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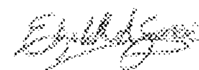

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

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

<u>CONSOLIDATED WITH</u>

PUBLIC SERVICE COMPANY OF NEW MEXICO,

Appellant,

v. No. S-1-SC-39676

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

SOUTHWESTERN PUBLIC SERVICE
COMPANY,

Appellant,

v. No. S-1-SC-39677

NEW MEXICO PUBLIC REGULATION
COMMISSION,

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In the Matter of a Commission Rulemaking
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TABLE OF CONTENTS

I. The IRP Rule Amendments unlawfully expand the Commission's regulation of utilities, allowing it to control resource selection………………………………………….. 1

A. Appellees paint different pictures of the Rule to obscure the Commission's seizure of control over resource selection…….. 2

B. Other laws regulate utilities' actual resource selections and leave no gaps to justify the expansion of Commission powers…… 5

C. The Commission exerts *ultra vires* control through the Rule's RFP and IM provisions……………………………………10

II. The Rule is contrary to law because it deprives parties of an appeal…13

III. The Rule is ripe for appellate review………………………………….15

IV. The Rule deprives Appellants of procedural due process by sequestering the IM from discovery and cross-examination while permitting admission of the IM's report as evidence…………………16

CERTIFICATE OF SERVICE………………………………………………….22

STATEMENT OF COMPLIANCE…………………………………………….22

TABLE OF AUTHORITIES

Cases - New Mexico

Albuquerque Bernalillo County Water Util. Authority v. N.M. Pub. Reg. Comm'n, 2010-NMSC-013, 148 N.M. 21 5

Citizens for Fair Rates v. N.M. Pub. Reg. Comm'n, 2022-NMSC-010 .... 1, 15

City of Albuquerque v. N.M. Pub. Reg. Comm'n, 2003-NMSC-028, 134 N.M. 472 6

Doña Ana Mutual Domestic Water Consumers Ass'n v. N.M. Pub. Reg. Comm'n, 2006-NMSC-032, 140 N.M. 6 10

El Paso Electric v. N.M. Pub. Reg. Comm'n, 2010-NMSC-048, 149 N.M. 174 9

Gila Res. Info. Project ex rel. Balderas v. N.M. Water Quality Control Comm'n, 2018-NMSC-025, 128 N.M. 328 15

Handmaker v. Henney, 99-NMSC-043, 128 N.M. 32 14

Kelly Inn No. 2, Inc. v. Kapnison, 1992-NMSC-005, 112 N.M. 231 14

N.M. AG v. N.M. Pub. Reg. Comm'n, 2013-NMSC-042 17

N.M. Mun. League, Inc. v. N.M. Environment'l Improvement Bd., 1975-NMCA-083, 88 N.M. 201 7

New Energy Econ., Inc. v. Shoobridge, 2010-NMSC-049, 149 N.M. 42 15

New Energy Economy v N.M. Pub. Reg. Comm'n, 2018-NMSC-024 .... 6, 8

PNM Elec. Servs. v. N.M. Pub. Util. Comm'n, 1998-NMSC-017, 125 N.M. 302 3

Q Link Wireless, LLC v. N.M. Pub. Reg. Comm'n, 2023-NMSC-___, (S-1-SC-38812, May 22, 2023) 6

Qwest Corp. v. N.M. Pub. Regul. Comm'n, 2006-NMSC-042, 140 N.M. 440.........5

State ex rel. Sandel v. N.M. Pub. Util. Comm'n, 1999-NMSC-019, 127 N.M. 272 3

TW Telecom of N.M., L.L.C. v. N.M. Pub. Reg. Comm'n, 2011-NMSC-029, 150 N.M. 12 .... 17, 18, 19

