

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE JOINT APPLICATION OF)
AVANGRID, INC., AVANGRID NETWORKS, INC., NM)
GREEN HOLDINGS, INC., PUBLIC SERVICE COMPANY)
OF NEW MEXICO AND PNM RESOURCES, INC. FOR)
APPROVAL OF THE MERGER OF NM GREEN)
HOLDINGS, INC. WITH PNM RESOURCES, INC.;)
APPROVAL OF A GENERAL DIVERSIFICATION PLAN;)
AND ALL OTHER AUTHORIZATIONS AND APPROVALS)
REQUIRED TO CONSUMMATE AND IMPLEMENT THIS)
TRANSACTION) Case No. 20-00222-UT
)
AVANGRID, INC., AVANGRID NETWORKS, INC.,)
NM GREEN HOLDINGS, INC., PUBLIC)
SERVICE COMPANY OF NEW MEXICO AND PNM)
RESOURCES, INC.,)
)
JOINT APPLICANTS.)

ORDER DISQUALIFYING IBERDROLA ATTORNEY

THIS MATTER comes before the Hearing Examiner upon the allegations of a concurrent conflict of interest involving Iberdrola attorney, Marcus Rael, and Mr. Rael's concurrent representation of the Attorney General and Bernalillo County in other unrelated proceedings. Being fully informed, the Hearing Examiner **FINDS** and **CONCLUDES** as follows.

Background

On July 23, 2021, NEE filed an Application for Subpoena seeking to depose Attorney Marcus Rael and to produce documents related to NEE's claim that Mr. Rael may have violated Rule 16-107 of the New Mexico Rules of Professional Conduct. Rule 16-107 NMRA. In response, the Hearing Examiner issued an Order on July 26 providing for responses to the Application by July 28.

Rule 16-107(A) of the New Mexico Rules of Professional Conduct prohibits attorneys from engaging in legal representations that constitute conflicts of interests among the attorney's current clients. Subsection (B) of the Rule, however, also specifies conditions, which if satisfied, will permit the concurrent representations.

16-107. Conflict of interest; current clients.

A. Representation involving concurrent conflict of interest. Except as provided in Paragraph B of this rule, a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

- (1) the representation of one client will be directly adverse to another client; or
- (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

B. Permissible representation when concurrent conflict exists.

Notwithstanding the existence of a concurrent conflict of interest under Paragraph A of this rule, a lawyer may represent a client if:

- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
- (2) the representation is not prohibited by law;
- (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
- (4) each affected client gives informed consent, confirmed in writing.

Rule 16-107 NMRA.

NEE's subpoena attempted to schedule Mr. Rael's deposition and the document production for August 6. But the subpoena for the documents acknowledged that Mr. Rael need not produce the documents in less than 14 days after service of the subpoena. The timing meant that the conflict issue would not likely be resolved before the scheduled start of the eight days of evidentiary hearings on August 11, 2021.

Accordingly, consistent with the New Mexico Supreme Court's ruling in *Living Cross Ambulance Serv., Inc. v. N.M. Pub. Regulation Comm'n*, 2014-NMSC-036, 338 P.3d 1258, the

Hearing Examiner acted to resolve the alleged conflict of interest issue prior to the start of the evidentiary hearings. On July 27, the Hearing Examiner issued an *Order Requiring Positions on Alleged Conflict of Interest* asking the parties involved in the alleged conflict of interest, i.e., the Joint Applicants, the Attorney General and Bernalillo County, to file by July 30, 2021 their positions (including affidavits describing and attesting to the facts of the alleged concurrent representations) on whether the alleged conflicts of interest exist and whether the conflicts are resolved, addressing each of subsections (3) and (4) of Rule 16-107(B). The Order also allowed other parties to file their positions on the alleged conflict of interest issue by the same date.

The Joint Applicants filed their response to NEE's Application for Subpoenas on July 28, and NEE filed a Reply on the same date. On July 30, Iberdrola/Avangrid, PNMR/PNM, the Attorney General and Bernalillo County filed their positions and affidavits on the alleged conflicts of interest, and NEE filed its Reply to the above responses.

Application for Subpoena

1. NEE's Application for Subpoena

In its July 23 Application for Subpoena, NEE asked the Hearing Examiner to issue subpoenas requiring the attendance of Marcus Rael at a deposition scheduled for August 6, 2021 and requiring further the production of documents. As noted, the subpoena for the document production acknowledged that documents did not need to be produced in less than 14 days after service of the subpoena. NEE asked for the subpoenas and the related discovery to develop facts concerning Mr. Rael's alleged concurrent conflict of interest under Rule 16-107 NMRA. NEE alleged that the conflict of interest arises from Mr. Rael's concurrent representation of Iberdrola (one of the Joint Applicants in this case), the Attorney General and Bernalillo County.

2. The Joint Applicants' July 28 response to the Application for Subpoenas -- lack of standing and untimely request, defectiveness of subpoenas.

In their July 28 response to the Application, the Joint Applicants argue that NEE, as a non-client of Mr. Rael, lacks standing to challenge Mr. Rael's representations under Rule 16-107 NMRA. They argue that only clients have the necessary standing.

They also argue that NEE's request is untimely -- that requests for disqualification must be filed at the onset of the litigation or with promptness and reasonable diligence once the facts upon which the motion is based have become known. They state that NEE has known since at least April 4, 2021, that Mr. Rael was involved in this case, but it made no attempt to allege a conflict of interest despite being fully apprised months ago of the same information it now relies on to claim a potential conflict in this case.

Third, the Joint Applicants argue that the subpoenas requested by NEE are defective in certain respects.

Finally, they argue that the communications NEE seeks are privileged and inadmissible in Commission proceedings. They state that Mr. Rael is an attorney who is providing legal services to Iberdrola and has provided legal services in other unrelated contexts to two other parties in this case. Under New Mexico law, all communications between Mr. Rael and his clients (including Iberdrola) are privileged under Rule 11-503 NMRA. In addition, under the Commission's rules, specifically 1.2.2.20(C) NMAC, all "statements, admissions, or offers of settlement made during the course of negotiations of settlements are privileged." Furthermore, "[n]o such statements, admissions, or offers of settlement shall be admissible as evidence in any formal public hearing. . . ." 1.2.2.20(C) NMAC; *see also* 1.2.2.16(D) NMAC ("Offers of settlement and statements made in furtherance of them made in the course of a settlement

conference are privileged and...shall not be admissible as evidence in any formal public hearing before the commission or presiding officer.”). Therefore, any communications between Mr. Rael and the New Mexico Attorney General or between Mr. Rael and Bernalillo County occurred during the course of settlement negotiations and are, therefore, privileged, cannot be disclosed, and cannot be entered into evidence in any Commission proceeding.

