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, OWN, AND OPERATE GENERATING UNIT 6 AT THE NEWMAN GENERATING STATION.	)	**Case No. 19-00349-UT**
EL PASO ELECTRIC COMPANY, APPLICANT	)	

NEW MEXICO ATTORNEY GENERAL'S POST-HEARING BRIEF-IN-CHIEF

COMES NOW the New Mexico Attorney General, Hector H. Balderas, by and through counsel, and hereby files this post-hearing brief-in-chief in Case No. 19-00349-UT. The Office of the New Mexico Attorney General is statutorily charged with representing the interests of El Paso Electric Company's ("EPE") residential and small business customers before the New Mexico Public Regulation Commission ("Commission"). NMSA 1978, § 8-5-17(A) (1998). EPE's residential and small business customers may be negatively affected if EPE's requested approval of a certificate of public convenience and necessity ("CCN"), to construct and operate a new, 228 megawatt natural gas-fired combustion turbine at the Newman Generating Station ("Newman 6"), is granted in this case.

NEWMAN 6 IS NOT REQUIRED BY THE PUBLIC CONVENIENCE AND NECESSITY

New Mexico's Public Utility Act ("PUA") requires that public utilities must be certified by the Commission with a CCN before constructing or operating a natural gas-fired generation resource. *See* § 62-9-1(A) (2019). "No public utility shall begin the construction or operation of any public utility plant or system or of any extension of any plant or system without first obtaining from the commission a certificate that public convenience and necessity require or will require such construction or operation." *Id*. The "public convenience and necessity" standard has been

interpreted by the Commission to be synonymous with the "public interest" standard. Case No. 19-00348-UT, Recommended Decision of the Hearing Examiner, (Apr. 22, 2020), at 16, aff'd., Order Adopting Recommended Decision, (May 13, 2020). However, EPE's application for a CCN to construct and operate Newman 6 fails to meet that standard.

A. Newman 6 does not provide a net public benefit because it is not needed at this time.

The "public convenience and necessity standard" to evaluate a CCN application implies that there must be a "net public benefit." *Id*. The "net public benefit" standard is not based merely on the satisfaction of statutory or regulatory elements. *See* Case No. 19-00348-UT, Order Adopting Recommended Decision, (Mat 13, 2020) at 1, 2, 4 ("EPE further argues that prior Commission decisions show that the 'net public benefit' is derived directly from an applicant's satisfaction of the requirements set out in Rule 551 . . . The Commission rejects EPE's exceptions."). Rather, the standard requires the Commission to evaluate the broader policy issues and the specific technical issues in addition to the statutory or regulatory requirements. By conducting a thorough analysis of a CCN application, the Commission retains its authority and discretion. What is axiomatic, however, is that a resource for which a public utility is seeking a CCN must be *needed* to reliably serve customers. Newman 6 is not needed at this time, thus, it cannot provide a "net public benefit" to EPE's customers.

EPE's "need" for new capacity is affected by its planning reserve margin. EPE's planning reserve margin of 15% is misleading in this case. The planning reserve margin, which EPE uses as a justification for acquiring Newman 6, is artificially higher than necessary. The Commission's rules do not specify a specific reserve margin. Rule 560 states, "The generating capacity of the utility's plant supplemented by the electric power regularly available from other sources must be sufficiently large so as to meet all normal demands for service *and provide a reasonable reserve*

for emergencies." 17.9.560.13(C) NMAC (emphasis added). Likewise, EPE is under no legal, regulatory, or contractual obligation to maintain a 15% reserve margin. *See* Direct Testimony of Andrea C. Crane ("Crane Direct") at 26:14-21. Additionally, the 15% reserve margin is based on an out-of-date and arbitrary study, it is an obsolete planning tool, and it is greater than that of other New Mexico public utilities. Direct Testimony of Michael Goggin at 19:7-24:8. And, ironically, Newman 6 would contribute to the outage risks that a planning reserve margin seeks to mitigate. Direct Testimony of Patrick J. O'Connell at 9:4-11:19. With a lower, reasonable planning reserve margin, EPE's "need" for new generation would not look so dire.

EPE's "need" for new capacity is affected by the retirements of its existing fleet resources. EPE has multiple generating resources that are nearing the end of their service lives which can provide the short-term capacity needs that this CCN Application seeks to address. Newman 1, Newman 2, Rio Grande 6, and Rio Grande 7, which are anticipated to be abandoned within the next few years, act as the largest contributing factor to EPE's estimated capacity shortfalls in 2022 and beyond. Crane Direct at 29:1-31:17. It is possible for EPE to operate these plants beyond 2022. *Id.* Additionally, EPE failed to perform any analyses for extending these older resources in the short-term. *Id.* Furthermore, the resources recently approved in Case No. 19-00348-UT help to alleviate EPE's short-term capacity needs. *Id.* If the Commission is satisfied with a smaller planning reserve margin similar to that of the other New Mexico public utilities, and EPE continues to operate Newman 1 and 2, and Rio Grande 6 and 7, on a short-term basis, there is no immediate need or necessity for Newman 6.

