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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,

PUBLIC SERVICE COMPANY OF NEW MEXICO,
WESTERN RESOURCE ADVOCATES,
COALITION FOR CLEAN AFFORDADABLE 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 WESTERN RESOURCE ADVOCATES, COALITION FOR CLEAN AFFORDABLE ENERGY, AND SIERRA CLUB

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STATEMENT OF COMPLIANCE
WITH RULE 12-502(D)(3)

I HEREBY CERTIFY that this Answer Brief complies with the limitations of Subparagraph (3) of Paragraph (D) of Rule 12-502 NMRA. The word count feature of the word processing system (Microsoft Word, Version 2007) used to prepare this Petition indicates a word count of nine thousand, four hundred ninety-nine [9,499], excluding the cover page, signature block, statement of compliance, and the certificate of service.

By: *___/s/ Thomas C. Bird___________*
Thomas C. Bird

INTRODUCTION

The New Mexico Constitution provides that the New Mexico Public Regulation Commission (the "Commission") "shall have responsibility for regulating public utilities . . . in such manner as the legislature shall provide." N.M. Const. art. XI, § 2. This Court very recently confirmed that the plain meaning of this provision is that the Commission's authority is subordinate to the powers granted to the Legislature to craft energy and regulatory policy in statutes. *State ex rel. Egolf v. New Mexico Pub. Regulation Comm'n*, 2020-NMSC-__, No. S-1-SC-38041, 2020 WL 4251786 (N.M. July 23, 2020) ("*Egolf*").

In 2019, the legislature enacted the Energy Transition Act ("ETA") to provide a comprehensive framework for our state's transition away from highly polluting fossil fuels to cleaner sources of electricity. In the ETA, the Legislature balanced the interests of the environment and future generations, utility ratepayers, utilities, and the communities affected by early coal plant retirements by loss of employment and tax base. The ETA respects foundational separation of powers principles in our Constitution, under which the Legislature sets policy and the Commission implements those policies.

In the portion of the law at issue in this appeal, the ETA provides a securitized financing mechanism that materially reduces the costs of abandoning a

polluting coal plant. The record in this case proves that Public Service Company of New Mexico's ("PNM's") early abandonment of the San Juan coal plant will save its customers money because the alternatives to continued operation of the plant, which are environmentally much better, are also less costly. [41 RP 014701-014702 (Recommended Decision 28-29)] ("PNM and other parties have presented modeling that shows that a variety of generating resources can be acquired to replace the San Juan capacity . . . and that the costs to do so will be less than PNM's continued operation of the plant."). When the benefits of the securitization financing mechanism are brought to bear, the savings are even greater.

The ETA financing order is the vehicle through which economic transition funds for affected communities and workers are made available. The ETA authorizes the use of some of the cost savings from securitization to fund severance and retraining programs for workers who will lose their jobs when a coal plant shuts down, as well as economic development funds for communities losing tax revenue when a plant closes. Here, the cost savings from the ETA financing mechanism enabled the Commission to approve approximately $40 million in economic transition funds for affected workers and communities.

Appellants complain that the ETA limited the ability of the PRC to require a utility such as PNM to take write-offs when it abandons a plant. Appellants' preferred approach, involving a write-off, would have approximately the same total

costs to ratepayers as the approach under the ETA. [11 RP 002464 (Direct Testimony of Douglas J. Howe)]. And this assumes that the Commission would have ordered a write-off of previously approved resources in the absence of the ETA, which is speculative, and if it had, that such a resolution would survive a challenge under the Fifth Amendment, which would present a question of first impression in New Mexico. In contrast to this uncertainty, the Legislature's approach in the ETA assures high-quality bond-financed savings to ratepayers. The ETA exchanges the speculative possibility of a shareholder write-off for assured cost savings from securitization. Regardless of whether Appellants oppose securitization as a policy matter, this is a rational way for the Legislature to designate the manner in which the Commission regulates utilities.

The Legislature's solution encouraged utilities to abandon a coal plant while saving customers money compared to running the plant, while also eliminating emissions and assisting affected communities. WRA, CCAE and Sierra Club support the approach the Legislature adopted that encourages utilities in New Mexico (and elsewhere) to abandon highly polluting coal plants. The ETA did not diminish the Commission's powers, it vastly expanded them by giving the Commission the authority to reject a utility's request for approval of replacement resources *and* select alternative replacement resources to achieve two of the

intended purposes of the ETA – reduce emissions, and mitigate environmental and financial harm to the impacted community.

But that was a policy debate that occurred in legislative committees before the enactment of SB 489. The ETA is now the law. Appellants are unhappy with the way the Legislature balanced competing interests in the ETA. Appellants now couch their policy preferences as constitutional arguments claiming that a universally accepted principle (that the Legislature can specify how the Commission regulates public utilities and sets rates) somehow does not apply in this instance. Appellants also base their attacks on significant mischaracterizations of the ETA. In light of what the ETA actually says, the relevant constitutional provisions, and the precedents establishing the controlling constitutional standards, Appellants' arguments must fail.

SUMMARY OF ARGUMENT

The Court should reject all of the Appellants' constitutional challenges to the ETA (Points 1 through 4, 6, and 8), and Appellants' sole non-constitutional challenge to the Commission's Order (Point 5). Intervener-Appellees agree with Appellants' Point 7, that the provisions of the ETA are severable.

Point 1: Review of the relevant provisions of the ETA disproves Appellants' claim that the Legislature eliminated Commission review of financing orders. The ETA mandated, and the Commission followed, a detailed process for

reviewing and deciding whether to approve PNM's application for a financing order. Appellants are also mistaken in postulating that the Legislature lacks the authority to set or change the legal standards by which the Commission regulates public utilities, or that the same constraints that govern the Commission's adjudication of utility cases also constrain the Legislature.

Point 2: Appellants suggest that Article XI, Section 2 of the New Mexico Constitution should be interpreted to mean that the Legislature's authority to direct the manner of utility regulation extends only to "other public service companies," but not to electric, gas, water, and other kinds of existing public utilities. Appellants' application of the last antecedent doctrine not only leads to an illogical result, it is impossible to reconcile with this Court's prior holdings. In *Egolf* and other cases, this Court has interpreted Article XI, Section 2 to mean that the Legislature has the constitutional authority to direct the manner in which the Commission regulates electric utilities.

Point 3: Appellants are also mistaken in claiming that the ETA somehow infringes on judicial authority by limiting judicial review of financing orders. Appellants can point to no provision of the ETA supporting their argument and overlook the ETA provisions expressly providing for judicial review.

Point 4: Appellants' argument that the title of the ETA offends the prohibition in Article IV, Section 16 against "logrolling" disregards the applicable

legal standards and the language of the title. Precedent calls for deference to the Legislature's judgment about entitling legislation; the Legislature had no constitutional obligation to choose a title that reflects Appellants' complaints about the ETA.

Point 6: Appellants' attack on the ETA as unconstitutional "special legislation" fails because the ETA does not specify particular persons or entities to which the ETA applies, but applies instead to any "qualifying utility" abandoning a "qualifying generating facility."

