

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

**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. 533 )**

**Case No. 16-00276-UT**

**PUBLIC SERVICE COMPANY OF NEW )  
MEXICO, )**

**Applicant. )**

**ORDER REJECTING STIPULATION IN CURRENT FORM**

**THIS MATTER** comes before the Hearing Examiners upon the filing of the Comprehensive Settlement Stipulation by Public Service Company of New Mexico (PNM) on May 5, 2017 and the Statement of Opposition filed by New Energy Economy (NEE) on May 10, 2017. Being fully informed, the Hearing Examiners **FIND** and **CONCLUDE** as follows:

Section 20(B)(3) of the Commission's rules of procedure states the “commission or presiding officer shall schedule [a contested] stipulation for public hearing and review unless it is determined that the nature and extent of the opposition is such that hearing the stipulation will not materially conserve commission, staff, and party resources. In the event this determination is made, the commission or presiding officer may refuse to entertain the stipulation.”

1.2.2.20(B)(3) NMAC. Subsection B(5)(a) states further that, “[i]n cases heard by a hearing examiner rather than the commission the hearing examiner may: (a) decide that the settlement stipulation should not be certified to the commission at all, in which event the hearing examiner may indicate to the parties and staff whether additional evidence or legal argument in support of the stipulation or amendments to the stipulation might meet the hearing examiner’s reservations about the stipulation.” 1.2.2.20(B)(5)(a) NMAC.

Thus, a stipulation should not be considered if it is apparent upon the filing of the stipulation that, on its face, the stipulation cannot ultimately be approved even after hearing -- that it fails the Commission's standards for the approval of stipulations.<sup>1</sup>

The Hearing Examiners find here that the stipulation filed on May 5, 2017 should not be heard as presented because the stipulation would impose unnecessary complexity on a major rate proceeding with looming suspension deadlines, would require the Commission to prejudge issues neither properly before it nor ripe for determination, and would violate other regulatory standards established as recently as PNM's last rate case.<sup>2</sup>

The stipulation's requirement that it be considered by the Commission and approved as a whole combined with the unworkable two phase hearing structure (discussed below) is destined to hamstring the Commission's deliberations in this case. Paragraph 37 states that "[i]t is the Signatories' intent that none of the provisions of this Stipulation shall become fully operative unless the Commission enters an order approving this Stipulation in full." Any changes dictated by the Commission constitute cause for any of the parties to withdraw from the stipulation and

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<sup>1</sup> See, e.g., *In the Matter of the Application of Public Service Company of New Mexico for Revision of its Retail Electric Rates Pursuant to Advice Notice Nos. 397 and 32 (form TNMP Services)*, Case No. 10-00086-UT, Order Denying Request for Interim Relief (Mar. 31, 2011) in which the Commission rejected, prior to a hearing on the complete stipulation, a portion of the stipulation that provided for an interim rate increase.

<sup>2</sup> The Commission has consistently applied the following standard when reviewing contested stipulations:

- (a) the parties and Staff had notice and an opportunity to be heard on the stipulation;
- (b) substantial evidence in the record as a whole supports the Commission's conclusion that the stipulation is fair, just and reasonable and in the public interest; (c) the stipulation is in accordance with applicable law.

The Commission has approved a Hearing Examiner's decision to determine the merits of specific stipulation issues contested by the parties, citing the requirement that a settlement be in accordance with applicable law and not violate any important regulatory principles. See Order Granting Request for Clarification, Case No. 13-00390-UT, (Sept. 16, 2015), at 3-4. It should also be noted that, as the Commission has observed on numerous occasions, the "substantial evidence as a whole" aspect of the standard for testing contested stipulations goes to whether the Commission's decision is supportable if challenged pursuant to the Supreme Court's appellate standard of review, which is just that -- substantial evidence in the record. See e.g., *Certification of Stipulation*, Case No. 14-00310-UT (Apr. 20, 2015), at 22 n.70 and accompanying text (distinguishing Applicant PNM's standard of *proof on the merits*, preponderance of evidence in the record, from standard of *review on appeal*).

declare it void. If the stipulation were to go to hearing and the parties were to object to any required changes recommended after the conclusion of the hearings, little time would be available under the limited length of the suspension period for the Commission to hold hearings and decide the merits of PNM's Application. The Commission would then be placed in the untenable position of being rushed into making decisions on complicated issues under the threat that the originally proposed rates would go into effect by operation of law at the end of the suspension period. Given, as discussed below, the obvious problems inherent in the Stipulation, it is fairly evident that the hearing examiners could not recommend approval of the stipulation in its entirety. As such, it is prudent to point out the problems now instead of proceeding with hearings that could prolong the inevitable and risk putting the Commission in a difficult bind.

