

**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 LIQUEFIED NATURAL GAS )  
FACILITY. )  
)  
NEW MEXICO GAS COMPANY, INC., )  
)  
                    APPLICANT. )  
\_\_\_\_\_ )

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

**NEW MEXICO GAS COMPANY, INC.'S  
EXCEPTIONS TO RECOMMENDED DECISION**

**FEBRUARY 28, 2024**

**Table of Contents**

**SUMMARY ..... 1**

**EXCEPTION I: THE RECOMMENDED DECISION INAPPROPRIATELY APPLIED  
A HEIGHTENED STANDARD TO NMGC’S CCN APPLICATION..... 4**

    A. The heightened standard imposed in the Recommended Decision has never been  
    applied to CCN cases in New Mexico and violates NMGC’s due process rights. .... 5

    B. The heightened standard expands the evidence that can be considered in violation of  
    the Commission’s own regulations. .... 7

    C. The heightened standard for CCN cases articulated in the Recommended Decision  
    would lead to unreasonable results. .... 9

**EXCEPTION II: THE RECOMMENDED DECISION IGNORES SWORN  
UNCONTROVERTED TESTIMONY IN ANOTHER COMMISSION PROCEEDING.  
..... 10**

**EXCEPTION III: THE RECOMMENDED DECISION INAPPROPRIATELY  
APPLIED A NEW STANDARD REQUIRING “CONTEMPORANEOUS” RECORDS  
OF EVERY ANALYSIS THE COMPANY PERFORMED FOR A CCN.....11**

**EXCEPTION IV: THE RECOMMENDED DECISION REQUIRES IMPOSSIBLE  
QUANTIFICATION OF BENEFITS TO CUSTOMERS..... 16**

**CONCLUSION ..... 17**

## Table of Authorities

<b>NEW MEXICO CASES</b>	
<i>El Paso Elec. Co. v. N.M. Pub. Regulation Comm'n</i> , Nos. S-1-SC-38874, S-1-SC-38911, ¶ 14 .....	5, 13
<i>Miller v. City of Albuquerque</i> , 1976-NMSC-052, ¶ 20, 89 N.M. 503, 554 P.2d 665...	8
<i>El Paso Elec. Co. v. N.M. Pub. Serv. Comm'n</i> , 1985-NMSC-085, 103 N.M. 300, 706 P.2d 511.....	9
<i>TW Telecom of N.M., LLC v. Pub. Regulation Comm'n</i> , 2011-NMSC-029, 150 N.M. 12, 256 P.3d 24.....	6, 13
<i>Bokum Res. Corp. v. N.M. Water Quality Control Comm'n</i> , 1979-NMSC-090, ¶ 14, 93 N.M. 546, 603 P.2d 285.....	14
<b>NEW MEXICO REGULATORY CASES</b>	
Case No. 15-00312-UT .....	6
Case No. 21-00095-UT.....	10, 11, 16
Case No. 15-00185-UT, <i>Recommended Decision</i> .....	12
Case No. 13-00297-UT, <i>Corrected Recommended Decision</i> .....	12
Case No. 07-00398-UT, <i>Recommended Decision</i> .....	12
Case No. 22-00270-UT, <i>Recommended Decision</i> .....	12
<b>NEW MEXICO STATUTES AND RULES</b>	
1.2.2.23(F) NMAC.....	8
<b>OTHER AUTHORITIES</b>	
I Kristin E. Hickman & Richard J. Pierce, Jr., <i>Administrative Law Treatise</i> § 7.1, at 728 (6th ed. 2019) .....	8

New Mexico Gas Company, Inc. (“NMGC” or the “Company”) hereby files the following exceptions to the February 21, 2024, Recommended Decision (“Recommended Decision”), and respectfully asks the New Mexico Public Regulation Commission (the “Commission”) to decline to adopt the Recommended Decision for the reasons set forth below.

### **SUMMARY**

This case is the product of a developing concern on the part of NMGC regarding the continued reliability of accessing gas from the Permian Basin during severe winter weather. This developing concern was most clearly evidenced during two extraordinary gas supply events that occurred in 2011 and 2021: the outage in 2011 which was considered in NMPRC Case No. 11-00042-UT, and Storm Uri in 2021 which was considered in NMPRC Case No. 21-00095-UT. Each of these events was without precedent in terms of the disruptions that were caused (2011) and the price impacts that resulted (2021).

