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IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-38247
CITIZENS FOR FAIR RATES AND THE ENVIRONMENT, and NEW ENERGY ECONOMY, INC.,

Appellants,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,
Appellee,

and

PUBLIC SERVICE COMPANY OF NEW MEXICO, WESTERN RESOURCE ADVOCATES, COALITION FOR CLEAN AFFORDABLE ENERGY, and SIERRA CLUB,

Interveners-Appellees.

IN THE MATTER OF PUBLIC SERVICE COMPANY OF NEW MEXICO'S ABANDONMENT OF SAN JUAN GENERATING STATION UNITS 1 AND 4 NMPRC Case No. 19-00018-UT.

APPELLANTS' JOINT BRIEF-IN-CHIEF

Oral Argument Requested

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COMPLIANCE

Citizens for Fair Rates and the Environment (CFRE) and New Energy Economy (NEE) (together, "Appellants") respectfully submit this Brief-In-Chief through which Appellants request this Court to reverse the New Mexico Public Regulation Commission's *Final Order on Request for Issuance of a Financing Order* issued on April 1, 2020 in Case No. 19-00018-UT and the April 6, 2020 *Compliance Filing of Public Service Company of New Mexico with Conforming Amendments to Consolidated Application Pursuant to Final Order*, and in compliance with Rule 12-213(A) and (F) NMRA.

I. INTRODUCTION

This appeal focuses principally on the constitutionality of the Energy Transition Act ("ETA"). This Court, in S-1-SC-38041, ordered the Public Regulatory Commission ("PRC" or "Commission") to apply the newly-passed ETA in acting on Public Service Company of New Mexico's ("PNM") application to impose on ratepayers a charge of $361,000,000 plus interest, which PNM claimed it was entitled to receive under the ETA as compensation for its planned abandonment of the remaining two units of the uneconomic San Juan Generating Station ("SJGS"). **41RP14858, 14865, 14867, 14870, 14918**.

The PRC granted PNM's application without reduction because the ETA removes the PRC's regulatory discretion under the Public Utility Act ("PUA") to evaluate and, if appropriate, reduce or deny PNM's request if it includes imprudently-incurred costs, is unjustified or excessive, unfair to ratepayers, if necessary to achieve just and reasonable rates, or to balance the interests of consumers and investors. The ETA eliminates the ability of the PRC to address and resolve the technical issues that arise in abandonment proceedings and, instead, requires that the PRC accept PNM's amount for cost recovery without modification.[1]

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[1] **41RP14951**. ("Sections 4(F) and 5(F) of the ETA constrain the Commission's ability to adopt the [] limits on recovery. The Commission lacks the authority to impose the limits.")

Appellants appeal, seeking reversal because the relevant provisions of the ETA are unconstitutional on their face or as applied to PNM's generation facilities for the reasons set forth below, including the ETA's unconstitutional and unlawful elimination of regulatory review of a monopoly utility's charges on ratepayers:

A. The ETA violates the N.M. and federal constitutions by permitting PNM to take hundreds of millions of dollars from ratepayers outside the regulatory process, without regulation or any opportunity to assert claims or defenses and without due process. Point 1.

B. N.M. Const. Art. XI §2 cannot be interpreted to allow the legislature to suspend PRC's authority to regulate rates of a monopoly utility. Point 2.

C. The ETA violates separation of powers because it eliminates the quasi-judicial fact-finding process required for ratemaking and eliminates meaningful judicial review of PNM's hundreds of millions of dollars in charges. Point 3.

D. The ETA's title did not identify any of the provisions that make it unconstitutional, thereby additionally violating N.M. Const. Art. IV §§16 and 18. Point 4.

E. The PRC acted unlawfully when it issued the subject financing order without fulfilling the requirements set forth in §62-18-4(B)(5) of the ETA that a "securities firm" provide an opinion on the investment quality of the bonds.

Point 5.

F. The ETA violates N.M. Const. Art. IV §24 because it applies only to PNM and is therefore special legislation. Point 6.

G. Unconstitutional Provisions of the ETA are Severable. Point 7.

H. The ETA violates N.M. Const. Art. IV §34 and Art. II §19 by impairing the obligations of, and vested rights in, pre-existing settlements and the outcomes of prior PRC and Supreme Court decisions involving the same subject matter. Point 8.

II. SUMMARY OF PROCEEDINGS

A. Nature of the Case, Course of Proceedings and Disposition Below

On 1/10/2019, the Commission opened this docket in Case No. 19-00018-UT by its *Order Requesting Response to Public Service Company of New Mexico's Verified Compliance Filing Concerning Continued Use of San Juan Generating Station to Serve New Mexico Customers Pursuant to Paragraph 19 of the Modified Stipulation* approved by the Commission's Final Order in 13-00390-UT. On January 18th, and 22nd, 2019, 11 parties and the PRC's staff filed pleadings responsive to the 1/10/2019 Order.

On 1/30/2019, the Commission issued its *Order Initiating Proceeding on PNM's December 31, 2018 Verified Compliance Filing Concerning Continued Use of and Abandonment of San Juan Generating Station*, thereby initiating a proceeding to address the abandonment of SJGS Units 1 and 4 pursuant to NMSA 1978, §62-9-5 of the PUA "and any other applicable statutes and NMPRC rules[.]" The 1/30/2019 Order required PNM to file an application with supporting testimony by 3/1/2019 in support of its planned abandonment addressing all relevant issues, including, PNM's proposed treatment and financing of undepreciated investments, decommissioning costs and reclamation costs.

On 2/27/2019, PNM filed an Emergency Petition for Writ of Mandamus and Request for Emergency Stay with the New Mexico Supreme Court seeking to

nullify the Commission's 1/30/2019 Order. S-1-SC-37552.

By order issued 3/1/2019, this Court ordered responses to the Petition for Writ by 3/19/2019 while at the same time granting the Request for Emergency Stay. S-1-SC-37552.

On 3/22/2019, Governor Lujan Grisham signed into law Senate Bill 489 ("SB 489"), which included the ETA; the effective date of SB 489 was 6/14/2019.

On 6/26/2019, this Court issued an Order *sua sponte* denying PNM's Petition for Writ and lifted the stay of the Commission's 1/30/2019 Order. S-1-SC-37552.

On 7/1/2019, PNM filed its Consolidated Application for Approvals for the Abandonment, Financing, and Resource Replacement for SJGS pursuant to the ETA ("Application") in a new docket –19-00195-UT, rather than the existing docket in 19-00018-UT. PNM sought approval from the PRC to 1) abandon SJGS Units 1 & 4; and 2) for replacement power resources; and 3) a financing order for $361 million (including $283 million in undepreciated investments) plus unknown interest.

On 1/10/2019, the Commission issued a Corrected Order on Consolidated Application, whereby the Commission bifurcated the review of PNM's Application into two separate proceedings. The abandonment and securitization issues were addressed in this proceeding, 19-00018-UT. The replacement resource issues were

addressed in 19-00195-UT.

On 7/25/2019, the Hearing Examiners issued a Procedural Order and, among other matters, required PNM to file a legal brief by 8/23/2019 regarding the issue of the extent to which N.M. Const. Art. IV, §34 prevents the application of the ETA to the issues in this case, and Responses to PNM's legal brief were to be filed by 10/18/2019. Appellants individually filed legal briefs opposing the application of the ETA, stating that the ETA was unconstitutional on its face or as applied.

On 8/26/2019, Appellants and others filed a Petition For a Writ of Mandamus challenging the constitutionality of certain provisions of the ETA, which this Court denied on 10/1/2019. S-1-SC-37875.

On 12/9/2019, the Speaker of the House Brian Egolf, Governor Lujan Grisham, et al., filed an Emergency Writ of Mandamus to direct the Commission to apply the ETA. S-1-SC-38041.

Evidentiary hearings before the PRC took place from December 10-19, 2019.

The PRC did not rule on the applicability of the ETA to this proceeding.

After hearing and briefing in the case below, on 1/29/2020, this Court issued an Order granting the Emergency Petition in S-1-SC-38041 ordering the Commission to apply the ETA to this proceeding and 19-00195-UT.

