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NO. S-1-SC-40636

CITY OF LAS CRUCES,

Appellant,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee.

EL PASO ELECTRIC COMPANY,

Intervenor-Appellee.

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

CONSOLIDATED REPLY BRIEF OF APPELLANT THE CITY OF LAS CRUCES

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STATEMENT OF COMPLIANCE

Pursuant to 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, and that the body of the brief contains 4,400 words.

By: /s/ *Anastasia S. Stevens*
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The City of Las Cruces ("City") hereby replies to the Answer Briefs of the New Mexico Public Regulation Commission ("Commission" or NMPRC") and El Paso Electric Company ("EPE").

I. ARGUMENT

A. THE PROHIBITION OF RETROACTIVE RATEMAKING DOES NOT APPLY TO COSTS RECOVERED THROUGH THE FPPCAC.

The Commission and EPE argue that the rule against retroactive ratemaking prohibits the Commission from allowing EPE to recover through the FPPCAC costs arising from its choice to use PVNGS Unit 3 at any valuation other than the proxy price authorized in Case No. 09-00171-UT. *See* **[EPE AB 24-26]; [NMPRC AB 15, 17-18].** They quote *Mountain States Telephone & Telegraph Co. v. New Mexico State Corporation Commission*, 1977-NMSC-032, ¶ 89, 90 N.M. 325, 341, 563 P.2d 588, 604, which held that "[t]here 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," but neglect to consider whether some specific statutory authority exists. **[EPE AB 25]; [NMPRC AB 18].**

It does. The purpose of utility regulation under the Public Utility Act is to make reasonable and proper utility services available at fair, just and reasonable rates. NMSA 1978, § 62-3-1(B) (1991). NMSA 1978, Section 62-8-7(E) (2011) authorizes the use of automatic cost recovery only for limited types of costs: taxes

or costs of fuel, gas, or purchased power. Automatic cost recovery through the FPPCAC is a "narrow exception" to the Public Utility Act's general requirement for notice, hearing, and Commission approval before any increase in rates charged to customers takes effect. *N.M. Indus. Energy Consumers v. New Mexico Pub. Regul. Comm'n*, 2007-NMSC-053, ¶ 31, 142 N.M. 533, 168 P.3d 105 *("NMIEC")*.

The Legislature directed the Commission to enact rules that allow it to consider periodically "which costs should be included in an adjustment clause, procedures to avoid the inclusion of costs in an adjustment clause that should not be included and methods by which the propriety of costs that are included may be determined by the commission in a timely manner, including what informational filings are required to enable the commission to make such a determination." NMSA 1978, § 62-8-7(E)(3). The limitation on the types of costs recoverable through the FPPCAC and the rulemaking authority were "safeguards" against the "massive abuses of the past." *NMIEC*, 2007-NMSC-053, ¶¶ 31, 32.

The Commission's FPPCAC rule allows it to consider the propriety of costs before and after a utility includes amounts in its monthly FPPCAC charges. Rule 17.9.550.10 NMAC permits the Commission to suspend any proposed adjustment in the monthly factor for a hearing, for reasons including "any unusual or substantial increases in the cost for fuel and purchased power." 17.9.550.10(B)(1) NMAC. Rule 17.9.550.19 NMAC provides for prudence reviews of costs collected through

a FPPCAC. Rule 17.9.550.18 NMAC allows the Commission to order refunds of amounts collected through the FPPCAC if it determines that "the utility's collection of such amounts is contrary to the provisions of 17.9.550 NMAC…or otherwise is unfair, unjust or unreasonable."

One of the stated purposes of Rule 550 is to "assure that utilities collect through the FPPCAC the amount actually expended for fuel and purchased power costs." 17.9.550.6(C) NMAC. This case boils down to a dispute over whether EPE had an absolute entitlement to use its deregulated PVNGS Unit 3 for New Mexico customers at an extraordinarily high price calculated under the proxy price formula approved in Case No. 09-00171-UT—a "windfall" because it actually incurred no elevated costs—or whether in the absence of prior approval of a price of $235.95 per MWh, the Commission can and should implement a just compensation.

