

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

RECOMMENDED DECISION

NOVEMBER 16, 2020

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Applicant.	)	
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**RECOMMENDED DECISION OF THE HEARING EXAMINER**

Elizabeth C. Hurst, Hearing Examiner for this case, submits this Recommended Decision to the New Mexico Public Regulation Commission ("NMPRC" or "Commission") pursuant to NMSA 1978, Section 8-8-14 and in accordance with 1.2.2.29(D)(4) and 1.2.2.37(B) NMAC. The Hearing Examiner recommends that the Commission adopt the following statement of the case, discussion, findings of fact, and conclusions of law and decretal paragraphs in a final order.

**I. STATEMENT OF THE CASE**

On November 18, 2019, El Paso Electric Company ("EPE" or "Company") filed an Application for issuance of a Certificate of Public Convenience and Necessity ("CCN") in accordance with the New Mexico Public Utility Act ("NMPUA") NMSA 1978, Sections 62-9-1 and 62-9-6 to construct, own, and operate a new approximately 228 Megawatt ("MW") natural gas-fired combustion turbine

("Newman Unit 6") at EPE's existing Newman Generating Station ("Newman Station") in northeast El Paso, El Paso County, Texas. EPE requests that pursuant to 17.3.580 NMAC ("Rule 580") the Commission approve EPE's certificated estimated cost for Newman Unit 6 of \$159.3 million, including \$ 18.2 million of Allowances for Funds Used During Construction ("AFUDC").

On November 20, 2019, the Commission issued an Order Appointing Hearing Examiner.

On November 20, 2019, the Hearing Examiner issued an Order Setting Pre-hearing Conference.

On November 21, 2019, EPE filed an Errata Notice Related to the Direct Testimony of Wayne Oliver.

The pre-hearing conference was held on November 22, 2019 and was attended by representatives of EPE, the City of Las Cruces ("City"), Dona Ana County ("County"), the New Mexico Attorney General ("Attorney General"), and the Staff of the Commission's Utility Division ("Staff"). The parties discussed procedural matters and agreed upon a procedural schedule.

On November 25, 2019, the Hearing Examiner issued a Procedural Order setting forth the procedural details and deadlines for this case. The procedural schedule: (1) required EPE to publish the Notice attached to the Procedural Order one time in a newspaper of general circulation in every county where EPE provides service by December 6, 2019 and immediately post a copy of the Notice on its website by December 6, 2019; (2) set an intervention deadline of January

17, 2020; (3) required Staff and permitted any Intervenors to file direct testimony by April 9, 2020; (4) required any stipulation to be filed by April 9, 2020; (5) required any opposition to a stipulation to be filed by April 14 and testimony in opposition to a stipulation to be filed by April 21, 2020; (6) required any rebuttal testimony to be filed by April, 28 2020; and (7) set May 11, 2020 as the date for a public hearing in this matter.

On December 2, 2019, Merrie Lee Soules filed a Motion to Intervene and on December 9, 2019, Ms. Soules filed a protest.

On December 17, 2019, Philip B. Simpson and Allen H. Downs filed Motions to Intervene.

On December 20, 2019, EPE filed an Affidavit of Publication reflecting that the Notice was published in the *Las Cruces Sun News* and an Affidavit of Proof of Publication and Web Posting reflecting that the Notice was published on EPE's website, <https://www.epelectric.com/company/public-notice>, in accordance with the Hearing Examiner's Procedural Order.

On December 20, 2019, EPE filed a Motion for Entry of Protective Order.

On December 23, 2019, the City filed a Motion to Intervene.

On January 8, 2020, the Hearing Examiner issued a Protective Order.

On January 13, 2020, Vote Solar filed a Motion to Intervene.

On January 15, 2020, the County filed a Motion to Intervene.

On January 21, 2020, the Coalition for Clean Affordable Energy (“CCAЕ”) and Ryan Brown filed Motions to Intervene. Ryan Brown filed an Amended Motion to intervene on January 24, 2020.

On January 21, 2020, the City filed a Motion to Strike Certain Portions of the Pre-filed Direct Testimony and Exhibits of EPE Witness Omar Gallegos.

On January 31, 2020, EPE filed an Objection to Ryan Brown’s Motion for Leave to Intervene as amended.

EPE filed a Response in Opposition to the Motion to Strike on February 3, 2020.

On February 4, 2020, the Hearing Examiner issued an Order granting Ryan Brown’s Motion to Intervene.

On February 4, 2020, the Attorney General filed an Unopposed Motion for Leave to Intervene out of Time.

On February 25, 2020, in response to a Motion to Amend Procedural Order filed by Philip B. Simpson to delay the hearing one day, the Hearing Examiner issued a Second Procedural Order postponing the start of the public hearing to May 12, 2020.

On March 24, 2020, Vote Solar filed a Motion for Admission of Sara Gersen, Raghu Murthy, and Charles Carter Hall to Appear *Pro Hac Vice*.

On March 27, 2020, Vote Solar filed a Motion to Compel and Adjust the Procedural Schedule requesting EPE be ordered to produce answers to certain of

Vote Solar's Discovery Requests and to delay the procedural schedule by six weeks in part because of COVID-19. A Notice of Errata was also filed.

On April 2, 2020, EPE filed a Motion to Set Discovery Limits.

On April 7, 2020, Vote Solar and CCAE filed a Response to EPE's Motion to Set Discovery Limits.

On April 8, 2020, the Hearing Examiner issued an Order Holding Procedural Order in Abeyance which held the procedural deadlines in abeyance pending resolution of Vote Solar's Motion to Compel and EPE's Motion to Set Discovery Limits.

EPE filed its Response to Vote Solar's Motion to Compel on April 9, 2020 and the County, the City, the Attorney General, and *pro se* intervenors Brown, Downs, Simpson, and Soules filed a Joint Response to EPE's Motion to Set Discovery Limits on April 13, 2020.

On April 10, 2020, the Hearing Examiner issued an Order Setting Status Conference.

A telephonic status conference was held on April 14, 2020 and was attended by representatives of EPE, Ms. Soules, Mr. Downs, Mr. Simpson, the City, Vote Solar, the County, CCAE, Mr. Brown, the Attorney General, and Staff. During that conference, Counsel for Vote Solar indicated that EPE had supplemented its responses and Vote Solar did not wish to pursue the Motion to Compel. The Hearing Examiner also asked the parties to consider making further attempts to cooperate during the discovery process during the current work at home

constraints occurring due to Covid-19. The Hearing Examiner expressed concerns about current health gathering and travel restrictions that could impact holding the hearing in this case. The parties agreed upon new procedural dates for testimony and a public hearing.

On April 15, 2020, the Hearing Examiner issued a Third Procedural Order extending the deadline for Staff and any intervenors to file direct testimony to April 24, 2020 and the deadline to file a rebuttal testimony to June 5, 2020, holding EPE's Motion to Set Discovery Limits in abeyance and resetting the public hearing to July 20, 2020 given health gathering and travel restrictions in place due to the COVID-19 pandemic.

On April 24, 2020, the following witnesses filed direct testimony: Andrea C. Crane, on behalf of the Attorney General; Marc A. Tupler and Jack Sidler on behalf of Staff; Patrick J. O'Connell, on behalf of CCAE; Jose F. Provencio and Lisa LaRocque, on behalf of the City; Rick Gilliam and Michael Goggin, on behalf of Vote Solar; and Philip B. Simpson and Merrie Lee Soules, *Pro Se*. An Affirmation supporting the testimony and exhibits was filed by Ms. Soules on April 27, 2020.

On May 20, 2020, the Commission on its own Motion issued an Order extending the statutory review period by three months to November 18, 2020.

On June 5, 2020, the following witnesses filed rebuttal testimony: David Hawkins, Wayne Oliver, Arne Olson, George Novela, Jessica Christianson, James Schichtl, and Omar Gallegos on behalf of EPE; and Michael Goggin on behalf of Vote Solar.



On June 8, 2020, the Hearing Examiner issued a Bench Request to EPE.

EPE filed its Response to the Bench Request on June 19, 2020.

On June 22, 2020, the Hearing Examiner issued a Pre-Hearing Memorandum Order directing all Parties to file a pre-hearing memorandum by July 6, 2020 identifying: (1) the names and availability of all witnesses the party intends to present at hearing; (2) the exhibits the party intends to present or use during cross examination will need to be pre-marked and e-mailed to all parties on the official certificate of service and the Hearing Examiner by July 13, 2020; and (3) the amount of time need for cross examination of each witness. The Pre-Hearing Memorandum Order further directed EPE to provide, after consultation with Staff and all parties, a proposed order of presentation of witnesses and proposed order of cross examination.

On June 25, 2020, Vote Solar filed a Motion to Strike Portions of Omar Gallegos and Wayne Oliver's Rebuttal Testimony.

On July 6, 2020, EPE, the County, Staff, CCAE, Allen Downs, the Attorney General, Merrie Lee Soules, Philip Simpson, the City, and Vote Solar all filed pre-hearing memorandums. Ryan Brown filed his pre-hearing memorandum on July 15, 2020. Revised pre-hearing memorandums were subsequently filed by Allen Downs, Vote Solar, CCAE, Merrie Lee Soules, the AG, and the City.

On July 6, 2020, EPE filed a Motion for Admission of Casey A. Bell to Appear *Pro Vac Vice*.

On July 7, 2020, Vote Solar filed a Motion for Leave for Non-local Attorneys to Participate Remotely in any public hearing that includes in-person appearances.

On July 8, 2020, EPE filed its Response in Opposition to Vote Solar's Motion to Strike Portions of the Rebuttal Testimony of Omar Gallegos and Wayne Oliver.

An Order Granting Admissions *Pro Hac Vice* was issued by the Hearing Examiner on July 14, 2020.

On July 15, 2020, upon stipulation by all parties, the Hearing Examiner issued an e-mail stating AG witness Andrea Crane's direct testimony would be stipulated into the hearing record and her appearance at the public hearing would be excused.

On July 16, 2020, the Hearing Examiner issued an Order Denying Vote Solar's Motion to Strike.

On July 17, 2020, EPE filed Objections and Motions to Limit the Direct Testimonies of Phillip B. Simpson and Merrie Lee Soules.

Mr. Simpson and Ms. Soules filed Responses in Opposition to EPE's Objections and Motions to Limit Testimonies on July 22, 2020.

A public hearing was held on July 20-24, 2020. The following appearances were entered at the hearing:

**For EPE**

Nancy B. Burns  
El Paso Electric Company

Jeffrey J. Wechsler  
Kari E. Olson

Montgomery & Andrews, P.A.

Casey Bell  
Duggins Wren Mann & Romero, LLP

**For City**

Anastasia S. Stevens  
Stevens Law, LLC

**For County**

Keith W. Hermann  
Stelzner, Winter, Warburton, Flores, Sanchez & Dawes, P.A.

**For Attorney General**

Robert F. Lundin

**For CCAE**

Stephanie L. Dzur

**For Vote Solar**

Jason Marks  
Jason Marks Law, LLC

Sara Gersen  
Raghu Murthy  
Carter Hall  
Earthjustice

**For Staff**

Bradford Borman

**Pro Se:**

Merrie Lee Soules  
Philip Simpson  
Allen Downs  
Ryan Brown

NMPRC Commissioner Stephen Fischmann also appeared and participated in portions of the hearing.

The following witnesses appeared at the hearing and were examined on their respective pre-filed testimonies:

**For EPE:**

James Schichtl  
Omar Gallegos  
Wayne Oliver  
David Hawkins  
Jessica Christianson  
Arne Olson  
George Novela

**For City:**

Lisa LaRocque  
Jose Provencio

**For Vote Solar**

Richard Gilliam  
Michael Goggin

**For CCAE:**

Patrick J. O'Connell

**For Staff:**

Jack Sidler  
Marc A. Tupler

**Pro Se:**

Merrie Lee Soules  
Philip B. Simpson

No one appeared during the hearing to provide public comment.

During the public hearing, Commissioner Fischmann asked that certain information be submitted by EPE in the form of responses to Bench Requests.

On July 24, 2020, Mr. Simpson filed Exhibit PBS-5 to his Revised Direct Testimony.

On July 31, 2020, the Hearing Examiner issued an Order Setting Bench Request Deadlines that ordered: (1) EPE to file responses to Bench Requests by August 7, 2020, (2) any replies to the Bench Request responses be filed by August

20, 2020, and (3) if requested, a hearing on the Bench Request responses would be held on August 28, 2020.

On August 7, 2020, EPE filed its Responses to the Bench Requests issued during the public hearing.

On August 17, 2020, Vote Solar and the City filed Replies to EPE's Responses to the Bench Requests.

No party requested a hearing on the Bench Request responses pursuant to 1.2.2.35(K) NMAC, Additional Evidence.

On August 3, 5, and 6, 2020, the Transcripts ("Tr.") of the July 20-24, 2020 hearings were filed with the Commission.

On August 18 and 19, 2020, EPE and CCAE each filed corrections to the hearing transcripts.

On September 4, 2020, Initial Post Hearing Briefs were filed by Staff, Attorney General, CCAE, Vote Solar, the City, Mr. Simpson, Ms. Soules, and EPE. A Corrected Initial Brief was also filed by CCAE. An Errata Notice was also filed by the City on September 21, 2020.

On September 10, 2020, EPE filed an Unopposed Motion for Extension of Deadline to File Response Briefs.

On September 11, 2020, the Hearing Examiner issued an Order Granting Motion for Extension of Time that allowed response briefs to be filed by noon on September 21, 2020.

On September 21, 2020, Response Briefs were filed by CCAE, Vote Solar, the City, EPE, and Ms. Soules.

On October 21, 2020, the Commission issued an Order Further Extending Consideration of the Application by One Month.

On October 28, 2020, a public comment by Tom Reavey who supported the CCN was filed with the Commission.

## **II. SUMMARY OF EPE'S REQUESTS, PARTIES' POSITIONS, AND THE HEARING EXAMINER'S RECOMMENDATIONS**

### **A. EPE's Requests**

EPE requested Commission authorization to construct, own, and operate a new approximately 228 MW natural gas-fired combustion turbine, Newman Unit 6, at EPE's existing Newman Station in northeast El Paso, Texas. EPE also requested that pursuant to Rule 580, the Commission approve EPE's certificated estimated cost for Newman Unit 6 of \$159.3 million, including \$18.2 million of AFUDC. EPE asserted that Newman Unit 6 combined with the two solar long-term purchased power agreements ("LTPPAs") and the battery storage capacity resource for which EPE sought Commission approval in Case No. 19-00348-UT ("companion case") provided the most cost-effective portfolio available through EPE's competitive bidding process to safely and reliably serve customer load over EPE's entire system while considering the economics of planned retirements versus potential life-extensions of older, inefficient units.

