IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. S-1-SC-39152

PUBLIC SERVICE COMPANY OF NEW MEXICO, and PNM RESOURCES, INC.,

Appellants,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee/Respondent,

and

NEW ENERGY ECONOMY, WESTERN RESOURCE ADVOCATES, INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 611, THE OFFICE OF THE NEW MEXICO ATTORNEY GENERAL, COALITION FOR CLEAN ADDORABLE ENERGY, DINE CITIZENS AGAINST RUINING THE ENVIRONMENT, SAN JUAN CITIZENS ALLIANCE, TO NIZHONI ANI, and NAVA EDUCATION PROJECT,

Intervenor-Appellees.

In The Matter of The Joint Application of Iberdrola, S.A., Avangrid, Inc., Avangrid Networks, Inc., NM Green Holdings, Inc., Public Service Company of New Mexico And PNM Resources, Inc. For Approval of the Merger of NM Green Holdings, Inc. with PNM Resources, Inc.; Approval of a General Diversification Plan; and All Other Authorizations and Approvals Required to Consummate and Implement this Transaction, NMPRC Case No. 20-00222-UT

NEW ENERGY ECONOMY'S RESPONSE IN OPPOSITION TO MOTION TO ENFORCE MANDATE AND ALTERNATIVE VERIFIED PETITION FOR WRIT OF MANDAMUS AND REQUEST FOR SANCTIONS AND ATTORNEY'S FEES

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

New Energy Economy ("NEE") responds as follows to the filing by Avangrid, its parent, Iberdrola, and affiliated corporations (hereinafter, "Avangrid") in which Avangrid seeks to relitigate the motion it filed and lost before the PRC, following remand, in which Avangrid sought to persuade the PRC to dismiss this case as "moot" rather than allowing its original order disapproving the Avangrid/PNM "merger" to stand. Avangrid did not appeal the PRC's decision but now, asks this Court to accept Avangrid's "Motion or Petition for a Writ of Mandamus" to finesse Avangrid's failure to appeal from the PRC's final order, which Avangrid now untimely claims to have somehow violated this Court's remand order. Avangrid's filing is procedurally impermissible, untimely and wrong.

This Court is undoubtedly familiar with the events related to this closed appeal, which the Avangrid parties and PNM brought following the PRC's decision to deny the Avangrid/PNM "merger" in Case No. 20-00222UT. **80RP39843**. The PRC did so after a full evidentiary hearing during which it received extensive evidence regarding problems ratepayers in Maine, Connecticut and New York experienced after Avangrid acquired local utilities, concluding that

the merger would not be in the interest of New Mexico's electricity consumers. **80RP39914-127**. Avangrid and PNM appealed.

After their appeal had been pending for 24 months, Avangrid and PNM cancelled their merger plans. Avangrid/Iberdrola et. al., moved to withdraw their appeal which the Court granted, dismissing Avangrid from the case and deleting it from the caption. *Motion to Withdraw from Appeal,* January 8, 2024.

PNM/PNMR also joined in moving for dismissal insofar as the appeal had involved the PRC's denial of the merger, but moved to retain the appeal regarding sanctions assessed against both PNM/PNMR and Avangrid/Iberdrola et. al., instead of against Avangrid alone. *Motion of Appellants PNM Resources, Inc. and Public Service Company of New Mexico for Partial Dismissal of Appeal*, January 8, 2024. (Attached as Exhibit A to Exhibits to Motion to Enforce Mandate ("Group Exhibits").)

The Court agreed with PNM regarding the sanctions issue and, pursuant to NMSA 1978, Section 62-11-5 (1982) (requiring the Court to annul and vacate the final order in its entirety if it found any error), remanded the case to the PRC to withdraw the sanction it had imposed on PNM and others and to address the PRC's final order consistent with its ruling. *Decision*, No. S-1-SC-39152, March 18, 2024. (Attached as Exhibit D to Group Exhibits.)

After this Court issued its Mandate on May 9, 2024,[1] Avangrid moved the PRC to dismiss the case on the grounds that case was now moot, apparently in the hope that such a dismissal would nullify the final order denying the merger. Case No. 20-00222-UT, *Motion to Dismiss,* May 24, 2024. (Attached as Exhibit F to Group Exhibits.). NEE opposed. (Attached as Exhibit G to Group Exhibits.)

On remand, the PRC did what the Supreme Court required in its Mandate: It withdrew the sanction on PNM et al. As to the balance of the PRC's original final order, the PRC reissued it, stating in *Order Upon Issuance of Mandate and Denying Motion to Dismiss* that the Supreme Court found nothing else in the original final order that was not just and reasonable. Case No. 20-00222-UT, *Order Upon Issuance of Mandate and Denying Motion to Dismiss,* July 11, 2024, ¶¶ 14-18 and Decretal Paragraphs A-C, and F. (Attached as Exhibit I to Group Exhibits.)

Avangrid moved for reconsideration, asserting what they are asserting here: that the Supreme Court's *Mandate,* although silent, somehow required the PRC to dismiss the case as moot. After the PRC denied Avangrid et al.'s Motion to Dismiss and failed to act on Avangrid's August 12, 2024 Motion for Reconsideration, Attached as Exhibit J to Group Exhibits, the Commission issued

[1] (Attached as Exhibit E to Group Exhibits.)

it's Sept. 6th *Order Acknowledging that Motion for Rehearing and Reconsideration Has Been Denied by Operation of Law.* (Attached as Exhibit L to Group Exhibits.)

Avangrid's notice of appeal was due on October 7, 2024 and it did not appeal.

Avangrid now asks this Court to order the PRC in this closed case to dismiss its final order based on mootness, in order to nullify the decision denying the merger. Yet that would be contrary to the principle of *res judicata* as to matters that were not altered by this Court's decision. *See*, *Merl v. Kong*, 2008 Haw. App. LEXIS 681, *9 ("A circuit court's judgment that has been appealed becomes final for res judicata purposes once the appeal is withdrawn.")

