IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

CITY OF LAS CRUCES,

Appellant,

S-1-SC-40636

v.

THE 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 APPELLEE NEW MEXICO PUBLIC REGULATION COMMISSION

Erin E. Lecocq
Appellate Specialist
New Mexico Public Regulation Commission
PO Box 1269
Santa Fe, NM 87504-1269
Erin.lecocq@prc.nm.gov
505-795-1037

TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Cases:

Cases from Other Jurisdictions:

Statutes:

Rules:

Other Authorities:

I. INTRODUCTION

Winter Storm Uri (also referred to as the "Cold Weather Event" or "Severe Weather Event") was a historic and catastrophic winter storm that swept across the United States in February 2021, bringing extreme cold, ice, and heavy snowfall to large portions of the country. The Southwest was particularly hard-hit, as the unprecedented cold led to widespread power outages and severe disruptions to natural gas supplies. The storm also caused extreme volatility in energy markets, with natural gas prices skyrocketing due to supply constraints. [**10 RP 1771**]

The initial question posed to Appellee the Public Regulation Commission ("Commission") was whether Intervenor El Paso Electric Company ("EPE") would be granted a variance from its approved Fuel and Purchased Power Cost Adjustment Clause ("FPPCAC") methodology in order to mitigate the impact of the increased costs to ratepayers incurred during this time. However, during the proceedings, the parties and the Commission expanded the scope of the issues before the Commission to examine whether the price utilized by EPE for the energy it obtained from the Palo Verde Nuclear Generating Station Unit 3 ("PV3" or "PVNGS") was the most cost-effective resource available to

EPE at the time, and whether the Commission-approved pricing structure should apply.

After a complex procedural process, the Commission eventually determined that based upon the evidence in the record, EPE's choice to use firm capacity and energy from PV3 during Winter Storm Uri was the most cost-effective option and allowed EPE to provide continuous and uninterrupted service to its customers. The Commission respectfully requests that its orders be affirmed.

II. STATEMENT OF FACTS

Although the path to this appeal may seem lengthy and complex, it is ultimately a straightforward matter when viewed through the lens of the facts central to this case. Appellant City of Las Cruces ("Appellant" or "CLC") appeals the Commission's Order Denying Motion for Rehearing and Motion for Stay, issued on October 3, 2024, and is seeking to "review . . . the Commission's Order Adopting Second Recommended Decision" issued on August 22, 2024, and the Second Recommended Decision issued . . . on May 20, 2024. [**NOA 1**]

EPE filed a Motion for Variance ("Motion") from its approved FPPCAC methodology, in which EPE requested to amortize the unusually high energy

costs resulting from Winter Storm Uri over a period of twelve months to mitigate the effect on customers. [**1 RP 0001**] One of the stated objectives of the Commission's FPPCAC rule is to "flow through to the users of electricity the increases or decreases in applicable fuel and purchased power expense per kilowatt-hour of delivered energy above or below a base fuel and purchased power expense." 17.9.550.6(D) NMAC. EPE's application stated, "without the requested variance, the FPPCAC factor would be $0.14/kWh in the April 2021 bills. If the requested variance is granted, the FPPCAC factor would be $0.029/kWh." [**1 RP 0005 ¶ 12**]

The Commission assigned a hearing examiner who retired prior to holding an evidentiary hearing, then assigned a second hearing examiner who, after an evidentiary hearing, issued a Recommended Decision that found the only issue to be decided in the case was whether to grant the requested variance to spread the costs over twelve months as opposed to one month. [**10 RP 1783**] Further, the hearing examiner found there was no evidence to controvert EPE's evidence that adequately satisfied its burden of proof for the requested variance, allowing an otherwise one-time charge for costs to be billed over twelve months, and recommended the Motion be approved. [***Id.***]

The Commission issued an order finding that further proceedings were needed before the Commission could rule upon the Motion, and ordered those further proceedings be limited to the question of "whether PVNGS 3 energy and capacity in February 2021, in response to the conditions created by Uri and the natural gas price crisis, was the most-cost-effective resource available to EPE." [**10 RP 1982-1983**]

