



IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

EL PASO ELECTRIC COMPANY,

Appellant,

v.

S-1-SC-40286

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.*

ANSWER BRIEF OF APPELLEE
NEW MEXICO PUBLIC REGULATION COMMISSION

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I. INTRODUCTION.

At the core of this matter lies a fundamental principle of the law: adherence to this Court's precedential decisions. The Commission's decision not to accept Appellant El Paso Electric Company's ("Appellant") proposed new rate-making order that would back-date relief prior to this Court's mandate is required under this Court's precedent. Moreover, Appellant has failed to demonstrate any compelling reason for overturning this well-established principle of regulatory law. Without such a justification, overturning the Court's precedent with respect to setting a rate that pre-dates this Court's mandate order would not only disrupt the carefully balanced interests that the ratemaking process is designed to protect but would also risk undermining the legitimacy of the regulatory system itself.

The integrity of the ratemaking process depends on the certainty that rates, once established, cannot be retrospectively altered. This principle is essential to maintain public trust in the regulatory system and to ensure that utilities can reliably anticipate revenues and ratepayers can depend on stable and predictable bills. The Commission's orders align with these fundamental principles, and the Commission respectfully requests these orders be affirmed.

II. SUMMARY OF PROCEEDINGS

In the appeal of Appellant's rate case before this Court in *El Paso Electric v. New Mexico Public Regulation Commission*, this Court issued an Order on May 1, 2023 in which it determined the Commission had violated Appellant's due process rights in the underlying proceeding by "denying or disallowing four requests made by EPE in its rate application: (1) to include in rate base expense for major plant additions after the 2019 base period; (2) to include in rate base lease prepayments made years for the 2019 base period; (3) to approve a proposed reconciliation of adjustment clause costs and revenues for 2017, 2018, and 2019; and (4) to include in EPE's capital structure an equity infusion that was made nine months after the end of the base period." *El Paso Elec. Co. v. New Mexico Pub. Regulation Comm'n*, ____-NMSC-____, ¶1, ____ P.3d ____ (S-1-SC-38874, S-1-SC-38911, May 1, 2023). The Court annulled and vacated the Commission's Order and remanded the matter back to the Commission. During the course of the initial appeal, Appellant notably did not seek to stay the rate implementation, either from the Commission or this Court. *See* NMSA 1978, § 62-11-6 (1941). Thus, the rates went into effect and remained in effect during the initial appeal.

In accordance with this Court’s opinion and mandate, the Commission issued its Order Upon Mandate, requiring Appellant to “provide a . . . calculation of 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 . . .”. [1 RP 75 ¶ 7]

In response, Appellant recommended a process that would reissue the 2020 Rate Case Order that included, among other proposals, authorizing Appellant to create a regulatory asset for deferral and recovery of the excluded annual revenue requirements in Appellant’s next general rate case. [2 RP 236] Thereafter, Appellant was ordered to submit a revised calculation of its revenue requirement, incorporating the three items identified for recalculation after this Court vacated the initial order. [2 RP 226 ¶ A] Additionally, Appellant was to provide a revised schedule of rates to recover the adjusted revenue requirement while maintaining the overall rate design adopted by the Commission. [*Id.*] Lastly, Appellant was instructed to calculate the difference between the total amount collected under the Commission’s Order Adopting Recommended Decision with Modifications from the effective date of the

approved rates to the issuance of the Court’s Mandate, and the amount that would have been allowed with the recalculated revenue requirement. [*Id.*]

Appellant submitted its recalculated revenue requirement as ordered and, based upon including the post-test-year major plant addition, the prepayments for Palo Verde Water or Effluent Agreement, and the Newman Buffer Zone Land Lease Request, determined the total revenue requirement increased from \$117,009,092 to \$117,514,588. [2 RP 247-248]

The Commission issued its Final Order on Remand on November 30, 2023. [3 RP 345-359] In the Final Order on Remand, the Commission determined Appellant should be permitted to implement its proposed revised rates on January 1, 2024, which allowed for the recovery of the increased revenue requirement to begin promptly. [3 RP 354 ¶ 25]

The Commission denied Appellant’s request to create a regulatory asset that would be designed to retroactively accrue the difference between Appellant’s prior base rates and the newly determined base rates dating back to the initial order. [3 RP 354-355 ¶ 26] Granting such a request, the Commission reasoned, would constitute impermissible retroactive ratemaking. The Commission based its determination on analysis of this Court’s opinion in *In re Comm’n Investigation into 1997 Earnings of U.S. West Communications, Inc.*, 1999-

NMSC-016, ¶ 52, 127 N.M. 254, 270, 980 P.2d 37, 53, where this Court stated “after vacating an order of the Commission and determining that interim rate relief was warranted. . . [the Court] addressed the question of whether the effective date of such relief could predate the Court’s order. [The Court] concluded that it could not.” *[Id.]*

Instead, following this precedent, the Commission granted Appellant’s request to create a regulatory asset designed to retroactively accrue the difference between Appellant’s current base rates and the new base rates for the period from the Court’s Mandate to the effective date of the new rates (January 1, 2024). [3 RP 358] Doing so, the Commission stated, would reasonably accommodate Appellant’s request while minimizing the impact of the regulatory asset upon ratepayers due, specifically, to the “relatively brief time period that would be addressed through the regulatory asset.” [3 RP 354 ¶ 25]

