**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**EL PASO ELECTRIC COMPANY,**

Petitioner-Appellant,

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

**NEW MEXICO PUBLIC REGULATION COMMISSION,**

Appellee.

*Appeal from the New Mexico Public Regulation Commission*

# REPLY BRIEF

ORAL ARGUMENT REQUESTED

Respectfully submitted,

SPENCER FANE, LLP

Jeffrey J. Wechsler
Kari E. Olson
Joseph M. Dworak
Post Office Box 2307
Santa Fe, NM 87504-2307
(505) 982-3873
jwechsler@spencerfane.com
kaolson@spencerfane.com

Nancy B. Burns
Deputy-General Counsel
El Paso Electric Company
300 Galisteo St. Ste. 206
Santa Fe, NM 87501
(505) 982-7391
nancy.burns@epelectric.com

*Attorneys for Petitioner-Appellant El Paso Electric Company*

## TABLE OF CONTENTS

**TABLE OF CONTENTS** ..... **i**

**STATEMENT OF COMPLIANCE** ..... **ii**

**TABLE OF AUTHORITIES** ..... **iii**

**ARGUMENT** ..... **1**

I. FAIRNESS AND THE INTEGRITY OF THE APPELLATE PROCESS REQUIRE A RULE THAT ALLOWS A TRUE-UP FOLLOWING A SUCCESSFUL APPEAL ..... 1

II. THE COURT SHOULD ALLOW A SUCCESSFUL APPELLANT TO RECOVER UNDERPAYMENTS FOLLOWING A SUCCESSFUL APPEAL ..... 3

A. Allowing Recovery from the Date the Unlawful Order Took Effect Does Not Constitute Retroactive Ratemaking ..... 3

B. Authorizing Recovery of Undercharges from an Unlawful Tariff Does Not Violate the Filed-Rate Doctrine ..... 9

III. *MOUNTAIN STATES* IS NOT CONTROLLING ..... 11

A. It Is Not Necessary to Overturn *Mountain States* ..... 11

B. If Necessary, the Court Should Overturn *Mountain States* ..... 13

IV. A STAY PROVIDES NO MEANINGFUL RELIEF ..... 16

CONCLUSION ..... 19

CERTIFICATE OF SERVICE ..... 20

## STATEMENT OF COMPLIANCE

As required by Rule 12-318(G) NMRA, undersigned counsel hereby certifies that this brief complies with Rule 12-318(F) NMRA and was prepared in 14-point Times New Roman typeface using Microsoft Word for Microsoft 365, and that the body of the brief contains 4366 words.

## TABLE OF AUTHORITIES

### New Mexico Cases

*Best v. Marino*, 2017-NMCA-073 ..... 5, 8

*Chatterjee v. King*, 2012-NMSC-019 ..... 9

*City of Las Cruces v. N.M. Pub. Regul. Comm'n*, 2020-NMSC-016, 476 P.3d 880 ..... 17-18

*El Paso Elec. Co. v. NMPRC*, 2023 WL 3166936 (N.M. May 1, 2023) ..... 5

*Herrera v. Quality Pontiac*, 2003-NMSC-018, 73 P.3d 181 ..... 14

*In re Comm'n InvestigationiInto 1997 Earnings of U. S. West Communications, Inc.*, 1999-NMSC-016, 127 N.M. 254 ..... 8-10, 16

*Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Comm'n*, 1977-NMSC-032, 90 N.M. 325 ..... 11-17

*Qwest Corp. v. NMPRC,* 2006-NMSC-042 ..... 15

*Sims v. Sims*, 1996-NMSC-078, 122 N.M. 618 ..... 16

*State ex. rel. Quintana v. Schnedar*, 1993-NMSC-033, 855 P.2d 562 ..... 6

*State v. Ayon*, 2023-NMSC-025 ..... 9

*Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n*, 1986-NMCA-033, 736 P.2d 986 ..... 18

