

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE JOINT APPLICATION)
OF IBERDROLA, S.A. 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) Case No. 20-00222-UT
OTHER AUTHORIZATIONS AND APPROVALS)
REQUIRED TO CONSUMMATE AND IMPLEMENT)
THIS TRANSACTION)
)
)
IBERDROLA, S.A., AVANGRID, INC., AVANGRID)
NETWORKS, INC., NM GREEN HOLDINGS, INC.,)
PUBLIC SERVICE COMPANY OF NEW MEXICO AND)
PNM RESOURCES, INC.,)
)
)
JOINT APPLICANTS.)
_____)

JOINT APPLICANTS' EXCEPTIONS
TO
CERTIFICATION OF STIPULATION

NOVEMBER 12, 2021

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1.2.2.35(F)

1.2.2.37(A)(3)

Rule 11-201(B), NMRA

Rule 16-107(B), NMRA

Public Service Company of New Mexico (“PNM”), PNM Resources, Inc. (“PNMR”), Iberdrola, S.A. (“Iberdrola”), Avangrid, Inc. (“Avangrid”), Avangrid Networks, Inc., and NM Green Holdings, Inc. (collectively, the “Joint Applicants”), file their Exceptions to the Certification of Stipulation (“CS”) issued on November 1, 2021. While the Joint Applicants very much disagree with the conclusions in the CS about the Joint Applicants and the potential harms of the merger transaction proposed by the Joint Applicants (the “Proposed Transaction”), in order to assure the New Mexico Public Regulation Commission (“NMPRC” or the “Commission”) that the Proposed Transaction will indeed greatly benefit New Mexico and New Mexicans, the Joint Applicants are willing accept all of the recommended modifications to Second Amended Stipulation filed on June 4, 2021 (“June 4 Stipulation”) in Appendix 2 of the CS, as discussed herein.

SUMMARY

The Commission has everything it needs to approve the Proposed Transaction with the regulatory commitments in the June 4 Stipulation, as modified by the other agreements with parties and the CS recommendations, as discussed herein (“Regulatory Commitments”).

While the Joint Applicants accept the recommendations modifications to the June 4 Stipulation contained in the CS, Joint Applicants take exception to the recommended findings that 1) the potential risks outweigh the concrete benefits of the Proposed Transaction, and 2) that the majority of the parties are not in agreement that the Proposed Transaction should be approved based on the totality of benefits and protections agreed to by Joint Applicants.¹ Joint Applicants are not submitting any exceptions to the modifications to the June 4 Stipulation contained in the CS, but offer limited discussion of three of the modifications to the June 4 Stipulation in the CS, as summarized below:

¹ Joint Applicants also urge the Commission not to adopt the sanctions in the CS.

- The Joint Applicants believe that the Commission has discretion to address the potential for an unduly punitive outcome resulting from adoption of the reliability metrics and automatic penalties in Regulatory Commitment No. 36 of Appendix 2 proposed in the CS;
- While the Joint Applicants believe that requiring a majority of independent directors at PNM is neither necessary nor beneficial to customers, if the Commission determines that such a requirement is necessary, Joint Applicants will accept all of these modifications regarding independent directors as and to the extent in Appendix 2; and
- The Joint Applicants understand that the suggested Regulatory Commitment prohibiting PNM employees from holding positions with upstream affiliated interests applies to affiliated entities above PNMR, which would preserve the current management structure that includes PNMR.

Based on the record before it, the Commission can and should approve the Proposed Transaction with the CS modifications to the June 4 Stipulation as described herein, so that customers and the State of New Mexico can start to receive the benefits of the Proposed Transaction – benefits that are significantly higher than any other utility merger in the State’s history. These benefits greatly outweigh the risks the CS identified.

ARGUMENT IN SUPPORT OF EXCEPTIONS

The Commission is not limited to simply approving or rejecting a stipulation, and can make its own judgment as to what is in the public interest based on the record, including modifying the stipulation.² Where a CS recommends modifications to a stipulation, the Commission is also not

² *Mountain States Tel. & Tel. Co. v. New Mexico State Corp. Comm'n*, 1977-NMSC-032, ¶ 19.

limited to accepting or rejecting those recommended modifications: the Commission has the authority to revise any recommended modifications made in a CS, as long as the revisions are supported by evidence in the record and in the public interest.³ Further, the Commission is not limited to the binary choice between one party's position or another party's position. Instead, the Commission is allowed under New Mexico law to adopt a position in between two parties' positions, if the Commission determines such a finding is appropriate based on the evidentiary record.⁴ The Commission should exercise these powers and approve the modifications to the June 4 Stipulation proposed in the CS, as specifically discussed below.

EXCEPTION I: THE CS DID NOT ACKNOWLEDGE THE SUBSTANTIAL AGREEMENT OF THE PARTIES AND ERRED IN FINDING THAT POTENTIAL HARMS OUTWEIGHED CONCRETE BENEFITS. (CS AT 37-53, 65-66)

A. There is Substantial Agreement that the Proposed Transaction Should be Approved.

The record reflects that there is substantial agreement among all but one party⁵ that the Proposed Transaction can and should be approved. The CS notes that following the filing of the June 4 Stipulation, negotiations continued among the parties for additional benefits and enhanced commitments to the Stipulation that were confirmed in the record by the Joint Applicants and certain parties during the evidentiary hearing, but not reflected in a consolidated written agreement that embodies all of these additional benefits and enhancements. The CS further states that some June 4 Stipulation signatories and non-signatories are not in full agreement with respect to the original terms of the June 4 Stipulation and have advocated for and against certain terms and for additional terms.

³ See, 1.2.2.37(A)(3) NMAC.

