BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE APPLICATION OF NEW MEXICO GAS COMPANY, INC. FOR REVISIONS TO ITS RATES, RULES, AND CHARGES PURSUANT TO ADVICE NOTICE NOS. 70 AND 71	)	**Case No. 18-00038-UT**
NEW MEXICO GAS COMPANY, INC. Applicant	)	

PHASE II RECOMMENDED DECISION

Frances I. Sundheim, Hearing Examiner in this case, hereby submits this Recommended Decision ("RD") to the New Mexico Public Regulation Commission ("Commission" or "NMPRC") pursuant to NMSA 1978, Section 8-8-14 and NMPRC Rules of Procedure 1.2.29(D)(4) and 1.2.37(B). The Hearing Examiner recommends that the Commission adopt the Statement of the Case, Discussion, Findings of Fact, Conclusions of Law and Decretal Paragraphs contained in this Recommended Decision in its Final Order.

I. STATEMENT OF THE CASE

On October 1, 2018, the Hearing Examiner issued the Order Approving Issue Bifurcation and Phase II Procedural Order (the "Order") in this matter. The Order, among other things, set an evidentiary hearing on the merits on "the issue of the disposition of the savings NMGC realized as a result of the enactment of the [Tax

Cuts and Jobs Act of 2017 ('TCJA')], including possible refunds to customers of such savings from January 1, 2018 to the effective date of [NMGC's] new rates" from the Company's above-captioned rate case. The Order also set dates for the filing of testimonies by the parties.

On October 24, 2018, NMGC filed the testimony of Scott A. Hastings and Daniel P. Yardley for Phase II of this case.

1. Mr. Yardley's testimony described a potential mechanism to institute a refund to customers if the Commission ordered NMGC to provide a refund.

2. Mr. Hastings testified that if the Commission ordered NMGC to provide a refund, the Commission should utilize NMGC's actual results to determine the refund.

3. On November 21, 2018, Staff Witness Charles W. Gunter, Attorney General Witness Andrea C. Crane, and NMIEC Witness Michael P. Gorman filed testimony responding to NMGC's Phase II testimonies.

4. Ms. Crane and Mr. Gorman advocated the use of a cost of service methodology to determine the amount of any refund ordered by the Commission, as opposed to the actual results method proposed by NMGC.

5. On December 5, 2018, Mr. Hastings filed rebuttal testimony wherein NMGC agreed to the use of a cost of service methodology to determine the amount

of refund if the Commission orders one, and suggested some changes to the calculations performed by Ms. Crane and Mr. Gorman.

II. NOTICE OF AGREEMENT

On December 10, 2018, the parties filed a Notice of Agreement of Certain Issues (Phase II) ("Agreement") attached hereto as **Exhibit B**. Therein, NMGC, Staff, the Attorney General, and NMIEC ("Signatories") agreed that in the event the Commission orders NMGC to issue a refund, a cost of service methodology is acceptable to use to determine the amount of the refund. The Signatories further agreed that the use of a cost of service methodology, which assumes a twelve-month period, results in an agreed-upon amount of $7.833 million. Attached to Exhibit B is the detailed calculation that NMGC, Staff, the Attorney General, and NMIEC accept as the correct calculation methodology and twelve-month amount to be refunded if the Commission orders a refund. To the extent any potential Commission-ordered refund relates to a period that is less than, or exceeds, a twelve-month period, the amount stated therein shall be prorated for the appropriate time period.

A Public Hearing on this matter was held on December 12, 2018. The following exhibits were entered into evidence:

- Phase II Testimony and Exhibits of Scott A. Hastings
- Rebuttal Testimony and Exhibit of Scott A. Hastings

- Notice of Agreement of Certain Issues Phase II
- Phase II Testimony and Exhibits of Daniel Yardley
- Direct Testimony and Exhibits of Michael Gorman
- Testimony of Andrea Crane
- Direct Testimony (Phase II) of Charles Gunter

At the public hearing, NMGC witness Scott Hastings testified regarding his Rebuttal Testimony. He emphasized that NMGC is not waiving its position regarding the propriety of a customer tax refund, which he states is primarily a legal issue. He also testified that the Company continues to assert that a tax refund to customers is not appropriate.

However, he testified in his rebuttal testimony that the Company was interested in resolving the amount of any potential refund parties allege NMGC collected pursuant to the Commission approved rates following the implementation of the TCJA. The Company determined that the methodology proposed by Ms. Crane and Mr. Gorman to determine the potential refund using a cost of service methodology was not inappropriate.

The Company initially espoused that, should the Commission determine a refund is legal, the Commission should use actual results of the Company to determine the potential TCJA refund. Specifically, the Company's preferred

methodology involved a calculation based on then projected 2018 financial results. Opposing parties argued that taxes paid by rate payers are not based on financial results for the Company for 2018; rather, taxes owed are based on rates established in the last base rate case —and the current settled base rate case.

