IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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

Appellants,

v. **S-1-SC-39152**

**NEW MEXICO PUBLIC REGULATION
COMMISSION,**

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**

STATEMENT OF ISSUES

Appellants Avangrid, Inc. ("Avangrid"), Avangrid Networks, Inc., NM Green Holdings, Inc. ("NM Green"), Iberdrola, S.A. ("Iberdrola"), Public Service Company of New Mexico ("PNM"), and PNM Resources, Inc. ("PNMR")

(collectively, "Joint Applicants")[1] respectfully submit this Statement of Issues, as required by Rule 12-208 NMRA.

I. Nature Of Proceeding

This appeal seeks annulment of an order of the New Mexico Public Regulation Commission (the "Commission") denying approval of a public utility merger based on improper evidence and an improper weighing of benefits and risks. Joint Applicants also challenge a discovery sanction imposed by the Commission in the same order.

II. Date Of Judgment, Timeliness Of Appeal

The Commission filed its Order on Certification of Stipulation on December 8, 2021, and Joint Applicants filed their Notice of Appeal on January 3, 2022. This Statement of Issues is timely filed within 30 days of the filing of the Notice of Appeal.

III. Statement Of The Case

A. Proceedings Relating to Proposed Merger Transaction.

In October 2020, PNMR and Avangrid reached agreement for the sale to Avangrid of all of the shares of PNMR for $4.3 billion. The proposed merger requires multiple governmental approvals, including from the Federal Energy

[1] Iberdrola was not originally an applicant in this proceeding, as no Commission rule or precedent required it. As discussed below, the Commission ordered Iberdrola to be joined as a necessary party in this case, and as such Iberdrola became a Joint Applicant in June 2021.

Regulatory Commission, the Public Utility Commission of Texas, and the Commission. Prior to the Commission's ruling on December 8, 2021, all other governmental entities approved the proposed merger.

Despite the fact that Joint Applicants were able to work with 23 out of 24 intervenor parties in this case, either to support or not oppose the merger, the Commission concluded that the risks of the transaction outweighed the public benefits it would yield and unanimously rejected the sale.

PNM is the largest investor-owned public utility company in New Mexico and is wholly owned by PNMR which, is traded on the New York Stock Exchange. Avangrid is a leading sustainable energy company in the United States, with approximately $36 billion in assets and is traded on the New York Stock Exchange. Avangrid wholly owns eight public utility companies operating in the northeastern United States through its subsidiary Avangrid Networks, Inc., and owns and operates approximately 7.5 gigawatts of wind and solar generation facilities in the United States.

Iberdrola is a global energy holding company headquartered in Spain providing utility services to approximately 32 million points of supply worldwide with operations on four continents. Iberdrola owns 81.5% of Avangrid's stock.

On November 23, 2020, Joint Applicants filed an application for the approval of the merger between PNMR and NM Green, with PNMR surviving the

merger and becoming a wholly owned subsidiary of Avangrid. The application was filed pursuant to NMSA 1978, Sections 62-6-12 to -13 (as amended through 1989) of the New Mexico Public Utility Act, and docketed as NMPRC Case No. 20-00222-UT. Joint Applicants included in their application pre-filed testimonies of witnesses that provided all of the information required by Section 62-6-12 and 17.6.450 NMAC, and described how the proposed merger satisfied the multi-prong test utilized by the Commission in similar merger cases within the last ten years.

The Commission appointed a hearing examiner to preside over the case. A procedural order issued on December 18, 2020 allowed for discovery pursuant to a protective order and set a schedule for the case, with a public hearing to begin on May 4, 2021. Ultimately, 24 parties intervened in the case. By the conclusion of the public hearing, all parties in the proceeding except for New Energy Economy, Inc. ("NEE") either supported or no longer opposed the merger.[2] The quantifiable benefits committed to by Joint Applicants by the end of the hearing increased to $94 million in rate benefits and over $200 million in economic development benefits. The proposed merger with Avangrid and Iberdrola offered customer

[2] On June 4, 2021, a Second Amended Stipulation was filed with two additional parties, resulting in 13 out of the 24 intervenors reaching settlement. One of the remaining intervenors, Berrendo Energy, LLC withdrew as an intervenor on May 26, 2021, certain other intervenors did not participate any further in the proceeding, taking no position. After further negotiations, which resulted in the addition of more benefits and protections, the remaining parties in opposition (except for NEE) no longer opposed the merger.

benefits through improvement to the financial strength of PNMR, which in turn supports PNM's ability to make necessary capital investments for the provision of services to its customers. Joint Applicants also committed to many protections for PNM's customers beyond those required by the Commission's rules and standards applied in previous merger applications. In all, Joint Applicants committed to provide more benefits than any prior applicant had offered in a public utility merger transaction in New Mexico.