⁴ *Hess Corp. v. N.M. Taxation & Revenue Dep't*, 2011-NMCA-043, ¶ 33 (Court concluded allocation was supported by substantial evidence where district court was provided conflicting expert testimony and a range of possible appropriate allocations and concluded that allocating the proceeds between the two types of claims evenly was appropriate, and this determination was within range provided by the experts); *Mattox v. Mattox*, 1987-NMCA-021, at ¶10 (substantial evidence requirement met where trial court valuation fell within range of figures offered through expert testimony).

⁵ New Energy Economy ("NEE") has been the only party (out of 24 parties) that continuously opposed the Proposed Transaction.

Therefore, the CS assumes that there is a lack of agreement among signatories and non-signatories with respect to a single set of agreed upon regulatory commitments.⁶

That assumption is incorrect. There is indeed a consensus among almost all of the parties that they support, or at least do not oppose, the Proposed Transaction based on the significant benefits set forth in the June 4 Stipulation as well as the additional benefits and enhancements agreed to by Joint Applicants. None of the 23 of the 24 parties supporting or not opposing the Proposed Transaction objected to Joint Applicants agreeing to additional benefits and protections. Further, none of these parties has indicated that if particular requests outside the fundamental agreements are not fully adopted it would be a “deal breaker” for approval of the Proposed Transaction, or would preclude a signatory from signing the Stipulation as modified in the CS Appendix 2.

Furthermore, the statement in the CS that changes have been negotiated to satisfy the “narrow interests of individual parties” and thus may not be in the public interest is incorrect.⁷ These parties negotiated in the best interests of residential and large customers (including residential customers most in need of assistance), indigenous community groups, and environmental concerns, among others.

B. The Proposed Transaction and Regulatory Commitments Provide Substantial Benefits for PNM’s Customers, Stakeholders and New Mexico.

Approval of the Proposed Transaction and the associated Regulatory Commitments will provide more than \$300 million in quantifiable benefits in the form of customer rate credits/funding, economic development funding and funding for a wide array of other beneficial programs. There are also numerous economic development, environmental and additional Regulatory Commitments that, while not quantified in terms of their monetary impact, provide significant benefits to PNM’s customers, the communities where PNM does business and the State as a whole. This comprehensive

⁶ CS at 36-37, 58-65.

⁷ CS at 36.

package of defined and concrete benefits significantly exceeds the benefits offered in any previous utility merger proceeding in the State's history. What the CS describes as "risks" are based on factual inaccuracies, relies on speculations, and lacks proper context. As a result, when the substantial benefits of the Proposed Transaction are properly weighed against actual risks, it is clear the Commission should approve the Proposed Transaction. Below is a summary of the myriad benefits under the Regulatory Commitments - benefits that will be realized only if the Proposed Transaction is approved.

Customer Rate Credits and Benefits: Joint Applicants have committed to overall customer rate benefits of \$94 million consisting of:

- \$67 million in customer rate credits to be paid over three years.⁸
- \$10 million in residential customer COVID-19 arrearage relief (in addition to the \$2 million already provided by PNMR).⁹ The \$10 million in arrearage forgiveness benefits not only those customers impacted by COVID-19, but *all* PNM customers because the arrearage forgiveness avoids the need for recovery of the associated bad debt expense in a future rate case.¹⁰ PNM will maintain its existing low-income customer assistance programs, including the PNM Good Neighbor Fund, for at least five years.¹¹
- \$2 million for the "Electrification for All" program under Regulatory Commitment No. 11 to assist customers in obtaining access to electric service, particularly in remote areas.¹² This will increase access to electric utility service for rural and Native American communities by decreasing some of the hurdles residents of these areas face in accessing electric service.¹³
- \$15 million for new low-income energy efficiency programs pursuant to Regulatory Commitment No. 8.¹⁴ A corresponding benefit of this program is a projected total customer savings of \$40.9 million over the estimated 8.9 years for the program life.¹⁵

⁸ Tr. Vol. I (Azagra) at 74:9-17; Tr. Vol. VI (M. Garrett) at 1583:4-1584:8.

⁹ Tr. Vol. III (Tarry) at 650:20-651:3.

¹⁰ JA Ex. 8 (Azagra 7/29/21 Reb.) at 7:10-16.

¹¹ JA Ex. 2 (2nd Amended Stip.) at Ex A, ¶ 7.

¹² JA Ex. 28 (Darnell Stip. Dir.) at 10:15-11:4.

¹³ JA Ex. 28 (Darnell Stip. Dir.) at 10:15-11:4.

¹⁴ JA Ex. 28 (Darnell Stip. Dir.) at 9:15-20.

¹⁵ JA Exhibit 28 (Darnell Stip. Dir.) at 8:4-9:20. The program currently applies to households with incomes of up to \$52,400.

- PNM will not file a general rate case prior to December 31, 2022, as proposed in the CS, which reflects an additional 6-month stay-out from what was previously agreed by the Joint Applicants.¹⁶

The agreed upon customer rate benefits are substantial. To provide some comparisons, the \$67 million in rate credits is far greater than the rate credits approved in the last three acquisition/merger cases: Emera acquisition - \$8 million,¹⁷ TECO merger - \$11 million,¹⁸ and EPE merger - \$8.7.¹⁹ In addition, an analysis of other recent merger proceedings from across the nation confirms Joint Applicants' proposed rate credits and rate benefits are well above the median, exceeding other examples of merger benefits per customer by more than 2 times.²⁰ Notably, these comparisons are conservative because they are based upon the previously agreed upon total of \$88 million in total rate benefits rather than the subsequently agreed upon level of \$94 million.

Customer Rate Credit Allocation: While there was a divergence of opinion on the allocation of the \$67 million rate credits,²¹ Joint Applicants defer to the Commission on this issue.

Economic Development Benefits: Joint Applicants have committed to a wide and diverse array of economic development benefits and state-wide funding if the Proposed Transaction is approved and closes which include:

- 150 new full-time jobs in New Mexico created within three years, and maintained for at least an additional five years. At least 130 of these jobs will be outside of PNM and Joint Applicants agree that at least 20 of the new jobs will be for electric service crafts persons to help ensure

¹⁶ CS at 72.

