IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

EL PASO ELECTRIC COMPANY,

Petitioner-Appellant,

v. **No. S-1-SC-40286**

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee.

Appeal from the New Mexico Public Regulation Commission

BRIEF IN CHIEF

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

TABLE OF CONTENTS i

STATEMENT OF COMPLIANCE ii

TABLE OF AUTHORITIES iii

INTRODUCTION 1

SUMMARY OF PROCEEDINGS 1

I. NATURE OF THE CASE 2

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW 2

III. SUMMARY OF FACTS 5

STANDARD OF DECISION 5

ARGUMENT 6

I. ALLOWING A SUCCESSFUL APPELLANT TO RECOVER UNDERPAYMENTS (OR OBTAIN A REFUND FOR OVERCHARGES) FOLLOWING A SUCCESSFUL APPEAL DOES NOT CONSTITUTE RETROACTIVE RATEMAKING 6

A. Courts Routinely Allow Collection of Underpayments (or Refund of Overcharges) Following a Successful Appeal 8

B. The *Mountain States* Decision Does Not Preclude this Court from Ordering the Collection of Underpayments 15

II. IF THE COURT DETERMINES THAT *MOUNTAIN STATES 1977 AND U.S. WEST* DO NOT ALLOW FOR THE COLLECTION OF UNDERPAYMENTS (OR REFUND OF OVERCHARGES) FOLLOWING A SUCCESSFUL APPEAL, THEN THE COURT SHOULD OVERTURN THOSE DECISIONS 19

A. *Mountain States 1977* Rests on Unsound Reasoning 19

B. Basic Fairness Requires Collection of Underpayments or Refund of Overcharges Following a Successful Appeal 22

C. Depriving EPE of the Ability to Collect Underpayments Would Amount to an Unconstitutional Taking.....24

III. THE COURT SHOULD CLARIFY THAT THE COMMISSION HAS AUTHORITY TO ORDER A REMEDY TO CORRECT FOR THE UNDER COLLECTIONS CAUSED BY THE UNLAWFUL RATES 25

CONCLUSION.....29

REQUEST FOR ORAL ARGUMENT 29

STATEMENT OF COMPLIANCE

As required by Rule 12-318(G) NMRA, undersigned counsel hereby certifies that this brief complies with Rule 12-318(F) NMRA and was prepared in 14-point Times New Roman typeface using Microsoft Word for Microsoft 365, and that the body of the brief contains 7039 words.

TABLE OF AUTHORITIES

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Application of Gen. Tel. Co. of Sw., 1982-NMSC-106, 98 N.M. 749 6

Attorney General v. New Mexico Public Regul'n Comm'n, 2011-NMSC-034, 150 N.M. 174 ..... 14, 25

Chatterjee v. King, 2012-NMSC-019, 280 P.3d 283 25

Dillon v. King, 1974-NMSC-096, 87 N.M. 79 21

Hobbs Gas Co. v. New Mexico Public Service Commission, 115 N.M. 678, 858 P.2d 54 (N.M. 1993) 27

In re Petition of PNM Gas Services, 2000-NMSC-012, 129 N.M. 1 24-25

Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Comm'n, 1977-NMSC-032, 90 N.M. 325 ..... *passim*

Public Service Co. v. New Mexico Public Service Comm'n, 1979-NMSC-042, 92 N.M. 721 14

Public Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n, 2019-NMSC-012, 444 P.3d 460 24

Qwest Corp. v. New Mexico Public Regulation Comm'n, 2006-NMSC-042, 140 N.M. 440 26-27

Rayellen Res., Inc. v. New Mexico Cultural Properties Review Comm., 2014-NMSC-006, 319 P.3d 639 6

Regulatory Matters

In re Southwest Public Service Co., Case No. 17-00255-UT, 2018 WL 3330118 (NMPRC) 8, 19, 27

Re Gas Co. of N.M., Case No. 2361, 1992 WL 503187 (NMPSC Feb. 6, 1992) 7, 27

Other Jurisdictions

Appeal of Granite State Elec. Co, 120 N.H. 536, 421 A.2d 121 ..... 9, 13

Application of Minnegasco, 565 N.W.2d 706 (1997).....12

Bd. of Comm'rs v. N.Y. Tel. Co., 271 U.S. 23 (1926).....8

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Marbury v. Madison, 5 U.S. 137 (1803).....22

Mountain States Tel. & Tel. Co. v. Arizona Corp. Comm'n, 124 Ariz. 433, 604 P.2d. 1144 (Ariz. Ct. App. 1979).....13

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Nantahala Power and Light Co. v. Thornburg, 476 U.S. 953.....11

Natural Gas Clearinghouse v. FERC, 965 F.2d 1066 (D.C. Cir. 1992) 28

North Carolina ex rel. Util. Comm'n v. Nantahala Power & Light Co, 313 N.C. 614, 332 S.E. 2d 397 (1985) 10-11

Northwestern Bell Tel. Co. v. State, 216 NW2d 841 (Minn. 1974) 21

Pennwalt Corp. v. Michigan Public Service Comm'n, 109 Mich. App. 542, 311 N.W.2d 423 (1981) 12

Popowsky v. Pa. Pub. Util. Comm'n, 695 A.2d 448 (Pa. Commnw. Ct. 1997).....27

Porter v. South Carolina Pub. Serv. Comm'n, 493 S.E.2d 92 (S.C. 1997).....27

Public Service Comm'n of Nevada v. Southwest Gas Corp., 99 Nev. 268, 662 P.2d 624 (1983).....10

Southwest Bell Tel. Co. v. Public Utility Comm'n of Texas, 615 S.W.2d 947 (Tex. Civ. App. Austin 1981).....10