The City of Las Cruces and Doña Ana County (but excluding the New Mexico Department of Justice) (“Intervenors”) moved for rehearing on the Final Order on Remand and for a partial stay pending appeal. [3 RP 434-491; 492-509] In its response to this motion, Appellant argued recovery from the date of the Mandate Order was not retroactive ratemaking because that only applies to “past deficits” or “past profits” caused by previously-adopted rates. [3

RP 514-515 ¶ 12] Appellant stated that “illegal rates, subsequently vacated by Supreme Court order, caused undercharges that are now recoverable prospectively from the date that the unlawful and subsequently voided rates were implemented.” [*Id.*] Appellant cited to several other jurisdictions where courts found a utility is entitled to recover any undercharges dating back to the date of the overturned order. [**3 RP 516-517 ¶ 16]**

The Commission denied the Motion for Rehearing and the Motion for a Partial Stay. [**3 RP 548-557]** The Commission determined that the pre-Mandate time period and the post-Mandate time period were not subject to the same legal analysis. [**3 RP 554 ¶ 22]**

Appellant timely filed a Notice of Appeal, appealing the Commission’s “Order Denying Joint Motion for Rehearing of Final Order on Remand; Order Denying Verified Joint Motion for a Partial Stay of the Final Order on Remand Pending Appeal.” [**NOA 1**] Appellant did not include a notice of its intent to appeal the Final Order on Remand in the Notice of Appeal. [**NOA 1-2**] However, the Commission infers Appellant intended to appeal the Final Order as well because Appellant included the Final Order in its Statement of Issues. [**SOI 2**] *See Mabrey v. Mobil Oil Corp.*, 1972-NMSC-023, ¶ 12, 84 N.M. 272, 274, 502 P.2d 297, 299 (“Where more than one order by the trial court exists, an appellant has

a duty to specify each order in the notice of appeal from which an appeal is taken.”); *but see Govich v. N. Am. Sys., Inc.*, 1991-NMSC-061, ¶ 13, 112 N.M. 226, 230, 814 P.2d 94, 98 (“The policies in this state, and the purpose of the rule, are vindicated if the intent to appeal a specific judgment fairly can be inferred from the notice of appeal and if the appellee is not prejudiced by any mistake.”).

III. STANDARD OF REVIEW

The Court reviews a final order of the Commission for a determination of whether the Commission’s decision is “arbitrary and capricious, not supported by substantial evidence, . . . or otherwise inconsistent with law.” *Doña Ana Mut. Domestic Water Consumers Ass’n v. N.M. Pub. Regulation Comm’n*, 2006-NMSC-032, ¶ 9, 140 N.M. 6, 9, 139 P.3d 166, 169. The burden is on the Appellant to show that the order appealed from is unreasonable or unlawful. NMSA 1978, § 62-11-4 (1941); *Att’y Gen. v. New Mexico Pub. Regul. Comm’n*, 2011-NMSC-034, ¶ 9, 150 N.M. 174, 177, 258 P.3d 453, 456.

In reviewing the Commission’s decision, the Court examines “two interconnected factors: whether the decision presents a question of law, a question of fact, or some combination of the two; and whether the matter is within the agency’s specialized field of expertise.” *Alb. Bernalillo Co. Water Util.*

Auth. v. NMPRC, 2010-NMSC-013, ¶ 17, 148 N.M. 21, 31–32, 229 P.3d 494, 504–05 (internal citations omitted).

The Court accords some deference to the Commission’s interpretation of its own governing statutes and will confer a “heightened degree of deference to legal questions that implicate special agency expertise or the determination of fundamental policies within the scope of the agency’s statutory function.” *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm’n*, 2019-NMSC-012, ¶ 15, 444 P.3d 460, 468 (internal citations omitted).

IV. ARGUMENT

The Commission’s Orders were not an arbitrary exercise of discretion but a necessary and deliberate application of binding legal principles set forth by this Court. These precedents clearly delineate the limitations on the Commission’s authority, particularly regarding the adoption of orders that could contravene established legal standards. The Commission’s decisions align with this Court’s guidance and reflect a proper understanding of its legal obligations, which did not allow the Commission to accept Appellant’s preferred order.

Additionally, Appellant failed to demonstrate that this Court’s precedent should be overturned. Appellant did not show how the Court’s decisions that prohibit retroactive ratemaking are no longer necessary for regulation in New

Mexico. Because Appellant both fails to demonstrate the Commission acted arbitrarily or capriciously in issuing its orders and fails to demonstrate why this Court's precedential decisions should be overturned, the Commission respectfully requests the Court affirm the Commission's orders.

A. *Mountain States* and its Progeny Prohibit the Commission From Adopting Appellant's Preferred Order.

This Court's prior cases establish two basic principles with respect to setting rates. First, new rates cannot be implemented such that the utilities make up past deficits. *Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Comm'n*, 1977-NMSC-032, ¶ 88, 90 N.M. 325, 341, 563 P.2d 588, 604 ("Ratemaking is inherently legislative, requiring any rate-setting order by the Commission to be prospective. Additionally, 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."). Second, any order the Commission issues setting a rate after its prior rate order has been vacated cannot predate the Court's order. *U.S. West*, 1999-NMSC-016, ¶ 52 ("After vacating an order of the Commission and determining that interim rate relief was warranted in that case, we addressed the question of whether the effective date of such relief could predate the Court's order. We concluded that it could not."). The Commission followed

these principles in determining that the Commission could not issue a rate-setting order that allowed the Commission to retroactively set a rate, nor could it order the date of the requested regulatory asset to predate the Court's order.

