IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

July 20, 2023

NO. S-1-SC-39673

EL PASO ELECTRIC COMPANY,
Appellant,

v.

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

NO. S-1-SC-39676

PUBLIC SERVICE COMPANY OF NEW MEXICO,
Appellant,

v.

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

AND

NO. S-1-SC-39677

SOUTHWESTERN PUBLIC SERVICE COMPANY,
Appellant,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,
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

ANSWER BRIEF

Robert Lundin, Esq.
Associate General Counsel
P.O. Box 1269
Santa Fe, New Mexico 87504-1269
(505)216-8569
Robert.Lundin@prc.nm.gov

Judith Amer, Esq.
Associate General Counsel
P.O. Box 1269
Santa Fe, New Mexico 87504-1269
(505)629-2102
Judith.Amer@prc.nm.gov

Attorneys for the New Mexico Public Regulation Commission

TABLE OF CONTENTS

TABLE OF AUTHORITIES

New Mexico Supreme Court

Other Authorities

STATEMENT OF COMPLIANCE

Pursuant to the requirements of Rule 12-318(F) NMRA, this Answer Brief uses the Times New Roman typeface and contains 10,979 words. The word count was obtained from Microsoft Word, version 2306.

By: */s/ Robert Lundin, electronically signed*

INTRODUCTION

The New Mexico Public Regulation Commission ("NMPRC," "PRC," "Commission," or "Appellee") hereby submits this "Answer Brief" to ask for deference from the Court and to defend the decisions of the Commission made on September 14, 2022, in the "Final Order," and on November 2, 2022, in the "Final Order Upon Reconsideration," issued in Commission Docket No. 21-00128-UT, from which El Paso Electric Company ("EPE"), Public Service Company of New Mexico ("PNM"), and Southwestern Public Service Company ("SPS") (together "Appellants") appeal. The Commission's decisions in the proceedings below repealed and replaced Rule 17.7.3 NMAC (10/27/2022, as amended through 11/29/2022) relating to the filing of integrated resource plans ("IRP Rule"). Appellants ask the Court to vacate the Commission's orders and the entirety of the IRP Rule. This Court should reject the Appeal and affirm the Commission's actions.

The proceedings below lasted approximately 1.5 years, during which time the IRP Rule was vetted and refined through several rounds of written and oral commentary and workshops, a working group, and a rehearing. Over the course of the proceedings, the Commission, in countless hours of internal deliberations, considered: 1,018 pages of comments filed through five commentary rounds by 13 different stakeholder groups; over seven hours of oral comment and discussion during two workshops and one public hearing; and 195 pages of briefing. The record

of this case, as summarized and analyzed in the Final Order and Final Order Upon Reconsideration, shows that the Commission approached the rulemaking with rigorous standards for thorough analysis, affording every stakeholder involved due process, and ultimately making rational decisions in accordance with the Commission's exclusive expertise. Further, the Commission acted within its bounds of authority, as explained in the Final Order and as explained in this Answer Brief, and should be afforded deference. The apparent impetus for this Appeal is not to rectify any violations of the Commission, rather, it appears to be the Appellants' dissatisfaction that they didn't persuade the Commission.

Appellants assert that the Commission lacked jurisdiction to adopt the IRP Rule and violated Appellants' due process rights by abrogating their control over resource planning; however, Appellants' arguments are unsupported by the facts of the case and the law. Rather, Appellants take an extremely narrow view of the Commission's jurisdiction that isn't supported by law or precedent, and Appellants rely on baseless, hypothetical claims of "what could happen" that are not possible to occur and do not arise from the language of the IRP Rule. Instead, Appellants' criticisms of the IRP Rule appear to arise from a resistance to change, transparency, and fairness in the procurement of energy generating resources.

The IRP Rule represents an evolution of the previous version of the Rule that was originally promulgated in 2007 and amended in 2017 and 2018. The IRP Rule

can be subdivided into two divisions of regulations: the first dealing with the IRP document itself, *see* 17.7.3.8 to 11 NMAC; and the second dealing with the outcomes of the IRP, *see* 17.7.3.12, 14 NMAC.

Every three years, a public utility shall file an IRP that is meant to "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." NMSA 1978, § 62-17-10 (2005) ("IRP Statute"). The important components of the IRP document that flow from this statutory purpose are the "statement of need" and "action plan." *See* 17.7.3.10, 11 NMAC. The IRP Rule involves the public in the development of the IRP, as required by the IRP Statute, by requiring the public utility to participate in six months of facilitations with stakeholders, with the aspiration of achieving an unopposed statement of need and action plan. 17.7.3.8 NMAC. However, the public utility is not required to agree with any stakeholder, and after the six months, it shall file the IRP with the Commission to perform a non-substantive compliance review. *Id.* That is, the development of an IRP is almost entirely left to the discretion of the utility, with the IRP Rule merely providing transparency for the Commission and advisory rights for the public. *See* § 62-17-10.

After the IRP is filed and "accepted" as compliant with the IRP Rule, 17.7.3.9 NMAC, the utility shall issue a request for proposals ("RFP") to continue advancing the purpose of the IRP Statute to "identify the most cost-effective portfolio of resources." Section 62-17-10. The IRP Rule provides minimum requirements for the RFP and a timeline for the RFP process; however, the IRP Rule does not prescribe nor proscribe any resource selections or procurements, and it does not prevent the utility from issuing any other RFP within the utility's own parameters. *See* 17.7.3.12 NMAC. The decision to procure a resource is always left to the utility. Additionally, the IRP Rule provides that an independent monitor ("IM") shall observe the RFP process and report to the Commission on the RFP's: fairness, competitiveness, robustness, reasonableness, and compliance with the IRP Rule. 17.7.3.14(G) NMAC. The IM does not act as an evaluator who evaluates the quality or prudence of resources bid into the RFP or their prioritization and selection, rather, the IM merely helps ensure there is transparency in the RFP process. *See id.*

Thus, the IRP Rule provides oversight and transparency regulations for the planning and solicitation phases of the IRP-specific procurement cycle only (not all procurements, *see* 17.7.3.12(M) NMAC). After planning and solicitation, public utilities are left total discretion in the selection of resources, which are then subject to Commission approval pursuant to statute and rule. NMSA 1978, § 62-9-1 (2019); and 17.9.551 NMAC (07/31/2012).

Appellants ask the Court to vacate the entirety of the IRP Rule even though it contains many provisions that the Brief-in-Chief does not object to or otherwise address.

Summary of Argument

First, the Commission's authority to promulgate the IRP Rule flows through the following channels which provide the jurisdictional boundaries within which the IRP Rule comfortably rests: the Public Utility Act ("PUA"), NMSA 1978, §§ 62-1-1 through 62-6-28 and 62-8-1 through 62-13-16 (1953, as amended through 2021); the Renewable Energy Act ("REA") including the renewable portfolio standard ("RPS"), NMSA 1978, §§ 62-16-1 to -10 (2007, as amended through 2021); and the Efficient Use of Energy Act ("EUEA"), NMSA 1978, §§ 62-17-1 through -11 (2005, as amended through 2020). The Commission has express authority to: adopt rules for integrated resource planning to identify the most cost-effective portfolio of resources, Section 62-17-10; to regulate the sale, furnishing, or delivery of electricity by any person to a utility to ensure reasonable costs, NMSA 1978, § 62-6-4 (2003); to ensure, through regulation, that rates, and every rule, regulation, practice, act, requirement, or privilege in any way relating to such rates, are fair, just, and reasonable, NMSA 1978, § 62-3-1(B) (2008), § 62-3-3(H) (2009), and *see* NMSA 1978, § 62-8-1 (1953); and to do all things necessary, appropriate, and convenient, NMSA 1978, § 62-19-9 (2020), and § 62-6-4. The Commission's authority to

promulgate the IRP Rule additionally flows from its implied authority to create policy that is necessary and fair as long as the Commission's boundaries of authority are defined, and an intelligible principle is followed. *See City of Albuquerque v. N.M. Pub. Regulation Comm'n* ("*CABQ*"), 2003-NMSC-028, ¶ 16, 79 P.3d 297; *see Howell v. Heim*, 1994-NMSC-103, ¶ 8, 882 P.2d 541; and *see Rivas v. Bd. of Cosmetologists* ("*Rivas*"), 1984-NMSC-076, ¶ 3, 686 P.2d 934.