After the retirement of the second hearing examiner, a third hearing examiner was assigned, who, upon reviewing EPE's Motion for Procedural Order, consolidated the issues before the Commission into three questions. Of these questions, those relevant to this appeal were: 1) What effect other relevant cases, including Case No. 18-0006-UT, have on the issues presented in this case; and 2) Whether PV3 energy and capacity was the most cost-effective resource available to EPE when EPE chose to use it in response to Uri and the natural-gas crisis in February 2021. [**12 RP 2219-2220; 2222**]

After examining the record, the third hearing examiner determined it was "legally appropriate and reasonable that EPE's actions regarding the use of PV3 firm capacity and energy during the Severe Weather Event . . . be measured by using the Commission's prior approved guideline," which was a "stipulation provision that the 'market based proxy pricing for PVNGS 3 would be

calculated in EPE's Monthly FPPCAC per the formula set out in the Stipulation.'" [**12 RP 2205**] The hearing examiner found this benchmark—the "proxy price"—had been used by the Commission in other EPE FPPCAC and rate cases for firm capacity and energy. The hearing examiner concluded that an analysis of the history of the approved use of the resource at the proxy price, along with the application of Rule 17.9.550 NMAC, would provide a sufficient foundation for the Commission to make its determination on whether to approve the Motion for Variance. [**12 RP 2205-2206**]

The hearing examiner concluded no party had proved EPE had any other "lower cost generation alternatives equivalent to using PV3 firm capacity and energy." [**12 RP 2243**] This does not necessarily mean no lower-cost resource was available, but that no resource capable of providing adequate firm capacity and energy was available to EPE at the time it was needed for a lower price. [**12 RP 2335**] There is no evidence in the record to refute this conclusion.

III. STANDARD OF REVIEW

The burden is on the Appellant to demonstrate the order is unreasonable or unlawful. NMSA 1978, § 62-11-4 (1965). Unreasonableness or unlawfulness may be shown by demonstrating the decision is arbitrary and capricious, is not supported by substantial evidence, or is an abuse of discretion "by being

outside the scope of the agency's authority, clear error, or violative of due process." *In re Zia Nat. Gas Co.*, 2000-NMSC-011, ¶ 4, 128 N.M. 728, 731, 998 P.2d 564, 567.

In reviewing the Commission's decision, the Court determines whether the Appellant's issues present a question of fact, a question of law, or some combination of the two. *Albuquerque Bernalillo Cty. Water Util. Auth. v. N.M. Pub. Regulation Comm'n*, 2010-NMSC-013, ¶ 17, 148 N.M. 21, 31, 229 P.3d 494, 504 (Bosson, J., dissenting) ("*ABCWUA*"). With respect to questions of fact, the Court "looks to the whole record to determine whether substantial evidence supports the Commission's decision." *Id.* ¶ 18. The Court views the evidence in the light most favorable to the Commission's decision and draws every inference in support of the Commission's decision. *Id.* ¶17. When fact finding is necessarily predicated on matters requiring expertise, the Court accords substantial deference to the Commission's determinations. *See ABCWUA*, 2010-NMSC-013, ¶ 50.

In reviewing questions of law, the Court accords some deference to the agency's interpretation or application of a governing statute. *New Mexico Indus. Energy Consumers v. PRC*, 2007-NMSC-053, ¶ 19, 142 N.M. 533, 539, 168 P.3d 105, 111. 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, 120 N.M. 579, 583, 904 P.2d 28, 32. However, the Court is not bound by the Commission's interpretation and may substitute its own independent judgment for that of the agency. *Id.*

Therefore, the Commission has broad discretion to evaluate the issues brought before it in this matter. This discretion reflects the Commission's expertise in regulating public utilities and ensuring that rates are just and reasonable.

IV. ARGUMENT

The Commission found the proxy price was to be used beyond the 2009 stipulation and reaffirmed EPE's right to rely upon this price in subsequent proceedings, including during Winter Storm Uri. Substantial evidence supports the Commission's calculation of the amount EPE was entitled to recover for its use of PV3 during February 2021. The Commission's determination that PV3 was the most cost-effective resource available to EPE during Winter Storm Uri was not arbitrary and capricious because the Commission thoroughly examined all relevant aspects of what constitutes a

"cost-effective resource," and properly determined, based upon evidence in the record, that additional factors other than cost needed to be considered. Therefore, the Commission respectfully requests that the Commission's orders be affirmed.