B. APPELLEES SEEK TO APPLY NOVEL AND INCORRECT STANDARDS OF REVIEW AND INTERPRETATIONS OF THE RULES OF APPELLATE PROCEDURE.

1. The "Reasoned Basis" Rule Applies to Review of NMPRC Orders.

In recognition of the principle of separation of powers between the executive and judiciary branches, the Court will not supply a reasoned basis for the agency's action that the agency has not given. *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n,* 2003-NMSC-005, ¶ 11, 133 N.M. 97, 61 P.3d 806 ("*Rio Grande*").

However, it may uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned. *Id.* ¶ 13.

Courts are not free to accept *post hoc* rationalizations of counsel in support of agency decisions, because the reviewing court must judge propriety of agency action solely on the grounds invoked by the agency. *Id.* ¶ 11 (citation omitted). As an Intervenor-Appellee that did not appeal or cross-appeal the Commission's orders in this case, EPE presumably is prohibited from supporting these orders on grounds not invoked by the Commission. *See* 12-601(D) NMRA; *cf.* 12 NMRA 12-201(B), (C) (cross-appeals, appellee positions).

2. EPE Conflates Standards of Review for Legal and Factual Issues.

After listing many standards for judicial review of agency orders, EPE's Brief fails to distinguish between those applicable to legal issues and to fact findings, most notably in asserting that 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.'" **[EPE AB 8]** (emphasis added). EPE's misstatement of the standard might be dismissed as carelessness, except that its brief contends that "uncontroverted record evidence" establishes that the Case No. 09-00171-UT proxy price was "subsequently affirmed or approved in three separate proceedings" and cites the testimony of its witnesses. *See* **[EPE AB 10, 11].** As explained below, the

Commission's orders in this case relied on testimony of EPE witnesses rather than analytical reading of the orders in previous proceedings

Ironically, the first hearing examiner expressly ruled that there should be no testimony on the legal issue of whether the Case No. 09-00171-UT proxy price was applicable in February 2021. *See* **[4 RP 0292 ¶ 5].** The City moved to strike some of EPE's pre-filed testimony, then to dismiss the proceeding. *See* [**4 RP 0332-43]; [4 RP 0363-80].** At hearing, the second hearing examiner declined to rule on the motions, stating that he would give the testimony "the weight to which it is entitled." **[4 RP 0436].** He dismissed the City's argument that the City and intervenor Soules had abided by the Procedural Order and EPE had not, stating that "at this point it's impossible to determine whether there would be prejudice to your party and whether it would be a determinative prejudice. ·· In other words, did it affect the final outcome if that is admitted, or not?" **[4 RP 0437];** *see also* **[4 RP 0435-43].**

The footnotes to the "Regulatory History" section of the First Recommended Decision hint at how heavily the second hearing examiner relied on EPE's testimony; additionally, many of the "*id.*" citations actually are to EPE's testimony. *See* **[10 RP 1767-70].** The Order for Further Proceedings, the Second Recommended Decision, the Final Order, and the Order on Rehearing all adopted that "Regulatory History," albeit with adjustments. Both answer briefs expressly

and repeatedly rely on the First Recommended Decision. The inference of prejudice is inescapable.

Another irony is that in the case EPE miscites for the standard of lawfulness, the Court stated that it was troubled by references at the hearing and in briefing to Commission staff's legal conclusions on matters of statutory construction and the Commission's reliance on those conclusions in its final order. *NMIEC,* 2007-NMSC-053, ¶ 19. The Court should be troubled by the Commission's reliance on EPE's testimony on matter of law in this case, as well.

3. The Commission's Interpretation of Previous Orders Is Not Reviewed Under a "Manifestly" or "Clearly Erroneous" Standard.

