UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PUBLIC SERVICE COMPANY OF NEW MEXICO

and

Cases 28-CA-023391
28-CA-066164

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL UNION NO. 611, AFL-CIO

ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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Comes now Counsel for the Acting General Counsel and respectfully submits this Answering Brief to Respondent's Exceptions to the Administrative Law Judge's decision in the above-captioned matter. The Acting General Counsel requests Respondent's exceptions be denied and the Administrative Law Judge's June 22, 2012 decision in this case be affirmed. In support of this position the Acting General Counsel offers the following:

I. STATEMENT OF THE CASE

Pursuant to charges filed by the International Brotherhood of Electrical Workers, Local Union No. 611, AFL-CIO (hereinafter "the Union"), a Consolidated Complaint was issued by the Regional Director of Region 28 alleging Respondent engaged in conduct in violation of Section 8(a)(1), (3), and (5) of the National Labor Relations Act (hereinafter "the Act"). A hearing before Administrative Law Judge Eleanor Laws was held on the issues raised by the Consolidated Complaint on November 15-18, 2011 and January 18-19, 2012 in Albuquerque, New Mexico.

On June 22, 2012, Judge Laws issued her decision in the case, properly finding Public Service Company of New Mexico (hereinafter "Respondent") violated Sections 8(a)(1) and (5) of the Act. Judge Laws found Respondent violated Section 8(a)(1) of the Act by: threatening

and interrogating employees, refusing to process a discrimination complaint by bargaining unit employee Eric Cox unless he proceeded without his Union representative; and denying bargaining unit employee Eric Cox's request to have his Union representative of choice represent him at an investigatory interview.

In addition, Judge Laws found Respondent violated Section 8(a)(5) of the Act by unilaterally making changes to the Informal Step of the contractual grievance and arbitration process by requiring stewards at the initial state of the Informal Step to explain in detail which articles of the contract are alleged to be violated and how these articles have been violated, refusing to sign in receipt of grievances that have been put to writing after oral grievances have been presented, and requiring more than one supervisor to be present during Informal Step grievance meetings; by unilaterally changing the requirement for Union representatives to access its Edith Service Center facility in Albuquerque, New Mexico in January 2011; by unilaterally changing the requirement for Union representatives to access its San Juan Generating facility in Farmington, New Mexico on July 15, 2011; and by refusing to provide the Union with the following relevant information it requested;

> the total number of medical appointments scheduled and approved by supervision for any and all medical appointments for bargaining unit or non-bargaining unit employees subject to the Respondent's policy; the total number of medical appointments scheduled and approved by supervision for any and all medical appointments for bargaining unit or non-bargaining unit employees subject to Respondent's PTO policy and required to provide a doctor's note to verify a medical appointment; the names, classifications and work locations of any and all employees subject to Respondent's PTO policy; and bargaining unit or non-bargaining unit employees who have scheduled a medical appointment with their supervisor;
>
> the discipline issued to Rex Foss for violations of Respondent's policies, including Do the Right Thing, which occurred as a result of Mr. Foss's involvement in the Carlisle and Montgomery leak incident;

> information pertaining to crew changes, including who from management made the decisions and how employees were informed of the decisions;
>
> a list of any bargaining unit employees or otherwise who have been discharged by Respondent for violation of the Employee Safety Manual; a list of any bargaining unit employees or otherwise who have been discharged by Respondent for violation of "other established safety procedures; a list of any bargaining unit employees or otherwise who have been disciplined by Respondent for violation of the Employee Safety Manual; a list of any employees bargaining unit or otherwise who have been disciplined by Respondent for violation of "other established safety procedures"; and
>
> Respondent's policy requiring discipline to be administered if any employee has been charged with 40 hours of "unscheduled absences" and the effective date of that policy; the "unscheduled time off requirements" referred to in Eric Morgan's January 25, 2011 email and the policy containing; the policy requiring employees to Pre-Approve for PTO on any day not designated a regular work day by the collective-bargaining agreement; the definition of "unscheduled absence" and the policy containing the definition; the names classifications and work locations of any and all Respondent's bargaining unit and non-bargaining unit employees disciplined for accruing 40 hours of "unscheduled absences" from April 1, 2008 or the date the policy became effective to March 1, 2011 whichever period is shorter.

Respondent excepts to certain findings of the Judge that it violated Section 8(a)(1) and (5) of the Act by engaging in the aforementioned conduct. The Acting General Counsel urges the Board to deny Respondent's exceptions and affirm the Judge's factual findings and conclusions of law.

II. BACKGROUND FACTS

Respondent is a New Mexico corporation that purchases, produces, transmits, and sells electricity to commercial and residential customers located throughout the State of New Mexico. It operates a number of facilities in the state, including facilities located in Farmington, Belen, and Albuquerque. Respondent and the Union have been parties to successive collective-bargaining agreements since the 1970's, with the most recent collective-bargaining agreement

having effective dates from May 1, 2009 through April 30, 2012. (Joint Exhibit 1) Pursuant to these collective-bargaining agreements, Respondent has recognized the Union as the exclusive collective-bargaining representative for over 600 of its employees in the Electric, Water, Transmission, Distribution, Production, Meter Reader, and Collector departments which are listed in the agreement. (Joint Exhibit 1).

The Union's collective-bargaining agreement with Respondent is serviced by Assistant Business Managers Ed Tafoya and Shannon Fitzgerald. (TR 30) Tafoya is primarily responsible for servicing bargaining unit employees working in the Electric Service Business Unit out of Respondent's offices in Albuquerque and Belen. (TR 350) Fitzgerald is primarily responsible for servicing bargaining unit employees working out at Respondent's San Juan Generating Station in Farmington. (TR 350)

III. ANALYSIS OF RESPONDENT'S EXCEPTIONS

A. Judge Laws Properly Found Respondent Unilaterally Changed The Informal Step of Grievance Procedure.

There is ample evidence in the record to support Judge Laws' finding that Respondent violated Section 8(a)(5) of the Act by implementing unilateral changes to the Informal Step of the grievance-arbitration process by (1) requiring stewards at the initial stage to explain in detail the articles of the collective-bargaining agreement Respondent violated, (2) refusing to sign in receipt of grievances reduced to writing after the grievance was presented orally, and (3) by requiring more than one supervisor to be present during Informal Step grievance meetings. Respondent's exceptions are without merit and the Board should reject them and affirm the ruling of the Administrative Law Judge that Respondent unilaterally changed the Informal Step of the grievance procedure.

