

# BAR BULLETIN

October 16, 2019 • Volume 58, No. 21



*Terete*, by Daniel Phill (see page 3)

Owen Contemporary

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## CLE Planner

*Upcoming programming  
from the  
Center for Legal Education*



**MARKET**  
the  
**ME**

**I WANT TO BE**

## 17th Annual Art Contest

**T**hrough the years, the Children’s Law Section Art Contest has demonstrated that communicating ideas and emotions through art and writing fosters thought and discussion among youth on how to change their lives for the better. This year’s theme is designed to encourage youth from around the state who have come in contact with the juvenile justice and/or the child welfare systems to think about how they want and will market themselves to the world. Using materials funded by the Section’s generous donors, contestants will create a canvas to demonstrate their idea of their future self.

**HOW CAN I HELP?** Support the Children’s Law Section Art Contest by way of a donation that will enable contest organizers to purchase supplies, display artwork, provide prizes to contestants and host a reception for the participants and their families. Art supplies and contest prize donations are also welcome.

**To make a tax deductible donation,** visit [www.nmbar.org/ChildrensLaw](http://www.nmbar.org/ChildrensLaw) or make a check out to the New Mexico State Bar Foundation and note “Children’s Law Section Art Contest Fund” in the memo line. Please mail checks to:  
**State Bar of New Mexico, Attn: Member Services, PO Box 92860, Albuquerque, NM 87199**  
*For more information contact Alison Pauk at [alison.pauk@lopdnm.us](mailto:alison.pauk@lopdnm.us).*



**Save the Date**  
for the Art  
Contest Reception!  
Oct. 23 at the  
South Broadway  
Cultural Center



**Officers, Board of Bar Commissioners**

Gerald G. Dixon, President  
 Ernestina R. Cruz, President-elect  
 Carla C. Martinez, Secretary Treasurer  
 Wesley O. Pool, Immediate Past President

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**State Bar Staff**

Executive Director Richard Spinello  
 Director of Communications  
 Evann Kleinschmidt  
 Graphic Designer Julie Schwartz  
 jschwartz@nmbar.org  
 Account Executive Marcia C. Ulibarri  
 505-797-6058 • mulibarri@nmbar.org  
 Communications Coordinator Cassandra Scott  
 505-797-6040 • notices@nmbar.org  
 Digital Print Center  
 Manager Brian Sanchez  
 Assistant Michael Rizzo

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The *Bar Bulletin* (ISSN 1062-6611) is published every other week by the State Bar of New Mexico, 5121 Masthead NE, Albuquerque, NM 87109-4367. Periodicals postage paid at Albuquerque, NM. Postmaster: Send address changes to *Bar Bulletin*, PO Box 92860, Albuquerque, NM 87199-2860.

505-797-6000 • 800-876-6227 • Fax: 505-828-3765  
 address@nmbar.org • [www.nmbar.org](http://www.nmbar.org)

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## Meetings

### October

- 17**  
**Public Law Section Board**  
 Noon, Legislative Finance Committee,  
 Santa Fe
- 18**  
**Family Law Section Board**  
 9 a.m., teleconference
- 22**  
**Intellectual Property Law Section Board**  
 Noon, JAlbright Law LLC
- 23**  
**Natural Resources, Energy and  
 Environmental Law Section Board**  
 Noon, teleconference
- 24**  
**Animal Law Section Board**  
 Noon, State Bar Center
- 25**  
**Immigration Law Section Board**  
 Noon, teleconference
- 25**  
**Cannabis Law Section Board**  
 Noon, teleconference
- 25**  
**Elder Law Section Board**  
 Noon, State Bar Center
- 31**  
**Trial Practice Section Board**  
 Noon, State Bar Center

## Workshops and Legal Clinics

### October

- 17**  
**Common Legal Issues for Senior Citizens  
 Workshop**  
 Presentation: 9:30–10:45 a.m., POA/AHCD  
 Workshop: 11 a.m.-noon, Mary Esther  
 Gonzales Senior Center, Santa Fe, (505)  
 797-6005
- 17**  
**Ask-A-Lawyer Legal Clinic**  
 1:30-4 p.m., The Yam Theatre, 219 Main St.  
 Portales, NM, 88130
- 22**  
**Common Legal Issues for Senior Citizens  
 Workshop**  
 Presentation: noon-1 p.m. POA/AHCD  
 Workshop: 1:30-2 p.m., Ken James Senior  
 Center, T or C, (505) 797-6005
- 23**  
**Consumer Debt/Bankruptcy Workshop**  
 6–9 p.m., State Bar Center, Albuquerque,  
 505-797-6094
- 24**  
**LawLaPalooza**  
 3-6 p.m., Cesar Chavez Community Center,  
 7505 Kathryn Ave. SE, Albuquerque, NM  
 87108
- 30**  
**Common Legal Issues for Senior Citizens  
 Workshop**  
 Presentation: 2-3 p.m. POA/AHCD  
 Workshop: 3-3:30 p.m., UNM-Taos Bataan  
 Hall, Taos, (505) 797-6005

**About Cover Image and Artist:** Daniel Phill has transformed, recreated, reimagined and evolved his unique style of blurring the boundaries of abstraction and representation. Known mostly for his botanical imagery, his paintings bear his signature bold strokes and improvised gestures and marks that are created and composed on layers upon layers of thick, wet, viscous paint on canvas. Phill received his MFA from Stanford University and his BFA from San Francisco Art Institute. Born 1955 Tacoma, Washington



# Notices

## COURT NEWS

### New Mexico Supreme Court Rule-Making Activity

To view recent Supreme Court rule-making activity, visit the Court's website at <https://supremecourt.nmcourts.gov/>. To view all New Mexico Rules Annotated, visit New Mexico OneSource at <https://nmonesource.com/nmos/en/nav.do>

### Supreme Court Law Library

The Supreme Court Law Library is open to the legal community and public at large. The Library has an extensive legal research collection of print and online resources, including Westlaw, LexisNexis and HeinOnline. The Law Library is located in the Supreme Court Building at 237 Don Gaspar in Santa Fe. Building Hours: Monday-Friday 8 a.m.-5 p.m. Reference and Circulation Hours: Monday-Friday 8 a.m.-4:45 p.m. For more information, call 505-827-4850, email [libref@nmcourts.gov](mailto:libref@nmcourts.gov) or visit <https://lawlibrary.nmcourts.gov>.

### Administrative Office of the Courts

#### re:SearchNM Training & Feedback Sessions

If you are currently using Secured Odyssey Public Access to access your New Mexico court case information, you should know that re:SearchNM will be replacing SOPA in the near future. The Judicial Information Division of the New Mexico Administrative Office of the Courts will be holding training and feedback sessions for New Mexico attorneys and justice partners the week of Oct. 15-18, and all current SOPA users will be receiving an email invitation to attend.

### Second Judicial District Court Notice to Attorneys and Public

The Second Judicial District Court Children's Court Abuse and Neglect Brown Bag will be held on Oct. 25 at noon in the Chama Conference Room at the Juvenile Justice Center, 5100 2nd Street NW, Albuquerque, NM 87107. Attorneys and practitioners working with families involved in child protective custody are welcome to attend. Please call 841-7644 for more information.

## Professionalism Tip

### With respect to my clients:

I will charge only a reasonable attorney's fee for services rendered.

### Eighth Judicial District Court Judicial Notice Of Retirement

One vacancy will exist in the Eighth Judicial District Court due to the retirement of the Honorable Jeff Foster McElroy effective Oct. 31. A Judicial Nominating Commission will be convened in Taos, N.M., at the Taos District County Courthouse within 30 days of the vacancy to interview applicants for this position. The date for this commission hearing has not yet been set, but it will be announced as soon as a date is selected. Further information on the application process can be found on the Judicial Selection website (<http://lawschool.unm.edu/judsel/index.php>), updates regarding the vacancy and the news release.

### Retirement Ceremony

The Eighth Judicial District Court cordially invites you to attend the retirement ceremony for The Honorable Jeff Foster McElroy on Oct. 25 at the Taos County Courthouse, 105 Albright Street, Second Floor, Taos, NM 87571. A reception in the courthouse lobby will follow the ceremony. All questions should be directed to program manager, Lauren Felts-Salazar at 575-751-8621 or [taodlmf@nmcourst.gov](mailto:taodlmf@nmcourst.gov).

### Pro Bono Committee Free Legal Fair

The Eighth Judicial District Court Pro Bono Committee will be hosting a free legal fair on Oct. 30 in Bataan Hall located at 121 Civic Plaza Drive, Taos, NM 87571 from 4-7 p.m. There will also be a free Legal Resources for Elderly Program workshop also in Bataan Hall from 2-3 p.m.

### Eleventh Judicial District Court

#### Suspension of Subsection (C) of Local Rule LR11-302

LR11-302 (C) states: "As a sanction for all other technical violations, the probationer shall be incarcerated for five days." The judges of the Eleventh Judicial District Court have decided that

effective immediately, subsection (C) of LR11-302 is suspended indefinitely. The remainder of LR11-302 remains in effect.

### Bernalillo County Court Closure Notice

The Bernalillo County Metropolitan Court will be closed on Oct. 28 for the Court's Annual Professional Development Conference. Misdemeanor custody arraignments, felony first appearances, preliminary examination hearings and traffic arraignments will not be held that day. The conference is sponsored by the New Mexico Judicial Education Center and paid for by fees collected by state courts.

### Bernalillo County Metropolitan Court Volunteers are Needed for Legal Clinics

The Legal Services and Programs Committee of the State Bar and the Bernalillo County Metropolitan Court hold a free legal clinic the second Friday of every month from 10 a.m. until 1 p.m. Attorneys answer legal questions and provide free consultations at the Bernalillo County Metropolitan Court, 9th Floor, 401 Lomas Blvd NW, in the following areas of law: landlord/tenant, consumer rights, emndployee wage disputes, debts/bankruptcy, trial discovery preparation. Clients will be seen on a first come, first served basis and attendance is limited to the first 25 persons.

### New Mexico Commission Access to Justice

The next meeting of the Commission is Oct. 18 from noon-4 p.m. at the State Bar of New Mexico. Commission goals include expanding resources for civil legal assistance to New Mexicans living in poverty, increasing public awareness, and encouraging and supporting pro bono work by attorneys. Interested parties from the private bar and the public are welcome to attend. More information about the Commission is available at [www.accesstojustice.nmcourts.gov](http://www.accesstojustice.nmcourts.gov).



**Statement of Ownership, Management, and Circulation as of Sept. 27, 2019.**

*Bar Bulletin*, Publication No. 1062-6611. 26 issues annually (bi-weekly). \$125 annual subscription price.

Publisher: State Bar of New Mexico, PO Box 92860 (87199-2860), 5121 Masthead NE, Albuquerque, NM 87109.

Owner: State Bar of New Mexico, PO Box 92860 (87199-2860), 5121 Masthead NE, Albuquerque, NM 87109.

No other known bondholders, mortgages, and/or other security holders.

<b>Printed Circulation</b>	<b>Average</b>	<b>Actual (Vol. 58, No. 19)</b>
Total Number of Copies	6181	6331
Paid Subscriptions Outside-County	3692	3756
Paid Subscriptions In-County	2489	2575
Sales Through Dealers, Carriers, etc.	0	0
Other Classes Mailed Through the USPS	0	0
Total Paid Distribution	6181	6331
Free Distribution by Mail		
Outside-County	0	0
In-County	0	0
Other Classes Mailed Through the USPS	0	0
Free Distribution by Mail	0	0
Total Free Distribution	90	90
Total Distribution	6271	6421
Copies not Distributed	0	0
Total	6271	6421
<b>Electronic Circulation</b>	<b>Average</b>	<b>Actual</b>
Requested Electronic Copies	2799	2992
Total Printed and Electronic Circulation	9070	9413
Percent Paid	99.00%	99.04%

I Certify that the statements made above are true and complete.

Evann Kleinschmidt, *Bar Bulletin* Director of Communications

## STATE BAR NEWS

### New Mexico Judges and Lawyers Assistance Program Attorney Support Groups

- Oct. 21, 5:30 p.m.  
UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.
- Nov. 4, 5:30 p.m.  
UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.
- Nov. 11, 5:30 p.m.  
UNM School of Law, 1117 Stanford NE, Albuquerque, King Room in the Law Library (Group meets on the second Monday of the month.) Teleconference participation is available. Dial 1-866-640-4044 and enter code 7976003#.

For more information, contact Latisha Frederick at 505-948-5023 or 505-453-9030 or Bill Stratvert at 505-242-6845.

### Board of Bar Commissioners 2019 Election Notice

The nomination period for seven Board of Bar Commissioner seats will close at 5 p.m., Oct. 21. Vacancies exist in the First Bar Commissioner District

(Bernalillo County), Third Commissioner District (Los Alamos, Rio Arriba, Sandoval and Santa Fe counties), Fifth Commissioner District (Curry, De Baca, Quay and Roosevelt counties), Sixth Commissioner District (Chaves, Eddy Lea, Lincoln and Otero counties) and Seventh Commissioner District (Catron, Dona Ana, Grant, Hidalgo, Luna, Sierra, Socorro and Torrance counties). Nominations of active status members to fill the vacancies caused by the expiration of the term of such members shall be made by petition of 10 or more active status members of the Bar who are in good standing and whose principal place of practice is in the respective district. View the vacant positions, terms, duties and requirements for BBC members and the nomination petition on page 13. For more information, contact Kris Becker at 505-797-6038 or kbecker@nmbar.org.

### Employee Assistance Program: Managing Stress Tool for Members

The Solutions Group, the State Bar's free Employee Assistance Program, announces a new platform for managing stress. My Stress Tools is an online suite of stress management and resilience-building resources which includes: training videos, relaxation music, meditation, stress tests, a journaling feature and much more. My Stress Tools helps you understand the root causes of your stress and gives you the help you need to dramatically reduce

— *Featured* —

**Member Benefit**



Defined Fitness offers State Bar members, their employees and immediate family members a discounted rate. Memberships include access to all five club locations, group fitness classes and free supervised child care. All locations offer aquatics complex (indoor pool, steam room, sauna and hot tub), state-of-the-art equipment, and personal training services. Bring proof of State Bar membership to any Defined Fitness location to sign up.

[www.definded.com](http://www.definded.com).

your stress and build your resilience. Your Employee Assistance Program is available to help you, 24/7. Call at 866-254-3555.

### State Bar of New Mexico Discount New Mexico United Tickets

The State Bar of New Mexico is happy to announce that State Bar members can now receive discounted tickets for the New Mexico United games! A big thanks to New Mexico United for their support. We invite all State Bar Members to purchase tickets by using the coupon codes below for the various games. Show your New Mexico United team spirit and purchase your tickets today! The following date has tickets for a discounted rate: Oct. 19 at 7:30 p.m.

### Public Law Section Procurement Code Institute CLE course

This course will provide information about the laws governing public procurement and ethical considerations for both

agency and private practitioners. Sessions will include legislative amendments, ethics and oversight changes to Procurement Code and Legislative Finance Committee evaluations of Procurement Code. The course will be held at 8 a.m., Oct. 25 in Apodaca Hall at the Old PERA Building located at 1120 Paseo De Peralta, Santa Fe. A total of 1.0 G, 3.0 EP credits will be offered. Please register at [www.nmbar.org](http://www.nmbar.org) or contact CLE at 505-797-6020.

### **Solo and Small Firm Section Nominations for Section Leadership**

Solo and small is BIG news! The Solo and Small Firm Section has open positions for Section leadership roles, including membership on the board of directors and committees for the 2020 term. The Section is looking for candidates from across New Mexico with diverse experiences, backgrounds, and geography. Whether you a new solo or a seasoned pro in the small firm world, we'd love to get to know you. Board commitment is one meeting monthly plus membership in a committee. Committee work depends on the purpose of each committee but expect both slow and busy times. Plans for 2020 committees are in the works now, so your input is critical. To express interest, contact Deian McBryde, chair-elect, at 505-465-9086 or email [deian@mcbrydela.com](mailto:deian@mcbrydela.com).

### **Young Lawyers Division Volunteer Attorneys/Paralegals Needed for Wills for Heroes throughout New Mexico**

The Young Lawyers Division will be hosting a Wills for Heroes event in Silver City on Oct. 19. Wills for Heroes volunteer attorneys provide wills, advance healthcare directives and powers of attorney free of charge to New Mexico first-responders. Volunteer paralegals will serve as witnesses and notaries. For more information and to sign up, please visit [nmbar.org/WillsForHeroes](http://nmbar.org/WillsForHeroes).

### **Mixer in Silver City**

Join the Young Lawyers Division for their mixer on Oct. 18 from 5 – 8 p.m. in Silver City. Food, drink, and conversation will be provided at Little Toad Creek Brewery and Distillery. All lawyers are welcome, not just the young ones! Please let us know if you can make it by sending your R.S.V.P to Sean FitzPatrick at [sfitzpatrick@fitzpatricklawllc.com](mailto:sfitzpatrick@fitzpatricklawllc.com).

### **Intellectual Property Law Section**

#### **Pro Bono Fair**

The Intellectual Property Law Section seeks volunteer attorneys for its second Pro Bono IP Fair Saturday, Nov. 2 at the UNM School of Law. Many creatives and inventors in our community need our help to get their journey started. The Fair will be open from 10 a.m. to 2 p.m., but you need not commit to that entire time. Attorneys will provide free consultations (limited to the time spent at the Fair) in all areas of IP law and/or business law. Visit [nmbar.org/IPLaw](http://nmbar.org/IPLaw) for more information!

### **UNM SCHOOL OF LAW**

#### **Law Library Hours**

##### **Fall 2019**

Through Dec. 31

##### *Building and Circulation*

Monday–Thursday	8 a.m.–8 p.m.
Friday	8 a.m.–6 p.m.
Saturday	10 a.m.–6 p.m.
Sunday	Closed.

##### *Reference*

Monday–Friday	9 a.m.–6 p.m.
---------------	---------------

##### *Holiday Closures*

Thanksgiving: Nov. 28-29

Winter Break: Dec. 23-Jan. 1, 2020

### **OTHER BARS**

#### **New Mexico Black Lawyers Association Annual CLE**

The New Mexico Black Lawyers Association invites members of the legal community to attend its annual CLE, "When They See Us: Navigating Expungement in New Mexico." (1.0 G) on Nov. 15 at the State Bar of New Mexico (5121 Masthead NE, Albuquerque, NM 87109). Lunch will be served prior to the CLE from 12:15 until 1:15 p.m., and the CLE will last from 1:30-2:30 p.m. Registration is \$50 for attorneys seeking credit, and \$40 for NMBLA members, co-sponsors, government/non-profit attorneys, attorneys who are not seeking CLE credit, and paralegals. The deadline to request a refund is Nov. 8. For more information, or to register online, please visit [www.newmexicoblacklawyersassociation.org](http://www.newmexicoblacklawyersassociation.org).

### **New Mexico Criminal Defence Lawyers Association**

#### **CLE Updates**

Updates on field sobriety testing, DWI, DV and misdemeanor laws and the new expungement statute are the focus of this CLE in Farmington which will also be webcast on Oct. 18. Included will be an exploration of novel approaches to defending marijuana and drug cases in light of the 2019 law changes. This seminar provides 4.0 CLE credits. To register for this seminar, please visit [www.nmcdla.org](http://www.nmcdla.org) or contact the New Mexico Criminal Defense Lawyers Association at [info@nmcdla.org](mailto:info@nmcdla.org).

#### **Trial Skills College**

However many times you've stepped into court, the NMCDLA Trial Skills College on Nov. 7-9 will take you to the next level for the next time you walk onto that floor. Fine-tuning your jury selection, opening statements, examinations and closing arguments with some of the best attorneys in the state is a prospect you just can't miss. Reservations limited to insure a small faculty to participant ratio. Faculty includes: Ahmad Assed, Theresa Duncan, Devon Fooks, Shammara Henderson and Wendy York. Seats available to criminal defense lawyers with a few civil rights slots also open. Early registration encouraged as case files will be sent in advance. More information at the New Mexico Criminal Defense Lawyers Association, [www.nmcdla.org](http://www.nmcdla.org) or [info@nmcdla.org](mailto:info@nmcdla.org).

#### **Oliver Seth American Inn of Court**

##### **2019-2020 Schedule**

The Oliver Seth American Inn of Court meets on the third Wednesday of the month from September to May. The meetings always address a pertinent topic and conclude with dinner. If you reside/practice in Northern New Mexico and wish to enhance your skills, meet some pretty good lawyers and some pretty nice judges too, please send a letter of interest to: Honorable Paul J. Kelly, Jr., U.S. Court of Appeals - Tenth Circuit, Post Office Box 10113, Santa Fe, New Mexico 87504-6113.

### **OTHER NEWS**

#### **Albuquerque Bar Association Appellate Law Update**

Please join the Albuquerque Bar Association for an update on appellate court cases affecting an array of practice

areas by Tim Adler. The lunch will take place Nov. 5 at the Embassy Suites, 1000 Woodward Pl NE, Albuquerque, NM 87102. There will be a networking time from 11:30 a.m.-noon and the Lunch and CLE will take place from noon-1 p.m.. The cost is \$30 for members, \$35, for non-members and \$5 for walk-ups. Please register for lunch by 5 p.m., Nov. 1. To register please contact the Albuquerque Bar Association's interim executive director Deborah Chavez at [dchavez@vancechavez.com](mailto:dchavez@vancechavez.com) or 505-842-6626

### Albuquerque Lawyers Club Monthly Lunch Meeting

The Albuquerque Lawyers Club invites members of the legal community to its November lunch meeting. Dick Minzner is the featured speaker. The title of his presentation is "Likely Legislative Issues." Included amongst the topics will be marijuana, film subsidies, payments to college athletes, the early childhood education

trust fund, free college, and tax reform. The lunch meeting will be held on Nov. 1 at noon at Seasons Restaurant, located at 2031 Mountain Road, NW, Albuquerque. For more information, please email [ydenning@gmail.com](mailto:ydenning@gmail.com) or call 505-844-3558.

### Christian Legal Aid Training Seminar

New Mexico Christian Legal Aid invites new members to join them as they work together to secure justice for the poor and uphold the cause of the needy. They will be hosting a Training Seminar on Nov. 1, from noon-5 p.m. at The State Bar of New Mexico located at 5121 Masthead St NE, Albuquerque, NM 87109. Join them for free lunch, free CLE credits, and training as they update skills on how to provide legal aid. For more information or to register, contact Jim Roach at 243-4419 or Jen Meisner at 610-8800 or [christianlegalaid@hotmail.com](mailto:christianlegalaid@hotmail.com).

### Santa Fe Neighborhood Law Center Update on Annual CLE Conference

The Santa Fe Neighborhood Law Center's annual December CLE, "Policy and Law Conference" will no longer be held. After 12 years the SFNLC, a non-profit policy and advocacy organization, has ceased its operations and is terminating its existence. Through litigation, agency advocacy and educational civic forums, the SFNLC advanced the rights of people threatened with foreclosures, improved City policies and procedures for review and approval of proposed developments, and conducted a major policy and law conference every December since 200 devoted to solutions for issues important to the life of Santa Fe. We thank the many presenters and participants for your support, attendance, hard work and wisdom over the years. Any questions should be directed to Daniel Yohalem, president of the SFNLC Board, at [dyohalem@aol.com](mailto:dyohalem@aol.com).

# eNews

## Get Your Business Noticed!

Advertise in our email newsletter, delivered to your inbox every Friday.



