IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. S-1-SC-39152

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

Appellants,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee.

and

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

Intervenor-Appellees.

In The Matter of The Joint Application of Iberdrola, S.A., Avangrid, Inc., Avangrid Networks, Inc., NM Green

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

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

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-318(G) NMRA, Appellants state that the body of the foregoing Joint Reply Brief contains eight thousand seven hundred forty-four (8,744) words in Times New Roman 14-point font, a proportionally-spaced typeface, as calculated by Microsoft Word 365, and is therefore within the limits permitted by order of the Court issued June 30, 2022.

By: */s/ Thomas C. Bird*

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I. INTRODUCTION

The Court should vacate and annul the Order on Certification of Stipulation ("Order") of the New Mexico Public Regulation Commission ("Commission") rejecting the Merger (as defined at page 3, BIC). The Answer Briefs submitted by the Commission and New Energy Economy ("NEE") reflect significant misapprehensions about the whole record substantial evidence standard, the legal residuum rule, and this Court's role in applying these standards. The Commission and NEE have not demonstrated the admissibility of the evidence the Hearing Examiner ("HE") and the Commission relied on in rejecting the Merger. They also fail to direct the Court's attention to substantial admissible evidence that justifies the Order. Instead, their arguments underscore a pervasive disregard for the Commission's rules, and the rules of evidence.

Nor have the Commission and NEE explained the Commission's failure to account for the service quality protections afforded by the Modified Stipulation, or the near-unanimous support the Modified Stipulation enjoyed. They fail to harmonize approval of the General Diversification Plan ("GDP") with rejection of the Merger, and fail to defend the unwarranted discovery sanction. Most importantly, they fall short in trying to show that, in light of the whole record, the Commission's decision to reject the Merger was reasonable and lawful.

II. ARGUMENT

A. The Commission and NEE Misapprehend the Whole Record Substantial Evidence Standard and the Legal Residuum Rule.

This appeal is unique because the bulk of the evidence the Commission relied on in rejecting the Merger is inadmissible or otherwise not properly considered on appeal under the whole record substantial evidence standard and the legal residuum rule. The analytical framework the appeal presents for the Court is to, first, determine how much of the evidence the Commission relied on should be discarded in conducting a whole record substantial evidence review and applying the legal residuum rule. Second, the Court must assess whether the evidence which survives this "winnowing" process is sufficient to conclude that the Commission acted reasonably and lawfully when it rejected the Merger.

Under this analysis, the Commission's Order does not stand simply because the record may contain some admissible evidence of risk. Rather, the Court must determine, in light of the evidence that can withstand appellate scrutiny, whether the Commission's decision was reasonable.

The Court should reject as irrelevant many of the descriptions of the standards of review offered by the Commission and NEE. For example, the discretion and latitude afforded an administrative agency in admitting hearsay evidence **[NEE AB**

56, 60] has no bearing on this appeal, where the legal residuum rule removes inadmissible evidence from consideration.

The Commission and NEE stress the deference appellate courts sometimes afford administrative agencies' fact determinations and weighing of competing interests. **[Comm. AB 6-7, NEE AB 6]** But they overlook the reasons this Court adopted a whole record substantial evidence standard and the legal residuum rule for review of agency rulings. This Court explained in *Duke City Lumber Co. v. N.M. Envt'l Imp. Bd*, 1984-NMSC-042, ¶¶ 11-13, 18, 101 N.M. 291, that it was heightening the standard of review for agency appeals to include whole record review, as compared to the standard controlling review of judicial decisions, because administrative agencies serve as factfinders, complainants and prosecutors, and operate under much laxer procedural and evidentiary rules. *Id.* The adoption of a whole record substantial evidence standard with the legal residuum rule thus signified decreased deference to agency fact finding.

Furthermore, the respect owed agency findings does not prevent a reviewing court from setting them aside if the record precludes the agency's decision "from being justified by a fair estimate of the worth of the testimony of witnesses or its informed judgment on matters within its special competence or both." *Tallman v. ABF,* 1988-NMCA-091, ¶ 16, 108 N.M. 124 (*superseded by statute on different grounds,* NMSA 1978, §§ 52-2-1-to-14 (1991), *as recognized in Leo v. Cornucopia*

Rest., 1994-NMCA-099, ¶ 22, 118 N.M. 354); *see also, In re Comm's Investigation of Rates for Gas Ser. of PNM's Gas Serv.*, 2000-NMSC-008, ¶¶ 13-14, 128 N.M. 747 (recognizing that the Commission cannot rely on agency expertise to ignore weight of evidentiary record). The "winnowing" contemplated by the whole record substantial evidence review requires the court to "analyze and examine all the evidence and disregard that which has little or no worth." *Tallman,* 1988-NMCA-091.

The Commission also argues that this Court has long refused to second guess the Commission's balancing of competing interests. **[Comm. AB 10-11]** None of the cases the Commission cited, however, involved a balancing determination like the one before the Court in this case, based largely on inadmissible or otherwise improper evidence subject to removal from consideration under the legal residuum rule.

The Commission disregards the New Mexico precedents indicating that application of the legal residuum rule and the whole record substantial evidence standard may properly entail balancing judgments by the appellate court. *See, e.g., Duke City Lumber Co.*, 1984-NMSC-042, ¶ 10 (describing whole record substantial evidence standard and explaining that, after courts consider evidence supporting and contrary to the agency decision, "[t]he reviewing court would then decide whether on balance, the agency's decision was supported by substantial evidence.")

(Emphasis added) (quoting *Universal Camera Corp. v. NRLB*, 340 U.S. 474 (1951)); *Tallman*, 1988-NMCA-091, ¶ 10 (explaining that the reference to "balancing" in *Duke City Lumber* means that a reviewing court, after examining the evidence and disregarding that which has little or no worth, must decide if there is evidence for a reasonable mind to accept as adequate to support the conclusion reached). "The test is one of reasonableness." *Tallman*, 1988-NMCA-091, ¶ 10

The Commission and NEE have not identified other admissible evidence that would suffice to allow a reasonable person to reject the stipulated grounds for approving the Merger. The Court should not be required to comb through the record and create grounds for upholding the Order below. *See Citizens for Fair Rates v. New Mexico Pub. Reg. Comm.*, 2022-NMSC-010, ¶¶ 19, 30, 503 P.3d 1138 (generally, a reviewing court should not "supply a reasoned basis for the agency's action that the agency itself has not given;" and, Court should not have to perform parties' work for them on inadequately briefed issues) (citations omitted).