*Trujillo v. City of Albuquerque*, 1998-NMSC-031, 965 P.2d 305 ..... 13-15

### Other Jurisdictions

*Kansas Pipeline P'ship v. State Corp. Comm'n*, 941 P.2d 390 (Kan. 1997) ..... 2, 7, 17

*Mountain States Tel. & Tel. Co. v. Pub. Util. Comm'n*, 502 P.2d 945 (Colo. 1972) ..... 1, 17

*Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066 (D.C. Cir. 1992) ..... 7

*Pennwalt Corp. v. Michigan Pub. Serv. Comm'n*, 311 N.W.2d 423 (Mich. Ct. App. 1981) ..... 17

*Pub. Serv. Comm'n of Nevada v. Sw. Gas Corp.*, 662 P.2d 624 (Nev. 1983) ..... 17

*Pub. Utilities Comm'n of State of Cal. v. FERC*, 988 F.2d 154 (D.C. Cir. 1993) ..... 8

*Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 615 S.W.2d 947 (Tex. Civ. App. 1981) ..... 6

*State ex. Rel. Utilities Comm. v. Nantahala Power & Light Co.*, 332 S.E. 2d 397 (N.C. 1985) ..... 7

*United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223 (1965) ..... 1

**New Mexico Regulatory Cases**

*In re EPE's 2022 Renewable Energy Act Application*, NMPRC 22-00093-UT, **Order Adopting Recommended Decision with Modifications**, 2023 WL 3600074 (NMPRC May 17, 2023) ..... 11

**Statutes, Rules**

NMSA 1978, § 62-3-1 (2008) ..... 2

NMSA 1978, § 62-6-4 (2003) ..... 6

NMSA 1978, § 62-8-1 (1953) ..... 2

NMSA 1978, § 62-8-7 (2011) ..... 6-7

NMSA 1978, § 62-11-1 (1993) ..... 6

NMSA 1978, § 62-11-5 (1941) ..... 2, 5

NMSA 1978, § 62-11-6 (1983)..... 16-18

**Other Authorities**

*Ab Initio,* Black's Law Dictionary (12th ed. 2024).....5

*Annul*, Black's Law Dictionary (6th ed. 1991).....5

*Annul*, Black's Law Dictionary (6th ed. 2014).....5

*Annul*, Black's Law Dictionary (12th ed. 2024) .....5

*Annulment of Judgment*, Black's Law Dictionary (12th ed. 2024).....5, 12

*Duly*, Black's Law Dictionary (12th ed. 2024).....8

El Paso Electric Company ("EPE") hereby replies to the Answer Briefs of the New Mexico Public Regulation Commission ("Commission") and Intervenors.

## ARGUMENT

### I. FAIRNESS AND THE INTEGRITY OF THE APPELLATE PROCESS REQUIRE A RULE THAT ALLOWS A TRUE-UP FOLLOWING A SUCCESSFUL APPEAL

Basic fairness and protecting the integrity of appellate review require a rule that allows collection of underpayments or refund of overcharges following a successful appeal. **[BIC 8-14, 22-24]**.

The guiding principles regarding an agency's authority to implement adjustments to effectuate a judicial decision were articulated by the United States Supreme Court in *United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223 (1965). There, the Court sustained a Federal Power Commission order directing a utility to refund the difference between rates that were deemed unlawful and the lower rates established by the Commission. The Court rejected the argument that the Commission lacked the authority to order refunds based on the rule against retroactive ratemaking, and explained that "an agency, like a court, can undo what is wrongfully done by virtue of its order." *Id.* at 229. *See also Mountain States Tel. & Tel. Co. v. Pub. Util. Comm'n*, 502 P.2d 945 (Colo. 1972). As one court cogently explained:

> [W]hen an appellate court takes away something bestowed on a litigant by a [lower tribunal], the litigant is required to surrender or return any ill-gotten gains. Otherwise, a successful appeal has little meaning.

*Kansas Pipeline P'ship v. State Corp. Comm'n*, 941 P.2d 390, 399 (Kan. 1997).

