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

ANSWER BRIEF OF INTERVENER-APPELLEE PUBLIC SERVICE COMPANY OF NEW MEXICO TO APPELLANTS' BRIEF-IN-CHIEF

(Oral Argument Requested)

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REQUEST FOR EXPEDITIOUS ORAL ARGUMENT

Pursuant to Rule 12-319 NMRA (2016), PNM respectfully requests oral argument to facilitate the Court's consideration of the matters at issue in this proceeding. In conformity with NMSA 1978, Section 62-18-8(B) (2019), PNM respectfully requests that the Court hear and determine the appeal of this case as expeditiously as practicable. This appeal creates uncertainty about the authorizations granted, and is preventing PNM from releasing substantial funding being counted on by state agency-sponsored programs currently being developed, affected workers such as mine workers facing imminent layoffs, and local communities that are directly affected. Unless the appeal is promptly resolved, PNM is unable to make any advance payments authorized by the NMPRC because the requirement for and recovery of these costs is dependent upon the validity of the challenged law and the financing order approving the issuance of the bonds to cover these costs.[1] **[41 RP 14777-14784]** As a result, impacted workers and communities are waiting until this appeal is resolved before they can receive any of the funding provided under the Energy Transition Act and the Financing Order.

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[1] *See Recommended Decision on PNM's Request for Issuance of a Financing Order* ("Recommended Decision"), Case No. 19-00018-UT, at 99-104 (Feb. 21, 2020).

I. INTRODUCTION AND SUMMARY OF ARGUMENT

In the case below, the New Mexico Public Regulation Commission ("Commission" or "NMPRC") approved Public Service Company of New Mexico's ("PNM") request for a financing order ("Financing Order") pursuant to the New Mexico Energy Transition Act ("ETA" or "Act").[2] The Act authorizes PNM to issue bonds to recover its allowed costs for the early abandonment of Units 1 and 4 of the San Juan Generating Station ("SJGS"), when the plant closes in 2022, and to provide funding to support the communities most impacted by its closure. **[44 RP 14945-14956]** The urgency and importance of this appeal cannot be overstated. The Court has already recognized the significant interests of the State at play in the ETA, with its recent mandamus decision in *State ex rel. Egolf et al. v. N.M. Public Reg. Commission* ("*Egolf*"), Case No. S-1-SC-38041, 2020 WL 4251786, ____-NMSC-___, ¶ 16 (Jul. 23, 2020), directing that the NMPRC apply the ETA to the proceedings below.

To help mitigate the economic impacts to the local and Native American communities from the plant and mine closures, the bonds will provide funding to state-administered funds for Indian affairs, and economic development and assistance to displaced workers. The bonds will also fund severance and job

[2] NMSA 1978, §§ 62-18-1 to -23 (2019).

training for the power plant and coal mine workers who will lose their jobs between now and the shutdown of the plant and the associated coal mine.

Appellants, Citizens for Fair Rates and the Environment ("CFRE") and New Energy Economy, Inc. ("NEE")[3] do not focus their appeal on the merits of the Financing Order and the standards for appellate review. Rather, they use this appeal of the Financing Order as a vehicle to selectively eliminate those portions of the ETA with which they disagree (securitization of abandonment and other defined costs, such as worker relief and community development delineated by the Legislature), while seeking to preserve those portions of the Act they favor. Appellants seek to invalidate the ETA's policies only to the extent that it permits utilities to recover necessary costs associated with the early abandonment of coal plants and provides economic relief to workers and communities impacted by the closure of the power plants and associated coal mines. **[BIC 45, 49]** Appellants do not challenge the portions of the ETA that impose enhanced requirements for renewable energy and more stringent emissions limitations on coal plants. **[*Id.*]**

This appeal should be summarily denied. Appellants' arguments are based on a distorted interpretation of the ETA and a misapplication of the constitutional principles governing the legislative process and the authority of the Legislature to set public policy. Appellants ignore fundamental constitutional principles: the

[3] CFRE and NEE are sometimes collectively referred to as "Appellants."

Legislature is the branch of government responsible for setting public policy, and the scope of the NMPRC's regulatory authority is defined by the Legislature.

Appellants incorrectly portray the ETA as forcing the NMPRC to approve, and customers to pay, "whatever" PNM asks with respect to plant abandonment costs with no meaningful opportunity for review. **[BIC 1, 13-14]** This is simply wrong. 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 under the bonds. Appellants also ignore that the ETA specifically requires that the securitized abandonment costs are subject to a true-up based on actual costs, and that the true-up will be implemented through changes in PNM's base rates, at which time the actual costs will be subject to Commission review for prudence and reasonableness. The only exception is that costs *already* reviewed by the Commission and included in rate base prior to January 1, 2019, and thus previously found to be reasonable and prudent, are not subject to re-litigation.

Appellants also seek to sweep other PNM power plants into this appeal, detailing resources such as the Four Corners Power Plant ("FCPP"), the Palo Verde Nuclear Generating Station ("PVNGS"), and certain unidentified natural gas plants. **[BIC 16-25]** Nothing about these power plants relates to this case. Moreover, the "facts" that Appellants rely on with respect to these other resources are not part of the record. Appellants almost exclusively rely on citations to case orders and filings

from other cases as factual support for their claims about the other resources, citing to none of the evidence in this case.

Appellants raise only one issue with respect to the ETA's requirements for issuance of a Financing Order, *i.e.*, that PNM failed to file a memorandum from a qualified securities firm that includes an opinion that the proposed bond issuance satisfies the current published AAA rating or equivalent. **[BIC 43-44]** PNM provided precisely such a memorandum from a securities firm explicitly confirmed by the State Board of Finance as qualified to render its opinion. Appellants claim that the memorandum must be invalidated because an individual within the securities firm, and not the firm itself, sponsored the memorandum. However, the facts demonstrate, and the Commission found, that the memorandum properly comes from a qualified securities firm and that it meets the requirements under the ETA.

II. SUMMARY OF RELEVANT FACTS

Much of what Appellant's represent about the ETA is incorrect and was specifically rejected by the NMPRC. In addition, Appellants scarcely address the terms of the Financing Order, which is the subject of this appeal. Accordingly, PNM provides the following general information and facts about the ETA and the Financing Order.

A. Senate Bill 489 and the Energy Transition Act.

The Legislature passed the ETA as part of Senate Bill 489 ("SB 489") to establish a comprehensive energy policy that provides an orderly transition of the State's electricity supply needs away from fossil fuel generation to renewable and carbon emission-free sources of energy. The Act addresses the interests of all stakeholders, including utility customers, utilities, workers, and local and Native American communities who will be impacted as the State transitions away from coal power plants and coal mines to renewable and other less carbon intensive resources.

