Sullivan-Leshin, Isaac, PRC

From: Sullivan-Leshin, Isaac, PRC
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To: Records, PRC, PRC
Subject: 20-00212-UT; Filing Submission
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IN THE MATTER OF THE PUBLIC SERVICE COMPANY OF NEW MEXICO'S PETITION FOR A DECLARATORY ORDER REGARDING WHETHER THE EFFICIENT USE OF ENERGY ACT PERMITS A UTILITY TO IMPLEMENT A FULL REVENUE DECOUPLING MECHANISM; 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 OF ENERGY ACT MANDATES THE COMMISSION TO FULLY AUTHORIZE FULL DECOUPLING UPON PETITION BY A PUBLIC UTILITY	)	**Docket No. 20-00212-UT**

Please file the attached <u>ORDER ADOPTING RECOMMENDED DECISION</u> into the above captioned case.

Thank you.

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BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

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

ORDER ADOPTING RECOMMENDED DECISION

THIS MATTER comes before the New Mexico Public Regulation Commission (the "Commission") upon the Recommended Decision, the Exceptions thereto, and the Response to the Exceptions, described below.

Whereupon, being duly informed,

THE COMMISSION FINDS AND CONCLUDES:

1. On January 14, 2022, the Hearing Examiner (the "HE") issued his Recommended Decision in this matter (the "RD").

2. On January 27, 2022, Public Service Company of New Mexico ("PNM") filed its Exceptions to the RD, and the Renewable Energy Industries Association of New Mexico ("REIA"), Western Resource Advocates ("WRA"), and Coalition for Clean, Affordable Energy ("CCAE"), filed their Exceptions to the RD.

3. On February 4, 2022, Albuquerque Bernalillo County Water Utility Authority ("ABCWUA") and Bernalillo County filed their Joint Response to the Exceptions (the "Joint

Response"), in which the New Mexico Attorney General, New Mexico Affordable Reliable Energy Alliance, and New Energy Economy joined (collectively, with ABCWUA and Bernalillo County, the "Joint Respondents").

PNM's Exception 1 and REIA/WRA/CCAE's Exceptions 1-3 – Full Decoupling

4. PNM takes exception to the HE's recommendation that the Commission declare that Section 62-17-5(F)(2) of the Efficient Use of Energy Act (the "EUEA") does not mandate the Commission to authorize or approve a full decoupling rate mechanism for some or all rate classes of a public utility. PNM contends that Section 62-17-5(F)(2) ("(F)(2)") unambiguously mandates full revenue decoupling.

5. PNM argues that the HE fails to apply the plain meaning rule, which is the beginning and end of the process of statutory construction where a statute's meaning is unambiguous. PNM argues that (F)(2)'s direction to the Commission to adopt 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 or natural gas actually sold by the public utility," clearly requires a decoupling mechanism that completely severs the connection between revenues per customer and the quantity of electricity actually sold. PNM contends that only a full revenue decoupling mechanism can satisfy the "without regard" language contained in (F)(2).

6. PNM contends that the HE expressly recognizes this plain meaning of the language of (F)(2) but erroneously goes on to reject it as ambiguous based upon a perceived conflict with certain provisions of the EUEA and the Public Utility Act (the "PUA"). The HE states that construing (F)(2) as mandating a full decoupling mechanism upon a utility's petition would strip the Commission of its authority to balance the public interest, ratepayers' interests, and investors'

interests, which is inherent in the PUA and the EUEA and which is essential to setting just and reasonable rates.[1]

