)**

The public policy in New Mexico favors settlement of disputes and using a cooperative approach in reconciling the interests of the parties. This is true even if all parties do not agree to the settlement. *Attorney General v. New Mexico Pub. Serv. Comm’n*, 1991-NMSC-028, ¶13, 111 N.M. 636 (“*Attorney General 1991*”). The Commission has clearly articulated protocols for the consideration of contested stipulations. Under the circumstances of this case where CCNs and approval of abandonment authority is involved, the public interest requires a demonstration that the Stipulation provides net benefits to customers and the public over what would have been the case in the absence of the Stipulation. The Stipulation must result in a better outcome than other feasible alternatives.

A stipulation provides net benefits if the benefits provided by the stipulation outweigh the costs or detriments of the stipulation. Cost mitigation provisions are beneficial in that they provide assurance against detriments, helping to demonstrate that a stipulation does result in net benefits to the public. Benefits do not have to be quantifiable to be considered in the weighing process. Non-quantifiable benefits may be even more important than quantifiable benefits.

PNM supports the Stipulation as written as providing net benefits to the public. PNM also does not oppose the inclusion of conditions to the CCN for the additional capacity in SJGS Unit 4 as testified to by PNM witness Olson to assure that the benefits of the Stipulation are retained once the SJGS ownership restructuring is completed among the Remaining Participants.

The Stipulation as a whole provides net benefits to the public in the ways that it seeks to resolve the issues in this proceeding, for example:

- (a) authorizing abandonment of SJGS Units 2 and 3 effective December 31, 2017;
- (b) providing for a reasonable sharing of the costs associated with the undepreciated investment in SJGS Units 2 and 3 between customers and shareholders;
- (c) granting a CCN for an additional 132 MW of capacity in SJGS Unit 4 at a reasonable value for ratemaking purposes to mitigate the undepreciated investment in SJGS Unit 3 in order to provide restructured ownership interests that will facilitate implementation of the Revised SIP;
- (d) granting a CCN to include 134 MW of Palo Verde Unit 3 in rate base at a valuation that provides net benefits to customers and properly balances their interests with the interests of shareholders;
- (e) denying recovery of costs incurred to comply with the FIP prior to execution of the Revised SIP Term Sheet;
- (f) denying recovery of costs associated with restructuring the Participation Agreement;
- (g) denying recovery of incremental fuel handling expenses in 2015 associated with the restructured ownership agreement;
- (h) denying recovery of an estimated \$13.6 million in additional San Juan common operating and maintenance (“O&M”) costs resulting from restructuring ownership interests;
- (i) providing performance standards for Palo Verde;

(j) providing for the equitable sharing of the costs associated with decommissioning Palo Verde Unit 3;

(k) insulating customers from certain costs in the event that SJGS Unit 4 must be retired in the future prior to full recovery of the net book value;

(l) providing that PNM's share of the reasonable and prudent costs of installing SNCR and balanced draft on San Juan Units 1 and 4, up to \$90.6 million, are recoverable in rates unless appropriately challenged in a rate proceeding, with PNM required to make an affirmative demonstration of reasonableness for cost overruns, if any. Ortiz Stip., pp. 10-12.

As will be demonstrated, the Stipulation meets all applicable legal requirements, is in the public interest and should be approved. The following discussion provides an analysis of how each substantive provision contributes to the Stipulation as a whole being in the public interest. *See, e.g., Ortiz Stip.*,<sup>1</sup> pp. 10-21.

Paragraphs 1-12 are for background and contextual purposes. Paragraph 15 reserved an issue for litigation in this proceeding that was not settled in the Stipulation. Paragraphs 35-39 are technical provisions. None of them are substantive provisions affecting the benefits provided by the Stipulation's settlement provisions, although paragraph 35 is designed to preserve certain provisions of the Stipulation despite accounting requirements.

The "Abandonment and CCNs" section of the Stipulation is comprised of paragraphs 13-17. Paragraph 13 provides that SJGS Units 2 and 3 shall be abandoned effective December 31, 2017, and permanently retired from providing service. There is no opposition in this case to this provision. There is general consensus that this provision provides substantial benefits for a

---

<sup>1</sup> Citations to initial testimony regarding the Stipulation, whether in support of or in opposition to, will be cited as "[Name] Stip.". Citations to rebuttal testimony will be identified as "[Name] Reb. Stip." Citations to pre-stipulation testimony will be identified as "[Name] Direct".

number of reasons. Abandonment of SJGS Units 2 and 3 saves customers money by avoiding the necessity of having to put costly SCR technology on all four units of SJGS in compliance with the FIP and, instead placing much less expensive SNCR on SJGS Units 1 and 4 in compliance with the Revised SIP. And, even as a less costly measure to comply with EPA's Regional Haze Rule requirements, it provides far greater environmental benefits than does the FIP. Darnell Stip., pp. 15-22; Van Winkle Stip., pp. 6-7.

With this agreement, it then becomes necessary to identify appropriate replacement power resources in order to demonstrate that the future public convenience and necessity allows the abandonment of SJGS Units 2 and 3, as will be discussed in more detail later in this Brief. Paragraph 14 addresses the issue of replacement power by providing that a CCN should be granted for an additional 132 MW of capacity in SJGS Unit 4, effective January 1, 2018, at an initial value for ratemaking purposes of \$26 million, which is accomplished by reducing the value of one of the units it will be replacing, SJGS Unit 3, by an equal amount. This provision is beneficial in that it provides partial replacement base load capacity to offset the loss of base load capacity from the units being abandoned and facilitates the San Juan ownership restructuring necessary for the unit retirements and the continued operation of Units 1 and 4. It is an existing resource which has provided reliable, low cost generation for decades. As an existing resource, it avoids construction and permitting risks for new plants. Even though additional costs such as the prorated costs associated with installation of SNCR and balanced draft increase the rate base value to \$358/kw, it is unlikely that any other resource could be obtained at that price. Ortiz Stip., pp. 26-28, 43; Olson Stip, pp. 9-10, 61-62; O'Connell Stip, pp. 17-19; Carrara Stip., pp. 23-26. Further, the acquisition of the 132 MW of additional capacity in SJGS Unit 4 preserves the availability of SJGS Units 1 and 4 as low cost, reliable generation for customers by

facilitating the San Juan ownership restructuring necessary in order to comply with the Revised SIP. Darnell Stip, pp. 26-27; Olson Stip, p. 15.

Paragraph 16 describes the possibility that, in a future case, the Commission may consider a possible transfer of value between SJGS Unit 4 and SJGS Unit 1. The Signatories have not agreed that this value swap should be approved by the Commission, only that it may consider whether it is in the public interest in a future case, with the Signatories reserving their rights to take whatever position they deem appropriate should the issue arise. There is nothing detrimental about this provision. Any benefits that may be derived from identification of this possible value transfer would be determined in a future case in which the issue arises. Carrara Stip., pp. 27-28.

Paragraph 17 continues the process of identifying cost-effective replacement power resources by providing for a CCN for PNM's 10.2% ownership share of Palo Verde Unit 3, with a capacity of 134 MW, effective January 1, 2018, to be included in rate base at an initial value of \$221.1 million, i.e., \$1650/kW. Associated transmission assets are also to be included in rate base. As with the additional capacity in SJGS Unit 4, Palo Verde Unit 3 provides a needed replacement resource to allow SJGS Units 2 and 3 to be abandoned. It provides partial replacement base load capacity to offset the loss of base load capacity from the units being abandoned and contributes to a well-diversified resource portfolio. It is an existing nuclear generation resource which is relatively inexpensive to operate and has zero greenhouse gas and other air emissions. As an existing resource, it avoids construction and permitting risks for new plants. It is a high capacity factor plant with an excellent operational track record. Ortiz Stip., pp. 26-28, 42-43; Olson Stip, pp. 66-67; O'Connell Stip, pp. 21-22; Carrara Stip., pp. 30-32.

The “Undepreciated Investment in Retired Plant” section is comprised of paragraphs 18 and 19. Paragraph 18 essentially adopts the recommendation contained in the pre-filed direct testimony of James R. Dittmer on behalf of the Albuquerque Bernalillo County Water Utility Authority (“ABCWUA”). Ortiz Stip., pp. 16-17. Rather than authorizing PNM to fully recover its undepreciated investment in the retired SJGS Units 2 and 3, the Signatories have agreed that PNM should be authorized to recover only half the amount, after deducting \$26 million from the value of SJGS Unit 3 in recognition of the initial value placed on the additional capacity in SJGS Unit 4 PNM is acquiring. PNM has agreed to absorb fifty percent of the undepreciated investment in SJGS Units 2 and 3 at the time of abandonment despite the fact that it has made a strong case for full recovery, as demonstrated in Section XI of this Brief. The Stipulation provides that the amount authorized for recovery should be placed in a regulatory asset to be amortized over a twenty-year period with a carrying charge equal to PNM’s pre-tax weighted average cost of capital (“WACC”) (as it may be modified from time to time by Commission orders in rate cases) on the unamortized amount. Paragraph 18 also contributes significantly to the net benefits to the public provided by the Stipulation. PNM’s case for full recovery of its undepreciated investment in SJGS Units 2 and 3 was a strong one. As such, this provision is beneficial to customers by eliminating the possibility of full recovery. *See New Mexico Indus. Energy Consumers v. New Mexico Pub. Serv. Comm’n*, 1986-NMSC-059, ¶ 34, 104 N.M. 565 (“*NMIEC 1986*”) (Commission possessed the legal authority to allow entire investment in excess plant in rate base so that decision to adopt inventorying method was more in the interest of customers than either full inclusion or disallowance from rate base of excess capacity); NMPRC Case No. 08-00078-UT, Certification of Stipulation, p. 104 (Nov. 24, 2008), *approved* Final

Order Partially Approving Certification of Stipulation (Dec. 11, 2008) (“08-78 CS”) (utility’s agreement to not seek cost recovery arguably allowed under law is a benefit to customers).

The cost-sharing approach included in the Stipulation of providing fifty percent recovery amortized over twenty years with a carrying charge equal to PNM’s pre-tax WACC on the unamortized balance is less costly to customers than other sharing mechanisms such as allowing a return of but not on the investment. Monroy Stip., pp. 21-22. In addition, using a twenty-year amortization period rather than the remaining depreciable lives reduces the overall costs that customers will have to pay by eliminating carrying charges for the additional sixteen years while mitigating rate impacts from a shorter recovery period. It provides a better matching of cost and benefits. As such it represents a proper balancing of competing considerations and is beneficial to the public. Sategna Stip, pp. 9-10; Gunter Reb. Stip., p. 17; *Re U.S. WEST Communications, Inc.*, 1993 WL 542786 (Minn.PUC).

Paragraph 19 provides that PNM will not recover any undepreciated investment associated with the \$26 million initial value placed on the additional capacity in SJGS Unit 4, nor any additional investment related to that capacity, if SJGS Unit 4 is abandoned with undepreciated investment remaining on PNM’s books. This provision is intended to insulate customers from any risk that future coal regulations might make this additional capacity uneconomic. PNM’s customers will therefore immediately benefit from the added value that the additional San Juan Unit 4 capacity brings to PNM’s resource portfolio while being insulated from future risk associated with this capacity being retired prematurely. Ortiz Stip., pp. 17-18. In addition, regardless of possible incentives or disincentives that arguably may result from this provision, net benefits exist by providing certainty about how cost recovery associated with early retirement of SJGS Unit 4 will be addressed for the additional capacity. 12 Tr. 2714, 2759

(1/21/15) (Crane); Gunter Reb. Stip., p. 11; *see* 08-78 CS, p. 104, (agreeing to not seek cost recovery arguably allowed under law is a benefit).

Paragraphs 20-27 comprise the section entitled “Palo Verde Performance Standards; Sharing of Costs Related to Palo Verde Unit 3”. These paragraphs were included in response to concerns of some of the parties regarding future risks associated with Palo Verde Unit 3 related to future performance and decommissioning liabilities. Paragraphs 20-21 establish a performance capacity factor benchmark of seventy-five percent for the three units of Palo Verde, applicable on a plant-wide basis for a seven-year period commencing January 1, 2018. Paragraph 22 provides that, if Palo Verde fails to meet that benchmark in any calendar year, PNM must bear the incremental cost of the amount of replacement power necessary to bring the performance up to the benchmark. Paragraph 23 describes the limited circumstances involving unplanned outages where the benchmark will not apply. Paragraph 24 describes the process to determine the cost impact when the performance benchmark does not apply. Although Palo Verde has been an excellent performer, these provisions provide insurance against unforeseen outages that may occur. Palo Verde Units 1 and 2 do not currently have any specific performance criteria. The provisions protect customers from not only imprudent operations but other events that may not be attributable to imprudence. The provisions do not in any way interfere with the Commission’s authority to deny recovery of imprudent costs. Carrara Stip., pp. 35-36; Carrara Reb. Stip., p. 27. As such these provisions contribute to the benefits provided by the Stipulation.

Paragraphs 25 and 26 contain provisions related to the nuclear decommissioning trust (“NDT”) for Palo Verde Unit 3 and how costs will be equitably shared between customers and shareholders. Paragraph 27 provides that PNM will not recover in rates costs associated with the

storage and disposal of spent fuel from the operation prior to January 1, 2018, of Palo Verde Unit 3. This assures that customers will only pay costs attributable to the time when Palo Verde is certified to provide service to them. In addition, by reducing by half customers' responsibility to pay annual decommissioning costs in excess of current estimates, customers are provided a measure of protection from unanticipated increases in decommissioning costs. Further, the Palo Verde Unit 3 decommissioning trust fund will be increased prior to certification by an \$11 million shareholder contribution to bring the level of funding for that unit into parity with the level of funding for Palo Verde Units 2 and 3. Upon decommissioning, cost responsibility will be shared pro-rata between shareholders and customers based on the number of years that the unit has operated as a jurisdictional asset. Accordingly, customers' maximum exposure for decommissioning costs, assuming the unit operates as jurisdictional asset from 2018 through the end of its operating license, is about fifty percent of the total. Horn Stip., pp. 6-15; Gunter Stip., pp. 30-33.

The "Miscellaneous Issues" section is comprised of paragraphs 28-39 and completes the Stipulation. Paragraph 28 describes the ratemaking treatment of the costs of the SNCR Project<sup>2</sup> at SJGS Units 1 and 4. This is beneficial to the public because it places a "soft cap" on the amount of costs for SNCR and balanced draft that are subject to the traditional presumption of reasonableness. In the absence of this provision, under traditional ratemaking practices, PNM would have been able to rely on the presumption of reasonableness for whatever it ultimately cost, regardless of overruns from current estimates. Ortiz Stip., p. 50; *PNM Gas Servs. v. New Mexico Pub. Util. Comm'n*, 2000-NMSC-012, ¶ 72, 129 N.M. 1; *Attorney General v. New Mexico Pub. Serv. Comm'n*, 1984-NMSC-081, ¶ 8, 101 N.M. 549 ("*Attorney General 1984*").

---

<sup>2</sup> References to "SNCR Project" refer to the installation of both SNCR and balanced draft.

Paragraph 29 reflects the agreement of the Signatories that PNM will not pursue, in this case or future cases, the accounting orders requested in its Application to allow future recovery of regulatory assets associated with \$13.6 million in additional San Juan common O&M costs, \$5.3 million of costs associated with compliance with the FIP and expenses incurred related to Regional Haze Rule compliance filings and restructuring the SJPPA. PNM will also not seek to recover \$1.0 million of incremental fuel handling expenses incurred in 2015 resulting from the San Juan restructured ownership agreement. This provision will require PNM to take a write-off of approximately \$19.8 million and represents a clear savings to customers. Ortiz Stip., pp. 49-50; Gunter Stip., pp. 27-28.

Paragraph 30 provides customers with the benefit of \$3.0 million in payments received by PNM from the Department of Energy (“DOE”) related to storage of spent fuel for Palo Verde Unit 3 prior to certification of the unit as a jurisdictional asset. The \$3.0 million in payments will be credited over a two-year period beginning January 1, 2018. It will be included as a reduction in PNM’s FPPCAC (or otherwise as a credit in rates if a FPPCAC is not in effect). Sategna Stip., p. 18. Because this payment relates to the time when Palo Verde Unit 3 was non-jurisdictional, this is a benefit to customers that would not be realized in the absence of the Stipulation.

Paragraphs 31 and 32 provide for the issuance by PNM of requests for proposal (“RFPs”)—one in 2015 for up to 50 MW of additional renewable energy resources and one in 2018 for both conventional supply-side resources and renewable energy resources. If the 2015 RFP identifies resources that are cost-effective as system resources, PNM will file for Commission approval to acquire those resources. If PNM determines that none of the identified resources are cost-effective for inclusion by 2017, it will file a report supporting its conclusion

with the Commission. Signatories may take whatever position with regard to the report they deem appropriate. The 2018 RFP will be designed to identify additional resources consistent with those determined to be necessary in the 2020-2022 timeframe in the four year action plan contained in PNM's 2017 IRP. Because system resources are not subject to the Reasonable Cost Threshold ("RCT") under the Renewable Energy Act ("REA") and provide another avenue in addition to Renewable Portfolio Standard ("RPS") compliance to add cost-effective resources, these provisions are beneficial to the public. Crane Stip., p. 16; 16 Tr. 3871-3876 (1/27/15) (Van Winkle).

Paragraph 33 resolves potential issues involved in PNM's acquisition of ownership interests in SJGS Unit 3 that it does not currently have, immediately prior to retirement of SJGS Unit 3. Since that additional SJGS Unit 3 ownership interest will not be placed into service, the Signatories agree that a CCN is not required for the acquisition, but agree that a CCN should be granted if the Commission determines that one is required. In addition PNM agrees that it will not charge customers for any incremental costs arising from the acquisition of additional interests in SJGS Unit 3. Thus, this provision is beneficial in protecting customers from any unforeseen costs associated with SJGS Unit 3 that might arise.

Paragraph 34 addresses the procurement of renewable energy credits ("RECs") from customer-owned solar distributed generation ("DG") during 2017-2019. PNM agrees that it will propose an extension of its current DG REC procurement program that is consistent with PNM's RPS, resource diversity requirements and the RCT to implement this agreement, after the program expires at the end of 2016. Crane Stip., p. 16.

Finally, it is important to note that the Stipulation as a whole provides significant additional benefits in that it has been well-received in the investment community, indicating that approval

will not have an adverse impact on PNM's credit ratings, protecting PNM's access to capital on favorable terms, to the ultimate benefit of customers. Horn Stip., pp. 18-26.