Movants/Petitioners rest their unsupported claim that the PRC, by failing to accede to Avangrid's request that the case be dismissed as moot somehow violated this Court's remand order even though it required no such thing. No. S-1-SC-39152, *Mandate*, May 9, 2024, attached as Exhibit E to Group Exhibits.

Avangrid's *Motion to Enforce Mandate and Alternative Verified Petition for Writ of Mandamus* ("Motion/Writ") is without any merit whatsoever, for the following reasons:

1. Avangrid, a party throughout the proceeding before the PRC, complains of an order that it could have appealed but chose not to. The law

establishes that a party must appeal within 30 days of a final decision or denial of a Motion for Rehearing;

2. Even if it could be argued that for some reason this Court should give Avangrid a "pass" for not appealing and allow it to revisit this closed case via a petition for a Writ of Mandamus, it would still lose for the following reasons:

    a. A litigant cannot lose a point at the trial level, fail to appeal, and then, after the time for appeal has run, use a Writ of Mandamus as a substitute for a timely appeal as a way of getting before an appellate court. *See*, Point 2A.

    b. Under the settled law relating to Writs of Mandamus, and under New Mexico Statute, NMSA 1978, §44-2-5, a party cannot pursue a mandamus action if the party had an adequate remedy at law and failed to pursue it. The right to appeal is, by definition, an adequate remedy at law. *See,* Point 2B.

    c. The basis on which Movants/Petitioners proceed is that the PRC didn't adhere to this Court's Mandate. But there is nothing in the Supreme Court's remand order that directed the PRC to dismiss the case on grounds of mootness, much less nullify the PRC's original order, or do anything other than what the PRC, in its discretion,

chose to do. In fact, Avangrid didn't ask the Supreme Court to order anything in its Mandate, nor could it have since it had been permitted to depart this appeal, nor did it even mention "mootness" when it voluntarily withdrew its appeal. *Motion to Withdraw from Appeal*, January 8, 2024 at 1. It is baseless for Avangrid to assert that, through silence, the PRC acquired a mandatory duty to dismiss the case on grounds of mootness instead of applying the *Hobbs* decision[2] and standing on its original order that was no longer under appeal and was therefore "reasonable and lawful", which is what the PRC did. *Order Upon Issuance of Mandate and Denying Motion to Dismiss,* July 11, 2024, ¶¶ 14-18 and Decretal Paragraphs A-C, and F. *See,* Point 2C.

d. It is well-established that a Writ of Mandamus, even if there were no adequate remedy at law, is unavailable unless the right to mandamus is clear, based on undisputed facts and, it involves a matter of great public importance, none of which elements are present here. *See,* Point 2D.

[2] *Hobbs Gas Co. v. N.M. Pub. Serv. Comm'n,* 1993-NMSC-032, ¶ 6, 115 N.M. 678, 858 P.2d 54

3. There is no procedural basis, either in the rules of this Court, the District Courts or the PRC that permits a party to litigation to "file a motion" in a closed case. A party may only file a "motion" after having successfully moved to reopen a case. This Case is closed here and at the PRC. *See,* Point 3.

As demonstrated below, each of the foregoing points is dispositive.

Lastly, New Energy Economy asks this Court for sanctions and attorneys' fees because there is to legal basis for Avangrid's filing and there has been a pattern and practice of procedural violations by Avangrid in this proceeding.[3, 4]

II. ARGUMENT

1. Appeals must be filed within 30 days; Motion for Rehearing Denied by Operation of Law within 20 days.

Pursuant to NMSA 1978 § 62-11-1 any appeal from the PRC must be filed within thirty days of a final order.

[3] For instance, **80RP39973-96**; **81RP40406-10, 81RP40438-41**.

[4] *See*, Group Exhibit A.

This is mirrored in the Commission's Rules: 1.2.2.37 A (1), H. Commission Rule 1.2.2.37 F (6) a motion for rehearing is deemed denied if the Commission does not act on it within twenty days.

According to the New Mexico Supreme Court in *Kelly Inn No. 102, Inc. v. Kapnison,* 113 N.M. 231, 236, 824 P.2d 1033, 1038 (1992), "[O]nce the thirty-day period has passed, we have consistently held that the court loses jurisdiction over the subject matter."

After this Court issued its *Decision* and *Mandate* in the merger case appeal, Avangrid filed a *Motion to Dismiss*, in Case No. 20-00222-UT, seeking dismissal of the case on remand on the grounds that the Merger would no longer take place and it was now moot, which was opposed by New Energy Economy. (Attached as Exhibit F and Exhibit G to Group Exhibits, respectively.) On July 11, 2024, the Commission issued its *Order Upon Issuance of Mandate and Denying Avangrid/Iberdrola's Motion to Dismiss*. (Attached as Exhibit I to Group Exhibits.) On August 12, 2024, Avangrid filed *Avangrid's Motion for Rehearing and Reconsideration of Order Upon Issuance of Mandate and Denying Motion to Dismiss,* at the Commission in Case No. 20-00222-UT.[5] (Attached as Exhibit J to

[5] On August 20, 2024, NEE filed its response to the Motion, opposing the Motion. (Copy attached as Exhibit K to Group Exhibits.)

Group Exhibits.) On September 6, 2024, the Commission issued its *Order Acknowledging that Motion for Rehearing and Reconsideration Has Been Denied by Operation of Law.* (Attached as Exhibit L to Group Exhibits.) Thirty days (plus the weekend) made any notice of appeal timely if filed on or before October 7, 2024. Neither Avangrid or Iberdrola, nor any affiliate chose to file a notice of appeal. Apparently Avangrid, recently came to view its decision not to appeal as a mistake, and, since the time for appeal is long gone, turned to its "motion" or "Petition for a Writ of Mandamus," as legally inappropriate as either maybe, as a way of getting its foot in this Court's door. Avangrid filed its Motion/Petition on November 22, 2024.

