BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF PUBLIC SERVICE COMPANY OF NEW MEXICO'S ABANDONMENT OF SAN JUAN GENERATION STATION UNITS 1 & 4	)	**Case No. 19-00018-UT**
IN THE MATTER OF PUBLIC SERVICE COMPANY OF NEW MEXICO'S CONSOLIDATED APPLICATION FOR APPROVALS FOR THE ABANDONMENT FOR SAN JUAN GENERATING STATION PURSUANT TO THE ENERGY TRANSITION ACT	)	**Case No. 19-00195-UT**

NEW ENERGY ECONOMY'S MEMORANDUM OF LAW ON THE APPLICABILITY OF ENERGY TRANSITION ACT TO THESE PROCEEDINGS

Pursuant to *Procedural Orders* issued in Case Nos. 19-00018-UT and 19-00195-UT, Public Service Company of New Mexico ("PNM") was required to address "the issue of the extent to which N.M. Const. Article IV, §34 prevents the application of the Energy Transition Act, NMSA 1978 § 62-18-1 to 23 (2019) to the issues in this case."[1] PNM filed its response on August 23, 2019.[2] In accordance with the procedural order, New Energy Economy ("NEE") states its position regarding this issue as follows, opposing PNM's claim that the Energy Transition Act ("ETA") should apply to this case.

I. Introduction.

In summary, it is NEE's position that the ETA cannot apply to this case because it affects the rights or remedies of ratepayers, changes the rules of evidence and procedure, and the matters at issue were before the PRC, in a pending case, before passage of the ETA. Under Article IV, §34 of the New Mexico Constitution the ETA cannot be applied. Additionally, there are relevant

[1] Case No. 19-00018-UT/19-00195-UT, *Procedural Order*, ¶ A(3) at 4 (July 25, 2019).
[2] Case No. 19-00018-UT, *Legal Brief of PNM Concerning Applicability of Energy Transition Act* (Aug. 23, 2019).

provisions of the ETA that are unconstitutional and should not be applied by the PRC in this or any other case. With respect to issues related to the unconstitutionality of provisions of the ETA, NEE recognizes that they will be decided by the Supreme Court on appeal. Those issues, however, rest to some significant extent on facts related to the current proceeding and forthcoming proceedings. NEE and the other parties, therefore, should have a full opportunity to develop those facts so that they will be in the record on appeal.

II. Background.

In December 2013 PNM filed an Application with the New Mexico Public Regulation Commission ("NM PRC") to close half the San Juan Generating Station ("SJGS"), install pollution controls and purchase more coal from SJGS's departing co-owners and to purchase more nuclear at Palo Verde Generating Station. After the first Stipulation was not approved on April 8, 2015,[3] PNM entered into a Supplemental Stipulation, which was also not approved,[4] but the Modified Stipulation was approved by *Final Order* on December 16, 2015. PNM was "allowed recovery of 50% of the undepreciated value of Units 2 and 3."[5] The case was instigated as a result of the Environmental Protection Agency's ("EPA") determination that PNM's SJGS violated the federal Clean Air Act's "regional haze" standards. PNM and EPA agreed that PNM would close half the plant and add pollution controls on the remaining two units, thereby addressing regional haze.[6] PNM testified and the PRC based its approval of PNM's certificate of convenience and necessity ("CCN") for more coal, at least in part, on PNM's representation that

[3] 13-00390-UT, *Certification of Stipulation,* April 8, 2015, p. 148.
[4] 13-00390-UT, *Certification of Stipulation,* November 16, 2015, p. 102.
[5] 13-00390-UT, *Certification of Stipulation,* April 8, 2015, p. 147. (At p. 114: "the recovery of one half of PNM's undepreciated investment in San Juan Units 2 and 3 after the units' abandonment reflects a reasonable balancing of the interests of investors and ratepayers.")
[6] *New Energy Economy v. New Mexico Public Regulation Commission,* 2018-NMSC-024, 416 P.3d 277, ¶3 (2018)

its replacement power portfolio would be "the most cost-effective portfolio."[7] Additionally, PNM's testified "[w]e are seeking a CCN that *will continue indefinitely* with this 132 megawatts [at SJGS]."[8] NEE challenged the truthfulness of PNM's claims.

On February 24, 2017, just one year and two months after the PRC granted approval of PNM's CCN Application based on the foregoing testimony, PNM's Board of Directors decided that a "shutdown scenario provides for transitioning of PNM Generation portfolio to fewer baseload resources and more opportunities in renewable, gas, and newer generation technology" and predicted that "higher rate base earnings result from significant capital investment - SJGS replacement power, renewables and other resource additions."[9]

Given this assessment PNM sought to pass SB 47 in 2018, PNM's Securitization – "Energy Redevelopment Bond Act," in the New Mexico's 53rd Legislature. Through this Act, PNM sought to recover from PNM ratepayers $353M in "undepreciated investments" resulting from closing SJGS, to require that *all* replacement power resources be owned by PNM, and to severely limit PRC's authority going forward. The bill failed despite a battalion of PNM lobbyists at the Roundhouse. PNM's concern, which was transparent, was that the PRC would view these issues unfavorably to PNM in the following ways: First, the most PNM would get from a PRC ruling to shutter SJGS ruling would be 50% of its undepreciated investments;[10] Second, the Commission might question why PNM had *reinvested* in the plant when it planned

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[7] 13-00390-UT, *Certification of Stipulation,* November 16, 2015, p. 29.
[8] 13-00390-UT, TR., PNM Vice President of Regulatory Affairs Ortiz, 10/13/15 pp. 4059-4060.) (emphasis supplied.)
[9] 16-00276-UT, NEE Exhibit 16, PNM's Response to NEE discovery, 7-1.
[10] Not only was there precedent for a "balancing of the interests of investors and ratepayers" in 13-00390-UT, but the Hearing Examiner in that case also cited to *Re Public Service Company of New Mexico*, Case No. 2146, Pt. II, 101 P.U.R.4th 126, 176, 179 (1989) that "Often, a fair result is a sharing of the costs [] between investors and ratepayers." At p. 163. 13-00390-UT, *Certification of Stipulation,* April 8, 2015, p. 113.

to close the plant in 14 months;[11] Third, the Commission might question why PNM(R) spent so much money investing in a non-viable polluting resource, including the addition of expensive pollution controls, and lent Westmoreland money to be the coal supplier without informing the PRC of this deal at that time;[12] Fourth, the Commission might question why PNM Resources would install pollution controls (and other planned capital expenditures that rewarded PNMR with a 9.575% ROE) in a plant that it planned to close in 2022; and Fifth, when PNM's SJGS is the single largest climate polluter in NM because of its carbon emissions[13] (until the Permian Basin's arrival on the scene) including the 2nd largest methane polluter at its mine, why should ratepayers cover *all* costs of PNM's imprudent business decisions to reinvest in and extend the life of the San Juan plant?!

In short succession, there was a 2018 primary and election where PNM spent $440,000 to elect its preferred Commissioners,[14] but they were defeated.

Importantly for present purposes, on January 10, 2019, the PRC opened a docket on the abandonment of SJGS. PNM effectively forced the PRC to do so by failing to comply with its

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[11] 13-00390-UT, *Certification of Stipulation,* November 16, 2015, p. 101 ("NEE states that, if these factors are treated equally, PNM's four unit shutdown will be within a tenth of a percent difference from the stipulation portfolio over a twenty-year horizon. NEE Brief in Chief, p. 29.")

[12] When the Hearing Examiner denied PNM's CCN for the 132 MW of more SJGS coal as unreasonable and not a net public benefit one of the main reasons was because PNM did not a post-2017 coal supply agreement or a coal price. 13-00390-UT, *Certification of Stipulation,* April 8, 2015, pp. 87-97. Ultimately, PNM resolved the question of coal availability and price with Westmoreland Coal Company. What PNM did not reveal and only came to light *after* the PRC granted CCN approval, is that PNMR, created a new subsidiary company, "New Mexico Capital Utility Corporation" to loan WSJ, a limited liability company formed as a subsidiary of Westmoreland Coal Co., $125 million to enable it to purchase the San Juan Mine from BHP Billiton for $127 million. *See*, 16-00078-UT.

[13] Case No. 19-00018-UT, NEE 1-19-(12), 4,126,140 CO_2 lb/MWh in 2018; 5,757,055 CO_2 lb/MWh in 2016.

[14] For instance, See, the front page Santa Fe New Mexican story: "PNM spends $440K in races for its regulator; Money for political action committee went to support commission incumbents," June 2, 2018, http://www.santafenewmexican.com/news/local_news/pnm-spends-in-race-for-its-regulator/article_46351f0f-2f75-5c1e-8a82-73f333061ed6.html

obligations under the Modified Stipulation approved of in 13-00390-UT on December 16, 2015 to pursue a 2018 Review Hearing.[15] On January 30, 2019 the PRC unanimously voted in favor of ordering PNM to file an abandonment application by March 1, 2019.[16] PNM appealed the PRC Order to the New Mexico Supreme Court, S-1-SC-37552. In PNM's Emergency Petition for Writ of Mandamus, it claimed that the PRC's Order should be invalidated because the PRC had acted beyond its legal authority when the order was issued, and that it infringed on its First Amendment rights. PNM also argued that the PRC 1/30 Order disregarded the PRC's own requirements and policies regarding abandonment and usurped the role of the legislature, which was considering the ETA at the time.

Given PNM's electoral defeat and the prospect of the a PRC composition that was unlikely to give PNM what it felt it could obtain from the legislature and the governor, PNM proceeded to make a second "end-run" around the PRC,[17] by going to the 54th Legislature and arranging for the introduction of SB 489, the Energy Transition Act. It is beyond peradventure that PNM's appeal of the PRC's decision to open a docket on SJGS abandonment was to buy time for its legislative end-run so that it might create a colorable argument that Article IV, §34 of the Constitution would not cut PNM's end run off at the line of scrimmage.

On March 22, 2019 Senate Bill 489 – the ETA – was signed into law. On June 26, 2019, the NM Supreme Court denied PNM's Emergency Petition and lifted the stay of the Commission's 1/30 Order.

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[15] 13-00390-UT & 19-00018-UT *Order Requesting Response to PNM's December 31, 2018 Verified Compliance Filing Concerning Continued Use of San Juan Generating Station to Serve New Mexico Customers Pursuant to Paragraph 19 of the Modified Stipulation.*

[16] 19-00018-UT, *Order Initiating Proceeding On PNM's December 31, 2018 Verified Compliance Filing Concerning Continued Use of And Abandonment of SJGS*, 1/30/2019, ("1/30 Order").

[17] *See*, the testimony of Steven M. Fetter, pp. 7-8, 12, 15, 17, and 18.

