

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

**IN THE MATTER OF THE PETITION OF)
PUBLIC SERVICE COMPANY OF NEW MEXICO)
FOR A REVISION TO ITS RATES, RULES, AND)
CHARGES PURSUANT TO ADVICE NOTICE)
NOS. 755 AND 756)
)
PUBLIC SERVICE COMPANY OF NEW MEXICO,)
)
Petitioner.)
_____)**

Case No. 06-00210-UT

**INITIAL BRIEF

OF

COMMUNITY ACTION
NEW MEXICO**

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Table of Authorities

Court cases

Blum v. Fisher and Fisher, 961 F.Supp. 1218 (N.D. Ill. 1997).

In *Bebchick v. Public Utilities Commission*, 318 F.2d 187 (D.C. Cir. 1963), cert. denied, 373 U.S. 913 (1963).

Consumers Lobby Against Monopolies v. PUC, 25 Cal.3d 891 (1979).

Dutton v. Walhar, 809 F.Supp. 1130 (D. Del. 1992).

In Re. Fisher, 29 Bankr. 542, 545 (Bankr. Kan. 1983).

Fuller v. Becker and Poliakoff, 192 F.Supp.2d 1361 (M.D. Fla.2002).

Heuser v. Johnson, 189 F.Supp. 1250 (D. N.M. 2001).

Market Street Railway v. Railroad Commission, 171 P.2d 875, 881 (Cal. 1946), cert. denied, 329 U.S. 793 (1946).

New Memorial Associates v. Credit Gen. Ins. Corp., 973 F.Supp. 1027 (D. NM 1997).

Person v. Stupar, Schuster and Cooper, 136 F.Supp.2d 957 (D. Wis. 2001).

Russey v. Rankin, 911 F.Supp. 1449 (D. N.M. 1995).

Romero v. Bank of the Southwest, 135 N.M. 1, 83 P.3d 288 (N.M. App. 2003).

Schimmel v. Slaughter, 975 F.Supp. 1357 (M.D. Fla. 1997).

Stern v. U.S. Sprint, Stipulation and Plan of Settlement at 6, Stern v. U.S. Sprint, No. CA000933 (L.A. Super. Ct. filed Feb. 12, 1988).

Taylor v. United Management, Inc., 51 F.Supp. 1212 (D. N.M. 1999).

United States v. Exxon Corp., 561 F.Supp. 816 (D. D.C. 1983), aff'd, 773 F.2d 1240 (T.E.C.A. 1985), cert. denied, 474 U.S. 1105 (1986), reh'g denied, 474 U.S. 1112 (1988).

Veach v. Sheets, 316 F.3d 690 (7th Cir. 2003).

Administrative Agency Decisions

In re the Application of Pacific Bell, No. 87-12-067 (Dec. 22, 1987) (Application 85-01-034; I.85-03-078; OII84; C.86-11-028).

State Statutes

NMSA 1978, Section 27-6-12
NMSA 1978, Section 27-6-13
NMSA 1978, Section 27-6-14
NMSA 1978, Section 27-6-17
NMSA 1978, Section 27-6-18
NMSA 1978, Section 57-12-2(C)
NMSA 1978, Section 57-12-2(D)
NMSA 1978, Section 57-12-3
NMSA 1978, Section 62-12-4

Federal Statutes

15 U.S.C. § 1692e(5)
26 U.S.C. § 6621(a)(2)
42 U.S.C. § 8623(d).
42 U.S.C. § 8624(b)(1)
42 U.S.C. § 8624(b)(2)(A)
42 U.S.C. § 8624(b)(2)(B)
42 U.S.C. § 8624(b)(9)
42 U.S.C. § 8624(b)(10)
42 U.S.C. § 8624(c)
42 U.S.C. § 8624(d)

Administrative Regulations

§17.5.410.6 NMAC
§17.5.410.31(A), NMAC

PNM Tariff

Tariff 11 [7th Revised], Para. 10

Other

S.Gale Dick. "Fluid Recovery: Flexible Ways to Settle Cases," 13 Alternatives to High Cost Litigation 73, 82 (1995).

Federal Reserve Board (FRB) Statistical Release G.19 (December 7, 2006).

Gail Hillebrand and Daniel Torrence, "Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits," 28 Santa Clara Law Review 747, 766 (1988).

National Consumer Law Center, *Access to Utility Service (3d ed)*, at §11.2.1, **THE CONSUMER CREDIT AND SALES LEGAL PRACTICE SERIES**, National Consumer Law Center: Boston (MA).

National Consumer Law Center, *Unfair and Deceptive Acts and Practices (6th ed.)*, at §§5.1.1.1.4 and 5.1.1.1.5, **THE CONSUMER CREDIT AND SALES LEGAL PRACTICE SERIES**, National Consumer Law Center: Boston (MA).

2 Newberg and Conte, *Newberg on Class Actions*, section 10.17 at 10-44, 10-45.

Note, "Collecting Overcharges from the Oil Companies: The Department of Energy's Restitutionary Obligation," 32 Stanford L.Rev. 1039 (1980).

U.S. Department of Agriculture, *Food Stamp Program: Average Monthly Participation (Households) (January 25, 2007)*. (Attached).

U.S. Federal Reserve Board, *Statistical Release G.19 (December 7, 2006)*. (Attached).

Introduction

This Brief is filed on behalf of Community Action New Mexico (CANM). CANM is a statewide association of eight Community Action agencies throughout the state of New Mexico. CANM works on poverty-related issues, including housing, education, homelessness prevention, and the unaffordability of home energy service. CANM has been active before the Commission on issues ranging from consumer protections to the pursuit of energy efficiency. CANM has also previously appeared before the New Mexico Public Regulation Commission (PRC or Commission) with respect to the Afton Generating Plant.

CANM appears in this natural gas rate case on behalf of itself and the low-income residential constituency which it serves. In this Initial Brief, CANM presents its analysis and argument relating to five specific issues raised in this Public Service Company of New Mexico (PNM or Company) natural gas rate case:

- CANM's proposal for the PRC to disapprove the late fee which PNM imposes on residential customers;
- CANM's documentation of the Company's failure to provide mandatory notice of consumer rights and remedies to disconnection prior to the disconnection of service during the winter shutoff moratorium;
- CANM's documentation of the Company's knowing issuance of false and deceptive notices of disconnection for nonpayment during the winter moratorium;
- CANM's documentation of the Company's unreasonable and unlawful refusal to fully and appropriately implement the statutory winter shutoff moratorium; and
- CANM's opposition to the Company's proposal to decouple rates and usage.

Each of these issues is discussed in detail below.

Position of CANM

ISSUE #1: RESIDENTIAL LATE FEE.

CANM proposes that PNM's residential late fee be eliminated in its entirety. In the alternative, but not in derogation of this recommendation, should the Commission choose not to eliminate the residential late fee, CANM proposes that the Commission:

- a. Limit the Company's late fee to a percentage equal to the Internal Revenue Service's statutory interest rate imposed by the Internal Revenue Service for delinquent taxes. 26 U.S.C. §6621(a)(2) (2006); and

- b. Require that the late payment fee not be imposed until an account is past due 60-days; and
- c. Establish a minimum arrears of \$200 at which to impose a late payment fee; and
- d. Exempt low-income customers from payment of a late payment fee, “low-income” to be defined as meeting the qualifications of the Low-Income Home Energy Assistance Program (LIHEAP); and
- e. Exempt not merely arrears subject to approved deferred payment plans from payment of the late payment fee, but also any arrears subject to non-collection attributable to any regulatory process or regulation (e.g., medical certificates).

ISSUE #2: WINTER SHUTOFFS WITHOUT NOTICE OF CONSUMER RIGHTS.

CANM recommends that the Commission direct PNM:

- To include with every shutoff notice issued during the moratorium period a clear and conspicuous notice that the customer may be exempt from shutoff if the customer meets the qualifications of LIHEAP, including being certified eligible for LIHEAP during the current or immediately preceding two program years by the state (or by a tribal authority), or having one or more members of the household receiving benefits through TANF, Food Stamps, SSI or the designated means-tested veteran’s benefit programs;
- To reconnect all customers unlawfully disconnected during the 2005/2006 winter heating season, and thus far in the 2006/2007 winter heating season, without cost.

In addition, the Commission should order restitutionary relief and impose sanctions as identified below.

ISSUE #3A: FALSE AND DECEPTIVE THREAT OF SHUTOFF.

CANM recommends that the Commission direct PNM to refrain from issuing a shutoff notice saying that service “will” result in a shutoff if payment is not made by a date-certain unless shutoffs are effected in all cases; from saying that nonpayment “may” result in a shutoff if payment is not made by a date certain unless a shutoff is the ordinary response to nonpayment; and from threatening that if payment is not made immediately or in a specified number of days, a shutoff will be initiated, if the determination to take that action at that time has not been made at the time of the notice.

In addition, the Commission should order restitutionary relief and impose sanctions as identified below.

ISSUE #3B: FALSE AND DECEPTIVE THREAT OF ADDITIONAL FEES AND CHARGES.

CANM recommends that the Commission direct PNM to refrain from issuing a shutoff notice saying that nonpayment by a date certain service “will” result in the disconnection of service along with the imposition of reconnect charges and a security deposit if payment is not made by a date-certain unless shutoffs are effected (and additional fees and charges are added) in all cases; from saying that nonpayment “may” result in a shutoff along with the imposition of additional charges if payment is not made by a date certain unless a shutoff is the ordinary response to nonpayment; and from threatening that if payment is not made immediately or in a specified number of days, a shutoff will be initiated (and additional fees and charges will be imposed), if the determination to take that action at that time has not been made at the time of the notice.

In addition, the Commission should order restitutionary relief and impose sanctions as identified below.

ISSUE #4: IMPLEMENTATION OF WINTER SHUTOFF MORATORIUM.

CANM recommends that the Commission direct PNM to extend the winter shutoff moratorium protections to all customers that meet the qualifications of LIHEAP, not merely those customers that are LIHEAP-approved by HSD.

More specifically, the Commission should direct PNM to extend the winter shutoff moratorium protections to all those customers who the qualifications of LIHEAP, including being certified eligible for LIHEAP during the current or immediately preceding two program years by the state (or by a tribal authority), or any household that documents to the Company that it is categorically eligible for LIHEAP, by statute, by having one or more members of the household receiving benefits through TANF, Food Stamps, SSI or statutorily-designated means-tested veteran’s benefit programs.

In addition, the Commission should order restitutionary relief and impose sanctions as identified below.

ISSUE #5: DECOUPLING OF USAGE AND RATES:

CANM recommends the disapproval of the Company’s proposed Rate Rider 16.

APPROPRIATE RESTITUTIONARY RELIEF AND SANCTIONS FOR ISSUES 2, 3 (A AND B) AND 4.

The Commission should impose sanctions on PNM for its violation of New Mexico statutes and PRC regulations. The violations meriting sanctions include:

- The failure to provide clear and conspicuous notice of consumer protections, including the right to be exempt from disconnection under the winter moratorium, whether or not the customer was ultimately disconnected;¹
- The actual disconnection of service to Company customers without providing adequate pre-shutoff notice during the winter moratorium period;²
- The knowing issuance of false and deceptive shutoff notices to customers threatening the disconnection of service if payment was not received in a Company office by a date certain, when the Company knew those customers were protected from service disconnection by the winter shutoff moratorium; and
- The knowing issuance of false and deceptive shutoff notices to customers threatening the imposition of additional fees if payment was not received in a Company office by a date certain, when the Company knew those customers were protected from service disconnection by the winter shutoff moratorium and that, accordingly, no additional fees could or would be imposed.

CANM recommends that, for violations in the 2005/2006 heating season, the Commission impose the minimum statutory penalty per violation for issuance of the unfair and deceptive shutoff notices during the winter moratorium period. By law, each deceptive statement is a separate violation under the statute. Since each shutoff notice contained two distinct false and deceptive statements, PNM would be liable for sanctions equal to the minimum damages of \$200 for each of its 84,359 shutoff notices. The number of December shutoff notices would need to be added to this figure.

The Company is further liable for separate sanctions for each unlawful service disconnection during the 2005/2006 winter shutoff moratorium. The total number of disconnections performed during the moratorium period reached 7,894. Since the Company did not report its December 2005 disconnections, the number of December 2005 disconnects would need to be added to this figure. Because of PNM's willful violation of state statute and Commission regulation, each unlawful shutoff performed without notice of consumer rights being provided should generate a sanction of \$300.

Similar sanctions should be imposed for all disconnections performed and disconnect notices issued during the 2006/2007 winter heating season. CANM requests that rather than setting sanctions at the minimum levels indicated by reference to the state Unfair Trade Practices Act, the following sanctions should be imposed for PNM's unlawful 2006/2007 activities:

¹ The violation in this instance is the failure to provide notice. This failure merits sanctions whether or not the customer was subsequently disconnected for nonpayment. The harm arises from the failure to receive notice of the customer's rights under the moratorium.