EPE asserted that it would need 370 MW of additional resources by summer 2023 (50 MW in 2022 and 320 MW in 2023) to meet increasing customer demand and to replace the capacity of the retiring Newman Units 1 and 2 and Rio Grande Unit 7. EPE also argued that the latest Loads and Resources (“L&R”) document, based on EPE’s 2019 load forecast, is consistent with EPE’s 2017 forecast and projects an even greater capacity need for 2022 and 2023.

EPE argued that Newman Unit 6’s operational characteristics will allow EPE to use the facility to meet peaking (meeting high demand at maximum output for a few hours in the day) and load following (operating longer hours to balance load variability) requirements. Further, EPE asserted that it provided testimony that approving Newman Unit 6 would provide safe, reliable, and economic electric utility service to EPE’s customers without unnecessary duplication or economic waste. EPE further argued that the Commission should give weight to the Public Utility Commission of Texas’s probable approval of Newman 6.

**B. Staff Position**

Staff supported EPE’s request for Commission approval of a CCN for Newman Unit 6. Staff conditioned its support upon certain EPE filing requirements tied to the Commercial Operation Date (“COD”) of Newman Unit 6. EPE would be required to file the proposed abandonments for Newman Units 1 and 2 and Rio Grande 7 within a specified period after the COD. Other permit, cost, and fuel information from EPE would be required in future filings.

**C. Intervenors’ Positions**

The Intervenors - Ms. Soules, Mr. Simpson, Mr. Downs, City, Vote Solar, County, CCAE, Mr. Brown, and Attorney General, opposed EPE's CCN request. Intervenors asserted that there were numerous flaws and deficiencies with EPE's Application. Some Intervenors claimed that the RFP and bid selection process had been skewed in favor of EPE's self-build option. There was also a claim that post-bid processes were biased. Intervenors argued that EPE failed to show need and had utilized a non-accepted IRP that the Commission had determined had been rendered largely obsolete by the recent 2019 Legislation (ETA and amendments to the RPS). Some Intervenors criticized EPE's load and resources modeling as being inaccurate especially in its low percent awarded toward capacity for renewable resources. Other Intervenors claimed EPE failed to actually choose a lower cost portfolio. Further, Intervenors asserted that EPE's capacity claim was too high because of the incorrect usage of a 15% reserve margin. Other Intervenors argued that Newman 6 is unnecessary and would lead to waste and unnecessary duplication. Intervenors also argued that EPE's cost justification for not wanting to extend existing plant was erroneous. Finally, Intervenors argued that contrary to New Mexico Law, EPE had failed to consider the ETA and changed RPS in its analysis and evaluation leading to the choice of Newman 6. Several Intervenors concluded that significant regulatory and technological uncertainty justified rejection of the CCN request at this time. Further, Intervenors suggested that near term load could be met by existing resources and that EPE could choose to issue a new RFP procurement process



based upon new information utilizing New Mexico RPS requirements and a new IRP.

#### **D. Hearing Examiner's Recommendations**

The Hearing Examiner finds that EPE failed to consider New Mexico law, specifically, Senate Bill 489 and the amendments to the Renewable Energy Act ("REA") in its RFP, bid selection, and resource evaluation process. The REA amendments require that renewable energy comprise the following minimum percentages of each public utility's total retail sales to New Mexico customers:

- (1) 20% by January 1, 2020;
- (2) 40% by January 1, 2025;
- (3) 50% by January 1, 2030; and
- (4) 80% by January 1, 2040.

Ultimately, the REA amendments require, by January 1, 2045, that zero carbon resources supply 100% of all retail sales of electricity in New Mexico.

EPE's choice of natural gas generation with a projected lifespan of at least 40 years will not result in a net benefit to New Mexico citizens and EPE's failure to consider the amended REA requirements and 2045 zero carbon emission requirement in its resource selection process is not in New Mexico citizens' public interest. Authorizing a CCN for Newman Unit 6 could subject EPE's ratepayers to paying stranded costs for some of the years of service lives that will be lost. Further, a preponderance of credible evidence shows that there is no immediate need for Newman Unit 6 because the renewable resources approved in Case No. 19-00348-UT, as well as other existing EPE resources, recently offered renewable

resources<sup>1</sup>, along with a brief delay in abandonments of Rio Grande 7, and Newman 1 and 2, should afford capacity in the near term to provide adequate safe and reliable electric service, at least until EPE evaluates and seeks approval for resource selections that are compliant with New Mexico law.

### III. LEGAL STANDARDS

#### A. PUA

The applicable standards for governing public utilities are set forth in the PUA and cases decided under that act. Under the PUA, the Commission has "general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulation and in respect to its securities..." NMSA 1978, Section 62-6-4(A). The PUA requires public utilities to obtain a CCN before constructing or operating any new public utility plant or system.<sup>2</sup> In determining whether to issue a CCN, the Commission must consider whether the new public utility plant or system is consistent with the public convenience and necessity.<sup>3</sup> The "public convenience and necessity" standard implies a net public benefit.<sup>4</sup> The utility applicant has the burden to show that the

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<sup>1</sup> See 19-0099-UT, Amended Application for Approval of El Paso Electric Company's Amended 2019 Renewable Energy Act Plan and 2020 Renewable Energy Act Plan Pursuant to the Renewable Energy Act and 17.5.8.571 MNAC and Third Revised Rate No. 38.

<sup>2</sup> NMSA 1978, Section 62-9-1(A).

<sup>3</sup> NMSA 1978, Section 62-9-1(A) and NMSA 1978, Section 62-9-6.

<sup>4</sup> *Re Valle Vista Water Utility Co.*, 212 P.U.R.4th 305, 309 (2001).

resource it proposes is the most cost effective resource among feasible alternatives.<sup>5</sup>

In prior cases, the Commission has equated the “public convenience and necessity” with the public interest.<sup>6</sup>

## **B. Evidentiary Standard**

EPE bears the burden of demonstrating, by a preponderance of evidence in the record, that the LTPPAs satisfy the requirements of Rule 551.8 and are reasonable and in the public interest. The burden of proof in this case is established as a matter of law.<sup>7</sup> The rule in administrative proceedings, in general and Commission adjudications in particular, is that unless a statute provides otherwise, the proponent of an order or moving party has the burden of proof.<sup>8</sup> The burden of proof is two-pronged: it includes both the burden of adducing sufficient evidence to go forward with a claim and the burden of ultimate

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<sup>5</sup> See Corrected Recommended Decision, Case No. 15-00261-UT (Aug. 15, 2016), at 89, 96-99, approved in Final Order Partially Adopting Corrected Recommended Decision (Sept. 28, 2016); Final Order, Case No. 13-00390-UT (Dec. 16, 2015), at 5-11; Order Partially Granting PNM Motion to Vacate and Addressing Joint Motion to Dismiss, Case No. 15-00205-UT (Dec. 22, 2015), at 10-11; In Re Public Service Company of New Mexico, Case No. 2382, 166 P.U.R. 4th 318, 337, 355-356 (1995).

<sup>6</sup> *Re Public Service Co.*, 119 P.U.R. 4th 48, 50 (1990); *aff'd*, *Public Serv. Co. of N.M. v. New Mexico Pub. Serv. Comm'n*, 112 N.M. 379, 815 P.2d 1169 (1991).

<sup>7</sup> See, e.g., In the Matter of Southwestern Public Service Company's Application Requesting: (1) Acceptance of its 2014 Annual Energy Efficiency and Load Management Report; (2) Approval of its 2016 EE/LM Plan and Associated Programs; (3) Approval of its Cost Recovery Tariff Rider; and (4) a Determination Whether a Separate Process Should be Established to Analyze a Smart-Meter Pilot Program, Case No. 15-0119-UT, Certification of Stipulation at 16 (Dec. 18, 2015) (citing *Gray v. State ex rel. Wyoming Workers' Safety and Compensation Div.*, 193 P.3d 246, 251 (Wyo. 2008)); see also NMSA 1978 § 62-8-7(A).

<sup>8</sup> Davis, Kenneth Culp, *Administrative Law Treatise* Section 169 at 255-57 (2 ed. 1980). See *Int'l Minerals and Chemical Corp. v. New Mexico Pub. Serv. Comm'n*, 81 N.M. 280, 283, 466 P.2d 557, 560 (1970) (“although the statute does not specifically place any burden of proof on (Complainant) International, the courts have uniformly imposed on administrative agencies the customary common-law rule that the moving party has the burden of proof”).

persuasion. The standard of proof in administrative adjudications is, unless expressly provided otherwise, the preponderance of the evidence.<sup>9</sup> It is evidence that, when weighed with that opposed to it, has more convincing force. It has superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other.<sup>10</sup>

### **C. Commission Rule Requirements**

With respect to project costs, EPE must notify the Commission regarding anticipated transmission and distribution or generation plant extensions and additions of a certain size or dollar amount. 17.5.440 NMAC ("Rule 440"). EPE must also provide the Commission with notice and cost information for new capacity additions. 17.8.570 NMAC ("Rule 570"). Furthermore, Rule 580 provides that no cost overruns incurred in the construction of new generating plant will be included in rates unless the Commission determines such overruns were prudently incurred. Rule 580 also provides that the total cost of construction of electric generating plant for a utility, including AFUDC, as estimated by the utility at the

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<sup>9</sup> See Davis, *supra*, Section 16.9 at 256 ("One can never prove a fact by something less than a preponderance of the evidence")(emphasis in original). See *Re Public Southwestern Pub. Serv. Co.*, Case No. 2678, P.U.R. Slip Copy, 1997 WL 78696 (NMPUC) \*11.

<sup>10</sup> *Black's Law Dictionary* 547 (2nd pocket ed. 2001). See *Lujan v. Circle K. Corp.*, 1980-NMCA-107, ¶18, 94 N.M. 719 (the preponderance of evidence standard of proof essentially means "substantial support in the evidence for the findings."..."That being true,..., the fact that there may have been contrary evidence which would have supported a different finding or conclusion does not permit this court, on appeal, to weigh the evidence, (citations omitted) or speculate as to what the trial court might have done.") (*quoting Mascarenas v. J.L. Kennedy*, 74 N.M. 665,668-69, 397 P.2d 213).

time of issuance of the CCN by the Commission, should be reflected in the order issuing the CCN. Any cost overrun that exceeds the certificated estimated cost is subject to an additional prudence review in a general rate case before being included in the utility's rates.

**D. Senate Bill 489**

Senate Bill 489 ("S.B. 489," 2019 N.M. Laws, ch. 65) and the Energy Transition Act are often considered one and the same legislation. But the ETA is only one part of Senate Bill 489. Senate Bill 489 includes 82 pages of double-spaced provisions. It contains primarily a new 49-page chapter of the Public Utility Act<sup>11</sup> entitled Energy Transition Act (ETA),<sup>12</sup> major revisions to the Renewable Energy Act (REA),<sup>13</sup> an amendment to the Air Quality Control Act,<sup>14</sup> and several other related amendments to the Public Utility Act.

The amendments to the Renewable Energy Act are intended more generally to increase the use of renewable energy by the state's electric public utilities. Senate Bill 489's amendments to the Renewable Energy Act require that renewable energy comprise the following minimum percentages of each public utility's total retail sales to New Mexico customers:

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<sup>11</sup>NMSA 1978, §§ 62-1-1 to -7 (1909, as amended through 1993), 62-2-1 to -22 (1887, as amended through 2013), 62-3-1 to -5 (1967, as amended through 2019), 62-4-1 (1998), 62-6-4 to -28 (1941, as amended through 2018), 62-8-1 to -13-16 (1941, as amended through 2019). See *Tri-State Generation and Transmission Ass'n v. N.M. Pub. Regulation Comm'n*, 2015-NMSC-013, ¶ 8 n.1, 347 P.3d 274 (listing the foregoing statutory provisions of the "entire PUA" and noting that § 62-13-1 specifies "the range of articles in Chapter 62 that comprised the PUA in 1993.").

<sup>12</sup> NMSA 1978, §§ 62-18-1 to -23 (2019).

<sup>13</sup> NMSA 1978, §§ 62-16-1 to -10 (2004, as amended through 2019).

<sup>14</sup> NMSA 1978, § 74-2-5 (1967, as amended 2019).

- (1) 20% by January 1, 2020;
- (2) 40% by January 1, 2025;
- (3) 50% by January 1, 2030; and
- (4) 80% by January 1, 2040.

Ultimately, the REA amendments require, by January 1, 2045, that zero carbon resources supply 100% of all retail sales of electricity in New Mexico.

#### **IV. DISCUSSION**

EPE requested Commission authorization to construct, own, and operate a new approximately 228 MW natural gas-fired combustion turbine, Newman Unit 6, at EPE's existing Newman Station in northeast El Paso, Texas. EPE also requested that pursuant to Rule 580, the Commission approve EPE's certificated estimated cost for Newman Unit 6 of \$159.3 million, including \$18.2 million of AFUDC. EPE asserted that Newman Unit 6 combined with the two solar LTPPAs and the battery storage capacity resource for which EPE sought Commission approval in Case No. 19-00348-UT ("companion case"), provided the most cost-effective portfolio available through EPE's competitive bidding process to safely and reliably serve customer load over EPE's entire system while considering the economics of planned retirements versus potential life-extensions of older, inefficient units.

##### **A. EPE's Application**

Newman 6 is scheduled to be in service for the peak seasons of 2023. The Operating and Maintenance ("O&M") costs are estimated to average

approximately \$4.8 million annualized maintenance cycle costs in 2019 dollars. Once in operation, EPE intends that the fuel costs associated with Newman 6, together with any fuel savings that may be achieved, will flow through EPE's existing Fuel and Purchased Power Cost Adjustment Clause. EPE will seek base rate treatment of the capital costs and ongoing plant maintenance and operation expenses for Newman and related transmission facilities in a future general ratemaking proceeding.

Newman Unit 6 will be a Mitsubishi Hitachi Power Systems Americas G-Series Air-Cooled Simple Cycle Facility with a nameplate rating of approximately 228 MW based on the elevation of the Newman Generating Station and summer peak conditions. Newman Unit 6's operational characteristics will allow EPE to use the facility to meet peaking (meeting high demand at maximum output for a few hours in the day) and load following (operating longer hours to balance load variability) requirements. Specifically, Newman Unit 6 will have "quick-start" capability, meaning it can come online in 4.5 minutes and reach 100% load capability in under 12 minutes. Even in regular start-up mode, the facility will come online in 20 minutes and achieve full load in 35 minutes.

