



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

**No. S-1-SC-40723**

**NEW MEXICANS FOR UTILITY SAFETY,**

**Appellant,**

**v.**

**NEW MEXICO PUBLIC REGULATION  
COMMISSION,**

**Appellee,**

**and**

**PUBLIC SERVICE COMPANY OF  
NEW MEXICO,**

**Intervenor-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,  
NMPRC Case No. 22-00058-UT.**

**PUBLIC SERVICE COMPANY OF NEW MEXICO'S  
ANSWER BRIEF**

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**RULE 12-318(G) NMRA STATEMENT OF COMPLIANCE**

The body of this Answer Brief uses a proportionally-spaced typeface (Times New Roman), contains 7,494 words, as counted by Microsoft Word for Microsoft 365 MSO, and thus complies with the limitations of Rule 12-318(F)(3) NMRA.

## I. INTRODUCTION

In this appeal, Appellant New Mexicans for Utility Safety (“Appellant” or “NMUS”) raises two principal legal challenges to the Public Regulation Commission’s (“Commission”) determinations in Intervenor-Appellee Public Service Company of New Mexico, Inc.’s (“PNM”) Grid Modernization Application. The first challenge concerns the Commission’s interpretation of the Grid Modernization statute, NMSA 1978, Section 62-8-13 (2025) (“Grid Mod Statute”). The second challenge focuses on the purported violation of NMUS’s procedural due process rights by the Commission. Neither challenge has merit.

Appellant’s appeal should be denied by the Court because the Commission properly refused to read the plain language of the Grid Mod Statute as authorizing or mandating the Commission to determine health and safety impacts of a proposed Advanced Metering Infrastructure (“AMI”) grid modernization project. In doing so, the Commission correctly relied on statutory language that expressly permits utilities to include AMI in their grid modernization programs.

The Appeal should also be rejected because the Commission’s determinations that information on health and safety impacts of AMI was not relevant or within the scope of the proceedings did not deny NMUS due process. NMUS’s due process rights were not violated because it was given the opportunity to fully participate in the Commission proceedings on PNM’s Grid Modernization Application, including

to argue the relevance of public health and safety issues, present relevant evidence, make other legal arguments and cross-examine witnesses.

The Appellant fails to carry its burden on appeal that the Commission’s Final Order is arbitrary or capricious, or contrary to law. Because NMUS has not presented any compelling reason why this Court should reverse the Commission, the Final Order should be affirmed.

## II. SUMMARY OF PROCEEDINGS

PNM filed its Grid Modernization Application on October 3, 2022, with supporting testimony.<sup>1</sup> Testimony from intervenors was submitted, a hearing was held on this Application in March 2023, and briefs were accepted after the hearing was concluded.<sup>2</sup> However, on May 31, 2023, the Commission issued an interim order, requiring PNM to file a cost-benefit analysis (“CBA”) along with additional supporting testimonies.<sup>3</sup> On July 10, 2023, the Hearing Examiner issued an Order Staying Proceedings to provide PNM with an opportunity to conduct a Commission-

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<sup>1</sup> [1 RP 0010-0854]

<sup>2</sup> Besides the testimony of NMUS [2 RP 0941-1091, 3 RP 1092-1315, 4 RP 1316-2674], other parties’ testimony was omitted from the Record Proper by agreement of the parties. Additionally, not all of the transcript of the hearing or post-hearing briefs regarding the initial hearing is in the Record Proper, but see Volumes 7 and 8 of the Record Proper for excerpts of the transcript, as well as PNM’s and NMUS’s post-hearing briefs and response briefs.

<sup>3</sup> This order was omitted from the Record Proper by agreement of the parties.

ordered CBA to support the projects included in its original Application.<sup>4</sup> PNM filed its CBA, with supporting testimonies, on November 22, 2023.<sup>5</sup> The Hearing Examiner then re-started the proceedings, requiring intervenor and rebuttal testimony be filed, and held a second phase of hearings on April 23, 24 and 30, 2024.<sup>6</sup> Post-hearing briefs and response briefs were filed after the conclusion of this second phase of hearings.<sup>7</sup> A Recommended Decision was then issued by the Hearing Examiner on August 16, 2024.<sup>8</sup> Exceptions were filed to the Recommended Decision, and a Final Order was issued on October 17, 2024.<sup>9</sup>

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<sup>4</sup> This order was omitted from the Record Proper by agreement of the parties.

<sup>5</sup> The CBA and supplemental testimony in support of the CBA was omitted from the Record Proper in this case by agreement of the parties.

<sup>6</sup> While all or portions of the intervenor and rebuttal testimony on the CBA, as well as the hearing transcript on the CBA, are omitted from the Record Proper, please see Volumes 9,10, 11 and 12 of the Record Proper.

<sup>7</sup> The Record Proper does not include all briefs of the parties, but please see Volume 13 of the Record Proper for PNM's and NMUS's post-hearing briefs or response briefs.

<sup>8</sup> **[13 RP 3823-3917]**

<sup>9</sup> The filed exceptions and responses to exceptions in the Record Proper can be found in Volumes 13 and 14. The Final Order is available at **[14 RP 3970-4114]**. NMUS filed a Motion for Rehearing of the Final Order, as well as an Amended Motion, on November 18, 2024. **[14 RP 4115-4130]** While NMUS's Brief-in-Chief makes note that no rehearing was noticed or held, and no recommended decision or order issued on the Motion for Rehearing **[BIC at 11]**, it should be noted that neither statute nor rule require such action. NMSA 1978, § 62-10-16 (1953); 1.2.2.37(F)(6)(a) NMAC ("If the commission does not act on a motion for rehearing within twenty (20) days after the final order has been issued, the motion shall be deemed denied."); *see also N.M. Elec. Serv. Co. v. Lea Cnty. Elec. Coop.*, 1966-NMSC-046, ¶ 2, 76 N.M. 434,

Appellant sets forth much of this same procedural background, as well as details the extensive number of motions and other legal filings it made in the underlying case. Additional details as to NMUS’s active participation during the course of these proceedings is detailed in Section III.D below.