3. NEE’s July 28 reply to the Joint Applicants’ response to the Application for Subpoena

NEE argues that it has standing to assert a conflict of interest and that some courts have found that it is irrelevant how the improper conduct of attorneys come to the tribunal’s attention. NEE states that under NMSA 1978, §8-5-17, the Attorney General is responsible for protecting residential and small business consumer interests. NEE states that it is a ratepayer, as are its board members, its director, its employees, and its constituent members. NEE also argues that it represents the interests of ratepayers that will be harmed if this merger is approved, especially, if the merger is based, even in part, on a conflict of interest, illegalities, undue influence and or fraud and corruption. *Coyler v. Smith*, 50 F.Supp.2d 966, 971-72. (C.D. Cal. 1999). (There is an exception to the rule on standing where the ethical breach “so infects the litigation in which disqualification is sought that it impacts the moving party’s interest in a just and lawful determination of her claims.”)

NEE also states that some courts have disregarded the standing requirement entirely instead focusing on the tribunal’s “inherent power to preserve the integrity of the adversary process.” *Greenfield MHP Associates, L.P. v. Ametek, Inc.*, 2018 WL 538961 (S.D. Cal. 2018).¹

¹ NEE also cites *Exp. Dev. Can. V. Ese Elecs. Inc.*, 2017 WL 3122157, *2 (C.D. Cal. 2017) (“A district court has inherent authority – either of its own accord or in response to a motion to disqualify counsel – to disqualify an attorney or firm as counsel for violating [ethical] standards.”); *Brumfield v. City of Seattle*, 2011 WL 13127184, *2 (W.D. Wash. 2011) (“Notwithstanding the fact that Plaintiff raises a conflict-of-interest question as a non-client

NEE argues that this proceeding is not a private matter between the Attorney General and the attorney Iberdrola hired to get the Attorney General to agree to the settlement. Every Commission proceeding is imbued with the public interest and the interests of ratepayers. NEE cites NMSA 1978, § 62-6-13, which authorizes the Commission to reject proposed acquisitions when it finds that “the proposed transaction is unlawful or is inconsistent with the public interest.”

NEE also argues that its attorneys, as officers of the Court, are obligated to report lawyer misconduct. NMRA 16-803.

Furthermore, NEE argues that it has diligently and zealously advocated on behalf of ratepayers in this case, and has not wasted time or engaged in unnecessary delay. It includes the following timeline to support its position:

| Date | Action | Respondent | Information Received |
|-------------|--|-----------------------|---|
| 2/26/2021 | Mr. Rael is retained by Iberdrola, S.A., on or before 2/26/2021, on behalf of Avangrid to provide legal advice in this case and to assist in settlement negotiations with various parties. | Pedro Azagra Blazquez | Meeting with NM AG's Office, 9:30 a.m. (Joint Applicants' 1 st Supplemental Objections and Responses to NM AREA-4, June 24, 2021) |
| 3/4/2021 | Attorney General files confidentiality agreement of | | |

party, the issue of disqualification is properly before the Court due to its inherent power to manage attorney conduct and to protect the integrity of its processes.”) (internal quotation marks and alteration omitted).

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| | Scott Hempling. | | |
| 3/10/2021 | Mr. Rael meets with Ken Martinez, County Attorney, Bernalillo County | Pedro Azagra Blazquez | <p>“Mr. Rael attended a scheduled meeting with Ken Martinez, the County Attorney for Bernalillo County, on March 10, 2021. Mr. Rael also had a number of telephone conferences with Mr. Martinez. <i>Mr. Martinez was advised of and aware of his right to have his regulatory counsel present for the discussions.</i>” (emphasis supplied.)</p> <p>(Joint Applicants’ 1st Supplemental Objections and Responses to NM AREA-4, June 24, 2021)</p> |
| 4/2/2021 | Attorney General files the testimony of Andrea Crane | | <p>Merger is not in the Public Interest</p> <ol style="list-style-type: none"> 1. Iberdrola should be joined as a Joint Applicant. 2. Rate Credit should be \$85 million. 3. PNM should assume all Four Corners Power Plant \$300 million costs of abandonment. 4. Economic Development funding should be \$80 million. 5. PNM should be prohibited from paying dividends if PNMR’s credit rating falls below investment-grade. 6. Penalties for failure to create jobs. 7. PNM should be required to provide quarterly reports on reliability and customer service metrics. 8. Transparency for Avangrid payments to Iberdrola. |
| 4/2/2021 | Attorney General files the testimony of Scott Hempling. | | <p>Merger is inconsistent with the Public Interest</p> <ol style="list-style-type: none"> 1. Iberdrola/Avangrid wants to use the public utility as a “platform” of captive customers, to advance its private financial interests for their renewables business in the Southwest. 2. Though the value to Iberdrola/Avangrid of controlling PNM is due largely to the captivity of PNM’s customers, the entire \$713 million control premium would go to PNMR’s shareholders. PNMR is selling control of a public franchise for private gain. The measure of that gain is the control premium—the excess of purchase price over market price. PNMR’s shareholders get this entire premium, even though most of the value Iberdrola/Avangrid is paying for is attributable to PNM’s customers rather than PNMR’s shareholders. 3. Iberdrola/Avangrid’s four-layer, multi-affiliate |

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| | | | <p>corporate structure pose multiple risks to PNM and its customers.</p> <p>4. The transaction's "benefits," all either token or non-committal, divert attention from the transaction's pecuniary purposes.</p> |
| 4/4/2021 | PNM responds to NEE's 7 th Set of Discovery | Pedro Azagra Blazquez | <p>"Joint Applicants state that Joint Applicants have not retained Marcus Rael. Joint Applicants understand that Iberdrola has retained him for legal services on a variety of issues in New Mexico, but Mr. Rael is not entering an appearance on behalf of either of the Joint Applicants in the merger proceeding before this Commission."</p> |
| 4/9/2021 | NEE sends IPRA Request to Office of New Mexico Attorney General Hector Balderas | | <p>Requesting among other things: All records relating to engagements by the Office of the Attorney General of the firm of Robles, Rael & Anaya, P.C., including, without limitation, each engagement and any associated contract or agreement, all fees, expenses, salaries and costs paid to Marcus Rael and/or his law firm, Robles, Rael & Anaya, P.C. or any member or employee thereof, from January 1, 2015 to the present.</p> |
| 4/13/2021 | NEE sends First Set of Discovery to New Mexico Attorney General | | <p>Repeats the same IPRA request in Discovery and ask a few other questions.</p> |
| 4/20/2021 | Filing of Initial Stipulation with the NMAG and other parties. | | <p>Joint Applicants files Initial Stipulation.</p> <p>Relative to Ms. Crane's testimony...</p> <p>The Signatories agree and stipulate as follows:</p> <ol style="list-style-type: none"> 1. Iberdrola should be joined as a Joint Applicant. 2. Rate Credit should be \$85 million. \$50 million. 3. PNM should assume all Four Corners Power Plant \$300 million costs of abandonment. Economic Development funding should be \$80 million. \$7.5 million over the three years and \$12.5 million for the benefit of impacted indigenous community groups in the Four Corners region. 5. PNM should be prohibited from paying dividends if PNMR's credit rating falls below investment grade. 6. Penalties for failure to create jobs. 7. PNM should be required to provide quarterly reports on reliability and customer service metrics. 8. Transparency for Avangrid payments to Iberdrola. |

