

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE APPLICATION)
OF NEW MEXICO GAS COMPANY FOR)
APPROVAL OF 2012 ENERGY EFFICIENCY)
PROGRAMS AND PROGRAM COST TARIFF)
RIDER PURSUANT TO THE NEW MEXICO)
PUBLIC UTILITY AND EFFICIENCY USE OF)
ENERGY ACTS,)
)
NEW MEXICO GAS COMPANY)
)
Applicant.)
_____)

Utility Case No. 11-00369-UT

2012 APR 10 PM 4:13
NEW MEXICO
PUBLIC REGULATION COMMISSION
OFFICE OF THE CLERK

STAFF'S EXCEPTIONS TO THE RECOMMENDED DECISION

Filed April 16, 2012

By

Nancy B. Burns, Staff Counsel

Utility Division Staff (“Staff”) of the New Mexico Public Regulation Commission (“Commission” or “NMPRC”), pursuant to NMPRC Rule 1.2.2.37C NMAC and the Order on Exceptions issued herein on April 12, 2012, files these exceptions to the Recommended Decision of the Hearing Examiner issued hereon on April 12, 2012 (“Recommended Decision” or “RD”).

I. INTRODUCTION

The Recommended Decision accurately presents the positions and arguments of Staff, the New Mexico Gas Company (“Gas Company”) and Interveners. Further, Staff does not except to the ultimate findings and conclusions contained in the Recommended Decision, recommending proposed program approval based on substantial record evidence. However, because the Recommended Decision suggests that the Efficient Use of Energy Act, NMSA 1978, § 62-17-1 *et seq.* (the “EUEA”) requires the Commission to approve any proposed energy efficiency program with a utility TRC projection of 1 or greater, without examination of the assumptions underlying the value of the benefits or costs of the proposed program, Staff files these exceptions.

Significantly, Commission modification of the RD is required to stop flawed legal arguments that a utility TRC projection of 1, in and of itself and without independent and critical examination by the Commission, adequately considers and balances the interests of ratepayers who bear 100% of the risk of EUEA program cost recovery. Such erroneous arguments, as put forth by the Gas Company and interveners in this case, should be squarely addressed and rejected as reducing the Commission’s role to little more than rubber stamping the approval of any energy efficiency program that a utility contends is cost effective.

It is settled law that the Commission's role is not a passive one and that the Commission has an ongoing, affirmative duty to establish rules and regulations, issue order, examine records, conduct investigations and do all other things necessary to insure that the public has fair rates and that the utility is fairly treated. Mountain States Tel. & Tel. Co. v. N.M. State Corp. Comm'n, 90 N.M. 325, 332, 563 P.2d 588, 595 (1977). To advance this objective, Staff's role is to represent the public interest in utility matters before the Commission by presenting to the Commission its beliefs on how the Commission should fulfill its responsibilities to balance the public interest, consumer interest and investor interest. NMSA 1978, Section 8-8-12 (2003 Repl. Pamp.) Further, the Commission has directed Staff to "develop the expertise to enable the Commission to perform a truly independent analysis of utility avoided cost calculations." Case No. 11-00123-UT, Recommended Decision, p. 79, issued October 3, 2011, adopted in relevant part by Final Order Partially Adopting Recommended Decision, issued November 1, 2011.

Specifically, the Final Order should find and conclude: (1) that the EUEA does not require the Commission to automatically approve proposed energy efficiency programs with a TRC projected by the utility to be 1 or greater; (2) that the assumptions underlying the value of the benefits or costs of any proposed energy efficiency program are subject to examination and analysis by Staff, Interveners and the Commission; and, (3) that the EUEA and Commission rules, as a matter of law, do not prohibit Commission rejection of a utility proposal to terminate a failing stand-alone energy efficiency program and incorporate it as a separate measure into a successful program with a resulting TRC projection of 1 or greater, when the stand-alone program has a significant history of under-performance and adds substantial costs of the successful program.

As further grounds for Staff's Exceptions, Staff states are argues as follows:

II. SUMMARY OF ARGUMENTS

A. Staff takes exception to the RD's conclusion that Staff "appeared to advocate for new conditions or new methods" to contest approval of two proposed residential programs supported by marginal TRC results. Recommended Decision, p. 79. Rather, the RD should be modified to affirm that Staff's examination and analysis of the avoided cost of gas assumptions underlying the Gas Company's marginal TRC projections for two disputed residential programs is consistent with the Commission's directive that Staff "develop the expertise to enable the Commission to perform a truly independent analysis of utility avoided cost calculations." Case No. 11-00123-UT, Recommended Decision, p. 79, issued October 3, 2011, adopted in relevant part by Final Order Partially Adopting Recommended Decision, issued November 1, 2011.

