BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF 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	)	
	)	**Case No. 20-00___-UT**
PUBLIC SERVICE COMPANY OF NEW MEXICO,	)	
Petitioner.	)	

PUBLIC SERVICE COMPANY OF NEW MEXICO'S BRIEF IN SUPPORT OF PETITION FOR DECLARATORY ORDER

Public Service Company of New Mexico ("PNM" or "Company"), pursuant to 1.2.2.21 NMAC, files this Brief in support of its Petition for Declaratory Order. In its Petition, PNM requests a declaratory order from the New Mexico Public Regulation Commission ("NMPRC" or "Commission") determining that NMSA 1978, §62-17-5(F)(2), a provision in the Efficient Use of Energy Act ("EUEA"), NMSA 1978, §§ 62-17-1 through 11 (2019), authorizes full revenue decoupling. Specifically, PNM requests that the Commission determine that Section 62-17-5(F)(2) provides for full revenue decoupling -- a mechanism that severs the link between utility revenues and customer consumption levels. This is the plain meaning of Section 62-17-5(F)(2), particularly when read in context with the neighboring provision—Section 62-17-5(F)(1). This understanding is confirmed by the context in which Section 62-17-5(F)(2) was passed as part of the 2019 amendments to the EUEA.

Despite the clear statutory text, the meaning of Section 62-17-5(F)(2) is contested. As described below, through the course of PNM's recent proceeding addressing its proposed full

revenue decoupling mechanism,[1] several intervenors argued that Section 62-17-5(F)(2) does not address full revenue decoupling. Rather, many intervenors argued that the Section only provides for mechanisms that remove the specific and narrow disincentives associated with implementing an energy efficiency or load management program.

There is therefore a controversy concerning the meaning of Section 62-17-5(F)(2) that the Commission can solve through a declaratory order pursuant to 1.2.2.21 NMAC.

In this Brief, PNM provides background on its recent decoupling proceeding, explaining how the controversy surrounding Section 62-17-5(F)(2) arose and describing why the controversy is still unresolved. Consistent with 1.2.2.21(B) NMAC, PNM then sets forth its position and the arguments in support of and in opposition to that position.

BACKGROUND

On May 28, 2020, PNM filed a Petition for Approval of a Rate Adjustment Mechanism to Remove Regulatory Disincentives and Original Rider No. 52 ("Decoupling Petition"). In its Decoupling Petition, PNM proposed a full revenue decoupling mechanism, to be called the Shared Cost of Service Rider ("SCS Rider"). The mechanism would be a full decoupling mechanism because it would entirely sever the link between customer usage and PNM's total revenues collected from PNM's residential and small power rate classes. On June 8, 2020, the Commission commenced Case No. 20-00121-UT pursuant to the Initial Order in the case, and the Commission assigned Anthony Medeiros as the Hearing Examiner to preside over the matter.

[1] Case No. 20-00121-UT. On October xx, 2020 PNM, along with [joint movants], filed a Joint Motion to Dismiss Case No. 20-00121-UT, in order to be able to first address and resolve, through this declaratory order proceeding, the threshold issue concerning the proper understanding and application of Section 62-17-5(F)(2). In the Joint Motion to Dismiss, PNM committed to file this Petition for Declaratory Order within [xx] days an order dismissing Case No. 20-00121-UT, if so ordered. On October [xx] 2020, the hearing examiner entered an order granting the Joint Motion to Dismiss, and dismissing Case No. 20-00121-UT. Accordingly, PNM now brings its Petition for Declaratory Order.

Several parties intervened: Albuquerque Bernalillo County Water Utility Authority ("ABCWUA"), the City of Albuquerque, the New Mexico Attorney General ("NMAG"), Bernalillo County, Coalition for Clean Affordable Energy ("CCAE"), Merrie Lee Soules, New Energy Economy ("NEE"), New Mexico Affordable Reliable Energy Alliance ("NM AREA"), the Renewable Energy Industries Association of New Mexico ("REIA"), Western Resource Advocates ("WRA"), and Staff of the Commission's Utility Division ("Staff").

