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' RESPONSE IN OPPOSITION TO APPELLEE'S PARTIAL MOTION TO DISMISS

Appellants Citizens for Fair Rates and the Environment ("CFRE") and New Energy Economy ("NEE") respond as follows to Western Resource Advocates' ("WRA's") Partial Motion to Dismiss ("WRA Motion").

Introduction. WRA asks this Court to dismiss from this appeal all the issues related to the Energy Transition Act's ("ETA's") constitutionality that the Public Regulation Commission ("PRC") did not address below. WRA's argument, in summary, is that because the PRC lacked jurisdiction to decide those issues and did not decide them, this Court is without jurisdiction to address them in this otherwise perfected appeal of the issues that the PRC did decide. WRA Motion, *passim*. According to WRA, if Appellants CFRE and NEE (or any of the other parties to this appeal) want those constitutional issues decided, they must proceed in the first instance to district court for their resolution, presumably with appeals by any dissatisfied parties to follow, ultimately reaching this Court via the district court and Court of Appeals, however long that takes. *Id.*

WRA's position, given this Court's and the Court of Appeals' previous decisions and under the New Mexico Rules of Appellate Procedure themselves, is incorrect. This Court, in its discretion, may exercise jurisdiction over all constitutional issues related to the ETA whether or not decided by the PRC. Given the importance to all parties of expeditiously resolving the constitutionality of the ETA and the importance of resolving these related constitutional issues in a

single, rather than multiple, proceedings, CFRE and NEE respectfully request that this Court exercise its discretion to decide them now.

As noted below, WRA explicitly agrees in its Motion that this appeal presents issues of great public importance and WRA seems to share the sensible view that all of the issues regarding the ETA's constitutionality be expeditiously decided together. Nevertheless WRA feels for some reason compelled to raise a jurisdictional obstacle to the resolution of a number of the constitutional issues, but that jurisdictional obstacle is one of WRA's imagination.

I. Genesis of this Appeal.

This appeal arises from the PRC's *Final Order on Request for Issuance of a Financing Order* ("Final Order") in Case No. 19-00018-UT. In the proceeding below, PNM sought and received recovery of $361,000,000 as compensation it claimed as a result of its decision to close the two remaining units of the San Juan Generating Station, a 45-year old coal plant near Farmington from which PNM has profited over the decades. During the pendency of this case, this Court instructed the PRC to apply the ETA to PNM's proceeding for "abandonment, financing, and replacement of units one and four of the San Juan Generating Station."[1] Under the ETA, no claim or defense presented by any party or the PRC reduced or could reduce the $361M that PNM claimed. Under the ETA, it became a "non-

[1] Case No. S-1-SC-38041, Orders of January 29, 2020, at p. 2 of 3.

bypassable charge" to be levied, plus interest, against ratepayers for twenty-five years. The financing order could not be modified or adjusted in any meaningful way by the PRC, even to protect ratepayers.

Below, CFRE and NEE raised challenges to the constitutionality of the ETA. The PRC explicitly addressed some of the constitutional issues raised by appellants in this appeal but declined to address others. *Final Order,* pp. 9-10. ¶¶ 35-37; *see Appellants' Joint Statement of Issues* 3(c) – (e) (pp. 10-11). CFRE and NEE raise all those issues, among other, non-constitutional issues, in this appeal.

II. Argument.

A. This Court Has the Jurisdiction and Discretion to Address Issues Not Addressed or Decided in the Inferior Tribunal.

Under New Mexico decisional law and under the New Mexico Rules of Appellate procedure, this Court may address all of the constitutional issues, whether the PRC addressed them or not. Because of the importance of the issues in this appeal, including expeditious resolution of the constitutional issues associated with the ETA, and because of the procedural and substantive difficulties that would arise in the event that some issues were addressed by this Court in this appeal while others would be addressed in a district court, this Court should exercise its jurisdictional discretion so that those issues can all be resolved by this Court in one proceeding, as even WRA seems to concede. WRA Motion, p. 6, ¶8.

