

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

**IN THE MATTER OF PUBLIC SERVICE COMPANY OF)
NEW MEXICO'S ABANDONMENT OF SAN JUAN) Case No. 19-00018-UT
GENERATING STATION UNITS 1 AND 4)**

FINAL ORDER ON REQUEST FOR ISSUANCE OF A FINANCING ORDER

THIS MATTER comes before the New Mexico Public Regulation Commission (“Commission” or “NMPRC”) on the February 21, 2020 Recommended Decision issued by Hearing Examiners Ashley Schannauer and Anthony Medeiros on Public Service Company of New Mexico’s (PNM) Request for Issuance of a Financing Order included as part of PNM’s July 1, 2019 Consolidated Application for Approvals for the Abandonment, Financing, and Resource Replacement for San Juan Generating Station pursuant to the Energy Transition Act (“Application”). The Commission, having reviewed the Recommended Decision (RD), the Application and being otherwise duly informed, **FINDS:**

1. The Commission has jurisdiction over the parties and the subject matter of this case.
2. On February 21, 2020, the Hearing Examiners issued an Order Shortening Deadline for Filing Exceptions and Addressing Deadline for Final Commission Action which required exceptions to be filed by March 3, 2020 and responses to exceptions to be filed by March 6, 2020.
3. Exceptions to the RD were filed by intervenors New Energy Economy (NEE), Citizens for Fair Rates and the Environment (CFRE) and joint intervenor-SJGS co-owners County of Los Alamos and M-S-R Public Power Agency (Exiting Participants) on March 3, 2020.
4. Responses to the Exceptions were filed by PNM, the City of Farmington, and jointly by the Sierra Club, Coalition for Clean Affordable Energy and Western Resource Advocates.

EXITING PARTICIPANTS' EXCEPTIONS

5. The Exiting Participants' first exception argues that PNM failed to submit competent evidence in support of its requested Financing Order because it introduced only portions of the mine reclamation study performed by outside consultant Golder and Associates as well as only the executive summary of the decommissioning cost study performed by consultant Burns and McDonald.

6. The Exiting Participants argue that the Commission should change the RD to require that PNM file full and complete copies of any mine reclamation study or study supporting decommissioning costs in any subsequent rate case or other proceeding in order to adequately support a determination of those costs.

7. The Commission agrees with the response to this exception. As participants at SJGS, the Exiting Participants had access to the very documentation that they now argue should have been considered, yet they did not seek to introduce such evidence or cross examine PNM's witnesses on these issues. As the response notes, at this stage, the ETA requires an estimate of the costs rather than a final accounting which will be the subject of future review. At that time, the participants will have an opportunity to seek and introduce such full documentation.

8. The Exiting participants' second exception argues that the PNM failed to adequately address the financial risks to ratepayers in the event SJGS is transferred to the City of Farmington and continues to operate through the installation of carbon capture technology. The Exiting Participants assert PNM should be required to substantiate how it will protect ratepayers, including how it will obtain financial security from City of Farmington and Enchant Energy, whether through surety bond or some other means, before a financing order is issued.

9. While the Exiting Participants' concerns are not without merit, at this point in time the City of Farmington / Enchant carbon capture project has not progressed to the point that it is clear whether that project will in fact come to fruition. Even then, the transfer of the departing SJGS participants' interests in the SJGS plant will be a matter of negotiation under the various operative contracts between the SJGS participants. While at this time there is an insufficiently definite basis on which to insert in the Financing Order provisions requiring PNM to take any specific actions to protect the interests of ratepayers, PNM shall keep the Commission apprised of all material developments that may lead to a transfer of PNM's interest in SJGS. PNM's actions remain subject to the Commission's scrutiny in the event any transfer is negotiated.

NEE / CFRE Exception 1-A - Compliance with Section 62-18-4(B)(5)

10. NEE argues PNM's application, which included a memorandum from Mr. Charles Atkins, a Senior Advisor at Guggenheim Securities, LLC in New York, did not provide an attestation by a securities firm "that the proposed issuance satisfies the current published AAA rating or equivalent "as required by Section 4(b)(5). CFRE joins in this exception.

