

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE JOINT APPLICATION OF)
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) Case No. 20-00222-UT
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)

New Energy Economy's Motion for Leave to File Attached Reply

COMES NOW, NEW ENERGY ECONOMY ("NEE"), by and through its undersigned counsel, and pursuant to Rule 1.2.2.12 (C)(1)(d) NMAC hereby files this *Reply to Joint Applicants' Response in Opposition to New Energy Economy's Objections to PRC's Notice of Meeting on 4-19-2023 to Address the Matters Set Forth in its Filing with the New Mexico Supreme Court*, Including its *Ex Parte* Decision, Contrary to Law, to Agree to a "Reconsideration" of the Final Decision in this Case ("Joint Applicants' Response"). In support of this Motion, NEE states:

1. On April 17, 2023 NEE filed *New Energy Economy's Objections to PRC's Notice of Meeting on 4-19-2023 to Address the Matters Set Forth in its Filing with the New Mexico Supreme Court, Including its Ex Parte Decision, Contrary to Law, to Agree to a "Reconsideration" of the Final Decision in this Case* ("NEE's Objection").

2. On May 1, 2023 the Joint Applicant's filed Joint Applicants' Response. Among other things, Joint Applicants' aver that "NEE can point to no communication concerning any topic other than procedure." Joint Applicants' Response at 5.

3. On April 20, 2023, between the filing of NEE's Objection and Joint Applicants' Response, the Commission filed its *Notice of Filing Ex Parte Communications*. Because this information was not disclosed at the time NEE's Objections were filed, and information included in the Commission's disclosure is directly responsive to Joint Applicants' Response, NEE respectfully seeks leave from the Commission to file a reply. A copy of NEE's proposed reply is included and attached hereto as *Attachment A*.

WHEREFORE, NEE respectfully seeks leave to file the attached Reply.

DATED: May 8, 2023.

Respectfully Submitted,

/s/ Mariel Nanasi, Esq.
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New Energy Economy's Reply to Joint Applicants Response to NEE's Objection

COMES NOW, NEW ENERGY ECONOMY ("NEE"), by and through its undersigned counsel, and pursuant to Rule 1.2.2.12 (C)(1)(d) NMAC hereby files this Motion Reply to the *Joint Applicants' Response in Opposition to New Energy Economy's Objections to PRC's Notice of Meeting on 4-19-2023 to Address the Matters Set Forth in its Filing with the New Mexico Supreme Court*, Including its *Ex Parte* Decision, Contrary to Law, to Agree to a "Reconsideration" of the Final Decision in this Case ("Joint Applicants' Response"). In support of this Motion, NEE states:

BACKGROUND

1. On March 8, 2023, after 5 separate discussions in executive session,¹ Public Service Company of New Mexico ("PNM"), Avangrid and Iberdrola, and the New Mexico Public

¹ Objections to PRC's Notice of Meeting on 4-19-2023 to Address the Matters Set Forth in its Filing with the New Mexico Supreme Court, Including its *Ex Parte* Decision, Contrary to Law, to Agree to a "Reconsideration" of the Final Decision in this Case ("NEE's Objection"), filed April 17, 2023, at ¶6.

Regulation Commission (“Commission” or “PRC”) filed their *Joint Motion for Stipulated Dismissal of Appeal and Remand for Rehearing and Reconsideration; Request for Expedited Ruling and Shortened Response and Mandated Periods* in S-1-SC-39152 (“Joint Motion for Remand”) in this appeal of NMPRC Case No. 20-00222-UT. The Joint Motion for Remand specifically requested that the “Commission shall conduct the rehearing and reconsideration under Rule 1.2.2.37(F) NMAC.” Joint Motion for Remand at ¶5.

2. The New Mexico Attorney General (“NMAG”) and NEE filed individual responses to the Joint Motion for Remand. Bernalillo County, the Albuquerque Bernalillo County Water Utility Authority (“ABCWUA”) and the New Mexico Affordable, Reliable Energy Alliance (“NM AREA”), also collaborated in a Joint Response to the Joint Motion for Remand.

3. In the NMAG response, the NMAG requested the Court ensure that, if remand is granted, that the Court set such terms and conditions on that remand that would ensure that the due process rights of all parties would be protected, and that any proceeding in front of the Commission would be conducted in a transparent and fair manner. Attorney General Response, pp. 5-6, filed March 14, 2023.

