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**

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.

Intervenor-Appellee, New Energy Economy ("NEE") in Case No. S-1-SC-39152, and Intervenor and active participant in NM PRC Case No. 20-00222-UT respectfully objects to the New Mexico Public Regulation Commission's ("PRC") notice of public meeting on April 19, 2023 to address its agreement with PNM, Avangrid and Iberdrola to reconsider the final ruling of the PRC of December 8, 2021 denying the subject merger. 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.

Background.

1. On November 23, 2020, PNM and Avangrid, and later joined by Iberdrola, filed their Joint Application with the Commission requesting approval of a Merger Agreement

(together with related action and documents, the "Proposed Transaction"). "Joint Applicants" are: Avangrid, Inc., a New York corporation; Avangrid Networks, Inc., a Maine Corporation; NM Green Holdings, Inc., a New Mexico corporation; Public Service Company of New Mexico (PNM), a New Mexico corporation; and PNM Resources, Inc. (PNMR), a New Mexico corporation.[1]

2. On November 1, 2021, the Hearing Examiner issued his Certification of Stipulation ("Certification") recommending denial of the Merger based on findings that 1) there was no settlement among the parties **(80 RP 39872)** and 2) the risks and harms posed by the proposed merger to PNM's customers outweighed its demonstrated benefits. **80 RP 39844-39845**.

3. On December 8, 2021, the PRC entered its *Order on Certification of Stipulation* adopted the Hearing Examiner's 445-page analysis setting forth the reasons and evidentiary bases for recommending rejection of the merger. Joint Applicants did not file a Motion for Rehearing (or Reconsideration) pursuant to 1.2.2.37 F NMAC within ten days, but did file an appeal on January 3, 2022, pursuant to NMSA 1978, §62-11-1 (1993).

4. The Joint Applicants and the other parties to this case completed briefing in the New Mexico Supreme Court on September 5, 2022, oral argument to be scheduled by the Court.

5. On information and belief, at an unknown date or dates in 2023, Avangrid/Iberdrola and/or PNM approached the New Mexico Public Regulation Commission

[1] Avangrid, Inc., Avangrid Networks, Inc., NM Green Holdings, Inc., and PNM/PNMR applied for approval of the merger. Before the hearing, the Hearing Examiner ordered that Iberdrola S.A., be made a party. **43RP17117-17150**. Iberdrola resisted joinder. **41RP16843-60**. Iberdrola did not sign the June 4th Stipulation, **43RP17031-42**, but did sign onto the Modified Stipulation in Appendix 2 of the Certification of Stipulation, with further requests for modification. **80RP40308-9**. Referred to herein as Joint Applicants.

("PRC" or "Commission"), *ex parte*, presumably through counsel, to propose to the PRC that it enter into an agreement to reconsider its final decision denying Joint Applicants' request for permission to merge.

6. Thereafter, the PRC held five "executive closed sessions", on 2/2/2023, 2/17/2023 (two), 2/21/2023, and 2/27/2023 "pursuant to NMSA 1978 §10-15-1(H)(7)", which allows closed meetings for attorney-client privileged discussion of pending litigation to which the NMPRC is a party. During the five meetings, the PRC arrived at the decision reflected in the joint motion, which included its agreement to reconsider. How the PRC communicated with PNM and Avangrid, before, during and after meetings closed to the public, is unknown, but since the PRC was then and now not a party to this case but has at all times been acting as the tribunal in this case, those contacts, as explained below, were unlawful.

7. The notices for those executive closed sessions did not alert the public or any parties that the PRC was using its closed sessions to determine whether to agree to reconsider its final decision denying the merger, that Avangrid *et al.* had approached it to request reconsideration or that it was in communication or negotiations with Avangrid/Iberdrola and PNM to do so and to agree on a legally unavailable procedure for accomplishing it.

8. On March 8, 2023, Joint Applicants PNM, Avangrid and Iberdrola ("Joint Applicants"), together with the PRC ("Movants") 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* ("Motion") in the New Mexico Supreme Court in the appeal brought by Joint Applicants. Neither the PRC nor Joint Applicants made NEE or any of the other parties to this case aware either that the PRC was being asked to reconsider its final decision in this case, that the PRC was considering it, or that the PRC had

agreed with Joint Applicants to do so. It was not until the PRC and Joint Applicants filed their motion in the Supreme Court that any of the other parties learned what had been addressed and agreed to in the course of the closed meetings.

9. Not only did the PRC, without notice to the other parties, agree with joint applicants that it would reconsider its final decision in this case, but it also agreed with them that it would, acting together with Joint Applicants, seek the approval of the Supreme Court to use only a summary procedure to reconsider its decision, under an inapplicable rule, Rule 1.2.2.37(F) NMAC, that would allow it and Joint Applicants to avoid the due process protections associated with the PRC rule that permits any case to be reopened, Rule 1.2.2.37 E (4) NMAC if it is appropriate to do so.

10. The PRC made this agreement with Joint Applicants via exclusively *ex parte* communications to which none of the other parties in this proceeding were privy, including the Attorney General, who has the statutory responsibility to represent the public and ratepayers in proceedings such as this one. NMSA 1978, § 8-5-17 (1998).

11. The PRC is the *tribunal* in this case but nevertheless entered into *ex parte* discussions with only the parties who are seeking the reconsideration, while excluding all other parties to the proceeding from the process. The PRC was not in the position of a party plaintiff considering filing a complaint in court or a defendant in a case it wishes to settle. Rather it was and is *the tribunal conducting and deciding this contested case, with an obligation to all parties and the public to be open, public and transparent, but now it has chosen one side of this controversy with which to align itself, without notice to the other parties before it in this proceeding. It has met with and agreed with the three parties that make up one side in the controversy it is adjudicating and has entered into an agreement with them to "reconsider" its*

final decision.[2] Appellants acting together with the PRC tribunal itself are seeking not just a dismissal of the pending appeal but additional relief to which they are not entitled in this multi-party case; a dismissal that will have the effect of reversing the final decision by requesting the Supreme Court to dismiss the appeal with instructions to "remand of this case for purposes of effectuating **their agreement** to resolve this appeal by submitting the matter to the Commission for rehearing and reconsideration,[3] … under Rule 1.2.2.37(F) NMAC."[4] (Emphasis supplied.) Application of the rule the PRC has surprisingly requested the Supreme Court to require them to follow after remand, even though it has no applicability, would effectively deprive NEE and the other parties of the due process otherwise required by the PRC's own rules, as though PNM and Avangrid had prevailed on the merits of their appeal and had somehow become entitled to enter into a settlement with each other of the merits of the merger, without the involvement or even knowledge of the other parties, in time to meet the April date that Avangrid and PNM agreed on for their merger, without the protections afforded by the applicable rules of the PRC, including Rule 1.2.2.37 E (4) NMAC, which allows a case to be reopened upon a proper showing.

