BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE FILING OF ADVICE NOTICE NO. 69 BY SOCORRO ELECTRIC COOPERATIVE, INC.	))))	**Case No. 18-00383-UT**
SOCORRO ELECTRIC COOPERATIVE, INC., APPLICANT	))	

CITY OF SOCORRO'S AND NEW MEXICO INSTITUTE OF MINING AND TECHNOLOGY'S JOINT VERIFIED RESPONSE TO INITIAL ORDER ON REMAND

COME NOW Intervenors City of Socorro ("the City") and New Mexico Institute of Mining and Technology ("Tech"), by and through their respective counsel, Stelzner, Winter, Warburton, Flores & Dawes, P.A., and Rodey, Dickason, Sloan, Akin & Robb, P.A., and hereby respond to the Commission's Initial Order on Remand, filed February 10, 2022. In response to the Commission's direct questions regarding Socorro Electric Cooperative, Inc.'s ("SEC") continued refusal to comply with the duly issued Commission Order Granting the City, NM Tech, and Staff's Joint Motion to Compel SEC to Comply with the Final Order and Order Assessing Fines for Non-Compliance (the "Compliance Order"), filed April 15, 2020, for deliberately failing to implement the Final Order in this case, the City and Tech state as follows:

Commission Question 1. Do you support or oppose the Final Order and state reasons?

1. The City and Tech support the relief granted in the Final Order. This case has already gone through the processes of application, protest, discovery, hearing, briefing, recommended decision, exceptions, Final Order, appeal, requests for a stay (denied by the Commission), and full briefing to the Supreme Court, where the parties now await final resolution. The end result was new just and reasonable rates for SEC's customers.

2. In response to statements made by the Commission seemingly supportive of alternative dispute resolution ("ADR") and a possible negotiation among parties, the City notes

that that suggestion does not reflect the current status of this proceeding. While ADR could have been an option at an earlier stage in this proceeding, the parties and the Commission have already expended hundreds of hours of time and effort in litigating this matter. Any reopening or any Commission-sponsored ADR of the Final Order may be outside the scope of the Supreme Court's limited order regarding the remand of the Compliance Order. Further, any reopening would only encourage SEC and perhaps other companies to believe that a Commission "Final Order" is not in fact a Final Order. Regardless, SEC had its chance to prove up its rate case – something they failed to do. Simply put, the City and Tech have no interest in relitigating a fully supported Final Order that is now squarely on appeal.

3. Additionally, this dispute is now no longer between SEC and the intervenors, it is between the Commission and SEC, with the intervenors included as interested parties. The Commission is obligated to ensure that SEC provides service at just and reasonable rates. NMSA 1978, § 62-3-1(B) (2008). The Final Order in Case No. 18-00383-UT met this obligation, yet SEC has refused to implement a duly issued Commission Order.

Commission Question 2. Do you support or oppose the compliance Order, and state reasons?

4. The City and Tech support the intent of the Compliance Order and most of the order's provisions for a number of reasons, including those stated by the Commission in the Compliance Order. Compliance Order at ¶¶ 15-20. SEC is blatantly ignoring Commission authority and instead has unilaterally decided to charge its captive customers whatever it desires, regardless of the just or reasonableness, or the quality of service. The City and Tech fought hard to protect the interests of their constituents and municipal corporate interests, and prevailed - SEC has wrongly denied the City and Tech and their constituents the benefits of that decision since September, 2019.

5. A core tenet of regulatory practice is that a public utility consents to regulation. This principle was recognized over a century ago in the landmark opinion in *Munn v. Illinois,* 94 U.S. 113 (1877). "Under the powers inherent in every sovereignty, a government may regulate the conduct of its citizens toward each other, and, when necessary for the public good, the manner in which each shall use his own property" and this has been customary since *"time immemorial"*. *Id.* SEC has continually flouted this long-established principle by refusing to comply with duly issued Commission Orders, displaying contempt for both the Commission and its own customers, and damaging its customers in the process by denying them the benefits of the Final Order.