¹⁷ Case No. 15-00327-UT, Certification of Stipulation, pp. 16-17, (June 6, 2016)(\$4 million per year rate credit would expire after two years), approved by Order Adopting Certification of Stipulation (June 22, 2016).

¹⁸ Case No. 13-00231-UT, Certification of Stipulation, p. 29 (June 30, 2014), approved by Final Order (Aug. 14, 2014).

¹⁹ Case No. 19-00234-UT, Amended Certification of Stipulation, p. 27 (Feb. 12, 2020), approved by Final Order Adopting Amended Certification of Stipulation (Mar. 11, 2020).

²⁰ JA Ex. 19 (Quilici 7/29/21 Reb.) at 7:3-22 and Figure 1: Direct Rate Credit/Customer at 8:1-2; 8:3-8 and Figure 2: Rate credit plus other customer benefits/customer at 9:1-2.

²¹ CS at 67. Joint Applicants proposed that the customer rate credits be distributed on the same basis that revenues were allocated in PNM's last rate case as consistent with prior merger cases, while acknowledging that this is a policy issue to be determined by the Commission. Joint Applicants Post Hearing Brief at 27-29. The CS proposes that the \$67 million in customer rate credits be allocated on a per customer basis. CS at 69.

PNM's reliability is maintained.²² Joint Applicants agree to pay \$80,000 to the PNM Good Neighbor Fund for any job that is not created within three years or maintained for the additional five years.²³ Joint Applicants further agree that these new jobs will pay an average of at least \$88,000 per year as proposed in the CS, which reflects an additional benefit of the Proposed Transaction.²⁴

- No involuntary terminations, except for cause or performance (other than those associated with the planned closure of San Juan) and no reductions in wages and benefits to employees for at least three years.²⁵ Joint Applicants will work to ensure displaced San Juan workers will receive the maximum possible employment opportunities afforded through the worker assistance fund run by New Mexico Workforce Solutions.²⁶ PNM job functions relating to: regulatory matters, engineering, system planning, transmission and distribution system maintenance, call center and other customer facing jobs, and system dispatch and control functions will remain in New Mexico.²⁷
- \$25 million of shareholder funding for economic development projects in New Mexico over ten years, which reflects a \$10 million increase over what the CS requested.²⁸
- \$12.5 million in shareholder funding over five years for economic development projects by indigenous community groups in the Four Corners region. This is in addition to the commitment for an Avangrid nonutility affiliate to work with the Navajo Nation toward the development of a renewable energy generation project of at least 200 MW.²⁹
- A commitment to fund: (1) \$1 million over two years to create or supplement a scholarship program in the Albuquerque/Bernalillo County metropolitan area, and (2) \$1 million to create or enhance apprenticeships in local high schools and colleges.³⁰
- Commitments intended to encourage diversity and New Mexico businesses to be suppliers to PNM including (1) encouraging local New Mexico businesses to manage PNM's energy efficiency programs in the future;³¹ and (2) implementing a minority-owned and woman-owned business procurement program.³²

²² IBEW Ex. 2 (Fitzgerald Stip.) at 3:19-3:22. Joint Applicants accept the SC recommendation at p. 78 that at least 20 of the jobs must be electric service craftsmen.

²³ JA Ex. 8 (Azagra 7/29/21 Reb.) at 4:9-5:21.

²⁴ CS at 78.

²⁵ JA Ex. 2 (2nd Amended Stip.) at ¶ 21.

²⁶ JA Ex. 2 (2nd Amended Stip.) ¶ 2.

²⁷ JA Ex. 16 (Kump 7/29/21 Reb.) at 2:18-3:15; JA Ex. 24 (Tarry 7/29/2021 Reb.) at 8:10-19.

²⁸ JA Ex. 8 (Azagra 7/29/21 Reb.) at 5:5-11. In response to Staff's position on economic development funding, Joint Applicants agreed to increase the economic development contribution to \$25 million over 10 years in exchange for Staff's agreement not to oppose the Proposed Transaction. While this increase was not included in the CS, Joint Applicants are committed to honor this increase in funding for economic development. Joint Applicants believe there is already evidence in the record to support this compromise position.

²⁹ JA Ex. 2 (2nd Amended Stip.) at Ex. A, ¶¶ 2, 47.

³⁰ Tr. Vol. I (Azagra) at 71:5-73:18.

³¹ JA Ex. 2 (2nd Amended Stip.) at Ex. A, ¶ 9.

³² JA Ex. 2 (2nd Amended Stip.) at Ex. A, ¶ 6.

- Commitments to partner with government agencies to (1) improve internet access in New Mexico through the waiver of rental fees for a three-year period for local government access to PNM-owned wooden street-lighting poles within one-half mile of public schools and government-owned or authorized low-income facilities;³³ (2) provide Albuquerque park streetlighting;³⁴ and (3) complete construction of a PNM-owned substation that will serve a growing area of southeast Albuquerque that includes the Albuquerque International Sunport.³⁵

Of the foregoing, the 150 new jobs, now with the added certainty that the average pay will be not less than \$88,000 per year, deserve particular emphasis. These new jobs will provide economic stimulus to PNM's service territory and potentially lead to an estimated 255 additional jobs,³⁶ which will bring over \$200 million of economic development benefits to New Mexico.³⁷ Moreover, Joint Applicants' direct funding for economic development now totals \$39.5 million, which substantially exceeds the total economic development funding in both the EPE merger and the NMGC/Emera merger.³⁸ The concrete benefits of economic development in the form of job training, new jobs, and business growth and development exceed those of any prior utility merger approved by the Commission.

Environmental Benefits: The Joint Applicants worked with several parties to develop a suite of Regulatory Commitments to foster sustainability and carbon reduction in the provision of electric service to customers, consistent with, and even exceeding, New Mexico's carbon reduction

³³ JA Ex. 2 (2nd Amended Stip.) at Ex. A, ¶¶ 2-3.

