

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

**PUBLIC SERVICE COMPANY OF NEW
MEXICO,**

Appellant,

v.

NO. S-1-SC-39401

**NEW MEXICO PUBLIC REGULATION
COMMISSION,**

Appellee.

*In The Matter of the Application of
Public Service Company of New Mexico's
Petition for a Declaratory Order Regarding
Whether the Efficient Use of Energy Act
Permits a Utility to Implement a Full Revenue
Decoupling Mechanism; 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,
NMPRC Case No. 20-00212-UT*

STATEMENT OF ISSUES

Appellant, Public Service Company of New Mexico ("PNM" or the "Company"), submits its Statement of the Issues pursuant to Rule 12-208(A) and (E) NMRA, and Rule 12-601 NMRA.

A. Statement of the New Mexico Supreme Court’s Jurisdiction

This is a direct appeal by PNM of the *Order Adopting Recommended Decision* (“Order”) issued by the New Mexico Public Regulation Commission (“NMPRC” or “Commission”) on April 27, 2022, in NMPRC Case No. 20-00212-UT.

The Order adopted, approved, and accepted the Recommended Decision of the designated Hearing Examiner, without modification, as an order of the Commission.¹ In doing so, the Commission concluded that NMSA 1978, Section 62-17-5(F)(2) (2019) of the Efficient Use of Energy Act² (“EUEA”) does not mandate full decoupling of customers’ rates to remove electric utility disincentives associated with energy efficiency programs. The Commission also concluded that NMSA 1978, Section 62-17-5(F)(4) (2019) 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 but declined to find that this prohibition extends to reductions to a utility’s weighted-average-cost-of-capital (“WACC”).

The New Mexico Supreme Court has jurisdiction over this appeal pursuant to NMSA 1978, Section 62-11-1 (1993) and Rule 12-601 NMRA. Pursuant to Section

¹ The Recommended Decision as adopted by the Order made several other findings that were not the subject of exceptions and, therefore, are not included in this appeal.

² NMSA 1978, 62-17-1 to -11 (2005 as amended through 2020).

62-11-1, the Notice of Appeal was timely filed on May 24, 2022, within thirty (30) calendar days of the Order. A separate appeal to this Court was brought by the Coalition for Clean Affordable Energy (“CCAЕ”) and the Renewable Energy Industries Association of New Mexico (“REIA”), docketed as S-1-SC-39406.

B. Background and Statement of the Case

PNM is a New Mexico public utility subject to the Commission’s jurisdiction under the Public Utility Act, NMSA 1978, Sections 62-1-1 to 62-13-15 (1941 as amended through 2019) (“PUA”). The EUEA also governs PNM’s request for approval of a rate adjustment mechanism to decouple the rates of residential and small power rate classes.

1. Procedural History of Underlying Case.

On May 28, 2020, PNM filed its Decoupling Petition seeking approval of a rate adjustment mechanism to decouple the rates of residential and small power rate classes beginning January 1, 2021. The Petition also sought approval of a Shared Cost of Service rider to effectuate the decoupling mechanism. On October 2, 2020, PNM filed its Motion to Stay proposing that the Commission first address and resolve through a declaratory order the threshold legal issue concerning the interpretation and application of a provision of the EUEA, Section 62-17-5(F)(2), as well as other legal issues raised in the Decoupling Petition proceeding. The Hearing

Examiner granted the motion and entered an Order Vacating Hearings and Staying Proceeding on October 2, 2020.

On October 30, 2020, PNM filed its Petition for Declaratory Order requesting a declaration that Section 62-17-5(F)(2) authorizes full revenue decoupling and rulings on certain other legal questions. 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”). On March 17, 2021, the Commission issued an order establishing the declaratory order proceeding pursuant to 1.2.2.21 NMAC and consolidated PNM’s Petition for Declaratory Order and the Joint Petition into a single proceeding in NMPRC Case No. 20-00212-UT.