The Commission lists the "case status" of the underlying docket, Case No. 20-00222-UT, as "CLOSED" and the last line of the PRC's July 11, 2024 *Order Upon Issuance of Mandate and Denying Motion to Dismiss* states: "This docket is now closed." (Attached as Exhibit I to Group Exhibits.)

Stunningly, Avangrid makes no mention in its current filing about its failure to appeal the decision by the PRC that it is now attempting to bring before this Court by way of "motion" or, alternatively, by way of a petition for a Writ of Mandamus directing the PRC to do what Avangrid unsuccessfully requested when the case was being concluded: dismissing the case as moot. But Avangrid is

raising the same issues now, after the time for appeal has run, that it raised before the PRC following remand. Whatever may be the underlying merits of their position, which NEE believes to be nil, the law is quite clear that a party to a proceeding cannot revive an issue before an appellate court by way of writ or otherwise, if it had the right to appeal but failed to timely do so.

2. There is No Basis For A Writ of Mandamus Under These Circumstances

A. Seeking a Writ of Mandamus Cannot Cure A Failure to Appeal

Mandamus is an extraordinary remedy that is available only where there is no other remedy. See *Cobb v. State Canvassing Bd.,* 2006-NMSC-034, ¶ 20, 140 N.M. 77, 140 P.3d 498. Other parties have tried such extra-legal maneuvers in other jurisdictions and have been soundly rebuffed:

> "[A] writ of mandamus is proper only when there is no plain, adequate and speedy legal remedy. This court has previously pointed out, on several occasions, that the right to appeal is generally an adequate legal remedy that precludes writ relief. Additionally, writ relief is not available to correct an untimely notice of appeal."

Pan v. Eighth Judicial Dist. Court, 120 Nev. 222, 224-225 (Nev. 2004).

> [T]here is no authority for treating an untimely appeal as a writ petition. (See *Taper* v. *City of Long Beach* (1982) 129 Cal.App.3d 590, 606-607 [181 Cal.Rptr. 169].) To do so would be improper because a writ petition should be entertained only where there is no adequate remedy by appeal and the remedy by appeal is not made inadequate by a party's having neglected to submit his notice of appeal for filing within the time allowed. (See *Simmons* v. *Superior Court* (1959) 52 Cal.2d 373, 375 [341 P.2d 13].)

In re Marriage of Patscheck, 180 Cal. App. 3d 800, 804, (1986).

> Wojciechowski may not use a writ of mandamus as a substitute for an untimely notice of appeal. *See Demos v. United States Dist. Court for the E. Dist. of Wash.*, 925 F.2d 1160, 1161 & n.3 (9th Cir. 1991) (order); *cf. In re Teleport Oil Co.*, 759 F.2d at 1378.

Wojciechowski v. Montevideo P'ship. (*In re Montevideo P'ship*.), 12 Fed. Appx. 587, 588. Here, Avangrid chose not to appeal and is trying to conjure up a belated one via mandamus; an effort that, if successful, would make the thirty-day filing requirement for notices of appeal unenforceable.

B. Avangrid is not Entitled to Writ of Mandamus when it has an Adequate Appellate Remedy

"The writ [of mandamus] shall not issue in any case where there is a plain, speedy and adequate remedy in the ordinary course of law." NMSA 1978, §44-2-5. Having a right to appeal is, by definition, an adequate remedy: "Mandamus also will not lie where there is an adequate remedy by appeal." *Montoya v. Blackhurst*, 84 N.M. 91, 92, citing *State ex rel. Sweeney v. Raynolds*, 17 N.M. 282, 127 P. 23 (1912). *See also*, *Alfred v. Anderson*, 86 N.M. 227, 230 (1974) ("…mandamus was not a proper remedy, since Petitioners had a plain, speedy and adequate remedy at law, to wit, an appeal from the order of Respondent denying their motion to quash the writs of garnishment.).

An Ohio Court of Appeals tersely packaged these various principles:

> A writ of mandamus is an extraordinary remedy which is exercised by this Court with caution and issued only when the right to relief is clear. *State ex rel. Brown v. Ashtabula Cty. Bd. of Elections*, 142 Ohio St. 3d 370, 2014-Ohio-4022, 31 N.E.3d 596, P11. Entitlement to a writ of mandamus requires the relator to demonstrate three elements: (1) that there exists a clear legal right to the relief, (2) respondent has a clear legal duty to provide that relief, and (3) no adequate remedy at law exists. …The burden is on the relator to establish the elements necessary to obtain the writ.
>
> It is apparent that Relator has failed to demonstrate the third element necessary for issuance of the extraordinary writ of mandamus: absence of an adequate remedy at law. "A cause of action in mandamus, filed originally in the court of appeals, will not lie where it is determined that the relator has a plain and adequate remedy in the ordinary course of the law by way of appeal." *State ex rel. Middletown Bd. of Edn. v. Butler Cty. Budget Comm.*, 31 Ohio St. 3d 251, 31 Ohio B. 455, 510 N.E.2d 383 (1987), syllabus. **To the extent Relator claims error with the decree in foreclosure in his case, he has not pursued an appeal from that order.**

State ex rel. Kirin v. Krichbaum, 2016-Ohio-887, P4-P5 (Ohio App. 2016).

Emphasis supplied, citations omitted.

C. The Supreme Court's Mandate Did Not Direct the PRC to Dismiss the Case on Grounds of Mootness

When arguing that "mandamus remedies agency disobedience of mandates," Motion/Writ at 19-20, the Movants/Petitioners rely on inapplicable law; the PRC did all the Supreme Court had required in its Mandate, which was to withdraw the sanction on PNM and others, and reissue the Final Order consistent with the *Decision* of March 18, 2024. "The Commission finds that the Final Order should be amended to be consistent and in conformity with the *Decision* [of the Supreme Court] and reissued. Specifically, the reissued Final Order should provide that

Avangrid, Inc., is solely liable for the $10,000.00 discovery sanction." *Order Upon Issuance of Mandate and Denying Motion to Dismiss*, July 11, 2024, at 4, ¶14. The footnote that followed the last sentence reads as follows: "For clarity, the Commission makes no additional amendments to the Final Order as no additional portions of the Final Order were changed by the [Supreme Court's] Decision." *Id.* (Attached as Exhibit I to Group Exhibits.)