Even if the ETA could be legitimately classified as "special" legislation, the Legislature had good reasons for enacting it. The test for the constitutionality of special legislation under New Mexico law resembles the test for judging whether legislation meets the rational basis standard in equal protection cases. The ETA serves a rational purpose in protecting New Mexicans from air pollution caused by coal-fired generation of electricity.

Point 8: Appellants advance an ill-defined blend of contract and vested rights impairment principles, mixed with the rule against new legislation affecting rights and remedies in pending cases, in claiming that the ETA unconstitutionally affects rights under a settlement agreement, and the prospect of disallowances and write-offs in future rate cases. Appellants lack standing to rely on any alleged impairment of the settlement agreement they identify because they were not parties

to the agreement. The case in which the settlement occurred concluded long before the effective date of the ETA, and therefore was not "pending."

Also, the Court should dismiss Appellants' arguments about nuclear, gas, and other coal facilities no utility has attempted to abandon because these claims are not ripe for judicial review. In alleging that the prospective elimination of write-offs amounts to unconstitutional impairment of contract or vested rights, Appellants make no effort to substantiate the existence of a right they may enforce, or to demonstrate how the ETA unconstitutionally violates any such right, or how such a claim comports with relevant New Mexico precedents.

Point 5: The Court should also reject Appellants' only non-constitutional argument, the assertion that the Commission violated Section 62-18-4(B)(5) of the ETA by accepting the opinions of Mr. Atkins about the investment quality of the bonds proposed by PNM. Substantial evidence supports the Commission's conclusion that Mr. Atkins, through his testimony and opinion letter, established that the bonds met the AAA investment quality standard imposed by the ETA. The Court should reject Appellants' spurious argument that the record is insufficient to satisfy Section 62-18-4(B)(5) because Mr. Atkins is a person employed by a securities firm, and not a securities firm.

ARGUMENT

I. THE ETA IS CONSTITUTIONAL.

STANDARD OF REVIEW: A *de novo* standard governs the assessment of whether a statute is constitutional. *Moses v. Ruszkowski*, 2019-NMSC-003, ¶ 10, 458 P.3d 406. The Court presumes the statute is valid and must uphold it unless it is "satisfied beyond all reasonable doubt" that the Legislature went beyond the bounds fixed by the Constitution. *Id.* The burden of establishing the invalidity of the statute rests on the challenger. *Id.* The Court "will not question the wisdom, policy, or justness of a statute." *Id.* "It is the particular domain of the Legislature, as the voice of the people, to make public policy." *El Castillo Retirement Residences v. Martinez*, 2017-NMSC-026, ¶ 27, 401 P.3d 751 (quoting *Hartford Ins. Co. v. Cline*, 2006-NMSC-033, ¶ 8, 140 N.M. 16).

Challenges to the constitutionality of statutes are classified as either "facial" or "as applied." *See, e.g. Bounds v. State ex rel. D'Antonio*, 2013-NMSC-037, ¶ 14, 306 P.3d 457. In a "facial" challenge, the Court considers only the text of a statute, not its application. *Id.* In an "as applied" challenge, the Court considers the facts of the case to determine whether application of a statute, even if facially valid, deprived the challenger of a protected right. *Id.* A party unable to show injury caused by application of the statute is confined to making a facial challenge. *Id.*

A. Appellants' Point 1 Has No Basis in Either Fact or Law.

1. The ETA Prescribes a Detailed Process By Which the Commission Must Review and Approve a Financing Order Before It Has Any Legal Effect.

Many of Appellants' constitutional claims rest on the inaccurate, but persistent, assertion that the ETA removes financing orders from any regulation by the Commission. [BIC 2, 11, 13, 15, 16, 29, 30, 31, etc.]. The record in the case, and the text of the ETA, belie Appellants' premise.

Sections four through twenty-three of the ETA pertain to financing orders. NMSA 1978 §§ 62-18-4 to 62-18-23 (2019). In particular, Section 4 contains detailed requirements for financing order applications and Section 5 provides the procedures and standards by which the Commission must review and act on such applications.[1] NMSA 1978 § 62-18-5.

The ETA does not require the Commission to approve a financing order merely because a utility has applied for approval. The ETA provides that "the

[1] Other provisions of the ETA provide for Commission regulatory oversight of financing orders, including that it can require a utility to file periodic reports regarding implementation of a financing order; audit the books and records of a utility that receives a financing order; and require the utility to pay for outside counsel to assist the Commission's review of applications for financing orders. NMSA 1978 § 62-18-5(J)-(K). The ETA also contains a catch-all provision preserving the Commission's authority over utilities. NMSA 1978 § 62-18-5(M) ("The provisions of this section shall not be construed to limit the authority of the commission to: (1) investigate the practices of or to audit the books and records of a qualifying utility; or (2) issue such further orders as may be necessary to effectuate the provisions of the Energy Transition Act.").

commission shall issue an order *granting or denying* the application for the financing order." NMSA 1978 § 62-18-5(A) (emphasis added). If an application for a financing order is contested, the Commission can approve the application only "if the commission finds that the qualifying utility's application for the financing order complies with the requirements of Section 4 of the Energy Transition Act." NMSA 1978 § 62-18-5(E). In the ETA, the Legislature did exactly what is appropriate under the constitutional separation of powers: make policy and define the legal standards, and then delegate implementation of the statute to the administrative agency.

In the proceedings below, the Commission followed the statutory process for reviewing PNM's application for a financing order. After PNM's filing of its Application on July 1, 2019, the Commission issued a procedural order for the case and the parties engaged in discovery. Staff and Interveners filed direct testimony supporting or opposing the Application on October 18, 2019 and PNM and other parties filed rebuttal testimony on November 15, 2019; from December 9 to 19, 2019, the Commission held a public hearing. On February 21, 2020, the Hearing Examiners issued a 165-page decision recommending approval of the financing order, which the Commission adopted in its final order on April 1, 2020.

This nine-month process followed the normal procedure by which the Commission conducts a contested case proceeding, and it involved Commission

scrutiny of every aspect of PNM's financing order. Rather than confront the record showing that the Commission in fact regulated PNM's application for a financing order, Appellants resort to hyperbolic claims that have no factual support. *See, e.g.*, [BIC 30 (mischaracterizing the ETA "as remov[ing] any regulation from PNM's undepreciated investments and decommissioning costs")]. In the same vein, the Appellants make the unsubstantiated assertion that "[t]he ETA eliminates all protections of ratepayers as to abandonment costs." [*Id.*]. But the Appellants fail to cite any actual provision of the ETA that allegedly does this.[2]

Next, Appellants claim, incorrectly, that the ETA denies due process to the public to oppose a financing order. [BIC 30-32]. Yet in the proceeding below, the Appellants were accorded multiple opportunities to attack PNM's application. Appellants served voluminous discovery requests, filed testimony, cross-examined witnesses, and filed multiple briefs. Appellants were given, and took advantage of, due process to oppose PNM's application for a financing order.