On 2/5/2020, the Commission issued a Compliance Order Pursuant to Writ

of Mandamus in this docket and Case No. 19-00195-UT.

On 2/21/2020, the Hearing Examiners issued their *Recommended Decision on Financing Order*, and *Recommended Decision on PNM's Request for Authority to Abandon San Juan Units 1 and 4 and to Recover Non-Securitized Costs*.

On April 1, 2020, the Commission adopted both Orders. Appellants do not appeal Final Order granting abandonment.

On April 10, 2020, CFRE and NEE appealed the *Final Order on Request for Issuance of a Financing Order.*

III. STANDARD OF REVIEW

A. General Legal Standard

The Court reviews a PRC decision to determine whether it is "arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency's authority, or otherwise inconsistent with law, with the burden on the appellant to make this showing [.]"*New Energy Economy v. N.M. Pub. Regulation Comm'n*, 2018-NMSC-024, ¶24, 416 P.3d 277, *citing N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n* (NMIEC), 2007-NMSC-053, ¶ 13, 142 N.M. 533, 168 P.3d 105 (internal quotation marks and citation omitted); *See* NMSA 1978, §62-11-4 (1965). On questions of law, "[w]e will reverse the agency's interpretation of a law if it is unreasonable or unlawful" and generally give little deference to the Commission's construction of statues. *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012, ¶15, 444 P.3d 460.

B. Constitutional Claims

The constitutionality of the Energy Transition Act and PRC's rulings are questions of law which this Court reviews *de novo. Albuquerque Bernalillo Cty. Water Util. Auth. v. N.M. Pub. Regulation Comm'n*, 2010-NMSC-013, ¶ 19, 229 P.3d 494; *U S West Commc'ns, Inc. v. N.M. State Corp. Comm'n*, 1999-NMSC-016, ¶ 15, 127 N.M. 254, 980 P.2d 37 (an agency's rulings with respect to whether

a party was "afforded the process it is due under the Fourteenth Amendment to the United States Constitution are subject to de novo review").

IV. Facts Relevant to Issues on Appeal.

A. Nature of the ETA.

The ETA passed the legislature as part of the 82-page long S.B. 489 (2019 N.M. Laws, Ch. 65) and became a new, 49-page chapter of the PUA.[2]

The ETA gives PNM rights to full cost recovery upon plant abandonment, and establishes mechanisms to facilitate the financing of PNM's interests in two coal-fired generating plants – the remaining Units 1 and 4 of SJGS in 2022 and PNM's interests in the Four Corners Power Plant ("FCPP") in 2031.[3] The ETA does this by permitting PNM to issue bonds [4] i.e., to "securitize," the amount it wants to receive from ratepayers as compensation when it abandons any of the foregoing plants, including what PNM calculates as financing costs,[5] abandonment costs,[6] the undepreciated investments of its interests in coal plants,[7] and its

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[2] **41RP14867.**
[3] *Id.*; NMSA 1978, §62-18-2S.
[4] §62-18-2F.
[5] §62-18-2H(1) and §2K; §2K(4) defines "financing cost," in part, as "any costs, fees and expenses related to … energy transition bonds, the application for a financing order, …or obtaining an order approving abandonment of a qualifying generating facility[.]";§62-18-4A the utility is entitled "to recover all of its energy transition costs[.]"
[6] §62-18-2H(2).
[7] §62-18-2H(2)(c) and (d) and (3).

estimated costs of plant decommissioning and mine reclamation.[8] The ETA converts the amount of PNM's request - $361,000,000 plus an unknown amount of interest as to the remaining SJGS units – into a "non-bypassable" "Energy Transition Charge" ("ETC"),[9] to be paid by PNM customers to retire the bonds over their estimated 25-year life.[10] Additionally, PNM may later recover the difference between the *estimated* costs recovered through the bonds if PNM's actual costs, including, decommissioning, reclamation, etc. are greater than PNM's original requests.[11] "[T]he Commission shall not reduce, impair, postpone or terminate the [ETCs] approved in the financing order" but it can be amended by the utility, to include an "upward adjustment."[12]

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[8] §62-18-2H(2)(a).
[9] §62-18-2G.
[10] §62-18-5H.
[11] §62-18-4B(10); 62-18-5J; §62-18-7B(2).
[12] §62-18-7; §62-18-4B(10). There is no qualifying language in §62-18-7B(2) that guarantees that consumers will only be responsible for "reasonable and prudent" adjustments. If there are any decommissioning or reclamation costs included in the financing order, as there are in PNM's application, and if the "actual costs" for decommissioning or reclamation exceed that by a hundred million dollars more, the plain language of the ETA allows PNM to adjust financing order to include those new, additional costs.
Q. (Nanasi) "What is the maximum principal amount?"
A. (Vice President and Treasurer of PNM Resources, Eden) "So the maximum amount that we have included in this application is $361 million."
Q. "But if there was an adjustment, what's the maximum principal amount that you can ask for?"
A. "Well, there are other sections in the ETA that discusses the amounts that can be filed..."
Q. "Okay. But the law allows you to do it; right?"

The PRC financing order is irrevocable[13] and the Commission may only deny PNM's request for a financing order under narrow, ministerial circumstances.[14] The PRC has no authority to question the amount, to reduce it for inclusion of imprudently-incurred costs or unfairness to ratepayers or carry out its constitutional and statutory duty to balance the interests of investors and ratepayers

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A. "That's correct."
…
Q. "So if there was a need by PNM to increase the amount, is it your testimony that $375 million is a ceiling, or are these other sections in 2(H) allow you to exceed that $375 million if read in conjunction with Section 7?"
A. "Well, again, the Energy Transition Act has laid out the cost that a qualifying utility is able to use or apply in this financing transaction. There are limits on the abandonment cost, but there are other costs associated that you can include in the energy transition cost."
Q. "Can you just please answer my question? Is $375 million an absolute ceiling, or can you go above it?"
A. "So the $375 million has to do with the abandonment cost, and that is the ceiling for the abandonment cost."
Q. "But you could go above the $375 million for non-abandonment costs. Is that your testimony?"
A. "So that's what the Energy Transition Act allows."
31RP10464-67.
…[I]n the event that there are costs … above the $361 million, we would come in for an amended financing order." …[A]s stated in the ETA the proceeds can be used for a very broad purpose. The description is very broad." **31RP10530-1**.

[13] §62-18-7A

[14] Q. "If the ETA's provisions are applied in this case, the PRC's approval will be ministerial only. Essentially, if the requirements of Section 4 are met, then the Commission has no choice but to issue a financing order. Is that correct?"
A. (Eden):"Well, the Energy Transition Act specifies the role of the Commission and what needs to be -- the conclusion needs to be a non-appealable financing order, yes."
31RP10459.

in assessing whether PNM should get all, some or none of its request.[15] The ETA provides: "The 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 §4 of the Energy Transition Act."[16] **41RP14988**.

The financing order allowing the ETCs creates a property interest,[17] and any actions taken pursuant to the order are legally valid, even if it is later determined to have been unlawful, effectively eliminating judicial review.[18] The ETA truncates from thirty to ten days the time for filing a request for rehearing[19] and notice of appeal.[20] In addition to effectively amending the PUA in numerous respects, the

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[15] **41RP14868; 41RP14930**. ("The Hearing Examiners acknowledge Staff's concerns. … however, [] the ETC adjustment process is mandated by the [ETA], and the Commission lacks the authority to modify it.")

[16] §62-18-5E; §62-18-5B and F.

[17] §62-18-2F, I, L, and M; 62-18-4(B)(8); 62-18-5F(5); 62-18-12(A); 62-18-4B(8); 62-18-5F(5) and (7); 62-18-5G; 62-18-5K; §62-18-7A; 62-18-10C; 62-18-12A-E and G; 62-18-13A-C, E-F, and G; 62-18-14A-B and (C)(6) and (9); 62-18-19A; 62-18-20; 62-18-21.

[18] §62-18-22.

[19] §62-18-8A; **41RP14872.** ("Accelerating the special process further, an application for rehearing is deemed denied under Section 8(A) if not acted upon by the Commission within ten calendar days as opposed to the twenty days prescribed in Section 62-10-16 of the Public Utility Act.")

