IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

EL PASO ELECTRIC COMPANY,

Appellant,

v. No. S-1-SC-39673

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee,

and

ONWARD ENERGY HOLDINGS, LLC,

Intervenor-Appellee,

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

CONSOLIDATED WITH

PUBLIC SERVICE COMPANY OF NEW MEXICO,

Appellant,

v. No. S-1-SC-39676

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AND

SOUTHWESTERN PUBLIC SERVICE COMPANY,

Appellant,

v. No. S-1-SC-39677

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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

BRIEF IN CHIEF

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SUMMARY OF PROCEEDINGS

I.

NATURE OF THE CASE AND SUMMARY OF THE ARGUMENT

Appellants El Paso Electric Company ("EPE"), Public Service Company of New Mexico ("PNM"), and Southwestern Public Service Company ("SPS") (collectively "Appellants" or "Utilities") take this appeal from orders of the New Mexico Public Regulation Commission (the "Commission") issued in the proceeding below captioned *In the Matter of a Commission Rulemaking Regarding NMPRC Rule 17.7.3 NMAC Integrated Resource Plans and Procurement Procedures,* Case No. 21-00128-UT, which adopted extensive amendments to the Commission's integrated resource plan ("IRP") rule, 17.7.3 NMAC (10/27/2022) (the "IRP Rule" or "Rule").

The IRP Rule was originally promulgated in 2007, pursuant to the Efficient Use of Energy Act ("EUEA"), and later revised in 2017 and 2018. The EUEA requires public utilities to file an IRP with the Commission, as stated in Section 62-17-10 (the "IRP Statute"), subject to the Commission's rulemaking authority. NMSA 1978, Section 62-17-1 to 11 (2005, as amended to 2013). The EUEA provides "public utility resource planning to meet New Mexico's energy service needs should be identified and evaluated on an ongoing basis in accordance with the principles of integrated resource planning." Section 62-17-1(I). IRPs evaluate

renewable energy, energy efficiency, load management, distributed generation and conventional supply-side resources "with the chief objective of "identify[ing] the most cost-effective portfolio of resources to supply the energy needs of customers." Section 62-17-10. The preparation of resource plans incorporates a public advisory process. *Id.* Before adoption of the amended rule, and consistent with the mandate of the IRP Statute, the IRP Rule required utilities to identify "resource options" and "the most cost effective resource portfolio". *New Energy Economy, Inc. v. N.M. Pub. Reg. Comm'n,* 2018-NMSC-024, 416 P.3d 277, *citing* 17.7.3.9(B)(4) & (7) NMAC (04/16/2007, as amended through 08/29/2017). The IRP Rule conformed with the IRP Statute by requiring the Commission to review and either accept utility IRP filings or return the filing to the utility with deficiencies to be corrected. 17.7.3.12 NMAC (04/16/2007, as amended through 01/30/2018).

The amended IRP Rule no longer focuses on the identification of the most cost-effective resource portfolio. Instead, the Commission acted beyond the scope of the IRP Statute—and beyond every other statute granting the Commission rulemaking authority—by amending the IRP Rule to include a litany of new requirements that reach beyond the filing of an IRP and into the Utilities' management of resource procurement. The Commission's extensive expansion of

the IRP Rule runs afoul of the IRP Statute by giving the Commission powers not granted to it and by imposing arbitrary and capricious burdens on the Utilities' resource procurement and planning processes.

Appellants intervened in the IRP Rule proceedings below and filed multiple rounds of comments. Appellants are the three electric, investor-owned utilities regulated by the Commission and are the only entities subject to the IRP Rule. Appellants EPE and SPS are also regulated in Texas by the Public Utility Commission of Texas, and all Appellants are regulated by the Federal Energy Regulatory Commission.

The IRP Rule amendments exceed the authority given to the Commission under the IRP Statute by, among other things, creating extensive new requirements for utility resource solicitation and selection and imposing the oversight of a Commission-directed Independent Monitor ("IM") on the Utilities' procurement processes, even though no such requirements or oversight is authorized or contemplated by the IRP Statute or any other law. 17.7.3.12 & 14 NMAC. Contrary to the IRP Statute, this newly-imposed process divests the Utilities of control over the identification of their most cost-effective resource portfolio. *Compare* 17.7.3.8 NMAC (2022) (utility's identification of the most cost-effective resource portfolio

omitted) *with* 17.7.3.9 NMAC (04/16/2007, as amended through 08/29/2017) (utility identifies the most cost-effective resource portfolio). The Commission granted the IM extensive power to direct the Utilities' bid process, evaluate the bids, and report to the Commission. 17.7.3.14(B), (C), (G) & (K) NMAC. The amended rule allows for all of the IM's actions to take place outside of an adjudicatory process, without scrutiny or challenge by the utility or any other party. 17.7.3.14(K) NMAC. Additionally, the amendments require Utilities to compensate a Commission-selected facilitator to oversee a six-month stakeholder process preceding the filing of an IRP, *see* 17.7.3.9 NMAC, even though no law imposes such a requirement for the IRP public advisory process.

The IRP Rule gives the Commission *carte blanche* to reject the Utilities' IRP plans or substitute a commenter's competing or opposing IRP proposals, leaving the Utilities without any recourse to challenge Commission orders. 17.7.3.9(E)(4) NMAC. Conversely, even if the Commission accepts a utility's IRP plan, the utility derives no future regulatory certainty from that acceptance, calling into question the regulatory basis and purpose for the many new burdensome requirements of the amended IRP Rule. The IRP Rule violates the Utilities' procedural due

process rights by imposing a process whereby an IRP is accepted or rejected without any procedural finality, while nonetheless mandating that the utility follow all objectionable plan components. The IRP Rule also fails to meaningfully consider the demands faced by the multi-state jurisdictional utilities, EPE and SPS, to plan resource procurements for integrated utility system governed by two state jurisdictions.

Appellants ask the Court to vacate the Commission's orders adopting the IRP Rule.

II.
COURSE OF PROCEEDINGS AND DISPOSITION BELOW

The Commission's adoption of the IRP Rule resulted from two distinct rulemaking stages. The first began on May 26, 2021, when the Commission issued its *Order Opening Docket, Initiating Rulemaking and Establishing Workshop Schedule*, in which the Commission sought to evaluate whether to repeal and replace its IRP Rule at 17.7.3 NMAC. **[1 RP 0001-0013]**

Thereafter, the Commission conducted a series of workshops, issued a summary of the proposed changes to the IRP Rule, received additional comments and solicited participants for a working group to develop and submit a proposal for the IM section of the draft rule. **[1 RP 0073, 4 RP 0628-0648]**

On November 3, 2021, the Commission issued the *Order Issuing Notice of Proposed Rulemaking* (the "NOPR Order"), which created the formal rulemaking in this docket to amend the IRP Rule. **[4 RP 0649-0684]** After issuing the NOPR Order, the Commission received initial, response, and reply comments on the proposed, amended IRP Rule. **[6 RP 0761-0931; 7 RP 0932-1151; 8 1152-1364; 9 RP 1365-1414]** The following participants filed comments on the proposed amendments to the IRP Rule: EPE, PNM, SPS, Onward, Interwest, Commission Utility Division Staff ("Staff"), the City of Las Cruces, the New Mexico Attorney General's Office, New Mexico Large Customer Group, Renewable Energy Industries Association, Sierra Club, and Vote Solar. *Id.* The Commission conducted a hearing on the proposed Rule on March 15, 2022. **[8 RP 1196-1205]**

