

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

DIRECT TESTIMONY OF SCOTT HEMPLING

**ON BEHALF OF THE
NEW MEXICO ATTORNEY GENERAL**

April 2, 2021

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**Direct Testimony of Scott Hempling
On Behalf of the
New Mexico Attorney General**

1 **I. Conclusions and qualifications**

2 **Q. State your name and address.**

3 **A.**Scott Hempling, 417 St. Lawrence Dr., Silver Spring MD 20901.

4 **Q. On whose behalf are you testifying and what is your testimony’s purpose?**

5

6 **A.**On behalf of the New Mexico Attorney General, I explain why the proposed transaction
7 is inconsistent with the public interest.

8 **A. *The transaction***

9 **Q. Describe this transaction’s basics.**

10 **A.**This transaction involves PNM Resources, Inc. (PNMR), Public Service Company of
11 New Mexico (PNM), Avangrid, Inc. (Avangrid), and Avangrid’s 81.5% owner
12 Iberdrola.¹ PNMR’s shareholders propose to sell control of PNM, and with it control of
13 PNM’s exclusive, government-granted right to serve captive electricity customers, to
14 Iberdrola-controlled Avangrid. PNMR’s shareholders would receive \$4.318 billion in
15 cash—a \$713 million, 19.8 percent control premium above PNMR’s unaffected stock
16 value.

17 • *To explain the \$4.318 billion:* PNMR’s shareholders will receive \$50.30 per
18 share. PNMR has 85,844,930 shares outstanding. Multiplying those two numbers
19 yields \$4.318 billion.

¹ The acquisition includes both PNM and Texas-New Mexico Power Company. For brevity, when I refer to PNM I mean to include Texas-New Mexico.

- 1 • *To explain the control premium:* The \$50.30 purchase price exceeded the
2 unaffected market price of PNMR’s stock by \$8.31 or 19.8 percent. Multiplying
3 the per-share premium times the number of shares yields \$713 million.²
4

5 Along with paying PNMR’s equity holders \$4.318 billion in cash, Avangrid
6 would take on PNMR’s \$4 billion in debt. Summing the \$4.318 billion payment for
7 PNMR’s equity and the \$4 billion of PNMR’s debt, the total cost to Iberdrola/Avangrid
8 would be \$8.3 billion.³

9 The transaction will make PNM and PNMR minor members, along with hundreds
10 of other subsidiaries, of the multinational Spanish conglomerate Iberdrola. Technically,
11 PNM and PNMR will become wholly owned subsidiaries of Networks, a 100 percent-
12 owned subsidiary of Avangrid. Practically, PNM and PNMR will be controlled by
13 Iberdrola, which owns 81.5 percent of Avangrid’s stock. PNM will be on the fourth
14 corporate layer down from Iberdrola.⁴

² For a detailed explanation of the control premium, see Part IV below.

³ Applicants’ responses to NMAG 2-4 (misnamed CCAE 2-4), NMAG 2-6.

⁴ How Iberdrola/Avangrid will finance its \$8.3 billion acquisition cost remains unclear, to the Applicants themselves. Avangrid has described only a “scenario” of what it “expects” based on “preliminary estimates”: that the financing would consist of (a) \$700 million from new debt incurred by Avangrid, and (b) \$3.6 billion in proceeds from issuing new Avangrid common stock—81.5% of which would be purchased by Iberdrola. How Iberdrola will raise \$3 billion (81.5% of \$3.6 billion), the Applicants do not say. And what Applicants did say could change: “Please note that the actual financing plan may differ from this.” Response to NEE 4-24. Iberdrola is asking this Commission to approve an \$8.3 billion transaction which Iberdrola itself doesn’t yet know how it will finance.

Iberdrola/Avangrid also is unclear about how it will pay off that financing. Asked about its expected return on the full acquisition cost, Applicants replied, “No specific expected return assumptions were made for the acquisition.” Applicants’ response to NEE 4-26.

1 Once PNM becomes a small box on Iberdrola’s corporate diagram, it will stay
2 there until Iberdrola, through Avangrid, decides to sell PNM to someone else—an event
3 that could occur as early as five years from now.⁵ At any time after that point, Iberdrola
4 can put this Commission in the same position it is now: having to say yes or no to a new
5 acquirer, chosen by Iberdrola the same way PNMR chose Iberdrola—by auctioning off
6 control of a state-granted privilege to whoever is willing to pay the highest price.⁶

7 **B. Summary of conclusions**

8 **Q. What are your conclusions?**

9 **A.** I recommend that the Commission find that this transaction is inconsistent with the public
10 interest, for these four reasons:

- 11 • *In this sale of a public franchise for private gain, the merger promoters’ goals*
12 *conflict with the customers’ interests.* When seeking an acquirer, PNMR asked:
13 How do we sell PNM for the highest possible price? When seeking a target,
14 Iberdrola/Avangrid asked: How do we find a “platform” of captive customers, one
15 we can use to advance our renewables business in the Southwest? A transaction
16 with such private-interest purposes cannot satisfy the public interest.⁷
- 17 • *Though the value to Iberdrola/Avangrid of controlling PNM is due largely to the*
18 *captivity of PNM’s customers, the entire \$713 million control premium would go*
19 *to PNMR’s shareholders.* PNMR is selling control of a public franchise for
20 private gain. The measure of that gain is the control premium—the excess of
21 purchase price over market price. PNMR’s shareholders get this entire premium,
22 even though most of the value Iberdrola/Avangrid is paying for is attributable to
23 PNM’s customers rather than PNMR’s shareholders.⁸

⁵ See Application at ¶ 29.J: “Avangrid will maintain the indirect controlling ownership interest in PNM for not less than five years following the closing of the Proposed Transaction.”

⁶ As explained in Part III.

⁷ *Id.*

⁸ As explained in Part IV.

- 1 • *Iberdrola/Avangrid’s complexities, present and future, known and unknown,*
2 *expose New Mexicans to multiple harms. Iberdrola/Avangrid’s four-layer, multi-*
3 *affiliate corporate structure, its acquisitiveness and its business risks, all pose*
4 *multiple risks to PNM and its customers. Among many other problems, PNM will*
5 *depend 100% on Iberdrola/Avangrid for equity, but Iberdrola/Avangrid has made*
6 *no binding commitment to provide that equity.*⁹
- 7 • *The transaction’s “benefits,” all either token or non-committal, divert attention*
8 *from the transaction’s pecuniary purposes. By its promoters’ admission, neither*
9 *party entered this transaction to benefit customers. And it shows. Each of the*
10 *post-hoc-claimed benefits—”best practices,” “size,” “jobs,” debt removal,*
11 *equipment buying, financial backing, renewable energy, and the pennies-per-*
12 *month rate refund—suffers from one of the following flaws: PNM can do it on its*
13 *own, it’s a product not of the merger but of merger strategy, it has no supporting*
14 *evidence, or it lacks an enforceable commitment.*¹⁰

15 **Q. Should the Commission merely reject this transaction?**

16 **A.** No. Rejection is a negative. It is better to be positive. The Commission can be positive by
17 defining the public interest, then establishing criteria and procedures that will align future
18 acquisition proposals with that public interest. I will recommend ways to do so in Part
19 VIII.

20 **C. *Qualifications and experience***

21 **Q. Describe your employment background, education and experience.**

22 **A.** I have worked in utility regulation since 1984, for every sector of the industry, with a
23 concentration on advising or appearing before state commissions on electricity matters.
24 From 1984 to 1990, I worked for a private law firm and a public interest organization.
25 From 1990 to 2006, I had my own law practice, representing or advising primarily state
26 commissions but also consumer advocacy agencies, independent power producers and

⁹ As explained in Part V.

¹⁰ As explained in Part VI.

1 utilities. From October 2006 through August 2011, I was Executive Director of the
2 National Regulatory Research Institute (NRRI). Founded by the National Association of
3 Regulatory Utility Commissioners, NRRI is a Section 501(c)(3) organization, funded
4 primarily by state utility regulatory commissions to provide research to regulatory
5 decision-makers.

6 My book on public utility law, *Regulating Public Utility Performance: The Law*
7 *of Market Structure, Pricing and Jurisdiction*, was published by the American Bar
8 Association in 2013. A second edition will come out Summer 2021. My book of essays,
9 *Preside or Lead? The Attributes and Actions of Effective Regulators*, was published by
10 NRRI in 2010. I published a second, expanded edition in 2013. My book *Regulating*
11 *Mergers and Acquisitions of U.S. Electric Utilities: Industry Concentration and*
12 *Corporate Complication* was published by Edward Elgar Publishing in October 2020. I
13 have written several dozen articles on utility regulation for publication in law journals,
14 trade journals and books. In addition to my writing and witness work, I teach public
15 utility law at Georgetown University Law Center.

16 I received a B.A. *cum laude* from Yale University in 1978, where I majored in
17 Economics and Political Science, and in Music. I received a J.D. *magna cum laude* from
18 Georgetown University Law Center in 1984. I am a member of the Bars of the District of
19 Columbia and Maryland.

20 **Q. Before what bodies have you presented testimony?**

21 **A.** I have presented testimony to the state commissions of California, Connecticut, District
22 of Columbia, Hawai`i, Illinois, Indiana, Kansas, Louisiana, Maryland, Minnesota,
23 Mississippi, New Jersey, North Carolina, Oklahoma, South Carolina, Texas, Vermont

1 and Wisconsin. I have also submitted testimony to federal district courts in Florida,
2 Minnesota, Montana and Wisconsin. These proceedings are listed on my resume. I also
3 have testified numerous times before the U.S. Senate and the U.S. House of
4 Representatives, and before the state legislatures of South Carolina, Arkansas, Vermont,
5 Virginia, North Carolina, Maryland, Nevada and California. This proceeding is the first
6 time I have testified before the New Mexico Public Regulatory Commission.

7
8 **II. An acquisition will satisfy the “public interest” only if it aligns**
9 **shareholder interests with customer interests**

10 *A. The “public interest” is a standard needing a definition*

11 **Q. What legal standard applies to this transaction?**

12 **A.** Under N.M.S.A. 1978, § 62-6-13, the Commission must reject this transaction if it is
13 “inconsistent with the public interest.” In applying this standard to prior acquisitions, the
14 Commission has asked whether the transaction will benefit utility customers, diminish the
15 Commission’s jurisdiction, diminish the quality of utility service, or result in the
16 improper subsidization of non-utility activities. The Commission also has required
17 sufficient protections against customer harm, including adverse effects on rates.

18 **Q. Explain the need for a definition of public interest.**

19 **A.** Section 62-6-13 requires the Commission to honor the public interest but it does not
20 define the public interest. To fill this gap, the Commission has used a four-factor
21 checklist. A checklist is not a standard; it is a means of assessing compliance with a

1 standard. A standard is a “level of quality or attainment”;¹¹ a “rule for the measure of . . .
2 value, or quality.”¹² A car repair shop has a checklist—brakes, steering, transmission,
3 emissions, air conditioning. The shop uses that checklist to assess whether the customer’s
4 car meets competitive standards for quality—for safety, efficiency and comfort. The
5 Commission’s checklist does not state a standard because it does not define the public
6 interest. Nor does the Application, or the testimony of any of the Applicants’ five
7 witnesses. In those submissions, “public interest” becomes a mere phrase to repeat, rather
8 than a standard to meet.

9 To give my testimony a logical foundation, and a standard against which to assess
10 this transaction, I offer a definition that reflects regulation’s mainstream principles.

11 ***B. The public interest requires shareholder-customer alignment, economic***
12 ***efficiency, competitive outcomes, and respect for legitimate investor***
13 ***expectations***

14 **Q. How do you recommend the Commission define the public interest standard?**

15 **A.** Commissions serve the public interest when their policies promote four regulatory
16 objectives:

17 *Aligning shareholder and customer interests:* Utility regulation serves the public
18 interest when it causes utilities to pursue their shareholders’ interests by
19 advancing their customers’ interests. That is how effective competition works:
20 The most successful businesses have the most satisfied customers.

21 *Economic efficiency:* Economic efficiency means the biggest bang for the buck. It
22 also means no wasted opportunities. Investors seek the highest return for a given
23 level of risk. Business managers seek the highest possible output for a given level
24 of input. Consumers seek the lowest price for a given quality of product. In utility
25 regulation, the public interest deserves the same rigor. Economic efficiency also

¹¹https://www.google.com/search?q=standard+definition&sourceid=ie7&rls=com.microsoft:en-US:IE-Address&ie=&oe=&rlz=&gws_rd=ssl.

¹² <https://www.merriam-webster.com/dictionary/standard>.

1 means allocating rewards to those who bear the burdens, and costs to those who
2 cause them.

3 *Replication of competitive outcomes:* Economic regulation seeks to replicate the
4 outcomes of effective competition.¹³ This goal is necessarily aspirational, because
5 competitive markets have imperfections—entry barriers, externalities,
6 oligopolistic and monopolistic conduct, and insufficient customer knowledge.
7 Regulation aims to replicate competition because competition, ideally, is
8 objective. Competition ranks players ruthlessly, based solely on merits. Utility
9 regulation should do the same.

10 *Respect for investors' legitimate expectations:* In both competition and regulation,
11 customers have no legitimate expectation of superlative service at bargain-
12 basement prices; investors have no legitimate expectation of superlative returns at
13 below-average risks.

14 **C. Applying the definition: Which merger policies serve the public interest?**

15 **Q. Applying your four prerequisites, does this transaction satisfy the public interest?**

16 **A.** No. Consider four points:

- 17 • Faced with a choice between (a) a transaction in which the acquirer's goal is to
18 buy a "platform" supported by captive customers and the target's goal is for its
19 shareholders to cash out at the highest possible price, and (b) a transaction whose
20 central purpose is to make customers as well off as possible, the right choice is the
21 latter.
- 22 • Where utility has received a monopoly privilege, allowing the utility's
23 shareholders to sell control of that franchise for a gain equaling 26 times what

¹³ As the Maryland Court of Appeals (the state's highest court) has stated:

[T]he state through its [public utility] commission takes the place of competition and furnishes the regulation which competition cannot give, and at the same time avoids the expense of duplication in the investment and operation of competing municipal public utilities.

Delmarva Power & Light Co. v. Public Service Comm'n of Maryland, 370 Md. 1, 6 (2002) (quoting Oscar L. Pond, *A Treatise on the Law of Public Utilities*, 29-31 § 901 (3d ed.1925)). See also Alfred Kahn, *The Economics of Regulation: Principles and Institutions*, Vol. 2 at 112 (1971, 1988) (stressing the importance of making regulation more intelligent and more effective in those circumstances in which competition is simply infeasible).

1 customers receive¹⁴ is the wrong answer. The right answer is to recognize that
2 customers were the major contributors to that gain, and to compensate them
3 proportionately.¹⁵

- 4 • When evaluating claims of customer benefits, the public interest is served by
5 counting only benefits backed by enforceable commitments; vague, generic
6 statements that are merely aspirational and noncommittal do not serve the public
7 interest.
- 8 • When evaluating whether merger benefits bear an appropriate relationship to
9 merger costs, what serves the public interest is counting only benefits arising
10 from efficiencies actually caused by the meshing of two companies; counting also
11 side payments offered merely to garner support does not.

12 As Part III.C will explain, PNMR sought the highest possible purchase price, while
13 Iberdrola/Avangrid sought a customer-supported “platform” from which to make future
14 acquisitions. Neither of these purposes satisfies the public interest.

15
16 **III. In this sale of public franchise for private gain, the merger**
17 **promoters’ goals conflict with the customers’ interests**

18 **Q. Is there a public interest problem in the way PNMR and Iberdrola/Avangrid came**
19 **together?**

20 **A.** Yes. It is necessary first to understand this transaction’s essence: PNMR is selling control
21 of PNM’s public privilege for private gain. The Parties’ shared purpose is to maximize
22 shareholder gain. PNMR designed and ran the acquisition process to get the highest price.
23 Iberdrola/Avangrid sought to make a “strategic” buy, so it could use PNM’s captive

¹⁴ PNMR’s shareholders will receive a control premium of \$713 million (as explained in Part IV). The Applicants are offering the customers \$27.1 million (\$24.6 million in rate refunds and \$2.5 million in economic development grants). $713/27.1 = 26.3$.

¹⁵ For a discussion of how to assess shareholder and customer contributions to the \$713 million value, see Part IV below.

1 customers as a “platform” for future acquisitions. For both parties, benefits to customers
2 were only incidental to their goals. By placing purchase price for PNMR’s shareholders
3 ahead of performance for PNM’s customers, PNMR’s actions conflicted with the public
4 interest. The next six subsections explain these points.

5 **A. *The transaction’s essence: PNMR is selling control of PNM’s public***
6 ***privilege for private gain***

7 **Q. Explain the nature of this transaction.**

8 **A.** For decades, PNM has been the beneficiary of a government-granted privilege: the
9 exclusive right to provide electric service to captive customers within a state-assigned
10 territory that no competitor can enter; while charging rates established under legal
11 principles that provide the utility a reasonable opportunity to recover its prudent costs,
12 and to earn a fair return on, its prudent, used-and-useful investments. PNM’s privilege is
13 valuable because its customers are captive and its risks are low.

14 Mechanically, PNMR shareholders are selling their PNMR stock; but practically
15 they are selling this privilege. Understood for what it is—a sale of public privilege for
16 private gain—this transaction conflicts with the public interest because neither party’s
17 goals are consistent with the public interest.

18 **Q. Why do you refer to the acquirer as Iberdrola/Avangrid?**

19 **A.** That’s how PNMR refers to the acquirers in its Proxy Statement.¹⁶ And it reflects the
20 corporate reality. Technically, the proposed acquirer of PNMR’s stock is Avangrid. But
21 Avangrid is subject to Iberdrola’s control. Avangrid could not make this acquisition

¹⁶ PNM Resources, Inc., Proxy Statement Pursuant to Section 14(a) of the Securities Exchange Act of 1934 (hereinafter “Proxy Statement”).

1 unless Iberdrola determined that Avangrid’s southwestern strategy was aligned with
2 Iberdrola’s worldwide strategy.¹⁷

3 ***B. The Parties’ shared purpose: Maximize shareholder gain***

4 **Q. Describe your understanding of this transaction’s purpose.**

5 **A.** The best way to understand this transaction’s purpose is not through the adjectives,
6 adverbs and self-praise offered by the promoters’ witnesses, but through the cold, stiff
7 Proxy Statement sentences drafted by the promoters’ lawyers—professionals constrained
8 by federal securities law to state nothing but facts:

9 [T]he PNMR board was focused on realizing a premium to the current
10 value in PNMR’s stock trading price due to the PNMR board’s concern
11 with PNMR’s ability to achieve its business plan as a result of its
12 relatively small financial capacity and industry and regulatory
13 constraints.¹⁸

14 The PNMR board concluded, based on consideration over the course of a
15 nearly two-year period which included numerous meetings at which
16 PNMR’s strategic alternatives were discussed, that the Avangrid merger
17 was in the best interests of PNMR’s shareholders and that the merger

¹⁷ Asked to explain the Proxy Statement’s use of “Iberdrola/Avangrid,” Mr. Tarry stated:

Many of the discussions PNMR held relating to a transaction with Avangrid were with representatives of both Avangrid and Iberdrola, the 80% shareholder of Avangrid. Accordingly, “Iberdrola/Avangrid” seemed an appropriate designation for purposes of the Proxy Statement disclosure. Iberdrola is not a party to the merger agreement.

Applicants’ response to NMAG Interrogatory 6-4.

¹⁸ Proxy Statement at 49.

1 consideration likely represented the highest value that could be obtained
2 for PNMR shareholders.¹⁹

3 Those two paragraphs state the truth: PNMR’s sole reason for selling was to get
4 the maximum gain. As for Iberdrola/Avangrid, Mr. Azagra deserves credit for his
5 candor:

6 For Avangrid, this is a strategic transaction that creates a significant
7 regulated utility and renewable energy platform.²⁰

8 Avangrid and PNMR are not entering into the Proposed Transaction in
9 order to create specific synergy savings or operational efficiencies.²¹

10 Iberdrola/Avangrid is buying PNM to use PNM’s government-protected privilege as a
11 “platform” from which to buy more market positions.

12 **C. *PNMR ran an acquisition process designed to get the highest price***

13 **Q. Explain how PNMR selected Iberdrola/Avangrid.**

14 **A.** PNMR’s Proxy Statement shows that its singular goal was to get its shareholders the
15 highest value. Digested here are the key events.²²

- 16 • In December 2018, the PNMR Board was concerned about “*PNMR’s inability to*
17 *date to grow through acquisition,*” and the “*risk of the erosion of the limited*
18 *capital base.*”²³

¹⁹ *Id.*

²⁰ Azagra Direct at 11:1-2.

²¹ *Id.* at 10:17-18.

²² Proxy Statement language is italicized. I digested this material to spare the reader the full dense text. I had neither intent nor need to shape the story because the story speaks for itself. For the full narrative, see the Proxy Statement at pp. 34-49.

²³ Proxy Statement at 34. The “limited capital base” refers to the Commission-regulated rate base on which customers pay a profit. “Erosion” refers, I assume, to the reduction in earnings that occurs as depreciation expense reduces rate base at a time when there are few capital additions to increase rate base. It also refers, I assume, to the

- 1 • The PNMR Board then hired advisors to “*begin contacting several possible*
2 *strategic merger partners.*” The “*key considerations*” in selecting possible
3 companies were “*strategic focus/presence in the region, financial capability and*
4 *ability to pay the merger consideration, and the likelihood of being able to receive*
5 *regulatory approval and consummate a transaction.*”²⁴
- 6 • The Board also was concerned that “*growth opportunities pursued by PNMR had*
7 *not materialized largely as a result of [PNMR’s] lack of financial capacity.*”²⁵
- 8 • In April-May 2019, the PNMR Board’s advisors met with Mr. Azagra twice, and
9 also contacted Companies A, B and C. In guiding its advisors, the Board “*focused*
10 *on its desire to obtain a fair value for shareholders, while also emphasizing the*
11 *importance of a strategic merger partner’s ability to enhance the company’s*
12 *pursuit of its strategic direction. The PNMR board also discussed the importance*
13 *of employee considerations.*”²⁶
- 14 • In May 2019, Company A expressed non-interest. In June 2019 Company C
15 expressed non-interest, due to PNMR’s high stock price and Company C’s
16 “leverage level and ability to fund a transaction.” In July 2019, Company B
17 expressed non-interest, citing “PNMR’s high stock market valuation, PNMR’s
18 leverage level, the New Mexico regulatory climate and PNMR’s small size.”²⁷
- 19 • In July 2019, the PNMR Board reiterated “*its concern with the financial and*
20 *regulatory challenges faced by PNMR and recognized the potential in a merger*
21 *transaction of realizing for PNMR shareholders the high valuation reflected in*
22 *PNMR’s current share trading price. The PNMR Board also considered the*
23 *strategic benefits of being part of a larger entity that is better capitalized and*
24 *more diversified, particularly one with substantial renewable energy operations.*”
25 And so the Board “*determined to pursue a strategic transaction if one would*

likelihood that new players—small renewable energy producers, microgrid creators, electric storage companies, and electric vehicle charging station suppliers—will make investments that substitute for PNM’s future rate-based investments.