State ex. rel. Utilities Comm'n v. Conservation Council of North Carolina, 312 N.C. 59, 320 S.E. 2d 679 (1984).....9, 12, 22

State ex rel. Util. Consumers Council v. Pub. Serv. Comm'n, 585 S.W.2d 41 (Mo. 1979) 8

United Gas Improvement Company v. Callery Properties, 382 U.S. 223 (1965).....9, 28

Statutes, Rules

NMSA 1978, § 62-11-4 (1965).....6, 16

NMSA 1978, § 62-11-5 (1941).....6

12-319(B) NMRA.....29

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64 Am. Jur. 2d *Public Utilities* § 152 (2024).....27

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INTRODUCTION

On June 23, 2021, the New Mexico Public Regulation Commission ("Commission") adopted new rates for El Paso Electric Company ("EPE") customers. On appeal, this Court determined that the new rates violated EPE's due process rights and were illegal. The Court remanded the case to the Commission on June 28, 2021 to adopt rates consistent with its decision. In a split vote, the Commission erroneously denied EPE's request to collect amounts that were the rules against retroactive ratemaking preclude allowing recovery of the under recovered amounts before the date of entry of the Supreme Court Mandate.

This case concerns whether EPE is entitled to recover over $1 million that it under-collected from June 23, 2021 to June 28, 2023 due to the illegal rates. The question presented is whether a successful appellant is entitled to recover the under-collected amounts (or a refund of over-collected amounts) caused by an illegal rate case order. As demonstrated herein, the requested relief is routinely allowed by courts, is not precluded by prior decisions from this court, and is required by basic fairness. For the reasons stated herein, the Court should overturn the erroneous Commission Order and remand the matter with instructions to allow EPE to recover the under-collected amounts caused by the illegal rate case order.

SUMMARY OF PROCEEDINGS

I. NATURE OF THE CASE

On June 23, 2021, following extensive ratemaking proceedings, the Commission entered its initial Order Adopting Recommended Decision with Modifications ("Unlawful Rate Case Order"). This Court determined the rates in that order were illegal. On remand, the Commission refused to allow EPE to recover the amounts that were under-collected because of the illegal rates in the Unlawful Rate Case Order. The question presented in this appeal is whether a successful appellant is entitled to recover the under-collected amounts (or a refund of over-collected amounts) caused by an illegal rate case order.

II. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

The Unlawful Rate Case Order was issued on June 23, 2021 adopting retail electric rates for EPE's customers ("Unlawful Rates"). On appeal, this Court determined the Commission violated EPE's due process five times over during the rulemaking proceeding, rendering the rates set forth in the Unlawful Rate Case Order illegal as a matter of law. *El Paso Elec. Co. v. N.M. Pub. Reg. Comm'n*, 2023 WL 3166936, **[RP 080–097]** ("Merits Decision"). The Court issued its mandate ("Supreme Court Mandate") on June 7, 2023 vacating and annulling the Unlawful Rate Case Order and remanding for further proceedings consistent with the Court's decision. **[RP 098-99]**

On June 28, 2023, the Commission issued its order upon mandate ("Mandate Order"), ordering a recalculation and revision of the rates set forth in the Initial Order, with an eye towards correcting the violations found by the Supreme Court in its Merits Decision. **[RP 073-99]; *see also* [RP 222-28]**

On September 12, 2023, EPE filed a response to the Mandate Order proposing recalculated rates. EPE proposed revised rates to be implemented on January 1, 2024. EPE also requested authorization to book regulatory assets for purposes of recovery of the difference between the Unlawful Rates set forth in the annulled Unlawful Rate Case Order and the revised rates recalculated in light of the due process violations found by the Supreme Court and implemented on January 1, 2024. EPE requested authorization to create two separate regulatory assets, for two separate time periods: (1) from June 23, 2021, the date of the Commission's issuance of its Initial Order, until June 7, 2023, the date of entry of the court's mandate, and (2) from June 7, 2023, until January 1, 2024. **[RP 233-81]**

Staff filed its response on September 26, 2023, noting its accord with EPE's recalculated rates. **[RP 327-344]** Staff recommended the Commission approve EPE's proposal to implement its revised rates beginning January 1, 2024. **[RP 339¶ 6]** Staff recommended further that the Commission grant EPE's request to book a regulatory asset for the second time period described above, i.e., from June

7, 2023, the date of the Supreme Court's entry of its mandate, until January 1, 2024. **[RP 335** ¶ 15. Finally, Staff recommended the Commission approve EPE's request for a reconciliation of its fuel and purchased power cost adjustment clause ("FPPCAC") from 2017 to 2019. **[RP 327-44]**

The City of Las Cruces and Doña Ana County also filed a joint response on September 26, 2023, supporting EPE's revised rates and their implementation on January 1, 2024. However, the City and County opposed the creation of any regulatory asset, for any time period, authorizing EPE to recover undercharges. The City and County also opposed the reconciliation of EPE's FPPCAC for the period from 2017 to 2019. **[RP 288 – 326]**

On November 30, 2023, the Commission entered its Final Order on Remand. **[RP 345-359]** The Commission found that Staff's recommendations should be adopted, to wit: (1) EPE may implement its revised rates beginning January 1, 2024, and (2) EPE may book a regulatory asset accounting for under collected amounts beginning June 7, 2023, the date of the Supreme Court's Mandate, until January 1, 2024. **[RP 354¶ 25]** The Commission denied EPE's request for a regulatory asset dating from June 23, 2021, the date of the Commission's issuance of its Initial Order, until June 7, 2023, the date of entry of the court's mandate voiding the Initial Order. *Id.* at ¶ 26. **[RP 345 – 359]**

Commissioner Ellison voted against the Final Order on Remand. **[RP 358]** At the Open Meeting on November 30, 2023 he explained that he did not consider allowing a recovery of the under-collected amounts to be retroactive ratemaking. Instead, he viewed it as a "reconciliation . . . due to a court order." He further explained that the Final Order on Remand would create a "terrible precedent" because there would be no remedy for making a utility or customers whole following a successful appeal. *See* Recording of November 30, 2023 NMPRC Open Meeting, (available at https://www.youtube.com/watch?v=j-6r2IybJW8) at 1:54 to 1:59.

