IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

CITY OF LAS CRUCES,

Appellant,

v. **No. S-1-SC-40636**

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee,

and

EL PASO ELECTRIC COMPANY,

Intervenor-Appellee.

In the Matter of the Application of El Paso Electric Company for a Variance from the Fuel and Purchased Power Cost Adjustment Clause Methodology, New Mexico Public Regulation Commission Case No. 21-00064-UT

ANSWER BRIEF OF EL PASO ELECTRIC COMPANY

ORAL ARGUMENT REQUESTED

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STATEMENT OF COMPLIANCE

As required by Rule 12-318(G) NMRA, undersigned counsel hereby certifies that this brief complies with Rule 12-318(F) NMRA and was prepared in 14-point Times New Roman typeface using Microsoft Word for Microsoft 365, and that the body of the brief contains 8,817 words.

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QUESTIONS PRESENTED

1. The New Mexico Public Regulation Commission ("Commission" or "NMPRC") previously approved a rate for energy and capacity supplied by El Paso Electric Company ("EPE") from the Palo Verde Generation Station Unit 3 (the "Proxy Price"). Is the City of Las Cruces' ("City") appeal of the Proxy Price within the scope of this case when the Proxy Price was adopted in previous cases (not this one) and EPE's only request to the Commission was for permission to spread the charges associated with Winter Storm Uri over a 12-month period for the benefit of its customers?

2. Did the Commission err in determining that its own prior orders authorized EPE to charge the Proxy Price for energy supplied by Palo Verde Generation Station Unit 3 ("PVGS Unit 3" or "PV3")?

3. The City seeks to disregard the Proxy Price and charge a different amount for energy and capacity supplied by PVGS Unit 3. Is the Commission authorized to retroactively adjust the rate charged for energy and capacity supplied by PVGS Unit 3?

4. Does the Record support the Commission's finding that PVGS Unit 3 energy and capacity represented the lowest reasonable cost of energy and capacity available to EPE where there is no evidence of an alternative source and PVGS Unit 3 addressed important reliability concerns?

SUMMARY OF PROCEEDINGS

The City provides a misleading and incomplete description of the proceedings below and the regulatory history of the Commission-approved Proxy Price issue in this proceeding. To provide a more accurate summary, EPE supplements the Summary of Proceedings as follows:

I. SUMMARY OF FACTS

From February 13 to February 19, 2021, New Mexico and Texas experienced extreme cold temperatures ("Winter Storm Uri" or "Cold Weather Event") that led to the declaration of a severe natural gas operating condition and posed challenges for electric utilities, including EPE. **[10 RP 1969]**. Other utilities experienced rolling blackouts and reported costs associated with Winter Storm Uri of up to $80 million. In contrast, EPE was able to provide continuous reliable electric service to its customers throughout the storm and made operational decisions that saved its customers $19 million. **[13 RP 2;662-2670]**. EPE's actions during Winter Storm Uri led the former Chair of the Commission to remark that "EPE should be applauded for keeping the lights on." **[1 RP 0047-0055]**.

In order to provide continuous service during Winter Storm Uri, EPE utilized PVGS Unit 3 to provide energy and capacity. Although PVGS Unit 3 was not in EPE's base rates, EPE was authorized to use the unit, at its discretion, subject to a proxy price that had been repeatedly approved by the Commission ("Proxy Price"). **[10 RP 1767-1770]**. Since 2009, the Proxy Price has been calculated in EPE's monthly Fuel and Purchased Power Cost Adjustment Clause ("FPPCAC") using the following formula:

- Capacity component: On a monthly basis, EPE will include capacity costs for PVGS Unit 3 in purchased power at the rate of $9.25 per kilowatt ("kW") times 211 MW of capacity at PVGS Unit 3.

- Energy component: On a monthly basis the energy costs for PVGS Unit 3 will be calculated by multiplying the megawatt-hours ("MWh") of energy generated by PVGS Unit 3 times the sum of (1) the Permian Basin daily index price as reported in Platt's Gas Daily's Daily Price Survey for the corresponding day of delivery under the heading "Permian Basin Area: El Paso, Permian Basin, Midpoint" times a 7.6 MMBtu per MWh heat rate and (2) $3.50 per MWh for nonfuel operation and maintenance expense.

- The amounts computed for capacity and energy on a Company basis will be allocated to New Mexico based upon the monthly energy allocator used to allocate fuel and purchased power costs to the New Mexico jurisdiction.

[10 RP 1768]. As a result of price spikes in the natural gas markets, February charges for PVGS Unit 3 power at the Commission-approved Proxy Price resulted in $5.7 million in incremental PVGS Unit 3 charges – that is charges that were directly attributed to Winter Storm Uri. **[6 RP 0839, 0842, 0872, 0911, 0942]**.

EPE was already authorized to recover all costs associated with Winter Storm Uri through the Commission-approved FPPCAC methodology,[1] but it was concerned that the FPPCAC methodology could create a hardship for some of its customers if all of the costs were charged in a single month as authorized. **[6 RP 0838, 0840-0841, 0882-0883]**. To address that concern, EPE proposed and

[1] The Commission's regulations state that the objective of a FPPCAC is to "flow through to the users of electricity the increases or decreases in applicable fuel and purchased power costs per kilowatt-hour of delivered energy above or below a base fuel and purchased power expense." 17.9.550.6.D NMAC.

voluntarily filed a Verified Motion for a Variance from the Approved FPPCAC Methodology ("Motion for Variance") to spread the costs associated with Winter Storm Uri over a twelve-month period to mitigate the potential effect on customers. **[6 RP 0703, 0707, 0834-0835, 0870, 0913]**.

The City intervened and conducted extensive discovery, consisting of over 1,000 discovery requests on a wide variety of issues. The City's primary argument was that the Proxy Price should not be applied to energy and capacity supplied by PVGS Unit 3. Due to retirements and delays in the schedule, three different Hearing Examiners presided over the proceeding.

In a prehearing Procedural Order, the First Hearing Examiner addressed the Proxy Price issue. She identified a passage from a recent Commission order that directly addressed the City's Proxy Price argument:

> To the extent that the City argues that the [Credit Suisse] proxy pricing for PVNGS Unit 3 approved in Case No. 09-00171-UT expired when the new rates approved in the *2015 Rate Case* took effect, that argument lacks merit. The Commission has never disapproved nor changed the proxy price approved in Case No. 09-00171-UT and EPE has continued to apply that proxy price.[2]

[4 RP 0292].

[2] The City originally appealed the finding above, which was made in Commission Case No. 20-00104-UT, to this Court. By Dispositional Order, the Court dismissed that issue in Case No. S-1-SC-38911 (Sept. 26, 2022).

