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' CONSOLIDATED REPLY 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 Consolidated Reply Brief 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 contains 5,997 words, using Times New Roman typeface. The New Mexico Supreme Court clerk informed counsel for New Energy Economy that a Court Order granting Appellants' unopposed Motion for Expansion of Word Count to 6,000 words would be forthcoming.

APPELLANTS' RESPONSE TO PNM'S REQUEST FOR EXPEDITIOUS ORAL ARGUMENT

In front of its Answer Brief, PNM appends a request that this Court "hear and determine the appeal of this case as expeditiously as possible," arguing that this appeal creates uncertainty about "authorizations" granted and "is preventing PNM from releasing substantial funding" for programs "currently being developed" for affected mine workers facing layoffs and to assist local communities. PNM Answer Brief, p. x.

Appellants do not object to this appeal being addressed outside the ordinary course in this Court, but do object to PNM's effort to rush this Court to a decision on matters that are of such economic consequence to ratepayers (and to PNM and its announced purchaser, Avangrid) that they far exceed the money associated with as yet undeveloped programs for job training.

The closure of San Juan Generating Station is almost two years away. The plant will run until then, and PNM is in negotiations with the City of Farmington and an operator who express the intent to keep it running. There is no need to rush funds for job training of uncertain need. The bonds that are central to this proceeding will not be issued until approximately September 2021. The PRC decision in this case permitted PNM to make advance payments, *if it chose to*, if the state agencies involved "inform PNM that the agencies can productively use

the funds prior to the plant's abandonment" and the PRC stated closure is "uncertain." **41RP14949**, *Recommended Decision*, p. 102.

PNM's unsubstantiated claims of urgency are before this Court on the heels of similar claims of emergency that the Hon. Speaker Egolf, et al submitted to this Court, in the Petition for Writ, S-1-SC-38041, as justification for this Court's need to abruptly intervene in the proceeding before the PRC, to which Rep. Egolf et al. were not parties and which resulting in a hurried writ decision based on, for example, a claim that the PRC's hesitancy to immediately apply the ETA was casting a pall on the reputation of bonds that were at the time more than two and a half years away from issuance.

PNM's current effort to rush through this appeal is another manifestation of what the PRC's Hearing Examiners identified, in an opinion regarding the replacement power portion of this PRC case, as the "manipulation of the timing of PNM's [SJGS] abandonment application" to maneuver it under the ETA it was promoting in the legislature. NM PRC Case No. 19-00195-UT, *Recommended Decision on Replacement Resources, Part II*, 6/24/2020, pp. 137-147.

Appellants respectfully submit that in their opinion, PNM's desire that this appeal be immediately accelerated is not about its discretionary pre-funding of undeveloped programs for miners and plant workers who may or may not be out of jobs, but about cementing the high price PNM expects to receive upon sale of itself

to Avangrid, which was in all likelihood driven in substantial part by the increase in PNM's value of the ETA to PNM.

This appeal raises matters of enormous economic importance to ratepayers as well as New Mexico's economy, because both are affected by the rates charged for electricity. Many of PNM's ratepayers are poor and some very poor. A pre-COVID Atlantic Monthly article showed that many people in New Mexico who are very poor must devote from 20 to 50% of their available income to paying their utility bills. See, "Where The Poor Spend More Than Ten Percent of Their Income on Energy", Atlantic Monthly, June 8, 2016. https://www.theatlantic.com/business/archive/2016/06/energy-poverty-low-income-households/486197/. These statistics, in addition to the important constitutional and regulatory issues this appeal involves, make it a matter of great public importance.

In determining whether it should agree to rush this appeal, Appellants respectfully request that this Court take into account the news from November 2nd that PNM is unburdening itself of its 13% interest in Four Corners by having its shareholders *pay* Navajo Transitional Energy Co. $75 million to take it and $22 more million in Navajo Mine reclamation obligations. "Still, PNM will charge customers at least $250 million to recover previous investments in the Four Corners plant. That's allowed under the state's Energy Transition Act[.]"

Albuquerque Journal, Nov. 2, 2020 "It's Official: PNM seeking Four Corners exit in 2024," https://www.abqjournal.com/1513586/its-official-pnm-seeking-four-corners-exit-in-2024.html. This latest ETA-imposed, unregulated impact on ratepayers raises the total, before Palo Verde Nuclear and PNM gas plants are closed, to $610,000,000, plus interest, shifted into rates without regulatory review.

The issues in this case are far too important, both economically and legally, for PNM to be asking that this Court rush to judgment because it wants to pre-fund programs that may or may not become necessary in the future.

Appellants respectfully request that the Court decline PNM's invitation to rush this appeal through the full deliberative process that the issues merit

For its Reply Brief, Appellants' state:

I. APPELLEES INCORRECTLY CLAIM THE ETA PROVIDES DUE PROCESS AND PERMITS CHALLENGES TO THE AMOUNT PNM CLAIMS AS COMPENSATION FOR ABANDONMENT

In their Answer Briefs, both Public Service Company of New Mexico ("PNM") and Intervenors Western Resource Advocates, Sierra Club and Coalition for Clean Affordable Energy ("Intervenors") (collectively "Appellees") mischaracterize the ETA and the proceedings below, claiming that under the Energy Transition Act ("ETA") the Public Regulation Commission ("PRC" or "Commission") retains its authority and parties opposing PNM's request had the opportunity, consistent with due process, the Public Utility Act ("PUA") and controlling decisional law, to contest the amount PNM claimed for compensation for abandoning San Juan Generating Station ("SJGS") Units 1 and 4. Their arguments are neither supported by the text of ETA, nor the record.

