



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-40286

**EL PASO ELECTRIC COMPANY,
Appellant,**

v.

**NEW MEXICO PUBLIC REGULATION
COMMISSION,**

**Appellee,
and**

**CITY OF LAS CRUCES , NEW MEXICO
DEPARTMENT OF JUSTICE, and
DOÑA ANA COUNTY
Intervenors-Appellees.**

**IN THE MATTER OF THE APPLICATION
OF EL PASO ELECTRIC COMPANY FOR
REVISION OF ITS RETAIL ELECTRIC
RATES PURSUANT TO ADVICE NOTICE
NO. 267, NMPRC Case No. 20-00104-UT**

INTERVENOR-APPELLEE'S ANSWER BRIEF

ORAL ARGUMENT REQUESTED

RAÚL TORREZ
New Mexico Attorney General
Aletheia V.P. Allen
Solicitor General
Lawrence M. Marcus
Assistant Solicitor General
Gideon Elliot
Utilities Bureau Chief
New Mexico Department of Justice

201 3rd St. NW, Ste. 300
Albuquerque, NM 87102

*Attorneys for New Mexico Department
Of Justice*

Anastasia S. Stevens
Stevens Law LLC
29 Tano West
Santa Fe, New Mexico 87506
(505) 795-3505
astevens.law@gmail.com

Brad Douglas, City Attorney
City of Las Cruces
P.O. Box 20000
Las Cruces, New Mexico 88004-9002
(575) 241-2128
bdouglas@lascruces.gov

Attorneys for the City of Las Cruces

Keith Herrmann
Nann Winter
STELZNER, WINTER, Warburton,
FLORES & Dawes, P.A.
Post Office Box 528
Albuquerque, New Mexico 87103
(505) 938-7770
Email: nwinter@stelznerlaw.com
Email: kherrmann@stelznerlaw.com

Nelson Goodin
Fred Kennon
Doña Ana County Counsel
Doña Ana County Attorney's Office
P.O. Box 2528
Las Cruces, New Mexico 88004
Phone: (575) 525-5916
Email: nelsong@donaanacounty.org
Email: fredk@donaanacounty.org

Attorneys for Doña Ana County

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INTRODUCTION

I. Summary

This case concerns whether a utility may, in the absence of a stay of a final rate order of the New Mexico Public Regulation Commission (“Commission” or “NMPRC”), recover the difference between the revenues it actually recovered under the Commission-authorized rate and the revenues that the utility would have recovered if the rates established as a result of the Court’s decision had been in effect pending the appeal. While this precise issue may be one of first impression, this Court’s prior decisions and the unambiguous statutory language of the New Mexico Public Utility Act (“PUA”)¹ establish that the requested retroactive remedy is not authorized under the law, and moreover is blocked by the filed-rate doctrine. Accordingly, the Court should affirm the Commission’s denial of El Paso Electric Company’s (“EPE”) request to recover approximately \$1 million in addition to the amounts that it recovered through the rates on file during the pendency of its appeal.

II. Joint Intervenor-Appellees

The Intervenor-Appellees joining in this Answer Brief are the New Mexico Department of Justice (“NMDOJ”), the City of Las Cruces (“CLC”), and Doña Ana County (“DAC”). Each of the Joint Intervenor-Appellees participated in the original rate case

¹ NMSA 1978, Sections 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).

brought by EPE, and all support the determination by the Commission that the rate schedules adopted by the Commission on remand should only have prospective application. Any issue not addressed in this Answer Brief does not indicate support or opposition.

NMDOJ represents the public interest and, in Commission proceedings, statutorily represents the interests of residential and small business consumers in New Mexico. NMSA 1978, Sections 8-5-2(J) (1933) and 8-5-17 (1999). CLC and DAC are large municipal customers of EPE, and their residents comprise a majority of EPE's New Mexico service territory. The Intervenor-Appellees thus represent a wide range of residential, small business, and municipal customers of EPE.

EPE's appeal seeks to eliminate and to overturn many decades of Supreme Court and Commission precedent. The relief requested by EPE violates the PUA, the longstanding prohibition on retroactive ratemaking, and the underlying policy and precedent supporting those principles. Accordingly, the appeal should be denied.

SUMMARY OF PROCEEDINGS

I. Nature of the Case

This case is the latest chapter in EPE's appeal of the Commission's Final Order in its 2020 Application for Revision of Retail Electric Rates in Case No. 20-00104-UT, which this Court vacated and remanded to the Commission for further proceedings. EPE now seeks the Court's direct intervention to order the Commission

to allow it to recover \$1 million in revenue it mischaracterizes as “under-collected” because of the “illegal rates” in a “Unlawful Rate Case Order.” **[BIC 2]**. Accordingly, the present matter concerns whether a utility, following a partially successful appeal from a Commission final order, in the absence of a stay, is entitled to retroactive relief for the period between the between the Commission’s final order and entry of revised rates following the Court’s decision vacating and remanding the matter to the Commission for further proceedings.

II. Course of the Proceeding and Disposition Below

EPE filed its 2020 Application for Revision of Retail Electric Rates in Case No. 20-00104-UT on May 29, 2020. *In Re App. of El Paso Elec. Co. for Rev. of its Retail Elec. Rates Pursuant to Advice Not. No. 267*, N.M. Pub. Regul. Comm’n Case No. 20-00104-UT, Recommended Decision at 1, 2021 WL 1550586 (Apr. 6, 2021). After suspension of the rates pursuant to NMSA 1978, Section 62-8-7 (B) (1991), and a full evidentiary hearing, the Hearing Examiner issued a Recommended Decision on April 6, 2021. The Commission entered its Final Order Adopting the Recommended Decision (“RD”) with Modifications on June 23, 2021. **[1 RP 4]**.

On June 25, 2021, EPE filed its Notice of Appeal with the Court. **[1 RP 6]**. On appeal, EPE challenged the Commission’s Final Order on ten separate grounds that this Court grouped into three categories of asserted error: (1) the order improperly denied EPE recovery of its cost of service, (2) the order improperly

determined EPE’s cost of capital, and (3) the order deprived EPE of its right to due process. **[1 RP 80]**. Despite EPE’s many purported issues with the order, EPE did not request a stay of the Commission’s Order. On June 30, 2021, pursuant to the Final Order, EPE filed Advice Notice No. 272 containing the Commission-approved rates, which took effect on July 10, 2021. **[1 RP 24]**.