Appellants also are wrong to suggest that the ETA ensures that a utility will be granted a financing order in the exact amount it requests. [BIC 32]. As mentioned above, the ETA grants the Commission authority to deny a utility's

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[2] Having failed to identify with particularity any provision of the ETA that "eliminates all protections of ratepayers," Appellants cannot attempt to make new arguments in their reply brief to substantiate the vague accusations in their initial brief. *See, e.g. Wilcox v. New Mexico Bd. of Acupuncture & Oriental Medicine*, 2012-NMCA-106, ¶ 15, 288 P.3d 902 (declining to address arguments made for the first time in reply brief).

application altogether if it does not comply with the statutory requirements. NMSA 1978 § 62-18-5(A). The mere fact that the Commission approved the utility's application in this instance, in the amount that the utility requested, does not mean that the law requires an approval, regardless of the evidence presented to the Commission. Appellants' argument is as illogical as claiming that, merely because a jury convicted a particular defendant, the law required the jury to return a conviction, regardless of the evidence.

Moreover, the Commission can require a utility to correct inaccuracies in the amounts sought for inclusion in a financing order. *See* NMSA 1978 § 62-18-5(E). To be sure, the ETA provides that if the Commission grants a financing order, it cannot deny a utility recovery of a portion of its already-approved undepreciated plant balance. *See* NMSA 1978 § 62-18-5. Critically, Appellants ignore that this provision applies only to the remaining undepreciated portion of plant investments that the Commission *has already approved* in a prior proceeding. *See* NMSA 1978 § 62-18-2 (H)(2)(c) (2019) (defining "abandonment costs," a component of "energy transition costs," as investments being recovered in rates as of January 1, 2019).

Here, in a series of decisions over the past decades, the Commission has approved some investments and disapproved others that PNM incurred at the San Juan Generating Station. The ETA does not disturb the Commission's prior

decisions to allow PNM to recover some costs but not others. Instead, the ETA merely avoids re-examining the prudency of costs that the Commission already decided were prudently incurred. Appellants ignore that the undepreciated costs that PNM will recover through the financing order are costs that the Commission previously reviewed and approved in other dockets. In addition, for certain utility costs included in the financing order that are not yet vetted, i.e., decommissioning and reclamation costs, the Hearing Examiners and the Commission expressly found that the Commission would review the prudence of those costs in future proceedings, when the Commission will compare the actual costs PNM incurs to the estimated costs in the financing order. [41 RP 014769-76 (Recommended Decision at 88-95)].

Appellants make much of their claim that the ETA differs from other states' laws regarding financing orders. [BIC 29, 32]. This is irrelevant to the constitutionality of the ETA. Nothing in the New Mexico Constitution forbids our Legislature from enacting a law that differs from other states' laws. Appellants' comparison of the ETA to laws in other states wrongly suggests that the Court is in the business of making policy judgments based on such comparisons, and questioning the Legislature's policy choices.

Appellants disagree with the policy the Legislature adopted in the ETA regarding financing orders. But Appellants' policy disagreements with the ETA do not render the ETA unconstitutional.

2. Even if the ETA Could Be Construed as the Legislature Conducting Ratemaking, the ETA Would be Constitutional.

Appellants' claim that the Legislature infringed on the Commission's authority gets the law backwards, and must be rejected under this Court's recent decision in *Egolf*. Appellants' primary argument is that the Commission must have unfettered control over how it determines rates, including how it decides applications for a financing order. But this Court recently affirmed that "[t]he Commission has a constitutional duty to regulate public utilities '*in such manner as the legislature shall provide*.' N.M. Const. art. XI, § 2." *Egolf*, 2020 WL 4251786, at *8 (emphasis added). *Egolf* confirms that the Legislature has the power to set the legal standards by which the Commission acts. Here, even if the ETA is interpreted as specifying the manner in which certain costs will go into rates, the Legislature has the constitutional authority to do so under Article XI, Section 2. *Id.*

The Appellants cite multiple cases noting that the Commission is the only agency authorized to set utility rates and that the Commission has the duty to regulate rates. [BIC 26-30]. But Appellants ignore that these cases, even before *Egolf*, held that the Commission must "regulate public utilities 'in such manner as

the [L]egislature shall provide.' N.M. Const. art. XI, § 2." *City of Albuquerque v. New Mexico Public Regulation Comm'n*, 2003-NMSC-028, ¶ 18, 134 N.M. 472. This Court has never held that the Commission has the power to set utility rates irrespective of legislative instructions, as the Appellants suggest. Instead, the Court has corrected the Commission when it has disregarded controlling legislation. *See, e.g., State ex rel. Sandel v. New Mexico Public Utility Comm'n*, 1999-NMSC-019, 127 N.M. 272 (issuing writ of mandamus to vacate Commission's order purporting to deregulate retail electric industry by establishing retail wheeling because the order unconstitutionally intruded upon the policy making authority of the Legislature).

Our precedents and statutes repeatedly confirm that the Legislature is empowered to create and reshape utility regulation in accord with its own policy judgments. *See, e.g., City of Albuquerque v. New Mexico Public Service Comm'n*, 1993-NMSC-021, ¶¶ 15-18, 115 N.M. 521 (recounting transition accomplished by the Public Utility Act from a localized scheme of utility regulation by municipalities to a statewide system administered by the Commission); *State ex rel. Sandel*, 1999-NMSC-019 (holding that Commission's implementation of retail wheeling essentially deregulated the market for retail electricity and intruded on the authority of the Legislature to control public utility regulation); *Qwest Corp. v. New Mexico Public Regulation Comm'n*, 2006-NMSC-042, ¶¶ 4, 22, 140 N.M.

440 (addressing amendments to the New Mexico Telecommunications Act eliminating rate of return regulation and implementing Alternate Form of Regulation as part of the transition from a regulated to a competitive environment); NMSA 1978, § 62-6-4.1(A) (1993) (establishing contract carriage of natural gas, stating that the purpose of the section is to "encourage lower costs of natural gas…by providing competition in natural gas markets…"); NMSA 1978, §§ 62-3A-1 to 62-3A-23 (1999) (repealed 2003) (the Electric Utility Industry Restructuring Act, repealed in 2003, allowing electric public utilities to impose non-bypassable wire charges on customers to recover transition and stranded costs related to deregulation). This body of law belies Appellants' suggestion that the Legislature lacks the power to alter the "regulatory compact," or that the existing regime of regulation is constitutionally immutable.

Appellants' cases, such as *Blake v. Public Service Co. of New Mexico*, 2004-NMCA-002, 134 N.M. 789, and *Morningstar Water Users Ass'n v. New Mexico Public Utility Comm'n*, 1995-NMSC-062, 120 N.M. 579, are inapposite. Neither holds that the constitutional duty of the Commission to regulate rates of monopoly public utilities exists outside of the Legislature's authority to determine the legal standards for such regulation, as confirmed in *Egolf*. 2020 WL 4251786, at *8. Here, the ETA specifies how the Commission shall regulate applications for a financing order.