B. The Commission's Rejection of the Merger Fails the Whole Record Substantial Evidence Test.

In their Answer Briefs, neither the Commission nor NEE contest the magnitude of the benefits that would accompany approval of the Merger. Consequently, the outcome of this appeal turns upon: (a) what evidence of the risks arising from the Merger may be properly considered on appeal under the whole record substantial evidence standard and the legal residuum rule, and (b) whether, in

light of properly considered evidence, the Commission's conclusion that the Merger was not in the public interest was reasonable. The Commission's decision fails the substantial evidence on the whole record test.

1. The Commission and NEE have not demonstrated that the evidence Appellants challenged was admissible and, therefore, properly considered on appeal.

a. The Commission and NEE have not justified reliance on the Spanish criminal investigation.

Appellants demonstrated that the evidence of the Spanish criminal investigation cannot support the Commission's order because asserted facts and allegations from other proceedings are hearsay and not subject to judicial notice. **[BIC 43]** Appellants also showed that the Commission's reliance on evidence of the investigation to support imputations of criminality violated the presumption of innocence. **[BIC 43-45]**

The Commission attempts to respond in three ways. First, the Commission incorrectly asserts that that Appellants waived their legal residuum challenge because they did not raise it below before the HE or in their exceptions to the Commission. **[Comm. AB 38-39]** Appellants raised the legal residuum rule generally in their motion to strike and in their objections and motion *in limine*. **[62 RP 21859, 21942]** They raised the issue again, specifically in relation to evidence of the Spanish criminal investigation. **[62 RP 21864, 21948]** (citing 1.2.2.35(A)(2) NMAC, the Commission rule codifying the legal residuum rule). The HE recounted

Appellants' assertion of the legal residuum rule in his order rejecting Appellants' evidentiary objections. **[65 RP 22392, 22394, 22404]** The Commission's own rule provides, in relation to decisions on the admission of evidence, "[f]ormal exceptions to rulings are not necessary and need not be taken." 1.2.2.35(L)(4) NMAC. The Commission completely fails to acknowledge its own regulation on this issue. Accordingly, the Commission's waiver arguments are groundless.

Second, the Commission incorrectly contends that no authority supports the conclusion that the presumption of innocence prevents the Commission from relying on the Spanish investigation. **[Comm. AB 39-40].** NEE similarly argues that a presumption of innocence is only relevant where the evidence is being used to prove an accused has committed a crime. **[NEE AB 54-55].**

These arguments overlook the plentiful authority in New Mexico and elsewhere showing that courts regularly enforce the presumption of innocence in a wide variety of civil and administrative proceedings. *See, e.g., C.J.L. Meyers & Sons Co. v. Black*, 1888-NMSC-005, ¶ 19, 4 N.M. 352 (noting that the "presumption is always in favor of innocence, and not of guilt"); *Torlina v. Trorlicht*, 1889-NMSC-012, ¶ 10, 5 N.M. 148 (same); *State ex rel. Neb. State Bar Asso. v. Jensen*, 171 Neb. 1, 8, 105 N.W.2d 459, 466 (1960) (recognizing applicability of presumption in attorney disbarment case); *Steinhouse v. Worker's Comp. Appeal Bd.*, 783 A.2d 352, 357 n.4 (Pa. Commw. 2000) (concluding that presumption applied in worker's

compensation case); *Emp. Ret. Sys. of Tex. v. Cash*, 906 S.W.2d 204, 206-207 (Tex. App. 1995) (applying presumption to deceased's conduct in death benefits dispute); *Wyckoff v. Mut. Life Ins. Co.*, 173 Ore. 592, 595, 147 P.2d 227, 229 (1944) (applying presumption in suit to recover accidental death benefits); *Pa. State Bd. of Med. Educ. & Licensure v. Schireson*, 360 Pa. 129, 136, 61 A.2d 343, 347 (1940) (applying presumption in medical licensure revocation proceeding); *Holmes v. Review Bd. of Ind. Empl't Sec. Div.*, 451 N.E.2d 83, 87 (Ind. 1983) (applying the presumption in unemployment compensation proceeding, noting that the presumption of innocence is "one of the basic elements which binds our society together"). The presumption of innocence thus prevents civil courts and administrative agencies from doing what the Commission did in this case: treating a party as guilty when no charge or indictment, let alone a conviction, has occurred.

Third, the Commission insists that it was entitled to give the evidence of the Spanish investigation the "weight" it deemed appropriate. **[Comm. AB 41-42]** This position simply sidesteps the question of whether the hearsay evidence of the then-pending investigation can be properly considered on appeal at all.

NEE argues that the hearsay problem is solved because the HE did not consider evidence of the Spanish investigation for the truth of the matters asserted, but for the fact of the investigation. **[NEE AB 51-53]** The record contradicts this assertion. The HE ruled that evidence of the Spanish investigation was relevant

"both for the fact of the investigation and for the activities being investigated. The evidence is relevant to the manner in which PNM's future operations would be controlled by Iberdrola and Avangrid and what the impact of that control will be." **[65 RP 22407]** (Emphasis added). NEE disregards the HE's explanation of his ruling. The HE did not presume innocence in explaining his ruling, nor confine his reasoning to the fact that the investigation was occurring. To the contrary, he admitted the evidence for the truth of the matters asserted, as confirmed by his explanation that the investigation justified concern that PNM would be controlled by a company and executives engaged in criminal conduct.

NEE itself argued that the investigation was relevant because it reflected past criminal conduct by Iberdrola and Avangrid. **[52 RP 19321]** ("Why is this corruption and fraud investigation relevant? Past criminal activity is relevant to understand what future Iberdrola/Avangrid actions will be like."). More importantly, the statements of the Commissioners during deliberations confirm they relied on this information for the truth of the matter. **[BIC 45]** The record contradicts NEE's claim that the evidence of the Spanish criminal investigation appropriately came into evidence.

NEE also makes the irrelevant point that the HE had "great latitude" in admitting evidence of the investigation. **[NEE AB 54]** On appeal, the relevant inquiry is whether a court would admit evidence of the investigation, and

correspondingly, whether evidence of the investigation counts toward supporting the Commission's order. NEE has not shown that evidence of the Spanish investigation can constitute substantial evidence supporting the Commission's order. *See State v. Vigil*, 1982-NMCA-058, ¶ 17, 97 N.M. 749, 643 P.2d 618 ("hearsay is insufficient to establish a fact in an administrative proceeding.").