On July 1, 2019, PNM filed its Consolidated Application in a new docket, Case 19-00195-UT, rather than in the existing docket in Case No. 19-00018-UT.[18] Relying on the ETA, PNM demanded cost recovery in the amount it wanted, along with other energy transition costs in an estimated amount of approximately $360.1 million, which included 100% recovery of PNM's undepreciated investments totaling $283.0 million, without the ability of the PRC to modify that request at all no matter what claim or defense is lodged by ratepayers and no matter whether PNM's figure included millions of dollars of imprudently incurred costs. Further, because of ETA's impossibly accelerated time-constraints, there is no time, and therefore no meaningful opportunity, to investigate, discover, and prepare testimony not only about the basis for the costs claimed, but about the costs associated with PNM's decades-long poisoning of people, land and water,[19] including by arsenic, boron, cadmium, chromium, selenium, molybdenum, lead, and uranium, among other metals. Parties to previous proceedings, such as 13-00390-UT, had two years to investigate PNM's claims. Now the parties, who are largely in the dark, will have no time at all in light of PNM's insistence that the ETA be imposed on its pending demands. The lack of due process in this case for ratepayers whose economic interests are at stake and for the public whose environment is being harmed by PNM make proceeding under the ETA constitutionally impermissible, in addition to being precluded by Art. IV, §34, as discussed below. How can any party investigate whether PNM and its co-owners have willfully or imprudently contaminated land and water for over 45 years and protect human health in a total of 9 months? Especially when PNM has refused to produce critical discovery materials, like geologic maps of the SJGS site; coal combustion residuals ("CCR") deposits, including groundwater-monitoring information, etc. until October 15, 2019, and only began to produce

[18] *Corrected Order on Consolidated Application*, July 10, 2019, ¶8.
[19] *See*, the testimony and exhibits of Norman E. Norvelle and Sterling Grogan.

materials as a result of *NEE's Motion to Extend Briefing and Compel Discovery, filed on* October 8, 2019.

The PRC has understandably required a legal distillation of whether N.M. Const. art. IV, §34 applies to this case. As NEE expert witness, Steven M. Fetter, former Chairman of the Michigan Public Service Commission, former bond rater for Fitch, former general counsel for the Michigan State Senate, and former PNM expert witness, states in his testimony in 19-00018-UT:

> I view the ETA as a significant departure from other 'securitization' laws in a way that undermines the core of the PRC's fundamental purpose and role – to regulate on behalf of the public to 'reasonably protect ratepayers from wasteful expenditure … [It] has allowed a regulated utility to determine the costs it wishes to recover through securitization, with no ability of the regulator to ensure that such costs are appropriately recoverable prior to being locked in through a financing order and bond issuance. Such a process would allow New Mexico public utilities to hold unprecedented power. In essence – intended or not – the ETA serves as a deregulation law.

Direct Testimony and Exhibits of Steven M. Fetter, August 6, 2019, at pp. 4, 17.

NEE will be clear: NEE is not opposed to a Securitization law if it, like the Texas law,[20] benefits ratepayers as well as the utility, not worse, and that due process controls. We are also in favor of an increase in the Renewable Portfolio Standard ("RPS") but New Mexico constitutional protections cannot be bargained away by legislators, no matter how noble their overall goals.

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[20] **1999 Texas Public Utilities Restructuring Act Mandate**

> "The **commission shall ensure** that securitization provides tangible and quantifiable benefits to ratepayers, greater than would have been achieved absent the issuance of transition bonds."
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> "The **commission shall ensure** that the **structuring and pricing** of the transition bonds result in the **lowest transition bond charges** consistent with market conditions and the terms of the financing order."

PURA, §39.301; *See, City of Corpus Christ v. Public Utility Commission*, 51 SW 3d 231, 239 (2001)

III. Relevant Facts.

1. This case is the latest chapter in the saga of PNM's protracted abandonment of the San Juan Generating Station (SJGS). It began with NMPRC Case No. 13-00390-UT, in which PNM applied to abandon SJGS Units 2 and 3. To resolve pending issues in that case, PNM entered into a Modified Stipulation, adopted by the Commission on December 16, 2015.[21] Paragraph 19 of that Modified Stipulation required PNM to make a filing with the PRC between July 1, 2018 and December 31, 2018, regarding whether SJGS should continue to serve PNM retail customers after 2022. This was to be known as the "2018 Review Hearing."[22]

2. No review hearing was requested by PNM until it made its "compliance filing" on December 31, 2018. In it, PNM disclosed that, with the exception of the City of Farmington, all SJGS co-owners, including PNM, had provided notice to one another that they did not intend to renew their participation in SJGS beyond 2022. *See* NMPRC Case No. 13-00390-UT, *PNM's Compliance Filing*. In fact, on June 29, 2018 PNM had informed all other SJGS co-owners that it would abandon SJGS in 2022,[23] but did not seek to abandon it before the PRC at that time. Based

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[21] 13-00390-UT, *Certification of Stipulation*, Nov. 16, 2015, adopted by *Final Order*, Dec. 16, 2015, upheld unanimously in *New Energy Economy v. New Mexico Public Regulation Comm'n*, 2018-NMSC-024, 416 P.3d 277.

[22] In the Commission's Final Order, at page 3, it stated: "The Modified Stipulation at ¶19 requires PNM to make the *first filing in the 2018 Review*, a recommendation as to whether all of SJGS … should continue serving its customers after June 30, 2022." Citing WRA's and CCAE's Response to NEE's Exceptions the Commission further stated: "[M]ore important than the burden of proof in the Modified Stipulation's *2018 proceeding*, and what is undisputed, is that PNM is tasked with initiating that *proceeding* and providing sufficient initial evidence to support the outcome [.]" (emphasis supplied.) When the New Mexico Supreme Court upheld the *Final Order* it found that the "the 2018 review" "provided a net public benefit." *New Energy Economy v. New Mexico Public Regulation Comm'n*, 2018-NMSC-024, supra, at ¶19. It is clear that the Commission, parties, and the public relied on and had a vested interest in a "proceeding" wherein PNM would make the first filing, not a "compliance filing" on the last day of December 2018.

[23] *See* NMPRC Case No. 13-00390-UT, *PNM's Verified Compliance Filing* (Dec. 31, 2018), PNM Exhibit TGF-4.

on PNM's compliance filing, the PRC found that "PNM has essentially irrevocably committed itself to the abandonment of SJGS over six months ago and is currently already involved in the steps necessary under its Exit Agreement … to proceed with an orderly closure of SJGS …" 13-00390-UT and 19-00018-UT, *Order Requesting Response to PNM's December 31, 2018 Verified Compliance Filing Concerning Continued Use of SJGS to Serve New Mexico Customers Pursuant to Paragraph 19 of the Modified Stipulation*, Jan. 10, 2019, p. 4.[24]

3. On January 30, 2019, the Commission required PNM to file an abandonment application by March 1, 2019, 1/30 Order, p. 14, ¶B. The application was to address all relevant issues, including: the basis for abandonment, costs of abandonment and the amount of cost recovery, and proposed treatment of undepreciated investments, decommissioning costs, and reclamation costs. The 1/30 Order also provided that the scope of that proceeding would include "all issues relevant to an abandonment proceeding, including financing of undepreciated assets, abandonment costs, reclamation and decommissioning, under NMSA 1978, §62-9-5 and any other applicable statutes and NMPRC rules." 1/30 Order, pp. 14-16, ¶¶A-C.

4. PNM responded to the 1/30 Order by filing an *Emergency Petition for Writ of Mandamus and Request for Emergency Stay* with the New Mexico Supreme Court on February 27, 2019. *Emergency Verified Petition of PNM for Writ of Mandamus, Request for Emergency Stay, and Request for Oral Argument* ("PNM Writ"), No. S-1-SC-37552. The writ argued, inter alia, that the PRC had violated PNM's First Amendment rights by issuing the order, and that the PRC order violated the legislative intent embodied in the *not yet passed* Energy Transition Act.

[24] Verified by the Federal Register at 84 FR 18574-6 §II, available at https://www.federalregister.gov/documents/2019/05/01/2019-08869/notice-of-record-of-decision-for-the-san-juan-mine-deep-lease-extension-mining-plan-modification.

On March 1, 2019, the Supreme Court issued a stay of further proceedings in Case No. 19-00018-UT.

5. On March 12, 2019 the legislature passed the ETA, effective June 14, 2019. Thereafter, on June 26, 2019, this Court after "consider[ing] the petition for writ of mandamus and responses thereto" denied PNM's Emergency Writ Petition.[25]

6. On July 1, 2019, PNM filed its *Consolidated Application for the Abandonment, Financing and Replacement of SJGS Pursuant to the Energy Transition Act* in a new docket, 19-00195-UT, rather than the existing docket in 19-00018-UT. The PRC issued a *Corrected Order on Consolidated Application* on July 10, 2019 ("Bifurcation Order"), providing for two separate proceedings regarding the issues raised in PNM's Application. Those portions of PNM's Application seeking approval of the abandonment of SJGS and a financing order, were "bifurcated" into the PRC-initiated case on January 10, 2019, 19-00018-UT, and the aspects of the Application related to replacement power would be considered in a separate proceeding under 19-00195-UT. Case No. 19-00018-UT and 19-00195-UT, *PRC Bifurcation Order*, July 10, 2019, at ¶¶ 18, 19, Ordering Paragraph A.

IV. Argument.

A. The ETA Cannot Be Applied to This Case Because It Affects The Rights and Remedies and Changes the Procedure of Litigants in a Pending Case

7. N.M. Const. art. IV, §34 states: "No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case." This constitutional provision equally applies to administrative agency proceedings. *In re Held Orders of U S West Communications, Inc.*, 127 N.M. 375, 379 (1999).

[25] S-1-SC-37552.

8. If applied, the ETA would affect the "rights and remedies" and "change the rules of evidence or procedure" for ratepayers in this litigation, which, as described above, was ongoing when the statute was signed into law.[26] Ratepayers' "rights and remedies" will be affected because the ETA has stripped the PRC of any regulatory oversight in several important areas, including the ability to amend utility requests for cost recovery based on the Commission's discretion. The adverse effect of the ETA on ratepayers is evident: PNM gets to determine the amount it seeks from ratepayers. The Commission has no ability to determine if the amount requested is legitimate let alone use its traditional role as "regulator" and apply general legal principles: to balance the interests between shareholder investors and ratepayers,[27] question the "prudence" of utility investment,[28] and ensure that rates are increased only if they are just and reasonable.[29] These bedrock consumer protections fall prey to PNM's pre-set,

[26] As of the ETA's passage, 11 parties made 21 filings before the PRC in this litigation, and 19 public comments were submitted. *See* 19-00018-UT Filings before PRC, attached as Exhibit A. The filings concerned such substantive matters as whether PNM had committed to abandon, requesting detailed discovery, and whether PRC control over abandonment timing was consistent with the PRC's responsibilities and public interest. *See, e.g.,* NMPRC Case No. 19-00018-UT, *Southwest Generation Operating Company Reply to Responses to PRC 1/10/2019 Order* (Jan. 22, 2019); *Attorney General's and Joint Respondents' Response to Commission Order Requesting Response* (Jan. 17, 2019); *New Energy Economy Pleading Pursuant to PRC Order of 1/10/2019* (Jan. 18, 2019).

