BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF AN INVESTIGATION INTO EL PASO ELECTRIC COMPANY'S RECOVERY OF COUNTY FRANCHSE FEES FROM ITS RATEPAYERS,	)	
	)	**Case No. 09-00421-UT**
EL PASO ELECTRIC COMPANY,	)	
Respondent.	)	

FINAL ORDER WITH COMPLIANCE REQUIREMENTS

THIS MATTER comes before the Public Regulation Commission ("Commission") upon the Response to Order to Show Cause ("Response"), filed January 5, 2010, by El Paso Electric Company ("EPE") and the Reply to El Paso Electric Company's Response to Order to Show Cause ("Staff's Reply"), filed January 22, 2010, by the Staff of the Commission's Utility Division ("Staff). Having reviewed EPE's Response and Staff's Reply, and being duly informed in the premises,

THE COMMISSION FINDS AND CONCLUDES AS FOLLOWS:

1. This investigation was initiated to determine whether certain franchise fees being paid to Doña Ana, Otero and perhaps other counties are unlawful under New Mexico statutes, and if so, why the Commission should not:

A. Require EPE immediately to cease passing through to its customers those franchise fees or taxes it pays to Doña Ana, Otero or any other New Mexico county that has imposed a franchise fee; and

B. Require EPE to refund to its customers, with or without interest, the total amount of franchise fees or taxes that it has paid to Doña Ana, Otero and any other New Mexico county.

To assist the Commission in this investigation, the Show Cause Order required EPE to file a Response on the above matters, and to provide certain other information discussed below.

2. On January 5, 2010, EPE filed its Response to the Show Cause Order. In its Response, EPE asserts that the fees imposed under the Doña Ana and Otero franchise fee ordinances and agreements are lawful under New Mexico statutes. EPE supports that assertion with a number of arguments. For the reasons discussed below, the Commission finds that the arguments raised by EPE are without merit and thus are rejected by the Commission.

3. EPE asserts that New Mexico counties are expressly authorized to permit public utilities to use the public highways and the streets and alleys of unincorporated towns under the grant of a franchise within their respective jurisdictions. In its Reply, Staff points that this assertion has some merit. Although the Commission also generally agrees with EPE's statement, the issue in this case is not whether Doña Ana, Otero and perhaps other counties are authorized to enter into franchise agreements or issue franchise ordinances to EPE. The issue is whether they have the lawful authority to impose a franchise fee or tax on EPE in the franchise agreements or ordinances granting such franchise.

4. EPE also points out that NMSA 1978, § 62-6-4.5(A) requires that franchise fees be stated as a separate line entry on bills sent to a public utility's customers, and that such fees be recovered solely from a customer located within the jurisdiction of the "government authority" imposing the franchise fee. Staff contends that this assertion is also among those that have merit.

While EPE's assertion is generally correct, it again misses the mark. Section 62-6-4.5(A) does not in way authorize New Mexico counties to impose franchise fees or taxes on any public utility when granting a franchise, but merely requires public utilities that seek to recover any such fees from the customers located within the jurisdiction of the government authority through a line item on their utility bills.

5. EPE next criticizes written Opinions of the New Mexico Attorney General ("AG"), in which the AG opined that counties did not have the authority to impose a franchise fee or tax when granting a franchise As portrayed by EPE, the AG's opinion was based on the AG's assumption that a certificate of public convenience and necessity ("CCN") issued by the Commission pre-empted a local government's authority to charge franchise fees. Although some of the AG's opinions can be read as reaching such result,[1] the Show Cause Order relied upon the AG's other legal reasoning set forth in its opinions. As stated in the Show Cause Order, the AG opined that counties do not have the authority to impose franchise fees or taxes based on the general rule that counties, unlike the state itself, have no inherent power of taxation. Rather, the AG observed, the power of counties and other local political subdivisions to tax "derives entirely from statutory or constitutional grant delegating them the power to impose taxes." Atty. Gen's. Opinion No. 57-51, at 2; *see also, City of Albuquerque v. New Mexico Public Regulation Commission,* 134 N.M. 472, 475, 79 P.3d 297, 300 (2003) (a county possesses only such power as are expressly granted to it by the Legislature, together with those necessarily implied to implement those express powers). Because there was no constitutional or statutory provision that delegated counties the authority to impose taxes in connection with the delegated authority

[1] *See e.g.* AG Opinion Nos. 57-124 (March 15, 1957).

to grant franchises under Section 68-1-3, the AG concluded that a utility franchised under Section 68-1-3 "is not the subject of a county franchise tax in the absence of a specific legislative declaration thereof." *Id.* at 3.