The reasons for rejection of the stipulation in its current form include the following.

**1. The stipulation's two phase hearing scheme is unworkable.** PNM's Application and the stipulation ask for approval of a rate increase to be implemented in two phases -- the first to take effect on January 1, 2018 and the second to take effect on January 1, 2019. But, unlike the Application, the stipulation also provides for two hearings, instead of one, to resolve PNM's rate increase request. The stipulation states that the first set of hearings in July will be on the stipulation generally, addressing revenue requirement issues for both the 2018 and 2019 increases and a limited number of rate design issues for the rates to become effective on January 1, 2018. The second set of hearings, to be held sometime in 2018, will be on rate design issues for the rates to become effective on January 1, 2019, including but not limited to PNM's

proposed Lost Contribution to Fixed Cost Mechanism, time of use rates, and intra class allocations.<sup>3</sup>

The stipulation's provision for two sets of hearings is unworkable on several grounds.

First, conducting two sets of contested hearings will definitely not conserve Commission, Staff, and party resources. The "Comprehensive Settlement Stipulation" is not comprehensive. It is only a partial settlement of some of the issues in the case, and not all of the parties have even signed on to the partial settlement. The issues on which the settling parties<sup>4</sup> have agreed are contested by at least one known party, NEE, and the issues on which the parties have not settled are contested by all parties. In addition, instead of streamlining the proceeding, the stipulation provides for two contested hearings instead of the single hearing that has currently been scheduled.

The signatories have not provided a convincing reason why the contested issues cannot be addressed in a single hearing, along with the remainder of the issues on which the parties have reached agreement in the stipulation. If PNM is not willing to litigate the contested issues reserved for the second set of hearings, it should consider withdrawing the issues from its Application and reserve them for a future proceeding.

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<sup>3</sup> The stipulation is not clear about the breadth of the scope of the second set of hearings. Part D is titled "Rate Design Phase of Proceedings in this Docket." Paragraph 28 identifies certain issues to be addressed in the second set of hearings, such as PNM's proposed disincentive mechanism and time of use rates. But it also states more broadly that "the Commission should issue a Phase I final order adopting this Stipulation, including the Phase I and Phase II non-fuel base rate increases, allocations among the rate schedules and Phase I rates; and that this Docket should remain open for a Phase II hearing on *rate design* and disincentive identification and removal issues, to be incorporated into Phase II rates. Stipulation, para. 28 (Emphasis added).

<sup>4</sup> In addition to PNM, the signatories include the New Mexico Attorney General, the Coalition for Clean Affordable Energy, Kroger Co., the Renewable Energy Industries Association, the Sierra Club, Wal-Mart, Western Resource Advocates, and Staff. Bernalillo County and the New Mexico Industrial Consumers filed Notices of Joinder in the stipulation on May 10, 2017.

Second, the two sets of hearings proposed in the stipulation cannot be completed within either the current 10-month suspension period expiring on November 6, 2017 or within the 12-month maximum suspension period permitted under the Public Utility Act which would expire on January 6, 2018.<sup>5</sup> The stipulation suggests as much but states only that the signatories agree PNM's Original Rider No. 48, LCFC Mechanism, should be tolled pending the outcome of the second set of proceedings. Stipulation, para. 29. Nothing is said about tolling or extending the suspension period for the other rates proposed to become effective on January 1, 2019, although the second set of hearings is anticipated to further change the rates specified in the stipulation to go into effect in 2019. The signatories have not filed a motion with the Commission to address the issue, and the hearing examiners do not have the authority to extend or toll the suspension periods.