On September 14, 2022, the Commission issued its *Final Order* **[9 RP 1415-1544]**, and on September 15, 2022, the Commission issued its *Errata to Final Order with Attachment #1,* entering into the record Exhibits A, B, C, and the Appendix, which had been erroneously omitted from the *Final Order.* **[9 RP 1545-1774]** After issuance of the Final Order and Errata, the Appellants moved for rehearing. **[9 RP 1775-1820; 10 RP 1833-1889]**

Commission Staff, Onward, and Interwest Energy filed responses to the motions for rehearing. **[10 RP 1921-1933; 1951-1965; 1976-1987]** On October

26, 2022, the Commission issued an order partially granting EPE, PNM, and SPS's motions for rehearing. **[10RP 1988-2015]** The Commission adopted the Rule amendment in its *Final Order Upon Reconsideration* on November 2, 2022. **[10 RP 2016-2065]** The citations to the IRP Rule in this brief come from Exhibit A to the Final Order on Reconsideration. In the *Notice Errata to Final Order Upon Reconsideration* issued on November 3, 2022, the Commission filed a corrected Exhibit B with redlines to show additions and deletions to the 2017 version of IRP Rule. **[10 RP 2066-2084]** The Commission rejected the issues raised in this appeal by Appellants, in its October 26 Order and *Final Order Upon Reconsideration,* based on the responses in opposition to amendments proposed by EPE, SPS, and PNM in their motions for rehearing. **[10 RP 2016-2065]**

Appellants have appealed the final order of the Commission pursuant to NMSA 1978, 62-22-1 (1993) and Rules 12-201(A)(2) and 12-601 NMRA. This is a direct appeal from the following orders entered by the Commission in the case below: *Final Order; Errata to Final Order with Attachment #1; Final Order Upon Reconsideration;* and *Notice of Errata to the Final Order Upon Reconsideration* (together, the "Orders").

III.

STATEMENT OF FACTS

A. Statutory and Regulatory Background

The IRP Statute is the only authority for the Commission to adopt rules that require Utilities to file IRPs. The IRP Statute, in relevant part, states the following:

> Pursuant to the commission's rulemaking authority, public utilities supplying electric or natural gas service to customers shall periodically file an integrated resource plan with the commission. 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 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. The preparation of resource plans shall incorporate a public advisory process.... 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.

NMSA § 62-17-10. This language has remained unchanged since 2005.

Before the appealed Rule amendments, the IRP Rule provided that the rule was specifically adopted to fulfill the requirements of the IRP Statute. *See* 17.7.3.8 NMAC (04/16/2007, as amended through 08/29/2017). The IRP Rule now cites not only the IRP Statute but also the Renewable Energy Act, Energy Transition Act, Grid Modernization Act, and Community Solar Act as additional statutory

authority for the IRP Rule, despite the Commission promulgating rules relating to those statutes. 17.7.3.3 NMAC; *see for example,* 17.9.572 NMAC (Renewable Energy for Electric Utilities) and 17.9.573 NMAC (Community Solar). In issuing the rulemaking Orders that are the subject of this appeal, however, the Commission never cited specific language from any of the foregoing additional statutes as support for the Rule amendments at issue. Rather, the Commission referred to these various statutes as a "web" of "interrelated authorities under which the Commission has broad jurisdiction to implement regulatory schemes befitting of the Commission's expertise and exclusive power." **[9 RP 1578]**

B. The Commission's final IRP Rule includes many provisions that fundamentally alter the regulation of Utilities through the IRP.

Reflecting this expansive new view of the IRP process, the IRP Rule essentially allows the Commission to usurp the utility's right to make its own decisions about resource planning and acquisitions. The Commission's extensive revisions to the IRP Rule (1) impose a litany of new requirements on the Utilities' resource request for proposals ("RFP") issuance and bid evaluation processes; (2) authorize the appointment of an IM and conferring upon the IM broad oversight over the Utilities' resource procurement processes; (3) create new mandates in the form of an IRP action plan and statement of need; (4) impose new requirements for

a facilitated stakeholder process preceding a utility filing its IRP; and (5) deprive the Utilities of meaningful, final action on their IRPs. **[4 RP 0684-0694]**

Among the Rule's stated purposes are "increasing transparency," and "involving stakeholder participation early in the process," and "tying the IRP outcome directly to the procurement process." 17.7.3.6(A) NMAC. Subsection 17.7.3.9(A) NMAC of the Rule prescribes a "facilitated stakeholder process" to develop a utility's statement of need and action plan, which provides that commenters can file their alternative proposals for Commission consideration; and Rule 17.7.3.9(E) NMAC allows the Commission to accept an alternative proposal or reject the utility's statement of need and action plan, but no provision is made for appeals by a utility from that decision. Sections 17.7.7.3(A)(2), (B), (C) and (D) NMAC, were added to the proposed Rule after the notice of proposed rulemaking ("NOPR") was issued. Acceptance of a statement of need and action plan comes with a requirement that the utility implement them but does not constitute a finding of prudence or pre-approval of costs. 17.7.3.13 NMAC.

According to Rule 17.7.3.11 NMAC, that action plan must detail the "specific actions the utility *shall* take to implement the IRP" and must "detail the specific actions the utility *shall* take to develop any resource solicitations or contracting activities to file the statement of need as approved by the Commission"

(emphasis added). These provisions are in direct conflict with the Commission's holding in the Final Order that the Commission is not making any substantive decisions on the utility's IRP or the related mandatory RFP procurement process. **[9 RP 1448]**

Rule 17.7.3.12(A) provides that the utility "shall issue a request for proposals" to address the utility's need as described in the statement of need and to fulfill the objectives of the utility's action plan. The utility must provide the Commission, the IM, and the parties to the IRP case, with "the documents and contracts that constitute the RFP solicitation . . . ." 17.7.3.12(C) NMAC. The Rule lists ten specific requirements for inclusion in the RFP. 17.7.3.12(F) NMAC. Any information the utility claims to be confidential must be identified and "proposed protection mechanisms" identified. 17.7.3.12(H) NMAC. Rule 17.7.3.12(I) prescribes ten specific "price and non-price criteria" that the utility must consider when evaluating the responses to the RFP. The utility is prohibited from discriminating against "independent power producers" in favor of utility-owned resources. 17.7.3.12(J) NMAC. Bid evaluation is subject to Commission review. 17.7.3.12(K) NMAC.

Under the Rule, the IM is granted wide-ranging powers, including an obligation to report to the Commission about proposed RFPs and identify alleged

deficiencies in the utility's RFP process. The Rule authorizes the Commission to appoint the IM to "monitor the procurement process of a public utility for competitive resource procurements pursuant to section 12 of this rule." 17.7.3.14(B) NMAC. The IM files a "design report" on the RFP design and reports to the Commission whether the RFP meets the requirements of the Rule. 17.7.3.14(G)(1)(a) NMAC. The IM also files a "final report" summarizing bid submissions, including resources and prices. 17.7.3.14(1)(b) NMAC. If the IM reports deficiencies to the Commission, the Commission may request "modifications" in future proceedings for approval of the solicited projects. 17.7.3.14(G)(1)(b)(ii) NMAC. The utility must provide the IM with "prompt and continuing access" to all bid documents, including, *inter alia,* model inputs, weighting criteria, and communications with bidders. 17.7.3.14(H), (I) & (J) NMAC. These disclosures are made part of the public record, and the reports of the IM are treated as evidence; however, the IM is not subject to cross-examination or discovery, and the parties may not communicate with the IM, unless the IM initiates contact. 17.7.3.14(I), (J), & (K) NMAC.