There is no language in the constitution or judicial precedents which say that every element of a utility's rates must be determined by an administrative agency, rather than by the Legislature. *See La Follette v. Albuquerque Gas & Elec. Co.'s Rates*, 1932-NMSC-076, ¶ 4, 37 N.M. 57 (acknowledging that the Legislature holds all powers not delegated to a regulatory agency). For this Court to accept the Appellants' argument that the Commission must have unfettered discretion to set rates free from standards set by the Legislature, the Court would need to overrule its recent decision in *Egolf*, overrule decades of separation-of-powers precedent, and rewrite Article XI, Section 2. Needless to say, the Court should decline the Appellants' invitation to overhaul an entire body of law.

3. The Legislature, In Enacting the ETA, Was Not Bound by the Same Constraints that Govern the Commission's Adjudication of a Case.

Appellants suggest that the constitution requires the Legislature to enact law regarding rates in the same manner that an agency must set rates in an adjudicated case. [BIC 26-32]. Appellants ask this Court to take the unprecedented step of applying case law concerning what an *agency* must do when determining utility rates to what the *Legislature* must do when writing policy into statutory law. In doing so, the Appellants conflate the agency's limited authority under its governing statutes with the Legislature's authority under the constitution to enact statutes.

The preceding section explains why this argument fails: as a factual matter, the ETA does not fix rates, but instead prescribes a process by which the Commission reviews and either approves or denies an application for a financing order. NMSA 1978 § 62-18-5. But even if the ETA limited the Commission's power to set rates, and instead set rates via legislation (which the ETA does not do), the ETA would still be constitutional.

Appellants' claim is fatally flawed because, under separation of powers principles, the Legislature's power to legislate is not bound by the same strictures controlling an administrative agency adjudicating a case. For example, Appellants urge this Court to overturn the ETA under the arbitrary and capricious standard of review that applies to agency action. [BIC 31]. This would be unprecedented. No New Mexico Court has ever applied the arbitrary and capricious standard of review to the Legislature's adoption of a statute.

Similarly, the Appellants suggest that the ETA fails to provide due process. [BIC 31]. To the extent that Appellants are claiming that the procedure for reviewing a financing order fails to provide due process, Appellants' claim has no merit. As described above, the Appellants were provided due process in the case before the Commission by having the opportunity to present testimony, issue discovery, cross-examine witnesses, and submit briefs.

B. Article XI, Section 2 Means What It Says.

Appellants argue that "logic" and the last antecedent rule support reading Article XI, Section 2 of the New Mexico constitution as providing the Commission with plenary authority to regulate electric utilities, without regard to legislation. [BIC 32-35]. Appellants argue that the phrase "in such manner as the Legislature shall provide" applies only to "such other public service companies," and not to the regulation of public utilities providing electric, natural gas, water, transportation, and the other services listed in Section 2. [*Id.*]. The Court should reject Appellants' unnatural, illogical interpretation.

The construction of constitutional provisions follows the same rules the Court applies in the construction of statutes. *State ex rel. Richardson v. Fifth Judicial Dist. Nominating Comm'n*, 2007-NMSC-023, ¶ 17, 141 N.M. 657. Construction must not render the application of the provision absurd, unjust, or unreasonable. *Id.* ¶ 20. Our courts accordingly reject unrealistic or irrational interpretations. *Id.*

This Court has consistently abided by the principle that, when the language of a constitutional provision is free from ambiguity when read in its plain and ordinary sense, there is no occasion for construction, and the courts are not at liberty to search for meaning beyond its terms. *See, e.g., Flaska v. State*, 1946-NMSC-035, ¶ 13, 51 N.M. 13; *State ex rel. New Mexico State Bank v. Montoya*,

1916-NMSC-071, ¶ 7, 22 N.M. 215. The Court must give effect to the clear language of a constitutional provision and refrain from further construction. *Hem v. Toyota Motor Corp.*, 2015-NMSC-024, ¶ 10, 353 P.3d 1219.

Our courts have rejected a strict application of the last antecedent rule. *See, e.g., Kevin J. v. Sager*, 2000-NMCA-012, ¶ 11, 128 N.M. 794. Instead, a qualifying phrase will not be restricted to its immediate antecedent where context requires that the qualifying phrase apply to several preceding phrases. *See, e.g., West Bluff Neighborhood Assoc. v. City of Albuquerque*, 2002-NMCA-075, ¶ 17, 132 N.M. 433, *overruled on other grounds in Rio Grande Chapter of Sierra Club v. New Mexico Mining Comm'n*, 2003-NMSC-005, 133 N.M. 97; *State ex rel. Dep't of Public Safety v. One 1990 Chevrolet Pickup*, 1993-NMCA-068, ¶ 11, 115 N.M. 644. The last antecedent rule merely serves as an aid to interpretation, not as an inflexible or binding principle which subordinates context. *Id.* (applying modifying phrase to three preceding clauses); *West Bluff Neighborhood Assoc.*, 2002-NMCA-075, ¶ 17 (declining to follow last antecedent rule where context indicated broader application of modifying phrase, relying on *State ex rel. Dep't of Safety*, 1993-NMCA-068, ¶ 11).

The Court must reject Appellants' interpretation under these guidelines, especially when this Court has repeatedly read the phrase "in such manner as the Legislature shall provide" as extending to the Commission's regulation of all of the

types of public utilities named in Section 2. *See, e.g.*, *Egolf*, 2020 WL 4251786, at *8; *Public Service Co. of New Mexico v. New Mexico Public Regulation Comm'n*, 2019-NMSC-012, ¶ 84, 444 P.3d 460; *City of Albuquerque*, 2003-NMSC-028, ¶ 18; *U.S. West Comm's, Inc. v. New Mexico Public Regulation Comm'n*, 1999-NMSC-024, ¶ 11, 127 N.M. 375. Appellants ignore this Court's longstanding interpretation of Section 2. These precedents confirm that the words "as the Legislature shall provide" unambiguously apply to the Commission's regulation of all New Mexico public utilities.

Next, Appellants' construction of Section 2 would lead to an absurd and impermissible result. In effect, Appellants claim that the constitution only recognizes the Legislature's authority to direct the manner of regulation for "other public service companies," while giving the Commission plenary authority over electric, gas, and water utilities without need to act in accordance with statutes such as the Public Utility Act and the Motor Carriers Act. This construction would render Section 2 absurd, unjust, and unreasonable, contrary to New Mexico precedents.

Appellants' interpretation would invalidate all legislation regarding public utilities that was enacted since Article XI, Section 2 became effective in 1999, and fly in the face of every decision of this Court holding that the Commission acted contrary to statute in its regulation of an electric, gas, or water utility, telephone

company, or motor carrier. The absurdity of that consequence places Appellants' interpretation beyond the realm of reasonable possibilities. *See State ex rel. Richardson*, 2007-NMSC-023, ¶ 17 (recognizing that the application of a constitutional provision must not yield absurd, unjust, or unreasonable results and courts should accordingly reject unrealistic or irrational interpretations).

