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**

RECOMMENDED DECISION

14 January 2022

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GLOSSARY OF ACRONYMS AND DEFINED TERMS

Acronym/Defined Term	Meaning
2015 Rate Case	Case No. 15-00261-UT
2016 Rate Case	Case No. 16-00276-UT
ABCWUA	Albuquerque Bernalillo County Water Utility Authority
Attorney General	New Mexico Attorney General
County	Bernalillo County, New Mexico
Br.	Brief in chief or initial brief
Case 2146, Part II	*In the Matter of the Adjudication of Alternatives to the Inventorying Ratemaking Methodology, and/or Plans for the Phasing in of Public Service Company of New Mexico's Excess Generating Capacity*, NMPSC Case No. 2146, Part II, Final Order (Apr. 5, 1989)
CCAE	Coalition for Clean Affordable Energy
CCN	Certificate of Public Convenience and Necessity
Commission or NMPRC	New Mexico Public Regulation Commission
COVID-19	Coronavirus disease
DG	Distributed Generation
DSM	Demand side management
EE/LM	Energy efficiency and load management
EPE	El Paso Electric Company
EUEA	Efficient Use of Energy Act

Acronym/Defined Term	Meaning
ETA	Energy Transition Act
FPPCAC	Fuel and Purchased Power Cost Adjustment Clause
GWh	Gigawatt-hour
H.B. 291	House Bill 291, the 2019 amendments to the EUEA
ICC	Illinois Commerce Commission
Joint Petition	ABCWUA and the County's Joint Petition for Declaratory Order in Case No. 20-00212-UT
Joint Petitioners	ABCWUA and Bernalillo County
kW	Kilowatt
Legislature	New Mexico Legislature
LCFC	Lost Contribution to Fixed Cost
MWh	Megawatt-hour
NEE	New Energy Economy
NMAC	New Mexico Administrative Code
NM AREA	New Mexico Affordable Reliable Energy Alliance
NMCA	New Mexico Court of Appeals
NMGC	New Mexico Gas Company
NMPSC	New Mexico Public Service Commission
NMPUC	New Mexico Public Utility Commission
NMRECA	New Mexico Rural Electric Cooperative Association
NREL	National Renewable Energy Laboratory
NMSA	New Mexico Statutes Annotated
NMSC	New Mexico Supreme Court
Opponents	Parties opposing a determination that EUEA Section 62-17-5(F)(2) mandates full revenue decoupling: Joint Petitioners ABCWUA/County, Attorney General, NEE, and NM AREA
Petition	PNM's Petition for Declaratory Order in Case No. 20-00211-UT

Acronym/Defined Term	Meaning
Procedural Order	Procedural Order issued in this case by the Hearing Examiner on March 30, 2021
Proponents	Parties favoring a full decoupling rate mechanism via EUEA Section 62-17-5(F)(2): PNM and CCAE/WRA/REIA
PNM	Public Service Company of New Mexico
PUA	Public Utility Act
PVNGS	Palo Verde Nuclear Generating Station
RAP	Regulatory Assistance Project
RBA	Revenue Balancing Account
REA	Renewable Energy Act
RECs	Renewable Energy Certificates
REIA	Renewable Energy Industries Association of New Mexico
Resp.	Response
Revised Stipulation	Modified Revised Stipulation in Case No. 16-00276-UT
ROE	Return-on-equity
SCSR	Shared Cost of Service Rider proposed in Case No. 20-00121-UT
SPS	Southwestern Public Service Company
Staff	Commission's Utility Division Staff
TEP	Transportation electrification plan
Tr.	Transcript of the July 15, 2021 oral argument in this case
WACC	Weighted average cost of capital
WRA	Western Resource Advocates
WUTC	Washington Utilities and Transportation Commission

Anthony F. Medeiros, Hearing Examiner in this proceeding, submits this Recommended Decision to the New Mexico Public Regulation Commission ("Commission" or NMPRC) pursuant to NMSA 1978, § 8-8-14 (1998, as amended through 2013) and NMPRC Rules of Procedure 1.2.2.21(C), 1.2.2.29(D)(4), and 1.2.2.37(B) NMAC. The Hearing Examiner recommends that the Commission adopt the following statement of the case, background, discussion, findings of fact, conclusions of law, and decretal paragraphs in an order.

I. STATEMENT OF THE CASE

This declaratory order proceeding evolved out of Case No. 20-00121-UT, which was docketed to consider a specific decoupling proposal made by Public Service Company of New Mexico (PNM). PNM requested approval in that case of its Shared Cost of Service Rider (SCSR) No. 52, a full revenue decoupling mechanism for select customer classes. "Full decoupling" is a utility rate mechanism that severs entirely the connection between an electric utility's sales and its revenues, no matter the reason for variation in the utility's sales. The decoupling rate mechanism PNM proposed in Case No. 20-00121-UT would have ensured that revenue per customer approved by the Commission in a general rate case proceeding would be recovered without regard to the quantity of electricity sold or the reason for any decreased sales of electricity.

On October 2, 2020, PNM filed in Case No. 20-00121-UT a Motion to Vacate Public Hearing and Stay Proceeding ("Motion to Stay") proposing to first address and resolve, through a declaratory order proceeding, the threshold issue concerning the proper understanding and application of a provision of the Efficient Use of Energy Act (EUEA), Section 62-17-5(F)(2), that states "[t]he commission shall:

> (2) 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.[1]

PNM committed in the Motion to Stay to file its petition for declaratory order within 14 days of an order staying Case No. 20-00121-UT, if so ordered. PNM also committed to asking the Commission, in the event it decided to entertain the Petition for Declaratory Order, to close the docket for Case No. 20-00121-UT.

On October 7, 2020, after holding a prehearing and status conference at which oral argument of the parties was entertained, the undersigned Hearing Examiner entered an Order Vacating Hearings and Staying Proceeding, which stayed Case No. 20-00121-UT and required PNM to file a petition for declaratory order with the Commission by October 30, 2020.

PNM filed its Petition for Declaratory Order ("Petition") in Case No. 20-00211-UT on October 30, 2020 requesting that the Commission resolve the following legal issues:

1) Whether Section 62-17-5(F)(2) mandates full decoupling of a utility's revenues from its sales when read *in pari materia* with other provisions of the EUEA and the Public Utility Act (PUA);[2]
2) 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 PUA;[3]

[1] NMSA 1978, § 62-17-5(F)(2) (2005, as amended through 2020).

[2] NMSA 1978, §§ 62-1-1 to -7 (1909, as amended through 1993), 62-2-1 to -22 (1887, as amended through 2013), 62-3-1 to -5 (1967, as amended through 2019), 62-4-1 (1998), 62-6-4 to -28 (1941, as amended through 2018), 62-8-1 to -13-16 (1941, as amended through 2021). *See Tri-State Generation and Transmission Ass'n v. N.M. Pub. Reg. Comm'n*, 2015-NMSC-013, ¶ 8 n. 1, 347 P.3d 274 (listing the foregoing statutory provisions of the "entire PUA" and noting that § 62-13-1 specifies "the range of articles in Chapter 62 that comprised the PUA in 1993.").

[3] NMSA 1978, § 62-8-6 (1941, as amended through 2008).

3) 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;

4) 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.

5) 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.[4]

PNM asserted in the Petition that the issues above are threshold legal issues that should be considered before PNM presents a new decoupling proposal in, among other potential proceedings, PNM's next general rate case. PNM stated that once the Commission has resolved the issues, PNM will evaluate if it wishes to propose a decoupling mechanism, and if so, it can design that decoupling mechanism consistent with the Commission's conclusion on the matters in the declaratory order proceeding. PNM asserted that issuance of a declaratory order will also have the benefit of reducing the number of disputed issues to be addressed in PNM's next general rate case and assist PNM in determining whether to bring forward a decoupling proposal in the next general rate case, or on a standalone basis.[5]

On November 3, 2020, the Albuquerque Bernalillo County Water Utility Authority (ABCWUA) and Bernalillo County (the "County") filed a Joint Petition for Declaratory Order ("Joint Petition"), which was docketed as Case No. 20-00212-UT. The Joint Petition requested a declaratory order on the following issues of law:

[4] PNM Petition 9-10.

[5] *Id*. 9.

a) 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.

b) 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.

c) 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.

d) Whether a standalone decoupling proposal violates the Commission's prohibition on piecemeal and retroactive ratemaking.[6]

In addition, the Joint Petition requested that the Commission take administrative notice of the pleadings and testimony filed in Case No. 20-00121-UT and either decline PNM's Petition for Declaratory Order or, in the alternative, merge the Joint Petition with PNM's Petition.[7]

On November 5, 2020, New Energy Economy (NEE) filed a Joinder in the Joint Petition in Case No. 20-00212-UT 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."[8]

[6] Joint Petition 9-10.

[7] *Id*. 13-14.

[8] NEE Joinder 1-2.

On March 17, 2021, the Commission issued its Order establishing this declaratory order proceeding. The Commission found that the legal issues framed in the petitions in Cases 20-00211-UT and 20-00212-UT "are," quoting the Order,

> 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.[9]

The Commission further determined that because the issues in Cases 20-00211-UT and 20-00212-UT cover the same subject matter and issues, the two petitions should be consolidated into a single proceeding.[10]

The Commission observed, moreover, that while its ruling in this consolidated proceeding would not preclude "the rights of other utilities to be heard subsequently on the issues determined, [it] would still establish precedent applicable in subsequent proceedings."[11] The Commission therefore reasoned that "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."[12]

Therefore, the Commission commenced this declaratory order proceeding pursuant to 1.2.2.21 NMAC to entertain the petitions in Cases 20-00211-UT and 20-00212-UT and to issue a

[9] Order (Mar. 17, 2021) at 9-10, ¶ 30.

[10] *Id*. at 10, ¶ 30.

[11] *Id*. at 9, ¶ 28. While the Commission's statement in this paragraph was addressing a ruling on the legal issues surrounding the application of Section 62-17-5 of the EUEA as raised in Case No. 20-00121-UT, the Commission finds at the beginning of the next paragraph that the "same would apply to the results of a proceeding on the requested declaratory orders." *Id*. at 9, ¶ 29.

[12] *Id*.

"single order resolving the legal controversies raised in those petitions."[13] The Commission also dismissed PNM's Petition in Case No. 20-00121-UT and canceled Advice Notice 568. Additionally, the Commission appointed the undersigned as Hearing Examiner "to preside, take all actions necessary and convenient within the limits of [his] authority, conduct any necessary hearings and take such other action in this case consistent with Commission procedure, including but not limited to, issuing a Recommended Decision with findings of fact and conclusions of law."[14]

Finally, with respect to affording utilities and other interested third parties the opportunity to litigate the issues in this proceeding, the Commission ordered that "[n]otice 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."[15]

On March 25, 2021, the Hearing Examiner held a prehearing conference in this case via a Zoom videoconference. The prehearing conference was attended by representatives of PNM, ABCWUA, the City of Albuquerque ("City"), the County, Coalition for Clean Affordable Energy (CCAE), NEE, New Mexico Affordable Reliable Energy Alliance (NM AREA), the New Mexico Attorney General ("Attorney General"), the Renewable Energy Industries Association of New Mexico (REIA), and Staff of the Commission's Utility Division ("Staff"). The Hearing Examiner and the participants discussed in the prehearing conference, among other things, the scope of issues

[13] *Id*. at 10, ¶ C.

[14] *Id*. at 10-11, ¶ D.

[15] *Id*. at 11, ¶ E.

addressable in the case, the proposed form and manner of notice, and the development of a schedule for briefing and oral argument.

PNM provided a draft proposed form of notice of proceeding to the Hearing Examiner via e-mail on March 25, 2021. Proposed edits to and comments regarding the draft notice were provided via e-mail on March 26, 2021 by CCAE, the County, NEE, REIA, and Staff. PNM indicated via e-mail on March 27, 2021 that it was "fine with the edits" proffered.

On March 30, 2021, the Hearing Examiner issued a Procedural Order for this proceeding. The Procedural Order established, *inter alia*, the following schedule and requirements: (i) required PNM to publish the Notice of Proceeding ("Notice") appended to the Procedural Order in the *Albuquerque Journal*, *Las Cruces Sun News*, and *Santa Fe New Mexican* by April 16, 2021; (ii) required PNM to send the Notice by first class U.S. mail, postage prepaid, to El Paso Electric Company (EPE), Southwestern Public Service Company (SPS), New Mexico Gas Company, Raton Natural Gas Company, and Zia Natural Gas Company by April 16, 2021; (iii) required PNM to cause the Notice to be served via e-mail to the individuals listed on the most recent, comprehensive NMPRC certificate of service for utilities and third parties, as supplemented and reflected Attachment 2 to the Procedural Order, by April 16, 2021;[16] (iv) required PNM to post a copy of the Notice on its website (http://www.PNM.com/regulatory) by April 16, 2021; (v) provided that if any other public utility intervened by May 14, 2021, that utility should also post the Notice on its website within five days of intervening; (vi) made motions to intervene due by May 14, 2021;

[16] *See In the Matter of the Temporary Moratorium on Residential Utility Disconnections During the Time Period Covid-19 Pandemic Emergency Orders are in Effect as Authorized by 17.9.560, 17.10.650 & 17.12.760*, Case No. 20-00205-UT, Certificate of Service issued with Commission's Order Clarifying the February 3, 2021 Order Regarding Disconnections of Residential Customer Utility Service Due to the Governor's Executive Orders Related to the COVID-19 Pandemic Pursuant to Rules 17.9.560.12(G), 17.10.650.11(G) and 17.12.760.9 NMAC (Mar. 17, 2021). The Procedural Order noted that, to avoid unnecessary duplication, since many of the individuals listed on the Certificate of Service for this case also appear on the service list for Case No. 20-00205-UT, those persons on the service list for this case are not included in Attachment 2.

(vii) required the filing initial briefs addressing the issues set forth under paragraphs 5 and 7 of the Procedural Order by June 7, 2021; (viii) required the filing of response briefs by June 28, 2021; (ix) set oral argument in this matter for July 15, 2021 and provided that, due to the ongoing COVID-19 pandemic, the oral argument would be conducted via the Zoom videoconference platform; and (x) invited interested persons not affiliated with a party may make oral or written comment pursuant to Rule 1.2.2.23(F) NMAC at the commencement of the oral argument.

On April 23, 2021, the Hearing Examiner issued an Order that (i) revised the case caption for this proceeding to reflect the consolidation and merger of dockets provided for in the Commission's March 17, 2021 Order, (ii) closed Case No. 20-00211-UT, and (iii) required that all future filings made by the parties and Staff into the consolidated and merged proceeding be filed in this case under the new caption established in the Order.

On May 23, 2021, PNM filed an affirmation of publication, web posting, mailing to utilities, and e-mailing to the individuals listed on Attachment 2 to the Procedural Order.

Motions for leave to intervene were filed by the following parties: NM AREA and CCAE on May 5, 2021; the Renewable Industries Association of New Mexico (REIA) on May 7, 2021; WRA on May 13, 2021; and the Attorney General, the City, the New Mexico Rural Electric Cooperative Association (NMRECA) on May 14, 2021. No other utilities potentially affected by any precedent established in the Commission's declaratory order in this proceeding moved to intervene.

The Hearing Examiner issued an Order establishing and official service list for this proceeding on May 18, 2021.

On June 7, 2021, initial briefs or briefs in chief ("Br.") were filed by the following parties: PNM; ABCWUA and the County (filing jointly); NEE; CCAE/WRA/REIA (filing jointly); and Staff.

On June 8, 2021, the Attorney General filed a notice of joinder in the positions taken by ABCWUA and the County in their initial brief.

On June 28, 2021, response briefs ("Resp.") were filed by: PNM; ABCWUA and the County (jointly); NEE; CCAE/WRA/REIA (jointly); and NM AREA.

On July 8, 2021, the Hearing Examiner issued an Order establishing procedures and requirements for the oral argument.

On July 15, 2021, an oral argument was conducted in this proceeding. The following counsel entered appearances at the beginning of the oral argument: Raymond Gifford for PNM; Keith Herrmann for ABCWUA; Jeffrey Albright for the County; Mariel Nanasi for NEE; Stephanie Dzur for CCAE; Gideon Elliot for the Attorney General; Jason Marks for REIA; Peter Gould for NM AREA; and Bradford Borman for Staff. Making arguments and standing for the questions of the Hearing Examiner and Commissioner Joseph Maestas were: Mr. Gifford for PNM; Mr. Herrmann jointly for ABCWUA and the County; Ms. Nanasi for NEE; Mr. Marks jointly for CCAE, WRA, and REIA; Mr. Gould for NM AREA; and Mr. Borman for Staff.

On July 26, 2021, the transcript of the July 15, 2021 oral argument ("Tr.") was filed by Cumbres Court Reporting Services, L.L.C.

II. BACKGROUND

A. Appropriateness of a Declaratory Order

Pursuant to 1.2.2.21 NMAC, the Commission rule governing petitions for declaratory orders, the Commission may issue a declaratory order "to terminate a controversy or to remove an uncertainty with respect to the applicability to the petition of any statute or rule administered by the commission or any commission order."[17]

[17] 1.2.2.21(A) NMAC.

In Case No. 05-00352-UT, the Commission granted PNM's petition for a declaratory order to consider, among other things, whether a public utility has discretion to determine whether to acquire renewable energy certificates (RECs) from qualifying facilities and whether it is reasonable and prudent for a public utility to pay for RECs. The Commission found that "[a] clear understanding of the valuation and ownership of RECs is necessary to facilitate the continued development of renewable energy resources and markets serving New Mexico electricity demand."[18]

In Case No. 09-00217-UT, the Commission initiated a declaratory order proceeding on its own motion to determine the legality of arrangements in which a developer installs, owns, and operates or leases a distributed generation (DG) system on a customer's premises and the customer or multiple customers pay the developer a per kilowatt hour (kWh) charge for the energy generated by the system.[19] In short, as the Hearing Examiner summed up in her Recommended Decision, "[t]he evident legal issue in this case is whether, under several general scenarios, a developer is a public utility." Hence, tracking the Commission's determination in Case No. 03-00352-UT, the Hearing Examiner found the declaratory order proceeding appropriate, stating that "a clear understanding of a disputed area of law is necessary to facility the continued development of renewable energy resources and markets serving New Mexico electricity demand."[20]

More recently, in Case No. 20-00240-UT the Commission entered a declaratory order on the petition of New Mexico Gas Company (NMGC) determining that NMGC is not a "public

[18] *In the Matter of Public Service Company of New Mexico's Petition for Declaratory Order Regarding the Purchase of Renewable Energy Certificates from Qualifying Facilities*, Case No. 05-00352-UT, Order Docketing Case, at 4-5, ¶ 8 (Dec. 13, 2005), *culminating in* Final Order Partially Adopting Recommended Decision (Nov. 20, 2008).

[19] *In the Matter of a Declaratory Order Regarding Third-Party Arrangements for Renewable Energy Generation*, Case No. 09-00217-UT, Recommended Decision, at 1, 6 (Oct. 23, 2009), *partially adopted and modified by* Declaratory Order Partially Adopting and Modifying Recommended Decision (Dec. 17, 2019).

[20] Case No. 09-00217-UT, Recommended Decision, at 6.

utility" as that term is used in Section 62-8-12 of the PUA[21] (regarding applications to expand transportation electrification) and, for that reason, is not obligated to file a transportation electrification plan (TEP) and that the intent of the Legislature was to require only public utilities providing electric service to file applications for approval of TEPs with the Commission.[22]

In this case, the Commission found in its Order initiating the proceeding that the legal issues framed in the petitions in Case Nos. 20-00211-UT and 20-00212-UT are appropriate to be resolved through the issuance of a declaratory order "to facilitate consideration of future decoupling applications."[23] Therefore, consistent with Commission's finding, a declaratory order is called for to remove regulatory uncertainty regarding the applicability to future decoupling proposals of the EUEA and PUA provisions implicated by the principal issue the petitioning parties have asked the Commission to resolve, i.e., whether Section 62-17-5(F)(2) of the EUEA mandates full revenue decoupling and by certain associated issues addressed below.

B. Issues Addressed in this Declaratory Order Proceeding

In accordance with the Commission's direction to address the legal issues set forth in the petitions in Case Nos. 20-00211-UT and 20-00212-UT, the issues analyzed in this decision are those raised in the respective petitions of PNM and joint petitioners ABCWUA and the County.[24] Given the significant overlap between the issues as framed in the respective petitions and to avoid unnecessary duplication and confusion,[25] the issues considered below consist of the following:

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[21] NMSA 1978, § 62-8-12 (2019).

[22] *In the Matter of Petition of New Mexico Gas Company, Inc. for a Declaratory Order that NMSA 1978, § 62-8-12 (2019) Does Not Apply to it and it Does Not Have to File an Application for Transportation Electrification*, Case No. 20-00240-UT, Recommended Decision (June 10, 2021), *adopted by* Final Order on Petition for Declaratory Order (Aug. 11, 2021).

[23] Order (Mar. 17, 2021) at 9-10, ¶ 30.

[24] *See supra* n. 9 and accompanying text.