In the aftermath of Winter Storm Uri in 2021, the Commission ordered NMGC to analyze possible solutions that would mitigate further curtailments and price spikes. NMGC complied with this request and submitted sworn testimony on these issues. NMGC then initiated this case in order to act on the results of a third-party independent analysis of gas storage solutions.

Despite over a decade of analysis and a case whose evidentiary record was open for over a year, the Recommended Decision determined that the Company’s analysis was deficient and that the evidence weighed decisively against NMGC’s application. In making this determination, the Recommended Decision deploys new standards that NMGC was not notified of. The use of these new standards is similar to the notice and due process issues identified by the Supreme Court in its May 2023 ruling in *El Paso Electric Co. v. N.M. Pub. Regulation Comm’n* and is a theme throughout these exceptions.

First, the Recommended Decision makes a distinction between a “necessary project” and a “discretionary project.” These terms appear nowhere in any statute, regulation, or prior gas utility decision. The Recommended Decision then classifies this case as falling into the discretionary category and finds that the Commission should apply a “heightened” standard to “discretionary” projects. Again, a “heightened” standard appears nowhere in any section of the Public Utility Act, appears nowhere in the regulations promulgated by the Commission, and has not been applied to any case in which NMGC has participated. NMGC had no notice as to what this standard means, how it is applied, or that the standard would apply in this case. Due to this lack of notice the Company was denied the opportunity to prepare for and present evidence to meet such a standard.

Second, the Recommended Decision recommends the Commission disregard over a decade of proceedings and testimonies on the issue of gas supply reliability in New Mexico and the consequences thereof. The Recommended Decision does not cite a Commission rule, an evidentiary rule, or a Supreme Court case in support of the proposition that the Commission is free to ignore or even strike references to sworn testimony on point that was demanded by the Commission in another case. This is a new declaration of an evidentiary standard that was applied after all evidence was closed and was all to the prejudice of NMGC.

Third, the Recommended Decision, again for the first time, institutes an additional new evidentiary standard of requiring “contemporaneous” records of every analysis the Company performed, and a requirement that the Company update each aspect of the analysis prior to filing a request for a certificate of public convenience and necessity (“CCN”). The Recommended Decision is silent on how “contemporaneous” a record must be to satisfy this standard, as well as the age of data NMGC is allowed to rely on without updates.

These new “standards” were not communicated in any way to NMGC, and the Recommended Decision cites a recent Public Service Company of New Mexico rate case decision (which NMGC was not a party to, and which was issued only a few months ago) as authority for requiring these new levels of evidence from NMGC in an application for a CCN. Again, these requirements appear nowhere in any prior natural gas case, regulation, statute, or prior Supreme Court case.

Fourth, the Recommended Decision requires a quantification of the benefits of the project in a dollar value, but fails to allow for the clear difficulty which arises in determining a quantified value to curtailing customers, predicting the weather, or predicting future events such as force majeure events or other events outside the control of the utility. Although testimony in the case demonstrated that such quantification of benefits is not possible, the Recommended Decision cites to cases from other jurisdictions and postulates that NMGC should have somehow been aware of cases going on in other states and performed a similar analysis.

The imposition of these new standards without prior notice or legal support, and the adoption of standards from cases in other states without notice or analysis as to their applicability, is the very definition of a ruling made in violation of due process. Due process rights are violated by the post hoc application of new and vague rules and standards for which notice was never provided. A decision made pursuant to these issues would be arbitrary and capricious.

NMGC urges the Commission to reject the adoption of so many new standards, to analyze the evidence and the past Commission cases regarding this issue, and to approve NMGC’s application to construct and operate a liquefied natural gas storage facility.