Finally, NEE and the Commission fail to acknowledge one of the great dangers of relying on the Spanish investigation to reject the Merger; namely, that the court in Spain could dismiss Iberdrola and all of its affiliates and current executives from the investigation.

b. The Commission and NEE have not demonstrated that the Liberty Audit may be considered on appeal.

The Commission and NEE fail to counter Appellants' argument that the management audit prepared by The Liberty Consulting Group ("Liberty") for the Maine Public Utilities Commission ("MPUC") was inadmissible hearsay, that no hearsay exception applied, that the HE improperly rejected Appellants' objection to its admission as "untimely," and that the HE unjustifiably took administrative notice of the Liberty Audit on the mistaken premise that it was a published report of a governmental agency. **[BIC 45-47]** The Commission and NEE have not demonstrated that the Liberty Audit was admissible and may be considered as substantial evidence on appeal. Their arguments based on Rules 11-807 and 11-803 are meritless.

The record discloses details about the Liberty Audit that counter the Commission's and NEE's arguments. Liberty is a private consulting firm in Lebanon, Pennsylvania. **[44 RP 17251]** The Service Contract between Liberty and the State of Maine-MPUC specified that Liberty "shall act in the capacity of an independent contractor and not as officers or employees or agents of the State." **[44 RP 17259, ¶ 3]** The agreement is governed by the laws of Maine. **[42 RP 17261, ¶ 14]** Under Maine law, the key distinction between an independent contractor and an employee is the independent contractor's retention of control over the details of the work performed. *See, e.g., Legassie v. Bangor Publ'g Co.*, 1999-Me.-180, ¶ 6, 741 A.2d 442. Accordingly, the Service Contract afforded the MPUC very limited control over Liberty's work, confined to reviewing the draft report for adherence to the Request for Proposal and work plan requirements. **[44 RP 17271]**

Importantly, in the Maine regulatory proceeding, Central Maine Power ("CMP") commented that the Liberty Audit contained factual inaccuracies that it would address in any future MPUC investigation. **[79 RP 39769]** The MPUC did not enter findings adopting the Liberty Audit; instead, it initiated a summary investigation into the issues raised in the Liberty Audit. **[79 RP 39773]** That investigation did not conclude before the close of evidence in this case. **[Id.]**

The Commission and NEE have relied on allegations from several proceedings pending in other jurisdictions: the Spanish investigation, the Liberty

Audit, a Maine regulatory investigation involving solar power generators, and a civil case pending in Maine entitled *Levesque et al. v. Iberdrola S.A. et al.* Yet, in none of these matters had the court or agency concluded the proceeding and entered findings or a judgment as of the close of the evidence in this case. The outcomes of each of the proceedings the Commission and NEE relied on were unknown. Evidence of this type is not admissible under our precedents. *See Peters Corp. v. N.M. Banquest Inv'rs Corp.*, 2008-NMSC-039, ¶ 37, 144 N.M. 434 (holding that speculative evidence regarding the resolution of another lawsuit was not admissible).

i. The Commission has not legitimized consideration of the Liberty Audit.

The Commission offers no credible justifications for treating the Liberty Audit as admissible or properly subject to administrative notice. The Court should reject the Commission's contention that Appellants waived their right to present the issue on appeal because they failed to raise their objections to the Liberty Audit in exceptions filed with the Commission. **[Comm. AB 45]** Once again, this argument ignores the Commission's own rule, which provides, in relation to decisions on the admission of evidence, "[f]ormal exceptions to rulings are not necessary and need not be taken." Rule 1.2.2.35(L)(4) NMAC.

The Commission persists in disregarding its rules and orders in defending the admission of the Liberty Audit. The Commission parrots the HE's unsupported pronouncement that the Liberty Audit qualified as a published report of a "governmental agenc[y]" under 1.2.2.35(D)(1)(a) NMAC because the MPUC commissioned the report and the report was filed in an MPUC docket. **[Comm. AB 44]** The argument that a report prepared by a private consultant hired by a governmental agency is the same thing as a report prepared by the government agency ignores the plain meaning of the words used in both 1.2.2.35(D)(1)(a) NMAC, and the contract executed by the MPUC. As discussed below, federal courts addressing the admissibility of reports prepared by non-government sources under the hearsay exception for government reports reject the assumption the Commission is making.

The Commission offers no explanation or justification, other than its own *ipse dixit*, that Appellants' objections to the Liberty Audit were not timely, even though Appellants filed their objections before the deadline for motions *in limine*, and motions to strike had passed under the HE's order. **[Comm. AB 44-45]** The Commission characterizes as "absurd[]" the Appellants' position that a deadline is defined by a due date set in a procedural order. **[Comm. AB 45]** The Commission, however, identifies no rule or principle by which Appellants could have discerned that, despite an order specifying a deadline, the "real" unwritten deadline was earlier

because Appellants knew the Commission was interested in the Liberty Audit and other parties had relied on it in preparing their testimonies.

The Commission's secret deadline argument resembles the HE's and Commission's determination that Appellants' failure to identify penalties incurred by Avangrid-owned utilities in the initial application for approval of the Merger demonstrated that Appellants were "less than forthcoming," even though the Commission is unable to identify a rule or precedent requiring the disclosure of such information. In this case, the handling of evidentiary matters and the Commission's arguments on appeal repeatedly contravene the Commission's own rules. *See Public Service Co. of N.M. v. N.M. Public Reg. Comm'n*, 2019-NMSC-012, ¶ 30, 444 P.3d 460 ("The Commission is not free to disregard its own rules…") (quoting *In re PNM Gas Serv.*, 2000-NMSC-012, ¶ 9, 129 N.M. 1, 1 P.3d 383).

The Commission also falls short in attempting to show that the Liberty Audit was admissible, or properly subject to administrative notice, under Rule 11-807, the "residual exception" to the hearsay rule. **[Comm. AB 45]** The rule imposes four conditions for its application, as follows:

> **(1)** the statement has equivalent circumstantial guarantees of trustworthiness;
>
> **(2)** it is offered as evidence of a material fact;
>
> **(3)** it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

> **(4)** admitting it will best serve the purposes of these rules and the interests of justice.

