IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NEW ENERGY ECONOMY, INC., CITIZENS FOR FAIR RATES & THE ENVIRONMENT, FOOD & WATER WATCH, PHYSICIANS FOR SOCIAL RESPONSIBILITY-NEW MEXICO, RIO ARRIBA CONCERNED CITIZENS, TEWA WOMEN UNITED, and DANIEL ERNEST TSO,

Petitioners,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,

Respondent,

PUBLIC SERVICE COMPANY OF NEW MEXICO,

Real Party in Interest.

Case No. S-1-SC-37875

VERIFIED PETITION FOR AN EMERGENCY WRIT OF MANDAMUS TO DECLARE SPECIFIC PROVISIONS OF THE "ENERGY TRANSITION ACT" UNCONSTITUTIONAL, TO ENJOIN THEIR ENFORCEMENT AND REQUEST FOR A STAY

Oral Argument Requested

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REQUEST FOR ORAL ARGUMENT

Because of the significant matters of public interest at stake in this matter, PNM respectfully requests oral argument in this Petition.

INTRODUCTION TO THE PETITION

Petitioners seek an Extraordinary Writ from this Court pursuant to Rule 12-504, and respectfully request that the Court act on an immediate basis to grant the relief requested below. This Petition addresses the constitutionality and lawfulness of seven provisions of the recently-enacted Energy Transition Act ("ETA") which effectively eliminate regulatory oversight of decisions by Public Service Company of New Mexico ("PNM") that will have hundreds of millions of dollars of impact on ratepayers and will preclude meaningful judicial review of those decisions. The ETA is voluminous and complex. It is attached in its entirety as Exhibit A, with the provisions at issue highlighted.

The ETA at its core addresses two critical energy goals for New Mexico: establishing new minimum requirements for the conversion to renewable energy resources, and adopting a mechanism for "securitizing" costs associated with the abandonment of old plants.

This Petition is necessary to compel the New Mexico Public Regulation Commission ("Commission" or "PRC") to disregard certain unconstitutional provisions that effectively give the utility unbridled discretion to charge ratepayers whatever amount the utility decides it should receive as compensation when it closes an old plant ("undepreciated investments") and the amount it should receive

for costs associated with decommissioning such plants. Such is the case in PRC Case No. 19-00018-UT in which Petitioners seek an immediate stay.

Specifically, this Court should order the PRC to disregard provisions of the ETA that: a) remove the PRC's authority to assess the justness and reasonableness of a utility's claim for compensation by ratepayers;[1] b) remove the PRC's authority to determine if a utility's claim for undepreciated investments and decommissioning costs fairly "balance the interest of consumers and the interest of investors …,"[2]; c) remove the PRC's authority to determine whether a utility should be precluded from shifting to ratepayers all of the costs associated with undepreciated investments and decommissioning, even if the utility investment is imprudent.[3] The broad authority of the PRC to apply these standards in ratemaking cases was recently affirmed by this Court in its May 2019 order to hold ratepayers harmless for PNM's imprudent investments at Palo Verde Nuclear Generating Station.[4]

This Court has recognized that 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." *Pub. Serv. Co. of New*

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[1] NMSA 1978 § 62-8-1 "Every rate made, demanded or received by any public utility shall be just and reasonable."
[2] *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).
[3] *Id., at* ¶¶29-33, 40, 42, 52.
[4] *Id.*

Mexico v. New Mexico Pub. Serv. Comm'n, 1991-NMSC-083, ¶28, 112 N.M. 379, 387, 815 P.2d 1169, 1177. However, the provisions of the ETA challenged in this Petition and addressed below turn the regulatory process upside down, empowering PNM and other utilities to decide what consumers should pay for undepreciated assets, decommissioning costs, and abandonment costs associated with fossil fuel plants and nuclear plant investments. With respect to these areas of utility operation and costs, the ETA has simply written the PRC out of the equation and stripped the PRC of its authority to regulate rates and protect consumers.

Furthermore, Petitioners request a declaration by this Court that the portion of the ETA preventing judicial review of any financing order violates separation of powers and due process of law and is therefore void.

Petitioners support the provisions of the ETA that increase the Renewable Portfolio Standard ("RPS"), Sections 26-35. The RPS establishes new minimum requirements for the conversion to renewable energy resources. Expanding the state's portfolio of renewable resources is a critical step in reducing carbon emissions and addressing the root cause of climate change, and these sections do not infringe upon ratepayers' constitutional rights. Replacement power for the San Juan Generating Station ("SJGS") is not challenged in this Petition and is currently being considered by the PRC in a separate docket, Case No. 19-00195-UT. Petitioners support the creation of special funds for workers and economic

recovery and development programs, especially for affected Indigenous communities, Section 16.

Petitioners also support the abandonment of SJGS and the concept of securitization, as well as the legislature's authority to adopt this financing tool to facilitate the abandonment of power plants. Petitioners simply argue that the legislature cannot pursue the tool of securitization in a way that is contrary to the Constitution, regulatory statutes, and legal precedent.

A. Grounds Upon Which Jurisdiction of this Court is Based

The Court has jurisdiction over this Petition pursuant to art. VI, § 3 of the N.M. Constitution, which provides original jurisdiction over mandamus against all state commissions and authority to issue writs as necessary to exercise the Court's jurisdiction. *See Taylor v. Johnson*, 1998-NMSC-015, ¶15, 125 N.M. 343, 348, 961 P.2d 768, 773; *see also Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶¶10-11, 127 N.M. 272.

