new energy economy
Addressing the Climate Challenge
With Bold Solutions

New Energy Economy and Allies Challenge
Unconstitutional Provisions of the Energy Transition Act

The most important basis of the Constitutional challenge to the Energy Transition Act ("ETA") is the Act's elimination of fundamental elements of the Public Regulation Commission's (PRC) authority to regulate the electric monopoly, thereby leaving ratepayers without protection in those respects.

The regulatory compact that has always been the bedrock of utility regulation is this: A utility such as PNM will be freed from competition, and will be allowed to be a monopoly. In exchange, the utility must submit to regulation by the state, through the PRC. The unconstitutional provisions in the ETA's securitization scheme overturn this legal framework by forbidding the very regulation that our Constitution, our Supreme Court and our Legislature have created to protect consumers from monopoly pricing and predation, namely, review and oversight by the PRC.

The ETA allows PNM to increase rates without *any* determination or ability to review, change or deny the rate increase whenever PNM abandons its coal plants, gas plants or nuclear investments. This is a fundamental due process violation because there is no opportunity for ratepayers to present a claim or defense to the utility's pre-determined amount of money it wants.[1] The ETA gives PNM a blank check[2] without any ability by the PRC to use its traditional role as "regulator" to balance the interests of shareholder investors and ratepayers,[3] to assess the prudence of utility investments[4] and to ensure that rates are increased only if increases are just and reasonable.[5] These bedrock consumer protections fall prey to PNM's pre-set utility-defined costs and no ratepayer claim or defense will modify the utility's stated amount. The PRC and the decades long jurisprudence that supports "continued regulation" of the electric monopoly is the only "shield" ratepayers have against unscrupulous actions by the utility and the ETA removes that shield by bypassing the PRC's authority to deny costs in part or in full.[6] This is unconstitutional.

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[1] "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." *Public Service Company of New Mexico v. New Mexico Public Regulation Commission,* 2019-NMSC-012, 444 P.3d 460, ¶63, citing *ABCWUA*, 2010-NMSC-013, ¶21, (quoting *Jones v. N.M. State Racing Comm'n,* 1983-NMSC-089, ¶6, 100 N.M. 434, 671 P.2d 1145).

[2] ETA Section 31C of the ETA provides:

> If a public utility has been granted a certificate of public convenience and necessity prior to January 1, 2015 to construct or operate an electric generation facility and the investment in that facility has been allowed recovery as part of the utility's rate-base, the commission may require the facility to discontinue serving customers within New Mexico if the replacement has less or zero carbon dioxide emissions into the atmosphere; provided that **no order of the commission shall disallow recovery of any undepreciated investments or decommissioning costs associated with the facility**. (emphasis added.)

[3] "[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).

[4] "[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." *Public Service Company of New Mexico v. New Mexico Public Regulation Commission,* 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)

[5] 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 just and reasonable." *Public Service Company of New Mexico v. New Mexico Public Regulation Commission*2019-NMSC-012, 444 P.3d 460, ¶ 86.

[6] Regulation serves the New Mexico statutory purpose of preventing "unnecessary duplication and economic waste." Regulatory oversight prevents overinvestment in high fixed costs. "Furthermore, regulation 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

What are the specific challenged sections of the ETA that New Energy Economy contends are unconstitutional and void?

§2H (1)-(3); §2S; §5; §8B; §11C; §22; and§31C.

Will the ETA challenge affect the Renewable Portfolio Standard?

Despite the constitutional and legal defects of the ETA, we support the provisions of the ETA increasing the Renewable Portfolio Standard ("RPS"). Expanding the state's portfolio of renewable resources is a critical step in reducing carbon emissions and addressing the root cause of climate change. Fortunately in the case of the ETA, the unconstitutional provisions dealing with decommissioning, abandonment, and undepreciated investments are distinct and severable from the rest of the legislation under applicable legal tests.

Which specific Constitutional provisions does the ETA violate?

1. New Mexico Constitution Art. XI, §2, provides that the Commission has a duty to regulate public utilities:

> **The public regulation commission shall have responsibility for regulating public utilities**, including electric, natural gas and water companies; transportation companies, including common and contract carriers; transmission and pipeline companies, including telephone, telegraph and information transmission companies; and other public service companies in such manner as the legislature shall provide.
> (emphasis added).