In addition, the rate design issues identified for resolution in the phase two hearings cannot be addressed in isolation from the consideration of their effects on PNM's sales and revenues and on the ultimate revenue requirement PNM can justify. The stipulation purports that the issues addressed in the second set of hearings will have no effect on the total revenue requirement to be approved,<sup>6</sup> but changes in the rates specified for the 2019 rate increase (i.e., the 2019 rates specified in the stipulation or the rates established in the second set of hearings) will likely have an impact on PNM's expected sales and the revenues PNM is likely to receive from

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<sup>5</sup> The stipulation proposes that initial testimony regarding the identification of any regulatory disincentives, and disincentive removal mechanism proposals, and/or proposing a rate design for Rate Schedules 1A, 1B, 2A and 2B, and intra-class rate design for Rate Schedules 3B and 20, together with any related settlement agreement, should be filed within 120 days of a Commission order approving the stipulation; that response testimony be filed 45 days thereafter; and that rebuttal testimony be filed 30 days thereafter. Dates for an evidentiary hearing on those additional issues would be established by the Hearing Examiners. Stipulation, para. 31.

<sup>6</sup> The stipulation states that the resolution of the issues in the second set of hearings "shall not affect or alter the additional non-fuel revenue requirement increase of \$30 million, for a total non-fuel revenue requirement of \$62.3 million, to be made effective as of January 1, 2019." Stipulation, para. 28.

the increase or decrease in sales.<sup>7</sup> Any approval of a disincentive mechanism, as proposed by PNM, should also result in a reduced return on equity. See Corrected Recommended Decision, Case No. 15-00261-UT, August 15, 2016, at 272-273. Thus, contrary to Paragraph 28 of the stipulation, the revenue requirement that PNM could justify after a further hearing might need to be revisited.

Third and finally, the stipulation provides that “the Commission should issue a Phase I final order adopting this Stipulation, including the Phase I and Phase II non-fuel base rate increases, allocations among the rate schedules and Phase I rates; and that this Docket should remain open for a Phase II hearing on rate design and disincentive identification and removal issues, to be incorporated into Phase II rates.” Stipulation, para. 28. To the extent that the Commission’s order approving the matters addressed in the first set of hearings constitutes a final order, however, an appeal of that order would likely result in the removal of the Commission’s jurisdiction over any further proceedings in the docket to implement the other terms of the stipulation. It would also create substantial confusion over the Commission’s ability to act further on the issues discussed below regarding the potential retirement and abandonment of San Juan Units 1 and 4 and PNM’s interest in the Four Corners plant.

**2. Prejudgment of San Juan and Four Corners Power Plant issues not presented in PNM’s Application.** The stipulation proposes that the Commission take action on issues not currently before it, invites the Commission to improperly bind future Commissions, and raises notice and due process issues. The concerns lie in Paragraphs 8 and 9 of the stipulation, which propose ratemaking treatment to address the potential requests by PNM for

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<sup>7</sup> In fact, the stipulation acknowledges that the Signatories may propose changes to the volumetric components of the residential bill. Stipulation, para. 30.

abandonment of PNM's interests in San Juan Units 1 and 4 and the Four Corners Power Plant. Paragraph 8 provides for PNM's recovery of an additional \$10 million each year to reduce the undepreciated value of San Juan Units 1 and 4. Paragraph 9 similarly provides for PNM's recovery of an additional \$10 million each year to reduce the undepreciated value of the Four Corners Power Plant, starting as early as PNM's next general rate case but no later than January 1, 2023. These rate treatments appear, within the context of the stipulation, to have been made to reduce the amount of the unrecovered costs in the plants that would have to be allocated in the event PNM decides to retire its interests in the plants.

The problem posed by these additional revenues is that PNM has not decided to retire the plants. PNM has not requested authority in this case to retire the plants, and the costs being addressed are only one of many ratemaking issues that will need to be decided if and when PNM asks for permission to do so. The stipulation also provides that the additional recoveries will continue until the Commission makes a ruling in a subsequent case denying any further recovery.

PNM's Application and supporting testimony provided no notice that the issues would be addressed in this case. New depreciation rates for the San Juan and Four Corners units were established only seven months ago in PNM's most recent rate case, and PNM's Application and supporting testimony in this case proposed no changes to the rates. The stipulation's proposal to increase the depreciation rates to encourage PNM to make a future decision to retire the plants – and not based upon any facts revisiting the merits of the depreciation rates determined in PNM's last rate case – is premature, hasty, and unwise.