Further, the fact that Avangrid's issues had become moot on appeal, which they didn't raise when they moved to withdraw their appeal,[6] hardly means they were moot when the Commission decided them in December 2021. PNM and Avangrid were free to ask the Supreme Court to remand to the PRC with instructions to dismiss the case as moot, but didn't do so. And even if Avangrid had raised mootness, it wouldn't mean that the PRC's original decision would

[6] *Motion to Withdraw from Appeal,* January 8, 2024. Avangrid's *Motion to Withdraw from Appeal* did not claim that their appeal was "moot." Having failed to raise the "mootness" argument before this Court in their *Motion to Withdraw from Appeal,* which they omitted as an Exhibit in their group of Exhibits (likely hoping this Court would not check or would forget), Movants/Petitioners waived any right that they may otherwise have had to raise "mootness" now before this Court. (Avangrid did include as Exhibit A, *Motion of Appellants PNM Resources, Inc. and Public Service Company of New Mexico for Partial Dismissal of Appeal,* as part of its Group Exhibits because PNM/PNMR did raise the issue of "mootness.") *Ferran v. Jacquez*, 1961-NMSC-072, ¶ 11, 68 N.M. 367; *State v. Bregar*, 2017-NMCA-028, ¶ 19 (declining to address particular argument that party did not make to district court); *Rupp v. Hurley*, 1999-NMCA-057, ¶¶ 24-25, 127 N.M. 222.

become a nullity, only that the case had become moot by action of the losing parties throwing in the towel after the PRC decided the case. Throwing in the towel does not make the PRC's reasoned, fact-based and law-based *Certification of Stipulation* and *Order on Certification of Stipulation* ("Final Order") a nullity, and the Supreme Court said nothing to suggest that it was.[7] Courts have faced just this situation in which a party on appeal has recognized that pursuing the appeal is not to its advantage, withdraws the appeal and then requests that the lower tribunal's

[7] In fact, this Court asked NEE's counsel about this very situation during oral argument on September 15, 2023:

Justice Vargas: So, let me ask you. If the, if I disagree, or we disagree that the sanctions against PNM were appropriate how can we *not* send it back under the current statute as written, I mean, it's pretty, it limits us a lot.

Mariel Nanasi: It does, I understand that. And thank you for that question. I think that if your honors decided that the decision is, was correct, and that you state that you uphold the Commission's decision, but for the sanctions that were also included against PNM, and *only* that, and ask as your normal orders say that you want, this remanded pursuant just to the instructions made by this Court, then yes, they could uphold the decision and reissue an Order.

Justice Vargas: How do we do that though in light of the language in 62-11-5 that says that if there is any order that's unreasonable and unlawful the only thing we can do is, the Supreme Court shall have no power to modify the action or order appealed from, but shall either affirm or annul and vacate. We get to do one or the other. How do we parse that?

https://supremecourt.nmcourts.gov/wp-content/uploads/sites/2/2024/01/Avangrid-v.-NMPRC-S-1-SC-39152.mp3 (At 52:00 - 56:04.)

decisions be ordered withdrawn on the grounds that the occurrence of mootness has unfairly deprived them of their right to appeal.

> Also, we will not apply the *Munsingwear* rule where "the losing party, party, fearful of having its loss confirmed by the appellate court, abandons the appeal and then moves to have the trial court's judgment vacated as moot, thus 'retiring to lick its wounds, fully intending to come out fighting again.'" *Harris v. Board of Governors of the Federal Reserve Sys.*, 938 F.2d 720, 724 (7th Cir. 1991) (quoting *Commodity Futures Trading Comm'n v. Board of Trade*, 701 F.2d 653, 656 (7th Cir. 1983)). Albuquerque was not required to pursue this appeal. If Plaintiff desired to end this case in good faith, it could have filed at any time a motion for voluntary dismissal. Plaintiff's motivations in filing the motion are highly suspect; dismissing this suit as moot and vacating the judgment could result in unfairness to the Defendant by exposing the Agency to the possibility of renewed actions by the Plaintiff.
>
> We deny Plaintiff's motion to dismiss this suit and to vacate the district court's judgment because we do not find the case moot; and even if the case were moot, vacatur could result in an unfair result for the Defendant.

City of Albuquerque v. Browner, 97 F.3d 415, 421 (10th Cir. 1996).[8]

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[8] *See also*, *In re Smith*, 964 F.2d 636, 637-638, (1992). If a case becomes moot on appeal, the appellate court loses jurisdiction. However, in order to protect the appellant against a preclusive (res judicata or collateral estoppel) use of an unappealable order, the appellate court will order the previous orders in the case dismissed at the same time that it dismisses the appeal. *United States v. Munsingwear,* 340 U.S. 36, 39, 71 S.Ct. 104, 106, 95 L.Ed. 36 (1950). **There is an exception for the case where the appellant, fearing that he will lose the appeal, abandons it, thus making the appeal moot, and asks us to dismiss the previous orders. We won't do it in that case. *Harris v. Board of Governors,* 938 F.2d 720, 724 (7th Cir.1991). The rule of *Munsingwear* is for the protection of a party who is thwarted in his desire for an appeal. It is not for the protection of a party who, knowing that the order below is sound and will be affirmed, wants nonetheless to deprive it of any preclusive effect.** (Emphasis supplied.)