11. Section 4(b)(5) requires an application for a financing order to contain:

[A] memorandum with supporting exhibits from a securities firm, such firm to be attested to by the state board of finance as being experienced in the marketing of bonds and capable of providing such a memorandum, that the proposed issuance satisfies the current published AAA rating or equivalent rating criteria of at least one nationally recognized statistical rating organization for issuances similar to the proposed energy transition bonds. The request for such attestation may be made by a qualifying utility prior to an application for a financing order, and the state board of finance shall act upon such a request promptly.

12. NEE argues that PNM's witness Charles Atkins's memorandum is insufficient because it contains what NEE terms a "disclaimer" stating:

This Presentation does not constitute financial advice or create any financial advisory, fiduciary or other commercial relationship. In addition, this Presentation does not constitute and should not be construed as (i) a

recommendation, advice, offer, or solicitation by Guggenheim Securities, its affiliates . . . with respect to any transaction or other matter, or with respect to the purchase or sale of any security . . . or addressing . . . (b) the relative merits or any such transaction or matter as compared to any alternative business or financial strategies that might exist for any party, (c) the financing of any transaction, or (d) the effects of any other transaction in which any party might engage. The views expressed herein are solely those of the author(s) and may differ from the views of other Representatives of Guggenheim securities.

13. NEE points to the final sentence of the paragraph stating “*The views expressed herein are solely those of the author(s) and may differ from the views of other Representatives of Guggenheim securities*” and argues that the memorandum fails because it is not issued by Guggenheim Securities, LLC as a “firm,” and only by Mr. Atkins.

14. This argument was specifically addressed in the RD and the Commission finds that the Hearing Examiners correctly rejected this argument. As the responses and RD note, the required attestation is to be made by the New Mexico Board of Finance regarding the fact that the securities firm is “experienced in the marketing of bonds and capable of providing such a memorandum.” As the RD notes, the requisite attestation was provided by the Board of Finance and not challenged.

15. Further, the RD correctly found that the function of the memo is not to attest that the proposed financing will obtain an AA rating, but rather that the proposed financing is structured to satisfy current major rating criteria for a AAA rating. The RD correctly found the memorandum finds that the proposed issuance of the Energy Transition Bonds by PNM satisfies the AAA rating criteria published by Fitch Ratings, Inc. This satisfies the statutory requirement that the memorandum opine that “the proposed issuance satisfies the current published AAA rating or equivalent rating criteria of at least one nationally recognized statistical rating organization for issuances similar to the proposed energy transition bonds.”

16. NEE’s reliance on Mr. Atkins’ answers to NEE’s interrogatories 4-6 and 4-7 admitted at NEE Exhibit 19 similarly misconstrue the nature of Mr. Atkins’s memorandum and relationship

with Guggenheim securities. As the responses and RD correctly conclude, Mr. Atkins confirms his authorization by Guggenheim to submit the required memorandum on the limited issue of whether the structure of the proposed bond issuance, but not to provide financial advice because Guggenheim has not been engaged with respect to the sale of bonds.

NEE / CFRE Exception 1-B - Compliance with Section 62-18-4(B)(11)

17. NEE also argues the financing order is not designed to achieve the lowest cost objective and is deficient under Section 4(B)(11) which requires that the application for financing order include “ a statement from the qualifying utility committing that the qualifying utility will use commercially reasonable efforts to obtain the lowest cost objective.”

18. Section 2(N) defines "lowest cost objective" as “the structuring, marketing and pricing of energy transition bonds results in the lowest energy transition charges consistent with prevailing market conditions at the time of pricing of energy transition bonds and the structure and terms of energy transition bonds approved pursuant to the financing order.”

19. NEE relies on Mr. Atkins’ testimony “the proposed securitization is structured to achieve the highest possible credit ratings and price at the lowest market-clearing interest costs consistent with investor demand and market conditions at the time of pricing.”

20. NEE asserts that the “lowest market-clearing cost” is not equivalent to the “lowest cost objective.” NEE asserts, without reference to contrary expert testimony, that the “lowest market-clearing cost” does not “reflect” PNM’s “obligation to make the bonds as inexpensive for ratepayers as possible” and instead “means whatever price that the bond issuer feels will sell” and therefore asserts there is a conflict of interest between the underwriter’s interest in making money and PNM’s obligation to ratepayers to secure the lowest possible interest rates. NEE presumes that this will

necessarily increase interest rates and costs for ratepayers and NEE therefore posits without reference to any supporting evidence that the “the ETA will not be cheaper than traditional ratemaking.”

