

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

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NEW MEXICO
PUBLIC REGULATION
COMMISSION
FILED

STAFF'S BRIEF OF DISPUTED ISSUES

Filed March 9, 2012

by:

Nancy B. Burns, Staff Counsel

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TABLE OF AUTHORITIES

Statutes:

NMSA 1978, § 62-3-1 *et seq.*

NMSA 1978, § 62-17-1 *et seq.*

Cases:

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).

In Re Petition of PNM Gas Services, 2000-NMSC-012, 129 N.M. 1, 1 P.3d 383 (2000).

Attorney General. v. N.M. Pub. Ser. Com'n., 101 N.M. 549, 552 (1984).

Gas Co. of NM v. NMPSC 100 N.M. 740, 676 P.2d 817 (1984).

International Minerals v. NMPSC, 81 N.M. 280, 466 P.2d 557 (1970).

Commission Cases:

Case No. 10-00295-UT, *In re New Mexico Gas Company for Approval of 2011 Energy Efficiency Programs and Program Cost Tariff Rider Pursuant to the Public Utility and Efficiency Use of Energy Act*, Recommended Decision, issued January 6, 2011, adopted by Final Order issued February 17, 2011.

Case No. 10-00037-UT, *In the Matter of the Renewables Stipulation and Public Service Company of New Mexico's Revised 2010 Renewable Energy Portfolio Procurement Plan*, Recommended Decision, issued August 3, 2010, adopted by Final Order Partially Adopting Recommended Decision, issued August 31, 2010.

Utility Division Staff (“Staff”) of the New Mexico Public Regulation Commission (“Commission”) files this brief pursuant to the Hearing Examiner’s directive to file a post hearing writing in early March and the agreement of New Mexico Gas Company (“NMGC”) and Utility Division Staff (“Staff”) to file a partial recommended decision with certain issues brief. Tr. 2/13/12, pp. 151-152.

I. INTRODUCTION

Staff supports the majority of regulatory approval requests set forth in NMGC’s Application, as modified through the course of this proceeding, and as set forth in the Joint Proposed Partial Recommended Decision of the Hearing Examiner filed in this docket. Staff additionally supports the proposed joint resolution of all compliance issues as presented in the Joint Proposed Partial Recommended Decision of the Hearing Examiner.

Staff, however, continues to recommend Commission disapproval of NMGC’s request for regulatory approval of its proposed, modified Residential ENERGY STAR Space Heating and Water programs (“residential space and water heating programs”) based on marginal TRC test results. Staff additionally continues to recommend Commission disapproval of NMGC’s request to modify its Commercial Solutions program by incorporating its ENERGY STAR Commercial Food Service (“CFS”) and Commercial High Efficiency Water Heater (“CHEWH”) into this comprehensive commercial program as program measures based on insufficient record evidence. Accordingly, this Staff’s Post-Hearing Brief will be limited to briefing these remaining disputed issues.

II. LEGAL ARGUMENTS

A. Applicable Legal Standards

The NMGC, as the moving party applicant, has the burden of proof in this proceeding, including both the burden of going forward and the burden of ultimate persuasion.¹ *International Minerals v. NMPSC*, 81 N.M. 280, 283, 466 P.2d 557 (1970) (the moving party has the burden of proof in Commission proceedings.) The Commission has recognized the applicable standard of proof in Commission administrative proceedings as the preponderance of evidence standard.² Mere conjecture and innuendo are insufficient to meet a utility's burden of proof. *Gas Co. of NM v. NMPSC* 100 N.M. 740, 744, 676 P.2d 817, 821 (1984).

The Efficient Use of Energy Act, NMSA 1978, § 62-17-1 *et seq.* (the "EUEA") provides that before the Commission approves an energy efficiency and load management program for a public utility, it must find that the portfolio of programs is cost-effective. Section 62-17-5(B). The EUEA directs the Commission to determine the cost-effectiveness of energy efficiency and load management measures using the total resource cost test. Section 62-17-5(C). Significantly, the EUEA also only authorizes the Commission to approve utility recovery of "prudent and reasonable costs" related to cost-effective energy efficiency and load management programs." NMSA 1978, §62-17-6(A).

¹Case No. 10-00037-UT, *In the Matter of the Renewables Stipulation and Public Service Company of New Mexico's Revised 2010 Renewable Energy Portfolio Procurement Plan*, Recommended Decision, pp. 14-15, issued August 3, 2010, adopted by Final Order Partially Adopting Recommended Decision issued August 31, 2010 ("PNM 2010 REA Final Order").

² PNM 2010 REA Final Order, pp. 14-15.

This EUEA “prudent and reasonable” standard for program cost recovery is distinct from but similar to the standard for recovery of individual operating expenses under the PUA.³ Under the PUA, requested expenses are presumed reasonable and prudently incurred unless challenged and the normal burden to be met in making a prima facie case regarding costs incurred ... is a demonstration that the costs were, in fact, incurred." *In re PNM Gas Services*, 129 N.M. 1, 1 P.3d 383, 2000 NMSC-012, ¶ 72 citing *Attorney General. v. N.M. Pub. Ser. Com'n.*, 101 N.M. 549, 552 (1984).