Appellees do not suggest that denying collection of underpayments is a fair outcome. Instead, Appellees assert that such an *un*fair outcome is required by the Public Utility Act ("Act"), because such relief is not allowed under the rule against retroactive ratemaking, and that the Court cannot conduct judicial ratemaking. *See, e.g.*, **[Commission AB 20-21]**. In Appellees view a successful appellant is simply out of luck. A legal victory is hollow, and the Court is powerless to provide relief. In short, a party would be entitled to pocket the "ill-gotten gains." *Kansas Pipeline*, 941 P.2d at 399.

Appellees' argument is inconsistent with the Public Utility Act, which declares that it is the policy of the State that services be provided "at fair, just, and reasonable rates." NMSA 1978, § 62-3-1(B); *see also* NMSA 1978, § 62-8-1. Contrary to the Act, Appellees construction would *require* a utility to provide services based on "unreasonable or unlawful" rates in every case in which the Commission order is found unlawful and reversed. NMSA 1978, § 62-11-5. Appellees rule would also read out the benefit of judicial review in Section 62-11-5 by assuming that a rate is final and valid following a Commission order.

The Commission concedes that it would be "intolerable" and that "due process—and basic fairness" compel the Commission and Court to refrain from allowing a taking of utility property. **[Commission AB 25]**. The Commission seems confused, however, on how such a taking would occur. **[*Id.*]**. Appellees' rule would invite a taking, forcing a utility to provide service at a rate that does not allow it to meet its cost of service, without any hope for recovery after a successful appeal. **[BIC 24-25]**.

The only policy justification the Commission offers for its interpretation is that "the integrity of the ratemaking process depends on the certainty that rates, once established, cannot be retrospectively altered." **[Commission AB 1]**. As discussed below, judicial review is an essential part of the ratemaking process, and rates are not "duly established" until that process is complete. As relevant to the subject of fairness, the "integrity of the ratemaking process" depends to an even greater degree on "ill-gotten gains" being returned when a Commission order is deemed unlawful or discriminatory.

## II. THE COURT SHOULD ALLOW A SUCCESSFUL APPELLANT TO RECOVER UNDERPAYMENTS FOLLOWING A SUCCESSFUL APPEAL

### A. Allowing Recovery from the Date the Unlawful Order Took Effect Does Not Constitute Retroactive Ratemaking

Appellees assert the rule against retroactive ratemaking does not allow for recovery of undercharges from the date the rates implemented by the unlawful order took effect. This argument should be rejected because conforming the amounts paid to the Court's rate case order is not retroactive ratemaking.

A necessary predicate of Appellees' argument is that the rates set by the Commission were appropriate when adopted, even though the rates were found unlawful. Appellees reason that, notwithstanding the appellate review process, the rates established by the Commission's Final Order were final rates. *See, e.g.* **[Intervenor AB 18]**. In Appellees' words, EPE "is incorrect . . . that this Court determined the rates in the initial order were illegal." **[Commission AB 14]**. Rather, according to Appellees, "the PUA makes clear that the rates set in the Commission's Final Order were lawful during the pendency of the appeal." **[Intervenors AB 18]**. Based on this understanding, Appellees argue that the Commission's task following the mandate from this Court was to adopt *new* rates in conformance with the Court's decision. *See, e.g.* **[Commission AB 32]**. Because Appellees understand this action to constitute development of a whole new rate, however, they argue that it can only apply prospectively. *See, e.g.* **[Commission AB 20, 10]**; **[Intervenor AB 17]**. According to their logic, once "the Court anul[led]" the Final Order, "then the rate is annulled ***on the date the Court makes such a mandate***." **[Commission Br. 32** (emphasis added)**]**. Thus, the lynchpin of Appellees' argument is their understanding

that the unlawful rates in effect during the appeal cannot be disturbed even after being annulled on appeal.

