

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

**IN THE MATTER OF THE PETITION OF PUBLIC)
SERVICE COMPANY OF NEW MEXICO, PURSUANT TO)
THE EFFICIENT USE OF ENERGY ACT AND THE PUBLIC)
UTILITY ACT, FOR APPROVAL OF A RATE) **Case No. 20-00121-UT**
ADJUSTMENT MECHANISM TO REMOVE)
REGULATORY DISINCENTIVES AND ORIGINAL RIDER)
NO. 52)**

**IN THE MATTER OF THE PETITION OF ALBUQUERQUE)
BERNALILLO COUNTY WATER UTILITY AUTHORITY)
AND BERNALILLO COUNTY FOR A DECLARATORY)
ORDER REGARDING WHETHER THE EFFICIENT USE) **Case No. 20-00211-UT**
OF ENERGY ACT MANDATES THE COMMISSION TO)
FULLY AUTHORIZE FULL DECOUPLING UPON)
PETITION BY A PUBLIC UTILITY)**

**IN THE MATTER OF PUBLIC SERVICE COMPANY OF)
NEW MEXICO'S PETITION FOR A DECLARATORY)
ORDER REGARDING WHETHER THE EFFICIENT USE) **Case No. 20-00212-UT**
OF ENERGY ACT PERMITS A UTILITY TO IMPLEMENT)
A FULL REVENUE DECOUPLING MECHANISM)**

ORDER

THIS MATTER comes before the New Mexico Public Regulation Commission (the "Commission") on the **May 28, 2020 Petition of Public Service Company of New Mexico (PNM) for Approval of a Rate Adjustment Mechanism to Remove Regulatory Disincentives and Original Rider No. 52 (Case 20-00121-UT)**; PNM's Petition for Declaratory Order Regarding Whether the Efficient Use of Energy Act Permits A Utility to Implement a Full Revenue Decoupling Mechanism (Case 20-00211-UT) and the Joint Petition for Declaratory Order Regarding Whether the Efficient Use of Energy Act Mandates the Commission to Fully Authorize Full Decoupling Upon a Petition by a Public Utility (Case 20-00212) filed by Bernalillo County and the Albuquerque Bernalillo Water Utility Authority (ABCWUA). Whereupon, being duly informed, **THE COMMISSION FINDS AND CONCLUDES:**

1. PNM's May 28, 2020 Petition in 20-00121-UT proposed a decoupling rate design pursuant to NMSA 1978, Section 62-17-5 which requires the Commission, on petition by a utility, to "remove regulatory disincentives through the adoption of a rate adjustment mechanism that ensures that the revenue per customer approved by the commission in a general rate case proceeding is recovered by the public utility without regard to the quantity of electricity actually sold by the public utility subsequent to the date the rate took effect."

2. By Initial Order dated June 10, 2020, the Commission commenced a proceeding on PNM's Petition and assigned Anthony Medeiros as Hearing Examiner (HE).

3. On July 13, 2020, New Energy Economy (NEE) filed a Motion to Dismiss the Petition. A separate Joint Motion to Dismiss was also filed that same day by the ABCWUA, the City of Albuquerque and the County of Bernalillo. Both motions assert, among other arguments, that PNM's Petition violates regulatory principles barring piecemeal and retroactive rate making and PNM's proposal to increase rates on only residential rate payers and small power users would be unjust during the COVID crisis. The motions further assert PNM's Petition seeking full revenue decoupling is contrary to NMSA 1978, Section 62-17-5(F)(2) which only authorizes decoupling mechanisms dedicated to removing disincentives attributable to utility implementation of energy efficiency and load management programs and addressing decreased utility revenue specifically tied to such programs.

4. On August 7, 2020, PNM filed a Consolidated Response in opposition to the motions to dismiss. Intervenors Western Resources Advocates (WRA) and Coalition for Clean Affordable Energy (CCAIE) filed a joint response in opposition to the motions to dismiss. Intervenor Merrie Lee Soules filed a response in support of the motions to dismiss.

