

1 **STATE OF NEW MEXICO**
2 **ADMINISTRATIVE HEARINGS OFFICE**
3 **TAX ADMINISTRATION ACT**

4 **MOLINA HEALTHCARE OF NEW MEXICO, INC**

5 *v.* **AHO Case No’s.22.01-002R & 22.01-003R, D&O# 24-12**

6 **NEW MEXICO TAXATION AND REVENUE DEPARTMENT**

7 **DECISION AND ORDER**

8 On March 6, 2024, Hearing Officer Chris Romero, Esq., of the Administrative Hearings
9 Office conducted an administrative hearing on the merits of the tax protest of Molina Healthcare
10 of New Mexico, Inc. (hereinafter “Molina” or “Taxpayer”) pursuant to the Tax Administration
11 Act and the Administrative Hearings Office Act.

12 The Administrative Hearings Office is an independent agency tasked with the fair and
13 impartial adjudication of protests under the Tax Administration Act. As explained by Regulation
14 22.600.1.20 C NMAC, the Hearing Officer is not “responsible to or subject to the direction of
15 any officer, employee or agent of the taxation and revenue department[.]” *See e.g.* Regulation
16 22.600.1 NMAC (2018)

17 Mr. Frank Crociata, Esq. and Mr. Scott Woody, Esq., appeared in person for Molina
18 accompanied by Mr. George Figueroa and Mr. Morris Chavez, Esq. Ms. Carolyn Marie Ingram,
19 Ms. Codruta Boggs, Ms. Kendra Pratali, and Ms. Joyce Hong also appeared by Zoom.

20 Staff Attorney, Mr. Timothy Williams, Esq., appeared in person representing the
21 opposing party in the protest, the Taxation and Revenue Department (“Department”), and was
22 accompanied by Ms. Angelica Rodriguez and Ms. Thanyathorn Winkelmaier, protest auditors.

23 Ms. Rodriguez was not called to testify for the Department and Ms. Winkelmaier
24 attended only as an observer for training purposes.

25 Taxpayer Exhibits 1 – 9, 11 – 18, 20 – 22 and Department Exhibit J.1 were admitted

1 either upon stipulation, without objection, or over objection.

2 The protest challenges the Department’s denials of separate refund claims filed for the
3 Premium Tax years 2018 and 2019. The claims arise from the application of the New Mexico
4 Medical Insurance Pool (“MIP”) credit under NMSA 1978, Section 59A-54-10 (C) (2007,
5 Amended 2020) at a time when the Office of Superintendent of Insurance (“OSI”) administered
6 the Premium Tax.

7 Molina asserted that OSI wrongly restricted the amount and utilization of MIP credits
8 contrary to NMSA 1978, Section 59A-54-10 (C) (2007, Amended 2020) by adopting a policy
9 which declared, absent statutory authority, that MIP credits were neither refundable nor fully
10 utilizable. The result of the policy was to deny Molina a refund of unused MIP credits in the total
11 amount of \$5,343,728.00.

12 As expounded in greater detail in the ensuing discussion, the Hearing Officer finds based
13 on the evidence and arguments presented that Molina’s protest should be GRANTED for the
14 reasons stated. IT IS DECIDED AND ORDERED AS FOLLOWS:

15 **FINDINGS OF FACT**

16 *Witness Introductions*

17 1. Carolyn Marie Ingram is employed by Molina Healthcare, Inc. She is also the
18 plan president of Molina, the taxpayer, formally known as Molina Healthcare of New Mexico,
19 Inc., which is a separate entity from Molina Healthcare, Inc. [Direct Examination of C. Ingram]

20 2. In her capacity as plan president, Ms. Ingram oversees all operations of the
21 Molina health plan for the state of New Mexico, including its marketplace products, medicaid
22 products, medicare products, personnel management and oversight, and state contract
23 administration. [Direct Examination of Ms. C. Ingram]

1 3. Ms. Ingram has been employed by Molina Healthcare, Inc. for approximately 9
2 years and has several years of previous experience relevant to healthcare, including: Center for
3 Healthcare Strategies for 4 years; New Mexico Medicaid Director and National Association of
4 State Comprehensive Health Insurance Plans (NSCHIP) director for 8 years; and served as a
5 board member and executive director of the New Mexico Medical Insurance Pool from 2002 to
6 2011. [Direct Examination of Ms. C. Ingram]

7 4. As board member and executive director of the New Mexico Medical Insurance
8 Pool, Ms. Ingram participated in and oversaw the selection of its administrator and executive
9 director, and contributed to the formulation of policy, rates development and adoption,
10 leveraging assessments, and assisted in drafting or promoting legislation to increase assessments
11 and implement tax credits. [Direct Examination of Ms. C. Ingram]

12 5. Ms. Ingram has personally participated in the legislative process to address
13 various aspects relating to the operation of the New Mexico Medical Insurance Pool, including
14 implementation of the MIP credit which compensated insurers, “on the back end,” to reduce
15 financial burdens on the private market which was absorbing the higher costs of providing
16 coverage to a high-risk population. [Direct Examination of Ms. C. Ingram]

17 6. George Figueroa is a Certified Public Accountant. He is retired and was formerly
18 employed for 14 years by Molina Healthcare, Inc. where he served as Vice President of tax. He
19 oversaw all tax areas for Molina with the exception of payroll tax. [Direct Examination of G.
20 Figueroa]

21 7. Mr. Figueroa worked closely with other insurers in New Mexico and freely
22 conferred with tax professionals from other insurers in reference to common concerns and issues.
23 As such, he was well informed in various matters affecting the New Mexico insurance industry.

1 [Direct Examination of G. Figueroa]

2 8. Morris J. Chavez served as Superintendent of Insurance from 2006 to 2010.

3 [Direct Examination of M. Chavez]

4 9. Mr. Chavez is also a New Mexico licensed attorney since 1999 and shareholder
5 with Saucedo Chavez which he founded in 2011. A portion of his practice is dedicated to
6 insurance law. [Direct Examination of M. Chavez]

7 10. Mr. Chavez was a licensed insurance agent from approximately 1998 to 2001 or
8 2002. [Direct Examination of M. Chavez]

9 11. In his capacity as Superintendent of Insurance, Mr. Chavez served as a board
10 member of the New Mexico Medical Insurance Pool. [Direct Examination of M. Chavez; Direct
11 Examination of C. Ingram]

12 *Molina Healthcare of New Mexico, Inc.*

13 12. Molina is a locally-operated Health Maintenance Organization which, as of the
14 date of the hearing, had provided managed care services in New Mexico for more than 20 years.

15 [Direct Examination of G. Figueroa]

16 13. Molina has served medicaid and medicare beneficiaries, and more recently,
17 marketplace or non-group insurance populations. [Direct Examination of G. Figueroa]

18 14. Molina provided services to medicaid beneficiaries under a contract with the
19 Human Services Department (HSD) of the State of New Mexico from “2014 through 2018.”

20 [Direct Examination of G. Figueroa]

21 15. Molina was notified in January of 2018 that after a competitive procurement
22 process, the state had selected a new contractor and that Molina’s medicaid contract would not
23 be renewed in 2019. [Direct Examination of G. Figueroa]

1 16. The contract to provide medicaid services for the State of New Mexico from 2014
2 through 2018 generated the “bulk of [Molina’s] market share” during that time. This was
3 important because the percentage of Molina’s market share was a variable contributing to the
4 computation of its assessment obligations to the New Mexico Medical Insurance Pool and its
5 MIP credit, which would ultimately determine its Premium Tax obligation. [Direct Examination
6 of G. Figueroa]

7 17. From 2014 to 2018, while Molina’s medicaid contract was active, Molina’s share
8 of the New Mexico market was substantial, and represented approximately 23 percent of the
9 market in 2018. [Direct Examination of G. Figueroa]

10 18. Expiration of Molina’s medicaid contract reduced Molina’s market share from
11 approximately 23 percent in 2018 to approximately 2 percent in 2019. [Direct Examination of G.
12 Figueroa]

13 *The New Mexico Medical Insurance Pool*

14 19. The New Mexico Medical Insurance Pool, also known as a “high risk pool,” is a
15 non-profit entity. It is not an agency of the State of New Mexico although it does work closely
16 with the Superintendent of Insurance. [Direct Examination of C. Ingram]

17 20. The purpose of the New Mexico Medical Insurance Pool is to provide health
18 insurance for its policy holders who represent the “sickest of the sick New Mexicans.” It was
19 created in 1987 to provide health insurance for New Mexicans who were unable to obtain
20 coverage from other sources. [Direct Examination of C. Ingram; Direct Examination of M.
21 Chavez]

22 21. The New Mexico Medical Insurance Pool provides healthcare coverage to
23 individuals who cannot obtain insurance or who may be underinsured for assorted reasons,
24 including certain medical conditions, employment-related barriers, or who are ineligible for

1 coverage under medicaid or medicare. [Direct Examination of C. Ingram]

2 22. Approximately 35 states have utilized “high risk pools” for extending health
3 insurance to high-risk populations. Although the Affordable Care Act has reduced the demand
4 for high-risk pools, or in some instances, rendered them obsolete, New Mexico continues
5 utilizing its high-risk pool to assist in providing health insurance to its high-risk population.
6 [Direct Examination of C. Ingram; Cross Examination of C. Ingram]

7 23. The New Mexico Medical Insurance Pool provides for basic health insurance
8 through a preferred provider organization (PPO) model. It includes coverage for inpatient,
9 outpatient, hospital, and other ancillary services consistent with standard commercial health
10 insurance products. [Direct Examination of C. Ingram]

11 24. Coverage eligibility is determined by demonstrating an inability to obtain
12 insurance coverage through conventional methods of procuring health insurance, plus New
13 Mexico residency. [Direct Examination of C. Ingram]

14 25. The New Mexico Medical Insurance Pool is established by state law and is
15 governed by a board that includes the Superintendent of Insurance, as well as insurance industry
16 and consumer representatives. [Cross Examination of C. Ingram]

17 26. At all relevant times, Molina was a provider of insurance to the New Mexico
18 Medical Insurance Pool. [Direct Examination of C. Ingram]

19 *Funding the New Mexico Medical Insurance Pool: An Overview*

20 27. Even with the reduced demand resulting from enactment of the Affordable Care
21 Act, the New Mexico Medical Insurance Pool costs remain substantial in light of the high-risk
22 population served and the increasing costs of health care. [Cross Examination of C. Ingram]

23 28. Generally speaking, high-risk pool losses, claims, and expenses are funded by

1 assessing premiums on policy holders. Because members are high risk, premiums rarely cover
2 the true costs of coverage or are so high that there is no financial incentive to participate.
3 Therefore, states supplement funding to high-risk pools through premiums assessed on insurance
4 companies based on their market share, through legislative appropriations, and through federal
5 grants. [Direct Examination of C. Ingram; Direct Examination of M. Chavez]

6 29. The New Mexico Medical Insurance Pool funds losses, claims, and expenses by:
7 assessing premiums on policy holders based on the average premium cost in the commercial
8 market; leveraging assessments against insurance companies based on their market share; and by
9 indirect legislative appropriation in the form of tax credits. [Direct Examination of C. Ingram;
10 Direct Examination of M. Chavez]

11 30. For illustration purposes, the National Association of State Comprehensive Health
12 Insurance Plans observed that in 2010, the New Mexico Medical Insurance Pool was funded
13 generally by: “Premiums, Federal grant, assessment to carriers, 50% premium tax credit on
14 regular and low-income program (LIPP) and a 75% premium tax credit on losses for publicly
15 sponsored members.” [Direct Examination of C. Ingram; Taxpayer Ex. 20.007]

16 31. For illustration purposes, the National Association of State Comprehensive Health
17 Insurance Plans observed that in 2010, the New Mexico Medical Insurance Pool derived its
18 funding from the specified sources in the following amounts: (1) premiums (21%); grants (2%);
19 tax credits (42%); and assessments (35%). [Direct Examination of C. Ingram; Taxpayer Ex.
20 20.007]

21 32. For illustration purposes, the National Association of State Comprehensive Health
22 Insurance Plans observed that in 2010, “Assessments are charged to: Commercial Health
23 Carriers, Stop Loss Carriers, [and] Medicaid Carriers” based on “market share[.]” [Direct

1 Examination of C. Ingram; Taxpayer Ex. 20.007]

2 33. At the time the National Association of State Comprehensive Health Insurance
3 Plans made the previously stated observations, one of its board members, Ms. Debbie
4 Armstrong, was simultaneously serving as Executive Director of the New Mexico Medical
5 Insurance Pool. [Direct Examination of C. Ingram; Taxpayer Ex. 20.006 – 20.007]

6 34. In 2015, Ms. Armstrong, Executive Director of the New Mexico Medical
7 Insurance Pool addressed a committee of the New Mexico State Legislature. Ms. Armstrong
8 reported that based on data at that time, the New Mexico Medical Insurance Pool obtained
9 funding from the following sources in the specified amounts: “Premiums – 20%” and “Health
10 Insurance Carrier Assessments – 80%,” but that assessments are offset by a “Tax Credit equal to
11 approx. 56% of assessment paid[.]” Thus, “Carriers fund approx. 36%” of the pool by passing
12 costs onto the private market with the state funding “approx. 44% via reduced revenue” in the
13 form of the tax credit. [Direct Examination of C. Ingram; Taxpayer Ex. 21.001 – 21.002]

14 35. Ms. Armstrong suggested that lawmakers and policymakers should “Take care to
15 not overburden [the] private market[.]” Since a portion of the pool’s expenses are funded by
16 premiums derived on the private market, care should be exercised not to drive premium costs so
17 high that it is unsustainable for insurance companies to operate in New Mexico. [Direct
18 Examination of C. Ingram; Taxpayer Ex. 21.001 – 21.002]

19 36. New Mexico does not provide direct legislative appropriation to the New Mexico
20 Medical Insurance Pool because it requires a steady flow of cash which cannot be accomplished
21 under New Mexico law. The New Mexico Legislature meets annually but the New Mexico
22 Medical Insurance Pool requires funding on a quarterly basis which is accomplished from the
23 assessments paid by insurers which “act like a bank” by advancing funds to the pool. [Direct

1 Examination of C. Ingram; Direct Examination of M. Chavez]

2 37. Although the Legislature could have implemented other funding structures, the
3 structure employed allows the New Mexico Medical Insurance Pool flexibility in securing funds
4 as needed to promptly respond to the variable medical demands of its high-risk pool participants.
5 For example, catastrophic events such as COVID-19 can rapidly increase the fiscal demands of
6 the pool which it can then address as soon as it observes increasing claims, hospitalizations, or
7 other indicators suggesting the need to increase cash flow. [Cross Examination of C. Ingram]

8 38. Methods for computing assessments and credits, including the percentages of
9 allowable credit is determined by NMSA 1978, Section 59A-54-10 (2007, amended 2020).
10 [Direct Examination of C. Ingram]

11 *Funding the New Mexico Medical Insurance Pool: Assessments*

12 39. The New Mexico Medical Insurance Pool is authorized by law to issue
13 assessments to insurers. Assessment payments are mandatory. Failure to pay mandatory
14 assessments would subject the delinquent insurer to penalty by the Superintendent of Insurance,
15 up to or including revocation of their Certificate of Authority which authorizes the insurer to
16 engage in business in New Mexico. [Direct Examination of C. Ingram; Direct Examination of M.
17 Chavez]

18 40. Revenue generated by the New Mexico Medical Insurance Pool through
19 assessments does not pay medical expenses incurred by patients. Instead, funds derived from
20 assessments pay for pool losses and administrative expenses. [Direct Examination of C. Ingram]

21 41. The New Mexico Medical Insurance Pool assesses health insurance carriers on a
22 quarterly basis “going forward” because the pool cannot predict with certainty the sum of its
23 actual losses or costs. [Direct Examination of C. Ingram]

1 42. Assessments can be significant, reaching as much as \$15,000,000 for a single
2 insurer. [Direct Examination of C. Ingram]