[27] "[T]he Commission *must* balance the interest of consumers and the interest of investors… to the end that reasonable and proper services shall be available at fair, just and reasonable rates … without unnecessary duplication and economic waste [.]" NMSA 1978, §62-3-1(b) (2008).

[28] "[T]he purpose of a prudence review is to hold ratepayers harmless from any amount imprudently invested, a disallowance should equal the amount of the unreasonable investment." *Pub. Serv. Co. of New Mexico v. New Mexico PRC,* 2019-NMSC-012, 444 P.3d 460, ¶38, ¶ 40, and ¶ 42. "[A] utility should not be rewarded for its imprudent failure to consider alternatives and [we] acknowledge that total disallowance may be an appropriate remedy for such imprudence in some circumstances, acknowledging the possibility of a full disallowance." *Id.*, ¶ 47 (citations omitted)

[29] The Supreme Court recently upheld the Commission's decision because it was "squarely within the authority of the Commission under Section 62-6-4(A) to regulate the rates of public utilities and the obligation of the Commission under Section 62-8-1 to ensure that those rate are

utility-defined costs and no ratepayer claim or defense will modify the utility's stated amount. Rather than making an equitable determination of undepreciated assets for the remaining two SJGS units (previously determined by the PRC to be 50/50 for Units 1 & 4 in 13-00390-UT[30]), PNM now may recover 100% under the ETA—no questions asked. Whatever the proper percentage for undepreciated assets, this is an issue that the PRC has had the discretion to decide— not the utility, but will lose if the ETA applies, notwithstanding Art. IV, § 34. The ETA violates art. IV, §34 of the N.M. Constitution because it changes the rights and remedies of ratepayers, predetermining the resulting rates in a pending action before the Commission. Thus, on this issue alone, the PRC should find that it should conduct its business as usual, applying settled procedures and ratepayer protections, without regard to the ETA. *Edwards v. City of Clovis*, 1980-NMSC-039, ¶7, 94 N.M. 136.

9. If there were any doubt about the "pendingness" of the issues before the PRC, the ETA makes it clear because the ETA actually anticipates its application to pending cases. ETA § 4(E) addresses this explicitly:

> If an application for approval to abandon a qualifying generating facility is pending before the commission on the effective date of the Energy Transition Act, the qualifying utility may file a separate application for a financing order, and the commission may join or consolidate the application for a financing order with the pending proceeding involving abandonment of the qualifying generating facility, with the consent of the applicant. On such joinder or consolidation, the time periods prescribed by the Energy Transition Act shall become applicable to the joined or consolidated case as of the date of the joinder or consolidation.

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just and reasonable." *Pub. Serv. Co. of New Mexico v. New Mexico PRC*, 2019-NMSC-012, 444 P.3d 460, ¶ 86.

[30] When PNM abandoned SJGS Units 2 and 3, PNM was allowed 50% of its undepreciated investments; Cost sharing "fairly balances the interests of investors and ratepayers and is reasonable." 13-00390-UT, *Certification of Stipulation*, Nov. 16, 2015, p. 124, adopted by Final Order, Dec. 16, 2015, upheld unanimously in *New Energy Econ., Inc. v. New Mexico Pub. Regulation Comm'n*, 2018-NMSC-024, 416 P.3d 277.

From this it can only be assumed that the legislators intended the ETA to affect cases that were ongoing at the time of its passage, despite N.M. Const. Art. IV, §34, which explicitly and categorically forbids the legislature from doing this.

10. The ETA dramatically changes procedure for abandonment cases before the Commission. Before the ETA, an abandonment proceeding was not constrained by a specific time limit, and there was ample time for research, testimony, and record-development. For example, NMPRC Case No. 13-00390-UT, "Phase I" of PNM's SJGS abandonment application was filed on December 20th, 2013,[31] and the final order was issued on December 16th, 2015,[32] almost two years later. In contrast, the ETA states that

> If a hearing is held, the commission shall issue an order granting or denying the application for the financing order to a qualifying utility that is abandoning a qualifying generating facility and an order on an accompanying application of the qualifying utility for approval to abandon the qualifying generating facility *within six months from the date the application for the financing order is filed* with the commission. For good cause shown, the commission may extend the time for issuing the order for an additional three months. ETA § 5(A) (emphasis supplied).

Worse yet, "[f]ailure to issue a financing order within the time prescribed by Subsection A of this section shall be deemed approval of the application for a financing order and approval to abandon the qualifying generating facility …" ETA §5(B). Thus the PRC must run proceedings on an extremely truncated schedule, or risk having the abandonment be approved by default when the six-month time limit expires. This is a dramatic procedural change from the deliberative timescale of previous proceedings, violating Art. IV, §34's prohibition on legislative procedural changes to pending cases.

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[31] NMPRC Case No. 13-00390-UT, *Application of Public Service Company of New Mexico for Approval to Abandon San Juan Generating Station Units 2 and 3, Issuance of CCN's for Replacement Power Resources, Issuance of Accounting Orders and Determination of Ratemaking Principles And Treatment* (Dec. 20, 2013).
[32] NMPRC Case No. 13-00390-UT, *Final Order* (Dec. 16, 2015).

11. This litigation was pending when the ETA was introduced. The PRC opened this docket, 19-00018-UT on January 10, 2019. The docket was to address "all issues relevant to an abandonment proceeding," including "[t]he proper treatment and financing of undepreciated investments, decommissioning costs, and reclamation costs", "[t]he status of PNM's acquisition of generating resources to replace the resources being abandoned," "how to address any negative impacts of the abandonment" including remediation and cleanup, and "[i]dentification of … the rate impact of any abandonment costs PNM asserts should be borne by PNM ratepayers, including affordability for residential customers, particularly low income customers, and for small business customers." Order Initiating Proceeding pp. 15-16 (Jan. 30, 2019). The ETA was introduced before the Senate (as SB 489) on February 7, 2019. The ETA became law on June 14, 2019, nearly six months after this docket was initiated.

12. Under NMSA 1978 §62-8-1, "[e]very rate made, demanded or received by any public utility shall be just and reasonable." In particular, the PRC's role has been to balance the interest of consumers and the interest of utility investors in abandonment cases. *Pub. Serv. Co. of New Mexico v. New Mexico PRC*, 2019-NMSC-012, 444 P.3d 460, ¶10, *citing* NMSA 1978, §62-3-1(B). This also means that the PRC has the power to deny recovery that was based on imprudent investments. *Id* at ¶¶ 29-33. In contrast, the ETA states that "[t]he commission *shall issue a financing order approving the application* if the commission finds that the qualifying utility's application for the financing order complies with the requirements of Section 4 of the Energy Transition Act." ETA §5(E). ETA section 4 does not include a determination of the justness, prudence, or reasonableness of recovery, nor does it demand a balancing of investor and ratepayer interests. It merely contains a set of clerical requirements such as "a description of the facility that the qualifying utility proposes to abandon," "an estimate of the energy transition

costs," and descriptions of securitization financing. None of the requirements of section 4 even hint at the due process considerations underlying the PRC's ratepayer-protective procedures.[33]

13. **The ETA Would Effectively Nullify the Supreme Court's Imprudence Finding in Case No. S-1-SC-36115, now on Remand in 15-00261-UT.** On May 16, 2019, the New Mexico Supreme Court held "the Commission's determination that PNM's decisions [regarding the purchase and lease extensions at the Palo Verde Nuclear Generating Station] were imprudent was supported by substantial evidence." *Pub. Serv. Co. of New Mexico v. New Mexico PRC*, 2019-NMSC-012, 444 P.3d 460, ¶38. The Court's opinion underscored the need to protect ratepayers against the imprudent decisions of utility management. Yet the ETA prevents ratepayers from raising the Commission's finding of imprudence and the Court's opinion that upheld this finding. Section 31C forbids the Commission from disallowing recovery of "any undepreciated investments" regardless of the underlying facts, leaving ratepayers vulnerable to utility mismanagement.

The ETA violates Art IV, §34 of the N.M. Constitution because it changes the rights and remedies of ratepayers previously established by the Supreme Court with regard to PNM's investment in its Palo Verde Nuclear Generating Station ("PVNGS") nuclear assets. Under Section 31C,[34] the Commission may not disallow *any* cost recovery for PVNGS nuclear. It could conceivably mandate an absurd result: the NM PRC could disallow the PVNGS from jurisdictional rate base (because of PNM's failure to meet its burden that the assets are the most cost effective resource among feasible alternatives) and ratepayers would be required to pay *all* costs, including decommissioning costs. This creates an unacceptable conflict between the

[33] Discussed *infra.*

[34] "*... no order of the commission shall disallow recovery of any undepreciated investments or decommissioning costs associated with the facility.*" (emphasis added).

PRC's constitutionally mandated duties and "the Commission's considerable discretion in the setting of just and reasonable rates"[35] versus the ETA with the effect of altering ratepayers' rights and remedies and modifying procedures of a pending case.

14. **The ETA Eliminates the Vested Rights of Ratepayers Guaranteed in Case 16-00276-UT Related to PNM's Investment in and Life Extension of Four Corners.** The vested rights of ratepayers are particularly relevant where the PRC has already ruled that it would defer until PNM's anticipated 2019 rate case "the issue of PNM's prudence in continuing its participation in FCPP [Four Corners Coal Plant] . . .." 16-00276-UT, *Revised Order Partially Adopting Certification of Stipulation*, 1/10/2018, p. 35, B. According to the PRC:

> … deferring such a ruling will permit consideration of the issue with the full participation of all parties . . . while also permitting a full opportunity for the Commission to consider the necessity and scope of the remedy in light of PNM's alleged imprudence.[36]

The PRC further remarked that, in the future, "administrative notice will be taken of the evidence on the issue of prudence admitted in the current proceeding."[37]

At the time, NEE appealed the Commission's decision, arguing that the imprudence determination should not have been reversed and the cost disallowance deferred. Case No. S-1-SC-36870. All the parties answering NEE's Brief-in-Chief acknowledged that the Commission Order would "suffice to protect ratepayers for the limited time that the Revised Stipulation would remain in effect before the need for any additional disallowances can be addressed." *Joint Response Brief of Albuquerque Bernalillo County Water Utility Authority, City of Albuquerque, Bernalillo County, and New Mexico Industrial Energy Consumers*, 10/12/2018, p. 13. Answer Brief of Intervener – Appellee PNM, 10/12/2018, p.10. NEE thereafter withdrew its appeal on

[35] *Pub. Serv. Co. of New Mexico v. New Mexico PRC*, 2019-NMSC-012, 444 P.3d 460, ¶11.
[36] *Id.*
[37] *Id.*

behalf of ratepayers, in reliance on its right to challenge FCPP expenditures in the next PNM rate case.

