IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. S-1-SC-39673

EL PASO ELECTRIC COMPANY,

Appellant,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee,

and

ONWARD ENERGY HOLDINGS, LLC, INTERWEST ENERGY ALLIANCE, and NEW MEXICO OFFICE OF THE ATTORNEY GENERAL,

Intervenors-Appellees.

In the Matter of Commission Rulemaking Regarding NMPRC Rule 17.7.3 NMAC Integrated Resource Plans and Procurement Procedures NMPRC Case No. 21-00128-UT

CONSOLIDATED WITH

NO. S-1-SC-39676

PUBLIC SERVICE COMPANY OF NEW MEXICO,

Appellant,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee,

and

ONWARD ENERGY HOLDINGS, LLC, INTERWEST ENERGY ALLIANCE, and NEW MEXICO OFFICE OF THE ATTORNEY GENERAL,

Intervenors-Appellees.

In the matter of a Commission Rulemaking Regarding NMPRC Rule 17.7.3 NMAC Integrated Resource Plans and Procurement Procedures, NMPRC Case No. 21-00128-UT

AND

NO. S-1-SC-39677

SOUTHWESTERN PUBLIC SERVICE COMPANY,

Appellant,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee,

and

ONWARD ENERGY HOLDINGS, LLC,
INTERWEST ENERGY ALLIANCE, and
NEW MEXICO OFFICE OF
THE ATTORNEY GENERAL,

Intervenors-Appellees.

In the Matter of a Commission
Rulemaking Regarding NMPRC
Rule 17.7.3 NMAC Integrated
Resource Plans and
Procurement Procedures,
NMPRC Case No. 21-00128-UT

JOINT ANSWER BRIEF OF INTERVENORS-APPELLEES ONWARD ENERGY HOLDINGS, LLC, INTERWEST ENERGY ALLIANCE, AND NEW MEXICO OFFICE OF THE ATTORNEY GENERAL

Oral Argument Requested

Keven Gedko
Assistant Attorney General
Aletheia V.P. Allen
Solicitor General
New Mexico Office of the Attorney General
408 Galisteo St.
Santa Fe, NM 87501
(505) 717-3500
kgedko@nmag.gov
aallen@nmag.gov

Attorneys for Intervenor-Appellee the New Mexico Office of the Attorney General

Joseph Yar
VELARDE & YAR
4004 Carlisle Boulevard NE, Suite O
Albuquerque, NM 87107
Ph: (505) 248-0050
joseph@verlardeyar.com

Attorneys for Intervenor-Appellee Onward Energy Holdings, LLC

Joan E. Drake
Susan E. Miller
Modrall, Sperling, Roehl, Harris & Sisk, P.A.
P.O. Box 2168
Albuquerque, NM 87103-2168
(505) 848-1850
jdrake@modrall.com
Susan.miller@modrall.com

Attorneys for Intervenor-Appellee Interwest Energy Alliance

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

New Mexico Administrative Cases

Record Proper

Appelants Brief in Chief

Other Authorities

I. INTRODUCTION

A. Summary

Appellants[1] seek to thwart the establishment of procedures aimed at fair, transparent, and competitive resource planning that will best serve the public with the most cost-effective resources consistent with state policies and requirements. Appellants have failed to overcome the deference accorded to the New Mexico Public Regulation Commission ("NMPRC," "PRC," or "Commission") and failed to carry their burden to show that the Commission's amendments to the Integrated Resource Planning ("IRP") Rule 17.7.3 NMAC (the "Rule") (6/30/1988, as amended through 10/27/2022) were not within the Commission's statutory authority, were arbitrary and capricious or not supported by substantial evidence, or that the Rule violates due process.

Contrary to Appellants' unsupported allegations that the Commission "radically transformed the IRP Rule in a manner inconsistent" with NMSA 1978, Section 62-17-10 (2005) (the "IRP Statute") and its regulatory powers **[BIC 23]**, the amendments to the Rule are well within the Commission's broad statutory authority. Further, the amendments are the culmination of a multi-year collaborative process

[1] This appeal was brought by El Paso Electric Company ("EPE"), Southwestern Public Service Company ("SPS"), and Public Service Company of New Mexico ("PNM") (collectively, "Appellants" or "Utilities").

through which the Commission carefully considered and balanced the competing interests of various stakeholders and policy goals.[2]

In addition, as set forth below, the Commission followed the legislative intent of the IRP Statute as well as statutes relevant to utility rates and service, as listed in 17.7.3.3 NMAC. The Rule amendments were implemented to address the goals of fairness, transparency, and early stakeholder input in the resource planning process, and to ensure that updated state policies and all appropriate technologies are properly considered in utility resource decisions. **[9 RP 1567, *see also* 2 RP 0292]** The Rule is further aimed at remedying what the Commission considered to be an "ineffective public input process and recurring problems of poorly designed and questionably noncompliant, non-transparent resource solicitations in recent years." *Id.*

Though Appellants offer a variety of claims in their attempt to undermine the Rule, none of them survive reasoned evaluation. Appellants' arguments that the Rule abrogates the Utilities' management prerogative and prevents multistate jurisdictional planning are without merit as the Rule in no way takes final decision-making authority away from the Utilities in the IRP process or in proposing new procurements for Commission approval in subsequent proceedings. Appellants

[2] The Commission held multiple workshops (including a set of workshops on the Independent Monitor provision), had five rounds of written comments on the rulemaking, and a public comment hearing. The workshop and rulemaking proceedings spanned a year and a half (from May 2021 to November 2022) and the Record Proper in this proceeding spans over 2080 pages.

make vague and undeveloped references to alleged violations of Appellants' due process rights yet fail to articulate how their interests are violated by the Rule **[BIC 38]**, which provides for utility and public input throughout the process while leaving the choice of a utility-specific IRP plan and proposed procurement in the hands of each utility. And Appellants raise a host of imagined harms that they speculate *could* happen but misstate the Rule and provide no evidence to support their speculation. Appellants essentially ask the Court for an advisory opinion, based on potential harms that may never occur, without the benefit of a developed factual record of any such hypothetical violations. The Court should not accept such an improper invitation.

Though the Appellants' arguments overcomplicate the issues for this Court's consideration and are, at times, based on erroneous statements of fact, this case presents the Court with relatively straightforward issues: (1) whether the Commission overstepped its statutory authority in the rulemaking process, and (2) whether the Rule deprives the Utilities of due process rights. The answer to both of these questions is a resounding No. Appellants provide no basis for this Court to overturn the Commission's thorough, careful, and deliberative rulemaking process, which provides for greater fairness, transparency, public input, and competition to achieve appropriate and meaningful planning that will lead to low-cost procurements for customers. The Court should uphold the Commission and the Rule.

B. Joint Intervenors

The Intervenors-Appellees joining in this Answer Brief are the New Mexico Attorney General ("NMAG"), Onward Energy Holdings, LLC ("Onward"), and Interwest Energy Alliance ("Interwest") (collectively, the "Joint Intervenors").[3] Each of the Joint Intervenors participated in the Commission's rulemaking and, while none obtained the full results they each sought, all support the Rule the Commission adopted.

The NMAG represents the public interest, and in Commission proceedings, statutorily represents the interests of residential and small business consumers. NMSA 1978, §§ 8-5-2(J) (1933) and 8-5-17 (1999). Onward is the owner and operator of the Valencia gas plant, which supplies electricity under contract to PNM. Interwest is a non-profit organization whose membership brings together the renewable energy industry with environmental advocacy organizations to promote the deployment of reliable, cost-effective, and diverse renewable energy resources. While the NMAG represents customer interests, Onward and Interwest represent entities that have been and will be bidders in utility procurements. It is significant that all of these diverse entities seek the same outcome: fair, transparent,

[3] The Court granted Onward's motion to intervene on January 10, 2023, and granted Interwest's and the NMAG's motions to intervene on July 10, 2023.

competitive, and well-informed processes to obtain for utility customers the lowest cost resources consistent with evolving state policies and requirements.