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[2] In *Bd. of County Comm'rs v. Ogden,* 117 N.M. 181, 184, 870 P.2d 143, 146 (Ct.App.1994). (Plaintiff, the County, sued Defendants for ejectment, quiet title, and slander of title; the decision behind closed doors to sue was not a violation of the Open Meetings Act.) *New Mexico State Inv. Council v. Weinstein*, 2016-NMCA- 069, ¶ 73, 382 P. 3d 923. (Defendants, are three groups of individuals and entities alleged to have engaged in misconduct related to New Mexico State Investment Council's management of the funds.) This situation is wholly different from the postures in *Ogden* and *Weinstein*, in which the Court of Appeals agreed that an agency could meet in closed session to make litigation decisions. In those cases, they were suing or being sued. They were not *the tribunal itself.*

[3] Movants' Motion at ¶2.

[4] Movants' Motion at ¶5.

12. On April 4, 2023, NEE filed *New Energy Economy's Motion for Leave to Supplement its Response with Additional Authority and Newly Discovered Evidence,* alleging Open Meetings Act violations by the PRC in arriving at the decision to reconsider and to request the Supreme Court to provide them with the above-described relief. On April 11, 2023, Appellants filed their Response.

13. 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," attached and incorporated herein as Exhibit A.

I. CONDUCTING AN OPEN MEETING TO RATIFY ILLEGAL, *EX PARTE* DECISIONS MADE IN CLOSED MEETINGS WOULD BE ITSELF ILLEGAL. FURTHERMORE, THE PRC IS WITHOUT JURISDICTION TO HOLD AND CONDUCT ANY MEETINGS RELATED TO RECONSIDERATION OR REOPENING OF A FINAL DECISION WHILE THIS CASE IS ON APPEAL

A. Absent an Express Grant of Authority an Administrative Agency Cannot Reconsider its Final Decision; The PRC's and Joint Applicants' agreement to seek a ruling from the Supreme Court that would require the PRC to violate the rehearing statute and its own rules is contrary to law and forbidden.

14. As more fully stated herein, the PRC did not merely come to an *ex parte* agreement to allow the Joint Applicants to withdraw their appeal, the PRC decided, without notice to the public or other parties to the case, outside a public meeting, to "reconsider" the merger decision[5] without *any* stated basis and contrary to the PRC's own rule, which allows reconsideration only in response to a motion filed within ten days of a decision. Rule 1.2.2.37(F) NMAC. NEE will not

[5] Movants' Motion at ¶5. ("The Commission **shall** conduct the rehearing and reconsideration under Rule 1.2.2.37(F) NMAC."). (Emphasis supplied.)

reiterate its objection to Movants' request that the Supreme Court direct it to invoke Rule 1.2.2.37(F) NMAC except to say that it is inapplicable, time-barred, and statutorily prohibited. Furthermore, an administrative agency's decision – in this case the PRC's decision of December 8, 2021 shall be 'final and conclusive' and without explicit legislative authority the agency is powerless to reconsider its decisions. *Armijo v. Save 'N Gain*, 1989-NMCA- 014, ¶¶ 20-23, 108 N.M. 281, 771 P.2d 989, attached and incorporated herein as Exhibit B.[6] Under NMSA 1978, § 62-10-16 (2021), the legislature ***has allowed rehearing by the PRC, but has placed a thirty-day time limit on them.*** Here, Avangrid/Iberdrola and PNM have apparently persuaded the PRC not only to ignore its own rules, but to ignore the statutory limits on rehearings set by the New Mexico legislature.

15. The only available procedure under which the PRC may consider altering a prior, final decision is found in Rule 1.2.2.37 E (4) NMAC, which allows the Commission to "reopen" a case if the predicates for reopening are met, and there is no basis for concluding that any of those predicates (new evidence, new law, change in public interest) are met here and, *if* they have been, they were met only in closed session, following unlawful *ex parte* communications with Joint Applicants.

16. Our Supreme Court has held that an agency must follow its own rules. *Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n*, 1993-NMSC-032, ¶¶8-12, 115 N.M. 678, 681-682, 858 P.2d 54, 57-58. (Changes in policies can be implemented, even retroactively, with adequate

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[6] The Colorado Appellate Court has cited *Armijo v. Save 'N Gain*, *supra*, favorably in *Murr v. City and County of Denver*, 2019 COA 51, ¶¶36-46. (An agency's action is final and it is fundamentally unfair to revisit a final decision after the time limit for reconsideration has lapsed due the principle of finality; administrative agencies generally have no jurisdiction or power to set aside a final decision once the aggrieved party has either appealed the decision or the time to appeal has passed.)

notice and adequate reasons for the change.) Here the PRC has entered into an agreement to violate its own rules, in contravention of these holdings. To convene a public meeting to ratify this decision to violate its own rules and its request that the Court endorse this decision would categorically violate the foregoing holdings.

If the PRC wishes to adopt a rule that will eliminate any temporal restriction on post-trial motions for reconsideration, it is free to propose an amendment to its rules and to hear from the public and the practitioners before this agency about whether that would be a good idea. But it is in no position to alter its rules on an *ad hoc* basis to accommodate the desires of enormous corporations who want the PRC to accommodate them as quickly as possible. The fact that Avangrid and Iberdrola would request that the PRC do such a thing is another indication of why the PRC was correct to reject the merger.

17. If the PRC proceeds to ratify its ill-advised decision to attempt to get around statute and its own rules, it will be voting to violate the parties' rights to due process of law and the public's right to have decisions relating to reopening final decisions reached in public meetings at which the parties are allowed to be heard and other due process protections afforded, not in closed meetings, and particularly not in closed meetings arising from, and involving, *ex parte* discussions between the tribunal itself and parties on one side of a contested case.

B. The Prohibition against *Ex Parte* prevents the Commission from making a decision to rehear and reconsider the merger denial.

The PRC's own rules, as well as a New Mexico statute, forbid direct or indirect contacts between any PRC Commissioner or Commissioners and any party or his representative outside

the presence of the other parties concerning "any matter docketed"[7]; the only exception being *ex parte* discussion of procedural matters, and then only *if* the commissioner involved in the *ex parte communication* reasonably believes that no party will gain an advantage as a result of it.[8] In its filing in the Supreme Court, the PRC and Joint Applicants, together, told the Supreme Court that the Commission had not made any final determination with regard to any specific outcome or decision that may result upon the Court's dismissal and remand to the Commission for rehearing and reconsideration of the Commission Order.[9] As doubtful as this statement is under the present circumstances, there are two determinations (or decisions) reflected in Movants' Motion before the Supreme Court. One is the PRC's decision – which it characterizes as its "agreement" with Joint Applicants - to reconsider the PRC's final decision.[10] It is incorrect to suggest that this is not itself a "decision". Not only would such a characterization be transparently untrue, but "reconsideration" and "reopening" both are created by specific PRC rules and procedures that cannot be invoked *ex parte* under the Commission's rules regarding *ex parte* contacts by parties to a contested case. By making this decision, the Commission has already agreed – and has *said in its moving papers that it has already agreed* - to rehear and reconsider the merger denial,[11] a decision that under the PRC's rules, can only be in response to

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[7] NMSA 1978, §62-19-23 A; N.M. Code R. §1.2.3.7 F. "**pending adjudication** means any matter docketed[]."

[8] NMSA 1978, §62-19-23 C.

[9] Movants' Motion at p. 3, ¶3.

[10] *Id.,* at p. 2, p. 3, ¶3, p. 4 ¶¶ 4-7 ("The Commission shall conduct the rehearing and reconsideration under Rule 1.2.2.37(F) NMAC.")