III. SUMMARY OF FACTS

A full summary of facts in the rate case was provided in EPE's Brief in Chief filed in the underlying appeal No. S-1-SC-38874. The following summary is limited to those facts that are relevant to the narrow legal issues presented in this appeal.

EPE calculated the total under-collected amount from the Unlawful Rate Case Order until the Supreme Court Mandate because of the illegal rates was $1,007,770. **[RP 247]** No party disputed that amount.

STANDARD OF DECISION

The Commission does not act with unlimited authority in general rate cases, but "is bound by, and limited to, its existing rules and regulations, proper

application of the law, compliance with the constitutional mandate, and by previously established methods of ratemaking, absent a change in circumstances peculiar to the company and the pending case, making it necessary that there be a departure from established methods." *Application of Gen. Tel. Co. of Sw.*, 1982-NMSC-106, ¶ 29, 98 N.M. 749. To prevail in this appeal, EPE must demonstrate that the Commission's denial of recovery of under collections caused by the Unlawful Rate Case Order "is unreasonable or unlawful." NMSA 1978, § 62-11-4 (1965). The Court must vacate an unreasonable or unlawful order. NMSA 1978, § 62-11-5. This Court reviews questions of law de novo. *Rayellen Res., Inc. v. New Mexico Cultural Properties Review Comm.*, 2014-NMSC-006, ¶ 18, 319 P.3d 639.

ARGUMENT

I. ALLOWING A SUCCESSFUL APPELLANT TO RECOVER UNDERPAYMENTS (OR OBTAIN A REFUND FOR OVERCHARGES) FOLLOWING A SUCCESSFUL APPEAL DOES NOT CONSTITUTE RETROACTIVE RATEMAKING

The Commission erred in concluding that the law forbids recovery of the under recovered amounts before the date of entry of the Supreme Court Mandate. The fundamental position animating the Final Order on Remand is that recovery of the undercharges from the date of the Unlawful Rate Case Order (June 23, 2021) to the date of the Supreme Court Mandate (June 28, 2023) would amount to retroactive ratemaking. In the words of the Commission, "allowing recovery of the

pre-Mandate [underpayments] would constitute unlawful retroactive ratemaking." **[RP 354]** It is therefore helpful to understand the principle of retroactive ratemaking.

In 1977, the New Mexico Supreme Court reviewed a claim by Mountain Bell that rates should be made effective retroactively to remedy what the Court had found to be an unconstitutional delay in setting new rates. Noting that the issue was one of first impression in New Mexico, the Court said:

> [T]his court has held that rate-making is legislative in its nature, and it is axiomatic that legislative action operates prospectively, not retroactively. Retroactive remedies, which are in the nature of reparations rather than rate-making, are peculiarly judicial in character, and as such are beyond the authority of the Commission to grant. Moreover, there is no better established rule with regard to the prescription of rates for a public utility than the one that holds that rate fixing may not be accomplished retroactively, unless some specific statutory or constitutional authority permits. Past deficits may not be made up by excessive charges in the future nor may past profits be reduced by disallowances to future operating expense.

Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Comm'n, 1977-NMSC-032, ¶¶ 88-89, 90 N.M. 325 (citations and internal quotation marks omitted) (hereinafter "*Mountain States 1977*").

The Commission has defined retroactive ratemaking as "'the setting of rates which permit a utility to recover past losses or which require it to refund past excess profits collected under a rate that did not perfectly match expenses[.]'" R*e Gas Co. of New Mexico*, Case No. 2361, 1992 WL 503187, at *10 (NMPSC Feb. 6,

1992) (quoting *State ex rel. Util. Consumers Council v. Pub. Serv. Comm'n*, 585 S.W.2d 41, 59 (Mo. 1979)); *see also Bd. of Comm'rs v. N.Y. Tel. Co.*, 271 U.S. 23, 31-32 (1926) ("Past losses cannot be used to enhance the value of the [utility's] property or to support a claim that rates for the future are confiscatory . . . . Profits of the past cannot be used to sustain confiscatory rates for the future."). The rule "prevents using prospective rates to make up for past losses or excessive profits collected under rates that did not perfectly match expenses." *In re Southwest Public Service Co.*, Case No. 17-00255-UT, 2018 WL 3330118 (NMPRC) (hereinafter "*In re SPS*").

In light of this definition, the Commission erred in concluding that EPE's request to recover under-collections was barred for two reasons: (1) authorizing a refund or collection of underpayments caused by an unlawful rate is not retroactive ratemaking; and (2) contrary to the Final Order on Remand, the *Mountain States 1977* decision does not preclude this Court from ordering the collection of underpayments.

A. Courts Routinely Allow Collection of Underpayments (or Refund of Overcharges) Following a Successful Appeal

The rule against retroactive ratemaking does not limit a court's authority to order appropriate relief in rate making appeals. Courts have consistently held this is so under four related rationales. Each is compelling and should be relied on here to afford EPE full relief from the Unlawful Rates.