4. In the *Joint Response to the Joint Motion for Dismissal and Remand* filed by Bernalillo County, ABCWUA and NM AREA, similarly noted that, in the event that a remand was ordered, the Commission and Joint Applicants’ request limited remand proceedings that 1.2.2.37(F) NMAC was inapplicable. The parties noted that the proper rule to apply in this case was 1.2.2.37(E)(4) NMAC. Application of (E)(4) would reopen the proceeding and allow all the parties their full due process rights. Joint Response, ¶ 11, filed March 16, 2023.

5. NEE's *Response in Opposition to Joint Motion for Stipulated Dismissal of Appeal and Remand for Rehearing and Reconsideration and for Expedited Treatment*, requested the Court to deny the March 8th Joint Motion. NEE Response, filed March 23, 2023.

6. On Friday, April 14, 2023, the PRC issued a Notice of Open Meeting for April 19, 2023 under Item #IX, "Discussion and Potential Action on Proposed Joint Motion for Stipulated Dismissal of Appeal and Remand for Rehearing and Reconsideration".

7. On April 17, 2023 NEE filed NEE's Objection to the Commission's open Meeting to the extent that the PRC intends to address, vote on, "cure" or otherwise take up its *ex parte* decision to "reconsider" the final decision in this case, it will be acting unlawfully, unless it intends to vote at this meeting to act to withdraw its filing in the New Mexico Supreme Court. NEE also alleged that the Commission violated the Open Meetings Act.²

8. Objection notwithstanding, the Commission did discuss the 20-00222-UT case and the process that led to the Commission joining the Joint Motion for Remand. The Commission stated that conversations with Avangrid's counsel began in January, and the Commissioners discussed it over several closed sessions. Among other items, the Commission admitted that it "erred in paragraph five of the March 8 motion by citing the Commission's rehearing rule. The

² In addition to arguments already made by NEE in its Objections filed on 4/17/2023, when the PRC filed its *Ex Parte* Communications NEE became aware of another reason that the PRC violated the Open Meetings Act, NMSA 1978, §§ 10-15-1 to -4. The PRC failed to provide public notice of the March 6, 2023 closed meeting at which it seems to have approved of joining Avangrid/Iberdrola/PNM in the Joint Motion to Remand. See, *Ex Parte* Communications, pp. 81-84, 91, 93-94. There is a "closed session meeting" agenda on the PRC website for March 6, 2022, but it does not include discussion of S-1-SC-39152/20-00222-UT, <https://api.realfile.rtscilients.com/PublicFiles/9ce35ae9dd194163979349178e937b5f/b31d72f9-d464-4a22-b879-26347be1d296/March%206,%202023%20Closed%20Meeting%20Agenda>.

reference to the Commission’s rehearing rule is not an aspect of the March 8 motion we focused on during our closed sessions”.³

9. Later the same day, the Commission made two filings, one in the New Mexico Supreme Court⁴ and one in this docket, its *Notice of Filing Ex Parte Communications* (“*Ex Parte Communications*”) and disclosed 94 pages of emails between two attorneys in the Commission’s General Counsel’s Office, Russell Fisk and Michael C. Smith, and Avangrid’s local counsel, Thomas Bird and Brian Haverly. These emails cover the time span from January 24, 2023 to March 7, 2023.

10. The PRC made an additional filing, on April 20, 2023,⁵ withdrawing its agreement to certain provisions of the Joint Motion for Remand and asserting that it now “*may consider a motion to reopen [by Appellants] pursuant to Rule 1.2.2.37(E) and afford all parties to this proceeding with the opportunity to be heard in connection with such motion in accordance with the Commission’s Rules of Procedure, R. 1.2.2.1, et seq.*”⁶ (Emphasis supplied.). Joint Appellants filed a *Notice of Concurrence* the next day, conceding that Rule 1.2.2.37 E (4) NMAC is the “appropriate process for further proceedings on remand.”⁷

³ NMPRC April 19, 2023 Open Meeting, available at <https://www.youtube.com/watch?v=9XDxq8XJe9c>, (last accessed April 28, 2024). Timestamps for segment: 02:39:32 – 03:12:42.

⁴ S-1-SC-39152, *Appellee, New Mexico Public Regulation Commission’s Response to Intervenor-Appellee New Energy Economy’s Motion for Leave to Supplement Its Response with Additional Authority and Newly-Discovered Evidence*, April 19, 2023

⁵ S-1-SC-39152, *Appellee, New Mexico Public Regulation Commission’s Notice of Errata/Clarification* (“Commission Errata”), April 20, 2023.

⁶ *Id.*

⁷ *Notice of Concurrence*, April 21, 2023.