On May 1, 2023, this Court issued a non-precedential decision vacating and annulling the Final Order, finding four of EPE’s due process arguments had merit based on the Commission’s departure from past regulatory treatment and practice without providing the utility with adequate notice and meaningful opportunity to be heard, and that the record lacked substantial evidence to justify the Commission’s change in practice, and that three of those holdings affected disallowances of rate recovery that EPE had challenged.² **[1 RP 81-83]**. On June 7, 2023, the Court issued its Mandate remanding the matter to the Commission for further proceedings consistent with its May 1, 2023, decision. **[1 RP 98]**.

On June 28, 2023, the Commission issued its Order Upon Issuance of Mandate. That order directed that the Final Order issued on June 23, 2021, “is REISSUED *nunc pro tunc* as of June 23, 2021,” which was its original date of issue, and that the “Final Order shall be reissued with all the content that was not disturbed

² The impropriety of one of the four holdings, concerning justification for the capital structure, was determined to be irrelevant, because the capital structure was upheld by this Court on separate grounds.

by the Court’s decision” but that it shall otherwise remain “silent as to the overturned holdings, pending a further order...that will provide specific adjustments.” [1 RP 75]. The Commission ordered EPE to recalculate its revenue requirement and its schedule of rates, incorporating the three categories of costs whose recovery had been previously disallowed, but whose disallowance was overturned by this Court. The Commission also ordered the Company to calculate “the amount due EPE for each of the three Commission holdings denying recovery of costs that were overturned by the Court, and a recommendation for recovering these amounts, including but not limited to a recommended time period for recovering the amounts and a recommended method of recovery.” [1 RP 75; *see also* 1 RP 76].

Because the Commission’s use of the phrase *nunc pro tunc* implied that EPE could seek retroactive relief, the City and County filed a motion for rehearing of the Order upon Issuance of Mandate. [1 RP 100-113]. The City and the County noted that EPE had not sought a stay of the Commission’s Final Order, which therefore remained in effect during the entire appeal period. [1 RP 104]. Therefore, an administrative *nunc pro tunc* order, which normally is used to correct past mistake or inadvertence, was inappropriate. [1 RP 105-06]. The attempt by the Commission to change what it had ordered, two years after the fact, was “not in conformity with any recognized usage of the term ‘nunc pro tunc.’” [1 RP 106]. Moreover, the City and County noted that “allowing EPE recovery of the amounts that it would have

recovered through base rates since June 23, 2021 (or July 10, 2021, when Advice Notice No. 272 took effect) had the Commission in June 2021 ruled exactly in accordance with the Court’s subsequent holdings on appeal is contrary to the Commission’s policy against retroactive ratemaking.” **[1 RP 106-07]**.

In its Response, Commission Staff agreed with the City and County, and stated that “the Joint Movants’ request to remove from the Order the references to reissuing the Final Order *nunc pro tunc* is warranted.” **[1 RP 123]**. Based on the above, the PRC issued an Order that partially granted the Motion for Rehearing, holding that it was unnecessary to reissue the prior Final Order, with alterations based on this Court’s Vacatur Order, *nunc pro tunc* as of its date of issue. **[1 RP 162]**. This is because, as noted in the Joint Motion, that Final Order had been “operative and effective during the pendency of the Appeal.” **[Id.]**. Instead, the prior Final Order, with all of the content that was undisturbed by this Court’s decision, was reissued as of the date of the June 7, 2023 Mandate, rather than as of its original issue date. **[1 RP 163]**. The Commission also found that, in upcoming filings on remand, “the Movants, Commission Staff, and EPE should include more detailed analyses” of the important New Mexico cases pertaining to retroactive utility ratemaking, including *Mountain States Telephone & Telegraph Co. v. New Mexico State Corporation Commission*, 1977-NMSC-032, 90 N.M. 325 (“*Mountain States*”), and subsequent precedent. **[Id.]**. In so doing, the Commission indicated that the issue of retroactive

ratemaking in cases where a Commission order is vacated by this Court would be the core issue on remand. **[See *id.*]**. Significantly, EPE’s response to the Commission’s Order Upon Issuance of Mandate did not fully meet the Commission’s requirement to calculate new rates. EPE estimated that inclusion of the previously disallowed costs would increase its revenue requirements by approximately \$500,000. **[1 RP 145]**. However, it declined to produce a new rate schedule. **[1 RP 146]**. Rather, EPE requested authorization to create a regulatory asset for the revised amounts beginning on the date of the July 10, 2021 Final Order, through the effective date of rates ordered at its next rate case. **[1 RP 142-43]**. EPE requested that the Commission order that this regulatory asset be permitted to be amortized over a three-year period and incorporated into the rates allowed at its next rate case. **[1 RP 143]**. Additionally, EPE requested carrying costs at EPE’s weighted average cost of capital (“WACC”) of 7.18% compounded monthly. **[1 RP 153-54]**. EPE argued that this would prevent the need for rates to be challenged immediately and would defer the legal issue regarding retroactive ratemaking. **[1 RP 144]**.

On July 26, 2023, several entities responded to EPE’s response, including Commission Staff and the Board of Regents of the University of New Mexico. **[2 RP 166-186]**. The City and County filed a Joint Response. **[2 RP 187-204]**. Commission Staff noted that simply allowing EPE to defer the implementation of the regulatory asset would delay addressing “a problem that will not be allayed by

the passage of time, *i.e.*, something that is retroactive ratemaking will still be retroactive ratemaking later.” **[2 RP 182]**. Commission Staff went on to note that it “rejects EPE’s attempt to relate things back to the ‘July 10, 2021 effective date of the rates ordered by the Appealed Order,’ because it is contrary to *Mountain States*.” **[Id.]**. Rather, Commission Staff recommended a regulatory asset “modified to key off the date of the issuance of the Court’s Mandate Order, which was June 7, 2023.” **[2 RP 182-83]**. In their Joint Motion, the City and County noted that EPE’s request for a regulatory asset did not comply with the Commission’s Order Upon Issuance of Mandate, which sought calculations and a new rate schedule. **[2 RP 190-92 at ¶¶ 13-18]**.

