

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

**IN THE MATTER OF EL PASO ELECTRIC COMPANY'S)
APPLICATION FOR A CERTIFICATE OF PUBLIC)
CONVENIENCE AND NECESSITY TO CONSTRUCT,) Docket No. 19-00349-UT
OWN, AND OPERATE GENERATING UNIT 6 AT THE)
NEWMAN GENERATING STATION)**

**ORDER ADOPTING RECOMMENDED DECISION WITH ADDITIONAL
INSTRUCTION**

THIS MATTER comes before the New Mexico Public Regulation Commission (“Commission”) upon the Recommended Decision issued by the Hearing Examiner, the exceptions filed thereto, the responses to the exceptions, and the motion for leave to reply, described below.

Whereupon, being duly informed,

THE COMMISSION FINDS AS FOLLOWS:

1. Hearing Examiner Elizabeth Hurst issued her Recommended Decision in this case on November 16, 2020.
2. On November 25, 2020, El Paso Electric Company (“EPE”) filed its exceptions to the Recommended Decision. On December 4, 2020, responses to EPE’s exceptions were filed by Merrie Lee Soules, the Coalition for Clean Affordable Energy (“CCAЕ”), the City of Las Cruces (the “City”), and Vote Solar.
3. On December 11, 2020, EPE filed a Motion for Leave to File Reply, seeking leave from the Commission to file a reply to the responses to exceptions filed in this matter, except for those filed by Merrie Lee Soules. In support of the motion, EPE argues that these responses are misleading and that they mischaracterize EPE’s positions and arguments in the exceptions. EPE states in the motion that, due to time constraints, it did not seek the positions of the other parties to the case.

4. On December 11, 2020, CCAE filed a response to the motion, opposing it as untimely as EPE chose to wait an entire week after receiving the responses to exceptions to file a reply.

5. The Commission finds that the motion should be denied. The Commission disagrees with CCAE that the reply is untimely. The Commission's Rules of Procedure allow for a reply to a response to an exception to be filed as late as thirteen days from the service of the response. 1.2.2.37(C)(1)(d) NMAC. The Commission instead denies leave to file the reply on the basis that it will not assist the Commission. The Commission can dispose of EPE's exceptions to the RD without reference to the responses to the exceptions. The arguments raised in the exceptions, as well as the arguments made in the responses to those exceptions, were extensively briefed to the Hearing Examiner. Thus, the Recommended Decision and the underlying record themselves contain the factual and legal arguments that compel the Commission to reject each of EPE's exceptions. It would be superfluous to entertain an additional dispute based solely on the content of the responses.

EPE Exception No. 1

6. EPE first argues that building Newman Unit 6 is in the public interest because it is the most cost effective option among feasible alternatives. EPE contends that there is no more cost-effective way for EPE to provide for the existing and future demand for electricity than by constructing Newman Unit 6. EPE goes on to argue that the Hearing Examiner "entirely disregarded the costs of electrical service to the consumer in the Recommended Decision." EPE further argues that the alternative scenario preferred by the Hearing Examiner, involving continued use of the older Newman Units 1 & 2, and Rio Grande Unit 7, were not selected in

EPE's modeling as part of the lowest reasonable cost portfolio to reliably serve customer load because the extensions are not economic.

7. Additionally, EPE argues that the “Intervenors introduced no modeling analyses, no alternative cost or reliability studies, and no evaluation whatsoever of the proposals bid into the 2017 RFP to counter those performed by EPE and E3.” EPE contends that the Intervenor thus “do not, and cannot, offer the Commission any cost-effective, feasible alternative to Newman Unit 6.” The modeling performed by EPE was thorough and proper, using two well-established and accepted modeling programs.

8. EPE further argues that it has demonstrated need for the generation capacity set out in its loads and resource analysis (“L&R”). The question before the Commission now is whether EPE will provide that needed generation capacity with a new, economically advantageous unit, or with old, economically disadvantageous units.

9. The Commission rejects this exception and accepts the reasoning of the Hearing Examiner. Further, the Commission notes that it is incumbent upon the applicant to show that a proposed facility is the most cost effective among feasible alternatives. It is not the burden of the intervenors to provide their own modeling analyses. It is sufficient for them to do, as they have done in this matter, show that the modeling performed by the applicant was based upon poor or false assumptions.