If the Commission were to approve this short-term solution, it would allow EPE time to elicit new proposals for generating resources that are superior for EPE's customers, system reliability, and planning horizon. Importantly, if EPE undertakes a new resource solicitation, then

it would be poised to consider the amended Renewable Energy Act ("REA") and Renewable Portfolio Standard ("RPS") in that planning process.

B. The public interest requires that EPE plan for the future and to comply with the law, yet EPE wholly failed its duty to consider the REA and RPS in this Application.

It should go without saying, but public utilities shall not make system planning decisions in a vacuum. The public interest requires that public utilities make prudent decisions, especially when utility customers are subject to the effects of such decisions for decades thereafter. Although the CCN statute does not require that full-spectrum regulatory compliance is necessary for the Commission to grant a CCN, it should be assumed that by complying with one statute or rule, a public utility will not simultaneously be treading over another statute or rule. Recently, the Commission has placed weight on the factor of legal compliance, specifically RPS compliance, in granting approval of new generation resources. Case No. 19-00348-UT, Recommended Decision of the Hearing Examiner, at 14, 56, aff'd., Order Adopting Recommended Decision, (May 13, 2020) (Stating that certain generation resources "are in the public interest" due, in part, to their "potential RPS compliance"; and concluding that "a net public benefit" results, in part, to a project's "legal compliance."). Additionally, the Commission "may attach to a CCN such terms and conditions consistent with the PUA that the Commission deems the public convenience and necessity require." Case No. 19-00157-UT, Recommended Decision of the Hearing Examiner, (Oct. 16, 2019) at 13, aff'd., Final Order Adopting Recommended Decision, (Nov. 6, 2019) at 5.

In 2019, the New Mexico Legislature made drastic changes to New Mexico's public utilities laws with the passage of the Energy Transition Act ("ETA") and amendments to the REA (specifically the RPS), together in Senate Bill 489 ("SB489"). The Legislature emphatically pronounced that New Mexico's regulated utilities would be transitioning away from fossil fuels to renewable energy. What had once been a modest standard of 20% renewable energy sales by 2020,

is now an aggressive 100% zero-carbon requirement by 2045. *See* § 62-16-4. SB489 represented such a dramatic shift that the Commission threw out EPE's integrated resources plan for being "largely obsolete." Direct Testimony of James Schichtl at 11:17-12:1; Tr. 848:10-850:25 (Jul. 23, 2020). The new RPS cannot be ignored. For a public utility to achieve the new RPS requirements, every decision it makes must be considered through the lens of achieving RPS compliance. Yet, EPE has proposed this Application with blinders on, as if it has tunnel vision and the RPS is not in its field of view.

EPE has not considered the RPS anywhere in its Application and direct testimonies, which evidences EPE's failure to respond to the changing dynamics in New Mexico public utilities law. The record reflects that EPE did not evaluate the Newman 6 proposal in light of the outcomes of SB489. Tr. 237:7-11 (Jul. 20, 2020). EPE will argue that it couldn't have considered the RPS as a factor in this case because Newman 6 was chosen from the RFP prior to the 2019 Legislative Session and passage of SB489, however, such an argument falls flat.

EPE's Application for a CCN to construct and operate Newman 6 was filed on November 18th, 2019 – 241 days after the Governor signed SB489, and 157 days after it became law. Once SB489 was passed and signed, EPE had a *duty* to re-evaluate its plans to build the 228 megawatt natural gas-fired power plant given the requirements that its sales from renewable resources must comprise, in increasing amounts, up to 100% of total sales by 2045. *See* Tr. 771:1-7 (Jul. 22. 2020), 841:13-20, 853:14-25 (Jul. 23, 2020) (admitting that the REA is a consideration in this case and must coordinate its resources selection with REA requirements.). The public interest requires that duty for the sake of prudency and good faith. EPE did not meet that duty. *See* Tr. 231:13-16 (Jul. 20, 2020) (EPE drafted direct testimonies in this case subsequent to the passage of SB489, which

do not include discussion of the REA or RPS). The zero-carbon RPS requirement cannot be achieved while Newman 6 generates energy for EPE's retail service.

EPE will argue that Newman 6 actually helps it to meet the RPS, but such argument also lacks merit. EPE claims that Newman 6 will facilitate the introduction of more renewables on to its system, but it hasn't quantified what that means, and more importantly, EPE hasn't proposed any renewables to take advantage of such facilitating qualities (the renewables proposed in 19-00348-UT would not count, as they have been considered irrespective to Newman 6 and will come online prior to Newman 6). Of course, EPE's justifications are after-the-fact, since it chose Newman 6 prior to the passage of SB489. Conclusory claims and shoehorned rationale as to future RPS compliance must not suffice for the Commission. At best, Newman 6 will marginally reduce EPE's greenhouse gas emissions by having a better heat rate than the aging natural gas plants that EPE intends to retire in the near future. Tr. 852:13-22 (Jul. 23, 2020). However, EPE cannot achieve RPS compliance by reducing emissions, rather, the RPS is satisfied by retiring renewable energy certificates. EPE has made no attempt to explain how Newman 6 will increase EPE's quantity of renewable energy certificates to meet the increasing RPS. By ignoring the amended REA and RPS in its Application, EPE failed to meet its duty as required by the public interest.