Mandamus is "a proper proceeding in which to question the constitutionality of legislative enactments." *Sego v. Kirkpatrick*, 1974-NMSC-059, ¶6, 86 N.M. 359, 524 P.2d 975, and this Court has recognized that exercising original jurisdiction is particularly appropriate when a "case presents a purely legal issue that is a fundamental constitutional question of great public importance." *In re*

Adjustments to Franchise Fees Required by Elec. Util. Indus. Restructuring Act of 1999, 2000-NMSC-035, ¶6, 129 N.M. 787, 14 P.3d 525. This is just such a case.

B. Circumstances Making It Necessary and Proper to Seek the Writ in this Court and at this Time

An appeal at the conclusion of the NMPRC proceeding will be ineffective to protect Petitioners' rights and prevent the harms addressed below. State district courts have concurrent original jurisdiction pursuant to NMSA 1978, §62-12-2 (1941), yet there are several reasons why this matter should proceed originally in this Court:

1. The due process and other constitutional claims raised by Petitioners are issues of law that this Court reviews de novo. *TW Telecom of New Mexico v. New Mexico Public Regulation Commission*, 2011-NMSC-029, ¶15, 256 P.3d 24;

2. The purely legal constitutional questions presented here do not involve any necessary fact-finding that falls within the purview of the Commission;

3. The constitutional questions presented here must first be resolved to enable the Commission to know how to proceed with the underlying substantive questions dealing with undepreciated investments, abandonment and decommissioning, and the setting of reasonable rates for ratepayers, all of which are at the core of the Commission's functions, and which may then be subject to judicial review in the ordinary course of proceedings;

4. Both administrative and judicial economy and convenience will be served by the initial resolution of the core constitutional questions presented here, which are matters of great public importance. *See Sandel, supra*, ¶11.

5. As this Court has emphasized:

> The very purpose of a Bill of Rights was to *withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials* and to establish them as legal principles to be applied by the courts. [Those . . . fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

Griego v. Oliver, 2014-NMSC-003, ¶1 316 P.3d 865 (emphasis added). The same is true with respect to the fundamental constitutional principles which govern the essential structure of our government—including the special role of the PRC in overseeing and managing the private utility monopolies consistent with the rights of ratepayers and the public interest.

C. The Parties and Identity of Real Parties in Interest

1. Petitioners and their Interests

a. New Energy Economy ("NEE") is an environmental and economic justice advocacy organization and a ratepayer whose headquarters are in Santa Fe, N.M. NEE represents the interests of thousands of other ratepayers, is an intervenor and participant in PRC Case Numbers 19-00018-UT, 19-00195-UT, 16-00276-UT, was an Intervenor-Appellee/Cross-Appellant in S-1-SC-36115 and Appellant in S-1-SC-36870. NEE actively

appears before the PRC in cases involving issues that will be directly impacted by the ETA.

b. Citizens for Fair Rates and the Environment: is a Silver City-based association of PNM residential ratepayers and is an intervenor in Case 19-00018-UT.

c. Food & Water Watch: is a non-governmental organization which focuses on corporate and government accountability relating to food, water, and corporate overreach.

d. Physicians for Social Responsibility-NM: is a chapter of the largest physician-led organization (50,000 members nationwide) working to protect the public from threats of nuclear proliferation, climate change, environmental toxins, and other threats to global survival.

e. Rio Arriba Concerned Citizens: is a grassroots volunteer organization whose mission is to protect the public health, land, air, and water of the Rio Chama Watershed, Rio Arriba County, and the State of New Mexico.

f. Tewa Women United: is a collective of tribal women, some of whom are ratepayers, in the Tewa homelands of Northern New Mexico and is dedicated to the promotion of educational, social and benevolent purposes, especially for ending violence against the Earth.

f. Daniel Ernest Tso is a Navajo Nation Council Delegate who represents thousands of Navajo Nation members, including thousands of PNM ratepayers who will be impacted by the ETA's provisions.

Absent the appropriate relief from this Court, the Petitioners and all ratepayers, including the PNM ratepayers they represent will suffer grave and irreparable injury. Petitioners have standing to request mandamus because they actively participated in the administrative proceeding below, are ratepayers or represent ratepayers, and have raised an issue of great public importance. *NEE v. Martinez,* 2011-NMSC-006, ¶9, 149 N.M. 207, 211, 247 P.3d 286, 290.

2. The Respondent

This petition is directed to the PRC as the Respondent because it is the administrative agency whose constitutionally mandated duties are at issue. The force of the writ being sought is to mandate the PRC to refrain from applying or enforcing the unconstitutional provisions of the ETA, and to direct the PRC to revert to the exercise of its traditional regulatory review of all of the matters dealing with undepreciated investments, abandonment and decommissioning, and the setting of reasonable rates for ratepayers. Additionally, this Petition seeks a declaration that judicial review of the PRC's decisions, including determinations of recoverable undepreciated investments, decommissioning costs and related financing orders, remains available.

3. Real Party in Interest

Public Service Company of New Mexico, the largest private electric monopoly utility involved in these matters, is a Real Party in Interest.

D. Grounds on which the Petition is Based, including Facts and Law Supporting the Same

Petitioners contend that Sections 2H, 2S, 5, 8B, 11C, 22 and 31C of the ETA are unconstitutional and unlawful. *See* Exhibit A.

1. The Relevant Uncontroverted Facts

This Petition was triggered by, and involves PNM's pending Application in 19-00018-UT to recover *all* "abandonment costs" associated with the retirement of generating units 1 and 4 at the SJGS through a financing order that includes all undepreciated investments, and decommissioning and reclamation costs, all of which PNM contends are governed by ETA, notwithstanding that these matters were pending before the PRC prior to the ETA's passage.

PNM's present Application in 19-00018-UT dates back to an earlier PRC case. Previously, PNM applied to abandon San Juan Units 2 and 3 in PRC 13-00390-UT.[5] To resolve pending issues in that case, PNM entered into a Modified

[5] When PNM abandoned SJGS Units 2 and 3, it 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.