Rule 11-807(A) NMRA.

The Commission makes no attempt to show that any of these requirements are satisfied. It claims, without explanation, that the Liberty Audit "has equivalent circumstantial guarantees of trustworthiness," and says nothing about the other requirements in 11-807(A).

The proponent of a hearsay exception bears the burden of demonstrating its applicability. *See State v. Mendez*, 2010-NMSC-044, ¶ 54, 148 N.M. 761, 242 P.3d 328. The residual exception "is to be used sparingly," and where a party fails to address the requirements of the exception, this Court will not consider its application. *State v. Leyba*, 2012-NMSC-037, ¶ 20, 289 P.3d 1215 (noting that "[t]he State has simply not laid any foundation for us to give serious consideration to this exception, and we will not do so."). The Court should reject the Commission's efforts to show the admissibility of the Liberty Audit.

ii. NEE has not justified consideration of the Liberty Audit.

NEE's arguments for the admissibility of the Liberty Audit fare no better. NEE contends that investigative reports are admissible, citing *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153 (1988). **[NEE AB 61-63]** The report at issue in *Beech Aircraft* concerned a plane crash during Navy training exercises. 488 U.S. at 156. A

naval officer prepared the report on orders of a commanding officer and pursuant to the Manual of the Judge Advocate General. *Id*. at 157. The Supreme Court held that portions of the report otherwise admissible under Rule 803(8)(c) of the Federal Rules of Evidence were not inadmissible "merely because they state a conclusion or opinion." *Id*. at 170.

NEE's argument overlooks an obvious and critical difference between this case and *Beech Aircraft*: a private consulting firm prepared the Liberty Audit, whereas a naval officer, acting in an official capacity on a superior officer's command and in accord with JAG procedures, prepared the crash investigation report. NEE's reliance on *Beech Aircraft* is misplaced because it does not address whether a report authored by a non-government independent contractor engaged by a government agency qualifies for the hearsay exception in Rule 803(8)(c) of the Federal Rules of Evidence (now compiled at Rule 803(8)(A)(iii)). New Mexico's counterpart, Rule 11-803(8)(c), provides in pertinent part:

> The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness.
>
> ……
>
> **(8) Public records.** A record or statement of a public office if it sets out
>
> …….
>
> **(c)** in a civil case…, factual findings from a legally authorized investigation.

> This exception does not apply if the opponent shows that the source of information or other circumstances indicate a lack of trustworthiness.

Rule 11-803(8)(c) NMRA.

Neither NEE nor the Commission cite any cases or other authorities addressing whether the hearsay exception for public office reports applies to reports written by non-government independent-contractors. Federal courts have recognized that the rationale behind Rule 803(8) in administrative settings "is that the administrative body's findings may be assumed to be trustworthy," but that assumption "has substantially diminished force when extended to sources outside the investigative agency from which the agency culls the information for its report." *Brown v. Sierra Nev. Mem'l Miners Hosp.*, 849 F.2d 1186, 1190 (9th Cir. 1988) (affirming exclusion of reports prepared by outside consultants and sent to Board of Medical Quality Assurance); *Toole v. McClintock*, 999 F.2d 1430, 1435 (11th Cir. 1993) (relying on *Brown* in concluding that report was inadmissible because, among other reasons, it was based on investigation from non-agency sources).

In *Cooper v. Meritor, Inc.*, 363 F. Supp. 3d 695 (N. D. Miss. 2019), the court considered the admissibility under Rule 803(8) of a site inspection report prepared by a private contractor for the Environmental Protection Agency. The court surveyed the federal law concerning what makes a third-party report prepared for a public agency "public" for purposes of Rule 803(8). *Id.* at 699-700. Some courts take a

narrow view of the hearsay exception and conclude that, if the report was not prepared by a public agency, it does not qualify for the exception, even where a public entity requested the private entity's services. *Id.* (discussing *Ricciuti v. N.Y.C. Transit Auth*., 754 F.Supp. 980, 985 (S.D.N.Y. 1990) ("While this entity's services were requested by a public office or agency, the St. Germain Group is not a public office or agency itself.…") *judgment vacated on other grounds*, 941 F.2d 119 (2d Cir. 1991)).

Other courts take a slightly broader view of the exception in such circumstances. *Id.* Some courts require a showing that that the privately prepared report was prepared by the equivalent of government investigators. *Id*. (discussing *United States v. Blackburn*, 992 F.2d 666, 672 (7th Cir. 1993)). Some courts require a showing that the agency "closely managed" the consultant's investigation. *Id.* (discussing *United States v. Davis*, 826 F. Supp 617, 621 (D.R.I. 1993)).

Like the courts in the *Brown* and *Toole* cases, the *Cooper* court reasoned that the hearsay exception for public records is based on the assumption that a public official will perform his duty properly, and that the assumption is "undermined when the person or entity preparing the report is not a public official." *Id.* at 699-700. For these reasons, the *Cooper* court elected to require that the proponent of the report show that it was prepared by the equivalent of a government investigator, or that a public agency closely supervised the relevant investigation. *Id.*

NEE has assumed that the Liberty Audit is admissible because NEE has characterized it as an "investigatory report," and cited *Beech Aircraft.* Again, NEE ignores the fact that Liberty is not a government entity. Under any of the standards applied in determining whether a report prepared by a non-government source meets the requirements for Rule 803(8) exceptions, the Liberty Audit is inadmissible. The Court may so conclude because Liberty is not a government agency, because Liberty is not "equivalent" to the MPUC, or because the MPUC did not closely supervise the investigation. The MPUC hired Liberty as an independent contractor, and the MPUC had limited control over Liberty's work, as a matter of Maine law and the terms of the contract. For these reasons, the Court should reject NEE's undeveloped contention that the Liberty Audit is admissible as an investigative report.

Another evidentiary problem, also ignored by NEE and the Commission, weighs against the admissibility of the Liberty Audit under Rule 11-803(8). The Liberty Audit resulted from 82 interviews and 190 responses to requests for information. **[79 RP 39768]** The Liberty Audit therefore involved multiple levels of hearsay, and many courts have rejected the application of the Rule 803(8) exception where the problem of double or triple hearsay is evident. *See, e.g., United States v. Ortiz*, 125 F.3d 630, 632 (8th Cir. 1997); *United States v. Mackey*, 117 F.3d 24, 28-29 (1st Cir. 1997). The admission of "hearsay within hearsay" requires an exception

for each level of hearsay. Rule 11-805 NMRA. The Liberty Audit was inadmissible, and, therefore, this Court should not regard it as substantial evidence.

c. The Commission and NEE ignored the Disciplinary Board's determination that no conflict existed in Rael's representation of Iberdrola and failed to provide any justification for the Commission's consideration of the HE's erroneous disqualification.