In addition, even though the IM acts as an "advisor" to the Commission with respect to the RFP process and presumably plays a prominent role in the

Commission's decision-making process, the Rule provides that the IM "shall not be subject to discovery nor cross-examination at hearing." 17.7.3.14(J) NMAC.

Rule 17.7.3.14 prescribes a process in which the IM compiles information about the competitive procurement process and makes that information available to all stakeholders, including the competing bidders. *See, e.g.,* 17.7.3.14(H) NMAC. The Rule works against the purposes of competitive procurement by permitting competitors to see other bidders' price information and to adjust their bids accordingly.

Rule 17.7.3.8(D) requires a multi-state utility to provide a description of the resource planning requirements of the other state and a description of how it is coordinating the IRP with its out-of-state resource planning. Under Rule 17.7.3.16(C), the Commission must merely take the out-of-state resource planning "into account." The coordination of multi-state resource planning is made impossible by the IRP Rule because the Commission has taken charge of, and dictated the terms of, the resource selection and procurement processes. In effect, the Commission is superseding the consideration of any involvement by Texas state regulators in considering resources that could serve both states.

The Appellants appeal all of the preceding amendments to the IRP Rule.

C. The Commission's Proceedings on the Rule Amendments

1. Initial Workshops

The statutory deficiencies can be traced to the "Straw Proposal" for IRP Rule revisions presented in initial workshops. **[2 RP 0283-0310]** The Straw Proposal was intended to transform the "current public input process." by increasing the direct involvement of the Commission, its advisors, and third parties in utility resource planning and procurement processes and management decisions, and drastically diminishing utility control over its resource planning and procurement processes. **[2 RP 0298-0299]**

2. The Notice of Proposed Rulemaking Proceedings

The Commission issued its NOPR Order on November 3, 2021, after receiving comments from workshop participants. **[4 RP 0650-0675]** The NOPR included a new, expansive "Objective" section, stating the intent of the Rule was now to allow for oversight of a utility's procurement evaluation and selection processes, expanded stakeholder involvement, and a "competitive" approach to a utility resource plan submission and selection. **[4 RP 0659-0660]** The NOPR contained no procedures for a rejected statement of need and action plan filed after the expanded stakeholder process under Section 9. **[4 RP 0666]** The NOPR also

provided for direct Commission control of a utility's RPF process through the participation of the IM. **[4 RP 0667-670]**

3. Comments on the Proposed IRP Rule

Appellants filed initial, response, and reply comments to the IRP Rule proposed by the NOPR Order. Appellants asserted that the IRP Rule exceeded the Commission's statutory authority, conflicted with other statutes and rules, and intruded on utility management decision-making. **[6 RP 0860; 0861-62; 0867-0868; 7 RP 0937-0946; 0987; 0991-0992; 0999-1002; 1061, 1063-1064; 1124-1125; 1131; 1134-1135; 1137; 1140-1141; 8 RP 1307-1311; 1336-1337; 1340-1345; 9 RP 1403]** Appellants EPE and SPS raised concerns with the negative impacts the IRP Rule will have on multi-jurisdiction utilities. **[6 RP 0860; 0866-0867; 7 RP 0955-0964]** Appellants argued that the procurement requirements and involvement of the IM exceeded the Commission's jurisdiction and were unlawful. **[6 RP 0860; 0862-0863; 0865; 0868-0870; 7 RP 0962-0963; 7 RP 0987; 0994-0999; 1061; 1064; 1108-1109; 1134; 1140-1141; 8 RP 1302-1305; 1313-1314; 1340; 1342-1343; 1345; 10 RP 1835-1843]** Appellants pointed out the indeterminate nature of the statement of need and action plan approval process, as did NM AREA. **[6 RP 0810-0811; 0815-0816; 0873-0877; 7 RP 0937-0938; 0943-0946; 0949; 0987-0993; 1005-1006; 1067-1073; 1125-1127; 1135; 8 RP**

1311-1312] Sierra Club commented that a fully litigated IRP proceeding overseen by the Commission and IM wastes the Commission and parties' resources if the Utilities are then required to fully litigate a certificate of public convenience and necessity ("CCN") or long term purchased power agreement ('LTPPA") approval proceeding. **[6 RP 0787]** Onward argued that a presumption of reasonableness should apply in later CCN proceedings. **[8 RP1159]** In contrast, other parties were keen to eliminate any presumptions that formerly applied to approval of an IRP. **[*See, e.g.*, 6 RP 0836-0837 (NMCLG); 6 RP 0783-0785 (Sierra Club and Vote Solar)]** The Commission adopted this proposal and eliminated any presumption attaching to acceptance of the IRP. 17.7.3.12(M) NMAC.

Staff proposed the elimination of 17.7.3.10 NMAC, arguing that a statement of need was unnecessary in light of the requirement under 17.7.3.8(A) NMAC that Utilities file IRPs. **[6 RP 0847]**

Staff, EPE, PNM, and NM AREA argued to eliminate the procurement requirements of the IRP Rule. **[7 RP 1077 (EPE); 7 RP 0934; 0939-0942; 0944-0946 (SPS); 7 RP 0992-0996; 1125; 1129; 1131; 1134; 1136; 8 RP 1342-1343; 1345 (PNM); 6 RP 0849 (Staff); 7 RP 1042-1043 (NM AREA);]** Onward conceded that "there is no express Legislative mandate to regulate utility procurements." **[8 RP 1154]** The Office of the Attorney General suggested that

the Commission conduct additional workshops and receive additional comments before adopting the IRP Rule. **[8 RP 1172]**

4. Final Order

The Final Order adopted in large part the extensive new requirements proposed in the NOPR. The Commission rejected the Utilities' challenges to its authority to adopt requirements for resource procurement in its Final Order, even while conceding that "an explicit provision of enabling law, that is directly on point to the specific procurement-related sections of the Proposed Rule, does not exist." **[9 RP 1438]** Despite this, the Commission justified inclusion of procurement requirements in the IRP Rule based on the supposition that it has the power to "develop the necessary policy to respond to unaddressed or unforeseen issues[.]" **[9 RP 1438-1439]** The Commission referred to this as its "web of authority" to promulgate the Rule. **[9 RP 1439]**

The Commission rejected the Utilities' objections to the Rule's intrusion into management decision-making. **[9 RP 1446]** The Commission failed to modify the IRP Rule to address the objection that the Rule does not account for the complexities of planning for multiple jurisdictions. **[9 RP 1466]** The Commission also rejected Appellants' objection to the involvement of the IM in the procurement process. The Commission described the IM as its "agent" and noted

that the IM's required report regarding the Utilities' procurement processes "may be cited or responded to by the parties in a hearing, but the IM is not itself a party and is not therefore subject to challenge or confrontation." **[9 RP 1523]**

5. Motions for Rehearing, Order on Motions, and Final Order Upon Reconsideration

Appellants filed motions for rehearing of the Final Order asking the Commission to rehear, *inter alia,* the impact of the proposed IRP Rule on multi-jurisdictional utilities. **[9 RP 1799-1801; 10 RP 1833-1889]** Appellants reiterated concerns about the role of the IM and the impact of the Rule on procurement decisions. **[9 RP 1777-1782; 1799; 10 RP 1834-1841]** Appellants also reasserted concerns the Rule imposed arbitrary or overreaching regulatory requirements on utility RFPs, was impermissibly vague, and improperly required disclosure of sensitive information implicating the security of utility facilities. **[9 RP 1778-1782; 10 RP 1841-1846]**.