Statutes

NMSA 1978, § 8-8-13(B) (1998) 19
NMSA 1978, § 62-6-4(B) (1941, as amended to 2003) 8, 9
NMSA 1978, § 62-9-1 (1941, as amended to 2019)....................7
NMSA 1978, § 62-11-1 (1941, as amended to 1993).................... 13, 14
NMSA 1978, § 62-16-1 to 10 (2004, as amended to 2019) 5
NMSA 1978, § 62-16-2(B) (2004, as amended to 2007) 6
NMSA 1978, § 62-17-1 to 11 (2005, as amended to 2013) 5
NMSA 1978, § 62-17-3 (2005, as amended to 2008)....................6
NMSA 1978, § 62-17-10 (2005).................... 2, 5, 6
NMSA 1978, § 62-19-23(C)(2) (1998, as amended to 2023) 19

Regulations

1.2.2.23(F) NMAC....................18
1.2.2.35(A) & (I) NMAC....................17
1.2.2.35(D)(4) NMAC 18
1.2.3.9 NMAC (07/15/2004)....................19
1.2.3.9(C) NMAC 19
1.2.3.9(D) NMAC....................19
17.7.2.9 NMAC (09/26/2017)....................6
17.7.3(G)(b) NMAC 12
17.7.3.7(I)(2) NMAC....................16
17.7.3.7(K) NMAC....................16

17.7.3.9(E)(4) NMAC....13
17.7.3.12(A) NMAC....10
17.7.3.12(B) NMAC....10
17.7.3.12(B) through (D) NMAC....10
17.7.3.12(D) NMAC....11
17.7.3.12(E) NMAC....10
17.7.3.12(F) NMAC....10
17.7.3.12(I) NMAC....11
17.7.3.12(K) NMAC....11
17.7.3.14(G)(1)(a) NMAC....16
17.7.3.14(G)(1)(b)(ii) NMAC....12
17.7.3.14(G), (H) & (I) NMAC....12
17.7.3.14(H), (I), & (J) NMAC....13
17.7.3.14(I)(1) NMAC....16
17.7.3.14(I)(2) & (G)(2) NMAC....12
17.7.3.14(I)(2) NMAC....19
17.7.3.14(K) NMAC....12, 18
17.9.551 NMAC (07/31/2012)....7, 8
17.9.551.8 NMAC....8
17.9.572 NMAC (05/04/2021)....6, 9
17.9.572.14 & 20 NMAC....9

Constitutional Provisions

N.M. Const. art. VI, § 2....14

I. The IRP Rule Amendments unlawfully expand the Commission's regulation of utilities, allowing it to control resource selection.

The Commission and Intervenor's answer briefs make clear Appellants and Appellees fundamentally disagree on the meaning of the amended Integrated Resource Plan ("IRP") Rule ("IRP Rule" or "Rule") provisions. This is not a case about semantics—this appeal is about the permitted scope of regulation and the utilities' right to manage their businesses to ensure they can provide safe and reliable service at just and reasonable rates. The purpose of the Rule is to shift control over internal resource planning and selection decisions from utilities to the Commission. Appellees fail to identify any statutory authority that allows the Commission to do so.

In promulgating the Rule, the Commission grants itself the power to legislate where it believes the Legislature has failed to act. This Court has refused to allow the Commission to define its own powers under the rubric of "utility regulation" and instead has limited the Commission's authority to that delegated by statute. *See Citizens for Fair Rates v. N.M. Pub. Reg. Comm'n*, 2022-NMSC-010, ¶ 45 ("[W]hile the New Mexico Constitution delegates to the Commission the exclusive responsibility for carrying out public utility regulatory policy, the parameters of that policy are, in the first instance, for the Legislature to decide.").

By expanding the Commission's involvement in utility integrated resource planning through request for proposals ("RFP") processes and Independent Monitor ("IM") oversight not found in statute, the Commission overreaches and legislates through rulemaking. This causes duplication and administrative waste given the Commission adjudicates utility requests for approval of long term purchased power agreements ("LTPPAs") or certificates of public convenience and necessity ("CCNs"). The Appellants are not resisting change, transparency, or fairness and are not rejecting meaningful public input when developing their IRPs. **[PRC AB 27; INT AB 27]** Transparency, competition, and fairness are not served by intruding into utilities' management activities so that the Commission can dictate resource selections. **[PRC AB 2; INT AB 27]**

A. Appellees paint different pictures of the Rule to obscure the Commission's seizure of control over resource selection.