SB 489 amends the Renewable Energy Act, NMSA 1978, §§ 62-16-1 to -10 (2004, as amended through 2019) ("REA"), to impose enhanced renewable resource standards and compliance milestones culminating in a requirement that public utilities supply all of their retail customers' needs through zero-carbon resources by January 1, 2045. Section 62-16-4(A)(1)-(6). As further incentive to transition to renewable resources, SB 489 amends the New Mexico Air Quality Control Act ("AQCA") to require more stringent limitations on carbon emissions from generating resources, to be adopted and effective by January 1, 2023. NMSA 1978, § 74-2-5(B)(1)(b) (2019).

To facilitate an accelerated abandonment of coal plants as required, renewable energy resources are being added, and the ETA provides that a utility

abandoning its interests in a coal plant may apply to the Commission for a financing order to recover its "energy transition costs" through the issuance of energy transition bonds. Section 62-18-4(A). Energy transition costs include a utility's financing costs, abandonment costs up to $375 million, any other compliance cost associated with changes in law enacted after January 1, 2019, and required payments to certain State funds to ameliorate the economic impacts to workers and local communities. Section 62-18-2(H)(1)-(4). The permitted abandonment costs include up to $30 million for plant decommissioning and specified mine reclamation costs, up to $20 million for severance pay and job training for impacted plant and coal mine workers, the utility's undepreciated investment in the coal plant as approved in rates or by court order as of as of January 1, 2019, and other undepreciated investments in the coal plant incurred to comply with law or as necessary to maintain a safe and reliable operation of the plant prior to its abandonment. Section 62-18-2(H)(2)(a)-(d). The proceeds from the sale of the bonds can only be used by the utility for purposes of providing utility service to customers and to pay financing costs. Section 62-18-10(A).

The recovery of the foregoing costs is accomplished through the sale of the bonds that are secured by and payable from charges collected through an "energy transition charge" ("ETC") on customer bills over the life of the bonds. *See* Section 62-18-2(F), (G). The ETC is non-bypassable, meaning that it must remain in effect

until the bonds are fully paid. Sections 62-18-5(F)(3), 62-18-2(P). The right to receive the revenues from the ETC are vested property rights under the ETA. Section 62-18-12(A). The ETC is subject to adjustment over the life of the bonds to ensure that there is neither an over-collection nor an under-collection of funds needed to timely pay-off the bonds. Section 62-18-6(B).

The objective of the safeguards on the repayment of the bonds is so that the bonds will have a high (AAA or equivalent) investment grade rating to achieve as low an interest rate as possible to save customers money. *See* § 62-18-4(B)(5). **[32 RP 10837:1-18, 11020:14-11022:22]** By securitizing abandonment costs, the utility foregoes its authorized rate of return on the investments recovered through the bonds so that it makes no further profit on these investments. Because the authorized rate of return is typically significantly higher than bond interest rates, customers save money compared to standard rate-of-return utility rate recovery. **[28 RP 9272]** The estimated net savings to customers as a result of the abandonment of SJGS and its replacement with lower carbon resources is approximately $80 million in 2023 alone. **[28 RP 9207:11-9208:12, 9272; 41 RP 14782]** Of this amount, $22 million is attributable to using securitized financing compared to traditional rate-of-return ratemaking. **[28 RP 9207:11-9208:12, 9272; 30 RP 9804:4-9, 9846]**

An application for a financing order necessarily involves *estimates* for the future costs of abandonment and this is specifically contemplated by the ETA. Section 62-18-4(B)(2)-(3). In order to ensure that customers only pay for the actual costs of abandonment, the ETA requires that a ratemaking mechanism be in place to adjust the utility's rates to account for any difference between the actual costs of abandonment and the estimated costs included in the bond financing. Section 62-18-4(B)(10).

The ETA also includes several provisions intended to ameliorate the economic impacts to coal plant and coal mine workers and local communities as a result of the plant and mine closures, including a unique feature to fund severance and job training of impacted mine workers, and not just the utility's power plant workers. Sections 62-18-2(H)(2)(b). SB 489 also amended the Public Utility Act ("PUA") to require the hiring of union apprentices for new power plants built as a result of competitive solicitations issued after July 1, 2020. NMSA 1978, § 62-13-16 (2019).

The ETA establishes certain state-administered funds including the Energy Transition Indian Affairs Fund, the Energy Transition Economic Development Fund, and the Energy Transition Displaced Worker Assistance Fund, all to be funded from proceeds from the sale of the bonds. Section 62-18-16. To further assist impacted communities, the ETA includes a preference that up to 450 MW of

replacement resources be located in the school district where the retired coal plant is located. Section 62-18-3(F).

B. The Financing Order.

The Financing Order authorizes PNM to securitize $360.1 million for the estimated recoverable costs associated with the abandonment of its remaining interest in SJGS through the issuance of bonds. **[41 RP 14794-14795, ¶ 18]** The bonds will be issued in 2022 through a Commission-authorized, PNM-owned special purpose entity which is structured to be "bankruptcy remote" from PNM. **[41 RP 14796-14799, ¶¶ 20-28]** The table below summarizes the estimated costs that make up the securitized amount.

Summary of Energy Transition Costs	
$11.1 million	Plant Employee Severance and Job Training
$8.9 million	Mine Employee Severance and Job Training
$1.8 million	Payment to Indian Affairs Fund
$5.9	Payment to Economic Development Fund
$12.1	Payment to Workers Assistance Fund
$9.4 million	Coal Mine Reclamation
$19.2 million	Plant Decommissioning
$283.0 million	Undepreciated Investment - SJGS
$8.7 million	Upfront Financing Costs

[41 RP 14707]

The foregoing represents the *maximum* amount that PNM is authorized to securitize. PNM committed that it will not securitize the full amount of the estimated abandonment costs if the updated estimates at the time the bonds are

issued are lower. **[41 RP 14720-14721]** In addition, contrary to the arguments of Appellants, the parties were given the opportunity to review and challenge PNM's estimated abandonment costs; however, the Commission found that no party, including Appellants, presented any evidence that the forgoing estimates were unreasonably high. **[41 RP 14720-14721]** NEE actually suggested that the certain of the estimated costs may be too low. **[*Id.*]**

The Financing Order authorizes PNM to collect the ETC to pay the debt service on the bonds over a 25-year period at specified charges. For residential customers using less than 900 kWh per month, the monthly charge is $1.90, and for customers using more, the monthly charge is $4.97. **[41 RP 14699]** The ETC is subject to a true-up to correct for any over-collection or under-collection. **[41 RP 14808-810, ¶¶ 50-55]** At the time that PNM starts charging customers the ETC, it must immediately reduce its rate base and eliminate all costs of SJGS from rates, which will more than offset the additional cost of the ETC. **[41 RP 14699]** All else held equal, it is estimated that, with the saving from the retirement of SJGS and the addition of lower emission resources, the average residential customer will realize a saving of $6.87 per month. **[41 RP 14784-14785]**

As required by the ETA, the Financing Order establishes a process to adjust PNM's base rates in the future to reconcile any differences between the estimated costs that are recovered in the bonds and PNM's actual costs. **[41 RP 14705]**

Again, contrary to the arguments of Appellants, this process includes the opportunity for the Commission and interested parties to review the reasonableness and prudence of the actual costs, including plant decommissioning and mine reclamation costs. **[41 RP 014772]** The only exception is that the undepreciated balances for investments in SJGS already included in rate base as of January 1, 2019, will not be subject to re-litigation. **[*Id.*]**

It is important to note that although the Financing Order approved the amounts to be financed, and the specific ratemaking methodologies relative to the ETC and the true-up mechanism as required by the ETA, no actual rates were set by the Financing Order in the proceeding below. The actual ETC will not go into effect until the bonds are sold in 2022, and the specific charges will be set by the Commission at that time.