Under the EUEA, no such presumption for costs in fact incurred exists. Indeed, program cost recovery is requested and authorized prior to any program costs being incurred and the actual cost effectiveness of approved programs is unknown until after recovery of incurred costs when the Commissions independent evaluator measures and verifies the actual performance of approved programs. Under this scenario, the Commission is required to balance the competing interests of the utility and ratepayers to protect the public interest in approving energy efficiency programs which may not be or may become underperforming and cost ineffective. *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).

³ *New Mexico Attorney General, et al. v New Mexico Public Regulation Commission, et al.*, 2011-NMSC-034, ___ NM ___, ___ P.3d ___ (2011) (“*NM Attorney General*”) (the EUEA must be read in harmony with the PUA).

B. The Record Lacks Evidence Necessary to Justify NMGC's Proposed Residential Space and Water Heating Programs

1. Facts

Staff has recommended rejection of NMGC's proposed space and water heating programs based on marginal TRC ratios for these proposed programs. Staff Exhibit 2, p. 12, ll. 11-13 (Reynold's Direct).

NMGC's TRC Test Results for its proposed water and space heating programs for PY 2012 were 1.05 for the water heating program and 1.03 for the space heating program. Staff Exhibit 2, p. 13, ll. 7-8. Staff witness Reynold's testified that there is "enough uncertainty about the assumptions underlying these marginal TRC ratios to question the cost effectiveness of these two programs". *Id.*, p. 13, ll. 9-11.

The TRC questionable assumptions addressed by Staff witness Reynolds include: (1) free rider factors; and (2) avoided costs. Staff Exhibit 2, pp. 13-16. NMGC, at Staff's request, did recalculate its TRC tests for these programs, using ADM's higher free rider factor recommendations rejected by NMGC in its application as outdated. Based on these assumptions, NMGC has conceded these programs, with respective TRC ratios of 1.02 and 1.00, "barely" meet the TRC. Casey Rebuttal, pp. 12-13.

Undisputed evidence, nevertheless, demonstrates that the avoided gas supply cost input used to calculate the benefit component of the TRC test has varied by 14 or 16 percent in the last three filings of New Mexico Gas. Exhibit JJR-4, to Staff Exhibit 2 (Reynold's Direct); Staff Exhibit 2, pp. 14-16; and Tr. 2/13/12, p. 135, ll. 10-11. NMGC did not contest Staff's testimony on the volatility of its avoided gas supply cost. Rather, NMGC witness Fernald

testified that NMGC used the most reliable projections of gas supply cost available. Fernald Rebuttal, pp. 9-10. And at hearing, Staff ultimately testified that in the “context of avoided cost that vary based on my exhibit have varied 14 or 16 percent in the last three filings” the proposed water and space heating programs are “marginal enough” that the Commission “should not support this”. Tr. 2/13/12 p. 135.

According to Staff witness Reynolds, the marginal cost effectiveness of these programs places “too high of a risk on ratepayers” of funding underperforming programs which may become cost ineffective; and, further, “it is not appropriate to burden ratepayers with the cost of marginally cost effective programs”. *Id.* pp. 13-16. Additionally, it is uncontested that “a dollar spent on an unsuccessful program or a program that has a TRC less than one is a dollar wasted.” Tr. 2/13/12, p. 146, ll. 16-18. In other words, the utility bears no risk of collection of underperforming and cost ineffective programs.

NMGC’s testimony that its TRC ratios for these marginally cost effective programs are “conservative” based on the fact that its 2010 PY TRC ratios were conservative is not persuasive and should be rejected. Staff witness Reynold’s testimony is undisputed that NMGC is in its third program year application and should be held to a standard of providing accurate projections based on more history and more data. Tr. 2/13/12, pp. 104-105.

2. Analysis

The record lacks evidence to justify approval of NMGC’s proposed, marginally cost effective water and space heating programs, and they should not be approved by the Commission. *International Minerals*, 81 N.M. at 283; Staff Exhibit 2, p. 13, ll. 9-11 (there is” enough uncertainty about the assumptions underlying these marginal TRC ratios to question the

cost effectiveness of these two programs”); and *Id.*, p. 12, ll. 11-13 (recommendation to disapprove).

NMGC arguably met its initial burden of establishing the cost effectiveness of its proposed heating and space heating programs by presenting TRC ratios of 3 and 5 percent above 1 for the contested programs. Staff Exhibit 2, p. 13, ll. 7-8; Sections 62-17-5(B) and (C); and *In re PNM Gas Services*, 2000 NMSC-012, ¶ 72. However, once contested by Staff, NMGC failed to present sufficient evidence to justify approval of the proposed programs given the uncontested variability of the avoided gas supply cost input used in the TRC Test over the past three filings of NMGC and the fact that the ratepayers shoulder all the risk and burden associated with underperforming programs which become cost ineffective. Exhibit JJR-4, to Staff Exhibit 2 (Reynold’s Direct); Staff Exhibit 2, pp. 13-16; Tr. 2/13/12, p. 135, ll. 10-11; NMSA 1978, §62-17-6(A) (the EUEA also only authorizes the Commission to approve utility recovery of “prudent and reasonable costs” related to cost-effective energy efficiency and load management programs).

