



**IN THE SUPREME COURT OF THE STATE OF NEW MEXICO**

**NEW MEXICANS FOR UTILITY  
SAFETY,**

Appellant,

**S-1-SC-40723**

v.

**THE NEW MEXICO PUBLIC  
REGULATION COMMISSION,**

Appellee.

**In the Matter of Public Service  
Company of New Mexico's Application  
for Authorization to Implement Grid  
Modernization Components that  
Include Advanced Metering  
Infrastructure and Application to  
Recover the Associated Costs through  
a Rider, Issuance of Related Accounting  
Orders, and Other Associated Relief,  
Case No. 22-00058-UT.**

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**ANSWER BRIEF OF APPELLEE  
NEW MEXICO PUBLIC REGULATION COMMISSION**

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## I. INTRODUCTION

This case concerns the Commission’s authority to manage its own proceedings. This authority is neither novel nor extraordinary—it is a fundamental procedural prerogative shared by administrative bodies and courts alike, designed to promote efficiency and prevent the introduction of irrelevant or distracting material.

Appellant New Mexicans for Utility Safety (“NMUS” or “Appellant”) argues the Commission acted unreasonably or unlawfully by misinterpreting NMSA 1978, Section 62-8-13 (2020) (“the Grid Modernization Statute”) during the Commission’s proceeding evaluating Public Service Company of New Mexico’s (“PNM”) Application for Grid Modernization Components (“Application”). According to Appellant, the Commission’s interpretation improperly limited the scope of the proceeding and prevented NMUS from introducing evidence on its preferred issue. Appellant argues that these limitations resulted in excluding NMUS’s evidence, which deprived Appellant of due process. But neither the record nor the law supports these claims. Established principles of administrative procedure permit the Commission to structure its proceedings in a manner that ensures relevance, efficiency, and fairness to all parties. Although Appellant may wish to present every concern it

considers important, it is the presiding officer—not the parties—who is empowered by law and trusted by the Commission to define the issues to be adjudicated and determine what should be before the Commission.

Here, the Commission correctly applied its expertise when it interpreted the statute in accordance with the statute’s plain language. In the Grid Modernization Statute, the Legislature charged the Commission with administering and implementing utilities’ use of grid modernization projects, which, the Legislature directed, include the use of advanced metering infrastructure (“AMI”). The Commission’s reading of the statute reflects its technical expertise and its practical understanding of the regulatory framework it is bound to enforce. Appellant offers no basis to conclude that the Commission’s interpretation was unreasonable or contrary to law; Appellant simply disagrees with it.

Additionally, the Hearing Examiner clearly defined the scope of the proceeding at the outset and granted Appellant’s request to intervene provided Appellant discuss a single issue: the “opt-out provision” and any associated costs. Throughout the case, the Hearing Examiner consistently advised Appellant that NMUS’s preferred issue—whether installing AMI would result in significant harm to people, animals, and vegetation across the state—was

not within that scope. Appellant's dissatisfaction with this limitation does not transform a lawful procedural decision into a denial of due process.

The Commission therefore respectfully requests that this Court affirm its orders.

## II. SUMMARY OF PROCEEDINGS

In 2020, the Legislature enacted the Grid Modernization Statute, which set forth the framework the Commission must use to evaluate utilities' grid-modernization applications and which included incorporating AMI. NMSA 1978, § 62-8-13 (2020). But at the Commission, the discussion over AMI began long before this. Commission case 15-00312-UT examined a PNM variance request that asked the Commission to approve suspension of PNM's meter testing program while they performed a cost benefit analysis associated with replacing current meters with AMI meters. Final Order, *In the Matter of the Application of Pub. Serv. Co. of New Mexico for Prior Approval of the Advanced Metering Infrastructure Project, Determination of Ratemaking Principles & Treatment, & Issuance of Related Accounting Orders Pub. Serv. Co. of New Mexico, Applicant*, 15-00312-UT (NMPRC Mar. 19, 2018), 1. In that hearing, NMUS proffered a significant amount of testimony regarding ostensible health risks posed by AMI. While the Hearing Examiner in that case determined he

could not make a specific finding that AMI posed an unacceptable risk to public health and safety, he did state

[w]hat is not in question, however, is that a substantial number of people believe they experience adverse health symptoms, and they firmly believe the symptoms are caused by electromagnetic waves and smart meters, in particular. The Hearing Examiner therefore [finds] that customers who have strong feelings about the health effects of the meters should be allowed to protect their stated health concerns without a prohibitively high cost.

*Id.* 69.

In that matter, whether to install AMI and what, if any, opt out provision might be considered were proper issues for Commission consideration because the Commission at that time was permitted to determine whether PNM would be permitted to “retire its existing consumption and demand meters and replace them with [AMI] meters and equipment capable of communicating data to and from a central PNM data center.” *Id.* 1.

However, in 2020, the Legislature, following the tide of New Mexico’s energy transition to efficient, renewable energy sources, enacted the “Grid Modernization Statute,” wherein the Legislature carved out a path for the Commission to follow. § 62-8-13. Specifically, the Commission was to examine the reasonableness of a utility’s “grid modernization projects,” which the Legislature defined as

Improvements to electric distribution or transmission infrastructure through investments in technologies or services that are designed to modernize the electrical system by enhancing electric distribution or transmission grid reliability, resilience, interconnection of distributed energy resources, distribution system efficiency, grid security against cyber and physical threats, customer service or energy efficiency and conservation.