[25] *See* PNM Br. at 2 ("The Joint Petition raised several issues that overlapped in part with PNM's Petition, and the Commission ordered the cases consolidated on March 17, 2021.").

1) Whether Section 62-17-5(F)(2) of the EUEA, read *in pari materia* with related provisions of the EUEA and the PUA, mandates full decoupling of a utility's revenues from volumetric sales;
2) Whether the application of a decoupling mechanism to some rate classes, but not other or all classes, constitutes an "unreasonable preference" in violation of Section 62-8-6 of the PUA;
3) Whether the return-on-equity or capital structure of an applicant utility can be adjusted downward when a petition for decoupling is granted under the EUEA;
4) Whether a standalone petition for decoupling is permitted under the EUEA, or does such a petition violate the principle against single-issue or "piecemeal" ratemaking;
5) Whether a petition for a decoupling mechanism would constitute retroactive ratemaking;
6) 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;
7) Whether a utility may use decoupling to establish an additional customer charge to recover for losses due to increased penetration of DG customers in spite of NMSA 1978, § 62-13-13.2, which allows for the recovery of the costs of ancillary and standby services from "new interconnected customers;" and
8) Pursuant to the Commission's ratemaking authority, should the Commission put PNM and other public utilities on notice of the obligation to perform adequate analysis, which includes the use of timely information and may include continuing updates and that the use of stale information will not be tolerated.

C. Legal Standards Applicable to the Declaratory Order in this Proceeding

1. Section 62-17-5(F) of the EUEA – Commission approval; energy efficiency and load management programs; disincentives.

The principal issue in this declaratory order proceeding hinges on what the Legislature intended when it amended Section 62-17-5(F) of the EUEA in 2019, specifically what it intended in creating the new Subsection F(2) that, in simplified form, provides for the adoption, "upon petition by a public utility," of "a rate adjustment mechanism" to "remove regulatory disincentives." A "before and after" juxtaposition of the statute is instructive. Before Section 62-17-5(F) was amended in 2019, that provision stated:

> F. The commission shall, upon petition or its own motion, identify regulatory disincentives or barriers for public utility expenditures on energy efficiency and load management measures and ensure that they are removed in a manner that balances the public interest, consumers' interests and investors' interests. The commission shall also provide public utilities an opportunity to earn a profit on cost-effective energy efficiency and load management resource development that, with satisfactory program performance, is financially more attractive to the utility than supply-side utility resources.[26]

The 2019 amendments to the EUEA were passed as House Bill (H.B.) 291.[27] Section 62-17-5(F) was substantially revised and divided into four subsections pursuant to H.B. 291. In its current form, Section 62-17-5(F) reads:

> F. The Commission shall:
>
> (1) 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;
>
> (2) 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

[26] NMSA 1978, § 62-17-5(F) (as amended through 2013).

[27] H.B. 291, 54th Leg., 1st Sess. (N.M. 2019), https://www.nmlegis.gov/Sessions/19%20Regular/final/HB0291.pdf.

> 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;
>
> (3) provide public utilities an opportunity to earn a profit on cost-effective energy efficiency and load management resource development that, with satisfactory program performance, is financially more attractive to the utility than supply-side utility resources; and
>
> (4) not reduce a utility's return on equity based on approval of a disincentive removal mechanism or profit incentives pursuant to the Efficient Use of Energy Act.[28]

2. Section 62-17-3 of the EUEA – policy declaration and balancing requirement.

Policy pronouncements in the EUEA also play a role in construing the legislative intent behind the 2019 amendment of Section 62-17-5(F). The policy is stated in Section 62-17-3 (and then repeated in Section 62-17-5(F)(1), as reflected immediately above). Since 2008,[29] the policy has read as follows:

> It is the policy of the Efficient Use of Energy Act that public utilities, distribution cooperative utilities and municipal utilities include all cost-effective energy efficiency and load management programs in their energy resource portfolios, that regulatory disincentives to public utility development of cost-effective energy efficiency and load management be removed in a manner that balances the public interest, consumers' interests and investors' interests and that the commission provide public utilities an opportunity to earn a profit on cost-effective energy efficiency and load management resources that, with satisfactory program performance, is financially more attractive to the utility than supply-side resources.[30]

[28] NMSA 1978, § 62-17-5(F) (as amended through 2020).

[29] A 2008 amendment provided that utilities may be permitted to earn a profit on cost-effective energy efficiency and load management resources that are financially more attractive than supply-side resources.

[30] NMSA 1978, § 62-17-3 (as amended through 2020).

For purposes of this proceeding, the key language in the policy declaration is the "balancing requirement" explained below, i.e., the EUEA's directive that the Commission remove regulatory disincentives to cost-effective energy efficiency and load management (EE/LM) development "in a manner that balances the public interest, consumers' interests and investors' interests."

3. Rate-setting principles enshrined in the PUA and applicable to the EUEA

The Public Utility Act commands, in Section 62-8-1, that "[e]very rate made, demanded or received by any public utility shall be just and reasonable."[31] The New Mexico Supreme Court has long held that the Commission "is vested with considerable discretion in determining the justness and reasonableness of utility rates."[32] The Court also has long emphasized, however, that "[t]o set a just and reasonable rate, the Commission must balance the investor's interest against the ratepayer's interest."[33] The utility seeking a rate increase bears the burden pursuant to Section 62-8-7(A) of demonstrating the increase is just and reasonable.[34]

Consistent with the foregoing rate-setting principles, the Public Utility Act contains in Section 62-3-1 a declaration of policy concerning public utility regulation, including the setting of "fair, just and reasonable" rates:

> B. It is the declared policy of the state that the public interest, the interest of consumers and the interest of investors require the regulation and supervision of public utilities to the end that reasonable and proper services shall be available at fair, just and reasonable rates and to the end that capital and investment may be encouraged and attracted so as to provide for the construction, development and extension, without unnecessary duplication

[31] NMSA 1978, § 62-8-1 (1941).

[32] *Attorney General v. N.M. Pub. Serv. Comm'n*, 1984-NMSC-081, ¶ 12, 101 N.M. 549, 685 P.2d 957; *see id*. *Public Serv. Co. of N.M. v. N.M. Pub. Reg. Comm'n*, 2019-NMSC-012, ¶ 9, 444 P.3d 460 (*PNM v. NMPRC*).

[33] *Timberon Water Co. v. N.M. Pub. Serv. Comm'n*, 1992-NMSC-047, ¶ 29, 114, N.M. 154, 836 P.2d 73 (citing *State v. Mountain States Tel. & Tel. Co.*, 1950-NMSC-055, ¶ 39, 54, N.M. 315, 224 P.2d 155).

[34] NMSA 1978, § 62-8-7(A) (1991, as amended through 2011).

> and economic waste, of proper plants and facilities and demand-side resources for the rendition of service to the general public and to industry.[35]

Embedded in this declaration of policy is a "regulatory compact." The regulatory compact has been addressed in Commission proceedings numerous times before. A concise description of the regulatory compact and the history behind it was given by PNM witness Lauren Azar in her rebuttal testimony in Case No. 19-00018-UT:

> When electric utilities were first emerging in the early 1900s, the states agreed to provide them with protection from competitors if the utilities agreed to provide safe and reliable service at a reasonable cost to all customers within a specified service territory. In return, the utilities agreed that the states could regulate them. This agreement was called the regulatory compact. Under the compact, regulators ensure that the utilities do not abuse their market power as a monopoly. 'The essence of regulation is the explicit replacement of competition with governmental orders as the principal institutional device for assuring good performance.' Alfred Kahn *The Economics of Regulation: Principals and Institutions*, Vol. I. p. 20 (1970). ***The regulatory compact balances the public interest of customers with the business interests of the utility*** through, among other things, the following:
>
> - ensuring that the utility's service and rates are just, reasonable and non-discriminatory; and
> - providing the utilities an opportunity to recover prudently expended costs plus a reasonable return on their investments.
>
> ***The regulatory compact protects both customers and the utilities***.[36]

Under the regulatory compact, in setting rates the Commission is "not bound to the use of any single formula or combination of formulae in determining rates. The rate-making function involves the making of pragmatic adjustments. It is the result reached, not the method employed, which is controlling."[37] The Commission described the "regulatory use of the end result test" in

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[35] NMSA 1978, § 62-3-1(B) (1967, as amended through 2008).

[36] Case No. 19-00018-UT, Rebuttal Testimony of Lauren Azar, PNM Exh. 8, at 9-10 (emphasis added).

[37] *PNM v. NMPRC*, 2019-NMSC-012, ¶ 10 (citing *Mountain States Tel. & Tel. Co. v. N.M. State Corp. Comm'n*, 1977-NMSC-032, ¶ 70, 90 N.M. 325, 563 P.2d 588). *See id. Attorney General of New Mexico v. N.M. Pub. Serv. Comm'n*., 1991-NMSC-028, ¶ 26, 111 N.M. 636, 808 P.2d 606 ("Not only has the AG not contested

(*Cont'd on next page*)

Case No. 2146, Part II, known as the "excess capacity case"[38] involving, among other things, excess capacity problems inhering PNM's ownership interest in the Palo Verde Nuclear Generating Station (PVNGS).[39] The Commission observed that under the end result test

> [t]he Commission should not burden the public with unreasonable or extortionate rates, considering the circumstances of each case, though in some cases the public utility corporation may only pay a meager, or no return on its investment. *There is a zone of reasonableness between confiscation and extortion in which the Commission's jurisdiction to make rates should be confined.*
>
> 'But *regulation does not insure that the business shall produce net revenues, nor does the Constitution require that the losses of the business in one year shall be restored from future earnings* by the device of capitalizing the losses and adding them to the rate base on which a fair return and depreciation allowance is to be earned. [citations omitted] The deficiency may not be thus added to the rate base for the obvious reason that the hazard that the property will not earn a profit remains on the company in the case of a regulated, as well as an unregulated business.'[40]

Thus, consistent with the declared policy of the PUA and longstanding case authority, in setting rates within the zone of reasonableness, the Commission is required to balance the public interest, consumers' interests, and investors' interests.[41]

(*Cont'd from previous page*)

the ultimate rate set in this tripartite case, he has failed even in the prudence case to challenge the $90 million disallowance or the performance standards imposed by the [NMPSC]. This tacit concession on the AG's part that the end result if just and fair illustrates, we think, the virtue and worth of the [NMPSC] final order on prudence.").

[38] *Id*. ¶ 2.

[39] In Case No. 2146, Part II, the Commission allowed the inclusion PVNGS Units 1 and 2 in New Mexico jurisdictional rates, but permanently excluded PVNGS Unit 3 (130 megawatts (or MW)) and 235 MW of coal-fired generating capacity from rate base (thus excluding approximately $384 million of capital costs from PNM's rate base). *In the Matter of the Adjudication of Alternatives to the Inventorying Ratemaking Methodology, and/or Plans for the Phasing in of Public Service Company of New Mexico's Excess Generating Capacity*, Case No. 2146, Part II, Final Order (Apr. 5, 1989), at 109, 116-17, ¶¶ F-I, 1989 N.M. PUC LEXIS 4, *122-*123.

[40] *Id*. at 56, 1989 N.M. PUC LEXIS 4, *58 (quoting *Mountain States Tel. & Tel. Co*., 1950-NMSC-055, ¶ 44, which, in turn, quotes *Federal Power Comm'n v. Nat. Gas Pipeline Co.*, 315 U.S. 575, 590 (1942)) (emphasis added).

[41] *Attorney General of New Mexico v. N.M. Pub. Reg. Comm'n*, 2011-NMSC-034, ¶ 15, 150 N.M. 174, 258 P.3d 435 (*A.G. v. NMPRC*).

Echoing the regulatory compact in a challenge to a Commission rule allowing utilities to recover an adder rate due to reduced usage caused by energy efficiency programs, the New Mexico Supreme Court described the PUA balancing test in its 2011 *A.G. v. NMPRC* decision as follows:

> When determining the investor's interest, the PRC takes into account the utility's interest in recovering its prudently incurred costs and earning a reasonable return on its capital investments. This encourages and attracts capital and investments so as to provide economic service to the general public and to industry, and protects the utility from a violation of due process and taking of property without just compensation. The ratepayer's interest, on the other hand, is to be protected from excessive rates that unjustly burden ratepayers while receiving steady and quality service from the utility.[42]

Looking to "the language of the EUEA to determine whether the Legislature intended a different method of determining whether a rate is 'just and reasonable' when the rate is created under the EUEA[,]" the Court found that the "balancing language" used in both the legislative findings under Section 62-17-2(E)[43] and the declared policy of the EUEA under Section 62-17-3, quoted above,

> is almost identical to the balancing language used under the PUA. Both require the PRC to balance the public interest, consumers' interests, and investors' interests. We read the EUEA in harmony with the PUA to conclude that when the PRC sets a rate, the Legislature intended the balancing requirement of the EUEA to be the same as the balancing done under the PUA to determine just and reasonable rates.[44]

Resultantly, consistent with the Court's finding in *A.G. v. NMPRC*, the balancing requirement the Commission employs in rate-setting determinations is the same under both the PUA and

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[42] *Id.* ¶ 16 (citations and quotations omitted). The Court's internal citations were to *In re PNM Gas Servs.*, 2000-NMSC-012, ¶¶ 8, 129 N.M. 1, 1 P.3d 383. Immediately after the passage quoted above, the Court quoted in support of the balancing test *Mountain States Tel. & Tel. Co*., 54 N.M. at 330-31, 224 P.2d at 170-71 ("The [PRC] should not burden the public with unreasonable or extortionate rates, considering the circumstances of each case . . . .") and *Behles v. N.M. Pub. Serv. Comm'n (In re Timberon Water Co.),* 114 N.M. 154, 161, 836 P.2d 73, 80 (1992) ("There is a significant zone of reasonableness . . . between utility confiscation and ratepayer extortion.").

[43] The legislative findings provision, Section 62-17-2, was repealed in its entirety pursuant to H.B. 291, but the policy provision, Section 62-17-3, was left intact.

[44] *A.G. v. NMPRC*, 2011-NMSC-034, ¶¶ 14-15.

the EUEA. Whether the balancing requirement applies to decoupling proposals under Section 62-17-5(F)(2) of the EUEA is a key contested issue analyzed and determined in Section III.A.2 below.

Incidentally, as the Commission noted in Case No. 19-00018-UT, the Legislature established the general framework for setting and changing all utility rates in Sections 62-3-1(B) (quoted above), 62-8-1,[45] and 62-8-7[46] of the Public Utility Act. Thus, "that framework," the Commission observed, "applies whether the Commission is exercising its rate-making authority pursuant to the Renewable Energy Act, the Efficient Use of Energy Act, or the [Energy Transition Act]."[47]

4. Section 62-8-6 of the Public Utility Act – discrimination.

The second issue addressed below is whether the application of a decoupling mechanism to some rate classes, but not others, constitutes an "unreasonable preference" in violation of Section 62-8-6 of the PUA. That provision of the PUA states, in its entirety,

> No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any corporation or person within any classification or subject any corporation or person within any classification to any unreasonable prejudice or disadvantage. No public utility shall establish and maintain any unreasonable differences as to rates of service either as between localities or as between classes of service. Nothing shall prohibit, however, the commission from approving economic development rates and rates designed to retain load or from approving energy efficiency programs designed to reduce the burden of energy costs on low-income customers pursuant to the Efficient Use of Energy Act.[48]

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[45] NMSA 1978, § 62-8-1 (1941) ("Every rate made, demanded or received by any public utility shall be just and reasonable.").

[46] NMSA 1978, § 62-8-7 (1991, as amended through 2011) (entitled "Change in Rates").

[47] Case No. 19-00018-UT, *Recommended Decision on Financing Order*, at 89 and n. 215, *adopted by* Final Order (Apr. 1, 2020) (citing, in n. 215, the following cases: *Otero County Elec. Coop., Inc. v. N.M. Pub. Serv. Comm'n,* 108 N.M. 462, 464, 774 P.2d 1050, 1052 (1989). *See e.g., N.M. Indus. Energy Consumers (NMIEC) v. N.M. Pub. Reg. Comm'n*, 2007-NMSC-053, ¶¶ 21-23, 142 N.M. 533, 168 P.3d 105 (finding the ratemaking process is the same under the PUA and the Renewable Energy Act).

[48] NMSA 1978, § 62-8-6 (1941, as amended through 2008).

5. Section 62-13-13.2 of the Public Utility Act – Interconnected customers; utility cost recovery.

Another contested issue raised in the Joint Petition of ABCWUA and the County is whether a utility may use full decoupling to establish an additional customer charge to recover for losses due to increased penetration of distributed generation (DG) customers in spite of Section 62-13-13.2 of the PUA. That section states, in pertinent part, "Upon request of an investor-owned utility in any general rate case, the commission shall approve interconnected customer rate riders to recover the costs of ancillary and standby services pursuant to this section only for new interconnected customers."[49] An interconnected customer is defined in the statute as a "utility customer that is also interconnected to non-utility distributed generation facilities,"[50] and a "new interconnected customer" is one that "became interconnected after December 31, 2010" or "whose renewable energy certificate purchase agreement entered into prior to January 1, 2011 is no longer in effect."[51] Ancillary and standby services are those "essential to maintain electric system reliability and are required as a consequence of interconnecting distributed generation facilities system and may include, among other services, regulation and frequency response, regulation and voltage support, spinning reserves and supplemental reserves."[52]

6. Commission's Authority to Perform Statutory Construction

The construction of statutes the Commission is charged with implementing like those summarized above is a necessary and appropriate exercise of Commission authority.[53] When engaged in statutory construction in the context of matters that the Legislature has delegated to this

[49] NMSA 1978, § 62-13-13.2 (2010).

[50] § 62-13-13.2(D)(2).

[51] § 62-13-13.2(D)(3).

[52] § 62-13-13.2(D)(1).

[53] *See County of Bernalillo v. N.M. Pub. Reg. Comm'n (In re Adjustments to Franchise Fees Required by Electric Utility Restructuring Act of 1999)*, 2000-NMSC-035, ¶ 19, 129 N.M. 787, 14 P.3d 525.

agency, the Commission must interpret legislative language in a reasonable manner consistent with legislative intent, "in order to develop the necessary policy to respond to unaddressed or unforeseen issues."[54] Accordingly, "[w]hen an agency," like the Commission, "that is governed by a particular statute construes or applies that statute, a reviewing court will give some deference to the agency's interpretation."[55]

However, the level of deference afforded the Commission by a reviewing court is contingent upon the nature of the question before the Commission:

> When reviewing administrative agency decisions courts will begin by looking at two interconnected factors: whether the decision presents a question of law, a question of fact, or some combination of the two; and whether the matter is within the agency's specialized field of expertise.[56]

When the matter is a question of fact, the court will generally defer to the agency, particularly if the factual issue concerns a matter in which the agency has specialized expertise, such as utility rate determinations, which are accorded "considerable deference."[57] The court will review the evidence in the light most favorable to the agency decision and will employ a whole record review to determine if the agency's factual determination is supported by substantial evidence.[58]

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[54] *City of Albuquerque v. N.M. Pub. Reg. Comm'n* (*NMPRC*), 2003-NMSC-028, ¶ 16, 134 N.M. 472, 79 P.3d 297.

[55] *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 11, 120 N.M. 579, 904 P.2d 28.

[56] *Id*. ¶ 10.

[57] *Public Serv. Co. of N.M. v. N.M. Pub. Reg. Comm'n*, 2019-NMSC-012, ¶ 14, 444 P.3d 460 (*PNM v. NMPRC*).

[58] *Morningstar Water Users Ass'n*, 1995-NMSC-062, ¶ 12. *See id. PNM v. NMPRC*, 2019-NMSC-012, ¶ 14 (noting that substantial evidence "requires that there is evidence 'that is credible in light of the whole record and that is sufficient for a reasonable mind to accept the conclusion reached by the agency.'") (Quoting *Att'y Gen. of N.M. v. N.M. Pub. Util. Comm'n (In re Comm'n's Investigation of the Rates for Gas Serv. of PNM Gas Servs.)*, 2000-NMSC-008, ¶ 4, 128 N.M. 747, 998 P.2d 1198).

When the question is purely a question of law, such as whether an agency has jurisdiction over the parties or the subject matter, the court "'will reverse the agency's interpretation if it is unreasonable or unlawful' and generally give little deference to the Commission's construction of statutes."[59] The court, however, will accord "some deference to the Commission's interpretation of its own governing statute" and will confer a "confer a heightened degree of deference to legal questions that implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function."[60] Still, "the court is not bound by the agency's interpretation and may substitute its own independent judgment for that of the agency because it is the function of the courts to interpret the law."[61]

7. Canons of statutory construction

Having confirmed the Commission's authority to interpret statutes, construe the language of the EUEA and PUA provisions implicated, and resolve the issues presented in a declaratory order, remaining to be described are the major principles of statutory construction the Commission should employ in attempting to interpret the statutory language implicated in this proceeding.

In construing statutes, the Commission's "guiding principle is to determine and give effect to legislative intent."[62] To glean the Legislature's intent, the Commission is "aided by classic canons of statutory construction."[63] In New Mexico law, there are "two themes or approaches . . .

