

SUPREME COURT OF NEW MEXICO

New Mexico Exchange Carrier Group v. New Mexico Public Regulation Commission

No. S-1-SC-34933, consolidated with No. S-1-SC-35036 · No. Nos. S-1-SC-34933 and S-1-SC-35036, consolidated · Decided March 17, 2016

SUMMARY

The Supreme Court of New Mexico reviewed consolidated appeals concerning the New Mexico Public Regulation Commission's 2015 rural universal service fund surcharge order and related rule amendments. The court concluded that the 3% surcharge rate was arbitrary, unsupported by substantial evidence, and inconsistent with the PRC's own rules requiring a prudent fund balance. The court also addressed the rule amendments, including the surcharge cap and revised funding formula, and reversed the PRC's orders for further proceedings.

CASE DETAILS

COURT	Supreme Court of New Mexico
WRITING FOR THE COURT	Edward L. Chávez, Justice; Barbara J. Vigil, Chief Justice; Petra Jimenez Maes, Justice; Charles W. Daniels, Justice
JURISDICTION	New Mexico
DECIDED	March 17, 2016
DOCKET	Nos. S-1-SC-34933 and S-1-SC-35036, consolidated
DISPOSITION	reversed_and_remanded
PROCEDURAL POSTURE	Consolidated appeals from two orders of the New Mexico Public Regulation Commission: an annual 2015 surcharge-rate order and a rulemaking order amending the State Rural Universal Service Fund rules.
STANDARD OF REVIEW	The court reviews PRC orders to determine whether they are arbitrary and capricious, unsupported by substantial evidence, outside the agency's authority, or otherwise inconsistent with law. The court reviews the whole record, considering evidence supporting and opposing the agency's decision in the light most favorable to the decision. An order must substantially comply with the governing statute.
PRECEDENTIAL VALUE	published

PARTIES

New Mexico Exchange Carrier Group v. New Mexico Public
Regulation Commission

TOPICS

judicial review of agency action

rulemaking

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statutory interpretation

standard of review

PRACTICE AREAS

administrative law

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telecommunications law

appellate procedure

QUESTIONS PRESENTED

1. Whether the PRC's 2015 Surcharge Rate Order was arbitrary, unsupported by substantial evidence, or inconsistent with the PRC's existing rule requiring a prudent fund balance.
2. Whether the 2013 statutory requirement to establish a surcharge cap authorized the PRC to operate the fund at a projected deficit or disregard its existing funding rules when setting the 2015 surcharge.
3. Whether the PRC's rulemaking order adopting a 3% surcharge cap and changing the funding formula was supported by substantial evidence.
4. Whether the PRC prejudged the rulemaking by referring to the pending rule changes when it issued the Surcharge Rate Order.
5. Whether the PRC had authority to modify the funding formula through rulemaking.

HOLDINGS

1. The PRC's 2015 Surcharge Rate Order was arbitrary, unsupported by substantial evidence, and violated the PRC's existing rule because the 3% surcharge was projected to leave the fund with a substantial deficit rather than a prudent fund balance.
2. The PRC did not prejudice the rulemaking, although language in the Surcharge Rate Order suggesting that the pending rule changes would reduce fund payments was troubling.
3. The PRC's adoption of the 3% surcharge cap and revised funding formula was not supported by substantial evidence.
4. The PRC had authority to modify the funding formula through rulemaking, but the revised formula and surcharge cap required substantial evidentiary support that was absent from the record.

KEY QUOTATIONS

"We do not interpret the "minimum" surcharge requirement in Section 63-9H-6(J) as authority to operate the Fund at a deficit." (§ 16)

"The record must have substantial evidence to support a finding that the newly adopted funding formula is adequate to satisfy the requirements of Section 63-9H-6(C) and (K) and Rule 17.11.10.19(C), and that the surcharge cap has not been arbitrarily established." (§ 32)

“We reverse the PRC’s Surcharge Rate Order in NMPRC Case No. 14-00279-UT and also reverse the PRC’s Rule Order in NMPRC Case No. 12-00380-UT. We remand both matters to the PRC for further proceedings consistent with this opinion.” (¶ 33)

FACTUAL BACKGROUND

New Mexico's Rural Telecommunications Act established a State Rural Universal Service Fund financed by a surcharge on intrastate retail telecommunications services and distributed to eligible local telephone companies. The PRC's existing rules required the annual fund amount to include eligible carriers' revenue requirements, administrative expenses, and a prudent fund balance. Despite evidence that a 3% surcharge would produce a projected \$3,870,813 deficit, the PRC adopted that rate for 2015. In a separate rulemaking, the PRC adopted a 3% surcharge cap and changed the funding formula from one based on 2004 access minutes to a rolling formula, although the record did not establish that the new formula would provide sufficient support.

PROCEDURAL HISTORY

The PRC issued a September 17, 2014 order setting a 3% surcharge rate and a November 26, 2014 rule order establishing a 3% surcharge cap and changing the funding formula. The New Mexico Exchange Carrier Group appealed both orders directly to the New Mexico Supreme Court. The Supreme Court reversed both orders and remanded for further proceedings.