## **II. A CONTESTED STIPULATION WILL BE APPROVED WHERE IT RESULTS IN A REASONABLE RESOLUTION OF THE ISSUES IN THE CASE**

### **A. Commission Standards for Review of a Contested Stipulation**

The Commission's authority to consider and approve contested stipulations is well-established. 1.2.2.20(B) NMAC. In Case No. 2087 (involving a contested stipulation), the New Mexico Public Service Commission ("NMPSC") conducted an extensive analysis of the Commission's authority to consider and approve contested stipulations and established the standards by which stipulations, including contested stipulations, would be analyzed and either approved or rejected. *Re Pub. Serv. Co. of New Mexico*, 110 P.U.R.4<sup>th</sup> 69, 82-85 (NMPSC 1990) ("*Case 2087*"), *aff'd*, *Attorney General 1991*.

Among other cases, the NMPSC relied upon a 1989 Ohio Public Utilities Commission decision. *Case 2087* (citing *In re Cleveland Elec. Illuminating Co.*, 99 P.U.R. 4<sup>th</sup> 407, 449-450 (Oh.PUC 1989)). The NMPSC noted that "the ultimate question to be answered by the Commission is whether, in light of the record, the Stipulation is reasonable." *Id.* (citation and quotation omitted). Relevant factors in determining the reasonableness of a contested stipulation are whether: 1) the settlement is a "product of serious bargaining among capable, knowledgeable parties"; 2) the settlement benefits ratepayers and the public interest; and 3) the settlement does not violate important regulatory principles. *Id.* (citation omitted).

The NMPSC also discussed a California Public Utilities Commission decision regarding the fair, just and reasonable standard. *Id.* (citing *In re Pacific Gas & Elec. Co.*, 99 P.U.R.4<sup>th</sup> 141, 173 (Cal.PUC 1988)). The California Commission considered numerous factors, including

the strength of the applicant's case, the risk, expense, complexity, and likely duration of further litigation, the extent of discovery so opposing parties can gauge the strength and weaknesses of their cases, the stage of the proceedings, and the experience and views of counsel. *Id.* (citation omitted).

The NMPSC summarized the applicable standard of review for determining if a contested stipulation should be approved as follows: (a) the parties and Staff had notice and an opportunity to be heard on the stipulation; (b) substantial evidence in the record as a whole supports the Commission's conclusion that the stipulation is fair, just and reasonable and in the public interest; and (c) the stipulation is in accordance with applicable law. *Id.* at 85. The New Mexico Public Utility Commission ("NMPUC") subsequently confirmed these standards. *Re Pub. Serv. Co. of New Mexico*, 157 P.U.R. 4<sup>th</sup> 540, 549-550 (NMPUC Case No. 2567, 1994) ("*Case 2567*").

**B. Approval of a Contested Stipulation Based on the Record as a Whole Does Not Require a Litigated Resolution of Each Issue**

The proponents of the Stipulation have the burden of supporting the Stipulation with sufficient evidence and legal argument to allow the Commission to approve it. 1.2.2.20(B)(4) NMAC; *Case 2087* at 84; *Case 2567* at 550. The Commission may adopt a proposed contested stipulation if substantial evidence in the record as a whole supports the Commission's balancing of interests and determination that the stipulation is reasonable. The touchstone is the reasonableness of the ultimate decision. *Case 2087* at 82-85; *Case 2567* at 549-550. The New Mexico Supreme Court has stated that the substantial evidence standard requires only that a reasonable person could have decided as the fact finder found. It does not require that a preponderance of the evidence support the finding. The Court will consider contrary evidence only to determine if the contrary evidence renders incredible the evidence relied on by the

Commission. *Otero County Elec. Coop., Inc. v. New Mexico Pub. Serv. Comm'n*, 1989-NMSC-033, ¶ 14; 108 N.M. 462.

Commission practice does not require a demonstration that each and every element of the stipulation would be adopted after a fully-litigated case. The NMPSC held in *Case 2087* that the purpose of stipulations is to avoid that very exercise.

“The numbers in the stipulation are the result of negotiation and compromise and, as such, are obviously not subject to empirical validation. The proposal is that they be accepted in lieu of whatever would have resulted from [the] lengthy, expensive process of fully litigating this matter....*The Commission's purpose here is not to second-guess the collective judgment of the parties supporting the stipulation, but rather to determine if the settlement, as a package, represents a reasonable resolution of this case.*”

*Case 2087* at 86 (emphasis supplied by PSC), quoting *In re Cincinnati Gas & Elec. Co.*, 71 P.U.R. 4<sup>th</sup> 140, 150 (Oh.PUC 1985); *but cf.* NMPRC Case No. 10-00086-UT, Final Order Partially Approving Certification of Stipulation, ¶ 20 at 12-13 (July 28, 2011) (“*Case 10-86*”) (impermissible “second-guessing” does not include modifications to make a stipulation just and reasonable if substantial evidence does not show that stipulation is just and reasonable without the modifications).

In *Attorney General 1991*, the New Mexico Supreme Court clearly set forth that the standard of review for a Commission decision adopting a contested stipulation was whether the Commission acted capriciously, whether the decision was supported by substantial evidence and whether the determination was within the scope of the Commission's authority. The Court stated that the Commission

can adopt a contested stipulation by, first, affording any non-stipulating party an opportunity to be heard on the merits of the stipulation (i.e., whether it is a fair and reasonable resolution of the controversy before the Commission) and second, making an independent finding, supported by substantial evidence in the record, that the stipulation does indeed resolve the matters in dispute in a way that is fair, just and reasonable and in the public interest.

*Attorney General 1991*, 1991-NMSC-028, ¶ 15. The Court also reviewed an NMPSC decision approving a contested stipulation in *NMIEC 1986*. In that case the Court also tested the NMPSC's decision by conducting a substantial evidence review. *NMIEC 1986*, 1986-NMSC-059, ¶¶ 32-36.

**C. The Withdrawal of Certain Signatories Does Not Affect the Standards for Approval of Contested Stipulation (Briefing Order Issue No. 2)**

Although three of the original Signatories to the Stipulation withdrew their support for the Stipulation after receiving the benefits of their bargaining, ostensibly due to developments that arose after filing of the Stipulation, there remains a Stipulation supported by the Staff, PNM, the Attorney General and NMIEC that has been the subject of extensive hearings. The withdrawals do not change the fact that there is a contested stipulation to be evaluated by the Commission consistent with the factors and principles described above. It should be noted that the *Case 2087* stipulation was supported only by the Staff and PNM but the New Mexico Supreme Court affirmed the authority of the NMPSC to consider it as a contested stipulation. *Attorney General 1991*, 1991-NMSC-028, ¶ 9.

**III. THE COMMISSION DOES NOT HAVE AUTHORITY TO MODIFY A STIPULATION OVER THE OBJECTION OF STIPULATING PARTIES.**

There is a strong public policy favoring settlements. *Attorney General 1991*, 1991-NMSC-028, ¶ 13; *NMIEC 1986*; *Case 2567*; *Case 2087*. Stipulations are contracts entered into by parties which represent mutual compromises to reach an overall agreement. If a stipulation is changed by the Commission over the objection of parties to the stipulation, the parties have not received the benefit of their bargain.

...[P]arties to a dispute are in the best position to determine how to resolve a contested matter in a way which is least disadvantageous to everyone. In

recognition of this principle, courts will strain to give effect to the terms of a settlement wherever possible. It follows that any action which would have the effect of vitiating the provisions of a particular settlement agreement and the concomitant effect of undermining public confidence in the settlement process in general, should not be countenanced. *Department of Pub. Advocate v. New Jersey Bd. of Pub. Utils.*, 206 N.J.Super. 523, 503 A.2d 331, 333-34 (App.Div. 1985).

There are no New Mexico court cases directly addressing the question of the Commission's authority to modify stipulations over the objections of the signatories. The concurring opinion of Justice Serna (joined by Justice Baca) in *Attorney General v. New Mexico Pub. Util. Comm'n*, 2000-NMSC-008, ¶ 17, 128 N.M. 747 ("*Attorney General 2000*"), comes closest. The concurring opinion quoted favorably from *Office of Consumer Advocate v. Utils. Bd.*, 452 N.W.2d 588, 594-595 (Iowa 1990) (stating that "[w]hile the [Utilities] Board is free to reject the stipulation," the Board has "no power to alter, amend, contradict, delete, or go beyond the terms of a stipulation") and from *Dept. of Pub. Advocate*, 503 A.2d at 335-36 (stating that the Board's power to modify its order "does not, in our view, include the authority to modify the stipulation in contravention of the express terms of the agreement over the objection of one party"). The majority opinion reversed the NMPUC for modifying the stipulation, without addressing the Commission's authority to do so, holding that substantial evidence did not exist to support the Commission's decision. *Attorney General 2000*, 2000-NMSC-008, ¶¶ 13-15.

The Commission has recognized the limits of its power regarding modification of stipulations. In NMPRC Case No. 08-000273-UT ("*Case 08-273*"), the Commission ruled that it would approve the stipulation filed in that case on the condition that the signatories agreed to three amendments. *Case 08-273*, Final Order Conditionally Approving Stipulation at 37-39 (May 28, 2009). The signatories did not oppose two of the amendments and, after rehearing, the Commission withdrew its ruling regarding the third amendment objected to by the signatories. *Case 08-273*, Order on Rehearing at 4-5 (June 18, 2009); accord *Case 10-86*, ¶ 21 at 13 (parties

should be given opportunity to amend stipulation in accordance with modifications determined by the Commission in order to provide opportunity to preserve benefits unachievable outside the stipulation).

**IV. APPROVAL OF APPLICATIONS FOR CCNS AND FOR AUTHORITY TO ABANDON PUBLIC UTILITY PLANT IS BASED ON A NET BENEFITS ANALYSIS.**

In Case Nos. 1891/1892, the NMPSC considered applications by Southern Union Company (“Southern Union”) and PNM for the approvals necessary for Southern Union to sell its New Mexico gas utility assets to PNM. Southern Union operated its New Mexico gas utility assets as a division, doing business as Gas Company of New Mexico. *Re Southern Union Company*, 64 P.U.R.4th 17, 19 (NMPSC 1984). Because the transaction involved a sale of assets, the approvals required included authorization for Southern Union to abandon its service in New Mexico pursuant to NMSA 1978, Section 62-9-5 (1983 version) and the issuance of a CCN to PNM to operate the gas utility assets being transferred by Southern Union, pursuant to NMSA 1978, Section 62-9-1 (1967 version). *Southern Union*, 64 P.U.R.4th at 23. The subsequent amendments to the various sections of the Public Utility Act (“PUA”) are not relevant for purposes of this analysis. In analyzing what standards to apply for approvals for CCNs and abandonment authority, the NMPSC noted that a “public convenience and necessity” standard was applicable. The NMPSC held:

...the public convenience and necessity standard demands an overall finding that the proposed abandonment of service and issuance of a new certificate will result in generally more effective service at lower cost than would occur in the absence of the requested commission action. 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 of service and issuance of a new certificate are granted.

*Re Southern Union*, 64 P.U.R.4th at 24; *accord* NMPRC Case No. 13-00004-UT, Final Order on Recommended Decision (June 26, 2013), *adopting* Recommended Decision at 4. In evaluating

whether net benefits are provided, benefits to customers can be divided into two categories: quantifiable benefits and unquantifiable benefits. An important consideration in the evaluation is that quantifiable benefits are not necessary and may be less important than unquantifiable benefits. As stated in *08-78 CS*: “[T]he Commission has made clear that ‘[b]y their very nature unquantifiable benefits and costs are not subject to a dollar valuation but, nevertheless, are every bit as important, or more so, as quantifiable benefits.’” *08-78 CS* at 101 (Nov. 24, 2008), adopted by Final Order Partially Approving Certification of Stipulation (December 11, 2008).

**A. Standards for Approval of a CCN and Relationship with IRP Rule (Briefing Order Issue No. 3)**

In exercising its authority to issue CCNs in accordance with the public convenience and necessity standard, the Commission may explore alternatives since it would not be in the public interest to issue a CCN that met a need but was “the worst among a range of alternatives.” NMPUC Case No. 2382, Recommended Decision of the Hearing Examiner, p. 49 (July 5, 1995), *adopted* Final Order Approving Recommended Decision (Nov. 20, 1995). The Commission may issue a CCN as requested, refuse to issue the CCN, or issue it for the operation of only a portion of the plant, and may attach to the CCN terms and conditions in harmony with the PUA as required by the public convenience and necessity in the Commission’s judgment. NMSA 1978, § 62-9-6 (1967). In addition the Commission is required to determine the ratemaking treatment and principles to be applied to the certified facilities in future rate cases if a utility requests that the Commission make that determination. NMSA 1978, § 62-9-1(B) (2005).

In applying the general standard for issuance of a CCN, Staff traditionally has considered the following factors in its review of CCN applications: (1) there is a need for the facility; (2) the facility is the most economical choice among the feasible alternatives; (3) no environmental violations are noted;

and, (4) no valid public opposition is received or the applicant is able to mitigate valid public concerns and impacts, thus making the project in the public interest. Ortiz Stip., pp. 38-39.

The IRP Rule requires that a utility's CCN application must demonstrate consistency with the utility's most recent IRP that has been accepted by the Commission, or demonstrate that material changes have occurred which warrant a different course of action. 17.7.3.12(B) NMAC. In this case the latest accepted IRP was filed in 2008 and is out of date and irrelevant. In particular, the approval of the Revised SIP by the EIB and the EPA constitutes a material change from past IRPs that warrants deviation from them. Ortiz Stip., p. 39. PNM's 2014 IRP was the subject of protests and the Commission has decided that it should not be accepted without a hearing to determine its compliance with the IRP Rule. However, the Commission has held the protest proceedings in abeyance pending the determinations in this case and in Case No. 14-00158-UT, PNM's renewable portfolio procurement case. NMPRC Case No. 14-00228-UT, Initial Order, ¶¶ A, B, pp. 10-11 (Aug. 13, 2014).

The public convenience and necessity standard also applies to applications for abandonment authority. The Commission has stated that "...an applicant for abandonment must make a factual showing that the proposed abandonment is consistent with the present and future public convenience and necessity, and that the public interest otherwise will in no way be disserved by the proposed abandonment." *Re Pub. Serv. Co. of New Mexico*, 119 P.U.R.4<sup>th</sup> 48, 51 (NMPSC 1990, Case No. 2296), *aff'd Pub. Serv. Co. of New Mexico v. New Mexico Pub. Serv. Comm'n*, 1991-NMSC-083, 112 N.M. 379. To satisfy this factual showing, the Commission articulated what is known as the *Commuters' Committee* factors. These factors are: (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. The

Commission's test is a flexible one that can and should be adapted to meet the specific facts and circumstances being evaluated. *Id.* Therefore, in some cases one or more of these factors may not be relevant and other relevant factors may be identified.

**V. ABANDONMENT OF SJGS UNITS 2 AND 3 IS IN THE PUBLIC INTEREST  
BECAUSE THE STIPULATION IDENTIFIES AND PROVIDES FOR ADEQUATE,  
RELIABLE AND COST-EFFECTIVE REPLACEMENT POWER.**

The record is clear that the Stipulation meets the *Commuters' Committee* factors so that abandonment of SJGS Units 2 and 3 are in the public interest. *E.g.* Ortiz Stip., pp. 22-28; Carrara Stip., pp. 11-16. No party opposed the abandonment of SJGS Units 2 and 3. Stipulation, ¶10. Because the energy and capacity from those two units are needed to meet customer demand, replacement power must be identified and in service by January 1, 2018. PNM has already received a CCN for 40 MW of utility-owned solar capacity in NMPRC Case No. 14-00158-UT to serve as a cost-effective system resource. This capacity is needed regardless of the abandonment of SJGS Units 2 and 3, but will nonetheless provide replacement power. PNM's resource modeling has identified a 177 MW gas turbine as another future power source to replace the abandoned capacity. However, while that plant has been identified as part of a cost-effective portfolio replacement resources, it is not at issue in this case since PNM will file an application for a CCN for that resource once plans are firmed up. O'Connell Stip., p. 43.

**A. It is in the Public Interest to Predicate Abandonment of SJGS on the  
Acquisition of Replacement Power as Stipulated**

To determine what would have occurred in the absence of the requested abandonment authority and resulting need for CCNs for replacement power, one must look to the EPA's FIP which required that SCR technology be installed on all four units of San Juan. Installation of emission controls as required by environmental regulators does not require prior approval of the Commission. Therefore, PNM could have proceeded to install SCR on all four units to allow

them to operate in compliance with the FIP. PNM could not have chosen to avoid FIP compliance by discontinuing SJGS operations without prior approval of the Commission to abandon service from SJGS. The record is clear that the abandonment of SJGS Units 2 and 3 and the CCNs for replacement power identified in the Stipulation provide reliable service at lower cost than compliance with the FIP.

The Stipulation identifies 134 MW of Palo Verde Unit 3, representing PNM's 10.2% ownership interest in that unit, and 132 MW of additional capacity in SJGS Unit 4, representing PNM's proposed acquisition of the ownership interests of exiting California owners, as replacement power resources for which CCNs should be granted in this case with rate base valuations determined as provided in the Stipulation. Stipulation, ¶¶ 14, 17. PNM's generation resource modeling identifies these two resources as components of the most cost-effective resource portfolio to serve customers beginning in 2018, properly considering risk and reliability in addition to cost. PNM's resource modeling used an IRP approach consistent with the Commission's IRP Rule to develop the portfolio. O'Connell Stip., pp. 27-38. Consistent with the holding in NMPUC Case No. 2382, PNM considered other possible alternatives but none were as beneficial and protective of customer interests as the Stipulation portfolio. O'Connell Stip., pp. 38-39; O'Connell Reb. Stip., PNM Ex. PJO-2 Rebuttal Stip.; *see also*, Commission Ex. 4.

The issues raised about PNM's Strategist® runs provided in support of the Application regarding inclusion of capital expenditures during the twenty-year planning period and the use of incorrect fuel costs were addressed and corrected in the Strategist® modeling performed in support of the Stipulation, without any change in the conclusion that the Stipulation portfolio is the most cost-effective. O'Connell Stip., pp. 14-16; O'Connell Reb. Stip., pp. 11-13;

Dauphanais Reb. Stip., p. 5. Other concerns raised about PNM's Application by the Signatories to the Stipulation have been satisfied by the Stipulation as a whole or rebutted in the record. Carrara Reb. Stip., p. 23; Dauphanais Stip., pp. 37-38; Dauphanais Reb. Stip., p. 5; O'Connell Reb. Stip, pp. 36-41; Crane Supp. Reb. Stip., pp. 4-8; 12 Tr. 2765 (1/21/15) (Crane).