The difference in the income tax expense portion of each cost of service calculation was used to determine the amount of a potential TCJA refund.[1] The methodology proposed by Ms. Crane. Mr. Gorman also proposed the use of cost of service methodology. Mr. Hastings further stated that upon review by the Company, while still favoring the actual cost methodology, the Company found the cost of service methodology acceptable.[2]

Mr. Hastings delineated several errors in either assumptions or calculations in those testimonies, and suggested corrections. These corrections were accepted by Ms. Crane and Mr. Gorman and were delineated at pages 3 and 4 of Hastings Rebuttal Testimony. Utilizing the corrected calculation of Ms. Crane, the estimated refund for the time period calculated was $7,833,876.[3] The calculation is attached to Exhibit A as Exhibit SAH Phase II Rebuttal.

In her testimony, Ms. Crane states that the two methods for calculating cost of service methodology involve using either last rate case cost of service or the

[1] Hastings Rebuttal, p.2.
[2] Tr. P.22-23.
[3] Hastings Rebuttal, p.5.

illustrative cost of service agreed to in this case. She states: "It is interesting to note that these two methodologies yield almost identical results."[4] She refers to Schedule ACC-1 that is attached to her testimony. "As shown in ACC-1, if the tax savings is calculated based on the cost of service in the last rate case, the total tax savings are $7,849,366. As shown on Schedule ACC-2 if the tax savings is calculated based on the illustrative cost of service in the current rate case, then the tax savings are $7,833,876. The difference in the two methodologies is insignificant."[5] She further states, "The Company has come back and accepted the methodology on Schedule ACC-2, based on the this case Phase I cost of service of $7.833 million... so at this point I am satisfied that the number and methodology in the agreement would result in a fair refund to ratepayers."[6]

It should be noted that all signatories to the Notice of Agreement are agreed to this method of calculation and the tax savings computation in this case. Counsel for Southwestern Public Service ("SPS") stated at hearing, "SPS did not take a position on the agreement. We've taken the position in our own appeal that the actual methodology [as opposed to the cost of service] is appropriate. So we did not contest the agreement between the other parties in this case. But that's our position in our case."[7]

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[4] Crane Tax Issues Testimony, p.12.
[5] Crane Tax Testimony, p12, l.16-20.
[6] Tr. P. 43, l. 24-25; p.44, l.1.
[7] Tr.p.24, l.2-7.

III. PROPRIETY OF A COMMISSION ORDERED REFUND

At the conclusion of the hearing of the Notice of Agreement of Certain Issues, ("Agreement") there was a discussion regarding the filing of post hearing briefs regarding the propriety of ordering a tax refund to customers based upon the savings resulting from the implementation of the TCJA. Although some parties had previously filed Prehearing briefs, all parties were given the opportunity to brief the question of an ordered refund. It was ordered that any party desiring to further brief the issue of possible refunds should do so not later than January 8, 2019.

NEW MEXICO GAS COMPANY (NMGC)

The TCJA has affected utilities across the country; however, there is no consensus of position throughout the country on how to implement the lowered tax rate of the TCJA. NMGC's position is that the Commission does not have the legal authority to order NMGC to issue a refund of revenues NMGC collected pursuant to Commission-approved rates. Therefore, the Commission should not require NMGC to refund any revenue that it received from customers from January 1, 2018 until new rates are approved in this proceeding.

In the Prehearing brief, NMGC argues, "As the New Mexico Supreme Court has explained, "rate-making is legislative in its nature" and subject to the "axiomatic" principle that "legislative action operates prospectively, not

retroactively. Unless otherwise expressly allowed by statute or the New Mexico Constitution, "the Commission's authority is legislative and therefore limited generally to prospective regulation...." [8] No New Mexico statute, nor provision in the Constitution, authorizes the Commission to order a retroactive refund of revenues NMGC has already collected pursuant to authorized rates." [9]

The Company further argues that the prospective nature of the Commission's authority reflects the separation of powers doctrine. "Retroactive remedies, which are in the nature of reparations rather than rate-making, are peculiarly judicial in character, and as such are beyond the authority of the Commission to grant." *Id.*, ¶ 88 (citation omitted). "'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.'" *Id.* (citation omitted). A refund of the savings NMGC realized between January 1, 2018 and the implementation of NMGC's new rates due to a decrease in NMGC's income tax expenses is the very definition of a "reparation" which constitutes illegal retroactive ratemaking. *Id.*, ¶ 88; *see also e.g. Niagara Mohawk Power Corp. v. Pub. Serv. Com.*, 54 A.D.2d 255, 255-56 (N.Y. App. Div. 1976) (holding that the commission's order that a utility return tax refunds received

[8] *Mt. States Tel. & Tel. Co. v. N.M. State Corp. Comm'n*, 1977-NMSC-032, ¶ 88, 90 N.M. 325, 563 P.2d 588 (citations omitted).
[9] NMGC Phase II Prehearing Brief, p.4-5.

subsequent to the prior rate determination via flow-through mechanism was unauthorized retroactive ratemaking).[10]

There have been some instances where the New Mexico Supreme Court has allowed refunds of commission approved rates primarily in the telecommunications area. NMGC notes, that in *Qwest Corp v. N.M. Pub. Reg. Comm'n,* 2006-NMSC-042, 140 N.M. 440, 143 P.3d 478, ("Qwest") the court recognized that amendments to the New Mexico Telecommunication Act, NMSA 1978, Sections 63-9A-1-20, eliminated rate-of-return regulation and implemented alternative form of regulation. In this instance, the Alternative Form of Regulation ("AFOR") the legislation permitted the Commission reopener provisions, including section X.B.5.e to, among other things, ensure "future compliance with the [AFOR] 'service standard *or* investment commitments....'" *Id.* (Emphasis in opinion). The Commission thereafter ordered consumer credits or refunds in an amount equal to the shortfall in the investment credit. *Id.*, ¶ 13. [11]

NMGC distinguishes this case by pointing out that the Commission was not acting under traditional regulatory law and policies, but was in fact dealing with a company that qualified for review under changed legislation that removed them from rate base rate of return regulation; reviewing the issues as pertaining to an AFOR.