3 43. The New Mexico Medical Insurance Pool generally computes assessments by
4 projecting losses for the upcoming year based on the number of members, claims experience, and
5 appropriate adjustment for the number of members insured and premiums received in the past
6 year. Otherwise stated, an assessment is derived from projecting the fiscal needs of the upcoming
7 year based on the prior year’s data, although circumstances may arise that require modification
8 (i.e. COVID 19). [Direct Examination of C. Ingram; Direct Examination of M. Chavez]

9 *Funding the New Mexico Medical Insurance Pool: the MIP Credit*

10 44. The New Mexico Medical Insurance Pool benefits from indirect legislative
11 appropriations in the form of the MIP credit to health insurers. [Direct Examination of C.
12 Ingram; Direct Examination of M. Chavez]

13 45. The MIP credit is not an incentive-type credit because it provides no incentive.
14 Instead, the MIP credit is used to reimburse insurers for losses incurred in providing insurance to
15 the “sickest of the sick New Mexicans.” The payment of assessments through which the credit is
16 generated is mandatory. [Direct Examination of M. Chavez]

17 46. The Legislature compensates insurers in the form of reduced revenues to its
18 general fund by awarding the MIP credit as reimbursement for funds advanced to the New
19 Mexico Medical Insurance Pool which are subsequently applied toward the insurer’s Premium
20 Tax obligation. [Direct Examination of C. Ingram]

21 47. With respect for tax credits as a funding source, “the funding is actually coming
22 from the New Mexico State Legislature. When assessments are levied upon the insurers to fund
23 pool losses, essentially, those insurers are given a tax credit by statute and that tax credit comes

1 from, essentially, the Legislature via the general fund so the money is kind of being sent back to
2 the insurance companies that are funding it via this tax credit.” [Direct Examination of M.
3 Chavez]

4 48. During her tenure as Executive Director and Board Chair for the New Mexico
5 Medical Insurance Pool, Ms. Ingram’s understanding of the MIP credit’s purpose was to offset
6 assessments issued to health insurers to fund pool operations, and for that reason, health insurers
7 were entitled to the benefits of the full credit amount provided by law. Stated otherwise,
8 insurance companies were financing the pool’s operations in the absence of direct legislative
9 appropriations to be subsequently remunerated in the form of a tax credit. [Direct Examination of
10 C. Ingram]

11 49. Because the New Mexico Medical Insurance Pool is not a state agency, it has no
12 ability nor authority to refund MIP credits from the state’s general fund, thereby satisfying the
13 legislature’s intention to indirectly appropriate funding to its operations. It merely calculates and
14 reports the credit amounts to insurers for inclusion in their Premium Tax returns. During all
15 relevant times, OSI would then process the return, collect payment, and pay refunds. [Direct
16 Examination of C. Ingram]

17 50. The New Mexico Medical Insurance Pool “calculates the credits for each
18 insurance company based off of what the insurance company has already paid and what the
19 expenses are for the pool.” [Direct Examination of C. Ingram]

20 *Funding the New Mexico Medical Insurance Pool: “True Up”*

21 51. At the end of the relevant calendar year, the New Mexico Medical Insurance Pool
22 provides a final assessment (“true up”) to determine more precisely what an insurer’s actual
23 assessment obligation should be and to evaluate whether it paid too much or too little. [Direct

1 Examination of C. Ingram]

2 52. The true up is based on actual figures, including losses, premiums amounts
3 assessed and paid, and the final costs incurred which will show an underpayment or overpayment
4 of the insurer. In the case of an overpayment, meaning when the updated assessed amount is less
5 than the insurer's share actually paid, the overpayment is refunded. In the case of an
6 underpayment, meaning when the updated assessed amount exceeds the assessed amount
7 actually paid, the insurer must pay the shortage. [Direct Examination of C. Ingram; *See e.g.*
8 Taxpayer Ex. 12]

9 53. True ups are usually completed the following calendar year. [Direct Examination
10 of C. Ingram; Taxpayer 12.001]

11 54. Revision of final assessments occur when late-arriving information requires
12 modification to the computations. Preparing the revised and final assessments can be a time-
13 consuming process. [Direct Examination of C. Ingram]

14 *Computations: Molina's Assessments and MIP Credits*

15 55. On June 26, 2017, the New Mexico Medical Insurance Pool issued its "2016 Final
16 Assessment[.]" [Direct Examination of G. Figueroa; Department Ex. J.1]

17 56. The "2016 Final Assessment" computed Molina's 2016 assessment liability,
18 which revealed an overpayment in the amount of \$1,000,198 as follows:

19 a. The "2016 NM Premiums Reported for ALL Insurers" reports a sum of
20 \$5,783,423,978 of which Molina's premiums, as detailed for "2016 NM Premiums Reported for
21 YOUR Company[.]" contributed \$1,387,782,023. [Direct Examination of G. Figueroa;
22 Department Ex. J.1]

23 b. Dividing Molina's premiums by the sum of all reported premiums
24 $(\$1,387,782,023 / \$5,783,423,978)$ established that Molina's 2016 market share was

1 23.995855%. [Direct Examination of G. Figueroa; Department Ex. J.1]

2 c. The “2016 Actual NMMIP Loss” was \$73,767,412 of which Molina’s
3 share was computed by multiplying the loss by Molina’s market share percentage (\$73,757,412 x
4 23.995855%) to reach a share of \$17,701,121. [Direct Examination of G. Figueroa; Department
5 Ex. J.1]

6 d. Molina’s final outstanding liability for 2016 is then computed by
7 calculating the difference between the sum of “Total 2016 Interim Assessments Paid by YOUR
8 Company[,]” which in this case was \$18,701,319 and Molina’s market share of the 2016 loss of
9 \$17,701,121, revealing an overpayment by Molina in the amount of \$1,000,198. [Direct
10 Examination of G. Figueroa; Department Ex. J.1]

11 e. Thus, the final amount due to be refunded to Molina for overpayment of
12 its 2016 assessment obligation was \$1,000,198. [Direct Examination of G. Figueroa; Department
13 Ex. J.1]

14 57. The “2016 Final Assessment” was accompanied by an “Allocation of Final
15 Assessment for 2016 Annual Premium Tax Credits[.]” It explained, “The figures below represent
16 the annual premium tax credits available for your company’s 2016 Premium Tax Return. Please
17 use these annual credit amounts only once and NOT in conjunction with any interim assessment
18 payments.” [Direct Examination of G. Figueroa; Department J.1]

19 58. MIP credit is computed as a percentage of “YOUR Company’s portion of 2016
20 Actual NMMIP Loss[.]” The total “2016 Premium Tax Credit Available” deriving from the
21 computations provided in the “2016 Final Assessment” was \$9,425,847 (\$7,699,988 awarded at
22 a premium tax percentage of 50 percent; \$1,725,859 awarded at a premium tax percentage of 75
23 percent). [Direct Examination of G. Figueroa; Department J.1]

1 59. Instructions on Molina’s 2016 Final Assessment directed that the MIP credits
2 awarded for the 2016 Annual Premium tax year be reported in 2016. However, under the
3 statewide audit, Molina’s 2015 MIP credits were reported on the 2016 Premium Tax return. Had
4 Molina claimed its 2016 MIP credits on its 2016 Premium Tax Return, as provided on the final
5 assessment, the result would have been to “double count the credits.” [Direct Examination of G.
6 Figueroa; Department J.1]

7 60. The 2017 Premium Tax Returns were due on April 15, 2018. Molina timely filed
8 its Premium Tax return with OSI accompanied by the 2016 Final Assessment. April 15, 2018 fell
9 on a Sunday. The file date indicates two dates: Friday, April 13, 2018 and Monday, April 16,
10 2018. [Direct Examination of G. Figueroa; Department J.1]

11 61. On May 6, 2019, the New Mexico Medical Insurance Pool issued its “2017 Final
12 Assessment Revised” and its “2018 Final Assessment.” [Direct Examination of G. Figueroa;
13 Taxpayer Ex. 12]

14 62. It is introduced with the following statement in reference to the 2017
15 computations: “Below is a revised calculation for the 2017 Final Assessment resulting from
16 reporting revisions subsequent to the original 2017 final assessment invoices. The NMMIP
17 Board and the OSI approved the revision for the 2017 final assessment and voted to include the
18 revised amount with the 2018 final assessment.” [Direct Examination of C. Ingram; Taxpayer
19 Ex. 12.001]

20 63. The “2017 Final Assessment Revised” computed Molina’s final 2017 liability, in
21 the amount due of \$1,206,005, as follows:

22 a. The “2017 NM Premiums Reported for ALL Insurers (revised)” reports a
23 sum of \$5,366,950,149 of which Molina’s premiums, as detailed for “2017 NM Premiums

1 Reported for YOUR Company[,]” contributed \$1,233,734,615. [Direct Examination of G.
2 Figueroa; Taxpayer Ex. 12.001]

3 b. Dividing Molina’s premiums by the sum of all reported premiums
4 (\$1,233,734,615 / \$5,366,950,149) established that Molina’s 2017 market share was
5 22.9876294869%. [Direct Examination of G. Figueroa; Taxpayer Ex. 12.001]

6 c. The “2017 Actual NMMIP Loss” was \$82,010,854 of which Molina’s
7 share was computed by multiplying the loss by Molina’s market share percentage (\$82,010,854 x
8 22.9876294869%) to reach a share of \$18,852,352. [Direct Examination of G. Figueroa;
9 Taxpayer Ex. 12.001]

10 d. Molina’s final liability for 2017 is then computed by calculating the
11 difference between the sum of “Prior 2017 Final Assessment Paid by YOUR Company[,]” which
12 in this case was \$17,646,347 and Molina’s market share of the 2017 loss of \$18,852,352. The
13 amount due for 2017 was \$1,206,005. [Direct Examination of G. Figueroa; Taxpayer Ex. 12.001]

14 e. Thus, the final Amount Due from Molina for its 2017 assessment
15 obligation was \$1,206,005. [Direct Examination of G. Figueroa; Taxpayer Ex. 12 12.001]

16 64. The “2018 Final Assessment” computed Molina’s final 2018 liability as an
17 overpayment in the amount of \$1,963,262, as follows:

18 a. The “2018 NM Premiums Reported for ALL Insurers” reports a sum of
19 \$5,989,817,901 of which Molina’s premiums, as detailed for “2018 NM Premiums Reported for
20 YOUR Company[,]” contributed \$1,357,428,147. [Direct Examination of G. Figueroa; Taxpayer
21 Ex. 12.001]

22 b. Dividing Molina’s premiums by the sum of all reported premiums
23 (\$1,357,428,147 / \$5,989,817,901) established that Molina’s 2018 market share was

1 22.6622606805%. [Direct Examination of G. Figueroa; Taxpayer Ex. 12.001]

2 c. The “2018 Actual NMMIP Loss” was \$70,838,942 of which Molina’s
3 share was computed by multiplying the loss by Molina’s market share percentage (\$70,838,942 x
4 22.6622606805%) to reach a share of \$16,053,706. [Direct Examination of G. Figueroa;
5 Taxpayer Ex. 12.001]

6 d. Molina’s final liability for 2018 is then computed by calculating the
7 difference between the sum of “Total 2018 Interim Assessments Paid by YOUR Company[,]”
8 which in this case was \$18,016,968 (Taxpayer Ex. 1) and Molina’s market share of the 2018 loss
9 of \$16,053,706. The amount overpaid by Molina was \$1,963,262. [Direct Examination of G.
10 Figueroa; Taxpayer Ex. 12.001]

11 e. Thus, the final amount due to be refunded to Molina for overpayment of
12 its 2018 assessment obligation was \$1,963,262. [Direct Examination of G. Figueroa; Taxpayer
13 Ex. 12]

14 65. The “2017 Final Assessment Revised” and “2018 Final Assessment” when
15 combined established Molina’s entitlement to a refund (“Total Combined Amount Due” of
16 (\$757,257)”) for overpayment of its 2017 and 2018 assessment obligations. [Direct Examination
17 of G. Figueroa; Taxpayer Ex. 12.001]

18 66. MIP credit was computed as a percentage of “YOUR Company’s portion of 2017
19 Actual NMMIP Loss (revised)” and “YOUR Company’s portion of 2018 Actual NMMIP
20 Loss[.]” It explained, “The figures below represent the annual premium tax credits available for
21 your company’s 2019 Premium Tax Return. Please use these annual credit amounts only once
22 and NOT in conjunction with any interim assessment payments.” [Direct Examination of G.
23 Figueroa; Taxpayer Ex. 12.002]

1 67. The total “Premium Tax Credit Available for 2019 return” deriving from the
2 “2017 (revised) Final Assessment” was \$639,182 (\$530,642 awarded at a premium tax
3 percentage of 50 percent; \$108,540 awarded at a premium tax percentage of 75 percent). The
4 credit amount specified was based only on “Your Company’s *additional* Share of 2017 NMMIP
5 Loss” (Emphasis Added). [Direct Examination of G. Figueroa; Taxpayer Ex. 12.002]

6 68. The total “Premium Tax Credit Available for 2019 return” deriving from the
7 “2018 Final Assessment” was \$8,428,196 (\$7,224,168 awarded at a premium tax percentage of
8 50 percent; \$1,204,028 awarded at a premium tax percentage of 75 percent). [Direct Examination
9 of G. Figueroa; Taxpayer Ex. 12.002]

10 69. Thus, the “Total Combined Premium Tax Credit Available for 2019 return” as
11 specified by the report was \$9,067,378 (\$7,754,810 awarded at a premium tax percentage of 50
12 percent; \$1,312,568 awarded at a premium tax percentage of 75 percent). [Direct Examination of
13 G. Figueroa; Taxpayer Ex. 12.002]

14 70. It is not unusual, as seen in this case, for a “2017 Final Assessment Revised” or a
15 “2018 Final Assessment” to be calculated in May or June of 2019 and for credit amounts to be
16 adjusted based on revised figures. [Direct Examination of C. Ingram; Taxpayer Ex. 12]

17 *OSI*

18 71. OSI administered taxes imposed pursuant to the New Mexico Insurance Code prior
19 to January 1, 2020. [Administrative Notice of Chapter 57 Section 30 Laws 2018]

20 72. Before March of 2015, Molina’s historical process was to report its MIP credit
21 under what Mr. Figueroa described as a “correlative approach,” meaning that the following items
22 would be reported in the same relevant year: amount of collected premiums and corresponding
23 Premium Tax; an assessment from the New Mexico Medical Insurance Pool based on pool losses

1 and market share, and a credit correlated with premiums, Premium Tax, and New Mexico
2 Medical Insurance Pool assessment, all filed together with the Premium Tax return for the year
3 of the relevant assessment. [Direct Examination of G. Figueroa]

4 73. This method, meaning the “correlative approach,” was consistent with how other
5 insurers were reporting in the same periods of time, and consistent since 1987 with how the
6 Office of Superintendent of Insurance administered the Premium Tax. [Direct Examination of G.
7 Figueroa; Direct Examination of M. Chavez]

8 74. Molina’s MIP credit never exceeded its Premium Tax liability under the
9 “correlative approach.” [Direct Examination of G. Figueroa]

10 75. No insurer’s credit should ever exceed its Premium Tax liability under the
11 “correlative approach.” [Direct Examination of M. Chavez]

12 76. To the extent there were any complications with the “correlative approach,” they
13 arose from the delay of the New Mexico Medical Insurance Pool’s inability to provide notice of
14 assessment and credit amounts before the deadline for filing Premium Tax returns on or before
15 the tax filing deadline in April of the relevant year. [Direct Examination of G. Figueroa]

16 77. The issue could have potentially been addressed by finding ways for the New
17 Mexico Medical Insurance Pool to provide notices of assessment and credit amounts earlier, or
18 in the alternative, delay the deadline to file Premium Tax returns. Instead of those approaches,
19 the Legislature extended to June 1 the timeframe within which the New Mexico Medical
20 Insurance Pool was to provide its financial statements. The deadline for taxpayer to file Premium
21 Tax returns, however, continued to be the traditional April deadline. [Direct Examination of G.
22 Figueroa]

23 78. During the First Session of the 52nd Legislature of the State of New Mexico in

1 2015, the Senate Judiciary Committee Substitute for Senate Corporations and Transportation
2 Committee Substitute for Senate Bill 577 proposed adding, among other modification to the
3 existing law, the following new language:

4 The New Mexico medical insurance pool credits shall only be
5 granted on the final annual premium tax return and shall only be
6 granted after the New Mexico medical insurance pool final
7 assessments have been issued for the prior calendar year. The
8 credits granted for the New Mexico medical insurance pool shall
9 not exceed the annual premium tax due on the final annual
10 premium tax return.

