IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. S-1-SC-39406

COALITION FOR CLEAN AFFORDABLE ENERGY and RENEWABLE ENERGY INDUSTRIES ASSOCIATION OF NEW MEXICO,

Appellants,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee,

and

ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY, BERNALILLO COUNTY, NEW ENERGY ECONOMY and NEW MEXICO AFFORDABLE RELIABLE ENERGY ALLIANCE,

Intervenors-Appellees.

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

CONSOLIDATED WITH

NO. S-1-SC-39401

PUBLIC SERVICE COMPANY OF NEW MEXICO,

Appellant,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee,

and

ALBUQUERQUE BERNALILLO COUNTY WATER UTILITY AUTHORITY, BERNALILLO COUNTY, NEW ENERGY ECONOMY and NEW MEXICO AFFORDABLE RELIABLE ENERGY ALLIANCE,

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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

PUBLIC SERVICE COMPANY OF NEW MEXICO'S BRIEF-IN-CHIEF

(ORAL ARGUMENT REQUESTED)

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-318(G) NMRA, Appellant Public Service Company of New Mexico ("PNM") states that the body of this brief is 36 pages and contains 8,209 words in Times New Roman 14-point font, a proportionally-spaced typeface, as calculated by Word for Microsoft 365 MSO Version 2108, and is therefore within the limits permitted by Rule 12-318(F)(3).

TABLE OF AUTHORITIES

Federal Cases

New Mexico Constitution

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I. INTRODUCTION

This case presents two questions of law for this Court to resolve:

> 1. Did the New Mexico Public Regulation Commission ("Commission") misconstrue Section 62-17-5(F)(2) (2019) of the Efficient Use of Energy Act[1] ("EUEA") in deciding that the statue does not mandate full decoupling of customers' rates to remove electric utility disincentives associated with energy efficiency programs?
>
> 2. Did the Commission subvert Section 62-17-5(F)(4) by finding the Commission can indirectly reduce a utility's return on equity if a decoupling mechanism is implemented?

Section 62-17-5(F)(2) was added to the EUEA to mandate full rate decoupling, in response to the Commission having construed the previous law to only allow for rate decoupling restricted solely to energy efficiency usage. PNM submits that the current statute cannot be similarly restricted by the Commission. PNM also asks the Court to make clear that the Commission cannot do indirectly what Section 62-17-5(F)(4) prohibits directly; namely, when the statute forbids reduction of a utility's return-on-equity ("ROE") based on approval of a disincentive removal mechanism, the Commission cannot change utility's weighted-average-cost-of-capital ("WACC") to effectively accomplish such a reduction through the back door.

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

To give context to these legal questions presented under the EUEA, the law is concerned with removing regulatory disincentives against energy efficiency and conservation that arise for a public utility under traditional ratemaking methods. Under traditional rate setting, fixed costs are often recovered through variable energy charges, giving a utility an incentive to earn more through increased consumption of energy; in utility regulation parlance, this is called the "throughput incentive." This also creates a disincentive to promote energy efficiency, and the EUEA recognizes and seeks to eliminate that disincentive.

Section 62-17-5 specifically allows for disincentives to be eliminated through a rate adjustment mechanism broadly known as "revenue decoupling." This mechanism can take different forms from "partial decoupling" to "full decoupling" by "decoupling" or unlinking some or all of a utility's sales volume from its ultimate recovery of fixed costs. In all instances, revenue decoupling seeks to remove a regulatory disincentive by severing the incentive/disincentive link between the utility's recovery of fixed costs and increases/decreases in consumers' energy consumption. By decoupling the link between earnings and energy consumption, the utility becomes financially neutral toward achieving policy objectives such as energy efficiency and conservation.

The arguments on the merits in this brief-in-chief are presented in two sections:

- The construction of Section 62-17-5(F)(2); and
- The construction of Section 62-17-5(F)(4).

II. SUMMARY OF PROCEEDINGS

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. **[7 RP 0905]** 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. **[*Id.*]** The Hearing Examiner granted the motion and entered an Order Vacating Hearings and Staying Proceeding on October 2, 2020. **[*Id.* at 0906]**

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. **[*Id.*]** On November 3, 2020, the Albuquerque Bernalillo County Water Utility Authority and Bernalillo County filed a Joint Petition for Declaratory Order ("Joint Petition"). **[1 RP 0001-0019; 7 RP 00907]** 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. **[3 RP 00387-0401]**

The parties to NMPRC Case No. 20-00212-UT filed initial briefs on June 7, 2021**[5 RP 0520-00550, 0551-0575, 0576-0582; 6 RP 583-0613; 0614-0622, 0623-06590660-0664]**, and then filed response briefs on June 28, 2021. **[6 RP 0665-0685, 0686-0705, 0706-0719, 0720-0746, 07747-0757]** 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. **[6 RP 0764-0889]**

On January 14, 2022, the Hearing Examiner issued a Recommended Decision **[7 RP 0898-00993]** recommending that the Commission find that EUEA Section 62-17-5(F)(2) does not mandate full decoupling. **[*Id.* ¶ 3 at 0990]** The Recommended Decision also found that Section 62-17-5(F)(4) does not permit the Commission to reduce a utility's ROE 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. **[*Id.* at 0968-0967, ¶ 5 at 0990]**

On April 27, 2022, the Commission adopted the Recommended Decision in its Order Adopting Recommended Decision ("Final Order"). **[7 RP 1078-1089]** In its Final Order, the Commission adopted the Recommended Decision in whole. **[7 RP ¶¶ A and B at 1087]**

IV. STANDARD OF REVIEW

This case presents a matter of pure statutory construction. As such, the Court's review is *de novo*.[2] In addition, whether a statute is ambiguous is also a question of law that courts review *de novo*.[3] Although the Commission's administration of a statute may be afforded some deference in certain circumstances, the Commission does not have the authority to "pour any meaning it desires into the statute,"[4] and "New Mexico courts accord little deference to the agency's own interpretation of its jurisdiction."[5] Finally, "[t]he court should reverse if the agency's interpretation of a law is unreasonable or unlawful."[6]

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[2] *Moongate Water Co. v. City of Las Cruces*, 2013-NMSC-018, ¶ 6. *See also Pub. Serv. Co. of N.M. v. N.M. Pub. Util. Comm'n*, 1999-NMSC-040, ¶ 14, 128 N.M. 309 ("Because statutory construction is outside the realm of the Commission's expertise, [the Supreme Court] afford[s] little, if any, deference to the Commission." (internal quotations and citation omitted)).