1. *Judge Laws' factual findings are supported by the evidence.*

Judge Laws correctly relied on the evidence describing the practice and procedures followed by the parties at the Informal Step of the grievance-arbitration procedure in the collective-bargaining agreement. The first step of the process is the Informal Step, which is fashioned in way for the parties to attempt to adjust the grievances informally. (Joint Exhibit 1). Throughout its prior 30-year bargaining relationship, Respondent and the Union carried out the Informal Step of the grievance procedure in an identical fashion. In May 2011, Respondent provided training to its supervisors and managers developed by the Management Associated Results Company (hereinafter "MARC") on dealing with the Union during the grievance process. (TR 956-957, 972, 1033-10350) A part of this training involved introducing supervisors and managers to guidelines known as the MARC Principles and having these supervisors and managers implement these guidelines during the grievance process. (TR 956-957, 972, 1033-1035, Resp. Exhibit A)

Tafoya, Fitzgerald, and Union Stewards Eric Cox, Clay Cash, Mike Patscheck, and Allen Barnard all provided testimony on how the grievance process operated between the parties prior to May 2011 and all of them testified Respondent implemented changes to this process subsequent to May 2011. (TR 37-38, 353, 393) Jamie Shockey, Respondent's supervisor who once served as a union steward, also testified the guidelines in the MARC Principles were a departure from how the Informal Step worked in the past. (TR 1109-1110) Those changes included a requirement that stewards explain in detail how each article of the collective-bargaining agreement was violated during the initial stage of the process, Respondent refusing to sign in receipt of the grievance because they needed additional time to investigate, and

Respondent rescheduling the Informal Step meeting in order to have two supervisors participate in the meeting.

The changes implemented by Respondent were consistent with the guidelines laid out in the MARC Principles, which were contrary to the past practice and procedures followed by the parties at the Informal Step. These changes resulted in Respondent refusing to accept grievances at the 2nd Step of the grievance-arbitration procedure on the grounds the Union did not comply with the unilaterally implemented changes to the Informal Step. Respondent's Senior Labor Relations Representative Mick Oldham testified he had refused to accept grievances on the grounds the grievances were not signed by the supervisor at the Informal Step. (TR 910-911). Based on this evidence, Judge Laws correctly found Respondent unilaterally changed the parties' longstanding practice of handling grievances at the Informal Step.

2. *Judge Laws correctly applied and analyzed the facts, past practice, and the collective- bargaining agreement.*

Respondent exceptions asserting there was no unilateral change to the past practice of handling grievances at the Informal Step and the failure of the Judge to construe the plain language of the collective-bargaining agreement are without merit and not supported by the evidence. The record clearly establishes a factual basis for Judge Laws' finding that Respondent unilaterally changed the established practice of handling grievances at the Informal Step of the grievance process.

Respondent argues Judge Laws failed to give appropriate weight to evidence from Respondent's Human Resources staff and managers indicating the guidelines in the MARC Principles and the application of these guidelines are not a departure from the collective-bargaining agreement. (Resp. Brief In Support of Exceptions, p. 8-9) Respondent's argument has no merit. In fact, the Judge's decision took into account and specifically notes the testimony

of Respondent's Human Resources Supervisor Eleanor McIntyre and Respondent's Senior Human Resources Consultant Tim Padilla, who were both directly involved in organizing the training for Respondent's supervisors and manager on the MARC Principles. (ALJD pg. 9, lines 15-20) Both McIntyre and Padilla testified it was their opinion training supervisors and managers on the MARC Principles would provide a better understanding of how to follow the collective-bargaining agreement and was not inconsistent with the agreement. (TR 974, 1034-1035) Judge Laws, however, credited the testimony of Acting General Counsel's witnesses and Respondent's supervisor Shockey, who once served as a union steward and processed grievances on behalf of the Union, on Respondent's implementation of the MARC Principles guidelines, and its departure from how the parties historically handled the Informal Step of the grievance process. (ALJD pg. 9, lines 22-30) Respondent's defense to the allegation it unilaterally changed the Informal Step failed to demonstrate it did not modify this long-standing historical practice at the Informal Step.

Respondent asserts Judge Laws' reading of the collective-bargaining agreement was not the only reasonable interpretation and due consideration was not given to Respondent's interpretation. (Resp. Brief In Support of Exceptions, p. 5-6) However, this issue does not turn on whether one parties' construction of the collective-bargaining agreement is more reasonable. Instead, the question is whether Respondent modified the collective-bargaining agreement or an established practice when its supervisors followed the following MARC Principle guidelines:

- You are not obligated to hear a grievance on a walk-in basis. Schedule a time for the informal meeting with employees and union steward that is convenient for you. Ensure second supervisor is available and/or attends the meeting, if you feel is needed. (sic)
- **Document the meetings as thoroughly as possible**. Be sure to follow MARC documentation process on page 52 under Chronological-Time-Sequence Note Taking in your MARC manual.
- **Do not** accept a written grievance until the informal process has occurred.

- Have the employee/union steward identify the section(s) of Articles allegedly violated and ask them to explain how they were violated. If employee/union steward cannot provide this information, document what they said.
- Do not state you cannot meet the remedy at this time, but instead ask for time to further research and/or obtain approval or communicate up (Management chain/HRBP).
- If at any time before the informal process has been completed a union steward presents a Step 1 grievance and requests you to sign it, you should indicate the Informal Step has not been completed, that you are attempting to follow the contractual grievance procedure, and that you will sign the Step 1 grievance if the matter is not resolved in the Informal Step.
- If you have had the informal meeting but have not yet provided the employee or union steward with the Company response, and the union steward presents a written grievance, you must state that you have not denied the remedy at this point and still consider this grievance at the Informal Step, and are attempting to follow the contractual grievance procedure, and that you will sign Step 1 grievance if it is not resolved at the Informal Step.
- If a union steward asks if you are refusing to sign for the written grievance, restate that you are attempting to follow the contract, have not denied the remedy, and will attempt to settle at the Informal Step, but you will sign Step 1 grievance if the matter is not resolved at the Informal Sep.
- If the union steward gives you a written grievance with "refused to sign" noted on it, continue to work at addressing the grievance at the Informal Step.