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| | | | (strikeouts represent what was ignored by the Stipulation that Ms. Crane testified were required conditions for a merger to be in the public interest.) |
| 4/22/2021 | PNM provides supplemental response to NEE's 7 th Set of Discovery, post granting of Motion to Compel (4/19/2021) | Pedro Azagra Blazquez | <p>"Iberdrola S.A. has retained Mr. Rael as legal counsel. Mr. Rael was retained on March 10, 2021.* His rate is \$400 per hour. Iberdrola S.A. is paying this expense."</p> <p>*Note this conflicts with the response given by JA to NM AREA that Rael was working for Iberdrola on or before 2/26/2021.</p> |
| 4/23/2021 | Attorney General Hector Balderas | Cholla Khoury provides an Affirmation | See, Exhibit 1. With regards specifically to the question of conflict between Rael's role with Iberdrola and the State of New Mexico through its contract with NMAG, Ms. Khoury states in Response to NEE 1-7: "The Attorney General has no knowledge of whether Robles, Rael & Anaya, P.C. has conducted a conflict review as it is not aware of any basis for conflict." |
| 5/12/2021 | Letter from Patricia Salazar, Open Government Division, NMAG; "Person responsible for denial: Cholla Khoury" | | <p>Approximately four hundred "responsive records" produced electronically, including contracts with private counsel and invoices from Robles, Rael & Anaya, P.C.</p> <p>Raw data received from NMAG, linked as follows: https://drive.google.com/drive/folders/1KjtxaYwe1krglYFCYSXloy2PeFLDeZfR?usp=sharing</p> |
| 6/11/2021 | NEE writes letter to Patricia Salazar, Open Government Division, NMAG | | Specifically requesting entire invoices, the removal of redactions and other case information that Rael and his law firm are assigned to by the NMAG. |
| 6/21/2021 | Reply email from Patricia Salazar, Open Government Division, NMAG | | "We are looking into this and will provide more information once we have thoroughly investigated it." |
| 6/23/2021 | Spain's High Court initiates | | Criminal investigation into corporate, spying, bribery, falsification of documents and fraud. |

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| | an investigation into Iberdrola Chief Executive Ignacio Galan and three Executive Committee Members | | |
| 6/24/2021 | NEE Issues 16 th Set of Discovery to JA | | Thirty-five interrogatories and request for production of documents about the 6/23/2021 criminal investigation of Iberdrola |
| 6/30/2021 | NEE follow up email to Patricia Salazar, Open Government Division, NMAG | | "I haven't heard from you in almost three weeks. Can you please update me about how what your "investigation" has revealed. I'm hoping to avoid a district court matter against the New Mexico Attorney General." |
| 7/6/2021 | JA file Responses and Objections to NEE 16 th Set of Discovery to JA | | JA provide slightly more information than the threadbare information provided in their 6/24/2021 <i>Joint Applicants' Notice Regarding Other Proceedings in Other Jurisdiction</i> . |
| 7/9/2021 | NEE files Objection to Notice, Motion to Compel and Requests Remedy from Commission | | Raises relevant investigations for serious misconduct including ethical violations in Spain and Maine. |
| 7/12/2021 | Email from Patricia Salazar, Open Government Division, NMAG | | "I have forwarded your email onto the appropriate individual and have not heard back from them. Thank you." |
| 7/13/2021 | NEE follow up email to Patricia Salazar, Open | | Requesting IPRA responses again. |

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| | Government Division, NMAG | | |
| 7/15/2021 | NEE files a complaint with exhibits and provides access to the raw data received from the IPRA with four other civic organizations with the State Ethics Commission, State Auditor, and the Disciplinary Board of the N.M. Supreme Court | | <i>See</i> , Exhibit 2 (with Exhibits A-H). The complaints and attached exhibits are essentially the same to each agency – the main difference is the heading and the citing of specific rules/law relevant to the specific agency. |
| 7/19/2021 | The Hearing Examiner issues Order Addressing NEE’s Objection and Request for Remedy | | <p>“If the Chairman and Chief Executive Officer of a company seeking an approval before the Commission is involved in a criminal investigation, the Commission deserves to know about it. And the Commission deserves to know what the criminal investigation is about.” Order at 10.</p> <p>Further, the Hearing Examiner grants NEE’s Motion to Compel in part and states: “The responses shall be provided promptly.” On Friday, 7/23/2021, NEE emails Joint Applicants to please provide the responses by Monday 7/26/2021.</p> <p>Lastly the Order requires JA to respond to certain question in Attachment A about Iberdrola/Avangrid’s conduct in Spain, Maine, and N.M. by 7/27/2021.</p> |
| 7/21/2021 | NEE files a “complaint update” with the State Ethics | | <i>See</i> , Exhibit 3. Updating the original complaint to include possible violations of Rule 16-107 and Rule 16-108. Specifically, noting Rule 16-108 G, requiring: “A lawyer who represents two or more clients shall not participate in making an aggregate |

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| | Commission, State Auditor, and the Disciplinary Board of the N.M. Supreme Court | | settlement of the claims... unless each client gives informed consent, in a writing signed by the client.” |
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NEE states that the Attorney General disregarded the conditions Ms. Crane testified were required for the merger to be in the public interest and the risks and harms identified by Mr. Hempling in his testimony when the Attorney General entered into the Stipulation. NEE states that the Attorney General’s changed position is why NEE made inquiries into what transpired.

NEE states that it and four other civic organizations have filed complaints with exhibits and the raw data received from the Attorney General’s IPRA Response with the State Ethics Commission, State Auditor, and the Disciplinary Board of the N.M. Supreme Court on the issue. NEE includes copies of the complaints and their attached documents in NEE’s Reply.

NEE also states that, while it has known of Mr. Rael’s hiring since at least April 4, 2021, it did not begin to understand the extent of the ongoing relationship and the relationships of the parties until it received the results of its IPRA request from the Attorney General’s office on May 12, 2021 and had a chance to wade through, organize and analyze the 400 documents in the response and to conduct independent research into other cases not provided by the Attorney General.

Finally, NEE argues that the communications NEE seeks from Mr. Rael fall within exceptions to the privileges recognized in the evidentiary rules pertaining to settlement negotiations and lawyer-client communications. NEE cites Rule 11-408 NMRA(B) which permits the admission of settlement negotiations to prove an effort to obstruct a criminal investigation or prosecution. NEE also argues that the “furtherance of crime or fraud,” “breach

of duty by lawyer or client,” and “joint clients” exceptions to the lawyer-client privilege in Rule 11-503 NMRA(D) apply.

