

Brian S. Colon
New Mexico Office of the State Auditor
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To: Brian S. Colon, Office of the State Auditor

From:

Mariel Nanasi, Executive Director, **New Energy Economy**
Maria Perez, Co-Director, **Democracy Rising**
Tiffany Stevens, Board Member, **Indivisible Nob Hill**
Daniel Pritchard and Robert Bresnahan, Directors, **Renewable Taos**
Paul Gibson and Roxanne Barber, Co-Founders, **Retake Our Democracy**

Date: July 15, 2021

We are writing to make a formal complaint against New Mexico Attorney General (“NMAG”) Hector Balderas for his questionable awarding of contracts and approval of what appear to be improper invoices submitted to the NMAG by Attorney Marcus Rael and his firm, Robles, Rael and Anaya P.C. from 2016 to the present. We are calling for a full investigation into what may be fraud and corruption in violation of the Governmental Conduct Act, NMSA 1978 Section 10-16-1 *et seq.*, and the Fraud Against Taxpayers Act, NMSA 1978 Section 44-9-1 *et seq.* We ask you to use your authority under the Audit Act, NMSA 1978 Section 12-6-1 *et seq.*, to audit and investigate the billing records described below and attached, and report violations consistent with your duties under the Audit Act.¹ A complaint has also been filed with the NM Ethics Commission and the NM Disciplinary Board.

Applicable Law

New Mexico’s Governmental Conduct Act provides for ethical principles of public service and states that public officers “shall treat [their] government position as a public trust” and “shall use the powers and resources of public office only to advance the public interest.”² This duty means that public officers “shall conduct themselves in a manner that justifies the confidence placed in them by the people, at all times maintaining the

¹ The Audit Act provides the State Auditor with the power to audit state agencies (NMSA 12-6-3(C)), imposes a duty to report violations of criminal statutes (NMSA 12-6-6), and provides the power to sue to enforce repayment of funds “for which an agency is accountable under law.” (NMSA 12-6-8).

² NMSA 10-16-3(A)

integrity and discharging ethically the high responsibilities of public service.”³ Furthermore, public officials must use “full disclosure of real or potential conflicts of interest” as a “guiding principle for determining appropriate conduct” and must take “reasonable efforts [] to avoid undue influence and abuse of office in public service.”⁴

It is also the duty of the attorney general to enforce the provisions of the Fraud Against Taxpayers Act. That statute prohibits a person from knowingly presenting a fraudulent claim for payment to a state agency. The attorney general must “diligently investigate suspected violations”⁵ of the Fraud Against Taxpayers Act.

Despite these duties, the facts outlined below demonstrate likely violations of these statutes and the attorney general’s apparent failures to both enforce the Fraud against Taxpayers Act and uphold his obligations under the public trust placed upon him by the people of New Mexico.

The issues and evidence presented herein warrant a full and independent investigation as to whether the attorney general is guilty of the following violations that fall within the statutory authority of the office of the state auditor:

- 1) **Conflicts of Interest/Favored Treatment:** A Conflict of Interest exists when the employee (or organization) has some personal kinship, friendship, financial or political interest that may cause the employee (or organization) to place personal and/or organizational interests above this duty.
 - a) Expending public resources on a business owned by the employee or one in which the employee has an interest in, personally or through association
 - b) Intentional violations of State Procurement regulations and related good business practices, thereby subverting fair and open competition; resulting in a specific vendor and/or individual(s) gaining unfair advantage.⁶

- 2) **Procurement & Contracting Improprieties**
 - a) Contract administration that enables vendors to be paid for services or goods not provided; individual who authorize or otherwise decides a contract award and, at the same time, has a vested interest in the company receiving the award. Potential conflicts of interest stemming from less-than-arms-length dealings are also a concern—where the individual influencing the contract award or administering the contract is either related to or has such a close association with one or more of the

³ NMSA 10-16-3(B)

⁴ NMSA 10-16-3(C)

⁵ NMSA 44-9-4 (A).

⁶<https://www.saonm.org/auditing/special-audits-and-investigations/issues-we-handle/>

company's principals as to create reasonable doubt as to his/her ability to place fiduciary duty above personal bias.⁷

This complaint is based on evidence obtained through an Inspection of Records Act (IPRA) request with the NMAG on April 9, 2021⁸ to try and determine the extent of the relationship between the NMAG and Mr. Rael and his law firm. The IPRA was filed after Mr. Rael's entry into case Case No. 20-00222-UT at the NMPRC appeared to correspond with the Attorney General withdrawing his opposition to the PNM/Avangrid merger despite the NMAG's own expert witnesses' position that the merger was not in the public interest.