EPE asserts that this quick-start capability will also help EPE meet its Southwest Reserve Sharing Group ("SRSG") operating reserve requirement as a non-spinning reserve, instead of having to carry the reserves on one of its less efficient and flexible retiring units or purchase power or reserves on the market. Its operational characteristics make Newman Unit 6 well-suited to respond to the

intermittency of the growing penetration of renewable resources on EPE's system. Given its strategic location within EPE's service territory, EPE averred that Newman Unit 6 will enhance overall system reliability by providing voltage support within EPE's load area and will reduce the risk of outages due to transmission system failure. Moreover, according to EPE, incremental O&M costs will be minimized because Newman Unit 6 will use the existing O&M staff at the Newman Generating Station, and fuel costs will also be minimized because the unit will run primarily on natural gas available from an El Paso Natural Gas transmission pipeline that has provided natural gas from multiple suppliers in the Permian and San Juan basins to the Newman Generating Station since 1960.<sup>15</sup>

EPE provided testimony that Newman Unit 6's heat rate of approximately 10,101 BTU per kWh (based on information from the manufacturer) will be lower than the average heat rate of 11,960 Btu per kWh for the retiring units, EPE's modeling estimates that fuel costs will decline by approximately \$4.3 million in the unit's first full year of operation.<sup>16</sup> EPE claimed that from an environmental standpoint, Newman Unit 6 will emit nearly 95% less NO<sub>x</sub> and 50% less CO than the units slated for retirement.<sup>17</sup>

EPE asserted that the evidence shows that the construction of Newman Unit 6 will provide a net public benefit to both EPE's customers (with respect to electrical service specifically) and residents of southern New Mexico and west

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<sup>15</sup> Hawkins Direct at 7, 9.

<sup>16</sup> Schichtl Direct at 18.

<sup>17</sup> Christianson Direct at 11.



Texas generally (with respect to environmental considerations). The Application is supported by the testimonies and evidence of EPE and Staff. EPE argued that this testimony establishes that Newman Unit 6 will provide safe, reliable, and economic electric utility service to EPE's customers without unnecessary duplication or economic waste.<sup>18</sup> EPE concluded that its continued customer demand growth and impending retirement of very old natural-gas fired units (Newman Units 1 and 2 and Rio Grande Unit 7) at the end of their useful lives, combined with EPE's reserve margin requirements, mandates the addition of new generating resources, and specifically additional peak generating capacity, beginning in 2022.<sup>19</sup>

EPE alleged that Newman Unit 6 will not be duplicative; its capacity is necessary to meet forecasted load growth and replace that of EPE's much older Newman Units 1 and 2 and Rio Grande Unit 7 that are already beyond their expected useful lives and will be retired in the near future.<sup>20</sup>

EPE asserted that Newman Unit 6's impact on the rates paid by EPE customers will be minor. Once operational, inclusion of Newman Unit 6 in rates should result in a small increase in base rates coupled with a small decrease in fuel rates, with the net impact being a 1.85% increase per month for an average customer during the first full year of operation.<sup>21</sup>

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<sup>18</sup> Schichtl Direct at 12.

<sup>19</sup> Schichtl Direct at 6, 8-9.

<sup>20</sup> Schichtl Direct at 13.

<sup>21</sup> Schichtl Direct at 18-19.

## 1. Loads and Resources Analysis

EPE currently meets its customer's electricity demand through its owned generation resources (which include thirteen gas-fired units, three uranium-fueled units, and 8 MW of solar photovoltaic ["PV"] systems) and 107 MW of solar LTPPAs.<sup>22</sup> Occasionally, EPE also purchases power from wholesale suppliers under capacity and/or energy contracts.<sup>23</sup> Although these resources are currently sufficient to meet customer demand, recent planning analyses performed by EPE clearly show that in the near future, EPE asserted that it will require additional plant capacity in order to safely and reliably serve its customers. EPE uses ongoing annual planning processes to forecast its future energy demands, beginning with the development of a load forecast and analysis of the age and condition of existing resources.<sup>24</sup> EPE's load forecasts, which predict expected, upper and lower bounds for energy and peak demand, are generated for a 20-year period.<sup>25</sup> EPE claimed that the 2019 forecast supports EPE's request for a CCN in this case, confirming that EPE's load growth supports the need to add Newman Unit 6 to EPE's portfolio.<sup>26</sup>

Supply, demand, and reserve information from EPE's system is compiled into EPE's L&R analysis. EPE averred that the L&R document reflects the balance or imbalance of generating and purchase power resources and expected load,

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<sup>22</sup> Gallegos Direct at 6-7, Table OG-02.

<sup>23</sup> Gallegos Direct at 7.

<sup>24</sup> Gallegos Direct at 8-9.

<sup>25</sup> Novela Direct at 5.

<sup>26</sup> Novela Direct at 5.

considering the appropriate reserve margin and assuming no new capacity added. EPE's 2017 L&R document (based on the April 2017 load forecast, planned retirements, and the reserve margin) showed that EPE would need additional capacity with daily cycling ability starting in 2022, and that its capacity need would increase over the subsequent years.<sup>27</sup> According to EPE, the 2017 L&R document shows that EPE would need 370 MW of additional resources by summer 2023 (50 MW in 2022 and 320 MW in 2023) to meet increasing customer demand and to replace the capacity of the retiring Newman Units 1 and 2 and Rio Grande Unit 7.<sup>28</sup> EPE asserted that the latest L&R document, based on EPE's 2019 load forecast, is consistent with EPE's 2017 forecast and projects an even greater capacity need for 2022 and 2023.<sup>29</sup> Specifically, the 2019 forecast predicts that native system energy will grow from 8,602 Gigawatt-hours ("GWH") in 2018, to 9,617 GWH in 2028, and then to 11,106 GWH by 2038, for a Compound Annual Growth Rate ("CAGR") of 1.3% over the 20-year period. It also projects native system peak demand to increase from 1,929 MW in 2018 to 2,169 MW in 2028 and 2,528 MW in 2038, for a 20-year 1.4% CAGR.<sup>30</sup>

## **2. Load Forecast**

EPE is a summer peaking utility, so its system experiences a significantly higher load during the day between May and September than it experiences the

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<sup>27</sup> Gallegos Direct at 13, 18, Exhibit OG-2.

<sup>28</sup> Gallegos Direct at 13, 18, OG-2.

<sup>29</sup> Gallegos Direct at 13-14, Table OG-03, Exhibit OG-3; Novela Direct at 4.

<sup>30</sup> Novela Direct at 7, Exhibit GN-1.

rest of the year. Demand in off-peak hours during the summer decreases significantly due to diurnal temperature swings in EPE's service area. Therefore, to efficiently meet peak demand, EPE asserted that its generation must be readily available during the day in the summer and be able to cycle or completely shut down during off-peak periods (including nights, weekends and the winter) and turn on without limit as soon as needed. This decreasing load factor results from a decreasing share of energy consumption by large industrial customers (loads with higher load factors) coupled with an increasing use of refrigerated air conditioners relative to evaporative coolers (lower load factor loads). The downward load factor trend means demand is growing faster than energy, and over time, the swings in demand become more pronounced in the summer months, requiring additional generation.<sup>31</sup> The native system energy and demand data from April 2020 (when stay-at-home orders were in place in EPE's service territory) indicates that although energy decreased by 5.7% on a year-over-year basis, the native system peak demand increased by 9.8% on a year-over-year basis.

Native system peak demand, upon which reserve margin planning is based, continued to grow through both of the most recent recessionary periods. These growth trends tend to show that peak demand is especially resistant to economic downturns.<sup>32</sup>

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<sup>31</sup> Novela Direct at 23-24.

<sup>32</sup> Novela Rebuttal at 6-7.

During the pendency of this case, EPE asserted that it experienced a new record native system peak demand of 2,173 MW between the hours of 4:00 p.m. MDT and 5:00 p.m. MDT on July 13, 2020.<sup>33</sup> Before the summer of 2020, EPE had not anticipated reaching that native system peak demand until 2026 – six years from now.<sup>34</sup>

### **3. Planning Reserve Margin**

According to EPE, the planning reserve margin, or the amount of firm resources above projected peak load required to sustain system reliability in excess of project annual firm demand, is widely accepted as a necessary and prudent element of resource planning. EPE averred that its physical location and resulting transmission import limits must be considered in EPE's long-term planning and establishment of an appropriate reserve margin.<sup>35</sup> EPE argued that its current reserve margin of 15 percent is consistent with the 2020 minimum reserve margin thresholds in the Western Electricity Coordinating Council ("WECC"), has been used in EPE's planning processes since 2012.

EPE averred that according to E3 witness Arne Olson, the appropriate reserve margin is different for each power system, and EPE's may be higher than those of other utilities for several reasons. First, because EPE has a smaller peak load and fewer and less diverse resources, a single outage is more likely to result

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<sup>33</sup> July 22, 2020 Hearing Transcript at 708:23-25; 726:21-727:8.

<sup>34</sup> *Id.*

<sup>35</sup> Gallegos Direct at 10.

in loss-of-load.<sup>36</sup> Further, because a large share of EPE's capacity comes from a single resource (Palo Verde nuclear, in Arizona) connected to load by a long-distance transmission tie, there will be an outsized effect on loss-of-load if there is a point-of-failure at that resource or at the transmission level.<sup>37</sup> Finally, EPE is sparsely connected to the rest of the Western Interconnection, so it cannot always rely on its neighbors in emergency situations. These connections are heavily utilized to bring in Palo Verde generation, leaving little room for additional transfers, and a single transmission outage could interrupt the Palo Verde supply and any external market purchases by EPE, thus reducing the capacity contribution of these incremental purchases.<sup>38</sup>

#### **4. Retirements of Newman Units 1 and 2 and Rio Grande Unit 7**

EPE plans to retire Newman Units 1 and 2 and Rio Grande Unit 7 in 2022, at which time they will be approximately 62, 59, and 64 years old, respectively. By 2022 these conventional steam turbine units will have exceeded industry average lives for that type of technology and their initial expected useful life.<sup>39</sup> The loss of 198 MW of capacity resulting from these planned retirements was considered in the 370 MW resource requirement shown in the 2017 L&R document.<sup>40</sup>

EPE hired Burns & McDonnell, conducted an analysis to determine the estimated O&M and investment costs for extending the retirements of these units.

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<sup>36</sup> Olson Rebuttal at 26-27.

<sup>37</sup> Olson Rebuttal at 27.

<sup>38</sup> Olson Rebuttal at 27-28.

<sup>39</sup> Gallegos Direct at 14, 16; Hawkins Rebuttal at 11.

<sup>40</sup> Gallegos Direct at 16.

Based on these costs, EPE's analyses established that such extensions would not be cost-effective and would entail other risks.<sup>41</sup> There are numerous maintenance items that would be required for even one more cycle of reliable operation of these units beyond their currently planned 2022 retirements.<sup>42</sup> Retirement extensions would result in higher O&M costs coupled with declines in reliability and availability.<sup>43</sup> Burns & McDonnell found the costs per kilowatt (kW) to extend Newman Units 1 and 2 until 2037 (\$841/kW) and to extend Rio Grande Unit 7 until 2027 (\$1,337/kW) to be much higher than the base cost of Newman Unit 6 (approximately \$620/kW).<sup>44</sup>

EPE also claimed that the operational benefits of Newman Unit 6 clearly outweigh those of Newman Units 1 and 2 and Rio Grande Unit 7 for meeting load and resource balancing requirements.<sup>45</sup> Because Newman Units 1 and 2 and Rio Grande Unit 7 are older steam turbine technologies, their operating characteristics are inflexible. They were not meant for cycling during summer peak loads; they have been most reliable when turned on and left on, and cycling these units has had significant wear-and-tear impacts, increased maintenance costs, and shortened their lives.<sup>46</sup> Their start-up times are referred to in days, not minutes.<sup>47</sup> These units also have no pollution controls, which were

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<sup>41</sup> Gallegos Direct at 14.

<sup>42</sup> Hawkins Rebuttal at 6-7, Exhibits DCH-2-R, DCH-3-R.

<sup>43</sup> Gallegos Direct at 14.

<sup>44</sup> Exhibit DCH-2-R, Table 10-3, p. 10-10; Exhibit DCH-3-R, Table 10-2, p. 10-10.

<sup>45</sup> Hawkins Rebuttal at 12.

<sup>46</sup> Hawkins Direct at 8; Hawkins Rebuttal at 11.

<sup>47</sup> Hawkins Rebuttal at 11.

not required when they were originally put into service, and they consume large volumes of water.<sup>48</sup> EPE claimed that it thoroughly evaluated and analyzed the option of extending the retirement dates of Newman Units 1 and 2 and Rio Grande Unit 7 as an alternative to Newman Unit 6.

## 5. Evaluation of 2017 RFP Bids and Reviewing Portfolio Selection

EPE first analyzed the 81 bids received from 36 different companies in the 2017 RFP (71 of which were renewable and/or battery storage proposals) to ensure they met eligibility and threshold requirements, including timeliness, payment of fee, responsiveness to RFP, operational requirements, similar project experience, site control, technology risk and financial capability. EPE then conducted a qualitative review of project development feasibility, resource reliability, operational viability and characteristics, and flexibility.<sup>49</sup> EPE further calculated the levelized cost of energy ("LCOE") of each proposal, which EPE claimed is an effective tool for ranking resources of the same technology type (solar, wind, solar plus storage, demand response, conventional combustion turbine [CT], conventional combined cycle, etc.) against each other.<sup>50</sup> The LCOE rankings and the qualitative review resulted in creation of a bidder shortlist, and those bidders were asked to submit best and final proposals.

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<sup>48</sup> Hawkins Rebuttal at 12; Christianson Direct at 11.

<sup>49</sup> Gallegos Direct at 21:1-10.

<sup>50</sup> Gallegos Direct at 21:14-23.



The best and final proposals from the shortlisted bidders were evaluated based on LCOE and re-ranked by technology types. EPE then used Strategist capacity expansion modeling software and the AURORA model, which performs production cost modeling at a much more detailed level, to evaluate the bids. Both Strategist and AURORA are widely accepted in the industry for his purpose. With the exception of solar and storage (which were limited based on operational and reliability considerations discussed below), EPE modeled all shortlisted bids in Strategist.<sup>51</sup> Proposals that did not meet EPE’s total capacity need were combined with other options to create portfolios that would meet capacity requirements. Solar and solar plus storage bids were modeled in batches with varying amounts of solar only versus solar with storage to determine how to optimally apply the 300 MW of solar that may contribute to peak. EPE alleged this also involved analysis of the interrelationships of solar resources and proximity to EPE’s service territory and associated transmission upgrade costs. EPE claimed that the Strategist modeling results determined the most cost-effective portfolios of resources selected by ranking them according to lowest Present Value Utility Cost from 2018 to 2037.<sup>52</sup> EPE then evaluated those portfolios to ensure they met reliability requirements such as reserve margin throughout a peak load day.<sup>53</sup> EPE concluded that the portfolio with the lowest Present Value Utility Cost that met operational requirements and the 15 percent reserve margin was selected – a

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<sup>51</sup> Gallegos Direct at 37:12-14.

<sup>52</sup> Gallegos Direct at 22:1-12, 37:14-22.

<sup>53</sup> Gallegos Direct at 36:17-19, 38: 1-3.

combination of four bids: (1) the Hecate Project 100 MW solar LTPPA, (2) the Buena Vista Project 100 MW solar plus 50 MW battery storage LTPPA, (3) the Canutillo Project 50 MW battery storage LTPPA, and (4) Newman Unit 6.