On August 24, 2023, the Commission issued an order to EPE, noting that the Company had failed to comply with its Order on Mandate and directing it to submit a revised rate schedule and supporting calculations. **[2 RP 226]**. Accordingly, the August 24 order required EPE to provide the following three calculations by September 12, 2023:

A recalculation of its revenue requirement that includes the three items that the Court found had been wrongfully denied, a recalculation of its schedule of rates designed to recover the recalculated revenue requirement (while preserving the overall rate design adopted by the Commission), and a calculation of the difference between the total amount that EPE was allowed to collect pursuant to the Commission’s Order Adopting Recommended Decision with Modifications during the period from the effective date of the approved rates to the date of the

Court's issuance of the Mandate, and the total amount that EPE would have been allowed to recover during the same period with the above recalculated revenue requirement.

[Id.].

On September 12, 2023, EPE responded to the Order to Provide Calculations, and stated that the disallowances resulted in a calculated annual revenue requirement of \$505,496 greater than the revenue requirement approved in the Commission's Final Order. **[2 RP 239]**. EPE attached a revised rate schedule that reflected this difference. **[2 RP 257-70]**. Based on these calculations, EPE determined that, if the three disallowances had not been made, it would have collected \$1,007,770.46 more between the June 10, 2021 effective date of the Commission's ordered rates and this Court's June 7, 2023 Mandate. **[2 RP 247, 271]**. EPE stated that "[t]his amount reflects the total that EPE under-collected from the issuance of the Final Order until the Mandate, prior to the application of carrying charges." **[2 RP 247]**.

Based on this revised rate schedule, EPE modified its earlier request for a regulatory asset. Rather than allowing the regulatory asset to continue to accrue principal until the next rate case, EPE requested that the revised rate schedule be approved effective January 1, 2024, to include the three previously disallowed annual expenses. EPE reiterated its request for the creation of a regulatory asset for disallowed expenses incurred prior to January 1, 2024, with accrued carrying costs, to be amortized over a three-year period beginning on the effective date of the rates

ordered at the next general rate case. **[2 RP 241]**. EPE requested that this regulatory asset be divided into two parts, one reflecting the calculated difference in revenue between the June 10, 2021 Final Order and the June 6, 2023 Mandate, and one reflecting the revenue difference between the date of the Mandate and January 1, 2024. **[2 RP 241-42]**.

Again, the City and County, in a joint pleading (and Commission Staff, in part) opposed EPE's request for a regulatory asset. The City and County noted that "the principle underlying recovery of *any* amounts [for the period prior to the Mandate] is contested." **[2 RP 302]**. The City and County also stated that, in the absence of a stay, "[t]here is no basis... for a public utility to collect amounts that it would have recovered had the Commission's Final Order reflected the Supreme Court's decision or opinion during the period of appeal." **[2 RP 318]**. Commission Staff stated that it was "largely in accord with EPE's calculations except to the extent that EPE's request for a regulatory asset conflicts with the prohibition against retroactive ratemaking" stated in *Mountain States*. **[2 RP 329]**. As it had in its July 26, response, Commission Staff agreed to a regulatory asset for the additional revenue requirements accrued after the Mandate, but not to those requirements that accrued before. **[2 RP 340]**.

In its Final Order on Remand, the Commission essentially adopted Commission Staff's recommendations. The Commission stated that it "agreed with

the conclusion reached by Commission Staff and the Joint Respondents that allowing recovery of the pre-Mandate adjustments would constitute unlawful retroactive ratemaking.” **[3 RP 354]**. The Commission ordered EPE to file an advice notice for implementation of revised rates to go into effect on January 1, 2024, and to create a regulatory asset to account for the increased revenue requirement between the June 7, 2023 Mandate and January 1, 2024. **[3 RP 357-58]**. On December 7, 2023, EPE filed the advice notice, with an effective date of January 1, 2024 for new rates. **[3 RP 360-477]**. On February 9, 2024, EPE filed a Notice of Appeal in this case.

The basis of EPE’s appeal now is its claim that the Commission erroneously denied its request to create a regulatory asset to charge customers for the amount it was not permitted to recover between July 10, 2021, and June 7, 2023, due to the so-called “Unlawful Rate Case Order.” As set forth below, the Commission was correct to deny EPE’s request on the grounds that it constituted a clear instance of retroactive ratemaking in violation of the PUA.

Significantly, EPE did not take the opportunity to seek a stay when it appealed the original Final Order. Nor did the Commission authorize the Company to state in the tariff it filed pursuant to the Final Order that those rates were subject to retroactive revision following this Court’s review. Finally, the under collection claimed by EPE does not rise to the level of a “taking” under the Fifth Amendment

to the United States. Accordingly, the Commission’s Final Order on Remand should be affirmed.

LEGAL STANDARD FOR REVIEW

A party challenging an NMPRC final order has the burden of establishing that the order is arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency’s authority, or otherwise inconsistent with law.” *N.M. Att’y Gen. v. N.M. Pub. Regul. Comm’n*, 2015-NMSC-032, ¶ 9 (internal quotation marks and citation omitted); *see also* NMSA 1978, Section 62-11-4 (1965) (“The burden shall be on the party appealing to show that the order appealed from is unreasonable, or unlawful.”)

In reviewing an order by the Commission, the Court begins “by looking at two interconnected factors: whether the decision presents a question of law, question of fact, or some combination of the two; and whether the matter is within the agency’s specialized field of expertise.” *N.M. Indus. Energy Consumers v. N.M. Pub. Regul. Comm’n*, 2007-NMSC-053, ¶ 13, 142 N.M. 533. In evaluating questions of fact, the Court utilizes the “substantial evidence” standard, based on the entire record. *Public Serv. Co. v. N.M. Pub. Regul. Comm’n*, 2019-NMSC-012, ¶ 14. While “[i]t is the function of the courts to interpret the law,” and court are thus “not bound by an agency’s interpretation of the law and may substitute [their] own judgment for that of the agency,” this Court has “long recognized the power of agencies to

interpret and construe the statutes that are placed, by legislative mandate, in their province.” *Doña Ana Mut. Domestic Water Consumers Ass’n v. N.M. Pub. Regul. Comm’n*, 2006-NMSC-032, ¶ 9. Deference is especially appropriate when “the legal questions presented implicate special agency expertise or the determination of fundamental policies within the scope of the agency’s statutory function.” *Id.* at ¶ 10.