**Benefits:**

- Circulation of 8,000
- Affordable pricing
- High open/click rates
- Schedule flexibility
- Popular content





## STATE BAR of NEW MEXICO

Contact Marcia Ulibarri,  
at 505-797-6058 or email [mulibarri@nmbar.org](mailto:mulibarri@nmbar.org)



# Legal Education

## October

- 16 **Auto Injuries Advanced Plaintiff Strategies**  
5.0 G, 1.0 EP  
Live Seminar, Santa Fe  
NBI, Inc.  
www.nbi-sems.com
- 16 **Going Over: Employment Law Issues When a Key Employee Leaves for a Competitor**  
1.0 G  
Teleseminar  
Center for Legal Education of NMSBF  
www.nmbar.org
- 16 **Hybrid Education-From Mediation to Social Media**  
2.0 EP  
Live Seminar, Albuquerque  
New Mexico Association Of Legal Administrators  
www.nmala.org
- 17 **Annual School Law Practice Seminar**  
12.0 G, 1.0 EP  
Live Seminar  
National School Boards Assoc  
Council School Attys  
www.nsba.org
- 17 **Bridge the Gap Mentorship Program CLE (Full Day Program)**  
5.0 G, 1.0 EP  
Live Webcast/Live Seminar,  
Albuquerque  
Center for Legal Education of NMSBF  
www.nmbar.org
- 17 **Bridge the Gap Mentorship Program CLE (Partial-Day Program)**  
3.0 G, 1.0 EP  
Live Webcast/Live Seminar,  
Albuquerque  
Center for Legal Education of NMSBF  
www.nmbar.org
- 17 **Motions Practice**  
1.0 G  
Live Seminar, Albuquerque  
Administrative Office Of The District Attorneys  
www.nmdas.com
- 18-19 **2019 Family Law Institute**  
10.0 G, 2.0 EP  
Live Webcast/Live Seminar,  
Albuquerque  
Center for Legal Education of NMSBF  
www.nmbar.org
- 22 **What to Do When a Partner Leaves? Non-Competition for Departing Owners**  
1.0 EP  
Teleseminar  
Center for Legal Education of NMSBF  
www.nmbar.org
- 22 **Fall District Attorney Conference**  
11.0 G, 2.0 EP  
Live Seminar  
Administrative Office Of The District Attorneys  
www.nmdas.com
- 23 **How to Practice Series: Demystifying Civil Litigation, Pt. 1 (2018)**  
6.0 G  
Live Replay, Albuquerque  
Center for Legal Education of NMSBF  
www.nmbar.org
- 23 **The Fear Factor: How Good Lawyers Get Into Ethical Trouble (2018)**  
3.0 EP  
Live Replay, Albuquerque  
Center for Legal Education of NMSBF  
www.nmbar.org
- 23 **Criminal Rules Hot Topics (2018)**  
2.5 G, 0.5 EP  
Live Replay, Albuquerque  
Center for Legal Education of NMSBF  
www.nmbar.org
- 24 **Animal Cruelty Issues: What Juvenile and Family Court Judges and Practitioners Need to Know**  
2.0 G  
Webcast/Live Seminar, Albuquerque  
Center for Legal Education of NMSBF  
www.nmbar.org
- 24 **An In-Depth Look at the Latest Info and Ethical Considerations Pertaining to Cultural Competency/Implicit Bias in the Legal Profession**  
2.0 EP  
Webcast/Live Seminar, Albuquerque  
Center for Legal Education of NMSBF  
www.nmbar.org
- 24 **Transgender 101 for Lawyers**  
2.0 G  
Live Webcast/Live Seminar,  
Albuquerque  
Center for Legal Education of NMSBF  
www.nmbar.org
- 24 **Trial (Preparation and Trial Phase)**  
1.0 G  
Live Seminar, Albuquerque  
Administrative Office Of The District Attorneys  
www.nmdas.com
- 25 **2019 Procurement Code Institute**  
1.0 G, 3.0 EP  
Live Seminar, Santa Fe  
Center for Legal Education of NMSBF  
www.nmbar.org
- 25 **Elder Law Institute: Empowering Vulnerable New Mexicans**  
5.5 G, 1.0 EP  
Live Webcast/Live Seminar,  
Albuquerque  
Center for Legal Education of NMSBF  
www.nmbar.org
- 29 **2019 Attorney – Client Privilege & Confidentiality Update**  
1.0 EP  
Teleseminar  
Center for Legal Education of NMSBF  
www.nmbar.org

Listings in the *Bar Bulletin* Legal Education Calendar are derived from course provider submissions and from New Mexico Minimum Continuing Legal Education. All MCLE approved continuing legal education courses can be listed free of charge. Send submissions to [notices@nmbar.org](mailto:notices@nmbar.org). Include course title, credits, location/course type, course provider and registration instructions.

- |  |  |  |
|--|--|--|
| <p><b>30 How to Practice Series: Demystifying Civil Litigation, Pt. 2 – Taking and Defending Depositions (2018)</b><br/>4.5 G, 2.0 EP<br/>Live Replay/Live Webcast<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>30 Federal Fiduciary Income Tax Workshop</b><br/>6.6 G<br/>Live Seminar, Albuquerque<br/>Halfmoon Education<br/>www.halfmoonseminars.org</p>                                     | <p><b>31 Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204</b><br/>1.0 EP<br/>Live Webinar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> |
| <p><b>30 Basic Guide to Appeals for Busy Trial Lawyers (2018)</b><br/>3.0 G<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>   | <p><b>31 Post-Mortem Trust and Estate Planning</b><br/>1.0 G<br/>Teleseminar<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>   | <p><b>31 Role and Responsibilities of Duty Attorney</b><br/>1.0 G,<br/>Live Seminar<br/>Administrative Office Of The District Attorneys<br/>www.nmdas.com</p>                        |
| <p><b>30 Recent Developments in Civil Procedure (2018)</b><br/>2.0 G<br/>Live Replay, Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  | <p><b>31 Complying with the Disciplinary Board Rule 17-204</b><br/>1.0 EP<br/>Live Webcast/Live Seminar,<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> |  |

## November

- |   |   |  |
|---|---|--|
| <p><b>1 ADR: Mediator Best Practices, Skills and Self-Care</b><br/>4.7 G, 1.0 EP<br/>Live Webcast/Live Seminar,<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                     | <p><b>7 Indian Law: The Multidisciplinary Practice</b><br/>5.0 G, 1.0 EP<br/>Live Webcast/Live Seminar,<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                           | <p><b>14 Complying with the Disciplinary Board Rule 17-204</b><br/>1.0 EP<br/>Live Webcast/Live Seminar,<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>                             |
| <p><b>1 Skills for Effective Depositions</b><br/>2.0 G,<br/>Live Seminar<br/>New Mexico Office Of Attorney General<br/>www.nmag.gov</p>   | <p><b>8 2019 Business Law</b><br/>4.5 G, 1.5 EP<br/>Live Webcast/Live Seminar,<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p>  | <p><b>14 Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204</b><br/>1.0 EP<br/>Live Webcast/Live Seminar,<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> |
| <p><b>6 Basics of Trust Accounting: How to Comply with Disciplinary Board Rule 17-204</b><br/>1.0 EP<br/>Live Webcast/Live Seminar,<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>13 Reefer Madness Part Deux: Chronic Issues in New Mexico Cannabis Law</b><br/>5.0 G, 1.0 EP<br/>Live Webcast/Live Seminar,<br/>Albuquerque<br/>Center for Legal Education of NMSBF<br/>www.nmbar.org</p> | <p><b>15 When They See Us: Navigating Expungement in New Mexico</b><br/>1.0 EP<br/>Live Webinar<br/>New Mexico Black Lawyers Association<br/>www.newmexicoblacklawyersassociation.org</p>                          |
| <p><b>7 NMCDLA Trial Skills College</b><br/>14.0 G<br/>Live Seminar<br/>New Mexico Criminal Defense Lawyers<br/>www.nmcdla.org</p>  | <p><b>13 Unlocking the Opportunity of Complex Asset Charitable Gifts</b><br/>1.2 G,<br/>Live Seminar<br/>National Christian Foundation<br/>www.ncfgiving.com</p>  | <p><b>21 A Comedic De-Briefing of the Law</b><br/>3.5 G, 3.5 EP<br/>Live Seminar<br/>Comedian Of Law<br/>www.comedianoflaw.com</p>   |

# Opinions

As Updated by the Clerk of the New Mexico Court of Appeals

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## Effective Sept. 27, 2019

### PUBLISHED OPINIONS

A-1-CA-36463	J Marquez v. Board of Trustees	Affirm	09/23/2019
A-1-CA-36190	A Russ v. J Russ	Affirm	09/24/2019
A-1-CA-36032	State v. L Costillo	Reverse/Remand	09/26/2019

### UNPUBLISHED OPINIONS

A-1-CA-36227	E Trujillo v. Los Alamos National Lab	Reverse/Remand	09/24/2019
A-1-CA-36199	H Balderas v. P Morris USA	Affirm	09/25/2019
A-1-CA-37880	CYFD v. Sara T	Affirm	09/25/2019
A-1-CA-35499	State v. J Grubb	Reverse/Remand	09/26/2019
A-1-CA-37764	State v. H Harvey	Affirm	09/26/2019
A-1-CA-37804	State v. R Barela	Affirm	09/26/2019
A-1-CA-38155	CYFD v. Anthony B.	Affirm	09/26/2019

Slip Opinions for Published Opinions may be read on the Court's website:

<http://coa.nmcourts.gov/documents/index.htm>

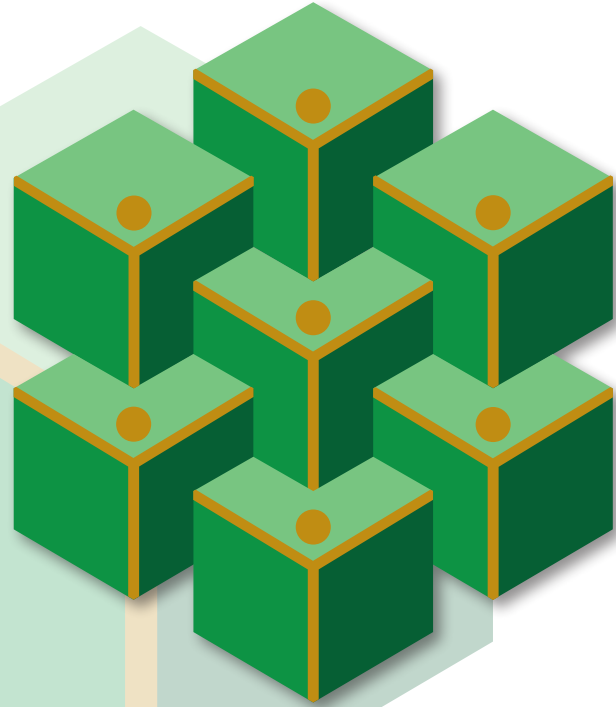




STATE BAR  
of NEW MEXICO

INTEREST ON LAWYERS  
TRUST ACCOUNTS

I Interest  
O on  
L Lawyers  
T Trust  
A Accounts



## *Funding Civil Legal Services in New Mexico*

### **What is an IOLTA account?**

A pooled, interest-bearing demand deposit account used by lawyers to hold client funds.

### **Where does IOLTA interest go?**

The interest generated on IOLTA accounts is remitted to the State Bar of New Mexico and distributed through an annual grant process conducted by the State Bar's Access to Justice Fund Grant Commission.

### **What do the grants fund?**

The Commission awards grants to Civil Legal Service Providers throughout New Mexico. These organizations provide civil legal assistance to low-income New Mexicans. In the 2019-2020 grant cycle, the Commission awarded \$675,000 to civil legal service programs. Of that amount, \$270,000 came from IOLTA funding.

### **How can I help?**

By choosing a bank with the highest interest rates for IOLTA, you are increasing the funding for civil legal services in New Mexico. To find out which banks offer the highest rates check our website at [www.nmbar.org/IOLTA](http://www.nmbar.org/IOLTA) or email [iolta@nmbar.org](mailto:iolta@nmbar.org).



# Check out our brand new events calendar!

## Events from:

- ✓ State Bar
- ✓ Courts
- ✓ UNM
- ✓ Voluntary bars
- ✓ And more!

## Search by:

- ✓ Date
- ✓ Event type
- ✓ Organizer

## Stay Organized- Stay Mobile!

Import your favorite events to your preferred calendar tool  
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[www.nmbar.org/eventscalendar](http://www.nmbar.org/eventscalendar)

Have an event to add?  
Email [notices@nmbar.org](mailto:notices@nmbar.org).



# BOARD OF BAR COMMISSIONERS ELECTION NOTICE 2019



Pursuant to Supreme Court Rule 24-101, the Board of Bar Commissioners is the elected governing board of the State Bar of New Mexico.

## **Duties and Requirements for Board of Bar Commissioner Members:**

- Attend all Board meetings (up to six per year), including the Annual Meeting of the State Bar.
- Represent the State Bar at local bar-related meetings and events.
- Communicate regularly with constituents regarding State Bar activities.
- Promote the programs and activities of the State Bar and the NM State Bar Foundation.
- Participate on Board and Supreme Court committees.
- Evaluate the State Bar's programs and operations on a regular basis.
- Ensure financial accountability for the organization.
- Support and participate in State Bar referral programs.
- Establish and enforce bylaws and policies.
- Serve as a director of the New Mexico State Bar Foundation Board.

Pursuant to the State Bar Bylaws, the Executive Director of the Bar provides notice to all active status members of the State Bar of the names of the Commissioners whose terms shall expire and the Bar Commissioner district from which they were elected (see positions expiring Dec. 31 and the districts below). Nominations of active status members to fill the vacancies caused by the expiration of the term of such members shall be made by petition of 10 or more active status members of the Bar who are in good standing and whose principal place of practice is in the respective district and must be received in writing in the office of the Executive Director of the Bar by 5 p.m. on or before Oct. 21 (see Nomination Petition on the next page). All active status members of the State Bar who maintain a place of practice within the State shall be eligible for nomination and election. A member shall be nominated from the District in which his or her principal place of practice is located. No state or federal judge shall be eligible to serve as a member of the BBC of the State Bar while in office. All of the positions are three-year terms and run from Jan. 1, 2020-Dec. 31, 2022, except as noted.

### **First Bar Commissioner District (one three-year and one one-year position)**

#### **Bernalillo County**

Commissioners whose terms expire  
this year:

- Sean M. FitzPatrick
- Lucy H. Sinkular

#### **Third Bar Commissioner District**

#### **Los Alamos, Rio Arriba, Sandoval and Santa Fe counties**

Commissioner whose term expires  
this year:

- Carolyn A. Wolf

#### **Fifth Bar Commissioner District**

#### **Curry, DeBaca, Quay and Roosevelt counties**

Commissioner whose term expires  
this year:

- Wesley O. Pool \*

### **Sixth Bar Commissioner District**

#### **Chaves, Eddy, Lea, Lincoln and Otero counties**

Commissioner whose term expires  
this year:

- Parker B. Folse

#### **Seventh Bar Commissioner District**

#### **Catron, Dona Ana, Grant, Hidalgo, Luna, Sierra, Socorro and Torrance counties**

Commissioners whose terms expire  
this year:

- Mick I. R. Gutierrez
- David P. Lutz

\*Ineligible to seek re-election

### **Send nomination petitions to:**

Executive Director  
Richard Spinello  
State Bar of New Mexico

PO Box 92860  
Albuquerque, NM 87199-2860  
rspinello@nmbar.org

**Petitions must be received by  
5 p.m., Oct. 21.**

Direct inquiries to 505-797-6038  
or kbecker@nmbar.org.



# NOMINATION PETITION FOR BOARD OF BAR COMMISSIONERS

We, the undersigned, members in good standing and who have a principal place of practice in the respective district of the nominee, nominate \_\_\_\_\_, with a principal place of practice in and representing the \_\_\_\_\_ Bar Commissioner District.  
Date Submitted \_\_\_\_\_

(1) \_\_\_\_\_  
Signature

\_\_\_\_\_  
Type or Print Name

\_\_\_\_\_  
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(2) \_\_\_\_\_  
Signature

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(3) \_\_\_\_\_  
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(10) \_\_\_\_\_  
Signature

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\_\_\_\_\_  
Address

# Clerk's Certificates

From the Clerk of the New Mexico Supreme Court

Joey D. Moya, Chief Clerk New Mexico Supreme Court  
PO Box 848 • Santa Fe, NM 87504-0848 • (505) 827-4860

## CLERK'S CERTIFICATE OF NAME CHANGE

As of August 8, 2019:  
**Faranak Nazari Benjamin**  
1060 Hubert Road  
Oakland, CA 94610  
970-901-6424  
frankienazari@gmail.com

As of September 18, 2019:  
**Sarah C. Burton**  
Office of the Second Judicial  
District Attorney  
520 Lomas Blvd., NW  
Albuquerque, NM 87102  
505-382-3790  
sarah.burton@da2nd.state.  
nm.us

## CLERK'S CERTIFICATE OF NAME AND ADDRESS CHANGE

As of September 12, 2019:  
**Claire L. Cook**  
Jackson Lewis, PC  
500 N. Akard Street,  
Suite 2500  
Dallas, TX 75201  
214-520-2400  
214-520-2008 (fax)  
claire.cook@jacksonlewis.com

## CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS

Effective September 11, 2019:  
**Thomas B. Jameson**  
1024 Forrester Avenue, NW  
Albuquerque, NM 87102  
505-321-7827  
tbjameson@gmail.com

## CLERK'S CERTIFICATE OF REINSTATEMENT TO ACTIVE STATUS AND CHANGE OF ADDRESS

Effective September 11, 2019:  
**Mary-Irene Kinsley**  
1423 S. Higley Road,  
Suite 110  
Mesa, AZ 85206  
480-344-0921  
mkinsley@davismiles.com

## CLERK'S CERTIFICATE OF CORRECTION

a clerk's certificate of change  
to inactive status and change  
of address dated July 31, 2019,  
contained a typographical  
error in the address change  
certified for **Gary Don  
Reagan**. It is corrected below:  
**Gary Don Reagan**  
PO Box 5214  
Hobbs, NM 88241

## IN MEMORIAM

As of September 7, 2019:  
**Michael G. Sutin**

## CLERK'S CERTIFICATE OF LIMITED ADMISSION

On **September 13, 2019**:  
**Hannah Vellinga**  
Law Offices of the Public  
Defender  
300 Gossett Drive  
Aztec, NM 87410  
505-386-4060  
hannah.vellinga@lopdnm.us

## CLERK'S CERTIFICATE OF ADMISSION

On September 23, 2019:  
**Ryan F. Adragna**  
Supreme Court of New  
Mexico  
PO Box 848  
237 Don Gaspar Avenue  
(87501)  
Santa Fe, NM 87504  
505-827-4880  
suprfa@nmcourts.gov

**Jamie L. Allen**  
Modrall, Sperling, Roehl,  
Harris & Sisk, PA  
PO Box 2168  
500 Fourth Street, NW  
(87102)  
Albuquerque, NM 87103  
505-848-1838  
jallen@modrall.com

**Lauren Mariam Aminian**  
1017 Fifth Street, NW  
Albuquerque, NM 87102  
505-379-0255  
lauren.aminian@gmail.com

**Noe Astorga-Corral**  
Sutin, Thayer & Browne, APC  
6100 Uptown Blvd., NE,  
Suite 400  
Albuquerque, NM 87110  
505-883-3471  
nxa@sutinfirm.com

**Erika E. Avila Stephanz**  
302-A F Street  
Elgin, OK 73538  
505-514-5024  
eeavila8@gmail.com

**Erica M. Baca**  
2677 N. Main Street,  
Suite 815  
Santa Ana, CA 92705  
714-644-8760  
embaca27@gmail.com

**Meaghan T. Baca**  
SaucedoChavez, PC  
800 Lomas Blvd., NW,  
Suite 200  
Albuquerque, NM 87102  
505-338-3945  
mbaca@saucedochavez.com

**Anna Maria Baecker**  
Law Office of J. Alison  
Cimino, PC  
1300 Lomas Blvd., NW  
Albuquerque, NM 87104  
505-842-0888  
505-842-0555 (fax)  
annabaecker22@gmail.com

**Krista L. Bailey**  
Law Offices of the Public  
Defender  
505 S. Main Street,  
Suite 121  
Las Cruces, NM 88001  
575-541-3193  
krista.bailey@lopdnm.us

**Andrew A. Bandzar**  
5150 Park Brooke Walk Way  
Alpharetta, GA 30022  
678-571-2968  
andrew.bandzar@gmail.com

**Valentina Elizabeth Basile**  
339 Via Vista Street, SE  
Albuquerque, NM 87123  
703-459-4255  
jc.valentina@live.com

**Luke Michael Batty**  
2804 Sierra Drive, NE  
Albuquerque, NM 87110  
505-362-6994  
lbatty38@gmail.com

**Jordan Edson Beal**  
Law Offices of the Public  
Defender  
610 N. Virginia Avenue  
Roswell, NM 88201  
575-208-1655  
jordan.beal@lopdnm.us

**Allyson Anne Beasley**  
Western Environmental Law  
Center  
208 Paseo Del Pueblo Sur,  
#602  
Taos, NM 87571  
575-224-6260  
beasley@westernlaw.org

**Siniva Marie Bennett**  
834 N. Sumner Street  
Portland, OR 97217  
971-570-5233  
nivabennett@gmail.com

**Ian Barnes Bertschausen**  
555 Broadway Blvd., NE,  
Suite 200  
Albuquerque, NM 87102  
866-732-3998, Ext. 11903  
ian.bertschausen@gmail.com

**Michael W. Boden**  
133 County Road 209B  
Seminole, TX 79360  
432-213-2785  
mboden12@live.com

**Lennie F. Bollinger**  
Wormington & Bollinger  
212 E. Virginia Street  
McKinney, TX 75069  
972-569-3930  
972-547-6440 (fax)  
lb@wormingtonlegal.com

**Ann L. Brethour**

New Mexico Court of Appeals  
PO Box 2008  
237 Don Gaspar Avenue  
(87501)  
Santa Fe, NM 87504  
505-827-4817  
coaalb@nmcourts.gov

**Emily Elizabeth Brown**

Cotton, Bledsoe, Tighe &  
Dawson, PC  
500 W. Illinois Avenue,  
Suite 300  
Midland, TX 79701  
432-685-8538  
ebrown@cbtd.com

**Anne Marie Bruno**

New Mexico Court of Appeals  
2211 Tucker Avenue, NE  
Albuquerque, NM 87106  
505-841-4618  
coaaxb@nmcourts.gov

**Taylor V. Bui**

New Mexico Court of Appeals  
2211 Tucker Avenue, NE  
Albuquerque, NM 87106  
505-841-4650  
505-841-4614 (fax)  
coatvb@nmcourts.gov

**Heather C. Burke**

Burke Law  
2268 Calle Cuesta  
Santa Fe, NM 87505  
505-428-9424  
info@hburkelaw.com

**Riley J. Busby**

Madison, Mroz, Steinman &  
Dekleva, PA  
PO Box 25467  
201 Third Street, NW,  
Suite 1600 (87102)  
Albuquerque, NM 87125  
505-242-2177  
rjb@madisonlaw.com

**Crystal C. Cabrido**

Office of the Thirteenth  
Judicial District Attorney  
PO Box 1919  
Los Lunas, NM 87031  
505-861-0311  
ccabrido@da.state.nm.us

**Janine N. Caller**

6037 Landry Avenue, NW  
Albuquerque, NM 87120  
505-730-1416  
janine.caller@gmail.com

**Kevin M. Cartwright**

333 Lomas Blvd., NW  
Albuquerque, NM 87102  
505-600-4645  
kevin\_cartwright@nmb.  
uscourts.gov

**Alejandra J. Chan**

215 Sena Street  
Santa Fe, NM 87505  
505-469-4379  
chan.al@outlook.com

**Israel S. Chávez**

2410 Centre Avenue, SE  
Albuquerque, NM 87106  
505-841-6000  
israel.chavez@state.nm.us

**Chukwudi M. Chigewe**

606 River Street #16  
Lansing, MI 48933  
347-687-4810  
bsib290@yahoo.com

**Yelitza Conover**

3821 Don January Avenue  
Clovis, NM 88101  
443-779-9333  
conover.yelitza2@gmail.com

**Ashley J. Cook**

Giddens & Gatton Law, PC  
10400 Academy Road, NE,  
Suite 350  
Albuquerque, NM 87111  
505-271-1053  
ashley@giddenslaw.com