² Since all winter disconnections were unlawful in the 2005/2006 winter heating season due to insufficient notice, it is not necessary to impose separate sanctions for the unlawful disconnection of customers protected by the winter moratorium. Without the insufficient notice, however, separate sanctions would be warranted for each disconnection that occurred without a determination of whether that customer was protected by the moratorium. The violation, in other words, would not be the disconnection of a protected customer, but rather the disconnection of a customer without a determination of whether that customer was protected by the moratorium.

Month	Unlawful Shutoff Notice	Unlawful Disconnection
January 2007	\$250	\$375
February 2007	\$300	\$450
March 2007	\$350	\$525

Argument

ISSUE #1: THE RESIDENTIAL LATE FEE IMPOSED BY PUBLIC SERVICE COMPANY OF NEW MEXICO SHOULD BE DISAPPROVED.

Public Service Company of New Mexico imposes a late payment charge of 1.5% a month (18% a year) on arrearages over 30-days old. (Tariff 11 [7th Revised], Para. 10). Community Action New Mexico urges that this late fee should be disapproved. CANM has demonstrated that:

- The late fee is not a cost-based fee;
- The late fee serves no function as an incentive for residential customers to pay their bills in a timely fashion; and
- The late fee is counterproductive in promoting prompt payment when applied to the bills of low-income customers.

The PNM Late Charge is not a Cost-Based Fee through which to Assign Costs to those Customers who Cause the Costs to be Incurred.

PNM does not offer the late payment charge as a cost-based mechanism through which to collect expenses caused by late payment. When asked to provide the “most recent cost justification. . .of the current residential late payment fee imposed by Public Service Company of New Mexico,” the Company responded: “the late payment fee is not strictly a cost-based rate.” (CANM Exh. 1, at 8). The Company subsequently acknowledged, again, that its late payment charge is not considered to be a cost-based charge through which to collect the costs caused by nonpayment. “Late payment fees were determined to be “not cost based” in the Final Order in NMPRC Case No. 2147.” (CANM Exh. 1, at 8).

Even though the Company concedes that its late fee is not cost-based (PNM Exh. 26, at 31), Company witness Fernald argues broadly that “if the Commission follows Mr. Colton’s recommendation . . . the Commission would be asking good paying customers to subsidize poor paying customers.” (PNM Exh. 26, at 34). There is simply no basis for this argument. Despite the conclusory statement by Company witness Fernald, the overwhelming *evidence* in this proceeding is that the Company does not incur costs as a result of late payment.

There is no Causal Connection Between Late Payment and Any Costs that the Company Collects through its Late Payment Charge.

Late payment does not cause the Company to incur credit and collection costs. There can be no other conclusion based on the evidence in this proceeding. As CANM established:

In order for a charge to be cost-based, there must not only be an expense allocated to the charge, but there must be some causal relationship that exists between the customer on whom the charge is imposed and the identified expense. With the

Company's late charges, there is no causal relationship between any collection expense and the customers on whom the late charge is imposed. There is no causal relationship between the late payment of utility bills and any expenses that the Company devotes to collection activity.

(CANM Exh. 1, at 14).

To support the late fee, PNM would need not only to identify certain costs allocated to late payment, but also would need to establish a line of causation between those costs and the customers on whom the fee is imposed. Fernald asserts this necessary element to justify the Company's late payment fee, but only in broad, unsupported, conclusory terms. He states without evidentiary support: "Without the late payment charge, customers would have an incentive to not pay their bills on time, *causing PNM to incur the costs related to collections and disconnections.*" (PNM Exh. 26, at 31) (emphasis added). Fernald argues only in the broadest conclusory terms that "by deterring customers from paying late, the late payment charge helps to control costs: costs of collection, costs of disconnection and costs of financing working capital." (PNM Exh. 26, at 31).

There is absolutely no evidence to *support* Fernald's assertion that "the late payment charge helps to control costs." As CANM established, "the staffing level for personnel performing collections activities does not depend on the level of collections in which the Company engages. The Company does not increase its collections staff during periods of peak collections nor does it decrease its collections staff during valleys." (CANM Exh. 1, at 14).

The lack of any causal connection between the level of Company expenses and the level of collection activity is illustrated by the PNM experience beginning in 2004/2005. CANM established that PNM experienced a substantial decline in collections activities from 2004 to 2005 (and beyond) due to a change in the "account selection criteria for collections." (CANM Exh. 1, at 14 – 15). When asked to "provide an explanation and detailed description of the adjustment in staff levels made to reflect the decreased number of collection activities," the Company responded that "no adjustment in staffing levels occurred." (CANM Exh. 1, at 15). These collections staff were not reassigned, they simply performed their "regular functions," which did not involve collections. "There were no changes in staffing duties. Employees involved in collections continues (*sic*) to perform their regular functions." (CANM Exh. 1, at 15).

The Company acknowledges that it does not have a *collections* staff, but rather a *customer service* staff. Accordingly, the level of collections activity does not drive its customer service expenses. Nonpaying customers no more "cause" the Company to incur its customer service expenses than do customers who call with bill inquiries, customers who call in order to enter into budget billing plans, or other customers who call with the innumerable customer service issues that face a public utility such as PNM.

Nor is there any evidence that the customers on whom a late fee is imposed cause the Company to engage in any collection activity or to incur any collection costs. Late fees are imposed before the Company begins any collection action. Late fees are imposed on customers against whom no

collection activity has been directed. After examining the PNM collection process, CANM found that “while the late payment charge is imposed on all arrears that are 30-days old or older, there are no collection costs incurred by the Company for arrears that are between 31-days old and 60-days old. . . . Clearly, the Company does not begin collection actions on the day after a bill becomes delinquent (*i.e.*, on Day 31 after the billing date). In such a case, imposition of a late fee imposes a charge when no costs have yet been incurred.” (CANM Exh. 1, at 12).

Finally, Mr. Fernald argues that the late fee is needed to prevent the Company from incurring working capital expenses. If the late fee is removed, he argues, “it is likely to result in customers paying later than they would have.” (PNM Exh. 26, at 33). Mr. Fernald offers no evidence in support of this statement. Nor can he conceivably have a basis for this conclusory assertion. Late fees are imposed at day 31. Yet more than 90% of the payments that are delinquent at Day 30 are paid before Day 60. The Company, however, cannot say that these late payments come in on Day 32 or on Day 59. “The Company does not track the rate at which it translates billings into revenue. (CANM-1-4; CANM-1-30; CANM-2-2). Accordingly, it has no basis to conclude that the late payment charge is needed to collect working capital.” (CANM Exh. 1, at 17). Indeed, in the Company response to CANM-2-2 cited in Colton’s testimony (CANM Exh. 1, at 17), the Company confirmed in response to a “Request for Admissions” that “PNM has not within the past 48 months “analyzed” or created a “report” concerning or involving the rate at which residential billings are collected.”

There is no Internal Company Effort to Associate its Collection Activities with its Customer Service Costs.

The costs that PNM assigns to its late payment charge represent generalized customer service costs that are unrelated to collection activities. Outside of Mr. Fernald’s conclusory assertions in this rate case, not even the Company makes an effort to associate its customer service expenses with collection activities. The expenses and staffing levels that are budgeted by PNM do not take into consideration the level of collection activity. There is no separate budget developed for collection activities. The Company concedes that “PNM does not have a detailed budget report that separately identifies collection related activities.” Indeed, “no financial reporting that includes collection information is provided at the department or functional unit level.” (CANM Exh.1, at 13).

The reason for this is clear. Contrary to Mr. Fernald’s conclusory statement,³ the Company’s customer service staff levels and customer services expenses are independent of collection activities. Neither staff levels nor expenses increase when collection activities go up; they do not decrease when collection activities go down. (CANM Exh. 1, at 15).

There is no Matching of the Company’s Collection Expenses and Late Payment Charge Revenue, Resulting in Low-Income Customers in Particular Double-Paying the Costs of Nonpayment.

³ Mr. Fernald asserts that “Mr. Colton ignores the fact that costs are increased. . . as a result of increased late payments. He also ignores the fact that those costs will have to eventually be borne by PNM’s other customers.” (PNM Exh. 26, at 34). CANM does not “ignore” this “fact” at all. As explained in detail above, and in Mr. Colton’s testimony, CANM denies this to be a “fact.”

Even if one assumes, solely for the sake of argument,⁴ that nonpayment by residential customers causes the Company to incur certain credit and collection costs, the Company does not allocate its costs and revenues to ensure that the revenue collected through its late fee is used to pay only for those expenses. Instead, the Company merely uses its late fee revenue as a miscellaneous revenue and deducts it from the overall revenue deficiency in the rate case. (PNM Exh. TGS-2, page 8 of 8, line 335). As a result, customers on whom a late charge is imposed pay *twice* for the costs of nonpayment, once through the late fee and again through their normal rates. The customers who end up double-paying these costs are predominantly low-income customers, those customers least able to afford such a double charge.

There can be no question but that there is no matching between the revenues actually paid by the residential class—and disproportionately paid by low-income customers—and either the revenues or expenses addressed in the Company’s cost of service study. Consider, for example, that in 2006 to date, the residential class has paid \$677,168 in late payment charges out of the total late payment fee revenue of \$813,411. The residential class, in other words, paid 83% of the total late fee revenue in 2006. The Company’s cost of service study for the test year, however, allocates \$792,254 of the total \$1,052,678 to the residential class, roughly 75%. (CANM Exh. 1, at 18). Part of the late fee revenue paid by residential customers, in other words, does not even get allocated to the residential customer class in this rate case.

So, too, is there a mismatch between late charge revenues and any working capital costs associated with late payment. The late payment charge imposed by PNM is 1.5% a month. It is imposed on Day 31 if there is an unpaid balance. If a customer is charged a late payment charge on Day 31, however, but pays his or her bill on Day 35, that customer has been charged for a full month of working capital even though he or she imposed only five days of working capital expense on the Company. (CANM Exh. 1, at 17). The “extra” \$53,000 a month is then allocated to *all* customers by using it as a deduction in calculating the *overall* revenue deficiency for this rate case.

The over-collection of late charges by PNM is dramatic. On average, while PNM sales customers had \$3.2 million in arrears in the 31-day bucket, that arrears had decreased to \$844,000 for the 61-day bucket. With a late payment charge of 1.5% per month, therefore, the Company is receiving nearly \$60,000 a month in late payment charges while incurring less than \$7,000 in working capital expenses. (CANM Exh. 1, at 17).

As can be seen, the PNM late fee is not a fee used to prevent “good paying customers from subsidiz[ing] poor paying customers” as argued by Company witness Fernald. (PNM Exh. 26, at 24). In fact, exactly the opposite is true. Through the PNM late fee, customers who pay late pay a substantial and continuing subsidy to good-paying customers. Indeed, the Company’s allocation of late fee revenue results in a subsidy payment from residential to non-residential customers. The source of this reverse subsidy is disproportionately low-income customers.

The PNM Late Charge is neither Necessary nor Effective as a Mechanism through which to Incentivize Customers to Make Prompt Payments.

⁴ CANM does *not* accept this assumption, but discusses it solely for the sake of analysis.

The Company asserts in defense of its late fee that the charge is both necessary and appropriate as a means to incentivize customers to make prompt payments. According to Company witness Fernald, “PNM believes that the late payment charge is very important in making sure that customers consider paying their utility bills a high priority. Without the late payment charge, customers would have an incentive to not pay their bills on time. . .” (PNM Exh. 26, at 31). Elsewhere, Company witness Fernald again argues in broad conclusive terms that “by deterring customers from paying late, the late payment charge helps to control costs. . .” (PNM Exh. 26, at 31). The Company argues that “PNM’s late payment charge is based on two rate design principals: deterrent and competition. The late payment charge needs to be set at a sufficiently high level to be a deterrent to late payment. . .”⁵

While it may very well be true that “PNM *believes* that the late payment charge is very important in making sure that customers consider paying their utility bills a high priority,” such a “belief” unsupported by evidence of any nature cannot serve as the basis for a decision supported by “substantial evidence” in the record.

The problem with the PNM testimony is that there is absolutely no evidence to support its “belief” that a late payment charge “deter(s) customers from paying late.”⁶ Nor is there any evidence that without a late fee, customers would have an incentive not to pay their bills on time. Nor is there any evidence to support the conclusion that the late charge serves as a “deterrent to late payment.” The Company has no information either using its own data or using data from any other utility that a late payment charge is an effective incentive to pay for residential utility customers. When asked to provide such data from its own customer base, PNM responded that “PNM is unaware of any such study in its custody.” (CANM Exh. 1, at 8 – 9).⁷

It is true that in reaching a negotiated settlement in NMPRC Case 2307, the parties stipulated that the Company’s late fee would no longer be considered “experimental.” (CANM Exh. 1, at 5; PNM Exh. 26, at 30). As with any stipulation, however, in recognition of the fact that such stipulations constitute negotiated agreements, that stipulation explicitly provided that “the provisions contained in this Stipulation are effective only for this proceeding, and shall not have precedential effect or be binding upon the Stipulating Parties or Staff in any other proceeding except as specifically set forth herein.” (Case No. 2307, Cost of Service Stipulation, at para. 14, June 20, 1990). That Stipulation did not establish the effectiveness of a late payment charge as a

⁵ The Company’s argument as to “competition” is addressed below.

