BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF PUBLIC SERVICE COMPANY OF NEW MEXICO'S ABANDONMENT OF SAN JUAN GENERATION STATION UNITS 1 AND 4	))))	Case No. 19-00018-UT

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF PUBLIC SERVICE COMPANY OF NEW MEXICO'S CONSOLIDATED APPLICATION FOR APPROVALS FOR THE ABANDONMENT FOR SAN JUAN GENERATING STATION PURSUANT TO THE ENERGY TRANSITION ACT	)))))))	Case No. 19-00195-UT

CITIZENS FOR FAIR RATES AND THE ENVIRONMENT'S RESPONSE BRIEF ON LEGAL CONFLICTS PRESENTED BY THE ENERGY TRANSITION ACT

October 18, 2019

TABLE OF CONTENTS

Introduction

Comes now, Citizens for Fair Rates and the Environment ("CFRE") pursuant to the Procedural Order issued on July 25, 2019[1] we file our Response Brief on Legal Conflicts Presented by The Energy Transition Act. Public Service Company of New Mexico ("PNM") filed its legal brief on August 23, 2019;[2] CFRE hereby files its response to PNM's brief. In our brief we address the significant conflicts between provisions in the Energy Transition Act ("ETA" or "Act") and controlling legal mandates.

The New Mexico legislature's recent enactment of the ETA has left the New Mexico Public Regulation Commission ("PRC" or "Commission") with the conundrum of how to proceed in the face of a new law that obviously violates both the state and federal constitutions, existing utility law, regulations, as well as regulatory norms (the "regulatory compact"), and decades of legal precedence.

The PRC has already taken various actions in an apparent attempt to begin to reconcile said conflicts; these include bifurcation of Public Service Company of New Mexico's Consolidated Application for the Abandonment, Financing & Replacement of The San Juan Generating Station Pursuant To The Energy Transition Act (July 1, 2019) into two proceedings[3] and the scheduling of briefing on the legal issues arising from ETA enactment, specifically on how "N.M. Const. Article IV, § 34 prevents the application of the Energy Transition Act, NMSA 1978, §§ 62-18-1 to -23 (2019), to the issues in the instant case."[4]

---

[1] Case No. 19-00018-UT/19-00195-UT, *Procedural Order* (July 25, 2019).
[2] Case No. 19-00018-UT/19-00195-UT, *Legal Brief of PNM Concerning Applicability of Energy Transition Act* (August 23, 2019).
[3] Case No. 19-00018-UT/19-00195-UT, *Corrected Order on Consolidated Application*, (7-10-19), ¶A.
[4] Case No. 19-00018-UT/19-00195-UT, *Procedural Order*, ¶ A(3) at 4 (July 25, 2019).

Unfortunately, the myriad of constitutional and legal conflicts far exceeds the pending case clause of NM's constitution and the provisions in the Public Utility Act ("PUA") which were specifically sighted in the Procedural Order, i.e., the provisions that the PRC already appears to be trying to reconcile with the ETA. Certain provisions in the ETA also violate U.S. and N.M. constitutional mandates that ensure due process of law, they attempt to change existing N.M. law without giving N.M. constitutionally required notification and clear delineation of the changes, they prescribe procedures that inhibit the function of the PRC, and they violate the separation of powers. Consequently, the Commission cannot proceed in the instant case without violating some legal mandate or another, the question is which legal mandates will the Commission enforce and which will it violate; or rather, will the Commission give the necessary greater weight to the controlling legal prescriptions.

Argument

1. Controlling Legal Mandates

In recognition and reinforcement of Article VI, Clause 2 of the U.S. Constitution, i.e., "the supremacy clause," the N.M. constitution states as follows:

> **NM Const. Article II, Sec. 1. [Supreme law of the land.]**
>
> The state of New Mexico is an inseparable part of the federal union, and the constitution of the United States is the supreme law of the land.