A. Appellees Mischaracterize the Nature of the ETA and the Proceedings Below

Underlying the constitutional issues is a disagreement about how the ETA changed the way PNM applies for and will receive hundreds of millions of dollars plus interest in compensation from ratepayers when PNM abandons SJGS and,

later, its other uneconomic coal, nuclear and gas generating investments, which comprise 90% of PNM's fleet.

In their Brief-In-Chief ("BIC"), Appellants argued that the ETA allows PNM to impose on ratepayers, without regulatory review, whatever PNM claims as recoverable costs when it proposes abandonment of a facility and seeks an ETA financing order.[1]

In their Answer Briefs, Appellees deny this, arguing that the ETA does not remove regulatory oversight; that Appellants and other parties "had an opportunity to review and challenge in the proceeding below PNM's cost estimates for the amounts to be securitized" and that ratepayers will have the opportunity to contest any additional costs that PNM seeks to impose in a future "true-up" process. PNM's Answer Brief ("PNM-AB"), 3, 10, 20. Appellees state correctly that the process below included discovery requests, cross-examination, the filing of testimony and multiple briefs, a public hearing and a 165-page decision. According to Appellees, Appellants' due process claims are therefore "hyperbolic." PNM-AB, 25; Intervenors' Answer Brief ("Intervenors-AB"), 10-11.

This is wholly misleading. *After* the evidence below was in, this Court issued the Writ requiring the PRC to apply the ETA, S-1-SC-38041, the Hearing Examiners ("HEs") explained how it changed the process: "The ETA provides

[1] BIC, 26-32.

only limited opportunities for Commission review of the costs recovered in the bond proceeds and the future adjustment of Energy Transition Costs ("ETCs") and other customer rates to recover the abandonment costs. **The ETA requires only that the costs to be financed with the bonds be adequately 'identified'…"** [2] (Emphasis added.) As to the evidence and expert testimony challenging PNM's claim to $361,000,000 in compensation from ratepayers, the HEs clarified that it was only admitted if the ETA was determined ***not*** to apply:

> Given the initial uncertainty about whether Art. IV, §34 of the New Mexico Constitution barred the application of the ETA to PNM's Application, the Hearing Examiners heard evidence and legal argument on scenarios assuming the ETA does and does not apply. The Supreme Court's decision resolves the issue, and the Recommended Decision addresses only the scenario that the ETA applies.[3]

Appellees muddle what occurred by stating, without explanation, that if a financing order is contested, the Commission approves it "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.'" Intervenors-AB, 10. Intervenors add that ETA permits the PRC "to issue an order *granting or denying* the application for the financing order" (citing §5A, emphasis in the original), implying that the PRC retained discretion to reject PNM's application on its merits.

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[2] **41RP14868**: "[T]he ETC charges is limited to the review and correction of the arithmetic proposed by PNM. (citing in fn. 19, NMSA 1978, 62-18-6(G)").
[3] **41RP14879**.

Id. But as §5 makes clear and as the HEs found in discussing the ETA's "unusual procedure" under which the PRC must tell PNM of any omission in its application and allow PNM to correct it. "Upon those changes being made, the ETA ***requires*** the Commission to issue a financing order approving the application." **41RP14872**. (Emphasis supplied.) The only issue as to which any evidence below was relevant under ETA, was whether PNM provided the "memorandum by a securities firm" required by §4(b)(5). *See* VII, below.

Notwithstanding ETA's text, Appellees claim that all testimony and argument below somehow remained relevant and was considered by the PRC in approving PNM's application. The HEs were under no such illusion: "The Commission will not have the authority to modify the ETCs based upon findings that some or all of the expenses that have been securitized were unreasonable or imprudently incurred."[4] This is because §5 of 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 Section 4 of the Energy Transition Act.

NMSA 1978 §62-18-5, emphasis supplied. Thus, the only requirement was that PNM's application comply with §4's shopping list. NMSA §62-18-4. All existing legal requirements including that the abandoned plant be used and useful; that the

[4] **41RP14948**.

amount not include imprudently-incurred costs; that the interests of ratepayers and investors be balanced; or even that the resulting rate be fair and reasonable, which this Court has identified as mandatory protections[5] to protect PNM's customers are eliminated. Appellees make no attempt to explain how the ETA's ministerial process comports with due process for ratepayers or meets the requirements of the PUA.