One fatal problem with Appellees' position is that it represents a fundamental misunderstanding of the effect of this Court's decision. Section 62-11-5 provides that if this Court determines a rate case order is "unreasonable or unlawful," it "shall vacate and annul the order." NMSA 1978, § 62-11-5. That is precisely what happened in this case. *See El Paso Elec. Co. v. NMPRC*, 2023 WL 3166936 (N.M. May 1, 2023). "Annul" means to "reduce to nothing," or "to make void or of no effect." Black's Law Dictionary (6th ed. 1991); *see also Best v. Marino*, 2017-NMCA-073, ¶ 38 ("Appellate courts often refer to dictionary definitions to ascertain the ordinary meaning of statutory language."). "To annul a judgment or judicial proceeding is to deprive it of all force and operation, either *ab initio* or prospectively as to future transactions." Black's Law Dictionary (6th ed. 2014); *see also* Black's Law Dictionary (12th ed. 2024) (defining "annulment of judgment" to mean a "retroactive obliteration of a [ ] decision, having the effect of restoring the parties to their pretrial positions"). *Ab initio*, in turn, means "from the beginning; from the first act; from the inception." *Id.* Thus, contrary to Appellees' understanding, the annulled rates were in fact "unreasonable and unlawful" "from the beginning." It follows that conforming the amounts charged to match the Court's order would not disrupt a lawful rate or constitute retroactive ratemaking.

Appellees' argument also fails to recognize judicial review as an integral part of the ratemaking process. The Commission is authorized "to regulate and supervise every public utility in respect to its rates and service regulations… all in accordance with and subject to the reservations of the Public Utility Act." NMSA 1978, § 62-6-4 (2003). Section 62-8-7 provides guideposts to "make any change in a rate that has been *duly established*." NMSA 1978, § 62-8-7(B) (2011) (emphasis added"). As an integral final step, Section 62-11-1 of the Act establishes the right for any party to seek judicial "review of the Commission's final orders." NMSA 1978, § 62-11-1 (1993). Read together, judicial review is part and parcel of the ratemaking procedure. *See State ex. rel. Quintana v. Schnedar*, 1993-NMSC-033, ¶ 4; 855 P.2d 562 ("the provisions of a statute must be read together with other statutes in pari materia").

As such, rates that are authorized by a Commission order subject to appeal are not final for ratemaking purposes until the process, including any requested judicial review, has run its course. *See Southwestern Bell Tel. Co. v. Public Util. Comm'n*, 615 S.W.2d 947, 957 (Tex. Civ. App. 1981) ("If these new official or legal rates are finally adjudged invalid, they were never effective at all to vest a right in anyone."). It follows that a Court mandate to the Commission to allow for recovery of underpayments from unlawful rates cannot constitute retroactive establishment of *new* rates. Instead, this relief is merely a correction of error in the existing rates

during the same ratemaking process. "Without such corrective power [parties] would be substantially and irreparably injured by [Commission] errors, and judicial review would be powerless to protect them from much of the losses so incurred." *Natural Gas Clearinghouse v. FERC*, 965 F.2d 1066, 1074-75 (D.C. Cir. 1992).

The North Carolina Supreme Court's explanation in *State ex. rel. Utilities Comm. v. Nantahala Power & Light Co.*, 332 S.E. 2d 397, 402 (N.C. 1985) provides a helpful articulation:

> [I]t is elementary that the Commission's approval of any rate is always subject to judicial review. It is equally well-settled that rates or charges fixed by an order of the Commission are to be considered just and reasonable unless and until they are changed or modified on appeal or by the further action of the Commission itself.... [When rates were determined to be excessive], rate payers became entitled to recover all overcharges collected pursuant thereto....The premise underlying such a refund obligation is that rates which are found to be excessive are then considered to have been illegal from the outset, and are not considered to have become illegal only as of the date on which the appellate court has found them to be so.... [It is] well within the Commission's inherent authority to order a public utility to refund monies which were overcollected from its customers under excessive and unlawful rates.