11. On May 1, 2023 the Joint Applicant's filed Joint Applicants' Response. Among other things, Joint Applicants' aver that "NEE can point to no communication concerning any topic other than procedure." Joint Applicants' Response at 5. This is a convenient statement to make because no party aside from Avangrid/PNM and Commission counsel had access to those communications at the time NEE's Objection was filed.

12. The emails attached to the Commission's *Ex Parte* Communications provide a snapshot of the discussions that led to the filing of the March 8th Joint Motion for Remand. Contrary to the Commission and Joint Applicants' posturing that the discussions were purely procedural, the disclosure reveals that, from the outset, the purpose of those communications between Avangrid/Iberdrola/PNM and the Commission was not only to settle the legal issues on appeal, **but also** to establish an agreement to reconsider the PRC's December 2021 decision and to request that the Supreme Court remand the case to the PRC authorizing that specific procedure. Further, the Commission would execute that pre-authorized, streamlined and truncated procedure, with its contents defined; once the case was remanded back to the PRC, it would "endeavor to reach a decision and issue its final order on rehearing and reconsideration"⁸ pursuant to a deadline conducive to the Applicants and their merger timetable. Under applicable law, however these *ex parte* communications are unlawful, unethical and violative of the rules barring *ex parte* communications between a party to a PRC case and the PRC.

⁸ Joint Motion for Remand, ¶ 6. *Also see*, ¶ 7, ("To assist in the prompt reconsideration and resolution of the proceeding below, Appellants and the Commission respectfully request expeditious consideration of this Motion, and a shortened response period [.]")

ARGUMENT

I. Contrary to the assertions of Joint Applicants and the Commission, these were *ex parte* communications.

a. *In one instance, Commission Counsel and Avangrid/Iberdrola/PNM⁹ attorneys specifically discussed a motion that the Commission would later rule on.*

13. In one specific instance, the Commission, through its representatives, *expressly* requested Avangrid's proposed motion for rehearing on the existing record that would ultimately be ruled upon by the Commission and discussed what the motion for rehearing should include.¹⁰ In response, Counsel for Avangrid stated "I have not included a draft of that motion because we would like to discuss your ideas about its content continuing the drafting of that motion."¹¹

14. The Commissioners concede that they erred in joining the Joint Motion for Remand by citing an inapplicable provision to conduct a "rehearing".¹² However, from the disclosed *Ex parte* Communications, we now know that Avangrid and the Commission did attempt to discuss the exact pleading upon which the Commission would review the application of the inapplicable rule 1.2.2.37(F) to "rehear and reconsider".¹³

15. Contrary to repeated assertions by the Commission and Joint Applicants that these communications were permitted and strictly "procedural", in this instance we see an attempt by

⁹ *Ex parte* Communications, 3/3/2023, p. 83. ("PNM is fully involved at every step. Our client and PNM are eager to move forward here.")

¹⁰ *Ex parte* Communications, 2/3/2023, p. 14.

¹¹ *Id.*, 2/9/2023, at p. 26.

¹² Commission Errata at 1.

¹³ *Ex parte* Communications, p. 36

Joint Applicants to discuss a pleading with the Commission as **applicant and tribunal**,¹⁴ not appellant and appellee.

16. Joint Applicant's will likely attempt to deflect the fact that they tried to discuss a pending motion by citing that the emails did not actually share the draft motion and that *attempted ex parte* is not the same as *ex parte*. However, that argument is meritless because the Commission's disclosure does not meet the requirements of 1.2.3.10 NMAC, due to the disclosure not being within 5 days, and it being incomplete. Furthermore, the fact of the *ex parte* communications is established by the emails themselves which were undeniably substantial and unlawful.

17. The *Ex Parte* Communications references telephone calls that have not been disclosed and even though the emails themselves refer to other (phone) communications, the PRC disclosed none of those. (*Ex Parte* Communications on pp. 2, 4, 5, 6, 55, 76, 83, and more). NMSA 1978, §62-19-23 C (1) requires that all communications be disclosed promptly¹⁵ and oral

¹⁴ New Mexico Rules of Professional Conduct, Article 1 Client-Lawyer Relationship: 16-100 N (“‘Tribunal’ denotes a court, an arbitrator ... administrative agency, or other body acting in an adjudicative capacity. ... [A]n adjudicative capacity when a neutral official, after the presentation of evidence or legal argument by a party or parties, will render a binding legal judgment directly affecting a party’s interests in a particular matter.”), 16-305, 16-306.

