**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**NEW MEXICO EXCHANGE CARRIER GROUP** **NO. 35,036**

Appellant,

v.

**NEW MEXICO PUBLIC REGULATION COMMISSION,**

Appellee,

and

**SPRINT COMMUNICATIONS COMPANY, L.P., SPRINT SPECTRUM L.P. and SMITH BAGLEY, INC., CTIA, THE WIRELESS ASSOCIATION, T-MOBILE WEST LLC, AND NAVAJO COMMUNICATIONS COMPANY,**

Intervenors.

CONSOLIDATED WITH

**NEW MEXICO EXCHANGE CARRIER GROUP,** **NO. 34,933**

Appellant,

v.

**NEW MEXICO PUBLIC REGULATION COMMISSION,**

Appellee,

and

**SMITH BAGLEY, INC., and NAVAJO COMMUNICATIONS COMPANY,**

Intervenors.

**ANSWER BRIEF OF INTERVENOR SMITH BAGLEY, INC.**

Patricia Salazar Ives, Esq.
CUDDY & McCARTHY LLP
1701 Old Pecos Trail
P.O. Box 4160
Santa Fe, NM 87502-4160
(505) 988-4176
pives@cuddymccarthy.com

and

David LaFuria, Esq.
Lukas, Nace, Gutierrez & Sachs, LLP
8300 Greensboro Drive
Suite 1200
McLean, VA 22102
(703) 584-8678
dlafuria@fcclaw.com

**Oral Argument Requested.**

## STATEMENT OF COMPLIANCE

Pursuant to Rule 12-213(G) NMRA 2015, the undersigned counsel certifies that this Brief was prepared in Times New Roman proportionally spaced typeface, and contains 7,026 words, based upon the word-count tool of Microsoft Office Professional 2010 software.

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Patricia Salazar Ives

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Intervenor Smith Bagley, Inc. ("SBI" or "Intervenor"), by counsel and pursuant to Rule 12-213(B) NMRA, submits this Answer Brief[1] in response to Appellant's Consolidated Brief in Chief, filed April 27, 2015 ("Appellant's Brief"). The two Commission Orders being appealed are:

- *In the Matter of the Rural Universal Service Fund Size and Surcharge Rate for 2015* (NMPRC Case No. 14-00279-UT) ("Surcharge Case"), NMECG v. NMPRC, No. 34,933;[2] and

- *In the Matter of Possible Changes to State Rural Universal Service Fund Rules at 17.11.10 NMAC* (NMPRC Case No. 12-00380-UT) ("USF Rule Case"); NMECG v. NMPRC, 2014-NMSC-__, No. 35,036.[3]

## I. INTRODUCTION

Appellant asks this Court to rule that the New Mexico legislature created an entitlement program, requiring the New Mexico Public Regulation Commission ("PRC" or "Commission") to guarantee approximately $24 million of State Rural Universal Service Fund ("State Fund") subsidies to Appellant's member companies, an unprecedented corporate welfare program that contradicts any fair

[1] Except where stated, all citations to the Record Proper ("**RP**") are to the Record Proper in Case No. 35,036.

[2] *See* [**Case No. 34,933 1 RP 4-20**] (*Order on Universal Service Fund Size and Surcharge Rate for 2015 in Docket No. 14-00279-UT and Closing Docket No. 06-00026-UT*, (Issued September 17, 2014) ("*Surcharge Order*")).

[3] *See* [**Case No. 35,036 1 RP 59-120**] (*Order Adopting Final Rule*, Case No. 12-00380-UT (Issued November 26, 2014) ("*USF Rule Order*")).

reading of the statute. Under Appellant's reading, if each of its member companies lost all but one of their respective customers, the PRC is legally required to continue providing the entire $24 million of State Fund support, into perpetuity (or, in Appellant's view, until the legislature changes the law).

In New Mexico, approximately 1,700,000 wireless consumers (including those of SBI) and approximately 732,000 wireline consumers (including large carriers, such as CenturyLink, and small rural telephone companies) pay into the State Fund each month.[4] Although wireless consumers make up the largest share, and contribute most of the funds, all but a small fraction of the $24 million in the State Fund is paid out to NMECG member companies, who collectively serve only 96,000 rural customers in the state. Less than $1 million is used to fund the state's Lifeline program and defray administrative expenses.

New Mexico carriers (wireline and wireless) pay per-minute rates to wireline carriers, including Appellant's members, to terminate intrastate calls. These per-minute charges are known as intrastate switched access charges. In 2005, the Legislature required the Commission to adopt a mechanism that "reduces intrastate switched access charges to interstate switched access charge levels in a

[4] *See* [**4 RP 2124 n.12**] Local Telephone Competition: Status as of June 30, 2012 at Tables 9 and 18, http://transition.fcc.gov/Daily_Releases/Daily_Business/2013/db0621/DOC-321568A1.pdf, (last visited on June 26, 2015) also cited in SBI's comments filed with the Commission on September 11, 2013.

revenue-neutral manner"[5] and to make payments to carriers, "in an amount equal to the reduction in revenues *that occurs as a result of reduced intrastate switched access charges*" (emphasis added).[6] In response, the Commission established the State Fund in the amount of approximately $24 million annually, arrived at by multiplying the per-minute reduction in access rates by the number of minutes processed by the carriers.[7]

In 2005, before widespread adoption of modern digital wireless networks in rural areas, before the widespread use of alternative services such as Internet telephony using Voice over Internet Protocol (VoIP), the world was a very different place. At that time, Appellant's member companies were processing 209,266,290 total intrastate switched access minutes.[8] Since then, competition from wireless and voice over the Internet (sometimes referred to as VoIP) has significantly reduced the number of telephone calls made over Appellant's member facilities. By 2012, Appellant's member companies were processing only 125,719,653 total access minutes,[9] a reduction of approximately 40%, resulting in

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[5] *See* NMSA 1978, § 63-9H-6(C) (2013).

[6] *See* NMSA 1978, § 63-9H-6(K) (2013).

[7] *See* [**4 RP 2380**] (Staff Comments on First Workshop Issues and Data Tables, filed August 5, 2013 at p. 7.)

[8] *Id.* (Total Minutes 2004).

