IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. S-1-SC-39152

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

Appellants,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee,

and

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

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

ANSWER BRIEF OF THE NEW MEXICO PUBLIC REGULATION COMMISSION

Oral Argument Requested

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STATEMENT OF COMPLIANCE

This Answer Brief uses the Times New Roman typeface, a proportionately-spaced typeface, 14-point font. The body of this Answer Brief contains 15,154 words, thus complying with this Court's May 27, 2022 Order that permitted the New Mexico Public Regulation Commission to file an answer brief with a word count of no more than 17,000 words. This word count was obtained from Microsoft Word for Microsoft 365 MSO (Version 2205).

By: */s/ Russell Fisk, electronically signed*

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I. INTRODUCTION

The New Mexico Public Regulation Commission (the "Commission") respectfully submits this Answer Brief to the Court, pursuant to Rule 12-318(B) NMRA.

The Court should affirm the Commission's decision, supported by substantial evidence, to reject adoption of the Modified Stipulation (defined below). The Commission properly found that the proposed merger, even if modified in the form suggested by the Hearing Examiner, was not in the public interest. The Appellants' Brief in Chief ("BIC") extols the benefits of the Modified Stipulation. It does not, however, meaningfully address, on the merits, the documented potential detriments of the Modified Stipulation. Rather, the Appellants primarily argue that the potential detriments should not have been considered because they were "inadmissible and extra-record evidence." **[BIC 2; *see also* BIC 12** (contending that the Hearing Examiner's finding that the potential risks of the merger outweighed its benefits "rested largely on evidence that that Appellants sought to exclude.")**]**

The Appellants attempt to paint the Hearing Examiner as an advocate against the Appellants who abused his authority by conducting his own personal investigation. **[BIC 54]** To the contrary, the Hearing Examiner notified all parties of his concerns and gave the parties ample opportunities to respond to his concerns.

The Hearing Examiner's concerns were extensively litigated and addressed in detail within the 40,795 pages of the record proper.

This Court recently dismissed a challenge to the Commission's authority to solicit evidence in an adjudicatory proceeding, stating:

> NMIEC further challenges the Commission's authority to solicit evidence, but "[a]t any stage of the proceeding the commission or presiding officer may require the production of further evidence upon any issue." 1.2.2.35(K) NMAC. Under Section 62-6-4(A), the Commission has the authority to "do all things necessary and convenient in the exercise of its power and jurisdiction," including the discretion to solicit evidence in fulfillment of its statutory directives. *Las Cruces Prof'l Fire Fighters v. City of Las Cruces*, 1997-NMCA-031, ¶¶ 31-32, 123 N.M. 239, 938 P.2d 1384 (affirming the administrative power "to consider evidence elicited by its own questions"). "[I]t could hardly be envisioned that Commissioners would sit as spectators, like Roman Emperors in the coliseum, and simply exhibit a 'thumbs-up or thumbs-down' judgment after the dust of battle settles in the arena." *Mountain States Tel. & Tel. Co.*, 1977-NMSC-032, ¶ 19.

Public Serv. Co. v. New Mexico Pub. Regul. Comm'n, 2019-NMSC-012, ¶ 129.

The Commission does not dispute that the Modified Stipulation contained potential benefits to the public comparable to those included in stipulations approved by the Commission in other merger cases. The elephant in the room for the Appellants is that, in those other cases in which the Commission approved mergers, there was no substantial evidence of potential detriments of the mergers. In contrast, in this case, there was substantial evidence before the Commission of potential detriments of the proposed merger.

The heart of the Appellants' argument is that the Commission did not properly balance the pros and cons of approving the proposed merger. However, "[w]here a difference or conflict in the evidence exists, a court should not substitute its opinion for that of the administrative agency." *State v. Romero*, 1987-NMCA-151, ¶ 10, 106 N.M. 657. The reviewing court presumes that the agency's determination is correct and will not reverse the agency unless it appears that the conclusion reached by the agency cannot be sustained either by the evidence or permissible inferences. *Id.*; *Las Cruces Professional Fire Fighters v. City of Las Cruces*, 1997-NMCA-044, ¶ 7, 123 N.M. 329. As shown in this Answer Brief, substantial evidence supports the Commission's balancing of the pros and cons of the proposed merger and its decision to reject it.

II. SUMMARY OF THE PROCEEDINGS

The purpose of this summary of the proceedings is to clarify a confusing point: what it is that the Appellants are appealing. The Appellants apparently appeal the Commission's decision not to adopt what they refer to as "the Modified Stipulation."

It is important to understand what the Modified Stipulation is. The Modified Stipulation is not the stipulation proposed by the parties for review by the Hearing Examiner. The Hearing Examiner referred to the stipulation proposed for his review at the hearing as the "June 4 Stipulation." **[80 RP 39842]** The Modified Stipulation is the stipulation, in the form as modified by the Hearing Examiner, that the Hearing

Examiner recommended to the Commission as an alternative in the event that the Commission did not adopt his primary and fundamental recommendation to reject the June 4, 2021 Stipulation. **[*See* 80 RP 39842-39843]**

After the Hearing Examiner issued his Certification of Stipulation (the "COS"), all of the signatories to the June 4 Stipulation, except for the Appellants, joined in the filing of the "Signatories' Exceptions." In the Signatories' Exceptions, this subset of the signatories took exception to the Hearing Examiner's primary recommendation not to approve the proposed merger and stated that they did not take exception to the Hearing Examiner's alternative recommendation to adopt the Modified Stipulation. **[80 RP 40297-40301]**

The Appellants filed their exceptions separately, stating that "the Appellants accept the recommend[ed] modifications to the June 4 Stipulation contained in the COS[.]" **[80 RP 40308]** Notwithstanding this statement of their acceptance of the Modified Stipulation, the Appellants expressed disagreement with certain terms of the Modified Stipulation in several sections of their exceptions. **[81 RP 40417, ¶ 20]**

In this appeal, the Appellants ask the Court to overturn the Commission's decision to adopt the Hearing Examiner's primary recommendation to reject the merger entirely, and they argue to the Court that the proper course of action would

have been for the Commission to adopt the Hearing Examiner's alternative recommendation to adopt the Modified Stipulation.

New Energy Economy ("NEE") was the only party to the proceeding below that opposed the Modified Stipulation, and the Commission understands NEE to take the same position in this proceeding before the Court.

III. STANDARD OF REVIEW

The issues raised in this appeal invoke three standards of review. First, the Appellants' challenge to the Commission's rejection of the proposed merger is governed by the general standard of review that this Court applies when reviewing administrative agency decisions: whether the Commission's decision is arbitrary and capricious, not supported by substantial evidence, outside of the scope of the Commission's authority or otherwise inconsistent with law. *Attorney General v. New Mexico Pub. Regul. Comm'n*, 2011-NMSC-034, ¶ 9, 150 N.M. 174. Substantial evidence is relevant evidence that a reasonable person might accept as adequate to support a conclusion. *Regents of Univ. of Cal. v. New Mexico Quality Control Comm'n*, 2004-NMCA-073, ¶ 29, 136 NM 45. Arbitrary and capricious acts are those that may be considered willful and unreasonable, without consideration of and in disregard of the facts and circumstances. *Public Serv. Co. of New Mexico v. New Mexico Pub. Util. Comm'n*, 1998-NMSC-017, ¶¶ 23-24, 125 N.M. 302.

Within this general standard of review, the Court has distinguished appeals that challenge factual findings of an administrative agency from appeals that challenge the agency's interpretation of a statute. *Citizens for Fair Rates and the Environment v. New Mexico Pub. Regul. Comm'n* , 2022-NMSC-010, ¶ 14. When the Court reviews a challenge to a factual finding by an administrative agency, it defers to the fact finder, *i.e.*, the agency, while applying whole-record review. *Bernalillo County Health Care Corp. v. New Mexico Pub. Regul. Comm'n*, 2014-NMSC-008, ¶ 26. This Court neither reweighs the evidence nor replaces the agency's factfinding conclusions with its own. *Id.* Additionally, this Court views the evidence in the light most favorable to the agency's decision. *In re Petition of PNM Gas Servs.*, 2000-NMSC-012, ¶ 4, 129 N.M. 1. Although the evidence may also support a finding contrary to the finding made by the agency, this Court will not disturb the agency's finding if supported by substantial evidence on the record as a whole. *Herman v. Miners' Hosp.*, 1991-NMSC-021, ¶ 6, 111 N.M. 550.

Relatedly, this Court will not "lightly disregard" an agency's decision once the agency has weighed competing interests and has come to a conclusion. *Groendyke Transport, Inc. v. New Mexico State Corp. Comm'n*, 1984-NMSC-067, ¶ 14, 101 N.M. 470. This standard of review is key to this appeal because the Appellants ask this Court to reverse the Commission's weighting and balancing of competing interests that resulted in its decision to deny the proposed merger.

Regarding the Commission in particular, this Court has repeatedly refused to second-guess the Commission's decisions in cases in which the Commission weighed competing interests to determine what decision would be in the public interest. *See Pub. Serv. Co. of N.M. v. N.M. Pub. Serv. Comm'n*, 1991-NMSC-083, ¶¶ 28-30, 112 N.M. 379 (affirming the Commission's determination of the appropriate distribution of the costs of PNM's overcapacity between ratepayers and shareholders).

Regarding the Appellants' challenge to the Commission's imposition of discovery sanctions, the applicable standard of review is "abuse of discretion." This Court "entrust[s] sanctions short of dismissal to the sound discretion of the trial court." *Lewis v. Samson*, 2001-NMSC-035, ¶ 13, 131 N.M. 317. Applying this standard of review, this Court will disturb the lower court's or agency's imposition of sanctions only "'when the trial court's decision is clearly untenable or contrary to logic and reason.'" *Id. (quoting Newsome v. Farer*, 1985-NMSC-096, ¶ 22, 103 N.M. 415).

