

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

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|---|---|-----------------------------|
| IN THE MATTER OF AN INVESTIGATION |) | |
| INTO PUBLIC SERVICE COMPANY OF NEW |) | |
| MEXICO'S ADDER RATES |) | |
| |) | |
| PUBLIC SERVICE COMPANY OF NEW |) | Case No. 11-00308-UT |
| MEXICO, |) | |
| |) | |
| Respondent. |) | |
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FINAL ORDER

THIS MATTER comes before the Public Regulation Commission ("Commission") upon the Briefs filed September 6, 2011, by Public Service Company of New Mexico ("PNM"), Coalition for Clean Affordable Energy and Western Resource Advocates (jointly, "CCAЕ/WRA"), which jointly filed a Brief, the Staff of the Commission's Utility Division ("Staff"), the New Mexico Attorney General ("AG") and New Mexico Industrial, and the Reply Brief, filed September 13, 2011, by PNM.

Upon consideration of the Briefs and Reply Brief, and being duly informed in the premises,

THE COMMISSION FINDS AND CONCLUDES:

1. This investigation was initiated by the Commission by the issuance, on August 16, 2011, of its Order Initiating Investigation in this case and in Case No. 11-00123-UT. In that Order, the Commission required PNM and Staff, and permitted other interested parties, to file briefs addressing the issues of whether PNM should be required to refund all Interim and Reduced Adders it has already received or will receive pursuant to Commission Orders issued in Case Nos. 10-00127-UT and 10-00280-UT, and whether it should be required to cease charging its customers for the Reduced Adder approved in Case No. 10-00280-UT, in light of the New

Mexico Supreme Court issued its decision in *New Mexico Attorney General, et al. v. New Mexico Public Regulation Commission, et al.*, Case Nos. 32,475 and 32,480 (hereinafter cited as “*Attorney General*”). In that decision, the Court vacated the Commission’s Final Order promulgating the Revised Rule, including the rules permitting utilities to recover the Interim and Reduced Adders. On August 12, 2011, the Court issued its mandate in that case.

2. After an extensive analysis of the issue, and relying principally on the filed rate doctrine and its corollary, the prohibition against retroactive ratemaking, the Hearing Examiner in Case No. 11-00123-UT issued, on October 3, 2011, a Recommended Decision that determined that the Commission find it was without the authority to require PNM to refund any of the Interim Adder amounts it charged its customers on or before August 20, 2011, the date PNM voluntarily ceased charging that amount. No party has filed Exceptions to that determination. Based upon a review of the Hearing Examiner recommendation, the Commission adopted that determination in a Final Order issued November 1, 2011 in Case No. 11-00123-UT (“November 1 Final Order”).

3. As stated in the November 1 Final Order, the Commission declined to address in that Order the issues of whether PNM should be required to refund or cease charging the Reduced Adder amounts that were authorized by the Commission in a Final Order in Case No. 10-00280-UT that was issued on June 23, 2011, or approximately one month before the Court issued its *Attorney General* decision. The Commission declined to address those issues primarily because they were beyond the scope of Case No. 11-00123-UT. Instead, the Commission determined, it would address the issues related to the Reduced Adder in a separate Order to be issued in the near future. This is that separate Order.

4. With regard to the issue of whether PNM should be required to refund the Reduced Adder amounts PNM has already charged and received, the Commission finds that it does not have the authority to require such refunds for the same reasons that it does not have the authority to require PNM to refund any of the Interim Adder amounts it has already collected; and those reasons are that the filed doctrine and prohibition against ratemaking prohibit the Commission from requiring a utility to refund any amounts charged in accordance with a Commission-approved tariff, unless the Commission expressly reserves the right to require refunds at the time it approves the tariff. As is the case with the Interim Adder, no such reservation of rights was made with respect to PNM's Reduced Adder. In any event, as is discussed below, even if the filed rate doctrine and prohibition against retroactive ratemaking did not apply, requiring such refunds would not be justified or appropriate because PNM's Reduced Adder is cost-based, utility-specific and based on substantial evidence in the record as required by *Attorney General*. Therefore, not only would it not be inappropriate to require the refund of the Reduced Amounts already collected, there is also no basis in the record that would justify requiring PNM immediately to cease charging its Reduced Adder.