The Commission and NEE rely heavily on supposed misconduct of the Office of the New Mexico Attorney General ("NMAG") to negate the entirety of the record supporting approval of the settlement, but fail to demonstrate that Rael's representation of Iberdrola properly constitutes evidence that the Merger was not in the public interest. Other than claiming that the HE's conflict analysis was longer and more thorough, the Commission simply disregards the fact that the Disciplinary Board found Rael's representation did not present a conflict. **[Comm. AB 20-21]**

Rule 17-201 is entitled "Jurisdiction" and provides that the disciplinary jurisdiction of this Court and the Disciplinary Board over attorneys admitted to practice in New Mexico is "exclusive." Rule 17-201 NMRA. The rule preserves the power of lower courts (and presumably agencies) to "maintain control over proceedings conducted before [them], such as the power of contempt." *Id.* The word "exclusive," however, logically dictates that the Disciplinary Board's decision prevails.

Neither the Commission nor NEE address Appellants' point that the HE's erroneous conflict determination had no bearing on the qualifications of Iberdrola or the NMAG, or whether the Merger would be in the public interest. The rule governing concurrent conflicts of interest only applies to lawyers, not their clients. *See* Rule 16-107 NMRA ("Except as provided in Paragraph B of this rule, a lawyer shall not represent a client if the representation involves a concurrent conflict of interest."). Consequently, a conflict of interest, even if one had existed, would be irrelevant to the merits of this case.

Contrary to NEE's argument, the legal residuum rule applies to consideration of Rael's supposed conflict. **[NEE AB 73]** Like hearsay, irrelevant evidence is inadmissible in court, and therefore not considered as substantial evidence on appeal under the legal residuum rule. Rule 11-402 NMRA.

d. The Commission and NEE fail to show that Hempling's testimony may be considered on appeal.

Appellants demonstrated that Scott Hempling's testimony should not be considered because the HE admitted it over the objections of Appellants and in violation of the Commission's rules. **[BIC 50-51]** A witness must be present at public hearings. *See* 1.2.2.35(I)(1) NMAC. Hempling was not present because he had been appointed to an ALJ position at the FERC. All parties have a right explicitly conferred by the Commission's rules to cross examine witnesses. *See* 1.2.2.20(B)(4)

NMAC. Despite Hempling's absence, and his unavailability for cross-examination, the HE admitted his pre-filed testimony.

The Commission and NEE ignore the fact that the admission of Hempling's testimony violated the Commission's rules, and instead offer inadequate justifications for considering the testimony on appeal. First, the Commission again claims that Appellants were required to raise the improper admission of Hempling's testimony as a written exception, despite Appellants' objections at the hearing and a prior motion. **[Comm. AB 25-29].** The Commission yet again overlooks its own regulation that exceptions on evidentiary issues are not required. *See* 1.2.2.35(L)(4) NMAC.

Next, the Commission and NEE argue that Hempling's testimony is admissible under Rule 11-801(D)(2) as a statement of an opposing party. **[Comm. AB 33-34; NEE AB 64-65]** The Commission claims that Hempling's testimony was admissible under Rule 11-801(D)(2)(c) & (d). NEE does not specify which part of Rule 11-801(D) it claims applies, but claims that the HE admitted Hempling's testimony "at least in part on" the basis that Rule 11-801(D) applied. **[NEE AB 64 n. 182, citing 62 RP 21870-1].** The cite NEE supplies for this claim, however, is not to any ruling by the HE, but to two pages of *Joint Applicants' Motion to Strike [Etc.]*. There is no evidence in the record that HE relied on any part of Rule 11-801(D)(2) in relation to Hempling's testimony.

The Commission's and NEE's arguments based on Rule 11-801(D)(2) fail because they have cited no authority supporting their position that expert opinion testimony is admissible as a statement of a party opponent. To the contrary, courts have rejected the idea that expert opinions can be treated as an opposing party's statement under either the "authorized" statement or the "agent or employee" exceptions to hearsay under Rule 801(D)(2). One of the most influential precedents in this area is *Kirk v. Raymark Indus., Inc.,* 61 F.3d 147 (3rd Cir. 1995). *Kirk* focused on the nature of the relationship between the party and expert witness, and the expert's responsibilities. "[S]ince an expert witness is not subject to the control of the party opponent with respect to consultation and testimony he or she is hired to give, the expert witness cannot be deemed an agent." *Id.* at 164. An expert is "charged with the duty of giving *his or her expert opinion* regarding the matter before the court…" *Id.* (emphasis in original). Even though the party retains the services of an expert, "expert witnesses are supposed to testify impartially in the sphere of their experience." *Id.* Consequently, the *Kirk* court could not "comprehend how an expert witness, who is not an agent of the party who called him, can be authorized to make an admission for that party." *Id.*

The Commission and NEE also ignore the requirement of an independent showing, beyond Hempling's testimony itself, to establish the expert's authority to speak for the party or an agency relationship. Rule 11-801(D)(2) NMRA. The

Commission and NEE again claim a hearsay exception without making any of the showings that the rules require.

e. The Commission and NEE fail to justify reliance on Berry's affidavit and his comments in the Open Meeting.

The Commission yet again claims that Appellants waived their objection by not raising on exceptions the issue of the HE's reliance on Seth Berry's affidavit. **[Comm. AB 25-29]** This argument, again, ignores the Commission's Rule 1.2.2.35(L)(4) NMAC.

The Commission also argues the Berry affidavit was admissible because it was referenced in Kump's supplemental testimony, which was admitted at the hearing. **[Comm. AB 34-36]** The Commission, however, cites no authority that hearsay becomes admissible because another witness rebuts or refers to it. Also, the HE directly relied on Berry's affidavit, not just Kump's references to it. **[80 RP 39956-39957]** The HE ignored the fact that he excluded the affidavit, and that Berry was not present at the hearing and therefore not subject to cross examination.