The Appellants incorrectly assert that a discovery violation must be based on willful misconduct or bad faith. **[BIC 69]** In support of this assertion, they cite *Lopez v. Wal-Mart Stores, Inc.*, 1989 NMCA-613, ¶ 7, 108 N.M. 259, which in turn cites *United Nuclear Corporation v. General Atomic Company*, 1980-NMSC-094, 96 N.M. 155, the latter of which is the leading New Mexico appellate opinion on

appellate review of a lower court's imposition of sanctions. *United Nuclear* held that a finding of willfulness or bad faith is required when the sanction is default judgment or dismissal. *United Nuclear,* 1980-NMSC-094, ¶ 202. In a later case, this Court explained that a court must find that the disobedient party acted willfully or in bad faith in failing to comply with a discovery order "before imposing the severe sanction of dismissal." *Marchman v. NCNB Nat'l Bank*, 1995-NMSC-041, ¶ 53, 120 N.M. 74. However, a court may apply lesser sanctions without a showing of willfulness or bad faith on the part of the disobedient party. *Id.* "The simple fact that the party failed to comply with the order is enough to support sanctions, 'notwithstanding a complete lack of culpability on [the sanctioned party's] part.'" *Id.* (quoting *Halas v. Consumer Servs., Inc.*, 16 F.3d 161, 165 (7th Cir. 1994)); *see also United Nuclear*, 1980-NMSC-094, ¶ 202 (stating that "a party 'refuses to obey' simply by failing to comply with an order"; willfulness is only relevant to form of sanction).[1]

Finally, the standard of review of the Hearing Examiner's evidentiary rulings is generally also abuse of discretion when the ruling involves an exercise of discretion or judgment. *Dewitt v. Rent-Center, Inc.*, 2009-NMSC-032, ¶ 13, 146 N.M. 453. For example, the abuse of discretion standard applies when an

[1] The language in Rule 1-037 NMRA (2005), in effect when this Court issued *Marchman v. NCNB Texas Nat'l Bank*, is substantially similar to the current language in 1-037 NMRA (2009).

evidentiary ruling involves balancing the potentially prejudicial nature of evidence of which admission is sought against its probative value or when a trial court is drawing a line regarding potentially cumulative evidence. *State v. Martinez*, 2008-NMSC-060, ¶ 8, 145 N.M. 220. However, this Court applies a de novo standard of review in reviewing any interpretations of law underlying the evidentiary ruling. *Id.*, ¶ 10.

IV. ARGUMENT

A. The Commission's Decision to Reject the Modified Stipulation Is Supported by Substantial Evidence and Is in the Public Interest

The Commission's decision to reject the proposed merger was based on its assessment of whether the proposed merger was in the "public interest," a highly fact-based inquiry that is at the core of the Commission's mission. *See* NMSA 1978 §§ 62-3-1 (2008) ("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 public utilities . . . ."); and 8-8-12(C) (2003) (stating that, in order to represent the public interest, the Commission's utility division "shall present to the commission its beliefs *on how the commission should fulfill its responsibility to balance the public interest, consumer interest and investor interest*.") (emphasis added).

The Appellants' argument that the Commission improperly balanced the benefits and detriments of the proposed merger, **[*see* BIC 34]**, leads to a dead end.

This Court has repeatedly held that it will not second-guess the Commission's balancing of interests as long as substantial evidence supports the Commission's decision. Additionally, evidence of conflicting opinions does lead to the conclusion that the Commission's decision is unsupported by substantial evidence. *Attorney General v. New Mexico Pub. Serv. Comm'n*, 1984-NMSC-081, ¶ 12, 101 N.M. 549. This standard is so critical to disposition of this case that it requires citation to the many cases in which the Court has followed it:

1. *Public Serv. Co. v. New Mexico Pub. Regul. Comm'n*, 2019-NMSC-012, ¶¶ 43-59 (affirming the Commission's remedy for PNM's imprudence, among alternatives);
2. *New Energy Economy, Inc. v. New Mexico Pub. Regul. Comm'n*, 2018-NMSC-024, ¶ 43 (stating, "The HE was free to perform his own calculation of the costs and benefits of the supplemental stipulation and did so. The Commission's decision to accept the HE's cost benefit analysis is a quintessential policy determination with which we will not interfere.");
3. *Albuquerque Cab Co. v. New Mexico Pub. Regul. Comm'n*, 2017-NMSC-028, ¶ 31 (stating, "The PRC could have reasonably found either for or against Q Cab on the issue of fitness to operate, but substantial evidence supports the determination of fitness that the PRC made . . .. This was a highly fact-based finding within PRC discretion, and we defer to it.");

4. *Bernalillo County Health Care Corp. v. New Mexico Pub. Regul. Comm'n*, 2014-NMSC-008, ¶ 27 (stating, "Because we do not reweigh the evidence, we defer to the hearing examiner.");
5. *PNM Elec. Servs. v. New Mexico Pub. Regul. Comm'n*, 1998-NMSC-017, 125 N.M. 302 (affirming the Commission's rejection of PNM Gas Services' application to institute gas and electric "optional service programs");
6. *Public Serv. Co. v. New Mexico Pub. Serv. Comm'n*, 1991-NMSC-083, 112 N.M. 379 (affirming the Commission's decision that the public interest was best served by continued regulation of San Juan Generating Station Unit 4);
7. *New Mexico Indus. Energy Consumers v. New Mexico Pub. Serv. Comm'n*, 1991-NMSC-018, 111 N.M. 622 (affirming the Commission's remedy of determining the appropriate distribution of costs of overcapacity between ratepayers and PNM); and
8. *Groendyke Transp., Inc. v. New Mexico State Corp. Comm'n*, 1984-NMSC-067, 101 N.M. 470 (affirming the Commission's weighing of the evidence in denying certificate to trucking company).

The Commission acknowledges that this Court must consider evidence of the alleged benefits of the proposed merger when reviewing the Commission's decision. Likewise, the Commission was required to consider such evidence, and, indeed, the Commission did consider the evidence of the potential benefits of adopting the June

4, 2021 Stipulation. **[*See* 80 RP 39873-39911]** In fact, the Hearing Examiner devoted 38 pages of his COS, which the Commission incorporated by reference into its final order, **[81 RP 40415]**, to a discussion of the purported benefits of adopting the June 4, 2021 Stipulation.

This Answer Brief does not reiterate evidence of the alleged benefits of the proposed merger, which are described at length in the BIC. Rather, this brief sets forth evidence of the potential harms of approval of the proposed merger, which provides substantial evidence to affirm the Commission's rejection of the proposed merger. Due to the word-count limit for this brief, the Commission does not herein specifically identify all of the potential harms identified in detail by the Hearing Examiner throughout his thorough 284-page COS.

The following is a summary of findings made by the Hearing Examiner supporting the Commission's rejection of the proposed merger, as well as evidence supporting the findings. Many of the findings concerned potential harm to ratepayers that was likely to result from approval of the proposed merger and other findings undermined or called into question the purported benefits of the proposed merger:

- The proposed merger was not designed to benefit PNM customers. It was designed to provide the Iberdrola, S.A. ("Iberdrola")/Avangrid, Inc. ("Avangrid") group of companies a strategic "beachhead" to develop non-

utility activities in the Southwest. **[80 RP 39845, supported by 80 RP 40007-4008]**;

- While the primary benefit of the proposed merger to customers is alleged to be the resulting link between PNM and a large group of companies that can provide access to financing on more reliable and less costly terms, evidence casts some doubt on this purported benefit. **[80 RP 39846, supported by 80 RP 39853-39897]**;
- "If PNM's service under Iberdrola, S.A./Avangrid, Inc.'s ownership is anything like the service provided by the Iberdrola, S.A./Avangrid, Inc. utilities in the Northeast, the quality of PNM's service is likely to be diminished." **[80 RP 39850-39851, supported by 80 RP 39914-39934];**
- "Avangrid, Inc.'s aggressive non-utility growth strategy presents a special risk that decisions made in the integration process could result in PNM ratepayers subsidizing the activities of Avangrid Renewables, LLC and Avangrid, Inc.'s other non-utility subsidiaries through preferential inter-affiliate agreements." **[80 RP 39852, supported by 80 RP 40046-40052]**;
- Avangrid's aggressive expansion into additional non-utility projects has raised concerns among credit rating agencies and contributed to the downgrade of Avangrid's credit rating by Moody's Research on July 21, 2021. **[80 RP 39853, supported by 80 RP 39896-39897]**;

- A management audit ordered by the Maine Public Utility Commission (the "Maine PUC") to address the service problems of Central Maine Power Company ("CMP"), a subsidiary of Avangrid Networks, Inc., discusses the risk that CMP will be provided inadequate resources and problem response from its parent holding companies as a result of its relative insignificance as an increasingly small part of a "vast Iberdrola family." **[80 RP 39853, supported by 80 RP 39928, 40088]**;
- The qualifications of Iberdrola and Avangrid are undermined by a criminal investigation in Spain of the Chairman and other top executives of Iberdrola and an Iberdrola subsidiary in Europe for bribery, violation of privacy and falsification of commercial documents. **[80 RP 39864, supported by 80 RP 39943-39955];**
- The technical qualifications of Avangrid are undermined by a Maine PUC investigation into complaints that CMP has increased the costs to be charged renewable energy developers to connect their projects to CMP's system months after entering into agreements with the developers on the proper amounts. **[80 RP, supported by 80 RP 39963-39965]**;
- Compliance issues in this case raise concerns about the qualifications of Iberdrola and Avangrid. **[80 RP, supported by 80 RP 39973-40002]**;

- Compliance issues involving Avangrid Renewables, LLC's current renewable energy projects in New Mexico raise concerns about the qualifications of Iberdrola and Avangrid. **[80 RP, supported by 80 RP 39965-39969**; and
- The Appellants did not propose adequate protections against harm to customers. **[80 RP 39857, supported by 80 RP 40002-40014]**.

This Court has recognized that the Public Utility Act ("PUA") "accords to energy consumers an entitlement to 'reasonable and proper service at fair, just and reasonable rates.'" *Citizens for Fair Rates & the Environment v. New Mexico Pub. Regul. Comm'n*, 2022-NMSC-010, ¶ 35 (quoting *Albuquerque Bernalillo Cnty. Water Util. Auth. v. New Mexico Pub. Regul. Comm'n*, 2010-NMSC-013, ¶ 30, 148 N.M. 21). Evidence of the potential detriments of the proposed merger shows that approving the proposed merger would endanger the consumers' entitlement.

The Court should follow the same path that it followed in *Public Service of New Mexico v. New Mexico Public Service Commission*, in which PNM appealed the Commission's disapproval of PNM's diversification plan. 1987-NMSC-124, 106 N.M. 622. In that case, as in this case, the statutory standard applied by the Commission was whether the proposed transaction was in the public interest. *Id.,* ¶ 16. The Commission based its disapproval of the proposed transaction primarily on its determination that the proposed holding company structure would impair the Commission's ability to supervise PNM to ensure reasonable rates and services. *Id.*,

¶ 17. PNM's proposed restructuring would have changed the status of certain subsidiaries of PNM to a status which could have been called "sisters" of PNM. Because the PUA's definition of "affiliated interest" excluded companies in "sister" relationships with a utility in the holding company structure, PNM's proposed holding company structure would have impeded the Commission's access to the books and records of the "sister" necessary to ensure the reasonableness of transactions between that "sister" and PNM. Therefore, the Commission found that PNM's ability to provide reasonable and proper utility service at fair, just and reasonable rates would be adversely and materially affected by the proposed restructuring. *Id.*, ¶ 19.

On appeal, PNM argued that the Commission (1) had no basis to disapprove the restructuring because PNM had fully complied with the applicable regulation and (2) the Commission had based its disapproval on regulatory concerns not addressed in that regulation. This Court affirmed the Commission's decision, stating that the decision fell within the scope of the applicable statutes and regulations and was supported by substantial evidence. *Id.*, ¶ 20.

