BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF SOUTHWESTERN PUBLIC SERVICE COMPANY'S APPLICATION FOR REVISION OF ITS RETAIL RATES UNDER ADVICE NOTICE NO. 256,	)	**CASE NO. 15-00296-UT**
SOUTHWESTERN PUBLIC SERVICE COMPANY,	)	
APPLICANT.	)	

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SOUTHWESTERN PUBLIC SERVICE COMPANY'S RESPONSE TO JOINT MOTION TO DISMISS SPS'S PROPOSED INCREASES TO RATE NO. 59

The New Mexico Public Regulation Commission ("Commission") should deny Vote Solar's and Coalition for Clean Affordable Energy's ("CCAE") Joint Motion to Dismiss Southwestern Public Service Company's Proposed Increases to Rate No. 59 ("Joint Motion") because the Joint Motion: (1) fails to understand Southwestern Public Service Company's ("SPS") direct testimony and documents that make a prima facie case supporting the proposed change in Rate No. 59 ("Rate 59"); and (2) incorrectly argues that SPS failed to provide notice of the proposed change. Because SPS has made a prima facie showing of entitlement to relief that is sufficient to warrant hearing on the merits and has provided notice of the proposed change, the Joint Motion must be denied under New Mexico law and Commission precedent.

Background and Summary of Response

Section 62-13-13.2 of the Public Utility Act ("PUA") governs an electric utility's request to establish and implement a standby rate rider that applies to Distributed Generation ("DG") customers.[1] In accordance with this provision, the Commission has approved Rate 59 in past SPS renewable portfolio standard cases and rate cases, thereby allowing SPS to recover costs associated with generation, transmission, and distribution facilities that are necessary to back-up a customer's DG system. Rate 59 currently applies to kilowatt-hours ("kWh") generated by SPS *as well as* kWh generated by the customer's DG facility. In this case, SPS proposes two changes to the rate approved in SPS's most recent rate case, Case No. 12-00350-UT. First, SPS proposes to reduce the application of the tariff so that the rate applies only to the kWh generated by the customer's DG facility. This is a benefit to customers with DG facilities because they will pay the standby charge on fewer kWh. Second, SPS proposes to increase the standby rate (the per kWh charge) consistent with SPS's proposed overall rate increase and the costs associated with generation, transmission, and distribution facilities to serve New Mexico retail customers. The net effect of these two changes (apply Rate 59 to fewer kWh, but increase the per kWh charge consistent with SPS's increased cost of service), however, will reduce the costs customers will pay under Rate 59 in the future compared to the costs customers are currently paying under the rate approved in SPS's last rate case.

In their Joint Motion, Vote Solar and CCAE do not oppose the first part of SPS's proposed change in Rate 59 (reduce the application of the rate to fewer kWhs).[2] They have, however, moved

[1] Section 62-13-13.2 provides that in "establishing interconnected customer rate riders," the commission shall assure that the costs are not duplicative of costs to be recovered in underlying rates and "shall give due consideration to the reasonably determinable embedded and incremental costs of the utility to serve new interconnected customers" and the reasonably determinable benefits to the utility system provided by interconnected customers.
[2] Joint Motion at ¶ 19.

to dismiss the second part of SPS's proposed change (the increase in the per kWh charge). The Commission should reject Vote Solar and CCAE's attempt to selectively object to only one part of SPS's proposed change in Rate 59. Both changes should be considered as a package. Either both parts of SPS's proposed change should be considered or neither should be considered.