5. On October 2, 2020, prior to the hearing on PNM's Petition scheduled for October

13 and 14, 2020, PNM filed a Motion to Vacate Hearing and Stay Proceeding in Case No. 20-00121-UT. PNM proposed to stay the proceeding until the Commission decided whether it would entertain a petition for declaratory order to resolve legal issues that had arisen in the case concerning whether Section 62-17-5(F)(2) permits full revenue decoupling or only authorizes decoupling mechanisms specific to removing disincentives limited to utility implementation of energy efficiency and load management programs, and addressing decreased utility revenue specifically tied to such programs.

6. PNM's motion proposed that a "declaratory order proceeding could also resolve other disputed legal issues that have arisen in this case, including whether a decoupling mechanism under Section 62-17-5(F)(2) may apply to some, but not all, of a utility's customer classes, and whether the Commission may consider an adjustment to a utility's return on equity if it approves a decoupling mechanism pursuant to Section 62-17-5(F)(2).

7. PNM noted that the issue of whether Section 62-17-5(F)(2) allows for full revenue decoupling "is virtually certain to arise in any future rate case proceeding...unless it is resolved in advance of that future rate case filing." PNM further argued "Staying this proceeding while the Commission decides whether to entertain these threshold issues will conserve parties' resources and avoid the need for duplicate work in multiple dockets" and "allow the parties to focus on the specifics of any decoupling mechanism PNM might propose" in a future rate case.

8. PNM's motion stated that while it PNM disagrees that Section 62-17-5(F)(2) requires that requests for full revenue decoupling must be presented only in general rate case proceedings, PNM says it is willing it was willing to "consider returning to this issue in its next general rate case, which it expects to file by the summer of 2021" and dismiss its pending Petition if the Commission decides to entertain "a petition for declaratory order pursuant to 1.2.2.21

NMAC, requesting a legal determination from the Commission as to whether Section 62-17-5(F)(2) does, or does not, provide for full revenue decoupling.”

9. PNM further stated that “In the event the Commission decides to not entertain the petition, PNM will make a filing in this docket within ten days indicating whether it intends to continue with its Petition and, if so, proposing a new procedural schedule.”

10. Initially, PNM’s motion was not opposed by Utility Division Staff (Staff), the New Mexico Attorney General (NMAG), the Coalition for Clean Affordable Energy (CCAIE), and Western Resource Advocates (WRA). Renewable Energy Industry Association of New Mexico (REIA), Bernalillo County, Albuquerque Bernalillo County Water Utility Authority (ABCWUA), the City of Albuquerque, and the New Mexico Affordable Reliable Energy Alliance (NM-AREA) took no position. New Energy Economy opposed the motion.

11. In subsequent filings, NM-AREA filed in support of PNM’s Motion to Vacate. The County of Bernalillo, ABCWUA and NEE opposed the motion to vacate. The City of Albuquerque proposed that the Commission order PNM to dismiss PNM’s specific proposed decoupling rate mechanism and conduct a hearing to determine the permissible scope of the decoupling mechanism contemplated by the Efficient Use of Energy Act.

12. REIA subsequently proposed that the issue of whether the Revised Stipulation in Case No. 16-00276-UT prohibits PNM’s implementation of a decoupling mechanism prior to its next general rate case, should be included as another threshold legal issue whose resolution would narrow the remaining issues in the case but also proposed that the case be stayed and the issues briefed as part of that proceeding.

13. On October 7, 2020, the Hearing Examiner issued an **Order Vacating Hearing and Staying Proceedings** which vacated the October 13 Hearing on PNM’s Petition, stayed the

proceeding pending further order and required PNM to file its Petition for Declaratory Order by October 30, 2020. The order found that there was “substantial merit in the approach proposed by PNM to addressing the threshold legal issues, a sensible alternative to intensive and, perhaps, ultimately unnecessary evidentiary hearings conducted in suboptimal conditions via videoconference given the ongoing COVID-19 pandemic” and “will advance the interests of administrative efficiency, adjudicative economy, and preservation of party and commission resources.”