In the instant case, the question before the Court is almost entirely of law. In light of the express provisions of the PUA and Court precedents dating back half a century, is the Commission authorized, following vacatur of its Final Order, to allow EPE to recover from customers amounts that the Company was not permitted to charge them during the pendency of its appeal?

The argument presented by EPE is novel in that it is not supported by any New Mexico case law. The Company is arguing to overturn long established precedent based on approaches taken by courts in different jurisdictions interpreting different statutory schemes for utility regulation.

ARGUMENT

I. The relief sought by EPE is improper retroactive ratemaking under this Court’s Decision in *Mountain States* and the plain language of the Public Utility Act.

Contrary to EPE’s contention, the regulatory asset that it seeks, covering the period between the original Final Order and the Mandate, is improper retroactive

ratemaking. As this Court has held, “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 statutory or constitutional authority permits.” *Mountain States*, 1977-NMSC-032, ¶ 89. Accordingly, “[p]ast deficits may not be made up by excessive charges in the future nor may past profits be reduced by disallowances to future operating expense.” *Id.* While EPE argues in its Brief in Chief that the rates in the original Final Order were void *ab initio*, that all or nothing interpretation ignores the historical and statutory framework for setting rates.

Every public utility subject to the Commission’s jurisdiction must file “schedules showing all rates established by it and collected or enforced, or to be collected or enforced, within the jurisdiction of the commission.” NMSA 1978, Section 62-8-3 (1953). Public utilities are prohibited from charging, demanding, collecting or receiving “greater or less compensation for any service rendered or to be rendered by such public utility than that prescribed in the schedules of such public utility”. NMSA 1978, Section 62-8-5 (1953). Commission orders “shall take effect and become operative thirty days after the service thereof”. NMSA 1978, Section 62-10-14 (1953). Once the Commission orders a utility to change its rates by filing new rate schedules, “[t]hose rates shall thereafter be observed until changed, as

provided by the Public Utility Act.” NMSA 1978, Section 62-8-7(D) (2011).³ “The pendency of an appeal shall not of itself stay or suspend the operation of the order of the commission.” NMSA 1978, Section 62-11-6 (1983). The Court has no authority to change filed rates but may only either affirm or annul and vacate an appealed order. NMSA 1978, Section 62-11-5 (1982).

The prohibition against retroactive ratemaking discussed in *Mountain States* and its progeny in the context of regulation of telecommunications companies has a statutory foundation for public utilities such as EPE that dates to the enactment of the Public Utility Act in 1941. Since the beginning of public utility regulation in New Mexico, the Filed Rate Doctrine has been part of the legislature’s design to remove any legal uncertainty as to what rates a utility may charge. Section 62-8-7(D) of the Public Utility Act provides that when the Commission determines that the rates requested in a utility’s application are not just and reasonable,

the commission shall determine the just and reasonable rates to be charged or applied by the utility for the service in question and shall fix the rates by order to be served upon the utility or the commission by its order shall direct the utility to file new rates respecting such service that are designed to produce annual revenues no greater than those determined by the commission in its order to be just and reasonable. ***Those rates shall thereafter be observed until changed, as provided by the Public Utility Act [Chapter 62, Articles 1 to 6 and 8 to 13 NMSA 1978]***

³ While 2011 is the latest amendment to 62-8-7, the substantially same language as quoted has been in the PUA since 1941.

NMSA 1978, Section 62-8-7(D) (1991). The explicit statement that rates are to be “observed until changed, as provided by” the Act, is the Filed Rate Doctrine in action, that is, that “the only legal rate is the filed rate, as stated in the commission’s public files.” Scott Hempling, Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction 344 (2d ed. 2021), citing to *Keogh v. Chicago & Nw. Ry. Co.* 260 U.S. 156, 163 (1922) (holding that unless and until set aside this rate is made, for all purposes, the legal rate.” *See also Valdez v. State*, 2002-NMSC-028, ¶ 5 (stating that the doctrine “allows for ‘any ‘filed rate’—that is, one approved by the governing regulatory agency—[to be] per se reasonable and unassailable in judicial proceedings brought by ratepayers.”)

This statutory section should be interpreted based on its plain language. When a statute is clear and unambiguous, the Court “will not read language into a statute that is not there, especially if the statutory language makes sense as written.” *Coalition. for Clean Affordable Energy v. N.M. Pub. Regul. Comm’n*, 2024-NMSC-016 at ¶ 26.

The PUA ensures that the only rate charged is the one on file with Commission and establishes the basis to prohibit a regulated utility from charging “any person a greater or less compensation for any services rendered... than that prescribed in the schedules of such utility... then filed in the manner provided in this act....” NMSA Section 62-8-5. The Filed Rate Doctrine and the operative statutory language serve

an equally important objective of insulating the rates on file from legal uncertainty. This is reflected in the PUA's express statement that "[t]he pendency of an appeal *shall not of itself stay or suspend the operation of the order of the commission...* " Section 62-11-6. (emphasis added).

Moreover, as noted above, the PUA provides the exclusive means through which rates can lawfully be changed, stating that rates are to be "observed until changed *as provided by the Public Utility Act [Chapter 62, Articles 1 to 6 and 8 to 13 NMSA 1978]*." Section 62-8-7(D). Whether the process is initiated by a new rate application under Section 62-8-7(A) or by the appeals process described in Chapter 62, Article 11 has no bearing on the unequivocal language of Section 62-8-7(D).

The Filed Rate Doctrine embodied in Section 62-8-7(D) is inseparable from the prohibition against retroactive ratemaking. Because rates approved by the Commission "*shall thereafter* be observed until changed"⁴, rates may only be charged prospectively, going forward from the effective date of the rates change in accordance with the PUA. This is in keeping with the oft cited holding that rate making is prospective because it is legislative in nature. *See In Re PNM Gas Servs.*, 2000-NMSC-012, ¶ 6, 129 N.M. 1.

EPE mischaracterizes the rates that were in effect during the pendency of the appeal as "illegal". [BIC 1, 2, 5, 15, 23]. When read *in pari materia*, the PUA only

⁴ NMSA 1978, Section 62-8-7(D) (2011) (emphasis added).

authorizes the utility to charge Commission-approved rates, and the Court has no authority to change or revise Commission rates, a power that the legislature bestowed exclusively to the Commission. Sections 62-8-7(D), 62-11-5. The prohibition against retroactive ratemaking is firmly grounded in the precise language of that statute, from which it follows that the utility can only charge a different rate after it is changed. In other words, the PUA makes clear that the rates set in the Commission's Final Order were lawful during the pendency of the appeal. The Commission cannot grant EPE's request for a regulatory asset to collect revenue it was not authorized to collect during that period because the Commission's ratemaking authority must be exercised prospectively.