[3] *State v. Rivera*, 2004-NMSC-001, ¶ 9, 134 N.M. 769.

[4] *State ex rel. Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 17, 127 N.M. 272 (quoting *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486, 1504 (D.C. Cir. 1984)).

[5] *Moongate Water Co.*, 2013-NMSC-018, ¶ 13.

[6] *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 11, 120 N.M. 579.

IV. ARGUMENTS

A. The Commission Misconstrued Meaning Of Section 62-17-5(F)(2) As Not Providing For Full Decoupling.

In 2019, the Legislature amended the EUEA to mandate the removal of regulatory disincentives associated with energy efficiency and conservation 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.[7]

The meaning of this 2019 amendment to the EUEA is the crux of this case. PNM contends that the text of Section 62-17-5(F)(2) is clear; it provides that to "remove regulatory disincentives," the decoupling mechanism adopted by the Commission must ensure 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*."[8] The

[7] § 62-17-5(F)(2).
[8] § 62-17-5(F)(2) (emphasis added).

emphasized phrase should put the question to rest: Section 62-17-5(F)(2) explicitly provides for a rate adjustment mechanism that allows a utility to recover a fixed revenue per customer "without regard" to volumetric sales, thus severing the link between sales and revenues. The concept embodied in the statute's rate adjustment mechanism is known as full revenue decoupling.[9] Further, the statute mandates this mechanism is to be implemented as part of a utility's general rates, as a stand-alone tariff rider, and not as part of the EUEA's energy efficiency rate rider.

The Commission, which adopted the reasoning of the Hearing Examiner's Recommended Decision ¶¶ 20-23 [**7 RP 0935**], disagreed with PNM's interpretation.[10] The Commission, in adopting the reasoning of the Hearing Examiner, concluded 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 Public Utility Act (PUA).[11] The Hearing Examiner found that Section 62-17-5(F)(2) is ambiguous and conflicts with other sections of the EUEA and the PUA. He further found that the Commission must be able to balance factors like the public interest,

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[9] *See* PNM's Initial Brief Addressing Petitions for Declaratory Orders, at 6 ("PNM Initial Br."). **[6 RP 0595]**

[10] **[7 RP 1085-1086]** Because the Commission in its Final Order adopted the Hearing Examiner's reasoning wholesale in three rather short paragraphs, PNM's discussion *infra.* addresses the reasoning of the Recommended Decision, which gives fuller expression of the statutory construction.

[11] Case No. 20-00212-UT, Recommended Decision at 43-54 (January 14, 2022). **[7 RP 0947-0958]**

customers' interests, and investors' interest in determining just and reasonable rates, 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.[12] The Recommended Decision concludes: "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."[13]

The legal conclusions in the Commission's Final Order adopting the Recommended Decision violate this Court's canons of statutory construction. It furthermore usurps the Legislature's authority to set the parameters of public utility regulatory policy.[14]

[12] *Id*.

[13] *Id.* at 43. **[7 RP 0947]**

[14] *See Citizens for Fair Rates & the Env't v. N.M. Pub. Regulation Comm'n ("CFRE")*, 2020-NMSC-010, ¶ 45 ("[W]hile the New Mexico Constitution delegates to the Commission the exclusive responsibility for carrying out public utility regulatory policy, the parameters of that policy are, in the first instance, for the Legislature to decide.").

1. The Plain Meaning Of Section 62-17-5(F)(2) Mandates Full Revenue Decoupling.

When interpreting a statute, the first step is to evaluate the plain meaning.[15] The Commission should not read words into the statute that are not there,[16] and the Commission should not construe the statute in way that would render parts "surplusage or superfluous."[17]

The Commission abandons the plain meaning rule in favor of creating ambiguity.[18] The Commission finds that a "single, isolated provision" cannot have

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[15] *Quynh Truong v. Allstate Ins. Co.*, 2010-NMSC-009, ¶ 37, 147 N.M. 583 (When a statute contains language which is clear and unambiguous, courts must give effect to that language and refrain from further statutory interpretation.). *See also State ex rel. Egolf v. N.M. Public Regulation Comm'n*, 2020-NMSC-018, ¶ 33 (The Commission has a constitutional duty to regulate public utilities in such manner as the legislature shall provide. (internal quotation omitted)).

[16] *State v. Maestas*, 2007-NMSC-001, ¶ 15, 140 N.M. 836 ("We may only add words to a statute where it is necessary to make the statute conform to the [L]egislature's clear intent, or to prevent the statute from being absurd.").

[17] *Katz v. N.M. Dep't of Human Servs.*, 1981-NMSC-012, ¶ 18, 95 N.M. 530.

[18] Notably, the Recommended Decision concluded that the idea that Subsection (F)(2) irrefutably "commands 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[.]" Recommended Decision at 47-48 (footnote omitted). **[7 RP 0951-0952]**

the effect that its plain language sets forth,[19] and concludes, "The Commission . . . should not unilaterally relinquish its [rate-setting] authority without a legislative determination mandating such a surrender in clear and explicit terms."[20] This has it exactly backwards: the Commission does not have plenary authority that the Legislature must explicitly take away; to the contrary, the Commission is bound to follow the plain language of the Legislature's direction.[21] That direction, embodied by the enactment of subsection (F)(2) in 2019, is that full revenue decoupling is the regulatory policy for the state.