§ 62-8-13(F). Importantly, the Legislature specifically included “advanced metering infrastructure” (“AMI”). § 62-8-13(F)(1).

In accordance with Section 62-8-13(A), the Commission, finding “grid management and controlling demand [to be] a critical piece in maintain[ing] grid reliability, resiliency, and minimizing risks to New Mexicans that would occur from planned or unplanned power outages,” ordered PNM to file a grid management application just as El Paso Electric Company (“EPE”) and Southwestern Public Service Company (“SPS”) had done the year prior.<sup>1</sup> [1 RP

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<sup>1</sup> In EPE’s Application, EPE sought approval of its grid modernization Projects. Certification of Stipulation, *Application of El Paso Electric Company for Approval of a Grid Modernization Project to Implement an Advanced Metering System (AMS) Project*, Advice Notice No. 274, Original Rate No. 46-Advanced Metering System Rider, Revised Rate No. 15-Miscellaneous Service Charges, and Original Form 42 for Opt-Out Provision and Fees, 21-00269-UT, (NMPRC

0003-0006] In that order, the Commission found “the implementation of AMI comports with the Grid Modernization Statute, will benefit PNM’s New Mexico retail customers and the public, and will provide a net public benefit.” [1 RP 0005, ¶ 7] Specifically, the Commission requested PNM address two specific issues in its application for grid modernization implementation: first, a

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October 12, 2022), 11. There, the Hearing Examiner stated “[t]he [Grid Modernization Statute, NMSA 1978, § 62-8-13] provides the Commission with specific guidance on AMS and other grid modernization projects that was not previously available. The [Grid Modernization Statute] requires that the Commission evaluate the ‘reasonableness’ of a project and the criteria set forth in NMSA 1978, Section 62-8-13(B)(1)-(7) provide a standard to review and determine whether EPE’s AMS Project’s ‘requested investments, incentives, programs and expenditures’ are factually and legally appropriate and reasonable.” *Id.* 12-13. While stipulations have slightly different requirements for approval than final orders after a hearing, the Hearing Examiner in the EPE case did not discuss or imply that health or safety was part of her consideration. EPE’s application was approved as stipulated with modifications in 2022. *Id.* NMUS did not seek to intervene in that proceeding. *Id.* at 4-6.

proposal for AMI, or “smart meters,” focusing on “automatic meter reading, remote fault detection, and including a discussion of updated rate design options consistent with variable availability resources that use smart meter capabilities including time of use options,” and second, “identifying demand response and grid management programs being considered for implementation using smart meter capabilities and how they work in conjunction with proposed rate design principles.” [1 RP 0006] There was no indication in this order that the Commission would consider *whether* to allow AMI, only *how* PNM would ensure a smooth transition from legacy meters to AMI. [*Id.*]

PNM filed its application on October 3, 2022 wherein it requested the Commission approve PNM’s implementation plan, project costs and related ongoing operations and maintenance costs, a grid mod rider, authorization for PNM to create related regulatory assets and liabilities for recovery, approval of an “opt-out consent form,”<sup>2</sup> a methodology to determine cost-based-opt-out-

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<sup>2</sup> The ability for customers to “opt out” of receiving an AMI meter was a determination made prior to this case based upon PNM’s research and by listening to health concerns from its customers. [1 RP 0204]

fees, approval of reporting criteria, approval of variances from Commission rules 410 and 530, and other approvals required under the Grid Modernization Statute, the Public Utility Act, and Commission rules to implement these projects and recover costs associated with the implementation plan. [1 RP 0022-0023]

Following its rules of procedure, the Commission assigned this matter to a hearing examiner. Appellant submitted its motion to intervene, stating it represented “residential customers of PNM and other investor-owned public utilities. . . who are concerned about the health, safety and environmental impacts of [AMI] on all New Mexicans.” [2 RP 0862] In particular, Appellant stated it sought intervention to “protect the public health, safety and environment.” [2 RP 0908] The Hearing Examiner granted Appellant’s motion subject to some conditions. First, the Hearing Examiner set the scope for NMUS’s involvement in the proceedings, stating “[i]f NMUS’s members do not want the technology (for whatever reason) they should be permitted to participate in the discussion about what it will mean for them to opt out and what costs (if any) they will be required to bear to do so. There can be no doubt that NMUS is entitled to submit evidence on that question and that evidence

could include what other utilities who have already rolled out AMI have done as regards customers who do not want it.” [2 RP 0932]

However, with respect to Appellant’s arguments regarding issues on *whether* AMI should be implemented due to perceived health effects, the Hearing Examiner determined this question was not at issue in the proceeding because the “Legislature informed utilities that they may include AMI investments in their applications for grid modernization,” and that Appellant’s contention that “AMI should not be used in New Mexico [would] intrude upon fundamental principles enshrined in New Mexico’s Constitution [where] this Commission cannot follow or tread.” [2 RP 0933] Appellant did not seek a review or reconsideration of this order.

The Hearing Examiner reiterated the scope of the proceeding in his Order on PNM’s Objection to NMUS’s Motion to Intervene and NMUS’s Motion for a Protective Order, issued on February 7, 2023, stating “the contention AMI will kill New Mexicans will not be considered in this case (nor will evidence attempting to prove this be admitted). Our Legislature has expressly authorized utilities to install AMI as part of grid modernization. It will prejudice the other intervenors and PNM, as well as the Commission, to spend limited resources on arguments that have already been resolved by our

Legislature.” [6 RP 2696] The Order further states “[i]n expressly defining the term ‘grid modernization’ to include AMI, the Legislature resolved the concerns advanced here by NMUS against NMUS . . . The term ‘customer protection’ as used in the Grid Modernization Statute does not have the meaning NMUS ascribes to it. Those words are about cost effectiveness and economic protections.” [6 RP 2696-2697] Appellant also did not challenge the issues presented in this order.