II. EPE's out of state authority does not demonstrate any need to overturn *Mountain States* or clarify the Commission's authority to order a remedy.

Similarly, contrary to EPE's contention, there are no grounds for the overturning of *Mountain States*. See [BIC 19-25]. EPE argues that retroactive ratemaking should be allowed, so as to give the Court the opportunity to provide a remedy. However, under the PUA, when the Court reviews a Commission order, it is not engaging in a traditional judicial review in which it provides a remedy for past torts or breaches of contract. It does not modify rates approved by the Commission; it simply affirms or vacates an order. If it vacates an order, the matter is remanded to

the Commission to issue an order conforming with the decision of the Court. As all ratemaking proceedings are legislative in character, they are, by nature, prospective.

EPE's argument that retroactive ratemaking is necessary for meaningful judicial review, is further undermined where, as here, a utility argues for a surcharge for claimed past underpayments. *See [BIC 22]*. Judicial remedies generally require payments to be made by tortfeasors or contracting parties in breach of an agreement. The ratepayers in the instant case did not commit torts or breach a contract – they merely used electricity at rates that were legal at the time, with the utility charging Commission-approved rates. If there is a party at fault, it is EPE for not seeking a stay and not promptly refiling conforming rates once the Court's decision and mandate were issued, not its ratepayers. Ratepayers should not be asked to pay for EPE's tactical error. Accordingly, traditional notions of judicial review are not applicable to the vacating of utility rates.

Moreover, the out-of-state authority on which EPE relies is irrelevant to the instant case, because much of this authority relies on statutory utility regulation schemes that are wholly distinct from the New Mexico PUA. For instance, EPE cites to *Farmland Industries Inc. v. Kansas Corp. Commission*, 37 P.3d 640 (Kan. Ct. App. 2001), which holds that “until judicial review is completed, utilities are subject to *refund orders* if the rates are ultimately determined to be unlawful.” **[BIC 9, 21]** (quoting *Farmland*, 37 P.3d at 647 (citing *Kan. Pipeline Partnership v. State Corp.*

Comm'n of Kan., 941 P.2d 390, 392 (Kan. Ct. App. 1997). However, *Farmland* is distinguishable from the instant case because the Kansas Corporation Commission interpreted the *existing purchased fuel adjustment clause tariffs* of Kansas local gas distribution companies (“LDC”) to require that refunds received by the LDCs as a result of FERC orders be passed through to their retail customers. 37 P.3d at 643-44, 648-51. The only question before the Court was how to distribute the refunds and, specifically, whether former retail gas customers that now received only transportation service from the LDCs were entitled to participate in the refunds. *Id.*

Moreover, *Farmland* is based on Kansas utilities law, which contains crucial differences from New Mexico law regarding finality of Commission Orders. For instance, regarding Commission Orders regarding natural gas

“All orders and decisions of the commission whereby any rates, joint rates, tolls, charges, rules, regulations, classifications, schedules, practice or acts relating to any service performed or to be performed by any natural gas public utility for the public are altered, changed, modified, fixed or established shall be reduced to writing, and a copy thereof, duly certified, shall be served on the natural gas public utility affected thereby. Such order and decision shall become operative and effective within 30 days after such service. Such natural gas public utility, *unless an action is commenced in a court of proper jurisdiction to set aside the findings, orders and decisions of the commission, or to review and correct the same*, shall carry the provisions of such order into effect.

KAN. STAT. ANN. SECTION 66-1,206 (1995) (emphasis added). This should be contrasted with the New Mexico statute. As noted above, in the absence of a stay,

Section 62-8-7(D) requires such orders to be observed unconditionally until changed.

EPE also quotes *Northwestern Bell Telephone Company v. State*, 216 N.W. 2d 841, 858 (Minn. 1974), for the proposition that amounts collected by a utility pending appeal enjoy no unique immunity from the claims of those to whom they rightfully belong. **[BIC 21]**. EPE neglects to note that the Minnesota Supreme Court reached that conclusion after comparing Minnesota statutes to those of Illinois, for example, and finding that “[n]othing in our statutes expressly deals with the question of whether new rates should be enforced or suspended pending appeal.” *Northwestern Bell*, 216 N.W. 2d at 858. Section 62-11-6 expressly provides that the “pendency of an appeal shall not stay or suspend the operation of the order of the commission” while allowing the Court, or in the first instance the Commission, to stay an order pending appeal. *See* Section 62-11-6; *City of Las Cruces v. N.M. Pub. Regul. Comm’n*, 2020 NMSC-016, ¶¶ 17-26, 476 P.3d 880. *Northwestern Bell* offers no support for EPE’s position.

Similarly, EPE cites to *Appeal of Granite State Electric Co.*, 421 A.2d 121, 122 (N.H. 1980) for the proposition that “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.” **[BIC 9]**; *see also* **[BIC 13]**. However, this case can, again, be distinguished from the one at bar. That opinion quoted an earlier holding

of the New Hampshire Supreme Court that the public utilities commission was endowed with “important judicial duties.” *Appeal of Granite State Elec. Co.*, 120 N.H. at 539, 421 A.2d at 123 (quoting *Petition of Boston & Maine Corp.*, 109 N.H. 324, 326, 251 A.2d 332, 335 (N.H. 1969)). New Hampshire law contains an express provision that allows the commission to order a public utility found to have an “illegal or unjustly discriminatory rate” to “make due reparation,” with interest, from the date of payment, going back for a period of up to two years. N.H. REV. STAT. ANN. Section 365:29 (1917, as amended through 2008).

EPE’s remaining citations to authority in other jurisdictions are similarly unhelpful to them, as they generally concern refunds rather than retroactive rate changes, and are based on statutes different from those of New Mexico. EPE has not provided any authority that would indicate that, in states with statutory schemes similar to that in New Mexico, it is typical to allow utilities to incorporate retroactive recoupment into approved rates.