**Julia Gabrielle Coulloudon**

Curtis & Co. Law Firm  
215 Central Avenue, NW,  
Suite 300  
Albuquerque, NM 87102  
505-243-2808  
505-242-0812 (fax)  
julia@curtislawfirm.org

**Tashika A. Curlee**

Law Offices of the Public  
Defender  
800 Pile Street,  
Suite A  
Clovis, NM 88101  
575-219-6323  
tashika.curlee@lopdmn.us

**Zachary Gregory Daw**

201 E. Main Drive,  
Suite 1100  
El Paso, TX 79901  
915-533-2493  
zdaw@scotthulse.com

**Kaitlyn Elizabeth DelBene**

University of New Mexico -  
Office of University Counsel  
MSC09 5300  
1 University of New Mexico  
Albuquerque, NM 87131  
505-272-2377  
kdelbene@salud.unm.edu

**Concetto Kirk Di Giacomo**

10015 E. Dynamite Blvd.,  
Suite 115  
Scottsdale, AZ 85262  
480-518-3569  
kirkdigiacomo@icloud.com

**Lilia A. Diaz**

Law Offices of Christopher C.  
Marlowe LLC  
820 Second Street, NW  
Albuquerque, NM 87108  
505-670-5971  
liliaandreadiaz@gmail.com

**Isaac E. Dodd III**

Law Offices of the Public  
Defender  
505 S. Main Street,  
Suite 121  
Las Cruces, NM 88001  
575-541-3193 Ext. 10540  
isaac.dodd@lopdmn.us

**Alexis Shannez Dudelczyk**

1807 Second Street, Suite 44B  
Santa Fe, NM 87505  
505-670-0358  
as.dudelczyk@gmail.com

**Alexander Guy Elborn**

Law Offices of the Public  
Defender  
2395 N. Florida Avenue  
Alamogordo, NM 88310  
575-551-7209  
alexander.elborn@lopdmn.us

**Stephen Michael Fernelius**

Fernelius Simon Mace Rob-  
ertson Perdue PLLC  
4119 Montrose Blvd.,  
Suite 500  
Houston, TX 77006  
713-654-5151  
713-654-4039 (fax)  
steve.fernelius  
@trialattorneytx.com

**Hannah G. Fields**

The Fields Law Firm, PC  
501 Executive Center Blvd.,  
Suite 200  
El Paso, TX 79902  
915-351-4000  
915-759-4067 (fax)  
hannah@fieldslawtexas.com

**Dillon Reed Fisher-Ives**

1907 Hano Road  
Santa Fe, NM 87505  
505-321-1493  
dfisherives@gmail.com

**Charlie Flewelling**

434 Quincy Street, NE  
Albuquerque, NM 87108  
971-300-4802  
charlie@pacificu.edu

**Sofia Elena Flores**

Law Offices of the Public  
Defender  
505 Marquette Avenue, NW,  
Suite 120  
Albuquerque, NM 87102  
505-369-3600  
sofia.flores@lopdmn.us

**Daniel N. Fogg**

Office of the Second Judicial  
District Attorney  
520 Lomas Blvd., NW  
Albuquerque, NM 87102  
505-222-1099  
daniel.fogg@da2nd.state.  
nm.us

**Mark D. Freudenheim**

Boyle & Freudenheim  
16 Spirit Court  
Santa Fe, NM 87506  
505-989-5057  
mark.freudenheim@gmail.  
com

**Lauren D. Gallaway**  
Law Offices of the Public  
Defender  
505 Marquette Avenue, NW,  
Suite 120  
Albuquerque, NM 87102  
505-369-3600  
lauren.gallaway@lopdmn.us

**Javier Garcia**  
1441 Coffee Villa Drive  
Modesto, CA 95355  
408-849-3898  
javiergarcianmlpr@gmail.com

**Luis C. Garcia**  
7301 Inwood Court, NW  
Albuquerque, NM 87120  
202-460-7323  
lc.vaz.garcia@gmail.com

**Olivia Kay Garcia**  
New Mexico Children, Youth  
& Families Department  
1031 Lambertson Place, NE  
Albuquerque, NM 87107  
505-841-7800  
olivia.garcia@state.nm.us

**Kaleigh E. Garduño**  
Dorato & Weems  
118 Wellesley Drive, SE  
Albuquerque, NM 87106  
505-314-8880  
kaleigh@doratoeweems.com

**Christie Geter**  
Office of the Second Judicial  
District Attorney  
520 Lomas Blvd., NW  
Albuquerque, NM 87102  
505-382-1440  
christie.geter@da2nd.state.  
nm.us

**Joshua A. Goldberg**  
Law Offices of the Public  
Defender  
505 Marquette Avenue, NW,  
Suite 120  
Albuquerque, NM 87102  
505-835-2228  
joshua.goldberg@lopdmn.us

**Aaron David Goldfarb**  
The Goldfarb Law Firm,  
PLLC  
309 E. Robinson Avenue  
El Paso, TX 79902  
915-995-5950  
aaron@goldfarb-legal.com

**Christian P. Goldsmith**  
Law 4 Small Business PC  
320 Gold Avenue, SW,  
Suite 620  
Albuquerque, NM 87102  
505-715-5700  
505-702-8810 (fax)  
jake@L4SB.com

**Javier L. Gonzales**  
Office of the Second Judicial  
District Attorney  
520 Lomas Blvd., NW  
Albuquerque, NM 87102  
505-382-5617  
javier.gonzales@da2nd.state.  
nm.us

**Joelle Nichole Gonzales**  
2491 Sawmill Road, Apt. 813  
Santa Fe, NM 87505  
505-670-6994  
joelle.gonzales.esq@gmail.  
com

**Nathan William Graff**  
Roberta Yurcic Legal Services,  
LLC  
507 Slate Avenue, NW  
Albuquerque, NM 87102  
505-492-4267  
505-807-0609 (fax)  
nwgraff.law@gmail.com

**James E. Grieco**  
Law & Resource Planning  
Associates, PC  
201 Third Street, NW, Suite  
1750  
Albuquerque, NM 87102  
505-346-0998  
jeg@lrpa-usa.com

**Steven J. Gross**  
The Cavanagh Law Firm  
1850 N. Central Avenue,  
Suite 2400  
Phoenix, AZ 85004  
602-322-4000  
602-322-4103 (fax)  
sgross@cavanaghlaw.com

**Michelle M. Halt**  
131 N. Drexel Street  
Mesa, AZ 85207  
480-319-4999  
mhalt9@gmail.com  
Robert Michael Hart  
New Mexico Court of Appeals  
2211 Tucker Avenue, NE  
Albuquerque, NM 87106  
505-767-6126  
coarmh@nmcourts.gov

**Joshua P. Hasyniec**  
Office of the Second Judicial  
District Attorney  
520 Lomas Blvd., NW  
Albuquerque, NM 87102  
505-382-9223  
joshua.hasyniec@da2nd.state.  
nm.us

**Hayden Hatch**  
Glasheen, Valles & Inderman,  
LLP  
1703 West Avenue  
Austin, TX 78701  
512-851-1053  
hayden.hatch@gvilaw.com

**Lucas Helper**  
Office of the Eighth Judicial  
District Attorney  
105 Albright Street,  
Suite L  
Taos, NM 87571  
575-758-8683  
lhelper@da.state.nm.us

**Kaythee Hlaing**  
Office of the Second Judicial  
District Attorney  
520 Lomas Blvd., NW  
Albuquerque, NM 87102  
505-222-1099  
kaythee.hlaing@da2nd.state.  
nm.us

**Damon J. Hudson**  
Hinkle Shanor LLP  
PO Box 2068  
218 Montezuma Avenue  
(87501)  
Santa Fe, NM 87504  
505-259-7526  
505-982-8623 (fax)  
dhudson@hinklelawfirm.com

**Kimberly Annise Huson**  
Lewis Brisbois Bisgaard &  
Smith  
1920 Vassar Drive, NE #8  
Albuquerque, NM 87106  
480-358-7601  
khuson77@hotmail.com

**David Michael Hutchens**  
Crenshaw, Dupree & Milam,  
LLP  
4411 98th Street,  
Suite 400  
Lubbock, TX 79424  
806-762-5281  
dhutchens@cdmlaw.com

**Brandon M. Ilgen**  
PO Box 22008  
Albuquerque, NM 87154  
970-208-3597  
brandon.ilgen@gmail.com

**Ricardo Jasso**  
2824 Mays Street, Apt. 6  
Amarillo, TX 79109  
210-585-8686  
rickjasso86@yahoo.com

**Grace Elizabeth Jennings**  
505 Marquette Avenue, NW,  
Suite 120  
Albuquerque, NM 87102  
505-369-3600  
grace.jennings@lopdmn.us

**Michael Thomas Jewell**  
6400 S. Fiddler's Green Circle,  
Suite 1000  
Greenwood Village, CO  
80111  
303-796-2626  
mjewell@bflaw.com

**Daniel Christopher Johns**  
Kaiser Permanente  
1 Kaiser Plaza, Floor 12  
Oakland, CA 94612  
510-267-7751  
daniel.johns@kp.org  
**Kara Jenelle Johnson**  
6969 Pastor Bailey Drive,  
Suite 120  
Dallas, TX 75237  
682-478-6654  
lawyerkarajohnson@ymail.  
com

**Madison R. Jones**  
PO Box 70238  
Albuquerque, NM 87197  
505-554-1115  
mrjones@wilcoxlawnm.com

**Rachael K. Jones**  
Sloan, Hatcher, Perry, Runge,  
Robinson & Smith  
PO Box 6138  
Round Rock, TX 78683  
512-481-2877  
rkjones983@gmail.com

**Magdalena Marie Kephart**  
Law Offices of the Public  
Defender  
505 Marquette Avenue, NW,  
Suite 120  
Albuquerque, NM 87102  
505-369-3600  
magdalena.kephart@lopdmn.  
us



From the New Mexico Supreme Court and Court of Appeals

From the New Mexico Supreme Court

**Opinion Number: 2019-NMSC-012**

No: S-1-SC-36115 (filed May 26, 2019)

PUBLIC SERVICE COMPANY  
OF NEW MEXICO,  
Appellant,  
v.  
NEW MEXICO PUBLIC REGULATION  
COMMISSION,  
Appellee, and  
NEW ENERGY ECONOMY, INC.,  
NEW MEXICO INDUSTRIAL ENERGY CONSUMERS, and  
ALBUQUERQUE BERNALILLO COUNTY WATER  
UTILITY AUTHORITY,  
Interveners-Appellees/Cross-Appellants,  
and  
WESTERN RESOURCE ADVOCATES, NEW MEXICO  
ATTORNEY GENERAL, and COALITION FOR CLEAN  
AFFORDABLE ENERGY,  
Interveners-Appellees.

In the Matter of the Application of  
Public Service Company of New Mexico  
for Revision of its Retail Electric Rates  
Pursuant to Advice Notice No. 513,  
NMPRC Case No. 15-00261-UT

**APPEAL FROM THE NEW MEXICO PUBLIC REGULATION COMMISSION**

Released for Publication July 9, 2019

PNM Resources, Inc.  
PATRICK V. APODACA  
STACEY J. GOODWIN  
Albuquerque, NM  
MILLER STRATVERT, P.A.  
RICHARD L. ALVIDREZ  
Albuquerque, NM  
KELEHER & MCLEOD, P.A.  
THOMAS C. BIRD  
Albuquerque, NM  
for Appellant  
MICHAEL C. SMITH  
Santa Fe, NM  
for Appellee  
New Energy Economy  
MARIEL NANASI  
Santa Fe, NM  
for Intervener-Appellee/Cross-  
Appellant New Energy Economy

PETER JUDE GOULD  
Santa Fe, NM  
for Intervener-Appellee/Cross-  
Appellant New Mexico Industrial  
Consumers  
STELZNER, WINTER, WARBURTON,  
FLORES, SANCHEZ & DAWES  
NANN M. WINTER  
Albuquerque, NM  
DAHL L. HARRIS  
Santa Fe, NM  
for Intervener-Appellee/Cross-  
Appellant  
Albuquerque Bernalillo County  
Water Utility Authority  
STEVEN S. MICHEL  
Santa Fe, NM  
for Intervener-Appellee Western  
Resources Advocates

HECTOR H. BALDERAS,  
Attorney General  
JOSEPH M. YAR,  
Assistant Attorney General  
for Intervener-Appellee New Mexico  
Attorney General  
CHARLES F. NOBLE  
Santa Fe, NM  
for Intervener-Appellee Coalition for  
Clean Affordable Energy  
JONES, SNEAD, WERTHEIM &  
CLIFFORD, P.A.  
JERRY TODD WERTHEIM  
CAROL A. CLIFFORD  
Santa Fe, NM  
for Amicus Curiae El Paso Electric  
Company

**Opinion****Barbara J. Vigil, Justice**

{1} This appeal arises from the final order of the New Mexico Public Regulation Commission (Commission) granting part, but not all, of the increase in retail electric rates sought by the Public Service Company of New Mexico (PNM) in Case No. 15-00261-UT. The Commission's final order is appealed by PNM and cross-appealed by the Albuquerque Bernalillo County Water Utility Authority (ABCWUA), New Energy Economy (NEE), and the New Mexico Industrial Energy Consumers (NMIEC). On appeal, PNM, NEE, ABCWUA, and NMIEC all raise numerous issues with the Commission's final order. In this opinion we address challenges made to the Commission's decisions regarding Palo Verde Nuclear Generating Station, the installation of balanced draft technology at San Juan Generating Station, the new coal supply agreement at Four Corners Power Plant, the inclusion of Rate 11B in rate banding, PNM's prepaid pension asset, and the adoption of Method A.

{2} With respect to Palo Verde, PNM appeals the Commission's denial of recovery in its rate base for (1) the repurchase of 64.1 MW of Palo Verde Unit 2 capacity at a valuation of \$2,550/kW; (2) \$49 million in improvements made to Palo Verde Unit 2; and (3) future recovery for nuclear decommissioning costs. In separate cross-appeals, NEE and ABCWUA each challenge the Commission's decision to allow PNM to recover for the repurchased 64.1 MW at a net book value of \$1,306/kW and for the cost of renewing five leases at Palo Verde. We additionally address ABCWUA's argument that the Commission violated its right to due process by refusing to reopen the proceedings to allow replies to PNM's response to a bench request regarding Palo Verde.

{3} We also answer the remaining challenges to the Commission's final order: PNM's appeal to the Commission's decision to deny recovery of \$52.3 million for the installation of balanced draft technology at San Juan Generating Station; NEE's claim that the Commission acted unreasonably and unlawfully by allowing recovery of \$19.5 million for the new coal supply agreement at Four Corners Power Plant; ABCWUA's challenge to the Commission's decision to reject PNM's proposal to exclude Rate 11B from rate banding; and NMIEC's arguments that the Commission acted unreasonably or unlawfully by allow-

ing recovery of \$137.8 million for PNM's prepaid pension asset and by adopting the Method A rate adjustment.

{4} We reject each of the arguments on appeal except one: we conclude that, by denying PNM any future recovery for its nuclear decommissioning costs related to the Palo Verde capacity at issue in this case, the Commission denied PNM due process of law. Therefore, we declare all other aspects of the Commission's final order to be lawful and reasonable, yet must annul and vacate the final order in its entirety pursuant to NMSA 1978, Section 62-11-5 (1982). *See Hobbs Gas Co. v. N.M. Pub. Serv. Comm'n*, 1993-NMSC-032, ¶ 6, 115 N.M. 678, 858 P.2d 54 (concluding that the Court may declare parts of an order to be reasonable and lawful while vacating an order in its entirety pursuant to Section 62-11-5). We remand the case to the Commission for further proceedings as required and the entry of an order consistent with this opinion. *See Hobbs*, 1993-NMSC-032, ¶ 6 (recognizing that on remand "the Commission may properly enter an order embodying those provisions in the earlier, vacated order that have been declared reasonable and lawful"); *Pub. Serv. Co. v. N.M. Pub. Serv. Comm'n*, 1979-NMSC-042, ¶¶ 13, 24, 92 N.M. 721, 594 P.2d 1177 (remanding to the Commission for the entry of an order based on substantial evidence and acknowledging that the Commission may conduct additional hearings as necessary).

**I. BACKGROUND**

{5} The complexity of this case compels us to begin our opinion by setting forth a brief overview of the procedural history as well as the relevant legal background. *See New Energy Economy v. Pub. Regulation Comm'n*, 2018-NMSC-024, ¶ 2, 416 P.3d 277. Additional background is provided as necessary in our discussion.

**A. Procedural Background**

{6} On August 27, 2015, PNM filed an application with the Commission claiming a revenue requirement of approximately \$123 million. In accordance with its procedural rules, the Commission appointed a hearing examiner to preside over the ratemaking proceedings and submit a recommended decision to the Commission. *See* 1.2.2.29(B), (D)(4) NMAC. Nearly twenty parties filed motions to intervene in the proceedings and, in a public hearing lasting three weeks and a two day supplemental hearing, over forty witnesses presented testimony on PNM's proposed rate increase.

{7} After the hearing examiner issued her corrected recommended decision and the parties filed their exceptions to her recommendations, the Commission issued its final order that incorporated and adopted the corrected recommended decision except as expressly modified or disapproved. The Commission's final order approved a revenue increase of \$61.2 million. The appeal and cross-appeals are taken directly from that order. *See* NMSA 1978, § 62-11-1 (1993) ("Any party to any proceeding before the [C]ommission may file a notice of appeal in the [S]upreme [C]ourt asking for a review of the [C]ommission's final orders.").

**B. Legal Principles Governing Rate Cases**

{8} We next set forth the general legal principles which apply to the setting of retail electric rates by the Commission. The Commission has the general and exclusive power to regulate a public utility's rates under NMSA 1978, Section 62-6-4(A) (2003). A utility's rates are generally based upon the utility's revenue requirement, the traditional elements of which are "(1) determination of the costs of the operation, (2) determination of the rate base which is the value of the property minus accrued depreciation, and (3) determination of the rate of return." *Hobbs Gas Co. v. N.M. Pub. Serv. Comm'n*, 1980-NMSC-005, ¶ 5, 94 N.M. 731, 616 P.2d 1116.

{9} The Commission has the obligation to ensure that "[e]very rate made, demanded or received by any public utility [is] just and reasonable." NMSA 1978, § 62-8-1 (1941). In meeting this obligation, the "Commission is vested with considerable discretion." *Hobbs*, 1980-NMSC-005, ¶ 4. The utility seeking an increase in rates bears the burden of demonstrating that the increased rate is just and reasonable. NMSA 1978, § 62-8-7(A) (2011).

{10} "The Commission [is] not bound to the use of any single formula or combination of formulae in determining rates. The rate-making function involves the making of pragmatic adjustments. It is the result reached, not the method employed, which is controlling." *Mountain States Tel. & Tel. Co. v. N.M. State Corp. Comm'n*, 1977-NMSC-032, ¶ 70, 90 N.M. 325, 563 P.2d 588. By statute, the Commission must balance

the interest of consumers and the interest of investors . . . to the end that reasonable and proper services shall be available at fair, just and reasonable rates and to the end that capital

investment may be encouraged and attracted so as to provide for the construction, development and extension, without unnecessary duplication and economic waste, of proper plants and facilities and demand-side resources for the rendition of service to the general public and to industry.

NMSA 1978, § 62-3-1(B) (2008). This balance between the interests of ratepayers and the interests of investors means that the Commission must ensure that rates are neither unreasonably high so as to unjustly burden ratepayers with excessive rates nor unreasonably low so as to constitute a taking of property without just compensation or a violation of due process by preventing the utility from earning a reasonable rate of return on its investment.

*PNM Gas Servs. v. N.M. Pub. Util. Comm'n (In re PNM Gas Servs.)*, 2000-NMSC-012, ¶ 8, 129 N.M. 1, 1 P.3d 383. We have recognized that “[t]here is a significant zone of reasonableness” in which rates are neither ratepayer extortion nor utility confiscation. *Id.* (quoting *Behles v. N.M. Pub. Serv. Comm'n (In re Application of Timberon Water Co.)*, 1992-NMSC-047, 114 N.M. 154, 836 P.2d 73).

{11} Despite the Commission’s considerable discretion in the setting of just and reasonable rates, “the Commission is not free to disregard its own rules and prior ratemaking decisions or ‘to change its position without good cause and prior notice to the affected parties.’” *PNM Gas Servs.*, 2000-NMSC-012, ¶ 9 (quoting *Hobbs*, 1993-NMSC-032, ¶ 12). We also acknowledge that, despite the discretion and flexibility afforded to the Commission, our review of its decisions is not “superficial in nature” and that we “must review the method employed by the Commission and the Commission’s application of its chosen methodology to the evidence in the record in order to determine in a meaningful way whether the result is unreasonable or unlawful.” *PNM Gas Servs.*, 2000-NMSC-012, ¶ 103.

## II. STANDARD OF REVIEW

{12} We review the Commission’s order to determine whether the “[Commission’s] decision is arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency’s authority, or otherwise inconsistent with law.” *Doña Ana Mut. Domestic Water Consumers Ass’n v. N.M. Pub. Regulation Comm’n*, 2006-NMSC-032, ¶ 9, 140 N.M. 6, 139 P.3d 166; accord NMSA 1978, § 62-11-4 (1965). The party challenging

the Commission’s order has the burden of making this showing. Section 62-11-4. {13} In reviewing the Commission’s decisions, we first consider whether the decision presents a question of fact, a question of law, or a combination of the two. *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm’n (NMIEC)*, 2007-NMSC-053, ¶ 13, 142 N.M. 533, 168 P.3d 105. Both questions of fact and questions of law are implicated in the numerous issues on appeal in this case.

{14} For questions of fact, this Court “look[s] to the whole record to determine whether substantial evidence supports the Commission’s decision.” *Id.* ¶ 24. Substantial evidence requires that there is evidence “that is credible in light of the whole record and that is sufficient for a reasonable mind to accept as adequate to support the conclusion reached by the agency.” *Id.* (quoting *Att’y Gen. of N.M. v. N.M. Pub. Util. Comm’n (In re Comm’n’s Investigation of the Rates for Gas Serv. of PNM’s Gas Servs.)*, 2000-NMSC-008, ¶ 4, 128 N.M. 747, 998 P.2d 1198). “We view the evidence in the light most favorable to the Commission’s decision, and draw every inference in support of the Commission’s decision, but we will not uphold the decision if it is not supported by substantial evidence.” *NMIEC*, 2007-NMSC-053, ¶ 24 (citations omitted). “The [Commission’s] decisions requiring expertise in highly technical areas, such as utility rate determinations, are accorded considerable deference.” *Albuquerque Bernalillo Cty. Water Util. Auth. v. N.M. Pub. Regulation Comm’n (ABCWUA)*, 2010-NMSC-013, ¶ 50, 148 N.M. 21, 229 P.3d 494 (internal quotation marks and citation omitted).

{15} On questions of law, “[w]e will reverse the agency’s interpretation of a law if it is unreasonable or unlawful” and generally give little deference to the Commission’s construction of statutes. *NMIEC*, 2007-NMSC-053, ¶ 19. However, we accord some deference to the Commission’s interpretation of its own governing statutes and

will confer a heightened degree of deference to legal questions that implicate special agency expertise or the determination of fundamental policies within the scope of the agency’s statutory function. However, the court is not bound by the agency’s interpretation and may substitute its own independent judgment for that of the agency because it is the function of the courts to interpret the law.

*Id.* (quoting *Morningstar Water Users Ass’n v. N.M. Pub. Util. Comm’n*, 1995-NMSC-062, ¶ 11, 120 N.M. 579, 904 P.2d 28).

{16} Several parties also argue that various decisions of the Commission are arbitrary and capricious. “A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in the light of the whole record.” *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm’n*, 2003-NMSC-005, ¶ 17, 133 N.M. 97, 61 P.3d 806. We consider the issues raised on appeal under the overarching legal principles governing rate cases by applying the foregoing standards of review depending on whether a particular argument challenges the facts, the law, or both.