We have included troubling highlights from IPRA and interrogatory requests as well as the proffered evidence that indicate conflicts of interest/favored treatment in the awarding of legal contracts as well as procurement and contracting improprieties through overbilling and duplicative billing approved by the attorney general. Further it appears as though the attorney general's relationship to this contractor may also have influenced the office's legal position in a high profile case currently pending before the NMPRC.

In your capacity to prevent fraud and corruption and protect against the waste of taxpayer funds we ask that your office investigate Marcus Rael and his firm, and the New Mexico Attorney General and his decisions to hire his friend and former law partner rather than have his in-house counsel prosecute these cases for the State and the people of New Mexico. In addition, we ask that you investigate why the Rael firm was selected to represent the State of New Mexico in the critically important case pending in the Supreme Court regarding allocation of water resources, given that the Rael firm lacked expertise in water law.

We understand that you had a prior professional relationships with Mr. Balderas and Mr. Rael that may make it impossible for you to be involved. We appreciate that this may require the hiring of an independent auditor.

Thank you in advance for investigating this very important matter.

⁷ Ibid

⁸ Exhibit A, New Energy Economy's IPRA to the NMAG, April 9, 2021.

Conflicts of Interest/Favored Treatment

The New Mexico Attorney General, Hector Balderas, awarded cases to Attorney Marcus Rael and his law firm, despite lack of expertise or experience in the relevant legal specialties.

Evidence received thus far suggests that the NMAG has improperly retained Attorney Marcus Rael, a personal friend and former law partner, and his law firm, Robles, Rael and Anaya P.C., to represent the State in important cases, regardless of whether they had expertise in that particular arena or not and whether they had experience before the US Supreme Court.⁹ These contracts give the appearance of favored treatment and contracting improprieties, and billing records indicate that the firm may have wasted and/or improperly collected many millions of taxpayer dollars.

The relationship between Attorney Marcus Rael and the Attorney General is established and documented. Corporate documents confirm that Rael was an officer in the AG's law firm Balderas & Associates, LLC,¹⁰ prior to Mr. Balderas's election to public office. When asked about his retaining his friend and law firm colleague for the *Texas v NM* water case, the AG stated: "This was the first time I had ever been associated with hiring that firm. In over 10 years of public service ... I'd never retained them".¹¹ That assertion, made in 2018, is false. In response to our IPRA request, a request that received a less than fulsome response, we counted 11 separate contracts with Robles, Rael and Anaya P.C., or partners of the firm, including two contracts prior to the *Texas v. NM* contract. See, Exhibit B. Of the 24 private attorneys or law firms reportedly retained by the NMAG's office, Robles, Rael and Anaya P.C. was awarded the highest number of contracts. Even that number remains suspect. We are aware of at least three additional contracts Marcus Rael has been awarded that are not reflected in the IPRA response from the NMAG's office, *State of New Mexico et al v. Volkswagen Group of America, Inc. et al.*, filed March 1st, 2016,¹² *The State of New Mexico v. Sterigenics U.S., LLC et al.*, filed December 28th, 2020,¹³ and *The State of New Mexico v. Gilead Sciences, Inc.*, filed March 22nd, 2021.¹⁴ If three such omissions exist, there are potentially more. Unfortunately, request for total amounts actually paid by the State of New Mexico to Marcus Rael or to Robles, Rael and Anaya P.C. is incomplete.

⁹ <https://www.sfreporter.com/news/coverstories/2018/01/09/in-deep-water/>

¹⁰ https://opencorporates.com/companies/us_nm/2406999

¹¹ <https://www.sfreporter.com/news/coverstories/2018/10/03/the-peoples-attorney/>

¹² <https://dockets.justia.com/docket/new-mexico/nmdce/1:2016cv00147/337233>

¹³ <https://dockets.justia.com/docket/new-mexico/nmdce/2:2020cv01355/456210>

¹⁴ <https://dockets.justia.com/docket/new-mexico/nmdce/1:2021cv00255/458909>

Our search of the New Mexico Sunshine Portal also revealed that the attorney general’s office has not disclosed all contracts with Robles, Rael, and Anaya P.C., which violates the Sunshine Portal Act.¹⁵

Procurement & Contracting Improprieties as evidenced in billing discrepancies that were signed off and paid for by the Attorney General

In the case of *Texas vs NM*, the invoices, the case record and Marcus Rael’s contemporaneous prosecution of other cases give the appearance of waste and abuse of taxpayer many millions of dollars of funds. According to the results of the IPRA request, Robles, Real and Anaya P.C. was first retained to represent the State in *Texas v. NM* in February of 2016.