The parties to NMPRC Case No. 20-00212-UT filed initial briefs on June 7, 2021, and then filed response briefs on June 28, 2021. The Hearing Examiner held oral argument on July 8, 2021, where all parties who filed briefs in the proceeding presented oral argument on their briefs.

On January 14, 2022, the Hearing Examiner issued a Recommended Decision recommending that the Commission find that EUEA Section 62-17-5(F)(2) does not mandate full decoupling. The Recommended Decision also found that Section 62-17-5(F)(2) 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 disincentive removal mechanism related to energy efficiency and load management but declined to extend that prohibition to a utility's WACC.

2. Background on the EUEA, and Revenue Decoupling.

The EUEA requires public utilities to “include all cost-effective energy efficiency and load management programs in their energy resource portfolios.”³ Energy efficiency programs are intended to “result in a decrease in consumption of electricity...without reducing the amount or quality of energy services,” and load management programs are intended to “result in decreased peak electricity demand or shift demand from peak to off-peak periods.”⁴ Utilities are directed to “acquire the cost-effective and achievable energy efficiency and load management resources available in their service territories.”⁵ The EUEA recognizes that utilities’ ability to acquire cost-effective energy efficiency and load management resources is limited by regulatory disincentives; the primary disincentive is the loss of annual revenues associated with the mandatory energy savings to be achieved through reduced or avoided retail sales. It is a further policy of the EUEA “that regulatory disincentives to public utility development of cost-effective energy efficiency and load

³ § 62-17-3.

⁴ § 62-17-4(F) and (G).

⁵ § 62-17-5(G).

management be removed in a manner that balances the public interest, consumers’ interests and investors’ interests.”⁶ “[U]pon petition or its own motion” the Commission is required to “identify and remove regulatory disincentives.”⁷ The purpose of a “decoupling” rate mechanism preserves the ability to produce established annual revenues in the face of the EUEA’s mandatory energy savings and sales reductions.

In 2019, the legislature amended the EUEA to mandate the removal of regulatory disincentives through revenue decoupling, directing that:

The 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.⁸

Revenue decoupling removes a regulatory disincentive by severing the link between the utility’s recovery of fixed costs and its consumers’ energy consumption. As a general matter, a utility has an incentive to earn more through increased consumption

⁶ § 62-17-3.

⁷ § 62-17-5(F)(1); 17.7.2.17 NMAC.

⁸ § 62-17-5(F)(2).

of energy – this is the so-called “throughput incentive.” Thus, revenue decoupling is a rate design mechanism meant to make a utility indifferent to its ultimate sales volume. If the link between earnings and energy consumption is severed, the utility becomes financially neutral toward achieving policy objectives such as energy efficiency and conservation as required by the EUEA. In turn, the decoupling mechanism uses a true-up mechanism to assure that a utility neither over- nor under-recovers its fixed costs.

3. Background on PNM’s Petitions for a Rate Adjustment Mechanism.

There is a long history of largely unsuccessful attempts before the Commission to address the means to remove regulatory disincentives associated with EUEA programs.⁹ Specifically to PNM, the Commission declined to adopt a decoupling proposal in PNM’s 2015 Rate Case (NMPRC Case No. 15-00261-UT) and the issue was again deferred in the settlement of PNM’s 2016 Rate Case (NMPRC Case No. 16-00261-UT). PNM next petitioned the Commission for

⁹ Commission consideration of disincentives began with the enactment of the EUEA and following initial individual requests filed by electric utilities as part of their applications for approval of EUEA programs, include the following rulemaking dockets: NMPRC Case Nos. 06-00065-UT, 08-00024-UT (consolidated with NMPRC Case Nos. 07-00424-UT, 08-00013-UT); NMPRC Case No. 12-00144-UT (proposing decoupling amendments); NMPRC Case No. 12-00250-UT (proposing decoupling amendments); and NMPRC Case No. 13-00310-UT. In NMPRC Case No. 13-00310-UT, the Commission’s rule provided for a utility to petition to identify and remove disincentives. *See* 17.7.2.17 NMAC (1/15/2015). This language was thereafter deleted and repealed in NMPRC Case No. 19-00168-UT.

