IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. S-1-SC-39152

AVANGRID, INC., AVANGRID NETWORKS, INC., NM GREEN HOLDINGS, INC., IBERDROLA, S.A., PUBLIC SERVICE COMPANY OF NEW MEXICO, and PNM RESOURCES, INC.,

Appellants,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee,

and

NEW ENERGY ECONOMY,
WESTERN RESOURCE ADVOCATES,
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 611, THE OFFICE OF THE NEW MEXICO ATTORNEY GENERAL, COALITION FOR CLEAN ADDORABLE ENERGY, DINE CITIZENS AGAINST RUINING THE ENVIRONMENT, SAN JUAN CITIZENS ALLIANCE, TO NIZHONI ANI, and NAVA EDUCATION PROJECT,

Intervenor-Appellee.

In The Matter of The Joint Application of Iberdrola, S.A., Avangrid, Inc., Avangrid Networks, Inc., NM Green Holdings, Inc., Public Service Company of New Mexico And PNM Resources, Inc. For Approval of the Merger of NM Green Holdings, Inc. with PNM Resources, Inc.; Approval of a General Diversification Plan; and All Other Authorizations and Approvals Required to Consummate and Implement this Transaction, NMPRC Case No. 20-00222-UT

ANSWER BRIEF OF INTERVENER-APPELLEE OF NEW ENERGY ECONOMY'S TO APPELLANTS' BRIEF-IN-CHIEF

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal arises from the decision by the New Mexico Public Regulation Commission ("PRC" or "Commission") to deny a request by the Public Service Company of New Mexico ("PNM"), PNM Resources, Inc. ("PNMR") and Avangrid Inc., a subsidiary of the Spanish energy conglomerate, Iberdrola, S.A., ("Joint Applicants") for permission to merge.[1] After a 7-day hearing, including live testimony by 21 witnesses and the admission of reams of documents, written testimony under oath and data, and after a period of public comment, the PRC voted unanimously to accept the recommendation of its Chief Hearing Examiner ("HE") that the proposed merger be rejected as contrary to the interests of PNM's customers and the public. The PRC's *Order on Certification of Stipulation* adopted the Hearing Examiner's 443-page, meticulous analysis setting forth the reasons and evidentiary bases for recommending rejection of the merger. Joint Applicants appealed.

[1] Avangrid, Inc., Avangrid Networks, Inc., NM Green Holdings, Inc., and PNM/PNMR applied for approval of the merger. Before the hearing, the Hearing Examiner ordered that Iberdrola be made a party. **43RP17117-17150**. Iberdrola resisted joinder. **41RP16843-60**. Iberdrola did not sign the June 4th Stipulation, **43RP17031-42**, but did sign onto the Modified Stipulation in Appendix 2 of the Certification of Stipulation, with further requests for modification. **80RP40308-9**.)

Joint Applicants' overarching appellate argument is that the record below does not support the PRC's decision to reject the merger and that the weight of the evidence favored Joint Applicants' merger, not its rejection.[2] Stated succinctly, Joint Applicants disagree with the PRC's decision. Joint Applicants make various attacks on the record to support what is no more than a dressed-up, and groundless, "insufficient evidence" argument. Their arguments principally include: 1) The PRC erred in not agreeing with Joint Applicants about the value to ratepayers of the benefits of the merger;[3] 2) The PRC "exaggerated the risks" to ratepayers associated with allowing Avangrid/Iberdrola to take over PNM's monopoly in New Mexico;[4] 3) There was, according to Joint Applicants' claims, no evidence other than hearsay to support the Commission's decision and it therefore violated the "legal residuum" rule that requires an administrative decision be based on at least *some* evidence that would be admissible in a court.[5]

Joint Applicants' sufficiency of the evidence arguments are untethered from reality. There was a mountain of admissible evidence before the Commission, including extensive non-hearsay and other evidence admissible in a court proceeding of Avangrid's poor performance, including numerous fines and

[2] Joint Brief at 24-27.
[3] Joint Brief at 28-41.
[4] Joint Brief at 42-61.
[5] Joint Brief at 26-27.

penalties in other states where it now operates, its cavalier and offensive treatment of its customers, its efforts to suppress community and roof-top solar projects, its gross incompetence in its operation of utilities in the Northeast, the pendency in Spain of a major, High-Court-endorsed criminal investigation of Iberdrola's top management for corruption, bribery and falsification of documents, and Avangrid's flouting of NMPRC's own rules during the course of these proceedings. In other words, the evidence is far, far more than enough to support the PRC's decision. Finally, in light of the whole evidentiary record of more than 40,000 pages, Joint Applicants' invocation of and reliance on the "legal residuum" rule as a basis for overturning the decision is entirely baseless.

The Hearing Examiner's Recommended Decision and the Commission's order thoroughly documented why adoption of the Contested Stipulation was not in the public interest. Yet Joint Applicants argue that the Commission should have approved the merger because a number of parties in the case supported the Contested Stipulation. First, as we explain below, Joint Applicants' characterization of the Contested Stipulation as having near-unanimous support is incorrect. Most importantly, however, once a regulatory commission determines that a merger or other action is not in the public interest, it must decline to approve it, even if all of the parties before the Commission were to support it.

Joint Applicants make four other arguments that we address below. One is that the Commission's analysis of the public interest contained an internal inconsistency and was therefore arbitrary and capricious.[6] Another is that the Hearing Examiner should not have imposed a discovery sanction on Joint Applicants or, alternatively (in a particularly ironic argument under the circumstances), if a sanction was merited, the Commission erred by imposing it on both Joint Applicants (who not only acted in lockstep below but are before this court as Joint Appellants), instead of just on Avangrid. PNM, at least as to that issue, apparently wishes to distance itself from Avangrid/Iberdrola's embrace.[7] The third is Joint Applicants' objection to statements made by Commissioners concerning an inability to police affiliate transactions if the merger took place. The fourth and last, is their objection to the Hearing Examiner's ruling on a concurrent conflict of interest by attorney Marcus Rael. Joint Brief at 66-68, 68-72, 47-50, and 58-60, respectively. These arguments are meritless and New Energy Economy ("NEE") addresses them below.

Over all, Joint Applicants' brief reflects either a lack of knowledge of, or unwillingness to address the evidence the Hearing Examiner and Commission heard and considered, which was sufficient not just to adequately support the

[6] Joint Brief at 66-68.
[7] Joint Brief at 68-73.

PRC's rejection of the Contested Stipulation and the merger it would have enabled, but to make its rejection not even a close call.

A last introductory point is significant: At various points in Joint Applicants' brief, they seem to complain that the PRC somehow went too far in investigating Avangrid/Iberdrola and pushed for too much information and made too much of Avangrid's/Iberdrola's problems and transgressions elsewhere.[8] What Joint Applicants seem be to suggesting *sub silentio* is that the PRC was biased and performed too much due diligence for the benefit of the public, even though this is what the law requires the PRC do before it can approve an acquisition of New Mexico's largest utility that will impact the state and the ratepayers for many decades to come.

II. STANDARDS OF REVIEW

Joint Applicants' statement of the standards of review is accurate so far as it goes but it is incomplete. NEE supplements it as follows:

> We review the [Commission's] determinations to decide whether they are arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency's authority or otherwise inconsistent with law, with the burden on the appellant to make this showing.

[8] Joint Brief at 42-47.

Citizens for Fair Rates and the Env't v. N.M. Pub. Regulation Comm'n, 2022-NMSC-010, ¶12. *See also,* NMSA 1978, § 62-11-4 (1965). "An agency's action is arbitrary and capricious if it provides no rational connection between the facts found and the choices made, or entirely omits consideration of relevant factors or important aspects of the problem at hand." *Albuquerque CAB Co. v. N.M. Pub. Regulation Comm'n,* 2017-NMSC-028, ¶ 8, 404 P.3d 1.

When the appellate court considers the substantiality of the evidence, it determines whether the decision is supported by evidence "that is credible in light of the whole record and that is sufficient for a reasonable mind to accept as adequate to support the conclusion reached by the agency." *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n*, 2019-NMSC-015, ¶ 8, 450 P. 3d 393.

The Court does not reweigh the evidence or replace the fact finder's conclusions with its own views, *DeWitt v. Rent-A-Center, Inc.*, 2009-NMSC-032, ¶ 12, 146 N.M. 453, and the Court gives substantial deference to factual findings that are predicated on matters requiring NMPRC expertise. *Alb. Bernalillo Co. Water Utility v. N.M. Pub. Regulation Comm'n*, 2010-NMSC-013, ¶ 50, 148 N.M. 21, 229 P.3d 494.

III. LEGAL STANDARDS APPLICABLE TO THE PRC'S CONSIDERATION OF AVANGRID'S ACQUISITION OF PNM

A. Applicable Legal Standards

Prior approval by the PRC of a "Proposed Transaction" such as this is required under Sections 62-6-12 and 62-6-13 of the PUA.[9] Section 62-6-13 provides that the NMPRC shall approve proposed acquisitions and consolidations "unless the commission shall find that the proposed transaction is unlawful or is inconsistent with the public interest[.]"[10]

The Hearing Examiner spelled out the legal standards for PRC's administrative adjudications, consideration of contested stipulations, merger transactions, and how to apply these interrelated standards. [11] The overarching test is whether the public interest is served by approving the merger as determined by the facts and circumstances of each case. Evaluation of the complex matrix of variables and factors at play in a merger must ultimately result in net positive benefit to ratepayers if a merger is to be approved. Both quantifiable and unquantifiable benefits are to be considered.[12]

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[9] NMSA 1978, §§ 62-6-12 and -13.
[10] NMSA 1978, § 62-6-13.
[11] **80RP39836-42**.
[12] *Id*., citing cases.

The Hearing Examiner and the Commission assessed whether the merger was in the public interest based on the following considerations in accordance with the law:

1. Whether the transaction provides benefits to utility customers;
2. Whether the NMPRC's jurisdiction will be preserved;
3. Whether the quality of service will be diminished; and
4. Whether the transaction will result in the improper subsidization of non-utility activities.[13]
5. Careful verification of the qualifications and financial health of the new owner; and
6. Adequate protections against harm to customers.[14]

In their assessment of the contested stipulation, the Hearing Examiner and the Commission also applied appropriate legal standards for review – granting non-stipulating parties an opportunity to be heard on the merits of the stipulation and making an independent finding, based on and supported by substantial evidence in the record, of whether the stipulation did indeed resolve the matters in dispute in a way that is fair, just and reasonable and in the public interest.[15] Below, the

[13] Case No. 04-00315-UT, *Certification of Stipulation*, pp. 16-17 (May 26, 2005), approved by *Final Order Approving Certification of Stipulation* (June 7, 2005).
[14] Case No. 11-00085-UT, *Recommended Decision* of the Hearing Examiner, pp. 15-16 (Dec. 2, 2011), approved by *Final Order* (Dec. 22, 2011).
[15] *New Energy Econ., Inc. v. N.M. Pub. Regulation Comm'n*, 2018-NMSC-024, ¶¶ 22-23, 416 P.3d 277*, citing, Attorney Gen. v. N.M. Pub. Serv. Comm'n*, 1991-NMSC-028, ¶ 15, 111 N.M. 636, 808 P.2d 606.

Commission found unanimously that the stipulation, even when modified, was not in the public interest.[16]

The Joint Applicants bear the burden of demonstrating the unreasonableness or unlawfulness of the order. NMSA 1978, § 62-11-4 (1965); *Zia Natural Gas Co. v. N.M. Pub. Util. Comm'n*, 2000-NMSC-011, ¶ 4, 128 N.M.

B. Applicable Evidentiary Standards

The starting point is the PRC's rules of procedure regarding evidence. In pertinent part they are as follows:

> **NMAC 1.2.2.32 PUBLIC HEARINGS:**
> **A. Rights of staff, parties, and commenters:**
>
> **(2) Commenters shall be entitled to make an oral or written statement for the record but such statement shall not be considered by the commission as evidence.** Commenters are not parties and shall not have the right to introduce evidence or examine or cross-examine witnesses, to receive copies of pleadings and documents, to appeal from any decisions or orders, or to otherwise participate in the proceeding other than by making their comments.
>
> **NMAC 1.2.2.35 RULES OF EVIDENCE:**
> **A. General:**
>
> **(1)** Subject to the other provisions of this rule, **all relevant evidence is admissible which, in the opinion of the presiding officer, is the best evidence most reasonably obtainable, having due regard to its necessity, competence, availability, and trustworthiness**.

[16] 81RP40427-8.

(2) In passing upon the admissibility of evidence the presiding officer shall give consideration to, but shall not be bound by, the New Mexico rules of evidence which govern proceedings in the courts of this state. The presiding officer shall also give consideration to the legal requirement that any final decision on the merits be supported by competent evidence.

D. Administrative notice:
(1) The commission or presiding officer may take administrative notice of the following matters if otherwise admissible under Subsection A of 1.2.2.35 NMAC:
(a) rules, regulations, administrative rulings, published reports, licenses, and orders of the commission and other governmental agencies;
(b) contents of certificates, permits, and licenses issued by the commission;
(c) tariffs, classifications, schedules, and periodic reports regularly established by or filed as required or authorized by law or order of the commission;
(d) decisions, records, and transcripts in other commission proceedings;

F. Official records: An official rule, report, order, record, or other document prepared and issued by any governmental authority may be introduced into evidence.
In cases where such official records, otherwise admissible, are contained in official publications or publications by nationally recognized reporting services and are in general circulation and readily accessible to all parties and staff, they may be introduced by reference unless the presiding officer directs otherwise, provided that proper and definite reference to the record in question is made by the party or staff offering the same.