Consistent with the Hearing Examiner’s determination that certain issues were outside the scope of the case, PNM moved to strike NMUS’s direct testimony as irrelevant and cumulative and challenged the witnesses’ qualifications as experts. [6 RP 2703-2723] In particular, PNM argued “none of the witnesses directly addresses PNM’s Application or PNM’s proposed AMI project.” [6 RP 2711]

Appellant, in its reply to PNM’s Motion to strike testimonies, continued to argue that the issue of health and safety of AMI should be considered in this proceeding, stating the issue of “whether or not AMI should be deployed in New Mexico at all has never been resolved.” [6 RP 2730] In his order striking Appellant’s testimonies, the Hearing Examiner reiterated the Commission’s stance on the issues before it: that the Legislature specifically included AMI in

its definition of “grid modernization,” and, therefore, the question of *whether* the Commission could consider AMI had indeed been answered by the Legislature and therefore could not be a question before the Commission. [6 RP 2787] The Hearing Examiner continued, stating “if our Legislature intended to grant the Commission authority to reject AMI wholesale, it would not have expressly defined grid modernization to include AMI,” and, consequently, the only questions the Commission would be permitted to examine in this proceeding would be

[N]ow that AMI is authorized, [how can] the technology [] be utilized to achieve the purposes of grid modernization. That is, whether an AMI proposal will produce energy and cost efficiencies, increase grid resilience and reliability, reduce air pollution and greenhouse gas emissions, and any of the many other considerations identified in Section 62-8-13(B).

[6 RP 2788] The Hearing Examiner also conducted extensive analysis of the statute in ascertaining how the Commission interpreted the Grid Modernization Statute for these proceedings. [6 RP 2787-2788]

Appellant sought reconsideration and interlocutory appeal of the Order Striking Testimonies. [6 RP 2802-2805] Appellant also sought to remove the Hearing Examiner, claiming the Hearing Examiner was biased when he “admitted testimony from PNM on health and safety of AMI” but struck

NMUS's evidence on that same issue. [6 RP 2848] The Hearing Examiner stated that no evidence has yet been "admitted at this stage of the proceedings," and reiterated the Commission's belief that the Legislature did not intend the Commission to consider whether physical harm would result from a utility's grid modernization plan because, if it did have such an intent, it would have said so in clear terms. [6 RP 2886-2887] Additionally, recognizing that the issue of potential health and safety issues regarding the use of AMI would not be entertained during this proceeding, the Hearing Examiner sua sponte struck all testimony and evidence proffered by PNM on this issue to ensure the record was clear of irrelevant evidence. [6 RP 2928]

Appellant filed a post-hearing brief wherein it restated its arguments that the Hearing Examiner misinterpreted the Grid Modernization Statute and continued to argue the Hearing Examiner was biased when he struck Appellant's testimony relating to the health effects of AMI, but did not strike testimony relating to the environmental benefits of PNM's grid modernization plan (which is not specific to AMI). [8 RP 3387-3393] Appellant never sought to cross-examine PNM or these witnesses on this issue; in fact, Appellant did not appear at the Phase One hearing except for the first few minutes of the first day wherein Appellant stated NMUS had been "prohibited from participating

in the public hearing” [6 RP 2947], would “not be putting on any witnesses,” and therefore would be “in and out of this hearing.” [7 RP 2974; *see also* 8 RP 2968; 2981-2982; 2992-2993; 3003-3004]

Contrary to Appellant’s claims, the Hearing Examiner did not prohibit Appellant from calling or examining witnesses or introducing evidence but only limited the subject matter of any examination to those issues which the Hearing Examiner deemed necessary for adjudication of PNM’s application, set forth at the outset of the proceeding. [*See, e.g.*, 8 RP 3393]

After the conclusion of the hearing and after post-hearing briefing, the parties jointly determined it would benefit the Commission for PNM to perform and supply a “cost benefit analysis.” [11 RP 3627] A hearing for this “Phase Two” of the proceedings was held so that all parties could question PNM’s witnesses on its submitted cost benefit analysis. Appellant did appear at this hearing and did cross examine PNM witness Hawkins about PNM’s discovery responses to Appellant’s questions regarding the “costs” ostensibly omitted from PNM’s analysis; namely, “costs of radiation to public health,” and an “increase in diabetes, heart attacks, strokes, cancer, and birth defects expected to be caused by this radiation.” [*Id.*] The Hearing Examiner sustained

PNM's objection to the relevance of the questions to its witness but did admit PNM's discovery responses as exhibits. [11 RP 3630]

The Hearing Examiner issued his Recommended Decision after all parties submitted post-hearing briefing for Phase Two, wherein he recommended that PNM's Application be approved subject to certain conditions and modifications. [13 RP 3914] For Appellant's arguments, he again explained that the issues of *whether* AMI should be implemented was not at issue in these proceedings because the Legislature "told the utilities they may utilize the technology," particularly given that the other two investor-owned utilities in New Mexico—El Paso Electric Company and Southwestern Public Service Company—had already received approval of their grid modernization applications and rollout of AMI. [13 RP 3907-3908] The Hearing Examiner again stated that AMI was permitted by the Legislature and the Commission was not in a position to consider evidence contrary to what the Legislature had already decided. [13 RP 3908]

Appellant filed exceptions to the Recommended Decision, repeating its position that the statute should have been read to include "public health, safety, and welfare" and therefore NMUS should have been able to introduce testimony on these issues. [14 RP 3930]

In its Final Order, the Commission adopted the Recommended Decision with limited amendments unrelated to this appeal and specifically rejected NMUS's exceptions to the Recommended Decision. [14 RP 3996-3997]

Appellant filed a motion for rehearing [14 RP 4124] that was denied by operation of law pursuant to NMSA 1978, Section 62-10-16 (1941) ("A failure by the commission to act upon such application within [twenty days] shall be deemed a refusal thereof").

