IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. S-1-SC-39152

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

Appellants,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee,

and

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

Intervenor-Appellees.

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

NEW ENERGY ECONOMY'S OPPOSITION TO OFFICE OF ATTORNEY GENERAL'S MOTION FOR LEAVE TO FILE REPLY BRIEF

John W. Boyd, Esq.
FREEDMAN BOYD HOLLANDER
& GOLDBERG, P.A.
20 First Plaza, Suite 700
Albuquerque, NM 87102
(505) 842-9960

Mariel Nanasi, Esq.
600 Los Altos Norte St.
Santa Fe, NM 87501-
(505) 469-4060

Attorneys for Intervener/Appellee New Energy Economy

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I. Introduction.

The Court should deny the Office of Attorney General's ("OAG") request because a) it is outside the rules because it is far past time to file any brief, including a brief-in-chief, which, had it been timely, would have been the proper filing by the OAG, whose proposed filing supports reversal of the PRC's decision regarding the Avangrid/PNM merger and the PRC's disqualification of Marcus Rael as Iberdrola/Avangrid's counsel. Since the OAG did not file an appeal or a Brief-In-Chief it is not in a position under this Court's rules to file a Reply Brief, since those are filed by a party who has filed a Brief-In-Chief. The OAG claims that it needs to submit a brief to respond to what it claims are "new" matters raised by the New Mexico Public Regulation Commission ("PRC" or "Commission") and New Energy Economy ("NEE") in their Answer Briefs to which the OAG has never had an opportunity to respond. OAG's Motion, pp. 2-3. In fact, however, neither the PRC nor NEE has raised anything in their Answer briefs that was not thoroughly litigated below. As explained more fully below, the OAG's motion for leave to file a late "Reply" brief should be denied.

II. There is no Provision in the Court's Rules for the Attorney General's Filing.

This appeal began when Public Service Company of New Mexico ("PNM"), PNM Resources, Inc. ("PNMR") and Avangrid Inc., a subsidiary of the Spanish energy conglomerate, Iberdrola, S.A., ("Joint Applicants") filed a notice of appeal of the Commission's *Order on Certification of Stipulation* denying the applicants permission to merge[1] in NMPRC Case No. 20-00222-UT on January 3, 2022, docketed in this Court as Case No. S-1-SC-39152. The PRC's decision adopted its Chief Hearing Examiner's *Certification of Stipulation* of December 8, 2021, in which he thoroughly analyzed a mountain of evidence before him and carefully stated the many reasons for recommending that the PRC reject the merger.

Along with other parties, the OAG participated below. When the OAG announced that it was reversing its position and joining the proponents of the settlement, it joined the side of the Appellants. The OAG filed no notice of appeal. Joint Appellants are the only parties who filed a notice of appeal and a statement of issues. Western Resource Advocates ("WRA") intervened as a party-appellant *before* Joint Appellants filed their Brief in Chief on April 7, 2022, the day that it was due. (WRA also filed a Notice of Joinder of Appellants' Brief in Chief on the

[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 be made a party. **43RP17117-17150**.

same day.) On March 29, 2022, NEE filed its Motion to Intervene and this Court granted intervention as of April 5, 2022.

Nearly a month after the Appellants filed their Brief in Chief, the OAG filed a Motion to Intervene in this case in which it requested "intervention as a party-appellee pursuant to Rule 12-601(D) as a matter of right" on May 5, 2022.[2] On May 6, 2022, the Court granted OAG's motion, ordering that the "caption on all future pleadings" reflect the OAG's status as an "Intervenor-Appellee". Order of May 6, 2022.