DISPOSITION

reversed_and_remanded

REMAND INSTRUCTIONS

The PRC must conduct further proceedings consistent with the opinion. The record must contain substantial evidence showing that the revised funding formula adequately satisfies NMSA 1978, Section 63-9H-6(C) and (K), and Rule 17.11.10.19(C), and that the surcharge cap was not arbitrarily established.

CASES CITED

- In re Fed.-State Joint Bd. on Universal Serv., 12 F.C.C.R. 8776, 8780-86 (1997)
- Tex. Office of Pub. Util. Counsel v. FCC, 183 F.3d 393 (5th Cir. 1999)
- N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n, 2007-NMSC-053, ¶ 13, 142 N.M. 533, 168 P.3d 105
- Gen. Tel. Co. of Sw. v. Corp. Comm'n (In re Gen. Tel. Co. of Sw.), 1982-NMSC-106, ¶ 29, 98 N.M. 749, 652 P.2d 1200
- Prometheus Radio Project v. FCC, 652 F.3d 431, 453 (3d Cir. 2011)
- Nat'l Tour Brokers Ass'n v. United States, 591 F.2d 896, 902 (D.C. Cir. 1978)
- In re PNM Gas Servs., 2000-NMSC-012, ¶ 4, 129 N.M. 1, 1 P.3d 383
- Rinker v. State Corp. Comm'n, 1973-NMSC-021, ¶ 5, 84 N.M. 626, 506 P.2d 783

OPINION

PER CURIAM.

1 IN THE SUPREME COURT OF THE STATE OF NEW MEXICO 2 Opinion
Number:_____ 3 Filing Date: March 17, 2016 4 NO. S-1-SC-34933 5 NEW MEXICO
EXCHANGE CARRIER GROUP, 6 Appellant, 7 v. 8 NEW MEXICO PUBLIC REGULATION
COMMISSION, 9 Appellee, 10 and 11 SMITH BAGLEY, INC. and 12 NAVAJO
COMMUNICATIONS COMPANY, 13 Intervenors. 14 CONSOLIDATED WITH 15 NO. S-1-SC-
35036 16 NEW MEXICO EXCHANGE CARRIER GROUP, 17 Appellant, 18 v. 19 NEW
MEXICO PUBLIC REGULATION COMMISSION, 20 Appellee, 1 and 2 SPRINT
COMMUNICATIONS COMPANY, L.P.; 3 SPRINT SPECTRUM, L.P.; SMITH BAGLEY, INC.;
4 CTIA, THE WIRELESS ASSOCIATION; T-MOBILE 5 WEST LLC; and NAVAJO
COMMUNICATIONS 6 COMPANY, 7 Intervenors.

8 APPEAL FROM THE NEW MEXICO PUBLIC REGULATION 9 COMMISSION 10 Comeau,
Maldegen, Templeman & Indall, LLP 11 William Phelps Templeman 12 Joseph Edward Manges
13 Santa Fe, NM 14 for Appellant New Mexico Exchange Carrier Group 15 Russell R. Fisk 16
Margaret Kendall Caffey-Moquin 17 Santa Fe, NM 18 for Appellee New Mexico Public
Regulation Commission 19 Cuddy & McCarthy LLP 20 Patricia Salazar Ives 21 Santa Fe, NM 22
Lukas, Nace, Gutierrez & Sachs, LLP 23 David LaFuria 24 McLean, VA 25 for Intervenors Smith
Bagley, Inc. and Navajo Communications Company 1 Lewis Roca Rothgerber LLP 2 Jeffrey H.
Albright 3 Albuquerque, NM 4 for Intervenors Sprint, T-Mobile, and CTIA, The Wireless
Association 1 OPINION 2 CHÁVEZ, Justice.

3 {1} In this opinion we address two orders issued by the New Mexico Public 4 Regulation
Commission (PRC) that affect the revenues of local telephone networks 5 including rural
telephone companies that make up the New Mexico Exchange Carrier 6 Group.

The first order is an annual order that must be issued by the PRC on or before 7 October 1 each
year that adopts a Surcharge Rate for the succeeding year. The 8 Surcharge Rate is paid by
consumers of all telephone communication services, both 9 wired and wireless.

The surcharge that is collected is placed in a State Rural 10 Universal Service Fund (Fund) and
distributed to local telephone networks. We will 11 refer to this order as the “Surcharge Rate
Order.” On September 17, 2014, the PRC 12 issued the Surcharge Rate Order, which adopted a 3%
Surcharge Rate for calendar 13 year 2015. 14 {2} The second order is a Rule Order that amends
the 2005 rules which set forth 15 the procedures for administering and implementing the Fund.

The Rule Order was 16 issued on November 26, 2014; the rule changes became effective on
January 1, 2015. 17 See 17.11.10.6 NMAC. We begin our analysis with a discussion of the Fund’s
18 background, followed by a discussion of the issues on appeal regarding each order 19 and our

reasons for reversing the PRC and remanding for further proceedings. 1 I. THE STATE RURAL UNIVERSAL SERVICE FUND 2 {3} Long-distance telephone carriers rely on local telephone networks on both ends 3 of a long-distance telephone call to complete the long distance call.

Some of these 4 local networks are owned by Incumbent Local Exchange Carriers (ILECs), including 5 numerous rural telephone companies that make up the N.M. Exchange Carrier Group. 6 ILECs are owners of public switched telephone networks. See John Gasparini, Hello, 7 Congress?