Thus, when contradictions in legal mandates arise between a state constitution or laws and the U.S. constitution, the U.S. constitution is the controlling legal force. When contradictions in

legal mandates arise between N.M. legislation and the N.M. Constitution it is the N.M. Constitution that is controlling:

> Policy determines duty. **With deference always to constitutional principles**, it is the particular domain of the legislature, as the voice of the people, to make public policy. Elected executive officials and executive agencies also make policy, to a lesser extent, as authorized by the constitution or the legislature. (Emphasis added.)
> Torres v. State, 894 P.2d 386, 119 N.M. 609 (1995), 389.

It is within the bounds of and in deference to the foregoing principles that the N.M. PRC will have to enforce, to the greatest extent feasible, the Energy Transition Act.

2. The N.M. Constitution Grants Authority to the PRC for the Regulation of Public Utilities

Pursuant to Article. XI, § 2 of the New Mexico Constitution,[5] the PRC has the "responsibility" to "regulate" public utilities.[6] [7] Although the NM constitution further provides that such regulation will be "in such manner as the legislature shall provide[,]" the legislative policy dictates may not be so restrictive that they disallow or disable the constitutional power entrusted to the Commission to "regulate" utilities or else the constitutional delegation of authority for regulation of utilities would be nullified.[8]

---

[5] **Article XI, Sec. 2. [Responsibilities of public regulation commission.]** The public regulation commission shall have responsibility for regulating public utilities . . in such manner as the legislature shall provide. . ."

[6] "It is the declared policy of the state that the public interest, the interest of consumers and the interest of investors require the regulation and supervision of such public utilities to the end that reasonable and proper services shall be available at fair, just and reasonable rates . . ." NMSA 1978, § 62-3-1.B. (2006).

[7] "'rate' means every rate, tariff, charge or other compensation for utility service rendered or to be rendered by a utility and every rule, regulation, practice, act, requirement or privilege in any way relating to such rate, tariff, charge or other compensation and any schedule or tariff or part of a schedule or tariff thereof" NMSA 1978, § 62-3-1.H. (2006).

[8] "[R]egulation protects the utility's consumers. Because it is a monopoly the utility must be regulated so that it cannot take advantage of its position or its customers." *Morningstar Water Users Ass'n v. New Mexico Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 54, 120 N.M. 579, 591, 904 P.2d 28, 40.

While the legislature certainly has the constitutional authority under Article. XI, § 2 to issue policy directives to guide the regulation of utilities, directives such as the ETA mandating the transition to renewable energy, and while such directives will certainly affect the rates of ratepayers, the power to "regulate" (i,e., to ensure that policy directives are implemented such that the interests will be balanced[9] and the resulting rates will be "just and reasonable")[10] is entrusted to the PRC by Article. XI, § 2.[11] The N.M. Supreme Court held that the Commission's rate setting power is not only derived from statute, but rather that the power to "**set utility rates**" is "**mandated**" by the NM Constitution itself; the Court cited that this power is derived, specifically from Article XI, § 2.

> Our Constitution **mandates** that a public regulation commission **set utility rates**. N.M. Const. art. XI, § 2. (Emphasis added.)
> *(Blake v. Pub. Serv. Co. of New Mexico*, 2004-NMCA-002, ¶ 22, 134 N.M. 789, 795, 82 P.3d 960, 966.)

3. Regulation of Utilities Requires Balancing of Interests

The N.M. Constitution gives the power to regulate to the Commission; the legislature may not remove that power. The N.M. Supreme Court has held that "[i]n return for monopoly market power in its industry, the utility must submit to Commission regulation."[12] Regulation requires balancing of interests:

---

[9] (*Matter of Rates & Charges of Mt. States Tel.*, 653 P.2d 501,1982,)
[10] NMSA 1978 § 62-8-7(A).
[11] "Under the Constitution, the legislature lacks the power to prescribe by statute rules of practice and procedure, although it has in the past attempted to do so. Certainly statutes purporting to regulate practice and procedure in the courts cannot be made binding, for the constitutional power is vested exclusively in this court." (*State ex rel. Anaya v. McBride*, 539 P.2d 1006 (1975), 88 N.M. 244, 1008.)
[12] *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Serv. Comm'n*, 1991-NMSC-083, 112 N.M. 379, 387, 815 P.2d., 1177.