¹⁵ NMSA 1978, §62-19-23 C (1) “where circumstances require, ex parte communications for procedural or administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are allowed if the commissioner or hearing examiner reasonably believes that no party will gain an advantage as a result of the ex parte communication and the commissioner or hearing examiner makes provision to **promptly notify** all other parties of the substance of the ex parte communication;” §62-19-23 D “A commissioner or hearing examiner who receives or who makes or knowingly causes to be made a communication prohibited by this section shall disclose it to all parties and give other parties an opportunity to respond.” (Emphasis supplied.)

ex parte communications be summarized and disclosed within five days.¹⁶ N.M. Code R.

§1.2.3.10.

18. Because of the very nature of *ex parte* communications, the parties to 20-00222-UT have no ability to verify these one-sided statements. Because of the severity of the remedies and sanctions for *ex parte* communications, both the Commission and Joint Applicants are both interested in a determination that these communications are not considered unlawful *ex parte*. Therefore, the parties cannot rely on a late and incomplete disclosure by interested parties that the disclosed communications contain a complete record of the prohibited conversation. *See* NMSA 62-19-23 (E) (2020), 1.2.3.11 NMAC.

19. However, even if the Commission had not seen a draft of the motion for rehearing, the Commission indicated that it had already prejudged such a motion, stating:

“[t]he Commission may, at any time, reopen any proceeding when it has reason to believe that conditions of fact or law have so changed as to require, or that the public interest requires, the reopening of such proceeding. **I think that there is a good case to make that already.** However, I don't want to make that decision yet. I want to hear what the parties have to say about that.”¹⁷

20. Despite the Commission's stated desire to “hear what the parties have to say”¹⁸, there is evidence that it has already seen and provided feedback to Avangrid on their proposed motion.

¹⁶ N.M. Code R. §1.2.3.10 “A commissioner, hearing examiner, or advisory staff member who receives, makes, or knowingly causes to be made a communication prohibited by this rule shall disclose it to all parties and give other parties an opportunity to respond. The person to whom the prohibited communication was made shall: A. disclose the prohibited communication by filing a copy of a written communication or a **summary of an oral communication in the record of the proceeding within five (5) calendar days of the communication**; and B. serve the disclosure on all parties to the proceeding[.]” (Emphasis supplied.)

¹⁷ NMPRC April 19, 2023 Open Meeting, available at <https://www.youtube.com/watch?v=9XDxq8XJe9c>, (last accessed April 28, 2024, timestamp 3:07:36 <https://youtu.be/9XDxq8XJe9c?t=11256> (emphasis added)).

¹⁸ *Id.*

b. *The Commission is the tribunal in this case, not a party to this PRC proceeding, as Avangrid et al. are, and as the excluded parties are.*

21. The Commission's attempts to obscure the issue of its improper conduct by stating in its *ex parte* communications with Avangrid/Iberdrola and ultimately with its merger partner, PNM, "may" have constituted prohibited *ex parte* communications. But upon review of the applicable law, the Commission's characterization is contrary to the contents of the communications that were disclosed, which were prohibited by statute, rule, and legal precedent.

22. The Commission defines *ex parte* communications as:

a direct or indirect communication with a party or his representative, outside the presence of the other parties, concerning a pending adjudication, that deals with substantive matters or issues on the merits of the proceeding, including any attachments to a written communication or documents shown in connection with an oral presentation that deals with substantive matters or issues on the merits of the proceeding. Rule 1.2.3.7(B) NMAC.

23. Commissioners and their advisory staff are prohibited from initiating, permitting or considering a communication directly or indirectly with a party or his representative outside the presence of the other parties concerning a pending adjudication. NMSA 1978, § 62-19-23; *See also* 1.2.3.8(A) NMAC.

24. A pending adjudication is defined as:

any matter docketed, or, in the case of a party represented by counsel, any matter that an attorney representing such party reasonably believes will be docketed before the commission, including, but not limited to, formal complaint proceedings, show cause proceedings, investigations, notices of inquiry . . . application proceedings, petitions, and any matter other than a rulemaking or a non-adjudicatory notice of inquiry requiring decision or action by the commission. Rule 1.2.3.7(F) NMAC.

(Emphasis supplied.)

25. Because this case is considered “pending” until it reaches a final decision following appeal,¹⁹ and because the entire purpose of the communications between Avangrid/Iberdrola/PNM and the Commission was to bring Case No. 20-00222-UT back before the Commission this case fits within the *ex parte* rule’s definition of a “pending adjudication.”