NEE does not contest that this Court properly granted the OAG's right to intervene. However, NEE contests the right of the OAG to file what it styles a "Reply" brief because 1) Rule 12-318 C (5) states: "**Reply brief.** The *appellant* may file a reply brief responding to each answer brief…" (Emphasis supplied.). The OAG did not appeal and, instead, filed a motion to intervene and was granted the status of an "Intervenor-Appellee," not an appellant; and 2) The OAG's Brief does not comply with the Court's rules for a Brief-in-Chief or a Reply Brief,[3] which makes it subject to rejection by this Court;[4] and 3) There is no rule allowing

[2] OAG's Motion to Intervene, 5/5/2022, p. 2.
[3] Rule 12-318. For instance, the OAG failed to comply with Rule 12-318 A (2), requiring that a table of authorities list statutes cited and page numbers, and Rule 12-318 F & G omitting a certificate of service or statement of compliance with rules. *See also*, Rules 12-309 B (requiring proof of service) and 12-307 E (requiring certificate of service).
[4] Rule 12-318 J.

the OAG to file a "reply brief" as its only brief. The OAG cannot legitimately claim that it was unaware of the filing and briefing deadlines because it was given notice of the appeal and was apprised of filings in this case, even before it moved to intervene, and could certainly have filed a notice of appeal if it wished to participate in the briefing.

III. The OAG seeks permission to file a brief on the basis that the PRC and NEE have raised new matters in their Answer Briefs, but neither did so.

In order to provide the Court with a reason to allow the OAG to file its request to file what it calls a reply brief, the OAG argues that NEE's and the Commission's Answer Briefs contain "allegations and misstatements [that] appear nowhere else in the record" and "appear[] for the first time." (OAG Motion at 3). If this were true, the OAG's untimely request may prompt the Court to relax its rules. This is wholly untrue. In fact, all arguments made in both the briefs of NEE and the Commission were based on record evidence developed and argued below. In the OAG's proposed reply brief ("OAG Reply Brief") the OAG re-argues positions that it argued below (and, in some instances, numerous times) and knew of months before the Hearing Examiner issued his Certification of Stipulation and the Commission issued its *Order on Certification of Stipulation.* The OAG's position

that it should be allowed to file its brief because it was ostensibly blindsided by the PRC and NEE in their Answer Briefs is unsupported, as NEE explains below.

A. All the Issues the OAG Raises in its "Reply Brief" The Parties Litigated Below

A cursory look at the Table of Contents of the OAG's brief tells the Court what it needs to know about the fact that the issues in its proposed brief are not new but were all made below. OAG Reply Brief, Table of Contents, p. 3. For example, the OAG's view that the PRC's Hearing Examiner was wrong to disqualify Marcus Rael, Esq., from representing Joint Appellants Iberdrola and Avangrid at the same time he was acting as a lawyer for the OAG itself and the State and people of New Mexico was itself a matter of extensive litigation below and, if the OAG wanted to contest it on appeal, it was free to file an appeal like any other litigant that has lost an issue at the lower tribunal.

For example:

1. In the Introduction to OAG's Reply Brief, the OAG states that the Commission and NEE contend at p. 5: "the OAG was improperly influenced by Iberdrola's counsel, Marcus Rael who represents the OAG in unrelated matters."

There is nothing new about this position; this argument doesn't "appear[] for the first time in [our] Answer Brief[s]." OAG Motion at 3. This argument formed the basis for NEE's challenge to attorney Rael's involvement in the case which was apparent when NEE pursued a Motion to Compel discovery,[5] argued for a subpoena for Rael,[6] responded to and opposed the request to quash the subpoena and sought Rael's disqualification,[7] and argued against the Appellants and the OAG when they requested that the Hearing Examiner reverse his original order for disqualification.[8] There were multiple references to Rael's influence in settlement negotiations and the impact it had on the proceedings during cross-examination,[9] in