While some states cited by EPE may not recognize this application of the prohibition against retroactive ratemaking, New Mexico’s PUA demonstrably does. Overturning such statutory framework when an adequate remedy is already available is unnecessary and EPE has not presented any compelling basis to do so.

III. The prohibition against retroactive ratemaking and the Filed Rate Doctrine do not constitute a “taking” because ratemaking is prospective in nature.

EPE argues that *In re Petition of PNM Gas Services*, 2000-NMSC-012, 129 N.M. 1, held that there would be a violation of due process and a taking of property without just compensation if the Court does not issue an order on this second appeal of EPE’s 2020 general rate application requiring the Commission to increase rates prospectively to compensate EPE for the \$1 million difference in revenue recovery between July 10, 2021 and June 6, 2023. *See* [BIC 24-25]. However, in that case, the Court did not direct the Commission to increase the gas utility’s rates retroactively. *See In re Petition of PNM Gas Services*, 2000-NMSC-012, ¶ 105 & *passim*.

While the utility’s appeal of that rate order, which decreased rates by \$6.9 million, was pending, PNM Gas Services filed another rate application that resulted in another Commission order that was appealed to this Court. *See Attorney Gen. of N.M. v. N.M. Pub. Util. Comm’n (In re Comm’n’s Investigation of Rates for Gas Serv. of PNM’s Gas Servs.)*, 2000-NMSC-008, 128 N.M. 747, 998 P.2d 1198; *see also* NMPRC Case Nos. 2662/2762, Certification of Stipulation, at 2 (Sept. 14, 2000), adopted by NMPRC Case Nos. 2662/2762, Final Order, at 5 (Oct. 24, 2000). Both rate orders were reversed by the Court and remanded within two months of each other. *See* NMPRC Case Nos. 2662/2762, Certification of Stipulation, at 2, 5. The

parties disagreed on whether the remanded rate orders should be consolidated. *See id.* at 5-6. A contested stipulation was reached that provided for a global settlement of all issues in both dockets and both Court opinions, however, and a two-day hearing was held. *See id.* at 6-8, 10. The stipulation provided for an increase in the gas utility's annual revenue requirement of approximately \$4.7 million, which would be reduced to approximately \$1.7 million after two years. *See id.* at 10-11. It also addressed the other issues presented to the Court. *See id.* at 11-38. The new gas rates took effect after the Commission's October 24, 2000 Final Order in the consolidated docket, more than three and one-half years after a \$6.9 million revenue reduction was implemented following the Final Order in Case No 2662. *See* NMPRC Case Nos. 2662 & 2762, Final Order, at 5; Certification of Stipulation, at 3, 55. Retroactive recovery of the revenue requirement differential was not raised in that case. *See* **[3 RP 473]**.

In another example of a general rate case reversed and remanded by this Court, Zia Natural Gas Company reacted to the Court's opinion in *Zia Natural Gas Company v. New Mexico Public Utility Commission (In re Zia Natural Gas Company)*, 2000-NMSC-011, 128 N.M. 728, by filing a revised cost of service statement and rate schedules on May 1, 2000, approximately a month after the Court issued its Mandate. *See* NMPRC Case No. 2745, Order on Remand, ¶ 1 (May 16, 2000); *cf.* **[2 RP 197]**; **[2 RP 306]**; **[3 RP 473]** (in three pleadings in Case No. 20-

00104-UT, the City and the County alerted the Commission to its Zia precedent). A week later, Commission Staff filed an affidavit supporting approval of Zia's revised calculations, and on May 16, 2000, the Commission ordered Zia to file an advice notice with new rate schedules that would take effect upon Commission Staff's compliance review. *See* NMPRC Case No. 2745, Affidavit of Gary Brenner, at 1 (May 8, 2000); Final Order on Remand at 2-3 (May 16, 2000). Again, retroactive recovery of the revenue difference for the time while the appeal was pending was not raised.

The filed rate doctrine and the related prohibition against retroactive ratemaking are recognized both in New Mexico and in other jurisdictions as foundational to the due process requirements of the Fifth Amendment. As the Vermont Supreme Court has stated,

The arguments against retroactive ratemaking are: (1) that it violates the statutory requirement that ratepayers should receive advance notice of all rate changes; (2) that it unfairly forces the ratepayer to pay a utility's past deficits, incurred when some ratepayers may not even have been customers; (3) that it promotes inefficient utility operation, resulting in higher costs to the public; and (4) that it deprives either the utility (if forced to make a refund) or the ratepayer (if required to pay a surcharge) of property without due process of law.

In Re Central Vt. Pub. Serv. Corp., 473 A.2d 1155, 1157 (Vt. 1984).

The ratemaking procedures of the PUA reflect the importance of notice in the regulatory scheme.

B. Unless the commission otherwise orders, no public utility shall make any change in any rate that has been duly established except after thirty days' notice to the commission, which notice shall plainly state the changes proposed to be made in the rates then in force and the time when the changed rates will go into effect and other information as the commission by rule requires. The utility shall also give notice of the proposed changes to other interested persons as the commission may direct. All proposed changes shall be shown by filing new schedules that shall be kept open to public inspection. The commission for good cause shown may allow changes in rates without requiring the thirty days' notice, under conditions that it may prescribe.

Section 62-8-7(B). That the statute plainly requires notice to the Commission and interested parties of the change in rates that will occur and when the change will be implemented, reflects the foundational pre-requisite for changing rates. Notice is fundamental not only to the due process rights of customers but utilities as well.

This is reflected in prior decisions where the Commission has ordered a utility to issue refunds or credits to customers. For instance, where the Commission approved a statutorily authorized alternative form of regulation for a telecommunications provider that contained an express obligation that the company invest a certain amount over a five-year period, and later ordered the company to issue customer refunds after finding it was not in compliance with the plan, this Court found the enabling statute and the company's own agreement put it on notice that a retroactive remedy could be implemented. "While spending any amount of

money may be burdensome for a corporate entity, Qwest was aware in 2001 that it was obligated to invest \$788 million in its New Mexico infrastructure.” *Qwest Corp. v. N.M. Pub. Reg. Comm’n*, 2006-NMSC-042, ¶ 30, 140 N.M. 440.

