

  
Joey D. Moya

**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**

**RESPONSE OF PUBLIC SERVICE COMPANY OF NEW MEXICO  
TO WESTERN RESOURCE ADVOCATES' MOTION TO DISMISS**

Public Service Company of New Mexico ("PNM") submits this Response to the *Motion to Dismiss Appellants' Constitutional Challenges to the Energy Transition Act for Lack of Jurisdiction* ("Motion") filed by Intervener-Appellee

Western Resource Advocates (“WRA”). WRA seeks to dismiss the constitutional challenges raised by the Appellants with respect to the Energy Transition Act<sup>1</sup> on the ground that this Court lacks original jurisdiction to consider these challenges. Appellants challenge the *Final Order on Request for Issuance of a Financing Order* (“Financing Order”) issued by the New Mexico Public Regulation Commission (“NMPRC” or “Commission”) on April 1, 2020, in NMPRC Case No. 19-00018-UT.<sup>2</sup> The Financing Order authorizes PNM to finance and recover certain abandonment-related costs through the issuance and sale of securitized bonds by a Commission-approved PNM subsidiary. In their *Joint Statement of Issues*, ten of the thirteen issues raised by the Appellants involve constitutional challenges to the Energy Transition Act rather than direct challenges to the Commission’s decisions. [Motion at 2]

It is WRA’s position that the Appellants’ constitutional challenges must first be brought in district court. [Motion at 6]

While PNM believes the Appellants’ constitutional challenges are unavailing, this Court has the authority to consider these challenges in this appeal under the

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<sup>1</sup> 2019 N.M. Laws, ch. 65.

<sup>2</sup> The Commission separately authorized PNM to abandon its interests in the San Juan Generating Station (“San Juan”) effective July 1, 2022. *See Final Order on Request for Public Service Company of New Mexico for Authority to Abandon its Interests in San Juan Generating Station Units 1 and 4 and to Recover Non-Securitized Costs*, Case No. 19-00018-UT (April 1, 2020).

Court's appellate jurisdiction. Therefore, denial of WRA's Motion on jurisdictional grounds is appropriate.

Should the Court find that it lacks appellate jurisdiction over these constitutional challenges, PNM respectfully requests that the Court treat the Appellants' filings in this case as a petition for writ of mandamus and proceed to rule on these challenges in this appeal under the Court's mandamus authority. PNM further respectfully submits that however the Court chooses to proceed, it is imperative that the issues raised in this appeal be resolved expeditiously to fulfill the objectives of the Energy Transition Act, and to provide certainty to the workers and communities that will be affected by the abandonment of San Juan and the potential closure of the San Juan coal mine.

## **ARGUMENTS AND AUTHORITIES**

### **A. This Court Has Appellate Jurisdiction to Consider the Appellants' Constitutional Challenges in this Appeal.**

WRA's Motion rests on the general lack of administrative agencies' authority to decide constitutional issues. *See, e.g., Victor v. N.M. Dept. of Health*, 2014-NMCA-012, ¶ 24, 316 P.3d. 213; *Maso v. State Taxation & Revenue Dep't*, 2004-NMCA-025, ¶¶ 2, 12, 135 N.M. 152; *Montez v. J & B Radiator, Inc.*, 1989-NMCA-060, ¶ 7, 108 N.M. 752. [Motion at 3-4] WRA relies on the holding in these cases that find where an administrative agency lacks jurisdiction to adjudicate an issue, a district court acting in an appellate capacity also lacks appellate jurisdiction to

consider the issue. *Maso*, 2004-NMCA-025, ¶ 13; *Victor*, 2014-NMCA-012, ¶ 24. However, these cases also hold that a district court has the authority to consider constitutional issues in the context of an administrative appeal under its original jurisdiction. *Maso*, 2004-NMCA-025, ¶ 14; *Victor*, 2014-NMCA-012, ¶¶ 24-25.

WRA correctly notes that the Commission did not have the authority to address, and did not address, the constitutional challenges raised by the Appellants in the proceeding below. As a result, WRA concludes that this Court lacks appellate jurisdiction to consider these challenges in this appeal. [Motion at 2] WRA also contrasts the broad scope of original jurisdiction of the district courts with the more limited original jurisdiction of the New Mexico Supreme Court pursuant to Article VI, Section 3 of the New Mexico Constitution, and concludes that this Court lacks original jurisdiction to consider the Appellants' constitutional challenges on appeal from the Commission. [Motion at 4-6] WRA is correct that this Court's original jurisdiction is limited. *See, e.g., Thurman v. Grimes*, 1931-NMSC-035, ¶11, 35 N.M. 498 (explaining that the Supreme Court lacked original jurisdiction "to entertain" the bill at issue). However, while WRA acknowledges this Court's appellate jurisdiction under Article VI, Section 2 of the New Mexico Constitution, WRA has not fully considered the scope of this Court's appellate jurisdiction over final orders issued by the Commission.

