

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)
))
AVANGRID, INC., AVANGRID NETWORKS, INC.,)
NM GREEN HOLDINGS, INC., PUBLIC SERVICE)
COMPANY OF NEW MEXICO AND PNM RESOURCES,)
INC.,)
))
JOINT APPLICANTS.)
)

Case No. 20-00222-UT

ORDER ADDRESSING NEE MOTION FOR RULE TO SHOW CAUSE WHY JOINT APPLICANTS SHOULD NOT BE HELD IN CONTEMPT AND FOR SANCTIONS

THIS MATTER comes before the Hearing Examiner upon the Motion for Rule to Show Cause Why Joint Applicants Should not be Held in Contempt and for Sanctions (“Motion”) filed by New Energy Economy (“NEE”) on May 27, 2021. Being fully informed, the Hearing Examiner **FINDS and CONCLUDES** as follows:

1. NEE's Motion

NEE's Motion asks the Hearing Examiner to issue a rule to show cause why Joint Applicants shouldn't be held in contempt and for sanctions for noncompliance with rules of discovery and misuse of its procedural right under NMSA 1978, § 62-6-17 to designate as "confidential" documents and associated information that Joint Applicants know are not legally amenable to such designation. NEE states that Joint Applicants have repeatedly failed to answer discovery, and when they do it is often incomplete, and/or is unnecessarily cloaked in

confidentiality, which has burdened parties to spend an inordinate amount of time seeking disclosure, transparency and public access.

NEE states that the purpose of the discovery rules is to allow liberal pretrial discovery, such that the trial itself is “a fair contest with the basic issues and facts disclosed to the fullest practicable extent” *citing Pincheira v. Allstate Ins. Co.*, 2008-NMSC-049, 190 P.3d 322, 328. NEE states that actions and inactions of Joint Applicants have been to hide evidence. NEE states that it has issued six Rule 1.2.2.25(J)(1) NMAC communications and filed one Motion to Compel in this matter in the last five months. NEE also states that when discovery disputes are finally resolved, Joint Applicants will have successfully managed to stall production until after the testimony due date.

NEE claims, in particular, that the Joint Applicants’ responses to its discovery request NEE 4-55 on the issue of penalties and disallowances in Avangrid’s utility subsidiaries have been incomplete and improperly designated as confidential in violation of Commission’s orders and rules. NEE states that the Joint Applicants responded on January 21, 2021 with a reference to an Avangrid Exhibit NEE 4-55 that was not, in fact, included in the response. Then, on January 28, 2021, the Joint Applicants provided CONFIDENTIAL Exhibits 4-55 (a)-(i) (1-28-21 Supplemental) and claimed confidentiality for the exhibit.

NEE claims, however, that the January 28 response was incomplete -- that it included only one of the 49 items that were subsequently identified as “actions and measures that relate to state and federal regulatory compliance issues” in the Joint Applicants’ May 18, 2021 response to the Hearing Examiner’s May 11, 2021 Order Regarding Avangrid Service Quality Issues and

Management Audits (“May 11 Order”).¹ NEE also claims that the Joint Applicants improperly designated the materials in the January 28 response as confidential.

NEE states that the Attorney General served a similar discovery request (NMAG 4-1) on February 25, 2021 and received a response on March 8, 2021 that included substantially more items than were included in the response to NEE 4-55. But the response to NMAG 4-1 still included only 10 of the 49 items in the Joint Applicants’ response to the Hearing Examiner’s May 11 Order.

NEE includes in its Motion a table comparing the items identified by the Joint Applicants in their responses to NEE 4-55, NMAG 4-1 and the Hearing Examiner’s May 11 Order:

Table 1

	Matter	Provided in Response to NEE 4-55	Provided in Response to NMAG 4-1	Provided in Response to HE	Penalty Amount
Central Maine Power (JA Ex. 1A)					
1	Docket No. 2019-00015	N	Y	Y	
2	Docket No. 2018-00194	N	Y	Y	
3	Docket No. 2020-00017	N	Y	Y	\$500,000
4	Docket No. 2020-00228	N	Y	Y	\$4.5MM (pending)
5	Distributed Generation Interconnection	N	N	Y	On-going investigation
Maine Natural Gas (JA Ex. 1A)					
6	Docket No. 2019-00129	N	N	Y	\$50,000
7	DFU 19-254	N	N	Y	\$500,000
8	Docket No. 2018-00128	N	N	Y	\$25,000
9	Docket No. 2018-00012	N	N	Y	\$15,000
Connecticut (JA Ex. 1A)					
10	Docket No. 03-03-07	N	N	Y	\$7,140
	Matter	Provided in Response to NEE 4-55	Provided in Response to NMAG 4-1	Provided in Response to HE	Penalty Amount
11	Docket No. 20-03-14	N	N	Y	\$219,615

¹ The May 11 Order required the Joint Applicants to provide, in part, “a list of enforcement actions and enforcement measures in rate or other proceedings initiated or concluded by state and federal regulatory agencies since January 1, 2016 against Avangrid, Inc.’s electric and gas utility subsidiaries and the results of the actions and measures.” May 11 Order, Attachment 3.