5. In their Joint Brief, the AG and NMIEC argue that the Commission should not only require PNM to cease charging its Reduced Adder, but that the Commission expand the scope of this investigation and require SPS and EPE to cease collecting any Adders being recovered in their energy efficiency rate riders. The AG and NMIEC agree that none of those utilities have any obligation to refund any of the Adder amounts received prior to the issuance of the *Attorney General* decision on July 27, 2011.

6. In support of their position, the AG and NMIEC argue that in vacating the Revised Rule, the Court not only nullified the Interim and Reduced Adder amounts set forth in

the Revised Rule, but also the concept of stand-alone rate adders and the methodologies used to determine and set those rate adders. Thus, they argue, any Adder that is currently being charged by any utility, and which is in any way based on the concepts and methodologies set forth in the Revised Rule now has no legal basis, and should be voluntarily withdrawn or cancelled by the Commission. Specifically, they argue that the Commission deviated from established regulatory law by: 1) Approving a rate that had no cost basis; 2) Allowed utilities to earn a profit under the Reduced Adder on energy efficiency programs even though they had not invested any capital in those programs; 3) Approving rates that had no relationship to any specific utility's actual circumstances; 4) Allowing utilities to recover claimed lost revenues without any investigation or determination of whether those utilities were already meeting their established revenue requirements and thereby violating the prohibition against piecemeal ratemaking.

7. They further argue that the Court in *Attorney General* construed the EUEA's requirement that the Commission balance the interests of investors and ratepayers in setting the Interim and Reduced Rates as mandating that adders not be paid unless the utility can demonstrate that it is not earning its Commission authorized rate of return due to the impact of its energy efficiency and load management programs. They contend that, to date, no utility that as requested authority to recover any adders has demonstrated that they are not earning its authorized overall rate of return because of its energy efficiency and load management programs.

8. The AG and NMIEC further contend that the Court in *Attorney General* rejected the notion that the use of the word "profit" rather than "investment" in the EUEA created a change in the traditional ratemaking concepts, which includes that a utility earn a return, or profit, on its invested capital. *Citing Hobbs Gas Co.*, 94 N.M. at 733, 616 P.2d at 1118. However, they argue that no utility has provided any evidence that it is using its own capital to

fund its energy efficiency programs. Instead, all funds are collected from ratepayers, on a more or less contemporaneous basis, through the use of rate riders. In their view, requiring ratepayers to pay the full expenses of these programs and then further require these ratepayers to give the utility a profit on those expenses completely distorts the balancing of interests required under the EUEA and NMPUA, results in unreasonable rates, and is therefore unlawful. All such rates, they argue, must be rescinded.

9. Staff similarly argues that *Attorney General* requires that the Commission use the “same ratemaking processes” under both the EUEA and the NMPUA, and that the Adders, as rates, must be cost-based, based on a utility’s revenue requirements, and based on traditional elements of ratemaking. Staff also contends that because the provisions of the EUEA that addresses incentives directly links a utility’s ability to make a profit to a utility’s “resources” and to utility “resourced development”, the EUEA embraces the traditional regulatory requirement that a utility only earn a return on its capital expenditures.

10. Staff attempts to bolster its position that incentives under the EUEA be earned solely on capital expenditures by citing to NMSA 1978, § 62-6-14.A, which provides:

When in the exercise of its powers and jurisdiction it is necessary for the commission to consider or ascertain the valuation of the properties or business of a public utility, or make any other determination involved in the fixing or setting of rates for a utility, the commission shall give due consideration to the history and development of the property and business of the particular public utility, to the original cost thereof, to the cost of reproduction as a going concern, to the revenues, investment and expenses of the utility in this state and otherwise subject to the commission’s jurisdiction, to construction work in progress and to other elements of value and rate-making formulae and methods recognized by the laws of the land for rate-making purposes.

Based on the foregoing, Staff asserts that *Attorney General*, at a minimum, requires EUEA rates, like all rates set by the Commission under the NMPUA, to be cost-based and based on a utility’s capital investment.