Here, Avangrid successfully moved to voluntarily dismiss its appeal. *Order*, No. S-1-SC-39152, at 3, January 22, 2024. ("all issues in this matter relating to the NMPRC's denial of the proposed utility merger are hereby DISMISSED.") When PNM/PNMR continued the appeal as to the one issue of sanctions, and was successful, this Court issued a *Mandate* to correct the record as to the one issue, which the Commission did in its *Order Upon Issuance of Mandate and Denying Motion to Dismiss*, filed on July 11, 2024. (Attached as Exhibit I to Group Exhibits.)

D. Even if there were No Adequate Remedy at Law Movants/Petitioners' Writ of Mandamus Invoke No Question of Great Public Importance or Undisputed Facts

This Court has held that the exercise of mandamus authority is proper when:

> the petitioner presents a purely legal issue concerning the nondiscretionary duty of a government official that (1) implicates fundamental constitutional questions of great public importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as direct appeal.

State ex rel. Sandel v. N.M. Pub. Util. Comm'n, 1999-NMSC-019, ¶11, 127 N.M. 272, 980 P.2d 55 ("*Sandel*").

The Court has also recognized that writs of mandamus are proper "where a petitioner [seeks] to restrain one branch of government from unduly encroaching or

interfering with the authority of another branch in violation of Article III, Section 1 of our state constitution."[9] The Court has characterized a writ of mandamus as "a drastic remedy to be invoked only in extraordinary circumstances" and where it is necessary "to force a clear legal right against one having a clear legal duty to perform an act and where there is no other plan, speedy and adequate remedy in the ordinary course of law."[10] The only basis for Avangrid's claim that the PRC now is burdened with a "clear legal duty" is Avangrid's assertion that its (strained) interpretation of this Court's *Decision and Mandate*, should be interpreted as imposing a clear legal duty on the PRC to change its final decision to satisfy Avangrid. This is hardly a basis to establish Avangrid's clear legal right to have this Court require the PRC to dismiss its December 2021 final order, even though Avangrid could have filed a timely notice of appeal and make whatever argument it wished.

Mandamus is a proper proceeding when a "case presents a purely legal issue that is a fundamental constitutional question of great public importance." *In re Adjustments to Franchise Fees Required by Elec. Util. Indus. Restructuring Act of*

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[9] *Id.*

[10] *State ex rel. Richardson v. Fifth Judicial Dist. Nominating Comm'n*, 2007-NMSC-023, ¶ 9, 141 N.M. 657 (*internal citations omitted*).

1999, 2000-NMSC-035, ¶6, 129 N.M. 787, 14 P.3d 525. This is not such a case for the reasons stated herein.

Another requirement for a writ of mandamus from this Court is that a petitioner cannot timely obtain non-discretionary relief by other means.[11] Movants/Petitioners could have pursued a determination via appeal but chose not to. Movants/Petitioners and counsel of record were served with the *Order Acknowledging that Motion for Rehearing and Reconsideration Has Been Denied by Operation of Law* on September 6, 2024, (Attached as Exhibit L to Group Exhibits), in Case No. 20-00222-UT and were specifically advised that the Commission "hereby ISSUES this acknowledgment of the Motion's denial by operation of law." Decretal ¶ A. Movants/Petitioners are using the present Motion/Writ proceeding in lieu of an appeal of Case No. 20-00222-UT.

Additionally, Avangrid has made no effort in its filing to explain how it is injured by the nature of the PRC's dismissal of the case, and a demonstration of injury to a beneficial interest is a requirement to obtain the writ. *State ex rel. Coll v. Johnson*, 128 N.M. 154, 159 (1999). *See also, In re Nat'l Prescription Opiate Litig.,* 2022 U.S. App. LEXIS 34312, *19 (6th Cir. 2022) (injury neither concrete nor sufficiently imminent to justify mandamus relief). In this respect, Avangrid

[11] *Sandel*, ¶ 11.

seems to be laboring under the misconception that if it can get the case dismissed as moot, the PRC's original decision will somehow disappear. But this isn't the law. See, *Merl v. Kong*, *supra,* 2008 Haw. App. LEXIS 681, *9 ("A circuit court's judgment that has been appealed becomes final for *res judicata* purposes once the appeal is withdrawn."). There is nothing in this Court's decision in this case suggesting that, on remand, the PRC should relieve Avangrid of the fully-litigated result in this case, which has stood unimpeached since Avangrid et al. withdrew their appeal on the merits.

Even if Mandamus were a proper substitute for appeal, the critical requirements for a mandamus action are lacking here: there is no "question of great public importance" because the PRC complied with this Court's *Decision* and *Mandate*, there are disputed facts, there were adequate remedies at law, and Avangrid has not alleged injury.

3. Avangrid Can't File a "Motion" in These Closed Cases.

On January 8, 2024, Avangrid moved to withdraw its appeal and for dismissal. On January 22, 2024, the Supreme Court granted the motion and dismissed "all issues in this matter relating to the NMPRC's denial of the proposed utility merger" and also granted PNM's motion to "retain jurisdiction over the issues relating to sanctions." The Court also ordered modification of the case

caption to reflect that Avangrid/Iberdrola had withdrawn their appeal.[12] *Order*, No. S-1-SC-39152, at 3 of 3, January 22, 2024. (Attached as Exhibit C to Group Exhibit.)

As to Avangrid's request that this Court can treat its filing, in the alternative, as a "motion", Avangrid presumes that this Court and the PRC, as open for motions in the former proceedings. Although NEE could not find a case in New Mexico stating the obvious, which is that a former party in a closed appeal, or a party to a closed case before an agency, can start filing a motion after the cases are closed simply because it is struck by a sudden desire to do so, other venues have addressed this:

> The general rule, with exceptions not relevant here, is that motions, notices, and other papers cannot be filed in closed cases unless a motion to reopen is filed and granted first. *See, e.g.*, *Vizant Techs, LLC v. Whitchurch*, No. 16-1824, 2016 U.S. App. LEXIS 23570, *3 (3d Cir. Oct. 27, 2016) ("[M]otions cannot be filed in a closed case and that a case must be reopened by order of the court before any motions can be filed."); *Ziadeh v. United States*, Civ. No. 3:06-CV-386, 2014 U.S. Dist. LEXIS 2645, *8 (E.D. Va. Jan. 9, 2014) ("A litigant may not simply file a motion in a closed case seeking relief years after the case was closed."); *Allred v. United States*, 2:08-CV-245, 2010 U.S. Dist. LEXIS 47285, *1 (D. Utah May 13, 2010) ("An amended complaint cannot be filed in a closed case, nor can parties be joined in a closed case. The court therefore denies Allred's motion to amend.").