11 [Direct Examination of G. Figueroa; Taxpayer Ex. 4.004 (Line 20)
12 – 4.005 (Line 5)]

13 79. The Fiscal Impact Report, reporting information received only from the Office of
14 the Superintendent of Insurance, explained that “The bill would make New Mexico medical
15 insurance pool (MIP) credits nonrefundable, resulting in an estimated \$1 million increase in
16 recurring annual transfer to the general fund.” [Taxpayer Ex. 4.011 (“Fiscal Implications”)]

17 80. The bill passed the Senate on March 20, 2015¹. The House took no action on the
18 bill and the session ended² on March 21, 2015. [Taxpayer Ex. 4.012 – 4.013]

19 81. On March 30, 2015, within 10 days of the conclusion of the 2015 Regular
20 Session, the Office of Superintendent of Insurance issued Bulletin No. 2015-014. The bulletin
21 had immediate effect and was “issued to clarify the application of Medical Insurance Pool (MIP)
22 credits to premium tax liability.” [Taxpayer Ex. 2]

23 82. Bulletin 2015-014 explained:

24 The [Medical Insurance Pool (“MIP”)] issues “Final Assessments”
25 to participating insurance companies for the previous calendar year

¹ Taxpayer Ex. 4.012 – 4.013 establish that the bill passed the senate on Legislative Day 41 which corresponds with March 20, 2015 according to the roll call of the vote publicly available at <https://www.nmlegis.gov/Sessions/15%20regular/votes/SB0577SVOTE.pdf>

² The date stated herein as the end of the 2015 Regular Session was determined by reference to Highlights of the Fifty-Second Legislature, First Session and First Special Session, 2015, New Mexico Legislative Council Service, June 2015 (<https://www.nmlegis.gov/Publications/Session/15/highlights.pdf>)

1 in May or June of each year. Insurance companies participating in
2 MIP are eligible to apply MIP credits on their premium tax returns
3 as provided for in Section 59A-54-10 (B) NMSA 1978. The Office
4 of the Superintendent of Insurance (OSI) will accept application of
5 MIP credits to final premium tax returns using the following
6 guidelines[.]

7 83. The first paragraph of the guidelines contained in Bulletin 2015-014 specified:

8 MIP amounts recorded on the company's MIP "Final Assessment"
9 received the previous year and generating premium tax credits will
10 be applied to the final premium tax return due the subsequent
11 April. For instance, the credit for the amount recorded on MIP
12 "Final Assessment" issued in May or June of 2014 will be applied
13 to the 2014 final premium tax return due on April 15th, 2015.

14 84. The new guideline adopted what is known as a "staggered approach" meaning
15 that if the New Mexico Medical Insurance Pool issued a final assessment and credit computation
16 for 2013 in May or June of 2014, then Molina and other similarly situated taxpayers would
17 report the credit on its final 2014 premium tax return due to be filed in April 2015. [Direct
18 Examination of G. Figueroa]

19 85. Conversely stated, a "staggered approach" required Molina and other similarly
20 situated taxpayers to defer the use of their credits for one year, meaning that insurers, including
21 Molina, would be prohibited from claiming any credits in 2014, which Mr. Figueroa
22 characterized as "a gap year". [Direct Examination of G. Figueroa]

23 86. The third paragraph of the guidelines contained in Bulletin 2015-014 specified:

24 OSI will not issue refunds or apply credits to the following year's
25 tax liability if the company's MIP credit is an amount greater than
26 the tax liability listed on the corresponding premium tax final
27 described above. If a company's MIP credit is greater than their tax
28 liability, OSI will reduce the premium tax liability to zero for the
29 applicable year and will not carry over a credit into the next year
30 unless the company has made an overpayment on their previous
31 years' premium taxes or quarterly estimated premium taxes. We
32 will only carry over the funds that were accrued due to premium
33 tax overpayments for three (3) years pursuant to Section 59A-6-5
34 (B) NMSA 1978.

1 87. The fourth paragraph of the guidelines contained in Bulletin 2015-014 specified
2 that:

3 If a participating company receives a corrected MIP “Final
4 Assessment” from MIP, the corresponding final premium tax
5 return described above must be amended to reflect the change.

6 88. Overall, Mr. Figueroa observed, the bulletin prohibited excess credits from being
7 refunded. Mr. Figueroa further observed, as an example, that a final assessment credit statement
8 relevant to 2013 is reported on its final premium tax return for 2014 filed in 2015. If the pool
9 issues a corrected revised assessment in 2015 after a return is filed, then the insurer reports the
10 revised credit in 2016 as part of its original return. [Direct Examination of G. Figueroa]

11 89. Bulletin No. 2015-014 purported to implement by bulletin a policy consistent with
12 the failed Senate Bill 577 in that it required a staggered approach to reporting (“...credits shall
13 only be granted on the final annual premium tax return and shall only be granted after ... final
14 assessments have been issued for the prior calendar year.”) It also purported to limit use of any
15 MIP credit (...credits ... shall not exceed the annual premium tax due...). [Direct Examination
16 of G. Figueroa; Taxpayer Ex. 4; Taxpayer Ex. 2]

17 90. On October 9, 2015, the Office of Superintendent of Insurance issued Bulletin
18 No. 2015-027. The bulletin superseded Bulletin No. 2015-014, had immediate effect, and was
19 “issued to clarify the application of MIP credits to premium tax liability.” It was similar in all
20 relevant aspects to Bulletin No. 2015-014. [Direct Examination of G. Figueroa; Taxpayer Ex. 3]

21 91. In 2013, Molina was assessed an approximate amount of \$16 million based on its
22 2013 market share. But, pursuant to Bulletin No. 15-014, Molina was required to claim no credit
23 on its 2014 premium tax return, thereby deferring the benefit of any credit until 2015 and
24 permitting OSI to implement the “staggered approach” detailed in the bulletin. [Direct
25 Examination of G. Figueroa]

1 92. In 2017, the Office of the Superintendent of Insurance initiated an audit of
2 premium tax collections. The audit was conducted by Examination Resources, LLC and
3 reviewed premium tax processes from January 1, 2003 through December 31, 2016. [Direct
4 Examination of G. Figueroa; Taxpayer Ex. 5.003 – 5.004]

5 93. Mr. Figueroa is familiar with the audit occurring in 2016 by the Office of
6 Superintendent of Insurance for tax years 2003 through 2016. He assisted with the production of
7 various records for examination but concentrated most of his efforts on Molina’s subsequent
8 protest. [Direct Examination of G. Figueroa]

9 94. The audit examined premium data for a total of 30 insurance providers offering
10 various types of insurance, 12 companies of which were health insurance providers and included
11 Molina. The 12 health insurance companies selected for audit represented 98.7 percent of the
12 total New Mexico health insurance market. [Direct Examination of G. Figueroa; Taxpayer Ex.
13 5.003 – 5.004]

14 95. The premium tax audit identified a total of \$64,607,019 in audit findings, in
15 which a deficiency of \$8,198,823 was attributed to Molina through findings 2017-001
16 (\$8,167,648) and 2017-005 (\$31,175). [Direct Examination of G. Figueroa; Taxpayer Ex. 5.015
17 (Molina is identified as “Company L”); Taxpayer Ex. 18.012]

18 96. The deficiency resulted from the prohibition on Molina claiming MIP credits in
19 2014 pursuant to Bulletin Nos. 2015-014 and 2015-027 in order for OSI to implement the
20 “staggered approach.” [Direct Examination of G. Figueroa]

21 97. Finding 2017-001 concerns the “Improper Application of MIP Credits[.]” [Direct
22 Examination of G. Figueroa; Taxpayer Ex. 5.012 – 5.013] It went on to explain:

23 The most significant MIP credit issue was related to tax year 2014
24 and the application of Bulletin No. 2015-14. With the issuance of

1 Bulletin No. 2015-14, the OSI instructed insurers to apply their
2 final MIP assessment for the preceding year to the premium tax
3 return due the subsequent April. Most of the insurers selected as
4 part of this audit, who claimed MIP credits during tax year 2013,
5 had previously claimed their 2013 MIP credits on their 2013
6 premium tax return utilizing their interim assessments and invoice
7 payments in lieu of the annual MIP final assessment. It was noted
8 these same insurers then erroneously claimed the same 2013 MIP
9 credits on their 2014 premium tax returns utilizing the 2013 MIP
10 final assessment. Given the 2013 MIP credits were previously
11 utilized in 2013, they were no longer available to be applied for tax
12 year 2014. The effect was that more MIP credits were taken by
13 insurers than were available. There was one insurer that did not
14 apply its MIP credits in compliance with Bulletin No. 2015-14
15 until tax year 2015. The same issue previously discussed regarding
16 the 2013 MIP credits was noted for this insurer with respect to its
17 utilization of the 2014 MIP credits.

18 98. The report went on to explain:

19 In addition, Bulletin No. 2015-14 clarified 59A-54-10 NMSA 1978
20 by stating the OSI will not apply credits or issue refunds for MIP
21 credits that exceed the current year tax liability. It was noted
22 multiple insurers applied MIP credits that exceeded the current
23 year tax liability resulting in inaccurate overpayment credit
24 balances.

25 [Direct Examination of G. Figueroa; Taxpayer Ex. 5.013]

26 99. The audit examination report also explained how two companies, not Molina,
27 were erroneously granted refunds of unused excess MIP credits. Finding 2017-007 concerns the
28 “Erroneously Applied Overpayment Credits[.]” [Direct Examination of G. Figueroa; Taxpayer
29 Ex. 5.014] It went on to explain:

30 Effect: It was noted three insurers erroneously applied
31 overpayment credits resulting in additional premium tax and health
32 insurance premium surtax due in the amount of \$24,957,746 which
33 includes balances related to erroneous refunds issued to two
34 insurers by the OSI totaling \$10,671,539.

1 100. Companies identified³ as C and J in the report represent the two insurers to which
2 OSI issued refunds in the combined amount of \$10,671,539 covering Premium Tax periods
3 preceding December 31, 2016. They both contested the findings that the refunds they received
4 were erroneous in response to invoices in which OSI attempted to recoup the refunds. [Direct
5 Examination of G. Figueroa; Taxpayer Ex. 5.014 – 5.015; Taxpayer Ex. 18.012 (noting the sum
6 of rows corresponding with Companies C (\$6,948,263) and J (\$3,723,276) under Finding 2017-
7 007); Taxpayer Ex. 7; Taxpayer Ex. 22]

8 101. On February 7, 2018, OSI entered a Final Order and Report in reference to
9 Company C. The Final Report and Order concluded that the refund to Company C in the amount
10 of \$6,948,263 was proper. It determined, “Resolution of [Company C]’s premium tax issues in
11 this manner is in the public interest and shall be recognized by OSI and by [Company C] as
12 being entirely consistent with the Superintendent’s and OSI’s constitutional and statutory
13 duties.” [Direct Examination of G. Figueroa; Taxpayer Ex. 7; Taxpayer Ex. 7.005 (Para. E)]

14 102. On April 14, 2018, OSI entered a Final Order and Report in reference to
15 Company J. The Final Report and Order concluded that the refund to Company J in the amount
16 of \$3,781,386 was proper. It determined, “Resolution of [Company J]’s premium tax issues in
17 this manner is in the public interest and shall be recognized by OSI and by [Company J] as being
18 entirely consistent with the Superintendent’s and OSI’s constitutional and statutory duties.”
19 [Direct Examination of G. Figueroa; Taxpayer Ex. 22; Taxpayer Ex. 22.007 (Para. E)]

20 103. Based on his personal knowledge and professional relationships in the New
21 Mexico insurance market, Mr. Figueroa observed that Companies C and J realized credits in
22 excess of their premium liability because they both experienced a significant decrease in

³ The names of the companies are contained in the record. However, the Hearing Officer will not refer to them by name herein finding that their identifies are not material the issues under consideration.

1 premiums due to the expirations of their medicaid contracts at the end of 2013. The outcome was
2 that the taxable premiums reported in 2013 generated a higher credit than the 2014 tax liability
3 based on 2014's significantly-reduced premium collections. [Direct Examination of G. Figueroa]

4 104. The total liabilities of Companies C and J under the statewide audit Finding 2017-
5 007, (based on the first digit noted) was \$9,000,000 which is relevant due to subsequent
6 discussions before the Legislature. [Direct Examination of G. Figueroa; Taxpayer Ex. 18.012
7 (Column Finding 2017-007 referring to digits in millionths columns for Companies identified as
8 C and J)]

9 105. In a presentation to the House Business and Industry Committee of the New
10 Mexico State Legislature, the Deputy Superintendent of Insurance⁴ explained the efforts of the
11 Superintendent of Insurance to collect outstanding liabilities in the amount of approximately \$60
12 million, as identified by the statewide audit. The Deputy Superintendent of Insurance explained,
13 "\$9 million will not be collected and that, that is not because we can't collect it, it is the way that
14 the audit was done and then the discussions that we did have with a few companies and it was
15 determined that they really did not owe that \$9 million." He continued, "it was like \$9 million in
16 credits that they didn't use and so ... that money was due to them in some shape or form." He
17 went on to explain that the third-party auditor agreed with OSI's determination that OSI "did not
18 need to collect that close-to \$9 million." [Taxpayer Ex. 9 (00:24:15 – 00:27:15)]

19 106. Comparable findings were made with regard to Molina. "On November 8, 2017,
20 ER submitted to OSI a Report of Examination, stating that its target examination of Molina's
21 calculation and payment of premium tax covered for tax years ended December 31, 2003 through
22 December 31, 2016. The November 8, 2017 Examination Report [...] identified Significant

⁴ The parties stipulated to the identity of the speaker.

1 Findings. OSI Staff promptly prepared an invoice reflecting amounts due pertaining to those
2 findings.” [Direct Examination of G. Figueroa; Taxpayer Ex. 8.002 (Para. 5)]

3 107. The finding upon which the invoice was founded explained:

4 OSI recalculated the premium tax and health insurance premium
5 surtax amounts for each year based upon its interpretation of the
6 NMSA 59A-54-10 NMSA 1978 and compared the results to the
7 returns filed by [Molina]. OSI concluded that [Molina] did not
8 apply New Mexico Medical Insurance Pool (MIP) Credits in
9 compliance with 59A-54-10 NMSA 1978. The misapplied MIP
10 credits were corrected during the examination resulting in a net
11 premium tax underpayment of \$8,306,900.

12 [Taxpayer Ex. 8.011]

13 108. “Molina requested correction and modification of the November 2017
14 Examination Report.” It sought a conference with the Superintendent of Insurance and
15 examiners, including representatives of the third-party contract auditor and OSI staff, “to discuss
16 the November 2017 Examination Report and Molina’s objections.” The conference was held on
17 December 11, 2017. [Direct Examination of G. Figueroa; Taxpayer Ex. 8.002 (Para. 7); 8.003
18 (Para. 9)]

19 109. Molina was anticipating a contentious conference on December 11, 2017.
20 However, the Superintendent of Insurance informed Molina that a new bulletin was being drafted
21 which would provide for the refund of the credits and effectively resolve the dispute arising from
22 the audit, in that if Molina agreed to pay the invoice, it could later obtain a refund in the
23 subsequent Premium Tax year. [Direct Examination of G. Figueroa]

24 110. The Report of Examination prepared by OSI’s Examiner-in-Charge, attached as
25 Exhibit A, to the Final Report and Order, observed:

26 While [Molina] disagreed with OSI’s interpretation of the
27 applicable statute, [Molina] agreed to concede the issue given
28 OSI’s issuance of Bulletin 2018-001. On January 5, 2018, the OSI
29 issued Bulletin 2018-001, Application of Medical Insurance Pool

1 Credits to Premium Tax Liability, Section 59A-54-10 NMSA
2 1978, replacing Bulletins 2015-014 and 2015-027. Per Bulletin
3 2018-001, in any year that a company's MIP credits exceed its
4 premium tax liability, the MIP credits may be treated as refundable
5 credits resulting in an overpayment. As of the date of issuance of
6 the final report, [Molina] and OSI have agreed that the amount of
7 \$8,306,900 will resolve and satisfy the Improper Application of
8 New Mexico Medical Insurance Pool Credits finding.