B. Staff takes exception to the RD to the extent that it does not explicitly reject the Gas Company's unfounded legal argument that "Staff is establishing a minimum TRC standard of 1.49 for the Commercial Solutions program alone, and is doing so arbitrarily" and should be rejected as a matter of law. Recommended Decision, pp. 80-82. Rather, the RD should be modified to explicitly reject this legal argument. Further the Final Order should determine that as a matter of law, the EUEA and Commission rules do not prohibit Commission rejection of a utility proposal to terminate a failing stand-alone energy efficiency program and incorporate it as a separate measure into a successful program with a resulting TRC projection of 1 or greater, when the stand-alone program has a significant history of under-performance and adds substantial costs of the successful program.

III. EXCEPTIONS

A. The Final Order Should Conclude Staff's Advocacy in this Case is Consistent with Commission Directive

Staff takes exception to the conclusion of the Recommended Decision at p. 79 that Staff “appeared to advocate for new conditions or new methods” to challenge approval of two proposed residential programs supported by marginal TRC projections when undisputed record evidence demonstrates: (1) that the entire benefit on the benefit side of the TRC equation for all gas company EUEA programs is the avoided gas and electric energy cost (Casey Direct; p. 34, ln. 6-8); and, (2) that the forecasted cost of gas for 2011 and 2012 is 14.7% and 16.5% lower in this case than in NMGC’s prior program approval case no. 10-00295-UT. Reynolds Direct; p. 15, ln. 8-12 . In considering this first exception, Staff respectfully requests that the Commission take administrative notice of the generally recognized technical fact that the wholesale cost of gas continues to fluctuate downward and currently is below \$2.00 per mmbtu. Rule 1.2.2.34D(1)(g) NMAC. This current wholesale price of gas is approximately half of what it was in May 2011 when NMGC established its avoided gas costs for this case. Fernald Direct; p. 14, ln. 1-6.

To advance the Commission’s efforts in analyzing the assumptions underlying utility TRC projections, the Final Order should modify the Recommended Decision to acknowledge that Staff’s advocacy in this case is consistent with the Commission’s directive that Staff “develop the expertise to enable the Commission to perform a truly independent analysis of utility avoided cost calculations.” NMPRC Case No. 11-00123-UT, Recommended Decision, p. 76. Further, the Final Order should put the Gas Company on notice that it is required to provide

the Commission with accurate and updated TRC projections to support proposed program approval, rather than conservative TRC projections based on stale data.

Further, to stop flawed legal arguments that a utility TRC projection of 1, in and of itself and without independent and critical examination by the Commission, adequately considers and balances the interests of ratepayers who bear 100% of the risk of EUEA program cost recovery, the Final Order in this case should affirm that a utility TRC projection of 1 or greater does not supersede the Commission's duty to consider and balance ratepayer interests with utility interests when setting rates under the EUEA and should conclude that the EUEA does not require the Commission to automatically approve proposed programs with a TRC or 1 or greater. It is settled law that the Commission is required to balance the competing interests of the utility and ratepayers to protect the public interest in setting rates under the EUEA. *New Mexico Attorney General, et al. v New Mexico Public Regulation Commission, et al.*, 2011-NMSC-034, 150 NM 174, 258 P.3d 453 (2011). Further, a utility TRC projection of 1 or greater does not supersede the EUEA's express limits on utility cost recovery to "prudent and reasonable" energy efficiency program costs. NMSA 1978, §62-17-6(A). Finally, the Commission's role is not a passive one and it cannot delegate its duty to protect the public interest to the utility by reliance solely on utility TRC projections. Mountain States Tel. & Tel. Co., 90 N.M. at p. 332.