(GC Exhibit 3, Resp. Exhibit A (emphasis in original)) The Judge relied on Respondent's application of these guidelines and the witness testimony in finding a departure from the previously established practice. Accordingly, Judge Laws correctly gave sufficient weight to the parties' collective-bargaining agreement and historical practices in finding Respondent unilaterally changed the Informal Step of the grievance procedure.

Respondent, in arguing sufficient weight was not given to its witnesses' testimony, is requesting the Board overrule Judge Laws' creditability determinations. The Board has consistently held the administrative law judge is in the best position to determine credibility based on her ability to observe the demeanor of a witness, and it will not overrule these credibility determinations absent a clear preponderance of the evidence that indicates otherwise.

Standard Dry Wall Products, 91 NLRB 544 (1950). Respondent has provided no such support for the Board to overrule Judge Law's credibility determinations.

3. *Judge Laws correctly found Respondent's changes to the Informal Step of the grievance procedure were material, substantial, and significant.*

The Board has found the addition of new requirements to an established practice or in the grievance procedure to be a violation of Section 8(a)(5) of the Act in similar cases. In *United Cerebral Palsy of New York City*, 347 NLRB 603 (2006), the employer distributed a new employee handbook to its bargaining unit and non-bargaining unit employees. The employer did not notify or consult with the union on the distribution of the handbook or its contents. The handbook contained a grievance and arbitration provision and stated employees must first consult with their supervisor and then the employer's program director before filing a grievance. According to the handbook, employees had to complete these two additional steps before proceeding to the contractual grievance process. The collective-bargaining agreement between the employer and the union did not include any similar requirement. Despite determining the grievance and arbitration provision in the handbook did change the grievance procedure, the judge found the changes did not amount to a rejection of the collective-bargaining agreement. The Board, however, disagreed and found the employer violated the Act. The Board, citing *NLRB v. Katz*, 369 U.S. 736 (1962), noted an employer violates Sections 8(a)(5) and (1) of the Act if it makes material unilateral changes during the course of a collective-bargaining agreement relationship on matters that are mandatory subjects of bargaining. In recognition of this principle, the Board noted the changes made to the handbook implicated a mandatory subject of bargaining. Accordingly, the Board concluded the parties' collective-bargaining agreement did not include the changes contained in the handbook and found the employer unilaterally changed the grievance arbitration procedure.

Like the employer in *United Cerebral Palsy of New York*, Respondent embarked on a training program designed to incorporate different practices into the Informal Step of the grievance procedure. Like the *United Cerebral Palsy of New York* employer, Respondent neither provided the Union with prior notice of the practices it intended to incorporate in the Informal Step nor the opportunity to consult or bargain over these new practices. Instead, Respondent unilaterally incorporated guidelines from the MARC training into the Informal Step.

The Board in *United Cerebral Palsy of New* found the employer's addition of two new requirements to the procedure contained in the handbook to be a material change to the grievance and arbitration procedure in the collective-bargaining agreement, as it found the employer's changes to be in violation of Section 8(a)(5) of the Act. Respondent, when it unilaterally implemented the guidelines of the MARC Principles, added three times as many additional requirements as the employer in *United Cerebral Palsy of New*. In view of these facts, Judge Laws correctly found Respondent's unilateral implementation of the MARC Principles to be material, substantial, and significant changes to the Informal Step of the grievance procedure.

For the reasons stated above, and as supported by the record, the Board should affirm Judge Laws findings and conclusions that Respondent violated Section 8(a)(5) of the Act by requiring stewards at the initial stage to explain in detail the articles of the collective-bargaining agreement Respondent allegedly violated, refusing to sign receipt of grievances reduced to writing after the grievance was presented orally by the Union, and by requiring more than one supervisor to be present during Informal Step grievance meetings.

B. Respondent Unilaterally Changed Tafoya's Access and Associated Threats

1. *Judge Laws correctly found Respondent's unilateral changes to Tafoya's access were material and substantial changes to the parties established past practice.*

Judge Laws found Respondent violated Section 8(a)(1) and (5) when it unilaterally changed Tafoya's access to its facility. Respondent, in its exception to this finding, does not dispute Judge Laws' factual findings. Instead, it argues Judge Laws erred in finding the change to Tafoya's access to Respondent's Albuquerque, New Mexico facility was a material or substantial restriction on his access or a removal of a real or substantial benefit.

The Judge's decision correctly summarizes how Respondent has progressively narrowed Tafoya's access to its facility since 2008 and the previous litigation related to Respondent's actions. Prior to 2008, Tafoya was allowed unfettered access to Respondent's facility between 6:00 am and 6:00 pm to meet with employees and carry out his duties as the bargaining representative. This was the same level of access Respondent provided to its contractors. In 2009, Respondent downgraded Tafoya's access to visitor status. In 2010, the time period covered by the Consolidated Complaint, Respondent limited Tafoya's access by requiring the approval of management and conditioning his access on his being escorted by a supervisor or manager. These changes were implemented without providing the Union with prior notice or an opportunity to bargain.

The Board has consistently found a union's access to an employer's facility for the purpose of administering and/or policing a collective-bargaining agreement is a mandatory subject of bargaining. *Appelbaum Industries, Inc*., 294 NLRB 981, 982 (1989); *Fashion Furniture Mfg*., 279 NLRB 705, 715 (1986); *Houston Coca Cola Bottling Co.*, 265 NLRB 766, 777-778 (1982), and an employer is not privileged to unilaterally change an established past practice of allowing its employees' bargaining representative entry onto its premises. *McGraw*

Hill Broadcasting Company, Inc., 355 NLRB No. 213 (September 30, 2010); *Granite City Steel Co.*, 167 NLRB 310, 312-313 (1967).

The Board has addressed similar cases involving unilateral changes to established access practices. In *Sierra Publishing Company d/b/a The Sacramento Union*, 291 NLRB 540 (1988), the union representing the employer's workers had unrestricted access to the employer's premises and work areas. In its attempts to limit access, the employer issued a written document reminding employees of its policy related to the access of non-employees to employee areas of the company's premises. One of the changes was for all union representatives to sign in at its reception desk and obtain permission to visit employee work areas. On the same day, the employer posted a formal policy statement that restricted all non-employees to the lobby. The employer instituted these policies and changes without bargaining with the union and the judge found the employer, without notice to the union, materially changed established practices when it invoked the non-employee access rules to limit the circumstances and conditions under which the union agents accessed its premises. The Board agreed with the judge that the employer violated Section 8(a)(5) of the Act and ordered it to restore the access practice prevailing before the unilateral changes were implemented.