The Phone's For You: Facilitating the IP Transition While Moving 8 Toward a Layers-Based Regulatory Model, 67 Fed. Comm. L.J. 117, 123 n.25 (2014); 9 47 U.S.C. § 251(h) (2012). When someone places a call, the caller's ILEC transports 10 the call to the long-distance carrier's network, which in turn transports the call for 11 some distance before transferring the call to another ILEC on the receiving end.

See 12 Mark D. Schneider, Marc A. Goldman, & Kathleen R. Hartnett, The USTA Decisions 13 and the Rise and Fall of Telephone Competition, 22 Comm. Law., Summer 2004, at 14 1, 18. Long-distance carriers pay access charges to compensate ILECs for using their 15 networks.

The PRC regulates access charges that ILECs receive for intrastate long- 16 distance calls, and the Federal Communications Commission (FCC) regulates access 17 charges that ILECs receive for interstate long-distance calls and wireless calls. See 18 NMSA 1978, § 63-9H-6(I) (2013); see also 47 U.S.C. §§ 151, 614 (2012); 47 C.F.R. 2 1 § 61.26 (2012). 2 {4} In 1996, the FCC required ILECs to lower their access charges for interstate 3 service.

However, to compensate ILECs for the reduction in access-charge revenue, 4 the FCC directed payments to ILECs from a federal universal service fund. See In re 5 Fed.-State Joint Bd. on Universal Serv., 12 F.C.C.R. 8776, 8780-86 (1997), aff'd in 6 part, rev'd in part sub nom. Tex. Office of Pub. Util. Counsel v. FCC, 183 F.3d 393 7 (5th Cir. 1999).

The PRC did not immediately follow the FCC's lead, and instead 8 continued to allow ILECs to charge high intrastate access rates, which meant that 9 New Mexico customers paid more for intrastate long distance calls than for interstate 10 long distance calls. 11 {5} However, effective July 1, 1999, the Legislature enacted the Rural 12 Telecommunications Act of New Mexico (the Act), NMSA 1978, §§ 63-9H-1 to -14 13 (1999, as amended through 2013), and directed the PRC to establish and administer 14 a " 'state rural universal service fund,' " Section 63-9H-6(A), with a "surcharge on 15 intrastate retail public telecommunications services to be determined by the [PRC]." 16 Section 63-9H-6(B).

The Legislature delegated broad authority to the PRC over the 17 Fund. 18 The [PRC] shall: 3 1 (1) establish eligibility criteria for participation in the 2 fund consistent with federal law that ensure the availability of service at 3 affordable rates....; 4 (2) provide for the collection of the

surcharge on a 5 competitively neutral basis and for the administration and disbursement 6 of money from the fund; 7 (3) determine those services requiring support from the 8 fund; 9 (4) provide for the separate administration and 10 disbursement of federal universal service funds consistent with federal 11 law; and 12 (5) establish affordability benchmark rates for local 13 residential and business services that shall be utilized in determining the 14 level of support from the fund.

The process for determining subsequent 15 adjustments to the benchmark shall be established through a rulemaking. 16 Section 63-9H-6(D). 17 {6} Later in 2005, the New Mexico Legislature amended the Act to require equal 18 access charges for intrastate and interstate calls, which were to be set at the rate 19 established by the FCC for interstate calls. See § 63-9H-6(I) (requiring a phase-in of 20 equal charges by May 1, 2008).

Like the FCC, the New Mexico Legislature 21 determined that the ILECs' lost revenue for intrastate calls would be replaced with 22 a combination of (1) limited increases in local rates up to an "affordability 23 benchmark," and (2) subsidy payments to ILECs from the Fund. See § 63-9H-6(A), 4 1 (D), (K).

The Fund is financed by a surcharge on intrastate retail telephone service, 2 which telecommunications carriers collect from their customers. See § 63-9H-6(B). 3 All telephone companies operating in New Mexico, wired and wireless alike, charge 4 their consumers the Surcharge Rate, and these monies are placed into the Fund and 5 paid out to ILECs. See 17.11.10.20 & 17.11.10.22 NMAC.

6 {7} The PRC adopted regulations implementing the 2005 Act amendments. 7 17.11.10.8 to -30 NMAC (11/30/05, as amended through 12/28/05). The regulations 8 required the size of the Fund to be set annually and to be "equal to the sum of [the 9 ILECs'] revenue requirements... plus projected administrative expenses and a 10 prudent fund balance." 17.11.10.19(A), (C) NMAC (citation omitted).

The PRC 11 defined each ILEC's revenue requirement as the amount of revenue the ILEC lost as 12 a result of the intrastate access charges. See 17.11.10.19(E) NMAC. The PRC then 13 determined that the size of each ILEC's revenue requirement—i.e., subsidy 14 payment—should be calculated using the number of intrastate access minutes that the 15 ILEC recorded in 2004.

See *id.* The regulation remained unchanged from the end of 16 2005 to 2013, and each ILEC received a subsidy payment based on an equation that 17 used its 2004 access minutes. See *id.* 18 {8} The PRC also appointed Solix, Inc. (Solix) to serve as a third party fund 5 1 administrator pursuant to Section 63-9H-6(G) and 17.11.10.10 NMAC. Solix is 2 responsible for the collection, administration, and disbursement of the Fund subject 3 to the PRC's supervision and approval.