[5] **23RP04679-04725**.
[6] **58RP20725-20754**; **58RP20777-20780**; **58RP20837-20841**.
[7] **60RP21249-21414**
[8] **76RP38628-38642**.
[9] On April 2, 2021, the AG filed the testimony of expert witnesses, Andrea Crane, **18RP03743-805**, and Scott Hempling, **18RP03630-03742**, in opposition to the merger stating that it was not in the public interest for multiple reasons, including many of the same reasons ultimately relied on by the Hearing Examiner and the Commission for rejection. Avangrid/Iberdrola hired attorney Marcus Rael to settle the case and "facilitate Avangrid's purchase of PNM". **67RP23546-7**. Contrary to the positions of his own experts stated just three weeks earlier, the OAG settled very early on in this case on April 21, 2021. **28 RP 5296-5329**. "NEE showed that Mr. Rael had taken actions in which the conflict of interest may have negatively impacted the clients." **80RP39998**; **60RP21249-21414**. (In particular, NEE demonstrated the chasm between the OAG's experts' testimonies and the initial settlement at **60RP21258-9**.) Joint Applicants' settlement with the OAG occurred before information regarding Avangrid's track record of penalties, disallowances, management audits and fines became publicly known on May 11, 2021. **72RP34253-4**. OAG's expert, Andrea Crane, testified that neither she or the OAG's other expert, Scott Hempling, directly participated in the settlement negotiations and had no firsthand conversations with Joint Applicants, other

briefing,[10] and in the Hearing Examiners' *Certification of Stipulation.*[11] This is hardly a new argument by the Commission and NEE.

2. Also, in the Introduction, the OAG contends that the Commission placed substantial weight on "unfounded allegations of misconduct by Rael." OAG Reply Brief at 5.

This issue was thoroughly litigated below and the OAG made a number of filings[12] related to it. It is not a new issue and it was addressed squarely by Joint Appellants in their Brief-In-Chief in this appeal. The OAG could have briefed this had it simply appealed or filed an earlier Motion to Intervene but it did not.

3. Like the OAG, the Appellants argued below and argue here that because other parties supported the stipulation, the PRC and this Court should have

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attorneys or consultants. **72RP34228-32**. Ms. Crane admitted that after the OAG settled the OAG didn't propound discovery or issue data requests, **72RP34237-8**, "stop[ped] analyzing the case," **72RP34238**, and focused on other cases, **72RP34238-41**. Before settlement the OAG did not have a comprehensive understanding of all the fines, audits and enforcement actions that were pending against Avangrid. **72RP34255-6**. Admitted that post settlement there were a lot of filings and discovery that was propounded but the OAG attention level decreased and therefore, the OAG did not have the benefit of the contents therein. **72RP34255-8**. Additionally, Ms. Crane's involvement was significantly less in this case than her involvement in the EPE merger case. **72RP34258-67**.

[10] **78RP39494-5**.

[11] **80RP39823-4; 80RP39996-40002**.

[12] For instance, **63RP22048-22057** ("The Attorney General's Position on Alleged Conflict of Interest"), **65RP22559-22565**, **72RP34111-34117**.

treated that support as sufficient to overcome any concerns the PRC might have had that the terms of the stipulation made approval of it contrary to the public interest. OAG Reply Brief at 6, 8-9. Joint Brief in Chief at 63-66.

Again, there is nothing "new" about this. It was fully addressed by NEE in its Response to Joint Applicants' Exceptions,[13] the Hearing Examiner in the *Certification of Stipulation*,[14] and, by the Commission.[15] The Proposed Transaction is not a popularity contest, it is governed by the public interest.[16] It is particularly noteworthy that none of the signatories to the Stipulation, other than the OAG, represent a significant number of individual ratepayer constituents.[17]

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[13] **81RP40367-8**.
[14] **80RP39870-1**.
[15] **81RP40427**.
[16] *See,* NMSA 1978, §§62-6-12 and 62-6-13.
[17] None of these regular PRC intervenors agreed to sign on to the PNM/Avangrid/Iberdrola Stipulation: New Mexico Affordable Reliable Energy Association (formerly New Mexico Industrial Energy Consumers); City of Albuquerque, Bernalillo County, Albuquerque Bernalillo County Water Utility Authority ("ABCWUA"), or PRC Staff. To put a finer point on this, when Ms. Winter, attorney for ABCWUA, was cross-examining Mr. Pedro Azagra Blazquez, Chief Development Officer and a Member of the Executive Committee of Iberdrola, S.A, and Member of Avangrid, Inc.'s Board of Directors, **80RP40025**, about contributing a million dollars by Avangrid/Iberdrola "to create a supplemental scholarship program dedicated to science technology, engineering and math education, within the confines of the Albuquerque/Bernalillo County metropolitan area" the following interchange occurred:
"A. [Mr. Azagra Blazquez] That is correct, as long as the Water Authority comes on board with the stipulation.
Q. [Winter] When you say 'comes on board,' you don't mean support, do