Appellees point to language in the Recommended Decision to support their claim that due process prevails because PNM's claimed costs can be scrutinized for "reasonableness and prudence." Intervenors-AB, 24. Appellees omit to say that this scrutiny applies only to SJGS and Four Corners Power Plant ("FCPP"), not to Palo Verde Nuclear Generating Station ("PVNGS") or PNM's gas plants. Equally importantly, this review only applies to post-January 1, 2019 costs, and additional decommissioning and reclamation costs at those facilities to be sought in a future rate case. Most importantly, it only relates to costs *above the* $361,000,000 bond amount, which cannot be challenged except for §4 deficiency. **41RP14948**. The HEs found: "The Commission will not have the authority to *modify the ETCs* based upon findings that some of or all of the expenses that have been securitized were unreasonable or imprudently incurred. The ETCs are fixed under the ETA." *Id.*

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[5] *PNM v. NMPRC,* 2019-NMSC-012, 444 P.3d 460, ¶¶8-11, 21, 40, 86; NMSA 1978, §62-3-1.

PNM put to rest any doubt about how ETA works when it announced a day before Appellants filed this Reply that PNM's shareholders will pay Navajo Transitional Energy Co. $75 million dollars for the privilege of walking away from PNM's 13% interest in the Four Corners coal plant, which is "expensive" compared to renewables. Apparently to reassure Wall Street and its shareholders, PNM explained that it will charge customers "at least $250 million," as "**allowed under the state's Energy Transition Act…**" "It's Official: PNM Seeking Four Corners Exit in 2024," Alb. Jour., 11/2/2020, emphasis supplied.[6]

B. Appellees are wrong that prior PRC plant approvals make an evidentiary hearing unnecessary

Intervenors argue that most of the money in the financing order is the "remaining undepreciated portion of plant investments that the Commission *has already approved* in a prior proceeding," making revisiting those costs unnecessary. Intervenors-AB, 12. (Emphasis in original.) This is significantly misleading. First, it fails to explain why PNM advocated for, and received, cost

[6] https://www.abqjournal.com/1513586/its-official-pnm-seeking-four-corners-exit-in-2024.html

recovery for 50% undepreciated investments when it closed SJGS Units 2 and 3,[7] which this Court affirmed as a "net public benefit."[8]

Second, it fails to mention why many parties' objected to 100% recovery for units 1&4: In 2015, PNM asked permission to acquire an additional 132 MW in SJGS (from owners in other states who were abandoning them) and testified that SJGS would be part of "the most cost-effective resource portfolio" and would provide ratepayer benefits for twenty years.[9]

The Commission *and this Court* took PNM at its word and approved the investments.[10] *Little more than one year later,* PNM's board of directors voted to divest from SJGS and announced it in its April 2017 Integrated Resource Plan.[11] Thus ETA didn't facilitate the "early" retirement of SJGS, as Appellees argue; PNM had announced the retirement well before it brought the ETA to the legislature. Under the ETA, PNM, after essentially double-crossing the PRC and this Court, was able to transform its SJGS financial liabilities (along with its other fossil and nuclear liabilities) into 100% ratepayer liabilities, *without any opportunity to raise the obvious unfairness.*

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[7] 13-00390-UT, *Final Order*, 12/16/2015, p.21, ¶56.
[8] *NEE, Inc. v. NMPRC*, 2018-NMSC-024, 416 P.3d 277, ¶46.
[9] *Id.*, ¶20.
[10] *Id.*, ¶46.
[11] NMPRC Case No. 17-00174-UT.

C. Appellees Misunderstand the Inference to be Drawn from the Fact that our ETA is the Only Securitization Law in the Nation that Allows the Utility to Unilaterally Determine the Amount it Will Receive in Compensation for Plant Abandonment

Appellants pointed out that many states have securitization laws but only New Mexico's ETA allows its utility to decide, without review, what it will recover from ratepayers for plant abandonment. BIC,14. There is not space enough to provide the Court with citations to every statute. Appellees have apparently conceded this, however, since they do not dispute it. In response, however, they state only a truism: Just because other states do it one way, doesn't mean that New Mexico's legislature can't do it differently. (Intervenors-AB, 13.)

But they *all* do it differently, and if it is an axiom of this and every other jurisdiction that ratepayers have a right to a process through which rates are made, "just and reasonable," New Mexico is more than an outlier. It has allowed a private, state-created monopoly to set its own rates, even though regulatory rate approval is fundamental.[12]

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[12] "[A] regulated utility monopoly… has agreed to exchange the freedom to determine whom it will serve, what it will charge for its service, and how it will finance or invest its resources for the freedom from competition that it enjoys." ***As a regulated utility, the rates it is allowed to charge for its services must be "just and reasonable" as determined by the PRC.*** *Moriarty Mun. Sch. Dist. v. Thunder Mtn. Water Co.*, 2006-NMCA-135, ¶8, 140 N.M. 612, 615, 145 P.3d 92, 95, citation omitted, emphasis supplied, aff'd, *Moriarty Sch. Dist. Bd. of Educ. v. Thunder Mtn. Water Co.*, 2007-NMSC-031, ¶8, 141 N.M. 824, 161 P.3d 869.

It is inescapable that Appellees' argument, even though made *sub silentio,* is that the legislature can just eliminate ratepayer protections in an individual rate case if it chooses to do so, notwithstanding accepted principles of monopoly utility regulation, the stated purposes of the Public Utility Act, due process, and this Court's long line of decisions regarding the importance of ratepayer protections, which ETA effectively jettisons. BIC, 26-30.