²⁴ *Id.* Missing from these “key considerations” were customer benefits—lower costs, more innovation, and more diversity of suppliers, resources and choices.

²⁵ *Id.* This concern was unrelated to PNM’s ability to operate cost-effectively or innovate for its customers, or to accommodate the technologies and new players that give customers more flexibility and more opportunities.

²⁶ *Id.* at 35.

²⁷ *Id.* at 35.

1 *become available on favorable terms.*” Specifically, it sought an “*indication of*
2 *interest and proposed price from Iberdrola/Avangrid, and directed its advisors to*
3 *broaden the search to include Company D and Company E.*”²⁸

- 4 • In August and September 2019, discussions with Company D did not bear fruit,
5 so the Board dropped that option.²⁹

- 6 • In September 2019, Iberdrola/Avangrid offered PNMR \$50.90 per share, just
7 above PNMR’s 30-day average trading price of \$50.52. The proposed payment
8 would be 40% in cash and the rest in Avangrid stock. Avangrid’s stated goal was
9 to “*grow [its]renewables and utility businesses.*”³⁰

- 10 • In December 2019, PNMR’s Board ended its discussions with
11 Iberdrola/Avangrid, citing what it called “*Avangrid’s continued delay in making*
12 *progress in negotiations by raising new concerns with PNMR’s coal-fired*
13 *generation.*”³¹

- 14 • In January 2020, the PNMR board discussed re-starting the discussions with
15 Avangrid. Among the Board’s reasons: “*no other potential merger partner*
16 *previously contacted had shown an interest in holding discussions with PNMR*
17 *about a strategic merger.*”³²

- 18 • In February 2020, the Board “*discussed the financial benefits for PNMR*
19 *shareholders of realizing a high valuation for their PNMR stock in light of the*
20 *downside risk of PNMR’s achieving its business plan.*” The Board saw these
21 benefits: “*[T]he scale, scope and diversity of the combined companies would*
22 *better position PNMR to make rate base investments, invest in new technologies*
23 *and strengthen PNMR’s balance sheet. This also would have the potential to*
24 *create job opportunities in New Mexico that would help in community and*

²⁸ Id. Again, the “concern” and the interest in “strategic benefits” was unrelated to customer benefits. True, seeking a company skilled in renewables was consistent with achieving the carbon-reduced future required by New Mexico law. But as I will discuss, New Mexico has multiple ways to attract renewables without subordinating PNM to a complex foreign holding company, or allowing PNMR’s shareholders to sell control of PNM’s franchise for a large gain.

²⁹ Id.

³⁰ Id. at 37.

³¹ Id. at 40.

³² Id.

1 *regulatory relationships as well as serve customers through ongoing*
2 *investments.”³³*

- 3 • Recall that Iberdrola/Avangrid’s Sept. 2019 offer had had a near-zero premium.³⁴
4 At a March 5, 2020 meeting, PNMR’s representative told Iberdrola/Avangrid that
5 the PNMR Board’s “*objectives for valuation included receiving a premium to its*
6 *trading price at the time of transaction announcement.”³⁵*
- 7 • “*On March 20, 2020, PNMR’s common stock price fell to \$29.93, the lowest price*
8 *it had been since 2015.”³⁶*
- 9 • At its meeting of April 27, 2020, the PNMR board “*expressed its support for*
10 *continuing discussions with Iberdrola/Avangrid about the transaction but*
11 *expressed reservations about valuation.”³⁷*
- 12 • On June 15, 2020, the PNMR board “*expressed its concern about entering into an*
13 *all-stock transaction with Avangrid in which PNMR shareholders would receive*
14 *little or no premium at a time when the PNMR common stock was trading at*
15 *under \$40 per share and when Avangrid had a new CEO.” Later that month, the*
16 *Board decided to end its discussions with Iberdrola/Avangrid.³⁸*
- 17 • In August 2020, discussions with Iberdrola/Avangrid restarted. PNMR’s
18 representatives emphasized their need for “*having a significant cash component in*
19 *the merger consideration; readdressing valuation in light of current stock prices*
20 *(the PNMR common stock price was approximately \$44.30 on August 7, 2020)*
21 *and PNMR’s having issued common stock at \$48.50 per share in January 2020;*
22 *and Iberdrola/Avangrid acknowledging that a comprehensive set of state*

³³ *Id.* at 41. Once again, the sole goal was value for shareholders; customers were relevant only as sources for that value. As for job opportunities, if they came from renewable energy they would exist due to the Energy Transition Act’s mandate, with or without any acquisition or acquirer.

³⁴ The offer was \$50.90 per share when the market price was \$50.52, representing a premium of less than 1 percent.

³⁵ *Id.* at 42. Again, strictly shareholder benefit; consumer benefits absent.

³⁶ *Id.*

³⁷ *Id.* at 43.

³⁸ *Id.* at 44.

1 *regulatory commitments should be proposed in order to provide comfort that*
2 *there would be a smooth regulatory approval process.”³⁹*

- 3 • On August 25, 2020, Iberdrola/Avangrid offered a package “*representing a value*
4 *to the PNMR shareholders of \$50.23 per share, representing a 13.8% premium to*
5 *PNMR’s common stock price of \$44.14 on August 25, 2020.” The PNMR Board*
6 *viewed the offer as “responsive” to PNMR’s needs, “including the need for*
7 *PNMR shareholders to receive a meaningful premium for their shares and for*
8 *there to be a significant cash component in the transaction.”⁴⁰*
- 9 • In September 2020, Avangrid’s stock price was stable or increasing, while
10 PNMR’s decreased to around \$41 per share. Mr. Azagra Blazquez said “*he was*
11 *concerned that the divergence in stock prices might cause Avangrid to reconsider*
12 *the proposed exchange ratio.” He also stressed the importance of PNMR’s having*
13 *agreements in place to exit from Four Corners.*⁴¹
- 14 • In an October 6, 2020 conference call, Mr. Azagra Blazquez proposed to change
15 its mixed stock-and-cash offer to all cash, so that Iberdrola could maintain an
16 ownership share exceeding 80%. He also said Iberdrola would make “a backstop
17 commitment” to ensure Avangrid’s ability to finance the all-cash price. On
18 governance, he offered to announce that PNMR would have two seats on the
19 Avangrid board and one seat on the Networks board, though he would not amend
20 the Iberdrola-Avangrid Shareholder Agreement. He also asked if PNMR would
21 accept a price of below \$50 per share. PNMR’s answer was no.⁴²
- 22 • On October 8, 2020, PNMR’s Transaction Review Committee “*discussed how the*
23 *benefits of valuation certainty in an all cash transaction could outweigh the*
24 *consideration of PNMR shareholders not participating in potential growth of the*
25 *combined company. The Transaction Review Committee further discussed the*
26 *strategic benefits of the proposed transaction for PNMR’s customers and*
27 *communities. The Transaction Review Committee unanimously determined that it*
28 *supported the proposed all cash transaction at the proposed merger consideration*
29 *of \$50.30 per share and would recommend it to the PNMR board.”⁴³*

³⁹ *Id.* at 44. The “regulatory commitments” were aimed not at helping the customers but at winning regulatory approval.

⁴⁰ *Id.* at 45.

⁴¹ *Id.* at 46.

⁴² *Id.* at 47.

⁴³ *Id.* at 48.

1 The transaction proceeded at that price.

2 **Q. Have you seen any evidence contradicting your conclusion that PNMR designed and**
3 **ran the acquisition process to get the highest price?**

4 **A.** No. But I have seen evidence that a PNMR witness resists what the Proxy Statement
5 reveals. ABCWUA 1-2 asked:

6 Please admit or deny that purchase price/ability to pay was the primary
7 consideration for PNM in reviewing Iberdrola's offer. If denied, please
8 list, in order of importance, the key considerations in selecting these
9 companies.

10 Mr. Tarry responded:

11 Denied. The section in the [Proxy Statement] entitled "PNMR's Reasons
12 for the Merger" identifies the numerous factors considered by the PNMR
13 board in making its determination to approve the merger with Avangrid.
14 The PNMR board did not determine an order of importance of these
15 factors.

16 No fair reading of the Proxy Statement can produce any conclusion other than this: The
17 PNMR Board's dominant purpose was value to the PNMR shareholders, in terms of
18 magnitude of compensation (price) and type of compensation (cash). That purpose was so
19 important that, as I document in Part III.D below, the Board agreed to risk a shareholder
20 penalty of \$130 million just to preserve the right to accept a better price if some other
21 acquirer offered it. It is true, as Mr. Tarry says, that the Proxy Statement lists other
22 reasons. But the factual narrative nowhere suggests that the Board would have sacrificed
23 price to find some other acquirer better able to satisfy those other reasons.

24 *D. In PNMR's choice of Avangrid, customer benefits were nearly irrelevant*

25 **Q. What does the Proxy Statement tell us about the importance of customer benefit in**
26 **PNMR's selection of Iberdrola/Avangrid?**

1 A. Customer benefit was nearly irrelevant. The Proxy Statement says that the negotiations
2 focused on these items:⁴⁴

- 3 • the size of purchase price;
- 4 • the form of the purchase price (cash vs. all stock vs. mix of cash and stock);
- 5 • the penalty PNMR would pay Iberdrola/Avangrid if PNMR backed out to take a
6 higher offer from a different acquirer;
- 7 • the fee Iberdrola/Avangrid would pay PNMR if Iberdrola/Avangrid backed out;
- 8 • a dissenters' rights closing condition;
- 9 • whether and which PNMR individuals would have seats on Avangrid's Board;
10 and
- 11 • PNM's exit from Four Corners.

12 None of these terms has any connection to customer benefits.

13 **Q. Is there other evidence that customer benefit was not PNMR's purpose?**

14 A. Yes, two major examples. First, at no point in the narrative did PNMR's executives and
15 advisors demand, or even ask, that prospective acquirers offer any serious customer
16 benefits. (Respectfully, I don't consider \$24.6 million a serious benefit, especially when
17 compared to the PNMR shareholders' \$713 million gain.) PNMR bargained over price,
18 cash-stock ratio, breakup fees, Board membership and executives' location, but never
19 over customer benefits. No one gathered or presented serious information, conducted
20 serious analyses or made any serious plans, about improving PNM's performance.
21 Customer benefits were beside the point.

⁴⁴ *Id.* at 41-44.

1 Second, PNMR reserved the right to walk away from Iberdrola/Avangrid in favor
2 of a “Superior Proposal” from someone else. Specifically, Merger Agreement Section
3 6.1(a) allows PNMR, under defined circumstances, to receive and consider (though not to
4 solicit) a competing proposal—one which is, or could reasonably be expected to result in,
5 a Superior Proposal. Under Section 6.1(f)(ii), a Superior Proposal is one that “would, if
6 consummated, result in a transaction that is more *favorable to the shareholders of*
7 *[PNMR] from a financial point of view*” compared to the Iberdrola/Avangrid proposal
8 (emphasis added). These provisions underscore the conflict between PNMR’s
9 shareholders and PNM’s customers. PNMR could reject Iberdrola/Avangrid in favor of
10 another acquirer, even one less likely to produce customer benefits, as long as the
11 alternative acquirer offered the PNMR shareholders more money (taking into account the
12 \$130 million penalty PNMR would owe Iberdrola/Avangrid).⁴⁵

13 **Q. Are you saying that in PNMR’s decision-making, customers were irrelevant?**

14 **A.** Not entirely. I assume that PNMR learned enough about Iberdrola/Avangrid to believe
15 that it would at least not damage PNM’s performance, though there is no evidence that
16 any PNMR decision-maker considered the risks I discuss in Part V below. But the Proxy
17 Statement shows that PNMR was not looking for a performer; it was looking for cash.

⁴⁵ I recognize that provisions like section 6.1(a) are commonplace in merger agreements for publicly traded companies. They protect a target’s board from shareholder lawsuits for breach of fiduciary duty to seek the highest price. But as I discuss in Part III.E below, that fiduciary duty under corporate law is subordinate to PNM’s obligations under public utility law. Otherwise routine limits on the authorized return on equity, or safety standards with penalties, would be superseded by the fiduciary duty to get the highest possible price. New Mexico law requires an acquisition to be not inconsistent with the public interest. The public interest does not allow a government-protected utility to sell out on terms that maximize its gain while making customer benefits an afterthought.

1 **Q. What if PNMR argues that the Proxy Statement never mentioned customer benefits**
2 **because the chief purpose of a Proxy Statement is to discuss shareholder benefits?**

3 **A.** That argument fails. Had PNMR actually focused on customer benefits, the Proxy
4 Statement would need to say so because those benefits could have reduced the
5 shareholders' gain. If, for example, PNMR's Board had given careful thought to
6 recognizing the customers' contribution to the value underlying the control premium (the
7 subject of Part IV below), the Proxy Statement would have said so.

8 **Q. In understanding PNMR's failure to consider customer benefits, is it relevant that**
9 **this transaction is a cash buyout rather than one in which PNMR's shareholders**
10 **receive either stock in the acquirer or a mix of cash and stock?**

11 **A.** Yes. In a stock-for-stock exchange, the target shareholders become shareholders in the
12 acquirer (along with the acquirer's pre-existing shareholders). So they still have skin in
13 the game—a stake in the post-acquisition company's financial health, including its ability
14 to serve customers well. A cash buyout is fundamentally different. The shareholders will
15 take their cash and leave. What they leave behind is no longer their concern.

16 *E. Silent while its parent sought the highest price, PNM violated its duty to*
17 *serve*

18 **Q. What is a public utility's obligation to its customers?**

19 **A.** In return for receiving the privilege of selling an essential service free of competition, a
20 utility must serve all its customers using the most cost-effective practices, and at the
21 lowest feasible cost.⁴⁶ These regulatory standards replicate the pressures of

⁴⁶ *El Paso Natural Gas Co. v. Federal Power Commission*, 281 F.2d 567, 573 (5th Cir. 1960) (holding that a utility must "operate with all reasonable economies"); *Midwestern Gas Transmission Co. v. E. Tenn. Natural Gas Co.*, 36 FPC 61, (1966), *aff'd sub nom. Midwestern Gas Transmission Co. v. Federal Power Commission*, 388 F.2d 444 (7th Cir. 1968) (holding that a utility must "use all available cost savings opportunities...as well as general economies of management"); *Potomac Elec. Power Co.*

1 competition.⁴⁷ In competitive markets, a firm that fails to operate with all reasonable
2 economies, fails to serve at lowest feasible cost, or fails to achieve all available savings,
3 loses its customers to companies that perform better. If New Mexico’s utilities don’t
4 replicate this discipline, their performance won’t be consistent with the public interest.

5 **Q. Did PNMR’s selection process square with PNM’s obligation to its customers?**

6 **A.** No. By focusing on price only, PNMR caused PNM’s customers what economists call
7 opportunity cost harm.⁴⁸ A utility causes opportunity cost harm when its action displaces
8 some other action that would produce more benefits to the public, at the same or lower
9 cost. Opportunity cost is waste. From PNMR’s perspective, choosing the highest price
10 was economically rational. But from a public interest perspective, selecting based
11 primarily on price rather than performance was economically irrational.

12 **Q. While PNMR was seeking an acquirer based on price, what did PNM do?**

13 **A.** There is no evidence that any PNM executive or board member protested while PNMR
14 was acting contrary to PNM customers’ interests. PNM’s executives and board members
15 are accountable to PNMR, PNM’s sole shareholder.

16 **Q. Does your view of a utility’s responsibility preclude all acquisitions of utilities?**

17 **A.** No, only acquisitions that put shareholder interests in conflict with customer interests.

18 Had PNMR placed customers first, its Application to the Commission would have

v. Pub. Serv. Comm’n of the District of Columbia, 661 A. 2d 131, 137 (D.C. 1995)
(holding that a utility has an obligation to serve at “lowest feasible cost”).

⁴⁷ As required by *Delmarva Power & Light Co. v. Public Service Comm’n of Maryland*, 370 Md. 1, 6 (2002), discussed in n.13 above.

⁴⁸ “[T]he opportunity cost of an item—what you must give up in order to get it—is its true cost.” Krugman and Wells, *Microeconomics* 7 (4th ed. 2015).

1 demonstrated that PNMR held a competition based on performance rather than one based
2 primarily on price. That competition would have produced guaranteed public benefits at
3 least equal to the maximum benefits that the most cost-effective available coupling could
4 produce.

5 **Q. Isn't seeking the highest price what profit-maximizing targets are supposed to do?**

6 **A.** In competitive markets, yes; but in that context competition imposes a constraint: the
7 target's desire for a high price is disciplined by the acquirer's need for the target to keep
8 its customers. Consider the sale of an apartment building, in a city with plenty of
9 apartment vacancies—and therefore effective competition among building owners for
10 tenants. The interests of the building seller, building buyer and renters are all aligned.
11 The building seller will demand the highest possible price, but the building buyer will
12 resist paying a price above what she predicts she can recover when, post-acquisition, she
13 competes for tenants. So the building buyer will pay a premium no greater than the new
14 economic value she believes she can create as the new owner. That new economic value
15 is a public interest benefit. Competitive pressure disciplines the acquisition price.

16 Monopoly utility service is different because the customers are captive—they
17 cannot shop for service elsewhere. So the interests of utility, acquirer and customers are
18 not aligned. There is conflict—here, between PNMR's shareholders and PNM's
19 customers. Insisting on the highest price for shareholders produces an outcome different
20 from insisting on the best performer for customers.

21 **Q. What if Applicants argue that the purchase price was comparable to that paid in**
22 **other acquisitions of utilities?**

23 **A.** If those other transactions were, like this one, undisciplined by competition for the
24 customers' benefit, they do not provide an appropriate comparison.

1 **.Q. Didn't the PNMR Board have a fiduciary duty to maximize its shareholders wealth?**

2 **A.** I assume so, based on the statutory law of its incorporation state. But a corporate board's
3 fiduciary duty is always subject to its other legal duties. Otherwise companies could,
4 without legal consequence, evade taxes, trade with forbidden countries, subject workers
5 to health hazards, or fail to carry out their obligation to serve their customers cost-
6 effectively, all to carry out their fiduciary duty to maximize shareholder wealth. The
7 analogy between competition and regulation works here as well. In competitive markets,
8 the fiduciary responsibility to get the highest price is constrained by a competitive reality:
9 if the acquisition target demands too high a price, the acquirer will be unable to serve its
10 customers without raising prices or cutting quality, thereby losing customers. In
11 competitive markets, the fiduciary pursuit is constrained by competition; in utility
12 monopoly markets, the fiduciary pursuit must be constrained by regulation.

13 Applying that reasoning here: Whatever corporate law duty the PNMR Board had
14 to maximize shareholders' wealth is constrained by PNM's New Mexico law duty to
15 serve its customers cost-effectively. The PNMR Board violated PNM's duty when it
16 chose an acquirer based primarily on price.

17

18 **IV. Though the value to Iberdrola/Avangrid of controlling PNM is**
19 **due largely to PNM's customers, the entire \$713 million control**
20 **premium will go to PNMR's shareholders**

21 **Q. Explain the purpose of this Part IV.**

22 **A.** Iberdrola/Avangrid has agreed to pay PNMR shareholders a \$713 million control
23 premium. This situation—PNMR receiving so large a gain for doing so little, with the

1 customers who created the value underlying the premium getting so little—is contrary to
2 the public interest.

3 **A. *The meaning of control premium***

4 **Q. What is a control premium?**

5 **A.** In the context of an acquirer’s purchase of 100% of a target company’s stock, the control
6 premium is the excess of the per-share purchase price over the target’s unaffected stock
7 market price. Unaffected market price is the market price for the target’s stock before that
8 price was affected by (meaning, driven up by) news of a possible acquisition.

9 This transaction’s purchase price, \$50.30 per share, is undisputed. The question is
10 what was the unaffected market price. If one uses the market price on the day preceding
11 the official announcement, \$45.74, then the control premium is \$4.56, or about 10
12 percent. But a company’s stock price on any single day can reflect random factors; also,
13 rumors can circulate well before a deal’s formal announcement. Analysts therefore
14 sometimes estimate the unaffected market price by choosing a longer period, like the 30,
15 60, 90 or 180 days preceding the announcement, then take the volume-weighted average
16 stock price for that period. There is no one right approach. I have discarded the single day
17 price as random, then used the simple average of the volume-weighted averages for 30,
18 60, 90 and 180 days. That average price is \$41.98. The control premium (\$50.30 minus
19 \$41.98) then would be \$8.32 or 19.8 percent. Multiplying the \$8.32 premium by the
20 85,834,874 PNMR shares yields a total control premium of \$713.7 million. See Table 1.

Table 1: PNMR’s Control Premium
 (Source: Applicants’ responses to NMAG 1-21, NMAG 2-3)

	VWAP ^a	Control Premium (\$50.30 purchase price)		
		Percent	\$/share	Total dollars
Closing (10/20/2020)	45.74	10.0	4.56	391,407,044
30-Day	42.17	19.3	8.13	697,837,558
60-Day	42.78	17.6	7.52	645,478,283
90-Day	41.39	21.5	8.91	764,788,763
180-Day	41.60	20.9	8.70	746,763,439

^aVolume-weighted average price for PNMR stock.

1 **Q. Why might an acquirer pay a purchase price exceeding market price?**

2 **A.** The reason is best understood by comparing an ordinary stock purchaser with a corporate
 3 acquirer. The ordinary purchaser of stock tells her broker, “Buy me some shares at the
 4 market price.” She has no reason to pay more than the market price because she is buying
 5 only a small sliver of the company. The acquirer of all the stock pays more than the
 6 market price because it is buying more than stock; it is also buying control. With that
 7 control, the acquirer can determine the future direction of the company. It can install its
 8 own board of directors and its own executives. It can use its control to advance its overall
 9 business objectives. An ordinary stock buyer has no such influence. Acquirers pay a
 10 control premium because they value control. Control brings the potential for higher
 11 earnings.