4. The OAG states: "The Briefs by both the Commission and NEE leave the impression that the OAG changed its position only after Iberdrola hired attorney Marcus Rael." OAG Reply Brief at 7; *See also*, OAG's argument at 11-14.[18]

In fact, the OAG did change its position only after Iberdrola/Avangrid hired attorney Rael. Rael was paid $350,000[19] to meet with the OAG and to participate in a handful of telephone conferences with representatives of Bernalillo County.[20]

While general theories of defense are espoused by the OAG in its brief, like "[i]t is axiomatic: "litigation risk drives settlement,"[21] there are no specifics contradicting appellees' rendition of facts, including the timeline of events. The overwhelming majority of the information relied on by Appellees comes from statements made by either the Joint Applicants or the OAG or their experts.[22] The

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you? You're simply indicating that perhaps the Water Authority wouldn't oppose?

A. [Mr. Azagra Blazquez] Correct. What I mean is that the Water Authority wouldn't oppose the transaction." **67RP23398**.

[18] "[T]he Commission and NEE misrepresent the chronology of settlement talks between the OAG and the Joint Applicants in relation to Mr. Real's retention by Iberdrola." OAG Reply Brief at 11.

[19] **67RP23549**.

[20] **80RP3999**.

[21] OAG Reply Brief at 12.

[22] **80RP3996-40001**.

OAG did mention one fact: "Ms. Crane testified that she 'reviewed several versions of the regulatory commitments and provided input to the NMAG.'" OAG Reply Brief at 13, *citing* **47RP17667**, (Crane's testimony in support of the Stipulation). However, the very sentence immediately preceding that comment reads: "I did not directly participate in settlement discussions with the Joint Applicants or other parties." **47RP17667**. If one combines the lack of expert engagement in the settlement with near complete subsequent disengagement by the OAG, it was undeniably reasonable of the Hearing Examiner and the PRC to draw the inference that it was Iberdrola/Avangrid's retention of Rael that caused the AG to do an about-face regarding the settlement that Crane testified was not in the public interest. Consider the following:

A. That the OAG settled with Joint Applicants in the early phase of this case, before the majority of information about Avangrid's egregious track record had been exposed and put in the record.[23]

B. That after the OAG settled it stopped analyzing the case;[24] and

[23] The OAG settled with Joint Applicants on April 21, 2021, **80RP39811**. On May 11, 2021, during a status conference, it was revealed that approximately $25 million in penalties and cost disallowances to Avangrid, Inc.'s electric utility subsidiaries occurred in the preceding 16 months, **80RP39812-13**.
[24] **72RP34238**.

C. That in the EPE merger case, 19-00234-UT, that occurred just two years earlier (and was approved by the Commission) Crane played a decisive and integral role throughout the settlement process;[25] and

D. The majority of the conditions Crane testified were necessary to meet the public interest standard were either entirely omitted or drastically lower in the initial Stipulation suddenly approved by the OAG:

i. Crane's number one condition for merger approval was that "Iberdrola be a Joint Applicant. And Iberdrola must explicitly accept and acknowledge the jurisdiction of the NMPRC and of the State of New Mexico."[26] Yet, during cross-examination Crane couldn't point to any commitment made by the Joint Applicants regarding the enforceability of jurisdiction over Iberdrola by the NMPRC and the State of New Mexico or any "enforcement mechanisms that may be available, or what steps someone may have to take, if they feel that the company is not meeting any of its merger commitments."[27] Critically, Iberdrola did not sign a Stipulation (despite the order requiring Iberdrola join as a party[28]) until the Hearing Examiner, in his *Certification of Stipulation*, "adds Iberdrola, S.A. to the list of the Joint Applicants on the signature page that are being bound by an authorized signature."[29]

ii. Crane testified that the original $24.6 million rate credit was inadequate and the per customer versus kilowatt hour allocation was inappropriate.[30] Crane recommended an $85 million rate credit and the AG settled for $50 million on April 21, 2021, and neither did the initial or subsequent Stipulations include a per customer allocation.[31]