This Court has appellate jurisdiction to consider the constitutional challenges raised by the Appellants to the Commission’s Financing Order. Article VI, Section 2 of the New Mexico Constitution provides in relevant part that “the supreme court shall exercise appellate jurisdiction as may be provided by law.” The *Victor* and *Maso* cases upon which WRA relies to support its position involve appeals to state district courts of administrative agency decisions. Unlike this case, these cases do not involve a direct appeal to this Court pursuant to the Court’s appellate jurisdiction under Section VI, Section 2 of the New Mexico Constitution. These cases should not be considered controlling in the context of the present appeal.

The applicable law in this case confers exclusive appellate jurisdiction over financing orders issued pursuant to Energy Transition Act to this Court. Section 62-18-8(A) of the Energy Transition Act provides that financing orders are to be issued separate from any other orders and constitute final orders for purposes of appeal. Section 62-18-8(B) of the Act further provides that an appeal of a financing order is to be filed pursuant to Section 62-11-1, which provides for direct appeal of Commission final orders to the New Mexico Supreme Court. NMSA 1978, § 62-11-1 (1993) (“Any party to any proceeding before the [C]ommission may file a notice of appeal in the [S]upreme [C]ourt asking for a review of the [C]ommission’s final orders.”).

Because the exclusive means of appealing the Financing Order under the Energy Transition Act is a direct appeal to this Court, the scope of the Court's appellate jurisdiction encompasses the associated authority to review constitutional challenges. Indeed, this Court has previously considered constitutional challenges to state statutes in the context of appeals of Commission final orders pursuant to Section 62-11-1. *See, e.g., Morningstar Water Users Ass'n v N.M. Public Util. Comm'n*, 1995-NMSC-062, ¶¶ 7, 49-55, 120 N.M. 579 (considering an equal protection challenge to specified sections of the Public Utility Act following the Commission's entry of a final order). Similarly, in *Montez*, relied upon by WRA, the New Mexico Court of Appeals proceeded to decide a constitutional equal protection challenge to sections of the Workers Compensation Act, despite having held that the constitutional challenge was outside the jurisdiction of the Workers Compensation Administration in the underlying proceeding. *Montez*, 1989-NMCA-060, ¶¶ 7-15. This Court has also considered other constitutional challenges to Commission orders. *See, e.g., El Paso Elec. Co. v. N.M. Public Serv. Comm'n*, 1985-NMSC-085, ¶ 9, 103 N.M. 300 (rejecting a First Amendment challenge to a rule restricting cost recovery for utility advertising).

WRA's position that the Appellants must sever their constitutional challenges from other aspects of their appeal and pursue them in a separate district court proceeding runs counter to this Court's rulings that disfavor a party to an

administrative proceeding also pursuing relief in a separate suit in state district court.

In *Smith v. City of Santa Fe*, this Court recognized the unsound policy and inefficiencies of what WRA proposes in its Motion:<sup>3</sup>

We perceive no sound judicial policy for allowing a party aggrieved by the administrative decision to forego an available avenue of judicial review only to allow that same party to initiate judicial review in another form at some future date that no one can predict or rely upon with any certainty. Indeed, the efficient administration of justice requires just the opposite. Once invoking the administrative review process offered by the City, the Smiths were obligated to either pursue a timely appeal under Rule 1-075 or, at minimum, initiate a declaratory judgment action within the same timeframe. Having failed to do so, we conclude that the district court lacked jurisdiction to rule on the Smith's claim for declaratory relief.

2007-NMSC-055, ¶ 24, 142 N.M. 786.

Sections 62-18-8 and 62-11-1, which govern appeals from Commission financing orders, in no way contemplate or authorize that certain appellate challenges will be severed and considered first in the district courts. To the contrary, this Court has exclusive jurisdiction to consider appellate challenges to Commission financing orders. WRA seeks dismissal of ten of the thirteen issues raised in the Appellants' *Joint Statement of Issues* so that these issues can first be considered in the district court. WRA appears to suggest, however, that this appeal may proceed

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<sup>3</sup> A strict application of the holding in *Smith* to this case also raises a question about whether it is too late for the Appellants to pursue relief in district court because the deadlines for appeal have expired under both Sections 62-18-8(B) and 62-11-1.

on the remaining three issues. [Motion at 2] However, if the Energy Transition Act is determined to be unconstitutional, a decision on the remaining three appellate issues becomes meaningless. Thus, WRA's interpretation of the limited scope of this Court's jurisdiction to consider constitutional challenges to Commission orders in the context of direct appeals will lead to an unworkable result.