12	Violations of Order in Docket No. 19-07-01	N	N	Y	\$10,000
13	Docket No. 20-03-15	N	N	Y	\$3,000
14	Docket 20-08-03	N	Y	Y	15 basis points
15	Docket 20-08-03	N	Y	Y	\$2.1 MM
Gas Companies (JA Ex. 1A)					
16	#19-11-15	N	N	Y	\$10,000
17	#19-07-14	N	N	Y	\$25,000
18	#17-12-02	N	N	Y	\$1.5 MM
19	#17-09-22	N	N	Y	\$25,000
20	#17-09-21	N	N	Y	\$50,000
21	#17-07-34	N	N	Y	\$50,000
22	#16-12-07	N	N	Y	\$50,000
23	20-11-12	N	N	Y	\$25,000
24	#20-02-20	N	N	Y	\$50,000
25	#19-12-02	N	N	Y	\$50,000
26	#19-11-14	N	N	Y	\$10,000
27	#19-10-30	N	N	Y	\$50,000
28	#18-12-15	N	N	Y	\$50,000
29	#18-02-10	N	N	Y	\$75,000
30	#17-09-23	N	N	Y	\$50,000
31	#16-08-19	N	N	Y	\$50,000
32	#16-05-11	N	N	Y	\$15,000
Massachusetts (JA Ex. 1A)					
33	DPU 19-PL-35	N	N	Y	\$100,000
34	DPU 19-DS-0588	N	N	Y	\$30,000
35	DPU 19-DS-0617A Berkshire	N	N	Y	\$20,000
36	DPU 20-PL-33 Berkshire	N	N	Y	\$50,000
37	DPU 20-PL-37 Berkshire	N	N	Y	\$75,000
38	DPU 20-PL-65 Berkshire	N	N	Y	\$10,000
New York (JA Ex. 1B)					
39	2016; RG&E	N	N	Y	\$300,000
40	2017; RG&E	N	N	Y	\$525,000 (Meter Reads) \$544,000 (Gas Safety)
41	Case 17-E-0594; NYSEG and RG&E	N	N	Y	\$3.9 MM
	Matter	Provided in Response to NEE 4-55	Provided in Response to NMAG 4-1	Provided in Response to HE	Penalty Amount
42	2018; NYSEG and RG&E	N	N	Y	\$3.5 MM (CAIDI)

					\$136,000 (RGE Gas Safety) \$67,000 (NYSEG Gas Safety)
43	2019; NYSEG and RG&E	N	N	Y	\$7.0 MM (SAIFI) \$525,000 (Meters) \$750,000 (NYSEG Gas Safety) \$1.8 MM (RGE Gas Safety)
44	Cases 19-E-0105 (NYSEG), 19-E-0106 (RG&E), 19-E-0107 (Con Ed), 19-E-0108 (O&R), 19-E-0109 (Central Hudson) and 19-E-0110 (National Grid)	N	105 and 106 only	Y	\$10.5 MM
45	Case 20-E-0586 NYSEG	N	Y	Y	\$2.0 MM
46	Case 20-M-0360; RG&E (Also Greenlight Networks and Frontier Communications)	N	Y	Y	Settlement on going
47	2020; NYSEG and RG&E	N	N	Y	\$7 MM (SAIFI) \$1.4 MM (NYSEG Meter) \$1.8 M (RGE Meter) \$1 MM (NYSEG Gas Safety) \$600,000 MM (RGE Gas Safety)
NERC (JA Ex. 1C)					
48	2021; CMP	N	Y	Y	\$360,000 (mitigated)

49	2019; CMP, NYSEG, RG&E	Y	Y	Y	\$450,000 (mitigated)
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See NEE Motion, Table 1, at 6-9.

Furthermore, on May 21, 2021, after the Joint Applicants provided public responses to the Hearing Examiner's May 11 Order, the Joint Applicants waived their claim of confidentiality for their January 28 response to NEE 4-55.

NEE claims that the Joint Applicants' failures prejudiced all the intervening parties. NEE states that the majority of the information was available to the Joint Applicants at the time discovery was requested and that if the material had been provided in a timely manner it would have been addressed in the intervenors' testimony due on April 2, 2021.^{2, 3}

NEE asserts, however, that the Joint Applicants' failure to timely disclose these issues when testimony was being drafted affected the scope of testimony and the time and resources

² NEE argues that withholding the information calls into question every response provided by Joint Applicants, and all intervenors are greatly prejudiced by this withholding.