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[19] *Id.* at 45. The Recommended Decision's reference to a "single, isolated provision" runs against the requirement that statutory amendments be interpreted to give effect to all parts. **[7 RP 0949]** *See Eldridge v. Circle K Corp.*, 1997-NMCA-022, ¶ 10, 123 N.M. 145 ("When a statute has been amended, the amendments must be read in conjunction with the other parts of the statute to give effect to each part and implement legislative intent.").

[20] *Id.* at 54. **[7 RP 0958]** It should be noted that there is no rate-setting authority to "unilaterally relinquish" where such authority is provided by the parameters the Legislature sets. *See CFRE*, 2020-NMSC-010¶ 45 (New Mexico Constitution delegates responsibility to Commission to carry out public utility regulatory policy decided by Legislature) (citation omitted). Accordingly, the more apt description is that the Legislature can "unilaterally divest" such duties.

[21] *See Egolf*, 2020-NMSC-018, ¶ 33 (The Commission has a constitutional duty to regulate public utilities "in such manner as the legislature shall provide."); *CFRE*, 2020-NMSC-010, ¶ 45 ("[W]hile the New Mexico Constitution delegates to the Commission the exclusive responsibility for carrying out public utility regulatory policy, the parameters of that policy are, in the first instance, for the Legislature to decide.").

The Commission held that Section 62-17-5(F)(2) must be read to conflict with sections of the EUEA[22] and the PUA[23] because the PUA allows for the Commission to balance factors like the public interest, customers' interests, and investors' interests to determine just and reasonable rates.[24] In other words, a mandatory decoupling mechanism under any circumstance would be an impermissible infringement on the Commission's ratemaking authority. Essentially, the Commission is manufacturing a controversy because the Legislature has exercised its prerogative and prescribed the form of ratemaking to be applied, not because the statute is unclear or conflicts with other statutory provisions.

The Commission's finding of a statutory conflict is untethered from relevant canons of statutory interpretation, including:

(1) a harmonizing interpretation should be identified if statutes appear to conflict;

(2) a later-enacted statue governs if there is conflict; and

(3) a more specific statute controls over a general statute.[25]

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[22] 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).
[23] NMSA 1978, §§ 62-1-1 to 62-13-16 (1941 as amended through 2021).
[24] *See* Recommended Decision at 48. **[7 RP 0952]**
[25] NMSA 1978, § 12-2A-10(A).

Furthermore, as this Court has said, "while the New Mexico Constitution delegates to the Commission the exclusive responsibility for carrying out public utility regulatory policy, the parameters of that policy are, in the first instance, for the Legislature to decide."[26] Rather than letting the Legislature decide, the Commission's misapplication of a clear-statement rule thwarts the Legislature's efforts to decide the parameters of public utility regulatory policy.

In interpreting statutes, the analysis begins (and often ends) with the plain meaning of the text.[27] Plain meaning is a tool used to discern the legislative intent.[28] Although the plain meaning is the "primary source" for understanding legislative intent, "it must yield on occasion to an intention otherwise discerned in terms of equity, legislative history, or other sources."[29] New Mexico Courts also look to other indicators of legislative intent when a statute is ambiguous.[30]

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[26] *CFRE*, 2022-NMSC-010, ¶ 45; *see also id.* (collecting cases, including *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 313 (1989) ("We have never doubted that state legislatures are competent bodies to set utility rates.")).

[27] *See State v. Jonathan M.*, 1990-NMSC-046, ¶ 4, 109 N.M. 789 ("When a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation.").

[28] *State v. Rivera*, 2004-NMSC-001, ¶ 12, 134 N.M. 769.

[29] *Sims v. Sims*, 1996-NMSC-078, ¶ 22, 122 N.M. 618 (quoting *Chesapeake & Ohio R.R. v. United States*, 571 F.2d 1190, 1194 (D.C. Cir. 1977)).

[30] *See N.M. Real Estate Comm'n v. Barger*, 2012-NMCA-081, ¶ 9 ("When we interpret an ambiguous statute, our primary task 'is to determine the intent of the Legislature and construe the statute in a manner that gives effect to that intent.'" (quoting *Leo v. Cornucopia Rest.*, 1994-NMCA-099, ¶ 10, 118 N.M. 354)).

The plain meaning of Section 62-17-5(F)(2) contemplates and authorizes full revenue decoupling, and this plain meaning is further supported by the legislative history surrounding the passage of Section 62-17-5(F)(2) and by the context provided in the preceding Section 62-17-5(F)(1).

In construing a statute, a statute's language, in context with surrounding statutory provisions, as well as the practical implications and legislative purpose of the statute controls. *See Bishop v. Evangelical Good Samaritan Society*, 2009-NMSC-036, ¶ 10, 146 N.M. 473. Though this Court does not typically begin by analyzing legislative purpose and history, the EUEA's legislative history is probative of Section 62-17-5(F)(2)'s meaning, and also provides an important regulatory backdrop against which the Legislature passed the 2019 amendments to the EUEA.[31]

Thus, it is relevant how the Commission previously interpreted Section 62-17-5(F)(1) before Section 62-17-5(F)(2) was added to the EUEA through the 2019 amendments to the EUEA.[32]

Section 62-17-5(F)(1) states:

> The Commission shall: . . . upon petition or its own motion, identify and remove regulatory disincentives or barriers for public utility expenditures on energy efficiency and load management measures in

[31] The 2019 amendments to the EUEA were passed as House Bill 291.

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

> a manner that balances the public interest, consumers' interests and investors' interests.