NMGC’s testimony that its TRC ratios for these marginally cost effective programs are “conservative” based on the fact that its 2010 PY TRC ratios were conservative is not persuasive and should be rejected. *Gas Co. of NM v. NMPSC* 100 N.M. 740, 744, 676 P.2d 817, 821 (1984) (mere conjecture and innuendo are insufficient to meet a utility’s burden of proof.) Staff witness Reynold’s testimony is undisputed that NMGC is in its third program year application and should be held to a standard of providing accurate projections based on more history and more data. Tr. 2/13/12, pp. 104-105.

Because NMGC has not provided sufficient evidence to justify that approval of its marginally cost effective proposed space and water heating programs would result in reasonable

and prudently incurred program costs, NMGC has not meet its burden of proof in this proceeding and these proposed programs should not be approved by the Commission. *International Minerals*, 81 N.M. at 283; and NMSA 1978, §62-17-6(A) (the EUEA also only authorizes the Commission to approve utility recovery of “prudent and reasonable costs” related to cost-effective energy efficiency and load management programs).

C. The Record Lacks Evidence Necessary to Justify NMGC’s Proposal to Incorporate its CFS and CHEWH Programs into its Commercial Solutions Program

Staff recommends the Commission should not approve NMGC’s proposal to incorporate its CFS program and CHEWH programs as measures into its Commercial Solutions program. Tr. 2/13/12, p. 109-110, ll. 15-1. The record lacks evidence necessary to justify that program approval would result in reasonable and prudently incurred program costs. NMSA 1978, §62-17-6(A) (the EUEA also only authorizes the Commission to approve utility recovery of “prudent and reasonable costs” related to cost-effective energy efficiency and load management programs). Accordingly, NMGC has not met its burden of proof in this proceeding and these proposed programs should not be approved by the Commission *International Minerals*, 81 N.M. at 283.

In Staff’s direct testimony, Staff conditionally supported NMGC’s proposal to turn its CFS and CHEWH programs into measures incorporated into the broader Commercial Solutions programs in PY 2012 “subject to a recalculation of the Commercial Solutions program’s projected TRC ratio that indicates no detrimental impact from the proposed incorporation.” Staff Exhibit 2, p. 29, ll. 11-15. In support of this Staff recommendation is the uncontested testimony of Staff witness Reynolds that these programs were a “matter of significant

Commission scrutiny in case No. 10-00295-UT”; that “participation has remained low”; and that the more than doubling of the Commercial Solutions budget may include absorption of the costs of the underperforming CFS and CHEWH programs” into the proposed Commercial Solutions program to the detriment to that program. *Id.* pp. 17-18. Staff has testified that it has been 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. *Id.* 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. At hearing, Staff continued to oppose approval of this request and testified that:

I think that these two programs that have under performed in 2010 and appear to under perform in 2011, and that as separate programs have a budget totaling \$250,000—a \$250,000 budget that is roughly equivalent to the growth in the Commercial Solutions budget from 2011 to 2012 and so it appears to be a major element of the commercial solutions program, and under those circumstances if those two programs result in a detrimental impact to the Commercial Solutions program, I don’t believe they should be incorporated in to that program.

Tr. 2/13/12, p. 109-110, ll. 15-1.

Because NMGC has failed to provide sufficient evidence to permit Staff and the Commission to analyze the impact of its proposed incorporation of two underperforming programs as measures into its Commercial Solutions program, NMGC has not met its burden of proving that this approval would result in reasonable and prudently incurred program costs and its requested approval should be denied. *Id.*; and NMSA 1978, §62-17-6(A) (the EUEA also

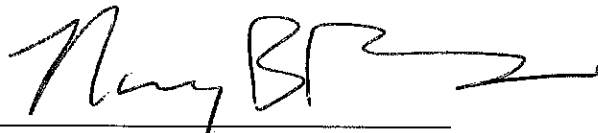
only authorizes the Commission to approve utility recovery of “prudent and reasonable costs” related to cost-effective energy efficiency and load management programs).

III. CONCLUSION

Wherefore, Staff respectfully requests the Commission adopt Staff’s recommendations contained herein to disapprove NMGC’s request for approval of its proposed residential space heating and water heating programs and NMGC’s request for approval of its proposal to incorporate its CFS and CHEWH programs into its Commercial Solutions program as separate measures.

Respectfully Submitted,

**NM PUBLIC REGULATION COMMISSION
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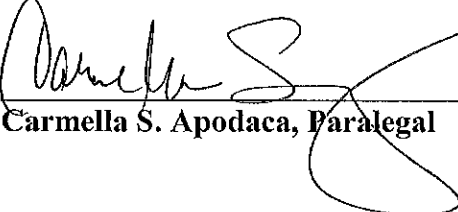
I HEREBY CERTIFY that a true and correct copy of the foregoing Staff's Brief of Disputed Issues, filed March 12, 2012, was mailed first-class postage pre-paid or by e-mail to the parties listed below:

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NEW MEXICO PUBLIC REGULATION COMMISSION



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