Under the IRP Statute, utilities are required to prepare an IRP by evaluating resource types and related factors to identify the most cost-effective resource portfolio for customers. That preparation includes a public advisory process. The IRP Statute requires the IRP to filed with, rather than approved by, the Commission. NMSA 1978, § 62-17-10 (2005) ("IRP Statute" or "Statute").

The Commission now assumes the power to design, evaluate, and select a utility's portfolio of resources by implementing IM and RFP processes that go well beyond resource planning set out in statute. **[INT AB 19]** The Commission's

metaphors describing its authority to adopt the Rule are colorful distractions that emphasize the Commission's lack of authority. **[PRC AB 13, 17 & 22]** The Commission fails to find statutory authority that meets this Court's test: whether the authority has been expressly granted by the Legislature or is "necessarily implied by statute." *PNM Elec. Servs. v. N.M. Pub. Util. Comm'n,* 1998-NMSC-017, ¶ 10, 125 N.M. 302. Beyond metaphor, no legislative delegation of authority allows the Commission to regulate utilities as provided in the Rule. *See State ex rel. Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶¶ 12-13 , 127 N.M. 272 ("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."). The Appellees' answer briefs effectively concede a lack of authority by embracing all laws under which the Commission operates. **[PRC AB 28-29; INT AB 11-12]**

The absence of a legislative mandate is amplified by Appellees' conflicting interpretations of the meaning and effects of the Rule. First, they argue the Commission, through the Rule, will achieve specific resource results by taking over the resource planning and selection processes. Admitting the Rule directly regulates procurements, the Commission argues, "[T]he Commission has devised a procedure … to turn IRPs into actionable plans that produce specific results."

[PRC AB 19, 25] The Intervenors argue the Rule allows the Commission to "determine" which portfolio is the most cost-effective (a determination the IRP Statute requires of utilities). **[INT AB 19]**

Having conceded the Rule amendments usurp the statutory directives to utilities, Appellees pivot to arguing the Rule does not curtail the utilities' resource selections. **[PRC AB 4; INT AB 14]** These disparate views among Appellees also carry through to conflicting interpretations of the due process and finality provided in the Rule. **[***Compare* **PRC AB 6** ("[T]he IRP Rule does not create an adjudication of the IRP or resulting RFP, . . ."; and **PRC AB 38** ("An appeal at the IRP stage does not make sense, . . .") *with* **INT AB 38** ("Any party to any proceedings before the Commission may file a notice of appeal . . .").**]**

These conflicting visions of the purpose and scope of the Rule prove the Rule is not only fatally vague and unclear, they demonstrate the validity of the Appellants' challenge to the Rule. The inescapable meaning of the Rule is the Commission's seizure of control over not just the utilities' IRP decisions, but also RFPs, bids, bid evaluations, and resource selections filed in the IRP docket. **[INT AB 19]**

No rationale supports the notion the Commission must engage in or actively control an actual RFP evaluation and selection process to accept the reasonableness of a twenty-year IRP intended to identify a combination of future resources that is

"most cost-effective." Section 62-17-10. This Court is not bound by the Commission's interpretation of its statutory powers and should give no deference to that interpretation in this appeal: The Court "may substitute [its] own judgment for that of the [PRC] if the [PRC's] . . . is unreasonable or unlawful." *Albuquerque Bernalillo County Water Util. Authority v. N.M. Pub. Reg. Comm'n,* 2010-NMSC-013, ¶ 51, 148 N.M. 21.

B. Other laws regulate utilities' actual resource selections and leave no gaps to justify the expansion of Commission powers.