## III. PALO VERDE NUCLEAR GENERATING STATION

{17} We first address the challenges made to the Commission’s determination to allow PNM to recover part, but not all, of its costs associated with Palo Verde Nuclear Generating Station. We begin with a brief factual background of PNM’s involvement at Palo Verde, setting forth the facts relevant to PNM’s request to recover its costs in retail electric rates.

{18} PNM’s participation at Palo Verde began in 1977 when the Commission granted PNM a certificate of public convenience and necessity to own, operate, and maintain an interest in each of the plant’s three units. See NMSA 1978, § 62-9-1(A) (2005) (“No public utility shall begin the construction or operation of any public utility plant or system . . . without first obtaining from the commission a certificate that public convenience and necessity require or will require such construction or operation.”). In 1985 and 1986, in Case Nos. 1995 and 2019, the Commission authorized PNM to sell its ownership interests in Palo Verde Units 1 and 2 and then lease those interests back for approximately twenty-nine and twenty-nine and a half years, respectively.

{19} Under the terms of the leases, PNM had three choices when the leases expired: (1) allow the lease to expire; (2) renew the lease at fifty percent the cost of the original lease; or (3) purchase the lease asset at a fair market value. In Case Nos. 1995 and 2019, the Commission granted PNM authority to exercise its options to renew the leases or repurchase the capacity in accordance with these lease terms. Although it authorized PNM to retain the Palo Verde interests at the expiration of the original leases, the Commission retained



full ratemaking authority over Palo Verde, including “the authority to disallow any or all of the lease expenses and transaction costs on a used-and-useful basis, on the basis of imprudence in the cost of the facilities, or on any other lawful basis[.]” {20} At the expiration of the leases on Palo Verde Units 1 and 2, PNM elected to repurchase 64.1 MW of Palo Verde Unit 2 capacity at a negotiated price of \$2,550/kW and to renew the five leases on the remaining capacity for eight years at fifty percent of the original cost. In this case, PNM sought to include the repurchased 64.1 MW in its rate base at a valuation of \$2,550/kW. As the full purchase price for the 64.1 MW, the \$2,550/kW represented both the net book value of Palo Verde Unit 2 and an acquisition adjustment for the amount paid over that net book value. See *Hobbs*, 1980-NMSC-005, ¶ 8 (defining an acquisition adjustment as “the amount paid for a plant in excess of original cost less accrued depreciation”). PNM also sought to include in its cost of service the \$19.8 million in annual lease expenses for the five renewed leases. Finally, PNM sought to include an additional \$49 million in its rate base for leasehold and common plant improvements to the 64.1 MW incurred under the original leases.

{21} Existing utility jurisprudence grants wide latitude to the Commission’s choice of methodology used to determine a utility’s rate base. *Hobbs*, 1980-NMSC-005, ¶ 6 (“Neither New Mexico case law nor the Public Utility Act imposes any one particular method of valuation upon the Commission in ascertaining the rate base of a utility.”); see *NMSA* 1978, § 62-6-14(A) (2009). However, the Commission “is bound by, and limited to . . . previously established methods of ratemaking, absent a change in circumstances peculiar to the company and the pending case, making it necessary that there be a departure from established method.” *Hobbs*, 1993-NMSC-032, ¶ 8 (quoting *Gen. Tel. Co. of the Sw. v. Corp. Comm’n (In re Gen. Tel. Co. of the Sw.)*, 1982-NMSC-106, ¶ 29, 98 N.M. 749, 652 P.2d 1200). In prior cases, the Commission has considered whether expenditures were prudently incurred and whether the asset is used-and-useful in providing service when determining the ratemaking treatment of expenditures on utility plants. *Pub Serv. Co. of N.M. (PNM)*, 101 P.U.R. 4th 126, 149-53 (N.M. Pub. Serv. Comm’n 1989). “The prudent investment theory provides that ratepayers are not to be charged for negligent, wasteful

or improvident expenditures, or for the cost of management decisions which are not made in good faith.” *Id.* at 151. “To be considered ‘used and useful,’ [a] property must either be used, or its use must be forthcoming and reasonably certain; and it must be useful in the sense that its use is reasonable and beneficial to the public.” *Id.* at 162.

{22} After considering the evidence in this case, the hearing examiner concluded that PNM’s decisions to renew the five leases and repurchase the 64.1 MW were imprudent because, *inter alia*, PNM failed to demonstrate that it “reasonably examined alternative courses of action.” Finding PNM’s decisions imprudent, the hearing examiner recommended that the Commission fully deny PNM recovery for all the costs attributed to renewing the five leases and repurchasing the 64.1 MW.

{23} The Commission adopted the hearing examiner’s conclusion that PNM’s decisions were imprudent on the basis that PNM had failed to demonstrate that it considered alternative courses of action. The Commission further adopted the hearing examiner’s separate finding that PNM had failed to establish that it paid fair market value for the repurchased 64.1 MW, as required by the prior authorizations in Case Nos. 1995 and 2019. However, the Commission rejected the total cost disallowance recommended by the hearing examiner and instead imposed alternative remedies for PNM’s imprudence.

{24} With regard to PNM’s repurchase of the 64.1 MW, the Commission denied PNM’s request to recover for that capacity at \$2,550/kW and instead allowed PNM to “bring the [64.1 MW] into the rate base at a reasonable value based on [its] net book value” of \$1,306/kW. For the renewed leases, the Commission allowed PNM to fully recover its costs because “the amount of those lease renewals was known to the Commission at the time it approved the lease transaction in that the terms of the leases expressly stated that the leases would be renewed at [fifty percent of the original cost].” The Commission further concluded that because PNM’s decisions in “renewing and reacquiring the leases . . . exposed ratepayers to costs associated with [nuclear] decommissioning responsibilities that likely would not have been incurred had an alternative resource other than nuclear been selected . . . the appropriate remedy to protect ratepayers from the effect of PNM’s imprudence is to shift the future burden of [nuclear] decommis-

sioning related costs from the ratepayers to PNM.” Finally, the Commission denied PNM separate recovery of the \$49 million for leasehold and common plant improvements because the recovery of the \$1,306/kW net book value included the value of those improvements.

{25} The Commission’s final order on Palo Verde is challenged by several parties on various grounds, which we address as follows. In Section A, we address PNM’s challenges to the Commission’s finding that PNM failed to demonstrate that its decisions to retain the Palo Verde assets were prudent. In Section B, we address PNM’s, NEE’s, and ABCWUA’s various challenges to the Commission’s chosen remedies for PNM’s imprudence. In Section C, we address PNM’s arguments regarding the Commission’s denial of a separate recovery for the leasehold improvements to the 64.1 MW. Finally, in Section D, we address ABCWUA’s argument that the Commission’s decisions on Palo Verde were made in violation of its rights to due process of law.

#### A. The Commission’s Determination of Imprudence Was Lawful and Reasonable

{26} PNM challenges the Commission’s conclusion that the repurchase of the 64.1 MW and the lease renewals were imprudent on three grounds. First, PNM argues that it was unreasonable for the Commission to even consider the prudence of its decisions regarding Palo Verde. Second, PNM argues that the Commission departed from the established prudence standard by requiring PNM to demonstrate that the repurchased 64.1 MW and the five renewed leases were PNM’s “least cost alternatives.” Third, PNM asserts that the Commission’s finding of imprudence was arbitrary and capricious, contrary to law, and not supported by substantial evidence. We address each argument in turn.

##### 1. The Commission’s review of PNM’s prudence was not contrary to its prior orders authorizing PNM to retain the Palo Verde assets

{27} PNM argues that it was not required to demonstrate the prudence of its decisions to repurchase the capacity or renew the leases at Palo Verde because these actions were previously authorized by the Commission in Case Nos. 1995 and 2019. Specifically, PNM contends that its decisions were made in reliance on these prior authorizations, which PNM claims the Commission has now disregarded without notice. We disagree.



{28} In Case Nos. 1995 and 2019, the Commission granted PNM authority to exercise its options to either renew the leases or repurchase the capacity in accordance with the terms of the leases. We agree with the Commission that these prior authorizations relieved PNM of its obligation to obtain permission to retain the Palo Verde capacity but did not, as PNM contends, relieve PNM from establishing that its decisions to do so were prudent. See NMSA 1978, § 62-6-12(A)(4) (1989) (“With the prior express authorization of the commission, but not otherwise . . . any public utility may sell, lease, rent, purchase or acquire any public utility plant or property constituting an operating unit or system or any substantial part thereof[.]”). In both Case Nos. 1995 and 2019, the Commission retained full ratemaking authority over Palo Verde, including “the authority to disallow any or all of the lease expenses and transaction costs on a used-and-useful basis, on the basis of imprudence in the cost of the Facilities, or on any other lawful basis[.]” Such a clear and unequivocal reservation of authority was sufficient to put PNM on notice that the Commission would indeed consider whether PNM’s decisions at Palo Verde were prudent for purposes of ratemaking and that PNM would have the burden of making that showing. We conclude that PNM was required to demonstrate its prudence regarding Palo Verde, regardless of the Commission’s prior authorizations in Case Nos. 1995 and 2019.

## 2. The Commission did not depart from the established standard of prudence

{29} In her recommended decision, the hearing examiner expressed the prudence standard this Court previously recognized in *PNM Gas Services*, 2000-NMSC-012, ¶ 63. Quoting Case No. 2087, the hearing examiner stated:

Prudence is that standard of care which a reasonable person would be expected to exercise under the same circumstances encountered by utility management at the time decisions had to be made. In determining whether a judgment was prudently made, only those facts available at the time judgment was exercised can be considered. Hindsight review is impermissible. Imprudence cannot be sustained by

substituting one’s judgment for that of another. The prudence standard recognizes that reasonable persons can have honest differences of opinion without one or the other necessarily being “imprudent.”

{30} PNM does not disagree with the prudence standard articulated above, but rather contends that the Commission departed from that established prudence standard in its application by focusing entirely on whether PNM demonstrated that the repurchased 64.1 MW and the five renewed leases were PNM’s “least cost alternatives.” See *PNM Gas Servs.*, 2000-NMSC-012, ¶ 9 (“[T]he Commission is not free to disregard its own rules and prior ratemaking decisions or to change its position without good cause and prior notice to the affected parties.” (internal quotations and citation omitted)). PNM’s argument is unpersuasive.

{31} The hearing examiner concluded that PNM was imprudent because, *inter alia*, a reasonable person under the circumstances faced by PNM’s management would have adequately considered alternatives to retaining the Palo Verde assets. The Commission adopted this conclusion by reference. By requiring PNM to demonstrate that its management adequately considered alternatives when it decided to repurchase the 64.1 MW and renew the five leases, the hearing examiner and Commission reasonably applied the prudence standard to PNM’s decisions.

{32} We pause, before concluding our analysis of this argument, to note that it was not inappropriate for the Commission to address whether PNM had demonstrated Palo Verde to be cost-effective or the lowest cost alternative. We observe that there is a meaningful relationship from the perspective of the ratepayers between the consideration of alternatives and the cost of the chosen generation resource. The goal of the consideration of alternatives is, of course, to reasonably protect ratepayers from wasteful expenditure. *PNM*, 101 P.U.R. 4th at 151. The failure to reasonably consider alternatives was a fundamental flaw in PNM’s decision-making process. See *In re PacifiCorp (PacifiCorp)*, UE 246, Order No. 12-493 at 26-27, 2012 WL 6644237 (Or. P.U.C. Dec. 20, 2012) (stating, in the context of analyzing a utility’s failure to reasonably consider alternatives, that the decision-making process

of the utility is properly included in the prudence analysis). However, even if a utility company was imprudent because it failed to prospectively consider alternatives, that imprudence may be mitigated by a demonstration that the decision of the utility nevertheless protected ratepayers from excess cost. See *PacifiCorp*, UE 246, Order No. 12-493 at 26, 2012 WL 6644237 (“It is possible that the utility may be able to present sufficient information from external sources . . . to establish that its ultimate decision was prudent—regardless of what internal decision-making process was used[.]”). Conversely, even if a utility reasonably considered alternatives but then chose to pursue an unreasonable alternative, the consideration of alternatives may be insufficient. *Cf. id.* (stating that although the prudent investment standard does not require optimal results, it does require that the utility’s action was objectively reasonable). In the context of the case before us, we need not and do not fully address these issues. We therefore conclude that the Commission did not apply a new “least cost alternative” test without notice, as PNM contends, but instead reasonably applied the prudence standard previously established by the Commission and recognized by this Court.

## 3. The Commission’s finding of imprudence is supported by substantial evidence in the record

{33} We next address PNM’s argument that the Commission’s finding of imprudence is not supported by substantial evidence. In the proceedings before the hearing examiner, PNM called a number of witnesses to testify that its decisions to repurchase 64.1MW of capacity and renew the five leases were prudent. PNM witnesses Gerard Ortiz and Elisabeth Eden both testified that retaining its Palo Verde assets after the termination of the original leases had long been part of PNM’s planning and strategy. Regarding the benefits of retaining its Palo Verde capacity, Ortiz testified that Palo Verde is a “zero emission plant” with a “strong performance record” and is “PNM’s lowest cost resource from an economic dispatch perspective.” Ortiz also testified that PNM’s decisions to renew the leases and repurchase the 64.1 MW were consistent with its Integrated Resource Plans (IRPs)<sup>1</sup> filed in 2008 and 2011. However, on cross examination, Ortiz could not recall if the 2008 IRP analyzed

<sup>1</sup>An IRP is a document electric utilities must file periodically with the Commission, see 17.7.3.9 NMAC, that, *inter alia*, should seek to identify resource options and determine the “most cost effective resource portfolio and alternative portfolios[.]” 17.7.3.9(B)(4), (7) NMAC.

the repurchase of the 64.1 MW and stated “that the 2011 IRP is really the relevant document.” Ortiz additionally could not recall the price inputs for natural gas or solar used in PNM’s modeling for the 2011 IRP.

{34} To counter PNM’s reliance on its 2011 IRP, NMIEC witness James Dauphinais testified that the IRP process did not conduct an analysis which would “determine whether allowing the leases to terminate, renewing the leases or purchasing the leases at fair market value was the most cost-effective resource option with respect to those leases.” Dauphinais testified that the 2011 IRP instead ran an analysis which assumed that all of the Palo Verde leases would expire in 2020 and compared a scenario in which PNM renewed all the leases at their previous cost with a scenario in which PNM replaced the 178 MW of leased Palo Verde Capacity with a 252 MW combined cycle gas turbine generation plant. The results of this analysis revealed that the option of replacing the Palo Verde capacity with the gas plant would cost an estimated \$51 million more than renewing the leases. According to Dauphinais, this analysis did not include the option of repurchasing any of the leased capacity at fair market value.

{35} PNM witness Ortiz confirmed that the 2011 IRP did not examine the option of purchasing the leased Palo Verde capacity and, in an answer to an interrogatory, PNM stated that it “had not performed any Strategist<sup>2</sup> runs, economic modeling, or financial analysis with respect to the acquisition of the interest in Palo Verde [Unit 2] at the valuation cited.” Moreover, on cross examination, Ortiz agreed that PNM had not submitted any quantitative analysis in this proceeding regarding the benefits of renewing the five leases, relying instead on the 2011 IRP.

{36} Given this evidence, the hearing examiner focused her analysis of PNM’s prudence on the 2011 IRP as the relevant IRP at the time PNM made the decisions at issue. The hearing examiner concluded that the 2011 IRP failed to demonstrate PNM’s prudence because, *inter alia*, it “did not test extension of the leases and purchases of the 64.1 MW against a wide range of futures/scenarios and input assumptions.” The evidence in the record

is sufficient to support this finding. Although Ortiz testified that the 2011 IRP demonstrated PNM’s prudence, “[t]he Commission is not bound by the opinions of experts so long as the Commission’s ultimate decision is supported by substantial evidence.” *Att’y Gen. of N.M. v. N.M. Pub. Serv. Comm’n*, 1984-NMSC-081, ¶ 15, 101 N.M. 549, 685 P.2d 957. The conflicting testimony of Dauphinais regarding the 2011 IRP supports the hearing examiner’s findings. *See id.* ¶ 12 (“[E]vidence of two conflicting opinions in the record does not mean that the decision arrived at is unsupported by substantial evidence.”). Viewing the record in the light most favorable to the decision, we conclude there is substantial evidence to support the hearing examiner’s determination that PNM failed to adequately consider alternatives to renewing the leases and repurchasing the 64.1 MW. *See NMIEC*, 2007-NMSC-053, ¶ 24.

{37} PNM also challenges the Commission’s conclusions that PNM could not rely on the 2011 IRP to demonstrate its prudence because that IRP had not been admitted into evidence and had not been expressly accepted as compliant with the IRP rules in a previous case. We need not address these arguments because, regardless of whether the 2011 IRP was accepted as compliant or admitted into the record, substantial evidence in the record supports the hearing examiner’s determination that the 2011 IRP “did not test extension of the leases and purchase of the 64.1 MW against a wide range of futures/scenarios and input assumptions.” This finding was not modified or rejected by the Commission.

{38} For the foregoing reasons, we hold that the Commission’s determination that PNM’s decisions were imprudent was supported by substantial evidence, was not arbitrary or capricious, was not contrary to law, and was thus lawful and reasonable. We must next consider whether the Commission’s remedies for PNM’s imprudence were reasonable and lawful.

**B. The Commission’s Remedy Limiting Recovery for the Palo Verde Assets Was Lawful and Reasonable but the Denial of All Future Nuclear Decommissioning Costs Was Unlawful**

{39} Under the prudent investment theory, “ratepayers are not to be charged for negligent, wasteful or improvident expenditures, or for the cost of management decisions which are not made in good faith.” *PNM*, 101 P.U.R. 4th at 151. Finding imprudence, the hearing examiner in this case recommended that the Commission disallow all recovery for the cost of the five renewed leases and the value of the repurchased 64.1 MW. However, the Commission rejected a total disallowance as its only option and instead relied on the approach taken by the Oregon Public Utility Commission (Oregon PUC) in *PacifiCorp*, UE 246, Order No. 12-493, 2012 WL 6644237 as a persuasive example of a commission finding imprudence but disallowing only a portion of the utility’s expenses.

{40} Similar to the finding of imprudence in this case, the Oregon PUC in *PacifiCorp* found that the utility had acted imprudently by not considering alternatives to its chosen environmental compliance measures. *Id.* at 17, 28. The Oregon PUC concluded that “[b]ecause the purpose of a prudence review is to hold ratepayers harmless from any amount imprudently invested, a disallowance should equal the amount of the unreasonable investment.” *Id.* at 31. However, the Oregon PUC faced a challenge in calculating how much to disallow:

Quantifying the impact of [the utility’s] imprudence has been hindered by the very actions that underlie our finding of imprudence—the utility’s inadequate analysis and decision-making. Had [the utility] reasonably considered other compliance alternatives and performed proper and robust analyses, we would have the information necessary to calculate the harm to ratepayers for the utility’s decision to proceed with its investments rather than pursuing other, least-costly, options. Without that information, we are left with determining a disallowance that reasonably penalizes [the utility] for its imprudence, while acknowledging our inability to assess a precise amount.

*Id.* Considering its options, the Oregon PUC rejected the argument of an intervenor that the utility’s costs should be fully disallowed and instead determined that a

<sup>2</sup>The hearing examiner described Strategist as follows: “PNM uses Strategist, a computer software tool, to rank portfolios. Strategist can consider alternative resource portfolios with the goal of identifying through an optimization algorithm the most cost effective combination of resources as measured by [net present value]. It varies its assumptions, *i.e.*, cost of fuel, carbon costs, through sensitivity analyses. Strategist determines whether PNM needs resources and recommends the most cost-effective portfolio to serve load over 20 years.”

partial disallowance of ten percent was an appropriate remedy. *Id.* at 31-32.

{41} The Oregon PUC reasoned that its imprecise remedy was consistent with general ratemaking principles because “[t]he economic judgments required in rate proceedings are often hopelessly complex and do not admit [of] a single correct result.” *Id.* at 32 (first alteration in original) (quoting *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 314 (1989)). The Oregon PUC further concluded that its chosen remedy was within its discretion to determine a utility’s rate base and explained that the partial disallowance was “reasonable in relationship to the potential harm to [ratepayers]” and led to just and reasonable rates. *PacifiCorp*, UE 246, Order No. 12-493 at 32, 2012 WL 6644237.

{42} In this case, the Commission agreed with and adopted the approach applied in *PacifiCorp* that the proper remedy for a utility’s imprudence “should equal the amount of the unreasonable investment” in order to “hold ratepayers harmless from any amount imprudently invested[.]” *Id.* at 31. Accordingly, the Commission did not deny PNM all recovery for the Palo Verde assets and, instead, crafted what it considered to be reasonable remedies intended to protect ratepayers. We address the approach taken by the Commission in this regard.

**1. The Commission’s remedy limiting PNM’s recovery to the net book value of \$1,306/kW for the repurchased 64.1 MW and the cost of the renewed leases is reasonable and lawful**

{43} In its final order, the Commission found that the Palo Verde assets “had always been certificated capacity and long been found to be used and useful” and concluded that the prior authorizations in Case Nos. 1995 and 2019 allowing PNM to retain that Palo Verde capacity demonstrated an intent that Palo Verde would continue to be used to serve New Mexico ratepayers. Moreover, the Commission noted that multiple parties supported the finding of imprudence yet still recommended that the Commission allow recovery for the Palo Verde assets at a reasonable valuation. In particular, NMIEC and Western Resource Advocates (WRA) argued that Palo Verde is an asset valuable to PNM’s customers and that the Commission should determine a reasonable valuation for both the repurchased 64.1 MW and the five renewed leases.

{44} With respect to the repurchased 64.1 MW, the Commission noted that the prior

authorizations reserved its authority “to disallow recovery of [PNM’s Palo Verde] costs to the extent found to be imprudent” and limited PNM to a repurchase at fair market value. The Commission found that PNM had failed to demonstrate its prudence and had also failed to demonstrate that it paid a fair market value for the 64.1 MW. Therefore, the Commission determined that an appropriate remedy, which would protect ratepayers from PNM’s failure to consider alternatives to Palo Verde, would be to disallow recovery for the amount PNM paid for the 64.1 MW over the net book value of that capacity. The Commission considered the evidence presented and determined that the net book value of \$1,306/kW was a reasonable value for the capacity and allowed PNM to bring the 64.1 MW into its rate base at that amount.

{45} With respect to the five renewed leases, the Commission noted that when it issued the prior authorizations granting PNM authority to renew the leases according to their terms it knew those terms specified that the leases would be renewed at fifty percent of the original cost. Accordingly, the Commission allowed PNM to recover the costs of the five renewed leases.

{46} The Commission’s treatment of the 64.1 MW and the renewed leases in this ratemaking case was necessarily imprecise because, as in *PacifiCorp*, the very behavior that caused the need for a remedy—PNM’s failure to consider alternatives—impaired the Commission’s ability to quantify the potential harm to ratepayers from PNM’s imprudence. See *PacifiCorp*, UE 246, Order No. 12-493 at 31, 2012 WL 6644237 (“Quantifying the impact of [the] imprudence has been hindered by the very actions that underlie our finding of imprudence—the utility’s inadequate analysis and decision-making.”). Despite this, the Commission established valuations for the 64.1 MW and the renewed leases which it considered appropriate to protect ratepayers and result in just and reasonable rates. Such an approach is a lawful and reasonable exercise of the Commission’s authority to determine the rate base of a utility under Section 62-6-14(A) and its obligation to ensure that rates are just and reasonable under Section 62-8-1.

{47} We recognize NEE’s and ABCWUA’s concerns that a utility should not be rewarded for its imprudent failure to reasonably consider alternatives and acknowledge that total disallowance may be an appropriate remedy for such imprudence

in some circumstances. See *PacifiCorp*, UE 246, Order No. 12-493 at 31, 2012 WL 6644237 (acknowledging the possibility of a full disallowance while concluding that “a disallowance should equal the amount of the unreasonable investment”). Under the particular facts and circumstances of this case, the Commission’s decisions were reasonably made with due consideration of the unique regulatory history of this Palo Verde capacity and the arguments of several parties that Palo Verde provides significant value to ratepayers. Accordingly, it was reasonable and lawful for the Commission to conclude that a total disallowance was not justified in this case.