An evidentiary hearing was held on the Motion for Variance before the Second Hearing Examiner. The Second Hearing Examiner did not exclude any evidence offered by the City. At the hearing, EPE witnesses were asked about resources other than PVGS Unit 3 that could have been used to provide service during Winter Storm Uri. EPE witnesses explained that they were not aware of any other resource that was available and would have provided continuous and reliable service to EPE customers. **[6 RP 0837; 13 RP 2620, 2670]**. There was no contrary testimony. EPE witnesses further testified that even if purchased power had been available, it would have been at a higher cost than the PVGS Unit 3 proxy price. **[13 RP 2720-2721, 2723]**. Again, there was no contrary testimony.

On December 2, 2022, the Second Hearing Examiner issued the First Recommended Decision. The First Recommended Decision found that the PVGS Unit 3 Proxy Price was an approved rate that EPE was "required to apply." **[10 RP 1780]**. It further found that "rejection of the longstanding Commission approved proxy rate would violate the rule against retroactive ratemaking." **[10 RP 1781]**. It recommended that the Motion for Variance be granted, and the contrary arguments of the City be rejected. The outgoing Commission considered the Recommended Decision on December 28, 2022 but did not take final action. Instead, the Commission retained jurisdiction of the matter and ordered that it be assigned to another Hearing Examiner "for further proceedings limited to the question of

whether [PVGS Unit 3] energy and capacity at the proxy price was the most cost-effective resource available to EPE." **[10 RP 1983]**.

Following a review of the Record, the Third Hearing Examiner issued the Second Recommended Decision. The Second Recommended Decision concludes that the "Proxy Price Methodology was always a valuation substitution to calculate firm capacity and energy provided voluntarily from EPE." **[12 RP 2207, 2242]**. It found that "using PV3 for capacity and energy was necessary and available to provide continuous uninterrupted service during the Severe Winter Event, and that EPE calculated the costs for using the PV3 firm capacity and energy using the Proxy Price Methodology correctly." **[12 RP 2243]**. It further noted that there was no evidence of "lower cost generation alternatives equivalent to using PV3 firm capacity and energy." **[12 RP 2243]**. Accordingly, like the First Recommended Decision, the Second Recommended Decision recommended that EPE's Motion for Variance be granted. **[12 RP 2246]**.

Following briefing on exceptions, the Commission issued its Order Adopting the Second Recommended Decision. **[12 RP 2341-46]**. In that Order, the Commission rejected the City's interpretation of the previous Proxy Price orders. It observed that "there was evidence in the record indicating that PVGS 3 energy and capacity, at the proxy price, was the most cost-effective resource available to EPE." **[12 RP 2342]**. It found persuasive that even if there were other resources available

(which it did not find), those resources were "subject to curtailment," and therefore "could have resulted in very detrimental consequences to EPE's ratepayers." **[12 RP 2344]**.

The City filed a motion asking the Commission to reconsider its Order and, following full briefing, the Commission denied the rehearing motion, specifically rejecting the City's Proxy Price argument for a third time, finding "the allegedly limited durations of the stipulation and the rates approved in Docket No. 09-00171-UT are irrelevant to the status of EPE's authorization to use PV3 energy and capacity during the crisis caused by Uri." **[12 RP 2432-43]**. It explained that the Commission has "repeatedly authorized EPE to use PV3 as a resource and to recover the costs thereof at the proxy price" because it was in the public interest. **[12 RP 2433]**. On the issue of the "time period during which the incremental costs were incurred," the Commission held that the City "relies upon a clear misunderstanding of EPE's variance request and the evidentiary record," as well as "an unreasonable interpretation of the phrase 'in February 2021,' as meaning every day and night of February 2021." **[12 RP 2432]**.

The City takes this appeal from the decision of the Commission.

STANDARD OF REVIEW

The party challenging a Commission decision bears the burden on appeal of showing that the decision "is unreasonable, or unlawful." NMSA 1978, § 62–11–4.

In reviewing orders of the Commission, the Supreme Court must determine whether the Commission decision is "arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency's authority, or otherwise inconsistent with law." *Att'y Gen. of N.M. v. N.M. Pub. Regulation Comm'n*, 2011-NMSC-034, ¶ 9, 258 P.3d 453. The Court "must review the method employed by the Commission and the Commission's application of its chosen methodology to the evidence in the record in order to determine in a meaningful way whether the result is unreasonable or unlawful." *PNM v. N.M. Pub. Regulation Comm'n*, 2019-NMSC-12, ¶11, 444 P.3d 460.

A decision is considered lawful when it is supported by evidence "that is credible in light of the whole record and that is sufficient for a reasonable mind to accept as adequate to support the conclusion reached by the agency." *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n*, 2007-NMSC-053, ¶ 24, 168 P.3d 105 (internal quotation marks and citation omitted).

The Court will confer a heightened degree of deference to legal questions that "implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function." *Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 11, 904 P.2d 28 (internal citations omitted). Discretion and flexibility is given to decisions made by agencies, like the Commission, with technical expertise. *See Attorney Gen. of State of N.M. v.*

New Mexico Pub. Serv. Comm'n, 1991-NMSC-028, ¶ 25, 808 P.2d 606 ("Finally, we must give PSC's decision great deference, owing to the Commission's expertise in this highly technical area"); *see also*, *PNM v. N.M. Pub. Regulation Comm'n*, 2019-NMSC-12, ¶11, 444 P.3d 460 (describing the "discretion and flexibility afforded to the Commission"). The Court is limited in its review to determine whether the decision is inconsistent with the law, not whether it could reach a different decision under the same circumstances. *See Albuquerque Cab Co., Inc. v. New Mexico Pub. Regulation Comm'n*, 2017-NMSC-028, ¶ 8, 404 P.3d 1 (the court holding that "we neither reweigh the evidence nor replace the fact finder's conclusions with our own" in limiting the scope of its standard of review for PRC decisions) (citing *Toltec Int'l, Inc. v. Village of Ruidoso*, 1980-NMSC-115, ¶ 3, 619 P.2d 186).

SUMMARY OF ARGUMENT

As explained above, from February 13 to February 19, 2021, Winter Storm Uri posed significant challenges for electric utilities throughout the region. Unlike other New Mexico and Texas utilities, EPE was able to provide continuous service to its customers throughout the storm and made operational decisions that saved its customers $19 million. **[13 RP 2662-2670]**.