## 6. Analysis of Renewables Bid into 2017 RFP

EPE received a large number of solar and storage bids (both combined and stand-alone) in the 2017 RFP, prompting EPE to analyze how much solar power could be reliably used to meet peak demand and load curve, and solar resources' effect of shifting the peak hour into the evening.<sup>54</sup> Solar resources do help serve EPE's daytime peak load, but as more solar resources are added to the system, the late afternoon net peak load (which can be served by solar) is reduced to the point that it is lower than the evening load at sunset (which cannot be served by stand-alone solar). Therefore, the net load at sunset becomes the new evening peak load.<sup>55</sup> EPE's analysis showed that a total of 400 MW nameplate of solar resources (including its existing 115 MW of solar) would create the new evening peak, and that only an additional 300 MW of solar would contribute to meeting peak load.<sup>56</sup>

All resources bid into the RFP were evaluated based on their respective abilities to reliably serve peak load, and therefore analyzed based on their specific performance characteristics.<sup>57</sup> Because solar power output is non-

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<sup>54</sup> Gallegos Direct at 25, l. 2-10.

<sup>55</sup> Gallegos Direct at 25, l. 10-14 and 28, l. 7-14.

<sup>56</sup> Gallegos Direct at 28:16-21.

<sup>57</sup> Gallegos Direct at 26:1-7.

dispatchable and intermittent given its reliance on the shining sun, there is risk that such output will fall below expected levels, especially during times of system peak when reserve margins are tightest. Given this risk, EPE historically credited its 115 MW of nameplate solar capability with a 70 percent contribution towards peak in its L&R analysis. This 81 MW contribution presented a marginal risk in meeting peak as it was less than a third of EPE's reserve margin.<sup>58</sup> However, because larger amounts of solar were considered in the 2017 RFP, EPE performed a study to determine the expected capacity of solar during peak hours to reliably serve its peak load. EPE contended that this study showed that expected capacity of solar resources during peak hours dropped to 25 percent or below during high load peak hours, with two of the top eleven load hours analyzed during summer 2016 experiencing output below 25 percent. Therefore, in order to maintain system reliability and continue using its 15 percent planning reserve margin (as opposed to increasing it to account for solar intermittency), EPE determined that a 25 percent solar capacity credit toward peak was appropriate.<sup>59</sup> EPE alleged that this capacity value is consistent with the National Renewable Energy Laboratory ("NREL") analysis for solar output projections in EPE's location.<sup>60</sup> Mr. Wayne Oliver of the Merrimack Energy Group, Inc., see § C.4, *infra*, concurred

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<sup>58</sup> Gallegos Direct at 26:10-22.

<sup>59</sup> Gallegos Direct at 27:5-20.

<sup>60</sup> Gallegos Direct at 28:1-5.

that the capacity contribution credit to peak for solar of 25% used by EPE in its analysis comports with current industry standards.<sup>61</sup>

Solar intermittency was also analyzed under various scenarios of 300 MW of solar capacity at a single site or geographically dispersed in 50 MW or 100 MW capacity increments. The NREL analysis indicated a greater operational impact to solar intermittency with 300 MW single-sited facilities, which would reduce the contribution to peak and increase the need for regulating reserves. Therefore, EPE chose to limit solar options to no greater than 100 MW to mitigate reliability issues and operational impacts while still leveraging economies of scale.<sup>62</sup>

For solar plus storage proposals, EPE used an aggregate of 100 percent of battery storage nameplate plus 25 percent of solar nameplate during peak hours.<sup>63</sup> Battery storage options benefit a resource portfolio by offering firming of intermittent renewable generation for peak hour utilization and providing load shifting of energy capacity and non-dispatchable renewable resources to peak hours.<sup>64</sup>

EPE also received eight proposals that included wind power. EPE claimed that wind power output is less consistent and more variable than solar on a day-to-day basis, so much so that it is difficult to credit wind with any significant contribution to peak. EPE's analysis based on NREL wind resource output

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<sup>61</sup> Oliver Rebuttal at 3:11-20.

<sup>62</sup> Gallegos Direct at 30:14-22.

<sup>63</sup> Gallegos Direct at 29:1-7.

<sup>64</sup> Gallegos Direct at 29:18-21.

projections in the vicinity of EPE's service territory indicated that wind output would be lowest during the hours when EPE has its highest load levels in summer peak months, that the lowest wind output levels would be during July and August, two of EPE's highest peak months, and that there could be days of zero output during EPE's late afternoon/early evening peak load hours. EPE asserted that because wind power does not offer firm output for meeting peak load, it analyzed wind proposals with contributions to peak from zero to ten percent.<sup>65</sup>

## 7. E3 Analyses

EPE engaged E3 to assist in evaluating bids made in response to the 2017 RFP with E3's methodologies and tools so EPE could assess the reasonableness of its underlying assumptions, modeling results and resource selection. E3 has performed extensive analyses of the economics and reliability of high-renewable electricity systems.<sup>66</sup> E3 used its system optimization model, RESOLVE, to determine the optimal resource portfolio configuration for EPE to meet its need for additional generation starting in 2022. E3 conducted a preliminary screening analysis of resource competitiveness, with a comparison of EPE's AURORA modeling to RESOLVE, and a capacity contribution analysis of different resources and portfolios using its RECAP electricity system reliability model.<sup>67</sup> EPE alleged that E3's use of RESOLVE and RECAP, which were designed specifically to consider the economics and reliability of renewable and storage resources,

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<sup>65</sup> Gallegos Direct at 31:3-17.

<sup>66</sup> Olson Rebuttal at 33:3-11.

<sup>67</sup> Gallegos Direct at 39:18-23.

allowed E3 to select the optimal portfolio mix that minimized cost and ensured reliability.<sup>68</sup>

E3 used transmission system parameters, load forecast, generation fleet characteristics, and the LCOE analysis provided by EPE, along with its own independent assumptions for cost curves and performance characteristics. Renewable and storage capacity contributions were calculated in RECAP and used to model the portfolio via RESOLVE. RESOLVE first identified the theoretical optimal resource portfolio that offered the lowest cost, which was 103 MW solar, 200 MW solar with 100 MW storage, 54 MW storage, 150 MW wind, and 160 MW CT. This portfolio was constrained to meet EPE's reliability needs, considering the capacity contribution of each type of resource at a given level. However, this theoretical portfolio is not a real option for EPE because RESOLVE is a linear model and therefore cannot select power plants of specific sizes.<sup>69</sup>

After identifying the theoretically optimal solution, E3 identified the top resource portfolios actually available to EPE given the specific RFP options and sizes available.<sup>70</sup> EPE asserted that E3 found three portfolios extremely close in cost, within \$8 million of each other on a net present value ("NPV") basis out of a total NPV of approximately \$2 billion, including the portfolio with Newman Unit 6. EPE concluded that the E3 analysis confirmed the amounts of renewables and storage preliminarily EPE selected. EPE argued that is E3's modeling results are

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<sup>68</sup> Gallegos Direct at 40:1-4.

<sup>69</sup> Gallegos Direct at 40:16-21, 41:1-2, n. 13; Olson Rebuttal at 15:15-16:3.

<sup>70</sup> Gallegos Direct at 40:16-21, 41:1-2.

strongly consistent with the results of EPE's modeling, even though different models were used.<sup>71</sup> EPE claimed that while the portfolio with Newman Unit 6 was not the least cost portfolio of the three, the differences are very small and Mr. Olson testified that qualitative factors such as the age and condition of the steam plants would likely be the driving factor behind portfolio selection.<sup>72</sup>

EPE also asserted that E3 assessed whether gas-fired generation would continue to be needed in 2045 and beyond given New Mexico's passage of recent amendments to the Renewable Energy Act. The E3 analysis confirmed that renewables and storage cannot fully displace gas generation on the EPE system and maintain adequate reliability.<sup>73</sup> While significant quantities of renewables and storage are likely to be needed on the EPE system in the future, EPE concluded that there will still be a need for firm capacity provided by natural gas generation. EPE claimed that a new technology such as long duration energy storage, hydrogen, advanced nuclear, or carbon capture and sequestration would be needed to entirely replace gas generation. Since these technologies are not commercially-available, the E3 analysis shows that continued reliance on gas for capacity needs is required.<sup>74</sup> EPE also claimed that E3's analysis also confirmed that EPE assumptions in its evaluation of the 2017 RFP

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<sup>71</sup> Olson Rebuttal at 14:20-15:3.

<sup>72</sup> Olson Rebuttal at 11:15-18, 17:6-8.

<sup>73</sup> Gallegos Direct at 41:14-16; Olson Rebuttal at 33:16-34:9.

<sup>74</sup> Gallegos Direct at 41:14-42:7; Olson Rebuttal at 34-35.

bids did not bias against renewables, and that EPE appropriately modeled renewable characteristics.<sup>75</sup>

## **8. Independent Evaluator**

EPE retained Wayne Oliver of the Merrimack Energy Group, Inc. as Independent Evaluator (IE) of the 2017 RFP process to oversee the process and avoid any perception of EPE favoring a self-build option over any other proposed project. EPE asked Mr. Oliver to ensure the 2017 RFP process was fair, transparent, unbiased, and would result in an outcome that was in the best interests of EPE customers. Mr. Oliver was asked to ensure that the self-build options received no preferential treatment, to identify and resolve any issues concerning such treatment as they arose, to oversee EPE's evaluation and selection processes, and to review all modeling results and analysis.<sup>76</sup>

Mr. Oliver has served as project manager for 125 competitive bidding or power procurement assignments in 20 states and two Canadian provinces on behalf of electric utilities, public utility commissions, other power buyers and public sector organizations representing a range of different technologies, project structures and product types.<sup>77</sup> Mr. Oliver has also served as IE or in a similar role for over 100 competitive bidding processes for conventional supply-side resources, renewable resources, energy storage, renewables combined with

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<sup>75</sup> Gallegos Direct at 42:14-15.

<sup>76</sup> Gallegos Direct at 20:1-16.

<sup>77</sup> Oliver Direct at 1:9-12, 2:3-7.



storage, and demand response, load management, and demand-side management resources, including several all-source solicitations.<sup>78</sup> Mr. Oliver found that the 2017 RFP resulted in the least cost resource portfolio based on actual bids received that met all of EPE's reliability and operational requirements.<sup>79</sup>

### **B. Certificated Estimated Cost of Newman Unit 6**

The estimated capital cost to construct the Newman Unit 6 project is approximately \$141.2 million, which includes the plant equipment, site work, and natural gas interconnection and upgrades necessary for installation, as well as \$3.1 million in estimated generation side interconnection costs and a contingency of \$5 million.<sup>80</sup> This does not include AFUDC, which is estimated at an additional \$18.1 million, or transmission interconnection costs or costs of necessary upgrades at the Newman Generating Station.<sup>81</sup> The estimated capital cost has been confirmed by EPE's Power Generation Department as an accurate estimate.<sup>82</sup> The estimated AFUDC was calculated each month based on the sum of accumulated construction cash flow for the preceding month plus one-half the construction cash flow for the current month, multiplied by EPE's weighted average cost of capital. EPE's WACC includes a return on equity of 9.65%, based upon the amount approved for EPE's AFUDC calculations in EPE's most recently

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<sup>78</sup> Oliver Direct at 2:8-13.

<sup>79</sup> Oliver Direct at 18:7-13.

<sup>80</sup> Hawkins Direct at 16; Sidler Direct at 12.

<sup>81</sup> Schichtl Direct at 14, Exhibit JS-1.

<sup>82</sup> Hawkins Direct at 16.

completed rate case in Texas as required by the FERC Uniform System of Accounts.<sup>83</sup>

EPE expects to finance the total cost of Newman Unit 6 through cash from operations, debt, common stock equity, a potential equity commitment from its parent, or a combination. EPE has a revolving credit facility and long-term debt mechanisms available for financing. The cost of Newman Unit 6 will not significantly change its financial position.<sup>84</sup>

Measured on a \$/kW basis, the proposed cost of Newman Unit 6 will be approximately \$620/kW, after adjustment for higher ambient temperatures, minimal humidity and higher elevation at the Newman Generating Station, all of which reduce the rated capacity of the unit which is based on construction at sea level and operation at 59 degrees Fahrenheit and 60 percent relative humidity.<sup>85</sup> Staff found this cost very favorable in comparison to the average base total overnight cost of approximately \$1,101/kW for a conventional 100 MW CT brought online in 2016.<sup>86</sup>

Pursuant to Rule 580, EPE requests that the Commission include in its Final Order in this case a “Certificated Estimated Cost” for Newman Unit 6 of \$159.3 million, which is the sum of the estimated capital cost and AFUDC.<sup>87</sup>

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<sup>83</sup> Schichtl Direct at 15.

<sup>84</sup> Schichtl Direct at 15-16.

<sup>85</sup> Hawkins Direct at 17 and 14-20.

<sup>86</sup> Sidler Direct at 10:23-11:3. Overnight cost is defined as the present value cost that would have to be paid as a lump sum up front to completely pay for a construction project. *Id.* at n. 12.

<sup>87</sup> Schichtl Direct at 17:1-2.

### **C. Informational and Notice Filings**

EPE averred that it had provided the necessary information regarding the purpose, construction details and new capacity data required under Rules 440 and 570. Further, EPE submitted its Rule 440 and Rule 570 compliance filings to the Commission.

### **D. Staff's Position**

Staff reviewed EPE's Application and the testimonies provided with that Application, along with additional information supplied by the Company pursuant to the parties' interrogatories and discussions with EPE.<sup>88</sup>

Staff claimed that it generally utilizes the following information in determining whether a specific facility meets the public convenience and necessity standard:

1. Information or studies showing need or use for the facility being proposed;
2. Information providing specific cost information for the facility being proposed;
3. Environmental, ecological and/or cultural impact studies for the facility being proposed;
4. Specific information demonstrating that the proposed facility is the most economical choice among any feasible alternatives; and
5. Demonstration that no valid public opposition to the project exists.<sup>89</sup>

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<sup>88</sup> Staff Exh. 1, Prepared Direct Testimony of Jack. D. Sidler, 6:11-13.

<sup>89</sup> Staff Exh. 1, Prepared Direct Testimony of Jack. D. Sidler, 9:15-10:9.

Staff's claimed that its analysis of the RFP documents, including the industry-standard selection criteria established by the Company, the consultation by an experienced, Independent Evaluator, and the results of the industry-standard Strategist forecasting and analysis software, leads Staff to conclude that the RFP was a fair, market-derived, effective and unbiased process, which provided the best, most cost-efficient, economically-feasible and operationally rational outcome for EPE and its customers.<sup>90</sup>

Staff acknowledges that public opposition to Newman 6 does exist amongst the intervenors in this case. However, in such a case as this, the Commission should balance the existence of that opposition against the interest that would be served should the CCN be granted. As noted before, a facility such as Newman 6 will be needed if Rio Grande 6, Newman 1 and Newman 2 are shut down.<sup>91</sup>

Newman 6 also is clearly a more affordable option for providing electricity to El Paso's customers than those older units.<sup>92</sup> However, the Commission should ensure that those older, less efficient units are actually shut down, leading to the conditions Staff recommends be attached to the CCN approval. With such conditions, the inescapable conclusion is that the Commission should grant the CCN for Newman 6. As Staff witness Tupler testified, the portfolio of generation resources chosen by EPE to meet its needs, which included Newman Unit 6, was

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<sup>90</sup> *Id.*, 9:5-13.

