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, and WESTERN RESOURCE ADVOCATES,

Intervenors-Appellees.

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

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

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ORAL ARGUMENT REQUESTED

TABLE OF CONTENTS

STATEMENT OF COMPLIANCE

Pursuant to Rule 12-318(G) NMRA, Appellants state that the body of the foregoing Joint Brief-in-Chief contains sixteen thousand, one hundred seventy-five (16,175) words in Times New Roman 14-point font, a proportionally-spaced typeface, as calculated by Microsoft Word 365, and is therefore within the limits permitted by order of the Court issued April 5, 2022.

By: */s/ Thomas C. Bird*

TABLE OF AUTHORITIES

Page

New Mexico Cases

Page

Other Jurisdictions

Rules

NMPRC Cases

Other Authorities

Page

I. INTRODUCTION

Avangrid, Inc. ("Avangrid"), Avangrid Networks, Inc. ("Networks"), NM Green Holdings, Inc. ("NM Green"), Iberdrola, S.A. ("Iberdrola"), Public Service Company of New Mexico ("PNM"), and PNM Resources, Inc. ("PNMR") (collectively, "Appellants") respectfully submit this Brief-in-Chief, pursuant to Rule 12-318 NMRA.

II. SUMMARY OF THE PROCEEDINGS

A. Nature Of The Case.

Appellants seek annulment of an order of the New Mexico Public Regulation Commission ("Commission") unlawfully denying Appellants' application for a merger and acquisition involving a New Mexico public utility. Appellants also challenge a discovery sanction.

B. Course Of Proceedings.

Following protracted litigation and negotiations ultimately yielding a stipulated settlement, the Hearing Examiner ("HE") recommended that the Commission reject the application because the risk of a deterioration in PNM's quality of service outweighed the benefits of the merger. The HE alternatively proposed modifications to the stipulation to reduce the risks, should the Commission conclude that the application could be approved. All but one of the parties either

supported or did not oppose approval of the merger with the HE's proposed modifications. The Commission voted unanimously to reject the merger.

C. Summary Of Argument.

The Court should vacate the Commission's denial of the proposed merger on three grounds. First, in weighing the benefits and risks of the proposed merger, the HE and Commission improperly placed their thumbs on the risk side of the scale by relying on inadmissible and extra-record evidence to support their conclusions, and undervalued the calculated benefits of the proposed merger. When the inadmissible and contradicted evidence relied on by the HE and Commission is excluded, what remains does not suffice for concluding that the risk of service deterioration outweighed the benefits.

Second, the Commission disregarded the agreement of Appellants and the signatories to accept the terms of the Modified Stipulation. The Modified Stipulation included all the additional benefits and protections proposed by the HE in the event the Commission decided to approve the proposed merger. The Commission improperly ignored the strong public policy favoring settlement and performed no discernible analysis of the additional benefits and protections under the Modified Stipulation.

Third, the public interest analysis in this case was internally inconsistent and is therefore arbitrary and capricious. This internal inconsistency is demonstrated by

the rejection of the proposed merger based on a potential diminution in service quality, while finding that Appellants' proposed General Diversification Plan ("GDP") complied with 17.6.450.10 NMAC ("Affiliate Rule"). Determining that the GDP complied with the Affiliate Rule necessarily meant that "it appears the utility's ability to provide reasonable and proper utility service at fair, just, and reasonable rates will not be adversely and materially affected by Class II transactions and their resulting effect[.]" 17.6.450.10(C) NMAC.

The Commission's imposition of a $10,000 discovery sanction on all Appellants must also be vacated. Avangrid responded to discovery and invoked confidentiality in good faith. These facts are unrebutted by any evidence in the record. Similarly, there is no evidence to support the Commissions' imposition of the discovery sanction on Appellants other than Avangrid when the subject discovery was not directed to nor answered by them. Moreover, by expanding the HE's proposed discovery sanctions against Avangrid in the final order to all Appellants without warning, the Commission violated the due process rights of non-Avangrid Appellants.

D. Summary Of Proceedings Relating to Proposed Merger.

In October 2020, PNMR and Avangrid agreed that an Avangrid subsidiary, NM Green, would merge with PNMR, resulting in Avangrid's ownership of all of the shares of PNMR (the "Merger"). **[1 RP 3]** Avangrid agreed to pay PNMR

shareholders $4.3 billion in consideration. **[1 RP 44]** The Merger required approvals from the Commission, the Federal Energy Regulatory Commission ("FERC"), the Public Utility Commission of Texas, the Federal Communications Commission, the Nuclear Regulatory Commission, the Department of Justice/the Federal Trade Commission, and the Committee on Foreign Investment in the United States; all but the Commission approved the Merger. **[68 RP 24232-24233, 24566]**

a. Parties, Transaction Background. PNM is a New Mexico investor-owned public utility and is wholly owned by PNMR, which is traded on the New York Stock Exchange ("NYSE"). **[78 RP 39277]** Avangrid is a leading sustainable energy company in the United States with approximately $36 billion in assets and is traded on the NYSE. **[78 RP 39275]** Avangrid's subsidiary, Networks, owns eight public utility companies operating in the northeastern United States, and Avangrid's subsidiary, Avangrid Renewables, Inc., ("Renewables") owns and operates approximately 7.5 gigawatts of renewable generation in the United States. **[78 RP 39275]**

Iberdrola is a Spanish global energy holding company providing utility services to approximately 32 million points of supply on four continents. Iberdrola owns 81.5% of Avangrid's stock. **[78 RP 39276]**

b. Application for Approval of Merger, Progress Toward Stipulation. The application for approval of the Merger included pre-filed testimony of witnesses

providing the information required by Section 62-6-12 and 17.6.450 NMAC, and described how the Merger satisfied the multi-prong test utilized by the Commission in merger cases within the last ten years. **[1 RP]** Twenty-four parties intervened in the case. Only New Energy Economy, Inc. ("NEE") actively opposed the Merger after the public hearing. **[78 RP 39274]**

Appellants ultimately committed to provide $94 million in quantifiable customer rate benefits and over $200 million in benefits from new jobs and economic development funding. **[78 RP 39291-39309]** The Merger would also benefit customers through improved financial strength for PNMR, which in turn would enhance PNM's ability to access capital and make investments necessary to provide services to customers. **[78 RP 39309-39313]** Appellants also committed to other customer and state-wide benefits, including financial and service quality protections for customers. **[78 RP 39295, 39307]** These benefits greatly exceeded the benefits in any prior merger approved under existing Commission rules and standards. **[78 RP 39273, 39293]**

After eighteen parties filed testimonies responding to Appellants' initial testimony, Appellants reached a settlement on April 21-22, 2021, with eight parties, including the New Mexico Attorney General ("NMAG"). **[13 RP 2735 – 14 RP 2792; 15 RP 2978 – 17 RP 3530; 18 RP 3565 – 21 RP 4546; 28 RP 5297-5329]** The NMAG is the statutorily-appointed advocate for residential and small business

customers. *See* NMSA 1978, § 8-5-17 (1998). The terms of the settlement significantly increased the originally proposed benefits, and included expanded consumer protections.

c. May 11th Status Conference. At a May 11 conference set to determine a hearing schedule for the settlement agreement, the HE reported that he *sua sponte* read an industry newsletter and Avangrid's Securities and Exchange Commission ("SEC") filings about penalties assessed against Avangrid-owned utilities operating in the northeastern United States. **[41 RP 16740-16742]** The HE stated his concern that the Commission had not been apprised of this publicly available information and stated his belief that Appellants had been less than forthcoming with the Commission. **[41 RP 16747-16748]**

In his May 11 Order, the HE ordered Appellants to provide the Commission information on all penalties imposed on Avangrid-owned utilities over the last five years, explain why they "had failed to notify the Commission" of such penalties, and identify the individuals at Avangrid, PNM, and PNMR who made the decision "to not notify the Commission" of these penalties. **[35 RP 6689-6707]** Appellants complied, explaining that there was no decision to "not notify the Commission" of this information because no statute, regulation, case law, or Commission precedent created a requirement to submit this information to the Commission. **[36 RP 6738-6749]**

d. June 4, 2021 Stipulation. Following the May 11, 2021 status conference, Appellants settled with additional parties in support of the Merger. Appellants and a diverse group of stakeholders filed a Second Amended Stipulation on June 4, 2022 ("June 4 Stipulation"). **[43 RP 17030-17075]** These agreements significantly increased the Merger's benefits, including among other commitments:

Customer Benefits

- $50 million in rate credits over three years;
- $6 million in residential customer arrearage relief;
- $2 million in residential assistance in remote areas for utility service;
- $15 million for low-income energy efficiency programs;
- Maintenance of PNM's existing low-income customer assistance programs, including the Good Neighbor Fund, for at least five years;
- Expansion of transportation electrification and solar energy programs;
- Pursuit of future Regional Transmission Organization participation;
- Diversity in procurement practices program by PNM

Economic Development and Community Benefits

- $7.5 million contribution to economic development projects and programs over a five-year period;
- $12.5 million ($2.5 million per year) in contributions to impacted indigenous community groups in the Four Corners region over a five-year period;
- Creation or addition of 150 full-time jobs in New Mexico over a three-year period;
- Non-utility affiliate partnership with Navajo Nation to develop 200 MW renewable energy project

Environmental Benefits

- Creation of a Carbon Reduction Task Force;
- Acceleration of carbon reduction goals where reasonable for customers;
- Creation of a Chief Environmental Officer position at PNM; and
- Studies for carbon footprint reductions in business operations by PNM.

[80 RP 39847-39848]

e. Evidentiary Challenges.