26. The Public Utility Act²⁰ requires the Commission “[u]pon receipt of a communication knowingly made or caused to be made by a party to a commissioner or hearing examiner in violation of this section, the commissioner or hearing examiner may, to the extent consistent with the interests of justice and the policy of the underlying statutes, require the party to show cause why his claim or interest in the proceeding should not be dismissed, denied, disregarded or otherwise adversely affected on account of the violation of this section.” § 62-19-23(E). But for the fact that the pending appeal has prevented further Commission proceedings in this matter, upon any remand, the Commission, will now have to require Avangrid/Iberdrola/PNM to show good cause as to why this case should not be dismissed for violating the *ex parte* statute.

c. The Commission has already indicated that it has prejudged the matter.

27. By comparing the *Ex parte* Communications with the words of the Commissioners at their open meeting, it became apparent that the Commissioners have prejudged the matter and are parroting Avangrid’s stated position.

28. In a February 2, 2023 email from Avangrid counsel, Attorney Brian Haverly states:

“[o]ur thoughts, however, are that **the existing record reflects agreement and non-opposition to the modified stipulation and to the additional proposals from Staff** - all of the benefits and protections are matters that are in the **existing record, which may not have all been reflected in the Commission's prior decision.** We were not contemplating a new agreement

¹⁹ Not to belabor the obvious, but a case still “pending” while on appeal. *Harris v. Lewis*, No. C 03-4049 MMC (PR), 2003 U.S. Dist. LEXIS 18812, at *2 (N.D. Cal. Oct. 16, 2003); *accord*, *Starko, Inc. v. Cimarron Health Plan, Inc.*, 2005-NMCA-040, ¶ 1, 137 N.M. 310, 110 P.3d 526

²⁰ NMSA 1978, §§ 62-1-1 through 62-19-24.

for signature. The Modified Stipulation would reflect all the benefits and protections in one place, which the parties have expressed positions on, and which may not have been reflected in the Commission's prior decision.”²¹ Then, in an almost verbatim restatement of Avangrid’s position at its April 19, 2023 Open Meeting the Commission demonstrated the impact of the *ex parte* communications when it stated “the Commission’s December 2021 order on the certification of the stipulation may not have properly evaluated the modified stipulation.”²²

29. Repeating the Joint Applicants’ talking points does not indicate that this matter will be ruled on by an impartial tribunal. A fair and impartial tribunal requires that the trier of fact be disinterested and free from any form of bias or predisposition regarding the outcome of the case. *See Tumey v. Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927); *National Labor Relations Board v. Phelps*, 136 F.2d 562 (5th Cir. 1943). The appearance of complete fairness must be present. *Santa Fe Exploration Co. v. Oil Conservation Com’n of State of N.M.*, 1992-NMSC-44 at ¶ 14.

d. *Parties were in fact prejudiced by the Commission and Joint Applicants’ ex parte communications.*

30. As stated in all responses to the Joint Motion for Remand, the procedure agreed to by the Commission would have substantively impaired the due process rights of the non-Avangrid/Iberdrola/PNM parties if the Court had granted the March 8th Motion for Remand. By engaging in communications with one side to the case below on substantive procedural matters affecting the rights of the parties that were not present, the Commission has engaged in prohibited *ex parte* communications.²³ By agreeing to a process that was intended to truncate the

²¹ *Ex parte* Communications, 2/2/2023, p. 10 (Emphasis supplied).

²² NMPRC April 19, 2023 Open Meeting, available at <https://www.youtube.com/watch?v=9XDxq8XJe9c>, (last accessed April 28, 2024, timestamp 2:52:32, <https://youtu.be/9XDxq8XJe9c?t=10352>).

²³ *Albuquerque Commons P’ship v. City Council*, 2008-NMSC-025, ¶34, (“[I]nterested parties in a quasi-judicial zoning matter are entitled to an opportunity to be heard, to an opportunity to

substantive procedural rights of the non-Avangrid/PNM parties, the Commission has shown that it is biased in favor of Avangrid/Iberdrola/PNM and cannot lawfully act as a neutral decisionmaker if the case were to be remanded.

31. The attempted, after-the-fact efforts to correct the illegal communications between the PRC and the Joint Applicants, and its agreement to support a prejudicial procedure on remand are too little, too late.²⁴ These acts of contrition do nothing to undo the Commission's demonstrated bias, prejudgment and partiality, and its disregard, over a period of almost three months, of its obligations and duties pursuant to the *ex parte* statute and its *ex parte* rule, and relevant case law.

II. The Commission's disclosure of the Communications did not meet the requirements of its own statute and rules and does not remedy the violation.

32. The Commission's *ex parte* rule requires the Commission to "promptly notify all other parties" of the prohibited *ex parte* communications in writing within **five calendar days** of the communication. Rule 1.2.3.10(A) NMAC.