³⁴ JA Ex. 2 (2nd Amended Stip.) at Ex. A ¶ 3 at 3.

³⁵ JA Ex. 2 (2nd Amended Stip.) at Ex. A, ¶ 4.

³⁶ JA Ex. 17 (Quilici Reb.) at 30:10-19.

³⁷ JA Ex. 17 (Quilici Reb.) at 32:3-7.

³⁸ See Case No. 19-00234-UT, Amended Certification of Stipulation, p. 25 (Feb. 12, 2020)(economic development contribution of \$20 million over 20 years), approved by Final Order Adopting Amended Certification of Stipulation (Mar. 11, 2020); Case No 15-00327-UT, Certification of Stipulation, pp. 21-22 (June 8, 2016) (\$5 million of economic development funding, \$5 million to build a pipeline to Mexico; \$10 million matching fund for bring gas to underserved communities), approved by Order Adopting Certification of Stipulation (June 22, 2016).

requirements for utilities.³⁹ This will provide tangible environmental benefits for customers and the State:

- PNM’s Executive Compensation Plan will include goals related to the achievement of PNM’s 2040 carbon reduction target, or earlier if feasible, which aligns PNM’s executive compensation plan with Joint Applicants’ and the State’s goal of achieving carbon reduction as part of the provision of reliable service at a reasonable cost.⁴⁰ Joint Applicants further agree that the compensation goals will include the minimization of “emission leakage” proposed in the CS.⁴¹ There should be no impact to rates because executive incentive compensation is not typically reflected in rates.⁴²
- PNM will name a Chief Environmental Officer by December 1, 2022, who will lead the development of company policies to align with legislative and Commission environmental policies and regulations and will also serve as a liaison to stakeholders to ensure PNM is considering feedback on an affordable and environmentally responsible path to carbon free resources.⁴³ Joint Applicants will create a Carbon Reduction Task Force to include voluntary stakeholder representatives of environmental interests, the clean energy industry, consumer interests and state agencies, such as the New Mexico Environment Department, the New Mexico Energy Minerals and Natural Resources Department, the Attorney General, and the Commission. This Task Force will help PNM meet or exceed its zero carbon goals by no later than 2040, and if feasible and otherwise in the public interest, by 2035.⁴⁴
- PNM will conduct three environmental studies at its expense which will address: (1) infrastructure requirements of projected electric vehicle demands; (2) efforts needed to decarbonize commercial buildings in PNM’s service territory by 2040; and (3) efforts needed to reach a 1.5% annual incremental energy efficiency savings in PNM’s service territory.⁴⁵
- PNM will engage in all reasonable efforts to find or participate in the development of a Regional Transmission Organization (“RTO”) that PNM can join by January 1, 2030, or as soon thereafter as possible, subject to Commission review and approval, which will assist with open and competitive electric generation markets, and elimination of barriers to market entry and control of bottleneck electric transmission facilities in the provision of retail and wholesale electric service.⁴⁶
- Joint Applicants will work with stakeholders to develop a second renewable energy resource and participation tranche for the Solar Direct Program to be filed within one year from

³⁹ CCAE Ex. 2 (Long Stip.) at 3 (Regulatory Commitments on customer benefits, environment benefits and just transition are significant and provide net benefits to customers and the state). The CS proposed certain refinements and clarifications with respect to a number of these Regulatory Commitments which are acceptable to Joint Applicants as discussed herein.

⁴⁰ JA Ex. 23 (Tarry Stip. Dir.) at 19:14 – 17.

⁴¹ CS at 96.

⁴² JA Ex. 30 (Darnell Stip. Dir.) at 25:8-18.

⁴³ JA Ex. 2 (2nd Amended Stip.), at Ex. A, ¶ 49 at 24; JA Ex. 23 (Tarry Stip. Dir.) at 19:8 – 11.

⁴⁴ JA Ex.2 (2nd Amended Stip.) at Ex. A, ¶ 43 at 21; JA Ex. 28 (Darnell Stip. Dir.) at 22:1 – 23:8.

⁴⁵ JA Ex. 2 (2nd Amended Stip.) at Ex. A, ¶ 48 at 24.

⁴⁶ WRA Ex. 5 (Howe Stip.) at 4:18-5:3, 6:16-7:11; CCAE Ex. 2 (Long Stip.) at 9, ¶ 42; Interwest Ex. 1 (Seguin) at 3:1-7.

closing.⁴⁷ The Solar Direct Program is a voluntary customer renewable energy program that is fully subscribed and a second tranche of Solar Direct resources will provide an additional opportunity for qualifying customers to source more of their energy from renewable resources.⁴⁸ PNM will reasonably expand all of its voluntary renewable energy programs, subject to Commission approval in applicable renewable energy proceedings.⁴⁹

Improved Credit Rating and Lower Customer Borrowing Costs: The Proposed Transaction will improve PNM's credit metrics, and positively impact PNM's credit rating, with the result that customers will (a) save money due to PNM's lower cost of borrowing and (b) benefit from PNM's greater access to needed capital for utility investments and operations.⁵⁰ As part of the Proposed Transaction, Avangrid will extinguish all of PNMR's debt following closing which will improve PNMR's credit metrics.⁵¹ This elimination of debt at PNMR will help improve PNM's financial flexibility, resilience and access to debt capital and will likely lead to S&P upgrading PNM's credit rating.⁵² While the CS expressed skepticism about these financial benefits,⁵³ these benefits have been verified by third parties. For example, following the announcement of the Proposed Transaction, S&P upgraded the credit outlooks for both PNMR and PNM from "stable" to "positive."⁵⁴ Staff is in agreement that PNM's credit metrics are likely to improve as a result of the Proposed Transaction with resulting benefits to customers in the form of better credit terms and a lower cost of debt.⁵⁵ Joint Applicants' financial expert estimates that PNM's customers may save an estimated \$21.5 million over ten years from a one-notch improvement in PNM's credit rating.⁵⁶ Notably, all of Avangrid's utility subsidiaries with published credit ratings are financially strong and have higher credit ratings than

⁴⁷ JA Ex. 2 (Stipulated Regulatory Commitments) at Ex. A, ¶ 51 at 26.