Stipulation, adopted by the Commission on December 16, 2015. 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 in operation to serve PNM retail customers; it was known as the "2018 Review Hearing".[6,7]

PNM made a "compliance" filing on December 31, 2018 – the last permissible day – and disclosed that all the co-owners of SJGS, including PNM, except for the City of Farmington, had provided notice to the other co-owners that they did not intend to renew the existing participation and coal agreements for SJGS. *PNM's Compliance Filing*, at pp. 4, 6. "As a result, PNM is not seeking any approvals in its Compliance Filing that would allow PNM to continue to use SJGS after June 2022 to serve retail customers and the issue presented under Paragraph 19 of the Modified Stipulation is essentially moot." *See Affidavit of Thomas G. Fallgren in Support of PNM's Verified Compliance Filing Pursuant to Paragraph 19 of Modified Stipulation, p. 5* (attached to PNM's Compliance Filing).

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[6] "The Commission resolved that case by approving a stipulation reached by PNM and several other parties in an order affirmed by this Court in *NEE*, 2018-NMSC-024, ¶46, 416 P.3d 277, 284. (Affirming that there was a net public benefit that "requires PNM to commit to certain future resource planning obligations" in the 2018 PRC review hearing. At ¶20, subsection (4).)

[7] *See Pub. Serv. Co. of New Mexico v. New Mexico PRC*, 2019-NMSC-012, 444 P.3d 460, ¶81 and ¶88; As this Court noted, "PNM's argument ignores that it agreed in Case No. 13-00390-UT that it would bear the burden of affirmatively demonstrating [evidence]. Given this prior stipulation …the Commission [and parties were]…entitled" to expect and rely on PNM's required filing.

Based on this 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 . . .." On January 10, 2019, the PRC opened a new docket, 19-00018-UT, to address the abandonment of the remaining SJGS Units 1 and 4. 13-00390-UT and 19-00018-UT, *Order Requesting Response to PNM's December 31, 2018 Verified Compliance Filing Concerning Continue Use of SJGS to Serve New Mexico Customers Pursuant to Paragraph 19 of the Modified Stipulation*, 1/10/2019, p. 4, ¶10.

Subsequently, on January 30, 2019, the Commission issued an order in 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"), requiring PNM to file an application by March 1, 2019, in support of its planned abandonment of SJGS. The 1/30 Order 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, and the amount of cost recovery, under NMSA 1978, §62-9-5 and any other applicable statutes and NMPRC rules. *See* Exhibit B, 1/30 Order, pp. 14-16, ¶¶A-C.

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. PNM argued that the 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 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.

PNM's petition explicitly sought to stay the abandonment filing required by the 1/30 Order. This Court ordered responses to PNM's petition on March 1, 2019 and granted its request for a stay. No. S-1-SC-37552.

While PNM's petition was pending, the legislature passed the ETA, effective June 14, 2019. 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:[8] PNM may

[8] Note that 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

recover up to $375,000,000 per generating facility in abandonment costs, including decommissioning costs and mine reclamation costs, and an unspecified amount in undepreciated investments and legal compliance costs. Sections 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.[9] Sections 2G, H; 4 A, B; 5; 11C; 31C.

The legal instrument used to approve such rate increases is called a "financing order." Section 2L. Once a utility applies for a financing order, the PRC *must approve it*, or the order is *deemed approved* by operation of law. Section 5.

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which do not belong to all persons on the same terms."). 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.

[9] "The prudent investment theory provides that ratepayers 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." *Re Pub. Serv. Co. of New Mexico*, 101 P.U.R. 4th 126, 1989 WL 418588 (N.M.P.S.C. Apr. 5, 1989).

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. Sections 5E; 7A-C; 12A; 22.

Section 31C then 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 – *and may not disallow* – 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. Section 31C.

Following passage of the ETA, this Court issued an order on June 26, 2019, denying PNM's Writ challenging the PRC's 1/30 Order and lifted the stay in 19-00018-UT. No. S-1-SC-37552. On July 1, 2019, PNM filed its *Consolidated Application for the Abandonment, Financing and Replacement of SJGS Pursuant to the Energy Transition Act* ("Abandonment Application") in a new docket, 19-00195-UT, rather than the existing docket in 19-00018-UT. The Application seeks approval "to retire and replace 497 MW of retail coal-fired generation resources at

the San Juan coal plant with a portfolio of new generation resources with equivalent capacity . . .."[10]

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 ordered to be considered in the original PRC-initiated case, 19-00018-UT, and the aspects of the Application related to replacement power would be considered in a new case, No. 19-00195-UT.[11]

Petitioners now seek an order from this Court invalidating certain provisions of the ETA on constitutional and other legal grounds, which, if granted, would preclude the Commission from issuing a financing order in 19-00018-UT pursuant to those provisions, and would require the Commission to evaluate the request on the customary bases, including assessment of its reasonableness and if it was in the public interest,[12] whether it fairly balances the interests of PNM shareholder investors and ratepayers,[13] and whether it includes costs imprudently incurred.