[11] *Id.*

a motion made within ten days and with the participation of all parties to the proceeding. Can the PRC seriously be suggesting that it can make the decision to reconsider a final decision without the knowledge and participation of any parties other than the joint applicants for merger, and without any notice to the public? The decision to reconsider the case was made without input from the other parties to the case and pursuant to *ex parte* communications and without any new evidence, (and none is mentioned in their motion), in which case the decision is without any basis and, by definition, arbitrary and capricious. To say that this is merely the type of minor procedural matter that can be agreed to *ex parte* – such as an extension of time to meet a briefing deadline – because it puts none of the other parties at a disadvantage would not be a credible assertion, and that is the only exception allowed for *ex parte* communications.[12] Or is the PRC saying that its *ex parte* decision to reconsider, arrived at as a result of *ex parte* communications with Joint Applicants gives no advantage to Joint Applicants and no disadvantage to the other parties who have been kept in the dark? If the PRC goes forward with its decision to "reconsider" under an inapplicable rule, it will have avoided any opportunity on the part of the other parties to meaningfully object and to be heard under the PRC's own rules of procedure for contested matters and without any inquiry into what the other parties to this proceeding have to say about the reconsideration and the merger, much less the "stipulated" dismissal in which only the PRC, PNM, and Avangrid/Iberdrola are parties.

18. Accordingly, if the PRC goes ahead with a public vote to somehow ratify the decisions reflected in its and the Joint Applicants' filing in the Supreme Court, it will only

[12] NMSA 1978, §62-19-23 C; N.M. Code R. §1.2.3.7 B (1) (b).

underscore and affirm its unlawful actions and further violate the law, this time by carrying into effect decisions reached *ex parte,* and in violation of the law.[13]

C. The PRC has lost jurisdiction to "Reconsider" Its Prior Ruling.

19. Because the merger appeal is before the New Mexico Supreme Court the Commission has lost jurisdiction to "reconsider" its decision in this proceeding. An appeal of a Commission order to the New Mexico Supreme Court divests the Commission of further jurisdiction over the matters encompassed in the order.[14] Enforcement of ancillary matters (attorneys' fees, etc.) is permissible while *modification* of a judgment is generally impermissible with limited exceptions. *Kelly Inn No. 102, Inc. v. Kapnison*, 1992-NMSC-005, ¶¶ 32 – 36. *Corbin v. State Farm Insurance Co*., 1990-NMSC-014, ¶ 10, 109 N.M. 589, held the trial court did not have jurisdiction to allow a plaintiff to amend (i.e., modify) his complaint more than 30 days after the filing of an appeal after which the trial court lost jurisdiction. *See also*, *Luboyeski v. Hill*, 1994-NMSC-032 which stands for the same proposition, the trial court loses jurisdiction to order a complaint to be amended after dismissal and appeal; *Luna v. Homestake Mining Co*.,

[13] N.M. Code R. §1.2.3.7 B "**ex parte communication** means a direct or indirect communication with a party or his representative, outside the presence of the other parties, concerning a [] pending adjudication"; §1.2.3.7 B (2): "ex parte communications include a status inquiry which states or implies: **(a)** a view as to the merits or outcome of a rulemaking after the record has been closed or a pending adjudication; **(b)** a preference for a particular party, or a reason why timing is important to a particular party; **(c)** a view as to the date by which a proceeding should be resolved; or **(d)** a view which is otherwise intended to address the merits or outcome, or to influence the timing, of a pending adjudication or rulemaking after the record has been closed."

[14] *See, Re Public Service Company of New Mexico*, 1999 N.M. PUC LEXIS 5, *6 (NMPRC, Aug. 25, 1999) (noting that the Commission had lost substantive jurisdiction over a docket as a result of a party appealing the Commission's final order.)

1983-NMCA-009 ¶ 7 ("after the entry of a final judgment a trial court loses jurisdiction to further modify or amend its judgment herein during the pendency of an appeal").

D. The PRC has failed to comply with the letter and spirit of the Open Meetings Act.

20. The PRC is not a Plaintiff or a Defendant in this case – it is the tribunal – the decisionmaker – in a contested, quasi-judicial matter. It is not a plaintiff or a defendant with its own interests, who, pursuant to the *Ogden* and *Weinstein* cases, can go into closed sessions to "discuss litigation decisions" or "strategy" under the protection of attorney-client privilege. Open Meetings Act, NMSA 1978 §10-15-1. There is no case in which an appellate court has permitted any tribunal, while an appeal is pending, or at any other time, to meet use closed meetings to make substantive decisions regarding its quasi-judicial duties, or to make quasi-judicial decisions such as the PRC agreed to in the course of its closed meetings in this case. NEE understands that the PRC relied on the Appellate Court's decision in [*Weinstein*] as a basis for arriving at its decision to reconsider in closed session. *Weinstein*, however, involved an agency *that was a defendant in litigation.* It was not the tribunal itself.

21. NEE sought the position of other parties before filing and can report that Joint Applicants oppose. Bernalillo County and CCAE take no position. NMAG is still analyzing the arguments made herein. No other party responded.

CONCLUSION

It is unlawful for the PRC to "reconsider" its earlier Final Order denying the merger or to have made an agreement with selected parties in a contested case to do so. It cannot make a decision to reconsider the merger via *ex parte* meetings, while the case is on appeal, on remand, or at any other time, because it is contrary to legal precedent and PRC rules. Joint Applicants

may move to withdraw their appeal and then they are free to file a new Application, or the PRC can follow its applicable procedure to reopen the case if it determines that new facts, law or a change in the public interest requires. Because the PRC is a public body any such future decision to "reopen" or consider a new Application must take place in public and according to established and binding rules of procedure.

WHEREFORE New Energy Economy respectfully requests that the Public Regulation Commission refrain from further actions relating to its agreement with PNM, Avangrid and Iberdrola other than to withdraw from the agreement and withdraw its pending motion before the Supreme Court, which NEE respectfully requests that it do forthwith, given that its agreement to reconsider its final decision is in violation of statute, the PRC's own regulations, was and was entered into *ex parte,* as is the motion pending before the Supreme Court and, further, any proceeding to enter into, agree to, or vote on is outside the PRC's jurisdiction in light of the pendency of the appeal.

DATED: April 17, 2023.

Respectfully Submitted,

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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.

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Respectfully submitted this 17th day of April, 2023.

New Energy Economy,

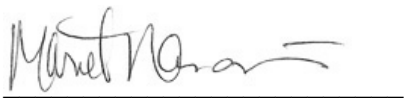

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Exhibit A

NEW MEXICO PUBLIC REGULATION COMMISSION

NOTICE OF OPEN MEETING
OPEN MEETING: REGULAR WEEKLY MEETING
Wednesday, April 19, 2023
1:30 p.m.
HYBRID MEETING

NOTICE: THIS IS A HYBRID MEETING WHICH WILL BE HELD IN PERSON AND VIA ZOOM. THE PUBLIC IS WELCOME TO ATTEND THE MEETING IN PERSON AT THE BOKUM BUILDING WHICH IS LOCATED AT 142 W PALACE AVE., SANTA FE, NM 87501. THE PUBLIC MAY ALSO VIEW THE MEETING REMOTELY VIA A LIVESTREAM ON YOUTUBE. INDIVIDUALS WISHING TO PROVIDE PUBLIC COMMENT MAY DO SO VIA ZOOM, OR BY PHONE; TO SIGN UP FOR PUBLIC COMMENT PLEASE CONTACT LaurieAnn Santillanes AT LaurieAnn.Santillanes@prc.nm.gov OR (505) 670-4830. GO TO https://www.nm-prc.org/nmprc-open-meeting-agenda/ SEVERAL MINUTES BEFORE THE START OF THE MEETING FOR A LINK TO THE LIVESTREAM.