II. LEGAL STANDARDS

In an appeal arising from a Commission's rulemaking proceeding, the Court applies the same standards of review as in an appeal of an adjudicatory proceeding. *See Att'y Gen. v. N.M. Pub. Regul. Comm'n*, 2011-NMSC-034, ¶ 9, 150 N.M. 174 (stating the standard of review for "administrative orders" and not differentiating between adjudicatory proceedings and rulemakings). The Court must affirm unless the Commission's decision is unreasonable or unlawful. *In re Zia Nat. Gas Co. v. N.M. Pub. Util. Comm'n*, 2000-NMSC-011, ¶ 4, 128 N.M. 728. "A party challenging a PRC final order has the burden of establishing that the order is arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency's authority, or otherwise inconsistent with law." *N.M. Att'y Gen. v. N.M. Pub. Regul. Comm'n*, 2015-NMSC-032, ¶ 9 (internal quotation marks and citation omitted); *see also* NMSA 1978, § 62-11-4 (1965) ("The burden shall be on the party appealing to show that the order appealed from is unreasonable, or unlawful.").

"[A]n agency's action is arbitrary and capricious if it provides no rational connection between the facts found and the choices made, or entirely omits consideration of relevant factors or important aspects of the problem at hand." *Colonias Dev. Council v. Rhino Envt'l Servs. Inc.*, 2005-NMSC-024, ¶ 41, 138 N.M.

133 (internal quotation marks, and citation omitted). An administrative decision is supported by substantial evidence when there is evidence "that is credible in light of the whole record and that is sufficient for a reasonable mind to accept as adequate to support the conclusion reached by the agency." *N.M. Indus. Energy Consumers v. N.M. Pub. Regul. Comm'n*, 2019-NMSC-015, ¶ 8 (internal quotation marks and citation omitted). Although the Court reviews the "whole record to determine whether there is substantial evidence to support the agency decision, [the Court] view[s] the evidence in the light most favorable to the decision." *In re Zia Nat. Gas*, 2000-NMSC-011, ¶ 4. The Court "neither reweigh[s] the evidence nor replace[s] the fact finder's conclusions with [its] own." *Albuquerque Bernalillo Cnty. Water Util. Auth. v. N.M. Pub. Regul. Comm'n*, 2010-NMSC-013, ¶ 18, 148 N.M. 21 (internal quotation marks and citation omitted).

In reviewing an order by the Commission, the Court begins "by looking at two interconnected factors: whether the decision presents a question of law, a question of fact, or some combination of the two; and whether the matter is within the agency's specialized field of expertise." *N.M. Indus. Energy Consumers v. N.M. Pub. Regul. Comm'n*, 2007-NMSC-053, ¶ 13, 142 N.M. 533 (internal quotation marks and citation omitted). In evaluating questions of fact, the Court "look[s] to the whole record to determine whether substantial evidence supports the Commission's decision." *Public Serv. Co. v. N.M. Pub. Regul. Comm'n*, 2019-NMSC-012, ¶ 14

(internal quotation marks, and citation omitted). "[T]he court will generally defer to the decision of the agency, especially if the factual issues concern matters in which the agency has specialized expertise." *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 12, 120 N.M. 579; *Stokes v. Morgan*, 1984-NMSC-032, ¶ 24, 101 N.M. 195 ("The special knowledge and experience of state agencies should be accorded deference.").

The Court similarly defers to the Commission's decision when the Commission applies a statute by which it is governed. *See Morningstar*, 1995-NMSC-062, ¶ 11 ("The court will confer a heightened degree of deference to legal questions that implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function." (internal quotation marks and citation omitted)). In matters related to statutory construction, the Court reviews *de novo* and has held that an agency's construction of the statute is afforded little deference as statutory construction is not a matter within the Commission's expertise. *Albuquerque Bernalillo Co. Water Util. Auth.*, 2010-NMSC-013, ¶ 50. However, the Court "will generally defer to an agency's reasonable interpretation of its own ambiguous regulations, especially where the subject of the regulation implicates agency expertise." *Id.* ¶ 51 (internal quotation marks and citations omitted).

The Supreme Court has explained that:

> [T]he provisions of a statute must be read together with other statutes *in pari materia* under the presumption that the Legislature acted with full knowledge of relevant statutory and common law. Thus, two statutes covering the same subject matter should be harmonized and construed together *when possible*, in a way that facilitates their operation and the achievement of their goals.

Pub. Serv. Co. of N.M. v. N.M. Pub. Util. Comm'n, 1999-NMSC-040, ¶ 23, 128 N.M. 309 (internal quotation marks and citation omitted).

III. ARGUMENT

A. The Commission's IRP Rule is Lawful and Reasonable

1. Adoption of the Rule Was Well Within the Commission's Statutory Authority and was a Reasonable Exercise of the Commission's Oversight Powers

a. The Commission's Statutory Authority is Broad, and Also Expressly Granted by the IRP Statute

The Commission acted well within its statutory authority when it adopted the amended Rule. Contrary to Appellants' arguments that the Commission is limited to the IRP Statute for its rulemaking authority [**BIC 23-24**], this Court has consistently recognized that deference to the Commission is appropriate when the Commission is engaging in policy-making consistent with the Legislature's intent. *See, e.g.*, *New Energy Econ., Inc. v. N.M. Pub. Regul. Comm'n*, 2018-NMSC-024, ¶ 25 ("As to matters of law, if it is clear that our Legislature delegated to the PRC (either explicitly or implicitly) the task of giving meaning to interpretive gaps in a statute, [the Court] will defer to the PRC's construction of the statute as the PRC has been

delegated policy-making authority and possesses the expertise necessary to make sound policy."); *City of Albuquerque v. N.M. Pub. Regul. Comm'n*, 2003-NMSC-028, ¶ 16, 134 N.M. 472 ("[I]t is presumed, in the context of administrative matters that the Legislature has delegated to an agency, that the Legislature intended for the agency to interpret legislative language, in a reasonable manner consistent with legislative intent, in order to develop the necessary policy to respond to unaddressed or unforeseen issues.")

The Legislature has granted the Commission both specific and general authority. Through the first sentence of the IRP Statute, the New Mexico Legislature expressly requires that utilities develop and file their IRP plans "[p]ursuant to the commission's rulemaking authority." Section 62-17-10. Generally, the New Mexico Legislature has delegated authority to the Commission to "adopt such reasonable administrative, regulatory and procedural rules as may be necessary or appropriate to carry out its powers and duties." NMSA 1978, § 62-19-9(B)(10) (2023).

The Legislature further articulated the Commission's powers and duties as follows:

> The commission shall have general and exclusive power and jurisdiction to *regulate and supervise* every public utility in respect to its rates and service regulations and in respect to its securities, all in accordance with the provisions and subject to the reservations of the Public Utility Act [Chapter 62, Articles 1 to 6 and 8 to 13 NMSA 1978], and to *do all things necessary and convenient in the exercise of its power and jurisdiction.*

NMSA 1978, § 62-6-4(A) (2003) (emphasis added). The legislative policy underlying this broad grant of authority to the Commission is as follows:

> [T]he public interest, the interest of consumers and the interest of investors require the *regulation and supervision* of public utilities to the end that reasonable and proper services shall be available at fair, just and reasonable rates and to the end that capital and investment may be encouraged and attracted so as to provide for the construction, development and extension, without unnecessary duplication and economic waste, of *proper plants and facilities and demand-side resources* for the rendition of service to the general public and to industry.

NMSA 1978, § 62-3-1 (B) (2008) (emphasis added).

Appellants' reliance on this Court's holding in *State ex rel. Sandel v. New Mexico Public Utility Commission*, 1999-NMSC-019, 127 N.M. 272, is wholly misplaced. **[BIC 23-25]** The *Sandel* Court was asked by petitioners (which included members of the New Mexico Legislature) to determine if the New Mexico Public Utility Commission exceeded its legislative authority "by effectively deregulating the retail side of the electric power industry in New Mexico in the absence of a statutory mandate from the Legislature." *Id.* ¶¶ 1, 9. Given that the Public Utility Commission made "sweeping pronouncements such as: 'It is the better public policy to always subject utilities to the checks and balances of competition,' and '[t]he public interest is not served by a policy framework that steadfastly holds to a now defunct scheme,'" this Court easily and unanimously determined that the Commission exceeded its authority. *Id.* ¶ 19. This decision reflected the fact that the

Public Utility Commission tried, in that case, to replace the statutorily established public policy, as opposed to carrying out and enacting that public policy. *See id.* ¶ 19.