Commission Staff filed a response to the motions for rehearing arguing that the selection of an IM for the procurement process should be done at the discretion of the utility and that resource selection should be dealt with in a general rate case, resource acquisition case, CCN application, or purchased power agreement case. **[10 RP 2002]**

The Commission largely rejected Appellants' arguments summarized above and also rejected Staff's concerns related to the IM, relying on the responses to the motions for rehearing of Interwest and Onward. **[10 RP 2003-1007]** The Commission's Final Order on Reconsideration amended the IRP Rule with the changes adopted by its order on the motions for rehearing. **[10 RP 2037-2047]**

IV.

RELATED APPEALS

The Supreme Court consolidated the Appellants' individual appeals by order entered March 30, 2023 and ordered the Appellants to file a consolidated brief.

V.

STANDARD OF REVIEW AND PRESERVATION OF THE ISSUES

A. Standard of Review

The Court employs the same standards of review in appeals from administrative agency rulemakings and adjudicatory proceedings. *See Tenneco Oil Co. v. N.M Water Quality Control Comm'n,* 1987-NMCA-153, ¶ 39, 107 N.M. 469, 760 P.2d 161. A Commission order must be set aside if "the "Commission's decision is arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency's authority, or otherwise inconsistent with law." *Doña Ana Mut. Domestic Water Consumers Ass'n v. N.M. Pub. Reg. Comm'n,* 2006-NMSC-

032, ¶ 9, 140 N.M. 6, 139 P.3d 166. "A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in the light of the whole record." *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n,* 2003-NMSC-005, ¶ 17, 133 N.M. 97, 61 P.3d 806.

In reviewing the Commission's decision, the Court begins by looking at whether the decision presents a question of fact, a question of law, or a combination of the two. *N.M. Indus. Energy Consumers v. N.M. Pub. Reg. Comm'n,* 2007-NMSC-053, ¶ 13, 142 N.M. 533, 168 P.3d 105 ("NMIEC"). For questions of fact, the Court "look[s] to the whole record to determine whether substantial evidence supports the Commission's decision." *NMIEC,* ¶ 24. For questions of law, the Court grants some deference to the Commission's interpretation of its own governing statutes, "[h]owever, the court is not bound by the agency's interpretation and may substitute its own independent judgment for that of the agency because it is the function of the courts to interpret the law." *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n,* 1995-NMSC-062, ¶ 11, 120 N.M. 579, 904 P.2d 28. The Court accord "little deference" to the agency's own interpretation of its jurisdiction. *Id.* ¶ 13 (internal citation omitted).

The Commission's legal interpretation of IRP Statute is reviewed *de novo. Albuquerque Bernalillo County Water Util. Auth. v. N.M. Pub. Reg. Comm'n,*

2010-NMSC-013, ¶ 50, 148 N.M. 21, 229 P.3d 494 ("Statutory construction 'is not a matter within the purview of the [PRC]'s expertise' and, therefore, 'we afford little, if any deference to the [PRC] on this matter.'" (internal citations omitted)). This Court also reviews *de novo* whether procedural due process has been denied. *Rayellen Resources, Inc. v. N.M. Cultural Properties Rev. Comm'n,* 2014-NMSC-006, ¶ 18, 319 P.3d 639.

An agency abuses its discretion when "its decision is not in accord with legal procedure or supported by its findings…." *Oil Transport Co. v. N.M. State Corp. Comm'n,* 1990-NMSC-072, ¶ 25, 110 N.M. 568, 798 P.2d 169. The Commission violated the Appellants' due process rights by failing to make a decision based upon evidence adduced at hearing and made part of the record. *TW Telecom v. N.M. Pub. Reg. Comm'n,* 2011-NMSC-029, ¶ 20, 150 N.M. 12, 256 P.3d 24. The Court also may annul and vacate an order of the PRC when its decision is arbitrary and capricious, outside the scope of the agency's authority, or otherwise inconsistent with law. *Pub. Serv. Co. of N.M. v. N.M. Pub. Reg. Comm'n*, 2019-NMSC-012, ¶ 12, 444 P.3d 460.

B. Appellants preserved the issues raised in this appeal.

Appellants preserved their challenges to the legality of the IRP Rule and Orders through the submission of multiple rounds of comments during the workshops predating the issuance of the NOPR and after the issuance of the NOPR. Appellants also filed motions for rehearing after the issuance of the September 14 Final Order. Appellants continued to assert that the IRP Rule exceeded the Commission's statutory authority, conflicted with other statutes and rules, and intruded on management decision-making. **[6 RP 0860; 0861-62; 0867-0868; 7 RP 0987, 0991-0992; 0999-1002; 1061; 1063-1064; 8 RP 1307-1311; 1124-1125; 1131; 1134-1135; 1137; 1140-1141; 1336-1337; 1340-1345; 9 RP 1777-1782; 1786-1788; 10 RP 1834-1846]** Appellants pointed out the legally inadequate nature of the statement of need and action plan approval process. **[6 RP 0873-0877; 7 RP 0937-0938; 0943-0946; 0949; 0989-0991; 1005-1006; 1067-1073; 1125-1127; 1135; 8 RP 1311-1312]** Appellants stated, again, that the procurement requirements and involvement of the IM were excessive and unlawful. **[6 RP 0860; 0862-0863; 0865; 0868-0870; 7 RP 0962-0963; 0987; 0994-0999; 1061; 1064; 1108-1109; 1134; 1140-1141; 8 RP 1302-1305; 1313-1314; 1340; 1342-1343; 1345; 10 RP 1834-1846]**

Appellants EPE and SPS raised concerns regarding the amended rule's negative impacts on multi-jurisdiction utilities. **[6 RP 0860; 0866-0867; 7 RP 0955-0964; 9 RP 1799-1801]**

ARGUMENT

I.

The Commission lacked statutory authority to adopt the IRP Rule Amendments.

In adopting the IRP Rule amendments that are the subject of this appeal, the Commission ignored the plain meaning of the IRP Statute and radically transformed the IRP Rule "in a manner inconsistent with the current regulatory scheme of the [IRP Statute and EUEA] that the [Commission] is charged with administering." *See State ex rel. Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 30, 127 N.M. 272, 980 P.2d 55 (Commission exceeded its authority and violated state constitutional provisions requiring separation of powers by effectively deregulating the retail electric power industry in the absence of a statutory mandate). Rather than continuing to administer an unchanged law the legislature enacted fifteen years ago, the Commission acted without statutory authority to create a new IRP Rule reflecting its own public policy preferences not grounded in the text of the IRP Statute. The IRP Rule, therefore, intrudes upon the legislature's purview and violates the separation of powers doctrine.

The New Mexico Constitution confers the Commission's power to regulate public utilities only "in such a manner the legislature shall provide." N.M. Const. art. XI, Section 2; NMSA 1978, § 8-8-4(B)(10) (1998). *See also PNM Elec. Servs. v. N.M. Pub. Util. Comm'n*, 1998-NMSC-017, ¶ 10, 125 N.M. 302, 961 P.2d 147 (administrative agencies "are limited to the power and authority that is expressly granted and necessarily implied by statute."); *see also Plains Elec. Generation and Transmission Corp. v. N. M. Pub. Util. Comm'n*, 1998-NMSC-038, ¶ 27, 126 N.M. 152, 967 P.2d 827 ("The [Commission's] power over public utilities reaches no farther than what is statutorily authorized.") (internal citation omitted). Accordingly, the Commission "may not by regulation impose requirements…inconsistent with[] those set forth by the Legislature." *Albuquerque Cab Co. v. N.M. Pub. Reg. Comm'n*, 2014-NMSC-004, ¶ 14, 317 P.3d 837.