⁶ Fernald seemingly seeks to bolster his argument through repetition rather than through documentation. He argues that “PNM *believes* that 1.5% is an appropriate rate to serve as a deterrent without being exorbitant.” (PNM Exh. 26, at 31). Fernald argues that “a cost-based rate could be developed based on PNM’s cost of borrowing, but it would not be high enough to be a deterrent.” (PNM Exh. 26, at 31). Despite this stated “belief,” and the conclusory statement about how high a rate needs to be in order to be a “deterrent,” PNM could provide *no evidence whatsoever*, either using data from itself or from any other utility, that a late fee serves as a deterrent to nonpayment at all, let alone that 1.5% is either necessary or “an appropriate rate.”

⁷ PNM seeks to avoid the need to document its conclusion by arguing that “While PNM does not have any PNM specific evidence to support this, late payment charges are a common practice in the industry and have been approved in many regulatory jurisdictions.” (PNM Exh. 26, at 32). The fact is, however, that PNM not only does not have any PNM specific evidence, it also has no evidence from *any other* company to support its late fee. The Company was explicitly asked to “provide all such studies performed using data for utilities other than the Company.” The Company responded: “PNM is unaware of any such study in its custody.” (CANM Exh. 1, at 9).

deterrent to late payment. Instead, by its very terms “this Stipulation reflects settlement discussions. . .” (Id., at para. 15). CANM presented the excerpt from the Order approving the Stipulation, along with the excerpted testimony referenced in that Order in this proceeding. (CANM Exh. 2).⁸ No testimony was presented in Case No. 2307 supporting a conclusion that the PNM late fee was either necessary or effective as a deterrent to late payment. As CANM witness Colton testified, given the fact that Case 2307 involved a settlement, “no indication was given [in the Stipulation] as to what was traded off in negotiations in order to allow the late payment charge to continue.” (CANM Exh. 1, at 5). The existence of trade-offs in settling cases, however, is precisely why stipulations provide, by their very terms, that they “. . .are effective only for this proceeding, and shall not have precedential effect or be binding upon the Stipulating Parties or Staff in any other proceeding. . .” (Case No. 2307, Cost of Service Stipulation, at para. 14, pages 6 – 7).

The Company refuses to come to grips with the implications of its testimony that its late fee is necessary as a deterrent to late payment. CANM cites overwhelming evidence that late payment fees are not only ineffective in promoting late payment by low-income customers, but are counterproductive. As CANM witness Colton testified:

overwhelming information supports the conclusion that responding to low-income payment troubles by *increasing* the bill through a charge such as a late payment charge will not only be ineffective in promoting prompt payment, but will indeed exacerbate rather than alleviate nonpayment.

(CANM Exh. 1, at 9).

Much of the research that has been done to support this conclusion was performed by Colton, himself. He cited study after study with data documenting that increasing the bills of customers who are in payment-trouble will be counterproductive in generating full and timely payment. Data from New Jersey, Missouri, Pennsylvania and Washington State all supported that conclusion. In addition, Congressionally-funded national studies of low-income customers supported this conclusion. (CANM Exh. 1, at 9 - 11).⁹ As Colton concluded, “In contrast to the lack of any information supporting the conclusion that late payment charges are an effective incentive for customers to pay, there is considerable data supporting the conclusion that late payment charges are an impediment rather than an incentive to prompt payments” for low-income customers in particular. (CANM Exh. 1, at 10).

Finally, if the PNM late fee is intended to serve as a deterrent to nonpayment, the imposition of late fees in certain circumstances makes no sense, since it cannot serve that deterrent function. As CANM witness Colton testified, “PNM reports that the only circumstances that prevent the

⁸ This language, and the cited testimony, is precisely what Fernald relies upon in his rebuttal testimony. (Compare CANM Exh. 2 to PNM Exh. 26, at 30, lines 7 – 11).

⁹ In contrast to Colton’s citation of numerous studies, the sum and substance of Mr. Fernald’s testimony is as follows: “While PNM does not have any PNM specific evidence to support this, late payment charges are a common practice in the industry and have been approved in many regulatory jurisdictions.” (PNM Exh. 26, at 31 – 32). This assertion is made despite the concession by PNM that it not only has no data of its own, but it has no data from *any other utility either* supporting the conclusion that a late fee is an effective deterrent to nonpayment. (CANM Exh. 1, at 9).

imposition of a late payment fee on a residential account in arrears involve cases in which there is a billing dispute.” (CANM Exh. 1, at 18 - 19). However, Colton continued:

for payment plan customers, the late fee serves no incentive function. The customer has already made arrangements to pay their bills. Finally, for customers providing medical and financial certificates, the late fee can serve no incentive function since the customer has established an inability to pay as a pre-condition to the certificate. In each of these cases, the late fee serves no [incentive] function.

(CANM Exh. 1, at 19).

The PNM Late Charge is neither Necessary nor Effective as a Mechanism through which to Make PNM Bill Payment “Competitive” with Credit Card Bills.

The final rationale offered by PNM as a justification for its late payment charge was newly introduced in the rebuttal testimony of John Fernald. According to Fernald “PNM’s late payment charge is based on two rate design principles, deterrent and competition.” (PNM Exh. 26, at 31). This notion of the late payment charge being justified by “competition” should be rejected as a desperate *post hoc* effort to develop a justification for a late charge that cannot be justified on any other basis. The notion of competition was certainly not used to support the PNM late payment charge in Case No. 2307, the stipulation on which PNM said it “relies” in support of its late charge. (PNM Exh. 26, at 30; CANM Exh. 2).¹⁰ Indeed, CANM Exhibit 2 quotes CANM data request 2-69 as asking for:

- c. The “data on which to base the level of the charge” as presented to the Commission.
- d. The data “on which to base any claims as to the effectiveness of the late payment program.”

The Company provided an obscure response indicating that the “data on which to base the level of the charge” was to be found in “the 630 schedules, testimony and exhibits filed in NMPRC Case No. 2307.” The Company provided an even more obscure response indicating that the “data on which to base any claims as to the effectiveness of the late payment program” was to be found in “the Testimony and Exhibits filed in Case No. 2307.” (CANM Exh. 2). As CANM witness Colton noted, however, a review of “the 630 schedules, testimony and exhibits,” along with a review of “the Testimony and Exhibits filed in Case No. 2307” revealed that the *totality* of evidence presented in support of the late payment charge aspect of the stipulation involved the following two exchanges:

¹⁰ PNM states quite explicitly that “PNM relies on the Stipulation, paragraph 9, page 5, in Case 2307 where the parties determined that the late payment charge shall be continued and no longer be considered experimental.” (PNM Exh. 26, at 30). CANM Exhibit 2 provides a copy of the Stipulation, of the pages of the Recommended Decision that discuss the Stipulation (pages 23 and 24), and of the hearing transcript pages cited by the Recommended Decision as being the basis for approving the Stipulation. At no point in that material was “competition” cited as a basis for the late charge.

Q. Now, if I recall from 2147, one of the positions was that a late payment charge could prompt people to pay on time and that you would see less people in arrears. Has the Company taken a look to see if that, indeed, did happen once the late payment charge was put into effect?

A. I'm not sure whether we did or not. Really that wasn't the Company's position. . . You would think that a 1-and-a-half percent charge on an unpaid bill would be a deterrent, but I'm not sure we did a study on that.

and

Q. Do you look at the late payment charge as a method of prompting payment or a method for recouping Gas Company's expenses related to late payment, such as the expense of mailing notices and collecting these amounts?

A. Well, it does both. I think primarily, in our view, it's a payment prompter, though it does also recover costs associated with that.

(CANM Exh. 1, at 4 – 5; CANM Exh. 2). As can be seen, the only “data” on which to base the level of the charge, as well as the only “data” on which to base any conclusion as to the effectiveness of the late charge as a non-payment deterrent, was a statement that “you would think that a 1-and-a-half percent charge on an unpaid bill would be a deterrent, but I'm not sure we did a study on that.” (CANM Exh. 2).¹¹ What “you would think . . . but I'm not sure we did a study on that” can hardly serve as substantial evidence in support of the Company's late payment charge. Not once, however, was the notion that the late fee was imposed to allow the Company to “compete” with credit card interest rates discussed, or introduced, or in any way relied upon.

The fact that the Company did not rely on this notion of “competition” before Mr. Fernald prepared his rebuttal testimony is clear from the record. CANM explicitly asked in discovery for all “data on which to base the level of the charge.” (CANM Exh. 2, at CANM-2-69). CANM further asked for all data on which to base any claims of the effectiveness of the late payment program. (CANM Exh. 2, at CANM-2-69). No data was provided on “competing” interest rates. No data was provided on the percentage of CANM customers having competing debts. No data was provided showing any relationship between PNM late charges and interest on other customer debts. No data was provided showing the extent to which consumers would pay other bills before a PNM bill in the absence of a PNM late fee. There is no information whatsoever to document the need for PNM's late charge on the grounds of “competition.” Indeed, the whole notion of a late charge needing to be set at a charge “competitive” with other interest rates was not documented, nor mentioned, nor even alluded to in any PNM discovery response regarding a justification for the Company's late fee.

¹¹ In fact, it is possible to conclude that the Company did *not* do such a study since CANM asked for all studies based on Company customers and PNM said that it could produce no such study. (CANM Exh. 2).

Perhaps the reason why no such data is referenced is because no such data exists to support Mr. Fernald's testimony. Credit card interest rates as reported by the Federal Reserve Board (FRB) Statistical Release G.19,¹² as most recently released on December 7, 2006, would indicate that the PNM late fee should now be reduced to no more than 13%. The credit card interest rates for the past four quarters have been as follows:

- November 2005: 12.58%
- February 2006: 13.30%
- May 2006: 13.16%
- August 2006: 13.06%

(FRB Statistical Release G.19, December 7, 2006).

Indeed, as FRB Release G.19 documents, it has been 4½ years since credit card interest rates have exceeded 13.5%. It has been more than 5½ years since credit card interest rates have exceeded 15%. It has been more than 11 years since credit card interest rates have exceeded 16%.

In reality, the whole notion that the 18% PNM late payment charge was selected so as to be “competitive” with credit card interest rates is a justification invented by Mr. Fernald for this proceeding (and *late* in this proceeding at that, having not been introduced in response to any discovery about the justification for the PNM late fee, but rather introduced only in Mr. Fernald's rebuttal). That justification had no basis in 1990. It has no basis today. It should be rejected.

Summary and Requested Relief.

The PNM late payment fee for residential bills should be disallowed. By the Company's own admission, the late payment charge is not a cost-based charge. Moreover, the charge is imposed on customers who do not have any causal connection to the costs being collected. The only data in the record supports the conclusion that the PNM late payment charge is not only ineffective as a deterrent to late payment, but also that it is *counterproductive* in serving as a deterrent. Finally, the notion that a late payment charge of 18% per year is necessary to be “competitive” with credit card interest rates is not only a newly invented rationale for the late charge, but it is a rationale that has no basis in fact.

While continuation of the late fee was stipulated to in Case 2307, that Stipulation, by its own express terms, provided that it was to be “effective only for this proceeding, and shall not have precedential effect or be binding upon the Stipulating Parties or Staff in any other proceeding . . .” (Case. 2307, Cost of Service Stipulation, at para. `4, pages 6 – 7). That Stipulation is not only not *binding*, but is not to be used for any “precedential effect.”

¹² CANM requests the Commission to take administrative notice of Federal Reserve Statistical Release G.19 released December 7, 2006. As a government publication, the Commission may take administrative notice of Statistical Release G.19. NM ADC, §17.1.2.37(D)(1)(a). A request for administrative notice made be made at any time in the proceeding.

In the alternative, and not in derogation of the action recommended immediately above, should the PRC decide not to disapprove the PNM late payment charge in its entirety, the PRC should:

- require that the late payment fee not be imposed until an account is past due 60-days; and
- establish a minimum arrears of \$200 at which to impose a late payment fee; and
- exempt low-income customers from payment of a late payment fee, “low-income” to be defined as meeting the qualifications of the Low-Income Home Energy Assistance Program (LIHEAP); and
- exempt not merely arrears subject to approved deferred payment plans from payment of the late payment fee, but also any arrears subject to non-collection attributable to any regulatory process or regulation (e.g., medical certificates); and
- index the late fee to a published interest rate used for nonpayment deterrent purposes.

If PNM’s late payment charge *is* designed to create an inducement to pay, it should be capped at a level equal to the interest rate imposed by the Internal Revenue Service for delinquent taxes. 26 U.S.C. § 6621(a)(2) (2006). This IRS rate is the only readily ascertainable rate that exists whose purpose is to serve this “inducement” function. As the courts have noted in calculating this IRS interest rate: “the (tax collector) has determined that its rate of interest must be high enough to deter tax evasion, restrict creative tax avoidance and compel timely payments.” *In Re. Fisher*, 29 Bankr. 542, 545 (Bankr. Kan. 1983).