[9] *Id*. (Total Minutes 2012).

over $9 million in excess subsidies each year. In response, the Commission decided to correct the problem by updating its formula to more closely reflect the actual minutes of use being processed by Appellant's member companies.

The Commission ruled that it would discontinue using decade-old traffic data and henceforth determine State Fund support for Appellant's member companies based on the number of minutes processed two years before the calculation is made.[10] By using more recent traffic data, the PRC will provide subsidies to carriers that more closely approximates what they should be receiving.[11] Despite the years of over subsidization, the Commission did not consider requiring carriers to repay prior overpayments, or to forego future payments as a "true up" mechanism. In addition, the Commission did not flash cut carriers, but rather it phased in the adjustments over a two-year period.[12] In addition, the Commission allowed companies adversely affected by its decision to apply for supplemental subsidies pursuant to 17.11.10.25 NMAC.[13]

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[10] *Id.*

[11] In a perfect world, traffic data would be up to the minute, to provide accurate subsidies.

[12] *Id.*

[13] [**1 RP 80**] (*USF Rule Order* at p. 21).

Under the law, Appellant's member companies are surely entitled to revenue neutral subsidies for each minute of traffic they terminate, in an amount equal to the reduction in intrastate switched access charges prescribed by the Commission. Yet, Appellant claims the statute compels the Commission to provide a subsidy for minutes that its member companies no longer terminate due to lost business, an implausible interpretation of an otherwise straightforward statute.

Compounding matters, Appellant repeatedly misstates core principles, first enunciated by Congress and later adopted by the New Mexico legislature, requiring universal service mechanisms to be specific, predictable and sufficient to provide consumers (not companies) with universal service support. Appellant would have this Court ensure that the state's universal service mechanism is sufficient to provide its member companies with specific and predictable revenue streams, an interpretation that has never been the law in New Mexico and has been specifically rejected by the Circuit Courts.[14]

Appellant contends that when the legislature directed the Commission to administer a universal service mechanism, its delegation of authority was purely ministerial, that the Commission has no authority to choose or alter the subsidy methodology, yet in 2005 Appellant did not challenge the Commission's authority to adopt a methodology that suited Appellant's interests.

[14] *See, e.g., Alenco Communications, Inc. v. FCC*, 201 F.3d. 608, 614-15 (5th Cir. 2001).

By holding the *status quo* for a decade without giving the program proper care and feeding, the Commission allowed a minor problem to metastasize into a major one. The Commission properly acted to correct the problem of subsidies not matching up with access minutes, as required by the statute, and to begin to bring accountability to the program. It is a fundamental principle of administrative law that an agency is permitted to change course, especially in response to changed circumstances, provided it gives an adequate explanation.[15] Here, the substantial increase in competition from VoIP and wireless, consumers' desire to avoid high intrastate long distance rates, evidence that support payments have not correlated with carrier investments in high-cost areas (as demonstrated by the QSI Report),[16] and the imperative to begin transitioning support from basic voice service to broadband, all provided good cause for the Commission to change course.

In sum, Appellant seeks to convince the Court of an incorrect and improbable statutory reading, they ask the Court to find that the Commission did not properly change course, and they seek to prohibit the Commission from *ever*

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[15] *See Motor Vehicle Mfr's Ass'n of U.S., Inc. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 56 (1980). There is no evidence to support Appellant's argument, [**BIC 40**], that the legislature has "acquiesced" in the Commission's prior decisions, as that assumes the legislature was actually informed about the increasing over-subsidization problem over the past decade, and specifically chose to do nothing about it.

[16] A copy of the QSI Report is appended to SBI's Comments in Case No. 12-00380-UT [**3 RP 1585-1600**].

changing course, in order to protect their subsidies. In fact, the Commission acted, perhaps later than some would have liked, to correct a growing problem and to protect New Mexico consumers who pay into the fund from over-subsidizing carriers who have failed to demonstrate that contributions are being invested for consumers' benefit.

For the reasons set forth below, both of the Commission's orders must be affirmed.

## II. SUMMARY OF PROCEEDINGS.

SBI generally agrees with the summary of proceedings provided in Appellant's Brief, with the following exceptions.[17]

Appellant describes the Commission's action as causing a "precipitous decline in support for rural telecommunications networks." [**BIC 2**] That statement incorrectly presumes that such declines correlate with reduced investment or higher charges to consumers, ignoring record evidence that many carriers are earning outsized returns on investment and require little or no support in 2015 to achieve universal service for consumers.[18]

Appellant states, "unlike the FCC, the legislature chose to continue full support for universal service." [**BIC 6**] Whatever that means, nothing in the statute

[17] SBI deems a summary of proceedings section necessary to put in context undisputed evidence that was before the Commission. *See* Rule 12-213(B).

[18] *See* [**3 RP 1585-1600**] (*QSI Report*).

can be reasonably interpreted to create a corporate welfare mechanism, guaranteeing the success of any particular company. As demonstrated below, the terms "specific" "sufficient" and "predictable" have always been interpreted to mean a mechanism that provides specific, sufficient and predictable support for consumers, to ensure they have access to services, not "full support" for carriers.[19] Moreover, the legislature specifically ordered the PRC to create a mechanism that is "portable,"[20] that is, support goes to the carrier the consumer chooses. That statutory command cannot be reconciled with the concept of a welfare program for any class of carrier.

Appellant conflates the statutory text into a legislative intent that its member companies "would not be deprived of revenue used to support affordable rural telephone service." [**BIC 8**] SBI finds nothing in the statute suggesting that the legislature intended for the Commission to "top up" individual NMECG member companies losing revenues due to legitimate competition from carriers offering a product that rural consumers perceive to be superior. As shown below, the legislature intended for revenue-neutral payments to compensate for reduced access charge rates, not the loss of business.

[19] *See Alenco*, 201 F.3d 608 at 622; *see also*, Section III.B, *infra.*

[20] Section 63-9H-6(C).

Appellant implies that the 'constant minutes' formula adopted by the Commission in 2005 was compelled by statute. [**BIC 9**] In fact, the statute provides for reductions in revenues as a result of *reduced access charges*.[21] Nothing in the statute compels the Commission to use a constant minutes formula. In fact, the better reading of the statute would reject a constant minutes formula because it risks providing much more support than carriers lose as a result of reduced access charges, which has in fact happened over the past decade.[22] Appellant's position requires the court to accept that the Commission is powerless to change its rules based on experience and the observation that public funds are being distributed inconsistent with the statute's requirements.