As NEE expert witness Fetter states: "I find the results of those proceedings could potentially be superseded by the new securitization law. The NMPRC ordered that the rights and remedies of ratepayers with respect to any imprudence by PNM flowing from the FCPP case would be protected in the next rate case. However, the ETA states that PNM is entitled to securitize any of its undepreciated assets irrespective of a prudence review,[38] and without an opportunity for ratepayers to be heard to present any claim or defense. Essentially, the NMPRC appears to be barred from altering PNM's request for 100% cost recovery for undepreciated assets at FCPP [.]" Direct Testimony and Exhibits of Steven M. Fetter, August 6, 2019, at pp. 11.

The PRC agreed:

> In case 16-00276-UT, the Commission initially found PNM had acted imprudently and denied recovery in rates of PNM capital investments and expenses associated with FCPP. On rehearing the Commission temporarily vacated the finding of imprudence but indicated the issue would be addressed again in PNM's next rate case. Section [2]H(2)(c) of SB 489 appears to now eliminate the Commission's power to address PNM's imprudence at FCPP by requiring that the expenses at issue be included in amounts securitized in bond offerings.

Response of PRC in Opposition to Verified Petition for Writ of Mandamus Filed by PNM, S-1-SC-37552, 3/19/2019, p.12, fn. 6. *See also* NEE's *Response in Opposition to PNM's Verified Petition for Writ of Mandamus, Request for Emergency Stay, and Request for Oral Argument*, 3/19/2019, p. 15, fn. 7.

The ETA interferes with the PRC's prior obligation to consider the prudence of PNM's expenditures at FCPP. The result of prohibiting a PRC review is significant: there was evidence

[38] Sections 2H(2); 2K(4)(d); 2S(4); 5E; 31C.

from the prior case that showed PNM made its 2013 re-investment in FCPP without *any* contemporaneous financial analysis—the epitome of imprudence. Based on this evidence, PRC could reasonably find ratepayers *not* responsible for *any* undepreciated FCPP investments— yet the ratepayers will pay. *Public Service Company of New Mexico v. New Mexico PRC, supra,* ¶¶ 9, 10, 2132, 35, 38, 39, 40, 42, 47, 52. The Court acknowledged the possibility of a "*full disallowance*" to insulate ratepayers from the imprudent actions of utility management. *Id.*, ¶ 47. *Pub Serv. Co. of N.M.,* 101 P.U.R. 4th 126, 149-53 (N.M. Pub. Serv. Comm'n 1989). ("[R]atepayers are not to be charged for negligent, wasteful or improvident expenditures, or for the cost of management decisions which are not made in good faith." *Id.* at p. 151.)

In *Chilili Corp. Ass'n v. Sundance Mountain Ranches, Inc.* 1988-NMCA-026, 107 N.M. 192, a county commission had approved a subdivision and adopted new regulations, while a district court case over Sundance's right to subdivide was pending. The court applied a vested rights analysis, even though a pending case existed, and declined to retroactively apply the new regulations. The court determined that the property owner had *reasonably relied* on the county's grant of approval and had *incurred extensive obligations in reliance* upon the approval. *Id.*, ¶ 9.

Thus, whether the vested rights approach or the more traditional "pending case" analysis applies, the ETA infringes on the rights of ratepayers to be protected from the wasteful expenditures of utility management.

15. New Energy Economy respectfully requests that the Commission expand its exploration of the unconstitutionality of the ETA, because to do otherwise compromises the public interest. NEE recognizes that the agency cannot itself determine the constitutionality or lack of constitutionality of the ETA, yet it is imperative through its procedures that it allow, NEE

and other parties, to make a plain, adequate, and complete record in order to preserve the issues and make a full factual record for there to be a determination on appeal. *Neff v. State Through Taxation & Revenue Dept.*, 1993-NMCA-116, ¶ 17, 116 N.M. 240, 244–45, 861 P.2d 281, 285–86. That said, *it is within the purview of the PRC to determine if the ETA applies to these cases*, because the Commission is not deciding on the "constitutionality" of the ETA, but how and if N.M. Const. art. IV, §34 applies to 19-00018-UT and 19-00195-UT.

16. For instance, Article IV, Section 24 of the New Mexico Constitution prohibits special legislation "where a general law can be made applicable." *Thompson v. McKinley County*, 112 N.M. 425, 816 P.2d 494, (1991) See also, *Keiderling v. Sanchez,* 91 N.M. 198, 199, 572 P.2d 545, 546 (1977) ("The evil inherent in special legislation is the granting to any person or class of persons, the privileges or immunities which do not belong to all persons on the same terms.").

17. Section 2(S) makes it clear that the ETA's securitization financing is special legislation. While Section 2R defines "public utility", Section 2S narrows the use of securitization financing only to PNM, because PNM is the only monopoly utility that "operates" a coal-fired generating in NM (Section 2S (3)) and is the only monopoly utility invested in coal.[39]

18. Among other things, the ETA authorizes PNM to issue bonds to pay for the retirement of coal-fired generating facilities, SJGS and the Four Corners Power Plant ("Four Corners" or "FCPP") as follows: PNM may recover up to $375,000,000 per generating facility

[39] In Case No. 17-00174-UT, PNM stated: PNM's IRP key findings are that coal is no longer economically competitive: "The most significant finding of the IRP is that retiring PNM's…share of SJGS in 2022 would provide long-term cost savings for PNM's customers…. the analysis found that PNM exiting its 13% share in the Four Corners Power Plant (FCPP) after the coal supply agreement expires in 2031 would also save customer money.

in abandonment costs, including decommissioning costs and mine reclamation costs, and an unspecified amount in undepreciated investments and legal compliance costs. ETA §§2H, 2S 5A, B, D and E. These costs and past investments, as well as other costs, are then recovered through electricity rate increases as a "non-bypassable charge" to customers for twenty-five years. The ETA requires customers pay the charge even if they later change energy providers or the Commission determines these charges are wasteful, excessive, imprudent, or inconsistent with law. ETA §§2G, H; 4 A, B; 5; 11C; 31C. This legislation seems specially targeted to ensure that PNM gets the maximum payoff for its abandonment without meaningful oversight of their cleanup plans.[40]

19. One particular aspect of the ETA that constitutes special legislation is the location mandate imposed by ETA §3(F). Section 3(F) defines replacement resources for abandoned facilities such that the resources must be "*located in the school district in New Mexico where the abandoned facility is located*, are necessary to maintain reliable service, and are in the public interest as determined by the Commission." This requirement means that any replacement for a facility abandoned by PNM must be built in the same school district as the previous facility operated by PNM. This does not allow administrative or judicial determinations of what is "the most cost effective resource portfolio" among feasible alternatives. This was the Pre-ETA

[40] There was a bill introduced on February 8, 2019, by Senator William Soules, SB 492, entitled the "Ratepayer Relief Act," https://www.nmlegis.gov/Legislation/Legislation?Chamber=S&LegType=B&LegNo=492&year=19, that did not grant special privileges or immunities to one electric monopoly, PNM, but provided for the use of securitization financing upon the abandonment of generation facilities operated or leased by any electric utility, and did not remove the authority of the PRC, but rather preserved and even enhanced its authority to determine that securitization financing results in just and reasonable rates.

standard for determining public interest, intended to protect ratepayers.[41] In a real sense, this law makes it so that utilities can (and perhaps even must) build new resources on the site of the old ones without serious review and consideration of efficiency or ratepayer pocketbooks. It also may be that the ETA § 3(F) provision is impossible to apply—the PRC cannot simultaneously require that all replacement resources must be built in the same school district as the previous PNM facility, are reliable, *and* are cost effective and in the public interest. After all, the public interest requires at minimum that the PRC find that utilities are satisfying the most cost effective resource among feasible alternatives objective,[42] that rates are just and reasonable, that recovery balances the interests of shareholders and ratepayers, and that rates are based upon prudent investments.[43] This location preference per se excludes wind resources, despite the fact that they

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[41] *New Energy Economy v. New Mexico Public Regulation Commission*, 2018-NMSC-024, 416 P.3d 277, ¶13 (2018)

[42] In Case No. 16-00105-UT, *Order Recommending Grant of PNM's Motion to Withdraw Application,* the Hearing Examiner stated: "The Commission has stated that a utility carries the burden in a resource acquisition case to show that the resource it proposes is the most cost effective resource among feasible alternatives." Citing, *Corrected Recommended Decision*, Case No. 15-00261-UT, August 15, 2016, pp. 89, 96-99, approved in *Final Order Partially Adopting Corrected Recommended Decision*, Case No. 15-00261-UT, September 28, 2016; *Final Order*, Case No. 13-00390-UT, December 16, 2015, pp. 5-11; *Order Partially Granting PNM Motion to Vacate and Addressing Joint Motion to Dismiss*, Case No. 15-00205-UT, December 22, 2015, pp. 10- 11; In *Re Public Service Company of New Mexico,* Case No. 2382, 166 P.U.R.4th 318, 337, 355- 356 (1995). The Commission adopted the Hearing Examiner's decision in it's final order and stated in Case No. 16-00105-UT, *Order Granting PNM's Motion to Withdraw Application,* 5/24/2017, ¶10: "[T]he Commission reiterates that PNM bears the burden of demonstrating that its proposed resource choice is the most cost effective resource among feasible alternatives." This bedrock consumer protection principle has been articulated and reiterated by the PRC repeatedly: 15-00312-UT, *Recommended Decision*, p. 104, unanimous approval in *Final Order*, 4/11/2018. Also See, Case No. 18-00261-UT, *Recommended Decision*, 3/18/2019, pp. 5-6, unanimously adopted by *Final Order*, 3/27/2019. ("Utilities also need to show that the proposed project is the most cost effective alternative to satisfy utilities' needs.") This standard was affirmed recently by our Supreme Court *Pub. Serv. Co. of New Mexico v. New Mexico PRC,* 2019-NMSC-012, 444 P.3d 460, ¶32.