### III. ARGUMENT

#### A. SUMMARY OF ARGUMENT

First, Appellant argues that the Commission made a reversible legal error by concluding that the Grid Mod Statute precludes consideration of certain public health, safety and welfare concerns related to Advanced Metering Infrastructure (“AMI”).<sup>10</sup> To make this argument, Appellant asks this Court to harmonize the Grid Mod Statute with certain “foundational objectives”<sup>11</sup> in the Public Utility Act (“PUA”) regarding public interest, and public health, safety and welfare. Appellant argues that even though the Grid Mod Statute explicitly permits utilities to propose the use of AMI technology, without reservation, broader references to public health and safety in the PUA required the Commission to independently determine health

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*cert. denied*, 385 U.S. 969 (noting that a timely motion for rehearing was filed but not acted upon by the Commission and “accordingly deemed refused”).

<sup>10</sup> Advanced metering infrastructure is an integrated system of smart meters, communications networks, and data management systems that enables two-way communication between utilities and their customers. [**See 1 RP 0121**]

<sup>11</sup> [**BIC at 13-14, 16-17**]

and safety impacts of electrical equipment deployed as part of AMI technology programs. NMUS's reliance on the cited PUA provisions are not compelling. Those statutes do not vest the Commission with authority to determine whether certain electric equipment meets applicable health and safety standards in that industry. Nor do those statutes supply the Commission with authority to override the legislative directives permitting utilities to use AMI to accomplish grid modernization.<sup>12</sup> As the Commission notes, if the Legislature had intended to grant the Commission the authority to reject AMI wholesale based on some broad public interest or health requirements, the legislation would so state, and would not explicitly define "grid modernization" to include AMI.

Second, Appellant asks this Court to determine that the Commission violated NMUS's procedural due process rights by denying admission of evidence that the Hearing Examiner determined was irrelevant. This argument is tied to the prior argument, in that the Commission determined that NMUS's proffered "evidence" on the public health effects of AMI was not relevant to the proceeding based on the Commission's interpretation of the Grid Mod Statute. The Commission has both the right and obligation to determine the scope of the proceedings before it and is not required to admit evidence into the record that is not relevant to a filed application.

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<sup>12</sup> Grid modernization is defined in Section 62-8-13(E).

Procedural due process does not require the Commission to hear irrelevant evidence or evidence the Commission determines is not dispositive given the statutory mandates surrounding a utility's programs to modernize its electrical grid. The record also clearly demonstrates that after NMUS was granted intervention in the underlying proceeding, over PNM's objection, it was then provided every opportunity to participate in the proceedings, including to present relevant evidence, cross-examine witnesses, and present or preserve its legal arguments.

***B. STANDARD OF REVIEW***

On appeal, the Appellant has the burden of proof to demonstrate the Final Order was unreasonable or unlawful. Specifically, the Appellant must demonstrate that the decision “is arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency's authority, or otherwise inconsistent with law.”<sup>13</sup> Where the Appellant raises a question of law, as in this appeal, the Appellant must overcome the deference to be given to the Commission in interpreting its governing

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<sup>13</sup> *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n*, 2007-NMSC-053, ¶ 13, 142 N.M. 533, 168 P.3d 105 (“*NMIEC v. PRC*”) (internal quotation marks and citation omitted); *see also Tri-State Generation and Transmission Ass'n, Inc. v. N.M. Pub. Regul. Comm'n*, 2015-NMSC-013, ¶ 7, 347 P.3d 274 (citing NMSA 1978, § 62-11-4 (1965)); *Albuquerque Bernalillo County Water Util. Auth. v. N.M. Pub. Regul. Comm'n*, 2010-NMSC-013, ¶ 17, 148 N.M. 21, 229 P.3d 494. § 62-11-4 (“The burden shall be on the party appealing to show that the order appealed from is unreasonable, or unlawful.”)

statutes.<sup>14</sup> In due process challenges, the Appellant must demonstrate it did not receive reasonable notice and was denied the opportunity to be heard and present its claims.<sup>15</sup> As this Court has found, “[t]he opportunity to be heard in a ‘meaningful manner’ generally includes an opportunity to review and present evidence, confront and cross examine witnesses, and consult with counsel, either by way of an informal or formal hearing.”<sup>16</sup>

***C. THE COMMISSION IMPLEMENTED THE LEGISLATURE’S INTENT IN INTERPRETING THE GRID MOD STATUTE TO AUTHORIZE AMI AS PART OF A GRID MODERNIZATION PROGRAM.***

The Commission lawfully interpreted a statute within its purview to determine it was not relevant to consider arguments that AMI posed a public health and safety risk. The Legislature was clear that a public utility such as PNM may file an application for approval of grid modernization projects that are needed by the utility;

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<sup>14</sup> In reviewing the Commission’s decision, we “begin by looking at two interconnected factors: whether the decision presents a question of law, a question of fact, or some combination of the two; and whether the matter is within the agency’s specialized field of expertise.” *Morningstar Water Users Ass’n v. N.M. Pub. Util. Comm’n*, 1995-NMSC-062, ¶ 10, 120 N.M. 579, 904 P.2d 28. The Court “will begin by according some deference to the agency’s interpretation” of its governing statute. *Id.*, ¶ 11.

<sup>15</sup> *TW Telecom of N.M., L.L.C. v. N.M. Pub. Regul. Comm’n*, 2011-NMSC-029, ¶ 17, 150 N.M. 12, 256 P.3d 24 (the “fundamental requirements of due process in an administrative context are reasonable notice and *opportunity to be heard and present any claim or defense.*”) (emphasis in original) (internal quotations and citations omitted).

<sup>16</sup> *State ex rel. Children, Youth & Families Dep’t v. Maria C.*, 2004-NMCA-083, ¶ 26, 136 N.M. 53, 94 P.3d 796 (“*State ex rel. CYFD*”) (internal citation omitted).

