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 and
WESTERN RESOURCES ADVOCATES,
COALITION FOR CLEAN AFFORDABLE ENERGY, and
SIERRA CLUB,**

Intervener-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.**

APPELLEE NEW MEXICO PUBLIC REGULATION COMMISSION'S ANSWER BRIEF

Oral Argument Not Requested

October 5, 2020

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Appellee, New Mexico Public Regulation Commission ("PRC" or the "Commission'), submits this brief in answer to the Brief in Chief filed in this appeal by appellants Citizens for Fair Rates and the Environment ("CFRE") and New Energy Economy, Inc. ("NEE") (collectively, "Appellants") on August 17, 2020. The Commission requests that the Court affirm the Commission's *Final Order on Request for Issuance of Financing Order* issued on April 1, 2020 in Case No. 19-00018-UT ("Final Order") **[44 RP 014945-014959]** and respectfully states:

I. STANDARD OF REVIEW:

In reviewing PRC decisions, the challenging party bears the burden of proving that the decision "is arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency's authority, or otherwise inconsistent with law." *Albuquerque Bernalillo County Water Util. Auth. v. N.M. Pub. Regulation Comm'n and Pub. Serv. Co. of N.M.*, 2010-NMSC-013, ¶ 17

"A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in the light of the whole record." *Rio Grande Chapter of Sierra Club v. N.M. Mining Comm'n,* 2003-NMSC-005, ¶ 17

"Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." .... The Supreme Court analyzes the entire record when determining whether substantial evidence supports the PRC's

order. .... The PRC's order is rejected "only if conflicting evidence renders incredible the evidence in support of the decision." Id. ¶ 6. *Qwest Corp. v. N.M. Pub. Regulation Comm'n*, 2006-NMSC-042, para. 38. (citations omitted)

"The court "must assess whether the PRC's decision presents a question of fact, a question of law, or some combination of the two".... "With respect to questions of fact, we look to the whole record to determine whether substantial evidence supports the Commission's decision."... "We view the evidence in the light most favorable to the [PRC's] decision and draw every inference in support of the [PRC's] decision[.]".... "When fact finding is necessarily predicated on matters requiring expertise, our deference is substantial." *New Energy Econ. v. N.M. Pub. Regulation Comm'n*, 2018-NMSC-24; para 25 (citations omitted)

II. ARGUMENT:

A. APPELLANTS' APPEAL DOES NOT CHALLENGE THE COMMISSION'S RULING THAT IT LACKED JURISDICTION TO ADDRESS APPELLANTS' CHALLENGES TO THE CONSTITUTIONALITY OF THE ENERGY TRANSITION ACT

Appellants' brief primarily asserts certain provisions of the Energy Transition Act ("ETA") are unconstitutional. The Commission does not dispute Appellants' legal proposition that "[t]he constitutionality of the Energy Transition Act and PRC's rulings are questions of law which this Court reviews de novo." However, Appellants' claims of error relate solely to the Commission's action in applying the ETA to PNM's application for a financing order. It is the impacts on the

Commission's established regulatory powers resulting from the mandatory provisions of the ETA that Appellants assert are unconstitutional; not any discretionary action in applying the law by the Commission.

With the exception of Appellants' claims that the Commission failed to require compliance with NMSA 1978, §62-18-4(b)(5)(addressed below), Appellants' appeal does not challenge any actual Commission ruling in the Final Order, including the Commission's ruling that it lacked jurisdiction to address and rule on Appellants' facial constitutional challenges to the ETA and that such claims should have been brought in a court of law with original jurisdiction to hear such claims; i.e. the district court.

Appellants' Summary of the Proceedings set forth in its Brief in Chief notes with regard to the issue of whether N.M. Constitution Article IV, Section 34 barred application of the ETA to PNM's application, the Commission "did not rule on the applicability of the ETA to this proceeding" prior to issuance of the mandate in S-1-SC-38041. Appellants acknowledge the Commission's application of the ETA was made in compliance and accord with the Court's mandate in S-1-SC-38041.