A. The Commission Properly Determined EPE Must Use the Commission-Established Proxy Price, and Properly Calculated the Amount EPE was Entitled to Recover for its Use of PV3 During Winter Storm Uri.

The questions before this Court include both questions of law and fact. The legal question centers on whether the Commission properly interpreted its prior orders when it determined EPE was entitled to apply the proxy price to its use of PV3. The factual inquiry involves determining whether the Commission appropriately calculated the incremental costs EPE is entitled to recover given the proxy price and gas prices at the time of EPE's use of PV3. In both cases, the Commission was bound to follow the proxy price mechanism and did not have the discretion to deviate from it—to do otherwise would constitute retroactive ratemaking.

i. The Commission properly interpreted its prior orders and appropriately determined that EPE could rely upon the proxy price that was established in 2009, and which has been used since.

Appellant's argument that the Credit Suisse proxy price expired when EPE's base rates were approved in Commission case number 15-00127 is not supported by prior Commission orders. The proxy price took effect by virtue of a stipulation in 2009 and which was last upheld in the Commission's final order in Commission case number 20-00104; there, the Commission adopted the Hearing Examiner's finding that the Credit Suisse proxy price had not expired. [**4 RP 0292, ¶ 5; 10 RP 1777**] Appellant acknowledged this, stating "the final order in Case No. 20-00104-UT, EPE's general rate case, accepted the Hearing Examiner's finding regarding the Credit Suisse proxy price. . ." [**4 RP 0335**] Evidence in the record also supports this conclusion: "EPE utilized the proxy price established by the Commission, or approved by the Commission, in the same manner that [it has] for the last 130 months, since it was approved in 2009."[1] [**5 RP 0495**]

[1] In the same rate case, the Commission decided that, going forward, EPE could no longer use PV3 as a resource. *See Order Adopting RD with Modifications*, Docket No. 20-00104-UT (June 23, 2021), Par. 34 (finding "the

The Second Recommended Decision came to the same conclusion. After reexamining the history of the Commission's orders, the hearing examiner determined it was "not reasonable to change the proxy price methodology just because gas prices were high," and concluded the "proxy price methodology is operating exactly as it always has, it is using the average gas price to calculate costs per the proxy price methodology." [**12 RP 2243**]

Interpreting the Commission's prior orders is a question of law. New Mexico Courts have not examined this specific question, but because Commission orders generally have the same force as statutes, *see Matter of Held Orders of U. S. W. Communications, Inc.*, 1997-NMSC-031, ¶ 8, 123 N.M. 554, 558, 943 P.2d 1007, 1011, it stands to reason the same rules applicable to the interpretation of statutes should apply to the interpretation of an order of

---

arrangement for PVGS Unit 3 was a negotiated result and a reasonable compromise at the time. That EPE now seeks fully to recover its costs is inconsistent with the bargain reached by the parties and approved by the Commission. The parties have not reached a new agreement, and EPE is unwilling to go forward under the old agreement.") But this was decided after EPE's use of PV3 during Winter Storm Uri.

an administrative agency. *See* 73A C.J.S. Public Administrative Law and Procedure § 343. Just as the Court does when asked to interpret a statute, here, the Court should examine the aim and object of construction of the order to ascertain the intent of the administrative body. *Id.* Agency orders should not be read in a vacuum; rather courts should look to the plain language and context of the order to guide their understanding. *Id.*

The Court should give substantial deference to an agency's interpretation of its own order. *See S. Utah Wilderness All. v. Office of Surface Mining Reclamation & Enf't*, 620 F.3d 1227, 1239 (10th Cir. 2010) (Ebel, J. dissenting) ("[W]hen an agency subsequently interprets its own order, we owe deference to this interpretation as well."). Moreover, it is well-established throughout the country that an agency's interpretation of the intended effect of its own orders is controlling unless clearly erroneous. 73A C.J.S. Public Administrative Law and Procedure § 343, citing *Pac. Gas & Elec. Co. v. FERC*, 464 F.3d 861, 868 (9th Cir. 2006). But while an administrative body may receive deference in interpreting its own orders, an interpretation by such body is not binding on the reviewing court. 73A C.J.S. Public Administrative Law and Procedure § 343.