Commission Questions 3. Is SEC intending to comply with the Final Order, and if so, when, and if not, why not?

6. It is clear from SEC's conduct that it does not believe it is subject to regulation, violating core tenets of cost-of-service regulation in the process. SEC has so indicated its reasons in its briefs in chief in the Supreme Court.

7. SEC will likely tout this remand on the Compliance Order as an indication that the Supreme Court ruled on more than just this limited issue. However, the City and Tech caution the Commission not to read too much into the Court's order. Given current backlogs of business in New Mexico's appellate courts, and the 18-month time lag between the filing of the City and Tech's unopposed motion to intervene on appeal and the Supreme Court's recent order granting that motion, *compare* Case No. S-1-SC-38302 Motion to Intervene, filed May 27, 2020 *with* Order Granting Intervention, filed December 14, 2021; *see also* Case No. S-1-SC-37320[1] (opinion issued on February 9, 2022 in appeal dated October 17, 2018), this case is likely well over a year from

[1] *Resolute Wind 1 LLC v. N.M. Pub. Regul. Comm'n*, Slip Opinion no._____, S-1-SC-37320.

any final disposition. And, no intervenor opposed the Supreme Court's very limited remand of the Compliance Order in this regard.

8. It is most likely that the Court recognized that SEC has allowed the Commission-imposed penalty to balloon to an astronomical amount, now over $866,000.[2] The City and Tech informed the Court at that time of their willingness to negotiate certain aspects of the Compliance Order, but they emphasized that SEC should not be allowed to continue rejecting the Commission's authority to enforce the Final Order.[3] The City and Tech have consistently maintained their position that SEC must implement the Final Order.

9. It is undisputed law that under NMSA 1978, § 62-11-6 (1983), the Final Order remains in full force while the Supreme Court considers an appeal. Compliance Order at ¶ 15. The Commission's Final Order is valid, and enforceable. No stay has been granted and SEC is openly and notoriously violating the Final Order. The Commission found as much, stating that "it is clear that SEC's failure to comply Final Order is contrary to established law that without a stay granted from the Supreme Court, '[t]he pendency of an appeal shall not of itself stay or suspend the operation of the order of the commission.' NMSA 1978, § 62-11-6." *Id.* at ¶ 16.

Commission Question 4. Are your positions identical to that stated in your Briefs filed in S-1-SC 38302 and S-1-SC 37948 and if not, what position is changed and in what manner;

10. The City and Tech's position has not changed since this matter has been fully briefed in the Supreme Court.

[2] $1,000 a day from 30 days after the Final Order pursuant to the methodology in the unanimous Compliance Order.
[3] *See* the positions stated in the Joint Motion of the Socorro Electric Cooperative, Inc. and the New Mexico Public Regulation Commission to Temporarily Stay Emergency Writ, Temporarily Stay Appeal of Compliance Order and Remand in Case No. S-1-SC-38302 at ¶14 filed May 29, 2020, granted January 26, 2022.

Commission Question 5. What rates have been charged by SEC and/or paid by Tech and the City since the date of the Final Order?

11. The City is unaware of any changes in SEC's rates. Contrary to the Commission's Final Order the City is currently paying expensive HPS rates for LED lights that it installed at its own cost, and continues to be denied the benefits of an LED lighting rate that was ordered by this Commission. *See* attached Affidavit of Polo Pineda. Meanwhile, Tech continues to pay the Large Commercial-class rates that the Final Order would have reduced. And SEC has made no apparent effort to explore the economic development rate that the Commission directed it to consider implementing.

Commission Question 6. Is SEC currently in compliance with the Final Order; and if not, reasons?