Antoine v. Hess Oil V.I. Corp., 2017 V.I. LEXIS 44, *14-15.

[12] Ignoring this Court's January 22nd *Order*, Movants/Petitioners used the former style in the merger appeal when it filed its *Motion to Enforce Mandate and Alternative Verified Petition for Writ of Mandamus*.

4. Sanctions & Attorneys' Fees Are Appropriate

Movants/Petitioners have taken up this Court's and New Energy Economy's time and resources with procedurally imaginary, meritless claims, presumably out of a desire to be able to inform third parties that there was no final result.[13] This Court's past rulings have allowed reasonable attorney fee awards in circumstances such as these, based on "a court's inherent powers to sanction the bad faith conduct of litigants and attorneys." *N.M. Right to Choose/NARAL v. Johnson,* 1999-NMSC-028, ¶ 15, 127 N.M. 654, 986 P.2d 450. Sanctions are intended to "preserve the integrity of the judicial process and the due process rights of the other litigants." *Weiss v. Thi of New Mexico at Valle Norte*, 2013-NMCA- 054, ¶ 17, 301 P.2d P. 3d 875.

"[T]his Court and the Court of Appeals have recognized that an award of attorney fees without a basis in a statute, contractual provision, or court rule may be justified as an exercise of a court's inherent powers when litigants, their attorneys, or both have engaged in bad faith conduct 'before the court or in direct defiance of the court's authority.'" *NARAL*, *supra,* at ¶ 16.

Sanctions are appropriate here for a procedurally and baseless Motion to Enforce Mandate when the underlying cases are closed, the Commission and this

[13] Apparently, Iberdrola is currently involved in another business venture to try and purchase all of Avangrid and take the business private. *See,* Group Exhibit A.

Court had lost jurisdiction, Avangrid/Iberdrola, et al. had voluntarily dismissed its appeal in this case and admit that they are "former appellants"[14] and when there is no legal justification for a petition for Writ of Mandamus, when the PRC did nothing to violate this Court's remand order and, most significantly, when Avangrid et al. simply chose not to appeal and then changed their minds after the time for appeal had run. Avangrid's filing is frivolous and was brought by a sophisticated, multi-state utility and its parent corporation, a global conglomerate.

Moreover, Movants/Petitioners' actions in this case reflect a pattern of disobedience that has infected this proceeding from the outset and thus are not merely accidental or inadvertent.[15]

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[14] *Motion/Writ* at 3.

[15] Discovery violations and sanctions: **80RP39973-85**; Findings that Joint Applicants' misused confidentiality requests: **80RP39985-6**; Skirting of Hearing Examiner Orders: 1) incomplete response to May 11 Order **80RP39990-2** and 2) use of non-record evidence **80RP39992-4**; Failure to abide regulatory norms **80RP39994-6**; Engagement of conflict of interest 80RP39996-40002; Unprecedented request to engage in oral argument after the Commission's deliberations had commenced **81RP40406-10, 81RP40438-41**; Engaging in *ex parte* with the Commission during the pendency of this appeal: On April 20, 2023, *Notice of Filing of Ex Parte Communications* and attached 93 pages of email communications between Thomas C. Byrd and Brian Haverly, attorneys for Appellants, and Russell Fisk and Michael C. Smith, attorneys for the NM PRC between the dates of January 17, 2023 through March 7, 2023; Using a case caption in their Motion/Petition for Writ, here, that no longer applies in this case, apparently to make it appear that the former appellants – Avangrid et al. – remained parties to this appeal, even though they had been removed as parties *at their request.*

NEE respectfully requests that this Court impose sanctions that are sufficient to deter any continuation of such litigation tactics, whether pursuant to its inherent powers or pursuant to the provisions of Rule 11. Rule 1-011 NMRA. *See also*, *Rivera v. Brazos Lodge Corp.,* 111 N.M. 670, 675, 808 P.2d 955, 959 (1991).

Goals of Rule 11 are deterrence and punishment of offenders and compensation of their opponents for expenditure of time and resources responding to ill-founded pleadings or other papers. *INVST Fin. Group, Inc. v. Chem-Nuclear Sys., Inc.,* 815 F.2d 391, 404 (6th Cir.), *cert. denied,* 484 U.S. 927, 108 S.Ct. 291, 98 L.Ed.2d 251 (1987).

Should this Court award attorney fees for the time NEE's attorneys spent in responding to Avangrid's current filing, its Attorneys will produce contemporaneous time sheets.

CONCLUSION

This *Motion to Enforce Mandate and Alternative Verified Petition for Writ of Mandamus* should be denied because it is without merit. New Energy Economy respectfully requests that this Court award sanctions and attorneys' fees and any other remedy it deems just, fair and appropriate.

Respectfully submitted this 2nd day of December 2024.

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-504(G)(3) and (H) NMRA, the body of the foregoing NEW ENERGY ECONOMY'S RESPONSE IN OPPOSITION TO MOTION TO ENFORCE MANDATE AND ALTERNATIVE VERIFIED PETITION FOR WRIT OF MANDAMUS AND REQUEST FOR SANCTIONS AND ATTORNEY'S FEES contains 5,721 words, and therefore complies with the limit imposed by Rule 12-504(G)(3) NMRA.