{48} Several parties raise specific challenges to the Commission’s chosen valuations of the Palo Verde assets. PNM challenges the Commission’s denial of full recovery of the \$2,550/kW purchase price for the 64.1 MW. On the other hand, NEE and ABCWUA contend that PNM is not entitled to any recovery for the Palo Verde assets. Considering both perspectives, we conclude that neither PNM nor NEE and ABCWUA have met their burden under Section 62-11-4 of showing that the Commission’s determination to limit PNM’s recovery to the net book value for the 64.1 MW and to recover the cost of the renewed leases was unreasonable or unlawful.

{49} PNM claims that its purchase of the 64.1 MW was the result of an arm’s-length transaction, negotiated following the procedures approved by the Commission in Case Nos. 1995 and 2019, and benefitted ratepayers by providing cost-effective, reliable, and carbon-free power. PNM therefore contends that it was entitled the entire purchase price of \$2,550/kW for the 64.1 MW as an acquisition adjustment. See *Hobbs*, 1980-NMSC-005, ¶ 12 (holding that the Commission erred when it denied a utility recovery of an acquisition adjustment where the purchase was the result of an arm’s-length transaction and the purchase benefitted ratepayers because the price was less than the appraised value). PNM further claims that its purchase price was a fair market value for that capacity. We disagree.

{50} First, the Commission found that PNM failed to demonstrate that its purchase price for the 64.1 MW was a fair market value for that capacity. Pursuant to the lease provisions, PNM did not obtain an appraisal of the 64.1 MW and instead negotiated the purchase price with the lessors. Absent an appraisal, PNM relied on evidence of sales or valuations



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8 a.m.–4:30 p.m.

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8:30 a.m.–4:30 p.m.

**5.0 G 1.0 EP**

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## 2019 Business Law Institute



**Friday, Nov. 8, 2019**

9 a.m.–4:15 p.m.

**4.5 G 1.5 EP**

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of other Palo Verde assets to support its negotiated purchase price of \$2,550/kW. This evidence included: Palo Verde capacity purchased by PNM at a 2007 auction and given a rate base valuation of \$2,549/kW; PNM's failed bid of \$2,578/kW in a 2011 auction for Palo Verde capacity; and an appraisal submitted by PNM in Case No. 13-00390-UT showing a value of \$2,500/kW for the Palo Verde capacity PNM sought approval for in that case.

{51} The hearing examiner rejected PNM's reliance on these previous sales and valuations, finding that (1) the 2007 purchase was not sufficiently contemporaneous because it was approved six years before PNM entered into the agreements to repurchase the 64.1 MW and PNM witness Eden admitted on cross-examination that energy markets had changed since that time; (2) the 2011 auction was not sufficiently comparable because it only involved a beneficial interest in that particular capacity, which would not include the "risks of typical ownership, such as [operation and maintenance costs], decommissioning costs, and costs of capital improvements"; and (3) the hearing examiner in Case No. 13-00390-UT had criticized the appraisal in that case and had recommended that it not be accepted to support PNM's proposed value for that capacity. In its final order, the Commission adopted the hearing examiner's findings regarding the "timing and comparability" of the sales and valuations relied upon by PNM. Viewing the entire record in the light most favorable to the Commission's decision, we conclude that there is substantial evidence to support the Commission's determination that PNM's reliance on these other sales and valuations failed to demonstrate that the \$2,550/kW it paid to acquire the 64.1 MW at Palo Verde was a fair market value. See *NMIEC*, 2007-NMSC-053, ¶ 24.

{52} Second, PNM's argument that it was entitled to an acquisition adjustment under *Hobbs*, 1980-NMSC-005, ¶ 2 ignores the central issue facing the Commission—how to protect ratepayers from PNM's failure to consider alternatives to retaining the 64.1 MW. PNM fails to address how the Commission's remedy for PNM's imprudent decision-making process was unreasonable or without a rational basis. Accordingly, we conclude that PNM has

not demonstrated that the Commission's remedy was arbitrary or capricious. See *Rio Grande Chapter of Sierra Club*, 2003-NMSC-005, ¶ 17.

{53} We next address NEE and ABCWUA's various arguments that the Commission's decision to grant recovery for the Palo Verde expenditures was not supported by substantial evidence and was contrary to prior Commission decisions. We are not persuaded by these arguments for the reasons set forth below.

{54} First, NEE and ABCWUA both contend that the Commission's used-and-useful determination is not supported by substantial evidence. The Commission has previously defined the used-and-useful standard to require that an asset is used or soon to be used and "its use is reasonable and beneficial to the public." *PNM*, 101 P.U.R. 4th at 162. The used-and-useful standard additionally recognizes a utility's obligation to "provide efficient and economical service." *Id.* In this case, the Commission noted that the prior authorizations in Case Nos. 1995 and 2019 indicated an intention that the Palo Verde resources would continue to serve ratepayers. Additionally, PNM witnesses testified that Palo Verde is "a cost-effective and reliable generation resource" that provides PNM with base load generation. These witnesses testified that Palo Verde is carbon emission free and contributes to PNM's fuel diversity. Viewed in the light most favorable to the Commission's decision, this evidence is sufficient for a reasonable mind to conclude that Palo Verde Units 1 and 2 are used-and-useful. See *NMIEC*, 2007-NMSC-053, ¶ 24.<sup>3</sup>

{55} We also reject NEE and ABCWUA's argument that the Commission's \$1,306/kW valuation for the 64.1 MW, based on the net book value of that capacity, was not supported by substantial evidence in the record. Because PNM had been leasing Palo Verde Unit 2, it was necessary to recreate a net book value for the unit. PNM originally proposed a net book value of \$1,596/kW but later in the proceedings revised this value and proposed a net book value of \$1,306/kW. PNM witness Jason Peters testified in support of this revised net book value with calculations including the cost basis for each of the Palo Verde Unit 2 leases from the original sales and the value of the capital investments and

common plant assets at Palo Verde. After considering net book values proposed by other parties, the Commission found that PNM's proposed net book value of \$1,306/kW was appropriate. We conclude that this determination involving the Commission's technical expertise is supported by substantial evidence in the record. See *ABCWUA*, 2010-NMSC-013, ¶ 50.

{56} We next consider NEE and ABCWUA's arguments that the Commission's decision to allow recovery for PNM's Palo Verde expenditures was contrary to its prior ratemaking decisions. The Commission rejected these arguments, determining that its prior authorizations in Case Nos. 1995 and 2019 indicated an intent to provide PNM with an opportunity to retain the Palo Verde capacity and potentially include the cost of doing so in its rates. This conclusion was reasonable and lawful and we therefore reject the arguments made by NEE and ABCWUA for the reasons stated below.

{57} NEE and ABCWUA both rely on Case No. 2444 to contend that the Commission intended to bring the Palo Verde capacity into the rate base at \$0. This reliance is misplaced. In Case No. 2444 the Commission decided that other leased Palo Verde capacity, repurchased by PNM outside the terms of the original leases, would be brought back into the rate base at \$0 at the end of the original lease term. Case No. 2444 involved different capacity, repurchased by PNM in a different manner, and therefore does not render the Commission's decision regarding this capacity arbitrary and capricious. For these reasons, we also reject NEE's additional arguments which similarly rely on Case No. 2444 and other ratemaking cases involving the repurchase of Palo Verde capacity outside of the terms of the original leases. {58} ABCWUA also contends that because the Commission equated the original lease payments with capital costs in prior rate cases and PNM has recovered those payments as operating and maintenance costs, it is contrary to those prior ratemaking decisions and contrary to law for the Commission to allow PNM to recover its Palo Verde costs in this case. See *Moyston v. N.M. Pub. Serv. Comm'n*, 1966-NMSC-062, ¶ 18, 76 N.M. 146, 412 P.2d 840 ("[W]here prior capital investments were charged to operating expenses and

<sup>3</sup>On appeal, the parties disagree as to whether a stipulated to used-and-useful finding for Palo Verde Units 1 and 2 from Case No. 2567 is still in effect or whether PNM had the burden in this case to demonstrate that those units are currently used-and-useful. Whether that stipulation is still in effect is not critical to our analysis because the Commission's finding that Palo Verde Units 1 and 2 are used-and-useful is supported by substantial evidence.



the rate apparently fixed on that basis, a utility cannot later capitalize such amounts in determining original cost for rate making purposes.”). We are not persuaded by this argument because, regardless of how PNM previously recovered its prior lease costs, in this case it sought recovery for new costs associated with the renewal of the five leases and the repurchase of the 64.1 MW.

{59} For the foregoing reasons, we conclude that the Commission’s decision authorizing PNM to recover the \$1,306/kW net book value for the repurchased 64.1 MW as well as the cost of the five renewed leases is in accordance with the law, supported by substantial evidence, and not arbitrary and capricious. However, the Commission’s decision on PNM’s imprudence did not end there. In its final order, the Commission noted that PNM’s “actions in renewing and reacquiring the leases have exposed ratepayers to costs associated with [nuclear] decommissioning responsibilities that likely would not have been incurred had an alternative resource other than nuclear been selected” and concluded that “the appropriate remedy to protect ratepayers from the effect of PNM’s imprudence is to shift the future burden of decommissioning related costs from the ratepayers to PNM.” We turn now to consider PNM’s challenges to this determination.

## 2. It was a violation of PNM’s right to due process of law to deny recovery for all future nuclear decommissioning costs

{60} At the end of the useful lives of the Palo Verde units, the Nuclear Regulatory Commission and the Palo Verde participation agreement require the decommissioning of those units. Under the terms of the original leases, PNM was responsible for all of the nuclear decommissioning costs associated with the Palo Verde capacity it leased. Whether or not it had renewed the leases or repurchased the 64.1 MW, PNM would have remained responsible for the same share of these decommissioning costs. However, the Commission has not previously determined whether ratepayers would be responsible for decommissioning costs for any period that Palo Verde Units 1 and 2 are not owned or leased by PNM. To reserve funds for these costs, PNM maintains nuclear decommissioning trusts and has previously recovered its contributions to these trusts in its rates.

{61} The hearing examiner found that the decommissioning trusts for Palo Verde Units 1 and 2 are completely or almost

completely funded and recommended that PNM currently cease contributing to the trusts and collecting those costs from ratepayers. The hearing examiner also recommended that PNM be given an opportunity to reinstate rate recovery for contributions to the trusts if it appears in the future that the funds will be insufficient. However, the Commission determined that part of the “appropriate remedy to protect the ratepayers from the effect of PNM’s imprudence” included “shift[ing] the future burden of decommissioning related costs from the ratepayers to PNM” and concluded that “[i]n the event additional funding is required, PNM shall bear those expenses without recovery from ratepayers.”

{62} PNM appeals this decision, arguing that it was not supported by substantial evidence in the record, was contrary to prior Commission practice, and that the Commission violated PNM’s right to due process of law by making this decision without providing PNM notice and an opportunity to be heard. Because we conclude that the Commission violated PNM’s right to due process, we do not reach PNM’s other arguments.

{63} “It is well settled that the fundamental requirements of due process in an administrative context are reasonable notice and opportunity to be heard and present any claim or defense.” *ABCWUA*, 2010-NMSC-013, ¶ 21 (quoting *Jones v. N.M. State Racing Comm’n*, 1983-NMSC-089, ¶ 6, 100 N.M. 434, 671 P.2d 1145). To argue that PNM was on notice that the disallowance of decommissioning costs was at issue, the Commission relies on the recommendation of the hearing examiner to deny, for the time being, recovery for contributions to the trusts. However, that recommendation did not address the permanent disallowance of recovery. The hearing examiner adopted the recommendation of ABCWUA witness James Dittmer, who acknowledged that it is possible that the nuclear decommissioning trusts will not be adequately funded at the retirement of the Palo Verde units and fully expected PNM to be able to later request rate recovery for its decommissioning costs. The hearing examiner’s recommendation, along with the testimony on which it was based, was limited to the temporary disallowance of recovery and did not provide PNM with notice of a permanent disallowance of recovery for its contributions to the nuclear decommissioning trusts.

{64} The Commission additionally argues that PNM was on notice regarding the issue of permanent disallowance of recovery for decommissioning costs because all expenses a utility seeks to recover in its rates are subject to review in accordance with the Commission’s obligation to ensure that rates are “just and reasonable” under Section 62-8-1. However, the Commission has previously recognized that “it would be burdensome to require a utility to justify every expenditure which is the basis of the request for rate relief” and that, therefore, the Commission assumes that an expense was reasonably incurred unless it is challenged. *PNM Gas Servs.*, 2000-NMSC-012, ¶ 72 (quoting *Pub. Serv. Co.*, 50 P.U.R. 4th 416, 427 (N.M. Pub. Serv. Comm’n 1982)). As we have discussed, ABCWUA witness Dittmer challenged PNM’s current recovery for its decommissioning costs but acknowledged that PNM would be able to later request recovery should the need arise.

{65} We are unconvinced that the challenge to PNM’s current recovery for its decommissioning costs or the obligation of the Commission to ensure that rates are “just and reasonable” provided PNM with notice of a potential permanent disallowance of all recovery for its future contributions to the nuclear decommissioning trusts. Because the issue of a permanent disallowance of recovery for contributions to the nuclear decommissioning trusts appears to have been first raised by the Commission in its final order, PNM was not afforded an opportunity to be heard on the issue. Accordingly, we conclude that the Commission’s decision to disallow recovery of any future decommissioning costs as a remedy for PNM’s imprudence deprived PNM of its right to due process of law.

## C. It Was Reasonable and Lawful for the Commission to Deny PNM Separate Recovery for the Leasehold Improvements

{66} Under the terms of the original leases, PNM was responsible for all of the costs associated with the asset including the lease payments, capital investments, and operating and maintenance costs. Title to the leasehold improvements would vest in the lessors rather than with PNM. PNM has previously included the cost of the leasehold improvements in its rate base, using a Commission approved depreciation rate based on the federal operating licenses for Palo Verde running through 2046.

{67} In its final order, the Commission addressed arguments that PNM would recover twice for the value of its leasehold improvements if it were able to recover both the \$1,306/kW net book value and the leasehold improvements separately. The Commission accepted that the \$1,306/kW net book value included the value of the leasehold improvements, and denied PNM separate recovery for the \$49 million value of the improvements. PNM challenges the Commission's denial of a separate recovery for these costs on the grounds that the Commission's decision unreasonably departs from prior Commission practice and is contrary to law. For the reasons that follow, we reject PNM's contentions.

{68} First, PNM argues it reasonably relied on prior Commission practice allowing it to recover for the leasehold improvements past the end of the initial lease terms and that, by denying separate recovery for the leasehold improvements, the Commission has disregarded its prior treatment of the improvements. *See Hobbs*, 1993-NMSC-032, ¶ 9. We conclude that, under the Commission's broad ratemaking authority under Section 62-6-14, it was reasonable and lawful for the Commission to find that PNM's proposed net book value included the value of the leasehold improvements and common plant assets and that recovery of the \$1,306/kW net book value would include recovery for those leasehold improvements. Because PNM will continue to recover the value of its leasehold improvements through its net book value, it was not contrary to the Commission's prior practice for it to disallow PNM to recover for the leasehold improvements separately.

{69} Second, PNM contends that the Commission's decision to include recovery of the leasehold improvements in the recovery of the net book value is contrary to the holdings of both *Cruzan v. Franklin Stores Corp.*, 1963-NMSC-056, 72 N.M. 42, 380 P.2d 190 and *Board of Education v. Thunder Mountain Water Co.*, 2007-NMSC-031, 141 N.M. 824, 161 P.3d 869. Both of these cases are inapposite. In *Cruzan*, this Court concluded that a lessee could not offset his liability to the lessor by the value of improvements made to the property, especially where the title to the improvements vested with the lessor by the terms of the lease. 1963-NMSC-056, ¶ 6-8. In *Thunder Mountain*, this Court held that it was not a "double recovery" to require a school board to pay the fair market value

for a utility's property in a condemnation action without deducting earlier payments made by the board to the utility to aid in construction of that property. 2007-NMSC-031, ¶¶ 6-7. Neither of these cases concern issues related to ratemaking, nor the Commission's authority to determine an asset's value and its obligation to balance the interests of the ratepayers and shareholders. *See* Section 62-6-14(A); Section 62-3-1(B). Indeed, this Court's decision in *Thunder Mountain* was based in large part on the distinction between standards with respect to ratemaking and those involved in a condemnation action. 2007-NMSC-031, ¶¶ 8-20.

{70} We conclude that it was neither contrary to law nor prior Commission practice for the Commission to allow PNM to recover the value of the leasehold improvements in the net book value and to disallow PNM to recover the cost of the leasehold improvements separately.

#### **D. The Commission's Decision Denying a Request to Reopen the Proceedings after Issuing a Bench Request Was Lawful and Not a Violation of ABCWUA's Due Process Rights**

{71} ABCWUA argues that the Commission violated its own procedural rules and due process of law by not reopening the proceedings to allow ABCWUA and several other parties an opportunity to reply to PNM's response to a bench request. Because the bench request pertained to the issue of recovery of PNM's Palo Verde expenditures, we address ABCWUA's arguments here.

{72} After the closure of both the initial and supplemental evidentiary hearings, the hearing examiner issued her initial recommended decision. Commissioner Lyons then issued a bench request directing PNM to answer questions regarding the potential financial, maintenance, layoff, and contractual consequences of the hearing examiner's recommendation to deny all recovery for the cost of the five renewed leases and repurchased 64.1 MW. *See* 1.2.2.30(B) NMAC (granting a single commissioner authority to "issue any procedural orders prior to, during, or after a public hearing"). NEE filed a motion requesting that the bench request be withdrawn or, in the alternative, that PNM's response to the bench request be stricken. The next day, PNM filed a response to the Commission's bench request and several parties, including ABCWUA, jointly filed a motion "oppos[ing] the ad-

dition of any new evidence . . . unless the Commission orders the evidentiary portion of this matter reopened and a hearing on new evidence presented on [PNM's] response," including additional discovery, cross-examination of witnesses, and the presentation of response and rebuttal testimony.

{73} In its order on these motions, the Commission found that PNM's response mostly reiterated evidence already in the record but also "include[d] additional information that ha[d] not previously been admitted into evidence." Stating that it uses bench requests to investigate whether to reopen the evidentiary proceedings, the Commission concluded that the "mere request for information does not indicate that the Commission is considering such information as substantive evidence or constitute admission of such information into the record." Accordingly, the Commission stated in its order that it would not reopen the proceedings but would instead "affirmatively exclud[e from consideration] that information contained in PNM's response to [the bench request] that is not already part of the record." This reasoning was consistent with a prior order in this case in which the Commission reopened the proceedings following several other bench requests. In that order, the Commission concluded that it is consistent with its procedural rules for it to issue a bench request for the limited purpose of obtaining information to decide whether to reopen the proceedings and that it cannot consider any information in response to such a bench request in making its final decision unless it reopens the evidentiary proceedings and provides other parties an opportunity to respond, as due process requires.

{74} On appeal, ABCWUA argues that the Commission's order denying the motion to reopen the proceedings violated its own procedural rule, 1.2.2.35(K) NMAC, and the principles of due process incorporated into that rule. We do not agree.

{75} First, the Commission's order was not a violation of its procedural rules. 1.2.2.35(K) NMAC provides that the Commission may, at any time, "require the production of further evidence upon any issue" and that "[a]ll parties and staff will be given an opportunity to reply to such evidence submitted and cross-examine the witness under oath." In this case, the evidentiary proceedings were closed, PNM's response to the bench request was not in evidence, and

the Commission affirmatively excluded from consideration any information in PNM's response not already in the record. Contrary to ABCWUA's argument, the requirement under 1.2.2.35(K) NMAC that staff and other parties be given an opportunity to respond to submitted evidence is inapplicable because the information in PNM's response was not evidence in the record. Instead, the Commission requested information to determine whether to reopen the proceedings, consistent with its authority to reopen the proceedings on its own motion and to consider facts and proposed evidence supporting a party's motion to reopen the proceedings. 1.2.2.37(E)(4) NMAC (providing that the Commission may reopen the proceeding on its own motion "when it has reason to believe that conditions of fact or law have so changed as to require, or that the public interest requires, the reopening of such proceeding"); 1.2.2.37(E)(1), (2) NMAC (providing that a party "may file a motion to reopen the proceeding for the taking of additional evidence" and shall support that motion with a "brief statement of proposed additional evidence").

{76} Second, the Commission's procedure in this case did not violate the fundamental requirements of due process in the administrative context, namely, reasonable notice and an opportunity to be heard. *See ABCWUA*, 2010-NMSC-013, ¶ 21. All parties were notified of Commissioner Lyons' bench request to PNM and of PNM's response, the parties were provided with an opportunity to respond on the issue of whether the Commission should reopen the proceedings, and the Commission considered the motions filed by NEE and the joint movants in making its decision to not reopen the proceedings. The Commission provided the parties with reasonable notice and an opportunity to be heard on whether to reopen the proceedings. Therefore, it was not a denial of due process for the Commission to decline to reopen the proceedings for supplemental evidentiary hearings.

{77} ABCWUA contends that the Commission must have considered the information in PNM's response in making its final decision. However, the Commission's decisions on Palo Verde in its final order do not rely on the information from PNM's response to the bench request and instead rely on separate legal and factual grounds. ABCWUA has not identified what information in PNM's response it contends the

Commission relied on nor has it identified any part of the Commission's final order which relies on that information. Under Section 62-11-4, the party appealing a decision by the Commission has the burden of demonstrating that the decision was unreasonable or unlawful. Without more, we are not persuaded by ABCWUA's bare assertion that the Commission must have relied on the information in PNM's response to the bench request in making its decision. *See ABCWUA*, 2010-NMSC-013, ¶ 35 (concluding that the appellant had failed to meet its burden under Section 62-11-4 by failing to present evidence that commissioners had not reviewed the record).

#### IV. BALANCED DRAFT

{78} PNM appeals the Commission's decision to deny it recovery for the costs of converting San Juan Generating Station Units 1 and 4 to a balanced draft system. Balanced draft technology reduces the pressure in the system by both pushing and pulling the gas through the boiler and environmental controls and is designed to reduce fugitive emissions. A brief overview of the recent environmental regulatory history of San Juan is helpful in understanding the context of these costs.

{79} Over a number of years, several plans were proposed to implement federal regulations on haze-causing emissions in New Mexico. *See generally New Energy Economy*, 2018-NMSC-024, ¶¶ 3-5 (discussing the responsibility of states to develop plans to implement federal environmental regulations and the history of the plans to control haze-causing emissions in New Mexico). In 2011, the Environmental Protection Agency (EPA) rejected portions of New Mexico's state implementation plan and proposed a federal implementation plan which required the installation of a specific emission control technology on all four San Juan units. *Id.* ¶¶ 3-4 (explaining that the EPA may develop a federal implementation plan if a state implementation plan is inadequate); *Approval and Promulgation of Implementation Plans; New Mexico*, 76 Fed. Reg. 52388, 52388-89 (Aug. 22, 2011). The New Mexico Environment Department (NMED) and PNM challenged the federal plan, arguing that the state plan required a less expensive technology which would satisfy the federal regulations.

{80} As the challenge to the federal plan was pending, in April 2012 an application for a revision to an air quality permit for San Juan was submitted to NMED on

behalf of PNM. The application contained two possible scenarios—one under the federal plan and the other under the state plan—both of which also included the conversion of all the units to balanced draft. A report estimating the costs under both scenarios concluded that balanced draft may be necessary for the installation of the emission control technology required by the federal implementation plan but would not be necessary for the technology in the state implementation plan. NMED issued a permit which approved both scenarios in August 2012. Subsequently, the EPA approved a revised state implementation plan which required the closure of San Juan Units 2 and 3 and the installation of the less expensive emission control technology on San Juan Units 1 and 4. *Approval and Promulgation of Implementation Plans; New Mexico*, 79 Fed. Reg. 60985, 60986 (Oct. 9, 2014). After the approval of the revised state implementation plan, NMED revised the permits for San Juan, both of which still incorporated conversion of Units 1 and 4 to balanced draft.