AGENDA

I. CALL TO ORDER AND ROLL CALL

II. PLEDGE OF ALLEGIANCE/STATE PLEDGE

III. CONSIDERATION AND APPROVAL OF THE AGENDA

IV. CONSIDERATION AND APPROVAL OF PRIOR MEETING MINUTES

- **Minutes of March 15, 22 and 29, 2023 Open Meetings**

V. EMPLOYEE OF THE MONTH

VI. PUBLIC COMMENT

VII. CONSENT ACTION ITEMS

A. Transportation Matters:

23-00088-TR-M **Erika Avila Stephanz**	**IN THE MATTER OF THE APPLICATION OF CARLSBAD FIRE DEPT. AMBULANCE SERVICE FOR REISSUANCE OF CERTIFICATE NO. 12328 AND TEMPORARY AUTHORITY TO PROVIDE AMBULANCE SERVICE** **PROPOSED ORDER ON APPLICATION**
23-00100-TR-M **Erika Stephanz**	**IN THE MATTER OF THE APPLICATION OF HIDALGO COUNTY AMBULANCE SERVICE FOR REISSUANCE OF**

	CERTIFICATE NO. 14017 AND TEMPORARY AUTHORITY TO PROVIDE AMBULANCE SERVICE **PROPOSED ORDER ON APPLICATION**

B. Utility Matters:

22-00108-UT **Hans Muller**	**IN THE MATTER OF THE APPLICATION OF EARTHGRID PBC FOR A CERTIFICATE OF REGISTRATION TO PROVIDE COMPETITIVE LOCAL EXCHANGE TELECOMMUNICATIONS SERVICE WITHIN THE STATE OF NEW MEXICO** **PROPOSED ORDER ON APPLICATION**
22-00299-UT **Erika Stephanz**	**IN THE MATTER OF THE FORMAL COMPLAINT OF JHAIRO AJTUN AGAINST TIMBERON WATER & SANITATION DISTRICT** **PROPOSED ORDER DISMISSING COMPLAINT**
23-00017-UT **Robert Lundin**	**IN THE MATTER OF THE FORMAL COMPLAINT OF TOM OLSEN AGAINST PUBLIC SERVICE COMPANY OF NEW MEXICO** **PROPOSED ORDER DISMISSING COMPLAINT**
20-00099-UT **Russell Fisk**	**IN THE MATTER OF APPLICATIONS FOR 2021 BROADBAND PROGRAM SUPPORT FROM THE STATE RURAL UNIVERSAL SERVICE FUND, AS PER 17.11.10.31 NMAC** **PROPOSED ORDER CONCERNING BACA VALLEY TELEPHONE COMPANY, INC.'S REQUEST FOR MIDPOINT DISBURSEMENT FOR RANCH TO RATON PROJECT**
21-00098-UT **Russell Fisk**	**IN THE MATTER OF APPLICATIONS FOR 2022 BROADBAND PROGRAM SUPPORT FROM THE STATE RURAL UNIVERSAL SERVICE FUND, AS PER 17.11.10.31 NMAC** **PROPOSED ORDER CONCERNING PLATEAU TELECOMMUNICATIONS INCORPORATED'S REQUEST**

	FOR FINAL DISBURSEMENT FOR BUFFALO ROAD PROJECT
22-00097-UT **Russell Fisk**	**IN THE MATTER OF APPLICATIONS FOR 2023 BROADBAND PROGRAM SUPPORT FROM THE STATE RURAL UNIVERSAL SERVICE FUND, AS PER 17.11.10.31 NMAC** **PROPOSED ORDER CONCERNING NMSURF, INC.'S INITIAL DISBURSEMENTS FOR PECOS PROJECT, PACHECO CANYON PROJECT, COCHITI LAKE – VILLAGE OF LA BAJADA PROJECT AND SAN ILDEFONSO PROJECT**
23-00071-UT **Russell Fisk**	**IN THE MATTER OF THE TARIFFS, AGREEMENTS AND FORMS PROPOSED BY THE QUALIFYING UTILITIES FOR THE COMMUNITY SOLAR PROGRAM** **PROPOSED ORDER CONCERNING PUBLIC SERVICE COMPANY OF NEW MEXICO'S ADVICE NOTICE NO. 602**
23-00046-UT **Russell Fisk**	**THE MATTER OF THE APPLICATION FOR APPROVAL OF EL PASO ELECTRIC COMPANY'S CONTINUED USE OF ITS FUEL AND PURCHASED POWER COST ADJUSTMENT CLAUSE** **PROPOSED ORDER CONCERNING FURTHER PROCEEDINGS**
23-00086-UT **Russell Fisk**	**APPLICATION FOR APPROVAL OF EL PASO ELECTRIC COMPANY'S 2023 RENEWABLE ENERGY ACT PLAN PURSUANT TO THE RENEWABLE ENERGY ACT AND 17.9.572 NMAC, AND SEVENTH REVISED RATE NO. 38 – RPS COST RIDER** **PROPOSED ORDER CONCERNING EL PASO ELECTRIC COMPANY'S VERIFIED MOTION FOR A TWO-MONTH EXTENSION OF THE MAY 1, 2023 FILING DATE**

VIII. REGULAR ACTION ITEMS

A. Transportation Matters:

23-00118-TR-M **Hans Muller** **Erika Stephanz**	**IN THE MATTER OF THE APPLICATION OF VILLAGE OF QUESTA D/B/A QUESTA VOLUNTEER FIRE DEPARTMENT FOR TEMPORARY AUTHORITY** **<u>RATIFICATION OF EMERGENCY ACTION TAKEN ON APRIL 5</u>**
21-00296-TR-M **Erika Stephanz**	**IN THE MATTER OF STAFF'S PETITION TO GRANT A PANDEMIC RELATED WAIVER TO AMBULANCES FROM RULE 18.3.14.11(A) NMAC** **<u>POTENTIAL ORDER EXTENDING WAIVER</u>**
Resolution 4-19-2023 **Hans Muller**	**A RESOLUTION TO ADOPT THE USE OF MINISTERIAL ACTION TO APPROVE UNCONTESTED APPLICATIONS, APPROVE TEMPORARY AUTHORITY TO CERTIFIED AMBULANCE CARRIERS, AND IMMEDIATELY SUSPEND MOTOR CARRIERS THAT FAIL TO MAINTAIN FINANCIAL RESPONSIBILITY OR VIOLATE A PRESCRIBED SAFETY REQUIREMENT** **<u>PROPOSED ADOPTION OF RESOLUTION</u>**