9 [Taxpayer Ex. 8.011]

10 111. As recognized by OSI's Examiner-in-Charge, on January 5, 2018, OSI issued
11 Bulletin No. 2018-001. The bulletin had immediate effect and was "issued to clarify the
12 application of Medical Insurance Pool ('MIP') credits to premium tax liability." It went on to
13 specify:

14 This Bulletin replaces Bulletins 2015-027 and 2015-014, both of
15 which are hereby permanently rescinded.

16 [Direct Examination of G. Figueroa; Taxpayer Ex. 6.001]

17 112. The use of the word "rescind" suggests that the previous bulletins should be
18 regarded as if they never existed. [Direct Examination of M. Chavez]

19 113. The most significant modification between Bulletin 18-001 and those which it
20 rescinded was observed in Paragraph 2, which explained:

21 If a company's MIP credit, applied in the manner described in
22 Paragraph 1 of this Bulletin, is greater than its tax liability, OSI
23 will treat the MIP credit as a refundable credit. OSI will issue
24 refunds or carry over the funds that were accrued due to premium
25 tax overpayments for up to three (3) years pursuant to Section
26 59A-6-5 NMSA 1978.

27 [Direct Examination of G. Figueroa; Direct Examination of M.
28 Chavez; Taxpayer Ex. 6.001 – 6.002 (Para. 2)]

29 114. On January 17, 2018, subsequent to filing of Bulletin 2018-001, OSI prepared an
30 updated invoice to Molina in the amount of \$8,193,886 which reflected the amount of the alleged
31 underpayment identified by the statewide audit. [Taxpayer Ex. 8.003 (Para 12); 8.015]

1 115. On January 26, 2018, Molina paid the invoiced balance of \$8,193,886 resolving
2 “Molina’s premium tax obligations for all years through December 31, 2016, inclusive of any
3 penalties and interest.” [Taxpayer Ex. 8.004 (Para 16); 8.006 (Para. D); 8.015]

4 116. The Final Report and Order of the Superintendent of Insurance, April 14, 2018,
5 ordered:

6 In accordance with Bulletin 2018-001, OSI shall afford Molina the
7 opportunity to realize in full refundable credits resulting from the
8 payment of Molina’s Medical Insurance Pool Assessments.

9 [Taxpayer Ex. 8.006 (Para E)]

10 117. The Final Report and Order of the Superintendent of Insurance, entered April 14,
11 2018, ordered:

12 Resolution of Molina’s premium tax issues in this manner is in the
13 public interest and shall be recognized by OSI and by Molina as
14 being entirely consistent with the Superintendent’s and OSI’s
15 constitutional and statutory duties.

16 118. The reports of examination confirming the propriety of refunds to Companies C
17 and J similarly rely in significant part on application of Bulletin No. 2018-001, both identically
18 finding that:

19 On January 5, 2018, the OSI issued Bulletin 2018-001, Application
20 of Medical Insurance Pool Credits to Premium Tax Liability,
21 Section 59A-54-10 NMSA 1978, replacing Bulletins 2015-014 and
22 2015-027. Per Bulletin 2018-001, in any year that a company’s
23 MIP credits exceed its premium tax liability, the MIP credits may
24 be treated as refundable credits resulting in an overpayment. Based
25 on the guidance provided in Bulletin 2018-001, the finding for
26 Erroneous Overpayment Credits has been remediated and the
27 refund issued by the OSI has been deemed appropriate.

28 [Direct Examination of G. Figueroa; Taxpayer Ex. 7.012;
29 Taxpayer Ex. 22.011]

30 119. The report of examination relevant to Molina made an identical observation in
31 reference to the application of Bulletin No. 2018-001 and added, “[Molina] and OSI have agreed

1 that the amount of \$8,306,900 will resolve and satisfy the Improper Application of New Mexico
2 Medical Insurance Pool Credits finding.” [Taxpayer Ex. 8.011 – 8.012]

3 120. Molina paid the amount based upon the representation that it would be entitled to
4 a refund once its MIP credits were applied to its liability. Had it not had reason to rely on the
5 OSI’s representations that it would be eligible for a refund of unused MIP credits, it would have
6 sued to further litigate the propriety of the statewide audit findings and OSI invoice for
7 compensation of the asserted unpaid liability. [Direct Examination of G. Figueroa]

8 121. Entry of the Final Report and Order gave rise to the right of appeal which Molina
9 deemed unnecessary given the representation that it could obtain a refund of unused credits on a
10 future date based on the findings in the report and Bulletin 2018-001. The deadline to appeal
11 expired on or about May 14, 2018. [Direct Examination of G. Figueroa; *See* NMSA 1978, Section
12 59A-4-20 (providing for appeal of Final Order); Section 39-3-1.1 (C) (appeal to be taken within
13 30 days of the filing of the Final Order)]

14 122. On May 16, 2018, the Office of Superintendent of Insurance issued Bulletin No.
15 2018-005. The bulletin had immediate effect and was “issued to further clarify the application of
16 Medical Insurance Pool (‘MIP’) credits to premium tax liability.” [Direct Examination of G.
17 Figueroa; Taxpayer Ex. 11.001]

18 123. The first paragraph of Bulletin No 18-005 provides:

19 MIP credits earned in the previous year and recorded on a
20 company’s MIP “Final Assessment” report may only be applied to
21 the final premium tax return due the subsequent April. When
22 determining quarterly estimated payments of the premium tax and
23 the health insurance premium surtax pursuant to Section 59A-6-
24 2(D) NMSA 1978, companies may not claim MIP credits from
25 quarterly “Interim Assessments.”

26 [Direct Examination of G. Figueroa; Taxpayer Ex. 11.001]

27 124. The second paragraph of Bulletin No 18-005 provides:

1 If a company's MIP credit, applied in the manner described in
2 Paragraph 1 of this Bulletin, is greater than its premium tax
3 liability due within its final premium tax return, the premium tax
4 liability will be reduced to zero dollars (\$0). Upon request from a
5 company, OSI may issue a refund of erroneous or overpaid
6 premium tax cash payments. OSI may also permit a company to
7 carry forward the erroneous payment or overpayment as a credit
8 against future premium tax liability within the succeeding three
9 years, pursuant to Section 59A-6-5(B) NMSA 1978. Any refund
10 request must be submitted in writing from a company as per the
11 written instructions provided at www.osi.state.nm.us.

12 [Direct Examination of G. Figueroa; Taxpayer Ex. 11.001 – 11.002]

13 125. The third paragraph of Bulletin No 18-005 provides:

14 If a company receives a "Final Assessment" report from MIP after
15 the company's final premium tax return was filed, the final
16 premium tax return must be amended to reflect the application of
17 the MIP credit. If a company receives a corrected "Final
18 Assessment" report from MIP, the corresponding final premium
19 tax return described above must be amended to reflect the
20 correction. A company shall submit an amended premium tax
21 return no later than 30 days after the date of the MIP "Final
22 Assessment" report. Failure to do so could result in the assessment
23 of a penalty in accordance with Section 59A-6-4 NMSA 1978.

24 [Direct Examination of G. Figueroa; Taxpayer Ex. 11.002]

25 *Molina's Premium Tax Returns*

26 126. Molina paid in full all quarterly assessments issued in 2018 in the total sum of
27 \$18,016,968, observing on each relevant assessment the notation stating, "This billing is
28 necessary in order to provide the New Mexico Medical Insurance Pool (NMMIP) with sufficient
29 revenue to continue NMMIP Operation. Interim billings are made quarterly to the top 25 market
30 share holders." MIP credits deriving from those assessments were contained in the 2018 Final
31 Assessment and 2018 Final Assessment for Annual Premium Tax Credit. [Direct Examination of
32 G. Figueroa; Taxpayer Ex. 1; Taxpayer Ex. 12.002]

33 127. Molina reported its 2017 and 2018 credits on its 2019 Premium Tax Return

1 consistent with its interpretation of the instructions provided on the relevant assessments. It then
2 determined that the notices and its filing method was inconsistent with the various bulletins. On
3 May 21, 2020, Molina submitted a refund claim to the Department together with Amended 2018
4 and 2019 Annual Premium Tax and Surtax Returns. [Direct Examination of G. Figueroa;
5 Taxpayer Ex. 13]

6 128. Molina explained “[t]he returns are being amended to properly reflect the
7 additional 2017 NM Medical Insurance Pool (MIP) credits based on the 2017 revised final
8 assessment invoice received in May 2019, subsequent to the filing of 2018 premium tax return.”
9 [Direct Examination of G. Figueroa; Taxpayer Ex. 13.001]

10 129. With respect for the 2018 amendment, Molina explained:

11 The invoice advised that the 2017 additional credits resulting from
12 the 2017 revised final assessment would be added to the 2018
13 credit available to be applied to the 2019 premium tax return. As
14 such, we claimed the additional 2017 credits on the 2019 Annual
15 Premium Tax Return. In accordance with Bulletin 2018-005, we
16 believe the additional 2017 credits are properly reported on an
17 amended 2018 return, not the 2019 return. Accordingly, we are
18 amending the 2018 return to reflect the 2017 revised final NM MIP
19 assessment and credit amounts. We respectfully request a refund in
20 the amount of \$639,182.75.

21 [Direct Examination of G. Figueroa; Taxpayer Ex. 13.001;
22 Taxpayer Ex. 12.002 (computing sum of “2017 (revised) Final
23 Assessment”)]

24 130. The 2018 amendment reported a total premium tax liability of \$40,763,567.25.
25 After subtracting from that amount applicable MIP credits and estimated tax payments, the
26 Premium Tax Due was \$1,869,074.93 (Line 22). However, since Molina had already paid
27 \$2,508,257.68 (Line 23), it sought a refund of the difference in the amount of \$639,182.75 which
28 corresponded with the additional 2017 MIP credits. [Direct Examination of G. Figueroa;
29 Taxpayer Ex. 13.002 (noting difference between Lines 22 and 23); 13.005 (total amount of

1 additional MIP credit deriving from “2017 (revised) Final Assessment” is \$639,182)]

2 131. As of the date of the hearing, the Department had taken no action to grant or deny
3 the refund requested in the amount of \$639,182.75. [Direct Examination of G. Figueroa;
4 Taxpayer Ex. 13.002 (difference between Line 22 of amount paid and Line 23 of amount due)]

5 132. With respect for its 2019 amendment, Molina explained:

6 The 2019 return is also being amended to exclude the 2017
7 additional NM MIP credits as pursuant to Bulletin 2018-005, they
8 were improperly combined with the 2018 NM MIP credits on the
9 original 2019 premium tax return. There is no change in net
10 premium tax liability due to this decrease in the NM MIP credits as
11 credits are in excess of the premium tax due.

12 [Direct Examination of G. Figueroa; Taxpayer Ex. 13.001]

13 133. The 2019 amendment reported a total premium tax liability of \$3,723,650.96.
14 [Direct Examination of G. Figueroa; Taxpayer Ex. 13.006 (Line 13)]

15 134. The 2019 amendment reported a total estimated quarterly premium tax payment
16 in the amount of \$3,853,005.44 and \$8,428,195.75 in applicable MIP credits. [Direct
17 Examination of G. Figueroa; Taxpayer Ex. 13.006 (Line 13; 15; 17; 21); 13.009]

18 135. When the MIP credits are applied to the liability, the estimated payments get
19 refunded. [Direct Examination of G. Figueroa]

20 136. After application of MIP credits in the amount of \$3,853,005.44, the 2019
21 amendment sought a refund of the estimated tax payments made in the same amount. [Direct
22 Examination of G. Figueroa; Taxpayer Ex. 13.006 (Line 21; 22)]

23 137. The 2019 amendment reported an overpayment of total health insurance surtax
24 due of \$43,075.11. However, MIP credits have no bearing on the surtax. [Direct Examination of
25 G. Figueroa; Taxpayer Ex. 13.007 (Line 15)]

26 138. The total combined tax due on the 2019 revealed a cash overpayment in the

1 amount of \$3,896,080.55. [Direct Examination of G. Figueroa; Taxpayer Ex. 13.006 (Line 22) –
2 13.007 (Line 15)]

3 139. On or about October 2, 2020, the Department issued a refund in the amount of
4 \$3,896,080.55 representing the sum of the overpayments of premium tax due (Taxpayer Ex.
5 13.006 – Line 22) and health insurance surtax due (Taxpayer Ex. 13.007 – Line 15) as calculated
6 in Taxpayer’s 2019 Amendment. [Examination of G. Figueroa; Taxpayer Ex. 14.001]

7 140. On June 26, 2020, Molina submitted a refund claim to the Department together
8 with Amended 2019 Annual Premium Tax and Surtax Returns, asserting that “the enclosed Tax
9 Return shows a revised total overpayment for 2019 of \$8,577,550.23, of which \$3,853,005.44
10 was previously requested to be refunded on the first amended Tax Return, resulting in an
11 additional refund of \$4,704,544.79 that is now being requested with the enclosed second
12 amended Tax Return.” [Direct Examination of G. Figueroa; Taxpayer Ex. 16.001; Taxpayer Ex.
13 16.003]

14 141. The comment box on the second 2019 Amended Return explained that it was “to
15 request a total prem tax fund of \$8,557,553.23 of which \$4,704,544.79 from MIP credits and
16 \$3,853,005.44 from estimated tax.” [Direct Examination of G. Figueroa; Taxpayer Ex. 16.003
17 (see comments)]

18 142. On September 18, 2020, the Department denied under Letter ID No.
19 L0366866096 a refund in the amount of “\$3,896,080.55” because “New Mexico Medical
20 Insurance Pool (MIP) Payment was greater than current years premium tax liability due. Amount
21 will be reduced to zero (\$0.00) Per Bulletin 2018-005.” The stated amount of the denial was
22 incorrect in that the stated amount was the total amount that the Department had already
23 refunded. [Direct Examination of G. Figueroa; Taxpayer Ex. 15.001; Taxpayer Ex. 14; Taxpayer

1 Ex. 13.006 (Line 21 and Line 22]

2 143. The solitary reason provided for denial of Molina’s refund request was the
3 application of Bulletin No. 2018-005. There is no dispute regarding any underlying figures or the
4 methods of computation. [Taxpayer Ex. 15.001]

5 144. When notified by Molina that Letter ID No. L0366866096 referred to an incorrect
6 amount and inquired about a correction, the Department responded: “We will not send out
7 another letter as your company was determined to have a refund owed. Even though it is not the
8 total amount you requested a refund was issued. So there is no denial letter needed to sent [sic]
9 out.” [Direct Examination of G. Figueroa; Taxpayer Ex. 17.001]

10 145. Molina experienced a significant reduction in its premiums in 2019 for reasons
11 similar to Companies C and J when Molina’s medicaid contract expired at the end of 2018. The
12 difference between Molina’s premium tax liabilities in years 2018 (\$40,763,567.25) and 2019
13 (\$3,723,650.96) derived from the reduction in premiums collected by virtue of losing its
14 medicaid contract. [Examination of G. Figueroa; Taxpayer Ex. 13.001 (Line 13); Taxpayer Ex.
15 13.006 (Line 13)]

16 *Bulletins*

17 146. Bulletins are appropriate and intended to provide “low-level guidance on an
18 issue” that can derive “from the desk of the superintendent.” They are not intended to effect
19 substantive rights and do not carry the force of law and cannot change the law. [Direct
20 Examination of M. Chavez (referring to Regulation 13.1.2.7 NMAC)]

21 147. The general procedure for drafting and adopting bulletins during Mr. Chavez’
22 tenure as Superintendent of Insurance, which preceded the period at issue in this case, was:

23 a. Evaluate issue and determine whether it was appropriate subject matter for a

1 bulletin as opposed to regulation or statutory revision.