The subject of this appeal is the Commission's Final Order granting EPE's Verified Motion for a Variance from the Approved FPPCAC Methodology. EPE filed the Motion to allow it to spread costs associated with Winter Storm Uri over a

twelve-month period in order to mitigate the effect on its customers. The Motion did not raise the issue of the proper amount of the costs associated with Winter Storm Uri (or the reasonableness and prudency of those costs) in any way. Rather, the amount of the costs were determined by applying the Commission mandated methodology from a filed and approved rate. The sole issue presented to the Commission was whether the costs associated with Winter Storm Uri should be spread over a twelve-month period as EPE as requested, or alternatively whether all costs should be charged to customers in a single month as would occur pursuant to the Commission's prior orders.

The uncontroverted record evidence in the underlying Commission proceeding establishes that:

1. The PVGS Unit 3 Proxy Price, the means by which EPE is allowed to recover costs associated with supplying PVGS Unit 3 capacity and energy to New Mexico customers, was adopted by the Commission in Case No. 09-00171-UT and subsequently affirmed or approved in three separate proceedings, **[6 RP 0851-0855, 0880; 8 RP 1448]**;

2. EPE has calculated the Proxy Price pursuant to the Commission authorized methodology, without modification, since this methodology was first established by the Commission in Case No. 09-00171-UT, **[6 RP 0909-0912, 0958, 0840; 8 RP 1458]**;

3. EPE has consistently included the calculated Proxy Price in the monthly fuel and purchased power expenses collected through

the FPPCAC as shown in monthly reports submitted by EPE, **[6 RP 0911-0913, 0958-0960]**;

4. EPE has applied the Proxy Price methodology in the same manner irrespective of whether the Proxy Price rate inured to the benefit of or the detriment of the Company **[6 RP 0859; 8 RP 1460]**;

5. The Commission has never rejected a monthly report, nor the monthly Proxy Price methodology-based calculations included therein, **[6 RP 1913, 0959, 0881-0882]**; and

6. EPE properly used the Commission-authorized Proxy Price methodology to calculate the charges for PVGS Unit 3 energy and capacity during Winter Storm Uri, **[6 RP 0958, 0841-0842, 0878-0880]**.

For almost two decades, the Commission has authorized the Proxy Price for PVGS Unit 3 which represents the lowest market price for equivalent capacity and energy. As a regulated utility, EPE is bound to apply the established Proxy Price. After reviewing its previous orders and regulatory history, the Commission confirmed that it has "repeatedly authorized EPE to use PV3 as a resource and to recover the costs thereof at the proxy price." **[12 RLP 2433]**. The City attacks that finding and argues that EPE was not authorized to charge the Proxy Price. It further asserts that the Record does not support the Commission's separate finding that energy and capacity supplied by PVGS Unit 3 represented the lowest cost energy

and capacity that was available to EPE during Winter Storm Uri. The City's appeal should be rejected for four reasons:

First, the Commission's recognition that the Proxy Price was in effect during this case is well supported by previous Commission orders and the regulatory history. Since 2009, the Commission has addressed the Proxy Price no less than three times. In each case, the Commission continued the FPPCAC and allowed EPE to charge the Proxy Price for PVGS Unit 3 capacity and energy. The Commission is entitled to considerable deference in interpreting the regulatory actions it has previously taken.

Second, the City's challenge to the Proxy Price is outside the scope of this proceeding and represents a collateral attack on previous Commission orders. The City effectively asks that the Court substitute a different rate for the Commission-approved Proxy Price. Accepting the City's position would amount to improper retroactive ratemaking and would violate an established practice of the Commission without notice.

Third, reaching the City's substantial evidence and arbitrary and capricious arguments is not necessary if the Court agrees that EPE was authorized to charge the Proxy Price. Even if the Court reaches those arguments, however, the Record strongly supports the Commission's finding that PVGS Unit 3 represented the lowest reasonable cost alternative available to EPE during Winter Storm Uri. As the

Commission explained, the City disregards important reliability concerns that drove resource decisions during Winter Storm Uri. There is no evidence in the Record to establish that EPE had *any* alternative source of energy and capacity, let alone a less expensive alternative. And even if there were available energy and capacity, it would have been more costly than the energy and capacity supplied by PVGS Unit 3.

Fourth, the City is mistaken about the relevant time period. The Motion for Variance in this case targets only those incremental costs directly associated with Winter Storm Uri. Neither the variance nor the outcome of this case will have any impact on the costs associated with the remaining days in February 2021.

The Court should affirm.

ARGUMENT

II. THE COMMISSION WAS AUTHORIZED TO GRANT EPE'S MOTION FOR VARIANCE AND ALLOW EPE TO RECOVER COSTS AT THE PROXY PRICE

For its primary argument, the City claims that the Commission erred when it found that EPE was authorized by previous Commission orders to charge the Proxy Price for PVGS Unit 3 capacity and energy. As described below, the City's appeal should be rejected for three related reasons: (1) the scope of the proceeding was limited to whether EPE was entitled to spread the incremental costs associated with Winter Storm Uri over 12 months for the benefit of its customers; (2) previous orders

of the Commission clearly authorize EPE to charge the Proxy Price; and (3) the City's position violates established ratemaking principles.

A. The Commission Has Repeatedly Authorized EPE to Use PVGS Unit 3 Energy at the Proxy Price

The City argues that the Commission erred in finding that it had previously authorized the Proxy Price, but that is not correct. A review of the four most relevant cases (Case Nos. 09-00171-UT, 13-00380-UT, 18-00006-UT, and 20-00104-UT), as well as the Commission's decisions in the current case, shows that the Commission's finding was well supported.

In Case No. 09-00171-UT, the Commission adopted the PVGS Unit 3 Proxy Price and determined that the proxy price "is representative of the lowest available market price for firm capacity and related energy." Case No. 09-00171-UT, *Final Order*, 2009 WL 6006298, at 19; **[6 RP 0852]** (quoting Final Order, Case No. 09-00171-UT, at 19). The Commission went on to confirm that the Proxy Price was "fair, just, and reasonable." *Id.*, 24; **[RP 0853]**.[3]

Subsequently, in Case No. 13-00380-UT, "the Commission approved continued use of the proxy price." **[54 RP 22782]**. More specifically, the Commission confirmed that "[t]he proxy pric[e] for PVNGS [Unit 3] based upon the

[3] The City makes much of the fact that Case No. 09-00171-UT was a stipulation, but that is of no import since only the Commission can adopt and impose a rate. NMSA 1978, § 62-6-4.