- a. Would the signatories to the stipulation have signed on, had they had all this information available?
- b. What other responses to discovery have been incomplete and inadequate?
- c. What discovery responses did the signatories rely on before agreeing to sign on?
- d. Were the responses relied upon answered fully and completely?
- e. How would their positions have changed if a complete and forthright disclosure had been made in a timely fashion?
- f. Knowing that Joint Applicants have not been forthright with all relevant information, do they still wish to be signatories to this stipulation?
- g. Knowing that Joint Applicants have not been forthright, how credible are commitments made by them, especially related to clauses to "work with" parties and "negotiate in good faith"?

NEE Motion, ¶20.

³ Following the Hearing Examiner's May 11 Order, NEE issued a further discovery request NEE 12-6 on May 14, 2021, in which it asked for a listing since 2005 "of all fine amounts and/or violations, the finding of the jurisdiction (brief description of issue, i.e., inadequate storm response or thousands of billing inaccuracies, etc.), the case number, the authority, the year the fine amounts and/or violations was meted out, whether Avangrid or Avangrid's subsidiary appealed said violation and if there was a settlement, please provide the final order in each of the above cases." NEE states that the response it received on May 24, 2021 includes "much more information" than the January 28 response to NM 4-55. NEE states that the "fulsome nature of Avangrid's response only occurred after the May 11 Order." NEE Motion, ¶15.

devoted to those topics. NEE also states that, when directly confronted by the Commission about past violations and penalties and their lack of transparency, the Joint Applicants continued to withhold information about fraud and corruption that took place on the international stage.⁴

NEE acknowledges that the Commission generally only considers sanctions for discovery violations after a motion to compel has been granted and not complied with. NEE argues that this situation is distinct due to the direct evidence that Joint Applicants withheld vital information during the time testimony was being drafted. NEE states that a court order issued under NMRA 1-037(A) is not required to impute sanctions under NMRA 1-037(B) because any clearly articulated order requiring or permitting discovery can provide the basis of sanctions for noncompliance. *Marchman v. NCNB Tex. Nat'l. Bank*, 1995-NMSC-041, 120 N.M. 74, 898 P.2d 709. NEE states that the Joint Applicants have violated the Procedural Order establishing the discovery requirements in this case, the Rules of Civil Procedure, and the Commission's Rules governing the scope and purpose of discovery.

NEE also cites to the Hearing Examiner's rulings in the May 11 Order to highlight the significance of the violations and their impact on this proceeding:

The Joint Applicants have failed to disclose any of the penalties and disallowances in the current proceeding, despite their relevance to this case, i.e., the risk that the adequacy of PNM's service may deteriorate under the direct or indirect control of Avangrid, Inc. The failure is also significant, given that Avangrid, Inc. has considered the issues to be sufficiently important to include them in its reports filed with the SEC.⁵ . . .

[T]he Joint Applicants' testimony has been less than forthcoming on these issues.⁶
. . .

The Joint Applicants' failure to disclose this information to the Commission in this proceeding is troubling and is also relevant to the credibility of their

⁴ Id., ¶18.

⁵ May 11 Order, at 3.

⁶ Id.

witnesses' testimony and the transparency by which Avangrid and PNM would conduct their business in New Mexico if the merger is approved.⁷

NEE asks for the following relief:

- A. Joint Applicants to reimburse Mariel Nanasi, attorney for New Energy Economy, for the time expended on the six efforts to resolve discovery disputes including the bringing of this Motion, paid for by shareholder funds (not to be reimbursed by ratepayers);
- B. An Order that Joint Applicants provide public information about all penalties and violations against Avangrid, Iberdrola, or any of its affiliates in the last 15 years within and outside of the United States;
- C. Joint Applicants to be forewarned that the withholding of evidence based on any frivolous claim that material is "irrelevant" or that "the discovery is not reasonably calculated to lead to the discovery of admissible evidence" will not be tolerated and that if there is a successful motion to compel and it is successful that Joint Applicants will have to reimburse the attorney for the entity contesting the withholding of evidence, paid for by shareholder funds (not to be reimbursed by ratepayers);
- D. Joint Applicants to be forewarned that any frivolous confidential designation will not be tolerated and that if there is a successful motion to release information from the cloak of confidentiality and it is successful that Joint Applicants will have to be reimburse the attorney for the entity contesting the confidential designation, paid for by shareholder funds (not to be reimbursed by ratepayers);
- E. Joint Applicants must review all previously designated confidentiality material to determine if said documents are actually deserving of protection and notify intervenors of said changes;
- F. That intervenors' experts be allowed to include in future testimony all information they deem necessary to properly defend their claims about whether the merger is in the public interest and fairly balances the interests between ratepayers and shareholders, that was previously withheld from them.

2. The Joint Applicants' response

On June 4, 2021, the Joint Applicants filed a response to the Motion. The Joint Applicants argue that the Motion is premature because NEE filed it before filing a motion to

⁷ *Id.*, at 4.

compel more complete responses to its discovery and before the Commission issued an order compelling more complete responses.