{81} In Case No. 13-00390-UT, PNM sought Commission approval to abandon San Juan Units 2 and 3 and replace that capacity with other generation resources in accordance with the revised state implementation plan. The Commission resolved that case by approving a stipulation reached by PNM and several other parties in an order we affirmed in *New Energy Economy*, 2018-NMSC-024, ¶ 46. The stipulating parties agreed that the installation of the emission control technology at San Juan was prudent but "also agree[d] that the prudence and reasonableness of the costs of the balanced draft [would] be determined in a PNM general rate case" in which PNM would have the burden to "make an affirmative demonstration that incurrence of the costs of balanced draft was prudent and reasonable."

{82} In this proceeding, PNM sought to include in its rate base the \$52.3 million it spent to convert San Juan Units 1 and 4 to a balanced draft system. Several parties opposed the inclusion of the balanced draft costs. During the hearing, WRA introduced into evidence emails between Bruno Carrara, the Utility Division Director of the Commission, and Richard Goodyear, the Air Quality Bureau Chief at NMED. In these emails Carrara asked Goodyear how the balanced draft system came to be incorporated into the regulatory framework at San Juan. In his response, Goodyear



explained that balanced draft was not required by the regional haze regulation and was not required for the installation of the less expensive emission control technology required by the state implementation plan. Goodyear went on to state:

Please note that PNM's assertion that the state of New Mexico required the balanced draft conversion is incorrect. PNM's request to implement the balanced draft project was entirely voluntary and only appears in the air quality permit because PNM requested the inclusion of the project in their air quality application. As PNM was in compliance with all applicable ambient air quality standards in effect prior to the proposed installation of the balanced draft project, it should be noted that the project is not required to comply with any applicable ambient air standard.

PNM witness Chris Olson agreed that PNM proposed balanced draft as an environmental compliance measure and that balanced draft is not required to comply with the regional haze requirements.

{83} In its final order, the Commission adopted the recommendation of the hearing examiner and denied PNM recovery for the costs of the balanced draft conversion on the grounds that PNM had failed to demonstrate that these costs were prudently incurred. The Commission declined to give the balanced draft costs the presumption of prudence and rejected PNM's reliance on its permits to demonstrate the prudence of the costs. The Commission based these decisions on the finding that "[b]ecause [San Juan] would not be in violation of any environmental standards without the [balanced draft system], there would have [been] no reason for the NMED to require its installation but for PNM's request." The Commission rejected PNM's argument that this finding was outside the scope of its authority. Finally, the Commission rejected PNM's arguments that the conversion to balanced draft was prudent because it reduced emissions and improved workplace health and safety, finding that PNM had failed to demonstrate either with sufficient evidence. On appeal, PNM argues that the Commission's conclusion that balanced draft was not required to comply with the applicable environmental standards was beyond the Commission's authority and that the Commission's finding that the balanced draft costs were imprudent was contrary to law.

{84} We first address whether the Commission exceeded its authority. The scope of the Commission's authority and jurisdiction is a question of law and we accord the Commission's interpretation of its own jurisdiction "little deference." *Doña Ana*, 2006-NMSC-032, ¶ 7. By statute, the Commission has the

general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates . . . 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.

Section 62-6-4(A); see also N.M. Const., art. XI, § 2 ("The public regulation commission shall have responsibility for regulating public utilities . . . in such manner as the legislature shall provide.").

{85} PNM argues that by finding that the balanced draft conversion was not required for San Juan to comply with the relevant environmental regulations, the Commission exceeded this statutory authority and infringed on the authority of NMED regarding environmental regulation. See *Colonias Dev. Council v. Rhino Env'tl. Servs., Inc. (In re Application of Rhino Env'tl. Servs.)*, 2005-NMSC-024, ¶ 14, 138 N.M. 133, 117 P.3d 939 ("The Environmental Improvement Act grants the Department and its Environmental Improvement Board . . . the power to regulate the environment on behalf of the citizens of New Mexico."). Specifically, PNM contends that this finding by the Commission is contrary to NMSA 1978, Section 74-2-7(L) (2003) which states that a final decision on a permit by [NMED] . . . that a source will or will not meet applicable local, state and federal air pollution standards and regulations shall be conclusive and is binding on every other state agency and as an issue before any other state agency shall be deemed resolved in accordance with that final decision.

PNM's argument is unconvincing.

{86} The Commission's finding that balanced draft was included in the permits for San Juan at PNM's request and not because it was required by the applicable environmental regulation was a finding specifically concerning the reasonableness of costs PNM was seeking to include in its rate base. Such a decision is squarely within the authority of the Commission under Section 62-6-4(A) to regulate the rates of public utilities and the obligation

of the Commission under Section 62-8-1 to ensure that those rates are just and reasonable. The Commission's finding did not concern whether San Juan Units 1 and 4 "meet applicable local, state, [or] federal air pollution standards," as prohibited by Section 74-2-7(L), and thus did not exceed the Commission's authority.

{87} We next turn to whether the Commission's finding that PNM failed to demonstrate the prudence of the balanced draft costs was contrary to law. We have previously recognized that "the Commission has an obligation to allow a utility expenses that are necessary in providing utility service, that benefit ratepayers, and that are prudently incurred." *Zia Nat. Gas Co. v. N.M. Pub. Util. Comm'n (In re Zia Natural Gas Co.)*, 2000-NMSC-011, ¶ 13, 128 N.M. 728, 998 P.2d 564. PNM argues that the balanced draft costs "were the product of governmental mandates and, therefore, [were] necessary and presumed prudent."

{88} PNM relies on *Alabama Power*, 237 P.U.R. 4th 337 (Ala. Pub. Serv. Comm'n 2004) to argue that there is a strong presumption that costs incurred to comply with a governmental mandate, such as environmental compliance costs, are prudent. However, as the Commission recognized, the decision in *Alabama Power* is based on the rationale that environmental compliance costs are "not costs that [the utility] can simply choose not to incur" and that the utility "has little or no control in terms of their timing or their relative magnitude." 237 P.U.R. 4th at 341-42. Here, however, the Goodyear email and Olson's testimony provided substantial evidence to support the Commission's finding that there is "at least a strong inference that the Permits included the installation of the [balanced draft system] primarily because PNM requested it." Moreover, PNM's argument ignores that it agreed in Case No. 13-00390-UT that it would bear the burden of affirmatively demonstrating the prudence of the balanced draft costs in its general rate case. Given this prior stipulation and the evidence indicating that balanced draft was in PNM's permits primarily at its own request, it was lawful for the Commission to reject PNM's argument that the balanced draft costs were entitled to a presumption of prudence.

{89} For the foregoing reasons, we conclude that the Commission's denial of PNM's balanced draft costs was within the Commission's authority to regulate the rates of public utilities and was not contrary to law.



## V. FOUR CORNERS POWER PLANT COAL SUPPLY AGREEMENT

{90} PNM sought to include \$19.5 million in its cost of service for its portion of a new fifteen year coal supply agreement (CSA) at Four Corners Power Plant. The new CSA replaces the previous CSA, which was set to expire in July 2016. Like the previous agreement, the new CSA includes a take-or-pay provision under which the owners of Four Corners are required to pay for a minimum amount of coal even if they do not need and take that coal.

{91} The hearing examiner recommended that the Commission approve the inclusion of the CSA costs in PNM's cost of service. Both NEE and the Coalition for Clean Affordable Energy (CCAЕ) filed exceptions to this recommendation. The Commission rejected these challenges and adopted the hearing examiner's recommendation to allow recovery for the CSA costs. On appeal, NEE argues that the Commission's decision was arbitrary and capricious, contrary to law, and not supported by substantial evidence. We disagree.

{92} First, NEE raises several challenges which go beyond the CSA and are instead directed, in essence, at the prudence of PNM's continued use of Four Corners as a generation resource. In its final order, the Commission determined that evidence had not been presented that PNM had a choice to discontinue its use of Four Corners. On appeal, NEE broadly points to the testimony of one of its witnesses, David Van Winkle, to support its contention that evidence was presented that PNM could have discontinued use of Four Corners in 2016. Nothing in Van Winkle's testimony undermines the Commission's determination. While Van Winkle testified that in his opinion it was imprudent for various reasons for PNM to make a long term commitment to Four Corners, the only decision challenged in his testimony was PNM's decision to sign the new CSA. NEE also relies on Van Winkle's testimony regarding El Paso Electric Company's decision to cease participation at Four Corners. However, evidence that El Paso Electric had the choice to discontinue its use of Four Corners does not, without more, indicate that PNM had the same choice. Accordingly, the Commission's conclusion that its "primary concern . . . [was] whether the CSA obtains coal at a reasonable cost and on reasonable terms" was supported by the evidence in this case, and we decline to recognize NEE's arguments directed at PNM's continued use of Four Corners as a generation resource.

{93} NEE also levels two challenges directed at the Commission's conclusion that recovery of the cost of the CSA was reasonable. First, NEE contends that *PNM Gas Services*, 2000-NMSC-012 requires that a utility use a cost/benefit analysis to evaluate contracts with take-or-pay provisions and it was contrary to law for the Commission to not require PNM to do so here. NEE's reliance on *PNM Gas Services* to support this proposition is misplaced. In that case, this Court affirmed the Commission's use of a cost/benefit analysis to determine whether the utility could recover in its rates the costs of discounts it applied to a take-or-pay rider. *Id.* ¶¶ 26-41. That case did not concern the reasonableness of the take-or-pay contract and, as such, is inapposite to the issue of whether the cost or terms of the Four Corners CSA are reasonable.

{94} Second, NEE argues the Commission's conclusion that "NEE's focus on the choice of coal as a fuel failed to provide any basis upon which [it] could say that the terms of the CSA were unreasonable" placed the burden on NEE rather than on PNM, contrary to Section 62-8-7(A). We are not convinced. PNM supported the reasonableness of the CSA with witness testimony regarding its cost and terms. PNM witness Susan Taylor testified that, using estimates that were higher than the actual price of the new CSA, PNM's pre-contract analysis showed that the new CSA was more cost effective than a gas plant. PNM witness Chris Olson additionally presented testimony that the take-or-pay provisions in the new CSA are consistent with industry standards and are comparable to similar provisions in the current San Juan CSA. Further, Olson testified that the take-or-pay provisions of the new CSA are more favorable to PNM than the previous CSA in several ways. In its final order, the Commission expressly discussed this evidence before determining that NEE's challenge gave it no basis to find that the cost or terms of the CSA were unreasonable. This finding was based on substantial evidence in the record and did not improperly shift the burden from PNM to NEE.

{95} For these reasons, we reject NEE's arguments that the Commission's decision to include the costs of the Four Corners CSA in PNM's cost of service was arbitrary and capricious, contrary to law, and not supported by substantial evidence.

## VI. RATE 11B

{96} Utilities often charge different classes of ratepayers different rates. *N.M. Att'y Gen. v. N.M. Pub. Regulation Comm'n*, 2015-NMSC-032, ¶ 29, 359 P.3d 133. In this case, PNM proposed to change its rate design so that the rates charged to the various rate classes would more accurately reflect the cost of providing service to those rate classes. The calculated revenue requirements for each rate class varied significantly and, in order to mitigate dramatic increases for certain rate classes, PNM proposed a "banding" process which would establish upper and lower limits on the percentage of the rate increase for each class. However, PNM proposed to not apply rate banding to Rate 11B, water and sewage utility customers including ABCWUA. Instead, PNM proposed to increase Rate 11B by the calculated revenue requirement for the class, which was lower than the lower limit of the band.

{97} PNM supported its proposal to exclude Rate 11B from rate banding with the testimony of Stella Chan and David Aguirre. Chan testified that PNM proposed excluding Rate 11B from rate banding to "effectuate the intent of the Amended Stipulation" in Case No. 10-00086-UT. According to both Chan and Aguirre's testimony, PNM agreed in the Amended Stipulation to work cooperatively with Rate 11B customers to ensure that those customers would not be "unduly penalized" by a proposed change to PNM's time of use (TOU) on-peak period. Rates charged during TOU on-peak periods are higher than those in off-peak periods to reflect the cost of serving customers and to encourage customers to use electricity during off-peak periods. In this case, PNM proposed to shift its TOU on-peak period by two hours to more accurately reflect its generation and delivery costs.

{98} Chan and Aguirre both further testified that the agreement reached between PNM and the Rate 11B customers, including ABCWUA, was to shift the data used to calculate Rate 11B's rates by two hours in anticipation of the two hour TOU on-peak period shift and in recognition of the historical ability of Rate 11B customers to adjust the majority of their usage to off-peak hours. Chan testified that the benefits of that agreement with Rate 11B customers would be reversed if rate banding was applied to Rate 11B, which was why PNM proposed to exclude Rate 11B from rate banding.

{99} However, ABCWUA witness Joseph Herz presented testimony which criticized PNM's proposed two hour TOU shift and recommended that the Commission not approve that shift until a more complete analysis had been performed. On examination by the hearing examiner, Herz testified that the agreement between PNM and ABCWUA did not include the proposed two hour shift and that he did not support such a shift. Herz testified that the agreement instead concerned the methodology used to calculate Rate 11B's demands for cost allocation purposes and would apply whether or not the Commission approved the two hour TOU shift. Finally, Herz admitted that PNM proposed to exclude Rate 11B from banding "in order to effectuate some of the goals of the stipulation" but testified that, in his opinion, Rate 11B should be excluded from banding whether or not the TOU shift was approved.

{100} In its post-hearing brief, PNM stated that its proposal to exclude Rate 11B from rate banding "was specifically and explicitly stated to be in accordance with Paragraph 39 of the Amended Stipulation, which presumed that the TOU pricing period would be changing." PNM recognized that Herz opposed the TOU shift and argued that, should the TOU shift not be approved, "the Commission should re-visit PNM's proposal to leave Rate 11B out of the banding process." In its response brief, ABCWUA claimed this was a change in position for PNM and argued that due process required that the Commission not consider it.

{101} The hearing examiner rejected ABCWUA's due process argument and recommended denying PNM's proposal to exclude Rate 11B on two bases: (1) the conflicting positions of PNM and ABCWUA as to whether their agreement was contingent on the TOU shift; and (2) that there was testimony that PNM's proposal would shift costs to other ratepayers but no testimony as to the extent of that impact. The Commission adopted the hearing examiner's findings, specifically noting that the recommendation was based on the lack of adequate evidence supporting the proposal.

{102} On appeal, ABCWUA challenges the Commission's decision on several grounds, but its primary contention is that the Commission's decision violated its right to due process of law. As we have previously discussed, "the fundamental requirements of due process in an administrative context are reasonable notice

and opportunity to be heard and present any claim or defense." *ABCWUA*, 2010-NMSC-013, ¶ 21 (quoting *Jones*, 1983-NMSC-089, ¶ 6). ABCWUA repeats its contention that the Commission's decision was based on PNM's post-hearing brief, which ABCWUA argues deprived it of notice and a meaningful opportunity to be heard. Specifically, ABCWUA argues that PNM's testimony did not connect exclusion of Rate 11B to the proposed TOU shift and, therefore, ABCWUA was denied an opportunity to respond to that argument. ABCWUA's arguments are contrary to the record and are without merit.

{103} Chan's testimony expressly connected PNM's proposal to exclude Rate 11B from rate banding with the Amended Stipulation from Case No. 10-00086-UT, which the testimony of both Chan and Aguirre consistently connected with PNM's proposal to shift the TOU on-peak period by two hours. This testimony provided ABCWUA with more than adequate notice of the connection between these two issues. Not only did ABCWUA receive this notice, it was provided with an opportunity to respond to PNM's position and did so. ABCWUA witness Herz presented testimony on the proposed two hour TOU shift, the agreement between PNM and ABCWUA pursuant to the Amended Stipulation, and PNM's proposal to exclude Rate 11B from rate banding.

{104} However, Herz's testimony conflicted with the testimony of Chan and Aguirre on these issues. This conflicting testimony, together with the lack of evidence on the effects of PNM's proposal on other ratepayers, failed to persuade the hearing examiner and, ultimately, the Commission that PNM's proposal to exclude Rate 11B from rate banding would result in just and reasonable rates. It was for that reason, and not any alleged change in position in PNM's post-hearing brief, that the Commission rejected PNM's proposal to exclude Rate 11B from rate banding. This decision by the Commission was reasonable, was supported by the evidence in the record, and was not made in violation of ABCWUA's right to due process of law.

#### VII. PREPAID PENSION ASSET

{105} NMIEC claims that the Commission's inclusion of the \$137.8 million Prepaid Pension Asset (PPA) in PNM's rate base was contrary to *New Mexico Attorney General*, 2015-NMSC-032, and was supported by insufficient evidence. NMIEC's arguments are unavailing on this point.

{106} A PPA is "the amount by which

investor contributions to a pension trust and earnings on those contributions exceed pension expenses." *N.M. Att'y Gen.*, 2015-NMSC-032, ¶ 3. Ratepayers benefit from this excess because its earnings are deemed to be income for a utility, reducing the amount of revenue the utility must collect from ratepayers. *Id.* ¶ 5. Consequently, this Court has held "that some or all of a prepaid pension asset should be included in the rate base to the extent that the evidence evinces that the asset was investor-funded, as opposed to ratepayer-funded." *Id.* ¶ 19. We admonished utilities not to "voluntarily overfund their pension funds simply to earn a favored rate of return." *Id.* ¶ 22.

{107} On appeal, NMIEC claims that the "totality of the testimony in the record" in this case "demonstrates that PNM has failed to show that the PPA amounts it seeks to include in rates are entirely funded by shareholder capital." Specifically, NMIEC contests the use of illustrative cost of service estimates from prior settlement agreements as evidence of investor contributions to pension funds. PNM contends that sufficient evidence did support the hearing examiner's determination that the PPA was investor-funded and that the Commission previously relied on illustrative cost of service to determine the reasonableness of rates in Case No. 10-00086-UT.

{108} In the proceedings below, PNM witnesses Elisabeth Eden and Jason Peters testified that the amount PNM sought to recover for its PPA was based on actuarial calculations which determined the amount of legally required investor contributions to PNM's pension funds. NMIEC witness Michael Gorman testified that PNM had failed to prove that it had not recovered its pension contributions from ratepayers and questioned PNM's evidence that the PPA had resulted exclusively from investor contributions. PNM witness Jason Peters provided rebuttal testimony including further documentation of the investor contributions to the PPA.

{109} Based on this evidence, the hearing examiner concluded that PNM investors contributed to the pension fund as they were legally required to do and that those contributions exceeded pension expenses such that the PPA could properly be included in PNM's rate base. In making this recommendation the hearing examiner rejected NMIEC's argument against the reliability of illustrative cost of service data, finding that such data was appropriate to

help document investor contributions to the pension fund and that NMIEC had not suggested an alternative way for PNM to calculate those contributions. The Commission adopted the hearing examiner's recommendation, specifically finding that PNM's use of illustrative cost of service was reasonable.

{110} Viewing the entire record in the light most favorable to the Commission's decision, we conclude that there is substantial evidence to support the Commission's determination that the PPA was investor, rather than ratepayer, funded. *See NMIEC*, 2007-NMSC-053, ¶ 24. The Commission's determination regarding the use of illustrative cost of service data is well within the Commission's technical expertise. NMIEC recognizes that the record contains specific testimony supporting that the PPA was investor funded, yet challenges the persuasiveness of that testimony. NMIEC asks that we reweigh the evidence, which we will not do, especially on this technical matter. *ABCWUA*, 2010-NMSC-013, ¶¶ 18, 50. Accordingly, we reject NMIEC's substantial evidence challenge on this point.

{111} Nor do we conclude that the Commission improperly removed the burden of proof from PNM, as contended by NMIEC. NMIEC relies on the statement by the hearing examiner that "NMIEC does not suggest how PNM could have alternatively calculated the amount of ratepayer contributions." We have addressed this type of argument before. *See ABCWUA*, 2010-NMSC-013, ¶ 83 ("[T]he [Commission] did not shift the burden of proof to the opposing parties; the [Commission] simply held that the opposing parties had failed to discredit or rebut PNM's evidence[.]"). As in *ABCWUA*, the Commission did not shift the burden of proof on this matter merely by noting that NMIEC did not offer evidence it found persuasive to counter that evidence offered by PNM.

{112} For the foregoing reasons, we reject NMIEC's arguments on appeal and conclude that the Commission's decision to allow PNM to recover \$137.8 million for its PPA is in accordance with the law and supported by substantial evidence.

## VIII. METHOD A

{113} NMIEC appeals the adoption of Method A, which adjusts PNM's methodology for calculating customer fuel costs. NMIEC's primary contention is that Method A violates the statutory rate caps established in NMSA 1978, Section 62-16-4 (2014).<sup>4</sup> Because Method A does not increase the amount large and exempt customers pay for renewable energy and instead ensures that those customers will more accurately pay for their use of conventional energy, we hold that Method A does not violate the statutory rate caps under Section 62-16-4 (2014). We likewise reject NMIEC's arguments that Method A was adopted in violation of due process, is arbitrary and capricious, and would not result in just and reasonable rates.

{114} As we have discussed, utilities charge different rates to different customer classes. *N.M. Att'y Gen.*, 2015-NMSC-032, ¶ 29. These classifications are often based on fuel needs, the purpose for which the fuel will be used, the time and duration of fuel use, and the possibility that a large customer could undertake self-generation if charged too much. II Leonard Saul Goodman, *The Process of Ratemaking* 964 (1998); *see also N.M. Att'y Gen.*, 2015-NMSC-032, ¶¶ 29-30 (discussing the utilization of "cost allocation" in ratemaking). This concept, called "cost allocation" or "differential rates," can be used to advance various policy objectives. *N.M. Att'y Gen.*, 2015-NMSC-032, ¶¶ 29-30.

{115} Section 62-16-4 (2014) of the New Mexico Renewable Energy Act, NMSA 1978, Sections 62-16-1 to -10 (2004, as amended through 2014) directs the Commission to apply differential rates to promote the development of renewable energy. *See N.M. Att'y Gen.*, 2015-NMSC-032, ¶¶ 30, 41. The cost of a utility's renewable energy portfolio is shared among three customer classes. First, large customers are capped in their contribution to the renewable energy portfolio under Section 62-16-4(A)(2) (2014) (capping the contribution for "nongovernmental customers at a single location or facility . . . with consumption exceeding ten million kilowatt-hours per year"). Second, government customers that take specific steps

to develop their own renewable energy generation are exempt from contributing to the renewable energy portfolio under Section 62-16-4(A)(3) (2014). Finally, other customers are not capped in their contribution but are protected under a reasonable cost threshold set by the Commission. *See* Section 62-16-4(C) (2014).

{116} The fuel costs required to generate electricity are among the expenses public utilities can recover through rates. PNM has previously recovered some of its fuel costs through its base fuel rate, which reflects an average fuel cost. But, to account for fluctuations in fuel and purchased power costs, there is a statutory and regulatory mechanism called a fuel and purchased power cost adjustment clause (FPPCAC). *ABCWUA*, 2010-NMSC-013, ¶ 2; *see also* 17.9.550.6(D) NMAC ("[T]he objective of a[n] FPPCAC is to flow through to the users of electricity the increases or decreases in applicable fuel and purchased power expense per kilowatt-hour of delivered energy above or below a base fuel and purchased power expense."). The intended effect of an FPPCAC is to allow a utility company to collect its actual fuel costs. *See* 17.9.550.6(C) NMAC (stating that one objective of the FPPCAC rule is to "assure that utilities collect through the FPPCAC the amount actually expended for fuel and purchased power costs"). As explained by the hearing examiner,

[i]f [a utility company's] actual fuel costs are greater than the revenues it collects from its base fuel rate, it recovers its undercollected fuel costs through its FPPCAC. Conversely, if [a utility company's] actual fuel costs are less than the revenues it collects from its base fuel rate, [it] returns its overcollected fuel revenues to customers through its FPPCAC.