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[25] **72RP34258-67**.
[26] **18RP 03751-2**; **72RP34303-5**.
[27] **72RP3403-5**.
[28] **80RP39850**.
[29] **80RP39911-14**.
[30] **72RP34306**.
[31] **72RP34307-8**.

Crane concluded that the allocation of the rate credit on a per-customer basis "would certainly reduce the impact dramatically to the residential class."[32]

iii. Crane's original proposal was for there to be $80 million worth of economic development investment but the initial stipulation with the OAG only included $20 million worth of economic development.[33]

iv. Crane's testimony remained consistent throughout that the merger agreement that requiring ratepayers foot the $300 million bill for Four Corners was something that should not be permitted; she also stated that the Stipulations are silent on the $300 million Four Corners issue and therefore failed to resolve it.[34] Crane also testified that Four Corners "is a condition of the merger, and I think it should be -- I recommend that it be treated as a transaction cost of the merger and absorbed by shareholders."[35] Ultimately, when asked about the financial net benefit to ratepayers, Ms. Crane testified: "if we're looking at the $300 million on one hand [from the Four Corners cost], and we're looking at the stated and quantified conditions, like the rate credits, and the economic development, then I may very well agree with you that $300 [million] of harm outweighs, you know, half of that in benefits[.]"[36]

v. Asked if there were any penalty provision if Avangrid failed to produce the promised jobs and retain them as it also pledged (which Crane also previously testified was necessary), Crane testified: "There certainly is no penalty provision in the stipulation."[37]

vi. Again, referring to Crane's original testimony, Crane was asked if there were automatic penalties for failure to meet reliability performance standards and provide adequate customer service in the

[32] **72RP34309**.
[33] **72RP34311-12**.
[34] **72RP34310-11**.
[35] **72RP34319**.
[36] **72RP34322-3**.
[37] **72RP34313-14**.

stipulation, and again, Crane testified: "Yeah, I don't believe there are any specific or explicit penalties."[38]

vii. Ms. Crane testified that while some of her concerns regarding oversight of hundreds of millions of affiliate transaction costs were acknowledged "they were not explicitly addressed to the extent that I recommended in my direct testimony[.]"[39]

None of these facts appear in the "summary of the facts," presented by the OAG in its proposed Reply Brief [40] even though these facts were testified to by the OAG's only witness at hearing and significant to the Hearing Examiner's Orders and Certification of Stipulation.

Rael's influence on the OAG was brought to light and explained *why* the OAG settled so early and for so little, and even after the evidence of Avangrid's track record was exposed, including potential harm from risks of outages and unreliability, increased cost of service, diminished service quality, corruption, subsidization of non-utility activities, and reduction in local control,[41] the OAG did not re-evaluate its position. The OAG had months to refute these claims and offered no other explanation for its action/inaction on behalf of residential and

[38] **72RP34314-15**.
[39] **72RP34315-19**.
[40] Rule 12-318 A (3).
[41] **80RP39798-40244**; **81RP40352-40382**.

small business ratepayers it is obligated to represent[42] and the public interest of New Mexicans as a whole; all these issues were argued and briefed below extensively.[43]

In addition to the above, the Hearing Examiner agreed the facts demonstrated that Marcus Rael violated the New Mexico Rules of Professional Conduct prohibiting attorneys from engaging in legal representations that constitute conflicts of interests among the attorney's current clients.[44]

Based on the concurrent conflict of interest the Hearing Examiner ordered the disqualification of Rael "by ordering Iberdrola to discontinue its relationship with the attorney"[45] and "[t]he Hearing Examiner and the Commission can and will consider Iberdrola's and the Attorney General's actions as they weigh the reasonableness of the Stipulation and the parties' supporting testimony."[46] According to the *Certification of Stipulation*:

> "NEE has shown, under an objective standard, that a concurrent conflict of interest exists for Mr. Rael in this proceeding under Rule 16-107(A). NEE has shown that Mr. Rael's representation of Iberdrola (on behalf of Avangrid) in

[42] NMSA 1978, §§ 8-5-2 (J); 8-5-17.
[43] **58RP20725-20754**; **60 RP21249-21414**; **62RP21984-21995**; **64RP22193-22208; 77RP38809-38892**; **78RP39430-39557**; **79RP39718-39753**; **81RP40352-40382**, *et al*.
[44] **64RP22365-74**.
[45] **64RP22371**.
[46] *Id.*

this case is directly adverse in this proceeding to the interests of the Attorney General (and the public the Attorney General represents) and to the interests of Bernalillo County. The Attorney General's initial position in this case recommended denial of the merger and acquisition transactions proposed by the Joint Applicants for the Commission's approval. The Attorney General's position changed during the course of the proceedings when it signed on to the Stipulation in this case."[47]

…

"None of the clients [Attorney General, Bernalillo County] claim in their July 30 statements of position that their interests are adverse as alleged by NEE. Nevertheless, the positions they have taken have been adverse from an objective point of view. Indeed, the Joint Applicants' response to NM AREA's discovery request, attached to NEE's July 28 filing (Attachment 1 hereto) shows that Mr. Rael met with the Attorney General's Office 18 times in late February through early April while the Attorney General was preparing its testimony opposing the Joint Applicants' proposal."[48]

…

"The Attorney General's initial position opposing the Joint Applicants' proposal was filed on April 2, 2021.[49] … [I]f Mr. Rael was advocating for Iberdrola's position or the Attorney General's position in those meetings, his representation at the time was adverse to at least one of the clients.[50]

…

"The July 30 filings of Iberdrola, the Attorney General and Bernalillo County indicate that none of the clients gave informed consent prior to the concurrent representation."[51]

…

[47] **64RP22368**.
[48] **64RP22369**.
[49] **64RP22370**.
[50] *Id.*
[51] **64RP22371**.

> "In regard to the Joint Applicants' argument about NEE's lack of standing, NEE has shown a prejudice sufficient to justify its standing to assert as a non-client that a conflict of interest exists sufficient to disqualify the Attorney General and Mr. Rael.[52] … In addition, as NEE notes, this case is not private litigation among two parties. It is a case of public interest that concerns the 530,000 ratepayers of PNM and the New Mexico economy as a whole. It is crucial that the proceeding and the Commission's final decision are viewed by the public as credible and without any taint of improper influence. The Hearing Examiner and the Commission have the power and the duty under the Supreme Court's holding in *Living Cross Ambulance Serv, Inc.* and NMSA 1978, §62-6-12 and §62-6-13 to inquire into and address the ethical issues raised by NEE."[53]

Again, the OAG had more than an adequate opportunity to defend itself and did so, but failed in its burden of persuasion, and the record reflects this conclusion.[54]

5. The OAG reargues, OAG Reply Brief at 9-11, that [the Hearing Examiner] and the Commission should have deferred to the Disciplinary Board's summary dismissal of a professional misconduct complaint rather than its own finding of Rael's concurrent conflict of interest, contrary to this Court's finding in *Living Cross Ambulance Serv., Inc. v. N.M. Pub. Regulation Comm'n,* 2014-NMSC-036, 338 P.3d 1258.

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[52] **64RP22372**.
[53] **64RP22372-3**.
[54] **63RP22048-22057**; **64RP22343-22376**; **65RP22559-22565**; **65RP22573-22580**; **72RP34111-34117**; **76RP38628-38642**; **76RP38643-38656**.