III. APPLICABLE LEGAL STANDARDS

A. Standards Applicable to Review of Commission Orders.

Under NMSA 1978, Section 62-11-4 (1965), an appellant bears the burden of proving that the Commission's final order is unreasonable or unlawful, and must overcome the presumption that the Commission's decision is reasonable. *Albuquerque Bernalillo County Water Util. Auth. v. N.M. Pub. Regulation Comm'n*, ("*ABCWUA*") 2010-NMSC-013, ¶ 35, 148 N.M. 21. In order to prevail on appeal, Appellants must show that the decision is not supported by substantial evidence,

arbitrary and capricious, outside the scope of the Commission's authority, or otherwise inconsistent with law. *See N.M. Indus. Energy Consumers v. N.M. Pub. Regulation. Comm'n* ("*NMIEC*"), 2007-NMSC-053, ¶ 13, 142 N.M. 533. The Court determines the appeal solely on the evidentiary record before the Commission, and the Court cannot permit the introduction of new evidence. NMSA 1978, § 62-11-3 (1982). The Court does not have the authority to modify the Commission's final order and, therefore, vacates any order that it finds unreasonable or unlawful. NMSA 1978, § 62-11-5 (1978); *Hobbs Gas Co. v. N.M. Pub. Serv. Comm'n,* 1993-NMSC-032, ¶ 6, 115 N.M. 678.

When presented with questions of fact, the Court looks at the whole record to determine whether substantial evidence supports the Commission's decision. *NMIEC*, 2007-NMSC-053, ¶ 24. The substantial evidence standard is met where the record as a whole demonstrates the reasonableness of the agency's decision; the Court does not reweigh the evidence or replace the fact finder's conclusions with its own views. *DeWitt v. Rent-A-Center, Inc.*, 2009-NMSC-032, ¶ 12, 146 N.M. 453. The Court gives substantial deference to factual findings that are predicated on matters requiring NMPRC expertise. *ABCWUA*, 2010-NMSC-013, ¶ 50.

The Supreme Court reviews questions of law and issues of statutory construction *de novo*. *Moongate Water Co. v. City of Las Cruces*, 2013-NMSC-018, ¶ 6, 302 P.3d 405; *see also Albuquerque Cab Co. v. N.M. Pub. Regulation*

Comm'n, 2014-NMSC-004, ¶ 10, 317 P.3d 837. Where the Legislature has delegated to the NMPRC (explicitly or implicitly) the role of interpreting gaps in the NMPRC's governing statutes, the Court defers to the NMPRC's statutory construction in areas of policy-making authority and where the NMPRC possesses necessary expertise to make sound policy. *New Energy Econ., Inc. v. N.M. Pub. Regulation Comm'n*, 2018-NMSC-024, ¶ 25, 416 P.3d 277 (citations omitted). The Court will not defer to the Commission's policy-based interpretation if it is unreasonable or unlawful and instead substitutes the Court's independent judgment for that of the Commission. *ABCWUA*, 2010-NMSC-013, ¶ 51.

B. Standards Applicable to Constitutional Challenges to Statutes.

Appellants primarily challenge the constitutionality of the ETA. However, these arguments fail to clear the very high hurdle necessary to demonstrate that the ETA is invalid. In passing on the constitutionality of a statute, courts are to presume that the Legislature is well-informed regarding existing statutory and common law and does not intend to enact a nullity. *N.M. Attorney Gen. v. N.M. Pub. Regulation. Comm'n*, 2013-NMSC-042, ¶ 27, 309 P.3d 89. Statutes are presumed to be valid and upheld against constitutional challenge unless it is beyond all reasonable doubt that the Legislature exceeded its constitutional authority. *State ex rel. Udall v. Pub. Emps. Ret. Bd.*, 1995-NMSC-078, ¶ 7, 120 N.M. 786; *see also Bounds v. State ex rel. D'Antonio*, 2013-NMSC-037, ¶ 11, 306 P.3d 457.

IV. ARGUMENT

As a threshold issue, PNM respectfully submits that the objective of the Appellants appears to be based more on a desire to "punish the utility" than challenging the fundamental policy objective of the ETA to transition New Mexico to a carbon-free energy future. The target of this appeal is PNM's recovery of its abandonment costs, and most specifically PNM's undepreciated investment in SJGS which, at $283 million, is the single largest component of these costs. Appellants' arguments about the claimed usurpation of authority of the Commission and the rights of customers is premised upon the assumption that, but for the ETA, PNM's recovery of these costs necessarily would be disallowed or greatly reduced. **[BIC 37]** This is a flawed premise. There are sound factual, legal, and policy grounds that allow a utility to recover its undepreciated investments when plants are retired due to government mandates or to benefit customers, as is the case here. **[*See* 28 RP 8953:13-8956:12, 8960:3-8969:21, 9006:3-9016:22]**

From a legal perspective, the NMPRC has an obligation to allow a utility to recover costs that are necessary to provide utility service, that benefit ratepayers, and that are prudently incurred. *City of Albuquerque v. N.M. Pub. Regulation Comm'n*, 2003-NMSC-028, ¶ 17, 134 N.M. 472. In addition, even outside of the ETA, there is ample authority to support a utility's full recovery of its undepreciated investments in plants where, as here, the plant is retired early to benefit customers.

See, e.g., Town of Norwood v. Fed. Energy Regulatory Comm'n, 80 F.3d 526, 531 (D.C. Cir. 1996) (denying full recovery is not in public interest because it gives investors the incentive to operate a plant until full investment is recouped, even if closing the plant would save ratepayers money); *see also In re Application of Pub. Serv. Co of Oklahoma*, Cause No. 201700151, 2018 WL 704312, at *2 (Jan. 31, 2018) (explaining that allowing a return "provides confidence in the financial integrity of the company" and "balances the interests of both the investor and the consumer"); *In re Alabama Power Co.*, Docket No. U-5033, 2011 WL 4826138 (Sept. 7, 2011). This result is entirely consistent with Section 62-3-1(B) of the Public Utility Act,[4] which provides that it "is the declared public policy of the state" that, among other things, "capital and investment may be encouraged and attracted so as to provide for the construction, development and extension, without unnecessary duplication and economic waste, of proper plants and facilities."