[59] *PNM v. NMPRC.*, 2019-NMSC-012, ¶ 15 (quoting *NMIEC*, 2007-NMSC-053, ¶ 19).

[60] *Id*. (quoting *Morningstar Water Users Ass'n*, 1995-NMSC-062, ¶ 11).

[61] *Id*.

[62] *NMIEC*, 2007-NMSC-053, ¶ 20 (citing *Pub. Serv. Co. of N.M. v. N.M. Pub. Util. Comm'n (PUC)*, 1999-NMSC-040, ¶ 18, 128 N.M. 309, 992 P.2d 860).

[63] *NMIEC*, 2007-NMSC-053, ¶ 20.

relating to how a court [and, by extension, the Commission] performs the task of applying a statute when the parties to a case disagree over the statute's meaning."[64]

The first approach, relied on as discussed below by both the proponents and opponents of finding a full decoupling rate mechanism in Section 62-17-5(F)(2), is often simply called the "plain meaning" rule. Pursuant to the plain meaning rule, "statutes are to be given effect as written and, where they are free from ambiguity, there is no room for construction; where the meaning of the statutory language is plain, and words used by the legislature are free from ambiguity, there is no basis for interpreting the statute[.]"[65] Under this approach, the Commission should not "depart from the plain wording of a statute, unless it is necessary to resolve an ambiguity, correct a mistake or an absurdity that the Legislature could not have intended, or to deal with an irreconcilable conflict among statutory provisions."[66]

Under the second "rejection-of-literal-language" approach, "where the language of the legislative act is doubtful or an adherence to the literal use of words would lead to injustice, absurdity or contradiction, the statute will be construed according to its obvious spirit or reason, even though this requires the rejection of words or the substitution of others."[67] Parenthetically, a "statute is ambiguous if reasonably informed persons can understand the statute as having two or more meanings."[68]

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[64] *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 2, 117 N.M. 346, 871 P.2d 1352. Chief Justice Montgomery proceeded to observe that the two "approaches, though probably intended to be complementary, often seem to work at cross purposes and to call for different answers to the question." *Id*.

[65] *Gallegos*, 1994-NMSC-023, ¶ 2 (internal quotation marks and citation omitted).

[66] *Regents of Univ. of N.M. v. N.M. Federation of Teachers*, 1998-NMSC-020, ¶ 28, 125 N.M. 401, 962 P.2d 1236.

[67] *Gallegos*, 1994-NMSC-023, ¶ 3 (internal quotation marks and citation omitted).

[68] *Bd. Of Educ. v. N.M. State Dep't of Pub. Educ.*, 1999-NMCA-156, ¶ 18, 128 N.M. 398, 993 P.2d 112.

Although, at first blush, the two interpretive doctrines just summarized – "plain and unambiguous meaning" and "rejection-of-literal-language" – appear contradictory, as explained by Chief Justice Seth Montgomery in *Gallegos*, "the two approaches, correctly understood, can be viewed as complementary[.]"[69] That is, "if the meaning of a statute is truly clear – not vague, uncertain, ambiguous, or otherwise doubtful – it is of course the responsibility of the judiciary to apply the statute as written and not to second-guess the legislature's selection from among competing policies or adoption of one of perhaps several ways of effectuating a particular legislative objectives."[70] However, Chief Justice Montgomery advised,

> courts must exercise caution in applying the plain meaning rule. Its beguiling simplicity may mask a host of reasons why a statute, apparently clear and unambiguous on its face, may for one reason or another give rise to legitimate (i.e., nonfrivolous) differences of opinion concerning the statute's meaning. In such a case, it can rarely be said that the legislation is indeed free from all ambiguity and is crystal clear in its meaning. While – as in this case – one part of the statute may appear absolutely clear and certain to the point of mathematical precision, lurking in another part of the enactment, or even in the same section, or in the history and background of the legislation, or in an apparent conflict between the statutory wording and the overall legislative intent, there may be one or more provisions giving rise to genuine uncertainty as to what the legislature was trying to accomplish. In such a case, it is part of the essence of judicial responsibility to search for and effectuate the legislative intent – the purpose or object – underlying the statute.[71]

In addition, the Commission should strive to read related statutes in harmony so as to give effect to all provisions:

> In ascertaining legislative intent, the provisions of a statute must be read together with other statutes in pari materia under the presumption that the legislature acted with full knowledge of relevant statutory and common law. . . . Thus, two statutes covering the same subject matter should be harmon-

[69] *Gallegos*, 1994-NMSC-023, ¶ 22.

[70] *Id*.

[71] *Id*. ¶ 23.

> ized and construed together *when possible*, in a way that facilitates their operation and the achievement of their goals.[72]

Similarly, "where several sections of a statute are involved, they must be read together so that all parts are given effect."[73] As a consequence, the reviewing court will be "disinclined to construe a statute to create conflicts between its provisions rather than resolve them."[74] Moreover, a "'statutory subsection may not be considered in a vacuum but must be considered in reference to the statute as a whole and in reference to statutes dealing with the same general subject matter.'"[75] In addition, it is presumed "that the Legislature was informed as to existing law, and that the Legislature did not intend to enact a law inconsistent with any existing law."[76]

In addition to parsing the language of an ambiguous statutory provision, the court also considers the statute's history and background[77] as well as the practical implications and legislative purpose of the statute.[78] The court, therefore, will examine "the overall structure of the statute and

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[72] *NMIEC*, 2007-NMSC-053, ¶ 20 (quoting *State ex rel. Quintana v. Schnedar*, 115 N.M. 573, 575-76, 855 P.2d 562, 564-65 (1993) (emphasis in original) (citations omitted). *See Benavidez v. Sierra Blanca Motors,* 1996-NMSC-045, ¶ 18, 122 N.M. 209, 922 P.2d 1205 ("Therefore, when several statutes relate to the same subject matter, we will, if possible, construe them so as to give effect to every relevant provision.").

[73] *Marbob Energy Corp. v. N.M. Oil and Conservation Comm'n*, 2009-NMSC-013, ¶ 11, 146 N.M. 24, 206 P.3d 135 (quoting *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1998-NMSC-50, ¶ 5, 126 N.M. 413, 970 P.2d 599). *See Bishop v. Evangelical Good Samaritan Soc'y*, 2009-NMSC-036, ¶ 11, 146 N.M. 473, 212 P.3d 361 ("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.").

[74] *Marbob Energy Corp.*, 2009-NMSC-013, ¶ 18 (citing *El Paso Electric Co. v. Real Estate Mart, Inc*., 1979-NMSC-023, ¶ 13, 92 N.M. 581, 592 P.2d 181 for "[i]t is the duty of the court, so far as practicable, to reconcile different provisions so as to make them consistent, harmonious, and sensible.").

[75] *Id*. (quoting 2A Norman J. Singer, *Statutes and Statutory Construction*, § 46:05, at 165 (6th ed., rev. 2000)).

[76] *Pub. Serv. Co. v. N.M. PUC*, 1999-NMSC-040, ¶ 25.

[77] *State v. Smith*, 2004-NMSC-032, ¶ 10, 136 N.M. 372, 98 P.3d 1022.

[78] *Bishop*, 2009-NMSC-036, ¶ 11.

its function in the comprehensive legislative scheme."[79] Thus, when a statute is ambiguous, the court "may consider the clear policy implications of its various constructions."[80]

Accordingly, reading the statutory provisions of the EUEA and PUA implicated *in pari materia*,[81] the Commission must construe the provisions to give effect to every relevant provision and consider the significant policy implications of the various constructions advanced in this proceeding.[82]

III. DISCUSSION

A. Whether Section 62-17-5(F)(2) of the EUEA Mandates Full Revenue Decoupling

The principal issue to be addressed in this proceeding is whether Section 62-17-5(F)(2) of the EUEA mandates full decoupling of a utility's revenues from its sales when read *in pari materia* with other provisions of the EUEA and the PUA. Full decoupling, which as noted above, severs the connection between a utility's sales and revenues no matter the reason for variation in the utility's sales, has been likened to setting a budget for the utility. As explained in a widely read article on the subject by the Regulatory Assistance Project (RAP), "in its essential, fullest form," decoupling

> insulates a utility's revenue collections from any deviation of actual sales from expected sales. The cause of the deviation – e.g., increased investment in energy efficiency, weather variations, changes in economic activity – does not matter. Any and all deviations will result in an adjustment ('true-up') of collected utility revenues with allowed revenues. The focus here is delivering revenue to match the revenue requirement established in the last rate case.

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[79] *Smith*, 2004-NMSC-032, ¶ 10.

[80] *Id*.

[81] *Miller v. Bank of America, N.A.*, 2015-NMSC-022, ¶ 18, 352 P.3d 1162, 1168 ("Whenever possible, we will read statutes in harmony, to give effect to all provisions.").

[82] *Benavidez v. Sierra Blanca Motors*, 1996-NMSC-045, ¶ 18, 122 N.M. 209, 213, 922 P.2d 1205, 1209 ("Therefore, when several statutes relate to the same subject matter, we will, if possible, construe them so as to give effect to every relevant provision.").

> Full decoupling can be likened to the setting of a budget. Through currently used rate-case methods, a utility's revenue requirement – i.e., the total revenues it will need in a period (typically, a year) to provide safe, adequate, and reliable service – is determined. The utility then knows exactly how much money it will be allowed to collect, no more, no less. Its profitability will be determined by how well it operates within that budget. Actual sales levels will not, however, have any impact on the budget.[83]

"Decoupling," as described by a state commission with experience implementing decoupling mechanisms, "is a ratemaking and regulatory tool intended to break the link between a utility's recovery of fixed costs and a consumer's energy consumption by reducing the impact of energy consumption on a utility's recovery of its fixed costs. Conservation advocates view decoupling as an important tool to promote greater conservation efforts by the utility by removing financial disincentives."[84] That commission, the Washington Utilities and Transportation Commission (WUTC), proceeded to explain that:

> [u]nder traditional ratemaking structures, utilities recover a large portion of their fixed costs through charges based on the volume of energy that consumers use. Consequently, a reduction in energy consumption may lower the probability that the utility can fully recover its fixed costs. Energy consumption may be lower for a variety of reasons. Consumers may lower their thermostats or take shorter showers. More energy efficient building codes and appliances, better and more efficient insulation, and warmer than normal weather can also reduce energy use. Conversely, an increase in energy consumption may lead to a utility over-recovering its fixed costs. The traditional financial incentives rewarding higher sales, some argue, create an environment in which utilities do not support conservation because it is inconsistent with their economic interests.[85]

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[83] *See* Regulatory Assistance Project (RAP), *Revenue Regulation and Decoupling: A Guide to Theory and Application*, at 11 (Nov. 2016), https://www.raponline.org/wp-content/uploads/2016/11/rap-revenue-regulation-decoupling-guide-second-printing-2016-november.pdf.

[84] *In the Matter of the Petition of Avista Corp. d/b/a Avista Utilities for an Order Authorizing Implementation of a Natural Gas Decoupling Mechanism and to Record Accounting Entries Associated with the Mechanism*, WUTC Docket UG-060518, Order 04 (Feb. 1, 2007), 2007 Wash. UTC LEXIS 55, *3.

[85] *Id*. 2007 Wash. UTC LEXIS 55, *3-*4.

1. Parties' positions

Several parties – PNM and CCAE/WRA/REIA, – read Section 62-17-5(F)(2) to compel the Commission to approve a request for full revenue decoupling; several others – joint petitioners ABCWUA and the County, the Attorney General,[86] New Energy Economy, and NM AREA – insist it does not. Staff, meanwhile, acknowledging that the Section 62-17-5(F)(2) seemingly requires the Commission to approve a decoupling mechanism while also emphasizing the balancing requirement engrained in the EUEA policy, takes a nuanced approach in ultimately urging the Commission to tread carefully in considering "the impacts on utility ratepayers prior to adopting PNM's requested decoupling proposal."[87] The parties' positions are set forth below followed by the Hearing Examiner's analysis and determination of the central issue in this case.

The proponents of full decoupling assert that Section 62-17-5(F)(2) of the EUEA plainly and unambiguously contemplates a rate adjustment mechanism that would accomplish full revenue decoupling. They claim that their interpretations are supported by a plain meaning reading of the statute.[88] PNM further argues its reading of Section 62-17-5(F)(2) is illuminated by the regulatory backdrop against which the Legislature amended the EUEA in 2019[89] and the distinct and more limited decoupling approach provided in the subsection preceding it.[90] CCAE/WRA/REIA also advocate certain policy reasons behind the full decoupling mechanism they perceive the Legislature as having mandated in Section 62-17-5(F)(2).[91]

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[86] As noted above, the Attorney General's positions are reflected in his notice of joinder in the initial brief of Joint Petitioners ABCWUA and the County.

[87] Staff Br. 4.

[88] PNM Br. 3, 5-6; PNM Resp. 4-5; CCAE/WRA/REIA Br. 2-3; CCAE/WRA/REIA Resp. 4-5.

[89] PNM Br. 4-5; CCAE/WRA/REIA Br. 9-10.

[90] PNM Br. 7; PNM Resp. 5; CCAE/WRA/REIA Br. 3-4.

[91] CCAE/WRA/REIA Br. 5-6.

PNM, for its part, states that until 2019 the Commission had consistently interpreted Section 62-17-5(F)(1) as not authorizing full revenue decoupling. First, PNM notes that 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.[92] Similarly, PNM points out that in adjudicatory proceedings the Commission had uniformly rejected full revenue decoupling under the former Section 62-17-5(F) – now Subsection (F)(1) – finding that proposals broached under 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).[93] Then, in a proceeding involving SPS, the Commission again held: "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."[94] Additionally, PNM notes, in its 2015 Rate Case (15-00261-UT) the Commission likewise rejected PNM's 2015 Revenue Balancing Account (RBA) decoupling proposal as overly broad.[95]

[92] PNM Br. 4 (citing *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. 513*, Case No. 15-00261-UT ("2015 Rate Case"), Corrected Recommended Decision (Aug. 15, 2016), 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).

[93] *Id*. (citing Corrected Recommended Decision, Case No. 15-00261-UT, at 263 for: "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)).

[94] *Id*. (citing Corrected Recommended Decision, Case No. 15-00261-UT, at 265, for quoting Case No. 10-00197-UT, Final Order Disapproving Certification of Stipulation and Denying Application Without Prejudice, ¶ 6 (Nov. 10, 2011)).

[95] *Id.* (citing Case No. 15-00261-UT, Final Order Partially Adopting Corrected Recommended Decision, (Sept. 28, 2016), at 82, ¶ 239).

Against this backdrop, PNM states that in 2019 the Legislature added, among other amendments to Section 62-17-5(F) delineated above,[96] Section 62-17-5(F)(2). PNM argues, along with CCAE/WRA/REIA, that Section 62-17-5(F)(2)'s clear and unambiguous meaning demonstrates that full revenue decoupling mechanisms are now not only authorized, but categorically mandated.[97] Although Section 62-17-5(F)(2) may not include the precise words "full decoupling," PNM maintains it describes that exact concept. The first sentence of Subsection (F)(2) 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." PNM reasons that only a full revenue decoupling mechanism could achieve what the emphasized language provides (i.e., that revenue per customer bears no relationship – "without regard" – to the quantity of sales).[98] In contrast, PNM notes, 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 (such as weather or the impacts of a global pandemic), customers' potential decision to conserve energy unrelated to an energy efficiency program (e.g., conservation resulting from appeals by environmental or conservation groups), and other energy efficiency increases resulting from improvements in codes and standards (that PNM claims a utility would have an incentive to oppose absent decoupling). PNM asserts what it terms the amended provision's "clear language" authorizes a utility to recover a revenue per customer "without regard" to volumetric

[96] *See* Section II.C.1 above.

[97] PNM Br. 5; CCAE/WRA/REIA Br. 2.

[98] PNM Br. 5 (citing RAP article quoted *supra*, *Revenue Regulation and Decoupling: A Guide to Theory and Application*, at 11).

sales, thus severing the link between sales and revenues. "That," PNM submits, "is full revenue decoupling."[99]

PNM next asserts that 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. Section 62-17-5(F)(2), according to PNM, provides broadly and without qualification that a specified revenue per customer may be recovered without regard to the quantity of electricity sold. Given the "broad language," PNM argues there is nothing to support a construction that Subsection (F)(2) only applies to specific disincentives to pursuing energy efficiency or load management and interpreting it with such a restriction would require reading words into the statute that are not there.[100]

Furthermore, PNM argues that reading Section 62-17-5(F)(2) alongside Section 62-17-5(F)(1) further reinforces the company's construction of Subsection (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, PNM points out that unlike Section 62-17-5(F)(2), Section 62-17-5(F)(1) explicitly provides for removal of regulatory disincentives "for expenditures on energy efficiency and load management measures." Noting that, as described above, the Commission has consistently interpreted this language to limit utilities to seeking recovery only for revenues lost through energy efficiency and load management programs, no such

[99] PNM Br. 5-6.

[100] PNM Br. 6 (quoting the Commission's Fiscal Impact Report (FIR) for House Bill 291, at 3, https://nmlegis.gov/Sessions/19%20Regular/firs/HB0291.PDF, PNM also observes that "[g]iven the unambiguous text, it is no surprise that the Commission itself described the effect of Section 62-17-5(F)(2) as follows: '[t]his bill essentially directs the Commission to approve a rate adjustment mechanism which decouples the revenue per customer from the quantity of electricity actually sold by the customer [*sic*], upon petition by a public utility for removal of regulatory disincentive pursuant to the EUEA.'").

limitation applies in Section 62-17-5(F)(2).[101] Moreover, PNM contends, the Legislature demonstrated it knew how to write such limitations; it did so in Section 62-17-5(F)(1); it did not do so in Section 62-17-5(F)(2). The negative inference to be drawn, PNM suggests, is that the Legislature intended not to include such limitations.[102]

Finally, PNM posits that 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.[103] PNM, thus, asserts "the correct interpretation requires reading Section 62-17-5(F)(2) as a complement to – and not a restatement of – (F)(1). The Legislature would not have enacted Section 62-17-5(F)(2) were it just a restatement of what Section (F)(1) already provided."[104] PNM posits that even if the "regulatory disincentives" in Subsection (F)(2) "are construed to only be those related to energy efficiency and load management, (F)(2) unambiguously prescribes the method for removing such incentives – namely, by completely severing the connection between per-customer revenue and volumetric sales."[105]

Therefore, PNM concludes, "because the Commission must give effect to Section 62-17-5(F)(2)'s plain meaning, the Commission must follow this legislative *command*"[106] and approve

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[101] PNM Br. 7.

[102] *Id*. (citing *Patterson v. Globe American Casualty Co.*, 1984-NMCA-076, ¶ 10, 101 N.M. 541, for: "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.").

[103] PNM Br. 7-8 (citing *Martinez v. Public Employees Retirement Association*, 2012-NMCA-096, ¶ 34, 286 P.3d 613, and *also* NMSA 1978, § 12-2A-10(A) (1997), which provides that statutes must be construed to give effect to each, but later-enacted statute governs if conflict is irreconcilable).

[104] PNM Br. 8. For the same reason, PNM later agues the argues the Commission need not conduct a balancing of interests when approving decoupling. *See* PNM Br. 19-20.

[105] PNM Br. 8.

[106] PNM Resp. 4 (citing *State ex rel. Egolf v. N.M. Pub. Reg. Comm'n*, 2020-NMSC-018, ¶ 33, 476 P.3d 896, for the proposition that the Commission may not infringe upon the Legislature's lawmaking authority) (emphasis added).

public utility requests to implement full rate decoupling mechanisms, full stop. This is no exaggeration, because as CCAE/WRA/REIA emphasize,

> [t]his mandatory ("The Commission shall…") language instructs the Commission that it must 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. This language leaves *no discretion* to the Commission as to whether it can consider *some* of the quantities of electricity or gas sold, as would be the case with limited decoupling. The Commission cannot consider changes in quantities sold due to fluctuations in weather, changes in the economy or any other factor that affects the quantity of electricity or natural gas sold, as would occur with limited decoupling. "Without regard" is unequivocal language saying the Commission cannot consider whether changes in the quantity of electricity or natural gas sold were due to energy efficiency programs or due to other reasons.[107]

"This is," CCAE/WRA/REIA resolve, "full decoupling."[108]

Closing the proponent's case for reading Section 62-17-5(F)(2) to mandate full decoupling, CCAE/WRA/REIA relate there are "good policy reasons for the Legislative mandate of full decoupling instead of limited decoupling," which they call a lost revenue adjustment mechanism (LRAM).[109] An LRAM, they explain, compensates a utility for lost revenues due to utility-run energy efficiency programs, but does not refund money to customers when revenues increase due to other factors such as weather or changes in building codes or appliance standards. An LRAM,

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[107] CCAE/WRA/REIA Br. 4 (emphasis in original).

[108] *Id*.