(cleaned up). *See also Kansas Pipeline*, 941 P.2d at 400 ("Appellate review is part of the ratemaking procedure. Until that procedure has run its course, no rate can be final. It cannot be retroactive rate making to order the refund of a rate which, although not final, has nonetheless been collected.").

The legislature's decision to include "duly established" in Section 62-8-7(B) further supports the conclusion that the ratemaking process must run its course

before a rate is final for ratemaking purposes. To be "duly established," rates must be finalized "[i]n a proper manner; in accordance with legal requirements." DULY, Black's Law Dictionary (12th ed. 2024); s*ee also Best v. Marino*, 2017-NMCA-073, ¶ 38. The rates implemented by the Commission's unlawful Final Order were not "duly established" because the appeal was pending and the ratemaking procedure was not concluded. Once the rate order was appealed, the parties, and EPE's customers, were on notice that the rates initially adopted by the Commission were subject to change following judicial review. *See Pub. Utilities Comm'n of State of Cal. v. FERC*, 988 F.2d 154, 163–64 (D.C. Cir. 1993) (parties "had sufficient notice that the approved rate was subject to change").

Finally, EPE explained that *In re Comm'n Investigation Into 1997 Earnings of U. S. West Communications, Inc.*, 1999-NMSC-016, ¶ 54, 127 N.M. 254 (hereinafter "*U.S. West*"), supports its position because the Court "'ordere[d] U.S. West to treat the rate reduction as if it went into effect . . . the date ordered by the Commission, notwithstanding the fact that the date [had] already passed.'" **[BIC 18** (quoting *U.S. West*, 1999-NMSC-016, ¶ 51**]**. Appellees do not challenge this understanding of *U.S. West*. The Court went on to explain that "it is not necessary for the Commission to engage in additional ratemaking because the Court's action merely serves to enforce the rates set in the Commission's order …[such that] the rule against retroactive

ratemaking provides no obstacle to giving effect to that order as of the date provided therein. . . ." *Id.* ¶ 54.

Applying the same reasoning here, the Court can direct the Commission to allow recovery of undisputed underpayments without engaging in additional ratemaking. Just as in *U.S. West,* the Court's action would merely "enforce the rates set in the Commission's order," subject to the Court's adjustment. *Id.*

The rule against retroactive ratemaking does not prevent the Court from exercising its equitable powers to direct the Commission to correct its error and provide for recovery of uncollected amounts back to the date the annulled order originally took effect. **[RP 098-99]**. To hold otherwise could put a reviewing Court in the untenable position of condoning the action it held was unlawful. *See*, *e.g.*, *Chatterjee v. King*, 2012-NMSC-019, ¶ 8, (courts have a duty to interpret the law to avoid raising constitutional concerns); *State v. Ayon*, 2023-NMSC-025, ¶ 63 ("[S]hall this court wink at the unlawful manner in which the government secured the proofs now desired to be used, and condone the wrong done defendants by the ruthless invasion of their constitutional rights, and become a party to the wrongful act by permitting the use of the fruits of such act?").

### B. Authorizing Recovery of Undercharges from an Unlawful Tariff Does Not Violate the Filed-Rate Doctrine

The Intervenors suggest that authorizing recovery of the undercharges dating back to the date the unlawful rates originally took effect would violate the Filed-Rate Doctrine. This argument fails on its own terms.

A similar contention was raised in *U.S. West*. There the utility argued "that the Court cannot enforce the interim rate reduction as of the effective date stated in the Commission's order without violating the filed-rate doctrine because U S West has not filed new tariffs in response to that order." *U.S. West*, 1999-NMSC-016, ¶ 57. The Court rejected this argument, holding that "the filed-rate doctrine does not apply when … the filed rate is found by the Commission to be unreasonable." *Id.*, ¶ 54 (citations and quotation marks omitted). Based on that reasoning, the Court concluded that "[it] may enforce the Commission's order as of the effective date provided therein." It thus directed "U.S. West to file appropriate tariffs to implement the Commission's order [and] this Court's mandate," specifying that "the implementation of the Commission's order shall include a refund or credit to ratepayers equal to the amount of overearnings the company has collected" from the date ordered by the Commission, notwithstanding the fact that the date had already passed. *Id.*, ¶ 58.