Appellants raised numerous objections to the admission of evidence and its consideration by the Commission in assessing whether to approve the settlement and Merger.

i. Updates on Avangrid Management Audits. On May 28, 2021, the Commission ordered Appellants to file bi-weekly updates and provide all related documents regarding management audits of Avangrid-owned utilities conducted by state regulators in Maine and Connecticut. **[42 RP 16890]** Appellants complied. **[44 RP 17248-17327; 50 RP 19033-19040; 51 RP 19303-19309; 53 RP 19518-19671; 58 RP 20718-20724; 65 RP 22473-22543; 74 RP 37604-37610; 77 RP 38990-38996; 79 RP 39764-39793; 80 RP 40289-40295; 81 RP 40388-40394, 40445-40458]**

ii. Notice of Investigation in Spain. Mindful of the Commission's criticisms for not proactively providing publicly available information about Avangrid, Appellants voluntarily filed a "Notice Regarding Proceedings in Other Jurisdiction," on June 24, 2021, notifying the Commission that Iberdrola's Chairman and certain other executives were named as investigated parties in a proceeding in Spain. **[50 RP 19007-19014]** Under Spanish law, being an investigated party requires participation in an investigation, but does not mean the person is or is likely

to be charged with a crime. **[54 RP 19866-19868]** None of Iberdrola's executives have been indicted, charged with, or convicted of a crime. **[54 RP 19866-19868]**

NEE moved to compel production of confidential information related to the ongoing investigation. **[52 RP 19310-19478]** Appellants opposed the motion because the information was highly confidential and was not likely to lead to admissible evidence. **[54 RP 19859-19885]** An expert in Spanish criminal law attested that under Spanish law the facts underlying such investigations are considered confidential until the initiation of the trial phase in order to protect the presumption of innocence of investigated individuals. **[54 RP 19868-19870, 19874-19881]**

The HE ordered Appellants to provide certain information to NEE, and to submit testimony answering the Commission's questions about the Spanish investigation. **[56 RP 20623-20629]** The HE ordered Iberdrola to provide the Commission under seal with Spanish court records that are secret under Spanish law. **[59 RP 21245-21246]**

iii. Attorney Marcus Rael. On July 23, 2021, NEE asked the HE to issue a subpoena to attorney Marcus Rael ("Rael") for deposition and appearance at the hearing. **[58 RP 20725-20754]** Rael never entered an appearance in the case and was separately retained by Iberdrola to assist in negotiating possible settlement terms with various parties, including Bernalillo County and the NMAG. **[58 RP 20765-**

20767] Claiming that Rael had a conflict of interest, NEE sought to undermine the June 4 Stipulation by alleging unethical conduct between Rael and NMAG Hector Balderas. **[58 RP 20726-20734]** Iberdrola, Bernalillo County, and the NMAG attested that Rael's involvement in settlement negotiations did not pose a conflict of interest. **[62 RP 21924-21935, 22002-22014; 63 RP 22048-22057]** Despite the fact that Rael had not appeared before the Commission, the HE found that a conflict existed, ordered Iberdrola to immediately cease utilizing Rael's services for the Merger, and reserved the right to consider this "disqualification" when weighing the merits of the stipulation. **[64 RP 22343-22376]** NEE also reported the alleged conflict to this Court's Disciplinary Board, which found that no conflict existed. **[65 RP 22595-22608]** Appellants filed the conclusions of the Disciplinary Board with the Commission. **[72 RP 34118-34127]**

f. Motions to Strike, *in Limine*. Appellants filed a motion *in limine* on July 30, 2021, seeking to exclude, principally on hearsay grounds, multiple items from evidence, including information related to the investigation in Spain, the management audit filed with Maine regulators related to a Networks utility, and the conflict allegations against Rael. **[62 RP 21936-21957]**

Appellants also moved to strike pre-filed testimony of NMAG witness Scott Hempling ("Hempling"), prepared prior to settlement with the NMAG. **[62 RP 21950-21951]** During the proceedings, FERC hired Hempling as an administrative

law judge, thereby preventing him from appearing as a witness. **[62 RP 21950-21951]** Hempling could not be cross-examined on his pre-filed testimony as required by Commission rules. *See* 1.2.2.32(A)(1) NMAC; 1.2.2.35(B) and (I)(1) NMAC. The HE admitted the testimony into the record over Appellants' objections. **[65 RP 22386-22420]** In reaching its ultimate findings and conclusions, the Commission expressly relied on all the evidence Appellants moved to exclude.

g. Hearing. At the August hearing, the signatories confirmed their support for the June 4 Stipulation and indicated general support for Appellants' additional regulatory commitments and customer protections developed during the course of the hearing at the request of several non-signatories. The parties submitted post-hearing statements and briefs with their final positions on the June 4 Stipulation and additional agreed provisions for Merger approval. **[77 RP 39010-39063; 78 RP 39064-39249, 39260-39557; 79 RP 39558-39575]** Signatories continued to support the June 4 Stipulation and generally supported the newly-added regulatory commitments and customer protections developed during the hearing. Non-signatories either supported or did not oppose the Merger, conditioned on the newly-added regulatory commitments and customer protections. NEE opposed the Merger and the stipulated agreements. **[78 RP 39430-39557]**

h. HE's Recommendations. The HE issued his Certification of Stipulation ("Certification") recommending denial of the Merger based on findings that 1) there

was no settlement among the parties **[80 RP 39872]** and 2) the unquantifiable risks of the Merger to PNM's customers outweighed the demonstrated benefits. **[80 RP 39844-39845]** These recommendations rested largely on evidence that Appellants sought to exclude. **[80 RP 39849-39860]**

In the alternative, the HE proposed additional provisions the Commission should require of Appellants if the Commission decided to approve the Merger. **[80 RP 39862-40077]** The HE compiled these additional provisions in Appendix 2 of the Certification (the "Modified Stipulation"). **[80 RP 40139-40196]** The additional provisions had been raised and largely agreed to by Appellants at the hearing and no party other than NEE disputed the efficacy of the additional provisions. The HE recommended that the Commission direct the signatories to adopt the Modified Stipulation as a condition of Merger approval. **[80 RP 40091]** The HE also recommended a sanction against Avangrid, in the form of attorneys' fees for NEE, for Avangrid's discovery responses. **[80 RP 39973-39988, 40091]**

i. Exceptions. Appellants took exception to the primary recommended findings that there was no settlement agreement and that the Merger should be rejected regardless of the additional agreements and strengthened protections. **[80 RP 40308-40311]** Appellants also excepted to the recommendation to impose a discovery sanction on Avangrid. **[80 RP 40323-40324]**

Appellants agreed to all of the additional protections proposed by the HE and urged the Commission to adopt the Certification's alternative for approval. **[80 RP 40325-40327]** Additionally, all of the other signatories to the stipulation confirmed that they agreed that the Commission should approve the Merger and provided written affirmation that they accepted the Modified Stipulation. **[80 RP 40296-40303]**

j. Commission Deliberations, Decision. The Commission deliberated about the Merger on December 1, and December 8, 2021. **[SRP 1-330]** At one meeting, a Maine legislator, Seth Berry, provided public comment urging the Commission to reject the Merger. **[SRP 41-44]** Berry is a proponent of government-owned utilities. **[62 RP 21940]** Berry was not a witness, not under oath, and not subject to cross-examination. **[62 RP 21940-21943]**

During deliberations, one Commissioner expressed concern about the Merger because Berry had called the Commission to urge denial. **[SRP 314-315]** The Commission's regulations expressly prohibit consideration of public comment as evidence in reaching a decision. *See* 1.2.2.23(F) NMAC.

The Commission adopted the HE's finding that there was no stipulation, despite the fact that every signatory confirmed they had a stipulated agreement to approve the Merger and accepted the Modified Stipulation. **[81 RP 40426-40428, 40433]** The Commission also adopted the finding that the unquantifiable risks of the

Merger outweighed its benefits. **[81 RP 40426-40428, 40433]** The Commission rejected the Merger and imposed a $10,000 penalty on Appellants as a discovery sanction. Appellants timely appealed. **[81 RP 40433]**

E. Summary Of Evidence Commission Relied On In Rejecting Merger.

The Commission assessed the merits of the Merger using a six-factor test:

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

[80 RP 39838-39839; 81 RP 40427] ("Six-Factor Test")

The Commission's analysis of Factor 1, benefits to utility customers, discounted customer benefits by implying that they are outweighed or invalidated by benefits that result for Appellants, their affiliates, shareholders and executives. **[80 RP 39845]** (noting the Merger was designed to provide a "beachhead" to develop non-utility activities, that PNMR shareholders would receive $391 million more than the market value of PNMR's stock, and that three PNMR officers would receive approximately $29 million in "Golden Parachute compensation.").

The HE stated that the Merger "was not designed to benefit PNM customers" because it was not intended to achieve synergies that provided cost savings. **[80 RP 39846]** The HE posited the primary customer benefit was "supposed to be PNM's

link to a large, financially stable [Iberdrola/Avangrid] group of companies that can provide access to financing on more reliable and less costly terms than are available through PNMR." **[80 RP 39846]** The HE observed that evidence of a recent downgrade of Avangrid's credit rating by a single credit rating agency cast doubt on this benefit. **[80 RP 39896-39897]**

The HE then addressed what he characterized as an "independent set of rate and economic development benefits" proposed by Appellants. **[80 RP 39846]** Despite the uncontested fact that approval of the Merger would result in these benefits, the HE concluded that "[t]he benefits do not result from the Proposed Transaction (i.e., the merger and acquisition). The benefits were designed and proposed to be comparable to the level of benefits deemed sufficient to gain Commission approval in other merger cases." **[80 RP 39846]**

The HE rejected comparisons between the benefits offered in this case and the benefits in three recently approved mergers that satisfied the public interest standard with significantly less substantial commitments. **[80 RP 39848-39849]** The HE appeared to reject the comparisons because one of the protections in the El Paso Electric Company ("EPE") merger included an agreement by EPE for a majority independent board, and Appellants had resisted such a requirement. **[80 RP 39848-39849]**

In applying Factor 2, preservation of the Commission's jurisdiction, Iberdrola was joined as a party and committed to be subject to the Commission's jurisdiction for as long as it indirectly owns PNM. **[80 RP 39911-39914]** The HE acknowledged that the Commission would have access to the books and records of affiliates as necessary to regulate PNM's utility activities; PNM's continuing status as a fully regulated public utility was uncontested. **[80 RP 40081]**

Regarding Factor 3, risk of diminishment in the quality of utility service, the HE concluded that "[i]f 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." **[80 RP 39850]** The HE based this prediction on a the Governor of Maine's hearsay statement that the service of Central Maine Power Company ("CMP") was "abysmal," poor customer service satisfaction ratings for Avangrid subsidiaries, $65 million in disallowances and penalties assessed against Avangrid subsidiaries since 2016, legislation in Maine vetoed by the governor to replace CMP with a government-owned utility, and the management audit commissioned by the Maine Public Utilities Commission ("MPUC") "to study the extent to which CMP's problems stem from the [Iberdrola/Avangrid] organizational structure." **[80 RP 39850-39851]** The HE also pointed to Appellants' testimony objecting to a Staff proposal that PNM be the sole New Mexico utility subject to stringent new reliability metrics and

significant penalties even though PNM's service reliability consistently matched or exceeded the other utilities. **[80 RP 39851]** Appellants ultimately agreed to Staff's reliability condition in the Modified Stipulation. **[80 RP 40325-40326]**

In discussing Factor 4, possible subsidization of non-utility activities, the HE wrote that Avangrid's "aggressive non-utility growth strategy presents a special risk that decisions made in the [post-acquisition] integration process could result in PNM ratepayers subsidizing" Avangrid non-utility activities through preferential inter-affiliate agreements. **[80 RP 39852]** PNM witness Joseph Tarry testified that the services to be provided by affiliates and the charges for them would be determined during the post-acquisition integration process, and the Commission would still determine the recovery of inter-company charges as it currently does with PNMR. **[71 RP 33352-33353]**