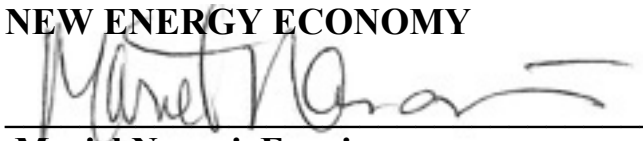
RULE 12-504(B)(1) VERIFICATION

Pursuant to Rule 12-504(B)(1) NMRA, I, Mariel Nanasi, hereby verify under oath that I have read the foregoing NEW ENERGY ECONOMY'S RESPONSE IN OPPOSITION TO MOTION TO ENFORCE MANDATE AND ALTERNATIVE VERIFIED PETITION FOR WRIT OF MANDAMUS AND REQUEST FOR SANCTIONS AND ATTORNEY'S FEES and that the statements contained in it are true and correct to the best of my knowledge, information, and belief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing NEW ENERGY ECONOMY'S RESPONSE IN OPPOSITION TO MOTION TO ENFORCE MANDATE AND ALTERNATIVE VERIFIED PETITION FOR WRIT OF MANDAMUS AND REQUEST FOR SANCTIONS AND ATTORNEY'S FEES was electronically served on all counsel of record through the New Mexico Supreme Court's Odyssey filing system on December 2, 2024.

NEW ENERGY ECONOMY



Mariel Nanasi, Esquire

https://www.ctinsider.com/business/article/avangrid-iberdrola-energy-shares-19821334.php

BUSINESS

Tensions rise as Spanish energy giant fights to take CT's Avangrid private

By Luther Turmelle,Reporter Oct 14, 2024

The Orange, Conn., headquarters of Avangrid, a subsidiary of Spanish energy giant Iberdrola.
Avangrid Networks/contributed photo

Spanish energy giant Iberdrola and powerful Connecticut officials appear to be on a collision course over the foreign company's efforts to acquire the remaining shares of its Connecticut-based subsidiary

Publicly traded Avangrid operates Iberdrola's U.S. energy subsidiaries, including Connecticut-based United Illuminating Co, and its two natural gas companies based in the state, Southern Connecticut Gas and Connecticut Natural Gas. Iberdrola and Avangrid officials have said that taking the Orange-based energy company private would enable Iberdrola to more easily access capital it needs to operate its businesses in Connecticut and other U.S. states. Iberdrola announced on March 7 that it is looking to acquire the 18.4 percent of Avangrid stock that it does not already own.

Iberdrola officals said at the time the announcement was made that they hope to close on the transaction by the end of this year. They also said taking Avangrid private will increase their business opportunities in the United States.

Two months later, the two companies announced they had reached an agreement to move forward with the deal. But after some lawmakers raised some concerns about the deal in September, state utility regulators have established a docket, which is the first step toward holding hearings on the case. That means that some sort of review will take place in Connecticut. And although no dates have been set, according to a spokeswoman with the Connecticut Public Utilities Regulatory Authority, regulatory hearings typically last between nine months and a year.

After lawmakers raised those concerns, Avangrid attorneys filed a brief claiming that Connecticut officials have no jurisdiction to approve or deny the transaction. That opinion was based on the fact that Iberdrola already owns a majority stake in the company and that there was no change of control over Avangrid.

The deal comes at a key time for Iberdrola, which wants to grow in markets with high credit ratings and in regulated businesses. Avangrid, which employs 8,000 people company wide, has $44 billion in assets and operations in 24 U.S. states. It owns and operates eight electric and natural gas companies, serving more than 3.3 million customers in New York and New England.

Relations between Avangrid, utility regulators and public officials has been strained since last year and the latest example of that surfaced this week. Frank Reynolds, president and chief executive officer of all three of Avangrid's Connecticut subsidiaries, criticized PURA's draft ruling on Oct. 4 in the current natural gas rate case.

The draft ruling, if approved unchanged next month, would reduce revenue requirements for the two natural gas utilities and reduce customers bills. Reynolds said the draft ruling shows "a clear lack of regard for our customers."

The draft decision would decrease revenue by $38.75 or approximately 8.8 percent for CNG, lowering residential customers' bills by approximately $12-$13 per month. It would decrease revenue by $36.61 million, or approximately 8.4 percent for SCG, also lowering residential customers bills by approximately $12-$13.

"These exorbitant decreases, which exceed the net income the companies earned last year, will almost certainly lead to immediate credit rating downgrades, even by more than one rating," Reynolds said in a statement. "Already, credit agencies are evaluating these draft decisions as ‘worse than expected, ‘punitive,’ and demonstrative of ‘a challenging regulatory

environment in Connecticut' – all of which signal downgrades on the horizon. Credit rating downgrades significantly impact customers' experience of reliable, resilient, and affordable service."

Downgraded credit ratings would increase what it costs the two gas companies to access capital, he said.

"The investments needed to facilitate both reliability and a sustainable future for the natural gas industry will be deferred, and customers will bear higher prices as we are forced to offer our bonds at a premium," Reynolds said in part. "PURA continues to send signal after signal that Connecticut is an unsafe and unwise place for capital investment, without which the state's goals are simply aspirational as PURA continues to put obstacles in the way of Connecticut's own objectives. Enabling companies like CNG and SCG to invest in the safety and reliability of the natural gas distribution system should be the highest priority of Connecticut leaders."

Without mentioning any Connecticut public official by name, Reynolds said the current regulatory decisions "suggest a greater focus on short-term political gains rather than on creating an affordable and sustainable energy future." Connecticut Senate President Martin Looney, D-New Haven is among those Connecticut lawmakers in favor of a full-blown hearing on Iberdrola's efforts seeking to make Avangrid a privately held company.

"I'm very concerned about the prospect of this happening," Looney said of Iberdrola's effort to make Avangrid a private company. "This is something we have to look at from all angles."

Looney made his comments early this month, prior to the release of the draft decision in the CNG and SCG rate case.