During the course of the proceedings, extensive discovery was conducted by the parties, several sets of pre-filed testimonies and exhibits were filed, motions and responses were filed, and status conferences were conducted. On April 2, 2021, 24 witnesses submitted pre-filed testimony on behalf of 18 of the intervening parties. On April 21, 2021, seven intervenor parties reached a settlement with Joint Applicants, including the New Mexico Attorney General ("NMAG"), who is designated by statute to advocate for residential and small business customers. *See* NMSA 1978, § 8-5-17 (1998). The terms of the settlement significantly increased the quantifiable benefits, as well as the consumer protection provisions, that Joint Applicants would be required to provide to New Mexico and PNM's utility customers. Joint Applicants gave timely and proper notice to the Commission of this settlement. On April 22, 2021, an eighth party reached a settlement with Joint Applicants.

The Commission vacated the original procedural order and set a status conference for May 11, 2021 to determine a possible schedule to consider the settlement agreement. By the May 11, 2021 status conference, 11 of the 24 intervenors had reached a settlement with Joint Applicants and were in full support of the proposed merger. On May 20, 2021, two additional intervenors filed a motion to join the settlement, which the hearing examiner granted on May 28, 2021, bringing the total intervenors reaching settlement to 13 of the 24 intervenors.

At the May 11, 2021 status conference, the Commission's hearing examiner *sua sponte* stated that he had read an industry newsletter and United States Securities and Exchange Commission filings from outside of the record relating to fines and penalties assessed against Avangrid-owned utilities operating in the northeastern United States. The hearing examiner stated his concern that the Commission had not been informed of these facts, and questioned the intervenors about whether these facts also concerned them. He believed Joint Applicants were less than forthcoming with the Commission, despite no requirement in any statute, regulation, or prior-Commission precedent that such information be provided to the Commission.

In a written order (the "May 11 Order"), the hearing examiner required Joint Applicants to provide to the Commission within seven days information on all fines and penalties at Avangrid-owned utilities over the last five years, explain why

they "had failed to notify the Commission" of the fines and penalties, and to identify the individuals at Avangrid, PNM, and PNMR who made the decision "to not notify the Commission" of these fines and penalties. Joint Applicants timely provided this information to the Commission, and explained that there was no decision at Avangrid, PNM, or PNMR to withhold this information because information of this type is not required by statute, regulation, case law, or past Commission precedent to be submitted to the Commission.

On May 24, 2021, Bernalillo County and the Albuquerque Bernalillo County Water Utility Authority filed their "Joint Motion for Joinder of Iberdrola, S.A. for Just Adjudication," citing Rule 1-019 NMRA. Joint Applicants opposed this motion on the basis that Rule 1-019 NMRA did not apply, and explained that Iberdrola, Avangrid's parent, was not a necessary party as the applicable statues, regulations, and prior Commission precedents do not and have not required the ultimate parent holding company to be a party to a merger application. The Commission ordered that Iberdrola was a necessary party, and Iberdrola promptly entered its appearance in the case.

On May 28, 2021, the Commission ordered Joint Applicants to file updates with the Commission every two weeks regarding management audits of Avangrid-owned utilities operating in Maine and Connecticut. These management audits were ordered by utility regulators in Maine and Connecticut pursuant to laws and

practices in those states, and involved utilities operating only in Maine and Connecticut. The Commission ordered Joint Applicants to file all copies of documents related to those management audits with the Commission whenever they became available, and Joint Applicants complied.

Mindful of the Commission's criticism for not proactively providing information about Avangrid to the Commission and the threat of sanctions, Joint Applicants filed a "Notice Regarding Proceedings in Other Jurisdiction," on June 24, 2021. The notice informed the Commission that Iberdrola's Chairman of the Board of Directors and certain other officers had been named as investigated parties in a proceeding in Spain. NEE objected to this notice filing and moved to compel information related to the ongoing investigation. Joint Applicants opposed the motion to compel. They explained that the information was not relevant because it involved an investigation only, and that under Spanish law, being named as an investigated party is a formal matter requiring participation in an investigation but does not mean anyone is charged with a crime or that a criminal charge is likely. Joint Applicants explained that none of Iberdrola's executives had been charged with a crime, let alone indicted for or convicted of a crime. Joint Applicants also provided an affidavit from an expert in Spanish criminal law explaining that the facts underlying such investigations are held secret under

Spanish law in order to protect the presumption of innocence of investigated individuals.