Neither EPE nor the Commission cites any New Mexico appellate opinion holding that agency interpretations of their past orders in adjudicatory proceedings are to be reviewed under an exceptionally deferential standard. *See, e.g.,* **[EPE AB 8-9, 12, 19]; [NMPRC AB 8-9, 12, 19].**

Pickett Ranch, LLC v. Curry, 2006-NMCA-082, 140 N.M. 49, 139 P.3d 209, held that de novo review did not apply to an agency's interpretation of its own ambiguous regulations (not adjudicatory orders). *Id.* ¶ 5; *see* **[EPE AB 19].** The Court of Appeals devoted twenty-two paragraphs to setting forth the language of the relevant statutes and regulations and expressing its own analysis and agreement with the agency, hardly a highly deferential standard. *See Pickett Ranch,* 2006-NMCA-082, ¶¶ 6-27.

Federal National Mortgage Association v. Chiulli, 2018-NMCA-054, 425 P.3d 739 addressed trial court, not agency, orders, specifically the intent of an order dismissing a mortgage foreclosure complaint with prejudice as a sanction for discovery violations. *Id.* ¶¶ 1, 9-11. The Court of Appeals held that a judgment or order should be interpreted in the same manner as any other written instrument. *Id.* ¶ 14. Where the language is clear and unambiguous, it must be "enforced as it speaks." *Id.* (citation omitted). When an order or judgment has some ambiguity or uncertainty, it may be construed in the light of the pleadings, other portions of the judgment, findings, and conclusions of law. *Id.* Because the judge who issued the order is familiar with the entire record and all of the circumstances, that judge is in the best position to clarify any ambiguity in the order. *Id.* Therefore, the reviewing court will only disturb a clarification by the trial court that is "manifestly unreasonable." *Id.*

The Commission's Brief acknowledges that interpretation of Commission orders is a question of law and suggests applying the rules of statutory interpretation. **[NMPRC AB 10-11].** However, it bypasses the first rule of statutory construction: giving effect to the plain meaning of the words unless the language is doubtful, ambiguous, or would lead to injustice, absurdity, or contradiction. *See Southwestern Pub. Serv. Co. v. N.M. Pub. Regul. Comm'n,* 2024-NMSC-012, ¶ 19, 548 P.3d 97.

The Commission then contends that an agency's interpretation of its own orders "is controlling unless clearly erroneous," citing two cases decided under the federal Administrative Procedure Act. **[NMPRC AB 11].** In the first, after determining that the earlier order was ambiguous, the court looked to "the plain language and context," owed "substantial deference" to the agency's interpretation, and avoided a "strained and unnatural" construction." *Southern Utah Wilderness Alliance v. Office of Surface Mining Reclamation and Enforcement,* 620 F.3d 1227, 1237, 1238-39 (10th Cir. 2010).

The second case used the phrase "clearly erroneous" in the context of the FERC's interpretation of an order that clarified a previous order within the same docket. *See Pacific Gas and Elec. Co. v. F.E.R.C.,* 464 F.3d 861, 868 (9th Cir. 2006). The court held that it lacked statutory jurisdiction to review the agency's decision not to exercise its discretionary power to prosecute or enforce. *See id.* at 863, 866-68. If this federal standard applied in New Mexico, it merely would affirm that the Commission was free to clarify previous orders within Case No. 21-00064-UT in its Order on Rehearing. It would not authorize the Commission to reimagine orders from long-closed dockets.

4. EPE's Contentions that the Only Issue Before the Commission Was Its Request to Recover Its Claimed "Incremental Costs" Over Twelve Months Are Improper and Inconsistent with the Record.