[43] Public interest is "a striking of the proper balance between the interests of all ratepayers and all investors." NMPRC Case No. 2087, *In the Matter of the Prudence of Costs Incurred by the Public Service Company of New Mexico in Construction of Palo Verde Nuclear Generating*

are cheapest resource among feasible alternatives. The area around San Juan Generating Station is not a candidate for wind power.[44] The San Juan area is also among the worst areas in New Mexico for solar generation.[45] PNM's *Application* properly takes this into account, proposing the "Jicarilla Solar" 50MW of solar + 20 MW of battery storage PPA and the "Arroyo Solar" 300 MW of solar + 40 MW of battery storage PPA in locations far from San Juan.[46] Moreover, the San Juan area is not where ratepayers live—the majority of ratepayers live far from the San Juan site. Requiring that replacement resources be built there increases transmission costs unnecessarily compared to resources that can be sited closer to population centers. Overall, it is clear that ETA § 3(F) constitutes special legislation that attempts to dictate the outcome in a pending case, because it does not allow for consideration of relevant issues, instead hamstringing replacement resources by requiring them to be in the same school district as the abandoned facility.[47]

Station, Final Order p. 85 (affirmed by *Attorney Gen. of State of N.M. v. New Mexico Pub. Serv. Comm'n*, 1991-NMSC-028, ¶ 28).

[44] *See* National Renewable Energy Laboratory, *Wind Atlas* p. 109, available at https://www.nrel.gov/gis/assets/pdfs/wind-atlas.pdf. As the map demonstrates, the area surrounding Farmington, NM, has only weak wind power. "Class 3 and 4 annual average wind power is found on the high plains and uplands of eastern Colorado and eastern New Mexico. … Plains areas farther west that are within the sheltering influence of the Rocky Mountains and river drainages generally have less wind power." *Id* at 104. In contrast, "Class 3 average wind power is estimated for the Rio Grande Valley corridor in the vicinity of Santa Fe, New Mexico." *Id* at 105.

[45] *See* National Renewable Energy Laboratory, *Direct Normal Solar Resource of New Mexico*, available at https://www.nrel.gov/gis/solar.html.

[46] The Jicarilla PPA would also support clean-energy development in an Indigenous community, the Jicarilla Apache nation.

[47] New Energy Economy supports economic development and perhaps even reparations for people living "in the school district of the PNM facility" but ETA § 3(F) is an attempt at a political solution and is contrary to the PRC's responsibility as regulator to protect electric utility ratepayers regarding energy decisions.

B. The ETA's Recovery Provisions Violate the New Mexico Constitution and Are Contrary to Public Interest

20. Under the New Mexico Constitution, the PRC has a duty to regulate public utilities. N.M. Const. art. XI, §2. That duty requires the Commission to review proposed rates to ensure that those rates are just and reasonable. NMSA 1978 §62-8-1; § 62-6-4 (2003) ("The Commission shall have general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations"). "Our Constitution mandates that a public regulation commission set utility rates." *Blake v. Pub. Serv. Co. of New Mexico*, 2004-NMCA-002, ¶ 22, 134 N.M. 789, 795, 82 P.3d 960, 966. Just and reasonable rate determinations are "the heart" of the regulatory system. *Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶18, 127 N.M. 272.

21. The ETA destroys PRC's ability to regulate utilities. Once a utility applies for a financing order, the PRC *must approve it*, or the order is *deemed approved* by operation of law. ETA §5. Furthermore, when the Commission issues a financing order, it is irrevocable except under narrow ministerial circumstances, creates a property interest, and any actions taken pursuant to the order are legally valid, even if it is later vacated. ETA §§5E; 7A-C; 12A; 22. Under the ETA, it does not matter what facts or evidence are presented to the Commission. In fact, it does not matter what facts or conclusions the Commission draws at all.

22. The ETA not only ties the hands of the PRC, it fatally undermines the very legal framework that governs modern energy law in New Mexico. That framework, sometimes referred to as the regulatory compact, provides utilities with a monopoly over a particular service and an exemption from the anti-trust laws, in return for government regulation and oversight of utility decision-making and investment. *See, e.g., Morningstar Water Users Ass'n v. New Mexico*

Pub. Util. Comm'n, 1995-NMSC-062.[48] *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Serv. Comm'n*, 1991-NMSC-083, ¶ 28, 112 N.M. 379, 387, 815 P.2d 1169, 1177. (Commission oversight is "the cornerstone of New Mexico's regulatory scheme. In return for monopoly market power in its industry, the utility must submit to Commission regulation.") Decades long jurisprudence supports "continued regulation" of the electric monopoly is *the* only "shield" ratepayers have against unscrupulous actions by the utility and the ETA eliminates that shield by over-riding the Public Regulation Commission's authority and responsibility[49] to deny costs in part or in full.

23. NEE Expert Steven Fetter reviewed the Fiscal Impact Report ("FIR") submitted as part of the legislative democratic process for the ETA. Upon review of the FIR in this instance, he found a negative description of the law, consistent with his views expressed in his expert testimony. Attached to his testimony, as Exhibit SMF-2, the FIR for SB 489/ETA, on page 6, importantly it addresses, as does he, the "**Limitations on PRC Authority:**" (emphasis in the original)

> Section 11.C of this bill prevents PRC from requiring a utility to use securitization to finance abandonment costs. ...
>
> The bill requires the commission to issue a financing order for the energy transition bonds if the application meets all requirements outlined in section 4 of the bill. According to the Attorney General's Office (NMAG) analysis of this bill, this requirement 'potentially [compromises] the commission's constitutional responsibility of regulating public utilities by precluding it from reviewing the substance and appropriateness of the financing order and instead allows the utility to self-regulate.'

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[48] This was specifically recognized in *Morningstar*, *supra*, at 904 P.2d 28, 39, 40. ("Regulation also serves the New Mexico statutory purpose of preventing "unnecessary duplication and economic waste. ... [Regulatory oversight] prevents overinvestment in high fixed costs[.] ... [R]egulation protects the utility's consumers. Because it is a monopoly the utility must be regulated so that it cannot take advantage of its position or its customers. In exchange for submitting to oversight by the Commission, the utility is permitted to operate as a monopoly within its service area.")

[49] N.M. Const. art. XI, § 2.

...

The PRC staff analysis of this bill notes the following:

> The Commission must be granted the authority to conduct a post-issuance review of financing costs to determine whether the utility actions were prudent and the financing costs resulted in lowest overall costs. The bill also does not preserve Commission authority to review a financing application under the: 1) 'public interest' standard; and 2) to ensure that the financing application results in just and reasonable rates. Finally, the Commission must have the authority to include additional terms and conditions in the financing order for the benefit of ratepayers.

Direct Testimony and Exhibits of Steven M. Fetter, August 6, 2019, at pp. 13-14.

24. The Public Regulation Commission's constitutional duty to regulate utilities requires the Commission to conduct review and exercise discretion over proposed rates to ensure that they are "just and reasonable." NMSA 1978 § 62-8-1. In particular, the "[t]he rate-making process involves a balancing of investor and consumer interests." *Matter of Rates & Charges of Mountain States Tel. & Tel. Co.*, 1982-NMSC-127, ¶ 26. This balance has resulted in the PRC denying or adjusting utility applications in various contexts. For example, when PNM requested ratemaking treatment for its Advanced Metering Infrastructure Project, the PRC ultimately denied, stating that "PNM's requests for the approval of regulatory assets to recover the undepreciated costs of the existing meters that PNM intends to replace and the estimated costs of a customer education program do not, in the context of PNM's current plan, fairly balance the interests of investors and ratepayers." NMPRC Case No. 15-00312-UT, *Recommended Decision* p. 96 (adopted unanimously by *Final Order* (Apr. 11, 2018).

25. Similarly, in PNM's most recent general rate case, Case No. 16-00276-UT, the Hearing Examiners found PNM's investment in and life extension of FCPP to be "imprudent," but the Commission "defer[red] the issue of PNM's imprudence to the next rate case." Yet "the Commission finds that the magnitude of the potential benefit of PNM to PNM of deferring the

issue of PNM's FCPP requires modification of the terms of the Revised Stipulation to balance the interests of ratepayers and the utility." Final Order, Case No.16-00276-UT, 1/10/2018 pp. 23, ¶67. The Commission held that "because of the scope of the potential imprudence at issue" found additional modifications were warranted including "the reduced rate of return equal to PNM's embedded cost of debt." *Id.* At p. 24. and p. 35 ¶ C. This cost disallowance is consistent and well within the authority of the PRC to protect ratepayers. *Pub. Serv. Co. of N.M. v. N.M. Pub. Serv. Comm'n,* 112 N.M. 379, 382-83, 815 P.2d 1169, 1177. (1991). ("[T]he Commission must determine the appropriate distribution of the costs of this overcapacity between the ratepayers and the utility.") In contrast, Section 5 of the ETA does not allow for the balancing of interests and effectively requires the Commission to approve an application for a financing order *as proposed by the utility.*

26. Section 31C allows PNM to obtain cost recovery for *any* undepreciated investments and decommissioning costs for all its gas plants and nuclear investments, as well as coal plants, without the opportunity for meaningful review by the PRC or for ratepayers to be heard. The Commission *must allow* recovery of any undepreciated investments or decommissioning costs by a utility, no matter if they were imprudently incurred or result in rates that do not meet the just and reasonable standard. ETA §31C.

27. The ETA conflicts with the PRC's constitutional duty to regulate public utilities. ETA §§2H, 2S, 5, 11C, and 31C require the PRC to approve financing orders for costs of abandonment of all gas and coal plants and nuclear investments in PNM's portfolio, depriving it of its right to conduct meaningful oversight of these costs. Section 31C expressly prohibits the Commission from disallowing cost recovery for any undepreciated investments and decommissioning costs in PNM's gas and nuclear plants. These provisions put PNM in charge of

deciding rates and deprive ratepayers of due process and regulatory protections intended under the Constitution.

28. New Mexico Constitution Art. II §18 states, in parallel with U.S. Const. Amendment 14, that "No person shall be deprived of life, liberty or property without due process of law ..." These constitutional provisions have been interpreted to guarantee that no individual shall have property taken from them by the government or using government processes without opportunity for hearing. "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis* v. *Ordean,* 234 U. S. 385, 394 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong* v. *Manzo,* 380 U. S. 545, 552 (1965).[50] At the absolute minimum, this requirement means that members of the public whose rights will be affected by the outcome of a case *must have the ability to affect the outcome of the case*. The ETA does not provide for this.