[20] §62-18-8B; **41RP14872.** ("The accelerated process is then wrapped up under Section 8(B) by requiring the aggrieved party to file a notice of appeal … within ten calendar days … as opposed to the thirty days ordinarily allowed for filing notices of appeal of a final order or refusal of an application for rehearing pursuant to NMSA 1978, §62-11-11.")

ETA amended the Renewable Energy Act,[21] Air Quality Control Act,[22] and repealed or amended several other PUA provisions.[23] **41RP14857**.

PNM customers pay the ETCs even if they change energy providers or the Commission determines the charges reflect wasteful, excessive or imprudent costs or are contrary to law.[24]

In addition to applying to the abandonment of PNM's coal plants, §62-18-31C, grants 100% cost recovery, including "any" undepreciated investments and decommissioning, when PNM abandons its gas and nuclear investments if replaced with resources with less or zero carbon emissions.

Although the provision is not without ambiguity, the ETA provides that if the utility decides *against* issuing transition bonds, "the commission [shall not] refuse to allow a qualifying utility to recover energy transition costs in an otherwise permissible fashion."[25]

New Mexico's ETA is unique among the many states enacting securitization laws in the country. Unlike all others, ours removes the regulatory authority's ability to assess the fairness and appropriateness of the amount the

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[21] NMSA 1978, §§ 62-16-1 to -10.
[22] NMSA 1978, § 74-2-5.
[23] NMSA 1978, §§ 62-1-1 to -7, 62-2-1 to -22, 62-3-1 to -5, 62-4-1, 62-6-4 to -28, 62-8-1 to -13-16.
[24] §62-18-2G; 62-18-2H; 62-18-4A-B; 62-18-5; 62-18-11C; 62-18-31C; *PNM v. NMPRC*, 2019-NMSC-012, ¶¶ 21-22.
[25] §62-18-11C.

utility wants to take from ratepayers.[26] **41RP14557-72**. Under our act, whatever the utility wants becomes a non-bypassable charge on ratepayers, leaving them unprotected by the agency charged with their protection. Below, NEE expert witness Steven 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, testified in 19-00018-UT: "[T]he ETA is 'unprecedented,' as it would be the only securitization bill in the country that allows the regulated entity to define and set the amount of recoverable cost for itself, without the benefit of Commission oversight." **3RP746**.[27] Fetter explained:

[T]he ETA [is] a significant departure from other 'securitization' laws in a

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[26] *See, e.g.,* Florida's Title XXVII, Chapter 366 (allowing only "reasonable and prudent nuclear asset recovery costs"), id at (§ 366.95 (2)(c)1.b.); Louisiana's law allowing securitization of a utility's costs associated with storm recovery, La. Stat. Title 45, §§1226C, 1227(15) (nothing in act will "limit, impair or impact the Commission's plenary jurisdiction" over rates and its ability to limit recovery to reasonable costs); W. Va. Code, Chapter 24, Article 2, §24-2-4f (allowing securitization of "actual prudently incurred costs"). There are many other examples that would burden the record. Appellants can supply them if the Court requests.

[27] A recent New York Times op-ed by a utilities reporter cautioned that because there is so much money in play in the transition from fossil fuels to renewable energy, utilities are aggressively campaigning to influence energy transition legislation for their benefit. ("When Utility Money Talks," *New York Times*, Aug. 2, 2020), https://www.nytimes.com/2020/08/02/opinion/utility-corruption-energy.html?smid=em-share. Appellants do not suggest that PNM acted illegally, although PNM would have to agree that its campaign contributions before passage of the ETA were significant. ("The New Mexico Oil and Gas Industry and Its Allies: Oceans of Oil, Oceans of Influence," Common Cause New Mexico and New Mexico Ethics Watch, March 2020), https://www.commoncause.org/new-mexico/resource/the-new-mexico-oil-and-gas-industry-and-its-allies-oceans-of-oil-oceans-of-influence/, pp. 8, 13, 26.

> 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[28] … [The ETA] 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.[29]

Furthermore, of relevance to this appeal is the requirement in §62-18-4(B)(5) that the utility file a memorandum by a "securities firm [] that the proposed issuance [of bonds] satisfies the current published AAA rating or equivalent rating criteria." Below, the PRC allowed PNM to rely on their expert's statement rather than that of his or another firm, and his firm disavowed his opinion. *Final Order on Request for Issuance of a Financing Order*, 4/1/2020, pp. 3-4.

PNM will issue the SJGS bond(s) about two years from now, coinciding with the expiration of the ownership and coal supply agreements on July 1, 2022.[30]

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[28] **3RP744**.

[29] **3RP757**. According to the New Mexico Attorney General's analysis "the commission's constitutional responsibility of regulating public utilities [is compromised] by precluding it from reviewing the substance and appropriateness of the financing order and instead allows the utility to self-regulate." **3RP753**.

[30] RD, p. 11, 21.

B. Facts specific to PNM's generation facilities subject to the ETA.

By its terms, the ETA governs the abandonment of all PNM's plants granted certificates of public convenience and necessity before 2015.[31] In that category are SJGS Units 1 and 4; PNM's interest in FCPP; PNM's interest in PVNGS and six gas plants. Their regulatory histories are important to Appellants' arguments relating to the constitutional powers of the PRC, the requirements that utilities be regulated, due process, vested rights and regulatory compact issues because they show that PNM, having been found to have acted imprudently at the expense of ratepayers in connection with FCPP and PVNGS, and having already agreed to 50% cost recovery for SJGS units 2 and 3, would almost certainly not recover 100% of its claimed abandonment costs if ratepayer interests and protection could be taken into account by the PRC. PNM unquestionably went to the legislature with the ETA to avoid the regulatory process that would have taken these factors into account.[32]

1. San Juan Generating Station (SJGS) Units 1 and 4.

PNM is the operator and a 66.4% owner in SJGS.[33]

In 2015, the PRC addressed the closure of SJGS Units 2 and 3, including PNM's compensation for its "undepreciated investments," PNM's further

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[31] §62-18-2S; §62-18-31C.
[32] **41RP15001**.
[33] 13-00390-UT, *Certification of Stipulation* (11/30/2015), Attachment A.

investment in coal and nuclear for replacement power, and the future of the remaining SJGS Units 1 and 4.[34] PNM's testimony was that SJGS Units 1 and 4 would "continue indefinitely" and its investment in them on behalf of ratepayers would be "cost effective" for twenty-years.[35] After PRC's approval of the stipulation that PNM and some parties reached in December 2015, PNM's Board of Directors determined in February 2017, that PNM could make more money shuttering the plant.[36] PNM came to this conclusion after having invested $145M in new capital expenditures at SJGS.[37]

Under the 2015 Stipulated Settlement, PNM's compensation for its "undepreciated assets" in SJGS Units 2 and 3 would be 50% of its claimed abandonment costs, half of $257,000,000. The Hearing Examiner recommended acceptance because the settlement "reflects a reasonable balancing of the interests of investors and ratepayers."[38] After considering objections, the PRC accepted the settlement, characterizing PNM's 50% recovery as "reasonable, perhaps even generous."[39]

The parties also agreed, in ¶19 of their settlement, that after 7/1/18, but no later than 12/31/18, PNM would initiate a PRC proceeding addressing the future of

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[34] 13-00390-UT, *Final Order*, 12/16/2015.
[35] *Id.* p.19; 27RP, NEE Exhibit 2.
[36] *See* 19-00195-UT, Testimony of PNM Senior VP, 1/27/2020, p. 992.
[37] 19-00018-UT, NEE Exhibit 10.
[38] 13-00390-UT, *Certification of Stipulation* (4/18/2015), pp. 114, 147, ¶8.
[39] 13-00390-UT, *Final Order*, 12/16/2015, p.21, ¶56.