In *Ernst Home Centers, Inc.*, 308 NLRB 848 (1992), the union had a practice of visiting the employer's stores and speaking with employees on the sales floor, in break areas, and in the lunch room. The employer sought to restrict the union's access to break areas and lunch rooms. The judge found the employer violated Section 8(a)(5) by unilaterally prohibiting union agents from speaking with employees in all areas except the break area or lunch room. The Board found the employer's unilateral change to the union's practice of visiting employees in all areas was a material change which the employer was obligated to bargain.

Since Judge Laws issued her decision on June 22, 2012, the Board addressed an access issue in *Miron & Sons, Inc*., 358 NLRB 1 (2012). The collective-bargaining agreement between the employer and union in that case provided the union access to the employer's facility at any time during working hours, provided there was no interference with production. After the expiration of the agreement, and while the parties were in negotiations for a successor agreement, the employer's president attempted to limit the union's access but reconsidered after the union representative assigned to the facility protested. A month or so later, during a visit to the plant by the union representative, the son of the employer's president informed the union representative he could not enter the shop when the president was not at the plant. The employer later informed the union its access to the shop would be conditioned on visiting during employees' lunch break. The judge, with Board approval, found the employer unilaterally altered the contractual rule and the parties' past practice regarding the union's access to the facility.

Respondent cites *Peerless Food Products, Inc*., 236 NLRB 161 (1978) for the proposition that limiting a union's representative access is not necessarily a material, substantial, and significant change. The Board, in agreeing with the judge, found the employer's limiting meetings and conversations with employees and shop stewards to the lunch room during breaks and lunch periods did not amount to a material, substantial, or significant change. The Board reached this conclusion based on the evidence demonstrating "the net effect of the change in policy is to remove [the union representative's] former right to engage unit employees in conversations on the production floor *when those conversations are unrelated to contract matters*." *Id*. at 161 (emphasis added)

The facts in *Peerless Food Products* are distinguishable from those present here. The net effect of Respondent's change to Tafoya's access has been to prevent him from performing his representative duties. Respondent has not presented a business justification or argued Tafoya impeded production. Instead, Respondent has restricted Tafoya's access in a manner that regulates his presence at the facility on its terms and during times when he sought access to perform his duties as the employees' bargaining representative. (TR 71, 239-240, 244, 339) In view of the undisputed facts, as properly found by Judge Laws, Respondent's unilateral changes to Tafoya's access had material and substantial impact on his ability and responsibility to administer and police the collective-bargaining agreement.

Extant Board law, as cited above, supports Judge Laws' findings and conclusions that Respondent violated Section 8(a)(5) of the Act by unilaterally changing the requirement for Union representatives to access its ESC facility in Albuquerque, New Mexico. The Acting General Counsel requests the Board deny Respondent's exceptions and affirm the Judge's findings and conclusions regarding these allegations.

2. *Judge Laws correctly found Respondent's Threats interfered with employees' Section 7 rights.*

Judge Laws found Respondent interfered with, restrained, and coerced employees in the exercise of their rights guaranteed by Section 7 in violation of Section 8(a)(1) of the Act when its security guard informed Tafoya, in the presence of employee Bert Garcia, of his orders from Respondent's Communications and Relay Department manager to not allow Tafoya on Respondent's property. (ALJD pg. 20, lines 31-43; pg. 21, lines 1-9) Specifically, Respondent challenges the Judge's finding that the security guard's statement was an actual threat. (Resp. Brief In Support of Exceptions, p. 12) It also appears Respondent excepts to the Judge's finding the statement was made by the security guard. (Resp. Brief In Support of Exceptions, p. 12)

Respondent, in support of this exception, reasons the statement could not have interfered with, restrained, or coerced Garcia's Section 7 rights because both he and Tafoya were aware of Respondent's policy prohibiting Tafoya from accessing its facility. Respondent's brief in support of its exceptions states the "sequence indicates that at the time of the security guard's alleged statement to Tafoya, (a) both Garcia and Tafoya had actual knowledge of [Respondent's] access policy as applied to Tafoya and (b) Garcia could therefore not reasonably have perceived the security guard's statement as any "threat"." (Resp. Brief In Support of Exceptions, p. 12)

Respondent's argument is without merit. Judge Laws appropriately rejected this argument and relied on long established Board principles when concluding the success or failure of Respondent's interference, restrained, or coercion was not controlling. As noted by the Judge, the test is whether the remark can reasonably be interpreted by employees as a threat. *See Smithers Tire and Auto Testing of Tex.*, 308 NLRB 72 (1992). Further, the Judge appropriately relied on the Board's legal standard in *Frontier Hotel & Casino*, 309 NLRB 761 (1992), which found the ejection of union representatives from the employer's premises interfered with union-related communications and coerced employees in violation of Section 8(a)(1).

Accordingly, Respondent's exceptions to Judge Laws' legal conclusions and findings that it interfered with, restrained, and coerced employees' in the exercise of their Section 7 rights by telling their exclusive bargaining representative he was prohibited from coming onto Respondent's property is without merit and should be denied.

C. Respondent Unilaterally Changed Fitzgerald's Access

Judge Laws correctly found Respondent violated Section 8(a)(1) and (5) when it unilaterally changed Assistant Business Agent Shannon Fitzgerald's access to its San Juan Generating facility, which is located in Farmington, New Mexico. Respondent excepts the

Judge's finding that its change to Fitzgerald's access was a material, substantial, and significant change from the practice established by the parties. Respondent's exception has no merit.