Appellant claims that this case concerns the collection of underpayments, not the setting of a new rate, and thus concludes retroactive collection should be permitted. [BIC 8] This reasoning is untenable. First, the Commission issued a new rate in its orders following the Court's Mandate. Second, because a new rate was set, it must apply prospectively. Finally, the original rate-setting order was not invalid from the outset; the rates were in effect until the Court ruled otherwise. The Court's analysis in *Mountain States* and subsequent decisions clearly prohibit the Commission from pursuing a different course in this matter.

- i. This Court was clear in *Mountain States* and its progeny that a new rate order can only date back to the Court's mandate, not to the date of the initial order.

The prohibition against retroactive ratemaking is an established principle in utility regulation, barring any specific statutory or constitutional authority. See *Mountain States*, 1977-NMSC-032, ¶¶ 89-90. Again, this Court has previously addressed this exact issue, ruling that the Commission's rate-setting order, issued in compliance with the Court's opinion and mandate, cannot be

retroactive to the date of the initial order. *U.S. West*, 1999-NMSC-016, ¶ 52 (“After vacating an order of the Commission and determining that interim rate relief was warranted in that case, we addressed the question of whether the effective date of such relief could predate the Court’s order... We concluded that it could not.”) (internal citations omitted).

The Commission has consistently defined retroactive ratemaking as “the setting of rates that allow a utility to recover past losses or require it to refund past excess profits collected under a rate that did not perfectly match expenses.” [BIC 7] This Court has endorsed this definition and applied it in subsequent rulings. *See, e.g., Mountain States*, 1977-NMSC-032, ¶ 89 (“Past deficits may not be made up by excessive charges in the future nor may past profits be reduced by disallowances to future operating expenses.”).

In *Mountain States*, the Commission’s denial of the utility’s application for new rates was overturned by this Court on appeal. The Court determined that the utility had been deprived of due process during the rate case hearing because it was not provided with sufficient notice regarding the specific cost-of-service formula that would be used. *Id.* ¶ 85. This precedent is directly relevant to this matter before the Court.

Here, the Court found a denial of due process in the underlying proceeding constituted error and necessitated a reversal of the Commission's order. Just as in *Mountain States*, Appellant had a deficit it sought to recover due to errors the Court found within the Commission's orders, and the Court declined to allow the utility to retroactively set its rate to recover those under charges. *Id.* ¶ 90 (“Accordingly, since, first, the Commission's authority is legislative and therefore limited generally to prospective regulation and, second, neither the applicable constitutional provisions nor the pertinent statutes, previously discussed at length, provide the requisite specific permission to make rates retroactive, the rates fixed by the Commission will apply prospectively only.”). To support the idea that the rate-setting order must be prospective, the Court also held that the Commission must take into consideration the most recent economic information in arriving at new rates. *Id.* ¶ 85. Just as in *Mountain States*, the Commission is tasked with setting a new rate in a new order, and that rate cannot pre-date the Court's Mandate.

In *U.S. West*, this Court affirmed the Commission's order, and stated in matters where the Commission's order is affirmed—not annulled, as here—, the rule against retroactive ratemaking is not implicated when it comes to the date of the Commission's order because the rates would not have been

interrupted. *U.S. West*, 1999-NMSC-016, ¶ 54. Nevertheless, the Court affirmed its inability to offer relief with respect to rate-setting that would pre-date this Court's order. *Id.* ¶ 52.

Finally, in *Qwest Corp. v. New Mexico Public Regulation Commission*, the Court held the Commission's authorization of a refund was permissible and did not constitute retroactive ratemaking because it was a remedy provided in accordance with an alternative form of regulation ("AFOR"). *Qwest Corp. v. NMPRC*, 2006-NMSC-042, ¶ 25, 140 N.M. 440, 447, 143 P.3d 478, 485, as revised (Sept. 25, 2006). The Court found the AFOR plan fit squarely within the Commission's express authority to regulate Qwest, and the Legislature intended to empower the Commission to approve the terms of individual AFOR plans. *Id.* The authority to select appropriate incentives to ensure compliance with those terms, as expressly outlined in the AFOR plan, was implicitly granted by the Legislature's broader delegation of authority. *Id.* Because this was a refund based on the AFOR plan and not a rate-setting order, the Court's authorization of a retroactive remedy does not implicate the prohibition against retroactive ratemaking because the AFOR plan was a "new form of regulation" that empowered the Commission to add incentives to ensure compliance, and no former rule existed for the company to rely on. *Id.* ¶ 30. It

is this remedy to which the Court refers when stating *Mountain States* does not preclude a retroactive procedure. *See id.* ¶ 29. [**See BIC 26**]

In the matter before the Court, therefore, the Commission acted precisely as this Court has instructed and issued its orders in full compliance with the established legal framework when it set a new rate and authorized the requested regulatory asset to commence from the date of this Court's mandate order and not the date of the initial vacated Commission order.

- ii. The Commission's Final Order is a rate-setting order and therefore, under the principles established by this Court in *Mountain States*, the rates it sets cannot predate this Court's mandate order.