Prior to 2019, the Commission had consistently interpreted Section 62-17-5(F)(1) as not authorizing full revenue decoupling. First, in a 2012 rulemaking to implement the EUEA, the Commission rejected a proposed rule to declare revenue decoupling the mechanism of choice to eliminate disincentives to energy efficiency programs.[33] Similarly, in adjudicating utilities' energy efficiency programs pursuant to the EUEA, the Commission uniformly rejected full revenue decoupling under Section 62-17-5(F)(1), finding that proposals pursuant to that section must be limited to energy efficiency programs. For example, the Commission rejected a full revenue decoupling proposal for PNM's then-natural gas utility under Section 62-17-5(F)(1).[34] Next, in a proceeding involving Southwestern Public Service Company, the Commission again held: "a utility must show the amount of fixed cost that would not be recovered as the result of its energy efficiency and load management programs and that the amount to be recovered by its proposed adder-

[33] *See generally* Case No. 15-00261-UT, Corrected Recommended Decision, at 261 (providing a historical overview of proceedings relevant to Section 62-17-5 of the EUEA, and discussing Case No. 12-00250-UT, a rulemaking where the Commission considered but rejected full revenue decoupling).

[34] *Id.* at 263 ("The Commission welcomes appropriate measures to eliminate disincentives to investment by utilities in energy efficiency programs as contemplated by the Act. However, they must be narrowly focused to address those disincentives, and not be aimed at making the utility whole for all load losses." (quoting Case No. 06-00210-UT, Final Order Partially Adopting Recommended Decision, ¶ 120 (June 29, 2007))).

like mechanism would not recover more than that amount."[35] The Commission likewise rejected PNM's 2015 Revenue Balancing Account ("RBA") decoupling proposal as overly broad.[36] In fact, the Commission has never approved *any* proposal to eliminate regulatory disincentives, despite the long-standing mandate to do so under the EUEA.

Against this backdrop,[37] the New Mexico Legislature added Section 62-17-5(F)(2) in 2019. Section 62-17-5(F)(2)'s clear and unambiguous meaning demonstrates that it authorizes full revenue decoupling mechanisms. *See State v. Jonathan M.*, 1990-NMSC 046, ¶ 4, 109 N.M. 789 ("When a statute contains language which is clear and unambiguous, we must give effect to that language and refrain from further statutory interpretation."). Although Section 62-17-5(F)(2) may not include the precise words "full decoupling," it describes that exact concept. The first sentence provides that the rate adjustment mechanism shall ensure the public utility recovers "revenue per customer . . . *without regard to the quantity of electricity or natural gas actually sold* by the public utility" (emphasis added).

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[35] *Id.* at 265 (quoting Case No. 10-00197-UT, Final Order Disapproving Certification of Stipulation and Denying Application Without Prejudice, ¶ 6 (Nov. 10, 2011)).

[36] *See* Case No. 15-00261-UT, Final Order Partially Adopting Corrected Recommended Decision, ¶ 239 (Sept. 28, 2016).

[37] *See Alexander v. Anderson (In re Protest of Alexander)*, 1999-NMCA-021, at ¶ 17, 126 N.M. 632 (stating that the legislature is presumed to be aware of a longstanding administrative construction of a statute).

Only a full revenue decoupling mechanism could achieve what the emphasized language provides (*i.e.*, that revenue per customer has *no relationship*—"without regard" —to the quantity of sales).[38]

A mechanism meant to remove only specific disincentives associated with energy efficiency or load management programs would still leave a utility's revenues subject to impacts on volumetric sales resulting from other effects, such as customers' energy conservation to an energy efficiency program (*e.g.*, conservation resulting from appeals by environmental or conservation groups); energy usage efficiencies and reductions resulting from improved codes and standards (that a utility would have an incentive to oppose absent decoupling); and macroeconomic effects on customers' energy consumption (like weather, or the impacts of a global pandemic). The statute's clear language authorizes a utility to recover a revenue per customer "without regard" to volumetric sales, thus

[38] *See* Regulatory Assistance Project, *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 ("Decoupling in its essential, fullest form 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.").

completely severing the link between sales and revenues. That is full revenue decoupling.

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

Given the unambiguous text, it is no surprise that the Commission itself in its fiscal impact analysis 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."[39] The Recommended Decision, and hence the Commission's Final Order on appeal here, reversed the Commission's early understanding of the statute.

Although the text of Section 62-17-5(F)(2) is clear standing alone, reading it alongside Section 62-17-5(F)(1) further reinforces the appropriate construction of Section 62-17-5(F)(2) as authorizing full decoupling. First, unlike Section 62-17-5(F)(2), Section 62-17-5(F)(1) *explicitly* provides for removal of regulatory disincentives "for public utility *expenditures* on energy efficiency and load management measures (emphasis added)." While the Commission had consistently

[39] Fiscal Impact Report, House Bill 291, at 3 (last updated March 4, 2019), https://nmlegis.gov/Sessions/19%20Regular/firs/HB0291.PDF. [40] *See, e.g.*, Case No. 15-00261-UT, Corrected Recommended Decision, at 265 ("a utility must show the amount of fixed cost that would not be recovered as the result of its energy efficiency and load management programs and that the amount to be recovered by its proposed adder-like mechanism would not recover more than that amount" (quoting Case No. 10-00197-UT, Final Order Disapproving Certification of Stipulation and Denying Application Without Prejudice, ¶ 6 (Nov. 10, 2011)).

interpreted previous the language of subsection (F)(1) to limit utilities to seeking recovery only for revenues lost through energy efficiency and load management

programs,[40] the addition of Section 62-17-5(F)(2) in 2019 did not contain that limitation. Further, 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 is that the Legislature intended not to include such limitations. *See Patterson v. Globe Am. Cas. Co.*, 1984-NMCA-076, ¶ 10, 101 N.M. 541 ("These statutes show the Legislature knows how to create a private remedy if it intends to do so. By negative inference, the Legislature's failure to provide for a private action suggests that it did not intend to create one.")