C. The Commission set a policy in 19-00195-UT that new fossil fuel generation resources are not in the public interest.

The Commission's stance towards new fossil fuel generation seems to mirror that of the New Mexico lawmakers. Recently, in docket 19-00195-UT, the Commission had the opportunity to consider and rule on an application for a CCN for a public utility to construct and operate a new, 280 megawatt natural gas-fired generation plant, and it unequivocally rejected it. *See* Case No. 19-00195-UT, Order on Recommended Decision on Replacement Resources – Part II (Jul, 29, 2020).

In-fact, the Commission rejected ten proposals for new gas plants in that case.[1] Alternatively, consistent with the recent legislative trend promoting renewable energy in New Mexico, the Commission favored a bold outcome in 19-00195, thereby setting a precedent and policy that favors renewable energy over fossil fuels.[2]

Out of ten proposals in Case No. 19-00195-UT that included variations of a large, utility-owned natural gas-fired power plant, the Commission rejected them all, instead choosing a portfolio of generation resources entirely composed of renewables and energy storage. *Id.* The Commission announced that natural gas-fired generation resources are "inconsistent with the ETA's policy of transitioning away from fossil fuel resources and reducing CO2 emissions through graduated increases in non-carbon generation up to 2040 under the revised Renewable Portfolio Standard (RPS)." *Id* at 13, 14. Part of the Commission's reasoning for the policy is that, adding new fossil fuel resources now does nothing to ease the burden of meeting the RPS requirements in the future, because the law "would still require the addition of substantial renewables to meet the 2025 RPS." *Id.* The point being that it is more efficient and beneficial to customers to "kill two birds with one stone" by satisfying both capacity needs and RPS requirements with renewable energy and storage resources.

The Commission was also swayed by the fact that the service lives of new natural gas generating units cannot coexist with the RPS's 2045 zero-carbon requirement, and that it must take certain preventative measures. Regarding the CCN request in 19-00195, the Commission noted further deficiencies of adding new natural gas units. The first being that their proposed operation would be for "substantially less time than their useful lives and would seek accelerated

[1] Case No. 19-00195-UT, Recommended Decision on Replacement Resources, Part II, (Jun. 24, 2020) at 67, 68, aff'd., Order of Recommended Decision on Replacement Resources – Part II (Jul. 29, 2020).

[2] *See* Tr. 238:6-15 (Jul. 20, 2020) (Discussion by Comm'r. Fischmann regarding the RPS).

depreciation over 18 years, essentially incorporating and passing future stranded costs" to ratepayer; and the second being that "there would [be] the potential of continued CO2 emissions after 2040 if the units, with their 22 remaining years of service life, are transferred to another owner" because "the units would still have a substantial usable life upon retirement . . . ." *Id.* That second point being in relation to the Commission's duty to "prevent carbon dioxide emitting electricity-generating resources from being reassigned, redesignated or sold as a means of complying with the [RPS.]" § 62-16-4(B)(4).

The Legislature's and Commission's policies towards preferring renewable energy and reducing greenhouse gas emissions, and the noted deficiencies of adding new fossil fuel resources, are directly applicable to EPE's CCN request in this case. Newman 6, as a large fossil fuel resource, is generally inconsistent with the ETA and REA. If Newman 6 is approved and EPE is granted a CCN, the Company will still be faced with a significant challenge in meeting the RPS – it will still need to add a significant amount of renewable resources to its system, because Newman 6 does little to nothing to help EPE meet its statutory RPS requirements. Newman 6 would also not be allowed to operate for the extent of its useful life, given the 2045 zero-carbon requirement. A truncated service life would result in either a large amount of stranded costs to be borne by EPE's ratepayers, or an accelerated depreciation schedule that essentially incorporates stranded costs. Additionally, there is the threat that EPE may seek to repurpose, transfer, reassign, or redesignate Newman 6 after 2045, thereby resulting in continued greenhouse gas emissions.

EPE argues that nothing in the REA or RPS prevents the Company from adding new natural gas resources, because there is an exception to the RPS for reliability and cost. Rebuttal Testimony of James Schichtl at 28:1-4; Tr. 746:4-10, 772:14-19 (Jul. 22, 2020), 851:6-25 (Jul. 23, 2020). In essence, EPE admits that it does not plan to, or knows that it cannot effectively, meet the 2045

requirements reliably or at reasonable cost. That is insufficient. EPE has a statutory duty to meet the requirements of the law. Anything less than a good faith attempt to conform to the requirements of the RPS is falling below the minimum duty that EPE owes to its customers and the State of New Mexico. If true RPS compliance is the desired end goal for New Mexico public utilities, then Newman 6 is a step along the wrong path to reach it.

Respectfully Submitted,

OFFICE OF THE NEW MEXICO ATTORNEY GENERAL

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CERTIFICATE OF SERVICE

I CERTIFY that on this date I sent to the parties and individuals listed below, via email only, a true and correct copy of the **New Mexico Attorney General's Post-Hearing Brief-in-Chief**.

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