10. Moreover, as pointed out by the Hearing Examiner, EPE in its generation resource selection process was required to consider the changes in New Mexico law regarding renewable resources and carbon emission standards that were effective when EPE filed this application. Compliance with New Mexico law is not merely a factor to be weighed against other factors when determining what serves the public interest. The Commission must ensure that EPE follows New

Mexico law. What is particularly troubling about EPE’s positions and arguments in this matter, made even more explicit in the exceptions, is that they manifest an intent on the part of EPE not to comply with the heightened requirements of the recent legislation. For example, EPE cites expert testimony to the effect that compliance with the renewable portfolio and zero-carbon requirements of the law are unfeasible. The Commission cannot accept this as a premise of the application. It is incumbent upon the Commission to make decisions that are consistent with a pathway toward compliance with the milestones set out in the recent legislation. In considering the public interest, the Commission must consider the public policy inherent in that legislation. It is clearly against the public interest to issue a CCN based on a record indicating an intent not to reach those milestones and including assumptions disregarding the law as well as assumptions inaccurately disfavoring renewable resources. EPE’s disregard for New Mexico law is more than sufficient reason to deny the application.

EPE Exception No. 2

11. EPE contends that approval of Newman Unit 6 will not result in stranded costs. EPE further argues that the issue of stranded costs is not presented in this proceeding, and that the Recommended Decision’s finding that EPE failed to consider or address this issue is both unsupported by the record and contrary to applicable law and longstanding regulatory principles. EPE contends that New Mexico customers will have no obligation to pay for Newman Unit 6 after 2045 if the unit is no longer serving New Mexico customers.

12. EPE argues that the Recommended Decision should be rejected on this issue for two related reasons. First, EPE argues that the Recommended Decision correctly notes that EPE has made “no specific ratemaking requests in this case.” EPE further argues that “this fact alone

should preclude a stranded cost analysis under current law because it underscores that the Parties did not create a complete record on this issue.”

13. Second, EPE argues that, to the extent that stranded costs are a relevant concern at this time, there is no evidence to support a conclusion that “current law” precluding use of Newman Unit 6 for its 40 year useful life will result in “New Mexico ratepayers . . . being obligated to pay millions of dollars in stranded costs or accelerated costs.” EPE argues that New Mexico customers will not be charged for any costs associated with Newman Unit 6 if or when it is no longer serving New Mexico customers. EPE argues that the 40-year depreciation period used by EPE for Newman Unit 6 is a benefit to New Mexico customers, because it means they will only pay for the amount of time of Newman Unit 6’s operating life when they are actually benefitting from the unit. EPE states that the Commission has previously found that a public utility bears the risk that costs associated with approved projects will not be recoverable and argues that Newman Unit 6 is no exception.

14. The Commission rejects this exception and accepts the reasoning of the Hearing Examiner. To that, the Commission adds that it disagrees with the argument that the Commission cannot consider the potential for stranded costs in a CCN proceeding that does not include a request for ratemaking treatment. The public convenience and necessity standard (identical to the “public interest,” as noted by the Hearing Examiner) is capacious enough to allow consideration of this issue. Moreover, it is wholly disingenuous of EPE to take the positions described above when, in the same set of exceptions, EPE cites the potential for imposition of stranded costs upon New Mexico ratepayers as a reason to reject the alternative approach described by the Hearing Examiner.

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EPE Exception No. 3

15. EPE argues that the Recommended Decision fails to consider the “additional public benefits of Newman Unit 6.” EPE contends that the Recommended Decision is incorrect in finding that “EPE’s choice to construct, own and operate a natural generation plant with a projected lifespan of at least 40 years will not result in a net benefit to EPE’s New Mexico ratepayers.”

16. First, EPE argues that it “put forward unopposed evidence that Newman Unit 6 offers significant environmental benefits as compared to life extensions of Newman Units 1 and 2 and Rio Grande Unit 7.” EPE contends that its testimony establishes that Newman Units 1 and 2 and Rio Grande Unit 7 predate the passage of the Clean Air Act in 1970 and, unlike Newman Unit 6, are not equipped with pollution controls for NO_x and CO.

17. Second, EPE argues that Newman Unit 6 would play a critical role in facilitating EPE’s transition to renewable resources. EPE contends that “the notion that Newman Unit 6 cannot form a part of the transition to renewable energy is simply incorrect.” EPE states that “it is undisputed that renewables are an intermittent resource.” EPE contends that “[w]ind generation profiles are even less consistent and more variable than solar.” EPE argues that, “[t]o satisfy its obligation to provide reliable service, firm resources such as Newman Unit 6 are required to satisfy the needs of EPE’s customers in the future.”