From a factual perspective, there has been no showing that any of PNM's investments in Units 1 and 4 of SJGS that are included in the amounts to be securitized were either unreasonable or imprudent, and no party challenged the reasonableness of the estimated amount of necessary investments for the post-2019

[4] NMSA 1978, §§ 62-1-1 to 7 (1909, as amended through 1993), 62-2-1 to -22 (1887, as amended through 2013), 62-3-1 to -5 (1967, as amended through 2019), 62-4-1 (1998), 62-6-4 to -28 (1941, as amended through 2018), 62-8-1 to -13-16 (1941, as amended through 2019) (the "PUA").

period. In fact, 79% of the book value of these units as of 2018 were made before PNM's 2015 rate case and were found to be prudent and recoverable in that case. **[28 RP 9002:15-9005:20]** Thus, the vast majority of the costs that make up PNM's undepreciated investment in SJGS have previously been reviewed and approved; prudence is not to be determined (or re-determined) on a hindsight basis. *In re PNM Gas Servs.*, 2000-NMSC-012, ¶ 63, 129 N.M. 1. As noted in the Recommended Decision in this case, any additional costs incurred with respect to SJGS after January 1, 2019, will subject to NMPRC review for prudence and reasonableness. **[41 RP 14772-14773]**

A. Response to Points 1 and 2: The Energy Transition Act is a Proper Exercise of Legislative Policy and Does Not Infringe on the Rights of the NMPRC or Customers.

1. *The ETA Does not improperly encroach upon or divest the NMPRC of its authority.*

Appellants assert that the ETA unlawfully infringes on the authority of the NMPRC, under Article XI, Sections 1 and 2 of the New Mexico Constitution, to set customer rates. **[BIC 26-29]** This argument ignores the role of the Legislature in setting public policy and well-established precedent that the NMPRC's authority is defined by the Legislature. Appellants' argument that Article XI, Section 2 somehow vests the NMPRC with inherent and self-executing authority to regulate public utilities without regard to legislative directive is contrary to law. This Court, in this very proceeding, reaffirmed that under Article XI, Section 2, the NMPRC's

authority over public utilities is only to be exercised "in such manner as the legislature shall provide." *Egolf,* 2020 WL 4251786, ____-NMSC-___, ¶ 17; *accord*, *ABCWUA,* 2010-NMSC-013, ¶ 18.

The Legislature, as the voice of the people, is in the unique position of creating and developing public policy. *State ex rel. Taylor v. Johnson*, 1998-NMSC-015, ¶ 21, 125 N.M. 343. While other elected officials and agencies have some authority to make policy, it is to a lesser extent and only as authorized in legislation or the New Mexico Constitution. *Id.* The ETA is a proper exercise of the Legislature's authority to craft the state's public utility energy policy. As oft noted by this Court, although the Commission is a constitutionally created body, it "may exercise only its statutorily authorized jurisdiction." *El Paso Elec. Co. v. N.M. Pub. Regulation. Comm'n,* 2010-NMSC-048, ¶ 6, 149 N.M. 174; *City of Sunland Park v. N.M. Pub. Regulation Comm'n*, 2004-NMCA-024, ¶ 19, 135 N.M. 143; s*ee also* NMSA 1978, § 62-6-4(A) (2003) (providing that the NMPRC's power and jurisdiction to regulate public utilities must be done "in accordance with the provisions and subject to the reservations of the [PUA]"). Thus, the Legislature is vested with the authority to set the policy for utility regulation in New Mexico, which the NMPRC is to carry out.

Appellants rely on numerous legal authorities describing the Commission's authority and duties over utility rates to support their argument that the ETA

impermissibly encroaches on the NMPRC's authority by defining how recovery for certain abandonment costs such as undepreciated investment, plant decommissioning, and mine reclamation must be treated. **[BIC 26-29]** Their arguments flatly ignore the Court's explicit holdings that the NMPRC's authority over rates is grounded in statute, *see, e.g.,* §§ 62-3-1(B), 62-6-4(A), 62-8-1, and 62-8-7, and is not the product of the agency's inherent authority. *Egolf*, 2020 WL 4251786, ____-NMSC-___, ¶ 17.

Moreover, the ETA does not divest the Commission of jurisdiction over public utilities. Rather, the ETA sets the legislative policy that the Commission is to follow with respect to the early retirement of coal-fired plants to facilitate the deployment of renewable resources and addresses impacts on those individuals and communities most impacted by the State's transition to cleaner forms of electricity production. This is no different than other laws setting energy policy, such as the REA, which imposes specific requirements for the amount of renewable energy in a utility's generation portfolio, or the Efficient Use of Energy Act, NMSA 1978, §§ 62-17-1 to -11 (2005, as amended through 2019) ("EUEA"), which requires utilities to implement and promote energy conservation efforts.

Likewise, the ETA provisions that define the costs that a utility may recover due to the early retirement of a coal plant do not encroach upon the authority of the NMPRC. The Legislature has defined what costs a utility is entitled to recover in

other provisions of the PUA. For example, the REA specifically mandates that the Commission allow utilities to recover both the "reasonable costs of complying with the renewable portfolio standard" and the "reasonable interconnection and transmission costs incurred by the public utility in order to deliver renewable energy to retail New Mexico customers." Section 62-16-6(A)-(B). Similarly, the EUEA requires that a utility shall recover its prudent and reasonable costs associated with cost-effective energy efficiency and load management programs. Section 62-17-6(A). After the repeal of the Energy Utility Restructuring Act of 1999, the Legislature authorized public utilities to recover their transition costs incurred in compliance with the act before its repeal. Section 62-6-4.2(A). The ETA is no different in this regard.

The ETA also does not preclude NMPRC review of PNM's abandonment costs that have not yet been subject to a ratemaking review. As noted above, the Commission and interested parties had a full opportunity to review and contest actual investments that were included in rates prior to 2019. Parties also had the opportunity in the case below to challenge PNM's estimated costs to be securitized, yet none were able to show that the requested costs themselves were unreasonable. **[41 RP 14720-14721]** Once PNM incurs the cost for abandonment of SJGS, the Commission and interested parties will again have a chance to review the prudence and reasonableness of PNM's final abandonment costs, including decommissioning

and mine reclamation expenses, as well as any investments in SJGS from 2019 and beyond. **[41 RP 14768-14773]** Any true-up or adjustments due to any findings of imprudence related to these costs will be accounted for in PNM's base rates. **[41 RP 14773]**

2. The ETA Does not violate customers' due process or other rights.

Appellants maintain that the ETA violates customer due process and other rights because it "eliminates all protections of ratepayers as to abandonment costs." **[BIC 30]** The ETA does not deprive customers of rights in process or in substance.