<sup>91</sup> See Staff Exh. 1, Prepared Direct Testimony of Jack Sidler, 10:11-16.

<sup>92</sup> *Id.*, 11:5-13.

the “best, most cost-efficient, economically feasible and operationally rational outcome for EPE and its customers.”<sup>93</sup>

Staff recommends that the Commission approve the Company’s CCN Application, with the following conditions:

a. That EPE applies for approval to abandon Rio Grande Unit 6 by 31 December 2020;

b. That EPE applies for approval to abandon Rio Grande Unit 7 no later than 120 days after the Final Order in this case with an abandonment date no later than 180 days after the Commercial Operation Date (“COD”) of Newman 6;

c. That EPE applies for approval to abandon Newman Unit 1 no later than 120 days after the Final Order in this case with an abandonment date no later than 180 days after the COD of Newman 6;

d. That EPE applies for approval to abandon Newman Unit 2 no later than 120 days after the Final Order in this case with an abandonment date no later than 180 days after the COD of Newman 6;

e. EPE shall file copies of all construction permits received for this project in this docket within two weeks of receipt of the final permit required;

f. EPE shall file in this docket the actual costs of this project, including the actual AFUDC amounts and how they were calculated, and also a comparison of the original estimate to the actual installed costs in the same format as EPE Exhibit RA-9, as soon as they become available;

g. EPE shall file a notice of the COD of this unit; and

h. EPE shall file a notice of the date that fuel costs, whether associated with start-up or commercial operation, shall first be included in EPE’s FPPCAC.<sup>94</sup>

## **E. Vote Solar**

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<sup>93</sup> Tupler Direct at 9.

<sup>94</sup> *Id.*, 4:1-5:7.

Vote Solar, argued that throughout EPE’s source selection process that led to the current Application, EPE skewed the outcome to favor EPE’s shareholders. Vote Solar alleged that EPE proposed building Newman Unit 6 despite its own consultants identifying a lower-cost portfolio with significantly less new gas capacity—even when those consultants relied on EPE’s obsolete assumption that the Company could recover the costs of a gas plant through 2063. Vote Solar concluded that the Commission should reject EPE’s Application because Newman Unit 6 is unnecessary, uneconomical, and in conflict with New Mexico’s clean energy goals.

Vote Solar argues that EPE’s Application is facially deficient when the Company has not attempted to show that building and operating Newman Unit 6 would be part of the lowest-cost portfolio that is consistent with the 2019 amendments to New Mexico’s Renewable Energy Act. Vote Solar points out that the Amended REA was signed by the Governor on March 22, 2019, eight months before EPE filed its Application and that the effective date of the amendments was June 14, 2019, well prior to EPE’s filing.<sup>95</sup> Vote Solar argues that there is no question that the amended REA applies to the Application.<sup>96</sup> Vote Solar asserts that in SB 489, the Legislature set ambitious clean energy standards that dramatically curtail the permissible role of fossil fuels in supplying retail electricity

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<sup>95</sup> S.B. 489, 54th Leg., 1st Sess. (N.M. 2019); El Paso Electric Company’s Application for a Certificate of Public Convenience and Necessity (filed Nov. 18, 2019).

<sup>96</sup> *State ex rel. Egolf v. New Mexico Pub. Regulation Comm’n*, No. S-1-SC-38041, 2020 WL 4251786, at \*7 (N.M. July 23, 2020) (citing *Hillelson v. Republic Ins. Co.*, 1981-NMSC-048, ¶ 11, 96 N.M. 36, 627 P.2d 878, for the rule that “effective law at the time of a case’s initiation is the controlling law of that case”).

sales during the design life of Newman Unit 6. The amended RPS requires that zero-carbon resources supply 100% electricity sold to New Mexico customers by 2045.<sup>97</sup>

Vote Solar argues that not only does EPE's Application lack any analysis of how the proposed addition of the Newman Unit 6 plant is consistent with the amended REA, the financial modeling supporting the Application assumes that Newman Unit 6, a carbon-emitting gas unit, will continue supplying electricity to New Mexico customers into the 2060s.<sup>98</sup> Vote Solar concludes that EPE's failure to account for the requirements of New Mexico law is inexcusable. Vote Solar also concludes that these amendments bar EPE from using carbon-emitting gas units like Newman Unit 6 to provide electricity to New Mexico customers after 2045 but that EPE assumes that the plant will operate well into the 2060's. Vote Solar claims that EPE is asking the Commission to approve Newman Unit 6 now and worry about whether it can comply with New Mexico's clean energy mandate later. Vote Solar argues the Commission cannot ignore the REA when considering EPE's Application, as it directly affects whether Newman 6 is in the public interest.

Vote Solar also asserts that one of EPE's primary rationales for ignoring the amended REA in determining the service life of Newman Unit 6 seems to be that it expects it can simply switch Newman Unit 6 over to Texas customers in 2040.<sup>99</sup>

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<sup>97</sup> NMSA 1978, § 62-16-4(A)(6).

<sup>98</sup> Ex. VS-2, *Direct Testimony and Exhibits of Michael Goggin on Behalf of Vote Solar* ("Ex. VS-2, Goggin Direct"), Ex. MG-9, pp. 18–19 (Apr. 24, 2020).

<sup>99</sup> Ex. EPE-12, *Rebuttal Testimony of James Schichtl on Behalf of EPE* ("Ex. EPE-12, Schichtl Rebuttal"), p. 51 (June 5, 2020) ("The generating unit . . . would be expected to continue to serve Texas load for its useful life, unless otherwise limited by Texas statute or regulatory requirements."). As noted

Vote Solar argues that the text of the law forecloses this tactic.<sup>100</sup> Vote Solar argues that the Commission is tasked to ensure that the RPS leads to real-world reductions in greenhouse emissions, anticipating and precluding the very rationale EPE relies on for this case. And while questions exist regarding how multi-jurisdictional utilities address the requirements of New Mexico’s REA, Vote Solar concludes that the answer to those questions is obviously not—as EPE assumed in its Application—to assume that the NM REA has no effect.

Further, Vote Solar argued that the Commission and Public Service Company of New Mexico (“PNM”) have recognized that the amended REA should inform resource planning decisions today. Citing to Case No. 19-00195-UT, the Commission adopted the Hearing Examiner’s recommendation that PNM replace the San Juan Generating Station with a portfolio of solar and energy storage resources.<sup>101</sup> One of the advantages of the adopted portfolio was that it “would accelerate PNM’s progress toward satisfying the increased RPS established in the 2019 Renewable Energy Act Amendments in Senate Bill 489.”<sup>102</sup> The Commission rejected alternative portfolios proposed by PNM and others that

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below in Section III.B, EPE has made no effort to show that Newman Unit 6 will be needed after 2040 based on cost and reliability considerations.

<sup>100</sup> NMSA 1978, § 62-16-4(B). The amended REA directs that in administering the 2040 and 2045 RPS mandates, the Commission shall “prevent carbon dioxide emitting electricity-generating resources from being reassigned, re-designated or sold as a means of complying with the standard” and “ensure that the standard does not result in material increases to greenhouse gas emissions from entities not subject to commission oversight and regulation.”

<sup>101</sup> Case No. 19-00195-UT, *Order on Recommended Decision on Replacement Resources - Part II*, p. 15 (July 29, 2020) (“San Juan Order”).

<sup>102</sup> Case No. 19-00195-UT, *Recommended Decision on Replacement Resources - Part II*, p. 124 (June 24, 2020) (“San Juan RD”).



included new gas generation, noting that the use of natural gas turbines is also 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)." <sup>103</sup> According to Vote Solar, in proposing its new gas-fired additions, PNM appropriately modeled the useful lives and depreciation using the assumption the new gas plants would no longer be in service after 2040.<sup>104</sup> As it demonstrated in Case No. 19-00195-UT, Vote Solar argues that the Commission must consider whether CCNs for capacity resources will position a utility to comply with the RPS in a cost-effective manner.

According to Vote Solar, the most glaring conflict between EPE's Application and the revised RPS is EPE's assumption that it will be able to use Newman Unit 6 to serve New Mexico customers long after 2045. The modeling of portfolios including Newman Unit 6 by EPE and its contractor E3 all assumed depreciation based on a useful life of 40 years.<sup>105</sup> Assuming Newman Unit 6 began operation as planned in 2023, this means that EPE's financial modeling assumes that New Mexico ratepayers would keep paying for the unit through 2063—18 years after New Mexico law requires that all electricity sales be provided by zero-

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<sup>103</sup> San Juan Order, p. 13.

<sup>104</sup> San Juan RD, p. 118.

<sup>105</sup> *Id.* at Ex. MG-2, pp. 112, 114 of 127. Elsewhere, EPE assumed an even longer useful life for Newman Unit 6. Tr. Vol. 4, 7/23/2020, pp. 802:20–803:11 (Mr. Schichtl admitting that a 45 year depreciation was used to calculate the first year rate impact shown for the selected portfolio).

carbon sources and 25 years after the 80% renewable energy requirement becomes effective.<sup>106</sup>

Vote Solar also claimed that while the Application was pending, EPE filed a general rate case, which includes a request to accelerate depreciation of its existing gas assets so that their costs are recovered no later than 2045.<sup>107</sup> Vote Solar noted that Staff witness Jack Sidler agreed that it is inconsistent and problematic for EPE to use 40 year depreciation when seeking to get a unit added to rate base, at the same time it is asking rate payers to pay accelerated depreciation for gas units already in rate base.<sup>108</sup> Vote Solar concluded that EPE's depreciation assumptions skewed their resource selection in favor of fossil resources because depreciating the plants by 2040 or 2045 would make a gas unit more expensive in a net-present-value calculation.<sup>109</sup>

Vote Solar also claimed that EPE artificially inflated its need for new capacity by assuming zero energy imports for the year Newman Unit 6 would come online, when in fact the Company can rely on up to 150 MW of annual imports to meet capacity needs.

According to Vote Solar, EPE unjustifiably assumed that wind resources could not provide any capacity contribution to peak demand, and failed to

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<sup>106</sup> Tr. Vol. 4, 7/23/2020, p. 803:6–11.

<sup>107</sup> Tr. Vol. 3, 7/22/2020, p. 765:1–5.

<sup>108</sup> Tr. Vol. 5, 7/24/2020, p. 1167:5–10.

<sup>109</sup> *Id.* at 1101:8–12. See also *id.* at p. 1164:7–11 (Staff witness Jack Sidler testifying to his belief that if the useful or recoverable life of Newman Unit 6 were deemed to be only 23 years for cost of service purposes, that would increase the cost of Newman Unit 6 relative to other potential resources).

pursue a contract for a 150 MW wind resource recommended by its consultants' modeling. The amended REA directs that in administering the 2040 and 2045 RPS mandates, the Commission shall "prevent carbon dioxide emitting electricity-generating resources from being reassigned, re-designated or sold as a means of complying with the standard" and "ensure that the standard does not result in material increases to greenhouse gas emissions from entities not subject to commission oversight and regulation." Vote Solar hypothesized that if EPE correctly valued capacity from its planned solar procurements, fixed the false assumption that market resources would disappear in 2023, and procured 150 MW of wind resources, these resources would provide more capacity than Newman Unit 6.

According to Vote Solar, EPE also stacked the deck for Newman Unit 6 by overestimating the cost of extending the life of its older gas units for a limited period. Vote Solar argued that EPE modeled life extensions following an expensive maintenance program prepared by Burns and McDonald, but admitted that it would not follow the Burns and McDonald replacement schedules in the event it continued to operate the older plants. Instead, EPE would continue to apply its own Predictive Maintenance Program, which is much less expensive.

Vote Solar maintained that on top of their biases against renewable resources and the Company's depreciated gas units, EPE's models favor Newman Unit 6 by overstating the reliability of gas units. Specifically, EPE failed to account for the risk of correlated gas plant outages. Vote Solar also argued fuel

interruptions and other contingencies can cause multiple gas units to fail at the same time, a phenomenon that EPE has observed on its own system. Vote Solar also alleged that EPE’S analysis does not account for the risks associated with adding even more gas capacity. Vote Solar argued that the Commission should be especially skeptical of EPE’S claim to need more gas capacity in light of the EPE’S recent building of new gas-fired units. EPE has built six new gas plants in the last eleven years, and the useful lives of all of them extend well past 2045:<sup>110</sup>

<u>Unit Name</u>	<u>Summer Net</u>	<u>Commission</u>	<u>Current</u>
Rio Grande 9	88	2013	2058
Montana 1	88	2015	2060
Montana 2	88	2015	2060
Montana 3	88	2016	2061
Montana 4	88	2016	2061
Newman 5	262	2009	2061

As to EPE claims that it needs the flexibility of gas generation with “fast-ramping”<sup>111</sup> capabilities, daily cycling ability<sup>112</sup>, and “quick-start”<sup>113</sup> capability. Vote Solar argues that EPE does not explain why units in its current fleet cannot meet that need. According to Vote Solar, EPE witness Omar Gallegos explains

<sup>110</sup> Ex. EPE-1, Gallegos Direct, p. 15 (Table OG-04).

<sup>111</sup> EPE Br., pp. 7, 19.

<sup>112</sup> *Id.* at pp. 9, 11, 17–18, 20.

<sup>113</sup> *Id.* at pp. 19–20.

that the five 88 MW combustion turbines in the table above all have “low turn-down, quick-start, and fast ramping capabilities.”<sup>114</sup>

Vote Solar also argued that evidence adduced in discovery and at the hearing proved that EPE showed blatant favoritism for its self-build options. EPE did not receive a bid for a 226 MW combustion turbine at Newman Station by the deadline for bids; the Newman Station bids submitted by EPE’s Power Generation team were for much larger combined cycle gas turbine (“CCGT”) units. EPE only received the 226 MW combustion turbine (“CT”) bid because it sent its Power Generation team an exclusive invitation to submit a late bid option for a CT and that other RFP participants were not afforded the same opportunity. Further, Vote Solar alleges that EPE repeatedly reached out to the EPE Power Generation after receiving its post-deadline CT bid, allowing its Power Generation team to correct critical deficiencies in the bid for the Newman Unit 6 CT well after the bid deadline.

Vote Solar argues that EPE’s proposal to construct a large and expensive gas combustion turbine is inconsistent with New Mexico’s clean energy mandates, rife with errors and bias, and would expose ratepayers to unnecessary risk and that the Commission should deny EPE’s Application.