Turning now to the history of Rate 59, SPS applied to establish and implement the rate in Case No. 10-00196-UT, a Renewable Portfolio Standard proceeding.[3] In this regard, SPS proposed to collect from DG customers the transmission, distribution, and production costs associated with its obligation to serve customers regardless of whether the customer's DG facility produced energy on a given day. To determine the amount of costs that would be collected from DG customers, SPS proposed to apply a percentage "unavailability factor" because SPS was only required to "have standby production backup equal to the average percent of time that the particular DG system is unavailable."[4] The unavailability factor was calculated to represent the back-up production that must be maintained to serve load when DG systems are not available.[5] SPS addressed the reasonably determinable benefits of new DG customers to SPS's system and proposed to adjust the amount of costs attributable to DG customers downward by 50% to account for those benefits.[6]

Following a hearing and based on the hearing examiner's recommended approval of Rate 59, the Commission rejected exceptions challenging the establishment and implementation of Rate

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[3] *See* Case No. 10-00196-UT, *In the Matter of Southwestern Public Service Company's Annual Renewable Portfolio Report for 2009 and its Application for Approval of (1) its 2010 Annual Renewable Energy Portfolio Procurement Plan; (2) Request for a Variance from Rule 572.14; and (3) Approval of Associated Tariffs,* Recommended Decision at 26-31 and Decretal ¶ F (Nov. 23, 2010), adopted by Final Order (Dec. 23, 2010).
[4] *See* Case No. 10-00196-UT, Direct Testimony of Donald E. Garretson, at 13.
[5] *Id.*
[6] *Id.* at 18.

59 and adopted the Recommended Decision approving SPS's proposal. In doing so, the Commission expressly determined that the rate met the requirements of Section 62-13-13.2.[7]

In accordance with the requirements of Section 62-13-13.2, Rate 59 was reviewed and approved once again in Case No. 10-00395-UT, SPS's next general rate case following Case No. 10-00196-UT. In Case No. 10-00395-UT, the continuation of Rate 59 was resolved by a stipulation that the Commission approved with its Final Order dated December 28, 2011 adopting the Certification of Stipulation.[8] The Final Order authorized SPS to revise Rate 59 so that it would not apply to customers with a separate demand charge and otherwise continued the methodology that was approved in Case No. 10-00196-UT.[9] The Certification of Stipulation noted that SPS had revised Rate 59 to address a concern raised by then-Commissioner Marks about Rate 59 in Case No. 10-00196-UT.[10]

The Commission considered Rate 59 for a third time in Case No. 12-00350,[11] SPS's next general rate case following Case No. 10-00395-UT. Case No. 12-00350 was fully litigated, and the Commission's Final Order approved SPS's request to increase in Rate 59.[12]

In the present case, SPS seeks to change – not establish – the existing standby rate rider by increasing the rate (the kWh charge) but decreasing the amount of generation to which the rate applies. As discussed below, SPS has filed testimony and other documents that state a prima facie

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[7] *See* Case No. 10-00196-UT, Recommended Decision at 25-31 and Decretal ¶ F (November 23, 2010), Final Order (December 23, 2010).
[8] *See* Case No. 10-00395-UT, *In the Matter of Southwestern Public Service Company's Application for Revision of its Retail Rates Under Advice Notice No. 235,* Certification of Stipulation at 61-62 and Decretal ¶ D (Dec. 12, 2011), Final Order Adopting Certification of Stipulation (Dec. 28, 2011).
[9] *See* Case No. 10-00395-UT, Certification of Stipulation at 61-62 and Decretal ¶¶ C and D (Dec. 12, 2011), Final Order Adopting Certification of Stipulation (Dec. 28, 2011).
[10] *See* Case No. 10-00395-UT, Certification of Stipulation at 61-62.
[11] *See* Case No. 12-00350-UT, *In the Matter of Southwestern Public Service Company's Application for Revision of its Retail Electric Rates Under Advice Notice No. 245*, Final Order Partially Adopting Recommended Decision at Decretal ¶ G (March 26, 2014).
[12] *See* Case No. 12-00350-UT, Final Order Partially Adopting Recommended Decision at Decretal ¶ G (Mar. 26, 2014), Advice Notice No. 245, Second Revised Rate 59 (Mar. 31, 2015).

case in support of its request to increase Rate 59 and has provided notice of the proposed change. The Joint Motion seeks to dismiss SPS's filing, but fails to provide any legitimate basis for such action. As explained in this response, the Joint Motion is legally deficient and therefore should be denied.