The Commission ordered certain information to be provided to NEE, required Joint Applicants to submit pre-filed testimony responding to specific questions the Commission had related to the investigation in Spain, and ordered Iberdrola to provide to the Commission under seal certain documents contained in the court's records in Spain that are secret under Spanish law.

In June and July 2021, the parties submitted pre-filed testimonies addressing the stipulation and related contested issues. Joint Applicants and signatories to the stipulation filed extensive testimony supporting the merger with substantial regulatory commitments they had negotiated. Response testimonies from four of the five remaining intervenors sought further concessions to address remaining issues, and NEE opposed the merger under all circumstance. The Joint Applicants and signatories filed rebuttal testimonies, with the Joint Applicants agreeing to additional substantial regulatory commitments and customer protections.

On July 23, 2021, NEE filed its "Application for Subpoena," requesting the Commission issue a subpoena to attorney Marcus Rael for deposition and appearance at the hearing. Mr. Rael never entered an appearance in the case and was retained by Iberdrola to assist in negotiating possible settlement terms with various parties. Mr. Rael participated in negotiations with Bernalillo County and

the NMAG. NEE claimed that Mr. Rael had a conflict of interest, and sought to undermine the stipulated settlement by alleging unethical conduct between Mr. Rael and New Mexico Attorney General Hector Balderas. Iberdrola, Bernalillo County, and the NMAG filed affidavits stating that they did not view Mr. Rael's involvement in settlement negotiations as a conflict of interest in relation to other work Mr. Rael's law firm was handling for each of the respective parties. The Commission disagreed with Mr. Rael's clients, finding instead that it had the authority to determine that a conflict existed, despite the fact that Mr. Rael was not an attorney of record in the Commission proceeding. The Commission ordered Iberdrola to cease utilizing Mr. Rael's services regarding the merger proceedingimmediately and reserved the right to utilize the disqualification when considering the merits of the stipulation. NEE also filed its allegations of a conflict of interest with this Court's Disciplinary Board, which found that no conflict existed. Joint Applicants filed the conclusions of the Disciplinary Board with the Commission.

As part of the pre-hearing procedures, Joint Applicants filed a motion *in limine* on July 30, 2021, seeking to exclude, principally on hearsay grounds, multiple items from evidence, including the management audit filed in Maine related to Avangrid's subsidiary, Central Maine Power Company, information related to the investigation in Spain involving certain Iberdrola executives, and

information related to Mr. Rael. Joint Applicants also moved to strike the pre-filed testimony of NMAG witness Scott Hempling who had been hired by the Federal Energy Regulatory Commission as a federal administrative law judge. Under federal law, he was prohibited from testifying as an expert witness and thus could not appear or be cross-examined on his written testimony as required by Commission rules. *See* 1.2.2.32(A)(1) NMAC; 1.2.2.35(B) and (I)(1) NMAC. The hearing examiner rejected Joint Applicants' arguments on these issues, and admitted the contested evidence into the record. The Commission expressly relied on all of the evidence Joint Applicants moved to exclude in making its determinations in this matter.

At hearing, the signatories confirmed their stipulated agreements and indicated support for or acceptance of Joint Applicants' further regulatory commitments and customer protections.

The hearing examiner issued his Certification of Stipulation, and recommended that the Commission find that there was no settlement agreement among the parties. The hearing examiner proposed a finding that the unquantifiable risks of the proposed merger to PNM's customers outweighed the benefits. The recommendations on these unquantifiable risks rested largely on the evidence that Joint Applicants sought to exclude. The hearing examiner recognized that the Commission might disagree with his recommendation, and

therefore proposed additional protections the Commission should require of Joint Applicants if the Commission decided to approve the merger. The additional protections had largely been raised and agreed to by Joint Applicants at hearing and were uncontroverted.

Through the exceptions process, Joint Applicants notified the Commission that they would accept all of the hearing examiner's proposed additional protections and revisions to the filed stipulation, while taking exception to the proposed finding there was no settlement agreement. Additionally, all of the other signatories to the stipulation stated that there was an agreement among the parties that the Commission can approve and, in order to eliminate any doubt, provided written affirmation that they accepted all of the hearing examiner's proposed additional protections and revisions to the filed stipulation.