- 2 b. If appropriate for a bulletin, drafting was delegated to legal staff.
- 3 c. Legal staff would draft and submit for the superintendent's review.
- 4 d. Resubmit to legal staff for further revision if necessary.
- 5 e. If no further revision is necessary, the superintendent will sign.
- 6 f. Bulletins do not require formal notice and public comment.

7 *Protest History*

8 148. On December 11, 2020, Molina separately filed: (1) Protest of Full Refund Denial
9 Issued under Letter ID. [No.] L0366866096; (2) Protest of Deemed Refund Denial due to
10 Department's alleged failure to grant or deny its refund. [Administrative File]

11 149. On January 29, 2021, the Department acknowledged Molina's protests of Letter
12 ID. No. L0366866096 and the alleged failure to grant or deny refund under Letter ID No.
13 L0569434544. [Administrative File]

14 150. On January 21, 2022, Molina by and through its counsel of record, filed a Request
15 for Hearing in reference to Letter ID. No. L0366866096. The amount in dispute noted was
16 \$4,704,544.79 plus interest. The Request for Hearing included Taxpayer Protest of Full Refund
17 Denial with referenced exhibits. [Administrative File (AHO Case No. 22.01-002R)]

18 151. On January 21, 2022, Molina by and through its counsel of record filed a Request
19 for Hearing in reference to the Department's failure to grant or deny a refund in the amount of
20 \$639,182.75. The Request for Hearing included Taxpayer's Protest of Deemed Refund Denial
21 with referenced exhibits. [Administrative File (AHO Case No. 22.01-003R)]

22 152. On January 21, 2022, Molina filed a Motion to Consolidate AHO Case Nos.
23 22.01-002R and 22.01-003R. The Department did not object to the request that Molina's protests

1 be consolidated. [Administrative File]

2 153. On January 25, 2022, the Administrative Hearings Office entered a Notice of
3 Telephonic Scheduling Hearing that set an initial hearing in the matter for February 18, 2022.

4 [Administrative File]

5 154. On February 18, 2022, the Administrative Hearing Office entered Order
6 Consolidating Protests, Scheduling Order and Notice of Administrative Hearing. [Administrative
7 File]

8 155. On February 23, 2022, the Department filed a consolidated answer to Molina's
9 protests titled New Mexico Taxation and Revenue Department's Answer to Protest.

10 [Administrative File]

11 156. On May 26, 2022, Molina filed Motion for Partial Summary Judgment Re: 2019
12 Premium Tax Year. [Administrative File]

13 157. On June 13, 2022, the Department filed a Stipulated Motion for Enlargement of
14 Time to File Response to Taxpayer's Motion for Partial Summary Judgment, and Motion to
15 Continue Deadline for Filing the Parties' Prehearing Statements. [Administrative File]

16 158. On June 20, 2022, Molina filed a Prehearing Statement. [Administrative File]

17 159. On June 21, 2022, the Administrative Hearing Office entered an Order
18 Converting Merits Hearing to Motions Hearing, Extending Deadline to File Response, and
19 Extending Deadline to File Prehearing Statements. [Administrative File]

20 160. On June 22, 2022 the Department filed Department's Response to Protestant's
21 Motion for Partial Summary Judgment and Request to Convert Merits Hearing to Oral
22 Arguments on Motion. [Administrative File]

23 161. A hearing on Molina's motion for partial summary judgment was held on July 11,

1 2022. [Administrative File]

2 162. On May 2, 2023, the Administrative Hearings Office entered an Order Denying
3 Partial Summary Judgment for Taxpayer finding that the factual record could benefit from
4 further development. [Administrative File]

5 163. On August 8, 2023, the Administrative Hearings Office entered a Scheduling
6 Order and Notice of Administrative Hearing that set a hearing on the merits for February 21,
7 2024. [Administrative File]

8 164. On January 30, 2024, the Department filed an Unopposed Motion for Extension
9 of Time to File Department's Prehearing Statement and Exchange Exhibits which it subsequently
10 withdrew in exchange for Expedited Joint Motion for Extension of Time for the Parties to File
11 Their Prehearing Statement and Exchange Exhibits. [Administrative File]

12 165. On February 2, 2024, the Administrative Hearings Office entered an Order
13 Granting Unopposed Motions for Extension of Time Nunc Pro Tunc. [Administrative File]

14 166. On February 5, 2024, Molina filed a Supplemental Prehearing Statement and the
15 Department filed Department's Prehearing Statement. [Administrative File]

16 167. On February 14, 2024, the Administrative Hearings Office continued the merits
17 hearing from February 21, 2024 to March 6, 2024 with input and concurrence from the parties
18 due to the Hearing Officer's selection to serve on the Judicial Selection Committee for the First
19 Judicial District. [Administrative File]

20 **DISCUSSION**

21 This consolidated protest challenges the Department's denials of separate refunds Molina
22 claimed in its Health Insurance Premium Tax and Surtax returns relevant to years 2018 and 2019.
23 The Department never formally acted on Molina's 2018 claim, and in response to Molina's 2019

1 claim, the Department issued a Full Refund Denial⁵ under Letter ID L0366866096, dated
2 September 18, 2020. The denial was grounded solely on the application of Bulletin No 2018-005.
3 The denial did not challenge any of the underlying information or computations showing the
4 amount of the refund requested. The denial merely stated, “ New Mexico Medical Insurance Pool
5 (MIP) Payment was greater than current years premium tax liability due. Amount will be reduced to
6 zero (\$0.00) Per Bulletin 2018-005.”

7 Both refund claims involve the application of the New Mexico Medical Insurance Pool
8 credit, also referred to herein as the MIP credit, to Molina’s Premium Tax liabilities in the relevant
9 years. The statute which establishes the MIP credit, NMSA 1978, Section 59A-54-10 (C) (2007,
10 Amended 2020) provides as follows, with emphases added:

11 The proportion of participation of each member in the pool shall be
12 determined annually by the board based on annual statements and
13 other reports deemed necessary by the board and filed with it by the
14 member. *Any deficit incurred by the pool shall be recouped by*
15 *assessments* apportioned among the members of the pool pursuant to
16 the assessment formula provided by Subsection A of this section;
17 *provided that the assessment for any pool member shall be allowed*
18 *as a fifty-percent credit on the premium tax return for that member*
19 *and a seventy-five-percent credit on the premium tax return for that*
20 *member for the assessments attributable to pool policy holders that*
21 *receive premiums, in whole or in part, through the federal Ryan*
22 *White CARE Act, the Ted R. Montoya hemophilia program at the*
23 *university of New Mexico health sciences center, the children's*
24 *medical services bureau of the public health division of the*
25 *department of health or other program receiving state funding or*
26 *assistance.*

27 In this case, both the 2018 and 2019 refund claims relate to Premium Tax years in which the
28 New Mexico Office of Superintendent of Insurance (“OSI”) administered the Premium Tax⁶,
29 NMSA 1978, Section 59A-6-2.

⁵ The denial was entitled “Full Refund Denial” but only denied a portion of the actual amount requested.

⁶ For the purpose of minimizing confusion, all references to OSI will include the Insurance Division of the Public Regulatory Commission which is the entity that administered the Premium Tax until 2013.

1 Effective January 1, 2020, administration of taxes imposed pursuant to the New Mexico
2 Insurance Code by OSI, including the Premium Tax, transferred to the Department. For this reason,
3 much of what is presented for consideration in this protest stems from the actions and conduct of
4 OSI, not the Department, even though the Department is the agency that ultimately denied Molina's
5 2019 claim, withheld action with respect to the 2018 claim, and now opposes Molina's protests.

6 2019 Refund Claim

7 Molina filed its 2019 Premium Tax return as instructed by OSI applying its staggered
8 approach to reporting. The return revealed that Molina's MIP credit generated in 2018 exceeded its
9 Premium Tax liability for the 2019 Premium Tax period resulting in excess unused MIP credit. This
10 resulted from a significant reduction in Molina's taxable premiums from 2018 to 2019 because its
11 loss of the state medicaid contract. Consequently, Molina requested a refund of the excess unused
12 MIP credit which the Department denied based on OSI Bulletin 2018-005.

13 Thus, with regard for the 2019 claim, the first question is whether Molina is entitled to full
14 utilization and refund of excess MIP credits under the plain language of Section 59A-54-10 (C)
15 (2007, Amended 2020). The second issue is whether the Department should be estopped from
16 denying Molina's 2019 claim based on OSI's representations that it would be permitted to obtain a
17 refund before it reversed course on the issue of MIP credit refundability with Bulletin No. 2018-
18 005.

19 2018 Refund Claim

20 The New Mexico Medical Insurance Pool issued a revised assessment for 2017 which
21 increased Molina's assessment obligation in 2017, the result of which increased the corresponding
22 2017 MIP credit. Molina amended its 2018 Premium Tax return to claim the additional MIP credit
23 generated in 2017, which at the time did not exceed Molina's 2018 Premium Tax liability. Thus,

1 Molina requested a refund of Premium Tax paid in cash in the 2018 Premium Tax year equal to the
2 amount of the additional 2017 MIP credit. The Department took no official action on Molina’s 2018
3 refund claim

4 Molina’s prehearing statement raised three issues with respect to its 2018 refund claim. The
5 first question was whether Molina should apply the additional 2017 MIP credit to its 2018 or 2019
6 Premium Tax year return. The second issue was whether the Department’s requirement that Molina
7 take the additional 2017 MIP credit on Molina’s 2019 Premium Tax return violates the U.S. and
8 New Mexico Equal Protection clauses because OSI instructed other similarly situated taxpayers to
9 take any MIP credit in the next Premium Tax year under the staggered approach. The final question
10 was whether the 2018 refund claim should merely be deemed approved under NMSA 1978, Section
11 7-1-29.2 (2020) which states, “Any taxpayer who requests approval of a statutory tax credit is
12 deemed to have received such approval if the request has not been granted or denied within one
13 hundred eighty days of the date it was filed.”

14 *The Burdens of Production and Persuasion*

15 Resolving the dispute central to the protest concentrates on the proper application of
16 NMSA 1978, Section 59A-54-10 (C) (2007, Amended 2020) which establishes entitlement to the
17 MIP credit as well as the method by which the amount of the MIP credit is computed.

18 Molina carries the burden of establishing entitlement to its refund claims which the Court
19 of Appeals has instructed be evaluated through the lens of the presumption of correctness. *See*
20 *Corr. Corp. of Am. of Tenn. v. State*, 2007-NMCA-148, ¶17, 142 N.M. 779 (Court of Appeals
21 reviewed refund denial “through the lens of a presumption that the Department's assessment is
22 correct.”); *citing TPL, Inc. v. New Mexico Taxation & Revenue Dept.*, 2003-NMSC-007, ¶ 10, 133
23 N.M. 447, 451, 64 P.3d 474, 478.

1 Therefore, the Hearing Officer will evaluate the evidence through the lens of the
2 presumption of correctness, as instructed by *Corr. Corp. of Am. of Tenn.* and *TPL, Inc.* within the
3 structure outlined by *Gemini Las Colinas, LLC v. New Mexico Taxation & Revenue Dep't, 2023-*
4 *NMCA-039*. In *Gemini*, the Court of Appeals answered the following questions:

5 (1) what must a taxpayer do to overcome the presumption of
6 correctness and whether, at this juncture, the hearing officer acts in
7 their fact-finding capacity; and (2) if a taxpayer overcomes the
8 presumption, what type of burden shifts to the department, and—
9 relatedly—which party bears the ultimate burden of persuasion.

10 *See Gemini, 2023-NMCA-039, ¶ 18.*

11 The Court of Appeals recognized that answering these questions was “no easy task” and that
12 it involved issues of first impression. *See Gemini, 2023-NMCA-039, ¶ 13, ¶19.* This case may also
13 involve issues of first impression in that it is the first time this office has been called upon to
14 evaluate the denial of a refund or credit through the “lens of a presumption of correctness” under
15 *Corr. Corp. of Am. of Tenn.* from 2007 and *TPL, Inc.* from 2003 since the “presumption of
16 correctness” was addressed by *Gemini* in 2023.

17 Generally speaking, “determining whether the taxpayer has overcome the presumption of
18 correctness is the first step in resolving a tax protest, and that it will only be the last step if the taxpayer
19 fails to overcome the presumption.” *See Gemini, 2023-NMCA-039, ¶ 23.*

20 As recognized by *Gemini*, Regulation 3.1.6.12 (A) NMAC provides:

21 The effect of the presumption of correctness is that the taxpayer has
22 the burden of coming forward with some countervailing evidence
23 tending to dispute the factual correctness of the assessment made by
24 the secretary. Unsubstantiated statements that the assessment is
25 incorrect cannot overcome the presumption of correctness.

26 *Gemini* explained that the call for “some countervailing evidence ... is merely a threshold
27 requirement for evidence, and that evidence need not be credible or ultimately persuasive.” *See*
28 *Gemini, 2023-NMCA-039, ¶ 25.* “[T]he presumption of correctness assessment is made by the

1 hearing officer in a purely legal capacity.” See *Gemini*, 2023-NMCA-039, ¶ 25.

2 “[I]f the taxpayer has not overcome the presumption, the protest may simply be denied.
3 In this scenario, there is no need for the department to present any evidence.” See *Gemini*, 2023-
4 NMCA-039, ¶ 23.

5 Based on all the evidence presented, the Hearing Officer was persuaded that Molina
6 overcame its burden of production in this case. “[I]f the taxpayer has overcome the presumption,
7 the outcome of the protest, at that point, remains undetermined. The taxpayer has overcome its
8 initial hurdle, but further legal and factual assessments remain before the hearing officer can
9 determine whether to grant or deny the protest.” See *Gemini*, 2023-NMCA-039, ¶ 23.
10 Consequently, “the department must be given an opportunity to present evidence to support its
11 assessment, and the hearing officer may not grant or deny the protest without, at the very least,
12 determining whether the department has carried its burden.” See *Gemini*, 2023-NMCA-039, ¶ 24.

13 “[T]he burden that shifts to the department is a burden of production.” The burden of
14 persuasion is always “borne by the taxpayer.” See *Gemini*, 2023-NMCA-039, ¶ 26.

15 “To overcome this burden, the department must put forth evidence to show the
16 correctness of its assessment—that is, evidence sufficient to make the correctness of the
17 department's assessment a question of fact.” See *Gemini*, 2023-NMCA-039, ¶ 29. This protest
18 does not involve any assessment by the Department, so viewing the rule through the *lens of the*
19 *presumption of correctness* established by *Corr. Corp. of Am. of Tenn.* and *TPL, Inc.*, the Hearing
20 Officer considered instead whether the Department provided sufficient evidence to make *the*
21 *correctness of the Department’s refund denials a question of fact*. “[T]he existence of this burden
22 means that the department cannot simply rely on the unreliability or incredibility of the
23 taxpayer's evidence.” Instead, the Department must produce evidence to justify its action, or in

1 this case, the denial of Molina’s refund claims. *See Gemini*, 2023-NMCA-039, ¶ 29.

2 Except for evidence solicited through cross examination, the Department did not present
3 any testimony, and the only exhibit bearing a Department identification (Department Ex. J.1)
4 was admitted upon Molina’s request. Conversely stated, the focus of the Department’s
5 evidentiary response was directed at “the unreliability or incredibility of the taxpayer’s
6 evidence.” It did not produce evidence to make the correctness, or propriety, of the Department’s
7 refund denials a question of fact.

8 Hence, according to *Gemini*, the Hearing Officer would be justified to simply grant
9 Molina’s protest. However, the Hearing Officer will proceed with discussion of Molina’s burden
10 of persuasion with respect to the merits of the protest as if the Department had come forward
11 with evidence to satisfy its own burden of production. *See Gemini*, 2023-NMCA-039, ¶ 29.