⁴⁸ JA Ex. 26 (Darnell Stip. Dir.) at 12:8 -13:9.

⁴⁹ JA Ex. 26 (Darnell Stip. Dir.) at 12:8 -13:9.

⁵⁰ JA Ex. 31 (Lapson Dir.) at 4:4-5:7; 13:11-14:16.

⁵¹ JA Ex. 9 (Kump Dir.) at 19:9-10.

⁵² JA Ex. 31 (Lapson Dir.) at 4:13-15, 13:1-9.

⁵³ CS at 90.

⁵⁴ JA Ex. 31 (Lapson Dir.) at Table EL-1 at 7.

⁵⁵ Staff Ex. 1 (Tupler Dir.) at 17:9-18:9.

⁵⁶ JA Ex. 33 (Lapson 7/29/21 Reb.) at 8:17-10:2, Table EL-1 at 9.

PNM and PNMR.⁵⁷ The weight of evidence shows a significant financial benefit for PNM and its customers as a result of becoming part of Avangrid.

Other Benefits: Joint Applicants have agreed to a host of other benefits that further weigh in favor of approval of the Proposed Transaction and which include:

- Maintaining PNM's existing low-income assistance programs, including the Good Neighbor Fund, for at least five years following closing.⁵⁸
- Maintaining PNM and PNMR's charitable contributions in New Mexico at historical levels for a minimum of five years, with a similar expectation for the PNM Resources Foundation's separate charitable activities.⁵⁹
- Maintaining PNM's headquarters in New Mexico as long as Avangrid owns PNM.⁶⁰
- Avangrid will own PNM for a minimum of ten years.⁶¹
- Joint Applicants, with assistance from the Attorney General, will implement a program to increase diversity within PNM's management.⁶² If at any time in the next five years PNM's management diversity is reduced by more than 10% from the prior year, Joint Applicants will donate \$250,000 to a scholarship fund.⁶³

C. The Risks Cited in the CS are Outweighed by the Benefits.

Many of the concerns expressed in the CS have been or are being addressed and resolved by Avangrid and its utilities, are consistent with applicable law, or are speculative.

The Evidence Shows Avangrid Utilities Provide Comparable Service with that of Peer Utilities

The CS expresses concerns about penalties and negative revenue adjustments that have occurred at Avangrid-owned utilities in the Northeast while ignoring the significant achievements and recognitions of Avangrid's utilities—like Just100, Worlds Most Ethical Companies, Compliance

⁵⁷ JA Ex. 32 (Lapson 4/21/21 Reb.) at 18:7-18, Table EL-3 at 19.

⁵⁸ JA Ex. 2 (Stipulated Regulatory Commitments) at Ex. A ¶7 at 5.

⁵⁹ JA Ex. 2 (2nd Amended Stip.) at Ex. A, ¶ 5.

⁶⁰ JA Ex. 2 (2nd Amended Stip.) at Ex. A, ¶ 17.

⁶¹ JA Ex. 2 (2nd Amended Stip.) at Ex. A, ¶ 14.

⁶² JA Ex. 2 (2nd Amended Stip.) at Ex. A, ¶ 10.

⁶³ JA Ex. 2 (2nd Amended Stip.) at Ex. A, ¶ 10.

Leader Verification, EEI Storm awards, and meeting or exceeding the vast majority of customer service metrics and reliability standards set with our customers.⁶⁴ First, many of these concerns are related to revenue adjustments that are part of the performance rate making methodologies commonly employed by other jurisdictions. With these mechanisms, utilities receive revenue increases or decreases depending on multiple metrics that are set by the regulators. Revenue adjustment decreases from one year to the next do not necessarily reflect decreased or deficient levels of customer service, just as rate adjustment increases do not necessarily correlate with issue pertaining to customer service.

Second, the fines or penalties that have been leveled against Avangrid utilities in New York, Connecticut, and Maine have either been remedied by Avangrid or are far lower than peer utilities in the region, reflecting comparably better performance. The CS notes that Avangrid's New York electric utilities and its Connecticut electric utility were fined millions of dollars for storm response performance. This criticism overlooks the broader context of state-wide penalties for *all* of the major utilities in those states, which are the result of more frequent and more intense weather events in the Northeast due to climate change. For example, Avangrid's New York penalties of \$10 million pale in comparison to its peer utility in New York, Consolidated Edison, which was fined over \$80 million for the same storm issues. Likewise, while Avangrid's Connecticut utility was fined less than \$2 million for storm-related performance, its peer utility, Eversource, was fined \$28 million.⁶⁵

Avangrid acknowledged Central Maine Power Company ("CMP") did not perform to Avangrid's expectations for customer service between 2016 and 2019 and agrees that the billing system rollout in Maine was not executed well, and that there were initially not enough customer service representatives to help with customer questions and concerns. Avangrid and CMP moved quickly to

⁶⁴ JA Ex. 9 (Kump Dir.) at 4:15-18; JA Ex. 16 (Kump 7/29/21 Reb.) at 25:1-8; Commission Ex. 6 (JA's Response to Order on Quality Service Issues) at 20-21, JA Exhibit May 11 Order 3B.