Second, the Commission's authority was not wielded in a manner that violated Appellant's due process rights. Due process in an administrative setting demands reasonable notice and an opportunity to be heard. *Jones v. N.M. State Racing Comm'n*, 1983-NMSC-089, ¶ 6, 671 P.2d 1145 (citation omitted). The IRP Rule speaks for itself on this point, as it is replete with processes and procedures for the filing of documentation and opportunities to comment. However, the IRP Rule does not create an adjudication of the IRP or resulting RFP, thus, it does not implicate the due process concerns of the opportunity to present claims or defenses. Rather, the IRP Rule provides a "sidecar" for the Commission and interested stakeholders to hitch a ride on to the utility-led IRP and RFP processes. The appropriate time for a utility to make claims and defenses is reserved for the subsequent docket that the utility initiates to seek approval for a resource procurement, pursuant to Section 62-9-1 and 17.9.551 NMAC (07/31/2012). The IRP Rule's minimal evidentiary provisions fit within the broad scope of the Commission's longstanding evidentiary

procedures pursuant to Rule 1.2.2.35 NMAC. The Commission is not bound by the New Mexico Rules of Evidence, but the relevancy and competency of evidence, being the bar to admissibility, is respected by the IRP Rule. 1.2.2.35(A)(1), (2) NMAC. As such, Appellants' arguments cannot support a claim of due process violations.

SUMMARY OF PROCEEDINGS

The Commission deems it necessary to supplement the summary of proceedings as provided in the Brief-in-Chief, because Appellant's summary is incomplete and fails to illustrate the full breadth of the proceedings.[1]

The "nature of the case" is a rulemaking. *See* Rule 12-318(B)(3). The rulemaking began on May 26, 2021, with a Commission order opening the docket, permitting written comments to be filed on a draft IRP rule **[1 RP 0018-0027]**, and scheduling a workshop with an opportunity to provide oral comments. **[1 RP 0001-0013]** Prior to the filing of written comments, Appellant SPS moved for a second round of comments to be scheduled, which the Commission granted and additionally scheduled a second workshop to be held. **[1 RP 0046-0059, 0070-0081]** Six stakeholders filed written first round comments, including each Appellant. **[1 RP**

[1] Rules of appellate procedure require that an "answer brief shall conform to the requirements of the brief in chief, except that a summary of proceedings shall not be included unless deemed necessary." Rule 12-318(B) NMRA.

0082-0200; 2 RP 0201-0269] Representatives from 14 stakeholder groups attended the first workshop, including each Appellant. **[9 RP 1424]**

Four stakeholders filed a second round of written comments, including each Appellant. **[2 RP 0329-0384; 3 RP 0385-0571; 4 RP 0572-0616]** Prior to the second workshop, the Commission provided a redlined draft IRP rule showing revisions resulting from considering the first round of written comments and oral comments at the first workshop. **[4 RP 0628-0648]** Representatives from 18 stakeholder groups and one individual stakeholder attended the second workshop, including each Appellant. **[9 RP 1425]** At the second workshop, the Commission solicited representatives from nine stakeholder groups, including each Appellant, to form a "working group" with the task of drafting proposed rule language for the IM section of the draft rule. **[9 RP 1425]** From August to October of 2021, the working group held five meetings and submitted its proposed IM language to the Commission. **[9 RP 1425-1426]**

The formal rulemaking process commenced on November 3, 2021, with the issuance of a notice of proposed rulemaking ("NOPR") and the Proposed Rule. **[4 RP 0649-0684]** The NOPR set deadlines for initial, response, and reply comments, and it scheduled a public hearing. **[4 RP 0655-0657]** Eleven stakeholders filed initial comments, eight stakeholders filed response comments, and eight stakeholders filed reply comments; including initial, response, and reply comments from each

Appellant. **[6 RP 0780-0931; 7 RP 0932-1151; 8 RP 1152-1195, 1268-1364; 9 RP 1365-1414]** Prior to the public hearing, Appellant-SPS filed a letter addressed to the Commissioners stating its intention not to participate in the public hearing. **[8 RP 1206-1214]** Representatives from nine stakeholder groups attended the public hearing on March 15, 2022, including Appellants EPE and PNM. **[9 RP 1427]**

On September 15, 2022, the Commission issued the "Final Order" which adopted the Proposed Rule with revisions after consideration of the three rounds of commentary and public hearing processes. **[9 RP 1415-1544]** Five stakeholders filed responses to Appellants' individual motions for rehearing, including Appellants EPE and PNM. **[10 RP 1908-1987]**

On November 3, 2022, the Commission issued the "Final Order Upon Reconsideration" which adopted the Proposed Rule with revisions as a result of granting in part and denying in part the three motions for rehearing filed by Appellants. **[10 RP 2016-2065]** On the same day, the Commission issued an errata which provided a corrected redline of the Proposed Rule. **[10 RP 2066-2084]** Thereafter, EPE, PNM, and SPS separately appealed.

ARGUMENT

I. Standard of Review

Appellants' description of the Court's standard of review is incomplete. **[BIC 19-21]** The Court reviews a final order of the Commission for whether 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." *Dona Ana Mut. Domestic Water Consumers Ass'n v. N.M. Pub. Regulation Comm'n* ("*Dona Ana*"), 2006-NMSC-032, ¶ 9, 139 P.3d 166. "The burden is on the parties challenging the agency order to make this showing." *Attorney General v. N.M. Pub. Regulation Comm'n*, 2011-NMSC-034, ¶ 9, 258 P.3d 453.

Arbitrary and capricious acts are those that may be considered willful and unreasonable, without consideration, and in disregard of the facts and circumstances. *Public Serv. Co. of N.M. v. N.M. Pub. Util. Comm'n*, 1998-NMSC-017, ¶¶ 23-24, 125 N.M. 302. "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, 61 P.3d 806. The Court of Appeals explained the arbitrary and capricious standard of review as it relates to rulemakings in greater detail in *Old Abe Co. v. New Mexico Mining Commission*:

> An agency's rule-making function involves the exercise of discretion, and a reviewing court will not substitute its judgment for that of the

> agency on that issue where there is no showing of an abuse of that discretion. Rules and regulations enacted by an agency are presumed valid and will be upheld if reasonably consistent with the statutes that they implement.
> A party challenging a rule adopted by an administrative agency has the burden of showing the invalidity of the rule or regulation. The reasonableness of an administrative rule or regulation is not purely a legal question; a factual basis must appear. To successfully challenge a rule promulgated by an agency exercising its delegated legislative authority, the challenger must show, in part, that the rule's requirements are not reasonably related to the legislative purpose but are arbitrary and capricious . . . Where there is room for two opinions, the action is not arbitrary and capricious even though one may believe an erroneous conclusion has been reached.