Invoices Paid and Hours Billed in the *Texas v. NM* Case:

File Name	Invoice Date	Matter	Amount	Marcus Rael	David Roman	Luis Robles	Susan Barela (€ Pilomena Hause	Lance Hough
	2/29/16		3324	\$53,593.75				
	9/30/16	3935 as of 9/30		\$133,160.25				
	4/14/17	Q4		\$118,207.20				
	6/30/17	4539		\$121,037.77				
	6/30/17	4540		\$99,666.08				
81700365	12/18/17			\$132,689.98	not provided			
81700616	12/31/17	Texas v. New Mexico		\$159,992.89	409.3	271.3		15.9
81700872	3/31/18	Texas v. New Mexico		\$105,494.19	164.2	307.2		
81700906	3/31/18	Texas v. New Mexico		\$101,822.94	not provided			
91700534	9/30/18	Texas v. New Mexico		\$195,386.69	not provided			
91700660	1/30/19	Texas v. New Mexico		\$165,251.33	not provided			
91700969	3/31/19	Texas v. New Mexico		\$183,827.80	not provided			
91701065	6/30/19	Texas v. New Mexico		\$196,094.86	not provided			
01700734	9/30/19	Texas v. New Mexico		\$207,612.79	146.1	815.4	100.4	
01700892	12/31/19	Texas v. New Mexico		\$194,078.04	not provided			
01701024	3/31/20	Texas v. New Mexico		\$222,345.50	113.7	609.3	23.7	346.7
01701144	6/30/20	Texas v. New Mexico		\$420,396.07	320.6	103.2	278.1	499.5
11700177	7/31/20	Texas v. New Mexico		\$185,083.48	54.7		173.5	215.1
11700331	8/31/20	Texas v. New Mexico		\$194,050.27				41.3
11700376	9/30/20	Texas v. New Mexico		\$141,116.59	29.9		131.8	243.8
11700378	10/31/20	Texas v. New Mexico		\$127,458.63	22.8		53.9	207.8
11700594	11/30/20	Texas v. New Mexico		\$96,564.60	90.1		33.6	144.3
11700595	12/31/20	Texas v. New Mexico		\$117,543.48	54.6		18.1	174
				\$3,672,475.18	572.7	2106.4	689	1484.5
								129.9
								15.9

Source: Exhibit B.

Though most billable hours were not provided, some examples of the invoices that raise doubts include:

- a. In Invoice 81700616, 409.3 hours were billed by Marcus Rael for a period from 10/1/2017 to 12/31/2017 at \$200 to \$225 per hour. The total number of working hours in a 12 week period, assuming an eight hour work day, equals 480. In this

¹⁵ See *NMSA 1978* Section 10-16D-3(d)

example, Marcus Rael billed NM taxpayers for 409 out of 480 regular (40-hour week) working hours in a three-month period. Marcus Rael reported working on other cases during this same time period.

- b. In the same invoice, 81700616, every email sent or received was billed at least .10 hours, or six minutes, regardless of content, suggesting an automated billing system to the invoice. This single invoice contains over 300 such .10 email items billed at a minimum of \$20 each, regardless of content.
- c. In Invoice 01700734, partner David Roman billed for 815.40 hours at \$200 per hour. Given a 9 hour work day for the workable week days (excluding holidays and weekends) totaling 576 available work hours, Mr. Roman would have to have worked nearly 12 hours a day, every week, every month on ONLY this case for a three-month period from 7/1/2019 to 9/26/2019. This does not appear reasonable and/or credible.
- d. The above invoices represent many hundreds of hours billed *every* three-month period for more than three years. For the “smaller” invoiced amounts there was an alleged four to six hundred hours worked by the firm, but there were certain other invoices that the Rael firm billed taxpayers, and the NMAG paid, for over a thousand hours in just one three-month period.

A detailed review of all invoices provided in Exhibit B, may yield further questionable billing practices. However, beyond wasting taxpayer dollars, the case record provides evidence that these billable hours did not reflect substantial or zealous representation for the State. The name Marcus Rael and his law firm, the supposed lead attorney, is missing from multiple pleadings in the case.

In transcripts from a March 19th, 2020 teleconference between parties, attached as Exhibit C, in the *Texas v. NM* case to discuss New Mexico’s emergency motion for a six month stay, opposing counsel objected, stating:

“I believe that much of New Mexico’s current problem -- aside from the [Covid] virus issue which I’ll address in a minute -- has been a result of their own decisions. They are the ones that decided who and how many people to put on the litigation of this very important case and they are the ones who decided not to take depositions early in the case, not to zealously and vigorously take depositions.... Those were decisions that we found curious.” See, Exhibit E, Transcript of Proceedings, March 19, 2020, pg. 28.