[109] CCAE/WRA/REIA Br. 5 (They note that according to the RAP article cited above, the most common form of full decoupling is "revenue-per-customer decoupling," but that limited decoupling is not, quoting Section 62-17-5(F)(2) with emphasis, "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." CCAE/WRA/REIA state that limited decoupling "gives regard to quantities of electricity sold based on the reason for the revenue variation. It differentiates between changes in sales quantities sold due to energy efficiency programs versus weather and other reasons and would compensate the utility for the former but not make adjustments (up or down) for the latter." *Id*. Thus, from CCAE/WRA/REIA's perspective, limited decoupling would violate the legislative language in Subsection (F)(2)).

therefore, is "an asymmetric procedure that results only in rate increases, never refunds, and has a potential for overearnings."[110] CCAE/WRA/REIA also contend it does not eliminate the "throughput" incentive[111] problem, whereby a utility's revenues are a function of volumetric sales and its profits can be harmed or enhanced by changes in sales.[112] An LRAM, they conclude, does not adequately remove regulatory disincentives, a legislative goal set forth in Section 62-17-5(F)(1).[113]

The opponents of full decoupling take a diametrically opposed approach to what Section 62-17-5(F)(2) provides and represents.

ABCWUA and the County (a/k/a the "Joint Petitioners") maintain that, reading 62-17-5(F) *in pari materia* with the entire EUEA, there is no mention that the disincentive removal mechanism should include anything other than revenues lost due to energy efficiency and load management measures. A plain reading of Section 62-17-5(F), ABCWUA and the County contend, requires that the Commission or utility shall: (1) identify regulatory disincentives or barriers for public utility expenditures based on energy efficiency and load management measures; (2) remove them pursuant to a mechanism under the EUEA in a manner that balances the public interest, consumers' interests, and investors' interests; and (3) not reduce the return on equity (ROE) based on approval of the mechanism.[114] They submit that their interpretation of Section 5(F) provides "a straightforward process to implement the policy codified in the EUEA and also

[110] CCAE/WRA/REIA Br. 5.

[111] *Id*.

[112] RAP, *Revenue Regulation and Decoupling: A Guide to Theory and Application*, at 12. In the preface to article, the RAP states that "Simply put, under traditional regulation, utilities make more money when they sell more energy. This concept is at odds with explicit public policy objectives that utility and environmental regulators are charged with achieving, including economic efficiency and environmental protection. This throughput incentive problem, as it is called, can be solved with decoupling." *Id*. at iv.

[113] CCAE/WRA/REIA Br. 5.

[114] Jt. Petitioner Br. 6.

provides guidance as to how the Commission may balance the interests of ratepayers and the utility."[115]

ABCWUA and the County make four principal arguments. First, they assert every rule of statutory construction dictates against PNM's interpretation. Applying the plain meaning rule, ABCWUA and the County submit that although the Legislature did not define "regulatory disincentives" in the EUEA, the term is used consistently throughout the act. The Joint Petitioners read every part of the EUEA as emphasizing the need and support for energy efficiency and load management programs. And, reading Section 62-17-5(F) to provide the methodology for the Commission to effectuate those programs without harm to the utility, they maintain that adding a new and unrelated interpretation of the reasons (practically any – ranging from the weather, economic conditions, or a global pandemic) for which costs can be recouped destroys the continuity of the statutory structure and introduces an absurd exception.[116]

Second, ABCWUA and the County argue that a careful construction of the grammatical structure of the four subsections of Section 62-17-5(F) of the EUEA reinforces the conclusion that the isolated subsection that the proponents of full decoupling rest their entire argument, Subsection (F)(2), cannot be separated from or given a different interpretation outside energy efficiency or load management programs. They note that "[e]ach subsection follows its predecessor, and all are separated by a semicolon, with (F)(3) followed by the conjunction 'and'. These subsections are to be construed together as a whole like every other part of the statute. Semicolons separating the subsections indicate that the provisions comprise a list of items of equal or similar importance."[117]

[115] Jt. Petitioner Br. 6-7.

[116] Jt. Petitioner Br. 7-9.

[117] Jt. Petitioner Br. 10.

But, to agree with PNM's position, the Joint Petitioners submit that the Commission would have to:

a. believe the term "regulatory disincentives" as used in Section 62-17-5(F)(2) means something different that the same term found in Section 62-17-5(F)(1);
b. interpret Section 62-17-5(F)(2) in a manner entirely inconsistent with the purpose of the EUEA as noted in the policy provision set forth in Section 62-17-3;
c. build upon that flawed interpretation of the EUEA in a manner that shifts all risk of collecting PNM's fixed costs (costs that are wholly unrelated to its energy efficiency and load management programs) to ratepayers in violation of a core principle of cost-of-service regulation enshrined in the PUA; and
d. base the erosion of well-established regulatory principles on a finding that the Legislature decided to fundamentally alter the intent and purpose of the PUA and EUEA by use of a narrowly written subsection of a provision within the EUEA.[118]

If PNM and the other proponents' position were legally correct, ABCWUA and the County warn that the Commission would lose the fundamental power granted to it by the PUA to ensure that services of public utilities are available at just and reasonable rates and the EUEA to ensure that regulatory disincentives to public utility development of cost-effective energy efficiency and load management be removed in a manner that balances the interests of consumers, the public, and investors.[119]

Instead, the Joint Petitioners assert the Commission must construe Section 62-17-5(F) along with all its subparts, which they view as integral to each other for the following reasons:

[118] Jt. Petitioner Br. 10-11.

[119] Jt. Petitioner Br. 11.

a. the sponsors of H.B. 291 introduced the proposed legislation as amendments to Section 62-17-5 as a whole; thus, the Legislature considered the existing language along with the proposed deletions and amendments;

b. Section 62-17-5(F) begins with the phrase, "The commission shall: …" followed by four numbered clauses, each followed by a semicolon, and the penultimate clause by the word, "and" – thus, Section 62-17-5(F) is one long, single sentence with six subparts;

c. integral to the meaning of Section 62-17-5(F), the Legislature used the term "regulatory disincentives" in Subsection (F)(1) to describe "barriers for public utility expenditures on energy efficiency and load management measures";

e. integral to the implementation of Section 62-17-5, the Legislature described the method for removing "regulatory disincentives" in Subsection (F)(2), i.e., "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 …."; and

f. integral to the further implementation of Section 62-17-5, the Legislature required in Subsections (F)(3) and (F)(4) that the utilities are afforded the "opportunity to earn a profit on cost effective energy efficiency and load management resources" and "not reduce a utility's return on equity based on approval of a disincentive removal mechanism… pursuant to the [EUEA]."[120]

Third, ABCWUA and the County argue that if the Commission were to interpret Subsection (F)(2) in isolation from the other essential parts of 62-17-5(F), it would render

[120] Jt. Petitioner Br. 11-13.

Subsections (F)(1) and (F)(4) mere surplusage. The Joint Petitioners note that when the Legislature substantially amended Section 62-17-5(F), it could easily have revised or removed the former Section 5(F) had that been the intent, but it chose not to, noting that the Legislature and New Mexico courts generally disfavor "repeal by implication" and the construe statutes harmoniously and that repeal by implication is only permissible when the new statute is "repugnant to the former law on the same subject as to be irreconcilable with it."[121] Instead, the Legislature placed the language formerly in Section 5(F) in new Subsection 5(F)(1) because, Joint Petitioners assert, it is key to understanding and interpreting the subsequent subsections. Without the definition of regulatory disincentives found in Section 62-17-5(F)(1), they conclude, the term "regulatory disincentives" found in Section 62-17-5(F)(2) is meaningless.[122]

Rather, the Joint Petitioners believe the proper interpretation (neither repugnant nor irreconcilable) of Section 62-17-5(F) is that Subsection (F)(1) explains the intent and purpose of decoupling under the EUEA and the language in that subsection must be read harmoniously with the stated policy of the EUEA contained in Section 62-17-3. That stated intent and purpose, in turn, Joint Petitioners postulate, is explained further in Subsections (F)(2)-(F)(4), which elaborate on the methodology to execute the purpose.[123]

Fourth and finally, the Joint Petitioners point out, citing the Commission's rejection of PNM's proposed RBA in the 2015 Rate Case, that the Commission has established that "regulatory disincentives," writ large, must be applied in a limited fashion and be narrowly tailored. They note that the Commission specifically held that the RBA proposed in the 2015 Rate Case shifted risks from economic cycles and weather fluctuations to ratepayers, exposing the ratepayers to those risks

[121] Jt. Petitioner Br. 13 (citing *Alarcon v. Albuquerque Pub. Sch. Bd. of Educ*., 2018-NMCA-021, at ¶ 23, 413 P.3d 507).

[122] Jt. Petitioner Br. 14.

[123] *Id*.

while shielding the shareholders and creating a financial windfall for PNM because it would compensate the company for lost revenues due to declines in customer use even if its actual revenues remained stable or grew because of customer growth.[124]

Countering PNM's assertions that the recent changes to the EUEA now allow this type of risk shifting, the Joint Petitioners maintain there was no change to the EUEA that altered its policy to promote cost effective energy efficiency and load management programs. They say the Commission found the RBA was not narrowly tailored and focused on the removal of energy efficiency disincentives and failed to distinguish disincentives specific to energy efficiency and instead proposed a wholesale revision of PNM's recovery of its fixed costs. Therefore, given their claim that there has been no change to the policy of the EUEA, the Joint Petitioners submit Case No. 15-00261-UT remains on-point for purposes of regulatory disincentives. The only way for PNM to ignore the established precedent, they reason, is for PNM to argue that the phrase "regulatory disincentives" as used in Subsection (F)(2) must be interpreted "without limitation" despite the language from the immediately preceding subsection, which addresses revenue impacts specifically and solely attributable to a utility's energy efficiency and load management programs.[125]

Since the remaining opponents' positions are quite similar to and overlap the Joint Petitioners' arguments to a significant degree, their arguments are summarized in the following condensed manner.

New Energy Economy asserts three reasons why, reading Section 16-17-5(F)(2) *in pari materia* with other provisions of the EUEA and PUA, it is apparent that Subsection (F)(2) does not permit – let along mandate – full decoupling of a utility's revenues from its volumetric sales. First,

[124] Jt. Petitioner Br. 14-15.

[125] Jt. Petitioner Br. 14-16.

performing a plain meaning textual analysis of the EUEA akin to the Joint Petitioners' set out above, New Energy Economy argues that Subsection (F)(2) only permits decoupling in relation to energy efficiency and load management programs.[126] Second, invoking the EUEA's balancing language in Sections 62-17-3 and 62-17-5(F)(1) and corresponding language in the PUA, New Energy Economy asserts the Commission must balance the interests of the public, customers, and investors when considering a decoupling mechanism.[127] Third, New Energy Economy contends two other provisions of the PUA, namely Section 62-8-7(E)[128] and Section 62-13-13.2 (dealing with rate riders designed to recover ancillary and standby services costs from new DG customers and addressed separately below)[129] would effectively add a new customer charge designed solely to recover its fixed costs from all residential and small business customers, thus creating an additional avenue for automatic recovery.[130]

Invoking the regulatory compact ("regulation does not insure that the business shall produce net revenues, nor does the Constitution require that the losses in one year shall be restored from future earnings . . . ."), NM AREA argues PNM's position that the amended EUEA guarantees

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[126] NEE Br. 1-6.

[127] NEE Br. 6-8.

[128] As PNM notes in its Response Brief, at 8, NEE erroneously cites Section 62-8-7(F) which, by its terms, applies to water utilities, i.e., a public utility, as defined in Section 62-3-3(G) of the PUA, "that may own, operate, lease or control: (3) any plant, property or facility for the supplying, storage, distribution or furnishing to or for the public of *water* for manufacturing, municipal, domestic or other uses[.]" NMSA 1978, § 62-3-3(G) (1967, as amended through 2009) (emphasis added). Additionally, NEE omits from its quotation of the supposedly applicable statute (Section 62-8-7(E), which addresses FPPCACs), "an increase in rates or charges *for the utility commodity* based upon cost factors other than taxes or cost of fuel, gas or purchased power . . . ." (emphasis added). The omission is, as PNM points out, glaring because it highlights that Section 62-8-7(E) is meant to apply as an exception to the general proposition set forth in Section 62-8-7(A) that "[a]t any hearing involving an increase in rates or charges sought by a public utility, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the utility." NMSA 1978, § 62-8-7(A). Moreover, as PNM asserts, a decoupling mechanism, by definition, is neither an increase or decrease in rates or charges and, even if relevant, would be controlled by the later-enacted Section 62-17-5(F)(2). PNM Resp. 8-9 (citing NMSA 1978, § 12-2A-10(A) (1997)).

[129] *See* Section III.G below.

[130] *See* NEE Br. 8-9.

its annual revenues until the Commission resets them in a subsequent rate case is "contrary to the plain language of the amended EUEA, case law precedent, and customers' constitutional protections against unjust and exorbitant rates."[131] Again, like the other parties opposed to finding full decoupling in Section 62-17-5(F)(2), NM AREA reads the EUEA and PUA *in pari materia* to require that any rates set by the Commission pursuant to the EUEA to remove regulatory incentives must be just and reasonable, which expressly requires a balancing of investor and ratepayer interests to be a "just and reasonable" rate.[132] NM AREA further argues that PNM's reading of the amended EUEA violates the plain meaning of the term "regulatory disincentives," which, NM AREA maintains, necessarily links a utility's disincentives to approved energy efficiency and load management measures.[133] NM AREA reasons that PNM's argument only makes sense if one ignores the fact that the "rate adjustment mechanism" described in Subsection (F)(2) "is to remove a utility's regulatory disincentives that act as a barrier to accomplishing of the goals of the EUEA[,]" and "PNM has not articulated any rational argument why making the utility whole for any revenue losses caused by any factor furthers the purposes of the EUEA."[134] Finally, calling the full decoupling rate mechanism a "make-whole rate for the utility," NM AREA argues such a rate, if implemented, would be *per se* unjust and unreasonable because it would provide no corresponding benefit to ratepayers. NM AREA thus concludes that "even if PNM's reading of Section 62-17-5(F)(2) were correct, it would be unenforceable. Neither the Legislature nor the

[131] NM AREA Br. 3 (quoting Final Order, Case No. 2146, Part II, at 56, 1989 N.M. PUC LEXIS 4, *58).

[132] NM AREA Br. 3-4. NM AREA adds in its Response Brief, at 4, that "[n]o language in the Legislature's recent amendments to the EUEA removes the Commission's discretion to reject any proposed decoupling rate that does not properly balance investors' and consumers' interests when examined in the context of the utility's total revenues."

[133] NM AREA Br. 4-5 (citing *A.G. v. NMPRC*, 2011-NMSC-034, ¶ 11).

[134] NM AREA Br. 5.

Commission can implement a rate that violates consumers' constitutional right to non-extortionate utility rates."[135]

Staff, for its part, acknowledges that the Section 62-17-5(F)(2) seemingly requires the Commission to approve a decoupling mechanism when a petition requesting such a mechanism is filed by a public utility.[136] However, considering the balancing requirement in Section 62-17-3 and reading the entire EUEA as a whole and consistent with the Section 62-3-1 of the PUA[137] makes it clear to Staff that the act

> involves the implementation of cost-efficient energy efficiency and load management programs, and further that any petition seeking to implement a decoupling or rate adjustment mechanism should be related to such programs. More importantly, however, it becomes clear that while § 62-17-5 F(2) [*sic*] apparently requires the Commission to approve a rate adjustment mechanism requested by a public utility, § 62-17-5 F(1) [*sic*] mandates that such approval be done in a manner that considers the impact of such a mechanism on other stakeholders, including the utility's customers. Certainly there is nothing about a petition filed by a utility, as opposed to a matter opened by the Commission on its own or as filed by someone else, that should mandate that the Commission ignore the impacts on customers. The Commission is not merely a rubber stamp on any such request made by the utility, but must investigate the request to ensure that the requested mechanism does not place a disproportionate burden of risk or expense on the utility's customers.[138]

[135] NM AREA Br. 5-6.

[136] Staff Br. 2.

[137] *See* Staff Br. 2-4.

[138] Staff Br. 3-4.

2. Analysis and determination: Construed in proper context and in harmony with other applicable provisions of the EUEA and the PUA, Section 62-17-5(F)(2) does not mandate the Commission to authorize full revenue decoupling; the statute does, however, provide for utility petitions for partial decoupling mechanisms tied to removing regulatory disincentives to energy efficiency and load management.

The Hearing Examiner's analysis of the pivotal issue in this proceeding is strictly a matter of statutory construction. His determination is *not*, as some of the parties' arguments would appear to have it, influenced by or grounded in critiquing or favoring any particular ratemaking methodology, policy prescription, or doctrine.

Turning thus to the matter at hand, as evinced by the parties' legitimate (i.e., nonfrivolous) differences of opinion over the statute's meaning,[139] the Hearing Examiner finds that Section 62-17-5(F)(2) of the EUEA is ambiguous. It is ostensibly ambiguous in two instances but genuinely ambiguous in only one fundamental way, the resolution of which, systematically applying the canons of statutory construction summarized above, is dispositive of whether the statute mandates full revenue decoupling.

The first seeming ambiguity – a superficial but, upon closer inspection, not authentic ambiguity – arises from the proponents' interpretation of "regulatory disincentives." The proponents postulate that term includes any and all causative factors for the deviation of actual sales from expected sales, be it increased investment in EE/LM, weather variations, changes in economic conditions, or a global pandemic. A plain reading of the EUEA reveals that the proponents' interpretation of the term serves to shoehorn an all-encompassing definition of regulatory disincentives to fit their predestined conception of *mandatory* full revenue decoupling whenever a utility petitions for the removal of such disincentives. The proponent's strained

[139] *Gallegos*, 1994-NMSC-023, ¶ 23.

reading of the statute notwithstanding, as used throughout the EUEA and read in proper context of the subject matter of the statue, i.e., energy efficiency and load management, the term "regulatory disincentives" is plain, unambiguous, and applicable strictly to removing regulatory disincentives to utility development of cost-effective energy efficiency and load management measures.

To start, the term "regulatory disincentives," which is not defined in the EUEA, appears five times in the text of the EUEA as amended in 2019,[140] each time either preceded or followed by "remove,"[141] "removed,"[142] or "removal of,"[143] while "disincentives" unmodified by "regulatory" is used once only, at the end of the heading to Section 62-17-5,[144] and the singular form "disincentive removal mechanism" is the last time any variation of the term appears in the statute, in Section 62-17-5(F)(4).[145] The very first time the term appears in the current EUEA is in the Section 62-17-3, which states "the policy" of the EUEA is, in pertinent part, "that regulatory disincentives to public utility development of cost-effective energy efficiency and load management be removed in a

[140] The EUEA was subsequently amended in 2020 to include "or natural gas" after "quantity of electricity" in Section 62-17-5(F)(2) to clarify that a rate adjustment mechanism may be adopted to ensure that the revenue per customer in a rate case remains constant without regard to the quantity of either electricity or natural gas sold.

[141] NMSA 1978, §§ 62-17-5(F)(1) ("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[.]"), F(2) ("remove regulatory disincentives through the adoption of a rate adjustment mechanism . . . .").

[142] *Id*. § 62-17-3 ("that regulatory disincentives to public utility development of cost-effective [EE/LM] be removed in a manner that balances the public interest, consumers' interests and investors' interests . . . .").

[143] *Id*. § 62-17-4(I) (". . . but 'program costs' does not include charges for incentives or the removal of regulatory disincentives[.]").

[144] *Id*. § 62-17-5 ("**62-17-5. Commission approval; energy efficiency and load management programs; disincentives**.") (emphasis in original). *See Tri-State Generation & Transmission Ass'n Inc. v. D'Antonio*, 2012-NMSC-039, ¶ 18, 289 P.3d 1232 (explaining that the court may look to a section's heading, "and ordinarily it may be considered as part of the act if necessary to its construction") (internal quotation marks and citation omitted); 73 Am. Jur. 2d *Statutes* § 100 (noting that a section's heading is a tool "for the resolution of doubt about the meaning of a statute.").

[145] *Id*. § 62-17-5(F)(4) ("not reduce a utility's return on equity based on approval of a disincentive removal mechanism or profit incentives pursuant to the Efficient Use of Energy Act.").

manner that balances the public interest, consumers interests and investors interests . . . ." The next time the term appears is at the end of the definition of "program costs" in Section 62-17-4(I), where program costs are said to "not include charges for incentives or the removal of regulatory disincentives[.]"

Significantly, although PNM argues the omission of the limiting or qualifying policy language from Section 62-17-5(F)(2) supports its full decoupling theory,[146] the defining phrase "on energy efficiency and load management measures . . . in a manner that balances the public interest, consumers' interests and investors interests" is not included in the Section 62-17-4(I) definition of "program costs" *before* Section 62-17-5(F)(2); nor does it appear *after* Section 62-17-5(F)(2) in reference to not reducing a utilities' ROE "based on approval of a disincentive removal mechanism or profit incentives" in Section 62-17-5(F)(4).

In any event, the omission of a defining phrase in one or more *but not all* sections of a statute does not necessarily expand or limit the meaning or breadth of the underlying term employed several times in the statute, particularly where the key phrase illuminating the term is strategically located, post-amendment, unchanged in meaningful places like the policy statement (here Section 62-17-3) and the beginning of a multi-part section (i.e., Section 62-17-5(F)(1)) immediately preceding the single, isolated provision that the proponents thus would have the Commission improperly consider in a vacuum.[147] To the contrary, as PNM has argued to a diametrically opposed result in this very proceeding and in another context where specific

[146] *See* PNM Br. 6 ("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."), 7 ("unlike Section 62-17-5(F)(2), Section 62-17-5(F)(1) *explicitly* provides for removal of regulatory disincentives "for expenditures on energy efficiency and load management measures.") (emphasis added).