Considerations bearing on Factor 5, careful verification of the qualifications and financial health of the new owner, included the assets and 2019 net profit/income of Iberdrola ($143 billion, and $3.8 billion net profit) and Avangrid ($35 billion, and $700 million net income). **[80 RP 39852-39853]** Iberdrola is a global utility with more than 170 years of experience in the electricity and gas businesses. **[80 RP 39852-39853]** Iberdrola and its subsidiaries provide regulated utility services in the United States, Spain, the United Kingdom, Brazil, and Mexico. Avangrid owns eight regulated electric and gas utilities through a subsidiary, serving more than 3.3

million customers throughout the Northeast. **[80 RP 39853]** Its other subsidiary, Renewables, is the third largest wind and solar power operator in the United States. One credit rating agency out of three [Moody's Investor Investor Services ("Moody's"), but not Standard & Poors Global Ratings ("S&P") or Fitch] downgraded Avangrid's credit rating in July, 2021, resulting from Moody's concern about Avangrid's expansion into non-utility projects. **[80 RP 39853]**

The HE's analysis of Factor 5 relied on a management audit commissioned by the MPUC, following billing system and customer service issues, which identified a potential risk that CMP will not be provided with adequate resources and problem responses from its parent affiliates because of its small part in the "vast Iberdrola family." **[80 RP 39853]** The audit cited Iberdrola's "aggressive" acquisition strategy and several recent acquisitions, and the HE concluded "[t]he risks cited in the Maine Audit are a concern for PNM and its customers as well." **[80 RP 39854]**

The HE also cited the criminal investigation in Spain as reason for concern about the qualifications of Iberdrola and Avangrid, stating "the criminal investigation is relevant as it may reflect the culture of the [Iberdrola/Avangrid] group of companies. PNM needs to maintain its culture of respect for state and federal law." **[80 RP 39854]** The HE also concluded that the criminal investigation was relevant because he was concerned that the Avangrid board would control

appointments and removals of PNM directors, and Iberdrola executives hold six of 14 seats on the Avangrid board; the Chairman and CEO of Iberdrola, who is participating in the investigation, is also the Chairman of Avangrid and participates in appointing and removing directors on the boards of Avangrid's subsidiaries; and Iberdrola and Avangrid allegedly exert influence over activities of Avangrid's subsidiaries by mandating cost cuts at the expense of service. **[80 RP 39854-39855]** The HE also speculated that the criminal investigation suggested the possibility that a utility's records might be altered or falsified, which would undermine the Commission's ability to regulate. **[80 RP 39855]**

"Although not rising to the level of criminality," activities of a CMP-funded Political Action Committee ("PAC") raised "similar concerns," the HE wrote. **[80 RP 39855]** The PAC hired investigators and consultants, all in compliance with Maine law, to research and "allegedly interfere with" Maine residents opposed to a transmission line proposed by CMP. **[80 RP 39855]**

The HE cited an ongoing and incomplete MPUC investigation into complaints that CMP had increased costs charged to renewable energy developers in violation of agreements, as reflecting on the "technical qualifications" of Appellants. **[80 RP 39855]** The HE also relied on Avangrid's "initial failure to disclose in this case the service problems of its Northeast utilities." This "failure" resulted in the cancellation and rescheduling of the May 4-12 hearing. **[80 RP 39856]** The HE also pointed to

incomplete discovery and failure to supplement discovery, overbroad confidentiality requests, incomplete responses to the May 11 Order requiring disclosure of enforcement measures and penalties against Avangrid's utility subsidiaries, use of non-record evidence of additional stipulations (with Staff) in a post-hearing brief, and employment of Rael and his disqualification by the HE. **[80 RP 39856]**

The HE also relied on "compliance issues" involving two Renewables-owned projects, the 298 MW El Cabo wind farm and the La Joya wind farm. **[80 RP 39856-39857]** The HE concluded that the El Cabo wind farm was sized at 298 MW for the alleged purpose of "avoiding the Commission location control review for projects sized at 300 MW or greater." The non-compliance related to the La Joya wind farm involved its failure to provide certain documentation. The HE concluded "[t]he violation and skirting of Commission rules and orders in the course of this proceeding indicate that a significant effort would be required to enforce the terms and conditions attached to any approval of the Proposed Transaction." **[80 RP 39857]**

In addressing Factor 6, relating to customer protections, the HE concluded that Appellants had not proposed "adequate protections." **[80 RP 39857]** The HE discussed the insistence of Iberdrola and Avangrid on controlling the PNM board as a reason for concern about the risk of a deterioration in service quality. The HE decided that "[a] primary cause of the service problems affecting customers of

[Avangrid] Northeast utilities appears to have been [Avangrid] insistence that the utilities cut resources to meet [Avangrid] 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 and Iberdrola]." **[80 RP 39857]**

In recommending outright rejection of the Merger, the HE relied on Appellants' "resistance" to "establishment of meaningful measures to maintain or improve the reliability of PNM's service to its New Mexico utility customers;" non-compliant behavior of Iberdrola, Avangrid, and Renewables in other jurisdictions, New Mexico, and this proceeding; the risk that the needs of Renewables may take priority over the resource needs of PNM for providing reliable utility service; and the risk that PNM will prefer Renewables over other renewable resource providers, thereby slowing the development of renewable energy in New Mexico and driving up the price for such resources. **[80 RP 39857-39860]** The HE also observed that "[t]here is no agreement among the parties … on the protective measures to address these harms and no agreement on their adequacy." **[80 RP 39860]**

The HE alternatively recommended a series of modifications, compiled in the Modified Stipulation, the Commission should adopt if it wanted to approve the Merger. **[80 RP 39862-39863]** Most notably, the HE recommended a majority independent board for PNM and stringent new service quality standards and penalties proposed by Staff. **[80 RP 40020-40031, 40044-40046]** Through the

exceptions process, Appellants and all the signatories to the June 4 Stipulation agreed to all of the modifications proposed by the HE. **[80 RP 40296-40332]**

F. **Facts and Proceedings Related to Discovery Sanction**.

During eight months of discovery, Appellants responded to 49 sets of written discovery requests with a total of 1,278 questions (including subparts). **[80 RP 40324]** Under 1.2.2.25(C) NMAC, the Commission's discovery practices are governed by the New Mexico Rules of Civil Procedure unless otherwise provided. The Commission places no limits on the number of discovery questions a party may serve. The HE shortened the response time to ten days, rather than the fifteen days provided under Commission procedural rules. *See* 1.2.2.25(E)(3) and (F)(4) NMAC. NEE and the NMAG sought discovery about operational concerns for, and fines levied on, Avangrid-owned utilities by regulators in northeastern states. Avangrid's answers included information identifying superstorm-related outage investigations in New York and Connecticut and an investigation in Maine related to CMP's difficulties with a billing program roll-out. **[45 RP 17376-17377]**

Following the May 11 status conference, NEE asked the Commission to sanction Appellants for Avangrid's incomplete answer to an NEE discovery request related to civil penalties imposed on Avangrid-owned utilities and for excessive claims of confidentiality regarding discovery materials. **[41 RP 16765-16835]** NEE asked for sanctions without first filing a motion to compel as required by

Commission rules, and despite Avangrid's previous offer to NEE to supplement the response. **[43 RP 17019-17025]** Appellants' response in opposition explained that, while Avangrid may have inadvertently missed some information in interpreting and responding to NEE's interrogatory, 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 received the inadvertently omitted information. **[43 RP 17023-17025]** Avangrid also supported claims of confidentiality as required by discovery rules and the protective order. **[43 RP 17023-17025]** Finally, Appellants noted NEE's request for sanctions ignored Commission rules requiring both a motion to compel to be filed first and a subsequent violation of an order compelling production. *See* 1.2.2.25(J) NMAC; *see also* Rule 1-037(A)(4) NMRA. **[43 RP 17018-17029]**

The HE ordered Appellants to file testimony addressing their compliance with discovery rules in responding to NEE's discovery and whether penalties should be imposed if a violation was found. **[45 RP 17380-17382]** The other parties were directed to file responsive testimony. **[Id.]** The HE ordered that the "issue of whether to order sanctions and/or administrative penalties and the amount thereof shall be litigated through examination of the above testimony at the hearings scheduled to start on August 11." **[45 RP 17382]**

At hearing, the HE admitted testimony from Robert Kump, Avangrid's President, explaining Avangrid's good faith efforts to properly respond to discovery,

the bases for the claims of confidentiality, and the reasons why sanctions were not warranted. **[69 RP 25165-25180]** No party filed testimony in response to Kump. Notwithstanding Avangrid's unrebutted demonstration of good faith, the HE found that the violations were "willful and that sanctions are appropriate." **[80 RP 39988]** The HE acknowledged that NEE failed to file testimony as directed but nonetheless recommended that NEE be awarded its attorneys' fees. **[Id.]** The HE recommended sanctions only against Avangrid. **[80 RP 40091]**

Appellants excepted to the proposed sanction against Avangrid. **[80 RP 40323-40324]** The Commission agreed with Appellants that an award against Avangrid of attorneys' fees to NEE was improper. **[81 RP 40431, ¶48]** Nonetheless, the Commission imposed sanctions against all Appellants, not just Avangrid as proposed by the HE, in the amount of $10,000 to be paid to the State. **[81 RP 40433, ¶ D]** The Commission provided no explanation for why it expanded the proposed sanctions to all Appellants based on Avangrid's responses to discovery.

III. ARGUMENT

A. THE COMMISSION'S REJECTION OF THE MERGER DOES NOT PASS WHOLE RECORD SUBSTANTIAL EVIDENCE REVIEW.

STANDARD OF REVIEW: 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. 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. 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.

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, 294). 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.

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. ABF*, 1988-NMCA-091, ¶¶ 7, 9, 108 N.M. 124 (*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). "In effect, 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.*

This Court maintains 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. The Commission has codified this "legal residuum" rule in its Rules of Evidence. *See* NMAC § 1.2.2.35(A)(2). 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.

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).

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).

STATEMENT OF PRESERVATION: Appellants preserved their challenges to the Commission's rejection of the proposed merger through the litigation process described in Part II D, above.

The Commission erroneously disregarded and discounted the benefits of the Merger, while relying on inadmissible and improper evidence to arrive at an exaggerated assessment of its risks. The Court should vacate the Commission's unreasonable and unlawful decision to reject the Merger.