Emphases supplied.

As the foregoing rules make clear, there is no restriction on the use of hearsay so long as the Hearing Examiner finds it to be relevant and reliable. *See*, *High Desert Bicycles, Inc., v. New Mexico Taxation and Revenue Dept*., No. A-1-CA-37850, Court of Appeals 2020, (hearsay evidence may be considered in administrative proceedings). This rule is the same under federal law:

> Generally, for example, if hearsay evidence meets the standards of the Administrative Procedure Act by being relevant, material, and unrepetitious, *see* 5 U.S.C. § 556 (d) (1982), agencies are entitled to weigh it according to its "truthfulness, reasonableness, and credibility," *see Johnson v. United States*, 202 U.S. App. D.C. 187, 628 F.2d 187, 190-91 (D.C. Cir. 1980); *see also National Association of Recycling Industries, Inc. v. Federal Maritime Commission*, 212 U.S. App. D.C. 68, 658 F.2d 816, 825 (D.C. Cir. 1980) (finding agency's disregarding of probative hearsay evidence to be arbitrary and capricious).

Veg-Mix, Inc. v. U.S. Dep't of Agric., 266 U.S. App. D.C. 1, 832 F.2d 601, 606 (1987)

In considering hearsay, Courts recognize that when an agency is asked to consider all relevant evidence the issue is not about its admissibility but what the Hearing Examiner and Commission judge to be the quality and probative value of the evidence. *See Young v. Bd. of Pharmacy,* 1969-NMSC-168, ¶¶ 15-17, 81 N.M. 5, 462 P.2d 139. ("Boards may admit any evidence and give probative effect to evidence that is of the kind commonly relied upon by reasonably prudent men in the conduct of serious affairs.")

What Joint Applicants object to falls within hearsay exceptions and specific provisions in the Commission's rules of evidence and, therefore, the legal residuum rule isn't even in play. For example, Joint Applicants object to the Liberty Audit, which was a "Final Report", commissioned by the Maine Public Utility Commission ("MPUC"), regarding the utility's performance under

Avangrid ownership. It is admissible under both N.M. R. Evid. 11-803 (8) as a public report commissioned by a governmental agency and as official record under the PRC's rules, 1.2.2.35. F NMAC.

"Reliability can be inferred without more in a case where the evidence falls within a firmly rooted hearsay exception." *State v. Dedman*, 2004-NMSC-037, ¶37, 136 N.M. 561, 102 P.3d 628. The opponent of admissibility in an administrative proceeding has the burden to show that the report should be excluded for lack of trustworthiness. *Id.*, citing, *Anaya v. N.M. State Pers. Bd.,* 107 N.M. 622, 627, 762 P.2d 909, 914 (Ct.App.1988). Here, the Hearing Examiner meticulously explained the evidence and the rulings that validated the introduction into evidence of all the documents Joint Applicants have focused on.[17] Furthermore, the record contains substantial corroborative evidence that clearly is not hearsay which supports the Commission's decision-making.[18]

IV. FACTS AND EVIDENCE RELIED ON BY THE HEARING EXAMINER IN REJECTING THE MERGER

This is an unusual appeal based on sufficiency of the evidence because the Hearing Examiner below, whose opinion the PRC adopted, wrote a voluminous decision explaining in detail the evidence before him, what he relied and, where

[17] **65RP22386-420**.
[18] *Id.*

necessary, the reasons for its admission into evidence. Accordingly, the "best evidence" before this court of why the Commission ruled as it did is thoroughly explained in the Hearing Examiner's recommended decision, which the PRC adopted. It is set forth at **80RP39799-40242**.

Below, there were the following basic categories of evidence that the Hearing Examiner considered, in roughly this order:

1. The benefits of the merger as provided in the June 4th Stipulation and the Modified Stipulation.

2. Potential harms associated with the merger, including Avangrid's and Iberdrola's conduct and performance elsewhere, fines and penalties, criminal investigation, diminished service quality, risk of subsidization of non-utility activities, etc.

3. Lessons learned from compliance issues in this proceeding: Discovery Violations; Over-Designation of Confidentiality; Failure to Disclose Track Record; Use of Non-Record Evidence.

A. The Benefits of the Merger.

Joint Applicants characterize the benefits their merger agreement and the Stipulation bestow as significant and sufficient to satisfy the requirement that the agreement be in the public interest. Joint Brief at 28. Those benefits would

include $94 million in rate credits over three years,[19] a promise to develop 150 new full-time jobs, appointment of a Chief Environmental Officer, establishment of a Carbon Reduction Task Force, a process to identify emissions impacts resulting from new contracts, and an obligation to explore, and if feasible, join a Regional Transmission Organization, expand PNM's transportation electrification and renewable energy programs, and because of Avangrid/Iberdrola's financial heft, PNM having expanded access to capital.[20] Joint Brief at 29-41.

Joint Applicants ascribe a value of the initial 150 jobs and "an additional secondary 255 jobs [that] *could* result" of over $200 million. Joint Brief at 32. (Emphasis supplied.) The Attorney General's expert, Andrea Crane, a financial consultant with over thirty years experience in utility regulation who has testified in over 400 regulatory proceedings,[21] testified below that because the merger agreement required PNM to sell its imprudently-renewed coal shares at the Four Corners Power Plant ("FCPP"), and because PNM intended to seek compensation from ratepayers of $300,000,000 for having to sell it, the $300,000,000, should be

[19] Overall $94M consisting of: $67M in rate credits over three years + $10M million in residential customer arrearages forgiveness + $2M to provide electricity to new customers in remote areas + $15M for low-income energy efficiency.

[20] There is no evidence in the record that PNM has had trouble obtaining credit in the last 10 years.

[21] **18RP03743-03805**.

treated as a "cost of the merger" and therefore assumed by the stockholders, not the ratepayers.[22] If PNM is successful in shifting to ratepayers the $300,000,000 in FCPP securitized financing costs, that amount would more than wipe out the quantifiable economic benefits of the merger.[23]

The Hearing Examiner found the allocation of the $67 million rate credit proposed by Joint Applicants to be inadequate, citing both Ms. Crane and NEE's expert.[24] "[T]he $67 million in rate credits may be a significant cost to the Joint Applicants, but the amounts to be received by each customer are relatively small."[25]

He further cited Crane's testimony about the inadequacy of the rate credit: ""[e]ven if we did $67 million on a per customer basis [rather than allocated differently among classes of ratepayers as Joint Applicants planned], you know, there's still a relatively small impact on people's lives, and that's how ultimately, at the end of the day, I think the rate credits have to be evaluated."[26] Concluding that the rate credit was ultimately inadequate compared to the potential risks, he found: "The per kWh allocation of the $65 million credit (i.e., the credit amount

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[22] **72RP34319**.
[23] **72RP34322-3**.
[24] **80RP39873-76**.
[25] **80RP39860**.
[26] **80RP39875-6**.

proposed in the June 4 Stipulation) would save residential customers even less -- $1.64 per month and $19.68 per year over three years."[27]

Regarding the other rate benefits the Hearing Examiner also found them not "sufficiently defined [as] to be enforceable":[28]

> Three- to five-year commitments for economic development benefits are likewise insufficient when compared to PNM customers' longer-term interests in reliable service. The environmental commitments pursue worthy goals, but they lack enforceable near-term results that are sufficient to outweigh PNM customers' immediate interests in reliable service at just and reasonable rates. The near-term benefits that *are* enforceable, such as the $15 million in funding for low-income energy efficiency programs, are not large enough in their scope and dollar amounts to outweigh the potentially wider harm of unreliable service.[29]

Lastly, he determined that the negotiated concessions had far more to do with appeasing the narrow interest of particular parties as opposed to a result that is defined by the public interest.[30]

As the evidence below made clear the Hearing Examiner and the Commissioners were correct to recognize that the benefits of the rate credits, which increased over the case's horizon, remained inadequate relative to the risks

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[27] **80RP39861.**
[28] **80RP39861**.
[29] **80RP39861**.
[30] **80RP39862**.

inherent in the Proposed Transaction: "The potential harms of the Proposed Transaction outweigh its benefits."[31]

B. Qualifications of Avangrid and Iberdrola

1. Avangrid/Iberdrola's performance following its takeovers of other U.S. utilities.

Just before the case was first scheduled for hearing, the parties learned that Avangrid's takeover of utilities in the Northeast had resulted in it having a reputation for unreliable performance, dismal customer satisfaction, poor safety, and high rates. On May 11, 2021, at a status conference that was meant to set scheduling procedures, the parties learned of the discovery of "approximately $25 million in penalties and cost disallowances to Avangrid, Inc.'s electric utility subsidiaries over the past 16 months. …. The participants also discussed the forensic audits that had been ordered in Maine and Connecticut to review whether the organizational structure of the Avangrid, Inc. group of companies was responsible for the poor service that formed the basis for the enforcement actions."[32]

[31] **80RP39844-63**.
[32] **80RP39812-3**.

As a result, the Hearing Examiner required the Joint Applicants to file bi-weekly reports of "the enforcement measures, disallowances and forensic audits pertaining to Avangrid, Inc.'s electric utility subsidiaries. The Hearing Examiner found that the service deficiencies of the electric utility subsidiaries are relevant to the Commission's review of the potential impact Avangrid, Inc.'s influence would have on the adequacy of PNM's service if the merger is approved."[33]

In their brief Joint Appellants have largely ignored the following evidence, taken from documents ***they*** were required to produce:

a) Facts About Avangrid's Settlements or Negative Revenue Adjustments that involve Reliability, Regulatory Non-Compliance or Safety Concerns

i. North American Electric Reliability Corporation ("NERC") Full Notice of Penalty Regarding Avangrid, November 26, 2019, Federal Energy Regulatory Commission ("FERC") Docket No. NP20-_-000.[34]: violations concerning transmission, operations, and reliability standards due to lack of effective management oversight and insufficient training and resulted in a penalty of $450,000.

ii. NERC Full Notice of Penalty Regarding Central Maine Power ("CMP"), April 29, 2021, FERC Docket No. NP21-_-000 Avangrid settled these matters for $360,000 and was required to include mitigation measures such as: "Avangrid has taken steps designed to *improve its operation's culture of compliance*. The operations department was *reorganized to assist with*

[33] *Id*.; **35RP06689-06707**: "The Hearing Examiner stated that the Joint Applicants' failure to disclose the information to the Commission in this proceeding was troubling and relevant to the credibility of their witnesses' testimony and the transparency by which Avangrid, Inc. and PNM would conduct their business in New Mexico if the merger is approved.")

[34] **69RP24725-28**; **69RP25249**; **80RP39851**; **80RP39915**.

reliability and compliance and to facilitate better inaction with the compliance department and senior Avangrid leadership. *New staff was added*, which includes a new operations director, a dedicated Maine PCC NERC compliance analyst, and a new NERC compliance manager."[35] (Emphasis supplied.)

iii. Maine Public Utility Commission ("MPUC") fined CMP $500,000 - the maximum administrative penalty amount allowable - in August of 2020 for violating Maine consumer-protection rules by sending notices stating that CMP would disconnect customer in the winter.[36]

iv. Investigation into its community solar and rooftop solar interconnection practices in April of 2021 in response to a complaint received from two community solar advocacy organizations in Maine.[37]

v. 2016 Rochester Gas & Electric ("RG&E") estimated meter reads, negative revenue adjustment of $300,000. This "negative revenue adjustment is a component of performance-based regulation, wherein the utility's revenues are adjusted on a downward basis if certain targets are not hit."[38]

vi. 2017 RG&E estimated meter reads/speed of answer and gas safety metrics, negative revenue adjustment of $525,000 and $544,000 respectively.[39]

vii. 2018 New York State Electric and Gas ("NYSEG") Customer Average Interruption Duration Index[40] ("CAIDI") and Gas Safety Records, negative revenue adjustment of $3,500,000 for CAIDI and $67,000 for Gas Safety Records.[41]

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[35] **69RP24728**; **60RP25174**; **80RP39981**.
[36] **69RP24774-6**; **69RP25277**; **80RP39917.** (lawsuit for intentional infliction of emotional distress related to CMP's winter disconnection notices sent to customers.)
[37] **80RP39963**, MPUC Notice of Formal Investigation, Docket No. 2021-00035.
[38] **69RP25170**.
[39] **69RP25170-1**.
[40] A reliability index commonly used by electric power utilities.
[41] **69RP25171**.