[10] NMGC Brief, p.5.
[11] NMGC Brief, p.8.

In *U.S. West v. N.M. State Corp. Comm'n,* 1999-NMSC-016, 127 N.M. 254, 980 P.2d 37, the issue concerned a Commission finding of over earning on the part of the company. As such, after a hearing, the Commission ordered the utility to charge lower rates on a prospective basis, with new rates beginning forty-five days after the date of the Commission order. *U.S. West*, 1999-NMSC-016, ¶ 11. On appeal, U.S. West argued that the rate decrease could not become effective until after the Court completed its review of the case. *Id.*, ¶¶ 51-57. The Court rejected that argument, noting that the Commission was the body to set rates, and held that the rate decrease was effective on the date established by the Commission order. *Id.*, ¶¶ 56-57.[12]

NMGC argues that the Court ordered a refund or credit to ratepayers equal to the amount of overearnings the company had collected since the effective date of the Commission order; therefore, the *U.S. West* opinion does not support retroactive ratemaking because it concerned prospective correction of utility over earning.

NMGC also argues that the refund of TCJA savings would constitute piecemeal ratemaking. "Piecemeal ratemaking involves changing rates for one item and ignoring all of the other cost of service elements." *In re Pub. Serv. Co.*, 2015 N.M. PUC LEXIS 84, 91-92 (PRC Nov. 18, 2015) (NMPRC Case No. 15-00166-UT). At page 10 of their brief, they state, the "Commission has a 'policy' against

[12] NMGC Brief op.8.

piecemeal ratemaking.'" *Id.* at 92. This policy is similar to that followed by commissions in other jurisdictions.[13]

The Company argues that income taxes are an expense of doing business, just like many other costs of doing business by the company. The Company states, "The change in the tax rate is no different from a change in insurance premiums or a change in employees' salaries. New rates are based on the total costs of operating the utility.[14] Since income taxes are routinely treated as an operating cost of the company, it is considered in ratemaking along with all other appropriate operating costs. As such, the company argues that this change must be evaluated in a ratemaking process along with all other operating costs, and should not be viewed in isolation. NMGC states that to do so is piecemeal ratemaking and a departure from established ratemaking principles.

The company also contends that the process devised by the Commission in the TCJA matter departs from the process employed by the Commission in 1986 in Case No. 2130, and related rate cases. The company argues that the precedent set

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[13] Other jurisdictions refer to piecemeal ratemaking as "single-issue ratemaking." Single-issue ratemaking is prohibited, or substantially limited, in a number of jurisdictions. *See e.g., Phila. Elec. Co. v. Pa. Pub. Util. Com*, 502 A.2d 722, 727-28 (Pa. Cmmnw. 1985) ("The general rule is that there may be no line by line examination of the relative success or failure of the utility to have accurately projected its particular items of expense or revenue and an excess over the projection of an isolated item of revenue or expense may not be, without more, the subject of the Commission's order of refund or recovery, respectively, on the occasion of the utility's subsequent rate increase requests."); *Bus. & Prof'l'l People for the Pub. Interest v. Ill. Commerce Comm'n*, 585 N.E.2d 1032, (Ill. 1991) ("The rule against single-issue ratemaking recognizes that the revenue formula is designed to determine the revenue requirement based on the *aggregate* costs and demand of the utility. Therefore, it would be improper to consider changes to components of the revenue requirement in isolation."); *see also Office of Consumer Counsel v. Dep't of Pub. Util. Control*, A.2d 1 (2006) (generally considering the rule against single-issue ratemaking); *State ex rel. Mo. Office of Pub. Counsel v. Pub. Serv. Comm'n*, 858 S.W.2d 806 (Mo. Ct. App. 1993) (discussing Missouri's statutory prohibition of single-issue ratemaking).

[14] NMGC Brief at 10.

in Case 2130 requires that the Commission must provide advance notice of such a change of practice or methodology, or any such change is unenforceable. The Company maintains that the Commission did not provide sufficient advance notice, so retroactive recovery is unenforceable as a matter of law.[15]

All parties acknowledge that the Commission has dealt with a change in federal income tax rates before. NMGC states that, "The Tax Reform Act of 1986 reduced the federal corporate income tax rate from 46% to 34%. That tax-rate reduction had a material effect on utility revenues, and the Commission took steps to investigate the effect of the reduction on utility operations."[16]

In NMPRC Case No. 2130, the Commission issued an order requiring all utilities subject to the Commission's jurisdiction to submit an affidavit detailing the effects of the Tax Reform Act of 1986 on the utilities' cost of service and overall financial condition. *In the Matter of the Review of the Effects of the Tax Reform Act of 1986 on the Collection of Revenues by All Utilities in the Jurisdiction of the New Mexico Public Service Commission,* Case No. 2130, Order Commencing Review of Effects of Tax Reform Act of 1986 on New Mexico Utilities at 5 (June 1, 1987).