12 Background

13 Molina is a locally operated health plan providing healthcare insurance services in New
14 Mexico. At various times, it has: (a) provided insurance products through the insurance
15 exchange; (b) served members under the federal medicare program; and (c) served members
16 under the federal or state medicaid program under contract with the New Mexico Human
17 Services Department (“HSD”) (which it held from January 1, 2014 through December 31, 2018).

18 Since the end of 2018, which marked the end of its medicaid contract, Molina has
19 continued to provide insurance services in New Mexico. However, the expiration of its medicaid
20 contract caused a substantial reduction in Molina’s net taxable New Mexico premiums between
21 2018 and 2019 that would eventually contribute to the circumstances underlying the protest. In
22 fact, its market share declined from around 22 percent to approximately 3 percent after
23 termination of the medicaid contract.

1 By and large, New Mexico imposes Premium Tax on all insurers engaging in the
2 insurance business in the state, including health maintenance organizations. Premium Tax
3 liability is determined primarily by the insurer’s gross premiums from policies in the state,
4 including premiums from medicaid, and is calculated on a calendar-year basis. Insurers make
5 quarterly estimated Premium Tax payments (April 15, July 15, October 15, and January 15) with
6 any final adjustments reported on returns due by the traditional April Tax Day deadline in the
7 subsequent calendar year. *See* NMSA 1978, Section 59A-6-2(D).

8 Since January 1, 2020, the Premium Tax has been administered by the Department. It
9 was previously administered by the OSI (from July 1, 2013 to December 31, 2019) and the
10 Insurance Division of the Public Regulatory Commission (prior to June 30, 2013).

11 Meanwhile, the Legislature established the New Mexico Medical Insurance Pool in 1987.
12 Its purpose was to provide access to health insurance coverage to “the sickest of the sick New
13 Mexicans” who could not obtain coverage from other sources or who had been denied coverage
14 for assorted reasons.

15 The New Mexico Medical Insurance Pool provides health insurance coverage through
16 plans paid by: (a) assessments issued against health insurers; and (b) premiums received from the
17 New Mexico Medical Insurance Pool policy holders. At the conclusion of each calendar year, the
18 New Mexico Medical Insurance Pool calculates its net premium revenues, expenses, claims
19 losses, and investment income and losses for the year. It then issues mandatory assessments to
20 insurers based on each insurer’s New Mexico market share to recoup its losses.

21 Conversely stated, the assessments issued by the New Mexico Medical Insurance Pool to
22 insurers generate the revenue to fund a substantial portion of its operating costs. The Legislature
23 then sought to reimburse insurers for a portion of the assessments through the MIP credit which

1 insurers could apply as payment toward their Premium Tax liability. The standard credit is 50
2 percent of the New Mexico Medical Insurance Pool assessment, or 75 percent credit for the
3 portion of the assessment attributable to pool policy holders that also receive premiums from
4 certain specified care programs.

5 Since 1987, according to the credible and well-informed testimony of Mr. Chavez, OSI
6 historically managed the Premium Tax so that New Mexico Medical Insurance Pool assessments,
7 MIP credits, and Premium Tax returns all correlated with the same calendar year's data, and
8 thus, each part's relevant variables derived from a common foundation (Premium Tax liability,
9 New Mexico Medical Insurance Pool assessment, and computation of MIP credits). This was
10 referred to as the "correlative approach."

11 Under the correlative approach, Molina's MIP credit never exceeded its Premium Tax
12 liability because, according to Mr. Figueroa and Mr. Chavez, all relevant variables correlated to
13 the same period of activity that generated the MIP credit and determined the corresponding
14 Premium Tax liability.

15 To the extent the correlative approach presented any difficulties, they may have stemmed
16 from timing. According to Ms. Ingram, who has the unique perspective of both president of
17 Molina and former executive director of the New Mexico Medical Insurance Pool, preparing
18 revised and final assessments can be a time-consuming process.

19 The result, as Mr. Figueroa observed, was that revised and final assessments were not
20 available to taxpayers, including Molina, in time for them to meet the traditional April tax
21 deadline. In fact, credit computations were not reported to insurers until May or June, *after* the
22 relevant April deadline passed. For that reason, Mr. Figueroa explained, Molina like other
23 similarly situated insurers could not accurately report final MIP credits by the due date provided

1 for an original final Premium Tax return. This presumably created additional work for OSI and
2 taxpayers when after receiving final reports from the New Mexico Medical Insurance Pool,
3 insurers had to amend their Premium Tax returns.

4 An early indicator that OSI might change the longstanding and well-established
5 correlative approach occurred during the first regular session of the 2015 Legislature. Senate Bill
6 577 sought to enact a staggered approach to reporting and to limit the amount of MIP credit
7 available to an insurer's Premium Tax liability. *See* Senate Bill 577, §§ 2, 4 (2015) (SJC Comm.
8 Sub.).

9 The bill proposed new language as follows: “credits shall only be granted on the final
10 annual premium tax return and shall only be granted after the New Mexico medical insurance
11 pool final assessments have been issued for the prior calendar year. The credits granted for the
12 New Mexico medical insurance pool shall not exceed the annual premium tax due on the final
13 annual premium tax return.”

14 The Fiscal Impact Report, recounting information received only from OSI, explained that
15 “The bill would make New Mexico medical insurance pool (MIP) credits nonrefundable,
16 resulting in an estimated \$1 million increase in recurring annual transfer to the general fund.”
17 [Taxpayer Ex. 4.011 (“Fiscal Implications”)] The bill passed the Senate on March 20, 2015. The
18 House took no action, and the session ended on March 21, 2015.

19 Nine days after the end of the session, on March 30, 2015, OSI adopted Bulletin No.
20 2015-014 which mandated a one-year stagger to application of the MIP credit. Hence, a final
21 MIP pool credit issued for one year (*e.g.* 2013) would be issued to the insurer by May or June of
22 the following year (*e.g.* 2014) to be claimed on the final Premium Tax return filed by the
23 traditional April Tax Day deadline of the year subsequent to that (*e.g.* 2015). Hence, a “staggered

1 approach” was implemented in contrast to the traditional correlative approach. Moreover,
2 Bulletin 2015-014 declared that excess MIP credits, a rare if not impossible occurrence under
3 correlative approach, were no longer refundable.

4 Thus, the first question to evaluate is whether the application of the staggered approach,
5 first established by Bulletin No. 2015-014 contradicts the intent behind the MIP credit by
6 restricting its use in ways the Legislature did not intend.

7 *Awarding the MIP credit: A Percentage of the Insurer’s Assessment*

8 New Mexico adheres to the plain meaning rule which commands that when a statute’s
9 language is clear and unambiguous, courts should give effect to that language and refrain from
10 further statutory interpretation. *See Wood v. State Educ. Ret. Bd.*, 2011-NMCA-020, ¶ 12; *see*
11 *also*, NMSA 1978, Section 12-2A-19 (the text of a statute serves as the primary, essential source
12 of its meaning). “A statute or subsection need not be considered independently or ‘in a vacuum,’
13 but alongside statutes dealing with the same subject matter. *See State v. Trujillo*, 2009-NMSC-
14 012, ¶ 22, 146 N.M. 14, 20, 206 P.3d 125, 131.

15 The text of Section 59A-54-10 (C) (2007, Amended 2020) provides that “[t]he proportion
16 of participation of each member in the pool *shall be determined annually by the board* based on
17 annual statements and other reports *deemed necessary by the board* and filed with it by the
18 member.” It goes on to direct that “[a]ny deficit incurred by the pool shall be recouped by
19 assessments apportioned among the members or the pool pursuant to the assessment formula
20 provided by Subsection A of this section; *provided that the assessment for any pool member*
21 *shall be allowed as a ... credit on the premium tax return for that member...*” (Emphases
22 Added).

23 The plain language reveals that the amount of the MIP credit is determined solely by a

1 percentage of an insurer’s assessment (“...*the assessment ... shall be allowed as a fifty-percent*
2 *credit on the premium tax return for that member and a seventy-five-percent credit on the*
3 *premium tax return for that member for the assessment...”).*

4 Otherwise stated, the plain language reveals no intention of the Legislature to define or
5 restrict the amount of MIP credit based on the amount of Premium Tax liability to which the
6 MIP credit will eventually be applied. Instead, the Legislature’s use of the word “shall” reveals
7 its intention to award MIP credits as a percentage of the New Mexico Medical Insurance Pool
8 assessment. Neither OSI nor the Department have any authority under the statute to supplant the
9 role of the New Mexico Medical Insurance Pool in issuing assessments or in calculating and
10 awarding the MIP credits to which insurers are entitled based on those assessments paid. *See*
11 *Marbob Energy Corp. v. New Mexico Oil Conservation Comm’n*, 2009-NMSC-013, ¶ 22, 146
12 N.M. 24, 32, 206 P.3d 135, 143 (“It is widely accepted that when construing statutes, ‘shall’
13 indicates that the provision is mandatory, and we must assume that the Legislature intended the
14 provision to be mandatory absent [a] clear indication to the contrary.”); *see also* NMSA 1978,
15 Section 12-2A-4 (A) (“‘Shall’ and ‘must’ express a duty, obligation, requirement or condition
16 precedent.”)

17 Moreover, the plain meaning of the statute’s text reveals the Legislature’s intention that
18 the word “credit” be given its ordinary meaning since the Legislature did not indicate an
19 intention to adopt an alternative definition. *See Marbob*, 2009-NMSC-013, ¶ 9 (Courts will give
20 words “their ordinary meaning, unless the Legislature indicates a different one was intended.”).
21 Thus, the term “credit,” as used in 59A-54-10 (C) (2007, Amended 2020) means “the balance in
22 a person’s favor in an account” or “an entry on the right-hand side of an account constituting an
23 addition to revenue, net worth, or liability account” or “a deduction from an amount otherwise

1 due.”⁷

2 Molina’s position is sound. The statutory text reveals the Legislature’s intention that the
3 MIP credit be computed based on a percentage of an insurer’s New Mexico Medical Insurance
4 Pool assessments. The statutory text reveals no intent for the amount of MIP credit to be
5 determined (or limited) by the amount of an insurer’s Premium Tax liability. Instead, the MIP
6 credit is applied toward the insurer’s Premium Tax liability as a credit toward its payment
7 obligation. Had the Legislature intended that an insurer’s Premium Tax liability control the
8 amount of allowable MIP credit, then the Legislature would have conveyed such intention. *See*
9 *e.g.*, Section 7-9-79.1 (“credit shall not exceed”); Section 7-9E-7 (credit “not to exceed”).
10 Instead, the only reference to the Premium Tax stems from the provision that the MIP credit shall
11 be applied as a “*credit on the premium tax return.*”

12 The staggered approach, as applied to these facts, results in an impermissible restriction on
13 Molina’s MIP credit where, for example, a significant MIP credit is earned in 2018, but due to a
14 reduction in market share experienced in 2019, the Premium Tax liability for that year is
15 substantially less than the MIP credits earned in the previous year, which in turn requires that the
16 excess and unused MIP credits be forfeited.

17 The effect of the staggered approach, coupled with the restriction on refundability of MIP
18 credits, may be best illustrated as follows. Section 59A-54-10 (C) (2007, Amended 2020) confers
19 a mandatory credit equal to 50 percent of the standard New Mexico Medical Insurance Pool
20 assessment and 75 percent for the portions of the assessment derived from specified sources. At a
21 minimum, however, based on these percentages, the MIP credit should represent no less than 50
22 percent of the assessment. Yet, as Molina illustrates, its 2018 MIP credit was effectively reduced

⁷ Merriam-Webster, <https://www.merriam-webster.com/dictionary/credit> (last visited, September 19, 2024)

1 to 23 percent of its New Mexico Medical Insurance Pool assessment. Molina’s 2018 New
2 Mexico Medical Insurance Pool assessment was \$16,053,706. Molina’s final MIP credit deriving
3 from that assessment was \$8,428,196 representing 52.5% of the 2018 assessment. However,
4 when Molina applied the 2018 MIP credit to satisfy the outstanding balance of its 2019 Premium
5 Tax liability (as required by the staggered approach) in the amount of \$3,723,651, it was
6 effectively denied the benefit of the remaining MIP credit of \$4,704,545 which it could neither
7 carry forward nor obtain refund. Thus, the value of the credit was reduced from 52.5 percent of
8 its 2018 assessment ($\$8,428,196 / \$16,053,706 = 0.525000022$) to 23 percent of the 2018
9 assessment ($\$3,723,651 / \$16,053,706 = 0.23194962$). Thus, the consequence of Bulletin No
10 2018-005 was to slash Molina’s MIP credit from 52.5 percent to 23 percent. This clearly
11 illustrates how adherence to Bulletin No. 2018-005 impermissibly altered and abridged the
12 express, unambiguous, and mandatory language of the Legislature, as stated in Section 59A-54-
13 10 (C) (2007, Amended 2020).

14 The next question is whether the Legislature intended to place any limitations on the full
15 utilization or refundability of the credit.

16 *Restricting Utilization or Refundability of the MIP Credit*

17 The goal of statutory construction is to give primary effect to the intent of the Legislature.
18 *See Wood*, 2011-NMCA-020, ¶ 12. In this regard, the plain language of the statute reveals the
19 Legislative intent for MIP credits to be utilized to the full extent of their value or, in the
20 alternative, to be refunded. Unlike other types of tax credits which are sometimes intended to
21 incentivize business behavior, the MIP credit derives from payments of mandatory New Mexico
22 Medical Insurance Pool assessments. Money generated from those assessments is used to finance
23 the operations of the New Mexico Medical Insurance Pool in lieu of direct funding from the

1 Legislature. Otherwise stated, the Legislature implemented a system in which insurers fund the
2 operations of the New Mexico Medical Insurance Pool in exchange for a credit established by a
3 percentage of their assessment.

4 This funding method is an indirect appropriation, as described by Ms. Ingram and Mr.
5 Chavez, which the Legislature implemented in order to compensate insurers for advancing
6 private funds for public purposes (financing health coverage to the “sickest of the sick New
7 Mexicans”). If not for this construct, as Ms. Ingram and Mr. Chavez explained, the Legislature
8 would be required to convene on a quarterly basis to evaluate costs and expenses and appropriate
9 funds to assure uninterrupted pool operations. However, the Legislature only meets for one
10 regular session per calendar year which would severely impair the ability of the New Mexico
11 Medical Insurance Pool to promptly respond to the needs of its members. In contrast, the
12 Legislature’s goals for providing for the “sickest of the sick New Mexicans” was better served
13 by implementing a system whereby funds could be rapidly generated based on escalating
14 demands, as Ms. Ingram observed around the COVID-19 pandemic beginning in 2020.

15 For these reasons, according to Mr. Chavez, former Superintendent of Insurance, OSI’s
16 historical perception from 1987 until 2015 was that the MIP credit was fully utilizable and
17 refundable. In fact, this view is consistent with OSI’s treatment of refunds with respect to other
18 taxpayers (*see* Taxpayer Exs. 8 and 22) as well as Bulletin No. 2018-001. *See* Taxpayer Ex.
19 6.001, Para. 2 (“If a company’s MIP credit ... is greater than its tax liability, OSI will treat the
20 MIP credit as a refundable credit.”)

21 Moreover, during consideration of SB 577, there seemed to be consensus around the
22 question of MIP credit refundability. SB 577 proposed to implement the staggered approach and
23 cap the MIP credit at the amount of the insurer’s Premium Tax liability. The Fiscal Impact

1 Report of the Legislative Finance Committee, citing information received only from OSI and its
2 own internal files, explained the “bill would make New Mexico medical insurance pool (MIP)
3 credit nonrefundable.” [Taxpayer Ex. 4.010 – 4.011] This statement suggests a consensus among
4 the Legislature, its Legislative Finance Committee, and OSI, that the MIP credit was already
5 refundable under existing law because the bill “would” change that and “make [the MIP] credit
6 nonrefundable.” The word “would” is “used in auxiliary function to express plan or intention.”
7 See <https://www.merriam-webster.com/dictionary/would> (last visited September 19, 2024).