THE FAILURE OF PUBLIC SERVICE COMPANY OF NEW MEXICO TO COMPLY WITH THE NEW MEXICO WINTER SHUTOFF MORATORIUM SHOULD BE DISAPPROVED AND SANCTIONS SHOULD BE IMPOSED.

Community Action New Mexico has challenged the reasonableness, and lawfulness, of the manner in which PNM has implemented New Mexico’s statutory winter shutoff moratorium. CANM has documented that:

- PNM failed to provide pre-termination notice of the right to be exempt from disconnection for nonpayment under prescribed circumstances;
- PNM knowingly sent false and deceptive notices threatening the disconnection of service for nonpayment during the moratorium period to customers the Company knew to be protected from shutoff by the moratorium;
- PNM knowingly sent false and deceptive notices threatening to impose additional fees on customer accounts during the winter months if payment was not made by a date certain, even though the Company knew those accounts to be protected from

shutoff by the moratorium and that no such additional fees would, or could, be imposed;

- PNM refused to extend the protections of the shutoff moratorium to customers other than those who had applied for and been approved to receive LIHEAP financial assistance in the current federal fiscal year.

Based on these documented unreasonable and unlawful actions of the Company, CANM seeks a Commission order:

- Directing the Company to immediately halt its unlawful actions;
- Directing the Company to fully and lawfully extend the protections of the statutory winter shutoff moratorium;
- Directing the Company to refund all fees imposed as a result of its unlawful actions; and
- Imposing sanctions for the Company's unlawful actions.

Each of the above statements and conclusions will be discussed in more detail below.

Issue #2: The Failure of Public Service Company of New Mexico to Provide Pre-Termination Notice of the Protections of the Winter Shutoff Moratorium is Unlawful.

In 2005, the New Mexico legislature enacted a law mandating that between November 15 and March 15 of each winter heating season, public utilities refrain from disconnecting service for nonpayment to customers that meet the qualifications for the Low-Income Home Energy Assistance Program. The statute (NMSA 1978, § 27-6-18) provides in relevant part: "A utility company shall not discontinue or disconnect service to a residential customer for any billing cycle from November 15 through March 15 for nonpayment if the customer meets the qualifications for the low income home energy assistance program."

Despite the clear creation of a new consumer protection to be available to New Mexico utility customers, Public Service Company of New Mexico chose *not* to provide notice of this shutoff protection before disconnecting service to residential customers during the winter moratorium months. There is no dispute that PNM failed to provide customers pre-termination notice of their right to be exempt from the shutoff of service during the moratorium months should they meet the qualifications of LIHEAP. Company witness Edgington had the following exchange in his rebuttal testimony:

- Q. Mr. Colton's testimony. . . asserts that PNM violated the moratorium because it failed to inform customers about their rights under the moratorium. Does the moratorium statute impose that requirement?
- A. Not as I understand the statute. . .

(PNM Exh. 22, at 9 – 10).

The argument by PNM that it “didn’t know” that it was required to provide notice to customers of the protections of the winter moratorium is untenable. Commission regulations clearly mandate the following:

At least fifteen (15) days before a utility discontinues service to a residential customer, the utility shall provide written notice to the customer stating its intent to discontinue service *and setting forth the customer’s rights regarding discontinuance of service. . .*

17.5.410.31(A), NMAC (2006) (emphasis added). One of these “customer’s rights regarding discontinuance of service” must clearly be the right to be exempt from disconnection for nonpayment during the winter months in the event that the customer meets the qualifications of LIHEAP.

PNM fails to provide customers notice of their right to be exempt from winter utility shutoffs for nonpayment should those customers meet the qualifications of LIHEAP.¹³ When asked to “explain and describe all changes made in the written notices of service termination for nonpayment after the enactment of the winter shutoff moratorium,” the Company responded “PNM did not make changes to its notices.” (CANM Exh. 1, at 27).

In addition to claiming that it didn’t know that it was required to provide pre-shutoff notice of the right to be exempt from service disconnection during the winter shutoff moratorium, PNM seeks to excuse itself from providing pre-shutoff notice of the moratorium protections in two other ways.

First, PNM asserts that its distribution of outreach for the LIHEAP program, which contains a reference to the winter moratorium, satisfies any notice provisions that it might have. Company witness Ron Edgington asserts:

[A]lthough it was not a requirement, customers were notified about the moratorium when given the PNM information pamphlet about LIHEAP through personal contact with PNM collectors, collection representatives and customer service representatives. Eight thousand pamphlets were distributed during the 2005 – 2006 heating season.

(PNM Exh. 22, at 10).

This argument must be summarily dismissed. The notice requirement imposed on the Company states that: “the utility shall provide written notice to the customer stating its intent to discontinue service *and setting forth the customer’s rights regarding discontinuance of service . . .*” 17.5.410.31(A), NMAC (2006) (emphasis added). Quite clearly, the obligation of the utility is to provide notice to the consumer of his or her “rights regarding discontinuance of service” *as part*

¹³ It is the right to be free from the disconnection of service, not the right to receive notice, that is dependent on meeting the qualifications of LIHEAP. The right to receive notice of the moratorium inheres in every customer.

of the written shutoff notice. Moreover, it is basic black letter law that notice shall be made in a meaningful time and in a meaningful manner. A reference to the shutoff moratorium in outreach regarding the availability of cash fuel assistance, not tied to any specifically-scheduled shutoff, either in time or in context, does not meet the legal test of providing notice in a meaningful time and meaningful manner.

Aside from the legal inadequacy of the brochures, the record in this proceeding demonstrates the substantive inadequacy as well. PNM witness Edgington reports that “eight thousand pamphlets were distributed during the 2005 – 2006 heating season.” (PNM Exh. 22, at 10). In contrast, the Company issued 112,201 shutoff notices from November 2005 through March 2006. (CANM Exh. 1, at 28). The Company hardly made a dent in informing those customers receiving a shutoff notice of their right to be free from disconnection during the winter moratorium period.

The refusal to provide notice of the consumer protections offered by the winter moratorium is the antithesis of PNM’s obligations under the Commission’s regulations. As the Commission’s regulations state quite explicitly:

The purpose of this rule is to establish uniform standards to be followed by electric, gas, and rural electric cooperative utilities in dealing with residential customers, to aid residential customers in obtaining and maintaining essential utility services, to promote safe and adequate service to residential customers, and to establish a basis for determining the reasonableness of such demands as may be made upon utilities by residential customers.

(17.5.410.6 NMAC, NMPUC Rule 410.1, 12-17-01).

It would be impossible for PNM to justify a failure to give notice of the winter moratorium:

- As a means “to aid residential customers in obtaining and maintaining essential utility services”; *or*
- As a means “to promote safe and adequate service to residential customers.”

Id. Indeed, the failure to provide such notice is directly contrary to these two stated objectives of the Commission’s regulations. The entire purpose of the winter moratorium is to aid residential customers in maintaining essential utility services during the winter months and to promote safe and adequate service to residential customers during the heating months when the loss of utility service could well be life-threatening. The failure to provide notice of the moratorium protections is not only inconsistent with these purposes, but is directly contrary to these purposes.

Whether or not required by the Commission’s regulations, providing notice is an essential component of any statute such as the winter moratorium protection. The statutory right to be exempt from winter shutoffs includes, implicit within it, the right of a consumer to be notified of his or her right to be exempt from disconnection from nonpayment. The winter moratorium

would have little meaning if the Company did not have to *tell* their customers of their right to be free from a winter disconnection of service for nonpayment. As one noted legal treatise states:

At common law, public utility service cannot be disconnected until after notice is given in accordance with the terms of the contract between the consumer and the utility. A utility's common law right to terminate service to enforce payment is conditional upon its duty to notify the consumer of its intention to do so *prior* (emphasis in original) to exercising that right. A contract by a public utility with its customer is an agreement to furnish service for an indefinite period of time. An implied term of such a contract is that service will not suddenly be terminated without reasonable notice. Cases have awarded damages for terminating services without notice.¹⁴

Second, the Company seeks to impose the obligation on the state LIHEAP office to notify low-income customers of their right to be exempt from disconnection of utility service for nonpayment during the winter moratorium period. The Company seems to argue that should the state LIHEAP office discuss the winter moratorium protections with recipients of their financial assistance, this discussion somehow excuses the Company from providing pre-termination notice of the winter shutoff protections.

This argument, too, must be firmly dismissed. The regulations of the Commission could not be clearer. "At least fifteen (15) days before a utility discontinues service to a residential customer, *the utility shall provide* written notice to the customer. . ." (17.5.410.31(A), NMAC (2006)) (emphasis added). Whatever discussions the state LIHEAP office may or may not have with its fuel assistance recipients does not change the explicit obligations imposed upon PNM by Commission regulation.

Quite aside from the fact that the *legal* obligation lies with the utility to provide notice of consumer rights, the PNM argument that it is the state LIHEAP office that should notify low-income consumers of the winter moratorium defies common sense as well. The state LIHEAP office takes LIHEAP applications from October 1 to August 31 of each year (CANM Exh. 1, at 23). Why the state LIHEAP office would provide notice of the winter moratorium to the households applying for LIHEAP from April through August was never explained. Why the state LIHEAP office would provide notice of the winter moratorium to LIHEAP recipients not in arrears to their utility was never explained. Moreover:

- PNM did not explain how the state LIHEAP office could provide counseling on the state winter moratorium statute consistent with federal statutory restrictions that limit the expenditure of LIHEAP funds to administration of the federal LIHEAP program. 42 U.S.C. §8624(b)(1).
- Nor did PNM explain, even assuming *arguendo* the state LIHEAP office could legally use its federal funding to provide counseling about a state utility program,

¹⁴ National Consumer Law Center, *Access to Utility Service (3d ed)*, at §11.2.1, **THE CONSUMER CREDIT AND SALES LEGAL PRACTICE SERIES**, National Consumer Law Center: Boston (MA).

how it could do so and stay within its ten percent cap on administrative dollars. 42 U.S.C. §8624(b)(9).

- Nor did PNM explain how the state LIHEAP office could be seen as providing counseling on the winter moratorium when such counseling is not included in the LIHEAP “state plan” required by federal law. 42 U.S.C. § 8624(c).
- Nor did PNM explain how the state LIHEAP office could provide counseling on the state winter moratorium statute when such counseling is not included in the state plan and expenditures on activities not included in the state plan are explicitly prohibited by federal law. 42 U.S.C. § 8624(d).

LIHEAP programs come under sharp statutory fiscal constraints. 42 U.S.C. § 8624(b)(10). It does not seem a revolutionary notion that an agency using *federal* dollars to administer a *federal* program cannot simply take those dollars to use on some other activity. PNM’s argument that the state LIHEAP office should have done precisely that should be rejected.

In sum, Public Service Company of New Mexico disconnected winter utility service to thousands of its New Mexico customers without giving those customers notice of their right to be exempt from such service disconnections under prescribed circumstances. PNM seeks to excuse its failure to provide notice by asserting that it did not know it was required to provide notice, even though the Commission regulation *explicitly* provides that pre-termination notice shall be provided which shall “set [. . .] forth the customer’s rights regarding discontinuance of service. . . .” PNM further seeks to excuse its failure to provide notice by asserting that it includes a reference to the winter shutoff moratorium in its LIHEAP outreach even though the Commission’s regulation *explicitly* provides that the notice of a “customer’s rights regarding discontinuance of service” shall be part of the “written notice to the customer stating its intent to discontinue service.” (17.5.410.31(A), NMAC (2006)) Finally, PNM seeks to excuse its failure to provide notice by asserting that the obligation lies with the state LIHEAP office, even though the Commission’s regulations explicitly impose the duty on the utility and even though using federal money for non-federal purposes is barred by federal statute. 42 U.S.C. § 8624(b)(1).

In addition to directing PNM to halt its unlawful practice, the Commission should impose appropriate sanctions. The appropriate sanctions are discussed in more detail below.

Issue #3: The False and Deceptive Threat by Public Service Company of New Mexico to Disconnect Service for Nonpayment During the Winter Shutoff Moratorium Period to Customers Known to be Protected by the Moratorium is Unlawful.

Public Service Company of New Mexico issues winter shutoff notices to customers protected by the winter shutoff moratorium, even though the Company knows that that law prohibits the actual disconnection of service. PNM does not deny that it engages in this practice. As Company witness Edgington testified:

- Q. Did PNM continue to send disconnection notices to residential customers during the moratorium?

- A. Yes. PNM continued to send the notices throughout the winter months to residential customers whose accounts were past due.

(PNM Exh. 22, at 8). Indeed, PNM continued to send winter shutoff notices to customers it knew to be protected by the winter shutoff moratorium. CANM witness Colton noted:

The Company concedes that it knowingly issues notices saying that it “will” disconnect service during the winter months to customers it knows to be protected by the shutoff moratorium. The Company’s own documents, as quoted above, state that “The collection process will continue, *whether or not a customer qualifies for the moratorium, and customers will still receive notices and visits to their homes.*” (CANM-3-17, page 2). (emphasis added).

(CANM Exh. 1, at 32).