1. The Commission Unlawfully and Unreasonably Discounted the Benefits of the Merger.

The Modified Stipulation included all of the benefits outlined in the June 4 Stipulation and additional benefits recommended by the HE, in the event the Commission decided to approve the Merger. **[80 RP 40296-40332]** The Commission failed to undertake a serious analysis of the totality of the unparalleled benefits for utility customers and the public. Instead, one Commissioner characterized the benefits as "fool's gold." **[SRP 170]**

In conducting the whole record substantial evidence review of the Commission's decision, the Court must consider the evidence of benefits the Commission denigrated, to determine whether the rejection of the Merger was reasonable. *See PNM Gas Servs.*, 2000-NMSC-012, ¶ 4. The Modified Stipulation includes substantial protections and benefits for customers, and significant public benefits. In the weighing process for mergers, both quantifiable and unquantifiable benefits are to be considered. *See, e.g.,* Case No. 04-00315-UT, Certification of Stipulation, 17 (May 26, 2005), adopted by Final Order Approving Certification of Stipulation (June 7, 2005). The magnitude of the Merger's benefits underscores the unreasonableness of the Commission's decision that the risks of diminished service outweighed them. What follows is a summary of some of the more significant benefits that the Commission unreasonably rejected.

a. Rate Benefits for PNM Customers. Under the Modified Stipulation, PNM customers would receive overall rate benefits of $94 million consisting of: $67 million in rate credits over three years allocated on a per customer basis; $10 million in residential customer arrearages forgiveness; $2 million to provide electricity to new customers in remote areas; and $15 million for low-income energy efficiency programs. PNM would also forgo filing a new rate case before December 1, 2022, and maintain its existing low-income assistance programs, including the Good Neighbor Fund, for at least five years. **[80 RP 40150, 40156-40157]**

The $67 million rate credit surpasses the rate credits approved by the Commission in other recent utility merger and acquisition transactions. In TECO Energy, Inc.'s ("TECO") acquisition of New Mexico Gas Company ("NMGC"), the customer rate credit was estimated to total $11 million for the period from October 1, 2014, to December 31, 2017. Case No. 13-00231-UT, Certification of Stipulation, 29 (June 30, 2014), adopted by Final Order (Aug. 13, 2014) ("Case No. 13-00231-UT CS"). The subsequent acquisition of TECO by Emera Inc. yielded an additional $2 million rate credit. Case No. 15-00327-UT, Certification of Stipulation, 16-17 (June 8, 2016) ($4 million per year rate credit would expire after two years), approved by Order Adopting Certification of Stipulation (June 22, 2016) ("Case No. 15-00327-UT CS"). In the most recent acquisition involving EPE, the customer rate credit was $8.7 million over three years. Case No. 19-00234-UT, Amended

Certification of Stipulation, 27 (Feb. 12, 2020), approved by Final Order Adopting Amended Certification of Stipulation (Mar. 11, 2020) ("Case No. 19-00234-UT CS").

Appellants engaged an expert to analyze and compare the rate credits in previous New Mexico transactions, and other merger transactions dating from 2017, with the rate credits offered in this case. The expert's analysis confirmed that the rate credits in this case are substantially greater than the median rate credits provided in the other merger transactions offering rate credits, including those approved in the EPE and the NMGC/TECO acquisitions. **[69 RP 25817]** Based on the $65 million rate credit at the time of the expert's analysis, the rate benefit was $122.64 per customer compared to the median rate benefit of $50.94 per customer in the other transactions. **[69 RP 25817-25818 Fig. 1]** The EPE rate credit was $86.14 per customer, and the NMGC rate credits represented $27.53 per customer. **[69 RP 25824 Table 1]** Staff Witness Reynolds calculated that Appellants would need to offer rate credits of $49.6 million to provide the same relative benefit approved in the EPE merger. **[74 RP 37140]**

Contrary to the Commission's analysis in prior mergers, the HE characterized the amounts to be received by customers as "relatively small." **[80 RP 39860]** The HE departed from established precedent and engaged in new and irrelevant comparisons by weighing customer benefits against the $2.3 billion that Avangrid

offered to pay above PNMR's book value, and the $391 million above market value for PNMR's shares. **[80 RP 39845]** The HE downplayed customer benefits by pointing out that PNMR departing officers would receive approximately $29 million in "Golden Parachute compensation." **[80 RP 39845]** However, this compensation will be paid by PNMR shareholders who voted to approve the merger, not customers. **[72 RP 33259-33260]**

These comparisons are both unprecedented and inapposite in assessing the adequacy of the Merger benefits. A utility customer is "not a partner or beneficiary of the utility. ... By paying bills for service [customers] do not acquire any interest, legal or equitable, in the property used for their convenience or in the funds of the company." *Gas Co. of N.M. v. N.M. Pub. Serv. Comm'n*, 1984-NMSC-002, ¶ 13, 100 N.M. 740; *see also CFRE v. N.M. Pub. Reg. Comm'n*, 2022-NMSC-010, ¶ 57, 503 P.3d 1138 (recognizing that requirement of fair, just and reasonable rates does not clearly express an intent to confer contractual or vested rights on energy consumers; rather, legislative policy requires regulation and supervision of public utilities' rates and services).

The Commission has not engaged in similar comparisons in assessing the benefits of past mergers. *See* Case No. 13-00231-UT CS, 28-31, 55; Case No. 15-00327-UT CS, 16-17, 37; Case No. 19-00234-UT CS, 27-29, 39-41, 61-62. This new method of comparing customer rate credits to the valuation of PNM's parent holding

company PNMR is an unfounded and improper departure from longstanding Commission policy in the assessment of the relative benefits of a proposed merger when compared to its costs. As this Court has held, the Commission "is not free to disregard its own rules and prior ratemaking decisions or 'to change its position without good cause and prior notice to the affected parties.'" *PNM Gas Servs.,* 2000-NMSC-012, ¶ 9.

b. Economic Development Benefits. Appellants developed a comprehensive and unmatched set of economic development benefits in this case. A primary benefit is the commitment to develop 150 new full-time jobs in New Mexico within three years of the Merger closing: at least 130 jobs will be non-PNM employed positions and at least 20 jobs are new positions for PNM craftsmen. The new jobs would be maintained for at least five years, with average annual wages of $88,000. Based on compliance reporting requirements, every job shortfall would require Appellants to pay $80,000 to PNM's Good Neighbor Fund. The costs of the new PNM jobs would not be included in rates without approval of the Commission. **[80 RP 40150-40151]**

Appellants' expert analyzed the economic impact from the 150 new jobs and estimated that an additional secondary 255 jobs could result, and the total economic impact for the state as a whole would be over $200 million. **[69 RP 25784-25786]**

Despite the very specific requirements relating to the new jobs in the Modified Stipulation, including detailed compliance reports, the Commission dismissed the new jobs as "not sufficiently defined" and "difficult-to-enforce." **[80 RP 39861]**

In terms of direct monetary support to the state economy, Appellants agreed to contribute $15 million to economic development projects in New Mexico over five years, and $2 million in educational aid. Appellants also agreed to fund $12.5 million over five years for economic development projects by indigenous community groups in the Four Corners region. **[80 RP 40152-40154]** Appellants' direct funding of $27.5 million for economic development exceeds the amounts of economic development funding in the EPE and NMGC/Emera transactions. *See* Case No. 19-00234-UT CS, 25 (economic development contribution of $20 million over 20 years); Case No. 15-00327-UT CS, 21-22 ($5 million of economic development funding, $5 million to build a pipeline to Mexico; $10 million matching fund for bring gas to underserved communities). **[69 RP 25824]**

Other significant economic development benefits include the development of a non-utility renewable energy generation project of at least 200 MW on the Navajo Nation within two years; utility procurement programs to enhance participation by local and women and minority owned businesses; and improved internet access by allowing free attachments to certain PNM utility poles. **[80 RP 40154, 40155, ¶ 6, 40156 ¶ 9, 40185]** One Commissioner criticized Appellants for not presenting any

renewable energy development plans, despite the identified Navajo Nation project. **[SRP 151]** The Commission also worried that renewable energy affiliate transactions would stifle renewable energy development. **[SRP 173]** One Commissioner went so far as to suggest Avangrid choose between owning PNM or allowing Renewables to operate in New Mexico. **[SRP 122-123, 176]** This suggestion ignored that Interwest Energy Alliance, a trade association for renewable energy developers, was a signatory to the stipulation **[3 RP 1926-1929; 43 RP 17030-17075]**; ignored that affiliate energy transactions are regulated by the FERC **[72 RP 34950-34952]**; and further ignored the affiliate transaction reporting and protections contained in the Modified Stipulation and Commission's rules. **[80 RP 40169-40177]**

The Commission characterized these substantial and comprehensive economic development benefits as "insufficient when compared to PNM customers' longer-term interests in reliable service." **[80 RP 39861]** This criticism ignored the benefits to customers from the commitment to maintain or increase existing levels of investment in utility infrastructure and to meet stringent reliability metrics that are not required of, nor met by, other utilities in New Mexico. The Commission did not make such a comparison in the EPE case, relying on a single statement of the utility as sufficient to ensure reliable service. Case No. 19-00234-UT CS, 45-49. As

discussed below, the Commission's stated concerns about future reliability are speculative and based on consideration of improper evidence.

c. New Environmental Benefits. Appellants negotiated with several parties to develop comprehensive commitments for fostering sustainability and accelerating carbon reduction in PNM's electric service, consistent with, and even exceeding, New Mexico's carbon reduction goals. To assure corporate accountability, PNM agreed to appoint a Chief Environmental Officer and tie executive compensation to goals for achieving and exceeding PNM's 2040 carbon reduction targets. **[80 RP 40183-40184, ¶ 44, 40186, ¶ 49]** The Modified Stipulation would also establish a Carbon Reduction Task Force consisting of stakeholders and state government representatives to conduct environmental studies and develop strategies for exceeding carbon reduction goals at a reasonable cost for customers. **[80 RP 40182-40183, ¶ 43, 40185-40186, ¶ 48]** Other commitments aimed at reducing carbon emissions included PNM's agreement to identify material emissions impacts resulting from new contracts; to explore and if feasible join, subject to Commission approval, a Regional Transmission Organization; and to expand PNM's transportation electrification and renewable energy programs. **[80 RP 40184, ¶ 45; 40181-40182, ¶ 42, 40187, ¶ 51]**

The Commission took the unprecedented step in this case of administratively noticing climate change, its likely causes and likely consequences. **[50 RP 18986-**

18991] The Commission recognized that, unless greenhouse gas emissions are quickly and substantially curtailed, the adverse consequences for public health, welfare and safety, the economy, the environment and all living things are likely to be severe, widespread and irreversible. **[Id. 18988]** Despite taking administrative notice of the urgent need to address climate change, the Commission dismissed the stipulated benefits for carbon reduction as merely "worthy goals," but "lack[ing] enforceable near-term results that are sufficient to outweigh PNM's customers' immediate interests in reliable service at just and reasonable rates." **[80 RP 39861]** Again, the Commission discounted benefits through false comparisons to perceived "better" objectives.

d. Financial Benefits. The record also shows that the Merger would provide significant financial benefits for PNM and its customers as a result of becoming part of a larger and financially stronger enterprise with generally higher credit ratings than PNM and PNMR. **[71 RP 33810]** PNMR is PNM's sole source of equity. **[71 RP 33811]** Each has individual credit ratings and is separately rated by Moody's and S&P with issuer credit ratings at the lower end of the investment grade scales. **[71 RP 33812]** The financial benefits of the proposed merger were independently confirmed; following the announcement of the proposed merger, S&P upgraded the credit outlooks for both PNMR and PNM from "stable" to "positive." **[71 RP 33813, Table EL-1, 33850-33855]**