July 27 Order Requiring Positions on Alleged Conflict of Interest.

As noted above, on July 27, the Hearing Examiner issued an *Order Requiring Positions on Alleged Conflict of Interest* asking the parties involved in the alleged conflict of interest, i.e., the Joint Applicants, the Attorney General and Bernalillo County, to file, by July 30, 2021, their positions (including affidavits describing and attesting to the facts of the alleged concurrent representations) on whether the alleged conflicts of interest exist and whether the conflicts are resolved, addressing each of subsections (3) and (4) of Rule 16-107(B). The Order also allowed other parties to file their positions on the alleged conflict of interest issue by the same date.

On July 30, the parties filed the responses discussed below.

1. Responses to the Hearing Examiner’s *Order Requiring Positions on Alleged Conflict of Interest*.

a. Iberdrola’s July 30 response

Pedro Azagra Blazquez filed an affidavit on behalf of Iberdrola and Avangrid. He states that Iberdrola, on behalf of itself and Avangrid, retained the services of Robles, Rael, & Anaya, P.C. He says Iberdrola understood the Robles Law Firm to have a broad experience of legal representation in New Mexico, including renewable energy generation projects, renewable energy transmission projects, and governmental affairs. Iberdrola also understood that the Robles Law Firm was experienced in complex settlement negotiations. Iberdrola believed that a more detailed understanding of New Mexico and the parties in this case could lead to a settlement agreement and believed that the Robles Law Firm could assist Iberdrola in advising Iberdrola and could potentially assist in a settlement in this case.

Mr. Azagra Blazquez states further that, at the time Iberdrola retained the Robles Law Firm, Marcus J. Rael, Jr. informed Iberdrola that the Robles Law Firm represented in various unrelated litigation matters multiple governmental entities, including the Bernalillo County Board of County Commissioners and the State of New Mexico in claims initiated by the New Mexico Attorney General's office. He says Iberdrola did not object to or otherwise have a concern about the Robles Law Firm's representations of other clients at that time on unrelated matters, and continues to not object to the Robles Law Firm's representation in of other clients on unrelated matters. At the time that Iberdrola engaged the Robles Law Firm, Iberdrola did not believe that there was a conflict of interest.

Mr. Azagra Blazquez states that Iberdrola did not consider the Robles Law Firm's representations of the other parties to be adverse to Iberdrola. Iberdrola believed that the representation of Iberdrola would not be materially limited by the Robles Law Firm's responsibilities to other clients, and Iberdrola had no concerns that the Robles Law Firm would be able to maintain the confidences of each client on each client's respective matters.

Nevertheless, Iberdrola argues in its response that, to the extent there is any concurrent conflict, subsection (3) of Rule 16-107(B) does not apply to make it non-consentable or impermissible. First, as stated in the affidavit of Mr. Blazquez, Iberdrola did not consider Mr. Rael to be representing opposing parties specifically in this litigation, and therefore, there is no non-consentable conflict of interest. With respect to the matter at hand, Mr. Rael represents only Iberdrola in the limited capacity of facilitating settlement discussions. Mr. Rael is not purporting to represent the Attorney General or the County in this proceeding or related negotiations. Second, there is no claim in this proceeding by Iberdrola against either the State of New Mexico or the Bernalillo County Board of County Commissioners. Likewise, there is no claim by the

Bernalillo County Board of County Commissioners or the State of New Mexico against Iberdrola.

In regard to subsection (4) of Rule 16-107(B) Mr. Azagra Blazquez and Iberdrola state that, if any conflict is determined to exist, the Affidavit is intended as and reflects a written waiver of any potential conflict.

b. The July 30 response of PNMR and PNM

In response to the Order, PNM and PNMR state simply that they have not engaged Marcus Rael as counsel with respect to any matters in this proceeding and, therefore, his representation of others presents no conflict of interest with respect to PNM and PNMR.

c. The Attorney General's July 30 response

In his affidavit, Matt Baca, Chief Counsel for the New Mexico Office of the Attorney General, describes the process by which the Attorney General contracts for professional legal services. He said potential cases are identified and reviewed internally to determine if there is a sufficient state interest to bring litigation or if outside expertise is needed to assist with the investigation to develop the facts adequately for litigation. If the decision is made to proceed, the recommended firm is put on contract for that matter. The Attorney General retains control over all aspects of the investigation and litigation, including directing, reviewing, and oversight of every stage and for every filing. At no time does an outside firm have independent authority to act on behalf of the Attorney General.

Mr. Baca states further that the Attorney General has reviewed the matters in which Marcus Rael has performed or currently performs professional services on behalf of the Attorney General in this capacity and found that none of the matters involves the regulation of a utility, any matter before the Public Regulation Commission, or is at all related to the present matter.

Mr. Baca states that, as soon as the Attorney General became aware that Mr. Rael had been retained by Iberdrola in this matter, an examination of any possible conflict was undertaken by the Attorney General, and none was found.

The Attorney General argues further in its response that Iberdrola's interests are in no way adverse to the State's interests in cases the State has brought against Wells Fargo, Monsanto or any other case in which the Attorney General, with the assistance of Mr. Rael, has exercised its police and civil law enforcement powers. The Attorney General argues that the Committee Commentary to Rule 16-107 makes it clear that simply representing a party in one transaction whom the lawyer is representing in another transaction does not automatically create a conflict. The Attorney General cites the Committee Commentary to Rule 16-107, n.6: "[S]imultaneous representation in *unrelated* matters of clients whose interests are only *economically* adverse, such as representation of competing economic enterprises in unrelated litigation, does not ordinarily constitute a conflict of interest and thus may not require consent of the respective clients." (Emphasis added by the Attorney General.)

The Attorney General states that the dominant theme throughout the commentary and case law surrounding concurrent conflicts of interest is lawyers representing two clients in the same proceeding or in separate proceedings that implicate the same or related issues, citing *Living Cross Ambulance Serv., Inc. v. New Mexico Pub. Regulation Comm'n*, 2014-NMSC-036, 338 P.3d 1258 and *In re Houston*, 1999-NMSC-032, 127 N.M. 582, 985 P.2d 752. As such, based on the Attorney General's understanding of the scope of Mr. Rael's representation of Iberdrola, the interests Mr. Rael is representing on behalf of Iberdrola are not directly adverse to the interests Mr. Rael represents on behalf of the Attorney General. The Attorney General states

that Mr. Rael's representation of the Attorney General concerns interests that are unrelated, not just to the current transaction but to this area of law altogether.

The Attorney General states that it determined, based on its understanding of Mr. Rael's representation of Iberdrola, that there was no interest that Mr. Rael represented on its behalf that would place his representation of Iberdrola in conflict with his representation of the Attorney General. Thus, no waiver of a conflict under Rule 16-107(B) was necessary.