11. Staff concludes by asserting that because PNM to date has not made any capital investment in the approved EUEA programs, and because PNM incurs little, if any, capital risk in its EUEA programs, PNM's Reduced Adder must fail as not cost-based and therefore not supported by substantial evidence in the record.

12. PNM disagrees with the AG's and NMIEC's contention that *Attorney General* requires a showing that a utility is failing to achieve its overall allowed rate of return before the Commission implements measures to remove disincentives and provides incentives for providing energy efficiency programs. PNM contends that the loss of revenue resulting from each kWh and KW saved under energy efficiency and load management programs (which PNM, points out, was recognized by the Court in *Attorney General*), occurs whether or not a utility is earning its overall allowed rate of return. According to PNM, this loss of revenue is undeniably a disincentive to utility implementation of energy efficiency and load management programs, even if the utility is otherwise earning the rate of return on which its rates were established in its law rate case. The EUEA does not provide, and the Court did not hold in *Attorney General*, PNM argues, that the Commission should remove disincentives only if it first finds that a utility is not otherwise earning its allowed rate of return.¹

13. PNM further posits that under the AG's and NMIEC's argument, no utility, including PNM, would ever be allowed to earn a profit on energy efficiency measures because even if the Commission were to determine that a utility were not earning its authorized rate of return, the Commission would presumably reset the utility's rates to recover only its newly

¹ Although the Revised Rule vacated by *Attorney General* concerned payments to utilities to both compensate for regulatory disincentives and provide incentives, the question of how a utility should be compensated for disincentives is not addressed in this Final Order as PNM's Reduced Adder does not include any compensation for disincentives.

established rate of return, and disallow any profit on its energy efficiency and load management programs.

14. PNM asserts that the AG's and NMIEC's apparent position that the Commission can only approve the removal of disincentives and incentives in a general rate case nullifies the provision in Section 62-17-6.A that gives utilities the option to recover program costs "along with commission-approved incentives . . . through an approved tariff rider or in base rates, or by a combination of the two." There would be no purpose for the Legislature to have allowed utilities to recover incentives through a rider if the rider level can only be set in a general rate case.

15. In further support of its argument, PNM cites to *Sangre de Cristo Dev. Corp., v. Santa Fe*, 84 N.M. 343, 347-348, 503 P.2d 323, 328 (1972), where the New Mexico Supreme Court has held: "The general rule is that cases are not authority for the proposition not considered." According to PNM, the Court did not consider in the *Attorney General* appeal or discuss in that opinion the issues of whether incentives and disincentives can only be established in a rate case and can be authorized only if the utility is not recovering its allowed rate of return, and thus cannot be used to support the AG's and NMIEC's assertions. Moreover, PNM contends, the AG's and NMIEC's interpretation of the EUEA would prevent the Commission from carrying out the legislative mandates to remove disincentives and provide incentives and would render meaningless the EUEA's provision giving utilities the option to recover incentives through a tariff rider rather than through base rates. The Court gave no indication that it intended to strike any part of the EUEA and *Attorney General* should not, PNM asserts, be construed to have that result.

16. With regard to the AG's, NMIEC's and Staff's contentions that incentives can only be given for capital investments, PNM argues that the Court did not hold that the only way disincentives/incentives could be evidenced-based, cost-based and utility specific would be in a general rate case. Rather, PNM argues, it was unnecessary for the Court to address any specific method for satisfying these criteria, because the method adopted in the Revised Rule, according to PNM, explicitly disavowed any intent to make the Adders cost-based or to tailor the Interim Adder to a specific utility based on the evidence of that utility's lost revenues, program costs, cost of debt or cost of capital. Thus, PNM continues, the Court addressed only whether consideration of these criteria was required at all, and not the manner in which they had to be accomplished.

17. PNM also cites to Section 62-6-14.A, the same statutory provision relied upon by Staff, and points out that under that statute, "investment" is just one factor to which the Commission must give due consideration in the setting of rates; "expenses" are another. Contrary to Staff's contention that Section 62-6-14.A requires that rates must be based on a utility's capital investment, PNM takes the position that Section 62-6-14.A gives the Commission broad discretion to use any ratemaking method "recognized by the law of the land." In that regard, PNM points out that the Commission and others have long recognized ratemaking methods that set the rate of return on expenses rather than on rate base. One such methodology, known as the operating ratio theory, has been widely employed in the regulation of the fares and rates of motor transportation enterprises. *Citing D.C. Transit System, Inc. v. Washington Metro. Area Transit Comm'n*, 350 F.2d 753 (D.C. App. 1965).