[147] *Smith*, 2004-NMSC-032, ¶ 10.

language is omitted from a statute[148] or subsequent subsections,[149] the language modifying the meaning of regulatory disincentives from the Section 62-17-3 policy statement expressly incorporated into Section 62-17-5(F)(1), quoting PNM in the more convenient context, "sets the stage for the remainder of this section."[150]

Therefore, absent some definite substantive indication to the contrary, the better and more judicious interpretive approach is for the Commission to construe the term "regulatory disincentives" as meaning the same thing and applying the same stated policy throughout the statute: removing barriers to utility development of cost-effective energy efficiency and load management in a manner that balances the public interest, consumers' interests, and investors' interests.

Even more significant than deciphering the context and placement of operative terms and the phrases modifying them in a statute, before the EUEA was amended in 2019 the Supreme Court in *A.G. v. NMPRC* interpreted Sections 62-17-3 and 62-17-5(F), both of which included the balancing language placed in both the EUEA and PUA, to constitute a legislative mandate "requiring the PRC to identify and remove regulatory disincentives to a public utility's *implementation of energy efficiency programs*."[151] Tellingly, despite the Court's interpretation in 2011 of regulatory disincentives as necessarily linked to energy efficiency and load management

[148] As discussed below, PNM later tries to read ***into*** Section 62-17-5(F)(4) a concept – total rate of return or weighted average cost of capital – that is neither stated nor even implied in the subsection. *See* Section III.C below.

[149] *See* Case No. 21-00017-UT, *In the Matter of the Application of Public Service Company of New Mexico for Approval of the Abandonment of the Four Corners Power Plan and Issuance of a Securitized Financing Order*, PNM's Post-Hearing Response Brief (Oct. 13, 2021), at 58 ("While it is true that the abandonment cut-off date is used only in Section 62-18-3(A) of the ETA, the qualifying language as to the abandonment cut-off *sets the stage for the remainder of this section*.") (emphasis added).

[150] *Id*.

[151] *A.G. v. NMPRC*, 2011-NMSC-034, ¶ 1 (emphasis added).

measures,[152] neither in amending the EUEA in 2019 nor in a subsequent 2020 amendment[153] did the Legislature change a single word of the EUEA policy set forth in Section 62-17-3; moreover, as indicated just above, the Legislature repeated the balancing language stated in the policy section of the act in the very first subsection addressing the identification and removal of regulatory disincentives, Section 62-17-5(F)(1), the same balancing language that had appeared previously in the old, superseded Subsection (F).[154] Accordingly, as even PNM seems in the end to acknowledge or at least reluctantly foresee,[155] as used in the EUEA the term "regulatory disincentives" plainly and ambiguously applies only to energy efficiency and load management measures which, not coincidentally, happens to be a core subject of the EUEA.

Unlike the interpretation of "regulatory disincentives," the second interpretive problem reveals a genuine ambiguity in the language of Section 62-17-5(F)(2) that requires the rejection-of-literal language approach to statutory construction. The problem is that the proponents' position that the decoupling language irrefutably inserted in Subsection (F)(2) ("without regard to the

[152] *See id.* 2011-NMSC-034, ¶ 11 ("When a utility implements an energy efficiency program, the utility *reduces the amount of energy consumed by its customers*. *This necessarily results in a reduction in the utility's revenue*.") (emphasis added).

[153] As explained in n. 140 *supra*, the 2020 amendment clarified that the rate adjustment mechanism in Sub-section F(2) applies to natural gas service as well as electric service by adding "or natural gas" after "quantity of electricity."

[154] The superseded Subsection (F), NMSA 1978, § 62-17-5(F), was last amended in 2008 to require the Commission to provide a profit incentive, i.e., to provide utilities an opportunity to earn a profit on cost-effect EE/LM resources that are more financially attractive than supply-side resources.

[155] PNM Br. 8 ("Even if the *'regulatory disincentives in (F)(2) are construed to only be those related to energy efficiency and load management*, (F)(2) unambiguously prescribes the method for removing such [dis]incentives – namely by completely severing the connection between per-customer revenue and volumetric sales.") (emphasis added). As it must to have any semblance of coherency, PNM's argument in the alternative turns a blind eye to the ineluctable truth in the text of the EUEA that the Commission is still required to remove regulatory disincentives to energy efficiency and load management measures *in a manner that balances the public interest, consumers' interests and investors' interests*.

quantity of electricity or natural gas actually sold by the public utility") commands[156] the Commission to authorize utility requests for rate adjustment mechanisms that accomplish full revenue decoupling flatly contradicts the balancing requirement firmly entrenched in the EUEA and the corresponding bedrock principle inhering the PUA that to set just and reasonable rates the Commission must balance the public interest, consumers' interests, and investors' interests. In other words, without expressly saying ***anything*** on the subject in the EUEA or the PUA,[157] in promulgating a single, isolated subsection of the EUEA that includes generic decoupling language, the Legislature supposedly stripped the Commission of its authority to perform the balancing test essential to setting just and reasonable rates.

The proponents' paradoxical reading of Subsection (F)(2) would lead to an absurd and unjust result[158] inasmuch as, all sound interpretive guidance to the contrary notwithstanding, if applied as proposed, a rate adjustment mechanism requested by a utility need not – indeed could not – be found just and reasonable as long the rate mechanism accomplishes full revenue decoupling through a separately identified tariff rider that provides for true-ups at regular intervals.[159] The Hearing Examiner must presume that, absent a clear expression of intent to

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[156] *See* PNM Resp. 4 ("Section 62-17-5(F)'s core command," "legislative command,"), 9 ("Section 62-17-5(F)'s clear legislative command").

[157] The best PNM can do is baselessly speculate in its Response, at 13, that "the legislature *very well* ***may have*** *concluded* that such policy benefits are broadly applicable and no specific public interest inquiry would be necessary[.]" (emphasis added).

[158] *Gallegos*, 1994-NMSC-023, ¶ 3; *see also United Water N.M. v. N.M. Pub. Util. Comm'n*, 1996-NMSC-007, ¶ 12, 121 N.M. 272, 910 P.2d 906 (court's construction must not render the statute's application "absurd, unreasonable, or unjust.").

[159] In reply, PNM resorts to arguing that full decoupling wouldn't change the underlying cost-of-service or the rate any customer pays on expectation," but would "simply provide for the actual revenue requirement being recovered, which can result in bill credits to customers." PNM Resp. 11. But "even if full decoupling did increase the cost of service (which it does not), there is no *constitutional* protection from exorbitant rates; rather, that limitation has been construed as the upper limit of the *statutory* "just and reasonable" standard from NMSA 1978, Section 62-8-1. *Id.* (emphasis in original and citing *N.M. Pub. Serv. Co. v. N.M. Pub. Reg. Comm'n*, 2019-

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eliminate the balancing requirement, the Legislature did not intend to enact a law inconsistent with both the EUEA policy statement it left undisturbed and the PUA principles elaborated above.

Of course, the proponents' position on Subsection (F)(2) is realistically sustainable only if the "regulatory disincentives" removable encompass any and all causative factors conceivable. But, as just construed, the regulatory disincentives removable under the EUEA plainly and unambiguously relate only to energy efficiency and load management measures. Therefore, as the EUEA prescribes and the PUA has much longer required, in establishing a rate adjustment mechanism pursuant to Section 62-17-5(F)(2), the Commission must ensure that, as the EUEA prominently emphasizes not once but twice,[160] the disincentives are removed in a manner that balances the public interest, consumers' interests, and investors' interests.

Still, as the Hearing Examiner suggested during the oral argument, the opponents failed to come to grips with the fact that Section 62-17-5(F)(2) unmistakably incorporates the concept of decoupling.[161] Consequently, the task remaining is to harmonize the decoupling language in Subsection (F)(2) with the entirety of the EUEA and applicable rate-setting principles enshrined in the PUA. The proponents advocate "full decoupling" and belittle "limited decoupling" as not really

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NMSC-012, ¶ 11 for the proposition that there is a significant zone of reasonableness under Section 62-8-1 in which rates are neither ratepayer extortion not utility confiscation). However, as already explained, *see* Section II.C.3 *supra*, PNM's allusion to the "zone of reasonableness between confiscation and extortion *in which the commission's jurisdiction* ***to make rates*** should be confined," *Mountain States Tel. & Tel. Co.*, 1950-NMSC-055, ¶ 44 (emphasis added), goes to the heart of the regulatory compact, which as PNM's own expert witness in Case No. 19-00018-UT, Lauren Azar, opined, ***balances the public interest of customers with the business interests*** of the utility through, among other things, (i) ensuring that the utility's service and rates are ***just, reasonable*** and non-discriminatory; and (ii) providing the utilities an opportunity to recover prudently expended costs plus a reasonable return on their investments. *See supra* n. 36 and accompanying text. In short, PNM implausibly endeavors to harmonize or reconcile the unharmonizable and irreconcilable: a properly set rate is either just and reasonable upon the Commission performing the obligatory balancing test or it cannot possibly be shown that the rate is just and reasonable because the Commission was stripped of the authority to perform the balancing test that is fundamental, according to Supreme Court precedent, to finding rates just and reasonable under the PUA.

[160] NMSA 1978, §§ 62-17-3, 62-17-5(F)(1).

[161] *See* Tr. 52-56.

decoupling at all because, they and others claim, limited decoupling does not fully incentivize EE/LM measures or remove the throughput incentive.[162] Nevertheless, as the Hearing Examiner also pointed out in the oral argument, whether attributable to intentional omission or oversight, neither they nor the opponents of decoupling addressed a third alternative evident in the literature they propounded: *partial* decoupling.[163] As explained in the Regulatory Assistance Project article cited repeatedly and unreservedly by the proponents,

> Partial decoupling insulates only a portion of the utility's revenue collections from deviations of actual from expected sales. Any variation in sales results in a partial true-up of utility revenues (e.g., 50%, or 90%, of the revenue shortfall is recovered).[164]

The Regulatory Assistance Project proceeds to favorably describe a "creative application of partial decoupling," which involved a

> combination conservation incentive/decoupling mechanism for Avista Utilities in Washington. The utility was allowed to recover a percentage of its lost distribution margins from sales declines in proportion to its percentage achievement of a Commission-approved conservation target, it was allowed only partial recovery. This proved a powerful incentive to fully achieve the conservation goal.[165]

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[162] *See* CCAE/WRA/REIA Br. 4-6; CCAE/WRA/REIA Resp. 2-8. *See also* RAP, *Revenue Regulation and Decoupling: A Guide to Theory and Application*, at 13 ("Limited decoupling does not fully eliminate the throughput incentive. The utility's revenues (and profits, therefore) are still to some degree dependent on sales. So long as it retains a measure of sales risk, the achievement of public policy goals in end-use efficiency and customer-sited resources, environmental protection, and the least-cost provision of service will be inhibited.").

[163] *See* Tr. 30-32, 51-52, 76.

[164] RAP, *Revenue Regulation and Decoupling: A Guide to Theory and Application*, at 12.

[165] *Id*. (citing Avista Utilities Order 04, *supra* n. 84, and noting Avista's recovery was capped at 90%). In Order 04, the WUTC approved a two-year pilot decoupling mechanism that was continued indefinitely by the WUTC in 2009 and subsequently converted to full decoupling for both Avista's electric and gas operations and authorized in a March 2020 WUTC order to continue through March 31, 2025 for both electric and natural gas. *See WUTC v. Avista Utilities*, WUTC Dockets UE-160228 and UG-160229 (Consolidated), Order 06 (Dec. 15, 2016), 2016 Wash. UTC LEXIS 449, *26 n. 41, *41, *133; *WUTC v. Avista Utilities*, Dockets UE-190334, UG-190334, and UE-190222 (Consolidated), Final Order 09 (Mar. 25, 2020), 2020 Wash. LEXIS 106, *60-*61. The partial decoupling mechanism approved in WUTC Order 04 applied only to residential and small commercial customers, included a new customer adjustment that removed the usage associated with new customers added since the corresponding month of the test year, and deferred 90% of the margin difference, either positive or

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Partial decoupling operates just like full decoupling in that, as explained in a National Renewable Energy Laboratory (NREL) article also cited by the proponents, partial decoupling "ensures the utility recovers the costs of providing electricity *without connecting recovery to the volume of electricity delivered*."[166] Where it differs from full decoupling is in allowing only some specified percentage of the deviation from actual sales to be trued-up, i.e., the utility receives some percentage of the difference between actual revenue earned and the allowed revenue.[167] Partial decoupling therefore is consistent with the decoupling language in Section 62-17-5(F)(2) ("without regard to the quantity of electricity or natural gas actually sold by the public utility") and, just as crucially, consistent with the approach of the WUTC[168] and other state commissions to decoupling rate mechanisms,[169] it affords the Commission the discretion to perform the balancing of interests test called for in the EUEA and integral to the Commission's rate-setting authority under the PUA.

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negative for later recovery (or rebate). The mechanism also incorporated a DSM test where the recovery of deferred costs was based on an earnings test where it could not earn more than its 9.11% rate of return and was based on Avista achieving specific conservation or DSM savings targets, such that < 70% savings = 0% $ deferred; > 70% and < 80% savings = 60% $ deferred; > 80% and < 90 % savings = 70% $ deferred; > 90% and < 100 % savings = 80% $ deferred; and 100% savings = 90% $ deferred. Avista was required to retain an independent third party to audit the results of DSM savings reported for decoupling purposes. The mechanism limited annual rate increases to 2% annually. *Id*. 2007 Wash. UTC LEXIS 55, *7-*8.

[166] NREL, *Decoupling Policies: Options to Encourage Energy Efficiency Policies for Utilities* (Dec. 2009), at 4, *available at* https://www.nrel.gov/docs/fy10osti/46606.pdf. (emphasis added). This NREL article is cited by CCAE/WRA/REIA in its initial brief, at 1, 4.

[167] *Id*.

[168] Avista Utils. Order 04, 2007 Wash. UTC LEXIS 55, *20 ("We have carefully considered the design of the stipulated partial decoupling mechanism, *including the public protections* afforded by the DSM test and the earnings test on recovery of deferred costs. After reviewing all of the arguments, *we determine that it is in the public interest* to allow the Company to proceed with this pilot program.") (emphasis added). *See WUTC v. Northwest Natural Gas, d/b/a NW Natural*, Docket UG-181053, Order 06 (Oct. 21, 2019), 2019 Wash. UTC LEXIS 313, *3-*4 (determining "that the Settling Parties have failed to provide an appropriate record to support the Decoupling Agreement and *thus have not demonstrated that the Decoupling Agreement is in the public interest*.") (emphasis added).

[169] *See, e.g.*, *People ex rel. Madigan v. Illinois Commerce Comm'n*, 25 N.E.3d 587, 597-98 (Ill. 2015) (in holding that Illinois commission (ICC) did not abuse its discretion in permanently approving volume-balancing-adjustment (VBA) revenue decoupling rider ("Rider VBA"), the Court found with regard to the appellants' argument that the ICC's decision was contrary to "rate-of-return principles," that the ICC determined Rider VBA

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Therefore, having construed Section 62-17-5(F)(2) *in pari materia* with other operative provisions of the EUEA and PUA, the Hearing Examiner determines that Subsection (F)(2) does not mandate or "command" the Commission to authorize the sort of full decoupling rate mechanisms propounded by PNM and CCAE/WRA/REIA. A holding to the contrary would require the Commission to accept the specious proposition that – prohibited from exercising the discretion to perform the time-honored balancing of interests analysis ***essential*** to setting just and

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"was intended to benefit both the companies and their customers" and that: "the ICC's decision to approve the rider as 'reasonable and justified' was an exercise of sound business judgment, reached after a four-year pilot program that operated as expected and after a deliberative ratemaking process, in which the views of the companies, the Attorney General and CUB, and its own staff were voiced and considered. The [ICC] concluded that there was a 'compelling and sufficient showing' that Rider VBA was 'reasonable and justified.' Implicit in that ruling is a belief that the rider comported with the Act [which, as the underlying ICC decision recognized, requires that rates be found just and reasonable for both investors and consumers, *North Shore Gas Co*., 2008 Ill. PUC LEXIS 133, *13] and rate-of-return principles. We cannot say that the Commission abused its discretion in approving it."); *In re Columbus Southern Power Co.*, 950 N.E.2d 164, 167 (Ohio 2011) (applying a statute, Ohio Rev. Code Ann. § 4928.66(D) that contains two requirements that an application for a revenue decoupling mechanism must meet before the Ohio PUC may approve it: (i) that the decoupling mechanism provide only for "the recovery of revenue that otherwise may be foregone by the utility as a result of or in connection with the implementation by the electric distribution utility of any energy efficiency or energy conservation programs;" and (ii) that the decoupling mechanism "*reasonably aligns the interests of the utility and of its customers* in favor of [energy-efficiency and energy-conservation] programs.") (emphasis added); *In the Matter of Public Utilities Comm'n; Instituting and Investigation to Reexamine the Existing Decoupling Mechanisms for Hawaiian Elec. Co., Inc., Hawaii Elec. Light Co., Inc., and Maui Elec. Co., Ltd.*, Hawaii PUC Docket No. 2013-0141, Order 32735 (Mar. 31, 2015), 2015 Haw. PUC LEXIS 144, *18 (stating "the commission specifically retained" in a 2010 decoupling order "the authority to review and/or terminate the decoupling mechanism at any time if the public interest so requires."); *In the Matter of Portland General Elec. Co. (PGE); Proposed Tariffs to Decouple Distribution Revenues from Residential and Small Nonresidential Consumer and their kWh Sales*, Oregon PUC Docket UE 126, Order No. 02-633 (Sept. 12, 2002), 2002 Ore. PUC LEXIS 346, *12, *15 (in finding it "was unable to conclude that PGE's decoupling is in the public interest" and denying PGE's proposed decoupling mechanism, the Oregon PUC observed that it would "view any decoupling proposal cautiously. Before adopting any such mechanism, the Commission must ensure that the proposal benefits the utility, its customers, and the public generally."); *Petition of Mass. Elec. Co. and Nantucket Elec. Co. Pursuant to G.L. c. 164, § 94, and 220 C.M.R. § 5.00 et seq., for a General Increase in Electric Rates and Approval of a Revenue Decoupling Mechanism*, Mass. Dept. of Public Utilities D.P.U. 09-39, Order (Nov. 30, 2009), 2009 Mass. PUC LEXIS 91, *96-*97 (noting that "[i]n reviewing the various components of National Grid's proposed revenue decoupling plan, the Department must evaluate whether the resulting rates are just and reasonable[.] . . . The Department has affirmed its authority to adopt decoupled rates as the model for all future ratemaking proceedings, citing to our delegated authority under G.L. c. 164, § 94 to prescribe the rates and prices that utilities may charge. . . . In determining the propriety of such rates, prices and charges, the Massachusetts Supreme Judicial Court has affirmed that the Department must find that they are just and reasonable.") (internal citations omitted).

reasonable rates[170] – a decoupling rate mechanism need not be just and reasonable to be not only authorized, but mandated.[171] This is an untenable proposition that, if adopted here without a clear expression of intent from the Legislature vitiating the balancing requirement in the instant context, would improvidently upend regulatory policy and constitutional jurisprudence established some eighty years ago.[172]

In sum, if the Legislature intended a shift in the rate-setting paradigm that inarguably important[173] and if not exactly radical then certainly momentous and profound, the Legislature could have amended the EUEA and PUA to provide clear and explicit guidance on the matter[174]

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[170] *See Timberon Water Co. v. N.M. Pub. Serv. Comm'n*, 1992-NMSC-047, ¶ 29, 114, N.M. 154, 836 P.2d 73 ("To set a just and reasonable rate, the Commission must balance the investor's interest against the ratepayer's interest.") (citing *State v. Mountain States Tel. & Tel. Co.*, 1950-NMSC-055, ¶ 39, 54, N.M. 315, 224 P.2d 155).

[171] *See supra* n. 159.

[172] *See Mountain States Tel & Tel. Co.*, 1950-NMSC-055, ¶ 39 ("The rate-making process under the Act, i.e., the fixing of 'just and reasonable' rates, involves a balancing of the investor and the consumer interests. Thus we stated in the Natural Gas Pipeline Co. case that 'regulation does not insure that the business shall produce net revenues.'") (quoting *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 590 (1942)).

[173] Tr. 40 (Mr. Gifford: "It is an important policy shift, yes . . . ."). It should also not go without noting that PNM's argument that decoupling is a relatively anodyne rate design principle "that has a place in multiple states, in multiple utilities' rate designs, and . . . is an accepted practice in multiple states for decades now," Tr. 39, is imprecisely applied and, frankly, beside the point. PNM's representation elides the fact that the full decoupling policy asserted in this case – i.e., the legislative "command" – would strip the Commission of its authority to perform the balancing of interests essential to setting just and reasonable rates, a policy command that likely has not been imposed on many, if any, of the state commissions that have implemented decoupling mechanisms. *See supra* n. 169 and accompanying text. Understood accurately, then, the proponent's bold full decoupling scheme does indeed call for a momentous and profound shift in the rate-setting paradigm.