18. EPE goes on to cite expert testimony to the effect that “other potential sources of zero-carbon firm capacity . . . are not viable for EPE. EPE contends, citing the expert, that, “[w]ithout firm capacity, ‘reducing carbon emissions beyond approximately 90% becomes very expensive and likely infeasible.’” EPE concludes that “[i]t necessarily follows that in order for EPE to satisfy the needs of its customers, some level of natural gas resources will be necessary, even in 2045.”

19. The Commission rejects this exception and accepts the reasoning of the Hearing Examiner. The Commission adds that even if the Commission were to accept the argument that the Hearing Examiner failed to weigh these considerations properly, which the Commission does not, the Commission finds that such benefits would not outweigh EPE's disregard for the renewable and zero-carbon requirements of New Mexico evidenced by the record and EPE's exceptions.

EPE Exception No. 4

20. EPE argues that “the Recommendation to the Commission to deny authorization of a CCN for Newman Unit 6 in New Mexico was made without any acknowledgement, much less consideration, of the multi-jurisdictional effects, long term negative impacts for the EPE system, or adverse consequences for EPE's New Mexico customers of rejecting Newman Unit 6 in light of the recent approval of a CCN by Texas.”

21. EPE goes on to note that EPE is a multi-jurisdictional utility with responsibility for serving customers in both New Mexico and Texas. EPE states, “Approximately 80% of EPE's customers are in Texas, and EPE has an obligation to comply with Texas utility law and the decisions of the PUCT [(the Public Utility Commission of Texas)].” EPE further notes that the PUCT granted EPE a CCN to construct, own and operate Newman Unit 6. EPE contends that “the PUCT final order contains considerably more evaluation and analysis of the issues surrounding a CCN for Newman Unit 6 than the Recommended Decision.” EPE asks the Commission to “re-evaluate the potential consequences for EPE customers, for EPE, and for the Commission.”

22. EPE further argues that the Recommended Decision “fails to consider the challenges for EPE of complying with inconsistent orders, the potential operational issues, and the economies of scale that New Mexico ratepayers currently enjoy by virtue of sharing system

resources with Texas customers” EPE goes on to say that “[d]enial of a CCN in New Mexico, in light of approval in Texas, will force EPE to reconsider its long-term resource planning and procurement processes given that a system resource that it finds to be in the best interests of all of its customers may not be permitted to serve customers across both jurisdictions.”

23. EPE further argues that, if the Commission accepts the Recommended Decision, “it will relinquish authority over Newman Unit 6 and deny itself the ability to influence the operation of the unit.” EPE claims that “the Recommended Decision fails to address the Commission’s duty to take into account EPE’s resource planning requirements in Texas (of which the construction, ownership and operation of Newman Unit 6 is now one) and to authorize EPE, as a multi-jurisdictional utility, to implement plans that coordinate its Texas resource planning requirements.” EPE concludes that, “given the PUCT decision granting a CCN for Newman Unit 6 and the fact that Newman Unit 6 is proceeding in Texas, the prudent approach for the Commission is to approve the CCN in New Mexico.”

24. The Commission rejects this exception and accepts the reasoning of the Hearing Examiner. The Commission adds that EPE’s arguments are beyond troubling. EPE’s contentions do not ask the Commission merely to consider the effects of differing Texas law and policy. EPE asks the Commission to subordinate the law of New Mexico to that of Texas and to disregard New Mexico law insofar as it is inconsistent or even inconvenient. It is incumbent upon a multi-jurisdictional entity such as EPE to plan for compliance with the law in all jurisdictions that it serves.

EPE Exception No. 5

25. While “not conced[ing] that the REA applies to this proceeding or that it is a legally relevant consideration,” EPE argues that the Recommended Decision “ignored extensive record

evidence that EPE seriously considered the REA and RPS requirements in selecting the resource portfolio of which Newman Unit 6 was a part, and that the selection is consistent with and supports REA compliance.” EPE argues that it “provided detailed testimony explaining how EPE’s case demonstrates that Newman Unit 6 is an integral part of the selected resource portfolio that helps EPE comply with the RPS requirements.”