SJGS Units 1 and 4 and prove why its plan for those units was correct. PNM's expert witness testified that his understanding that the 2018 Review hearing would be a "public process."[40] Both the PRC and this Court on appeal identified that portion of the settlement as contributing to the settlement being "a net public benefit" and one basis for approval.[41]

On appeal from the PRC's approval of the Modified Stipulation, NEE argued that the future of the remaining units should have been addressed right away rather than later. PNM told this Court, however, that "there will be ample opportunity to address the continued desirability of SJGS as a generation resource in 2018" pursuant to the procedure in the Settlement. S-1-SC-35697, *Answer Brief of Intervener-Appellee Public Service Company of New Mexico,* 11/2/2016, p.43. This Court accepted PNM's argument.[42]

As this Court is (likely painfully) aware, the future of Units 1 and 4, and the compensation, if any, that PNM would receive from ratepayers in return for their abandonment, became a matter of great controversy because, rather than initiating a

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[40] **28RP8857-60**.

[41] The PRC stated that ¶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" and that "more 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 [.]" 13-00390-UT, *Final Order*, 12/16/2015, p.3, ¶4; *NEE, Inc. v. NMPRC*, 2018-NMSC-024, ¶19(8), 416 P.3d 277, 290.

[42] *NEE, Inc. v. NMPRC*, 2018-NMSC-024, ¶19(8).

proceeding before the PRC as agreed, PNM drafted SB 489 that became the ETA.[43] If the ETA applied to the SJGS, PNM would get 100% of its undepreciated investments as opposed to the 50% that it had agreed to for Units 2 and 3, or the zero recovery that some witnesses testified would be appropriate.[44] All this became irrelevant once this Court ordered the PRC to apply the ETA.[45]

2. Palo Verde Nuclear Generating Station ("PVNGS").

PNM holds a 10.2% interest in PVNGS as a result of mid-1980s sale-and-leaseback transactions with investors.[46] In 2012/2013, PNM elected to extend until 2022/2023 114 megawatts of the leases in PV Unit 1, and purchased 64.1 megawatts in PV Unit 2.[47]

At a rate hearing after the 2012/13 transactions, PNM sought cost recovery for the PVNGS lease extensions and purchase. The Hearing Examiner and the PRC

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[43] *See,* 19-00195-UT, *Recommended Decision on Replacement Resources, Part II*, 6/24/2020, pp. 147.

[44] 19-00018-UT, **35RP**, New Mexico Attorney General ("NMAG") Exhibit 1, p.57. (For instance, NMAG's expert witness Crane: "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.").

[45] **41RP1503-04**; This Court decided S-1-SC-38041 on an incomplete and at times misleading record, and without the benefit of participation by any party opposing application of the ETA, thus hearing the case, effectively, *ex parte.* S-1-SC-38041, *Order Denying Motions to Intervene*, but allowing PNM's intervention, 1/16/2020.

[46] 15-00261-UT, *Corrected Recommended Decision ("CRD")*, 8/15/2016, pp.72-79.

[47] *Id.*

found that PNM had entered into the transactions without any economic analysis or any consideration of alternative resources and accordingly found PNM's investments imprudent. The Hearing Examiner recommended that the costs be excluded until PNM proved that they were the "most cost effective resources among available alternatives."[48]

Of additional significance to this appeal is that the Hearing Examiner, in addressing PNM's further PVNGS investments, cautioned that on top of the initial price tag, ratepayers would have to assume future decommissioning costs.[49] The PRC decided in its *Final Order,* however, to allow the resources in rate base but at a lower book value, not PNM's purchase price.[50] In order to protect ratepayers from the effects of PNM's imprudence, the PRC relieved ratepayers from paying future decommissioning costs. *Id.* [51]

PNM appealed. This Court affirmed the finding of imprudence: "The goal of the consideration of alternatives is, of course, to reasonably protect ratepayers from wasteful expenditures. The failure to reasonably consider alternatives was a fundamental flaw in PNM's decision-making process."[52] This Court held that "a

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[48] 15-00261-UT, *CRD*, 8/15/2016, pp. 108-111.
[49] 15-00261-UT, *CRD*, 8/15/2016, pp. 82-85, 92, 103-106.
[50] 15-00261-UT, *Final Order Partially Adopting Corrected Recommended Decision*, pp.21-39, ¶66-119.
[51] *Id.*, p. 38 ¶117.
[52] *PNM v. NMPRC*, 2019-NMSC-012, ¶31, 38.

disallowance should equal the amount of the unreasonable investment."[53] However, this Court reversed denial of future decommissioning costs, holding that it violated PNM's due process rights because PNM had not been on notice that such a remedy was contemplated.[54] The Court remanded the case for further proceedings.[55]

Under the ETA, however, the Commission is now powerless to follow this Court's direction to hold ratepayers harmless from PNM's imprudence when PNM abandons PVNGS and seeks 100% cost recovery, including all decommissioning costs, so long as the replacement resources qualify it for ETA treatment.[56]

3. Four Corners Power Plant (FCPP).

FCPP is a 51-year-old coal plant, of which PNM owns 13%.[57] In 2013, the coal contracts, partnership and operating agreements and other contracts under which FCPP operated were to expire three years later. El Paso Electric, a part owner, determined to end its ownership and participation.[58] The plant was unreliable and needed significant new capital improvements to continue operation in a safe manner.[59] PNM's documents show that in that same year, PNM believed

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[53] *Id.*, at ¶40, 42, 47.
[54] *Id.*, at ¶63-65.
[55] *Id.*, at ¶134.
[56] §62-18-31C; N.M. Const. Art. IV, §34.
[57] 16-00276-UT, *Certification of Stipulation,* 10/31/2017, pp. 29,40.
[58] *Id.*, pp. 35, 49-51.
[59] *Id.*, pp. 45-47, 54.

that if it also failed to renew its participation in FCPP, its justifications for continuing its ownership and purchasing additional coal shares in the neighboring, SJGS plant would be more thoroughly scrutinized.[60] Accordingly, PNM renewed its participation in all FCPP contracts, including PNM's $580,000,000 share in a take-or-pay coal contract. Further, PNM agreed to fund $148,000,000 in capital improvements to address FCPP's unreliability and to add pollution controls.[61]

In its 2016 rate case, 16-00276-UT, PNM requested cost recovery for all of its FCPP pollution control and capital improvements.[62] NEE and others objected.[63] The Hearing Examiners agreed with the objectors, finding that PNM's decision to continue participating in FCPP without any contemporaneous economic analysis, risk evaluation, or consideration of alternatives, and PNM's related decisions to invest in costly pollution controls and capital improvements had not been prudent.[64] The Hearing Examiners stated that "the appropriate remedy for PNM's imprudence in extending its participation in Four Corners and pursuing the $90.1 million investment in the SCR [Selective Catalytic Reduction] and the $58 million of the additional life-extending capital improvements is the disallowance of all

[60] *Id.*, pp. 42-44, 51.
[61] *Id.*, p. 68.
[62] *Id.*
[63] *Id.*, pp. 19-69.
[64] *Id.*, p. 69.

costs associated with the investment and improvements."[65] In light of a proposed stipulated settlement, however, the Hearing Examiners agreed that a "lesser disallowance might be reasonable in the context of a stipulation," and recommended that instead of its usual return on equity (9.575%), PNM should receive only cost of debt (3+%) on the investments and a further disallowance of a percentage on the capital investments.[66]

The PRC initially adopted the Certification of Stipulation except that it increased sanctions on PNM for imprudently extending the life and investment in FCPP.[67] PNM moved for reconsideration of the imprudence findings and sanctions. In the Commission's 1/10/2018 *Revised Order Partially Adopting Certification of Stipulation* it agreed to remove and defer its imprudence finding, but added a further, small reduction to PNM's revenue.[68] "The issue of PNM's prudence in continuing its participation in FCPP shall be deferred until PNM's next rate case."[69] According to the PRC, deferral would permit consideration of sanctions independent of a settlement process and would provide "a full

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[65] *Id.*, p. 68.
[66] *Id.* At pp. 68, 179-180.
[67] Ordering "a further inquiry into the full scope of potential further disallowances." 16-00276-UT, *Order Partially Adopting Certification of Stipulation,* 12/20/17, p. 33, ¶112.
[68] 16-00276-UT, *Revised Order Partially Adopting Certification of Stipulation*, 1/10/2018, pp. 22-24, 35, ¶¶B-C.
[69] *Id.*

opportunity for the Commission to consider the necessity and scope of the remedy in light of PNM's alleged imprudence."[70]

NEE appealed, but withdrew its appeal after all other parties took the position that the Commission's Order deferring the imprudence/sanctions issue 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. 12.