⁶⁵ JA Ex. 16 (Kump 7/29/21 Reb.) at 21:17-22:2.

add resources, implement system changes, and promote new leaders to improve customer service.⁶⁶ Since then, for almost two years, the evidence reflects that CMP has addressed these issues and has satisfied, and continues to satisfy and exceed, the Maine Public Utilities Commission's stringent customer service metrics.⁶⁷ CMP's billing system is up and running, and no customers were overcharged. Even the Maine Audit (upon which the Commission should not rely as it is not a final determination by the Maine Public Utility Commission)⁶⁸ recognizes that CMP has experienced improvements over the last few years and credits Avangrid for proactively investing in CMP. Further, CMP's reliability metrics are better than those of its peer utilities.⁶⁹

Taken in context, Avangrid's utilities are performing better than their peers and it is incorrect to suggest they are providing poor service to customers.

Importantly, Avangrid has been reinvesting in CMP's system to address performance issues, and recent years demonstrate a commitment to improving CMP's infrastructure service to its customers.⁷⁰ Further, the revised Regulatory Commitments recommended in CS Appendix 2 comprehensively protect against any concern that PNM might face any pressures to divert funds from system investments to dividend payouts. In particular, the CS requires that: the independent board members must approve any PNM dividend payments to its shareholder (Appendix 2, paragraph 17); PNM cannot pay dividends if its credit rating is too low or if its capital structure is not maintained

⁶⁶ Avangrid worked with CMP to invest in local leadership and resources. JA Ex. 11 (Kump 4/21/21 Reb.) at 28:18-29:4; JA Ex. 16 (Kump 7/29/21 Reb.) at 29:18-30:9.

⁶⁷ JA Ex. 16 (Kump 7/29/21 Reb.) at 25:1-8.

⁶⁸ Furthermore, the Commission cannot take Administrative Notice of the Maine Audit as it does not qualify under any of the categories listed in NMPRC's Rules of Evidence, 1.2.2.35(D), NMAC. While it was submitted to a governmental agency, the report is not a published report of a governmental agency as contemplated in subparagraph (D)(1)(a). It is not a periodic report required by law or order of the NMPRC, so it does not qualify for admission under subparagraph (D)(1)(c). It is not a record of another NMPRC proceeding, such that it might be admitted under subparagraph (D)(1)(d), or any other basis in the rule. The Maine Audit also does not qualify for admission as an official record under 1.2.2.35 (F), NMAC, as such records are expressly limited to "[a]n official rule, report, order, record, or other document prepared and issued by any governmental authority." *Id.*

⁶⁹ JA Ex. 36 (Small Stip. Dir.) at 5:5-13.

⁷⁰ JA Ex. 11 (Kump 4/21/21 Reb.) at 28:18-29:17.

(Appendix 2, paragraphs 28-30); PNM must adhere to its existing plans to invest in system maintenance, upgrades and improvements (Appendix 2, paragraph 36); PNM must maintain adequate personnel and hire new electric craftsmen as necessary (Appendix 2, paragraphs 2, 21, and 36); and PNM must meet stringent reliability metrics or face penalties (Appendix 2, Attachment 1).

Avangrid is Unfairly Criticized for Lawful and Legitimate Actions: The CS also appears to criticize Avangrid for taking actions in Maine in relation to a ballot initiative.⁷¹ Yet, the record does not contain any allegation that Avangrid's actions were contrary to the laws and procedures in Maine and some of the facts recited in the CS are inconsistent with the evidence in the record.⁷² There is uncontroverted evidence in the record that the challenged signatures were gathered and included in an unlawful manner and were invalidated by the Maine Secretary of State, thus supporting Mr. Kump's statement of "fraud and other unlawful behavior. . . ."⁷³ Additionally, while the CS states that Mr. Kump provided no evidence that RFS had a documented history of fraud. Mr. Kump attached letters to the Maine Ethics Commission that provided such evidence of fraudulent activity in previous campaigns.⁷⁴

Additionally, the CS appears to focus on a potential conflict of interest related to an outside attorney as an example of misbehavior by Avangrid and Iberdrola.⁷⁵ However, the New Mexico Supreme Court Disciplinary Board, the agency with jurisdiction over attorney ethics and conduct, found *no conflict* and both the Attorney General and Bernalillo County affiants stated under oath that they did not believe a conflict of interest existed.⁷⁶ Even if there was a conflict of interest under

⁷¹ CS 149-155 (stating Avangrid's claims of fraud "appear to be over-stated").

⁷² This referendum effort was not a grass-roots campaign, but another facet of the dark-money opposition by fossil-fuel generators to the NECEC, a clean energy project approved by the Maine and Massachusetts regulators and upheld by the highest courts in Maine and Massachusetts. JA Ex. 15 (Kump 7/27/21 Supp.) at 5:5-14; 15:15-16:5.

⁷³ CS at 154-155.

⁷⁴ JA Ex. 15 (7/27/21 Supp.) at JA Exhibit July 27 Supp. RDK-6.

⁷⁵ CS at 166 and 189-195.

⁷⁶ The Attorney General's Position on Alleged Conflict of Interest (7/30/21), Affidavit of Matt Baca; Bernalillo County Verified Pleading in Response to Order Requiring Positions on Alleged Conflict of Interest (7/30/21), Affidavit of W. Ken Martinez.

Rule 16-107 NMRA, the rule is clear the responsibility to avoid the conflict rests on the attorney and in no way required Avangrid or Iberdrola to ensure potential conflicts of interest did not exist or were waived, and therefore, it would be improper to place blame on a client for such an alleged conflict.

Further, the CS states that the Joint Applicants provided an “incomplete” response (“May 18 Response”) to the Hearing Examiner’s May 11, 2021 (“May 11 Order”) order seeking information about enforcement actions and measures taken with respect to Avangrid’s electric and gas utility subsidiaries. This conclusion was reached despite Avangrid’s good faith attempts to provide responsive materials through an extensive discovery process. The CS also claims that the *Levesque v. Iberdrola* case was “not provided in the discovery in this case” (CS at 182), but Avangrid did in fact disclose the *Levesque* case to NEE in discovery in response to NEE 4-55, as well as in other public filings such as Avangrid’s 10-K.⁷⁷ There is no basis to conclude that a material risk exists that the Commission’s robust discovery procedures provide inadequate protections.