Clearly, the context of Section 2 forecloses the mechanical application of the last antecedent rule. Appying the rule to Section 2 would unmoor public utility regulation from its existing foundations and contradict this Court's longstanding interpretation. The Court should again acknowledge that Section 2 means what it says.

C. Contrary to Appellants' Point 3, the ETA Preserves Judicial Review of Financing Orders.

1. <u>The ETA Preserves the Judiciary's Authority to Review a Financing Order</u>.

In Point 3, Appellants claim that the ETA prevents courts from crafting any meaningful remedies if a court invalidates a financing order. [BIC 37]. Tellingly, Appellants fail to cite any language in the ETA to support this argument. To the contrary, the ETA expressly provides for judicial review of financing orders. NMSA 1978 § 62-18-8. The ETA also states that New Mexico law governs the validity of a financing order. NMSA 1978 § 62-18-20.

Appellants suggest that the non-bypassable nature of a financing order usurps judicial power. [BIC 37]. But Appellants misunderstand the meaning of "non-bypassable." The ETA provides that after a utility issues bonds pursuant to a financing order approved by the Commission, all customers will be charged the rider until the bonds are retired. *See* NMSA 1978 § 62-18-2(P). The "non-bypassable" nature of the financing order has no effect whatsoever on the ability of courts to review and alter a financing order. It simply means that, after notice and hearing, if a financing order is approved by the Commission, and survives an appeal (or is not appealed), the rate rider cannot be reopened. Without that certainty, the bonds would not qualify for lower interest rates than ordinary utility debt obligations. The non-bypassable provision of the ETA is conceptually similar to revenue bonds.

Next, Appellants repackage their false claim that the ETA gives a utility whatever it wants in a financing order, and this somehow thwarts judicial review. [BIC 37]. As explained above, a utility cannot self-issue a financing order. Instead, a utility must obtain Commission approval, and the Commission can grant such approval only if the utility's application meets the legal standards set forth in the ETA. NMSA 1978 § 62-18-5(A),(E). Moreover, the ETA preserves the Commission's authority to review the prudence of a utility's proposed ratemaking treatment of financing costs as well as the prudence of future costs such as

decommissioning and reclamation. [41 RP 014769-76 (Recommended Decision 88-95)].

Appellants also argue that because the Commission rejected their arguments below, it must have been because of a lack of due process. [BIC 37]. Appellants seem never to have thought of the possibility that the Commission rejected their arguments because they lacked factual and legal merit. As the Recommended Decision noted, every party in the case that weighed in disagreed with NEE's interpretations of law. "All parties that addressed the issue, except NEE, agree that the Commission has the authority to review and modify PNM's proposal." [41 RP 014770 (Recommended Decision 89)]. "NEE, on the other hand, reads the ETA to ensure that PNM's proposed financing order will be approved as written, with whatever ratemaking procedures PNM proposes." [41 RP 014771 (Recommended Decision 90)]. "The Hearing Examiners do find, however, that the Commission has the authority to make the modifications recommended by the Hearing Examiners in this case." [*Id.*].

With regard to the Commission's ability to conduct a prudence review of the amount PNM expends on ETA transition charges, "[a]s in the prior section, all parties that addressed the issue, except NEE, agree that the Commission has the authority to review the reasonableness and prudence of the actual costs to be addressed when reconciling the estimated costs included in the securitization and

PNM's finally- incurred costs." [41 RP 014772 (Recommended Decision 91)]. Appellants have advanced strained interpretations of the ETA to create unworkable constitutional challenges, where no basis for a legitimate appeal exists.

The fact that the Appellants have a policy disagreement with the ETA's legal standards for a financing order does not render the ETA unconstitutional.

2. There is No Reason in this Case to Find a Conflict Between the ETA and the Court's Rules, as Appellants Met the Ten-Day Filing Requirement; But if the Court Finds that the ETA's Deadline for Filing an Appeal is Invalid, that Determination Would Not Affect the Validity of the Remainder of the ETA.

The ETA requires that a notice of appeal of a financing order be filed in this Court within ten days of issuance of the financing order. NMSA 1978 § 62-18-8(B). Rule 12-601(A) and (B) provide thirty days to file a notice of appeal from decisions of a commission such as the Commission, and further state that the Rule 12-601 supersedes any conflicting statute governing the procedures for filing a direct appeal from an agency decision. *See* Rule 12-601(A) NMRA.

The Legislature is not categorically prohibited from enacting legislation concerning procedural matters in the courts. *Albuquerque Rape Crisis Center v. Blackmer,* 2005–NMSC–032, ¶ 5, 138 N.M. 398; *see also Grassie v. Roswell Hosp. Corp.*, 2008-NMCA-076, ¶¶ 10-16, 144 N.M. 241. Instead, this Court has held that a statute and Court rule concerning the same procedural issue should both be given effect, if possible. *Blackmer,* 2005–NMSC–032, ¶ 11.

There may be situations in which the statute and Rule 12-601 would conflict; for example, if an appellant filed a notice of appeal more than ten days, but less than thirty days, after the Commission issues a financing order. However, that conflict does not exist in this particular case, and thus there is no reason for the Court to address a situation that has not presented itself. *See Grassie*, 2008-NMCA-076, ¶¶ 10-16 (declining to overturn a district court action taken pursuant to a statute merely because of the possibility that the statute and a court rule could conflict in other circumstances).

If the Court nonetheless finds that the thirty-day appeal period in Rule 12-601(B) supersedes the ten-day appeal period in Section 62-18-8(B), the proper remedy is to invalidate the ten-day appeal deadline, but leave the remainder of the ETA intact. The ETA's ten-day appeal deadline is severable from the rest of the ETA.

D. Appellants' "Logrolling" Complaint Is Meritless.

The Court should also reject Appellants' complaint that the title of the ETA violates the constitutional prohibition against "logrolling." [BIC 38-43]. Appellants' arguments mischaracterize the contents of the ETA and the standards governing assessment of whether a statute's title violates Article IV, Section 16 of our constitution.

In *State v. Miller*, this Court explained that the general principles guiding the application of Article IV, Section 16 are "few in number and simple." 1927-NMSC-045, ¶ 5, 33 N.M. 200. The purposes of the provision are to prevent surreptitious "logrolling" and to give general notice to all concerned of the character of the proposed legislation. *Id.* Although the prohibition is mandatory, it should be liberally construed to avoid impeding proper legislative functions. *Id.* The propriety of the title of an act is primarily a legislative question. *Id.* It is unnecessary that the details of the act be embraced in the title, but only that its contents be germane to the title. *Id.* Doubts about the sufficiency of a title should be resolved in favor of upholding it. *Id.*

The title does not need to be an abstract of the entire act and will suffice if it fairly indicates through general terms the scope and purpose of the act. *Id.* ¶ 7. The measures necessary for the attainment of the general object of the act identified in the title may be included in its body, and everything necessary or appropriate for the accomplishment of the purpose expressed in the title is sufficiently indicated by the title itself. *Id.* ¶ 8.