The Attorney General states that his office and other parties are represented by experienced attorneys who have substantial experience in this area of practice. Mr. Rael's engagement did not supplant or otherwise change the negotiating structure between the parties. Negotiations had begun between the lead negotiators for the Attorney General and Avangrid prior to Iberdrola hiring Mr. Rael. The Attorney General states that, as soon as it became aware that Mr. Rael had been retained by Iberdrola, an examination of any possible conflict was undertaken by the Attorney General, and none was found. Negotiations continued between the lead negotiators for each party, as they had prior to Mr. Rael's engagement, and no waiver was sought or required.

d. Bernalillo County's July 30 response

W. Ken Martinez, County Attorney for Bernalillo County, states in his affidavit that there are no known conflicts of interest between Mr. Rael and/or his law firm and Bernalillo County that exist as described by New Energy Economy in its Application for Subpoena nor that are within the scope of either Rule 16-107(B) subsection (3) or Subsection (4).

The County goes on to state in its response that neither Mr. Rael, nor his firm, nor any attorney within his firm has entered an appearance in Case No. 20-00222-UT. Mr. Rael was hired by Iberdrola to assist Iberdrola, but Iberdrola was not a party to the proceeding until the

Hearing Examiner on June 8, 2021 approved Bernalillo County's and Albuquerque Bernalillo County Water Utility Authority's "Joint Motion for Joinder of Iberdrola, S.A. for Just Adjudication" filed by the County and ABCWUA which was filed on May 24, 2021.

Second, to the best of the County's knowledge (and following a survey of e-dockets by local counsel), neither Mr. Rael nor the law firm of Robles, Rael & Anaya, P.C. or any of their attorneys have been involved in any cases at the New Mexico Public Regulation Commission in which they have been adverse to the County within the past eight years. These include rate cases, abandonment cases, rulemaking proceedings, renewable portfolio cases and other cases in which Bernalillo County has entered an appearance:

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| Case No. 15-00261-UT | Case No. 20-00031-UT |
| Case No. 16-00276-UT | Case No. 20-00121-UT |
| Case No. 18-00043-UT | Case No. 20-00124-UT |
| Case No. 18-0095-UT | Case No. 20-00237-UT |
| Case No. 19-00018-UT | Case No. 21-00017-UT |
| Case No. 19-00129-UT | Case No. 21-00083-UT |
| Case No. 19-00158-UT | |
| Case No. 19-00159-UT | |
| Case No. 19-00195-UT | |
| Case No. 19-00352-TR-M | |

The County argues that this eliminates any direct conflict between Mr. Rael and the County concerning any previous case(s) before the Commission.

Third, the County states that contracts procured with Mr. Rael or members of his law firm providing legal services to the County fall generally into the following areas, none of which are related to Case No. 20-00222-UT: Land Use and Planning, Counsel Robert White; the McClendon Lawsuit involving the Metropolitan Detention Center, Counsel Taylor Rahn; procured contracts in place for the County's elected Sheriff and Assessor as may be needed for matters with those offices; and representation of the County on national opioid litigation. There are also case assignments made by the New Mexico counties on claims made under the County's

insurer. To the best of the County's knowledge, none of these present any conflicts between Mr. Rael and his law firm and the County.

The County states that it has not been asked to provide written consent under Rule 16-107(B). Mr. Rael has had no discussion with the County concerning questions or concerns about his being under contract with Iberdrola. The County states that it has no authority to grant written consent on a potential conflict in the absence of knowing the specific contractual obligations of Mr. Rael with Iberdrola. Mr. Rael has facilitated confidential settlement discussions between the County and Mr. Azagra Blazquez, but Mr. Rael has not been directly involved in any specific terms of settlement with local counsel for the County or the County. The County states that it has separate representation on its behalf in this proceeding.

2. NEE's July 30 Reply

NEE claims that Attorney Marcus Rael has violated and continues to violate Rule 16-107 NMRA of the New Mexico Rules of Professional Conduct. NEE moves to disqualify Attorney General Hector Balderas and Iberdrola Counsel Marcus Rael, strike the intervention and pleadings of the New Mexico Attorney General's Office beyond the pre-filed direct testimonies, issue the subpoenas for materials, deposition, and appearance at hearing by Marcus Rael requested by NEE on July 23, 2021, and issue a Bench Request or Commission Subpoena. In the alternative, NEE requests that the Commission refer this matter to the New Mexico Disciplinary Board, and stay the proceeding until the Disciplinary Board rules on the conflict of interest.

NEE's filing also incorporates by reference the arguments and exhibits (discussed above) that NEE included in its July 28 Reply to the Joint Applicants' response to NEE's Application for Subpoena.

NEE states that the Attorney General and Iberdrola are current clients of Mr. Rael. NEE argues that Mr. Rael's representation of Iberdrola is directly adverse to the Attorney General, because the Attorney General is charged with representing residential and small business consumers in matters before the Commission under NMSA 1978, § 8-5-17(A), and NMPRC proceedings are adversarial in nature, since it is the Commission's duty to balance the interests of shareholders and ratepayers.

NEE states that there is no requirement under Rule 16-107(A) that the representation of the two clients be in the same case, or even in front of the same tribunal for a conflict to exist, just that they are adverse in some matter and represented by the same counsel. As Iberdrola and the Attorney General are adverse in this docket, a concurrent conflict exists by Mr. Rael's representation of two adverse parties, and no additional analysis is required to determine the *existence* of a conflict of interest. Rule 16-107(A) NMRA.

NEE acknowledges that the conflict that exists under Rule 16-107(A) could have been waived. But NEE states that, in this case, no analysis is necessary under Rule 16-107(B) because the Attorney General has admitted that its informed consent has not been requested or granted. NEE states that, when information regarding this conflict was specifically requested by NEE in discovery, there was no recognition of this conflict by the NMAG, Mr. Rael or Iberdrola, nor any attempt to remedy this ethical conflict. This means that Mr. Rael has knowingly represented both parties in violation of 16-107 for many months. NEE states that Iberdrola/Avangrid's Affidavit of Pedro Azagra Blazquez on July 30, 2021 is too late to constitute a "written waiver" as required by the rules. NEE states that Iberdrola/Avangrid did not consider Mr. Rael's representations of the other parties to be adverse to Iberdrola, because that is what Mr. Rael had to offer: access and undue influence.