See § 63-9H-6(G); 17.11.10.12 NMAC. 4 Each year Solix submits a report to the PRC that offers a range of options for the 5 Fund size and the Surcharge Rate for the following year as required by Section 63- 6 9H-6(M), 17.11.10.19(A) NMAC, and 17.11.10.12(E) NMAC.

The PRC has the 7 ultimate responsibility to decide the amount of the Fund and the Surcharge Rate. See 8 17.11.10.19(B) & 17.11.10.20(B) NMAC; see also § 63-9H-6(A), (C). The 9 regulations that governed the administration of the Fund from 2004 up to and 10 including the Surcharge Rate Order at issue in this case requires the Fund size to be 11 “equal to the sum of each [eligible ILEC’s] revenue requirement[+]... plus projected 12 administrative expenses and a prudent fund balance.” 17.11.10.19(C) NMAC.

13 [T]he revenue requirement for each [ILEC]... shall be equal to the 14 [eligible ILEC’s] applicable [2004] intrastate access minutes multiplied 15 by the difference between the allowable intrastate access rate... and the 16 [eligible ILEC’s] historical intrastate access rate, with the product of this 17 computation multiplied by the [eligible ILEC’s] historical collection 18 factor, and then reduced by the [eligible ILEC’s] imputed benchmark 19 revenue....1 1 20 Historically the formula has been represented arithmetically as “((Historical 21 Rate Minus Allowable Rate) Times minutes Times Collection Factor) Minus Imputed 22 Benchmark Revenue.” 17.11.10.19(E) (2005).

6 1 17.11.10.19(E) NMAC (citation omitted). 2 {9} However, because of the expansion of wireless services, e-mail, text 3 messaging, social media, and other new internet-based video and telephone 4 communications, the use of wired telephone services has declined significantly. See 5 Kevin Werbach, Reflections on Network Transitions and Social Contracts for the 6 Broadband World, 13 Colo.

Tech. L.J. 45, 46, 57 (2015). In New Mexico, there was 7 an approximately 40% decline in access minutes occurring from 2004 through 2012. 8 On November 27, 2012, the PRC issued a Notice of Proposed Rulemaking to address 9 possible amendments to the Fund rules, to, among other things, change the Fund 10 formula to apply 2012 access minutes instead of 2004 access minutes and to establish 11 a 3% surcharge cap.

While the PRC was considering these rule changes, in 2013 the 12 Governor signed into law House Bill 58, Chapter 194, Section 4 of New Mexico 13 Laws of 2013, which amended NMSA 1978, Section 63-9H-6(J) (2005) and required 14 the PRC to “establish a cap on the surcharge.” Section 63-9H-6(J). 15 {10} It was against this backdrop that the PRC issued the November 26, 2014 Rule 16 Order, which set the surcharge cap and amended the formula for calculating the Fund, 17 effective January 1, 2015.

The relevant details of the process involved in adopting 18 the Rule Order will be described in the discussion of the merits of the N.M. Exchange 7 1 Carrier Group’s appeal of the Rule Order.

However, because the amended 2 regulations did not apply to the Surcharge Rate Order, we will first discuss the merits 3 of the N.M. Exchange Carrier Group's appeal of the Surcharge Rate Order.

4 II. THE SURCHARGE RATE ORDER CASE (NMPRC Case No. 14-00279- 5 UT; New Mexico Supreme Court Case No. S-1-SC-34933) 6 {11} On September 17, 2014, a three to two majority of the PRC issued the 7 Surcharge Rate Order adopting a 3% Surcharge Rate and a Fund amount of 8 approximately \$21 million for calendar year 2015.

On appeal, the N.M. Exchange 9 Carrier Group contends that the Surcharge Rate Order is arbitrary and capricious 10 because the PRC did not adhere to the regulations in existence at the time of its 11 issuance of the Order, but rather anticipated what it might do with respect to 12 amending the funding formula and establishing a surcharge cap in the Rule Order 13 case.

The N.M. Exchange Carrier Group emphasizes that had the PRC adhered to the 14 existing regulations it could not have adopted a 3% Surcharge Rate because doing so 15 results in a projected deficit of \$3,870,813 at the end of 2015—a clear violation of 16 17.11.10.19(C) NMAC, which requires the Fund to have “a prudent fund balance.” 17 The N.M. Exchange Carrier Group also contends that the Surcharge Rate Order is not 18 supported by substantial evidence because the Fund administrator (Solix), the PRC's 19 Fund Advisory Board, and the PRC's own counsel agreed that a 3.62% Surcharge 8 1 Rate was the appropriate rate and would result in a Fund size of \$25,057,152 with a 2 projected net balance of \$327,153 at the end of 2015.

3 {12} In response, the PRC contends that the 2013 legislative amendments to the Act 4 required the PRC to cap the Surcharge Rate, and the 3% Surcharge Rate is supported 5 by substantial evidence because the 3.62% rate recommended by Solix, the Fund 6 Advisory Board, and PRC general counsel would have been the highest in the history 7 of the Fund, which would conflict with the PRC's responsibility under Section 63- 8 9H-6(J) to keep the Surcharge Rate to a minimum.