Thus the issue of imprudence and sanctions was left pending, with PNM facing the possibility, in its next rate case, of a full disallowance of the FCPP costs. *PNM v. NMPRC*, 2019-NMSC-012, ¶¶ 9, 10, 21, 32, 35, 38-42, 47, 52 (full disallowance of imprudently incurred costs a possibility where necessary to protect ratepayers).

However, as the PRC put it, with the ETA in place, it "appears to now eliminate the Commission's power to address PNM's imprudence at FCPP by

[70] 16-00276-UT, *Revised Order Partially Adopting Certification of Stipulation*, 1/10/2018, p. 35, B.

requiring that the expenses at issue be included in amounts securitized in bond offerings.[71]

4. PNM's Gas Plants

The ETA ensures that PNM is fully compensated for "any undepreciated investments or decommissioning costs" for all its pre-2015 plants, which is all of them, regardless of imprudence or negligent operation, reckless pollution or any other mismanagement, thereby insulating the company and its shareholders from financial risks.[72] PNM reported to the U.S. SEC that all of the company's existing natural gas generation resources qualify for recovery of any undepreciated investments and decommissioning costs under the ETA.[73] PNM's Senior VP Darnell confirmed at hearing that the ETA granted PNM this financial protection.[74]

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[71] *Response of New Mexico Public Regulation Commission in Opposition to Verified Petition for Writ of Mandamus Filed by Public Service Company of New Mexico*, S-1-SC-37552, 3/19/2019, p.12, fn. 6.
[72] §62-18-31C
[73] 19-00195-UT, TR., 1/27/2020, pp. 987-989. NEE Exhibit #30 (PNM Letter to U.S. Securities and Exchange Commission ("SEC"), 1/10/2020.
[74] *Id.*

V. ARGUMENT

Point 1: By Permitting PNM To Take Whatever It Wishes From Ratepayers when It Abandons Its Uneconomic Resources, the ETA violates the New Mexico Constitution, Existing PUA Statutes, Ratepayers' Right To Reasonable Rates, Due Process Rights and the Regulatory Compact By Which An Electric Monopoly May Exist.

A. The Constitutional, Statutory and Regulatory Framework for Setting Rates.

Our Constitution creates the PRC and provides that it "shall have responsibility for regulating public utilities…" N.M. Const. Art. XI §§1, 2.

Central to this appeal is the law relating to the setting of rates and the rights of ratepayers. It is logical and straightforward and begins with the policy that underlies all utility regulation. "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. *See also,* NMSA 1978 §62-8-1. "Rates" include "every rate, tariff, charge or other compensation for utility service…" NMSA 1978, §62-3-3 H.

"The Commission has **the general and exclusive** power to regulate a public utility's rates under NMSA 1978, Section 62-6-4(A) (2003)." *PNM v. PRC,* 2019-NMSC-012, ¶8-11. (Emphasis supplied.) "The Commission has the obligation to ensure that 'every rate made, demanded or received by any public utility [is] just and reasonable.' NMSA 1978, §62-8-1 (1941)." "[T]he utility seeking an increase

in rates bears the burden of demonstrating that the increased rate is just and reasonable" and rate setting may not be arbitrary. *PNM v. NMPRC*, 2019-NMSC-012, ¶¶9, 26, *and see, Otero County Elec. Co-op., Inc.*, 1989-NMSC-033, ¶13, 108 N.M. 462, 774 P.2d 1050, citing, *New Mexico Indus. Energy Consumers v. New Mexico Pub. Serv. Comm'n*, 104 N.M. 565, 569, 725 P.2d 244, 248-250 (1986) (New Mexico Supreme Court construes statute broadly governing valuation of properties by the Commission in setting rates).

Rates may only be the product of regulation. "[R]egulation protects a utility's customers. *Because it is a monopoly the utility must be regulated* so that it cannot take advantage of its position or its customers." *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. (Emphasis supplied.) This rule is of long standing because it is self-evident that "without regulation, utility companies could unilaterally set rates." *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 601 (1944) (internal citation omitted).

As this Court has held, setting rates and determining whether they are just and reasonable implicates both questions of fact and questions of law. See, e.g., *PNM v. PRC*, 2019-NMSC-012, ¶13. Although setting a particular rate is quasi-legislative, the question of whether a rate is just and reasonable is "a question of fact for the agency to decide." *Texas Ass'n of Long Distance Tel. Companies*

(TEXALTEL) v. Pub. Util. Comm'n of Texas, 798 S.W.2d 875, 887 (Tex. App. 1990), writ denied (Mar. 20, 1991).

The process of arriving at a just and reasonable rate requires that the regulatory authority balance competing interests. The regulatory authority must "set utility rates that are evidence based, cost based, and utility specific…[and] must balance investors' interests against ratepayers' interests when determining whether a utility rate is just and reasonable." *New Mexico Atty. Gen. v. N.M. Pub. Regulation Comm'n*, 2013-NMSC-042, ¶ 16, 309 P.3d 89, 95. The regulating authority is not bound to a particular formula. To be just and reasonable the rate must be "within a zone of reasonableness…between utility confiscation and ratepayer extortion." *Attorney General v. PRC*, 2011-NMSC-034, ¶13, 150 N.M. 174, 258 P. 3d 453, 457.

As the D.C. Circuit explained in reviewing a rate order, "courts must determine whether or not the end result of that order constitutes a reasonable balancing, based on factual findings, of the investor interest in maintaining financial integrity and access to capital markets and the consumer interest in being charged non-exploitative rates." *Jersey Cent. Power & Light Co. v. F.E.R.C.*, 810 F.2d 1168, 1177–78 (D.C. Cir. 1987)

The finding of facts and application of discretion by the regulatory authority is how the ratepayers are protected from the monopoly in ratemaking, including the

related issue of utility property valuation. See, e.g. *Hobbs Gas Co. v. New Mexico PRC*, 1980-NMSC-005, ¶ 4, 94 N.M. 731, 733, 616 P.2d 1116, 1118.

These principles explain why New Mexico's securitization law, the ETA, is a surprising, solitary outlier among the many existing securitization laws: It is the only one in which the amounts the utility receives as compensation for abandoning uneconomic plants is unregulated and left to the utility to determine, with resulting charges against ratepayers in the hundreds of millions and perhaps billions of dollars that PNM will obtain without regulatory review or approval and without having to prove that the resulting charges are just and reasonable. **3RP740-785**; **41RP14553-68**; **13RP3193-3240**, *passim*.

B. Ratepayers' Rights.

New Mexico statutory and decisional law not only requires that what a utility is permitted to charge be just and reasonable, it assures that ratepayers can protect themselves from charges that are excessive. NMSA 1978, §62-10-1.

Under the PUA's §62-10-1 "any person or party affected" by a rate may file a complaint with the Commission, which determines probable cause and holds a hearing if required, with notice to affected parties.

The PRC's rules allow ratepayers to participate as parties before the PRC in its hearings, including its rate hearings.[75]

[75] § 1.2.2.23(A) NMAC.

Under the PUA, the Attorney General is required to protect ratepayers and the public in proceedings before the PRC.[76]

Finally, if the foregoing statutes and rules did not suffice, this Court requires the PRC to provide ratepayers with due process of law when a utility seeks a rate increase. In *Alb. Bernalillo Co. Water Util. Auth. v. NMPRC*, 2010-NMSC-013, ¶ 21, 148 N.M. 21, 32, 229 P.3d 494, 505, the Water Utility Authority, a ratepayer, complained that it had not received notice consistent with due process. This Court explained:

> 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.

Id.,[77] (citations omitted). The ETA eliminates all protections of ratepayers as to abandonment costs.

C. The ETA's impacts.

Like all other courts, this Court has stated that if a utility is a monopoly it must be regulated.[78] The ETA removes any regulation from PNM's undepreciated investments and decommissioning costs, imposing hundreds of millions of dollars,

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[76] NMSA 1978, §8-5-17.