This appeal followed.

### III. STANDARD OF REVIEW

The burden is on the Appellant to demonstrate that the order is unreasonable or unlawful. NMSA 1978, § 62-11-4 (1965). Unreasonableness or unlawfulness may be shown by demonstrating the decision is arbitrary and capricious, is not supported by substantial evidence, or is an abuse of discretion "by being outside the scope of the agency's authority, clear error, or violative of due process." *In re Zia Nat. Gas Co.*, 2000-NMSC-011, ¶ 4, 128 N.M. 728, 998 P.2d 564.

## A. Commission Interpretation of Statutes

Interpretation of statutes is a question of law, which this Court reviews de novo. *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Util. Comm'n*, 1999-NMSC-040, ¶ 14, 128 N.M. 309, 992 P.2d 860.

When an agency that is governed by a particular statute construes or applies that statute, the court will accord “deference to interpretation given to a statute by the agency to which it is addressed.” *Public Serv. Co. v. New Mexico Pub. Serv. Comm'n*, 1987-NMSC-124, ¶ 12, 106 N.M. 622, 747 P.2d 917. The court will confer a heightened degree of deference to legal questions that “implicate special agency expertise or the determination of fundamental policies within the scope of the agency’s statutory function.” *Morningstar Water Users Ass’n v. New Mexico Pub. Util. Comm’n*, 1995-NMSC-062, ¶ 11, 120 N.M. 579, 904 P.2d 28 (internal citations omitted) (“The special knowledge and experience of state agencies should be accorded deference.”). However, the Court is not bound by the agency’s interpretation and may substitute its own independent judgment for that of the agency because it is the function of the courts to interpret the law; the court should reverse if the agency’s interpretation of a law is unreasonable or unlawful. *New Mexico Atty. Gen. v. New Mexico Pub. Regulation Comm'n*, 2013-NMSC-042, ¶ 12, 309 P.3d 89.

## **B. Due Process**

The constitutionality of the Commission's orders constitutes a question of law, which the Court reviews de novo. *Alb. Bernalillo Co. Water Util. Auth. v. NMPRC*, 2010-NMSC-013, ¶ 19, 148 N.M. 21, 229 P.3d 494. In administrative proceedings, due process requires notice and a meaningful opportunity to be heard. *Id.* ¶ 21.

In sum, Appellant bears the burden to show the Commission acted unreasonably or unlawfully. Here, the Commission's interpretation of the statute is entitled to deference, falls well within its statutory authority, and reflects a reasonable application of its specialized expertise. The record also shows that all parties received adequate notice and a full opportunity to present evidence and argument, and Appellant identifies no procedural deficiency that would constitute a constitutional violation.

Appellant has not met its burden, and the Commission respectfully requests that the Court affirm its orders.

## **IV. ARGUMENT**

The Commission properly interpreted the Legislature's statutory language and gave effect to the definitions the Legislature itself included. Construing the Grid Modernization Statute in a manner consistent with its text

and purpose, the Commission reasonably identified the issues before it in evaluating PNM's application. In so doing, the Commission exercised its authority to manage its own proceedings by excluding evidence that was irrelevant to these issues and that would not have assisted the Hearing Examiner in reaching a decision. Like trial courts, administrative bodies are entrusted with this gatekeeping function to promote efficient, orderly hearings and to prevent the record from being burdened with information that obscures rather than elucidates. The Commission's interpretation of the statute—and its corresponding decision to limit irrelevant evidence—was both lawful and firmly within its discretion.

Because the Commission reasonably interpreted the statute to limit the inquiry regarding AMI to the manner of its deployment, it properly excluded evidence falling outside that scope. Appellant received clear notice of the issues to be adjudicated and ample opportunity to present argument and evidence on those matters. That process fully satisfied the requirements of due process. Therefore, the Commission respectfully requests that the Court affirm.

**A. The Commission’s Interpretation of the Grid Modernization Statute Was Reasonable and its Interpretation Should Be Accorded Deference.**

The threshold question before the Court is whether the Commission reasonably interpreted the Grid Modernization Statute when it determined questions as to whether AMI was healthy or safe were not at issue in the Commission’s evaluation of whether to approve PNM’s Application. The Commission respectfully requests that the Court affirm the Commission for two reasons. First, the canons of statutory construction require the Commission to examine the plain meaning of the statute unless it is ambiguous. Only then would the Commission need to examine the statute within the context of the Public Utility Act (“PUA”), NMSA 1978, Sections 62-1 through 6 and 62-8 through 13 (1979, as amended through 2024).

Second, the Court should grant a degree of deference to the Commission’s interpretation of the Grid Modernization Statute because the statute implicates special agency expertise and the determination of fundamental policies within the scope of the Commission’s function. *N.M Indus. Energy Consumers v. N.M Pub. Regul. Comm’n* (“NMIEC”), 2007-NMSC-053, ¶ 19, 142 N.M. 533, 168 P.3d 105. The statutory criteria for evaluating utility grid modernization applications are well within the Commission’s expertise.