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[10] *See* Exhibit C, Application at pp.1-2.
[11] *See* Exhibit D: PRC Bifurcation Order, Case No. 19-00018-UT and 19-00195-UT, July 10, 2019, at ¶¶ 18, 19, Ordering Paragraph A.
[12] This Court has held that "[t]he public interest is to be given paramount consideration; desires of a utility are secondary." *Public Service Co. of New Mexico v. New Mexico Public Service Comm'n,* 112 N.M. 379, 815 P.2d 1169,

GROUNDS IN SUPPORT OF THE PETITION

I. THE UNCONSTITUTIONAL PROVISIONS OF THE ETA, IF ENFORCED, WOULD PRECLUDE THE COMMISSION FROM EXERCISING ITS CONSTITUTIONAL FUNCTION TO REGULATE UTILITIES

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. However, certain ETA provisions make the Commission's review of PNM proposals meaningless by eliminating PRC discretion to approve, modify, or deny requested rates increases. In other words, the ETA prevents the Commission from "regulating" public utilities under the plain meaning of that term, as to the hundreds of millions of dollars in undepreciated investments and decommissioning costs that a utility may claim it should recover from ratepayers, even including what are likely to be the enormous costs associated with PNM's imprudent acquisition of interests in the Palo Verde Nuclear Generating Plant. NMSA 1978, § 62-6-4 (2003). ("The commission shall have general and exclusive power and

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1173 (1991), citing *Telstar Communications, Inc. v. Rule Radiophone Serv., Inc,* 621 P.2d 241, 246 (Wyo. 1980).

[13] *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012, *supra*, at ¶8-10 ("legal principles which apply to the setting of retail electric rates by the Commission.")

jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations [.]")

A. PRC Has A Duty to Regulate and Exercise Control Over Utilities, and the Legislature May Not Eliminate That Control

Pursuant to the New Mexico Constitution, art. XI, § 2, the PRC has a duty to "regulate" public utilities. The same section provides for regulation "in such manner as the legislature shall provide." This constitutional provision has been interpreted to give the PRC explicit authority over rates. "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.

To determine the meaning of a constitutional provision, New Mexico courts begin with "the plain meaning of that language." *Hem v. Toyota Motor Corp.* 2015-NMSC-024, 353 P.3d 1219, 1222. When the meaning is clear and unambiguous, the courts "must give effect to that language and refrain from further ... interpretation." *Id.* (quoting *Sims v. Sims,* 1996–NMSC–078, ¶ 17, 122 N.M. 618, 930 P.2d 153) (internal quotations omitted).

Petitioners have found no case law construing N.M. Const. art. XI, § 2 to require anything other than continued utility regulation by the PRC over rates.[14]

[14] Regulation serves the New Mexico statutory purpose of preventing "unnecessary duplication and economic waste." NMSA 1978, §62-3-1(b) (2008). "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 customers."

The plain meaning of the term "regulate" necessarily involves the exercise of control.[15]

While the legislature has broad constitutional authority to direct the PRC, there are limits to that authority. The plain language of N.M. Const. art. XI, § 2 recognizes the legislature's role in creating policy, but that language cannot be read so broadly as to eliminate the PRC's role as regulator entirely. Such an interpretation would be inconsistent with the first provision of N.M. Const. art. XI, § 2, establishing the duty of the PRC to regulate in the first place, and render it meaningless. If that first provision is to have meaning, the PRC must have the ability to exercise some degree of control over utilities.

The legislature may not, as it has done in the ETA, deregulate PNM and allow PNM, a monopoly, to set its own parameters for rate increases associated with undepreciated investments and decommissioning financing without *any* ability for the PRC to evaluate the legitimacy of the utility-determined cost proposal. To allow the legislature to strip the PRC of oversight, with the likely

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Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n, 1995-NMSC-062, ¶ 54, 120 N.M. 579, 591, 904 P.2d 28, 40.

[15] The verb "regulate" means: "To control (an activity or process) esp. through the implementation of rules." "Regulation" means: "Control over something by rule or restriction …" "Control" is defined as: "To exercise power or influence over" The noun "control" is defined as: "The direct or indirect power to govern the management and policies of a person or entity; the power or authority to manage, direct, or oversee." Black's Law Dictionary, 10th ed. (2014).

consequence of rate increases that have never been determined to be just and reasonable or in the public interest, flies in the face of express constitutional mandates including utility regulation and due process, established precedent, regulatory custom, and commonsense.

In this regard, the ETA is an anomaly among other states' energy transition legislation. 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.

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

B. Traditionally, the PRC has Exercised Its Constitutional Authority to Adjust or Deny Utility Rate Requests as Required by the Public Interest

Consistent with its constitutional mandate, the PRC is required to effectuate state policy and to follow the statutes governing ratemaking. The Public Utility Act states:

> It is the declared policy of the state that the public interest, the interest of consumers and the interest of investors require the regulation and supervision of public utilities to the end that reasonable and proper services shall be available at fair, just and reasonable rates . . ..

NMSA 1978, §62-3-1(B).

Elsewhere, the legislature clearly sets forth the guiding measure of rate-making: "Every rate made, demanded or received by any public utility shall be just and reasonable." NMSA 1978 § 62-8-1 (1941). Determining whether rates are just and reasonable involves weighing facts and evidence, NMSA 1978 § 62-8-7, and the exercise of what has been described as "considerable discretion" by the PRC. *Hobbs Gas Co. v. New Mexico PRC*, 1980-NMSC-005, ¶ 4, 94 N.M. 731, 733, 616 P.2d 1116, 1118. Just and reasonable rate determinations are "the heart" of the regulatory system. *Sandel, supra,* ¶18.

This Court has interpreted the law to require the PRC to strike a balance between investor and consumer interests. *Matter of Rates & Charges of Mountain States Tel. & Tel. Co.*, 1982-NMSC-127, ¶26, 99 N.M. 1, 7, 653 P.2d 501, 507. The PRC has historically acted according to this directive in ratemaking cases, acknowledging that the "public interest" requires "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 PNM in Construction of Palo Verde ("PV") Nuclear Generating Station*, Final Order, p. 85 (affirmed on appeal, *Attorney Gen. v. New Mexico PRC*, 1991-NMSC-028, ¶ 28, 111 N.M. 636, 642, 808 P.2d 606, 612).