Just as the Court had authority to implement rates as of the date the Commission order was issued in *U.S. West*, it also has authority to cure the effects

of the Commission's Unlawful Rate Order in the current case. The following discussion from the Commission in another EPE case is instructive:

> The filed rate doctrine does not transform an unlawful tariff into a lawful tariff. The policy behind the filed rate doctrine is to prevent price discrimination and to preserve the role of agencies in approving rates and to keep courts out of the rate-making process. The Commission, recognizing that a tariff provision remained in effect after it became unlawful, is not prevented by the filed rate doctrine from correcting the error.

*In re El Paso Elec. Co. 2022 Renewable Energy Act Plan*, Case No. 22-00093-UT, 2023 WL 3600074 at *1 (NMPRC May 17, 2023).

The Filed-Rate Doctrine is not a bar to EPE obtaining full relief from the unlawful rates.

## III. *MOUNTAIN STATES* IS NOT CONTROLLING

### A. It Is Not Necessary to Overturn *Mountain States*

As discussed in EPE's Brief in Chief, *Mountain States* is not controlling here. In *Mountain States*, a rate had not been established on the date the utility requested new rates be applied. 1977-NMSC-032, ¶ 4. Recognizing the "great measure of public policy that enters into the apportionment of rates," *id.* ¶ 27, the Court declined to apply the rates retroactively to the date the utility originally applied for new rates, *id.* ¶¶ 4, 86, 90. In those circumstances, where no rate had been adopted, the Court determined (1) that it could not adopt a rate because only the Commission had that

authority and (2) any new rate should apply prospectively since the Commission had not yet adopted a rate. *See id.* ¶¶ 4, 9, 86-90.

To be sure, *Mountain States* provides valuable background for understanding the current case. But *Mountain States* did not answer three critical questions presented in this case: (1) whether the rule against retroactive ratemaking prevents refunds or recovery of amounts that are found unlawful by this Court on appeal; (2) whether appellate review of a Commission rate order is part of the ratemaking process; and (3) what rates should be applied when a Commission rate order is annulled and the parties are "restor[ed] to their pretrial positions," Black's Law Dictionary (12th ed. 2024) (defining "annulment of judgment").

Appellees do not meaningfully address the important distinctions from *Mountain States* identified by EPE. The closest attempt is in Intervenors assertion that it is "not entirely accurate" that the Commission did not adopt new rates in *Mountain States*. **[Intervenors AB 29]**. A basic review of the case shows that Intervenors are mistaken.

The primary question in *Mountain States* was whether the Commission had authority to refuse to adopt interim rates where it had already determined that the utility was losing money. 1977-NMSC-032, ¶¶ 6, 12, 19, 50. In the part of the case relevant to the applicable date of the rates, at issue was the 6-month period between January 14, 1976, and August 11, 1976. *Id.* ¶ 86. January 14th represented the date

that "the Commission refused to approve the [original] proposed rate." *Id.* ¶¶ 4, 86. After the Commission refused to adopt the original rate, the utility filed a subsequent petition for interim rates. *Id.* ¶¶ 36, 48. The Court reviewed the order resulting from the interim filing and determined that the Commission "had a constitutional duty to fix interim rates." *Id.* ¶ 50. The latter date, August 11, 1976, represented the date that the Court ordered the Commission to impose the interim rates subject to a bond that would protect the prevailing party until the Commission adopted permanent rates. *Id.* ¶¶ 5, 36, 48, 86. But because the original January 14th rate was rejected outright, there was no new rate adopted by the Commission for the Court to review and judge during the 6-month period between the two dates. Nor did the *Mountain States* Court annul a previous rate order of the Commission as occurred in this case.

In short, *Mountain States* is not controlling because it addresses a related, but different question based on distinct facts. The Court is therefore free to evaluate the present case without implicating *stare decisis*.