First, courts have consistently held that the rule against retroactive ratemaking does not limit the Court's authority to afford relief because the initial commission order is not final for ratemaking purposes until after full judicial review. *See, e.g.*, *Farmland Industries Inc. v. Kansas Corp. Comm'n*, 29 Kan.App.2d 1031, 1040, 37 P.3d 640 (2001) ("until judicial review is completed, utilities are subject to refund orders if the rates are ultimately determined to be unlawful."); *Appeal of Granite State Elec. Co*, 120 N.H. 536, 537, 421 A.2d 121, 123 (explaining "the substitution of new rates in accordance with this court's order for those required by the PUC's earlier order does not involve a retroactive application of the law. Until the rate had become final, the rate established by the PUC had not become tantamount to a statute which could not be amended retrospectively.").

The decision in *State ex. rel. Utilities Comm'n v. Conservation Council of North Carolina*, 312 N.C. 59, 67, 320 S.E. 2d 679 (1984) explains that

> Retroactive rate making occurs when, the utility is required to refund revenues collected, pursuant to the then lawfully established rates, for such past use. The key phrase here is lawfully established rates. A rate has not been lawfully established simply because the Commission has ordered it. If the Commission makes an error of law in its order from which there is a timely appeal the rates put into effect by that order have not been lawfully established until the appellate courts have made a final ruling on the matter.

(Internal citations and quotation marks omitted). *See also United Gas Improvement Company v. Callery Properties, 382 U.S. 223, 289, (1965)*

(recognizing that under the circumstances where an agency order, "which never became final, has been overturned by a reviewing court...the Commission could properly conclude that the public interest required the producers to make refunds for the period in which they sold their gas at prices exceeding those properly determined to be in the public interest.... An agency, like a court, can undo what is wrongfully done by virtue of its order.") (Internal citations and quotation marks omitted).

Second, courts have consistently rejected the application of retroactive ratemaking because a judicial reversal of an unlawful Commission order invalidates the order from the beginning, as if the order had never been entered. *See, e.g., Public Service Comm'n of Nevada v. Southwest Gas Corp.*, 99 Nev. 268, 278, 662 P.2d 624, 627 (1983) (holding "a refund order . . . is not a form of retrospective legislation; it is merely a recognition that charges cannot be validly grounded on a void order . . ."); *Southwest Bell Tel. Co. v. Public Utility Comm'n of Texas*, 615 S.W.2d 947, 957 (Tex. Civ. App. Austin 1981) (concluding "[n]o one ever had a right thereafter to charge or pay for the utility's services according to any other system of rates. If these new official or legal rates are finally adjudged invalid, they were never effective at all to vest a right in anyone . . .").

The decision in *North Carolina ex rel. Util. Comm'n v. Nantahala Power & Light Co,* 313 N.C. 614, 741-742, 332 S.E. 2d 397, 472 (1985) (reversed on other

grounds by *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953) explains the rationale.

> First, the Court identified the applicable principals of law:
>
> > It is elementary that the Commission's approval of any rate is always subject to judicial review. It is equally well-settled that rates or charges fixed by an order of the Commission are to be considered just and reasonable unless and until they are changed or modified on appeal or by the further action of the Commission itself.

Id. Then, applying these established principles of law, the Court determined that the rates subject to appeal "were only presumed to have been lawfully approved by the Commission until the 1977 order was reviewed by our appellate courts. When, upon appellate review and further action by the Commission itself, the 1977 rates were determined to be excessive, [rate payers] became entitled to recover all overcharges collected pursuant thereto." *Id.* Finally, the court clarified that:

> [V]arious dates upon which appellate decisions were entered in this case have absolutely no bearing upon the temporal extent of Nantahala's refund obligation. The premise underlying such a refund obligation is that rates which are found to be excessive are then considered to have been illegal from the outset, and are not considered to have become illegal only as of the date on which the appellate court has found them to be so. The Commission's order with respect to the temporal extent of the refund obligation is, therefore, compatible with the mandate of this Court in Edmisten, and well within the Commission's inherent authority to order a public utility to refund monies which were overcollected from its customers under excessive and unlawful rates.

Id. (Internal citations and quotation marks omitted).

Third, courts have also held that the general prohibition on retroactive rate making cannot apply because meaningful judicial review requires the right to relief. For example, in *Conservation Council of North Carolina*, 312 N.C. at 68, the court held it was "authorized to order refunds when the Commission has made an error of law in its rate making procedures." The court explained that "[t]o hold otherwise would deny ratepayers who appeal from erroneous orders of the Commission adequate relief while allowing utilities to retain the proceeds of rates that were illegally charged. It defies common sense to believe that the Legislature intended such a result." *Id.*; *see also, e.g.*, *Pennwalt Corp. v. Michigan Public Service Comm'n*, 108 Mich.App. 542, 545-546, 311 N.W.2d 423, 425 (1981) (holding "a judicially mandated refund is the result statutorily authorized review of the Commission's orders and does not constitute retroactive rate-making.");*Application of Minnegasco*, 565 N.W.2d 706, 711 (1997) (holding that "the Commission has implied statutory authority to order a recoupment remedy to compensate a public utility for lost revenue occasioned by a rate order reversed on appeal" in part because "[w]hatever rate instability results from this authority is outweighed, in our estimation, by the importance of a meaningful remedy when the Commission exceeds its statutory authority in ordering rates.").