12 In a competitive market, the potential for higher earnings exists because the
 13 acquirer will increase its products’ quality or lower their cost, so as to generate more
 14 sales or more profit-per-sale. But Iberdrola/Avangrid has made clear that its purpose is
 15 not to increase PNM’s quality or lower its costs. Iberdrola/Avangrid has different reasons

1 for paying the control the premium, as explained next. Understanding those reasons is
2 key to understanding the asymmetry in allocating the entire control premium
3 automatically to the PNMR shareholders.

4 ***B. The value Iberdrola/Avangrid sees in controlling PNM was not created***
5 ***by PNMR's shareholders alone***

6 ***1. Iberdrola/Avangrid is paying the \$713 million control premium***
7 ***because it expects to use PNM's rate-basing and renewables-***
8 ***buying to increase Iberdrola/Avangrid's earnings***

9 **Q. Why is Iberdrola/Avangrid paying the premium?**

10 **A.** The answer lies in this quote:

11 When evaluating investment opportunities, Iberdrola/Avangrid seek to
12 identify operations that have a history of operational excellence and are
13 situated in regions with high growth potential. Iberdrola/Avangrid are
14 convinced that PNM presents such an opportunity.⁴⁹

15 Translated into practical New Mexico terms, Iberdrola/Avangrid appears to be relying on
16 two profit paths: (a) persuading the Commission to award all new electricity capital
17 expenditure opportunities to PNM automatically, so that those expenditures can go into
18 PNM's rate base and thus produce earnings for Iberdrola/Avangrid;⁵⁰ and (b) winning
19 new contracts to sell renewables to PNM. (Other profit paths, like expanding in the
20 Southwest, will be assisted by these two paths.)

⁴⁹ Applicants' response to NEE 4-27.

⁵⁰ See Proxy Statement at 41 ("The PNMR board further discussed the possible strategic benefits of an Avangrid merger for PNMR. These benefits included that the scale, scope and diversity of the combined companies would better position PNMR to *make rate base investments*, invest in new technologies and strengthen PNMR's balance sheet.") (emphasis added).

1 These two expectations conflict with the Commission’s legal duty—the duty to
2 maximize customer benefit by always awarding capital expenditure opportunities and
3 power purchase contracts to the most meritorious, rather than automatically to the
4 incumbent.

5 There is a larger point. The Applicants have proposed that the entire \$713 million
6 control premium go to PNMR’s shareholders, with a mere \$24.6 million for customers.
7 But if Iberdrola/Avangrid paid the premium because it expects PNM to rate-base all
8 future capital expenditures and to buy renewables from Avangrid, those opportunities
9 exist not because the PNMR shareholders did anything special; they exist because New
10 Mexico granted PNM an exclusive privilege to serve captive customers—customers who
11 pay for the rate base and who, given New Mexico’s Energy Transition Act, will pay for
12 the new electricity production stimulated by that Act. This asymmetry, between the
13 customers creating the value and the shareholders getting the gain, makes this transaction
14 inconsistent with the public interest.

15 **2. *More possible earnings: Persuade the Commission to authorize***
16 ***equity-level returns on PNM equity that Iberdrola/Avangrid***
17 ***purchases with lower-cost debt***

18 **Q. How might Iberdrola/Avangrid’s use of debt make it willing to pay a control**
19 **premium?**

20 **A.**To buy a company is to buy its equity. In buying PNMR, Iberdrola/Avangrid is buying
21 PNM’s equity (and also taking on PNMR’s debt). The purchase price, recall, is \$4.318
22 billion. To finance this purchase of equity, Iberdrola/Avangrid says it will incur at least
23 \$700 million in new debt.

24 Debt costs less than equity because the lender’s risk is lower than the
25 shareholder’s risk. A borrower is contractually obligated to pay back the lender’s

1 principal, with interest; an issuer of common equity stock is not obligated to pay the stock
2 buyer anything. Because stock buyers face a higher risk of losing their investment (or
3 receiving earnings lower than expected), they demand a higher return. Suppose the
4 interest rate on an acquirer's acquisition debt is 5.00%, while the target utility's
5 authorized return on equity is 9.00%. If the acquirer can finance its purchase of the
6 target's equity at 5.00% but have the commission authorize a return on that equity of
7 9.00%, the acquirer will earn substantial additional income. The anticipation of that extra
8 profit is one possible reason why Iberdrola/Avangrid would pay a price for PNMR
9 exceeding PNMR's stock market price.

10 This extra profit is not attributable to risk-taking by PNMR shareholders or
11 managerial decision-making by PNM executives. Nor does this extra profit reflect
12 improvement in business operations that could benefit customers. There is, therefore, no
13 necessary reason why PNMR shareholders should receive the portion of the premium
14 associated with this value.

15 **Q. Didn't the PNMR shareholders provide the investment and hire the executive team**
16 **that created the utility's value?**

17 **A.** One must take care with the term "value." Looking only at the market value before the
18 acquisition, including the excess of market price over book value, one could argue that
19 this value is attributable to shareholders' actions. This value has two components. The
20 excess of market price over book value reflects the market's expectation that future
21 earnings will exceed authorized earnings, as I have already discussed. That value
22 ordinarily belongs to shareholders, because they risked their dollars hoping to get
23 earnings exceeding the earnings associated with book value.

1 But the control premium—the excess of the acquirer’s purchase price over market
2 price—is a different story, for the reasons I have already discussed. The control premium
3 is not necessarily attributable to target shareholder risk-taking or target management skill.
4 Customers already compensate shareholders for their risk, through the return on equity
5 element in the utility’s revenue requirement. And customers already compensate the
6 shareholders for management effectiveness when they pay rates that reflect management
7 costs. Good utility performance is the quid pro quo for the regulatory commitment to set
8 rates based on prudent cost, used-and-useful assets and a fair rate of return. There is no
9 logical basis for extra compensation—especially for shareholders alone—in the form of a
10 control premium.

11 ***C. PNMR’s value to Iberdrola/Avangrid is largely attributable to PNM’s***
12 ***government-granted privilege to serve captive customers***

13 **Q. How do government decisions affect PNMR’s value to Iberdrola/Avangrid?**

14 **A.** I have explained that (a) Iberdrola/Avangrid is willing to pay a premium to control
15 PNMR, but that (b) the value underlying that premium is not likely attributable to PNM’s
16 merits. We also know that Iberdrola/Avangrid did not pay the premium for the chance to
17 improve PNM’s service or lower its costs, because service-improving and cost-lowering
18 were not on Iberdrola/Avangrid’s reasons to buy or on PNMR’s reasons to sell. What is
19 valuable to this acquirer is acquiring control of PNM’s exclusive, government-granted
20 privilege to provide an essential service to a captive customer base. It is for that privilege
21 that Iberdrola/Avangrid is paying the control premium.

22 Another way to understand the point: By buying 100 percent of PNM,
23 Iberdrola/Avangrid is actually buying two things: control of the utility’s assets, and
24 control of the government-granted privilege. Today, PNM’s utility assets sit on PNM’s

1 rate-setting books at book value. After the acquisition, those same assets will sit on the
2 same books at the same book value (a necessary result of not putting the control premium
3 into rate base). Because New Mexico’s electricity rates are based on book value, we can
4 assume that the value to Iberdrola/Avangrid of these assets (i.e., the assets separated from
5 the franchise) is book value—the net present value of the future stream of earnings made
6 by possible by charging rates based on book value (plus, of course the increment by
7 which PNMR’s stock price exceeds that book value). By offering a price exceeding that
8 level, Iberdrola/Avangrid must be paying for more than just the assets. What
9 Iberdrola/Avangrid is paying for is control of the franchise.

10 Part IV.A explained that an ordinary stock-purchaser pays only the market price
11 because she is purchasing only stock. She is a passive owner. The difference between her
12 and a purchaser of all the stock is not just a difference in degree. While she’s bought only
13 the right to a small portion of the company’s future earnings and growth, the 100 percent
14 acquirer has bought control—of all the decisions that can increase earnings and value:

- 15 • control over the Board and top management;
- 16 • control over the timing of rate cases;
- 17 • control over the types and timing of cost reductions, such as through layoffs or
18 refinancing;
- 19 • control over whether and when to withhold from customers any savings from
20 reducing cost;
- 21 • control over whether, when and how to influence government policy on the
22 allocation of risk between shareholders and customers;
- 23 • control over the nature and timing of infrastructure spending; and
- 24 • control over decisions about how to use the existing utility franchise to create
25 more business opportunities (such as renewable energy sales to the controlled
26 utility affiliate).

1 In sum: Purchasing control means purchasing control over the government-granted
2 privilege to serve captive customers—and all the value that the franchise can produce.

3 **Q. Aren't acquisition premia typically paid in acquisitions of companies in competitive**
4 **markets?**

5
6 **A.** Yes, but that fact supports my reasoning. In a competitive market as in a utility monopoly
7 market, the acquirer pays a control premium to get control of the target's market position.
8 But in a competitive market, the target company has earned its market position through
9 merit—by taking investment risks and displaying managerial skill. In the regulated
10 monopoly context, the utility gets its market position not from merit but from the state
11 government's decision to grant control of a captive customer base. That is what
12 Iberdrola/Avangrid is buying: a market position granted and protected by government.
13 The problem is this: The value of that control comes from PNM's customers, while the
14 control premium reflecting that value is going to the PNMR shareholders.

15 Here is one more way to understand this distinction between the competitive
16 market and the utility monopoly market: Suppose that prior to Iberdrola/Avangrid's
17 negotiations with PNMR, New Mexico had passed a law allowing and encouraging
18 multiple companies to provide competitively the services that PNM today provides
19 exclusively. PNM's value to Iberdrola/Avangrid would have dropped. So would the price
20 that Iberdrola/Avangrid offered.

21 **D. *PNM's franchise is not the PNMR shareholders' asset to sell for gain***

22 **1. *PNM's franchise is not the PNMR shareholders' private asset; it***
23 ***is a privilege granted to PNM for the public's benefit***

24 **Q. Explain the concept of a utility franchise.**

1 A. A utility’s franchise—that government-granted, exclusive privilege to serve captive
2 customers—consists of rights and responsibilities: rights granted by government to the
3 utility, and responsibilities imposed by the government on the utility. The rights include
4 the right to provide legally-defined services to a largely captive customer base, and to
5 receive in return compensation that satisfies statutory and constitutional standards. The
6 responsibilities include the obligation to provide service that satisfies commission-set
7 standards, and to charge only commission-authorized rates.

8 The franchise is thus a conditional privilege. It is not an asset that can be sold and
9 resold, like a McDonald’s franchise or a New York City taxi medallion. It is not like
10 corporate stock, or buildings, or trucks or power plants. The franchise privilege is not a
11 commodity, available for sale to the highest bidder. The franchise is not bought and sold
12 by anyone. It remains with the government, to be granted to whichever company the
13 government chooses.⁵¹

14 Because the franchise is a privilege created by government, it cannot have been
15 created by the shareholders; nor was it purchased by shareholders. The franchise does
16 have value, because the right to provide exclusive electric service has value. But that

⁵¹ See *New Orleans Gas Co. v. La. Light Co.*, 115 U.S. 650, 669 (1885) (describing a franchise as “belonging to the government, to be granted, for the accomplishment of public objects, to whomsoever, and upon what terms it pleases”); see also *Bank of Augusta v. Earle*, 38 U.S. (13 Pet.) 519, 595 (1839) (describing franchises as “special privileges conferred by government upon individuals, and which do not belong to the citizens of the country generally of common right”); *McPhee & McGinnity Co. v. Union Pacific R.R. Co.*, 158 F. 5, 10 (8th Cir. 1907) (describing a franchise as a “right or privilege which is essential to the performance of the general function or purpose of the grantee, and which is and can be granted by the sovereignty alone, such as the right or privilege of a corporation to operate an ordinary or commercial railroad, a street railroad, city waterworks or gasworks, and to collect tolls therefor”).

1 specific value, as I explained in Part IV.C, does not derive from actions of shareholders
2 or executives alone; it derives from actions by government and customers—actions by
3 government to limit competition for the defined product and compel customers to pay
4 government-set rates for that product; and actions by captive customers to pay those
5 rates. The franchise never loses its public character.

6 **2. *Since Commission-set rates have provided PNMR shareholders***
7 ***their legally required compensation, they have no automatic right***
8 ***to more compensation***

9 **Q. Explain the connection between the compensation PNMR shareholders receive**
10 **through PNM’s rates, and the gain they would receive from the control premium.**

11 **A.** A utility’s shareholders have a legal right to fair compensation. That right comes from
12 two sources: the statutory requirement that rates be just and reasonable; and the
13 Constitutional standard, inscribed in the Fifth Amendment’s Takings Clause (as applied
14 to the states through the Fourteenth Amendment’s Due Process Clause), stating: “nor
15 shall private property be taken without just compensation.”

16 In conventional cost-based ratemaking, the utility’s annual revenue requirement
17 reflects reasonable operating and maintenance expenses, depreciation, debt (both interest
18 and principal) and capital expenditures, as well as an authorized fair return on equity.
19 From that revenue requirement, regulators derive rate levels that will produce that fair
20 return on equity if actual sales equal the reasonably projected sales and if actual costs
21 reflect the reasonably projected costs. The authorized return on equity is applied to a rate
22 base that reflects assets necessary to provide utility service. As Justice Brandeis famously
23 explained:

24 The thing devoted by the investor to the public use is not specific property,
25 tangible and intangible, but capital embarked in the enterprise. Upon the

1 capital so invested the Federal Constitution guarantees to the utility the
2 opportunity to earn a fair return.⁵²

3 Justice Brandeis’s analysis is the basis for our modern understanding of how the
4 Constitution applies to ratemaking. The phrase “capital embarked in the enterprise,”
5 Justice Brandeis explained, is the money invested in assets that serve the public, i.e.,
6 book value, otherwise known as rate base:

7 The adoption of the amount prudently invested as the rate base and the
8 amount of the capital charge as the measure of the rate of return would
9 give definiteness to these two factors involved in rate controversies which
10 are now shifting and treacherous, and which render the proceedings
11 peculiarly burdensome and largely futile. Such measures offer a basis for
12 decision which is certain and stable. The rate base would be ascertained as
13 a fact, not determined as matter of opinion. It would not fluctuate with the
14 market price of labor, or materials, or money.⁵³

15 When this Commission lawfully sets cost-based rates, utility shareholders receive their
16 legally required compensation.

17 **Q. You have explained how Commission-set rates provide shareholders their legally**
18 **required compensation. What is the relationship between that compensation and the**
19 **control premium?**

20 **A.** If a lawfully set rate gives shareholders sufficient compensation, they have no automatic
21 right to additional compensation—such as the gain from selling control of the exclusive
22 privilege. Applying Justice Brandeis’s wording, the control premium does not represent
23 “capital embarked in the [public utility] enterprise.”

24 Because the control premium doesn’t represent investment in utility service
25 assets, PNMR shareholders have no legally protected expectation of receiving it. Any

⁵² *Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Commission*, 262 U.S. 276, 290 (1923) (Brandeis, J., concurring).

⁵³ *Id.*, 262 U.S. at 307-08.

1 expectation of receiving a premium arises from shareholders investing in the stock
2 market, not from utilities investing in public service assets. Rate base is where
3 government honors its constitutional obligations; stock is where shareholders invest their
4 money. The dollars shareholders spend to buy stock are therefore constitutionally distinct
5 from the dollars a utility spends to acquire utility assets. Only the latter dollars—dollars
6 associated with utility service rather than an acquirer’s stock-buying—receive
7 constitutional protection.

8 **Q. Companies in competitive markets routinely sell their businesses at a premium, with**
9 **their shareholders keeping the gain. What’s the difference?**

10 **A.** As Part III.E explained, in a competitive market the acquirer’s willingness to pay the
11 premium, and the target’s expectation of a premium, are both disciplined by competition
12 in the market for the target’s product. In that product market, the target company receives
13 neither government protection from competition nor government assurance of reasonable
14 prices. So if the acquirer pays a control premium for the target, we can logically attribute
15 the premium to real economic value created by the acquisition—value that competitive
16 pressures will force the acquirer to share with customers. The discipline imposed by
17 competition in the product market will discipline the size of the premium, leaving no
18 logical reason to question either its appropriateness or the target shareholders’
19 expectation of keeping the gain.

20 In a regulated utility market, that key fact—competition in the ultimate product
21 market to discipline the premium—is absent.

22 **3. *Mere legal ownership of PNMR stock does not entitle the owners***
23 ***automatically to the entire control premium***

24 **Q. Aren’t PNMR stockholders automatically entitled to the entire control premium**
25 **because they’re the legal owners of PNMR’s stock?**

1 **A.** No. In the utility regulatory context, the value of utility stock is always affected by
2 regulatory decisions, which can raise or lower that value depending on how those
3 decisions affect earnings. When utility shareholders volunteer to invest in a government-
4 regulated market, they impliedly accept that regulation can reduce the value of their
5 holdings. That has been the law since medieval times, memorialized in the landmark case
6 of *Munn v. Illinois*:

7 [When someone] devotes his property to a use in which the public has an
8 interest, he, in effect, grants to the public an interest in that use, and must
9 submit to be controlled by the public for the common good, to the extent
10 of the interest he has thus created. He may withdraw his grant by
11 discontinuing the use; but, so long as he maintains the use, he must submit
12 to the control.⁵⁴

13 Recall also that with its purchase price, Iberdrola/Avangrid is buying two things:
14 ownership of stock (which is what ordinary stock purchasers buy), and control of the
15 government privilege. The portion of the purchase price equal to the market price of the
16 stock pays for that stock. So that amount of course goes to shareholders: payment for
17 stock goes to the owner of the stock. The control premium, in contrast, pays for control of
18 the franchise. Because that franchise is a conditional privilege granted to the utility, not
19 an asset owned by its shareholders, the portion of the purchase price associated with the
20 franchise must flow to the driver of that value—shareholders and customers in proportion
21 to their contribution. I address this concept of contribution next.

22 ***E. Conventional regulatory principles require that shareholders and***
23 ***customers share the control premium based on each group’s***
24 ***contribution to its value***

25 ***1. The public interest criterion: Benefits go to the benefit-creator***

⁵⁴ 94 U.S. 113, 126 (1876).

1 **Q. In determining how to share the control premium between shareholders and**
2 **customers, what standard should apply?**

3 **A.** The necessary standard is the statutory public interest standard. Part II.A explained that
4 the public interest has four major components: alignment of the interests of shareholder
5 and customers, economic efficiency, outcomes consistent with competition, and respect
6 for legitimate investor expectations. The sharing principle that I just mentioned—
7 allocating the control premium to shareholders and customers in proportion to their
8 contribution—satisfies all four of these criteria. It is based on a principle consistently
9 used in utility regulation: benefits go to the benefit-creators and burden-bearers.

10 In regulation, we commonly allocate costs to cost-causers, rewards to risk-takers
11 and benefits to benefit-creators. Customers pay for the costs they cause, utilities are
12 compensated for the risks they prudently take, and benefits are allocated to those who
13 create them. Applied here, this principle requires allocating the control premium between
14 PNMR shareholders and PNMR customers according to each group's relative
15 contribution to the premium's value.

16 Commissions follow this principle when they allocate the gain from a utility's
17 sale of an asset previously used for utility service. If that asset had been in the utility's
18 rate base (which means that the cost was borne by the customers), and if the utility then
19 sells that asset for a price exceeding the asset's net book value (net book value equaling
20 original cost less accumulated depreciation), the gain typically goes to the customers. The
21 customers bore the cost, so they get the gain. If the asset had not been in rate base, the

1 gain normally goes to shareholders because they bore the economic burden. Benefit goes
2 to the burden-bearer.⁵⁵

3 For the control premium, the question is: Who are the burden-bearers? Who took
4 the actions or bore the costs that produced the value that caused Iberdrola/Avangrid to
5 offer a \$713 million control premium? I turn to that question next.

⁵⁵ On this topic, the frequently cited precedent is *Democratic Central Comm. of the District of Columbia v. Washington Metropolitan Area Transit Comm'n*. The court there stated:

It is well settled that utility investors are entitled to recoup from consumers the full amount of their investment in depreciable assets devoted to public service. This entitlement extends, not only to reductions in investment attributable to physical wear and tear (ordinary depreciation) but also to those occasioned by functional deterioration (obsolescence) and by exhaustion (depletion). . . . [Since customers] have shouldered these burdens, . . . it is eminently just that consumers, whose payments for service reimburse investors for the ravages of wear and waste occurring in service, should benefit in instances where gain eventuates--to the full extent of the gain.

485 F.2d 786, 808-11, 822 (D.C. Cir. 1973) (footnotes omitted); *id.* at 808 (“[I]f the land no longer useful in utility operations is sold at a profit, those who shouldered the risk of loss are entitled to benefit from the gain.”). *See also* Separation of Costs of Regulated Telephone Service from Costs of Nonregulated Activities, 2 FCC Rcd. 6283, 6295 ¶¶ 113-14 (Sept. 17, 1987) (order on reconsideration) (observing that “[t]he equitable principles identified in [*Democratic Central Committee*] have direct application to a transfer of assets out of regulation that produces gains to be distributed, and requiring that customers receive the gains on assets when the market value of the assets exceeds net book cost”); *N.Y. Water Serv. Corp. v. Pub. Serv. Comm’n of N.Y.*, 12 A.D.2d 122, 129 (N.Y. App. Div. 1960) (allocating gain on sale to customers when customers bore the risk of a loss in value of the assets); *N.Y. State Elec. & Gas*, Case No. 96-M-0375, 1996 N.Y. PUC LEXIS 671, at *8 (N.Y. Pub. Serv. Comm’n Nov. 19, 1996) (memorandum opinion) (reserving the net gains on the sale of land for customers is equitable and reasonable); *N.Y. Tel. Co. v. N.Y. Pub. Serv. Comm’n*, 530 N.E.2d 843 (N.Y. 1988) (customers entitled to benefits on sale of yellow pages advertisements).