[15] NMGC Brief at 11.
[16] NMGC Brief at 12.

Following the filed affidavits, the Commission ordered that all tax related revenues collected by utilities under the previous tax rate were subject to refund in a future rate case. Following the Commission's orders, companies either entered into settlement agreements with the Commission or litigated the tax issue in their next rate case.

Public Service Company of New Mexico ("PNM") did not reach agreement with the Commission, so the Commission deferred determining the effect of the Tax Reform Act of 1986 until PNM's next base rate proceeding. That case was based on a 1988 test year. The Commission examined PNM's revenues and expenses during 1988, including the lower income tax expense produced by the tax-rate change. The Commission concluded that PNM had not over-earned in 1988. The Commission, therefore, did not order any refunds attributable to the change in tax law. *See Public Serv. Co. of N.M.* NMPRC Case No. 2262, Final Order, 111 P.U.R 4th 313, 327 (Apr. 12, 1990).

NMGC relies upon this precedent. In its filed testimony in Phase II, the Company demonstrated that it has not been over earning and should not be required to return anything to customers under the standards established in NMPRC Case No. 2130.

From the foregoing arguments and precedent, NMGC contends that there was not actual notice by the Commission that there would be a change in its methodology or procedure in relation to the TCJA.

The Company argues that the Commission's January Order in the Investigation Case merely directed Staff to ask NMGC, among other utilities, what it intended to do with the savings generated by the TCJA. NMGC responded to the Commission by letter on February 23, 2018 stating that it planned to retain the revenues. The Commission took no further action, issued no new orders, provided no additional notice, and held no hearings on the issue until September 2018.

The Company contends that the consideration of tax savings from tax reform in between rate cases is not a matter of Commission first impression. The Company contends that the Commission established its methodology and procedure for addressing decreases in federal income taxes in 1986, primarily in NMPRC Case No. 2130. In that case, the Commission's thorough notice procedures and analysis of utility financial conditions during that relevant time frame stand in stark contrast to how the matter has been thus far been addressed by the Commission in 2018. Additionally, NMGC did not have any actual Commission notice that it may have to refund tax savings from the TCJA retroactively.

The Company contends that a refund would impose a substantial burden on NMGC, for which there is no mechanism of recovery after refund. An ordered

refund of the amount agreed to in the Agreement of Certain Issues, $7,833,366, calculated at that time would present a substantial burden to NMGC. A revised calculation to account for the months since the calculation was made will increase that amount. If ordered to refund, NMGC asserts, no mechanism would permit NMGC to recover, retroactively, amounts refunded to customers. In these circumstances, the substantial burden factor weighs in favor of the NMGC retaining the tax benefits. [17]

THE NEW MEXICO ATTORNEY GENERAL (NMAG)

The NMAG did not file a Pre hearing brief, but did file a Post Hearing Brief. The NMAG relies upon an analysis of whether an agency's adjudicatory action should be applied prospectively or retroactively by following a five-factor balancing test.[18] The *Hobbs* balancing test, as established by the United States Supreme Court, espoused by the D.C. Circuit, and incorporated by the New Mexico Supreme Court, weighs whether agency action may be applied retroactively, and it depends on:

> (1) whether the particular case is one of first impression, (2) whether the new rule represents an abrupt departure from well established practice or merely attempts to fill a void in an unsettled area of law, (3) the extent to which the party against whom the new rule is applied relied on the former rule, (4) the degree of the burden which a retroactive order imposes on a party, and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.[19]

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[17] NMGC Brief, pp.15-16.
[18] *See Qwest Corp. v. N.M. Pub. Regulation Comm'n*, 2006-NMSC-042, ¶ 29, 140 N.M. 440; *Hobbs Gas Co. v. N.M. Pub. Serv. Comm'n*, 1993-NMSC-032, ¶ 14, 115 N.M. 678; *SEC v. Chenery Corp.*, 332 U.S. 194, 201-03 (1947); *Retail, Wholesale & Dep't Store Union, AFL-CIO v. NLRB*, 466 F.2d 380, 390 (D.C. Cir. 1972).
[19] *Accord Hobbs*, 1993-NMSC-032, ¶ 14 (quoting *Retail,* 466 F.2d at 390).

The NMAG argues that NMGC's position that the tax refund issue has been dealt with in an inconsistent manner is incorrect. The NMAG states that, "The Commission's process following the enactment of the TCJA in 2018 has been virtually identical to the actions of the Commission in 1987."[20] The NMAG contends that the process had not varied, but the outcomes in the two processes have varied. As such, the NMAG states, "The processes used to consider a generational tax issue is what defines the treatment of the utilities, not the outcomes reached. Outcomes are fact driven, and each utility is a unique entity, with unique circumstances, and with facts that may reasonably result in different outcomes."[21]

The NMAG argues that the factors in the *Hobbs* case support the refund of collected taxes from the ratepayers. "The reduction of the federal corporate income tax is a once-in-a-generation issue. Although there is precedent set by the Commission in regards to the tax issue, it is by no means settled or well-established. The issue has lain dormant for three decades."[22] As such, the NMAG asserts that the argument espoused by NMGC, that the 1986 federal tax change treatment standardized a well settled or established practice that the Commission is required to follow in the present matter is erroneous.