Ratepayers' rights to just and reasonable rates were articulated by the United States Supreme Court in the seminal case of *FPC v. Hope Natural Gas Co.,* 320 U.S. 591, 64 S.Ct. 281, 88 L.Ed. 333 (1944), a case repeatedly cited by this Court.[13] Judge Bazelon of the D.C. Circuit synthesized *Hope* as it applies here: "[F]rom from the earliest cases, the end of public utility regulation has been recognized to be protection of consumers from exorbitant rates. Thus, there is a zone of reasonableness within which rates may properly fall. It is bounded at one end by the investor interest against confiscation and at the other by the consumer interest against exorbitant rates." *Washington Gas Light Co. v. Baker*, 188 F.2d 11, 14 (D.C.Cir.1950). The PRC has itself relied on this analysis.[14]

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[13] For instance: *Behles v. New Mexico Pub. Serv. Comm'n (In re Timberon Water Co.),* 114 N.M. 154, 161, 836 P.2d 73, 80 (1992); *Attorney General v. N.M. Pub. Regulation Comm'n*, 111 N.M. 636, 808 P.2d 606, 612 (1991) *State Corp. Comm'n v. Mountain States Tel. & Tel. Co.,* 58 N.M. 260, 271-73, 270 P.2d 685, 692-93 (1954).

[14] NMPRC, Case No.15-00261-UT, *Corrected Recommended Decision*, 8/15/2016, p. 16.

II. THIS APPEAL IS DIRECTED AT THE ETA'S ELIMINATION OF THE PRC'S AND THIS COURT'S JUDICIAL POWER TO SUPERVISE RATES, NOT AT THE IRREVOCABILITY OF BONDS

Appellees agree that judicial review is vital but misconstrue Appellants' argument and rely on irrelevant cases, mischaracterizing Appellants as attacking the irrevocability of bonds. PNM-AB, 22-23. Appellants agree that once a bond is issued, it must be irrevocable. That is in fact, *why* it is so important that there be a quasi-judicial fact-finding process that an appellate Court can review – because the non-bypassable charge will remain on ratepayers' bills for 25 years.

Appellees do not suggest that the PUA's requirement that rates be "just and reasonable" can be eliminated. It is undeniably a pillar of utility regulation that the regulatory authority *must* "ensure that rates are neither unreasonably high so as to unjustly burden ratepayers with excessive rates nor unreasonably low so as to constitute a taking of property without just compensation[.]" *New Mexico Atty. Gen. v. New Mexico Pub. Regulation Comm'n*, 2013-NMSC-042, ¶20, 309 P. 3d 89, 96.

In *Attorney Gen. v. New Mexico Pub. Regulation Comm'n*, 2011-NMSC-034, ¶13, 150 N.M. 174, 258 P.3d 453, 457, this Court held: "The declared policy of the PUA is '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) (2008) (emphasis added). Under the PUA, a rate is "just and reasonable" when it fairly balances the investor's interest against the ratepayer's interest. *See In re PNM,* 2000–NMSC–012, ¶8, 129 N.M. 1, 1 P.3d 383.

Below, because the PRC hadn't yet determined whether or not to apply the ETA and to provide this Court with a record, the PRC allowed evidence on which a regulatory decision could be based, but which became irrelevant after the Writ. The evidence exists, however, and Appellees decline to address it. The following examples elucidate the importance of regulatory analysis in arriving at a fair and just rate.

As to PNM's claim for 100% SJGS "undepreciated investments": the Albuquerque Bernalillo Water Utility Authority[15] and NM Attorney General ("NMAG")[16] advocated cost recovery from ratepayers of zero dollars, based on the unique facts related to SJGS. PRC Staff advocated for 50% recovery plus an

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[15] **39RP13912-13942**.

[16] NMAG's expert testified that, given that the abandoned investments are no longer cost effective "there is no reason why ratepayers should be responsible for any of these costs, once these units are no longer being used to provide regulated utility service." **11RP2444**. "In fact a possible result is that 100% of any stranded costs are allocated to shareholders, rather than New Mexico ratepayers." **11RP2448**.

interest rate at the cost of debt, providing their reasons.[17] When questioned about the fairness of customers bearing 100% of the burden for PNM's further investment in SJGS after PNM's about face *just after acquisition,* even WRA's expert witness, former PRC Commissioner, Douglas Howe, testified: "They should have some responsibility for that bad bet."[18] NEE advocated that PNM receive cost recovery of 50% undepreciated investments, as PNM had negotiated for the first two SJGS units, at cost of debt, minus the cost of capital expenditures from 12/2015 forward.[19]

When WRA asked to exclude reclamation and decommissioning costs and NMAG asked that decommissioning and reclamation costs be capped at the amount PNM claimed under ETA securitization, however, the HEs were blunt: "The Commission lacks the authority [under ETA] to impose the limits [on cost recovery]." **41RP14847**. There were other substantial claims and defenses,[20] but under the ETA none could impact the amount ratepayers must pay.