[174] Tr. 94 (Hearing Examiner: "With that shift from (F)(1) to (F)(2), all of a sudden you're changing the regulatory compact. Don't you think the legislature should say so, if that's what's intended." Mr. Gould: "If that's what they intended they should say so . . . and they should have gone back and removed the "just and reasonable" language from the policy provision, and they should have removed it from (F)(1), and they should have gone back to the Public Utility Act and changed the policy statement there. They should have changed 62-8-1, in which they would have said "Yeah, well some rates don't need to be just and reasonable, and the Commission has no discretion."). *Cf Assoc. of Bus. Advocating Tariff Equity v. Mich. PSC (In re Detroit Edison Co.*), 817 N.W.2d 630, 634 (Mich. Ct. App. 2021) ("It is our judgment that a plain reading of MCL 460.1097(4) does not empower the PSC to approve or direct the use of a [revenue decoupling mechanism or RDM] for electric providers. If the Michigan Legislature had wanted to do so, it is plain from the language applicable to gas utilities in MCL 460.1089(6) that it could and would have made its intention clear. Accordingly, we reverse the PSC's decision to authorize Detroit Edison to adopt a rate decoupling mechanism because in doing so it exceeded its powers.").

pursuant to the New Mexico Constitution,[175] which grants the Legislature the power to make or modify law in the public utility regulatory policy sphere.[176] But in amending the EUEA in 2019, the Legislature did not divest the Commission of its rate-setting responsibility delegated under the New Mexico Constitution, as the Legislature otherwise has unquestionably done in certain specific contexts like the Renewable Energy Act (REA)[177] regarding costs associated with approved utility procurement plans[178] and notably, in the same legislative session in which the EUEA amendments at issue were adopted, regarding the qualifying utility's "reasonable actions" taken to comply with a financing order approved under the Energy Transition Act (ETA).[179] The Commission therefore should not unilaterally relinquish its authority without a legislative determination mandating such a surrender in clear and explicit terms.

[175] N.M. Const. art. XI, § 2 (stating, in pertinent part and as amended in 2020, that "[t]he public regulation commission shall have responsibility for regulating public utilities *as provided by law*.") (emphasis added).

[176] *See, e.g., Egolf*, 2020-NMSC-018, ¶ 33 (explaining that the discretion to make or modify applicable law "is not within the discretion of the Commission and is instead a function of our Legislature); *State ex. rel. Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 13, 127 N.M. 272, 980 P.2d 55 ("The nature and extent of the NMPUC's authority was defined by the Legislature when it enacted and amended the [PUA]."); *City of Albuquerque v. NMPRC*, 2003-NMSC-028, ¶¶ 16-22 (discussing the NMPRC's legislatively-derived rulemaking authority).

[177] NMSA 1978, §§ 62-16-1 to -10 (2004, as amended through 2021).

[178] Section 62-16-6(A) of the REA provides that "[c]osts that are consistent with commission approval of procurement plans or transitional procurement plans ***shall be deemed to be reasonable***." NMSA 1978, § 62-16-6(A) (emphasis added). The Supreme Court has construed the language "costs that are consistent with commission approval of procurement plans . . . shall deemed to be reasonable" to mean costs included in the utility's approved procurement plans "are *reasonable as a matter of law*. Because these procurement costs are reasonable, SPS is entitled under Section 62-16-6(A) to recover large customer cap costs." *N.M. Attorney General v. N.M. Pub. Reg. Comm'n*, 2015-NMSC-032, ¶ 49, 359 P.3d 122 (emphasis added).

[179] NMSA 1978, §§ 62-18-1 to -23 (2019). Section 62-18-11(B) of the ETA provides that "[r]easonable actions taken by a qualifying utility to comply with the financing order ***shall be deemed to be just and reasonable for ratemaking purposes***." NMSA 1978, § 62-18-11(B) (emphasis added).

B. Whether application of a decoupling mechanism to some rate classes, but not others, constitutes an "unreasonable preference" in violation of Section 62-8-6 of the PUA

As noted above, Section 62-8-6 of the PUA provides in pertinent part, "[n]o public utility shall establish and maintain any unreasonable differences as to rates of service either as between localities or as between classes of service." The question in this case is whether the application of a decoupling mechanism to some specific rate classes, but not others or all rate classes, violates Section 62-8-6.

1. Parties' Positions

The parties taking positions on this issue in briefing included PNM, CCAE/WRA/REIA, New Energy Economy, and NM AREA.

PNM originally requested a declaratory order stating that application of a full or limited decoupling mechanism to some rate classes but not others does not facially violate Section 62-8-6. PNM asserts that applying a decoupling mechanism to some classes but not others is permitted by Section 62-8-6, and Section 62-17-5(F)(2) itself reinforces that understanding.[180]

PNM states that the New Mexico Supreme Court has repeatedly interpreted Section 62-8-6's prohibition as only applying to arbitrary differences.[181] PNM notes that the cases where the Court and this Commission determined a charge or discount to constitute an unreasonable preference or difference illustrate the types of differences that may be deemed arbitrary for

[180] PNM Br. 9.

[181] *Id*. (citing, as discussed *infra*, *International Minerals & Chemical Corp. v. NMPSC*, 1970-NMSC-032, ¶ 19, 82 N.M. 280; *City of Albuquerque v. NMPSC*, 1993-NMSC-021, 115 N.M. 521, 854 P.2d 348; and *City of Albuquerque v. NMPRC*, 2003-NMSC-028).

purposes of Section 62-8-6, and from these instances it is clear that arbitrary differences are ones that are not related to the underlying cost-of-service or existing rates.[182]

PNM maintains it is also important to note that a decoupling mechanism is not a charge. Rather, a decoupling mechanism provides a true-up to assure that the per-customer revenue amount approved in a rate case is recovered by the utility, meaning a decoupling mechanism that applies to one class of customers but not others does not increase or lower the expected revenues paid by the class with an applicable decoupling mechanism.[183] PNM further argues that even if a decoupling mechanism were interpreted to be an additional charge or preference, applying the mechanisms to some rate classes but not others would not constitute an unreasonable difference under Section 62-8-6 where there are differences between the respective customer classes' existing rates or costs of service. For example, PNM notes, the company's SCSR decoupling proposal in Case No. 20-00121-UT did not apply to classes for whom fixed cost recovery depends less on volumetric rates (e.g., customer classes with a demand charge in addition to the monthly customer charge).[184] In PNM's view, such a difference tied to the cost-of-service and existing rates would not be arbitrary and, thus, would not be an unreasonable difference under Section 62-8-6.[185]

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[182] PNM Br. 10 (citing, as also discussed further *infra*, *Mountain States Legal Foundation v. N.M. State Corp. Comm'n*, 1984-NMSC-086, 101 N.M. 657, 687 P.2d 92; and *In the Matter of the Filing of Proposed New Rates by Kit Carson Electric Cooperative, Inc.*, Case No. 15-00375-UT, Recommended Decision, at 81-82 (Oct. 31, 2016), *adopted by* Final Order Adopting Recommended Decision (Dec. 7, 2016) (rural electric cooperative's proposal to apply a $3 monthly discount for verified low-income customers was discriminatory and therefore prohibited by Section 62-8-6).

[183] PNM Br. 10 (citing *See* Regulatory Assistance Project article, *supra*, at 11, for description of how revenue variations result in a true-up under full decoupling).

[184] PNM Br. 10-11 (citing Case No. 20-00121-UT, Direct Testimony of Stella Chan, at 3-4 and Fig. SC-1 (filed May 28, 2020)).

[185] PNM Br. 11.

PNM, finally, notes that Section 62-17-5(F)(2) expressly anticipates that a decoupling mechanism may apply to different customer classes differently; it provides that "a rate adjustment mechanism shall be separately calculated for the *rate class or classes* to which" it applies.[186] PNM notes that the use of the singular "class" shows that a decoupling mechanism could permissibly apply to a single rate class, meaning that such an approach would not violate Section 62-8-6 or would displace Section 62-8-6's application in the decoupling context as the later-enacted statue.[187] PNM adds that by providing that a decoupling mechanism must be separately calculated, the Legislature expressly provided for differing application of such a mechanism for different rate classes, including perhaps for only one rate class.[188]

CCAE/WRA/REIA starts where PNM left off, noting that the plain language of Section 62-17-5(F)(2) permits a utility to decouple rates for some classes but not for others. As to whether applying decoupling to only some rate classes creates and "unreasonable preference," CCAE/WRA/REIA state that Section 62-8-6 of the PUA does not prohibit differences in rates or even rate structures as between rate classes, only "unreasonable" differences. They give several examples of differences between rate classes that are not intrinsically unreasonable: "For example, large customer classes have separate demand charges and residential customers do not. Different classes have different energy and demand costs, some have time of use rates, some have interruptible rates, some have customer charges and some do not." CCAE/WRA/REIA thus reason that an "unreasonable" difference is one which is arbitrary and not based on any valid difference in

[186] *Id*. (emphasis in original).

[187] *Id*. (citing NMSA 1978, § 12-2A-10(A) (1997): "If statutes appear to conflict, they must be construed, if possible, to give effect to each. If the conflict is irreconcilable, the later-enacted statute governs. However, 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.").

[188] PNM Br. 11.

characteristics between rate classes.[189] With respect to decoupling mechanisms proposed for some classes but not others, CCAE/WRA/REIA believe a utility must provide a reasonable explanation as to why the mechanism is proposed for some classes but not for others. The rationale for alternative rate treatment could have to do with different characteristics of the classes it is applied to, or different characteristics of the rate structures applicable to different classes, such as how fixed costs are recovered, or some other rationale that is not arbitrary. Nevertheless, CCAE/WRA/REIA conclude, if the utility has a valid reason for applying the decoupling adjustment to some classes and not others, there is no "unreasonable difference" that would be violative of Section 62-8-6.[190]

NM AREA states that the PUA does not intrinsically prohibit variations in rates.[191] The determination whether the application of a decoupling rate to one rate class and not another is discriminatory, NM AREA submits, is a fact-specific determination which cannot be made in this proceeding. NM AREA explains that factors such as whether a rate class has a demand charge, or whether a rate class is at unity with respect to its contribution to the utility's total revenue requirements are factors the Commission must consider when determining whether a decoupling charge is just and reasonable for that rate class. Given the fact-specific nature of such considerations, NM AREA recommends that the Commission affirm the general principle that variations in rates on a customer class by customer class basis are not *per se* discriminatory. Specific determinations regarding the application of a decoupling charge, NM AREA suggests, should be left to the discretion of the Commission in each general rate case.[192]

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[189] CCAE/WRA/REIA Br. 7.

[190] CCAE/WRA/REIA Br. 8.

[191] NM AREA Resp. 6 (citing *City of Albuquerque v. NMPSC*, 1993-NMSC-021, ¶ 28).

[192] NM AREA Resp. 7.

New Energy Economy, on the other hand, argues that is unreasonable for PNM to put the burden of its decoupling proposal on residential and small power customers.[193] New Energy Economy criticizes the decoupling proposal PNM made in Case No. 20-00121-UT, the SCSR set forth in Advice Notice No. 568 that delineated a revenue per customer decoupling mechanism applicable only to PNM's residential and small power rate classes.[194] However, that proposal is no longer before the Commission to consider because, as noted in the statement of the case above, in its March 17, 2021 Order establishing this declaratory order proceeding the Commission dismissed PNM's Petition in Case No. 20-00121-UT and canceled Advice Notice No. 568. In any event, New Energy Economy argues that "rather than reduce the burden of energy cost on low income customers, as [Section 62-8-6] permits, PNM seeks to increase the burden on all residential and small power customers, while not seeking the same increase on other customers, resulting in an 'unreasonable preference or advantage' to others."[195]

2. Analysis and determination: A rate decoupling mechanism applied to specific rate classes pursuant to Section 62-17-5(F)(2) does not ipso facto violate Section 62-8-6's prohibition of "unreasonable differences as to rates of service . . . as between classes of service."

To determine whether application of a decoupling mechanism to one or more specific rate classes violates Section 62-8-6 of the PUA requires, as some parties performed, an analysis of Supreme Court precedent applying the statute or analogous constitutional principles. The first Supreme Court precedent, *International Minerals & Chemical Corp. v. NMPSC*, applied the precursor (1953 Comp.) version of the statute, Section 68-6-6, to hold that a difference in rates set

[193] NEE Resp. 10.

[194] *See* NEE Br. 9-10.

[195] NEE Br. 11.

by the Commission for potash companies of SPS that was based on differing costs of service was not arbitrary and therefore did not violate the statute.[196]

In 1984, the Supreme Court held in *Mountain States Legal Foundation v. New Mexico State Corp. Comm'n* that the Commission's establishment of a telephone discount rate program that differentiated between certain individuals qualifying for public assistance, i.e., heads of households who were 62 years of age or older, from other "economically needy individuals" who received the same service was unjustly discriminatory.[197] The Court found that although the Commission had been granted broad ratemaking authority under the New Mexico Constitution, that authority did not include "the power to effect social policy through preferential rate making" and that the Commission lacked "the authority to effect social programs through its ratemaking process."[198] The power to establish "social programs to aid the elderly and indigent or any other segment of society," the Court concluded, "is the proper function of the Legislature."[199] The Commission subsequently applied the Court's holding in *Mountain States Legal Foundation* in determining that Kit Carson Electric Cooperative's proposal to apply a $3 monthly discount off the monthly fixed charge for verified low-income customers was discriminatory and therefore prohibited by Section 62-8-6.[200]

Subsequently, the Supreme Court held in a 1993 decision, *City of Albuquerque v. NMPSC*, that Section 62-8-6 "does not prohibit variations in rates, nor does it require 'equal service.' Rather, it prohibits 'unreasonable differences' in rates of service between localities. Section 62-8-6

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[196] 1970-NMSC-032, ¶ 19.

[197] 1984-NMSC-086, ¶¶ 1, 6-7.

[198] *Id.* ¶ 7.

[199] *Id.*

[200] *In the Matter of the Filing of Proposed New Rates by Kit Carson Electric Cooperative, Inc.*, Case No. 15-00375-UT, Recommended Decision at 81-82 (Oct. 31, 2016), *adopted by* Final Order Adopting Recommended Decision (Dec. 7, 2016).

thus forbids arbitrary variations in rates, while permitting variations due to differing costs of service to different areas."[201] Expanding on its holding, the Court explained that "[a]llowing municipalities to contract with utilities for service rates to their inhabitants does not, ipso facto, violate Section 62-8-6. On the contrary, because utilities themselves may know more about the cost of service to a particular locality than the Commission, . . . our holding [that Section 62-6-15 of the PUA authorized a municipality to enter into contracts for rates not only for itself but also its inhabitants] may actually promote the mandate of Section 62-8-6 by allowing utilities to propose what they presumably believe to be reasonable rates based on the characteristics of the municipalities they serve."[202]

Ten years later, citing the holding in *City of Albuquerque v. NMPSC*, the Court concluded that the Commission did not adopt an arbitrary variation in rates in approving a tariff that allowed PNM, in complying with local ordinances requiring the placement of utility systems underground based on aesthetics and not public health and safety, to recover "the costs of undergrounding on the customers directly benefitting from the service, such that the variation in rates would reflect differing costs of service."[203]

The Supreme Court precedent just reviewed confirm the general principle that variations in rates and rate structures from one customer class to another based on different costs of service do not ipso facto violate Section 62-8-6's prohibition of "unreasonable differences as to rates of service . . . as between classes of service." Therefore, whether a decoupling rate mechanism applicable to certain classes but not others is discriminatory is a fact-intensive question that can

[201] *City of Albuquerque v. NMPSC*, 1993-NMSC-021, ¶ 29.

[202] *Id*.

[203] *City of Albuquerque v. NMPRC*, 2003-NMSC-028, ¶¶ 24-25.

only be determined on a case-by-case basis where the specific factors and underlying data are evaluated. It also bears repeating in this context that, as Section 62-17-5(F)(2) seems to anticipate in providing that "a rate adjustment mechanism shall be separately calculated for the *rate class or classes*" to which it applies, other state commissions have found decoupling mechanisms applied to discrete rate classes to be just, reasonable, and in the public interest. For instance, as noted above, the Washington commission approved a decoupling mechanism that applied only to Avista Utilities' residential and small commercial customers.[204]

C. Whether the return-on-equity or capital structure of an applicant utility can be adjusted downward when a petition for decoupling is granted under the EUEA

1. Parties' Positions

On this issue, while the proponents are unified in arguing Section 62-17-5(F)(4) prohibits the Commission from adjusting a utility's return-on-equity (ROE) when implementing a decoupling mechanism,[205] they part ways on whether the statue further proscribes making an adjustment to the utility's capital structure. PNM argues the Commission may not adjust the utility's capital structure based on approval of a full decoupling mechanism.[206] CCAE/WRA/REIA simply concludes, without further elaboration, that the statute does not prohibit making an adjustment to capital structure.[207]

PNM argues that the legislative intent to hold a utility harmless when a decoupling mechanism is approved would be "undermined and thwarted" if the Commission could adjust downward the utility's capital structure. This is because, PNM posits, an equivalent change to

[204] *See supra* n. 165.

[205] PNM Br. 13; CCAE/WRA/REIA Br. 14.

[206] PNM Br. 14.

[207] CCAE/WRA/REIA Br. 14.

capital structure could be made to reduce the weighted average rate-of-return the same amount as a reduction in return-on-equity may have caused. Therefore, in PNM's view, Section 62-17-5(F)(4) should be interpreted more broadly to prohibit any downward adjustment to the utility's overall rate-of-return.[208] Notably, PNM concludes its argument rather defensively, maintaining "that this is not an instance where the negative inference that the absence of 'total rate of return' or similar phrase means the legislature meant to exclude that term because PNM has not identified an analogous statute where both total rate of return and return on equity are addressed."[209]

The opponents who addressed this issue, the Joint Petitioners and New Energy Economy, also acknowledge that Section 62-17-5(F)(4) precludes the Commission from reducing a utility's ROE upon approving a decoupling mechanism. New Energy Economy recognizes the statute but then proceeds to argue that it and Section 62-17-5(F)(2) are facially unconstitutional for allegedly running afoul of core constitutional requirements related to regulated utilities to the extent that the "2019 legislature," in New Energy Economy's words, "attempted to provide New Mexico regulated utilities with a level of financial reward that cannot be squared with fundamental constitutional requirements."[210] Inasmuch as New Energy Economy's argument exceeds the scope of issues framed in the Petition and Joint Petition and then set in the Commission's March 17, 2021 Order and the March 30, 2021 Procedural Order, the Hearing Examiner deems it inappropriate and otherwise unnecessary to address the argument in this decision.

[208] PNM Br. 14.

[209] PNM Br. 15 (citing *Patterson v. Globe Am. Cas. Co.*, 1984-NMCA-076, ¶ 10, 101 N.M. 541, 685 P.2d 396 ("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.").

[210] *See* NEE Br. 19-24.

The Joint Petitioners, for their part, assert that Section 62-17-5(F)(4) only applies to decoupling mechanisms directly tied to energy efficiency and load management, i.e., it protects the utility only from lost sales attributable to statutorily authorized EE/LM programs.[211] The Joint Petitioners argue that allowing a full decoupling mechanism that protects it from losses due to all decreased sales, whatever the cause, while at the same time not reducing a utility's ROE strikes the wrong balance between risk and reward for utilities, reasoning "[j]ust as a utility may enjoy the benefit of growth without reducing shared costs commensurately, the risk of decreased sales is the other side of that regulatory coin. Contrary to assertions otherwise, energy efficiency and load management programs are the sole exceptions authorized by the Legislature in the EUEA."[212]

2. Analysis and determination: EUEA Section 62-17-5(F)(4) does not permit the Commission to reduce a utility's return-on-equity founded on approval of a disincentive removal mechanism related to energy efficiency and load management.

That Section 62-17-5(F)(4) of the EUEA does not permit the Commission to reduce a utility's ROE based on approval of a disincentive removal mechanism is not reasonably disputed. And since, properly construed, the regulatory disincentives for which a removal mechanism is authorized relate strictly to energy efficiency and load management measures, the issue is resolved for purposes of this declaratory order.

As for PNM's endeavoring to take the issue beyond the ROE to protecting the utility's overall return – i.e., its weighted average cost of capital (WACC) – the argument would resonate at all (it doesn't) only if the EUEA mandated full revenue decoupling; as determined above, the statute does not command full decoupling. In point of fact, the EUEA's singular focus on not reducing a utility's ROE while omitting the WACC is one further indication, reading Subsection

[211] Jt. Petitioner Br. 23.

[212] *Id.*

(F)(4) *in pari materia* with other provisions of the EUEA, that Section 62-17-5(F)(2) is focused on removing regulatory disincentives tied to energy efficiency and load management measures. PNM's bid to read into Subsection (F)(4) words or concepts (total rate of return or WACC) not appearing in that provision stands in stark contrast to its argument regarding Subsection (F)(2) that words not rotely repeated in that subsection support its full revenue decoupling thesis. Ironically, then, PNM's attempt to have it both ways in related subsections once again proves too much.