Striking a balance between ratepayer and investor interests 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 ("AMI Project"), the issue arose as to whether to grant a Certificate of Public Convenience and Necessity ("CCN") and whether the project would produce "a net public benefit." 15-00312-UT, Recommended Decision at p. 79, (adopted unanimously in Final Order, Apr. 11, 2018) (footnotes omitted). The Commission ultimately denied PNM's request for cost recovery, stating that "PNM's requests . . . do not, in the context of PNM's current plan, fairly balance the interests of investors and ratepayers." Recommended Decision, *supra*, at p. 96.

Similarly, in 16-00276-UT, the Hearing Examiners found PNM's investment in the FCPP coal facility to be "imprudent" but deferred the issue to the next rate case. The PRC concluded that "the magnitude of the potential benefit to PNM of deferring the issue . . . requires modification of the terms of the Revised Stipulation to balance the interests of ratepayers and the utility." Exhibit F, 16-00276-UT, *Revised Order Partially Adopting Certification of Stipulation*, 1/10/2018, at p. 23,

¶67. The PRC then ordered a cost disallowance, finding it consistent with and well within the PRC's authority 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). ("the Commission must determine the appropriate distribution of the costs … between the ratepayers and the utility.")

C. Several Provisions of The ETA Prevent the PRC From Exercising Its Constitutional Function to Regulate PNM

Sections 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.

1. Section 5 Requires the PRC to Grant PNM Full Recovery for the Abandonment of Its Coal Facilities without Consideration of Prudence or Fairness to Ratepayers

Section 5 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. Section 4, 5E (emphasis added).

The ETA does not permit the Commission to determine whether the proposed request will result in just and reasonable rates, to conduct a prudence determination, or to deny rate increases that fail to properly balance shareholder investor and ratepayer interests.

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).

In short, the Commission may not amend, reduce, or disallow rates proposed in the financing order application because the ETA requires approval. The ETA reduces the Commission's role to compliance review – essentially a clerical task – ensuring that the utility's application is complete. This is not the utility regulation contemplated by the Constitution. Consequently, this Court should hold unconstitutional the ETA provisions described above because they violate N.M. Const. art. XI, § 2.

2. Section 31C Prohibits the Commission from Disallowing Rate Increases for Undepreciated Investments or Decommissioning Costs

Section 31C similarly deprives the Commission of control over utility requests to impose rates for undepreciated investments and decommissioning costs.

Section 31C states that "… *no order of the commission shall disallow recovery of any undepreciated investments or decommissioning costs associated with the facility*." (emphasis added). Thus, the Commission *must* approve rate proposals that contain undepreciated investments and decommissioning costs for a utility's facilities that once served customers of New Mexico, has received a CCN prior to January 1, 2015 (which includes all of PNM's gas plants and nuclear investments), and replaced those facilities with "less or zero carbon dioxide emissions [.]" Once again, the utility, rather than the Commission, decides what rates customers will pay. For the same reasons cited above, Section 31C also violates the New Mexico Constitution.

II. THE UNCONSTITUTIONAL PROVISIONS OF THE ETA VIOLATE DUE PROCESS BY FAILING TO PROVIDE FOR A MEANINGFUL HEARING

"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." *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012, *supra* at ¶63 (internal citations omitted). The opportunity to be heard must be meaningful.

The essence of due process "is the right to be heard at a meaningful time and in a meaningful manner." *New Mexico Indus. Energy Consumers v. New Mexico PRC*, 1986-NMSC-059, ¶ 18, 104 N.M. 565, 568, 725 P.2d 244, 247. This Court

has previously reversed PRC orders for lack of due process because a party was "not afforded an opportunity be heard on the issue." *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012, *supra* at ¶ 65. Similarly, the Court has vacated PRC orders when parties have been denied the opportunity to present evidence and cross-examine witnesses. *See e.g., TW Telecom, L.L.C. v. New Mexico PRC*, 2011-NMSC-029, ¶ 22, 150 N.M. 12, 256 P.3d 24, 29.

Sections 2H, 5, 11C, and 31C require the Commission to approve financing orders, resulting in hundreds of millions of dollars to be passed on to ratepayers, without providing ratepayers with a meaningful opportunity to be heard. On its face, the ETA appears to provide ratepayers with "notice" and "opportunity to be heard" through a checklist that must be followed in Section 4. But the process imposed by Section 4 is no more than a clerical exercise to make sure that an application is complete. It does not matter what ratepayer defenses or evidence are presented – the outcome, regardless of imprudence and unfairness to ratepayers will not change.[16]

[16] In *Stow Mun. Elec. Dept. v. Department of Public Utilities*, 426 Mass. 341, 688 N.E.2d 1337 (1997), the Supreme Judicial Court of Massachusetts reversed and remanded a decision of the State's Department of Public Utilities' (DPU) because the record lacked substantial evidence of what the public interest required. The Court held that on remand, the DPU should consider whether stranded costs award would be in accordance with public interest in fair competition, equal treatment, low rates, and other factors relevant to Department's duty to protect ratepayers'

Section 2H 2(d) and 2H3 effectively allow PNM to self-regulate and make any investments it sees fit without allowing the Commission to make a prudence-based adjustment or complete disallowance on behalf of the public interest.[17] It does not matter what claim or defense may be raised by ratepayers to PNM's decisions or the amount it imposes on ratepayers. Under Section 5, costs may not be disallowed, no matter the claim or evidence presented. For example, even if the utility has knowingly and persistently contaminated land, groundwater or streams and seeks to impose any decommissioning costs on ratepayers, ratepayers must pay for *all* clean-up costs. Section 31C.

III. THE UNCONSTITUTIONAL PROVISIONS OF THE ETA IMPROPERLY LIMIT JUDICIAL REVIEW, VIOLATING SEPARATION OF POWERS AND DUE PROCESS

The ETA unduly limits judicial review in two important respects that violate the separation of powers and due process: It provides that any action taken pursuant to a Commission-authorized financing order is valid *per se*, even if that order is later determined to have been unlawful and vacated. To make any sort of

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interests.