The Commission deliberated about the case during two open meetings on December 1, 2021 and December 8, 2022. At one of these meetings, a Maine legislator, Seth Berry, called in and urged the Commission to reject the proposed merger. Mr. Berry is a proponent of Maine legislation for a state takeover of an Avangrid-owned utility. Mr. Berry was not a witness, was not under oath, nor subject to cross-examination.

During deliberations, one Commissioner stated that he was concerned about the merger transaction because Mr. Berry had taken the time to call the

Commission and urge them to deny the proposed merger. However, the Commission's own regulations state that public comment cannot be used as evidence for making a determination in a case before the Commission. *See* 1.2.2.23(F) NMAC. Another Commissioner mentioned the multiple letters the Commissioner received from the public noting concerns about the proposed merger, even though letters are viewed the same as public comment, and the letters were not part of the evidentiary record or subject to cross-examination. One Commissioner called Iberdrola executives "criminals" despite the fact that no Iberdrola executive has been charged with, indicted for, or convicted of any crime.

The Commission ultimately adopted the hearing examiner's finding that there was no stipulation (despite the fact that every signatory to the stipulation confirmed their stipulated terms to approve the merger and explicitly agreed to the adoption of the hearing examiner's revisions to the stipulation). The Commission also adopted the finding that the unquantifiable risks of the proposed merger outweighed the benefits. The Commission rejected the proposed merger.

B. Proceedings Related to Discovery Sanction.

During discovery, Joint Applicants fully responded to a total of 49 sets of written discovery requests with a total of 872 questions (not including subparts) or 1,278 questions (including subparts) over 7 ½ months. The Commission does not apply the limits on the number of discovery questions imposed by the New Mexico

Rules of Civil Procedure and shortened the response time to ten days, rather than the fifteen days provided under its procedural rules. *See* 1.2.2.25(E)(3) and (F)(4) NMAC. Joint Applicants' timely provided discovery answers to all parties via email and through a secure website accessible to the parties which contained all prior discovery requests, responses and related exhibits.

NEE and the NMAG posed discovery about operational concerns for Avangrid-owned utilities raised by regulators in northeastern states where those utilities operate, and fines levied on Avangrid-owned utilities. Avangrid's answers included information identifying weather-related outage investigations in New York and Connecticut and an investigation in Maine related to Central Maine Power Company's difficulties with a billing program roll-out.

Shortly after the May 11 status conference, NEE asked the Commission to sanction Avangrid for providing an incomplete answer to an NEE discovery request related to civil penalties imposed on Avangrid-owned utilities and for making excessive claims of confidentiality with respect to materials produced in discovery in violation of a protective order. NEE asked for sanctions without first filing a motion to compel as required by Commission rules (1.2.2.25(J) NMAC; Rule 1-037(A)(4) NMRA), and despite Joint Applicants' previous offer to supplement the response to NEE's prior discovery request. Joint Applicants filed a response with the Commission explaining that, while Joint Applicants may have

inadvertently missed some information in the response to NEE, the oversight was harmless because the missing information had been provided to all parties in response to the May 11 Order, and therefore all parties were aware of the inadvertently omitted information. Joint Applicants also pointed out that it was inappropriate to sanction a party for discovery-related issues without a motion to compel first being filed and violation of an order granting the motion to compel. *See* 1.2.2.25(J) NMAC; *see also* Rule 1-037(A)(4) NMRA. Joint Applicants also supported the claims of confidentiality.

The hearing examiner ordered that the issue of sanctions would be addressed at the evidentiary hearing and ordered Joint Applicants to file testimony addressing the alleged discovery violations and for other parties to file responsive testimony with respect to the issue of sanctions.

At the hearing, the hearing examiner admitted Avangrid's testimony explaining Avangrid's good faith efforts to properly respond to discovery, the bases for the claims of confidentiality, and the reasons why no sanctions were warranted. No party, including NEE, filed the testimony that was required by the hearing examiner to rebut to Joint Applicants' explanations or that supported the imposition of any sanctions or an award of attorney's fees to NEE. Moreover, no party questioned Avangrid witnesses about alleged discovery violations or the proposed sanctions.

The hearing examiner nonetheless found that Avangrid should be sanctioned for discovery violations, despite the unrebutted testimony of Avangrid's good faith efforts to properly respond to discovery and claims of confidentiality. The Certification of Stipulation recommended that NEE be awarded its attorney's fees for bringing the motion despite NEE's failure to provide the evidentiary information ordered by the hearing examiner establishing the factual basis for sanctions and the amount of such fees.

