BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF NEW MEXICO GAS COMPANY INC.'s APPLICATION FOR THE ISSUANCE OF A CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY TO CONSTRUCT A LIQUIFIED NATURAL GAS FACILITY.	)	
	)	**Case No. 22-00309-UT**
NEW MEXICO GAS COMPANY, INC.	)	
Applicant.	)	

JOINT RESPONSE OF WESTERN RESOURCE ADVOCATES AND THE NEW MEXICO DEPARTMENT OF JUSTICE TO NMGC's EXCEPTIONS

COME NOW Western Resource Advocates ("WRA") and the New Mexico Department of Justice "(NMDOJ") and hereby submit their Joint Response to New Mexico Gas Company, Inc.'s ("NMGC") Exceptions to Recommended Decision ("Exceptions") filed on February 28, 2024. The Recommended Decision ("RD") was issued on February 21, 2024, recommending that the New Mexico Public Regulation Commission ("NMPRC" or "Commission") disapprove NMGC's Application for a certificate of public convenience and necessity ("CCN") because the proposed LNG [liquified natural gas] facility ("Facility") "does not provide a net public benefit and it does not promote the public interest."[1].

[1] RD, p. 147, par. 5.

NMGC's Exception No. 1 Should Be Denied Because It was Not Improper to Apply a Heightened Standard to NMGC's CCN Application for its Proposed LNG Facility.

The Recommended Decision applied a heightened level of scrutiny to NMGC's CCN Application because the Facility is discretionary[2] and discretionary projects warrant stronger justification.[3] The Recommended Decision relied on the heightened standard as articulated in Case No. 15-00312-UT,[4] a case involving another discretionary project:

> … the scope of the Commission's considerations should be broader. The Commission should consider the extent of any public opposition, the extent to which PNM's justifications are not clearly demonstrated, and the extent to which any uncertainties will impact the public interest and create unreasonable risks for ratepayers.[5]

A. Contrary to its claims, NMGC's due process rights were not violated by application of a heightened level of scrutiny.

NMGC maintains that it was impermissibly held to a new standard, complaining that Case No. 15-00312-UT was not a CCN case[6] and that it was not aware it could be held to a heightened standard until post-hearing briefing, after the close of evidence. NMGC's argument that its due process rights were violated fails on multiple grounds. First, NMGC was not held to a new or different standard. Matters spelled out for consideration under a heightened level of scrutiny, as

[2] "[A] utility's proposed resource acquisition or facility is discretionary if it 'is not necessary for the provision of adequate service, and not required by any Commission rule or regulatory mandate.'" RD, p. 10, citation omitted. NMGC witness John Reed testified that the Company could provide reliable and affordable service without the proposed LNG Facility. NMGC Hearing Exh. 4 (Reed Rebuttal), p. 4, lns. 3-5 ("It cannot be said … that without the proposed LNG Facility the Company cannot provide reliable and affordable service.").
[3] RD, p. 12, citing Case No. 15-00312-UT Recommended Decision, p. 79.
[4] RD at 4, referring to Case No. 15-00312, Public Service Company of New Mexico's advanced metering infrastructure proposal.
[5] Case No. 15-00312-UT Recommended Decision, p. 79.
[6] Id. at 79, fn. 26 (the Hearing Examiner did not find it necessary to address the issue of whether a CCN was required).

articulated in Case No. 15-00312-UT,[7] are already fully subsumed in the "public convenience and necessity" language of the longstanding CCN statute -- section 62-9-1. A heightened level of scrutiny does not change the ultimate standard of review for a CCN that is set forth in that statute. Section 62-9-1, entitled New construction; ratemaking principles ("CCN statute"), of the New Mexico Public Utility Act ("PUA"),[8] provides that new public utility plant must be required by "the public convenience and necessity."[9] The Commission has equated the "public convenience and necessity" with the public interest.[10] Thus the matters for Commission consideration under heightened scrutiny, as articulated in Case 15-00312-UT, clearly relate to the public interest and are already within the scope of matters that may properly be considered. There is no new or changed standard.