14. None of those parties opposed to PNM’s Motion to Vacate sought an interlocutory appeal to the Commission from the **Order Vacating the Hearing and Staying Proceedings**.

15. PNM subsequently filed its **Petition for Declaratory Order in Case 20-00211-UT** on October 30, 2020 requesting that the Commission resolve the following legal issues:

- a. Whether Section 62-17-5(F)(2) mandates “full” decoupling of a utility’s revenues from its sales when read *in pari materia* with the other provisions of the EUEA and the NMPUA;
- b. Whether application of either “full” or “limited” decoupling to some rate classes, but not others, constitutes an “unreasonable preference” in violation of Section 62-8-6 of the NMPUA;
- c. Whether a standalone petition for decoupling is permitted under the EUEA, or whether such petition violates the principle against stand-alone or single-issue ratemaking;
- d. Whether PNM is estopped by the Revised Stipulation in Case No. 16-00276-UT from seeking to implement a decoupling mechanism prior to its next general rate case.
- e. Whether the return-on-equity or capital structure of an applicant utility can or should be adjusted downward when a petition for full decoupling is granted under the Efficient Use of Energy Act.

16. PNM’s Petition argues:

The controversy presented here is straightforward. It is a pure question of law, and it is a threshold and overarching question that should be addressed before there is further consideration of a specific PNM decoupling proposal, e.g., in PNM’s next rate case. Therefore, resolving this controversy, through a declaratory order, prior to PNM’s next rate case, offers the most efficient path forward for PNM, the Commission, and all intervenors. Then, once the Commission has resolved this

controversy, PNM will evaluate if it still wishes to propose a decoupling mechanism, and if so, it can design that decoupling mechanism consistent with the Commission's conclusion on this matter. This will also have the benefit of reducing the number of disputed issues to be addressed in PNM's next rate case. The correlate questions of law raised by other parties will also aid the Commission and the parties narrowing the issues to be considered with respect to any PNM decoupling proposal, and assist PNM in determining whether to bring forward a decoupling proposal in the next general rate case, or on a standalone basis.

17. On November 3, 2020, ABCWUA and Bernalillo County filed a separate **Joint Petition for Declaratory Order** in Case 20-00212-UT, seeking a declaratory order on the following issues of law: Whether the Commission is mandated to adopt a decoupling mechanism proposed by a utility related or unrelated to energy efficiency, load management and regulatory disincentives as contemplated by the EUEA; Whether a utility may use decoupling to establish an additional customer charge, to recover for losses due to increased penetration of Distributed Generation ("DG") customers in spite of the existence of an on-point statute, NMSA 1978, § 62-13-13.2, and the burdens of proof established therein; How the Commission may balance the interests of customers and shareholders in adopting a decoupling mechanism pursuant to NMSA 1978, § 62-17-5(F) in *pari materia* with the EUEA and the PUA; and Whether a standalone decoupling proposal violates the Commission's prohibition on piecemeal and retroactive ratemaking.

18. The Joint Petition further requests that the Commission either decline PNM's Petition for Declaratory Order, or in the alternative, merge the Joint Petition with PNM's Petition.

19. On November 5, 2020, NEE filed a Joinder in the Joint Petition requesting an additional declaration providing: "Pursuant to the Commission's ratemaking authority, the Commission puts public utilities on notice of its obligation to perform adequate analysis, which includes the use of timely information and may include continuing updates. Use of stale information will not be tolerated."