WRA's argument that this Court lacks jurisdiction over the constitutional issues that were undecided by the PRC and beyond its power is contrary to precedent and ignores this Court's own rules that permit it to address issues of public importance even if the Court below did not and/or could not address them. Under Rule 12-321, NMRA ("Scope Of Review; Preservation"), appellate issues are generally limited to those that were properly preserved below, but it provides the following exceptions relevant here:

> (2) This rule does not preclude a party from raising or the appellate court, in its discretion, from considering issues that by case law, statute, or rule may be raised for the first time on appeal. These issues include, but are not limited to, issues involving
>
> (a) general public interest;
>
> ....
>
> (d) fundamental rights of a party.

Rule 12-321(2)(a), (d), NMRA. Thus this Court's own rule establishes that it may, in its discretion, exercise appellate jurisdiction over any of the issues Appellants raise in this appeal if they are of public interest, which no party has contested that these issues in this appeal are. WRA explicitly concedes that the issues raised by CFRE and NEE are matters of great importance. WRA Motion, p. 6, ¶ 8 ("WRA reluctantly raises the jurisdictional issue presented here because, like Appellants, it

recognizes that the constitutionality of the ETA is a matter of great public importance that warrants expeditious determination.").

In addition to being matters of great public importance, they involve the fundamental rights of Appellants who, in addition to having been parties below, are ratepayers and represent ratepayers. Not only does the importance of the constitutionality of the ETA transcend "general public interest" within the meaning of NMRA 12-321, it involves the issue of whether this statute impinges on the fundamental rights of ratepayers to due process of law and the constitutional protections built into the legislative process by the New Mexico constitution. Furthermore, this Court has recognized the "protection of ratepayers" as central to PRC's role in the regulation of monopoly utilities such as PNM. *Pub. Serv. Co. of N.M. v. N.M. Pub. Regulation Comm'n,* 2019-NMSC-012, ¶¶ 8-10, 32, 52, 444 P.3d 460.

Whether this Court should exercise its discretionary authority to assume jurisdiction of all of the constitutional issues raised in this appeal could conceivably be subject to debate, although thus far neither WRA or any other party has attempted an argument that this Court should *not* exercise its discretionary authority to hear all the constitutional issues raised in this Appeal. WRA's argument appears to be that it would be nice if this court *could* decide all the constitutional issues, but unfortunately it can't. WRA Motion, p. 6, ¶ 8. As to

PNM itself, it has opposed CFRE's and NEE's motion for extension of time for full briefing until after the Court resolves WRA's motion for partial dismissal because "Appellants seek an open-ended extension of time to file their briefs-in-chief." *Response of Public Service Company of New Mexico to Appellants' Motion for Extension of Time to File Briefs-in-Chief*, 6/29/2020, p. 1. PNM's grounds for opposing it? Undue delay will prejudice it. *Id.*, pp. 2-4. Certainly a delay of years before many of the constitutional issues inherent in the ETA have worked their way from district court to this Court would cause PNM far more prejudice than a minor extension of the briefing schedule in this appeal, until 30 days after this Court rules on this Motion. CFRE and NEE do not seek an open-ended extension; only a reasonable time after this Court has resolved WRA's motion for partial dismissal.

All of the constitutional issues are ripe and the record necessary to decide them complete.[2] This Court is fully empowered to assume jurisdiction over issues

[2] This Court applies a de novo standard of review to a constitutional challenge to a statute. *Moses v. Ruszkowski*, 458 P.3d 406, 410 (N.M. 2018). Furthermore, appellate courts "apply the same . . . standard of review as the district court sitting in its appellate capacity" when reviewing district court's review of agency decisions. *See Archuleta v. Santa Fe Police Dep't ex rel. City of Santa Fe*, 2005-NMSC-006, ¶ 15, 137 N.M. 161, 167, 108 P.3d 1019, 1025. Thus the review this Court will undertake is the same regardless of whether the constitutional challenge arose in a district court proceeding or at the PRC. To the extent that evidentiary facts are necessary, those facts are either in the record or in the relevant pleadings, subject to judicial notice and/or can be derived from orders in the PRC's files, of

of public importance, such as those presented in this appeal. RULE 12-321, NMRA, *and see, Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶11, 127 N.M. 272.

As to WRA's argument that if the PRC lacked jurisdiction to decide the constitutional issues, this Court has no jurisdiction, other courts have rejected this claim as has our Court of Appeals. In a context similar to this one, the federal 6th Circuit Court of Appeals emphasized the importance of courts promptly addressing the constitutionality of a statute on appeal from an agency decision applying a statute claimed to be unconstitutional, even where the agency had been without authority to address its constitutionality. Not only would addressing the issue be of great benefit to the parties and the public, "a decision now will avoid a waste of judicial resources and will not interfere with [the agency's] proceedings on questions over which it has initial discretion." *McCoy-Elkhorn Coal Corp. v. U.S. Envtl. Prot. Agency*, 622 F.2d 260, 264–65 (6th Cir. 1980).