1 **Q. On allocating the control premium, what if the evidence for customer and**
2 **shareholder contribution is equal in weight?**

3 **A.** If the Commission finds that the arguments for customers and shareholders are of equal
4 weight—or that the control premium is, technically, a windfall, a lucky value to which no
5 one actually contributed—the Commission could use a default of 50-50. I am not
6 suggesting that the evidence will indicate equal weights. But using that default as a
7 starting point, and then requiring each side to prove how it has contributed more than
8 50% to the value, has logic. The Applicants’ proposal to grant PNMR’s shareholders 100
9 percent automatically does not.⁵⁶

10

11 **V. Iberdrola/Avangrid’s complexities, present and future, known**
12 **and unknown, expose New Mexicans to multiple harms**

13 **Q. Does this transaction expose New Mexico’s electricity customers to harm?**

14 **A.** Yes. This transaction exposes New Mexico to Iberdrola’s corporate complexity—
15 complexity that will grow as Iberdrola buys more companies after this one, making PNM
16 a smaller and smaller part of this acquisitive conglomerate. The harms fall into four main
17 categories:

- 18 • Iberdrola’s business risks conflict with PNM’s dependence on it for equity.
- 19 • Avangrid will be motivated and able to impede the market diversity necessary to
20 reduce customers’ costs and increase their choices.
- 21 • Iberdrola/Avangrid’s acquisition debt will limit the Commission’s future
22 flexibility.

⁵⁶ To be precise, the amount that the Commission would allocate would be the portion of the control premium represented by the New Mexico retail electricity share of PNMR’s total business.

- 1 • Iberdrola/Avangrid’s activities will bring other risks and harms that the
2 Commission can neither prevent nor control.

3 I discuss each of these harms next.

4 **A. *Iberdrola is a foreign, complex conglomerate intending more***
5 ***acquisitions after this one***

6 **Q. Describe the companies proposing to control PNM.**

7 **A.** Using its 81.5 percent-owned subsidiary Avangrid, the Spanish holding company
8 Iberdrola collects captive electric customers in the U.S. by paying cash or stock to the
9 departing shareholders of state-regulated monopolies. Those shareholders sell to
10 Iberdrola, for gain, control of the exclusive privilege to serve. With these purchases,
11 Iberdrola takes control of companies that are free of the competitive accountability that
12 normal businesses face each day. In the U.S. there are, for now, eight: New York State
13 Electric & Gas, Rochester Gas and Electric, Central Maine Power, United Illuminating,
14 Connecticut Natural Gas, Southern Connecticut Gas, Maine Natural Gas and Berkshire
15 Gas.

16 Closely related to Avangrid’s monopoly-buying business is its renewable
17 business. Riskier than the monopoly business, its success depends in part on preserving
18 federal and state laws that favor renewables, eliminating government subsidies of fossil
19 fuels, and winning contracts to sell at wholesale to monopoly utilities like PNM.

1 Iberdrola owns hundreds more companies. Its value is around \$143 billion; its
2 2019 profit exceeded \$3.8 billion.⁵⁷ Its largest stockholder, at 8.69 percent, is Qatar
3 Holdings LLC.⁵⁸

4 None of the three companies—Networks, Avangrid, Iberdrola—is willing to limit
5 its future acquisitions to reduce the risks in New Mexico. Nor is Iberdrola/Avangrid
6 willing to subject its future acquisitions to this Commission’s review, regardless of the
7 risks to New Mexico or the Commission’s costs to protect customers from those risks.
8 The Commission will have no way of knowing how many more acquisitions
9 Iberdrola/Avangrid will buy, how complex it will get or how insignificant PNM will
10 become.

11 ***B. Iberdrola’s business risks conflict with PNM’s dependence on it for***
12 ***equity***

13 **Q. What concerns should the Commission have about PNM’s access to equity**
14 **financing?**

15 **A.** Equity is a business’s financial lifeblood. If the Commission chooses PNM to construct
16 and own future infrastructure, the utility will need hundreds of millions of dollars in
17 equity and debt. Today, PNM’s source of equity is PNMR. PNM is PNMR’s only
18 significant business. If Iberdrola/Avangrid buys PNMR, PNM’s sole source of equity will
19 be Iberdrola/Avangrid. PNM will be but one of hundreds of Iberdrola/Avangrid’s
20 businesses. Iberdrola/Avangrid’s ability and willingness to inject equity into the New
21 Mexico utilities will depend on two things: Iberdrola/Avangrid’s financial health, and the

⁵⁷ Azagra Direct at 7:2-5.

⁵⁸ Applicants’ response to NMAG 1-25.

1 priority Iberdrola/Avangrid places on New Mexico relative to its many other ventures.
2 Iberdrola/Avangrid’s financial health, in turn, will depend on the success or failure of
3 those other business ventures.

4 The result: Today, the main influence on PNM’s financial health, and its access to
5 capital, is the decisions of this Commission. After the acquisition, the main influences on
6 PNM’s financial health will come from not only this Commission but also from (a) four
7 other state commissions (New York, Maine, Connecticut, Massachusetts), whose
8 decisions about Avangrid’s eight other utilities will affect Avangrid’s health; and (b)
9 Iberdrola, who will view PNM as a very small percentage of Iberdrola’s total earnings.⁵⁹
10 That percentage will keep declining as Iberdrola/Avangrid buys more companies.

11 **Q. What Commission actions would be necessary to protect customers from these**
12 **risks?**

13 **A.** The Commission will need to develop criteria and procedures for assessing major
14 acquisitions before they occur. It will need to consider location, type of business, size of
15 business and business risks. The Commission can also develop safe harbors—types of
16 acquisitions so unlikely to cause risk that notice without review is sufficient. But waiting
17 for harm to occur, then trying to fix the harm, is not consistent with the public interest.
18 Nor is assuming that harm is an impossibility.

19 *C. Avangrid will be motivated and able to impede the market diversity*
20 *necessary to reduce customers’ costs and increase their choices*

21 **Q. Discuss the risks this transaction poses to New Mexico’s future efforts to reduce**
22 **customer costs while increasing choice and innovation.**

⁵⁹ See Applicants’ response to NMAG 6-16 (using 2019 figures, “PNM would have represented 3% of Iberdrola’s revenues, and 1% of Iberdrola’s net income”).

1 A. Part IV.B.1 explained that Iberdrola/Avangrid’s willingness to pay a control premium
2 and take on PNMR’s debt is based in part on the acquirer’s expectations that (a) the
3 Commission will assign future capital expenditure opportunities to PNM (thereby
4 increasing its rate base), and (b) Avangrid will be selling, to PNM and others, renewable
5 energy for profit. As Avangrid has said:

6 Avangrid Renewables’ business plan includes investment of more than \$8
7 billion between 2021 and 2025, with \$3 billion in our offshore wind
8 projects and around \$1 billion per year in onshore wind and solar. With
9 these investments, Avangrid expects to add 5.6 GW to reach a total
10 consolidated capacity of 13.2 GW by 2025, including 1.6 GW of offshore
11 wind from the Vineyard Wind and Park City Wind projects. This
12 represents an increase of approximately 74% compared to 2020 figures.⁶⁰

13 That’s Iberdrola/Avangrid’s incentive. Its opportunity exists because of the affiliate
14 relationship—actually the control relationship—that Avangrid will have with PNM. I
15 explain each point next.

16 *I. The sales relationship between Iberdrola/Avangrid and PNM will*
17 *not be arm’s length*

18 Q. **Doesn’t Iberdrola/Avangrid insist that the relationship between Avangrid and PNM**
19 **will be “arm’s length”?**

20 A. Yes, Mr. Kump says that wholesale electricity sales between PNM and
21 Iberdrola/Avangrid will be at “arms-length.”⁶¹ But these words lack enforceable
22 commitments. Unaddressed are the following questions:

- 23 • How will executives prevent improper communications between PNM’s power
24 supply planners and Avangrid’s renewable marketers, so that the marketers don’t
25 get advance information about PNM’s power supply needs, or its RFP design,
26 before Avangrid’s competitors do?

⁶⁰ Applicants’ response to NEE-1-13.

⁶¹ Krum Supp. at 2:3-8.

- 1 • How will executives address the natural tendency that PNM decision makers will
2 have to favor the company that owns them over independent competitors—
3 especially when Iberdrola/Avangrid has opposed an independent monitor?
- 4 • How will Iberdrola/Avangrid penalize employees who disobey arm’s-length
5 rules?
- 6 • How will the two companies’ executive compensation systems—which currently
7 base compensation in part on earnings or share price—be revised so that no
8 employee has any incentive, at all, to rig procedures? Enron and Wells Fargo had
9 ethics rules too—but they also had compensation systems that rewarded people
10 for increasing the company’s earnings.

11 On these questions, the Applicants have offered no guidance.

12 To say that Iberdrola/Avangrid’s dealings with PNM will be at arm’s-length is to
13 ignore the transaction’s explicit purpose: to make PNM Avangrid’s “platform” for
14 carrying out its “strategic plan”—a plan to develop and sell more renewables to
15 companies like PNM, and including PNM.⁶² Indeed Avangrid’s very structure—a
16 combination of monopoly utilities (Networks) and renewable competitors (Avangrid
17 Renewables)—embodies the risks of non-arm’s-length relations.

18 2. *The proposed transaction lacks conventional protections against*
19 *competitive favoritism*

20 **Q. Is Iberdrola/Avangrid committed to unbiased competition in the wholesale sales of**
21 **renewable power?**

22 **A.** The evidence is unclear. It appears that the Applicants oppose the conventional solution
23 of an independent monitor. I respectfully disagree with the company’s reasons for this
24 opposition. Specifically:

⁶² Asked whether PNM or Iberdrola/Avangrid will “oppose PRC efforts to award [capital expenditure] opportunities based on bidder merit,” Messrs. Tarry and Kump answered “no.” Applicants’ response to NMAG 6-9. That response, while helpful, provides no enforceable commitments.

1 The Applicants cite FERC’s authority to review interaffiliate wholesale
2 transactions. But they present no evidence of what resources FERC devotes to that task or
3 the quality of its review. The Applicants also cite this Commission’s requirement of
4 advance notice of interaffiliate transactions, along with an explanation of whether the
5 utility attempted to obtain the goods at a price lower than that paid to the affiliate. But in
6 this proposed acquisition, PNM violated that very principle when it chose to be acquired
7 by Iberdrola/Avangrid primarily because it offered the highest possible price. And these
8 references to the Commission’s role omit any discussion of the Commission resources
9 necessary to oversee not only the competitions that Iberdrola/Avangrid will enter; but
10 also all the pre-competition relationships and communications between retail personnel
11 and the wholesale personnel, relationship that can introduce the risk of favoritism.⁶³

⁶³ In discovery, the Applicants do say that Avangrid is “not opposed to a third-party being involved in the procurement process.” But this statement does not define “being involved,” which could mean anything from running the process and making the decision, to passively watching the process. The same discovery response refers to “the many protections that already exist under federal and state law,” adding:

Avangrid further believes it is inappropriate for a third-party appointed by the Commission to determine the awarding of any projects involving the operation of a utility’s system in light of the burden of proof that already exists for PNM to prove that certain contracts benefit ratepayers. Finally, Avangrid believes it would be inappropriate to cause PNM to incur these costs when other electric utilities in the state are not required to have such third-party oversight and expense.”

Applicants’ response to NMAG 7-5(b). This passage ignores this reality: that if non-PNM entities don’t trust the process, they won’t come to New Mexico to compete; and (b) when a necessary capital expenditure is time-sensitive, a Commission finding that PNM failed to carry its burden of proof doesn’t leave much time to start the process all over again.

1 Mr. Tarry asserts that if the Commission does require an independent monitor,
2 customers should pay for it. He cites “the well-established ratemaking principle that a
3 utility should be able to recover its reasonable and necessary costs of compliance with
4 applicable regulatory requirements.”⁶⁴ This argument severs principle from purpose. The
5 purpose of allowing a utility to recover its costs is to assign costs to the cost-causers—the
6 bedrock principle not only of regulation specifically but also of microeconomics
7 generally. Here, we need an independent monitor solely because Iberdrola/Avangrid
8 wants to both own PNM and sell power to PNM. Were Iberdrola/Avangrid to compete
9 for renewable sales in New Mexico without owning PNM, an independent monitor would
10 not be necessary. Because the cause of the independent monitor’s cost is
11 Iberdrola/Avangrid, it should be Iberdrola/Avangrid’s responsibility to pay for it.

12 ***D. Iberdrola/Avangrid’s acquisition cost will limit the Commission’s future***
13 ***flexibility on rate-setting***

14 **Q. Is there a connection between Iberdrola/Avangrid’s acquisition cost and the**
15 **Commission’s flexibility in making future decisions?**

16 **A.** Yes. The Applicants say, accurately, that the acquisition will not affect the Commission’s
17 legal authority. But the transaction will affect the Commission’s practical authority; in
18 particular its ability to set PNM’s rates based on cost-effectiveness.

19 To buy PNMR, Iberdrola/Avangrid will have to spend \$4.3 billion—at least \$700
20 million of which is the control premium. It also will have to take on PNMR’s \$4 billion
21 debt. Part IV.B explained that one reason Iberdrola/Avangrid is paying the control
22 premium (and borrowing money to finance it) is its expectation that PNM’s will continue

⁶⁴ Tarry Supp. at 2:15-20.

1 to rate-base expenditures and will buy renewable power from Avangrid. If the facts
2 diverge from that premise, Iberdrola/Avangrid's earnings will be lower than what it
3 expected and paid for. So if the Commission offers to companies other than PNM the
4 capital expenditure opportunities that normally would go to PNM, such as for generation,
5 transmission, distribution or storage, there will be pressure—from Iberdrola/Avangrid,
6 rating agencies, lenders and stockholders—to favor PNM rather than potentially more
7 meritorious companies. At a time when technology is creating more opportunities for
8 customer choice and supplier cost-effectiveness, the Commission needs more flexibility,
9 not less.

10 *E. Iberdrola/Avangrid's activities will bring other risks and harms that the*
11 *Commission can neither prevent nor control*

12 **Q. Describe the other risks that this transaction brings to New Mexico.**

13 **A.** Avangrid's multiple monopoly utilities bring one set of risks; its 7500 MW in merchant
14 generating facilities bring another. Both these business activities raise regulatory risks
15 and operating risks. Then there are risks coming from Iberdrola's control of Avangrid and
16 each company's future acquisitions, and the risks of affiliate abuse. I discuss each in turn.

17 *I. Regulatory risks*

18 **Q. Describe Avangrid's regulatory risks.**

19 **A.** At the federal level, Avangrid is subject to decisions of the Federal Energy Regulatory
20 Commission, the Commodity Futures Trading Commission, the Department of Energy
21 and the Environmental Protection Agency. At the state level, Avangrid's eight utilities
22 are subject to the utility regulatory commissions in New York, Maine, Connecticut and
23 Massachusetts. They are also subject to the New York State Department of
24 Environmental Conservation, the Maine Department of Environmental Protection, the

1 Connecticut Siting Council, and the Connecticut Department of Energy and
2 Environmental Protection. Any of these agencies can issue decisions that affect
3 Avangrid's finances adversely.

4 *Risks in general:* These regulatory agencies can take diverse regulatory actions.

5 Avangrid acknowledges that those actions can affect

6 rates for [Avangrid's] products and services, financings, capital structures,
7 cost structures, construction, environmental obligations (including in
8 respect of, among others, air emissions, water consumption, water
9 discharge, protections for wildlife and humans, nuisance prohibitions and
10 allowances, regulation of gas infrastructure operations and associated
11 environmental and facility permitting), development and operation of
12 electric generation facilities and electric and gas transmission and
13 distribution facilities, natural gas transportation, processing and storage
14 facilities, acquisition, disposal, depreciation and amortization of facilities
15 and other assets, service reliability, hedging, derivatives transactions and
16 commodities trading.⁶⁵

17 On these many issues, adverse regulatory decisions can require "our businesses to cancel
18 or delay planned development activities, to reduce or delay other planned capital
19 expenditures or investments or otherwise incur costs that we may not be able to recover
20 through rates."⁶⁶ In particular, failure to get favorable rate decisions for its eight
21 monopoly utilities means that Avangrid's "cash flows, results of operations and financial
22 condition, and our ability to earn a return on investment and meet financial obligations,
23 could be adversely affected."⁶⁷

⁶⁵ Avangrid 2019 10-K at 28.

⁶⁶ *Id.*

⁶⁷ *Id.*

1 *Risks in the monopoly businesses:* As public policymakers seek to demonopolize
2 and diversify energy options, giving customers more choice of supplies and suppliers,
3 Avangrid’s U.S. monopoly business could lose value and face lower credit ratings,
4 making Avangrid’s own financial status less secure.

5 *Transmission risks:* Through its monopoly utilities, Avangrid owns monopoly
6 transmission assets. Affecting those assets’ value are FERC decisions on transmission
7 competition, cost recovery, cost allocation and return on equity—all subjects that
8 regularly involve controversy among industry players and states, before FERC, the U.S.
9 courts of appeal and even the U.S. Supreme Court.

10 *Generation risks:* Avangrid’s ownership of generating facilities, directly or
11 through its monopoly utilities, subject it to dozens of environmental and land use
12 regulations,

13 including, but not limited to, extensive federal, state and local
14 environmental statutes, rules and regulations relating to air quality, water
15 quality and usage, climate change, emissions of greenhouse gases
16 (including, but not limited to carbon dioxide), waste management,
17 hazardous wastes (including the clean-up of former manufactured gas and
18 electric generation facilities), marine, avian and other wildlife mortality
19 and habitat protection, historical artifact preservation, natural resources
20 and health and safety (including, but not limited to, electric and magnetic
21 fields from power lines and substations, and ice throw, shadow flicker and
22 noise related to wind turbines).

23 So Avangrid is at risk of “potentially significant civil fines, criminal penalties and other
24 sanctions.”⁶⁸

25 Avangrid’s renewable energy success depends in part on legislative provisions, in
26 the form of tax credits, renewable portfolio standard mandates, and the avoidance of

⁶⁸ *Id.* at 27.

1 independent monitoring when it seeks to have its controlled utilities buy its renewable
2 power. None of these benefits are certain.

3 *Risks from reliability regulation:* All of Avangrid's utility businesses and
4 generation businesses are subject to reliability regulation by the North American Electric
5 Reliability Corporation and FERC. Penalties for failure to comply with reliability
6 standards, including cyber-security standards, can reach \$1.3 million per day per
7 violation.

8 *Risks from commodities and derivatives trading, and from international trade:* A
9 distinct set of risks arises from Avangrid's involvement in the sale of commodities and
10 derivatives;⁶⁹ and from trade policy, which affects tariffs for, among other things, solar
11 panels, wind towers, aluminum and steel.⁷⁰

12 2. *Operating risks*

13 **Q. Describe Avangrid's operating risks.**

14 **A.** Operating risks include

- 15 • disruptions to the capital markets and reductions in credit ratings (which directly
16 affect the interest rates Avangrid pays);
- 17 • disruptions, outages and failures to its electricity and natural gas transmission,
18 transportation and distribution systems, whether due to human error, weather
19 (especially wind conditions given Avangrid's heavy investment in wind), cyber-
20 breaches or terrorist attack;
- 21 • financial market disruptions, which can affect Avangrid's ability to fund its
22 pension obligations; and

⁶⁹ *Id.* at 29.

⁷⁰ *Id.* at 30.

- 1 • “[v]olatility in the price of natural gas and home heating oil, [which] could
2 adversely impact the demand for gas conversions and could have a material
3 adverse effect on our regulated gas utilities’ ability to grow their businesses.”⁷¹

4 3. *Risks from Iberdrola’s and Avangrid’s future acquisitions*

5 **Q. Are there risks to New Mexico’s customers from Iberdrola’s and Avangrid’s future**
6 **acquisitions?**

7 **A.** Yes. New Mexico has no law limiting the complexity of a holding company that controls
8 a New Mexico utility.⁷² Iberdrola/Avangrid plays down this point. Its Application
9 describes only its present holdings and its present risks. It then self-assesses those
10 holdings as successful and low-risk. This subjective description, even if accurate, is stuck
11 in the present. Because the company opposes, I assume, any Commission authority to
12 condition or limit the company’s future acquisitions, its description of the present does
13 not accurately describe the future.

14 This transaction therefore is not merely about Iberdrola/Avangrid’s acquisition of
15 PNM. That’s the approval it seeks explicitly. Implicitly, and in reality,
16 Iberdrola/Avangrid seeks permission not only to acquire PNM but also to acquire any
17 other company Iberdrola/Avangrid wants in the future, regardless of the risks those future
18 acquisitions cause to PNM. For that is what this Commission will be approving: PNM’s
19 affiliation with and subordination to not only Iberdrola/Avangrid’s present holdings and
20 present risks, but also all of Iberdrola/Avangrid’s future holdings and future risks. The

⁷¹ *Id.* at 37.

⁷² Contrast Wisconsin, which has a statute limiting how large and complex the holding company can become. See Wisc. Stat. § 196.795.

1 Commission cannot logically deem consistent with the public interest an affiliation who
2 future features are outside the Commission's knowledge and review.

3 **4. Risks from PNM supporting Iberdrola's affiliates**

4 **Q. Are there risks to New Mexico's customers from PNM's relationship with**
5 **Iberdrola's affiliates?**

6 **A.** Yes. On PNM's relationship to Iberdrola's hundreds of affiliates, the Application has this
7 to say:

8 PNM will not without prior approval of the Commission:

9 i. loan its funds or securities or transfer similar assets to any
10 affiliated interest; or

11 ii. purchase debt instruments of any affiliated interests or guarantee or
12 assume liabilities of any affiliated interests.⁷³

13 PNM will not lend to or borrow funds from any affiliates, other than as permitted
14 by the Commission.⁷⁴

15 PNM will not share credit facilities with any affiliates, other than as approved by
16 the Commission.⁷⁵

17 This language expressly leaves open the possibility that Iberdrola/Avangrid will
18 have PNM seek Commission permission to engage in these actions. But
19 Iberdrola/Avangrid would seek this support from PNM only if the affiliate needing help
20 has an emergency financial problem that only PNM could solve. Were there no affiliate
21 emergency there would be no need for utility help. And if there is an affiliate emergency,
22 PNM needs to distance itself from it, not be forced to resolve it. There is no legitimate
23 reason why PNM, whose financial health depends almost entirely on its captive

⁷³ Application at ¶ 26.e.

⁷⁴ *Id.* at ¶ 30.c.

⁷⁵ *Id.* at ¶ 30.d.

1 customers, should ever provide any financial support to affiliates. There should be no
2 temptation to do so.

3 Iberdrola/Avangrid has stated repeatedly that PNM and its customers will benefit
4 from Iberdrola/Avangrid's large size and strong finances. If so, Iberdrola/Avangrid's
5 affiliates should not need PNM's financial support.