Appellant states that support has enabled their members to make investments "expanding and upgrading rural wireline networks." [**BIC 11**] Yet, Appellant's members have provided the Commission with remarkably little accountability over the years. The record below (stretching nearly two years) contains almost nothing from Appellant's member companies beyond unsupported statements. The

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[21] Section 63-9H-6(K).

[22] Moreover, as SBI pointed out, the transition to all-IP telephony over the next several years, will eliminate transfer payments among carriers – that is – carriers likely will pay nothing to each other for access. [**3 RP 1580**] (SBI Comments, August 22, 2014 at p. 6).

independent QSI Report finds facts leading to exactly the opposite conclusion – that support payments are not correlating with investments.[23]

Appellant states that its member companies testified at the public hearing that, "residential customers could face substantial increases in local service rates." [**BIC 14**] While that may be true, throughout the two year rulemaking process, no member company has ever entered data into the record demonstrating how much support it could lose before it would be forced to raise rates, how much new revenue streams (*e.g.*, broadband or special access services) are offsetting intrastate switched access losses, how support is being invested, whether consumers have an alternative to their service (for example from wireless, cable, or other technologies), or anything else that would assist the Commission. Appellant's members have utterly failed to support these claims (or similar claims asserted) at [**BIC 18-19**] with anything the Commission can measure.

Appellant claims, once again without support, that the decline in access minutes is a myth, because mobile carrier access minutes which were counted in the calculation in 2005, are now excluded. [**BIC 14**] Appellant did not argue this point throughout the two-year rulemaking proceeding below, but one of its members uttered it at the last public hearing. If explored fully, Appellant would be required to demonstrate that wireless usage is not reducing wireline usage, that

[23] *See* [**3 RP 1585-1600**] (QSI Report).

consumers are not using VoIP alternatives (*e.g.*, Skype, FaceTime, Vonage) to traditional long distance calling, and that these trends are not accelerating. Appellant's members chose not to litigate these facts in the proceeding below.

Appellant would have the Court believe that the Fund Administrator recommended a 3.62% surcharge proposal, when in fact the Fund Administrator presented the Commission with six scenarios, including the one ultimately selected.[24] [**BIC 15**] Moreover, Appellant has never disputed that the Commission is not required to accept the Fund Administrator's recommendation.

Appellant states that the Commission's governing rule "required access support payments of $24 million." [**BIC 17**] No Commission rule states that support payments must be $24 million into perpetuity, or prevents the Commission from changing any rule, whether through a variance or a notice and comment rulemaking.

Appellant cites statements made at the October public hearing regarding how important fiber is in rural areas. [**BIC 19**] Left unsaid was the overwhelming support for policies that drive investments in rural broadband. Witnesses such as Andrew Othole, the Director of Planning and Development at the Pueblo of Zuni, spoke in favor of setting aside funds for broadband, which could be done with savings realized due to reductions in subsidies currently being provided with no

[24] *See id.* [**1 RP 5-6**] (*Surcharge Order,* at pp. 2-3).

accountability.[25] Numerous other commenters, including Verizon, Sprint, CTIA, Smith Bagley, Inc., and tw telecom, spoke about accountability and the need for the fund to provide support to consumers and to rural areas that need it, something the current mechanism fails to do.

## III. ARGUMENT

### A. The Standard of Review for Interpreting a Legislative Statute.

A principal point of contention is what the legislature meant when it authorized the creation of a subsidy mechanism. The Court must interpret the legislature's plain language, assuming that "unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 37, 42 (1979). Words must also be read, "in their context and with a view to their place in the overall statutory scheme." *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007). In this case, it will be necessary for the Court to ascertain legislative intent by "reading all the provisions of a statute together, along with other statutes *in pari materia* ['upon the same matter or subject – Black's Law Dictionary, Fifth ed.]." *N.M. Mining Assoc. v. N.M. Water Quality Control Comm'n*, 2007-NMCA-010, ¶12, 141 N.M. 41, 44 ("N.M. Mining").

[25] [**2 RP 763-764**] (*Transcript of Public Comment Hearing before Hearing Officer Sandra Skogen* (Oct. 8, 2014) at pp. 10-11).

### B. The Statute Provides Carriers with a Subsidy for Reduced Access Charges, Not for Lost Business.

Appellants repeatedly invoke the concept of "revenue neutrality," to claim that the statute requires the Commission to ensure that its member companies receive a sufficient amount of revenue each year so that consumers can receive service.[26] While sounding good in concept, Appellant's claim finds no support in the statute, which reads in pertinent part:

> The commission shall authorize payments from the fund to incumbent local exchange carriers in combination with revenue-neutral rate rebalancing up to the affordability benchmark rates, in an amount equal to the reduction in revenues that occurs as a result of reduced intrastate switched access charges.[27]

The statute authorizes the Commission to do two things. First, to engage in "revenue neutral rate rebalancing up to the affordability benchmark rates" which allows carriers to raise their retail rates for service up to a Commission-established affordability benchmark. By increasing retail rates, a carrier requires less subsidy. The retail rate increase was to be revenue neutral, that is, a dollar of rate increase in exchange for a dollar of subsidy decrease. Indeed, after careful consideration, the

[26] *See, e.g.,* [**BIC 38**]

[27] Section 63-9H-6(K) (2013).

Commission adopted increases to the affordability benchmark, consistent with recent action of the Federal Communications Commission.[28]

Second, the statute authorizes the Commission to make subsidy payments, "in an amount equal to the reduction in revenues that occurs as a result of reduced intrastate switched access charges." In practice, if the Commission reduces access charge rates by a penny, it provides a penny of subsidy to the carrier for each minute that it terminates. This is also a revenue-neutral concept.[29]

Nothing in either of these two payment mechanisms compels or even authorizes the Commission to provide any subsidy to a carrier for lost business in the marketplace. Yet, Appellant insists that the concept of "revenue neutrality" really means that a member company is not only entitled to a subsidy for the reduction in per-minute access charges for every minute that it terminates, but that the statute compels the Commission to retain the overall $24 million subsidy even as minutes disappear to competition.