The Appellees concede a lack of explicit authority by falling back on other statutes that address other forms of regulation. The Commission cites the Renewable Energy Act, Section 62-16-1 to 10 (2004, as amended to 2019), and Efficient Use of Energy Act, Section 62-17-1 to 11 (2005, as amended to 2013). **[PRC AB 19-20; 24-26; 27 & 30]** Intervenors argue the Commission's Rule corrects the Legislature's neglect in *not* authorizing the Commission to regulate procurement. **[INT AB 12]** These arguments effectively concede that no explicit authority exists that authorizes the Rule. Appellees ignore that "[a]gencies are created by statute, and limited to the power and authority expressly granted or necessarily implied by those statutes." *Qwest Corp. v. N.M. Pub. Regul. Comm'n,* 2006-NMSC-042, ¶ 20, 140 N.M. 440.

The statutes cited by Appellees have left no "gaps" to be filled by the Rule amendments. The Commission has already adopted rules to implement those laws. The Renewable Energy Act, NMSA 1978, Section 62-16-2(B) (2004, as amended to 2007) ("REA") and Rule 17.9.572 NMAC (05/04/2021), govern renewable energy requirements. The Efficient Use of Energy Act, NMSA 1978, Section 62-17-3 (2005, as amended to 2008) ("EUEA"), and Rule 17.7.2.9 NMAC (09/26/2017), specify energy savings programs and targets. No gaps are left to be filled in the achievement of these legislative mandates.

This Court has held that in adopting certain other statutes, the Legislature intended the Commission to address, through regulation, "unaddressed or unforeseen issues." *City of Albuquerque v. N.M. Pub. Reg. Comm'n,* 2003-NMSC-028, ¶ 16, 134 N.M. 472. But the IRP Statute is not such a law. The Legislature has not changed the IRP Statute since 2005. The specific provision governing IRPs, Section 62-17-10, does not authorize control over RFPs through the involvement of the IM. *See Q Link Wireless, LLC v. N.M. Pub. Reg. Comm'n,* 2023-NMSC-___, ¶ 10 (S-1-SC-38812, May 22, 2023) (in statutory construction, "the specific governs over the general") (citation omitted). Further, this Court has previously recognized the Commission's longstanding refusal to limit a utility's resource selection process to only a competitive RFP approach, noting the Commission's view that no law requires or authorizes the Commission to order a

utility to issue an RFP. *New Energy Economy v N.M. Pub. Reg. Comm'n,* 2018-NMSC-024, ¶ 39.

The other laws cited by the Commission relate to new policy objectives and *disprove* the claim that the Legislature left gaps for the Commission to interpret and fill. If the Legislature updated these laws and did not alter the IRP Statute, we may presume that the Legislature intended to accomplish its policy objectives through amendments to the REA and EUEA, not the IRP Statute. *See N.M. Mun. League, Inc. v. N.M. Environment'l Improvement Bd.*, 1975-NMCA-083, ¶ 7, 88 N.M. 201 ("All statutes are presumed to be enacted by the legislature with full knowledge of all other statutes in *pari materia* and with reference thereto.").

The Commission argues it has authority to adopt the Rule amendments based on its ratemaking authority. [**PRC AB 16** ("If a 'rate' equals 'every rule, regulation, practice, act, requirement or privilege,'. . . IRP-related procurement practices could be subject to oversight regulations given that procurement has a direct impact on rates.")] The Commission admits, however, that resource selections made pursuant to a Commission-accepted IRPs cannot affect rates *unless and until* the Commission approves the resource in a subsequent proceeding under different statutes and rules. [**PRC AB 4**] With this argument, the PRC concedes the IRP Rule amendments are not needed to regulate procurements.