1995-NMCA-134, ¶ 10, 908 P.2d 776 (quoting *Tenneco Oil Co. v. N.M. Water Quality Control Comm'n*, 1987-NMCA-153, ¶ 15) (quotations and edits in original omitted).

"When reviewing a question of fact", the Court defers "to the decision of an agency if it is supported by substantial evidence." *Dona Ana*, 2006-NMSC-032, ¶ 11. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Rinker v. State Corp. Comm'n,* 1973–NMSC–021, ¶ 5, 506 P.2d 783. The Court views the evidence in the light most favorable to the decision made by the Commission. *In re Petition of PNM Gas Servs.*, 2000-NMSC-012, ¶ 4, 129 N.M. 1. Although "the evidence may support inconsistent findings," the Court "will not disturb an agency's finding if supported by substantial evidence on the record as a whole." *Herman v. Miners' Hosp.*, 1991-NMSC-021, ¶ 6, 807 P.2d 734.

When reviewing questions of law,

> It is the function of the courts to interpret the law, and we are therefore not bound by an agency's interpretation of law and may substitute our own judgment for that of the agency. *We are, however, more likely to defer to an agency interpretation if the relevant statute is unclear or ambiguous, the legal questions presented implicate special agency expertise or the determination of fundamental policies within the scope of the agency's statutory function, and it appears that the agency has been delegated policy-making authority in the area.*
> However, we long have recognized the power of agencies to interpret and construe the statutes that are placed, by legislative mandate, within their province. In other words, by delegating a specific power to the Commission in such broad terms, our legislature expected that the Commission would develop an appropriate test to fit the regulatory climate.
> This deference is not absolute, however, and we will reject an agency's interpretation even of an ambiguous statute if it appears unreasonable or inconsistent with legislative intent.

Dona Ana, 2006-NMSC-032, ¶ 10 (quotations and edits in original omitted; emphasis added).

And lastly, it 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 the legislative intent and to develop the necessary policy to respond to unaddressed or unforeseen issues. *CABQ*, 2003-NMSC-028, ¶ 16. "The Legislature can delegate legislative powers to administrative agencies but in so doing, boundaries of authority must be defined and followed. In New Mexico, action taken by a governmental agency must conform to some statutory standard or intelligible principle." *Rivas*,

1984-NMSC-076, ¶ 3 (citations omitted). The "Court generally will not hold that the policymaking of an administrative agency violates separation of powers principles unless such administrative policymaking conflicts with or infringes upon what is the essence of legislative authority—the making of law." *State ex rel. Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 12, 980 P.2d 55 (citation and edits in original omitted).

II. The Commission Did Not Exceed Its Authority In Promulgating The IRP Rule

The Commission's font of legal authority flows through numerous channels that include New Mexico's Constitution, statutes, rules, and regulations. There are hundreds of these channels that together comprise the Commission's authority, and they are complex, interrelated, and they must work in harmony with each other so that the Commission can perform its function as a regulatory agency.

In the "Final Order" issued in the proceedings below, the Commission explained its authority using the metaphor of a "web," **[9 RP 1435-1440]** because a web is an apt way to describe the many overlapping and interwoven aspects of the Commission's authority. Appellants take issue with the Commission describing its authority as a web, describing it as an "invention**." [BIC 26]** The Brief-in-Chief implies that the Commission used the web metaphor *itself* as justification for its legal authority – an unreasonable implication. **[BIC 26, 28]** Whether the Commission's

authority is described as a "web" or another metaphor, the rhetorical figure of speech chosen is merely for demonstrative purposes and it makes no difference to the actual legal boundaries of the Commission's authority, which, with a reasonable interpretation, permits the Commission to regulate the fairness and transparency of Appellants' IRP-related procurement procedures to ensure fair, just, reasonable, and cost-effective rates, as explained below.

a. The Commission Has Express and Implied Authority to Promulgate the IRP Rule

Through its many grants of express authority, and the implied authority that necessarily follows, the Commission is afforded the discretion to develop and promulgate rules which provide oversight to the processes and procedures of public utility integrated resource planning and IRP-related procurement to ensure fairness, transparency, cost-effectiveness, and just and reasonable rates. The Commission has broad jurisdiction to implement regulatory schemes befitting of the Commission's special expertise and exclusive power. The IRP Rule is an expression of the Commission's authority derived from the broad, explicit and implicit authority granted to the Commission by the laws of New Mexico.

The Commission's overarching legal responsibilities are defined in the State's Constitution, "The public regulation commission shall have responsibility for regulating public utilities as provided by law." N.M. Const. art. XI, § 2. The PUA additionally provides, "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 . . . ." Section 62-6-4 (emphasis added). The Commission derives much of its power from the PUA, which 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." *Doña Ana* , 2006-NMSC-032, ¶ 16 (emphasis added).

Additionally, the following important foundational principle radiates, at all times, throughout the Commission's authority: public utility rates and services shall be fair, just, and reasonable. Section 62-3-1(B) ("It 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 to the end that reasonable and proper services shall be available at fair, just and reasonable rates . . . ."); Section 62-8-1 ("Every rate made, demanded or received by any public utility shall be just and reasonable."). And a further key principle, according to this Court, is that the Commission shall be allowed considerable discretion and great flexibility in acting on its authority. *S. Union Gas Co. v. N.M. Pub. Serv. Comm'n*, 1972-NMSC-072, ¶ 2, 503 P.2d 310 ("The legislature has established certain goals which utility regulation and supervision are intended to achieve: reasonable and proper services

should be made available to the public at fair, just and reasonable rates . . . Further, the Legislature has allowed the Commission great flexibility in the methods to be used in achieving those goals."); *Hobbs Gas Co. v. N.M. Pub. Serv. Comm'n*, 1980-NMSC-005, ¶ 4, 616 P.2d 1116 ("The Commission is vested with considerable discretion in determining whether a rate to be received and charged is just and reasonable.").

While evaluating the laws that define the bounds of the Commission's authority, the term "rate" must be read with its expansive definition in mind, as it is important to understanding the Commission's authority. "Rate" is defined as "every rate, tariff, charge or other compensation for utility service rendered or to be rendered by a utility *and every rule, regulation, practice, act, requirement or privilege in any way relating to such rate*, tariff, charge or other compensation and any schedule or tariff or part of a schedule or tariff thereof . . . ." NMSA 1978, § 62-3-3(H) (2009) (emphasis added). If a "rate" equals "every rule, regulation, practice, act, requirement or privilege," and the foundation of the Commission's Constitutional duty to regulate public utilities is built around fair, just, and reasonable rates, then it is no stretch that public utilities' IRP-related procurement practices could be subject to oversight regulations given that procurement has a direct impact on rates.

In addition to the Commission's general and exclusive powers, it may "take administrative action by issuing orders not inconsistent with law to assure implementation of and compliance with the provisions of law for which the commission is responsible and to enforce those orders by appropriate administrative action and court proceedings" and "adopt such reasonable administrative, regulatory and procedural rules as may be necessary or appropriate to carry out its powers and duties . . . ." Section 62-19-9. The Commission's general and exclusive power also extends to "do all things necessary and convenient in the exercise of its power and jurisdiction." Section 62-6-4. And in interpreting the authority of the Commission, the PUA "shall be liberally construed to carry out its purposes." NMSA 1978, § 62-3-2 (1985).

The channels of authority discussed up to now have broadly defined the boundaries of the Commission's authority, but the Commission also relied on specific statutes in the promulgation of the IRP Rule. On the specific topic of integrated resource planning, the Commission has the distinctive authority as follows:

> *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. Nothing in this section shall prohibit public utilities from implementing cost-effective energy efficiency and load management programs and the commission from approving public utility expenditures on energy efficiency programs and load management programs prior to the commission establishing rules and guidelines for integrated resource planning. The commission may exempt public utilities with fewer than five thousand customers and distribution-only public utilities from the requirements of this section. 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.