In the opinion of Appellants' financial expert, Ellen Lapson, Avangrid is regarded as a sound and low-risk participant in the U.S. utility market, with more than 60% of its cash flow resulting from utility operations in diverse regulatory jurisdictions. Avangrid's non-utility renewable business involves long-term agreements with creditworthy purchasers. Iberdrola is highly regarded within the European Union and globally, and both Avangrid and Iberdrola have a demonstrated track record of successfully raising money in the debt capital and short-term funding markets. **[71 RP 33814-33815]**

At the time this case was filed, Iberdrola and Avangrid's S&P ratings were one notch higher than PNMR, and their Moody's ratings were two notches higher. **[71 RP 33815 and Table EL-2]** The HE noted that Moody's downgraded Avangrid by one notch. **[80 RP 39896-39897]** However, as Lapson confirmed, even with the downgrade, Avangrid's S&P and Moody's credit ratings remained higher than PNMR's. **[71 RP 33916-33917]** Significant to this case, all of Avangrid's utility subsidiaries with published credit ratings are financially strong and have higher credit ratings than PNM. **[71 RP 33898, 33899, Table EL R-3]** Appellants also agreed that PNM would maintain its own bond credit and debt ratings with at least two nationally recognized rating agencies. **[80 RP 40170-40171, ¶ 27]** Furthermore, under the Modified Stipulation, all of PNMR's debt would be extinguished within 90 days and PNMR would remain debt-free as long as it is owned by Avangrid or

unless otherwise authorized by the Commission, which benefits PNM's credit status. **[80 RP 40168, ¶ 20]**

Based on the greater financial strength and generally higher credit ratings of Iberdrola and Avangrid, and Avangrid's commitment to eliminate PNMR's debt, Lapson concluded that S&P was likely to upgrade PNM's credit rating. She also believed it was likely that Moody's would upgrade PNMR's credit rating following the merger with the possibility that PNM's credit rating could also be upgraded upon a showing of improvement in PNM's individual credit metrics. **[71 RP 33816-33818]** Lapson maintained this opinion even after Avangrid's one-notch credit downgrade. **[71 RP 33918]** The higher credit ratings provide customer benefits in the forms of PNM's lower cost of borrowing and greater access to needed capital for utility investments and operations. **[71 RP 33810-33811, 33819-33820]**

While actual customer savings due to higher credit ratings are not quantifiable with precision, for illustrative purposes, Lapson calculated that PNM's customers could save an estimated $21.5 million over ten years from a one-notch improvement in PNM's credit rating. **[71 RP 33913-33915, Table EL-1]** Staff's financial expert, Marc Tupler, agreed that PNM's credit metrics are likely to improve because of the Merger with resulting benefits to customers in the form of better credit terms and a lower cost of debt. **[74 RP 37041-37042]** The Commission failed to analyze this additional evidence.

In assessing the benefits of PNMR and PNM becoming part of a larger and financially stronger enterprise, the HE concluded that there were "pluses and minuses" and that "the Commission should be skeptical about the extent to which the [Iberdrola/Avangrid] group will benefit PNM financially." **[80 RP 39897]** This skepticism is based largely on testimony submitted by NMAG witnesses Hempling and Andrea Crane ("Crane") before the NMAG negotiated increased benefits and protections as a signatory to the June 4 Stipulation and supporter of the Merger. **[80 RP 39894-39897]** As discussed below, the HE and Commission improperly relied upon the Hempling testimony as he never adopted it under oath or appeared for cross-examination. Crane thereafter testified in support of the Merger, confirming that whatever initial skepticism she expressed, it was resolved through the enhanced regulatory commitments developed after her initial testimony. **[72 RP 34852-34883]**

The HE largely ignored Crane's testimony in support of the Merger. Crane confirmed the financial benefits of the Merger, noting the "proposed acquisition would provide PNM with expanded access to capital as it transitions to carbon-free general resources and strengthens its transmission grid to accommodate increasing reliance on renewable energy." **[72 RP 34854]** In assessing the fifth Commission standard for approval of mergers relating to the financial health of the new owner, Crane testified that from the beginning she has been satisfied that Avangrid has sufficiently strong financial metrics to be a suitable holding company for PNM, and

that given the regulatory commitments in the June 4 Stipulation, she did not have any concerns about the financial health of either Avangrid or Iberdrola. **[72 RP 34880]** Crane concluded that, with the additional regulatory commitments under the June 4 Stipulation, the Merger was in the public interest and should be approved. **[72 RP 34881]**

The Commission overlooked other financial benefits from the Merger, including greater access to capital afforded by higher credit ratings, particularly during periods of constrained capital markets. **[71 RP 33819-33820; 33885]** Moody's noted that PNM is facing a "credit challenge" associated with its increased capital spending beginning in 2021. **[71 RP 33814]** As part of Avangrid, PNM would have access to broader sources and greater assurance of obtaining necessary capital. **[71 RP 33816]** Tupler also confirmed that the financial protections and credit enhancements associated with the Merger will strengthen PNM's ability to serve its customers and to meet the requirements of the Energy Transition Act and other renewable energy and sustainability initiatives. **[74 RP 37043]**

Another overlooked benefit of the Merger is that Avangrid's companies, because of their financial strength and size, were not experiencing the supply chain issues that other smaller utilities, including PNM, have faced. **[69 RP 24813-24814; 71 RP 33246]** Relatedly, PNM customers would benefit from the greater buying power of Avangrid and Iberdrola, resulting in both lower costs and more timely

delivery of needed materials, equipment, and services. **[69 RP 25013; 71 RP 33249-33250]**

In assessing the benefits of the merger, the Commission ignored or minimized the extensive evidence that PNMR's merger with Avangrid will benefit PNM's customers through rate credits, better and lower cost access to capital for infrastructure needed to serve customers, and increased access and buying power with respect to equipment and services.

e. Enforceability of Benefits. The HE noted that some regulatory commitments could be difficult to enforce, such as the creation of 150 new jobs, the work of the Carbon Reduction Task Force, PNM's efforts to join an RTO and the development of options for San Juan decommissioning. **[80 RP 39861, n. 67; 39906]** While some of the regulatory commitments do not have quantifiable end goals, they do require specific actions and compliance reporting. Fulfillment of these commitments can be objectively evaluated based on PNM's actions in pursuit of these matters, as reported to the Commission. The vast majority of the regulatory commitments are easily documented and verified, such as the $67 million in customer rate credits, the $10 million in residential customer arrearage forgiveness, the $2 million in funding for new electricity for customer and the $15 million funding for low-income energy efficiency programs. Likewise, the $15 million funding for general economic development projects and the $12.5 million in funding

for economic development projects for indigenous communities in the Four Corners region are easily verified, as is the development of 200 MW of renewable energy on the Navajo Nation. As noted above, the requirement that 150 new jobs be created is very detailed with defined quantifiable monetary consequences for any compliance failure.

The Modified Stipulation includes effective enforcement provisions. Regulatory Commitment 54 includes specific reporting requirements and confirms that the Appellants are subject to consequences, including penalties under Section 62-12-4, in the event of any failure to abide by any regulatory commitment. **[80 RP 40189-40190, ¶54]** Similarly, Regulatory Commitment 15 confirms that the jurisdiction of the Commission is retained and applicable to all of the Appellants with respect to the enforcement of the Regulatory Commitments, access to affiliate records, and subpoena and other powers. **[80 RP 40160, ¶15]** Thus, the Commission has ample means for enforcing each regulatory commitment.

2. The Commission Unlawfully and Unreasonably Exaggerated the Risks.

After winnowing out inadmissible evidence, unsupported assumptions contradicted by the record and the law, and other factors which must be disregarded in the Court's whole record substantial evidence review, the Commission had no reasonable grounds for concluding that the risks of service deterioration outweighed the benefits of the Merger.

a. Spanish Criminal Investigation. The legal residuum rule forecloses reliance on the hearsay evidence of the criminal investigation in Spain. Facts and allegations from another legal proceeding are inadmissible hearsay, and not properly subject to judicial notice. *See, e.g., Gonzales v. Surgidev Corp.*, 1995-NMSC-036, ¶¶ 30-32, 120 N.M. 133. "As a general rule, a court may not take judicial notice of proceedings or records in another cause so as to supply, without formal introduction of evidence, facts essential to support a contention in a cause then before it." *Id.* ¶ 30 (quoting *M/V Am. Queen v. San Diego Marine Constr. Corp.*, 708 F.2d 1483, 1491 (9th Cir. 1983)); *see also State v. Erickson K.*, 2002-NMCA-058, ¶¶ 22-24, 132 N.M. 258 (following *Gonzales* in rejecting hearsay basis for establishing probation violation, and concluding that the violation could not be established by judicial notice of bench warrant or other materials from court file).

No party submitted admissible evidence concerning the Spanish investigation. The Commission may not rely on facts concerning the investigation to support denial of the merger.

More egregiously, the Commission disregarded the presumption of innocence by imputing criminality based on the hearsay evidence of the incomplete investigation. 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 of innocence is a core safeguard of fairness in our legal system. "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 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.*

The Commission's heavy reliance on facts originating from the incomplete, ongoing Spanish investigation signaled a presumption of guilt, not innocence, leading to the conclusion that the Merger posed a risk of diminished service. The

Commission engaged in this unlawful reasoning, despite the absence of any charges, indictment, or conviction of Iberdrola, its officers or subsidiaries.

The improper influence of the Commission's disregard for the presumption of innocence was profound and pervasive. Commissioner Hall concluded that the Spanish investigation disclosed "just plain illegal behavior, bribery and surveilling, spying…on members of the public who oppose their objectives." **[SRP 303-304]** Commissioner Maestas cited the Spanish investigation as a factor in his decision to vote against the Merger. **[SRP 307-308]** Commissioner Becenti-Aguilar also cited the sealed investigation materials and suggested they should be made public. **[SRP 313]** The record thus confirms that the hearsay evidence of the Spanish investigation and the Commission's disregard for the presumption of innocence significantly influenced the conclusion that the risks of the merger outweighed the benefits.

b. Maine "Liberty Audit." The Maine Management Audit ("Liberty Audit") also did not provide a lawful foundation for the Commission's assessment of the risk of service deterioration. 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. *See, e.g., Chiordi v. Jernigan,* 1942-NMSC-053, ¶ 19, 46 N.M. 396 (explaining that hearsay is excluded because the tests usually used to ascertain the truth of evidence, including cross-examination, the sanctity of an oath, and the

declarant's risk of perjury, cannot be applied); *State v. Vigil*, 1982-NMCA-058, ¶ 18, 97 N.M. 749 (accord).

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*.