EPE's Brief repeatedly contends that the scope of this proceeding was limited to its motion to amortize recovery of what it characterized as the "incremental costs" associated with the Cold Weather event over twelve months. *See* **[EPE AB 20-22];** *see also* **[*id.* at 1, 9-10, 28-29, 34].** Although the First Recommended Decision proposed that the Commission adopt that position, the Commission soundly rejected EPE's contention in its Order for Further Proceedings. *See* **[10 RP 1761, 1772-80, 1783-84]; [10 RP 1979 ¶ 37, 1981-83 ¶¶ 45-46, A, B].** As discussed above in Section I(B)(1), EPE may not raise *post hoc* arguments for affirmance on grounds explicitly rejected by the Commission.

EPE's arguments that the public notice and Procedural Order issued by the first hearing examiner limited that broad scope also are unavailing. *See* **[EPE AB 21-22].** Within days after the Motion for Variance was filed, it became clear that the Commission, Staff, and other parties viewed the scope of this case more broadly than EPE does. *See, e.g.,* **[1 RP 0026-28; 1 RP 0039-44; 3 RP 0239-43].** At the Commission's direction, Staff and the parties, including EPE, conferred and reached agreement on a FPPCAC billing factor that excluded EPE's claimed "incremental costs." **[3 RP 0258 ¶ 10.a].** They also agreed that the case should be assigned to a hearing examiner and explicitly stated that "[t]he Parties agree that the hearing shall address all February FPPCAC costs." **[3 RP 0259 ¶ 10.d].**

EPE had actual notice of its own agreement and the entire Procedural Order, which prescribed eleven issues to be addressed in its direct testimony, only one of which alluded to a potential amortization period. **[4 RP 295-97 ¶ E].**

That Procedural Order also stated that if the Commission adopted the hearing examiner's recommendation in Case No. 20-00104-UT about the Case No. 09-00171-UT proxy price not having expired, the issue of whether that proxy price was in effect in February 2021 was outside of the scope of this case, but if the Commission did not adopt her recommendation, "the issue of what, if any, proxy price applied in February 2021 may be raised in posthearing briefs in this case to the extent necessary." **[4 RP 0292 ¶ 5].** By the time the City filed its post-hearing briefs challenging the applicability of the Case No. 09-00171-UT proxy price in February 2021, EPE and the Commission had responded to the City's appeal of the Final Order in Case No. 20-00104-UT by claiming that the Commission's findings on the continuing applicability of the proxy price were non-binding dicta. *See El Paso Elec. Co. v. N.M. Pub. Regul. Comm'n*, Nos. S-1-SC-38874 and S-1-SC-38911, dec. ¶¶ 2-7 (N.M. Sept. 26, 2022) ("*EPE*"); *see also id.*, NMPRC AB 1; EPE AB 7-10 (Dec. 23, 2021); *cf.* **[10 RP 1690-1718]** (EPE Answer Brief attached to its Response Brief to the Commission). Before the First Recommended Decision was issued, the Court had dismissed the City's rate case appeal on the grounds that it did "not present an actual controversy capable of actual relief" because the parties agreed that the

Commission's statements were non-binding dicta. *EPE*, dec. ¶ 6; *see also* **[10 RP 1758-59].** EPE's arguments about the scope of this proceeding are thinly veiled attempts to rewrite history and renege on the representations it made to this Court in the rate case appeal.

C. THE APPELLEES FAIL TO ADDRESS THE LANGUAGE OF THE CASE NO. 09-00171-UT STIPULATION AND FINAL ORDER AND DISREGARD THE ABSENCE OF BINDING DETERMINATIONS IN SUBSEQUENT CASES.

1. The Commission's Brief Identifies Just One Previous Case and Does Not Address Its Holding that Case No. 18-00006-UT was the "Operative Order" during February 2021.

The Commission's Brief is notable for its nearly total failure to identify, let alone discuss, the previous orders in which the Case No. 09-00171-UT proxy price was "repeatedly reaffirmed and perpetuated." **[NMPRC AB 13];** *see also* **[*id.* at 8-11, 17].** It cites the First Recommended Decision, which in turn relied on EPE's testimony and descriptions of prior cases in subsequent orders. *See, e.g.,* **[*id.* at 12]** (citing **[10 RP 1768-70]**). The Commission never acknowledges that the Case No. 09-00171-UT stipulation stated that the proxy price methodology was "[f]or this Stipulation only," and does not respond to the City's interpretations of the language, scope, and binding effect of the subsequent cases.