Shortly thereafter, ABCWUA, Bernalillo County, and the City of Albuquerque ("Joint Movants") filed a Joint Motion to Dismiss Public Service Company of New Mexico's Petition for Approval of a Rate Adjustment Mechanism (Decoupling), or, Alternatively, Motion to Defer Approval of a Rate Adjustment Mechanism to PNM's Next Rate Case (July 13, 2020) ("Joint Motion"). NEE also filed a Motion to Dismiss Petition and Supporting Brief ("NEE Motion") (collectively, the "Motions").

The Motions advanced several arguments why the Decoupling Petition should be dismissed. Both Motions asserted that Section 62-17-5(F)(2) does not authorize the Commission to adopt a full revenue decoupling mechanism. Rather, according to the Motions, Section 62-17-5(F)(2) only authorizes the Commission to adopt a mechanism to remove the disincentives directly (and only) relating to implementation of energy efficiency and load management programs. *See* Joint Motion, at 2-11; NEE Motion, at ¶¶ 42-49.

PNM timely filed its Consolidated Response in Opposition to the Motions to Dismiss on August 7, 2020 ("Consolidated Response"). In the Consolidated Response, PNM argued that the Motions' interpretation of the EUEA, and specifically Section 62-17-5(F)(1) and (F)(2), was incorrect as a matter of the text, given the need to harmoniously read between those two subsections, and the existing regulatory backdrop in which the amendments to the EUEA were

passed in 2019. *See* Consolidated Response, at 2-11. Hearing Examiner Medeiros did not rule on the Motions, and allowed the case to proceed.[2]

Intervenors in Case No. 20-00121-UT also urged that PNM should petition for a rate adjustment mechanism under Section 62-17-5(F)(2) within a general rate case. Given the broad intervenor support for this approach, and given the need to resolve a critical threshold legal question of whether Section 62-17-5(F)(2) authorizes a full revenue decoupling mechanism, PNM concluded that staying Case No. 20-00121-UT and filing this Petition offered the most practical and efficient path forward. Resolving this threshold legal issue in advance of PNM's next general rate case filing will conserve Commission and party resources in that future rate case filing, and allow parties to better focus their testimony on the specific mechanics of a decoupling mechanism, if PNM chooses to propose one.

ARGUMENT

The Commission should conclude that Section 62-17-5(F)(2) contemplates and authorizes a full revenue decoupling mechanism like the SCS Rider PNM proposed in Case No. 20-00121-UT. In construing a statute, New Mexico courts look to a statute's language, in context with surrounding statutory provisions, as well as the practical implications and legislative purpose of the statute.[3] PNM will explain why all these support PNM's contention that Section 62-17-5(F)(2) addresses full revenue decoupling. Although New Mexico courts do not typically begin by analyzing legislative purpose and history, the EUEA's legislative history is probative of Section

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[2] *See supra* footnote 1.

[3] *See Bishop v. Evangelical Good Samaritan Soc.*, 2009-NMSC-036, ¶ 10, 146 N.M. 473 ("[W]hen presented with a question of statutory construction, we begin our analysis by examining the language utilized by the Legislature, as the text of the statute is the primary indicator of legislative intent. We also consider the statutory subsection in reference to the statute as a whole and read the several sections together so that all parts are given effect. We must also consider the practical implications and the legislative purpose of a statute." (internal quotations and citations omitted)).

62-17-5(F)(2)'s meaning, and it also provides an important regulatory backdrop against which the legislature passed the 2019 amendments to the EUEA. For this reason, PNM provides a history of the pertinent statutory provisions within the EUEA (Sections 62-17-5(F)(1) and (F)(2)) and how the Commission previously interpreted Section 62-17-5(F)(1) before Section 62-17-5(F)(2) was added to the EUEA through the 2019 amendments.[4]

Before turning to the text of Section 62-17-5(F)(2), it is important to understand what Section 62-17-5(F)(1) says. In full, it states:

> The Commission shall: . . . upon petition or its own motion, identify and remove regulatory disincentives or barriers for public utility expenditures on energy efficiency and load management measures in a manner that balances the public interest, consumers' interests and investors' interests.