As evidence of the latter point, 9 the PRC refers us to In re Implementation of the State Rural Universal Service Fund, 10 NMPRC Case No. 06-00026-UT, for each of the orders setting a Surcharge Rate 11 beginning in calendar year 2007.

The Surcharge Rates from calendar years 2007 12 through 2014 were as follows: 13 2007 = 3.0% 14 2008 = 2.5% 15 2009 = 2.15% 16 2010 = 2.45% 17 2011 = 3.00% 18 2012 = 3.30% 19 2013 = 3.45% 20 2014 = 3.45% 21 Utilizing this evidence, the PRC argues that “the 3% surcharge rate [it adopted for 22 2015] is higher than the median of the surcharge rates previously set by the [PRC], 9 1 which was 2.725%, and higher than the average of those rates, which was 2.9125%.” 2 {13} A party challenging a PRC order must establish that the order is “arbitrary and 3 capricious, not

supported by substantial evidence, outside the scope of the agency's authority, or otherwise inconsistent with law." N.M.

Indus. Energy Consumers v. 5 N.M. Pub. Regulation Comm'n, 2007-NMSC-053, ¶ 13, 142 N.M. 533, 168 P.3d 105 6 (internal quotation marks and citation omitted); see also NMSA 1978, § 63-9H-13(B) 7 (1999). Under NMSA 1978, Section 63-9H-11 (2013), we must uphold a PRC order 8 if the order substantially complies with the Act. 9 {14} The annual determination of the Fund is governed by 17.11.10.19 NMAC as 10 it existed before the 2015 amendments.

See *Gen. Tel. Co. of Sw. v. Corp. Comm'n 11* (In re *Gen. Tel. Co. of Sw.*), 1982-NMSC-106, ¶ 29, 98 N.M. 749, 652 P.2d 1200 12 (stating that an agency is bound by its existing rules and regulations). "The 13 administrator[, Solix,] shall determine the amount of the fund annually, subject to 14 [PRC] approval, on or before October 1 of each year...." 17.11.10.19(A) NMAC 15 (2005). "The amount of the fund shall be equal to the sum of each [eligible ILEC's] 16 revenue requirements, calculated pursuant to this section... plus projected 17 administrative expenses and a prudent fund balance." 17.11.10.19(C) NMAC (2005).

18 Although the Legislature amended the Act in 2013 to require the PRC to establish a 10 1 cap on the surcharge, the required cap is the subject of the Rule Order case docketed 2 as 35,036, not case no. 34,933, the Surcharge Rate Order case.

The Surcharge Rate 3 Order was issued on September 17, 2014. Final comments in the Rule Order case 4 were not due until September 19, 2014, a public hearing was not scheduled until 5 October 1, 2014, and the record was not closed until October 15, 2014.

The PRC 6 still did not have all of the evidence in the Rule Order case, and therefore it was not 7 in a position to make a decision regarding what cap to impose on the Surcharge Rate 8 in future years. Moreover, the prospective cap is irrelevant to the Surcharge Rate 9 Order because even the 2015 rule amendments require that the annual surcharge be 10 large enough to include "a prudent fund balance." Compare 17.11.10.19(C) NMAC 11 (2005) with 17.11.10.19(C) NMAC (2015).

12 {15} Historically Solix had recommended that the PRC maintain an annual Fund 13 balance of approximately \$2 million, which represents the cost of operating the Fund 14 for one month. In 2012, the PRC for the first time rejected Solix's rationale for 15 maintaining a Fund balance of approximately \$2 million because "the rule only calls 16 for a 'prudent' contingency." Accordingly, for calendar year 2013 the PRC approved 17 a 3.45% Surcharge Rate—less than the 3.5 to 3.6% rate suggested by Solix and the 18 PRC Advisory Board—which resulted in a \$1.5 million dollar surplus to begin 11 1 calendar year 2013.

This was the first time the Fund's surplus had been less than \$2 2 million. The Fund surplus to begin calendar year 2015 was projected to be \$875,660. 3 {16} The PRC's justification for

approving a 3% Surcharge Rate for 2015 was the 4 2013 amendment to the Act, as well as the fact that the 3% rate is higher than the 5 median or average rates since 2008.

However, the amendment to the Act does not 6 specify a formula to be used by the PRC in calculating the eligible ILECs' revenue 7 requirements, see 2013 N.M. Laws, ch. 294, § 4; the amended formula is the subject 8 of the Rule Order case, not the Surcharge Rate Order case.

In addition, the 2013 9 amendment to the Act does not prohibit the PRC from including in the annual fund 10 a prudent Fund balance, as evidenced by the fact that the PRC continues to have a 11 prudent Fund balance requirement in its rules. See 17.11.10.19(C) NMAC.

We do 12 not interpret the “minimum” surcharge requirement in Section 63-9H-6(J) as authority 13 to operate the Fund at a deficit. 14 {17} It is also immaterial that the 3% Surcharge Rate is higher than the median or 15 average of previous Surcharge Rates. Never in the history of setting Surcharge Rates 16 had the PRC approved a Surcharge Rate that resulted in a projected deficit.

The 17 record reflects that surcharge rates of less than 3% were approved by the PRC when 18 the beginning Fund balance was well over \$2 million—the amount Solix 12 1 recommended as a prudent Fund balance. Once the projected Fund balance was 2 approximately \$2 million, as recommended by Solix, the PRC approved Surcharge 3 Rates of 3.30%, and twice at 3.45%.