12. No, and it is apparent that SEC simply does not believe it is subject to the Commission's authority - despite the fact that it subjected itself to this Commission's jurisdiction and sought this Commission's express approval to increase rates. Only after the Commission rejected that increase did SEC challenge the Commission's regulatory authority. SEC continues to openly and blatantly disregard the Commission, to its own customers' detriment. Further, SEC has directly lied to its customers about its intent to comply with the Commission's Final Order[4] and never addressed why it deliberately chose to mislead and misinform its customers. SEC's disrespect for the Commission and its customers is beyond the pale and will continue so long as the Commission allows such behavior to continue.

13. This is not the first instance that SEC demonstrated disregard and contempt for its own members. In 2010, SEC sued all of its members, seeking declaratory judgment that SEC was

[4] *See* City of Socorro, New Mexico Tech, and Staff's Joint Motion to Direct Attorney General to Commence Mandamus Proceeding at p. 2, Exhibits A and B.

exempt from the New Mexico Open Meetings Act and Inspection of Public Records Act after membership voted on rule changes that directed SEC to voluntarily comply with both acts.[5] SEC confusingly stated that "[t]he Board of Trustees cannot meet its burden and responsibility to conduct the business and affairs of the SEC in the best interest of its members when it is required to open access to its books, records, audits to members without the reservation of right to determine if such access would be harmful to the SEC and its members."[6] The District Court quickly dispelled these claims noting that SEC "by legitimate act of its members has chosen to voluntarily be subject to the Open Meetings Act … and the State Inspection of Public Records Act" and granted prevailing parties attorney's fees.[7]

Commission Question 7. Should the Compliance Order be revised and/or withdrawn?

14. The Compliance Order should not be withdrawn. As the Supreme Court has reminded the Commission, "the Commission is [not] devoid of means to prevent a public utility from undermining its authority." *State ex rel. Egolf v. N.M. Pub. Regulation Comm'n*, 2020-NMSC-018, ¶ 28, 476 P.3d 396. To the contrary, the Public Utility Act "explicitly provides the Commission with a process to prevent violation of Commission orders." *Id.* In pertinent part, the statute declares:

> Whenever the commission shall be of the opinion that any person or utility is failing or omitting … to do anything required of it … by any order of the commission, … it may direct the attorney general of New Mexico to commence an action or proceeding in the district court in and for the county of Santa Fe, or in the district court of the county in which the complaint or controversy arose, in the name of the state of New Mexico for the purpose of having such violations stopped and prevented … by mandamus ….

[5] *See SEC v. Charlene West et. al.* Thirteenth Judicial District Court, Case No. D-1314-CV-2010-00849, Complaint at ¶¶ 3, 18-21, filed June 29, 2010.
[6] *Id.* at ¶ 38.
[7] *SEC v. Charlene West et. al*, Order Awarding Attorneys' Fees, at ¶¶ 2-3, filed Nov. 8, 2011.

NMSA 1978, § 62-12-1 (1941). That the Commission is "of the opinion that [Socorro Electric] is failing or omitting … to do [something] required of it … by an[] order of the commission," *id.*, is plain; the Commission entered an order to that effect now years ago, *see* Compliance Order at pp. 5-8, and nothing has changed in the interim save for the progressive erosion of respect for the Commission's authority in the face of Socorro Electric's open and notorious contempt for it. Under these circumstances, "[t]he course of action to enforce [the Final Order] is clear," *State ex rel. Egolf*, 2020-NMSC-018, ¶ 29: the Commission should enlist the Attorney General's assistance.

Commission Question 6 [sic]. What revisions should be made to the Compliance Order?

15. There should be no modifications to the Compliance Order that do not result in SEC's immediate compliance with the Final Order, retroactive to the date of the Final Order.

16. However, because SEC has indicated that no amount of monetary penalty will result in SEC recognizing the Commission's authority, SEC should be required to track and account for all decreases that would have resulted from the new rates and be ordered to issue refunds to the date of the Final Order. SEC should also immediately implement the LED lighting rates and credit any customers with qualifying LED lighting that was wrongfully charged. And SEC should be ordered, again, to investigate the possibility of establishing an economic development rate. Lastly, some penalty imposed on SEC's board is absolutely warranted. All of this tracking should be subject to verification by a third party at SEC's expense and not recoverable in rates.