**EXCEPTION I: THE RECOMMENDED DECISION INAPPROPRIATELY APPLIED A HEIGHTENED STANDARD TO NMGC’S CCN APPLICATION.**<sup>1</sup>

At the outset, the Recommended Decision adopts a proposal by New Energy Economy and the New Mexico Department of Justice to impose a heightened standard on the purportedly “discretionary” LNG project. NMGC takes exception to this inappropriate and inapplicable heightened standard. In imposing this standard, the Recommended Decision relies on NMPRC Case No. 15-00312-UT (the “PNM AMI Case”), which was not a CCN application, wherein the Recommended Decision asserts “the Commission held that 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.’”<sup>2</sup> The Recommended Decision asserts that because the Company does not claim that the proposed LNG Facility is essential to providing adequate service, the project is discretionary and subject to the heightened standard articulated in the PNM AMI Case. Therefore, the Recommended Decision concludes that,

In addition to proof by a preponderance of the evidence that the LNG Facility will produce a net public benefit and that NMGC has conducted an evaluation of reasonable alternatives to its proposal, the Commission should also carefully evaluate the public interest and ensure a fair balancing of the interests of investors and ratepayers consistent with the regulatory compact that governs the utility’s provisioning of monopoly service in a specified territory. Furthermore, the Commission should consider the extent of any public opposition, the extent to which NMGC’s justifications are not clearly demonstrated, and the extent to which any uncertainties will impact the public interest and create unreasonable risks for ratepayers.<sup>3</sup>

The heightened standard imposed by the Recommended Decision is problematic for several reasons: 1) such a standard has never been applied to a request for a CCN in New Mexico and its

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<sup>1</sup> Exception I takes exception to Section 3.1 (pp. 7-13), Section 4.4.5 (pp. 126-142), and Section 4.5 (pp. 143-144) of the Recommended Decision.

<sup>2</sup> RD at 10.

<sup>3</sup> RD at 12.

application here violates NMGC’s due process rights; 2) the standard imposed is impermissibly expands the evidence that can be and was considered in violation of the Commission’s own regulations; and 3) the imposition of such a standard in CCN cases would lead to unreasonable and absurd results.

**A. The heightened standard imposed in the Recommended Decision has never been applied to CCN cases in New Mexico and violates NMGC’s due process rights.**

If the Commission wishes to change the standards imposed on utilities, sufficient notice and an opportunity to present evidence is required. The imposition of new requirements mid-case and after the close of evidence, is insufficient to provide notice and is a violation of a utility’s right to due process. Recently, the Supreme Court found that the Commission violated this fundamental requirement when it mistakenly relied on a Southwestern Public Service Company (“SPS”) case for an incorrect proposition as the basis for imposing a new requirement on El Paso Electric Company (“EPE”):

Reliance on the SPS rate case is misplaced. That case does not stand for the proposition—and therefore does not provide notice or justification—that post-TYP adjustments for additions to plant will be excluded unless all plant-based balances are synchronized. Put simply, reasoning that a practice is sufficient falls short of announcing that the practice is required, whether in the SPS rate case itself or in any future case. Thus, the SPS rate case does not meaningfully alter the PRC’s past practice of allowing post-TYP plant additions without concern for synchronization.<sup>4</sup>

In addition to relying on a case that did not provide sufficient notice of a precedential change, the Commission also imposed this requirement on EPE *after* the hearing and the close of evidence.<sup>5</sup> Although intervenors argued that EPE had sufficient notice and opportunity to respond

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<sup>4</sup> *El Paso Elec. Co. v. N.M. Pub. Regulation Comm’n*, Nos. S-1-SC-38874, S-1-SC-38911, ¶ 8, 2023 N.M. LEXIS 80 (May 1, 2023).

<sup>5</sup> *Id.* ¶ 9.



after the hearing, in post-hearing briefing and exceptions, the Supreme Court found no authority supporting that “such a late opportunity to object – well after the close of evidence – is sufficient to satisfy due process concerns under these circumstances.”<sup>6</sup> “Therefore, EPE [was] correct that it lacked notice of the standard that would be applied on this issue and an opportunity to introduce evidence to meet that standard.”<sup>7</sup>

As in the EPE case, the imposition of this new standard is impermissible. First, in imposing the heightened standard, the Recommended Decision relies exclusively on the PNM AMI Case as precedent for allowing the imposition of the heightened standard to a CCN application. This reliance is misplaced. In the PNM AMI Case, PNM did not request a CCN; rather, it requested approval of its AMI project pursuant to the Commission’s implicit discretionary authority under the Public Utility Act.<sup>8</sup> “PNM acknowledge[d], however, that the exercise of such implicit authority outside the context of a CCN request [was] discretionary.”<sup>9</sup> Therefore, the Hearing Examiner in the PNM AMI case determined what standard was required for the Commission to exercise its implicit discretionary authority and recommended a standard “higher than for a CCN.”<sup>10</sup> Ultimately, “[g]iven the Hearing Examiner’s finding that the standard to approve a discretionary request is higher than the standard that applies to CCNs, the Hearing Examiner [did] not find it necessary to address the issue of whether a CCN [was] required for PNM’s pursuit of