Until 2019, the Commission had consistently interpreted Section 62-17-5(F)(1) as not authorizing full revenue decoupling. First, in a 2012 rulemaking, the Commission rejected a proposed rule to declare revenue decoupling the mechanism of choice to eliminate disincentives to energy efficiency programs.[5] Similarly, in adjudicatory proceedings, the Commission has uniformly rejected full revenue decoupling under Section 62-17-5(F)(1), finding that proposals pursuant to that section must be limited to energy efficiency programs. For example, the Commission rejected a full revenue decoupling proposal for PNM's then natural gas utility under Section 62-17-5(F)(1).[6] Next, in a proceeding involving Southwestern Public Service Company, the Commission again held: "a utility must show the amount of fixed cost that would not be

[4] *See* H.B. 291, 54th Leg., 1st Sess. (N.M. 2019).
[5] *See generally* Case No. 15-00261-UT, Corrected Recommended Decision, at 261 (providing a historical overview of proceedings relevant to Section 62-17-5 of the EUEA, and discussing Case No. 12-00250-UT, a rulemaking where the Commission considered but rejected full revenue decoupling).
[6] *Id.* at 263 ("The Commission welcomes appropriate measures to eliminate disincentives to investment by utilities in energy efficiency programs as contemplated by the Act. However, they must be narrowly focused to address those disincentives, and not be aimed at making the utility whole for all load losses." (quoting Case No. 06-00210-UT, Final Order Partially Adopting Recommended Decision, ¶ 120 (June 29, 2007))).

recovered as the result of its energy efficiency and load management programs and that the amount to be recovered by its proposed adder-like mechanism would not recover more than that amount."[7] Further, the Commission likewise rejected PNM's 2015 Revenue Balancing Account ("RBA") decoupling proposal as overly broad.[8]

Against this backdrop,[9] the New Mexico legislature added Section 62-17-5(F)(2) in 2019, which states in full:

> The Commission shall: . . . upon petition by a public utility, 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 or natural gas actually sold by the public utility subsequent to the date the rate took effect. Regulatory disincentives removed through a rate adjustment mechanism shall be separately calculated for the rate class or classes to which the mechanism applies and collected or refunded by the utility through a separately identified tariff rider that shall not be used to collect commission-approved energy efficiency and load management program costs and incentives.

Section 62-17-5(F)(2)'s clear and unambiguous meaning demonstrates that it authorizes full revenue decoupling mechanisms. *See State v. Jonathan M.*, 1990-NMSC 046, ¶ 4, 109 N.M. 789 ("When a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation."). Although it may not include the precise words "full decoupling," it describes that exact concept. The first sentence provides that the rate adjustment mechanism ensures the public utility recovers "revenue per customer . . . *without regard to the quantity of electricity or natural gas actually sold* by the public utility" (emphasis added). Only a full revenue decoupling mechanism could achieve what the emphasized

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[7] *Id.* at 265 (quoting Case No. 10-00197-UT, Final Order Disapproving Certification of Stipulation and Denying Application Without Prejudice, ¶ 6 (Nov. 10, 2011)).
[8] *See* Case No. 15-00261-UT, Final Order Partially Adopting Corrected Recommended Decision, ¶ 239 (Sept. 28, 2016).
[9] *See Alexander v. Anderson (In re Protest of Alexander)*, 1999-NMCA-021, at ¶ 17, 126 N.M. 632 (stating that the legislature is presumed to be aware of a longstanding administrative construction of a statute).

language provides (*i.e.*, that revenue per customer has *no relationship*—"without regard" — to the quantity of sales). This is because a mechanism meant to remove only specific disincentives associated with energy efficiency or load management programs would still leave utility revenues partially dependent on utility sales resulting from other effects, including macroeconomic effects (like weather, or the impacts of a global pandemic) or customers' potential decision to conserve energy unrelated to an energy efficiency program. The clear language authorizes a utility to recovery a revenue per customer "without regard" to volumetric sales, severing the link between sales and revenues. That is full revenue decoupling.