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[17] **11RP2566-73**.
[18] **34RP11840**.
[19] **38RP13669**, **13714-15**.
[20] For instance, NMAG objected that PNM ratepayers were overpaying for severance costs, because their share of costs should be 58.7% (*not* 100%) reflecting PNM's SJGS percentage ownership, **11RP2448-50**; NM AREA objected to financing application approval, requesting that PNM refile within nine months of the issuance of the bond, because "whether or not those costs are reasonably known or can be reasonably estimated [is lacking] based on the information presented to the Commission." **36RP12893**.

This Court has emphasized that the PRC, *a constitutionally created body,* has the general and exclusive power to regulate a public utility's rates.[21] "[D]etailed findings [] after examining all of the relevant figures"[22] is required,[23] including the amount of cost recovery for undepreciated investments, from zero to 100%. In addition to blocking PRC's rate-setting procedures, the ETA removed the authority of this Court to review the PNM-determined amount, thereby eliminating the judiciary from its role in assessing whether a rate is within the zone of reasonableness and protecting consumers from exorbitant rates.

This Court identified its review of a quasi-judicial decision as requiring: "a clear statement of what, specifically, [it] believes, after hearing and considering all the evidence, to be the relevant and important facts upon which its decision is based, and a full explanation of *why* those facts lead it to the decision it makes. This is critical for facilitating meaningful judicial review of the action []". *Albuquerque Commons P'ship v. City Council of City of Albuquerque*, 2008-NMSC-025, ¶35, 144 N.M. 99, 110, 184 P.3d 411, 422. (Emphasis supplied.)

A meaningful quasi-judicial proceeding on rates from abandonments is gone under ETA, as is meaningful appellate review, since there will be no record in future and the existence of the present record is the result of happenstance. Justice

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[21] *PNM v. NMPRC,* 2019-NMSC-012, ¶8; NMSA 1978, §62-6-4(A).
[22] *Jersey Cent. Power & Light v. FERC*, (D.C. Cir. 1987) 810 F.2d 1168, 1176-77.
[23] Abandonment costs are just as much "rates" as any other charges. NMSA 1978, §62-3-3 H.

Bosson articulated the essence of separation of powers in *Albuquerque Commons P'ship, supra*, quoted at BIC, 35, and its logic is determinative here. Further, "quasi-judicial proceedings are necessary to elicit the determinative facts." *Id.*, ¶32. Issues like abandonment cost recovery determinations are particularly fact-intensive.[24] Under the plain vanilla holding in *Albuquerque Commons P'ship* regarding what falls within the judicial sphere and falls within the legislative sphere, the ETA is *not a* public policy matter of a general character but a resolution of specific, individual economic rights, and its elimination of the quasi-judicial regulatory process and judicial review of that process violates separation of powers. *Id.*, ¶¶43, 58. This is an unavoidable conclusion unless this Court cedes to the legislature the right to determine the *specific* property rights of ratepayers and utilities and the associated property values themselves, in rate-setting.

III. THE ETA WILL NOT SAVE RATEPAYERS MONEY; QUITE THE CONTRARY

Intervenors argue that under a traditional regulatory approach, allowing the Commission, rather than PNM, to decide the amount of recovery from ratepayers would result in "approximately the same cost to ratepayers as the approach under

[24] *See*, e.g., *In re Pub. Serv. Elec. & Gas Co.'s Rate Unbundling,* 167 N.J. 377, 771 A.2d 1163, 1174 (2001) ("The BPU's valuation of PSE & G's generation facilities and its stranded cost determination were base on years of fact-finding and extensive quasi-judicial and quasi-legislative proceedings.").

the ETA," citing the Direct Testimony of Douglas Howe. Intervenors-AB, 2-3. The evidence shows otherwise. Most importantly, beyond the fact that ratepayers will be paying twice as much for Units 1 and 4 than they did for Units 2 and 3, the cost to ratepayers is unknown because it will be driven by the bonds' interest rates. PNM's expert admitted that he couldn't predict what the rate would be and ratepayers could be stuck with an "extremely steep yield curve where -- where interest rates in the longer years are quite, quite high."[25]

The evidence below demonstrated that after PNM took the 50% write-off for abandonment of SJGS units 2&3, PNM's stock soared, indicating the market's view was different than that of Appellees.[26] Under cross-examination, Howe admitted that the ETA would cost ratepayers $25M more compared to traditional ratemaking.[27] Furthermore, NMAG's financial expert testified that ratepayers could well pay $483 million more under the ETA.[28] Whichever expert proves to be correct, this testimony underscores the fact-intensive nature of rate proceedings and the divide between such determinations and forward-looking policy decisions by the legislature.

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[25] **31RP10556-7**.
[26] **38RP13721-22**, NEE Exhibit #7.
[27] **34RP11939**.
[28] **34RP11779-11784**.

IV. THE ETA APPLIES TO ALL OF PNM'S PRE-2015 INVESTMENTS; APPELLEES AVOID ADDRESSING THE ETA'S SWEEPING EFFECT ON FUTURE RATE DETERMINATIONS.