Section 62-18-5(A) of the ETA specifically provides for a hearing on a proposed financing order, and the NMPRC conducted such a hearing before issuing the Financing Order. The fundamental elements of due process in the context of administrative proceedings are reasonable notice and an opportunity to be heard that affords parties a fair opportunity to present their case. *See ABCWUA*, 2010-NMSC-013, ¶ 21. The ETA and the proceeding below comport with due process standards. Moreover, customers will again have an opportunity to be heard in the proceedings to true-up the securitized dollar amounts with the actual costs that were incurred.

Appellants' arguments are premised upon the notion that customers are entitled, as a matter of law, to have their rates based on a disallowance of all or some of the costs for the abandonment of SJGS. The fallacy of this contention was

addressed above. Moreover, there is long-standing authority that utility customers have no vested property interest in any particular rate. *Wright v. Central Kentucky Natural Gas Co.*, 297 U.S. 537, 542, 56 S.Ct. 578 (1936) (customers have no vested right that would preclude the city from reasonably adjusting rates); *Sellers v. Iowa Power & Light Co.*, 372 F.Supp. 1169, 1172 (S.D. Iowa.1974) ("utility customers have no vested rights in any fixed utility rates"); *Georgia Power Project v. Georgia Power Co.*, 409 F.Supp. 332, 340 (N.D. Ga. 1975) (customers have "no sufficient 'property' interest in a given utility rate" to invoke procedural due process). Customer's rights are not violated because the ETA allows a utility to recover its costs associated with abandoning a power plant before the end of its operating life in order to save customers money and to comply with environmental and regulatory mandates.

B. Response to Point 3: The Energy Transition Act Does Not Violate the Separation of Power Doctrine by Limiting Judicial Review

Appellants argue that the ETA violates the separation of powers doctrine in two respects. First is the claim that the Act guarantees the continued validity of financing orders notwithstanding court review. Their second claim is that the ten day period for filing an appeal deprives the Court of its appellate authority. **[BIC 36-38]** Neither argument is correct.

1. *There is no impermissible limit on appellate review.*

Section 62-18-8 of the ETA provides an opportunity for an aggrieved party to appeal a financing order pursuant to the statutory appellate review process under Section 62-11-1. Therefore, appellate review of a financing order is no different than any other final order of the Commission.

Appellants misstate that financing orders under the ETA are exempt from appellate review. **[BIC 38]** Rather, the ETA provides that once the bonds have been issued, if the ETA is repealed, amended, or invalidated thereafter, it will not impair the validity of the bonds or any action that the NMPRC, a utility, or any other person took pursuant to the Act while it was in effect. Section 62-18-22. Such statutory savings clauses do not violate the separation of powers doctrine.

"Savings" or "grandfather" clauses such as Section 62-18-22 are legally valid. *See Edwards v. Bd. of County Comm'rs of County of Bernalillo*, 1994-NMCA-160, ¶¶ 10-13, 119 N.M. 114 (legislature can continue to recognize previous legislation in force for certain purposes even if original enabling legislation is repealed) *citing Bd. of Educ. v. Citizens' Nat'l Bank*, 1917-NMSC-059, 23 N.M. 205 (1917) (where savings clause existed, school districts could still issue bonds even though enabling statute was repealed and legislature did not grant school district that power). The Legislature has authority to pass laws that contain clear and unambiguous language to grant a contractual or vested right or interest to

individuals who have acted in accordance with those laws while valid and in effect. *Regents of Univ. of N.M. v. N.M. Fed'n of Teachers*, 1998-NMSC-020, ¶¶24-25, 125 N.M. 401 (purpose of savings or grandfather clause is to except particular case or situation from general principle or enactments, to preserve something from immediate interference, protect something old, or relieve entity from submitting to something new). These types of clauses are typically deemed necessary to prevent harm that could occur where new statutory restrictions or requirements impose hardships upon activities that were established prior to the law's enactment (or in this instance, purported invalidation). *Cf. Roberts v. State Bd. of Embalmers and Funeral Directors,* 1976-NMSC-257, ¶ 15, 78 N.M. 536 (where administrative agency granted a license under previous standards that allowed a waiver of training requirements which was no longer allowable under contemporary statutes, agency could not thereafter revoke that license on same grounds as waived). Section 62-18-22 does not violate the separation of powers doctrine.

2. Ten-Day Deadline for Filing Notice of Appeal.

Appellants also claim that the ten day period to file a notice of appeal from the issuance of a financing order under Section 62-18-8(B) violates the separation of powers doctrine under Article III, Section 1 of the New Mexico Constitution. **[BIC 38]** Appellants provide no legal citation to support their argument and they fail to explain how this limits this Court's ability to review the Commission's order.

Therefore, the Court need not consider this argument. *Carrillo v. Compusys, Inc.*, 1997-NMCA-003, ¶ 13, 122 N.M. 720 ("We will not consider an argument on appeal, particularly a constitutional one, which is not adequately supported by cited authorities.").

In addition, this appeal was filed within the ten-day statutory deadline so there is no actual controversy over this issue in the present appeal. This Court will generally avoid issuing advisory opinions involving hypothetical situations. *See In re U.S. West Communications, Inc.*, 1998-NMSC-032, ¶ 8, 125 N.M. 798.

While Appellants failed to cite to any authority in support their argument, PNM notes that Rule 12-601(B) NMRA provides for a thirty-day period for filing appeals from any commission or agency final order. Rule 12-601(A) provides that to the extent there is any conflict with a statute on the deadline to file an appeal, the appellate rules will control. Application of the Court's appellate rules does not require that the conflicting statute be held invalid. However, for the reasons stated above, the Court does not need to decide this issue in the present case.

C. Response to Point 4: The Title of SB 489 Provided the Requisite Notice of its Contents and Does Not Violate Article IV, Sections 16 and 18 of the New Mexico Constitution.

The New Mexico Constitution provides that 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." N.M. Const. art. IV, § 16. If an act contains a subject that is not expressed in its title, those sections of the act encompassing that subject "shall be void." *Id.* Relatedly, "[n]o law shall be revised or amended, or the provisions thereof extended by reference to its title only; but each section thereof as revised, amended[,] or extended shall be set out in full." N.M. Const. art. IV, § 18.