The Sixth Circuit's decision in *Elkhorn* is consistent with New Mexico decisional law. Our Court of Appeals has held that, even where an agency cannot address constitutional issues, an appeal from the agency's decision is the proper avenue for their resolution. In *Neff v. State Through Taxation & Revenue Dept.*,

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which this Court may also take judicial notice. *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 may take judicial notice of agency proceedings below, including any "closely interwoven" causes before the agency).

that court held that where an agency "cannot itself determine the constitutionality of the underlying . . . law, its procedures provide a plain, adequate, and complete means whereby that determination can be made through the appeal process to the courts." *Neff v. State Through Taxation & Revenue Dept.*, 1993-NMCA-116, ¶ 17, 116 N.M. 240, 244–45. Other jurisdictions agree. *See, Froysland v. N. Dakota Workers Comp. Bureau*, 432 N.W.2d 883, 892 (N.D. 1988) ("a question of the constitutionality of an act under which an administrative agency operates may be raised for the first time on appeal to the district court, if based solely on the record made in the administrative agency...."); *Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 737 F.3d 228, 234–35 (2d Cir. 2013) (holding that Vermont law, while precluding agencies from addressing constitutional challenges to statutes, permits those challenges to be raised on appeal from agency decisions).[3]

These decisions dovetail with the standard of review by this Court of agency decisions, which includes whether the agency's action was contrary to law. *N.M. Indus. Energy Consumers v. N.M. Pub. Reg. Comm'n*, 2007- NMSC-053, ¶ 13, 142 N.M. 533. If the ETA is unconstitutional, the PRC's decision below is contrary to law, whether the PRC could not or simply refrained from addressing the constitutional issues.

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[3] This Court has never hesitated to decide on appeal from an agency whether a party before the agency received due process. *See, e.g., Albuquerque Bernalillo Cty. Water Util. Auth. v. N.M. Pub. Regulation Comm'n* (ABCWUA), 2010-NMSC-013, ¶ 19, 229 P.3d 494,

The ETA itself supports this Court's assumption of jurisdiction over all constitutional issues. Not only does it provide for direct review by this Court of the PRC's application of its provisions, it requires that this Court act on ETA-related appeals "as expeditiously as practicable." NMSA 1978 §62-18-8.[4]

The cases cited by WRA which purportedly compel this Court to limit its jurisdiction are inapposite. In each of the cited cases, after announcing that the agency decision maker did not have jurisdiction over constitutional issues, the courts proceeded to address them. *See Maso v. State of New Mexico Taxation & Revenue Dep't, Motor Vehicle Div.*, 2004-NMCA-025, ¶ 15, 135 N.M. 152, 156, *aff'd sub nom. Maso v. State, Taxation & Revenue Dep't, Motor Vehicle Div.*, 2004-NMSC-028, ¶ 15, 136 N.M. 161 ("[T]he district court's opinion purports to exercise appellate jurisdiction pursuant to Rule 1–074(Q), but it is clear from the substance of the six-page opinion that the district court fully considered the parties' arguments on the due process issue, unconstrained by the statutory limits on appellate review"); *Victor v. N.M. Dep't of Health*, 2014-NMCA-012, ¶ 24, 316 N.M. 213 (reaffirming the holding in *Maso* that a court can simultaneously

[4] *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. (describing the distinction between a properly judicial function and a properly legislative function); *Bd. of Educ. of Carlsbad Mun. Sch. v. Harrell*, 1994-NMSC-096, ¶ 46, 118 N.M. 470, 484, 882 P.2d 511, 525 (judiciary must check exercise of judicial functions by other bodies, and requiring that the "essential attributes" of judicial power "remain in the courts")

exercise its appellate and original jurisdiction); *Montez v. J & B Radiator, Inc.*, 1989-NMCA-060, ¶ 7, 108 N.M. 752, 754, ("[W]e believe the purpose of the rule requiring preservation is not served by applying it here, and we address the merits of the claim").