[20] NMAG Post Hearing Brief, p.4.
[21] NMAG Post Hearing Brief, p. 5.
[22] NMAG Post Hearing Brief, p. 6.

The NMAG argues that, in fact, refunds are a well established practice that have been issued for many years and are codified in statute. In fact, the NMAG argues that Rule 17.1.330.9 NMAC is the "Tax Adjustment Clause." The NMAG argues that this well-established rule allows utilities, via the tax adjustment clause, to make bill increases in the face of tax increases. It requires that customer bills may not be increased unilaterally by a utility when income taxes increase.[23] But the opposite—that customer bills may not be decreased when income taxes decrease—is not necessarily true. This rule does not enunciate what to do in the event of a tax decrease. The rule is silent in that regard. However, if a utility has the authority to increase a bill in light of certain tax increases, then it is implicit that the utility may decrease or refund a bill in light of tax decreases.[24]

NMGC's argument that because the statute and rule do not specifically mention refunds of federal corporate income tax, then such a refund would violate section 62-8-7(E) and rule 17.1.330.[25] NMAG asserts that the correct reading of Rule 17.1.330.9 is that customer bills may not be increased via the tax adjustment clause when federal income taxes increase, and is silent on decreases. Based on this analysis, NMGC's interpretation is argued to usurp the intent of the rule.

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[23] 17.1.330.9 NMAC.

[24] NMAG Post hearing Brief at p.7. NMGC argues that just because the statute and rule do not specifically mention refunds of federal corporate income tax, then such a refund would violate section 62-8-7(E) and rule 17.1.330

[25] *See id.* at 3-5

The NMAG argues that the TCJA issue was not addressed in a novel manner; in fact, it was treated in a consistent manner –as precedent dictated. Although the investigatory processes used following each federal act were similar, the outcomes for individual utilities are still properly open to debate. NMGC argues that disparate treatment of public utilities is synonymous with disparate outcomes.[26] In actuality, the NMAG states that what matters is the process and not the outcome. The processes used to consider a generational tax issue is what defines the treatment of the utilities, not the outcomes reached. Outcomes are fact driven, and each utility is a unique entity, with unique circumstances, and with facts that may reasonably result in different outcomes.[27]

The NMAG argues that the present tax question does not fall under a well established practice, since the last issue before the Commission was thirty years ago. The NMAG argues that the Commission has in fact statutory authority to raise customer bills when an increase in tax takes place, and that to interpret this authority for increases only lacks symmetry and usurps the intent of Rule 17.1.330.9. Finally, the NMAG believes the Commission has good cause to permit a refund, and that NMGC had prior notice of this possibility.[28]

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[26] NMGC's Prehearing Brief at 15.
[27] NMAG Brief at 5.
[28] NMAG Brief, p. 9.

In fact, the NMAG states that two days before the TCJA was signed into law, the Commission anticipated the tax-rate change and ordered Public Service Company of New Mexico ("PNM") to incorporate the change into its cost of service to take effect January 1, 2018.[29] On the day that the TCJA was signed into law, the hearing examiner in SPS's rate case issued a bench request requiring SPS to incorporate the impacts of the TCJA into its cost of service.[30] These orders alerted NMGC that the tax issue would be addressed immediately, as NMGC intervened in the cases, and was served with the two aforementioned orders. Additionally, the Commission opened a docket on January 24, 2018 to determine the TCJA's effects on regulated utilities.[31] This docket further put NMGC on notice of a tax-rate reduction and other potential regulatory outcomes.[32]

The NMAG concludes that for the reasons stated, a Commission ordered refund of the taxes collected since January 1, 2018 should be returned to ratepayers.

NEW MEXICO INDUSTRIAL ENERGY CONSUMERS (NMIEC)

NMIEC concurs with the NMAG that the taxes collected under the prior tax schedules should be returned to the ratepayers, and refund will result in just and reasonable rates.

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[29] Case No. 17-00255-UT, December 22, 2017 Bench Request to SPS, (12-22-18).
[30] Case No. 17-00255-UT, December 22, 2017 Bench Request to SPS, at 3 (12-22-17).
[31] *See* Case No. 18-00016-UT, Order Commencing Review of TCJA (1-24-18).
[32] NMAG Brief p. 10.