21. The RD correctly finds that Mr. Atkins’ expert testimony is uncontradicted and establishes that the marketed offering plan PNM will follow is typically used for utility securitized financings and is “designed specifically to achieve the lowest market clearing price and therefore the lowest available interest rates and lowest ETCs to consumers.”

NEE Exception 2:

22. NEE argues that the Commission should reject PNM’s proposed financing order because the plant decommissioning and mine reclamation costs are not known to a greater degree of certainty and the PRC should require audits by the New Mexico Environment Department (NMED) and New Mexico Energy, Minerals, and Natural Resources Department (EMNRD) before approving the financing order.

23. NEE points to 14 contaminant spills reported to the NMED as well as what NEE describes variously as a 2014 “spill” or “leak” of process water from the SJGS North Evaporation Pond. While NEE notes that PNM is pursuing remediation techniques such as “monitored natural attenuation” for the nitrate plume resulting from the evaporation pond leak and has installed two other recovery systems, it rejects those remediation techniques as “wholly ineffectual.”

24. NEE asserts PNM’s use of natural attenuation for the nitrate plume “does not actually follow Federal EPA guidelines,” yet PNM witness Mr. Hale testified that the guidelines are not binding regulations. He rejected NEE’s assertion that PNM had failed to identify specific methods of attenuation, noting that PNM was utilizing biodegradation, chemical reactions, and dilution as methods of attenuation and that such methods were appropriate in light of the conditions – “because, one, the source has been removed; two, the nitrate-impacted groundwater isn’t going anywhere;

three, we are seeing decreasing concentrations in the affected monitoring wells; four, there are no receptors of that nitrate-impacted water. Nobody's drinking it. There are no water wells in that area."

25. NEE similarly concludes PNM's recovery systems are "wholly ineffectual" because they "do not go down far enough to intercept groundwater" yet fails to identify any testimony indicating that the recovery system depth is not effective as installed.

26. NEE further declares PNM's decommissioning study, which recommends the "retirement in place" scenario and puts off full demolition and reclamation for 25 years to be "horribly irresponsible" because without reference to any supporting testimony in the record, NEE surmises PNM may not exist 25 years from now and ratepayers in the future may bear decommissioning cost for service they never received.

27. The response and RD correctly note, the Commission lacks jurisdiction over the environmental concerns raised by NEE. NEE's conclusory claims of evidence of environmental violations are speculative and lack sufficient support in the record to justify rejecting PNM's financing order to request environmental audits from NMED and EMNRD. As NEE itself acknowledges, the previous incidents cited by NEE have been reported to NMED, have been subject to NMED oversight, including remediation activities, and there is no evidence that SJGS or the San Juan mine are currently violating any environmental regulatory standards. There is no evidence to support NEE's assertion that during a retirement in place, SJGS would "continue leaching contamination" or evade future NMED oversight. Finally, as the RD notes, any costs in excess of the decommissioning and reclamation costs approved for securitization will remain subject to Commission review and oversight in future rate proceedings and unreasonable or imprudent costs are subject to disallowance.

NEE EXCEPTION 3 – Commission Authority to Review Reasonableness and prudence of PNM’s Actual Expended Energy Transition Costs

28. The Hearing Examiners requested briefing from the parties on the issue of whether under the ETA the Commission retain authority to review the reasonableness and prudence of PNM’s actual Energy Transition Costs when it trues up the difference between the estimated costs include in the securitized Energy Transition Costs and the final actual costs expended.

29. Based on the uniform agreement by all other responding parties, the RD found that the Commission retains the authority to disallow unreasonable and imprudently incurred costs when it reconciles the Energy Transition Costs with actual expenditures. NEE relies on Section 62-18-31(C) in asserting the RD erred in reaching that conclusion.