Here, there is strong justification to support deferring to the Commission's interpretation of its prior orders with respect to establishing and extending

the proxy price for EPE's use of PV3. While Appellant repeatedly claims the proxy price was applicable to the first stipulation only [**BIC 8, 13, 16, 19, 20, 24**], the Commission has reaffirmed and approved the continued use of the proxy price in several subsequent orders indicating its intention to signify the reasonableness of the proxy price in each subsequent order. [**10 RP 1768-1770**] The second hearing examiner found "the Commission-authorized pricing mechanism, which EPE applied in exactly the same way every month from when it was approved in the 2009 Rate Case until the conclusion of the 2021 EPE Rate Case, is the means by which EPE was, and is, allowed to recover costs associated with energy and capacity supplied by PVGS Unit 3." [**10 RP 1770**]

After reexamining the Commission's prior orders, the third hearing examiner came to the same conclusion, stating in the Second Recommended Decision that the proxy price methodology has been used since 2009, and "Intervenors and Staff appeared content with EPE using the proxy price methodology when gas prices were low or even negative; however, when gas prices are high during a Severe Weather Event, they suddenly chose to disregard the proxy price methodology." [**12 RP 2242**] The Commission adopted this rationale and conclusion in its Final Order Adopting the Second

Recommended Decision [**12 RP 2344-2345**] and again underscored its conclusions in its Order Denying Motion for Rehearing and Stay. [**12 RP 2432**]

The Commission did not read the 2009 Stipulation and Order in a vacuum, but rather conducted a thorough analysis of all the relevant prior orders. Reading those orders in context, the Commission concluded that because the proxy price established in 2009 was repeatedly reaffirmed and perpetuated by the Commission in several subsequent orders, and because EPE had implemented and relied upon the proxy price since 2009, it is reasonable for the Commission to determine the proxy price should be used in 2021. Because Appellant has neither demonstrated that the Commission intended to terminate or amend the proxy price through those additional proceedings, nor that the Commission's conclusion in this case is "clearly erroneous," the Commission respectfully requests the Court affirm the Commission's orders.

ii. <u>While the Commission has discretion to set just and reasonable rates, the Commission is bound by its decision to utilize the proxy price for EPE's use of PV3; to order otherwise would constitute retroactive ratemaking.</u>

Having established that the Commission continually reaffirmed and perpetuated the proxy price for EPE's use of PV3, the next step is to determine

whether the Commission applied it properly to EPE's use of PV3 during the month of February 2021.

The issue of whether the Commission correctly calculated incremental costs using the proxy price is a question of fact. Substantial evidence in the record supports the Commission's conclusion, which also underscores the Commission's adherence to consistent application of the proxy price.

When reviewing a question of fact, the Court will defer to the decision of an agency if it is supported by substantial evidence, which is "evidence that a reasonable mind would regard as adequate to support a conclusion." *Dona Ana Mut. Domestic Water Consumers Ass'n v. New Mexico Pub. Regulation Comm'n*, 2006-NMSC-032, ¶ 11, 140 N.M. 6, 10, 139 P.3d 166, 170 (internal citations omitted). The Court does not substitute its judgment for that of the agency; although the evidence may support inconsistent findings, the Court will not disturb the agency's finding if supported by substantial evidence on the record as a whole." *Id.* (internal citations omitted). Finally, the Court must view the evidence in the light most favorable to the decision made by the Commission. *Attorney Gen. of the State of N.M. v. New Mexico Pub. Serv. Comm'n*, 1984-NMSC-081, ¶ 11, 101 N.M. 549, 553, 685 P.2d 957, 961 (internal citations omitted).

a. The proxy price methodology

The Commission properly utilized the proxy price methodology in this matter. The proxy price methodology "is comprised of a single variable component, based on the average price of gas across the month, to the total amount of energy supplied from PV3 during the month." [**6 RP 883**] While Appellant argues the Commission erred in applying the proxy price methodology to the entire month of February 2021, the function of the proxy price is to do just that. The Commission cannot now alter this formula; to do so would constitute improper retroactive ratemaking.