The Commission further argues that Berry's telephonic input at the Open Meeting was not a basis for the Commission's decision because only a single Commissioner mentioned Berry's call as a reason for his decision, and alternatively that the Commission is permitted to rely in part on public comment in "formulating a proper rate structure." **[Comm. AB 36-37]** (citing *PNM Gas Servs.,* 2000-NMSC-012, ¶ 99, 129 N.M. 1). That opinion, however, did not consider the Commission's

rule foreclosing the treatment of comments as evidence. *See* 1.2.2.23(F) NMAC. Commissioner Byrd's express reliance on Berry's call, like the reliance of Commissioners Hall, Maestas, and Becenti-Aguilar on the Spanish criminal investigation, reinforces the conclusion that the Commission rejected the Merger on improper grounds, and in contravention of its own rules.

> f. The Commission and NEE have not justified the conclusion that the alleged lack of disclosure of penalties imposed on Avangrid-owned utilities reflected a risk of service deterioration.

Appellants challenged the Commission's character judgment ("less than forthcoming") based upon the Commission's perceived failure to disclose penalties imposed on utilities in other jurisdictions by pointing out that no regulation, precedent, or practice suggested that such penalties must or should be disclosed in the approval application. **[BIC 53-54]** In response, neither NEE nor the Commission identified any requirement imposing an obligation to disclose such penalties. Appellants' point on this key issue is unrebutted.

The Commission argues that public utilities are subject to "numerous ongoing disclosure requirements by law and regulation" and that "[a]n applicants' decision not to disclose adverse information voluntarily is relevant to the question of how forthcoming with such information the applicant is likely to be…" **[Comm. AB 53]** The Commission thus relies on the laws and regulations (typically written, published, and therefore knowable) imposing disclosure requirements, while failing

to identify any New Mexico laws, regulations, or precedent that required the disclosure of the information it claims Appellants improperly withheld. The consequence of Appellants "failing" to disclose information no law or regulation required was an arbitrary judgment that Appellants were not "forthcoming," and therefore unsuitable utility owners. The Court should reject the Commission's secret, unwritten and unprecedented "forthcomingness" test.

Appellants also pointed out that the HE undertook independent research outside the record, in contravention of Rule 21-209(C) NMRA and the norms foreclosing fact investigation by judges. **[BIC 54-55]** The Commission and NEE ignored this argument, and emphasized instead the Commission's ability to require parties to produce evidence. The Commission relies on *Las Cruces Professional Firefighters v. City of Las Cruces*, 1997-NMCA-031, 123 N.M. 239. **[Comm AB 50-51]** That Court of Appeals decision confirmed a labor-management board member's authority to ask wide-ranging questions at a hearing. The opinion, however, says nothing about Rule 21-209(C) NMRA ("[a] judge shall not investigate facts in a matter independently, and shall consider only the evidence presented and any facts that may properly be judicially noticed."), or the propriety of an independent fact investigation conducted by a fact-finder outside of a hearing. The Commission and NEE sidestep the problem that the HE engaged in independent fact

investigation in violation of Rule 21-209, and that the judgment about Appellants being "less than forthcoming" originated from his violation of the rule.

g. The Commission and NEE ignore the Modified Stipulation's protections against service deterioration.

Appellants described the safeguards against utility service deterioration included in the Modified Stipulation to demonstrate that the Commission's assessment of that risk did not account for these safeguards. **[BIC 61-63]** Neither the Commission nor NEE deny the comprehensiveness and stringency of these safeguards. Instead, they argue throughout their Answer Briefs that the performance of certain Avangrid-owned utilities evidences the risk that PNM will suffer a decline in service quality, and therefore warranted rejection of the Merger.

This position ignores the fact that the performance safeguards in the Modified Stipulation, including the requirement that the majority of PNM board members must be disinterested and independent, would make PNM unlike any of the other Avangrid-owned utilities. The performance of northeastern utilities operating in different regulatory settings, not subject to the obligations of the Modified Stipulation, does not provide a reasonable predictor of PNM's performance risk in this case, and therefore do not support the Commission's decision.

Neither NEE nor the Commission attempt to show that the protections in the Modified Stipulation are insufficient to eliminate the risk of service deterioration. Nor do they attempt to justify the Commission's disregard of those protections in

rejecting the Merger. Ignoring those safeguards made the Commission's decision unlawful. *See, e.g., In re Rhino Envt'l Servs.*, 2005-NMSC-024, ¶ 41, 138 N.M. 133, 117 P.3d 939 ("An agency's action is arbitrary and capricious if it…entirely omits consideration of relevant factors or important aspects of the problem at hand.") (quoting *Atlixco Coal. v. Maggiore*, 1998-NMCA-134, ¶ 24, 125 N.M. 786).

Moreover, our precedents applying whole record substantial evidence review require a risk assessment that accounts for the safeguards against a decline in service quality in the Modified Stipulation. *See, e.g., Tallman*, 1988-NMCA-091, ¶ 14 (noting that the substantiality of evidence "must take into account whatever in the record fairly detracts from its weight") (quoting *Universal Camera*, 340 U.S. at 488). The Commission did not provide such an assessment. The Answer Briefs of the Commission and NEE repeat this analytical defect. For these reasons, the Commission's rejection of the Merger in reliance on evidence concerning the performance problems of utilities not subject to the obligations imposed by the Modified Stipulation was unreasonable and unlawful.

C. The Commission and NEE Have Not Explained or Justified the Commission's Disregard for the Near-Unanimous Support for the Modified Stipulation.

The HE recommended rejecting the June 4 Stipulation based on his assumptions that the signatories no longer supported it, and that no confirmed consensus existed in the form of any written agreement on the additional settlement

modifications agreed to during hearing. **[80 RP 39872]** These assumptions were dispelled when Appellants and other parties, in post-hearing statements, accepted and supported the Modified Stipulation. **[81 RP 40417, ¶ 10]** Only NEE objected to approval of the Merger under the Modified Stipulation. Despite this, the Commission, in derogation of its own stated policy favoring settlements, failed to properly consider the overwhelming support for approval. **[BIC 63-65]**

In response to Appellants' arguments, the Commission acknowledged that it has a "policy favoring stipulations, which the [HE] recognized." **[Comm. AB 16-17]** This acknowledgement is mere lip service as the Commission failed to discuss or identify where in the Order the Commission considered and evaluated the strong support for approval of the Modified Stipulation and the Merger. Instead, the Commission cited to *Pub. Serv. Co. v. N.M. Pub. Serv. Comm'n*, 1991-NMSC-018, ¶ 50, 111 N.M. 622, which stands for the proposition that the Commission is a "prime mover" and not a mere spectator with respect to the matters before it. **[Comm. AB 17]** However, the cited case does not support the Commission's failure to properly consider the extent of the support for the Modified Stipulation and Merger.