Commission approval of the stipulation as presented would also violate its longstanding policy against issuing orders that are binding on future Commissions. Indeed, both this Commission and at least one predecessor have rejected provisions of stipulations that would

have resulted in prematurely binding future Commissions. In a Final Order issued an El Paso Electric Company rate case on September 24, 1998, the Public Utilities Commission (PUC) rejected provisions of a stipulation that attempted to determine future stranded costs. The PUC explained that it could not and would not approve “any agreed-to provisions by the Signatories which attempt to bind future Commissions through our approval of this Stipulation.”<sup>8</sup>

This Commission has upheld the policy against issuing orders with binding effect on future commissions. For instance, in Case No. 10-00347-UT, Southwestern Public Service Company (SPS) sought approval of a stipulation authorizing SPS to enter into a short-term (six month) PPA to purchase capacity from its affiliate, Public Service Company of Colorado, and recover its energy costs under the PPA through its fuel clause. Although it approved the stipulation, the Commission struck a provision that would have required it to issue an expedited final order on requests for approval of future PPAs between SPS and its affiliates within 60 days of setting the matter for hearing. Considering procedural circumstances analogous to those animating this Order, the Commission said, “[a]s a matter of policy, the Commission does not issue Orders that are binding on future Commissions.”<sup>9</sup> PNM has also seen Commission findings similar to those above in at least one case dealing with requests for Commission approval of future PPAs.<sup>10</sup>

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<sup>8</sup> *In the Matter of the Complaints of J. Derald Morgan and Joe Lujan Against El Paso Electric Company and the Investigation into El Paso Electric Company's Rates*, Case No. 2722, Final Order (Sept. 24, 1998), at 11-12.

<sup>9</sup> *Application of Southwestern Public Service Company: (1) for Authority to Purchase 109 MW of Capacity and Associated Energy from its Affiliate Public Service Company of Colorado for the Period Through September 2011; and (2) to Suspend the Pre-Approval Requirement from Case No. 3116*, Case No. 10-00347-UT, Final Order Partially Adopting Recommended Decision (May 3, 2011), at 3 (emphasis in original).

<sup>10</sup> *See In the Matter of the Resource Stipulation Concerning Public Service Company of New Mexico's Proposed Approval of the Valencia PPA, Acquisition of a Beneficial Interest in PVNGS Unit 2 Ownership Trust and CCN for Luna Energy Facility and Lordsburg Generating Station*, Case No. 08-00305-UT, Final Order Adopting Certification of Stipulation (May 26, 2009), at 6, ¶ 16 (“... the Commission finds that is should approve the Resource Stipulation, but subject to a clarification of one of its provisions. Paragraph 6(g) of the Resource

(continued . . . )



In addition, the proposals relating to the San Juan and Four Corners units raise concerns over depriving due process to interested parties who might have objected if PNM had provided sufficient notice in accord with Commission rules when PNM filed its Application last December.<sup>11</sup>

**3. Violation of Other Regulatory Principles.** The Stipulation contains additional provisions that may contravene important regulatory principles. For example, the stipulation provides discounts for certain customer classes that draw into question the reasonableness of the overall level of revenue increase under the stipulation. While the stipulation purports to generally allocate the revenue increase on a *pro rata* basis among PNM's customer classes, it nevertheless provides special discounts to certain classes considerably below what the Commission would factor into a proportional and equitable sharing of burdens among all rate classes. Most of the customer classes, including the residential class, would experience rate increases of 4.87% and 4.39% on January 1, 2018 and January 1, 2019 for a total increase of 9.26%. Rates for water and sewer customers, such as the Albuquerque Bernalillo County Water

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Stipulation provides that when PNM requests Commission approval of future long-term PPAs, PNM can request, and 'the Commission should then make', as it does pursuant to § 62-9-1B with respect to CCNs, a determination of the ratemaking principles and treatment that will be applicable to the approved PPA for the term of the PPA. *Because it is inappropriate for a stipulation to bind future Commissions to take or not take any specified actions, the Commission construes this provision as encouraging the Commission to make requested rate determinations, rather than mandating it.* Moreover, insofar as the parties have agreed to file a proposed rule that would incorporate certain provisions of Paragraph 6 of the Resource Stipulation, including Paragraph 6(g), it should be made clear that any request made by PNM for a determination of rate treatment of any approved long-term PPA will be made in accordance with any final rule that may be issued by the Commission in response to the proposed rule to be filed pursuant to the Resource Stipulation." (emphasis added).