The proxy price is made up of two parts: a capacity component, which does not vary, and which, according to the stipulation, is $9.25 per kilowatt hour times 211 MW of capacity at Pv3, and an energy component, which is calculated by multiplying the megawatt-hours of energy generated by PV3 and supplied to EPE in a month, by the sum of the Permian Basin daily index price times a 7.6 MMBtu heat rate, and $3.50 per MWh for nonfuel operation and maintenance expense. [**9 RP 1603-1604**] Because there is a variable component, the proxy price is determined by taking an average of these costs over the entire month. [**6 RP 0884**]

But the incremental PV3 cost of $5.7 million—at issue here—is the result of "the difference in the PV3 proxy price calculation as approved in the 2015 Rate Case and the PV3 proxy price calculation using an adjusted average Permian Basin daily index price excluding the gas for February 11 through the 22nd." [**1 RP 0004-0005; 0016; 5 RP 493-494; 6 RP 883-885**]

Because the Commission-approved proxy pricing for PV3 includes a variable component linked to natural gas prices, that component rose above the usual monthly amount due to the spike in gas prices across the country. [**6 RP 841**] The incremental portion of the monthly PV3 proxy price was calculated by comparing the full Commission-approved price with an adjusted version, which did not take into account the price on the days during the winter storm. [***Id.***] The full cost calculation reflects actual February gas prices, following EPE's standard FFPCAC method, while the adjusted calculation excludes gas prices from February 11–22, when the Cold Weather Event occurred: the difference between these two values is the incremental amount for which EPE sought a variance to allow for a 12-month amortization [**6 RP 841-842; 1 RP 0004-0005**]

Contrary to Appellant's argument, while the Commission did base its conclusion primarily upon the testimony of EPE's expert witness, that does

not mean it did not consider other expert testimony. [**BIC 20, 35**] The Commission is not bound by the opinions of experts so long as the Commission's ultimate decision is supported by substantial evidence. *See Attorney Gen. of State of N.M.*, 1984-NMSC-081, ¶ 15. Substantial evidence supports the Commission's conclusion that EPE's approach correctly isolated the relevant incremental cost and ensured consistency with the approved pricing methodology. [**12 RP 2245; 2432**]

b. The Commission is bound by the proxy price methodology and is unable to permit the pricing suggested by Appellant.

Appellant's argument that the Commission improperly allowed EPE to recover costs it did not incur can likewise not be sustained. The proxy price methodology does not recover the actual costs incurred—this is not how the proxy price methodology functions. Indeed, the proxy price rate has never been based on costs actually incurred by EPE, even when EPE incurred higher costs than the proxy price allowed EPE to recover. [**8 RP 1420-1421, 1475**] While Appellant argues EPE should not be able to recover costs not incurred "just because there's this formula," [**8 RP 1418**], the Commission in fact is bound to allow EPE to recover these costs precisely because of the proxy price formula. To allow otherwise would constitute retroactive ratemaking, which

is prohibited. *See Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Comm'n*, 1977-NMSC-032, ¶ 89, 90 N.M. 325, 341, 563 P.2d 588, 604 ("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.").

Based on the record and supported by substantial evidence, the Commission correctly determined EPE properly applied the proxy price methodology to its incremental costs incurred during Winter Storm Uri. Therefore, the Commission respectfully requests the Court affirm the Commission's orders.

B. The Commission Must Always Consider Cost and Reliability Together to Ensure Reasonable and Proper Service at Just and Reasonable Rates.

As explained *supra*, the Commission correctly interpreted its prior orders when it determined that the proxy price established in 2009 could be utilized for this matter. Appellant urged the Commission not to apply the proxy price, arguing that applying the proxy price would result in a "windfall" for EPE. [**BIC 3**] But the Commission found that because "EPE has no certificate of convenience and necessity ("CCN") to use PVNGS 3 to serve EPE's New Mexico

customers . . . EPE is not authorized to pass through the actual costs of using PVNGS 3 to serve New Mexico customers." [**10 RP 1979**]. Because EPE could not pass through the actual costs of PV3, the cost had to be passed through at the proxy price. This fact prompted the need to focus the Commission's analysis on "whether EPE's decision to use PVNGS 3 to serve customers during Uri was appropriate," as the only way in which the proxy price would have been avoided was if EPE had been able to use, and did use, a resource other than PV3. [**12 RP 2220**] Because EPE had no reasonable alternatives, given the escalated prices for gas during Winter Storm Uri, the Commission's conclusion that it was appropriate for EPE to utilize PV3 is supported by substantial evidence.