B. Utility Matters:

23-00049-UT **Erika Stephanz** **Judith Amer**	**IN THE MATTER OF TIMBERON WATER & SANITATION DISTRICT ADVICE NOTICE NO. 18 AND ADVICE NOTICE NO. 19** **<u>PROPOSED ORDER CONCERNING ADVICE NOTICES NOS. 18 AND 19</u>**

IX. DISCUSSION AND POTENTIAL ACTION

Cholla Khoury	**RULEMAKING OVERVIEW AND PRIORITIZATION**
S-1-SC-39152 **20-00222-UT** **Michael Smith**	**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. **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.** **DISCUSSION AND POTENTIAL ACTION ON PROPOSED JOINT MOTION FOR STIPULATED DISMISSAL OF APPEAL AND REMAND FOR REHEARING AND RECONSIDERATION**

X. DISCUSSION

Collin Gillespie	**LEGISLATIVE REVIEW**
David Martinez	**REVIEW OF Q1 CRD REPORT**

XI. COMMUNICATIONS WITH CHIEF OF STAFF

XII. COMMUNICATIONS WITH COMMISSIONERS

XIII. ADJOURNMENT

To obtain a copy of this agenda please log in to the Commission's website at https://www.nm-prc.org/.

The Commission will make reasonable efforts to post the agenda on the Commission's website at least 72 hours prior to the Open Meeting, but the inability to do so within the 72 hours prior, will not require the Commission to delay the meeting or to refrain from acting on any agenda item on which it otherwise could act.

At any time during the Open Meeting the Commission may close the meeting to the public to discuss matters not subject to the New Mexico Open Meetings Act. The Commission may revise the order of the agenda items considered at this Open Meeting.

Notice is hereby given that the Commission may request that any party answer clarifying questions or provide oral argument with respect to any matter on the agenda. If the Commission makes such a request, any party present at the meeting, either in person or by telephone, shall have an equal opportunity to respond to such questions or argument. In the event a party whose case is on the agenda chooses not to appear, the absence of that party shall not cause such discussion or argument to become *ex-parte* communications.

PERSONS WITH DISABILITIES

ANY PERSON WITH A DISABILITY REQUIRING SPECIAL ASSISTANCE IN ORDER TO PARTICIPATE IN THIS PROCEEDING SHOULD CONTACT THE OFFICE OF DIRECTOR OF ADMINISTRATIVE SERVICES OF THE COMMISSION AT (505) 467-9116 AS SOON AS POSSIBLE PRIOR TO THE COMMENCEMENT OF THE OPEN MEETING.

PUBLIC COMMENT

All members of the public wishing to provide public comment may do so via Zoom, or by telephone. Individuals wishing to comment must sign up to do by contacting LaurieAnn Santillanes at LaurieAnn.Santillanes@prc.nm.gov or (505) 670-4830 at least 2 hours before the start of the meeting. When sending an email to sign up for public comment please identify the name of the commentor(s), the name of the organization they represent (if any), and the topic or issue on which they desire to comment. The portion of the agenda allocated for public comment at any one open meeting shall be limited to a maximum of 30 minutes for all persons wishing to provide comment. The order of speakers will be based on the order in which speakers sign up, but public officials may be taken out of order. If a speaker is not present at the time he or she is called to provide comment, that speaker shall forfeit their opportunity to speak. **Public comment by an individual or entity shall be limited to no more than three (3) minutes** unless the Commission acts to extend the period. If the number of individuals on the sign-up sheet desiring to provide comment would exceed the allotted 30-minute period, the Chair may limit individual remarks to a shorter time period. Individuals represented by or representing a common organization or association may be asked to select one individual to act as spokesperson to speak for the group. Individuals who sign up to comment, but either fail to do so or choose to speak for less than their allotted time, may not cede or yield their time to another speaker. Written comments of individuals who cannot be physically present may not be read aloud at the meeting but may be submitted to the Commission.

The subject matter of public comments shall be relevant to matters within the Commission's jurisdiction. Public comment will not be permitted on pending rulemaking proceedings before the Commission once the opportunity for public comment in those proceedings has closed. Public comment by parties to a proceeding or adjudication pending before the Commission will not be permitted where the comment concerns matters at issue in such proceeding. The Chair shall retain the right to stop any speaker who raises an issue that is not under the Commission's jurisdiction or is subject to the restrictions above. Public comment will be received without Commission comment or response. However, individual Commissioners may at their option seek clarification or additional information from speakers through the Chair.

No speakers will be accommodated after the public comment portion of the agenda has closed. The Chair retains the right to exercise discretion in the implementation of this policy and may override the above rules in case of emergency or other unforeseen circumstances.

Speakers providing comment shall at all times conduct themselves in accordance with proper decorum. Profane or vulgar language or gestures will not be tolerated. Audience members shall not disrupt an open meeting by speaking without being recognized by the Commission and shall not incite others to do so. The Commission retains the right to remove disruptive attendees and individuals who fail to conduct themselves in accordance with these provisions from the Commission meeting.

Exhibit B


KeyCite Yellow Flag - Negative Treatment
Declined to Extend by Derringer v. Turney, N.M.App., August 13, 2001

108 N.M. 281
Court of **Appeals** of New Mexico.

Yvette B. ARMIJO, Claimant–Appellant,
v.
SAVE 'N GAIN and Penn General Southwest, Respondents–Appellees.

No. 10558.
|
Feb. 28, 1989.

Synopsis
Workers' compensation claimant moved for leave to file rejection of recommendations of prehearing officer and requested permission to revoke her written acceptance of recommendations and be accorded hearing on merits. The Department of Labor, Workers' Compensation Division, Joseph N. Wiltgen, Hearing Officer, denied motion, and claimant **appealed**. The Court of **Appeals**, Donnelly, J., held that: (1) prehearing officer's delay in issuing recommended informal resolution did not deprive workers' compensation director of further jurisdiction; (2) claimant's written acceptance of recommended resolutions waived her due process rights to further formal hearing; and (3) claimant's motion to withdraw her written acceptance was not timely.

Affirmed.

Apodaca, J., filed opinion concurring specially.

Procedural Posture(s): On **Appeal**.

Attorneys and Law Firms

****990 *282** Martin J. Chavez, Chavez Law Offices, Albuquerque, for claimant-appellant.

Ben M. Allen, Hatch, Beitler, Allen & Shepherd, P.A., Albuquerque, for respondents-appellees.

OPINION

DONNELLY, Judge.

{1} Claimant, Yvette Armijo, **appeals** the denial of her motion seeking to reopen her worker's compensation claim for psychological disability in order to permit a formal hearing on the merits. The principal issue raised by claimant on **appeal** is whether the Workers' Compensation Division (WCD) hearing officer abused his discretion by refusing to allow claimant to reject the recommended resolution made by the prehearing officer after she had filed a written acceptance of the proposed administrative resolution. We affirm.