Argument

I. SPS has filed testimony and other documents that meet its initial burden of proof with respect to the proposed change to Rate 59.

The Joint Motion improperly seeks to challenge the sufficiency of testimony and documents supporting Rate 59 in SPS's filing prior to hearing on the merits. As discussed below, New Mexico law favors the resolution of disputes on their merits, and SPS's filing states a prima facie case in support of its request to change Rate 59. If Vote Solar and CCAE disagree with SPS's request, that disagreement must be resolved through an evidentiary hearing rather than on a motion to dismiss.

New Mexico law requires that in evaluating a motion to dismiss, all facts asserted in SPS's direct testimony and supporting documents are assumed to be true.[13] Further, a motion to dismiss should be granted only when an applicant, such as SPS, is not entitled to relief under any set of facts provable under the claim.[14] Because it is difficult for a movant (such as Vote Solar and CCAE) to establish that an opposing party (such as SPS) is not entitled to relief under any set of provable facts, motions to dismiss are rarely granted by New Mexico courts.[15] Consequently, New Mexico courts instead favor resolving disputes on their merits.[16]

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[13] *See, e.g. Rio Grande Kennel Club v. City of Albuquerque*, 2008-NMCA-093, ¶ 10, 144 N.M. 636.
[14] *See Las Luminarias v. Isengard,* 1978-NMCA-117, ¶ 3, 92 N.M. 297.
[15] *See id.*
[16] *See, e.g., Romero v. Philip Morris, Inc.*, 2010-NMSC-035, ¶¶ 8-10, 148 N.M. 713 (declining to adopt the more lenient summary judgment standard applied by federal courts); *see also Zamora v. St. Vincent Hospital,* 2014-NMSC-035, ¶¶ 9-11, 355 P.3d 1243 (recognizing that New Mexico courts view summary judgment with disfavor, preferring a trial on the merits.).

The standard for dismissal is equally strict in the regulatory context. In *Municipal Light Boards v. Federal Power Commission*, 450 F.2d 1341 (D.C. Cir. 1971), the court determined that a regulatory commission's authority to reject a utility's filing should be limited to "the clear case of a filing that patently is either deficient in form or a substantive nullity." The New Mexico Supreme Court has endorsed this standard, and the Commission has consistently applied it.[17] The Commission has further recognized that a motion to dismiss tests only the applicable law and not the factual allegations of the pleadings (such as SPS's direct case), which must be taken as true.[18]

In the present case, SPS's Advice Notice, direct testimony, attachments to testimony, and rate filing package schedules state facts that constitute a prima facie case in support of SPS's proposal to change Rate 59. Detailed information regarding the proposed change is provided in the Advice Notice that was filed with SPS's Application.[19] The Advice Notice lists the DG standby rate for each customer class to which the rate applies (Residential, Small General, Irrigation, and Small Municipal and School) and sets out the formula used to calculate the rate.[20] The Advice Notice states that the rate is calculated based on a Production Standby Charge and a Transmission and Distribution Standby Charge, provides the methodology used to derive those charges, and indicates that the proposed charges will be based on customer usage.

The Joint Motion's argument that SPS has failed to provide any testimony to support an increase in Rate 59 is factually and legally unsupported. SPS's filing presents direct testimony to

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[17] *See U.S. West Comm., Inc. v. N.M. State Corp. Comm'n*, 1993-NMSC-074, ¶ 8, 116 N.M. 548; Case No. 13-00231-UT, *In the Matter of the Application of TECO Energy, Inc., New Mexico Gas Co., Inc. and Continental Energy Systems, LLC, for Approval of TECO Energy, Inc.'s Acquisition of New Mexico Gas Intermediate, Inc. and for all Other Approvals and Authorizations Required to Consummate and Implement the Acquisition,* Order Denying Motion to Dismiss at 5 (Feb. 12, 2014); Case No. 12-00019-UT, *In the Matter of the Filing of New Rates by Continental Divide Electric Cooperative, Inc.,* Order Denying Motion to Dismiss at 7 (Dec. 11, 2012).