AMI and the associated communications network to support it are explicitly listed as grid modernization components in the Grid Mod Statute without exception. NMUS has not made any argument that indicates the Commission incorrectly or unlawfully interpreted the Grid Mod Statute. The Commission correctly determined the scope of the evidence admitted at hearing on PNM's proposal to install AMI to exclude evidence regarding the public health or safety effects of AMI. This Court should affirm the Commission's interpretation of the Grid Mod Statute.

***1. The Commission's Interpretation of the Grid Mod Statute Should Be Given Deference.***

The Commission has the general and exclusive authority to regulate a public utility's rates and service regulations and in respect to securities transactions.<sup>17</sup> The Legislature also granted the Commission discretion to consider and approve grid modernization projects based on the specific needs of the utility.<sup>18</sup> Specifically, when a grid modernization application is filed by a public utility, the Commission is to determine reasonableness among various investments or incentives to facilitate grid modernization; rate designs or programs that incorporate the use of technologies, equipment or infrastructure associated with grid modernization; and

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<sup>17</sup> NMSA 1978, § 62-6-4(A) (2003). To the extent the Commission is granted authority to promulgate safety rules and regulations under NMSA 1978, Section 62-6-24 (1941), it has done so by requiring utilities to follow national electric standards. *See* 17.9.560.13(B) NMAC.

<sup>18</sup> § 62-8-13(A).

customer education and outreach programs that increase the awareness of the benefits of grid modernization.<sup>19</sup> The Grid Mod Statute specifies 12 different types of grid modernization projects that qualify for approval, of which AMI is the first on the list.<sup>20</sup> Based on the plain language of the statute, the Legislature clearly intended for the Commission to use its unique expertise to evaluate grid modernization applications, assessing the various proposed investments, and to approve programs that include AMI as a reasonable means to accomplish the grid modernization objectives in the statute.

This Court has accorded more deference to an agency's interpretation of statutes within the agency's purview when those statutes implicate specific agency expertise.<sup>21</sup> The Grid Mod Statute fits this criterion by requiring the Commission to employ its agency expertise in applying seven sets of criteria when evaluating a grid modernization project, none of which include general public health or safety standards for electrical equipment. The Commission must utilize its agency expertise to determine whether proposed grid modernization programs meet those

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<sup>19</sup> § 62-8-13(A), (B).

<sup>20</sup> § 62-8-13(A), (F).

<sup>21</sup> *Morningstar*, 1995-NMSC-062, ¶ 11; *NMIEC v. PRC*, 2007-NMSC-053, ¶ 19 (citing *Morningstar*).

technical criteria.<sup>22</sup> Given the level of agency expertise entrusted to the Commission in the Grid Mod Statute, the Court should provide deference to the Commission’s statutory interpretation that the Legislature specifically authorized AMI deployment, without exception. Because the Commission reasonably interpreted its authorizing legislation, arguments as to potential health or safety concerns associated with AMI are legally irrelevant.

***2. The Commission Appropriately Rejected Claims That It Must Consider Assertions of Public Health and Safety Before Approving Statutorily-Authorized AMI Deployment.***

The Commission correctly interpreted the Grid Mod Statute to find that the Legislature explicitly permits AMI as a technology that utilities may adopt to modernize the electrical grid. The Grid Mod Statute defines “grid modernization” to include (1) “electric distribution or transmission infrastructure” assets; or

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<sup>22</sup> § 62-8-13(B)(1)-(7). NMUS contends:

[A]s greenhouse gases are a component of air pollution—and air contaminants include radioactive materials, including radioactive materials, including any sources that emit radiation, such as electromagnetic radiation, as in radio frequencies (‘RF’) from AMI ... the [C]ommission is obliged to consider whether sources of RF contribute to a reduction of air pollution, including RF.

**[BIC at 9 n.4]** While it is the case that one of the seven criterion the Commission must apply in evaluating a grid modernization project in Section 62-8-13(B) is whether a grid modernization project is “designed to contribute to the reduction of air pollution, including greenhouse gases” (*see* Section 62-8-13(B)(4)), neither NMUS’s Brief-in-Chief nor the Commission’s record establishes that RF is an air pollutant targeted by the Grid Mod Statute.

(2) “technologies or services.”<sup>23</sup> These assets, technologies or services must be “designed to modernize the electrical system by enhancing 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.”<sup>24</sup> The Grid Mod Statute proceeds to define 12 different assets, technologies or services that meet the objectives of modernizing the electrical system. The very first asset, technology or service in that list is “advanced metering infrastructure [AMI] and associated communications networks.”<sup>25</sup>

Throughout the underlying proceedings, NMUS argued that “AMI cannot be implemented in New Mexico because the technology is too dangerous and its deployment will result in death and suffering.”<sup>26</sup>

The Hearing Examiner made “[a] ruling ... early in these proceedings that NMUS’s argument is inconsistent with the Legislature’s decision to expressly authorize utilities to deploy [AMI] for customer benefits and energy-policy goals.”<sup>27</sup>

The Recommended Decision added that the Grid Mod Statute enactment, including

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<sup>23</sup> § 62-8-13(F).

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*, at § 62-8-13(F)(1).