Credit Suisse agreement, which was approved in NMPRC Case No. 09-00171-UT, continues to be reasonable." Case No. 13-00380-UT, *Final Order*, 2014 WL 2670548, at ¶ 12. It again held that the Proxy Price "reflects the lowest equivalent market price of capacity and energy." *Id.* It provided that EPE's FPPCAC, including the Proxy Price, "shall remain in effect without modification until further order of the Commission." *Id.*, Ordering ¶ A. That FPPCAC has not been altered in ways relevant to the Proxy Price.

EPE's next general rate case took place in 2015 in Case No. 15-00127-UT. The FPPCAC and Proxy Price were before the Commission in that case. The Commission ordered EPE to remove all fuel and purchased power costs (which includes PVGS Unit 3 costs) from base rates and instead recover all such costs through its FPPCAC. *See* Case No. 18-00006-UT, *Recommended Decision*, 2018 WL 6243927, at *9 (describing the Commission order in Case No. 15-00127-UT). However, the Commission did not otherwise alter the FPPCAC, including the Proxy Price, which EPE continued to utilize with Commission authorization.[4] *Id.* at *31 (explaining in 2018 that the Proxy Price "has continued" since Case No. 15-00127-UT).

[4] The Commission made some appropriate changes to the FPPCAC in Case No. 15-00127-UT, but otherwise continued the FPPCAC, including the Proxy Price.

In Case No. 18-00006-UT the Commission considered whether to continue EPE's FPPCAC. As part of Case No. 18-00006-UT, the City argued that the Proxy Price should be adjusted. Case No. 18-00006-UT, *Recommended Decision*, 2018 WL 6243927, at *32-33 (Order defining the scope of the case); *see also* Case No. 18-00006-UT, *Final Order*, 2019 WL 922206, at *3 n.5 (explaining the scoping order). The Commission rejected that argument, deciding instead that the issue should be addressed in EPE's next rate case when it would have the benefit of additional data from EPE's Integrated Resource Plan process. *Id.* In the Final Order in Case No. 18-00006-UT, the Commission continued EPE's FPPCAC, including the Proxy Price, without change. Case No. 18-00006-UT, *Recommended Decision*, 2018 WL 6243927, at *32-33, ¶¶ 11-13; Case No. 18-00006-UT, *Final Order*, 2019 WL 922206, at *18, ¶¶ 83-85, Ordering ¶ A (approving as "well taken" EPE's proposal to continue using PVGS Unit 3 at the Proxy Price through the FPPCAC until the next rate case). It again confirmed that the Proxy Price represented the "lowest equivalent market price," and acknowledged that the Proxy Price had been "provided for by prior Stipulations and Commission Final Orders, including Case No. 13-00380-UT, which established the current FPPCAC." *Id.* The Commission further found that EPE's "policies and practices," including the Proxy Price, were "designed to assure that electric power is generated and purchased at the lowest reasonable costs," and it allowed EPE to "continue [to] use PVNGS Unit 3 for New

Mexico, unless modified in EPE's next rate case." *Id.* The Commission did not place an expiration on its approval of EPE's Proxy Price but, instead, permitted EPE to continue to charge the Proxy Price at least until its next rate case, at which time the methodology and rates could be considered. Case. No. 18-00006-UT, *Final Order*, 2019 WL 922206, at *8, *18.

In Case No. 20-00104-UT, the City argued, as it does in this case, that the Proxy Price approved in Case No. 09-00171-UT had expired. The Commission found that the City's argument "lacked merit." Case No. 09-00171-UT, *Recommended Decision*, 2021 WL 1550586 (NMPRC, April 6, 2021), *adopted by Order Adopting Recommended Decision with Modifications*, 2021 WL 2694628 (NMPRC, June 23, 2021); *see also* **[4 RP 0291-0292]** (quoting the Recommended Decision in Case No. 20-00104-UT). It explained that the Commission "has never disapproved nor changed the proxy price approved in Case No. 09-00171-UT and EPE has continued to apply that proxy price." *Id.*

There is no language in any Commission order from 2009 through 2018 that discontinues or repeals approval of EPE's established Proxy Price. To the contrary, EPE has shown through uncontroverted Record evidence that the Commission authorized Proxy Price rate has been applied by EPE in the same way in each of its monthly Rule 550 filings submitted in the twelve years since the Proxy Price was approved by the Commission in 2009. **[6 RP 0913]**. The record further establishes

that the Proxy Price rate has been applied by EPE in this manner irrespective of which way the rate benefit inured–whether in favor of or to the detriment of the Company. **[6 RP 0843]**.

Thus, each of the three Hearing Examiners in the present case found that EPE was authorized to charge the Proxy Price. *See* **[4 RP 0291-0292]** (First Hearing Examiner rejecting the City's position because it "lacks merit"); **[10 RP 1779]** (Second Hearing Examiner relying on "well-established Commission orders establishing the Proxy Price rate and EPE's authorization to use PV3 to serve New Mexico customers," for the conclusion that "EPE is **required** to apply the Proxy Price"); **[12 RP 2207, 2243]** (Third Hearing Examiner recognized that proxy price "has been used for over two decades" and recommended finding the February 2021 calculations "were accurate and should be accepted"). Following the First Recommended Decision in this case, the Commission explained that using PVGS Unit 3 was within the "broad authorization" of EPE. **[10 RP 1980]**. In fact, the Commission explained, the Proxy Price "was the only acceptable price at which to pass the cost of PVNGS 3 energy and capacity to customers." **[10 RP 1979]**. And following the Second Recommended Decision, the Commission left no room for doubt that it has "repeatedly authorized EPE to use PV3 as a resource and to recover the costs thereof at the proxy price." **[12 RP 2433]**.

The decisions of the Commission are entitled to deference. *Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 11, 904 P.2d 28. That is particularly true here, where the Commission is explaining its own past orders. *See, Pickett Ranch, LLC v. Curry*, 2006-NMCA-082, ¶ 5, 140 N.M. 49 (court "will accord deference to the [agency's] interpretation of its own [orders]"). In such circumstances, "substantial deference is accorded to [the Commission's] interpretation of its own order," and that interpretation is not disturbed unless it is "manifestly unreasonable." *Fed. Mortgage Ass'n v. Chiulli*, 2018-NMCA-054, ¶ 14, 425 P.3d 739.

In the face of the deference accorded to the Commission, the City nonetheless attempts to distinguish the Commission's previous orders. As an illustration, the City claims that Commission did not authorize the Proxy Price in Case No. 18-00006-UT because it excluded some testimony on PVGS Unit 3 issues. **[BIC 23]**. But that position cannot be squared with the language of the case allowing EPE to "continue [to] use PVNGS Unit 3 for New Mexico, unless modified in EPE's next rate case." Case No. 18-00006-UT, *Final Order*, 2019 WL 922206, at *18, ¶¶ 83-85, Ordering ¶ A. Nor is it unusual for the Commission to allow the status quo to continue, pending regulatory treatment in a subsequent case. While the City may disagree with the Commission's interpretation of its past orders, it cannot be argued that the Commission's interpretation is "manifestly unreasonable." Each of the

City's other attempts to distinguish the Commission's past orders is similarly unpersuasive.