This Court's Opinion and Mandate in *El Paso Elec. Co. v. N. M. Pub. Reg. Comm'n* vacated and annulled the Commission's rate-setting order and remanded the matter back to the Commission for further proceedings. *EPE*, ____-NMSC-____, ¶ 1 (citing NMSA 1978, § 62-11-5 (1982) ("The Supreme Court shall have no power to modify the action or order appealed from, but shall either affirm or annul and vacate the same.")).

As a threshold matter, Appellant is incorrect in its statement that this Court determined the rates in the initial order were illegal. [**BIC 2**]. The Commission's initial order was overturned by the Court after the Court found the Commission

violated Appellant's due process rights in the underlying rate case matter. *EPE*, ____-NMSC-____, ¶ 1.

Appellant's claim the Court found the rates were "illegal" is premised on the notion that the Court has the power to determine whether a rate is fair and therefore legal, but this Court itself has held that it has no such power. This Court held that it is "not a rate-making body, that [it does] not have the power or authority to determine what a fair actual rate is and that [it] can only determine whether an *order* of the Commission is just and reasonable and to be enforced, or the contrary." *Mountain States*, 1977-NMSC-032, ¶ 9 (emphasis added); *see also U.S. West*, 1999-NMSC-016, ¶ 53 ("If only the Commission, and not this Court, has the power to engage in ratemaking, it follows that only the Commission, and not this Court, can change rates after this Court vacates a prior order of the Commission and remands the matter for further proceedings.").

Therefore, Appellant's argument that this Court determined the rate "illegal" lies on a misunderstanding of this Court's ability to make determinations of Commission orders on appeal. Only the Commission is granted general and exclusive authority to make and set rates. NMSA 1978, § 62-6-4(A) (2003) ("The commission shall have general and exclusive power and

jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations and in respect to its securities. . .”); *see also Mountain States*, 1977-NMSC-032, ¶ 9 (“It is difficult to conceive of a more clear and all-inclusive grant of power to a governmental agency. The Commission has a duty to be a prima mover in the procedure to see that the public interest is protected by establishing reasonable rates and that the utility is fairly treated so as to avoid confiscation of its property.”)

Upon receiving this Court’s Opinion and Mandate Order, the Commission issued its “Order Upon Issuance of Mandate” and “Order Requiring El Paso Electric Company to Provide Calculations,” each directing Appellant to file a recommendation to implement a recalculation of its revenue requirement in accordance with the Court’s opinion. [1 RP 075 ¶ 7; 2 RP 226 ¶ A] Appellant filed its recommendation on September 12, 2023, which included the following requests:

- 1) approve EPE’s post-TYP major plant addition request;
- 2) approve EPE’s prepayments for the Palo Verde Water or Effluent Agreement and Newman Buffer Zone Land Lease request;
- 3) approve EPE’s request to reconcile fuel and purchased power cost adjustment clause (“FPPCAC”) costs and revenues for 2017 through 2019;
- 4) authorize EPE to issue new rates as reflected in Revised Schedule O-2 to be effective January 1, 2024;
- 5) Authorize EPE to create a regulatory asset for the annual revenue requirements of the Appealed Order’s improper exclusions for the amounts

that were under-collected between the entry of the 2020 Rate Case Order and the Mandate; and the amounts that were, or will be, under-collected from the issuance of the Mandate until January 1, 2024, when the new rates go into effect.

[2 RP 235-242] Commission Staff, in response to Appellant’s recommendation, found Appellant had “accurately *recalculated its rates* in a manner that preserves the rate design adopted by the Commission, in compliance with the Commission’s August 24 Order.” [3 RP 351 ¶ 18 (**emphasis added**)]

In its Final Order, the Commission ordered Appellant’s alternative proposal to implement its revised rates on January 1, 2024 be adopted, finding the proposal would allow for the recovery of the increased revenue requirement to begin promptly. [3 RP 354 ¶ 25] Further, the Commission granted Appellant’s request to book a regulatory asset for the under-collected amounts that had accrued, finding it would reasonably accommodate EPE’s request while minimizing the impact of the regulatory asset upon ratepayers because the regulatory asset would only be approved as of the date of the issuance of the Mandate, June 7, 2023, to January 1, 2024. [*Id.*] Thus, the Commission reasoned, granting Appellant’s request to apply carrying charges to the regulatory asset at EPE’s weighted average cost of capital (“WACC”) “should not have a substantial

impact upon EPE's ratepayers as the principal amount will be relatively small.”
[*Id.*]

The principles of *Mountain States* and *U.S. West* apply to these orders because the Commission's Final Order is a rate-setting order, both procedurally and substantively. First, as discussed *supra*, the Court does not have the ability to modify an order of the Commission; it can only affirm or annul and vacate. NMSA 1978, § 62-11-5 (1982). The Court, therefore, annulled and vacated the Commission's original order setting rates. Once 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. *Pub. Serv. Co. v. New Mexico Pub. Serv. Comm'n*, 1979-NMSC-042, ¶ 24, 92 N.M. 721, 725, 594 P.2d 1177, 1181. Therefore, the Appellant's initial rate-setting order was annulled and vacated, necessitating the Commission to reissue it.