Put another way, once the Commission in 2005 established the $24 million level, Appellant argues that the statute denies the Commission any authority to change it, because any reduction would not provide a "sufficient" level of revenue, no matter how much business they lose. As SBI understands it, Appellant claims a

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[28] *See* [**1 RP 66-72**] (*USF Rule Order* at pp. 7-13).

[29] *See* Section 63-9H-6 (C).

right to $24 million per year, even if each of its member companies continues to serve only a single customer. The Commission properly considered and rejected this argument as an improbable reading of the statute.[30]

Giving the words of the operative language their plain meaning, the better reading is that when the legislature mandated a subsidy "*in an amount equal to the reduction in revenues that occurs as a result of reduced intrastate switched access charges*," it meant just that, compensation for *reduced access charges*. It did not also mean that carriers should receive a subsidy for a reduction in revenues that occurs as a result of *reduced intrastate switched access minutes processed*, or *a reduction that occurs as a result of losing customers.*

Reading the entire statute in context, nowhere did the legislature state or infer that the universal service mechanism is to be an entitlement program, paying out support to telephone companies for traffic they do not process in order to ensure their business success, to the detriment of consumers and competitors. In fact, when it established the program and authorized the Commission to administer it, the legislature conferred a broad and specific mandate just the opposite of Appellant's view:

> The fund shall be competitively and technologically neutral, equitable and nondiscriminatory in its collection and distribution of funds, portable between eligible telecommunications carriers and additionally shall provide a specific, predictable and sufficient support

[30] *See* [**1 RP 77-78**] (*USF Rule Order* at pp. 18-19).

> mechanism as determined by the commission that reduces intrastate switched access charges to interstate switched access charge levels in a revenue-neutral manner and ensures universal service in the state.[31]

If Appellant's view is adopted, the fund could not be competitively or technologically neutral, because it would continue to favor one class of carrier with excessive subsidies, harming consumers by making it much harder for them to choose competitive carriers or technologies.

Nor can Appellant's view be squared with the mandate that the fund be equitable and nondiscriminatory in its collection and distribution of funds. On the collection side, 1.7 million wireless consumers are paying into the fund to subsidize a technology that New Mexicans are increasingly abandoning, without accountability from the wireline carriers receiving it, who collectively serve only 96,000 access lines.[32] Today, the State Fund provides wireless consumers with zero dollars for infrastructure support, despite the fact that they pay in the majority of the State Fund. Appellant would continue to have the Commission ignore the statute by maintaining the status quo indefinitely.

Continuing the current policy makes distributions less equitable and more discriminatory each year. The 40% over-payments (roughly $9 million annually and growing) could be invested in the technologies that consumers are choosing, or

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[31] *See* Section 63-9H-6(C) (emphasis added).

[32] The Commission noted the lack of accountability in the *USF Rule Order* at pp. 20-21 [**1 RP 79-80**].

as the statute provides, "portable between telecommunications carriers." SBI has made no secret of the fact that it would benefit from portability, because it is ready, willing, and able to use universal service funds to improve its network for rural consumers and help to ensure universal service for rural consumers in its service area.

It must also be noted that the New Mexico statute was patterned after the federal statute and the FCC's core universal service principles, which use almost exactly the same words. For example, 47 U.S.C. §254(b)(5) establishes the following core universal service principle: "There should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service." The FCC, as authorized by 47 U.S.C. §254(b)(7), adopted an additional core principle that:

> Universal service support mechanisms and rules should be competitively neutral. In this context, competitive neutrality means that universal service support mechanisms and rules neither unfairly advantage nor disadvantage one provider over another, and neither unfairly favor nor disfavor one technology over another.[33]

The FCC also established portability as a core feature of universal service mechanisms, allowing support to move with consumers' choices. While the FCC

[33] *Federal-State Joint Board on Universal Service, Report and Order*, FCC 97-157, 12 FCC Rcd 8776, 8801 (1997), aff'd in part, rev'd in part and remanded by *Texas Office of the Pub. Util. Counsel v. F.C.C.*, 183 F.3d 393 (5th Cir. 1999). (However, the concept of "competitive neutrality" was acknowledged by the Court).

has moved away from portability in favor of explicitly subsidizing both wireline and wireless technologies in separate programs, the New Mexico legislative language-requiring portability remains in the state's statute.[34]

Reading the state statute *in para materia* with the federal statute, one finds no support for the concept that universal service subsidies were intended to be *specific*, *sufficient* or *predictable* for any individual carrier. It is the universal service *mechanism* that must be specific, predictable, and sufficient to provide *consumers* with universal service. As the Fifth Circuit put it when rural telephone companies complained that reductions in support would not provide them with sufficient funding:

> [P]etitioners' sufficiency challenge fundamentally misses the goal of the Act. The Act does not guarantee all local telephone service providers a sufficient return on investment; quite to the contrary, it is intended to introduce competition into the market. Competition necessarily brings the risk that some telephone service providers will be unable to compete. ***The Act only promises universal service, and that is a goal that requires sufficient funding of customers, not providers.*** So long as there is sufficient and competitively neutral funding to enable all customers to receive basic telecommunications services, the FCC has satisfied the Act and is not further required to ensure sufficient funding of every local telephone provider as well… "Sufficient" funding of the customer's right to adequate telephone

[34] SBI therefore disagrees with Appellant's claim, [**BIC 6**], that the New Mexico legislature departed from the FCC by providing "full support for universal service." As shown above, the statute cannot be interpreted to provide for lost business and, if anything, the FCC's departure from strict portability by creating separate support mechanisms is more protective of wireline carriers than the current New Mexico statute.