The HE, however, relied on two grounds in denying Appellants' motions to strike and exclude the Liberty Audit. First, the HE determined that Appellants' objections were untimely, finding that Appellants knew of the Commission's interest in the audit since May, 11, 2021, complied with a pre-trial order to produce it without objection, and other parties relied on the audit in pre-filed testimony filed on July 16, 2021. **[65 RP 22403]** For these reasons, the HE decided that it was "fairly late" to object, despite the fact that Appellants filed the Liberty Audit with the Commission on July 13, 2021, and filed their motion to strike 14 days after the date Intervenors filed testimony. **[53 RP 19518-19671]**

The HE ignored the established deadline of July 30, 2021 for motions i*n limine*, motions to strike, and objections to any pre-filed testimony. **[57 RP 20663]** Appellants met the deadline. The HE's "timeliness" reasoning is arbitrary and capricious because it disregards the HE's deadlines for objections.

Second, the HE concluded that the Liberty Audit was subject to administrative notice under 1.2.2.35(D)(1)(a) NMAC. **[65 RP 22403]** That rule states:

> 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….

The HE determined that the Liberty Audit could be administratively noticed because "the audit report was commissioned by the [MPUC] and filed by the [MPUC] in its public records." **[65 RP 22403]** This ruling disregarded the plain language of the Commission rule by overlooking the fact that the Liberty Audit states the opinions of a private consultant, contested by the utility, and therefore is not "a published report" of a "governmental agenc[y]." 1.2.2.35(D)(1)(a) NMAC. Nothing in the language of 1.2.2.35(D)(1)(a) NMAC suggests that filing of the Liberty Audit in the public records of the MPUC made it properly subject to administrative notice.

The Liberty Report was hearsay. Appellants timely moved to strike and exclude it. It was not a "published report" of a "governmental agenc[y]." Under the legal residuum rule, the Court must disregard the Liberty Report.

c. Rael's Representation of Iberdrola. The Commission also unlawfully anchored its determination of risk on the supposed "concurrent conflict of interest" in Rael's representation of Iberdrola. **[80 RP 39996-40002]** Rael has represented the

NMAG in unrelated matters. The NMAG did not object to Rael's representation of Iberdrola or otherwise perceive a conflict. **[63 RP 22048-22057]** Although Rael had not appeared as counsel of record, the HE disqualified Rael from representing any party in the merger case. **[64 RP 22365-22373]**

The New Mexico Disciplinary Board, however, rejected NEE's simultaneous complaint that Rael had violated the Rules of Professional Conduct, concluded that no conflict of interest arose in Rael's representation of Iberdrola, and denied a request for reconsideration of its ruling. **[65 RP 22603-22604; 72 RP 34116-34117]** Appellants moved to exclude evidence related to Rael's alleged conflict of interest. **[62 RP 21949-21950]** Nonetheless, the HE relied on his disqualification of Rael as one of the grounds for concluding that the Merger posed an unacceptable risk of a deterioration in utility service. **[80 RP 39996-40002]**

Under the legal residuum rule, the Court should disregard the HE's improper and erroneous decision to disqualify Rael. First, the responsibilities for avoiding conflicts between an attorney and a client rest with the attorney, not the client. Rule 16-107, NMRA. For this reason, the existence of a conflict, even if one existed, could not legitimately support negative conclusions about Iberdrola, nor any of Rael's clients.

Second, this 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 Disciplinary Board is charged with investigating attorney misconduct and taking appropriate action. See Rule 17-102(A) (1-2) NMRA. The HE cited no authority for the proposition that an administrative law judge's ruling concerning an attorney conflict of interest should control when it contradicts the decision of the Disciplinary Board.

Finally, the precedent the HE relied on as support to disqualify Rael bears no resemblance to this situation. In *Living Cross Ambulance Serv. v. N.M. Pub. Regulation Comm'n,* Living Cross argued that the Commission abused its discretion by allowing Living Cross's former attorney to appear and represent an adverse party before the Commission in a dispute concerning certification of ambulance service, before ruling on Living Cross' motion to disqualify the attorney. 2014-NMSC-036, ¶¶ 1, 6, 338 P.3d 1258. The former client asserted a direct conflict of interest. In this case, the accusation of a conflict came from NEE. None of Rael's clients perceived a conflict; the Disciplinary Board agreed.

Living Cross says nothing to suggest that the Commission may ignore the Disciplinary Board's decision on an attorney conflict issue that contradicts the Commission's assessment. *Living Cross* does not recognize the Commission's power to "disqualify" an attorney not appearing before it, and impute negative inferences to the client based on the purported conflict. Nothing in *Living Cross* supports the Commission's conclusion that Iberdrola's engagement of Rael

demonstrated a credible risk of diminished utility service. The Court should remove from the scales any consideration of the Commission's arbitrary determination that Rael's representation of Iberdrola was evidence of a future risk to utility customers in New Mexico.

d. Hempling Testimony. The Court should also reject Hempling's testimony as support for the Commission's decision. **[80 RP 39894-39895, 40017]** The HE permitted Hempling's testimony to remain in the record, over objection and despite his unavailability for cross-examination, in contravention of the Commission's rules.

Appellants moved to exclude Hempling's testimony on the grounds that Appellants are subject to FERC regulation, frequently participate in FERC proceedings, and federal law prohibited Hempling from testifying. **[62 RP 21950-21951]** They also argued that the Commission's Rules of Procedure prohibit the use of testimony from witnesses not subject to cross-examination. *See* 1.2.2.20(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."). The Commission's Rules further 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 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.

The NMAG filed a notice of non-appearance for Hempling. **[63 RP 22078-22083]** The HE permitted the admission of Hempling's testimony over Appellants' objections, concluding that the NMAG's notice of non-availability was well-taken. **[65 RP 22411-22417]** The HE thus placed in the record testimony not adopted by the witness under oath and which no party could cross-examine, in complete disregard of the Commission's rules and basic fairness. Hempling's testimony was quintessential hearsay. *See Chavez*, 1997-NMCA-111, ¶ 7 (noting that, by its very nature, hearsay is the testimony of a declarant who is not present, not under oath, and not subject to cross-examination). The legal residuum rule requires that the Court disregard Hempling's testimony.

e. Berry's Testimony and Comments. The HE again violated Commission rules in the handling of non-hearing testimony and comments from Berry, a state legislator from Maine and long-time Avangrid opponent who has a separate political agenda to pursue government-owned power companies.

In motion practice related to service quality issues, NEE filed a verified statement from Berry. **[40 RP 16572-16694]** NEE witness Christopher Sandberg relied on Berry's statement. **[75 RP 38269]**

Appellants moved to strike and exclude Berry's statement and Sandberg's testimony relying on Berry's statement on hearsay grounds and because Berry had not submitted pre-filed testimony as required for witnesses to be presented at an

evidentiary hearing. **[62 RP 21939-21943; 62 RP 21856-21858]** The HE granted in part/denied Appellants' motions, holding that Berry's statements relating to the activities of CMP in investigating supporters of a referendum against Avangrid's proposed transmission line were inadmissible. **[65 RP 22394]** Berry was not a witness at the evidentiary hearing, and not subject to cross-examination.

Nonetheless, the HE explicitly relied on Berry's hearsay statement concerning the Maine referendum. **[80 RP 39956-39962]** The hearsay nature of Berry's statement and his unavailability for cross examination preclude any consideration of his statement. The legal residuum rule prevents this Court from regarding Berry's statement as support for the Commission's rejection of the merger.

Berry also called in to the open meeting held on December 1, 2021, to give public comment, and urged the Commissioners to vote against the Merger. **[SRP 41-44]** Commissioner Byrd later remarked, in explaining his vote against the Merger, that he "thought it was very telling that a state representative from another state who has no vested interest in the state of New Mexico would call in and give his opinion about this. They're in a place … where they are trying to see how to get rid of a problem. To me, that's very concerning." **[SRP 315]** The Commission's 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.

f. Imputed Dishonesty, "Failure to Disclose" Penalties. The Commission also improperly based its assessment of risk on Appellants' purported "failure" to report penalties imposed on Avangrid-owned utilities. The HE concluded that Appellants had been "less than forthcoming" because they did not disclose this information until the HE reviewed publicly available information from an industry newsletter and Avangrid's SEC filings and directed Appellants to report them. **[35 RP 6689-6691; 41 RP 16740-16742]** This "failure" became the cornerstone for the Commission's perception that Avangrid and Iberdrola were untrustworthy and that the Merger created an unacceptable risk of service deterioration. *See, e.g.,* **[SRP 169]** (Commissioner Fischmann: "They gave incomplete information. They did not—in terms of the east coast, they certainly weren't forthcoming in disclosing that. Ashley, correct me if I'm wrong on that. Am I correct in saying that?" HE Schannauer: "You're correct.").

The Court should reject the alleged "failure" as a reason justifying the Commission's disapproval of the merger for three reasons. First, no rule, precedent, regulation, or legal principle required Appellants to disclose service problems and resulting sanctions against affiliate utilities operating in other states. The HE never identified any reporting requirement in the applicable statutes or regulations; none exist. No such requirement has been imposed in other merger applications. The perception that Appellants dishonestly or deliberately withheld this information is

unreasonable without some foundation for concluding that Appellants were required to disclose it.

The HE's approval of Appellants' GDP as compliant with the Affiliate Rule reinforces the conclusion that there is no basis in Commission regulations to accuse Appellants of a dishonest failure to disclose the fines and penalties of a purchaser-holding company's subsidiary affiliate. The HE characterized Appellants as guilty of an "initial failure," meaning that he believed that Appellants' initial filing should have revealed the fines and penalties of affiliates. The Affiliate Rule does not require this type of information or level of detail regarding affiliates and the GDP therefore contained no information about the fines and penalties imposed on Avangrid-owned utilities. The HE did not require an amendment of the GDP to disclose the fines and penalties as a condition for its approval, as he should have if the Affiliate Rule actually required the disclosure of such information. *See* 17.6.450.10(E) NMAC (authorizing Commission to modify or add conditions to GDP to make it consistent with the public interest). This fact belies the suggestion that Appellants were obligated to reveal the fines and penalties in their initial approval filing.

Second, the accusation of dishonesty originated from the HE's independent research beyond the record. "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. "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. The HE exceeded the role of a "neutral and detached magistrate" when he conducted his own factual investigation.

Finally, the imputation of dishonesty for "hiding" public information is unfair and illogical. The Merger proceeding was litigation with adverse parties; it involved extensive discovery and expert analysis. The supposition that Appellants intended to conceal information readily accessible to the public through SEC filings by not specifically including that information in their initial filing is arbitrary and capricious. This is especially true given the evidence in the record demonstrated that fines imposed on Avangrid-owned utilities were materially lower than peer utilities operating in the same jurisdictions. **[69 RP 25092-25094]** The Court should reject

the Commission's determination that Appellants were "less than forthcoming" in their initial application for approval of the Merger.

g. Renewable's "Compliance" Issues. The conclusion that the Merger posed an unacceptable risk of a deterioration in service cannot reasonably rest on the allegedly "non-compliant" conduct of Renewables in relation to the El Cabo and La Joya wind farm projects in eastern New Mexico. The evidence related to the two instances of supposed "non-compliance" reveal no such risk.