Not only is the Final Order a rate-setting order due to the procedural posture after appeal, but Appellant concedes the Final Order sets new rates, not only those that were implemented in January 2024, but also by recalculating its revenue requirement. [2 RP 245 ¶ 5] (“EPE has recalculated the revenue requirement, schedule of rates, and calculated the difference between the revenue amounts under currently effective, approved rates and under the

recalculated schedule of rates.”). Commission Staff concurred: “Staff finds that EPE has accurately recalculated its rates in a manner that preserves the rate design adopted by the Commission . . .” [2 RP 335 ¶ 15] In rate-setting, the revenue requirement is a value upon which the rate is based. If the revenue requirement changes, the rate necessarily changes. See Stefan H. Krieger, The Ghost of Regulation Past: Current Application of the Rule Against Retroactive Ratemaking in Public Utility Proceedings, 1991 U. Ill. L. Rev. 983, 995 (1991) (“Once the commission determines the revenue requirement, it then estimates the level of revenue under the proposed rates and determines the extent to which the proposed rates meet or exceed this requirement.”).

The Commission’s Final Order cannot be merely an order permitting Appellant to collect underpayments. Because it replaces the initial annulled rate-setting order, and because it sets new rates and recalculates Appellant’s revenue requirement, the Final Order must be a rate-setting order.

Appellant’s proposed order included a request to “create a regulatory asset for the annual revenue requirements of the Appealed Order’s improper exclusions beginning from the July 10, 2021 effective date of the rates ordered by the Appealed Order for deferral through the effective date of rates ordered in EPE’s next general rate case.” [1 RP 151] Specifically, Appellant argued it was

entitled to recover its “undercharges” back to the date of the Commission’s initial order. [1 RP 128 ¶ 9-10] Because this request is, in essence, a request to make up past deficits with charges in the future, the Commission determined that to grant Appellant’s request would constitute retroactive ratemaking. *See Mountain States*, 1977-NMSC-032, ¶ 89 (“Past deficits may not be made up by excessive charges in the future nor may past profits be reduced by disallowances to future operating expenses.”). [3 RP 354-355 ¶ 26] The Commission reasoned that because it was setting a new rate, the new rate must be prospective in nature, and cannot be used to remedy or rectify a perceived under-collection. [3 RP 355 ¶ 28] Because Appellant determined a recalculated revenue requirement, the Commission, in adopting this proposal, issued an order setting a rate. Therefore, the Commission’s order cannot operate retroactively; to do so would, by definition, constitute retroactive ratemaking.

If Appellant is seeking a retroactive remedy, that is a separate remedy altogether and beyond the ability of the Commission to grant. Retroactive remedies, which are reparations rather than ratemaking, are “peculiarly judicial in character, and as such are beyond the authority of the Commission to grant.” *Mountain States*, 1977-NMSC-032, ¶ 88 (citing *Pacific Telephone & Tel. Co. v.*

Public Utilities Comm’n, 62 Cal.2d 634, 44 Cal.Rptr. 1 (1965); *Southern Pac. Co. v. Railroad Commission*, 194 Cal. 734 (1924)).

Appellant also requests this Court order “the collection of underpayments.” [BIC 8] This is not a matter for this Court to consider. This is outside the scope of this appeal and, because the Court can only affirm or annul an order of the Commission, outside the scope of the Court’s authority in this matter. *NMSA* 1978, § 62-11-5; *Hobbs Gas Co. v. New Mexico Pub. Serv. Comm’n*, 1993-NMSC-032, ¶ 6, 115 N.M. 678, 680, 858 P.2d 54, 56 (“This Court has no power to modify the order appealed from, but ‘shall either affirm or annul and vacate the same.’”).

The Commission acted in accordance with this Court’s established precedent, which plainly barred the adoption of Appellant’s preferred order.

B. Appellant Has Not Demonstrated Why This Court Should Overturn Mountain States.

Stare decisis is the judicial obligation to follow precedent, and it lies at the very core of the judicial process of interpreting and announcing law. *Trujillo v. City of Albuquerque*, 1998-NMSC-031, ¶ 33, 125 N.M. 721, 730, 965 P.2d 305, 314 (internal citations omitted). It promotes important principles in the maintenance of a sound judicial system such as stability of the law, fairness in

assuring that like cases are treated similarly, and judicial economy. *Trujillo*, 1998-NMSC-031, ¶ 33.

But the principle of *stare decisis* does not mean the law is indelible. To overcome this important principle, this Court has stated that “in both common law and constitutional cases . . . ‘any departure from [precedent] . . . demands special justification.’” *Id.* ¶ 34. This special justification includes demonstrating: 1) whether the precedent is so unworkable as to be intolerable; 2) whether parties justifiably relied on the precedent so that reversing it would create an undue hardship; 3) whether the principles of law have developed to such an extent as to leave the old rule “no more than a remnant of abandoned doctrine;” and 4) whether the facts have changed in the interval from the old rule to reconsideration so as to have “robbed the old rule” of justification. *Id.* As discussed *infra*, Appellant has not attempted to meet any of these factors. Instead, Appellant’s argument consists of nothing more than unsubstantiated claims that fail to satisfy any of the criteria necessary to justify overturning *Mountain States*.

- i. Appellant has not provided sufficient analysis to support a conclusion this Court should overturn its precedential decision in *Mountain States*.