The Hearing Examiners' *February 21, 2020 Recommended Decision* ("RD"), adopted and incorporated as part of the Commission's Final Order, confirms: "The issue of whether the ETA applies in this case has already been decided by the New Mexico Supreme Court" and "[t]he Supreme Court's decision resolves the issue, and

the Recommended Decision addresses only the scenario that the ETA applies." RD, pp 23-25. **[41 RP 014703-014705]**

Furthermore, the Commission declined to rule on Appellants' separate facial challenges to the ETA raised in the underlying proceeding which form the basis of the current appeal. While Appellants' brief asserts "the PRC did not address whether it could decide Constitutional issues," Appellants acknowledge the Hearing Examiners expressly declined to address those claims stating in the RD, stating: "The Hearing Examiners believe it would be improvident to address the constitutional claims asserted by NEE and CFRE. Should NEE and CFRE wish to pursue what amount to facial challenges to the constitutionality of the ETA, they should be taken to district court, the tribunal with original jurisdiction over such claims in New Mexico jurisprudence." RD, pp 26. **[41 RP 014706]**

Moreover, the Commission's Final Order adopted the RD on this point and expressly confirmed their ruling: "The Hearing Examiners correctly found NEE's facial challenges to the constitutionality of the ETA *are not properly raised before the Commission and should be or have been taken to district court*, which is vested with original jurisdiction over such claims under the New Mexico Constitution." *Final Order,* p. 9. ¶34. (emphasis added). **[44 RP 014953]**

In reaching this ruling, the Commission relied on this Court's decision in *Schuster v. State Dept of Taxation and Revenue* holding that "[A]ny constitutional

challenge beyond MVD's scope of statutory review is brought for the first time in district court under its original jurisdiction." See 2012-NMSC-025, ¶¶ 20-21. The Commission further noted the Court of Appeals' adoption of that holding in *Victor v. N.M. Dept of Health* providing that constitutional challenges that exceed any hearing officer's review are subject to the original jurisdiction of the district court. See 2014-NMCA-012, ¶ 24. Unlike the situation where constitutional issues are necessarily implicated by factual determinations within the scope of the Commission's authority, in the current instance, the constitutional challenges raised by Appellants present no factual issues within the scope of the Commission's regulatory authority, but instead only pure legal issues.

Further, while Appellants' May 8, 2020 *Statement of Issues* asserts vaguely that the Commission "implicitly" addressed and ruled on certain constitutional issues, Appellants fail to identify the basis for that assertion and their Brief in Chief provides no argument on that point or claim of error by the Commission. See *State v. Correa*, 2009-NMSC-051, ¶ 31. ("On appeal, issues not briefed are considered abandoned, and we do not raise them on our own.")

While Appellants now assert they may assert these constitutional challenges to the ETA on appeal, Appellants' *Statement of Issues* confirms it does not state any claim of error in the Commission's ruling on this point, noting only that they "seek to raise here constitutional issues that the Public Regulation Commission may or

may not have had the authority to decide." *Statement of Issues*, p.3. Indeed, Appellants' prayer for relief in its Brief seeks only a ruling a from the Court on these constitutional challenges. Accordingly, the Commission does not provide further analysis herein on its ruling that Appellants were limited to raising such constitutional challenges in the District Court pursuant to that court's original jurisdiction.

Similarly, the Commission's answer brief does not address the issue presented by Appellants concerning whether the Appellants may properly raise their constitutional challenges on appeal rather than through a district court action. This raises a purely legal issue that also does not challenge or implicate the Commission's exercise of its regulatory authority. Where suit is brought against the Commission in district court challenging the constitutionality of a statute the Commission applies, the New Mexico Attorney General typically defends the statute on behalf of the Commission and the State of New Mexico in accordance with NMSA 1978, Section 8-5-2. In the current instance, no suit has been brought in district court and while the Attorney General was a party to the underlying case, the Attorney General has not sought to intervene in this appeal.

B. THE COMMISSION'S DETERMINATION THAT PNM'S APPLICATION SATISFIED THE REQUIREMENTS OF NMSA 1978, §62-18-4(B)(5) WAS SUPPORTED BY SUBSTANTIAL EVIDENCE

Appellants' claim the Commission erred in finding that PNM's application satisfied the requirements of NMSA 1978, Section 62-18-4(B)(5) should be rejected because substantial evidence presented on behalf of PNM's application for a financing order was sufficient for the Commission to find that PNM had met the statutory requirements. Appellants' reliance on what they characterize as conflicting language in a disclaimer is insufficient to demonstrate that the Commission erred in finding that PNM met its statutory obligation to provide the required memorandum from a securities firm supporting its application for a financing order.