viii. 2018 RG&E Gas Safety Records, negative revenue adjustment of $136,000.[42]

ix. 2019 NYSEG System Average Interruption Frequency Index[43] ("SAIFI") and Gas Safety Records, negative revenue adjustment of $7,000,000 for SAIFI and $750,000 for Gas Safety Records.[44]

x. 2019 RG&E Estimated Meter Reads and Gas Safety Records, negative revenue adjustment of $525,000 for Meter Reads and $1,800,000 for Gas Safety Records.[45]

xi. 2020 NYSEG SAIFI, Meter Reads, and Gas Safety Records, negative revenue adjustment of $7,000,000 for SAIFI, $1,400,000 for Meter Reads, and $1,000,000 for Gas Safety Records.[46]

xii. 2020 RG&E Meter Reads, Gas Safety Records, negative revenue adjustment of $1,800,000 for Meter Reads and $600,000 for Gas Safety Records.[47]

xiii. NYPSC Case No. 17-E-0594, NYSEG and RG&E Order to Show Cause Relating to March 8, 2017 Windstorms, settlement of $3,900,000.[48]

xiv. Public Utilities Regulatory Authority ("PURA") Docket 17-12-02, in which Connecticut Natural Gas ("CNG") received a $1,500,000 penalty for failing to install properly rated plastic tees.[49]

xv. NYPSC Docket 19-E-0105 and NYPSC Docket 19-E-0106, in which NYSEG and RG&E were fined $9,000,000 and $1,500,000 respectively for their performance during a spate of winter and spring storms in 2018. These

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[42] **69RP25171**.
[43] SAIFI indicates how often the average customer experiences a sustained interruption usually measured over the course of a year.
[44] **69RP25171**.
[45] **69RP25171**.
[46] **69RP25172**.
[47] **69RP25172**.
[48] **69RP25172**.
[49] **69RP25172**. (Ultimately, CNG made investments and operational changes and was not required to make a monetary payment to the regulator/State.)

fines were categorized as offsets to be included in future proceedings for the benefit of customers and not as amounts paid to the State or the regulator.[50]

xvi. NYPSC Case No. 20-E-0586 dated January 21, 2021, Investigation into the Utilities' Preparation for and Response to August 2020 Tropical Storm Isaias and Resulting Electric Power Outage.[51]

xvii. Massachusetts Department of Public Utilities ("DPU")20-PL-33, Berkshire Gas Company was issued a penalty of $50,000 regarding safety testing practices.[52]

xviii. DPU 20-PL-37, Berkshire Gas was issued a penalty of $75,000 regarding inspection practices.[53]

xix. DPU 20-PL-65, Berkshire Gas was issued a penalty of $10,000 regarding control room practices.[54]

Avangrid's CEO, Mr. Kump, referred to the following violations as involving "lower level financial penalties":[55]

xx. MPUC Docket No 2019-00129, Maine Natural Gas was issued a penalty of $50,000 regarding issues with is quality assurance and quality control programs.[56]

xxi. MPUC Docket No. 2018-00128, Maine Natural Gas was issued a penalty of $25,000 regarding a trenchless technology installation by a third-party contractor.[57]

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[50] **69RP25173**.
[51] **69RP25173-4**.
[52] **69RP25174**.
[53] **69RP25174**.
[54] **69RP25174**.
[55] **69RP25175**; **80RP39978**.
[56] **69RP25175**.
[57] **69RP25175**.

xxii. MPUC Docket No. 2018-00012, Maine Natural Gas was issued a penalty of $15,000 regarding plastic pipe work and inspection without the necessary qualifications.[58]

xxiii. PURA Docket 19-07-14, Connecticut Natural Gas was issued a penalty of $15,000 for an installation practice incident.[59]

xxiv. PURA Docket 17-09-22, Connecticut Natural Gas was issued a penalty of $25,000 regarding inspector qualifications.[60]

xxv. PURA Docket 16-12-07, Connecticut Natural Gas was issued a penalty of $50,000 regarding joining installation practices.[61]

xxvi. PURA Docket 20-11-12, Southern Connecticut Gas was issued a penalty of $25,000 regarding joining installation practices.[62]

xxvii. PURA Docket 16-05-11, Southern Connecticut Gas was issued a penalty of $15,000 regarding safety testing practices.[63]

xxviii. DPU 19-DS-0588, Berkshire Gas Company was issued a penalty of $30,000 regarding installation practices.[64]

xxix. DPU 19-DS-0617A, Berkshire Gas Company was issued a penalty of $20,000 regarding installation practices.[65]

There are also dozens and dozens of smaller violations in the hundred to thousand dollar – up to $5,000 range for "failure to comply with Call Before You

[58] **69RP25175**.
[59] **69RP25175**.
[60] **69RP25175**.
[61] **69RP25176**.
[62] **69RP25176**.
[63] **69RP25176**.
[64] **69RP25176**.
[65] **69RP25176**.

Dig Program regulations.[66] There are also approximately a dozen "failure to follow procedures" for gas and pipeline safety and/or inspection and maintenance issues resulting in fines in the $10,000, $50,000 - $100,000 range.[67]

The Hearing Examiner concluded: "This record and its potential duplication in New Mexico is concerning, as well as the Joint Applicants' resistance to Staff's proposed reliability standards. The Joint Applicants' assertions about the resources and expertise of the Iberdrola, S.A./Avangrid, Inc. group of companies do not match well against their record in the Northeast.[68]

2. Service Quality: Avangrid/Iberdrola and their utilities in Maine, Connecticut and New York

a) The Hearing Examiner was Rightfully Concerned about Avangrid's Customer Service in Maine

Avangrid/Iberdrola's utility in Maine, Central Maine Power (CMP) implemented a new billing system called SmartCare in late October 2017. The Maine PUC found, in separate, parallel proceedings that CMP's implementation of

[66] **69RP25308-319**; **40RP16601-5**.
[67] *Id.*
[68] **80RP39851-2**.

the system and its customer service response to the billing issues arising from its implementation were imprudent.[69]

Relying on the Order from the Maine Public Utilities Commission, Docket No. 2018-00194, Feb. 26, 2021, the Hearing Examiner recited in his *Certification of Stipulation* for the Commission disturbing information regarding numerous billing defects and errors that affected CMP's customers.

> The Commission's investigation of CMP's metering and billing practices is, in many ways, without precedent. **The Commission has not in recent history—and probably never before—seen complaints against a utility reach the numbers they have here, nor seen the kind of public skepticism of customers' utility bills** that has been raised against CMP in the last two years. The unusual circumstances that created this skepticism—record-high electricity usage and experience with an unfamiliar and error-prone software program—demanded a regulatory response.[70]

(Emphasis supplied.)

CMP's management did not reasonably manage the implementation of SmartCare and its customer service during the post-go-live period, including: "the combination of CMP's relaxation of testing standards, deviation from standard testing methodologies and implementation-tracking practices, and insufficient resources leading up to go-live, especially at implementation. CMP's imprudence

[69] **80RP39919**.
[70] *Id., citing*, Order, Maine Public Utilities Commission, Docket No. 2018-00194, Feb. 26, 2021.

contributed to delays in addressing defects and caused customer confusion and customer distrust of the Company and its billing system, which manifested in complaints customers brought to the Commission's Consumer Assistance and Safety Division and in testimony customers presented at the three public-witness hearings."[71] The Hearing Examiner details further orders of the Maine Commission which included requiring monthly status reports on the closing out of open defects, in footnote 187.[72]

As a result, the MPUC ordered a penalty of a 100 basis point reduction in the Company's allowance for cost of equity. The Maine Commission found that the reduction would be equivalent to a $6.6 million reduction to the Company's annual distribution revenues, and $9.9 million over the 18-month period during which the reduction would likely be in effect.[73]

In February of 2020, the MPUC ordered a management audit of CMP to determine whether the current management structure is appropriate and in the interest of Maine ratepayers. One question the MPUC wanted to answer was

[71] **80RP39920**.
[72] **80RP39921-2**.
[73] **80RP39917**; **80RP39924**.

whether there is something endemic in the management structure that had led to a drop in the quality of CMP's customer service during Avangrid ownership.[74]

The management audit commissioned by the MPUC[75] and performed by the Liberty Consulting Group confirmed that Avangrid's management structure, rapid cycling of senior management and overemphasis on closing earnings gaps all contributed to its subsidiaries' poor performance. Additionally, the audit found influence from parent company, Iberdrola was continuing. For example, the audit stated:

> This is not our first encounter with financial-driven measures at Iberdrola, S.A.'s U.S. utilities. A decade or so ago, we saw similar measures, at that time driven by Spanish leadership's overarching focus on controlling its New York utility financial results through pressure on reducing headcount and vegetation management expenditures and even on transferring core utility functions to a profit-making subsidiary. . . .one thing that has not changed is the leadership focus we saw on these headcount and vegetation management as sources of cost cutting today.[76]

These management audit findings are consistent with the parent company pressure discussed by the U.S. District Court for the District of Maine in *Levesque et al. v. Iberdrola S.A. et al*., No.2:19-cv-00389-JDL, Order on Motions to Dismiss, August 6, 2021.

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[74] **80RP39925**.
[75] **53RP19519**.
[76] **80RP39929**.

The Court Order from the *Levesque* case, a class action complaint seeking damages from CMP/Avangrid/Iberdrola for their incompetence in the implementation of the SmartCare billing system ("300,000 CMP customers saw their bills increase, many by 50% or more"), the direct and indirect harm it caused customers over a three-year period which was exacerbated by prolonged poor customer service, was attached to NEE's Brief-in-Chief below.[77] The *Levesque* Order is important for several reasons highlighted by the Hearing Examiner:

1. It "reveals the extent to which Iberdrola, S.A. intervenes in the management decisions of Avangrid, Inc.'s electric utilities and the negative impact that such actions can have on the utilities' services."[78]
2. overarching control by Iberdrola:[79] Iberdrola owns approximately 81.5% of Avangrid.[80] In Avangrid's 10-K, filed with the Securities and Exchange Commission, under "risk factors" Avangrid explains that "Iberdrola exercises significant influence over Avangrid, and its interests may be different than yours."[81]
3. Iberdrola resisted joinder in the lawsuit but the Court exercised jurisdiction over the company.[82]
4. Financial agreements between the Iberdrola "family of companies" make tracking payments for services and costs difficult.[83]

b) In assessing Whether Quality of Service will be Diminished the Hearing Examiner also Examined Avangrid's utilities' customer

[77] **78RP39516-57**.
[78] **80RP39989**.
[79] **80RP40025**.
[80] **68RP23666**; **68RP24227**.
[81] *Id*.; **80RP40017**.
[82] **80RP40024**.
[83] *Id.*

dissatisfaction, penalties and disallowances for poor service quality

Evidence at the hearing revealed that J.D. Power's nationwide 2020 Electric Utility Customer Satisfaction Studies ranked Avangrid's Central Maine Power last – 128th among the 128 investor-owned electric utilities surveyed for residential customer satisfaction.[84] New York State Electric and Gas Company (NYSEG), another Avangrid-owned company, ranked 17th of the 18 large electric utilities surveyed in the East region. Avangrid's United Illuminating Company ranked 11th among the 12 midsize electric utilities surveyed in the East region.[85]

The Connecticut Public Utilities Regulatory Authority ("CT PURA"), also recently ordered a management audit of Avangrid's United Illuminating in conjunction with a $2.1 million civil penalty it assessed against the utility for "failing to comply with standards of acceptable performance in emergency preparation or restoration of service in an emergency."[86] The audit is ongoing and has several areas of focus including "organizational changes necessary to address subpar emergency response performance deficiencies."[87]

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[84] **80RP39914**.
[85] *Id.*
[86] **68RP23668**; **36RP08578-84**.
[87] **68RP23668**; **36RP06755**; **36RP08565-6**.

c) The Issue of Governance is Particularly Problematic

Upon review of the management audits from Maine, Connecticut and New York (all provided by Joint Applicants),[88] testimony of experts,[89] the benefit of regulatory agencies' orders,[90] and legal cases more fully detailed in the *Certification of Stipulation* the Hearing Examiner soberly concluded:

> The issue of governance is particularly problematic, and it is not capable of cure with the modifications proposed by the parties, including the last-minute modifications proposed by NM AREA and Bernalillo County, which have been largely accepted by the Joint Applicants. There is a clear contradiction between Avangrid, Inc. and Iberdrola, S.A.'s professed goals of local control and their refusal to allow that control. The limitations on local control that the Joint Applicants will allow indicate that Avangrid, Inc. and Iberdrola, S.A.'s insistence on their right of control will prevail and that PNM's customers will be subject to the risks that the customers of Avangrid, Inc.'s other utilities have experienced.[91]

3. Customer-Service Related Penalties in the Wintertime

The Hearing Examiner specifically described service-related penalties that were especially exacerbated by weather:

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[88] **68RP23668**; **36RP06737-09325**; **36RP07673**: "Standard corporate governance practice is for the board to be composed of independent directors[.]"
[89] **80RP40016-20.**
[90] For example, **80RP39916**, **80RP39920**, **80RP39923-5**, **80RP39950**, **80RP39963-4**.
[91] **80RP40020**.

a) New York

RG&E was penalized $2.8 million and $1.5 million for violations of its emergency response plan during the 2017 and 2019 storms.[92]

The 2019 penalties for NYSEG were largely the result of NYSEG maintaining inadequate personnel, failure to assess storm damage and **perform required functions to assist life support equipment (LSE) customers**, in Winter Storm Riley and Winter Storm Quinn.[93]

NYSEG also disseminated inaccurate estimated times of restoration and issued untimely press releases. Citing the Order to Show Cause from New York, the Hearing Examiner emphasized:

> Both customers and governmental entities expressed frustration and confusion over inaccurate and frequently changing ETRs [Estimated Time of Restoration], and many reported they lost trust in the ETRs provided by Con Edison and NYSEG. This result is not acceptable -- customer and municipal decisions are predicated on accurate ETRs. An uneducated decision resulting from bad or stale utility information can have detrimental results.[94]

[92] **80RP39915**.
[93] **80RP39915-6**.
[94] **80RP39916-7**.