Section 62-9-1 controls the Commission's authority to issue CCNs for new utility facilities. The Commission's Rule governing approval of LTPPAs, 17.9.551 NMAC (07/31/2012), prevents a utility from becoming obligated under an LTPPA before Commission approval. 17.9.551.8 NMAC. Through these proceedings, the so-called "generic" results of IRPs become specific resource procurements. **[PRC AB 23, 25, 26-27]** A CCN proceeding provides a full airing of issues with the resource procurement in lieu of the IRP proceeding. *See New Energy Economy, Inc.*, 2018-NMSC-024, ¶ 30 ("All parties recognized that the issues addressed in the CCN proceedings were the very same issues at the heart of the 2014 IRP protest proceedings. NEE gives us no reason to conclude that the PRC was required to hold duplicative proceedings.").

In its search for statutory authority, the Commission then turns NMSA 1978, Section 62-6-4(B) (1941, as amended to 2003) on its head. **[PRC AB 16].** Section 62-6-4(B) permits the Commission to regulate the sale of energy to a utility for resale to the public "*only to the extent necessary* to enable the commission to determine that the cost to the utility . . . is reasonable and that the methods of delivery . . . are adequate." *Id.* (emphasis added).

This explicit limitation explains why the Commission devotes its answer brief to its general ratemaking authority, attempting unsuccessfully to link energy "cost" to resource selection. **[PRC AB 16, *citing* § 62-6-4(B)]** Examination of

energy costs and ratemaking, however, are not part of the IRP process; they are the subject of other proceedings under other rules. **[***See, e.g.*, 17.9.551 NMAC, *cited by* **PRC AB 4]** This Court should overturn the Rule as it has in other cases where the Commission exceeded its jurisdiction and interpreted its ratemaking authority and definition of a "rate" too broadly. *El Paso Electric v. N.M. Pub. Reg. Comm'n*, 2010-NMSC-048, ¶ 11, 149 N.M. 174.

The Commission's most dramatic overreach is its reliance on the REA as a source of authority for the IRP Rule. **[PRC AB 19]** Under that statute and Rule 17.9.572 NMAC, utilities submit annual plans regarding renewable resource requirements and procurements. In those proceedings, the Commission examines, and approves, modifies, or rejects, procurement costs, competitiveness, consistency with the IRP, and furtherance of the public interest. 17.9.572.14 & 20 NMAC.

The Commission acknowledges this law governing procurements and attempts to distinguish the *additional* requirements of the IRP Rule as "[t]he Commission's least intrusive means of regulating competitive procurements . . . to monitor the utilities' procurement processes[,]" and to provide "transparency." **[PRC AB 19]** Through the Rule amendments, the Commission has moved its jurisdictional control far beyond Section 62-6-4(B), allowing it to dictate the manner in which resource selection is conducted from beginning to end. *See* Section I(C) *infra*.

The IRP Rule is inconsistent with law and arbitrary and capricious because it exceeds the scope of the Commission's authority and intrudes upon the utilities' management of key business functions, including long-term planning decisions and the selection of resources to operate its system and fulfill its customers' needs. *See Doña Ana Mutual Domestic Water Consumers Ass'n v. N.M. Pub. Reg. Comm'n,* 2006-NMSC-032, ¶ 9, 140 N.M. 6 (the Commission's decision will be set aside if arbitrary and capricious or outside the scope of the agency's authority).

C. The Commission exerts *ultra vires* control through the Rule's RFP and IM provisions.

Appellees distort the effect of the RFP provisions of the Rule, downplaying the Commission's control over resource selection. [**PRC AB 4**; **INT AB 21**] The text of the Rule conflicts with these interpretations. 17.7.3.12(A) NMAC ("[T]he utility shall follow the request for proposals process to ensure cost competitiveness and fairness in procurement by comparing proposals among bidders through a transparently designed and monitored request for proposals."). These design and monitoring provisions demonstrate full control of the RFP process by the PRC and its chosen IM. The utility must respond to the IM's design report before issuing its RFP. 17.7.3.12(E) NMAC. The Commission also exerts control over the RFP by precisely dictating the information it must include. 17.7.3.12(F) NMAC. If the utility issues an RFP in the IRP docket, 17.7.3.12(B) NMAC, its RFP processes

can only occur with IRP approval and Commission involvement in every part of an RFP process through the IM, 17.7.3.12(B) through (D) NMAC.