Here, however, the Commission acted contrary to its legal authority by amending the IRP Rule to include numerous new regulatory requirements that are unsupported by any statute. Through the amendments to the IRP Rule, the Commission now claims the power to directly regulate utility management activities such as the Utilities' resource RFPs, procurement bids, bid evaluation, and resource selection. The Commission claimed this authority in the admitted absence of any statutory amendments expressly authorizing its actions.

Instead, the Rule amendments are founded upon what the Commission called a "web" of authority and "intelligible principle" derived from other statutes that do not govern IRPs. In claiming such a broad and expansive view of its rulemaking authority, the Commission infringed on the Legislature's "unique position" in "creating and developing public policy" and violated the separation of power doctrine. *See Sandel,* 1999-NMSC-019, ¶¶ 12-13 ("an unlawful conflict or infringement occurs when an administrative agency goes beyond the existing New Mexico statutes or case law it is charged with administering and claims the authority to modify existing law or to create new law on its own"). *See also County of Bernalillo v. N.M. Pub. Reg. Comm'n,* 2000-NMSC-035, ¶ 19, 129 N.M. 787, 14 P.3d 525 ("[w]ith respect to the principle of separation of powers, an unlawful conflict or infringement occurs when an administrative agency goes beyond the existing New Mexico statutes or case law it is charged with administering and claims the authority to modify this existing law or to create new law on its own . . . ."), *citing Sandel,* 1999-NMSC-019, ¶ 12.

The Commission's amendment of the IRP Rule imposing new and intrusive conditions on resource procurements poses the same *ultra vires* problem as the Commission's deregulation of the electric power industry addressed by the Court in *Sandel.* In that case, the Court found that the Public Utility Commission

exceeded its authority by deregulating the retail side of the electric power industry in a manner inconsistent with the regulatory scheme of the Public Utility Act. *Sandel,* 1999-NMSC-019, ¶ 30. In the IRP rulemaking the Commission, with an acknowledged lack of explicit authority under the IRP or any other statute, fundamentally alters the scope and nature of the IRP Rule by relying on its own inventions, a "web of authority" and shadowy "intelligible principle".

A. The Commission conceded it lacked express statutory authority to adopt the challenged provisions of the IRP Rule.

In its Final Order, the Commission admits there is no explicit provision in law that authorizes the amendments to the IRP Rule, stating: "[w]hile it is true that an explicit provision of enabling law, that is directly on point to the specific procurement-related sections of the Proposed Rule, does not exist, such a provision is not needed to permit the Commission to promulgate the Proposed Rule, nor should one be expected to exist." **[9 RP 1577]** Lacking actual statutory authority for its Rule, the Commission justifies its adoption of Rule amendments by referencing a "web" of authority and "intelligible principle" found in a list of its general regulatory powers. **[9 RP 1578]** The list of powers cited by the Commission, without the benefit of citation to any specific authority, comes down to a sweeping statement that the Commission makes policies, fills in legislative gaps, and interprets legislation. **[9 RP 1578]**

Conceding that the Commission was relying upon a claimed broad rulemaking power, the Final Order states, "[t]he Proposed Rule is one of many expressions of the Commission's regulatory authority that does not neatly rest in any one single grant of power, rather, it is derived from the Commission's broad explicit and implicit authority warranted by the laws of New Mexico." **[9 RP 1435]**

New Mexico law requires greater rigor than this from the Commission—its constitutional authority is not free standing. Rather, the Commission's only has authority to act as delegated by the Legislature. The Legislature has spoken plainly about what an IRP is and what the Commission can do. IRPs are governed specifically by the IRP Statute and, applying a "well-settled principle of statutory construction," "the specific governs over the general." *Q Link Wireless, LLC v. N.M. Pub. Reg. Comm'n,* __ NMSC __, ¶ 10, __ P.3d __ (S-1-SC-38812, May 22, 2023), *citing Schultz v. Pojoaque Tribal Police Dep't,* 2010-NMSC-034, ¶ 14, 148 N.M. 692. 242 P.3d 259 (Internal quotation marks and citation omitted) The Commission cannot exceed its statutory authority by invoking some generalized authority ungrounded in any specific statutory language. *See N.M. Mining Ass'n v. N.M. Mining Comm'n,* 1996-NMCA-098, ¶ 15, 122 N.M. 332, 924 P.2d 741 (agency cannot "amend or enlarge their authority through the device of

promulgating rules and regulations"). To the extent the Commission cites other statutes to support its actions, it failed to point to any text within any of those laws to support the Rule amendments that are the subject of this appeal. The Commission ultimately cited thirteen distinct statutes, such as its power to set rates, as general authority for the IRP Rule amendments. **[10 RP 2037]** The Commission also cited changes to other laws, such as the Energy Transition Act, Renewable Energy Act and Community Solar Act and to its inherent power to interpret statutes and determine legislative intent to justify its changes to the IRP Rule. **[9 RP 1438]** The Commission ignores that it has promulgated or amended other rules specific to those statutes. *See, e.g.*, 17.9.550 (Electric Utility Rate Cases); 17.9.551 (Long Term Purchased Power Agreements); 17.9.572 NMAC (Renewable Energy for Electric Utilities); 17.9.573 NMAC (Community Solar). The Commission also ignores the fact that the IRP Statute itself was not amended.

The Commission cites this amorphous "web" of authority to justify its self-appointed "policy-making, gap-filling, and interpretive powers". **[9 RP 1439]** None of the laws cited, however, included a grant of authority for the Commission to control the Utilities' resource RFPs, procurement bids, bid evaluation and internal resource selection processes or to impose an IM as the Commission's overseer of those management activities. *Compare* § 62-6-4(B) (sale, furnishing, or

delivery of electricity to a utility for resale to customer subject to regulation only to the extent necessary to enable commission to determine reasonableness of cost to utility at place which distribution to public begins); § 62-17-8 (express authority for Commission selection of independent evaluator for energy efficiency programs) *with* § 62-17-10 (requirement that utilities develop IRP that considers range of resources to identify most cost-effective portfolio of resources to supply energy needs of customers).

To the extent the Commission asserts the Rule amendments are supported by its broad authority, such implied powers must "arise from the statutory language by fair and *necessary* implication." *Howell v. Heim*, 1994-NMSC-103, ¶ 8, 118 N.M. 500, 882 P.2d 541 (emphasis added). Here, nothing in the record supports a finding that the IRP Rule amendments, which vastly expand the Commission's oversight over utility management of resource procurement, are in any way necessary to implement the statutes cited by the Commission.

Further, the IRP Statute does not authorize the Commission to regulate and monitor RFPs and contains no delegation of interpretive authority to the Commission, as the Commission implies, regarding "unaddressed or unforeseen" issues. [**9 RP 1577**, *citing City of Albuquerque v. N.M. Pub. Reg. Comm'n,* 2003-NMSC-028, ¶ 16, 134 N.M. 472, 79 P.3d 297] There are no "gaps in [the IRP]

statute" that need to be construed by the Commission. **[9 RP 1578**, *citing New Energy Econ., Inc. v. N.M. Pub. Reg. Comm'n,* 2018-NMSC-024, ¶ 25, 416 P.3d 277] Indeed, the fact that the prior version of the IRP Rule implemented the IRP Statute without issue for over 15 years—a statute that remains unchanged since 2005—supports that there is no "gap" to be filled by the rule amendments at issue. There is simply no basis to support that the Commission had implied powers to adopt the challenged Rule amendments.