Joint Applicants excepted to the proposed sanction in the Certification of Stipulation. Although the Commission agreed with the Joint Applicants that an award of attorneys' fees to NEE against Avangrid was improper, the Commission nonetheless imposed sanctions against all Joint Applicants, not just Avangrid, in the amount of $10,000 to be paid to the State. Apart from Avangrid, the other Joint Applicants were not notified that they could be subject to sanctions and had no opportunity to contest the sanction ultimately imposed.

IV. <u>Statement of Issues and Preservation</u>

Issue 1: Did the Commission unreasonably and unlawfully deny approval of the merger by improperly basing its decision on inadmissible hearsay evidence and information outside the evidentiary record? Among other things, the Commission: impermissibly relied on written testimony of a witness that was not present for cross examination; public comment and letters to Commissioners that are not

evidence; audit materials relating to a non-jurisdictional utility that had no proper foundation; investigative materials from a foreign jurisdiction whereby the Commission presumed the guilt of parties involved despite the fact that there have been no charges, indictments, or convictions of or for criminal conduct and Spanish law requires the presumption of innocence in criminal investigations; and an accusation of an attorney conflict of interest that this Court's Disciplinary Board rejected as unsubstantiated.

Issue 2: Did the Commission unreasonably and unlawfully determine the merger was contrary to the public interest by imposing arbitrary standards, improperly weighing benefits and risks, and ignoring the weight of the admissible evidence? Among other things, the Commission: required Joint Applicants to provide non-jurisdictional information and meet new standards not specified in any statute, regulation, or precedent applied by the Commission in other merger cases; ignored the overwhelming support for the merger among intervenors; determined there was no settlement despite the unanimous affirmation by stipulating signatories of merger commitments made by Joint Applicants; unjustly weighed unquantified risks based on speculation about a diminishment in the quality of utility service and the Commission's perceived inability to regulate Joint Applicants; and minimized the economic benefits resulting from the merger in a

manner inconsistent with and unsupported by the evidentiary record and prior Commission precedent.

Issue 3: Did the Commission act unreasonably and unlawfully, and in violation of due process, when it imposed a $10,000 penalty on all Joint Applicants for a discovery sanction directed solely to Avangrid? Avangrid provided good-faith responses to discovery requests; any sanctions were to be based on required testimony from the complaining party that was never offered, and therefore, the sanctions, including the amount, were unsupported by the evidentiary record; and the Commission arbitrarily assessed a significant penalty against all of the Joint Applicants, where the discovery deficiencies were attributed only to Avangrid.

Joint Applicants preserved these issues in the course of litigating the merger application, as described above, including in Joint Applicants' motion *in limine*, post-hearing briefs and exceptions to the hearing examiner's recommended decision.

V. Relevant Standards Of Review And Authorities

The Commission erred by denying the merger between PNMR and NM Green, as well as imposing a sanction, based upon the relevant standards of review and authorities set forth below:

Issues 1 and 2: (Denial of Approval of Proposed Transaction)

A. "Upon the filing of [a utility merger] application, the [C]ommission shall promptly investigate the same, with such hearing and upon such notice as the [C]ommission may prescribe, and unless the [C]ommission shall find that the proposed transaction is unlawful or is inconsistent with the public interest, it shall give its consent and approval in writing." NMSA 1978, § 62-6-13.

B. In an appeal from a Commission order, the Supreme Court "shall vacate and annul the order complained of if it is made to appear to the satisfaction of the court that the order is unreasonable or unlawful." NMSA 1978, § 62-11-5 (1982); *In re PNM Gas Servs.*, 2000-NMSC-012, ¶ 4, 129 N.M. 1, 1 P.3d 383. The appellant bears 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. 728, 998 P.2d 564. The appellant satisfies that burden by demonstrating that the order is arbitrary or capricious, not supported by substantial evidence, or an abuse of discretion by being outside the scope of the agency's authority, clear error, or violative of due process. *Zia Natural Gas*, 2000-NMSC-011, ¶ 4.

C. This Court has adopted the whole record substantial evidence standard for review of agency orders, including Commission orders. *PNM Gas Servs.*, 2000-NMSC-012, ¶ 4 (citing *Duke City Lumber Co. v. N. M. Envtl. Improvement Bd.*,

1984-NMSC-042, 101 N.M. 291, 293, 681 P.2d 717, 719). This standard requires the Court to review the whole record, including the evidence in favor of and the evidence contrary to the Commission's decision, in order to determine whether the decision is supported by substantial evidence. *Id.* The Court defers to Commission decisions in highly technical areas, such as ratemaking, but accords less deference when reviewing determinations outside the realm of the Commission's expertise. *Plains Elec. Generation & Transmission Coop. v. N. M. Pub. Util. Comm'n*, 1998-NMSC-038, ¶ 7, 126 N.M. 152, 967 P.2d 827.