B. The Commission Properly Weighed the Near-Unanimous Support for the Modified Stipulation and Mr. Rael's Representation of Iberdrola

The Appellants argue that the Commission's decision was arbitrary and capricious because the Commission allegedly disregarded the fact that, with the

exception of NEE, all of the parties either supported or did not oppose the Modified Stipulation. **[BIC 63-66]** This argument is dumbfounding and implies the Commission is a stooge. It is true that the Commission has a policy favoring stipulations, which the Hearing Examiner recognized. **[80 RP 39836]**. However, this Court has held:

> The Commission has a duty to be a prime mover in the procedure to see that the public interest is protected by establishing reasonable rates and that the utility is fairly treated so as to avoid confiscation of its property. *Considering this broad mandate it could hardly be envisioned that the Commissioners would sit as spectators, like Roman Emperors in the coliseum, and simply exhibit a "thumbs-up or thumbs-down" judgment after the dust of battle settles in the arena.*

Public Serv. Co. v. New Mexico Pub. Serv. Comm'n, 1991-NMSC-018, ¶ 50, 111 N.M. 622 (emphasis added).

Further, it is dubious to place significant weight on the near unanimous support of the Modified Stipulation, given that the Modified Stipulation was not the stipulation proposed by the parties for approval, but the form of the stipulation containing modifications recommended by the Hearing Examiner.

Moreover, the AG's conduct in this case gave the Commission good reason not to place substantial weight on the near unanimous support of the Modified Stipulation. At the outset of this case, the AG zealously discharged his obligation to represent the interests of residential and small-business consumers in matters before the Commission. NMSA 1978, § 8-5-17(A) (1999). The AG contracted with Scott

Hempling, a law professor who taught regulatory law at Georgetown University and who is one of the preeminent authorities on, and few published authors regarding, utility mergers and acquisitions. **[18 RP 03639-03640]** Indeed, during the pendency of the case below, Mr. Hempling was appointed as an administrative law judge at the Federal Energy Regulatory Commission. **[62 RP 21950-21951]**

Before the Appellants and several other parties, including the AG, filed a Notice of Initial Stipulation on April 21, 2021 **[28 RP 05296-05329]**, the AG filed the Direct Testimonies of Mr. Hempling and Andrea Crane on April 2, 2021. **[18 RP 03630-03742 (Hempling); 18 RP 03743-03805 (Crane)]**. Both Mr. Hempling and Ms. Crane testified that the proposed merger was not in the public interest. **[18 RP 03638-03639 (Hempling); 18 RP 03638-03639 (Crane)]**. However, less than one month later, the AG reversed course and signed onto an initial stipulation with the Appellants, which was filed on April 21, 2021. **[28 RP 05296-05329]**.

This was after Iberdrola retained local counsel, Marcus Rael, specifically for the purpose of negotiating a stipulation in this case. **[10 RP 02444-02446; 80 RP 39997-39998]** Mr. Rael met with the AG's office 18 times in late February through early April 2021. [**80 RP 39999]**. Subsequently, Ms. Crane filed testimony in support of the June 4 Stipulation, though she had not participated in the settlement discussions that led to the June 4 Stipulation. Mr. Hempling did not file testimony

in support of the June 4 Stipulation. Ms. Crane's testimony in support of the stipulation includes the following question and answer:

> **Q. Did you participate in the settlement discussions that resulted in the Stipulation?**
> A. I did not directly participate in the settlement discussions with the Appellants or other parties. I did review several versions of the Regulatory Commitments and provide input to the NMAG.

[47 RP 17667] When questioned about this testimony at the hearing, Ms. Crane admitted that she was not involved in any settlement discussions for any version of the stipulation. **[72 RP 34228-34232]** Nor was Mr. Hempling consulted in the settlement discussions. **[*Id.*]** Ms. Crane specifically testified, "I — I really didn't — don't even think I saw the Second Amended Stipulation until it was filed[.]" [**72 RP 34243]**

Moreover, Ms. Crane testified that, after the AG signed the Initial Stipulation, the AG served no discovery requests in the case. **[72 RP 34227-34228]** Nor did Ms. Crane spend much time reviewing the 19 sets of discovery responses that were served by the Appellants after the AG signed the initial stipulation. **[72 RP 32456-34257]** Further, Ms. Crane testified that she had only generally been aware of and did not have a comprehensive understanding of, the audits, fines and enforcement actions in other jurisdictions involving the Appellants. **[72 RP 34254-34256]** Indeed, in response to a bench request, the AG ludicrously stated that one benefit of the merger consisted of the lessons that Avangrid had learned from the experience

of dealing with severe storms in the Northeast, though any lesson that Avangrid may have learned resulted from its own incompetent preparation for and handling of the consequences of the storms. **[40 RP 16568]**

A plausible inference to explain the AG's sudden and complete about-face is that the AG was improperly influenced by Mr. Rael, who was representing the AG and Bernalillo County at the time he was hired by Iberdrola in the case below. **[80 RP 39998]** In August 2021, the Hearing Examiner found that a concurrent conflict of interest existed for Mr. Rael under Rule 16-107(A) NMRA and that the conflict disqualified Mr. Rael from further representing Iberdrola and the joint applicants in connection with the issues and stipulation in this case. **[64 RP 22344-22374]**. The Hearing Examiner considered this conflict of interest in discussing the qualifications of the proposed new PNM parent companies. He explained, "The Avangrid, Inc./Iberdrola, S.A. group of companies have experienced compliance issues in this proceeding that may foretell future compliance issues if the Proposed Transaction is approved." **[80 RP 39973]**.

The Appellants object to the Hearing Examiner's finding of a conflict of interest and his consideration of the conflict of interest in his analysis of the merger. **[BIC 47-50]**. The Appellants cite to a finding of the New Mexico Disciplinary Board that Mr. Rael's representation of Iberdrola, S.A. in this case was not a conflict of interest. **[BIC 48]**. The Board made this finding in a two-page letter, **[65 RP**

22603-22604], and affirmed the finding, again in a two-page letter, upon a request to reconsider **[72 RP 34116-34117]**. However, the Appellants' reliance on the Board's finding is not persuasive and its conclusion is in no way binding upon the Commission.

Frankly, the Hearing Examiner's 31-page in-depth analysis of whether Mr. Rael had a conflict of interest, **[*see* 64 RP 22344-22374]**, is far more thorough and persuasive than the Board's two-page analysis. The Board never provided a thorough written opinion or analysis of the issue to the extent or depth provided by the Hearing Examiner. Further, once the Hearing Examiner disqualified Mr. Rael, the Disciplinary Board considered the issue "moot." **[72 RP 34117]**. In asserting that the Commission must concur in the Disciplinary Board's determination, **[BIC 49-50]**, the Joint Appellants disregard the key finding in this Court's opinion in *Living Cross Ambulance Service v. New Mexico Public Regulation Commission* that "[i]t is essential that a tribunal determine whether an attorney or a law firm is disqualified from a case immediately upon being alerted to a potential conflict of interest." 2014-NMSC-036, ¶ 22. The Commission, as the tribunal in the matter below, had an essential obligation to rule on this critical matter before proceeding any further.[2] *Id*.

[2]In fact, this is not the first time that Mr. Rael has been disqualified from representing a party in a proceeding. **[See 81 RP 40378-40382]**.

The Hearing Examiner found that Mr. Rael took actions in which the conflict of interest may have impacted the AG and the residential and small business customers whose interests the AG is statutorily charged with representing in proceedings before the Commission. **[80 RP 39998-39999]**. Because Mr. Rael was hired by Iberdrola — a proposed new owner of PNM — it was proper for the Commission to consider Mr. Rael's conflict of interest in assessing the qualifications of this proposed new owner.

Staff witness John Reynolds, the Commission's Utility Division Director, testified about the lack of respect that Iberdrola and Avangrid had displayed for the regulatory process, and his testimony was enlightening. He testified that this lack of respect was disturbing as to what it may foretell about the relationship between the Commission and a future PNM with a board tightly controlled by Iberdrola, and Avangrid:

> There appears to be a lack of understanding or respect for a protocol of regulatory conduct by Iberdrola and Avangrid which has manifested itself in the conduct of the settlement discussions in this case. Clients and attorneys communicate with each other. Attorneys speak for the clients. While this can be cumbersome, this protocol respects the attorney-client relationship, and it minimizes confusion. In this high-profile case, there has been a steady concern shared by some parties about Iberdrola or Avangrid circumventing this protocol in order to apply pressure indirectly. While no overt pressure has been exerted on me, I am aware that senior NMPRC staff has met with PNM senior management concerning the Proposed Transaction and Staff's position. This is disturbing as to what it may foretell about the relationship between the Commission and a future PNM with a Board tightly controlled by Iberdrola and Avangrid. This lingering concern is in

> significant part why Staff has continued to advocate for an independent PNM Board. Having worked on two investor-owned merger cases in the last two years, the contrast has been clear. In the earlier case, the buyers were represented by a handful of decision makers who met with the parties as a group and who responded swiftly and decisively to various parties' demands. In this case, the settlement discussions have been difficult, contentious, and drawn out. There has been a small number of group meetings with a variety of representatives from Iberdrola, Avangrid and PNM. Aside from these few group meetings, there appear to have been a significant number of bilateral meetings which have resulted in many of the more targeted Regulatory Commitments. While Iberdrola and Avangrid appear to be in charge, Staff has found its bilateral meetings with PNM alone to have been more productive. Iberdrola's and Avangrid's impatience with established protocol and refusal to follow that protocol has been a major impediment to resolving this matter outside the contentious litigation process.
>
> Staff believes that it is necessary to address this issue in any order about this merger. Utility regulation is a delicate balancing act between the regulator and the regulated entity that should be based on mutual respect. If this is addressed correctly, it may mitigate some of Staff's concerns that underlie our recommendation for an independent PNM Board.

[84 RP 19791-19792].

Iberdrola and Avangrid's disregard of the regulatory process is significant because regulation protects the utility's customers:

> Because it is a monopoly the utility must be regulated so that it cannot take advantage of its position or its customers. In exchange for submitting to oversight by the Commission, the utility is permitted to operate as a monopoly within its service area.

Morningstar Water Users Assoc. v. New Mexico Pub. Util. Comm'n, 1995-NMSC-012, ¶ 54, 120 N.M. 579.

C. The Appellants' Evidentiary Challenges Should be Rejected as Lacking Merit and for Procedural Defects

1. The Hearing Examiner and the Commission Did Not Rely on Inadmissible and Extra-Record Information

Throughout their arguments challenging evidentiary rulings, the Appellants incorrectly suggest that the Hearing Examiner and Commission relied on information not admitted at the hearing or subject to scrutiny by the parties. **[*See, e.g.,* BIC 2 ("[T]he HE and Commission improperly placed their thumbs on the risk side of the scale by relying on inadmissible and extra-record evidence . . .. "); BIC 43 ("No party submitted admissible evidence concerning the Spanish investigation.")]** All of the evidence admitted and considered by the Hearing Examiner and the Commission was properly admitted into evidence and was the subject of much litigation. What the Appellants really object to is the Hearing Examiner's bringing attention to relevant information not disclosed by the Appellants. The Appellants even accuse the Hearing Examiner of improperly conducting "independent research beyond the record" and "conducting his own factual investigation." **[BIC 54-55]**

In fact, what happened is that the Hearing Examiner became aware of enforcement actions and measures involving Avangrid's electric utility subsidiaries. **[35 RP 06689]** Avangrid included some of these in its reports filed with the Securities and Exchange Commission. **[35 RP 06690]** The Hearing Examiner

notified all parties of this information and gave the parties ample opportunities to respond to his concerns.