Once all RFP-related documents are provided in the IRP docket, "commissioners, commission utility division staff, and intervenors may submit comments to the utility, including on whether its proposed RFP conforms with its statement of need and action plan and is not unduly discriminatory." 17.7.3.12(D) NMAC. The Rule contains no process for the utility to respond in a manner that might preclude a later finding by the Commission that the RFP was tainted if the utility disputes or deviates from those "comments."

The utility must evaluate the bid according to nine price and non-price criteria including, *inter alia,* consistency with the EUEA and REA. 17.7.3.12(I) NMAC. Bid evaluations are "subject to review by the commission". 17.7.3.12(K) NMAC. Again, the Rule is vague about how and when this review of bids will occur, what rights the utility has to defend its bid evaluation, or what the Commission's review is intended to accomplish.

The Rule's new procurement process will create a chilling effect on the utilities' business of resource planning and selection by burdening the procurement of resources, exposing sensitive bid information, and subjecting bidding to the influence of competitors. This overexposure will create uncertainty for bidders, risk disclosure of competitively sensitive business information, slow the bid

process, and, potentially, increase costs for customers. This works against the consumer interests in reliable, fairly-priced energy.

The IM is designated to interpret and fulfill all of the policy objectives outlined by the Commission in its answer brief. [**PRC AB 4**; **INT AB 36**] The IM conclusively determines whether the RFP process is fair, competitive, robust, reasonable, and compliant with the Rule. 17.7.3(G)(b) NMAC. None of these terms is defined. The IM reviews in real time all components of the RFP process, including highly sensitive bid and modeling data, and reduces that review into a series of reports to the Commission that are evidence, but not subject to examination. 17.7.3.14(G), (H) & (I) NMAC. The IM reports, may "[A]t any point" notify the Commission of a deficiency. 17.7.3.14(I)(2) & (G)(2) NMAC.

While the utility can comment on the reports, the Rule specifies no procedure in which the IM reports are reviewed, accepted or rejected. 17.7.3.14(K) NMAC. Deficiencies found by the IM must "be addressed by the commission in a future proceeding for approval of the solicited projects." 17.7.3.14(G)(1)(b)(ii) NMAC. Thus, a utility's failure to comply with the IM recommendations or findings automatically imperils its future application without due process. *See* Section III, *infra.*

The only transparency ensured by this process is the exposure of competitively sensitive bid information and analyses, with its accompanying

chilling effect on participants in the RFP processes. The IM has access to all communications with bidders, all data, model inputs, bids, and "any other relevant information" relied on by the utilities, but the utilities may not initiate contact with the IM. 17.7.3.14(H), (I), & (J) NMAC. Thus, the IM is shrouded in a protective cloak. Appellees who were intervenors below state that they "have been and will be bidders in utility procurements[,]" **[INT AB 4]** revealing a special interest in obtaining information and advocating in this appeal for "transparency."

II. The Rule is contrary to law because it deprives parties of an appeal.

The Commission designed the Rule to prevent an appeal of an IRP acceptance or rejection by claiming it makes no substantive decisions on the IRP or any procurement. **[BIC 45-46]** "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." **[PRC AB 45]**