{117} The record indicates that the previous FPPCAC formula was the total projected fuel costs for the time period at issue, adjusted by the over- or undercharged amount for the prior period, divided by the total amount of energy projected to be billed in the period. This method, in effect, underpriced the fuel cost for conventional energy by including in the denominator the projected amount of both conventional

<sup>4</sup>These statutory rate caps were recently amended by our Legislature. *See* 2019 N.M. Laws, ch. 65, § 29 (removing the statutory rate caps for large customers and amending the manner in which certain government customers are exempt). How these amendments change the method by which PNM will allocate its fuel costs is a matter for the Commission. *See N.M. Att'y Gen. v. N.M. State Corp. Comm'n*, 1996-NMSC-002, ¶ 11, 121 N.M. 156, 909 P.2d 716 ("[T]his Court is not a rate-making body."). Accordingly, this opinion does not address this change in law, but instead addresses the arguments regarding Method A under the law in effect at the time of the Commission's final order in this case.



and renewable energy, even though renewable energy does not have any associated fuel cost.

{118} Although all customer classes were affected by this FPPCAC formula, the method of calculation resulted in a windfall to large customers, who were simultaneously undercharged for their conventional energy usage and statutorily capped in their contribution to the renewable energy portfolio under Section 62-16-4(A) (2014). This benefit could be substantial. For example, one large customer saved approximately \$766,000 more in fuel costs from the inclusion of renewable energy in the FPPCAC than it contributed to the renewable energy portfolio.

{119} In a series of cases over several years, the Commission sought to properly construe and then address this windfall to large customers. In this case, the Commission ordered PNM to revise its method for calculating fuel costs, specifically ordering PNM to remove renewable energy from its FPPCAC calculation. To carry out this order, PNM proposed Method A. Under Method A, PNM, in relevant part, (1) recovers all fuel and purchased power costs through the FPPCAC and none through its base rate; (2) excludes estimated renewable energy from the calculation of estimated nonrenewable fuel costs, such that nonrenewable fuel cost calculations include only estimated nonrenewable energy; and (3) breaks the FPPCAC charges to a customer into two parts which reflect the customer's use-ratio of nonrenewable energy to renewable energy, which always has a zero fuel cost.

{120} WRA Witness Dr. Douglas Howe testified in support of Method A, explaining that it would partially correct the fuel cost misallocation by more accurately charging customers for the true costs of their conventional energy usage. Dr. Howe believed that Method A would "clarify the costs and benefits of renewable energy" by allowing customers to "see explicitly the fuel costs of the conventional resources that serve them, and the zero fuel cost of the renewable energy that serves them." Dr. Howe testified that Method A would "provide a more accurate presentation and fair outcome for all PNM customers."

{121} Commission Staff recommended that the Commission adopt a modified version of Method A. The hearing examiner considered both Method A and the modified version and recommended that Method A be adopted without modification. The Commission agreed and ordered the adoption of Method A.

#### **A. Method A is a Lawful Exercise of Commission Authority and Does Not Violate the Statutory Rate Caps in Section 62-16-4 (2014)**

{122} NMIEC first contends that Method A is unlawful because it imposes additional costs on customers whose renewable energy costs are capped under Section 62-16-4(A) (2014). We disagree and hold that Section 62-16-4(A) (2014) limits only renewable energy costs and does not otherwise restrict the Commission's authority to increase the cost of conventional energy usage in order to provide for just and reasonable rates.

{123} In addition to requiring utilities to procure an increasing percentage of renewable energy each year, Section 62-16-4 (2014) limits the amount that utilities can charge certain customers for renewable energy. Section 62-16-4(A)(2) (2014) provides that "the kilowatt-hours of renewable energy procured for [large] customers shall be limited so that the *additional cost* of the *renewable* portfolio standard to each customer does not exceed the lower . . . of two percent of that customer's annual electric charges or ninety-nine thousand dollars (\$99,000)." (emphasis added). Government customers who take specified steps to produce their own renewable energy are exempt from contributing to the renewable energy portfolio under Section 62-16-4(A)(3) (2014).

{124} NMIEC relies on *New Mexico Attorney General*, 2015-NMSC-032 to argue that the Legislature intended Section 62-16-4(A) (2014) to limit the total electricity cost for large customers. However, NMIEC misconstrues *New Mexico Attorney General*. In that case, we affirmed the Commission's discretion to permit utilities to recover renewable energy costs that exceeded the statutory cap from non-capped customers. *N.M. Att'y Gen.*, 2015-NMSC-032, ¶¶ 34-36. We explained that the purpose of the statutory rate caps is to protect large and exempt customers from renewable energy costs, rejecting the contention that utilities must reduce their renewable energy procurement whenever costs exceed the statutory cap, and thereby protect other customers from bearing these costs. *Id.* ¶¶ 30, 45-46. We did not, however, hold that Section 62-16-4(A) (2014) protects large and exempt customers from paying the full costs of their conventional energy usage.

{125} NMIEC further contends that "[i]f the Legislature believed that . . . [there was] an unfair misallocation of fuel costs"

it "would have added clear, unequivocal language" correcting that fuel misallocation. We disagree. Section 62-16-4(A) (2) (2014) expressly limits what large and exempt customers will pay for renewable energy but is silent with respect to the burden on those customers for the costs of conventional energy. This silence does not bar the Commission from otherwise allocating the costs of conventional energy usage or otherwise exercising its authority to provide for just and reasonable rates. *State v. Wrosteck*, 1994-NMSC-042, ¶ 17, 117 N.M. 514, 873 P.2d 260 ("We do not read language into the Act that is not there.").

{126} Provided renewable energy costs do not exceed the statutory rate caps, Section 62-16-4 (2014) does not restrict the Commission's authority to regulate a utility's method for charging customers for fuel usage. Method A does not impose additional charges for renewable energy usage on large and exempt customers, but rather increases their fuel costs to more accurately reflect the true costs of their conventional energy usage. Therefore, we conclude that Method A does not violate the statutory rate caps in Section 62-16-4(A) (2014) and is a lawful exercise of Commission authority.

#### **B. The Commission's Adoption of Method A Was Consistent with Due Process**

{127} NMIEC asserts that Method A was adopted in violation of due process, specifically arguing that it was adopted as a result of a biased or predetermined process. For the following reasons, we disagree.

{128} In Case No. 13-00183-UT, the Commission heard testimony regarding a possible misallocation of fuel costs and directed PNM to "identify whether or not there are 'disproportionate fuel benefits' and address rate and ratemaking issues and the associated and interrelated impacts on customer class related base rates, base fuel costs, the fuel clause and adjustments, as well as the renewable rate rider." Subsequently, in Case No. 15-00166-UT, the Commission concluded that the issue had been mischaracterized until that point and rejected a proposed solution in the form of a rate-rider. Instead, the Commission determined that the more appropriate approach would be to consider changes to the FPPCAC in a separate docket with more information. In this case, the Commission adopted Method A after considering the arguments for and



against it, as well as a modified version of Method A proposed by Commission Staff. This process is distinguishable from the biased and predetermined decision that resulted in a denial of due process in the case relied on by NMIEC, *Reid v. New Mexico Board of Examiners in Optometry*, 1979-NMSC-005, ¶¶ 4, 9, 92 N.M. 414, 589 P.2d 198 (concluding that due process was denied when a board member, prior to disciplinary proceedings, said that the subject of the proceedings “would be losing his license soon”).

{129} NMIEC further challenges the Commission’s authority to solicit evidence, but “[a]t any stage of the proceeding the commission or presiding officer may require the production of further evidence upon any issue.” 1.2.2.35(K) NMAC. Under Section 62-6-4(A), the Commission has the authority to “do all things necessary and convenient in the exercise of its power and jurisdiction,” including the discretion to solicit evidence in fulfillment of its statutory directives. *Las Cruces Prof’l Fire Fighters v. City of Las Cruces*, 1997-NMCA-031, ¶¶ 31-32, 123 N.M. 239, 938 P.2d 1384 (affirming the administrative power “to consider evidence elicited by its own questions”). “[I]t could hardly be envisioned that Commissioners would sit as spectators, like Roman Emperors in the coliseum, and simply exhibit a ‘thumbs-up or thumbs-down’ judgment after the dust of battle settles in the arena.” *Mountain States Tel. & Tel. Co.*, 1977-NMSC-032, ¶ 19. The Commission correctly adopted its rejection of NMIEC’s similar arguments in Case No. 15-00166-UT.

{130} Additionally, the record does not support that NMIEC did not have reasonable notice or an opportunity to be heard, which are the fundamental requirements of due process in this context. See *ABCWUA*, 2010-NMSC-013, ¶ 21. As noted by the Commission, “this issue has had a long history and NMIEC has been a party to all of the proceedings[.]” NMIEC had ample opportunity to challenge Method A.

NMIEC presented testimony regarding the impact of Method A and cross-examined PNM witness Gerard Ortiz regarding the alleged fuel misallocation, *inter alia*. NMIEC witness James Dauphinais testified that “NMIEC does not believe that under New Mexico law there is a disproportionate fuel benefit” and that “the cost and burden of Method A are not justified by the amount of fuel costs that would be reallocated.” Finally, NMIEC voiced its objections to Method A in its post-hearing briefing to the Commission. This met the requirements of due process under *ABCWUA*, 2010-NMSC-013, ¶ 21.

{131} Finally, the Commission’s decision to stay Case No. 16-00016-UT did not deprive NMIEC of an opportunity to challenge the imposition of a fuel clause adjustment. NMIEC had the opportunity to object to the stay, did not, and availed itself of the opportunity to challenge the imposition of a fuel clause adjustment in the instant case. For the foregoing reasons, we conclude that Method A was adopted in accordance with the requirements of due process and not as a result of a biased process, as alleged by NMIEC.

**C. The Commission’s Adoption of Method A Was Otherwise Lawful and Reasonable**

{132} NMIEC challenges the reasonableness of Method A on various other grounds. However, there was substantial evidence to support the adoption of Method A, including Dr. Howe’s testimony that Method A would correct the identified fuel cost misallocation and would result in a fairer outcome for all customers. We reject the argument that Method A is arbitrary and capricious and imposes an improper surcharge identical to the rate-rider the Commission rejected in Case No. 15-00166-UT. As the Commission explained, it rejected the surcharge approach and “the very notion of a [disproportionate avoided fuel benefit]” after determining that “the entire . . . issue arose through an error in PNM’s fuel cost calculations.”

{133} We also reject the argument that Method A is inherently flawed and unjust because its calculation did not include all quantifiable costs and benefits, as required to calculate the reasonable cost threshold under 17.9.572.14(C) NMAC. The record gives us no basis to conclude that fuel cost calculations are subject to the same requirements as the reasonable cost threshold and the matter is of a technical nature warranting heightened deference to the Commission. See *ABCWUA*, 2010-NMSC-013, ¶ 50. The parties and the hearing examiner devoted significant attention to the calculation of Method A. For these reasons, we hold that the adoption of Method A was lawful and reasonable.

**IX. CONCLUSION**

{134} We conclude that virtually all of the Commission’s decisions are reasonable and lawful, but because we conclude that the Commission’s denial of any future recovery for nuclear decommissioning costs violated PNM’s right to due process of law we vacate and annul the Commission’s final order en toto. See Section 62-11-5; *Hobbs*, 1993-NMSC-032, ¶ 6. We therefore remand to the Commission for further proceedings consistent with this opinion.

{135} **IT IS SO ORDERED.**

**BARBARA J. VIGIL, Justice**

**WE CONCUR:**

**JUDITH K. NAKAMURA,**  
Chief Justice

**EDWARD L. CHÁVEZ,**  
Justice, retired  
Sitting by designation

**J. MILES HANISEE,**  
Judge, Sitting by designation

**PETRA JIMENEZ MAES,**  
Justice, retired  
Sitting by designation,  
not participating



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Tom is listed in *Best Lawyers in America*, *Chambers-USA*, *Southwest Super Lawyers* and *Benchmark Litigation* for his expertise and experience in employment and labor law. He is a co-author of the New Mexico Employment Law Desk Reference – Second Edition, Rodey Law Firm © 2013.

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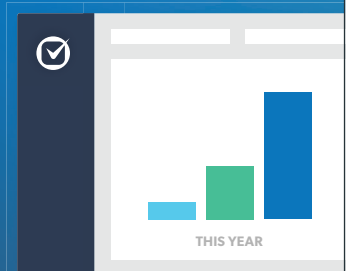
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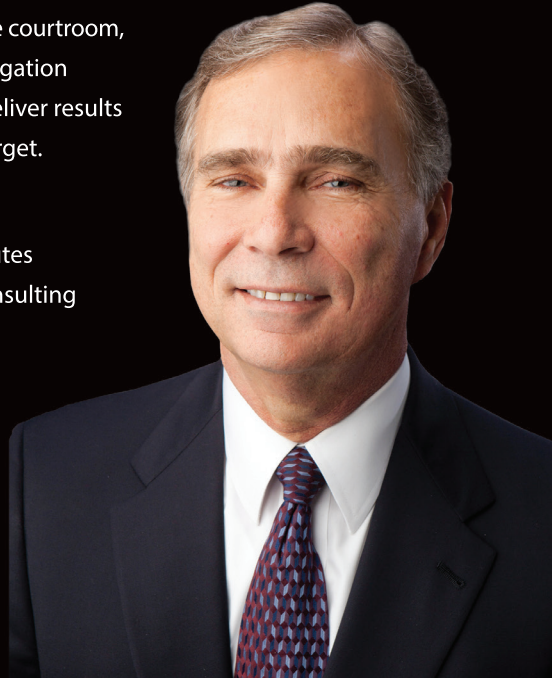
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has joined the Firm as an Associate



Mr. Busby earned his Bachelor of Science degree in  
Psychology in 2016 from Brigham Young University and  
his Doctor of Jurisprudence in 2019 from the University  
of Arizona James E. Rogers College of Law.

We welcome him to our practice.

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# Help us address the needs of low-income New Mexicans!

## Portales Legal Fair

The Ninth Judicial District Pro Bono Committee is hosting a Portales Legal Fair, a free legal fair, on **Thursday, October 17, 2019 from 1:30 pm-4:00 pm** at the Yam Theatre, 219 Main St. Portales, NM 88130. Pro Bono Luncheon from 11:30am-1:00pm with guest speaker Justice Shannon Bacon.

*\*first-come, first-served\**  
*\*interpreters will be available\**

**We are looking for attorneys who practice in the following areas to give consults:**

Divorce	Wills/Probate
Creditor/Debtor	Contracts
Power of Attorney	Immigration
Custody	SSI/SSDI
Child Support	Kinship/
Public Benefits	Guardianship
Unemployment	Bankruptcy
Landlord/Tenant	Personal Injury

**If you would like to volunteer, please email Benjamin Cross at: [clodbsc@nmcourts.gov](mailto:clodbsc@nmcourts.gov)**

## Albuquerque Law-La-Palooza

The Second Judicial District Pro Bono Committee is hosting Law-La-Palooza, a free legal fair, on **Thursday, October 24, 2019** at the Cesar Chavez Community Center, 7505 Kathryn Ave. SE, Albuquerque, NM 87108.

*\*first-come, first-served\**  
*\*interpreters will be available\**

**We are looking for attorneys who practice in the following areas to give consults:**

**FAMILY LAW ISSUES**  
**12:00PM-3:00PM**

**CIVIL LEGAL ISSUES**  
**3:00PM-5:00PM**

**If you would like to volunteer, please register here:**

<https://www.cognitoforms.com/VolunteerAttorneyProgram1/AlbuquerqueLawLaPalooza102419>

*For questions, please contact Dina Afek at: [dinaa@nmlegalaid.org](mailto:dinaa@nmlegalaid.org)*

## Taos Legal Fair

The Eighth Judicial District Pro Bono Committee is hosting the Taos County Legal Fair, a free legal fair, on **Wednesday, October 30, 2019 from 4:00 pm-7:00 pm** at Bataan Hall 120 Civic Plaza Drive, Taos, NM 87571.

*\*Pre-Registration Required\**  
*\*interpreters will be available\**

**We are looking for attorneys who practice in the following areas to give consults:**

Divorce	Wills/Probate
Creditor/Debtor	Contracts
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Child Support	Kinship/
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Unemployment	Bankruptcy
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## Positions

### Associate Attorney

Tucker, Yoder, Hatfield, Eley & Associates, the largest firm in San Juan County, practicing in New Mexico and Colorado, has an immediate associate opening in its Farmington office for civil, domestic relations and criminal practice. Ideal candidates will be team players, ready to assist clients in a variety of cases. New Mexico and Colorado bar admission a plus. Salary depending on experience. Please send cover letter and resume to [jennifer@tbylaw.com](mailto:jennifer@tbylaw.com)

### Divorce Lawyers – Come Grow with Us!

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### Traffic Arraignment Attorney

The City of Albuquerque Legal Department is hiring an Assistant City Attorney position in the Property and Finance division of the City Attorney's Office. The position will administer the traffic arraignment program and assist in areas of real estate and land use, governmental affairs, regulatory law, procurement, general commercial transaction issues, civil litigation and. The department's team of attorneys provide legal advice and guidance to City departments and boards, as well as represent the City and City Council on complex matters before administrative tribunals and in New Mexico State and Federal courts. Attention to detail and strong writing skills are essential. Applicant must be an active member of the State Bar of New Mexico in good standing or able to attain bar membership within three months of hire. Salary will be based upon experience. Please submit resume and writing sample to attention of "Legal Department Assistant City Attorney Application" c/o Angela M. Aragon, Executive Assistant/HR Coordinator; P.O. Box 2248, Albuquerque, NM 87103, or [amaragon@cabq.gov](mailto:amaragon@cabq.gov).

### Associate Attorney

Stiff, Keith & Garcia is a successful and growing law firm representing national clients, looking for a lawyer to work as an associate in the areas of insurance defense and civil litigation. Flexible work environment available. Minimum of 2 years of litigation experience. Strong academic credentials, and research and writing skills are required. We are a congenial and professional firm. Excellent benefits and salary. Great working environment with opportunity for advancement. Send resume to [resume01@swcp.com](mailto:resume01@swcp.com)

### Public Education Department – Attorney Positions

The Public Education Department (PED) is seeking attorneys for its Office of General Counsel. In addition to practicing education law, attorneys may be relied on for advice on matters relating to contracts, procurement, employment, public records, federal and state government funding, and/or other governmental agency matters. Strong writing and interpersonal skills are essential. More details about positions and how to apply are provided on the State Personnel Office website at <http://www.spo.state.nm.us/>. Please check the website periodically for updates to the list of available positions.

### Trial Attorney

Trial Attorney wanted for immediate employment with the Ninth Judicial District Attorney's Office, which includes Curry and Roosevelt counties. Employment will be based in either Curry County (Clovis) or Roosevelt County (Portales). Must be admitted to the New Mexico State Bar. Salary will be based on the NM District Attorneys' Personnel & Compensation Plan and commensurate with experience and budget availability. Email resume, cover letter, and references to: Steve North, [snorth@da.state.nm.us](mailto:snorth@da.state.nm.us).

### Property and Finance Attorney

The City of Albuquerque Legal Department is hiring an Assistant City Attorney for the Property and Finance Division. The work includes, but is not limited to: contract drafting, analysis, and negotiations; drafting ordinances; regulatory law; Inspection of Public Records Act; procurement; general commercial transaction issues; intergovernmental agreements; dispute resolution; and civil litigation. Attention to detail and strong writing skills are essential. Three (3)+ years' experience is preferred and must be an active member of the State Bar of New Mexico, in good standing. Please submit resume and writing sample to attention of "Legal Department Property Finance Assistant City Attorney Application" c/o Angela M. Aragon, Executive Assistant/HR Coordinator; P.O. Box 2248, Albuquerque, NM 87103, or [amaragon@cabq.gov](mailto:amaragon@cabq.gov).

### Assistant City Attorney/ Employment and Labor Division

The City of Albuquerque Legal Department is looking to fill an Assistant City Attorney position within its Employment and Labor Division. This Division is responsible for representing the City in litigation related to employment and labor law in New Mexico State and Federal Courts, before the City of Albuquerque Personnel Board, and before the City of Albuquerque Labor Board. The Division also provides counsel throughout all City Departments related to employment and labor issues. Attention to detail, strong writing skills, and the ability to work well as a part of a team are essential. Five or more years' experience in employment or labor law is preferred for the first position. Two or more years of experience in civil litigation is preferred for the second, with additional preference given for experience in employment or labor law. Applicants must be an active member of the State Bar of New Mexico in good standing. Salary will be based upon experience. Please submit resume and writing sample to attention of "Legal Department Assistant City Attorney Application" c/o Angela M. Aragon, Executive Assistant/HR Coordinator; P.O. Box 2248, Albuquerque, NM 87103, or [amaragon@cabq.gov](mailto:amaragon@cabq.gov).

### Assistant City Attorney for the Municipal Affairs Division

The City of Albuquerque Legal Department is hiring an Assistant City Attorney for the Municipal Affairs Division. The Department's team of attorneys provides a broad range of general counsel legal services to the Mayor's Office, City Council, the Albuquerque Police Department, various City departments, boards, commissions, and agencies. The legal services provided by the division includes, but are not limited to, drafting legal opinions, reviewing and drafting policies, ordinances, and executive/administrative instructions, reviewing and drafting contracts, providing counsel on Inspection of Public Records Act requests and other open government issues, providing advice on City ordinances and State/Federal statutes and regulations, and providing general advice and counsel on day-to-day operations. Attention to detail and strong writing skills are essential. Preferences include: Five (5)+ years' experience; criminal legal experience; policy writing; and addressing evidentiary issues. Candidates must be an active member of the State Bar of New Mexico in good standing. Salary will be based upon experience. Please submit resume and writing sample to attention of "Legal Department Assistant City Attorney Application" c/o Angela M. Aragon, Executive Assistant/HR Coordinator; P.O. Box 2248, Albuquerque, NM 87103, or [amaragon@cabq.gov](mailto:amaragon@cabq.gov).

### Litigation Attorney

With 51 offices and over 1,400 attorneys, Lewis Brisbois is one of the largest and most prestigious law firms in the nation. Our Albuquerque office is seeking associates with a minimum of three years litigation defense experience. Candidates must have credentials from ABA approved law school, actively licensed by the New Mexico state bar, and have excellent writing skills. Duties include but are not limited to independently managing a litigation caseload from beginning to end, communicating with clients and providing timely reporting, appearing at depositions and various court appearances and working closely with other attorneys and Partners on matters. Please submit your resume along with a cover letter and two writing samples to phxrcruiter@lewisbrisbois.com and indicate "New Mexico Litigation Attorney Position". All resumes will remain confidential. LBBS does not accept referrals from employment businesses and/or employment agencies with respect to the vacancies posted on this site. All employment businesses/agencies are required to contact LBBS's human resources department to obtain prior written authorization before referring any candidates to LBBS. The obtaining of prior written authorization is a condition precedent to any agreement (verbal or written) between the employment business/ agency and LBBS. In the absence of such written authorization being obtained any actions undertaken by the employment business/agency shall be deemed to have been performed without the consent or contractual agreement of LBBS. LBBS shall therefore not be liable for any fees arising from such actions or any fees arising from any referrals by employment businesses/agencies in respect of the vacancies posted on this site.

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### Deputy District Attorney and HIDTA- Deputy District Attorney

Immediate openings for a Deputy District Attorney and HIDTA- Deputy District Attorney in Deming. A Deputy District Attorney in Lordsburg, and an Senior Trial Attorney in Silver City. Salary Depends on Experience. Benefits. Please send resume to Francesca Estevez, District Attorney, FMartinez-Estevez@da.state.nm.us or call 575-388-1941.

### Associate Attorney

Hatcher Law Group, P.A. seeks an associate attorney preferably with one to two years of legal experience for our downtown Santa Fe office. We are looking for an individual motivated to excel at the practice of law in a litigation-focused practice. Hatcher Law Group defends individuals, state and local governments and institutional clients in the areas of insurance defense, coverage, workers compensation, employment and civil rights. We offer a great work environment, competitive salary and opportunities for future growth. Send your cover letter, resume and a writing sample via email to juliez@hatcherlawgroupnm.com.