6 ***F. Experience, logic and economic theory confirm that the risks to PNM***
7 ***are not speculative***

8 **Q. In prior acquisition cases, applicants have labeled concerns about affiliate business**
9 **risk “speculative.” Are they?**

10 **A.** No. Respectfully, adjectives don't change facts. Here are four facts:

- 11 • The geographic reach and type-of-business scope of Iberdrola/Avangrid's future
12 acquisitions have no legal limit. So while Iberdrola/Avangrid has, and will have,
13 detailed acquisition strategies that it keeps confidential, the Commission will have
14 no information about what those strategies are or will be.
- 15 • The Commission does not know, and will have no power to control, how small
16 PNM will become relative to Iberdrola/Avangrid. Nor does the Commission know
17 how small is too small, or how many unrelated affiliates are too many unrelated
18 affiliates, before PNM's welfare becomes too insignificant to engage the attention
19 of Iberdrola/Avangrid's leadership.
- 20 • Iberdrola/Avangrid's acquisition aspirations are in tension with PNM's public
21 service obligations, because if equity becomes scarce for Iberdrola/Avangrid, the
22 Commission has no enforceable guarantee that Iberdrola/Avangrid will put PNM
23 before any other of its ventures. Iberdrola/Avangrid cannot, at least not under
24 oath, tell each utility subsidiary's state commission that their utility will be
25 Iberdrola/Avangrid's top priority, any more than a teacher can tell every parent
26 that their child is above average.
- 27 • Iberdrola/Avangrid's future acquisitions, and the activities of the acquired
28 companies, will occur outside the Commission's jurisdiction and control.

29 The concerns I raise here are actually shared by Iberdrola/Avangrid. Section
30 5.1(ii) of the Merger Agreement prohibits PNMR, between now and consummation, from
31 making any “acquisition of . . . or investment in any interest, in any Person, corporation,

1 partnership or other business organization or division thereof or any assets,” except for
2 investments that don’t exceed \$20 million individually or \$60 million in the aggregate.
3 The Merger Agreement has this limit because investing in new businesses changes the
4 risks that Iberdrola/Avangrid is taking on. So Iberdrola/Avangrid limited any new PNM
5 risks to insignificant levels—precisely what I recommend.
6

7 **VI. The transaction’s “benefits,” all either token or non-committal,**
8 **divert attention from the transaction’s pecuniary purposes**

9 **Q. What concerns should the Commission have about what the Applicants call**
10 **benefits?**

11 **A.** The Applicants have made clear that this acquisition produces no “synergies,” is purely
12 “strategic” for Iberdrola/Avangrid, and for PNMR is motivated by gain for its
13 shareholders. Since the transaction itself promises no benefits, the Applicants present a
14 list similar to what appears in many merger proposals. These items are inadequate. After
15 defining “benefit” to make clear which items should count and which should not, I
16 address each one: “best practices,” “size,” “jobs,” debt removal, equipment buying,
17 financial backing, renewable energy, and the pennies-per-month payment.

18 *A. A “benefit” should count only if attributable to the merger rather than*
19 *to merger strategy, and only if backed by commitments and*
20 *consequences*

21 **Q. In determining whether this acquisition is consistent with the public interest, how**
22 **should the Commission evaluate the Applicants’ assertions of benefits?**

23 **A.** Because we are analyzing an acquisition, the only logically relevant benefits are the ones
24 produced by the actual acquisition—the meshing of two companies. Any other “benefit”
25 comes from merger strategy, not merger meshing. No student gets an “A” for bringing an
26 apple to the teacher. No commission approves a rate increase because the utility promises

1 to donate to charity. Violating that principle for acquisitions conflicts with the purpose of
2 regulation: to produce the best performance.

3 Any claim of benefit deserves additional skepticism because PNMR did not
4 choose Iberdrola/Avangrid to improve PNM's performance. PNM thinks its performance
5 is just fine.⁷⁶ As Part III.C explained, PNMR chose Iberdrola/Avangrid based on price.
6 And Iberdrola/Avangrid didn't choose PNMR so it could make PNM a better utility.⁷⁷
7 Iberdrola/Avangrid chose PNMR to get a Southwestern "platform"—a government-
8 protected monopoly platform from which to make more acquisitions and sell more
9 renewable energy.⁷⁸

10 Moreover, Avangrid has no plan for creating benefits.⁷⁹ It has performed no
11 studies on cost savings or management improvements.⁸⁰ It has identified no economic or
12 engineering inefficiencies for the transaction to improve.⁸¹ By the Applicants' own
13 words, this transaction has no public interest purpose.

⁷⁶ "PNM provides reliable, safe and cost-effective electric service to its customers in full accordance with its obligation to serve and in conformity with Commission requirements." Applicants' response to NEE 4-40.

⁷⁷ "Avangrid and PNMR are not entering into the Proposed Transaction in order to create specific synergy savings or operational efficiencies." Azagra Direct at 10:17-18.

⁷⁸ "For Avangrid, this is a strategic transaction that creates a significant regulated utility and renewable energy platform." Azagra Direct at 11:1-2.

⁷⁹ Applicants' response to NEE 4-32.

⁸⁰ Applicants' response to NEE 4-33.

⁸¹ Applicants' response to NEE 4-35.

1 **B.** *“Best practices” are not merger benefits if PNM should be using them*
2 *already*

3 **Q.** **Iberdrola/Avangrid asserts it will introduce “best practices.” Is this a merger**
4 **benefit?**

5 **A.** Not likely. This assertion—standard merger applicant strategy—has a logical hole at its
6 center. Before state commissions, acquirers make the “best practices” argument regularly.
7 If best practices are so readily available to acquirers, they should already be known to and
8 carried out by the targets. Best practices are not some secret formula; they are available to
9 any prudent manager.⁸²

10 Because best practices are available without a merger, they are not properly
11 attributable to the merger. A competitive company has no choice but to use best practices.
12 The same goes for a monopoly utility. Competent companies don’t need \$713 million
13 premia to use best practices.

14 In any event, the Applicants have not specified a single specific practice that they
15 will provide to PNM, let alone how that practice will improve PNM’s performance.⁸³ Nor
16 have they identified a single executive who will be responsible for making best practices
17 actually happen. Avangrid will merely “provide information” and “initiate discussions.”

⁸² Asked to “explain why PNM is incapable of effecting [Iberdrola/Avangrid’s] best practices on its own,” the Applicants didn’t answer the question. Applicants’ response to NMAG 4-6(B).

⁸³ See Applicants’ response to NMAG 4-6 (“Avangrid has not yet identified the best practices to be introduced at PNM. This will be a collaborative effort beginning during the integration process that starts at closing, and will be ongoing. The only work that has been done is the identification of the candidate areas for best practices that will be subject to discussion between the joint teams.”).

1 There are literally “no consequences” for Iberdrola/Avangrid executives, or executives of
2 the acquired utility, if the discussions bear no fruit.⁸⁴

3 Best practices could count if they are unique, backed by specific metrics,
4 connected to a plan for achieving those metrics, and accompanied by a list of responsible
5 individuals along with the career consequences for not succeeding. Iberdrola/Avangrid
6 offers none of these things. Without real accountability, best practices are only
7 aspirations. A customer can’t take them to the bank—unlike the PNMR shareholders,
8 who can deposit their purchase price the day it arrives. As the Maryland Commission
9 held:

10 P]rojections of benefits through synergies, shared services or best
11 practices are inherently speculative and, to the extent they materialize, will
12 likely benefit customers only as forgone requests for rate relief, which we
13 have previously held to be too intangible to qualify as a benefit under
14 Maryland utility statutes. . . .⁸⁵

15 I also question the consistency in the Applicants’ claiming “best practices” to
16 support a transaction in which PNM chose its acquirer for its price rather than its
17 practices.

18 **Q. Do you have a concern about any of Iberdrola/Avangrid’s “best practices”?**

19 **A.** Yes. One of Iberdrola/Avangrid’s best practices is entitled “Cross operating company
20 resource sharing for emergency response.”⁸⁶ Historically, unaffiliated U.S. utilities have
21

⁸⁴ Applicants’ response to NMAG 4-9.

⁸⁵ In the Matter of the Merger of Exelon Corporation and Constellation Energy Group, Order No. 84698 (Feb. 17, 2012), 2012 Md. PSC LEXIS 12 at text accompanying note 356.

⁸⁶ Confidential JA Exhibit NMAG 4-5.1, located at p.2 of a document entitled 2.2.3.1-CO5.1.pdf (quoted here with permission).

1 entered into intercompany agreements to provide mutual assistance during storms. On
2 this topic, Avangrid’s “best practice,” labeled “High Priority,” is this: “Avangrid
3 operating companies would have an established protocol for sharing intercompany
4 resources before offering non-company mutual assistance.” As I understand this item,
5 each Avangrid acquisition would diminish the company’s commitment to the common
6 good. I don’t consider this approach to public service a public interest benefit.

7 **C. *The “size” argument has no supporting evidence***

8 **Q. The Applicants say that PNM will benefit from Iberdrola/Avangrid’s large size.
9 What is your response?**

10 **A.** The size argument—also frequently repeated by applicants in other cases—has no
11 evidentiary value. It is possible that for a particular set of services, there is some size
12 range within which cost-effective performance is more likely to occur, compared to sizes
13 above *and below* that range. But Iberdrola/Avangrid gives us no evidence, for various
14 activities, on what that size range is or how it relates to PNM specifically. The Applicants
15 could have offered statistical studies to prove its point, but they didn’t. They at least
16 could have offered anecdotal evidence, such as comparing small utilities like Madison
17 [Wisconsin] Gas & Electric with large utilities like Pacific Gas & Electric, but they
18 didn’t. The size argument is only argument—possibly true, possibly false—but it is not
19 evidence.

20 The argument is also one-sided. Avangrid has “size” because it has eight utilities.
21 But attached to each of those utilities is an obligation—an obligation to serve. If
22 Iberdrola/Avangrid had talked of the size of its *obligations*, it would have made itself
23 look much less attractive to New Mexico. For adding one more mouth to feed does not
24 increase the odds for the previously added mouths. And PNM will become one of those

1 previously added mouths because this acquisition will be followed by others. “Size” is a
2 half-story, the uncomfortable half omitted.

3 Since any benefit of size is offset by the burden of obligation, “size” can matter to
4 New Mexico only if there are economies of scale.⁸⁷ But despite eight separate U.S.
5 acquisitions, and many more outside the U.S., Iberdrola has not identified a single
6 objective study showing that its business of owning monopoly utilities benefits from
7 economies of scale. Utility service is still largely a local service. It’s getting more local
8 with customer self-supply and other forms of distributed energy resources. The size
9 argument has no factual basis.

10 ***D. The “new jobs” are likely unrelated to the merger and outside the***
11 ***Commission’s jurisdiction***

12 **Q. Discuss Iberdrola/Avangrid’s plans to bring jobs.**

13 **A.** Iberdrola/Avangrid says it “will create or bring an additional 100 full-time jobs to New
14 Mexico over the three years following the closing of the Proposed Transaction.”⁸⁸ This
15 claim has three flaws.

16 First, this proposal’s vagueness raises multiple questions, all important to New
17 Mexico but remote from this Commission’s jurisdiction over electric utility performance:
18 What *kind* of jobs are we talking about? Make-work or productive? Consistent with the
19 state’s economic development plans or counterproductive? Upwardly mobile or dead-
20 end? Paid properly or paid stingily? Union or non-union? In other words, how do we

⁸⁷ Economies of scale exist when, for a particular product or service, long-run average cost per unit declines as output increases. Paul Krugman & Robin Wells, *Microeconomics* 348 (4th ed. 2015).

⁸⁸ Application at ¶ 29.D.

1 know these jobs will truly develop the state’s economy? A job is not just a number; it is
2 someone’s livelihood. The job’s quality matters.

3 Second, if the jobs are actually related to PNM’s performance, then PNM would
4 be obligated to create these jobs without the acquisition. If so, the jobs can’t count as
5 benefits from the transaction. For this offer to have credibility (why the perfect round
6 number of 100?), there needs to be clarity and commitment about the what and the where.

7 Third, if the jobs are ones that exist elsewhere but are moved from some other
8 state, New Mexico’s gain becomes some other state’s loss. That is not how states should
9 treat each other. And we certainly don’t want Iberdrola later to seek the California
10 Commission’s support for an acquisition there by promising to move 100 jobs from New
11 Mexico. Indeed, with Iberdrola/Avangrid making no promise about how long these jobs
12 will remain in New Mexico, we face that very risk.

13 *E. Making Avangrid responsible for PNMR’s debt makes no guaranteed*
14 *difference to customers of PNM*

15 **Q. Discuss Avangrid’s intent to “extinguish” PNMR’s debt.⁸⁹**

16 **A.** Iberdrola/Avangrid says that it will help PNM’s customers by “extinguishing” PNMR’s
17 debt. But PNMR’s debt was never supposed to be the customer’s problem; a utility is
18 supposed to be insulated from its affiliate’s finances. So “eliminating” a problem that
19 PNMR itself created shouldn’t count as a customer benefit. Finally, this transaction is not
20 truly “extinguishing” the economic effects of PNMR’s debt, because the funds to do so
21 will come either from new Iberdrola/Avangrid debt, Iberdrola/Avangrid’s current funds
22 or new holding company equity. Whatever the funding source for removing the debt, the

⁸⁹ App. at ¶ 29.K.

1 burden doesn't disappear; it just moves to somewhere else in the corporate family—thus
2 reducing the family's ability to support PNM.

3 ***F. PNM had no problems buying equipment until Avangrid said it did***

4 **Q. Comment on the Applicants' assertion that the acquisition will improve PNM's**
5 **ability to buy equipment.**

6 **A.** Mr. Tarry says that when buying specialized equipment, large holding company systems
7 get preferences over smaller systems.⁹⁰ Like “size,” this assertion is words without data.
8 No witness offers examples of PNM forgoing a necessary purchase or suffering
9 dangerous delays because some company bigger had access that was better. No witness
10 provided evidence of equipment suppliers saying “PNM, you're a \$7.3 billion company
11 with 530,000 captive customers, but you're not attractive enough for us to sell you our
12 equipment.”⁹¹ No witness explained how prudent utilities buy spare parts well in advance
13 of need, to avoid shortages. And nowhere in the Proxy Statement—the document whose
14 every sentence lawyers at risk of malpractice suit check for accuracy and completeness—
15 is there evidence of PNMR ranking prospective acquirers by their ability to buy
16 specialized equipment.

17 Equipment purchasing was not the reason for this transaction. And if it was a
18 reason, PNM should have sought acquirers who excel at it. But PNMR sought only the
19 acquirer offering the highest price.

⁹⁰ Tarry Direct at 9:7-16.

⁹¹ PNMR's total assets in 2019 were \$7.3 billion. PNMR 2019 10-K at A-26.

1 **G.** *Thanks to its captive customers, PNM has successfully financed its*
2 *capital expenditures for decades; there is no evidence that it needs help*
3 *from Iberdrola/Avangrid*

4 **Q.** **Applicants say that Iberdrola/Avangrid can give financial support to PNM. Is this a**
5 **benefit the Commission should count?**

6 **A.** No. Like any utility, PNM is obligated to make capital expenditures. This Commission is
7 legally obligated to set rates sufficient to finance those expenditures. There is no evidence
8 that this Commission has failed to do so. Subordinating PNM to a \$143 billion Spanish
9 conglomerate⁹² is not a sensible way to solve a problem that PNM never said existed.

10 And again we have words without commitment, because Iberdrola/Avangrid has
11 made no legal commitment to inject equity into PNM. It is in fact unclear whether the
12 Commission has the power to order Iberdrola/Avangrid to do so, since
13 Iberdrola/Avangrid is not itself a public utility subject to the Commission’s jurisdiction.

14 Mr. Tarry argues that with Iberdrola/Avangrid as PNMR’s sole owner, PNM will
15 have access to lower-cost financing.⁹³ Again no data, notwithstanding Avangrid’s having
16 acquired eight other U.S. utilities. And no guarantee either. Avangrid is part of an
17 Iberdrola riskier and more complex than PNM, subject to risks of currency fluctuations
18 and business failures completely foreign to PNM.

19 **Q.** **Is there another concern about PNM’s dependence on its acquirer for equity?**

20 **A.** Yes. Iberdrola/Avangrid was asked to commit that “if Iberdrola/Avangrid ever has
21 insufficient financial resources to cover the needs of the to-be-acquired PNM as well as

⁹² Azagra Direct at 7:2-5.

⁹³ Tarry Direct at 9:18-21.

1 [Iberdrola/Avangrid's] other affiliates, PNM's needs will have priority." This clear
2 question did not get a clear answer:

3 Each utility currently has and will continue to have the same obligation to
4 obtain necessary financing to meet its needs to continue to provide safe
5 and reliable service at reasonable cost. Of course, Avangrid will provide
6 increased access for PNM to the equity and debt markets.⁹⁴

7 This response (a) avoided acknowledging the premise that Iberdrola/Avangrid might have
8 insufficient resources; and (b) avoided the reality that in the event of its own capital
9 insufficiency, its hundreds of affiliates will become competitors of each other for
10 Iberdrola/Avangrid's scarce capital.

11 Iberdrola/Avangrid cannot have it both ways: arguing that its capital availability
12 will be a major benefit to PNM, while insisting that the Commission cannot require it to
13 make that capital available to PNM. Absent Iberdrola/Avangrid's enforceable guarantee
14 that it will inject equity into PNM when the Commission requires, the Applicants' claim
15 of financial benefit lacks enforceability; therefore it lacks value.

16 As for the financial benefits cited by Ms. Lapson,⁹⁵ there are two problems. First,
17 no witness, including Ms. Lapson, suggests that PNM needs these benefits. Prior to
18 Iberdrola/Avangrid offering the \$713 million control premium, no PNM executive or
19 Board member was telling this Commission that its access to capital was so poor, and its
20 ratings so low, that it needed an acquisition. And if PNM did have an access-to-capital
21 problem, an acquisition making PNM a minor subsidiary of a Spanish conglomerate, with
22 all the gain going to PNM's shareholders, was hardly the only solution. PNM still could

⁹⁴ Applicants' response to NEE 4-48.

⁹⁵ Lapson Direct at 10-14.

1 have run an acquisition that made customer performance the primary purpose, with
2 assistance in bond ratings among the criteria. Improved access is a post-hoc argument; it
3 is not a real reason for or benefit from the transaction.

4 ***H. The rate credit and economic development payment, token efforts to***
5 ***garner support, are below this Commission's dignity***

6 **Q. Comment on Iberdrola/Avangrid offers of rate credits and economic development**
7 **funds.**

8 **A.** The \$24.6 million rate credit, spread over 530,000 customers over three years, is pennies
9 per month. The same goes for the \$2.5 million for economic development, in a state
10 whose 2019 gross domestic product was \$105 billion.⁹⁶

11 The low numbers should not surprise. As Mr. Azagra acknowledges, the
12 transaction produces no operational benefits, no efficiencies, no cost reductions, no
13 innovations, no value to support a payment to customers. Unable to create value, there
14 was only so much Iberdrola/Avangrid was willing spend from its treasury. And that
15 willingness was diminished, nearly to zero, by the PNMR Board's insistence on a \$713
16 million control premium, all going to the PNMR shareholders alone.

⁹⁶ <https://www.forbes.com/places/nm/?sh=4fd9a2988336>.

1 **VII. Conditions are necessary, but their sufficiency and enforceability**
2 **are uncertain**

3 *A. To protect customers from holding company risk-taking, the*
4 *Commission must fill a regulatory gap*

5 **Q. Explain how the repeal of federal protections leaves New Mexico’s electricity**
6 **customers exposed to risks from complex holding companies.**

7 **A.** Until its repeal in 2005, the federal Public Utility Holding Company Act of 1935
8 (“PUHCA” or “the Act”) required, subject to certain exceptions, that each utility holding
9 company constitute a “single integrated public-utility system.”⁹⁷ A holding company
10 could not acquire two or more utilities unless the acquisition would “serve the public
11 interest by tending towards the economic and efficient development of an integrated
12 public-utility system.”⁹⁸ Another provision, Section 7(d), prohibited utility holding
13 companies from issuing securities that, among other things, involved an “improper risk”
14 or were “detrimental to the public interest or the interest of investors or consumers.”

15 These provisions aligned each utility’s corporate structure and financial structure
16 with its public service obligations. By complying, utilities would avoid the corporate
17 structures and managerial behaviors that had caused harm to investors, consumers and the
18 public interest: expansionist acquisitions that served no engineering purpose, arbitrary
19 mixes of utility and non-utility businesses, acquisitions funded by too much debt and too
20 little equity (thereby reducing a holding company’s real economic stake in the utilities it
21 controlled), and interaffiliate transactions that forced utilities to fund non-utility affiliates
22 and pay cash dividends to the leveraged holding company owners. By eliminating these

⁹⁷ Defined in Section 2(a)(29)(A) of PUHCA (repealed).

⁹⁸ Section 10(c)(2) of PUHCA (repealed).

1 abuses, the Act left utilities free to focus on their proper purpose: providing essential
2 utility service, locally. For 70 years, a “strategic” acquisition like Iberdrola/Avangrid’s—
3 a transaction whose sole purpose was to buy a platform to increase profits—was illegal.

4 **Q. Why were these federal protections important to state commissions?**

5 **A.** These federal protections reduced the possibility that the cost or quality of utility service
6 would be compromised by a holding company’s complexity and its conflicting
7 objectives. As a result, state commissions could focus their limited resources on reducing
8 cost and improving quality, rather than having their attention and resources diverted to
9 preventing harm.

10 In 2005, Congress repealed the Act. As a result, there is today no federal limit on
11 holding company arrangements involving geographically dispersed, operationally
12 unrelated utilities; no federal limit on the mixing of utility and non-utility businesses or
13 low-risk and high-risk businesses; and no federal limits on excess holding debt or
14 complex corporate structures.⁹⁹ Without PUHCA’s federal protections, the responsibility
15 to protect consumers from holding company acquisitions falls entirely on state
16 commissions.