Finally, courts have held that authority to grant equitable or restitutionary remedies (e.g. ordering refunds to ratepayers (or collection of undercharges)) is

included within the judicial function to review a commission order. The court in *Mountain States tel. & Tel. Co. v. Arizona Corp. Comm'n*, 124 Ariz. 433, 436, 604 P.2d. 1144, 1147 (Ariz. Ct. App. 1979), explained:

> The refund in this case [ ] was precipitated by this Court's decision in Scates and not by the Corporation Commission's own determination of the impropriety of the 1975 rate increase. The refund is the result of the direct, statutorily authorized, review of the Commission's order. We therefore conclude that nothing in the procedural history of this case, Arizona's statutes or case law, or general principles of rate making precludes the Corporation Commission's refund order.

124 Ariz. at 436.

After concluding that refund is an available remedy, the Arizona court additionally held that "amounts collected under an invalid order should be refunded unless to do so would be unjust in the particular circumstances of the case". *Id.; see also, e.g., Mountain States Tel. & Tel. Co v. Public Utilities Comm'n*, 180 Colo. 74, 83, 502 P.2d 945, 949 (1972) ("This Court may, on review of a Commission rate order, require correction or legal errors contained in the order and provide that benefits arising from those corrections be passed on to customers of the utility."); A*ppeal of Granite State Elec. Co.*, 120 N.H. at 539, ("[i]n awarding reparation, the PUC performs a judicial function. As such, it must not only perform duties statutorily created, but also exercise those powers inherent within its broad grant of power. One such power is to award restitution if one has been unjustly enriched at the expense of another.").

The retroactive issues presented in the context of rate order reversals is largely a function of the time it takes to complete judicial review of a rate case order and a subsequent remand process. This is yet another compelling justification for recognizing judicial authority to provide relief in the form of recovery of underpayments or (or to obtain a refund of overcharges) following a successful appeal.

These established rationales should be applied to reach the same result here. This Court has already vacated and annulled the unlawful rate case and remanded the matter to the Commission for further proceedings consistent with the Decision. **[RP 098-99]**; s*ee also Attorney General v. New Mexico Public Regul'n Comm'n*, 2011-NMSC-034, ¶ 9, 150 N.M. 174 (explaining "[t]his Court does not have the authority to modify orders of the PRC; we must either affirm or annul and vacate the order") (internal quotation marks omitted). The Court's annulment renders the Unlawful Rate Order invalid from the beginning, as if the order had never been entered. *See Public Service Co. v. New Mexico Public Service Comm'n*, 1979-NMSC-042, ¶ 24, 92 N.M. 721, (determining that "[o]nce the Commission's order is annulled and vacated, a rate case is in the same posture it was in before the original decision was rendered. The Commission may hold additional hearings and take additional testimony *just as if the vacated order had never been entered . . .*") (Emphasis added)). The rule against retroactive ratemaking simply does not apply.

B. The *Mountain States* Decision Does Not Preclude this Court from Ordering the Collection of Underpayments

In reaching the erroneous conclusion that recovery of the under-collected amounts was barred as retroactive ratemaking, the Commission relies exclusively on the *Mountain States 1977* and *U.S. West* cases. **[RP 355-56]** The Commissions' reliance is misplaced. While both cases discuss related issues, neither is directly on point. Specifically, neither decision addresses whether a utility should be allowed to recover undercharges (or receive a refund for overpayments) for Commission rates that are subsequently found by the Court to be illegal (in this case by violating due process).

In *Mountain States 1977*, the utility brought an application for new rates. 1977-NMSC-032, ¶ 2. At a hearing, it was undisputed that the utility was underearning by approximately $1 million per month, *id.* at ¶¶ 3, 47, but the Commission declined to adopt new rates, *id.* ¶ 4, 33. *Id.* at ¶¶ 3, 47. On appeal, the New Mexico Supreme Court held that the Commission was obligated to adopt interim rates after "it became obvious that it would be a considerable length of time before permanent rates could be fixed" in order to "minimize the confiscation of Mountain Bell's property." *Id.* ¶ 50. As a remedy, the Court ordered the Commission to "proceed to fix rates" consistent with the legal principles outlined in the opinion. *Id.* ¶ 33.

After confirming that the Commission had a duty to set the new rates, the *Mountain States 1977* Court turned to the question of whether the new rates should be made retroactive to the original date of the Commission order in which it declined to put in place new rates. *Id.* ¶¶ 86-90. Under the circumstances presented in that case – where the Commission had not adopted interim rates in the first instance – the Court held that it would amount to retroactive ratemaking to apply the interim rates to the date of the original Commission order. *Id.* ¶ 90.

The Commission notes that the *Mountain States 1977* Court concluded in that case that relief could not "predate the Court's order." **[RP 355 (internal quotation marks omitted)]** But the Final Order on Remand fails to note that was because the Commission in *Mountain States 1977* never adopted rates in the first place. In those circumstances, the Court would have been crafting and adopting rates in the first instance. Obviously, such an exercise would have amounted to ratemaking by the Court. *See Mountain States*, 1977-NMSC-032, ¶ 33.

That same obstacle does not apply in the present case. Instead, in this case, the Commission has already adopted rates. The Court's only role was to evaluate whether those rates were lawful and reasonable. NMSA 1978, § 62-11-4. When it determined that the rates were unlawful, a necessary corollary to meaningful relief was that EPE is entitled to the under-collected amounts caused by legal errors of

the Commission. It is undisputed that the under-collections were approximately $1 million. **[RP 246-47, 349-52]**

In short, *Mountain States 1977* does not address the specific question posed in this case and does not present an impediment to recovery of the under-collected amounts.