6. EPE's Response does not contest the AG's determination that counties and other local political subdivision have the power to tax solely to the extent they are granted such authority by statute or the New Mexico Constitution. EPE also does not cite to any statute or constitutional provision that gives the counties such authority. Instead, EPE contends that municipalities have no clearer basis for charging franchise fees than do counties, and that the courts have recognized that municipalities have the authority to impose franchise fees and taxes on public utilities. EPE Response at 6. However, EPE's contention that municipalities and counties have the same authority to impose taxes is in error.

7. Section 6.D of Article X of the New Mexico Constitution expressly gives municipalities that adopt a charter (i.e., become a "home rule municipality") may, subject to certain exceptions not relevant here, "perform all functions not expressly denied by general law or charter." That same provision further provides:

> No tax imposed by the governing body of a charter municipality, except a tax authorized by general law, shall become effective until approved by a majority vote in the charter municipality.

Under this constitutional provision, charter municipalities, which include the City of Albuquerque and Santa Fe, have the authority to impose a franchise fee or tax on utilities, provided that a majority of the residents of those cities vote to approve the franchise fee or tax. No similar constitutional authority exists for unincorporated counties such as Doña Ana and Otero Counties.

8. EPE's Response does, however, point to NMSA 1978, §4-37-1,which provides that "counties are granted the same power that are granted municipalities except for those power that are inconsistent with statutory or constitutional limitations placed on counties." However, the powers that are granted counties by that statute are those that are granted to municipalities generally, and not to those that have been granted solely to "home rule". Even if it were assumed that Section 4-37-1 gives the Counties the same right to adopt charters and have the same powers as home rule municipalities under Section 6.D of Article X, the fact remains that neither County has done so. As such, the Counties have the same statutory authority that has been granted to municipalities that do not adopt a charter, and, under NMSA 1978, § 3-42-1, those municipalities are authorized to recover only certain costs incurred in granting the franchise. As discussed in the Show Cause Order, the franchise fees and taxes at issue are clearly not just the reimbursement of the costs incurred by the Counties in granting the franchises to EPE.

9. EPE's further contention that the Commission does not have the jurisdiction to prohibit EPE from recovering the franchise fees imposed by the counties is also without merit. The amounts that EPE charges its customers with respect to the franchise fees are rates that are charged in connection with it utility service and thus are subject to the jurisdiction of the Commission. It is well-established that the Commission may disallow the recovery of any cost incurred by a utility where the utility has failed to meet its burden of proof of showing that the costs were prudently incurred. *See e.g., In re Petition of PNM Gas Services,* 129 N.M. 1, 1 P.3d 383 (2000); *Otero County Electric Co-Op v. New Mexico Pub. Serv. Comm'n,* 108 N.M. 462, 774 P.2d 1050 (1989). Insofar as EPE's was not required by law to pay the franchise fees paid

by the counties, it was EPE's burden to show why its payment of those fees or taxes was prudent under the circumstances. However, EPE has failed to present any such evidence.