33. We now know that these communications began in mid January, and continued through March 7, 2023 and were not divulged to the other parties until April 20, 2023. There was no attempt by the Commission to obey the timelines prescribed by its controlling *ex parte* statute and rule.

present and rebut evidence, to a tribunal which is impartial in the matter — i.e., having had no pre-hearing or *ex parte* contacts concerning the question at issue — and to a record made and adequate findings executed.") (Citations omitted.)

²⁴ See S-1-sC-39152, NMPRC's Response to NEE's Motion to Supplement, filed on April 19, 2023, at pp. 9-10, Commission Errata at 1-2, Joint Applicants' Notice of Concurrence, S-1-SC-39152, filed April 21, 2023.

34. Further, as discussed above, the *Ex Parte* Communications references to telephone calls or discussion that we do not have any other record of:

- a. Jan. 24, p.2;
- b. Jan. 17 voicemail, p. 4;
- c. Feb. 20, p. 76;
- d. discussion regarding the San Juan appeal, p. 80;
- e. March 3, 2023, p. 83.

35. The Commission has not provided any “summary of an oral communication in the record of the proceeding within five (5) calendar days of the communication” as required by 1.2.3.10(A) NMAC for any of the identified communications above, and parties have no way of knowing if those calls represent the entirety of communications between Joint Applicants and the Commission.

36. The disclosures are illegible in some instances (*Ex Parte* Communications, p. 47) and reveal additional conversations between PNM and the Commission regarding another case (*Ex Parte* Communications, pp. 80-1). The Commission has provided no communications or disclosures as required by rule regarding the discussions concerning San Juan Generating Station, and the parties have no ability to verify if they have been prejudiced in another matter.

37. There is no limited exception for communications regarding purely procedural matters outside the presence of other parties in the rule. While minor procedural communications are permitted (for scheduling, or other trivial matters) that “do not deal with substantive matters or issues on the merits”, they are only allowed if the Commission reasonably believes that no party will gain an advantage as a result of the *ex parte* communication. Rule 1.2.3.9(A) NMAC.

38. The Commission has violated all of these substantive provisions of Section 62-19-23 and Rule 1.2.3 NMAC by first engaging in the documented communications with Avangrid/Iberdrola and PNM, and further by waiting almost ninety days before informing the other parties of these prohibited communications.

III. There is no “settlement” exception under the *ex parte* prohibition, in statute, rule or case law.

39. The PRC and Appellants claim that because they were discussing “settlement” that their *ex parte* discussions and decisions were merely “procedural” and therefore not subject to the laws against *ex parte* contacts between a tribunal and a party in a matter before it. This assertion is unsupported by any statute, rule or decision by any appellate court anywhere in the country. There is no “settlement” exception in the statute or rule prohibiting *ex parte* communications and the only exception for “procedural” matters is for an emergency, or minor, non-substantive procedural matters such as scheduling or other inconsequential matters whose circumstances require *ex parte* contact, none of which apply here.²⁵

40. Commissioner Aguilera’s substantive statement at the open meeting of April 19th establishes what he *learned* from Joint Applicants during the *ex parte* communications: “Also the Commission’s December 2021 Order on the Certification of Stipulation may not have properly evaluated the Modified Stipulation.”²⁶ This is substantive, by its terms. The subsection NMSA 1978, §62-19-23 (C)(1) of the statute provides a narrow exception to the categorical ban on *ex parte* communications where the communication is for procedural or administrative purposes that are non-substantive, and only if the *ex parte* communication does not disadvantage

²⁵ NMSA 1978, §62-19-23; N.M. Code R. §1.2.3.

²⁶ “Without both sides present to balance the presentation of information, a judge may have a misleading impression of the factual context underlying a proceeding. Worse, the judge may have an inaccurate or incomplete version of the facts. These negative effects of *ex parte* communications on the judicial process have generated concern and reaction from the organized bar for the last seventy-five years.” Abramson, Leslie, “The Judicial Ethics of Ex Parte and Other Communications”, 37 Hous. L. Rev 1346. (Winter, 2000).

any other party and is promptly disclosed. In addition, the Commission and Avangrid/Iberdrola/PNM pointedly discussed what evidence the Commission would consider once it granted rehearing.²⁷ There is nothing more “substantive” than such a discussion.

41. Examples of substantive matters include an inquiry about whether a party’s client would contribute to a settlement, *In re Disqualification of Williams* (1993) (Ohio) 657 N.E.2d 1352 (disqualifying judge on that basis),²⁸ a request for leave to amend a complaint, *Perry v. Laidlaw Transit Servs.*, No. 05cv1565-L(CAB), 2006 U.S. Dist. LEXIS 104722, at *4 (S.D. Cal. May 3, 2006). On the other hand, a judge’s *ex parte* contacts with a jury concerned the issue of adjourning for the evening is not substantive but is, rather, a housekeeping procedural issue.”