30. Section 62-18-31(C) states:

If a public utility has been granted a certificate of public convenience and necessity prior to January 1, 2015 to construct or operate an electric generation facility and the investment in that facility has been allowed recovery as part of the utility's rate-base, the commission may require the facility to discontinue serving customers within New Mexico if the replacement has less or zero carbon dioxide emissions into the atmosphere; provided that no order of the commission shall disallow recovery of any undepreciated investments or decommissioning costs associated with the facility.

31. NEE focuses on only the last clause of the section stating “provided that no order of the commission shall disallow recovery of any undepreciated investments or decommissioning costs associated with the facility.” NEE essentially argues that Section 62-18-31(C) is a provision of general applicability barring disallowance of any undepreciated investment or decommission costs for any costs included as an Energy Transition Charge in the Financing Order.

32. The RD correctly rejected NEE’s broad interpretation of Section 62-18-31(C). NEE ignores that the last clause of Section C on which it relies clearly modifies the preceding clauses, which in turn are limited to the circumstance in which the Commission is empowered to require the

abandonment of a generating facility where a replacement generating facility has less or zero carbon dioxide emissions.

NEE EXCEPTION 4 – The Energy Transition Act is Unconstitutional and the Commission should make a “finding” on this issue.

33. Both NEE’s final exception and CFRE’s Exceptions 1, 2, 3, and 5 raise a number of claims of constitutional violations based on the application of the ETA and resulting changes to traditional ratemaking and regulatory principles. Among other things, that the ETA restrains the Commission’s ability to adopt limits on PNM’s cost recovery.

34. The Hearing Examiners correctly found NEE’s facial challenges to the constitutionality of the ETA are not properly raised before the Commission and should be or have been taken to district court, which is vested with original jurisdiction over such claims under the New Mexico Constitution.

35. NEE argues that “under the law, it is the Commission’s duty to set rates and regulate the monopoly public utility, yet the ETA clearly forbids regulation” and requests a specific finding in the Commission’s Final Order that “The Commission is prohibited by the Energy Transition Act from amending, adjusting or modifying the financial request in the Financing Order submitted by Public Service Company of New Mexico and therefore is unable to balance the interests of customers and shareholder investors, to the detriment of ratepayers. Based on substantial record evidence PNM’s financial request is not prudent or used and useful, and will not result in just and reasonable rates.”

36. The language of NEE’s requested “finding” is inconsistent with the findings of the RD and the Commission’s rulings in this Order. While NEE cites to various statutory provisions and caselaw it asserts are inconsistent with the provisions of the ETA, it fails to adhere to basic tenets of statutory interpretation. “In considering the statute's function in relation to related statutes

passed by the Legislature, “[w]henver possible, we must read different legislative enactments as harmonious instead of as contradicting one another.” State v. Rivera, 2004-NMSC-001, para. 13. Likewise, NEE should be mindful of the longstanding related doctrines of constitutional avoidance regularly applied by the courts and described in Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 345-48 (1936). As Justice Frankfurter has noted: “[i]f there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not pass on questions of constitutionality ... unless such adjudication is unavoidable.” Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 103 (1944).

37. It should suffice for purposes of this matter to point out that Article XI, Section 2 of the New Mexico Constitution vests the PRC with “responsibility for regulating public utilities, including electric, natural gas and water companies; transportation companies, including common and contract carriers; transmission and pipeline companies, including telephone, telegraph and information transmission companies; and other public service companies *in such manner as the legislature shall provide.*” (emphasis added). The legislature’s singular authority to define public policy is directly applied in its discretionary actions in setting the parameters of regulation through legislation. Those parameters may range over a broad spectrum, from stringent regulation to deregulation.

IT IS THEREFORE ORDERED:

A. The Recommended Decision on Public Service Company of New Mexico’s (PNM) Request for Issuance of a Financing Order, including the Statement of the Case, Discussion, Findings of Fact and Conclusions of Law, Decretal Paragraphs and the Financing Order recommended by the Hearing Examiner, are well taken and are hereby incorporated by reference as if fully set forth in this Final Order, and are ADOPTED, APPROVED, and ACCEPTED as the Findings, Conclusions and Orders of the Commission.

B. All exceptions, pending motions, requests or any other matter not expressly ruled on or addressed in the hearing or in the discussion of this Final Order herein are hereby deemed denied and disposed of consistent with the discussion of this Final Order.