PNM complains that the evidence of its imprudent acquisitions in PVNGS and FCPP are outside the record and should not be considered in this appeal. PNM-AB 39. To the contrary, reference to evidence and rulings in related cases is appropriate. *Attorney Gen. of State of N.M. v. New Mexico Pub. Serv. Comm'n,* 1991-NMSC-028 ¶ 24, 111 N.M. 636, 641, 808 P.2d 606, 611 (appellate court's takes judicial notice of agency proceedings below, including any "closely interwoven" causes). Unregulated cost recovery when PVNGS and FCPP close is just as relevant to the constitutionality of the ETA as cost recovery arising from SJGS, and PNM makes no effort to explain why the Court should ignore past determinations of PNM imprudence, including determinations by this Court, from which this Court has held ratepayers should be protected, but which ETA permits PNM to recover. BIC, 45-48.

When SJGS, FCPP and PVNGS and all its pre-2015 gas plants close, ratepayers will face, *at a minimum,* more than a billion dollars plus interest, a guaranteed increase in rates from PNM's recoveries for undepreciated assets, before decommissioning costs, without any ability by the PRC to balance the interests of shareholders and ratepayers, or account for the imprudent investments

PNM has made, as determined by the PRC and this Court.[29] While Appellees argue that this Court shouldn't consider the 100% recovery that the ETA rewards PNM for all its other coal, nuclear and gas investments, it does not deny Appellants claim; the ETA will transfer cost recovery for "any undepreciated investments and decommissioning costs."[30] When PNM's Senior Vice President was confronted about the fairness of PNM receiving 100% cost recovery for all its PVNGS, FCPP, and gas investments without PRC's ability to modify or adjust those PNM-determined requests, even when some of those acquisitions had been deemed to be imprudent, he testified: "The ETA says it allows for recovery."[31] This Court has held: "the purpose of a prudence review is to hold ratepayers harmless from any amount imprudently invested[.]"[32] Under ETA, PNM's customers will compensate it for 100% of these undepreciated investments, imprudent or not.

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[29] *PNM v. NMPRC,* 2019-NMSC-012, ¶21-38. ("Existing utility jurisprudence grants wide latitude to the Commission's choice of methodology used to determine a utility's rate base.")
[30] §62-16-6(C)
[31] **20RP5222-5581**, Darnell, deposition, 107-125; **24RP6867**.
[32] *PNM v. NMPRC,* 2019-NMSC-012, ¶40.

V. APPELLEES MISCONSTRUE ART. XI §2; APPELLANTS AGREE THAT THE LEGISLATIVE BRANCH SETS POLICY BUT IT CANNOT DECIDE INDIVIDUAL REGULATORY RATE DISPUTES REQUIRING EXPERTISE, FACT FINDING AND THE EXERCISE OF REGULATORY DISCRETION

Appellants addressed the language of N.M. Const. Art. XI, §2, by which the people of New Mexico created and empowered the PRC, and explained that its final phrase, in light of the structure and logic of the amendment and the accepted "last antecedent" rule of statutory construction, relates only to "other public service companies" that the legislature might add after the amendment was adopted. BIC 32-35.

PNM did not respond. Intervenors answer by stating that Art. XI, §2 is unambiguous and "means what it says." Intervenors-AB, 22. Appellants agree but come to a conclusion opposite to Intervenors'. Stating a truism, of course, is no substitute for logic and legal analysis, particularly when reading the provision in light of its structure and punctuation, and considering the two categories of subject matter in the Amendment itself: One category is public utilities placed by the amendment under PRC's regulatory control and the other is "other public service companies" to be added by the legislature later. The semicolon preceding the final phrase and absence of a comma between its two internal phrases support Appellants' analysis.

Appellants' agree that the last antecedent rule is not absolute and have not argued otherwise. Appellants' interpretation is buttressed by it, however, and Appellees, have failed to explain why the rule shouldn't apply here, given the provision's text. Intervenors-AB, 22.

Confusing matters further, Appellees' argument implicitly posits that Art. XI, §2 should be assigned two meanings: 1) the legislature can add other public service company's to PRC's jurisdiction in such manner as the legislature shall provide *and* 2) the legislature can overrule the PRC's constitutional authority in such manner as the legislature shall provide. While it could mean both, it would be an awkward way of having done so.

Intervenors also argue that this court has, in effect, resolved this issue in their favor in issuing its Writ to require the PRC to apply the ETA below, as well as in other decisions. Intervenors-AB, 21. In none of the cases cited by Intervenors, however, was this issue actually raised. In each of them, the Court treated it as a given, without analysis or comment, that the phrase modified whatever preceded it. *State ex rel. Egolf v. New Mexico Pub. Regulation Comm'n*, 2020 WL 4251786, at *4 (N.M. July 23, 2020); *PNM v. NMPRC,* 2019-NMSC-012, ¶84, and City of *Albuquerque v. New Mexico Pub. Regulation Comm'n*, 2003-NMSC-028, ¶18, 134 N.M. 472, 482, 79 P.3d 297, 307.