The Company, in other words, threatens to disconnect service for nonpayment to customers during the winter months even though the Company knows that collection technique to be statutorily prohibited. As CANM witness Colton notes: “To threaten to undertake a collection action that a company either does not intend to undertake, or is not permitted to undertake, is universally considered to be an unfair and deceptive act and practice.” (CANM Exh. 1, at 30).

There can be no question but that PNM knowingly issued false and deceptive disconnect notices to its residential customers in the 2005/2006 winter moratorium period. The Company indicates that:

- Its 15-day notice of disconnection states that “The past due balance shown above must be received in our office no later than [insert date], otherwise your service *will be* disconnected and your account will be subject to reconnection and deposit fees.” (CANM-2-62). (emphasis added).
- Its hand-delivered two-day notice states “Payment must be received in the office no later than the date shown on this notice, or we *will* disconnect your electric and gas services.” (CANM-2-62) (emphasis added).
- Its door hanger states that “Your PNM service *will be* disconnected on [insert date]. Here’s what you need. . .to keep it from being disconnected. *Full payment. . .must be made.*” (CANM-2-62). (emphasis added).

(CANM Exh. 1, at 31). As CANM witness Colton notes:

none of those notices are true or accurate. In each case, the Company says that service “will be disconnected” in the absence of certain customer action when, in fact, service will *not* be disconnected. The disconnect notice is knowingly communicating an inaccuracy. The Company is knowingly including a falsehood in its efforts to collect money. The shutoff notice is, at best, intentionally deceptive.

(CANM Exh. 1, at 31).

The fact that these “intentionally deceptive” and “knowingly false” statements are unreasonable and unlawful under New Mexico law can hardly be questioned. The New Mexico Unfair Trade Practices statute defines an “unfair or deceptive trade practice” to include:

a false or misleading oral or written statement, visual description or other representation of any kind knowingly made in connection with the sale. . .of goods or services. . .or in the collection of debts by a person in the regular course of his trade or commerce, which may, tends to or does deceive or mislead any person. . .

NMSA 1978, § 57-12-2(D). PNM’s shutoff notices meet each of the elements of that definition.

The fact that the collection of utility arrears involves a collection of debts by a person “in the regular course of his trade or commerce” is equally clear. The term “trade or commerce” is defined to include “the. . .offering for sale or distribution of any services and any property and any other article, commodity or thing of value, including any trade or commerce directly or indirectly affecting the people of this state.” NMSA 1978, § 57-12-2(C). The sale of natural gas and electricity by PNM is clearly included within, if nothing else, the term “any other article, commodity or thing of value” As referenced in this section of the statute. Moreover, no-one could seriously argue that PNM’s sale of natural gas (and electricity) is something other than an item “directly or indirectly affecting the people of this state” as cited in this statutory section.

In addition to the clear and specific language of New Mexico statutes, misrepresentations concerning the imminence of threatened collection actions are universally considered to be both unfair *and* deceptive.

Nor can collectors misrepresent the imminence or probability of legal action. Debt collectors may not threaten that nonpayment “will” result in legal action unless suit is filed in all cases, cannot threaten that nonpayment “may” result in litigation unless suit is the ordinary response to nonpayment, and cannot threaten that if payment is not made immediately or in a specified number of days, specified action will be initiated, if the determination to take that action at that time has not been made.

* * *

Collectors may not misrepresent the rights, duties, or obligations of any person arising from any federal, state or local statute or regulation, such as that a debtor is subject to prosecution under the federal mail fraud statutes. Collection letters may not be designed to create fear and take advantage of the consumer’s ignorance of legal procedures. Thus, it is deceptive to threaten that nonpayment will lead to garnishment of the debtor’s wages, without disclosing that garnishment requires a judicial order, or to threaten falsely that goods can be

repossessed, that a lien will be placed on everything the debtor owns, that the consumer can be arrested, or that added attorney, investigatory, or other fees will be assessed.¹⁵

The unreasonableness of allowing PNM to send shutoff notices during months in which shutoffs are explicitly prohibited is finally manifested by the fact that, were PNM a debt collector, its actions would be explicitly prohibited by federal law. (15 U.S.C. §1692e(5) (2007)).¹⁶ Surely a collection action prohibited by federal law cannot be found to be reasonable by the Commission, however effective it might be as a collection device.

While under New Mexico law, there need be no intent to deceive in order for an action to be unfair and deceptive, *Taylor v. United Management, Inc.*, 51 F.Supp. 1212 (D. N.M. 1999); *New Memorial Associates v. Credit Gen. Ins. Corp.*, 973 F.Supp. 1027 (D. N.M. 1997); *Russey v. Rankin*, 911 F.Supp. 1449 (D. N.M. 1995), that issue is not relevant to this case. PNM *knew* that its threats of imminent collection action were untrue at the time they were made. Moreover, PNM *intended* its threats of imminent winter service disconnection to be believed and acted upon by the consumers to whom those threats were made. PNM believed that these false threats of imminent winter service disconnection would be effective in prompting customers to pay their bills. The Company conceded that it simply believed that the collection benefits arising from its false and deceptive statements trumped the fact that its warning of an imminently pending winter disconnection of service was not true.

The appropriate relief for these violations of the winter moratorium is discussed in more detail below.

Issue #4: The False and Deceptive Threat by Public Service Company of New Mexico that Nonpayment of a Winter Bill Would Result in the Imposition of Additional Fees and Charges is a Separate and Distinct Unlawful Action.

In addition to providing a false and deceptive threat that service would be disconnected during the winter months, even though the disconnection of service was prohibited by law, Public Service of New Mexico provided a false and deceptive threat that additional fees would be imposed on customer accounts when those customers were protected against service termination by law and no additional fees could be imposed. This unlawful action is established by two uncontested facts:

- The Company admits that it issued a notice of disconnection to customers during the winter moratorium period “*whether or not a customer qualifies for the moratorium . . .*” (CANM-3-17, page 2). (emphasis added) (*quoted at* CANM Exh. 1, at 32).

¹⁵ National Consumer Law Center, *Unfair and Deceptive Acts and Practices* (6th ed.), at §§5.1.1.1.4 and 5.1.1.1.5, **THE CONSUMER CREDIT AND SALES LEGAL PRACTICE SERIES**, National Consumer Law Center: Boston (MA).

¹⁶ “A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section: . . .(5) The threat to take any action that cannot legally be taken or that is not intended to be taken.”

- The Company further admits that its 15-day disconnect notice stated as follows: “The past due balance shown above must be received in our office no later than [insert date], otherwise your service *will be* disconnected and your account *will be subject to reconnection and deposit fees.*”

(CANM-2-62 *quoted at* CANM Exh. 1, at 31).

As these two facts are uncontested, the only question is whether the Company’s knowingly false and deceptive threats that additional fees (“reconnection and deposit fees”) would be added to the account of a customer protected from disconnection by the winter moratorium statute is unlawful..

A PNM shutoff notice that threatened a customer protected by the winter moratorium that “the past due balance shown above must be received in our office no later than January 18, 2006,¹⁷ otherwise your service will be disconnected and your account will be subject to reconnection and deposit fees” is knowingly false and deceptive not only in the threat of the imminence of the disconnection, but also in the threat of imposing the additional “reconnection and deposit fees.”

It is deceptive to threaten that nonpayment of an account will lead to the assessment of added attorney, investigatory or other fees when, in fact, it will not. One of the most commonly found deceptive practices is the false and deceptive statement that, should payment by a debtor not be made by a date certain, certain fees “will be” added to the account and become due. The representation that such fees “will be” added to the account has been held to deceptively convey the message that such fees are unavoidable. For example, to say that court costs will be added to the account without stating that these costs are dependent upon a finding by a court is deceptive. A statement that a consumer will be liable for attorney’s fees when such fees are neither presently incurred, nor unavoidable, is a false and deceptive statement. *See, e.g., Veach v. Sheets*, 316 F.3d 690 (7th Cir. 2003) (misrepresentation to say that consumer owes treble damages, court costs and attorneys fees until there has been a judgment); *Person v. Stupar, Schuster and Cooper*, 136 F.Supp.2d 957 (D. Wis. 2001) (statement that consumer owes attorney’s fees misleading and deceptive if collectors not entitled to attorneys fees at time statement made); *see also, Blum v. Fisher and Fisher*, 961 F.Supp. 1218 (N.D. Ill. 1997).

The fact that the PNM statement is in the future tense does not change the holding. The PNM notice falsely states that payment of the past-due amount “*must be received*” (emphasis added) in the Company’s offices by a date certain; otherwise “your account *will be* subject to reconnection and deposit fees.” (emphasis added). The language clearly states that the additional costs are a certainty once the payment date is missed. Consumers would very likely interpret this notice to say that “reconnection and deposit fees” could not be avoided once the payment date is missed. Such statements are false and deceptive. *See, e.g., Fuller v. Becker and Poliakoff*, 192 F.Supp.2d 1361 (M.D. Fla. 2002); *Dutton v. Walhar*, 809 F.Supp. 1130 (D. Del. 1992); *Schimmel v. Slaughter*, 975 F.Supp. 1357 (M. D Fla. 1997).

¹⁷ This hypothetical date is inserted for illustrative purposes. Each disconnect notice had its own date certain.

The appropriate relief for these violations of the winter moratorium is discussed in more detail below.

Issue #5: The Failure of Public Service Company of New Mexico to Extend Winter Shutoff Moratorium Protections to Customers Unless Such Customers had been “LIHEAP-Approved” by HSD is Unlawful.

Beginning with the 2005/2006 winter heating season, New Mexico utilities operated under a statutorily mandated winter shutoff moratorium. Between November 15th and March 15th of each winter season, New Mexico utilities are prohibited from disconnecting service for nonpayment “if the customer meets the qualifications of the low-income home energy assistance program.” (NMSA, 1978, § 27-6-18).

PNM did not (and still does not) extend the winter shutoff moratorium to all customers who the Company knows (or should know) “meet the qualifications of the low-income home energy assistance program.” Instead, PNM states that the statutory winter shutoff moratorium only “prevents utilities from disconnecting *LIHEAP approved* customers from Nov. 15 – March 15.” (CANM-3-4) (emphasis added) (*quoted at* CANM Exh. 1, at 22). The Company makes no secret of the fact that it extends the moratorium protections only “after HSD¹⁸ determined eligibility and notified PNM.” (CANM-3-5) (CANM Exh. 1, at 22).

PNM makes no effort to identify LIHEAP-eligible customers. The Company states that “PNM does not identify customers for eligibility for the Low-Income Home Energy Assistance Program (LIHEAP). The New Mexico Human Services Department (HSD) determines eligibility and notifies PNM which customers are qualified for the program.” (CANM-3-1). (CANM Exh. 1, at 23 – 24). Limiting the shutoff moratorium protections to LIHEAP-approved households is unlawful.

PNM argues that it is not the responsibility of the utility to determine whether a customer is protected from the winter disconnection of service under the winter moratorium. Instead, PNM asserts that it is the exclusive responsibility of the state LIHEAP agency to make a determination of whether a PNM customer qualifies for the protections of the winter moratorium. Company witness Edgington argues:

New Mexico law grants HSD the sole authority to determine if a customer is eligible for the LIHEAP program. PNM must rely on HSD to determine if a customer meets the qualifications of the LIHEAP program. PNM does not take on the responsibilities of the state agency in making the decisions that determine customers who are qualified for a state program through completion of the LIHEAP eligibility application. PNM does not have the systems, training or personnel to gather, verify, update and maintain customer information for the application or to assist the customer in completing the application including the interview. HSD is the entity charged with that responsibility.

¹⁸ HSD is the New Mexico state Human Services Department.

PNM Exh. 22, at 3. Edgington then advanced a remarkable legal proposition: that only those households who apply for and participate in the Low-Income Home Energy Assistance Program (LIHEAP) “meet the qualifications” for the program. The Company argues quite directly: “Essentially, to be eligible for LIHEAP means the customer has been determined by HSD to meet the requirements to participate in the program. . .” (PNM Exh. 22, at 4). This proposition advanced by PNM is not only inconsistent with state law, but it is contrary to federal law as well.

The issues presented by PNM are thus three-fold:

- Is it the state Human Services Department (HSD) or the utility that has the responsibility to determine who is to be protected from winter nonpayment disconnections by the state’s winter shutoff moratorium?
- Does the New Mexico statutory winter shutoff moratorium only “prevent[...] utilities from disconnecting *LIHEAP approved* customers from Nov. 15 – March 15”? (CANM-3-4 (emphasis added), *quoted at* CANM Exh. 1, at 22).
- Are only those persons who have applied for, and been found eligible, to participate in LIHEAP those “customers that meet[. . .] the qualifications of the low-income home energy assistance program”?

The arguments advanced by PNM in support of its refusal to fully implement the New Mexico winter shutoff moratorium are untenable and clearly not contemplated by the winter moratorium statute.

It is the Utility and not the State LIHEAP Office that is Responsible for Determining Whether a Customer is Exempt from Disconnection During the Winter Months.

Any reasonable reading of the New Mexico winter shutoff moratorium statute leads to the conclusion that the responsibility for determining who is protected by the winter moratorium lies with the utility and not with the state LIHEAP agency. The statute reads as follows:

A utility company shall not discontinue or disconnect service to a residential customer for any billing cycle from November 15 through March 15 for nonpayment if the customer meets the qualifications for the low-income home energy assistance program. The utility company shall report the customer’s need for assistance to the human services department and the department shall take immediate action to mitigate the problem.