[18] Case No. 13-00231-UT, Order Denying Motion to Dismiss at p. 5 (Feb. 12, 2014).

[19] *See* Advice Notice No. 256 at Fourth Revised Rate No. 59 Canceling Third Rate No. 59 (Oct. 19, 2015).

[20] *See* Advice Notice No. 256 at Fourth Revised Rate No. 59 Canceling Third Rate No. 59 at sections entitled, "Applicability," "Rate," and "Definitions."

support the proposed change. Numerous SPS witnesses discuss the increasing costs of providing production, transmission, and distribution capacity service to SPS's customers and explain that these expenses are reasonable and necessary: e.g., SPS witness Brad E. Baldridge discusses the costs of distribution infrastructure capital additions; Kenneth R. Munsell addresses the costs of transmission infrastructure capital additions; and Alan J. Davidson discusses production plant capital costs.[21] SPS witness Evan D. Evans generally describes SPS's increasing costs, including costs associated with production, transmission, and distribution infrastructure and supports SPS's request to recover those costs from customers.[22] SPS witness Ian C. Fetters then summarizes these costs by customer class in Attachment ICF-2 to his testimony.[23] As the Commission determined in Case No. 10-00196-UT, DG customers should bear an appropriate share of these costs because they are connected to SPS's system and take service from SPS to the extent power generated by their DG facilities is insufficient.[24]

The Joint Motion also ignores the direct testimony of SPS witness Richard M. Luth, which specifically addresses the proposed change to Rate 59 to reduce the application of the rate to fewer kWhs.[25] On page 46 of Mr. Luth's testimony, at Table RML-2, he states that SPS proposes to revise Rate 59, the Distributed Generation Standby Service Rider, by limiting the application of the charge to customer usage provided by customer generation rather than to all customer usage.

The Joint Motion further disregards the attachments filed with Mr. Luth's testimony that provide detailed information supporting SPS's proposal to revise Rate 59. Attachment RML-4 lists the production capacity charge for the standby rate,[26] and Attachment RML-7 provides the present

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[21] *See* Case No. 15-00296, Direct Testimony of Brad E. Baldridge (Oct. 16, 2015); Direct Testimony of Kenneth R. Munsell (Oct. 16, 2015); Direct Testimony of Alan J. Davidson (Oct. 16, 2015).
[22] *See* Case No. 15-00296, Direct Testimony of Evan D. Evans at 12-13 (Oct. 16, 2015).
[23] *See* Case No. 15-00296, Direct Testimony of Ian C. Fetters at Attachment ICF-2 (Oct. 16, 2015).
[24] *See* Case No. 10-00196-UT, Recommended Decision at 25-31 (Nov. 23, 2010).
[25] *See* Case No. 15-00296, Direct Testimony of Richard M. Luth at 46 (Oct. 16, 2015).
[26] *See* Case No. 15-00296, Direct Testimony of Richard M. Luth at Attachment RML-4 (Oct. 16, 2015).

versus proposed rate comparison for the standby rate that applies to the Residential, Small General Service, and Small Municipal and Schools rate classes.[27] The workpaper "Fixed Cost per kWh" included in Attachment RML-8 sets out the standby rate calculation for each customer class to which the rate applies. These attachments are part of Mr. Luth's testimony that was filed with the Commission, were served on the parties to this case, and provide detailed information that supports SPS's proposal to revise Rate 59.