As a threshold matter, Appellant neglects to provide any analysis to support its request to this Court to overturn *Mountain States*. Stating only that the reasoning for *Mountain States* is unsound, Appellant fails to recognize or discuss the rationale for the prohibition against retroactive ratemaking and the substantial number of matters in New Mexico that rely on this reasoning. [BIC 20]

This Court requires that the parties adequately brief all appellate issues to include an argument, the standard of review, and citations to authorities for each issue presented. *Elane Photography, LLC v. Willock*, 2013-NMSC-040, ¶¶ 70-71, 309 P.3d 53, 75 (internal citation omitted). This Court has stated it will “not review unclear arguments or guess at what a party’s arguments might be.” *Id.* To rule on an inadequately briefed issue, this Court would have to develop the arguments itself, effectively performing the parties’ work for them. *Id.* (citing *State v. Clifford*, 1994-NMSC-048, ¶ 19, 117 N.M. 508, 513, 873 P.2d 254, 259 (“We remind counsel that we are not required to do their research....”))).

Because Appellant has not developed an argument, the Court need not do so for them. However, even if Appellant had provided the requisite analysis,

the arguments to overturn *Mountain States* under the factors outlined in *Trujillo* would still fall short.

- ii. Appellant has not shown *Mountain States* yields a resolution that is unworkable or intolerable.

Appellant provides no indication, in New Mexico or otherwise, that the rule against retroactive ratemaking is “unworkable” or “intolerable.” Appellant’s assertion that “basic fairness” mandates the collection of underpayments or the refund of overcharges lacks support from any authoritative New Mexico case law. [BIC 22] The concept of “basic fairness” does not equate to an “intolerable rule,” and alone does not provide a legitimate basis for this Court to overturn established precedent.

As previously discussed, under the rule against retroactive ratemaking, when a commission engages in ratemaking, it can look to the future only. Specifically, the rule requires that when determining each of the terms of the revenue requirement formula, when allocating rates between classes or within a class and calculating the amount of revenue to be collected under proposed rates, the commission cannot adjust for past losses or gains to either the utility, consumers, or particular classes of consumers. Krieger, *supra*, at 997. Even though a commission may use a historical test year to determine the revenue requirement formula, the rule requires that the commission adjust for known

and measurable utility expectations in the test period. Krieger, *supra*, at 997. Even if the court reverses a rate order on appeal, the court remands the case to the commission to fix rates for the future. Krieger, *supra*, at 998. Once the commission fixes rates, any changes can be prospective only. Krieger, *supra*, at 998.

Appellant fails to demonstrate how this rule, and the hypothetical scenarios presented that flow from this rule [**BIC 23**], are unworkable and warrant abandoning the rationale in *Mountain States* within the framework of a changing regulatory landscape or evolving legal principles. Indeed, while the Appellant may perceive the facts as unfair, Appellant’s analysis neglects to consider a scenario where the utility has over-earned and a new rate is implemented to recover those funds. If the Commission were to mandate such a recovery, it could arguably constitute a taking of the utility’s property without due process, which would be intolerable. *Mountain States*, 1977-NMSC-032, ¶ 38 (“It is a well-established principle that private property may not be taken for public use without just compensation.”) (internal citations omitted). In such a case, due process—and basic fairness—would compel the Commission to refrain from issuing such an order. It is therefore inconsistent with established legal principles and equally “unfair” to allow the Commission to set a

retroactive rate that benefits the utility while due process principles prohibit setting a retroactive rate that would result in a refund from the utility.

Far from intolerable, the Court's analysis in *Mountain States* presents a rule upon which utilities, the Commission, and other parties may reliably rest their understanding of the Commission's role with respect to ratemaking, as well as the Commission's constraints and powers with respect to ratemaking after this Court has vacated a rate-setting order. Appellant has provided no evidence—beyond their own subjective view of fairness—that shows the rule, as defined by the Court, to be "unworkable" or "intolerable"; therefore, Appellant has failed to meet this prong..

- iii. Appellant has not demonstrated the principles of regulatory law in New Mexico rely upon *Mountain States* to such an extent that reversing it would create an undue hardship.

The Court has been very clear in its precedential decisions that it is not a ratemaking body: it cannot implement an order to amend or set a rate. *See, e.g., Matter of Rates & Charges of U S W. Communications, Inc.*, 1996-NMSC-002, ¶ 11, 121 N.M. 156, 161, 909 P.2d 716, 721 (“[T]his Court is not a ratemaking body.”); *Matter of Rates & Charges of Mountain States Tel. & Tel. Co.*, 1982-NMSC-127, ¶ 21, 99 N.M. 1, 7, 653 P.2d 501, 507 (“We do not set rates....”); *State Corp. Comm'n v. Mountain States Tel. & Tel. Co.*, 1954-NMSC-044, ¶ 19, 58 N.M. 260, 266, 270

P.2d 685, 689 (“We do not have the power or authority to determine what a fair actual rate is.”). If a rate were not effective on the date the Commission issued it, but rather only became effective once the appellate court had reviewed, it would essentially be the appellate court that functioned as the rate-making body rather than the Commission. This is not what the Legislature intended.

The authority to set rates has been delegated exclusively to the Commission, making it the Commission’s legislative responsibility to establish those rates. NMSA 1978 § 62-6-4(A) (“The commission shall have general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations and in respect to its securities, all in accordance with the provisions and subject to the reservations of the Public Utility Act, and to do all things necessary and convenient in the exercise of its power and jurisdiction”); *Mountain States*, 1977-NMSC-032, ¶ 88 (“[R]atemaking is legislative in nature, and it is axiomatic that legislative action operates prospectively, not retroactively.”).