The Commission's "web of authority" approach also conflicts with the requirement that the legal basis for the Commission's adoption of the IRP Rule must be clearly stated, and the record must demonstrate that the Commission has properly exercised the discretion granted to it by the Legislature. *See City of Albuquerque*, 2003-NMSC-028, ¶ 17 (a legislative grant of authority must contemplate the regulations issued); *see also Fed'l Power Comm'n v. Texaco, Inc.*, 417 U.S. 380, 396 (1974) (the FPC was bound to exercise its discretion within the limits of the statute enabling it, and its orders must disclose their bases in the statutes and clearly indicate that the FPC's discretion was properly exercised).

The Commission has conceded that it lacks explicit statutory authority. **[9 RP 1577]** This makes statutory analysis simple: There is no such power conferred, the EUEA and IRP statutes are clear and unambiguous, and the Court

therefore "must give effect to that language and refrain from further statutory interpretation." *Marbob Energy Corp. v. Oil Conserv. Comm'n,* 2009-NMSC-013, ¶ 9, 146 N.M. 24, 206 P.3d 135, *citing Anadarko Petroleum Corp. v. Baca,* 1994-NMSC-019, 117 N.M. 167, 870 P.2d 129. The IRP Rule fails to meet this requirement because the Commission has relied on legislative grants of authority that do not encompass regulation of utility business and management practices, it conflicts with other statutes and rules, and it subsumes the Legislature's power to define the scope of the Commission's authority.

The Commission tries to find a toehold for its interpretation in the concept of the "intelligible principle", citing *Rivas v. Board of Cosmetologists,* 1984-NMSC-076, ¶ 3, 101 N.M. 592, 686 P.2d 934. **[9 RP 1578]** *Rivas* does not support the Commission's departure from its express statutory mandate in the IRP Statute. In *Rivas*, the Court upheld the overriding principle of administrative law that "[a]n administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority." *Id.* The boundaries of the Commission's authority are defined by the IRP Statute and Commission actions must conform to the statutory standard. *Id.*

The "intelligible principle" that the Commission implies it is trying to follow is a means to create expansive, new oversight of a utility's resource RFP and

resource selection process by the IM and Commission. The Legislature's intelligible principle behind the IRP Statute and the EUEA, however, is explicit: the adoption of rules to govern the Utilities' integrated resource planning process to "identify the most cost-effective portfolio of resources to supply the energy needs of customers." § 62-17-10. The IRP Statute has not replaced or changed any of the existing statutory requirements for approvals of CCNs, abandonments, or acquisitions. This Court has held the IRP Statute neither prescribes nor proscribes resource selections for utilities: "[o]ther statutes govern the circumstances under which a utility may procure, construct, or abandon general resources." *New Energy Econ.*, 2018-NMSC-024, ¶ 13.

The Court should first look to the IRP Statute to determine what the IRP Rule is meant to accomplish. The IRP Statute has not been amended since its adoption in 2005. Nowhere in the IRP Statute is the Commission granted authority to dictate the Utilities' bid process and to employ an IM to oversee that process. In considering the meaning of the EUEA and IRP Statute as they pertain to the IRP Rule, the Court will not read into the statute language that is not there if the provision makes sense as written. *NMIEC,* 2007-NMSC-053, ¶ 33, *citing Pub. Serv. Co. of N.M. v. N.M. Pub. Reg. Comm'n,* 1999-NMSC-40, ¶ 18, 128 N.M. 309, 992 P.2d 860 (internal citation omitted). The purposes and policies stated in

the IRP Statute define the Commission's authority related to IRPs and set the parameters for the Rule. The Commission strayed when it tried to interpret and apply legislative intent and policies from other statutes to amend the IRP Rule.

B. The new IRP Rule impermissibly transforms the IRP from a planning tool to a prescription of what resources must be procured.

Through the challenged IRP Rule, the Commission has assumed the power to prescribe utility resource selection and procurement by dictating the factors a utility must consider when evaluating resources, to require that the majority of generation resources be acquired through competitive solicitations, and to appoint an IM to oversee the resource acquisition process. 17.7.3.12 & 14 NMAC. The IRP Statute does not grant these powers to the Commission. § 62-17-10. The IRP Statute creates a planning tool; it does not empower the Commission to control procurement. *See In the Matter of the Proposed Amendments to the Integrated Resource Planning Rule Amendments* NMPRC Case No 17-00198-UT, Final Order on Integrated Resource Planning Rule Amendment at 7, ¶ 12 (Jan. 10, 2018) ("The NOPR found that presumption was not contemplated by [the IRP Statute] which expressly states the IRP is a planning tool."). Integrated resource planning also does not substitute for obtaining a CCN for a particular resource. *Id.*

The Commission's longstanding practice of using the IRP as a utility's "planning tool" only and not a means of compelling specific resource procurements has fixed its interpretation of the IRP Statute. *See Norwegian Nitrogen Prods. Co. v. United States*, 288 U.S. 294, 311 (1933) (consistent administrative practice after statutory amendment "fix[ed] the meaning of the statute").

The Commission argued this interpretation in a case before the Supreme Court in 2018. The Supreme Court considered the IRP Rule prior to its amendment in *New Energy Econ.*, 2018-NMSC-024, which involved a challenge to approval of a contested stipulation granting CCNs and dismissing challenges to PNM's IRP. The Court held that "[a]n IRP should seek to identify 'resource options' and determine 'the most cost-effective resource portfolio and alternative portfolios[.]'" *Id.* ¶ 13, *citing* 17.7.3.3.9(B)(4) & (7) NMAC (prior version of the Rule). In finding that statutes other than the IRP Statute govern procurement, construction, or abandonment of generation resources, the Court cited the statutes requiring Commission approval to acquire or construct new generation resources, including Sections 62-6-12(A)(4) and 62-9-1(A). Contrasting the requirements of an IRP from a CCN proceeding, the Court summarized the requirements of the IRP Statute and Rule: "The IRP provisions require PNM to demonstrate the merits of

its 2014 IRP as measured by the standards articulated in Section 62-17-10 and clarified in the applicable provision of the administrative code and require the PRC to permit public participation." *New Energy Econ.*, 2018-NMSC-024, ¶ 30. The Court specifically rejected arguments by New Energy Economy that the Commission should have required PNM to conduct an RFP in order to prove that PNM's resource proposals were "the most cost effective" options in accordance with the IRP Statute. The IRP Statute setting forth the Commission's powers has not changed since the *New Energy Economy* decision. The fixed meaning of the IRP Statute does not permit the Commission to require a utility to conduct an RFP, or to do so in the manner prescribed by the new IRP Rule.

The Commission has adopted the IRP Rule amendments by applying policies of its own invention to a process that has been in place for many years. The Commission inserts requirements regarding resource procurements and independent monitoring that do not appear in the IRP Statute and fails to explain this shift of control over procurement bids and resource selection from the utility to the Commission. *High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1994-NMCA-139, ¶ 43, 119 N.M. 29, 888 P.2d 475 (agency decision was reversed when the agency attempted to give new meaning to its previously enacted code). The IRP Statute, as interpreted and applied for years prior to this amendment, makes

sense as written and should not be reinterpreted to include resource procurements and independent monitoring. There are no gaps to be filled and no policies to be articulated other than those stated in law that are given over by the Legislature to be implemented by the Commission. The Court should not defer to the Commission's unexplained, unsupported departure from the Court's holdings in *New Energy Economy* or the Commission's longstanding prior application of the IRP Statute. *Sandel,* 1999-NMSC-019, ¶ 28.

