

How and Why Settlement: How are they reached and what they mean in the mean in the regulatory context

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PRC Rule governing settlements:

1.2.2.20 FORMAL STIPULATIONS: The commission recognizes that the parties to a proceeding and staff may reach compromises and settle some or all issues. Settlement stipulations shall be binding only if approved by the commission.

A. Uncontested stipulations:

(1) If the staff and all parties enter into a stipulation settling some or all of the issues in a proceeding, the stipulation shall be filed and a copy presented to the presiding officer. If the proceeding is before the commission *en banc*, the commission may in its discretion assign a hearing examiner to preside over any public hearing to be conducted on the stipulation.

(2) When filed and presented, the stipulation must be accompanied in rate cases by a reconciliation statement showing the dollar impact of the settlement and the resulting rates. This statement shall contain the information listed in Subsection F of 1.2.2.36 NMAC.

(3) Upon receipt of a stipulation which would settle substantive issues, the commission or presiding officer shall conduct a public hearing to determine whether the stipulation should be approved by the commission, provided that in extraordinary cases, for good cause shown, the commission or presiding officer may forego a public hearing. The proponents of the stipulation have the burden of supporting the stipulation with sufficient evidence and legal argument to allow the commission to approve it.

(4) In the event the parties and staff enter into a settlement of one or more issues but not of the entire case, the commission or presiding officer may in their discretion combine the public hearing on the settlement stipulation with the public hearing on the contested issues.

(5) In cases heard by a hearing examiner rather than the commission, the hearing examiner may:

(a) decide that the settlement stipulation should not be certified to the commission at all, in which event the hearing examiner may indicate to the parties and staff whether additional evidence or legal argument in support of the stipulation or amendments to the stipulation might meet the hearing examiner's reservations about the stipulation; or

(b) certify the settlement stipulation to the commission for its review; the certification shall include a recommended disposition of the stipulation, whether the recommendation be positive or negative or otherwise suggest a manner of disposition; exceptions to the certification may be filed within ten (10) days after the date the settlement stipulation is certified to the commission, unless the commission or presiding officer directs otherwise.

B. Contested stipulations:

(1) If some, but not all, of the parties to a proceeding, including staff, enter into a stipulation seeking to dispose of some or all of the issues in the proceeding, the stipulation shall be filed and copies presented to the presiding officer and served on the parties or staff opposing the stipulation. If the proceeding is before the commission *en banc*, the commission may in its discretion assign a hearing examiner to preside over any public hearing to be conducted on the stipulation. When filed and presented, the stipulation must be accompanied in rate cases by a reconciliation statement showing the dollar impact of the settlement and the resulting rates. This statement shall contain the information listed in Subsection F of 1.2.2.36 NMAC.

(2) Parties or staff opposing the stipulation shall file statements briefly setting forth the grounds upon which they oppose the stipulation in writing within five (5) days after the stipulation is served, or orally at the public hearing, whichever occurs first. Responses by staff or parties supporting the stipulation shall be made as directed by the commission or presiding officer.

(3) The commission or presiding officer shall schedule the stipulation for public hearing and review unless it is determined that the nature and extent of the opposition is such that hearing the stipulation will not materially conserve commission, staff, and party resources. In the event this determination is made, the commission or presiding officer may refuse to entertain the stipulation. The commission or presiding officer also has the discretion to combine a public hearing on a contested stipulation with the public hearing on the merits of any substantive issues not addressed by the stipulation.

(4) A public hearing shall be conducted to determine whether the stipulation shall be approved by the commission. The proponents of the stipulation have the burden of supporting the stipulation with sufficient evidence and legal argument to allow the commission to approve it. At the public hearing all parties and staff shall be allowed an opportunity to present evidence and cross-examine opposing witnesses on the stipulation.