C. This Order is effective immediately.

D. Copies of this Order shall be served on all persons listed on the attached Certificate of Service, via e-mail to those whose e-mail addresses are known, and otherwise via regular mail.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this 1st day of
April, 2020.

NEW MEXICO PUBLIC REGULATION COMMISSION

/s/ Cynthia B. Hall, electronically signed
CYNTHIA B. HALL, COMMISSIONER DISTRICT 1

/s/ Jefferson Byrd, electronically signed
JEFFERSON L. BYRD, COMMISSIONER DISTRICT 2

/s/ Valerie Espinoza, electronically signed
VALERIE ESPINOZA, COMMISSIONER DISTRICT 3

/s/ Theresa Becenti-Aguilar, electronically signed
THERESA BECENTI-AGUILAR, COMMISSIONER DISTRICT 4

/s/ Stephen Fischmann, electronically signed
STEPHEN FISCHMANN, COMMISSIONER DISTRICT 5



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**IN THE MATTER OF PUBLIC SERVICE COMPANY OF)
NEW MEXICO'S ABANDONMENT OF SAN JUAN) Case No. 19-00018-UT
GENERATING STATION UNITS 1 AND 4)**

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Final Order on Request for Issuance of a Financing Order** issued by the New Mexico Public Regulation Commission on April 1st, 2020 was sent via email to the parties indicated below:

Stacey Goodwin	Stacey.Goodwin@pnmresources.com;
Ryan Jerman	Ryan.Jerman@pnmresources.com;
Richard Alvidrez	Ralvidrez@mstlaw.com;
Robert Edwards	Bob.Edwards@troutman.com;
Dan Akenhead	DAkenhead@mstlaw.com;
Mark Fenton	Mark.Fenton@pnm.com;
Carey Salaz	Carey.salaz@pnm.com;
Steven Schwebke	Steven.Schwebke@pnm.com;
Heather Allen	Heather.Allen@pnmresources.com;
Mariel Nanasi	Mariel@seedsbeneaththesnow.com;
Aaron El Sabrout	Aaron@newenergyeconomy.org;
Joan Drake	jdrake@modrall.com;
Lisa Tormoen Hickey	lisahickey@newlawgroup.com;
Jason Marks	lawoffice@jasonmarks.com;
Matthew Gerhart	matt.gerhart@sierraclub.org;
Katherine Lagen	Katherine.lagen@sierraclub.org;
Ramona Blaber	Ramona.blaber@sierraclub.org;
Camilla Feibelman	Camilla.Feibelman@sierraclub.org;
Michel Goggin	MGoggin@gridstrategiesllc.com;
Nann M. Winter	nwinter@stelznerlaw.com;
Keith Herrmann	kherrmann@stelznerlaw.com;
Dahl Harris	dahlharris@hotmail.com;
Peter Auh	pauh@abcwua.org;
Jody García	JGarcia@stelznerlaw.com;
Andrew Harriger	akharriger@sawvel.com;
Donald E. Gruenemeyer	degruen@sawvel.com;
Joseph A. Herz	jaherz@sawvel.com;
Steven S. Michel	smichel@westernresources.org;
April Elliott	April.elliott@westernresources.org;
Pat O'Connell	pat.oconnell@westernresources.org;
Douglas J. Howe	dhowe@highrocknm.com;
Bruce C. Throne	bthroneatty@newmexico.com;