approval of a rate adjustment mechanism to remove regulatory disincentives in NMPRC Case No. 18-00043-UT. In that case, PNM proposed a stand-alone lost contribution to fixed cost (“LCFC”) rate adjustment mechanism that was limited to recovering the fixed cost lost due to the implementation of energy efficiency and load management programs. PNM’s petition in NMPRC Case No. 18-00043-UT satisfied its obligation under the Modified Revised Stipulation approved by the Commission in NMPRC Case No. 16-00276-UT, which provided that “the Signatories agree that a new docket should be opened for a hearing on EUEA disincentive identification and removal issues for PNM.”¹⁰

The 2019 amendments to the EUEA, including the new Paragraph 62-17-5(F)(2) cited above, were signed into law by the Governor on April 3, 2019, and took effect on June 14, 2019. On June 7, 2019, the hearing examiner in NMPRC Case No. 18-00043-UT issued an Order Recommending Dismissal of Proceeding noting that “PNM plans on filing a new application with the Commission at some unspecified future time requesting for approval of a disincentive mechanism that

¹⁰ See NMPRC Case No. 16-00276-UT, Modified Revised Stipulation in Compliance with and Conforming to Commission's Orders Granting Conditional Approval at ¶ 26 (January 23, 2018).

will comply with the requirements of recently enacted amendments to the Efficient Use of Energy Act.”¹¹ The hearing examiner concluded:

Given the amendments to the [Efficient Use of Energy Act] 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 ... 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 [Efficient Use of Energy Act]- 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.¹²

The Commission issued its Order Accepting Hearing Examiner’s Recommendation and Dismissing Proceeding on June 12, 2019.¹³

In the second quarter of 2020, PNM deferred its planned filing of a general rate case, which would have included the decoupling proposal presented in the Decoupling Petition, due to the COVID-19 pandemic and in deference to the strain it put on PNM’s customers. Instead, PNM filed its Decoupling Petition as a standalone petition in May 2020 seeking to implement the decoupling mechanism on January 1, 2021. PNM’s decoupling proposal presented in the Decoupling Petition was aligned with the state’s policy goals of encouraging conservation and

¹¹ NMPRC Case No. 18-00043-UT, Order Recommending Dismissal of Proceeding at 1-2 (June 7, 2019).

¹² *Id.* at 15.

¹³ Case No. 18-00043-UT, Order Accepting Hearing Examiner's Recommendation and Dismissing Proceeding (June 12, 2019).

energy efficiency by using the statutory decoupling mechanism to remove disincentives.

4. *Parties Positions on Interpretation of the EUEA.*

The disagreement of the parties in the case below centered around the interpretation of the new language added to the EUEA in 2019. Specifically, the dispute turned on whether the addition of Paragraph 62-17-5(F)(2) mandated “full” revenue decoupling, or whether it limited revenue decoupling only to identified losses from energy efficiency and load management programs. PNM, Western Resource Advocates and CCAE argued the former; ABCWUA, the County and New Energy Economy the latter.

5. *Hearing Examiner’s Recommended Decision on Interpretation of the EUEA.*

The Hearing Examiner found that Section 62-17-5(F)(2) does not mandate full revenue decoupling when read *in pari materia* with other provisions of the EUEA and PUA.¹⁴ The Hearing Examiner found that Section 62-17-5(F)(2) is ambiguous and conflicts with other sections of the EUEA and the PUA. The Hearing Examiner found that the Commission must be able to balance factors like the public interest, customers’ interests, and investors’ interest in determining just and reasonable rates,

¹⁴ Case No. 20-00212-UT, Recommended Decision at 43-54 (January 14, 2022).

and concluded that interpreting Section 62-17-5(F)(2) to mandate full revenue decoupling conflicts with the Commission's ability to consider those factors.¹⁵

The Hearing Examiner also addressed whether the Commission could reduce a utility's rate of return if a decoupling mechanism is implemented. The Recommended Decision found that 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; however, the Hearing Examiner declined to extend this prohibition to reductions of the Company's WACC.¹⁶ The Recommended Decision therefore found that the Commission was free to achieve the same result of the prohibited reduction to a utility's authorized return on equity by instead imputing a lower equity to debt structure to the utility and thus achieving a lower overall rate of return or WACC.