In contrast, the Final Order at issue here acts to *fulfill* the Commission's statutory mandate. Unlike the commission's action in *Sandel* – which expressly sought to determine what is "the better public policy" – the Commission in the present case expressly articulated the constitutional and statutory authorities under which the Rule amendments were promulgated. *See* Final Order ¶¶ 69-78 ("Legal Authority") **[9 RP 1574-79]**. All of these amendments were enacted to accomplish the public policy set forth in the IRP Statute.

b. Appellants' Arguments Ignore the Plain Language of the IRP Statute and State Law and Policy Advancements

Appellants argue that the Commission lacked foundation for its rulemaking because the IRP Statute itself has not been amended. **[BIC 8-9; 23]** This argument overlooks the plain language of the IRP Statute as well as the recent significant and far-reaching advancements in state law and policies regarding utility resources, which are the key focus of integrated resource planning.

The IRP Statute explicitly mandates that resource types and energy programs be evaluated in a utility's IRP. It states:

> Utility integrated resource plans shall evaluate renewable energy, energy efficiency, load management, distributed generation and conventional supply-side resources on a consistent and comparable basis, and to take into

> consideration risk and uncertainty of fuel supply, price volatility and costs of anticipated environmental regulations in order to identify the most cost-effective portfolio of resources to supply the energy needs of customers.

Section 62-17-10. Since the IRP Statute's adoption, the Legislature has enacted or amended numerous statutes regarding these resources that it mandates to be evaluated. These include the Public Utility Act, NMSA 1978, §§ 62-3-1 to 5 (1967, as amended through 2008); the Efficient Use of Energy Act, NMSA 1978, §§ 62-17-1 to 11 (2005, as amended through 2007); the Renewable Energy Act, NMSA 1978, §§ 62-16-1 to 10 (2004, as amended through 2007); the Energy Transition Act, NMSA 1978, §§ 62-18-1 to 23 (2019); the Community Solar Act, NMSA 1978, §§ 62-16b-1 to 8 (2021); and the Grid Modernization Act, NMSA 1978, §§ 62-8-13 (2020, as amended through 2021). **[9 RP 1561-62]** Therefore, the Commission's ability to satisfy the IRP Statute's mandate requires the Commission to update the Rule to account for legislative enactments and amendments put into effect since the IRP Statute's inception.

The Commission's update of the Rule is also in accordance with this Court's guidance. This Court has held that the Public Utility Act is "a *comprehensive regulatory scheme* granting the PRC the policy-making authority to *plan and coordinate* the activities of New Mexico public utilities, in a manner consistent with the Legislature's stated goals." *Dona Ana Mut. Domestic Water Consumers Ass'n v. N.M. Pub. Regul. Comm'n*, 2006-NMSC-032, ¶ 16, 140 N.M. 6 (emphasis added).

In the rulemaking proceeding, the Commission succinctly explained the competing policy considerations and the reasons for its amendments to the Rule:

> Integrated resources plans must not wither on the vine after their submission, relegated to a mere compliance docket, remaining static. Rather, execution must follow planning, which must be dynamic. Implementation of the Proposed Rule increases transparency and provides guidance for the execution of a utility's plans. If a material event occurs that warrants a different course of action than the submitted action plan entails, the utility is required to put the Commission and other stakeholders on notice as to how that change affects both the utility's need and its action plan through on that need . . . . To be sure, the Legislature did not determine that integrated resources plans must be filed periodically with the Commission simply for those plans to exist. Rather the IRP, as a planning tool, is meant to inform the public and Commission so that it may carry out its mandate to ensure just and reasonable rates under the PUA *inter* alia.

[9 RP 1587-88 ¶ 96] Accordingly, in acting to amend the Rule, the Commission was cognizant of its regulatory responsibilities and that it must comply with the obligations imposed upon the Commission by the Legislature.

Further, Appellants' claim that prior Commission practice has fixed the meaning of the IRP Statute **[BIC 34-35]**, and that it therefore does not permit the Commission to require a utility to conduct an RFP, is erroneous for multiple reasons. First, the rule has been amended multiple times, altering the IRP process in each case, and therefore defeating the claim that the immediately prior IRP rule fixed the meaning of the IRP Statute. The Commission and parties took note of prior IRP rule amendments, which Appellants did not contest. **[9 RP 1511-12 ¶ 97-98, 1512-13 ¶ 255, 1514-15 ¶ 259, 1516 ¶ 266]**

Second, Appellants incorrectly assert that the meaning of the IRP Statute is fixed by the rule, when in fact the meaning of the IRP Statute was fixed by the Legislature, and the Rule has been revised to fulfill that fixed meaning. Stated simply, the form of the Rule has never altered or influenced the clear, fixed meaning of the IRP Statute; the rule has simply aimed to fulfill it. Third, Appellants assert a false dichotomy in support of their argument, claiming that the meaning was fixed to preclude "compelling specific resource procurements," **[BIC 34]** implying that the current Rule compels specific resource procurements. But, as explained extensively herein, the amended Rule does not compel specific resource procurements.[4] So, even if the meaning of the IRP Statute had been fixed by the past IRP rule, which it was not, the amended Rule would not contradict that meaning because it does not compel specific resource procurements.

Finally, Appellants support their argument with an inaccurate presentation of *New Energy Econ.*, 2018-NMSC-024. Appellants reference this Court's denial of an RFP requirement, in that case, as support for a fixed meaning in which RFPs cannot ever be required in an IRP planning process. **[BIC 35]** But Appellants fail to note that the Court's ruling was based upon the IRP rule that was law at the time of that proceeding. Moreover, since the IRP Statute is put into effect "[p]ursuant to the commission's rulemaking authority," it is meaningless for Appellants to claim that

[4] *See infra*, Section III.A.3.

the Rule cannot include an RFP requirement because "[t]he IRP Statute setting forth the Commission's powers has not changed since the *New Energy Economy* decision." **[BIC 35]** If Appellants' logic were to be followed, then no changes to the Rule would have been permissible since its first articulation, since the IRP Statute has never changed. However, the Rule has undergone multiple revisions without a change to the IRP Statute, which proves Appellants' argument to be false. For these reasons, Appellants' arguments, which are based upon the false notion that prior IRP rules fixed the meaning of the IRP Statute, are without merit.

2. The Commission Interpreted the IRP Statute Consistent with Legislative Intent

In promulgating the Rule, the PRC interpreted and implemented legislative intent in a reasonable manner. The Commission identified public interest concerns in previous utility IRP and procurement processes, carefully considered various options that might address its concerns, and tailored its rule amendments to address its concerns. **[9 RP 1428-29]**

a. The Commission Amended the Rule to Address Specific Public Policy Concerns Consistent with the Intent of the IRP Statute

At heart, the Rule's objective remains the same as it did prior to the amendment: ensuring utility compliance with the IRP Statute through PRC oversight of utilities' integrated resource plans with the objective of identifying the most cost-effective portfolio of resources to serve customers' needs, considering other policy

matters such as renewable energy and energy efficiency. *See* 17.7.3.6 NMAC. The prior rule clearly stated:

> The purpose of this rule is to set forth the commission's requirements for the preparation, filing, review and acceptance of integrated resource plans by public utilities supplying electric service in New Mexico in order to identify the most cost effective portfolio of resources to supply energy needs of customers. For resources whose costs and service quality are equivalent, the utility should prefer resources that minimize environmental impacts.

17.7.3.6 NMAC (4/16/2007). The Rule amendments do not change or expand that objective, but simply adjust the regulatory processes to be followed in order to more fully ensure that utility IRPs and the procurements that follow from them actually fulfill the intent of the IRP Statute. **[*See* 9 RP 1676-1678]** As noted above, the IRP Statute is specific in requiring utilities to include a public advisory process and a consistent and comparable evaluation of renewable energy, energy efficiency, load management, distributed generation, and conventional supply-side resources.

