

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

IN THE MATTER OF NEW MEXICO GAS )  
COMPANY INC.'S APPLICATION FOR THE )  
ISSUANCE OF A CERTIFICATE OF PUBLIC )  
CONVENIENCE AND NECESSITY TO )  
CONSTRUCT A LIQUIFIED NATURAL GAS )  
FACILITY. )  
NEW MEXICO GAS COMPANY, INC., )  
 )  
 )  
 )  
 )  
 )  
 )  
 )

---

**Case No. 22-00309-UT**

**NEW ENERGY ECONOMY'S  
RESPONSE TO EXCEPTIONS**

**March 5, 2024**

## Table of Contents

I.	Introduction.....	1
II.	Response to NMGC Exception #1: Applying the Heightened Scrutiny to NMGC’s LNG Application was Appropriate; NMGC Didn’t Meet Either the Lesser Included Net Public Benefit Test or the Higher Heightened Scrutiny Test that Applies to A Discretionary Project.....	3
	A. NMGC’s own witnesses rebutted any claim that the LNG facility is necessary in order to provide reliable service at just and reasonable rates and/or guaranteed price spike mitigation.	3
	B. Given that the LNG Facility is not needed for reliability or price spike mitigation the Hearing Examiner rightfully determined that the CCN Application should be reviewed pursuant to a heightened standard of scrutiny for discretionary projects .....	4
	C. NMGC’s Application for a Certificate of Convenience and Necessity Didn’t Meet the Net Public Benefit Test.....	7
III.	Response to NMGC Exception #2: NMGC’s Reliance on “Evidence” that Was Not Subject to Cross-Examination was Unlawful; The Hearing Examiner Rightfully Excluded this Testimony, Otherwise, it would have been a Violation of Intervenors’ Due Process Rights.....	8
IV.	Response to NMGC Exception #3: Requiring Contemporaneous Information Is Not a “new requirement”; It is Integral to A Prudent Decision-Making Process.....	10
V.	Response to NMGC Exception #4: Encouraging Reasonable Quantification, Including a Cost-Benefit Analysis, Cannot be Considered “Impossible”, And Contrary to NMGC’s View, is Consistent with the Public Interest .....	11
VI.	CONCLUSION.....	13

## Table of Authorities

### Federal Cases

<i>Consolidated Edison Co. of N.Y., Inc. v. Federal Energy Reg. Comm'n</i> , 823 F.2d 630, (D.C.Cir. 1987).....	7
<i>Sierra Club v. FERC</i> , 867 F.3d 1357 (D.C. Cir. 2017) .....	5
<i>Transcontinental Gas Pipe Line Corp. v. Federal Power Comm'n</i> , 488 F.2d 1325, 1328 (D.C.Cir. 1973).....	7

### New Mexico Cases

<i>Kepler v. Slade</i> , 1995-NMSC-035, 119 N.M. 802, 896 P.2d 482. ....	9
<i>Pub. Serv. Co. of New Mexico v. New Mexico PRC</i> , 2019-NMSC-012, 444 P.3d 460.....	10
<i>Public Serv. Co. of N.M. v. New Mexico Pub. Serv. Comm'n</i> , 106 N.M. 622, 747 P.2d 917, (1987).....	6
<i>Public Service Co. of New Mexico v. New Mexico Public Service Comm'n</i> , 1991-NMSC-083, 112 N.M. 379, 815 P.2d 1169 (1991).....	7

### New Mexico Court of Appeals

<i>Reddy v. N.M. Dept. of Transportation</i> , No. A-1-CA-39852, (N.M.Ct.App. June 1, 2022) .....	9
---	---

### Cases from Other Jurisdictions

<i>Cf. Telstar Communications, Inc. v. Rule Radiophone Serv., Inc.</i> , 621 P.2d 241 (Wyo.1980).....	7
---	---

### New Mexico Regulatory Cases

NMPRC Case No. 12-00386-UT.....	13
NMPRC Case No. 15-00109-UT.....	13
NMPRC Case No. 15-00261-UT.....	11
NMPRC Case No. 15-00312-UT.....	<i>passim</i>
NMPRC Case No. 18-00261-UT.....	5
NMPRC Case No. 19-00102-UT.....	10
NMPRC Case No. 20-00087-UT.....	5
NMPRC Case No. 20-00210-UT.....	5
NMPRC Case No. 20-00222-UT.....	9
NMPRC Case No. 21-00095-UT.....	4, 8, 9
NMPRC Case No. 22-00270-UT.....	11
NMPRC Case No. 22-00309-UT.....	1
NMPRC Case No.19-00349-UT.....	13
NMPUC Case No. 2382.....	11

### New Mexico Statutes and Rules

1.2.2.35(D)1)(d) NMAC.....	9
NMSA 1978, § 62-6-4(A).....	11
NMSA 1978, § 62-8-1 (1941).....	10
NMSA 1978, § 62-8-7(A) (2011).....	10
NMSA 1978, § 62-9-5 .....	6

## I. Introduction

In this case, the Hearing Examiner’s core determination regarding the merits of New Mexico Gas Company, Inc.’s (“NMGC” or the “Company”) Application for approval of an LNG facility at the edge of Albuquerque was this:

The Hearing Examiner, having considered the record as a whole, finds that the preponderance of the evidence weighs decisively against approving a CCN for the LNG Facility. The record lacks clarity on whether the primary rationale for the LNG Facility is to enhance NMGC’s reliability and thereby decrease the risk of supply disruptions like the 2011 severe winter event or to promote price spike mitigation like the extreme price volatility experienced during Storm Uri in 2021. Irrespective of the confusion in the record, the preponderance of record evidence shows that the proposed LNG Facility is not required for NMGC to provide reliable service or that the alleged problems with Keystone Storage’s performance and dependability that the Company cites are increasing or unmanageable; to the contrary, if anything, the evidence suggests the Keystone Storage’s performance has improved. Furthermore, NMGC has not shown that the LNG Facility can provide meaningful price volatility protection or that the Facility is the most cost-effective among feasible alternatives. As to NMGC’s evaluation of alternatives, the record shows that NMGC failed to perform the rigorous investigation that a prudent utility should perform prior to making a significant resource decision and committing to substantial, long-term capital investment expenditures. Moreover, NMGC failed to update time-sensitive elements of its analyses of alternatives. Accordingly, the Hearing Examiner finds that the LNG Facility would not provide a net public benefit. The Hearing Examiner therefore recommends that the Commission disapprove NMGC’s Application.<sup>1</sup>

The evidence before the PRC in this case fully substantiates the Hearing Examiner’s findings that:

- a) The proposed liquified natural gas facility (LNG) is not cost effective.<sup>2</sup>

---

<sup>1</sup> Case No. 22-00309-UT, *Recommended Decision* (“RD”), 142-143, (2/1/2024).

<sup>2</sup> *Id.*, at 102-123 (At 121: “Thus, assuming 2027 LNG Facility costs of \$29.1 million and net Keystone Storage costs of \$4.4 million (assuming 50% of the costs are offset by a sublease), during the first full year of operation, the net impact of the LNG facility would be a net increase of \$24.7 million on customers’ bills, a figure considerably higher than the \$3.3 million touted by the Company.”) (At 100: “Even if the Commission accepted the dubious replacement gas cost savings estimate – and as reflected in the findings above the Hearing Examiner advises against accepting it – the best possible outcome for ratepayers is that they would have saved \$13.8 million out of \$107 million in extraordinary gas costs. Given that Mr. Reed himself described Storm Uri as a “once-in-a century level of disruption,” the savings realized would have been marginal, at best, and certainly insufficient to justify the substantial additional costs (over

- b) The proposed LNG facility will not provide greater price spike mitigation than Keystone and may even make customers more vulnerable to the vicissitudes of the market.<sup>3</sup>
- c) NMGC failed to perform the rigorous investigation that a prudent utility should have performed prior to making a significant resource decision and committing to substantial, long-term capital investment expenditures in the process.<sup>4</sup>
- d) The risks of the proposed LNG facility outweigh the benefits.<sup>5</sup>
- e) A CCN for the LNG Facility will not result in fair, just and reasonable rates. The purpose of LNG facility is to expand gas usage<sup>6</sup> and increase ratebase from \$833 million in 2023 to \$1,229 billion in 2027 “primarily resulting from the construction

---

retaining Keystone Storage) associated with constructing the LNG Facility. Indeed, considering, among other factors addressed in this decision, the significant additional cost NMGC proposes that ratepayers taken on – to the tune of at least \$100.4 million – the minimal 1-in-100 year savings opportunity the Company presents as “potentially possible” doesn’t look like a bet worth taking on behalf of ratepayers, particularly when other critical factors are weighed in the net public benefit balancing test.” (citations omitted.)

<sup>3</sup> *Id.*, at 93-101 (At 93-94: “[T]he LNG Facility would likely provide decreased access to stored gas in comparison to retaining the Keystone Storage arrangement. ... As Mr. Gould explained at the hearing, traders would often want to use LNG to save money on gas costs, but their requests are frequently denied because using facilities in that fashion jeopardizes reliability. ... [W]hen choosing between reliability concerns and price mitigation during an uncertain, volatile situation like Storm Uri and having a limited amount of LNG stored, reliability concerns will prevail, and customers will be stuck with extraordinary gas costs. Because of the limited supply of LNG storage, Intervenor warn that it is likely to result in high extraordinary gas costs than a larger storage option like Keystone.”) (citations omitted.)

<sup>4</sup> *Id.*, at 125; Tr. (Vol. II) 444-448 (Reed); NMGC Ex. 3 Reed Dir. at 52. (Mr. Reed admitted that he did not evaluate Keystone Storage as a potential solution.)

<sup>5</sup> *Id.*, at 131-142; (At 141: “NMGC declined to the opportunity to have PHMSA conduct an independent study that might have addressed or even assuaged some of the valid concerns expressed by the Intervenor and the Commission during the course of this case.”)