Section 62-17-10 (emphasis added). Additionally, as it relates to third-party suppliers of energy, the Commission's specific grant of authority provides that the "sale, furnishing or delivery of . . . electricity by any person to a utility for resale to or for the public *shall be subject to regulation by the commission* but only to the extent necessary to enable the commission to determine that the *cost to the utility* of the . . . electricity at the place where the major distribution to the public begins *is reasonable* and that the methods of delivery of the . . . electricity are adequate . . . ." Section 62-6-4 (emphasis added). Thus, the Commission may regulate sales and deliveries of electricity to public utilities to determine that costs are reasonable.

Contrary to Appellant's assertion that the Commission lacks authority to regulate procurement **[BIC 26]**, the Legislature amended the REA in 2019[2] to

[2] Senate Bill 489.

require that all renewable energy resources – which will constitute the majority of generating resources in the near future – *be competitively procured*. NMSA 1978, § 62-16-4(G)(3)(a) (2019). And the Commission shall adopt rules to implement the competitive procurement requirement. *See* NMSA 1978, § 62-16-7(A)(1) (2019); and *see* § 62-16-9 (2019). The Commission's least intrusive means of regulating competitive procurements is to monitor the utilities' procurement processes, which is just the transparency that the IRP Rule provides.

Appellants assert that, without an explicit provision of enabling law that is directly on point to the specific procurement-related sections of the IRP Rule, the Commission exceeded its authority with respect to that section of the rule. **[BIC 26-33]** However, such a hyper-specific provision is not needed to affirm the Commission's decision, nor should one be expected to exist. In passing law, the Legislature cannot be expected to foresee and address all issues, developments, and needs that may arise in utility regulation. *See CABQ*, 2003-NMSC-028, ¶ 16 ("it 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 2019 REA amendments, in part, necessitate the Commission's development of policy to respond to the unaddressed issue of competitive procurement to ensure fair,

just, and reasonable rates, and to identify the most cost-effective portfolio of resources.

Statute is seldom written with the specificity required for the Commission to sufficiently regulate public utilities, and that is at least partially why the Commission was imbued with rulemaking authority. The Legislature created the broad resource procurement requirements in the RPS, and the Commission is left with the responsibility to implement them on a more granular level. To argue that the Commission exceeded its authority in promulgating the IRP Rule suggests that there can be no mechanism to implement New Mexico's competitive resource procurement requirements. It is sensible and reasonable to assume that the Legislature enacted laws setting forth standards and goals for utility resource procurement but left to the Commission how to get there. To be sure, the Legislature did not determine that integrated resource plans must be filed periodically with the Commission for those plans to simply *exist*. Rather, the IRP is meant to identify the most cost-effective portfolio of resources – resources that are largely the product of competitive procurement – and to inform the public and Commission so that the Commission may carry out its mandate to ensure just and reasonable rates under the PUA. As such, the IRP Rule addresses the legislative gaps in the IRP Statute and REA, and the Commission's interpretation that procurement must follow planning to identify the most cost-effective portfolio of resources is not unreasonable.

The Commission's legislative power to adopt rules must define boundaries of authority and follow boundaries of authority as determined by the Constitution and statutes of New Mexico. *See Rivas*, 1984-NMSC-076, ¶ 3. Within those boundaries, there must exist an "intelligible principle" for the Commission's actions to conform. *See id.* Likewise, the Commission is once-again afforded discretion in defining and following its boundaries of authority and conforming to an intelligible principle. *See New Energy Econ., Inc. v. N.M. Pub. Regulation Comm'n* ("*NEE v. PRC*"), 2018-NMSC-024, ¶ 25, 416 P.3d 277 ("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, we 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.") The Commission was clearly given the task of giving meaning to interpretive gaps in the IRP Statute and the REA. Section 62-17-10 ("Pursuant to the commission's rulemaking authority . . . ."); § 62-16-7(A)(1) ("The commission . . . shall adopt rules . . . ."); and § 62-16-9 ("The Commission shall promulgate rules . . . ."). And determining the cost-effectiveness of a competitively procured resource portfolio is squarely within the Commission's special expertise. *See El Vadito de los Cerrillos Water Ass'n v. N.M. Pub. Serv. Comm'n*, 1993-NMSC-041, ¶ 11, 858 P.2d 1263 ("Commission decisions requiring

expertise in highly technical areas, such as utility rate determinations, are accorded considerable deference."); and *see Dona Ana*, 2006-NMSC-032, ¶ 10.

Thus, there exists a wide spectrum of law from which the Commission's authority to regulate IRP-related procurement can be interpreted, and to which the Commission is bound. The IRP Rule fits well within those bounds as a means to ensure fair, just and, reasonable rates – the foundation of public utility regulation – and to help IRPs and utilities identify the most cost-effective portfolio of resources.

From the Constitutional responsibility to regulate public utilities; to the statutory authority of general and exclusive power to supervise public utilities and plan and coordinate their activities; to the Commission's special expertise and the paramount importance of ensuring fair, just, and reasonable rates (whereas "rates" includes rules, regulations, requirements, practices, and acts that *in any way* relate to such rates); to the specific duty to regulate the cost of third party deliveries of electricity to utilities for the public and the specific duty to craft rules for IRPs to evaluate resources and to ensure the cost-effectiveness of those resources; to the Commission's policy-making, gap-filling, and interpretive responsibilities; to the recent revolution in State policy to focus on utilities' renewable and carbon-free competitive energy procurements; boundaries of authority exists in which an intelligible principle is readily identifiable and amply supported. The intelligible principle is, simply, "to identify the most cost-effective *portfolio of resources* to

supply the energy needs of customers", Section 62-17-10, and to ensure "fair, just, and reasonable rates", Section 62-3-1.

Until the latest amendments to the IRP Rule, the Commission found that its former IRP rules worked to achieve merely generic results on that intelligible principle. **[9 RP 1439, 1464, 1465, 1467, 1503]** The Commission determined that IRPs did not reliably plan or predict any actual resource procurements to come, and utility procurements often occurred behind a veil from the Commission. **[9 RP 1439, 1440]** These outcomes frustrated the intent of the Legislature and goals of the law. With the newest IRP Rule, the Commission determined that it seeks to achieve specificity and transparency in the pursuit of identifying the most cost-effective portfolios of resources to supply customers. **[1 RP 0003; 9 RP 1423, 1428, 1440, 1448, 1533]** Planning and procurement go hand-in-hand. Resource plans did not carry much value when there was no requirement that the utility put those plans into action. Resource procurement must follow resource planning, or else the planning portion may be a futile exercise. Additionally, it is impossible for an IRP to accomplish the statutory mandate of identifying the most cost-effective portfolio of resources to supply the energy needs of customers without there being an accompanying process to evaluate the actual resources available to be procured. The IRP Rule provides a process to identify actual generation resources in order to

achieve the goals of a public utility's integrated resource plan, legislative directives, and the Commission's Constitutional responsibility.

b. The IRP Statute is Vague and Ambiguous, it Contains Gaps, and it is Subject to the Commission's Interpretive Responsibility

"Integrated resource plan" and "public advisory process" are unique terms in the IRP Statute that are not defined and are thus vague and ambiguous. The Legislature left it to the Commission to interpret their meanings. The term "portfolio" is likewise undefined and seldom used throughout Chapter 62 of the New Mexico Statutes, and it is vague and ambiguous. The term "cost effective" as used in the IRP Statute is confused by its definition in the Efficient Use of Energy Act, which is irrelevant in relation to portfolios of generation resources, *i.e.* the definition of "cost-effective" references energy efficiency, load management, and the "utility cost test," yet it ignores renewable and conventional generation resources which are clearly contemplated in the IRP Statute. *Compare* § 62-17-4(C) (2019), *with* § 62-17-10. "Cost effective" is also vague and ambiguous. Thus, it is the Commission's responsibility to interpret "most cost-effective portfolio of resources" along with the other terms. These ambiguities are gaps, such as the gap between planning and action.