The Commission's order initiating the rulemaking clearly stated its objectives to address concerns with the prior IRP Rule **[1 RP 2-3]**, which included:

- to update the IRP Rule to comply with the laws that have been enacted and/or amended since the original IRP rule was promulgated in 2007;
- to set forth the Commission's requirements for the preparation, filing, review, and acceptance of IRPs by public utilities in order to identify the most cost-effective portfolio of resources to supply the energy needs of customers;
- to establish a competitive format for analyzing alternative resource portfolio plans in order to ensure fair, robust competition in selection

of plans that are consistent, efficient, and in harmony with the IRP process;

- to ensure that utilities, when proposing resources, prioritize those that best comply with the state's requirements for reducing greenhouse gas emissions, fostering clean energy development, and modernizing the grid;
- to ensure that, in considering proposed resources, utilities shall prioritize distributed energy resources, demand response, and focus on energy efficiency, renewable energy, and flexible generation, including but not limited to low-emission fueled resources, energy storage systems, and transmission and distribution grid improvements;
- to improve transparency for regulators, intervenors, and the public in the planning and procurement process; and
- to minimize hastily reviewed last-minute regulatory decisions created by current deficiencies in PRC planning and procurement processes.

Each of these objectives, and the provisions of the Rule that implement them, are reasonable. The Commission correctly identified concerns with previous IRP proceedings that it sought to address to protect the public interest by amending the Rule to do the following:

- provide for early and increased stakeholder involvement;
- provide for improved transparency;
- provide the Commission with improved evidentiary records and specific timelines for its consideration of critical energy resource choices to be made by the utilities;
- ensure that updated state policies and all appropriate technologies are properly considered in utilities' resource decisions;
- improve the current, at times ineffective, public input process; and
- address recurring problems of poorly designed and questionably non-compliant, and certainly non-transparent resource solicitations experienced in recent years.

[9 RP 1428 ¶¶ 38, 39] Other parties also identified the same needs for improved IRP and procurement processes based on past experiences. **[*See, e.g.*, 1 RP 116-117; 2 RP 292; 3 RP 393-94, 423-29; 6 RP 784-85, 787, 821-22]**

Appellants fail to carry their burden to demonstrate how the Rule amendments that address these concerns are not reasonable or in the public interest. This Court should defer to the Commission's determination that amendments to the Rule are consistent with the intent of the IRP Statute and the other statutes by which it is governed. *See Morningstar*, 1995-NMSC-062, ¶ 12 ("The court will confer a heightened degree of deference to . . . the determination of fundamental policies within the scope of the agency's function.").

b. Review and Comment on Utilities' RFPs is a Proper and Reasonable Approach to Effectuate the Intent of the IRP Statute

Appellants focus on the Rule's requirements for a procurement process that follows the Commission's acceptance of an IRP, review of the proposed procurement request for proposals ("RFP"), and use of an Independent Monitor ("IM"). Appellants assert that the Commission has wrongly assumed power over utility procurements. **[BIC 33]** Contrary to this erroneous assertion, the Rule expressly leaves the selection of proposed procurements squarely in the utilities' hands. 17.7.3.9.E(2), 17.7.2.12(D) NMAC. Appellants also fail to note that independent

monitors are fairly common in other jurisdictions and work within the procurement process without assuming power over the regulated utilities.[5]

In addition, the Commission recognized that the linkage between resource planning and resource procurement is obvious and undeniable – the purposes of a statutorily mandated IRP and Commission-accepted action plan remain unfulfilled if they are not implemented. **[9 RP 1368, 1567, 1581, 1632]** The Commission recognized that it cannot sufficiently regulate the filing of IRPs to identify the most cost-effective portfolio of resources without there being an accompanying process to evaluate how the actual resources were procured and determined to be the most cost effective. **[9 RP 1440]** The Commission further recognized that the lack of linkage between IRP planning and actual procurements has led to concerns in subsequent procurement proceedings.[6] **[9 RP 1477]** It was therefore reasonable for the Commission to conclude that the planning process set forth in the Rule would be ineffective without oversight of the RFP process. [*See* **9 RP 1440** "The Proposed Rule provides a process to evaluate actual potential generation resources in order to

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[5] The Commission and parties noted that IMs are authorized in several other states **[3 RP 403, 9 RP 1521-22]**

[6] The Commission has authority to oversee and approve utility procurements in subsequent proceedings. NMSA 1978, § 62-9-1 (authority to approve Certificates of Convenience and Necessity ("CCN") for new construction and operations; NMSA 1978, § 62-6-12 (authority to approve acquisitions); 17.9.551 NMAC (authority to approve Power Purchase Agreements ("PPA")); and NMSA 1978, Section 62-16-4 (authority to approve procurements to comply with the Renewable Energy Act).

achieve the goals of a public utility's integrated resource plan, legislative directives and the Commission's Constitutional responsibility."] Appellants fail to carry their burden to demonstrate that such linkage to strengthen the Commission's consideration of resource procurements is unreasonable.

The purpose of the RFP review is to "ensure cost competitiveness and fairness in procurement by comparing proposals among bidders through a transparently designed and monitored request for proposals." 17.7.3.12(A) NMAC. Similarly, the use of an IM is to "help the commission determine that the request for proposals design and execution is fair, competitive, and transparent." 17.7.3.14(A) NMAC. Providing for competitiveness (leading to low-cost procurement), fairness, and transparency is squarely within the Commission's sphere of authority and is reasonable to protect the public interest and fulfill the IRP Statute's objective of identifying the most cost-effective resource portfolio for utility customers. *See* Section 62-17-10. The Rule provides for such processes for the utility's and the public's benefit in advance of and during issuance of the RFP, preventing the Commission from being subject to the lack of a fair, transparent RFP process in a later procurement case, when it is essentially *too late*. **[*See* 9 RP 1429, 1440, 1533]**

Moreover, while the Rule provides for public and Commission comments on the proposed RFP and consideration of IM comments, it does not mandate that the utility revise the RFP based on these comments, which "shall be considered, and

may be incorporated, by the utility prior to the issuance of the RFP." 17.7.3.12(D) NMAC (emphasis added). Similarly, the IM is an advisor to the Commission and will report on the RFP process, but "shall not make or participate in the public utility's decisions regarding the procurement process or the selection of resources." 17.7.3.14(A) NMAC. Thus, contrary to Appellants' erroneous assertions **[BIC 33]**, the utility, not the Commission, retains ultimate control over its RFP and its procurement. It is up to the utility to accept or ignore the comments provided by the Commission, the public, and the IM. *See* 17.7.3.12 and 17.7.3.14(A) NMAC. Appellants fail to carry their burden to demonstrate how such protection of the public interest is not reasonable.

c. The Commission Reasonably Determined that the Rule Should Not Include a Presumption of Prudence

Because the Rule retains utility discretion and does not create a litigated approval process for the IRP, the Rule properly does not confer a presumption of prudence upon an accepted IRP. While Appellants complain they should receive a presumption of prudence due to increased oversight, their retention of full discretion over their IRP, RFP, and procurement, irrespective of adverse comments, does not warrant such a presumption.

The Commission considered this issue carefully. Section 13 of the proposed rule in the Notice of Proposed Rulemaking ("NOPR") would have given an evidentiary presumption to a utility that could show that, in a subsequent resource

procurement proceeding, the procurement is consistent with its approved statement of need and action plan. **[9 RP 1510, ¶ 247]** It was noted that a previous version of the IRP rule included a rebuttable presumption, but that was removed in the 2017 amendments to the prior IRP rule. **[9 RP 1514, ¶ 259]** The Commission's reasoning in that case was that the IRP Statute frames the IRP as a "planning tool" and the IRP contains only proposed or intended resource types. Therefore, a Commission-accepted IRP, and its stated resource types, are not necessarily proof or *prima facie* evidence that the stated resource types (not the particular resource being proposed) are required by the public convenience and necessity. *See In re Proposed Amendments to the Integrated Resource Planning Rules 17.7.3 NMAC*, NMPRC Case No. 17-00198-UT, Final Order on Integrated Resource Planning Rule Amendments at 2-3, ¶ 5 (January 10, 2018).