In a *post hoc* effort to justify this failure, the Commission asserts, without explanation or citation to any authority, that it is "dubious" to place weight on near-unanimous support for the Modified Stipulation where the form of the stipulation

was recommended by the HE (and based on the evidentiary record). **[*Id.*]** This argument is not supported by authority, and this Court is free to disregard it. *Weiss v. N.M. Bd. of Dentistry*, 1990-NMSC-077, ¶ 31, 110 N.M. 574, 798 P.2d 175. Moreover, this position is contrary to the Commission's own rules and past practice on contested stipulations. Rule 1.2.2.20(B)(5)(a) NMAC grants the HE the authority to require amendments to a stipulation to meet any reservations concerning approval, and it is not unusual for the Commission to require parties to accept amendments or modifications to a stipulation as a condition for final approval.[1] The Commission "is not free to disregard its own rules and prior ratemaking decisions or 'to change its position without good cause and prior notice to the affected parties.'" *PNM Gas Servs.*, 2000-NMSC-012, ¶ 9.

The Commission further attempts to sidestep its failures by disparaging the NMAG and claiming that his "conduct in this case gave the Commission good reason not to place substantial weight on the near unanimous support of the Modified Stipulation." **[Comm. AB 17]** The Commission's claimed inference of improper conduct by the NMAG has no factual support and is nothing more than argument of

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[1] *See, e.g., Final Order*, ¶¶ B and C at 26, Case No. 13-00390-UT (NMPRC Dec. 16, 2015) (Rejecting original stipulation and conditioning approval on the signatories executing a modified stipulation); *Order Approving Stipulation of Petitioner, the New Mexico Attorney General, and Intervenors with Modification*, ¶¶ A and B at 13, Case No. 15-00058-UT (NMPRC Sept. 27, 2017).

counsel based on improper conjecture. *V.P. Clarence Co. v. Colgate*, 1993-NMSC-022, ¶ 2, 115 N.M. 471, 853 P.2d 722 (briefs and arguments of counsel are not evidence.); *PNM Gas Servs.*, 2000-NMSC-012, ¶ 66 (conjecture is not a substitute for evidence). The law presumes that all public officials, including the NMAG, have performed their duties in a regular and lawful manner, and the burden of producing evidence to the contrary rests on the party contesting the official's conduct. *See State v. Rivera,* 1993-NMCA-011, ¶ 29, 115 N.M. 424 (collecting cases). No such evidence exists.

The Commission admits, but glosses over, the fact that the NMAG's change of position on the merger occurred *after* the addition of substantial benefits set out in the April Stipulation. **[Comm. AB 18]** The Commission then attempts to suggest that the NMAG improperly excluded one of his witnesses, Andrea Crane, from settlement negotiations. **[*Id.* 18-20]** Whether Crane was involved in settlement negotiations is irrelevant. What is relevant, and overlooked by the Commission, is that Crane testified that she had reviewed the June 4 Stipulation, compared it against her initial criticisms of the original regulatory commitments, and concluded that, with the additional benefits and customer protections, the Merger is in the public interest. **[72 RP 34852-34881]**

The Commission fails to address why it did not properly consider the support for the Modified Stipulation by Appellants and the other twelve signatories

comprised of a diverse set of parties representing labor, Native American interests, environmental and clean energy organizations, large customers, and governmental entities. **[80 RP 40297-40299]** There is no evidence, or even argument by the Commission, that any of these parties supported the Merger because of any improper influence.

NEE argues that the Commission addressed the public policy in New Mexico favoring settlement and cites a portion of the Order where the Commission concluded that the potential harms of the Merger outweigh the benefits, including the additional and enhanced regulatory commitments of the Modified Stipulation. **[NEE AB 74]** However, the portion of the Order cited by NEE does not consider or address the uncontested fact that all parties, except NEE, supported or did not oppose the Modified Stipulation.

NEE also argues that it is not the only opponent to the Modified Stipulation, a position at odds with the Commission, which does not dispute that the support for the merger is "near unanimous." **[Comm. AB 17]** NEE states that Staff, Bernalillo County, ABCWUA and NM AREA did not sign on to the Modified Stipulation which is evidence of their opposition. **[NEE AB 75]** NEE's argument fails for two reasons. First, none of these parties filed responses in opposition to the Modified Stipulation. Second, either in post-hearing briefing or during hearing, all of these non-signatory parties except NEE indicated that, with the enhanced regulatory

commitments that Appellants agreed to on the record, they no longer opposed the Merger. **[72 RP 35259-61; 74 RP 36971-73; 77 RP 38898; 78 RP 39186]**

Finally, NEE relies on a case from Indiana, *Nextel W. Corp. v. Ind. Util. Regulatory Comm'n*, 831 N.E. 2d 134, 155 (Ind. Ct. App. 2005), for the proposition that an agency may not accept a settlement merely because private parties are satisfied, but must consider whether the public interest will be served by the settlement. **[NEE AB 75]** NEE misses the point. Appellants do not dispute that the Modified Stipulation must be evaluated before approval. In this case, the Commission entirely failed to consider and weigh the near unanimous support of numerous and diverse parties for the Modified Stipulation and the Merger before rejecting it. The Commission has no legitimate basis for ignoring the substantial evidence in the record supporting the settlement. *In re Comm'n Investigation of Rates for Gas Serv.*, 2000-NMSC-008, ¶¶ 13-14.

D. The Commission and NEE Have not Harmonized Rejection of the Merger with the Public Interest Analysis in the GDP Approval.

As detailed on pages 66 to 68 of the BIC, the Commission's Order is arbitrary and capricious because it includes inconsistent conclusions about the public interest under the "Six-Factor Test" and in the approval of the GDP to govern and control future affiliate transactions with Avangrid and Iberdrola.