The PRC consistently applied the 2005 version 4 of Rule 17.11.10 through its 2013 Surcharge Rate Order. In fact, in its 2013 5 Surcharge Rate Order, the PRC commented that Rule 17.11.10 was being reexamined, 6 but because the workshops addressing potential rule revisions were still ongoing, the 7 PRC was not in a position to know the results of the workshops—that is, it would not 8 know what rule changes or surcharge cap would result from its reexamination of the 9 rules.

10 {18} Solix recommended a 3.62% Surcharge Rate for 2015, which would result in 11 a projected surplus of \$327,153. A 3.57% Surcharge Rate was projected to result in 12 a nearly zero Fund balance. Solix projected that a 3% Surcharge Rate for 2015 would 13 result in a \$3,870,813 deficit at the end of 2015.

Although the PRC Advisory Board 14 concurred in Solix's recommendation, the PRC rejected it, despite Solix's projected 15 deficit and the fact that the PRC had never before approved a Surcharge Rate that was 16 projected to result in a Fund deficit.

We are persuaded that the PRC Surcharge Rate 17 Order is arbitrary, not supported by substantial evidence, and is a clear violation of 18 its own rules, which require that the surcharge be large enough to allow for a prudent 13 1 Fund balance.

Accordingly, we reverse the PRC's Surcharge Rate Order. 2 III. THE RULE ORDER CASE (NMPRC Case No. 12-00380-UT; New Mexico 3 Supreme Court Case No. S-1-SC-35036) 4 {19} The PRC issued the Rule Order on November 26, 2014, to be effective January 5 1, 2015. Among

provisions not relevant to this appeal, the Rule Order set a 3% 6 surcharge cap and switched from a fixed calculation based on the ILEC's 2004 access 7 minutes to a rolling approach that uses an ILEC's "intrastate access minutes for the 8 calendar year that is two years prior to the year for which the calculation is made." 9 17.11.10.19(E) NMAC.

Each year the PRC issues an order determining the Fund size 10 for the upcoming year. See 17.11.10.19(A) NMAC. Under the new rules that will be 11 effective in 2017, an ILEC's payment will be based on its intrastate access minutes 12 from 2015. See 17.11.10.19(E) NMAC. 13 {20} The N.M. Exchange Carrier Group argues on appeal that the PRC was arbitrary 14 in its adoption of the aforementioned provisions for several reasons.

We first address 15 the contention that the PRC prejudged the Rule Order by virtue of its adoption of the 16 Surcharge Rate Order approving a 3% Surcharge Rate. Specifically, the N.M. 17 Exchange Carrier Group points to paragraph 7 of the Surcharge Rate Order wherein 18 the PRC references the pending rulemaking and states that the changes " 'will reduce 19 the payments from the Funds in 2015.' " As additional evidence of the PRC's alleged 14 1 prejudgment, the N.M.

Exchange Carrier Group refers to a statement by one 2 commissioner that the Surcharge Rate Order was "just laying some ground work" for 3 the Rule Order. Both the Surcharge Rate Order and the commissioner's statement 4 were made before the Rule Order case was scheduled to be closed and before the 5 public hearing regarding the proposed rule changes. If in fact the Surcharge Order, 6 which was issued ten weeks prior to the Rule Order, preordained the results of the 7 Rule Order, the Rule Order should be set aside.

See *Prometheus Radio Project v. FCC*, 652 F.3d 431, 453 (3d Cir. 2011) (setting aside an agency order when a draft 9 order circulated before the comment period had expired). An agency that is 10 considering rule changes must maintain an "open-minded attitude" until the rule is 11 adopted so that interested parties can offer the benefit of their expertise to the agency 12 through commentary.

Nat'l Tour Brokers Ass'n v. United States, 591 F.2d 896, 902 13 (D.C. Cir. 1978). 14 {21} It is difficult to understand what the PRC meant by its language in paragraph 15 7 of the Surcharge Rate Order. Without including the footnotes, the language 16 provides in its entirety: 17 Guided by the statutory directive that the surcharge "be held to a 18 minimum,"³ the [PRC] disapproves the recommended increase,⁴ which 19 would result in the highest surcharge rate in the history of the Fund.⁵ 20 Moreover, the recommendation of Solix is based on "business as usual," 15 1 ignoring the 2013 statutory mandate to establish a cap on the surcharge 2 and the pending rulemaking that will be completed this year.⁶ These 3 changes will reduce the payments from the Funds in 2015.

Accordingly, 4 the [PRC] finds that a projected Fund size of \$21,186,3397 and a 3.0% 5 surcharge for calendar year 2015 should be approved at this time. 6 (The footnotes noted in this quotation

have not been included in this opinion.) It is 7 evident from the language of the Surcharge Rate Order that the PRC did not set a cap; 8 it approved a 3% Surcharge Rate for calendar year 2015.

In addition, the formula 9 utilized by Solix and accepted by the PRC for deciding both the Fund size and the 10 Surcharge Rate for the 2014 Surcharge Rate Order was the formula set forth in the 11 2005 version of Rule 17.11.10.19(E), not the formula that was proposed in the 12 rulemaking case.