<sup>6</sup> NEE Ex. 3, NMGC Exhibit to response to NEE 4-7, at pdf p. 8 of 21 (“Project Justification Report,” “Justification: LNG storage could become a key component of NMGC’s future capacity expansion plans and revenue generation ...”).

and ownership of the LNG storage facility”<sup>7</sup> for its Canadian-parent company, Emera.<sup>8</sup>

**II. Response to NMGC Exception #1: Applying the Heightened Scrutiny to NMGC’s LNG Application was Appropriate; NMGC Didn’t Meet Either the Lesser Included Net Public Benefit Test or the Higher Heightened Scrutiny Test that Applies to A Discretionary Project**

**A. NMGC’s own witnesses rebutted any claim that the LNG facility is necessary in order to provide reliable service at just and reasonable rates and/or guaranteed price spike mitigation.**

Tellingly, NMGC omits the facts of its own \$1000/hour expert witness<sup>9</sup> who testified as follows regarding whether the proposed LNG facility is needed to provide reliable service or price spike mitigation:

a) Regarding Reliability: “[T]he gas supply, transportation, and system enhancements completed since February 2011, combined with those enhancements that are currently in progress, provide NMGC’s customers with improved gas supply reliability at a reasonable cost.’ Indeed, in hindsight, the Company’s ‘gas supply, transportation, and system enhancements’ were proven effective against customer curtailments during the 2021 winter event[.]”<sup>10</sup>

b) Regarding Reliability:

**Q.:** “Do you believe that the LNG facility is necessary in order for the Company to be able to provide reliable and affordable service?”

**A.:** By the way I define ‘necessary,’ no. ... There are other ways of continuing to provide reliable, affordable service. Some are better than others; some are more costly than others. I think it’s too much to say that if the LNG Application is denied, the Company won’t continue to be able to provide reliable service.”<sup>11</sup>

---

<sup>7</sup> NEE Exh. 4, NEE 4-13.4, at pdf pp.18 of 26 (New Mexico Gas Company, Inc’s Response to New Energy Economy’s Fourth Set of Interrogatories and Requests for Production of Documents, p. 3 of 21).

<sup>8</sup> *Id.*; NEE Exh. 1 at 26 (Subra Dir.).

<sup>9</sup> Tr. (Vol. II) 487 (Reed). While Reed did not want to guess at how much his company has been paid for its services in relation to this case, he has put in over 100 hours working on the matter and believes that half a million dollars may be a reasonable estimate. *Id.* at 487-488.

<sup>10</sup> NMGC Exh. 3 at 54 (Reed Dir.); RD at 127.

<sup>11</sup> Tr. (Vol. 2) 433-434 (Reed).

- c) Regarding Reliability: “This is not an issue of the gas not being physically available, it’s a question of how much you pay for it. The capacity is there[,]” and the pipeline system and supply system are typically robust.<sup>12</sup> The NMGC system, being located between both the Permian and the San Juan Basins, means that it is quite unlikely that NMGC would be unable to obtain gas from both markets at the same time.<sup>13</sup> In fact, NMGC has diversified its supply portfolio to originate supply not only from the Permian and San Juan Basins but also from the Piceance Basin,<sup>14</sup> which contains trillions of cubic feet of natural gas.<sup>15</sup> These additional gas supply sources create redundancy and resiliency, and NMGC was able to draw on these sources of gas during the once-in-a-century event<sup>16</sup> experienced in 2021.<sup>17</sup>
- d) Regarding Price Spike: Winter Storm Uri was a “once-in-a-century level [price] disruption.”<sup>18</sup>
- e) Regarding Price Spike: “it is unreasonable to expect that any new infrastructure could provide complete price protection under the circumstances presented by Winter Storm Uri.”<sup>19</sup>

**B. Given that the LNG Facility is not needed for reliability or price spike mitigation the Hearing Examiner rightfully determined that the CCN Application should be reviewed pursuant to a heightened standard of scrutiny for discretionary projects**

---

<sup>12</sup> Tr. (Vol. II) 483-484 (Reed).

<sup>13</sup> *Id.* at 485.

<sup>14</sup> Case No. 21-00095-UT, *New Mexico Gas Company, Inc. Compliance Filing and Supporting Testimony Filed Pursuant to Decretal Paragraph of the NMPRC’s June 2021 Final Order Relating to the 2021 Winter Event* (filed 03/31/2022), at pdf p. 44-45 of 71, (Bullard Dir.) at 37-38.

<sup>15</sup> *Id.* at pdf p. 45 of 71.

<sup>16</sup> NMGC Exh. 3 (Reed Dir.) at 7 (describing Storm Uri as “a once-in-a-century level of disruption[.]”).

<sup>17</sup> *Id.*

<sup>18</sup> NMGC Exh. 3 at 7 (Reed Dir.); RD at 127; NEE Exh. 1 (Subra Dir.) at Exh. WS-7, pp. 4-5 (Reed/Bullard Interrogatory Response: “What we were referring to as a 1 in 100 year event . . . was that Winter Storm Uri produced price spikes that were a 1-in-100 probability based on the fluctuation from pre-event prices to peak prices.”).

<sup>19</sup> NMGC Exh. 3 (Reed Dir.) at 77; In fact, NMGC states that it is impossible for it to establish a storage alternative “that is capable of preventing a reoccurrence of the 2021 Winter Event[.] NMGC purchases gas in the market, but does not control the market, and is therefore subject to fluctuations in market pricing regardless of what it does with respect to storage.” Case No. 21-00095-UT, *New Mexico Gas Company, Inc. Compliance Filing and Supporting Testimony Filed Pursuant to Decretal Paragraph of the NMPRC’s June 2021 Final Order Relating to the 2021 Winter Event* (filed 03/31/2022), at pdf p. 11 of 71, (Bullard Dir.) at 4.