Subsequently, in *U.S. West*, the New Mexico Supreme Court again considered whether utility rates should apply to the original date of a Commission order. In *U.S. West*, the Commission held an emergency hearing based on the Annual Report of the telephone utility and determined that it had over-earned by approximately $22 million. 1999-NMSC-016, ¶¶ 3, 10. Unlike *Mountain States 1977*, in *U.S. West* the Commission had already set interim rates pending a full rate case. On appeal, the utility argued that the effective date of the interim rates should be the date of the Court order, not the original date the Commission adopted the interim rates. *Id.* ¶ 51. Thus, the question considered by the Court was when the adopted rates became effective. The Court held that "when the Court affirms the Commission's [ratemaking] order, the rule against retroactive ratemaking provides no obstacle to giving effect to that order as of the date provided [in the rate order], particularly when the rates set by the order would have gone into effect at that time but for the filing of a removal action." *Id.* ¶ 54.

The Commission places great weight on *U.S. West*, but there is nothing remarkable about holding that the effective date of an agency order is when the order was adopted, *when the order is affirmed*. But that principle does not apply in this case, where the original order was not affirmed, but rather found to be unlawful and thus annulled. As with *Mountain States 1977*, the *U.S. West* case is not on point and does not preclude recovery for under or over collections when a Commission order is found unlawful and void. If anything, the *U.S. West* case supports EPE's position because the Court "ordere[d] U.S. West to treat the rate reduction as if it went into effect . . . the date ordered by the Commission, notwithstanding the fact that the date [had] already passed." *Id.* ¶ 51. Applied to the current case, this principle would entitle EPE to recover undercharges dating back to the date of the Commissions Unlawful Rate Case Order.

Moreover, the Commission's treatment of *Mountain States 1977* and *U.S. West* suffers from yet another flaw. It cites *Mountain States* for the general prohibition on retroactive ratemaking and assumes, without establishing, that it applies in this case. It does not. As discussed above, the Court finding a Commission ratemaking order unlawful and requiring recovery of under-collections or refund of over-collections does not amount to ratemaking at all. The prohibition on retroactive ratemaking "prevents using prospective rates to make up for past losses or excessive profits collected under rates that did not perfectly

match expenses." *In re SPS*, 2018 WL 3330118 at 20. That rule simply does not apply here. EPE is not claiming that previously valid rates either caused a past deficit or "excessive profits." This case does not concern comparing authorized revenues with actual revenues and then adjusting for unexpected profits or shortfalls. Nor is EPE seeking to recover amounts for periods before the Commission acted pursuant to its legislative ratemaking authority. EPE is instead seeking to recover under-collected amounts from the date the unlawful and voided rates were implemented by the Commission. *Mountain States* and its progeny do not prevent that recovery.

II. IF THE COURT DETERMINES THAT *MOUNTAIN STATES 1977 AND U.S. WEST* DO NOT ALLOW FOR THE COLLECTION OF UNDERPAYMENTS (OR REFUND OF OVERCHARGES) FOLLOWING A SUCCESSFUL APPEAL, THEN THE COURT SHOULD OVERTURN THOSE DECISIONS

EPE urges the Court to reject the Commission's reading of *Mountain States 1977* and *U.S. West* and allow recovery of the under-collections caused by the Unlawful Rate Case Order. In the alternative, the Court should clarify or overrule the problematic parts of those decisions to allow for the refund of overcharges or collection of underpayments.

A. *Mountain States 1977* Rests on Unsound Reasoning

If the Court understands *Mountain States 1977* and *U.S. West* in the same way as the Commission, then the first reason that those cases should be clarified or overruled is that the reasoning is unsound in three fundamental ways.

First, limits on retroactive ratemaking stem from limits on legislative power in general and the constitutional mandates that certain private expectancies and rights are protected from any retroactive disruption by the government. *E.g. Mountain States*, 1977-NMSC-032, ¶¶ 88, 90. The Commission acts with legislative-type power in setting rates and in doing so cannot set rates that violate any statutory or constitutional prohibition, including setting rates so low as to be confiscatory. Nor can the Commission reach back in time and impair the "regulatory contract" by reducing the parties' expectancies assured by Commission orders.

While no utility or customer has a vested right in the continuation of a particular rate for electric service, everyone does have an expectation that rates will not be altered retroactively by legislative fiat. Unlike general legislative acts, however, the Commission's final rate orders are routinely and often superseded by requests for new rates, resulting in a series of final orders for discrete periods of time, with each order based on facts then-adjudicated with finality in the underlying contested cases (and appeals, if taken).

It is well understood, however, that Commission orders are subject to appeal and may be overturned. There is no reasonable expectation of finality in the rates until an appeal has been completed. In other words, a rate has not been lawfully established simply because the Commission has ordered it. If the Commission makes an error of law in its order from which there is a timely appeal the rates put into effect by that order have not been lawfully established until this Court has made a final ruling on the matter. *Farmland Industries v. Kansas Corp. Comm'n*, 37 P.3d 640, 647 (Kan. App. 2001) ("until judicial review is completed, utilities are subject to refund orders if the rates are ultimately determined to be unlawful"). "[A]mounts collected by a utility pending appeal enjoy no unique immunity from the claims of those to whom they rightfully belong." *Northwestern Bell Tel. Co. v. State*, 216 N.W.2d 841, 858 (Minn. 1974).

Second, the Commission's reading of *Mountain States* rests on its understanding that the Court engages in ratemaking if it orders that over-collections be refunded (or under-collections be recovered). That is not the case. When the Court evaluates a Commission order, it is not engaging in "public policy decisions" that are necessary to establish rates in the first place. *Mountain States*, 1977-NMSC-032, ¶ 27. Rather, it is undertaking the normal type of review of an agency action that courts engage in every day. *See Dillon v. King*, 1974-NMSC-096, ¶ 28, 87 N.M. 79 (the judiciary's proper "function and duty [is] to say what

the law is" (citing *Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.")). There is nothing legislative about determining that a Commission order is unlawful and providing a remedy.