And further:

“They have done very little in terms of keeping on schedule...You're hearing the frustration in my voice because this is just exactly what we've experienced since

way back when Mr. Rael said they weren't ready, that the schedule had to accommodate them, that they needed six more months than Texas did before they could issue their expert reports. This is a refrain we've heard from day one of this litigation and it continues and it continues today.” *Id.*, pg. 30-31

And further:

“They had one deposition scheduled -- one deposition scheduled before all of this occurred before the deadline for when they were to file the report, so the fact that they somehow now need months of depositions before they can file their report is not even at best -- it's just disingenuous.” *Id.*, pg. 51.

The ostensible reason for this requested stay was the planned replacement of Attorney David Roman as counsel, upon which the judge rightfully questioned why that was a problem when the named lead attorney, Marcus Rael remained. David Roman responded to the judge:

“Your Honor, that is true that he has been designated on the captions as lead counsel. I have been the one who has had the bulk of all of the day-to-day operations of the case whether it be issuing and responding to discovery, taking and preparing for a number of depositions, coordinating all of the case coordination with state agencies, even working on the day-to-day strategy, meeting with the other parties and that's been the role that new lead counsel would have to step in and fill. Because of competing cases of large stature Mr. Rael has not been involved to the extent that may have been thought otherwise.” *Id.*, pg. 12.

From fall 2019 to the end of 2020 Marcus Rael had billed the state more than 800 hours at \$250 per hour (excluding those hours not provided on the majority of invoices). This despite the fact that he was listed as the lead attorney but was not acting in that capacity, despite the fact that he had “competing cases of large stature” and despite the fact that after more than two years of discovery his law firm had accomplished so little work. The request for an extension of discovery was denied.

All of this evidence begs the question: What was Marcus Rael working on? If he was not actually the lead attorney, why was he billing at the rate of \$225 or more per hour, and what did he spend upward of 800 hours doing? Clearly, based on the evidence, his attention was focused elsewhere, and New Mexico’s representation at the Supreme Court suffered as a result.

The New Mexico Attorney General also appointed a Denver firm, Trout, Raley, Montano, Witwer & Freeman, P.C. to the *Texas vs NM* case, that according to the internet has an expertise in water law. We do not have their billing records, but their name appears on most pleadings. Their billing records may put the real firm's billing in context.

Rael's other pending cases

During the relevant time period, Marcus Rael was also lead attorney, appointed by the NMAG in the class action suit against Volkswagen; the Volkswagen case was filed in January of 2016 and was settled in December of 2019. Litigation of both cases took place simultaneously.

In the Volkswagen case, Robles, Rael and Anaya P.C. submitted an Unopposed Motion for Attorney Fees on December 20th, 2019 that stated:

“Counsel committed to this case knowing that doing so would likely preclude them from accepting other matters. As noted above, the full-scale litigation of this case would have required an extraordinary commitment to discovery, not to mention the time-consuming motion practice and argument-preparation that comes with high-stakes litigation involving sophisticated counsel... Counsel was prepared to turn away other employment to meet the needs of this litigation.”
See, Exhibit D.

Robles, Rael and Anaya P.C. asked for and received \$4,050,000 in compensation, 30% of the settlement amount approved to compensate the Volkswagen owners in New Mexico, plus expenses of \$129,928 for their work on the Volkswagen case, an amount approved in a declaration filed by Cholla Khoury, Assistant AG to Hector Balderas. *See, Exhibit E.*

By itself these attorney fees in the Volkswagen case are unremarkable for a case that lasted well over three years. However, the contemporaneous billing invoices for *Texas v. NM* cast doubt on their accuracy and the oversight provided by the NMAG's office. During this same time period, in which Rael's firm was “committed” to the Volkswagen case and “prepared to turn away other employment to meet the needs of this litigation,” the firm was billing taxpayers for millions of dollars in fees in the *Texas v. NM* case.

Simultaneously with the alleged work on the *Texas v. NM* case, Mr. Rael and other counsel in his firm were also working for the NMAG, and other clients on many other cases, making it doubtful that they could have spent the time and hours they claimed in the *Texas v. NM* case, the Volkswagen class action and perhaps others.