1. *Background facts*

Fitzgerald followed the same routine in visiting Respondent's San Juan Generating facility for a number of years in his role as the Assistant Business Agent. (TR 369) Prior to October 2011, he visited the facility every Tuesday. (TR 369) Fitzgerald would call Human Resources, drive to the plant, obtain a temporary placard from security to place on the dashboard of his vehicle, and then enter the plant. (TR 366-367) McIntyre, Respondent's Human Resources Supervisor at the San Juan Generating facility, and bargaining unit employees were aware of Fitzgerald's weekly routine. (TR 932, 1019, 1030, 1098) Fitzgerald visited with employees in the different shops and the control rooms, which were spread out over Respondent's facility. (TR 361, 366-367) In carrying out his representational duties, Fitzgerald met with supervisors in their office and met with employees when they were on their breaks, which were taken in the shops. (TR 360) Some bargaining unit employees did not have scheduled breaks so he met with them in their work areas. (TR 1065, 1112-1114)

An internal Union election resulted in a brief and temporary change of Assistant Business Agents. (TR 382, 931) Aaron King replaced Fitzgerald as the Assistant Business Agent at the San Juan Generating facility from July 15, 2011 to September 9, 2011. (TR 355) Prior to assuming the official duties of Assistant Business Agent, King met with McIntyre and Padilla, who is the Senior Labor Relations Consultant at the San Juan Generating facility. King testified McIntyre expressed she did not like that Fitzgerald arrived at the facility unannounced. King informed McIntyre he would call in advance and, unlike Fitzgerald, he would conduct most of his business at the Union hall. (TR 383-384) McIntyre and Padilla offered King office space in

Respondent's Administrative Building to meet with bargaining unit employees. (TR 391-392) King testified he did not have a problem with the offer from McIntyre and Padilla but further testified he never requested use of the office space in the 8 weeks he served as Assistant Business Agent. (TR 385-386) King testified he did not view McIntyre and Padilla making office space available for him as a requirement that he meet with bargaining unit employees there or that he was not allowed inside the plant. (TR 391-392) Rather, King viewed it as a courtesy. Padilla perceived that he and King agreed about the changed access, but he did not view his agreement with King as binding on Fitzgerald. (TR 952-953) McIntyre, on the other hand, did not view the offer of office space to King as an agreement. (TR 1052)

When Fitzgerald reported to the facility on October 4, 2011, his first visit since returning to the Assistant Business Agent position, he was unable to follow the routine he had followed for a number of years. (TR 351) Fitzgerald contacted Padilla about his inability to enter the facility. (TR 358) Padilla advised Fitzgerald Respondent was changing his access. He informed Fitzgerald he would be provided a room in the Administrative building and if he needed to meet with his stewards and other employees they would be called up to the Administrative building. (TR 358) Padilla also advised Fitzgerald if he needed to go anywhere else on Respondent's property, he would have to be escorted by McIntyre, Respondent's Compliance Manager, or Padilla. During the hearing, Padilla, McIntyre, and King all testified the Union did not agree to the loss of any access rights during King's tenure as Assistant Business Agent. (TR 391-392, 952-953, 1052) Respondent, in its exceptions, has not disputed these factual findings of Judge Laws' decision.

2. *Judge Laws correctly found Respondent's unilateral changes to Fitzgerald's access were material and substantial changes to the parties' established past practice.*

The facts found by Judge Laws in the preceding section is an accurate account of the testimony and evidence presented during the hearing. Respondent, in its exceptions, has not challenged Judge Law's credibility resolutions or the background of the established practice as told by the witnesses. Respondent argues, however, its modifications to Fitzgerald's access were not material, substantial, or significant changes from the practice established prior to July 2011. (Resp. Brief In Support of Exceptions, p. 13-14)

Judge Laws, in evaluating the allegations of Fitzgerald's changed access at the San Juan Generating facility in Farmington, rightly applied the same analysis and conclusion reached in Respondent's changes to Tafoya's access to Respondent's Albuquerque facility as discussed in Section III B(1) of this brief. (ALJD pg. 23; pg. 24, lines 6-7) A union's access to an employer's facility for the purpose of administering the collective-bargaining agreement is a mandatory subject of bargaining. *Appelbaum Industries, Inc*, supra. As such, an employer is not permitted to make unilateral changes to parties' established practice of access to its premises. *McGraw Hill Broadcasting Company, Inc*., supra. The Board has consistently affirmed this principle. See *Sierra Publishing Company d/b/a The Sacramento Union*, supra; *Ernst Home Centers, Inc.*, supra; *Miron & Sons, Inc*., supra.

Respondent admits Fitzgerald enjoyed wide-ranging access to the San Juan facility prior to its decision to condition his access on his being escorted by Respondent's Human Resources professionals or the Compliance Manager and to only allow him to meet with employees and stewards in its Administration building. Contrary to Respondent's contentions, these restrictions to Fitzgerald's access were material and injected an element of employer control over the

Union's representational functions. To this end, these changes would allow Respondent to track which bargaining unit employees met with Fitzgerald, as Respondent required Fitzgerald to provide the names of employees he needed to speak with so it could summon the employees to the Administrative building. Further, Respondent produced no evidence employee production suffered as a result of Fitzgerald's presence inside the facility.

As such, Judge Laws correctly found that Respondent violated Section 8(a)(5) of the Act by unilaterally changing Fitzgerald's access to the San Juan Generating facility in Farmington, New Mexico. Accordingly, the Acting General Counsel requests the Board affirm the Judge's findings and conclusions and deny Respondent's exceptions regarding this access allegation.

D. Respondent's Refusal to Process Cox's Discrimination Complaint

1. *Factual background.*

Respondent has a policy titled "Do The Right Thing," that contains an Equal Opportunity provision. (CP Exhibit 3, pg. 5) This policy also contains a Harassment-Free Work place provision, which states Respondent will not tolerate harassment based on race and other factors. (CP Exhibit 3, pg. 5-6) Article 8 of the collective-bargaining requires Respondent to comply with state and federal laws in providing equal opportunity to all employees regardless of, among other things, an employee's race. (Joint Exhibit 1) Article 8 also requires Respondent to comply with the regulations of the New Mexico Public Utility Commission. Tafoya, as the Assistant Business Manager, has been involved in raising issues related to employees' safety and health and has initiated complaints at the Environmental Protection Agency and OSHA. (TR 496-497)

Eric Cox is one of Respondent's employees working at its Albuquerque facility. Cox also serves as a steward. In late April or early May 2010, Cox notified Respondent of his complaints of discrimination and retaliation based on his race and union activity. (TR 225)

Respondent assigned Tommy Lee, a Human Resources Director from one of its affiliated companies in Las Colinas, Texas, to investigate Cox's claims. (TR 636, 638) Cox notified Lee by e-mail that he wanted to schedule a date that would allow Tafoya to attend the meeting as his Union Representative. (TR 226) Lee responded to Cox' message and stated he did not understand Cox' need for Union representation. (TR 226, 645)

In early October 2010, Lee and Cox met in Albuquerque. (TR 226) Tafoya accompanied Cox to the meeting. (TR 227) Lee informed Cox Respondent decided to split the investigation of his claim into two parts—the claim of racial discrimination and the claim of union animus. (TR 227, 647) Lee further advised Tafoya he could not participate in Cox's complaint of racial discrimination and could serve only as a witness in Cox's complaint of union animus. (TR 227, 647, GC Exhibit 2) There was no discussion of Cox's complaints about racial and union animus. (TR 227) Consequently, Respondent did not allow Tafoya to participate in its investigation into Cox's claims of racial discrimination. These facts, on which Judge Law's relied upon, are supported by the record and are not challenged by Respondent in its exceptions to the Judge's decision.