The Joint Applicants note that 1.2.2.25(C) NMAC provides that discovery in commission proceedings is governed by the New Mexico rules of civil procedure, except where the civil rules are inconsistent with the Commission's procedural rules. They state that the applicable New Mexico civil rule and the Commission's rule on sanctions provide that sanctions can be awarded only after a party fails to comply with an order requiring the discovery.

The Joint Applicants state that, under Rule 1-037(A)(1-3) NMRA, a party complaining that a discovery response is incomplete must file a motion to compel. (Rule 1-037(A)(1-3) NMRA). If the motion to compel is granted, the Court must give the party who opposed the motion an opportunity for a hearing and may impose a penalty of reasonable expenses, including fees, on the party who opposed the motion. (Rule 1-037 (A) (4) NMRA). The Joint Applicants state that only after an order has been entered on the motion to compel and the responding party has not complied with that order, may the Court enter sanctions. (Rule 1-037(B) NMRA).

The Joint Applicants also cite to the similar requirement in the Commission's rules of procedure (1.2.2.25(J) NMAC), which provides that a motion for sanctions cannot be filed before the Commission has issued an Order requiring more complete responses:

Staff or a party may move for an order compelling discovery or for sanctions for failure to comply with an order directing that discovery be had as provided in the New Mexico rules of civil procedure for the district courts. In addition to the sanctions provided in those rules, the commission may impose the penalties set forth in applicable law, for failure to comply with an order of the commission or presiding officer.⁸

⁸ (Emphasis in Joint Applicants' response.)

Furthermore, the Joint Applicants state that the Public Utility Act also requires that violation or disobedience of a lawful order must occur before the Commission may impose a penalty:

Any person or corporation which violates any provision of the Public Utility Act [Chapter 62, Articles 1 to 6 and 8 to 13 NMSA 1978] or which fails, or omits or neglects to obey, observe or comply with any lawful order or any part of provision thereof, of the commission is subject to a penalty of not less than one hundred dollars (\$100) nor more than one hundred thousand dollars (\$100,000) for each offense.⁹

Second, the Joint Applicants argue that they have complied with NEE's discovery requests. They state that the parties were able to work cooperatively through the discovery and confidentiality dispute concerning the Joint Applicants' response to NEE Interrogatory 9-12, which sought the production of "invoices regarding all advertising costs." The Joint Applicants state that, on its face, NEE 9-12 was overly broad, but that during a May 18, 2021 telephonic conferral, NEE clarified that it was seeking only invoices for advertising related to the proposed merger transaction. Based on the narrowing of the scope of the discovery request through the type of cooperative discussions that the rules contemplate, the Joint Applicants produced copies of responsive documents. Joint Applicants supplemented this response with an additional recent invoice on June 3, 2021. The Joint Applicants state that the requirements in the Commission's procedural rules and the protective order that the parties seek to informally resolve discovery and confidentiality disputes work as intended.

In regard to NEE's request under NEE 4-55, the Joint Applicants state that the responses they provided to NEE 4-55, NMAG 4-1 and the Hearing Examiner's May 11 Order differed because the requests sought different information. The Joint Applicants also state that they

⁹ NMSA 1978, §62-12-4.

should not be sanctioned, because NEE eventually received the information requested in NEE 4-55. The Joint Applicants state that they offered to supplement the response to NEE 4-55 when NEE contacted Joint Applicants about it in May of this year, but NEE stated it was not necessary if the response would mirror the information provided in response to the Hearing Examiner's May 11 Order. The Joint Applicants argue that they offered to resolve the issue via the precise avenues that the New Mexico rules of civil procedure and the Commission's discovery rules require prior to filing a motion for sanctions.

The Joint Applicants also state that they eventually agreed to lift the designation of certain documents as confidential through cooperative discussions. They state that the documents they provided in response to NEE 4-55 included Avangrid's internal notes about the proceedings and that the notes had not been made public previously and constituted mental impressions of the matters listed. They state that, once NEE asked the Joint Applicants to reconsider the designation via a good faith letter, Avangrid agreed to accommodate NEE's request to make the information public, notwithstanding the fact that the initial confidential designation was appropriate. The Joint Applicants state that they worked cooperatively with NEE and came to a mutually agreeable resolution.

Finally, the Joint Applicants argue that there is no prejudice to NEE in this case. They state that, based on the stipulation reached among several parties, the Hearing Examiner has extended the procedural schedule to allow NEE and all intervenors until July 16, 2021, almost a full month after the Joint Applicants submit their Amended Stipulation and testimony in support of it, in which to file additional testimony. They state that NEE and the other parties have almost two months from the date the Joint Applicants produced documents in response the Hearing Examiner's May 11 Order.

3. Ruling

The Hearing Examiner finds that the Joint Applicants should show cause why the Commission should not find (a) that the Joint Applicants' response to NEE 4-55 has violated the Commission's discovery rules, the discovery requirements in the December 18, 2020 Procedural Order, and the prohibition in the January 14, 2021 Protective Order against the over-designation of discovery responses as confidential and (b) that the Joint Applicants' May 18 response violated the disclosure requirements in the Hearing Examiner's May 11 Order.