Finally, the CS proposes rejection of the Proposed Transaction based on concerns regarding the investigation ongoing in Spain. As Joint Applicants have stated in prior filings, the investigation is wide-ranging and involves many companies and individuals in Spain. There have been no criminal charges levied against any Iberdrola executives, and certainly no one has been convicted. Since this is a preliminary legal matter that has not resulted in any conclusive findings and may never result in any charges (and investigated parties as well as charged parties are presumed to be innocent),⁷⁸ it would

⁷⁷ JA Ex. NEE 4-55(C) pg. 8 of 10, which was attached to JA Ex. 14 (Kump 7/28/21 Dir.) as JA Ex RDK-1 at pg. 41 of 120.

⁷⁸ Under International, US and Spanish law, anyone charged with an offense is presumed innocent. *State v. Ortega*, 1991-NMSC-084, ¶ 24, 112 N.M. 554, 817 P.2d 1196 (Discussing “the overriding presumption of innocence with which the law endows the accused and which extends to every element of the crime”) (citing *Sandstrom v. Montana*, 442 U.S. 510, 522, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)); *State v. Armijo*, 1931-NMSC-008, ¶ 35, 35 N.M. 533, 2 P.2d 1075 (“The right of an accused person to the presumption of innocence is fundamental; none more so.”); *State v. Henderson*, 1970-NMCA-022, ¶ 12, 81 N.M. 270, 466 P.2d 116 (“In a criminal prosecution defendant is presumed to be innocent, and this presumption remains with him until his guilt is established by the evidence beyond a reasonable doubt.”). Here, there have been no formal charges and under Spanish law, parties that are being investigated also have a presumption of innocence.

be inappropriate and prejudicial to draw negative inferences in this case by assuming a particular outcome or wrongdoing due to this investigation.⁷⁹

EXCEPTION II: THE JOINT APPLICANTS URGE THE COMMISSION NOT TO IMPOSE THE CS PROPOSED SANCTIONS. (CS AT 180-181)

The CS recommends that Avangrid be sanctioned for failing to fully answer NEE’s discovery requests, and that the penalty should be for Avangrid to pay NEE’s attorney’s fees.⁸⁰ Joint Applicants urge the Commission not to impose these sanctions. Avangrid acted in good faith in attempting to answer all discovery requests and has already been appropriately admonished by the Hearing Examiner for filing incomplete responses to NEE 4-55.

For context, the May 18 Response and the response to NEE 4-55 were meant to address different questions, and as a result Avangrid provided different sets of materials albeit with some overlapping information.⁸¹ In the May 18 Response, the Joint Applicants provided an explanation of their interpretation of the question and how they identified which items were “enforcement actions and enforcement measures.” Joint Applicants believe that the items that the CS identified in the chart⁸² did not arise as a result of enforcement actions or measures. The Joint Applicants urge the Commission not to draw a negative inference that Avangrid was somehow intentionally non-responsive.

⁷⁹ See *Peters Corp.*, 2008-NMSC-039, ¶ 37 (evidence of possible outcome of lawsuit not before the court is speculative and therefore not relevant).

⁸⁰ CS at 284.

⁸¹ NEE 4-55 asked for “all current or pending instances of non-compliance with any state, federal law or Commission rule or order by Iberdrola, Avangrid, or any of its affiliates for which the company may be liable and subject to civil or criminal penalties for the last ten years.” The May 11 Order requested, in relevant part, “a list of enforcement actions and enforcement measures in rate or other proceedings initiated or concluded by state and federal regulatory agencies since January 1, 2016 against Avangrid, Inc.’s electric and gas utility subsidiaries and the results of the actions and measures.” Not all fines and penalties are assessed because of enforcement actions or enforcement measures and not all enforcement actions and measures are considered to be fines or penalties.

⁸² CS at 183.

The recommendation for sanctions, in light of Avangrid's recognition that it has already been admonished and must ensure it files full and complete responses going forward, is unnecessary and inconsistent with the record of good faith effort by Avangrid. Further, in New Mexico discovery sanctions are warranted only if a motion to compel has been granted and a party refuses to comply, which is not the case as Avangrid provided the information requested by the Hearing Examiner and NEE as the scope of those requests became more clear.⁸³ In this instance, rather than filing a motion to compel with respect to the response to NEE 4-55, in accordance with the protective order issued by the Hearing Examiner, NEE instead immediately requested sanctions.

Additionally, while Joint Applicants' response to NEE 4-55 may not have been as complete as it could have been, Joint Applicants submitted the discovery response in good faith by providing significant information to NEE covering not only fines and penalties, but lawsuits and damages claims as well.⁸⁴ The disclosure was so broad that it included, contrary to the findings of the CS, disclosure of the *Levesque* case.⁸⁵

For these reasons, the Joint Applicants urge the Commission not to impose the CS proposed sanctions.⁸⁶

⁸³ 1.2.2.25(J) NMAC (Staff or a party may move for an order compelling discovery or for sanctions for failure to comply with an order directing that discovery be had as provided in the New Mexico rules of civil procedure for the district courts); Rule 1-037 NMRA; *See, e.g., Marchman v. NCNB Texas National Bank*, 1995-NMSC-041, para. 52, 120 N.M. 74 (recognizing that, although an order serving as the predicate for a Rule 1-037(B) sanction need not be written or issued pursuant to Rule 1-037(A), a "clearly articulated order" is required as the basis of sanctions for noncompliance); *see also* NMSA 1978, §62-12-4.

⁸⁴ JA Ex. 14 (6/28/21 Dir.) at 3:6-4:3.