PNM witness O'Connell acknowledged that many changes in portfolio modeling occurred between the time of the original Application and the hearing, including some future resource additions. But he pointed out that, despite all the changes, Palo Verde Unit 3 and additional capacity in SJGS Unit 4 continued to be confirmed as part of the most cost-effective replacement portfolio. He pointed out that such a result demonstrated that the solution was "robust", i.e., that the solution continues to perform well over many different scenarios and assumptions. 5 Tr. 994-995, 1001 (1/9/15) (O'Connell); 6 Tr. 1131 (1/12/15) (O'Connell).

PNM performs its resource modeling to serve New Mexico customers and thus does not include the potential for wholesale market transactions because to do so could change the resource mix and subject customers to additional risk due to volatile market prices. O'Connell Stip., pp. 13-14. However, when the additional value associated with the potential for profitable off-system sales is taken into account, the cost-effectiveness of the Stipulation portfolio increases. 9 Tr. 1022, 1042-1046 (1/9/15) (O'Connell); O'Connell Reb. Stip., pp. 13-15.

**B. Alternative Proposals for Abandonment Without the Stipulated Replacement Power Are Not in the Public Interest**

One of the alternatives considered by PNM was a four unit shutdown of SJGS. Although New Energy Economy ("NEE") witness Fisher claimed that a four unit shutdown was less costly than the Stipulation portfolio, he failed to include in his modeling consideration of reliability and risk resulting from a portfolio that added such large amounts of renewable energy in such a short period of time. 9 Tr. 2031-2032 (1/15/15); O'Connell Reb. Stip., pp. 17-20. Further, Dr. Fisher

improperly applied the Strategist® model to come up with his cost comparisons. For example, he attributed benefits to the four unit shutdown that are not applicable or available under that scenario. Mr. O’Connell pointed out that the raw Strategist® runs must be adjusted to account for the accurate and applicable costs attributable to each of the different scenarios. 5 Tr. 916-917 (1/9/15) (O’Connell). By including identical costs in each of his comparison scenarios, even where the costs associated with the scenarios were different, Dr. Fisher failed to compare alternatives on a comparable and consistent basis. As testified to by NMIEC witness Dauphanais, comparison on a comparable and consistent basis as required by the IRP Rule means that each scenario must be modeled using the costs that are applicable and attributable to each scenario, not manipulating the scenarios to provide cost benefits that don’t exist, just because they exist for other scenarios. 11 Tr. 2520, 2522 (1/20/15) (Dauphanais); *accord* 5 Tr. 919-920, 1005-1006 (1/9/15) (O’Connell)

Further, Dr. Fisher simplistically assumed that “raw” Strategist® runs provided the final answer with regard to cost-effectiveness, though he admitted that Strategist®, as a capacity expansion model, has limitations when modeling plant retirements. 9 Tr. (1/15/15) (Fisher); *see also* 5 Tr. 917-918 (1/9/15) (O’Connell). Additional analyses must be conducted after getting the raw Strategist® runs before a proper resource modeling exercise can be said to have been conducted. 11 Tr. 2519-2520 (1/20/15) (Dauphanais); 6 Tr. 1242-1243 (1/12/15) (O’Connell). In addition, cost is not the only factor that must be considered in selecting a resource portfolio. Reliability is an important factor, e.g., how the portfolio is impacted by operating reserves or frequency balancing requirements. 6 Tr. 1162-1163 (1/12/15) (O’Connell). However, in recommending that the Commission order PNM to file for abandonment of all four units of SJGS units, Dr. Fisher did not take into consideration the implications of that action for service

reliability. 9 Tr. 2031-2032 (1/15/15) (Fisher). As a practical matter neither the raw Strategist® runs nor Mr. Van Winkle's resource model incorporated reliability factors. Van Winkle Stip., Ex. DVW OST-4, p. 3; 16 Tr. 3890 (1/27/15) (Van Winkle). In any event, NEE's other resource modeling witness, Mr. Van Winkle, admitted that it was too early to pursue a four unit shutdown and much more work needed to be done before considering it. 15 Tr. 3702-3710 (1/26/15) (Van Winkle). Thus, Dr. Fisher's analyses should be disregarded. Ms. Crane agreed that a four unit shutdown was not preferable, given the substantially higher near term revenue requirement impacts. 12 Tr. 2796-2799, 2837-2841 (1/21/15) (Crane); Monroy Stip., PNM Ex. HEM-10 Stip; *see also* 5 Tr. 938-939 (1/9/15) (O'Connell); Commission Ex. 4, PNM Ex. 2, Revised Bench Request. Further, it would be very difficult to acquire enough replacement power for a four unit shutdown by 2018. 5 Tr. 913 (1/9/15) (O'Connell). And, a four unit shutdown at the end of 2017 is not compatible with the Revised SIP because SNCR must be placed on Units 1 and 4 by January 31, 2016. 5 Tr. 934 (1/9/15) (O'Connell).

Mr. Van Winkle's resource modeling for a two unit shutdown suffers from similar fatal flaws. His modeling did not properly identify the costs associated with his portfolio. O'Connell Reb. Stip., pp. 23-29. His modeling did not include a risk analysis associated with his replacement power portfolio. 15 Tr. 3749 (1/26/15) (Van Winkle). Thus, he failed to consider the impact on PNM's operations of quickly adding large amounts of wind resources as well as any increased risk associated with more gas-fired generation to support wind generation due to natural gas price volatility. *See* O'Connell Reb. Stip., pp. 17-21; Ortiz Stip., pp. 27-28. Although natural gas prices are low today, upward pressure on gas prices is now being manifested, and they are expected to increase during the twenty-year planning period. 8 Tr. 1649-1651 (Reed). PNM performed an extensive Monte Carlo simulation analysis to test how

risky various portfolios are, and how well each stood up to a variety of possible future scenarios and risk exposures, including changes in gas prices. O'Connell Stip, pp. 30-35; 6 Tr. 1201- 1206 (1/12/15) (O'Connell). The Stipulation portfolio performed the best.

Mr. Van Winkle's analysis relies heavily on the use of levelized cost to compare different generation technologies. Although a levelized cost analysis may be appropriate when comparing resources of similar technologies, e.g., renewables to renewables, it skews the results improperly when comparing technologies with different production profiles such as dispatchable generation to variable or intermittent generation. 6 Tr. 1152-1153 (1/12/15) (O'Connell). Dispatchable generation can be controlled by power operators, i.e., their output can be increased or decreased when needed, whereas renewable resources such as wind and solar provide power whenever the wind blows and the sun shines, requiring load following technologies that are dispatchable to maintain frequency control and assure reliability of the system. 16 Tr. 3881-3887 (1/27/15) (Van Winkle). Thus, simply comparing costs averaged over the course of the year fails to recognize that costs vary during the course of the day and fails to properly take account of the value of dispatchable resources such as coal. 16 Tr. 3896-3898 (1/27/15) (Van Winkle). The Minnesota Public Utilities Commission has so recognized:

As previously discussed, a Levelized Cost of Electricity analysis calculates the net present value of the expected annual costs - including variable and fixed operations and maintenance costs, capital costs and the return on investment - divided by annual generation over the term of the proposal. However, it does not consider how a new resource would affect the utility's existing resources - for example, by helping to avoid additional capacity costs and variable costs, including fuel.

Because this model takes little or no account of the context within which a resource would be used, the analysis may be appropriate where competing resources will be used in identical contexts, and thus all other factors can be regarded as equal. But the U.S. Energy Information Administration concludes that "the direct comparison of the levelized cost of electricity across technologies is

often problematic and can be misleading as a method to assess the economic competitiveness of various generation alternatives.”

*In the Matter of the Petition of N. States Power Co. d/b/a Xcel Energy for Approval of Competitive Res. Acquisition Proposal & Certificate of Need*, 2014 WL 3401042, at \*32 (Minn.PUC). Other witnesses agreed with PNM witness O’Connell that levelized cost is not an appropriate analysis for purposes of this case. O’Connell Reb. Stip, pp. 24-29; 6 Tr. 1152-1153, 1228 (1/12/15) (O’Connell); 12 Tr. 2800-2801 (1/21/15) (Crane); Carrara Reb. Stip., pp. 19, 20-21.

At the request of Commissioner Jones, PNM conducted an analysis of a three unit shutdown using assumptions specified in the Bench Request along with other assumptions required to perform the analysis, consistent with other modeling runs. The evidence shows that a three unit shutdown is not a feasible alternative to a two unit shutdown because a) the assumptions specified in the Bench Request are not realistic and b), even using the specified assumptions, and even with potential incremental transmission costs excluded, the cost of the three unit shutdown exceeds the cost of the Stipulation portfolio Commission Exhibit 4, pp. 2-3, 4-6; PNM Ex. 1 Bench Request; 15 Tr. 3545-3546 (1/26/15) (O’Connell).

**VI. THE COMMISSION SHOULD NOT REQUIRE A NEW RFP PROCESS FOR REPLACEMENT POWER UNDER THE CIRCUMSTANCES OF THIS CASE.  
(RESPONSE TO BRIEFING ORDER ISSUE NO. 6)**

The Commission does not have express legal authority to require PNM to issue an RFP to acquire replacement capacity under the PUA. The Commission must find its authority and jurisdiction to act either expressly or by necessary implication from statutory authority that governs. *See, e.g., Plains Elec. Gen. & Trans. Coop., Inc. v. New Mexico Pub. Util. Comm’n*, 1998-NMSC-038, ¶ 9, 126 N.M. 152; *El Vadito de los Cerrillos Water Ass’n v. New Mexico Pub. Regulation Comm’n*, 1993-NMSC-041, ¶ 15, 115 N.M. 784. The Legislature has provided for a

competitive bidding process for the acquisition of resources in only one circumstance set forth in the Efficient Use of Energy Act (“EUEA”), NMSA 1978, Section 62-17-5(E) (2013). As a general proposition, it is reasonable to infer that “if a statute on a particular subject omits a particular provision, inclusion of that provision in another related statute indicates an intent [that] the provision is not applicable to the statute from it was omitted.” *United Rentals Northwest, Inc. v. Yearout Mech., Inc.*, 2010-NMSC-030, ¶ 25, 148 N.M. 426 (alteration in original) (internal quotation marks and citation omitted). The PUA does not contain an equivalent authorization that the Commission may order utility plant to be obtained through a competitive bidding process.

PNM has used an RFP process in the past to identify specific resources required to meet a specific need, but has not been required to do so. *See* NMPRC Case No. 13-00175-UT, Certification of Amended Stipulation at 13-14 (June 3, 2014), *approved* Order Approving Certification of Stipulation (June 18, 2014). In this case an all-source RFP is unnecessary to demonstrate that the CCNs for Palo Verde Unit 3 and for the additional capacity in SJGS Unit 4 are the best replacement resources when SJGS Units 2 and 3 are abandoned because PNM already had the market information through other recent RFPs to know that they are the most economical options at the values provided in the Stipulation. O’Connell Reb. Stip., p. 2. In addition, an all source RFP can be undesirable because of the lack of specificity involved. O’Connell Reb. Stip., p. 35. Rather, as a general proposition, an RFP process is appropriate once a particular type of resource is identified. O’Connell Reb. Stip., p. 35. An RFP would not have yielded useful responses as the resources for which CCNs are sought in this case are not available on the market. 6 Tr. 1130 (1/12/15) (O’Connell). Therefore, the Commission should not depart from its long-standing prior requirements for a CCN.

## **VII. PNM HAS ESTABLISHED PROPER GROUNDS FOR ISSUANCE OF A CCN FOR AN ADDITIONAL 132MW INTEREST IN SAN JUAN UNIT 4**

San Juan is a four unit coal-fired generating station located in Waterflow, New Mexico with 1683 MW of net generation capacity. Olson Stip., p. 5. It provides base load generation, which is essential for reliable electric service, to over 500,000 PNM customers in New Mexico. *Id.* at 9. San Juan Unit 4 is the newest and largest generation unit, having a net capacity of 504 MW and an initial in-service date in 1982. *Id.* at 5, 62. PNM currently owns a 195 MW interest in San Juan Unit 4. *Id.* at 8. As part of the San Juan ownership restructuring required to implement the terms of the Revised SIP, and to replace a portion of the lost generation capacity due to the retirement of San Juan Units 2 and 3 under the Revised SIP, PNM is seeking a CCN to acquire an additional 132 MW in San Juan Unit 4. *Id.* at 17. If the CCN is granted as requested, PNM will have a total jurisdictional capacity of 327 MW in San Juan Unit 4. *Id.* at 61.

The requisite elements for the Commissions' issuance of a CCN for a proposed generation resource are discussed in Section IV.A, above. PNM's Application and the supporting evidentiary record in this case for the requested CCN for the additional 132 MW in San Juan Unit 4 meet all of these elements. Ortiz Stip., pp. 38-41.

### **A. PNM's Acquisition of an Additional 132 MW in San Juan Unit 4 is in the Public Interest.**

The retirement of San Juan Units 2 and 3 represents a very significant amount of PNM's base load capacity – 418 MW in total. O'Connell Stip., pp. 17, 19. As a result of the retirement of these two units, PNM will need additional round-the-clock energy and capacity in order to meet customer needs. *Id.* at 17-18. The need for additional generation due to the retirement of San Juan Units 2 and 3 has not been disputed in this proceeding.

Apart from the need for this additional generation capacity, the record in this case also demonstrates that the 132 MW in San Juan Unit 4 is the most cost-effective replacement resource. Under Paragraph 14 of the Stipulation, the additional 132 MW interest in Unit 4 is to be placed on PNM's books at an initial value of \$26 million for ratemaking purposes. *Id.* at 19. Additional costs associated with PNM's acquisition of the 132 MW in San Juan Unit 4 include PNM's pro-rata share of the SNCR Project in the amount of \$21.2 million for a total cost for this generation resource of \$47.2 million. *Id.* At this valuation, PNM's cost on a per kW basis is only \$358.00 and there are no other feasible alternatives available at this price. *Id.*

The cost-effectiveness of the addition of the 132 MW interest in San Juan Unit 4 is also confirmed on a net present value ("NPV") basis. As shown in PNM Exhibit PJO-6 Stip, the NPV cost for the proposed generation replacement portfolio without the additional 132 MW interest in San Juan Unit 4 is \$7,630 million. *Id.* at 18; PNM Exhibit PJO-6 Stip. If the 132 MW in San Juan Unit 4 is included in the portfolio, the NPV is \$7,589 – a savings to customers of \$41 million over a twenty-year period. *Id.*

The public interest is further supported by the fact that San Juan Unit 4 has provided reliable and cost-effective energy to PNM customers for more than three decades. Olson Stip., p. 62. For the period from 2008 through 2012, San Juan had an average availability factor of 87.47%. While variability in the quality of delivered coal has impacted overall San Juan performance in 2013 and 2014, this is a transitory circumstance due to a particularly narrow coal seam in the San Juan underground coal mine. Olson Reb. Stip., p. 21. Following discussions with San Juan Coal Company, coal quality and variability have improved. *Id.*

In addition, PNM's proposed acquisition of additional capacity in San Juan Unit 4 obviates the need for the construction of new generation capacity. San Juan Unit 4 is an existing

resource and PNM's acquisition of the additional 132 MW will not result in any additional environmental impact. Ortiz Stip., p. 40.

The retirement of San Juan Units 2 and 3 will also result in significant environmental benefits compared to implementation of the FIP. Emissions of nitrogen oxides ("NOx"), sulfur dioxide ("SO<sub>2</sub>") and carbon monoxide ("CO") will be reduced by 62%, 67% and 44%, respectively. Darnell Stip., p. 21. Particulate matter ("PM"), volatile organic compounds ("VOCs"), carbon dioxide ("CO<sub>2</sub>") and hazardous air pollutants, including mercury, will be reduced by approximately 50%. *Id.* Additional environmental benefits include an estimated 53% reduction in water usage and a 50% reduction in solid waste generation, including coal combustion residuals ("CCRs"). *Id.* Even emissions from vehicular traffic will be reduced by about half. *Id.* at 21-22.

In addition to the foregoing, and perhaps the most significant in terms of the public interest, PNM's acquisition of the 132 MW will facilitate the ownership restructuring necessary for the retirement of San Juan Units 2 and 3 to implement the Revised SIP. Olson Stip., p. 45. Implementation of the Revised SIP, and approval of the Stipulation portfolio which includes the added interest in San Juan Unit 4, represents the most cost-effective Regional Haze compliance alternative for PNM's customers. O'Connell Stip., pp. 10-12. It also has the least cost impact on PNM customers beginning in 2018. Monroy Stip., pp. 21-22.

**B. The Addition of 132 MW of San Juan Unit 4 is Consistent with PNM's 2014 Integrated Resource Plan ("IRP").**

The most-recently accepted PNM IRP dates to 2008. O'Connell Stip., p. 20. At the time the 2008 IRP was accepted, it was not contemplated that San Juan Units 2 and 3 would need to be retired in order to achieve the most cost-effective means of environmental compliance. For this reason, PNM filed a notice of material change with the Commission as a result of the Term

Sheet among PNM, the State and the EPA. *Id.* at 20; Ortiz Stip., p. 39. PNM's 2014 IRP is the most recent, but it has not been accepted. It is presently being held in abeyance pending the outcome of this proceeding and Case No. 14-00158-UT (which has now been resolved by approval of a stipulation). However, the proposed addition of the 132 MW in San Juan Unit 4 is specifically addressed in, and is entirely consistent with, PNM's 2014 IRP. O'Connell Stip., p. 20; Ortiz Stip., p. 39.

**C. San Juan Unit 4 is in Compliance with Applicable Environmental Requirements.**

San Juan Unit 4 is also in compliance with applicable environmental requirements. Olson Stip., p. 63. There are no outstanding notices of violation or other enforcement actions pending with respect to San Juan Unit 4. *Id.* PNM, as operating agent for San Juan, possesses all of the requisite permits for the continued operation of San Juan. *Id.* The existing air permits for San Juan specifically authorize and require installation of SNCR emission control technology on San Juan Unit 4 in conformity with the Revised SIP. Moreover, San Juan Unit 4 will undergo conversion to a balanced draft configuration which will help ensure, among other things, that it remains in compliance with new and stricter emissions standards under the National Ambient Air Quality Standards ("NAAQS") for PM emissions. *Id.* at 52-53. Following the installation of SNCR and the conversion to balanced draft, San Juan Unit 4 will be equipped with state-of-the-art environmental controls and well-positioned to meet any reasonably anticipated future environmental regulations. Cichanowicz Stip., p. 36.