NEE states that the Supreme Court is unambiguous regarding the importance of the conflict of interest provisions of the rules of professional conduct. NEE cites the Court's decisions that require a tribunal to determine whether an attorney or a law firm is disqualified from a case immediately upon being alerted to a potential conflict of interest. *Living Cross Ambulance Serv., Inc. v. N.M. Pub. Regulation Comm'n*, 2014-NMSC-036 at ¶ 22, 338 P.3d 1258; *Mercer v. Reynolds*, 2013-NMSC-002, 292 P.3d 466. The Court in *Living Cross* stated that, if left unchecked, conflicts of interest will taint an entire case and call into question the integrity of the attorney-client relationship. *Living Cross*, 2014-NMSC-036 at ¶ 22.

NEE argues that the very existence of a conflict has tainted the nature of the negotiations and has impugned the integrity of this entire proceeding. NEE states it is for the sake of the integrity of any decision rendered by this tribunal that this remedy be granted.

NEE states that NMRA 16-804 (A) identifies any violation or attempted violation of the rules as professional misconduct. Further, it is professional misconduct for an attorney to engage in conduct that is prejudicial to the administration of justice. *Id.* at (D). Rule 16-804 commentary ¶ 2 provides that “a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice. Offenses involving violence, dishonesty, breach of trust, or serious interference with the administration of justice are in that category.”

The Government Conduct Act also requires a public officer to treat the legislator's or public officer's or employee's government position as a public trust. NMSA 1978, § 10-16-3 (A) (2011). “Full disclosure of real or potential conflicts of interest shall be a guiding principle for determining appropriate conduct. At all times, reasonable efforts shall be made to avoid undue influence and abuse of office in public service.” *Id.* at (C).

NEE argues that the general remedy in less complex matters would be to disallow the representation of the conflicted counsel. However, due to the nature and effect of this conflict, requiring the parties to retain replacement counsel is insufficient in remedying the impact of this conflict.

NEE also asks that the initial testimonies of the Attorney General's witnesses continue be admitted to the evidentiary record pursuant to the *Procedural Order for Proceeding Addressing Contested Stipulation at Ordering*, May 28, 2021, p. 8, ¶ 2.

Ruling

The Hearing Examiner finds that Mr. Rael should be disqualified from further representation of Iberdrola in the matters at issue here. The Hearing Examiner recognizes that Mr. Rael has not entered an official appearance in this case that could subject him directly to the Commission's authority. The Commission nevertheless can effectively accomplish the disqualification by ordering Iberdrola to cease the representation.

The New Mexico Supreme Court has held that disqualification based on a conflict of interest claim should take place before a hearing on the substantive proceedings. *Living Cross Ambulance Serv., Inc. v. N.M. Pub. Regulation Comm'n*, 2014-NMSC-036, 338 P.3d 1258. The Court emphasized the duty of loyalty to one's client, the significance of a conflict of interest claim and the need to address the issue, once it is raised, before proceeding with the substantive merits of a case:

"In the practice of law, there is no higher duty than one's loyalty to a client." *Roy D. Mercer, LLC v. Reynolds*, 2013-NMSC-002, ¶1, 292 P.3d 466. As such, our Rules of Professional Conduct prohibit attorneys from representing clients where a conflict of interest exists. *See, e.g.*, Rule 16-107(A)(1) NMRA (stating that attorneys cannot represent a client if the representation would be "directly adverse to another client"); *see also* Rule 16-110 NMRA (the conflicts of interest of a single attorney are imputed to the entire firm). The Rules of Professional Conduct place an affirmative duty on attorneys to protect their

clients, even after the representation of a client has ended, by not working on cases that are materially adverse to the interests of a former client. Rule 16-109(A) (proscribing an attorney's representation of a client "in the same or a substantially related matter" if the client's interests are "materially adverse" to those of a former client); *Mercer*, 2013-NMSC-002, ¶14, 292 P.3d 466 ("Clients must be secure in their understanding that attorneys will maintain their confidences, even after the termination of an attorney-client relationship."). We have previously indicated that disqualification based on a conflict of interest should take place before a hearing on the merits under Rule 16-110. *See Mercer*, 2013-NMSC-002, ¶39, 292 P.3d 466 ("In failing to disqualify the . . . firm, the district court misapplied the plain language of Rule 16-110(C) mandating disqualification. [The client] would have been forced to go through a trial on the merits with the potential of a breach of client confidences. That potential breach is simply unacceptable.").

Living Cross Ambulance Serv., Inc., 2014-NMSC-036, at ¶13.

The New Mexico Supreme Court has held that an objective standard is used when determining whether the lawyer reasonably could believe that the representation of a client with interests adverse to those of another client would not adversely affect the lawyer's relationship with the other client. The Court said in *In re Stein* that "Respondent's subjective belief that no conflicts existed is irrelevant." *In re Stein*, 2008-NMSC-0013, ¶22, 143 N.M. 462, 468. The Court stated in that case that, "[v]iewed objectively, the facts speak for themselves." *Id.*, at ¶23, 143 N.M. at 469.

The Supreme Court described the same objective standard in *In re Sheehan, Esq.*:

This is an area in which a lawyer should not simply rely on instinct to comply with ethical obligations. The determination of whether a conflict exists requiring that the Rule 16-107(A) conditions be met prior to proceeding with the representation is an objective standard. The fact that an attorney failed to consult with the clients and obtain consent because he or she did not believe the interests were directly or substantially adverse is not a defense to a conflict of interest charge. Careful analysis and erring on the side of caution in these situations is recommended.

In re Sheehan, Esq., 2001-NMSC-020, at ¶12, 130 N.M. 485, 487. See also *In re Houston*, 1999-NMSC-32, at ¶12, 127 N.M. 582, 584.

The conflict of interest analysis described by Iberdrola was subjective. Iberdrola affiant, Mr. Azagra Blazquez, said in his affidavit that at the time Iberdrola engaged the Robles Law Firm, Iberdrola did not believe that Iberdrola's interests were directly adverse to the interests of the Attorney General and Bernalillo County in this proceeding. He claims to have had this belief despite his statement that Iberdrola hired Mr. Rael to assist in the settlement of parties' adverse positions in the case.

Similarly, the Attorney General claims to have found no conflict of interest when the Attorney General became aware that Iberdrola had retained Mr. Rael. The Attorney General's affiant, Matt Baca, said the matters on which Mr. Rael performs services for the Attorney General are not related to the regulation of a utility, to any matter before the Commission or to the present matter. He does not address, however, the adverse interests of Iberdrola in this case relative to the Attorney General's interests in this case.