2. *Judge Laws found Respondent violated Section 8(a)(1) of the Act when it conditioned investigating his complaint on his Union representative not participating in the investigation.*

Judge Laws properly found Respondent violated Section 8(a)(1) of the Act by conditioning whether it would meet with employee Cox and investigate his discrimination complaint on his bargaining representative not participating in the investigation. (ALJD pg. 28, 24-27) Respondent objects to Judge Laws' ultimate conclusion that Cox's discrimination complaint was essentially a grievance. (Resp. Brief In Support of Exceptions, pg. 15-16) While Respondent's exceptions focus on the characterization of Cox's complaint as a grievance, Judge

Law's analysis of Respondent's duties and obligations during the grievance process is most significant in her finding that Respondent violated the Act by prohibiting Tafoya's participation.

The parties' collective-bargaining agreement sets the terms and conditions of employment for employees and defines their obligations and duties regarding them. Respondent, in Article 8, Section A, of the agreement, agrees to comply with all state, local, and federal laws regardless of an employee's race, religion, color, sex, age, or national origin. (Joint Exhibit 1) The definitions section in Article 10 of the agreement states "[t]he definition of a grievance is limited to a dispute between the parties hereto with respect to the interpretation or application of the provisions of this Agreement *or to the application of a specific policy to a specific employee*." (emphasis added) (Joint Exhibit 1)

Respondent's "Do The Right Thing" policy, which is separate and distinct from the negotiated collective-bargaining agreement, falls within the definition of *a specific policy* referenced in Article 10 of the collective-bargaining agreement. The paragraph following the definitions section in Article 10 states:

> The following procedure shall be the exclusive means by which either party may seek to resolve any dispute or grievance arising under the provisions of this Agreement. *The parties and any grievant shall be required to exhaust the remedies provided hereunder prior to seeking adjudication*, thereof, in any other tribunal, except as may otherwise be provided by law. (emphasis added)

(Joint Exhibit 1)

The language in the collective-bargaining agreement clearly states the provisions of the Agreement serves as the exclusive means to resolve disputes arising under the agreement. As such, Respondent is not privileged to unilaterally exclude its employees' bargaining representative from employee grievances, in any form, which arise under the collective-bargaining agreement or the application of a specific policy.

The Act permits an employee's designated representative to act as their exclusive representative for the purposes of collective-bargaining in respect to rates of pay, wages, hours and other conditions of employment. 29 U.S.C. §159(a). In this matter, Cox adhered to the agreement negotiated by his employer with his bargaining representative. He notified Respondent of his complaint, and instead of filing a complaint with a federal or state agency, Cox first attempted to exhaust Respondent's internal process. Respondent, however, placed conditions on Cox presenting his complaint on Tafoya's non-involvement in the process.

Respondent, in its Brief In Support of Exceptions, misconstrues the Judge's findings as requiring all issues submitted outside the collective-bargaining agreement to be viewed as grievances. Respondent states:

> [w]ere the Board to affirm this finding by the ALJ, then the Board would effectively be imposing on employers a new duty to examine all complaints submitted *outside* of the CBA-prescribed grievance process to attempt to identify which complaints should be (or should have been) shoehorned into the grievance-handling process despite an employer's or unions decision not to submit any such grievance. (Resp. Brief In Support, pg. 17)

Respondent then provides a hypothetical where a bargaining unit employee wishes to lodge a complaint of racial or sexual harassment by an employee who happens to be a union steward. Respondent asserts if the employee desired to submit the complaint outside of the grievance process, but the employer decides it should be processed as a grievance under the collective-bargaining agreement and involves the union in that processing, the employer would be violating the privacy rights of the complaining bargaining unit employee. Respondent reasons this would expose employers to potential violations of the Act.

Respondent's application of its hypothetical is flawed when measured against the facts in the present case and its rationale misconstrues the obligations of employers and unions who are

in a collective-bargaining relationship. First, neither the Judge nor the Acting General Counsel maintains the employer is obligated to involve the employees' exclusive bargaining representative in "all complaints" over the objection of the complaining employee. Article 10 of the parties' collective-bargaining agreement does not *require* the involvement of a union representative to file a grievance. The provision states "[a]ny employee, or designated member of a group of employees, having a grievance. . . .shall first take up the grievance orally with the immediate supervisor of the grievant . . ." (Joint Exhibit 1). This is similar to what Cox did when he took his complaint of racial discrimination to Respondent.

Secondly, it was Cox's request to have his collective-bargaining representative participate. Tafoya did not demand to be involved in the process over Cox's objection. Contrary to Respondent's hypothetical, Acting General Counsel has not put forth any argument suggesting Respondent, or employers generally, must "immediately" involve the Union in all discussions touching on employees' terms and conditions of employment. However, Board principles recognize the right of employees to utilize their collective-bargaining representative in situations implicating their terms and conditions of employment.[1] The record demonstrates Lee did not prohibit Tafoya from participating in the meeting because he was protecting Cox's desire to keep the matter private. Instead, Cox requested the presence and participation of Tafoya into matters specifically covered by the collective-bargaining agreement and Respondent's other polices, which are incorporated by reference into parties' the collective-bargaining agreement.

Finally, the obligations of employers and unions to bargain often involve the exchange of confidential and private information. The Board has long recognized this dynamic and have

[1] While the application of *Weingarten* rights does not specifically apply to this situation, the underlying principles of the *Weingarten* doctrine are instructive. The rights under *Weingarten* arise are triggered upon "the request" of the employee—not the union. *NLRB v. J. Weingarten, Inc*., 420 U.S. 251, 257 (1975), *Appalachian Power Company*, 253 NLRB 931, 933 (1980). Also, an employer is under no obligation to volunteer a union representative or provide one unless the employee makes the request. *Montgomery Ward & Co*., 269 NLRB 904, 905 (1984).

allowed for flexibility when these issues arise. The Board applies a balancing test of the need for the information versus the chilling effect on an employer's right to manage its business. *See Berbiglia, Inc.*, 233 NLRB 1476 (1977). Absent evidence indicating a lack of reliability on the requesting party's part, the Board's policy favors disclosure while allowing it to be conditioned on the requester's willingness to keep the information confidential. S*ee Lasher Service Corp.*, 332 NLRB 834 (2000), *E.I. Dupont & Co*., 276 NLRB 335 (1985).