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<sup>6</sup> *Id.* ¶ 10 (citing *Mountain States*, 1986-NMSC-019, ¶ 26 (holding that the utility had sufficient notice of a potential change in methodology based on (1) prefiled testimony from staff and intervenor witnesses proposing to change the method, (2) the utility’s rebuttal testimony opposing the change, and (3) the utility’s further testimony at the hearings); see also *TW Telecom*, 2011-NMSC-029, ¶ 17 (“The opportunity to be heard should be at a meaningful time and in a meaningful manner.”)).

<sup>7</sup> *Id.* ¶ 12.

<sup>8</sup> Case No. 15-00312-UT, *Recommended Decision* at 77 (“PNM cites the Commission’s ‘general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations.., all in accordance with the provisions and subject to the reservations of the Public Utility Act ... and to do all things necessary and convenient in the exercise of its power and jurisdiction.’”).

<sup>9</sup> *Id.*

<sup>10</sup> *Id.* at 79.

the AMI project proposed here.” A CCN was neither requested nor found necessary for PNM’s project. Simply put, the PNM AMI Case was not a CCN case.

The PNM AMI Case set a standard to be met for a utility to demonstrate that the Commission should exercise its implicit discretionary authority outside of “specific powers expressly stated in the Public Utility Act.”<sup>11</sup> It does not stand for the proposition, as asserted in the Recommended Decision, that any project not necessary for the provision of adequate service, and not required by any Commission rule or regulatory mandate is discretionary and subject to a different higher standard than a CCN. Therefore, the PNM AMI Case is insufficient to provide notice that a heightened standard could be imposed on a utility applying for a CCN. Unlike in the PNM AMI Case, NMGC sought approval of a CCN and the CCN standards expressly articulated in the PUA, which contain no mention of “discretionary” projects, must apply. NMGC’s Application cannot be found deficient for failure to meet an unrelated and unrequested standard.

Second and significantly, Intervenor’s claim that the heightened standard should apply to NMGC’s CCN Application was first raised in post-hearing briefing.<sup>12</sup> Therefore, this issue was only raised *after* the close of evidence. NMGC lacked notice of the heightened standard that would be applied and was not given an opportunity to introduce evidence to meet that standard. The post-hearing imposition of this standard violates NMGC’s right to due process. For all of these reasons, the Recommended Decision’s application of a heightened standard in this matter was impermissible.

**B. The heightened standard expands the evidence that can be considered in violation of the Commission’s own regulations.**

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<sup>11</sup> *Id.* at 77.

<sup>12</sup> NEE BIC at 4; NMAG(NMDOJ) BIC at 10-11.

The new standard articulated in the Recommended Decision purports to expand the types of evidence that can be considered in ruling on a CCN application, specifically stating, “the Commission should consider the extent of any public opposition.”<sup>13</sup> Such a directive is in contravention of the Commission’s own regulations. Once an agency adopts a set of procedures by rule, the agency must comply with its own procedural rules even if the procedures adopted by the agency exceed those independently required by the Due Process Clause.<sup>14</sup> Further, failure to comply with its own published procedures is fatal to an agency’s decision.<sup>15</sup>

Pursuant to 1.2.2.23(F) NMAC, persons providing public comment “shall be entitled to make an oral statement or submit a written statement for the record, *but such statement shall not be considered by the commission as evidence.*” (emphasis added). Therefore, the directive that the Commission consider public opposition as evidence in a CCN application is against its own procedure. This directive is also a departure from Commission precedent that, as described above, violates due process.

The Recommended Decision specifically references public comment and opinion as being considered in forming the Decision.<sup>16</sup> The Recommended Decision purports to reach its decision and only then to make reference to public opinion as support for its decision. Per the Recommended Decision, the reference to this public opinion is only made because of the adoption of the heightened scrutiny standard for “discretionary” projects. The problem is twofold. First the declaration of a discretionary project and heightened standard. Second, the reference to evidence only because of this heightened standard. None of this was previewed as being potentially

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

<sup>14</sup> I Kristin E. Hickman & Richard J. Pierce, Jr., *Administrative Law Treatise* § 7.1, at 728 (6th ed. 2019).