A disconnect is evident in the IRP Statute between planning and action. The plain meaning of the word "plan" suggests that some sort of action shall follow to execute the plan. Cambridge Dictionary, *Plan*, https://dictionary.cambridge.org/us/dictionary/english/plan (last visited Jul. 18, 2023) ("a set of decisions about

how to do something in the future"). However, the IRP Statute does not address what comes after the plan. Similarly, the plain meaning of the word "integrated" suggests that the "plan" should be holistic, to include procurement. And the term "resource" cannot be ignored or assumed to mean only generic resources. But the IRP Statute does not specifically address procurement. Thus, there is a clear gap in the Statute between planning and action. **[7 RP 1093; 9 RP 1444]**

The purpose of the IRP, and in-turn the Commission's rules to implement the IRP Statute, is to "identify the most cost-effective portfolio of resources to supply the energy needs of customers." Section 62-17-10. The Commission determined that, prior to the IRP Rule amendments at issue in this Appeal, IRP proceedings only yielded generic results. **[9 RP 1439, 1464, 1465, 1467]** The Commission found that, before there were any procurement provisions in the IRP Rule, IRPs had very little impact on the resource portfolios of public utilities for which they were supposed to "plan." **[9 RP 1532]** Now, the Commission has devised a procedure with the input of Appellants and many supportive stakeholders, to turn IRPs into actionable plans that produce specific results. The Commission understood that IRPs developed under former versions of the IRP Rule did not identify actual, cost-effective resources as contemplated in the IRP Statute. **[9 RP 1440]** The tool that public utilities use to identify actual, potential resource options to procure for their portfolios is an RFP. Therefore, it goes to reason that an RFP issuance is the

appropriate action to follow the integrated resource planning process, and the Commission is all but obliged to promulgate a rule for IRP-related RFP procedures to fill in the gap left by the Legislature.

The Commission's interpretation of an integrated resource plan to identify the most cost-effective portfolio of resources as consisting, in part, of a "statement of need," 17.7.3.8(B) NMAC, and an "action plan," *id.,* to be followed by an RFP process to evaluate actual resources to procure for a utility's portfolio, is not unreasonable. Rather, resource procurement is the logical next step after resource planning, and nothing in the IRP Statute refutes that interpretation.

c. Procurement Oversight Authority is Fairly and Necessarily Implied

"The agency's authority is not limited to the express powers granted by statute, but also includes those powers that arise from the statutory language by fair and necessary implication." *Howell v. Heim*, 1994-NMSC-103, ¶ 8. Appellants state in conclusory terms that "nothing in the record supports a finding that the IRP Rule amendments . . . are in any way necessary to implement the statutes cited by the Commission." **[BIC 29]** However, that is simply false. As explained in the Final Order **[9 RP 1440]** and in this Answer Brief, resource procurement must follow resource planning, *i.e.* it is necessary. As the Commission concluded, there is a gap in the IRP Statute between planning and procurement that, without bridging, would render IRPs and the IRP Statute fruitless. **[9 RP 1439, 1440, 1451]** Indeed, history

has shown that IRPs filed under the previous version of the IRP rule were wanting, because the prior process was deficient. **[1 RP 0003; 9 RP 1439, 1440, 1465, 1467, 1503]** The Commission cannot sufficiently regulate the filing of IRPs to identify the most cost-effective portfolio of resources without being able to review actual resources bid into an RFP issued by a public utility – that is, the Commission cannot uphold its statutory responsibility without implementing the IRP Rule's procurement oversight provisions. Thus, it is not only fair but necessary for the Commission to have promulgated the amendments to the IRP Rule.

d. The IRP Statute Is Not Exclusively Controlling

Appellants claim that the IRP Statute alone comprises the black letter law that forms the basis and the strict bounds of the Commission's authority to promulgate an IRP Rule **[BIC 8, 28]**; however, that argument ignores the reality that the Commission's different grants of authority are not mutually exclusive. The Commission's grants of authority work in harmony, they overlap, and there are many of them. Appellants state in conclusory terms, "The IRP Statute is the only authority for the Commission to adopt rules that require Utilities to file IRPs." **[BIC 8]** Appellants' argument ignores the very first words of the IRP Statute, which say, "Pursuant to the commission's rulemaking authority . . . ." Section 62-17-10. The Commission's rulemaking authority is obviously broader than the IRP Statute alone. In response to the Final Order's discussion of the many statutes that together form

the boundaries of the Commission's authority, Appellants state, "The Commission ignores that it has promulgated or amended other rules specific to those statutes" **[BIC 28]**; as if the ratio between statutes and rules is 1-to-1.

The Commission's powers are not compartmentalized as the Appellants imply. Appellants point to no authority to support their suggestion that one statute may only yield one rule, or that multiple statutes may not be interpreted together to promulgate one rule. Commonsense suggests that any one statute may cause many rules to be promulgated to implement it, and any collection of statutes may be read together to develop one rule. It is typical in the New Mexico Administrative Code for there to be many statutes cited in the "STATUTORY AUTHORITY" section of any given rule.

For example, based on the Appellants' narrowly focused argument, one may believe that the provision of the IRP Statute requiring a "most cost-effective portfolio" to be identified would supplant or conflict with the Commission's foundational authority to ensure that rates are fair, just, and reasonable (as "cost-effective" is not necessarily the same as "fair, just, and reasonable"). That cannot be true as it would intrinsically undermine the Commission's statutory duties. Also, there are many Commission rules that do not stem from one particular statute, but rather, the general regulatory powers of the Commission; for example, Rule 17.5.440 NMAC (12/27/2022), which governs extensions, system improvements, repairs,

replacements, and additions, does not have an on-point corollary in statute. Thus, the IRP Statute is not the sole controlling authority in play.

e. The Regulatory Environment Has Changed Since the 2018 IRP Rule Amendments

Further justification for the Commission's motivations to amend the IRP Rule include the backdrop setting of the recent, rapid movement in New Mexico's energy policies. In the previous five years, after the last IRP Rule amendments in 2018, the Legislature enacted significant laws that shifted the regulatory paradigm such that it became the Commission's responsibility to reflect on its policies with that new paradigm in mind, and to consider its own rule amendments in response. These changes include the passage of: amendments to the REA – specifically the RPS; the Energy Transition Act ("ETA"); the Community Solar Act; amendments to the EUEA; and the grid modernization statute. These new laws and amendments to established law each suggests to the Commission that it should take a focused interest in renewable and clean energy procurements, policy outcomes, and updating the Commission's rules so that New Mexico will be better positioned to integrate with the progressively stringent renewable portfolio standard whilst ensuring fair, just, and reasonable rates for utility customers.

Most importantly, the amendments to the REA reshaped the future of electricity generation in New Mexico. The REA's RPS was dramatically amended to progressively increase until it reaches 100% zero-carbon resources in 2045. *See* §

62-16-4. The RPS is also "subject to commission oversight," Section 62-16-2(A)(2), the Commission is charged with administering the RPS, Section 62-16-4(B), and the Commission is required to implement it via rules, Section 62-16-9. Critically, all renewable energy assets must be competitively procured. Section 62-16-4(G)(3). One should not underestimate the sheer amount of competitive renewable energy procurements that the RPS will require over the coming years, that are subject to Commission oversight, and that should be planned-for in an IRP.