The Rule 16-107 analysis is not limited solely to conflicts in related matters. In a situation, as here, where an attorney represents Client A and Client B in different matters, the attorney has a concurrent conflict of interest if the attorney represents Client A in a matter in which Client A's interests are directly adverse to the interests of Client B -- whether the attorney is representing Client B in that matter or not. Committee Commentary 6 to Rule 16-107 NMRA states that "[l]oyalty to a current client prohibits undertaking representation directly adverse to that client without that client's informed consent. Thus, absent consent, a lawyer may not act as an advocate in one matter against a person the lawyer represents in some other matter, even when the matters are wholly unrelated."²

² Committee commentary 6 to Rule 16-107 NMRA describes reasons for the prohibition:

[6] . . . The client as to whom the representation is directly adverse is likely to feel betrayed, and the resulting damage to the client-lawyer relationship is likely to impair the lawyer's

Bernalillo County Attorney Ken Martinez appears to conclude the County's interests are not directly adverse to Iberdrola's interests in this case, because Mr. Rael has not entered an appearance in the case and Iberdrola was not made a party to the case until ordered to do so on June 8, 2021. The Joint Applicants, however, stated in response to an NEE discovery request that Iberdrola was hired on or before February 26, 2021 *on behalf of Avangrid* to provide legal advice in this case and to assist in settlement negotiations with various parties, including, presumably, Bernalillo County.³ Moreover, when Iberdrola did become a party, the County's interests as an opponent of the Stipulation were directly adverse to the interests of Iberdrola in addition to the interests of Avangrid.

NEE has shown, under an objective standard, that a concurrent conflict of interest exists for Mr. Rael in this proceeding under Rule 16-107(A). NEE has shown that Mr. Rael's representation of Iberdrola (on behalf of Avangrid) in this case is directly adverse in this proceeding to the interests of the Attorney General (and the public the Attorney General represents) and to the interests of Bernalillo County. The Attorney General's initial position in this case recommended denial of the merger and acquisition transactions proposed by the Joint Applicants for the Commission's approval. The Attorney General's position changed during the course of the proceedings when it signed on to the Stipulation in this case. Bernalillo County's initial position recommended denial of the transactions proposed by the Joint Applicants, and, although Bernalillo County has apparently agreed to certain compromises in its pre-filed rebuttal testimony, its position is still adverse to Iberdrola and its other Joint Applicants.

ability to represent the client effectively. In addition, the client on whose behalf the adverse representation is undertaken reasonably may fear that the lawyer will pursue that client's case less effectively out of deference to the other client, i.e., that the representation may be materially limited by the lawyer's interest in retaining the current client.

³ See NEE timeline of events above.

An example of continuing differences involves the allocation to competing customer classes of the \$65 million rate credit provided in the Stipulation. The witness the Attorney General has presented in support of the Stipulation, Andrea Crane, recommends approval of the Stipulation, but she disagrees with the Joint Applicants (including Iberdrola) and Bernalillo County on an issue that is not addressed in the Stipulation -- how the \$65 million in rate credits will be allocated to customers. Ms. Crane recommends that the rate credits be issued on a per-customer basis. The Joint Applicants originally proposed that a lower amount of credits be allocated on a per-kWh basis. Bernalillo County recommends that that the credits be allocated on the same basis as costs were allocated in PNM's last rate case. The Joint Applicants appear to have reached agreement on the issue on July 21 with Bernalillo County -- instead of the Attorney General -- as indicated in PNM witness Darnell's July 21, 2021 rebuttal testimony.⁴

None of the clients claim in their July 30 statements of position that their interests are adverse as alleged by NEE. Nevertheless, the positions they have taken have been adverse from an objective point of view. Indeed, the Joint Applicants' response to NM AREA's discovery request, attached to NEE's July 28 filing (Attachment 1 hereto) shows that Mr. Rael met with the Attorney General's Office 18 times in late February through early April while the Attorney General was preparing its testimony opposing the Joint Applicants' proposal.

| | | |
|-----------|----------|-----------------------------|
| 2/26/2021 | 9:30 AM | Meeting with NM AG's Office |
| 3/4/2021 | 8:00 AM | Meeting with NM AG's Office |
| 3/10/2021 | 8:00 AM | Meeting with NM AG's Office |
| 3/10/2021 | 11:30 AM | Meeting with NM AG's Office |
| 3/11/2021 | 8:00 AM | Meeting with NM AG's Office |
| 3/11/2021 | 8:30 AM | Meeting with NM AG's Office |
| 3/16/2021 | 9:00 AM | Meeting with NM AG's Office |
| 3/18/2021 | 11:30 AM | Meeting with NM AG's Office |
| 3/23/2021 | 1:30 AM | Meeting with NM AG's Office |
| 3/24/2021 | 8:00 AM | Meeting with NM AG's Office |

⁴ See Crane (July 27 rebuttal), at 11-12; Reno (July 16), at 4; Darnell (July 21 rebuttal), at 7.

| | | |
|-----------|----------|-----------------------------|
| 3/24/2021 | 8:30 AM | Meeting with NM AG's Office |
| 3/25/2021 | 9:30 AM | Meeting with NM AG's Office |
| 3/25/2021 | 11:30 AM | Meeting with NM AG's Office |
| 3/25/2021 | 3:00 PM | Meeting with NM AG's Office |
| 3/30/2021 | 10:00 AM | Meeting with NM AG's Office |
| 3/31/2021 | 5:00 PM | Meeting with NM AG's Office |
| 4/1/2021 | 8:30 AM | Meeting with NM AG's Office |
| 4/5/2021 | 2:00 PM | Meeting with NM AG's Office |

First Supplemental Objection/Response (June 24, 2021), from Joint Applicants' 1st Supplemental Objections and Responses to NM AREA-4, attached as Exhibit G to NEE's July 28, 2021 Reply to Joint Applicants' Response in Opposition to Application for Subpoena (Attachment 1 hereto).

The Attorney General's initial position opposing the Joint Applicants' proposal was filed on April 2, 2021. The Joint Applicants stated that Mr. Rael's communications with the Joint Applicants are protected from disclosure by the attorney-client privilege and the contents of Mr. Rael's communications with the other parties in the case were relating to settlement discussions and are protected from disclosure from 1.2.2.20 NMAC ("Statements, admissions, or offers of settlement made during the course of negotiations of settlement are privileged.") Either way, if Mr. Rael was advocating for Iberdrola's position or the Attorney General's position in those meetings, his representation at the time was adverse to at least one of the clients.

The discovery response also shows that Mr. Rael met with the Bernalillo County Attorney on March 10, 2021 and also "had a number of telephone conferences" with the County Attorney. Bernalillo County's initial position opposing the Joint Applicants' proposal was filed on April 2, 2021.

NEE has also shown that the representation is not permissible under Rule 16-107(B) NMRA. Subsection B(4) of Rule 16-107 allows an attorney to continue their representation despite the concurrent conflict of interest if "each client gives informed consent, confirmed in

writing.” Rule 16-107(B)(4) NMRA. The July 30 filings of Iberdrola, the Attorney General and Bernalillo County indicate that none of the clients gave informed consent prior to the concurrent representation. Iberdrola states that, if a conflict is determined to exist, its July 30 filing should be considered as its written waiver. The Attorney General states that a waiver was not necessary because there was no conflict. Bernalillo County states that it has not been asked to provide its consent, and it lacks the information required to give informed consent.