<sup>15</sup> *Miller v. City of Albuquerque*, 1976-NMSC-052, ¶ 20, 89 N.M. 503, 554 P.2d 665.

<sup>16</sup> RD at 15-16, 76, 130-143.

applicable to this case and therefore the Company's due process rights were violated by this arbitrary application of new standards and new rules of evidence for this case.

**C. The heightened standard for CCN cases articulated in the Recommended Decision would lead to unreasonable results.**

The application of a heightened standard based on the reasoning in the Recommended Decision sets an unclear, unworkable standard would lead to potentially absurd or unreasonable results. The New Mexico Supreme Court has “express[ed] its deep concern regarding the reasonableness of [a] heightened standard of proof, especially since a ‘preponderance of evidence’ standard is customary in administrative and other civil proceedings.”<sup>17</sup>

In deciding to apply the heightened standard, the Recommended Decision reasons that NMGC submits that storage is a necessary component of a gas utility's portfolio, but NMGC does not assert that the proposed LNG Storage Facility is essential to its providing adequate service.<sup>18</sup> Therefore, the Recommended Decision asserts, “since the LNG Facility is not necessary for NMGC's provision of adequate service, and is not required by any Commission rule or regulatory mandate, it is a discretionary project.”<sup>19</sup>

In effect, the Recommended Decision states that where a utility has an established need, but more than one project could meet that need, a proposed project is discretionary, and the heightened standard should apply instead of the established CCN standard. As applied, the established CCN standard would only apply where a proposed project is the *only* solution to a utility's need. Such a standard is unreasonable. In any CCN filing, there are multiple options that can meet a utility's need. In fact, this is directly acknowledged by the Commission's established

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<sup>17</sup> *El Paso Elec. Co. v. N.M. Pub. Serv. Comm'n*, 1985-NMSC-085, 103 N.M. 300, 706 P.2d 511.

<sup>18</sup> RD at 10.

<sup>19</sup> RD at 11.

CCN standard requiring that a utility “show that it has considered alternatives before going forward with a project.”<sup>20</sup> The heightened standard exception articulated in the Recommended Decision would swallow the general CCN standard without amendment to or consideration of the language of the statute. It is a clear abrogation of the law as written and cannot be sanctioned by the Commission. For these reasons, the heightened standard is unworkable and would lead to unreasonable results.

**EXCEPTION II: THE RECOMMENDED DECISION IGNORES SWORN UNCONTROVERTED TESTIMONY IN ANOTHER COMMISSION PROCEEDING.**<sup>21</sup>

The Recommended Decision recommends the Commission disregard over a decade of proceedings and testimonies on the issue of gas supply reliability in New Mexico and the consequences thereof. Moreover, despite repeated references throughout this case to the proceedings in NMPRC Case No. 21-00095-UT, the Recommended Decision recommends the Commission strike the uncontroverted sworn statements of NMGC Witness Bullard regarding NMGC’s analysis of other possible solutions. NMGC takes exception to the disregard and striking of these sworn testimonies.

In making this recommendation, the Recommended Decision institutes a new standard of evidence -- that testimony that was sworn to but was uncontroverted by other parties and which the Commission did not seek to examine itself, is afforded little to no weight. First, the Commission itself ordered NMGC to provide this evidence in Case No. 21-00095-UT. NMGC complied with the Commission’s order and provided sworn testimony in that proceeding (the “Compliance Filing”). Simply copying that evidence in this case appeared unnecessary. That

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<sup>20</sup> RD at 8.

<sup>21</sup> Exception II takes exception to Section 4.2 (pp. 39-67) of the Recommended Decision.

testimony went uncontroverted. Second, NMGC repeatedly referenced, cited, and excerpted Case No. 21-00095-UT and the Compliance Filing throughout the Application and Direct Testimony in this matter.<sup>22</sup> NMGC proffered the same witness who sponsored the testimony in the Compliance Filing, Tom C. Bullard, in this matter.<sup>23</sup> Therefore, the Intervenor in this case were provided notice and an opportunity to cross NMGC's witness on his testimony in the Compliance Filing and his continued reliance on and adoption of it in this matter. Third, the Recommended Decision does not cite a Commission rule, an evidentiary rule, or a Supreme Court case in support of the proposition that the Commission is free to ignore or even strike references to sworn testimony on point that was demanded by the Commission in another case. It is simply a new declaration of an evidentiary standard that was applied after all evidence was closed.