Because the statute's plain meaning can be ascertained from the Grid Modernization Statute itself, there was no need to examine it within the context of the remainder of the PUA. And because the Commission is able to evaluate this statute given its own expertise, the Court should defer to the Commission's interpretation.

i. The Canons of Statutory Construction Support the Commission's Interpretation of the Grid Modernization Statute.

This Court has established the manner in which it reviews the Commission's interpretation of its guiding statutes. When construing statutes, the Court's guiding principle is to determine and give effect to legislative intent. *NMIEC*, 2007-NMSC-053, ¶ 18. In ascertaining the Legislature's intent, the Court follows classic canons of statutory construction in that it looks first to the plain language of the statute, giving the words their ordinary meaning, unless the Legislature indicates a different one was intended. *NMSA* 1978, § 12-2A-19 (1997) ("The text of a statute or rule is the primary, essential source of its meaning"); *NMIEC*, 2007-NMSC-053, ¶ 20. Under "the plain meaning rule," a statute is "to be given effect as written without room for construction unless the language is doubtful, ambiguous, or an adherence to the literal use of the words would lead to injustice, absurdity or contradiction, in which case the statute is

to be construed according to its obvious spirit or reason.” *Coal. for Clean Affordable Energy v. New Mexico Pub. Regulation Comm’n*, 2024-NMSC-016, ¶ 24, 549 P.3d 500.

*a. Plain Meaning*

The Grid Modernization Statute is clear. It states the specific criteria the Commission should consider when evaluating a utility’s application for grid modernization projects. § 62-8-13(B). It clearly and unambiguously defines “grid modernization” to include AMI. § 62-8-13(F)(1). And it omits any directive for the Commission to examine the health or safety effects of AMI. § 62-8-13. As Appellant noted, “the statute does not even contain the word ‘health’ or the word ‘environment.’” [6 RP 2731]

The Legislature directed the Commission to review the reasonableness of a utility’s grid modernization application, including a detailed examination of “the requested investments, incentives, programs and expenditures.” § 62-8-13(B). The fact the Legislature indicated this in a heading before enumerating what the Commission must evaluate indicates the Legislature intended the Commission examine only the “investments, incentives, programs, and expenditures” of a proposed “grid modernization project.” See § 62-8-13. It is

reasonable to conclude the Legislature intended for the Commission to evaluate AMI through this lens.

It is apparent not only that the Commission therefore need only examine the reasonableness of the proposed project with respect to its investments, incentives, programs, and expenditures, but it is sufficiently clear that the Commission does not need to examine other statutes within the PUA to determine the question put before it here: how to evaluate the reasonableness of and whether to approve a utility's application for grid modernization projects. The statute makes sense as written; it provides all the information the Commission needs to evaluate the reasonableness of these projects and therefore it is not only unnecessary but contrary to the canons of statutory construction to read into the statute an omitted requirement that the Commission must also consider the health and safety of the advanced metering infrastructure the Legislature directed the utilities to include. *State ex rel. Sandel v. New Mexico Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 17, 127 N.M. 272, 980 P.2d 55 (The Court cannot “read into a statute or ordinance language which is not there, particularly if it makes sense as written.”).

*b. Legislative Intent*

The Legislature frequently requires the Commission to consider specific criteria when assessing utility applications. In the energy efficiency context, for instance, the Legislature has explicitly directed the Commission to consider health and safety. *See, e.g.*, NMSA 1978, § 62-17A-2(F) (2022) (“energy efficiency” means measures that target efficient energy consumer behavior, equipment or devices . . . and *includes health and safety measures that use efficient equipment or devices to improve indoor air or drinking water quality.*”) (emphasis added). Absent this direction, the Commission may make the determination that such consideration was not contemplated by the Legislature and therefore should not be considered.

For example, in *Coalition for Clean Affordable Energy v. New Mexico Public Regulation Commission*, this Court determined that the Commission’s interpretation of NMSA 1978, Section 62-17-5(F)(2) (the decoupling statute) within the Efficient Use of Energy Act was unreasonable because the statute was clear in describing a full decoupling mechanism. *CCAЕ*, 2024-NMSC-016, ¶ 28. (“The language of the statute is therefore clear with respect to the type of mechanism therein described, namely, a full revenue decoupling mechanism.”). Because the manner in which the Commission read the statute

would result in a limitation of the Commission’s ability to determine whether a rate was just and reasonable, the Court determined the Legislature could not have intended such an interpretation and vacated the Commission’s order. *Id.* ¶ 34. Ultimately, the Court reasoned, the Legislature set the parameters for the Commission’s ability to determine decoupling mechanisms and the Commission was not free to read or interpret this in a way that would contravene legislative intent. *Id.* ¶ 35.