Section 62-18-4(b)(5) requires an application for a financing order to contain:

> [A] memorandum with supporting exhibits from a securities firm, such firm to be attested to by the state board of finance as being experienced in the marketing of bonds and capable of providing such a memorandum, that the proposed issuance satisfies the current published AAA rating or equivalent rating criteria of at least one nationally recognized statistical rating organization for issuances similar to the proposed energy transition bonds. The request for such attestation may be made by a qualifying utility prior to an application for a financing order, and the state board of finance shall act upon such a request promptly.

PNM's application was supported by a memorandum authored by Mr. Charles Atkins, a Senior Advisor at Guggenheim Securities, LLC in New York, NY. **[32 RP 010889]**

While Appellants challenged the Guggenheim memorandum on a number of grounds in the case below, on appeal Appellants have abandoned their previous arguments challenging the substance of Mr. Atkins' memorandum and Guggenheim Securities' qualifications to issue the required memorandum. Instead, they now

restrict their argument to the single claim that Mr. Atkins' memorandum failed to satisfy the requirements of Section 62-18-4(B)(5) because it constituted the opinion of "an individual employed by a firm" rather than an opinion of the firm itself.

Appellants base this claimed deficiency in the evidence on the fact that the memorandum included what Appellants themselves term a "disclaimer" stating:

> This Presentation does not constitute financial advice or create any financial advisory, fiduciary or other commercial relationship. In addition, this Presentation does not constitute and should not be construed as (i) a recommendation, advice, offer, or solicitation by Guggenheim Securities, its affiliates . . . with respect to any transaction or other matter, or with respect to the purchase or sale of any security . . . or addressing . . . (b) the relative merits or any such transaction or matter as compared to any alternative business or financial strategies that might exist for any party, (c) the financing of any transaction, or (d) the effects of any other transaction in which any party might engage. The views expressed herein are solely those of the author(s) and may differ from the views of other Representatives of Guggenheim securities.

Appellants' argument focuses solely on the last sentence of the disclaimer language, essentially asserting that because the disclaimer indicated Mr. Atkins's opinion may differ from other representatives of Guggenheim, it must be inferred that his memorandum cannot be deemed a memorandum which binds Guggenheim.

The RD and the Commission's Final Order properly rejected NEE's argument on this point, noting that Mr. Atkins' answer to NEE's Interrogatory 4-7 on this point confirmed that: "Mr. Atkins was authorized by Guggenheim Securities to submit his expert direct testimony". **[44 RP 014946-014947 & 32 RP 010801-010825]**

Mr. Atkins further confirmed under cross-examination by NEE at the public hearing on PNM's application that he had and was acting within his authority to bind Guggenheim.

> Q. Mr. Atkins, with all due respect, you don't have the authority from Guggenheim Securities to bind the firm with respect to the transaction that is the subject of this current case. Is that right?
>
> A. I am an authorized representative to produce and to submit the -- this particular memorandum, Exhibit 4. I am an authorized representative, yes, I am.
>
> Q. But are you binding the firm?
>
> A. I have -- I am an authorized representative, and I do have -- yes, I am an authorized representative, and this, I have – this particular memorandum has been offered on behalf of our firm, and so it is a securities firm memorandum …. It is --And it is offered on behalf of our firm, and I am an authorized representative, and I have that authority.
>
> **[31 RP 010544-010545; [17 RP 004136-004141; & 32 RP 010826-011034]**

Appellants did not seek to examine Mr. Atkins concerning the language in the disclaimer that they now rely on. In light of Mr. Atkins' unequivocal and unrefuted testimony that he was authorized to bind Guggenheim, the Commission was justified in accepting such testimony as substantial evidence in support of its determination that the Guggenheim memorandum and PNM's application satisfied the requirements of Section 62-18-4(B)(5).

III. CONCLUSION

The Court should up hold the Commission's Final Order for Issuance of a Financing Order and reject Appellants' challenge claiming the Commission erred in finding that PNM's application satisfied the requirements of NMSA 1978, Section

62-18-4(B)(5). The Substantial evidence in the record identified herein was presented on behalf of PNM's application for a financing order and was sufficient for the Commission to find that the Guggenheim Securities memorandum met the statutory requirements of the ETA.

Respectfully submitted this 5th day of October, 2020.

NEW MEXICO PUBLIC REGULATION COMMISSION

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 5th, 2020, a true and correct copy of the foregoing *Appellee New Mexico Public Regulation Commission's Answer Brief* was electronically filed in the Supreme Court's Odyssey filing system, which in turn has caused service upon counsel for all parties of record.

NEW MEXICO PUBLIC REGULATION COMMISSION

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