The development of an adequate remedy is difficult. Mr. Rael has not entered an official appearance in this case, but the Commission can grant the substance of NEE’s request to disqualify Mr. Rael by ordering Iberdrola to discontinue its relationship with the attorney. NEE’s request to take action against the Attorney General is more problematic. NEE argues that the Attorney General’s association with Mr. Rael is improper, but NEE cites no legal authority for the Commission to take the action it requests. The Attorney General is an elected official who is charged by statute with the representation of the interests of residential and small business customers.⁵ Neither that statute nor the Commission’s authorizing statute appear to provide any authority for the Commission to adjudicate the Attorney General’s conduct.⁶

The Hearing Examiner and the Commission can and will consider Iberdrola’s and the Attorney General’s actions as they weigh the reasonableness of the Stipulation and the parties’ supporting testimony. Otherwise, NEE’s remedy may lie with the New Mexico courts.

⁵ NMSA 1978, §8-5-17(A) provides that the Attorney General shall represent residential and small business consumers in matters before the Public Regulation Commission as the Attorney General deems appropriate.

⁶ The Attorney General’s authorizing statute grants the Attorney General discretion in determining when the public interest requires him to bring a civil action on behalf of the state. *State ex rel. Bingaman v. Valley Sav. & Loan Ass’n*, 1981-NMSC-108, 97 N.M. 8, 636 P.2d 279. The disqualification of the attorney general is an action that should be undertaken with the greatest circumspection. *State v. Armijo*, 1994-NMCA-136, 118 N.M. 802, 887 P.2d 1269; cert. denied, 119 N.M. 20, 888 P.2d 466.

In regard to the Joint Applicants' argument about NEE's lack of standing, NEE has shown a prejudice sufficient to justify its standing to assert as a non-client that a conflict of interest exists sufficient to disqualify the Attorney General and Mr. Rael.

The New Mexico Court of Appeals stated that only a current or former client generally has standing to move for disqualification of counsel based on an alleged conflict of interest. But the Court also stated that a non-client party may have standing to move for disqualification when the non-client establishes that the conflict prejudices or injures the non-client's own rights. The Court, nevertheless, upheld in that case the district court's determination that the non-client there did not have standing to challenge a conflict of interest between the Attorney General's office and the New Mexico State Investment Council. *N.M. State Inv. Council v. Weinstein*, 2016-NMCA-069, ¶¶ 92-94, 382 P.3d 923, 947. The Court of Appeals, however, noted a contrary ruling in *Sanchez v. Siemens Transmission Sys.*, 1991-NMCA-028, ¶36, 112 N.M. 236, 814 P.2d 104, *rev'd in part on other grounds by* 1991-NMSC-093, 112 N.M. 533, 817 P.2d 726.

The federal district court case of *Colyer v. Smith*, 50 F.Supp. 2d 966 (C.D. Cal. 1999) cited by NEE has a more extensive discussion of the issue. The court discussed the lack of consensus nationally on the extent to which a non-client of an allegedly conflicted attorney has standing to disqualify the attorney. The court noted that the majority view is that non-clients lack standing, but it also acknowledged a minority view that allows non-clients to seek disqualification if "the ethical breach so infects the litigation in which disqualification is sought that it impacts the moving party's interest in a just and lawful determination of her claims" or "where the ethical breach is so severe that it obstructs the orderly administration of justice."

In addition, as NEE notes, this case is not private litigation among two parties. It is a case of public interest that concerns the 530,000 ratepayers of PNM and the New Mexico

economy as a whole. It is crucial that the proceeding and the Commission's final decision are viewed by the public as credible and without any taint of improper influence. The Hearing Examiner and the Commission have the power and the duty under the Supreme Court's holding in *Living Cross Ambulance Serv, Inc.* and NMSA 1978, §62-6-12 and §62-6-13 to inquire into and address the ethical issues raised by NEE.⁷

The Hearing Examiner also finds that NEE has not been untimely in raising the conflict of interest.

Finally, in view of the ruling on Mr. Rael's disqualification, the Hearing Examiner finds that NEE's Application for Subpoena should be denied. The disqualification of Mr. Rael achieves the primary purpose for which the subpoenas were requested. And, to the extent that NEE seeks to discover and present additional evidence on this issue at the hearing, the Hearing Examiner finds that NEE has had an ample opportunity by this stage of the case to obtain the information sought. Rule 1-026(B)(2)(b).

⁷ The Commission is required to approve utility applications for mergers and consolidations proposed under NMSA 1978, §62-6-12 "unless the commission shall find that the proposed transaction is unlawful or *is inconsistent with the public interest* . . ." NMSA 1978, §62-6-13 (Emphasis added). Indeed, the Commission's procedural rules assign hearing examiners with "the duty to conduct full, fair, and impartial public hearings and to take appropriate action to avoid unnecessary delay in the disposition of proceedings and to maintain order." 1.2.2.29.C NMAC. The powers assigned to hearing examiners include the powers to issue orders to show cause regarding proceedings before the hearing examiner; to regulate the course of public hearings or investigations, and to take such other action as may be necessary and appropriate to the discharge of their duties, consistent with the statutory authority or other authorities under which the commission functions and with the rules and policies of the commission. *Id.*

IT IS THEREFORE ORDERED:

Iberdrola attorney, Marcus Rael, is disqualified from further representation on behalf of Iberdrola and the Joint Applicants in connection with the issues and Stipulation in this proceeding. Iberdrola shall cease Mr. Rael's representation for the duration of this proceeding.

ISSUED at Santa Fe, New Mexico on August 6, 2021.

NEW MEXICO PUBLIC REGULATION COMMISSION

/s/ Ashley C. Schannauer

Ashley C. Schannauer
Hearing Examiner

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

**IN THE MATTER OF THE JOINT APPLICATION OF)
 AVANGRID, INC., AVANGRID NETWORKS, INC., NM)
 GREEN HOLDINGS, INC., PUBLIC SERVICE COMPANY)
 OF NEW MEXICO AND PNM RESOURCES, INC. FOR)
 APPROVAL OF THE MERGER OF NM GREEN)
 HOLDINGS, INC. WITH PNM RESOURCES, INC.;)
 APPROVAL OF A GENERAL DIVERSIFICATION PLAN;)
 AND ALL OTHER AUTHORIZATIONS AND APPROVALS)
 REQUIRED TO CONSUMMATE AND IMPLEMENT THIS)
 TRANSACTION)**

Case No. 20-00222-UT

CERTIFICATE OF SERVICE

I CERTIFY that on this date I sent via email to the parties listed below a true and correct copy of the Order Disqualifying Iberdrola Attorney.

| | | | |
|----------------------|--|--------------------|--|
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DATED August 6, 2021.

NEW MEXICO PUBLIC REGULATION COMMISSION

Ana C. Kippenbrock

Ana C. Kippenbrock, Law Clerk