(a) The Joint Applicants' response to NEE 4-55

The Commission's rules on discovery favor prompt and complete discovery as a means toward effective presentations at public hearing and avoidance of the use of cross-examination at public hearing for discovery purposes.¹⁰ The rules also include the requirement to timely supplement responses previously provided.¹¹

Paragraph M of the December 18, 2020 Procedural Order requires responses to discovery requests within ten calendar days after service:

M. Service of all documents filed in this proceeding and discovery requests and responses shall be via email unless a party requests a hard copy or unless otherwise ordered. Avangrid and PNM shall post the discovery requests they receive from the parties and Avangrid's and PNM's responses to discovery requests, including exhibits, on PNM's file sharing platform. All responses to discovery requests shall be served within 10 calendar days of service of the request unless otherwise agreed or ordered.

Significantly, too, an evasive or incomplete answer is treated as a failure to answer.¹²

¹⁰ 1.2.2.25.A NMAC.

¹¹ Section 1.2.2.25.I NMAC requires timely supplementation of responses to discovery requests:

I. Supplementation of responses to discovery requests: A party or staff who has responded to a request for discovery is under a duty reasonably and promptly to amend or supplement their previous response if they obtain information which they would have been required to provide in such response if the information had been available to them at the time they served the response.

¹² Rule 1-037(A)(3).

Paragraph 8 of the January 14, 2021 Protective Order issued in this case discusses the broad scope of discovery encouraged under the Commission's rules and the Commission's policy on the disclosure of public records and the requirements of the Inspection of Public Records Act. Paragraph 8 states that parties "should avoid designating documents as confidential that would not be entitled to such protection under IPRA."

NEE 4-55 was served on January 11, 2021. It asked the Joint Applicants to "identify all current or pending instances of non-compliance with any state, federal law or commission rule by Iberdrola, Avangrid, or any of its affiliates for which the company may be liable and subject to civil or criminal penalties for the last ten years." The Joint Applicants' response was provided on January 21, 2021. The response referred to "Avangrid Exhibit NEE 4-55" that was purportedly attached to the response, but the exhibit was not, in fact, attached.

The Joint Applicants' January 28, 2021 response included a series of exhibits designated as confidential (CONFIDENTIAL Avangrid Exhibits 4-55 (a)-(i) 1-28-21 Supplemental) identifying violations and fines, but, according to the NEE Motion, the exhibits did not include all violations and fines responsive to NEE 4-55 that occurred and were assessed prior to that date. The Joint Applicants' May 18 filing in response to the Hearing Examiner's May 11 Order also indicates that the Joint Applicants do not appear to have supplemented their January 28, 2021 response with violations and fines that were subsequently determined and assessed.

The March 8, 2021 response to NMAG 4-1 does not appear to cure the Joint Applicants' failures. NMAG 4-1 asked the Joint Applicants to provide for each of Avangrid's U.S. utility subsidiaries, "(A) links to regulatory expressions of concern about the subsidiary's performance, and (B) all documents reflecting or relevant to Avangrid's (or any affiliate's) responses to those concerns." The response to NMAG 4-1 provides a list of proceedings and docket numbers but no

identification of violations or fines. The March 8 response to NMAG 4-1 likewise does not include all of the violations known at that time (some of which were included in the Joint Applicants' May 18 response to the Hearing Examiner's May 11 Order).

Further, most of the items identified in the Joint Applicants' January 28 response to NEE 4-55 do not appear to include any information that might deserve confidential treatment under the January 14, 2021 Protective Order. The Joint Applicants' request for confidential treatment was waived only on May 21, 2021 -- approximately four months after the Joint Applicants' January 28 response to NEE 4-55 and the related request for confidential treatment.

Contrary to the Joint Applicants' response to the instant Motion, this is not how discovery is supposed to take place. The Commission's rules and the December 18 procedural order require complete responses at the time a party provides a discovery response, and incomplete answers are considered failures to respond. The rules also require the timely supplementation of responses. The rules do not require parties conducting discovery to presume that the answers they receive will be incomplete. Incomplete answers are the exception to what the rules anticipate. The rules do not anticipate that a party conducting discovery will also be required to undertake a continuing series of communications to confirm the presumption that the answers are incomplete, and then to file motions to compel complete answers.

The Joint Applicants primarily base their opposition to the NEE Motion on NEE's failure to have sought a motion to compel complete answers before filing the sanction motion. But NEE appears to have learned about the incompleteness of the Joint Applicants' January 28 response only after the Joint Applicants finally provided their May 18 response to the Hearing Examiner's May 11 Order. It is not clear how NEE (or any party issuing discovery and receiving a response that omits items that have been requested) should have known that the items were omitted until after

they learned about the omitted violations and fines from an independent source, such as the Joint Applicants' May 18 response to the May 11 Order. By the time NEE learned of the omitted items through the identifications provided in response to the May 11 Order, a motion to compel complete responses to NEE 4-55 would have been moot.