Following multiple rounds of comments on this issue from diverse perspectives, the Commission decided to remove the rebuttable presumption provision: "The Commission finds that it should not create a litigated approval process for the statement of need and action plan. Consequently, it would not be proper to award an evidentiary presumption to the outcomes of a process that is not subject to litigation and approval." **[9 RP 1515, ¶ 261; *see also* 9 RP 1517, ¶ 269]** The Commission instead retained the role of the IRP as a "planning tool," provided for Commission acceptance of an IRP as compliant with the Rule rather than

adjudicated approval of the utility's choices, and noted its concern to protect due process rights of intervenors and the public: "Any issues that a party has with a utility's proposed procurement may be fully and fairly litigated in that proposed procurement's approval docket, *i.e.*, due process is afforded." **[9 RP 1517, ¶ 270]**

The Commission was within its discretion to decide not to include a rebuttable presumption on these grounds.

3. The Rule Does Not Abrogate Utility Control of Resource Planning or Procurement

The Rule does not abrogate utility control of resource planning or procurement. The Rule does not prescribe the specific resources or even the generic types of resources to be procured. Rather, the Rule establishes that "[t]he plan shall show the resource options the *utility intends* to use to meet [the service needs of its customers over the planning period]." 17.7.3.8(A) NMAC (emphasis added). The Rule further states, "The utility is only required to identify a resource option type, unless a commitment to a specific resource exists at the time of the filing." 17.7.3.8(A) NMAC. The Rule only requires the utility to present its planned intent, and in no way usurps a utility's discretionary power to plan and pursue its resource options.

The utility's control over procurement is emphasized by 17.7.3.10 and 17.7.3.11 NMAC, which address the statement of need and the action plan. "The statement of need is a description and explanation of the amount and the types of

new resources, including the technical characteristics of any proposed new resources, *to be procured* . . . ." 17.7.3.10(A) NMAC (emphasis added). Only the amount and type of needed resources are identified by the IRP process. The actual procurements will take place in a future case filing, after the IRP is completed and accepted, and will be proposed by the utility. This is explained in 17.7.3.11(A) NMAC, which states, "The utility's action plan shall: detail the specific actions the utility shall take to develop any resource solicitations or contracting activities to fulfill the statement of need as accepted by the commission." 17.7.3.11(A)(2) NMAC. The utility defines its own action plan and at a later date develops its own resource solicitations. It is after the Commission's acceptance of the utility's IRP that the utility develops solicitations that fulfill the needs that were defined by the utility during the IRP process. Thus, while the amended Rule provides for more transparency to stakeholders and the public regarding the procurement process, it does not, in any way, abrogate the utility's control of procurement.

Notably, the amended Rule states that the utility's action plan "does not replace or supplant any requirements for applications for approval of resource additions set forth in New Mexico law or commission regulations." 17.7.3.11(C) NMAC. Though Appellants point to a distinction between statutes that govern procurements and the statute that governs IRPs and imply that the distinction is not maintained in the current Rule **[BIC 34]**, they fail to note that the amended Rule

explicitly requires that distinction be maintained, and therefore the utility's control of resource selection is guaranteed. *See id.*

The utility also maintains discretionary control over the processes that inform their procurements. The Rule establishes that comments on the utility's RFP "may be incorporated" by the utility. 17.7.3.12(D) NMAC. The Rule further establishes that the utility may utilize "additional criteria" of its own choosing in the RFP process, in addition to the minimum criteria provided in the rule. 17.7.3.12(J) NMAC. In addition, the Rule is clear that the IM does not abrogate the utility's control over procurement: "The independent monitor shall advise the commission and report on the RFP process, but the independent monitor *shall not make or participate in the public utility's decisions regarding the procurement process or the selection of resources.*" 17.7.3.14(A) NMAC (emphasis added).

Though the Rule provides minimum standards for how the IRP is developed, it never impinges upon the management prerogative of the utilities over the recommendations that management makes to the Commission. As this Court has established, though the Commission's authority to "inject itself in the internal management of a public utility is limited, . . . courts have permitted commissions substantial latitude in protecting the public." *Application of PNM Elec. Servs. v. N.M. Pub. Util. Comm'n*, 1998-NMSC-017, ¶ 21, 125 N.M. 302; *see also Ariz. Corp. Comm'n v. State ex rel. Woods*, 830 P.2d 807, 818, 171 Ariz. 286 (Ariz 1992)

(en banc) ("The Commission must certainly be given the power to prevent a public utility corporation from engaging in transactions that will so adversely affect its financial position that the ratepayers will have to make good the losses . . . ."). In support of this latitude, this Court clarified that "[t]he 'invasion of management' prohibition upon which PNM relies has waned," and highlighted the fact that New Mexico courts recognize the "expansive regulatory power" of the Commission, "broadly and liberally construing the Public Utilities Act to effect the Legislature's articulated policies." *Application of PNM Elec. Servs.*, 1998-NMSC-017, at ¶¶ 21, 14.

Crucially, this Court highlighted authority establishing that "commissions are generally empowered to act in areas seemingly reserved to management prerogative where the regulated action is 'impressed with public interest.'" *Id.* ¶ 21. (internal quotation marks and citation omitted). This is significant because the basis for the Commission's authority is defined in the Public Utility Act's Declaration of Policy, where the Legislature established that "[i]t is the declared policy of the state that *the public interest*, the interest of consumers and the interest of investors require the regulation and supervision of public utilities . . . ." Section 62-3-1(B) (emphasis added). Given that this regulation and supervision, in the case of the IRP Statute, is specifically accomplished "[p]ursuant to the [C]ommission's rulemaking authority," it is evident that the Commission has been granted liberal authority to protect the

public interest by effectuating its rulemaking authority to formulate the integrated resource planning Rule. *See* § 62-3-2 (the Public Utility Act "shall be liberally construed to carry out its purpose").

Additionally, the Rule does not frustrate the utilities' management prerogative over management's recommendations to the Commission by simply providing for more meaningful public input. The Appellants claim that the Commission can accept a commentor's or stakeholder's alternative proposal **[BIC 10, 41].** But this is incorrect because the Commission is limited to identifying deficiencies in the utility's filing and returning it to the utility with instructions for refiling to be compliant with the Rule. *See* 17.7.3.9(E)(4) NMAC. The Rule preserves the utilities' ultimate decision-making power, and its allowances for public input are dictated by the IRP Statute, which states simply and clearly: "The preparation of resource plans shall incorporate a public advisory process." Section 62-17-10. Meaningful public input, as statutorily required via the public advisory process mandated in the development of integrated resource plans, should be protected and promoted against the utilities' attempts to deny it.

It is in this light – of the Commission's broad rulemaking authority and the value of public input – that Appellants' claims should be considered. Appellants assert that the Commission has assumed the power to prescribe utility resource selection. **[BIC 33]** This assertion is incorrect as the Commission has simply

established minimum factors that should be considered to protect the public interest, has established an RFP process that serves only to inform the resource selection decisions that a utility will independently make, and has appointed an IM that "shall not make or participate in the public utility's decisions regarding the procurement process or the selection of resources." 17.7.3.14(A) NMAC. None of these measures invade the power of the utility to control its own resource selections and procurements, and none of these measures abrogate the utility's management prerogative.

4. The Rule Presents No Barrier to Multi-State Jurisdictional Planning

Appellants complain that the Rule will interfere with or prevent multi-state planning since New Mexico's IRP Rule requirements may result in different outcomes than those of Texas, within which EPE and SPS both serve customers. **[BIC 5, 13, 36-38]** The Rule presents no barrier to multi-state jurisdictional planning. In fact, the Rule restates the exact same statutory language that provides utilities the ability to accomplish multi-state resource planning. Section 62-7-10 and 17.7.3.16(C) NMAC both identically state, "The commission shall take into account a public utility's resource planning requirements in other states and shall authorize utilities that operate in multiple states to implement plans that coordinate the applicable state resource planning requirements." The Rule also establishes methods by which it can be assured that the Commission knowledgeably approves plans that

coordinate multi-state resource planning requirements. The Rule mandates: "A multi-jurisdictional utility shall include in its IRP . . . . *a description of how it is coordinating the IRP with its out-of-state resource planning requirements.*" 17.7.3.8(D) NMAC (emphasis added). Rather than present a barrier to multi-state jurisdictional planning, the Rule explicitly aims to achieve it.