The New York Commission described the 2019 penalties as the largest ever in New York State for a utility failing to follow procedures related to an emergency response.[95]

b) Maine

Central Maine Power Company's record also includes a $500,000 civil penalty for illegal winter disconnection notices, the maximum penalty allowed under Maine law.[96]

4. Criminal investigation of Iberdrola and Avangrid executives

Pursuant to NEE's Motion to Compel,[97] the Hearing Examiner ordered Iberdrola to provide to the PRC, under seal, Spanish court docket of an ongoing criminal investigation against certain Avangrid/Iberdrola executives.[98] As established in the court records, the Chairman and other top executives of Iberdrola, S.A. and an Iberdrola, S.A. subsidiary in Europe are subjects of an investigation ("the Investigated Parties") for, among other things, bribery, violation of privacy, falsification of commercial records, and the illegal hiring of a security

[95] **80RP39915-7**.
[96] **80RP39917**.
[97] **52RP19310-19478**.
[98] **59RP21245-21246**.

company directly or indirectly owned by a police official to interfere with Iberdrola S.A.'s opponents.[99]

5. Compliance Issues in New Mexico: El Cabo & La Jolla

The Hearing Examiner cited both of these instances of regulatory non-compliance by Avangrid, who is already operating wind projects in New Mexico, and PRC staff's objection to "actions [that] are inconsistent with the ethical principles and good corporate governance values it espouses in this case.[100]

a. The El Cabo Wind Project, part of the vast[101] Avangrid corporate structure, is in Torrance County, New Mexico, and was completed in 2017 with 142 turbines and a stated generating capacity of 298 megawatts.[102] PRC Staff complained that Avangrid did not seek necessary Commission location approval for projects of 300 megawatts in size: "It is [] apparent that Avangrid was well aware of the Commission's location control authority and that the project appeared to be deliberately sized to barely skirt 'unnecessary regulatory risk'. It does not appear accidental that the project was described as one that "will not exceed 299

[99] **80RP39854**.
[100] **80RP39965**.
[101] **67RP24968**.
[102] **69RP24940**.

MW".[103] PRC Staff also discovered that internal Avangrid/Iberdrola documents revealed that the companies understood this in advance and actively planned to avoid regulatory oversight.[104]

Avangrid proceeds with its projects and asks permission later and this is no exception: CEO Kump testified "… El Cabo is nearing the point where it will be put into operation. For future projects, we will consult with Staff regarding any project with a rated capacity that falls within 5% of the statutory minimum requirement for the Commission's location approval."[105]

b. La Joya Wind Project, is also part of Avangrid's dizzying corporate structure,[106] and is also located in Torrance County. La Joya is currently under construction, and consists of at least 111 turbines and a generating capacity of 306

[103] **74RP37190**. Footnote 19 cited thereto by PRC Staff witness states: "While I am not an engineer, my experience as a Staff witness addressing renewable energy generation suggests that it is unlikely that a wind facility could effectively be limited to operating at any given moment at no more than 1 MW (or 0.336%) over its 298 MW nameplate capacity given the normal range of wind velocities. Given that the nameplate capacity of Avangrid's La Joya facility has variously been stated as 304 MW or 306 MW, there appears to be at least some margin of error in establishing wind turbine capacities."
[104] **74RP 37190**; **74RP37205-6**.
[105] **69RP25020**; **69RP25743**.
[106] **67RP24969**.

megawatts.[107] PRC Staff objected that Avangrid "did not make the necessary post-approval compliance filings."[108]

CEO of Avangrid Kump acknowledged that PRC Staff was correct and testified: "I admit there was a miscommunication between Avangrid's affiliate and the contractor regarding who would file the construction permits with the Commission[.]"[109] The second was a failure on our part to provide notice that the project was placed in service."[110]

6. Technical Qualifications: Rooftop & Community Solar Investigation

After synthesizing all the evidence, the Hearing Examiner cautioned that the proposed transaction will require protections to prevent the "potential slowing of the development of New Mexico's renewable energy resources and higher prices for PNM's customers."[111]

Joint Applicants correctly note that the Hearing Examiner took administrative notice of climate change and its impacts. Joint Brief at 35-36. What Joint Applicants neglected to mention is that they didn't join in the request to take

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[107] **69RP24940**.
[108] **69RP25019**.
[109] **69RP25742**.
[110] **69RP25019**.
[111] **80RP39857**.

administrative notice of climate change and its impacts,[112] and when specifically asked why, Mr. Azagra Blazquez testified:

> "[W]e don't have the time, you know, and the effort, you know, to confirm that is 100 percent accurate. There are many statements there. I think we have to go to the document, review that, and make sure, you know, we are a hundred percent comfortable signing that.
>
> We have signed many, many things, but it takes a lot of time, so that's probably the reason why, you know, we were not comfortable addressing that."[113]

The primary selling point for the Avangrid/Iberdrola merger is the attractiveness of a renewable energy leader to help blaze the trail to a new energy economy. However, in response to Commissioner Hall's question about whether Avangrid could provide a "satisfactory distribution grid that can accommodate" all the solar residential consumers and small, medium and large commercial customers seeking interconnection access,[114] Mr. Kump answered, "in talking to our team, it's a very, you know, complex issue, and one that we're quite frankly learning on the fly as we go through this."[115]

Additionally, in MPUC Docket 2021-00035 dated April 6, 2021, Investigation Into Interconnection Practices Involving Central Maine Power,

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[112] **68RP24628-32**; **50RP18987-9**.
[113] **67RP23485-6**.
[114] **69RP24856-9**
[115] **69RP24858**.

Avangrid's subsidiary CMP was accused by independent solar developers of undermining both community solar and rooftop solar. The regulatory agency opened a docket to investigate after finding probable cause.[116] The complaint from the solar organizations stated as follows:

> CMP's interconnection practices are egregiously incompetent and are jeopardizing hundreds of millions of dollars in investment and immediate cost savings for Maine homeowners and businesses.[117]

MPUC's investigation was on-going at the time of hearing.

While Avangrid/Iberdrola tout themselves as being steeped in renewable energy experience and being "green" companies, the companies are largely invested in gas and nuclear and wind and have less than 2% solar in their portfolios,[118] which is even less than PNM. Both Mr. Kump and Mr. Azagra Blazquez testified that the companies have and would continue to pursue nuclear,[119] gas and fossil fuels, both in the regulated utility and non-regulated

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[116] **69RP25173**; **69RP24776-9**.

[117] **69RP24776**; **69RP24848**: "But I'll confess. There is a backlog of requests. We've put tremendous resources to it, but these studies are complex. They need to be done in conjunction with our local ISO, and it has resulted in developers, you know, waiting, and they are frustrated by the fact that they're waiting to get these interconnection studies done."

[118] **67RP23487-8**; **75RP38331**: "Iberdrola/Avangrid have current investments as follows: a total of 16,965 MW of gas; 3,177 MW of nuclear; 8,560 MW of wind; and solar accounts for under 2% of their entire portfolio."

[119] **69RP24862** ("although it has its own issue with respect to spent fuel that people worry about")

affiliates. When asked about his statement regarding "excellent growth opportunities in the Southwest," Mr. Azagra Blazquez replied: "I think it is also a growth opportunity with relation to hydrogen."[120]

Avangrid/Iberdrola is already in New Mexico with wind generation, and it appears that any additional development will be done by Avangrid/Iberdrola unregulated affiliates, not by PNM. The Hearing Examiner relied on the expert testimony of Attorney General witness Hempling and City of Albuquerque witness Dr. Larry Blank of New Mexico State University who both raised the risk that the Avangrid merger could "drive out competing renewable energy developers and lead to higher prices for New Mexico consumers."[121]

C. Compliance Issues in this Proceeding Included Lack of Transparency & Failure to Disclose Track Record of Penalties, Fines, and Violations, Repeated Discovery Violations and Over-Designation of Confidentiality

On June 14, 2021, the Hearing Examiner found that Joint Appellants likely violated the procedural order on discovery for failing to provide adequate discovery responses and by making overbroad claims of confidentiality on

[120] **67RP23590-1**; **67RP23598-9**.
[121] **80RP39858; 80RP40048-52**.

documents, in both instances related to compliance issues in other states that Joint Appellants failed to disclose.[122] The Hearing Examiner specifically noted failures to adequately respond to inquiries by other parties, and the Hearing Examiner, and therefore the Commission itself.[123] Specifically at that time, in addition to other instances in this case, Joint Appellants were notified that their conduct was being scrutinized, and further, that incomplete, unresponsive answers to requests for information and discovery would be scrutinized and subject to sanctions and/or administrative penalties.[124] Joint Appellees were afforded the opportunity to respond to these findings.[125]

Upon reviewing their responses, the Hearing Examiner did not find Joint Appellants responses to be satisfactory and specifically found that the discovery violations "negatively impacted the proceedings" and may have provided a faulty basis for some of the parties to sign onto the stipulation.[126] Excuses of the Joint Appellants notwithstanding, the Hearing Examiner found that Joint Appellants failure was either willful, in bad faith, or due to their own fault.[127]

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[122] **45RP17379-17383**.
[123] *Id.*
[124] *Id.*
[125] *Id.*
[126] **80RP39985-39986**.
[127] **80RP39987**.

The Hearing Examiner determined that sanctions were appropriate[128] not solely pursuant to 1.2.2.25(J) NMAC, but also pursuant to NMRA 1-037, and NMSA 1978, § 62-12-4, arising from violations of the procedural order in this case.[129]

In admonishing the Joint Appellants for their lack of candor, the Hearing Examiner bluntly noted that "this is not how discovery is supposed to take place."[130]

V. ARGUMENT

POINT I.
There is more than sufficient evidence in the record to support the Hearing Examiner's and Commission's conclusions that the Risks of the Proposed Merger Outweigh its Benefits

After the lengthy hearing, during which Joint Applicants introduced all the evidence they wished to rebut the evidence and findings of poor performance and misconduct in other jurisdictions in which Avangrid owns utilities, Avangrid/Iberdrola could not overcome their track record of outages and unreliability, diminished service quality, more than $65 million in penalties and

[128] **45RP17377-17379**.
[129] **45RP17372-17373**.
[130] **45RP17377**.

violations, failure to abide Commission rules and law, the risk of subsidization of non-utility activities, and significant reduction in local control.

What the Hearing Examiner and Commission derived from the evidence provides a much better summary of the factual bases for rejecting the merger than NEE or Joint Applicants can and NEE will not detail the evidence more than it already has. After the Commission properly weighed the benefits against the risks of the merger, including the proposed Appendix 2 Modified Stipulation in the Certification of Stipulation, they rejected the Proposed Transaction and found:

> This Order does not reiterate the full analysis of the Certification, which is set forth by the HE in intricate detail over several hundred pages. However, in reviewing the testimony in this case, the Commission does not find fault with the Certification's conclusion that that the benefits cited by the Joint Applicants, while not insubstantial, are not as significant as they are portrayed and are insufficient to overcome the potential risk of the Proposed Transaction as set forth in the Certifications recitation and analysis of the factual record in this case. This is especially true given that many of the most concrete financial benefits are limited to investments or expenditures of specific sums certain and regulatory commitments limited to terms of three to five years. By contrast, the concerns of risks based on the demonstrated performance and compliance history of Iberdrola/Avengrid (sic) with regard to quality-of-service issues, including reliability, as well as risks of improper subsidization of non-utility activities, will be ongoing.[131]

[131] **81RP40426**.

Joint Applicants complain that "The Commission has not engaged in similar comparisons in assessing the benefits of past mergers." Joint Brief p. 31. However, the Hearing Examiner correctly concluded:

> Those previous cases, however, lacked a showing of the potential harms present here. This case has a clear showing of potential harms that can negatively affect the basic need for reliable utility service. Because of the facts here, the Hearing Examiner finds that the potential harms outweigh the promised benefits. The benefits are not meaningful if PNM's customers do not have reliable service.[132]
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> …
>
> A primary cause of the service problems affecting customers of Avangrid, Inc.'s Northeast utilities appears to have been Avangrid, Inc.'s insistence that the utilities cut resources to meet Avangrid, Inc.'s financial goals. Protections are needed to shield the PNM board of directors and management from the earnings priorities of the upstream holding companies of Avangrid, Inc. and Iberdrola, S.A. The promises of Iberdrola, S.A. and Avangrid Inc. that PNM will operate under local control post-merger are contradicted by their insistence that Iberdrola, S.A. and Avangrid, Inc. be in control of the PNM board of directors and management.[133]
>
> …
>
> Even assuming the adoption of protections that appear sufficient, including protections to ensure service quality and reliability, the Commission will need to devote considerable enforcement resources to ensure that Avangrid, Inc. and PNM comply with those protections. Avangrid, Inc. has not been forthcoming regarding the penalties and disallowances that have been assessed against its Northeast public utilities, and it has violated and skirted Commission rules and orders in this proceeding. The Hearing Examiner is recommending sanctions against Avangrid, Inc. for its discovery violations in this case. Avangrid Renewables, LLC has also skirted and failed to comply

[132] **80RP39860**.
[133] **80RP39857**.