D. Whether a standalone petition for decoupling is permitted under the EUEA, or does such a petition violate the principle against single-issue or "piecemeal" ratemaking

1. Parties' Positions

Parties arguing whether a rate decoupling mechanism may be implemented outside the context of a general rate case or would constitute single-issue (a/k/a "piecemeal") ratemaking include PNM, CCAE/WRA/REIA, the Joint Petitioners, New Energy Economy, and NM AREA.

The proponents of full decoupling, PNM and CCAE/WRA/REIA, argue that a standalone petition for decoupling does not violate the principle against piecemeal ratemaking, and even it did, Section 62-17-5(F)(2) expressly authorizes the implementation of this type of rate adjustment mechanism between rate cases.

PNM begins by observing that single-issue or piecemeal ratemaking "involves," as the Commission has observed, "changing rates for one item and ignoring all of the other cost of service elements."[213] Decoupling is not used to change rates for one item; rather, according to the proponents, it simply ensures that previously determined costs of service are recovered.[214] On this principle, the proponents cite an Illinois Supreme Court decision already discussed in the context

[213] PNM Br. 11 (citing *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 (Former TNMP Services)*, Case No. 10-00086-UT, Certification of Stipulation (June 21, 2011), at 114).

[214] PNM Br. 11; CCAE/WRA/REIA Br. 9.

of this Commission's rate-setting authority.[215] In the context of single-issue ratemaking, the court in *People ex rel. Madigan v. ICC* recognized in affirming a decoupling mechanism approved by the Illinois commission – called a volume-balancing-adjustment (VBA) rider or "Rider VBA") – that Rider VBA did not violate the rule in Illinois against single-issue ratemaking because the rider "accepts the revenue requirement and provides a mechanism to recover it accurately" and, further, that since "the rider has no impact on the revenue requirement, it poses no risk of distorting the ratemaking process."[216] The only instance PNM says it could identify where the New Mexico Supreme Court has addressed piecemeal ratemaking is in *ABCWUA v. NMPRC*,[217] where the court only referenced an argument that the Fuel and Purchased Power Cost Adjustment Clause (FPPCAC) challenged unsuccessfully in that case represented piecemeal ratemaking.[218]

In addition, PNM states that, as with decoupling mechanisms, FPPCACs are specifically authorized by the Legislature pursuant to NMSA 1978, § 62-8-7(E), which provides an exception to the principle against piecemeal ratemaking. Thus, even if decoupling represented piecemeal ratemaking – a point PNM is unwilling to concede – then Section 62-17-5(F)(2) would constitute an exception to the general rule because it expressly provides that a utility may petition for a decoupling mechanism without undertaking an entire rate case. "Perhaps this determination," PNM surmises, "reflects the legislative choice that a costly and lengthy rate case is unnecessary for approving an appropriate decoupling mechanism."[219] PNM notes, however, that a decoupling mechanism certainly could be determined through a rate case, but the Legislature provided

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[215] *See supra* n. 169.

[216] PNM Br. 11-12 and CCAE Br. 10 (quoting *People ex rel. Madigan v. ICC*, 25 N.E.3rd at 559-600).

[217] 2010-NMSC-013, ¶ 11, 148 N.M. 21, 229 P.3d 494.

[218] PNM Br. 12.

[219] *Id*.

regulatory flexibility of allowing the presentation of decoupling mechanisms in stand-alone cases.[220] CCAE/WRA/REIA add that renewable energy riders allowed for electric utilities under the REA are another analogous species of rate adjustment mechanisms that do not run afoul of the policy against single-issue ratemaking. "Just as the REA allows for adjustments between rate cases," they conclude, Section 62-17-5(F) of the EUEA "expressly allows for a rate adjustment mechanism that of necessity involves a surcharge or credit between rate cases."[221]

The opponents, on the other hand, believe the only way to properly implement a decoupling rate adjustment mechanism is in the context of a general rate case. The Joint Petitioners, citing Case No. 2361, state that the Commission has long disapproved of piecemeal ratemaking because, quoting the Recommended Decision in that case, "[u]nless a complete picture is presented, the Commission cannot possibly fulfill its duty to determine just and reasonable rates."[222] Quoting, next, the Commission's Final Order in Case No. 2058, Joint Petitioners state, "[i]f a utility is allowed to increase a single rate without showing that it is under-earning and suffering a revenue shortfall, it can selectively bring forward issues that will enhance revenues and ignore areas where it is over collecting."[223] They note that in Case No. 2058, the Commission concluded that "a utility should not be permitted to implement a revenue-enhancing rate or charge without demonstrating that its revenues need to be increased, i.e., that it is under-earning."[224] The

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[220] *Id*.

[221] CCAE/WRA/REIA Br. 11.

[222] Jt. Petitioner Br. 18.

[223] Jt. Petitioner Br. 18 (quoting *In the Matter of the Application of Public Service Company of New Mexico for Approval of its Proposed Rates Pursuant to Advice Notices No. 163 and Rules Pursuant to Advice Notice No. 164*, Case No. 2058, Final Order (Oct. 5, 1987), at

[224] Jt. Petitioner Br. 18 (quoting Case No. 2058, Final Order, at 4). Quoting further from the Final Order in Case No. 2058, Joint Petitioners state, at 18, that the "policy basis for the Commission's decision" in Case No. 2058 was as follows:

(*Cont'd on next page*)

Joint Petitioners assert that the reasoning of the Commission in Case No. 2058 concerning piecemeal ratemaking applies with equal force in this proceeding. Without reviewing all cost-of-service aspects, Joint Petitioners submit, a utility can pick and choose which rate classes to adjust without consideration of the impact on other rate classes. Joint Petitioners contend that if a rate adjustment mechanism is approved outside of a general rate case – a case in which all a utility's costs and revenues would be considered – there will be no way to know if the proposed increase (or decrease) caused by the rate adjustment mechanism would be offset by other cost-of-service components or how that increase would affect the revenue requirements of other rate classes. Similarly, the Joint Petitioners conclude, there is also no way of knowing whether application of the proposed rate adjustment mechanism in future cases would fairly balance the interests of ratepayers and shareholders and result in just and reasonable rates as required by Section 62-8-7(A) of the PUA.[225]

New Energy Economy, once again, errantly focuses its argument on PNM's decoupling proposal, the since withdrawn SCSR mechanism, in Case No. 20-00121-UT, a docket which is closed. Nevertheless, like the Joint Petitioners, New Energy Economy also analyzed Commission decisions addressing piecemeal ratemaking such as those in Case Nos. 2058, 2361, and 10-00086-

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> [T]he Commission must balance the interests of ratepayers and shareholders and consider the overall end result of its rate orders . . . . For this reason [*sic*] separate, formal rate proceeding for incremental changes in rates are not favored by the courts or by this Commission. *Id*. at 5.
>
> Piecemeal ratemaking permits a utility to increase revenues without showing that they are necessary to earn a reasonable return . . . . [A] commission rate decision must be based upon the total cost of providing service. *Id*. at 6.
>
> This long-established [anti-piecemeal] policy is designed to protect ratepayers from an increase in one cost of service component, which might be offset by a reduction in another cost of service component. *Id*. at 7.

[225] Jt. Petitioner Br. 19.

UT discussed above.[226] New Energy Economy concludes that the Commission's reasoning in Case No. 2058 applies in this case:

> Here, PNM requested approval of a rate adjustment mechanism in a vacuum. If PNM's stand-alone decoupling proposal is approved, there is no way to know if the proposed increase caused by the rate rider mechanism would be offset by other cost of service components in a general rate case proceeding – a case in which all of PNM's costs and revenues are considered. There is also no way of knowing whether a stand-alone application of the proposed rate adjustment mechanism in future cases would fairly balance the interests of ratepayers and shareholders and result in just and reasonable rates as required by NMSA 1978 § 62-8-7(A) [*sic*].[227]

NM AREA, emphasizing the provision in Section 62-17-5(F)(2) ". . . that ensures that the revenue per customer approved by the commission in a general rate case proceeding is recovered by the public utility[,]" complains that PNM never explains how the Commission can determine and approve a "revenue per customer" without first examining a utility's total revenue requirements as required by the *A.G. v. NMPRC* decision discussed in Section II.C.3 above. In addition, acknowledging that decoupling designed to remove regulatory disincentives for utility expenditures on EE/LM measures and programs is a narrow exception to the general rule that the setting of just and reasonable rates "does not insure that the business shall produce net revenues, nor does the Constitution require that losses of the business in one year shall be restored from future earnings,"[228] NM AREA contends that any decoupling rate set by the Commission that simply guarantees a utility's revenues on a customer-by-customer basis could easily insure that a utility

[226] *See* NEE Br. 11-13.

[227] *Id*. 14.

[228] NM AREA Resp. 5 (quoting *Mountain States Tel. & Tel. Co*., 1950-NMSC-055, ¶ 44).

earns excessive returns for its investors.[229] "Such a scheme," NM AREA concludes, "would clearly violate the basic balancing of interests required by the [PUA] and the EUEA."[230]

2. Analysis and determination: A petition requesting approval of a rate adjustment mechanism to remove regulatory disincentives to energy efficiency and load management is permissible and, in fact, expressly provided for under EUEA Section 62-17-5(F).

The Commission's policy against single-issue or piecemeal ratemaking generally involves changing rates for one item while ignoring all the other costs of service elements typically examined in a general rate proceeding.[231] The Commission disapproves of piecemeal ratemaking because, "[u]less a complete picture is presented, the Commission cannot possibly fulfill its duty to determine just and reasonable rates."[232] "If a utility is allowed to increase a single rate without showing that it is under-earning and suffering a revenue shortfall," the Commission explained in Case No. 2058, "it can selectively bring forward issues that will enhance revenues and ignore areas where it is overcollecting."[233] The Commission thus concluded in Case No. 2058 that "a utility should not be permitted to implement a revenue-enhancing rate or charge without demonstrating that its revenues need to be increased, i.e., that it is under-earning."[234]

Whether any particular decoupling mechanism would violate the policy against piecemeal ratemaking is an academic exercise that cannot, or at least should not, be decided in this declaratory order proceeding where, unlike the Rider VBA upheld in *People ex rel. Madigan v.*

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[229] NM AREA Resp. 5-6.

[230] NM AREA Resp. 6.

[231] Case No. 10-00086-UT, Certif. of Stip., at 114 (citing Utility Case No. 2262, Recommended Decision (Mar. 8, 1990) at 149).

[232] *Id*. (citing Case No. 2361, Recommended Decision (Sept. 30, 1991) at 25).

[233] *Id*. (citing Case No. 2058, Final Order (Oct. 5, 1987) at 5).

[234] *Id*. (citing Case No. 2058, Final Order at 4).

ICC, no concrete decoupling proposal is presented for consideration.[235] But what *is* determinable in this proceeding is that a decoupling mechanism focused properly and solely on removing regulatory disincentives to the utility's development of cost-effective energy efficiency and load management programs and measures may be presented to the Commission in a proceeding outside a general rate case. Accordingly, the Hearing Examiner determines that, analogous to accepted processes for consideration of utility FPPCACs pursuant to 17.9.550 NMAC and renewable energy riders pursuant to the REA, a utility petition requesting approval of a rate adjustment mechanism to remove regulatory disincentives to EE/LM programs and measures is permissible and, in fact, expressly provided for under Section 62-17-5(F) of the EUEA either as a stand-alone petition, as part of the utility's triennial application for approval of proposed EE/LM programs or measures pursuant to 17.7.2 NMAC, or since nothing in the EUEA prohibits it, as a request for relief in a general rate case.

Having resolved this issue, the Hearing Examiner once more feels compelled to note that PNM's postulation that the Legislature provided regulatory flexibility in allowing the presentation of decoupling mechanisms in stand-alone cases is apt – but only apt, to be sure, to the extent that the decoupling is partial and strictly related to removing disincentives to energy efficiency and load management measures and programs. Consequently, the regulatory flexibility built into the EUEA for regulatory *disincentive* mechanisms – essentially a conservation analog to EE/LM *incentive*

[235] The Hearing Examiner understands that decoupling, conceptually, does not change rates for any single item. According to the literature, the rate design method operates, instead, to recover previously determined costs of service subject to adjusting or truing-up deviations in collected and allowed revenues. *See, e.g.,* RAP, *Revenue Regulation and Decoupling: A Guide to Theory and Application*, at 20-21 ("A 'successful' revenue function would be one that keeps the actual revenue collection as close as possible to its actual cost of service throughout the period between rate cases."). Designed correctly, then, a decoupling mechanism should not impact the revenue requirement. However, it would be improvident to make a sweeping, theoretical ruling in this proceeding; in any event, it is unnecessary to do so given the Hearing Examiner's ensuing ruling that a petition requesting approval of a rate adjustment mechanism to remove regulatory disincentives is allowed under Section 62-17-5(F) of the EUEA.

mechanisms and akin to the REA's provision for renewable energy procurement riders – reinforces the Hearing Examiner's resolution that Section 62-17-5(F)(2) does not mandate the Commission to implement full decoupling where, as the opponents point out with justification, total revenue requirements and other cost-of-service components likely would need to be examined in the more holistic context of a general rate case to establish, after balancing the interests of consumers and investors and the public interest, a just and reasonable rate mechanism.

E. Whether a petition for a rate adjustment mechanism under Section 62-17-5(F)(2) would constitute retroactive ratemaking

1. Parties' Positions

The proponents argue that approving a decoupling mechanism would not result in retroactive ratemaking. Two opponents, the Joint Petitioners and New Energy Economy, argue that approval of a stand-alone decoupling rider would amount to retroactive ratemaking.

PNM argues decoupling does not constitute retroactive ratemaking because, distinguishing Mountain Bell's request in *Mountain States Telephone & Telegraph Co.* that its revenue deficiency remedy be made retroactive to account for revenues it should have earned, a decoupling mechanism acts prospectively as a true-up to effectuate previously adopted rates and therefore does not constitute retroactive ratemaking.[236] Moreover, citing the *Mountain States Telephone and Telegraph Co.* court's observation that ratemaking may not be accomplished retroactively "unless some specific statutory or constitutional authority permits," PNM submits that Section 62-17-5(F)(2)'s instruction that the Commission "shall" entertain a decoupling petition on a stand-alone

[236] PNM Br. 20 (citing *Mountain States Tel. & Tel. Co.*, 1950-NMSC-055, ¶¶ 86-90).

basis "overcomes any argument that the principle against retroactive ratemaking prohibits the Commission from acting on a decoupling petition."[237]

CCAE/WRA/REIA agrees with PNM that there is nothing retroactive about decoupling and analogizes the decoupling methodology to true-ups and reconciliation procedures used by the Commission, particularly the FPPCAC Rule, 17.9.550 NMAC ("Rule 550"). Under Rule 550, CCAE/WRA/REIA point out, an electric utility is allowed to change its rates monthly, through a rate rider, outside a rate case, depending on its actual fuel and purchased power costs from a preceding period and must also carry a balancing account, to "compensate for under-collections and over-collections of revenue by increasing or decreasing the factor for the next following billing month."[238] They maintain the FPPCAC methodology is legally no different from decoupling where the utility is allowed, on a prospective basis, to change its rates to compensate for over- or under-collections of revenue and the allowed revenue amount is determined in a rate case, with all adjustments to assure proper recovery of allowed revenues are prospective and based on prospective information.[239] Further, CCAE/WRA/REIA note that the New Mexico Supreme Court has recognized that the Commission can implement a procedure for prospective refunds or surcharges to reconcile rates to authorized returns, citing the court's decision in *In re Comm'n Investigation into 1997 Earnings of U.S. West Communications,*[240] In the underlying proceeding, the Commission's order was based on the finding that U.S. West was earning more than the authorized ROE in its last rate case but if U.S. West chose not to file a rate case, the interim rate

[237] *Id*. 20-21 (quoting *Mountain States Tel. & Tel. Co.*, 1950-NMSC-055, ¶ 89).

[238] CCAE/WRA/REIA Br. 16-17 (quoting 17.9.550.12(B) NMAC).

[239] *Id.* 17.

[240] *Id*. (citing *In re Comm'n Investigation into 1997 Earnings of U.S. West Communications, Inc.*, 1999-NMSC-016, ¶ 11, 127 N.M. 254, 980 P.2d 37).

would become permanent. CCAE/WRA/REIA explain that the interim procedure effectively put rates into effect subject to refund or surcharge based on future information and did not violate the prohibition against retroactive ratemaking.[241]

Both the Joint Petitioners and New Energy Economy focus their arguments on the SCSR decoupling mechanism PNM proposed and subsequently withdrew with the closure of Case No. 20-00121-UT. Relying on the Supreme Court's 1977 opinion in *Mountain States Tel. & Tel. Co. v. N.M. State Corp. Comm'n*, the Joint Petitioners emphasize the court's declaration that "retroactive remedies, which are in the nature of reparations rather than rate-making, are peculiarly judicial in character, and as such are beyond the authority of the Commission to grant," as well as the court's finding from the 1950 *Mountain States Tel. & Tel. Co.* decision that it had "previously criticized the Commission for failure to use the 'latest available actual figures' and asserted that the determination of rates 'depends upon the economic facts relevant at the time of decision.' … Quite obviously the most recent figures would be the most reliable in determining adequate utility rates."[242] This language, the Joint Petitioners submit, provides the basis for the Commission to reject the use of stale data in cases that come before it, which is the situation, they claim, that arose in PNM's decoupling petition in Case No. 20-00121-UT.[243]

The Joint Petitioners are concerned that without clear guidance as to when a rate adjustment mechanism can be adopted, the Commission and the parties may find themselves in the situation that arose in Case No. 20-00121-UT, where PNM proposed to determine credits or charges for the affected classes subject to the SCSR mechanism based on cost per customer

[241] CCAE/WRA/REIA Br. 17.

[242] Jt. Petitioner Br. 19 (quoting *Mountain States Tel. & Tel. Co. v. N.M. State Corp. Comm'n*, 1977-NMSC-032, ¶¶ 82, 88).

[243] Jt. Petitioner Br. 19.

established in PNM's 2015 Rate Case, the Company's last fully litigated base rate proceeding.[244] Joint Petitioners observe that a lot can happen between rate cases. For example, they point out, since 2015 PNM's risk profile has changed, partly due to new legislation such as the Energy Transition Act, and the energy grid modernization roadmap. Under the reasoning of *Mountain States Tel. v. N.M. State Corp. Comm'n*, Joint Petitioners contend it would be improper to approve a rate adjustment mechanism because a proposed mechanism is intended to recover or credit future costs based upon costs approved in a general rate case. Hence, allowing the use of stale data, the Joint Petitioners conclude, would be a retroactive remedy.[245]

New Energy Economy, reviewing essentially the same line of Supreme Court precedent as the Joint Petitioners, argues that the SCSR mechanism PNM proposed in Case No 20-00121-UT would have been impermissibly retroactive because it would have allowed PNM to recover 2015 vintage "fixed cost" revenues authorized by the Commission prior to PNM's most recent general rate case measured by its forecasted billing determinants for residential and small power customers that were subsequently superseded and replaced by the Future Test Year Period class usage forecasts relied on by the Commission in Case No. 16-00276-UT ("2016 Rate Case").[246]

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[244] The Commission considered the Modified Revised Stipulation approved in PNM's most recent rate proceeding in Case No. 16-00276-UT as being the product of a "black box" settlement. For instance, in addressing exceptions regarding a contested cost item apart from the Four Corners Power Plant selective catalytic reduction pollution control system and additional capital expenses, i.e., $46 million in San Juan Generating Station capital expenditures, the Commission stated in its *Revised Final Order* in the 2016 Rate Case that: "Even in the context of a *'black box' stipulation* that includes a $16.5 million cushion of unspecified cost reductions, the Commission declines to find that it is proper to issue PNM a 'blank check' expense account for unknown projects that the Signatories acknowledge have not been identified as included within the terms of that Stipulation." *In the Matter of the Application of Public Service Company of New Mexico for Revisions of its Retail Electric Rates Pursuant to Advice Notice No. 533*, Case No. 16-00276-UT *Revised Order Partially Adopting Certification of Stipulation* ("*Revised Final Order*") (Jan. 10, 2018), at 33, ¶ 92 (emphasis added).

[245] Jt. Petitioner Br. 20.

[246] *See* NEE Br. 17-19.

2. Analysis and determination: Any rate adjustment mechanism approved by the Commission must operate prospectively and ensure that the revenue per customer recovered to remove disincentives to EE/LM was determined in the utility's last general rate case proceeding.

It is axiomatic that, as the Supreme Court has long held, rates fixed by the Commission must apply prospectively.[247] Consistent with the Hearing Examiner's ruling on piecemeal rate-making in Section III.D above, to be legal and regulatorily acceptable, any rate adjustment mechanism approved by the Commission in a stand-alone proceeding or in a utility's triennial EE/LM proceeding[248] would have to operate prospectively and ensure that the revenue per customer recovered to remove disincentives to energy efficiency and load management was determined in the utility's last general rate case proceeding. Whether the underlying data on which the mechanism formulates recovery are relevant, sufficient, and either timely or stale must be determined, as CCAE/WRA/REIA correctly point out, on a case-by-case basis.[249] Of course, utilities should be aware – without having to be forewarned – that requests for a rate adjustment mechanism or other relief founded on stale, irrelevant, insufficient, or otherwise defective data are susceptible to being rejected by the Commission on that basis alone. Beyond forewarning utilities and other stakeholders of the foregoing for future reference, no sweeping declaration or policy pronouncement in this declaratory order proceeding is likely to fix, going forward, the problem of utilities failing to perform adequate analyses conducted using timely and appropriately updated information.