However, in the instant case, EPE is attempting to recoup money from ratepayers who had no notice that EPE would claim the right to include three previously disallowed annual expenses in its revenue requirements retroactively, either before the Mandate from the Court or afterward. Even after EPE proposed recovering the revenues associated with the later-reversed expense disallowances dating to July 2021, the Company did not propose giving notice to its customers of its request for a regulatory asset and the Commission did not order EPE to do so. *See* [1 RP 139, 142-44]; *cf.* [2 RP 223-27] (Order Requiring EPE to Provide Calculations issued on Aug. 24, 2023 acknowledged that EPE was requesting a regulatory asset for retroactive recovery but did not order the Company to give notice to ratepayers).

This illustrates an underlying rationale for the prohibition against retroactive rate-making: while it is fair for a company to have to refund money when it was previously on notice that rates were subject to refund for failure to abide by certain conditions, it is not fair to change the price to customers after they purchased and consumed the commodity, when they had no notice the rates they had been charged might increase in the future. The unfairness of this proposed regulatory asset is

especially glaring because the customers paying the higher rates are not necessarily the same as those who may have benefitted from underpayments between the date of the original Final Order and the Mandate.

The proper remedy for EPE to preserve its right to recover certain costs incurred by the Company during the appellate process would have been to seek a stay of the order or portions thereof, which EPE neglected to do. EPE could have mitigated its losses by seeking a stay of the Final Order. Any losses incurred by EPE because it did not avail itself of this mechanism should not be passed on to blameless ratepayers who relied on the earlier rates. Additionally, EPE could have filed another rate application while the appeal was pending, as PNM Gas Services did in Case Nos. 2662 and 2762 and as PNM recently has done in Case No. 24-00089-UT, while its appeal of the Commission's rate order in Case No. 22-00270-UT is on appeal in Case No. S-1-SC-40332. *See* NMPRC Case No. 24-00089-UT, Application for Revision of Retail Electric Rates (June 14, 2024); NMPRC Case No. 22-00270-UT, Final Order (Jan. 3, 2024); Case No. S-1-SC-40332.

The Court's role in this case is to determine whether the Commission acted unlawfully or unreasonably when it issued the Final Order on Remand in Case No. 20-00104-UT. It is not the Court's responsibility to correct EPE's tactical litigation errors in this proceeding and in other potential regulatory proceedings.

Based on this background, *Mountain States* and its progeny are applicable to this Appeal, and support affirmance of the Commission's decision. While EPE attempts to distinguish *Mountain States* by arguing that, in that case, the State Corporation Commission, the predecessor to the Commission, "never adopted rates in the first place," this not entirely accurate and, in any event, it is a distinction without a difference. **[BIC 16]**. While the Commission in *Mountain States* had not adopted rates *in that particular rate case*, the utility did have rates on file and was seeking a rate increase. 1977-NMSC-032, ¶¶ 1-2. In both situations, a rate schedule was in place that was indisputable under the Filed Rate Doctrine (and in the case of utilities regulated under the PUA, Section 62-8-7) until this Court issued a mandate that required the rate to be changed. Thus, both *Mountain States* and the instant case concerned errors by the Commission that resulted in corrections to a utility for a period of time until an Order was entered by this Court.

IV. The Commission's Application of the Rule Against Retroactive Ratemaking Does Not Result in a Taking Under the U.S. or New Mexico Constitution.

EPE's parade of horrible marches on, with the Company arguing that "depriving it of its *ability* to collect underpayments would amount to an unconstitutional taking" because it would be require the Company to "provide power without allowing [it] to pass through the cost of providing that service"; and moreover, it would result in unjust and unreasonable rates. **[BIC 24]**.

EPE is not entitled to recover, or pass through, its exact cost of service. The rates a commission sets for a utility do not need to exactly reflect the utility's cost of service to be "just and reasonable" under the PUA. "The just and reasonable standard of the PUA requires rates to be "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." *Socorro Elec. Coop., Inc. v. N.M. Pub. Regul. Comm'n*, 2024 WL 2888038, *10 (N.M. June 10, 2024) (citing *PNM Gas Servs.*, 2000-NMSC-012, ¶ 8. It is well established that "[t]here is a significant zone of reasonableness ... between utility confiscation and ratepayer extortion." *Attorney Gen. v. N.M. Pub. Regul. Comm'n*, 2011-NMSC-034, ¶ 16 (internal citation omitted).

In the context of Commission ratemaking, "just compensation" requires regulators to honor "distinct, investment backed expectations." *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). The Commission creates a distinct expectation, when it approves a rate that is relied on by investors. Hempling p. 371. "In a Penn Central inquiry, the factors for determining a regulatory taking include "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." *State v. Wilson*, 2021-NMSC-022, ¶ 29, 9

(internal quotation marks and citation omitted). The purpose of a Penn Central inquiry is to “allow the careful examination and weighing of all the relevant circumstances.” *Id.* (citing *Tahoe-Sierra*, 535 U.S. at 322, 122 S. Ct. 1465) (internal quotation marks omitted and citations omitted). This examination begins [w]hen a utility makes a credible, specific claim that a rate’s “end result” would violate its right to a rate “sufficient to assure confidence in the financial integrity of the enterprise.” Hempling at 376 (citing *Fed. Power Comm’n v. Hope Nat. Gas Co.*, 320 U.S. 591, 64 S. Ct. 281, 88 L. Ed. 333 (1944)). When this occurs, the regulator must do two things: allow the utility to present facts at the hearing, then consider those facts when setting rates. *Id.*

EPE cannot show a taking occurred under the United States and New Mexico Constitution because the “underpayment” of \$1 million must make the end-result of the rates the Commission set in the Final Order fall outside the zone of reasonableness. In the proceedings before the Commission on remand, EPE did not argue that the \$1 million in “underpayments” due to the so called “illegal rate” order put the Company in dire financial straits and it did not submit evidence showing that it had suffered a “loss of confidence in the financial integrity of the enterprise.” **[BIC 24]**. This is likely due to the fact that \$1 million in “underpayments” that accumulated over 707 days, equated to less than \$1,500 a day, a *de minimis* amount in the Company’s daily cash intake. If EPE believed this “underpayment” was going

to cause it irreparable financial harm, as noted earlier, it could have sought a stay, but it did not. Accordingly, the economic impact of the Commission's Final Order on EPE does not necessitate conducting the second step of a Penn Central inquiry—determining whether the order interfered with a distinct investment backed expectation.