2. The Appellants Failed to Preserve for Review Two of Their Evidentiary Objections

This Court should dismiss two of the Appellants' evidentiary objections because they were not preserved for appellate review by the Appellants and because the Appellants did not exhaust their administrative remedies because they did not raise the challenges before the Commission.

While the Appellants objected to evidentiary rulings before the Hearing Examiner, they did not raise all of these objections in their exceptions to the COS, thus foregoing the opportunity to have the Commission consider them. **[*See* 80 RP 40304-40332 (Appellants' Exceptions to COS)]**. The evidentiary challenges that appear in the BIC but were not raised in the Appellants' exceptions are:

1. "Hempling Testimony" **[BIC 50-51]**; and
2. "Berry's Testimony" **[BIC at 51-52]**.

Rule 12-321 NMRA states, "To preserve an issue for review, it must appear that a ruling or decision by the trial court was fairly invoked."[3] To preserve an issue for appeal, a party must have made a timely and specific objection that apprised the lower court or agency of the nature of the claimed error and that allowed it to make

[3] The New Mexico Rules of Appellate Procedure govern appeals of PRC final orders to this Court. *City of Las Cruces v. NMPRC*, 2020-NMSC-016, ¶ 15.

an intelligent ruling thereon. *Gonzales v. Shaw*, 2018-NMCA-059, ¶ 14. A primary reason for the preservation requirement is to alert the lower court or agency to a claim of error so that it has an opportunity to correct any mistake. *State v. Leyva*, 2011-NMSC-009, ¶ 36, 149 N.M. 435; *State v. Phillips*, 2000-NMCA-028, ¶ 18, 128 N.M. 777.

"The doctrine of exhaustion of remedies is absolute 'where a claim is cognizable in the first instance by an administrative agency alone . . . judicial interference is withheld until the administrative process has run its course'." *McDowell v. Napolitano*, 1995-NMSC-029, ¶ 10, 119 N.M. 696 (quoting *State ex rel. Norvell v. Arizona Pub. Serv. Co.*, 1973-NMSC-051, ¶ 31, 85 N.M. 165).

Requiring the Appellants to raise their evidentiary objections in their exceptions to the COS is also consistent with this Court's ruling in *City of Las Cruces v. New Mexico Public Regulation Commission* that a party must request a stay from the agency of an order instead of seeking a stay directly from this Court. *City of Las Cruces v. New Mexico Pub. Regul. Comm'n*, 2020-NMSC-016. This Court said that its holding is "consistent with the long-standing doctrine of exhaustion of administrative remedies under which a party is ordinarily required to pursue relief from an administrative agency, where available, before seeking redress from the courts." *City of Las Cruces v. NMPRC*, 2020-NMSC-016, ¶ 18.

The Commission's hearing examiners do not issue final, binding decisions. They make recommendations to the Commission, including recommended findings of fact and conclusions of law. NMSA 1978, § 8-8-14(B) (2013). "The recommended decision shall be provided to the parties, and they may file exceptions to the decision prior to the final decision of the commission." *Id.*

The Commission's hearing examiners assist the Commission in determining factual and legal issues, but the core judicial function is independently performed by the Commission itself. The Court does not review rulings made by a hearing examiner not ruled upon by the Commission. *Cf. Buffington v. McGorty*, 2004-NMCA-092, ¶¶ 29-32, 136 N.M. 226 (finding that district court erroneously concluded that Child Support Hearing Officer Act precluded it from reviewing report and recommendations of hearing officer; district court's order implying that, if it could, it would affirm the hearing officer, was insufficient to allow review by Court of Appeals; reversing district court's order and remanding case for district court to consider objections to hearing officer's report, rule on those objections and establish a basis for the district court's actions); *Harris v. Taxation & Revenue Dep't*, 1987-NMCA-034, ¶ 10, 105 N.M. 721 ("An administrative order which is required to be submitted to a superior for approval is not final for purposes of review. In general, an appellate court will not review the proceedings of an administrative agency until the agency has taken final action.") (citation omitted).

Other state and federal courts have held that failure to raise an issue in exceptions to a hearing officer's recommendation or report results in a waiver of the claim. *See e.g., United States v. Sullivan*, 431 F.3d 976, 984 (6th Cir. 2005) (holding that defendant waived appeal of district court's denial of pretrial motion by failing to object in a timely manner to magistrate judge's report and recommendation); *Gonzalez v. Sears Holding Co.*, 980 F.Supp.2d 170, 175 (D. Puerto Rico 2013) (failure to raise objections to magistrate's report and recommendations waives party's right to review in the district court, and those claims not preserved by such objection are precluded on appeal); *Sneed v. Austin Indep. Sch. Dist.*, 487 F.Supp.3d 584, 589 (W.D. Texas 2020) ("A party's failure to file in a timely manner written objections to the proposed findings, conclusions, and recommendation in a report and recommendation bars that party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings and legal conclusions accepted by the district court."); *Attorney General v. Public Serv. Comm'n*, 136 Mich. App. 52, 56 (Mich. Ct. App. 1984) ("Failure by a party to file exceptions to the proposal for decision in a timely manner constitutes a waiver of any objections not raised."); *Civil Serv. Employees Assoc. v. Public Emp. Rel. Bd.*, 73 N.Y.2d 796, 798 (N.Y. 1988) ("Any exception to the ALJ's ruling not specifically raised is waived."); *Sebastianelli v. Sebastianelli*, 876 A.2d 431, 432-33 (Pa. Super.

Ct. 2005) (husband's failure to file exceptions to master's conclusion resulted in a waiver of the claim on appeal).

Not only did the Appellants fail to raise evidentiary objections in their exceptions to the Hearing Examiner's COS, they did not avail themselves of their right to file a motion with the Hearing Examiner to permit an interlocutory appeal to the Commission of his rulings. *See* 1.2.2.31 NMAC ("Interlocutory Appeals from Rulings of the Presiding Officer"). The Hearing Examiner made his rulings in his Order Addressing Prehearing Motions and Objections, issued on August 6, 2021. **[65 RP 22387-22418]** The hearing in this case was held from August 11, 2021 through August 19, 2021. **[80 RP 39825]** The deadline for filing a motion to permit interlocutory appeal of the Order Addressing Prehearing Motions and Objections was August 9, 2021, before the hearing began. *See* 1.2.2.31(B)(1) NMAC. A motion to permit interlocutory appeal would not have been disposed of before the hearing began, but it could have been disposed of before the hearing ended.

A statement in the BIC actually supports a finding that the Appellants did not preserve arguments that they did not raise in their exceptions to the COS. This statement is that the Commission "expressly relied on all the evidence Appellants moved to exclude." **[BIC 11]**. However, how would the Commission know that the Appellants had moved to exclude evidence when the Appellants had not raised these arguments in their exceptions?

3. Alternatively, the Unpreserved Evidentiary Challenges Should be Rejected on the Merits

The Commission has shown that this Court should not consider evidentiary objections not raised in the Appellants' exceptions to the COS. Should the Court nevertheless proceed to consider the merits of the objections, the Court should find them meritless.

Before the Appellants and several other parties, including the AG, filed a Notice of Initial Stipulation on April 21, 2021, **[28 RP 05296-05329]**, the AG filed the Direct Testimonies of Scott Hempling and Andrea Crane on April 2, 2022. **[18 RP 03630-03742 (Hempling); 18 RP 03743-03805 (Crane)]**. Both Mr. Hempling and Ms. Crane testified that the proposed merger was not in the public interest. **[18 RP 03638-03639 (Hempling); 18 RP 03638-03639 (Crane)]**. On April 21, 2021, the Appellants filed the rebuttal testimonies of Ronald Darnell, Ellen Lapson, Joseph Tarry and Lisa Quilici, which extensively rebutted Mr. Hempling's direct testimony. **[32 RP 06015-06027 (Quilici); 32 RP 06069-06077 (Tarry); 32 RP 06179-06181; (Lapson); 32 RP 06189-06199 (Darnell)]**.

After the Appellants filed a Notice of Amended Stipulation on April 23, 2021 and yet another version of the stipulation on May 7, 2021, the Hearing Examiner issued a procedural order to set a schedule for consideration of a contested stipulation. The Hearing Examiner ordered that, subject to his future rulings on outstanding motions, all testimonies filed before May 3, 2021, along with testimonies in support

of, and in opposition to, the stipulation, would be admitted at the hearing. **[42 RP 16889-16890]**.

The testimony to be admitted at hearing would therefore include Mr. Hempling's direct testimony, as it was filed on April 2, 2001. The Hearing Examiner ordered any party intending to examine at the hearing any witness, such as Mr. Hempling, who had filed testimony before the stipulation was filed and had not filed additional testimony concerning the stipulation, to provide notice of such intent by July 16, 2021. **[42 RP 16889, 16890]**.

NEE filed such a notice of intent to examine Mr. Hempling, though it was untimely filed. **[61 RP 21692]**. In response, the AG filed a notice stating that it would not make Mr. Hempling available for the hearing because NEE's notice was untimely. **[63 RP 22079-22080]**. The Appellants then filed objections and a motion in limine, which, among other things, sought to strike from evidence Mr. Hempling's written direct testimony and all testimony based upon Mr. Hempling's written direct testimony. **[62 RP 21950-21951].**

In support of their motion, the Appellants stated that, since the time that Mr. Hempling had filed his direct testimony, he had been appointed as an Administrative Law Judge ("ALJ") for the Federal Energy Regulatory Commission. They argued that testifying before the Commission would conflict with Mr. Hempling's obligation to act fairly and impartially as an ALJ. **[*Id.*]** In response to the motion,

NEE noted that Mr. Hempling himself had not stated that testifying in the case would conflict with his duties as an ALJ and argued that his testimony was admissible under Rule 11-801(D)(2) NMRA. **[64 RP 22205]**

The Hearing Examiner denied the Appellants' motion to strike Mr. Hempling's direct testimony and all testimony based upon Mr. Hempling's testimony. Regarding the AG's notice that it would not make Mr. Hempling available at hearing, though, the Hearing Examiner ruled that Mr. Hempling need not appear at the hearing. **[65 RP 22417-22418]**

In their BIC, the Appellants argue that this Court should not consider Mr. Hempling's written testimony for the following reasons: (1) federal law prohibited Mr. Hempling from testifying; (2) Mr. Hempling was not subject to cross examination; and (3) Mr. Hempling's testimony should be excluded under the legal residuum rule. **[BIC 50-51]**

The Hearing Examiner's denial of the motion to strike Mr. Hempling's written direct testimony was correct for two reasons. First, the time-honored standard that the Commission applies in determining whether a contested stipulation should be adopted is:

> (a) the parties and Staff had notice and an opportunity to be heard on the stipulation; (b) substantial evidence *in the record as a whole* supports the Commission's conclusion that the stipulation is fair, just

> and reasonable and in the public interest; and (c) the stipulation is in accordance with applicable law.[4]

In re PNM for Revision of Retail Electric Rates, Docket No. 10-00086-UT, 2011-WL-11758929, ¶ 13 (emphasis added) (N.M.P.R.C. July 28, 2011). This evidentiary standard of proof requires a meaningful analysis of the entire record, including testimony filed before the stipulation was filed, which included not only Mr. Hempling's direct testimony, but the testimonies filed by Appellants in rebuttal of Mr. Hempling's testimony.