[247] *Mountain States Tel. & Tel. Co. v. N.M. State Corp. Comm'n*, 1977-NMSC-032.

[248] Although, as noted Section III.D above, nothing in EUEA prohibits a utility from petitioning for a partial decoupling mechanism within a general rate case.

[249] *See* CCAE/WRA/REIA Br. 18.

F. 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

Paragraph 26 of the Modified Revised Stipulation ("Revised Stipulation") in Case No. 16-00276-UT addressed the matter of "EUEA disincentive identification and removal" as follows:

> PNM agrees to withdraw its proposed Original Rider No. 48, Lost Contribution to Fixed Cost Mechanism ('LCFC Mechanism') for the residential and small power rate schedules (Rate Nos. 1A and 1B, Rate Nos. 2A and 2B). The identification of regulatory disincentives and the appropriate means to remove regulatory disincentives pursuant to the Efficient Use of Energy Act ('EUEA') have remained in dispute among the parties in previous PNM cases, in Case Nos. 15-00261-UT and 10-00086-UT, and the Signatories are not presently in agreement with regard to PNM's Original Rider No. 48, LCFC Mechanism. To that end, the Signatories agree that a new docket should be opened for a hearing on EUEA disincentive identification and removal issues for PNM, the outcome of which would be implemented as part of PNM's next general rate case. The Signatories agree that resolution of this issue within a new docket is timely and appropriate, and that the deferred implementation of that resolution to PNM's next rate case addresses the issues identified in the *Stipulation Order*. PNM shall file a petition to open this new docket within thirty days after a Final Order in this case.[250]

Addressing the future regulatory disincentive proceeding proposed in Paragraph 26, in their Certification of Stipulation the Hearing Examiner stated they did not take issue with:

> the Signatories' agreement providing for PNM to open a new docket for a hearing on a disincentive identification and removal under the EUEA after the resolution of this case; nor, however, do they recommend that the Commission necessarily endorse at this time the process set forth in paragraph 26 or, for that matter, any particular process for addressing the complexities of identifying and removing regulatory disincentives pursuant to Section 62-5-17(F) of the EUEA, be it in a docket dedicated to the task, a rulemaking, or an energy efficiency docket. Suffice it for now that the Commission acknowledges pursuant to paragraph 26, that parties with a particular interest in promoting energy efficiency programs have obtained PNM's commitment to address the matter [of] EUEA disincentives in a new docket.[251]

[250] Case No. 16-00276-UT, Modified Revised Stipulation (Jan. 23, 2018), at 16, ¶ 26.

[251] Case No. 16-00276-UT, Certification of Stipulation (Oct. 31, 2017), at 150.

PNM took exception in the 2016 Rate Case to the Hearing Examiners' recommendation that the Commission not endorse the specific process set forth in Paragraph 26. Addressing PNM's exception, the Commission first noted in its *Revised Final Order* that it had not yet approved "a specific 'disincentive mechanism' per se" despite examining "proposed mechanisms to identify and remove regulatory disincentives on their merits in several litigated cases."[252] Agreeing with the Hearing Examiners' recommendation, the Commission concluded "that there is no need for the Commission to endorse or require any particular process that the Signatories may determine to follow outside of that which the Commission has followed. Moreover, nothing about the denial of this exception in any way restricts the rights of the Signatories under the Revised Stipulation as the Certification makes no change to Paragraph 26."[253]

1. Parties' Positions

Two parties, CCAE/WRA/REIA and PNM, took opposing positions on whether PNM is estopped by Paragraph 26 of the Revised Stipulation from seeking to implement a decoupling mechanism prior to the company's next general rate case. New Energy Economy posited an entirely different issue not framed for briefing in this proceeding, arguing that PNM's proposed SCSR in Case No. 20-00121-UT would have violated the terms of the stipulated order in Case No. 16-00276-UT.

CCAE/WRA/REIA state that the express language of Paragraph 26 provided a two-step process for implementation of a PNM disincentive mitigation mechanism that could include decoupling: a free-standing case to determine the appropriate or allowable mechanism ("a new docket should be opened for a hearing on EUEA disincentive identification and removal issues for

[252] Case No. 16-00276-UT, *Revised Final Order*, at 31, ¶ 87.

[253] *Id*.

PNM"), followed by implementation of that mechanism in PNM's "next general rate case." That two-step process, CCAE/WRA/REIA maintain, was an express commitment made by PNM and the other parties to the Revised Stipulation in Case No. 16-00276-UT.[254]

CCAE/WRA/REIA assert that Paragraph 26 is enforceable as between the Signatories to the agreement notwithstanding the Commission's declining to endorse the procedures agreed to therein. They point out that, although the Commission did not endorse Paragraph 26 of the Revised Stipulation, the Commission still recognized the denial of PNM's exception did not restrict the rights of the Signatories under the Revised Stipulation since the Commission did not change Paragraph 26.[255]

CCAE/WRA/REIA claim that the Revised Stipulation and Paragraph 26 was the result of bargaining by the parties. Pursuant to Paragraph 26, PNM agreed to drop its proposed LCFC mechanism and defer implementation of a revised disincentive mechanism until the mechanism was developed outside of a rate case to be implemented in PNM's next rate case, in return for other parties agreeing to the process that was intended to lead to a resolution of the issue. The Signatories specifically agreed that "resolution of this issue within a new docket is timely and appropriate."[256]

Applying basic principles of contract law, CCAE/WRA/REIA maintain that when promises are bargained for, and consideration is given, the result is an enforceable contract.[257] They contend that the Signatories' promises to not pose procedural objections to a hearing on the identification of PNM's regulatory disincentives and the permissible mechanisms for the mitigation of those

[254] CCAE/WRA/REIA Br. 12.

[255] CCAE/WRA/REIA Br. 12-13.

[256] CCAE/WRA/REIA Br. 13.

[257] *Id*. (citing *Romero v. Earl*, 1991-NMSC-042, ¶ 6, 111 N.M. 789, 810 P.2d 808).

disincentives was valuable consideration,[258] and Paragraph 26 has the other required element of an enforceable contract, which is mutual assent.[259] Therefore, on its face, CCAE/WRA/REIA reason, Paragraph 26 is a binding agreement between the parties' to the Revised Stipulation.

In addition, CCAE/WRA/REIA note that both the Commission and the Supreme Court recognize that regulatory stipulations are enforceable contracts as between the parties such that the parties may reserve the right to withdraw if the entirety of a stipulation is not accepted by the Commission.[260] They say, moreover, that parties who appear regularly at the Commission recognize that regulatory stipulations bind parties separately from the Commission's order. CCAE/WRA/REIA bring up in this regard the stipulation resolving SPS's last rate case, where the parties "agreed not to oppose the full application of depreciation rates associated with the 2032 abandonment date in SPS's next base rate case," a provision which on its face bound the parties, aside from any Commission order.[261] Therefore, CCAE/WRA/REIA contend that Paragraph 26 of the Revised Stipulation is enforceable under contract law against PNM, and requires PNM to defer implementation of any disincentive mechanism to its next rate case, after developing the decoupling mechanism in a separate docket. They conclude that PNM cannot implement a decoupling disincentive prior to its next general rate case, even if that is otherwise permitted by statute, and the Legislature's 2019 amendment of the EUEA did not relieve PNM of its obligations

[258] *Id.* (citing *Luginbuhl v. City of Gallup*, 2013-NMCA-053, ¶ 15, 302 P.3d 751, for: "Consideration consists of a promise to do something that a party is under no legal obligation to do or to forbear from doing something he has a legal right to do.").

[259] *Id*.

[260] *Id*. (citing *In re Commission's Investigation of Rates for Gas Serv. of PNM's Gas Servs*., 2000-NMSC-008, ¶ 17, Serna J., concurring).

[261] CCAE/WRA/REIA Br. 13-14 (citing Case 19-00170-UT, Certification of Stipulation, at 39).

under the rate case stipulation. A change in law, CCAE/WRA/REIA add, relieves a promissory of its contractual obligation only if the legal change renders performance impossible.[262]

New Energy Economy did not analyze Paragraph 26 of the Revised Stipulation. NEE argues, rather, that Case No. 16-00276-UT established rates going-forward and that PNM could not therefore establish a decoupling mechanism linked to the revenue per customer determined in a case before then (i.e., Case No. 15-00261-UT).[263]

PNM, addressing CCAE/WRA/REIA's argument first, does not disagree with the general principles of contract law they cite as well as the Commission's practice that stipulations reached through litigation are binding to the signing parties with those general principles.[264] Nonetheless, as PNM points out, CCAE/WRA/REIA failed to acknowledge, let alone analyze, the proceedings following the Revised Stipulation in Case No. 16-00276-UT. In short, PNM petitioned the Commission for approval of a rate adjustment mechanism to remove regulatory disincentives in Case No. 18-00043-UT, but that case was subsequently dismissed after the Hearing Examiner determined that the amendments to the EUEA rendered obsolete PNM's proposed LCFC rate adjustment mechanism.[265] PNM, thus, asserts that the its duty to implement the outcome of Case No. 18-00043-UT was extinguished because Case No. 18-00043-UT did not produce an outcome that PNM could implement.[266]

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[262] CCAE/WRA/REIA Br. 14 (citing *City of Starkville v. 4-Cty. Elec. Power Ass'n*, 819 So. 2d 1216, 1224 (Miss. 2002) for proposition that electric cooperative was not relieved of obligation when change in law made contract less beneficial to it).

[263] *See* NEE Br. 14-17.

[264] PNM Resp. 16 (citing PNM Br. 12, where PNM notes it already satisfied its obligation, thereby acknowledging that it had the obligation under the Modified Revised Stipulation).

[265] PNM Resp. 16 (citing Case No. 18-00043-UT, Order Recommending Dismissal of Proceeding (June 7, 2019), at 5).

[266] PNM Resp. 16.

Second, PNM contends that New Energy Economy's argument does not make sense. PNM expounds that under New Energy Economy's logic, the Company would be able to propose a stand-alone decoupling mechanism so long as it is based on the revenue per customer amount implied – to the extent ascertainable – by the rates set in Case No. 16-00276-UT, which NEE contends "remains in effect until the next general rate case."[267] PNM thus observes there is no reason that Case No. 16-00276-UT necessarily bars the Company from bringing forward a standalone decoupling proposal before its next general rate case.[268]

2. Analysis and determination: PNM is not estopped by Paragraph 26 of the Revised Stipulation from petitioning for a rate adjustment mechanism dedicated to removing regulatory disincentives to energy efficiency and load management measures prior to its next general rate case, should it so choose.

The Hearing Examiner addresses in this decision solely the issue framed by the Commission in its March 17, 2021 Order[269] and his subsequent Procedural Order.[270] In conformity with Paragraph 26 of the Modified Revised Stipulation and the Commission's *Revised Final Order* in the 2016 Rate Case, PNM duly pursued a disincentive mechanism in "a new docket," Case No. 18-00043-UT. The outcome of the new docket called for in Paragraph 26 was impossible to implement in PNM's next rate case because after PNM, CCAE, and WRA filed a joint motion to dismiss, the Commission issued an Order on June 12, 2019 accepting the Hearing Examiner's recommendation to dismiss the matter and the docket, accordingly, was closed. In seeking dismissal of Case No. 18-00043-UT, neither CCAE nor any other party mentioned – much less

[267] PNM Resp. 16-17.

[268] PNM Resp. 17.

[269] *See* Mar. 17, 2021 Order, at 4, ¶ 12, at 5, ¶ 15.

[270] Procedural Order, at 9, ¶ F ("On or before June 7, 2021, the petitioning parties (PNM, ABCWUA, the County, and NEE) and Staff shall, and intervenors may, file initial briefs addressing the issues set forth under paragraphs 5 and 7 of this Order."). New Energy Economy's unsolicited and inherently illogical argument therefore warrants no further treatment.

sought to preserve or carry forward – the commitments made in Paragraph 26 beyond Case No. 18-00043-UT. PNM's duty to implement the outcome of Case No. 18-00043-UT terminated, therefore, with the dismissal of that proceeding. Nevertheless, as presaged in the Hearing Examiner's Order recommending dismissal of that case,[271] PNM subsequently filed its petition for approval of the SCSR decoupling mechanism pursuant to the EUEA in Case No. 20-00121-UT, a proceeding that, in turn, was dismissed in the process of establishing this declaratory order proceeding.

G. Whether a utility may use decoupling to establish an additional customer charge, to recover for losses due to increased penetration of DG customers in spite of the existence of NMSA 1978, § 62-13-13.2 and the associated burdens of proof

1. Parties' Positions

Reacting to PNM's repeated citation in its petition in Case No. 20-00121-UT to the increased penetration of DG customers as justification for the need for full revenue decoupling, the Joint Petitioners argue that a rate adjustment mechanism under Section 62-17-5(F)(2) should not be used a means to circumvent the burdens required by NMSA 1978, § 62-13-13.2, which as summarized in Section II.C.5 above, authorizes the implementation of rate riders to recover the

[271] In his June 7, 2019 Order Recommending Dismissal of Proceeding in Case No. 18-00043-UT, the Hearing Examiner's findings, conclusions, and recommended disposition stated, at 5, as follows:

> The Hearing Examiner finds good cause to dismiss this proceeding. Given the amendments to the EUEA set to become effective in a matter of days, the LCFC disincentive mechanism PNM proposed in this case will be superseded and, thus, rendered obsolete. Therefore, as NMIEC [now NM AREA] submits, it would serve the interest of regulatory efficiency and, furthermore, preserve party and Commission resources and avoid unnecessary confusion to begin anew Commission consideration of a putatively EUEA-compliant disincentive mechanism for PNM, should it elect to request one, in an uncluttered docket bearing a case number that reflects the year in which PNM would propose such a mechanism.
>
> Accordingly, for the reasons stated, the Hearing Examiner concludes that the appropriate disposition of this matter is to dismiss the proceeding without prejudice to PNM proposing in some future case a disincentive mechanism which addresses the standards set forth in the recently amended EUEA.

costs of ancillary and standby services for new interconnected DG customers.[272] For similar reasons, New Energy Economy argues that PNM seems to be attempting to use Section 62-17-5(F)(2) to avoid addressing the requirements of Section 62-13-13.2 for DG customers.[273]

PNM, for its part, argues that Section 62-13-13.2 has no application to decoupling and that, in any event, as the latter-enacted statute, Section 62-17-5(F)(2) would control even if the Commission determines the two statutes conflict.[274]

2. Analysis and determination: There is no inherent conflict between Section 62-17-5(F)(2) of the EUEA, properly construed, and Section 62-13-13.2 of the PUA.

In light of his determination that Section 62-17-5(F)(2) does not mandate full revenue decoupling and that the rate adjustment mechanisms authorized under that provision are confined to those designed to remove regulatory disincentives to energy efficiency and load management measures, the Hearing Examiner finds no inherent conflict between Section 62-17-5(F)(2) of the EUEA, properly construed as set forth above, and Section 62-13-13.2 of the PUA.

H. Pursuant to the Commission's ratemaking authority, should the Commission put PNM and other public utilities on notice of the obligation to perform adequate analysis, which includes the use of timely information and may include continuing updates and that the use of stale information will not be tolerated

1. Parties' Positions

New Energy Economy requested that the Commission issue the foregoing declaration given PNM's alleged penchant for relying in past cases on "outdated and un-refreshed data." This included, among other proceedings cited by New Energy Economy, PNM's use of five-year-old

[272] *See* Jt. Petitioner Br. 20-22.

[273] *See* NEE Br. 8-9.

[274] *See* PNM Br. 17-18; PNM Resp. 9.

data from the 2015 Rate Case, to establish the revenue per customer basis for the SCSR mechanism in Case No. 20-00121-UT.[275]

PNM and CCAE/WRA/REIA oppose New Energy Economy's requested declaration. PNM argues that New Energy Economy's request is inconsistent with the language of Section 62-17-5(F)(2) to the extent that, in providing a mechanism should ensure the revenue per customer approved in "***a*** general rate case proceeding" is recovered by utility, the statute does not specify ***which*** general rate case proceeding's authorized revenue per customer amount to use.[276] CCAE/WRA/REIA agrees with PNM, adding that the statute requires the Commission to act on a utility "petition" for a rate adjustment mechanism and includes no limiting language stating that the petition must be filed as part of a rate case, although the mechanism must be based on the revenue per customer approved by the commission in a general rate case.[277] Therefore, CCAE/WRA/REIA assert, "it must be determined on a case-by-case basis what data is considered relevant, timely or stale. Billing determinants would include the amount of revenue per customer and number of customers in a class subject to decoupling."[278]

2. Analysis and determination: *See* Section III.E *supra*.

Since the matter of "stale data" was already considered in the context of determining whether a petition for a rate adjustment mechanism under Section 62-17-5(F)(2) would constitute retroactive ratemaking, New Energy Economy's requested declaration is addressed under Section III.E above.

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[275] *See* NEE Resp. 11-16 (alleging "PNM's reliance on outdated and un-refreshed data" as having been at issue in Case Nos. 15-00261-UT, 16-00276-UT, and 19-00102-UT).

[276] PNM Br. 21.

[277] CCAE/WRA/REIA Br. 18.

[278] *Id*.

IV. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Statement of the Case, Background, Discussion, and all findings and conclusions therein, whether or not separately stated, numbered, or designated as findings and conclusions, are incorporated by reference herein as findings and conclusions. Based on the foregoing Statement of the Case, Background, and Discussion, the Hearing Examiner recommends that the Commission further **FIND** and **CONCLUDE** as follows:

1. The Commission has jurisdiction over the subject matter of this case.

2. Reasonable, proper, and adequate notice of this matter has been given.

3. Section 62-17-5(F)(2) of the Efficient Use of Energy Act, NMSA 1978, § 62-17-5(F)(2), does not mandate the Commission to authorize or approve a full decoupling rate mechanism for some or all rate classes of a public utility.

4. A rate adjustment mechanism applied to specific rate classes pursuant to NMSA 1978, § 62-17-5(F)(2) does not ipso facto violate the prohibition against "unreasonable differences as to rates of service . . . as between classes of service" set forth in NMSA 1978, § 62-8-6.

5. Section 62-17-5(F)(4) of the Efficient Use of Energy Act, NMSA 1978, § 62-17-5(F)(4), does not permit the Commission to reduce a utility's return-on-equity based on approval of a disincentive removal mechanism founded on removing regulatory disincentives to energy efficiency and load management measures and programs.

6. A public utility petition requesting approval of a rate adjustment mechanism to remove regulatory disincentives to energy efficiency and load management programs and measures is permissible under NMSA 1978, § 62-17-5(F)(2) whether presented as a stand-alone petition, as part of the utility's triennial application for approval of proposed energy efficiency and load management programs or measures pursuant to 17.7.2 NMAC, or as a request for relief in a general rate case.

7. Any rate adjustment mechanism approved by the Commission pursuant to NMSA 1978, § 62-17-5(F) must operate prospectively and ensure that the revenue per customer recovered to remove disincentives to energy efficiency and load management measures and programs was determined in the utility's last general rate case proceeding.

8. PNM is not estopped by Paragraph 26 of the Revised Stipulation in Case No. 16-00276-UT from petitioning for a rate adjustment mechanism pursuant to NMSA 1978, § 62-17-5(F) prior to its next general rate case, should the Company so choose.

9. There is no inherent conflict between NMSA 1978, § 62-17-5(F)(2), properly construed as set forth in this Order, and NMSA 1978, § 62-13-13.2.

V. DECRETAL PARAGRAPHS

Based upon the Findings of Fact and Conclusions of Law set forth herein and the record as a whole, the Hearing Examiner recommends that the Commission **ORDER** as follows:

A. The findings, conclusions, analyses, determinations, and rulings made and construed herein are hereby adopted and approved as the findings, conclusions, analyses, determinations, and rulings of the Commission.

B. Any argument, issue, or matter not specifically addressed or rule on during this proceeding is resolved consistent with the findings and conclusions of this Final Order and the Commission's Rules.

C. In accordance with l.2.2.35(D) NMAC, the Commission has taken administrative notice of all Commission orders, rules, decisions, and other relevant materials in all Commission proceedings cited in this Order.

D. This Order is effective immediately.

E. A copy of this Order shall be served on all parties listed on the official service list for this case.

F. This docket is closed.

ISSUED at Santa Fe, New Mexico this **14th** day of **January 2022**.

NEW MEXICO PUBLIC REGULATION COMMISSION

Anthony F. Medeiros

Anthony F. Medeiros
Hearing Examiner

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NEW MEXICO PUBLIC REGULATION COMMISSION

! Anthony F. Medeiros !

Anthony F. Medeiros
Hearing Examiner!

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