26. EPE contends that “the Recommended Decision arbitrarily fails to recognize that Newman Unit 6 will be an important and integral part of the transition to renewable energy and will position EPE to comply with the RPS requirements in a cost-effective manner.” EPE further contends that “a generator such as Newman Unit 6 that can be turned on and off rapidly and on a daily basis can be used during EPE’s peak load hours throughout the year, provide reliability support to EPE’s system during non-peak hours, and be economically dispatched to displace more expensive energy.” Therefore, EPE argues that “Newman Unit 6 is an ideal complement to the intermittent nature of renewable resources such as solar and wind for reliably meeting EPE’s highest load levels during the summer months.”

27. The Commission rejects this exception and accepts the reasoning of the Hearing Examiner. The Commission acknowledges that such considerations as those described by EPE include some relevant considerations. However, when such considerations are included as part of a deeply flawed analysis by EPE which, among other flaws, overstates the unreliability of renewable resources, the Commission cannot conclude that the proposed facility would actually contribute to compliance with the renewable and zero-carbon energy requirements of the law.

EPE Exception No. 6

28. EPE argues that the Recommended Decision fails to comport with the Public Utility Act because it lacks the detailed findings of fact necessary to determine whether the public

convenience and necessity requires denial of a certificate for construction or operation of Newman Unit 6. EPE cites the provision of the Public Utility Act that requires that “the order of the commission shall be based upon []findings of fact” which shall consist of “ultimate facts as are necessary to determine the controverted questions presented by the proceeding [which] shall be separately stated and numbered.” NMSA 1978, § 62-10-14 (1941).

29. EPE argues that “[t]he controverted question presented by EPE’s Application in this proceeding is whether the public convenience and necessity requires the construction or operation of Newman Unit 6.” EPE further argues that “[t]he Recommended Decision is void of the required findings necessary to make a determination on that that question.”

30. The Commission rejects this exception and accepts the Recommended Decision as written. The Recommended Decision includes detailed findings, in the “Hearing Examiner Determination” section, to support the conclusion that “EPE’s failure to comply with the New Mexico legal requirements is not in the public interest,” which is the “ultimate fact” supporting the recommendation. As noted above, the Hearing Examiner, following Commission precedent, notes that “the public interest” is identical to the “public convenience and necessity.” This ultimate fact is, in accordance with the requirements of the Public Utility Act, separately stated and numbered in the “Findings of Fact and Conclusions of Law” section.

31. The Commission has jurisdiction over the parties and the subject matter of this case.

32. The Commission accepts and adopts all findings of fact and conclusions of law throughout the Recommended Decision.

33. The Commission further finds that EPE should be ordered to provide, in its next application for approval of any resource acquisition, whether by CCN or long-term purchased

power agreement, a comprehensive plan showing how EPE will comply with the renewable energy and zero-carbon energy requirements of New Mexico law.

IT IS THEREFORE ORDERED:

A. The Decretal Paragraphs contained in the Recommended Decision are incorporated by reference as if fully set forth herein and are ADOPTED, APPROVED, and ACCEPTED as orders of the Commission.

B. The Recommended Decision is ADOPTED, APPROVED, and ACCEPTED in its entirety.

C. EPE is hereby ordered to provide, in its next application for approval of any resource acquisition, the plan described in Paragraph 35, above.

D. EPE's Motion for Leave to Reply is DENIED.

E. This Order is effective immediately.

F. A copy of this Order shall be served upon all parties listed on the attached certificate of service via email, if the email addresses are known, and if not known, by regular mail.

G. This docket is now closed.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this 16th day of
December, 2020.

NEW MEXICO PUBLIC REGULATION COMMISSION

/s/ Cynthia B. Hall, electronically signed
CYNTHIA B. HALL, COMMISSIONER DISTRICT 1

/s/ Jefferson Byrd, electronically signed
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/s/ Valerie Espinoza, electronically signed
VALERIE ESPINOZA, COMMISSIONER DISTRICT 3

/s/ Theresa Becenti-Aguilar, electronically signed
THERESA BECENTI-AGUILAR, COMMISSIONER DISTRICT 4

/s/ Stephen Fischmann, electronically signed
STEPHEN FISCHMANN, COMMISSIONER DISTRICT 5



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OWN, AND OPERATE GENERATING UNIT 6 AT THE)
NEWMAN GENERATING STATION)**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Order Adopting Recommended Decision with Additional Instruction** issued by the New Mexico Public Regulation Commission on December 16th, 2020 was sent via email to the parties indicated below:

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DATED this 16th day of December, 2020.

NEW MEXICO PUBLIC REGULATION COMMISSION

/s/ Isaac Sullivan-Leshin, electronically signed

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