> with Commission rules and orders in regard to its current renewable energy projects in New Mexico.[134]

POINT II.
Iberdrola/Avangrid's Purpose for the Merger Is to Use PNM's Monopoly Platform to Improperly Subsidize its Non-Utility Growth Activities

In addition to the foregoing, the Hearing Examiner and PRC expressed concern that the evidence established that there was a significant risk that PNM would be used by Avangrid to improperly subsidize its non-utility activities.[135]

The Hearing Examiner was taken by Mr. Kump's admission that Avangrid/Iberdrola planned to use the PNM platform as a "beachhead[136] to consolidate the energy market for non-utility business in the Southwest, as they have done in Maine, which is properly seen as potentially detrimental to ratepayers and New Mexicans. As the Hearing Examiner concisely summed up this risk:

> Avangrid, Inc.'s interest in accelerating the renewable energy business of Avangrid Renewables, LLC in the Southwest may not be consistent with the provision of reliable utility service by PNM. Avangrid, Inc. states that it wants to use its acquisition of PNM as a "beachhead" for Avangrid Renewables, LLC's projects in New Mexico and the Southwest. The resource needs of

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[134] **80RP39858-9**.
[135] **80RP39937** (Joint Applicants lack a plan on how it intends to integrate PNM into Avangrid's corporate organization in terms of the services Avangrid affiliates will provide to PNM. Integration issues were discussed by the auditors in Maine as being at least partially responsible for the service problems of CMP.)
[136] **69RP24881**.

> Avangrid Renewables, LLC may take priority over PNM's need for resources to provide reliable utility service to its customers.[137]

Indeed, it is no longer in dispute that the purpose of Joint Applicants is as NMAG's witness Hempling plainly pointed out:

"PNMR's sole reason for selling was to get the maximum gain [for shareholders and senior management]. As for Iberdrola/Avangrid, Mr. Azagra deserves credit for his candor:

> For Avangrid, this is a strategic transaction that creates a significant regulated utility and renewable energy platform.
>
> Avangrid and PNMR are not entering into the Proposed Transaction in order to create specific synergy savings or operational efficiencies."[138]

The record is replete with the unabashed statements of Mr. Azagara Blazquez[139] and Mr. Kump[140] regarding their desires for control and

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[137] **80RP39845**; **80RP39859**.

[138] **72RP34755**; **80RP39845**. (The Proposed Transaction will provide PNMR shareholders $391 million more than the market value of the shares of PNMR stock. Three PNMR officers departing after the merger will receive approximately $29 million in "Golden Parachute" compensation. All 500,000 residential ratepayers will share $26 million, or $1.64 per month for three years. **80RP39874.**)

[139] **67RP23525-6**; **67RP23588-9**; **67RP23595-6**. ("..[If this transaction is approved, does Avangrid anticipate expanding its investment in unregulated renewable development activities in New Mexico? We would love to do so…. The answer is yes, we believe for not only purposes of New Mexico, but beyond New Mexico. … [W]e would love to …. benefit from that energy relationship with other states and countries.")

[140] **69RP24821-3**, **69RP24876-83**, (At **69RP24880**: "We view this transaction

consolidation[141] of New Mexico's energy resources. Meanwhile, there is evidence from a number of witnesses that specifically warn the Commission that the actual purpose for the Iberdrola/Avangrid PNMR/PNM merger is to use PNM's monopoly platform to improperly subsidize its non-utility growth activities and that ratepayers and New Mexicans will inherit negative consequences as a result.[142] The deleterious consequences involve, but are not limited to, declining electric reliability, market contraction, higher utility rates, the death of the thriving rooftop solar business, and anti-competitiveness. As the Hearing Examiner pointed out the Management Audits, particularly the 2021 MPUC Audit, foretell the same.[143]

> Management's overemphasizing of cuts in and limits on resources as a means for closing gaps in meeting the earnings expectations of the equity investment community has sacrificed effectiveness in providing service.[144] …We found Avangrid's process unduly weighted toward meeting financial goals, with that imbalance both adversely affecting bottom-up analysis and overweighting final budget decisions toward financial goals. While such earnings-related goals are not unusual for utility holding company planning, the effective balancing of such goals with reliable utility operations has not been evident at Avangrid (before 2020), especially in the case of CMP.[145]

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really as one about growth[.] … We find that very attractive, and we see that as providing opportunities that we may not even be aware of today, or in the future in terms of growth and investment we can make in this state.")

[141] **69RP24883**.

[142] **80RP40047-57**; **80RP39853** (Avangrid's aggressive expansion into additional non-utility projects has raised concerns among credit rating agencies and may have led in part to a credit downgrade by Moody's in July 2021.)

[143] **80RP40023**.

[144] **53RP19523.**

[145] **53RP19583.**

In other words, Avangrid's vision of New Mexico's monopoly utility as providing it a "beachhead" for expanding its business of selling power elsewhere creates the risk that New Mexico's and its ratepayers' interests will be subject to Avangrid's desire to promote its efforts to sell energy outside its service area, to say nothing of the risk that it will use cost-cutting to support its parent corporation's bottom line, as it has done elsewhere. Avangrid doesn't need PNM to enter the renewables market in the Southwest, as its New Mexico wind projects demonstrate. It is the use of PNM's monopoly as its beachhead for this activity that is the source of concern.

A. Joint Applicants Acknowledge that Tracking, Let Alone "Policing" Affiliate Transactions Would Be a Herculean Task

Joint Applicants argue that the Commission unlawfully and unreasonably exaggerated the risks of the merger when it questioned its ability to police Avangrid affiliates. Joint Brief at 58-60. Joint Applicants seem to be arguing that no matter how complex Avangrid/Iberdrola's business is, no matter how many affiliates they have that they may in future decide to transact business with, and no matter how many difficulties other states have experienced in attempting to keep up with Avangrid and its affiliates, the PRC is necessarily abandoning its Constitutional duty to regulate them if it questions whether it has the resources to do so.

Joint Applicants themselves pointed out in their Application that tracking their affiliate transaction information would be burdensome because the Avangrid/Iberdrola affiliate structure was so complex that the Commission should waive its requirement that it set forth in their General Diversification Plan:

> "Rule 450.13(A)(2)(a) and (b) require that PNM file notification with the Commission 'of all new or expanded lines of business or ventures entered into by [PNM] or any affiliate…,' and annual reports detailing all affiliates and their relationship to one another." … Iberdrola has hundreds of direct and indirect subsidiaries operating across four continents.[146] "Joint Applicants believe there is little value to the Commission and stakeholders in obtaining a list with basic contact information of hundreds of entities …. [I]t would be burdensome on the Joint Applicants to compile and update this information, and burdensome on the Commission's staff to attempt to track this information."[147]

Yet Joint Applicants grossly exaggerate the Commissioners' acknowledgement of the burden of affiliate oversight when they accused the Commission of refusing to follow their constitutional duty to regulate.[148] A fair understanding of what the Commissioners were stressing in deliberations was that because of the many problems including unethical activity[149] and unprofessional conduct[150] already observed, in combination with Avangrid's outsized media and

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[146] **1RP00285**.
[147] **1RP00286**.
[148] Joint Brief at 58-60.
[149] **80RP39994-6** (undermining the attorney-client relationship)
[150] **80RP40027** (including provisions that would bind future Commissions and guarantee Commission approval); **80RP39992-4**. (use of non-record evidence)

political influence,[151] a regulatory agency's effort to conduct basic oversight responsibilities on behalf of the public would be, to put it mildly, difficult. *See*, the maximum penalty meted out in Maine[152] and largest fines NY history.[153] The violations continued regardless of the toughest regulatory sanctions available.[154] Even when certain behavior isn't *per se* illegal as the Hearing Examiner remarked "it does go beyond the norms considered appropriate here."[155]

POINT III.
Joint Applicants are Incorrect to Complain of the Use of "Inadmissible and Improper Evidence" in Assessing the Benefits and Risks of the Merger

Joint Applicants complain that the Hearing Examiner used inadmissible hearsay evidence when assessing two critical factors (diminished service, qualifications of new owner) required for Merger approval.[156] Specifically, Joint Applicants state: "the Commission erroneously disregarded and discounted the

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[151] For example, Joint Applicants and signatories, including the Attorney General, requested oral argument after Commission deliberations had already begun, in violation of 1.2.2.37(D) NMAC and supplemented their request with a full court media press. **81RP30395-99**; **81RP40406-10**; **81RP40438-42**.
[152] **80RP33917**. (2017)
[153] **80RP39917**. (2019)
[154] **80RP399914**. ("the three electric utilities were assessed penalties and disallowances of approximately $25 million between January 2020 and May 11, 2021.")
[155] **80RP39954**. (referring to harassing a utility's opponents.)
[156] **80RP39838-39839; 81RP40427** (setting forth a six-factor test).

benefits of the Merger, while relying on inadmissible and improper evidence to arrive at an exaggerated assessment of its risks." Joint Brief at 27.

Joint Applicants' argument regarding the Hearing Examiner's admission of supposed hearsay evidence fails for two reasons. First, the New Mexico Administrative Code, Rules of Evidence, gives the "presiding officer" (i.e., the Hearing Examiner), broad discretion to admit *any* "relevant evidence," which in the opinion of the Hearing Examiner is the "best evidence reasonably obtainable, having due regard to its necessity, competence, availability and trustworthiness." 1.2.2.35A (1) NMAC. Here, the Hearing Examiner chose to admit evidence that, in his discretion, was "necessary, competent, available, and trustworthy" to inform his analysis of two critical factors for merger approval: (1) quality of service post-merger and (2) qualifications of the new owner. He fully explained why he was admitting it and why it was admissible.[157] Second, despite the Joint Applicants' full-throated complaints, the rules of evidence, such as hearsay, have little bearing on the admissibility of evidence in a PRC proceeding. 1.2.2.35 A (2) NMAC. Furthermore, in most instances the Rules of Evidence would also accommodate the admission of the evidence of which Joint Applicants complain.

Joint Applicants fail to explain why, given the HE's discretion, and given his careful explanations of why he admitted and considered the evidence of which

[157] **65RP22386-22420**.

Joint Applicants complain, there was any abuse of discretion by the HE. It should be enough to just say that and no more, since all the evidence that the Hearing Examiner admitted was, as Joint Applicants tacitly concede, relevant, and they offered no arguments below to persuade the Hearing Officer that the evidence of Avangrid-owned utilities' poor performance, fines, penalties, etc., was incorrect or unreliable, nor do they now claim it to be incorrect or unreliable. Critically, Joint Applicants don't claim that they showed, or are able to show, that any of the evidence wasn't true. They simply argue that it shouldn't have been admitted.

A. The legal residuum rule is inapplicable.

Given the amount of evidence before the PRC in this case, the legal residuum rule has no place here. However, since the Joint Applicants relied so heavily on it NEE will address it below.

Joint Applicants rely on *Trujillo v. Emp't Sec. Comm'n of N.M.* 1980-NMSC-054, 94 N.M. 343, 610 P.2d 747, 748, and its progeny to argue that the legal residuum rule was somehow violated by the PRC in this case. Joint Brief at 26-27, 43-52. Their reliance on the legal residuum rule is misplaced because, here, there was far more than "only hearsay" and far more, even, than merely substantial evidence that supported the Commission's decision. There was overwhelming evidence. As we have spelled out throughout our brief, there were thousands of

pages of non-hearsay evidence to support a denial of the merger based on the PRC's conclusion that, even after Joint Applicants increased their payments to various parties and slightly improved their promised short-term rates, "the potential harms of the Proposed Transaction continue to outweigh its benefits."[158]

The *Trujillo* case, like *Anaya v. N.M. State Pers. Bd.,* 107 N.M. 622, 627, 762 P.2d 909, 914 (Ct.App.1988), which followed, made clear, "[t]he legal residuum rule does not require that all evidence considered by the administrative agency be legally admissible evidence, but only 'that an administrative action be supported by *some* evidence that would be admissible in a jury trial.'" (Emphasis in the original). *Duke City Lumber Co. v. New Mexico Env'tl. Improvement Bd.,* 101 N.M. at 295, 681 P.2d at 721. "Besides, petitioners do not distinguish between inadmissible hearsay and hearsay that is admissible under one of the exceptions in the rules of evidence. The latter may be used to satisfy the legal residuum rule." *Anaya*, *supra*, *citing, Young v. Bd. of Pharmacy, supra.*

The legal residuum rule was applied in the *Trujillo* case because the *only* evidence against Trujillo was a hearsay allegation of misconduct that Trujillo contradicted in testimony under oath and the case involved his own ability to earn a living. *Trujillo, supra*. None of those facts or circumstances apply here. Here,

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[158] **81RP40427**.

the record is replete with official reports, direct and expert testimony, along with documents provided, albeit reluctantly, by the Joint Applicants themselves.

B. Joint Applicants' Complaints about the Consideration of the Spanish Criminal Investigation, Maine's Management Audit, Hempling's Testimony and Berry's Verified Statement and Public Comments are Without Basis.

In their Brief, Joint Applicants complain of the HE's and PRC's consideration of the following documents and testimony.

(1) the Spanish criminal investigation (Joint Brief at 43),

(2) the Liberty management audit (Joint Brief at 45),

(3) Hempling's Testimony (Joint Brief at 50), and

(4) Berry's Verified Statement and Public Comments (Joint Brief at 51).