### Assistant City Attorney for the Litigation Division

The City of Albuquerque Legal Department is hiring an Assistant City Attorney for the Litigation Division. The department's team of attorneys represent the City in litigation matters in New Mexico State and Federal Courts, including trials and appeals, and provide legal advice and guidance to City departments. Attention to detail and strong writing skills are essential. Five (5)+ years' experience is preferred and must be an active member of the State Bar of New Mexico in good standing. Salary will be based upon experience. Please submit resume and writing sample to attention of "Legal Department Assistant City Attorney Application" c/o Angela M. Aragon, Executive Assistant/HR Coordinator; P.O. Box 2248, Albuquerque, NM 87103, or amaragon@cabq.gov.

### Trial Support and Appellate Attorney

Durham, Pittard & Spalding, LLP is looking to hire a trial support and appellate attorney to join its Santa Fe office. Durham, Pittard & Spalding, LLP handles a wide variety of complex civil trials and appeals, including a significant number of cases representing plaintiffs throughout New Mexico who have suffered a catastrophic injury or wrongful death. Durham, Pittard & Spalding, LLP's attorneys frequently assist other trial attorneys with briefing, hearings, and strategic trial support, and act as lead counsel, handling appellate briefing and oral argument in a wide range of complex appeals in both state and federal court. The candidate should have 3-10 years of applicable experience, a strong work ethic, research and writing talent, and a sense of teamwork and camaraderie. Judicial clerkship experience is encouraged but not mandatory. Please send a letter of interest, resume, list of references, and a writing sample to mfinn@dpslawgroup.com.

### Assistant Attorney General Positions

The Office of the New Mexico Attorney General is recruiting for Assistant Attorney General positions in Civil and Criminal Affairs. The job postings and further details are available at [www.nmag.gov/human-resources.aspx](http://www.nmag.gov/human-resources.aspx).

### Litigation Attorney

Keller & Keller is an award winning personal injury law firm located in Albuquerque. We are seeking an attorney with 0-5 years of experience to join our personal injury litigation team. We are proud to offer an attractive compensation and benefits package, including a salary commensurate with experience, medical insurance, 401(k) retirement plan and paid time off. All applicants must have an active license to practice law in New Mexico. The Litigation Attorney will work directly with two Litigation Attorneys and two Litigation Paralegals on a daily basis. Responsibilities include: strategic planning and discussion regarding cases; planning for and meeting court established deadlines; client contact; court appearances; trial preparation; motion practice; mediations; and depositions. We are looking for a person with critical thinking skills and the ability to apply those skills in a fast-paced environment. Excellent interpersonal communication skills with clients and coworkers is a must. Additionally, the candidate must be able to apply their knowledge and skills to make decisions and take action on cases. Interested candidates should forward a cover letter and resume to Zachary Farmer at [zfarmer@2keller.com](mailto:zfarmer@2keller.com). No phone calls, please. All inquiries will be confidential.

### Prosecutors

Immediate openings for Prosecutors interested in creating safer communities and a better legal system, one case at a time. Imagine collaborating with a diverse team of professionals, having a manageable caseload with a competitive salary in a great workplace environment. We have positions available in Las Vegas, NM with the Fourth Judicial District Attorney's Office. If you are interested in learning more about the positions or wish to apply, contact us at (505) 425-6746, or forward your letter of interest and resumé to Richard D. Flores, District Attorney, c/o Mary Lou Umbarger, Office Manager, P.O. Box 2025, Las Vegas, New Mexico 87701 or e-mail: [mumbarger@da.state.nm.us](mailto:mumbarger@da.state.nm.us)

### Entry-Level Attorney Positions

JUST PASSED THE BAR? Put that Degree to work for you! We have entry-level attorney positions immediately available with the Fourth Judicial District Attorney's Office in Las Vegas, NM. Excellent opportunity to gain valuable experience in the courtroom with a diverse team of mentor attorneys. Requirements include J.D. and current license to practice law in New Mexico. Please forward your letter of interest and resumé to Richard D. Flores, District Attorney, c/o Mary Lou Umbarger, District Office Manager, P.O. Box 2025, Las Vegas, New Mexico 87701 - or via e-mail: [mumbarger@da.state.nm.us](mailto:mumbarger@da.state.nm.us) Competitive salary and great workplace environment!



### Lawyer Position

Hennighausen & Olsen, L.L.P., seeks an attorney to practice in the following areas: civil, contract, water law, natural resources, and property. If interested, please send resume and recent writing sample to: Managing Partner, Hennighausen & Olsen, L.L.P., P.O. Box 1415, Roswell, NM 88202-1415. All replies are kept confidential. No telephone calls please.

### Assistant District Attorney

The Fifth Judicial District Attorney's office has immediate positions open for new or experienced attorneys, in our Carlsbad and Roswell offices. Salary will be based upon the New Mexico District Attorney's Salary Schedule with starting salary range of an Assistant Trial Attorney to a Senior Trial Attorney (\$58,000 to \$79,679). Please send resume to Dianna Luce, District Attorney, 301 N. Dalmont Street, Hobbs, NM 88240-8335 or e-mail to 5thDA@da.state.nm.us.

### Assistant Trial Attorney

Assistant Trial Attorney wanted for immediate employment with the Seventh Judicial District Attorney's Office, which includes Catron, Sierra, Socorro and Torrance counties. Employment will be based primarily in Sierra County (Truth of Consequences). Truth of Consequences is a short one hour drive from Las Cruces. Must be admitted to the New Mexico State Bar. Salary will be based on the NM District Attorneys' Personnel & Compensation Plan and commensurate with experience and budget availability. Will also have full benefits and excellent retirement plan. Send resume to: Seventh District Attorney's Office, Attention: J.B. Mauldin, P.O. Box 1099, 302 Park Street, Socorro, New Mexico 87801. Or email to: jbmauldin@da.state.nm.us .

### Bankruptcy Specialist

Ensures full compliance with loan bankruptcy regulations and State specific laws. Monitors accounts throughout the loan bankruptcy process and communicates with appropriate parties. Acquires a copy of all bankruptcy documents. Receives and determines distribution of funds for Payment Processing Department, works with the Escrow department for annual Escrow analysis. Responsible for the foreclosure process. Must complete foreclosures accurately in adherence to mandatory State and Investor guidelines. Ability to read and comprehend Investor (FHA, FNMA, USDA, VA) guidelines and meet timelines. Prepare referrals, bidding instructions for all sales. Performs other related duties as assigned. Email resume to annette@westloan.com

### Department of Finance and Administration seeks General Counsel

The Department of Finance and Administration (DFA) is hiring for the position of General Counsel. DFA's mission is to guide, serve, and support public entities to ensure fiscal accountability and effective government is responsive to all New Mexicans. The General Counsel represents the Department in legal matters that involve the Secretary's Office and the Department's five divisions, including the DFA Cabinet Secretary's Office, State Budget Division, Board of Finance, Financial Control Division, and Local Government Division. Preferred applicants will have a commitment to public service and significant legal practice experience in public law. The successful candidate will have familiarity with or the ability to master the following areas: the General Appropriations Act; legislative drafting and interpretation; public records inspection and retention; conduct of meetings subject to the Open Meetings Act; representation of public bodies; administrative adjudications, appeals, and rulemakings; negotiation and preparation of contracts; federal and state grant programs; joint powers agreements; garnishments; public procurement; public finance, bond issuances, and bond refundings; local government taxes and finances; civil litigation, appeals, and records management. This list is not exhaustive and conveys the DFA General Counsel's diverse practice. Successful applicants must have strong analytic, research, communication and interpersonal skills. The salary range is from \$85,000 to \$100,000 per year. Interested attorneys may submit an application to Matt Garcia, General Counsel to the Governor, directed to Vanessa.Kennedy@state.nm.us. Learn more about DFA at [www.nmdfa.state.nm.us](http://www.nmdfa.state.nm.us).

### New Mexico Public Education Department's Special Education Bureau – Attorney Supervisor and Attorney Advanced

The New Mexico Public Education Department is seeking attorneys for its Special Education Bureau. The openings include an Attorney Supervisor position, and a Lawyer Advanced position. More details about the positions and how to apply are available at <http://www.spo.state.nm.us/>. Please check the website periodically for updates to the list of available positions.

### Litigation Attorney

Litigation/trial attorney wanted for immediate employment. We are a busy and well respected plaintiff only personal injury and medical malpractice firm in need of an experienced Litigation attorney. 100% paid health insurance, paid sick and vacation time, and 15% retirement plan (funded by the firm). Salary and bonuses are commensurate with experience and ability. Please email resume, cover letter and references to [santafelaw56@gmail.com](mailto:santafelaw56@gmail.com)

### Senior Trial Attorney Assistant Trial Attorney Entry Level Attorney

The 13th Judicial District Attorney's Office is accepting resumes for experienced Senior/Mid-level/Entry Level Trial Attorney's. This position requires a minimum of five years of experience as a prosecutor; and it requires handling complex felony litigation. Salary is commensurate with experience. Send resumes to Krissy Fajardo, Program Specialist, P.O. Box 1750, Bernalillo, NM 87004, or via E-Mail to: [kfajardo@da.state.nm.us](mailto:kfajardo@da.state.nm.us). Deadline for submission of resumes: Open until filled.

### Contract Civil Legal Attorney

PROGRAM: Peacekeepers, Espanola NM; STATUS: Regular/Part Time/Exempt; BENEFITS: No; RATE OF PAY: DOE; EDUCATION: Juris Doctorate; EXPERIENCE: 10 years' experience in family law. REQUIRED CERTIFICATES: None; Practice civil and family law with an emphasis on domestic violence orders of protection within the Eight Northern Pueblos.

### See what positions are open

Caught you browsing the job ads. Something in you yearns for a Better Place, with Better Pay. We're that place. Awarded "Best Places to Work." We've grown from 15 to 47 in 2 years. We've tripled our team, our client base, and our culture. We haven't lost anyone to resignation (Except to go to law school). We work hard, have fun and are enormously grateful for The team we have, in our mission to represent wrongfully injured clients. Are you good? That good? Are you driven to help, learn and get even better? Are you hungry to do more? Something more meaningful? Are you a team player? (That means you cooperate and Collaborate.) Then stop flipping pages, slightly frustrated. Check us out at [HurtCallBert.com/careers](http://HurtCallBert.com/careers). Watch employee testimonial videos. See what positions are open. Answer our questionnaire. You just might make the cut.

### Experienced Litigation Attorney

Cordell & Cordell, P.C., a domestic litigation firm with over 100 offices across 36 states, is currently seeking an experienced litigation attorney for an immediate opening in its office in Albuquerque, NM. The candidate must be licensed to practice law in the state of New Mexico, have minimum of 3 years of litigation experience with 1st chair family law preferred. The firm offers 100% employer paid premiums including medical, dental, short-term disability, long-term disability, and life insurance, as well as 401K and wellness plan. This is a wonderful opportunity to be part of a growing firm with offices throughout the United States. To be considered for this opportunity please email your resume to [Hamilton.Hinton@cordelllaw.com](mailto:Hamilton.Hinton@cordelllaw.com)

### State Ethics Commission seeks first General Counsel

The newly formed New Mexico State Ethics Commission is recruiting for its first General Counsel. The State Ethics Commission Act creates the General Counsel's position. The Act charges the General Counsel to lead investigations into complaints over which the Commission has jurisdiction and to recommend when the Commission should set public hearings on those complaints. The General Counsel will also represent the Commission in legal proceedings and assist the Commission in all aspects of its work. Preferred applicants will have significant experience in litigation and the supervision of attorneys and a strong commitment to public service. The successful candidate will have a familiarity with or the ability to master the following areas: the laws over which the Commission has jurisdiction; administrative adjudications, appeals, and rulemakings; civil litigation and case management; conduct of meetings subject to the Open Meetings Act; representation of public bodies; negotiation and preparation of contracts; public procurement; and public records inspection and retention. Successful applicants must have excellent analytic, communication, and interpersonal skills. The salary range is from \$115,000 to \$125,000 per year. Individuals interested in the position may submit applications to Mr. Matthew Baca at [Matthew.Baca@state.nm.us](mailto:Matthew.Baca@state.nm.us). The position will remain open until filled.

### Associate Attorney

Holt Mynatt Martínez, P.C., an AV-rated law firm in Las Cruces, New Mexico is seeking associate attorneys with 1-5 years of experience to join our team. Duties would include providing legal analysis and advice, preparing court pleadings and filings, performing legal research, conducting pretrial discovery, preparing for and attending administrative and judicial hearings, civil jury trials and appeals. The firm's practice areas include insurance defense, civil rights defense, commercial litigation, real property, contracts, and governmental law. Successful candidates will have strong organizational and writing skills, exceptional communication skills, and the ability to interact and develop collaborative relationships. Prefer attorney licensed in New Mexico and Texas but will consider applicants only licensed in Texas. Salary commensurate with experience, and benefits. Please send your cover letter, resume, law school transcript, writing sample, and references to [rd@hmm-law.com](mailto:rd@hmm-law.com).

### Attorney Experience in Tribal Law

We are looking for an attorney with a minimum of 5 years experience in tribal law. Excellent writing skills and a developed sense of ethics a Must. Native preferred. Send resume and your own requirements to [cbs@stetsonlaw.com](mailto:cbs@stetsonlaw.com).

### County of Bernalillo RFP #17-20-EM Criminal Justice System Reform Consulting Services

On behalf of the Office of the County Manager, the Procurement and Business Services Department Purchasing Section is soliciting proposals for Criminal Justice System Reform Consulting Services. Pertinent RFP documents can be downloaded through the Purchasing website [www.bernco.gov/finance/procurement-and-business-services.aspx](http://www.bernco.gov/finance/procurement-and-business-services.aspx) at no cost; firms must be registered to download the document. If not registered, interested parties may register at [www.bernco.gov/finance/vendor-registration.aspx](http://www.bernco.gov/finance/vendor-registration.aspx). Vendors are also welcome to contact Emily McKenzie at (505) 468-7330, or by e-mail [emckenzie@bernco.gov](mailto:emckenzie@bernco.gov) to request a hard copy document at a cost of 50 cents per page. A Non-Mandatory Pre-Proposal Conference will be held on October 15, 2019 @ 9:00 a.m. (local time) at the Albuquerque/Bernalillo County Government Center, One Civic Plaza NW, 10th Floor, Purchasing Conference Room, Albuquerque, N.M. 87102. Sealed submittals must be addressed to the Procurement and Business Services Department, Purchasing Section, One Civic Plaza NW, 10th Floor, Room 10010, Albuquerque, NM 87102 and received no later than 4:00 p.m. (local time), October 28, 2019. Delivery of proposals is the sole responsibility of the Offeror. The Purchasing Section will date and time stamp the sealed envelope upon receipt. Late submittals will not be accepted.

### Assistant County Attorney Position

Sandoval County is seeking applications for an Assistant County Attorney position. Minimum qualifications include two years of experience of legal experience. Municipal/local government experience preferred. This position's primary responsibility will be reviewing and responding to Inspection of Public Record Act (IPRA) requests. Salary based on qualifications and experience. The position remains open until filled. The first review of applications will be conducted on October 25, 2019. To apply visit <http://www.sandovalcountynm.gov/departments/human-resources/employment/>

### Assistant County Attorney

Doña Ana County is seeking an Assistant County Attorney who will perform internal counsel duties such as draft ordinances, review contracts, consult in matters of potential liability, attend public meeting and hearings on behalf of the Board of County Commissioners, County Manager, elected officials, department directors, and other appointed boards and commissions and defends and/or represents the County in limited litigation matters. The full job description and application procedures can be found at <https://careers-donaanacounty.icims.com>.

### New Mexico Public Regulation Commission Legal Division Director

The New Mexico Public Regulation Commission is accepting applications for the position of Division Director of the Legal Division. This position is responsible for coordination of all NMPRC Legal Division's activities and development of the division's standards in dealing with Federal and State statutes and regulations to ensure division compliance statewide in a fair and equitable fashion. Applying laws and regulations in evaluation of technical facts; advising the Legal Division on sensitive issues relating to division conduct and budgetary issues. Work closely with Human Resources on all personnel matters. Make legal recommendations, on regulatory cases coming before the NMPRC. Oversee the advisement and counsel provided the Commission by Legal staff on the most complex legal, technical, economic and policy issues; in all issues concerning the NMPRC Legal Division. Advise and assist the NMPRC in rulemakings. The position requires extensive knowledge of State and Federal Legal rules, laws, and NMPRC background information. Extensive knowledge of the New Mexico statutes relating to NMPRC oversight, knowledge of the New Mexico legislative process, aspects of the NMPRC's programs, goals, and long-term plans. Knowledge of ex-parte rules and regulations. Extensive knowledge of Employment Law. Minimum qualifications: JD from an accredited law school; ten years of experience in the practice of law, including at least four years of administrative or regulatory law practice and three years of staff supervision; admission to the New Mexico Bar or commitment to taking and passing Bar Exam within six months of hire. Background in employment law, technical, economic and policy issues. Salary: \$56,239.00- \$125,000.00 per year (plus benefits). Salary based on qualifications and experience. This is a GOVEX "at will" position. The State of NM is an EOE Employer. Apply: Submit letter of interest, résumé, writing sample and three references to: Human Resources, Attention: Rene Kepler, [Renes.Kepler@state.nm.us](mailto:Renes.Kepler@state.nm.us) or NMPRC P.O. Box 1269, Santa Fe, NM 87504-1269 by October 31, 2019.

### Attorney Wanted

Small AV-rated firm seeks attorney with trial experience interested in civil litigation, primarily insurance defense. Must do high-quality work, use good judgment, possess strong work ethic, work efficiently, and take initiative. Email resume to Nathan H. Mann at [nmann@gcmlegal.com](mailto:nmann@gcmlegal.com).



### Senior Children's Court Attorney Positions

The Children, Youth and Families Department is seeking to fill two vacant Children's Court Attorney positions: one to be housed in Rio Rancho, New Mexico, the other to be housed in offices in Gallup and Grants, New Mexico. Salary range is \$58,480 to \$93,384 annually, depending on experience and qualifications. The attorney housed in Rio Rancho will represent the Department in abuse/neglect and termination proceedings and related matters in Sandoval and Torrance counties. The attorney housed in Gallup and Grants will represent the Department in abuse/neglect and termination proceedings and related matters in McKinley and Cibola counties. The ideal candidate will have experience in the practice of law totaling at least four years and New Mexico licensure is required. Benefits include medical, dental, vision, paid vacation, and a retirement package. For information, please contact; David Brainerd, Managing Attorney, at (505) 327-5316 ext. 1114. To apply for this position, go to [www.state.nm.us/spo/](http://www.state.nm.us/spo/). The State of New Mexico is an EOE.

### Solo/Small Firm Attorneys

Are you an established solo or small firm that would like the benefit of being part of an AV-rated, small firm that concentrates in civil litigation, especially insurance defense? We seek one or more such attorneys with same or compatible practices. Contact Nathan H. Mann by email at [nmann@gcmlegal.com](mailto:nmann@gcmlegal.com)

### Contract Paralegal/Legal Assistant

Small bustling private practice with a lone provider specializing in neutral Family Court special master work (by court order) is seeking a ½ to ¾ time contractor Paralegal or Administrative Assistant with experience in family court work. Experience with Microsoft Office is necessary. The work includes case and client management, scheduling and billing using phone, email, excel and the Our Family Wizard (OFW) platform. Contracted hourly rate is negotiable depending on experience. No public interaction other than by phone and email. Office environment is very comfortable and not accessible to the public. Please call Bob at 505.239.3748. All inquiries are completely confidential.

### Part-Time Paralegal

Part-time paralegal 20-25 hours/week. May work from home as needed. Must have extensive litigation experience. Discovery expertise, Medical malpractice experience and Spanish fluency are a plus. Please send resume and salary requirements to [kelly@collinsattorneys.com](mailto:kelly@collinsattorneys.com)

### Paralegal

The law firm of Butt Thornton & Baehr PC has an opening for an experienced litigation Paralegal (4+ years). Excellent organization, computer and word processing skills required. Must have the ability to work independently. Generous benefit package. Salary DOE. Please send letter of interest and resume to, Gale Johnson, [gejohnson@btblaw.com](mailto:gejohnson@btblaw.com)

### Paralegal

Litigation Paralegal with minimum of 3- 5 years' experience, including current working knowledge of State and Federal District Court rules, online research, trial preparation, document control management, and familiar with use of electronic databases and related legal-use software technology. Seeking skilled, organized, and detail-oriented professional for established commercial civil litigation firm. Email resumes to [e\\_info@abrfirm.com](mailto:e_info@abrfirm.com) or Fax to 505-764-8374.

### NMPED Paralegal Position

PARALEGAL - The Public Education Department is looking for a team player with strong writing and interpersonal skills, great attention to detail and follow-through, and an interest in public service. To apply, please fill out an application at <http://www.spo.state.nm.us/applicationguide/>, and email 2 writing samples to [Aaron.Rodriguez2@state.nm.us](mailto:Aaron.Rodriguez2@state.nm.us).

## Office Space

### Office Space for Lease – Downtown

Beautiful space to sub-lease with lots of natural light, cork floors, free tenant parking, enclosed patio space, front door security, shared kitchenette, conference rooms and lobby. Four-to-six offices plus common area available approximating 2,500-3000 square feet. Available January 1, 2020 for 3-5 year term. Rent is slightly below downtown market rate of \$17.00 per square foot; includes utilities. Walking distance to Courthouses, government buildings and downtown restaurants. Access to basement storage. Please contact: [sublease2019@outlook.com](mailto:sublease2019@outlook.com)

### Prime Downtown Location at Plaza500 –

Professional office suite available on the 5th floor of the prestigious Albuquerque Plaza Building. This Class A Office space provides fully furnished offices with IT, dedicated phone line, mail services and full-time receptionist. Parking access and short-term leases available. New tenants receive monthly access to the recently renovated Hyatt Regency Albuquerque fitness center. 201 Third Street NW. Please Contact Sandee at 505-999-1726.

### Office Space in Journal Center For Lease

Available Soon. A beautiful office space, in great location in Journal Center one block north of the Bar Center, for Lease. 2,500 square feet, reception area, five office rooms including a master suit with vaulted roof, brick finishes and a gas fire place that looks into the reception area, a reception area, computer room, and one additional small work station. The fireplace also looks into the reception area. A medium sized conference room, also with brick finish and book shelves. Partially furnished, including receptionist desk and chairs conference table and chairs, a small kitchen with new refrigerator, dishwasher and sink with hot and cold running water. Bathrooms are part of the common area for this and the next door office and not included in the square footage for rent purposes. Landlord pays utilities, monitored security, quarterly pest control, maintenance and taxes all for \$17.95 a square foot per annum or \$3,739.58 per month. Will require a 2 year lease commitment and a security deposit equal to the first month's rent. If interested, call 858-3303 and ask for Pam.

### 500 Tijeras NW

Beautiful office space is available with reserved on-site tenant and client parking. Walking distance to court-houses. Two conference rooms, security, kitchen, gated patios and a receptionist to greet and take calls. Please email [esteffany500tjerasllc@gmail.com](mailto:esteffany500tjerasllc@gmail.com) or call 505-842-1905.

## Miscellaneous

### Want To Purchase

Want to purchase minerals and other oil/gas interests. Send details to: P.O. Box 13557, Denver, CO 80201

### Lawyer Retiring

Solo practitioner in Socorro, NM is retiring and is interested in being contacted by law firm or individual attorney who would be interested in purchasing the practice, including building, most equipment & furnishings, good will, etc. Contact John R. Gerbracht at [gerbrachtlaw@gmail.com](mailto:gerbrachtlaw@gmail.com)

### For Sale

New Mexico Reports Volumes 4-147. Call Ira M. Karmiol at (505)-250-4556 if you prefer reading case law from a book.

### DIAL 222-2222 !!!

222-2222 phone number is now available in Albuquerque! Fantastic opportunity to identify, brand and grow your practice. Long term lease available and affordable. Contact [rrw2d2@aol.com](mailto:rrw2d2@aol.com) for immediate details.



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