B. Retroactively Changing the Proxy Price Is Outside the Scope of the Commission Proceeding

1. The Scope of the Commission Proceeding Was Limited to the Motion for Variance

Next, this case arises from EPE's response to the unanticipated Winter Storm Uri that impacted all electric utilities in the region. By all accounts, EPE reacted responsibly and admirably by providing reliable service throughout Winter Storm Uri and saving its customers $19 million. **[13 RP 2;662-2670]**. Contrary to the City's position, the case was not initiated by EPE to seek permission to recover the costs associated with Winter Storm Uri – EPE was already authorized to recover all costs through its FPPCAC. **[1 RP 0001-0008]**. EPE was also authorized to recover costs associated with PVGS Unit 3 at the Proxy Price. **[10 RP 1979]**. Instead, this case was opened by EPE as a way to mitigate the costs to EPE's customers by requesting permission to spread the incremental costs associated with Winter Storm Uri over twelve months so that customers would not have to pay all of those costs in April.[5]

[5] No Party in the underlying proceeding opposed the requested twelve-month amortization described in the Motion for Variance. **[8 RP 1286, 1354, 1377]**.

The City has repeatedly attempted to obfuscate the focus of this case, but two points reinforce that the scope of this case is limited to how to spread the incremental costs of Winter Storm Uri. *First*, the Commission did not provide notice that issues raised by the City would be issues presented at hearing. Notice "should be reasonably calculated . . . to apprise interested parties of the pending action and afford them an opportunity to present their case." *U S West Commc'ns, Inc.*, 1999–NMSC–016, ¶ 29, 127 N.M. 254 (internal quotation marks and citation omitted). Therefore, to comport with due process requirements, the Commission was tasked with giving notice of all issues that were to be presented at the hearing in this matter. *See Jones v. N.M. State Racing Comm'n*, 1983-NMSC-089, ¶ 9, 100 N.M. 434; *Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Commission*, 1977-NMSC-032, 90 N.M. 325 ("the Company was not given adequate notice" of issues that would arise in the hearing).

It is, therefore, meaningful that the notice provided by the Commission in this case was limited to the specific amortization request included in EPE's Motion for Variance. Specifically, the approved notice identified the relevant issue in this case as whether the Commission should "grant a variance from the approved FPPCAC methodology" to amortize EPE's recovery of the previously "authorize[d]" amount "for twelve months." **[4 RP 0302]**. The notice did not include any of the issues raised by the City challenging the Proxy Price.

Second, the Procedural Order that established the contours of this case was explicit that the Proxy Price issue was outside the scope of the case. As explained above, in an earlier EPE rate case, the Hearing Examiner addressed the same Proxy Price argument raised by the City and found that the "argument lacks merit." **[4 RP 0291-0292]**. When the Procedural Order was issued, the Commission had not yet ruled on the referenced rate case Recommended Decision. Nonetheless, in anticipation of a Commission order, the Hearing Examiner specified that if the Commission left that portion of the rate case Recommended Decision undisturbed, "the issue of whether the Credit Suisse proxy price was in effect during February 2021 ***is outside the scope of this case***." **[4 RP 0291-0292]** (emphasis added). On June 23, 2021, the Commission adopted the 2020 Rate Case Recommended Decision without disturbing the conclusion that the Commission-approved Proxy Price was still in effect. *E.g.* **[10 RP 1777]** ("[t]he City attempts, in this variance case, to revisit its position argued in the rate case; but this case is not the rate case"). As a result, pursuant to the express language of the Procedural Order, any challenge to the Proxy Price was "outside the scope of this case."

2. The City's Position Violates Established Principles of Law

In addition to being explicitly outside the scope of the case, the City's position that the Commission should abandon the longstanding Proxy Price, and instead

direct EPE to charge a different rate using a different methodology, also fails because it violates three established principles of ratemaking.

a. The City's Challenge to the Commission-Approved Proxy Price Is an Improper Collateral Attack on Past Commission Orders

First, the City's appeal represents an improper collateral attack on previous Commission orders adopting the Proxy Price. "A collateral attack is an attempt to avoid, defeat, or evade [an order], or deny its force and effect, in some incidental proceeding not provided by law for the express purpose of attacking" the order. *Lewis v. City of Santa Fe*, 2005-NMCA-032, ¶ 7, 137 N.M. 152, 155 (internal quotes and cites omitted); *see also Shovelin v. Cent. New Mexico Elec. Co-op., Inc.*, 1993-NMSC-015, ¶ 11, 115 N.M. 293, 298 (holding administrative adjudicative decisions may be given preclusive effect); *City of Socorro v. Cook*, 1918-NMSC-072, ¶ 11, 24 N.M. 202 (holding decision by city council, under a special act of the Legislature to determine title to city lands, was res judicata and not subject to collateral attack); *VanderVossen v. City of Espanola*, 2001-NMCA-016, ¶¶ 19-21, 130 N.M. 287, 293 ("[administrative] decision may not be challenged by an untimely collateral attack").

At base, the City's appeal represents a challenge to the previous orders of the Commission. Accepting the City's position could create a path to ignore the Proxy Price adopted in previous Commission cases and apply a different rate to PVGS Unit

3 energy and capacity. That path is blocked. The Commission should reject the City's appeal as a collateral attack on the previous approval of the Proxy Price.

b. The City's Appeal Should Be Rejected as Seeking Retroactive Ratemaking

Next, a public utility such as EPE is only permitted to charge rates authorized by the Commission. Based on Commission approval, EPE charged the Proxy Price to customers for PVGS Unit 3 capacity and energy from approximately 2010, after Case No. 09-00171-UT, until the final order in the 2020 EPE Rate Case. Section 62-3-3(H) broadly defines "rate" as:

> every rate, tariff, charge or other compensation for utility service rendered or to be rendered by a utility and every rule, regulation, practice, act, requirement or privilege in any way relating to such rate, tariff, charge or other compensation and any schedule or tariff or part of a schedule or tariff thereof;

NMSA 1978, § 62-3-3(H) (2009); *see also Tri-State Generation & Transmission Ass'n, Inc. v. N.M. Pub. Regul. Comm'n*, 2015-NMSC-013, ¶ 25, 347 P.3d 274. As acknowledged by Commission and all three Hearing Examiners, there can be no doubt that the Proxy Price is an approved "rate" that provided the basis by which EPE was "compensate[ed] for utility service" for using PVGS Unit 3 energy and capacity to serve New Mexico ratepayers. *See e.g.*, Case No. 09-00171-UT, *Final Order*, 2009 WL 6006298, at 1; Case No. 13-00380-UT, *Final Order*, 2014 WL 2670548, at ¶ 12, Ordering ¶ A; Case No. 18-00006-UT, *Recommended Decision*, 2018 WL 6243927, at *9, *31; Case No. 18-00006-UT, *Recommended Decision*,

2018 WL 6243927, at *32-33, ¶¶ 11-13; Case No. 18-00006-UT, *Final Order*, 2019 WL 922206, at *18, ¶¶ 83-85, Ordering ¶ A. As a public utility, EPE was therefore required to apply the Proxy Price. **[8 RP 1358, 1448]**; **[10 RP 1979]**.