{2} Claimant was employed by Save 'N Gain in Albuquerque as a stocker. On July 27, 1987, she filed a worker's compensation claim for psychological disability alleging that she suffered a disabling injury on June 24, 1987. Respondents, Save 'N Gain and Penn General Southwest, denied the claim in their response filed on August 12, 1987. Claimant's dispute was heard by a prehearing officer in an informal conference on August 24, 1987, at which claimant appeared pro se and respondents appeared with counsel. On November 3, 1987, the prehearing officer issued a recommended resolution of the claim beyond the sixty-day statutory time limit prescribed in NMSA 1978, Section 52–5–5(C) (Repl.Pamp.1987). After the recommended resolution was issued, claimant consulted an attorney. Thereafter both claimant and respondent filed written acceptances of the prehearing officer's recommended resolutions. Claimant's written acceptance was filed November 20, 1987. On January 25, 1988, claimant, acting on the advice of a different attorney, moved for leave to file a rejection of the recommendations and requested permission to revoke her written acceptance and be accorded a hearing on the merits. Claimant **appeals** the denial of that motion.

I. JURISDICTIONAL ISSUES

{3} We initially address two jurisdictional issues raised by claimant.

{4} (A) Claimant contends that the WCD prehearing officer's failure to issue the recommended resolution within 60 days rendered it void and exhausted his jurisdiction to take any further action in the matter. Claimant argues that the prehearing officer's issuance of a recommended resolution 41 days after the statutory deadline raises a jurisdictional question. Although the jurisdictional issue was not included in claimant's docketing statement, appellate review of this question is not limited where the issue involves the forum's subject matter jurisdiction. SCRA 1986, 12–216(B). A jurisdictional defect may not be waived and may be raised at any stage of the proceedings, even sua sponte by the

appellate court. *State v. Ramirez,* 89 N.M. 635, 556 P.2d 43 (Ct.App.1976).

{5} Legislation prescribing the sixty-day time requirement for the issuance of a recommended administrative resolution, as set forth in Section 52–5–5(C), became effective June 19, 1987. The statute provides in applicable part:

> Upon receipt, *every claim shall be evaluated by the director or his designee, who shall then contact all parties and attempt to informally resolve the dispute. Within sixty days after receipt of the claim, the director shall issue his recommendations for resolution* * * *. Within thirty days of receipt of the recommendation of the director, each party shall notify the director on a form provided by him of the acceptance or rejection of the recommendation. *A party failing to notify the director* ****991 *283** *waives any right to reject the recommendation and is bound conclusively by the director's recommendation unless, upon application made to the director within thirty days after the foregoing deadline, the director finds that the party's failure to notify was the result of excusable neglect.* If either party makes a timely rejection of the director's recommendation, the claim shall be assigned to a hearing officer for hearing. [Emphasis added.]

Claimant filed her claim on July 27, 1987. The recommended resolution was not issued until November 3, 1987, more than three months after the claim was received by the WCD.

{6} In *Lopez v. New Mexico Board of Medical Examiners,* 107 N.M. 145, 754 P.2d 522 (1988), the supreme court addressed an issue concerning the validity of the decision of the state medical licensing board after the expiration of a prescribed statutory deadline. The court concluded that a statutory time limit on actions by that board was "expressly jurisdictional" and that action taken by the board after the time had run was without force and effect. *Id.* Claimant also relies on *Foster v. Board of Dentistry,* 103 N.M. 776, 714 P.2d 580 (1986) (ruling by review board revoking a professional license after expiration of time period prescribed by law held null and void). *See also* *Varoz v. New Mexico Bd. of Podiatry,* 104 N.M. 454, 722 P.2d 1176 (1986) (limitation period imposed by statute held a procedural safeguard).

{7} Claimant asserts that here, as in *Foster* and *Lopez,* the language of the statute indicates a legislative intent to impose a time limit on the ability of the WCD to issue a recommended informal resolution. Claimant contends the court may not alter a clear legislative condition and statutory intent of providing a "quick and efficient delivery of indemnity and medical benefits to injured and disabled workers." NMSA 1978, § 52–5–1 (Repl.Pamp.1987); *Sanchez v. Bernalillo County,* 57 N.M. 217, 257 P.2d 909 (1953). While it is clear that in adopting a process for the informal resolution of workers' compensation claims, the legislature intended to provide a procedure for expediting worker's compensation claims, we discern no legislative intent that the sixty-day time limit stated in Section 52–5–5(C) preclude further administrative action in this **case**.

{8} Statutes governing the revocation of professional licenses reflect a legislative determination that a balance should be struck between the public's need to be protected and the licensee's individual property right to earn a livelihood under a state-conferred license. *Varoz v. New Mexico Bd. of Podiatry.* In contrast, the statutory time requirement for action by the WCD director or his designee contained in Section 52–5–5(C) is designed to provide an expeditious method for the resolution of workers' claims. The thrust of the statute indicates that the rights of the parties in a workers' compensation action are not subject to forfeiture because of the division's failure to comply with statutory deadlines. Instead, Section 52–5–1 affirmatively declares that it "is the specific intent of the legislature that benefit claims be decided on their merits * * *."

{9} Section 52–5–5(C) read together with the legislatively declared purposes set forth in Section 52–5–1 of the Workers' Compensation Act reveals a legislative intent that the WCD should not be deprived of administrative jurisdiction when the issuance of recommended resolutions are delayed beyond the prescribed statutory time limit. Instead, we conclude that a failure of the director to comply with the legislative

time constraints imposed by Section 52–5–5(C) permits the parties to either waive any delay in the rendition of the informal resolution and await the recommended resolution or, if no informal resolution has been filed after the expiration of the sixty-day period, to invoke its right to a prompt hearing on the merits before a hearing officer without further delay and without the necessity of awaiting the issuance of an informal settlement recommendation. Here claimant's election to accept the delayed recommendation effectively waived any objection to the untimeliness of the director's recommendation. Thus, the delay in the issuance of the recommended informal resolution ****992** ***284** did not deprive the WCD of further jurisdiction to act in this matter.

{10} (B) Claimant additionally asserts that she was effectively denied due process of law herein and the right to have her **case** decided on the merits when her claim for psychological disability was considered in an informal conference under administrative procedures established under the Workers' Compensation Act. *See* NMSA 1978, § 52–5–7 (Repl.Pamp.1987). Specifically claimant argues that she was deprived of due process by requiring her to submit to an informal adjudication of her claim under circumstances where no record was made of the proceedings, no testimony of supporting witnesses was required, adverse witnesses were not presented for cross examination, and no findings of fact or conclusions of law were made. Claimant further alleges that neither the Workers' Compensation Act nor the Rules and Regulations adopted by the WCD authorize the prehearing officer to make a final disposition on a claim. We understand claimant's arguments here as challenging the constitutionality of the Workers' Compensation Act and the jurisdiction of the WCD to conclusively determine her claims. Although this issue was not clearly asserted in claimant's docketing statement, we nevertheless consider the contention because it raises a jurisdictional issue. *See* SCRA 1986, 12–216(B).

{11} Claimant's due process rights, however, are not deemed denied unless she is deprived of a reasonable opportunity to present her **case** and have the merits of her claims fairly judged in "some form of hearing" in an appropriate forum. *Logan v. Zimmerman Brush Co.,* 455 U.S. 422, 433, 102 S.Ct. 1148, 1156, 71 L.Ed.2d 265 (1982) (emphasis omitted).

