
NEW MEXICO PUBLIC REGULATION COMMISSION

FROM THE OFFICE OF DISTRICT 5 COMMISSIONER SANDY JONES

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NEWS RELEASE

Commissioner Jones Files Dissent In PNM/Valencia Power Case

SANTA FE – I respectfully dissent from the Commission’s decision to conditionally approve the uncontested stipulation (“stipulation”) in this case. The record in this case shows that the public interest, and PNM’s ratepayers, would be better served by the rejection of the Stipulation in its entirety, and the Commission investigating Public Service Company of New Mexico’s (“PNM”) sales of station power to Valencia Power LLC (“Valencia”).

Before addressing where I depart from my fellow commissioners, I would like to first state that I agree with the majority’s decision to condition approval of the stipulation on PNM agreeing to pass through to its customers 100 percent of the back billed amounts to be paid by Valencia. PNM plainly acknowledges in the stipulation that the Commission could have determined that it violated the Public Utility Act by its failure to bill Valencia for any station service for the 5-1/2-year period from May 30, 2008 to Nov. 20, 2013. PNM also admits that by not including its sales of station power in its rate filing in Case No. 10-00086-UT, its last general rate, it “could” have increased the rates of PNM’s other customers. Given these admissions, I am bewildered by the Commission staff’s entering into the stipulation, which did not require PNM to pass through any of the back billed amounts that might be paid by Valencia and thus remedy the harm to PNM’s customers caused by its violations of law.

That having been said, the Commission’s conditional approval of the stipulation falls short in approving two other elements of the stipulation: the rate that should be used to determine the back billed amount, and how far back the back billing period should go. Turning first to the issue of the rate, the stipulation provides that station power would be provided to Valencia under a new Rate 33B, which is less than one-half of the rate provided under existing Rate 3C, the only other rate that would be applicable to station power. It is relevant to note that PNM has been applying Rate 3C to the station power provided to the Rio Bravo generating station. It’s unclear why Rate No. 3C could appropriately be applied to the Rio Bravo generating station, but is not appropriately applied to Valencia. An evidentiary hearing should have been held to answer that fairly obvious question.

More significantly, however, not only will Rate 3C, which is one of PNM’s lowest rates, be used for future sales of station power to Valencia (unless that is changed in PNM’s pending general rate case), but will also be applied retroactively to the back billed period in plain violation of the Commission’s long-held policy against retroactive ratemaking. When evaluating the reasonableness of a stipulation, the Commission has historically looked to whether the stipulation, as a whole, violates any important regulatory principal or policy [Final Order Conditionally Approving Stipulation, Case No. 08-00273-UT, May 28, 2009, pp. 9-10]. The Commission should have rejected the stipulation on that ground alone.

Turning to the issue of how far back the back billing period should reach, the stipulation provides that Valencia should be back billed to Nov. 2, 2012, which is 12 months from the date PNM discovered its failure to charge Valencia for station power. The Commission’s order in this case approved that back-billing period. Although the Commission’s rules generally provide for a maximum back-billing period of 12 months, it also provides that the Commission “may determine a different time limit for back-billing or refunding in order to achieve a reasonable, fair and just result.” [17.9.560.12(8)(0 NMAC)]

In light of PNM's violation of law, and its admission, or at least near admission, that its violation increased the rates of its other customers because it failed to include its sales to Valencia in Case No. 10-00086-UT, the fair and just result in this case would have been to extend the back billing period to at least August 2011, the effective date of the rates approved in Case No. 10-00086-UT. Doing so would have resulted in a back billing period that is approximately 15 months longer than the back-billing period approved by the Commission. I am at a loss to understand why the Commission failed to do at least that.

Moreover, a serious question exists of whether the back-billing period in this case should have been extended to July 2009, the date that PNM's rates in Case No. 08-00273-UT became effective. Case No. 08-00273-UT was PNM's general rate immediately preceding Case No. 10-00086-UT. In its Motion for Rehearing ("Motion"), filed April 28, 2015 in this case, PNM, perhaps anticipating the issue, argues that it appropriately did not include its sales to Valencia in Case No. 08-00273-UT because the test period in that case ended on March 31, 2008, which was before it began providing service to Valencia in May 2008. At best, PNM's argument is misleading.

Under the Commission's rules, utilities using a historical test year (which was the case in Case No. 08-00273-UT) must reflect known and measureable changes that occur within 150 days after the end of the test period. Indeed, PNM included in that rate case sales to two large customers that were to commence 120 days after the end of the test. PNM's sales to Valencia, by contrast, started about 60 days after the end of the test period. It is also a little more than ironic that PNM initiated that rate case, in part, in order to recover the amounts paid under its Power Purchase Agreement with Valencia. It is possible that PNM has some valid arguments that would justify its failure to include the Valencia sales in Case No. 08-00273-UT. Although it had every opportunity to do so in its Motion, it failed to do so. The Commission should have held a hearing to resolve that issue as well.

I also take issue with the contention that has been raised in this case that PNM's back billing issue could have been decided through mediation before a private mediator rather than this Commission. Although the Commission's authority over a generator's sales of power to a utility is limited in certain respects, that is not true with respect to a utility's retail sales to a generator, or any other retail customer. The Public Utility Act gives the Commission "general and *exclusive* power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations..." §62-6-4 (2014) (Emphasis added). Thus, the Commission not only has the jurisdiction to determine the rate PNM should charge Valencia for station power, it is the only forum that can do so. That exclusive jurisdiction cannot be overridden or defeated by an agreement between a utility and a customer.

By one informal estimate, if the back billing period in this case had been extended to July 2009, and been calculated using Rate 3C, the amount to be refunded to PNM's customers would increase from approximately \$600,000 to approximately \$3,438,000. Given the significant difference in those amounts and the record in this case, holding a hearing in this case on the foregoing issues would have been well worth the effort. It would also have better served PNM's customers and the public interest.

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