⁹⁹ There remains some review by the Federal Energy Regulatory Commission under Section 203 of the Federal Power Act, and under a vestige of PUHCA 1935 known as “PUHCA 2005.” But in all its merger cases since the late 1980s, FERC has not used these provisions to protect customers from the risks discussed in my testimony. FERC has focused on the risks of vertical and horizontal market power. I make this statement objectively, based on my study of every FERC merger decision issued since the late 1980s and my participation in several of the underlying transactions. For more detail, see my book *Regulating Mergers and Acquisitions of U.S. Electric Utilities: Industry Concentration and Corporate Complication* (Edward Elgar Publishing 2020); and my article, “Inconsistent with the Public Interest: FERC’s Three Decades of Deference to Electricity Consolidation,” *Energy Law Journal* (Fall 2018), available at [https://www.eba-net.org/assets/1/6/15-233-312-Hempling_\[FINAL\]1.pdf](https://www.eba-net.org/assets/1/6/15-233-312-Hempling_[FINAL]1.pdf).

1 **B. Conditions are necessary to reduce the risk of harm**

2 **Q. Are conditions necessary to reduce this transaction’s risk of harm?**

3 **A.** Yes, but I am concerned about their sufficiency. No condition can correct a transaction
4 whose origin lies in PNMR selecting PNM’s new owner based on price rather than
5 performance. That origin, by itself, makes this transaction inconsistent with the public
6 interest because it precludes acquisitions by better performers.

7 With that caveat, I offer three conditions: to protect PNM from its acquirer’s
8 business risks, to prevent Iberdrola/Avangrid from siphoning capital away from PNM,
9 and to prevent Iberdrola/Avangrid from using unearned advantages to distort potentially
10 competitive markets.

11 **1. Protect PNM from Iberdrola/Avangrid’s business risks**

12 *No member of the Iberdrola/Avangrid corporate family shall acquire any*
13 *interest in any business, where such interest exceeds a dollar level*
14 *established by the Commission to eliminate the possibility of harm to*
15 *PNM, unless the Commission has determined that the acquisition and*
16 *continued ownership of that interest will neither cause harm to PNM nor*
17 *increase the cost of the Commission oversight.*

18 *The Commission shall have access, in New Mexico, to the books and*
19 *records of any Iberdrola/Avangrid affiliate whose business activities the*
20 *Commission reasonably believes could affect PNM adversely.*

21 **2. Prevent inappropriate movement of capital away from PNM**

22 *Iberdrola/Avangrid shall maintain the elements of PNM’s capital*
23 *structure within the ranges established by the Commission from time to*
24 *time. Accordingly:*

- 25 a. *Iberdrola/Avangrid shall inject equity into PNM*
26 *consistent with Commission policies and directives.*
- 27 b. *PNM shall not pay dividends except to the extent*
28 *consistent with the Commission policies and*
29 *directives.*

1 c. *PNM shall not incur debt except to the extent*
2 *consistent with Commission policies and directives.*

3 d. *PNM utilities shall not provide financial support of*
4 *any type to any Iberdrola/Avangrid business*
5 *venture, other than through the purchase of goods*
6 *or services consistent with the Commission's rules*
7 *and orders on interaffiliate transactions.*

8 **3. *Eliminate unearned advantages in potentially competitive***
9 ***markets***

10 *No Iberdrola/Avangrid affiliate providing in New Mexico a competitive or*
11 *potentially competitive service (as defined by the Commission) may*
12 *receive from any other Iberdrola/Avangrid affiliate any form of support*
13 *unless such support is consistent with Commission rules designed to*
14 *ensure that no Iberdrola/Avangrid affiliate has any unearned advantage in*
15 *selling any product for which the sale or purchase is subject to the*
16 *Commission's jurisdiction.*

17 *No Iberdrola/Avangrid affiliate shall deny to any provider of electric*
18 *service any service, or any access to any facility, if the Commission*
19 *determines that the service or access is necessary for the provider to*
20 *compete effectively. The Commission shall ensure reasonable*
21 *compensation to Iberdrola/Avangrid or its affiliate for providing any such*
22 *service or access.*

23 **C. *Proposals on board membership won't diminish Iberdrola/Avangrid's***
24 ***control***

25 **Q. *Comment on the Applicants' proposal to put New Mexico residents or independent***
26 ***directors on the PNMR or PNM Boards.***¹⁰⁰

27 **A.** It is inarguable that New Mexico's largest electric utility must have New Mexico
28 residents on its Board. But promising the inarguable is not a merger benefit. The question
29 is whether the New Mexico members of the PNMR and PNM Boards will be independent
30 of the Iberdrola/Avangrid Boards. If not, this item solves none of problems I've raised.
31 PNMR's current Board has New Mexico residents—all of whom I believe voted to sell

¹⁰⁰ Kump Direct at 12:6-7.

1 control of PNM’s government-granted privilege to Iberdrola/Avangrid, based on price
2 instead of performance, for a \$713 million control premium that shareholders (including
3 share-owning Board members) would keep all for themselves. The New Mexico
4 members cast this vote without seeking, let alone obtaining, any serious, tangible
5 enforceable benefit for PNM’s 530,000 customers—other than pennies-per-month for
6 three years. In fact, when we asked Iberdrola/Avangrid to identify “precisely what
7 decisions by PNM are you legally committing not to interfere with,” the Applicants
8 didn’t answer.¹⁰¹

9 And it was PNMR’s independent directors who made a special point of insisting
10 that PNMR’s advisors continue discussions with Iberdrola/Avangrid.¹⁰² Independent
11 directors don’t remove parent-utility conflict; they are parties to that conflict. For a utility
12 board’s independent directors are independent only of the utility’s management; they are
13 not independent of the utility’s parent. Indeed, the reason why independent directors are
14 independent of management is so that their sole allegiance will be to the parent.
15 Independent directors are not “independent” like this Commission’s members are
16 independent. A commission’s members are independent of the utility so they can serve
17 the public interest. In a corporation, independent directors are independent of the utility’s
18 management so they can serve the holding company’s interests. If the independent
19 director sees a conflict between the holding company’s and the utility customers’

¹⁰¹ Applicants’ response to NMAG 4-8(B). (There was no response.)

¹⁰² Proxy Statement at 38.

1 interests (assuming both interests are legal interests), the holding company’s interests
2 prevail.

3 If a utility board member were truly committed to New Mexico’s needs, and truly
4 independent of the holding company, she could veto any holding company instruction
5 that conflicted with the utility’s obligation to its customers. No typical independent
6 director has that power—and Iberdrola/Avangrid hasn’t proposed one who will have that
7 power. New Mexico residents on the PNM and PNMR Boards? Of course. But they must
8 be legally free to vote New Mexico’s needs, regardless of Iberdrola/Avangrid’s wishes.

9 **Q. Is there other evidence that Avangrid will control PNM?**

10 **A.** Yes. Mr. Kump stated that control of day-to-day operations will lie with PNM.¹⁰³ But he
11 also stated that if PNM has performance problems, Avangrid “can be expected to
12 similarly react quickly and appropriately to ensure that customer service expectations are
13 met or exceeded.”¹⁰⁴ These two statements are not consistent.

14
15 **VIII. The Commission should craft a merger policy that attracts only**
16 **those applicants that put the public interest first**

17 **A. *Four public interest goals***

18 **Q. How can the Commission update its policies so that future acquisition proposals are**
19 **consistent with the public interest?**

20 **A.** I recommend that the Commission begin by defining the public interest. That way, those
21 companies whose business purposes align with the privilege of serving New Mexico will

¹⁰³ Applicants’ response to NMAG 5-7.

¹⁰⁴ Applicants’ response to NMAG 5-13 (referencing problems at Avangrid subsidiary Central Maine Power).

1 feel welcome to compete for that privilege, while those with less public-spirited purposes
2 will go elsewhere. It would be presumptuous for me, an outsider, to define New Mexico’s
3 public interest with any real detail. What I can do is share four general themes that seem
4 relevant to the state.

5 *1. Cost-effective transition of the electric supply*

6 **Q. Explain the goal of cost-effectively transitioning the electric supply.**

7 **A.** “Transition” means not only changing how companies produce and deliver electricity but
8 also changing how customers use electricity. “Cost-effective” means insisting not only on
9 the most cost-effective solutions but also on the most cost-effective providers. The cost-
10 effective, consumer-friendly shutdown of Four Corners deals with the past; to deal with
11 the future we need cost-effective planning and procurement of renewable energy,
12 distributed energy resources, storage, microgrids, and residential and community solar—
13 all subject to Commission-designed RFPs and independently monitored competitive
14 bidding.

15 *2. Economic development*

16 **Q. Explain the goal of economic development.**

17 **A.** New Mexico’s economic development agencies, state and local, have plans and goals for
18 attracting and retaining industrial and commercial enterprises. Economic development
19 actions often include tax breaks and grants. Those features risk producing zero-sum
20 outcomes as states compete with each other, each spending its own taxpayer funds to
21 attract or retain the same companies. More productive is to attract companies by
22 improving the state’s infrastructure in terms of the physical (e.g., roads, bridges,
23 broadband) and the human (e.g., education, health care). Working with the economic

1 development agencies, the Commission can identify the types and quality of electric
2 service that will support the desired economic development. The solution need not be
3 confined to the traditional economic development rates (which, like tax breaks, risk zero-
4 sum competition with other states). Business customers care about cybersecurity, power
5 quality, short-term and long-term reliability, and opportunities to self-supply. A
6 necessary component of economic development will be providing work opportunities for
7 Four Corners employees and stimulus funding for that sub-region.

8 **3. *Electrification for all***

9 **Q. Explain the goal of electrification for all.**

10 **A.** “Electrification” means not just electric vehicles for the well-off but also full electric
11 service for the non-well-off. The state can identify depressed areas that lack either
12 electric service or the ability to pay for it, then deploy both financial resources (like rate
13 credits) and physical resources (like basic electricity infrastructure and energy-efficient
14 rehabilitation for aging housing).

15 **4. *Respect for customers***

16 **Q. Explain the goal of respect for customers.**

17 **A.** This category has at least three components.

18 *Help customers take charge of their choices:* For a century, customers have had
19 no choice but to take what the utility makes them take: for New Mexico, electricity
20 produced by high-cost, high-risk coal, nuclear and gas generators. New technologies are
21 bringing new options: residential solar, community solar, large-scale solar, microgrids,
22 storage, energy efficiency and demand response. Customers now can have, and deserve, a
23 chance to shape their own paths to low-cost, green consumption.

1 *Attract diverse suppliers:* To give customers diverse choices there must be diverse
2 suppliers. There is no reason to expect that PNM or any monopoly can do everything
3 well. For every new type of performance, we need to find the best performer.

4 *Recognize customers' contributions:* Some utilities call their customers
5 “ratepayers”—captive, compliant payers of their monthly bills. These customers—real
6 people—are the reason why a utility has value to an acquirer. Contrarily, PNMR thinks it
7 can sell control of PNM for a \$713 million gain and have its shareholders keep it all. The
8 customers deserve to receive the value of what they created. But most important for
9 customers is a promise of respect—demonstrated by a utility whose decisionmakers put
10 performance first.

11 ***B. Criteria to distinguish acquisitions that support from those that stifle***

12 **Q. How can the Commission adjust the acquisition process to achieve public interest**
13 **goals?**

14 **A.** If the Commission wants someone other than PNMR to control utility service, then rather
15 than allow the utility to select that entity based on price, the Commission should require
16 the selection to be based on performance. To do so, it should invite multiple competitors.
17 One always learns more by actively making comparisons than by reactively reviewing a
18 single proposal in isolation.¹⁰⁵ To guide those that process, the Commission should

¹⁰⁵ See, e.g., Daniel Kahneman, *Thinking, Fast and Slow* 355, 360-61 (2011) (explaining that in contrast to evaluating a single option, a comparison “involves a more careful and effortful assessment. . . .R]ationality is generally served by broader and more comprehensive frames, and joint evaluation is obviously broader than single evaluation.”).

1 develop clear criteria and filing requirements that enable it to compare fully those who
2 compete for the privilege.

3 **Q. What criteria might the Commission use to determine which applicants will support**
4 **New Mexico's electricity future and which will stifle that future?**

5 **A.** An acquirer is more likely to support New Mexico's electricity future if

- 6 • the acquirer's dominant motivation is to make the New Mexico's priorities its
7 priorities, rather than treat the state as a platform for the acquirer's priorities.
- 8 • the acquisition creates no conflict of interest between the utility-as-buyer,
9 minimizing cost to customers; and the acquirer-as-seller, seeking earnings by
10 selling electricity to the utility it controls.
- 11 • the acquirer neither needs nor intends to insist on controlling every new utility
12 capital expenditure for itself, but rather sees itself as a facilitator for the entry of
13 diverse supplies and suppliers.
- 14 • the members of the post-acquisition board and the top executives are compensated
15 based on how well they perform for the customers rather than how much stock
16 value and earnings they bring to shareholders. Profit is not a bad word, but the
17 executives' financial interests should not conflict with the customers' interests.
- 18 • the transaction is a stock-for-stock transaction, so that there is no multi-billion-
19 dollar acquisition cost, and so that the PNM shareholders are not cashing out and
20 departing.

21 An acquirer is more likely to stifle New Mexico's electricity future if

- 22 • the transaction involves a large control premium, making the acquirer's financial
23 health depend on controlling the utility's future capital expenditures for itself.
- 24 • the acquirer expects to be, or needs to be, the monopoly provider of every new
25 service, and so will fight customers, competitors and the Commission each time
26 the Commission aims to award new capital expenditure opportunities based on
27 merit rather than incumbency.
- 28 • the acquirer views the utility as a supplier of captive customers who serve as a
29 hedge against acquirer's riskier ventures.
- 30 • the acquirer views the utility as a "fixer-upper," where it sands a few edges, paints
31 over a few cracks, then sells it for gain after five years.

32

Conclusions

1
2 **Q. You have recommended against this acquisition when the Commission has**
3 **previously approved acquisitions. Are you recommending that the Commission**
4 **change its approach to utility acquisitions?**

5 **A.** Respectfully, yes. I am recommending that the Commission now define the public
6 interest as requiring that the local utility accept acquisition offers not on the basis of
7 payment to shareholders but on the basis of service to customers. I am recommending
8 that the Commission treat the government-created privilege to provide an essential
9 service on a monopoly basis as having value created not by the company granted that
10 privilege, but by the government that created the privilege and the captive customers who
11 give that privilege its economic value.

12 I am also recommending that the Commission define the public interest by
13 referencing regulation's central purpose: to produce utility performance that as closely as
14 possible resembles the performance that customers enjoy in a competitive setting. In an
15 effectively competitive market, mergers happen because they produce companies that can
16 serve customers most efficiently. In those mergers, the customer interest, the target
17 company's interest, the acquirer's interest and public interest are all aligned.

18 My testimony is complex because this transaction is complex. But the message is
19 not. Iberdrola/Avangrid wants to control PNM to get a platform; PNMR wants to sell
20 control of PNM's public franchise to get \$713 million. Nothing about this transaction
21 benefits consumers; much about this transaction will harm them. There are no reasons to
22 approve this transaction, and many reasons to reject it.

23 **Q. Does this conclude your Direct Testimony?**

24 **A.** Yes.

Resume of Scott Hempling

Scott Hempling is an attorney, expert witness, author and teacher. As an attorney, he has assisted clients from all industry sectors—regulators, utilities, consumer organizations, independent competitors and environmental organizations. As an expert witness, he has testified numerous times before state commissions and before committees of the United States Congress and the legislatures of Arkansas, California, Maryland, Minnesota, Nevada, North Carolina, South Carolina, Vermont, and Virginia. As a teacher and seminar presenter, he has taught public utility law and policy to a generation of regulators and practitioners, appearing throughout the United States and in Australia, Belgium, Canada, Central America, England, Germany, India, Italy, Jamaica, Mexico, New Zealand, Nigeria, Norway, Peru and Vanuatu. He is currently an arbitrator in an electric rate case in Vanuatu.

Hempling's legal treatise, *Regulating Public Utility Performance: The Law of Market Structure, Pricing and Jurisdiction*, was published by the American Bar Association in 2013. It has been described as a "comprehensive regulatory treatise [that] warrants comparison with Kahn and Phillips." A second edition will be published by Fall 2021. His book *Regulating Mergers and Acquisitions of U.S. Electric Utilities: Industry Concentration and Corporate Complication* was published by Edward Elgar Publishing in Fall 2020. His book of essays, *Preside or Lead? The Attributes and Actions of Effective Regulators*, has been described as "matchless" and "timeless"; a Spanish translation has circulated throughout Latin America, through the auspices of the Asociación Iberoamericana de Entidades Reguladoras de la Energía, REGULATEL (an association of telecommunications regulators from Europe and Latin America) and the World Energy Forum. The essays continue monthly at www.scotthemplinglaw.com.

His articles have appeared in the *Energy Bar Journal*, the *Electricity Journal*, *Energy Regulation Quarterly*, *Public Utilities Fortnightly*, *ElectricityPolicy.com*, publications of the American Bar Association, and other professional publications. These articles cover such topics as mergers and acquisitions, the introduction of competition into formerly monopolistic markets, corporate restructuring, ratemaking, utility investments in nonutility businesses, transmission planning, renewable energy and state–federal jurisdictional issues. From 2006 to 2011, he was the Executive Director of the National Regulatory Research Institute.

Hempling is an adjunct professor at the Georgetown University Law Center, where he teaches public utility law and has taught regulatory litigation. He received a B.A. *cum laude* in (1) Economics and Political Science and (2) Music from Yale University, where he was awarded a Continental Grain Fellowship and a Patterson research grant. He received a J.D. *magna cum laude* from Georgetown University Law Center, where he was the recipient of an *American Jurisprudence* award for Constitutional Law. He is a member of the District of Columbia and Maryland Bars. More detail is available at www.scotthemplinglaw.com.

Education

B.A. *cum laude*, Yale University. 1978. Two majors: Economics and Political Science, Music. Recipient of a Continental Grain Fellowship and a Patterson Research grant.

J.D. *magna cum laude*, Georgetown University Law Center, 1984. Recipient of *American Jurisprudence* award for Constitutional Law; editor of *Law and Policy in International Business*; instructor, legal research and writing.

Professional Experience

President, Scott Hempling, Attorney at Law LLC (2011–present).

Adjunct Professor, Georgetown University Law Center (2011–present).

Executive Director, National Regulatory Research Institute (2006–2011).

Founder and President, Law Offices of Scott Hempling, P.C. (1990–2006).

Attorney, Environmental Action Foundation (1987–1990).

Associate, Spiegel and McDiarmid (1984–1987).

Past Clients

Independent Power Producers and Marketers

California Wind Energy Association, Cannon Power Company, Electric Power Supply Association, EnerTran Technology Company, National Independent Power Producers, SmartEnergy.com, U.S. Wind Force.

Investor-Owned Utilities

Madison Gas & Electric, Oklahoma Gas & Electric.

Legislative Bodies and Executive Departments

South Carolina Department of Administration, South Carolina Senate, Vermont Legislature.

Municipalities and Counties

American Public Power Association; Connecticut Municipal Electric Energy Cooperative; Iowa Association of Municipal Utilities; City of Jacksonville, Florida; Montgomery County, Maryland; Texas Cities; City of Winter Park, Florida.

Public Interest Organizations

Alliance for Affordable Energy, American Association of Retired Persons, Consumer Federation of America, D.C. Consumer Utility Board, Energy Foundation, Environmental Action

Foundation, Environmental Defense Fund, GRID2.0 (Washington, D.C.), Illinois Citizens Utility Board, Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists.

Regulatory Commissions and Consumer Agencies

Arkansas Attorney General, Arkansas Public Service Commission, Arizona Corporation Commission, Australia Energy Regulator, British Columbia Office of the Auditor General, British Columbia Utility Commission, California Public Advocates Office, Connecticut Department of Public Utility Control, Connecticut Office of Consumer Counsel, Delaware Public Service Commission, Hawai'i Public Utilities Commission, Hawai'i Office of Planning, Indiana Utility Regulatory Commission, Kansas Corporation Commission, State of Maryland, Maryland Energy Administration, Maryland Attorney General, Maryland Office of People's Counsel, Massachusetts Attorney General, Massachusetts Department of Public Utilities, Mexico's Comisión Reguladora de Energía, Minnesota Public Utilities Commission, Mississippi Public Service Commission, Mississippi Public Utilities Staff, Missouri Public Service Commission, Montana Public Service Commission, National Association of Regulatory Utility Commissioners, Nevada Consumer Advocate, Nevada Public Service Commission, New Hampshire Public Utilities Commission, New Jersey Division of Ratepayer Advocate, North Carolina Utilities Commission, Ohio Public Utilities Commission, Oklahoma Corporation Commission, Pennsylvania Office of Consumer Advocate, Puerto Rico Energy Commission, South Carolina Department of Administration, South Carolina Department of Consumer Affairs, South Carolina Public Service Commission, Texas Office of Public Utility Counsel, Vermont Department of Public Service, Virginia State Corporation Commission, Wisconsin Attorney General.

Testimony Before Legislative Bodies

United States Senate

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United States House of Representatives

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Appropriations Subcommittee on Commerce, Justice, State and the Judiciary, Apr. 1989 (discussing proposals to increase staff administering PUHCA).

Subcommittee on Energy and Power, Sept. 1988 (discussing "independent power producers" and PUHCA).

State Legislatures

Judiciary Committee, South Carolina Senate (2000) (discussing options for introducing retail electricity competition).

Commerce Committee, Arkansas General Assembly (1999) (discussing legislation to introduce retail electricity competition).

Health Access Oversight Committee, Vermont General Assembly (1999) (discussing options for state regulation of prescription drug pricing).

Electricity Restructuring Task Force, Virginia General Assembly (1999) (discussing options for introducing retail electricity competition).

Study Committee, North Carolina Legislature (1999) (discussing legislation to introduce retail electricity competition).

Committees on General Affairs, Finance, Vermont Senate (February-March 1997) (discussing options for structuring the electric industry).

Task Force to Study Retail Electric Competition, Maryland General Assembly (1997) (discussing options for introducing retail electricity competition).

Interim Committee on Electric Restructuring, Nevada Legislature (1995-97) (discussing options for structuring the electric industry).

Committee on Energy and Public Utilities, California Senate (December 1989) (discussing relationships between electric utilities and their non-regulated affiliates).

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Louisiana Public Service Commission: Utility holding company's acquisition of merchant generation company (2018).

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Maryland Public Service Commission: Canadian holding company acquisition of retail natural gas company (2017).

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Louisiana Public Service Commission: Holding company acquisition of utility holding company (2015).

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U.S. District Court for Minnesota: Effects of Minnesota statute limiting reliance on fossil fuels (2013).

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Wisconsin Public Service Commission: Effect of merger on state regulatory powers (2000).