{12} Claimant argues that neither the Workers' Compensation Act nor the rules and regulations promulgated by the WCD empower a prehearing officer with the authority to make a final disposition of her claim. We disagree. Section 52–5–7 establishes a procedure for informal hearings to attempt to expeditiously resolve a worker's claim, to provide a procedure for formal administrative hearings, and to allow for judicial review. As observed in *Mathews v. Eldridge,* 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976), there is no deprivation of due process rights where a claimant has been accorded an opportunity to be heard through the informal hearing and affirmatively waived her right to a subsequent formal hearing. Her written acceptance of the recommended resolutions constituted a waiver of her rights to a further formal hearing. *See* § 52–5–5(C). Under the facts before us we find no validity to claimant's jurisdictional challenge nor infringement upon claimant's right of due process of law.

II. DENIAL OF MOTION TO REJECT RECOMMENDATION

{13} Claimant alleges abuse of discretion by the hearing officer in denying her motion to withdraw her prior written acceptance and to enter a rejection of the recommended informal resolution. Claimant's attempted rejection was filed nine weeks after she originally filed her written acceptance of the director's recommendation. Claimant analogizes the motion to set aside her agreement to the recommended resolution to a motion for reopening of her **case** under SCRA 1986, 1–060(B), arguing that she has a legitimate, compensable claim and that her failure to timely file a rejection of the resolution falls within the ambit of "excusable neglect." She points out that the prehearing officer found she suffered a work-related psychological disability but that the claim was not compensable under NMSA 1978, Section 52–1–24(B) (Repl.Pamp.1987), because the disability resulted from a series of events rather than from a single traumatic event.

{14} After receiving the recommended resolution, claimant consulted an attorney (not her present counsel) who advised her that psychological impairments were not compensable under the Workers' Compensation Act and that she should accept the recommended resolution. Claimant's motion to reject the recommendation was filed more than thirty days after she received the informal recommendation from the prehearing ****993** ***285** officer. We interpret the thirty-day deadline specified in Section 52–5–5(C) as also evidencing a legislative intent that motions filed by the parties, including a motion to withdraw a prior acceptance of a proposed informal resolution, must be filed within thirty days after the issuance of the prehearing officer's recommendations.

{15} Claimant asserts that because she relied on the mistaken advice of her former attorney and because she was a psychologically impaired pro se claimant, her failure to file an earlier rejection constituted a showing of excusable neglect, requiring that the recommended resolution be set aside. Although prior New Mexico decisions have discussed the use of Rule 1–060(B) to reopen workers' compensation disputes in district court, no **case** has specifically ruled on the applicability of the rule to a workers' compensation **case** in the context of a hearing before an administrative hearing officer. *Cf.* *Phelps Dodge Corp. v. Guerra,* 92 N.M. 47, 582 P.2d 819 (1978); *Battersby v. Bell Aircraft Corp.,* 65 N.M. 114, 332 P.2d 1028 (1958); *Davis v. Meadors–Cherry Co.,* 65 N.M. 21, 331 P.2d 523 (1958).

{16} The provisions of Rule 1–060(B) govern district court procedural issues except where other rules or statutory provisions are clearly inconsistent. SCRA 1986, 1–001. Prior to the adoption of an administrative procedure to process workers' compensation claims, the rules of civil procedure were held to be applicable in workers' compensation proceedings except where the provisions of the Workers' Compensation Act were in conflict. *See Beyale v. Arizona Pub. Serv. Co.,* 105 N.M. 112, 729 P.2d 1366 (Ct.App.1986) (construing former Section 52–1–34).

{17} The Act creating the WCD expressly repealed Section 52–1–34 which provided that "[t]he Rules of Civil Procedure for the District Courts * * * shall apply to all claims, actions and **appeals** under the Workmen's Compensation Act * * * except where provisions of the Workmen's Compensation Act directly conflict with [such] rules * * *." The new legislation, Laws 1987, Chapter 342 establishing the WCD expressly authorized the director to adopt reasonable rules and regulations in order to effect the purposes of the Workers' Compensation Act. NMSA 1978, § 52–5–4 (Repl.Pamp.1987). Neither the briefs of the parties nor the record before us indicate whether the director has adopted any rule providing for a right of rehearing after the issuance of a recommended informal resolution.

{18} Jurisdictions that have considered the question of whether an **administrative** **agency** has the authority in the absence of a statute or rule to grant a rehearing or to otherwise **reconsider** or vacate their own final decisions have reached diverse results. *See* Annotation, *Power of* ***Administrative Agency*** *to Reopen and* ***Reconsider*** *Final Decision as Affected by Lack of Specific Statutory Authority,* 73 A.L.R.2d 939 (1960).

{19} In some jurisdictions courts have held that **administrative** **agencies**, like courts, have the inherent or implied power to modify or **reconsider** final decisions during the time the agency retains control over the matter. *Wammack v. Industrial Comm'n,* 83 Ariz. 321, 320 P.2d 950 (1958); *Western Kraft Paper Group v. Department for Natural Resources & Env't Protection,* 632 S.W.2d 454 (Ky.Ct.App.1981); *Duvin v. State Dep't of Treasury,* 76 N.J. 203, 386 A.2d 842 (1978); *Valdez v. Lyman–Roberts Hosp., Inc.,* 638 S.W.2d 111 (Tex.Ct.App.1982); *see also* *Trujillo v. General Elec. Co.,* 621 F.2d 1084 (10th Cir.1980). Other states adhere to the rule that determination of whether an **administrative** **agency** has the power to **reconsider** or to vacate a final decision must be gleaned from the agency's enabling legislation and the specific functions and power of the agency. *Suryan v. Alaska Indus. Bd.,* 12 Alaska 571 (1950); *Koehn v. State Board of Equalization,* 166 Cal.App.2d 109, 333 P.2d 125 (1958); *Yamada v. Natural Disaster Claims Comm'n,* 54 Haw. 621, 513 P.2d 1001 (1973); *Olson v. Borough of Homestead,* 66 Pa.Commw. 120, 443 A.2d 875 (1982); *Hupp v. Employment Sec. Comm'n,* 715 P.2d 223 (Wyo.1986). In *Yamada* the court observed, "The weight ****994** ***286** of authority requires that an **administrative** **agency's** power to **reconsider** final decisions be statutorily grounded, either stated expressly or inferred from a reading of the entire statute." *Yamada v. Natural Disaster Claims Comm'n,* 54 Haw. at 626, 513 P.2d at 1004.

{20} New Mexico follows the latter approach, holding that in the absence of an express grant of authority, the power of any **administrative** **agency** to **reconsider** its final decision exists only where the statutory provisions creating the agency indicate a legislative intent to permit the agency to carry into effect such power. *See Kennecott Copper Corp. v. Employment Sec. Comm'n,* 78 N.M. 398, 432 P.2d 109 (1967). Reconsideration generally involves reexamination of the issues involved. *See* *Kerr–McGee Nuclear Corp. v. New Mexico Envtl. Improvement Bd.,* 97 N.M. 88, 637 P.2d 38 (Ct.App.1981).

{21} Section 52–5–5(C) expressly provides that after receipt of the recommended disposition of the director, each party shall notify the director of the acceptance or rejection of the

recommendation and "[a] party failing to notify the director waives any right to reject the recommendation *and is bound conclusively by the * * * recommendation unless, upon application made to the director within thirty days after the * * * deadline, the director finds that the party's failure to notify was the result of excusable neglect.*" (Emphasis added.)