Third, the Commission's reading of the case law would have the effect of denying meaningful judicial review. The Court has recognized that "[r]etroactive remedies, which are in the nature of reparations rather than rate-making, *are peculiarly judicial in character*, and as such are beyond the authority of the Commission to grant." *Mountain States*, 1977-NMSC-032, ¶ 88. But the Commission's reading would deprive the Court of the ability to impose just the sort of "retroactive remedies" that are necessary for relief.

B. Basic Fairness Requires Collection of Underpayments or Refund of Overcharges Following a Successful Appeal

Next, basic fairness requires collection of underpayments or refund of overcharges following a successful appeal. "To hold otherwise would deny ratepayers who appeal from erroneous orders of the Commission adequate relief while allowing utilities to retain the proceeds of rates that were illegally charged." *Conservation Council of N. Carolina*, 320 S.E.2d at 686.

If the Court affirms the Final Order on Remand and does not clarify or overturn *Mountain States 1977*, judicial review of Commission ratemaking orders would be an empty promise. Two hypothetical examples illustrate the concern:

Hypothetical Example No. 1: During a rate case hearing the Hearing Examiner excludes every witness representing the customers' interests without explanation. When the case is pending, the hypothetical utility engages in *ex parte* discussions with two of the three hypothetical Commissioners. One of the Commissioners accepts a position as vice-president of the utility to start after the case is completed. She does not recuse herself and is the deciding vote. The approved rate design adopted by the Commission is inherently discriminatory against a Native American tribe in the service area. Customers appeal the rates adopted by the Commission, but the case takes four years before a decision is issued by the Court. During that period, the utility over-collects $50 million from its ratepayers.

Hypothetical Example No. 2: The hypothetical Commission is frustrated with one particular utility and singles it out for punishment by ordering it to file a rate case. During the hearing, one of the hypothetical Commissioners appears and offers evidence into the record that no other party has had the opportunity to review. The Hearing Examiner recommends a small rate increase, but the Commission ignores the recommended decision and orders a 40% decrease in rates. It adopts a new method for calculating the cost of service that was never disclosed, is fundamentally different than the method applied to every other utility, and contrary to decades of practice. In explaining its decision, the Commission states that it is electing to ignore its statutory obligation to balance the interests of the ratepayers and the utility in this case only. It further acknowledges that it is disregarding a controlling New Mexico Supreme Court precedent that is directly on point. The utility appeals the rates adopted by the Commission, but again the case takes four years before a decision is issued by the Court. During the pendency of the appeal, the utility under-collects $50 million from its ratepayers. Because it is a small utility, it is unable to meet its financial obligations and is forced into bankruptcy.

The two hypothetical examples are admittedly extreme. The point is that under the Commission's reasoning there would be no recourse for either the customers or the utility. Both would be forced to accept that they were wrongly and illegally deprived of $50 million with no hope for recovery. Such a result would be inherently unfair and contrary to fundamental principles of judicial

review. It is hard to imagine what equitable or policy based reasons could exist for perpetuating such a rule.

C. Depriving EPE of the Ability to Collect Underpayments Would Amount to an Unconstitutional Taking

"The Commission has the obligation to ensure that every rate made, demanded or received by any public utility is just and reasonable." *Public Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012, ¶ 9, 444 P.3d 460 (citations and internal quotation marks removed). By statute, the Commission must balance the investor's interest against the ratepayer's interest," to ensure that "rates are neither unreasonably high so as to unjustly burden ratepayers with excessive rates nor unreasonably low so as to constitute a taking of property without just compensation or a violation of due process by preventing the utility from earning a reasonable rate of return on its investment." *In re Petition of PNM Gas Services*, 2000-NMSC-012, ¶ 8, 129 N.M. 1, 1 P.3d 383.

A bedrock principles of utility regulation is that "private property may not be taken for public use without just compensation." *Mountain States 1977*, 1977-NMSC-032, ¶ 38. As it applies to EPE, this principle means that the Commission cannot order EPE to provide power without allowing EPE to pass through the costs of providing that service.

Yet if the Court adopts the Commission's interpretation of *Mountain States 1977* and does not clarify or overrule the problematic reasoning, that is exactly

what will happen. The Court has already determined that the previous rates were unlawful and did not allow EPE to recover a reasonable return on its investment. If the Commission's reasoning stands, and the unlawful and annulled order is somehow given effect, EPE provided power from June 23, 2021 to June 7, 2023 without receiving just compensation. *See, e.g., Attorney General v. New Mexico Pub. Reg. Comm'n*, 2011-NMSC-034, ¶ 16, 258 P.3d 453 (citing *In re Petition of PNM Gas Services*, 2000-NMSC-012, ¶ 8, 129 N.M. 1) (explaining that it would be a taking to deprive a utility of the opportunity to recover its incurred costs and earn a reasonable rate of return). The Court would be knowingly countenancing a violation of EPE's due process rights. That is not how the Court operates. *See, e.g., Chatterjee v. King*, 2012-NMSC-019, ¶ 8, 280 P.3d 283 (courts have a duty to interpret the law to avoid raising constitutional concerns).

III. THE COURT SHOULD CLARIFY THAT THE COMMISSION HAS AUTHORITY TO ORDER A REMEDY TO CORRECT FOR THE UNDER COLLECTIONS CAUSED BY THE UNLAWFUL RATES

Finally, in order to provide critical guidance to the Commission, utilities, ratepayers, and the general public, the Court should take this opportunity to clarify whether the Commission (as opposed to the Court) has authority to order a remedy that would allow a refund for over-collections or recovery of under-collections following a successful appeal.