Finally, the Legislature is presumed to be aware of existing statutory provisions when enacting amendments and is further presumed to intend its amendments to complement the existing language. *Martinez v. Pub. Empls. Ret. Ass'n*, 2012-NMCA-096, ¶ 34.[41] Thus, the correct interpretation requires reading Section 62-17-5(F)(2) as a complement to—and not a restatement or subpart of—Subsection 62-17-5(F)(1). The Legislature would not have enacted Section 62-17-5(F)(2) were it just a restatement of what Section 62-17-5(F)(1) already provided.

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

[41] *See also* NMSA 1978, § 12-2A-10 (Statutes must be construed to give effect to each, but later-enacted statute governs if conflict is irreconcilable.).

See State v. Rivera, 2004-NMSC-001, ¶ 18, 134 N.M. 769 ("We are generally unwilling to construe one provision of a statute in a manner that would make other provisions null or superfluous."); *Katz v. New Mexico Department of Human Services*, 1981-NMSC-012, ¶ 18, 95 N.M. 530 ("This interpretation would result in obliterating the distinction between the mandatory and optional categories explicitly written into the law by Congress. A statute must be construed so that no part of the statute is rendered surplusage or superfluous."). Even if the "regulatory disincentives" in subsection (F)(1) are construed to only be those related to energy efficiency and load management (identifying and removing "regulatory disincentives or barriers for public utility expenditures…"), subsection (F)(2) unambiguously prescribes the method a utility may use for removing regulatory disincentives as a whole—namely, by completely severing the connection between per-customer revenue and volumetric sales. Only a full revenue decoupling mechanism satisfies the "without regard" language contained in Section 62-17-5(F)(2).[42]

The plain meaning of Section 62-17-5(F)(2) is sufficient for the Court to declare the EUEA mandates full decoupling.

[42] PNM Initial Br. at 5. **[6 RP 0594]**

2. There is no conflict between Section 62-17-5(F)(2) and the remainder of the EUEA and the PUA, meaning a clear-statement rule is unsupported.

Rather than attempting to harmonize Section 62-17-5(F)(2) with other provisions of the EUEA and PUA, the Commission's adopted reasoning goes out of its way to find a "conflict." Specifically, the Recommended Decision decided there is a fundamental conflict between the Legislature's mandate of a specified rate adjustment mechanism Section 62-17-5(F)(2) and the EUEA's and PUA's general statements providing for balancing the public interest, consumers' interest, and investors' interest.[43] From that purported conflict, the Recommended Decision then determined that Section 62-17-5(F)(2)'s language must be ambiguous rather than "irrefutably" clear as to its legislative directive.[44] This ignores precedent that properly interpreting statutes requires identifying a harmonizing interpretation.

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[43] *See* Recommended Decision at 48 ("The proponents' paradoxical reading of Subsection (F)(2) would lead to an absurd and unjust result . . . 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." (footnotes omitted)). **[7 RP 0952]**

[44] *See id.* at 47-48 (finding "genuine ambiguity" because "Subsection (F)(2)['s] . . . command[that] the Commission . . . 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." (footnote omitted)). **[7 RP 0951-0952]**

The Legislature has directed that "[i]f statutes appear to conflict, they must be construed, if possible, to *give effect to each*."[45] Rather than identify a harmonizing interpretation, the Commission's rationale did not give effect to the "without regard" language contained in subsection (F)(2) and instead stated that "a properly set rate" can only be just and reasonable if the Commission so determines.[46] Reaching a harmonizing interpretation should start from the premise that the Legislature's enactments are in furtherance of the interests reflected in Section 62-3-1(B).[47] This Court's decision in *CFRE* (adapted to the statute here) proves the point that it was for the Legislature to decide whether permitting a public utility to select the rate mechanism provided for in Section 62-17-5(F)(2) promotes the legitimate interests reflected in Section 62-3-1(B) and Section 62-17-3.[48] The type of rate or rate methodology can be set by the Legislature, which it has done in

[45] NMSA 1978, § 12-2A-10(A) (1997) (emphasis added). This canon of interpretation is supported by ample caselaw. *See, e.g.*, *Herald v. Bd. of Regents of the Univ. of N.M.*, 2015-NMCA-104, ¶ 28 (stating, "a determination that two legislatively enacted provisions irreconcilably conflict is not favored" and collecting cases).

[46] Recommended Decision at 49 n.159. **[7 RP 0953]**

[47] *Id.* at 48. **[7 RP 0952]**

[48] 2022-NMSC-010, ¶ 42. Notably, *CFRE* did not require a "clear statement" to reach this conclusion.

authorizing full decoupling. This assumption that only the Commission can do this was unsupported before *CFRE* was decided,[49] but it certainly cannot stand now.[50]

Additionally, the facts of *State ex rel. Helman v. Gallegos* show the type of case where a true conflict exists.[51] *Gallegos* involved a seemingly straightforward change to the Public Employees Retirement Act relating to the purchase of service credits. However, once applied, that change would have dramatically reduced the amount that employees would need to pay to one-twelfth the cost of the year before.[52] Moreover, the amendment at issue would also have been "internally inconsistent" because the amendment "specified a different formula for calculating the cost of an additional year of service credit."[53] Given these inconsistencies and unintended dramatic change in policy, the court reached beyond the plain meaning of the statute to better effectuate the legislative objective. By contrast here, the authorization for a full decoupling method is consistent with the mandate that the Commission establish rates designed to produce a utility's annual revenue requirement that has been determined to be just and reasonable.[54]

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[49] *See* N.M. Const. art. XI, § 2 ("The public regulation commission shall have responsibility for regulating public utilities *as provided by law*." (emphasis added)).
[50] *See CFRE*, 2022-NMSC-010, ¶ 45 ("We once again emphasize that the Commission is constitutionally tasked with the 'responsibility for regulating public utilities as provided by law.'").
[51] 1994-NMSC-023, 117 N.M. 346
[52] 1994-NMSC-023, ¶ 11.
[53] *Id.* ¶ 29.
[54] NMSA 1978, § 62-6-8(D) (2011).