This Court has appellate jurisdiction to address constitutional challenges raised in this appeal and WRA's Motion should be denied.

**B. In the Event the Court Determines that it Does Not Have Appellate Jurisdiction to Consider the Appellants' Constitutional Challenges, the Court Should Proceed to Consider These Challenges Under its Original Jurisdiction Over Writs of Mandamus.**

As noted by WRA, this Court's original jurisdiction is set forth in Article VI, Section 3 of the New Mexico Constitution. Among the matters over which the Court may exercise original jurisdiction are writs of mandamus against all state officers, boards and commissions. N.M. Const. art IV, § 3. Although the Appellants' constitutional challenges to the Energy Transition Act are presently before the Court by means of a notice of appeal and statement of issues, this Court can treat these filings as a petition for writ of mandamus to timely and efficiently consider the Appellants' constitutional arguments. *See County of Bernalillo v. N.M. Pub. Regulation Comm'n*, 2000-NMSC-035, ¶¶ 5, 7, 129 N.M. 787 (treating notice of appeal as petition for writ of mandamus where the appellant had no right to appeal pursuant to Section 62-11-1).



The constitutional issues raised by the Appellants are amenable to this Court's review pursuant to its mandamus authority. Indeed, this Court previously exercised its mandamus jurisdiction to mandate that the Commission apply the Energy Transition Act to PNM's application for a financing order in the proceeding below. *See State ex rel. Egolf v. N.M. Pub. Regulation Comm'n*, Case No. S-1-SC-38041, Order (Jan. 29, 2020). An exercise of the Court's mandamus jurisdiction and writ authority is appropriate when the case presents "a purely legal issue concerning the non-discretionary duty of a government official that (1) implicates fundamental constitutional issues 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 direct appeal." *State ex rel. Sandel v. N.M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 11, 127 N.M. 272.

All of the prerequisites for a mandamus review are met in this case. The Energy Transition Act represents a comprehensive expression of the state's energy policy relating to the electric generation for public utilities. Therefore, the constitutional challenges raised by the Appellants implicate fundamental issues of great public importance and, as discussed below, go beyond the immediate parties to this proceeding. As such, the first prerequisite is satisfied.

As to the second prerequisite, the Appellants present facial constitutional challenges to the Energy Transition Act which do not involve the resolution of

factual disputes. Moreover, to the extent that any facts are relevant to the constitutional challenges, they are supplied by the record on appeal in this case.

With regard to the third prerequisite, if the Court presently lacks jurisdiction over this appeal as asserted by WRA, the only way to expeditiously resolve the Appellants' challenges is through mandamus review in the present proceeding. A district court declaratory judgment action challenging the constitutionality of the Energy Transition Act, even if filed immediately and considered on an expedited basis, would require months before issuance of a final, appealable order, and does not account for the time involved with any likely appeals.

**C. Prompt Resolution of Appellants' Constitutional Challenges is Critical to Prevent Harm.**

A prompt determination is required to prevent harm stemming from a delayed ruling on the challenges to the Financing Order. Timely resolution is necessary to prevent economic harm to the workers and communities that will be impacted by the closure of the power plant and the coal mine when abandonment occurs effective July 1, 2022.<sup>4</sup> The Energy Transition Act requires the securitized bonds to include \$20 million for severance and job training costs for impacted workers at the power

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<sup>4</sup> The City of Farmington, one of the owners of San Juan, is working with a third-party to acquire all of the interests in San Juan and to continue to operate the plant beyond 2022. The Final Order found that this project had not progressed to the point that it is clear it will come to fruition. Final Order, ¶ 9 at 3. Whether the plant continues to operate beyond 2020 does not alter the requirements under the Energy Transition Act to fund worker severance and state-administered funds.

plant and coal mine, and \$19.8 million in payments to state-administered energy transition funds for Indian affairs, economic development, and displaced workers to mitigate the impacts from the plant and mine closures pursuant to Sections 62-18-2(H) and 62-18-16. The closure processes at the power plant and the mine will commence prior to the final abandonment date leading to the elimination of jobs. This is particularly true with respect to mine workers because mining will be curtailed so that stockpiled coal will be used to fuel the power plant in the final months of operation.