8 SB 577 failed and its corresponding Fiscal Impact Report may not establish the intent of
9 the Legislature when it enacted Section 59A-54-10 (C) (2007, Amended 2020). Nevertheless, the
10 work of the Legislature, the Legislative Finance Committee, and OSI in the Fiscal Impact Report
11 shows a consensus belief that the existing law allowed refunds of the MIP credit. This
12 interpretation is reasonable and there is nothing in the plain meaning of Section 59A-54-10 (C)
13 (2007, Amended 2020) to suggest otherwise.

14 The next question, agreeing that the MIP credit is computed as a percentage of the New
15 Mexico Medical Insurance Pool assessment and that the amount of unused credit is fully
16 utilizable and refundable, is whether OSI’s various bulletins could impose limitations on the MIP
17 credit that were not explicit in the law.

18 *The Statute Prevails Over the Bulletin*

19 A mere nine days after the failure of SB 577, OSI adopted Bulletin 2015-014 which was
20 remarkably similar to the failed bill. In addition to implementing the staggered approach, it
21 similarly explained that MIP credits would be applied to the extent of the insurer’s Premium Tax
22 liability and that excess MIP credits could neither be carried forward nor refunded. Conversely
23 stated, the bulletin sought to accomplish what SB 577 would have, according to its FIR, if it

1 passed.

2 Bulletin 2015-027, adopted on October 9, 2015, slightly revised the prior Bulletin No.
3 2015-014 and maintained the general position that credits would be applied to the extent of the
4 insurer's Premium Tax liability and excess MIP credits would neither be carried forward nor
5 refunded.

6 Bulletin 2018-001, adopted on January 5, 2018, then explicitly *rescinded* Bulletin Nos.
7 2015-014 and 2015-027 and instructed that credits exceeding liability *were* indeed, now
8 *refundable*. OSI then proceeded to issue refunds citing that very same bulletin as authority and
9 explaining that the refunds, as well as the policy embodied in Bulletin 2018-001, were "entirely
10 consistent with the Superintendent's and OSI's constitutional and statutory duties." [Taxpayer
11 Ex. 7.005; Taxpayer Ex. 8.006; Taxpayer Ex. 22.007]

12 In yet another reversal, OSI adopted Bulletin No. 2018-005 on May 17, 2018 when it
13 determined that credits exceeding liability *were not* refundable anymore. Despite the substantive
14 variations and vacillations in OSI policies beginning in 2015, the statute remained unchanged.

15 Thus, when Molina's refund claim came to the Department's attention, after it assumed
16 responsibility for enforcement and implementation of the Premium Tax, it referred to and relied
17 upon OSI policy to deny the claim explaining, "New Mexico Medical Insurance Pool (MIP)
18 Payment was greater than current years premium tax liability due. Amount will be reduced to
19 zero (\$0.00) *Per Bulletin 2018-005.*" [Taxpayer 15.001 (Emphasis Added)].

20 The problem, as Molina's evidence and argument established, is that the Department's
21 reliance on Bulletin 2018-005 is simply misplaced because neither OSI nor the Department can
22 impose a limitation on statutory rights that the Legislature did not prescribe. *See Rainbo Baking*
23 *Co. of El Paso, Tex. v. Comm'r of Revenue*, 1972-NMCA-139, ¶ 11, 84 N.M. 303. Agencies

1 may not, even by properly promulgated rule, “abridge, enlarge, extend or modify the statute
2 creating the right or imposing the duty.” *Id.* at ¶ 10. Rules that are read to do so are void
3 pursuant to NMSA 1978, Section 14-4-5.7 which provides that “[n]o rule is valid or enforceable
4 if it conflicts with statute. A conflict between a rule and a statute is resolved in favor of the
5 statute.”

6 *Rainbo Baking* rejected the Department’s disallowance of a deduction based on when a
7 taxpayer was in possession of a nontaxable transaction certificate. The Department had
8 promulgated a regulation that required the taxpayer to possess the certificate *prior* to an audit.
9 *Rainbo Baking* acknowledged the Department’s “authority to regulate the possession of
10 nontaxable transaction certificates, but this authority did not extend to imposing a time
11 requirement which would abridge or modify the deduction authorized by the Legislature[.]” *See*
12 *Rainbo Baking*, 1972-NMCA-139, ¶ 12. Therefore, because the statute did not require possession
13 prior to the audit, the offending regulation imposing that requirement was void. *Id.*

14 Remarkably, this case does not involve the promulgation of rules under the State Rules
15 Act, the Administrative Procedures Act pursuant to Section 59A-2-8 (J) (2013, Amended 2021),
16 or even the Department’s powers to promulgate rules under NMSA 1978, Section 9-11-6.2. This
17 observation is pertinent because these represent the formal procedures through which agencies
18 promulgate rules having the force of law. They generally require public notice and an
19 opportunity to be heard.

20 Instead, the purported limitations on MIP credit on which the Department based its denial
21 derive from a *bulletin* which OSI defines as “a statement, inquiry, or order of broad or general
22 interest or application that does not in itself create new law but which may require certain actions
23 to be performed under existing law.” *See* Regulation 13.1.2.7 NMAC. In the hierarchy of binding

1 authority, a bulletin has the lowest authoritative weight, especially when it is at odds with a clear
2 statutory requirement.

3 As Mr. Chavez, former Superintendent of Insurance explained, the process of adopting
4 bulletins provides no opportunity for public review or comment because bulletins do not nor
5 should they affect the rights of, or the procedures available to the public or any person. *See e.g.*
6 NMSA 1978, Section 12-8-2 (G) (2) (1969). But in this case, focusing on Bulletin 2018-005 as
7 the solitary reason underlying the Department’s denial, the bulletin purported to impose a cap on
8 the amount of MIP credit, and prohibit refundability of unused MIP credit, which were positions
9 contradictory to the plain language of the statute, not to mention the historical consensus among
10 the Legislature, its Legislative Finance Committee, OSI, and Molina with how the MIP credit
11 had been administered for nearly 30 years, not to mention OSI’s more recent treatment of
12 similarly situated taxpayers seeking refunds of MIP credit.

13 The Deputy Superintendent of Insurance even explained to a committee of the
14 Legislature that taxpayers should be entitled to utilize their MIP credits. When explaining the
15 progress OSI was making in collecting outstanding liabilities, he said of \$9 million which was
16 refunded to two similarly situated insurers that the money would “not be collected” because the
17 money represented “\$9 million in credits that they didn’t use and so ... that money was due to
18 them in some shape or form.” [Taxpayer Ex. 9 (00:24:15 – 00:27:15)]

19 Bulletin No. 2018-005 reflected only one of several conflicting stances OSI took in this
20 area beginning in 2015. Yet, the statutory language at all times remained unchanged, which calls
21 to mind the rule that our courts “generally show little deference to an agency’s interpretation of
22 its own statute when the interpretation is an unexplained reversal of a previous interpretation or
23 consistent practice.” *See High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1994-NMCA-

1 139, ¶ 45, 119 N.M. 29, 42, 888 P.2d 475, 488. In this case, OSI’s wavering and inconsistent
2 shifts away from its long-established methods of administering the MIP credit represent an
3 “unexplained reversal of a previous interpretation or consistent practice.” From 1987 until 2015,
4 OSI maintained consistent adherence to the correlative approach to reporting. In 2015, it
5 implemented a staggered approach to reporting and declared that MIP credits were not
6 refundable or applicable to future tax liabilities. [Taxpayer Ex. 2; Taxpayer Ex. 3] Then in 2018,
7 OSI reversed course on the issue of refundability and issued two refunds (not to Molina) in
8 excess of \$10,000,000. [Taxpayer Ex. 6; Taxpayer Ex. 9; Taxpayer Ex. 7; Taxpayer Ex. 22] In
9 doing so, OSI declared that allowing companies “the opportunity to realize in full refundable
10 credits resulting from the payment of [companies’] Medical Insurance Pool Assessments” was
11 “consistent with the Superintendent’s and OSI’s constitutional and statutory duties.” [Taxpayer
12 Ex. 7.005 (Paras. D & E); Taxpayer Ex. 22 (Paras. B & E); Taxpayer Ex. 8.006 (Paras. E & F)]
13 OSI also publicly stated in reference to refunds paid to other taxpayers that the refunds derived
14 from “credits that [the insurance companies] didn’t use and so ... that money was due to them in
15 some shape or form.” [Taxpayer Ex. 9] Roughly four months later in Bulletin 2018-005, which
16 served as the solitary reason for denying Molina’s refund, OSI yet again retreated from its
17 position on refundability and declared that MIP credits were not refundable. All the while, the
18 underlying statute never changed.

19 Thus, consistent with the Supreme Court’s observation in *High Ridge Hinkle Joint*
20 *Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 9, 126 N.M. 413, 416, 970 P.2d 599, 602,
21 the prior construction given the statute, perhaps as early as 1987 according to credible and well-
22 informed testimony of Mr. Chavez, constitutes the *actual policy* which OSI subsequently sought
23 to change non-legislatively. This, is “an improper procedure.” See *High Ridge Hinkle Joint*

1 *Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 9, 126 N.M. 413, 416, 970 P.2d 599, 602

2 As background, the *Hinkle* cases involved interpreting the Comprehensive City Zoning
3 Code which permitted “outdoor storage or activities” as a conditional use for properties bearing
4 certain zoning designations. City zoning officials had previously interpreted that conditional use
5 to include outdoor activities unrelated to storage, but when the plaintiff’s conditional use
6 application was denied based on a new interpretation of the statute, the Supreme Court withheld
7 its deference to the new interpretation.

8 The same rules apply to this protest. Beginning in 2015, within days of Senate Bill 577’s
9 failure to advance, OSI adopted a new bulletin that abandoned the long-standing correlative
10 approach to reporting MIP credits in favor of a new staggered approach that also restricted the
11 full utilization of MIP credits. The result was to set aside decades of well-established process in
12 favor of a new policy, neither grounded in law nor historical application, the result which gives
13 rise to this protest.

14 Under the historical correlative approach, Molina’s premium tax liability, paid
15 assessments, and computations of MIP credits were related to common variables in the same tax
16 year, and for that reason, the MIP credit which was calculated as a percentage of the assessments
17 paid never exceeded the Premium Tax liability for that period. The staggered approach changed
18 that by disassembling the longstanding structure and assembling a Frankenstein framework that
19 relied on variables from different years which failed to align, and in some scenarios, could
20 generate an excess credit which OSI or the Department, at least in the case of Molina, refused to
21 refund.

22 This occurred when Molina experienced a significant reduction in premiums between
23 2018 and 2019 due to the loss of its state medicaid contract. The result was a significant MIP

1 credit earned based on its pre-2019 market share, which also determined its New Mexico
2 Medical Insurance Pool assessment obligation and resulting MIP credit. When that MIP credit
3 was applied to Molina’s 2019 Premium Tax obligation which had been substantially reduced
4 from the prior years, the result was a significant amount of unused MIP credit. Molina requested
5 and was denied a refund based on Bulletin No 2018-005.

6 Molina’s Equal Protection Claim

7 Molina argued that it has been treated differently under the law contrary to the Equal
8 Protection Clauses of the United States and New Mexico Constitutions. Those Equal Protection
9 Clauses require that similarly situated taxpayers receive equal treatment under the law unless
10 there is a rational basis for disparate treatment. *See Metro. Life Ins. Co. v. Ward*, 470 U.S. 869,
11 875 (1985) (higher tax rate on out-of-state insurers than in-state insurers unconstitutional); *Burch*
12 *v. Foy*, 1957-NMSC-017, ¶¶10-12, 62 N.M. 219, 308 P.2d 199 (higher minimum wage on “five
13 and dime stores” than competitor drug stores violated equal (protection)); *Gosnell Dev. Corp. v.*
14 *Ariz. Dep’t of Revenue*, 744 P.2d 451, 453 (Ariz. Ct. App.1987) (calculating the same deduction
15 differently for construction contractors taxed under the same statute unconstitutional).

16 To the extent a rational basis exists for the disparate treatment, then there must be
17 evidence in the record or legal rationale to justify the disparate treatment. *See, e.g., Rodriguez v.*
18 *Brand West Dairy*, 2016-NMSC-029, ¶ 25, 378 P.3d 13, 25 (statute can be ruled unconstitutional
19 if the legislative classification is “not supported by firm legal rational or evidence in the record”)
20 (citation omitted).

21 The evidence on this record supports that other similarly situated taxpayers received the
22 benefit of their unused MIP credits in reliance on Bulletin 2018-001. Yet, Molina was denied the
23 same treatment without any evidence of a “firm legal rational or evidence in the record.” While

1 this is suggestive of an equal protection issue, Molina prevails on statutory grounds. *See*
2 *Schlieter v. Carlos*, 1989-NMSC-037, ¶ 13, 108 N.M. 507, 510, 775 P.2d 709, 712 (“It is an
3 enduring principle of constitutional jurisprudence that courts will avoid deciding constitutional
4 questions unless required to do so. We have repeatedly declined to decide constitutional
5 questions unless necessary to the disposition of the case.”)

6 Estoppel

7 Molina asserts that the Department should be estopped from denying Molina’s refund.
8 Estoppel applies against the state when right and justice demand it or when the state engages in a
9 shocking degree of aggravated and overreaching conduct. *See N.M. Taxation & Revenue Dep ’t*
10 *v. Bien Mur Indian Market Center, Inc.*, 1989-NMSC-015, 108 N.M. 228; *Waters-Haskins v. NM*
11 *Human Servs. Dep ’t*, 2009-NMSC-031, 123, 146 N.M. 39. However, whether the remedy of
12 equitable estoppel is available in an administrative protest remains uncertain. *See AA Oilfield*
13 *Service v. New Mexico State Corporation Commission*, 1994-NMSC-085, ¶18, 118 N.M. 273
14 (equitable remedies are not part of the “quasi-judicial” powers of administrative agencies)⁸.
15 Nevertheless, the Hearing Officer will discuss the issue in the interest of completeness which
16 might assist the parties and appellate courts during any subsequent appellate review.

17 If equitable estoppel was a clearly available remedy within the context of a tax protest,
18 courts are reluctant to apply it against the state in cases involving the assessment and collection of
19 taxes. *See Bien Mur*, 1989-NMSC-015 ¶9. In such cases, estoppel applies only pursuant to statute

⁸ The appellate courts have yet to consider whether the Administrative Hearings Office, as an independent administrative tribunal tasked solely with conducting fair administrative hearings independent of the supervision of the administrative agency involved in the hearing, may consider or rule upon equitable estoppel. It is possible that since the Administrative Hearings Office now serves a similar function as a tax court, it *may* have some more latitude than other administrative agencies to consider some form of quasi-equitable relief. But under current case law, the nature of an administrative agency being limited to those powers proscribed by statute, and the fact that equitable powers under the law are well understood to be limited to the judiciary, the Administrative Hearings Office remains generally reluctant to consider equitable relief absent further guidance from our appellate courts.

1 or when “right and justice demand it.” *Id.*

2 Courts have further clarified that estoppel cannot lie against the state when the act sought
3 would be contrary to the requirements expressed by statute. *See Rainaldi v. Public Employees*
4 *Retirement Board*, 1993-NMSC-028, ¶18-19, 115 N.M. 650. Having carefully reviewed the facts
5 as established by the evidence as well as the applicable law, the relief Molina seeks in this
6 protest is not contrary to any legal authority known to the Hearing Officer or cited by the parties.

7 In *Waters-Haskins*, the Court of Appeals identified six elements to consider when
8 evaluating a claim for equitable relief against a governmental agency:

9 (1) the agency’s conduct amounting to a false representation or concealment
10 of material facts or, at least, that is calculated to convey the impression that
11 the facts are otherwise than, and inconsistent with, those which the party
12 subsequently attempts to assert; (2) the agency’s intention, or at least
13 expectation, that the other party will act upon such conduct; and (3) the
14 agency’s knowledge, actual or constructive, of the real facts. The essential
15 elements that apply to the party raising equitable estoppel as a defense are
16 “(1) [l]ack of knowledge and of the means of knowledge of the truth as to
17 the facts in question; (2) reliance upon the conduct of the party estopped; and
18 (3) action based thereon of such a character as to change his position
19 prejudicially.