NMGC claims that heightened standard imposed by the Recommended Decision is a “new” standard and its imposition deprives the Company of due process and would lead to unreasonable results. New Mexico Gas Company, Inc.’s Exceptions to Recommended Decision (“Exceptions”) at 2-10.

While no attorney is bound to know all the law, because it is not an exact science, NMGC attorneys should be familiar with well settled principles of Commission law and rules of practice which are of frequent application in the ordinary regulated utility profession.<sup>20</sup> Case No. 15-00312-UT has been repeatedly affirmed for its general legal propositions, including for its discussion of a heightened standard of review for discretionary projects, for example:

- Application by Public Service Company of New Mexico (“PNM”) requesting approvals related to its plan to join the Western Energy Imbalance Market (“EIM”) in April 2021, Case No. 18-00261-UT, *Recommended Decision* at 9, 11-12, 3/18/2019, *Final Order Adopting Recommended Decision*, (NM PRC 3/27/2019).
- Case No. 20-00210-UT, *In the Matter of the Formal Complaint of New Energy Econ. Against Pub. Serv. Co. of New Mexico*, 2020 WL 6544541, at \*19 (NM PRC Nov. 2, 2020) (“On March 19, 2018, the Hearing Examiner rejected PNM’s AMI project finding that there was “no net public benefit, no evaluation of alternatives and [it was not in] the public interest.” Case No. 15-00312-UT, pp. 81-84; pp.102-104; p.110. (The Commission unanimously approved of the Recommended Decision on April 11, 2018.) The Commission’s decision in the AMI case and its “public interest” scope is consistent with *Sierra Club v. FERC*, 867 F.3d 1357, 1368 (D.C. Cir. 2017) where the Court held that FERC failed to meet the “public benefit” test because the agency did not factor health and environmental risks into resource procurement decisions and without the agency’s consideration of these environmental consequences it cannot be said that the agency engaged in “reasoned decision-making.” The Court found that the failure to review the climate-change impacts was “significant enough to undermine informed public comment and informed decision-making.”) (citations omitted.).
- Case No. 20-00087-UT, at 3, ¶5, *Final Order, In the Matter of the Application of Pub. Serv. Co. of New Mexico for Approval of Its 2021 Elec. Energy Efficiency Program Plan, Profit Incentive & Revised Rider No. 16 Pursuant to the New Mexico Pub. Util. Act, Efficient Use of Energy Act & Energy Efficiency Rule*, (NM PRC Oct. 28, 2020).

---

<sup>20</sup> *George v. Caton*, 93 N.M. 370, 600 P.2d 822, 828-830 (N.M.Ct.App. 1979).



So, the NMGC claim that a heightened standard of review for discretionary projects is a *new* standard is meritless. The Commission has adopted this principle and practice in relevant cases.

Additionally, the above cited testimony from NMGC’s own witness underscores the logical and reasonable conclusion that the LNG project is not “necessary, no” and is in fact discretionary. “[T]he Commission’s authority over public utilities is broad and that it is not limited to specific powers expressly stated in the Public Utility Act.<sup>21</sup> The issue NMGC is raising about how the Commission is applying a test that is not found in the CCN statute is similar to the issue raised on appeal by PNM before the Supreme Court more than two decades ago, to no avail - the utility decried the Commission’s development of the “*Commuters’ Committee*” factors for abandonment under NMSA §62-9-5, where the Commission applied the factors found in a Pennsylvania case. Here the Commission is applying the factors in a New Mexico case, 15-00312-UT, to apply its CCN statute. There is no meaningful difference between the case at bar and what the Commission did in establishing factors for applying the statutory test for abandonment; the Commission has the authority to develop appropriate tests to implement the statutes. Factually, abandonment and CCNs both require a “public interest” determination. Our Supreme Court determined as follows:

*Appropriate factors.* PNM contends that the Commission was without authority to consider the *Commuters’ Committee* factors in determining the appropriateness of abandonment under the “public convenience and necessity” part of Section 62–9–5. We agree that Section 62–9–5 does not by its terms require consideration of any of the *Commuters’ Committee* factors, but only a determination that continuation of service is unwarranted or that the present and future public convenience and necessity do not otherwise require continuation of service or use of the facility. However, we long have recognized the power of agencies to interpret and construe the statutes that are placed, by legislative mandate, within their province. *See, e.g., Public Serv. Co. of N.M. v. New Mexico Pub. Serv. Comm’n*, 106 N.M. 622, 625, 747 P.2d 917, 920 (1987) (“it is well settled that courts should

---

<sup>21</sup> *See* Case No. 15-00312-UT, *Recommended Decision*, at 77 (3/19/2018) approved in *Final Order*, (NM PRC 4/11/2018).

accord deference to the interpretation given to a statute by the agency to which it is addressed”). In other words, by delegating abandonment power to the Commission in such broad terms, our legislature expected that the Commission would develop an appropriate test to fit the regulatory climate. *Transcontinental Gas Pipe Line Corp. v. Federal Power Comm’n*, 488 F.2d 1325, 1328 (D.C.Cir.1973) (Federal Power Commission must consider fully all factors relevant to overall public interest under federal statute authorizing abandonment of natural gas facilities when the Commission finds “public convenience and necessity” permits abandonment), *cert. denied*, 417 U.S. 921, 94 S. Ct. 2629, 41 L.Ed.2d 226 (1974); *Consolidated Edison Co. of N.Y., Inc. v. Federal Energy Reg. Comm’n*, 823 F.2d 630, 637 (D.C.Cir.1987) (same, but reviewing court may scrutinize reasons for rules and factors so chosen).