(5) In cases heard by a hearing examiner rather than the commission the hearing examiner may:

(a) decide that the settlement stipulation should not be certified to the commission at all, in which event the hearing examiner may indicate to the parties and staff whether additional evidence or legal argument in support of the stipulation or amendments to the stipulation might meet the hearing examiner's reservations about the stipulation; or

(b) certify the settlement stipulation to the commission for its review; the certification shall include a recommended disposition of the stipulation, whether the recommendation be positive or negative or otherwise suggest a manner of disposition; exceptions to the certification may be filed within ten (10) days after the date the settlement stipulation is certified to the commission, unless the commission or presiding officer directs otherwise.

C. Inadmissibility of settlement offers and rejected settlements: Statements, admissions, or offers of settlement made during the course of negotiations of settlements are privileged. No such statements, admissions, or offers of settlement shall be admissible as evidence in any formal public hearing, nor disclosed by any mediator designated pursuant to this rule either voluntarily or through compulsory process, unless agreed to by all the parties and staff. If a stipulation is not approved by the commission, the terms of the proposed settlement are also inadmissible unless their admission is agreed to by all the parties and staff. Nothing in this subsection shall preclude proponents of a contested settlement stipulation from offering that stipulation into the record for purposes of its consideration by the commission or presiding officer.

D. Precedential effect: Unless the commission explicitly provides otherwise in the order approving the stipulation, approval of a stipulation does not constitute commission approval of or precedent regarding any principle or issue in the proceeding.

What is your position?

1. Join or accept the stipulation. 1.2.2.20.A(3) NMAC. Forego a hearing?
2. Request a hearing on the stipulation.
3. Should the Commission "refuse to entertain" the stipulation and instead schedule a hearing on the merits because "the nature and extent of the opposition is such that hearing the stipulation will not materially conserve commission, staff, and party resources." 1.2.2.20.B(3) NMAC.
4. Should the Commission (or Hearing Examiner) hold a hearing on both matters *included* in the contested stipulation *and* the merits of any substantive issues *not addressed by the stipulation*.¹ 1.2.2.20.B(3) NMAC. (*The commission or presiding officer also has the discretion to combine a public hearing on a contested stipulation with the public hearing on the merits of any substantive issues not addressed by the stipulation.*)

¹ Case No. 20-00222-UT, *Certification of Stipulation*, November 1, 2021, p. 8. ("The Hearing Examiner indicated that hearings would be scheduled to consider the modified version of the May 7 stipulation and that the modified stipulation, as a contested stipulation would be considered pursuant to 1.2.2.20.B(3) NMAC. Thus, the hearing would address the contested stipulation and the merits of any substantive issues not addressed by the stipulation.")

Opposition to Settlement:

1.2.2.20.B(2) NMAC – party opposing stipulation (settlement) has five (5) days for the filing of statements in opposition to a stipulation.

What are some grounds to be raised in opposition?

1. Does the stipulation resolve the matters at issue in a reasonable manner?²
2. Does the stipulation provide a net public benefit?³
3. Does the stipulation violate any regulatory practices and principles?⁴
4. Does it meet the legal standards?⁵
5. Does the stipulation include or address safety or environmental issues which is necessary

² See, e.g., Case No. 13-00390-UT, April 8, 2015 *Certification of Stipulation*, pp. 26-29, supplemented in November 16, 2015 by the *Certification of Stipulation*, pp. 12-13, adopted in *Final Order*, Dec. 15, 2016. The April 8, 2015 Certification notes: “Because a stipulation is no more than the sum of its parts, the Commission must determine...whether the manner in which the Stipulation proposes to resolve those issues, especially those opposed by other parties, is reasonable,” citing, *Final Order*, Case No. 10-00086-UT, p.14, and prior Orders; A settlement must be “fair, just and reasonable” or “in the public interest.”

³ *Re Valle Vista Water Utility Co.*, 212 P.U.R. 4th 305, 309 (2001). (“The ‘public convenience and necessity’ standard requires a net public benefit.”)