[17] 16-00276-UT is an example of the importance of PRC oversight. There, NEE challenged PNM's right to recovery certain SJGS capital expenditures. When PNM changed course and stated that it was no longer economic to continue relying on SJGS, NEE disputed PNM's additional SJGS investment. It was largely successful: The Hearing Examiners amended the Revised Stipulation to permit recovery of only $9.6M of the $46M PNM requested in capital expenditures. Exhibit F, *Revised Order Partially Adopting Certification of Stipulation*, 1/10/2018, p. 6, ¶24.

judicial review more difficult, the ETA specifies a ten-day time limit after a financing order for filing a notice of appeal. Section 8B.

A. The ETA's Guarantee of Valid Action Unconstitutionally Limits Judicial Review

The New Mexico Constitution, art. III, § 1 provides for three distinct departments of government: legislative, executive and 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).

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 . . .."

Section 22 clearly undermines judicial authority because once a bond is issued and the law is changed in any way, the statute prevents the courts from invalidating or otherwise modifying "any action allowed pursuant to that act …" The statute ties the hands of the courts with respect to legal review and prevents them from crafting appropriate remedies. This is an unacceptable usurpation of judicial power, violates the separation of powers, and is unconstitutional.

B. The Ten-Day Limit for Notice of Appeal Violates Separation of Powers Doctrine

Section 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, purports to shorten that period to ten days whenever the issue involves a utility's effort to secure hundreds of millions, and perhaps billions, of dollars in claimed undepreciated investments and decommissioning costs.

IV. THE TITLE OF THE ETA FAILS TO GIVE NOTICE OF THE SUBJECT OF THE BILL AND FAILS TO IDENTIFY THE EXISTING PROVISIONS OF LAW THAT IT AMENDS

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, 18. 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.

The legal test is whether the title of the legislation gives reasonable notice of the subject matter of the body of the act. *State v. Ingalls*, 1913-NMSC-068, 18 N.M. 211, 135 P. 1177. When applying the test, there is a presumption in favor of validity. *Martinez, supra.* at 508, 525 P.2d at 868. Even a bill whose subject is stated in only general terms may well be sufficient to satisfy §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,[18] but makes no mention of other critical subjects,

[18] 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 ISSUED BY THE PUBLIC REGULATION COMMISSION; PROVIDING PROCUREMENT OF REPLACEMENT RESOURCES, INCLUDING LOCATION OF THE REPLACEMENT RESOURCES; AUTHORIZING THE COMMISSION TO

including its alteration of PRC procedures in general or in particular, including its elimination of PRC regulatory authority over recovery of undepreciated investments and decommissioning costs, its impact on rates, its change of the time

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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.

for appeal, much less its serial and extensive amendments of the Public Utility Act itself, which creates a categorical conflict with Art. IV §18, as well as §16, discussed in this section below. In short, by omission of key provisions in the title of the ETA it seems calculated to mislead.

The N.M. Constitution states that if the title of the bill is defective, those provisions of the bill that are not accurately described in the title are void. N.M. Const. art. IV, §16 ("… 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 …").

Petitioners point out that the title includes no reference to recovery of "rates", "undepreciated investments" or "decommissioning" costs or "deregulation". Thus, the title does not provide reasonable notice that the ETA will authorize without the possibility of amendment *any* utility-defined rate increases for undepreciated investments and decommissioning costs.

In addition to the failure of the bill title to provide proper notice about its contents, the bill itself fails to explicitly address amendments to New Mexico's Public Utility Act, which are either effectively repealed or effectively amended as to a claim by a utility to recover from ratepayers the value the utility ascribes to its undepreciated investments or the amount it claims for decommissioning costs. 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).

In addition to the foregoing provisions regarding policy, commission powers, duties and procedures, NMSA § 62-11-1 establishes a thirty day notice of appeal to the Supreme Court from a decision in "any proceeding" before the PRC. Further, the ETA interferes with judicial review by precluding a hearing on a utility's application for recovery of undepreciated investments and

decommissioning costs (other than as to "form") but leaves intact the Public Utility Act's requirement that any appeal from a Commission order must be "on the record." NMSA 1978 § 62-11-3. 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.

The effect of the ETA on the foregoing existing statutory provisions is to amend or repeal them. There can be little doubt that in addition to violating art. IV §16 of our Constitution it violates art. IV, Sec. 18, which 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." N.M. Const. art. IV, § 18.

Whether because the ETA's title is misleading or because the ETA amends the Public Utility Act wholesale as to important consumer protection issues that do not appear in its title, the ETA violates art. IV §§ 16 and 18 of our Constitution.

V. APPLYING THE ETA TO AN EXISTING CASE VIOLATES THE PENDING CASES CLAUSE OF THE N.M. CONSTITUTION

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.* (1999) 127 N.M. 375, 379.

Specifically, the ETA, if applied, would affect the "rights and remedies" of ratepayers in three cases that were pending at the time ETA was signed into law: the recent decision by this Court in *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012, and remanded to the PRC in 15-00261-UT, cited above, and Cases 19-00018-UT and 16-00276-UT. 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.

A. The ETA Would Effectively Nullify the Supreme Court's Imprudence Finding in Case No. S-1-SC-36115

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 PV Nuclear Generating Station] were imprudent was supported by substantial evidence." *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012*, supra* at ¶38. The Court's opinion underscored the need to protect ratepayers and hold them harmless for the imprudent decisions of utility management ("a disallowance should equal the amount of the unreasonable investment"). *Id.,* at ¶40.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 PV nuclear assets. Under Section 31C, the Commission may not disallow *any* cost recovery for PV nuclear. This creates an unacceptable conflict between the PRC's constitutionally mandated duties and the ETA with the effect of altering ratepayer rights and remedies and modifying procedures of a pending case.