Second, Mr. Hempling's testimony was admissible under Rule 11-801(D)(2) NMRA of the New Mexico Rules of Evidence, regardless of his availability as a witness, as a statement of an opposing party. According to the rule, a statement by an opposing party is not hearsay when it is offered against the opposing party and

a. was made by the party in an individual or representative capacity,
b. is one that the party manifested that it adopted or believed to be true,
c. was made by a person whom the party authorized to make a statement on the subject,

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[4] The quoted portion of the Commission's order from Docket No. 10-00086-UT incorrecty refers to "substantial evidence in the record as a whole," whereas it should refer to "a preponderance of the evidence in the record as a whole." *See El Paso Elec. Co. v. New Mexico Pub. Serv. Comm'n*, 1985-NMSC-085, ¶ 12, 103 N.M. 300 (the standard of proof in administrative adjudications is, unless expressly provided otherwise, the preponderance of the evidence). The quoted language conflates the evidentiary standard of proof for orders issued in administrative adjudications with the appellate standard of review of such orders, "substantial evidence in the record as a whole.".

d. was made by the party's agent or employee on a matter within the scope of that relationship and while it existed, or
e. was made by the party's co-conspirator during and in furtherance of the conspiracy.

11-801(D)(2) NMRA. Pursuant to this rule, an opposing party's statement is not hearsay even if the statement was not against the party's interest when made. Rule 11-801 NMRA Committee Commentary.

Mr. Hempling's testimony was admissible non-hearsay as consisting of a set of statements offered by NEE against an opposing party, the AG, who had authorized Mr. Hempling to make statements on the subject and who was in principal-agent relationship with Mr. Hempling as a retained expert. 11-801(D)(2)(c) & (d) NMRA. Therefore, the Hearing Examiner did not abuse his discretion in admitting Mr. Hempling's direct testimony into evidence.

4. The Hearing Examiner Did Not Rely on Statements by Representative Berry that Had Been Excluded from Evidence

In their BIC, the Appellants argue that the Hearing Examiner erred in relying in his COS on statements made by Maine State Representative Seth Berry that the Hearing Examiner had ruled inadmissible when challenged by the Appellants. The Appellants cite to pages 149 to 155 of the COS. **[BIC 51-52]**. It is incorrect that the Hearing Examiner relied on statements that he had ruled inadmissible. The statements of Representative Berry that the Hearing Examiner ruled were inadmissible were contained in two documents prepared by Representative Berry

and attached to NEE witness Christopher K. Sandberg's July 16, 2021 testimony in opposition to the Second Amended Stipulation, which the Appellants moved to strike. **[65 RP 22390-22395]**.

On page 150 of the COS, the Hearing Examiner quoted the Verified Statement and Exhibits of Seth A. Berry on Behalf of NEE, which was an exhibit to NEE's Reply to Appellants' Response to Order Regarding Avangrid Service Quality Issues and Management Audits ("NEE's Reply"), filed on May 26, 2021. **[80 RP 39957]**. On July 19, 2021, the Hearing Examiner issued an order which, among other things, required the Appellants to file supplemental testimony addressing certain issues. One such issue was the verification of the accuracy of certain statements made by Representative Berry in his verified statement attached to NEE's Reply. **[56 RP 20630-20631]**.

On July 27, 2021, witness for the Appellants Robert Kump filed supplemental testimony addressing the verification issue. In his supplemental testimony, Mr. Kump quoted the statements by Representative Berry that would later appear on page 150 of the COS and responded to them. **[59 RP 20843-20860]**. At the hearing, the Appellants moved into evidence, without any reservation, Mr. Kump's supplemental testimony, filed July 27, 2021, which was admitted into evidence absent objections. **[69 RP 24678-24681]**. Thus, the Hearing Examiner quoted

statements of Representative Berry that had been admitted into evidence without objection by the Appellants.

5. The Commission Did Not Improperly Rely on Public Comment in Rejecting the Proposed Merger

Representative Berry spoke at the public comment hearing in the case below on December 1, 2021. **[SRP 041-044]** Commission Rule of Procedure 1.2.2.23(F) NMAC states, "Commenters shall be entitled to make an oral statement or submit a written statement for the record, but such statement shall not be considered by the commission as evidence." The Appellants object to the following statement made by Commissioner Byrd at the Commission's December 8, 2021 Open Meeting during which the Commission voted to reject the merger application:

> I 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, and it was mentioned by Mr. Smith, where they're trying to see how to get rid of a problem. To me, that is very concerning.

[BIC at 52 (quoting SRP 315)]. To begin with, this was a statement by a single Commissioner, which cannot be attributed to the Commission itself. Representative Berry's public comment is not mentioned or relied upon in the Commission's final order. [***See*** **81 RP 40414-40436]** Therefore, Representative Berry's public comment was not relied upon by the Commission..

Additionally, Commissioner Byrd preceded his statement quoted above by stating his concern about Avangrid's customer service problems in Maine, which

were admitted into evidence. **[80 RP 39919-39933]** Thus, his quoted statement is supported by evidence in the record.

Moreover, this Court has held that the Commission, in making public policy decisions necessarily implicated by rate design, "may rely in part on public commentary in its task of evaluating the evidence in the record and formulating a proper rate structure." *In re Petition of PNM Gas Servs.*, 2000-NMSC-012, ¶ 99, 129 N.M. 1. In that case, the Court reversed a Commission decision because the Commission had relied *solely* upon public comment in setting a residential customer charge. *Id.* In contrast, in this case, ample evidence corroborated Representative Berry's opinion regarding Avangrid's customer service problems in Maine. **[80 RP 39850-39856, 39914-39934, 39972-39973, 39980-39981, 40025]**

6. The Commission Properly Relied on Evidence of the Spanish Investigation of Iberdrola

On June 24, 2021, the Appellants filed a notice informing the Commission of a pending criminal investigation in Spain involving Iberdrola, Ignacio Galan (who is the Chairman and Chief Executive Officer of Iberdrola, as well as the Chairman of Avangrid, Inc.) and a number of then current and former Iberdrola executives. **[50 RP 19008-19009]**.

The Spanish court conducting the investigation was looking into Iberdrola's hiring of a Spanish security company, Cenyt, to interfere with the management and operations of companies with interests perceived by Iberdrola's management to be

adverse to Iberdrola and its executives. The investigating court was examining the nature of the involvement in these activities by Iberdrola's executives, some of whom would be in positions of authority and influence over PNM if the merger were approved. **[80 RP 39947]**

The Spanish investigation also concerned suspected criminal bribery insofar as Iberdrola, through Asenjo Martin (the head of security for Iberdrola from at least 2004 through November 2019), made payments to Cenyt while Villarejo Perez (a former police official who was also under investigation for his alleged interest in Cenyt) was an active member of the National Police Force. The Spanish investigation was also investigating suspected criminal forgery insofar as Mr. Martin allegedly admitted that work that Cenyt performed for projects was falsely described in some invoices as work performed for more innocent projects, for the purpose of concealing the work of Mr. Perez while he was an active member of the National Police Force. **[80 RP 39948-39953]** The Hearing Examiner described the investigation in detail, and the Commission refers the Court to the COS for such detail. **[80 RP 39947-39953]**

In their BIC, the Appellants argue that (1) the legal residuum rule forecloses reliance on the Spanish investigation; and (2) the Commission disregarded the presumption of innocence by imputing criminality based upon the mere existence of a pending investigation. **[BIC 43]** The Appellants did not argue before the Hearing

Examiner or in their exceptions that the legal residuum rule prevents consideration of the Spanish investigation. **[*See* 62 RP 21947-21949 (Appellants' Objections and Motion in Limine; 80 RP 15-16 (Appellants' Exceptions to COS]**.

Having failed to raise the argument below, the Appellants have waived any right that they may otherwise have had to raise it before the Court. "[U]nder long standing principles of appellate practice this court has refused to consider theories differing from those on which the case was tried and now advanced for the first time on appeal[.]" *Ferran v. Jacquez*, 1961-NMSC-072, ¶ 11, 68 N.M. 367; *State v. Bregar*, 2017-NMCA-028, ¶ 19 (declining to address particular argument that party did not make to district court); *Rupp v. Hurley*, 1999-NMCA-057, ¶¶ 24-25, 127 N.M. 222 (refusing to considering rationale not raised before district court). In any event, the legal residuum rule is not applicable because, as the Hearing Examiner found, evidence regarding the Spanish investigation that was challenged by PNM (on other grounds) was corroborated by other evidence in the record. **[65 RP 21 (Order Addressing Prehearing Motions and Objections); 80 RP 39944]**

The Appellants cite no authority stating that the Commission could not rely on the pending Spanish investigation due to the presumption of innocence. **[BIC 43-45]** Neither the Hearing Examiner nor the Commission made any findings concerning the guilt of any party under investigation or relied upon an implication or assumption of guilt arising from that the pending investigation. The Hearing

Examiner acknowledged that no formal criminal charges had been issued against Iberdrola or Avangrid, and merely stated that "a Spanish court has found that the Public Prosecutor and the police have presented sufficient evidence to warrant the criminal investigation." **[80 RP 147]**

The Hearing Examiner and the Commission properly relied on evidence of the Spanish investigation in considering the qualifications and financial health of one of the proposed new owners — Iberdrola. **[80 RP 39943]** The Hearing Examiner explained how the Spanish investigation was relevant to the matter before the Commission:

> The criminal investigation in Spain is relevant and of concern in this case. It is a criminal investigation of the highest officials in the Iberdrola, S.A. and Avangrid, Inc. corporate chain, which is seeking to acquire PNM. It is also a criminal investigation of an Iberdrola, S.A. subsidiary in Spain that develops energy projects.
>
> There have been no formal criminal charges issued against the officials or the subsidiary at this point and no convictions. But a Spanish court has found that the Public Prosecutor and the police have presented sufficient evidence to warrant the criminal investigation.
>
> The criminal investigation raises questions about one of the legal standards for the approval of a merger -- the qualifications of the company seeking to acquire PNM. Utility requests for approvals are supposed to be accomplished within the confines of the Commission's discovery and hearing processes based upon the Commission's rules of procedure. Hiring of security companies to investigate and harass a utility's opponents might not be illegal in New Mexico, but it does go beyond the norms considered appropriate here. The discussion below regarding the investigative activities of Central Maine Power Company, a U.S. subsidiary of Iberdrola, S.A. and Avangrid, Inc., is concerning in this regard.
>
> The issue of document falsification is even more significant. Much of utility regulation involves the review of documents prepared

> and maintained by utilities. This is important for enforcement and for the discovery process associated with utility rate cases and requests of resource acquisitions. Allegations of document falsification are therefore especially concerning.
>
> Moreover, apart from whether the actions of Iberdrola, S.A.'s executives and its subsidiary constitute crimes under Spanish law, their actions appear to represent methods of doing business that should raise concerns for the Commission.
>
> The criminal investigation is also important due to the prevalence of Iberdrola, S.A. executives on the Avangrid, Inc. board of directors, which appoints and removes directors and management of Avangrid, Inc.'s utility companies. Six of Avangrid, Inc.'s 14 board members are senior executives in the Iberdrola, S.A. corporate structure. Ignacio Galán, Iberdrola, S.A.'s CEO and Chairman, serves as the Board Chair of Avangrid, Inc. Mr. Galán is under investigation in the Spanish court proceedings. The four members of Avangrid, Inc.'s executive committee also include Mr. Galán, plus Iberdrola, S.A.'s Chief Financial Officer, the Avangrid, Inc. CEO and one independent board member.