The Supreme Court in *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 66 (1975) acknowledged that national labor policy embodies the principles of non-discrimination as a matter of highest priority, and stated it must construe the Act in light of this broad national policy. The Board has also recognized this principle and found that requests for information relating to possible race and sex discrimination are relevant to a union's role as the collective-bargaining representative of employees. *Westinghouse Electric Corp.*, 239 NLRB 106, 107 (1978). In light of these long held principles, it is unmistakable that discrimination based on race and sex impact employees' conditions of employment, and it is fitting that employees have the right to include their collective-bargaining representative in the redress of these issues.

Respondent asserts it had no notice from the Consolidated Complaint or the Acting General Counsel that Cox's discrimination complaint should be characterized as a grievance. (Resp. Brief In Support of Exceptions, pg. 15) The Acting General Counsel has not characterized Cox's complaint as a grievance. Paragraph 5(e) of the Consolidated Complaint plainly states Respondent refused to meet with the Union and Cox regarding a complaint Cox filed regarding his working conditions because he insisted his Union representative be present during such meetings. During the hearing, Acting General Counsel, as illustrated by the factual

background in this section of this brief, introduced evidence on the contents of the collective-bargaining agreement referencing Respondent's obligation to comply with local, state, and federal laws, as well as Respondent's related policies to maintain a workplace free of discrimination. The Acting General Counsel also put forth evidence demonstrating Tafoya's involvement in these areas when acting as bargaining unit representative. Paragraph 5(e) of the Consolidated Complaint and the evidence clearly demonstrate Acting General Counsel's theory, which is Respondent agreed to meet with Cox regarding his complaints of racial discrimination on the condition Tafoya not participate. As discussed, the evidence establishes this theory.

For these reasons, the Acting General Counsel requests the Board reject Respondent's exceptions, affirm Judge Laws findings, and adopt her reasoning that Respondent violated Section 8(a)(1) of the Act by conditioning the investigation of Cox's discrimination complaint on the grounds his collective-bargaining representative not participate.

E. Respondent Unlawfully Denied Cox the Union Representative of his Choice

Respondent excepts to Judge Laws' finding that it violated Cox's *Weingarten* rights by denying him the Union representative of his choice. The facts relied upon by the Judge are clearly supported by the evidence and are undisputed.

1. *Factual background.*

The record clearly establishes Cox was instructed to report to the office and meet with Laurie Monfiletto, who is Respondent's Director of Human Resources, and Tom Mitchell, Respondent's Manager. (TR 234, 235, 336) Cox contacted Tafoya on his way to the meeting. (TR 69, 236) Tafoya advised he was five minutes away from the facility and would be there shortly. (TR 69, 236) When Cox arrived Union steward Bert Garcia was present. (TR 336) After Monfiletto advised Cox why he was called into the meeting, Cox requested that Tafoya or another steward named Fred Martinez serve as his representative. Monfilleto testified when Cox

insisted on a different union representative, she allowed Cox a five-minute break presumably to locate Martinez. (TR 589-590) By this time Tafoya was at Respondent's facility outside of its locked perimeter. (TR 238, 338, 590) Cox and Garcia went out to the locked perimeter where Tafoya was waiting. After five minutes had elapsed, Mitchell went looking for Cox so they could resume the meeting. He approached Cox and Garcia and advised they needed to get back inside to continue the meeting. (TR 71) When Tafoya indicated he was available to attend the meeting as Cox's union representative, Mitchell told Tafoya he was not allowed inside Respondent's facility and could not represent Cox. (TR 71, 239, 339)

2. *Judge Laws correctly found Respondent denied Cox the Union representative of his choice.*

Judge Laws found Respondent violated Section 8(a)(1) of the Act by denying Cox the available Union representative of his choice. (ALJD pg 30, lines 33-34) Respondent takes exception to this finding and argues the finding is in error because the evidence does not establish that Tafoya was available and ready when the meeting was scheduled to begin. (Resp. Brief In Support of Exceptions, p. 19-20) This argument ignores the facts and lacks merit.

Monfilleto, Respondent's witness, testified on direct examination that she allowed a five-minute break in the interview. (TR 589) By the time the interview resumed, Tafoya was at the facility and available to represent Cox. (TR 71) Tafoya, Cox, and Garcia testified Mitchell told Tafoya he was not allowed in the facility. (TR 71, 240) Respondent resumed the meeting when Tafoya was present at the facility but not allowed access to the meeting locations on the premises.

The evidence clearly demonstrates Tafoya was available to serve as Cox's Union representative. In fact, it was Mitchell denying Tafoya permission to come inside the facility that made Tafoya unavailable. The Judge, based on the evidence, correctly found Respondent

violated Section 8(a)(1) of the Act when it denied Cox the Union representative of his choice when that representative was available. Respondent's argument that Tafoya was not available when the meeting began and, thus, was unavailable is not supported by the evidence. Accordingly, the Board should affirm Judge Laws' findings and conclusions and reject Respondent's exception.

F. Respondent Unlawfully Interrogated and Threatened Employees

Respondent excepts to Judge Law's findings that its agents unlawfully interrogated and threatened employees because of their union activities. (Resp. Brief In Support of Exceptions, pg. 20) Specifically, Respondent argues its Supervisor Dale Smyth did not interrogate Cox about what Union business he was conducting or otherwise interfere with, restrain, or coerce employees in the exercise of their rights guaranteed by Section 7 of the Act. (Resp. Brief In Support of Exceptions, p. 21) Respondent's exception has no merit. Judge Laws properly credited the testimony of Cox and employee Joe Montano and found (1) Smyth questioned Cox about the substance of potential grievances he was investigating on behalf of employees and (2) conveyed the message that Respondent demanded to know the substance of employee meetings with their collective-bargaining representative interfered with employees' Section 7 rights. (ALJD pg. 33, lines 37-40)

1. Factual background.

In June 2011, Cox, in his role as a Union steward, received permission to be off duty to conduct Union business. (TR 247) Cox conducted this business inside the crew room at Respondent's facility, discussing potential overtime grievances with a few employees, including Joe Montano. (TR 247, 1135) Supervisor Smyth came into the room and asked Cox if he was working that day. Cox advised he was working but was approved to conduct Union business.