42. Non-substantive matters include such matters as “a one day extension to file a responsive pleading,” that did not result in any procedural advantage. *Lucero v. Citelum US, Inc.*, No. 1:18-cv-1088-WJ-SCY, 2019 U.S. Dist. LEXIS 217729, at *4-5 (D.N.M. Dec. 17, 2019). Here, the communications not only concerned important, substantive procedural issues and other substantive and merits issues, but also included their disposition by the PRC, without the knowledge of any of the other parties.

43. Appellants’ argument that the Commission has a well-established history and practice of resolving appeals at the Supreme Court, and that there is precedent for their *ex parte* engagement to settle cases on appeal, e.g., NMPRC Case No. 17-00255-UT (Supreme Court Case No. S-1-

²⁷ *Ex parte* Communications, pp. 6, 7, 10, and more.

²⁸ “A judge should neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. The *ex parte* contact in this case, initiated by the judge, was not for a scheduling or ministerial matter but concerned the substantive matter of a party’s likelihood to contribute to a settlement. Whether or not evidence of bias, prejudice, or interest exists, the *ex parte* contact may create an appearance of impropriety.” *Rowan v. Klinehamer (In re Williams)*, 74 Ohio St. 3d 1248, 1249-50, 657 N.E.2d 1352 (1993), citation omitted.

SC-37248) justifies their *ex parte* communication is absurd. Of course, NEE understands and supports the principle that the law favors settlements, but certainly not when the “settlement” negotiations are between the tribunal itself and one side of the litigation, or where the public interest mandates otherwise, as was found by the Hearing Examiner in his Certification of Stipulation and by a unanimous bi-partisan elected Commission in December 2021. If the parties wish to settle, then all parties must be included, not the tribunal and one side.

44. In NMPRC Case No. 17-00255-UT/Supreme Court Case No. S-1-SC-37248 there was a “stipulated dismissal,” in which other parties joined and in which the cross-appeal of Vote Solar was preserved. Additionally, there was no evidence of *ex parte* communications, and even if there was, the issue was not raised; the PRC, itself, did not file a *Notice of Ex Parte Communications* (like they did here), and there was no objection, let alone determination regarding the manner in which settlement came about. Given the insufficiency of the record on the issue of *ex parte* communications (one way or the other) NMPRC Case No. 17-00255-UT/Supreme Court Case No. S-1-SC-37248 has no bearing on the case herein and has no precedential effect.

IV. The Public Utility Act calls for strict sanctions in a case such as this.

45. As stated in the March 16th Joint Response by Bernalillo County, ABCWUA and NM AREA:

It is settled law that “administrative proceedings must conform to the fundamental principles of justice and the requirements of due process of law.” *Hahn v. County Assessor*, 1975-NMCA-116, 88 N.M. 492, 498, 542 P.2d 1182 (N.M. App. 1975). The essence of due process is “the opportunity to be heard and to present any defense” and necessarily includes, the right to conduct discovery, the right to call witnesses, the right to an evidentiary hearing, the right to a neutral decisionmaker, and the right to a decision that is based on the record evidence. *Id.* at 88 N.M. pp. 496-498 (Emphasis supplied).

46. These principles apply to administrative proceedings as well as to trials. *Reid v. New Mexico Bd. of Examiners of Optometry*, 1979-NMSC-005 at ¶8. The rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the customary safeguards affiliated with court proceedings have, in the interest of expedition and a supposed administrative efficiency, been relaxed. *Id.*

47. The Commission is required to follow the *Ex Parte* statute and its own *Ex Parte* Rule. *N.M. Exchange Carrier Group, v. NMPRC*, 2016-NMSC- 015, ¶ 14. The Commission's disregard of the statute and rule reflect negatively on its fitness to render an impartial decision if this appeal is dismissed and the case is remanded.

48. The Public Utility Act calls for a commissioner to "self recuse in any adjudicatory proceeding in which the commissioner ... is unable to make a fair and impartial decision or in which there is reasonable doubt about whether the commissioner or hearing examiner can make a fair and impartial decision, including... when the commissioner or hearing examiner has a personal bias or prejudice concerning a party or its representative or has prejudged a disputed evidentiary fact involved in a proceeding prior to hearing." NMSA 1978, § 62-19-7 (A).