[77] Affirmed again in *PNM v. NMPRC*, 2019-NMSC-012, ¶63.

[78] *Id.*, ¶¶8-11; *Blake v. Pub. Serv. Co. of New Mexico*, 2004-NMCA-002, ¶ 22, 134 N.M. 789, 795, 82 P.3d 960, 966 ("Our Constitution mandates that a public regulation commission set utility rates."). See also, *PacifiCorp v. Pub. Serv. Comm'n of Wyo.*, 2004 WY 164, ¶ 28, 103 P.3d 862, 871 (Wyo. 2004) ("regulatory compact", which is the fundamental basis for utility regulation, requires that rates be regulated to ensure fair rates).

and perhaps billions if PVNGS's decommissioning costs skyrocket, on ratepayers without regulation.

The PUA states, and this Court has held, that ratemaking can only be sustained if it results in "fair and just rates." The ETA removes any consideration of fairness and justness.

This Court has held that ratemaking cannot be arbitrary.[79] The ETA's ratemaking, which allows PNM to name the charges that its customers will have to pay when PNM abandons a plant, gives PNM what is anathema to utility law; the right to name its price. A coin flip would be less arbitrary because ratepayers would have at least a fifty-fifty chance of protecting themselves.

This Court has held, and the PUA supports, that interested parties in rate cases must be provided an opportunity to be heard and present any claim or defense. The ETA eliminates those due process protections, allowing the utility to get what it wants despite any evidence presented at hearing.

This Court has held that ratemaking necessarily involves a complex process of fact-finding and exercise of regulatory discretion.[80] The ETA dispenses with fact-finding and the application of that inquiry in abandonment proceedings.

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[79] *Id.*

[80] *NEE, Inc. v. NMPRC*, 2018-NMSC-024, ¶25, 416 P.3d 277. ("When fact finding is necessarily predicated on matters requiring expertise, our deference is substantial.")

The law requires that in an abandonment proceeding a utility can recover only those costs that it prudently incurred, and that in setting the amount of recovery, the interests of the shareholders and ratepayers be balanced.[81] Under the ETA, there is no evidence that can alter PNM's requested amount. For units 2 and 3 of the SJGS, when this process was followed, PNM was happy to accept 50% of its claimed costs and urged this Court to approve that settlement. Under the ETA, for Units 1 and 4 of the same plant, PNM gets 100%, without having to prove a thing.

All other states' securitization laws leave to the regulatory authorities the determination of charges to be imposed on ratepayers for undepreciated investments and decommissioning. The ETA is the only one that takes that calculation away from the regulatory authority and, upending utility regulation, gives it to the utility itself. **3RP740-785**; **41RP14553-68**.

Point 2: N.M. Const. Art.XI §2 Does not Provide a Basis for ETA Constitutionality.

In the writ proceeding before this Court last January, PNM told this Court: "Article XI, Section 2 of the New Mexico Constitution specifically requires that the Respondents regulate utilities in the manner prescribed by the Legislature." *PNM Brief in Support of Petition for Writ of Mandamus*, pp. 5, 7. On this basis, PNM sought to explain why the legislature was free, in effect, to deregulate PNM's

[81] *PNM v. NMPRC*, 2019-NMSC-012, ¶¶ 10, 21, 29-32.

charges when it abandoned inefficient and wasteful plants. In neither PNM's nor the Governor et al's argument to this Court, however, did the entire provision appear. Rather, they included only the last phrase without what preceded it. Here is the provision in full:

> 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 supplied.) The Petitioners asked this Court to uncritically assume that the final phrase of the provision modifies all that precedes it and not just the phrase that immediately precedes it, of which it is a part.

They are wrong for two reasons: The first is logic and the second is an accepted principle of statutory construction. It makes sense that in drafting the proposed amendment to our Constitution, the legislature would leave an avenue open for it to assign to the PRC additional types of public service companies to regulate, rather than having to amend the constitution every time it wanted to add one. It is illogical to assume from that there was an intent to allow a utility to go to the legislature with a proposed law that would let it escape regulatory review. The PRC "shall have responsibility" for regulating utilities, but shall not have that responsibility if the legislature is persuaded by a regulated utility that it should be allowed to charge what it wishes? At the very least, this is an interpretation that

makes little sense and conflicts with all of the legal principles set forth in Point I, *supra*.

Moreover, there is a settled rule of statutory construction that secures a logical interpretation of the provision: The final phrase in a paragraph only modifies the immediately preceding phrase unless another intention is apparent. Thus the final phrase in §2 modifies only the immediately preceding phrase, making the full final phrase the logical "and other public service companies as the legislature shall provide."

"[R]elative and qualifying words, phrases, and clauses are to be applied to the words or phrase immediately preceding, and are not to be construed as extending to or including others more remote." *Chavez v. Am. Life & Cas. Ins. Co. of Fargo N.D.*, 1994-NMSC-037, ¶ 7, 117 N.M. 393, 395, 872 P.2d 366, 368. This is the "doctrine of the last antecedent." See also, *Rogers v. Allied Mut. Inc. Co.*, 520 N.W.2d 614,617 (S.D. 1994); (Doctrine of the Last Antecedent "is the general rule of statutory as well as grammatical construction that a modifying clause is confined to the last antecedent unless there is something in the subject matter or dominant purpose which requires a different interpretation."); *In re App of Consumers Energy Reconciliation of 2010 Costs*, 874 N.W.2d 136, 141 (Mich. App. 2015) (doctrine provides that "last antecedent is 'the last *word, phrase, or*

clause that can be made an antecedent *without impairing the meaning of the sentence.*'"). (Emphasis supplied.)

The public passed a constitutional amendment to create the PRC and require that it regulate electric utilities; it is illogical to believe that the amendment included a provision that the legislature could decide on its own to deregulate the heart of an agency's responsibility to regulate monopolies: the setting of rates.[82] There is no reason to interpret §2 as PNM thinks it should be, particularly in light of the sweeping amendments PNM's interpretation will make to the PUA and existing decisional law.

Point 3: The ETA violates the doctrine of separation of powers by eliminating the quasi-judicial fact-finding process and exercise of discretion that are requirements of lawful ratemaking.

The ETA unduly limits judicial review in two important respects that violate the separation of powers and due process. This Court has described the distinction between a properly judicial function and a properly legislative function as follows:

> [L]egislative action reflects public policy relating to matters of a permanent or general character, is not usually restricted to identifiable persons or groups, and is usually prospective; quasi-judicial action, on the other hand, generally involves a determination of the rights, duties, or obligations of specific individuals on the basis of the application of currently existing legal standards or policy considerations of past or present facts developed at a

[82] Just and reasonable rate determinations are "the heart" of the regulatory system. *State ex rel. Sandel v. New Mexico Public Utility Commission*, 1999–NMSC–019, ¶18, 127 N.M. 272, 980 P.2d 55.

> hearing conducted for the purpose of resolving the particular interest in question.

Albuquerque Commons P'ship v. City Council of City of Albuquerque, 2008-NMSC-025, ¶ 32, 144 N.M. 99, 109, 184 P.3d 411, 421. What the holding in this case delineates is the role for the Legislature: make policy – adopt the tool of securitization (which allows for a lower interest rate for undepreciated investment recovery) and leave to the PRC's quasi-judicial fact-finding process the determination of what amount is just and reasonable and, therefore, what amount should be securitized. The legislature sets climate policy in the Renewable Energy Act and leaves the technical implementation (resource types, megawatts necessary, reliability metrics, etc.) and associated costs to the PRC. **41RP14869**. Appellants do not oppose securitization just the elimination of regulatory oversight of the amount and, therefore, consumer protections.

A. The ETA's Guarantees of Continuing Validity of Financing Orders Unconstitutionally Limits Judicial Review

N.M. Const. 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 certain types of cases by administrative agencies to be constitutional because they provide ultimate access to the courts. *See e.g., Wylie Corp. v. Mowrer*, 1986-NMSC-075, 104 NM 751, 753, 726 P.2d 1381, 383. "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*, 1994-NMSC-096, ¶ 46, 118 N.M. 470, 484, 882 P.2d 511, 525.