29. Section 5 of the ETA effectively requires the Commission to approve an application for a financing order as proposed by the utility. Section 5A states that the Commission may approve or deny an application, but this turns out to be an illusory choice because Section 5E states the Commission "shall issue a financing order approving the application" as long the utility complies with ETA abandonment requirements." ETA §§4, 5E (emphasis added). Section 5B is clear:

> Failure to issue an order *approving* the application or advising of the application's noncompliance pursuant to Subsection E of this section . . . shall be deemed approval of the application for a financing order . . .. (emphasis supplied).

[50] *See also Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n,* 2019-NMSC-012, at ¶63 ("It is well settled that the fundamental requirements of due process in an administrative context are reasonable notice and opportunity to be heard and present any claim or defense").

30. The ETA further violates due process because of its short window for review. The ETA strips the PRC of most of its regulatory power, including its ability to balance remedies in the public interest, and makes it so that the PRC must approve utility filings within six months (or nine months with extension for "good cause"). ETA §5. This is a wholly inadequate amount of time for discovery, hearings, consultation with local communities, and decision by the PRC. Yet all of these must be provided to ratepayers and parties in order for the requirements of due process to be satisfied. In particular, six months (or even nine months) are an impossible span of time to develop the record in this case, especially concerning cleanup of environmental contaminants on the site of New Mexico's largest and oldest-running coal plant (SJGS). This violates the PRC's duty to review, the Supreme Court's right to judicial review under separation of powers doctrine (discussed *infra*), and ratepayers' due process rights.

31. The title of the ETA violates the constitutional prohibition against so-called log-rolling, or "hodge-podge" legislation, because it fails to include essential terms and fails to alert the public that it effectively amends long-standing provisions of New Mexico's Public Utility Act. N.M. Const. art. IV, §16. The purpose of the rule against log-rolling is to ensure that the legislature and the public have adequate notice about the contents of legislation. *Martinez v. Jaramillo*, 1974-NMSC-069, 86 N.M. 506, 508, 525 P.2d 866, 868. Even a bill whose subject is stated in only general terms may well be sufficient to satisfy Section 16, but it may not be *misleading,* as the ETA is, by including some topics and omitting others. *See City of Albuquerque v. State*, 1984-NMSC-113, ¶ 9, 102 N.M. 38, 40, 690 P.2d 1032, 1034. In this case, the ETA includes a dizzying array of words and phrases relating to some of its topics,[51] but

[5151] ETA's title: AN ACT RELATING TO PUBLIC UTILITIES; ENACTING THE ENERGY TRANSITION ACT; AUTHORIZING CERTAIN UTILITIES THAT ABANDON CERTAIN GENERATING FACILITIES TO ISSUE BONDS PURSUANT TO A FINANCING ORDER

makes no mention of how it alters PRC procedures, including its elimination of PRC regulatory authority over recovery of undepreciated investments and decommissioning costs, its impact on rates, its change of the time for appeal, much less its serial and extensive amendments of the Public Utility Act itself. In short, by omission of key provisions in the title of the ETA it seems calculated to mislead. The title includes no reference to recovery of "rates", "undepreciated investments" or "decommissioning" costs or "deregulation". Thus, the title does not provide

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ISSUED BY THE PUBLIC REGULATION COMMISSION; PROVIDING PROCUREMENT OF REPLACEMENT RESOURCES, INCLUDING LOCATION OF THE REPLACEMENT RESOURCES; AUTHORIZING THE COMMISSION TO IMPOSE A FEE ON THE QUALIFYING UTILITY TO PAY COMMISSION EXPENSES FOR CONTRACTS FOR SERVICES FOR LEGAL COUNSEL AND FINANCIAL ADVISORS TO PROVIDE ADVICE AND ASSISTANCE FOR PURPOSES RELATED TO THE ACT; PROVIDING PROCEDURES FOR REHEARING AND JUDICIAL REVIEW; PROVIDING FOR THE TREATMENT OF ENERGY TRANSITION BONDS BY THE COMMISSION; CREATING SECURITY INTERESTS IN CERTAIN PROPERTY; PROVIDING FOR THE PERFECTION OF INTERESTS IN CERTAIN PROPERTY; EXEMPTING ENERGY TRANSITION CHARGES FROM CERTAIN GOVERNMENT FEES; CREATING THE ENERGY TRANSITION INDIAN AFFAIRS FUND, THE ENERGY TRANSITION ECONOMIC DEVELOPMENT ASSISTANCE FUND AND THE ENERGY TRANSITION DISPLACED WORKER ASSISTANCE FUND; PROVIDING FOR NONIMPAIRMENT OF ENERGY TRANSITION CHARGES AND BONDS; PROVIDING FOR CONFLICTS IN LAW; PROVIDING THAT ACTIONS TAKEN PURSUANT TO THE ENERGY TRANSITION ACT SHALL NOT BE INVALIDATED IF THE ACT IS HELD INVALID; REQUIRING THE PUBLIC REGULATION COMMISSION TO APPROVE PROCUREMENT OF ENERGY STORAGE SYSTEMS; PROVIDING NEW REQUIREMENTS AND TARGETS FOR THE RENEWABLE PORTFOLIO STANDARD FOR RURAL ELECTRIC COOPERATIVES AND PUBLIC UTILITIES; AMENDING CERTAIN DEFINITIONS IN THE RENEWABLE ENERGY ACT AND RURAL ELECTRIC COOPERATIVE ACT; REQUIRING THE HIRING OF APPRENTICES FOR THE CONSTRUCTION OF FACILITIES THAT PRODUCE OR PROVIDE ELECTRICITY; ALLOWING COST RECOVERY FOR EMISSIONS REDUCTION; PROVIDING POWERS AND DUTIES FOR THE PUBLIC REGULATION COMMISSION OVER VOLUNTARY PROGRAMS FOR PUBLIC UTILITIES AND RURAL ELECTRIC COOPERATIVES; REQUIRING THE PROMULGATION OF RULES TO IMPLEMENT THE RENEWABLE ENERGY ACT; REQUIRING THE ENVIRONMENTAL IMPROVEMENT BOARD TO PROMULGATE RULES TO LIMIT CARBON DIOXIDE EMISSIONS OF CERTAIN ELECTRIC GENERATING FACILITIES.

reasonable notice that the ETA will authorize without the possibility of amendment any utility-defined rate increases for undepreciated investments and decommissioning costs.

32. The ETA amends several sections of existing law without notice, in violation of N.M. Const. Art. IV §16. and Art. IV §18 states: "No law shall be revised or amended, or the provisions thereof extended by reference to its title only; but each section thereof as revised, amended or extended shall be set out in full."

33. At least the following provisions of the current PUA are repealed or amended by the ETA: NMSA 1978 § 62-3-3(B) (Policy of New Mexico is that the public interest requires the regulation and supervision of utilities) PRC); NMSA 1978 § 62-3-4(A); (PRC "shall have general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates…and its securities…"); NMSA § 62-2-6(A) (Utility issuance of securities is subject to supervision and control of PRC); NMSA 1978 62-6-7 (PRC to hold hearings on utility securities to determine if issuance is consistent with the public interest, etc."); NMSA 1978 § 62-6-14 (valuing utility property requires utility to provide all information utility needs to investigate the value ascribed by utility); NMSA 1978 §62-8-1 (rates made or demanded by utility "shall be just and reasonable."); NMSA § 62-10-1 (any person may complain that any utility "rate" or "practice" is "unfair" or "unjust" and the commission may proceed to hold hearings on the complaint); NMSA § 62-10-2 (PRC may conduct "such other hearings" as may be required in the administration of its duties"); NMSA §62-10-5 (PRC must give "at least twenty days' notice" of all its hearings at which any matters determined).

34. The New Mexico Constitution, art. III, §1 provides for three distinct departments of government: the legislative, the executive, and the judicial. Some overlap of government functions is permissible, and the Court has held the adjudication of cases by certain

administrative agencies to be constitutional. *See e.g., Wylie Corp. v. Mowrer*, 1986-NMSC-075, 104 NM 751, 753, 726 P.2d 1381, 383. At the same time: "The judiciary . . . must maintain the power of check over the exercise of judicial functions by quasi-judicial tribunals in order that those adjudications will not violate our constitution. The principle of check requires that the essential attributes of judicial power, *vis-a-vis* other governmental branches and agencies, remain in the courts." *Board of Educ. v. Harrell,* 118 N.M. 470, 484, 882 P.2d 511, 525 (1994). It is fundamental to administrative law that the courts be able to meaningfully review regulatory decisions. The entire American system of administrative decision-making depends on there being an avenue to the courts from any significant regulatory decision that affects property rights or liberty rights, otherwise it would violate separation of powers. In essence, the only way administrative agencies can be permitted to make decisions affecting the property, rights, and remedies of ratepayers is if meaningful judicial review is available.

35. The ETA violates separation of powers to the extent that it seeks to alter prior decisions of the PRC and the courts, and seeks to affect he outcome of a pending case. N.M. Const., Art III, Sec. 1 ("The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others, except as in this constitution otherwise expressly directed or permitted."). At a minimum, to the extent that the ETA effectively reverses the PRC's prior determinations of imprudence of PNM expenditures or prevents the PRC from addressing such issues in pending cases, it violates this constitutional doctrine. See, e.g., *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 225–26, 115 S. Ct. 1447, 1456–57, 131 L. Ed. 2d 328 (1995):

> When retroactive legislation requires its own application in a case already finally adjudicated, it does no more and no less than "reverse a determination once made, in a particular case." The Federalist No. 81, at 545. Our decisions stemming from *Hayburn's Case*—although their precise holdings are not strictly applicable here, see *supra,* at 1452–1453—have uniformly provided fair warning that such an act exceeds the powers of Congress. See, *e.g., Chicago & Southern Air Lines, Inc.,* 333 U.S., at 113, 68 S.Ct., at 437 ("Judgments within the powers vested in courts by the Judiciary Article of the Constitution may not lawfully be revised, overturned or refused faith and credit by another Department of Government"); *United States v. O'Grady,* 22 Wall. 641, 647–648, 22 L.Ed. 772 (1875) ("Judicial jurisdiction implies the power to hear and determine a cause, and ... Congress cannot subject the judgments of the Supreme Court to the re-examination and revision of any other tribunal"); *Gordon v. United States,* 117 U.S.Appx. 697, 700–704 (1864) (opinion of Taney, C.J.) (judgments of Article III courts are "final and conclusive upon the rights of the parties"); *Hayburn's Case,* 2 Dall., at 411 (opinion of Wilson and Blair, JJ., and Peters, D.J.) ("[R]evision and control" of Article III judgments is "radically inconsistent with the independence of that judicial power which is vested in the courts"); *id.,* at 413 (opinion of Iredell, J., and Sitgreaves, D.J.) ("[N]o decision of any court of the United States can, under any circumstances, ... be liable to a revision, or even suspension, by the [l]egislature itself, in whom no judicial power of any kind appears to be vested"). See also *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 18 How. 421, 431, 15 L.Ed. 435 (1856) ("[I]t is urged, that the act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereby.... This, as a general proposition, is certainly not to be denied, especially as it respects adjudication upon the private rights of parties. When they have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it"). Today those clear statements must either be honored, or else proved false.