Moreover, the Commission's contention that the proxy price "was last upheld" in Case No. 20-00104-UT simply is wrong. **[NMPRC AB 9].** As discussed above in Section I(B)(4), the Court dismissed the City's appeal of Case No. 20-

00104-UT based on agreement of the parties, including the Commission, that the proxy price language was dicta.

2. EPE's Brief Reiterates the First Recommended Decision Without Addressing the Language and Context of the Previous Orders or the Development of the Commission's Position in this Case.

EPE's Brief repeats arguments it made in this case and in the appeal of Case No. 20-00104-UT without acknowledging the issues raised in the City's Brief-in-Chief or the course of the Commission's reasoning in this proceeding. *See* **[EPE AB 13-20].** Like the Commission, EPE does not address the plain language of the Case No. 09-00171-UT stipulation that the proxy pricing was "[f]or this Stipulation only." *See* **[EPE AB 14].**

Nor does EPE address the Commission's conclusion that Case No. 13-00380-UT could not have made a determination that PVNGS Unit 3 energy and capacity would be the lowest cost option available to EPE in every instance in the future, because doing so would be "unreasonable" and "would constitute a present failure by the Commission to carry out its duties under the Public Utility Act." *Compare* **[EPE AB 14-15]** *with* **[10 RP 1981 ¶ 43].** EPE does not address the City's argument that the Case No. 13-00380-UT Final Order did not and could not change the expiration terms of the Case No. 09-00171-UT stipulation and Final Order, which then were still in effect. *Compare* **[EPE AB 14-15]** *with* **[BIC 24-27].**

EPE assumes that the PVNGS Unit 3 proxy pricing was an intrinsic element of its FPPCAC and its Case No. 13-00380-UT FPPCAC continuation and inserts the phrase "including the Proxy Price" into the Commission's order that "EPE's existing FPPCAC shall remain in effect without modification until further of the Commission." *Compare* **[EPE AB 15]** *with* NMPRC Case No. 13-00380-UT, Final Order, ¶ A (Jan. 8, 2014). EPE offers no support for this contention, which cannot be sustained in light of the Commission's determination that the proxy price was outside the scope of its next FPPCAC continuation docket, Case No. 18-00006-UT. *See* NMPRC Case No. 18-00006-UT, Recommended Decision, at 3 & Ex. A.

EPE argues that the FPPCAC and the proxy price were before the Commission and were approved in its next general rate proceeding, Case No. 15-00127-UT, relying on statements in the Recommended Decision in Case No. 18-00006-UT rather than the language of the Case No. 15-00127-UT Recommended Decision and Final Order. **[EPE AB 15].** EPE does not explain why it would have filed a FPPCAC application in Case No. 18-00006-UT just one and one-half years after the Final Order in Case No. 15-00127-UT was issued, if the FPPCAC and the proxy price had been "continued" and reaffirmed in the rate case. **[EPE AB 15-16];** *cf* NMPRC Case No. 18-00006-UT, Recommended Decision, at 1 & n.1, 12-13 (stating that EPE's application was filed in January 2018 because of Rule 550's four-year

requirement from the time EPE's FPPCAC was "established" and "last authorized" in Case No. 13-00380-UT).

EPE's Brief contends that the Commission approved its request to continue its FPPCAC, "including the Proxy Price," in Case No. 18-00006-UT without responding to the City's arguments that the Commission cannot have considered and approved the proxy price once it held that issue to be outside of the scope of the case. **[EPE AB 16-17];** *see also* **[BIC 21-23].** Indeed, that Recommended Decision more reasonably should be interpreted as stating that EPE *proposed* no changes to its existing FPPCAC *and* continued use of PVNGS Unit 3, and that *only* the FPPCAC, not the proxy price, "shall be continued." *See* NMPRC Case No. 18-00006-UT, Recommended Decision, at 50 ¶¶ 13-14. Likewise, statements in the Final Order that the parties should be prepared to present the proxy pricing issue in EPE's next general rate case would be better interpreted as recognition that the proxy price was properly a rate case issue. *Compare* **[EPE AB 16]** *with* NMPRC Case No. 18-00006-UT, Final Order, ¶¶ 85, A.