While the currently-proposed Constitutional Amendment's wording is not determinative of what the current version means, it is illuminating:

> The public regulation commission shall have responsibility for regulating public utilities as provided by law. **The public regulation commission may have responsibility for regulation of other public service companies in such manner as the legislature shall provide.**

N.M. Const. Art. XI, §2 ([Responsibilities of public regulation commission.] [Proposed]), (Emphasis supplied). Its second sentence mirrors its predecessor and supports Appellants' interpretation.

Intervenors argue that Appellants' interpretation would lead to an "absurd result" because it would mean that the legislature could not set policy, as reflected in the PUA. Intervenors-AB, 21. Appellants agree that the legislature sets policy, such as requiring "just and fair rates", creating "renewable energy standards", establishing the right of securitization and the like."[T]he Legislature is the policy-making body." *State ex rel. Taylor v. Johnson,* 1998-NMSC-015, ¶41, 125 N.M. 343, 353, 961 P.2d 768, 778. It does not, however, function as a body to resolve particular asset valuation issues and rate disputes.

Thus the question becomes, again, is passing a law that ratepayers must pay PNM $361,000,000 for SJGS Units 1 and 4, plus an unknown interest rate, amortized over 25 years a matter of policy? Or does it simply impose on PNM's customers PNM's-predetermined outcomes in particular abandonment cases,

which is not a legislative matter but has always been a quasi-judicial matter? As this Court has articulated the distinction between the former and the latter, it is *without doubt,* the latter. *Albuquerque Commons P'ship, supra* at II, above.

There is another reason this Court should hesitate to adopt Appellees' interpretation of Art. XI, §2. Under NMSA §8-8-19, regulated entities are forbidden to make campaign contributions to candidates for the entity that regulates them, the PRC. There is no such prohibition on contributions to legislators or candidates for governor, and PNM took full advantage of the opportunity. BIC, 14, fn. 27. What would it mean to basic principles of governance if this provision were interpreted to allow legislators to receive campaign contributions from PNM and then "regulate" PNM, as Appellants suggest they are free to do, by transferring enormous amounts of money from ratepayers to PNM, without any regulatory oversight, under circumstances such as these. Setting policy is appropriate because it does not involve particular financial recovery for a private monopoly, as the ETA does.

VI. APPELLANTS FAIL TO EXPLAIN HOW THE ETA'S TITLE COMPORTED WITH THE REQUIREMENTS OF ART IV §§ 16 and 18 WHEN IT INCLUDED NOTHING ALERTING THE READER TO ITS AMENDMENTS OF THE PUBLIC UTILITY ACT AND ITS CHANGES TO RATEMAKING

Appellees don't deny that the ETA amended no fewer than eight sections of the PUA, in addition to amending two other sections, the Air Quality Control Act and the Renewable Energy Act ("REA"), respectively, NMSA 1978, §§74-2-1 to 17 and §§62-16-1 to 10. Nor do Appellees contest that the ETA significantly altered PNM's and ratepayers' rights upon PNM's plant abandonment or that its title lacks any words suggesting that it would amend the PUA *at all*, much less across the board as to PNM's abandonment recovery. As Appellees also concede, the title's only reference to the ETA amending *anything* is that it amends "certain definitions" of the REA. Intervenors-AB, 28.

Appellees nevertheless argue that ETA's title does not violate Art. IV §§16 and 18 because, first, it is "lengthy and comprehensive," providing sufficient notice of the Act's provisions by referring to "Public Utilities" and "Enacting the Energy Transition Act." PNM-AB, 25. It also mentions many other topics, but nothing that intimated changes to ratemaking, abandonment, amendments to the PUA or withdrawal of PRC authority. Lengthy? Yes. Comprehensive? No.

Second, Appellees argue that even if the ETA amends the PUA across the board, there is no requirement that it say so, even if it specifically identifies an

amendment to a different act. Third, Appellees argue that even if its title referred to its amendment of definitions of the REA, because it was not a "pinpoint" reference it needn't mention the other amendments it made, *even to a different Act, the PUA*. Fourth, Appellees argue that Art. IV, §16 does not require the Legislature to title SB 489 in a way that enumerates its "bad effects." Intervenors-AB, 28-29.

All the foregoing arguments are to avoid the unavoidable: ETA's principal effects will be to transform by amendment the way PNM obtains cost recovery for hundreds of millions, perhaps billions of dollars with its plant abandonments by removing the quasi-judicial process of ratemaking that protects ratepayers from PNM's overreach, and give it to PNM itself. Certainly it would have been helpful if the title had included all its "bad effects" but, contrary to Appellees' arguments that wasn't necessary. Intervenors-AB, 27. What is required is reasonable notice of its contents. While PNM's drafting motivations are not determinative, the wordy title and its omission to signal the amendments allowing PNM to impose enormous costs on ratepayers without regulatory review, while pointedly signaling the comparatively small amounts that will go to job training, strongly suggest that PNM drafted the title to distract. To argue that it sufficed to include the words "public utilities" and include details about every aspect of the Act ***but*** these provisions is for Appellees to thumb their noses at our constitution's titling requirements. ETA's title was a textbook example of logrolling because it failed

even to hint at the provisions that, in terms of economic impact, were the most consequential provisions of the bill *by far* while pointedly identifying all the Act's other subjects.