17. The City and Tech recognize that one aspect of the Compliance Order – SEC's self-inflicted personal sanctions of over $800,000 – are likely to strike the Supreme Court as excessive. But, allowing a utility or intervening appellant to completely ignore orders and assert self-imposed stays of Commission orders, essentially granting automatic stays of all cases pending appeal,

would send the wrong signal to regulated entities or more litigious intervenors who would wish to stymie any company actions. It would allow any intervenor to abuse the appeals process and grind all operations to a halt.

18. Bearing the cost of the rate reductions without the benefit of any rate increases would be an acceptable penalty for SEC's intransigence. Disgorgement of these overages would not be "retroactive ratemaking" because it does not change the outcome of a lawful rate; it eliminates the unjust enrichment from an unlawful rate. *See El Paso Elec. Co.*, 105 F.E.R.C. ¶ 61,131 at P 35 (2003) (requiring the refund of time value of revenues received from transmission service provided in violation of the filed rate doctrine, because the utility had failed to file the agreements at FERC; disgorgement was not a retroactive rate change but an "appropriate and proportionate remedy" for violation of the Act). While the Public Utility Act does not explicitly allow disgorgement of profits, a penalty of this amount would surely be within the confines of authorized penalties pursuant to NMSA, § 62-12-4 (1993).

19. We also note that this failure to consent to regulation and provide reliable service at just and reasonable rates may be grounds to revoke SEC's operating authority. Utilities have lost their operating franchise authorities for:

a. Having an "'abysmal' history of violating legal and environmental requirements" and a "history of making and breaking promises to regulatory agencies". *Bd. of Pub. Utils. v. Valley Rd. Sewerage Co. (in Re Valley Rd. Sewerage Co.)*, 154 N.J. 224, 238, 712 A.2d 653 (1998) (upholding Board's decision); and

b. Failing to resolve numerous customer-service complaints, where the failure "could not be attributed to lack of operating funds but rather to the philosophy and ability of the present management and, therefore, customer difficulties with service would persist as long as the present management was associated with the Company."

Redfield Tel. Co. v. Ark. Pub. Serv. Comm'n, 621 S.W.2d 470, 471-72 (Ark. 1981) (upholding Commission's finding that public necessity required revocation of certificate to serve, or transfer of the plant and certificate to an "able third party").

Commission Question 8. Have the parties been in negotiations since the Compliance Order?

20. The City and Tech have not engaged in any rate-related negotiations with SEC. However, the City and SEC recently settled litigation related to the right-of-way franchise granted by the City to SEC. Via such settlement, the City has granted SEC authority to occupy public right-of-way until no later than 2024. Each count of SEC's complaint was ultimately dismissed. See, *the Socorro Electric Cooperative, Inc., v. City of Socorro*, Seventh Judicial District, Case No. D-725-CV-2019-00234.

Commission Question 9. If so, what areas of agreement and/or disagreement remain amongst the parties?

21. SEC feels that it is immune from regulation. The City and Tech disagree and note the Constitutional obligations placed on the Commission to regulate public utilities. N.M. Const. Art. XI, Sec. 2.

22. SEC continues to force its customers to purchase expensive services that do not meet customer needs. SEC has failed to implement LED street lighting rates or economic development rates, services that SEC's customers have consistently requested.

Commission Question 10. What proposed resolution of the matter is desired to be able to file a stipulated joint motion of dismissal of all New Mexico Supreme Court appeals; and

23. The City and Tech would not object to SEC implementing the Final Order and withdrawing its appeals.

24. See response to question 6 [sic], above. SEC must immediately implement the Commission's Final Order. Further, SEC's intransigence certainly warrants some penalty to dissuade any future non-compliance.

Commission Question 11. SEC shall submit its audited financial statements for 2019, 2020 and 2021.