20. Notwithstanding its original lack of opposition to PNM’s motion to vacate, on November 24, 2020, the NMAG filed a **Request for Rulemaking and Response to Dueling Petitions for Declaratory Orders** in both cases 20-00211-UT and 20-00212-UT. The NMAG agreed with both the PNM and the Joint Movants that the Commission should remove uncertainty regarding the applicable standards for decoupling, but proposes instead that those issues be resolved through the formulation of standards in a rulemaking process, because it would “afford all parties potentially affected by the rule the opportunity participate; (2) it would allow the Commission additional time to formulate and articulate the standards to be applied; (3) it allows the standards set forth in a rule to apply with equal force to all regulated entities in the state, and not just PNM; and (4) a rulemaking will provide a superior record on review to demonstrate the Commission’s rationale.”

21. The NMAG further argues a rulemaking is appropriate because PNM “has indicated that it does not intend to proceed in [the 20-00211-UT] docket, regardless whether the Commission entertains its petition and issues a favorable ruling, asking that the docket be closed and stating that an order would merely inform its “next steps in whether and how to propose a decoupling mechanism under Section 62-17-5(F)(2) in its next rate case.”

22. The NMAG therefore requests that the Commission: 1) close Case No. 20-00121-UT; 2) deny both PNM and the Joint Movants Petitions for Declaratory Order; and 3) initiate a rulemaking proceeding to address the threshold issues raised in both the Joint Movants’ and PNM’s petitions for declaratory orders.

23. On December 8, 2020, PNM filed a **Response to the NMAG’s Request for Rulemaking**, asserting that the Commission should “reject the AG’s request to consider the threshold legal issue raised in Case No. 20-00121-UT – whether NMSA 1978, Section 62-17-

5(F)(2) requires full decoupling upon a utility's request – in a rulemaking because, under the Commission's Procedural Rules, 1.2.2 NMAC, a declaratory order is the appropriate procedure for resolving the issue.”

24. PNM asserts that “contrary to the AG's assertion, PNM's interests in pursuing decoupling are immediately at stake because PNM's petition for approval of a decoupling mechanism is pending before the Commission in Case No. 20-00121-UT. That proceeding has been stayed only until the Commission decides whether to entertain PNM's Petition... If the Commission decides that it will not entertain the petition, PNM will make a filing in Case No. 20-00121-UT within ten days indicating whether it intends to continue with its Petition and, if so, proposing a new procedural schedule.”

25. PNM further argues that “any concerns the Commission has regarding the due process rights of other utilities and stakeholders can be remedied through the form and method of notice the Commission approves in the declaratory action proceeding” and “converting the proceeding to a rulemaking will not provide the Commission additional time to consider the proceeding because the Procedural Rules do not provide any temporal restrictions on the Commission's issuance of a declaratory order.”

26. The Commission agrees that while a rulemaking would provide an opportunity to interpret the statutory scheme governing decoupling and formulate standards with the input of all affected utilities and interested parties, it must recognize the inherent flaw in the NMAG's request for rulemaking identified by PNM; that a rulemaking was not initiated prior to PNM's filing of its Petition in Case 20-00121-T and that petition currently remains pending before the Commission and consistent with the applicable statutes and the requirements of due process the Commission must address that Petition.

27. As PNM notes in response to the NMAG, the proceedings in Case 20-00121-UT are stayed and PNM has consented to dismissal of that pending case only to pursue a more direct resolution of these legal issues through a declaratory order so that it may in the future seek approval of a decoupling mechanism in a general rate case. The NMAG, like a number of other parties, initially did not oppose that course of action and the Hearing Examiner vacated the scheduled hearing and stayed that case to permit PNM to file its Petition for Declaratory Order. Those parties opposing PNM's requested legal rulings have filed an opposing Joint Petition for Declaratory Order

28. As several parties have noted in their pleadings, the legal issues surrounding the application of NMSA 1978, Section 62-17-5 that have been raised in Case 20-00121-UT would necessarily be determined if the Commission rejected the Petitions for Declaratory Orders, vacated the current stay and proceeded to a hearing and determination on the merits of PNM's Petition. In that instance, the Commission's ruling, while not precluding the rights of other utilities to be heard subsequently on the issues determined, would still establish precedent applicable in subsequent proceedings.