D. The whole record substantial evidence review process "does not contemplate or permit weighing the credibility of live witness testimony by the reviewing court," but does call for a "canvass… of all of the evidence bearing on a finding or decision, favorable and unfavorable, in order to determine if there is substantial evidence to support the result." *Tallman v. Ark. Best Freight*, 1988-NMCA-091, ¶¶ 7, 9, 108 N.M. 124, 767 P.2d 363, *superseded by statute on different grounds*, NMSA 1978, §§ 52-2-1 to -14 (1991), *as recognized in Leo v. Cornucopia Rest.*, 1994-NMCA-099, ¶ 22, 118 N.M. 354, 881 P.2d 714). "In effect the whole record review involves a winnowing process." *Id.* ¶ 9. The Court must "analyze and examine all the evidence and disregard that which has little or no worth." *Id.* To conclude that an administrative decision is supported by substantial evidence, the Court must be satisfied that the evidence demonstrates the

reasonableness of the decision. *Id*. ¶ 13; *Attorney Gen. of N. M. v. N. M. Pub. Regulation Comm'n*, 2013-NMSC-042, ¶ 29, 309 P.3d 89.

E. In adopting the whole record substantial evidence standard for review of administrative decisions, this Court retained the rule that an agency's determination must rest on admissible evidence. *Duke City Lumber Co.*, 1984-NMSC-042, ¶ 20. "New Mexico courts require that an administrative action be supported by some evidence that would be admissible in a jury trial." *Id*. ¶ 19. This requirement is called the "legal residuum rule." *Id.* This legal residuum rule has been administratively codified by the Commission in its Rules of Evidence. *See* NMAC § 1.2.2.35(A)(2) (requiring that the hearing examiner "give consideration to the legal requirement that any final decision on the merits be supported by competent evidence."). Consequently, an agency's finding or decision must be set aside if the only support found is inadmissible hearsay. *Tallman*, 1988-NMCA-091, ¶ 9. Hearsay does not qualify as substantial evidence. *Trujillo v. Emp't Sec. Comm'n of N. M.,* 1980-NMSC-054, ¶ 8, 94 N.M. 343, 610 P.2d 747 (describing legal residuum rule). "As a general proposition, hearsay is insufficient to establish a fact in an administrative proceeding." *State v. Vigil*, 1982-NMCA-058, ¶ 17, 97 N.M. 749 (citing *Chiordi v. Jernigan*, 46 N.M. 396, 129 P.2d 640 (1942); *Ferguson-Steere Motor Co. v. State Corp. Comm'n*, 1957-NMSC-050, 63 N.M. 137, 314 P.2d 894 (1957); *McWood Corp. v. State Corp. Comm'n*, 78 N.M. 319,

431 P.2d 52 (1967)). "Mere uncorroborated hearsay or rumor does not constitute substantial evidence." *Ferguson-Steere Motor Co.*, 1957-NMSC-050, ¶ 14 (citations omitted).

F. The Commission's Rules of Procedure prohibit the use of testimony from witnesses not subject to cross-examination. *See* 1.2.2.20(5)(b)(4) NMAC ("At the public hearing *all parties* and staff *shall be allowed an opportunity to present evidence and cross-examine opposing witnesses on the stipulation.*"). (Emphasis added). The Commission's Rules of Evidence require that "[a]ll witnesses must be present at the public hearing and shall adopt, under oath, their prepared written testimony, subject to cross-examination and motions to strike unless the witness's presence at the public hearing is waived by the [hearing examiner] *upon notice to and without objection from staff and the parties.*" 1.2.2.35(I)(1) NMAC (Emphasis added).

G. The purpose of the hearsay rule is to limit the danger of unreliable evidence. *Chavez v. City of Albuquerque*, 1997-NMCA-111, ¶ 7, 124 N.M. 239. By its very nature, hearsay is the testimony of a declarant who is not present, not under oath, and not subject to cross-examination. *Id.* The job of ascertaining the truth is more difficult without these indicia of trustworthiness. *Id.*

H. The substantiality of the evidence "must take into account whatever in the record fairly detracts from its weight." *Tallman*, 1988-NMCA-091, ¶ 14

(quoting *Universal Camera v. Nat'l Labor Relations Bd.*, 340 U.S. 474, 488 (1951)). The respect owed agency findings will not prevent the reviewing court from setting them aside when the record precludes the agency's decision "from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." *Tallman*, 1988-NMCA-091, ¶ 16 (quoting *Universal Camera*, 340 U.S. at 490).