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

Timeline

NEE 4-55 served on Joint Applicants	January 11, 2021
Joint Applicants response (w/o Avangrid Exhibit NEE 4-55)	January 21, 2021
Joint Applicants response to NEE 4-55 with confidential exhibits	January 28, 2021
Staff & intervenor testimony	April 2, 2021
Initial Stipulation	April 23, 2021
May 7 Stipulation	May 7, 2021
Originally scheduled hearings (rescheduled to August)	May 4-12, 2021
Hearing Examiner Order requiring the Joint Applicants to file a list of enforcement measures	May 11, 2021
Joint Applicants response to May 11 Order	May 18, 2021
Joint Applicants waive confidentiality request for NEE 4-55	May 21, 2021

The reasons why the intervenors failed to address the Avangrid utilities' violations, penalties and cost disallowances in other states in the testimony they filed on April 2, 2021 is now understandable. Indeed, the Hearing Examiner expressed frustration at the intervenors (in addition to the Joint Applicants) at the May 11 status conference for their failures to address these issues. If the information had been promptly provided in response to NEE 4-55, the issues could have been addressed in the intervenors' April 2, 2021 testimony. The information may have also prompted

some of the parties not to have joined in the Stipulation or to have insisted that the Stipulation include stronger protections to ensure service quality.

NEE acknowledges that it did not file a motion to compel further responses to NEE 4-55 and that the current Motion is not filed to address the Joint Applicants' non-compliance with an order issued in response to a motion to compel. But the Joint Applicants have provided no reason that NEE should have been aware of the extent to which the Joint Applicants omitted information in their January 28 response to NEE 4-55 before the Joint Applicants filed their response on May 18, 2021 to the Hearing Examiner's May 11, 2021 order. A motion to compel by a party is also not necessary for the Commission to enforce its orders with administrative penalties pursuant to NMSA 1978, §62-12-4.

The Hearing Examiner also notes that the New Mexico Supreme Court has provided a degree of latitude in regard to the requirement for an order compelling discovery before sanctions can be awarded. In *Marchman v. NCNB Texas National Bank*,¹³ the Court stated that a court order issued under Rule 37(A) is not a prerequisite to imposition of Rule 37(B) sanctions. The Court said any clearly articulated order requiring or permitting discovery can provide the basis of sanctions for noncompliance. Federal courts applying the similar rule under the Federal Rules of Civil Procedure have, at times, excused that requirement.¹⁴

(b) The Joint Applicants' May 18 response to the Hearing Examiner's May 11 Order

The foregoing section addresses enforcement measures that were included in the Joint Applicants' May 18 response to the Hearing Examiner's May 11 Order but were not included in the Joint Applicants' January 28 response to NEE 4-55. This section address the enforcement

¹³ 1995-NMSC-041, para. 52, 120 N.M. 74.

¹⁴ See, *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 729 F.2d 469, 473 (7th Cir. 1984); *Qualcomm Inc. v. Broadcom Corp.*, 2008 U.S. Dist. LEXIS 911, fn 9 (S.D. Cal. 2008).

measures that were identified in the January 28 responses to NEE 4-55 but were not identified in the Joint Applicants' May 18 response to the May 11 Order.

The Hearing Examiner's May 11 Order required the Joint Applicants to "[p]rovide a list of enforcement actions and enforcement measures in rate or other proceedings initiated or concluded by state and federal regulatory agencies since January 1, 2016 against Avangrid, Inc.'s electric and gas utility subsidiaries and the results of the actions and measures."

The Joint Applicants' May 18 response to the Hearing Examiner's May 11 Order, however, appears to be incomplete. A comparison of the May 18 response with Exhibits 4-55(a)-(i) (1-28-21 Supplemental) attached to the Joint Applicants' January 28, 2021 response to NEE 4-55 indicates that a number of enforcement measures in the form of fines for the same five-year period covered by the May 11 Order have been omitted from the Joint Applicants' May 18 response to the May 11 Order.

For these reasons, the issues presented in the NEE Motion warrant attention and potential action regarding sanctions and/or administrative penalties. This Order, accordingly, provides the notice and opportunity for the Joint Applicants to address these issues.