In the same way, here, the Legislature indicated that to give effect to the stated intent to incentivize the use of clean and renewable energy and reduce air pollution, the utilities may seek Commission approval of applications for projects designed to “facilitate grid modernization.” § 62-8-13(A) and (B). To read this statute as permitting the Commission and parties to continue debating whether AMI is included in this directive would not only be an exercise in futility, but would be contrary to legislative direction because the Legislature provided the Commission with a definition of “grid modernization” in the statute itself, which, as the Hearing Examiner repeatedly stated, includes the use of AMI as a way in which to improve electric distribution or transmission infrastructure. § 62-8-13(F)(1). Therefore, any continued debate would be contrary to legislative intent in enacting this statute. *See Citizens for*

*Fair Rates & the Env't v. New Mexico Pub. Regulation Comm'n*, 2022-NMSC-010, ¶ 45, 503 P.3d 1138 (“While 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.”); *see also, e.g., State ex rel. Egolf v. New Mexico Pub. Regulation Comm’n*, 2020-NMSC-018, ¶ 33, 476 P.3d 896 (explaining that the discretion to make or modify applicable law “is not within the discretion of the Commission and is instead a function of our Legislature”); *Sandel*, 1999-NMSC-019, ¶ 13 (“The nature and extent of the [Commission’s] authority was defined by the Legislature when it enacted and amended the [New Mexico Public Utility Act].”).

- ii. The Court should defer to the Commission’s interpretation of the Grid Modernization Statute.

As discussed above, the Grid Modernization Statute is not ambiguous but it does implicate special agency expertise and the determination of fundamental policies within the scope of the agency. Because the Grid Modernization Statute enumerates specific considerations for the Commission in evaluating applications for grid modernization projects, the Court should accord heightened deference to the Commission’s interpretation of what it

must consider within these applications. *See Doña Ana Mut. Domestic Water Consumers Ass'n v. N.M. Pub. Regul. Comm'n*, 2006-NMSC-032, ¶ 10, 140 N.M. 6, 139 P.3d 166 (internal citations omitted) (“We are more likely to accord heightened deference to the Commission’s 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.’”); *accord New Energy Econ., Inc. v. N.M. Pub. Regul. Comm'n*, 2018-NMSC-024, ¶ 25, 416 P.3d 277.

In *Doña Ana*, this Court was asked to determine whether the Commission’s definition of “unreasonably interfere with the service or system” provision within Section 62-9-1 was reasonable. *Doña Ana*, 2006-NMSC-032, ¶ 15. The Court explained that the Legislature intended to give the Commission broad authority to supervise public utilities and ensure they provide reasonable and adequate service at just and reasonable rates. To fulfill that mandate, the Commission must have a detailed understanding of utility operations in order to determine whether a particular activity would interfere with a utility’s system or service. *Id.* ¶ 17. Deferring to the Commission’s interpretation of this definition, then, followed the general legislative directive in setting a standard

by which to determine whether Doña Ana’s proposed construction would “interfere unreasonably” with the system. *Id.* ¶ 20.

Just as in *Doña Ana*, here, the Commission is tasked with approving applications for grid modernization projects as part of its general supervision of public utilities, and, more specifically:

[T]o facilitate grid modernization, rate designs or programs that incorporate the use of technologies, equipment or infrastructure associated with grid modernization and customer education and outreach programs that increase awareness of grid modernization programs and of the benefits of grid modernization.

§ 62-8-13(A). The Legislature then enumerated a list of considerations the Commission must consider when evaluating these applications, all of which implicate Commission expertise in determining the “reasonableness” of the proposed project and specifically, whether the proposed project would yield a specific outcome. § 62-8-13(B)(1) through (7).

Because these considerations implicate, if not necessitate, Commission expertise, the Court therefore should defer to the Commission’s interpretation of what must be considered in these projects, and, in particular, what is and is not relevant for the Commission’s consideration.

iii. Appellant is misreading the health and safety requirements in the PUA.

Appellant repeatedly points to Sections 62-3-1 and 62-3-2 to stand for the proposition that all Commission decisions must take health, safety, and welfare into account. [BIC 16, 18] A close reading of these statutes reveals that There is no mandated requirement within these sections for the Commission to take health and safety into consideration in every decision it makes or that it failed to harmonize the Grid Modernization Statute with the stated objectives of the PUA.

First, Appellant argues section 62-3-1 “mandates a foundational purpose of utility regulation is to protect public interest and welfare.” [BIC 16] But this phrase is referring to the “regulatory compact.” That is, that it is, because utilities are “affected with the public interest” in that they provide necessary services to the public, it is in the public interest for utilities to be regulated and supervised. *See* NMSA 1978, § 62-3-1 (2008) (“It is the declared policy of the state that the public interest . . . require[s] the regulation and supervision of public utilities.”). There is no indication in the statute of any mandate or requirement upon the Commission, neither is the word “protect” used in the section. Had the Legislature intended to require the Commission to make

public interest findings in every case, it would have done so. Instead, the Legislature created specific, targeted standards the Commission must evaluate for individual considerations throughout Chapter 62. Appellant's requested interpretation would collapse these distinct statutory schemes into a generalized public interest test that appears nowhere in the PUA or the remainder of Chapter 62.

Section 62-3-2(A)(2) references the preservation of public health, safety, and welfare only in the specific context of constructing and extending utility facilities "without unnecessary duplication and economic waste," particularly as it relates to including rural cooperatives. NMSA 1978, § 62-3-2(A)(2) (1985). Likewise, Subsection (A)(4) ties those concerns solely to ensuring rural electric cooperatives are treated comparably to investor-owned utilities. Nothing in Section 62-3-2 suggests that these health-and-safety considerations apply to every aspect of the Commission's jurisdiction. When the Legislature intends to require such considerations more broadly, it does so explicitly. *See, e.g.*, NMSA 1978, § 62-17A-4(D) (2022) ("The department may require that applications meet additional criteria consistent with the goal of improving the energy efficiency, livability or public health and safety of affordable housing in underserved communities."); NMSA 1978, § 62-17A-2(F) (2022) ("As used in the

Community Energy Efficiency Development Block Grant Act: “energy efficiency” . . . includes health and safety measures that use efficient equipment or devices to improve indoor air or drinking water quality.”).