However, the PRC's footnote 6, which addresses the pending 13 rulemaking, states "[t]o the extent that Rule 17.11.10 (including 17.11.10.19(C) 14 NMAC) requires the [PRC] to ignore these changes to the Fund, the [PRC] finds good 15 cause for a variance." Footnote 6 strongly suggests that (1) the PRC was considering 16 the pending rulemaking when it decided the Surcharge Rate case, and (2) the PRC did 17 not follow the existing rules.

18 {22} By contrast, a year earlier, when the PRC adopted the Surcharge Rate for 2014, 19 at a time when the rulemaking was also pending, the PRC made it clear that the 20 rulemaking proceeding was not a consideration in setting the 2014 rate.

The PRC 16 1 stated in its Surcharge Rate Order that "[i]f revisions to Rule 17.11.10 require a 2 change in the surcharge rate, the [Commission] can address the change when the 3 revisions to the rule are implemented." 4 {23} Although the language we have quoted from the 2014 Surcharge Rate Order 5 is troubling, the process followed by the PRC and the evidence that supports its 6 adoption of the Rule Order persuade us that the PRC did not prejudice the rule 7 amendments.

Nonetheless, we agree with the N.M. Exchange Carrier Group that the 8 amendments are not supported by substantial evidence. 9 {24} The rulemaking proceeding began on November 27, 2012, when the PRC 10 issued a Notice of Proposed Rulemaking to (1) consider changes to residential and 11 business affordability benchmarks, (2) update the data for determining a provider's 12 revenue requirements to 2012 access minutes, (3) implement a 3% cap on the 13 Surcharge Rate, and (4) establish exceptions to the surcharge cap.

On January 23, 14 2013, the PRC entered an order vacating the rulemaking and procedural schedule 15 under the Notice of Proposed Rulemaking and scheduled the first in a series of 16 workshops for April 8, 2013. The order also asked participants to be prepared to 17 discuss, among issues not relevant to this case, whether the PRC should (1) substitute 18 2012 intrastate access minutes for 2004 minutes in the formula used to determine an 17 1 eligible ILEC's revenue requirements under Rule 17.11.10.19, and (2) establish a cap 2 on the Surcharge Rate.

Written comments were due by March 25, 2013. 3 {25} The PRC received eleven sets of comments on March 25, 2013. Comcast 4 favored a 3% surcharge cap because based on the thirteen states in which Comcast 5 operates that have similar funds, ten states had surcharges

under 3%, and eight states 6 had surcharges below 2%. Verizon opined that the PRC should impose a cap of less 7 than 3% and that the subsidy should be based on need.

None of the remaining 8 comments favored a cap. Just three days before the first workshop was scheduled, 9 Governor Susana Martinez signed House Bill 58 into law resulting in the 2013 10 Amended Act, which in relevant part amended Section 63-9H-6(J) to require the PRC 11 to establish a surcharge cap as part of the PRC's rulemaking. See 2013 N.M. Laws, 12 ch. 194, § 4.

13 {26} On July 10, 2013, the PRC issued an order setting workshop schedules, 14 requiring data from eligible ILECs, and soliciting comments regarding updating 15 affordability benchmark rates, changing the formula for the determination of the 16 annual fund, and implementing the 2013 amendments to the Act by considering a 17 Surcharge Rate cap.

In August 2013, the PRC received an additional fourteen sets 18 of comments, with some supporting a 3% cap. Four workshops were conducted in 18 1 2013, with additional comments filed through January 24, 2014. 2 {27} The PRC issued a second Notice of Proposed Rulemaking on July 23, 2014, 3 proposing to amend the surcharge rules to, among other things, implement a 3% cap 4 on the Surcharge Rate and to begin a four-year transition from using 2004 access 5 minutes to using 2012 access minutes to calculate the annual Surcharge Rate.

The 6 second Notice of Proposed Rulemaking also required those who wanted to comment 7 on the proposed rule amendments to file written comments by August 22, 2014, with 8 responses to the comments due no later than September 19, 2014. A public hearing 9 was scheduled for October 1, 2014, and the record was scheduled to close on October 10 15, 2014. 11 {28} The N.M.

Exchange Carrier Group contends that the permanent 3% surcharge 12 cap is not supported by substantial evidence because the majority of those who 13 commented regarding the second Notice of Proposed Rulemaking opposed the 3% 14 cap, thus proving that the PRC arbitrarily committed itself to a 3% cap before the 15 Rule Order case was complete.

We are required to review the whole record, 16 including the evidence both in favor of and contrary to the PRC's decision, when 17 determining whether its decision is supported by substantial evidence, while looking 18 at the evidence in the light most favorable to the PRC decision. *PNM Gas Servs. v. 19 1 N.M. Pub. Util. Comm'n (In re PNM Gas Servs.)*, 2000-NMSC-012, ¶ 4, 129 N.M.

2 1, 1 P.3d 383. Substantial evidence is "such relevant evidence as a reasonable mind 3 might accept as adequate to support a conclusion." *Rinker v. State Corp. Comm'n*, 4 1973-NMSC-021, ¶ 5, 84 N.M. 626, 506 P.2d 783.