Some of the opponents to the Stipulation have attempted to raise the prospect of future environmental regulation as grounds to deny the issuance of the CCN for the additional 132 MW in San Juan Unit 4. The two future environmental regulations most frequently cited in opposition to the Stipulation are the EPA's proposed Clean Power Plant Rule ("CPP Rule") and

the proposed Coal Combustion Residuals Rule (“CCR Rule”). However, neither of these regulatory proposals represents any disqualifying risk for the addition of the 132 MW of San Juan Unit 4.

As detailed in the rebuttal testimony of PNM’s environmental expert, J. Edward Cichanowicz, San Juan uses a “dry” method for handling CCRs. Cichanowicz Reb. Stip., p. 7. The CCR Rule is primarily concerned with “wet” handling and storage of CCRs in impoundments. *Id.* These methods are not used at San Juan and it was not expected that the EPA’s CCR Rule would have any significant impact on San Juan operations. *Id.* at 7-8. In addition, CCRs generated at San Juan are put to beneficial use for mine reclamation at the San Juan coal mine. *Id.* at 8. EPA indicated that beneficial use of CCRs would continue regardless of whether CCRs were determined to be hazardous or non-hazardous waste. *Id.*

Mr. Cichanowicz’s opinions concerning the lack of impact from the CCR Rule were confirmed on December 19, 2014, when EPA issued its final rule. The EPA determined that CCRs are not a hazardous waste. 14 Tr. 3464<sup>5</sup> (1/23/15) (Dirmeier). The EPA also determined that the CCR Rule was inapplicable to CCRs put to beneficial use such as mine reclamation purposes. *Id.*; *see also* WRA Exhibit 1; 16 Tr. 3847-3854 (1/27/15) (Van Winkle).

The potential impacts of the CPP Rule on San Juan have likewise been overstated, particularly in light of the fact that two units are to be retired thereby reducing carbon emissions from San Juan by approximately one-half. The CPP Rule is a proposed rule to limit emissions of CO<sub>2</sub> from electric generation units. Cichanowicz Stip., p. 32. It is only a proposed rule at this point, involves myriad sources and many aspects of the rule are not completely defined or clarified. *Id.* The EPA’s CO<sub>2</sub> targets for New Mexico consist of an interim benchmark of 1107 lbs/MWh for 2020 and a final limit of 1048 lbs/MWh beginning in 2030. *Id.*

The CPP Rule as proposed by the EPA provides four “building blocks” to be used to achieve compliance, including (1) improving the efficiency of existing coal-fired plants; (2) increasing the dispatch of natural gas-fired combined cycle units; (3) increasing the use of renewable generating sources; and (4) increasing energy efficiency. *Id.* at 33. The retirement of Units 2 and 3 will reduce CO<sub>2</sub> emissions by some 7.7 M tons, significantly reducing New Mexico’s contribution to atmospheric carbon emissions. *Id.* Replacement of a portion of this lost generation with zero-CO<sub>2</sub> emitting power from Palo Verde Unit 3 only helps to ensure that that state emissions remain on a downward trajectory compared to the addition of fossil fuel generation. *Id.* at 33-34. Indeed, the role of nuclear power in the calculation of final emission targets was heavily commented upon in the public comment period for the CPP Rule. Cichanowicz Reb. Stip., p. 3.

WRA presented a compliance model which focused solely on PNM’s anticipated CO<sub>2</sub> emissions and generation resources in an attempt to demonstrate that additional unit retirements at San Juan may be required under the CPP Rule. 14 Tr. 3490 (1/23/15) (Dirmeier). However, WRA was unable to verify the source for its model or to substantiate or confirm the inputs in its model. 14 Tr. 3482-88 (1/23/15) (Dirmeier). In addition, WRA had to concede that compliance with the proposed CPP Rule is not determined by an analysis of the resource portfolio of a single entity. 14 Tr. 3490 (1/23/15) (Dirmeier). Rather, compliance is assessed on a state-wide basis. *Id.* The CPP Rule, through the four building blocks, allows for significant flexibility and there will be many compliance options available to New Mexico, other than unit retirement. Cichanowicz Reb. Stip., p. 5. Moreover, PNM’s portfolio analyses used in this case includes a cost for carbon regulation so that even if costs are incurred to comply with the CPP Rule, these costs have been accounted for. 14 Tr. 3478-79 (1/23/15) (Dirmeier). The costs used by PNM are

within a reasonable range as forecasted by Synapse, NEE's consultant. 9 Tr. 2035-2036, 2042-2043 (1/15/15) (Fisher). In addition, Stipulation paragraph 19 provides an additional measure of protection for customers should SJGS Unit 4 have to be retired early.

**D. There is No Valid Opposition to the CCN for San Juan Unit 4.**

An element that the Commission has considered in assessing whether to grant a CCN is the level of valid public opposition to the proposed approval. While the Stipulation opponents have mounted a vigorous campaign against the proposed CCN for the 132 MW interest in San Juan Unit 4, their opposition is not valid for the reasons discussed below.

1. PNM is not increasing its coal generation portfolio by acquiring the additional 132 MW interest in San Juan Unit 4.

Much of the hearing in this matter focused on PNM's proposal to acquire 132 MW in San Juan Unit 4 as replacement generation. However, the opposition to this proposal was based largely on the false narrative that PNM was adding coal generation to its resource portfolio. This is untrue and ultimately the opponents to the CCN for the 132 MW of San Juan Unit 4 were forced to admit that approval of the Stipulation will actually result in a net reduction of PNM's interest in coal generation at San Juan by 286 MW which represents a reduction of some 36%. 10 Tr. 2172 (1/16/15) (Lehr); 14 Tr. 3444 (1/23/15) (Dirmeier); Ortiz Stip., p. 40. Thus, the opposition to the proposed CCN for the 132 MW in Unit 4 on the grounds that it increases PNM's reliance on coal-fired generation is not valid. As Attorney General witness Crane testified: "Listening to the public comment yesterday, I thought that maybe the proposal was that they were going to come in and build two new coal plants. The fact of the matter is, this is going to create a significant reduction in coal production, you know, in New Mexico." 12 Tr. 2752 (1/21/15) (Crane).

2. Any questions relating to the San Juan ownership restructuring can be addressed by the conditional granting of a CCN for the 132 MW in San Juan Unit 4.

As part of their efforts to defeat the approval of the CCN for the 132 MW interest in San Juan Unit 4, the opponents to the Stipulation have focused on the absence of a binding agreement with respect to the ownership restructuring of San Juan in order to effectuate the retirement of San Juan Units 2 and 3 and to implement the SNCR Project on San Juan Units 1 and 4 as required under the Revised SIP. PNM acknowledges that the ownership restructuring has proceeded more slowly than anticipated and that the matter was further complicated by the decision of the City of Farmington not to acquire the additional 65 MW in San Juan Unit 4 as contemplated under earlier term sheets among the San Juan owners. Olson Supp. Stip., p. 1. However, any risks associated with the present absence of a final restructuring agreement can be addressed by reasonable conditions on the approval of a CCN for the additional 132 MW of San Juan Unit 4. *Id.* at 6.

Notwithstanding the latest developments related to the San Juan ownership restructuring, the San Juan owners remain engaged in negotiations and committed to a final and binding restructuring. *Id.* at 4-5. The benefits to PNM's customers of the approval of the Stipulation have been documented and quantified in PNM's pre-filed and oral testimony in this case. PNM has committed that, notwithstanding any changes to the terms of the proposed ownership restructuring, the cost allocation percentages and benefits for PNM customers will be consistent with those identified in the ownership restructuring term sheets and the customer benefits agreed to in the Stipulation will remain unchanged. *Id.* at 6. In addition, so as not to change the fundamental request for the CCN for the 132 MW in San Juan Unit 4 and to address concerns by other parties, PNM agreed that it will not acquire the 65 MW in Unit 4 that Farmington has now

declined. Olson Supp. Stip., p. 6. Finally, PNM also committed that a binding restructuring agreement among the San Juan owners will be executed no later than May 1, 2015. *Id.* In the event that a binding restructuring agreement is not achieved by May 1, 2015, PNM will notify the Commission and the parties to the proceeding with a proposal for moving forward in the absence of a final restructuring agreement. *Id.* at 7.

PNM agrees that the foregoing conditions should be incorporated into any final order approving the Stipulation and granting the CCN for the 132 MW in San Juan Unit 4. *Id.* These conditions preserve the benefits to customers under the Stipulation. In addition, they provide a mechanism for the Commission to reconsider the CCN in the event a binding ownership restructuring agreement is not concluded. *See* NMSA 1978, § 62-9-4 (1980).

3. Any questions concerning a post-2017 fuel supply for San Juan can be addressed through appropriate conditions for the issuance of a CCN for the 132 MW of San Juan Unit 4.

The opponents of the Stipulation also assert that there is too great uncertainty concerning a post-2017 fuel supply for San Juan for the Commission to approve the CCN for the 132 MW in Unit 4. However, the coal supply issue needs to be considered in the proper context. The San Juan Coal Mine has been the exclusive supplier for San Juan since inception in 1971. Olson Stip., p. 51. Over the more than forty years that San Juan has operated, there have been changes in the ownership and operation of the San Juan Coal Mine. *Id.* There have also been several iterations of fuel supply agreements with the various mine owners and operators. *Id.* The existing Underground Coal Sales Agreement (“UG-CSA”) under which fuel is supplied to San Juan extends to the end of 2017. Olson Reb. Stip., p. 17. Therefore, there are nearly three years left under the UG-CSA and there is no immediate danger of San Juan not having fuel to operate. *Id.*

Those San Juan owners who will continue active involvement in San Juan after 2017, including PNM, acknowledge the importance of having sufficient certainty concerning a cost-effective and reliable post-2017 fuel supply. Olson Stip., p. 48-49. In fact, sufficient certainty concerning a future coal supply is a condition to the final restructuring agreement. *Id.* To that end, PNM and the other remaining participants are in the process of negotiating with SJCC and its parent, BHP Billiton, for a post-2017 fuel supply. *Id.* at 50. The UG-CSA has been amended to allow for the closing date for a purchase transaction for the San Juan coal mine of December 31, 2016. *Id.*

The San Juan Fuels Committee has approved a strategy for a post-2017 fuel supply. Olson Reb. Stip., p. 11. Due diligence has been undertaken with respect to the San Juan Coal Mine and a solicitation was issued to qualified miners requesting an expression of interest and estimated pricing to conduct mining operations. *Id.* at 13. The review of the bids confirms that there is interest in the marketplace to provide a post-2017 fuel supply for San Juan. *Id.* at 13-14. The details of the preliminary pricing and their relationship to PNM's replacement portfolio analyses and assumptions are addressed in more detail in PNM's confidential filing under separate cover. *See* PNM Confidential Post-Hearing Brief.

Much of the objection that has been raised to PNM's proposed acquisition of the 132 MW interest in San Juan Unit 4 relates to the understanding that PNM intends to acquire ownership of the San Juan Coal Mine. However, there has been no final decision that PNM will acquire any interest in the SJCC mine. Olson Reb. Stip., p. 14. Under the Sixth Amendment to the UG-CSA, there is no requirement that PNM or any of the other remaining San Juan owners assume ownership of the mine. *Id.* at 12. Again, the details of the San Juan owners' coal strategy are addressed in more detail in PNM's Confidential Post-Hearing Brief.

In addition, while PNM is pursuing a future coal supply with SJCC and BHP, it is pursuing other options, including an agreement with the Ute Mountain Ute Tribe, for a supply of coal from a proposed above-ground mine. Olson Reb. Stip., p. 18. PNM and the other owners also have viable contingency plans in the event an agreement cannot be reached for a post-2017 fuel supply for San Juan. The details of the alternatives and contingency plans are addressed in PNM's Confidential Post-Hearing Brief.

Finally, many of the Stipulation opponents contend that PNM will enter into a long-term and inflexible agreement that obligates PNM to continue operating San Juan for decades into the future. However, PNM and the other remaining participants recognize that flexibility in terms of minimum takes and the term of any future coal agreement are important elements in any agreement for a post-2017 fuel supply. Olson Reb. Stip., p. 17. A five-year fuel contract for the period from 2018 to 2022 with reasonable pricing is feasible. *Id.* at 16. In fact, to address these concerns, PNM will agree to a condition in any CCN for the 132 MW in San Juan Unit 4 that requires Commission review and approval for any fuel agreement that extends beyond 2022. Olson Supp. Stip., p. 7. The absence of a final fuel supply agreement for San Juan – almost three years before the expiration of the current UG-CSA - is not a basis to deny PNM's application for a CCN for the additional 132 MW interest in San Juan Unit 4. The Commission has not previously required fuel price certainty in granting CCNs, not even for gas-fired generation and its associated price volatility.

4. The other issues raised in opposition to the issuance of a CCN for the 132 MW of San Juan Unit 4 are not valid grounds for denial.

The opponents to the Stipulation have also attempted to raise various “risks” allegedly associated with PNM's acquisition of the 132 MW interest in San Juan Unit 4. The claimed risks run the gamut including: (1) possible regulation of methane emissions from coal mines; (2)

possible, but unspecified, future environmental regulations; (3) a lawsuit by WildEarth Guardians against SJCC; (4) the water supply for San Juan; and, (5) a 2011 fire in the SJCC underground mine. Although the opponents to the Stipulation raised these so-called risks, they are not able to quantify either the likelihood of these risks occurring or any estimated costs associated with these risks if they do occur.

The claimed threat of methane regulation was not directed specifically at San Juan, but rather at the SJCC coal mine. However, methane emissions from coal mines are not presently regulated. Vicinus Reb. Stip., p. 26. Moreover, there is currently no proposed EPA regulation to address methane emissions from coal mines. 14 Tr. 3472 (1/23/15) (Dirmeier). According to the EPA, methane emissions from coal mining accounted for less than one percent of total greenhouse gas emissions in the United States based on 2011 data. *Id.* The focus of potential future EPA regulation of methane is not related to coal mining, but rather oil and gas production. Vicinus Reb. Stip., pp., 26-27; 14 Tr. 3468-69 (1/23/15) (Dirmeier). In the opinion of PNM's mining expert, regulation of methane emissions from coal mines does not pose any major risk. Vicinus Reb. Stip., p. 26.

With regard to potential future environmental regulation, apart from the CPP Rule and the CRR Rule discussed above, the opponents to the Stipulation were unable to identify any specific environmental regulations that will be imposed. 14 Tr. 3492 (1/23/15) (Dirmeier). Nor were they able to quantify the risks associated with future environmental regulation in terms of likelihood or cost. 14 Tr. 3492-93 (1/23/15) (Dirmeier). In any event, Mr. Cichanowicz confirmed that with the addition of SNCR and the conversion to a balanced draft configuration, San Juan will be well-positioned to meet likely future environmental regulations. Cichanowicz Stip., p. 36.

The lawsuit by WildEarth Guardians against SJCC was also raised as a potential risk associated with the proposed CCN for the 132 MW interest in San Juan Unit 4 due to its claimed threat to the San Juan coal supply. However, neither San Juan nor PNM are involved in the suit. The federal Office of Surface Mining Reclamation and Enforcement and SJCC are defending the suit and PNM and the other San Juan remaining participants are monitoring the suit as part of the due diligence process. Olson Reb. Stip., pp. 22-23. Again, the opponents to the Stipulation were not able to analyze or quantify the supposed risk associated with this lawsuit. 14 Tr. 3994-95 (1/23/15) (Dirmeier). There is no basis for the Commission to reject the proposed CCN for the 132 MW interest in San Juan Unit 4 based on this lawsuit.

The Stipulation opponents have also tried to suggest that the water supply for the operation of San Juan is threatened by pending litigation. However, they fail to note that the dispute involved in the litigation has been pending since 1975 and that in 2013 the trial court ruled in a manner that confirms PNM's existing water rights for San Juan operations. Olson Reb. Stip., p. 10. San Juan has access to 27,700 acre-feet per year of water which is completely adequate for its operational needs. *Id.* The pending appeal of the trial court's ruling affirming PNM's water rights is not grounds to deny the application for the CCN.

SJCC experienced a fire in its underground mine in 2011 which resulted in a suspension of production coal for several months while mine regulators investigated. Olson Reb. Stip., p. 20. The Stipulation opponents point to this event as another risk of PNM's acquisition of the 132 MW in San Juan Unit 4. However, the facts are that there was ample coal supply to assure continued operation of San Juan during the period of suspended production. *Id.* Any risk presented by the fire was completely and properly managed.

As demonstrated above, the foregoing litany of claimed risks by the Stipulation opponents are entirely speculative. They do not serve as a valid basis to deny PNM's requested CCN for the additional 132 MW in San Juan Unit 4.

**VIII. PNM HAS ESTABLISHED PROPER GROUNDS FOR ISSUANCE OF A CCN FOR THE 134 MW INTEREST IN PALO VERDE UNIT 3**

PNM is also seeking a CCN for its 134 MW interest in Palo Verde Unit 3 as part of the replacement generation for the retirement of San Juan Units 2 and 3. Palo Verde is a three unit nuclear power plant located near Phoenix, Arizona and is operated by Arizona Public Service Company. Olson Stip., p. 66. The three units at Palo Verde came on line between 1986 and 1988 and have operating licenses that variously extend to 2046 and 2047. O'Connell Stip., p. 20. PNM has a 10.2% interest in each of the three Palo Verde Units. Olson Stip., p. 66. However, only the capacity associated with Palo Verde Units 1 and 2 is currently included in PNM's jurisdictional portfolio. *Id.* Palo Verde Unit 3 was previously excluded from PNM's jurisdictional resources. O'Connell Stip., p. 20.

Paragraph 17 of the Stipulation provides in part that "PNM shall be granted a CCN to include its 10.2% ownership share of Palo Verde Unit 3, with a capacity of 134 MW, in rate base to serve New Mexico retail customers, effective January 1, 2018." The evidentiary record in this case establishes that the Stipulation should be approved with respect to the CCN for the 134 MW in Palo Verde Unit 3.