This Court's rules regarding certification of issues from a district court also militate in favor of this Court taking up these important issues now. Rules 1-074 S and 1-075 S NMRA permit any party to request that issues be certified to the appellate court if they involve 1) a novel question; 2) a constitutional question; 3) a question of state-wide impact; 4) a question of imperative public importance; 5) a question that is likely to recur and the need for uniformity is great [or]; 6) an appeal from any district court determination is highly likely such that certification in the first instance would serve the interests of judicial economy and reduce the litigation expenses to the parties. CFRE and NEE are not arguing that the certification process, as such, can be invoked here, but those rules identify the bases under which this Court will take up issues before a district court decides them, and they serve to specify in greater detail what this Court's appellate rule 12-321, quoted above, means when it refers to this Court's jurisdiction to take up on appeal important issues, even if they were neither decided nor preserved below. Any one of the foregoing criteria would justify this Court's taking up these issues in this appeal, but all of them are met here. Can it really be WRA's position that

even if this Court could take up these constitutional issues in the first instance, without waiting for a district court to decide them, it may not do so where the same criteria are met but the inferior tribunal is an agency not a court? Even where the Supreme Court takes direct appeals from the agency and even where the Court has discretion to address important issues raised in the first instance on appeal?[5]

WRA's restrictive view of this Court's jurisdiction – i.e., that it may have jurisdiction over this case, but jurisdiction over the ***issues*** in the case must be parsed to determine whether there is jurisdiction over each - is wholly contrary to the spirit of the rules and decisions cited above. "In the interest of judicial economy and to avoid a multiplicity of lawsuits" New Mexico courts can simultaneously exercise appellate and original jurisdiction as necessary." *Maso*, 135 N.M. at 157; *See also* 27A Am. Jur. 2d Equity § 67 (2020) (citing *State ex rel.*

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[5] Although it is unnecessary to the resolution of WRA's motion, it is notable that under Article VI, §§ 3 & 13 of the New Mexico Constitution, this Court and the district courts have concurrent jurisdiction in mandamus to decide any issue that (1) implicates fundamental constitutional questions of great public importance, (2) can be answered on the basis of virtually undisputed facts, and (3) calls for an expeditious resolution that cannot be obtained through other channels such as a direct appeal." *State ex rel. Sandel v. New Mexico Pub. Util. Comm'n*, 127 N.M. 272, 980 P.2d 55 (1999). *See also, Cty. of Bernalillo, N.M. v. N.M. Pub. Reg. Comm'n*, 2000-NMSC-035, ¶ 6, 129 N.M. 787, 14 P.3d 525 ("Assuming mandamus would otherwise lie, we exercise our power of original jurisdiction in mandamus if the case presents a purely legal issue that is a fundamental constitutional question of great public importance.").This is no more than yet another indication that, contrary to WRA's assertion that this Court, because it lacks jurisdiction, *cannot* decide the constitutional issues in this case, the law's logic in this case is that these issues get decided as expeditiously as possible.

State Hwy. and Transp. Dept. of N.M. v. City of Sunland Park, 3 P.3d 128, 132 (N.M. App. 2000)) ("Equity favors the prevention of a multiplicity of actions, and the interposition of a court of equity may be invoked to prevent a multiplicity of actions.").[6]

Conclusion. For the reasons set forth above, CFRE and NEE respectfully request that this Court deny WRA's Motion to Dismiss certain of the constitutional issues raised in this appeal.

Respectfully submitted this 2nd day of July, 2020.

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[6] This Court is free to interpret the pleadings in this appeal solely as an appeal or as including a mandamus proceeding, although the distinction is unnecessary in light of the rules and decisional law cited in this Response. "Our courts have chosen function over form when considering writs of mandamus." *Hoyt v. State*, 2015-NMCA-108, ¶ 21, 359 P.3d 147, 153; *see also, e.g.*, *Laumbach v. Bd. of Cty.* Comm'rs of San Miguel Cty., 1955-NMSC-096, 60 N.M. 226, 290 P.2d 1067 (giving effect to a civil complaint for equitable relief by converting it to a petition for mandamus); *State v. Roybal*, 2006–NMCA–043, ¶ 17, 139 N.M. 341, 132 P.3d 598 (stating that "it is the substance of the [pleading], and not its form or label, that controls" the question of jurisdiction).

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:

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NEW ENERGY ECONOMY