NMSA 1978, § 27-6-18. There are at least three aspects of this statute which demonstrate that, contrary to PNM’s argument, the obligation is on the part of the utility to determine those customers who are exempt from disconnection.

- First, the statute quite explicitly states that “the utility company shall report the customer’s need for assistance to the human services department. . .” PNM unlawfully seeks to completely reverse this process. The Company does not extend

the winter shutoff moratorium protections until the state Human Services Department (HSD) reports the customer's need for assistance to the utility. As CANM witness Colton reported (relying on PNM discovery responses): "The Company states that *"The New Mexico Human Services Department (HSD) determines eligibility and notifies PNM which customers are qualified for the program."* (CANM-3-1)." (CANM Exh. 1, at 23). (emphasis added). This process used by PNM is the complete opposite of that process set out in the statute.

- Second, the statute quite explicitly creates a three-step process. The first step involves the Company ascertaining a customer's need for assistance. The second step involves the Company reporting that need for assistance to the HSD. The third step involves HSD taking "immediate action to mitigate the problem." Clearly, HSD does not become involved with the moratorium process until *after* the Company ascertains the customer's need for assistance and reports that need for assistance to the Department. PNM's process is contrary to these three steps.
- Third, the statute is clear that the action of the Department is in *response to* the Company's determination of a customer's need for assistance. The statute states quite clearly that after a utility reports the customer's need for assistance to the Department, "the department shall take *immediate action* to mitigate the problem." The phrase "immediate action," of course, makes clear that the Department's action is a *future* action, one that comes *after* the Company's determination and report of the customer's need for assistance.

In contrast, PNM would have its responsibility simply be the provision of generic LIHEAP outreach at the beginning of the winter heating season. In order for a customer to be covered by the winter moratorium statute, it would be the customer's responsibility to apply for LIHEAP assistance, and it would be the responsibility of HSD to report that application and a certification of LIHEAP eligibility to the Company. The Company makes clear that it will make no effort to determine a customer's need for assistance. As CANM witness Colton reported: "In a memo to all customer service representatives (CSRs) explaining how CSRs should respond to the new winter shutoff moratorium legislation, PNM executive Ron Edgington instructed "please ask them if they have received LIHEAP assistance this heating season. If not, you may *offer* the following general financial guidelines – but **do not** ask them what their income is. . ." (CANM-3-16) (emphasis in original) (double emphasis on "do not" in original)." (CANM Exh. 1, at 26). Offering "general financial guidelines," but operating under explicit Company directions to *not* ask customers what their income is, hardly fulfills the Company's responsibility to determine a customer's need for assistance so that such need can be reported by the Company to HSD under Section 27-6-18.

In sum, the process advocated by PNM tortures the plain meaning of New Mexico's winter moratorium statute. Any reasonable reading of the New Mexico winter shutoff moratorium statute leads to the conclusion that the responsibility for determining who is protected by the winter moratorium lies with the utility and not with the state LIHEAP agency.

The New Mexico Statutory Winter Shutoff Moratorium Goes Beyond Preventing Utilities from Disconnecting LIHEAP-Approved Customers from Nov. 15 – March 15.

PNM states that it operates under a Company policy that the New Mexico winter moratorium statute only prevents the disconnection of service to *LIHEAP-approved* customers. The Company could not have been more direct in stating its policy: PNM states that the statutory winter shutoff moratorium only “prevents utilities from disconnecting *LIHEAP approved* customers from Nov. 15 – March 15.” (CANM-3-4) (emphasis added) (quoted at CANM Exh. 1, at 22). This construction bears no reasonable relationship to the statutory obligations or process created by the New Mexico winter moratorium statute.

Three lines of reasoning support this conclusion:

- First, if the New Mexico legislature had intended for the winter shutoff moratorium to protect only LIHEAP participants, it could and would have explicitly stated so. Section 27-6-18 provides that winter shutoff protections apply “if the customer meets the qualifications for the low income home energy assistance program.” Contrast that general determination to the very specific language of Section 27-6-17, NMSA 1978. That statutory section reads that certain delays in service disconnections are to be implemented “if the department has certified to the utility that a customer is eligible for utility payment assistance under the Low Income Utility Assistance Act. . .” In New Mexico, as elsewhere, where the legislature uses one language in one statutory section, and uses *different* language in a different statutory section, particularly where the statutory sections are related, there is an intent for a different meaning to attach to the language.

Accordingly, as is clear here, where the New Mexico legislature intended for certain shutoff protections to be made dependent on having the Department “certif[y] to the utility that a customer is eligible for utility payment assistance,” the legislature explicitly said so. Since it created a *different* requirement in the moratorium statute, the legislative intent to have a different, and broader, test to be applied for purposes of implementing the winter shutoff moratorium should be effected.

- Second, to read Section 27-6-18 narrowly, and to require winter shutoff protections to be granted only to LIHEAP-approved customers (as argued by PNM) is inconsistent with the articulated “legislative intent and purpose” of the Low-Income Utility Assistance Act. The legislature specifically said that “it is the intent of the legislature and the purpose of the Low Income Utility Assistance Act to assist indigent residents to meet the increased costs for gas and electrical utilities. . .to the maximum extent possible. . .” (NMSA 1978, § 27-6-12). (emphasis added). The Company’s effort to read in a process of having customers, in essence, *apply* for winter moratorium protections, and to be certified eligible by a state agency, when no such application process or certification process is provided in the statute, is at direct odds with this legislative purpose to provide protections, and to assist low-income customers “to the maximum extent possible.” The Company’s efforts limit the protections of Section

27-6-18 rather than making them available to the maximum extent possible as directed by the legislature.

- Third, the term “meet the qualifications of” is not synonymous with “LIHEAP eligible” and is certainly not synonymous with “LIHEAP-approved.” Contrast Section 27-6-18, for example, with Sections 27-6-14 and 27-6-13. Section 27-6-14 provides that “utility assistance supplements shall be paid to or on behalf of those individuals who are *determined to be eligible* by regulation of the department.” (emphasis added). Section 27-6-13 reads that “the department is authorized to *determine eligibility*” and that “the department is authorized. . .to make utility assistance payments to or on behalf of *eligible recipients. . .*” (emphasis added). Similarly, Section 27-6-17 provides that certain procedural protections are to be extended “if the department has certified to the utility that a *customer is eligible for* utility payment assistance. . .” (emphasis added).

Clearly, when the legislature wanted to make some action dependent upon a New Mexico low-income household being found eligible for LIHEAP, it specifically said so. The legislature, however, made the winter moratorium protections dependent upon a different test, a finding that a utility customer meets the qualifications of the LIHEAP program. The legislature certainly did not make the winter moratorium protections dependent upon a customer being certified as eligible for LIHEAP.

The difference is quite significant. Rather than having the Human Services Department determine eligibility for LIHEAP before extending the winter shutoff protections, the utility need only find that a customer meets the qualifications for LIHEAP.

- A customer receiving LIHEAP the previous winter heating season, for example, would “meet the qualifications” for LIHEAP even though that customer had not been certified eligible (“LIHEAP-approved” in the terminology of the PNM discovery response) in the current federal fiscal year.
- A customer having received “crisis” assistance would “meet the qualifications” of LIHEAP even if that customer had not been certified eligible in the current federal fiscal year.
- A customer that received LIHEAP assistance in the July or August preceding a winter heating season¹⁹ would clearly “meet the qualifications” of LIHEAP even though that customer had not been certified eligible in the current federal fiscal year.²⁰

¹⁹ The New Mexico LIHEAP program takes LIHEAP applications through August 31 of each year. (CANM Exh. 1, at 23).

²⁰ How possibly could the change in federal fiscal years on October 1st change an August LIHEAP recipient into a customer who no longer “meets the qualifications” of LIHEAP in November? Nonetheless, PNM’s policy is expressly that it will not grant winter moratorium protections unless the customer is “LIHEAP-approved” *in the current heating season*. (CANM-3-16, cited at CANM Exh. 1, at 26).

In each of these instances, PNM would know from its own records that the customer meets the qualifications of LIHEAP. In each of these instances, however, PNM does not now extend the protections of the winter shutoff moratorium unless the customer would again apply for, and be certified eligible by HSD, for LIHEAP in the current federal fiscal year. Under PNM's reading of the winter moratorium statute, a PNM customer having received a LIHEAP grant on August 31, 2006, could have his or her service disconnected on November 15 (less than 90 days later) because the Company would claim that the customer did not "meet the qualifications" for LIHEAP unless that customer filled out a new LIHEAP application form and was newly certified eligible by HSD.

Customers Can "Meet the Qualifications of the Low-Income Home Energy Assistance Program" for Purposes of the Moratorium Whether or not they Apply for and are "LIHEAP-Approved" by HSD.

PNM's policy of extending the protections of New Mexico's winter shutoff moratorium only to "LIHEAP-approved" customers results in the disconnection of service to customers who "meet the qualifications" of the LIHEAP program in violation of Section 27-6-18. By law, some households are categorically eligible for LIHEAP assistance by the very fact of their participation in some other public assistance program.

Under the federal LIHEAP statute, certain categories of households are eligible for LIHEAP because of their participation in other public assistance programs. This categorical eligibility extends to any household in which one or more individuals receive:

- Temporary Assistance for Needy Families (TANF); or
- Supplemental Security Income (SSI) payments; or
- Food Stamps; or
- Payments under certain needs-based veterans' programs.

42 U.S.C. § 8624(b)(2)(A). By statute, in other words, a participant in any one of these programs "meets the qualifications" of LIHEAP whether or not that household ever applies for (and receives cash assistance) through the LIHEAP program. The very fact of their participation in one of the programs designated by the federal statute "meets the qualifications" of LIHEAP under the federal statute.²¹

Providing assistance to households under an *income* standard is *in addition to* those households that are categorically eligible for LIHEAP. 42 U.S.C. § 8624(b)(2)(B).

PNM witness Edgington thus errs as a matter of law when he states that "New Mexico law grants HSD the sole authority to determine if a customer is eligible for the LIHEAP program." (PNM Exh. 22, at 3). PNM witness Edgington further errs as a matter of law when he states that the only way for a customer to be qualified for the LIHEAP program is through "completion of the LIHEAP eligibility application." (PNM Exh. 22, at 3). PNM witness Edgington errs as a matter of law when he states that "to be eligible for LIHEAP means the customer has been determined

²¹ Under the statute, a state may, but is not required to, provide for the automatic enrollment in LIHEAP by households that are categorically eligible.

by HSD to meet the requirements to participate in the program.” (PNM Exh. 22, at 4). PNM witness Edgington errs as a matter of law when he states that “income level is required to determine LIHEAP qualification.” (PNM Exh. 22, at 5).²² Under the federal LIHEAP statute, four categories of low-income households are made categorically eligible for LIHEAP by operation of law rather than by application to HSD.

Setting aside the state’s Low-Income Energy Assistance Act for the moment, under the *federal* LIHEAP statute, certain households are categorically eligible (*i.e.*, “meet the qualifications of LIHEAP” in the terminology of the New Mexico winter moratorium statute) whether or not those households ever submit a LIHEAP application with HSD or actually receive cash assistance through the program. These customers are not made eligible by their income; they are not made eligible by their LIHEAP application. They are made eligible for LIHEAP as soon as they become a participant in one of the programs listed in the federal LIHEAP statute, and, accordingly, “meet the qualifications” for LIHEAP.

PNM denies all of these customers the protections to which they are entitled under the New Mexico statutory winter shutoff moratorium.

The number of customers that PNM excludes from the shutoff protections because of its unlawful limitation on its application of the winter shutoff moratorium is enormous. It is possible, for example, to look at just one of the four programs participation in which makes a household categorically eligible for LIHEAP. The Commission may take administrative notice of the most recent Food Stamp participation report by the U.S. Department of Agriculture (USDA), the agency that administers the Food Stamp program. That January 2007 publication reports that in 2006, New Mexico had 95,499 households participating in the Food Stamp program. (U.S. Department of Agriculture, Food Stamp Program: Average Monthly Participation (Households), January 25, 2007). In 2005, the report states, New Mexico had 93,094 households participating in Food Stamps.²³ In contrast, in 2005, New Mexico had 55,155 LIHEAP participants. (CANM Exh. 1, at 25). In 2006, New Mexico had 71,704 LIHEAP participants (CANM Exh. 1, at 25). As can be seen, PNM’s position that the winter moratorium protects only “LIHEAP-approved” customers denies winter shutoff protections to tens of thousands of New Mexico’s low-income households that “meet the qualifications of LIHEAP” in the terms of Section 27-6-18.