The Hearing Examiner did not abuse his discretion in admitting this evidence and hearsay rules do not preclude admission.

1. Evidence of the Spanish Investigation.

Joint Applicants argue that the Hearing Examiner improperly took judicial notice of a pending criminal investigation in Spain of Iberdrola's top management for corruption, bribery and falsification of documents. According to their argument, criminal allegations against Iberdrola's management in another legal

proceeding are inadmissible as hearsay and not properly subject to judicial notice. Joint Brief at 43, *citing Gonzalez v. Surgidev Corp*. 1995-NMSC-036, ¶¶ 30-32, 120 N.M. 133, 899 P.2d 576 (N.M. 1995).

Gonzalez did not concern an administrative proceeding in which the Hearing Examiner, acting within his regulatory authority, determined that the evidence was relevant and should be admitted. Furthermore, *Gonzalez,* even if it could be applied in this context, does not preclude judicial notice of the Spanish court records that were provided to the Commission under seal. The *Gonzalez* Court referenced the case of *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir.1994), wherein the 11th Circuit outlined the limitations on using judicial notice for court records:

> [A] court may take judicial notice of a document filed in another court not for the truth of the matters asserted in the other litigation, but rather to establish the fact of such litigation and related filings.

Gonzalez, 899 P.2d at 586. This was the case here: these records were not used by the Hearing Examiner to establish the criminality of Avangrid/Iberdrola. The Hearing Examiner underscored that he drew no conclusion of guilt but that the allegations of illegal activities were still a matter of concern: "[A]part from whether the actions of Iberdrola, S.A.'s executives and its subsidiary constitute crimes under Spanish law, their actions appear to represent methods of doing

business that should raise concerns for the Commission."[159] He found these allegations relevant to the issue of the qualifications of Avangrid/Iberdrola and, ultimately, relevant to whether a merger with Avangrid/Iberdrola would be beneficial to New Mexico. But even if the Hearing Examiner took the allegations seriously, as he did, this is an administrative hearing at which Avangrid/Iberdrola had a full opportunity to address them, at which Avangrid/Iberdrola produced the document, and at which the Commission was charged not with determining whether Iberdrola's management committed the crimes alleged, but whether, with such charges in play, it should assume ownership of our monopoly utility.

The Spanish Court, as is required in Spain, made a finding "that the Public Prosecutor and the police have presented sufficient evidence to warrant a criminal investigation."[160] Thus, these were not unsupported allegations from anonymous sources but serious allegations of criminality based on an investigation by the national police force and the public prosecutor. They should be afforded the same level of trustworthiness that we give to the findings of our own judiciary.

For example, the Spanish court found evidence that certain Investigated Parties contracted the services of third parties to develop information to interfere with Iberdrola opponents. The court also found evidence that the Investigated

[159] **80RP39954**.
[160] *Id*.

Parties accessed confidential data of the people perceived to have adverse interests to Iberdrola and other Investigated Parties. Also revealed was evidence of payments between specific individuals and entities that allegedly constituted bribes.[161] Allegations of document falsification were "especially concerning" to the Hearing Examiner because much of "utility regulation involves the review of documents prepared and maintained by utilities. This is important for enforcement and for the discovery process associated with utility rate cases and requests for resource acquisitions."[162] The records of the investigation, supported by factual evidence, led the Hearing Examiner to admit the evidence from the Spanish court on the basis that it was "relevant and of concern"[163] and because it may reflect the culture of the Iberdrola, S.A./Avangrid, Inc. group of companies.[164]

The Hearing Examiner had great latitude to admit evidence of the fact that Iberdrola's top management were under criminal investigation in Spain. 1.2.2.35A (1) NMAC. Despite Appellants' contention to the contrary, presumption of innocence concerns are irrelevant where the evidence is not being used for proof that the accused have committed crimes. Joint Brief at 44. ("The Commission's

[161] **80RP39947-53**. (details of allegations and evidence).
[162] **80RP39954**.
[163] **80RP39953**.
[164] **80RP39954**.

heavy reliance on facts originating from the incomplete, ongoing investigation signaled a presumption of guilt . . ..")

The Spanish investigation formed a legitimate basis for raising a concern of risk to the public and ratepayers arising from the merger. Joint Applicants object that there should be a presumption that a person is "innocent until proven guilty." The presumption of innocence is critical to the criminal process, of course, but it is hardly a trump card in this context. What if a management company wanted to be considered for managing New Mexico's airports, roads, public transportation system, court system, internet, phone system, a charter school or any other complex public or semi-public institution? Would we say, "We know they're the subject of a major criminal investigation by the DOJ but they haven't been convicted, so go ahead and hire them?" The question answers itself. Are Joint Applicants suggesting that in assessing the qualifications of an entity seeking to acquire a utility, the PRC may not consider whether the entity's management is facing felony criminal charges in connection with its utility operations in another jurisdiction? How would this serve the public interest?

NEE is unaware of all the contents of the Spanish report of investigation because it was delivered to the PRC by Avangrid, under seal, as the HE required.[165] It is available to this Court, as is its translation. NEE knows enough about its

[165] **80RP39946**.

contents, however, to know that aside from potential criminal liability, the Spanish court records raise serious questions of Avangrid/Iberdrola's manner and reputation of doing business. The character and reputation of PNM's chosen partner is undeniably relevant to a determination of whether the Merger should have been approved.

For instance, the Avangrid board of directors, would have the power to approve the appointment and removal of the PNM board of directors; Iberdrola executives hold six of the 14 director seats on Avangrid's board. The Chairman and CEO of Iberdrola, who is under investigation in the Spanish criminal proceedings, is also Chairman of Avangrid and, in that position, holds the ultimate approval authority for the appointment and removal of the boards of directors of Avangrid's electric utility subsidiaries.[166]

This Court has long recognized the broad discretion given to administrative boards and commissions over the admission of evidence: "Boards may admit any evidence and give probative effect to evidence that is of the kind commonly relied upon by reasonably prudent men in the conduct of serious affairs." *Young v. Board of Pharmacy*, 81 N.M. 5, 462 P.2d 139 (N.M. 1969). A reasonable, prudent person would be grossly negligent in failing to take into account the fact that he or she was being asked to entrust a company whose management was the subject of an

[166] **80RP39854-5**.

important criminal investigation with management of an enterprise whose duty is to the public and whose functioning is enormously important to the public and the state. The Hearing Examiner was well within his authority to consider this evidence—not for the truth of the allegations but to include the fact that Iberdrola's management is under a cloud in Spain that involves allegations of serious criminal misconduct.

2. The Maine "Liberty Audit" and Risk of Diminishment of Service.

The Maine Audit ("Liberty Audit") was commissioned by the Maine Public Utility Commission ("MPUC") and filed in its public records. It was an admissible final report that sets out factual findings from a legally authorized investigation pursuant to 1.2.2.35 D (a) and F NMAC and pursuant to NM Rules of Evidence 11-803 (8).

According to CMP's legal counsel:

> [T]he Commission engaged Liberty Consulting Group ("Liberty") to conduct the audit of CMP and to prepare an audit report (the "Report"). The management audit process lasted almost a year. Liberty conducted more than 75 interviews with CMP and Avangrid leaders and reviewed thousands of pages of documentation, made available willingly and transparently by CMP in response to 190 data requests.[167]

[167] 53RP19660-1.

Joint Applicants argue the Liberty Audit did not provide a lawful foundation for the Commission's assessment of the risk of service deterioration. According to Joint Applicants, the Liberty Audit was hearsay, no hearsay exception applied, no party had an opportunity to cross-examine its authors, no witness sworn by an oath vouched for its truth, and no declarant risked perjury charges by testifying about it. Joint Brief at 47. While Joint Applicants stated that the audit was contested by the utility, and it was below, it wasn't contested by CMP/Avangrid in the Maine docket – in fact CMP/Avangrid recognized that "[t]he management audit process was extensive, and the Company appreciates Liberty's recognition of the Company's strong performance[.]"[168] CMP/Avangrid's legal response regarding the audit's findings was submitted in the MPUC docket.[169] Both CMP/Avangrid's legal response and their press release regarding the audit's findings were produced by Joint Applicants, and are part of this record.[170]

The Hearing Examiner was well within his discretion to admit the results of this audit because it disclosed risks of possible service issues arising from the Iberdrola corporate management structure and its investment strategies— both areas that are not-state specific. Of concern in the audit was Iberdrola's "aggressive strategy of acquisitions, including its proposed acquisition of PNMR, its non-utility

[168] 53RP19662.
[169] 53RP19660-4.
[170] **53RP19660-7**.

growth strategy in the United States . . ..”[171] The auditors noted that CMP comprises . . . “just 2% of Iberdrola, S.A.’s customers worldwide” and, as such, gets the attention due for such a small holding.[172]

On a substantive level, the Maine Audit disclosed several items of concern: “Avangrid’s lack of focus on a sufficiently broad set of operational metrics,” “pressure to mitigate earnings gaps,” and a clear “preference for financial performance rather than personnel with operations-centered backgrounds.”[173] The auditors concluded that “the weak focus on operational experience at the top has contributed to service-related problems.”[174] Moreover, the organizational structure “appears to confirm that financial performance and rate recovery concerns lead operational considerations.”[175]

The Hearing Examiner observed that the risks cited in the Liberty Audit are relevant concerns for PNM and its customers as well.[176] In exercising his discretion to admit the audit, the Hearing Examiner properly included the results and conclusions of the audit in his determination of the risks of the merger to New Mexico customers. The audit was the “best evidence reasonably obtainable” of

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[171] **80RP39853-4**.
[172] **80RP39854**.
[173] **80RP39931**.
[174] **80RP39932**.
[175] *Id*.
[176] *Id*.

how Avangrid/Iberdrola operates in Maine and potentially would operate in New Mexico. The audit was commissioned by the MPUC (an entity uniquely qualified to take notice and address CMP service issues), and performed by a consultant about whom there were no allegations of bias.

Similarly, Joint Applicants asserted that the Hearing Examiner improperly concluded that "[if] PNM's service under [Iberdrola/Avangrid] ownership is anything like the service provided by the [Iberdrola/Avangrid] utilities in the Northeast, the quality of PNM's service is likely to be diminished."[177] The Hearing Examiner based this prediction on what Appellants' framed as "hearsay" the following: The Governor of Maine's statement that the service of CMP was "abysmal;" the poor customer service satisfaction rating for Avangrid subsidiaries, $65 million in disallowances and penalties against Avangrid subsidiaries since 2016, and the audit commissioned by the MPUC "to study the extent to which CMP's problems stem from [Iberdrola/Avangrid] structure."[178] Yet, as discussed throughout this brief, this evidence was well within the Hearing Examiner's discretion to admit under Commission rules, and relevant to the issue at hand: whether there was a risk of diminishment in the quality of service to New Mexico post-merger. Evidence of known service problems, disallowances and penalties,

[177] Joint Brief at 16, *citing* **80RP39850**.
[178] **80RP39850-1**.

and poor customer service ratings was "probative" in that it tended to provide further information as to what New Mexicans might expect from PNM's chosen partner. This is evidence "of the kind commonly relied on by reasonably prudent men in the conduct of serious affairs." *Young v. Board of Pharmacy*, 81 N.M. 5, 462 P.2d 139 (N.M. 1969). Only a foolish consumer would buy a car without checking the Consumer's Guide ratings and the car's history of maintenance and accidents.

Joint Applicants' complaints about the PRC's consideration of this evidence beg the question: How is the Hearing Examiner, and the PRC, to perform the due diligence required to determine if the profound question of whether Avangrid/Iberdrola should be selected to control our grid and provide our electricity for decades to come? Is it to refuse to consider what other agencies in other states have found its performance to be unacceptable? Must it somehow subpoena Commissioners from those other states to testify here? Or should it do as it did here, which is to consider the official reports and actions of those other agencies and then turn to Avangrid, as it did, and ask "What do you have to say about all this?"

In *Gonzalez*, *supra,* which was not an administrative proceeding, cited by Joint Applicants as support to exclude the audit, defendant Surgidev argued that transcripts of FDC Panel hearings were hearsay, and the trial court abused its

discretion by admitting them into evidence as public records. Surgidev contended that the transcripts were not factual findings under SCRA 11-803(H)(3) because they contained opinions of the Panel members.

The New Mexico Supreme Court rejected that argument. It noted that the U.S. Supreme Court had addressed this issue under the federal equivalent to SCRA 11-803(H)(3) in *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 109 S. Ct. 439, 102 L. Ed. 2d 445 (1988). In *Beech Aircraft*, the Court considered the admissibility of an investigatory report on the cause of an airline crash. *Id.* at 157-59, 109 S. Ct. at 443-45. The Court held that the investigatory report was admissible under the public records and reports exception to the hearsay rule despite including both facts and opinions of the investigatory panel. This was so because the rule's "limitations and safeguards lie elsewhere: First, the requirement that the reports contain factual findings bars admission of statements not based on factual investigation" and "[s]econd, the trustworthiness provision requires the court to make a determination whether the report, or any portion thereof, is sufficiently trustworthy to be admitted." *Gonzalez*, 899 P.2d at 585 *citing* 488 U.S. at 169. In addition to these safeguards, the Court mentioned the obvious: "[O]f course it goes without saying that the admission of a report containing 'conclusions' is subject to the ultimate safeguard—the opponent's right to present evidence tending to contradict or diminish the weight of those conclusions." 488 U.S. 153, 168.