B. The ETA Unconstitutionally Affects an Ongoing Proceeding Related to Closure of SJGS Units 1 and 4

On January 10, 2019, the PRC initiated a SJGS abandonment docket under 19-00018-UT. *Order Requesting Response to PNM's December 31, 2018 Verified Compliance Filing.* The PRC found that PNM sought to avoid the "2018 Review" hearing to address the continuation of SJGS and to perform alternative resource portfolios. *Exhibit B,* 1/30 Orde*r,* at pp. 3-4 and pp. 11-12, ¶¶ 5-6 and ¶¶ 17-20.

Rejecting further delay, especially because the "2018 Review" hearing never happened, the PRC ordered PNM to file an "Application with supporting testimony […] addressing all relevant issues." *Id.,* pp. 14-16 ¶B 1-13, C.

On February 27, 2019, PNM appealed the Order by Emergency Petition in *Public Service Company of New Mexico v. New Mexico PRC*, No. S-1-SC-37552. PNM argued that the PRC had exceeded its authority by opening a docket and requiring PNM to file an abandonment application to address a myriad of issues, including how to treat undepreciated assets, decommissioning and reclamation costs, and replacement power.

Subsequent events occurred in short succession: On March 1, 2019, this Court issued a stay and requested responses from parties. On March 22, 2019 Senate Bill 489 – the ETA – was signed into law. On June 26, 2019, the Court denied PNM's Emergency Petition and lifted the stay of the Commission's 1/30 Order.

Then, 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. Relying on the ETA, PNM requested cost recovery of ETA-defined abandonment and other energy transition costs in an estimated amount of approximately $360.1 million, which included $340.3 million for the following:

- Undepreciated investments totaling $283.0 million;
- Costs for job training and severance for San Juan coal plant and coal mine employees totaling $20.0 million;
- Decommissioning and reclamation costs of $28.6 million; and
- Transactional costs for issuing energy transition bonds and

obtaining approval of abandonment of $8.7 million.

Exhibit C, Abandonment Application, p. 5. The ETA, if it applies, would require approval of all the above-stated financial requests, as long as the PRC was satisfied that the application complied with Section 4 of the ETA. Sections 2G, H, S; 4; 5E and 11C.

The adverse effect of the ETA on ratepayers is evident: 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[19]), PNM now may recover 100% under the ETA – no questions asked. Whatever the proper percentage for undepreciated assets, this is an issue that prior to the ETA the PRC had the discretion to decide – not the utility.

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 an action pending action before the Commission. Those provisions should be found

[19] Sixteen months after PNM received its CCN in SJGS, it announced that SJGS was uneconomic. PNM's abrupt about-face throws into question the utility's decision-making process and is relevant to whether PNM's capital investment in SJGS was prudently incurred. *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012*, supra* at ¶32 ("the decision-making process of the utility is properly included in the prudence analysis.") A prudence analysis is relevant evidence in a PRC proceeding to determine the percentage amount of recoverable undepreciated assets to ensure rates are fair, just and reasonable. Pending Case 19-00018-UT sought to delve into these questions. However, the ETA circumvents any analysis and allows PNM to recover 100% of undepreciated assets, at an amount it sets, paid by ratepayers in a non-bypassable charge for the next 25 years.

unconstitutional. *See Edwards v. City of Clovis,* 1980-NMSC-039, ¶7, 94 N.M. 136.

C. The ETA Eliminates Vested Rights Guaranteed in PRC Case No. 16-00276-UT

The vested rights of ratepayers are particularly relevant because 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] . . .."[20] 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.[21]

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."[22]

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. 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

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[20] 16-00276-UT, *Revised Order Partially Adopting Certification of Stipulation*, 1/10/2018, p. 35, B, attached as Exhibit F.
[21] *Id.* at p. 23, ¶66.
[22] *Id*.

for any additional disallowances can be addressed." Case No. S-1-SC-36870, *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, and *Answer Brief of Intervener – Appellee PNM*, 10/12/2018, p. 10. NEE thereafter withdrew its appeal on behalf of ratepayers, in reliance on its right to challenge PNM's imprudent FCPP investment in the next 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, […] 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.

Exhibit E, Direct Testimony and Exhibits of Steven M. Fetter, August 6, 2019, at p. 11.

The PRC agrees:

> 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 determinative: there was evidence 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, inconsistent with the holdings of this Court in *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012,*supra,* ¶¶ 8- 10, 21, 32, 39-42, 47, 52.

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 wasteful expenditures.

VI. UNCONSTITUTIONAL PROVISIONS OF THE ETA ARE SEVERABLE

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 Court should invalidate 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 Petition meet all three *Bradbury* requirements.

First, the defective provisions are unrelated to the enforceable parts and can be distinguished and separated based on subject matter. Petitioners challenge Sections 2G, 2H, 2S, 5, 11C, 22, and 31C related to the abandonment of power plants, specifically the financing of costs through the issuance of bonds. The other parts of the bill relate to different subjects not at issue in this Petition, such as the RPS. *See* ETA, Sections 26-35.

Second, the invalid provisions of the ETA related to the financing of power plant retirements can be severed without impairing the force and effect of the RPS provisions. The RPS is an independent policy and will be implemented separately. Practically speaking, there is no overlap with the plant retirement process. Third, and finally, there is no basis to conclude that the legislature would not have passed

an increase in the RPS had it known the provisions stripping the PRC of its authority over public utilities were unconstitutional.