IT IS THEREFORE ORDERED:

1. The Joint Applicants shall file testimony by June 28, 2021 on the questions outlined below regarding their response to NEE 4-55:
 - a. Explain the reference in the January 21, 2021 response to "Avangrid Exhibit NEE 4-55." Did the Joint Applicants prepare the cited exhibit? And, if so, provide a copy.
 - b. Was the Joint Applicants' January 28, 2021 response to NEE 4-55 complete? Explain.

c. Did the Joint Applicants supplement their response to NEE 4-55 after January 28, 2021? Explain.

d. Do any incomplete responses of January 21 and 28, 2021 to NEE 4-55 violate section 1.2.2.25 of the Commission's procedural rules and paragraph M of the December 18, 2020 Procedural Order? Explain.

e. Did the Joint Applicants' failure to supplement its responses to NEE 4-55 violate section 1.2.2.25 of the Commission's procedural rules and paragraph M of the December 18, 2020 Procedural Order?

f. Describe the material for which the Joint Applicants requested confidential treatment in their January 28, 2021 response to NEE 4-55. Describe the basis for the request for confidential treatment. If the request for confidential treatment did not apply to each item in the response, explain why the Joint Applicants requested confidential treatment for the entire response. Also, explain why the Joint Applicants decided to waive the request in May 2021.

g. Did the breadth of the confidential designation in the Joint Applicants' January 28, 2021 response to NEE-45 violate paragraph 8 of the January 14, 2021 Protective Order?

h. If the Commission finds that the Joint Applicants' January 21 and 28 responses and their failure to supplement the responses violated the Commission's procedural rules and the December 18, 2020 Procedural Order, describe whether sanctions under the Commission's discovery rules and/or administrative penalties under NMSA 1978, §62-12-4 can and should be assessed.

- i. If the Commission finds that the breadth of the confidential designations in the Joint Applicants' January 28 response (i.e., CONFIDENTIAL Avangrid Exhibits 4-55 (a)-(i) 1-28-21 Supplemental) violated paragraph 8 of the January 14, 2021 Protective Order, describe whether administrative penalties under NMSA 1978, §62-12-4 can and should be assessed.
2. The Joint Applicants shall file testimony by June 28, 2021 on the questions outlined below regarding their response to the Hearing Examiner's May 11 Order:
 - a. Did the Joint Applicants' May 18 response provide a complete response to the Hearing Examiner's May 11 Order?
 - b. Provide a list of the fines and penalties (for the period 2016 to date) identified in the January 28, 2021 response to NEE 4-55 and indicate which fines and penalties were included in the Joint Applicants' May 18 response to the Hearing Examiner's May 11 Order.
 - c. If the Commission finds that the Joint Applicants violated the Hearing Examiner's May 11 Order, describe whether administrative penalties under NMSA 1978, §62-12-4 can and should be assessed.
3. Responsive testimony, including the amount of and support for any recovery of attorney fees as a sanction, shall be filed by July 16, 2021.
4. The Joint Applicants may file rebuttal testimony by July 29, 2021.
5. The issue of whether to order sanctions and/or administrative penalties and the amount thereof shall be litigated through examination of the above testimony at the hearings scheduled to start on August 11. The issue will be resolved in the recommendation to be issued

by the Hearing Examiner after the hearing and the subsequent decision issued by the Commission.

ISSUED at Santa Fe, New Mexico on June 14, 2021.

NEW MEXICO PUBLIC REGULATION COMMISSION

/s/ Ashley C. Schannauer

Ashley C. Schannauer
Hearing Examiner

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 listed below a true and correct copy of the Order Addressing NEE Motion for Rule to Show Cause Why Joint Applicants Shouldn't Be Held in Contempt and For Sanctions.