The issue before us is not, as PNM would have it, whether the Commission may consider factors not expressly required by the statute, but “whether its *reasons* for doing so in its chosen manner are permissible ones.” *Consolidated Edison*, 823 F.2d at 637. PNM offered no argument concerning the Commission's reasons for construing the statute as it did, nor in the proceedings below did PNM offer an alternative construction of the statute. The factors chosen by the Commission reflect the complex regulatory balance that must be struck between the interests of New Mexico energy consumers and those of the utility. The Commission premised its construction of the statute on the observation that the touchstone for certification and abandonment proceedings is the public convenience and necessity, both now and in the future. *Cf. Telstar Communications, Inc. v. Rule Radiophone Serv., Inc.*, 621 P.2d 241, 246 (Wyo.1980) (“public interest is to be given paramount consideration; desires of a utility are secondary”). Faced with no New Mexico precedent construing the operative statutory terms, the Commission adopted a totality of the circumstances approach in which the *Commuters’ Committee* factors offer several, but by no means the exclusive, perspectives to be examined. We think the factors so chosen by the Commission permit due consideration of the interests of both the utility and consumers in accordance with the purposes of public utility certification and abandonment.<sup>22</sup>

### **C. NMGC’s Application for a Certificate of Convenience and Necessity Didn’t Meet the Net Public Benefit Test**

As unequivocally stated by the Hearing Examiner:

NMGC’s concern that the heightened level of scrutiny *not be applied* to its Application will have been asserted in vain if the Commission finds that the LNG Facility does not meet the lesser included standard of providing a net public benefit. It is also possible that an Application for approval of a discretionary resource or project fails both the net public benefit test and the heightened scrutiny standard. That is what the Commission ultimately found in Case No. 15-00312-UT with respect to PNM’s AMI project proposal, and this is

---

<sup>22</sup> *Public Service Co. of New Mexico v. New Mexico Public Service Comm’n*, 1991-NMSC-083, ¶¶11-12, 112 N.M. 379, 815 P.2d 1169, 1173 (1991).

what the Hearing Examiner ultimately finds and concludes below regarding the Company's LNG Facility proposal.<sup>23</sup> (citations omitted.)

According to NMGC, "In the PNM AMI Case, PNM did not request a CCN[.]" NMGC Exceptions at 6. However, NMGC's categorical statement sidesteps the PRC's holding in that case: "Although PNM states that a CCN is not necessary, it nevertheless argues that the evidence it has presented in this case satisfies the standard for the issuance of a CCN, should the Commission determine that a CCN is necessary for the project."<sup>24</sup> Unlike the Hearing Examiner in Case No. 15-00312-UT, who did not reach analysis under the standards for a CCN, the Hearing Examiner in this case, did recommend rejection of the CCN for the reasons stated herein.

**III. Response to NMGC Exception #2: NMGC's Reliance on "Evidence" that Was Not Subject to Cross-Examination was Unlawful; The Hearing Examiner Rightfully Excluded this Testimony, Otherwise, it would have been a Violation of Intervenors' Due Process Rights**

NMGC relied for its alternative analysis on possible contractual changes for gas supply and hedging. However, for support, NMGC relies for the most part on its compliance filing in Case 21-00095-UT,<sup>25</sup> a case in which the prudence and reasonableness of its contracting, hedging and supply practices were at issue. In other words, it would have been against the Company's interest to seek and identify improvements to these practices when that docket was initiated at the Company's request for approval of a mechanism to recover and finance the extraordinary gas costs incurred during Storm Uri in 2021. Moreover, that compliance filing was

---

<sup>23</sup> RD at 12-13.

<sup>24</sup> See Case No. 15-00312-UT, *Recommended Decision*, at 75 (3/19/2018) approved in *Final Order*, (NM PRC 4/11/2018).

<sup>25</sup> Case 21-00095-UT, New Mexico Gas Company Inc.'s Compliance Filing and Supporting Testimony [by Tom C. Bullard] Filed Pursuant to Decretal Paragraph N of the NMPRC's June 2021 Final Order Relating to the 2021 Winter Event (3/31/2022) ("Compliance Filing").

filed after issuance of the Final Order in that docket and not subjected to cross-examination in any hearing.<sup>26</sup>

The Company's claims regarding an alternatives analysis relies heavily on the testimony of Mr. Bullard from 21-00095-UT, a year and a half earlier than this case, that cannot be considered in this case because NMGC failed to request that administrative notice be taken of that testimony in advance of the hearing so that earlier testimony could also be the subject of cross-examination.<sup>27</sup> The Hearing Examiner in the case at bar, consistent with past precedent and practice, ignored the testimony which was not subject to examination. In Case No. 20-00222-UT, the Hearing Examiner issued an *Order Striking Portions of Joint Applicants' Post-Hearing Brief* on November 1, 2021 striking the relevant pages of the Joint Applicants' Post-Hearing Brief because it included matters outside the record and found that admission of that "evidence without those procedures [including the right to cross-examine evidence] would, unless waived by the parties, violate the objecting parties' due process rights."<sup>28</sup>

Adhering to the law and Commission precedent, the Hearing Examiner in this case rightfully gave no weight to the NMGC's unexamined prior testimony.