This is a fundamental principle in regulatory law that Appellant has not sufficiently argued should be reexamined. Nor has Appellant appropriately analyzed the potential hardship of reversing such cornerstone determinations in New Mexico, which would likely be tremendous. While Appellant cites to a

number of states in which the Commission has the power to issue a rate-setting order that pre-dates the court's vacating order, [BIC 8-14] Appellant neither includes or attempts to discuss any potential hardship or benefit to New Mexico regulatory law other than the two hypothetical examples, which, as discussed *supra*, do not take into account all aspects of the purpose of the rule.

Indeed, Appellant's use of a North Carolina case where the court determined that an order of the public regulation agency does not become effective until given time for judicial review underscores the differences in power between the two respective agencies. *Compare N.C. Gen. Stat. Ann.* § 62-30 (West) ("The Commission shall have and exercise such general power and authority to supervise and control the public utilities of the State as may be necessary to carry out the laws providing for their regulation, and all such other powers and duties as may be necessary or incident to the proper discharge of its duties."), *with NMSA 1978* § 62-6-4 (A) ("The commission shall have general *and exclusive power* and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations and in respect to its securities, all in accordance with the provisions and subject to the reservations of the Public Utility Act, and to do all things necessary and convenient in the exercise of its power and jurisdiction") (emphasis added); *compare also State ex rel. Utilities*

Comm'n v. Nantahala Power & Light Co., 313 N.C. 614, 741 (1985) (internal citations omitted) (stating rates were only presumed to have been lawfully approved by the Commission until reviewed by the appellate courts), *with* NMSA 1978, § 62-11-6 (“The pendency of an appeal shall not of itself stay or suspend the operation of the order of the commission . . .”).

Clearly, in New Mexico, the Commission is accorded the sole ability to set a rate, and that rate is effective once issued until or unless such time as this Court annuls that order. NMSA 1978, § 62-11-6.

As opposed to the powers and duties ascribed to the utility commission in North Carolina, the Commission in New Mexico has the *exclusive* power to set a new rate once the Court vacates a prior rate-setting order, and, in accordance with the foundational regulatory prohibition against retroactive ratemaking, the Commission can only set a new rate in accordance with the Court’s opinion that operates prospectively.

Without conducting a side-by-side comparison of each state Appellant cites with the regulatory powers and permissions in New Mexico, it is impossible to determine whether a change in the New Mexico regulatory law would yield similar results as those states or would cause unnecessary undue hardship to

the regulatory sphere in New Mexico. Because Appellant failed to conduct such an analysis, Appellant's arguments fail the second prong.

- iv. Appellant has not shown the principles of law have evolved to such an extent that the rationale underlying *Mountain States* has become “no more than a remnant of abandoned doctrine.”

The value of the rule against or the allowance of setting a rate that pre-dates the Court's order varies across jurisdictions, reflecting the diversity of legal interpretations among the states. Given that courts nationwide are nearly evenly divided on this issue, it is imperative for the Court to scrutinize the rationale underlying the rule against retroactive ratemaking as it is applied in New Mexico to see that it is not a mere remnant of an abandoned doctrine, even though, again, Appellant has failed to do so.¹

¹Other states that prohibit recovering “undercharges” as it constitutes retroactive ratemaking include California, *see, e.g., S. Cal. Edison Co. v. Pub. Utilities Com.*, 20 Cal. 3d 813, 816 (1978) (“The Legislature has not undertaken to bestow on the commission the power to roll back general rates already approved by it under an order which has become final, or to order refunds of amounts collected by a public utility pursuant to such approved rates and prior to the effective date of a commission decision ordering a general rate reduction.”); South Carolina, *see, e.g., Daufuskie Island Util. Co., Inc. v. S.C. Office of Regulatory Staff*, 440 S.C. 523, 525 (2023) (Affirming Commission's order denying request for the reparations surcharge, finding it would amount to impermissible retroactive ratemaking); Illinois, *see, e.g., People ex rel. Hartigan v. Illinois Commerce Comm'n*, 148 Ill. 2d 348, 396 (1992) (“The Commission's function is legislative in nature and the rates that it sets are prospective in operation. To allow the Commission to now order “reparations” from rates that it originally set would violate the well-established rule against

First, retroactive ratemaking is not permitted because it is imperative that ratepayers and shareholders be able to rely upon Commission-approved rates. If commissions were permitted to retroactively alter rates at will, thereby subjecting ratepayers' bills and utility revenues to constant and significant fluctuations, it would inevitably raise profound concerns about the integrity and legitimacy of the ratemaking process. *See* Krieger, *supra*, at 1040. Additionally, utilities and shareholders benefit from having fixed and predictable rates; stability significantly impacts the utility's credit rating. As elaborated further in Section IV(B)(v), adjustment clauses can alleviate some of these concerns. However, they serve as mechanisms for mitigation and amendment in response to specific issues that may emerge; they do not, and cannot, supplant the fundamental process of rate-setting itself.

Second, retroactive ratemaking affects economic efficiency in that it places upon the utility the risk that in fixing rates the commission erred in estimating

retroactive ratemaking.”) (internal citations omitted); Indiana, *see, e.g., Indiana Office of Util. Consumer Counselor v. Duke Energy Indiana, LLC*, 183 N.E.3d 266, 267 (Ind. 2022) (holding a utility cannot recover past costs, adjudicated under a prior rate order, by treating the costs as a capitalized asset.”); and New Jersey, *see, e.g., Petition of Elizabethtown Water Co.*, 107 N.J. 440, 459 (1987) (holding that retroactive ratemaking is prohibited regardless of whether such ratemaking benefits the utility or the ratepayer.). This, however, is not an exhaustive list.

expenses and revenues. Certainly, a procedure that required a utility to set aside amounts earned over its allowed return in a reserve account as an offset for the next general rate increase would create a disincentive for the utility to earn over this return. Likewise, an adjustment clause which allowed a utility to change its rates automatically each month to reflect its failure to earn its allowed return would not encourage utility efficiency.