To be clear, it is EPE's frontline position that the Court has the authority to order a remedy to allow a successful appellant to recover under-collections (or a refund of over-collections). *See* Argument Section I, *supra.* But whether *the Court* can order over-collections to be refunded or underpayments to be paid is a different question than whether *the Commission* can order similar relief. In its Final Order on Remand, the Commission erroneously concludes that *the Commission* does not have authority to order any retroactive remedy to correct for the underpayments associated with the Unlawful Rates. **[RP 354-355]** Unfortunately, the Court has not provided clear guidance on this issue.

As discussed above, in *Mountain States 1977*, the Court observed that "[r]etroactive remedies, which are in the nature of reparations rather than ratemaking, are peculiarly judicial in character, and as such are beyond the authority of the Commission to grant." 1977-NMSC-032, ¶ 88. However, in *Qwest Corp. v. New Mexico Public Regulation Comm'n*, 2006-NMSC-042, 140 N.M. 440, the Court seemed to back away from that rule. In that case the Court considered whether a customer refund "violate[d] the rule against retroactive remedies because the [refund] order [was] a remedial measure" and the regulatory plan at issue was "legislative in nature." *Id.* ¶ 28. In allowing the customer refund, the Court explained that the *Mountain States 1977* case "does not preclude the PRC from implementing a retroactive procedure." *Id.* at ¶ 29. That holding is hard

to reconcile with the *Mountain States 1977* holding or the Commission's Final Order on Remand.[1]

Similarly, the Commission itself has recognized "exceptions to the rule against retroactive ratemaking," *In re SPS*, 2018 WL 3330118 at *21, and has observed that "prospective rate allowances for recovery of historic costs . . . is not always retroactive ratemaking." *Re Gas Co. of N.M.*, 1992 WL 503187, at *11. For example, the Commission has acknowledged that the rule against retroactive ratemaking is "inapplicable to fuel cost adjustments," *id.*, and to "unanticipated expenses" where the expenses are "extraordinary and non-recurring,"[2] *In re SPS*, 2018 WL 3330118 at *21.[3]

One author cogently described the applicable question in the current case as "[i]f a court finds a commission-approved rate increase unlawful, may the

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[1] The *Qwest* Court also applied the factors identified in *Hobbs Gas Co. v. New Mexico Public Service Commission*, 115 N.M. 678, 858 P.2d 54 (N.M. 1993) for when to allow a "radical departure from past practice." *Id.* at ¶ 9. But those factors seem out of place for the current issue because they address when to depart form the default retroactive application of a new agency rule and apply the new rule prospectively only. *Id.* ¶¶ 13-15.

[2] The under-collected amounts associated with the Unlawful Rate Case Order are extraordinary because they are both "unanticipated" and "non-recurring." "Generally, amortizing an extraordinary expense incurred in the past does not result in a retroactive rate-making." *Porter v. South Carolina Pub. Serv. Comm'n*, 493 S.E.2d 92, 97 (S.C. 1997) (citing *Popowsky v. Pa. Pub. Util. Comm'n*, 695 A.2d 448 (Pa. Commnw. Ct. 1997)).

[3] It is also generally acknowledged that the prohibition against retroactive ratemaking "applies only to base rate proceedings and not to surcharge proceedings." 64 Am. Jur. 2d *Public Utilities* § 152 (2024).

commission order refunds without violating the rule against retroactivity? The general answer is yes." Scott Hempling, *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction*, at 335 (Energy Bar Association 2013). Consistent with that general rule, the United States Supreme Court explained in *United Gas Improvement Co. v. Callery Properties, Inc.* that "an agency, like a court, can undo what is wrongfully done by virtue of its [prior] order." 382 U.S. 223, 229 (1965).

Thus, in *Natural Gas Clearinghouse v. FERC*, the D.C. Circuit considered a case in which it determined that the Federal Energy Regulatory Commission ("FERC"), 965 F.2d 1066 (D.C. Cir. 1992), had set a rate too low for a natural gas pipeline. To correct the issue, FERC imposed a corrective surcharge and the customers appealed. The court rejected the customers' position that the corrective surcharge represented retroactive ratemaking because the statute was silent and an agency "'can undo what [was] wrongfully done.'" *Id.* at 1073 (quoting *Callery*, 382 U.S. at 229). The court reasoned that absent such remedial authority, "the pipeline's primary right under [the statute] to propose and collect a justified rate would be drastically curtailed, . . . pipelines would be substantially and irreparably injured by FERC errors, and judicial review would be powerless to protect them from much of the losses so incurred." *Id.* at 1074-75.

That same reasoning applies in the present case. The Court should clarify that the Commission is authorized to order a remedy to make EPE whole and correct for the underpayments associated with the Unlawful Rates.

CONCLUSION

The Commission's Order concluding that the law forbids recovery of the under recovered amounts before the date of entry of the Supreme Court Mandate should be reversed and the case should be remanded to the Commission with instructions to allow for the collection of underpayments.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 12-319(B) NMRA, EPE hereby requests oral argument. EPE believes that oral argument will be helpful to the resolution of this case because the issues before the Court are complex and because the Court may have questions concerning the underpinnings of the issues that can only be answered if oral argument is allowed.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 12, 2024, the foregoing was electronically filed and served on all counsel of record via the Court's electronic filing system, as more fully reflected on the Notice of Electronic Filing.

/s/ Jeffrey J. Wechsler
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