### B. If Necessary, the Court Should Overturn *Mountain States*

In the alternative, if the Court finds that *Mountain States* is controlling, then it should clarify or overrule the problematic parts of *Mountain States* to allow for the refund of overcharges or collection of underpayments.

The Commission cites to the Court's analysis in *Trujillo v. City of Albuquerque*, 1998-NMSC-031, 965 P.2d 305, to assert that EPE "has not attempted

to meet any of (the *Trujillo*) factors." **[Commission AB 21-22]**. Contrary to that contention, the reasoning provided by EPE throughout its Answer Brief more than satisfies the *Trujillo* factors and strongly supports overturning *Mountain States*. *Id.* ¶ 34. As to the application of the *Trujillo* factors, this Court has recognized that they should be considered together, and it is not necessary to satisfy each one of the factors to overturn precedent. *See, e.g., Herrera v. Quality Pontiac*, 2003-NMSC-018, ¶ 15, 73 P.3d 181, 188 (Court overturned precedent despite finding only two *Trujillo* factors present). Nevertheless, each of the *Trujillo* factors justify allowing recovery of under-collections.

### 1. Whether the Precedent Is So Unworkable as to Be Intolerable

The first factor is whether *Mountain* States, as understood by Appellees, is so unworkable as to be intolerable. As discussed above, Appellees interpretation of the rule is inherently unfair, deprives parties of meaningful appellate review, and would countenance a wrong without a remedy.

### 2. Whether Parties Justifiably Relied on the Precedent so that Reversing Would Create an Undue Hardship

The Commission devotes several pages to this factor but makes no effort to show that any party relied on the Commission's interpretation of *Mountain States* in such a way that reversing it would create an undue hardship. **[Commission AB 26-**

**30]**. Indeed, it is difficult to imagine how any party could be harmed by a rule that would allow unlawful rates to be returned to where they belong.

### 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"

On this point, EPE maintains that Appellees' interpretation of *Mountain States* has never been adopted and that the case is neither directly on point nor controlling. The Court's more recent evaluation of relevant issues in *U.S. West* supports EPE's position. *See* **[BIC 27]**. In fact, in this very case, the Commission allowed recovery of the under-collections between the date of the Court's Mandate on June 7, 2023, and January 1, 2024, the effective date of the new rates. **[RP 548-557]**. Under the Commission's own reasoning, allowing recovery of these past amounts in the rates that started in January 2024 would violate the rule against retroactive ratemaking. More recently, in *Qwest Corp. v. NMPRC* the Court noted that *Mountain States* "does not preclude the PRC from implementing a retroactive procedure" relating to rates. 2006-NMSC-042, ¶ 29. Thus, to the extent that Appellees' interpretation of *Mountain States* ever had merit, recent developments reveal it to be "no more than a remnant of abandoned doctrine." *Trujillo*, 1998-NMSC-031, ¶ 34

#### 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

This case presents unique facts unlike prior precedent and provides an opportunity for this Court to distinguish an important question of law affecting judicial review and equitable remedies in utility ratemaking. As discussed above, Appellee's interpretation is both unfair and without justification.

## IV. A STAY PROVIDES NO MEANINGFUL RELIEF

As a final alternative argument, Appellees assert that even if allowing recovery does not amount to retroactive ratemaking, EPE should have sought a stay pursuant to Section 62-11-6. While Appellees stop short of arguing that EPE has waived its right to appeal or that EPE was *required* to seek a stay in the first instance, they do insinuate that the Act limits the Court's authority such that the exclusive remedy for a party challenging a rate case order is to request a stay from both the Commission and Court. According to Appellees, a stay is a "legal remedy" that can "address situations exactly like the issue before this Court." **[Commission Br. 34]**. The Court should reject this argument for four reasons.