The Financing Order authorizes PNM to advance monies for these purposes, subject to certain conditions, prior to issuance of the securitized bonds if circumstances show the need for earlier funding.<sup>5</sup> A delay in resolution of the challenges to the Financing Order and Act will be prejudicial to the plant and mine workers, as well as to the Four Corners and Native American communities impacted by the closure of the power plant and coal mine, because they must wait until these challenges are resolved before they can receive any of the funding provided under the Energy Transition Act and the Financing Order.

The uncertainty created by the challenge to the Financing Order and Energy Transition Act also impairs the marketability of the bonds because the bonds cannot

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<sup>5</sup> *Recommended Decision on PNM's Request for Issuance of a Financing Order* ("Recommended Decision"), at 99-104.

be issued and sold until a final and non-appealable financing order is obtained.<sup>6</sup> Therefore, any appeal or other proceeding will need to be resolved well in advance of the anticipated issuance of the bonds in July 2022<sup>7</sup> so that necessary underwriting and marketing of the bonds can be completed. A protracted process for determining the validity of the Energy Transition Act and the Financing Order will necessarily frustrate the very objectives of the Act.

Finally, a prompt determination of the Appellants' constitutional challenges through a mandamus review is consistent with the Energy Transition Act, which provides for expeditious review of financing orders. *See* Section 62-18-8(A) (imposing a ten day deadline for filing a notice of appeal); Section 62-18-8(B) (providing that this Court "shall proceed to hear and determine the [financing order] appeal as expeditiously as practicable").

## CONCLUSION

This Court has the authority under its appellate jurisdiction to review and resolve all of the challenges to the Financing Order, including any associated constitutional challenges to the Energy Transition Act, that have been raised by the Appellants. Therefore, WRA's motion should be denied. However, to the extent

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<sup>6</sup> Recommended Decision, ¶ 28 at 120, NMPRC Case No. 19-00018-UT (Feb. 21, 2020).

<sup>7</sup> Recommended Decision, at 121.

that the Court determines that it lacks appellate jurisdiction over any issues in this matter, PNM respectfully submits that the Court can and should consider these issues pursuant to its original jurisdiction to issue writs to the Commission. The fate of New Mexico's energy policy relating to electric generation for public utilities is dependent on this Court's final resolution of these issues.

Respectfully submitted this 6<sup>th</sup> day of July 2020,

**PUBLIC SERVICE COMPANY OF NEW MEXICO**

Stacey J. Goodwin, Associate General Counsel  
PNM Resources, Inc.  
Corporate Headquarters – Legal Department  
Albuquerque, NM 87158-0805  
(505) 241-4927  
Stacey.Goodwin@pnnresources.com

and

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*/s/ Richard L. Alvidrez*

Richard L. Alvidrez  
Miller Stratvert P.A.  
500 Marquette NW, Suite 1100  
P.O. Box 25687  
Albuquerque, NM 87125  
(505) 842-1950  
ralvidrez@mstlaw.com

*Attorneys for Public Service Company of New Mexico*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that the foregoing Response was filed and served via the Court's Odyssey File & Serve System, and a true and correct copy was served by email on July 6, 2020, to the following counsel for the parties:

John Boyd  
[jwb@fbdlaw.com](mailto:jwb@fbdlaw.com)

*Counsel for Appellant Citizens for Fair Rates  
and the Environment*

Mariel Nanasi  
[mariel@seedsbeneaththesnow.com](mailto:mariel@seedsbeneaththesnow.com)

*Counsel for Appellant New Energy Economy*

Michael C. Smith  
[Michaelc.smith@state.nm.us](mailto:Michaelc.smith@state.nm.us)

Judith Amer  
[Judith.Amer@state.nm.us](mailto:Judith.Amer@state.nm.us)

*Counsel for Appellee New Mexico Public Regulation Commission*

Thomas C. Bird  
[tcb@keleher-law.com](mailto:tcb@keleher-law.com)

Steven S. Michel  
[steve.michel@westernresources.org](mailto:steve.michel@westernresources.org)

Cydney Beadles  
[cydney.beadles@westernresources.org](mailto:cydney.beadles@westernresources.org)

*Counsel for Intervener-Appellee Western Resource Advocates*

Matt Gerhart  
[matt.gerhart@sierraclub.org](mailto:matt.gerhart@sierraclub.org)

Jason Marks  
[lawoffice@jasonmarks.com](mailto:lawoffice@jasonmarks.com)

*Counsel for Intervener-Appellee Sierra Club*

Stephanie Dzur  
[stephanie@dzur-law.com](mailto:stephanie@dzur-law.com)

*Counsel for Intervener-Appellee Coalition for Clean Affordable Energy*

*/s/ Richard L. Alvidrez*

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