B. The Final Order Should Explicitly Reject the Gas Company's Argument that Staff is Arbitrarily Establishing Minimum TRC Requirements and Request the Gas Company to Provide Updated TRC Projections

Staff takes exception to the RD to the extent that it does not explicitly reject the Gas Company's legal argument that "Staff is establishing a minimum TRC standard of 1.49 for the Commercial Solutions program alone, and is doing so arbitrarily" and should be rejected as a matter of law Recommended Decision, pp. 80-82. The RD implicitly rejects Gas Company's

argument that Staff's position should be rejected as a "matter of law" by concluding the substantial record evidence support Gas Company's position. Id. However, the RD should be modified to explicitly reject this argument. Further, the Final Order should affirm that the EUEA and Commission rules, as a matter of law, do not prohibit Commission rejection of a utility proposal to terminate a failing stand-alone energy efficiency program and incorporate it as a separate measure into a successful program with a resulting TRC projection of 1 or greater, when the stand-alone program has a significant history of under-performance and adds substantial costs of the successful program. Rules and statutes should not be construed to permit utility gaming of program cost effectiveness.

The facts in this case regarding Gas Company's proposal to terminate two under-performing commercial programs with a significant history of under-performance and substantial costs and incorporate them as separate measures into Gas Company's successful Commercial Solutions program with a resulting TRC projection of 1.49 are undisputed. In this case, Staff requested that the utility provide Staff with updated TRC projections to support its proposals which the Gas Company did not provide in rebuttal. Rather, the Gas Company testified that the incorporation of these programs as measures of an expanded 2012 Commercial Comprehensive program will not have a detrimental impact on the projected TRC of 1.49 (RD, p. 81). The Gas Company further asserted that its proposed incorporation would not result in any costs to the program or to the company if no customers choose to install those measures (RD, p. 81). Yet, 2010 data for these programs show that costs are somewhat insensitive to participation. Reynolds Direct, Exhibit JJR-5. Full Year 2011 data is not yet available. Also, the proposed expansion of the Commercial Solutions program more than doubles its budget. Reynolds Direct, p. 17, ln. 22 (2011 Budget \$312,938 / 2012 Budget \$651,159 /

Increase \$338,221). Reynolds Direct, p. 17, ln. 20 (2011 CFS Budget \$156,283 2011 + CHEWH Budget \$96,636 = Total \$252,919 to be incorporated in 2012 Commercial Solutions Budget).

Staff testified that it was unable to quantify the extent to which the 108% budget increase to the Commercial Solutions program is attributed to underperforming existing programs; and, Staff's particular concern is that while Rule 17.7.2 NMAC does not require all measures with a program to be cost effective, an unintended consequence of the rule may be that underperforming programs linger as underperforming measures within broader programs. Reynolds Direct, p. 18. NMGC did not recalculate the TRC for its proposed Commercial Solutions program as requested by Staff. See generally Casey Rebuttal, pp. 14-16.

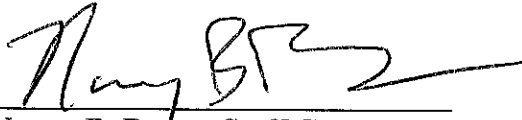
In order to address Staff's concerns about the proposed expanded 2012 Commercial Solutions programs, the Final Order should require the Gas Company to provide two TRCs to quantify the impact of the expansion: one TRC for the Commercial Solutions program as proposed and one TRC for the Commercial Solutions program excluding the incorporated Commercial Food Services program and Commercial High Efficiency Water Heater program.

Conclusion

For the foregoing reasons, Staff respectfully requests the Commission issue a Final Order in this case consistent with Staff's Exceptions.

Respectfully Submitted,

**NM PUBLIC REGULATION COMMISSION
UTILITY DIVISION**



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BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE APPLICATION OF NEW)
MEXICO GAS COMPANY FOR APPROVAL OF 2012)
ENERGY EFFICIENCY PROGRAMS AND)
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Case No. 11-00369-UT

NEW MEXICO GAS COMPANY, Applicant.)
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CERTIFICATE OF SERVICE

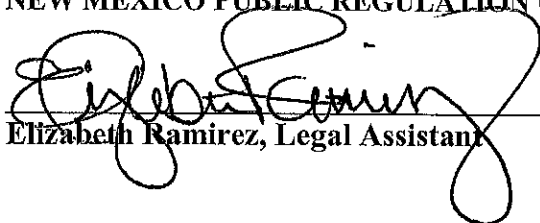
I HEREBY CERTIFY that a true and correct copy of the foregoing **Staff Exceptions to the Recommended Decision**, issued April 16, 2012, was mailed first-class postage pre-paid or by e-mail to the party(s) listed below:

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DATED this 16th day of April, 2012.

NEW MEXICO PUBLIC REGULATION COMMISSION



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