Nor was there an "imposition of new requirements mid-case"[11] that NMGC claims violated its due process rights for lack of notice. NMGC's argument that El Paso Elec. Co. v. N.M. Pub. Regulation Comm'n, ___ P. 3d ____, 2023 WL 3166936 (May 1, 2023) ("EPE v. NMPRC"), supports its position fails on similar reasoning. EPE v. NMPRC reversed the Commission for departing from past practice and excluding certain amounts from rates which had previously been recovered through rates. In the instant case, there is no departure from past practice. The heightened level of scrutiny that was applied to Commission review of discretionary projects in

[7] Those matters include the extent of any public opposition, the extent to which PNM's justifications are not clearly demonstrated, and the extent to which any uncertainties will impact the public interest and create unreasonable risks for ratepayers.
[8] NMSA 1978, §§ 62-1-1 to 62-6-28 and 62-8-1 to 62-13-16 (1887, as amended through 2021); *see Citizens for Fair Rates & the Environment v. NMPRC,* 2022-NMSC-010, noting that *§* 62-3-3 specifies the Public Utility Act is comprised of Chapter 62, Articles 1 to 6 and 8 to 13.
[9] RD, pp. 2-3.
[10] Case No. 19-00349-UT Recommended Decision, p. 17, citing *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).
[11] NMGC's Exceptions, p. 5.

2018 was not a departure from past practice or from the "public convenience and necessity" standard enunciated in the CCN statute. Therefore, NMGC had sufficient notice of the standards to which its CCN application would be subjected.

B. Contrary to NMGC's claims, the heightened standard does not expand the evidence that can be considered in violation of the Commission's own regulations.

NMGC either misapprehends or mischaracterizes the language in the Recommended Decision that the Commission should consider the "extent of any public opposition" to the LNG Facility in arguing that the "directive is in contravention of the Commission's own regulations."[12] While NMGC is correct that the Commission's procedural rules provide that public comments shall not be considered as evidence,[13] the Recommend Decision states that the Commission should consider *the extent of* any public opposition, not the truth or merits of the opposition. Moreover, evidence may be evaluated in the context of public comment.

C. Contrary to NMGC's claims, the heightened standard would not lead to unreasonable results.

As pointed out in this Response to NMGC's Exceptions, *supra*, the practical effect of the heightened level of scrutiny that is applied to discretionary projects serves to enumerate certain specific factors that the Commission should consider. It neither supplants the legal standard of review expressed in section 62-9-1 (that the new utility plant is required by the public convenience and necessity) nor exceeds the broad grant of authority that that statute confers to the Commission. Under this statute, the Commission's authority itself is discretionary; it "may", not "shall", issue a CCN if the standard is satisfied. If the Commission determines to exercise its authority and issue

[12] NMGC's Exceptions, p.8.
[13] 1.2.2.23(F) NMAC.

a CCN, the CCN statute only requires a finding that the new utility plant is required by the public convenience and necessity and that an order granting or denying the application be issued within a certain period of time.[14] Commission decision-making under the CCN statute is guided by the policy enunciated in the PUA to "avoid unnecessary duplication and economic waste."[15] There is a rational basis to subject discretionary projects to heightened scrutiny. Heightened scrutiny of discretionary facilities is a reasonable application of the Commission's discretion under section 62-9-1.

NMGC's Exception no. 1 should be denied because heightened scrutiny does not subject the LNG Facility to a new or different legal standard of review and is consistent with past precedent of which NMGC is presumed to have knowledge.[16] Finally, there is no indication whatsoever that the LNG Facility would have been approved but for this heightened level of scrutiny. In fact, the Hearing Examiner found that the Company's LNG Facility proposal "fails both the net public benefit test and the heightened scrutiny standard."[17]

NMGC's Exception No. 2 Should be Denied Because the Recommended Decision's Treatment of the Company's 21-00095 Compliance Filing does not Reflect a New Evidentiary Standard.