**A. PNM's Acquisition of an Additional 134 MW in Palo Verde 3 is in the Public Interest.**

The need for additional energy and capacity as a result of the retirement of San Juan Units 2 and 3 is addressed above in Section VII.A relating to the proposed CCN for an additional

132 MW interest in San Juan Unit 4. The need for the 134 MW capacity from Palo Verde Unit 3 is no different. O'Connell Stip., p. 21.

In PNM's replacement resource analysis, PNM analyzed all feasible replacement resources for the proposed 134 MW interest in Palo Verde Unit 3. *Id.* at 22. The results of this analysis show that the 134 MW interest in Palo Verde Unit 3, in conjunction with solar PV and gas peaking capacity, is the most economical replacement generation alternative. *Id.* In fact, the 20-year NPV of the Revised SIP portfolio with the 134 MW of Palo Verde Unit 3 is \$117 million less expensive than the next less costly alternative. O'Connell Reb. Stip., p. 12, Table PJO-1, PNM Ex. PJO-2 Rebuttal Stip.

As with the proposed additional interest in San Juan Unit 4, PNM's proposed acquisition of additional capacity in Palo Verde Unit 3 avoids the need for the construction of new generation capacity or a new purchased power agreement with another supplier. Olson Stip., p. 66. Palo Verde has also been a very reliable generation resources with an equivalent availability factor ("EAF") of 88.58% over the past five years. *Id.* As an added measure of security to PNM customers, Paragraphs 20 and 21 of the Stipulation impose a seventy-five percent capacity factor performance benchmark for all three Palo Verde Units for the period from January 1, 2018, through December 31, 2024. *Id.* at 67. Under Paragraph 22 of the Stipulation, PNM will bear the incremental cost of replacement generation necessary to account for any failure of Palo Verde to meet the benchmark. *Id.*

Palo Verde has all of the necessary elements for continued long-term operation. It has a reliable fuel supply that includes a mix of contracts for fuel and fuel-related services for both the near-term (2018) and the intermediate (2025) term. *Id.* at 68. The market for nuclear fuel is global in nature and Palo Verde has a well-established fuel procurement program that evaluates

the balance between long-term contracts and market opportunity. *Id.* Palo Verde also has a secure water supply in that the bulk of its water needs are met by treated effluent from Phoenix and surrounding communities. *Id.* The water supply contract for Palo Verde extends through the current licensed life of the power plant. *Id.* In addition, PNM has the necessary transmission capacity to supply its New Mexico customers from Palo Verde. *Id.* at 69-70.

Finally, because Palo Verde is non-emitting in terms of air emissions, PNM can avoid the air emissions associated with likely alternative fossil fuel generation. Cichanowicz Stip., p. 29. By way of example, a state-of-the art natural gas combined cycle generator of equivalent capacity would emit approximately 30 tons of NO<sub>x</sub>, 18.4 tons of carbon monoxide and 473,651 tons of CO<sub>2</sub>. *Id.*

**B. The Addition of 134 MW of Palo Verde Unit 3 is Consistent with PNM's 2014 IRP.**

The CCN for the 134 MW interest in Palo Verde Unit 3 is also consistent with PNM's 2014 IRP which, as discussed above, is the most recent IRP. The proposed addition of the 134 MW in Palo Verde Unit 3 is specifically addressed in PNM's 2014 IRP. O'Connell Stip., p. 22.

**C. Palo Verde Unit 3 is in Compliance with Applicable Environmental Requirements.**

There are no outstanding regulatory or other environmental compliance issues relating to Palo Verde Unit 3. Olson Stip., p. 69.

**D. There is No Valid Opposition to the CCN for the 134 MW in Palo Verde Unit 3.**

Some of the Stipulation opponents have questioned the proposed CCN for the 134 MW interest in Palo Verde. However, the opposition is not valid.

NEE is the primary opponent of the CCN for the 134 MW in Palo Verde Unit 3 and takes a "shotgun" approach in its opposition hoping that some of the scattershot will hit the mark. Van Winkle Stip., pp. 23-28. However, even NEE's opposition is not absolute. Rather NEE asserts

that a CCN for the additional capacity in Palo Verde Unit 3 should not be issued “at this time” pending the issuance of an all resource RFP. *Id.* at 23. The lack of merit to this argument was addressed in Section VI above.

NEE also objects to the addition of the 134 MW in Palo Verde Unit 3 based on the agreed price under the Stipulation of \$1,650/MW. *Id.* at 23, 25. The proper valuation of PNM’s interest in Palo Verde Unit 3 and the applicability of acquisition adjustment concepts are addressed in Section XII below.

NEE asserts that PNM does not need additional base load generation and that there are less expensive replacement resources than the 134 MW capacity in Palo Verde Unit 3. *Id.* at 24. However, these assertions are refuted in Section VII.A above.

Future decommissioning costs are also raised as an issue by NEE. *Id.* at 25-26. However, as addressed in Section I.B. above, decommissioning costs are to be shared between PNM shareholders and PNM customers on an equitable basis and in proportion to the actual time period that each of the two stakeholder groups had the benefit of the resource. NEE also asserts that there are “significant financial risks” associated with ownership of Palo Verde Unit 3. *Id.* at 25. However, NEE has failed to provide a proper overall risk assessment of the various portfolios identified. Their assertions are nothing more than speculation.

NEE also opposes granting the CCN for Palo Verde Unit 3 on the grounds that it will not create any jobs in New Mexico. *Id.* at 29. This claim is rather inconsistent and ironic considering that NEE’s proposal to completely shutter San Juan and the related San Juan mine will result in massive job loss in the Four Corners area, especially among the Native American population, in addition to resulting in the loss of millions of dollars in annual tax revenues. Darnell Stip., pp. 23-25.

NEE raises Palo Verde's water consumption as a basis to reject the request for the CCN for Unit 3. Van Winkle Stip., p. 29. Of course, denial of the CCN will not alter Palo Verde's water use by one gallon. Moreover, as noted above, Palo Verde's water needs are met by effluent from Phoenix and its surrounding communities.

NEE also states that inclusion of PNM's interest in PNM's New Mexico jurisdictional generational portfolio will not help meet either the RPS or assist in compliance with the CPP Rule. *Id.* at 28. Mr. Van Winkle's analysis is inconsistent with the way the RPS is calculated. 16 Tr. 3866-3870 (1/27/15) (Van Winkle). And as discussed above, utilizing energy from Palo Verde Unit 3, which does not emit carbon, will in fact help New Mexico meet the proposed CO<sub>2</sub> standards under the CPP Rule.

NEE also raises transmission line loss as a reason to deny the CCN for PNM's interest in Palo Verde Unit 3. Van Winkle Stip, p. 28. However, NEE utterly fails to demonstrate or even assert that this line loss causes Palo Verde Unit 3 to be uneconomic or more costly than other feasible generation resources, especially considering his failure to identify possible transmission costs associated with Mr. Van Winkle's recommended portfolio.

All of the issues raised by NEE in opposition to the CCN for the 134 MW in San Juan Unit 3 are either unsupported or rebutted. Accordingly, there is no valid opposition.

**IX. ALL NECESSARY CONDITIONS FOR ISSUANCE OF THE CCNS ARE PROVIDED IN THE STIPULATION AND PNM'S AGREED CONDITIONS WITH RESPECT TO THE CCN FOR THE 132 MW INTEREST IN SAN JUAN UNIT 4.**

The Stipulation includes the necessary conditions required by the public convenience and necessity in accordance with Section 62-9-6: payment by PNM without rate recovery of \$11 million into the Palo Verde Unit 3 decommissioning trust fund to bring the fund into parity with the trust funds for Units 1 and 2 (Stipulation, ¶ 25); placing a "soft" cap on the annual

decommissioning expenses for Palo Verde Unit 3 at \$1.3 million for recovery in rates with any necessary expenditures in excess of that amount being shared between customers and shareholders on a fifty-fifty basis (Stipulation, ¶ 25); responsibility for actual decommissioning costs to be allocated between shareholders and customers based on the amount of time it was an excluded resource (from the in-service date through December 31, 2017) and the time it was in rate base providing retail service to New Mexico customers (January 1, 2018, through cessation of commercial operation) (Stipulation, ¶ 26); PNM shall not be allowed to recover in rates costs associated with the storage and disposal of spent fuel from the operation prior to January 1, 2018, of Palo Verde Unit 3; (Stipulation, ¶ 27); and the performance benchmark applicable to the entire Palo Verde operation (Stipulation, ¶¶ 20-24).

The Stipulation also provides the conditions applicable to the CCN for the additional capacity in SJGS Unit 4 consistent with the public convenience and necessity. Those conditions include that, should SJGS Unit 4 be required to be retired early, the undepreciated investment in the additional capacity will not be subject to recovery in rates (Stipulation, ¶ 19). PNM witness Olson also identified additional conditions that the Commission could impose that would not be objectionable to PNM to deal with any uncertainty caused by the decision by the Farmington electric utility to not acquire 65 MW in SJGS Unit 4 that it had previously decided to acquire and the absence of a coal supply arrangement for SJGS post-2017. Olson Supp. Stip., pp. 6-7.

**X. THE APPROVAL OF THE SNCR PROJECT BY THE COMMISSION  
IS NOT AT ISSUE IN THE PROCEEDING AND THE COMMISSION HAS THE  
AUTHORITY TO APPROVE STIPULATION PARAGRAPH 28.  
(Response to Briefing Order Issue No. 4).**

The SNCR Project refers to the installation of SNCR technology on San Juan Units 1 and 4 as required by the Revised SIP and the conversion of these units to a balanced draft

configuration. Olson Stip., p. 52. Paragraph 28 of the Stipulation addresses the SNCR Project as follows:

28. PNM's reasonable and prudent share of the costs of the SNCR Project at SJGS Units 1 and 4 shall be included in rate base. To the extent that the PNM share of the costs associated with the SNCR Project exceeds \$90.6 million, PNM shall be required to make an affirmative demonstration that incurrence of the costs overruns was prudent and reasonable.

A question arose at the hearing concerning the understanding of the stipulating parties with respect to this provision in the Stipulation and whether the cost or reasonableness of the SNCR Project are at issue in this proceeding. The stipulating parties agreed on their common understanding of the meaning of Paragraph 28 of the Stipulation and affirmed the following statement on the record in this proceeding:

MR. MICHEL: The stipulating parties are not requesting that the Commission in this case approve or disapprove the SNCR project or determine whether any or all of the costs of that project are reasonable and prudent. The prudence and reasonableness of the costs of the SNCR project or its components will be determined in a rate case or such other docket as the Commission may identify for that purpose.

2 Tr. 120-21(1/6/15).

The foregoing statement was affirmed as accurate by counsel for the stipulating parties on the record. *Id.* at 121. The non-stipulating parties either concurred with or took no position on this statement. *Id.* at 121-23. The Hearing Examiner indicated that no formal ruling on this issue would be made unless and until a party filed a motion requesting a ruling. *Id.* at 124. No motion has been filed seeking a ruling on this issue.

Paragraph 28 of the Stipulation essentially recognizes general ratemaking principles and principles regarding burden of persuasion and burden of going forward with evidence traditionally applied by the Commission and recognized by the New Mexico Supreme Court as applicable in Commission proceedings, including the use of evidentiary presumptions. The

Commission has previously exercised authority to limit when traditional evidentiary presumptions may be used. Rule 580. Paragraph 28 is consistent with that authority.

In both judicial and quasi-judicial proceedings, “burden of proof” is a term which describes two different concepts: the “burden of persuasion” which never shifts, and the “burden of going forward with evidence”, which may shift back and forth during the course of the proceedings. *Duke City Lumber Co. v. New Mexico Env'tl. Improvement Bd.*, 1980-NMCA-160, ¶ 6, 95 N.M. 401. The burden of going forward with evidence shifts once the party who bears the burden of proof has made a *prima facie* showing. *Duke City*, 1980-NMCA-160, ¶ 7.

The normal burden to be met in making a *prima facie* case regarding costs incurred in transactions with non-affiliates is a demonstration that the costs were, in fact, incurred. *Attorney General 1984*, 1984-NMSC-081, ¶ 8. Presumption as used by the Commission means a general disposition by the Commission to view expenses incurred as reasonable. Unless an expense is challenged, the Commission assumes it was reasonably incurred. *PNM Gas Servs.*, 2000-NMSC-012, ¶ 72.

The import of paragraph 28 of the Stipulation is that the presumption of reasonableness that exists with regard to costs incurred by a utility is limited to \$90.6 million, after which there must be an affirmative demonstration that cost overruns were reasonable and prudently incurred. In the absence of the Stipulation, there would not be a limit on the costs presumed reasonable. The presumption of reasonableness is rebuttable such that parties may challenge in a rate case where the costs are included in the cost of service for recovery in rates that the costs incurred were actually reasonable and prudently incurred. If the challenge creates a serious doubt with regard to the prudence of the expenditure, the burden of going forward with evidence of prudence shifts to PNM. *See State of Missouri ex rel. Assoc. Natural Gas Co. v. Pub. Serv.*

*Comm'n*, 954 S.W.2d 520, 528 (Mo.App. 1997). Nothing in the Stipulation purports to limit the challenges that may be made.

As reflected above, Paragraph 28 has very limited application. No presumption of prudence or reasonableness applies to any expenditure in excess of \$90.6 million for the SNCR Project. The approval of the Stipulation and Paragraph 28 will not constitute a finding the SNCR Project is either reasonable or prudent or recoverable in PNM's rates. Those issues are subject to determination in another proceeding.

Despite the clarification that neither the reasonableness nor the prudence of the SNCR Project are issues in this proceeding, there was still considerable testimony and cross-examination on the SNCR Project, particularly with respect to the balanced draft component. Therefore, some discussion on the background and need for the SNCR Project is appropriate.

As noted above, the SNCR Project encompasses both the installation of SNCR emission control technology on San Juan Units 1 and 4 as well as the conversion of these units to balanced draft. Olson Stip., p. 52. Under the now-approved Revised SIP, SNCR must be installed on San Juan Units 1 and 4 within fifteen month of the EPA approval of the Revised SIP but no earlier than January 31, 2016. *Id.* at 55. Because EPA issued its approval of the Revised SIP on October 9, 2014, the applicable deadline for the completed installation of SNCR is January 31, 2016. *Id.* at 55-56. Installation of SCNR is also required under San Juan's air permits. *Id.* at 46. Although two San Juan owners requested that the installation of SNCR be deferred to a future date, the EPA rejected these requests. Olson Reb. Stip., p. 9. Therefore, this control technology must be installed by January 31, 2016, if San Juan is to comply with the requirements of the Revised SIP. While it is not an issue in this case, there is no question that installation of SNCR on Units 1 and 4 is required for environmental compliance purposes. And when EPA was asked

to include in its approval a statement that it would consider eliminating the requirement for SNCR on SJGS Units 1 and 4 if a proposal to retire them in a reasonable time frame was presented, it declined to do so. 16 Tr. 3877-3879 (1/27/15) (Van Winkle).

The conversion of San Juan Units 1 and 4 to balanced draft is the element of the SNCR Project that drew most of the comment and opposition during the course of this proceeding. Notwithstanding the fact that PNM is not seeking approval for or recovery of the costs of the balanced draft conversion in this case, some of the Stipulation opponents have challenged the necessity of this element of the SNCR Project in this proceeding.

As explained by PNM witness Cichanowicz, a balanced draft handling system both “pushes” and pulls” the system gas through the entirety of the boiler and environmental controls significantly reducing, if not eliminating, the intrusion of flue gas and air pollutants into the ambient air. Cichanowicz Reb. Stip., p. 9. The conversion of Units 1 and 4 to balanced draft configuration is required under San Juan’s air permits and is to be installed in conjunction with the SNCR technology. Olson Stip., p. 54. In addition, from cost and efficiency standpoints it made sense to implement the balanced draft conversion at the same time as the outages required for the installation of SNCR. *Id.* at 55.

The Stipulation opponents assert that the decision of the San Juan owners to convert the two remaining San Juan units to balanced draft was “voluntary” based on an email from NMED. NEE Ex. 1. The characterization that the decision to convert San Juan Units 1 and 4 to balanced draft was voluntary is, from PNM’s perspective, an overstatement and ignores the fact that the NMED nonetheless included this requirement in the San Juan air permits and that there are clearly important air quality compliance issues that are addressed through balanced draft. Olson Reb. Stip., p. 27. Failure to implement the balanced draft conversion could compromise San

Juan's ability to comply with the recently revised Primary Annual PM<sub>2.5</sub> NAAQS of 75 ppb and the 1 hour SO<sub>2</sub> NAAQS of 75 ppb. Cichanowicz Stip., p. 24. In addition, the balanced draft conversion will use state-of-the-art variable frequency drives which can be used to improve the heat rate of the electric generation units which reduces the emissions of CO<sub>2</sub> and will help in compliance with the CPP. *Id.* at 24-25. Further, as the Commission well knows, it is not uncommon for regulated entities to propose how to deal with regulatory issues. If the Commission agrees and includes the recommendation in an order, it becomes binding on the regulated entity regardless of who initiated the proposal. The same is true of air permits issued by NMED.

It should be remembered that nothing in the PUA purports to provide the Commission with authority to decide what environmental controls should be placed on electric generating stations. The Commission must assume that the NMED was acting reasonably within the scope of its authority to include the balanced draft requirement in the SJGS air quality permit. *See, Albuquerque Bernalillo County Water Utility Authority v. New Mexico Public Regulation Commission*, 2010-NMSC-013, ¶ 35, 148 N.M. 21, 229 P.3d 494; *Nat'l Council on Compensation Insurance v. New Mexico State Corporation Commission*, 1988-NMSC-036, ¶ 28, 107 N.M. 278 (1988); *Bass Enters. Prod. Co. v. Mosaic Potash Carlsbad, Inc.*, 2010-NMCA-065, ¶ 11, 148 N.M. 516. The Commission may not second-guess NMED regarding what requirements should be included in air quality permits.