The Commission accepted and adopted all findings of fact from the initial Recommended Decision, except the Commission rejected any implication that it had "predetermined that the use of PVNGS 3 energy and capacity in Feb 2021 was the lowest cost option available to EPE." [**10 RP 1983**] As a result, the Commission requested additional proceedings to determine the answer to the limited question of "whether EPE's use of PV3 energy and capacity in February 2021, in response to the conditions created by Uri and the natural gas price crisis, was the most cost-effective resource available to EPE." [**10 RP 1981-1982**

¶¶ 45-46] The Commission clarified it was using the language "most cost-effective resource" instead of "least cost alternative" in order to indicate it should use the "most cost-effective resource test." [**10 Rp 1982, fn 1**]

i. Whether a resource is cost-effective must be determined by examining cost as well as other considerations, such as reliability.

"Cost-effective" is not defined in any Commission-governing statute or Commission rule, nor is it defined by this Court.[2] Based upon the Commission's understanding of the phrase "cost-effective," the Commission determined it must evaluate cost as well as reliability and efficiency.

To determine the meaning of a term, the Court considers the plain meaning of the term unless it is clearly indicated a different meaning is intended. *See ABCWUA*, 2010-NMSC-013, ¶ 52. The Oxford Advanced Learners Dictionary defines "cost-effective" as "giving the best possible profit or benefits in comparison with the money that is spent." Oxford Advanced Learners Dictionary, "Cost-Effective", (March 6, 2025), https://www.oxfordlearnersdictionaries.com/us/definition/english/cost-

[2] No party objected to this phrase, and all parties agreed the record had been sufficiently developed with respect to this question. [**12 RP 2194**]

effective?q=cost-effective. Under this definition, the Commission must consider not only the cost of the resource EPE chose to use during Winter Storm Uri, but also the benefits to customers arising from the selected resource. Here, the Commission appropriately weighed both cost and general benefits, including the safety and reliability of the service. The Commission's decision to do so is neither arbitrary nor capricious because all parties agreed to the complete record at the time and none objected to the Commission's consideration of reliability issues. [**6 RP 848; 12 RP 2196; 13 RP 2725**]

As discussed *supra*, the Commission was required to assess the cost of EPE's actions during Winter Storm Uri, and to weigh the use of PV3 relative to other resources, using the Commission's previously approved and stipulated proxy price methodology. [**6 RP 857-858; 12 RP 2225-2226**] There is sufficient evidence in the record to demonstrate that EPE considers cost when choosing its firm capacity and energy, and, looking at those, EPE's choice to use PV 3 was the most cost-effective resource available to EPE at the time, given EPE's other considerations. [**7 RP 1205; 13 RP 2726-2727**] The Commission found no evidence of any definitively cheaper alternative energy source during this period. [**12 RP 2242-2244**]

Given the Public Utility Act's ("PUA") general directives to the Commission to ensure safe and reliable energy at just and reasonable rates, the Commission is always required to consider the safety and reliability of a resource along with the cost of that resource. *See* NMSA 1978, §§ 62-1 through 62-6 and 62-8 through 62-13 (1887, as amended through 2021). Adopting Appellant's reasoning that the Commission should only consider cost would require the Court and the Commission to read "cost-effective" to mean simply "lowest cost" without further considerations and would be contrary to the directives and objectives of the PUA. *See, e.g.*, NMSA 1978, § 62-3-1(B) (2008) ("It is the declared policy of the state that . . . *reasonable and proper services* shall be available at fair, just and reasonable rates. . .") (emphasis added); NMSA 1978 § 62-8-7(E)(1) (2011) (requiring the Commission to enact rules governing fuel adjustment clauses that allow the Commission to periodically consider "whether the existence of a particular adjustment clause is consistent with the purposes of the Public Utility Act, including *serving the goal of providing reasonable and proper service at fair, just and reasonable rates* to all customer classes.") (emphasis added); *New Energy Econ., Inc. v. New Mexico Pub. Regulation Comm'n*, 2018-NMSC-024, ¶ 13, 416 P.3d 277, 282 ("To identify the most cost-effective resource portfolio, utilities shall evaluate all feasible

supply, energy storage, and demand-side resource options on a consistent and comparable basis, and take into consideration risk and uncertainty (including but not limited to financial, competitive, reliability, operational, fuel supply, price volatility and anticipated environmental regulation.")).