Appellants argue that the title of SB 489 failed to comply with Article IV, Sections 16 and 18 because it failed to provide proper notice of the bill's contents. **[BIC 38-43]** This argument is not based on the actual provisions of SB 489, but rather Appellants' hyperbolic mischaracterizations of the Act, which they claim allows PNM "to arbitrarily impose enormous charges on ratepayers; that the PRC's authority to regulate PNM's charges is being removed as to abandonment and decommissioning costs *of all of 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 . . . are amended to eliminate their applicability to PNM's demands for compensation from its customers for plant abandonments." **[BIC 40-41 (emphasis in original)]**

The title of SB 489 is lengthy and comprehensive and expressly states that it is: "RELATING TO PUBLIC UTILITIES" and "ENACTING THE ENERGY TRANSITION ACT." The title then lists the contents of the bill which include,

among many other things, that the bill: "authoriz[es] certain utilities that abandon certain generating facilities to issue bonds pursuant to a financing order" and "provid[es] new requirements and targets for the renewable portfolio standard[.]" It also explains that the bill "provid[es] procedures for rehearing and judicial review" and it "creat[es] the Energy Transition Economic Development Assistance Fund and the Energy Transition Displaced Worker Assistance Fund." As such, the title provides notice of the contents and substance of the ETA, and specifically identifies the three topics Appellants argue it must.[5]

Appellants also contend that the title of SB 489 fails to provide notice that it "was effectively amending the [Public Utilities Act] *across the board*," while "explicitly informing the reader" that it amends certain definitions in the Renewable Energy Act." **[BIC 41-42 (emphasis in original)]** This is not the legal standard embodied by Sections 16 and 18 of Article IV of the New Mexico Constitution. The title of an act does not need to name the provisions of the existing law that it amends or alters; rather, it must only give notice of the subject matter of the legislation. The Supreme Court confirmed this principle thus: "We do not require the title to a legislative enactment be an index of everything in the act itself so long

[5] Appellants state it would have been sufficient if SB 489 had simply identified the following topics: 1) transition to renewable energy; 2) utilization of securitization as financing mechanism; and 3) assistance to communities affected by transition. **[BIC 40]**

as the title gives notice of the subject matter of the legislation." *Pierce v. State*, 1996-NMSC-001, ¶ 64, 121 N.M. 212.

Even if the ETA does amend or alter provisions of the PUA, this does not render it void per Sections 16 and 18 of Article IV. *Id.* ("[T]he fact that an act may amend certain provisions of other statutes by implication, does not in and of itself violate Section 18." (internal quotation marks and citations omitted)). The case Appellants rely upon, *City of Albuquerque v. State*, 1984-NMSC-113, 102 N.M. 38, is inapposite. The Court held a statute unconstitutional where the bill's title specifically identified a provision of an act the bill amended ("AMENDING SECTION 3–60–25"), and omitted reference to the provision of another act the bill amended (Section 3-21-6). *Id.* ¶ 2. Where the Legislature chooses "to *specifically pinpoint statutory sections*" amended by the bill, Article IV, Section 16 requires that it do so with all other statutory sections that the bill amends. *Id.* ¶ 5 (emphasis added). The title of SB 489 does not pinpoint statutory sections that the bill amends, as was the case in *City of Albuquerque v. State*. It is the Legislature's prerogative to *not* do so.

The Legislature may, and frequently does, intentionally choose not to enumerate in the title of the act the provisions that the act amends or alters, and the Supreme Court has upheld challenges to these acts based on Articles 16 and 18 of Article IV. *See, e.g., Albuquerque Bus Co. v. Everly*, 1949-NMSC-058, ¶ 20, 53

N.M. 460 (holding that the act did not violate Article IV, Section 16 where the title of the bill stated that it amended specific provisions of the statute granting franchises to public utilities yet contained a section providing for a referendum election, because the section "is nothing more than a condition under which a municipality might grant a franchise to a public utility"); *see also Pierce*, 1996-NMSC-001, ¶ 65. (emphasizing that it is the province of the Legislature to determine the title of its legislation, and "[w]here there is any doubt as to the sufficiency of the title, it must be upheld" (internal quotation marks and citations omitted)).

An act contravenes Article IV, Section 16 if it contains a subject that "cannot be considered in any way germane to the general subject of the Act." *Johnson v. Greiner*, 1940-NMSC-017, ¶ 28, 44 N.M. 230. In other words, the bill must contain completely unrelated subjects to run afoul of Article IV, Section 16. *See id.* (holding that a statute authorizing the alteration and redesigning of the capitol building and executive mansion in Santa Fe and also authorizing the acquisition of land for parks, where the general subject of the statute was the state capitol building and mansion in Santa Fe, unconstitutionally embraced more than one subject because the acquisition of lands for park purposes was not germane to the general subject). A bill may cover more than one subject as long as "none of the provisions of the act are so disconnected or repugnant to th[e] [main] subject or to each other

that it can be said that by no fair intendment can they be considered as germane to this general subject." *State v. Mirabal*, 1928-NMSC-056, ¶ 10, 33 N.M. 553. If there is no "new, different, and separate subject in the act," the title suffices. *Id.*

The title of SB 489 encompasses all of the statutes that could be affected by the new energy policy to be achieved through its various provisions; thus, the title puts on notice anyone—public utilities and the consumers they serve, as well as the Commission itself—potentially affected by its directions concerning renewable energy and the financing of certain generating station retirements designed to help accomplish and achieve the new renewable energy standards. *See, e.g., Pierce*, 1996-NMSC-001, ¶ 64. ("The title to Senate Bill 310 on its face encompassed all New Mexico statutes that could be affected by the income tax or the Corporate Income and Franchise Act. Thus, this title placed on notice anyone potentially liable for income taxes." (internal quotation marks and citations omitted)). Each of the subjects of the ETA are mutually connected and of the same nature and denomination as described in the title; that is, abandoning a generating facility, financing the abandonment, procuring replacement resources, and providing new requirements for the renewable portfolio standard, etc.

D. <u>Response to Point 5</u>: The Commission Properly Concluded that PNM Satisfied the Requirement Under Section 62-18-4(B)(5) for a Securities Firm Memorandum.

The ETA provides that an application for a financing order must include, among other things, "a memorandum with supporting exhibits from a securities firm," which provides that the proposed issuance of bonds "satisfies the current published AAA rating or equivalent rating criteria of at least one nationally recognized statistical rating organization[.]" Section 62-18-4(B)(5).