The Commission argues that Appellants failed to preserve this issue because it was not addressed in Appellants' exceptions. **[Comm. AB 46]** The Commission

forgets to mention that it severely constrained Appellants' opportunity to take exception to the lengthy recommendations of the HE. The Commission rules provide for up to forty pages for exceptions (1.2.2.37(C)(1)(b) NMAC), but the Commission took the unusual step, without explanation, of shortening the maximum length to only 20 pages. **[80 RP 40280-40281]**

Notwithstanding these limitations, Appellants strenuously objected in their Exceptions to the recommended finding that the proposed merger was not in the public interest because the risks outweighed the substantial benefits. **[*Id.* 40311-40323]** In their post-hearing brief, Appellants also demonstrated that the GDP met the requirements of the Affiliate Rule **[78 RP 39341-39349]**, including confirmation that there will be no adverse and material effect on PNM's utility operations and that PNM will continue to provide reasonable and proper electric utility service at fair, just and reasonable rates. **[*Id.* 39344]** These filings sufficed to place the Commission on notice that Commission action on the GDP necessarily should be consistent with the Commission's ruling on the Merger.

The Commission and NEE brush off the approval of a GDP as a mere ministerial review of the GDP's contents. The Commission argues that the HE "recommended approval [of the GDP] only because it contained all of the information required by the Commission rule, not because he had found that the proposed Class II transaction itself was in the public interest." **[Comm. AB 46]** NEE

is even more dismissive about the approval of the GDP contending that "[a]ll the [HE] said was, in effect, 'If you approve the merger, the GDP looks ok.'" **[NEE AB 77]**

These positions are contrary to the plain language of the Commission's rule, which specifically requires as a condition of approval of the GDP that "the Commission finds that such approval is in the public interest" based on a determination "that the level of investment appears reasonable and that it appears the utility's ability to provide reasonable and proper service at fair, just and reasonable rates will not be adversely and materially affected by Class II[2] transactions and their resulting effect[.]" 17.6.450.10(C) NMAC. The Commission's approval of the GDP was not "ministerial" and does not square with its conclusion that the Modified Stipulation and Merger are not in the public interest. Thus, the Order is arbitrary and capricious. *Nat'l Parks Conservation Ass'n v. United States EPA*, 788 F.3d 1134, 1141 (9th Cir. 2015).

Finally, NEE asserts that 17.6.450(D) NMAC corrects the Commission's "error" in approving the GDP. **[NEE AB 78]** This argument is unfounded as the Commission never invoked this provision of the Affiliate Rule to investigate, or take any action rescind or modify its approval of the GDP.

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[2] The approval of additional holding companies for PNM is the Class II transaction at issue.

E. The Commission and NEE Have Not Justified the Discovery Sanctions Against Appellants.

Appellants challenged the $10,000 discovery sanction imposed on all Appellants because it was contrary to the evidence and violated due process. **[BIC 68-72]**

The Commission now admits that "the record contains no evidence that any of the Appellants other that Avangrid had violated discovery rules or orders" and that its decision to extend discovery sanctions to the other Appellants was "overbroad." **[Comm. AB 60]** While correct that its sanctions were overbroad, the Commission is incorrect that this "is not an issue properly before this Court." **[*Id.*]** The concession that the Order was in error does not remove the issue from appeal; rather, it requires that the Order be vacated as not supported by substantial evidence with instructions on remand to correct the imposition of the admittedly improper sanctions.[3] Section 62-11-5 (1982) provides that this Court "shall vacate and annul the order complained of if it is made to appear to the satisfaction of the court that the order is unreasonable or unlawful." NMSA 1978, § 62-11-5. The fact that Avangrid paid the $10,000 discovery sanction under protest does not alter the fact that the

[3] NEE attempts to argue that the Commission properly imposed discovery sanctions on all Appellants. **[NEE AB 81-82]** The Commission's admission that there was no evidence to support the expansion of sanctions and that it erred in doing so is dispositive of this issue.

Order imposing sanctions on other Appellants was improper, and they are entitled to have the Order vacated and corrected on this issue.

As detailed at pages 69 and 70 of the BIC, Avangrid provided extensive testimony as directed about its good faith compliance and the absence of any intent or willfulness to violate any discovery requirements. None of this evidence was controverted, despite the HE ordering[4] that "[r]esponsive testimony, including the amount of and support for any recovery of attorney fees as a sanction, *shall* be filed by July 16, 2021." **[45 RP 17382, ¶ 3]** (emphasis added) Despite the fact that no such evidence was presented, the Commission adopted the HE's recommendation to impose sanctions based on the HE's finding of willfulness with respect to Avangrid's claimed discovery violations. **[80 RP 39988]**

Confronted with the total lack of evidence of a willful violation by Avangrid, the Commission now retreats from its reliance on the HE's finding and contends that the HE, "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." **[Comm. AB 64]** This is a new position as the Commission, in its Order

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[4] *Order Addressing NEE Motion for Rule to Show Cause Why Joint Applicants Should Not be Held in Contempt and for Sanctions* issued June 14, 2021 ("June 14 Order") **[45 RP 17364-17383]**

adopting the findings of the HE, made no effort to correct the purported error in the grounds for HE's imposition of discovery sanctions.

The issue of sanctions in this case has been a constantly moving target. Because the June 14 Order clearly intended that the proposed sanction for the claimed discovery violations was to be the assessment of attorney fees supported by evidence (which was never provided), the Commission pivoted to imposing a penalty pursuant to NMSA 1978, § 62-12-4 (1993). **[81 40432, ¶¶ 51, 52]** The Commission now pivots again in contending for the first time that the HE applied an erroneous standard in recommending sanctions. The Commission now admits also that it improperly expanded sanctions to Appellants beyond Avangrid.

The Commission's varying rationales and determinations related to the imposition of discovery sanctions in this matter lack any standard or norm. As such, they are arbitrary and capricious. *See Planning & Design Sols. v. City of Santa Fe*, 1994-NMSC-112, ¶ 23, 118 N.M. 707, 885. P.2d 628 (holding that the City was arbitrary and capricious in departing from procurement code and acting without an "adequate determining principle" in the conduct of a request for proposal). The Commission's imposition of sanctions on Avangrid should be overturned as factually unsupported and arbitrary and capricious.

III. CONCLUSION

The Court should vacate and annul the Commission's Order as unlawful and unreasonable.

Respectfully submitted this 5th day of August, 2022

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of August, 2022, I caused the foregoing to be submitted to Odyssey File & Serve, which in turn caused all counsel to be served by email.

/s/ Thomas C. Bird
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