I. A ruling by an administrative agency is arbitrary and capricious if it is "unreasonable or without a rational basis, when viewed in the light of the whole record." *Pub. Serv. Co. of N. M. v. N. M. Pub. Regulation* Comm'n, 2019-NMSC-012, ¶ 16, 444 P.3d 460 (quoting *Rio Grande Chapter of Sierra Club v. N. M. Mining Comm'n*, 2003-NMSC-005, ¶ 17, 133 N.M. 97).

J. In cases in which the Commission's orders do not satisfy the requirements encompassed within the "unreasonable or unlawful" guidelines established in Section 62-11-5, and the precedents explaining those guidelines, this Court has vacated and annulled the Commission's orders. *See, e.g., PNM Gas Servs.*, 2000-NMSC-012, ¶¶ 17-18 (concluding that Commission's denial of losses on reacquired debt on the ground that utility had failed to carry its burden of proving that benefits to ratepayers outweighed the cost of reacquiring debt was not supported by substantial evidence); ¶ 24 (concluding that "[b]eyond the lack of substantial evidence in the record to support [denial of recovery of reacquired debt

losses], we are troubled by the punitive aspects of the Commission's reasoning"); ¶ 25 (concluding that Commission's criticism of utility's use of imputed debt methodology was contrary to the Commission's previously established policy and precedents, and therefore unreasonable and unlawful); ¶ 66 (rejecting as speculative decision to disallow producer take-or-pay costs as lacking substantial evidence support, where Commission's conclusion rested solely on speculation); ¶ 77 (holding that Commission's decision to deny entirely rate case expenses was unreasonable and without support in the record); *N. M. Exch. Carrier Grp. v. N. M. Pub. Regulation Comm'n*, 2016-NMSC-015, 369 P.3d 1058 (holding at ¶¶ 28-33 that the Commission's decision to impose a 3% cap on surcharges was not supported by substantial evidence, and at ¶¶ 11-18 that the Commission's surcharge order was arbitrary, not supported by substantial evidence, and in clear violation of the Commission's own rules); *Plains Elec. Generation & Transmission Coop*, 1998-NMSC-038, ¶ 18 (rejecting as speculative the Commission's assertion that failure of investment "could well, and probably would, … materially and adversely affect[]" Plains' ability to provide proper utility service at fair just and reasonable rates); *Zia Natural Gas Co.*, 2000-NMSC-011, ¶ 3, 128 N.M. (holding that denial of utility's tax expense was arbitrary and that denial of cash working capital allowance as an element of rate base and the reduction of aircraft expense in rate base lacked substantial evidence support); *Attorney Gen. of N. M. v. N. M. Pub. Regulation*

Comm'n, 2011-NMSC-034, ¶¶ 18-19, 150 N.M. 174 (annulling and vacating order adopting rates under the Efficient Use of Energy Act as arbitrary and lacking support in the record because the Commission did not consider utility revenue requirements or any of the traditional elements of ratemaking).

K. The New Mexico Public Utility Act contains a policy declaration explaining that regulation is required "to the end that capital and investment may be encouraged and attracted so as to provide for the construction, development and extension, without unnecessary duplication and economic waste, of proper plants and facilities and demand-side resources for the rendition of service to the general public and to industry." NMSA 1978, § 62-3-1(B) (2008).

L. The presumption of innocence is "undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law." *Coffin v. United States*, 156 U.S. 432, 453 (1895). The presumption extends back as far as Deuteronomy and Roman law, and has existed in the common law from the earliest time. *Id*. at 454-455.

M. "The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment" and "[t]he presumption of innocence, although not articulated in the Constitution, is a basic component of a fair trial under our system of criminal justice." *Estelle v. Williams*, 425 U.S. 501, 503 (1976). The presumption of innocence is an element of Fourteenth Amendment due process and

an essential of a civilized system of criminal procedure. *Taylor v. Kentucky*, 436 U.S. 478, 486 n.13 (1978). The presumption of innocence applies in administrative proceedings in assessing credibility and supports the exclusion of hearsay evidence. *See, e.g., Steinhouse v. Workers' Comp. Appeal Bd.*, 783 A.2d 352, 357 n.4 (Penn. Commw. Ct. 2000).