The burden of proving untrustworthiness is on the party opposing admission of the report. *Kehm v. Procter & Gamble Manufacturing Co*., 724 F.2d 613, 618 (8th Cir.1983); *Clark v. Clabaugh*, 20 F.3d 1290, 1294 (3d Cir.1994), ("the [official report], . . . authored by officers charged with a legal duty and authorized to conduct the investigation, is presumed admissible under Rule 803(8)(C), including its opinions, conclusions and recommendations, unless the defendants demonstrate its untrustworthiness."). Joint Applicants had the burden to show the audit was untrustworthy or inaccurate; they did not meet this burden. Furthermore, the foregoing analyses were in the context of court proceedings, not administrative proceedings, where the admissibility of these documents is indisputable.

3. Hempling's sworn testimony is admissible as a statement by a party opponent and is not hearsay.

Scott Hempling, was one of the Attorney General's two experts in supporting the AG's opposition to the merger. He became unavailable for the hearing,[179] because he had recently become an Administrative Law Judge at FERC.[180] He provided direct testimony for the Attorney General on April 2,

[179] **62RP21870-1**.
[180] *Id.*

2021,[181] before the Attorney General changed from opposing to supporting the merger. Hempling's testimony contains an important analytical component contradicting the Attorney General's later change in position regarding whether the merger is consistent with the public interest. Because the Attorney General became a proponent of the merger, and because Hempling's testimony was on behalf of the Attorney General when he authored it, it became admissible as a statement by a party opponent and not hearsay. *State v. Jackson*, 2018-NMCA-066, 429 P. 3d 674, 681 (Ct. Appeals 2018) (statements is "non-hearsay" under Rule 11-801(D)(2)(a) NMRA (characterizing a statement made by the opposing party as "not hearsay").) *State v. Woodward*, 121 N.M. 1, 908 P. 2d 231, 237 (1995) (Rule 11-801(D)(2)(a) NMRA excluding admissions by a party-opponent from the hearsay rule). The Hearing Examiner admitted Hempling's testimony at least in part on that basis.[182]

Joint Applicants contested Hempling's testimony with the testimony of Joint Applicants' expert Quilici.[183] Joint Applicants presented approximately 35 separate pre-filed direct, supplemental, and rebuttal testimonies, including initial direct, rebuttal testimony and live testimony from numerous experts, and had ample opportunities to directly address and rebut Hempling's testimony regarding

[181] *Id.*
[182] *Id.*
[183] **69RP25759-74**.

whether the merger would be a benefit to PNM ratepayers and would be in the public interest. All this evidence was admitted into the record.

4. Berry's Verified Statement and Public Comments

Two Avangrid, Inc. subsidiaries, Central Maine Power Company (CMP) and NCEC Transmission LLC (NCEC) created and funded a political action committee (PAC) in Maine, Clean Energy Matters, in September 2019 to oppose the 2019-2020 citizen initiative campaign begun by the opponents of the proposed NCEC transmission line.[184] Maine Representative Seth A. Berry, one of the organizers of the citizens' initiative, stated that the PAC operated a campaign to discredit the citizen initiative process and included a network of out-of-state political consultants and aggressive strategies.[185] Joint Applicants' witness, Kump stated that Representative Berry misstated the legal and factual debate regarding the NECEC project and the proposed referendum but did not deny that the amounts claimed by Representative Berry were spent in the amounts indicated for the purposes of opposition research stated.[186]

Regarding evidence submitted by Representative Berry about PAC activities, the Hearing Examiner observed that "[a]lthough not rising to the level of

[184] **80RP39956**.
[185] **80RP39957**.
[186] *Id*.

criminality," activities of a CMP-funded Political Action Committee ("PAC") raised "similar concerns." Joint Brief at 19. The PAC hired investigators and consultants to research and "allegedly interfere with" Maine residents opposed to a transmission line proposed by CMP.[187] The Hearing Examiner was well within his discretion to consider such corporate activities, while not illegal, as undesirable and in conflict with New Mexico's expectations for appropriate utility conduct. This evidence also gave additional credence to the questionable activities noted in the Spanish investigation and reinforced the view that this is typical Avangrid/Iberdrola behavior corporate culture and behavior and not aberrant.

Joint Applicants complain that the Hearing Examiner and Commission unduly relied on the statements of Berry "as support for the Commission's rejection of the merger." Joint Brief at 52. There is no evidence that the reliance on this evidence was inappropriate especially given all the other corroborative evidence to the same effect that clearly is not hearsay.

NEE attached a sworn statement by Representative Berry, House Chair of the Committee on Energy, Utilities and Technology, serving in the Maine House of Representatives in its *Reply of New Energy Economy to Joint Applicants Response to Order Regarding Avangrid Service Quality Issues and Management Audits*.[188]

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[187] **80RP39855**.
[188] **40RP16573-692**.

NEE argued then and it does now that Mr. Berry's verified statement addressed the six factors that the Commission is required to consider when determining whether to approve a merger.[189] Joint Applicants didn't object to the verified statement at that time. The Hearing Examiner required that Joint Applicants file testimony in response to certain aspect of Berry's statement among other matters.[190] Mr. Kump provided extensive written and oral testimony on these matters.[191]

NEE attached the same sworn statement of Berry to NEE's expert's testimony, Christopher Sandberg, an attorney who practiced at the Minnesota Public Utilities Commission, taught business law as a professor, and was an associate and partner in a top-25 Minnesota law firm, where he lead the firm's Utilities and Technology Law practice area, emphasizing regulatory issues, business development, administrative law, and civil litigation.[192] Of significance to this appeal is that *Joint Applicants objected to Mr. Sandberg's inclusion of Berry's testimony* ***and the Hearing Examiner struck most of Berry's testimony****, leaving only the portion that related to a controversial transmission project which the HE found reliable and because Avangrid's CEO had testified to it himself.*[193]

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[189] **40RP16573-83**.
[190] **42RP16889**, ¶d, 4**2RP16897**.
[191] For example, **69RP24768-74**; **69RP25080-3**; **69RP25322-37**; **69RP25441-520**.
[192] **55RP20254-6**; **55RP20324-20483**.
[193] **65RP22390-5**.

The Hearing Examiner provided a measured and reasonable basis for his decision, which largely favored Joint Applicants.[194]

Lastly, Joint Applicants object to Mr. Berry's public comment. Under 1.2.2.23.F. and 1.2.2.32. A(2) NMAC the public is "entitled" to make comment in a public hearing. *Freed v. City of Albuquerque (In re Hearing on the Merits Regarding Air Quality Permit No. 3135)*, 2017-NMCA-011, ¶¶ 21-23, 388 P.3d 287 (in permitting actions that substantially affect the public interest, the Legislature has recognized the intrinsic value of public input separate from its technical relevance by requiring the Board to consider public input prior to reaching a decision.); *Pickett Ranch, LLC v. Curry*, 2006-NMCA-082, ¶¶ 28-29, 140 N.M. 49, 139 P.3d 209*, citing, Colonias Development Council*, 2005 NMSC 24, 138 N.M. 133, 117 P.3d 939. (Our Supreme Court set aside the Secretary's final order and remanded for a limited public hearing, concluding that "the hearing officer erred in characterizing testimony relating to the community's quality of life as irrelevant.").

The Hearing Examiner and Commissioner had the discretion to consider these comments, along with similar evidence of corporate culture and reputational evidence, because they were relevant to their determination and derived from a reliable source who spoke from specific experience. These comments were not

[194] *Id*.

dispositive of the risk to New Mexico consumers of an Avangrid/PNM Merger but simply added another legitimate piece to the puzzle of "Who is Avangrid?" It was up to Joint Applicants to dispel these criticisms and counter accusations of unethical conduct and service problems. They failed to do so. Thus, the Hearing Examiner and Commission properly cited the public's concern that was substantiated by facts set forth in the evidentiary record, in their ultimate rejection of the Avangrid/PNM Merger.

POINT IV.
The Hearing Examiner Appropriately Disqualified Attorney Rael from Representing Avangrid/Iberdrola in this case

Joint Applicants abandoned logic in claiming that the disqualification issue implicates the legal residuum rule.

Joint Applicants complain that the Hearing Examiner should not have found that attorney Marcus Rael had a concurrent conflict of interest in representing Iberdrola and the Attorney General ("AG") at the same time in different cases and disqualified him on that basis. Joint Brief at 47-50. Joint Applicants are incorrect. Rael was properly disqualified.

On April 2, 2021, the AG filed the testimony of expert witnesses, Andrea Crane[195] and Scott Hempling[196] in opposition to the merger stating that it was not in the public interest for multiple reasons, including many of the same reasons ultimately relied on by the Hearing Examiner and the Commission for rejection.

Iberdrola hired attorney Marcus Rael, to "facilitate Avangrid's purchase of PNM".[197] Rael had represented the AG's Office and the State of New Mexico and its citizens, in numerous cases that had been farmed out to him under AG Balderas, including several that were pending when Iberdrola hired him. He also represented Bernalillo County, another party to this proceeding, in unrelated litigation.[198] Rael, acting on behalf of Iberdrola/Avangrid, visited with persons at the AG's office 18 times and had a number of telephone conferences with Bernalillo County;[199] for this Rael was paid $350,000.[200]

Shortly after Rael's visits to the AG's office, the AG changed his position and supported the merger. The AG joined the Stipulation on April 21, 2021.[201]

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[195] **18RP03743-805**.
[196] **18RP03630-03742**.
[197] **67RP23546-7**.
[198] **80RP39996**.
[199] **80RP3999**.
[200] **67RP23549** (the purpose of the amendment to the original contract with Rael was to increase the cap fee of the professional services agreement from $250,000 to $350,000.)
[201] **80RP5296-05329**; **60RP21256-66**.

The AG agreed to the PNM/Avangrid merger stipulation (without Iberdrola) with a $50M rate credit and $7.5M for economic development and other provisions.[202] This was despite Ms. Crane's expert testimony stating that if a merger be approved it should include "Iberdrola as a Joint Applicant," an $85M rate credit and $80 million for economic development.[203] The stipulation that was signed by the AG contained some increases in payments over the Application but did not address any of the other problems that the AG's experts had testified would have to be addressed before the AG could approve it (*ie.,* not shifting to ratepayers the $300M securitized financing for Four Corners, along with other provisions they thought necessary [204]).

After first denying it, when Mr. Azagra Blazquez was impeached with his own sworn affidavit, he agreed that he knew that *at the time* Iberdrola retained Mr. Rael's law firm that Mr. Rael was concurrently representing the Attorney General and Bernalillo County in other litigation.[205] Affidavits filed by the AG and Bernalillo County also indicated that neither party provided written consent for the

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[202] **28RP05306**.
[203] **18RP03751-2**; **60RP21257-63**.
[204] **72RP34307-11**, **72RP34319-23** (Four Corners).
[205] **80RP23535-6**; **80RP39998**; **58RP20743-8**. (Rael's own firm wrote a legal memo in a separate case involving another concurrent conflict of interest determining that Rael could not represent both the Town of Edgewood and Edgewood Mayor Bassett yet he represented both regardless. *See also,* **81RP40378-82**.)

concurrent representations.[206] 16-107B (4) New Mexico Rules of Professional Conduct.

After reviewing multiple filings, the Hearing Examiner found that NEE had shown[207] that Mr. Rael's representation of Iberdrola/Avangrid was directly adverse to the interests of the AG (and to the residential and small business customers the AG is statutorily charged with representing) and to the interests of Bernalillo County.[208] Based on the evidence, including the sworn admissions of the parties, the Hearing Examiner disqualified Rael from representing Iberdrola in the proceeding because he found that Rael had a concurrent conflict of interest and disqualified him from further representation of Iberdrola in the proceeding.

The Hearing Examiner had a duty to "conduct [a] full, fair, and impartial public hearing[.]"1.2.2.29.C NMAC. The Hearing Examiner's decision was within his discretion pursuant to *Living Cross Ambulance Serv., Inc. v. N.M. Pub. Regulation Comm'n,* 2014-NMSC-036, 338 P.3d 1258.[209] ("left unchecked, conflicts of interest will taint an entire case and call into question the integrity of the attorney-client relationship.") The Hearing Examiner specifically noted that

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[206] ***Id***.
[207] **58RP20726-52**; **60RP21250-72**; **62RP21985-93**.
[208] **80RP39998**.
[209] **64RP22343-22376**; **80RP40000-2**; **76RP38643-38656**.

this "is a case of public interest that concerns the 530,000 ratepayers of PNM and the New Mexico economy as a whole. It is crucial that the proceeding and the Commission's final decision are viewed by the public as credible and without any taint of improper influence."[210]

Joint Applicants reliance on the legal residuum rule as a shield as it regards Iberdrola/Avangrid's concurrently conflicted attorney, Marcus Rael, makes no sense. Rael's concurrent conflict of interest wasn't an issue of hearsay; the misconduct raised issues of improper influence, witness bias and credibility, and potentially, attorney incompetence.[211]

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[210] **80 RP 40002**.