C. The new IRP Rule violates the IRP Statute's explicit requirement that the Commission allow multi-jurisdiction utilities to coordinate their state resource planning.

The EUEA requires the Commission to consider a public utility's resource planning requirements in other states and to authorize utilities that operate in multiple states to implement plans that coordinate the applicable state resource planning requirements. *See* § 62-17-10. "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." *Id.*

Multi-jurisdictional utilities must include in their IRPs a description of resource planning requirements in other states and "how it is coordinating the IRP with its out-of-state resource planning requirements." 17.7.3.8(D) NMAC.

Appellants acknowledge that Rule 17.7.3.16(B), under "Exemptions," requires the Commission to "take into account a public utility's resource planning requirements in other states" and to "authorize utilities that operate in multiple states to implement plans that coordinate the applicable state resource planning requirements." That provision, however, appears to be little more than window dressing because the remainder of the IRP Rule lacks the flexibility required to accommodate other jurisdictions' resource planning requirements.

For example, 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. The plight of multi-jurisdictional utilities amplifies the overall problem posed by the new IRP Rule's shift away from a utility's identification of its most cost-effective portfolio of resources through utility planning tools, the core objective of the IRP Statute. The Rule alters the focus of the IRP from utility resource planning based on overall portfolio cost-effectiveness to 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. *Compare* § 17.7.3.8 NMAC *with* § 17.7.3.9 NMAC (04/16/2007, as amended through 08/29/2017).

II.

The IRP Rule abrogates utility control of resource planning in violation of the Utilities' due process rights.

The IRP Rule is fatally flawed in its failure to provide minimum procedures for full and fair consideration of the utility's IRP, precluding the utility from effectively presenting evidence and defending its own IRP and procurement practices. *See Albuquerque Bernalillo Water Util. Ass'n,* 2010-NMSC-013, ¶ 21, ("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 citations omitted). Appellants' due process rights are implicated by the IRP Rule because Appellants have a property interest in energy resources they acquire, and the transmission and distribution systems that are part of their grids. *See Uhden v. N.M. Oil Conservation Comm'n,* 1991-NMSC-89, ¶ 10, 112 N.M. 528, 817 P.2d 721 (administrative proceedings affecting a property or liberty interest must comply with due process).

The Commission's IRP Rule sets up a series of requirements for the IRP and the RFP process without providing a lawful set of procedures leading to acceptance or rejection of the IRP.

A. The facilitated stakeholder process exceeds the scope of the IRP Statute's public advisory process and does not provide due process to the utilities.

The restated IRP Rule includes new procedures for the filing of the IRP with the Commission following a "facilitated stakeholder process". 17.7.3.9 NMAC. The Commission relies on the IRP Statute's provision that the utility's "preparation of resource plans shall incorporate a public advisory process." § 62-17-10. However, this advisory process cannot be a means for the Commission to substitute commenters' plans for those of a utility. The Utilities' due process rights were violated by the adoption of Sections 17.7.3.9(A)(2), (B), (C) and (D) NMAC because those provisions were not included in the amendments issued with the NOPR. *See T.H. McElvain Oil & Gas Ltd. P'ship v. Benson-Montin-Greer Drilling Corp.*, 2017-NMSC-004, ¶ 25, 388 P.3d 240 ("An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated . . . to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."), *citing Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

The Rule envisions that the utility's statement of need and action plan, which form the core of the IRP, are subject to required negotiation among the

utility, Staff, and stakeholders. 17.7.3.9 NMAC. The Staff and stakeholders (also referred to as commenters) must be given access "to the same modeling software used by the utility on equality footing as the utility, and shall performs a reasonable number of modeling runs, . . ." for staff and each stakeholder. 17.7.3.9(A)(1) NMAC.

The utility submits its IRP, explaining all resolved and unresolved issues resulting from the facilitated process . . . ." 17.7.3.9(E) NMAC. Any commenter may "include the commenters' own draft statement of need and action plan for commission review." 17.7.3.9(E)(1)(a) NMAC. Contrast these provisions with the Commission's Rules of Procedures, which state: "Commenters shall be entitled to make an oral or written statement for the record but such statement shall not be considered by the Commission as evidence. Commenters are not parties and shall not have the right to introduce evidence or examine or cross-examine witnesses, to receive copies of pleadings and documents, to appeal from any decisions or orders, or to otherwise participate in the proceeding other than by making their comments." 1.2.2.32(A)(2) NMAC.

The Rule automatically incorporates the commenters' actions plans and statements of need into the utility's IRP as mandated addenda. 17.7.3.9(E)(1)(b) NMAC. Following a filing by Staff on whether the IRP complies with the Rule,

the Commission then either accepts the IRP as compliant or rejects the IRP as deficient. 17.7.3.9(E)(4) NMAC. The Commission may accept submittals by Staff, commenters, or other third-party stakeholders rather than the utility's IRP. A plausible end result of this process would be the acceptance of an IRP that the utility opposes. No further process is described by the Rule.

By requiring the utility to incorporate competing stakeholder IRP proposals into the IRP, the Commission has removed the utility's right to a decision on the merits of its own proposal. The IRP process results in a final Commission determination--acceptance or rejection of the utility's IRP—with which the utility must subsequently comply and, therefore, the utility must be accorded full due process rights. *T.H. McElvain Oil & Gas*, 2017-NMSC-004, ¶ 25.

In *New Energy Economy,* the Court rejected claims that the utility should not be allowed to decide what resource alternatives should be presented to the Commission and concluded that a utility was not required to assist the witnesses of an adversary. 2018-NMSC-024, ¶¶ 36, 37. The IRP Rule conflicts with the Commission's Rules of Procedures and violates this Court's holdings by compelling the utility to assist third parties in developing competing resource plans, incorporate those plans into the utility's submissions, and be subject to the proposals of commenters that are not part of an evidentiary process.

The Commission may, by adopting a third party's proposed statement of need and action plan, seize control over the core functions of the utility. The utility's statement of need is defined in terms of "meeting net capacity, providing reliability reserves, securing flexible resources, securing renewable energy, expanding or modifying transmission or distribution grids, or securing energy storage." 17.7.3.10(B) NMAC. The action plan must detail the "specific actions the utility *shall* take to implement the IRP" and must "detail the specific actions the utility *shall* take to develop any resource solicitations or contracting activities to fill the statement of need as approved by the Commission." 17.7.3.11(A)(1) & (2) NMAC (emphasis supplied). The Commission, however, has no statutory authority to impose such requirements through rules, and therefore Rule 17.7.3.9(B) NMAC impermissibly invades the prerogatives of utility management. *See PNM Elec. Servs.*, 1998-NMSC-017, ¶ 22 (Commission may not take action that would usurp utility management prerogatives).

Further, despite the profusion of processes and detailed oversight it would require, the Rule produces few, if any, efficiencies in later proceedings. Section 17.7.3.13(A) expressly states that approval of an action plan, which a utility *shall* follow, "does not constitute a finding of prudence or pre-approval of costs associated with acquiring additional resources." The costs of implementing an

approved action plan must be considered in a general rate case, resource acquisition proceeding, or CCN application matter. 17.7.3.13(B) NMAC. If the IRP and RFP processes that are made part of the IRP docket are not formal proceedings with a determinative outcome, then all of the actions taken in the IRP docket are meaningless because they would have to be re-litigated in a CCN or LTPPA case at a later date.