Next, Section 62-17-5(F)(2) does not include any terms of limitation or qualifications that would make it apply only to revenues impacted by the implementation of energy efficiency or load management programs. For example, the legislature could have included a limitation that recovery by the public utility is without regard to the quantity of electricity actually sold by the public utility *that is due solely to energy efficiency or load management programs*. But the legislature did not do so. Rather, Section 62-17-5(F)(2) provides broadly and without qualification that a specified revenue per customer may be recovered without regard to the quantity of electricity sold. Given this broad language, there is nothing to support a construction that Section (F)(2) only applies to specific disincentives to pursuing energy efficiency or load management, and interpreting it with such a restriction would require inappropriately reading words into the statute that do not exist. *See Burroughs v. Bd. of County Comm'rs*, 1975- NMSC-051, ¶ 14, 88 N.M. 303 ("[T]he court will not read into a statute or ordinance language which is not there, particularly if it makes sense as written.").

Although the text of Section 62-17-5(F)(2) is clear standing alone, reading it alongside (F)(1) further reinforces the appropriate construction of (F)(2) (*i.e.*, that it authorizes decoupling

mechanisms beyond those only meant to remove specific disincentives from energy efficiency and load management programs). First, unlike (F)(2), (F)(1) *does* explicitly limit removal of regulatory disincentives through decoupling only to those "for expenditures on energy efficiency and load management measures." As described above, the Commission has already and uniformly interpreted this language to limit utilities to seeking recovery only for revenues lost through energy efficiency and load management programs.[10] No such limitation applies in (F)(2). Thus, to the extent that NEE and the Joint Movants contend that (F)(2) is similarly limited, the contention is based on adding words of limitation to (F)(2) that simply are not there. Further, the legislature demonstrated it knew how to write such limitations; it did so in Section (F)(1); it did not do so in Section (F)(2).[11]

Finally, the legislature is presumed to be aware of existing statutory provisions when enacting amendments and is further presumed to intend its amendments to complement the existing language. *Martinez v. Public Empls. Ret. Ass'n*, 2012-NMCA-096, ¶ 34. Thus, the proper interpretation requires reading (F)(2) as a complement to—and not a restatement of—(F)(1). The legislature would not have enacted Section (F)(2) were it just a restatement of what Section (F)(1) already provided. *See State v. Rivera*, 2004-NMSC-001, ¶ 18, 134 N.M. 769 ("We are generally unwilling to construe one provision of a statute in a manner that would make other provisions null or superfluous."); *Katz v. N.M. Dep't of Human Servs.*, 1981-NMSC-012, ¶ 18, 95 N.M. 530 ("This interpretation would result in obliterating the distinction between the mandatory and optional

[10] *See, e.g.*, Case No. 15-00261-UT, Corrected Recommended Decision, at 265 ("a utility must show the amount of fixed cost that would not be recovered as the result of its energy efficiency and load management programs and that the amount to be recovered by its proposed adder-like mechanism would not recover more than that amount" (quoting Case No. 10-00197-UT, Final Order Disapproving Certification of Stipulation and Denying Application Without Prejudice, ¶ 6 (Nov. 10, 2011))).

[11] *See, e.g.*, *Patterson v. Globe Am. Cas. Co.*, 1984-NMCA-076, ¶ 10, 101 N.M. 541 ("These statutes show the Legislature knows how to create a private remedy if it intends to do so. By negative inference, the Legislature's failure to provide for a private action suggests that it did not intend to create one.").

categories explicitly written into the law by Congress. A statute must be construed so that no part of the statute is rendered surplusage or superfluous.").