> service can be achieved regardless of which carrier ultimately receives the subsidy.[35]

In response to carrier arguments that *they* were entitled to predictable support amounts, the Fifth Circuit stated:

> What petitioners seek is not merely predictable funding mechanisms, but predictable market outcomes. Indeed, what they wish is protection from competition, the very antithesis of the Act….the Commission reasonably construed ***the predictability principle to require only predictable rules that govern distribution of the subsidies, and not to require predictable funding amounts.*** Indeed, to construe the predictability principle to require the latter would amount to protection from competition and thereby would run contrary to one of the primary purposes of the Act.[36]

These principles are directly on point here. Appellant asks this Court to accept that when the legislature adopted the words specific, predictable and sufficient, words that track precisely the federal statute, the legislature intended that state support would be set aside for and made sufficient and predictable to ensure its member companies' success in the marketplace (a concept diametrically opposed to the federal scheme that the state statute was based on).[37]

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[35] *Alenco,* 201 F.3d at 620, 621 (emphasis added).

[36] *Id.* at 622, 623 (emphasis added).

[37] Appellant's view necessarily requires this Court to order the Commission to retain a universal service mechanism that is not competitively neutral, in violation of 47 U.S.C. §253 (b), which provides in pertinent part, "Nothing in this section shall affect the ability of a State to impose, *on a competitively neutral basis* and consistent with section 254 of this title, requirements necessary to preserve and advance universal service…." (emphasis added).

In sum, the Court should reject Appellant's argument that the legislature intended for its members to receive a guarantee of market success, a concept that cannot be found in the statutory language above.

### C. The Commission's Action Was Well-Considered, Based on Substantial Evidence, and Was Anything But Arbitrary.

In order to overturn an agency action, Appellant must demonstrate that the Commission acted arbitrarily and capriciously, providing "no rational connection between the facts found and the choices made, or it entirely omits consideration of important aspects or relevant factors of the issue at hand." *NM. Mining*, 2007-NMCA-010, ¶22.

Reforming the State Fund was under consideration for two years and the docket is replete with multiple workshops, notices, comments, and hearings, in which numerous interested parties made a fulsome record. SBI and others advocated for the course of action adopted by the Commission and have disagreed to the extent that the action does not go far enough, or fast enough.[38] This decision did not come out of the blue and a fair reading of such an extensive docket leads one to conclude that reforms chosen by the Commission flowed directly from evidence put into the record, it was well considered, and anything but arbitrary.

[38] For example, a search of the Commission's Docket 12-00380 reveals that SBI made at least seven substantive filings between March 2013 and October 2014.

Appellant claims the Commission provided no evidence justifying the timeline for implementing reforms and the outcome will be "rate shock."[39] Appellant attempts to reverse the burden of proof, to require the Commission to prove that rate shock would *not* occur. The proper inquiry for this Court is whether Appellant or any other party has entered into the record proper evidence demonstrating that reducing support to Appellant's member companies as proposed *would* cause rate shock.[40]

Appellant has never pointed to anything in the record proper demonstrating that "rate shock" would occur. It does not even attempt to define rate shock. For two years, its members have repeatedly made unsupported claims that subsidy reductions may for example, cause layoffs, reductions in capital expenditures, or difficulty repaying loans.[41] Nowhere in the record below does Appellant state any specific effects on any member company, such as whether it will become unprofitable due to subsidy reductions, how much subsidy a company can afford to lose before raising rates, whether revenues from unregulated business lines such as broadband will affect the need to raise basic service rates, or providing the

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[39] *See* [**BIC 53-55**].

[40] SBI opposed Appellant's attempt in its request for stay to, for the first time, introduce extra-record evidence supporting a claim of rate shock.

[41] *See* [**BIC 56**]; *see also* [**2 RP 805-807, 809-811, 812-828**] (Transcript of October 1, 2014 Public Comment Hearing, pp. 53-55, 57-59, 60-76).

Commission with any data about what will actually happen to consumer rates, actually defining and demonstrating rate shock.

Given that Appellant's member companies will see subsidy reductions ranging from 6.7% to 87.6%,[42] it was they who had a burden to produce specific record evidence that the Commission's proposed action would cause consumer rates to change, such that a conclusion could be drawn that "rate shock" might actually occur. The Commission cannot be expected to prove that rate shock will not occur, given that the information needed to do so is held solely by Appellant's member companies. Now, this Court must reject any extra-record evidence or similarly unsupported requests to have this Court second-guess the Commission's judgment.

Further evidence that the Commission did not act arbitrarily -- it specifically opened a path for carriers adversely affected to seek supplemental support under 17.11.10.25 NMAC, which allows a carrier to "petition the commission for support from the fund at a level greater than that provided for by Subsection C of 17.11.10.19 NMAC, when such an adjustment is necessary to ensure the

[42] *See* Appellant's Motion for Stay Pending Appeal, Case No. 35,036, February 13, 2015, Exhibit A to Exhibit A (*Order Authorizing Payment and Requiring the Filing of Information*, January 28, 2015, NMPRC Case No. 15-00010-UT),

availability of local telecommunications services at affordable rates in the state."[43] Accountability is achieved because in order to qualify for supplemental support, a carrier must submit "historic and prospective information on its costs of providing services and shall demonstrate that it is providing services in the most prudent manner possible."[44]

For example, if a carrier has used subsidies to help build out its network, and does not need the amount of support it currently receives from the State Fund, it will presumably not petition the Commission for supplemental subsidies. On the other hand, if the reduction in subsidies to a carrier will threaten affordable service for consumers, it may file an application to increase its subsidies. By requiring carriers to come forward with substantive showings of need, backed by appropriate data, the Commission can begin to direct subsidies to the areas that need it most, and will in the future be able to demonstrate to the public that their contributions are benefitting New Mexico citizens. The Commission also set aside funds in anticipation that some carriers may request supplemental funds.[45]

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[43] *See* [**1 RP 79-80, 93-95**] (*USF Rule Order* at pp. 20-21, 34-36). Under recently enacted H.B. 58, 52nd Leg., 1st Sess. (N.M. 2015), the legislature has ordered the Commission to conduct expedited procedures on such petitions *available at* http://www.nmlegis.gov/Sessions/15%20Regular/bills/house/HB0058.html.

[44] *See* 17.11.10.19(C) NMAC.

[45] *See* [**1 RP 98**] (*USF Rule Order*, at p. 39) ("This is not an arbitrary percentage. Given the changes to the Access Reduction Support formula and resulting

In sum, all of these actions evidence careful consideration and sensitivity for carriers that can demonstrate adverse effects from these reforms. Taken together, these actions, fully supported by the record, are anything but arbitrary.