PNM provided the requisite memorandum sponsored by its witness Charles Atkins, a senior advisor at Guggenheim Securities, who is authorized to bind his firm to the memorandum. **[32 RP 10829, 10832:21 to 10833:9, 10887-11008; 11015:12 to 11022:22]** Appellants argue that the memorandum represented the opinion of an individual, not the "securities firm" because the firm included a disclaimer that stated: "The views expressed herein are solely those of the author(s) and may differ from the views of other Representatives of Guggenheim securities." **[BIC 44]** This argument is without merit and was properly rejected by the NMPRC. **[41 RP 14755-757]**

The facts show that the standard disclaimers appended to the securities firm memorandum are consistent with its purpose; they do not undermine any of the information and conclusions provided in the memorandum nor render invalid the opinions expressed therein. **[32 RP 11020:14-11021:13]** The securities firm

memorandum reports that Fitch Ratings, Inc. "is a nationally recognized statistical rating organization that has published 'AAA' criteria for bond issuances similar to the proposed Energy Transition Bonds." **[32 RP 10889, 10833:3-5]** The only "attestation" required by Section 62-18-4(B)(5) is that the securities firm be "attested to by the state board of finance as being experienced in the marketing of bonds and capable of providing such a memorandum." **[32 RP 10985, 11021:15-11022:1-8]** That attestation was made in writing by the State Board of Finance and Appellants do not challenge that fact. The Guggenheim Securities memorandum was prepared for the purposes of the ETA by a senior advisor of the firm, it confirms that the bond issuance authorized by the financing order satisfied current AAA rating criteria, and it thereby complies with the requirements of Section 62-18-4(B)(5). These material facts were examined by the Commission, which determined the necessary statutory showings were met. **[41 RP 14755-14757]**

Appellants presented no facts to dispute any of the foregoing. To the extent that Appellants are urging a different interpretation of the ETA than applied by the NMPRC, the Court should defer to these factual findings that are predicated on matters requiring NMPRC expertise. *ABCWUA*, 2010-NMSC-013, ¶ 50.

E. Response to Point 6: The Energy Transition Act is Not Special Legislation in Violation of Art. IV, Section 24 of the New Mexico Constitution.

Appellants argue that the ETA's "relevant provisions" apply only to PNM and that only two power plants in New Mexico meet the ETA's definition of a "qualifying generating facility." From this they make the conclusory argument that the ETA is invalid as "special legislation," with no supporting analysis. **[BIC 44-45]** Again, in the absence of meaningful argument or authority, the Court need not consider this argument. *Carrillo*, 1997-NMCA-003, ¶ 13. However, as detailed below, the ETA is not special legislation, but even if it were, it is constitutionally permissible special legislation.

Article IV, Section 24 calls for a two-part analysis: (1) whether the law is general or special; and (2) if it is special, whether the enactment of the special legislation was an appropriate response to the particularized circumstance to which the Legislature directed it. The constitutional provision only prohibits the "enactment of local or special laws in certain enumerated instances," and it "further enjoins the legislature from passing special laws where a general law can be made applicable." *Albuquerque Metro. Arroyo Flood Control Auth. v. Swinburne*, 1964-NMSC-206, ¶ 6, 74 N.M. 487. Special legislation is not *per se* unconstitutional, as Appellants appear to believe: "There is nothing in the Constitution which would

invalidate a legislative act merely because it is special in character provided a local situation exists which under particular facts makes a general law inapplicable." *Id.*

The ETA is a "general law" because it "relates to a subject of a general nature, or that affects all the people of the state, or all of a particular class[.]" *Id.* ¶ 5 (citations omitted). The ETA, among other things, facilitates the expansion of renewable energy in the state by encouraging the retirement of coal plants and setting strict emissions standards for coal plants that are not retired. In this way, the ETA affects all people of New Mexico. It also affects the conduct of *all* in a particular class by setting increasing renewable energy requirements for all public utilities, which necessitates displacement of other types of existing generation, and aids in the closure of *all* qualifying coal-based generating facilities statewide. In other words, the ETA does not foster "the evil" that belies special legislation. *Keiderling v. Sanchez*, 1977-NMSC-103, ¶ 6, 91 N.M. 198 ("The evil inherent in special legislation is the granting to any person or class of persons, the privileges or immunities which do not belong to all persons on the same terms.").

Moreover, even assuming *arguendo* that the ETA is special legislation, it is not unconstitutional. Article IV, Section 24 only enjoins the enactment of special legislation where general laws cannot "be made applicable." N.M. Const. art. IV, § 24. New Mexico appellate courts have repeatedly acknowledged the necessity and appropriateness of special legislation where a general law cannot be made

applicable: "Merely because a legislative act is special in its application, however, does not necessarily make it in violation of the constitutional restriction." *Swinburne*, ¶ 6. "[W]hen a general law cannot be made applicable, but a law is required, special laws are permissible." *Id.*

Coal power plants pose a particular and atypical circumstance to the extent that they may not be included in every regulated utility's generation fleet, and a general, non-specific provision of law cannot be made applicable to effectuate the Legislature's policy initiatives that include reducing or eliminating coal plant emissions either by abandonment or stringent pollution control measures. *Id.* ¶ 7 (explaining that the Legislature may pass special legislation that addresses the "particular, special[,] and atypical conditions of the area sought to be protected"). To the extent the ETA has any characteristics of special legislation in its application to SJGS, this is the result sought by the policymakers of New Mexico to effect the early closure of coal plants in favor of generation of energy from renewable resources.

The ETA is constitutional because it is of general applicability or contains provisions necessary to effectuate the Legislature's policy initiatives. Courts will "give great weight to the legislature's classification," and "[o]nly if a statutory classification is so devoid of reason to support it, as to amount to mere caprice will

it be stricken down." *Thompson v. McKinley County*, 1991-NMSC-076, ¶ 4, 112 N.M. 425 (citation omitted).

F. Response to Point 7: There is No Need to Sever Any Provisions of the Energy Transition Act Based on the Claimed Unconstitutionality of Select Provisions.

Appellants argue that this Court can hold the portions of the ETA relating to the financing of abandoned facilities unconstitutional, and that the remaining sections of the ETA that amend the REA and they can continue in full force and effect. **[BIC 45]**

As a threshold matter, this argument presupposes that the portions of the ETA relating to the recovery of plant abandonment costs and the issuance of bonds to recover those costs are invalid. As discussed above, there is no basis to hold the ETA unconstitutional, so the question of the severability of the ETA is not at issue.

In any case, it is not a foregone conclusion that the portions of the ETA favored by Appellants are severable from those portions challenged in this appeal. While the Uniform Statute and Rule Construction Act provides that statutes are generally severable, NMSA 1978, § 12-2A-9 (1997), this is not so unless certain other conditions—not argued by Appellants and not present here—are met.

A statute is severable only if the invalid provision can be excluded "without impairing the force and effect of the remaining parts, and if the legislative purpose as expressed in the valid portion can be given force and effect, without the invalid

part, and, when considering the entire act it cannot be said that the legislature would not have passed the remaining part if it had known that the objectionable part was invalid." *Cobb v. State Canvassing Board*, 2006-NMSC-034, ¶ 48, 140 N.M. 77 (internal quotations marks and citation omitted). In short, the Court must determine whether severance of the challenged sections of the ETA would frustrate the Legislature's intent, bearing in mind "that every presumption is to be indulged in favor of the validity and regularity of the legislative act." *Baca v. New Mexico Dep't of Pub. Safety*, 2002-NMSC-017, ¶¶ 8, 11, 132 N.M. 282 (internal quotations marks and citation omitted).