<sup>11</sup> See, e.g., *Albuquerque Bernalillo County Water Utility Authority v. N.M. Pub. Reg. Comm'n*, 2010-NMSC-013, ¶ 21, 148 N.M. 21, 32, 229 P.3d 494 (2010) ("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.' *Jones v. N.M. State Racing Comm'n*, 100 N.M. 434, 436, 671 P.2d 1145, 1147 (1983) (internal quotation marks and citation omitted). Notice 'should be more than a mere gesture; it should be reasonably calculated, depending upon the practicalities and peculiarities of the case, to apprise interested parties of the pending action and afford them an opportunity to present their case.' *U.S. West Commc'ns, Inc.*, 1999-NMSC-016, ¶ 29, 127 N.M. 254, 980 P.2d 37 (internal quotation marks and citation omitted). General notice of the issues to be presented at a hearing is sufficient to comport with due process requirements. *Santa Fe Exploration Co. v. Oil Conservation Comm'n*, 114 N.M. 103, 111, 835 P.2d 819 (1992).")

Utility Authority, would increase at rates of 0.13% and 4.34% on January 1, 2018 and January 1, 2019 for a total increase less than half the average at 4.47%. Rates for street lighting customers, such as the City of Albuquerque and Bernalillo County, would not increase at all.

The special discounts also violate the inter-class gradualism or “banding” principles adopted by the Commission in recent rate cases for PNM and SPS in Case No. 15-00296-UT and the principles proposed by PNM in this case. In Case No. 15-00261-UT, the Hearing Examiner recommended, and the Commission implemented, an approach that applied a 130% upper band and a 65% lower band in the allocations of revenue increases to PNM’s customer classes.<sup>12</sup> In Case No. 15-00296-UT, the Commission approved the global stipulation’s proposed 132% upper band and 75% lower band.<sup>13</sup> Here, the 4.47% and 0.00% increases proposed for Water and Sewage (Rate 11B) and Streetlighting (Rate 20) classes for the Phase II increases are also less than the 65% (9.02% average increase in revenues x 65% = 5.86%) allocations of the revenue increase. The 0.13% and 0.00% increases proposed for Water and Sewage (Rate 11B) and Streetlighting (Rate 20) classes for the Phase I increases are far less than the appropriate revenue allocations.

In sum, this Order does not dismiss this case. It only provides that the stipulation, as currently written, should not be heard. The parties have the opportunity to revise the stipulation to eliminate the problems cited in this Order. If they do not revise the stipulation, this matter will proceed to hearing on PNM's original Application as presently scheduled.

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<sup>12</sup> See Corrected Recommended Decision, Case No. 15-00261-UT, at 218.

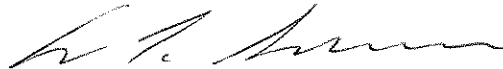
<sup>13</sup> See *In the Matter Southwestern Public Service Company's Application Company's Application for Revision of its Retail Rates Under Advice Notice No. 256*, Case No. 15-00296-UT, Certification of Stipulation (July 22, 2016), at 29-30.

**IT IS THEREFORE ORDERED:**

1. The Hearing Examiners will not convene a hearing on the Comprehensive Settlement Stipulation filed on May 5, 2017 in its current form.
2. The procedural schedule established in the Hearing Examiners' May 1, 2017 Order Establishing New Procedural Schedule shall remain unchanged.
3. As provided in the May 1, 2017 Order, any further requests for extending the procedural schedule shall be directed to the Commission for its approval of any extension of the suspension period.
4. This Order is effective immediately.

**ISSUED** at Santa Fe, New Mexico, this 12<sup>th</sup> day of **May 2017**.

**NEW MEXICO PUBLIC REGULATION COMMISSION**



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**Ashley C. Schannauer**  
**Anthony F. Medeiros**  
**Hearing Examiners**

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

**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. 533. )  
)  
PUBLIC SERVICE COMPANY OF NEW )  
MEXICO, APPLICANT )**

**Case No. 16-00276-UT**

**OFFICIAL CERTIFICATE OF SERVICE**

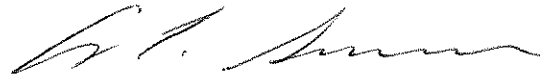
I CERTIFY that on this day I sent to the parties listed below, via email only, a true and correct copy of the **Order Rejecting Stipulation in Current Form.**

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DATED this 12th day of May 2017.

NEW MEXICO PUBLIC REGULATION COMMISSION



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16-00276-UT Official Labels.doc