<sup>26</sup> [13 RP 3905 (citing [2 RP 0896-0900])]

<sup>27</sup> [13 RP 3905 (citing [6 RP 2696-97])]

“the context in which it was enacted, and the uncontested fact that grid mod generally and [AMI] specifically are essential to achieve state energy policy goals rebut NMUS’s core position that AMI is discretionary and a senseless investment given the harm it will produce.”<sup>28</sup> The result of this interpretation of the Grid Mod Statute is that all evidence on public health and safety matters offered by NMUS and by PNM were stricken from the record and not admitted as evidence in the underlying proceedings.<sup>29</sup>

There is no language in the Grid Mod Statute that would require the Commission to consider the health and safety of AMI before permitting deployment of this technology. In fact, the record demonstrates that the Commission believed it would be *abdicating* its duties had it not permitted AMI:

NMUS’s emphasis that ... AMI is only optional ignores ... one express goal of grid modernization: reduction of greenhouse gases. If there is linkage between reduction of emissions and grid modernization, and also between grid modernization and AMI, then it is clear the Commission would be acting inconsistent with the legislative will if it did as NMUS suggests and receive evidence on whether AMI should be rejected wholesale in New Mexico as a

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<sup>28</sup> [13 RP 3906]; *see also* [13 RP 3907, which provides:

The Commission does not have authority to de-authorize, on health and safety grounds, that which the Legislature has authorized. ... the Legislature defines state policy, enacts law on matters, and this agency (and others like it) see that the legislation is realized and that policy objectives are carried out. NMUS’s claim that the Commission can hold hearings on the permissibility of the use of AMI in New Mexico and, if persuaded, reject and preclude what the Legislature has authorized is entirely contrary to these settled principles.]

<sup>29</sup> [6 RP 2782-2796 (striking NMUS witness testimony)] [6 RP 2918-2945 (striking PNM testimony)]

threat to human and environmental health. That the Commission cannot do this is clear from basic administrative law principles.<sup>30</sup>

The Hearing Examiner found that if the Legislature intended to grant the Commission the authority to reject AMI wholesale, it would not have expressly defined grid modernization to include AMI without exception.<sup>31</sup> The Hearing Examiner ultimately concluded that it was not permitted to read into a statute language that restricted AMI deployment on public health and safety concerns when such qualifications are not there in statute.<sup>32</sup>

Appellant's Brief-in-Chief cites no legal authority or record evidence that specifically challenges the Hearing Examiner's determinations that the Grid Mod

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<sup>30</sup> [6 RP 2787]

<sup>31</sup> [6 RP 2787-88] Appellant cites *State ex rel. Egolf v. New Mexico Pub. Regulation Comm'n*, 2022-NMSC-010, ¶ 21, 503 P.3d 1138, for the notion that the Commission is created by statute and is limited to the authority granted in such statutes. [BIC at 15] PNM does not disagree with this statement, as the Commission was clearly acting within its statutory authority when it approved implementation of AMI. In the same line of argument, Appellant also cites to *State ex rel. Sandel v. New Mexico Pub. Regulation Comm'n*, 1999-NMSC-019, ¶ 26, 127 N.M. 272, 980 P.2d 55, for the argument that the Commission "cannot abdicate its statutory responsibilities by interpreting a meaning contrary to statutory mandate." [BIC at 15]; see also [BIC at 17-18] As noted above, the Hearing Examiner thought the Commission would abdicate its statutory responsibilities if it did *not approve AMI* given the language in the Grid Mod Statute, as well as the context of enactment. Thus, contrary to NMUS's arguments, nothing in statute or in the record indicates that the Commission has either exceeded its statutory authority or abdicated its duties under statute.

<sup>32</sup> [6 RP 2789] It should be noted that the Hearing Examiner stated that any customer protections envisioned in the Grid Mod Statute were related to the "commercial exchange" that occurs when customers purchase electricity, not broadly to public health or safety. [6 RP 2789] See also [13 RP 3906-07]

Statute expressly contemplates AMI deployment, and that deployment was necessary to satisfy the objectives of grid modernization. Rather, Appellant entirely rests its position that the Commission misinterpreted statutes by not reading the Grid Mod Statute in *pari materia* with purported mandates on health, safety and welfare in the PUA. These arguments are not grounded in the actual language of PUA cited by the Appellant, nor are they supported by basic principles of statutory construction.

Citing to Sections 62-3-1, 62-3-2(A)-(C) and 62-3-2.1 of the PUA,<sup>33</sup> NMUS claims that the public's health, safety and welfare are foundational objectives of the PUA, and that the PUA must be liberally construed to realize these objectives.<sup>34</sup> NMUS claims that by reading the Grid Mod Statute in isolation, the Commission failed to harmonize its language with the referenced sections of the PUA.<sup>35</sup>

However, the cited statutes do not indicate foundational requirements or statutory duties that the Commission was required to consider when interpreting the Grid Mod Statute. Taking each of the statutes cited by Appellant one at a time, there is no basis for claiming the Commission abdicated its duties or failed to harmonize the Grid Mod Statute with the PUA as a whole.

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<sup>33</sup> NMSA 1978, § 62-3-1 (2008); NMSA 1978, § 62-3-2 (1985); NMSA 1978, § 62-3-2.1 (1991).

<sup>34</sup> [BIC at 13-14]

<sup>35</sup> [BIC at 16-17]

First, Section 62-3-1 of the PUA is a declaration of policy that public utilities are affected by the public interest. The specific language in this statute speaks to the economics of regulating public utilities' business functions to determine just and reasonable rates and provide utility service without unnecessary duplication or waste.<sup>36</sup> Moreover, the “public interest” factors that this statute lists to which public utilities “are affected with” pertain to economic, business and industry objectives—not public health and safety factors as NMUS argues to this Court.<sup>37</sup>

Presumably, to attempt to bolster its reliance on this statutory section, NMUS points to *Griffith v. New Mexico Public Service Commission*,<sup>38</sup> where the Court held that Section 62-3-1 is a preamble to the PUA, and includes certain, but not all, points of public interest that can be considered with regard to regulating public utilities affected with the public interest.<sup>39</sup> That general judicial finding in *Griffith* does not

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<sup>36</sup> § 62-3-1(B) (“It is 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 ...”).

<sup>37</sup> *Id.*, § 62-3-1(A)(1)-(3) (listing the following public interest factors: that a “substantial portion of public utilities’ business and activities involves the rendition of essential public services to a large number of the general public”; that “public utilities’ financing involves the investment of large sums of money, including capital obtained from many members of the general public”; and that “the development and extension of public utilities’ business directly affects the development, growth and expansion of the general welfare, business and industry of the state”).