Appellant’s reliance on *Griffith v. New Mexico Public Service Commission* to support its interpretation is likewise misplaced. [BIC 16] *Griffith* addressed a single, narrow question—whether a subdivision developer qualified as a “public utility” under the PUA—and cited Section 62-3-1 only as part of the statute’s preamble to illuminate legislative purpose. *Griffith v. New Mexico Pub. Serv. Comm’n*, 1974-NMSC-024, ¶ 4, 86 N.M. 113, 520 P.2d 269. The Court used the provision to interpret an ambiguity in the definition of “public utility,” not to impose a substantive requirement that the Commission evaluate public health, safety, or the public interest in every decision. *Id.* ¶ 6. Nothing in *Griffith* transforms this policy statement into a mandatory analytical framework, and the case provides no support for Appellant’s attempt to expand the statute beyond its limited interpretive function.

This is not to say the Commission is not concerned with matters of health and safety; it absolutely is. However, contrary to Appellant’s assertions, the Commission is not *mandated* to consider those in this proceeding, particularly when, as was determined here, the Legislature has clearly stated what the

Commission must consider when evaluating applications for grid modernization components. See § 62-8-13(B). The Hearing Examiner determined that questions of health and safety with respect to AMI were irrelevant in this particular proceeding and did not require specific evidence to be offered to answer a question that was not specifically asked in the statute. The Hearing Examiner's reading of the Grid Modernization Statute therefore does not indicate the Legislature intended to repeal by implication the health and safety policy of the PUA, [BIC 18], nor does it indicate the Commission is not concerned with matters of health and safety when determining whether to approve applications that come before it. It only indicates that here, in this specific proceeding, the question of *whether* to install AMI—and therefore, any discussion about why AMI should *not* be installed—had already been answered by the Legislature and, therefore, the only remaining question was *how* PNM proposed to do so. The Hearing Examiner's interpretation was therefore reasonable and the Commission respectfully requests the Court so find.

**B. The Commission's Procedures Fully Satisfied Constitutional Due Process Requirements.**

The fundamental requirements of due process in administrative proceedings are reasonable notice and a meaningful opportunity to be heard

and to present any claim or defense. *TW Telecom of N.M. LLC v. N.M. Pub. Regulation Comm'n*, 2011-NMSC-029, ¶ 17, 150 N.M. 12, 256 P.3d 24. Notice is adequate when it affords a party a meaningful opportunity to respond. *Id.*; *Resolute Wind 1 LLC v. N.M. Pub. Regulation Comm'n*, 2022-NMSC-011, ¶ 24, 506 P.3d 346.

Here, Appellant received all process required by law. Appellant was afforded clear notice of the issues the Commission would consider when evaluating PNM's application, was permitted to intervene for the express purpose of addressing any opt-out provision and related costs, and was allowed to participate fully in the evidentiary hearing. Although Appellant asserts that its due process rights were violated because it was not permitted to introduce evidence it believed was relevant, such disagreement with an evidentiary ruling does not constitute a denial of due process.

- i. Due process does not require the Commission to admit or consider irrelevant evidence.

Like the courts, the Commission has inherent authority to manage its own proceedings, including discretion over the admissibility and scope of evidence. The Legislature expressly directs the Commission to streamline cases by taking evidence “with the least delay practicable” and by “limiting

repetitious testimony.” NMSA 1978, § 62-19-9(C)(3)(b)-(c) (2023). These provisions reflect the Legislature’s intent that the Commission control its proceedings to ensure efficiency and maintain focus on issues material to the case.

The Commission’s procedural rules reinforce this authority. A public hearing permits only the evidence “the commission or presiding officer deems relevant or material to the issues.” 1.2.2.7(P)(6) NMAC. Thus, while parties must have a fair opportunity to present their case, that right extends only to evidence deemed relevant or material.

Similarly, “[a]ll relevant evidence is admissible” if, in the presiding officer’s judgment, it is the “best evidence most reasonably obtainable,” taking into account necessity, competence, availability, and trustworthiness. 1.2.2.35(A)(1) NMAC. This flexibility helps the Commission manage complex administrative records while ensuring its decisions are supported by substantial evidence. *See Pub. Serv. Co. of N.M. v. N.M. Pub. Regulation Comm’n*, 2019-NMSC-012, ¶ 14, 444 P.3d 460. The Hearing Examiner specifically noted his authority to “exclude inadmissible, incompetent, cumulative, or irrelevant evidence.” [6 RP 2919] He also identified the issues to

be addressed at the outset of the proceeding. [2 RP 0933] The exclusion of evidence outside the stated issues fell squarely within his discretion.

Excluding evidence that is irrelevant or immaterial does not deprive a party of due process. Due process in administrative proceedings requires only notice of the opposing claims and a reasonable opportunity to meet them. *ABCWUA*, 2010-NMSC-013, ¶ 28. It does not guarantee a right to introduce any evidence a party wishes. The Commission’s decision to limit evidence to that which is relevant and probative aligns with established due process principles and promotes both administrative efficiency and fairness.

- ii. The Commission properly balanced the interests at stake in this proceeding under the *Mathews* test.

The Court examines alleged deprivations of due process by balancing (1) the private interest that will be affected by the official action; (2) “the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards”; and (3) “the [g]overnment’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.” *ABCWUA*, 2010-NMSC-013, ¶ 28 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976)).