> Thus it is that a taking occurs not when an investment is made (even one under legal obligation), but when **the balance between investor and ratepayer interests — the very function of utility regulation** — is struck unjustly. Although the agency has broad latitude in striking the balance, **the Constitution nonetheless requires that the end result reflect a reasonable balancing of the interests** of investors and ratepayers. (Emphasis added.) (*Jersey Central Power & Light Co. v. FERC*, 810 F.2d 1168, D.C.Cir.1987.)

> The ratemaking process involves a **balancing of investor and consumer interests**. Neither is paramount. To argue that the consumer interest is best served by focusing solely on the investor interests ignores the **Commission's duty to set rates**[.]" (Emphasis added.) (*Matter of Rates & Charges of Mt. States Tel.*, 653 P.2d 501,1982.)

4) **Statute is Unconstitutional if it Prevents an Agency from Administering its Function**

Because of the controlling nature of N.M.'s constitution over acts of the N.M. legislature, the N.M. Supreme Court has, held N.M. statute to be invalid and unconstitutional when it attempted to disable the courts from effectively administering their judicial function, i.e., from administering their constitutionally prescribed responsibilities:

> ". . . *See also State ex rel. Bliss v. Greenwood*, 63 N.M. 156, 162, 315 P.2d 223, 227 (1957) (statutory regulation invalid if it does not enable court effectively to administer its judicial functions); *Southwest Underwriters v. Montoya*, 80 N.M. 107, 109, 452 P.2d 176, 178 (1969) (legislation unconstitutional if it touches upon rules of pleading, practice and procedure essential to performance of courts' constitutional duties)."
> (As cited in *Lovelace Medical Center v. Mendez*, 111 N.M. 336, 805 P. 2d 603, (1991), ftnt. #3.)

5. **PRC Has Exclusive Jurisdiction to Regulate Rates**

PRC regulation of utilities has consistently been interpreted as the agency having the "exclusive"[13] "power and jurisdiction" to regulate utility rates. The N.M. Supreme Court has often reiterated some version of following:

[13] "The commission shall have general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates . . . and in respect to its securities . . . and to do all things necessary and convenient in the exercise of its power and jurisdiction. . ." NMSA 1978, § 62-6-4(A).

> The Commission has "general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations . . ." Section 62-6-4(A). A public utility cannot change its rates without first obtaining the Commission's approval. *See* § 62-8-7(A)-(F). When a public utility requests a rate change, the Commission "may" conduct a hearing concerning the reasonableness of the rates; and the proposed rates are suspended until the Commission determines reasonable rates. *See* § 62-8-7(C). At any hearing involving an increase in rates, the public utility carries the burden of proving that the increase "is just and reasonable." Section 62-8-7(A)."
> (*Tri-State Generation and Transmission Association, Inc., v. New Mexico Public Regulation Commission and Kit Carson Electric Cooperative, Inc,* 2015-NMSC-34,182, ¶ 14.)

Certainly, legislative **redelegation of the authority to regulate** (i.e., the ratemaking authority) **to the utilities themselves** is unconstitutional:

> It is well established that the "rate-making process" [] i.e., the fixing of "just and reasonable" rates, involves a balancing of the investor and the consumer interests.
> *(FPC v. Hope Natural Gas Co.,* supra 320 U.S. 591, 603, 1944.)

Furthermore, the N.M. Supreme Court has found not only that the Commission is responsible for ensuring that rates made and received by public utility must be just and reasonable, but also that **the Commission has considerable discretion in so determining**.[14]

6. Can the N.M. Legislature Exclude ALL Utility Costs from Regulatory Review?

The N.M. legislature may not strip the Commission of its "considerable discretion" in setting rates. If the NM Legislature were to have the power to exclude stranded, decommissioning, and reclamation costs from regulatory review (and hand the power to set associated rates over to the utilities), can the legislature do the same with regard to resource acquisitions? If so, how far

[14] (See *Hobbs Gas Co. v. N.M. Pub. Serv. Comm'n,* 94 N.M. 731, 733, 616 P.2d 1116, 1118, 1980.)

can the legislative assault on the Commission's constitutional responsibility to regulate public utility companies go?