6. Commission Order on Exceptions to the Recommended Decision.

On April 27, 2022, the Commission issued its Order adopting, approving, and accepting the Recommended Decision as the final order of the Commission. On the issue of interpreting Section 62-17-5(F)(2), the Commission accepted the Hearing Examiner's recommendation and declared this section does not mandate that the

¹⁵ *Id.*

¹⁶ NMPRC Case No. 20-00212-UT, Recommended Decision, at 64-65 (January 14, 2022).

Commission authorize or approve a full revenue decoupling rate mechanism for some or all rate classes of a public utility. The Commission agreed with the Hearing Examiner’s interpretation of the EUEA that the decoupling mechanism should not be applied to a utility’s general rates but must be limited to only the calculated savings from the EUEA programs. The Commission concluded that “[a] full revenue decoupling rate mechanism would have effects that far exceed the stated purpose of (F)(2), which is to ‘remove regulatory disincentives.’”¹⁷

The Commission also agreed with the Hearing Examiner’s interpretation of Section 62-17-5(F)(4), finding that “(F)(4) prohibits the Commission from reducing a utility’s [return-on-equity] based on approval of a disincentive removal mechanism” but that “this prohibition does not extend to WACC, of which [return-on-equity] is only one component.”¹⁸

C. Statement of the Issues to be Raised on Appeal and How They Were Preserved

In this section, PNM details the issues it raises on appeal and how these issues were preserved. The issues were preserved by PNM’s filing of the following pleadings: *Public Service Company of New Mexico’s Initial Brief Addressing Petitions for Declaratory Orders* filed June 7, 2021 (“*Initial Brief*”), *Public Service*

¹⁷ NMPRC Case No. 20-00212-UT, Order Adopting Recommended Decision at ¶ 20 (April 27, 2022).

¹⁸ *Id.* at ¶ 25.

Company of New Mexico's Response Brief Addressing Petitions for Declaratory Orders filed June 28, 2021 (“*Response Brief*”), and *Public Service Company of New Mexico's Exceptions to Recommended Decision* filed January 27, 2022 (“*Exceptions*”).

1. *Appellate Issue Related to Commission's Interpretation of EUEA Section 62-17-5(F)(2)*

PNM may raise the following issue on appeal, which relates to the lawfulness of the Commission's legal interpretation of EUEA Section 62-17-5(F)(2):

- a) Did the Commission misinterpret Section 62-17-5(F)(2) of the EUEA, in concluding that the language in this section of the EUEA does not mandate full revenue decoupling? Issue preserved in *Initial Brief* at 3-8, *Response Brief* at 3-13, *Exceptions* at 3-19.

2. *Appellate Issue Related to Commission's Interpretation of EUEA Section 62-17-5(F)(4)*

PNM may raise the following issue on appeal, which relates to the lawfulness of the Commission's conclusion that the prohibition in Section 62-17-5(F)(4) against reducing a utility's return-on-equity found on approval of a disincentive removal mechanism does not extend to the utility's WACC:

- a) Did the Commission misinterpret Section 62-17-5(F)(4) of the EUEA, by concluding that this section does not prohibit a reduction to the

utility's WACC? Issue preserved in *Initial Brief* at 13-15, *Response Brief* at 17-18, *Exceptions* at 19-21.

D. Summary of Relevant Law on Appeal.

1. General Law Relating to Appeals from Commission Orders

Under NMSA 1978, Section 62-11-4 (1965), PNM bears the burden of showing that the Final Order is unreasonable or unlawful. The party challenging the Commission's decision bears the burden of demonstrating that the decision is arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency's authority or otherwise inconsistent with law. *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n*, 2007-NMSC-053 ¶ 13, 142 N.M. 533. In reviewing a Commission decision, the Court looks at 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. *Id.* The Court must vacate an order that it finds to be unreasonable or unlawful, but the Court does not have the authority to modify the Final Order. NMSA 1978, Section 62-11-5 (1982); *Hobbs Gas Co. v. N.M. Pub. Serv. Comm'n*, 1993-NMSC-032, ¶ 6, 115 N.M. 678.