[80 RP 39953-39954].

The Appellants argue to the Court that the Hearing Examiner and the Commission relied too heavily on evidence of the Spanish investigation. **[BIC 43-45]**. However, appellate courts will not substitute their judgment concerning the weight to be given to evidence relied on by the lower court or agency absent a misapplication of law or error in admission of evidence. *Jones v. A.E. Beavers*, 1993-NMCA-100, ¶ 24, 116 N.M. 634. The Commission, sitting as the fact finder, weighs the evidence, and appellate review is limited to whether the Commission's decision is supported by substantial evidence. *Tanuz v. Carlberg*, 1996-NMCA-076,

¶ 7, 122 N.M. 113. The Appellants have not shown that the Commission erred in admitting evidence of the Spanish investigation.

7. The Commission Properly Relied on Evidence of the Maine PUC Audit

Avangrid Networks, Inc. owns four electric utilities in the Northeast -- Central Maine Power Company ("CMP"), New York State Electric and Gas Company ("NYSEG"), Rochester Gas & Electric Company ("RG&E") and United Illuminating Company ("UIC"). J.D. Power's nationwide 2020 Electric Utility Customer Satisfaction Studies ranked CMP last – number 128 among the 128 investor-owned electric utilities surveyed for residential customer satisfaction. NYSEG ranked 17th of the 18 large electric utilities surveyed in the East region. UIC ranked 11th among the 12 midsize electric utilities surveyed in the East region. Only RG&E performed well. In addition, the three low-performing utilities were assessed penalties and rate-recovery disallowances totaling approximately $25 million between January 2020 and May 11, 2021, arising from quality-of-service issues. Moreover, the penalty and rate-recovery disallowance amounts assessed against these three electric utilities during the five years prior to the proceeding below totaled $63.1 million. **[80 RP 39914-15]**

The Maine PUC Audit, of which the Appellants challenge admission into evidence, arose from CMP's implementation of a new billing system called SmartCare in late 2017. The Maine PUC found, in separate, parallel proceedings,

that CMP's implementation of the system and its customer service response to the billing issues resulting from the implementation were imprudent. **[80 RP 39919]** The Maine PUC found, in an order issued on February 19, 2021, that CMP's customer service was imprudent, starting in 2016 and since implementation of SmartCare at the end of October 2017. The Maine PUC found that CMP's customer service problems were severe and longlasting and that CMP had lost its customers' trust. As a result, the Maine PUC ordered a 100-basispoint reduction in CMP's cost of equity. Also, the Maine PUC ordered that a management audit be conducted of CMP and its affiliated service companies, Avangrid Management Company ("AMC") and Avangrid Service Company ("ASC"), to determine whether CMP's current management structure and the management services provided by AMC and ASC were appropriate and in the interest of Maine ratepayers. **[80 RP 39919-39925]**

The Maine PUC hired Liberty Consulting Group to perform the management audit. The Maine PUC's audit was completed and its findings were then made publicly available on July 12, 2021. **[53 RP 22398]** The Hearing Examiner extensively discussed the audit findings in the COS, and the Commission directs the Court's attention to this portion of the record. **[80 RP 399270-39934]**

The Appellants argued to the Hearing Examiner that evidence of the Maine PUC audit should not be admitted on the ground that it was hearsay to which no exception from the hearsay rule applied and further objected that the Commission

could not, in the alternative, take administrative notice of it. **[65 RP 22395]**. The Hearing Examiner rejected the Appellants' challenge to admission of evidence of the Maine PUC audit on two grounds.

First, the Hearing Examiner found that the Appellants' objection was untimely given that the Commission had provided notice of its interest in the audit findings to the Appellants as early as May 11, 2021 and given that intervenors had relied on the audit findings in their July 16, 2021 prefiled testimonies.

Second, the Hearing Examiner ruled that the Commission could take administrative notice of the Maine PUC audit under 1.2.2.35(D)(1)(a) NMAC of the Commission's Rules of Procedure, which provides that the Commission may take administrative notice of "rules, regulations, administrative rulings, published reports, licenses, and orders of the commission and other governmental agencies[.]" In support of this ruling, the Hearing Examiner stated that the audit had been commissioned by the Maine PUC and had been filed by the Maine PUC in its public records. **[65 RP 22403]** He also noted that the audit findings stated that the audit was conducted by a firm selected through a request-for-proposals process conducted by the Maine PUC. For this reason, the audit had indicia of competence and trustworthiness. **[65 RP 22402]**

In their BIC, the Appellants argue that the Hearing Examiner's finding that the evidentiary objection was untimely was arbitrary because the Hearing Examiner

disregarded that the Appellants met the July 30, 2021 deadline for filing motions to strike. **[BIC 46]** The Court should not consider this argument because the Appellants did not raise it in their exceptions to the COS, thereby depriving the Commission itself of the opportunity to consider the argument and thereby failing to exhaust their administrative remedies. **[80 RP 40320]** Should the Court nevertheless consider the substance of the argument, the Court should affirm the Hearing Examiner's ruling as the objection was untimely for the reasons stated by the Hearing Examiner. The Appellants' argument suggests, absurdly, that an evidentiary objection that became untimely due to certain events in the proceeding could somehow be revived and become timely due to the later imposition of a procedural deadline.

The Appellants further argue in their BIC that the Hearing Examiner erred in taking administrative notice of the audit. **[BIC 47]**. He did not. The Hearing Examiner's Order Addressing Prehearing Motions and Objections shows that he considered the New Mexico Rules of Evidence. **[65 RP 22395-22403]**. Even if the audit does not qualify as a published report of the Maine PUC (which the Commission does not concede), it has indicia of competence and trustworthiness for the reasons stated above and was alternatively admissible under the residual exception of Rule 11-807 NMRA. 11-807 NMRA.

D. The COS Was Not Internally Inconsistent

The Appellants argue that the COS was internally inconsistent because it recommended rejection of the proposed merger based on the deterioration in service quality that was a significant potential harm of approving the merger proposal while finding that the Appellants had complied with subpart 17.6.450.10 NMAC of the Commission's rule regarding "Affiliate Transactions." **[BIC 3]** The Court should reject this argument because the Appellants did not raise it in their exceptions to the COS and therefore did not preserve the argument for appeal.

On the merits, the argument should also be rejected because the requirement of a Commission-approved general diversification plan is merely one aspect of the Commission's review of a merger proposal, approval of which does not indicate approval of the overall merger proposal. The COS clearly indicates that the Hearing Examiner recommended approval of the Appellants' proposed General Diversification Plan (GDP) only because it contained all of the information required by the Commission's rule, not because he had found that the proposed Class II transaction itself was in the public interest. The Hearing Examiner stated:

> No party has objected to the sufficiency of the information contained in the 2021 GDP. *Staff witness John Reynolds states that PNM's 2021 GDP appears to comply with the content requirements in Rule 17.6.450.10(B) NMAC* and appears to satisfy the necessary conditions associated with the Class II Transaction, i.e. the Proposed Transaction, which is at issue in this case.

> In the event the Commission approves the Proposed Transaction, the Hearing Examiner recommends that the 2021 GDP be approved, subject to a further filing by the Appellants that incorporates the amendments to the June 4 Stipulation made in the Modified Stipulation.

[80 RP 40087 (emphasis added)]

E. The Hearing Examiner Did Not Improperly Depart from Precedent

The Appellants argue that the Hearing Examiner improperly departed from established precedent and engaged in novel and irrelevant comparisons by weighing customer benefits against the $2.3 billion that Avangrid had offered to pay above PNM Resources's ("PNMR") book value and $391 million above market value for PNMR's stock. They also argue that the Hearing Examiner discounted the potential customer benefits arising from the proposed merger by raising as an opposing point that PNMR's departing officers would receive approximately $29 million in "golden parachute" compensation. The Appellants counter this by pointing out that PNMR shareholders, not customers, would pay for this compensation. **[BIC 31-32]**.

The Hearing Examiner did not depart from established precedent. In evaluating the proposed merger, he applied the factors considered by the Commission in past merger cases. The Hearing Examiner identified those factors, as follows:

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. Verification of the qualifications and financial health of the owner; and
6. Adequate protections against harm to customers.

[80 RP 39838-39839]. The COS's table of contents shows that the Hearing Examiner comprehensively addressed each of these factors. **[80 RP 39802-39807 (Sections VI(B) – VI(G))]**. The analyses conducted under each of these factors may vary from one case to another to take into account the particular circumstances and particular concerns present in a particular case.

The Appellants' argument is similar to an argument made to this Court by Living Cross Ambulance Service, Inc. ("Living Cross") and rejected by this Court. *Living Cross Ambulance Serv., Inc. v. New Mexico Pub. Regul. Comm'n*, S-1-SC-35590, dec., 2017 WL 38983, (N.M. Jan. 5, 2017) (nonprecedential). While this decision is nonprecedential, the Court's reasoning is persuasive. In that case, the Commission had granted a certificate to American Medical Response ("AMR") to provide ambulance service in a territory, over the objections of the territory's incumbent provider, Living Cross. The Commission had found that Living Cross had not shown that it would be able to provide continuous and adequate service alone and had also found that Living Cross had not shown that its financial difficulties were the result of the Commission's previous issuance of a temporary certificate to AMR. *Living Cross*, S-1-SC-3550, dec. ¶ 3. The Commission relied on testimony regarding Living Cross's substantial delays in responding to emergency calls and

even failures to respond at all. *Id*., ¶ 8. Living Cross argued on appeal that the Commission's decision was arbitrary because the Commission had not promulgated a rule imposing specific, uniform standards for response times or dropped calls. This Court rejected this argument, holding that the Motor Carrier Act does not require uniform standards for response times or dropped calls. The Court found:

> [T]he Legislature has chosen not to micromanage or specifically define every term in the Motor Carrier Act, but instead has delegated authority to the PRC to assess these factors and weigh the reasonableness of a carrier's response to requests for service according to the unique circumstances of each case. In fact, a uniform response time standard might actually be contrary to the discretionary approach that the Motor Carrier Act appears to endorse.