### D. The Commission Provided Appropriate Notice, Explanation, and Justification for its Rule Changes.

When the Commission first reduced access charges in 2005, it determined a fund size based on 2004 intrastate access traffic levels. Ten years later, when traffic levels have reduced by 40%, the Commission recognized that the 2004 formula was outdated, that "$9.6 million of access reduction support is not substantiated by current (*i.e.*, 2012) intrastate switched access minutes,"[46] and acted to correct a significant and growing problem, the over-subsidization of Appellant's member companies.

Appellant argues that the changes were unexpected and not sufficiently explained, or even authorized.[47] Multiple parties advocated a full $9 million reduction in support to Appellant's member companies, and SBI urged the Commission to make the cut immediate.[48] Even Appellant proffered a

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reduction in payments, 3% will cover the immediate demands on the State Fund and leave headroom for additional support under 17.11.10.25 NMAC if need is established.")

[46] [**1 RP 72**] (*USF Rule Order* at p. 13).

[47] *See* [**BIC II.D, II.E, and II.F**]

[48] [**3 RP 1827**] (SBI Comments filed December 20, 2013 at p. 6).

compromise reduction in subsidies on behalf of its members.[49] While the ultimate choice to implement the transition over a two-year period rather than four years as originally proposed may be disappointing to both SBI and Appellant, neither can properly claim that it was unexpected.

Nor can any party claim that the Commission failed to provide adequate notice. In its Order Initiating Proposed Rulemaking ("*OIPR*") the Commission plainly stated that the final rule "may include all or part of the language" included in the proposed rule and put interested parties on notice that the Commission would "also consider alternative approaches to any language in [the proposed rule] based on comments provided in this docket."[50] The Commission ordered commenting parties to advocate for why suggested changes should be made, and to provide a redline of the proposed rule containing inserts and strike through markings for the Commission's consideration.[51] The Commission also noticed and held an open hearing on October 1, 2014, engendering robust discussion from interested parties and members of the public, with several commissioners present.[52]

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[49] [**1 RP 75**] (*USF Rule Order* at p. 16).

[50] [**1 RP 180**] (*OIPR* at p. 3).

[51] [**1 RP 181**] (*OIPR* at p. 4).

[52] [**1 RP 181-182**] (*OIPR* at pp. 4-5).

Additionally, the Commission held the record open until October 15, 2014, to allow time for last minute submissions.

Nothing prohibits the Commission from adopting a rule that varies from what was proposed in the *OIPR*. Moreover, the Commission's lengthy exposition of all of the commenting parties' positions and its decision, contained at pages 13-21 of the USF Rule Order [**1 RP 72-80**], including consideration of an alternative proposal submitted by NMECG, is more than enough for the Court to conclude that the Commission examined the relevant data and articulated a satisfactory explanation for its action.[53]

"The whole rationale of notice and comment rests on the expectation that the final rules will be somewhat different and improved from the rules originally proposed by the agency." *Trans–Pac. Freight Conf. of Japan/Korea v. Fed. Mar. Comm'n*, 650 F.2d 1235, 1249 (D.C. Cir. 1980). It is not "uncommon for a final rule to contain new provisions that are 'substantially different' from those in the proposed rule." *Select Specialty Hospital–Akron, LLC v. Sebelius*, 820 F. Supp. 2d 13, 23 (D.D.C. 2011), *quoting Health Ins. Ass'n of Am., Inc. v. Shalala*, 23 F.3d 412, 421 (D.C. Cir. 1994). [54]

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[53] *See Motor Vehicle*, 463 U.S. at 43.

[54] *See Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 407 F.3d 1250, 1259 (D.C. Cir. 2005) (While an agency may promulgate final rules that differ from the proposed rule, a final rule is a "logical outgrowth" of a

Important for this Court is whether the *OIPR* apprised interested parties fairly so that they had an opportunity to comment. On its face, the *OIPR* put every party on notice that a four-year transition was in the proposed rule, but that the Commission would also consider alternative approaches from interested parties.[55] In proceedings, dating back as far as workshops conducted in early 2013, there are comments and submissions into the record, including from Appellant, discussing what transition plan the Commission should adopt. SBI preferred an immediate $9 million cut in support to Appellant's member companies.[56] Appellant preferred no transition, redlining out all transition language in its August 22, 2014 Comments on the *OIPR*.[57] That the Commission chose two years instead of four was well within its discretion and was more than adequately debated in the months leading

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proposed rule, for purposes of notice requirements, only if interested parties should have anticipated that the change was possible, and thus reasonably should have filed their comments on the subject during the notice-and-comment period; "logical outgrowth" doctrine does not extend to a final rule that is a brand new rule.)

[55] [**1 RP 180**] (*OIPR* at p. 3).

[56] [**3 RP 1827**] (SBI Comments filed December 20, 2013 at p. 6).

[57] [**3 RP 1732-1748**] (Comments of the NMECG, filed August 22, 2014, at Ex. A (proposed changes to 17.11.10.19 NMAC)).

up to the decision such that every party should have understood that the final rule could change from what was proposed.[58]

Lastly, the Commission has a duty to change its rules to accommodate changed circumstances, especially changes in technology that make prior decisions untenable or that undermine the universal service principles set forth by the legislature. The statute is a broad delegation of authority from a legislature, instructing the Commission to:

> …implement a "state rural universal service fund" to maintain and support at affordable rates those public telecommunications services and comparable retail alternative services provided by telecommunications carriers that have been designated as eligible telecommunications carriers, including commercial mobile radio services carriers, as are determined by the commission.[59]

Appellant essentially argues that the Commission is without legal authority to reverse its decision in 2005 to adopt the current mechanism,[60] even in the face of massive change in the industry due to the introduction of VoIP, email, SMS text, and mobile Internet calling, as well as conclusions in the independent QSI Report

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[58] For example, SBI strenuously advocated for a broadband fund, which appeared in the proposed rule, but was stricken from the final rule as premature. All interested parties had to know that the final rule might not include a broadband fund, based on the way the Commission framed its notice.

[59] Section 63-9H-6(A).