18. PNM additional cites to the Motor Carrier Act, § 65-2A-21.F, which, like the NMPUA, requires that the Commission set rates that are reasonable, but, in light of the nature of

transportation businesses, recognizes that the rates must cover total operating expenses “plus a reasonable profit.” Nothing in *Attorney General*, PNM argues, precludes the Commission from applying a comparable cost-based method for determining the profit electric utilities should be provided for non-capital intensive energy efficiency and load management resource development or invalidates the express provisions of Section 62-6-14.A that requires the Commission to give express consideration to “other methods of value and rate making formulae and methods recognized by the laws of the land for ratemaking purposes.”

19. According to PNM, it is undisputed that most, of not all, energy efficiency and load management programs deployed by utilities in New Mexico, as well as nationwide, do not involve significant utility capital investment. Limiting the provision of profits to utility capital investment would, PNM argues, render ineffective and meaningless the Legislature’s carefully constructed statutory provisions requiring incentives.

20. In further support of its position, PNM draws on the 2008 amendment to Section 62-17-3 of the EUEA, where the Legislature replaced “energy efficiency and load management *investments*” with “energy efficiency and load management *programs*” (emphasis added). According to PNM, other amendments made in 2008 systematically deleted the word “investment(s)” at least nine times and replaced it with the terms “program” or “development”, with the end result that the word “investment” no longer appears anywhere in the EUEA. The Legislature’s careful and deliberate elimination of any suggestion that the EUEA is intended only to promote utility capital investment in energy efficiency, PNM contends, reflects the reality that most energy efficiency measures available to utilities involve non-capital costs.

21. PNM contends that Staff’s construction of the EUEA that link utility profits to energy efficiency and load management “resources” and “resource development” would also

mean that utilities are required to acquire energy efficiency and load management programs that involve utility capital investment. PNM reaches that conclusion because Section 62-17-5.A requires that the Commission consider utility acquisition of energy efficiency and load management “resources” to be in the public interest, and because Section 62-17-5.G requires utilities to acquire cost effective energy efficiency and load management “resources”. Thus, PNM argues, under Staff’s interpretation, none of energy efficiency and load management programs now being implemented by utilities in New Mexico are required by the EUEA, and utilities would not be required to proposed any energy efficiency or load management programs that do not involve utility capital investment. This, PNM contends, is not a reasonable interpretation of the EUEA and would defeat the legislative intent expressed in the EUEA.

22. Finally, PNM responds to some of the “overarching principles” that NMIEC and the AG contend should apply to future adders as being without merit. Because the issue of how any future adders should be determines is beyond the scope of this investigation, the Commission will not address those issues here.

23. The Commission finds that, based upon its reading of *Attorney General* and the provisions of the EUEA and the NMPUA, neither the NMPUA nor the EUEA require that the profit mandated by Section 62-17-5 be limited solely on energy efficiency and load management programs that involve utility capital investments. The Commission also finds that the nothing in those Acts requires that the mandated removal of disincentives or the opportunity to earn a profit on cost-effective energy efficiency programs be determined solely in a utility’s general rate case.

24. Turning first to the issue of whether a profit can only be allowed in utility capital investments rather than expenses, the Court in *Attorney General* did not, as the AG, NMIEC and Staff contend, hold that the return earned by a utility through its Commission-approved rates

must be earned solely on capital investments. Although squarely holding that Adders must, among other matters, be “cost-based”, the Court did not also specify the type of costs that underlie the Adders. The Commission acknowledges that the Court recognized the Commission’s historic ratemaking practice “of taking into account the utility’s interest in recovering its prudently incurred costs and earning a reasonable return on its capital investment.” *Attorney General*, 150 N.M. at ____, 258 P.2d at 457. However, there is nothing in *Attorney General* to indicate that the Court intended its description of the Commission’s historic ratemaking practices as anything more than that, and to signal a departure from the Court’s long-standing precedent of leaving to the Commission’s discretion the precise methodology for determining just and reasonable rates. As held by the Court in *Mountain States Telephone and Telegraph Company*, 90 N.M. 325, 338, 563 P.2d 588, 601 (1977):

The Commission was 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 results reached, not the method employed, which is controlling.* (Emphasis added). (Citations omitted).