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Illinois Commerce Commission: Affiliate relations and mixing of utility and non-utility businesses (1998).

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Speaker and Lecturer

United States: American Antitrust Institute; American Association of Retired Persons; American Bar Association; American Power Conference; American Public Power Association; American Wind Energy Association; Chicago Bar Association (Energy Section); Columbia University Institute for Tele-Information; Electric Cooperatives of South Carolina; Electric Power Research Institute; *Electric Utility Week*; Electricity Consumers Resource Council; Energy Bureau; *Energy Daily*; Executive Enterprises; Exnet; Federal Energy Bar Association; Harvard Electricity Policy Group; Indiana State Bar Association; Infocast; King Abdullah Petroleum Studies and Research Center; Louisiana Energy Bar; Management Exchange; Maryland Resiliency Through Microgrids Task Force; MIT Energy Initiative; Michigan State University Public Utilities Institute; Mid-America Association of Regulatory Commissioners; MidAtlantic Demand Resources Initiative; Mid-Atlantic Conference of Regulatory Utility Commissioners; National Association of Regulatory Utility Commissioners; National Association of State Utility Consumer Advocates; National Conference of Regulatory Attorneys; National Governors Association; National Independent Energy Producers; New England Conference of Public Utility Commissioners; New England Public Power Association; New Mexico State University Regulatory Studies Program; New York Bar Association (Energy Section); North Carolina Electric Membership Corporation; Pennsylvania Bar Institute; Puerto Rico Energy Center; Puerto Rico Institute of Public Policy; Regulatory Studies programs at Michigan State University, New Mexico State University and University of Idaho; Society of American Military Engineers; Society of Utility and Regulatory Financial Analysts; Southeastern Association of Regulatory Utility Commissioners; Universidad del Turabo (Puerto Rico); United Nations Association at Georgetown Law; U.S. Department of Energy Forum on Electricity Issues; U.S. Department of Energy Solar Energies Technology Office; U.S. Environmental Protection Agency; Western Interstate Energy Board; Wisconsin Public Utilities Institute; Wisconsin Bar-Public Utilities Section; Yale Alumni in Energy; Yale School of Forestry and Environmental Studies.

International: Australian Competition and Consumer Commission; Australian Energy Regulator; Bergen Center for Competition Law & Economics, University of Bergen (Norway); British Columbia Utilities Commission; Canadian Association of Members of Utility Tribunals; Canadian Energy Law Forum; Central Electric Regulatory Commission (India); Comisión Reguladora de Energía (Mexico); The Energy and Resources Institute (India); Government & Policy Think Tank, Sharif University Institute of Technology (Iran); Independent Power Producers Association of India; India Institute of Technology at Kanpur; Ludwig-Maximilians-Universität (Munich, Germany); Management Development Institute (Gurgaon, India); National Association of Water Utility Regulators (Rome, Italy); New Zealand Electricity Authority; New Zealand Commerce Commission; Nigeria Electric Regulatory Commission; Office of Utility Regulation of Jamaica; OSIPTEL (the Peruvian Telecom Regulator) Training Program on Regulation for University Students; Petroleum and Natural Gas Regulatory Board (India);

Regulatel (an international forum of telecommunications regulators); Regulatory Policy Institute (Cambridge, England); Utilities Regulatory Authority of Vanuatu; World Regulatory Forum.

Community Activities

Member, PEPCO Work Group, appointed by County Executive of Montgomery County, Maryland (2010–2011).

Sunday School teacher, Temple Emanuel, Kensington, Maryland (2002–2006, 2008).

Board of Trustees, Temple Emanuel (2005–2006).

Musical performer (cello): Riderwood Village Retirement Community (2003-present); St. Paul Episcopal Church (Centreville, MD).

Interrogatories Cited

CCAE INTERROGATORY 2-4: **PEDRO AZAGRA BLAZQUEZ**

PLEASE CONFIRM THAT AVANGRID WILL PAY SHAREHOLDERS \$4.318 BILLION FOR APPROXIMATELY \$1.8 BILLION OF PNMR EQUITY (BASED ON THE SEPTEMBER 30, 2020 10-Q). IF THIS IS NOT CONFIRMED, PLEASE EXPLAIN HOW MUCH WILL BE PAID FOR PNMR'S EQUITY, AND PLEASE PROVIDE ALL SUPPORTING CALCULATIONS AND DOCUMENTATION WITH YOUR RESPONSE.

RESPONSE:

Confirmed.

NMAG INTERROGATORY 2-6: **PEDRO AZAGRA BLAZQUEZ**

PLEASE CONFIRM THAT THE TOTAL TRANSACTION VALUE IS \$4.318 BILLION, PLUS APPROXIMATELY \$4.0 BILLION OF ASSUMED DEBT, FOR A TOTAL OF APPROXIMATELY \$8.318 BILLION. IF THIS IS NOT CONFIRMED, PLEASE EXPLAIN HOW MUCH WILL BE PAID IN TOTAL, AND PLEASE PROVIDE ALL SUPPORTING CALCULATIONS AND DOCUMENTATION WITH YOUR RESPONSE.

RESPONSE:

Avangrid confirms that the transaction value includes \$4.318 billion equity value, plus approximately \$4.0 billion debt, which results in a projected total transaction value of approximately \$8.3 billion.

NEE INTERROGATORY 4-24: **PEDRO AZAGRA BLAZQUEZ**

DESCRIBE ALL TYPES, SOURCES AND TERMS OF THE ACQUISITION FINANCING FOR THIS TRANSACTION.

RESPONSE:

Based on preliminary estimates, Avangrid expects a potential scenario in which the \$4.3 billion equity value is financed with approximately \$700 million of debt financing at Avangrid and \$3.6 billion from an issuance of Avangrid common equity (including Iberdrola's participation pro-rata for its current ownership in Avangrid). Iberdrola has issued a funding commitment letter for the \$4.3 billion equity value. Please note that the actual financing plan may differ from this.

NEE INTERROGATORY 4-26:
PEDRO AZAGRA BLAZQUEZ

WHAT IS AVANGRID/IBERDROLA'S EXPECTED RETURN ON THE FULL ACQUISITION COST? WHAT ARE THE SPECIFIC NET REVENUE FLOW AT THE ACQUIRER PROJECTS WILL PRODUCE THAT EXPECTED RETURN?

RESPONSE:

No specific expected return assumptions were made for the acquisition.

NMAG INTERROGATORY 6-4:
JOSEPH D. TARRY

PLEASE EXPLAIN THE PROXY STATEMENT'S USE OF "IBERDROLA/AVANGRID," AS OPPOSED TO THE NAME OF THE APPLICANT, AVANGRID.

RESPONSE:

Many of the discussions PNMR held relating to a transaction with Avangrid were with representatives of both Avangrid and Iberdrola, the 80% shareholder of Avangrid. Accordingly, "Iberdrola/Avangrid" seemed an appropriate designation for purposes of the Proxy Statement disclosure. Iberdrola is not a party to the merger agreement.

ABCWUA REQUEST FOR ADMISSION 1-2:
JOSEPH. D TARRY

REGARDING STATEMENTS IN THE DPS AT 34, "KEY CONSIDERATIONS IN SELECTING THESE COMPANIES WERE STRATEGIC FOCUS/PRESENCE IN THE REGION, FINANCIAL CAPABILITY AND ABILITY TO PAY THE MERGER CONSIDERATION, AND THE LIKELIHOOD OF BEING ABLE TO RECEIVE REGULATORY APPROVAL AND CONSUMMATE A TRANSACTION." PLEASE ADMIT OR DENY THAT PURCHASE PRICE/ABILITY TO PAY WAS THE PRIMARY CONSIDERATION FOR PNM IN REVIEWING IBERDROLA'S OFFER. IF DENIED, PLEASE LIST, IN ORDER OF IMPORTANCE, THE KEY CONSIDERATIONS IN SELECTING THESE COMPANIES.

RESPONSE:

Denied. The section in the DPS entitled "PNMR's Reasons for the Merger" identifies the numerous factors considered by the PNMR board in making its determination to approve the

merger with Avangrid. The PNMR board did not determine an order of importance of these factors.

NMAG INTERROGATORY 1-21:
ROBERT D. KUMP

PLEASE QUANTIFY AND PROVIDE THE ACQUISITION PREMIUM THAT RESULTS FROM THE PROPOSED TRANSACTION. PLEASE PROVIDE ALL SUPPORTING ASSUMPTIONS, CALCULATIONS, AND WORKPAPERS WITH YOUR RESPONSE.

RESPONSE:

Please see JA Exhibit NMAG 1-21 for the calculation.

NMAG INTERROGATORY 2-3:
JOSEPH D TARRY/PEDRO AZAGRA BLAZQUEZ

PLEASE PROVIDE THE TOTAL NUMBER OF SHARES OUTSTANDING FOR A) PNMR, B) AVANGRID, AND C) IBERDROLA.

RESPONSE:

- A. As of December 31, 2020, PNMR has 85,834,874 shares of common stock outstanding (no par value).
- B. The total number of shares outstanding for Avangrid is 309,491,082, which represents the weighted-average number of basic common shares outstanding as of September 30, 2020.
- C. The total number of shares outstanding for Iberdrola is 6,350,061,000 as of September 2020.

NEE INTERROGATORY 4-27:
PEDRO AZAGRA BLAZQUEZ

PNM'S RETAIL RATES EARN AN AUTHORIZED RETURN ON ONLY BOOK COST. THE AVANGRID/IBERDROLA'S ACQUISITION COST EXCEEDS THAT BOOK COST. GIVEN THOSE FACTS, HOW WILL THE AVANGRID/IBERDROLA MAKE UP THE DIFFERENCE BETWEEN WHAT PNM CAN EARN ON BOOK COST AND WHAT THE AVANGRID/IBERDROLA EXPECTS TO EARN ON ITS FULL ACQUISITION COST? TO WHAT EXTENT IS THE ACQUIRER RELYING ON THE FOLLOWING FACTORS TO RECOVER ITS ACQUISITION COSTS:

- A. REGULATORY LAG,

- B. EARNING AN EQUITY-LEVEL RETURN ON PNM EQUITY FINANCED WITH DEBT, AND**
- C. OTHER FACTORS?**

RESPONSE:

When evaluating investment opportunities, Avangrid/Iberdrola seek to identify operations that have a history of operational excellence and are situated in regions with high growth potential. Avangrid/Iberdrola are convinced that PNM presents such an opportunity.

Avangrid/Iberdrola do not intend to rely on regulatory lag or use of leverage at PNM.

NMAG INTERROGATORY 6-0 (SIC):
JOSEPH D. TARRY

REFERENCE PAGE 35 OF THE PROXY STATEMENT: "IN THIS [MAY 2019] DISCUSSION, THE PNMR BOARD FOCUSED ON ITS DESIRE TO OBTAIN A FAIR VALUE FOR SHAREHOLDERS, WHILE ALSO EMPHASIZING THE IMPORTANCE OF A STRATEGIC MERGER PARTNER'S ABILITY TO ENHANCE THE COMPANY'S PURSUIT OF ITS STRATEGIC DIRECTION."

- A. PLEASE DESCRIBE FULLY WHAT IS MEANT BY "ABILITY TO ENHANCE."**
- B. PLEASE DESCRIBE FULLY WHAT IS MEANT BY "STRATEGIC DIRECTION."**

RESPONSE:

- A. "Ability to enhance" includes the additional financial capacity that could be provided by a merger partner with greater financial resources than PNMR. It includes "the benefits ... that the scale, scope and diversity of the combined companies would better position PNMR to make rate base investments, invest in new technologies and strengthen PNMR's balance sheet", as stated on p. 41 of the Proxy Statement. It includes "the benefits to customers and local communities that can be provided by a larger company, with a focus on creating jobs in New Mexico, sustainability and reliable and efficient services", as stated on p. 50 of the Proxy Statement.

- B. As of May 2019, PNMR's most recent articulation of its "strategic direction" was contained in its publicly-filed April 2019 Investor Meetings Presentation and contained two principal features: (1) "Transform to Cleaner Energy Portfolio: Plans to be coal-free by 2031, Retire and replace coal-fired generation with cleaner energy portfolio, Invest to maintain system reliability"; and (2) "Meet Customer Expectations: Provide reliable, affordable energy while enhancing customer experience, Integrate technologies and customer insights to new products and services, Enhance grid to facilitate evolving customer needs".

NMAG INTERROGATORY 1-25:
PEDRO AZAGRA BLAZQUEZ

PLEASE IDENTIFY THE LARGEST FIVE SHAREHOLDERS OF IBERDROLA, AND PLEASE IDENTIFY THE NUMBER OF SHARES OWNED BY EACH.

RESPONSE:

The only data that Iberdrola maintains in response to this question is as follows:

SHAREHOLDER	VOTING INTEREST AS A PERCENTAGE OF TOTAL
Qatar Holdings LLC	8.69
BlackRock Group	5.251
Norges Bank	3.43

NEE INTERROGATORY 4-62:
PEDRO AZAGRA BLAZQUEZ

IN WHAT OTHER MARKETS DOES AVANGRID/IBERDROLA INTEND TO ACQUIRE UTILITIES? WHAT CRITERIA DOES AVANGRID/IBERDROLA USE TO DETERMINE INTEREST IN NEW MARKETS?

RESPONSE:

Avangrid regularly looks for opportunities to engage in mergers, acquisitions and other strategic transactions in the United States. Avangrid looks for opportunities that would have a good strategic fit with Avangrid's core businesses in stable environments, offering future growth opportunities, and maintaining balance sheet strength.

NMAG INTERROGATORY 6-16:
PEDRO AZAGRA BLAZQUEZ

USING 2019 FIGURES, IF PNM HAD BEEN A SUBSIDIARY OF AVANGRID, WHAT PERCENTAGE OF IBERDROLA'S CONSOLIDATED (A) REVENUES AND (B) NET INCOME WOULD HAVE BEEN REPRESENTED BY PNM'S REVENUES AND NET INCOME?

RESPONSE:

PNM would have represented 3% of Iberdrola's revenues, and 1% of Iberdrola's net income.

NEE INTERROGATORY 1-13:
PEDRO AZAGRA BLAZQUEZ

PLEASE PROVIDE THE FOLLOWING INFORMATION REGARDING MR. BLAZQUEZ'S STATEMENT IN HIS DIRECT TESTIMONY (P. 11) THAT "IN PARTICULAR, AVANGRID'S FINANCIAL RESOURCES WILL ALLOW PNM TO INVEST IN NEW TECHNOLOGIES AND SUPPORT AN ACCELERATED TRANSITION TO CLEAN ENERGY, AND WILL ASSIST PNM WITH ITS PLANS TO EXIT ITS COAL GENERATION SOONER":

- A. DESCRIBE HOW AVANGRID INTENDS, DESIRES OR HOPES TO ACCELERATE PNM'S TRANSITION TO CLEAN ENERGY IF THE PROPOSED TRANSACTION IS APPROVED;**
- B. STATE WHETHER, IF THE PROPOSED TRANSACTION IS APPROVED, IT IS AVANGRID'S INTENTION, DESIRE OR HOPE TO MAKE PNM'S GENERATION RESOURCE PORTFOLIO CARBON FREE ANY EARLIER THAN 2040 WHEN PNM INDICATED IN CASE NO. 19-00195-UT IT PLANNED OR INTENDED TO BECOME N FREE AND, IF SO, DESCRIBE THAT CARBON FREE TIME OBJECTIVE OR TARGET;**
- C. AVANGRID HAS PROVIDED ANY INPUT TO PNM OR PNMR REGARDING, OR OTHERWISE PARTICIPATED IN, PNM'S DEVELOPMENT OF ITS NEXT INTEGRATED RESOURCE PLAN ("IRP") EXPECTED TO BE FILED WITH THE COMMISSION EARLY NEXT YEAR AND, IF SO, STATE THE NAME AND TITLE OF EACH SUCH OFFICER AND EMPLOYEE AND DESCRIBE THE SCOPE OF THAT INPUT OR PARTICIPATION.**

RESPONSE:

- A. As one of the cleanest U.S. utilities and a leader in renewable energy, Avangrid is at the forefront of the nation's transformational change in how energy is generated and utilized to address the issues of climate change. Avangrid is strongly committed to reducing its carbon intensity rate by investing in wind and solar generation technologies and to keeping its carbon level well below the industry average.**

In 2019, Avangrid continued to grow its renewables capacity with the commissioning of 831 MW of wind projects, including 605 MW in the fourth quarter as of December 31, 2019. Avangrid Renewables had over 700 MW of onshore wind under construction with expected completion in 2020 of the following projects: The 158 MW Otter Creek Wind Farm in Illinois, the 155 MW Tatanka Ridge Wind Farm in South Dakota, and the 306 MW La Joya Wind Farm in New Mexico. In addition, Avangrid Renewables plans to substantially expand its utility-scale solar portfolio, with at least 734 MW planned to enter service by 2022.

During 2019, Avangrid Renewables executed 480 MW of new power purchase agreement contracts, including long-term contracts for the 215 MW Montague solar project in Oregon and 57 MW Camino solar project 57 MW Camino solar project in California that includes 11 MW of battery storage.

Avangrid Renewables' business plan includes investment of more than \$8 billion between 2021 and 2025, with \$3 billion in our offshore wind projects and around \$1 billion per year in onshore wind and solar. With these investments, Avangrid expects to add 5.6 GW to reach a total consolidated capacity of 13.2 GW by 2025, including 1.6 GW of offshore wind from the Vineyard Wind and Park City Wind projects. This represents an increase of approximately 74% compared to 2020 figures.

In addition to Avangrid's continued growth in renewable energy capacity, the company also seeks to reduce operational emissions and energy losses in transmission and distribution, which remain below 7%.

In 2019 our Networks businesses supported their commitment to a clean energy future investing a record \$1.6 billion in efforts to strengthen and modernize the grid infrastructure and develop innovative technologies that will serve as the backbone of our energy transformation. Avangrid has set industry-leading targets to reduce emissions and is investing in new technologies and innovations that enable the clean energy transformation.

Avangrid has made the following commitments to addressing climate change and achieving carbon neutrality:

- Committed to achieving carbon neutrality from owned or controlled sources (Scope 1) by 2035
- Commitment to decreasing GHG emissions intensity from owned or controlled sources (Scope 1) by 35% by 2025 v 2015
- Commitment to increasing renewable installed capacity by more than 100% by 2025 v 2015
- Commitments to greening our facilities by reducing CO2 emissions by 25% and in our own fleet by investing in charging stations and converting 60% of fleet to cleaner energy by 2030 (100% for light duty).

Climate change is a key consideration in defining Avangrid's strategy and Avangrid prioritizes its actions based on the UN Sustainable Development Goals. Avangrid treats climate change not only as a risk factor, but also as an opportunity for growth through mitigation and adjustment activities during the transition toward a low-carbon economy. Avangrid's strategy is aligned with the objectives of the Paris Agreement, committing to the decarbonization of the energy model through renewable energy, storage and smart grids. We are also investing in infrastructure to protect customers from the effects of climate change such as the threat of flooding and the increasing frequency and severity of storms.

Avangrid's Board of Directors and senior management are committed to identifying and evaluating the risks to the company associated with climate change. Every year, risk tolerance levels are reviewed and approved through risk policies and limits that establish the qualitative and quantitative risk appetite at the level of the group and at each of the principal

businesses and corporate functions. In addition, the board regularly discusses major risks and threats and the different exposures of the group, as well as compliance with the risk policies, limits and approved indicators.

As a result of actions by Avangrid, Iberdrola, a multitude of strategic players in the US energy industry and the investment community, there has been a calculated move away from coal-fired generation projects. To date, over 130 globally significant banks and insurers have announced their divestment from coal mining and/or coal-fired power plants, and more than 30 of the largest asset managers have announced their divestment from coal mining and/or coal-fired power plants. Global capital flight pressures are building, rapidly. Once significant strategic and financial players start moving away from coal, others will continue to follow. The Institute for Energy Economics and Financial Analysis (IEEFA) reports that the “rush for the exit is likely to become a stampede, particularly following BlackRock’s divestment from thermal coal announced in January 2020.”

Avangrid is working to encourage the momentum away from coal-fired generation. While early retirement is certainly an important goal, where an equity owner owns a minority share and is not a controlling interest holder (as PNM is with Four Corners), the best way to continue building momentum is to divest as soon as possible. With an early exit by PNM, PNM’s customers will be served from a resource mix with reduced carbon emissions. Requiring PNM to retain an ownership interest in a coal generation asset is inconsistent with the Energy Transition Act and the Renewable Energy Act, is contrary to Avangrid’s internal environmental policies, and contrary to building this momentum.

- B. Avangrid has not discussed with PNM a different target carbon free date, but the importance of these issues to Avangrid is reflected in the response to A. above.
- C. No.

NMAG INTERROGATORY 6-9:
JOSEPH D. TARRY/ROBERT D. KUMP

REFERENCE PROXY STATEMENT PAGE 41, FEB. 20, 2020: "THE PNMR BOARD FURTHER DISCUSSED THE POSSIBLE STRATEGIC BENEFITS OF AN AVANGRID MERGER FOR PNMR. THESE BENEFITS INCLUDED THAT THE SCALE, SCOPE AND DIVERSITY OF THE COMBINED COMPANIES WOULD BETTER POSITION PNMR TO MAKE RATE BASE INVESTMENTS, INVEST IN NEW TECHNOLOGIES AND STRENGTHEN PNMR'S BALANCE SHEET."

- A. PLEASE IDENTIFY THE SPECIFIC “RATE BASE INVESTMENTS” CONTEMPLATED?**

- B. DOES THIS CHARACTERIZATION OF "RATE BASE INVESTMENTS" AS A "STRATEGIC BENEFIT" MEAN THAT PNMR EXPECTED THAT FOR FUTURE CAPITAL EXPENDITURES, THE PRC WOULD GRANT THE OPPORTUNITIES TO MAKE THOSE EXPENDITURES TO PNM?**
- C. DOES THE REFERENCE TO THE "BENEFITS" OF "RATE BASE INVESTMENTS" MEAN THAT PNM OR IBERDROLA/AVANGRID WILL OPPOSE PRC EFFORTS TO AWARD THOSE OPPORTUNITIES BASED ON BIDDER MERIT?**

RESPONSE:

- A. The rate base investments discussed by the PNMR Board do not refer to specific individual projects, but instead reference rate base investments in general.
- B. PNM's current capital expenditure plan does not include any generation capital that requires the PRC to grant the opportunity to make the investment. The plan does assume that PNM gets recovery of its capital investments through normal rate case filings and FERC formula rates.
- C. No.