25. With respect to this request and the City and Tech's proposed remedy to have SEC track all revenue decreases and issue refunds to the date of the Final Order in 18-00383-UT, the City and Tech request that Commission staff conduct the accounting of back refunds, or, that SEC retain a third-party consultant to perform the required audit. Any such third-party consultant cannot have been retained by SEC or another cooperative (distribution or generation) in the past, and the associated costs should be borne by SEC and not recoverable in rates.

WHEREFORE, for the foregoing reasons, the City and Tech request that SEC be required to comply with the Final Order in 18-00383-UT and assessed a penalty commensurate with its continued, intentional violations of the Public Utility Act, retroactively to the date of the Final Order, and any other relief the Commission deems just and reasonable.

Respectfully submitted,

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BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE FILING OF ADVICE NOTICE NO. 69 BY SOCORRO ELECTRIC COOPERATIVE, INC.	)	**Case No. 18-00383-UT**
SOCORRO ELECTRIC COOPERATIVE, INC., APPLICANT	)	

AFFIDAVIT OF LEOPOLDO "POLO" PINEDA

I, Leopoldo "Polo" Pineda, having first been duly sworn upon oath, depose and state as follows:

1. I am an adult over the age of eighteen (18) years, and the matters in this affidavit are made on my own personal knowledge.

2. My office is located at 111 School of Mines Road, Socorro, New Mexico 87801.

3. I currently serve as the City Clerk, Chief Procurement Officer, and Information Technology Director of the City of Socorro, New Mexico.

4. The New Mexico Department of Transportation (NMDOT) agreed to supply the City of Socorro with Light-emitting diode (LED) lights to replace all the High Pressure Sodium Lights (HPS) on interstate light poles and all median light poles.

5. At the City's expense, the City replaced the north end 1-25 entrance and exit, California Street median lights, and U.S. Highway 60 West median lights.

6. To date, the City of Socorro has replaced 96 HPS lights with LEDs.

7. Socorro Electric Cooperative Inc. (SEC) is currently charging us for those lights the same rate that they would charge for HPS lights in their filed Rate 5. Seventy-five (75) of which are charged at the 250 watt HPS light rate ($15.50 per fixture, per month) and twenty-one (21) lights at the 400 watt HPS light rate ($24.25 per fixture, per month).

8. Below is a summary of the 18-00383-UT Recommended Decision's changes to SEC's streetlight rate. RD at Exhibit 3.

Existing Light Type	Existing Rate (per fixture, per month)	LED Equiv.	New RD LED Rates (per fixture, per month)
250 W HPS	$15.50	115W	$13.44

STL			
400 W HPS STL	$25.49	199W	$16.38

9. Rate 5 also assumes that SEC owns and leases the lights to the City and includes that cost in the rates. However, we are currently working to get our lights metered so that we only pay for the energy used.

10. We still have additional lights from NMDOT, but we decided to delay installation until we get an LED rate from SEC, because we will not see those savings otherwise.

FURTHER AFFIANT SAYETH NAUGHT.

STATE OF NEW MEXICO
NOTARY PUBLIC
LENA A. CHAVEZ
COMMISSION NUMBER 1098353
EXPIRATION DATE 02-05-2025

Leopoldo Pineda
LEOPOLDO "POLO" PINEDA

STATE OF NEW MEXICO)
) ss.
COUNTY OF SOCORRO)

Subscribed and sworn to before me this 23rd day of February, 2022, by Leopoldo "Polo" Pineda.

Lena A. Chavez
NOTARY PUBLIC

My Commission Expires:

02/05/2025

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SOCORRO ELECTRIC COOPERATIVE, INC.,	)	**Case No. 18-00383-UT**
Applicant.	)	

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the **City of Socorro's and New Mexico Institute of Mining and Technology's Joint Verified Response to Initial Order on Remand** was served via email on February 23, 2022, to the following persons listed below:

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DATED this 23rd day of February, 2022.

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