[211] **58RP20726-52**; **60RP21250-72**; **62RP21985-93** (particularly **62RP21989-90**)**;** *See also,* **40RP16568**: The NMAG argued that penalties and violations in the Northeast constituted a "benefit of the merger". This argument is contrary to law and fact and demonstrated the NMAG was not critically analyzing information in violation of his statutory obligations, NMSA 1978, § 8-5-17(B)(1)-(2); **58RP20750-2**: Mr. Balderas is the chief law enforcement officer of the State of New Mexico, entrusted to uphold and execute the laws. Yet, curiously in this case his position is: "'There are more important issues in the merger for the experts to focus on' than legal details, Balderas added."

POINT V.

Notwithstanding all of the above Evidence of Incompetence and Unethical Behavior Joint Applicants Argue that this Court, Contrary to its Precedents, Should Substitute its Judgment for the Commission's and Approve the Merger Because Public Policy Supports Settlements

Joint Applicants ask this Court to vacate the Commission's decision to reject the merger. Joint Brief at 63-66. Joint Applicants argue that "[p]ublic policy in New Mexico consistently favors the settlement of disputes [and that] the Commission offered no explanation for ignoring the settlement. *Id*. This isn't true. The Commission did offer an explanation, and in pertinent part found:

> The proponents of the Proposed Transaction now gloss over the potential risks of the Proposed Transaction based on the enhanced revisions proposed in the Appendix 2 Modified Stipulation which they now recast as additional enhanced benefits, rather than revisions necessary to mitigate the very real concerns about risks of harm identified by many of those same parties in this case during the proceedings. As the Certification notes, given the nature of the facts that gave rise to concerns, the revised provisions don't eliminate those risks, but instead will require sustained and vigilant regulatory oversight to maintain. Ultimately, in evaluating the six factors the Commission applies when determining whether a utility merger satisfies the public interest under NMSA 1978, §62-6-12 the Certification concludes the potential harms of the Proposed Transaction continue to outweigh its benefits. The Certification makes clear that in the HE's estimation, this conclusion holds true even with the application of the revisions included in the proposed Appendix 2 Modified Stipulation.[212]

[212] **81RP40427**.

Joint Applicants describe NEE as the only opponent, but that is also not true. PRC Staff is not a signatory, and notably, did not file Exceptions to the *Certification of Stipulation*. Moreover, it speaks volumes that the parties that regularly practice before the PRC and represent a significant number of ratepayers refused to *sign* on to *any* Stipulation iteration, including the proposed Appendix 2 Modified Stipulation: Bernalillo County, Albuquerque Bernalillo County Water Utility Authority, and New Mexico Affordable Reliable Energy Association (formerly New Mexico Industrial Energy Consumers).

Additionally, the Proposed Transaction is governed by the public interest[213] and no matter how many parties sign on if the merger is harmful for ratepayers and New Mexicans then the Commission is obliged to reject it. *Nextel W., Corp. v. Ind. Util. Regulatory Comm'n*, 831 N.E.2d 134, 155 (Ind. Ct. App. 2005) ([A]n agency may not accept a settlement merely because the private parties are satisfied;[214] rather, an agency must consider whether the public interest will be served by accepting the settlement.) (internal citations omitted.)

The Commission's decision is well supported by the record.

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[213] *See,* NMSA 1978, §§62-6-12 and 62-6-13.
[214] **81RP40431** ("the Commission handles matters of public import, rather than private disputes").

POINT VI.
Joint Applicants' Argument that the PRC's "Public Interest" Analysis is Internally Inconsistent and Therefore Arbitrary and Capricious is Frivolous.

Joint Applicants' final argument is that the PRC's determination that the public interest would not be served by allowing the merger was inconsistent with its supposed approval of the PNMR/Avangrid "General Diversification Plan" ("GDP"), which includes a provision that its Plan be consistent with the public interest. According to Joint Applicants, the PRC can't disapprove the merger but approve the GDP, without being inconsistent and, therefore, acted arbitrarily and capriciously. Joint Brief at 66-68.

Joint Applicants don't explain to the Court the difference between an application for approval of a merger and an application for approval of a GDP, which a filing utility is required to make *in anticipation* of the completion of a merger or other "Class II Transaction" and involves a separate regulation and approval process, as Joint Applicants themselves made clear when they filed their original application for approval of the merger and approval of their proposed GDP.[215]

[215] **1RP00002-3**. (Joint Applicants apply "for approval of (1) the merger…under NMSA 1978, Sections 62-6-12 and 62-6-13, and…(3) PNM's 2021 General Diversification Plan…which is filed in connection with [the merger], pursuant to 17.6.450 NMAC ("Rule 450").

The PRC rejected the merger as contrary to the public interest so it never approved and never would have approved the Joint Applicant's GDP. Below, the HE methodically explained what a GDP filing is, what information must be in it, what regulations and statutes are implicated, and whether the PNM/Avangrid proposed GDP met those requirements.[216] The HE concluded that the Joint Applicants' "2021 GDP" filing "appears to comply with the content requirements in Rule 17.6.450.10(B) NMAC and appears to satisfy the necessary conditions associated with the Class II Transaction, i.e., the Proposed Transaction, which is at issue in this case." On that basis, the HE concluded:

> "***In the event*** **the Commission Approves the proposed transaction, the Hearing Examiner recommends that the 2021 GDP be approved.…**"[217]

(Emphasis and italics supplied.)

This is what the PRC adopted when it adopted the Hearing Examiner's Certification of Stipulation, nothing more. Thus, the Joint Applicants' claim that the PRC's decision was internally inconsistent is entirely contrary to what the HE and PRC actually said and did. All the Hearing Examiner said was, in effect, "If you approve the merger, the GDP looks ok."

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[216] **80RP 40077-40089**.
[217] **80RP40087**.

Furthermore, even if the PRC had actually taken the illogical position that it disapproved the merger but approved the GDP, it would *still* have been meaningless in light of NMAC R. § 17.6.450.10, which provides that approval of a GDP "shall in no way limit or preclude the Commission from subsequently investigating and reviewing Class I and Class II transactions or taking such steps as it deems necessary…"

Joint Applicants' effort to seize on what they incorrectly see as a technicality is based on no inconsistency, no statute, no regulation, no logic, no facts and on a technicality that doesn't exist.

POINT VII.
Sanctions Were Appropriate

Joint Appellants argue: "The Commission levied a $10,000 sanction against all Appellants based on Avangrid's discovery responses and confidentiality claims. The Court must vacate the sanction. Uncontroverted evidence demonstrates that Avangrid answered discovery and asserted confidentiality claims in good faith. With respect to Appellants other than Avangrid, the record contains no evidence that they violated any discovery rules or orders." Joint Brief pp. 68-69.

The Hearing Examiner thoroughly explained his rationale for sanctions.[218] Throughout the proceeding discovery responses were incomplete, or objected to without basis. Too often Joint Applicants over-designated material as "confidential" when the information didn't qualify.[219] There were other challenges to Joint Applicants' overdesignation of confidentiality – they were all responded to by Joint Applicants.[220] The Hearing Examiner repeatedly granted public access to the material.[221] Commission's rules on discovery favor prompt and complete discovery as a means toward effective presentations at public hearing and avoidance of the use of cross-examination at public hearing for discovery purposes. 1.2.2.25A NMAC. Significantly, the New Mexico Rules of Civil Procedure consider an evasive or incomplete answer as a failure to answer. Rule 1-037(A)(3). The Commission's rules on discovery and the New Mexico Rules of Civil Procedure also require parties to provide supplemental responses on a timely basis to responses that have been previously provided.[222] §1.2.2.25I NMAC; Rule 1-026(E) NMRA.

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[218] **80RP39973-80**.
[219] **80RP39973-80**; **45RP17432** ("Avangrid, Inc., Avangrid Networks, Inc., NM Green Holdings, Inc., Public Service of Company of New Mexico ("PNM"), and PNM Resources, Inc. (collectively "Joint Applicants") and hereby provide their notice of withdrawal of their claim of confidentiality")
[220] **44RP17182-17204**; **80RP39986**.
[221] **51RP19235-45**; **51RP19259-71**; **65RP22581-94**.
[222] **80RP39983-84**.

Avangrid admits that in "hindsight" their responses were insufficient and incomplete and that they failed to supplement their responses.[223] Joint Applicants failed to address the findings by the Hearing Examiner that Joint Applicants provided "no identification of violations or fines" in response to NMAG 4-1.[224] Joint Applicants' arguments that the failure to produce was made in "good faith" and that there is "no evidence that they violated any discovery rules or orders" ignores the record.[225] Joint Applicants also argue that "no party filed testimony in response to Kump." Joint Brief, at 70. This was unnecessary because cross-examination and his own admissions sufficed.[226]

The Hearing Examiner found that the discovery violations "negatively impacted the proceedings" and he explained:

> The reasons why the intervenors failed to address the Avangrid utilities' violations, penalties and cost disallowances in other states in the testimony they filed on April 2, 2021 is now understandable. Indeed, the Hearing Examiner expressed frustration at the intervenors (in addition to the Joint Applicants) at the May 11 status conference for their failures to address these issues. If the information had been promptly provided in response to NEE 4-55, the issues could have been addressed in the intervenors' April 2, 2021 testimony. [227]

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[223] **80RP39975-82**; **67RP24788-90**.
[224] **45RP17366-80**.
[225] **80RP39973-88**.
[226] **80RP39973-92**.
[227] **45RP17378**.

When a party fails to comply with the Court's Orders and the Rules of Discovery sanctions are appropriate. *United Nuclear Corp. v. General Atomic Co.*, 1980-NMSC-094, ¶ 237, 629 P.2d 231, 246 (1980). The Hearing Examiner found that Joint Appellants failure was either willful, in bad faith, or due to their own fault.[228]

While NEE has not examined every filing made by Joint Applicants, it appears from a review of the record that all of their filings have been on behalf of PNM/PNMR *and* Avangrid/Avangrid Networks/NM Green Holdings/Iberdrola. All Rule 1.2.25(J)(1) correspondence,[229] Responses to all (three[230]) NEE's Motions to Compel,[231] Response to ABCWUA Motion to Compel,[232] Response to NEE's Motion for Sanctions,[233] and the Responses to Confidentiality Designations[234] were filed by attorneys on behalf of PNM/PNMR *and* Avangrid/Avangrid Networks/NM Green Holdings/Iberdrola. All discovery responses to parties were

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[228] **80RP39987**.
[229] **23RP04701-3**; **43RP16977**; **43RP16986** ("Thank you for conferring with Brian Haverly [attorney for Avangrid/Avangrid Networks/NM Green Holdings/Iberdrola] and me [Rick Alvidrez, attorney for PNM/PNMR]…"); **43RP16994**; **43RP16997**; **52RP19475-477**;
[230] **23RP04680-725** (Marcus Rael); **43RP16959-17012** (Four Corners); **52RP19311-478** (Spanish investigation)
[231] **26RP05072-05085**; **45RP17386-17415**; **52RP19509-19517**; **54RP19859-19885**;
[232] **12RP02643-02700**.
[233] **43RP 17018-25**.
[234] **52RP19479-88**;

also jointly responded and objected to by the Joint Applicants.[235] PNM/PNMR actually made all the filings with the Commission (see cover filing page bearing PNM's signature block) and on the last page of each Joint Applicant filing it bears a unique PNM stamp that it uses as a code for its filings, for instance, "*GCG#528297"* on **43RP17025**. If other applicants are saying that they relied on Avangrid for Avangrid's responses and just signed the pleadings as a convenience, it should have said so at the time and not now, on appeal.

Lastly, there is no due process violation. Joint Applicants, jointly and severally, frustrated the efforts of litigants and the PRC in this matter throughout the hearing. The Joint Applicants, not just Avangrid, were well aware of the games they were playing – they were actively invested and engaged in hiding relevant material and disobeying PRC rules and Orders. Only Avangrid paid the $10,000 for the sanctions,[236] so there was no actual penalty incurred by other entities.

[235] For instance, "Joint Applicants Objections and Responses to New Mexico Affordable Reliable Energy Alliance's Fourth Set of Interrogatories and Requests for Production of Documents," **42RP16923**.
[236] **81RP40460**.

VI. CONCLUSION

This Appeal should be denied because the arguments raised by Appellants are factually and legally incorrect. The PRC was fully justified in finding that a merger between Iberdrola/Avangrid and PNM/PNMR would not be in the public interest under NMSA 1978, §§62-6-12 and -13. The Commission based its unanimous decision on substantial evidence in the whole factual record before them. Therefore, the Order on Certification of Stipulation should be affirmed in all respects.

Respectfully submitted this 13th day of June 2022.

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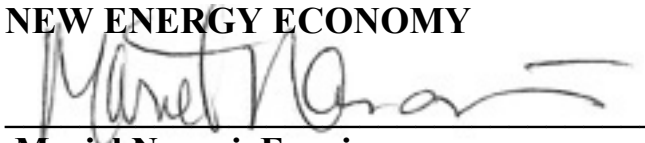
STATEMENT OF COMPLIANCE

Pursuant to the Court's Order of May 27, 2022 New Energy Economy states that the body of the foregoing Answer Brief is 83 pages and contains 16,976 words in Times New Roman 14-point font, a proportionally-spaced typeface, as calculated by Microsoft Word for Office 365, and is therefore within the limits permitted under the Order of this Court.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief was electronically served on all counsel of record through the New Mexico Supreme Court's Odyssey filing system on June 13, 2022.

NEW ENERGY ECONOMY



Mariel Nanasi, Esquire