Vote Solar also alleged that EPE’s failure to recognize the full capacity value of solar resources handicapped Solar’s ability to compete against other resources and created a fictitious need for capacity.

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<sup>114</sup> Ex. EPE-2, Gallegos Rebuttal, p. 49:11-13.

Vote Solar argued in the alternative that if the Commission does allow EPE to construct this facility, it should explicitly state in its order that it will not allow the utility to accelerate depreciation or recover the costs of the unit from New Mexico customers past 2045.

As to EPE's criticisms of potential life extensions for existing plant, Vote Solar averred that EPE has a history of understating the effectiveness of its Predictive Maintenance Program in CCN cases: in 2012, EPE asked the Commission to approve construction of Montana Units 1 and 2, in order to replace Rio Grande Unit 6 and Newman Unit 2, then scheduled to retire in December 2015.<sup>115</sup> After Montana Units 1 and 2 were approved, EPE changed its mind on Newman Unit 2 retirement, deciding that it could run reliably in active service for another seven years.<sup>116</sup> Vote Solar concluded that extending the life of an existing unit by a few years could buy time to acquire additional carbon-free resources that are lower-cost than Newman Unit 6.

#### **F. CCAE**

CCAЕ argued that Newman 6 should be denied because EPE had a less-costly alternative that would have provided greater system benefits and less risk, and would have better positioned New Mexico to meet increasing renewable

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<sup>115</sup> Case No. 12-00137-UT, *Final Order Adopting Recommended Decision*, Ex. 1, pp. 6–7 (Jan. 23, 2013) (“In addition, EPE currently anticipates retiring Rio Grande Unit 6 (45 MW) at the end of December 2014 and Newman Unit 2 (76 MW), one of EPE’s local units that has dual fuel capability, at the end of December 2015. The Montana Units 1 and 2 will fully cover the loss of approximately 121 MW from these older, less efficient units.”).

<sup>116</sup> Ex. EPE-2, *Rebuttal Testimony of Omar Gallegos*, p. 19:4–19:14 (June 5, 2020).

requirements. CCAE Witness O’Connell, a Professional Engineer and former PNM employee, testified that EPE did not reasonably consider alternatives to Newman 6; that Newman 6 is not the most cost-effective among reasonable alternatives; Newman 6 is not even the best resource for EPE’s system. Newman 6 increases system risks of outages compared to the least-cost alternative. Mr. O’Connell concluded that EPE had not met its burden of proof for a CCN, and its request should not be granted.

Mr. O’Connell testified that the evidence shows the selection of a 228 MW gas combustion turbine was a poor choice among the feasible alternatives available to EPE. It is more expensive, less fuel-efficient, and less flexible, and there were other technologies available among the bids EPE received that make more sense when the longer-term ETA requirements are considered.<sup>117</sup>

Mr. O’Connell also testified that the three units EPE plans to retire and replace with the capacity in 19-00348-UT and 19-00349-UT have not been maintained in accordance with the life extension report from Burns & McDonnell that showed additional, considerable investment will be required after 2022 to rely on the three old gas units EPE indicated it plans to retire, however according to CCAE, EPE has not provided the amount of investment required to continue the plants availability through 2025.<sup>118</sup>

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<sup>117</sup> CCAE Exh. 31, O’Connell Direct at 4-5.

<sup>118</sup> CCAE Exh. 31, O’Connell Direct at 7-9.

CCAIE concludes that based upon the failure of EPE to provide the full cost impacts of EPE's replacement plan EPE is unable to show that unnecessary duplication and economic waste will not occur. CCAIE argues that the cost impact of a replacement plan could have been provided to the Commission in an abandonment proceeding as well, but EPE has chosen not to file for abandonment of its three older gas units. Additionally, CCAIE claims that an estimate of the cost of a retirement plan is needed to demonstrate that a CCN request is in the public interest.

CCAIE avers that there will however be ongoing, potentially significant, costs associated with maintaining the availability of the units slated for retirement for up to five more years. 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>119</sup>

Mr. O'Connell further alleges that EPE's proposed 228 MW Newman 6 would leave only 76 MW of reserve capacity if it tripped offline, even less than a Palo Verde unit. Newman 6's addition EPE would result in a fourth large unit representing 70% or more of its planning reserves. He concluded that this increases the chance of an outage resulting in a significant loss of reserve capacity; it adds to the very risk a reserve margin is intended to mitigate. Mr. O'Connell concludes that prudent planning would favor resources that

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<sup>119</sup> CCAIE Exh. 31, O'Connell Direct at 10.



decreased rather than increased this risk to EPE's system by selecting smaller gas units as replacement resources.<sup>120</sup>

CCAIE argues that EPE inadequately considered alternatives to the resource choice consistent with its rejected 2018 IRP. Whether a utility has properly evaluated alternatives is an issue to be determined based upon the evidence in a hearing.<sup>121</sup>

EPE evaluated the proposed Newman 6 plant favorably as it was "consistent with" EPE's prior IRPs. Mr. Schichtl testified, "Yes, as discussed by EPE witness Gallegos, the addition of a gas turbine is consistent with EPE's most recently accepted 2015 IRP and more recently filed [2018] IRP"<sup>122</sup> while also acknowledging the reason EPE's 2018 IRP was not accepted by the Commission. The order contends that the ETA includes amendments to the REA that will substantially increase renewable portfolio standards and change the way that renewable energy costs are considered in complying with the REA.<sup>123</sup> CCAIE concludes that EPE's adherence to the conclusions of an "obsolete" IRP is problematic.

CCAIE also criticizes EPE's use of Strategist, which it claims is an outdated software tool for consideration of integrating renewable energy. Strategist does not adequately value renewable contributions to serving load. EPE's Strategist

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<sup>120</sup> CCAIE Exh. 31, O'Connell Direct at 11.

<sup>121</sup> See, *In the Matter of Pub. Serv. Co. of New Mexico's Renewable Energy Act Plan for 2018 & Proposed 2018 Rider Rate Under Rate Rider No. 36 Pub. Serv. Co. of New Mexico, Petitioner*, NMRPC Case 17-00129-UT, 2017 WL 3535908, at \*4 (NMPRC Aug. 11, 2017).

<sup>122</sup> EPE Exh. 11, Schichtl Direct at 11:10-15.

<sup>123</sup> EPE Exh. 11, Schichtl Direct 11:10-12:4(emphasis added).

results differed significantly with E3's and NREL's. Strategist, a platform Mr. O'Connell used in the past, requires conservative assumptions for renewable energy to ensure it produces adequately reliable portfolios. This kludge undervalues renewable energy resources within a Strategist analysis.<sup>124</sup> CCAE avers that modern NREL and E3 platforms can model a portfolio with renewable resources probabilistically and are therefore better tools for considering the contributions of wind and solar to a generation portfolio.

The NREL study provided a basis for the Strategist modeling assumptions employed by EPE for the marginal value of solar and wind capacity additions, and determined that for EPE's service territory, wind and solar resources are complementary.<sup>125</sup> The E3 and NREL studies determined a wind energy resource would reduce the gas capacity need, and the synergy between solar and wind provided more capacity than either resource alone.<sup>126</sup> CCAE argues that significantly, E3 identified a least cost portfolio constructed with a smaller new gas unit, a wind resource, a paired battery and solar resource and a Newman 1 life extension.<sup>127</sup> The E3 study used the same short-listed bids EPE used in Strategist modeling and from those bids selected the least cost resource portfolio which the E3 study referred to as, "Scenario 3."

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<sup>124</sup> CCAE Exh. 31, O'Connell Direct at 17:8-20.

<sup>125</sup> CCAE Exh. 31, O'Connell Direct at 18:9-13.

<sup>126</sup> CCAE Exh. 31, O'Connell Direct at 18:9-14.

<sup>127</sup> CCAE Exh. 31, O'Connell Direct at 13, and EPE Ex. 1, Gallegos Direct, Attachment OG-6 El Paso Portfolio Analysis Final Summary Results at 16 of 32.

Scenario 3 is least cost not only under the base set of assumptions, but also under the 300 MW Export, Low Battery Cost and Low Fuel Cost sensitivities. EPE's request in this case, however, is most similar to E3's Scenario 1, and it comes in second to Scenario 3 in two out of the four price environments analyzed. EPE's proposed portfolio is never the least cost.<sup>128</sup> The optimized portfolio and all E3 Scenarios EPE modeled from actual bids included a 150 MW wind resource.<sup>129</sup> E3's Scenario 3 was made up of the short-listed bids from EPE's 2017 RFP and was least cost on an NPV basis. In addition to the 150 MW wind, it included a 5-year extension of Newman 1 (76 MW), a 49 MW CT and 50 MW of solar paired with a 25 MW battery resource. It provided the smallest thermal fleet.<sup>130</sup> Notably, Scenario 3, the portfolio with the smallest thermal fleet, more closely matched the theoretical optimal portfolio, RESOLVE Select, than Scenario 1, which included the Newman 6 units.<sup>131</sup>

CCAЕ concluded that Scenario 3 would have locked in less new gas generation (only 49 MW versus 228 MW) and provided EPE with more time to plan its system to incorporate more renewables by extending Newman 1 for 5 years, as well as provided additional renewables that could be used for NM RPS compliance.

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<sup>128</sup> O'Connell Direct at 18, 19.

<sup>129</sup> See, EPE Exh. 1, Omar Direct, Attachment OG-6 at 19 of 32, "RESOLVE Results, Base Scenarios".

<sup>130</sup> O'Connell Direct at 19.

<sup>131</sup> See, Tr. Vol 1 (7/20/2020) at 192:9 to 196:4.

Further, CCAE argued that the wind resource that was part of E3's optimized portfolio and all four of the Scenarios modeled by E3 would have provided a transmission benefit. It would have generated RECs that could have been applied to New Mexico's RPS requirement. The 150 MW wind resource that was shortlisted and included in all of the E3 portfolios would have generated 629,6000 MWh of energy and RECs without curtailment<sup>132</sup> However, "EPE did not assign a value to the RECs for analysis."<sup>133</sup>

CCAIE alleges that EPE did not factor the requirements of the increased Renewable Energy Standard into its choice of Newman 6. EPE's resource selection of the 228 MW combustion turbine did not account for the elimination of emissions from fossil fuel resources for New Mexico service by 2045. CCAIE concludes that EPE's proposed Newman Unit 6, which ignores its own expert's analysis, would result in a larger than necessary gas plant using a technology that does not best meet the important goals of reducing fuel cost and accommodating new renewable energy."

EPE presents a false choice in framing its decision as between Newman 6 versus life-extensions for its three near-retirement gas units.<sup>134</sup> Allowing Texas-centric system planning instead of system planning to accommodate all of EPE's customers could result in higher costs, unnecessary duplication and economic waste for New Mexico customers. CCAIE argues that as a multi-jurisdictional

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<sup>132</sup> See, CCAIE Exh. 35.

<sup>133</sup> CCAIE Exh. 36.

<sup>134</sup> CCAIE Ex. 31 O'Connell Direct at 22.

entity, there are two ways EPE can accommodate its New Mexico's RPS requirements. EPE may either allocate renewable system resources to its New Mexico customers, or procure dedicated resources for its New Mexico customers to meet the RPS. EPE did exactly that in NMPRC 19-00099-UT. Mr. Schichtl explained that EPE has historically allocated system resources on the basis of how they are used. However, if New Mexico customers paid the price differential for allocating renewable system resources to New Mexico for RPS purposes and Texas customers were held harmless, there is no legal impediment preventing EPE from proposing that arrangement to its Texas customers.

#### **G. Attorney General**

Attorney General argues that EPE's residential and small business customers may be negatively affected if EPE's requested approval of a CCN, to construct and operate a new, 228 megawatt natural gas-fired combustion turbine at Newman 6 is granted in this case. The Attorney General also alleges that Newman 6 is not needed at this time, thus, it cannot provide a "net public benefit" to EPE's customers.

In criticizing EPE's planning reserve margin, which EPE uses as a justification for acquiring Newman 6, the Attorney General avers that that 15% is artificially higher than necessary. 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.<sup>135</sup> Further, the Attorney General argues that Newman 6 would contribute to the outage risks that a planning reserve margin seeks to mitigate.<sup>136</sup> The Attorney General concludes that 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. It is possible for EPE to operate these Newman 1, Newman 2, and Rio Grande 7 beyond 2022.<sup>137</sup> Additionally, Attorney General claims that EPE failed to perform any analyses for extending these older resources in the short-term. Further, Attorney General concludes that the resources recently approved in Case No. 19-00348-UT help to alleviate EPE's short-term capacity needs.<sup>138</sup>

The Commission has placed weight on the factor of legal compliance, specifically RPS compliance, in granting approval of new generation resources.<sup>139</sup> In 2019, the New Mexico Legislature made drastic changes to New Mexico's public utilities laws with the passage of the ETA and amendments to the REA (specifically the RPS), together in Senate Bill 489 ("SB489"). SB489 represented such a dramatic shift that the Commission threw out EPE's integrated resources plan

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<sup>135</sup> Direct Testimony of Michael Goggin at 19:7-24:8.

<sup>136</sup> Direct Testimony of Patrick J. O'Connell at 9:4-11:19.

<sup>137</sup> *Id.*

<sup>138</sup> *Id.*

<sup>139</sup> 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.").

for being “largely obsolete.”<sup>140</sup> The new RPS cannot be ignored. 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 SB 489.<sup>141</sup> Attorney General argued that 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.<sup>142</sup> The public interest requires that duty for the sake of prudence and good faith. EPE did not meet that duty.<sup>143</sup> The zero-carbon RPS requirement cannot be achieved while Newman 6 generates energy for EPE’s retail service. By ignoring the amended REA and RPS in its Application, EPE failed to meet its duty as required by the public interest.

As have other Intervenors, Attorney General references Case No. 19-00195-UT, and the Commission’s consideration of replacement resources under the amended RPS requirements and the Commission rejection of a new 280 megawatt natural gas-fired generation plant.<sup>144</sup> The Commission noted further

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<sup>140</sup> Direct Testimony of James Schichtl at 11:17-12:1; Tr. 848:10-850:25 (Jul. 23, 2020).

<sup>141</sup> Tr. 237:7-11 (Jul. 20, 2020).

<sup>142</sup> 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.).

<sup>143</sup> 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).

<sup>144</sup> See Case No. 19-00195-UT, Order on Recommended Decision on Replacement Resources – Part II (Jul. 29, 2020). 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).

deficiencies of adding new natural gas units, including future stranded costs and possible transfer of the unit (which according to the Attorney General, the Commission has a duty to prevent<sup>145</sup>). Attorney General concluded that 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.