---

<sup>26</sup> In Case 21-00095-UT, the Final Order was issued on June 15, 2021 and the compliance filing that includes the Direct Testimony and Exhibits of Tom C. Bullard was made on March 31, 2022. (Although the Company neglected to request that administrative notice be taken pursuant to 1.2.2.35(D)1)(d) NMAC of Mr. Bullard's testimony from this compliance filing or otherwise attach it to a filing in the instant case, it is cited in at least thirty (30) footnotes in NMGC's Brief.); *See also, Reddy v. N.M. Dept. of Transportation*, No. A-1-CA-39852, (N.M.Ct.App. June 1, 2022), citing *Kepler v. Slade*, 1995-NMSC-035, ¶13, 119 N.M. 802, 896 P.2d 482. ("We do not consider these documents because '[m]atters outside the record present no issue for review.'")

<sup>27</sup> RD at 42, 58.

<sup>28</sup> Case No. 20-00222-UT, *Certification of Stipulation*, at 186 (11/1/2021), *Order on Certification of Stipulation*, (NM PRC 12/8/2021).

**IV. Response to NMGC Exception #3: Requiring Contemporaneous Information Is Not a “new requirement”<sup>29</sup>; It is Integral to A Prudent Decision-Making Process**

Without feasible alternatives determined by reasonably contemporaneous analysis and investigation, the Commission is at risk of making incomplete and ill-informed decisions: PNM’s “decision with respect to the PVNGS capacity will be subject to intense scrutiny and must be fully supported by an adequate analysis of alternatives and cost-effectiveness. . . . PNM [is] on notice of its obligation to perform continuing and timely updates of any analyses it may have performed that provide the basis for any decision it may reach. The Commission specifically places PNM on notice that the Commission is not bound by the remedies it employed [beforehand] and reserves the right to identify and impose any appropriate remedies for any additional imprudent actions by PNM, up to and including total disallowance.” 19-00102-UT, *Order on Petition for Investigation*, ¶¶15, 17-18, 1/8/2020.

In *Public Service Company of New Mexico v. New Mexico Public Regulation Commission*, the Supreme Court held that “The goal of the consideration of alternatives is, of course, to reasonably protect ratepayers from wasteful expenditure. The failure to reasonably consider alternatives was a fundamental flaw in PNM’s decision-making process.” *Pub. Serv. Co. of New Mexico v. New Mexico PRC*, 2019-NMSC-012, 444 P.3d 460, ¶32.

The Commission has the obligation to ensure that “[e]very rate made, demanded or received by any public utility [is] just and reasonable.” NMSA 1978, § 62-8-1 (1941). The utility seeking an increase in rates bears the burden of demonstrating that the increased rate is just and reasonable (NMSA 1978, § 62-8-7(A) (2011) and the Commission cannot make this determination without “contemporaneous evidentiary support”.<sup>30</sup> “[U]tilities must conduct

---

<sup>29</sup> NMGC Exceptions at 12.

<sup>30</sup> NMGC Exceptions at 13.

reasonable alternatives analyses before selecting resources. Deficiencies in analyses may warrant non-recovery of all or a portion of the costs of resources imprudently selected.”<sup>31</sup> The Hearing Examiner found that, “NMGC’s failure to update time-sensitive elements of its analyses was improvident and determinative.”<sup>32</sup>

**V. Response to NMGC Exception #4: Encouraging Reasonable Quantification, Including a Cost-Benefit Analysis, Cannot be Considered “Impossible”,<sup>33</sup> And Contrary to NMGC’s View, is Consistent with the Public Interest**

The Commission has “general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations ... all in accordance with the provisions and subject to the reservations of the Public Utility Act ... and to do all things necessary and convenient in the exercise of its power and jurisdiction.” NMSA 1978, § 62-6-4(A). NMGC’s Exceptions at 16 cries victim, “The Recommended Decision appears to impose another new standard and require a quantification of the benefits in a dollar value, but fails to provide any guidance on how a utility can assign a value to curtailing customers.” In fact, the Recommended Decision did not “require a quantification of the benefits,” but it did state that if NMGC wanted to make its case it should have “provide[d] an objective quantification of benefits versus costs of the proposed LNG project [and that omission] was contrary to the public interest, particularly where, while the record shows a substantial benefit to Emera shareholders in terms of after-tax ROE and enhanced earnings with the LNG Facility in rate base, NMGC neglected to

---

<sup>31</sup> See Case No. 22-00270-UT, *Recommended Decision* (NMPRC 12/08/2023), at 42, approved in *Final Order* (NMPRC 01/03/2024) at 20-24; Case No. 15-00261-UT, *Corrected Recommended Decision* (NMPRC 8/15/2016) at 96- 99 (same), approved in *Final Order Partially Adopting Corrected Recommended Decision* (NMPRC 9/28/2016); NMPUC Case No. 2382, *Final Order Approving Recommended Decision* (NMPUC 11/20/1995), at 48-49.