The ETA eliminates judicial review by preventing courts from crafting any meaningful remedies to a utility's demand for cost recovery of imprudently incurred costs.[83] Under the ETA the charges cannot be undone and will remain "non-bypassable." This usurps judicial power, violates the separation of powers, and is unconstitutional. Below, many lawyers spent countless hours of effort and resources challenging with evidence, PNM's $361M request, but for naught because the ETA imposed on the process, gave PNM what it wanted regardless of evidence of unfairness to ratepayers.[84] If the ETA is applied there is no meaningful opportunity for any ratepayer organization or individual ratepayers to present a claim or defense. The ETA thus not only denies the ratepayers their due process

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[83] *New Mexico Indus. Energy Consumers v. New Mexico Public Service Commission*, 111 N.M. 622, 808 P.2d 592, 603-4, (1991) ("the Commission has not yet determined if and to what extent investment in any plant is imprudent, or how imprudence would effect its rate treatment," assuming that the prudence determination is for the PRC to decide *before* there is an increase in rates.)

[84] The Hearing Examiners recommend giving PNM 100% of its financial request, $361M, in it's financing order plus an unknown interest rate and the ability to upwardly adjust the financing order based on "actual costs" expended because they were constrained by the ETA. ("[T]he ETA constrain[s] the Commission's ability to adopt limits on recovery.") **41RP14961**.

and statutory rights to mount defenses to PNM's charges, it removes their validity from review by the courts. *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 20-25, 125 N.M. 343, 961 P.2d 768.

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

Under the ETA 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.[85] To make even the limited judicial review more difficult, the ETA specifies a ten-day time limit after a financing order is approved for filing a request for rehearing and notice of appeal. §62-18-8A-B. The time period for notice of appeal is an unconstitutional limit on judicial review and violates N.M. Const. Art. III, §1.

Point 4: The Title of the Act that Included the ETA Violated N.M. Const. Art. IV §§16 and 18.

Art. IV, §16 of the New Mexico Constitution provides, in pertinent part:

> 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.

This Court has explained how the title of an act is measured for compliance with §16: "Does the title fairly give such reasonable notice of the subject-matter of the statute itself as to prevent the mischief intended to be guarded against?" *State v.*

[85] §62-18-22.

Ingalls, 18 N.M. 211, 135 P. 1177 (1913). In *City of Albuquerque v. State*, 1984-NMSC-113,102 N.M. 38, 609 P.2d 1032 the Court found that the title was misleading "because the act itself went far beyond anything revealed by the title[.]"

This is the Title of SB 489:

> 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 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 FRANCHISE AND CERTAIN OTHER GOVERNMENT FEES; 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; CREATING THE ENERGY TRANSITION ECONOMIC DEVELOPMENT ASSISTANCE FUND AND THE ENERGY TRANSITION DISPLACED WORKER ASSISTANCE FUND; AMENDING CERTAIN DEFINITIONS IN THE RENEWABLE ENERGY ACT; REQUIRING THE HIRING OF APPRENTICES FOR THE CONSTRUCTION OF FACILITIES THAT PRODUCE OR PROVIDE ELECTRICITY; REQUIRING THE ENVIRONMENTAL IMPROVEMENT BOARD TO PROMULGATE RULES TO LIMIT CARBON DIOXIDE EMISSIONS OF CERTAIN ELECTRIC GENERATING FACILITIES.

In addition to requiring reasonable notice of what is in an act's title, Art. IV, §16 also includes the prevention of "hodge-podge or log-rolling legislation, surprise or fraud on the legislature," and the enactment of legislation "not fairly apprising the people of the subjects of legislation so that they would have no opportunity to be heard on the subject." The Supreme Court of Iowa identified the motivation for provisions like §16: "It surfaced as a constitutional requirement as a result of public demand derived from a prevailing sense that bills giving substantial grants to private parties were often 'smuggled through the legislature under an innocent and deceptive title." *Godfrey v. State*, 752 N.W.2d 413, 427 (Iowa 2008). The ETA was just such a bill.

This lengthy title dwells in detail on three topics that it could easily have identified succinctly instead of in the confusing, scattershot manner that the bill's authors chose: 1) transition to renewable energy; 2) utilization of securitization as a financing mechanism, and 3) assistance to communities affected by the transition. Although it alludes to the ETA by name, it doesn't say what the ETA accomplishes, even in general terms, and it fails to alert the reader to the fact that PNM is being given the right to arbitrarily impose enormous charges on ratepayers; that the PRC's authority to regulate PNM's charges is being removed as to the abandonment and decommissioning costs *of all its uneconomic plants*; that judicial review of the propriety of the charges is being eliminated and that

numerous provisions of the PUA, as well as the Constitutional requirement that the PRC regulate all electric utilities in the state, which this Court has held are exclusive and plenary, are amended to eliminate their applicability to PNM's demands for compensation from its customers for plant abandonments.

The title of the ETA fails to alert the reader that it was effectively amending the PUA *across the board* insofar as it controlled the treatment of PNM's plant abandonment charges, which the PUA had always covered and which due process, the regulatory compact, N.M. Const. Art. XI §2 and fundamental precepts of utility law require.

In addition to the title's failure to allude to any of the costs that the Act will impose on ratepayers, its elimination of regulatory involvement, its restrictions on judicial review and its sweeping amendment of the PUA, the title is also notable for its mention that it is amending "certain definitions" in the Renewable Energy Act. Thus its authors had no unwillingness to mention benign effects of the act, but foreswore any mention of the alteration of the PUA, its deregulating effect and its implications for ratepayers. New Mexico courts have held that when the title of a legislative act identifies statutes that are to be amended by but fails to alert the reader that another statute is amended by the act, there is a clear violation of Art. IV, §16.

> The New Mexico courts have consistently held that when the title of a legislative act specifically pinpoints statutory sections which are to be

> amended by the act, but the title fails to set out a wholly unrelated statutory section which also is amended by the act, there is a clear violation of Article IV, Section 16.

City of Albuquerque v. State, 1984-NMSC-113, ¶ 5.

The ETA's title explicitly informs the reader that it "amends certain definitions in the Renewable Energy Act," but includes no reference to recovery of "rates", "undepreciated investments" or "decommissioning" costs, "nuclear" or "deregulation", which the ETA accomplishes almost surreptitiously by withdrawing from the reach of the PRC all charges related to abandonment costs, which are and will be enormous.

Hearing testimony confirms this claim:

> Vice President and Treasurer of PNM Resources, Eden, testified:
> Q. "The ETA has a long title, but doesn't reference its amendment to the Public Utility Act, and specifically 62-6-6, the requirement to file a separate financing application. Is that also correct?"
> A. "Yes."[86]

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); §62-3-4(A); (PRC "shall have general and exclusive power and jurisdiction to regulate and

[86] 19-00018-UT, TR., 12/13/2019, Eden, p. 960.

supervise every public utility in respect to its rates…and its securities…"); §62-2-6(A) (Utility issuance of securities is subject to supervision and control of PRC); §62-6-7 (PRC to hold hearings on utility securities to determine if issuance is consistent with the public interest, etc.); §62-6-14 (valuing utility property requires utility to provide all information PRC and public need to investigate the value ascribed by utility); §62-8-1 (rates made or demanded by utility "shall be just and reasonable."); §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); §2-10-2 (PRC may conduct "such other hearings as may be required in the administration of its duties"); §62-10-5 (PRC must give "at least twenty days' notice" of all its hearings at which any matters determined).

What would legislators, the public or the press have said about the ETA if the title disclosed that PNM's abandonment costs, including nuclear decommissioning costs, were deregulated?

Point 5: When the PRC approved PNM's financing order it failed to require compliance with §62-18-4(b)(5).

The PRC erred in approving PNM's application for a financing order because PNM did not satisfy the ETA's requirement that the applicant for a financing order provide a memorandum by a "securities firm [] that the proposed issuance satisfies the current published AAA rating or equivalent rating criteria."