The ETA created a scheme for retiring coal-fired generation assets to be replaced by competitively procured replacement resources with a bias towards renewable energy. *See* NMSA 1978, § 62-18-3 (2019). The EUEA was amended to allow for greater rate adjustment mechanisms to be implemented to promote further energy efficiency measures. *See* NMSA 1978, § 62-17-5(F) (2020). The Community Solar Act gave the Commission oversight over smaller scale non-utility renewable energy projects. *See* NMSA 1978, § 62-16B-1 to -8 (2021, as amended through 2022). And amendments to the PUA gave the Commission authority to review the reasonableness of grid modernization efforts. NMSA 1978, § 62-8-13 (2021). These laws depict the changing regulatory environment, and they highlight the Commission's need to keep its rules and regulations up-to-date, including the IRP Rule.

f. Appellants Misapply *NEE v. PRC*

Appellants argue, with citation to *NEE v. PRC*, that the Court "has held the IRP Statute neither prescribes nor proscribes resource selections for utilities . . . ." **[BIC 32]** However, the portions of the Court's Opinion cited by Appellants, **[BIC 32, 34]**, is merely explanatory *dicta* for the former IRP Rule in effect from 2018 to 2022, rather than a profession of the legal boundaries of IRPs or the IRP Statute generally.

Appellants try to twist a holding of *NEE v. PRC* – that arguments in favor of requiring an RFP in those specific circumstances were rejected by the Court – as grounds for the Commission's lack of authority in this Case because it dealt with the same IRP Statute. **[BIC 35]** Appellants' argument is a square peg in a round hole. Although the IRP Statute has not changed since *NEE v. PRC* was decided, other statutes have, such as the substantially increased RPS and the REA requiring competitive procurements, as discussed above. *NEE v. PRC* is also readily distinguishable, as that case concerned entirely different facts (a stipulation on achieving Federal regional haze standards vs. an IRP rulemaking), and the posture of the provisions cited by Appellants are not what they are portrayed to be. The *NEE v. PRC* opinion partially relies on a finding of the Commission that no law was cited by the complaining party that would require a utility to issue an RFP. *NEE v. PRC*, 2018-NMSC-024, ¶ 39. However, saying that no law was cited to require an RFP is

not the same as saying that the Commission does not have authority to promulgate a rule that requires issuance of an RFP. Additionally, *NEE v. PRC* implies that an RFP could be required or appropriate under difference circumstances. *See id.* ¶ 40.

g. Appellants' "Arbitrary and Capricious" and "Substantial Evidence" Arguments Are Without Merit

Appellant's Brief-in-Chief uses the term "arbitrary and capricious" but it does not actually make an argument that the Commission's actions in the below proceedings were arbitrary and capricious, because that argument cannot be made in good faith. "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. Appellants do not make the argument that the Commission's actions were "unreasonable or without rational basis," rather, Appellants make the argument that the Commission exceeded its authority and violated Appellants' due process rights, yet they included the term "arbitrary and capricious" to check the box. **[BIC 23-48]**

As previously mentioned, the record in the below proceedings is substantial, and the Final Order is a prime example of the meticulously detailed approach the Commission took to analyzing the record and affording it due consideration. For example, the Final Order summarizes and analyzes every comment submitted during the formal rulemaking process in exacting detail. **[9 RP 1440-1532]** The Final Order additionally provides substantial legal justification and explanation for the changes

the Commission made to the IRP Rule, **[9 RP 1435-1451]**, easily exceeding the low-bar "rational basis" test. The Final Order Upon Reconsideration does the same. **[10 RP 2016-2084]** The Commission's scrupulous approach can be construed as neither arbitrary or capricious; and the number of comments and argument submitted during the proceedings that rebuke the positions of the Appellants is substantial and reliable.

Although Appellants correctly cite to the arbitrary and capricious standard of review in the Brief-in-Chief, **[BIC 19, 20, 21]**, they only mention that standard twice in argument – in the introduction and the conclusion. **[BIC 3, 48]** Appellants' claims that the Commission acted arbitrarily and capriciously are entirely terse, conclusory, and without further explanation, and therefore should be rejected. Further, Appellants correctly cited to the "substantial evidence" standard of review. **[BIC 19, 20]** However, they do not mention it a single time in argument, therefore, any contention Appellants may raise in their reply brief or oral argument that the Commission's actions were against the substantial evidence should also be rejected as being waived and incongruous with the Commission's proven, meticulous summary and analysis of the record.

III. The IRP Rule Affords Fundamental Due Process

"It is well settled 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." *Jones v. N.M. State Racing Comm'n*, 1983-NMSC-089, ¶ 6

(citation omitted). The IRP Rule affords the fundamental requirements of notice and opportunity to be heard at every stage of the IRP and RFP processes, as explained below. However, it is important to note that the IRP Rule does not create any form of an adjudicatory proceeding, thus the opportunity to present claims or defenses is not relevant. Rather, the IRP Rule provides processes that work like notice and comment, where non-legal filings are made and the utility and stakeholders are afforded the opportunity to respond. The relevant stage of the procurement process that invites fully fledged administrative adjudication, where claims, defenses, and evidentiary decisions are made – where due process is critical – is during the specific resource approval phase, which is outside the scope of the IRP Rule. The IRP Rule provides,

> *In any proceeding filed by a public utility for approvals* stemming from its solicitation made pursuant to the RFP process as described in 17.7.3.12 NMAC, the commission may rely upon any reports or findings of the IM assigned to monitor that solicitation as evidence, provided that such evidence 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). Thus, there is no truth in Appellants' claim that the IM's reports are not subject "to an adjudication as would any other evidence." **[BIC 44]**

Upon commencement of the IRP process, the utility is required to provide notice of its intent to file an IRP which is then followed by six months of facilitated discussions. 17.7.3.9(A) NMAC. After the six months of facilitated discussions, the

utility files its IRP which triggers a comment process where the public gets an opportunity to file comments on the IRP, the utility is permitted to respond to public comments, and Commission Utility Division Staff opines on the statement of need's and action plan's compliance with the IRP Rule. 17.7.3.9(E) NMAC. And if the Commission agrees with Staff or otherwise finds compliance-related deficiencies with the statement of need and action plan, then it identifies those deficiencies to the utility and affords the utility an opportunity to make corrections. *Id.*

Upon commencement of the RFP process, the Commission, Staff, and intervenors are given the opportunity to comment on the utility's proposed RFP, and the utility may respond to those comments if it decides to alter the proposed RFP prior to issuance. 17.7.3.12(D), (E) NMAC. Further, the utility is permitted to confer on the selection of the IM, 17.7.3.14(C)(4) NMAC, and the utility, staff, and intervenors are permitted to comment on the IM's reports, 17.7.3.14(I)(1), (K) NMAC. The utility is not forbidden from communicating with the IM, 17.7.3.14(J) NMAC, and the IM's communications and reports are made part the case record, 17.7.3.14(I), (J) NMAC.

Appellants state in conclusory terms that the IRP Rule is "fatally flawed" because it lacks a set of lawful procedures for full and fair consideration of an IRP. **[BIC 38]** Appellants then immediately pivot their argument to there being a due process violation given that the IRP Rule as adopted does not match the IRP Rule as

proposed in the notice of proposed rulemaking, without further explanation or record citation. **[BIC 39]** These arguments are muddled, conclusory, unsupported, and should be rejected. The Brief-in-Chief then immediately pivots to discuss the provisions of the IRP Rule that offend due process **[BIC 39-43]**, but this Answer Brief addresses those factually incorrect statements in section **V.** at pages 41-46.