7. PNM criticizes the HE's conclusion that these earlier statutory provisions conflict with (F)(2)'s clear meaning, arguing that the HE failed to fulfill his obligation to seek an interpretation that harmonizes the statutory provisions. PNM disputes what PNM views as the HE's assumption that the determination of just and reasonable rates can only be accomplished through the Commission's balancing of interests. Instead, PNM argues that, to harmonize the statutes, the HE should have adopted the premise that the Legislature itself considered the public interest, ratepayers' interests, and investors' interests when amending the EUEA. PNM cites the New Mexico Supreme Court's recent decision, *Citizens for Fair Rates and the Env't v. N.M. Pub. Regulation Comm'n*, 2022-NMSC-010, specifically the Court's rejection of the argument that the Legislature had unconstitutionally invaded the Commission's exclusive realm of public utility regulation. *Id.* at ¶ 44. The Court found that the Legislature is empowered, within constitutional limits, to itself determine the prudence of expenditures by a public utility, bypassing the usual Commission prudence review process. *Id*. at ¶¶ 47, 48.

8. Moreover, PNM argues that the omission from (F)(2) of an express requirement to engage in interest balancing, as compared to the inclusion in (F)(1) of such an express requirement, indicates that the Legislature intended to exclude such balancing from (F)(2). PNM rejects the HE's reading that the interest balancing requirement impliedly carries over from (F)(1) to (F)(2).

9. PNM also rejects the HE's conclusion that the overbreadth of full revenue decoupling, which removes not only disincentives to energy efficiency and load management efforts but insulates a utility's revenue from all other contingencies, must lead to the conclusion

[1] *See* NMSA 1978, §§ 62-3-1(B) (the PUA) and 62-17-3 (the EUEA).

that the Legislature did not intend to adopt it. PNM first notes that the "irrefutable" language of the statute precludes "second-guess[ing]" the Legislature's policy choices. PNM then goes on to adduce policy benefits of full decoupling – that it would clearly remove all disincentives to energy efficiency, load management, and conservation efforts; that, through its simplicity, it would avoid difficulties in attributing revenues to various causes and, potentially, costly litigation; and that it would promote collection of an approved annual revenue requirement.

10. PNM goes on to argue that even if one concludes, erroneously, that there is no harmonizing interpretation, then the resulting conflict must be resolved in favor of full decoupling. PNM cites the Uniform Statute and Rule Construction Act, NMSA 1978, Sections 12-2A-1 *et seq*., in particular, Section 12-2A-10, "Irreconcilable statutes or rules." The section provides that if two statutes are irreconcilable, "the later-enacted statute governs," except that "an earlier-enacted specific, special or local statute prevails over a later-enacted general statute unless the context of the later-enacted statute indicates otherwise." NMSA 1978, § 12-2A-10. PNM also argues that (F)(2) is the more specific statutory provision versus the general ratemaking principles of the PUA and the EUEA and controls for that reason as well.

11. PNM further argues that the regulatory history of the decoupling issue indicates that the Legislature intended to mandate full decoupling when it amended the EUEA in 2020. The Commission has consistently rejected full revenue decoupling.[2] As PNM notes, the Legislature is

[2] PNM cites Docket No. 12-00250-UT, *In the Matter of the Commission's Energy Efficiency Rules at 17.7.2 NMAC, Including Proposed Rules in Revenue Decoupling* (the Commission considered but rejected full revenue decoupling); Docket No. 15-00261-UT, PNM's 2015 General Rate Case (the Commission rejected full revenue decoupling proposal as not authorized by EUEA as it existed at the time) (other citations omitted here).

presumed to be aware of longstanding administrative decisions, and the Legislature is presumed to have changed the law when it amends a statute.[3]

12. PNM further contends that the partial revenue decoupling recommended by the HE does not comply with (F)(2), which provides only for full revenue decoupling. Moreover, PNM contends that the HE's recommended partial revenue decoupling does not remove regulatory disincentives to energy efficiency and load management efforts. PNM notes that the examples of partial decoupling cited by the HE from other jurisdictions "use various tests and conditions that explicitly tie them to reductions in load or energy use reductions" that the HE's recommended version does not. Indeed, PNM argues, none of the cited tests or conditions could be applied here given (F)(2)'s requirement of "unconditional severance of revenues from sales."