<sup>38</sup> 1974-NMSC-024, 86 N.M. 113.

<sup>39</sup> **[BIC at 16]**; see also *Griffith*, 1974-NMSC-024, ¶¶ 4-5.

negate the fact that the Commission’s statutory authority is directed to the regulation of a public utility’s rates and service regulations, and securities transactions.<sup>40</sup> In *Griffith*, the Court was faced with determining whether a water system operated by a subdivision should be deemed a public utility.<sup>41</sup> While the *Griffith* Court found that one of the purposes of the Act is to preserve public health, safety and welfare, it used this finding to frame its determinations on the public or private nature of the enterprise in question, where it was unclear whether the PUA’s definition of a public utility applied to that enterprise.<sup>42</sup>

Appellant confusedly argues that “[t]he Commission’s refusal to consider public safety created an ambiguity regarding its duties” and “[t]he Commission was required to resolve that ambiguity by consulting the PUA’s mandate vis-à-vis the declaration of policy.”<sup>43</sup> Appellant does not couch its ambiguity argument in terms of the statutes themselves, but in the purported application of the statutes by the Commission. There is no ambiguity in the Grid Mod Statute, and the Commission’s actions did not create an ambiguity with regard to its statutory duties. The

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<sup>40</sup> § 62-6-4(A).

<sup>41</sup> *Griffith*, 1974-NMSC-024, ¶ 6.

<sup>42</sup> *Id* at ¶¶ 5-6.; *see also id.* at ¶ 4 (“Generally, a preamble is a declaration by the legislature of the reasons for the passage of the statute and is helpful in the interpretation of any ambiguities within the state to which it is prefixed”).

<sup>43</sup> **[BIC at 16 (citing *Griffith*, 1974-NMSC-024, ¶ 5)]**

Legislature plainly defined “grid modernization” to include AMI as an acceptable technology, without exception.<sup>44</sup> Without any ambiguity in the statute, the relevance of the *Griffith* decision is questionable.

Even were there to be ambiguity in the Grid Mod Statute, application of the economics-based parameters of Section 62-3-1 does not expand the public interest in regulating public utilities to include regulation of public health and safety by the Commission. Neither the language of Section 62-3-1 of the PUA nor the *Griffith* Court’s findings stand for the proposition that the Commission is widely charged with considering every aspect of public health and safety regarding the regulation of public utility services.

While Appellant similarly states that Section 62-3-2 of the PUA should be harmonized with the Grid Mod Statute,<sup>45</sup> it is unclear how that statute applies to a grid modernization application made by an investor-owned public utility such as PNM. Section 62-3-2 extends regulation by the Commission pursuant to the PUA to rural electric cooperatives.<sup>46</sup> The statute finds that regulation of those cooperatives is necessary to effectuate the purposes of the Rural Electric Cooperative

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<sup>44</sup> § 62-8-13(F)(1).

<sup>45</sup> **[BIC at 14, 16]**

<sup>46</sup> § 62-3-2. NMUS fails to note that the Grid Mod Statute explicitly states it does not apply to rural electric cooperatives. § 62-8-13(E).

Act<sup>47</sup> and is essential to the “public health, safety and welfare” of the state to avoid unnecessary duplication of utility systems.<sup>48</sup> So, while the cited statutory section references the public health, safety and welfare of the *state*, it does so to limit duplication of utility service between rural cooperatives and other utilities and not to grant jurisdiction over all aspects of public health and safety to the Commission. This statute does not function to create an overarching mandate for the Commission to regulate every aspect of public health, safety and welfare as part of its regulation of public utilities. NMUS cites no case that stands for the proposition that Section 62-3-2 broadly charges the Commission with considering every potential public health and safety aspect associated with the regulation of public utilities.

NMUS also fails to provide any case or other legal citation that the section of the PUA authorizing the regulation of rural electric cooperatives either: 1) applies to an investor-owned utility like PNM, or 2) requires the Commission to determine various health-related hazards associated with meter equipment when approving grid modernization projects for investor-owned utilities.

The same failures of Appellant’s logic apply to its reliance on Section 62-3-2.1 of the PUA, which also does not apply to electric utilities such as PNM. This statutory section establishes ratemaking policy for small water and sewer utilities

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<sup>47</sup> § 62-3-2(A)(1).

<sup>48</sup> § 62-3-2(A)(2).

and sets policy as to duplication of service and facilities between municipal water and sewer utilities and public water and sewer utilities.<sup>49</sup> As with Section 62-3-2, this statute does not function to create an overarching mandate for the Commission to regulate every aspect of public health, safety and welfare as part of its regulation of public utilities or electric utilities in particular.

In summary, a simple review of the statutes cited by NMUS fails to show that any specific statutory section must be harmonized with the Grid Mod Statute. A mere mention of public interest or public health, safety and welfare in the PUA does not translate into a “policy mandate”<sup>50</sup> to review every aspect of utility regulation for such issues—particularly if the statutory section at issue is not relevant or applicable to investor-owned utilities like PNM.<sup>51</sup>

Even assuming, *arguendo*, that this Court determines it must harmonize the Grid Mod Statute with these other provisions of the PUA, then the method to resolve conflicts between statutes is to treat the specific statute as an exception to the general

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<sup>49</sup> § 62-3-2.1(A)-(C).

<sup>50</sup> **[BIC at 14]**

<sup>51</sup> Appellant’s BIC claims that, after a diligent search, it found no cases on point disputing what it claims is the over-arching policy or purpose of the PUA—that being to preserve public health, safety and welfare. **[BIC at 14]** However, such an assertion must first presume that the Appellant’s original assumption is proven—that the Commission must take into consideration public health, safety and welfare for every component of electric utility regulation.

statute.<sup>52</sup> In such a case, the very specific mandate in the Grid Mod Statute that expressly permits AMI deployment would govern and not general claims about preservation of public health and safety with regard to the regulation of rural electric cooperatives or water and sewer utilities. Nothing in the PUA's preamble (Section 62-3-1) or granting of supervisory control over public utilities (Section 62-6-4(A)) indicates the Commission is to base its regulation on general health and safety considerations.