⁴ See, e.g., Case No. 22-00390-UT, *Order Denying Stipulation of Settlement and Requiring a Hearing on the Merits and Amended Second Procedural Order*, Sept. 21, 2023, at 7, ¶19, citing Case No. 16-00276-UT, “the hearing examiner exercised the ability to refuse to entertain a stipulation under Rule 1.2.2.20(B)(3). In the *Order Rejecting Stipulation in Current Form*, the hearing examiner explained that a stipulation will not materially conserve commission, staff, and party resources if it is apparent upon the filing of the stipulation that, on its face, the stipulation cannot ultimately be approved even after hearing --- that it fails the Commission’s standards for the approval of stipulation.” (At fn. 2: “The Commission has approved a Hearing Examiner’s decision to determine the merits of specific stipulation issues contested by the parties, citing the requirement that a settlement be in accordance with applicable law and *not violate any important regulatory principles.*”) (Emphasis supplied.) *In the Matter of the Application of Public Service Company of New Mexico for Revision of its Retail Electric Rates Pursuant to Advice Notice No. 533*, Case 16-00276-UT Order Rejecting Stipulation in Current Form (May 12, 2017). The decision to refuse to entertain a stipulation was done by the hearing examiner under Rule 1.2.2.29(C) powers of the hearing examiners.

⁵ A settlement must be “fair, just and reasonable” or “in the public interest.” See *Applications of Public Service Company of New Mexico and New Mexico Gas Company, Inc. for the Abandonment, Purchase and Sale of Gas Utility Assets and Services*, Case No. 08-00078-UT, Certification of Stipulation (Nov. 24, 2008), at 3, *Final Order Partially Approving Certification of Stipulation*, (Dec. 11, 2008).

- to include in any “public interest” determination?
6. Was there a requirement for the utility to “demonstrate that it reasonably examined alternative courses of action?”⁶
 7. Was the settlement’s short- and long-term impacts on the utility and its customers must be considered “as a whole”?⁷
 8. Does the stipulation *reasonably* balance the interests of a utility’s customers with those of its investors?⁸
 9. Does the stipulation comport with other laws?

Reasonableness of the Stipulation

To determine the reasonableness element of approval of a Stipulation, the Commission has focused on three questions: whether the settlement is a product of serious bargaining among capable, knowledgeable parties; whether the settlement, as a whole, benefits customers and the public interest; and, whether the settlement, as a whole, violates any important regulatory principle or practice.⁹ Will a settlement between just two parties pass muster?

⁶ The New Mexico Supreme Court explained, in *Public Serv. Co. of N.M. v. NMPRC*, 2019-NMSC-012, ¶¶ 22-32, 444 P.3d 460, (At ¶32: “We observe that there is a meaningful relationship from the perspective of the ratepayers between the consideration of alternatives and the cost of the chosen generation resource. The goal of the consideration of alternatives is, of course, to reasonably protect ratepayers from wasteful expenditure. The failure to reasonably consider alternatives was a fundamental flaw in PNM’s decision-making process.”) (citation omitted.)

⁷ NM PRC Case No. 16-00276-UT, *Order Rejecting Stipulation in Current Form*, May 12, 2017. (“[T]he Commission has observed on numerous occasions, the “substantial evidence as a whole” aspect of the standard for testing contested stipulations goes to whether the Commission’s decision is supportable if challenged pursuant to the Supreme Court’s appellate standard of review, which is just that – substantial evidence in the record.” *citing*, *Certification of Stipulation*, Case No. 14-00310-UT (Apr. 20, 2015) at 22 n. 70.)

⁸ NMSA 1978, § 62-3-1(B) (2008).” *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm’n*, 2019-NMSC-012, ¶10, 444 P.3d 460. If fully understood and from a balancing of interests perspective, does the Stipulation provides too much “give” by one party and too much “take” by the utility?

⁹ *See, e.g.*, Case No. 22-00390-UT, *Order Denying Stipulation of Settlement and Requiring a Hearing on the Merits and Amended Second Procedural Order*, Sept. 21, 2023, at 8, ¶20.