NMGC complains that the Hearing Examiner's ruling to disregard certain improper references to its March 31, 2022 Compliance Filing on Case No. 21-00095-UT "institutes a new

[14] NMSA 1978, § 62-9-1(C).
[15] NMSA 1978, § 62-3-1(B).
[16] It should be noted that precedent is particularly important in evaluating CCN applications because the rule addressing such applications covers only form and procedural, not substantive, requirements. 17.1.2.10 NMAC. The heightened level of scrutiny discussed in the RD does not impose new filing requirements on a CCN application without which it would be vulnerable to a facial challenge.
[17] RD, pp. 12-13.

standard."[18] NMGC's argument is that this Compliance Filing was ordered by the Commission, includes the sworn-to testimony of its Vice President Tom C. Bullard, and was referenced in Mr. Bullard's testimony and other filings in this case.[19]

NMGC does not attach or otherwise seek admission of this Compliance Filing, explaining that "[s]imply copying that evidence in this case appeared unnecessary."[20] Yet despite this omission, NMGC's Brief-in-Chief cites not to Mr. Bullard's testimony for Compliance Filing matters incorporated into his testimony in this case, but instead cites directly to the Compliance Filing some thirty-one (31) times for evidentiary support. This problem was pointed out by Intervenors in their Joint Response Brief,[21] and properly recognized by the Hearing Examiner who, in turn, noted that "the Compliance Filing was filed *after* the Commission's issuance of the *Final Order* in Case No. 21-0095-UT and subsequently was not subjected to cross-examination in any hearing."[22] That being said, the Hearing Examiner did not disregard all citations to the Compliance Filing, exempting those references admitted as evidence in this case. Those exceptions are listed with specificity in footnote 140 on page 42 of the Recommended Decision.

NMGC's claim that this declares a new evidentiary standard is nonsense. The Commission's Rules of Procedure have long provided that records, including testimony, from one case are not automatically admitted into the record of another case. The Commission or presiding office must affirmatively take administrative leave of such records.[23] See, for example, pages 15-16 of the *Order Denying PNM Motion to Remove or Dismiss Four Corners Power Plant Prudence*

[18] NMGC's Exceptions, p. 10.
[19]NMGC Hearing Exh. 1 (Bullard Direct) and NMGC Hearing Exhibit 2 (Bullard Rebuttal).
[20] NMGC's Exceptions, p. 10.
[21] Intervenors' Joint Response Brief, p. 9, fn. 40.
[22] RD, p. 42.
[23] 1.2.2.35(D)(1)(d) NMAC

Issues and Granting Joint Motion for Commission to Take Administrative Notice of Portions of the Record in Case No. 16-00276-UT issued in Case No. 22-00270-UT on June 16, 2023. NMGC's exception on this point should be denied.

NMGC's Exception No. 3 Should be Denied Because the Hearing Examiner's Finding that NMGC's Evaluation of Alternatives to its Proposed Facility Was Not Sufficiently Contemporaneous was Proper and in Accordance with Applicable Law.

NMGC again exaggerates the impact of the Hearing Examiner's ruling. NMGC claims that the Hearing Examiner's finding that "NMGC failed to update time-sensitive elements of its analyses of alternatives"[24] is the equivalent of imposing a new legal requirement on CCN applications without notice. Overlooking the Hearing Examiner's limitation on updating only those elements that are "time-sensitive," NMGC complains that "[r]equiring updated analyses is completely untenable" and "next to impossible" when looking at multiple projects.[25]

An example of information that could have been updated for purposes of its CCN application is NMGC's investigation into swing gas hedging. The record showed only that the Company looked into "[a] couple years ago, and I [Bullard] forget exactly when, but we looked at hedging to swing volumes over the winter months" and it was very expensive.[26]

NMGC bears the burden of proof to show that its proposed project is the most cost-effective among feasible alternatives.[27] It is understood that evaluation of alternatives to a proposed facility must be contemporaneous to be meaningful and that whether the evaluation is sufficiently

[24] RD, p. 3.
[25] NMGC's Exceptions, p. 15.
[26] *Id.* at 169.
[27] recognized by NMGC on p. 12 of its Exceptions.

contemporaneous is a question of fact. No new legal standard was imposed on NMGC's CCN application.[28] This exception should, too, be denied.

NMGC's Exception No. 4 Should be Denied Because the Costs of a Proposed Facility Should be Justified by Both Quantifiable and Unquantifiable Benefits.