Neither can the Commission use its ratemaking authority to indirectly attack the inclusion of balanced draft in the SJGS air quality permit. It is generally recognized that one cannot do indirectly what the law does not allow to be done directly. *Carmell v. Texas*, 529 U.S. 513, 541, 120 S.Ct. 1620 (2000); *State v. White*, 2010-NMCA-043, ¶ 16. The Commission has an obligation to allow a utility to recover expenses that are necessary in providing utility service, that benefit ratepayers, and that are

prudently incurred. *Albuquerque Bernalillo County Water*, 2010-NMSC-013, ¶ 68; *Zia Natural Gas Company v. New Mexico Public Utility Commission*, 2000-NMSC-011, ¶ 13, 128 N.M. 728. Costs incurred to comply with environmental requirements are, like taxes, necessary costs of doing business which are recoverable in rates. *Citizens Utility Board v. Illinois Commerce Commission*, 651 N.E.2d 1089, 1095 (Ill. 1995); *cf.*, *Albuquerque Bernalillo County Water*, (taxes are an example of expenses that are a necessary cost of doing business). The Commission cannot disallow prudent expenditures for essential utility service even if a loss resulted, because the expenditures were required. *Zia*, 2000-NMSC-011, ¶ 13.

There are also significant operational benefits that accompany conversion to balanced draft due to the elimination of fugitive dust resulting in lower maintenance and manpower costs. *Id.* at 25. In addition, balanced draft reduces workplace exposure to fugitive dust and reduces respirator protection areas. *Id.* at 25. It will also help eliminate fugitive ammonia emissions that will occur as a result of the installation of the SNCR. *Id.* at 26.

The necessity, prudence and reasonableness of the balanced draft conversion of San Juan Units 1 and 4 will be addressed in more detail in the proceeding where PNM is seeking cost recovery. However, there is sufficient and convincing evidence in the record in this proceeding to approve Paragraph 28 of the Stipulation.

**XI. THE ALLOWANCE OF RECOVERY OF 50% OF THE UNDEPRECIATED INVESTMENT IN SJGS UNITS 2 AND 3 AS OF DECEMBER 31, 2017, AFTER TRANSFERRING \$26 MILLION IN VALUE TO THE ADDITIONAL CAPACITY IN SJGS UNIT 4 PROVIDES SUBSTANTIAL BENEFITS TO CUSTOMERS, IS WITHIN THE AUTHORITY OF THE COMMISSION TO ALLOW AND DOES NOT VIOLATE ANY REGULATORY PRINCIPLE.**

Paragraph 18 of the Stipulation provides:

PNM shall be allowed to recover 50% of its undepreciated investment in SJGS Units 2 and 3 as shown on its books as of December 31, 2017, after reducing the net book value of SJGS Unit 3 by \$26 million to reflect the value placed on the

additional SJGS Unit 4 capacity. Until that time, PNM shall continue to depreciate SJGS Units 2 and 3 according to its approved depreciation schedules. Based on current projections, PNM estimates its undepreciated investment in SJGS Units 2 and 3 will be approximately \$257.0 million at December 31, 2017. Based on this estimate, PNM will be allowed to recover 50% of the undepreciated investment estimated at \$115.5 million, which is \$257.0 million less \$26.0 million transferred to Unit 4, i.e., \$231.0 million, multiplied by 50% as the percentage of recovery agreed to in this Stipulation. PNM shall place the amount of undepreciated investment allowed to be recovered in a regulatory asset which shall be amortized over a twenty year period with a carrying charge equal to PNM's pre-tax weighted average cost of capital ("WACC") (as it may be modified from time to time by Commission orders in rate cases) on the unamortized amount.

PNM witness Ortiz demonstrated that all the investments in SJGS Units 2 and 3 were prudently incurred. He identified the cases wherein the Units were granted CCNs and pointed out that, since the time they were certified, they had always been considered to be resources needed in PNM's supply portfolio. He testified that there was only one instance where investment in SJGS Units 2 and 3 had been challenged as imprudent and noted that the challenge had been rejected by the Commission. Ortiz Stip., pp. 30-31. In NMPRC Case No. 10-00086-UT, NEE argued that costs incurred for retrofits and environmental upgrades were imprudently incurred because PNM knew or should have known that anticipated future environmental regulation would require PNM to make significant additional investments in environmental upgrades and, if so, PNM knew or should have known that it would have been less costly to replace its coal fired plants with alternative energy sources or energy efficiency programs. NMPRC Case No. 10-00086-UT, Final Order Partially Approving Certification of Stipulation, ¶¶ 150-151, at 65-66 (July 28, 2011) ("*10-86 Order*"). The Commission found, however, that there was nothing in the record to show that the potential costs of future environmental compliance were reasonably known and quantifiable, even through the date of the Final Order in that case, July 28, 2011. *10-86 Order*, ¶ 153, at 67. The Commission determined that the evidence would

have to show that PNM knew or should have known of future environmental requirements in 2005 before it became obligated to make the investments in order for disallowance as imprudence to not constitute impermissible hindsight review. *10-86 Order*, ¶ 152, at 66-67.

In this case the possibility that SJGS Units 2 and 3 could be retired in order to achieve a less costly alternative to the FIP did not become known until the execution of the Term Sheet by PNM, NMED and EPA that provided for consideration of a Revised SIP that would allow installation of less costly SNCR technology on SJGS Units 1 and 4 if Units 2 and 3 were retired. The FIP was issued in August 2011; the Term Sheet was executed February 15, 2013. Darnell Stip., pp. 6, 11, PNM Ex. RND-2 Stip, PNM Ex. RND-6 Stip; *see also* 15 Tr. 3706-3710 (1/26/15) (Van Winkle). At that point investments in SJGS Units 2 and 3 were limited to only those necessary to keep the plants operational until their retirement date of December 31, 2017. Olson Stip., p. 24. Therefore, all investments in SJGS Units 2 and 3 have been prudently incurred and thus are recoverable in rates.

No party contests the provisions of the Stipulation that would authorize abandonment of SJGS Units 2 and 3. In fact, NEE witness Van Winkle testified:

The request to abandon San Juan Units 2 and 3 on 12/31/17 and permanently retire them should be approved by the PRC. PNM has shown that abandonment of SJGS units 2 and 3 in conjunction with implementation of SNCR on SJGS Units 1 and 4 meet the Regional Haze Clean Air Act requirements. The EPA, New Mexico Environment Department and the New Mexico Environmental Improvement Board concur with the RSIP. PNM has shown in this case that the RSIP is less costly than implementing the Federal Implementation Plan (“FIP”) that required implementation of Selective Catalytic Reduction (SCR) on all four SJGS units. Further, the RSIP is a significantly better environmental outcome than the FIP.

Van Winkle Stip., pp. 6-7. He maintained that position on cross-examination. 15 Tr. 3703-3706, 3708-3710 (1/26/15) (Van Winkle).

Because the investment in SJGS Units 2 and 3 was prudently incurred and the decision to abandon them prior to full recovery of that investment is reasonable, resulting in lower cost service than would be the case if they were to remain in service with costly SCR installed, it follows that the undepreciated investment in them is subject to full recovery, including a return on that investment. Ortiz Stip, pp. 29-34; cf. *Attorney General v. Dept. of Pub. Utils.*, 455 N.E.2d 414, 419 (Mass. 1983) (no legal impediment to allowing utility to recover its prudent investment in plant reasonably abandoned and to recover carrying charges on amounts amortized); *Re GASCO, Inc.*, 132 P.U.R.4<sup>th</sup> 352, 372 (Haw. PUC 1992) (“The test in determining whether amortization of the undepreciated balance of a plant should be allowed is whether the investment in the plant was prudent when made and whether the retirement or abandonment of the plant before its useful life was based on reasonable grounds.”).

The “used and useful” concept is not a bar to recovery of the undepreciated investment in SJGS Units 2 and 3. There is no statute that requires the application of the used and useful principle in New Mexico. To the contrary, the Commission is granted a substantial amount of flexibility in the selection of ratemaking methods. NMSA 1978, § 62-6-14(A) (2009). The New Mexico Supreme Court, in rejecting an argument that the adoption of the inventorying ratemaking methodology violated the used and useful principle, stated:

Our case law confirms that the “used and useful” concept is but one factor among many to be considered by the Commission in its rate base analysis. We have consistently construed the statute broadly rather than to limit the Commission to any one particular method; the touchstone is the reasonableness of the ultimate decision.

*NMIEC 1986*, 1986-NMSC-059, ¶ 29, 104 N.M. 565.

The NMPSC has held:

Inclusion or exclusion in rates of plant does not automatically follow from a used and useful determination. Remedies for excess capacity can range from a total

inclusion of the assets in rates to a total and permanent exclusion. Often, a fair result is a sharing of the costs of excess capacity between investors and ratepayers.

*Re Pub. Serv. Co. of New Mexico*, 101 P.U.R.4<sup>th</sup> 126, 163 (NMPSC 1989) (“*Case 2146 Pt. II*”), *aff’d NMIEC 1991; accord Case 2567*.

In *Case 2146 Pt. II*, the NMPSC gave primary consideration to the proper balancing of customer and investor interests giving due consideration to all the facts and circumstances. *Case 2146 Pt. II*, 101 P.U.R.4<sup>th</sup> at 155. The NMPSC ruled that, under the facts and circumstances of that case, the proper balancing of interests required some amount of excess capacity to be included in rate base. *Case 2146 Pt. II*, 101 P.U.R.4<sup>th</sup> at 176. The NMPSC noted:

Regulators must balance these interests in a continually changing economic environment. Regulation must, in addition to preventing the utility from charging excessive rates and neglecting the quality of its service, provide incentives to improve the quality and efficiency of service.

*Case 2146 Pt. II*, 101 P.U.R.4<sup>th</sup> at 150. This balancing approach is consistent with New Mexico Supreme Court pronouncements: “The rate-making process involves a balancing of investor and consumer interests. Neither is paramount.” *Mountain States Telephone & Telegraph Co. v. Corp. Comm’n*, 1982-NMSC-127, ¶ 26, 99 N.M. 1; *see NMIEC 1986*, 1986-NMSC-059, ¶ 36 (affirming NMPSC’s rejection of proposal that would result in greater savings to customers at “drastically greater exposure” to investors).

The overwhelming majority of cases from other jurisdictions indicate that the used and useful principle has no place in the analysis of whether the costs of cancelled or abandoned plant should be recovered in rates. *E.g. Office of Consumer Advocate*, 449 N.W.2d at 386-387; *People’s Org. for Washington Energy Resources v. Washington Util. and Transp. Comm’n*, 711 P.2d 319, 332 (Wash. 1985); *Attorney General v. Dept. of Pub. Utils.*, 455 N.E.2d at 424; *see Wisconsin Pub. Serv. Corp. v. Pub. Serv. Comm’n of Wisconsin*, 325 N.W.2d 867, 871 (Wis.

1982) (“It is arbitrary and capricious to authorize a utility to expand its facilities, spend large amounts of money prudently to accomplish that goal, and then force the utility to bear the entire risk of such expenditures.”). Even where embodied in statute, unless amortization of costs is also prohibited, the used and useful principle is applicable only to rate base questions in order to avoid “doing violence to the whole scheme of public utility law.” *Office of Consumer Advocate*, 449 N.W.2d at 387. Therefore, where rate recovery is authorized through amortization of prudently incurred costs without inclusion in rate base, the used and useful principle is inapplicable. *People’s Org.*, 711 P.2d at 329.

Most of these cases dealt with plants cancelled before they commenced operation and were therefore never used and useful. Although the applicable legal principles involved are the same, there is a stronger argument for full recovery where the plant is abandoned prior to the end of its useful life, especially under the circumstances that exist in this case.

[R]atepayers generally “bear the expense of depreciation” and ... investors generally “are entitled to recoup from consumers the full amount of their investment in depreciable assets devoted to public service,” [*Democratic Central Committee v. Washington Metropolitan Area Transit Commission*, 485 F.2d 786, 808 (D.C. Cir. 1973)]...Because customers have benefitted from the operation of the plant for over 30 years, and because ceasing plant operations will benefit customers by lowering rates [allowing recovery would] promote economic efficiency....Denying full recovery would likely give investors an incentive to operate plants until they recouped all of their investment even though closing the plant would save ratepayers money.

*Town of Norwood v. Fed. Energy Regulatory Comm’n*, 80 F.3d 526, 532 (D.C. Cir. 1996); *Citizens Action Coalition v. Northern Indiana Pub. Serv. Co.*, 485 N.E.2d 610, 616 (1985) (although disallowing recovery of costs associated with plant cancelled prior to completion, stating that allowance of amortization of abandoned plant investment that had been used and useful was proper in that it encourages utilities to remove obsolete plants and property from rate base, benefitting consumers); *cf. Case 2146 Pt. II*, 101 P.U.R.4<sup>th</sup> at 150 (“Regulation must, in

addition to preventing the utility from charging excessive rates and neglecting the quality of its service, provide incentives to improve the quality and efficiency of service.”).

City/Counties witness Kumar recommended total disallowance but his reasoning is confusing, contradictory and fundamentally unreliable. Kumar Stip., pp. 13-21; *see generally* Ortiz Reb. Stip., pp. 7-19. A key component of his rationale ostensibly supporting his recommendation for disallowance was his characterization of the abandonment of SJGS Units 2 and 3 as a “management decision.” Kumar Stip., p. 18; 12 Tr. 2674-2676 (1/21/15) (Kumar). Characterizing it as a “management decision” says nothing about whether the costs should be recovered, given that management must make numerous business decisions to properly manage and operate its business to serve customers reliably. Ortiz Reb. Stip., p. 11. The Commission has an obligation to allow a utility to recover expenses that are necessary in providing utility service, that benefit ratepayers, and that are prudently incurred. *Zia*, 2000-NMSC-011, ¶ 13, 128 N.M. 728. Costs incurred to comply with environmental requirements are necessary costs of doing business which are recoverable in rates. *Citizens Util. Bd. v. Illinois Commerce Comm’n*, 651 N.E.2d 1089 (Ill. 1995); *see In re Alabama Power Co.*, 2011 WL 4826138 (Alab.PSC).

The Commission cannot disallow prudent expenditures for essential utility service even if a loss resulted, because the expenditures were required. *Zia*, 2000-NMSC-011, ¶ 13. The Commission’s authority to determine what expenditures are prudent is not unlimited. For example, the Commission cannot disallow tax expenses based on choice of capital structure even if the capital structure selected resulted in higher tax expense to ratepayers, because to do so interferes with a choice left to management. *Id.* Neither can the Commission use its ratemaking authority to force upon a utility a choice of organizational structure which is committed to

management discretion. *Id.*; *Moyston v. New Mexico Pub. Serv. Comm'n*, 1966-NMSC-062, ¶ 41, 76 N.M. 146.

The test for determining if management acted prudently is well-established in New Mexico:

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

NMPSC Case No. 2087, Order on Burden of Proof and Specific Issues to be Addressed at 4-5 (Oct. 4, 1988), quoting *Re Salem Nuclear Generating Station*, 70 P.U.R.4<sup>th</sup> 568, 574 (Pa. PUC 1985); *Re PNM Gas Services*, 176 P.U.R. 4<sup>th</sup> 89, 135 (NMPUC 1997); accord, *PNM Gas Servs.*, 2000-NMSC-012, ¶ 63. In addition, although a utility has the burden of proving the reasonableness of its costs, it is entitled to a presumption that costs it has incurred are prudent. *Attorney General 1984*, 1984-NMSC-081, ¶ 8; accord, *PNM Gas Servs.*, 2000-NMSC-012, ¶ 72, quoting *Re Pub. Serv. Co. of New Mexico*, 50 P.U.R. 4<sup>th</sup> 416, 427 (NMPSC 1982) ("*PNM 1982*") (unless an expense is challenged, the Commission assumes it was reasonably incurred). Unsupported allegations that a cost was not prudently incurred is insufficient to rebut the presumption of prudence. In using the term "challenge" in *PNM 1982*, the NMPSC was referring to part of the process developed when cost of service indexing was transformed into an annual rate review from a quarterly adjustment. *PNM 1982* at 422. In order to be accepted, challenges had to be in sufficient detail to demonstrate good cause for further investigation. *PNM 1982* at 422. This is consistent with the law on what is required to rebut a presumption of prudence and shift the burden of going forward with additional evidence. A utility receives the

benefit of the presumption of prudence until a serious doubt is created with regard to the prudence of the expenditure. *State of Missouri ex rel. Assoc. Natural Gas Co.*, 954 S.W.2d at 528.

Mr. Kumar's characterization completely ignores the reality of the situation. Ortiz Reb. Stip., pp. 10-15. PNM's "management decision" was made in the context of a changed governmental mandate that initially required compliance with the FIP to keep SJGS operating. In order to mitigate the costs associated with complying with that governmental mandate, PNM is required to shut down SJGS Units 2 and 3 and install SNCR on Units 1 and 4. And PNM must obtain Commission approval for abandonment and CCNs for the replacement power resources. Mr. Kumar's view of the situation does not comport with the reality of the very real role played by governmental mandates. See Darnell Stip., pp. 6-15; *Alabama Power*.

In contrast to Mr. Kumar, NEE's policy expert, Ronald Lehr, a former utility commissioner, favors the retirement of coal resources where significant capital investment is required for environmental compliance and there are more cost-effective alternatives. 10 Tr. 2176 (1/16/15) (Lehr). Moreover, Mr. Lehr also favors a utility's recovery of undepreciated investment as an incentive to retire facilities under these circumstances. 10 Tr. 2176-77 (1/16/15) (Lehr).

In his August 2014 testimony, Mr. Kumar demonstrated a disturbing lack of familiarity with how the "used and useful" concept has generally been treated when dealing with cost recovery for abandoned or cancelled plant in the absence of a statute dictating the result. Kumar Direct, pp. 10-11. His doctrinaire approach simply is not consistent with the used and useful concept as applied in New Mexico. Indeed, he admitted prior to the Stipulation that a 50% sharing of costs related to the retirement of SJGS Units 2 and 3 represented an appropriate

balance of the interests of customers and investors if his strict application of the used and useful concept was not adopted. Kumar Direct, p. 34.

Mr. Kumar demonstrated a lack of knowledge in other respects as well. For example, in his direct testimony he cited a Federal Energy Regulatory Commission (“FERC”) case as precedent for a 50-50 sharing of cancelled plant costs. Kumar Direct, p. 34. When asked on cross-examination about FERC policy of allowing 50% recovery of costs associated with cancelled plant, he claimed to have no knowledge of such a policy and insisted that FERC had no such policy. 11 Tr. 2631 (1/20/15) (Kumar). However, when asked to read an excerpt from the decision he cited, he was forced to admit that FERC has had a policy allowing 50% recovery of costs associated with cancelled plant dating back to 1988. 11 Tr. 2632-2633 (1/20/15) (Kumar). He also admitted that between 1979 and 1988 FERC operated under a policy allowing return of, but not return on, costs of abandoned plant. 11 Tr. 2633-2634 (1/20/15) (Kumar). Despite his strongly held opinion about the used and useful concept, Mr. Kumar admitted that he was aware of the *Town of Norwood* case allowing full cost recovery plus carrying charges on the unamortized balance in the case of plant which had been serving customers reliably for many years being retired early, though he erroneously thought it was a settled case. 11 Tr. 2635-2637 (1/20/15) (Kumar).