Finally, PNM’s argument that only customers approved for LIHEAP by the state HSD denies the protection of the winter moratorium to residents of tribal lands. The PNM argument asserts that “New Mexico law grants HSD the sole authority to determine if a customer is eligible for the LIHEAP program.” (PNM Exh. 22, at 3). The Company further asserts that “the New Mexico Human Services Department (HSD) determines eligibility and notifies PNM which customers are qualified for the program.” (CANM-3-1, quoted at CANM Exh. 1, at 23 – 24). What this argument does not acknowledge is that *federal* law provides tribal lands with their own LIHEAP funding, independent of the state HSD. 42 U.S.C. §8623(d). To the extent that PNM insists that

²² Income may be needed to determine the *level* of LIHEAP cash assistance to be provided such a household, but not to determine whether such a household *qualifies* for LIHEAP.

²³ The Commission may, at any point in a proceeding, take administrative notice of data published in a government publication. See, note 13, *supra*.

only customers that have been LIHEAP-approved by HSD are entitled to winter moratorium protections, the Company is denying winter shutoff protections to all those tribal members who receive their LIHEAP benefits through their tribe, and not through HSD.

Of course, this shouldn't happen. The statute does not extend the winter shutoff protections only to households that have been LIHEAP-approved by HSD. The statute extends the winter shutoff protections to all customers who meet the qualifications of LIHEAP. If PNM did not seek to unreasonably (and unlawfully) restrict the coverage of the winter shutoff moratorium in the first place, this issue with tribal members would not be a problem.

In sum, PNM unlawfully limits the extension of the winter shutoff moratorium to "LIHEAP-approved customers." PNM errs as a matter of law when it states that only households that have applied for, and been certified LIHEAP-eligible, by HSD "meet the qualifications" of the LIHEAP program. The statutory phrase "meets the qualifications for" is broader than, and covers more households than, the phrase "LIHEAP-approved." By federal statute, participants in a wide range of public assistance programs are made categorically eligible for LIHEAP. Finally, tribal members meet the qualifications for LIHEAP even though they may not be "LIHEAP-approved" by HSD. PNM's unlawful placement of limitations on the moratorium's coverage denies winter protections to thousands of New Mexico's vulnerable households.

The Commission should Direct PNM to Stop its Unlawful Actions and Should Impose Sanctions for its Unreasonable and Unlawful Conduct.

Just as important as recognizing the violations of New Mexico's winter moratorium law as identified above is the need for the Commission to structure appropriate relief. The relief that is appropriate in this case is injunctive in nature. In addition, the Commission should impose sanctions on PNM for its knowing violation of the law. Finally, the Commission should order restitution for fees and expenses imposed on PNM customers after PNM's unlawful actions. Each of these conclusions is discussed in more detail below.

The Commission should Issue Injunctive Relief Mandating that the Company Appropriately Implement the New Mexico Winter Shutoff Moratorium.

The Commission should issue immediate injunctive relief directing PNM to comply with the clear dictates of the New Mexico winter moratorium statute and PRC regulations. The Commission should direct PNM:

- To include with every shutoff notice issued during the moratorium period a clear and conspicuous notice that the customer may be exempt from shutoff if the customer meets the qualifications of LIHEAP, including being certified eligible for LIHEAP during the current or immediately preceding two program years by the state (or by a tribal authority), or having one or more members of the household receiving benefits through TANF, Food Stamps, SSI or designated means-tested veteran's benefit program;

- To refrain from issuing a shutoff notice saying that service “will” result in a shutoff if payment is not made by a date-certain unless shutoffs are effected in all cases; from saying that nonpayment “may” result in a shutoff if payment is not made by a date certain unless a shutoff is the ordinary response to nonpayment; and from threatening that if payment is not made immediately or in a specified number of days, a shutoff will be initiated, if the determination to take that action at that time has not been made at the time of the notice.
- To extend the winter shutoff moratorium protections to all customers that meet the qualifications of LIHEAP, including being certified eligible for LIHEAP during the current or immediately preceding two program years by the state (or by a tribal authority), or having one or more members of the household receiving benefits through TANF, Food Stamps, SSI or designated means-tested veteran’s benefit program;
- To reconnect all customers unlawfully disconnected during the 2005/2006 winter heating season, and thus far in the 2006/2007 winter heating season, without cost.

There can be no justification for the Company issuing unlawful false and deceptive disconnect notices during the winter months. Nor can there be any excuse for the Company unlawfully disconnecting customers during the winter months, either because they received inadequate pre-disconnection notices of their consumer rights or because they were protected by the winter moratorium as a household qualified for LIHEAP. Such unlawful activity on the part of PNM should be brought to an immediate halt.

The Commission should Provide Restitutionary Relief for Fees and Expenses Imposed on Customers Based upon the Company’s Unlawful Implementation of the New Mexico Winter Shutoff Moratorium.

In addition to stopping unlawful shutoff activity on the part of PNM, the Commission should return all customers that have been unlawfully disconnected to their pre-disconnection position. The relief sought above (in the nature of injunctive relief) will restore service to customers that had been unlawfully disconnected. In addition, customers should be restored to their pre-disconnect financial position. A customer that was unlawfully disconnected should incur no costs as a result of the Company’s unlawful action. This is the simple law of restitution, under which the customers unlawfully disconnected should be restored to their position *ex ante* the unlawful action by PNM. *Romero v. Bank of the Southwest*, 135 N.M. 1, 83 P.3d 288 (N.M. Ct. App. 2003). Since the utility received money as a result of its unlawful action, the restitutionary remedy is designed to restore the status quo, returning both parties to the position they were in before the injury. *Id.*

Accordingly, the Commission should direct PNM to refund to all customers unlawfully disconnected during the 2005/2006 winter heating season, and thus far in the 2006/2007 winter heating season, all disconnect and reconnect fees, and all post-disconnection cash security deposits imposed on customers unlawfully disconnected. Fees and deposits unlawfully imposed

during the 2005/2006 winter heating season should be restored to customers in 2007 dollars.²⁴ Since the lawful imposition of reconnect fees is dependent upon the lawfulness of the underlying disconnection of service in the first place, all post-disconnect fees and charges imposed on customers disconnected during the relevant time periods (2005/2006 winter moratorium season; 2006/2007 winter moratorium season to date) are void *ab initio* and should be refunded to the customers from whom they were collected.²⁵ A shutoff performed without required notice is unlawful in its entirety. *See, Heuser v. Johnson*, 189 F.Supp. 1250 (D. N.M. 2001); *see also, Passantino v. Consolidated Edison Company of New York*, 54 N.Y.2d 840, 428 N.E.2d 391 (N.Y. 1981). While the instant case does not involve the constitutional issues presented to the *Heuser* court, the principle is the same: a shutoff lacking a prerequisite pre-shutoff notice is unlawful *ab initio*. The fees and charges imposed on all customers unlawfully disconnected in order for that unlawful action to be remedied should be disgorged and returned to the customers.

The Company unlawfully disconnected at least 7,894 accounts in the 2005/2006 winter heating season. (CANM Exh. 1, at 29). The number is likely higher, since the Company did not report the number of accounts disconnected in December 2005. (CANM Exh. 1, at 29). For each such account unlawfully disconnected, the customer should receive a refund of his or her reconnect fees along with any post-disconnection cash security deposit imposed. The Company should provide an accounting to the Commission of each residential account disconnected during the 2005/2006 winter season, the reconnect fees and cash security deposits imposed, and a documentation of the refund of all such fees and charges.

A similar restitutionary payment of fees and charges should be ordered for all residential customers disconnected thus far in the 2006/2007 winter heating season (November 15, 2006 to present inclusive).

The Commission should Impose Sanctions on PNM for its Knowing Violation of New Mexico Law with Respect to the State's Winter Shutoff Moratorium.

Public Service Company of New Mexico violated New Mexico law in at least four ways that cannot be condoned by New Mexico regulators. The separate and distinct violations each merit the imposition of sanctions as outlined below. The violations meriting sanctions include:

- The failure to provide clear and conspicuous notice of consumer protections, including the right to be exempt from disconnection under the winter moratorium, whether or not the customer was ultimately disconnected;²⁶
- The actual disconnection of service to Company customers without providing adequate pre-shutoff notice during the winter moratorium period;²⁷

²⁴ A customer, in other words, who paid a \$100 fee in 2006 is not made whole by having the Company refund \$100 in 2007. The \$100 should be adjusted for inflation between the time the funds were paid and the time those funds are refunded.

²⁵ Fees and charges collected from customers who were unlawfully disconnected, but who the company can not now locate, should be added to the *cy pres* fund discussed below.

²⁶ The violation in this instance is the failure to provide notice. This failure merits sanctions whether or not the customer was subsequently disconnected for nonpayment. The harm arises from the failure to receive notice of the customer's rights under the moratorium.

- The knowing issuance of false and deceptive shutoff notices to customers threatening the disconnection of service if payment was not received in a Company office by a date certain, when the Company *knew* those customers were protected from service disconnection by the winter shutoff moratorium; and
- The knowing issuance of false and deceptive shutoff notices to customers threatening the imposition of additional fees if payment was not received in a Company office by a date certain, when the Company *knew* those customers were protected from service disconnection by the winter shutoff moratorium and that, accordingly, no additional fees could or would be imposed.

Calculating the Sanction

In imposing sanctions, the Commission should take note of the seriousness of the statutory violations by the Company. “The entire purpose of the winter shutoff moratorium was based on the recognized life-threatening consequences of the unaffordability of home utility service during New Mexico's winter months. Public Service Company of New Mexico knowingly and intentionally violated that fundamental health and safety protection.” (CANM Exh. 1, at 33).

Two separate statutes provide guidance on what an appropriate sanction would be for PNM’s statutory violations identified above:²⁸

- First, the New Mexico state “unfair trade practices act” provides for private judicial remedies of \$100 per violation or \$300 minimum damages when an action is willful. (NMSA 1978, § 57-12-10(B)).
- Second, New Mexico statutes provide that “any person or corporation which violates any provision of the Public Utility Act or which fails, omits or neglects to obey, observe or comply with any lawful order, or any part or provision thereof, of the commission is subject to a penalty of not less than one hundred dollars (\$100) nor more than one hundred thousand dollars (\$100,000) for each offense.” NMSA 1978, § 62-12-4.

CANM recommends that, for violations in the 2005/2006 heating season, the Commission impose the minimum statutory penalty per violation for issuance of the unfair and deceptive shutoff notices during the winter moratorium period. As CANM witness Colton documented, the total number of residential disconnect notices issued during the 2005/2006 winter heating

²⁷ Since all winter disconnections were unlawful in the 2005/2006 winter heating season due to insufficient notice, it is not necessary to impose separate sanctions for the unlawful disconnection of customers protected by the winter moratorium. Without the insufficient notice, however, separate sanctions would be warranted for each disconnection that occurred without a determination of whether that customer was protected by the moratorium.

²⁸ “Unfair or deceptive trade practices and unconscionable trade practices in the conduct of *any* trade or commerce are unlawful.” NMSA 1978, § 57-12-3. (emphasis added). trade" or "commerce" includes the advertising, offering for sale or distribution of any services and any property and any other article, commodity or thing of value, including any trade or commerce directly or indirectly affecting the people of this state; NMSA 1978, § 57-12-2(C).

season reached 84,359. The number of disconnect notices issued in December 2005 would need to be added to this figure.²⁹

By law, each deceptive statement is a separate violation under the statute. Since each shutoff notice contained two distinct false and deceptive statements, PNM would be liable for sanctions of \$200 for each of its 84,359 shutoff notices.

In addition, since each shutoff performed without proper notice is unlawful, the Company is liable for separate sanctions for each unlawful service disconnection during the 2005/2006 winter shutoff moratorium. The total number of disconnections performed during the moratorium period reached 7,894.³⁰ Since the Company did not report its December 2005 disconnections, the number of December 2005 disconnects would need to be added to this figure. (CANM Exh. 1, at 29). Because of PNM's willful violation of state statute and Commission regulation, each unlawful shutoff performed without notice of consumer rights being provided should generate a sanction of \$300.

Similar sanctions should be imposed for all disconnections performed and disconnect notices issued during the 2006/2007 winter heating season. The false and deceptive threats of disconnections, along with the false and deceptive threats of imposing additional fees and charges during the 2006/2007 winter heating season, however, would have occurred after objection (raised by CANM) had notified PNM of the perils of such false and deceptive threats. Accordingly, CANM recommends that rather than setting sanctions at the minimum levels indicated by reference to the state Unfair Trade Practices Act, the following sanctions should be imposed for PNM's unlawful 2006/2007 activities:

Month	Unlawful Shutoff Notice	Unlawful Disconnection
January 2007	\$250	\$375
February 2007	\$300	\$450
March 2007	\$350	\$525

(CANM Exh. 1, at 34 – 35). Such sanctions are relatively minor given the nature of the life-threatening legal violation, and the fact that the Company *knew* it was violating the law when it engaged in its unlawful activity.

²⁹ The Company issued 112,201 notices of service disconnection for nonpayment to residential customers during the months of November 2005 through March 2006. (CANM-1-5). (The Company did not report the number of disconnect notices for December 2005. To that extent, this number *undercounts* the number of disconnect notices.) If one assumes that half of the November and March disconnect notices were issued outside the moratorium period (the moratorium runs from November 15 through March 15 of each heating season), the final figure is 84,359 (again, the December disconnect notices would need to be added to this figure). CANM Exh. 1, at 29.