NMAG INTERROGATORY 7-5:
ROBERT D. KUMP

NEE 2-6 ASKED: "STATE WHETHER AVANGRID SUPPORTS THE DEVELOPMENT OF NON-UTILITY OWNED RENEWABLES IN NEW MEXICO, AND IF NOT, WHAT THE PUBLIC POLICY BASES ARE FOR THAT POSITION." YOU RESPONDED: "NON-UTILITY OWNED RENEWABLES ALREADY EXIST IN NEW MEXICO, AND AVANGRID IS NOT PROPOSING TO CHANGE THE CONTINUED EXISTENCE OF NON-UTILITY OWNED RENEWABLES IN NEW MEXICO."

- A. PLEASE ANSWER: "SUPPORT"—YES OR NO?**
- B. IF THE ANSWER IS "YES WE SUPPORT," RECONCILE THAT ANSWER WITH YOUR OPPOSITION TO HAVING AN INDEPENDENT MONITOR OVERSEE PROCUREMENT OF THIRD-PARTY-SUPPLIED POWER.**
- C. IF THE ANSWER IS "NO WE DON'T SUPPORT," EXPLAIN YOUR ANSWER.**

RESPONSE:

- A. Joint Applicants object to this interrogatory to the extent it attempts to limit Avangrid's ability to provide a full answer to the question. Subject to and without waiving this objection, Avangrid supports efficient, reliable, cost-effective renewable energy generation in New Mexico, whatever the source.
- B. Avangrid is not opposed to a third-party being involved in the procurement process. Avangrid does not believe the cost is necessary based on the many protections that

already exist under Federal and State law. Avangrid further believes it is inappropriate for a third-party appointed by the Commission to determine the awarding of any projects involving the operation of a utility's system in light of the burden of proof that already exists for PNM to prove that certain contracts benefit ratepayers. Finally, Avangrid believes it would be inappropriate to cause PNM to incur these costs when other electric utilities in the state are not required to have such third-party oversight and expense.

C. See response to NMAG 7-5(B).

NEE INTERROGATORY 2-6:
ROBERT D. KUMP

THE DIRECT TESTIMONY OF WITNESS BLAZQUEZ STATES, AT PAGE 11, LINES 1-6, "FOR AVANGRID, THIS IS A STRATEGIC TRANSACTION THAT CREATES A SIGNIFICANT REGULATED UTILITY AND RENEWABLE ENERGY PLATFORM. AVANGRID HAS ALREADY MADE SIGNIFICANT RENEWABLE ENERGY INVESTMENTS IN NEW MEXICO, AND BELIEVES THAT THE PROPOSED TRANSACTION WILL ALLOW NEW MEXICO TO CONSIDER NEW EFFICIENT INTEGRATED ALTERNATIVES FOR REPLACING AGING FOSSIL GENERATION WITH RENEWABLE ALTERNATIVES." PLEASE STATE WHETHER AVANGRID SUPPORTS THE DEVELOPMENT OF NON-UTILITY OWNED RENEWABLES IN NEW MEXICO, AND IF NOT, WHAT THE PUBLIC POLICY BASES ARE FOR THAT POSITION.

RESPONSE:

Non-utility owned renewables already exist in New Mexico, and Avangrid is not proposing to change the continued existence of non-utility owned renewables in New Mexico.

NEE INTERROGATORY 4-40:
RONALD N. DARNELL

PLEASE DESCRIBE IN DETAIL THE SPECIFIC PUBLIC INTEREST THAT THIS ACQUISITION IS ADDRESSING AND HOW PNM IS NOT CURRENTLY MEETING THIS NEED AND HOW THE APPROVAL OF THIS MERGER WILL IMPROVE AVANGRID/IBERDROLA'S ABILITY TO MEET THIS NEED.

RESPONSE:

PNM provides reliable, safe and cost-effective electric service to its customers in full accordance with its obligation to serve and in conformity with Commission requirements. With regard to the additional benefits that will result from the merger, please see responses to NEE 1-13, NEE 4-4 and NEE 4-31.

NEE INTERROGATORY 4-32
ROBERT D. KUMP

TO PRODUCE THE CLAIMED BENEFITS, WHAT SPECIFIC ACTIONS WILL THE MERGED COMPANY TAKE, ON WHAT SPECIFIC SCHEDULE? PROVIDE A MONTH-BY-MONTH AND YEAR-BY-YEAR PLAN. IDENTIFY THE SPECIFIC INDIVIDUALS WHO WILL BE RESPONSIBLE FOR THESE ACTIONS, ALONG WITH THE COMPENSATION AND CAREER CONSEQUENCES IF THEY PRODUCE OR FAIL TO PRODUCE THE CLAIMED BENEFITS.

RESPONSE:

Avangrid has not yet developed a month-by-month plan. However, Avangrid will fulfill the regulatory commitments that have been offered in this proceeding within the timeframes set forth in those commitments. See response to NEE 4-18.

NEE INTERROGATORY 4-33:
PEDRO AZAGRA BLAZQUEZ

AT WHAT POINT IN THE PROCESS OF CONSIDERING AND FASHIONING THIS TRANSACTION DID YOU STUDY COST SAVINGS AND MANAGEMENT IMPROVEMENTS? WHO PERFORMED THE STUDIES? IDENTIFY ALL INSTRUCTIONS OR GUIDANCE PR DUALS RESPONSIBLE FOR PERFORMING THE STUDIES.

RESPONSE:

No such studies have been performed.

NEE INTERROGATORY 4-35:
ROBERT D. KUMP

PLEASE IDENTIFY ALL SPECIFIC ECONOMIC OR ENGINEERING INEFFICIENCIES IN PNM'S CURRENT OPERATIONS THAT IBERDROLA/AVANGRID'S ACQUISITION OF PNM'S SYSTEM WILL IMPROVE.

RESPONSE:

Avangrid has not proposed any specific economic or engineering inefficiencies in PNM's operations that would be improved as a result of the Proposed Transaction. See response to NEE-4-31.

NMAG INTERROGATORY 4-6:
ROBERT D. KUMP

- A. DESCRIBE WITH FULL PRECISION ALL “BEST PRACTICES” YOU WILL INTRODUCE AT PNM.
- B. EXPLAIN WHY PNM IS INCAPABLE OF EFFECTING THOSE BEST PRACTICES ON ITS OWN.

RESPONSE:

Avangrid has not yet identified the best practices to be introduced at PNM. This will be a collaborative effort beginning during the integration process that starts at closing, and will be ongoing. The only work that has been done is the identification of the candidate areas for best practices that will be subject to discussion between the joint teams.

NMAG INTERROGATORY 4-9:
ROBERT D. KUMP

- A. IDENTIFY THE SPECIFIC INDIVIDUALS AT AVANGRID OR IBERDROLA RESPONSIBLE FOR ENSURING, FOR EACH OF THE PRIOR ACQUISITIONS OF U.S. UTILITIES, THE IMPLEMENTATION OF BEST PRACTICES.
- B. DESCRIBE THE SPECIFIC CONSEQUENCES FOR EACH SUCH INDIVIDUAL IF THEY FAILED TO ACHIEVE THE BEST PRACTICE. PLEASE DO NOT OBJECT ON GROUNDS THAT THIS OCCURRED OUTSIDE NEW MEXICO AND THEREFORE IS NOT RELEVANT TO NEW MEXICO. YOU’VE CLAIMED YOU’LL INTRODUCE BEST PRACTICES HERE. YOUR PAST EXPERIENCE ON SUBJECT IS RELEVANT TO THE CREDIBILITY OF YOUR CURRENT CLAIM.

RESPONSE:

Avangrid’s integration team will initiate discussions regarding best practices, which will be ongoing after integration is complete. Avangrid will share information regarding best practices. There are no consequences regarding failure to provide this information; however it is Avangrid’s experience that the Avangrid Networks utilities choose to adopt cost-effective best practices through this process.

CONFIDENTIAL JA Exhibit NMAG 4-5.1

(quoted in the main testimony)

NEE INTERROGATORY 4-48:

ROBERT D. KUMP

INDICATE YOUR COMMITMENT TO THIS PROPOSITION: IF THE IBERDROLA/AVANGRID EVER HAS INSUFFICIENT FINANCIAL RESOURCES TO ACQUIRE PNM AS WELL AS THE HOLDING COMPANY'S OTHER AFFILIATES, PNM'S NEEDS WILL HAVE PRIORITY.

RESPONSE:

Each utility currently has and will continue to have the same obligation to obtain necessary financing to meet its needs to continue to provide safe and reliable service at reasonable cost. Of course, Avangrid will provide increased access for PNM to the equity and debt markets.

NMAG INTERROGATORY 4-8:

ROBERT D. KUMP

- A. PROVIDE A COMPLETE, OPERATIONALLY RELEVANT DEFINITION OF "LOCAL CONTROL."**
- B. PRECISELY WHAT DECISIONS BY PNM ARE YOU LEGALLY COMMITTING NOT TO INTERFERE WITH?**

RESPONSE:

Avangrid's definition of local control is the ability of utility to control day-to-day operations, which includes dividend issuances, debt issuances, capital expenditures, budgeting, operations and maintenance, customer service, regulatory proceedings and stakeholder relations, among others.

NMAG INTERROGATORY 5-7:

ROBERT D. KUMP

REGARDING "DAY TO DAY" OPERATIONS OF PNM POST-CLOSING THAT AVANGRID STATES WILL BE HANDLED BY THE LOCAL COMPANY OFFICERS:

- A. DEFINE WHAT DAY-TO-DAY OPERATIONS ENTAIL.**
- B. WILL PNM CONTROL THE TIMING OF ITS RATE CASES POST-MERGER? IF NOT, EXPLAIN WHY NOT.**
- C. WILL PNM CONTROL HIRING FOR ALL OF ITS MANAGEMENT, UNION AND NON-UNION EMPLOYEES POST-MERGER? IF NOT, EXPLAIN THE**

CIRCUMSTANCES THAT WILL LIMIT PNM'S AUTONOMY IN THE AREA OF HIRING EMPLOYEES.

- D. WILL PNM DETERMINE THE AMOUNT AND TIMING OF THE DIVIDENDS IT WILL PROVIDE TO ITS PARENT? IF NOT, EXPLAIN WHY NOT.**
- E. LEY RESPONSIBLE FOR THE CREATION AND ISSUANCE OF REQUESTS FOR PROPOSALS?**
- F. WILL PNM CONTROL ITS CAPITAL SPENDING PROGRAM? IF NOT, EXPLAIN WHY NOT.**
- G. WILL PNM BE SOLELY RESPONSIBLE FOR THE AMOUNT AND TIMING OF ITS MAINTENANCE PROGRAMS? IF NOT, EXPLAIN WHY NOT.**
- H. RESPONSIBLE FOR ITS IRP? IF NOT, EXPLAIN HOW ITS AUTONOMY BE LIMITED IN THIS AREA.**

RESPONSE:

- A. Day-to-day operations include all activities necessary for the utility to achieve its strategic goals and to provide safe, reliable and high-quality service to customers.
- B. Yes
- C. Yes
- D. Yes, as permitted by law and subject to any applicable Securities and Exchange Commission requirements.
- E. Yes
- F. Yes
- G. Yes
- H. Yes

NMAG INTERROGATORY 5-13

ROBERT D. KUMP

REGARDING QUALITY-OF-SERVICE ISSUES POST-MERGER AT CENTRAL MAINE POWER ("CMP"), PLEASE:

- A. DESCRIBE THE QUALITY-OF-SERVICE ISSUES THAT AROSE FROM THE TRANSITION TO A NEW BILLING OR ACCOUNTING SYSTEM.**
- B. EXPLAIN WHY CMP NEEDED A NEW BILLING SYSTEM AND INDICATE IF IT WAS REQUIRED FOR COMPATIBILITY WITH IBERDROLA'S SYSTEMS.**
- C. INDICATE IF PNM WILL ALSO BE REQUIRED TO TRANSITION TO A NEW SYSTEM OF BILLING OR ACCOUNTING POST-MERGER.**
- D. PROVIDE THE AMOUNT AND TIMING OF PENALTIES LEVIED BY THE MAINE PUBLIC UTILITIES COMMISSION.**
- E. DESCRIBE ALL QUALITY-OF-SERVICE ISSUES THAT THE MAINE UTILITY COMMISSION ADDRESSED WHEN IT ASSESSED PENALTIES TO CMP.**

F. EXPLAIN WHY SUCH QUALITY-OF-SERVICE ISSUES CANNOT OCCUR IN NEW MEXICO FOLLOWING THE MERGER CLOSE.

RESPONSE:

- A. Central Maine Power Company's roll out of a new "SmartCare" billing system in 2017 was challenged due to initial bill errors and billing system defects its customers experienced following its implementation in 2017. The challenges in rolling out the new billing system were compounded by the coincidence of an intense winter cold snap and a steep increase in the standard offer price (reflecting pass-through supply costs outside of CMP's control). These three factors together made for a perfect storm of unprecedentedly difficult events. Resulting high customer bills and intense media scrutiny created an elevated level of customer distrust, which in turn put unanticipated stress on the Company's customer contact center. As CMP acknowledged in the attached "Docket No. 2018-00194 order", its customer service following the implementation of SmartCare was not up to the standards acceptable to the CMP. An independent audit conducted by the Maine Public Utilities Commission confirmed that the underlying cause for customer high bill complaints was not due to defects in the billing system, but rather extremely cold weather and a dramatic increase in supply prices.

CMP has made substantial progress in addressing these. CMP has appointed a new Vice President of Customer Service with a focus specifically on Maine, a Manager of Billing and Revenue Recovery dedicated to CMP, added significant new resources in its customer contact center, billing department and system support areas and, as a result, CMP has been achieving levels of customer service quality that are consistently better than targets established by the Commission in Docket No. 2018-00194. All the while, CMP's rates have remained among the lowest in New England.

- B. CMP's legacy customer billing system was a one-off custom development that operated on a mainframe computer system. The system software and hardware were long past expected life and were no longer supportable. In addition, the billing system and operating platform were unable to capitalize on the additional data granularity provided by the Company's Advanced Metering Infrastructure ("AMI") capabilities. The replacement system will provide much greater flexibility to offer innovative rate designs and billing mechanisms through a direct integration with the AMI's meter data management system. For these reasons, the Maine Public Utilities Commission authorized the billing system replacement project. The new system was not required for compatibility with Iberdrola systems.
- C. PNM's billing and accounting systems will be evaluated for conformance and interoperability with existing Avangrid infrastructure after the closing of the proposed transaction.
- D. None.

E. As indicated in the Maine Public Utilities Commission order in Docket No. 2018-00194, the Commission's service quality issues of foremost concern are reflected in the four service quality measures and related target performance levels established in association with the 100 bps penalty imposed on the Company. These four measures and the related performance targets are as follows:

- Average Speed of Answer (Call Center) >80% within 30 seconds
- Call Abandonment Rate (Call Center) <7%
- Estimated Bills <1%
- Bill Error Rate <0.4%

CMP has maintained average performance levels that are better than the Commission's established targets on all four measures since measurement began in March 2020.

F. The CMP service quality issues identified by the Maine Public Utilities Commission in their findings in Docket No.'s 2018-00194 and 2019-00015 arose from a unique confluence of events and circumstances in late 2017 and early 2018, in which the Company faced the implementation of a new customer billing system coincident with one of the largest storm outage events in CMP's history. This was immediately followed by an extremely cold winter period and a dramatic increase in unregulated supply prices. This unfortunate sequence of events stressed CMP's customer service in a variety of ways that could not have been anticipated. The combination of an extended period of outages, followed by several months of extraordinarily high customer bills overwhelmed the Company's contact center. This resulted in many customers having difficulty contacting a CMP representative and many calls being abandoned. As social and conventional media drew perceived connections between high winter customer bills and the new billing system, demands for a PUC investigation and audit further amplified customer mistrust and applied additional stress to CMP's customer service capacity. Although the PUC's investigation and audit ultimately concluded that the source of high customer bills could be attributed to weather conditions and supply price increases, the Commission nonetheless expressed concerns with the quality of CMP's customer service during this period. Accordingly, the PUC ordered a management efficiency penalty of 100 bps on CMP's allowed ROE until the Company successfully demonstrates 18 consecutive months of acceptable customer service performance, as measured by the four measures described above.

To ensure that CMP meets or exceeds the PUC's required service quality measures, CMP and Avangrid management have proactively taken numerous steps to improve customer

service quality, including expanded contact center staffing and adding additional local management oversight of key customer service functions. Importantly, the Company did not wait for a PUC order to implement these steps, but rather implemented these measures well before the Commission issued its decisions in the two referenced proceedings. As a result, CMP has not only met or exceeded the PUC's service quality targets since the Commission issued its decision in February 2020, but was doing so for a number of months prior to this.

As for the likelihood that similar circumstances could be experienced in New Mexico, it is impossible to predict if or when there could be a similar confluence of external forces that would simultaneously fall upon another utility. However, should a similar set of conditions materialize in New Mexico, Avangrid can be expected to similarly react quickly and appropriately to ensure that customer service expectations are met or exceeded.

**AFFIRMATION (IN LIEU OF AFFIDAVIT)
OF SCOTT HEMPLING**

In compliance with the *Temporary NMPRC Electronic Filing Policy of March 20, 2020*, and under Rule 1-011(B) NMRA of the New Mexico Rules of Procedure for the District Courts, I, Scott Hempling, hereby file this Direct Testimony on Behalf of the New Mexico Attorney General and state as follows:

I hereby affirm in writing under penalty of perjury under the laws of the State of New Mexico that the statements contained in the foregoing *Direct Testimony of Scott Hempling on Behalf of the New Mexico Attorney General* are true and correct to the best of my knowledge, information, and belief.

I further declare under penalty of perjury that the foregoing is true and correct.

A handwritten signature in black ink, appearing to read "Scott Hempling". The signature is written in a cursive style with a long horizontal stroke at the end.

Executed on April 2, 2021.

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 and individuals listed below a true and correct copy of the Direct Testimony of Scott Hempling on April 2, 2021.

Stacey Goodwin Ryan Jerman Richard Alvidrez Mark Fenton Carey Salaz Steven Schwebke Patrick V. Apodaca Mariel Nanasi Christopher Sandberg Joan Drake Lisa Tormoen Hickey Nann M. Winter Keith Herrmann Dahl Harris Peter Auh Andrew Harriger Jody Garcia Steven S. Michel April Elliott Cydney Beadles Pat O'Connell Douglas J. Howe Cholla Khoury Gideon Elliot Robert F. Lundin Andrea Crane Doug Gegax Joseph Yar Jeffrey Spurgeon Bruce C. Throne Rob Witwer Jeffrey Albright Michael I. Garcia Amanda Edwards Matt Dunne Maureen Reno Richard L. C. Virtue	Stacey.Goodwin@pnmresources.com ; Ryan.Jerman@pnmresources.com ; Ralvidrez@mstlaw.com ; Mark.Fenton@pnm.com ; Carey.salaz@pnm.com ; Steven.Schwebke@pnm.com ; Patrick.Apodaca@pnmresources.com ; Mariel@seedsbeneaththesnow.com ; cksandberg@me.com ; jdrake@modrall.com ; lisahickey@newLawgroup.com ; wnwinter@stelznerlaw.com ; kherrmann@stelznerlaw.com ; dahlharris@hotmail.com ; pauh@abcwua.org ; akharriger@sawvel.com ; JGarcia@stelznerlaw.com ; smichel@westernresources.org ; April.elliott@westernresources.org ; Cydney.Beadles@westernresources.org ; pat.oconnell@westernresources.org ; dhowe@highrocknm.com ; ckhoury@nmag.gov ; gelliot@nmag.gov ; rlundin@nmag.gov ; ctcolumbia@aol.com ; dgegax@nmsu.edu ; joseph@yarlawoffice.com ; spurgeonJ@southwestgen.com ; bthroneatt@newmexico.com ; witwerr@southwestgen.com ; JA@Jalblaw.com ; mikgarcia@berncogov ; AE@Jalblaw.com ; dunneconsultingllc@gmail.com ; mreno@reno-energy.com ; rvirtue@virtuelaw.com ;	Kyle J. Tisdell Ally Beasley Ahtza Dawn Chavez Joseph Hernandez Nicole Horseherder Jessica Keetso Thomas Singer Mike Eisenfeld Robyn Jackson Jane L. Yee Larry Blank, Ph.D. Saif Ismail Peter J. Gould Kelly Gould Jim Dauphinais Michael Gorman Justin Lesky Stephanie Dzur Ramona Blaber Don Hancock April Elliott Brian J. Haverly Jason Marks Matthew Gerhart R. Scott Mahoney David L. Schwartz Katherine Coleman Thompson & Knight Randy S. Bartell Sharon T. Shaheen Jennifer Breakell Hank Adair Cindy A. Crane Peter Mandelstam Steve W. Chriss Barbara Fix Katherine Lagen	tisdell@westernlaw.org ; beasley@westernlaw.org ; ahtza@navaeducationproject.org ; joseph@navaeducationproject.org ; nhorseherder@gmail.com ; jkeetso@yahoo.com ; Singer@westernlaw.org ; mike@sanjuancitizens.org ; Robyn.jackson@dine-care.org ; jyee@cabq.gov ; lb@tahoeconomics.com ; sismail@cabq.gov ; peter@thegouldlawfirm.com ; Kelly@thegouldlawfirm.com ; jdauphinais@consultbai.com ; mgorman@consultbai.com ; jlesky@leskylawoffice.com ; Stephanie@Dzur-law.com ; Ramona.blaber@sierraclub.org ; sricdon@earthlink.net ; ccae@elliottanalytics.com ; bjh@keleher-law.com ; lawoffice@jasonmarks.com ; matt.gerhart@sierraclub.org ; Scott.Mahoney@avangrid.com ; david.schwartz@lw.com ; Katie.coleman@tklaw.com ; Tk.eservice@tklaw.com ; rbartell@montand.com ; sshaheen@montand.com ; jbreakell@fmtn.org ; hadair@fmtn.org ; crcrane@enchantenergy.com ; peterm@enchantenergy.com ; Stephen.chriss@wal-mart.com ; baafix@earthlink.net ; Katherine.lagen@sierraclub.org ;
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DATED this 2nd day of April, 2021.

NEW MEXICO OFFICE OF THE ATTORNEY GENERAL

/s/ Gideon Elliot

Gideon Elliot, Assistant Attorney General