§62-18-4(b)(5).[87] Instead, of meeting this requirement, PNM provided the opinion of an individual employed by such a firm. His firm, however, explicitly informed the PRC that the opinion was the individual's and *not* the opinion of the firm. "The views expressed herein are solely those of the author(s) and may differ from the views of other Representatives of Guggenheim securities."[88]

The PRC agreed not to enforce the mandate specified in section §62-18-4(b)(5) by its terms accepting PNM's argument that because the statement from the firm was a standard disclaimer, it could be ignored and the broker's opinion accepted. **44RP14948-50.** The ETA is clear, however: The memorandum must be from the firm; it does not a make an allowance for a "standard disclaimer". *State v. Oliver*, 2020-NMSC-002, ¶19, 456 P.3d 1065, 1073 (court cannot use "interpretation" to rewrite unambiguous terms of a statute); *Gammon v. Ebasco Corporation*, 74 N.M. 789, 399 P.2d 279, 280. (1965) (language of the statute is clear and unambiguous in its requirement.)

Point 6: The ETA violates N.M. Const. Art. IV §24, because it is special legislation.

ETA's relevant provisions apply only to PNM; The Hearing Examiners found that "[t]he San Juan and Four Corners stations are the only facilities in New

[87] ETA Section 5E states that a financing order must comply with the requirements of Section 4 to be approved. §62-18-5 E.
[88] PNM Exhibit CNA-4 p. 15.

Mexico that satisfy the ETA's definition of 'qualifying generating facility,'" [89] which means it is special legislation. NMSA 1978, §62-18-2S *Thompson v. McKinley Cty.*, 1991-NMSC-076, ¶ 5, 112 N.M. 425, 427, 816 P.2d 494, 496 (defining "special legislation").

Point 7: Unconstitutional Provisions of the ETA are Severable.

The unconstitutional and invalid provisions of the ETA related to the financing of power plant retirements can be severed without impairing the force and effect of whole sections of S.B. 489 that are constitutional, *ie.*, amendments to the Renewable Energy Act ("REA"), and the Air Quality Control Act ("AQCA"), primarily §§26-35. Under *Bradbury & Stamm Const. Co. v. Bureau of Revenue*, 1962-NMSC-078, ¶7, 70 N.M. 226, 230–31, 372 P.2d 808, 811, the enforceable parts can be left in tact and can be distinguished and separated based on subject matter. The REA and AQCA are independent policies and will be implemented separately by different administrative agencies.

Point 8: The ETA violates N.M. Const. Art. II §19, which forbids impairing the obligations of contracts and N.M. Const. Art. IV §34, which forbids impairing the vested rights of parties.

The ETA cannot nullify a stipulated settlement relied upon and upheld by this Court because it would constitute legislative interference with ratepayers'

[89] 19-00195-UT, *Recommended Decision on Replacement Resources, Part II*, 6/24/2020, p.11, fn. 18, *Final Order*, adopted unanimously, 7/29/2020.

vested rights, or alter a pending case, in violation of Art. IV §34,[90] or it would impair a contractual settlement in violation of Art. II §19. To hold otherwise would usurp the judicial function. *Thorpe v. King*, 248 Ind. 283, 285, 227 N.E.2d 169, 170 (1967).

As explained above at pp. 15-25, PNM ratepayers had vested rights in three matters which the ETA extinguishes; all were established before the ETA became law.[91] They include a contractual (settlement) agreement,[92] a determination by this Court that requires the PRC to hold ratepayers harmless for PNM's imprudence in PVNGS investments and to fashion an appropriate remedy, and a decision by the PRC to address in future how to protect ratepayers from PNM's imprudence in extending the life of FCPP.[93]

a. SJGS - PNM agreed to hold a 2018 Review Hearing (¶19 of the modified stipulation) when it entered into the 2015 settlement regarding the future

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[90] *Stockard v. Hamilton,* 1919-NMSC-018, ¶9, 25 N.M. 240, 242-245, 180 P. 294, 295; quoted with approval in *U.S. West Communications, Inc. v. N.M. Pub. Regulation Commission,* 1999-NMSC- 024, ¶13, 127 N.M. 375, 379, 981 P.2d 789, 793. *See, also,* 19-00159-UT, *Recommended Decision*, 12/2/2019, p. 42.

[91] N.M. Const. Art. IV, §34.

[92] *Jones v. United Minerals Corp.*, 1979-NMSC-103, 93 N.M. 706, 604 P.2d 1240 (settlement agreement is an enforceable contract).

[93] *See, In re Held Orders of U S W. Communications, Inc.*, 1999-NMSC-024, ¶13, 127 N.M. 375, 379, 981 P.2d 789, 793 (holding that Art. IV, §34 applies to administrative proceedings); *Edwards v. City of Clovis*, 1980-NMSC-039, ¶7, 94 N.M. 136. ("City cannot, by enacting an ordinance, affect or change what would be the result of a pending action before the City Council or Commission or the result of a pending case in court[.]")

of SJGS. *NEE v. NMPRC*, 2018-NMSC-024. (affirming PRC's finding of "net public benefit" for the 2018 Review Hearing.[94]). The ETA relieved PNM of its promise.

b. PVNGS - the PRC found PNM had been imprudent when it conducted no financial analysis before acquiring nuclear interests with associated costly capital expenditures and decommissioning risk. 15-00261-UT. In the ensuing appeal, *PNM v. NMPRC,* 2019- NMSC-012, 444 P.3d 460, this Court affirmed PRC's finding of imprudence, overturned PRC's remedy for lack of notice to PNM that it was under contemplation, and remanded to the PRC to provide PNM with due process and reconsider the remedy. The ETA gives PNM 100% for undepreciated investments and decommissioning costs regardless of its established imprudence.

c. FCPP – The PRC deferred "imprudence" ruling on PNM's FCPP investments, and potential associated cost disallowance until PNM's next rate case, after PNM failed to perform financial analysis or comparison of resource alternatives. 16-00276-UT and its ensuing appeal, S-1-SC-36870 (appeal withdrawn). The ETA relieves PNM of any reduction in cost recovery as a result of

[94] *See*, lengthy discussion about the "value" of the 2018 Review, 13-00390-UT, *Certification of Stipulation*, 11/30/2015, pp. 35-48, and by the PRC, *Final Order*, 12/16/2015, pp. 2-5, ¶2-9 (PNM has the affirmative "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 [] evidence[.]" at ¶4.)

its imprudence.

When this Court affirmed PRC's denial of cost recovery for balanced draft expenditures it held: "PNM's argument ignores that it agreed in Case No. 13-00390-UT that it would bear the burden of affirmatively demonstrating the prudence of the balance draft costs in its general rate case. Given this prior stipulation …it was lawful for the Commission to reject PNM's argument that the balanced draft costs were entitled to a presumption of prudence."). *PNM v. NMPRC*, 2019-NMSC-012, ¶88. That finding concerned the disallowance of one capital expenditure (more than $50M of imprudent expenses).

In these three instances cited above PNM invested in entire plants when they were uneconomic for ratepayers but a boon for investors, and was found to have been imprudent (with associated pending disallowances worth hundreds of millions of dollars). PNM dealt with these problems by going to the legislature to deregulate the abandonment proceedings and their associated costs, via the ETA, effectively eliminating prior agreements and undoing PRC and Supreme Court decisions. Additionally, the ETA undoes this Court's insistence that a utility's investments must be prudent: "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." *Id.*, ¶¶21, 29-32.

VI. STATEMENT OF RELIEF SOUGHT

For the foregoing reasons, Appellants request that this Court:

1. Declare that the following provisions of the ETA are unconstitutional and void:

- §2H (1)-(3);
- §2S;
- §4;
- §5;
- §7;
- §8;
- §11B&C;
- §22; and
- §31C.

2. Remand the case to the PRC to rule on the financial issues regarding SJGS abandonment, based on the evidence presented in 19-00018-UT.

Respectfully submitted this 17th day of August, 2020.

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CERTIFICATE OF SERVICE

I CERTIFY that on this day I sent, via email only, to the parties listed below a true and correct copy of **APPELLANTS' JOINT BRIEF-IN-CHIEF.**

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DATED: August 17, 2020.

NEW ENERGY ECONOMY

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