It is for these reasons the Commission's order setting a rate cannot be vacated retroactively to the date it was issued; such a scheme would render the ratemaking process impossible. The rate is valid once set and ordered by the Commission. If the Court annuls or vacates on appeal, then the rate is annulled on the date the Court makes such a mandate. Then, the Commission must undertake its duty to reexamine the factors and implement a new rate.

Because, as shown above, the rules prohibiting retroactive ratemaking and issuing a rate order that pre-dates the Court's order are still sound principles that utility regulation relies upon, and because Appellant has failed to show that the Commission's inability to set a rate that pre-dates the Court's order without violating the rule against retroactive ratemaking is a "remnant of abandoned doctrine," Appellant's arguments fail the third prong.

- v. Appellant has not shown the principles underlying the rule against retroactive remaking and finality of rates have been reconsidered since *Mountain States* in a way that has “robbed the old rule” of justification.

Appellant argues limits on retroactive ratemaking stem from “legislative power” and “constitutional mandates that certain private expectancies and rights are protected from any retroactive disruption by the government.” [BIC 20] Appellant argues that unlike legislation, “there is no reasonable expectation of finality in the rates until the appeal has been completed” and that “the rates put into effect by [an order overturned on appeal] have not been lawfully established until this Court has made a final ruling on the matter.” [*Id.*] Not only does Appellant fail to support this contention with any authority from New Mexico, the contention itself is simply incorrect.

The New Mexico Legislature’s stance on this matter is unequivocal: “The pendency of an appeal shall not of itself stay or suspend the operation of the order of the commission . . .” NMSA 1978, § 62-11-6. It is evident that the Legislature intended—and empowered—the Commission to have all orders, including rate orders, take effect immediately upon issuance. There is no indication that the Legislature intended to establish a grace period delaying the implementation of rates until the appeal period has elapsed.

The Commission and utilities are not without remedies for situations such as Appellant describes here other than issuing a rate retroactively. Regulatory mechanisms such as a Fuel and Power Purchase Cost Adjustment Clause (“FPPCAC”) is a mechanism to adjust the rates charged by utility companies to their customers based on the fluctuating costs of fuel and power purchases. Similarly, other regulatory mechanisms exist that allow utilities to account for changes in specific cost components that are difficult to predict and can vary significantly over time. These include an Energy Cost Adjustment Clause (“ECAC”), Transmission Cost Adjustment (“TCA”), Decoupling Mechanisms, and Demand-Side Management (“DSM”) Adjustment Clauses.

Finally, and perhaps most importantly, it is essential to note that a legal remedy already exists to address situations exactly like the issue before this Court: Appellant could have requested a stay from this Court. While the burden is on the Appellant to demonstrate the need for a stay, and a stay is never guaranteed, it is specifically designed to prevent the exact problem Appellant is seeking to address here. *Tenneco Oil Co. v. New Mexico Water Quality Control Comm’n*, 1986-NMCA-033, ¶ 10, 105 N.M. 708, 710, 736 P.2d 986, 988 (Requiring parties to demonstrate (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.”). Though a stay would have prevented the harm Appellant claims to have suffered here, Appellant made no effort to seek a stay from either the Commission or this Court on its rate case.

Given the substantial opportunities for alternative remedies beyond the issuance of a new retroactively-applied rate, there is no compelling reason to suggest that the rule against retroactive ratemaking has been rendered unjustifiable. As previously discussed, the rationale supporting the rule against retroactive ratemaking remains robust. Appellant’s assertion that considerations of basic fairness or equitable restitution should prevail does not alter this reality.

V. CONCLUSION

It is neither wise nor necessary to demolish a building to fix a leaky faucet. In the same way, it is both unwise and unnecessary to overturn a cornerstone of regulatory precedent to solve a problem that can be effectively addressed using the mitigation mechanisms already in place. Appellant has not demonstrated any of the elements to justify reversal of precedent exist here, and no rationale exists for the Court to do so. Moreover, the Commission

followed the precedent that has been firmly established by this Court in determining that it could not accept Appellant's preferred order that would constitute retroactive ratemaking, and no reason has been provided to depart from that principle. Neither the Commission's Final Order nor its Order Denying Rehearing is arbitrary or capricious or otherwise unlawful; therefore, the Commission respectfully requests this Court affirm the Commission's orders.

Respectfully Submitted,

THE NEW MEXICO PUBLIC
REGULATION COMMISSION

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STATEMENT OF COMPLIANCE WITH VOLUME-TYPE LIMITATIONS

Pursuant to Rule of Appellate Procedure 12-318(G) NMRA, I certify that this contains 8,023 words in the body of the brief, according to a count by Microsoft Word Version 2306.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing *Answer Brief of Appellee New Mexico Public Regulation Commission* to be served by email through the Court's electronic filing system to all counsel of record on August 29, 2024.

/s/ Erin E. Lecocq

Erin E. Lecocq