**EXCEPTION III: THE RECOMMENDED DECISION INAPPROPRIATELY APPLIED A NEW STANDARD REQUIRING "CONTEMPORANEOUS" RECORDS OF EVERY ANALYSIS THE COMPANY PERFORMED FOR A CCN.**<sup>24</sup>

In determining that the LNG Facility would not provide a net public benefit, the Recommended Decision found that NMGC did not conduct a reasonable analysis of feasible alternatives to the LNG Facility.<sup>25</sup> A substantial portion of NMGC's Post-Hearing Brief-in-Chief is dedicated to explaining the many non-LNG alternatives that the Company has evaluated since the severe winter weather event in 2011 which forced curtailments of customers.<sup>26</sup> NMGC considered (i) physical infrastructure changes, such as CNG facilities, propane air, and new

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<sup>22</sup> See Application at 6; NMGC Exh. 1 (Bullard Dir.) at 4, 19-23, 25-41.

<sup>23</sup> Case No. 21-00095-UT, New Mexico Gas Company, Inc.'s Compliance Filing and Supporting Testimony Filed Pursuant to Decretal Paragraph N of the NMPRC's June 2021 Final Order Relating to the 2021 Winter Event (March 31, 2022).

<sup>24</sup> Exception III takes exception to Section 4.2 (pp. 39-67) and Section 4.4.4 (pp. 123-126) of the Recommended Decision.

<sup>25</sup> RD at 124.

<sup>26</sup> See NMGC BIC at 6-25.

pipelines; (ii) options to reduce customer demand, such as energy efficiency and demand response programs; and (iii) changes to its baseload and swing gas policies and its hedging programs.<sup>27</sup> The Recommended Decision concluded that this multi-part analysis, which stretched over a decade, was insufficient.<sup>28</sup> The basis of this conclusion is a finding that “NMGC’s evaluation of gas supply contract and hedging options, relying almost exclusively on outdated information provided almost two years ago in the *Extraordinary Cost Recovery Case*, lacked a contemporaneous evidentiary foundation[.]”<sup>29</sup> The Recommended Decision characterizes “NMGC’s failure to update time-sensitive elements of its analyses” as “determinative.”<sup>30</sup>

In prior cases, the Commission has required utility applicants seeking a CCN to establish (i) that the project at issue provides a “net public benefit,” (ii) that the utility considered alternatives to the project, and (iii) that the chosen project is the most cost-effective among feasible alternatives.<sup>31</sup> The Recommended Decision appears to impose a fourth requirement (or, at a minimum, modify the second-listed requirement above) by requiring that a utility’s analysis of alternatives have “contemporaneous evidentiary support.” The authority cited in the Recommended Decision to impose this new requirement is PNM’s recent rate case, Case No. 22-00270-UT,<sup>32</sup> in which it was found that PNM acted imprudently when it decided to extend its participation in the Four Corners Power Plant in October 2013, relying upon a non-updated May 2012 analysis of the cost-effectiveness of its participation.<sup>33</sup>

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<sup>27</sup> NMGC BIC at 6-25.

<sup>28</sup> RD at 124.

<sup>29</sup> RD at 124 (emphasis added).

<sup>30</sup> RD at 125.

<sup>31</sup> RD at 7-8 (citing Case No. 15-00185-UT, *Recommended Decision* (NMPRC Sept. 30, 2015); Case No. 13-00297-UT, *Corrected Recommended Decision* (NMPRC Mar. 6, 2014); Case No. 07-00398-UT, *Recommended Decision* (NMPRC Feb. 6, 2008); Case No. 22-00270-UT, *Recommended Decision* (NMPRC Dec. 8, 2023)).

<sup>32</sup> RD at 45 n.148 (citing Case No. 22-00270-UT, *Recommended Decision*, at 40-41).

<sup>33</sup> Case No. 22-00270-UT, *Recommended Decision*, at 80-83, 97-103.

NMGC takes exception to the Recommended Decision’s analysis regarding “contemporaneous evidentiary support” for several reasons, each of which are explained herein. First, NMGC takes exception to the requirement that its analysis of non-LNG alternatives have “contemporaneous evidentiary support,” because NMGC lacked proper notice that a new evidentiary burden was being placed on its CCN application. Second, the “contemporaneous evidentiary support” requirement is impermissibly vague. Third, the imposition of such a requirement is untenable. Fourth, even if the “contemporaneous evidentiary support” requirement were appropriate, NMGC takes exception to the Recommended Decision’s finding that NMGC’s analysis lacked such support.