13. PNM finds the HE's detailed analysis of the meaning of "regulatory disincentives" throughout the EUEA beside the point. PNM contends that the phrase's meaning "is of no moment" to the question of whether (F)(2) provides for full revenue decoupling. The Legislature has found that full decoupling is one way of accomplishing the removal of regulatory disincentives, and the Commission must accept this determination. PNM concludes that full decoupling "may sweep more broadly than removing only what the [RD] found to be 'regulatory disincentives,' but it is not the Commission's place to second-guess that choice."

14. REIA, WRA, and CCAE have three "exceptions," which are actually three arguments supporting one exception to the RD, which is the same as PNM's first exception.[4] REIA, WRA, and CCAE take exception to the HE's recommendation that the Commission declare

[3] *Alexander v. Anderson (In re Protest of Alexander),* 1999-NMCA-021, at ¶ 17; *GandyDancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, ¶ 14.

[4] As the exceptions filed by REIA, WRA, and CCAE include arguments raised by PNM and addressed above, these exceptions are not described in such detail as was PNM's first exception, above.

that (F)(2) does not mandate that the Commission authorize or approve a full decoupling rate mechanism.

15. REIA's, WRA's, and CCAE's first exception/argument is that the HE erred in not giving effect to the plain meaning of an unambiguous statute. They disagree with the HE's conclusion that interpreting (F)(2) to mandate full decoupling would create an irreconcilable conflict with pre-existing portions of the EUEA and therefore, such an interpretation must be avoided. They note that the Legislature has the power to change the law and that amendments supersede older portions of the statute to the extent that they cannot be reconciled.

16. REIA's, WRA's, and CCAE's second exception/argument is that partial revenue decoupling was not briefed or otherwise addressed by any of the parties. Further, they argue that there is no language in (F)(2) that can be interpreted as authorizing or mandating partial decoupling. Like PNM, they interpret (F)(2) as mandating full decoupling upon a proper petition and not even authorizing partial decoupling.

17. REIA's, WRA's, and CCAE's third exception/argument concerns Section 62-13-13.2, "Interconnected customers, utility cost recovery." They agree with the HE's conclusion that there is no conflict between this statute and (F)(2), but they disagree with the HE's rationale for the conclusion. They reject what they refer to as the HE's "erroneous finding that [](F)(2) is a nullity making no changes to prior law."

18. In the Joint Response, the Joint Respondents criticize REIA, WRA, and CCAE's "hyper-focus" in the exceptions upon the plain meaning canon of statutory interpretation. They contend that REIA's, WRA's, and CCAE's exceptions are "completely devoid" of any reference to the stated policy of the EUEA, any reference to the need to balance the needs of ratepayers against the interests of investors, and any reference to what constitutes a regulatory disincentive.

The Joint Respondents further contend that the exceptions do not address how mandating full decoupling would infringe upon the Commissions ratemaking authority. They contend that REIA, WRA, and CCAE's discussion of (F)(2) omits any discussion of the need to remove regulatory disincentives.

19. The Joint Respondents also criticize PNM's exceptions. They reject PNM's interpretation of (F)(2) as calling or full decoupling, arguing that the words "full" and "decoupling" appear nowhere in the EUEA or the PUA. They also contend that PNM, REIA, WRA, and CCAE argue that the Legislature intended to repeal (F)(1) through implementation of (F)(2), which contention they reject as involving a repeal by implication, strongly disfavored in statutory construction. They further argue that PNM undermines its reliance upon the plain meaning rule of statutory construction when it argues that the meaning of "regulatory disincentives" is irrelevant. They contend that the HE's partial decoupling recommendation accomplishes the decoupling required by (F)(2) while affording the Commission the discretion to balance interests.