The Supreme Court reviews questions of law and issues of statutory construction *de novo*. *Moongate Water Co. v. City of Las Cruces*, 2013-NMSC-018, ¶ 6. Because statutory interpretation is not a matter within the Commission's

expertise, the Court gives little or no deference to the Commission's interpretation. *Pub. Serv. Co. of N.M. v. N.M. Pub. Util. Comm'n*, 1999-NMSC-040, ¶ 14, 128 N.M. 309, *see also Albuquerque Cab Co. v. N.M. Pub. Regulation Comm'n*, 2014-NMSC-004, ¶ 10 ("We review de novo an administrative agency's statutory construction and determination of legislative intent.").

2. *Summary of Applicable Sections of EUEA*

Relevant authorities applicable to the review of the Commission's interpretation of EUEA Section 62-17-5(F)(2) and Section 62-17-5(F)(4) include:

- a) Section 62-17-5(F)(2) ("The 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.”). The Commission misinterpreted this provision. Applicable to Statement of Issues (“SOI”) C.1(a).

- b) Section 62-17-5(F)(4) (“The commission shall ... (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.”) The Commission misinterpreted this provision. Applicable to SOI C.2(a).

The policy directives of the EUEA also inform the interpretation of Section 62-17-5 and provide 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.” § NMSA 1978, 62-17-3 (2008).

3. Summary of PUA and other Relevant Statutes

The PUA provides that the public interest, the interests of consumers and the interests of investors are served by regulation that encourages capital and investment in utility plant and service, including through economic use of demand-side

resources for the rendition of service to the general public and to industry.¹⁹ The PUA also provides that “[e]very rate made, demanded or received by any public utility... be just and reasonable.”²⁰ “To set a just and reasonable rate, the Commission must balance the investor’s interest against the ratepayer’s interest.”²¹ Rate schedules are to set forth user classifications and must be adhered to so no person shall “receive or accept any service from a public utility for a compensation greater or less than that prescribed in such schedules.”²² The PUA requires that the rates set by the Commission be “designed to produce annual revenues no greater than those determined by the commission in its order to be just and reasonable.”²³

E. How the Issues Arose

PNM submitted a Petition for Declaratory Order requesting the Commission resolve legal issues in the interpretation of the EUEA, including 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 PUA. ABCWUA filed a Joint Petition for Declaratory Order shortly thereafter, and the petitions were

¹⁹ NMSA 1978, § 62-3-1 (2008) (amending policy to encompass demand-side resources).

²⁰ § 62-8-1.

²¹ *Timberon Water Co., Inc. v. N.M. Pub. Serv. Comm’n*, 1992-NMSC-047, ¶ 29, 114 N.M. 154, 161 (internal citations omitted).

²² NMSA 1978, §§ 62-8-4 and 62-8-5 (1953).

²³ NMSA 1978, § 62-8-7(D) (2011).

consolidated into a single proceeding, NMPRC Case No. 20-00212-UT. Parties filed initial briefs responding to the Petitions for Declaratory Orders and then filed response briefs to the initial briefs. The Hearing Examiner ordered oral argument on the matter on July 15, 2021. Following oral argument, the Hearing Examiner issued a Recommended Decision on January 14, 2022. Parties filed exceptions to the Recommended Decision. The Commission then issued an order adopting the Recommended Decision.

F. Related Appeals

CCAIE and REIA have filed a related appeal pending in S-1-SC-39406.

Respectfully submitted this 23rd day of June 2022.

PUBLIC SERVICE COMPANY OF NEW MEXICO

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Public Service Company of New Mexico's Notice of Appeal was served in accordance with Rules 12-202(E) and 12-208(C) NMRA by email to the parties listed below on June 23, 2022:

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