The Recommended Decision’s imposition of a “contemporaneous evidentiary support” requirement to NMGC’s analysis of non-LNG alternatives is improper, because, as with Exception I, NMGC lacked notice of this standard that would be applied to its CCN application and an opportunity to introduce evidence to meet the standard. As the New Mexico Supreme Court has recognized, “the fundamental requirements of due process in an administrative context are reasonable notice and opportunity to be heard and present any claim or defense.”<sup>34</sup> Based on Commission precedent, NMGC had notice that it carried the burden of proving that it considered non-LNG alternatives prior to seeking a CCN and that the LNG Facility was cost-effective as compared to those alternatives. NMGC presented results of analyses that were performed by the Company in real time as it evaluated and considered storage options in the context of the problem presented and the applicable standards of review set forth in the statute. And while in general any evidence presented in any case may be subject to an attack on timeliness, NMGC was not given prior notice that its consideration of alternatives would be judged on a timeliness standard that

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<sup>34</sup> *El Paso Elec. Co. v. N.M. Pub. Regulation Comm’n*, Nos. S-1-SC-38874, S-1-SC-38911, ¶ 14 (quoting *TW Telecom of N.M., LLC v. Pub. Regulation Comm’n*, 2011-NMSC-029, 150 N.M. 12, 256 P.3d 24).



finds no support in the statute, or that this standard would be declared determinative of issues in its application. Moreover, NMGC's analysis was reasonably timely, given the complexity of the issues and the length of time it takes to litigate these types of cases. NMGC filed its application for a CCN almost a year before the recommended decision was issued in the PNM rate case, which is apparently the source of the "contemporaneous evidentiary support" requirement. Had NMGC known this type of time limit was going to be applied to its analysis of alternatives, the Company could have considered methods to update aspects of its lengthy evaluation of the best solution to increase reliability, mitigate price volatility, and protect customers. By imposing a new temporal requirement on NMGC's analysis of non-LNG alternatives after the close of evidence, the Recommended Decision deprived NMGC of due process by failing to give notice and an opportunity to be heard on a "determinative" issue.

The "contemporaneous evidentiary support" requirement is further problematic because it is impermissibly vague, such that it fails to inform utilities of how it will be applied in future CCN cases. The Recommended Decision does not specify what makes a utility's consideration of alternatives "contemporaneous" with its decision to pursue a project. It is reasonable to assume that these events do not need to be exactly contemporaneous, but the Recommended Decision provides no clarity about whether utilities are afforded days, months, or years between their analysis of alternatives and their decision to pursue a project. This lack of clarity not only renders the "contemporaneous evidentiary support" requirement unworkable in practice, but also violates due process. "It is well established that a . . . regulation which . . . requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning and differ as to its application, lacks the first essential of due process of law."<sup>35</sup> Thus, it was improper for the

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<sup>35</sup> *Bokum Res. Corp. v. N.M. Water Quality Control Comm'n*, 1979-NMSC-090, ¶ 14, 93 N.M. 546, 603 P.2d 285.

Recommended Decision to impose the “contemporaneous evidentiary support” requirement on NMGC’s CCN application. It creates a situation where, in an effort to meet a moving standard of contemporaneousness, the utility is encouraged to continuously updated evidence so that it is never considered stale, which leads to unnecessary expense that does not serve the public interest.

Requiring updated analyses is also completely untenable in situations wherein the Company is looking at multiple large projects that could provide a solution. This is not the same as evaluating a wind farm versus a solar farm. The solutions that NMGC looked at were multi-faceted, and included: building underground storage, building a Liquefied Natural Gas storage facility, building multiple pipelines to interstates, wellhead acquisitions, building propane air facilities, obtaining different supply sources, leasing third-party owned storage, and the ability to change contractual provisions of supply and storage providers.<sup>36</sup> It is next to impossible to continuously update the costs of all of these projects, which all have different market drivers and many of which require complex engineering and construction experts. Requiring such continuously updated analyses of numerous options is unworkable, costly, and would discourage regulated utilities in New Mexico from proposing CCNs that provide a public benefit.