<sup>32</sup> RD at 125.

<sup>33</sup> NMGC Exceptions at 16.

provide a corresponding quantification of benefits to ratepayers and, critically, failed to show that the Facility would be cost-effective for ratepayers.”<sup>34</sup> This isn’t a novel request for a

---

<sup>34</sup> RD at 143; *See*, 123: “A benefit-cost analysis might have attempted to quantify the benefits to ratepayers over the life of the LNG Facility and shown its cost-effectiveness for ratepayers, but NMGC neglected to present a rigorous economic analysis of that sort in this case, an issue which is taken up below in considering additional public interest factors under the heightened scrutiny test.” *See also*, 128-130: “Moreover, the Hearing Examiner is mindful of NMGC’s preemptive argument that requiring benefit-cost analysis, like those cited by Intervenors, would violate NMGC’s due process rights because requiring a benefit-cost analysis now would be tantamount to “implement[ing] new CCN standards in the middle of the case[.]” and “would violate NMGC’s due process rights.” Conscious of this argument and its potential resonance, that is why, in part, the Hearing Examiner reserved the consideration of the benefit-cost analysis issue to this post-net public benefit portion of the decision.

Still, the Hearing Examiner has already found that NMGC failed to provide a quantification of benefits to ratepayers over the life of the LNG Facility and, thus, failed to show that the Facility would be cost-effective *for ratepayers*. That finding does not mean that a benefit-cost analysis is requisite element of a CCN case in New Mexico. The finding simply means that NMGC failed to show that the LNG Facility would benefit ratepayers in stark contrast to how the record evidence shows the Facility would benefit Emera shareholders in terms of after-tax ROE and enhanced earnings. What is suggested here, then, is that a quantitative analysis, based on analyzing numerical data to test objective facts shown in calculations and graphs, perhaps may have shown that the quantified benefits of the LNG Facility outweigh the costs to ratepayers. So, while NMGC was not required to submit such a benefit-cost analysis under prevailing CCN standards in New Mexico, it behooved the Company to provide more than a qualitative assessment of incremental benefits, which the Hearing Examiner found wanting, insufficient, and unreliable. Consequently, while a benefit-cost analysis or other empirical analyses like those presented in the *Wisconsin PSC Decision* approving two peak shaving LNG facilities for two Wisconsin gas utilities in 2021 or the New York PSC’s Order Adopting Gas System Planning Process (“*New York PSC Order*”) – which requires gas utilities in New York to compare alternatives based on benefit-cost analyses (BCAs), bill impact analyses, the NPV of estimated costs, and emissions impacts – were not required in this CCN case, NMGC should have been aware of these precedents and perhaps considered patterning an empirical analysis or analyses founded on those precedents, which considered in the first precedent (the *Wisconsin PSC Decision*) and categorically requires in the latter (the *New York PSC Order*), the systematic quantification of benefits and costs in gas resource planning in an objective fashion.

Once again, the point of this section is to simply emphasize that, unfortunately, an objective quantification of benefits versus costs of the proposed LNG project was not presented for the Commission’s consideration in this case. While the CCN standard did not require the applicant Company to present a BCA or other similar empirical modeling, the public interest cried out for such evidence in this case, particularly in light of the relatively staunch public opposition expressed against the LNG project and the unanswered safety and environmental siting questions summarized in the next section. (citations omitted.)

preposterous presentation of evidence; this is basic due diligence for a monopoly utility requesting an increase in rates for captive customers for many millions of dollars over 20-40 years to demonstrate cost effectiveness to utility regulators. Is it too much trouble to ask: *Is the project worth it?* If the NMGC is arguing that a cost-benefit quantification is outside its ability, it can't perform a cost benefit analysis because it is too cumbersome, even when this type of evidence is customary in other states, then its Application should fail.<sup>35</sup>

## VI. CONCLUSION

NMGC has failed to demonstrate a net public benefit. Critically, failed to show that the LNG Facility would be cost-effective for ratepayers. NMGC's CCN request for the LNG Facility is inconsistent with the public interest because it is contrary to the financial, health and safety concerns<sup>36</sup> of New Mexicans; therefore, New Energy Economy, on behalf of our members and the people of New Mexico are respectfully requesting that the Commission deny NMGC's CCN request for the LNG Facility in Rio Rancho.

---

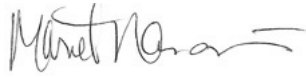
<sup>35</sup> For Example, Case No. 12-00386-UT, *Final Order Adopting Recommended Decision*, (NM PRC 5/1/2013) (long and short term costs of Macho Springs solar are cost effective.); See also, Case No. 15-00109-UT, *Certification of Stipulation* at 40-41; Case No. 15-00312-UT at 86-88, discussing PNM's cost-benefit analysis for its proposed (and rejected) AMI project (3/19/2018); Case No. 19-00349-UT, *Recommended Decision*, at 54 (11/16/2020) ("It is impossible to know the true costs and benefits of approving the CCN without balancing the cost of the new generation against the cost, or cost savings, associated with retiring the existing units.")

<sup>36</sup> RD at 141 ("NMGC failed to provide in this case a detailed draft safety and security plan for the LNG Facility. NMGC failed to conduct a cumulative impact analysis of direct or indirect GHG emissions in the fugitive release or combustion of LNG. NMGC neglected to quantify to any reasonable degree of probability potential increased health care costs to Albuquerque and Rio Rancho residents, if any, associated with discretionary GHG emissions venting.")