NMIEC argues that the Commission's primary responsibility under the New Mexico Public Utility Act ("NMPUA") is to regulate and supervise public utilities,

> to the end that reasonable and proper services shall be available at fair, just and reasonable rates and to the end that capital and investment may be encouraged and attracted so as to provide for the construction, development and extension, without unnecessary duplication and economic waste, of proper plants and facilities and demand side resources for the rendition of service to the general public and to industry. NMSA 1978 § 62-3-1.B

"NMGC has not provided a single authority from New Mexico, or from any other relevant jurisdiction, that supports the notion that its retention of unearned tax savings results in just and reasonable rates for customers. Nor has it provided any evidence in this case that it needs to retain the approximately $7.8 million in tax savings, *see* Notice of Agreement of Certain Issues (Phase II), in order to invest in plant and facilities to provide service to its customers. Having made no positive showing that it has a right to retain these savings, NMGC's entire argument is a negative one based on its attempt to misconstrue the equitable maxims of piecemeal and retroactive ratemaking."[33]

NMIEC argues that the circumstances of this case require that the Commission consider the rates charged to customers that are unarguably in excess of the actual taxes required to be paid to the federal government after January 2018. NMIEC maintains that, there is no equitable or legal justification for NMGC to retain the tax savings windfall.

[33] NMIEC Post Hearing Brief, p. 2.

"New Mexico Supreme Court has held that "the Commission should not burden the public with unreasonable or extortionate rates, considering the circumstances of each case." *State v. Mountain States Tel & Tel.,* 54 N.M. 315, 338, 224 P.2d 155 (1950). NMIEC argues the circumstances of this case are these: (1) the TCJA has resulted in lower federal tax rates for NMGC; (2) as a result of those lower federal tax rates, NMGC saved approximately $7.8 million in calendar year 2018; (3) NMGC has not shown that it did anything to earn this additional $7.8 million in revenue; and (4) NMGC has also not shown that customers received any added benefit or service enhancement which would justify the Company's retention of these tax savings."[34]

NMIEC also argues that the tests enunciated in *Hobbs Gas Company v. New Mexico Public Service Commission,* 115 N.M. 678, 682-83, 858 P.2d 54 (1993) favor the refund of the tax over collection to ratepayers. NMIEC states, "An analysis of the circumstances in this case clearly demonstrates that none of the elements of this five factor test support the application of the retroactive ratemaking prohibition with respect to a refund of NMGC's tax savings." [35]

NMIEC concludes that, "the Commission should find that NMGC's legal and factual arguments against a refund of the TCJA tax savings are meritless. NMIEC

[34] NMIEC Brief p. 3.
[35] NMIEC Brief p.4.

respectfully requests the Commission to order NMGC to refund the over-collected taxes in the amount agreed to by the parties…"[36]

The City of Albuquerque states it supports the argument put forward by NMIEC in lieu of a phase II brief.

STAFF OF THE UTILITY DIVISION

In its post-hearing brief, Staff discussed, and based its opinion regarding Phase II on, the procedural posture of the filed a Notice of Appeal and Verified Motion for Partial Stay with the New Mexico Supreme Court ("Court") regarding the provision in the Southwestern Public Service Company's ("SPS") Final Order requiring that SPS provide TCJA refund credits to customers. In the pre-filed Direct Testimony (Phase II) and pre-filed Response Testimony of Charles W. Gunter, Mr. Gunter laid out the options for the Commission to consider in deciding how to address the tax refund issue.[37] Staff's brief supports Mr. Gunter's testimony but believes that the most pertinent question is the impact on this case of the ongoing appeal of the recently decided Southwestern Public Service ("SPS") rate case, Docket No. 17-00255-UT. As stated in its brief, "Staff believes that the ultimate determination of the retroactive tax refund in this proceeding should follow that of the SPS case. Should SPS prevail on its appeal, as the Court's actions imposing the

[36] NMIEC Brief, p. 5.
[37] Staff Exhibit 5, Response Testimony of Charles W. Gunter, pp. 9-11.

stay in that case suggest is somewhat likely, Staff believes that the facts of this case are sufficiently similar that such judicial determination will have a precedential effect."[38]

Since that time, on February 15, 2019, SPS and the Commission filed a Joint Motion for Remand and Stipulated Dismissal of SPS's Appeal of the Commission's Order which stated resolution of SPS's Appeal of Case No. 17-00255-UT (Appeal No. S-1-SC-37248, the associated appeal of NMPRC's order in Case No. 18-00016-UT (Appeal No. S-1-SC-36466).

The Stipulated Agreement states that SPS and the NMPRC have agreed that the NMPRC will replace its original Final Order in Case No. 17-00255-UT with a New Order that eliminates the retroactive TCJA refund; adjusts the 51% equity ratio to 53.97% consistent with the Hearing Examiner's Recommended Decision; adjusts the 9.1% ROE to 9.56% consistent with the finding and supported by substantial evidence in the record; and retains the PRC's determinations regarding several other rate case issues.[39]

On February 28, 2019, the New Mexico Supreme Court issued an order that, among other things, accepted the Stipulation and dismissed the rate case appeal.

[38] Staff Post-Hearing Brief, p. 4.
[39] New Final Order on Partial Mandate from the New Mexico Supreme Court, Case No. 17-00255 UT, p. 3.

Therefore, this Stipulation settles the issue of the TCJA refund and permits SPS to retain taxes collected under its prior approved rates.

Therefore, based on the opinion in its brief that the outcome of the appeal would have a precedential effect, the Hearing Examiner concludes that Staff accepts the Stipulation in the SPS case as precedential in this matter. As such, Staff should not currently object to the Commission's order that eliminates the retroactive TCJA refund.