Id., ¶ 11. This Court further rejected Living Cross's argument that the lack of uniform standards for ambulance response times presented a constitutional due process problem because service providers did not have adequate notice as to the limit for an acceptable response time. This Court held that the Motor Carrier Act provided a sufficiently definite standard by requiring that response times be "reasonable." *Id.*, ¶ 14.

The PUA provides that the Commission shall approve proposed acquisitions and consolidations "unless the commission shall find that the proposed transaction is unlawful or is inconsistent with the public interest[.]" NMSA 1978, § 62-6-13 (1953). The statute delegates to the Commission broad discretion when considering whether to approve a proposed merger, allowing the Commission to determine

which facts are relevant to "the public interest" and to determine what weight should be given to the relevant facts when deciding whether approval of a particular merger is in the public interest.

F. The Commission Properly Considered Avangrid's Failure to Disclose Service Problems

The Appellants argue that the Commission should not have considered the Appellants' failure to disclose Avangrid's service problems as a reason for denying approval of the proposed merger for three reasons. **[BIC 53]** First, they argue that there is no requirement to disclose service problems and resulting sanctions against affiliate utilities operating in other states. **[*Id.*]** Neither the Hearing Examiner nor the Commission stated that the Appellants had an obligation to disclose this information. Rather, the failure of the Appellants to disclose Avangrid's service problems is relevant to whether the Appellants met their burden to demonstrate the adequate qualifications of the proposed new owner. **[*See* 80 RP 39969-39973]**

Second, the Appellants allege that "the accusation of dishonesty originated from the HE's independent research beyond the record." **[BIC 54]** The Appellants' argument is based upon a fundamental misunderstanding of the purpose of a Commission adjudicatory proceeding. The Commission is charged with protecting and advancing the public interest. *PNM Elec. Serv's v. New Mexico Pub. Util. Comm'n*, 1998-NMSC-017, 125 N.M. 302. The primary purpose of the Commission's merger review, in particular, is to determine whether a proposed

merger is in the public interest. If evidence submitted and elicited by the parties (including the Commission's Staff) is insufficient to allow the Commission to decide this ultimate question, the Commission has a duty to seek such evidence as will supply the deficiency. The Commission has adopted a Rule of Procedure, 1.2.2.35(K) NMAC, for this very purpose. It provides:

> **K. Additional Evidence:** At any stage of the proceeding the commission or presiding officer may require the production of further evidence upon any issue. Such evidence may, at the discretion of the commission or presiding officer, be in writing or presented orally. All parties and the staff will be given an opportunity to reply to such evidence submitted and cross-examine the witness under oath.

1.2.2.35(K) NMAC.

The New Mexico Court of Appeals has affirmed an administrative agency's authority to solicit evidence. In *Las Cruces Professional Fire Fighters v. City of Las Cruces*, 1997-NMCA-031, 123 N.M. 239, the Court of Appeals considered the City of Las Cruces' (the "City") claim that it did not receive a fair hearing before the Las Cruces labor-management board (the "Board") due to the alleged bias of the Board's chairperson. The Board had ruled in favor of the union that a directive issued by the City's fire chief constituted a prohibited practice. On appeal, the City objected to the chairperson's questioning of the union representative at the hearing "on matters [the representative] never raised and to matters to which the fire fighters did not testify to. This is before the City even ha[d] the opportunity to cross examine [the representative]." The City also objected to the chairperson's questioning of the fire

chief at length, including questions on topics not covered by the direct examination. *Id.*, ¶ 30.

The appellate court found no impropriety in the chairperson's questioning. The appellate court found that "the questions were intelligent, respectful, phrased in a fair manner, and pertinent to issues to be decided at the hearing." *Id.*, ¶ 31. Additionally, the appellate court held:

> In a jury trial the trial judge must be careful not to ask questions in such a manner as to convey the judge's personal view of the evidence or the merits of the case . . . but that would not be a concern with a hearing before the Local Board. *There is no reason to forbid the board to consider evidence elicited by its own questions and limit it to evidence elicited by questioning by the parties.*

Id., ¶ 32 (emphasis added).

The Hearing Examiner properly solicited additional evidence necessary to determine whether the June 4 Stipulation was in the public interest. Moreover, the Appellants do not dispute the fact that they were provided an opportunity to respond to the additional evidence.

Third, the Appellants argue that the imputation of dishonesty for not disclosing Avangrid's service problems "is unfair and illogical," in part because this case was "litigation with adverse parties." **[BIC 55]** The Appellants again misapprehend the purpose of a Commission administrative adjudicatory proceeding. Regulated utilities in Commission proceedings are not in precisely the the same position as parties in district court proceedings. Pursuant to the time tested

regulatory compact, public utilities are permitted to operate as monopolies, subject to a corresponding legal obligation to provide "adequate, efficient and reasonable service." NMSA 1978, § 62-8-2 (1953). One result of this compact is that a regulated utility is subject to numerous, ongoing disclosure requirements by law and regulation, and the utility is often in the position of determining how to comply with such requirements and which information is pertinent. An applicant's decision not to disclose adverse information voluntarily is relevant to the question of how forthcoming with such information the applicant is likely to be if allowed to manage a regulated utility. It was therefore permissible for the Commission to attribute some weight to the Appellants' failure to disclose relevant information.

G. The Commission Properly Relied on Evidence of Noncompliance by Avangrid Renewables, LLC

Avangrid has been operating in New Mexico since at least 2017 through its subsidiary, Avangrid Renewables, LLC ("Renewables"). Renewables builds renewable energy projects and sells the energy to public utilities. **[80 RP 39965]** The Appellants argue that it was not reasonable for the Commission to conclude that the proposed merger posed an unacceptable risk of deterioration in service due to the conduct of Renewables in relation to the El Cabo and La Joya wind farms in eastern New Mexico.

Regarding the El Cabo Wind Farm, Staff witness John Reynolds testified that Renewables deliberately skirted New Mexico law by claiming that its El Cabo Wind

Farm has a capacity of 298 MW in an attempt to avoid a Commission location control proceeding. The PUA requires that persons proposing generation facilities designed for or capable of operation at a capacity of 300 MW or more obtain Commission "location control" approval as well as approval of the width of the right-of-way needed for the "gen-tie" line tying the generation facility to the grid. Renewables did not seek either approval from the Commission regarding the El Cabo Wind Farm. **[80 RP 39965]**.

The Appellants argue that the "skirting" allegation rests upon unqualified and unsupported speculation that the El Cabo Wind Project might sporadically exceed 300 MW. **[BIC 57]** This is not true. Mr. Reynolds cited two documents in which the project's developers stated that the nominal, or "nameplate," capacity of the El Cabo Wind Farm was approximately 298 MW, that generation as then planned would not exceed 299 MW, and that a 300+ MW project would clearly fall under the Commission's jurisdiction and would therefore jeopardize the initial project due to unnecessary regulatory risk. **[80 RP 39967]**

Factfinding frequently involves selecting which inferences to draw. "An appellate court must indulge in '[a]ll reasonable inferences in support of the district court's decision' and disregard 'all inferences or evidence to the contrary'." *State v. Martinez*, 2018-NMSC-007, ¶ 15 (quoting *Jason L.*, 2000-NMSC-018, ¶ 10, 129 N.M. 119). Additionally, "[t]he fact that another district court could have drawn

different inferences on the same facts does not mean this district court's findings were not supported by substantial evidence." *Id.* The Commission drew a reasonable, negative inference from Mr. Reynolds' testimony, which should not be disturbed on appeal.

Regarding the La Joya Wind Farm, Mr. Reynolds testified that Renewables had not complied with applicable requirements concerning location and right-of-way width approval because Renewables had not made certain compliance filings. **[80 RP 39966]** Mr. Kump confirmed in his testimony that Renewables had not made the compliance filings. He testified that one of the filings was not timely due to a miscommunication between his team and the contractor as to who would compile the construction permits and file them with the Commission. He further testified that the second failure to file had been due to Renewables' failure to provide notice that the project had been placed in service. He apologized for the errors and further testified that Avangrid would work diligently to ensure that such errors would not occur again. **[80 RP 39966-39967]**

The Appellants argue that the untimely filings should not be considered by the Commission because Staff ultimately settled with the Appellants concerning the filings. Citing to Staff's initial post-hearing brief, the Appellants state, "Staff concluded that the 'non-compliance' problems it had raised along with reservations about the Merger, did not outweigh the benefits." **[BIC 57]** The Appellants'

statement that Staff ultimately settled with the Appellants is misleading. In its initial post-hearing brief, Staff stated that, as set forth in Staff's testimony, it opposed the November 4, 2021 Stipulation, and Staff counsel argued that the November 4, 2021 Stipulation should not be adopted. **[78 RP 39178]** Staff also stated in its brief that, after the hearing, it entered into an agreement with the Appellants not reflected in the evidentiary record **[78 RP 39179]**

After the hearing, Staff and the Appellants filed a joint motion to permit the filing of their agreed-upon positions or, in the alternative, to reopen the record for the purpose of admitting their compromise position into evidence. **[76 RP 38663]** In an order issued on August 27, 2021, the Hearing Examiner denied this joint motion to admit evidence of the compromise position without additional proceedings, finding that the compromise position constituted new evidence in the form of additions and modifications to the November 4, 2021 Stipulation. He ordered that, if Staff and the Appellants wished to introduce the new evidence, they must file a motion to reopen the record. **[76 RP 38702-38705]** The Appellants and Staff did not file such a motion. Nevertheless, the Appellants cited their compromise position with Staff in their post-hearing brief as if the positions had been admitted into evidence. The Hearing Examiner found that the Appellants had ignored the due process requirement reflected in the Hearing Examiner's August 27, 2021 order, and

he struck the references to the compromise positions from the Appellants' post-hearing brief. **[80 RP 40252-40254]**

The Hearing Examiner did not strike Staff's initial post-hearing brief, presumably because Staff made it clear in the brief that its agreement with the Appellants had not been admitted into evidence. The Appellants' reliance on Staff's brief to represent that they had settled with Staff is improper.

H. The Commission Did Not Rely on an Inability to Enforce Regulatory Commitments in Rejecting the Proposed Merger

The Appellants incorrectly argue that the Commission, in rejecting the proposed merger, relied on the Commission's inability, due to insufficient resources, to enforce the proposed regulatory commitments. They cite to Volume 80, pages 39855 and 39857 of the record proper, which are pages 48 and 50 of the COS. **[80 RP 39855, 39857]** Page 50 of the COS says nothing even to suggest that the Hearing Examiner relied on any alleged inability of the Commission to enforce the proposed regulatory commitments in recommending denial of approval of the merger. The only language on page 50 of the COS that the Appellants may be relying on is the following:

> The 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 of any conditions attached to any approval of the Proposed Transaction.

[80 RP 39857] This sentence merely states what it states: that a significant effort would be required to enforce the regulatory commitments. It does not say that the Commission lacks the resources to do so.