The Commission cannot mean what it says. Acceptance or rejection of the IRP creates a right to an appeal because it generates a final order deciding the substance of resource selection and procurement. *See* NMSA 1978, § 62-11-1 (1941, as amended to 1993) (granting this Court appellate jurisdiction over all commission final orders). The Commission can refuse to accept the utility's IRP and require that it be refiled. 17.7.3.9(E)(4) NMAC. By rejecting the IRP, the Commission changes the utility's portfolio of resources and dictates the type of

resource selection to follow. Section I, *supra.* Rejection has the practical effect of deciding all issues of law and fact for that filing, creating a final order. *Kelly Inn No. 2, Inc. v. Kapnison*, 1992-NMSC-005, ¶ 14, 112 N.M. 231 (order or judgment is final when all issues of law and fact have been determined and the case disposed of to the fullest extent possible). Practicality dictates the finality of the determination for the exercise of appellate jurisdiction. *See id.* ¶ 15 ("the term 'finality' is to be given a practical, rather than a technical, construction[,]" and "to determine whether a judgment is final, the court must look to its substance and not its form"). A rejection is a decision on substance: it tells a utility that it may not select its chosen resources through procurement.

The Commission argues that because the final acceptance and IM report may appear in a later adjudicatory proceeding, it cannot be a final order. **[PRC AB 6; 38-39]** This Court's grounded, flexible view of finality—whether the Commission's decision "practically disposes of the merits of the action[,]" *Handmaker v. Henney*, 99-NMSC-043, ¶ 7, 128 N.M. 32—makes IRP rejection a final order even if other proceedings related to the planned procurements may follow. *See generally Kelly Inn No. 2*, ¶ 12 (subsequent fixing of attorneys' fees). *See* Section I(B), *supra.* Intervenors agree that the Commission's decision will generate a final order subject to the right of appeal. **[INT AB 38-40]** This Court must take the Commission at its word that it intended the Rule to deprive all parties

the right to an appeal. The Rule is contrary to law because it deprives parties of their right to one appeal. Section 62-11-1; N.M. Const. art. VI, § 2.

III. The Rule is ripe for appellate review.

The finality of the Commission's order for appeal also answers the related question of ripeness. **[INT AB 43-44]** The question of whether the Commission has exceeded its legislative authority in rulemaking is ripe for judicial review, when, as here, final action has been taken. *See New Energy Econ., Inc. v. Shoobridge*, 2010-NMSC-049, ¶¶ 19-20, 149 N.M. 42 (dissolving injunction because administrative agency had not completed it rulemaking and issued its final order). The same ripeness rule applies to constitutional challenges to a final order of an administrative agency. *See Citizens for Fair Rates*, 2022-NMSC-10, ¶¶ 21-23 (statutory appeal from Commission final order encompasses constitutional challenges). By reciting the effects of the Rule, the Appellants do not speculate about future effects of an unripe rule **[INT AB 43]**; they meet their burden of demonstrating that no set of circumstances exists where the Rule could be valid. *Gila Res. Info. Project ex rel. Balderas v. N.M. Water Quality Control Comm'n*, 2018-NMSC-025, ¶ 6, 128 N.M. 328.

IV. The Rule deprives Appellants of procedural due process by sequestering the IM from discovery and cross-examination while permitting admission of the IM's report as evidence.

The IM produces reports in a fortress of solitude, impervious to questions from a party in any proceeding. A utility cannot be heard on the IM's understanding of facts, raise potential bias in the conclusions found there, or interrogate comprehension of the complex technical and principles the IM must address in the final report. *See* 17.7.3.14(G)(1)(a) NMAC (requiring the IM final report to address the reasonableness, competitiveness, and fairness of the utility's solicitation, evaluation and procurement process). The Commission can receive the final report into evidence, 17.7.3.14(I)(1) NMAC, without foundation for its admission or cross-examination of the IM about the report. The Commission has designed the Rule to deprive utilities of due process through admission of the final report as evidence "in a subsequent adjudicatory docket." **[PRC AB 37]**

The Commission's answer brief provides a roadmap for a one-way trip to a procedural due process violation: "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." **[PRC AB 37]** By Commission design, "the IM shall be shielded from discovery and cross-examination." **[PRC AB 37]**; 17.7.3.7(K) NMAC. In a proceeding related to approval stemming from solicitations made

pursuant to the Rule's procurement process, "[t]he commission may rely upon any reports or finding of the IM assigned to monitor a solicitation as evidence…." 17.7.3.7(I)(2) NMAC.