Appellants also falsely claim "the Rule's facilitated stakeholder process allowing commenters to submit alternative plans to the Commission for review (17.7.3.9 NMAC) and the request for proposals process (17.7.3.12 NMAC) leave no room for consideration of resource planning and selection requirements of another jurisdiction." **[BIC 37]** Notably, Appellants cite no specific text of the Rule in support of this claim. In fact, a review of the Rule provisions cited by Appellants makes it clear that: 1) commenters have the ability to submit comments taking into account requirements of other jurisdictions; and 2) the utility has no obligation to change its IRP submission in response to the public comments. The Rule establishes that "[t]he utility shall file, within 60 days of the utility's filing of the IRP, a written response to all timely filed written public comments, stating *whether it adopts any of the written comments* as amending the IRP *and the reasons why or why not.*" 17.7.3.9(E)(2) NMAC (emphasis added). The Rule further establishes:

> Within 21 days of receipt of the RFP documents, commissioners, commission utility division staff, and intervenors may submit comments to the utility, including on whether its proposed RFP conforms with its accepted statement of need and action plan and is not

> unduly discriminatory. Comments shall be considered, and *may* be incorporated, by the utility prior to the issuance of the RFP.

17.7.3.12(D) NMAC (emphasis added). Thus, an actual reading of the Rule reveals that there are no limits on the ability of commenters to consider multi-jurisdictional planning, no obligation for the utility to adopt any comments, and no limitations to the utilities' multi-jurisdictional planning capabilities.

Furthermore, the fact that New Mexico and Texas have different statutes and policies does not impose constraints on New Mexico, the Commission, or its rulemaking authority. Appellants' claim that they are improperly restricted relies on a right that the utilities do not have. Specifically, Appellants insinuate that it is improper that resource selection, overseen by the Commission, would proceed "even if another jurisdiction has already engaged in a planning process that leads to a different solution." **[BIC 37-38]** And Appellants claim "the Commission is superseding the consideration of any involvement by Texas state regulators in considering resources that could serve both states." **[BIC 13]** But Commission regulation and supervision in New Mexico have always proceeded even if another jurisdiction has already engaged in a planning process that led to a different solution. *See* Section 62-6-4. The Commission's navigation of decisions made in other states is an everyday occurrence in the handling of case filings of New Mexico's public utilities, but the Commission never cedes authority to the decision makers of other states.

The Commission has historically made it clear that each state's commission has exclusive jurisdiction over the operations that occur in the same state in which a state's commission is granted authority. *See, e.g., In Re Zia Nat. Gas Co.*, Final Order Case No. 3110 (Dec. 7, 1999) (holding that the Commission retains exclusive jurisdiction over a utility's New Mexico facilities and operations, and "over any impact on, or issues regarding, those facilities and operations which arise due to . . . Texas facilities and operations," and vice versa: "This Commission agrees with the Staff that Texas, as opposed to the NMPRC, is the proper authority to regulate . . . service to customers in that state").

Hence, Appellants' claim that the Rule imposes an inappropriate burden on a utility that has already engaged in a planning process in another state is a vacuous assertion. By statute, the Commission maintains exclusive jurisdiction over public utility operations in the state of New Mexico, and that authority is not limited by processes that occur in another state. Moreover, as set forth above, the Rule actually does take into account multi-jurisdictional planning needs and Appellants' claim is unsupported and false.

5. The Rule Provides Appropriate Confidentiality, Exemption, and Variance Provisions

Appellants incorrectly assert that the Rule does not include appropriate protections for bidders' confidential information. **[BIC 13]** To the contrary, the Rule expressly provides that the utility may submit any portions of its IRP under seal to

the extent the utility deems specific information to be confidential and provides for entry of a protective order. 17.7.3.15(A) NMAC and 17.7.3.15(B) NMAC. The Rule also provides for protection of bid information pursuant to a Commission-issued protective order. 17.7.3.15(C) NMAC. Appellants fail to identify how such provisions, typically applied in Commission proceedings, fail to protect from public disclosure material considered to be confidential.

Appellants complain that the Commission's oversight of the RFP process will hamper utilities' abilities to address unforeseen events and emergencies. To the contrary, the Rule expressly provides for exemptions from the Rule under certain circumstances. 17.7.3.16 NMAC. In addition, the Rule provides for variances from the Rule that may be requested under particular circumstances. 17.7.3.17 NMAC.

B. The Rule Does Not Violate Due Process Rights

1. Appellants Fail to Articulate a Substantive Due Process Right at Risk of Violation

Appellants make vague and undeveloped references to the Rule amendments violating Appellants' due process rights **[BIC 43-45]** yet fail to articulate exactly how such rights are allegedly violated. It is well-established that the

> Due Process Clauses of the United States and New Mexico Constitutions require the government to afford certain procedural protections prior to depriving any person of a constitutionally protected interest in life, liberty, or property . . . . Accordingly, [a]dministrative hearings that affect a property or liberty interest must comply with due process.

N.M. Dep't of Workforce Sols. v. Garduno, 2016-NMSC-002, ¶ 10 (internal quotation marks and citation omitted).

To the extent Appellants claim a property interest in their ability to select resources and transmission and distribution systems, Appellants do not (and cannot) cite to any provision of the Rule that deprives them of control over their respective resource plans and procurements. In fact, the Rule expressly leaves the selection of proposed procurements resulting from an RFP in the utilities' hands, although the PRC has authority under the Public Utility Act to approve specific proposed procurements in subsequent proceedings, which Appellants do not challenge here.

Relatedly, substantive due process "requires that regulations promulgated according to the grant of police powers, which place a protected property interest at risk, bear a reasonable and valid relationship to public morals, health, or safety." *Mills v. N.M. Bd. of Psych. Exam'rs*, 1997-NMSC-028, ¶ 14, 123 N.M. 421. As this Court has recently explained, it will apply a modified rational basis standard in reviewing substantive due process challenges under the New Mexico Constitution. *See Citizens for Fair Rates & Env't v. N.M. Pub. Regul. Comm'n*, 2022-NMSC-010, ¶ 40. "In practical terms, our rational basis standard requires the challenger to bring forward record evidence, legislative facts, judicially noticeable materials, case law, or legal argument to prove that the [challenged legislation] is . . . not rationally

related to the articulated legitimate government purposes." *Id.* (internal quotations, and citations omitted).

Not only have Appellants failed to bring forth *any* evidence to satisfy their initial burden of persuasion in support of their alleged due process violations, but the record is replete with evidence, discussed throughout the Commission's Final Order **[9 RP 1416-1544]**, demonstrating how and why the amendments to the Rule are rationally related to New Mexico's legitimate governmental purpose of overseeing utility resource planning. Appellants ignore New Mexico's legitimate government purpose in implementing the PRC's constitutional and legislative mandates to regulate and supervise public utilities,[7] and fail to demonstrate that the Commission's rulemaking is beyond its statutory authority or does not reasonably implement the legislative intent of the statutes the Commission is obligated to implement in the public interest.

2. The Rule Does Not Violate Procedural Due Process

a. The Rule's Use of an Independent Monitor Does Not Violate Due Process

[7] The PRC's constitutional mandate is to regulate utilities as provided by law. NM Const. Art. XI Sec. 2. The Legislature's expressed policy is that the public interest requires the regulation and supervision of public utilities by the PRC, and the Legislative directed the PRC "to do all things necessary and convenient in the exercise of its power and jurisdiction." NMSA 1978, §§ 62-3-1, 62-6-4.

Appellants assert that the Commission's creation of an IM "intrudes on the Utilities' management practices and violates their due process rights." **[BIC 44]** Appellants contend that the IM's reports, which may be used as evidence, are subject only to "comments." **[BIC 44]** However, the Rule grants the public utility undertaking the RFP process, as well as other parties to the proceeding, the right to comment on the IM reports, and present defenses to the IM's findings on the RFP process. 17.7.3.14 NMAC. These comments become part of the public record. That procedure is consistent with due process. *See Alb. Bernalillo Co. Water Util. Auth.*, 2010-NMSC-013, ¶ 21 (stating that "the fundamental requirements of due process in an administrative context are reasonable notice and opportunity to be heard and present any claim or defense" (internal quotation marks and citation omitted)).