***D. APPELLANT WAS AFFORDED PROCEDURAL DUE PROCESS TO PRESENT EVIDENCE, CROSS-EXAMINE WITNESSES AND MAKE ITS LEGAL ARGUMENTS.***

The crux of Appellant's constitutional claims in this case is that the Commission violated its procedural due process rights by striking evidence that the Commission deemed to be irrelevant to the proceeding.<sup>53</sup> Appellant states that the Commission, in striking all of its testimony, did not provide Appellant a meaningful opportunity to be heard on issues related to the health and safety impacts of AMI,

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<sup>52</sup> *State v. Santillanes*, 2001-NMSC-018, ¶ 11, 130 N.M. 464, 27 P.3d 456 (citation omitted).

<sup>53</sup> [BIC at 21-22]

resulting in the Commission deciding a key dispute without consideration of its evidence.<sup>54</sup>

Appellant's procedural due process claims are without merit both from a factual and legal standpoint. As the record bears out, NMUS was granted intervention, and was provided *every opportunity* to participate in the proceedings. From a legal perspective, procedural due process does not require the Commission to hear irrelevant evidence or evidence the Commission determines is not dispositive given legislative direction.<sup>55</sup>

***1. NMUS Was Provided a Full Opportunity to Participate in the Underlying Proceeding.***

NMUS's argument that it did not have a meaningful opportunity to review and present evidence, confront and cross-examine witnesses, and consult with counsel is

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<sup>54</sup> **[BIC at 20-21]** NMUS also argues it was denied a meaningful opportunity to conduct discovery relevant to its intervention in this case. **[BIC at 22-23]** This argument is a red herring. The scope of discovery is limited to "any information, not privileged, which is relevant to the subject matter involved in the pending action." Rule 1-026(B)(1) NMRA; *see also Edens v. Edens*, 2005-NMCA-033, ¶ 29, 137 N.M. 207, 109 P.3d 295 (the Court has discretion to limit discovery on immaterial and irrelevant matters). The discovery issues raised by NMUS all pertain to matters that the Commission had already deemed irrelevant in the proceeding. **See [6 RP 2882-2892]**

<sup>55</sup> Under the New Mexico Rules of Evidence, evidence that is not relevant is inadmissible. Rule 11-402 NMRA. Further, the Commission's rules state that all *relevant* evidence is admissible which, in the opinion of the presiding officer, is the best evidence most reasonably obtainable, having due regard to its necessity, competence, availability, and trustworthiness. 1.2.2.35(A)(1) NMAC.

simply wrong. “The opportunity to be heard in a ‘meaningful manner,’ generally includes an opportunity to review and present evidence, confront and cross examine witnesses, and consult with counsel, either by way of an informal or formal hearing.”<sup>56</sup> The record bears out that the Commission met this standard.

As previously noted, Appellant was granted intervention in the underlying proceeding, even over PNM’s objection.<sup>57</sup> Subsequently, Appellant filed testimony on behalf of 11 witnesses.<sup>58</sup> PNM filed a motion to strike the testimony of those witnesses.<sup>59</sup> Appellant then filed a response to PNM’s motion to strike.<sup>60</sup> The Hearing Examiner issued an order that struck the testimony of the Appellant.<sup>61</sup> NMUS filed a Motion for Reconsideration of the Hearing Examiner’s order striking testimony.<sup>62</sup>

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<sup>56</sup> *State ex rel. Children, Youth & Families Dep’t v. Maria C.*, 2004-NMCA-083, ¶ 26, 136 N.M. 53, 94 P.3d 796 (citation omitted).

<sup>57</sup> NMUS filed a motion for leave to intervene on December 9, 2022. **[2 RP 0861-0867]** PNM objected to NMUS’s motion to intervene on December 21, 2022. **[2 RP 0868-0895]** NMUS filed a request and motion for leave to file a reply to PNM’s objection and a reply to PNM’s objection on December 27, 2022. **[2 RP 0896-0928]** On January 19, 2023, the Hearing Examiner granted NMUS conditional intervention in the proceeding subject to NMUS supplying certain additional information. **[2 RP 0929-0940]**

<sup>58</sup> **[2 RP 0941-1091; 3 RP 1092-1315; 4 RP 1316-1825; 5 RP 1826-2674]**

<sup>59</sup> **[6 RP 2702-2726]**

<sup>60</sup> **[6 RP 2769-2781]**

<sup>61</sup> **[6 RP 2782-2796]**

<sup>62</sup> **[6 RP 2813-2825]**

After the Hearing Examiner's order, the Appellant filed a motion to permit it to file an expedited interlocutory appeal,<sup>63</sup> as well as a motion and supporting brief to disqualify and remove Hearing Examiner Christopher Ryan.<sup>64</sup> The Hearing Examiner then issued an order denying Appellant's motion for reconsideration of the order striking testimony, as well as an order denying NMUS's motion to disqualify the Hearing Examiner from the proceedings.<sup>65</sup> Then, NMUS filed another emergency motion with the Commission, asking it to reconsider the motion to disqualify the Hearing Examiner and to suspend the proceedings.<sup>66</sup> PNM filed a response to this emergency motion,<sup>67</sup> and the Commission issued an order denying the emergency motion.<sup>68</sup>

Finally, the Appellant also had an opportunity to participate in the evidentiary hearings and cross-examine witnesses. It should be noted that, in the first phase of

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<sup>63</sup> **[6 RP 2801-2808]**

<sup>64</sup> **[6 RP 2838-2861]** While it is not in the record of this proceeding, on March 3, 2023, NMUS filed an Emergency Petition for a Writ of Mandamus or Superintending Control, and Request for Stay with the New Mexico Supreme Court. This Court rejected both requests. *New Mexicans for Utility Safety v. N.M. Pub. Regul. Comm'n and Christopher Ryan*, No. S-1-SC-39817 (N.M. Apr. 25, 2023) (denying writ of mandamus) (nonprecedential); *New Mexicans for Utility Safety v. N.M. Pub. Regul. Comm'n and Christopher Ryan*, No. S-1-SC-39817 (N.M. Apr. 11, 2023) (denying motion for a temporary stay) (nonprecedential).