[60] *See* [**BIC 38-42**].

that subsidies are not matching up with investments to benefit rural consumers.[61] To sustain this objection, the Court must read the statute as providing the Commission with no discretion to respond to these changes, and completely ignore the legislature's mandate to ensure that the fund be "competitively and technologically neutral, equitable and nondiscriminatory in its collection and distribution of funds…."[62] In spite of the fact that Appellant's member companies are being over-subsidized by more than $9 million per year, and in spite of the fact that the fund's contributions and distributions are no longer being administered in an equitable and nondiscriminatory fashion (as evidenced in part by the QSI Report), Appellant would have the Court conclude that the Commission is powerless to uphold the very principles that the legislature ordered it to implement.

Lastly, Appellant must concede that the Commission was delegated sufficient authority to create the original subsidy mechanism, yet it argues that the Commission is without authority to change it. Appellant can't have it both ways. The Commission found that the statute's plain meaning requires a minutes-of-use

[61] *See* [**1 RP 76-**77] (*USF Rule Order* at pp. 17-18).

[62] Section 63-9H-6(C).

formula for determining access reduction support[63] and affirmed its prior rationale for proposing a rule change -- that the 2004 formula is outdated.[64]

The decision to use more current data to more accurately determine appropriate subsidy amounts was more than justified with "a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance."[65] The Commission explained that the prior formula could not be "revenue neutral" because in the absence of a subsidy, the 40% reduction in access minutes would have reduced carrier revenue by a corresponding 40% amount. Accordingly, the subsidy has been providing much more revenue than carriers would have received without a subsidy.[66] The Commission acknowledged comments urging action as a result of consumer migration to newer technologies,[67] and concluded that changes to the formula would "reflect today's telecommunications environment."[68]

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[63] [**1 RP 77**] (*USF Rule Order*, at p. 18).

[64] *Id*., [**1 RP 72**] (*USF Rule Order* at p. 13).

[65] *Motor Vehicle*, 463 U.S. at 42; *New Jersey Bd. of Pub. Utilities v. F.E.R.C.*, 744 F.3d 74, 104 (3d Cir. 2014); *Exxon Corp. v. Lujan*, 970 F.2d 757, 762, n. 4 (10th Cir. 1992).

[66] [**1 RP 77-78**] (*USF Rule Order*, at pp. 18-19).

[67] *Id.*, [**1 RP 74**] (*USF Rule Order*, at p. 15).

[68] *Id.*, [**1 RP 78**] (*USF Rule Order*, at p. 19).

Sensitive to consumers, the Commission preserved the mandatory minutes-of-use mechanism, while inviting parties able to demonstrate that consumers will fail to receive universal service to apply for supplemental subsidies under 17.11.10.25 NMAC. This protects rural consumers who may depend on subsidies to obtain affordable service, and it helps to ensure that contributions are equitable. Contributing consumers are protected from over-subsidizing any company that is earning high rates of return or not investing in its network, as demonstrated by the QSI Report.

Appellant seeks preservation of the status quo, $24 million per year without a showing of need. The Commission has ruled that Appellant's member companies may have per-minute access support that matches their actual traffic (without a showing of need), and additional support may be sought, upon good cause. The statute not only authorizes such a decision, but the basic universal service principles articulated by the legislature compel it.

In sum, everyone participating in the proceeding understood that the changes adopted were well within the channel of what was proposed in the Commission's notices and advocated by the parties over two years of proceedings. The Commission sufficiently explained the reason for changing its rules and demonstrated how they comply with the statute.

### E. Reducing the Contribution Factor to 3.0% Does Not Threaten Universal Service in New Mexico.

Each year, the Commission conducts a proceeding to determine how much money is needed in the upcoming year to cover the State Fund obligations and administrative expenses. The Commission's rules establish October 1 as the deadline for specifying the subsequent year's fund size and contribution factor (the percentage of telecommunications revenue appearing on customer invoices),[69] in part to give carriers time to adjust their billing systems to specify the new contribution factor in January.

Based on advice from the Fund Administrator, the Commission reduced the State Fund from approximately $24 million to approximately $20 million, and thus it reduced the amount that all New Mexico consumers contribute to the fund from 3.45% to 3.0% of their charges for intrastate telecommunications service.[70] Appellant never disputed that the Commission is not required to accept the Fund Administrator's recommendation, and indeed the Fund Administrator presented the Commission with six scenarios, including the one ultimately selected in the *Surcharge Order*.[71]

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[69] 17.11.10.19(A) NMAC.

[70] [**Case No. 34,933 1 RP 4-20**] (*Surcharge Order*).

[71] *See id.* [**Case No. 34,933 1 RP 5-6**] (*Surcharge Order*, at pp. 2-3).

The Commission acknowledged that decisions made in its *Surcharge Order* were being made in conjunction with Case No. 12-00380-UT, a concurrently running notice and comment rulemaking proceeding to reform the State Fund, which had been going on for nearly two years, and was nearly complete in September of 2014.[72] On November 26, 2014, the Commission's *USF Rule Order* reformed the State Fund, phasing in a $9.6 million reduction in Access Reduction Support to Appellant's member companies, over two years.[73]

The *Surcharge Order* and *USF Rule Order* dovetailed in that both took effect in January, 2015,[74] so that the 3.0% contribution factor adopted in September will raise sufficient revenue in 2015 to cover universal service subsidies, administrative costs, and a reserve fund (in the aggregate, approximately $20 million).

Appellant makes much of the fact that the *USF Rule Order* amending rule 17.11.10.20(A) NMAC contained a typographical error, specifying 2016 as the effective date of the new 3.0% cap on the fund.[75] That error was corrected by the

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[72] *Id.*

[73] *See* [**1 RP 72, 78**] (*USF Rule Order,* at pp. 13 and 19).

[74] [**1 RP 22**] (*Errata Notice to Order Adopting Final Rule,* December 11, 2014).

[75] *See, e.g.*, [**BIC 32**].