NMGC misconstrues the Hearing Examiner's discussion of the Company's decision to not conduct an objective analysis of the benefits to ratepayers to incorrectly suggest that the Recommended Decision imposes a new standard for approval of a CCN that requires the "impossible quantification of benefits to customers", i.e., the avoidance of a curtailment.[29] To be clear, what NMGC provided for the Commission's consideration in this case was a *qualitative analysis*.[30] As the Intervenors noted, a qualitative analysis is subject to the unidentified biases of the party performing the analysis and is therefore inherently less reliable than a quantitative analysis based on numerical data.[31] The Hearing Examiner correctly understood this to suggest that while NMGC was not required to submit a benefit-cost analysis under the statute, "it behooved the Company to provide more than a qualitative assessment…."[32] Thus, the Hearing Examiner noted those cases from Wisconsin and New York identified by NMDOJ Witness DeLeon not as *legal* precedent but rather as counterfactuals to NMGC's implied argument that conducting such an analysis in New Mexico is "impossible."

[28] *PNM v. NMPRC*, 2019-NMSC-012, ¶ 51, 444 P.3d 460, 476 (2019)
[29] NMGC's Exceptions, p. 17.
[30] *See* NMDOJ Brief-in-Chief, p. 30, fn. 84, citing NMGC Witness Reed stating that NMGC expressed it as a "present value differential compared to Keystone, and then qualitatively considered the incremental benefits associated with higher reliability, operational flexibility, and resilience."
[31] Intervenors' Joint Response Brief at 3-4.
[32] RD, p. 129.

The underlying principle here is that in order for regulation to be a substitute for competition it must subject applications from New Mexico's regulated investor-owned utility to the same restraints that competition places on unregulated utilities.[33] In the context of NMGC's application, that means determining whether there is substantial evidence of a net public benefit. "Substantial evidence requires that there is evidence that is credible in light of the whole record that is sufficient for a reasonable mind to accept as adequate to support the conclusion…" sought by the company.[34] In this case, it was NMGC's failure to provide an *objective* analysis of the benefits to ratepayers that prevented it from meeting this standard. NMGC's exception should be denied.

Summary of Argument

NMGC's Exceptions 1-4 all essentially assert arguments that new standards were imposed on its CCN application without proper notice. A quick review of the case history of NMGC and its predecessors shows numerous financings, PGAC [purchased gas adjustment clause] filings, rate cases, energy efficiency plans and even mergers but not CCNs to construct or operate new facilities. Nevertheless, NMGC is still charged with knowledge of Commission law and precedent.

In conclusion, NMGC has not demonstrated that its proposed LNG Facility will substantially improve reliability or moderate price volatility to a degree that would justify its construction and cost. The claimed benefits of the proposed LNG Facility relative to Keystone, namely "…improved reliability and a greater ability to moderate price volatility…," are

[33] *See City of Albuquerque v. New Mexico Pub. Serv. Comm'n*, 1993-NMSC-021, ¶ 39, 115 N.M. 521, 534, 854 P.2d 348, 361 ("[R]egulation is a substitute for competition and should attempt to put the utility sector under the same restraints competition places on the industrial sector.")
[34] *PNM v. NMPRC*, 2019-NMSC-012, ¶ 14, 444 P.3d 460, 468 (2019).

significantly overstated. The Company has not shown that the LNG Facility is needed to provide reliable service to customers or even increases reliability in any significant way. Therefore, the Company has not demonstrated by a preponderance of evidence that its proposed LNG Facility is required for the public convenience and necessity or that it would provide net public benefits. Approval of the LNG Facility would result in unnecessary duplication and economic waste. The Application is contrary to the public interest and should not be approved.

WHEREFORE, for the foregoing reasons, WRA and NMDOJ request that the Commission issue a Final Order that denies NMGC's Exception nos. 1-4 and adopts the Recommended Decision of the Hearing Examiner in its entirety, and for such other and further relief deemed just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *Joint Response of Western Resource Advocates and The New Mexico Department of Justice to NMGC's Exceptions* was e-mailed on this date to the parties listed below:

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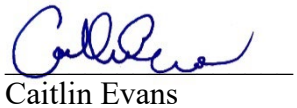
DATED this **5th** day of **March, 2024**.



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