Connecticut has always been a high cost state in terms of energy for consumers and businesses. But enmity between company officials and Connecticut public officials involved in the dispute has only escalated since the summer of 2023.

In statements and regulatory filings, company officials have said several times that regulators have not allowed Avangrid to collect enough revenue to allow its subsidiaries to keep up with reliability improvements for the three utilities distribution networks.

Avangrid has taken an aggressive stance in its dealings with PURA since last summer when regulators were hearing UI's rate hike request that commissioners with the regulatory agency rule on in August 2023. That decision is now being adjudicated in the courts.

The company helped organize an August 2023 protest outside PURA's New Britain headquarters that attracted more than 150 of Avangrid's Connecticut subsidiaries. A company spokeswoman said at the time that money from shareholders was used to pay workers their normal salary, so they wouldn't have to take a day off to participate in the rally.

Rallies and protests outside PURA headquarters are rare, so officials with the agency that has jurisdiction over PURA, the Connecticut Department of Energy and Environmental Protection, took it seriously.

The protest had a surreal air, with employees posing for pictures and videos, but no speeches from Reynolds. A pair of Environmental Conservation Police officers, wearing military-style fatigues, helmets and holstered pistols at their sides, stood watch.

The officers said they were deployed as a precaution.
State troopers are commonly inside the headquarters building in New Britain's Franklin Square during hearings and have been for decades. But government observers said the August 2023 protest was the first time that a company regulated by PURA had helped facilitate a protest outside PURA's headquarters during a rate case, as was DEEP's response to the gathering.
Without specifically mentioning the August 2023 protest, Looney accused Avangrid officials of "trying to bully lawmakers and regulators."

State Sen. Ryan Fazio, R-Greenwich, said he is "sympathetic to Senator Looney's" comments about Avangrid's tactics. Fazio, who is a ranking member of the General Assembly's Energy and Technology Committee, said he favored "a robust review" of Iberdrola's efforts to take Avangrid private.

"Everybody should have their day in court, so to speak," Fazio said. "And I don't think the legislature should be involved in the transaction of every business. But a lot of thought and attention should go into this review."

State Sen. Norman Needleman, D-Essex, chairman of the committee, said he has no reason to doubt Iberdrola's explanation of why it wants to take Avangrid private.

"I'm not going read that much into the whole thing," Needleman said. "I think there are hits that the company (Avangrid) has taken and they are looking to spread the risk involved over a much larger company. I think if I were in their position, I'd probably do the same thing."

Oct 14, 2024

Luther Turmelle
REPORTER
Luther Turmelle is a business reporter with Hearst Connecticut Media Group. Turmelle has covered the towns of Cheshire and Wallingford and he specializes in the utility and energy beats. A graduate of Boston University, Turmelle has held multiple leadership roles in the Society of Professional Journalists, including two terms on the organization's national Board of Directors.

The Office of the Attorney General (https://portal.ct.gov/ag)
William Tong

Press Releases

OFFICE OF THE ATTORNEY GENERAL
CONNECTICUT

09/16/2024

Attorney General Tong, Consumer Counsel Petition for State Review of Iberdrola Move to Take Avangrid Fully Private

(Hartford, CT) – Attorney General William Tong and Consumer Counsel Claire E. Coleman today filed **a petition with the Public Utilities Regulatory Authority** seeking state review of the proposed acquisition by Iberdrola of all remaining shares of Avangrid. Iberdrola is a Spain-based multinational conglomerate that owns 81.6 percent of United Illuminating, Southern Gas and Connecticut Natural Gas, as well as utilities in Maine, Massachusetts and New York. Iberdrola has moved to purchase all remaining shares, removing Avangrid as a publicly traded company.

Once fully private, Avangrid will no longer have an obligation to make filings with the U.S. Securities Exchange Commission, will no longer have minority shareholders that could serve as a check on risky corporate behavior, and will no longer be subject to a 2015 shareholder agreement established when Avangrid acquired United Illuminating, Southern Gas and Connecticut Natural Gas. That agreement required the company to appoint four independent directors to its board, including two from the formerly independent Connecticut utilities. Further, the acquisition requires Iberdrola to pay $300 million in premiums to minority shareholders, diverting resources away from investments that could better benefit Connecticut consumers.

Iberdrola has applied for regulatory approval with the SEC, the Federal Energy Regulatory Commission, the state public utilities regulatory commissions in New York and Maine, but it has not applied for such approval in Connecticut or Massachusetts.

Iberdrola has already failed to honor its obligations to Connecticut consumers. Earlier this year, Attorney General Tong sued United Illuminating over the company's longstanding failure to remediate contamination at the defunct English Station power plant in New Haven. Last month, the company refused to comply with a PURA order to provide credits to customers installing home electric vehicle charging stations.

"Connecticut families are hurting right now under surging, unaffordable electric costs. We need more accountability and oversight, not less when it comes to our public utilities. Avangrid may have a Connecticut address, but we know far too many major decisions are made in Spain. This expensive maneuver diverts hundreds of millions of dollars away from Connecticut needs, and extinguishes some of the last vestiges of local control. This deal needs rigorous state scrutiny," **said Attorney General Tong.**

"Avangrid's footprint in Connecticut spans both the natural gas and electric utility sectors, serving hundreds of thousands of customers across the state – and those customers could be impacted by Iberdrola's plan to reduce oversight of Avangrid's activities," **said Consumer Counsel Coleman.** "Iberdrola's move to take Avangrid private should be reviewed in a proceeding before Connecticut's Public Utilities Regulatory Authority. Similar reviews are underway in both Maine and New York, and Connecticut's consumers deserve the same level of protection from any potential harm. I am grateful for Attorney General Tong's partnership in today's joint petition on behalf of Connecticut's consumers."

Assistant Attorney General John Wright, Legal Assistant Caroline McCormack, and Deputy Associate Attorney General Michael Wertheimer, Chief of the Consumer Protection Section are assisting the Attorney General in this matter.

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