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.

2. "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." *Public Service Company of New Mexico v. New Mexico Public Regulation Commission,* 2019-NMSC-012, 444 P.3d 460. The essence of due process is "is the right to be heard at a meaningful time and in a meaningful manner." *New Mexico Indus. Energy Consumers v. New Mexico Pub. Serv. Comm'n*, 1986-NMSC-059, ¶ 18, 104 N.M. 565, 568, 725 P.2d 244, 247.

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 …"

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customers. In exchange for submitting to oversight by the Commission, the utility is permitted to operate as a monopoly within its service area." *Morningstar Water Users v. Pub. Util.*, 1995-NMSC, 904 P.2d 28. *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.")

3. The ETA unduly limits judicial review in three important respects, violating the separation of powers. The ETA provides that any action taken pursuant to a Commission authorized financing order is valid per se, even if that order is vacated. Thus, not only does the ETA eliminate meaningful PRC involvement in the determination of how much a utility should receive from ratepayers when it closes plants and demands "stranded costs" and decommissioning costs as the utility sees fit, meaningful involvement on the part of the courts is also eliminated because there will be no evidence before the PRC regarding the appropriateness of these amounts and therefore no basis for court review. In addition, the ETA provides for a ten-day time limit within which any party who opposes a utility's claim must file the notice of appeal. This latter point may be effectively moot in light of the fact that the ETA, on its face, effectively eliminates all but the most technical bases for appeal.

New Mexico Constitution Art. III, § 1. Separation of powers.

4. The New Mexico Constitution, Art. 4, §16 provides:

The subject of every bill shall be clearly expressed in its title, and no bill embracing more than one subject shall be passed except general appropriation bills and bills for the codification or revision of the laws; but if any subject is embraced in any act which is not expressed in its title, only so much of the act as is not so expressed shall be void …

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."

The purpose of this constitutional provision is to prevent "hodge-podge or log-rolling legislation, surprise or fraud on the legislature, or not fairly apprising the people of the subjects of legislation so that they would have no opportunity to be heard on the subject." *Martinez v. Jaramillo*, 1974-NMSC-069, 86 N.M. 506, 508, 525 P.2d 866, 868. Specifically, the title of the ETA fails to include the terms "rates," "undepreciated investments" or "decommissioning." It further fails to provide notice to the legislators and the public that provisions of the current Public Utility Act are repealed or amended by the ETA.

5. The New Mexico Constitution, Art. IV, §34, provides:

> "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 applies to proceedings undertaken by administrative agencies. *In re Held Orders of U S West Communications, Inc.* (1999) 127 N.M. 375, 379.

By enacting the ETA the legislature affected the rights and remedies and changed the rules of evidence or procedure for ratepayers in three pending cases: Case No. S-1-SC-36115 – on remand to the NM PRC in Case No. 15-00261-UT, NMPRC Case No. 19-00018-UT, and the vested rights of ratepayers as a result of the Final Order in NMPRC Case No. 16-00276-UT and its affect in PNM's next rate case. The ETA requires that "*any"* cost recovery from ratepayers the utility decides it wants for undepreciated investments and decommissioning it gets and the PRC shall approve those costs, despite findings or potential findings that those investments were imprudent or wouldn't result in rate increases that are fair just and reasonable.

6. Art. 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."). The securitized financing of the ETA was created for PNM, the only state monopoly utility that has investments still in coal.

Why is it critical that the Supreme Court ultimately decide on the constitutional challenge?

The ETA allows PNM to set the amount it wants to recoup for decommissioning a plant and ratepayers must pay it. The PRC does not have the ability to amend PNM's requested amount at all for either 100% undepreciated investments or for decommissioning costs, which are likely to be enormous. Even if the company was poisoning the land or the San Juan river through negligence, gross negligence or even deliberately, RATEPAYERS PAY ALL; SHAREHOLDERS PAY NOTHING. What could this mean besides potentially enormous costs for ratepayers without any corporate accountability? It could mean that the price tag is so high that the clean-up does not get done because it would cause rate shock. If there were even a split between ratepayers and shareholders for clean up then there's a chance we could actually hold PNM accountable for the actual clean up. And what are the implications of the ETA's approach to PNM's behavior in future, without oversight?