The rule against retroactive ratemaking, adopted and applied by this Commission, "prevents using prospective rates to make up for past losses or excessive profits collected under rates that did not perfectly match expenses." *In re Southwest Public Service Co.*, Case No. 17-00255-UT, 2018 WL 3330118 (NMPRC); *see also SFPP, LP v. Federal Energy Regulatory Commission*, 967 F.3d 788, 801-802 (D.C. Cir. 2020) (cert. dismissed); *SFPP, L.P. v. FERC*, 141 S. Ct. 2170, 209 L. Ed. 2d 777 (2021) ("The retroactive ratemaking doctrine is a logical outgrowth of the filed rate doctrine, prohibiting the Commission from doing indirectly what it cannot do directly"). The rule prohibits a regulated entity from "charg[ing], or be[ing] forced by the Commission to charge, a rate different from the one on file with the Commission for a particular good or service." *SFPP, LP v. Federal Energy Regulatory Commission*, 967 F.3d 788, 801-802 (D.C. Cir. 2020). As this Court has recognized:

> There is no better established rule with regard to the prescription of rates for a public utility than the one that holds that rate fixing may not be accomplished retroactively, unless some specific statutory or constitutional authority permits. Past deficits may not be made up by excessive charges in the future nor may past profits be reduced by disallowances to future operating expense.

Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Comm'n, 1977-NMSC-032, ¶ 88, 90 N.M. 325.

Accepting the City's position would require rejecting the approved Proxy Price in favor of a newly minted alternative rate. That would violate the rule against retroactive ratemaking by barring EPE from collecting costs at the previously approved Proxy Price.

c. The City Asks this Court to Abandon Longstanding Commission Practice Without Notice

Third, the City's position violates the principle that the Commission cannot abruptly depart from longstanding Commission practice without prior notice. This Court has struck down a similar retroactive remedy in *Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n*, 1993-NMSC-032, 115 N.M. 678. *Hobbs Gas* involved review of a Commission Order requiring the company to apply a new cost-of-gas rate factor calculation retroactively and refund the resulting over-collections to customers. On appeal, the New Mexico Supreme Court considered the specific question of whether the Commission could apply a new methodology for calculating purchased gas adjustment clause to the utility retroactively. The Court held that "a regulatory body cannot, without prior notice, abruptly depart from past practice on which the regulatee has relied and impose a retroactive refund requirement upon the regulatee." *Id.*, ¶ 22; *see also PNM v. New Mexico Public Regulation Comm'n*, 2019-NMSC-012, ¶ 11.

Here, like in *Hobbs Gas*, the City is asking the Court to disregard a Commission-adopted pricing methodology that EPE has relied on for over ten years, and instead retroactively apply a new, arbitrary pricing mechanism that would require EPE to forego up to $5.7 million in previously approved rates. *See e.g.*, **[8 RP 1461-1462]**. Similar to *Hobbs Gas*, uncontroverted evidence cited above establishes that (1) the Proxy Price rate for PVGS Unit 3 capacity and energy was approved by the Commission in Case No. 09-00171-UT and was affirmed or approved in three subsequent Commission proceedings, and is not a matter of first impression; (2) the change in methodology requested by the City "represents an abrupt departure from well-established practice"; (3) EPE has demonstrated reliance through uncontroverted evidence establishing that EPE has applied the Commission-authorized pricing methodology in exactly the same way every month since it was approved in EPE's 2009 Rate Case; (4) the proposed retroactive rate adjustment advocated by the City, if ordered, would impose a substantial burden on EPE by disallowing or limiting recovery of the $5.7 million PVGS Unit 3 charge component of EPE's Cold Weather Event; and (5) there are no statutory interests that support a retroactive refund of costs incurred by EPE in order to provide continuous, reliable service to New Mexico customers during Winter Storm Uri.

Consistent with the Court's analysis and holding in *Hobbs Gas*, it would be fundamentally unfair and unlawful to retroactively apply the change in methodology

advocated by the City and reject the Proxy Price. The Commission "cannot, without prior notice, abruptly depart from past practice on which [EPE] has relied and impose a retroactive refund requirement upon [EPE]." The City's position must be rejected.

III. THE COMMISSION'S ORDERS AUTHORIZING EPE TO RECOVER FOR PVGS UNIT 3 ENERGY AND CAPACITY AT THE PROXY PRICE WERE REASONABLE AND RATIONALLY BASED ON THE RECORD

For its next argument, the City asserts that the Commission erred by finding that use of PVGS Unit 3 energy and capacity "represented the lowest cost alternative available to EPE." **[BIC 31]**. The Court does not need to reach this issue, but if it does, the Commission's order was reasonable and rationally based on the Record.

A. The Court Does Not Need to Reach the City's Substantial Evidence and Arbitrary and Capricious Arguments

As an initial matter, if the Court agrees with the Commission and finds that EPE was authorized to charge the Proxy Price for PVGS Unit 3 service to New Mexico customers during Winter Storm Uri, then it is not necessary to reach the City's contention that the Commission erred in finding that the energy and capacity from PVGS Unit 3 represented the lowest cost alternative available to EPE . This is true for two reasons. First, the Proxy Price explicitly "reflects the lowest equivalent market price of capacity and energy." *E.g.* Case No. 13-00380-UT, *Final Order*, 2014 WL 2670548, at ¶ 12. Second, the PVGS Unit 3 Proxy Price was an approved

rate that EPE was "required to apply." **[10 RP 1780]**; *see also* **[10 RP 1979]** (explaining that the Proxy Price "was the only acceptable price at which to pass the cost of PVNGS 3 energy and capacity to customers"). Each of these principles is explained above.