Id. As a California Court of Appeals has held, these principles are equally applicable to quasi-judicial administrative proceedings. *California Sch. Boards Assn. v. State of California*, 19 Cal. App. 5th 566, 587–88, 228 Cal. Rptr. 3d 430, 446 (Ct. App. 2018), as modified on denial of reh'g (Feb. 7, 2018) ("[O]nce the Commission's decisions are final, and have not been set aside by a court, the Legislature does not have the power to direct the Commission to set them aside or reconsider them."). See also, *Petition of Kirchner*, 164 Ill. 2d 468, 495, 649 N.E.2d 324, 336–37 (1995), abrogated on other grounds by *In re R.L.S.*, 218 Ill. 2d 428, 844 N.E.2d 22 (2006) ("While the General Assembly may enact retroactive legislation which changes the effect of a prior decision of a reviewing court with respect to others whose circumstances are similar but

whose rights have not been finally decided, it is axiomatic that the General Assembly may not validly enact a statute, the effect of which is to change a decision of this court which has finally adjudicated the rights of particular parties.").

36. The ETA makes it so that applications that comply with the ministerial requirements of ETA §4 *must be approved*. ETA §5. Thus, parties have no incentive to allow discovery or hearing to develop a full record because it won't change the outcome regardless of the evidence. In addition to denying ratepayers due process rights, as discussed above, this severely hampers judicial review. After all, any appeal from a Commission order must be "on the record." NMSA 1978 § 62-11-3. This is the essence of the judicial review that must exist so that parties can challenge a regulatory decision. It seems axiomatic that if one provision of law, here the ETA, precludes the creation of a record regarding a matter with substantial impact on ratepayers and another provision requires that an appeal be only on the record, it results in a procedural conundrum that is inconsistent with elemental due process and judicial review. There can be no meaningful involvement on the part of the courts because there is no evidentiary basis on which a court might determine whether the charges on the ratepayers are or are not justified. Thus, on appeal, it would be impossible for a court to review PRC findings pursuant to the ETA on the merits. The ETA effectively eliminates courts from the administrative decision-making process by creating a situation where there is no record on appeal and no ability for any court to address the merits of utility claims for hundreds of millions of dollars in abandonment costs.

37. ETA §8B provides for a ten-day time limit to file a notice of appeal after denial of an application for rehearing or issuance of a financing order. The time period for notice of appeal is an unconstitutional limit on judicial review and violates Article III, Section 1 of the N.M. Constitution. Under the Public Utility Act, an appeal from a Commission order must be within

thirty days of the final order. NMSA 1978, §62-11-1. The ETA, apparently in an effort to frustrate any effort by any injured party to seek court intervention, shortens that period to ten days.

38. Section 22 of the ETA, titled "VALIDITY ON ACTIONS IF ACT HELD INVALID," provides that "if any provision of that act is invalidated, superseded, replaced, repealed or expires for any reason, that occurrence shall not affect the validity of any action allowed pursuant to that act that is taken by the commission, a qualifying utility, . . . or any other person ..." This means that any action taken pursuant to the ETA will remain valid even if the ETA, its provisions, or a financing order is later invalidated by the PRC or by a court. Thus, the statute makes it impossible for courts to craft appropriate remedies in the event of overreach. This unacceptably usurps judicial power, violates the separation of powers, and is unconstitutional. In fact, this provision of the ETA renders the ETA and decisions pursuant to it unreviewable. If no remedy can be created in response, then any attempt to appeal would be moot.

39. ETA § 25(D) requires that "the commission shall approve energy storage systems that ... provide the public utility the discretion, subject to applicable laws and rules, to operate, maintain, and control energy storage systems." Thus, Section 25 D unreasonably forbids the PRC from reviewing and determining whether PNM engaged in fair competition for replacement resources because it allows PNM to hyper-narrow the universe of all feasible alternatives by only using PNM-owned energy storage systems. When PNM issued its Request for Proposals in April 2019 for battery energy storage systems as part of its replacement resources for SJGS, the RPS contained exclusionary and anti-competitive provisions precluding Independent Power Producers from proposing 'eligible' Power Purchase Agreement Bids. In response to the Commission's

June 12, 2019 and June 27, 2019 Bench Requests in Case No. 18-00030-UT PNM acknowledged that the April 2019 RFP was for utility-owned energy storage systems only, and cited Section 25 D of the ETA as justification for its exclusionary practice. In *Public Service Company of New Mexico v. New Mexico Public Regulation Commission*, the Supreme Court held that "The goal of the consideration of alternatives is, of course, to reasonably protect ratepayers from wasteful expenditure. The failure to reasonably consider alternatives was a fundamental flaw in PNM's decision-making process." *Pub. Serv. Co. of New Mexico v. New Mexico PRC,* 2019-NMSC-012, 444 P.3d 460, ¶32. As a result of Section 25 D of the ETA, the Commission is forbidden from performing its constitutional duty to regulate and determine that "[e]very rate made, demanded or received by any public utility [is] just and reasonable." NMSA 1978 § 62-8-1. The PRC and the public cannot know if PNM's energy storage systems are the most cost effective resource among feasible alternatives and that PNM's procurement won't result in excessive or wasteful expenditure because PNM bases its request for approval on an inherently biased and exclusionary RFP that only allows utility-owned eligible bids. This is of tremendous detriment to the public interest and violates ratepayers' right to due process and the Commission's duty to review utility filings.

40. The unconstitutional procedural provisions of the ETA and recovery of those costs through rate increases are severable from the most significant part of the bill – increasing the RPS. The PRC should not apply the unconstitutional and unlawful parts of the ETA related to financing undepreciated assets and decommissioning costs, leaving the other provisions of the law, primarily Sections 26-35, intact. As the Court has stated:

> It is well established in this jurisdiction that a part of a law may be invalid and the remainder valid, where the invalid part may be separated from the [] other portions, without impairing the force and effect of the remaining parts, and if the legislative purpose as expressed in the valid portion can be given force and effect, without the

invalid part, and, when considering the entire act it cannot be said that the legislature would not have passed the remaining part if it had known that the objectionable part was invalid.

Bradbury & Stamm Const. Co. v. Bureau of Revenue, 1962-NMSC-078, ¶ 7, 70 N.M. 226, 230–31, 372 P.2d 808, 811 (page numbers omitted). The invalid provisions at issue in this Brief meet all three *Bradbury* requirements.

V. Even if the ETA is Applicable, PNM's Financing Order Fails to Meet Its Requirements

41. Even if the Commission finds that the ETA applies to Case No. 19-00018-UT, the Commission may not issue a financing order approving the application because PNM's financing order does not comply with the requirements of Section 4 of the ETA, specifically the criteria outlined in §§4B (5) and 4B (12). *See*, Direct Testimony & Exhibits of Charlotte A. Grubb, pp. 13-20.

42. ETA §4B (5) requires that the application include "a memorandum with supporting exhibits from a securities firm, such firm to be attested to by the state board of finance as being experienced in the marketing of bonds and capable of providing such a memorandum, that the proposed issuance satisfies the current published AAA rating or equivalent rating criteria of at least one nationally recognized statistical rating organization for issuances similar to the proposed energy transition bonds."

43. No portion of PNM's application is an attestation by a securities firm "that the proposed issuance satisfied the current published AAA rating or equivalent …" The testimony of Charles Atkins, attached to PNM's exhibit, comes the closest, but Atkins states that "this preliminary structure and pricing information is illustrative and subject to change, and the actual structure and pricing will differ, and may differ materially from this preliminary structure." TR

Atkins at 21. Thus, there is no attestation. Furthermore, the Guggenheim Securities Firm explicitly disclaims Atkins' testimony and the attached memorandum:

> This Presentation does not constitute financial advice or create any financial advisory, fiduciary or other commercial relationship. In addition, this Presentation does not constitute and should not be construed as (i) a recommendation, advice, offer, or solicitation by Guggenheim Securities, its affiliates … with respect to any transaction or other matter, or with respect to the purchase or sale of any security … or addressing … (b) the relative merits or any such transaction or matter as compared to any alternative business or financial strategies that might exist for any party, (c) the financing of any transaction, or (d) the effects of any other transaction in which any party might engage. *The views expressed herein are solely those of the author(s) and may differ from the views of other Representatives of Guggenheim securities*. PNM Exhibit CNA-4 p. 15 (emphasis supplied).

ETA §4B(5) requires "a memorandum with supporting exhibits *from a securities firm*" (emphasis supplied). Yet the memorandum in the application goes out of its way to disavow any responsibility for Guggenheim, in violation of the ETA.

44. ETA §4B(12) requires that the application include "a statement from the qualifying utility committing that the qualifying utility will use commercially reasonable efforts to obtain the lowest cost objective." ETA §2N defines "lowest cost objective" such that "the structuring, marketing and pricing of energy transition bonds results in the lowest energy transition charges consistent with prevailing market conditions at the time of pricing of energy transition bonds and the structure and terms of energy transition bonds approved pursuant to the financing order."

45. Atkins' testimony directly contravenes the requirements of § 4(b)(12). Where 4(b)(12) requires that utilities seek the "lowest cost objective," Atkins testified that "My testimony … describes how the proposed securitization is structured to achieve *the highest possible credit ratings and price* at the lowest market-clearing interest costs consistent with investor demand and market conditions at the time of pricing." TR. Atkins at 1 (emphasis

supplied). The concern Atkins identifies with meeting the "lowest market-clearing cost" does not reflect PNM's obligation to make the bonds as inexpensive for *ratepayers* as possible. This is not at all the same thing as the "lowest cost objective" required by the ETA.

46. PNM's application also fails to satisfy the location mandate expressed by ETA § 3(F). Its proposed replacement resources under "Scenario 1" include the Arroyo Solar project, and the Jicarilla Solar project, neither of which is located within the San Juan school district. To be clear—NEE supports the inclusion of these resources as replacements, but they do not comply with the Energy Transition Act's location mandate. As discussed above, NEE thus urges the Commission to find that the location mandate is special legislation that is impossible to apply given the requirement of satisfying the "public interest."

WHEREFORE, for all the foregoing reasons, as well as any others the Commission finds appropriate, NEE respectfully urges the Commission to find that the Energy Transition Act does not apply to 19-00018-UT and 19-00195-UT and removes the power and authority of the New Mexico Public Regulation Commission to regulate the electric monopoly on behalf of the ratepayers.