Assuming *arguendo* that the “contemporaneous evidentiary support” requirement was properly imposed on NMGC’s CCN application, the Recommended Decision is incorrect in finding that NMGC’s analysis of alternatives relied on “stale” information.<sup>37</sup> The Recommended Decision stresses that much of the Company’s analysis of alternatives was presented “almost two years ago” in a March 31, 2022 compliance filing in Case No. 21-00095-UT.<sup>38</sup> However, that two-year period counts from NMGC’s March 31, 2022 compliance filing until the date of the

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<sup>36</sup> NMGC BIC at 6-25.

<sup>37</sup> RD at 48.

<sup>38</sup> RD at 124.

Recommended Decision—not the date when NMGC filed its CCN application (December 16, 2022) and not the date when NMGC decided it would pursue the LNG project (March 31, 2022). Indeed, in the March 31, 2022 compliance filing, NMGC Witness Bullard testified that “NMGC intends to file for approval of a CCN to build an LNG facility near the Company’s load centers.”<sup>39</sup> Rather than relying on two-year-old information, as suggested in the Recommended Decision, NMGC expressed its intention to pursue the LNG Facility in the same filing in which it presented its comprehensive analysis of non-LNG alternatives. Thus, in the event the Commission adopts the Recommended Decision’s requirement of a “contemporaneous” analysis of alternatives, NMGC established that its analysis was contemporaneous with its decision to pursue the LNG project.

**EXCEPTION IV: THE RECOMMENDED DECISION REQUIRES IMPOSSIBLE QUANTIFICATION OF BENEFITS TO CUSTOMERS.**<sup>40</sup>

The Recommended Decision appears to impose another new standard and require a quantification of the benefits in a dollar value, but fails to provide any guidance on how a utility can assign a value to curtailing customers. The Company provided multiple calculations related to cost savings of the gas supply itself, but also stated improved reliability would mitigate the possibilities of curtailments in the future. The Recommended Decision relied on the fact that NMGC did not reduce the benefit of keeping gas flowing to its customers in severe weather events to a dollar calculation. The reason why NMGC did not try to “value” avoiding curtailments is because it is an impossible task – as the New Mexico Department of Justice witness Andrea Crane admitted at the hearing.<sup>41</sup> Despite this, the Recommended Decision points to cases from Wisconsin

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<sup>39</sup> NMPRC Case No. 21-00095-UT (Bullard Dir.) at 41:1-2.

<sup>40</sup> Exception IV takes exception to Section 4.4.5 (pp. 126-128), Section 4.4.6 (pp.128-130), and Section 4.5 (pp. 142-144).

<sup>41</sup> Tr. (Vol. 4) 927:7-18 (Crane).

and New York, without any analysis of those states' laws and regulations, and states that NMGC should have been aware of cases going on in other states and performed a similar analysis.<sup>42</sup> Awareness of the level of analyses conducted to meet CCN standards in other states is insufficient notice that NMGC would be required to conduct similar analysis in New Mexico. As acknowledged by New Mexico Department of Justice witness Sol DeLeon, Commissions in other states likely have different requirements and legal standards for approval of CCNs.<sup>43</sup> NMGC cannot be expected to predict which differing standard amongst multiple states might be imposed on it. As described in Exception I, the imposition of such a standard does not comport with the requirements of due process.

### **CONCLUSION**

Based on the facts in evidence and the legal arguments presented in NMGC's brief, NMGC respectfully requests that the Commission grant NMGC's Exceptions. NMGC urges the Commission to reject the adoption of so many new standards, to analyze the evidence and the past Commission cases regarding this issue, and to approve NMGC's application to construct and operate a liquefied natural gas storage facility.

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<sup>42</sup> RD at 128-130.

<sup>43</sup> Tr. (Vol. 4) 892:25-893:2 (DeLeon) ("my understanding is that different Commissions would require different kinds of analysis").

Respectfully submitted this 28th day of February 2024.

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**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

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

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Case No. 22-00309-UT

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing *New Mexico Gas Company, Inc.'s Exceptions to Recommended Decision* was emailed on this date to the parties listed below.

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**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

New Mexico Gas Company Inc.'s  
 Exceptions to Recommended Decision

NMPRC Case No. 22-00309-UT

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**DATED** on February 28th, 2024.

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