Citing 17.7.3.14(G) NMAC, Appellants claim, without support, that the "IM's opinions have superior weight, over all other party's [*sic*] opinions including Staff's." **[BIC 45]** Appellants' position is inconsistent with the plain language of the Rule. Subpart G describes the duties of the IM and the two reports that the IM will prepare. That section provides, in relevant part:

> The IM shall file a minimum of two reports with the commission. The first report shall analyze the RFP design (design report). The final report shall review the fairness of the RFP execution (final report).

17.7.3.14(G)(1) NMAC.

> The RFP design report shall state whether the contents of the proposed RFP comply with the requirements of 17.7.3.10 NMAC through 17.7.3.12 NMAC and are otherwise reasonable, competitively fair,

> designed to promote a robust bid response, and designed to identify a utility's most cost-effective option among resource alternatives to meet its service needs in compliance with this rule.

17.7.3.14(G)(1)(a) NMAC.

> In the final report, the IM shall, . . . review and report on the reasonableness, competitiveness, and fairness of the utility's solicitation, evaluation, and procurement process, including but not limited to bid screening, comparison, evaluation, and short-listing criteria.

17.7.3.14(G)(1)(b) NMAC.

Subpart G does not direct the Commission to give the IM report greater weight than any other evidence. To the contrary, other parts of the Rule authorize the public utility, Commission Utility Division Staff, and any parties to the public utility's most recent IRP docket to comment on the design report. *See* 17.7.3.14(I)(1) NMAC. And, though the Commission may rely upon the IM reports as evidence, the reports "shall *not be conclusive* as to whether or not a resource proposed by the utility shall be approved." 17.7.3.14(I)(2) NMAC (emphasis added). Accordingly, the IM reports may only be used as evidence of whether the RFP process is fair, reasonable, and competitive, and the Rule does not give the IM reports greater weight than other evidence, including the comments made by the utility and other parties on the reports.

The scope of the IM's authority is limited to making a report on whether the RFP process is fair, and the IM lacks any authority to direct the Commission to agree with or act on the report. At most, the Commission *may rely* on the report to request

(not order) that the utility make modifications in a timely manner. 17.7.3.14(G)(1)(b)(ii) NMAC. The Rule does not authorize the IM to request that the utility make modifications based on its report, nor does the IM have decision-making authority over any other aspect of the IRP. As explained by the Rule, the IM "shall advise the commission and report on the RFP process, but the [IM] *shall not* make or participate in the public utility's decisions regarding the procurement process or the selection of resources." 17.7.3.14(A) NMAC (emphasis added).

Appellants correctly point out that the IM is not a witness under the Rule, but improperly ask this Court to determine that the IM should be subject to cross-examination. **[BIC 44-45]** The IM serves in a limited advisory capacity, like others who serve in advisory roles to the Commission. *See* NMSA 1978, § 62-19-19 (2023) (regarding PRC advisory staff, as distinct from PRC adjudicatory staff pursuant to NMSA 1978, Section 62-19-17 (2023), which expressly provides that adjudicatory staff may present testimony); *see also Qwest Corp. v. N.M. Pub. Regul. Comm'n*, 2006-NMSC-042, ¶ 58, 140 N.M. 440 (holding that the Commission may hire advisory staff to assist the PRC, and need not disclose advice from advisory staff, including a contract expert). Appellants point to no authority under which an advisor to the Commission must be subject to cross-examination. *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764 ("[T]o present an issue on appeal for review, an appellant must submit argument *and authority* as required by rule.").

b. The Rule's Lack of an Express Appeal Provision Does Not Violate Due Process

Appellants complain that the Rule does not grant a right to appeal the final decision on the IRP and RFP. **[BIC 46-47]** However, any party to any proceeding before the Commission may file a notice of appeal with the New Mexico Supreme Court for a review of a final order by the Commission. *See* NMSA 1978, § 62-11-1 (1993). A final order made by the Commission pursuant to a rule is appealable even if the rule does not expressly provide a right to appeal.

Moreover, though the Appellants base their argument in an alleged lack of a "'final' decision," and claim the prior Rule granted the Utilities a greater right to appeal, they then explain that the "'Review, Acceptance, and Action' provisions of [the prior rule's] 17.7.3.12 were similar to the acceptance or rejection provisions of 17.7.3.9(E) NMAC of the new Rule." **[BIC 46]** Further, the Appellants expressly reference "the Commission's final order" that will be made "[a]fter the Commission accepts or rejects an IRP . . .." **[BIC 46]** It is notable that the Appellants misrepresent the Commission's statement regarding making "no *substantive* decisions on the utility's IRP or RFP." **[BIC 46]** The record makes clear that the Commission was referring to the fact that the Commission does not abrogate the utility's freedom and discretion to choose how to conduct its IRP and RFP processes. **[9 RP 1447 – 48]**. The Appellants then inappropriately conflate and transpose "substantive" into "final" in their brief, and then rely on that transposition to claim that they are

deprived of a right to appeal. **[BIC 46]** The Court should recognize that the Appellants have confused the issue of whether there is a final order, which is evidenced by the Appellants recognizance that the "Review, Acceptance, and Action" provisions are similar in the Prior and Amended Rule,[8] and the Appellants provision of a list of actual Final Orders that were issued under the prior rule. **[BIC 47]** The Appellants fail to demonstrate how processes will be any different under the amended Rule.

Moreover, though the Commission may accept the statement of need and action plan through its acceptance of the IRP as being compliant with the Rule, both documents are subject to modification if the public utilities argue that a "material event" so requires. 17.7.3.8.E(1)(2) NMAC. Importantly, the Commission's action is not *approval* of the utilities' choices of resource types in an IRP – those choices are up to the utility and are not litigated in the IRP proceeding.[9] Rather, the Commission's action is *acceptance that the IRP is compliant* with the Rule. A utility may be required to revise the IRP to comply with the Rule following Commission review or when new circumstances prompt the utility to amend its IRP. *See*

[8] And the Appellants again falsely state that third parties' proposals can be accepted by the Commission, and ignore the Rule's delineated process for responsive comments by the utility.

[9] See discussion above, Section III.A.3.B and note 7 regarding the fact that actual procurement processes follow after Commission acceptance of a utility's IRP plan, and proceed in a different docket.

17.7.3.8(E) and 17.7.3.9(E)(4) NMAC. This approach provides more, not less, opportunity for the utilities to be heard and to adapt their resource planning to evolving circumstances. Given these provisions, and the statutory right to appeal any final order of the Commission, the Rule's lack of express mention of appeal from the Commission's determination on the statement of need and action plan does not constitute a due process violation.

c. Consideration of Public Comments Does Not Violate Due Process

Appellants erroneously assert that the Rule violates their due process rights because, unlike the previous IRP rule, the new Rule "automatically provide[s] for Commission review of alternative proposals by third parties for acceptance." **[BIC 47]** The Rule allows the public to provide comments on the utility's proposed IRP and allows the public to propose a draft statement of need and action plan. 17.7.3.9(E) NMAC. However, the utility has the opportunity to adopt or reject any provisions from a proposed public alternative to its IRP. 17.7.3.9(E)(2) NMAC. The Rule does not authorize the Commission to adopt or require a utility to substitute a member of the public's alternative statement of need and action plan for that proposed by the utility. Rather, the Commission's Utility Division Staff considers both the written public comments and the utility's written responses when it files a statement with the Commission regarding the statement of need's and action plan's compliance with the Rule. 17.7.3.9(E)(3) NMAC. If the Commission then

determines that the utility's IRP is not consistent with the Rule, the Commission identifies deficiencies and returns it to the utility for re-filing. 17.7.3.9(E)(4) NMAC.