Respectfully submitted this 18th day of October, 2019

New Energy Economy

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Exhibit A

Filings Before PRC in 19-00018-UT Prior to 3.22.2019				
Party/Respondent	Style of Filing	Date	Issues Raised	Page Number(s) Where Issue Appears
Public Service Company of New Mexico (PNM)	Motion for Extension of Time to Respond to 1/10/19 Order Requesting Response to PNM's 12/31/18 Verified Compliance Filing & Request for Shortened Response Time	1/16/2019	Moving for 14 day extension of deadline to submit parties' positions	1, 4
Albuquerque Bernalillo County Water Utility Authority (ABCWUA)	Response in Accordance with Order Shortening Time for Responses to PNM's Motion for Extension of Time to Respond to the Commission's 1/10/19 Order	1/17/2019	Opposing PNM's request for extension of time	1
New Energy Economy (NEE)	Response to PNM's Motion for Extension of Time	1/17/2019	- Requesting that PRC deny PNM's request to extend deadline to submit parties' positions - requesting discovery	1, 5 3
New Mexico Industrial Energy Consumers (NMIEC)	Response to Commission Order Shortening Time to Respond to PNM's Motion for Extension of Time	1/17/2019	Opposing PNM's request for extension of time	1
NM Attorney General Utility Division Staff, NMPRC ABCWUA NMIEC	Attorney General's and Joint Respondents' Response to Commission Order Requesting Response	1/17/2019	- That the commission should immediately conduct full review of whether PNM's decision to abandon SJGS is in the public interest - that the scope of the docket be broad	4 7
Coalition for Clean Affordable Energy (CCAE)	Position on Procedural Matters	1/18/2019	- That PRC order was deficient notice and may violate due process standards	1

			- that PRC order may frustrate legislative policy - opposing PRC docket	3
				4
New Energy Economy (NEE)	Pleading Pursuant to PRC Order of 1/10/2019	1/18/2019	- Urging PRC to proceed with abandonment case	1
			- requesting detailed discovery	6
			- that proceeding is necessary to conduct "fair, complete, and timely" review of PNM abandonment	9
Public Service Company of New Mexico (PNM)	Verified Response to Order Requesting Response to PNM's 12/31/18 Verified Compliance Filing	1/18/2019	- That PNM has not actually or irrevocably abandoned SJGS	1
			- requesting PRC grant PNM's request to file for abandonment at a later time	2
			- that requiring PNM to initiate abandonment before conclusion of 2019 legislative session would frustrate policy	5
San Juan County Entities	Response of SJC Entities to Order Regarding PNM's Verified Compliance Filing	1/18/2019	- Requesting PRC deny PNM's December filing as non-compliant	1
			- requesting PRC require PNM to correct deficiencies in December filing before proceeding with abandonment docket	1
			- that the Commission should hold a hearing to ensure compliance with Modified Stipulation	
				12

Sierra Club	Response to Order Requesting Responses to PNM's 12/31/2018 Compliance Filing	1/18/2019	- Expressing intent to intervene - taking no position with regard to abandonment timing - opposing bifurcation of abandonment and approval proceedings	1 2 3
Southwest Generation Operating Company (SWG)	Response Pursuant to Commission's 1/10/2019 Order	1/18/2019	That SWG is not aware of any good reason for PNM to delay filing	1
Western Resource Advocates (WRA)	Response Pursuant to Commission's 1/10/2019 Order	1/18/2019	- That PNM's filing was compliant with the requirements of the stipulation and final order in 13-00390-UT - that beginning abandonment now would hamstring legislative policy	1 2
Interwest Energy Alliance	Response Pursuant to Commission's 1/10/2019 Order	1/22/2019	- That PRC should accept PNM 12/30/2018 filing as compliance filing and establish reasonable timeframe for PNM abandonment - that PNM's filing should be before 5/1/2019	2 3
New Energy Economy (NEE)	Response to Pleadings Filed by PNM & WRA On 1/18/2019 Pursuant to PRC Order	1/22/2019	- Moving PRC to proceed as set forth in 1/10/2019 order - opposing PNM & WRA arguments about legislative policy	1 1, 2-5
NM Attorney General Utility Division Staff, NMPRC ABCWUA NMIEC	Attorney General's and Joint Respondents' Response to PNM's Verified 1/18/2019 Filing	1/22/2019	- That the PRC should proceed without delay in review of PNM's ongoing abandonment - that PRC review does not violate legislative policy	1 4

			- that PRC review does not result in admin. inefficiency - that PRC has authority to conduct immediate review	5 7
Public Service Company of New Mexico (PNM)	Response to Pleadings Filed In Response to Order Requesting Response	1/22/2019	- That the PRC should allow PNM to complete SJGS analysis and file its application once that is complete - that PNM is committed to file by 6/30/2019 - that PNM is not irreversibly committed to abandonment - that PNM's 12/30/2018 filing was compliant	1 1 5 7
San Juan County Entities	Response of SJC Entities to Filings of PNM, Staff & Other Intervenors Regarding PNM's Verified Compliance Filing & Request for Oral Argument	1/22/2019	- That PNM's compliance filing should not be accepted - requesting a hearing on this docket to comply with 13-00390-UT modified stipulation - requesting oral argument	1 1 1
Southwest Generation Operating Company (SWG)	Motion for Extension of time to Reply to Responses Pursuant to PRC 1/10/2019 Order	1/22/2019	Requesting extension of time to reply to responses to PRC 1/10/2019 order	1
Southwest Generation Operating Company (SWG)	Reply to Responses to PRC 1/10/2019 Order	1/22/2019	- That PRC control over abandonment timing is consistent with PRC responsibilities and public interest	2

			- opposing PNM argument that proceeding would frustrate legislative policy - requesting PRC assign this case to a hearing examiner	10
				15
San Juan County Entities	Response of SJC Entities to NEE's Motion for Reconsideration	2/4/2019	- Supporting PRC withdrawal of acceptance of PNM's IRP - that SJC do not intend to interfere with NEE motion for reconsideration with its appeal	1 1
Public Service Company of New Mexico (PNM)	Motion and Supporting Brief for Rehearing on Commission Order Initiating Proceeding and Request for Oral Argument	2/7/2019	- Moving PRC for rehearing on 1/30/2018 order - requesting oral argument - requesting PRC vacate abandonment order - that abandonment must be "voluntary act" of utility - that it is impossible for PNM to comply with abandonment order by 3/1/2019	1 1, 28 1 4
				24
Sierra Club	Response to PNM Motion for Rehearing	2/15/2019	- Supporting PNM motion for rehearing - requesting that PRC set aside 1/30/2019 order - that abandonment proceeding would be 'inefficient' in light of newly introduced Energy Transition Act (ETA)	1 1 1

			- that order exceeds PRC jurisdiction - requesting PRC extend abandonment deadline until after legislative session	4 6
Coalition for Clean Affordable Energy (CCAE)	Response to PNM Motion for Rehearing	2/20/2019	- Supporting Sierra Club response to motion for rehearing - requesting PRC wait until end of legislative session	1 2
New Energy Economy (NEE)	Response to PNM Motion for Rehearing	2/20/2019	- Opposing PNM motion for rehearing - whether PNM has already begun construction of gas units to replace SJGS - requesting immediate discovery - that PRC has obligation to initiate abandonment - that PRC order requiring PNM provide proprietary license to parties is not contrary to law	1 2 3 4 7
New Mexico Industrial Energy Consumers (NMIEC)	Response to PNM Motion for Rehearing	2/20/2019	- Opposing PNM motion for rehearing - that PRC order does not violate Section 62-13-3(A) NMPUA	1, 2 1
PRC Staff	Response in Opposition to PNM Motion for Rehearing	2/20/2019	- That there have been no material changes since issuance of order that warrant rehearing - opposing PNM motion for rehearing	1 2
San Juan County Entities	Response to PNM Motion for Rehearing	2/20/2019	- Supporting 60 day extension of time for PNM to file abandonment application	1, 6

			- that PRC does have jurisdiction over this matter	1
Western Resource Advocates (WRA)	Response to PNM Motion for Rehearing	2/20/2019	- That this docket is intended to limit applicability of ETA	2
			- requesting scope of docket be limited to what was contemplated by 13-00390-UT stipulation and order	3
			- requesting suspension of docket till end of legislative session	
				3
Commentors	Public Comments Concerning PRC 1/30/2019 Order	2/25/2019	- Describing how power plant closure will affect Navajo/Dine communities	2, 5, 8, 72
			- perspective of San Juan mine employees	
			- supporting application of ETA	3
			- requesting that Sierra Club be removed as an intervening party & that Commissioner Hall be recused	5, 10, 11, 55, 69 16
			- opposing application of ETA	
			- that concerns of PRC staff have not been addressed by ETA	
			- objecting to PNM's requested rate increase	39
				57
				74

Public Service Company of New Mexico (PNM)	Consolidated Motion & Supporting Brief for Leave to Reply to NEE's Response to Motion for Rehearing	2/26/2019	- requesting leave to reply to NEE response to motion for rehearing - that PNM has not begun construction of a gas plant at SJGS site	1 2

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF PUBLIC SERVICE COMPANY OF NEW MEXICO'S ABANDONMENT OF SAN JUAN GENERATION STATION UNITS 1 & 4	)))	19-00018-UT
IN THE MATTER OF PUBLIC SERVICE COMPANY OF NEW MEXICO'S CONSOLIDATED APPLICATION FOR APPROV ALS FOR THE ABANDONMENT, FINANCING, AND RESOURCE REPLACEMENT FOR SAN JUAN GENERATING STATION PURSUANT TO THE ENERGY TRANSITION ACT	)))))))	19-00195-UT

CERTIFICATE OF SERVICE

I CERTIFY that on this date I sent to the parties and individuals listed here, via email only, a true and correct copy of

NEW ENERGY ECONOMY'S MEMORANDUM OF LAW ON THE APPLICABILITY OF ENERGY TRANSITION ACT TO THESE PROCEEDINGS

issued on October 18, 2019.

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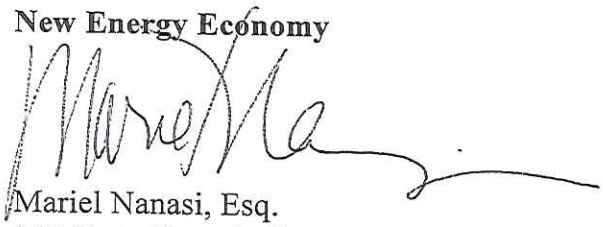
New Energy Economy



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