Finally, EPE contends that in its last general rate Case No. 20-00104-UT, the Recommended Decision adopted by the Commission rejected the City's position that the Case No. 09-00171-UT proxy price had expired by its terms when new base rates were approved in Case No. 15-00127-UT. **[EPE AB 17].** Just like the Commission,

EPE does not acknowledge that it responded to the City's appeal of that finding by arguing it was unappealable, non-binding dicta. *See* **[10 RP 1702-05].**

3. EPE's Entitlement to Use the Case No. 09-00171-UT Proxy Price Expired in 2016, But EPE Had Continuing Authorization under the Case No. 2722 Stipulation to Use PVNGS Unit 3 Energy and Capacity Needed to Serve New Mexico Customers.

It is undisputed that after the Case No. 09-00171-UT stipulation was replaced with new base rates approved in Case No. 15-00127-UT, EPE in fact continued to utilize the entire output of PVNGS Unit 3 that was not allocated to its Texas jurisdiction for New Mexico customers. Its actions do not establish, however, that EPE was entitled either to use PVNGS Unit 3 all of the time or to be compensated at the Case No. 09-00171-UT proxy price.

The stipulation and order in Case No. 09-00171-UT, and in EPE's preceding general rate cases, recognized that the overarching authority for EPE's use of the decertified and abandoned PVNGS Unit 3 was found in the Case No. 2722 stipulation, which provided that:

> EPE in its discretion may use Palo Verde Unit No. 3 to provide capacity or energy needed to serve EPE's New Mexico customers, including reserve margins as provided in Paragraph 7, and to the extent Palo Verde Unit No. 3 is so used, such firm capacity and energy shall be valued at the market price for the lowest equivalent firm capacity and related energy available to EPE.

NMPRC Case No. 09-00171-UT Stipulation, ¶ 9 (July 15, 1998) (quoted in **[12 RP 2205 n.12]**). Although the Commission's orders in this case rarely cite Case No.

2722, the showings that EPE was required to make in the Procedural Order and the Order for Further Proceedings are consistent with this standard. *See* **[4 RP 0295 ¶ E(1)]; [10 RP 1981-83 ¶¶ 45, A, B, C]; [12 RP 2205 n.6, 2206]**.

D. THE APPELLEES CONFLATE THE METHOD BY WHICH EPE ARBITRARILY ISOLATED ITS CLAIMED "INCREMENTAL COSTS" FROM THE ACTUAL IMPACT ON EPE'S CUSTOMERS OF EPE'S CHOICE TO USE PVNGS UNIT 3 THROUGHOUT FEBRUARY 2021.

The City contends that it was arbitrary and capricious for the Commission not to consider whether PVNGS Unit 3 was the most cost-effective resource available to EPE throughout February 2021 when the $5.7 million of "incremental costs" EPE claimed were derived from applying the calculated proxy price to PVNGS Unit 3 energy generated throughout the month. **[BIC 35-38]; *see also* [5 RP 0642-43].** EPE and the Commission respond by reiterating ***how*** EPE calculated the $5.7 million, which is not disputed. *See* **[EPE AB 33-34]; [NMPRC AB 15-18].** Neither Appellee explains ***why*** this approach satisfied the Commission's intent when it rejected the First Recommended Decision's finding that Case No. 13-00380-UT "predetermined that the use of PVNGS Unit 3 energy and capacity would be the lowest cost option available in every instance in the future in which EPE would choose to use it." **[10 RP 1981 ¶ 43].** Nor does either Appellee defend the Commission's finding that it is "unreasonable" to interpret "in February 2021" as meaning every day of that month. **[12 RP 2432 ¶ 25]; *see also* [BIC 36-37].**

E. THE APPELLEES' DEFENSES OF THE CONCLUSION THAT PVNGS UNIT 3 NECESSARILY WAS THE MOST COST-EFFECTIVE OPTION DURING THE COLD WEATHER EVENT ARE LEGALLY AND FACTUALLY SUSPECT.