*Errata Notice to Order Adopting Final Rule*, issued on December 11, 2014.[76] Appellant also complains that the cap's effective date was "accelerated," surprising and prejudicing its members, seemingly ignoring the fact that a 3% cap was contemplated all the way back in the original *Notice of Proposed Rulemaking*, published November 27, 2012,[77] and heavily debated since the legislature adopted House Bill 58, requiring the Commission to adopt a cap.[78]

From a practical perspective, it is difficult to see how Appellant's members are harmed by the Commission's timing, or its actions. With respect to timing, the Commission adopted a $20 million fund size and a corresponding 3.0% contribution factor in September of 2014. Everyone knew that these two numbers were to become effective in January of 2015. Accordingly, it could not have been a surprise to anyone following these proceedings that shortly afterward the Commission adopted a 3.0% cap, also effective in 2015. The cap's effective date (even if erroneous) did not change the fact that the earlier *Surcharge Order* specified a 3.0% contribution factor starting January 2015. That is, a 3.0% contribution factor was established for 2015, irrespective of when the cap became

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[76] [**1 RP 22**].

[77] *See* [**1 RP 99**] (*USF Rule Order*, at p. 40, n.59).

[78] *See* H.B. 58, 52nd Leg., 1st Sess., *supra*.

effective. Accordingly, Appellant cannot possibly have been harmed by the Commission's timing, or its typographical error.

Substantively, the Court should summarily dismiss Appellant's arguments that the cap will cause grave harm, threaten affordability, result in layoffs, and reduced investment, for the same reasons set forth above. Appellant had two years of notice and comment rulemaking to present facts supporting these assertions, but it has chosen not to, despite the fact that its member companies are the only ones with access to such information. The only hard data presented concerning investment patterns and return on investment by Appellant's member companies, the QSI Report, revealed large variances in capital investments and returns on investment that bear little correlation to subsidies.[79]

Accordingly, at best, it is uncertain whether a 3.0% cap will adversely affect any carrier, and there are several important fail-safe mechanisms that should protect consumers. First, the cap is not forever – it only lasts for three years. If the Commission sees evidence consistent with the statements made by Appellant, it can raise the cap at the beginning of 2018. Second, the Commission is not required to maintain the 3.0% cap for even one day more than it chooses to. If circumstances dictate, the Commission may simply conduct a rulemaking to raise or lower the cap at any time. Third, the Commission specifically invited carriers

[79] [**1 RP 77**] (*USF Rule Order*, at p. 18).

requiring supplemental support to apply for it pursuant to 17.11.10.25 NMAC, which requires a demonstration of accountability. This safety valve protects rural consumers who need service by making supplemental subsidies available, but it also protects citizens contributing to the State Fund by ensuring that subsides are only provided to carriers that make an appropriate demonstration of need.

In sum, the appropriate question is whether the record contains evidence that would lead the Court to conclude that capping the contribution factor at 3.0% will fail to provide the state's citizens with universal service using a mechanism that is specific, predictable and sufficient. No carrier demonstrated to the Commission that the proposed reduction in state subsidies will cause material harm. To the extent that Appellant's member companies believe the capped fund is insufficient to provide New Mexico citizens with basic universal service, the Commission retained Rule 17.11.10.25, allowing carriers to mitigate any perceived harm by applying for supplemental subsidies. There is no record evidence that the 3.0% cap threatens universal service in New Mexico.

## IV. CONCLUSION

Appellant's member companies have put no evidence into the record to demonstrate that consumers will suffer rate shock or an inability to have universal service. They make unsupported assertions and fight the Commission's

appropriate action to target scarce universal service dollars toward the rural areas and citizens who really need it and bring some accountability to the State Fund.

The Commission's notice, in the midst of a two-year process, sufficiently explained that the final rule could change from what was originally proposed, depending upon comments and record evidence provided by interested parties.

Appellant continually mischaracterizes subsidies as being for its members, as opposed to consumers, and mischaracterizes the legislature's use of the term "revenue neutrality" to mean shielding them from business losses as well as reductions in access charge rates. Appellant's implausible reading of the statute requires an interpretation at odds with its plain meaning, and requires the Court to ignore other provisions, where the legislature directs the Commission to create and administer a fund that is competitively neutral and equitable in its collection and distribution of funds. It also ignores a Congressional mandate that all state universal service mechanisms be competitively neutral.

None of the Commission's decisions will harm universal service. In the long run, universal service will be strengthened because the public will have increasing confidence that subsidy funds are being properly invested. The statute expresses the legislature's unambiguous intent that the fund provide subsidies to Appellant's members to compensate for reductions in access charge rates, not for a loss of business. The Commission properly acted on record evidence to correct the

problem of subsidies not matching up with access minutes as required by the statute, and to begin to bring accountability to the program.

To sustain Appellant's claim, the Court will need to conclude that the legislature intended, as a matter of law, for the universal service mechanism to be an entitlement program for Appellant's members, a $24 million annual subsidy, into perpetuity. Appellant comes nowhere close to making that case.

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Respectfully submitted,

Patricia Salazar Ives, Esq.
CUDDY & McCARTHY LLP
1701 Old Pecos Trail
P.O. Box 4160
Santa Fe, NM 87502-4160
(505) 988-4176
pives@cuddymccarthy.com

And

David LaFuria, Esq.
Lukas, Nace, Gutierrez & Sachs, LLP
8300 Greensboro Drive
Suite 1200
McLean, VA 22102
(703) 584-8678
dlafuria@fcclaw.com

## STATEMENT OF REASONS FOR ORAL ARGUMENT

Pursuant to Rule 12-213(A)(6), NMRA, oral argument is requested because it will assist the Court due to the complexities of the factual and procedural history of the administrative proceedings below.

## CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of June 2015, a copy of the foregoing *Answer Brief of Intervenor Smith Bagley, Inc.* was emailed and mailed to the following:

William P. Templeman
Joseph E. Manges
Comeau, Maldegan, Templeman & Indall, LLP
P.O. Box 669
Santa Fe, NM 87504-0669
wtempleman@cmtisantafe.com

Jeffrey H. Albright
Lewis Roca and Rothgerber, LLP
201 Third Street NW, Suite 1950
Albuquerque, NM 87102-4388
JAlbright@lrrlaw.com

Margaret Caffey-Moquin
Russell R. Fisk
Associate General Counsel
NM Public Regulation Commission
P.O. Box 1269
Santa Fe, NM 87504-1269
Margaret.Moquin@state.nm.us

Russell.Fisk@state.nm.us

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Patricia Salazar Ives