B. The Record Supports the Commission's Finding that PVGS Unit 3 Represented the Lowest Reasonable Cost Alternative Available to EPE During Winter Storm Uri

If the Court reaches the City's substantial evidence issue, the Record supports the decision of the Commission. On the question of the lowest cost alternative, the Commission found that "there was evidence in the record indicating that PVGS 3 energy and capacity, at the proxy price, was the most cost-effective resource available to EPE." **[12 RP 2342]**; *see also* **[12 RLP 2336] (**"the only firm capacity choice to provide uninterrupted continuous service" during Winter Storm Uri was PVGS Unit 3). It observed that the City "speculated about potential generation resources," but held that "none of the these [speculative] resources were equivalent to PV3's firm capacity and energy." **[12 RLP 2336]**. The Commission explained that even had one of the sources identified by the City been available, it was a "less reliable nonequivalent generation resource or one that was subject to curtailment," and therefore "could have resulted in very detrimental consequences to EPE's ratepayers." **[12 RP 2344-45]**. And at any rate, the Commission found that the Record contained no "lower cost generation alternatives equivalent to using PV3

firm capacity and energy." **[12 RP 2243]**. These findings find robust support in the Record.

Considering the disruption and risk that occurred for utilities without power during Winter Storm Uri, "EPE's first priority during the Cold Weather Event was to provide continuous reliable electric service to all of its customers." **[13 RP 2724]**. The City disregards this critical consideration when it contends that EPE had other options available to it to generate the power that it ultimately received from PVGS Unit 3. The City also failed to support its contention that EPE had other alternatives to PVGS Unit 3 that they could count on to provide *continuous uninterrupted* service. "[D]uring the Cold Weather Event, unloaded local generation capacity was constrained due to a lack of natural gas supply and concurrent operational flow orders on both the interstate and intrastate pipelines." **[13 RP 2624]**. And "[d]ue to [these] natural gas supply limitations, there were no other viable local generation alternatives." **[13 RP 2670]**. Throughout Winter Storm Uri, PVGS Unit 3 was therefore "used to maintain system integrity, meet reliability requirements, mitigate natural gas utilization, and serve load uninterrupted." **[13 RP 2726]**. In fact, PVGS Unit 3 "was absolutely necessary to effectively meet [EPE's] native load during the Cold Weather Event." **[7 RP 1056]**.

At hearing, the City argued that EPE should have instead supplied power through market purchases, but there is no evidence anywhere in the record to

establish that such market purchases were even an option. **[12 RP 2243]**. As EPE witness Gonzalez repeatedly explained, EPE was unable to confirm that such market purchases were available to EPE. **[13 RP 2626-2629]**. Although they bore the burden of proof, no witness offered contrary evidence or established that firm energy was in fact available. **[12 RP 2243]**; *see also* **[7 RP 1045, 1047, 1051, 1052, 1165; 8 RP 1470; 13 RP 2589-2590, 2626-2628]**. In contrast, EPE witness Buraczyk testified that PVGS Unit 3 represented the *only* firm capacity during the Cold Weather Event. **[7 RP 1203, 1206; 8 RP 1468-1469]**. The following testimony from the Commission Staff witness is illustrative:

> Q. Now I want to look at your answer on page 3. So at lines 1 through 3, you recognize that Mr. Buraczyk testified that there were no viable alternatives, generation alternatives to PV-3, right?
>
> A. Yes. That's what he stated in his testimony.
>
> Q. And you didn't file any contradictory testimony on this point, did you?
>
> A. No, I did not.

[8 RP 1468].

It necessarily follows that PVGS Unit 3 represented the lowest equivalent, in fact the only, reliable and consistently available energy and capacity to serve New Mexico customers during Winter Storm Uri.[6]

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[6] Even if they were available, it would not have been prudent or reasonable to rely on market purchases as the City suggests. "From a reliability perspective, it would not have been wise to defer use of PV3 in favor of resources with less certainty."

Moreover, even if additional EPE gas generation or third-party purchases were available to meet New Mexico customers' power needs, these other options would not have been at a lower cost. Theoretically, one option during Winter Storm Uri was for EPE to use local generation. **[13 RP 2590-2591]**. But as explained above, there was no local generation available during the Cold Weather Event. **[13 RP 2670]**. "Although EPE may have had unused local capacity, it was infeasible to increment EPE's local generation due to its gas supply constraints." ***[Id.]***. And even if local generation had been available, EPE computed that it would have cost New Mexico customers approximately $8.5 million for local generation instead of the $5.7 million cost of the PVGS Unit 3 power. ***[Id.]***.

The second alternative advocated by the City was to utilize same-day market purchases for every hour during Winter Storm Uri. But as explained above, there is no evidence that such firm energy was available. **[7 RP 1045, 1047, 1051, 1052, 1165; 8 RP 1470; 13 RP 2589-2590, 2626-2628]**. For those limited same-day purchases that EPE *was* able to confirm, the average cost was approximately $300, more that the firm energy supplied from PVGS Unit 3. **[7 RP 1046, 1047, 1055-1056, 1056, 8 RP 1460-1461]**. Thus, even it if were an applicable standard, which EPE denies, the only conclusion supported by the Record is that PVGS Unit 3

[13 RP 2671]. PV3 "was a more reliable resource when compared to either third party purchases, which could have been curtailed, or the option of running additional EPE gas generation, which would have had the risk of fuel curtailment." *Id.*

represented the lowest equivalent available energy and capacity during Winter Storm Uri.

C. The Record Supports the Commission's Treatment of the Relevant Period of Time

The City argues that the Commission erred by not addressing "whether EPE had energy and capacity options available to it during the days of February *outside* of the 'Cold Weather Event.'" **[BIC 35]**. This argument represents a fundamental misunderstanding of the nature of the case. **[12 RP 2432]** (noting that the City "relies upon a clear misunderstanding of EPE's variance request and the evidentiary record"). The City's position should be rejected because the Record supports the Commission's treatment of the relevant period of time.

The variance requested in the instant case includes the incremental component of its PVGS Unit 3 costs during Winter Storm Uri, which was a defined period in February 2021. Because the Proxy Price fluctuates with gas prices by design, these incremental PVGS Unit 3 costs are attributable to the unusually high natural gas prices during Winter Storm Uri. To calculate the total incremental cost, EPE took the difference between the full PVGS Unit 3 Proxy Price calculated using Permian Basin daily index price (i.e., the actual gas prices for all of February 2021) and the PVGS Unit 3 Proxy Price calculated using an adjusted average Permian Basin daily index price (i.e., the actual gas prices for February 2021, excluding the prices from February 11, 2021 through February 22, 2021). **[6 RP 0872-0873]**.