The Second Recommended Decision adopted by the Commission searched unsuccessfully for definitions of "cost-effective" in rules and prior orders, and held that consideration of costs of alternatives was precluded because there were no resources equivalent to Unit 3. **[12 RP 2223-26, 2242-44].** Violating the reasoned basis rule once again, the Commission's Brief cites the dictionary definition of "cost-effective" and claims that the Commission appropriately "weighed" the costs and the benefits of EPE's choice to use PVNGS Unit 3 during Winter Storm Uri. **[NMPRC AB 20-21]**. Its citation to the Second Recommended Decision's peremptory rejection of the intervenors' testimony does not address their evidence about available local fuel-oil generation resources and market conditions in the WECC or the City's arguments about applicable legal standards. *Compare* **[BIC 39-41]** *with* **[NMPRC AB 21]; [12 RP 2242-44].**

The Commission's Brief relies on the oral testimony of EPE witness Buraczyk about purchased power not being equivalent to EPE-owned PVNGS Unit 3. **[NMPRC AB 21]** (citing **[7 RP 1205]**). It does not, however, address the City's argument that the Commission is not free, without notice and good cause, to accept in this case virtually the same testimony by the same witness that it rejected in Case

No. 20-00104-UT in holding that EPE could replace PVNGS Unit 3 energy and capacity with purchased power. *See* **[BIC 44-45].**

EPE's Brief makes the same error of relying on Mr. Buraczyk's previously rejected testimony. **[EPE AB 31].**

EPE also wrongly shifts the burden of proof to the intervenors and Staff. **[*Id.*]** It incorrectly asserts that "no witness . . . established that firm energy was available." **[*Id.*]** EPE witness Gonzalez testified that EPE purchased power between February 14 and 17 at prices that averaged $305 per MWh. **[7 RP 1057].** The record also reflects that EPE made sales contracted months or days in advance of the Cold Weather Event at prices around $70 per MWh. **[6 RP 0829]**. Mr. Gonzalez testified that he could neither affirm *nor deny* that 40 MW of firm energy was available for purchase every hour of February 2021 because EPE did not actively engage in such purchases. **[7 RP 1051].** He explained that his reluctance to affirm that power was available arose from EPE's standards for reviewing the creditworthiness of sellers, not knowledge of market supply shortfalls. **[7 RP 1049-52].**

Mr. Gonzalez also testified that EPE "committed" to using PVNGS Unit 3 for New Mexico customers for the entire month of February 2021 as part of its "long-term planning," not specifically in anticipation of the Cold Weather Event. *See* **[7 RP 1044, 1055].** To the extent that the Commission's orders in this case rest on a determination that EPE's "choice to use [Unit 3] in response to Uri and the natural-

gas crisis in February 2021" was "reasonable and necessary," Mr. Gonzalez's testimony renders the Commission's decision arbitrary and capricious. **[12 RP 2236];** *see also Rio Grande,* 2003-NMSC-005, ¶ 17 (without a rational basis).

II. CONCLUSION

For the reasons stated above and in the City's Brief-in-Chief, the Commission's Orders are unlawful, unreasonable, arbitrary and capricious and should be vacated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 14, 2025, I caused a copy of the foregoing Consolidated Reply Brief of Appellant the City of Las Cruces to be electronically filed in the Supreme Court's Odyssey filing system, which in turn caused service upon all counsel of record.

/s/ Anastasia S. Stevens
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