Although the Joint Motion concedes that SPS's rate filing package schedules provide information regarding the standby rate, Vote Solar and CCAE contend that Schedules O-2 and O-3 should be ignored because they failed to specifically list the "DG Standby Service Rider."[28] Under Rule 530, Schedule O-2 must contain "a proof of revenue by rate class utilizing the proposed rate schedules," and Schedule O-3 must provide "a comparison of the rates for each rate class." Rule 17.9.530.14(O) NMAC. On Schedule O-2, SPS provides a revenue analysis broken out by rate, including the standby rate as it applies to various rate classes.[29] Schedule O-3 provides a rate comparison that separately lists the dollar amount and percentage change for the DG standby rate that applies to the Residential, Small General Service, and Small Municipal and School rate classes.[30] Thus, SPS showed the standby rate on Schedules O-2 and O-3. Neither Section 62-13-13.2 nor Rule 530 requires a utility to use the nomenclature "DG Standby Service Rider" when presenting a standby rate on rate filing package schedules. No one has been misled or deprived of information. Vote Solar's and CCAE's complaint elevates form over substance. The Joint

[27] *See* Case No. 15-00296, Direct Testimony of Richard M. Luth at Attachment RML-7 (Oct. 16, 2015).
[28] *See* Joint Motion at ¶ 12.
[29] Case No. 15-00296-UT, SPS Rate Filing Package Schedule O-2, lines 13-16, 26-29, 118-120 (Oct. 16, 2015).
[30] Case No. 15-00296-UT, SPS Rate Filing Package Schedule O-3 at lines 18-20, 31-33, and 125-127 (Oct. 16, 2015).

Motion's argument that the standby rate information provided on SPS's Schedules O-2 and O-3 is deficient is unsupported and lacks merit.

The Commission should deny the Joint Motion's argument that SPS has failed to state a prima facie case to support its proposed change in Rate 59. By arguing that SPS has failed to meet its burden of proof in establishing that Rate 59 is just and reasonable under Section 62-8-7 of the PUA, the Joint Motion erroneously relies on the standard for review that applies to evidence presented at the evidentiary hearing rather than the standard that applies in evaluating a motion to dismiss.[31] As discussed above, it is only after the hearing that the Commission may determine whether SPS has met its burden of proof. Through its advice notice, testimony, attachments to testimony, and rate filing package schedules, SPS has established its prima facie case and met its initial burden of going forward with respect to the revision of Rate 59 and that warrants a hearing on the merits in accordance with New Mexico law and Commission precedent. The Joint Motion's argument that the Commission should dismiss Rate 59 prior to the hearing lacks merit and should be rejected.

II. SPS's filing complied with the Commission's notice requirements.

The Joint Motion incorrectly claims that SPS has failed to provide notice of its proposal to change Rate 59 as required by Commission Rule 17.1.2.10(B) and (C) NMAC. Specifically, the Joint Motion contends that SPS failed to file a statement comparing the present and proposed rates, provide the number of customers in each rate class, and provide the average bill impacts.[32] This

[31] The Joint Motion's reliance on Case Nos. 2361 and 1440 in support of its burden of proof argument is misplaced. Case No. 2361 involved cost recovery in a "unique case" that was "in no way comparable to a general rate case," and Case No. 1440 addressed whether the utility met its burden of proof at the evidentiary hearing—not prior to hearing. *See* Case No. 2361, *In the Matter of the Application of Gas Company of New Mexico for Authority to Collect Certain Costs Through a Cost Rider*, Recommended Decision to Dismiss Proceeding at 35-36 (Sept. 30, 1991); Case No. 1440, *In the Matter of the Application of Gas Company of New Mexico for an Adjustment of its Rate Schedules for Natural Gas Service*, Order on Cost of Capital and Revenue Requirements (Dec. 29, 1978).

[32] *See* Joint Motion at ¶¶ 9-11.

argument is predicated on the erroneous assumption that Rate 59 customers constitute a separate "rate class" and ignores the Notice and associated information SPS has provided regarding its filing.