The prohibition against logrolling serves to prevent surprise or fraud upon the Legislature, avoid carelessly or unintentionally adopting overlooked provisions, and fairly apprise the people of the subjects of the Legislation. *City of Albuquerque v. Campbell*, 1960-NMSC-138, ¶ 20, 68 N.M. 75. The Constitution

commits the drafting of legislation to the Legislature; courts should be "slow to interfere" by pronouncing the work of the Legislature insufficient. *Crosthwait v. White*, 1951-NMSC-003, ¶ 20, 55 N.M. 71.

Under these guidelines, Appellants have no grounds for their "logrolling" complaint or for suggesting that the Legislature "smuggled" the aspects of the ETA Appellants dislike past the public and legislators. [BIC 40-41]. The title specifically refers to regulatory treatment of the financing for the transition away from coal generation in three clauses: "AUTHORIZING CERTAIN UTILITIES THAT ABANDON CERTAIN GENERATING FACILITIES TO ISSUE BONDS PURSUANT TO A FINANCING ORDER ISSUED BY THE PUBLIC REGULATION COMMISSION," "PROVIDING FOR THE TREATMENT OF ENERGY TRANSITION BONDS BY THE COMMISSION," and "PROVIDING FOR NONIMPAIRMENT OF ENERGY TRANSITION CHARGES AND BONDS." [BIC 39]. The words "PUBLIC UTILITY," "UTILITIES," "GENERATING FACILITIES," and "FACILITIES THAT PRODUCE OR PROVIDE ELECTRICITY" appear throughout the title. Although the title says that the ETA "AMEND[S] CERTAIN DEFINITIONS IN THE RENEWABLE ENERGY ACT, it contains no "pinpoint" reference to specific statutory sections amended by the act. The presence of "pinpoint" references might substantiate

Appellants' criticism that the title does not cite specific provisions of the Public Utility Act Appellants believe the ETA amends. [BIC 41-42].

Appellants appear to believe that Article IV, Section 16 required the Legislature to entitle the ETA in a manner that discloses all of the bad effects Appellants attribute to the act. [BIC 41-43]. But the Legislature is free to disagree with Appellants' characterizations of the statute, particularly the premise that the ETA accomplished a "deregulation" of abandonment. Our precedents leave to the Legislature a great deal of latitude in deciding how to entitle legislative acts. *See State v. Miller*, 1927-NMSC-045, ¶ 5; *Crosthwait,* 1951-NMSC-003, ¶ 20. Appellants have not demonstrated that the Legislature was constitutionally compelled to entitle the ETA in accordance with Appellants' criticisms, or that the title of the ETA falls short of the relevant standards.

E. The ETA Is Not Unconstitutional "Special Legislation."

Appellants assert that the ETA is unconstitutional "special legislation" because it applies "only to PNM." [BIC 3, 44-45]. Appellants' argument consists of two sentences and a cite to *Thompson v. McKinley County*, 1991-NMSC-076, ¶ 5, 112 N.M. 425. [*Id.* 44-45].

The threshold for overturning a statute as special legislation is high. "Only if a statutory classification is so devoid of reason to support it, as to amount to

mere caprice, will it be stricken down." *Board of Trustees of Las Vegas v. Montano*, 1971-NMSC-025, ¶ 14, 82 N.M. 340.

First, the ETA is not "special legislation. The ETA does not list particular individuals or companies to which the Act applies. Instead, the ETA's financing provisions apply to any "qualifying utility" that abandons a "qualifying generating facility." NMSA 1978 § 62-18-4(A). These classifications are rational. The ETA limits the financing provision to a "qualifying utility" because those are the only utilities regulated by the Commission. *See* NMSA 1978 § 62-18-2(T) (adopting the definition of "qualifying utility" that is used in the Public Utility Act to determine which utilities are regulated by the Commission). The ETA limits the financing provisions to a "qualifying generating facility," which is defined to mean a coal-fired power plant, NMSA 1978 § 62-18-2(S), because the purpose of the ETA is to transition New Mexico away from expensive and polluting coal-fired facilities toward cheaper and less polluting technologies for generating electricity. *See* NMSA 1978 § 62-16-4(A) (2019) (establishing deadlines by which utilities must obtain certain percentages of their electricity from carbon-free sources). It is true that PNM is the only public utility in New Mexico that owns and operates coal-fired power plants. But that does not make the ETA impermissible special legislation, given that the classifications have a rational basis.

The ETA protects New Mexico's environment for all New Mexicans. The Legislature owes a constitutional duty to every person in the state to safeguard New Mexico's environment. The Legislature's decision to act to protect the atmosphere from the harmful effects of coal-powered plants was therefore constitutionally impelled:

> The protection of the state's beautiful and healthful environment is hereby declared to be of fundamental importance to the public interest, health, safety and the general welfare. The legislature shall provide for control of pollution and control of despoilment of the air, water and other natural resources of this state, consistent with the use and development of these resources for the maximum benefit of the people.
>
> N.M. Const. art. XX, § 21.

"Article XX, Section 21 of our constitution recognizes the duty to protect the atmosphere and other natural resources, and it delegates the implementation of that specific duty to the Legislature." *Sanders-Reed v. Martinez*, 2015-NMCA-063, ¶ 16, 350 P.3d 1221. The ETA fulfills the Legislature's constitutional obligations to all New Mexicans. It may not be legitimately challenged on the ground that it is "special."

Second, even if the ETA could be legitimately classified as "special," our precedents recognize that special legislation is constitutional where the circumstances require special attention and measures, and the Legislature could rationally conclude that special legislation was appropriate. *See, e.g., Thompson*,

1991-NMSC-076, ¶¶ 12-15. These standards resemble those controlling the rational basis test in equal protection cases. *Id.* ¶¶ 4, 18.

In *Thompson*, the Legislature enacted restrictions on drive-up windows for alcohol purchases effectively applicable only to McKinley County. Business operators challenged the statute as unconstitutional "special" legislation. This Court pointed out that the purpose and interests of Article IV, Section 24 align closely with those protected by the equal protection clauses of the state and federal constitutions. *Id.* ¶ 4. The Legislature's classification therefore deserved great weight. *Id.*

This Court upheld the legislation because the Legislature could rationally conclude that the ease of purchasing alcohol at drive-up windows and the proximity of McKinley County to large reservations for Native Americans contributed to the special circumstances justifying special legislation. *Id.* ¶¶ 13-15. The same considerations which made the statute "rational" under equal protection standards also prevented it from being unconstitutional special legislation. *Id.* ¶ 18.

In this case, the problems posed by coal-generated power production, and the need to replace those resources with renewable alternatives, undoubtedly warranted legislation that might be regarded as "special." Coal-fired power plants emit air pollution at higher rates than all other kinds of facilities, and they produce

toxic coal ash that must be disposed of. Moreover, as the proceedings below demonstrated, coal-fired power plants have become much more expensive than alternative sources of electricity, and thus transitioning away from coal will save New Mexicans money. [41 RP 014703 (Recommended Decision 22)] ("[T]he immediate impact of the securitization and abandonment should be a net savings in customers' monthly bills.")]. Even though PNM is the only affected owner of coal powered plants, the Legislature could, and did, rationally conclude that the special problems posed by coal generation justified enactment of the ETA, even if it applied only to PNM.