<sup>65</sup> **[6 RP 2893-2903]; [6 RP 2904-2909]**

<sup>66</sup> **[6 RP 2910-2917]**

<sup>67</sup> This response was omitted from the Record Proper by agreement of the parties.

<sup>68</sup> **[6 RP 2952-2961]**

the underlying case, the Appellant filed a motion requesting periodic excusal from the hearing<sup>69</sup>—meaning that the Appellant chose to not avail itself of all the rights afforded to it. Appellant also filed legal briefs, motions, including a motion for rehearing, and exceptions in the underlying proceeding, as well as participated in a second phase of the proceeding wherein additional evidence was admitted.<sup>70</sup>

In summary, the record reflects that the Appellant was given ample opportunities to present relevant evidence, make legal arguments, and cross-examine witnesses.

***2. Procedural Due Process Does Not Require the Commission to Admit or Hear Irrelevant Evidence.***

Appellant’s argument that its due process was violated when the Commission refused its ability “to present its case, develop a factual record to support its exceptions, and fully participate in the proceeding”<sup>71</sup> ignores that the Commission also has the authority to determine the scope of the proceedings before it.

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<sup>69</sup> [6 RP 2946-2951]

<sup>70</sup> *See, e.g.*, [8 RP 3374-3427], [9 RP 3495-3500, 3519-3544], [13 RP 3724-3759], [14 RP 3918-3935], [14 RP 4115-4130].

<sup>71</sup> [BIC at 22 (citing *State v. Flores*, S-1-SC-32094, dec. ¶ 15 (N.M. Feb. 24, 2011) (nonprecedential)]

In fact, the Commission is obligated to assess the evidence presented and determine whether such evidence is relevant to the application at issue.<sup>72</sup> The Legislature has granted the Commission discretion to determine the scope of proceedings necessary to determine a case at hand. For example, the Commission is authorized to conduct such hearings as may be required in the administration of the power and duties conferred in the PUA.<sup>73</sup> Upon notice and such hearing as the Commission deems to be necessary, the Commission's findings of fact in its final order "shall consist only of such ultimate facts as are necessary to determine the controverted questions presented by the proceeding."<sup>74</sup> The Commission was within its discretion to determine that its review of PNM's application to implement a grid modernization program that includes deployment of AMI did not require hearings or ultimate findings of fact on public health and safety matters related to AMI.

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<sup>72</sup> Under the New Mexico Rules of Evidence, evidence that is not relevant is inadmissible. Rule 11-402 NMRA; *see also* 1.2.2.35(A)(1) NMAC (stating that all relevant evidence is admissible).

<sup>73</sup> NMSA 1978, § 62-10-2 (1953).

<sup>74</sup> NMSA 1978, § 62-10-14 (1953).

As noted above, Appellant was granted the opportunity to argue the relevance of its proffered health and safety related testimonies.<sup>75</sup> In keeping with the order striking NMUS's testimonies, the Hearing Examiner, on his own motion, also issued

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<sup>75</sup> Appellant attempts to argue that its due process was “compromised by the Commission’s explicit threat of sanctions if [the Appellant] continued to argue the relevance of public health, safety or welfare, which chilled the ability of the intervenor to exercise its rights ...” [**BIC at 22** (citing **14 RP 3999**) (citation omitted from original quote)] It should be noted that the Record Proper cite provided by Appellant to indicate its participation was chilled in the proceeding was to the Final Order in the case, where the Commission stated:

NMUS’s exceptions intentionally raise arguments that have already been determined in this proceeding to be legally irrelevant, inappropriate, and disallowed for consideration; and NMUS’s exceptions are also not based upon record evidence and are at times inadequately cited. They are rejected. Further, in raising such legally irrelevant and inappropriate arguments, NMUS has seemingly flouted the orders of the Commission and the Presiding Officer. Disrespectful conduct and a party’s lack of discretion in adhering to lawful orders of the Commission shall not be tolerated. Therefore, NMUS is put on notice that any further argument to the Commission in this Docket related to issues that have been stricken from these proceedings may result in actions taken pursuant to NMSA 1978, Section 62-12-4 (1993).

Since this admonition occurred in the Final Order—nearly the last step in the Commission’s process—the Appellant’s argument that this somehow chilled its participation is ineffectual. Also, the record itself belies that the Appellant somehow felt chilled in terms of participation in the case, as the Appellant made numerous legal filings and had multiple opportunities to present relevant evidence or cross examine witness. Furthermore, as stated in the Final Order, the Commission has a statutory right to penalize parties that fail to comply with Commission orders. *See* § 62-12-4.

an order striking testimony from PNM on health-related issues.<sup>76</sup> The Appellant raised inaccurate arguments in the underlying proceeding and its Brief-in-Chief that the Commission had “admitted” PNM’s evidence on health-related issues but denied admission of NMUS’s evidence on the same or similar issues and then subsequently struck PNM’s evidence to “un-ring the bell” in terms of the relevance of these issues.<sup>77</sup> The correct set of facts is that the Hearing Examiner, prior to hearing wherein testimony is admitted into the record, undertook of his own motion to strike PNM’s testimony on health-related issues.<sup>78</sup>

Any claim that the Commission acted inappropriately by “admitting” PNM’s testimony on those issues is inconsistent with the Commission’s procedural rules, as PNM’s testimony on health-related issues had been pre-filed but not yet admitted to the record. As the Hearing Examiner explained, pre-filed testimony that parties upload to the Commission’s E-Docket system as part of an application filing package