#### **H. City**

EPE's original Application and direct testimony and exhibits in this case, filed on November 18, 2019, were uniformly criticized by the intervenors for failing to address the implications of the increased RPS requirements of the amended REA.<sup>146</sup> In his Rebuttal Testimony, EPE's Vice President of Regulatory Affairs, James Schichtl, essentially argued that the selection of Newman Unit 6 was not affected by the spring 2019 passage and effective date of the amendments to the REA because the Company had announced in December 2018 its selection of the proposals in response to its 2017 All Source RFP for which it intended to pursue contract negotiations.<sup>147</sup> City argued that Staff simply ignored the REA altogether. The Act is not mentioned in the direct testimony of either Staff witness.

City concluded that there is no evidence whatsoever in this case indicating that EPE has a "plan" of its own for a reasonable, REA-compliant, and cost-effective transition to more renewable energy resources and, critically, zero

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<sup>145</sup> § 62-16-4(B)(4).

<sup>146</sup> See NMSA 1978, §§ 62-16-4(A)(5), (A)(6), (B)(4).

<sup>147</sup> See EPE Ex. 12, Schichtl Rebuttal at 30-32.



reliance on gas-fired energy for New Mexico retail customers. According to City, the only hint of an EPE “plan” is evidence presented at hearing that EPE is proposing, in its pending general rate Case No. 20-00104-UT, to accelerate the depreciation of all of existing gas-fired generating units so that they are fully depreciated by 2045.<sup>148</sup> Thus, EPE’s “plan” appears to be to recover the costs of all its 1,474 MWs of existing gas-fired generation from New Mexico ratepayers by 2045, even though nearly half of that capacity is from units with expected lifetimes that extend well beyond that date.<sup>149</sup>

City argues that all of EPE’s Strategist and Aurora modeling of portfolio options and all of consultant E3’s RECAP modeling of the Effective Load Carrying Capacity (“ELCC”) of additional renewable energy and storage and RESOLVE modeling of portfolio options were performed before the REA was amended.<sup>150</sup> None of the modeling reflected the amended REA’s rigorous renewable energy requirements or the costs associated with early retirement of any of EPE’s gas-fired generating facilities, existing or proposed.<sup>151</sup> While the Company is not expected to foresee future action by the legislature, it is required to comply with applicable legislation once the law has changed. City argues that EPE did none of these things.

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<sup>148</sup> See 7/22/2020 Tr. 760-66; CLC Ex. 57 (administrative notice taken 7/22/2020 Tr. 766).

<sup>149</sup> Cf. EPE Ex. 1, Gallegos Direct at 15 & Ex. OG-3 (45 MW Rio Grande Unit 6 excluded from Table OG-04, Anticipated Retirement of EPE Resources).

<sup>150</sup> See, e.g., EPE Ex. 3, Oliver Direct at Ex. WJO-4, pp. 33-45; EPE Ex. 1, Gallegos Direct at Ex. OG-6 (E3 EPE Portfolio Analysis dated Jan. 20, 2019).

<sup>151</sup> See *id.*; see also 8/22/2020 Tr. 578 (Olson) (none of E3’s modeling for EPE included any RPS constraints).

According to City, this case boils down to EPE's claimed "need" to replace four older gas-fired generating units. As other parties have done, City criticizes EPE's non-retirement of generation resources that EPE previously asserts will be retired, and its practice of seeking replacement of resources prior to receiving formal abandonment approval from the Commission, which City refers to as engaging in a game of "regulatory chicken". City argues that the Commission is not prevented, and in fact, should utilize its regulatory jurisdiction over assets dedicated to public service, specifically in this case to deny EPE's CCN request because EPE has not demonstrated that replacing old gas units with Newman 6 will result in a net public benefit.

City also argued that Staff's cost comparisons are fundamentally irrelevant. According to City, whether the cost of Newman Unit 6 is comparable to that of other gas-fired generation obviously has no bearing on whether that unit was appropriately selected as "the most cost effective among feasible alternatives."<sup>152</sup> Even whether EPE's estimated costs of extending the lives of Rio Grande Unit 7 and Newman Units 1 and 2 are higher than EPE's estimated "overnight" capital cost for Newman Unit 6 is of little or no relevance to determining the most cost-effective feasible portfolio among many bid options.

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<sup>152</sup> NMPRC Case No. 17-00142-UT, Recommended Decision at 4, (Nov. 17, 2017), adopted by Final Order Adopting Recommended Decision (Nov. 29, 2017) (citing NMPRC Case No. 15-00261-UT, Corrected Recommended Decision at 96 (Aug. 15, 2016), adopted in relevant part by Final Order Partially Adopting Corrected Recommended Decision (Sept. 28, 2016)).

City also claims that EPE's and Staff's simplistic cost comparisons are rife with errors.

City also argues that E3's analysis favored extension of Newman Unit 1 over construction of Newman Unit 6 even though its modeling was done with no RPS constraints.<sup>153</sup> E3's modeling, completed by the end of January 2019, did not reflect the 20 percent RPS requirement that was in effect indefinitely before the REA was amended in 2019.<sup>154</sup> E3's RESOLVE analysis picked a five-year extension of Newman Unit 1 followed by procurements of solar and battery storage in 2028.<sup>155</sup>

City also argues that EPE's Brief misrepresents both the nature of E3's analysis and its conclusions. At least three times EPE asserts that E3's analysis verified that Newman Unit 6 was part of the most cost-effective portfolio, before finally admitting that the portfolio modeled by E3 that included Newman Unit 6 as a forced-in resource was "not the least cost portfolio of the three" but came within \$8 million of the lowest cost scenario other than E3's RESOLVE Select without EPE-mandated resource choices.

City also took issue with EPE's use of a 15% reserve planning margin. According to City, the Commission should be wary of providing any sort of

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<sup>153</sup> See 7/22/2020 Tr. 578 (Olson).

<sup>154</sup> See *id.*; see also EPE Ex. 1, Gallegos Direct at Ex. OG-6 p. 1 of 32; CLC Ex. 41, EPE's Responses to Interrogatory CLC 1-16 at Attachment 9, Attachment 10; NMSA 1978, cf. §62-16-4(A)(1)(d) (2014) (former 2020 RPS).

<sup>155</sup> See EPE Ex. 1, Gallegos Direct, Ex. OG-6 pp. 16, 19 of 32; cf. 7/21/2020 Tr. 569, 582, 600 (Arne Olson testified that E3 did not analyze EPE's portfolio needs under the amended REA and that his reference to REA compliance was "generic" rather than specific to the New Mexico Act's requirements).

approval for EPE's planning reserve margin in its determination on the merits of this CCN application for at least three reasons. First, the record overwhelmingly demonstrates that no regulatory body of any sort requires EPE to maintain a 15 percent planning reserve margin.<sup>156</sup> Second, E3's analysis of Effective Load Carrying Capacity ("ELCC") reflects the modern loss of load probability ("LOLP") approach to assessment of system reliability when portfolios include solar and wind generation resources, not EPE's static and obsolete planning reserve margin approach.<sup>157</sup> Mr. Olson testified that E3 used its RECAP model to calculate a planning reserve margin to be used in its RESOLVE modeling that would enable EPE to meet the industry-standard Loss of Load Expectation ("LOLE") of 2.4 hours per year, or 24 hours in ten years.<sup>158</sup> All of the portfolio scenarios that E3 modeled—four including specific resources forced in by EPE and the RESOLVE Select that did not include any forced-in resource selections—exceeded that criterion.<sup>159</sup> Third, in a bench request issued by Commissioner Fischmann during the hearing, EPE was asked to calculate EPE's system peak requirements inclusive of a 15 percent reserve margin at various LOLE levels. EPE's response calculated an 18 percent reserve margin was necessary to achieve an LOLE of 2.4 hours per year, and a reserve margin of 14 percent would suffice to achieve an LOLE of 4.8 hours per

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<sup>156</sup> See, e.g., EPE Ex.7, Olson Rebuttal and 23; EPE Ex. 1, Gallegos Direct at 11.

<sup>157</sup> See, e.g., EPE Ex. 7, Olson Rebuttal at 23-26; CCAE Ex. 31, O'Connell Direct at 17; Vote Solar Ex. 2, Goggin Direct at 19-34.

<sup>158</sup> See EPE Ex. 7, Olson Rebuttal at 12-13, 23-26.

<sup>159</sup> See *id.* at 14; see also EPE Ex. 1, Gallegos Direct at Ex. OG-6, p. 20 of 32.

year.<sup>160</sup> In Case No. 19-00195-UT, the Commission accepted PNM's undisputed proposal to use a 0.2 LOLE for assessing proposed portfolios to replace its San Juan Generating Station, representing a LOLE standard of two days or 48 hours in ten years.<sup>161</sup>

### **I. Simpson**

Mr. Simpson argued that EPE's plan to build Newman Unit 6 is expensive, unnecessary, and extremely risky. He alleged that EPE has not met the burden of proof that its plan to build Newman 6 is consistent with the public convenience and necessity, or that it is the most cost-effective resource among feasible alternatives. Instead, he believed that EPE disregarded the advice of its own experts when it devalued wind and solar resources, and played up the risks of renewables while ignoring the much larger cost and reliability risks of the proposed new gas plant.

Mr. Simpson argued that the most egregious flaw in its plan is that EPE neglected to give serious consideration to the effects of the New Mexico ETA which includes RPS that will limit the useful lifetime of New Mexico's portion of any new natural gas resources, but EPE ignored the effective cost increases caused by that shortened life.

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<sup>160</sup> See EPE's Response to Commission Bench Requests Issued During Hearing at 6-7 (Aug. 8, 2020).

<sup>161</sup> See NMPRC Case No. 19-00195-UT, Recommended Decision on Replacement Resources—Part II at 30-32.

Mr. Simpson concluded that a more prudent plan would be to temporarily extend the lives of existing plants while building more renewable and storage resources which would buy enough time to conduct the modeling needed to design a lowest cost portfolio that accounts for EPE's existing portfolio, newly approved resources, and the revised New Mexico RPS.

In his justification that Newman 6 is unnecessary and wasteful, Mr. Simpson asserted that the age of the three older and much smaller EPE that EPE planned to retire was not unusual. In fact, according to Mr. Simpson, even if their lives were extended to 2027, five years beyond EPE's currently planned 2022 retirement date, their age at retirement would be within the most common age range, 60 to 70 years old, for similar Natural Gas Steam ("NGST") plants expected to retire between 2017 and 2023. In 2027, the ages of Newman Unit 1, Newman Unit 2, and Rio Grande Unit 7, will be 67, 64, and 69 years, all within the most common retirement age range of 60 to 70 years.

Mr. Simpson argues that any source of electrical power can fail, and these plants are no exception. However, their small size is an advantage in terms of overall system reliability because an individual failure has a relatively small impact on the system as a whole. They are unlikely to fail at the same time unless there is a natural gas supply issue that affects all gas plants. The largest two of these plants have a summer peak capacity of 76 MW, and the smaller one is 46 MW. Mr. Simpson avers that this means that if one does fail, its impact on EPE's ability to serve load is much smaller than the impact of failure of the proposed 228 MW

Newman 6. Mr. Simpson concludes that these plants should be maintained for capacity needs as recommended in the Burns &McDonnell studies, and run only when needed, while additional renewable and storage resources are procured to meet needs for both energy and peak capacity.

The ETA's amendments to the RPS in Section 62-16-4 NMSA 1978 are challenging. Mr. Simpson claimed that because EPE gets 40 percent of its energy from the non-renewable Palo Verde nuclear Plant 1, using up the 20% of non-renewable energy available in 2040, gas-generated energy will be excluded from New Mexico beginning January 1, 2040.

He further argued that EPE discounts the contributions of renewable resources in an attempt to justify new gas plant construction. Mr. Simpson asserted that EPE cherry picks NREL analysis to support its 25% crediting of solar towards peak, while ignoring the E3 analysis and half of the NREL analysis, both of which recommend a 40-50% credit of solar towards peak. Mr. Simpson also claimed that EPE ignored the availability of inexpensive wind resources, and the advice of its own consultants that when combined with solar, wind can effectively contribute to meeting peak demand. Mr. Simpson also concluded that EPE failed to treat multiple types of demand-side resources on a comparable basis with supply side resources, ignoring their capability to cost-effectively reduce the need for new generation.

**J. Ms. Soules**

Ms. Soules is an EPE ratepayer and resident of Las Cruces and Intervener in this case. Ms. Soules is a frequent party to EPE cases. She posits the inquiry which she considers pivotal in this case, “Should forecasted retirements serve as justification of need for new resources?” Relying upon NMSA 1978, 62-9-5 which addresses Abandonment of Service, Ms. Soules argues that “the Commission must assume that the resources in question are not being abandoned, are available, and therefore do not require replacement. According to Ms. Soules, the question becomes – is there a net public benefit to adding a new additional resource to use instead of, and in addition to, the existing available resources?”

Ms. Soules cited testimony which she believes shows that EPE has not met its evidentiary burden justifying replacement. Citing a study by the Lawrence Berkeley National Laboratory (“LBNL”), Mr. Gallegos concluded that if Rio Grande 7, Newman Unit 1 and Newman Unit 2 were retired at the end of 2022, that they would be beyond the industry average retirement age.<sup>162</sup> Yet under cross examination, Mr. Gallegos acknowledged that, should those same units not be retired for an additional 5 years beyond the end of 2022, their retirement age would actually be within the most common age projected for natural gas steam unit retirements by the same LBNL study.<sup>163</sup> Ms. Soules concluded that EPE has not demonstrated that age of Rio Grande 7, Newman Unit 1, and Newman Unit 2 is a determinant factor.

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<sup>162</sup>See Gallegos Direct Testimony, 16:17 – 17:1.

<sup>163</sup> See Transcript, pages 52-57. See also Ex. MLS-06.



As to EPE's claim that there the risk related in continuing to run Rio Grande 7, Newman Unit 1 and Newman Unit 2, Ms. Soules asserted that EPE's Mr. Hawkins testified that Rio Grande 7, Newman Unit 1, and Newman Unit 2 have been running, through 2019, with reasonable forced outage rates. He testified that Rio Grande 7, Newman Unit 1, and Newman Unit 2 each have a record of forced outage rates in 2019 significantly below the GADS fleet benchmark of 32%. Therefore, Ms. Soules concluded that Rio Grande 7, Newman 1, and Newman 2 would not appear to be a reliability risk.

Regarding EPE's assertion that economic criteria demonstrates that Rio Grande 7, Newman 1, and Newman 2 should be retire, Ms. Soules cited to Mr. Gallegos' hearing and rebuttal testimonies<sup>164</sup>, and Mr. Hawkins' Rebuttal and hearing testimonies,<sup>165</sup> for her assertions that Mr. Gallegos was unable to identify critical cost assumptions that are at the root of the economic analyses and Mr. Hawkins was also not able to define the cost assumptions used for the economic analyses related to life extensions for Rio Grande 7, Newman Unit 1, and Newman Unit 2. Ms. Soules argued that the Commission should not put a great deal of confidence in the costs used to analyze the economic impact of life extensions for the three units.

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<sup>164</sup> See Tr., pp. 3 See Hawkins Rebuttal Testimony, p. 6, lines 8-10. 0, 31, 36-39; See Gallegos Rebuttal Testimony 11:19 – 12:3.