N. The secrecy of criminal investigatory processes, such as grand jury proceedings, "acts as a shield by protecting innocent people under investigation from the injury to their reputations that could be caused by the disclosure of baseless accusations." 24 *Moore's Federal Practice-Criminal Procedure*, § 606.06[1] (2022). "By far the most important factor in determining the continuing need for secrecy is whether the investigation has been completed." *Id*. at § 606.06[2][b][i]. "When the investigation is continuing, all of the reasons for maintaining secrecy continue unabated, virtually precluding disclosure." *Id*.

O. "A judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed." Rule 21-209(C) NMRA. "The prohibition against a judge investigating the facts in a matter extends to information available in all mediums, including electronic." *Id.* comment 6.

P. "Except for evidence properly subject to judicial notice, a defining feature of the judge's role in an adversarial system is that the judge will consider

only the evidence presented by the parties." ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 478, at 2 (2017). "Judges must be careful not to undermine this hallmark principle of judicial impartiality, or substitute for the time-honored role of the neutral and detached magistrate someone who combines the roles of advocate, witness, and judge." *Id.* The term "judge," as used in Formal Opinion 478, includes a "member of the administrative law judiciary." *Id.* at 1, n.2.

Q. The responsibilities for avoiding conflicts between an attorney and a client rest with the attorney, not the client. Rule 16-107, NMRA.

R. The New Mexico Supreme Court has the inherent power to regulate conduct for attorneys and to determine discipline for misconduct. *See In re Treinen*, 2006–NMSC–013, ¶ 6, 139 N.M. 318. The New Mexico Supreme Court Disciplinary Board is charged with investigating attorney misconduct and taking appropriate action. *See* Rule 17-102(A) (1-2) NMRA.

S. New Mexico law encourages and promotes the resolution of legal disputes through settlement and stipulations. *See, e.g., Envtl. Control, Inc. v. City of Santa Fe*, 2002-NMCA-003, ¶ 19, 131 N.M. 450 ("Public policy encourages settlement agreements, and the courts have a duty to enforce them.") (quoting *Bd. of Educ. v. Dept. of Pub. Educ.*, 1999-NMCA-156, ¶ 14, 128 N.M. 398).

Issue3: Improper Discovery Sanction.

A. "Discovery in commission proceedings shall be governed by the New Mexico rules of civil procedure for the district courts applicable to discovery, except where such rules are inconsistent with this rule." 1.2.2.25(C) NMAC. "Staff or a party may move for an order . . . for sanctions for failure to comply with an order directing that discovery be had as provided in the New Mexico rules of civil procedure for the district courts." 1.2.2.25(J)(1) NMAC.

B. Discovery sanctions under Rule 1-037(B) require the violation of a "clearly articulated order requiring or permitting discovery." *Marchman v. NCNB Tex. Nat'l Bank*, 1995-NMSC-041, ¶ 52, 120 N.M. 74. Case management/general orders that do not include a targeted order requiring compliance with a particular discovery request generally do not suffice for purposes of imposition of discovery sanctions under Rule 37(b). *Evans v. Griffin*, 932 F.3d 1043, 1046-47 (7th Cir. 2019).

C. The choice of sanctions under Rule 1-037 lies within the sound discretion of the trial court, and it will be reversed only for an abuse of discretion. *Medina v. Found. Reserve Ins. Co.,* 1994-NMSC-016, ¶ 7,117 N.M. 163.

D. "Any person or corporation . . . which fails, omits or neglects to obey, observe or comply with any lawful order, or any part of provision thereof, of the [C]ommission is subject to a penalty of not less than one hundred dollars ($100)

nor more than one hundred thousand dollars ($100,000) for each offense." NMSA 1978, § 62-12-4 (1993).

E. The Commission violates due process rights where it raises and imposes an adverse consequence for the first time in its final order, without notice to the affected party or an opportunity for the party to respond. *Pub. Serv. Co. of N.M. v. N.M. Pub. Regulation Comm'n*, 2019-NMSC-012, ¶¶ 63-65, 444 P.3d 460.

VI. Statement Regarding Tape Recording

Evidentiary proceedings before the Commission were transcribed, not tape recorded. The video recorded open meetings were transcribed by a certified court reporter at the request of Joint Applicants.

VII. Related or Prior Appeals

There are no related or prior appeals regarding the underlying proceeding.

Respectfully submitted this 2nd day of February 2022,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellants' Statement of Issues was served in accordance with Rules 12-202(F) and 12-208(C) NMRA by email to the parties listed below on February 2, 2022:

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