If Palo Verde Nuclear Generating Station is closed "early" because nuclear can't compete against solar and wind +storage ratepayers will pay *any* undepreciated investments and decommissioning costs requested by PNM even if these costs are not legitimate.

If PNM receives 100% undepreciated investments in San Juan without any ability to change that amount using bedrock consumer protection legal principles: "balance between ratepayers and shareholders, prudence determination for investments, or whether the resulting rates would be fair, just and reasonable" than PNM will use the ETA for Four Corners, gas plants, nuclear investments also without review. Ratepayers pay and Wall St. shareholders are insulated from all risk no matter how unfair.

Regarding the ETA, the most problematic sentence: the Commission is required to allow – and may not disallow – "recovery of *any* undepreciated investments or decommissioning costs by a utility." Section 31C. Unlike the Commission's typical orders, once a utility applies for a financing order, it must be approved by the Commission. If the Commission refused, the financing order would be approved without further ado.

According to the Attorney General's Office (NMAG) Fiscal Impact Report ("FIR") submitted as part of the legislative process for the ETA 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.'** (At p. 6)

How has the Public Regulation Commission responded?

The Public Regulation Commission has required parties to brief the issue of whether the ETA applies to the abandonment and securitized financing case (19-00018-UT), and the replacement power case (19-00195-UT), involving the closure of the last two units of the San Juan Generating Station. Three parties opposed the ETA's applicability to the case. The New Mexico Attorney General's Office didn't file a brief but its expert witness testified as follows:

"The Company's proposal does not provide a reasonable balance between shareholders and ratepayers. Under the Company's proposal, ratepayers will continue to pay for the undepreciated investment in the SJGS even though they are no longer benefitting from these assets. While ratepayers will be responsible for these costs for the next 25 years, the plant will not be used or useful in the provision of utility service. However, the Company and its shareholders will recover their entire investment upfront and will not face any risk of non-recovery.

"The shifting of risk from shareholders to ratepayers is especially unfortunate since it was PNM's management, at the direction of PNM shareholders, that was responsible for PNM's investment in SJGS coal plants. Since the first SJGS unit was opened in 1973, it was the Company's management, not its ratepayers, that had the responsibility to assess the likely remaining life of the SJGS units, to evaluate the escalating environmental requirements, and to consider advances in renewable technologies. It is the continuous responsibility of utility companies to evaluate investment options, to ensure that utility service is being provided at the lowest reasonable cost, and to ensure that ratepayers are paying for services that they are actually receiving." (At p. 25)

"The most striking feature of the Company's proposal is that it assumes that ratepayers should be responsible for all risks … [and] does not reflect any cost to shareholders. Under the Company's proposal, shareholders recover 100% of their investment in the SJGS Units 1 and 4, and they will recover this investment sooner than they otherwise would have. In addition, shareholders will continue to earn a return on, and of, new investment in PNM. The largest flaw in the Company's proposal is that there is no recognition of the fact that shareholders should bear some of the responsibility for … closure of the SJGS." (At p. 53)

"I recommend that the NMPRC approve the abandonment of SJGS Units 1 and 4, but deny the Company's request to recover 100% of its stranded costs from ratepayers. In fact, a possible result is that 100% of any stranded costs are allocated to shareholders, rather than New Mexico ratepayers. However, if the NMPRC determines that New Mexico ratepayers should be responsible for some portion of stranded costs, then I recommend that the NMPRC limit recovery to 50% of stranded costs [.]" (At p. 59)

Does New Energy Economy oppose Securitization?

New Energy Economy does not oppose securitization. [7] if New Mexico's securitization law, like Texas', [8] benefited ratepayers as well as the utility, and provided PRC scrutiny and due process protections for ratepayers in the determination of what they should pay, NEE would be happy with it. We are also in favor of an increase in the RPS but New Mexico constitutional protections cannot be bargained away by legislators, no matter how noble their overall goals.

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[7] 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.

[8] **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."

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