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<sup>76</sup> **[6 RP 2918-2945]** As noted by the Hearing Examiner, “PNM likely supplied testimony in its application ... on the matters upon which NMUS is singularly focused because PNM ‘anticipated potential opposition to its grid modernization plan on health grounds’ as NMUS opposed PNM’s last grid mod application on health grounds.” **[6 RP 2927]** (citation not in original)

<sup>77</sup> **[BIC at 21-22]**

<sup>78</sup> **[6 RP 2928]**

is not admitted evidence.<sup>79</sup> Testimony is not admitted into the record until a hearing is held and a motion for admission is considered.<sup>80</sup> However, once testimony is pre-filed in the E-Docket system, parties may, within a specified period of time set forth by administrative rule or by Commission order, file motions to strike pre-filed testimony.<sup>81</sup> While PNM filed such a motion regarding NMUS's pre-filed health and safety related testimony in advance of hearing, the Appellant did not similarly file a motion to strike PNM's pre-filed health-related testimony.

In exercising the Commission's purview to establish the scope of the proceedings at hearing, no health- or safety-related evidence from any party was admitted into evidence or considered by the Commission in issuing its Final Order. The Hearing Examiner had the authority on his own motion to issue an order excluding PNM's pre-filed health-related testimony from admission and did so. "By striking PNM's preemptive statements that there are no health or biological impacts

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<sup>79</sup> **[6 RP 2926]** Written direct testimony and exhibits in support of an application filed at the Commission, if required by Commission rule or order, must be included at the time of the application's filing, and failure to do so is grounds for rejection of the filing. 1.2.2.11(B) NMAC.

<sup>80</sup> **[6 RP 2926]**; *see also* 1.2.2.35(I)(1) NMAC (prepared written testimony shall be adopted under oath at hearing, and admitted subject to cross-examination and motions to strike).

<sup>81</sup> Any evidence offered into evidence is subject to appropriate and timely objection, and the hearing examiner has discretion with or without objection to exclude inadmissible, incompetent, cumulative or irrelevant evidence or order the presentation of such evidence discontinued. 1.2.2.35(L)(1) and (2) NMAC.

associated with implementation of AMI, NMUS's due process claim is answered, and ... [t]he playing field is made level."<sup>82</sup> In summary, the Hearing Examiner ensured that the evidentiary record was devoid of all evidence associated with the health effects of AMI, ensuring that PNM and NMUS were on equal footing regarding evidence of this nature. The Appellant did not provide a single citation that indicates procedural due process eclipses an agency's ability to admit or strike evidence deemed irrelevant.<sup>83</sup> In fact, authority from appellate courts indicates that the Commission need not permit the presentation of irrelevant or repetitive evidence to check a due process box.<sup>84</sup>

In other words, due process does not exist in a vacuum such that parties get to present evidence that is irrelevant just so an agency can state it satisfied the procedural due process rights of the party. While Appellant tries to make this argument by relying on the *Resolute Wind* case, its arguments do not hold up to scrutiny. The core issue in the *Resolute Wind* case is that the Commission improperly

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<sup>82</sup> **[6 RP 2928]**

<sup>83</sup> See *In re Adoption of Doe*, 1984-NMSC-024, ¶ 2, 100 N.M. 764, 676 P.2d 1329 (“We assume where arguments in briefs are unsupported by cited authority, counsel after diligent search, was unable to find any supporting authority. We therefore will not do this research for counsel. Issues raised in appellate briefs which are unsupported by cited authority will not be reviewed by us on appeal.” (citations omitted))

<sup>84</sup> See *Scruggs v. Jordan*, 485 F.3d 934 (7<sup>th</sup> Cir. 2007) (finding that prison disciplinary officials need not permit the presentation of irrelevant or repetitive evidence in order to afford prisoners due process).

adopted its own methodology for summarily resolving a hotly contested factual issue.<sup>85</sup> Specifically, this Court in *Resolute Wind* found that the Commission violated Resolute Wind's due process by precluding it altogether from presenting evidence given the methodology used to resolve the factual issue.

But this Appeal turns on a legal conclusion, not a contested factual issue. The decision to strike irrelevant evidence on public health and safety related to AMI was a matter of statutory construction.<sup>86</sup> Since the Commission determined that the Legislature had already decided that AMI was permitted to be deployed in a grid modernization program, general health and safety issues relating to AMI technologies were not on the table.

#### IV. CONCLUSION

Appellant raises questions of law in this appeal and fails to meet its burden to demonstrate that the Final Order was arbitrary, capricious or contrary to law. The Commission reasonably interpreted the Grid Mod Statute to find that PNM is permitted to implement AMI as part of PNM's grid modernization activities, based

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<sup>85</sup> *Resolute Wind I LLC v. N.M. Pub. Regul. Comm'n*, 2022-NMSC-011, ¶ 21, 506 P.3d 346.

<sup>86</sup> Similar arguments apply to NMUS's citation to *Flores*, S-1-SC-32094, dec. ¶ 15, which concerns a district court preventing parties from making a record. The record at issue in that case concerns the reasonableness of a stop based on factual circumstances. Again, the facts are not an issue in this case. There is no authority that requires an adjudicative body to create a record based on evidence deemed to be legally irrelevant.

on the plain language of the statute. The Court should provide some deference to the agency's expertise in implementing the Grid Mod Statute given its technical requirements for regulated utility programs. The Commission also has not violated the Appellant's due process rights. The Court should affirm the Commission's Final Order.

Respectfully submitted this 4th day of December 2025.

**PUBLIC SERVICE COMPANY OF NEW MEXICO**

*/s/ Stacey J. Goodwin*

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**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing brief was electronically served on all counsel of record through the New Mexico Supreme Court's Odyssey filing system on December 4, 2025.

*/s/ Stacey J. Goodwin*

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Stacey J. Goodwin