B. The RFP procurement and independent monitor provisions exceed the Commission's jurisdiction and violate due process.

The procedures set out in 17.7.3.9 NMAC for the IRP process encompass not only the acceptance or rejection of the IRP, but also requires utilities to conduct RFPs to implement IRP action plans that are conducted with the oversight of the IM. 17.7.3.14(K) NMAC ("the independent monitor shall serve as an advisor to the commission and shall not be a party to the proceedings in accordance with 1.2.3.9 NMAC."). As discussed above, the IRP Statute does not grant the Commission oversight over a utility's procurement processes. In *New Energy Economy, supra,* the Court noted that the Commission determined "NEE had not 'cited any law that requires or authorizes the [PRC] to order a utility to issue an RFP.'" 2018-NMSC-024, ¶ 38. The Court held "[t]his evidence reflects that the HE and PRC determined that an RFP was neither required nor appropriate. We will not second-guess this determination." 2018-NMSC-024, ¶ 40.

In addition to exceeding the Commission's statutory authority, the Rule's creation of an IM as an agent of the Commission intrudes on the Utilities' management practices and violates their due process rights. The IM is not a party and is not therefore subject to challenge or confrontation by the Utilities. **[RP 1523]** The Rule also permits the IM to submit reports to the Commission that may or may not be subject to challenge at hearing. The IM files his or her reports in the IRP docket, which may or may not be relied upon as evidence, and the reports are subject only to "comments" but not to an adjudication as would any other evidence. 17.7.3.14(I)(1) & (2) & (K) NMAC ("the commission may rely upon any reports or findings of the IM assigned to monitor that solicitation **as evidence** . . . .") (emphasis supplied). However, the IM may not be called as a witness, is not subject to discovery, and is not subject to cross-examination. *Compare* 17.7.3.14(I)(2) NMAC *with* 17.7.3.14(K) NMAC.

The IM's involvement in the RFP process violates the Utilities' due process rights because the IM learns facts about the bids and procurements, reports on those facts to the Commission, and is not required to defend its proffered facts and opinions in the hearing room. *Cf.* 1.2.2.35(I)(1) NMAC (witness must be present at NMPRC hearings and subject to cross-examination unless presence is waived upon notice to and without objection from parties). Inclusion of evidence

incorporated from another proceeding by the IM, the RFP process, and made part of the record for decision in the IRP through the IM reports denies the utilities the opportunity to present evidence and cross-examine witnesses in violation of procedural due process. *TW Telecom of N.M., L.L.C.*, 2011-NMSC-029, ¶¶ 20-21.

The IM's opinions have superior weight, over all other party's opinions, including Staff's. 17.7.3.14(G) NMAC. This approach is at odds with the Commission's role as an impartial adjudicator of cases presented to it. The right to a hearing before the Commission is rendered meaningless under the new IRP Rule if the Commission bases its action upon information received outside the hearing. *See McCaughtry v. N.M. Real Estate Comm'n,* 1970-NMSC-143, ¶ 14, 82 N.M. 116, 477 P.2d 292 ("The fact that there may be substantial and properly introduced evidence which support the Board's ruling is immaterial if evidence outside the hearing is considered and relied upon.") (the chief prosecutor "cloistered" with the commission to provide "ex parte testimony and argument"). *See also TW Telecom,* 2011-NMSC-029, ¶ 20 ("The [PRC] is authorized only to make its decision [based] upon evidence adduced at the hearing and made a part of the record."), *citing Transcon. Bus Sys. v. State Corp. Comm'n,* 56 N.M. 158, 56 N.M. 158, 177, 241 P.2d 829, 941 (1952).

C. The Rule's lack of process violates the Utilities' rights.

In its Final Order, the Commission describes its review process as making "no *substantive* decisions on the utility's IRP or RFP." [**9 RP 1448** (emphasis in the original)] The Rule belies this statement. After the Commission accepts or rejects an IRP, the parties to the Commission proceeding must have an opportunity to appeal the Commission's final order if they are dissatisfied with the statement of need, the action plan, or both. *See* NMSA 1978 § 62-11-1 (providing a right to appeal Commission orders). The New Mexico Constitution guarantees the right to one appeal to an aggrieved party. N.M. Const. art. VI, § 2.

The Rule does not address the right of appeal or the effect that an appeal will have on the implementation of the action plan. Nor does it provide any means for an evidentiary process for consideration of opposing proposals or the assumptions and positions of commenters, stakeholders, Staff, or the IM. Because of the Commission's view that there is no "final" decision on the IRP and RFP, the Utilities are also deprived of their right to appeal. NMSA 1978, § 62-11-1 (1993), Rule 12-102(A)(2) NMRA, and Rule 12-601 NMRA.

In contrast, the Commission's procedures for review of utilities' annual Renewable Energy Act plans require notice, testimony, evidence, hearing, and approval or modification, if the plan is protested. 17.9.572.14 & 20 NMAC.

Applications for CCNs also require notice, hearing and a decision. 17.1.2.9 NMAC. The same is true for Energy Efficiency applications upon which the Commission takes action. Rule 17.7.2.8(N) NMAC.

The Commission's review under the prior version of the IRP Rule granted Utilities greater procedural rights that comported with due process and the right to an appeal. Even though the "Review, Acceptance and Action" provisions of 17.7.3.12 were similar to the acceptance or rejection provisions of 17.7.3.9(E) NMAC of the new Rule, the Commission's rules did not automatically provide for Commission review of alternative proposals by third parties for acceptance, and the Commission conducted proceedings on disputed utility IRPs and entered final orders. *See, e.g., In the Matter of Pub. Serv. Co. of N.M.'s 2017 IRP,* NMPRC Case No. 17-00174-UT, Final Order, 2018 N.M. PUC LEXIS 67 (Dec. 19, 2018) (applying its procedural rules for hearings and post hearing submissions; accepting the IRP); *In the Matter of the Protest to EPE's 2015 IRP,* NMPRC Case No. 15-0024-UT, Final Order Approving Certification of Stipulation and Granting Waiver From 17.7.12 NMAC, 2017 N.M. PUC LEXIS 41 (May 31, 2017) (adopting, approving, and accepting a stipulation related to the IRP); *In the Matter of the 2018 IRP of Zia Natural Gas Co.,* NMPRC Case No. 18-00046-UT, Final Order, 2018

N.M. PUC LEXIS 25 (June 13, 2018) (accepting the proposed IRP as compliant with the IRP Rule).

III.
CONCLUSION

In contrast to the procedures under the previous IRP Rule, the new Rule's IRP and RFP processes go beyond the purpose of the IRP Statute and require the utility to act upon Commission proceedings that are based on disputed facts and implicit decisions for which there is no hearing or opportunity for cross examination. The Rule impermissibly inserts the IM as evaluator and advisor into a mandated RFP procurement process with access to all underlying data and information of the utility without due process protections, all of which must be either repeated or overcome in future proceedings.

The Commission's procedures for consideration of a utility's IRP and its overreaching control of utilities' procurement practices are not authorized by the Legislature and are not in accord with fundamental procedural due process rights and are, therefore, contrary to law and arbitrary and capricious. The Court should vacate the Commission's Final Orders and new IRP Rule.

REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 12-319(B) NMRA, Appellants hereby request oral argument to assist in the resolution of this appeal. Appellants believe that oral argument will allow the parties to address the Court's questions regarding the complex issues presented in this appeal.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of June, 2023, I filed the foregoing Brief in Chief electronically through the Odyssey File & Serve System, which caused all counsel of record to be electronically served.

/s/Carol A. Clifford
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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 as modified by Order of the Court and was prepared in 14-point Times New Roman typeface using Microsoft Word 2019, and that the body of the brief contains 10,205 words.

/s/Carol A. Clifford
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