After reviewing the record in its 5 entirety, we are persuaded that the PRC's decision to impose a 3% cap is not 6 supported by substantial evidence. 7 {29} The PRC acknowledges that in response

to the second Notice of Proposed 8 Rulemaking, “[m]ost commenters oppose[d] the 3% cap,” including the N.M. 9 Exchange Carrier Group, Mescalero Apache Telecommunications, Inc., Navajo 10 Communications, La Jicarita, Sacred Wind, the Attorney General of New Mexico, 11 and the PRC staff.

The PRC cited T-Mobile West, LLC as the only entity that 12 supported a 3% cap. However, Comcast and Verizon had previously expressed their 13 support for a 3% or lower cap. Notwithstanding the overwhelming opposition, the 14 PRC adopted the 3% Surcharge Rate cap for a three-year period, believing that “the 15 changes to the Access Reduction Support formula” would result in lower Fund 16 payments, leaving sufficient “headroom for additional support” pursuant to 17 17.11.10.25 NMAC, if the need for additional support was established.

18 {30} Our review is not as simple as comparing the number of entities in favor of the 20 1 3% cap with those who either oppose the 3% cap or take no position on the cap. Our 2 review requires us to look at the whole record and determine whether there is 3 evidence to support the PRC’s decision. See *In re PNM Gas Servs.*, 2000-NMSC- 4 012, ¶ 4.

In this case, the PRC states in its order that the change in Fund formula will 5 result in lower Fund payments, which will leave a balance sufficient to address an 6 eligible ILEC’s proven needs. Two significant problems arise from this statement. 7 First, the PRC admits that the “true sufficiency or insufficiency of the Access 8 Reduction Support is not known.” This is problematic because Section 63-9H-6(C) 9 requires the Fund to provide “a specific, predictable and sufficient support 10 mechanism” for eligible ILECs.

In addition, payment to eligible ILECs is to be “in 11 an amount equal to the reduction in revenues that occurs as a result of reduced 12 intrastate switched access charges.” Section 63-9H-6(K). Although a cap certainly 13 offers specificity and predictability, the Fund must still be sufficient, and the PRC 14 does not point to any evidence to establish that the new formula provides sufficient 15 support.

The record contains a report filed by Ken Smith, an economist for the Staff 16 of the Telecommunications Bureau of the Utility Division, indicating that in 2012 17 ILECs were processing 125,719,653 total access minutes, which amounted to a 18 reduction of almost 40% in traffic from 2004. See Staff Comments on First Workshop 21 1 Issues and Data Tables at 7 (August 5, 2013).

According to Smith, “[m]oving the 2 base to 2012 minutes could reduce the payments from the fund by approximately 8-9 3 million.” *Id.* However, the accuracy of the data was questionable, and in any event, 4 PRC staff recommended “a four-year phase-in of the 2012 minutes on a percentage 5 basis.” PRC staff also commented that projecting the demand side of the formula was 6 made

more complicated by House Bill 58, and it was therefore virtually impossible to establish the cap because of the uncertainty of demand.

PRC staff went on to recommend a 3.5% cap with an emergency escape clause because Fund revenues have been declining annually and Solix needed to provide realistic Fund balance projections. {31} The second problem with the PRC's reliance on lowering fund payments based on need is that the PRC admits that the support required by the Act does not require a showing of need to qualify for Access Reduction Support because Section 63-9H-6(K), which provides for Access Reduction Support, is independent from the need-based support in Section 63-9H-6(L).

Amended Rule 17.11.10.25(A) allows an eligible ILEC serving in a high-cost area to petition "for support from the fund when such payments are needed to ensure the widespread availability and affordability of residential local exchange service in the high-cost area of the state served by the [eligible ILEC]." However, if the Fund is not "equal to the sum of each [eligible ILEC's] revenue requirements... plus projected administrative expenses and a prudent fund balance" as required by Rule 17.11.10.19(C), there will not be resources in the Fund from which to supplement the funds of an eligible ILEC that demonstrates need.

For these reasons, we are not satisfied that the record in this case supports the PRC statement that "the changes to the Access Reduction Support formula" will result in lower Fund payments, leaving sufficient "headroom for additional support" pursuant to 17.11.10.25 NMAC. Perhaps the actual experience during calendar year 2015 will provide the evidence that supports the PRC Rule Order, but the evidence in the record before us does not do so.

{32} Although we conclude that the PRC has the authority to modify the funding formula as part of its rulemaking authority and it should establish a surcharge cap as required by the 2013 Act, we remand this matter to the PRC for further proceedings. The record must have substantial evidence to support a finding that the newly adopted funding formula is adequate to satisfy the requirements of Section 63-9H-6(C) and 6(K) and Rule 17.11.10.19(C), and that the surcharge cap has not been arbitrarily established.

IV. CONCLUSION {33} We reverse the PRC's Surcharge Rate Order in NMPRC Case No. 14-00279-2 UT and also reverse the PRC's Rule Order in NMPRC Case No. 12-00380-UT. We remand both matters to the PRC for further proceedings consistent with this opinion. {34} IT IS SO ORDERED. _____ EDWARD L. CHÁVEZ, Justice
WE CONCUR: _____ BARBARA J. VIGIL, Chief
Justice _____ PETRA JIMENEZ MAES, Justice
_____ CHARLES W. DANIELS, Justice
JUDITH K. NAKAMURA, Justice, not participating