First, the Court should disregard the suspicion that Renewables "deliberately skirted" the statutory requirement for a location permit for generation facilities designed for or capable of operation at a capacity of 300 MW or greater. *See* NMSA 1978, § 62-9-3 (B). Staff witness John Reynolds, while conceding that he was not an engineer, testified that he believed it was unlikely that the El Cabo 298 MW project would always operate below 300 MW, given the variability of the wind. **[74 RP 37190 n. 19]** He also testified that discovery responses disclosed that El Cabo was deliberately designed to operate just under the threshold for the location permit requirement. **[74 RP 37190-37191]**

Purposefully designing the El Cabo wind farm project to operate just under the 300 MW statutory cut-off is not evidence that the project was designed for or capable of operation above that threshold, or that it has ever exceeded the threshold in actual operation. The record is undisputed that the nameplate capacity for the

project is 298 MW **[69 RP 25743]** and that the accusation of "skirting" rests on the unqualified and unsupported speculation that the El Cabo project might sporadically exceed 300 MW. No rule or precedent indicates that the nameplate capacity of a project is not the proper measure of compliance with the location permit requirement. The HE did not cite any rule or precedent for the proposition that coming close to, but not reaching, a limit set by a statute is in any way illegal, unethical, or indicative of an impending decline in PNM's service quality.

Second, the record concerning "non-compliance" in relation to the La Joya project did not support rejection of the Merger. Reynolds testified that a Renewables' subsidiary failed to make an information filing about construction permits and an in-service date to the Commission, following issuance of a location permit. **[74 RP 37136-37137]** Kump explained that the filings, delayed as a result of a miscommunication with a contractor, had been submitted and that Renewables was responsible for the oversight in failing to file a notice that the project was placed in service. He emphasized that Avangrid would work diligently to prevent such problems from recurring. **[69 RP 25019]**

Significantly, Staff ultimately settled with Appellants, concluding that Merger approval would serve the public interest, with Staff's recommended conditions. **[78 RP 39177-39194]** Thus, Staff concluded that the "non-compliance" problems it had raised along with reservations about the Merger, did not outweigh the benefits.

Evidence of a one-time "compliance" failure by Renewables does not reasonably support the prediction that the Merger would create a risk that PNM's service quality will decline.

h. Inability to Regulate. The Court also should reject the notion that the Commission will be unable to enforce Appellants' regulatory commitments or enforce the law as a legal basis for denying the Merger. New Mexico law requires the Commission to do its job, as directed by the New Mexico Constitution and the New Mexico Public Utility Act.

The HE warned repeatedly in his analysis that enforcement of Appellants' commitments, and of their compliance with the law, might be difficult, in light of compliance issues in New Mexico and elsewhere. **[80 RP 39855, 39857]**

The Commissioners echoed these concerns in their remarks during deliberations. Commissioner Fischmann noted the Commission's difficulty in regulating entities until something goes wrong. **[SRP 301]** Commissioner Maestas lamented that "it's becoming common knowledge that that the [Commission] lacks the necessary funding and resources to effectively enforce a complex transaction such as this proposed merger." **[SRP 308]**

The New Mexico Constitution, however directs that the Commission "shall have responsibility for regulating public utilities…in such manner as the Legislature shall provide." N.M. Const. art. XI, § 2; *State ex rel. Egolf*, 2020-NMSC-018, ¶ 33,

476 P.3d 896 (noting that the Commission owes a "constitutional duty to regulate" as the legislature shall provide). The Legislature has articulated broad policy goals for public utility regulation in the Public Utility Act:

> It is the declared policy of the state that the public interest, the interest of consumers and the interest of investors require the regulation and supervision of such public utilities to the end that reasonable and proper services shall be available at fair, just and reasonable rates and to the end that capital and investment may be encouraged and attracted so as to provide for the construction… 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).

Permitting the Commission to reject the Merger, based on reservations about Commission resources and qualifications to regulate, would make the constitutional duty imposed by Article XI, §2 optional. The Commission cannot thwart the Legislature's policy goals by deciding it lacks the resources to enforce the law. The Court should not credit this reasoning.

The Commission's ostensible concerns about enforceability and the resources required to police performance of Appellants' regulatory commitments are unwarranted. First, the compliance issues the Commission believes serve as justification for its concern are meritless, as addressed throughout this brief. Even NEE's expert testified that he knew no reason the Commission would currently be unable to effectively regulate PNM. **[74 RP 37679]**

Second, the Modified Stipulation contains enforcement commitments including an annual report to the Commission describing the progress Appellants have made toward meeting each regulatory promise, including among others reliability metrics, PNM's current capital structure, and PNM's board composition. **[80 RP 40189-40190]** To the extent that there is any failure to meet each regulatory commitment, any stakeholder may request, or the Commission may *sua sponte* initiate, a proceeding to enforce the Merger commitments and Appellants will be subject to potential consequences, including the penalties provided for pursuant to NMSA 1978, Section 62-12-4. **[Id.]**

i. Improved Performance. The HE and the Commission focused on the shortcomings of Avangrid-owned utilities, without acknowledging the utilities' efforts and success in improving service performance. CMP experienced difficulties and made mistakes in implementing a new billing and customer service software program, but Avangrid worked with CMP to solve the problems. Consequently, CMP had satisfied the conditions imposed by the MPUC every month since the conditions were created. **[69 RP 25082-25083]** CMP's rates are the second lowest among investor-owned utilities in northern New England **[Id. 25083]** and CMP's business customer service ranking with J.D. Power has improved, moving up four places between 2019 and 2020. **[Id.]**

Also, Concentric Energy Advisors analyzed CMP's reliability performance and found that from 2013 to 2019 Avangrid's utilities in Connecticut, Maine, and New York performed better than the average of other investor-owned utilities in the same states, which was undisputed. **[72 RP 34665]** The Commission overlooked these developments in concluding that the Merger posed an unacceptable risk of deterioration in utility service. *See Tallman*, 1988-NMCA-091, ¶ 14 (noting that the substantiality of the evidence "must take into account whatever in the record fairly detracts from its weight.") (quoting *Universal Camera*, 340 U.S. at 488).

k. Disregard of Safeguards. The Commission's exaggerated perception of the risks of service deterioration stemmed also from its unreasonable failure to account for the comprehensive protections against that risk included in the Modified Stipulation. These safeguards exhaustively addressed service quality risks arising from the possible influence of Avangrid and Iberdrola, preferential treatment of affiliates, and the underfunding of investments required for reliable and safe electric utility service.

The Modified Stipulation expressly addressed the possible risks associated with upstream control of PNM. Appellants agreed to a majority of "independent" and "disinterested" members on the PNM board, as defined by NYSE regulations. **[80 RP 40161]** Appellants also agreed that the PNM board will have decision making authority over PNM's capital expenditures, operations and maintenance

expenditures, and debt issuances. **[80 RP 40161]** Approval of dividend decisions requires a supermajority vote. **[80 RP 40162]** PNM's senior management and CEO will have control over PNM's day-to-day operations. **[80 RP 40163]** Board meetings will be held in New Mexico. **[80 RP 40163]** No PNM employees may simultaneously hold positions with upstream affiliates. **[80 RP 40163]** An Independent Lead Director, designated and elected by independent board members, will promote strong independent oversight of PNM's management and affairs. **[80 RP 40165]** The authorized purpose of PNM is the provision of electric utility service and activities reasonably necessary and appropriate for that purpose, and PNM board members and officers are obligated to act in the best interest of PNM and its customers. **[80 RP 40168]**

The Modified Stipulation also contains comprehensive measures against preferential treatment of affiliates, and abuse of affiliate relations. Lending to and borrowing from affiliates is prohibited without Commission approval, so is sharing of credit facilities among affiliates. **[80 RP 40169-40170]** Cross-default arrangements among affiliates are prohibited. **[80 RP 40170]** No transfers to or from an affiliate of material assets is permitted except in arms-length transactions. **[80 RP 40170]** PNM must have stand-alone bond credit and debt ratings. **[80 RP 40170]** An Independent Evaluator retained for the Commission's benefit will ensure fair RFP

processes for PNM procurement of energy resources, power supply, and generation facilities to prevent favoritism to affiliates. **[80 RP 40173]**

Appellants also agreed to Staff's proposed stringent and exhaustive service safety and reliability commitments. **[80 RP 40177]** They range in specificity from a broad obligation to invest in PNM's system to ensure reliability and safety to the extremely detailed and specific standards for reliability, reporting, and penalties (set out in Attachment 1 to the Modified Stipulation) which no other utility in New Mexico is required to satisfy. **[80 RP 40177]** Investment in PNM's distribution and transmission will occur to ensure utility service at standards consistent with industry-established metrics for reliability and safety and consistent with PNM's current five-year budget. **[80 RP 40177]** Appellants agreed to a service quality study for large customers. **[80 RP 40177]** In PNM's next three rate cases, it will report the number of employees and workers needed to fulfill its safety and reliability commitments. **[80 RP 40178]** Appellants agreed that no material diminution in customer service or system reliability would occur for as long as Avangrid or an affiliate owns PNMR and PNM. **[80 RP 40178]**

B. THE COMMISSION UNREASONABLY IGNORED THE NEAR-UNANIMOUS SUPPORT OF THE MODIFIED STIPULATION.

The Court should vacate the Commission's decision on the additional ground that it disregarded the fact that, with the exception of NEE, all of the parties supported or did not oppose the Modified Stipulation. The Commission's failure to

account for this fact makes its decision arbitrary and capricious under New Mexico law.

The Commission's final order acknowledged that Appellants and signatories accepted and supported the Modified Stipulation. **[81 RP 40417, ¶ 10]** The Order noted that Appellants expressed continued disagreement with Regulatory Commitments 17 and 36, but would nonetheless accept them. **[Id. 40417-40418, ¶¶ 11-12]** The Order then skipped ahead to the question of whether the benefits of the Merger, with the Modified Stipulation, outweighed the risks. **[Id. 40418-40428, ¶¶ 13-39]** The existence of an almost completely unopposed stipulation had no apparent influence on the Commission's decision. The Commission offered no explanation for ignoring the settlement. Rather, the HE and Commission discounted the benefits contained in the stipulations because they satisfied the "narrow interests" of the signatories. **[80 RP 39843]** Even though the signatories represented a diverse coalition of customer, labor, environmental, and community advocates, including the NMAG, one Commissioner accused the signatories of ignoring fundamental issues "in order to get their little piece of fool's gold." **[SRP 170]**

Agency action is arbitrary and capricious if it "entirely omits consideration of relevant factors or important aspects of the problem at hand." *Atlixco Coal. v. Maggiore*, 1998-NMCA-134, ¶ 24, 125 N.M. 786; *Vigil v. Pub. Emps. Ret. Bd.*, 2015-NMCA-079, ¶ 26, 355 P.3d 67 (accord). Agency officials may not disregard

facts or issues that prove difficult or inconvenient, "or refuse to come to grips with the result to which those facts or issues lead." *Atlixco Coalition*, 1998-NMCA-134, ¶ 24. Allowing agencies to ignore material issues raised by the parties "would render their right to be heard illusory." *Id*.