{22} As observed in 73 A.L.R.2d 939 at 956, "The fact that a statute creating an **administrative** **agency** provides that its determination shall be 'final and conclusive' has been held an indication of legislative intent not to confer upon the agency the power to **reconsider** its determinations." *See Magma Copper Co. v. Arizona State Tax Comm'n,* 67 Ariz. 77, 191 P.2d 169 (1948) (provision for **appeal** conclusive evidence legislature intended administrative decision to be final and **appeal** the exclusive remedy); *see also* *Ex Parte Baldwin County Comm'n v. Alabama Envtl. Management Comm'n,* 526 So.2d 564 (Ala.1988); *Heap v. City of Los Angeles,* 6 Cal.2d 405, 57 P.2d 1323 (1936).

{23} We conclude that a party may move that his prior written acceptance of the prehearing officer's informal resolution be set aside or withdrawn upon a showing of good cause. However, we interpret the language of Section 52–5–5(C) as indicating a legislative intent that a time limit exist on the authority of the director to vacate or modify a recommended disposition, thus requiring (1) a showing of good cause, and (2) that the motion for reconsideration was made within thirty days following receipt by the parties of the hearing officer's proposed informal recommendation.

{24} As shown by the record, claimant filed her motion for reconsideration and for permission to reject the recommendation of the director approximately nine weeks after she had previously filed a written acceptance of the recommendation. Under these facts claimant's motion to withdraw her written acceptance was not timely and the director properly denied the motion.

{25} The decision of the hearing officer is affirmed.

{26} IT IS SO ORDERED.

ALARID, J., concurs.

APODACA, J., specially concurs.

APODACA, Judge, specially concurring.
I concur in the majority opinion except for the holding that claimant's attempt to withdraw her prior written acceptance of the informal resolution was not timely under NMSA 1978, Section 52–5–5(C) (Repl.Pamp.1987). In my view, that statute applies only to a situation where a party has failed to notify the director of acceptance or rejection of the recommendation. Here, claimant did not fail to notify the director; instead, she filed an acceptance. Consequently, this **case** does not fall within the provisions of Section 52–5–5(C).

Rather, claimant's motion to withdraw her written acceptance was properly denied because there is no provision for **reconsidering** a Workers' Compensation Division ****995** ***287** prehearing officer's recommended resolution. Claimant argues that her motion is analogous to a motion under SCRA 1986, 1–060(B). However, the legislature repealed the statute that applied the rules of civil procedure to workers' compensation proceedings, *see* 1986 N.M. Laws, chapter 22, section 102 (repealing NMSA 1978, Section 52–1–34), and gave authority to the Division to promulgate its own rules and regulations. *See* NMSA 1978, § 52–5–4 (Repl.Pamp.1987). Although the Division could have provided for a procedure analogous to a motion under Rule 1–060(B), it has not done so. In the absence of a Division rule or regulation providing a procedure for **reconsidering** recommended resolutions, claimant's motion was properly denied. The decision of the hearing officer must be affirmed on these grounds.

All Citations

108 N.M. 281, 771 P.2d 989, 1989 -NMCA- 014

End of Document

2021 New Mexico Statutes
Chapter 62 - Electric, Gas and Water Utilities
Article 19 - Public Regulation Commission
Section 62-19-23 - Ex parte communications. (Effective January 1, 2023.)

Universal Citation: NM Stat § 62-19-23 (2021)

A. A commissioner shall not initiate, permit or consider a communication directly or indirectly with a party or his representative outside the presence of the other parties concerning a pending rulemaking after the record has been closed or a pending adjudication.

B. A hearing examiner shall not initiate, permit or consider a communication directly or indirectly with a party or his representative outside the presence of the other parties concerning a pending rulemaking or adjudication.

C. Notwithstanding the provisions of Subsections A and B of this section, the following ex parte communications are permitted:

(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;

(2) a commissioner may consult with another commissioner or with advisory staff whose function is to advise the commission in carrying out the commissioner's rulemaking or adjudicative responsibilities;

(3) a hearing examiner may consult with the commission's advisory staff;

(4) a commissioner or hearing examiner may obtain the advice of a nonparty expert on an issue raised in the rulemaking or adjudication if the commissioner or hearing examiner gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond; and

(5) pursuant to the public regulation commission's rulemaking authority a party to a proceeding may consult with the commission's advisory staff. By July 1, 2004, the commission shall establish such rules.

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.

E. Upon 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.

Exhibit D

N.M. Code R. § 1.2.3.7

Section 1.2.3.7 - DEFINITIONS

As used in this rule:

A.advisory staff means a person hired by the chief of staff, with the consent of the commission, with expertise in regulatory law, engineering, economics or other professional or technical disciplines, to advise the commission on any matter before the commission, including a member of the commission's office of general counsel or an expert or staff hired by the chief of staff on a temporary, term or contract basis for a particular case, but not including persons hired by an individual commissioner who serve at the pleasure of that commissioner;

B.ex parte communication means a direct or indirect communication with a party or his representative, outside the presence of the other parties, concerning a pending rulemaking after the record has been closed or 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;

(1) ex parte communications do not include:

(a) statements made by commissioners, hearing examiners, or advisory staff that are limited to providing publicly available information about a pending adjudication or rulemaking after the record has been closed; or

(b) inquiries relating solely to the status of a proceeding, including inquiries as to the approximate time that action in a proceeding may be taken;

(2) ex parte communications include a status inquiry which states or implies:

(a) a view as to the merits or outcome of a rulemaking after the record has been closed or a pending adjudication;

(b) a preference for a particular party, or a reason why timing is important to a particular party;

(c) a view as to the date by which a proceeding should be resolved; or

(d) a view which is otherwise intended to address the merits or outcome, or to influence the timing, of a pending adjudication or rulemaking after the record has been closed;

C.hearing examiner means a person appointed by the commission pursuant to NMSA 1978 Section 8-8-14 to preside over any matter before the commission, including rulemakings, adjudicatory hearings and administrative matters, and provide the commission with findings of fact, conclusions of law, and a recommended decision on the matter assigned;

D.non-adjudicatory notice of inquiry means a proceeding commenced by the commission's issuance of a notice entitled "non-adjudicatory notice of inquiry" for the

purpose of inquiring into issues of broad applicability to consumers or regulated entities, or to a class or type of consumers or regulated entities, with a view toward possible future rulemaking or other procedures where the proceeding does not directly concern a dispute between particular parties or company-specific regulatory issues;

E.party, unless otherwise ordered by the commission, means:

(1) a person who has been given formal party status;

(2) a person who has submitted to the commission a filing seeking affirmative relief, including, but not limited to, an application, waiver, motion, tariff change or petition;

(3) a person who has filed a formal complaint, petition for order to show cause, petition for investigation or petition for notice of inquiry;

(4) the subject of a formal complaint, order to show cause, investigation or notice of inquiry;

(5) members of the general public, after the issuance of an order closing the record in a rulemaking proceeding; and

(6) staff of the commission's utility division, transportation division, or insurance division directed by statute to represent the public interest in a proceeding before the commission;

F.pending adjudication means 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 other than non-adjudicatory 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.

N.M. Code R. § 1.2.3.7

1.2.3.7 NMAC - N, 7-15-04; A, 9-1-08