25. Contrary to Staff’s contention, nothing in NMSA 1978, § 62-6-14.A limits the Commission’s ratemaking authority to allowing utilities to earn a return solely on utility investments. Rather, that statute requires that the Commission, when setting a utility’s rates, give “due consideration” to a number of matters, which include the utility’s “revenues, investment and *expenses* of the utility”, as well as to “other elements of value and rate-making formulae and methods recognized by the laws of the land for rate-making purposes.” One such methodology that the Commission has used in the setting of rates under the Motor Carrier Act is the “operating ratio approach”. Under that approach, “revenue requirements are calculated by dividing operating expenses by a target operating ratio deemed necessary to produce revenues

adequate to cover operating expenses plus depreciation, taxes and capital costs”. Recommended Decision, issued April 6, 2009, Case No. 08-00267- TR-R, at 7. In other words, motor carriers rates are based entirely on a motor carrier’s operating expenses, and not on its capital investments. Although that approach is generally used for transportation companies, that approach, according to a well-respected treatise, “has been used as a substitute for the rate base/rate of return approach in situation in which investor-provided capital and the related capital costs have not been a significant factor in the total cost of providing services.” Robert L. Hahne & Gregory E. Aliff, *Accounting for Public Utilities*, § 3.01[1](3) (hereinafter cited as “Hahne & Aliff”). Because energy efficiency and load management programs did not involve much, if any, utility capital investments, the use of the operating cost or similar approach to determine an allowable profit on those programs would be entirely appropriate.²

26. The Commission also disagrees with Staff’s contention that by directly linking the utility’s opportunity to earn a profit to utility “resources” and resource development under various provisions of the EUEA, the EUEA embraces the “traditional” requirement that a utility only earn a return on its capital expenditures.

27. Section 62-17-2.A includes as one of the Legislature’s policy underpinnings of the EUEA that “it is necessary and appropriate to provide rate treatment and financial incentives to public utilities to develop *all* cost-effective and achievable energy efficiency and load management resources.” (Emphasis added.) Nothing in the EUEA indicates that the Legislature intended to encourage the development of just those energy efficiency resources that involved utility capital investment, particularly in light of the fact (as acknowledged by Staff) that all

² It is worth observing that NMSA 1978, § 65-2A-21.F, the statute governing the setting of rates under the Motor Carrier Act, provides that “the commission shall authorize revenue levels that are adequate under honest, economical and efficient management to cover total operating expenses, . . . , plus a reasonable *profit*.”

energy efficiency and load management programs that have been proposed by the utilities and approved by the Commission involve ordinary expenses, rather than capital expenditures. If anything, the fact that the Legislature's 2008 amendments to the EUEA eliminated any reference to energy efficiency and load management "investment" clearly undercuts Staff's contention.

28. More fundamentally, however, Staff's argument would render meaningless one of the cornerstones of the EUEA - the requirement that public utilities "acquire all cost-effective and achievable energy efficiency and load management *resources* available in their service territories". Because few if any energy efficiency and load management programs that are available today involve utility capital investments, adopting Staff's argument would likely result in all programs currently being offered by PNM and the other New Mexico investor-owned utilities to cease offering those programs because doing would no longer be required by the EUEA and because the utilities would no longer have any incentive to provide acquire those programs voluntarily. The courts "will reject an interpretation of a statute that makes parts of it mere surplusage or meaningless. *Jones v. Murdoch*, 145 N.M. 473, 483, 200 P.3d 523, 534 (2009). It has also been long recognized in this State that statutes should not be construed to achieve an absurd result or to defeat the intended object of the Legislature. *See e.g.*, *Trujillo v. Romero*, 82 N.M. 301, 481 P.2d 89 (1971); *State v. Nance*, 77 N.M. 39, 419 P.2d 242 (1966), certiorari denied 386 U.S. 1039, 87 S.Ct. 1495, 18 L.Ed.2d 605 (1967). Staff's position would not only render the requirement under Section 62-17-5.F that utilities be afforded the opportunity to earn a profit on energy efficiency and load management resource development, but would largely render the entire EUEA meaningless, and thus should be rejected by the Commission.