IV. DISCUSSION

NMAG and NMIEC have argued that the Commission should order that NMGC refund to customers the savings resulting from the enactment of the TCJA from January 1, 2018 which was the effective date of the TCJA through the implementation of new rates in Phase I of this docket. They argue that the refund is fair because NMGC was on notice that the enactment of the TCJA was an issue, and that the opening of Case No. 18-00016-UT on January 24, 2018 constituted notice of the possibility of a refund because it required each utility to make a filing stating (a) the impact on the utility financial operations caused by the decrease in federal corporate income tax rate; and (b) what the utility proposed to do with the tax rate reduction savings. (18-00016-UT, Order at 3).

There is no question that all parties concur that the differential in tax rates is incorporated in NMCG's going forward rates.

NMGC argues that the situation currently before the Commission differs from the last federal tax change decided by the Commission. An important consideration is that the alleged notice of the Commission in Case No. 18-00016-UT did not actually state that a refund was under consideration. In that docket, utilities were queried as to the calculated amount of the tax differential, and were only specifically asked what they planned to do with the collected amounts. The NMAG and NMIEC argue that the notice of the possibility of refund was implied based upon the Commission issuance and the prior Commission policies.

NMAG argues that the process in the present tax issue has been "virtually identical" with the Commission's prior process in 1986.[40] This is not persuasive. In 1986 the Commission considered the financial condition of each of the effected utilities. Staff, in this case states: "Staff has no reason to believe that NMGC will not under-earn in 2018 based on actual and projected results at this time.[41] In the current cases, Case No. 17-00255-UT and this case, both were found to be under earning. As such, there was additional process, including financial analysis that the Commission requested in 1986. Based upon the fact that there was not any language in Case No. 18-00016-UT that could be construed as notice of a potential refund, the

[40] NMAG Brief, p.16.
[41] Direct Testimony (Phase II) Charles Gunter, p.13.

Hearing Examiner concludes that actual notice of refund cannot be construed from that docket.

In the SPS case, the Hearing Examiner stated that "...refund to customers of the savings resulting from enactment of the TCJA from January 1, 2018 to the effective date of new rates in this case...would depart from the Commission's general rule against retroactive ratemaking and general policy of piecemeal ratemaking."[42] Following the language and reasoning of the Hearing Examiner in that case would also not put any entity on notice of a refund. Notice requires a clear and unequivocal statement, and should not require a party to "construe" any fact.

While the Commission dismissed the Hearing Examiner's finding and ordered a refund to SPS customers, SPS filed a Notice of Appeal and Verified Motion for Partial Stay with the New Mexico Supreme Court regarding the provision of the Final Order requiring the TCJA refund to customers. On September 25, 2018, NMGC filed with the Court its Notice of Joinder in that appeal. On September 26, 2018, the Court issued its order granting SPS's motion for acceptance of notice of appeal, temporarily granting the motion for partial stay. On November 5, 2018, the Court subsequently continued the partial stay until the conclusion of the proceedings or further order of the Court. NMGC was granted leave to file a brief in the SPS appeal on December 24, 2018.

[42] Case3 No. 17-00255-UT Order, p.11.

The grant of an application for stay of an administrative order is an exercise of judicial discretion. *Tenneco Oil Co. v, New. Mexico Water Quality Control Comm'n*, 1986-NMCA-033, ¶ 10, 105 N.M. 708. In determining whether to exercise that discretion to stay an administrative order, courts consider four separate factors: (1) a likelihood that the applicant will prevail on the merits of the appeal; (2) a showing of irreparable harm to the 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. *Id* at 10.

The Court's granting of SPS' motion for partial stay and its subsequent Order on November 5, 2018 suggest that the Court accepted that these factors exist: that irreparable harm would result if the stay were not issued; that no substantial harm would result to other interested persons; that no harm would be done to the public interest by granting the stay; and most importantly, that there is a likelihood that SPS will prevail in the appeal. Staff finds this final factor of particular import in this case.[43]

This analysis is persuasive in determining that the Court found there was no harm to the public interest in granting the stay. NMGC's participation in the appeal indicates that the Company will proceed in the same manner should such a refund be ordered in this case.

[43] Staff Brief, p. 3.

All of the companies affected by this issue have incorporated the change in tax rates going forward. The Hearing Examiner is not persuaded that the Court would treat NMGC differently from SPS should the Commission order a refund in this case. In fact, parties have not argued in testimony or briefs any fact in this case that differs from the facts surrounding the SPS issue.

The most current pronouncement by the Commission itself is not the original Final Order in SPS, but the New Final Order. Therein, the Commission's own settlement with SPS in Joint Motion for Remand and Stipulated Dismissal of SPS's Appeal of the Commission's Order –which stated resolution of SPS's Appeal of Case No. 17-00255-UT (Appeal No. S-1-SC-37248) and the associated appeal of Commission's Order in Case No. 18-00016-UT (Appeal No. S-1-SC-36466)– speaks for itself. The Commission approved the retention of the tax savings accrued by SPS prior to the implementation of new rates. There are no facts that would distinguish this case from SPS.