Mr. Kumar also sponsored contradictory testimony. Despite his recommendation that all cost recovery associated with the abandonment of SJGS Units 2 and 3 should be disallowed, he claimed that paragraph 19 of the Stipulation was detrimental to customer interests because it provided a disincentive for PNM to act reasonably to seek abandonment of SJGS Unit 4 if circumstances warranted because it precluded recovery of undepreciated investment in the additional capacity in SJGS Unit 4 – precisely the reason cited by PNM for allowing recovery.

Kumar Stip., pp. 12-13; *see, Town of Norwood; Citizens Action Coalition*. Yet he stubbornly refused to acknowledge the contradiction between his two positions. 11 Tr. 2637-2644 (1/20/15) (Kumar).

It should be pointed out that Attorney General witness Crane clearly saw benefits resulting from paragraph 19, regardless of possible incentives or disincentives by providing certainty as to how cost recovery associated with early retirement of SJGS Unit 4 will be addressed for the additional capacity. 12 Tr. 2714, 2759 (1/21/15) (Crane). This is a benefit because the commitment will avoid litigation of this issue in a future filing. *See 08-78 CS*, p. 104, (agreeing to not seek cost recovery arguably allowed under law is a benefit).

Recovery of PNM's prudent investments in SJGS Units 2 and 3 cannot be denied based on the notion advanced by Mr. Kumar that the authorized return on equity ("ROE") has already compensated PNM for this potential loss. First, the Commission's order in *Case 10-86*, PNM's last rate case, did not include an explicit premium to cover the potential disallowance of prudent investments from rate base. *Case 10-86*, at 58-59. Further, the ROE authorized in that case was based on cost of equity estimates for a peer group of electric utilities using Discounted Cash Flow ("DCF") analyses, and there was no indication that these DCF results reflected an expectation of significant disallowance of prudent investments at those utilities. Hevert Reb. Stip., p. 12. Thus, PNM's authorized ROE includes neither an explicit nor an implicit premium for the loss of prudent investments.

Second, it is not reasonable to conclude that investors in electric utility stocks expect disallowance of prudent investments and therefore require equity returns that include a premium for that risk. Hevert Reb. Stip., p. 9. On the contrary, "in a cost of service-based regulatory environment, in exchange for the obligation to serve, equity investors expect utilities to have the

opportunity to earn a fair return on prudent investments.” Hevert Reb. Stip., p. 8. The nature of cost-of-service regulation is such that the expected risk is less than for unregulated firms. “The risk-limiting nature of regulation is what enables utilities to have costs of capital below those of unregulated firms, even as utilities use comparatively higher proportions of debt (that is, higher degrees of financial leverage) in their capital structure.” Hevert Reb. Stip., p. 9.

Third, a utility’s cost of equity includes a premium over the cost of debt not because equity investors expect that regulators will disallow cost recovery for prudent investments, as Mr. Kumar suggests, but because creditors have a priority on the utility’s earnings and assets while equity investors are only “residual claimants.” Hevert Reb. Stip., p. 11. And utilities do face numerous business and financial risks that impact the recovery of costs and the ability to earn returns equal to the cost of capital, even though non-recovery of prudent investments is not one of them. These risks include “regulatory lag, uncertainty in regard to authorized ROE levels, earnings volatility due to weather fluctuations and other demand factors, construction risk associated with capital-intensive assets, financial risk from debt leverage, uncertainty with regard to the outcome of prudency reviews, and high capital investment requirements associated with the obligation to serve.” Hevert Reb. Stip., pp. 11-12. Hence, it is erroneous to assume that PNM’s equity investors have received compensation to cover the risk of loss of prudent investments just because PNM’s authorized ROE is higher than its cost of debt.

Fourth, investors in utility stocks do not expect regulatory disallowances of prudent investments (and therefore do not require a rate of return reflecting that risk) because, as shown earlier in this Brief, regulators in the vast majority of cases have approved recovery of some or all of the investment in cancelled and retired plant. Indeed, full recovery with a compensatory rate of return has generally been granted for plant retired early to comply with environmental and

other regulations. *See* Hevert Reb. Stip., pp. 13-15; *see also* *Town of Norwood* (where the FERC granted full recovery of and on the remaining undepreciated investment in a nuclear power plant in part because early retirement, even with full cost recovery, was less costly for customers than continued operation).

Finally, investors in PNM stock would not expect this Commission to disallow recovery of the undepreciated investment in retired plant because the Commission has clearly stated that “[a]s a general rule, utilities are able to recover from its ratepayers the cost of a facility that is prematurely retired . . .”. NMPRC Case No. 08-00078-UT, Final Order Partially Approving Certification of Stipulation, December 11, 2008, at 4. In that case, the Commission determined that the gain from the sale by PNM of all of its gas utility assets and operations were properly retained by PNM’s shareholders because “the risks of loss on the sale of an entire utility or utility system falls on the utility’s shareholders, and therefore any gain on the sale of those assets should be allocated entirely to shareholders, absent special circumstances that warrant a different allocation.” *Id.* at 4-5. On the other hand, the risk of loss of specific utility assets as a result of early retirement due to obsolescence, destruction and other causes not attributable to imprudence “generally are borne by ratepayers under the long-held principle that utilities are entitled to recover the reasonable and prudently incurred costs of providing service to its ratepayers.” *Id.* at 3-4. Concomitantly, “[b]ecause ratepayers bear that type of risk . . . the Commission, as a general rule . . . [has] allocated all or a portion of the gain on the sale of specific assets by a utility made in the course of providing utility service to ratepayers . . .”. *Id.* at 4. Such was the case with respect to the gains from PNM’s sale of capacity interests in SJGS to Anaheim, UAMPS and Farmington. Case No. 2408 (Anaheim); Case No. 2553 (UAMPS); and Case No. 1693 (Farmington). Thus, under this Commission’s precedents, there was no reason for

investors in PNM stock to expect that the early retirement of specific plant assets would lead to a disallowance of cost recovery and no reason for the Commission to authorize an ROE premium to cover the risk of such disallowance.

PNM's case for full recovery of its undepreciated investment in SJGS Units 2 and 3 was thus a strong one. As such, PNM's agreement that the Stipulation as a whole is just and reasonable, with the Stipulation providing for only fifty percent recovery, is beneficial to customers by eliminating the possibility of full recovery. *See NMIEC 1986*, 1986-NMSC-059, ¶ 34 (Commission possessed the legal authority to allow entire investment in excess plant in rate base so that decision to adopt inventorying method was more in the interest of customers than either full inclusion or disallowance from rate base of excess capacity); *08-78 CS*, p. 104 (Nov. 24, 2008), *approved 08-78 CS* (utility's agreement to not seek cost recovery arguably allowed under law is a benefit to customers).

The cost-sharing approach included in the Stipulation of providing fifty percent recovery amortized over twenty years with a carrying charge equal to PNM's pre-tax WACC on the unamortized balance is less costly to customers than other sharing mechanisms such as allowing a return of but not on the entire investment. PNM witness Monroy demonstrated that the cost sharing approach contained in the Stipulation resulted in a lower net present value of revenue requirements in the amount of nearly \$7 million and a lower cumulative revenue requirement in the amount of nearly \$34 million over the proposed twenty year recovery period as compared to a return of but no return on approach that is often used by other commissions to share costs for cancelled plants. *Monroy Stip.*, pp. 21-22.

The Stipulation provides that amortization of the amount of undepreciated investment to be recovered in rates should be over a twenty year period. The only other time frame

recommended is over the remaining lives of SJGS Units 2 and 3 had they not been retired early, i.e. through 2053, sixteen years longer. However, it does not follow that because the depreciable lives have been set as continuing through 2053 the amortization period for recovery of costs associated with taking the assets out of service early should correspond to that time period. The costs associated with early retirement are current costs and, so, the longer the amortization period the greater the mismatch between costs and benefits. In addition the longer the amortization period, the greater the total amount of costs recovered from customers due to the carrying charges on the unamortized balance. But a precise matching of costs and benefits attributable to a very short amortization period imposes significantly higher annual costs than does a longer amortization period. Thus the Stipulation provides a reasonable balancing of the competing considerations. Determining the appropriate amortization period is a judgment call requiring the Commission to balance customers' long term and short term interests and to weigh the gravity of heightening the mismatch between the time these costs were incurred and the time they will be recovered. *Re U.S. WEST Communications.*

**XII. THE COMMISSION IS NOT LIMITED TO VALUING RATE BASE ASSETS AT NET BOOK VALUE. THE COMMISSION IS REQUIRED TO TAKE ALL APPROPRIATE FACTORS INTO CONSIDERATION WHEN IT ASSIGNS A RATE BASE VALUATION. IT IS THUS APPROPRIATE UNDER THE CIRCUMSTANCES OF THIS CASE THAT PALO VERDE UNIT 3 BE VALUED AT \$221 MILLION AND THE ADDITIONAL CAPACITY IN SJGS UNIT 4 BE VALUED AT \$26 MILLION.**

**(Response to Briefing Order Issue No.5)**

The Stipulation provides that a CCN be issued for PNM's ownership of Palo Verde Unit 3, which was decertified and is currently excluded from rate base. It also provides that a CCN be issued for 132 MW of additional capacity in SJGS Unit 4, representing capacity to be acquired from California owners desiring to terminate their participation in SJGS Unit 4. Consistent with NMSA 1978, Section 62-9-1(B) (2005), the Stipulation provides for a determination of certain

ratemaking principles and treatment associated with the plant requested to be certified, i.e., the value of the plant when it is added to rate base. The Stipulation provides for valuations determined on a basis other than net book value.

The Commission is not precluded from using valuation methods other than net book value. Indeed, the PUA requires the Commission to give due consideration to a variety of valuation methods appropriate to the circumstances. NMSA 1978, § 62-6-14(A) (2009). PNM witness Reed, an expert consultant who has testified about 200 times in the past 38 years on utility regulation matters, testified that it was not contrary to traditional regulatory practice to include assets in rate base above net book value. Mr. Reed was the only witness who has an expertise in valuation of utility assets. He testified that net book value is not a relevant consideration in the determination of value from a resource that produces economic profits in the wholesale markets. He agreed with PNM witness Ortiz that, when the market value of a facility exceeds its net book value, the market value is recoverable in rates where a net benefit accrues to customers. 8 Tr. 1586 (1/14/15) (Reed); Reed Stip., pp. 29-30. He identified instances where non-utility plant had been added to rate base by utilities at acquisition price, i.e., the market value of the plant when acquired and added to rate base. Although PNM is not acquiring Palo Verde Unit 3, it is currently non-utility plant that would be added to rate base, and thus its fair market value, not its net book value, is what is relevant for rate base valuation purposes. Reed Reb. Stip., pp. 3- 6.

The NMPUC has previously recognized that there are three primary methods to arriving at a value for property: (1) capitalization of earnings, (2) reproduction cost new less depreciation, and (3) comparable sales. NMPUC Case No. 2588, Recommended Decision (Corrected) of the Hearing Examiner at 25 (March 24, 1995), *modified on other grounds* Final

Order (May 22, 1995). This is consistent with the evidence in this case. Mr. Reed valued Palo Verde Unit 3 using a DCF methodology, a capitalization of earnings approach that is widely used to value long-term assets. Reed Stip., p. 3. Mr. Reed's method took into account the current low costs of energy in the wholesale markets and, using reliable projections of future market prices, calculated a market value for Palo Verde Unit 3 of \$2500. Reed Reb. Stip., pp 7-11. Using low, base and high cost projected scenarios to derive a valuation range, he found the Stipulation value of \$1650/kW to be at the low end of a reasonable range and fair to customers. Reed Stip., pp. 28-29.

Although not relied on by Mr. Reed for purposes of his market valuation study, PNM witness Horn identified market transactions involving the sale of interests in Palo Verde Unit 2. Previous transactions had resulted in sale prices of between \$2500/kW and \$2850/kW, with PNM losing a competitive bid process while offering \$2578/kW. Horn Stip., p. 4. These transactions provide additional support for the results reached by Mr. Reed's DCF analysis. Mr. Van Winkle's skepticism that PNM may have been incented to bid high in order to receive a higher rate base valuation is belied by the transaction where PNM was not willing to pay enough to win the bidding process, as well as the fact that the Commission is not bound to accept the purchase price and in one instance accepted a stipulation that reduced the rate base value to \$2500/kW from the purchase price of \$2850/kW. Horn Stip. p. 4; 16 Tr. 3835-3836 (1/27/15) (Van Winkle). NEE's theoretical view of utility incentives simply does not stand up to the real world of utility actions under Commission regulation.

Although PNM is not paying cash for the additional 132 MW of SJGS Unit 4, the provision of the Stipulation providing an initial rate base value of \$26 million, i.e., \$197/kW, is imminently reasonable under the circumstances. First, customers receive a benefit because this

value is transferred from the value of SJGS Unit 3 immediately prior to retirement, thus reducing the amount of undepreciated investment subject to recovery. Because the value is connected to plant that will be in service, it will be depreciated over its remaining life, thereby lowering annual costs to customers compared to amortization over a shorter period due to its not being in service. The value is much lower than any other replacement resource that could be acquired. Further, since it is being acquired as a replacement for capacity in SJGS Unit 3, Staff's pre-Stipulation testimonies proposed treating it as an exchange for Unit 3 which would result in a valuation of approximately \$89 million. De Cesare Direct, p. 4.

Although Palo Verde Unit 3 is not being acquired and thus its valuation is not truly an "acquisition adjustment" (Sategna Reb. Stip., p. 3), the law regarding acquisition adjustments is helpful in demonstrating that the Commission is not limited to net book value for purposes of valuing rate base assets. The New Mexico Supreme Court described the general standard for inclusion of acquisition adjustment in rate base to be "that a utility seeking inclusion of the adjustment must prove that the purchase was an arm's length transaction and resulted in some benefit to the rate payer." *Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n*, 1980-NMSC-005, ¶ 12, 94 N.M. 731. The Court in that case was confronted with the "fair value rate base" practice of the former NMPSC where the NMPSC weighted the net original cost of plant in service with a replacement cost valuation to achieve a "fair value rate base". The Court found that Hobbs Gas did not include an acquisition adjustment in its net original cost rate base and that the purchase of the assets in a competitive process demonstrated "true market value". *Id.* The Court reversed the NMPSC for deducting the amount of the acquisition adjustment from the equity portion of the capital structure for purposes of deriving the rate of return to be applied to the fair value rate base. *Hobbs Gas*, 1980-NMSC-005, ¶ 13.

The Commission applied the *Hobbs Gas* general standard in PNM's rate case filed in 2007. Case No. 07-00077-UT, Final Order Partially Adopting Recommended Decision, ¶¶ 53-61, at 20-23 (April 24, 2008). In that case PNM sought inclusion in rate base of acquisition adjustments related to: (1) repurchase of sixty percent of the Eastern Interconnect Project ("EIP"), a major electric transmission line; (2) the purchase of transmission facilities from Tri-State Generation & Transmission Cooperative; and (3) the purchase of a twenty two percent beneficial interest in the leases of Palo Verde Units 1 and 2. The Recommended Decision of the Hearing Examiner recommended inclusion of the EIP acquisition adjustment but recommended disallowance of the other two acquisition adjustments. Recommended Decision at 85-93. The Commission allowed inclusion of all three adjustments.

The Commission accepted the rationale that the EIP lease repurchase was beneficial to customers because the EIP is an essential transmission line and the acquisition eliminated the risk of having to purchase the asset at fair market value at the end of the lease term. Recommended Decision at 90.

With regard to the Tri-State transaction, the Commission ruled that PNM had met its burden of proof under *Hobbs Gas*. The Commission ruled that customers of PNM benefitted from the transaction, recovery of depreciation expenses through rates charged to members of distribution cooperatives was irrelevant and there was no compelling evidence that the transactions were not at arm's length. Final Order, ¶ 56, at 21-22; *see*, Recommended Decision at 85-86 (assets have value greatly in excess of book value based on their interconnections and proximity to PNM's electrical system, a benefit significantly larger than the adjustment sought).

With regard to the Palo Verde lease transaction, the Recommended Decision recommended denial based on a stipulation that recovery of the acquisition adjustment would not

be recovered from customers. However, the Hearing Examiner had not properly interpreted a subsequent stipulation which reversed that covenant and allowed recovery. Final Order, ¶¶ 58-61, at 22-23. The evidence in the case showed that ownership of the leases was more beneficial to customers than lease payments. Final Order, ¶ 57, at 22.

In the recent case involving the acquisition by Zia Natural Gas Company of gas properties in Dona Ana County near Las Cruces, the Commission accepted the Recommended Decision of the Hearing Examiner which expanded on the standards for allowing rate recovery of acquisition adjustments, consistent with the general standard discussed by the Court in *Hobbs Gas* and applied in PNM's 2007 rate case. In that case, Zia sought approval to apply its New Mexico system-wide rates to the newly-acquired system. Staff recommended that Zia be required to file a rate case as soon as possible in order to determine the appropriate valuation for rate base purposes. *Re Zia Natural Gas Co.* 2011 WL 2573133, \*12. The Commission adopted the recommendation of the Hearing Examiner not to require Zia to file a rate case at any particular point in time and that proper valuation of the new assets could wait until Zia found it to be in its own self-interest to file. However, the Commission noted that, since the property being acquired had never been regulated by the Commission, a proper rate base valuation did not exist. It therefore required Zia to propose appropriate valuations in its next rate case so that the issue of acquisition adjustment, either positive or negative, could be considered. *Id.*, \*14. In footnote 2, the Commission referred favorably to a previous case (involving a sewer utility) that stated that the Commission "determines each case involving an acquisition adjustment request on its own facts but that the following standards are compatible with generally acceptable ratemaking standards in New Mexico:"

Acquisition adjustments are generally excluded from the rate base and amortized below-the-line under the premise that these excess costs provide no additional

benefit to ratepayers. To allow these investment dollars to earn a return or to allow recovery through cost of service may unjustly penalize customers. Rate base treatment and/or cost of service treatment, however, has been allowed by various regulatory commissions under a variety of circumstances. The reasons most commonly cited for allowing rate base treatment of acquisition adjustments are as follows:

(1) when acquisitions represent an essential or desirable part of an integration of facilities program devoted to serving the public better;

(2) when acquisitions are clearly in the public interest, because operating efficiencies purchased offset the excess price over net original cost;

(3) when the terms of the acquisition agreement receive prior regulatory approval, especially if there is a public hearing and investigation that concludes the transaction is in the public interest; and

(4) when acquisitions are determined to involve arm's length bargaining.