This provision of the Rule does not constitute a procedural due process violation. The IRP Statute requires a public advisory process, and this Court has emphasized the importance of public participation in the IRP process. *See New Energy Econ.*, 2018-NMSC-024, ¶ 30 (determining that the Commission was required to permit public participation in the review of PNM's 2014 IRP). Though the Rule is consistent with the Court's holding in *New Energy Economy*, it does not compel the Commission to adopt an alternative plan over the public utility's objection. Accordingly, the public's participation under the Rule does not constitute a procedural due process violation.

d. Changes from the Proposed Rule in the NOPR Did Not Violate Due Process.

The utilities' assertion that their due process rights were violated because stakeholder input provisions were not included in the NOPR **[BIC 39]** is wholly unsupported and incorrect. The opportunity for and role of public input into the IRP process was clearly a live issue in the rulemaking, was commented on by parties including the utilities, and was carefully considered by the Commission. **[9 RP 1469-80, ¶¶ 151-72]** The Commission's decision to include the stakeholder provisions in the final Rule was a logical outgrowth of the proposed rule and parties should have anticipated that change was possible following comments on the NOPR. *See, e.g.*,

Veterans Justice Grp., LLC v. Sec'y of Veterans Affairs, 818 F.3d 1336, 1344 (Fed Cir. 2016) (stating that "an agency's final rule need not be identical to the proposed rule" and holding that "[w]here a proposed rule is modified in light of public comment, the modified rule may be promulgated as a final rule without additional notice and opportunity for comment, so long as the final rule is a 'logical outgrowth' of the proposed rule.")

The fact that the Utilities commented on public input issues is a clear indication that they did anticipate that the change was possible.

C. Appellants Improperly Seek An Advisory Opinion Concerning Issues and Raise Speculative Hypotheticals that May or May Not Arise Under the IRP Rule Amendments

Appellants raise imagined harms that they speculate *could* happen as a result of the Rule amendments. For instance, Appellants erroneously assert that the amendments will result in "resource selection as approved and overseen by the Commission, even if another jurisdiction has already engaged in a planning process that leads to a different result." **[BIC 37]** Notably, Appellants do not allege that there *is* conflict with resource planning in another jurisdiction, only that there *could be* a conflict. Similarly, Appellants march out a parade of horribles they claim may arise from the IM's role in the procurement process and potential issues with appellate rights. **[*See, e.g.*, BIC 44** ("The Rule also permits the IM to submit reports to the Commission that may or may not be subject to challenge at hearing."); *id.* at p. 46

(the Rule does not "provide any means for an evidentiary process for consideration of opposing proposals or the assumptions and positions of commenters, stakeholders, Staff, or the IM").] Appellants' parade of fears about what the Commission may do in future IRP proceedings are based on sheer speculation, which is not substantial evidence upon which either the Court or the Commission can rely. *See* 1.2.2.35(A) NMAC; *see also Pacheco v. Martinez*, 1981-NMCA-116, ¶ 24, 97 N.M. 37 ("Nevertheless, findings must rest on substantial evidence, not speculation and conjecture.").

Not only are Appellants wrong on the merits, for the reasons discussed herein, but more fundamentally Appellants are seeking an order from this Court vacating the amendments to the Rule based upon harms that may or may not occur in the future, and without the benefit of a developed factual record of any such hypothetical violations. As such, Appellants seek little more than an advisory opinion from this Court based upon potential issues that are not ripe for determination and that may never rise to the level of a concrete injury or an actual controversy. As a matter of judicial prudence, this Court should not entertain arguments based upon Appellants' imagined harms. *See Am. Fed. of State, Cnty. & Mun. Emps. v. Bd. of Cnty. Comm'rs of Bernalillo Cnty.*, 2016-NMSC-017, ¶ 18 ("The purpose of the ripeness requirement is and always has been to conserve judicial machinery for problems

which are real and present or imminent, not to squander it on abstract or hypothetical or remote problems." (internal quotation marks and citation omitted)).

This Court historically has refrained from reviewing facial challenges to administrative rules prior to enforcement of such rules and before there is an actual controversy. *See Tri-State Generation & Transmission Ass'n, Inc. v. State ex rel. D'Antonio*, 2012-NMSC-039, ¶¶ 48-49 (holding that claims that a rule promulgated by the New Mexico Office of the State Engineer could result in harm were speculative and not ripe for review without an actual controversy, and that the appellants did not have standing to advance arguments based on the hypothetical effect of the regulations). Indeed, this Court recently rejected a request for a determination of the Commission's authority pursuant to proceedings provided for under the Energy Transition Act (the "ETA") on ripeness grounds. *See Citizens for Fair Rates & Env't*, 2022-NMSC-010, ¶ 27 ("Any dispute about the extent of the Commission's authority in the proceedings contemplated by Sections 62-18-4(B)(10) and 62-18-5(F)(8) would require this Court to set out an advisory opinion, as well as to construe the [Energy Transition Act] in light of other relevant considerations of New Mexico public utility law. We will not undertake such an extensive review today.").

This Court should similarly reject Appellants' invitation to consider the amendments to the Rule, and other relevant consideration of New Mexico public

utility law, based upon hypotheticals alone and in the absence of a developed factual record. Speculation is not evidence and cannot form the basis for overturning the PRC's well considered Rule.

D. The Commission Provided Ample Opportunity for Input and Carefully Considered Comments

The Commission carefully considered the Utilities' and other parties' comments in multiple workshops and comment opportunities both prior to and after issuing the NOPR. The Commission developed the NOPR based on comments and workshop efforts by the Utilities and the public, considered additional comments on the NOPR, and made further amendments based on those comments. In addition, the Commission considered the Utilities' arguments in their Motion for Rehearing and made further amendments to the proposed rule in response to those comments. **[9 RP 1422-27]** The utilities had more than sufficient opportunity to be heard in this rulemaking, and the Commission responded to their and other parties' comments by revising the proposed rule on multiple issues.

IV. CONCLUSION

The Rule is well within the Commission's constitutional and statutory authority, is a reasonable implementation of the intent of the IRP Statute and the Commission's related authorities, does not violate due process, and is the result of the Commission's thorough consideration of comments. The Utilities did not prevail

on all issues raised in the rulemaking, but that does not render the Rule arbitrary or capricious, not based on substantial evidence, or otherwise not in accordance with law. To the contrary, the Rule is the result of substantial input from the Utilities and stakeholders, is well reasoned and well supported by the record, and establishes processes designed to implement the IRP Statute in a fair and transparent manner to support resource planning that is in the public interest. This Court should uphold the Rule.

Respectfully submitted July 20, 2023,

/s/ Keven Gedko
Keven Gedko
Assistant Attorney General
Aletheia V.P. Allen
Solicitor General
New Mexico Office of the Attorney General
408 Galisteo St.
Santa Fe, NM 87501
(505) 717-3500
kgedko@nmag.gov
aallen@nmag.gov
Attorneys for Intervenor-Appellee the New Mexico Office of the Attorney General

/s/ Joseph Yar
Joseph Yar
VELARDE & YAR
4004 Carlisle Boulevard NE, Suite O
Albuquerque, NM 87107
Ph: (505) 248-0050
joseph@verlardeyar.com
Attorneys for Intervenor-Appellee Onward Energy Holdings, LLC

/s/ Joan E. Drake
Joan E. Drake
Susan E. Miller
Modrall, Sperling, Roehl, Harris & Sisk, P.A.
P.O. Box 2168
Albuquerque, NM 87103-2168
(505) 848-1850
jdrake@modrall.com
Susan.miller@modrall.com
Attorneys for Intervenor-Appellee Interwest Energy Alliance

STATEMENT OF COMPLIANCE

As required by Rule 12-318(G) NMRA, undersigned counsel hereby certifies that this brief complies with Rule 12-318(F) NMRA. This brief was prepared using Times New Roman 14-point print. According to Microsoft Word, the body of this brief contains 10,636 words. This brief complies with the limitations set forth in Rule 12-318(F)(2).

/s/ Joan E. Drake
Joan E. Drake

CERTIFICATE OF SERVICE

I hereby certify that, on July 20, 2023, a true and correct copy of the foregoing document was filed and served via the Court's Odyssey File/Serve system, which caused all counsel of record to be electronically served.

/s/ Shawna Tillberg
Shawna Tillberg, Paralegal
Velarde & Yar