Therefore, to ensure "reasonable and proper service" is provided to customers, the Commission must examine not only the cost of the service, but whether the service is safe and reliable. There is ample evidence in the record to demonstrate that EPE's choice to utilize PV3 demonstrated a consideration of reliability as well as cost. [***See, e.g.,* 5 RP 0562; 6 RP 0848; 13 RP 2725-2726**]

The Second Recommended Decision addresses these considerations as follows:

> The key to understanding how EPE (and other utilities for that matter) dispatch generation resources for native load is to understand how reliability considerations affect the economic dispatch of generation, and hence the costing of fuel and purchased power for native load customers. Simply put, reliability requirements are necessary to ensure that power is available to native load customers in the event of system contingencies such as sudden increases in load or the loss of a generator or a transmission line. Reliability requirements also include voltage support for transmission. If reliability considerations were not a factor in generation resource dispatch, EPE's economic dispatch would simply start with its cheapest source of generation first and then layer on increasingly more expensive generation until native load was met.

[**12 RP 2227**]

The Commission therefore did not act arbitrarily and capriciously in examining factors other than cost when it was faced with the question of whether PV3 was the "most cost-effective resource available to EPE"; it was abiding by its statutory mandate.

ii. The Commission properly compared cost to reliability to determine PV3 was the most cost-effective resource available.

Understanding the cost must be passed through to customers at the proxy price, and recognizing the benefits associated with EPE's use of PV3 during the winter storm, the Commission properly compared both costs and benefits when it determined "if the firm capacity and energy from PV3 was the only generation source that could have provided uninterrupted reliable continuous service during the Severe Winter Event, then it was the lowest cost alternative." [**12 RP 2243; 2343 ¶ 11**] The Commission, in its order, found "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 2343 ¶ 10**]

The Commission also adopted the hearing examiner's determination that "EPE's updated Proxy Price calculations for firm capacity and energy provided

by PV3 during February 2021 were accurate. . . Other considerations, such as the reliability of the resource, are relevant to this recommendation." [***Id.***] The Commission's determination was based on evidence in the record indicating that PV3 was a reliable, firm resource to a greater extent than other resources available at the time." [***Id.***] The Commission also adopted the hearing examiner's analysis of EPE's use of PV3 versus other options available to EPE and concluded that "[c]hoosing [a] less reliable nonequivalent generation resource or one that was subject to curtailment, during critical weather, even if that generation resource might have been less expensive, could have resulted in very detrimental consequences to EPE's ratepayers." [**12 RP 2344**]

Therefore, given the Commission's obligations to consider cost and reliability, the Commission's conclusion that EPE's use of PV3 was the most cost-effective resource choice at the time it was chosen, was not arbitrary or capricious. The Commission respectfully requests that the Court so find.

V. CONCLUSION

In the wake of Winter Storm Uri's devastation, the Commission was tasked with evaluating whether EPE's pricing and procurement decisions aligned with the approved regulatory framework and served the best interests of its customers. After a thorough examination of the record—including extensive

testimony and analysis—the Commission properly concluded that EPE's reliance on firm capacity and energy from PV3 was the most cost-effective option available under the extraordinary circumstances. The approved proxy pricing mechanism ensured that the appropriate costs were passed through, and the approved variance properly amortized the incremental portion of those costs. The Commission's decision reflects a careful, evidence-based determination consistent with established methodology and sound regulatory principles. Accordingly, the Commission respectfully requests its orders be affirmed.

Respectfully Submitted,

THE NEW MEXICO PUBLIC
REGULATION COMMISSION

/s/ Erin E. Lecocq
Erin E. Lecocq
Appellate Specialist
P.O. Box 1269
Santa Fe, NM 87504-1269
Tel: 505-795-1037
Erin.lecocq@prc.nm.gov

Counsel for The New Mexico Public Regulation Commission

STATEMENT OF COMPLIANCE WITH VOLUME-TYPE LIMITATIONS

Pursuant to Rule of Appellate Procedure 12-318(G) NMRA, I certify that this contains 5,414 words in the body of the brief, according to a count by Microsoft Word Version 2306.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing *Answer Brief of Appellee New Mexico Public Regulation Commission* to be served by email through the Court's electronic filing system to all counsel of record on March 24, 2025.

/s/ Erin E. Lecocq
Erin E. Lecocq