The analysis above suggests that unless a Commission order does not cause the end result of the rates set, in terms of the utility's return on equity, to fall outside the zone of reasonableness, there is no interference with a shareholders' distinct investment backed expectation. Moreover, even where a commission order may cause rates that land at the margin of the zone of reasonableness, the filed rate doctrine in 62-8-7(D) makes clear that until the Commission establishes new rates following judicial review, the only legitimate, distinct investment-backed expectation is one based on the rates on file with the Commission.

V. EPE's Hypotheticals Also Illustrate that PUA Affords Fairness to Both Ratepayers and Utilities.

EPE attempts to bolster its arguments using two admittedly extreme hypotheticals involving a commission that arbitrarily and capriciously issues orders that are appealed but not reviewed for four years. **[BIC 22]** The first involves a utility over-collecting \$50 million from customers during the pendency of the appeal, while the second concerns a utility that under-collects \$50 million and is driven into

bankruptcy as a result. **[Id.]** EPE states that the hypotheticals are intended to illustrate that under the Commission’s reasoning, “there would be no recourse for either the customers or the utility” who would be “forced to accept” being “illegally deprived of \$50 million with no hope for recovery.” **[BIC 23]**

These hypotheticals are implausible because both the utility and the customers would be entitled to a stay. Section 62-11-6 provides that the Court in its discretion may stay a Commission order, in whole or in part, on such terms as deemed just and in accordance with the practice of courts exercising equity jurisdiction. Thus, principles of equity apply to requests for a stay of a Commission order filed directly with the Court. A stay of an administrative order pending appeal is governed by the four-part test that considers whether there has been a showing of: “(1) a likelihood that applicant will prevail on the merits of the appeal; (2) a showing of irreparable harm to applicant unless the stay is granted; (3) evidence that no substantial harm will result to other interested persons; and (4) a showing that no harm will ensue to the public interest.” *Tenneco Oil Co. v. New Mexico Water Quality Control Comm’n*, 1986-NMCA-033, ¶ 10, 105 N.M. 708. Importantly, an administrative order will not be stayed pending appeal where the applicant has not made a showing of each of the factors required to grant the stay. *Id.* ¶ 11.

EPE’s hypotheticals are clearly crafted to meet each of the Tenneco factors. The record in each case is presumably replete with evidence of the commission’s

violation of the PUA making the appellants likely to succeed on the merits. Both the utility and customers would be able to show the irreparable harm they would suffer because of the filed rate doctrine and rule against retroactive ratemaking embedded in Section 62-8-7, and the magnitude of the harm is not de minimis, accruing at a rate of \$12.5 million a year⁵. Moreover, the hypotheticals contain no facts suggesting a stay would cause harm to other parties or the public interest. Thus, EPE's hypotheticals have the opposite of their intended outcome, reminding us that the Company did not seek a stay, and establishing the basis for an inference that it did not seek one because it realized it likely would not pass the Tenneco test. Similarly, if EPE could not succeed in obtaining a stay, it could not then and cannot now, pass the *Penn Central* examination to show it has suffered a taking.

Neither of EPE's hypotheticals survive a modicum of scrutiny. Both the case at bar and EPE's far-fetched hypotheticals could have been avoided had EPE followed procedures set forth in the PUA for seeking a stay, promptly filing conforming rates, or seeking injunction, mandamus, or other action prescribed under NMSA Sections 62-12-1, -2 (1953). after the Mandate, or filing a new application for rates pending its first appeal.

⁵ \$50 million divided by 4 years = \$12.5 million per year.

CONCLUSION

The express provisions of the PUA and Court precedent that have guided Commission decisions for over half a century resulted in a decision to deny EPE's request to enable it to retroactively recover from customers amounts that the Company was not permitted to charge during the pendency of its appeal. Accordingly, EPE is asking this Court to overturn long established precedent, not based on New Mexico law, but the interpretations of courts in other jurisdictions interpreting different statutory schemes for utility regulation. EPE had the opportunity to avoid the need for this appeal, but it did not choose to do so. Even so, the rates in place during the pendency of the appeal were not unreasonable and did not result in an unconstitutional taking. For the foregoing reasons, EPE's arguments should be rejected.

Respectfully Submitted by:

NEW MEXICO DEPARTMENT OF JUSTICE

RAÚL TORREZ
Attorney General

/s/ Gideon Elliot

Gideon Elliot

Utilities Bureau Chief

505-490-4865

gelliot@nmmdoj.gov

/s/Lawrence M. Marcus

Lawrence M. Marcus
Assistant Solicitor General
505-584-3190
lmarcus@nm DOJ.gov

Attorneys on behalf of the New Mexico
Department of Justice

-AND-

STEVENS LAW LLC

By: /s/ Anastasia S. Stevens
Anastasia S. Stevens
29 Tano West
Santa Fe, New Mexico 87506
(505) 795-3505
astevens.law@gmail.com

Brad Douglas, City Attorney
City of Las Cruces
P.O. Box 20000
Las Cruces, New Mexico 88004-9002
(575) 241-2128
bdouglas@lascruces.gov
ATTORNEYS FOR
THE CITY OF LAS CRUCES

-AND-

STELZNER, WINTER, Warburton,
Flores & Dawes, P.A.

Post Office Box 528

Albuquerque, New Mexico 87103

(505) 938-7770

Email: nwinter@stelznerlaw.com

Email: kherrmann@stelznerlaw.com

By: /s/ Keith W. Herrmann

NANN M. WINTER

KEITH W. HERRMANN

Nelson Goodin

Fred Kennon

Doña Ana County Counsel

Doña Ana County Attorney's Office

P.O. Box 2528

Las Cruces, New Mexico 88004

Phone: (575) 525-5916

Email: nelsong@donaanacounty.org

Email: fredk@donaanacounty.org

Attorneys for Doña Ana County

STATEMENT OF COMPLIANCE WITH VOLUME-TYPE LIMITATIONS

Pursuant to Rule of Appellate Procedure 12-318(G) NMRA, I certify that this contains 8,809 words in the body of the brief, according to a count by Microsoft Word Version 2402.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing document was submitted for e-filing and service through the Court's "Odyssey File & Serve" filing system this 24th day of September, 2024, which caused all counsel of record to be served by electronic means or as otherwise stated, as more fully reflected on the Notification of Service:

/s/ Keith W. Herrmann
KEITH W. HERRMANN