29. Having determined that the opportunity to earn a profit is not limited to just those resources that involve capital investments, the issue remains as to whether PNM's Reduced

Adder is “cost-based” within the meaning of the NMPUA and the *Attorney General* decision. Upon review of the record in Case No. 10-00280-UT, the case in which the Commission approved PNM’s existing Reduced Adder, the Commission finds that it is “cost-based”. In that case, the Commission rejected PNM’s proposed Reduced Adder of \$0.05 per kWh of lifetime energy savings and \$10 per kW of demand savings, and instead approved Staff recommended Reduced Adder of \$0.002 per kWh and \$4 per KW. The Commission did so based on its findings that PNM’s proposed Reduced Adder would result in PNM earning a 19% return on its approved program costs, whereas Staff’s recommended Reduced Adder would result in PNM receiving approximately \$1.4 million in reduced adder revenues, which equaled a 7.7% annual return on those costs. Final Order, Case No. 10-00280-UT, at 27 – 30 (“Case No. 10-00280-UT Final Order”).

30. The Commission further found in Case No. 10-00280-UT that PNM should not be permitted to recover a return on its energy efficiency and load management resource costs that is greater or equal to the return that PNM would receive on its capital investments. “Capital investments in supply-side generation are initially made by the utility through a combination of debt and equity, which remains at risk until the facility is fully depreciated.” Case No. 10-00280-UT Final Order at 29. By contrast, because PNM’s energy efficiency costs are recovered “on a more or less real-time basis from its ratepayers, PNM’s risk of recovering those amounts are far less than the risks it faces for capital investments in supply-side resources.” Case No. 10-00280-UT Final Order at 30. The Commission additionally found that PNM’s program costs do not meaningfully constrain its ability to make capital investments in other projects or pay dividends to its shareholders. *Id.* The Commission thus determined that Staff’s recommended Reduced Adder provided PNM with a reasonable incentive that complies with the requirements

of Section 62-17-5.F. In making that determination, the Commission did not rely upon the provisions of the now-vacated Revised Rule to make that determination.

31. The methodology used by the Commission to determine the reasonableness of Staff's recommended Reduced Adder was essentially a simplified version of the operating ratio approach that the Commission has traditionally used to set the rates of motor carriers under the Motor Carrier Act. As discussed above, that methodology is used a substitute for the rate base/rate of return approach "in situations in which investor-provided capital and the related capital costs have not been a significant factor in the total cost of providing service." Because that is precisely the situation presented by energy efficiency and load management programs, the use of that methodology to determine PNM's Reduced Adder is appropriate.

32. The Commission is not persuaded by NMIEC's and the AG's argument that because PNM's energy efficiency and load management costs are recovered on a more or less contemporaneous basis, it would be unfair to require ratepayers to pay the full expenses of these programs and further require them to give the utilities a profit on those expenses. Their contention not only flies in the face of Section 62-15-5.F., which requires that the Commission provide utilities an opportunity to earn a profit on cost-effective energy efficiency and load management resource development, but also overlooks the fact that utilities have the opportunity to recover all of their capital investments and expenses from ratepayers through their Commission-approved rates, and not just their energy efficiency and load management resource costs.

33. As explained by the Commission in the Case No. 10-00280-UT Final Order, the difference between a utility's recovery of its capital costs and energy efficiency program costs is that capital expenses are recovered over a longer period of time and thus is at greater risk of

recovery than the risks of recovering energy efficiency program costs. The utility's lower risk of recovering its energy efficiency program costs does not mean, as NMIEC and the AG contend, that no profit should be allowed on those costs. Instead, that lower risk should be reflected in the rate of return that the Commission should allow on those costs. That approach is not only consistent with the Commission's long-standing ratemaking policies, but is also consistent with the EUEA's mandate that the Commission provide utilities an opportunity to earn a profit on cost-effective energy and efficiency load management resource development that, with satisfactory performance, is financially more attractive to the utility than supply-side utility resources. Given the disparity in risks between a utility's supply-side investments and its energy efficiency and load management programs, it would appear that giving utilities a relatively small return on their program costs would be financially more attractive than investing in supply-side utility resources.