Appellees rely on cases containing snippets of language that seem in some largely unexplained way to suggest that the title of the ETA is constitutionally acceptable. But an examination of those cases shows they are no help to the Appellees. *See* cases cited at Intervenors-AB, 26-29, and PNM-AB, 24-29, none of which creates or even hints of any exception to the requirement that a title provide reasonable notice of an act's contents.

PNM disputes Appellants' reliance on *City of Albuquerque v. State,* 1984-NMSC-113, 102 N.M. 38 for the proposition that an act is unconstitutional if it goes far beyond what's in the title, which the ETA undoubtedly does. The Appellees' position is based on the title's supposed comprehensiveness. But the Constitution and cases interpreting its applicable provisions articulate, again and again, that the title must give fair notice of the subjects covered by the Act. *State v. Ingalls*, 1913-NMSC-068, ¶ 14, 118 N.M. 211. *City of Albuquerque* does no more than enforce this general rule, emphasizing that the constitution forbids "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."

1984-NMSC-113, ¶ 4, quoting *Martinez v. Jaramillo,* 86 N.M. 506, 508, 525 P.2d 866, 868 (1974).

Appellees invoke *City of Albuquerque,* however, for the curious proposition that unless a title "pinpoints" a particular statutory provision as being amended, presumably by its official citation, the title's drafters may refrain from mentioning other amendments an act makes. In other words, since the title of the ETA stated "amending certain definitions" of the REA, its drafters were free not to mention other amendments, whether by category or specifically. This makes no sense if the requirement is that the title reasonably inform the public of its subjects and it is hardly what *City of Albuquerque* holds. There, this Court held that if a particular section of one act is identified in a title, it is a clear Constitutional violation if the Act includes amendments of other Acts that are not subsumed in the title. *City of Albuquerque v. State,* 1984-NMSC-113, ¶7, 102 N.M. 38, 40, 690 P.2d 1032, 1034, citations omitted.

PNM can only have drafted the title with the understanding that the provisions at issue here would be controversial with legislators who, during a busy session, were unlikely to dissect the ETA's 82-page text. Indeed, a title's length and specificity can, as it did here, serve to conceal provisions of an act that are not mentioned. *See Crosthwait v. White*, 1951-NMSC-003, ¶20, 55 N.M. 71 (quoting *Gomez*, 1929-NMSC-063, ¶29). There is no New Mexico decision that can be read

to sanction a title like this one. The Supreme Court of Missouri's holdings are like New Mexico's, but its Supreme Court helpfully simplified the way to appraise a title like this:

> The basic idea, stated somewhat differently, … is that "where the title of an act descends to particulars and details, the act must conform to the title as thus limited by the particulars and details." In more simple terms, the rule is that the title to a bill cannot be underinclusive.

Nat'l Solid Waste Mgmt. Ass'n v. Dir. of Dept. of Nat. Res., 964 S.W.2d 818, 820–21 (Mo. 1998), as modified (Apr. 21, 1998), citation omitted.

Appellees' insistence that Appellants' complaint is that the title did not include ETA's "bad effects" is a straw man. Appellants' argument is straightforward: The Act's title did not give reasonable notice of these important provisions, and the detail that it did provide made it all the more misleading.

VII. PNM HAS NOT COMPLIED WITH THE PLAIN LANGUAGE OF ETA §4B5

Appellees state the obvious, as though it justifies the deviation from ETA's requirement of an opinion by a securities firm: "A securities firm cannot testify." Intervenors-AB, 41. No doubt. But a firm can take an official position, provide an opinion, signed by an officer authorized to do so, and can authorize a person to testify on its behalf. Trivializing and dismissing Atkins' firm's disclaimer as "boilerplate" (*Id.*) does not change the plain language of ETA's §4B5. Broker

Atkins' firm, Guggenheim Securities LLC, disavowed his testimony that the ETA will achieve AAA bond rating.[33] Further, Mr. Atkins provided this sworn testimony: Question: "Does Mr. Atkins have the authority to bind the firm, Guggenheim Securities LLC, with respect to the transaction that is the subject of this current case…?" Atkins' answer: "*Guggenheim Securities has not been engaged by PNM with respect to the transaction that is the subject of this case, …or [this] financial instrument in connection with any potential transaction in this matter.*"[34] Nothing will change the fact that the ETA requires "*a memorandum with supporting exhibits from a securities firm*" (§4B(5). There is none.

[33] **17RP4208**, PNM Exhibit CNA-4, 15.
[34] **40RP14235,** NEE Exhibit #19.

CONCLUSION

For the reasons set forth above, Appellants respectfully request that the Court reverse the decision of the PRC granting the financing order for SJGS Units 1 and 4, declare the relevant provisions of the ETA unconstitutional, and grant further relief the Court considers just and necessary.

Respectfully submitted this 3rd day of November, 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' CONSOLIDATED REPLY BRIEF-IN-CHIEF.**

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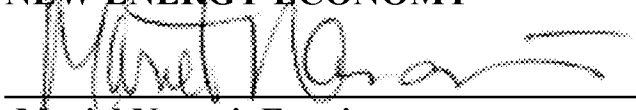
NEW ENERGY ECONOMY



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