Appellants argue that the IM section of the IRP Rule violates utilities' due process rights because the IM is not subject to confrontation. **[BIC 43-45]** First, the Constitutional right of confrontation applies to criminal proceedings. *See* U.S. Const. amend. VI. Second, Appellants' argument ignores basic rules of evidence in Commission adjudications. The Commission is not bound by the New Mexico Rules of Evidence. 1.2.2.35(A)(2) NMAC. All relevant evidence is admissible, which is a low bar. 1.2.2.35(A)(1) NMAC. The Commission may take administrative notice of reports. 1.2.2.35(D) NMAC. And, "A commissioner or hearing examiner may obtain the advice of a nonparty expert on an issue raised in the rulemaking or adjudication if the commissioner or hearing examiner gives notice to the parties of the person consulted and the substance of the advice and affords the parties reasonable opportunity to respond." 1.2.3.9(D) NMAC; and NMSA 1978, § 62-19-23(C)(4) (2020).

The reports of the IM may be relevant evidence to subsequent dockets considering the approval of a resource procurement, and the utility is afforded the

opportunity to respond to those reports during both the RFP process and any subsequent adjudicatory docket where such reports are introduced as evidence, but those reports are not conclusive evidence. 17.7.3.14(I)(2) NMAC. Further, the IM is a contracted advisor to the Commission rather than a party or witness. 17.7.3.14(K) NMAC; 1.2.3.9(D) NMAC; and § 62-19-23(C)(4). As the IM is not a witness, the IM's reports are not testimony, thus the avenue for introduction to the record in a subsequent adjudicatory docket would be as an exhibit to the testimony of a party's witness, or as administratively noticed. In either instance, the utility has the opportunity to rebut an IM's report in a subsequent adjudicatory docket with its own witnesses, exhibits, and argument. A utility's due process rights are not violated under the routine circumstances when the Commission takes administrative notice of relevant reports, when a witness includes a relevant report as exhibit to the witness's testimony, or when the utility is forbidden from cross-examining the Commission's advisors.

Additionally, the IM fits the role of "advisory staff" pursuant to NMSA 1978, Section 62-19-9 (2020), as a contract-basis hire. *See* 17.7.3.14(E) NMAC. The *ex parte* communications statute and rule exempt advisory staff so that they may freely consult with the Commission without disclosure. *See* § 62-19-23(C)(2); and *see* 1.2.3.9(C) NMAC. This Court's precedent also supports the Commission's determination that the IM shall be shielded from discovery and cross-examination.

Qwest Corp. v. NMPRC, 2006-NMSC-042, ¶¶ 55-60, 143 P.3d 478 (Holding that a consultant contracted to advise the Commission falls within the definition of advisory staff.).

a. Utilities Are Not Deprived of Any Right of Appeal

Appellants claim that because there is no final decision on an IRP or RFP, the utilities are deprived of their right to appeal. **[BIC 46]** However, this argument invites the question of: do they intend to appeal their own decisions? The IRP is a product of the utility's decision-making, and it is either accepted or rejected based on a *compliance review* with instructions for corrections and refiling. 17.7.3.9(E) NMAC. An appeal at the IRP stage does not make sense, because the IRP is created by the utility, thus a utility would not, logically, appeal its own plan. Additionally, the RFP is created by the utility with the IRP Rule's parameters to ensure fairness and transparency. *See* 17.7.3.12 NMAC. Bids received on an RFP are outside the control of the Commission or utility, and the utility holds the discretion to pursue the procurement of any bid and seek approval. *Id.* Thus, an appeal at the RFP stage likewise does not make sense, as a utility would not appeal its own decision to procure resources.

"Acceptance" of an IRP is a procedure that carries less significance than "approval" of an IRP, and it should not amount to an appealable final order pursuant

to NMSA 1978, Section 62-11-1 (1993). Appellants simultaneously argue that "acceptance" is and is not an appealable final order. **[BIC 41, 46]**

IV. The IRP Rule's Multi-Jurisdictional Utility Provisions Mimic Statute And Affords Appropriate Consideration to Multi-Jurisdictional Utilities

Appellants' undeveloped argument that the IRP Rule violates the IRP Statute's explicit requirements concerning multi-jurisdictional utilities is inaccurate on its face and would invite violations of New Mexico law. **[BIC 36-38]** The IRP Rule mimics the IRP Statute – that is, the Rule follows the black letter law of the Statute. *Compare* § 62-17-10, *with* 17.7.3.8(D) and 17.7.3.16(C) NMAC.

The IRP Statute requires, "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." Section 62-17-10 (emphasis added). The Legislature used the phrase "shall take into account" which implies the Commission has some discretion to analyze multi-jurisdictional obligations; and the Legislature used the terminology "coordinate" which implies that the utilities have discretion to devise their plans for their multi-jurisdictional requirements.

The IRP Rule uses the verbatim language from the IRP Statute. 17.7.3.16(C) NMAC. It also requires that a "multi-jurisdictional utility shall include in its IRP a description of its resource planning requirements in the other state(s) where it

operates, and a description of how it is *coordinating* the IRP with its out-of-state resource planning requirements." 17.7.8(D) NMAC (emphasis added). Thus the IRP Rule puts multi-jurisdictional utilities in the driver's seat to devise their plans sufficient to satisfy their multi-jurisdictional obligations, and the Commission accepts it without substantive scrutiny. Therefore, the IRP Rule neatly fits within the IRP Statute's multi-jurisdictional utilities mandate.

Appellants' argument that the IRP Rule "appears to be little more than window dressing" is untrue and misinformed. **[BIC 37]** The IRP Rule puts the onus on the utility to describe its coordination efforts, and to devise its statement of need and action plan, for which the Commission will accept without substantive scrutiny. *See* 17.7.3.9(E)(4) NMAC. The Commission does not evaluate and approve a utility's description of its multi-jurisdictional coordination efforts. *See id.* The only parts of the IRP that the Commission reviews, pursuant to the IRP Rule, are the statement of need and action plan – and that review amounts to merely a non-substantive compliance review. *Id.* Further, a multi-jurisdictional utility may apply for a variance from the IRP Rule. 17.7.3.17 NMAC.

Appellants' argument amounts to a "get out of jail free card" where they allege the IRP Statute's requirement to coordinate differing jurisdictional requirements allows them to pick and choose which jurisdiction's requirements they may follow. Appellants' interpretation cannot stand. Public utilities like EPE and SPS chose to

operate in multiple jurisdictions, therefore, they chose to submit to the legal requirements of each jurisdiction. The Commission recognizes that it may be challenging to meet New Mexico's stringent RPS when Texas's RPS is much less stringent, *see* Tex. Util. Code Ann. § 39.904, but there is no authority that supports the proposition that EPE or SPS may disregard the valid laws of New Mexico in favor of the laws of Texas.

It appears Appellants' grievance is with the Legislature and the RPS. The RPS is what is causing the dramatic shift towards renewable and zero-carbon energy generation for which public utilities will have to competitively procure substantial new assets to achieve compliance. It may be difficult when the procurement requirements of each state are not aligned, but the Commission didn't enact the RPS. However, the Commission does have a duty to implement and enforce it. Sections 62-16-4(B), 62-16-7(A), and 62-16-9. Thus, it is the RPS, not the Commission or the IRP Rule, that is the root cause for any complications Appellants may have with other states' resource planning requirements. Appellants should address their complaint to the appropriate institution: the Legislature.