Thus, for reasons described above, Section 62-17-5(F)(2) plainly and unambiguously contemplates a rate adjustment mechanism that would accomplish full revenue decoupling. This interpretation is supported by its plain meaning, the different and more limited decoupling approach authorized by prior-existing Section 62-17-5(F)(1), and the regulatory backdrop against which the legislature amended the EUEA in 2019. Nonetheless, in Case No. 20-00121-UT, NEE and the Joint Movants contended that Section 62-17-5(F)(2) provides only limited decoupling to remove the disincentives resulting directly (and only) from energy efficiency and load management programs—in other words, nothing but a recapitulation of existing Section 62-17-5(F)(1). *See* Joint Motion, at 2-11; NEE Motion, at ¶¶ 42-49.

Pursuant to 1.2.2.21 NMAC, PNM describes the arguments it expects will be raised—based on the Motions filed by NEE and the Joint Movants in Case No. 20-00121-UT—to support the interpretation that Section 62-17-5(F)(2) authorizes only decoupling mechanisms to remove disincentives for energy efficiency and load management programs. First, the Joint Motion emphasizes that Section 62-17-15(F)(1) specifically limits the removal of disincentives to those for expenditures on energy efficiency and load management measures. *See* Joint Motion, at 3-4. The Joint Movants do not explain, however, why the express limitation in (F)(1) should be imported into (F)(2), which lacks such language, or why the legislature would have enacted (F)(2) if it is just a restatement of (F)(1). Next, the Joint Movants argue that a full revenue decoupling mechanism would "run[] afoul of multiple sections of the Public Utility Act." Joint Motion, at 5. Specifically, they argue that a decoupling mechanism would conflict with Section 62-8-7(F), but they do not acknowledge the "fundamental principle of statutory interpretation, that the more

specific [statutory provision] control[s] the general [statutory provision]." *State ex rel. Schwartz v. Sanchez*, 1997-NMSC-021, ¶ 8, 123 N.M. 165. Similarly, the Joint Movants argue that a full decoupling rider would be contrary to Section 62-13-13.2, again without acknowledging that the specific controls the general. Joint Motion, at 6.

The Joint Movants also argue that "[r]ules of statutory construction dictate against PNM's interpretation." Joint Motion, at 8-9. Specifically, the Joint Motion cites the canons that a court must give effect to the intent of the legislature, the plain language canon, and that statutes must be interpreted as a whole. *Id.* PNM certainly agrees with the principles, but for the reasons described above, these canons support PNM's interpretation and not the Joint Movants'.

NEE raised similar arguments. NEE asserted that the plain language of Section 62-17-5(F)(2) does not provide for the type of full decoupling that PNM proposed in Case No. 20-00121-UT; that PNM's interpretation would be inconsistent with Section 62-13-13.2; and that a full decoupling mechanism would not properly balance public interest considerations. NEE Motion, at ¶¶ 42-49.

PNM also notes that both NEE and other parties also disagreed with PNM's positions on whether Section 62-17-5(F)(2) permits a decoupling mechanism to apply only to a subset of a utility's customer classes, and whether Section 62-17-5(F)(2) precludes adjusting the Company's return on equity if it approves a decoupling mechanism. Although PNM does not believe these questions are as central to PNM's planning for proposing another decoupling mechanism in its forthcoming rate case, the Commission may also want to take the opportunity to decide these questions here. Like the question on full revenue decoupling, they are pure questions of law, and this may present the most efficient procedural path to address these questions.

CONCLUSION

PNM's Petition meets the requirements of 1.2.2.21 NMAC, and because resolving the controversy identified here could save the Commission, PNM, and intervenors significant resources, PNM urges that resolving the threshold controversy presented here is appropriate. Thus, for the foregoing reasons, PNM requests that the Commission terminate the controversy on whether Section 62-17-5(F)(2) authorizes full revenue decoupling. The Commission may also wish to address the questions of whether a decoupling mechanism can apply to a subset of customer classes and whether Section 62-17-5(F)(4) precludes adjusting the Company's return on equity if it approves a decoupling mechanism pursuant to Section 62-17-5(F)(2). These issues are not as critical to PNM's design of a proposed decoupling mechanism, but it could serve efficiency for the Commission to address them in its declaratory order.

Respectfully submitted this 30th day of October, 2020.

PUBLIC SERVICE COMPANY OF NEW MEXICO

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