F. The Provisions of the Energy Transition Act Are Severable.

Appellants are correct that, if any provision of the ETA is found to be unconstitutional, it is severable from the remainder of the ETA. For example, the ETA provisions concerning financing orders can be removed without impairing the effect of other provisions concerning the legal standard for approving new resources and targets for adopting renewable resources.

Similarly, as noted above, the ETA's ten-day deadline for appealing a financing order is severable from every other provision in the ETA. Removing the appeal deadline would not impair the force and effect of any other provisions in the ETA concerning financing orders.

G. The Court Should Reject Appellants' Impairment of Contract, Vested Rights, and Pending Case Challenges.

In Point 8, Appellants mash together the constitutional prohibitions against impairment of vested rights, impairment of contract rights, and legislative changes which alter the rights and remedies of parties in pending cases. [BIC 48]. Appellants use this mélange of constitutional rules to challenge the ETA on the ground that it unconstitutionally affects ratepayer rights in relation to the stipulated settlement in Case No. 13-00390-UT, concerning San Juan Generating Station (SJGS) [BIC 46-47], Palo Verde Nuclear Generating Station (PVNGS) [BIC 47], and Four Corners Power Plant (FCPP). [BIC 47-48]. The Court should reject these ill-defined, irrelevant, and underdeveloped "as applied" arguments.

All property rights are held subject to the fair exercise of the state's police power. *See, e.g., Green v. Town of Gallup*, 1941-NMSC-050, ¶ 21, 46 N.M. 71; *Temple Baptist Church v. City of Albuquerque*, 1982-NMSC-055, ¶ 44, 98 N.M. 138. The prohibition in the contract clause is not literal or absolute. *Los Quatros, Inc. v. State Farm Life Ins. Co.*, 1990-NMSC-082, ¶ 25, 110 N.M. 750.

The relevant analysis, ignored by Appellants, asks whether a substantial impairment of contract rights has occurred, and, if so, whether the state can identify a "significant and legitimate public purpose" to guarantee that the state is exercising its police power, rather than benefitting special interests. *Id.* 1990-NMSC-082, ¶ 28. Then, the reviewing court must determine whether adjustment of

contract rights is based upon reasonable conditions and appropriate in light of the public purpose justifying the legislation. *Id.* Appellants also ignore that the electric utility industry is highly regulated by state and federal government, which weighs against finding that state action unconstitutionally impairs contract rights. *See, e.g., Greentree Solid Waste Auth. v. County of Lincoln*, 2016-NMCA-005, ¶ 25, 365 P.3d 509 (noting that where activity underlying assertion of vested rights is regulated, impairment claim based on contract for regulated activity fails, *citing Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357 (1908)).

In short, Appellants have made no effort to substantiate, by analysis or precedent, their assertion that the ETA impairs any "vested" or contract right held by Appellants or anyone else.

1. Appellants Lack Standing to Complain About the Effect of the ETA on the Stipulated Settlement, Which Concluded Case No. 13-00390-UT.

Appellants first seem to argue that the ETA unconstitutionally impairs contract rights established in the stipulated settlement in Case No. 13-000390-UT concerning SJGS. This assertion [BIC 46-47] overlooks the fact that Appellants were not parties to the stipulation. NEE opposed the settlement agreement and appealed the Commission's approval of the settlement. *See New Energy Economy v. New Mexico Public Regulation Comm'n*, 2018-NMSC-024, 416 P.3d 277. Appellants lack standing to assert a contractual impairment argument based on a

contract to which they are not parties. *See, e.g., Russell v. Allied Textile Companies, PLC,* 288 B.R. 7, 11 (Bankr. D. Me. 2003); *In re Estate of Dobert*, 963 P.2d 327, 332 (Ariz. App. 1998). Appellants fail to cite any authorities recognizing that strangers to contracts may complain of their alleged impairment, and this Court may assume no such authorities exist. *See, e.g., Curry v. Great Northwest Ins. Co.,* 2014-NMCA-031, ¶ 28, 320 P.3d 482.

Moreover, Case No. 13-000390-UT was not pending when the ETA became effective. NEE unsuccessfully challenged the Commission's approval of the Modified Stipulation, this Court affirmed, and the case is no longer "pending." *See, e.g., Starko, Inc. v. Cimmaron Health Plan, Inc.*, 2005-NMCA-040, ¶ 9, 137 N.M. 310 ("The general rule derived from the case law is that a case is… no longer pending once a final decision is entered and a court or agency no longer has jurisdiction.")

Appellants have made no attempt to demonstrate that the Modified Stipulation creates a vested right or contract right Appellants have standing to enforce, and do not demonstrate that Case No. 13-000390-UT was "pending," as contemplated by Article IV, Section 34, when the ETA took effect. The arguments based on the Modified Stipulation should be discarded as undeveloped. *See, e.g., State v. Guerra*, 2012-NMSC-014, ¶ 21, 278 P.3d 1031 (explaining that appellate court has no obligation to address undeveloped issue); *Elane Photography, LLC v.*

Willock, 2013-NMSC-040, ¶ 70, 309 P.3d 53 ("To rule on an inadequately briefed issue, this Court would have to develop the argument itself, effectively performing the parties' work for them…This creates a strain on judicial resources and a substantial risk of error."). The Court should not consider attempts to repair these deficiencies in Appellants' reply brief. *See. Wilcox,* 2012-NMCA-106, ¶ 15.

2. Appellants Misapprehend the Plain Meaning of Section 62-16-6(C) and Any Challenges to the Application of this Section to PVNGS and FCPP are Not Ripe.

Appellants misconstrue the meaning of Section 62-16-6(C) of the Renewable Energy Act, which was enacted in SB 489, but which is not codified within the ETA. Appellants claim that this provision, NMSA 1978 § 62-16-6(C), improperly interferes with implementing prior Commission decisions concerning PVNGS and FCPP, and with potential future decisions regarding PNM-owned gas plants.[3] [BIC at 19-25].

In the case underlying this appeal, PNM did not apply to abandon PVNGS, FCPP, or any gas plants, nor did the Commission require any such plants to be abandoned. Thus, the issues raised in pages 19-25 of Appellants' Brief-in-Chief are not before the Court and are not ripe for review. Lastly, NMSA 1978 § 62-16-6(C) is implicated only if the Commission requires a utility to abandon certain

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[3]Appellants cite NMSA "§62-18-31C," a non-existent statute. We believe they intended to cite NMSA 62-16-6(C) (2019), which was enacted by section 31 of SB 489.

plants, and does not govern a utility's voluntary application to abandon a facility Thus, even in a hypothetical scenario in which PNM were to apply to abandon PVNGS, FCPP, or a gas plant, Section 62-16-6(C) would not apply.

In addition, nuclear plants such as PVNGS emit no carbon dioxide, and thus no replacement resources emit less carbon dioxide than a nuclear power plant. As a result, it is unclear how the Commission could ever use Section 62-16-6(C) to order PNM to cease using PVNGS.