The Appellants also cite comments made by Commissioners Fischmann and Maestas at the open meeting at which the Commission issued its decision. **[BIC 58]** Reliance on these comments should be disregarded for the reasons stated above regarding comments made by Commissioner Byrd.

I. The Commission Properly Gave Evidence of Avangrid's Improved Performance the Weight It Deserved

The Appellants argue that the Hearing Examiner and the Commission improperly focused on the shortcomings of Avangrid-owned utilities without acknowledging the utilities' efforts and success in improving service. **[BIC 60]** But the COS, which the Commission adopted, indeed acknowledges Mr. Kump's testimony about the efforts to improve made by Avangrid's subsidiaries. **[80 RP 39925-39927]** As discussed above, it is not the Court's role to second-guess the Commission's weighing of evidence.

J. The Commission Properly Determined that It Was in the Public Interest to Reject the Proposed Merger Rather than Approve It Subject to Conditions that Would Be Difficult and Time-Consuming to Enforce

It is ironic that the Appellants argue that the Commission unreasonably failed to account for the comprehensive protections against the risk of service deterioration

included in the Modified Stipulation, given that many of those protections had not been agreed to by the Appellants, but recommended by the Hearing Examiner to be added as conditions of the approval of the proposed merger. Moreover, it was only when faced when the Hearing Examiner's primary recommendation to reject the proposed merger that the Appellants agreed to some of these protections. **[80 RP 39858** (stating that the Appellants had resisted the establishment of meaningful measures to maintain or improve the reliability of PNM's service to its New Mexico utility customers)**]** In addition, the sincerity of the Appellants' acceptance of the additional conditions in the Modified Stipulation is called into question by their continued disagreement, as stated in their exceptions to the COS, with certain conditions of the Modified Stipulation. **[81 RP 40417, ¶ 11]**. It should also be noted that the Appellants, in making this argument, again improperly refer to their agreement to Staff's proposed safety and reliability standards. **[BIC 63]**

It was within the Commission's broad discretion to determine that it was in the public interest to reject the proposed merger rather than approve it subject to conditions that would be difficult and time-consuming to enforce.

K. The Imposition of Sanctions Against Avangrid for Discovery Violations Did Not Constitute an Abuse of Discretion

The Hearing Examiner recommended that the Commission impose sanctions against Avangrid for discovery violations, which the Commision adopted in its final

order.[5] The Commission, however, agrees with PNM that the Commission's decision to go beyond the recommendation to extend liability for the sanctions to the other Appellants, was overbroad.

Whether the Commission should sanction Iberdrola and PNM was not an issue before the Hearing Examiner as no party had advocated for it. Further, the record contains no evidence that any of the Appellants other than Avangrid had violated discovery rules or orders. **[BIC 69].** It was not an issue before the Commission upon its consideration of exceptions to the COS and therefore is not an issue properly before this Court. Avangrid, not Iberdrola or PNM, paid the $10,000 fine assessed by the Commission, and thus neither Iberdrola nor PNM have been harmed by the Commission's imposition of fines against all of the Appellants. **[81 RP 40460-40461** (Appellants' Compliance Filing Providing Notice of Payment (stating that on January 6, 2002, Avangrid submitted $10,000 payment)**]** However, the Commission's imposition of sanctions against Avangrid is an issue properly before this Court.

[5] The Hearing Examiner recommended that the sanctions take the form of Avangrid paying for NEE's attorney fees, from shareholder funds, for the time expended on NEE's efforts to resolve the discovery dispute regarding NEE discovery request NEE 4-55 including the time expended in bringing NEE's motion. **[80 R.P. 39988].** The Commission adopted the general recommendation to assess a penalty against Avangrid but ordered that the penalty take the form of a fine pursuant to NMSA 1978, § 62-12-4 (1983), which authorizes the Commission to assess fines for failure to obey Commission orders. **[81 RP 40430-40432]**.

The Hearing Examiner's recommended sanction related to Avangrid's response to NEE's Interrogatory 4-55 (NEE 4-55), which asked the Appellants to "identify all current or pending instances of non-compliance with any state, federal law or commission rule by Iberdrola, S.A., Avangrid, Inc., or any of its affiliates for which the company may be liable and subject to civil or criminal penalties for the last ten years." **[80 RP 39973]** The Appellants' January 21, 2021 response referred to an attached "Avangrid Exhibit NEE 4-55," which was not actually attached to the response. On January 28, 2021, the Appellants provided a response to NEE Interrogatory 4-55, which included a series of exhibits designated as confidential, identifying violations and fines against Avangrid and its utility subsidiaries. However, the exhibits did not include all violations and fines responsive to NEE 4-55 that had actually occurred and had been assessed before January 28, 2021. **[80 RP 39973-39974]**

In response, NEE filed its Motion for Order to Show Cause Why Appellants Shouldn't be Held in Contempt and for Sanctions (the "NEE Motion"). **[80 RP 39973]** The Hearing Examiner issued an order directing the Appellants to file testimony showing why the Commission should not find that the response to NEE 4-55 violated the Commission's discovery rules, the discovery requirements in the December 18, 2020 procedural order, and the prohibition in the January 14, 2021 protective order against the over-designation of discovery responses as confidential.

The order further provided that the issue of whether to order sanctions and the amount thereof would be litigated through examination of the pre-filed testimony at the hearing. The order set a deadline for response and rebuttal testimonies. **[80 RP 79975]**

The Appellants subsequently filed the Direct Testimony of Robert Kump, Deputy Chief Executive Officer and President of Avangrid. **[51 RP 19066-19225]** NEE did not file testimony responding to Mr. Kump's testimony. **[80 RP 39988]**

The Hearing Examiner's analysis of the response to NEE 4-55 is thorough and extensive, and the Commission directs this Court's attention to this analysis. **[80 RP 39973-39988]** In summary, Mr. Kump testified that Avangrid had interpreted NEE 4-55 narrowly and that the exhibit that Avangrid had submitted on January 28, 2021, had not been prepared for the specific purpose of responding to NEE 4-55. The exhibit had been a compilation of annual reports that Avangrid had prepared historically as part of its internal data-collection efforts to track fines, penalties and lawsuits at Avangrid's regulated businesses. **[80 RP 39975]** Mr. Kump testified that Avangrid should have included three additional categories of information in response to NEE 4-55:

1. Settlements and negative revenue adjustments that did not result in a monetary payment to the regulator/State;
2. "Lower level financial penalties" that Avangrid, Inc. inadvertently omitted from its January 28, 2021 response; and

3. Proceedings that did not involve noncompliance, or were expected to yield a penalty based on Avangrid, Inc.'s experience and historical precedent, or the status of the proceeding.

[80 RP 39975-39980] Mr. Kump admitted that the Appellants had not supplemented their January 28, 2021 response to NEE 4-55. He identified six additional matters that had not been included in the January 28, 2021 response, and the Hearing Examiner identified two more. **[80 RP 39980-39982]** Mr. Kump admitted that Avangrid's narrow interpretation of NEE 4-55 resulted in a misleading response and that the response should have explained that interpretation and/or included the settlements and negative revenue adjustments. **[80 RP 39983, 39985]**

The Hearing Examiner concluded that (1) the January 28, 2021 response to NEE 4-55 was incomplete and evasive; (2) Avangrid did not supplement its January 28, 2021 response to include violations and fines that were subsequently determined and assessed; and (3) Avangrid's claim of confidentiality for its response to NEE-55 was baseless, as supported by Avangrid's eventual waiver of confidentiality of the response on May 21, 2021, approximately four months after the January 28, 2021 response to NEE-55. **[80 RP 39984-39986]** The Hearing Examiner explained that Avangrid's violations negatively impacted the proceedings:

> Indeed, a primary reason for the further proceedings ordered in this case after the originally scheduled hearing dates in May was the Hearing Examiner's discovery in early May of the violations, fines and cost disallowances not previously disclosed by the Appellants in their pre-filed testimony.

> . . . The Appellants' incomplete response to NEE-55 on January 28 and their failure to supplement that response help explain why intervenors failed to address the Avangrid, Inc. utilities' violations, penalties and cost disallowances in other states in the testimony they filed on April 2. If the information had been promptly provided in response to NEE 4-55, the issues could have been addressed in the intervenors' April 2, 2021 testimony. The information may have also prompted some of the parties not to have joined in the Stipulation or to have insisted that the Stipulation include stronger protections to ensure service quality.

[80 RP 39985-39986]

The Hearing Examiner, like PNM, mistakenly stated that the imposition of discovery sanctions requires a finding that a party's failure to comply is willful, in bad faith or due to its own fault. **[80 RP 39987]** As discussed in the Standard of Review section of this brief, above, such findings are not required if the sanction takes the form of a fine. The Hearing Examiner found that the violations were willful and ordered NEE to be awarded its attorney's fees for the time expended on NEE's efforts to resolve the discovery dispute regarding NEE 4-55, including the bringing of the NEE Motion, paid for by shareholder funds. **[80 RP 39987-88]**

The Commission affirmed the Hearing Examiner's finding that sanctions were warranted based on the discovery violations. **[81 RP 40431, ¶ 49].** However, as stated above, the Commission assessed the penalty in the form a fine under Section 62-12-4 of the PUA instead of attorney's fees. NMSA 1978, § 62-12-4 (1983). The Commission stated that the amount of the fine should bear some relation to and be proportionate to the impact of the violation on the proceedings. The Commission

found that a $10,000 penalty was appropriate based on the disruption of the proceedings caused by the discovery violations and the additional time and effort that was required for pleadings, testimony, and orders addressing the discovery violations. **[81 RP 40132, ¶¶ 51-52]** The Commission did not address whether the violations were willful or in bad faith, nor was it required to do so. **[81 RP 40130-40132]**

The basis of the Appellants' challenge to the imposition of the fine on Avangrid is that no substantial evidence supports a finding that Avangrid acted willfully or in bad faith. **[BIC 68-71]**. Because such a finding was not necessary to impose the fine, the Appellants' argument fails. Substantial evidence shows that Avangrid committed the discovery violations. The simple fact that Avangrid failed to comply is enough to support sanctions in the form of a fine.

V. CONCLUSION

In conclusion, the Commission asks the Court to affirm the Commission's Order on Certification of Stipulation.

/ / /

VI. STATEMENT REGARDING REQUEST FOR ORAL ARGUMENT

The Commission requests oral argument due to the number and complexity of the issues in this appeal.

Respectfully submitted this 14th day of June, 2022, as an Attachment to the Motion of the New Mexico Public Regulation Commission to Request that the Court Accept Late Filing of Answer Brief

NEW MEXICO PUBLIC REGULATION COMMISSION

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/ / /

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 14, 2022, a true and correct copy of the foregoing *Answer Brief of the New Mexico Public Regulation Commission* was electronically filed in the Supreme Court's Odyssey filing system, as an Attachment to the Motion of the New Mexico Public Regulation Commission to Request that the Court Accept Late Filing of Answer Brief, which in turn has caused service upon counsel for all parties of record.

NEW MEXICO PUBLIC REGULATION COMMISSION

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