First, as Appellees concede, nothing in the Act requires a party to seek a stay or else be precluded from receiving relief. In evaluating statutes such as Section 62-11-6, "the presumption is that the legislature. . . does not intend to overturn long-established equitable powers beyond what it declares with irresistible clearness."

*Sims v. Sims*, 1996-NMSC-078, ¶ 29, 122 N.M. 618 (internal quotation marks and citations omitted). Here, there is no such "irresistible clearness" to alter the normal principles of law. Rather, the statute leaves it to the discretion of both the litigants and this Court to determine whether a stay should be sought or granted. NMSA 1978, § 62-11-6. For that reason, courts have routinely rejected the argument that a stay is a substitute for the authority to provide a refund or collection of underpayments. *See, e.g.*, *Pub. Serv. Comm'n of Nevada v. Sw. Gas Corp.*, 662 P.2d 624, 630 (Nev. 1983) ("We hold that failure to apply for injunction to enjoin enforcement of a void order does not *per se* avoid a refund of monies improperly paid as a result of a void order."); *Pennwalt Corp. v. Michigan Pub. Serv. Comm'n*, 311 N.W.2d 423, 425 (Mich. Ct. App. 1981) ("There is no requirement that an injunction be sought as a condition of full judicial review."); *Mountain States Tel. & Tel. Co. v. Public Util. Comm'n*, 502 P.2d 945 (Colo. 1972) (petition for stay is not a condition precedent to seeking reimbursement for illegal rates). In short, "[a]ny argument that a party is entitled to retain the benefits because the other side did not stay the effect of the judgement will not be successful." *Kansas Pipeline Partnership*, 9412 P.2d at 401.

Second, requiring a stay as a prerequisite to seeking relief would be inefficient and place a significant burden on this Court. This would require appellants in rate case appeals to seek injunctive relief in every case – first from the Commission, and

again from this Court. *See City of Las Cruces v. N.M. Pub. Regul. Comm'n*, 2020-NMSC-016, ¶ 20, 476 P.3d 880. It would also be expensive and inefficient. And the Court would face pressure to make a determination on a stay as quickly as possible to mitigate the accruing harm.

Third, the stay provision in Section 62-11-6 is not an adequate substitute for a refund. It will take time for the Court to issue a stay. All the while, the unlawful rates are potentially costing the appellant (be it utility or ratepayers) significant amounts. As an example, the utility in *U.S. West* was over-collecting nearly $1.1million from ratepayers *every month*. 1999-NMSC-016, ¶10. If it took the six months to enter a stay, the total would reach $6.5 million. Under Appellees' interpretation, those dollars would never return to the customers who overpaid. Moreover, if a stay were the only available remedy and the Court declined a stay but ultimately overturned the Commission order, there would be no way to recover the amounts.

Fourth, one of the elements for a stay is a showing of "irreparable harm." *E.g. Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n*, 1986-NMCA-033, ¶ 10, 736 P.2d 986. If EPE is correct that a successful appellant is entitled to be made whole, then the harm is not "irreparable" because it can be trued up after the appeal to match this Court's decision.

## CONCLUSION

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

Respectfully Submitted,

Nancy B. Burns
Deputy-General Counsel
El Paso Electric Company
300 Galisteo St. Ste. 206
Santa Fe, NM 87501
Telephone (505) 982-7391
nancy.burns@epelectric.com

and

SPENCER FANE, LLP

*/s/ Jeffrey J. Wechsler*
Jeffrey J. Wechsler
Kari E. Olson
Joseph M. Dworak
Post Office Box 2307
Santa Fe, New Mexico 87504-2307
(505) 982-3873
jwechsler@spencerfane.com
kaolson@spencerfane.com

*Attorneys for Petitioner-Appellant*
*El Paso Electric Company*

## CERTIFICATE OF SERVICE

**I HEREBY CERTIFY** that on October 21, 2024, the foregoing was electronically filed and served on all counsel of record via the Court's electronic filing system, as more fully reflected on the Notice of Electronic Filing.

*/s/ Jeffrey J. Wechsler*
Jeffrey J. Wechsler