V. Appellants Assert Several Baseless Claims

Appellants claim that the IRP Rule gives the Commission "*carte blanche*" to approve a commenter's statement of need or action plan over that of the utility, and that a plausible end-result of the IRP process is the acceptance of an IRP that the

utility opposes, which would "seize control over the core functions of the utility." **[BIC 4, 40-42]** Appellants' claim is categorically false and not plausible. Section 9 of the IRP Rule allows stakeholders to submit, as public comment, their own versions of the statement of need and action plan; however, those comments are not subject to approval or acceptance. 17.7.3.9(E) NMAC. Rather, public comments are merely for informational and transparency purposes to round out the "public advisory process." *See id*; and *see* § 62-17-10. The only documents that the Commission reviews for compliance with the IRP Rule, and consequently accepts or rejects as compliant, is the statement of need and action plan that the *utility* drafts and submits. 17.7.3.9(E)(4) NMAC. The utility retains freedom to agree with any of the commenters' counter-proposals and to adopt them, 17.7.3.9(E)(2) NMAC, but at no point in the IRP Rule is the utility forced to adopt the positions of opposing stakeholders. In fact, the IRP Rule's acceptance process is not substantively different from the former IRP Rule that existed from 2018 to 2022. **[4 RP 670, 671]**; 17.7.3.12 NMAC (01/30/2018).

Appellants claim that Section 11 of the IRP Rule has mandatory provisions that directly conflict with the Commission's holding in the Final Order that the Commission makes no substantive decisions on a utility's IRP or RFP. **[BIC 10, 11]** This claim is also false. The Commission makes no substantive decisions at any point during the IRP or RFP process – that much can be seen from a plain reading

of the IRP Rule. The parts of Section 11 that Appellants point to are, ironically, mandatory actions that the utilities have discretion to determine. That is, the utilities themselves write the mandatory actions into the action plan, *see* 17.7.3.9(A), (E) NMAC, and the IRP Rule merely holds them accountable to their own chosen actions. 17.7.3.11 NMAC.

Appellants claim that in Sections 12 and 14 of the 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 . . . ." **[BIC 33]** Again, this claim is false. The IRP Rule provides nine price and non-price criteria that utilities shall use to evaluate bids; however, such criteria are not exclusive, the IRP Rule does not require the criteria to be evaluated in any certain way, and nor do these criteria carry any authority to prescribe resource selection. 17.7.3.12(I) NMAC. Public utilities hold the discretion to wield the criteria in their evaluations of bids, along with any other criteria they wish to include. *See* 17.7.3.12(J) ("Additional criteria used by the utility for evaluation . . . .").

Appellants claim that the IRP Rule "essentially" permits the Commission to "usurp" the utility's managerial prerogatives. **[BIC 9, 42]** The reality couldn't be further from the truth. The utility is placed in an active role throughout the IRP and RFP processes. The IRP Rule places the responsibility on the utility for guiding the Commission, Staff, and stakeholders throughout the IRP and RFP processes, and it

places the responsibility of all substantive decision-making on the utility. Additionally, the utility is left with discretion in its choices throughout the processes of the IRP Rule. The utility has freedom and discretion to choose: when to begin the facilitated stakeholder process, 17.7.3.9(A) NMAC; whether to reach agreement with stakeholders on the statement of need or action plan, *id.*; how many modeling runs is reasonable, 17.7.3.9(A)(1) NMAC; when to file the IRP subject to deadline, 17.7.3.9(E) NMAC; how to coordinate its out-of-state planning requirements, 17.7.3.8(D) NMAC; when to file IRP comment responses subject to deadline, and the contents of such comments, 17.7.3.9(E)(2) NMAC; what the contents of the statement of need and action plan shall be, 17.7.3.10 and 11 NMAC; whether to notify the Commission of material events that would have the effect of changing the statement of need and action plan, 17.7.3.8(E) NMAC; when to issue an RFP subject to deadline, 17.7.3.12 NMAC; what shall constitute the RFP documents, 17.7.3.12(C) NMAC; when to provide the RFP documents, *id.*; whether to incorporate comments on the RFP, 17.7.3.12(D) NMAC; what information to include in an RFP, 17.7.3.12(F) NMAC; whether to incorporate changes to the RFP, 17.7.3.12(E) NMAC; how to prioritize bid ranking criteria and how to rank bids, 17.7.3.12(H), (I) NMAC; whether to issue additional RFPs or make other procurements, 17.7.3.12(L), (M) NMAC; to seek cost recovery, 17.7.3.13, 14(D) NMAC; who to recommend to serve as independent monitor, 17.7.3.14(C)(4), (D) NMAC; whether and how to

comment on the independent monitor's report, 17.7.3.14(I)(1) NMAC; whether to claim confidentiality protections, 17.7.3.15 NMAC; whether to seek a variance from any provision of the IRP Rule, 17.7.3.17 NMAC; and finally, whether to select, procure, and seek approval of any of the resources from the RFP, Section 62-9-1, and 17.9.551 NMAC (07/31/2012). Meanwhile, the Commission makes no *substantive* decisions on the utility's IRP or RFP. Thus, there is no merit to the argument that the Commission is supplanting utility management's discretion and decision-making with its own.

However, in response to Appellants' comments submitted during the proceedings **[9 RP 1470, 1471, 1473-1475]**, the Commission revised the proposed IRP Rule to remove a litigated approval process for the statement of need and action plan in favor of an "acceptance" process **[9 RP 1446, 1447, 1469, 1479-1480, 1508]** similar to what had been codified in the previous version of the IRP Rule. **[4 RP 670, 671]**; 17.7.3.12 NMAC (01/30/2018). Whereas an approval procedure early in the IRP process could have been interpreted as overly prescriptive, an acceptance procedure, along with input from the Commission, Staff, and stakeholders, provides the utility with multiple opinions and options to inform its implementation of the action plan without mandating any specific resource selections. The acceptance procedures do not lock the utility into any Commission-mandated course of action, nor does it create a point of litigation at the statement of need and action plan. The

utility may take into consideration the input of the Commission, Staff, and stakeholders in its selection of resources at its discretion.

Finally, Appellants assert, without citation, that the IRP Rule cuts against competitive procurements because it permits "competitors to see other bidders' price information and to adjust their bids accordingly." **[BIC 13]** There is no citation for that claim because it does not exist in the Rule, and it is not feasible to occur. There is simply no provision for entities to see price results in advance of a solicitation because such data is not summarized by the IM until the "final report" is filed, *after the solicitation is completed.* 17.7.3.14(G)(1)(b)(ii) NMAC.

CONCLUSION

For the foregoing reasons, the Commission respectfully requests that Appellants' appeal for relief be denied and for the Commission's Final Order, Final Order Upon Reconsideration, and IRP Rule be afforded deference and affirmed.

NEW MEXICO PUBLIC REGULATION COMMISSION

/s/ Robert Lundin, electronically signed
Robert Lundin, Associate General Counsel
P.O. Box 1269
Santa Fe, NM 87504-1269
(505) 629-2102
Robert.Lundin@prc.nm.gov

CERTIFICATE OF SERVICE

I CERTIFY that on July 20th, 2023, a true and correct copy of the *New Mexico Public Regulation Commission's Answer Brief* was electronically filed in the Supreme Court's Odyssey filing system, which in turn has caused service upon counsel for all parties of record.

/s/ Robert Lundin, electronically signed
Robert Lundin, Associate General Counsel
New Mexico Public Regulation Commission
P.O. Box 1269
Santa Fe, NM 87504-1269
(505) 629-2102
Robert.Lundin@prc.nm.gov