Public policy in New Mexico consistently favors the settlement of disputes, and the Commission has a well-established history of following this policy. *See, e.g., Quintana v. Motel 6, Inc*., 1984-NMCA-134, ¶ 11, 102 N.M. 229 (noting historical and current policy favoring settlement of disputed claims); *See generally*, 1.2.2.16 NMAC and 1.2.2.20 NMAC. In this case, the Commission disregarded that policy and entirely ignored a stipulation that promised to resolve this case by agreement. The Commission's order should be vacated as arbitrary and capricious for its unexplained failure to account for the agreement/non-opposition of all parties except NEE. *See, e.g., In re Comm'n Investigation of the Rates for PNM Gas Servs.,* 2000-NMSC-008, ¶¶ 8, 13, 128 N.M. 747 (overturning Commission where testimony supporting uncontested stipulation contradicted commission assertions, and Commission provided no explanation for going against the weight of the evidence); *Citizens of Fla. v. Graham*, 213 So.3d 703, 708, 713 (Fla. 2017) (reversing order of Florida Commission for failing to explain why it did not consider or apply settlement agreement in ruling on recovery of project costs, concluding that Commission's

disregard for the settlement agreement "departed from the essential requirements of law").

C. THE COMMISSION'S PUBLIC INTEREST ANALYSIS IS INTERNALLY INCONSISTENT AND THEREFORE ARBITRARY AND CAPRICIOUS.

An additional reason to vacate the Commission's decision arises from the internally inconsistent conclusions it reached concerning "public interest." The Legislature mandated that, "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 (1953). No party has suggested that the Merger is "unlawful." The controlling consideration in this case is therefore whether the Merger is consistent with the "public interest," such that the Commission erred in rejecting it.

The Six-Factor Test the HE applied addresses the public interest requirement of Section 62-6-13. **[80 RP 39848-39850]** That test includes consideration of benefits for utility customers and the adequacy of protections against harm to customers. **[Id.]** After applying the test, the HE recommended rejection because the potential harms of the Merger outweighed the benefits, and the changes negotiated by Appellants "have not produced a result that is in the public interest." **[80 RP 39843]**

The analysis of Appellants' GDP under the Affiliate Rule overlaps with the Six-Factor Test in addressing the public interest and possible adverse effects on utility service. Approval under the Affiliate Rule is in the public interest if the Commission finds that "it appears the utility's ability to provide reasonable and proper service at fair, just, and reasonable rates will not be adversely affected by Class II transactions and their resulting effects." **[80 RP 40078]** The HE found PNM's GDP complied with the Affiliate Rule and confirms that "there will be no adverse and material effects on PNM's utility operations and that PNM will continue to provide reasonable and proper electric utility service at fair just and reasonable rates." **[80 RP 40081]** As for protection of ratepayers, the GDP also confirms that PNM will continue to be subject to Commission jurisdiction and that Appellants had stipulated to "numerous customer protections." **[80 RP 40085]**

No party objected to the sufficiency of the information in the GDP. **[80 RP 40087]** Staff's expert concluded that the GDP satisfied the Affiliate Rule. **[Id.]** The HE recommended approval of the GDP, if the Commission approved the merger, subject to Appellants incorporating into the stipulation the amendments contained in the Modified Stipulation. **[Id.]**

The HE's analysis under the Affiliate Rule thus reflects the determination that, with the inclusion of the Modified Stipulation, Appellants' GDP, and therefore the Merger, accorded with the "public interest." The GDP analysis expressly considered

the risk of adverse effects on utility service, without mentioning the litany of illegitimate concerns identified in the HE's Six-Factor Test analysis as grounds for rejecting the Merger. In short, the HE's Affiliate Rule analysis and the Six-Factor Test analysis conflicted in their conclusions about the public interest.

"[A]n internally inconsistent analysis is arbitrary and capricious." *Nat'l Parks Conservation Ass'n v. EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015) (citation omitted); *Gen. Chem. Corp. v. United States*, 817 F.2d 844, 857 (D.C. Cir. 1987) (accord). Our courts have applied analogous reasoning in areas outside of administrative law. *See, e.g., Gabaldon v. Erisa Mortg. Co.,* 1999-NMSC-039, ¶¶ 31-33, 39, 128 N.M. 84 (noting internal inconsistencies in Court of Appeals' analysis of negligent entrustment claim, reversing); *Macias v. Macias*, 1998-NMCA-170, ¶¶ 20-21, 126 N.M. 303 (vacating and remanding district court findings on transmutation of property based on internal inconsistencies). The HE found that the Merger was not in the public interest in applying the Six-Factor Test, but concluded that, with the Modified Stipulation, the Merger met the GDP Rule requirements, which include public interest and customer protection considerations. The dissonance in this reasoning further supports vacating the Commission's order.

D. THE DISCOVERY SANCTION IMPOSED ON APPELLANTS IS UNSUPPORTED AND VIOLATES DUE PROCESS

The Commission levied a $10,000 sanction against all Appellants based on Avangrid's discovery responses and confidentiality claims. **[81 RP 40433, ¶ D]** 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. Their due process rights were violated because they were not provided notice that the Commission was going to extend a sanction in the Certification, proposed against only Avangrid, to all Appellants.

A decision to impose discovery sanctions is reviewed for an abuse of discretion and a sanction will only be overturned when untenable or contrary to logic or reason. *Lewis v. Samson*, 2001-NMSC-035, ¶ 13, 131 N.M. 317. A discovery sanction, however, must be based on willful misconduct or bad faith. *Lopez v. Wal-Mart Stores, Inc*., 1989-NMCA-013, ¶ 7, 108 N.M. 259. There is no evidence of willfulness or bad faith by Appellants.

In accordance with the HE's directive, Kump filed testimony explaining how Avangrid interpreted the NEE discovery request and describing the information provided. **[69 RP 25165-25176]** Kump confirmed that, although Avangrid made some errors in responding to the NEE discovery, they were inadvertent and not intended to delay the proceeding. **[69 RP 25177-25178]** Kump also supported Avangrid's claim of confidentiality, confirming the summary of information produced was not publicly available. **[69 RP 25179]** He also confirmed that in the interest of making a good faith effort to avoid a discovery dispute, Avangrid agreed

to waive confidentiality in this instance. **[69 RP 25179-25180]** Kump noted that Avangrid had not supplemented its discovery response, but had offered to do so, and that all of the information that would have been included in any supplementation was provided in subsequent submittals, including responses NEE's twelfth set of discovery. **[69 RP 25176]**

No party filed testimony in response to Kump. Notwithstanding the lack of evidence to counter Avangrid's good faith in responding to the NEE discovery, the HE found that the violations were "willful and that sanctions are appropriate." **[80 RP 39988]** The HE acknowledged that NEE failed to file testimony as directed but nonetheless recommended that NEE be awarded its attorneys' fees. **[Id.]** The HE recommended sanctions only against Avangrid and not against any other Appellant. **[80 RP 40091]**

The record contradicts the finding that Avangrid acted willfully. Kump repeatedly detailed Avangrid's good faith efforts to comply with the NEE discovery and supported the confidentiality of the documents provided in response to that request. **[69 RP 25168, 25177, 25179, 25180, 25181]** There was no countervailing evidence. The testimony of a witness, whether interested or disinterested, cannot arbitrarily be disregarded in the absence of proper grounds to do so. *Alto Vill. Servs. Corp. v. N.M. Pub. Serv. Comm'n* 1978-NMSC-085, ¶ 14, 92 N.M. 323. Even assuming that the Commission is free to ignore the testimony of a witness, any

decision must still be based on whole record substantial evidence. *PNM Gas Servs.*, 2000-NMSC-012, ¶ 4. There is no substantial evidence in the record to support the Commission's finding of willfulness on the part of Avangrid and, therefore, the sanctions against Avangrid cannot stand.

As evidence of another discovery violation, though not the basis if the discovery sanction, the HE cited the failure of Avangrid to disclose the case of *Levesque v. Iberdrola*, *S.A.* in response to NEE Interrogatory 1-67, and concluded that the *Levesque* case "was not provided in discovery in this case." **[80 RP 39988-39989]** However, Avangrid confirmed to both the HE and the Commission that Avangrid had in fact disclosed the *Levesque* case in response to NEE Interrogatory 4-55. **[79 RP 39648, n. 78, 39677; 80 RP 40324]** Indeed, the *Levesque* case was listed on an Avangrid discovery response attached to NEE's motion for sanctions. **[41 RP 16796]** Notwithstanding Avangrid's disclosure of the *Levesque* case, the HE persisted in the incorrect conclusion that the case was not disclosed in discovery in this case. **[80 RP 39989]**

The sanctions against Appellants other than Avangrid are also unreasonable. The subject discovery was solely directed toward and responded to by Avangrid. There is no evidence that the Appellants as a group failed to comply with discovery rules or orders. This was confirmed when the HE limited his findings and proposed

sanction to Avangrid alone. The Commission nonetheless expanded the sanction in its final order, without explanation, to all Appellants.

The Commission provided no notice that it was considering expanding the HE's proposed sanctions against Avangrid to all Appellants, nor were they given any opportunity to defend themselves against this expansion before issuance of the final order. "It is well settled that the fundamental requirements of due process in an administrative context are reasonable notice and opportunity to be heard and present any claim or defense." *Albuquerque Bernalillo Cty. Water Util. Auth., v. N.M. Pub. Regulation Comm'n*, 2010-NMSC-013, ¶ 21, 148 N.M. 21.

This Court previously vacated a Commission order under analogous reasoning in *Pub. Serv. Co.*, 2019-NMSC-012. In that case, the Commission for the first time in its final order, determined that as part of a remedy for imprudence, PNM would be foreclosed from recovery of future decommissioning expenses related to the Palo Verde Nuclear Generating Station. *Id.* ¶¶ 60-64. Because PNM was not afforded an opportunity to be heard on this issue before the final order, the Court concluded that the Commission's decision deprived PNM of its right to due process and vacated the order. *Id.* ¶ 65. The same is true with respect to the imposition of sanctions on the non-Avangrid Appellants in this case and the final order must likewise be vacated.

IV. CONCLUSION

The Court should vacate and annul the Commission's Order on Certification of Stipulation as unlawful and unreasonable.

V. STATEMENT REGARDING REQUEST FOR ORAL ARGUMENT

Appellants request oral argument in this important appeal to ensure that the Court and the parties have every opportunity to address any questions not resolved by the briefs.

Respectfully submitted this 7th day of April 2022.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 7th day of April, 2022, I caused the foregoing to be submitted to Odyssey File & Serve, which in turn caused all counsel to be served by email. I also certify that the Motion was served via email only, to the parties listed below:

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