Rule 17.1.2.10(C) requires a utility to provide notice of a proposed rate change that includes: the amount of the proposed change; the customer classes to which the rate change will apply; and the present rates and the proposed rates for each customer class to which the proposed rates would apply.[33] As discussed above and as demonstrated by Advice Notice No. 256, the attachments to Mr. Luth's testimony, and Rate Filing Package Schedules O-2 and O-3, DG customers subject to Rate 59 do not constitute a separate rate class. Rather, they are members of the Residential, Small General Service, Small Municipal and Schools, and Irrigation customer classes. The Notice in this case, which the Commission approved and issued, set out the proposed changes in rates for each of these classes, by percentage and dollar amount, along with the average bill impact.[34] Neither Section 62-13-13.2 nor Rule 17.1.2.10 supports the Joint Motion's argument that SPS was required to provide this information separately for DG customers who are subject to Rate 59.

The Joint Motion also disregards the information SPS provided with its filing. As discussed above, SPS's advice notice, testimony, attachments, and rate filing package schedules were filed with the Commission and provide the specific information regarding the application of Rate 59 that the Joint Motion claims is absent from SPS's filing. The Joint Motion's notice argument ignores the content of SPS's filing and should be rejected.

The Joint Motion's notice argument is further undercut by the focus on only one part of the change SPS proposes to make to Rate 59. The Joint Motion does not object to SPS's proposed

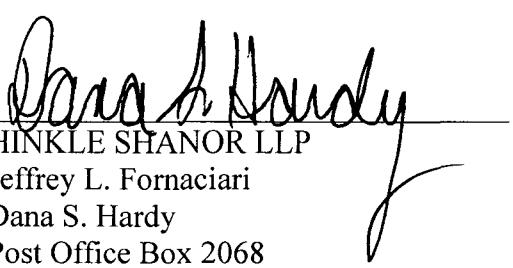
[33] Rule 17.1.2.10(C)(2)(a) through (c) NMAC.
[34] *See* Case No. 15-00296-UT, Notice of Proceeding and Hearing, attached to Procedural Order (Nov. 23, 2015).

change in the application of Rate 59 to fewer kWhs, so somehow the notice is sufficient for that part of the proposed change. If the notice is sufficient for the first part of SPS's proposed change in Rate 59 (apply the rate to fewer kWh), as the Joint Motion appears to concede, then the notice is sufficient for the second part of the proposed change (increase the per kWh charge). Conversely, if the notice is insufficient for the change in the kWh charge, then it must be insufficient for the proposed change to apply the kWh charge to fewer kWh.

Conclusion

The Joint Motion disregards the Commission's prior review and approval of Rate 59 in Case Nos. 10-00196-UT, 10-00395-UT, and 12-00350-UT and ignores the information included in SPS's filing. That information, considered in its entirety, establishes that SPS has stated a prima facie case of entitlement to relief that warrants a hearing on the merits. CCAE and Vote Solar's opposition to SPS's request to revise Rate 59 should be considered at the hearing and not on summary dismissal. The Joint Motion should be denied.

Respectfully submitted,

By: 

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of *Southwestern Public Service Company's Response to Joint Motion to Dismiss SPS's Proposed Increases to Rate No. 59* was electronically served and sent via Federal Express or hand-delivery, as indicated below, to each of the following on this 21st day of March, 2016:

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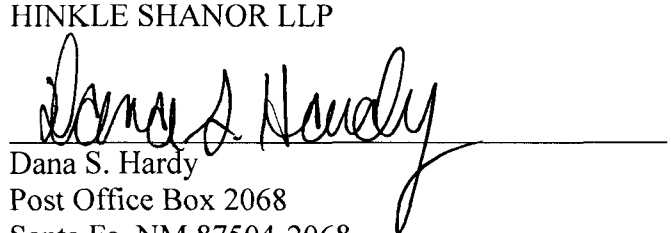

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