10. EPE also misconstrues the Show Cause Order when it asserts that the Commission does not have the jurisdiction to construe, enforce or terminate a contract between a utility and government entity. As indicated by the Commission in its Order Extending Deadline for Filing Replies and Denying Motion for Limited Intervention, issued January 19, 2010, this proceeding has nothing do to with the construction, enforcement or termination of the Counties' franchise ordinances imposing the franchise fee or taxes on EPE. Rather, the sole issues to be determined in this case are whether EPE should, under the facts and circumstances of this case, be required to refund to its customers all or a portion of the franchise fees it has paid to Doña Ana and Otero County. Even though the Commission is requiring EPE to cease charging its customers for those fees and to refund a portion of the fees already collected, EPE is not, by the issuance of this Order, relieved of its obligation to continue to pay those fees to the Counties. The issue of whether EPE is required to continue to pay those franchise fees to the Counties must be made by a court having jurisdiction, and not the Commission.

11. EPE further asserts that the Commission cannot, under the doctrine of retroactive ratemaking, require refunds of the franchise fees and taxes that may have been included in base rates prior to the implementation of NMSA 1978, § 62-6-4.5. EPE states that it eliminated all franchise fees from base rates and revised its billing forms in EPE Advice Notice No. 195 by Final Order in Case No. 03-00302-UT. According to documents filed in that proceeding, EPE commenced recovering all franchise fees and taxes it pays through a line item in its bills (rather

than through base rates) commencing with EPE's first billing cycle that began on or after June 1, 2004.

12. The Commission agrees that it cannot, under the prohibition against retroactive ratemaking and its corollary, the filed rate doctrine, require EPE to refund the franchise fees that were included in base rates that were approved by the Commission and reflected in tariffs on file with the Commission. It is telling, however, that EPE does not argue or even suggest that the Commission cannot require EPE to refund the franchise fees and taxes that EPE commenced collecting through line item charges on its bills to customers residing in the Counties commencing in June 1, 2004 pursuant to EPE's Advice Notice No. 195. Under the facts and circumstances of this case, neither the filed rate doctrine nor the prohibition against retroactive ratemaking bar the Commission from requiring EPE to refund those amounts to its customers.

13. The filed rate doctrine and the prohibition against retroactive ratemaking have been described in various ways in this and in other jurisdiction. One public utility commission has described the prohibition against retroactive ratemaking as follows:

> The benefit of the prohibition on retroactive ratemaking is that utilities and customers may relay on the stability [of] approved rates by altering rates only prospectively, without any attempt to recapture past excess profits or redress deficient past revenues.

Re Alaska Exchange Carriers Association, Inc., 2008 WL 2155647 at 5, Regulatory Commission of Alaska (2008). A court has similarly held that the prohibition against retroactive ratemaking dictates that "[o]nce rates are set by a regulatory agency in accordance with statutory guidelines, the revenues realized belong to the company." *Connecticut Light and Power Company v. Department of Public Utility Control,* 1995 WL 360777 (Conn.Super). With regard to the filed rate doctrine, the New Mexico Supreme Court has held that "A file rate is one that is approved

by the regulatory agency and is 'per se reasonable and unassailable in judicial proceedings brought by ratepayers." *Summit Properties, Inc. v. Public Service Company of New Mexico,* 138 N.M. 208, 215, 118 P.3d 716, 723 (2005) (hereinafter referred to as *"Summit").* The filed rate doctrine has also been described in a manner that suggests it is synonymous with the prohibition against the prohibition against retroactive ratemaking. *See e.g. Texas Eastern Transmission Corporation,* 72 FERC 61,152 (1995) (Under the filed rate doctrine, final rates approved by the **61767* Commission cannot be changed retroactively).

14. All of the foregoing formulations of these doctrines make it clear that they apply to rates that have been approved by the Commission. Indeed, in *Summit,* the Court held that the filed rate doctrine did apply to a utility's connection fees that were reviewed by Commission Staff for glaring problems, but were not reviewed or approved by the Commission. *Summit, supra,* 138 N.M. at 216, 118 P.3d at 725. As acknowledged by EPE in its Response ("Bench Request Response"), filed January 26, 2010 to a Commission Bench Request Order, none of the franchise fees paid by EPE to the Counties were ever included in any cost-of-service studies supporting EPE's requests for rate increase that were filed on or after June 1, 2004. Thus, the Commission has never examined, much less approved, the amounts charged to its Doña Ana and Otero Counties with respect to the franchise fees it paid to the Counties. EPE's flow-through of the franchise fees to those customers are, at least since June 1, 2004, very similar in nature to the costs of fuel and purchased power costs recovered through a fuel and purchased power adjustment clause. As is the case with the franchise fees at issue here, the Commission does not, as a routine matter, examine the prudence of a utility's fuel and purchased power costs before they are recovered by the utility from its customers. Thus, the Commission clearly has the power