Served this 5th day of March, 2024.

**New Energy Economy**

A handwritten signature in black ink, appearing to read "Mariel Nanasi". The signature is fluid and cursive, with a long horizontal stroke at the end.

Mariel Nanasi, Esq.  
300 East Marcy St.  
Santa Fe, NM 87501  
(505) 469-4060  
Mariel@seedsbeneaththesnow.com

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

**IN THE MATTER OF THE APPLICATION )  
OF NEW MEXICO GAS COMPANY, INC. )  
FOR APPROVAL OF REVISIONS TO ITS ) Case No. 23-00255-UT  
RATES, RULES, AND CHARGES )  
PURSUANT TO ADVICE NOTICE NO. 96 )**

**CERTIFICATE OF SERVICE**

I CERTIFY that on this day I sent via email a true and correct copy of the

**NEW ENERGY ECONOMY'S  
RESPONSE TO EXCEPTIONS**

to the parties listed below.

**NM GAS COMPANY**

Thomas Domme	tmd@jhkmlaw.com;
Brian Haverly	bjh@jhkmlaw.com;
Julianna T. Hopper	jth@jhkmlaw.com;
Anita Hart	anita.hart@nmgco.com;
Rebecca Carter	rebecca.carter@nmgco.com;
Gerald Weseen	gerald.weseen@nmgco.com;
Nicole V. Strauser	nicole.strauser@nmgco.com;

**Coalition for Clean Affordable Energy**

Charles de Saillan	Desaillan.ccae@gmail.com;
Cara R. Lynch	Lynch.Cara.NM@gmail.com;

**Federal Executive Agencies**

Peter Meier	peter.meier@hq.doe.gov;
Paige Anderson	Paige.anderson@hq.doe.gov;
Saul J. Ramos	Saul.ramos@nnsa.doe.gov;
Dwight Etheridge	detheridge@exeterassociates.com;

**Incorporated County of Los Alamos**

Daniel A. Najjar	dnajjar@virtuelaw.com;
Philo Shelton	Philo.Shelton@lacnm.us;
Ben Olbrich	Ben.Olbrich@lacnm.us;

**New Energy Economy**

Mariel Nanasi	mariel@seedsbeneaththesnow.com;
---------------	---------------------------------

**New Mexico AREA**

Peter J. Gould	peter@thegouldlawfirm.com;
Kelly Gould	kelly@thegouldlawfirm.com;
Katrina Reid	office@thegouldlawfirm.com;

**New Mexico Office of Attorney General**

Gideon Elliot	GElliot@nmag.gov;
Joshua LaFayette	JLafayette@nmag.gov;
Maria Oropeza	MOropeza@nmag.gov;
Jocelyn Barrett	JBarrett@nmag.gov;

**NMPRC Utilities Staff**

David Black	David.Black@prc.nm.gov;
-------------	-------------------------

Bradford Borman  
Ed Rilkoff  
Elizabeth Ramirez  
Peggy Martinez-Rael  
Elisha Leyba-Tercero  
Gabriella Dasheno  
Timothy Martinez  
Marc Tupler  
Bamadou Ouattara  
Jonah Mauldin  
Angelique Herrera  
Naomi Velasquez  
Daren Zigich  
Edison Jimenez  
Orland Whitney

Bradford.Borman@prc.nm.gov;  
Ed.Rilkoff@prc.nm.gov;  
Elizabeth.Ramirez@prc.nm.gov;  
Peggy.Martinez-Rael@prc.nm.gov;  
Elisha.Leyba-Tercero@prc.nm.gov;  
Gabriella.Dasheno@prc.nm.gov;  
Timothy.Martinez@prc.nm.gov;  
Marc.Tupler@prc.nm.gov;  
Bamadou.Ouattara@prc.nm.gov;  
Jonah.Mauldin@prc.nm.gov;  
Angelique.Herrera@prc.nm.gov;  
Naomi.Velasquez1@prc.nm.gov;  
Daren.Zigich@prc.nm.gov;  
Edison.Jimenez@prc.nm.gov;  
Orland.Whitney@prc.nm.gov;

**Western Resource Advocates**

Cydney Beadles  
Aaron Gould  
Caitlin Evans

cydney.beadles@westernresources.org;  
aaron.gould@westernresources.org;  
caitlin.evans@westernresources.org;

**PRC General Counsel Division**

Scott Cameron  
Robert Lundin  
LaurieAnn Santillanes  
Erika Avila Stephanz

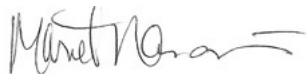
Scott.Cameron@prc.nm.gov;  
Robert.Lundin@prc.nm.gov;  
Laurieann.Santillanes@prc.nm.gov;  
Erika.stephanz@prc.nm.gov;

**PRC Hearing Examiners Division**

Ana.Kippenbrock@prc.nm.gov;

**DATED** this March 5, 2024.

**New Energy Economy**



Mariel Nanasi, Esq.  
300 East Marcy St.  
Santa Fe, NM 87501  
(505) 469-4060  
Mariel@seedsbeneaththesnow.com