The record is clear that the notice issued by the Commission did not mention refunds and was, therefore, an information gathering exercise. The recent agreement with SPS permitting retention of taxes collected under previously approved rates, including the testimony of Staff regarding the precedent that is set by the ruling in the SPS appeal. I find and recommend that there be no refund to customers of the

taxes collected since January 2018. The facts and circumstances on the record provide substantial support for this recommendation.

V. FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. NMGC is a public utility as defined by NMSA 1978, § 62-3-3(G) and is subject to the jurisdiction of the Commission pursuant to NMSA 1978, § 62-3-1 *et seq.*

2. The Commission has jurisdiction over the parties to and the subject matter of this case.

3. Reasonable and proper notice of this case has been provided.

4. NMGC entered into a Stipulated Agreement regarding the outcome of its Application for Revisions to its Rates, Rules, and Charges Pursuant to Advice Notice Nos. 70 and 71, having been designated as Phase I in this Case No. 18-00038-UT. The Phase I Certification of Stipulation was separately decided.

5. NMGC and the parties in Phase II entered into a Notice of Agreement of Certain Issues (Phase II) ("Agreement") attached hereto as Exhibit A. Therein, NMGC, Staff, the Attorney General, and NMIEC ("Signatories") agreed that in the event the Commission orders NMGC to issue a refund, a cost of service methodology is acceptable to use to determine the amount of the refund. The Signatories further agreed that the use of a cost of service methodology, which assumes a twelve-month period, results in an agreed-upon amount of $7.833

million. Any additional months shall be calculated in the same manner.

6. The Hearing Examiner concludes that the method for computation of any potential Commission ordered refund is supported by the testimony in the case, and finds that the methodology accurately calculates the refund agreed to by the parties and is accurate accounting of the TCJA rate change.

7. The matter of the propriety of a refund to NMGC customers has been fully litigated. Each party has supported their arguments with their interpretations of the facts and law regarding this issue.

8. The determination of the propriety of a refund, therefore, becomes an issue of policy and precedent for the Commission. As previously detailed, the Commission has recently stipulated with SPS that no retroactive refund to customers of the TCJA savings would be ordered. NMAG's case facts are not dissimilar from those underlying the agreement in SPS.

9. As a policy matter, the Hearing Examiner concurs with Staff's conclusion concerning the SPS case "[t]hat the facts of this case are sufficiently similar that such judicial determination will have a precedential effect."[44]

10. Based on the facts and substantial record evidence in this case, the Hearing Examiner concludes that the Commission settlement of the treatment of TCJA with SPS is precedent in this case.

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[44] Staff Brief, p. 4.

11. Should the Commission decline to apply the precedent of the stipulation in the SPS case, the Commission should consider the arguments of the parties, as previously discussed herein.

12. The Hearing Examiner further concludes that adequate notice to utilities of a possible refund was not given in Case No. 18-00016-UT.

13. The Hearing Examiner concludes that ordering a refund of the TCJA from January 1, 2018 to the date of the establishment of new rates in this case would depart from the Commission's general rule against retroactive ratemaking and general policy against piecemeal ratemaking.

VI. DECRETAL PARAGRAPHS

Based on the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner recommends that the Commission **ORDER** that:

A. The Statement of the Case, Discussion, and all findings of fact and conclusions contained herein are hereby adopted as the findings, conclusions, rulings, and determinations of the Commission.

B. The Commission Orders that a cost of service methodology is acceptable to determine the amount of taxes collected under prior Commission approved rates. The Commission Orders that the cost of service methodology, which assumes a twelve-month period, results in an amount of $7.833 million collected under prior Commission rates.

C. Based upon the substantial evidence in the record and the Commission's stipulated agreement in Appeal of Case No. 17-00255-UT (S-1-SC-37248) and the associated Appeal of Commission's Order of Case No. 18-00016-UT (S-1-SC-36466), the Commission FINDS and Orders that there is substantial identity of issues in the present case. Therefore, the precedent follows that no tax refund be ordered the present case.

D. In accordance with 1.2.2.35.D NMAC, the Commission has taken administrative notice of all Commission orders, rules, decisions, and other relevant materials in all Commission proceedings cited in this Order.

E. NMGC's proposed corrections to the transcript are adopted.

F. Any matter not specifically ruled upon during the hearing or in this Order is disposed of consistent with this Order.

G. Copies of this Order shall be mailed to all persons on the attached Certificate of Service.

H. This Order is effective immediately.

I. This docket is closed.

ISSUED at Santa Fe, New Mexico this April 8, 2019.

NEW MEXICO PUBLIC REGULATION COMMISSION

FRANCES I. SUNDHEIM
HEARING EXAMINER

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE APPLICATION OF NEW MEXICO GAS COMPANY, INC. FOR REVISIONS TO ITS RATES, RULES, AND CHARGES PURSUANT TO ADVICE NOTICE NOS. 70 AND 71.	)	**Case No. 18-00038-UT**
NEW MEXICO GAS COMPANY, INC. APPLICANT	)	

CERTIFICATE OF SERVICE

I CERTIFY that on this day I sent to the individuals listed below, via email only, a true and correct copy of the **PHASE II RECOMMENDED DECISION**.

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DATED on April 8, 2019.

NEW MEXICO PUBLIC REGULATION COMMISSION

Ana C. Kippenbrock

Ana C. Kippenbrock, Law Clerk