³⁰ The Company disconnected 10,708 residential accounts during the 2005/2006 winter moratorium period. (As with notices, the Company did not report December 2005 disconnections. To that extent, this number undercounts the number of residential service disconnections.) If one assumes that half of the November and March disconnections were performed outside the moratorium period, the total number of disconnections performed during the moratorium period reached 7,894. CANM Exh. 1, at 29.

A Cy Pres Use of the Sanction

While CANM recommends using the New Mexico Unfair Trade Practices Act as the standard by which to determine the reasonableness of the sanctions to be imposed on PNM, CANM is *not* asking the Commission to enforce the Unfair Trade Practices Act. Nor is CANM asking the Commission to assess damages caused by the unlawful PNM activities described in detail above. Instead, CANM is merely using the minimum damages as a yardstick by which to guide the appropriate level of *sanctions* that the Commission should impose on PNM for its knowing violation of Commission regulations as well as the state's winter shutoff moratorium. The reasonableness of using these minimum damages as a measure of sanctions is confirmed by the minimum sanctions set by statute for violation, by a New Mexico utility, of the utility statutes, Commission regulations, or Commission orders.

Given the nature of the sanctions, and the nature of the legal violations that give rise to the sanctions, it is reasonable for the Commission to dedicate those sanctions to a use which would promote the purposes of the statutes that have been violated by the Company. Such a use is in the nature of the creation of a cy pres fund. Cy pres funding is frequently called "fluid recovery." Given the clear authority that the PRC exercises all of the equitable powers of a court in its adjudicatory capacity, *Consumers Lobby Against Monopolies v. PUC*, 25 Cal.3d 891 (1979), the Commission can use its authority to fashion a cy pres trust fund based on the sanctions imposed for PNM's unlawful practices.

Cy pres funding has become increasingly common and has spread far beyond its roots in court-ordered cy pres. It is a useful mechanism for collecting and distributing exactly the type of sanction that CANM has proposed in this proceeding. One such use of cy pres funding arose out of a state regulatory commission finding of deceptive activity by a California utility:

An important example was the trust fund established following an administrative action against Pacific Bell by the California Public Utilities Commission. In a 1987 decision, the commission levied more than \$50 million in fines against PacBell for using deceptive tactics in marketing telephone services to low-income customers.

Only two-thirds of the eligible customers claimed shares of the award, so the commission used the remaining funds -- \$16.5 million -- to create the Telecommunications Education Trust. During the past 6 years, the trust has awarded grants to almost 200 community organizations in California that educate consumers about telecommunications issues, says Rob Feraru, public advisor to the utilities commission.³¹

Federal courts have also applied cy pres funding to the utility arena. In *Bebchick v. Public Utilities Commission*, 318 F.2d 187 (D.C.Cir. 1963), *cert denied*, 373 U.S. 913 (1963), the D.C. Circuit Court approved use of funds collected for an invalid fare increase for the benefit of the

³¹ S.Gale Dick. "Fluid Recovery: Flexible Ways to Settle Cases," 13 *Alternatives to High Cost Litigation* 73, 82 (1995).

class who paid it--those who use the transit system. The court required that a fund be created to benefit transit users in any pending or future rate proceedings. The court gave examples of proper fund uses, including covering costs that might otherwise lead to a fare increase or aiding in determining whether fares should be reduced.

Similar to this CANM action against PNM, although not a class action, the Court ruled that the overcharges should be utilized for the benefit of the entire injured class. The Court established a fund administered by the Public Utilities Commission on behalf of transit users. The class protected by the New Mexico winter moratorium involves low-income payment-troubled customers.

CANM proposes a *cy pres* trust fund use of the PNM sanctions similar to the trust fund uses ordered by the D.C. Circuit Court and the California Public Utilities Commission. As CANM witness Colton explained, the PNM sanctions should be used:

to capitalize a Low-Income Energy Assistance Trust Fund for Public Service Company of New Mexico. Revenues from the Trust Fund should be administered by the PNM Low-Income Energy Assistance Trust for the benefit of low-income PNM customers. A Board consisting of various stakeholders should govern the Trust. These stakeholders would include the Company, Community Action New Mexico, the Commission, the state LIHEAP office, one member of the public appointed by the Governor, one low-income PNM customer appointed by the state LIHEAP office, and one representative of a [community-based organization] serving low-income households (other than a Community Action Agency) appointed by the state LIHEAP office. The Trust Fund could be used to pay energy assistance benefits, to provide weatherization, to assist in meeting deposit demands, to retire arrears, or for other purposes the Trust deems to further the energy assistance interests of the Trust's beneficiaries.

(CANM Exh. 1, at 35 - 36). Colton explained:

The purpose of the winter shutoff moratorium is to protect payment-troubled low-income customers. The administration of this Trust Fund would not only advance that same objective, but would also help address the business objections that the Company has voiced with respect to New Mexico's new winter shutoff moratorium. Indeed, the Trust Fund is a classic *cy pres* trust fund.

(CANM Exh. 1, at 36). Colton, too, noted the California Telecommunications Education Trust Fund³² as one model on how to collect and distribute the sanctions for a utility's deceptive activities as found by a state utility commission. (CANM Exh. 1, at 37). The investigation by the California Public Utilities Commission found "violations of statutes, general orders, and tariff

³² In re the Application of Pacific Bell, No. 87-12-067 (Dec. 22, 1987) (Application 85-01-034; I.85-03-078; 0II84; C.86-11-028).

provisions.”³³ Colton noted that utility cases have been cited as “particularly appropriate” instances for use of cy pres trust funds. (CANM Exh. 1, at 36).³⁴

Finally, Colton noted that:

Finally, while not created through state regulatory action, and not distributed through a single formal legal trust, one of the most noteworthy examples of funds being set aside in trust for the use of low-income beneficiaries involved the Petroleum Escrow Violation Fund, commonly known as “oil overcharge” dollars.

(CANM Exh. 1, at 37).

One commentator notes the reasons why a cy pres trust fund approach such as that proposed by CANM is most appropriate for claims such as those brought by CANM against the Company in this case:

The method of cy pres or fluid recovery most appropriate in consumer class actions is the consumer trust fund. A consumer trust fund remedy operates either by endowing a new project or by funding an existing private program. A consumer trust fund 'achieves the cy pres purpose most closely' for several reasons. It can be structured to serve the purposes of the underlying litigation, thus avoiding the uncertainties of earmarked escheat or general escheat; it avoids the market disruption of price rollbacks; and most importantly, consumer trust funds can be structured to serve all the members of the class, regardless of their sophistication or socioeconomic status. The benefit takes the form of increased services to, or protection of rights of the entire class, which is preferable to limiting benefits only to those who successfully complete a claim.³⁵

Like CANM witness Colton (CANM Exh. 1, at 37), these commentators noted the “oil overcharge” cases as a classic example of the use of a cy pres trust fund remedy.

In the Department of Energy cases, collectively known as the Petroleum Violation Escrow Account Cases (PVEA), a consumer trust fund remedy was adopted for that portion of the overcharges allocated by decision or settlement to consumers rather than to commercial users of overpriced oil. In one of the PVEA cases, for example, the U.S. District Court for the District of Columbia determined that the best way to give restitution to injured consumers of oil which had been overpriced during the price controls of the late 1970's was to use the overcharge monies for one or more of five energy conservation programs.³⁶

³³ Pac Bell Application, at 79 (quoting Pac Bell Application 86-08-026 'mimeo,' at 19-20).

³⁴ Colton (CANM Exh. 1, at 36) cited: 2 Newberg and Conte, *Newberg on Class Actions*, section 10.17 at 10-44, 10-45, and *Market Street Railway v. Railroad Commission*, 171 P.2d 875, 881 (Cal. 1946), *cert. denied*, 329 U.S. 793 (1946).

³⁵ Gail Hillebrand and Daniel Torrence, “Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits,” 28 *Santa Clara Law Review* 747, 766 (1988) (internal notes deleted).

³⁶ *United States v. Exxon Corp.*, 561 F.Supp. 816 (D.D.C. 1983), *aff'd*, 773 F.2d 1240 (T.E.C.A. 1985), *cert.*

Finally, the trust fund proposed by CANM is akin to a second California trust fund established based upon the unlawful activities of a local utility. As Hillebrand and Torrence reported,³⁷ the structure, purpose and underlying basis of this trust fund was very similar to what CANM proposes in this proceeding:

Similarly, in *Stern v. U.S. Sprint*, a telephone overcharge case, the Superior Court of Los Angeles approved a plan of settlement calling for the creation of a \$1,000,000 fund to finance a California nonprofit public benefit corporation. The purpose of the corporation would be to 'further the interests of consumer protection through a wide range of activities which may include the dissemination of consumer information, establishment of a consumer complaint center or clearinghouse, establishment of fellowships for work on consumer protection issues in academic or other settings, and participation in administrative hearings or litigation.'³⁸

The structure the *Sprint* case used is nearly identical to that proposed by CANM:

The structure of the consumer trust fund can vary widely depending on the goals of the original litigation, the amount of money available, and the time period over which the funds will be used. The court has broad discretion to order uses of the fund which will both deter future violations and also compensate or serve the same group of people who were victims of the practice that formed the basis for the original suit. A general statement of purpose or issues can be combined with delegation of ongoing supervision to an appointed board to provide both guidance and the necessary flexibility to ensure maximum benefit to the injured consumers.³⁹

This recommendation can be compared favorably to the structure as proposed by CANM witness Colton discussed above.

In sum, CANM recommends the imposition of sanctions on the Company for its knowing violation of New Mexico law. CANM recommends those sanctions be collected and distributed through a cy pres trust fund as described above.

ISSUE #6: THE PNM PROPOSAL TO DECOUPLE USAGE AND RATES SHOULD BE DISAPPROVED.

denied, 474 U.S. 1105 (1986), reh'g denied, 474 U.S. 1112 (1988). For a discussion of the doctrinal bases for the trust fund concept in the PVEA cases, see Note, "Collecting Overcharges from the Oil Companies: The Department of Energy's Restitutionary Obligation," 32 Stanford L.Rev. 1039 (1980).

³⁷ Hillebrand and Torrence, *supra*, at 768.

³⁸ Hillebrand and Torrence, *supra*, at 767, citing, *Stern v. U.S. Sprint*, Stipulation and Plan of Settlement at 6, *Stern v. U.S. Sprint*, No. CA000933 (L.A. Super. Ct. filed Feb. 12, 1988).

³⁹ Hillebrand and Torrence, *supra*, at 767.

CANM recommends that the Company's proposed revenue decoupling mechanism (Rate Rider 16) be disapproved. The revenue decoupling mechanism will have a direct and disproportionately adverse impact on low-income customers.

There can be little question but that the proposed Rate Rider 16 will have a disproportionate adverse impact on low-income customers and will result in a direct income transfer from less affluent to more affluent customers. There is a direct relationship between the efficiency of energy usage and income. Increases in energy efficiency have occurred in the more wealthy populations. While low-income customers tend to use less energy because they have smaller homes, they tend to use more energy on a per square foot basis. (CANM Exh. 1, at 39). Under Rate Rider 16, as efficiency improvements continue in the homes of more wealthy households, the Rider will kick in. As the Company acknowledges, the Rider is likely to increase rates over time to the extent that per customer consumption is decreasing.

The impact of that observation is not income neutral. The decreasing per customer consumption (due to the replacement of appliances with more efficient appliances, increases in housing efficiency, etc.) is likely to occur for more wealthy customers. (CANM Exh. 1, at 39). The Rate Rider 16 thus redistributes rates from the more wealthy to the less wealthy.

CANM documented that low-income consumers do not have the same capacity to implement energy efficiency improvements as do higher income customers. This is true for several reasons.

- First, low-income households tend to have extremely high implicit discount rates (also sometimes known as hurdle rates or internal rates of return). Low-income consumers require an 80 – 90% hurdle rate (1-year payback), while higher income customers accept a 30% hurdle rate (3-year payback).
- Second, low-income households tend to have extremely low liquidity. The payback period for any particular energy efficiency measure, of course, becomes irrelevant if the household does not have the investment capital with which to begin. It is axiomatic to note that not many low-income households are purchasing new water heater or home heating systems.
- Third, low-income households tend to live in rental dwellings. Tenants have little or no incentive to improve their landlord's property. They do not receive any of the increased value of the property and, in fact, may face rent hikes as a result of the improvements.
- Finally, low-income tenants tend to be more mobile. As a result, the payback period required to justify such an investment would need to match the household's tenure. A low-income household, in other words, will not invest in a measure with a two-year payback if that household tends to move to a different dwelling every 12 months.

(CANM Exh. 1, at 39 – 41).

In sum, CANM urges the Commission to find that Rate Rider 16 will have a direct and disproportionately adverse impact on low-income PNM customers. It is yet another example of

how the Company is pursuing policies and practices that have the effect of transferring money from lower-income households to higher income households. Given the unaffordability of home energy to low-income customers with which to begin, this impact cannot be justified. Rate Rider 16 should be disapproved.

Respectfully Submitted,

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