Again, the Commission cannot mean what it says. If the IM report comes into evidence, then the IM is by definition a witness—one whose words are evidence. Procedural due process before the Commission means notice and opportunity to be heard "at a meaningful time and in a meaningful manner." *TW Telecom of N.M., L.L.C. v. N.M. Pub. Reg. Comm'n*, 2011-NMSC-029, ¶ 17, 150 N.M. 12 (internal punctuation omitted). Notice and opportunity to be heard includes the right to present evidence and cross-examination on the impact of the IM's work and on the factual findings in the final report. *See N.M. AG v. N.M. Pub. Reg. Comm'n*, 2013-NMSC-042, ¶ 30 (due process rights can be violated when relying on evidence from a separate case without providing the appellant the opportunity to present evidence and cross-examination on the evidence in separate case) (interpreting *TW Telecom*) (no constitutional violation because material from separate case involved purely legal issue).

The IM will make factual findings on procurement—from reasonableness, to competition, to fairness. The meaningful time and manner for presentation of evidence and cross-examination is in the IRP proceeding, and before the report is completed. Though the Commission claims it would not violate due process rights

in the "routine circumstance" when a witness includes a relevant report as an exhibit," **[PRC AB 37]**, that is only true because, in the routine circumstance, the author of the report is a witness who appears at a hearing and is subject to confrontation through presentation of contrary evidence, objection to admissibility, and cross-examination in the proceeding. *See* 1.2.2.35(A) & (I) NMAC (evidence at hearing must be admissible as the best evidence reasonably obtainable with due regard to necessity, competence, availability, and trustworthiness, and also with consideration of the New Mexico Rules of Evidence). These rules protect due process and by necessity require the right to object to the IM's report before the Commission can rely upon it as evidence. Any evidence considered without notice and opportunity to be heard in the same proceeding in which it is offered violates procedural due process. *See TW Telecom*, ¶ 20 ("The PRC is authorized only to make its decision based on the evidence adduced at the hearing and made part of the record.") (citation and internal punctuation omitted). The Commission's appeal to administrative notice does not rescue its Rule. **[PRC AB 37]** A request to take administrative notice is "subject to appropriate objection" under the same evidentiary rule that governs admission of other evidence. 1.2.2.35(D)(4) NMAC.

The IM is a witness who, by special privilege, avoids examination in any proceeding. That the Rule calls the IM a consultant does not negate due process concerns, nor does the right to put in comment later in an adjudicatory proceeding

[PRC AB 36-37; **INT AB 37]** Comments are not evidence in the later proceeding and come only after the report has been completed, meaning opportunity to be heard has not come at a meaningful time and in a meaningful manner. 1.2.2.23(F) NMAC. The IM does not serve in an advisory capacity once the IM report is placed into evidence into a proceeding. *Compare* 17.7.3.14(K) NMAC (IM shall be advisor to commission under 1.2.3.9 NMAC (07/15/2004)) *with* 1.2.3.9(D) NMAC (nonparty gives advice to commission, not evidence, subject to opportunity to respond). The Commission's use of the IM to create evidence admitted in future proceedings is also not saved by the "advisory staff" referenced in NMSA 1978, § 62-19-23(C)(2) (1998, as amended to 2023) and the Commission's Rule at 1.2.3.9(C) NMAC. **[PRC AB 37]** NMSA 1978, Section 8-8-13(B) (1998) delimits the permissible role of advisory staff and does not allow the advisor to create evidence for future proceedings. 17.7.3.14(I)(2) NMAC. To meet procedural due process, the Rule must permit notice and opportunity to be heard at a meaningful time and place: before the IM report becomes evidence in the proceeding in which it is offered. *TW Telecom*, ¶ 20. Because the Rule does not, it stands contrary to law, and this Court must vacate it.

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CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of September, 2023, I filed the foregoing Reply Brief 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 4,399 words.

/s/Carol A. Clifford
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