The Commission's adopted rationale also found conflict between subsections (F)(1) and (F)(2) because subsection (F)(1) provides for removal of regulatory disincentives in a manner that balances public the public, consumer, and investor interest whereas subsection (F)(2) does not.[55] Contrary to that analysis, however, the difference between subsections (F)(1) and (F)(2) further supports the plain-meaning interpretation of subsection (F)(2). The inclusion of the balancing language in subsection (F)(1) but not subsection (F)(2) supports the interpretation that the Legislature *intended* not to include general balancing language in subsection (F)(2), but rather to identify a specific rate mechanism that accomplishes the legislative goal of removing regulatory disincentives.[56] Indeed, there would have been no reason to add subsection (F)(2) if it means what the Commission says.[57]

Although the Legislature's choice of language should settle the matter, and the Commission should not otherwise second-guess the Legislature's policy choices, it cannot go unsaid that decoupling also promotes the legitimate interests

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[55] Recommended Decision at 49 & n.160. **[7 RP 0953]**

[56] *See, e.g.*, *Russello v. United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." (alteration omitted) (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972))).

[57] *See Gandy Dancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, ¶ 14 (The Legislature is presumed to change the law when it amends a statute.).

(*i.e.*, the public interest, consumers' interests, and investors' interests) reflected in Section 62-3-1(B), Section 62-8-7(D) and Section 62-17-3.[58] As environmentally-oriented groups argued, full revenue decoupling ensures that all disincentives are removed while avoiding costly litigation and difficulties in attributing revenues lost to energy efficiency as opposed to other causes.[59] Thus, full decoupling removes disincentives to energy efficiency, conservation, and load management programs (public and consumer interest), avoids costly litigation (consumer and investor interest), and removes difficulties in attributing revenues (consumer and investor interest); it further promotes the collection of an approved annual revenue requirement as contemplated by Section 62-8-7(D) (rates for utility service to be designed to produce annual revenues no greater than determined to be just and reasonable).

3. Even if there were conflict between Section 62-17-5(F)(2) and the remainder of the EUEA, Section 62-17-5(F)(2) would control as the more specific and more recently enacted provision.

Even if the Commission could be found to have rationally discerned a conflict between subsection (F)(2) and the provisions for balancing interests located in the EUEA and PUA was correct, the canons of statutory construction layout how such a conflict should be resolved.

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[58] *CFRE*, 2020-NMSC-010, ¶ 42.

[59] *See* PNM Resp. Br. at 13 & n.35. **[6 RP 0738]** Moreover, decoupling solves the "throughput" incentive problem. *See id.* at 8. **[6 RP 0733]**

Upon finding conflict between statutes, NMSA 1978, Section 12-2A-10(A) (1997) directs that when the conflict "is irreconcilable, the later enacted statute governs."[60] There is no dispute that subsection (F)(2) was added in 2019 and is the later-enacted statute when compared with the PUA and EUEA provisions that the Recommended Decision relies upon. Thus, subsection (F)(2) governs.

In addition, another clearly applicable canon of interpretation holds that the specific controls over the general.[61] Subsection (F)(2) is a specific statute that remedies a defined unwanted aspect of energy efficiency and load management policies (that is, regulatory disincentives for utilities to promote such policies and programs); whereas Section 62-3-1(B), entitled "Declaration of Policy," provides for broad policy goals to be achieved by regulation, including that "the public interest, the interest of consumers and the interest of investors require regulation . . . to the end that reasonable and proper services shall be available at fair, just and reasonable rates." Similarly, the Recommended Decision relies on Section 62-17-3, entitled "Policy," and Section 62-17-5(F)(1) for their statements on balancing "the public interest, consumers' interests and investors' interests."[62] Thus, applying

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[60] *Accord State ex rel. State Eng'r v. United States*, 2018-NMCA-053, ¶ 16 ("Specific and later-enacted statutes control over general, earlier-enacted laws.").
[61] *See State v. Santillanes*, 2001-NMSC-018, ¶ 11, 130 N.M. 464 ("The general/specific statute rule provides a method to resolve an otherwise irreconcilable conflict between statutes by treating the specific statute as an exception to the general statute.").
[62] Recommended Decision at 49 & n.160. **[7 RP 0953]**

the canon that the specific controls over the general, the specific legislative instruction provided in Subsection (F)(2) controls over the general statements of policy contained in Sections 62-3-1(B) and 62-17-3.

As these canons demonstrate, even if the Court found the provisions to be in conflict, then the canons of statutory interpretation that apply to such conflicts support the interpretation that Subsection (F)(2) provides for full decoupling.

4. The regulatory backdrop against which Section 62-17-5(F)(2) was added confirms its plain meaning.

The clear language in subsection (F)(2), the relevant canons of statutory interpretation, the adjacent subsections (F)(1) and (F)(4) all support full decoupling. What is more, the regulatory backdrop against which Section 62-17-5(F)(2) was added further supports requiring full revenue decoupling. The regulatory history of the Commission's treatment of the EUEA demonstrates the Legislature's intent to provide for full revenue decoupling.[63]

Before subsection (F)(2) was added, the Commission had interpreted Section 62-17-5(F)(1) (then-Section 62-17-5(F)) as *not* authorizing full revenue decoupling. First, in a 2012 rulemaking, the Commission rejected a proposed rule to declare revenue decoupling the mechanism of choice to eliminate disincentives to energy

[63] *See* PNM Initial Br. at 4 **[6 RP 0593]**; PNM Resp. Br. at 6. **[6 RP 0731]**

efficiency programs.[64] Similarly, in adjudicatory proceedings, the Commission has uniformly rejected full revenue decoupling under Section 62-17-5(F) (or any other means of removing regulatory disincentives), finding that proposals pursuant to that section must be limited to energy efficiency programs. For example, the Commission rejected a full revenue decoupling proposal for PNM's then-natural gas utility under Section 62-17-5(F). [65] Next, in a proceeding involving Southwestern Public Service Company, the Commission again held: "a utility must show the amount of fixed cost that would not be 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."[66] More recently, the Commission rejected PNM's 2015 RBA decoupling proposal as overly broad, stating: "The RBA fails to distinguish disincentives specific to energy efficiency and instead proposes a wholesale revision of PNM's recovery of its fixed

[64] *See generally* Case No. 15-00261-UT, Corrected Recommended Decision, at 261 (Aug. 15, 2016) (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).