34. Turning next to the AG's and NMIEC's contention that no Adder should be allowed unless it is shown that the utility is not recovering its revenue requirements, that argument, if adopted by the Commission, would in reality mean that all Adders can only be approved in a utility's general rate case. It is acknowledged that the Court in *Attorney General* stated: "Without inquiring into a utility's revenue requirements, we fail to see how the PRC could adequately balance the investors' interests against the ratepayers' interests when adopting [the Revised Rule]." *Attorney General*, 150 N.M. at ____, 258 P.3d at 458. However, as correctly pointed out by PNM, "[t]he general rule is that cases are not authority for propositions not considered." *Sangre de Cristo Dev. Corp. v. Santa Fe*, 84 N.M. 343, 347 – 348 (19172). The issue of whether Adders could be established only in a utility's general rate case and only when it is shown that the utility is not recovering its authorized rate of return was never

considered by the Court and not discussed in the *Attorney General* opinion. The Commission further agrees with PNM that the AG's and NMIEC's construction of the EUEA would render meaningless the provision giving utilities the option to recover incentives through a tariff rider, rather than base rates. As a general matter, tariff riders (including energy efficiency tariff riders) are rate mechanisms that are generally used to permit utilities to commence recovering specific types of costs from ratepayers and without having to undergo a general rate case. *See e.g.*, Case No. 10-00100-UT.

35. While not dispositive of the issue, the Commission also finds merit in PNM's argument that if utilities could only be authorized to receive Adder revenues if they are under-recovering their revenue requirements, they would never, as a practical matter, be in a position to receive those Adder amounts. If it were determined in a rate proceeding that a utility was under-recovering its costs, the more likely and straightforward outcome that the Commission would increase the utility's base rates, and then deny the utility's request to recover the Adder amounts. Thus, the AG's and NMIEC's arguments would again render the EUEA's mandate that utilities be authorized to receive an Adder meaningless.

36. For the foregoing reasons, the Commission finds that PNM's Reduced Adder is evidence-based, cost-based and utility specific as required by the EUEA and *Attorney General*. Accordingly, PNM should not be required to refund any of the Reduced Adder amounts it has already collected from its ratepayers, and should be allowed to continue to collect those amounts until further order of the Commission.

37. The Commission jurisdiction over the parties and the subject matter of this proceeding.

IT IS THEREFORE ORDERED:

A. PNM shall not be required to refund any of the Reduced Adder amounts it has already collected from its ratepayers, and shall be allowed to continue to collect those amounts until further order of the Commission.

B. This Final Order is effectively immediately.

C. Copies of this Final Order shall be served on all persons listed on the attached Certificate of Service via email if their email address is known, and if not known, via regular mail.

D. This docket is closed.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this 3rd day of
November, 2011.

NEW MEXICO PUBLIC REGULATION COMMISSION

PATRICK H. LYONS, CHAIRMAN



Theresa Becenti-Aguilar

THERESA BECENTI-AGUILAR, VICE CHAIR

*Jason A. Marks with
concurrency*

JASON A. MARKS, COMMISSIONER

Ben L. Hall

BEN L. HALL, COMMISSIONER

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

**IN THE MATTER OF AN INVESTIGATION)
INTO PUBLIC SERVICE COMPANY OF)
NEW MEXICO'S ADDER RATES.)
)
PUBLIC SERVICE COMPANY OF NEW)
MEXICO, RESPONDENT.)**

Case No. 11-00308-UT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of **Final Order** adopted November 3, 2011, was sent on the same date by electronic mail and/or by first-class mail postage prepaid mail to the following:

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DATED this 3rd day of November, 2011.

NEW MEXICO PUBLIC REGULATION COMMISSION



Ana C. Kippenbrock, Paralegal