20 *Id.*, ¶22 (internal citations omitted).

21 Prior to proceeding with a discussion of the elements, the Hearing Officer will reiterate that
22 the conduct upon which Molina asserts entitlement to estoppel does not stem from any Department
23 conduct. The issue relates to OSI’s conduct prior to the Department assuming responsibility for the
24 administration of the Premium Tax.

25 Molina’s protest asserted that OSI engaged in conduct intended to mislead it. This is
26 illustrated through several direct references to Bulletin No. 2018-001, which interpreted excess
27 MIP credits to be refundable. [Taxpayer Ex. 8.003 (Para. 11); 8.006 (Para. E); 8.011 – 8.012
28 (“Subsequent Event”); 8.013 – 8.014 (Bulletin 2018 – 001 attached as Exhibit B)] Bulletin No.

1 2018-001 was even included as an exhibit to its Final Report and Order that purported to
2 compromise Molina’s dispute regarding the invoice OSI issued subsequent to the statewide
3 audit. In each reference, OSI’s explicit position was that excess MIP credits were refundable for
4 the audit period and would be treated as refundable going forward. It explained, “[i]n accordance
5 with Bulletin 2018-001, OSI shall afford Molina the opportunity to realize in full refundable
6 credits resulting from the payment of Molina's Medical Insurance Pool Assessments.” *See*
7 Taxpayer Ex. 8.006 (Para. E) it further explained that the policy was consistent with “OSI’s
8 constitutional and statutory duties.” *See* Taxpayer Ex. 8.006 (Para. F)

9 The evidence established that OSI intended Molina to rely on these statements. Molina
10 was satisfied with the compromise embodied in the Final Report and Order [Taxpayer Ex. 8] and
11 relinquished any claims it had, or could have raised, based on the policy expounded in Bulletin
12 2018-001. However, mere days after the deadline had passed for Molina to appeal the Final
13 Order and Report, OSI reversed course yet again and adopted Bulletin 2018-005, which
14 determined that MIP credits were no longer refundable.

15 As Mr. Figueroa explained, representations in the Final Report and Order regarding the
16 refundability of MIP credits, as explained in Bulletin 2018-001, were dispositive in Molina’s
17 decision to pay the invoice, forego litigation, and seek a refund at a later date.

18 The direct consequence was a legal detriment to Molina in that it lost its statutory right to
19 appeal OSI’s Final Report and Order. *See* NMSA 1978, Section 59A-4-20; Section 39-3-1.1 (C).
20 Had OSI issued Bulletin 2018-005 just days sooner, then Molina could have reevaluated its
21 position and timely appealed the Final Report and Order and litigated, at a much earlier time, the
22 question of whether MIP credits were refundable.

23 The evidence presented supports the assertion that OSI induced Molina into agreeing

1 with, and not appealing, the Final Report and Order issued subsequent to the statewide audit by
 2 explicitly informing them that excess MIP credits would be *refundable.*, and then changing
 3 course immediately after the Final Report and Order became final and non-appealable. This
 4 conduct, by OSI, is the sort of conduct that would justify estoppel in this case, if it applied.

5 However, the analysis does not stop with the six elements. In addition to these six
 6 elements, any claimant for equitable relief against a governmental agency must show
 7 “affirmative misconduct on the part of the government.” See *Kilmer v. Goodwin*, 2004-NMCA-
 8 122, ¶27, 136 N.M. 440. (internal citations omitted). The conduct contemplated to support
 9 application of equitable estoppel against the government must show a shocking degree of
 10 aggravated overreach. See *Waters-Haskins*, ¶23.

11 The evidence here meets that standard. At a time when it was advantageous to OSI to
 12 resolve Molina’s dispute of its invoice, it utilized Bulletin 2018-001 to induce Molina to pay the
 13 invoice and forego further litigation in reliance on the representation that it could obtain a refund
 14 of unused excess MIP credits in a subsequent Premium Tax period. Shortly after the deadline to
 15 appeal had passed, OSI adopted the new policy embodied in Bulletin 2018-005 that was contrary
 16 to the terms upon which Molina had accepted and paid its invoice. The result, based on the
 17 evidence presented culminated with the Department denying Molina’s refund based *solely* on
 18 Bulletin No. 2018-005. [Taxpayer Ex. 15.001] The evidence satisfied all the elements of
 19 equitable estoppel. Yet, relief need not rely on equitable estoppel since the evidence established
 20 for a variety of other reasons that Molina’s protest should be granted.

21 Therefore, and for the reasons stated herein, Molina’s protest is GRANTED.

22 **CONCLUSIONS OF LAW**

23 A. Taxpayer filed timely, written protests to the denial of its refunds. Jurisdiction lies

1 over the parties and the subject matter of this protest.

2 B. Taxpayer made timely requests for hearing and the Administrative Hearings Office
3 conducted hearings within 90 days of Taxpayer’s protest under NMSA 1978, Section 7-1B-8
4 (2019). The parties did not object that the hearing satisfied the requirements of Section 7-1B-8.

5 C. Molina carries the burden of establishing entitlement to its refund claims which
6 the Court of Appeals has instructed be evaluated through the lens of the presumption of
7 correctness. *See Corr. Corp. of Am. of Tenn. v. State*, 2007-NMCA-148, ¶17, 142 N.M. 779 (Court
8 of Appeals reviewed refund denial “through the lens of a presumption that the Department's
9 assessment is correct.”); *citing TPL, Inc. v. New Mexico Taxation & Revenue Dept.*, 2003-NMSC-
10 007, ¶ 10, 133 N.M. 447, 451, 64 P.3d 474, 478.

11 D. “[D]etermining whether the taxpayer has overcome the presumption of correctness
12 is the first step in resolving a tax protest, and that it will only be the last step if the taxpayer fails to
13 overcome the presumption.” *See Gemini*, 2023-NMCA-039, ¶ 23.

14 E. The call for “some countervailing evidence ... is merely a threshold requirement
15 for evidence, and that evidence need not be credible or ultimately persuasive.” *See Gemini*,
16 2023-NMCA-039, ¶ 25.

17 F. The primary goal of statutory interpretation is “to give effect to the intent of the
18 [L]egislature.” *See Dell Catalog Sales L.P. v. N.M. Taxation & Revenue Dep’t*, 2009-NMCA-
19 001, ¶19, 145 N.M. 419, 199 P.3d 863.

20 G. “[T]he presumption of correctness assessment is made by the hearing officer in a
21 purely legal capacity.” *See Gemini*, 2023-NMCA-039, ¶ 25.

22 H. “[I]f the taxpayer has not overcome the presumption, the protest may simply be
23 denied. In this scenario, there is no need for the department to present any evidence.” *See*

1 *Gemini*, 2023-NMCA-039, ¶ 23.

2 I. “[I]f the taxpayer has overcome the presumption, the outcome of the protest, at
3 that point, remains undetermined. The taxpayer has overcome its initial hurdle, but further legal
4 and factual assessments remain before the hearing officer can determine whether to grant or deny
5 the protest.” *See Gemini*, 2023-NMCA-039, ¶ 23.

6 J. “[T]he burden that shifts to the department is a burden of production.” The burden
7 of persuasion is always “borne by the taxpayer.” *See Gemini*, 2023-NMCA-039, ¶ 26.

8 K. “[T]he department must be given an opportunity to present evidence to support its
9 assessment, and the hearing officer may not grant or deny the protest without, at the very least,
10 determining whether the department has carried its burden.” *See Gemini*, 2023-NMCA-039, ¶ 24.

11 L. “To overcome this burden, the department must put forth evidence to show the
12 correctness of its assessment—that is, evidence sufficient to make the correctness of the
13 department's assessment a question of fact.” *See Gemini*, 2023-NMCA-039, ¶ 29.

14 M. “[T]he existence of this burden means that the department cannot simply rely on
15 the unreliability or incredibility of the taxpayer's evidence.” Instead, the Department must
16 produce evidence to justify its action, or in this case, the denial of Molina’s refund claims. *See*
17 *Gemini*, 2023-NMCA-039, ¶ 29.

18 N. New Mexico adheres to the plain meaning rule which commands that when a
19 statute’s language is clear and unambiguous, courts should give effect to that language and
20 refrain from further statutory interpretation. *See Wood v. State Educ. Ret. Bd.*, 2011-NMCA-020,
21 ¶ 12; *see also*, NMSA 1978, Section 12-2A-19 (the text of a statute serves as the primary,
22 essential source of its meaning).

23 O. “A statute or subsection need not be considered independently or ‘in a vacuum,’

1 but alongside statutes dealing with the same subject matter. *See State v. Trujillo*, 2009-NMSC-
2 012, ¶ 22, 146 N.M. 14, 20, 206 P.3d 125, 131.

3 P. Legislative intent is fulfilled “by first looking at the plain meaning of the
4 language of the statute, reading the provisions ... together to produce a harmonious whole.” *See*
5 *Dell Catalog Sales L.P. v. N.M. Taxation & Revenue Dep’t*, 2009-NMCA-001, ¶19, 145 N.M.
6 419, 199 P.3d 863; *Sundance Mech. & Util. Corp. v. Armijo*, 1987-NMSC-078, ¶5, 106 N.M.
7 249, 250, 741 P.2d 1370, 1371.

8 Q. Statutory provisions must be given “fair, unbiased, and reasonable construction,
9 without favor or prejudice to either the taxpayer or the [s]tate, to the end that the legislative
10 intent is effectuated and the public interests to be subserved thereby are furthered.” *See Chavez v.*
11 *Comm’r of Revenue*, 1970-NMCA-116, ¶7, 82 N.M. 97, 476 P.2d 67.

12 R. NMSA 1978, Section 59A-54-10 provides a credit to be applied to taxpayer’s
13 Premium Tax liability. The amount of credit is determined by the amount of an assessment paid to
14 the New Mexico Medical Insurance Pool. The amount of the credit is not contingent on the
15 taxpayer’s Premium Tax obligation.

16 S. NMSA 1978, Section 59A-54-10 (C) (2007, Amended 2020) provides a credit to
17 be applied to taxpayer’s Premium Tax liability. The amount of credit is determined as a percentage
18 of the assessment paid to the New Mexico Medical Insurance Pool. The amount of the credit is not
19 reliant or in any way contingent on the taxpayer’s Premium Tax obligation (“...*the assessment ...*
20 *shall be allowed as a fifty-percent credit on the premium tax return for that member and a*
21 *seventy-five-percent credit on the premium tax return for that member for the assessment...”).*

22 T. “It is widely accepted that when construing statutes, ‘shall’ indicates that the
23 provision is mandatory, and we must assume that the Legislature intended the provision to be

1 mandatory absent [a] clear indication to the contrary.” *See Marbob Energy Corp. v. New Mexico*
2 *Oil Conservation Comm’n*, 2009-NMSC-013, ¶ 22, 146 N.M. 24, 32, 206 P.3d 135, 143; *see also*
3 NMSA 1978, Section 12-2A-4 (A) (“‘Shall’ and ‘must’ express a duty, obligation, requirement
4 or condition precedent.”)

5 U. NMSA 1978, Section 59A-54-10 (C) (2007, Amended 2020) does not contain any
6 indication of Legislative intent to cap or otherwise limit the amount of credit earned, applied, or
7 refunded to a taxpayer.

8 V. Agencies may not, even by properly promulgated rule, “abridge, enlarge, extend
9 or modify the statute creating the right or imposing the duty.” *See Rainbo Baking Co. of El Paso,*
10 *Tex. v. Comm’r of Revenue*, 1972-NMCA-139, ¶ 11, 84 N.M. 303; “No rule is valid or
11 enforceable if it conflicts with statute. A conflict between a rule and a statute is resolved in favor
12 of the statute.” *See* NMSA 1978, Section 14-4-5.7.

13 W. The Office of Superintendent of Insurance defines “Bulletin” as “a statement,
14 inquiry, or order of broad or general interest or application that does not in itself create new law
15 but which may require certain actions to be performed under existing law.” *See* Regulation
16 13.1.2.7 NMAC.

17 X. “Any taxpayer who requests approval of a statutory tax credit is deemed to have
18 received such approval if the request has not been granted or denied within one hundred eighty days
19 of the date it was filed.” *See* NMSA 1978, Section 7-1-29.2 (2020).

20 Y. New Mexico courts “generally show little deference to an agency’s interpretation
21 of its own statute when the interpretation is an unexplained reversal of a previous interpretation
22 or consistent practice.” *See High Ridge Hinkle Joint Venture v. City of Albuquerque*, 1994-
23 NMCA-139, ¶ 45, 119 N.M. 29, 42, 888 P.2d 475, 488; *see also High Ridge Hinkle Joint*

1 *Venture v. City of Albuquerque*, 1998-NMSC-050, ¶ 9, 126 N.M. 413, 416, 970 P.2d 599, 602.

2 Z. Equal Protection requires that similarly situated taxpayers receive equal treatment
3 under the law unless there is a rational basis for disparate treatment. *See Metro. Life Ins. Co. v.*
4 *Ward*, 470 U.S. 869, 875 (1985).

5 AA. To the extent a rational basis exists for the disparate treatment, then there must be
6 evidence in the record or legal rationale to justify the disparate treatment. *See, e.g., Rodriguez v.*
7 *Brand West Dairy*, 2016-NMSC-029, ¶ 25, 378 P.3d 13, 25.

8 BB. Estoppel applies against the state when right and justice demand it or when the
9 state engages in a shocking degree of aggravated and overreaching conduct. *See N.M. Taxation*
10 *& Revenue Dep 't v. Bien Mur Indian Market Center, Inc.*, 1989-NMSC-015, 108 N.M. 228;
11 *Waters-Haskins v. NM Human Servs. Dep 't*, 2009-NMSC-031, 123, 146 N.M. 39.

12 CC. Whether the remedy of equitable estoppel is available in an administrative protest
13 remains uncertain. *See AA Oilfield Service v. New Mexico State Corporation Commission*, 1994-
14 NMSC-085, ¶18, 118 N.M. 273 (equitable remedies are not part of the “quasi-judicial” powers of
15 administrative agencies)

16 DD. Courts have further clarified that estoppel cannot lie against the state when the act
17 sought would be contrary to the requirements expressed by statute. *See Rainaldi v. Public*
18 *Employees Retirement Board*, 1993-NMSC-028, ¶18-19, 115 N.M. 650.

19 EE. Any claimant for equitable relief against a governmental agency must show
20 “affirmative misconduct on the part of the government.” *Kilmer v. Goodwin*, 2004-NMCA-122,
21 ¶27, 136 N.M. 440.

22 For the reasons stated, Taxpayer’s protest is GRANTED. Molina is entitled to the refunds
23 claim in 2018 and 2019 plus interest permitted by law.

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DATED: September 25, 2024



Chris Romero
Hearing Officer
Administrative Hearings Office
P.O. Box 6400
Santa Fe, NM 87502

1 **NOTICE OF RIGHT TO APPEAL**

2 Pursuant to NMSA 1978, Section 7-1-25 (2015), the parties have the right to appeal this
3 decision by *filing a notice of appeal with the New Mexico Court of Appeals* within 30 days of the
4 date shown above. If an appeal is not timely filed with the Court of Appeals within 30 days, this
5 Decision and Order will become final. Rule of Appellate Procedure 12-601 NMRA articulates
6 the requirements of perfecting an appeal of an administrative decision with the Court of Appeals.
7 Either party filing an appeal shall file a courtesy copy of the appeal with the Administrative
8 Hearings Office contemporaneous with the Court of Appeals filing so that the Administrative
9 Hearings Office may begin preparing the record proper. The parties will each be provided with a
10 copy of the record proper at the time of the filing of the record proper with the Court of Appeals,
11 which occurs within 14 days of the Administrative Hearings Office receipt of the docketing
12 statement from the appealing party. *See* Rule 12-209 NMRA.
13

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing to the parties listed below this 25th day of

September 2024 in the following manner:

First Class U.S. Mail & Email

First Class U.S. Mail & Email

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