The Hearing Examiner addressed this exact issue in his ruling of August 23, 2021:

> "As to the Commission's authority to disqualify the Iberdrola counsel, courts have recognized that administrative agencies have independent authority to control their proceedings. Rule 17-201 of the Supreme Court's Disciplinary Rules states that attorneys are subject to the exclusive disciplinary jurisdiction of the Supreme Court and the Disciplinary Board, but it also states that the Disciplinary Rules shall not be construed to deny to any other court such powers as are necessary for that court to maintain control over proceedings conducted before it. Rule 17-201 NMRA.
>
> The New Mexico Court of Appeals has stated that administrative agencies have the same authority as courts to maintain control over their proceedings and that the authority is separate and apart from, and does not infringe upon, the Supreme Court's exclusive authority to discipline attorneys [citing the Court in *Chavez v. State Workers' Comp. Admin.,* 2012-NMCA-060, ¶15, 280 P.2d 927, 932.]
>
> …
>
> The Commission's procedural rules assign hearing examiners with "the duty to conduct full, fair, and impartial public hearings and to take appropriate action to avoid unnecessary delay in the disposition of proceedings and to maintain order." 1.2.2.29.C NMAC. The powers assigned to hearing examiners include the powers to issue orders to show cause regarding proceedings before the hearing examiner; to regulate the course of public hearings or investigations, and to take such other action as may be necessary and appropriate to the discharge of their duties, consistent with the statutory authority or other authorities under which the Commission functions and with the rules and policies of the Commission. *Id.*
>
> Indeed, the Supreme Court held in *Living Cross Ambulance Serv., Inc. v. N.M. Pub. Regulation Comm'n,* 2014-NMSC-036, 338 P.3d 1258, that the Commission has the authority and duty to determine conflict of interest questions in proceedings before it. Further, the disqualification at issue here

> does not interfere with any disciplinary action that might be ordered by the Supreme Court.[55]
>
> …
>
> In addition, further evidence relevant to the determination of the concurrent conflict of interest, which was not available at the time of the August 5 and 12 Letters, has been presented in hearings in this case.[56] … [T]he Commission is the body that determines the evidence that is relevant and admissible in cases before it, and the Hearing Examiner has determined that evidence related to Mr. Rael's representation of Iberdrola in this matter is relevant to the Commission's review of the Stipulation. Whether a concurrent conflict of interest exists or not, Mr. Rael's representation of Iberdrola is evidence of the manner in which the Joint Applicants have attempted to gain the Commission's approval of the proposed merger. The August 6, 2021 *Order Addressing Prehearing Motions and Objections* found that such evidence is relevant and admissible."[57]

6. The OAG argues, OAG Reply Brief at 14-16, "that any alleged misconduct by the OAG has no bearing on how other parties' evidence supporting the merger should be evaluated." OAG Reply Brief at 14. Essentially, the OAG argues in conclusion that Rael's improper influence and the Attorney General's misconduct and malfeasance "is not a proper basis for denying the merger."

Undoubtedly, the disqualification of Rael from representing Iberdrola was not the basis for denying the merger. What it did was to limit the weight the PRC ascribed to the AG's sudden endorsement of the proposed initial settlement. That

[55] **76RP38643-38656**.
[56] *Id.*
[57] *Id.*

was perfectly appropriate. The OAG includes cites to the record and this alone indicates that these arguments were made below and are therefore not "arguments made for the first time." NEE has already provided brief refutation to this argument above so won't repeat its response. However, NEE respectfully suggests that no one could read the Hearing Examiner's *Certification of Stipulation* or the Commission's *Order on Certification of Stipulation* and be convinced that the merger was recommended to be denied or was rejected *only because of* Rael's ethical violations (which, by the way, was similarly raised by this Court in S-1-SC38555, *Governing Body for the Town of Edgewood v. Hon. Maria Sanchez-Gagne*, Order of October 29, 2021, striking the pleadings and disqualifying the law firm of Robles, Rael & Anaya, **81RP40378-82**,) or the OAG's actions in this case. Their actions and inactions merely contributed to the many other reasons for merger denial.