⁸⁵ JA Ex. NEE 4-55(C) pg. 8 of 10, which was attached to JA Ex. 14 (Kump 6/28/21 Dir.) as JA Ex RDK-1 at pg. 41 of 120. The question of whether one of the document requests inadvertently omitted a small handful of documents needs to be considered in light of the fact that the Joint Applicants fully responded to 49 sets of questions with a total of 872 questions (not including subparts) or 1,278 questions (including subparts) over a 7.5 month period of time in this proceeding.

⁸⁶ Furthermore, there are no provisions for awarding damages or attorney fees within the Public Utility Act, and no party presented any evidence of the value of any alleged attorney's fees. (See Order Addressing NEE Motion For Rule To Show Cause Why Joint Applicants Should Not Be Held In Contempt For Sanctions, issued on June 14, 2021, at p. 19) Thus, there is no record to support the proposed sanctions.

RELIABILITY METRICS AND PENALTIES IN REGULATORY COMMITMENT NO. 36 (CS AT 224-239)

As part of the June 4 Stipulation, in Regulatory Commitment No. 36, Joint Applicants proposed a detailed set of commitments to ensure the continued levels of reliability and service that PNM customers have come to expect. Joint Applicants recognize that a goal of imposing new reliability standards is to ensure that PNM's reliability does not deteriorate under Avangrid ownership.

The CS proposes to adopt Staff's original reliability standards with two appropriate modifications.⁸⁷ The CS indicates that the purpose of the proposed adoption of Staff's reliability standards "is not punishment" but rather to provide a "substantial incentive to encourage the continuing provision of reliable service."⁸⁸ The undisputed evidence is that PNM's reliability metrics over both the last five years and the last 15 years are consistent with or more reliable than those of other electric utilities operating in the State.⁸⁹

To the extent that the Commission chooses to adopt the reliability metrics and penalties in the CS, the Joint Applicants defer to the Commission's further consideration on whether a five-year limitation would allow the Commission a sufficient opportunity to develop reliability standards and penalties that would apply to all utilities in New Mexico equally, to avoid a discriminatory approach to quality of service that does not correlate with identifiable impacts of the merger. No other New Mexico electric utility is subject to penalties for failing to meet the same or similar standards to be required of PNM.

⁸⁷ CS at 237-238, Appendix 2 at 28-31 and Attachment 1. The Commission can choose to adopt the reliability conditions proposed in Attachment A to Staff's Initial Post-Hearing Brief because they represent a middle-ground between two extreme positions that are in existing evidence in the record. Advocating for a middle ground in post-hearing briefing is not prohibited by any law in New Mexico.

⁸⁸ CS at 238.

⁸⁹ JA Ex. 37 (Small 7/29/21 Reb.) at 4:14-19.

Joint Applicants do not oppose reasonable and achievable reliability standards, even in conjunction with potential reasonable monetary penalties. While the evidence reflects that the imposition of the proposed standards could place PNM immediately in non-compliance and subject to substantial penalties that would not necessarily be tied to any degradation in overall service, and that a defined time period or rulemaking would be a more appropriate approach, Joint Applicants will accept the CS modifications. A standard of reliability should neither place undue emphasis on penalties nor set unduly strict metrics that cannot be met by actions within the control of the utility,⁹⁰ and Joint Applicants believe the Commission has discretion to recognize that this potential could occur and be addressed in the future as part of its consideration of the CS recommendations on reliability metrics and penalties.

INDEPENDENT BOARD REQUIREMENTS IN REGULATORY COMMITMENT NO. 17 (CS AT 195-219)

Joint Applicants previously explained in this proceeding why the CS recommendation to require a majority of independent directors at PNM was not necessary given all of the other protections and commitments agreed to by Joint Applicants, including the authority of the three independent directors to make determinations regarding dividends, dividend policy and compensation for officers and directors. Ultimately, in post-hearing briefing, 23 out of 24 parties did not pursue a requirement for a majority of independent directors. However, if the Commission adopts the CS recommendation for a majority of independent directors at PNM, and to the extent shown in Appendix 2 of the CS, Joint Applicants will accept that decision.

⁹⁰ JA Ex. 35 (Fridley 7/29/21 Reb.) 23:9-24:17; JA Ex. 37 (Small 7/29/21 Reb.) at 6:17-8:12.

POSITIONS IN UPSTREAM AFFILIATE INTERESTS IN REGULATORY COMMITMENT NO. 17 (CS AT 221)

The CS recommends adding a prohibition against having PNM employees, including the President and senior management hold positions with upstream affiliated interests. Joint Applicants have committed to have Mr. Tarry run not only PNM but also PNMR. Accordingly, Joint Applicants interpret this recommendation to prohibit PNM employees from holding positions with upstream affiliated interests, *other than at PNMR*, consistent with PNM and PNMR's current dual employment positions, and the evidentiary record on corporate structure and ongoing employment commitments. A different interpretation would create an inconsistency between this Regulatory Commitment and information in the evidentiary record that the Joint Applicants intend to have Mr. Tarry, with his management team, run both PNM and PNMR, as reflected in the record.⁹¹

⁹¹ To the extent the Commission disagrees with that interpretation, this should be treated as an Exception.

Respectfully submitted this 12th day of November, 2021.

**AVANGRID, INC., AVANGRID
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HOLDINGS, INC., AND
IBERDROLA, S.A.**

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BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE JOINT APPLICATION)
OF IBERDROLA, S.A., 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) **Case No. 20-00222-UT**
OTHER AUTHORIZATIONS AND APPROVALS)
REQUIRED TO CONSUMMATE AND IMPLEMENT)
THIS TRANSACTION)
)
)
IBERDROLA, S.A., AVANGRID, INC., AVANGRID)
NETWORKS, INC., NM GREEN HOLDINGS, INC.,)
PUBLIC SERVICE COMPANY OF NEW MEXICO AND)
PNM RESOURCES, INC.,)
)
)
JOINT APPLICANTS.)
)

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of **Joint Applicants’ Exceptions to Certification of Stipulation** was emailed to the parties listed below on November 12, 2021:

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