Appellants argue that the financing provisions "can be distinguished and separated based on subject matter," and that "the Renewable Energy Act and Air Quality Control Act are independent policies and will be implemented by different administrative agencies." **[BIC 45]** These considerations are not the criteria for determining whether supposed unconstitutional portions of a statute will run afoul of the Legislature's intent. Even if the ETA is capable of severance in fact, there must exist some indicia that the Legislature intended to allow the act to stand if some of its provisions were declared invalid. *Id.* ¶ 10.

Severance of the financing provisions of the ETA would frustrate the Legislature's intent. The ETA embodies bold changes in energy policies for the State; ones that would place great strains on a utility and impacted workers and

communities absent the Act's provisions for ameliorating the hardships attendant to necessary plant and mine closures. Thus, the financing provisions are "so connected in subject and purpose with the Act as a whole that the Legislature would not have enacted the remainder of the Act if it had known" that the financing sections were invalid. *Id.* ¶ 11.

This stands in contrast to Section 62-18-8(B), providing the ten day deadline for filing a notice of appeal or a request for rehearing on a financing order. Section 62-18-8(B) is merely procedural. If the Court were to invalidate that specific section of the ETA, the overall purpose and objectives of the ETA could still be fulfilled.

G. Response to Point 8: The Energy Transition Act Does Not Impair Contractual or Vested Rights in Violation of Article II, Section 19 or Article IV, Section 34 of the New Mexico Constitution.

Appellants argue that PNM ratepayers have contractual and/or vested rights in the following three matters, and that the ETA changes or alters their rights: (1) the Modified Stipulation in Case No. 13-00390-UT, which provided for a review hearing on SJGS in 2018; (2) the New Mexico Supreme Court's affirmation of the NMPRC's determination that certain investments in PVNGS were imprudent; and (3) the decision by the NMPRC to defer to a future case the issue of whether PNM was imprudent in remaining a participant in FCPP. **[BIC 46-48]** None of these issues are a topic of the Financing Order or otherwise properly before the Court.

Appellant's claim that the ETA violates Article II, Section 19, relating to the impairment of contractual rights, and Article IV, Section 34, disallowing the application of new laws to pending cases, should be rejected. These claimed rights are illusory and outside the scope of this appeal.

With regard to Appellants' claimed rights under the Modified Stipulation and Article IV, Section 34, this Court has already rejected the argument that the proceeding contemplated by the Modified Stipulation, and the NMPRC's docket requiring PNM to file an application to abandon SJGS, constituted a "pending case" for purposes of Article IV, Section 34. *Egolf,* 2020 WL 4251786, ____-NMSC-___, ¶ 20 ("The pivotal question is whether the abandonment of San Juan Units One and Four was a pending case prior the enactment of the ETA. We conclude that it was not.") The question of whether there was a pending case at the time PNM filed its application for a financing order has been resolved and precludes Appellants' renewed arguments here.

Appellants' arguments relying on Article II, Section 19 relating to claimed impairment of contractual rights under the Modified Stipulation are likewise unavailing. Significantly, neither Appellant was a party to the Modified Stipulation and they have failed to identify any cognizable interest or right that has been impaired under the Modified Stipulation by the ETA. *See Whitely v. N.M. State Pers. Bd.*, 1993-NMSC-019, ¶ 9, 115 N.M. 308 ("A prerequisite to a finding that a

contract obligation is unconstitutionally impaired is proof of the existence of a contract, the benefits of which are somehow denied to the claimant due to the effect of legislation or other governmental action."). While the Modified Stipulation contemplated a filing by PNM, there was no agreement for any specific outcome from that filing. Moreover, the Commission accepted PNM's application for abandonment as fulfilling any requirement for PNM to file a proceeding to address the issue of the future of SJGS. **[3 RP 000520, ¶ 18]** Thus, the requirements under the Modified Stipulation have been fulfilled.

Appellants' arguments relating to FCPP and PVNGS should also be rejected. First, neither plant is the subject of this proceeding. SB 489 amended the REA to now allow the NMPRC to require a utility to abandon certain rate-based generation resources in favor of replacement resources that have lower or no carbon emissions, in which case the utility is entitled to recover its associated undepreciated investments and decommissioning costs. Section 62-6-6(C). However, the Commission has not ordered the abandonment of either FCPP or PVNGS so these facilities and issues are not the subject of this appeal and, therefore, the Court can properly refrain from rendering what could only be considered an advisory opinion. *See In re U.S. West Communications, Inc.*, 1998-NMSC-032, ¶ 8.

Second, Appellants' BIC is virtually devoid of citations to the record with respect to factual support for its claims about FCPP and PVNGS. **[*See* BIC 16-25,**

45-48] Rule 12-318(A)(3) NMRA specifically requires that briefs cite to specific portions of the record to support factual arguments. Appellants cite almost exclusively to orders and pleadings in other cases outside of the record in this case for factual support for their arguments relating to FCPP and PVNGS. Section 62-11-3 requires that the Court determine an appeal of a final order solely on the record before the Commission, and new evidence cannot be introduced on appeal. Therefore, Appellants' attempt to augment the record by citations to matters that are outside of the record proper should be rejected.

Finally, Article IV, Section 34 has no application to any issues pertaining to FCPP or PVNGS. Appellants failed to show that there was any "pending case" involving FCPP or PVNGS that would preclude the application of the ETA in this or any other case. Appellants have also failed to establish any vested right with respect to FCPP or PVNGS. Customers do not have any vested property rights, legal or equitable, in utility plant or property. *Gas Co. of N.M. v. N.M. Pub. Serv. Comm'n*, 1984-NMSC-002, ¶¶12-13, 100 N.M. 740. And as discussed above, customers likewise have no vested rights in any particular rate. *Wright*, 297 U.S. at 542.

V. CONCLUSION

This Appeal should be denied because the arguments raised by Appellants with respect to the ETA and the Financing Order are factually and legally incorrect.

Appellants wholly fail to clear the hurdles of appellate and constitutional review standards. The ETA is a proper exercise of legislative authority in setting public policy which the Commission is required to follow. The ETA was enacted in conformity with the constitutional legislative requirements. PNM has met all of the requirements necessary for a valid and enforceable financing order under the ETA. Therefore, the Financing Order should be affirmed in all respects.

Respectfully submitted this 5th day of October 2020.

PUBLIC SERVICE COMPANY OF NEW MEXICO

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STATEMENT OF COMPLIANCE

Pursuant to Rule 12-318(G) NMRA, PNM states that the body of the foregoing Answer Brief is 41 pages and contains 9,524 words in Times New Roman 14-point font, a proportionally-spaced typeface, as calculated by Microsoft Word for Office 365, and is therefore within the limits permitted under Rule 12-319(F).

s/ Stacey J. Goodwin
Stacey J. Goodwin

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was electronically served on all counsel of record through the New Mexico Supreme Court's Odyssey filing system on October 5, 2020.

s/ Stacey J. Goodwin

GCG #527207