Stacey Goodwin	Stacey.Goodwin@pnmresources.com ;	Kyle J. Tisdell	tisdell@westernlaw.org ;
Ryan Jerman	Ryan.Jerman@pnmresources.com ;	Ally Beasley	beasley@westernlaw.org ;
Richard Alvidrez	Ralvidrez@mstlaw.com ;	Ahtza Dawn Chavez	ahztza@navaeducationproject.org ;
Mark Fenton	Mark.Fenton@pnm.com ;	Joseph Hernandez	joseph@navaeducationproject.org ;
Carey Salaz	Carey.salaz@pnm.com ;	Nicole Horseherder	nhorseherder@gmail.com ;
Steven Schwebke	Steven.Schwebke@pnm.com ;	Jessica Keetso	jkeetso@yahoo.com ;
Patrick V. Apodaca	Patrick.Apodaca@pnmresources.com ;	Thomas Singer	Singer@westernlaw.org ;
Mariel Nanasi	Mariel@seedsbeneaththesnow.com ;	Mike Eisenfeld	mike@sanjuancitizens.org ;
Christopher Sandberg	cksandberg@me.com ;	Robyn Jackson	Robyn.jackson@dine-care.org ;
Joan Drake	jdrake@modrall.com ;	Jane L. Yee	jyee@cabq.gov ;
Haley B. Adams	hadams@modrall.com ;	Larry Blank, Ph.D.	lblank@tahoeconomics.com ;
Lisa Tormoen Hickey	lisahickey@newLawgroup.com ;	Saif Ismail	sismail@cabq.gov ;
Nann M. Winter	nwinter@stelznerlaw.com ;	Peter J. Gould	peter@thegouldlawfirm.com ;
Keith Herrmann	kherrmann@stelznerlaw.com ;	Kelly Gould	Kelly@thegouldlawfirm.com ;
Dahl Harris	dahlharris@hotmail.com ;	Jim Dauphinais	jdauphinais@consultbai.com ;
Peter Auh	pauh@abcwua.org ;	Michael Gorman	mgorman@consultbai.com ;
Andrew Harriger	akharriger@sawvel.com ;	Justin Lesky	jlesky@leskylawoffice.com ;
Jody Garcia	JGarcia@stelznerlaw.com ;	Stephanie Dzur	Stephanie@Dzur-law.com ;
Steven S. Michel	smichel@westernresources.org ;	Ramona Blaber	Ramona.blaber@sierraclub.org ;
April Elliott	April.elliott@westernresources.org ;	Don Hancock	sricdon@earthlink.net ;
Cydney Beadles	Cydney.Beadles@westernresources.org ;	April Elliott	ccae@elliottanalytics.com ;
Pat O'Connell	pat.oconnell@westernresources.org ;	Noah Long	Nlong@nrhc.org ;
Douglas J. Howe	dhowe@highrocknm.com ;	Brian J. Haverly	bjh@keleher-law.com ;
Cholla Khoury	ckhoury@nmag.gov ;	Jason Marks	lawoffice@jasonmarks.com ;
Gideon Elliot	gelliot@nmag.gov ;	Matthew Gerhart	matt.gerhart@sierraclub.org ;
Jennifer Van Wiel	jvanwiel@nmag.gov ;	R. Scott Mahoney	Scott.Mahoney@avangrid.com ;
Andrea Crane	ctcolumbia@aol.com ;	David L. Schwartz	david.schwartz@lw.com ;
Doug Gegax	dgegax@nmsu.edu ;	Katherine Coleman	Katie.coleman@tklaw.com ;
Joseph Yar	joseph@yarlawoffice.com ;	Thompson & Knight	Tk.eservice@tklaw.com ;
Jeffrey Spurgeon	spurgeonJ@southwestgen.com ;	Randy S. Bartell	rbartell@montand.com ;
Bruce C. Throne	bthroneatty@newmexico.com ;	Sharon T. Shaheen	sshaheen@montand.com ;
Rob Witwer	witwer@southwestgen.com ;	Jennifer Breakell	jbreakell@fmtn.org ;
Jeffrey Albright	JA@Jalblaw.com ;	Hank Adair	hadaair@fmtn.org ;
Michael I. Garcia	mikgarcia@berncogov ;	Cindy A. Crane	ccrane@enchantenergy.com ;

Amanda Edwards Matt Dunne Maureen Reno Richard L. C. Virtue Daniel A. Najjar Philo Shelton Kevin Powers Robert Cummins Steven Gross Martin R. Hopper Kurt J. Boehm Bill Templeman Justin Bieber Julie A. Wolfe Andrew Wernsdorfer Joel Johnson	AE@Jalblaw.com ; dunneconsultingllc@gmail.com ; mreno@reno-energy.com ; rvirtue@virtuelaw.com ; dnajjar@virtuelaw.com ; Philo.Shelton@lacnm.us ; Kevin.Powers@lacnm.us ; Robert.Cummins@lacnm.us ; gross@portersimon.com ; mhopper@msrpower.org ; kboehm@bkllawfirm.com ; WTempleman@cmtisantafe.com ; jbieber@energystrat.com ; julie@dietzedavis.com ; andy@berrendoenergy.com ; Joel@berrendoenergy.com ;	Peter Mandelstam Steve W. Chriss Katherine Lagen Camilla Feibelman Michael C. Smith Bradford Borman Peggy Martinez-Rael Elizabeth Ramirez Gilbert Fuentes Jack Sidler John Bogatko Milo Chavez Marc Tupler Elisha Leyba-Tercero Gabriella Dasheno Dhiraj Solomon John Reynolds Ana Kippenbrock	peterm@enchantenergy.com ; Stephen.chriss@wal-mart.com ; Katherine.lagen@sierraclub.org ; Camilla.Feibelman@sierraclub.org ; Michaelc.smith@state.nm.us ; Bradford.Borman@state.nm.us ; Peggy.Martinez-Rael@state.nm.us ; Elizabeth.Ramirez@state.nm.us ; GilbertT.Fuentes@state.nm.us ; Jack.sidler@state.nm.us ; John.Bogatko@state.nm.us ; Milo.Chavez@state.nm.us ; Marc.Tupler@state.nm.us ; Elisha.Leyba-Tercero@state.nm.us ; Gabriella.Dasheno@state.nm.us ; Dhiraj.Solomon@state.nm.us ; John.Reynolds@state.nm.us ; Ana.Kippenbrock@state.nm.us ;
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DATED June 14, 2021.

NEW MEXICO PUBLIC REGULATION COMMISSION

Ana C. Kippenbrock

Ana C. Kippenbrock, Law Clerk