29. The same would apply to the results of a proceeding on the requested declaratory orders. Moreover, as PNM notes, notice of the declaratory proceeding may be fashioned to apprise other utilities and interested parties of the declaratory order proceeding and thereby afford those third parties the opportunity to actively litigate these issues.

30. Under these specific circumstances, the Commission finds that the legal issues set forth in the petitions in cases 20-00211-UT and 20-00212-UT are appropriate to be resolved through the issuance of a declaratory order. While PNM asserts several of the legal issues raised in Case 20-00212-UT do not meet the standard that there be a matter in controversy for a

declaratory order because PNM's requested relief in Case 20-00121-UT sought only full revenue decoupling, the Commission finds these issues should be addressed in the interests of resolving as many issues as possible in order to facilitate consideration of future decoupling applications. Furthermore, because the issues in 20-00211-UT and 20-00212-UT concern the same subject matter and issues, the two petitions should be consolidated into a single proceeding as suggested by several parties.

31. Several parties have also requested that Hearing Examiner Anthony Medeiros be appointed in the event a hearing examiner is appointed to preside over the declaratory order proceedings, due to his extensive familiarity with the legal issues concerning decoupling in prior cases and his involvement in Case 20-00121-UT.

IT IS THEREFORE ORDERED:

A. The requests that Commission entertain the petitions for declaratory orders in Cases 20-00211-UT and 20-00212-UT are granted and such proceeding is hereby commenced, as provided by this Order.

B. Cases 20-00211-UT and 20-00212-UT are consolidated for purposes of this proceeding and the issuance of single order resolving the legal controversies raised in those petitions.

C. PNM's Petition in Case 20-00121-UT is dismissed and Advice Notice No. 568 is cancelled.

D. Pursuant to NMSA 1978, §8-8-14 and the Commission's Utility Division Procedural Rules, 17.1.2. NMAC, et seq, and Chief Hearing Examiner Ashley Schannauer's nomination, **Anthony Medeiros** is appointed as Hearing Examiner to preside, take all actions necessary and convenient within the limits of the Hearing Examiner's authority, conduct any

necessary hearings and take such other action in this case that is consistent with Commission procedure, including but not limited to, issuing a Recommended Decision with findings of fact and conclusions of law.

C. The Hearing Examiner shall issue a procedural order at his earliest convenience establishing the terms by which notice of NMGC's Petition shall be made and establishing a timeframe for intervention by any interested parties in accordance with statutory and regulatory requirements.

E. Notice shall be made to all utilities and other persons potentially affected by a decision in this matter and shall specifically advise them that legal matters common to and affecting their interests may be determined in this proceeding and advise them of their right and opportunity to intervene and be heard in this matter.

F. A copy of this Order shall be served upon all persons listed on the attached Certificate of Service by e-mail, if e-mail addresses are known, or by regular mail otherwise.

G. This Order is effective immediately.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this 17th day of
March, 2021.

NEW MEXICO PUBLIC REGULATION COMMISSION

/s/ Cynthia B. Hall, electronically signed

CYNTHIA B. HALL, COMMISSIONER DISTRICT 1

/s/ Jefferson L. Byrd, electronically signed

JEFFERSON L. BYRD, COMMISSIONER DISTRICT 2

/s/ Joseph M. Maestas, electronically signed

JOSEPH M. MAESTAS, 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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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Order** issued by the New Mexico Public Regulation Commission on March 17th, 2021 was sent via email to the parties indicated below:

Stacey Goodwin
Ryan Jerman
Ray Gifford
Mark Fenton
Carey Salaz
Heather Allen
Mariel Nanasi
Jason Marks
Nann M. Winter
Keith Herrmann
Dahl Harris
Peter Auh
Andrew K. Harriger
Jody García