The variance to EPE's approved FPPCAC methodology requested in this case is specific to costs associated with Winter Storm Uri, including the incremental component of EPE's PVGS Unit 3 costs. EPE's incremental PVGS Unit 3 costs are due to abnormally high natural gas prices during the Winter Storm Uri, and it is these incremental costs that will be included in the total amount recovered via the requested 12-month amortization period. Consequently, whether the PVGS Unit 3 energy and capacity at the Proxy Price was the most cost-effective resource available to EPE *during entire month of February 2021* is irrelevant and beyond the scope of this proceeding. **[6 RP 0872-0873, 0883-0884]**; *see also* **[12 RP 2238-39]**.

D. The Evidence on Which the City Bases Its Appeal Is Unreliable

In arguing that there were lower cost alternatives available during Winter Storm Uri, the City relies heavily on testimony regarding the EPE costing model that has been repeatedly discredited. *See* **[BIC 39-41]**. The simplistic premise behind the City's costing model argument is that if an off-system sale is happening, then PVGS Unit 3 energy and capacity was not being relied upon. **[8 RP 1313]**. This is not correct. Nor is it the first time that the City has made the exact same argument. In Case No. 18-00006-UT, the City used the same methodology and assumptions to reach the same conclusions. In that matter, the Commission soundly rejected the City's analysis as fatally flawed and unusable:

> [They] ignore [EPE Witness] testimony explaining that the Company is required to provide reliable service to its native load customers whether

> or not it makes a single off-system sale, and the provision of such service to native load customers results in cost causation that must be assigned to that service. The Intervenors do not cite to any competent evidence in the record to rebut [EPE Witness's] testimony on this point. The testimony of lay witnesses Ms. Soules and Mr. Downs misunderstood and misapplied renewable energy and incremental cost concepts and refused to acknowledge or apply reliability considerations in their analysis . . . Ms. Soules' arguments reflect her lack of knowledge and understanding of electric utility operating and reliability requirements. Her conclusion that cost allocation should not be dependent on reliability requirements reflects a basic flaw in her analysis . . . . The Hearing Examiner finds that Ms. Soules' arguments here are not supported by record evidence and are based on underlying misconceptions and errors and shall be disregarded.

Case No. 18-00006-UT, *Recommended Decision*, at 41–42 (adopted by the Commission on February 13, 2019). The same reasoning applies in this case.

The City continues to misinterpret the costing model. As EPE witness Gonzalez repeatedly explained, it is necessary for EPE to have available capacity to meet peak demand. **[7 RP 1015-1016]**. Without such available resources, EPE might be unable to provide service during the peak times, and blackouts could result. For that reason, every responsible utility plans to have sufficient resources to meet the anticipated peak demand, just as EPE did.

However, as with all utilities, during non-peak times, not all the necessary capacity is being utilized. During these times, off-system sales are necessary to ensure that resources are available to provide continuous and reliable service. **[7 RP**

1017]. These sales are known as reliability sales. **[7 RP 1017]**. Without these reliability sales, EPE would not have the resources available to meet peak demand. In the words of Mr. Buraczyk:

> It is important to clarify that, at times, it is necessary to make sales for purposes of reliability. Examples of sales for reliability may include those made to sell excess generation during periods where loads are below reliability must-run and/or must-take generation levels.

[13 RP 2658]. Mr. Gonzalez confirmed that *all* off-system sales during the relevant period were made exclusively for reliability purposes:

> As I've stated, these [off-system] sales, given the trading time frame, were being specifically made to meet reliability must-run operating minimums for our local generation.

[7 RP 1126]; *see also* **[7 RP 1020, 1040-1041]**. While the City was reluctant to agree, they did not offer any actual evidence to contest this fact. **[8 RP 1309]**.

The City simply has repeated the same basic analyses, with the same errors and omissions, and the same erroneous conclusions as were rejected in Case No. 18-00006-UT.

IV. PUBLIC POLICY SUPPORTS AFFIRMING THE COMMISSION'S ORDER ALLOWING EPE TO RECOVER ITS COSTS PURSUANT TO THE PROXY PRICE

Finally, public policy supports allowing EPE to recover the energy and capacity supplied by PVGS Unit 3 at the Proxy Price. In light of the potential consequences and the difficulty in providing service during emergencies such as Winter Storm Uri, courts and commissions have routinely rejected "Monday

morning quarterback" arguments and allowed recovery for services provided during extreme weather conditions. For example, in a widely cited decision that informs this matter, the Rhode Island Supreme Court reversed a commission decision that Narragansett Electric Company should not be allowed to recover certain extraordinary costs it incurred in providing "heroic" service to restore electricity after an exceptionally damaging ice storm. *Narragansett Elec. Co. v. Burke*, 415 A.2d 177, 179–80 (R.I. 1980). "[T]he court was concerned that unless it allowed the utility to recover storm-related expenses in this case, the next time a severe storm occurred the utility would have no incentive to restore service swiftly and efficiently." Stefan H. Krieger, The Ghost of Regulation Past: Current Application of the Rule Against Retroactive Ratemaking in Public Utility Proceeding, 1991 U. Ill. L. Rev. 983, 1004 (1991). For the same reason, there is a "plethora of cases from other jurisdictions permitting a utility to recover the extraordinary costs associated with an unusually severe storm." *Narragansett*, 415 A.2d at 179–80. *See, e.g., Mississippi ex rel. Pittman v. Mississippi Pub. Serv. Comm'n*, 520 So.2d 1355, 1360-63 (Miss.1987) (allowing a utility to recover storm-damage expenses after Hurricane Elana); *Wisconsin Envtl. Decade v. Public Serv. Comm'n*, 298 N.W.2d 205, 211-12 (Wis.Ct.App.1980) (affirming commission's grant of expenses caused by ice storm).

Though the details differ, the spirit of the decisions is the same - public utilities that provide service in emergencies should not be punished for the expenses incurred

in providing that service. That principle applies here. EPE kept the lights on for its customers for the duration of an anomalous, potentially devastating freeze period. Revisiting such an emergency months after the fact to nitpick the decisions and undermine that success is counter to sound public policy. Rather than using this case as an unprecedented vehicle to restrict EPE's cost recovery, "EPE should be applauded for keeping the lights on." **[1 RP 0047-0055]**.

CONCLUSION

For the reasons described above, the Court should reject the City's arguments and affirm the decision of the Commission.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 24, 2025, the foregoing was electronically filed and served on all counsel of record via the Court's electronic filing system, as more fully reflected on the Notice of Electronic Filing.

/s/ Jeffrey J. Wechsler
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