The Commission provided Appellant adequate opportunities to be heard given the rights at stake in this proceeding. In this case, PNM applied for grid modernization project approval, including deploying AMI, creating regulatory assets and assessing an opt-out provision. [1 **RP 0021-0023**] The investments PNM is making in New Mexico grid infrastructure are significant, and the question before the Commission was not only to approve the application but also to approve the mechanisms by which PNM would recover its expenses. [1 **RP 0029**] Because the question before the Commission was not whether to install AMI, but how to roll out the grid modernization projects, how PNM may seek cost recovery, and whether and at what cost one might be permitted to “opt out” of the technology, the interest of Appellant could only be related to these questions. [1 **RP 0018-0038**] The private interest, therefore, notwithstanding what Appellant claims it is, must be related to cost recovery and costs to ratepayers. On this question, there is a clear property right for both PNM and NMUS, and not, as Appellant contends, a deprivation of life or liberty. [2 **RP 0932-0933**]

Based on the interests at stake in this proceeding, the procedures the Hearing Examiner provided to the parties were sufficient. First, as discussed above, the private interests affected by the Commission’s decisions relate to

costs and cost recovery. They are significant investments made by PNM, and as a result, the cost to opt out may not be insignificant for an average ratepayer.

Second, the risk of erroneous deprivation of a utility or ratepayer's property interest is always a risk in Commission proceedings as there are complex questions of engineering and economics involving many parties with vastly differing opinions. This case was no different. This factor is balanced between the parties at risk of being erroneously deprived of this property interest: PNM, the ratepayers, and those who may be charged for "opting out," such as members of NMUS.

Finally, as noted above, the Commission has a strong interest in conducting efficient hearings and ensuring that the often-voluminous evidence presented is confined to relevant issues so the record remains clear and the neither the parties nor the Commissioners are distracted by irrelevant matters. Additionally, the Commission had a directive from the Legislature as to what it must consider when evaluating applications, and, given that this was not the first application for grid modernization projects, was also required to treat these applications consistently for each utility. *Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n*, 1993-NMSC-032, ¶ 22, 115 N.M. 678, 858 P.2d 54

(Holding that regulatory treatment which radically departs from past practice without proper notice will not be sustained.).

In sum, the Hearing Examiner's decision to exclude Appellant's proffered evidence—having determined it was not relevant to the statutory issues before the Commission—withstands scrutiny under *Mathews*. Appellant was afforded notice of the proceeding, notice of the issues the Commission was to consider in the application, the opportunity to present relevant evidence, and the right to challenge adverse rulings through the hearing itself, substantial briefing, reconsideration requests, an interlocutory appeal, and argument before the Commission. That Appellant was precluded from introducing evidence deemed irrelevant does not convert the Commission's lawful exercise of discretion into a constitutional deprivation. The Commission properly exercised its statutory and regulatory authority to focus the record on competent, material, and probative evidence.

iii. Appellant waived its due process right to be present at the hearing when NMUS chose not to appear at the hearing.

New Mexico courts have found that a person who voluntarily absents himself from a hearing waives their right to be present at the hearing, defeating a denial of due process argument. *See, e.g., State ex rel. Children, Youth &*

*Families Dept. v. Christopher L.*, 2003-NMCA-068, ¶ 23, 133 N.M. 653, 68 P.3d 199 (holding respondent waived his right to appear at his termination of parental rights hearing when he voluntarily hung up the telephone); *Taylor v. United States*, 414 U.S. 17, 20, 94 S.Ct. 194, 38 L.Ed.2d 174 (1973) (Even in criminal cases, defendants who voluntarily absent themselves from the courtroom have waived their right to be present.). Appellant did not appear at the hearing except for a few moments on the first day. Appellant was not prevented from appearing. Instead, NMUS chose not to do so following the Hearing Examiner's decision not to allow the testimony or the evidence NMUS proposed. This does not equate to a due process violation.

In sum, Appellant received every procedural protection the law requires. NMUS had notice of the issues that would be considered, multiple opportunities to present its position on both the interpretation of the Grid Modernization Statute and its position on PNM's application and the issues the Commission identified, and multiple occasions to appeal to the Commission itself. The mere fact that the outcome was unfavorable to Appellant does not transform a fair and lawful process into a constitutional violation. Therefore, the Commission respectfully requests that the Court affirm the Commission's order.

## V. CONCLUSION

The record demonstrates that the Commission complied with its statutory duties, exercised sound discretion, and provided Appellant a fair and meaningful opportunity to be heard. Appellant has not met its burden to show the Final Order is arbitrary, capricious, or otherwise unlawful. Accordingly, the Commission respectfully requests that the Court affirm the Commission's Final Order.

Respectfully Submitted,

THE NEW MEXICO PUBLIC  
REGULATION COMMISSION

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**STATEMENT OF COMPLIANCE WITH VOLUME-TYPE  
LIMITATIONS**

Pursuant to Rule of Appellate Procedure 12-318(G) NMRA, I certify that this contains 7,845 words in the body of the brief, according to a count by Microsoft Word Version 2306 and therefore complies with the limits of 12-318(F)(3) NMRA.

**CERTIFICATE OF SERVICE**

I hereby certify that I caused a true and correct copy of the foregoing *Answer Brief of Appellee New Mexico Public Regulation Commission* to be served by email through the Court's electronic filing system to all counsel of record on December 4, 2025.

/s/ Erin E. Lecocq

Erin E. Lecocq