(TR 248) When Cox told Smyth he was conducting investigations into possible grievances, Smyth asked Cox about the nature of the grievances. (TR 79-80, 247-249, 811, 1130) Cox did not elaborate on the subject matter of the grievances. Smyth, in a forceful tone and still in the presence of Montano and the other employees, demanded Cox tell him the substance of the grievances and specifically the employees involved with the grievances. (TR 249, 1130-1131) When Cox refused to reveal the information, Smyth instructed Cox to come to his office. (TR 250, 1133)

Mitchell, Respondent's Manager who Smyth reports to, and Tafoya became involved in the situation. Tafoya testified he asked Smyth why he needed specific information from Cox, and Smyth repeated Cox needed to reveal specifically what grievances he was working on and who they were for. (TR 80, 254) Smyth testified his discussion with Cox was a regular conversation and no one raised their voice. (TR 825-826) However, Montano testified Cox and Smyth's discussion did escalate and became progressively aggressive (TR 1131) Mitchell also testified both Cox and Smyth were upset and he got involved because the ordeal had escalated too high. (TR 872)

Judge Laws relied upon these facts, which are based on the testimony of Cox and Montano, in finding that Smyth unlawfully interrogated Cox and threatened employees when he insisted Cox reveal the substance of the grievances. (ALJD pg. 33, lines 5-24)

2. Judge Laws properly credited Cox and Montano's testimony.

Respondent, in its arguments supporting this exception, suggests Judge Laws' inferences were in error. Respondent argues Smyth, when meeting with the employees, was not attempting to find out specific information about the grievances based on how he answered Smyth's questions seeking information about those grievances. Rather, Respondent maintains Smyth's

questions were reasonable and appropriate because he was attempting to determine the availability of the employees to work. These assertions lack merit and are not supported by the record.

Judge Laws properly credited the testimony of Cox and Montano and found their versions of events to be consistent. More importantly, the Judge appropriately discredited Smyth's testimony. According to Smyth, he calmly approached Cox for the purpose of finding out which employees were available for an assignment. However, neither Cox nor Montano recalled any discussion about employee availability and they both recalled Smyth's aggressive tone and demeanor when asking about the specific grievances Cox was discussing with employees. Mitchell's testimony also demonstrates Smyth was anything but calm during this confrontation, which required Mitchell to become involved to ease the tension generated from Smyth's questioning.

Respondent proposes alternative inferences based on facts that are not supported by the evidence or its witnesses' account of the confrontation between Cox and Smyth, which took place in the presence of employees. It argues the Judge erred in finding contrary to these alternative inferences and further erred in crediting the testimony of Cox, Montano, and Mitchell over Smyth. The Board has long recognized that the administrative law judge is in the best position to determine credibility based on the ability to observe the demeanor of a witness, and it will not overrule these credibility determinations absent a clear preponderance of the evidence that indicates otherwise. *Standard Dry Wall Products*, supra. Respondent has provided no such support for the Board to overrule Judge Law's credibility determinations. As such, the Acting General Counsel requests the Board affirm the Judge's findings and conclusions and deny Respondent's exception.

G. Respondent's Refusal to Provide Information

Respondent excepts to the Judge's finding that Tafoya's request for information regarding non-bargaining unit employees was relevant. (Resp. Brief In Support of Exceptions, pg. 25-28) The evidence clearly establishes the relevance of the Union's request for information regarding non-bargaining unit employees is necessary and relevant to the Union's role as the collective-bargaining representative.

The facts surrounding the Union's request for information on non-bargaining unit employees are not complicated. Tafoya requested documents related to all employees disciplined for violating laws, policies, and procedure applicable to Respondent's entire workforce, including non-bargaining unit employees. These requests were related to disciplines and/or discharges that were rendered under Respondent's policies and procedures, as well as state laws. Respondent has failed and refused to provide information related to non-bargaining unit employees. (TR 89) Tafoya testified he requested the information related to non-bargaining unit employees based on his belief they were also subject to the same rules and policies as bargaining unit employees. (TR 89)

The Board has addressed this identical issue with this Respondent in *Public Service Company of New Mexico*, 356 NLRB No. 160 (May 24, 2011). In that particular case, the Union requested that Respondent provide information regarding disciplines issued to non-bargaining unit employees for violating the State of New Mexico's regulations and statutes, Respondent's Personal Code of Conduct, and Respondent's "Do The Right Thing" policy, all of which apply to both bargaining unit employees and non-bargaining unit employees. The day before the hearing, Respondent provided the Union with the requested information and the complaint was amended

to allege Respondent's delay in furnishing the Union with the requested information violated the Act.

The judge, with Board approval, found Respondent violated Section 8(a)(5) of the Act by delaying in providing the information requested by the Union regarding disciplinary actions taken against non-bargaining unit employees for violating policies applicable to all employees, based on the Union demonstrating the information was relevant to its role as employees' collective-bargaining representative.

This same standard applies to the present case before the Board. As correctly found by the Judge, the Union demonstrated the relevance of the information it seeks from Respondent related to non-bargaining unit employees. Respondent does not argue any of these policies do not apply equally to both bargaining unit and non-bargaining unit employees. Instead, it only generally asserts the Union's requests are not relevant because the information relates to non-bargaining unit employees.

Judge Laws correctly found the Union demonstrated the relevance of its request for information related to non-bargaining unit employees regarding violations of the PTO policy, the "Do the Right Thing" policy, safety schedules, and other policies. As a result, Respondent violated Section 8(a)(5) of the Act by failing to provide the Union with the requested information. Accordingly, the Acting General Counsel requests the Board affirm the Judge's findings and conclusions and deny Respondent's exception regarding these request for information allegations.

IV. CONCLUSION

For the reasons stated above and based on the record as a whole, the Acting General Counsel respectfully requests that Respondent's Exceptions to the Decision of the Administrative Law Judge be denied in their entirety.

Dated at Indianapolis, Indiana this 20th day of August 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE THE DECISION OF THE ADMINISTRATIVE LAW JUDGE in **PUBLIC SERVICE COMPANY OF NEW MEXICO**, Cases 28-CA-23391 et al. was served by E-Gov, E-Filing, and E-Mail on this 20th day of August 2012, on the following:

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