<sup>165</sup> See Hawkins Rebuttal Testimony 6:8 – 10; Tr. pp. 434-437.

Ms. Soules asserted that the economic analyses also depend on some other inputs, including a definition of feasible alternatives, expected useful lifetimes, and assumptions for how much energy will be generated by a unit as represented by capacity factor. In each of these categories, EPE made unreasonable assumptions. Ms. Soules also criticized what she called EPE's lack of feasible alternatives, including limits on solar and wind, and EPE's failure to consider alternative lifetime extensions.

Ms. Soules also criticizes EPE for what she refers to as its history of forecasting retirements that don't happen, referring to EPE's claims in CCN and IRP cases that Rio Grande 6 would be retired in 2012, Rio Grande 7 and Newman 2 would retire in 2013, or in 2009, EPE forecasted that Rio Grande 6, Rio Grande 7, Newman 1, Newman 2, Newman 3, and Newman 4 would all be retired by the end of 2016.<sup>166</sup> "Ms. Soules testified that not one of these retirements has taken place."<sup>167</sup> Ms. Soules concluded that EPE should not be allowed to unilaterally remove the capacity of a generating unit through declaring retirement (or inactive reserve, or mothballed, or retired for planning purposes, or any other such term) without the supervision of the Commission.

Ms. Soules further claimed that EPE has a legitimate need for approximately 87 MW of additional generation capacity in the 2022-2023 time period. To the extent that the Load Forecast and other assumptions are accurate, there may be

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<sup>166</sup> Case No. 07-00301-UT. See Also 12-00137-UT, 15-00241-UT, and 18-00293-UT.

<sup>167</sup> See Soules Direct, pp. 19 – 20. See also Ex. MLS-03.

additional need of 120 MW through 2027. These conclusions are based on the imbalance of EPE generating and purchased power resources versus expected loads, considering EPE's 15% reserve margin criterion, as represented on Line 8.0 Margin Over Reserve of the Soules' 2017 L&R document.<sup>168</sup> The resources approved by the Commission in Case No. 19-00348-UT, the Hecate 1 PPA for 100 MW of solar and the Buena Vista 1 PPA for 100 MW of solar and 50 MW/4hr battery storage more than satisfy that legitimate capacity need for 87 MW of additional generation in the 2022-2023 timeframe. Ms. Soules also averred that the resources proposed in Case No. 19-00099-UT, a total of 70 MW of solar would further address the possibility of needing additional capacity in the 2023-2024 timeframe. All of these resources are consistent with the amended Renewable Energy Act.

Ms. Soules asserted that EPE relies on nuclear for 40 percent of its energy generation and natural gas for 41 percent.<sup>169</sup> Energy generation from nuclear resources is consistent with the amended Renewable Energy Act, being carbon free. Energy generation from natural gas resources is not consistent with the Renewable Energy Act. Further, almost half of EPE's existing natural gas generation capacity has planned retirement dates after the Renewable Energy

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<sup>168</sup> See Direct Testimony of Merrie Lee Soules, 27:13 – 28:1. See also Exhibit MLS-04, Loads & Resources 2018-2027.

<sup>169</sup> See Direct Testimony of Omar Gallegos, page 7, lines 16-17.

Act requires 100% carbon free generation.<sup>170</sup> This existing natural gas generation capacity is likely to result in stranded costs.<sup>171</sup>

Ms. Soules concludes that without any idea of how EPE would meet the requirements of the Renewable Energy Act, it is unreasonable for EPE to assert “that its CCN request and the larger resource procurement of which Newman Unit 6 is one part, is consistent with the REA.”<sup>172</sup> In fact, adding a large gas-fired generator when faced with both immediate and long term significant needs for renewable energy is, by definition, inconsistent with the requirements of the Renewable Energy Act. Ms. Soules argued that the public interest requires that we avoid long term commitments to burning natural gas, or any other carbon based fuel, to produce electricity to the extent that there are feasible alternatives with more attractive environmental impacts. Committing to Newman Unit 6 with an expected useful life of 40 to 45 years of burning carbon based natural gas would violate the public interest.

#### **K. Hearing Examiner Determination**

EPE’s 2017 RFP and bid evaluation process have been vigorously challenged and criticized in both this and the companion case. Some of Intervenor’s claims appear to be credible and Intervenor’s skepticism of EPE’s ultimate choice of a self-build gas plant may have some merit. Further, there are

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170 See Direct Testimony of Omar Gallegos, page 15, Table OG-04: Anticipated Retirement of EPE Resources.

171 See Direct Testimony of Merrie Lee Soules, 11:16-13:5.

<sup>172</sup> See Schichtl Rebuttal Testimony, page 25, lines 15-17.

credible criticisms about EPE's L&R analysis as well as EPE's reliance on its IRP that the Commission found to be "largely obsolete" because of 2019 Legislative changes.<sup>173</sup>

EPE asserted that Newman Unit 6 combined with the two solar LTPPAs<sup>174</sup> and the battery storage capacity resource provided the most cost-effective portfolio available through EPE's competitive bidding process to safely and reliably serve customer load over EPE's entire system while considering the economics of planned retirements versus potential life-extensions of older, inefficient units. EPE's justification for needing these resources was a small increase in load as well as replacement of aging generation that it wished to retire and ultimately abandon in the near future. EPE chose to separate the components of the bid selection into two filings with the Commission, ostensibly according to EPE, "because they had differing regulatory time periods for

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<sup>173</sup> In Case No. 18-00293-UT, the Commission issued an Order Closing Docket; Issuing a Variance From 17.7.3.12 NMAC on September 18, 2019 and found "that this docket should be closed. The 2019 Legislative session instituted major changes impacting resource planning during the 20-year period at issue. Such changes have caused the 2018 Amended IRP to be largely obsolete. The Energy Transition Act included amendments to the Renewable Energy Act ("REA") that will substantially increase renewable portfolio standards and change the way that renewable energy costs are considered in complying with the REA. See NMSA 1978, §§ 62-16-4, 62-16." And that it would be an inefficient use of the resources of the Commission, Staff, EPE, and the other participants, to continue to litigate an obsolete IRP. Finding 16. At Finding 18, the Commission found: "Finally, the Commission finds that the full capacity of Rio Grande 6 should be included in future loads and resources tables until the projected year of an abandonment filing. Excluding such capacity from loads and resources tables causes an understatement of capacity and, accordingly, a potential over investment in future capacity.

<sup>174</sup> In the companion case, 19-00348-UT, where the Commission approved the two solar LTPPAs, there was a showing that, in the near term, because of the planned abandonment of Rio Grande 6 in 2020, and because of some load growth, EPE will have some generation need in order to provide future electric services.

Commission determination, (the LTPPA's had a six month time period, while CCN's have up to 15 months)". The effect of EPE's filing bifurcation of the renewable resources and energy storage part of the bid selection into one case and the gas generation part of the bid selection into another case is either a serendipitous event or it could indicate EPE's recognition or concern regarding changes in New Mexico law and their potential impact on EPE's resource selection.

A utility is required to provide safe and reliable electricity. In the past, the means by which that electricity is provided has been largely left up to the utility with regulatory oversight provided by the Commission subject to the principles of the regulatory compact. In recent years, the New Mexico legislature began to set specific requirements for energy programs, like energy efficiency and renewable energy resources. These new energy efficiency and renewable energy resource requirements apply to New Mexico utilities.

The Amendments to the REA were passed and were effective in 2019 prior to the filing of EPE's Application in this case. As identified by Intervenors, it is necessary that the resource selection process be analyzed by all applicable legal requirements, including those imposed by SB 489, more specifically the Amended REA and RPS requirements. EPE could have modified its Application to comport with this review or even delayed filing its Application until it had analyzed its request under the Amended REA and RPS requirements. However, EPE chose to go ahead and file its Application without any analysis of how its resource selection would comply with the Amended REA and RPS requirements. According to

testimony in this case, EPE Witness Mr. Schichtl stated: “Clearly EPE could not make resource procurement decision for 80 percent of its load based on a statute that does not apply to that jurisdiction.”<sup>175</sup> The Commission is aware of EPE’s multi-jurisdictional status and that EPE provides service in Texas. However, for EPE’s service in New Mexico, EPE is required to comply with the State of New Mexico’s laws. Further, EPE did not allege that any Texas law would be comprised by compliance with New Mexico law. Additionally, as to EPE’s assertion that the generation asset “could continue to serve in Texas for its useful life” (even if no longer serving New Mexico customers), such a transfer appears contrary to the intent of NMSA 62-16-4(B).

The Hearing Examiner finds that 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 its cases. EPE’s failure to include an analysis of those changes negatively impacts the Commission’s consideration of whether EPE’s Application’s is in compliance with New Mexico legal requirements and the Commission’s important public interest considerations. Further, the only other supporter of EPE’s Application, Staff, provided no Amended REA and RPS requirements analysis for EPE’s resource selection. Without any contrary legally compliant resource selection analysis offered by EPE or Staff, the only determination the Commission

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<sup>175</sup> Ex. EPE-12, *Rebuttal Testimony of James Schichtl on Behalf of El Paso Electric Company*, p. 39:3-4 (June 5, 2020) (“Ex. EPE-12, Schichtl Rebuttal”).

can make under current New Mexico law is that EPE's choice to construct, own and operate a natural gas generation plant with a projected lifespan of at least 40 years will not result in a net benefit to EPE's New Mexico ratepayers and EPE's failure to consider the Amended REA and RPS requirements is not in New Mexico citizens' public interest.

EPE failed to address the serious potential negative cost implications to New Mexico ratepayers of being obligated to pay millions of dollars in stranded costs or accelerated costs in order to allow EPE recovery of costs for a gas generation asset that under current law could not be used to serve New Mexico customers for its projected 40 year useful life. EPE actions are not in New Mexico ratepayers' public interest, and are in fact, at odds with current New Mexico energy policy as set forth in SB 489. Therefore, the Hearing Examiner finds that EPE's request for a CCN to construct, own, and operate Newman Unit 6, a 228-MW gas-fired combustion turbine should be denied.

While there are no specific ratemaking requests in this case, the Hearing Examiner finds that when considering the authorization of a generation source, it is reasonable and necessary for the Commission to be able to evaluate how long the resource will provide service and potential impediments affecting that projected service life. Such information allows the Commission to more thoroughly and accurately analyze the proposed resource types, and potential negative or positive impacts upon the utilities' ratepayers and the citizens of New Mexico. The importance of scrutinizing these concerns at the earliest opportunity is especially



warranted when considering EPE's recent requests for "accelerated depreciation of existing gas generation to ensure that the cost of these assets is fully recovered by the earlier of their planned retirement dates or 2045 when it is anticipated that these generating units may no longer be providing energy to EPE's New Mexico customers" in its pending rate case, No. 20-00104-UT.<sup>176</sup>

The Hearing Examiner finds these determinations to be consistent with the Commission's Order in Case No. 19-00195-UT that approved an all-renewable and storage portfolio rather than gas generation.<sup>177</sup> The Commission rejected alternative portfolios proposed by PNM and others that included new gas generation, noting that the use of natural gas turbines is also 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)."<sup>178</sup> The Commission's Order also notes that "PNM proposes to operate the natural gas turbines for substantially less time than their useful lives and would seek accelerated depreciation over 18 years, essentially incorporating and passing future stranded costs to PNM ratepayers".<sup>179</sup>

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<sup>176</sup> Case No. 20-00104-UT Schichtl Testimony at p. 14.

<sup>177</sup> See NMPRC Case No. 19-00195-UT, Order on Recommended Decision of Replacement Resources—Part II (July 29, 2020); Recommended Decision on Replacement Resources, Part II (June 24, 2020).

<sup>178</sup> *Id.* at Item 51.

<sup>179</sup> *Id.* at Item 52.

The Hearing Examiner further finds that a preponderance of credible evidence shows that there is no immediate need for Newman 6 because the renewable resources approved in Case No. 19-00348-UT, as well as other existing EPE resources, recently offered renewable resources, along with a brief delay in abandonments of Rio Grande 7, and Newman 1 and 2, should provide sufficient capacity in the near term to allow EPE to provide adequate safe and reliable electric service, at least until EPE evaluates and seeks approval for resource selections that are compliant with New Mexico law.

## **V. FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Hearing Examiner recommends that the Commission **FIND** and **CONCLUDE** as follows:

1. The Statement of the Case, discussion and analysis, and all findings and conclusions are incorporated by reference herein as Findings of Fact and Conclusions of Law.

2. EPE is certified and authorized to conduct the business of providing public utility service within the State of New Mexico, provides electric utility services within the State of New Mexico, and as such is a public utility subject to the jurisdiction of the Commission under the New Mexico Public Utility Act ("NMPUA"). As a public utility, EPE is required to furnish adequate, efficient and reasonable service at just and reasonable rates in conformity with Sections 62-8-1 and 62-8-2 of the NMPUA.

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

4. Due and proper notice of this case and its subject matter was given in accordance with the NMPUA and Commission rules.

5. EPE's failed to consider the New Mexico legal requirements of the Amended REA and RPS requirements and their impacts in EPE's CCN request for a natural gas generating plant.

6. EPE's failure to comply with the New Mexico legal requirements is not in the public interest.

7. EPE's request for a CCN to construct, own, and operate Newman Unit 6, a new 228-MW gas-fired combustion turbine, should be **DENIED**.

8. EPE and CCAE proposed corrections filed pursuant to 1.2.2.34(C)2 NMAC are accepted.

## **VI. DECRETAL PARAGRAPHS**

Based upon the record and all reasons set forth above, the Hearing Examiner recommends that the Commission **ORDER** as follows:

A. The Statement of the Case, Discussion, decisions, rulings, and all findings and conclusions contained therein, whether separately stated, numbered, or designated as findings and conclusions, are hereby adopted and approved as findings, conclusions, rulings and determinations of the Commission.

B. EPE's request for authorization of a CCN for Newman Unit 6 is **DENIED**.

C. Any matter not specifically ruled on prior to or during the hearing or in this Order is disposed of consistent with this Order and Commission rules.

D. EPE's post-hearing responses to the Hearing Examiner's Bench Requests made during the hearing shall be considered evidence of record pursuant to 1.2.2.37(K) NMAC.

E. This Order is effective immediately.

F. Copies of this Order shall be sent to all persons on the attached Certificate of Service.

G. This Docket is closed.

**ISSUED** at Santa Fe, New Mexico this 16<sup>th</sup> day of November 2020.

**NEW MEXICO PUBLIC REGULATION COMMISSION**

/s/Elizabeth C. Hurst

Elizabeth C. Hurst  
Hearing Examiner

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

**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 Recommended Decision.

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DATED this November 16, 2020.

**NEW MEXICO PUBLIC REGULATION COMMISSION**

*Ana C. Kippenbrock*

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**Ana C. Kippenbrock, Law Clerk**