and authority to require utilities to refund any fuel and purchased power costs that were imprudently incurred to its customers. The Commission has the same power and authority with respect to the franchise fees recovered by EPE in its first billing cycle commencing on or after June 1, 2004.

15. In its Bench Request Response, EPE stated that it collected a total of $56,712 from its Otero County customers, and $943,250 from its Doña Ana County customers, commencing with its first billing cycle after June 1, 2004 through December 31, 2004. That amount, when added to the amounts shown on Exhibit I ("Exhibit 1") to EPE's Response shows that, since June 1, 2004 through the end of November 2009, EPE has charged and collected a total of $288,987 from its Otero County Customers, and $5,366,804 from its Doña Ana County.

16. For the foregoing reasons, EPE should be required to:

A. Immediately cease and desist from passing through to its customers any the franchise fees it pays to the Counties;

B. Refund to its Doña Ana and Otero County customers the amount of franchise fees it has passed through to those customers since June 1, 2004, including the additional amounts that EPE charged and collected after the period shown in Exhibit 1, plus interest at a rate equal to EPE's cost of long-term debt shown in EPE's rate case in which a Final Order was last issued before the commencement of the period in which the amounts were collected, which interest shall be accrued monthly. EPE should be required to refund that total amount ("Total Amount"), plus interest to its Doña Ana and Otero County customers over a three-year period through a credit on their bills. The interest on the unamortized balance shall be accrued monthly and equal to 6.6886%, which is EPE's cost of long-term debt included in EPE's rate petition filed in Case

No. 09-00171-UT, until such time as the Commission issues a Final Order establishing new rates in response to in any future rate petition filed EPE, at which time the interest rate shall be equal to EPE's cost of long-term debt included in that future rate petition.

17. The Commission has jurisdiction over the parties and subject matter of this proceeding.

IT IS THEREFORE ORDERED:

A. EPE shall immediately cease and desist from charging and collecting from its customers the franchise fees and taxes paid to the Counties.

B. Within three business days after this Final Order is issued, EPE shall file:

1. Schedules showing the Total Amount to be refunded to its customers, determined in accordance with Paragraph 16.B of this Final Order;

2. An Advice Notice and tariff providing for the refund of the Total Amount over a three year period to EPE's Doña Ana and Otero County customer, plus interest on the unamortized balance determined in accordance with Paragraph 16.A of this Final Order.

C. This Order is effective immediately.

D. Copies of this Order shall be emailed to all persons on the attached Certificate of Service if their email addresses are known, and if not known, mailed to such persons via regular mail.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this 26th day of January, 2010.

NEW MEXICO PUBLIC REGULATION COMMISSION

David W. King

DAVID W. KING, CHAIRMAN

JEROME D. BLOCK, VICE CHAIRMAN

Dissent

JASON A. MARKS, COMMISSIONER

TELEPHONICALLY APPROVED

CAROL K. SLOAN, COMMISSIONER

SANDY JONES, COMMISSIONER

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EL PASO ELECTRIC COMPANY, RESPONDENT	)	

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Final Order with Compliance Requirements** issued January 26, 2010, was e-mailed or mailed by regular mail on the same date to the following parties:

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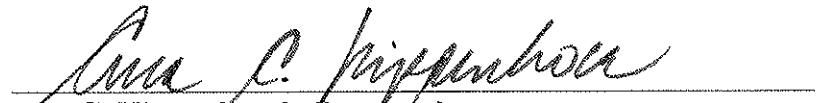
Dated this 26th day of January, 2010

NEW MEXICO PUBLIC REGULATION COMMISSION



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