The Commission's Decision

20. The Commission rejects these exceptions. The Commission is persuaded by the HE's reasoning, and the Commission accepts the HE's recommendation to issue a declaration that (F)(2) does not mandate the Commission to authorize or to approve a full revenue decoupling rate mechanism for some or all rate classes of a public utility. A full revenue decoupling rate mechanism would have effects that far exceed the stated purpose of (F)(2), which is to "remove regulatory disincentives." As the HE has shown, the term "regulatory disincentives," as used throughout the EUEA and, consistent with the stated purposes of the EUEA, refers to "regulatory disincentives to utility development of cost-effective energy efficiency and load management measures." The full revenue decoupling mechanism advocated by PNM and the other advocates

of full decoupling would, as PNM admits, have effects extending well beyond removing such disincentives.

21. Indeed, the adoption of full revenue decoupling would be a radical departure from the regulatory paradigm established in the PUA, eliminating ordinary business risks to which public utilities are subject. Full revenue decoupling would create an entitlement to a fixed revenue in the amount of the revenue requirement established in the public utility's most recent base rate case. Such an entitlement payment would be guaranteed by the ratepayers, who would be required to make up any shortfall in revenue from sales, no matter the cause for such a shortfall.

22. As the HE has pointed out, the proponents of full decoupling advocate for an interpretation of (F)(2) that would eliminate the Commission's authority to balance the interests of ratepayers, investors, and the public, which is central to the determination of just and reasonable rates. Instead, the proponents argue in the exceptions, that the Commission should presume that the Legislature has already undertaken such balancing prior to adopting (F)(2). The Commission does not accept that broad presumption, which would be an excessive interpretive leap based on unwarranted implications from the amendments to the EUEA. If the Legislature wished to depart so radically from the decades-old approach of the PUA, the Legislature would have expressly stated so, not only in amendments to the EUEA but in amendments to the PUA itself. Moreover, the Commission will not simply presume that the Legislature undertook a balancing of interests that led to the mandatory (upon petition) adoption of full revenue decoupling, a result that is heavily skewed against ratepayers' interests in favor of investors' interests.

23. Finally, the Commission agrees with the HE that the partial revenue decoupling mechanism that he describes in the RD is consistent with the stated purpose of removing regulatory disincentives.

PNM Exception 2 – Return on Equity

24. PNM agrees with the HE's conclusion that that Section 62-17-5(F)(4) ("(F)(4)") prohibits the Commission from reducing a utility's approved return on equity ("ROE") based on approval of a disincentive removal mechanism. PNM rejects, however, the conclusion that the Commission could achieve a similar result indirectly by decreasing a utility's equity ratio, thereby decreasing the utility's weighted average cost of capital ("WACC"). PNM argues that, though this "work around" would not violate the plain meaning of the statutory language, it would violate the intent "demonstrate[d]" by (F)(4), "to hold the utility harmless when a full decoupling mechanism is approved."

The Commission's Decision

25. The Commission rejects this exception. The Commission agrees with the HE that (F)(4) prohibits the Commission from reducing a utility's ROE based on approval of a disincentive removal mechanism. The Commission further agrees with the HE that this prohibition does not extend to WACC, of which ROE is only one component.

26. The Commission accepts and adopts all findings of fact and conclusions of law throughout the RD.

IT IS THEREFORE ORDERED:

A. The Decretal Paragraphs contained in the RD are incorporated by reference as if fully set forth herein and are ADOPTED, APPROVED, and ACCEPTED as orders of the Commission.

B. The RD is ADOPTED, APPROVED, and ACCEPTED.

C. This Order is effective immediately.

D. A copy of this Order shall be served upon all parties listed on the attached certificate of service via email, if the email addresses are known, and if not known, by regular mail.

E. This docket is now closed.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this 27th day of April, 2022.

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

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I caused to be sent via e-mail a true and correct copy of the ***Order Adopting Recommended Decision*** issued April, 2021 to the parties set forth below:

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DATED this **28th** day of April **2022**.

NEW MEXICO PUBLIC REGULATION COMMISSION

/s/ Isaac Sullivan-Leshin, electronically signed

Isaac Sullivan-Leshin, Law Clerk

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