[65] *Id.* at 263 ("The Commission welcomes appropriate measures to eliminate disincentives to investment by utilities in energy efficiency programs as contemplated by the Act. However, they must be narrowly focused to address those disincentives, and not be aimed at making the utility whole for all load losses." (quoting Case No. 06-00210-UT, Final Order Partially Adopting Recommended Decision, ¶ 120 (June 29, 2007))).

[66] *Id.* at 265 (quoting Case No. 10-00197-UT, Final Order Disapproving Certification of Stipulation and Denying Application Without Prejudice, ¶ 6 (Nov. 10, 2011)).

costs."[67] Significantly, in describing the RBA, the Commission used the same language that subsection (F)(2) uses: "The RBA calls for the PRC to authorize PNM to collect a preestablished fixed level of revenue ***without regard*** to sales levels and apply to its fixed cost recovery. An allowed annual revenue per customer in each customer class would then be set."[68]

Finally, the Commission itself commented on House Bill 291 when it was before the Legislature. At that time, the Commission stated: "This bill would shoehorn the Commission into approving a decoupling mechanism under the guise of a regulatory disincentive removal application pursuant to the EUEA without considering the wide[-]ranging implications of such a mechanism."[69] Under *Gallegos*, such contemporaneous documents may be considered in understanding intent.[70]

The Legislature is presumed to be aware of longstanding administrative decisions.[71] Given this long-running administrative backdrop of denying

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[67] *See* Case No. 15-00261-UT, Final Order Partially Adopting Corrected Recommended Decision, ¶ 239 (Sept. 28, 2016).
[68] *Id.* ¶ 226 (emphasis added).
[69] Fiscal Impact Report, House Bill 291, at 3 (last updated March 4, 2019), https://nmlegis.gov/Sessions/19%20Regular/firs/HB0291.PDF.
[70] *See Gallegos*, 1994-NMSC-023, ¶ 36 ("We hold . . . that the trial court properly admitted contemporaneous documents, actually submitted to the legislature, for the purpose of determining whether any of the revisions to the Act was expected to have a significant fiscal impact.").
[71] *In re Protest of Alexander*, 1999-NMCA-021, at ¶ 17, 126 N.M. 632.

decoupling proposals to cure regulatory disincentives to promote energy efficiency and load management efforts, the Legislature's choice to add Section 62-17-5(F)(2), which "irrefutably" provides for full decoupling demonstrates the Legislature's intent to change the law.[72] Although this regulatory backdrop reflects the Commission's persistent reluctance to approve full revenue decoupling where the past laws may have been less explicit, the Commission should not allow its past policy views on decoupling to impact its analysis of what the Legislature intended when it added Section 62-17-5(F)(2) to the EUEA.

5. The Recommended Decision's analysis of the meaning of "regulatory disincentives" is not relevant to the statutory construction.

The Recommended Decision relied on by the Commission analyzes at length the meaning of "regulatory disincentives" throughout the EUEA.[73] However, the meaning of "regulatory disincentives" does not answer the question at hand -- whether Section 62-17-5(F)(2) permits full revenue decoupling. Section 62-17-5(F)(2) reflects a reasonable and broadly encompassing approach in achieving Section 62-17-3's stated goal [of removing regulatory disincentives]. Irrespective of the definition of "regulatory disincentives," Section 62-17-5(F)(2) dictates how such disincentives may be removed (*i.e.*, through full decoupling). As this Court

[72] *See Gandy Dancer*, 2019-NMSC-021, ¶ 14 (The Legislature is presumed to change the law when it amends a statute.).
[73] *See* Recommended Decision at 43-47. **[7 RP 0947-0951]**

has recognized, "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 objective*."[74] Here, the Legislature provided for a method that may sweep more broadly than an alternative approach the Commission may have desired for removing *only* what the Recommended Decision found to be "regulatory disincentives," but it is not the Commission's place to second-guess that choice.[75] Indeed, it is not argued that full decoupling would *not* remove the "regulatory disincentives."[76] Simply because it would also decouple revenues from other external effects on customer sales is not reason to reject the Legislature's unambiguous policy choice.

Ultimately, the Commission effectively changes the text of subsection (F)(2) to read that the Commission shall "remove regulatory disincentives [*to energy efficiency and load management but do nothing more*] 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

[74] *Gallegos*, 1994-NMSC-023, ¶ 22 (emphasis added).
[75] *See United States v. Rodgers*, 466 U.S. 475, 484 (1984) ("Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress.").
[76] *See* PNM Resp. Br. at 5 & n.8. **[6 RP 0730; 6 RP 0593]**

without regard to [*reductions in sales that are attributed to load management and energy efficiency programs*]."

PNM preserved these issues below in its post-hearing briefing, at the oral argument in this proceeding and in PNM's Exceptions to the Recommended Decision. **[6 RP 0583-0613, 720-0746, 0781-806, 872-877; 7 RP 1012-1042]** The Commission does not get to interlineate or change statutory language to suit its policy predilections. The plain language, statutory context, canons of statutory interpretation and history of the EUEA's amendment all point to the same construction of subsection (F)(2): full decoupling is authorized by the statute.