7. Finally, the OAG states that the Commission focused "on the outdated June 4th stipulation" OAG Reply Brief at 16. However, the Commission looked at the record as a whole, and did *not* just review the June 4th Stipulation, and in its *Order on Certification of Stipulation* it explicitly states so:

> The Joint Applicants and Signatories focus their exception on their newly expressed willingness to accept the HE's revisions set forth the Modified Stipulation included as Appendix 2 to the Certification. Significantly, those revisions impose greater protections and safeguards in the form of Regulatory

Commitments than the provisions of the June 4 Stipulation which was the subject of the evidentiary hearing and the Certification's analysis. The HE's Order on Post-Hearing Filings affirmed that the certification would be based on the parties' positions as expressed in their statements of position filed at of the close of the evidentiary hearings. While Joint Applicants' and Signatories' assert those statements indicate continued support for the June 14 (sic) Stipulation, those statements demonstrate a lack of uniform agreement over the additional regulatory commitments proposed or agreed to by Joint Applicants during the hearing. Notably, the Joint Applicants' and Signatories' exceptions to the Certification primarily assert their belief that the Certification erred in the relative weight it accords to the purported benefits of the Proposed Transaction and the various matters that the Regulatory Commitments address – what are otherwise referred to as the potential risks of the Proposed Transaction. That many of the Signatories recognized the need for additional enhanced Regulatory Commitments beyond those initially agreed to in the June 4 Stipulation is evident from the continued negotiations that took place during the evidentiary hearing on the June 4 Stipulation.[58]

The proponents of the Proposed Transaction now gloss over the potential risks of the Proposed Transaction based on the enhanced revisions proposed in the Appendix 2 Modified Stipulation which they now recast as additional enhanced benefits, rather than revisions necessary to mitigate the very real concerns about risks of harm identified by many of those same parties in this case during the proceedings. As the Certification notes, given the nature of the facts that gave rise to concerns, these provisions will not eliminate those risks, but instead will require sustained and vigilant regulatory oversight to maintain. Ultimately, in evaluating the six factors the Commission applies when determining whether a utility merger satisfies the public interest under NMSA 1978, §62-6-12 the Certification concludes the potential harms of the Proposed Transaction continue to outweigh its benefits. The Certification makes clear that in the HE's estimation, this conclusion holds true even with the application of the revisions included in the proposed Appendix 2 Modified Stipulation.[59]

[58] **81RP40427**, ¶38.
[59] **81RP40427**, ¶39.

NEE's purpose in reviewing some of the evidence relevant to the OAG's motion to allow it to file a Reply Brief is to show two things: First, that what the OAG claims are issues newly raised on appeal are not newly raised at all. Second, NEE's purpose is to show that if the Court permits the OAG to file its brief, there are a deluge of statements in evidence that will require response from NEE and, presumably, the PRC.

IV. CONCLUSION

The Office of Attorney General Hector Balderas' motion for leave to file the "Reply Brief" should be denied because the arguments raised therein are factually and legally incorrect, are cumulative, and non-compliant with rules of appellate procedure.

Respectfully submitted this 8th day of August 2022.

Attorneys for Intervener/Appellee New Energy Economy

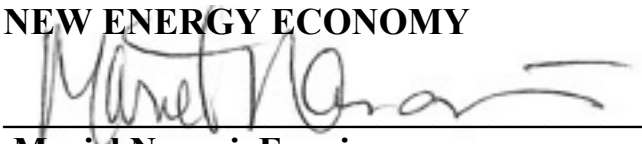
/s/ John W. Boyd, Esq.
FREEDMAN BOYD HOLLANDER
& GOLDBERG, P.A.
20 First Plaza, Suite 700
Albuquerque, NM 87102
(505) 842-9960

/s/ Mariel Nanasi, Esq.
300 East Marcy St.
Santa Fe, NM 87501
(505) 469-4060

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing New Energy Economy's Opposition to New Mexico Attorney General's Request to File Brief was electronically served on all counsel of record through the New Mexico Supreme Court's Odyssey filing system on August 8, 2022.

NEW ENERGY ECONOMY



Mariel Nanasi, Esquire