Because the ETA meets all three requirements of *Bradbury*, Sections 2G, 2H, 2S, 5, 8B, 11C, 22, and 31C may be severed from the ETA and declared unconstitutional without invalidating the entire law.

REQUEST FOR IMMEDIATE STAY

Pursuant to NMSA 1978, § 62-11-6 (1983) Petitioners request an immediate stay of Case No. 19-00018-UT, currently pending before the PRC. The ETA requires that the PRC approve PNM's application to increase electricity rates by $360.1 million plus interest without the ability to amend the utility-determined amount to cover PNM's currently requested undepreciated investments and decommissioning costs at SJGS, or else the financing order will be approved by operation of law. Sections 2H, 2S, 5 E, 11C and 31C. This amount will appear on PNM's customers' bills in a "non-bypassable charge" for twenty-five years. Once the financing order is approved, it cannot be revoked or amended at a later date, except by the utility. Sections 6, 7 A-C. Furthermore, approval of a financing order creates a property interest, and any actions taken pursuant to it are legally valid, even if the order is later vacated by a court. Sections 12 A, 22. Unless the Court grants an immediate stay, PNM will effectively raise rates without Commission oversight, and Petitioners and other ratepayers will be irreparably harmed as a result. Pursuant to NMRA 12-504(D), the Court may grant a request for a stay prior to the filing of responses.

When determining whether to exercise its discretion and grant a stay from an order of an administrative agency, this Court considers whether the applicant has shown: (1) a likelihood that applicant will prevail on the merits of the appeal; (2) a

showing of irreparable harm to applicant unless the stay is granted; (3) evidence that no substantial harm will result to other interested persons; and (4) a showing that no harm will ensue to the public interest. *Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n*, 1986-NMCA-033, ¶ 10, 105 N.M. 708, 710, 736 P.2d 986, 988. "An injury that is irreparable is without adequate remedy at law." *State ex rel. State Highway & Transp. Dept. of N.M. v. City of Sunland Park*, 2000-NMCA-044, ¶ 19, 129 N.M. 151, 157, 3 P.3d 128, 134.

Each of the four factors support a stay in this case. The irreparable harm stems from the very same provisions at issue in this Petition. Failure to issue the stay will result in long-term injury to ratepayers because the ETA leaves consumers with no legal recourse. Once a financing order is approved, either by action or by operation of law, it is irrevocable, it cannot be amended except by the utility, it creates a property interest, and any actions taken pursuant to it are legally valid, even if the order is later vacated by a court. Sections 5 E, 6, 7 A-C, 12 A, 22. Rate increases, approved without the constitutional safeguards of PRC oversight or the exercise of its regulatory authority, will go into effect without any avenue for consumer relief.

Without a stay, Petitioners and other PNM ratepayers will also suffer irreparable harm in the form of economic hardship. New Mexico has one of the

lowest levels of per capita income[23] and one of the highest poverty rates in the country.[24] Adding $360.1 million plus interest to existing electricity rates without regulatory oversight will add to the substantial burden already faced by New Mexico ratepayers.

Furthermore, a stay will not result in substantial harm to other interested persons. PNM and other parties to Case No. 19-00018-UT will not be prejudiced or otherwise harmed because the PRC bifurcated the issues in PNM's application into two cases and extended the time for review in both cases.[25] The financing of abandonment of SJGS and related issues will be addressed in Case No. 19-00018-UT, and replacement power issues in Case No. 19-00195-UT .[26] This Court will have time to address the issues raised in this Petition and dispose of the case without delaying replacement power issues. While energy transition bonds will not take effect until summer 2022, the financing order will issue as a matter of law in April 2020 without the PRC's ability to amend or modify the amount even "to make sure that securitization is better for ratepayers than traditional ratemaking

[23] Per capita income in past 12 months (in 2017 dollars), 2013-2017 is $25,257; Persons in poverty, percent: 19.7%. https://www.census.gov/quickfacts/NM
[24] 2018 Talk Poverty report (New Mexico): Population: 2,044,187 Number in Poverty: 401,755. 19.7% of New Mexican households live at or below the poverty level. Ranked: 49th in the nation, https://talkpoverty.org/state-year-report/new-mexico-2018-report/
[25] *See* Exhibit D, at ¶ 18-19; A.
[26] *Id*.

principles, not worse."[27] If this Court finds that the financing of energy transition bonds are indeed unconstitutional because it allows the utility to "self-regulate",[28] there is plenty of time before summer 2022, in the next legislative sessions, to approve a securitization bill without depriving the PRC of its authority to regulate public utilities.

[27] See Exhibit D, Testimony and Exhibits of Steven M. Fetter, pp. 16-17. ("Probably the most damning is that the Commission is prevented from modifying the financing order in the utility's application.")

[28] *Id.,* p.13 ("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.'")

STATEMENT OF RELIEF SOUGHT

For the foregoing reasons, Petitioners request that this Court:

1. Grant an Immediate Stay of NM PRC Case No. 19-00018-UT to prevent the financing order from issuing by operation of law;
2. Set an expeditious time for the responses and oral argument;
3. Issue a Writ of Mandamus:

   a. Holding the challenged sections of the ETA unconstitutional and void:

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

   b. Mandating the PRC to refuse to enforce the unconstitutional provision, and;

   c. Directing the PRC in its application of the ETA, to revert to the exercise of its traditional regulatory review of all of the matters

dealing with undepreciated investments, abandonment and decommissioning, and the setting of reasonable rates for ratepayers.

Respectfully submitted this 26th day of August 2019,

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VERIFICATION

I, Mariel Nanasi, President of and Attorney for New Energy Economy, being duly sworn upon my oath, state that I have read the attached Verified Petition and the statements contained in the Petition are true and correct to the best of my knowledge, information and belief.

Mariel Nanasi, Esq.