Stacey.Goodwin@pnmresources.com;
ryan.jerman@pnmresources.com;
rgifford@wbklaw.com;
Mark.Fenton@pnm.com;
Carey.Salaz@pnm.com;
Heather.Allen@pnmresources.com;
Mariel@seedsbeneaththesnow.com;
lawoffice@jasonmarks.com;
nwinter@stelznerlaw.com;
kherrmann@stelznerlaw.com;
dahlharris@hotmail.com;
pauh@abcwua.org;
akharriger@sawvel.com;
JGarcia@stelznerlaw.com;

Steven S. Michel
Cydney Beadles
Pat O'Connell
Amanda Levin
April Elliott
Jeffrey Albright
Michael I. Garcia
Amanda Edwards
Jalbright Law, LLC
Maureen Reno
Matthew Dunn
Josie Gage
Stephanie Dzur
Don Hancock
Ramona Blaber
Justin Brant
Howard Geller
Tammy Fiebelkorn
April Elliott
Peter J. Gould
Kelly Gould
James Dauphinais
Mike Gorman
Jane L. Yee
Larry Blank
Saif Ismail
Cholla Khoury
Gideon Elliot
Robert F. Lundin
Andrea Crane
Douglas Gegax
Merrie Lee Soules
Bradford Borman
John Bogatko
Milo Chavez
John Reynolds
Peggy Martinez-Rael
Elizabeth Ramirez
Michael C. Smith
Patrick Apodaca
Rick Alvidrez
Amanda Edwards
Amanda Levin
Anthony Medeiros
April Elliott
Christopher Sandberg

smichel@westernresources.org;
cydney.beadles@westernresources.org;
pat.oconnell@westernresources.org;
alevin@nrdc.org;
april.elliott@westernresources.org
JA@Jalblaw.com;
mikgarcia@bernco.gov;
AE@Jalblaw.com;
Admin@Jalblaw.com;
mreno@reno-energy.com;
dunneconsultingllc@gmail.com;
JGage.recs@gmail.com;
Stephanie@Dzur-law.com;
sricdon@earthlink.net;
ramona.blaber@sierraclub.org;
jbrant@swenergy.org;
hgeller@swenergy.org;
tfiebelkorn@swenergy.org;
april@elliottanalytics.com;
peter@thegouldlawfirm.com;
kelly@thegouldlawfirm.com;
jdauphinais@consultbai.com;
mgorman@consultbai.com;
jyee@cabq.gov;
lb@tahoeconomics.com;
sismail.@cabq.gov;
ckhoury@nmag.gov;
gelliot@nmag.gov;
rlundin@nmag.gov;
ctcolumbia@aol.com;
dgegax@nmsu.edu;
mlsoules@hotmail.com;
Bradford.Borman@state.nm.us;
John.Bogatko@state.nm.us;
Milo.Chavez@state.nm.us;
John.Reynolds@state.nm.us;
Peggy.Martinez-Rael@state.nm.us;
Elizabeth.Ramirez@state.nm.us;
michaelc.smith@state.nm.us;
Patrick.apodaca@pnmresources.com;
RALvidrez@mstlaw.com;
AE@Jalblaw.com;
alevin@nrdc.org;
anthony.medeiros@state.nm.us;
april.elliott@westernresources.org;
cksandberg@me.com;

Saif Ismail
Tammy Fiebelkorn
Eric Lohmann
Dana De La Cruz

sismail@cabq.gov;
tfiebelkorn@swenergy.com;
eslohmann@sawvel.com;
dmdelacruz@sawvel.com;

DATED this 17th day of March, 2021.

NEW MEXICO PUBLIC REGULATION COMMISSION

/s/ Isaac Sullivan-Leshin, electronically signed

Isaac Sullivan-Leshin, Paralegal

Isaac.sullivan-leshin@state.nm.us