*Id.*; accord, *In re Application of CDS Rainmakers Utilities, L.L.C.*, NMPRC Case No. 09-00245-UT, Recommended Decision, at 21, quoting Hahne and Aliff, "Accounting for Public Utilities, § 4.04[2] (Matthew Bender, 1991) (March 3, 2010), approved, Final Order (June 10, 2010).

Since Palo Verde Unit 3 has never been included in rate base, its current net book value is not an appropriate rate base valuation. Sategna Stip., pp. 5-6; Ortiz Stip., pp. 41-42, 48-49; see *Zia Natural Gas*, \*14. As pointed out by Mr. Reed, other valuation methods are more appropriate. Reed Stip., p. 25. Further, the CCNs for both Palo Verde Unit 3 and the additional capacity in SJGS Unit 4 are part of the most cost-effective resource portfolio and thus represent essential and desirable parts of an integration of facilities program devoted to serving the public better. See *CDS Rainmakers Utilities*, RD at 21.

Acquiring the additional capacity in SJGS Unit 4 at zero cost effectively results in a negative acquisition adjustment since that cost is lower than original cost less depreciation. Much like a positive acquisition adjustment, the ratemaking treatment of negative acquisition adjustments should be reflective of benefits to customers. Ortiz Stip., p. 47; see *Zia Natural Gas*, \*14. In addition customers benefit because the acquisition allows PNM to preserve its existing interest in SJGS Units 1 and 4, which are reliable, low cost generation. See *Re*

*Application of Arizona Pub. Serv. Co.*, 2012 WL 1455090 (Az.CC). Since the Stipulation effectively provides for partial non-recognition of the negative acquisition adjustment such that net benefits from the valuation are provided to customers, the Stipulation valuation is reasonable and should be accepted.

### **XIII. CONCLUSION**

The record and the law are clear: the Stipulation is in the public interest and should be approved. The remaining Signatories are experienced, knowledgeable parties who engaged in a substantial amount of discovery and investigation to determine the best approach to dealing with the complex and myriad set of issues and circumstances involved in this case. The Stipulation has been supported as providing a resource portfolio that meets the public convenience and necessity with the most cost-effective resources, including abandonment of SJGS Units 2 and 3 and CCNs for Palo Verde Unit 3 and additional capacity in SJGS Unit 4, taking into account short term impacts on customers, long term costs, reliability and risk. Other alternatives were explored but didn't adequately meet the public convenience and necessity due to costs and inadequate consideration of risks and impacts on reliability and system operations. Thus substantial evidence supports the approval of the Stipulation. The Stipulation is in accordance with all applicable law.

Respectfully submitted:

**PUBLIC SERVICE COMPANY OF NEW MEXICO**

Benjamin Phillips, Associate General Counsel  
Stacey J. Goodwin, Deputy Associate General Counsel  
PNM Resources, Inc.  
Corporate Headquarters – Legal Department  
Albuquerque, NM 87158-0805  
Phone: 505-241-4836  
[Ben.Phillips@pnmresources.com](mailto:Ben.Phillips@pnmresources.com)  
[Stacey.Goodwin@pnmresources.com](mailto:Stacey.Goodwin@pnmresources.com)

Richard L. Alvidrez  
Miller Stratvert P.A.  
500 Marquette NW, Suite 1100  
P.O. Box 25687  
Albuquerque, New Mexico 87125  
Phone: (505) 842-1950  
[ralvidrez@mstlaw.com](mailto:ralvidrez@mstlaw.com)



Patrick T. Ortiz  
Cuddy & McCarthy, LLP  
1701 Old Pecos Trail  
P.O. Box 4160  
Santa Fe, New Mexico 87502-4160  
Phone: (505) 954-7323  
[portiz@cuddymccarthy.com](mailto:portiz@cuddymccarthy.com)

*Attorneys for Public Service Company of New Mexico*

GCG #519419

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

**IN THE MATTER OF THE APPLICATION )  
OF PUBLIC SERVICE COMPANY OF NEW )  
MEXICO FOR APPROVAL TO ABANDON )  
SAN JUAN GENERATING STATION UNITS )  
2 AND 3, ISSUANCE OF CERTIFICATES )  
OF PUBLIC CONVENIENCE AND )  
NECESSITY FOR REPLACEMENT POWER )  
RESOURCES, ISSUANCE OF ACCOUNTING )  
ORDERS AND DETERMINATION OF )  
RELATED RATEMAKING PRINCIPLES AND )  
TREATMENT, )  
)  
)  
**PUBLIC SERVICE COMPANY OF NEW )  
MEXICO, )  
)  
)  
Applicant )  
)  
)****

---

**Case No. 13-00390-UT**

**CERTIFICATE OF SERVICE**

I hereby certify that **Public Service Company of New Mexico's Post-hearing Brief-in-Chief** was mailed first-class, postage-paid, to the following persons whose mailing addresses are listed below and emailed to those persons at the email addresses and hand-delivered on February 16, 2015 as shown below:

Benjamin Phillips, Esq.  
PNM Resources, Inc.  
Corporate Headquarters – Legal Department  
Albuquerque, NM 87158-0805  
[Ben.Phillips@pnmresources.com](mailto:Ben.Phillips@pnmresources.com)

Bradford Borman, Esq.  
PNM Resources, Inc.  
Corporate Headquarters – Legal Department  
Albuquerque, NM 87158-0805  
[Bradford.Borman@pnmresources.com](mailto:Bradford.Borman@pnmresources.com)

Cholla Khoury, Esq.  
Assistant Attorney General  
Office of the Attorney General  
PO Drawer 1508  
Santa Fe, NM 87504-1508  
[ckhoury@nmag.gov](mailto:ckhoury@nmag.gov)  
[lmartinez@nmag.gov](mailto:lmartinez@nmag.gov)

Nann M. Winter, Esq.  
Stelzner, Winter, Warburton, Flores, Sanchez  
& Dawes, P.A.  
P. O. Box 528  
Albuquerque, NM 87103-0528  
[nwinter@stelznerlaw.com](mailto:nwinter@stelznerlaw.com)

Patrick T. Ortiz, Esq.  
Cuddy & McCarthy, LLP  
PO Box 4160  
Santa Fe, NM 87502-4160  
[Portiz@cuddymccarthy.com](mailto:Portiz@cuddymccarthy.com)

Peter J. Gould, Esq.  
PO Box 34127  
Santa Fe, NM 87594-4127  
[pgouldlaw@gmail.com](mailto:pgouldlaw@gmail.com)

Steven S. Michel, Esq.  
Western Resource Advocates  
409 E. Palace Ave., Unit 2  
Santa Fe, NM 87501  
[smichel@westernresources.org](mailto:smichel@westernresources.org)

Donald E. Gruenemeyer, P.E.  
Sawvel & Associates, Inc.  
100 East Main Cross Street, Suite 300  
Findlay, Ohio 45840-4889  
[degruen@sawvel.com](mailto:degruen@sawvel.com)

Marcos D. Martinez  
City Attorney Office  
City of Santa Fe  
P. O. Box 909  
Santa Fe, NM 87501  
[mdmartinez@santafenm.gov](mailto:mdmartinez@santafenm.gov)

Rachel Brown  
Santa Fe County Attorney's Office  
102 Grant Avenue  
Santa Fe, NM 87501  
[rabrown@santafecountynm.gov](mailto:rabrown@santafecountynm.gov)

Louis W. Rose  
Randy S. Bartell  
Montgomery & Andrews, P.A.  
P. O. Box 2307  
Santa Fe, NM 87504-2307  
[rbartell@montand.com](mailto:rbartell@montand.com)

Martin R. Hopper  
M-S-R Public Power Agency  
P. O. Box 4060  
Modesto, CA 95352  
[mhopper@msrpower.org](mailto:mhopper@msrpower.org)

Daniel R. Dolan  
Dolan & Associates  
3321 Candelaria NE #126  
Albuquerque, NM 87107  
[dan@lobo.net](mailto:dan@lobo.net)

Lisa Tormoen Hickey  
Alpern Myers Stuart LLC  
14 N. Sierra Madre, Suite A  
Colorado Springs, CO 80903  
[lisahickey@coloradolawyers.net](mailto:lisahickey@coloradolawyers.net)

Charles F. Noble, Esq.  
CCA  
409 E. Palace Ave., Unit #2  
Santa Fe, NM 87501  
[Noble@energyenvironmentlaw.com](mailto:Noble@energyenvironmentlaw.com)

Nicholas Schiavo  
Acting Public Utilities Director  
City of Santa Fe  
801 W. San Mateo  
Santa Fe, NM 87505  
[naschiavo@santafenm.gov](mailto:naschiavo@santafenm.gov)

James R. Dittmer  
Utilitech, Inc.  
623 NE Saint Andrews Circle  
Lee's Summit, MO 64064  
[jdittmer@utilitech.net](mailto:jdittmer@utilitech.net)

Steven Gross  
Porter Simons, P.C.  
40200 Truckee Airport Rd., Suite One  
Truckee, CA 96161  
[gross@portersimon.com](mailto:gross@portersimon.com)

Bruce C. Throne, Esq.  
1440-B South St. Francis Drive  
Santa Fe, NM 87505  
[bthroneatty@newmexico.com](mailto:bthroneatty@newmexico.com)

Michael I. Garcia  
Assistant County Attorney, Sr.  
Bernalillo County Legal Department  
520 Lomas Blvd. NW, 4<sup>th</sup> Floor  
Albuquerque, NM 87102  
[mikgarcia@bernco.gov](mailto:mikgarcia@bernco.gov)

Jeffrey H. Albright, Esq.  
Lewis Roca Rothgerber LLP  
201 Third Street NW, Suite 1950  
Albuquerque, NM 87102  
[jalbright@lrlaw.com](mailto:jalbright@lrlaw.com)

**Hand Deliver To:**  
Michael C. Smith, Esq.  
New Mexico Public Regulation Commission  
1120 Paseo De Peralta  
Santa Fe, NM 87501  
[MichaelC.Smith@state.nm.us](mailto:MichaelC.Smith@state.nm.us)

**Hand Deliver To:**  
Elisha Leyba-Tercero  
New Mexico Public Regulation Commission  
1120 Paseo De Peralta  
Santa Fe, NM 87501  
[Elisha.leyba-tercero@state.nm.us](mailto:Elisha.leyba-tercero@state.nm.us)

**Hand Deliver To:**  
Ashley C. Schannauer  
New Mexico Public Regulation Commission  
1120 Paseo De Peralta  
Santa Fe, NM 87501  
[Ashley.Schannauer@state.nm.us](mailto:Ashley.Schannauer@state.nm.us)

**Hand Deliver To:**  
Charles Gunter  
New Mexico Public Regulation Commission  
1120 Paseo De Peralta  
Santa Fe, NM 87501  
[Charles.Gunter@state.nm.us](mailto:Charles.Gunter@state.nm.us)

**Hand Deliver To:**  
Commissioner Patrick H. Lyons  
New Mexico Public Regulation Commission  
1120 Paseo De Peralta  
Santa Fe, NM 87501  
[Patrick.Lyons@state.nm.us](mailto:Patrick.Lyons@state.nm.us)

**Hand Deliver To:**  
Sandra Skogen, Esq.  
New Mexico Public Regulation Commission  
1120 Paseo De Peralta  
Santa Fe, NM 87501  
[Sandra.skogen@state.nm.us](mailto:Sandra.skogen@state.nm.us)

**Hand Deliver To:**  
Dwight Lamberson  
New Mexico Public Regulation Commission  
1120 Paseo De Peralta  
Santa Fe, NM 87501  
[Dwight.Lamberson@state.nm.us](mailto:Dwight.Lamberson@state.nm.us)

**Hand Deliver To:**  
Patrick L. Lopez  
New Mexico Public Regulation Commission  
1120 Paseo De Peralta  
Santa Fe, NM 87501  
[Patrick.lopez@state.nm.us](mailto:Patrick.lopez@state.nm.us)

**Hand Deliver To:**  
Bruno Carrara  
New Mexico Public Regulation Commission  
1120 Paseo De Peralta  
Santa Fe, NM 87501  
[Bruno.carrara@state.nm.us](mailto:Bruno.carrara@state.nm.us)

**Hand Deliver To:**  
Commissioner Karen L. Montoya  
New Mexico Public Regulation Commission  
1120 Paseo De Peralta  
Santa Fe, NM 87501  
[Karen.Montoya@state.nm.us](mailto:Karen.Montoya@state.nm.us)

**Hand Deliver To:**  
Commissioner Valerie Espinoza  
New Mexico Public Regulation Commission  
1120 Paseo De Peralta  
Santa Fe, NM 87501  
[Valerie.Espinoza@state.nm.us](mailto:Valerie.Espinoza@state.nm.us)

**Hand Deliver To:**

Commissioner Linda Lovejoy  
New Mexico Public Regulation Commission  
1120 Paseo De Peralta  
Santa Fe, NM 87501  
[Linda.Lovejoy@state.nm.us](mailto:Linda.Lovejoy@state.nm.us)

**Email Only:**

Susan C. Kery  
[sck@sheehansheehan.com](mailto:sck@sheehansheehan.com)

Anthony Sisneros  
[Anthony.sisneros@state.nm.us](mailto:Anthony.sisneros@state.nm.us)

Charles Kolberg  
[ckolberg@abcwua.org](mailto:ckolberg@abcwua.org)

David Van Winkle  
[david@vw77.com](mailto:david@vw77.com)

Camilla Feibelman  
[Camilla.feibelman@sierraclub.org](mailto:Camilla.feibelman@sierraclub.org)

Nellis Howard  
[Nellis.khoward@sierraclub.org](mailto:Nellis.khoward@sierraclub.org)

Mariel Nanasi, Esq.  
[Mariel@seedsbeneaththesnow.com](mailto:Mariel@seedsbeneaththesnow.com)

John W. Boyd, Esq.  
[jwb@fbdlaw.com](mailto:jwb@fbdlaw.com)

Tom Singer  
[Singer@westernlaw.org](mailto:Singer@westernlaw.org)

Glenda Murphy  
[gmurphy@westernresources.org](mailto:gmurphy@westernresources.org)

Michael Dirmeier  
[mdirmeie@gmail.com](mailto:mdirmeie@gmail.com)

Dahl Harris  
[dahlharris@hotmail.com](mailto:dahlharris@hotmail.com)

**Hand Deliver To:**

Commissioner Sandy Jones  
New Mexico Public Regulation Commission  
1120 Paseo De Peralta  
Santa Fe, NM 87501  
[Sandy.Jones@state.nm.us](mailto:Sandy.Jones@state.nm.us)

Robb Hirsch  
[rhirsch@edlconsulting.us](mailto:rhirsch@edlconsulting.us)

Mark Fenton  
[Mark.Fenton@pnm.com](mailto:Mark.Fenton@pnm.com)

Thomas Wander  
[Thomas.Wander@pnmresources.com](mailto:Thomas.Wander@pnmresources.com)

Noah Long  
[nlong@nrdc.org](mailto:nlong@nrdc.org)

Don Hancock  
[sricdon@earthlink.net](mailto:sricdon@earthlink.net)

Megan Anderson  
[anderson@westernlaw.org](mailto:anderson@westernlaw.org)

Sarah Cottrell Propst  
[propst@interwest.org](mailto:propst@interwest.org)

Josh Ewing, Esq.  
[je@fbdlaw.com](mailto:je@fbdlaw.com)

Joseph A. Herz  
[jaherz@sawvel.com](mailto:jaherz@sawvel.com)

James Cotton  
Andrea Crane  
[ctcolumbia@aol.com](mailto:ctcolumbia@aol.com)

Vincent DeCesare  
[Vincent.decesare@state.nm.us](mailto:Vincent.decesare@state.nm.us)

Cydney Beadles  
[Cydney.beadles@state.nm.us](mailto:Cydney.beadles@state.nm.us)

Laura E. Sanchez, Esq.  
[Laura.e.sanchez@comcast.net](mailto:Laura.e.sanchez@comcast.net)

Jack Sidler  
[Jack.sidler@state.nm.us](mailto:Jack.sidler@state.nm.us)

David Rhodes  
[rhodesd@southwestgen.com](mailto:rhodesd@southwestgen.com)

James Dauphinais  
[jdauphinais@consultbai.com](mailto:jdauphinais@consultbai.com)

REIA of NM  
[prcaction@reia-nm.org](mailto:prcaction@reia-nm.org)

David Rode  
[drode@daimc.com](mailto:drode@daimc.com)

Antonio Paez  
[apaez@daimc.com](mailto:apaez@daimc.com)

Douglas Gegax  
[dgegax@nmsu.edu](mailto:dgegax@nmsu.edu)

John M. Stomp III  
[jstomp@abcwua.org](mailto:jstomp@abcwua.org)

Rob Witwer, Esq.  
[witwerr@southwestgen.com](mailto:witwerr@southwestgen.com)

Maurice Brubaker  
[mbrubaker@consultbai.com](mailto:mbrubaker@consultbai.com)

Adam Baker  
[abaker@bakerlawoffice.net](mailto:abaker@bakerlawoffice.net)

Jay Kumar  
[jkumar@etcinc.biz](mailto:jkumar@etcinc.biz)

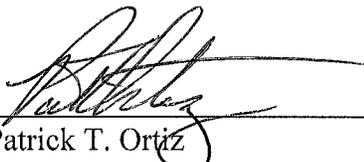
Pete Lewis  
[plewis@daimc.com](mailto:plewis@daimc.com)

Alex Dreisbach  
[adreisbach@daimc.com](mailto:adreisbach@daimc.com)

Erin Overturf, Esq.  
[Erin.overturf@westernresources.org](mailto:Erin.overturf@westernresources.org)

Dated this 16th day of February, 2015.

By: \_\_\_\_\_

  
Patrick T. Ortiz  
Cuddy & McCarthy, LLP  
1701 Old Pecos Trail  
P. O. Box 4160  
Santa Fe, NM 87502-4160