49. The Public Utility Act now requires the remaining Commissioners to recuse because the Commission has indicated that it has already prejudged the decision of whether to grant a motion for rehearing/reopening this matter, and there is clear doubt about whether the Commission can make a fair and impartial decision. This language in the recently recompiled statute regarding the specific conduct of the Commission is non-discretionary. Because NMAC 1.2.2.38(B)(2) provides that any party may file a motion to disqualify and remove a commissioner from participating in a proceeding, along with an affidavit setting forth the alleged grounds for disqualification and if the Commission refuses to self recuse in this matter, the Commission

“shall provide a full explanation in support of the refusal.” § 62-19-7 (B). That justification alone will be subject to judicial review and further appellate proceedings.

50. Joint Applicants and the Commission have now undermined one justification for the Supreme Court granting their remand request, that of conserving judicial resources. Joint Motion for Remand at ¶ 3. Because both Joint Applicants and the Commission have now tainted the proceedings in this matter, there is no benefit of judicial expediency to remanding this case. The *ex parte* communications that have already been disclosed have created additional appealable issues that likely will not survive appellate review. Therefore, the best venue for this case to remain is before the impartial judiciary of the Supreme Court.

WHEREFORE, because the PRC has no jurisdiction to take any action while this case is on appeal to the Supreme Court, NEE takes this opportunity to make clear to the PRC commissioners who entertained Avangrid/Iberdrola/PNM’s requests and entered into the agreements described herein that, should this case be remanded by the Supreme Court to the PRC, NEE will immediately move to disqualify Commissioners Aguilera and Ellison.

DATED: May 8, 2023.

Respectfully Submitted,

/s/ Mariel Nanasi, Esq.
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(505) 469-4060

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE JOINT APPLICATION OF)
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)

Case No. 20-00222-UT

CERTIFICATE OF SERVICE

I CERTIFY that on this date I sent via email to the parties and individuals listed below a true and correct copy of:

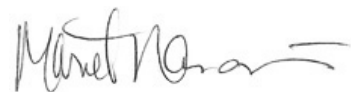
NEW ENERGY ECONOMY’S OBJECTIONS TO PRC’S NOTICE OF MEETING ON 4-19-2023 TO ADDRESS THE MATTERS SET FORTH IN ITS FILING WITH THE NEW MEXICO SUPREME COURT, INCLUDING ITS *EX PARTE* DECISION, CONTRARY TO LAW, TO AGREE TO A “RECONSIDERATION” OF THE FINAL DECISION IN THIS CASE.

Stacey Goodwin Ryan Jerman Richard Alvidrez Mark Fenton Carey Salaz Steven Schwebke Patrick V. Apodaca Mariel Nanasi Christopher Sandberg Joan Drake Lisa Tormoen Hickey Nann M. Winter Keith Herrmann Dahl Harris Peter Auh Andrew Harriger Jody García	Stacey.Goodwin@pnmresources.com ; Ryan.Jerman@pnmresources.com ; Ralvidrez@mstlaw.com ; Mark.Fenton@pnm.com ; Carey.salaz@pnm.com ; Steven.Schwebke@pnm.com ; Patrick.Apodaca@pnmresources.com ; Mariel@seedsbeneaththesnow.com ; cksandberg@me.com ; jdrake@modrall.com ; lisahickey@newLawgroup.com ; nwinter@stelznerlaw.com ; kherrmann@stelznerlaw.com ; dahlharris@hotmail.com ; pauh@abcwua.org ; akharriger@sawvel.com ; JGarcia@stelznerlaw.com ;	Kyle J. Tisdell Ally Beasley Ahtza Dawn Chavez Joseph Hernandez Nicole Horseherder Jessica Keetso Thomas Singer Mike Eisenfeld Robyn Jackson Jane L. Yee Larry Blank, Ph.D. Saif Ismail Peter J. Gould Kelly Gould Jim Dauphinais Michael Gorman Justin Lesky	tisdell@westernlaw.org ; beasley@westernlaw.org ; ahtza@navaeducationproject.org ; joseph@navaeducationproject.org ; nhorseherder@gmail.com ; jkeetso@yahoo.com ; Singer@westernlaw.org ; mike@sanjuancitizens.org ; Robyn.jackson@dine-care.org ; jyee@cabq.gov ; lb@tahoeconomics.com ; sismail@cabq.gov ; peter@thegouldlawfirm.com ; Kelly@thegouldlawfirm.com ; jdauphinais@consultbai.com ; mgorman@consultbai.com ; jlesky@leskylawoffice.com ;
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Respectfully submitted this 8th day of May, 2023.

New Energy Economy,



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