Rob Witwer	witwerr@southwestgen.com;
Jeffrey Albright	JA@Jalblaw.com;
Amanda Edwards	AE@Jalblaw.com;
Michael I. Garcia	mikgarcia@bernco.gov;
Greg Sonnenfeld	greg@sonnenfeldconsulting.com;
Charles F. Noble	Noble.ccae@gmail.com;
Stephanie Dzur	Stephanie@Dzur-law.com;
Vicky Ortiz	Vortiz@montand.com;
Peter J. Gould	pgouldlaw@gmail.com;
Kelly Gould	kellydarshan@gmail.com;
Jim Dauphinais	jdauphinais@consultbai.com;
Michael Gorman	mgorman@consultbai.com;
Randy S. Bartell	rbartell@montand.com;
Sharon T. Shaheen	sshahen@montand.com;
John F. McIntyre	jmcintyre@montand.com;
Marvin T. Griff	Marvin.Griff@thompsonhine.com;
David Ortiz	DOrtiz@montand.com;
Jennifer Breakell	jbreakell@fmtn.org;
Lorraine Talley	ltalley@montand.com;
Anna Sommer	ASommer@energyfuturesgroup.com;
Chelsea Hotaling	CHotaling@energyfuturesgroup.com;
Tyler Comings	tyler.comings@aeclinic.org;
Don Hancock	stricdon@earthlink.net;
Stephen Curtice	stephen@youtzvaldez.com;
Shane Youtz	shane@youtzvaldez.com;
James Montalbano	james@youtzvaldez.com;
Barry W. Dixon	bwdixon953@msn.com;
Kyle J. Tisdell	tisdell@westernlaw.org;
Erik Schlenker-Goodrich	eriksg@westernlaw.org;
Thomas Singer	Singer@westernlaw.org;
Mike Eisenfeld	mike@sanjuancitizens.org;
Carol Davis	caroljdavis.2004@gmail.com;
Robyn Jackson	chooshgai.bitsi@gmail.com;
Thomas Manning	cfreccleanenergy@yahoo.com;
Debra S. Doll	Debra@doll-law.com;
Katherine Coleman	Katie.coleman@tklaw.com;
Thompson & Knight	Tk.eservice@tklaw.com;
Jane L. Yee	jyee@cabq.gov;
Larry Blank, Ph.D.	lb@tahoeconomics.com;
Saif Ismail	sismail@cabq.gov;
David Baake	david@baakelaw.com;
Germaine R. Chappelle	Gchappelle.law@gmail.com;
Senator Steve Neville	steven.neville@nmlegis.gov;
Senator William Sharer	bill@williamsharer.com;
Rep. James Strickler	jamesstrickler@msn.com;
Rep. Anthony Allison	Anthony.Allison@nmlegis.gov;

Rep. Rod Montoya	roddmontoya@gmail.com;
Rep. Paul Bandy	paul@paulbandy.org;
Patrick J. Griebel	patrick@marrslegal.com;
Richard L. C. Virtue	rvirtue@virtuelaw.com;
Carla R. Najjar	Csnajjar@virtuelaw.com;
Philo Shelton	Philo.Shelton@lacnm.us;
Robert Cummins	Robert.Cummins@lacnm.us;
Kevin Powers	Kevin.Powers@lacnm.us;
Steven Gross	gross@portersimon.com;
Martin R. Hopper	mhopper@msrpower.org;
Cholla Khoury	ckhoury@nmag.gov;
Gideon Elliot	gelliot@nmag.gov;
Robert F. Lundin	rlundin@nmag.gov;
Elaine Heltman	Eheltman@nmag.gov;
Andrea Crane	ctcolumbia@aol.com;
Douglas Gegax	dgegax@nmsu.edu;
Michael C. Smith	Michaelc.smith@state.nm.us;
Bradford Borman	Bradford.Borman@state.nm.us;
John Bogatko	John.Bogatko@state.nm.us;
Jack Sidler	Jack.Sidler@state.nm.us;
Milo Chavez	Milo.Chavez@state.nm.us;
Marc Tupler	Marc.Tupler@state.nm.us;
Beverly Eschberger	Beverly.Eschberger@state.nm.us;
Georgette Ramie	Georgette.Ramie@state.nm.us;
Dhiraj Solomon	Dhiraj.Solomon@state.nm.us;
Anthony Sisneros	Anthony.Sisneros@state.nm.us;
Peggy Martinez-Rael	Peggy.Martinez-Rael@state.nm.us;
Elizabeth Ramirez	Elizabeth.Ramirez@state.nm.us;
Gilbert Fuentes	GilbertT.Fuentes@state.nm.us;
Jason Montoya	JasonN.Montoya@state.nm.us;
Ashley Schannauer	Ashley.Schannauer@state.nm.us;
Anthony Medeiros	Anthony.Medeiros@state.nm.us;

DATED this 1st day of April, 2020.

NEW MEXICO PUBLIC REGULATION COMMISSION

/s/ Isaac Sullivan-Leshin, electronically signed

Isaac Sullivan-Leshin, Paralegal