B. The Commission Misinterpreted Section 62-17-5(F)(4).

The Commission rightly concluded that Section 62-17-5(F)(4) prohibits the Commission from reducing a utility's approved ROE based on approval of a disincentive removal mechanism.[77] The follow on question raised by PNM's Declaratory Petition sought a conclusion by the Commission that it may not also reduce a utility's equity ratio in order to reduce the utility's WACC as a work-around to achieving the end prohibited by Section 62-17-5(F)(4).[78] The Petition argued that the Commission should not be permitted to do indirectly what Section 62-17-5(F)(4) prohibits directly.[79]

[77] Recommended Decision at 64. **[7 RP 0968]**
[78] PNM Initial Br. at 13-15 **[6 RP 0602-0604]**; PNM Resp. Br. at 18. **[6 RP 0743]**
[79] PNM Initial Br. at 13-15 **[6 RP 0602-0604]**; PNM Resp. Br. at 18. **[6 RP 0743]**

The Recommended Decision adopted by the Commission accuses PNM of being inconsistent because PNM argues for the plain meaning of the statute in its construction of subsection (F)(2), but argues a different interpretive method for subsection (F)(4). The interpretive methods urged by PNM are wholly consistent. Both interpretations are aimed at fully effectuating the Legislature's intent. Indeed, as *Gallegos* noted, the plain meaning rule and the rejection-of-literal-language approach are complementary (not contradictory) because the "legislative objective" is the controlling criterion.[80] PNM's arguments are likewise complementary. subsection (F)(2)'s plain language demonstrates the Legislature's clear intent, and a straightforward application of that plain language effectuates the legislative intent.[81]

[80] 1994-NMSC-023, ¶ 22.

[81] *See id.* ("[I]f 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 objective.").

Subsection (F)(4) demonstrates an unambiguous intent to hold the utility financially harmless when a full decoupling mechanism is approved.[82] However, subsection (F)(4), when narrowly applied under the Commission's interpretation, would result in defeating rather than serving the legislative purpose because its exact words do not expressly prohibit the Commission from accomplishing the forbidden consequence (reducing a utility's ROE) through arbitrarily changing a utility's capital structure to reduce the resulting WACC, thus reducing the effective ROE the utility is permitted. Essentially, if a utility's capital structure has a higher rate of ROE and a lower rate of return for debt, if the Commission changes the relative percentages for each so the capital structure imputes a greater percentage to debt, then the overall return a utility can earn is reduced, even if the ROE is not changed. Changing the capital structure by increasing the debt ratio therefore has the same effect as reducing the ROE for a utility.

As *Gallegos* noted, "[I]t is part of the essence of judicial responsibility to search for and effectuate the legislative intent—the purpose or object—underlying

[82] This avoids a penalty to the utility from having full decoupling allow a utility to collect its fixed costs approved by the Commission, which opponents to decoupling view as a reduced utility risk. *See* Recommended Decision at 36 **[7 RP 0940]**; Case No. 15-00261-UT, Corrected Recommended Decision at 273 (Aug. 15, 2016) ("PNM's return on equity could be lowered to reflect the reduced risk to shareholders resulting from [the] decoupling adjustment. While only about 20% of state commissions that have approved decoupling have linked decoupling to a decrease in ROE, an ROE reduction should flow from approval of decoupling." (citations omitted)).

the statute."[83] Thus, "to give effect to the intent of the legislature,"[84] Section 62-17-5(F)(4)'s reach should be read to prevent an end-run that would thwart the manifest legislative intent. This reasonable interpretation of Section 62-17-5(F)(4)'s reach, moreover, is consistent with the facts of *Gallegos.* There, the court identified an "internal[] inconsisten[cy], so that judicial interpretation [was] necessary to effectuate the legislature's intent."[85] Although Section 62-17-5(F)(4) is not internally inconsistent, if its meaning is thwarted by interpreting it to expressly permit a reduction to the WACC as a substitute for reducing the ROE, then it would not fully effectuate the Legislature's intent. To the contrary, it would allow the Commission to accomplish indirectly what the statute directly prohibits. The Commission's determination that it can reduce a utility's ROE by recategorizing capital as debt rather than equity thereby creates a new regulatory disincentive for a utility through Section 62-17-5(F)(4), when the utility attempts to remedy disincentives through the application of Section 62-17-(F)(2).

PNM preserved these issues below in its post-hearing briefing, at the oral argument in this proceeding and in PNM's Exceptions to the Recommended Decision. **[6 RP 0583-0613, 720-0746, 0781-806, 872-877; 7 RP 1012-1042]** For all these reasons, the Court should conclude that subsection (F)(4) does not allow

[83] 1994-NMSC-023, ¶ 23.
[84] *State v. Rowell*, 1995-NMSC-079, ¶ 8, 121 N.M. 111.
[85] 1994-NMSC-023, ¶¶ 4, 29.

the Commission to reduce a utility's WACC as a consequence of approving a decoupling mechanism under Subsection (F)(2).

V. CONCLUSION

This appeal involves the construction of two provisions of the EUEA that the Commission has not-too-passively resisted since their passage. Section 62-17-5(F)(2) of the EUEA can only be read as mandating full decoupling when a utility brings a proper application. Section 62-17-5(F)(4) can only be read to prohibit the Commission from trying to accomplish indirectly, by manipulating the WACC, what the plain language of the statute prohibits directly, the reduction of ROE upon approval of a decoupling application. PNM respectfully requests the Court reject the erroneous constructions of the statute applied by the Commission and vacate the Commission's Order.

Respectfully submitted this 6th day of September 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was electronically served on all counsel of record through the New Mexico Supreme Court's Odyssey filing system on September 6, 2022.

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