New Mexico’s Governmental Conduct Act and the Appearance of a Conflict of Interest that Gave Rise to this Complaint .¹⁶

New Energy Economy (“NEE”) is an intervenor in NM PRC Case No. 20-00222-UT. On March 10, 2021, Iberdrola retained Marcus Rael for \$400 per hour. *See*, Exhibit F.¹⁷ On April 2, 2021, Assistant Attorney General Gideon Elliot filed the expert testimonies of Andrea Crane and Scott Hempling, stating among other things that merger was “*not* in the public interest”, the legal standard, and if the Commission were to approve the merger a number of conditions would have to be included. On April 20, 2021, after the NMAG had been involved in settlement discussions with Marcus Rael, a stipulation was announced.¹⁸ There was a huge chasm between the “benefits” offered in the NMAG/Avangrid/PNM stipulation and the required conditions suggested in the NMAG expert witnesses’ testimonies.¹⁹

On June 24, 2021, in NMPRC Case No. 20-00222-UT, Joint Applicants’ filed their 1st Supplemental Objections and Responses to New Mexico Affordable Reliable Energy Alliance’s 4th Set of Interrogatories and Requests for Production of Documents. Iberdrola/Avangrid testified, in NM AREA 4-1, that “Mr. Rael is retained by Iberdrola, S.A., on behalf of Avangrid to provide legal advice in this case and to assist in settlement negotiations with various parties.” The first meeting Mr. Rael had with the NMAG was on 2/26/2021 and had a number of successive meetings with the NMAG for a total of 18 meetings, the last meeting occurring on 4/5/2021. This contradicts the Joint Applicants’ Response to NEE, that stated that Mr. Rael was hired by Iberdrola, S.A., on 3/10/2021. Joint Applicants’ state further that “Additionally, Mr. Rael attended a scheduled meeting with Ken Martinez, the County Attorney for Bernalillo County, on March 10, 2021. Mr. Rael also had a number of telephone conferences with Mr. Martinez. Mr. Martinez was advised of and aware of his right to have his regulatory counsel present for the discussions.” ABA Model Rule 4.2; N.M.R. Prof’l. Cond. 16-402.

Given the close relationship between the NMAG and Mr. Rael and the appearance of a conflict of interest that appeared to influence the NMAG’s ability to perform its duty to protect the rights of ratepayers in the case, NEE filed an Inspection of Records Act

¹⁶ The NM PRC added Iberdrola, parent company of Avangrid, as a party, on June 8, 2021.

¹⁷ NMPRC Case No. 20-00222-UT, Joint Applicants’ 1st Supplemental Objections and Responses to NEE-7, April 22, 2021, NEE 7-1. “Iberdrola S.A. has retained Mr. Rael as legal counsel. Mr. Rael was retained on March 10, 2021. His rate is \$400 per hour. Iberdrola S.A. is paying this expense.”

¹⁸ *See*, Exhibit G, NMPRC Case No. 20-00222-UT, Joint Applicants’ filed their 1st Supplemental Objections and Responses to New Mexico Affordable Reliable Energy Alliance’s 4th Set of Interrogatories and Requests for Production of Documents, June 24, 2021.

¹⁹ *See*, Exhibit H, a cursory inspection of the expert testimony provided by Andrea Crane and Scott Hempling on behalf of the AG’s office and the stipulation signed by the Attorney General.

(IPRA) request with the NMAG²⁰ to try and determine the extent of the relationship between the NMAG and Mr. Rael and his law firm. The responses received from the NMAG was organized into an Excel spreadsheet, to facilitate review. *See*, Exhibit B.

The response received thus far warrants your office's further investigation.

Attachments

Exhibit A: New Energy Economy's IPRA to the NMAG, April 9, 2021.

Exhibit B: Responses received from the NMAG to NEE's IPRA organized into an Excel spreadsheet.

Exhibit C: *Texas v. NM*, Transcript of Proceedings, March 19, 2020.

Exhibit D: Unopposed Motion for Attorney Fees on December 20th, 2019.

Exhibit E: Declaration filed by Cholla Khoury, Assistant AG to Hector Balderas

Exhibit F: NMPRC Case No. 20-00222-UT, Joint Applicants' 1st Supplemental Objections and Responses to NEE-7, April 22, 2021.

Exhibit G: NMPRC Case No. 20-00222-UT, Joint Applicants' filed their 1st Supplemental Objections and Responses to New Mexico Affordable Reliable Energy Alliance's 4th Set of Interrogatories and Requests for Production of Documents, June 24, 2021.

Exhibit H: a cursory inspection of the expert testimony provided by Andrea Crane and Scott Hempling on behalf of the AG's office and the stipulation signed by the Attorney General.

²⁰ Exhibit A, New Energy Economy's IPRA to the NMAG, April 9, 2021.