For these reasons, to the extent that the Appellants are challenging the constitutionality of Section 62-16-6(C), the Court must dismiss those challenges.

3. Appellants Have Demonstrated No Unconstitutional Harm to Any Contract Right or Vested Right Related to PVNGS or FCPP.

As mentioned above, the Court should dismiss any challenges to the application of the ETA to FCPP and/or PVNGS, because the Commission decision on appeal in this case approved a financing order solely for costs related to SJGS. Nonetheless, if the Court considers the merits of Appellants' challenges to the hypothetical application of the ETA to FCPP and PVNGS, the Court should reject Appellants' claims.

In relation to PVNGS and FCPP, Appellants appear to believe that the ETA unconstitutionally eliminated the prospect of cost disallowance or write-offs for imprudent investments in PVNGS and FCPP. [BIC 47-48]. Again, Appellants do not explain the contract or vested right underlying these claims, or how the ETA

improperly affects a "pending case" relating to PVNGS or FCPP, or Appellants' standing to assert the kinds of constitutional claims they mention, without development. They do not attempt to demonstrate how the impact of the ETA violates the impairment clause, in light of the clear exercise of police power underlying enactment of the ETA. *See, e.g., Green*, 1941-NMSC-050, ¶ 21; *Temple Baptist Church*, 1982-NMSC-055, ¶ 44. Appellants do not attempt to account for the highly regulated context in which their impairment arguments arise, namely, that the electric utility industry is heavily regulated. *See, e.g., Greentree Solid Waste Auth.*, 2016-NMCA-005, ¶ 25. Most pervasively, Appellants ignore the legitimate public purposes accomplished by the ETA. *See, e.g., Los Quatros, Inc.*, 1990-NMSC-082, ¶ 28.

II. THE COMMISSION'S ORDER COMPLIES WITH SECTION 62-18-4.

STANDARD OF REVIEW: On appeal, the Commission's order will be affirmed unless the appellant demonstrates that it is arbitrary and capricious, or not supported by substantial evidence. *Albuquerque Bernalillo County Water Auth. v. New Mexico Regulation Comm'n*, 2010-NMSC-013, ¶ 17, 148 N.M. 21.

Appellants' sole non-constitutional claim is their Point 5, arguing that the Commission erred in finding that PNM provided the opinion of a securities firm regarding the investment quality of the proposed bonds, as required by NMSA 1978 § 62-18-4(B)(5). [BIC 43-44]. Commission decisions that apply the record

evidence to the law are reviewed under a substantial evidence standard. "Substantial evidence requires that there is evidence 'that is credible in light of the whole record and that is sufficient for a reasonable mind to accept as adequate to support the conclusion reached by the agency.'" *Public Service Co. of New Mexico v. New Mexico Public Regulation Comm'n*, 2019-NMSC-012, ¶ 14, 444 P.3d 460. The Court does not reweigh the evidence. *New Mexico Indus. Energy Consumers v. New Mexico Public Regulation Comm'n*, 2019-NMSC-015, ¶ 13, 450 P.3d 393.

The Commission's finding that PNM complied with NMSA 1978 § 62-18-4(B)(5) is supported by substantial evidence. PNM submitted an opinion from Charles N. Atkins II, a Senior Advisor at Guggenheim Securities.[4] [32 RP 010829]. In both his direct testimony, and in the memorandum attached to his testimony as Exhibit CNA-4, Mr. Atkins testified that the bonds that PNM proposed to issue would qualify to be rated as AAA securities and thus met the criteria in NMSA 1978 § 62-18-4(B)(5). [32 RP 010888 to 011008]. The New Mexico Board of Finance attested that Mr. Atkins and his firm, Guggenheim

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[4] In the Record Proper, Mr. Atkins' direct testimony and exhibits appear in Volume 32, which contains the Transcript of Proceedings for December 13, 2019. Mr. Atkins' direct testimony begins on pdf page 65 of the Transcript for December 13, 2019. Mr. Atkins' formal opinion on the bonds that PNM proposed to issue appears in Exhibit CNA-4, which is attached to Mr. Atkins' direct testimony.

Securities, met the qualifications specified in the ETA, NMSA 1978 § 62-18-4(B)(5), to provide this opinion. [32 RP 010985].

Appellants' argument against the finding is that PNM submitted an opinion from an employee of a securities firm, rather than from a securities firm itself. [BIC 43-44]. This argument is absurd. A securities firm cannot testify. Only individuals can testify on behalf of a firm, as Mr. Atkins did here, on behalf of Guggenheim Securities.

Appellants' argument rests entirely upon the fact that the Atkins written opinion contained a boilerplate disclaimer at the end stating that "[t]he views expressed herein are solely those of the author(s) and may differ from the views of other Representatives of Guggenheim securities." [32 RP 010902].[5] But Mr. Atkins clarified in his rebuttal testimony that he was "specifically authorized by Guggenheim Securities to act as a representative of the Firm in these proceedings." [17 RP 004137]. Mr. Atkins also testified that "I am acting as a duly authorized representative of Guggenheim Securities." [17 RP 004139].

Moreover, the Appellants do not dispute that the New Mexico Board of Finance supplied the attestation, required by the ETA, NMSA 1978 § 62-18-

[5] There is no record evidence that anyone at Guggenheim Securities actually had a different opinion than the opinion that Mr. Atkins provided in his testimony. Thus, there is no record evidence that Guggenheim Securities has an internal difference of opinion on the investment quality of PNM's proposed bonds. This is yet another reason that Mr. Atkins' opinion was the opinion of Guggenheim Securities.

4(B)(5), that "Guggenheim Securities, LLC and Charles N. Atkins II have experience in the marketing of bonds similar to energy transition bonds authorized by the ETA and that the firm has the expertise to provide a memorandum indicating whether the bonds would satisfy the current published AAA" rating criteria. [32 RP 010985]. Nor do Appellants dispute the substance of the opinion that Mr. Atkins provided, in which he concluded that PNM's proposed bonds would qualify for a AAA rating, as required by the ETA. [32 RP 010888 to 011008].

In sum, no expert testimony in the record contradicts Mr. Atkins' testimony that he provided an opinion on behalf of Guggenheim Securities, and that, in his expert opinion, the PNM's proposed bonds would receive a AAA bond rating. The Commission's conclusion was supported by uncontroverted evidence, and thus easily satisfies the substantial evidence standard. Appellants' argument is frivolous and should be rejected.

CONCLUSION

The Court should reject all of Appellants' as applied or facial constitutional challenges to the ETA, reject Appellants' challenge to the Commission's acceptance of Mr. Atkins' opinion, and affirm the Commission's financing order.

Respectfully submitted,

COALITION FOR CLEAN AFFORDABLE ENERGY

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 5, 2020, I caused a copy of the foregoing Answer Brief to be electronically filed in the Supreme Court's Odyssey filing system, which in turn caused service upon all counsel of record.

__/s/ Thomas C. Bird__

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