Provisions in the ETA that allow utilities to implement rate increases without "regulation" (the balancing of interests) are an affront to regulatory norms, decades of legal precedent, ratepayers' right to due process of law, as well as N.M.'s constitutional directive that the PRC has the "responsibility" to regulate monopoly utilities.

7. The Legislature's Policy Driving Role in Ratemaking Must Not Undermine Due Process Rights

In *Gulf States Utilities v. PSC*, 578 So. 2d 71 (1991) - La, the Louisiana Supreme Court, after consideration of the legislative policy driving role in ratemaking, reaffirmed the role of prudency review in ratemaking:

> Despite the legislative nature of ratemaking, however, it is also true that a prudence inquiry involves "adjudicative facts," . . . The nature of the inquiry thus makes it appropriate for the Commission to hold an evidentiary hearing before making a determination of such significance to the company and its investors. (Citation omitted.)

The Court determined that the legislative role in ratemaking must not interfere with the constitutionally guaranteed right to due process of law:

> Further, we agree with the company's assertion that the property interest at stake is one to which due process concerns protected by the federal and state constitutions attach, and that the company is entitled to a hearing before being deprived of that interest. The issue thus becomes whether the kind of hearing provided by the Commission in this case violated Gulf States' due process rights. The U.S. Supreme Court has established a three part balancing test to determine what safeguards are necessary when a constitutionally protectable liberty or property interest is at stake. A reviewing court must weigh the interests of the affected individual, the risk of erroneous decision making based on the procedures used, and the government's interest in efficient resolution of the issues.

Mathews v. Eldridge, 424 U.S. 319, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976). (Internal citations omitted.)

8. **Requirements of Due Process**

Application of the "three part balancing test" prescribed by *Mathews v. Eldridge* "to determine what safeguards are necessary when a constitutionally protectable liberty or property interest is at stake" indicate that Commission adherence to due process principles would best serve the public in the instant case:

A) As discussed below, "the [property] interests of the affected individual[s,]" ratepayers, is greater than the interests of PNM;

B) "the risk of erroneous decision making based on the procedures used," supports utilizing an evidence-based trial-like hearing to ensure that due process rights are protected and that rates prescribed by the Commission are balanced, just, and reasonable; furthermore, the risk of erroneous decision making based upon the Commission enforcing the primacy of constitutional mandates is low in the instant case because the conflicts are obvious.

C) "the government's interest in efficient resolution of the issues" strongly supports Commission application of the ETA in a constitutionally consistent manner. Certain provisions in the ETA are so obviously unconstitutional that any delay in so determining and appropriate remediation (i.e., constitutionally consistent application of the policy objectives pursued by the ETA) would be a failure to serve "the government's [and the public's] interest in efficient resolution of the issues."

The U.S. and N.M.[15] constitutional guarantee of the right to due process of law is the controlling legal mandate and must therefore be the primary consideration when conflicting provisions attempt to remove this fundamental right.

In *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012, at ¶63, the N.M. Supreme Court reiterated that "'It is well settled that the fundamental requirements of due process in an administrative context are reasonable notice and opportunity to be heard and present any claim or defense." (Citations omitted.)

Again, it is the Commission, not PNM, that must determine and prescribe rates. This responsibility includes regulating, i.e., balancing interests and determining the amount for which rate-affecting financing orders are issued. In *KFC National Management Corp. v. N.L. R.B.*, 497 F.2d 298, 304 (2d Cir.1974) the Second Circuit of Appeals Court noted that "what emerges from the *Morgan* quartet is the principle that those legally responsible for a decision must in fact make it[.]"

9. ETA Mandated Hearings are Deficient

The ETA mandated Commission review process for the issuance of rate-affecting financing orders does not satisfy the requirements set out in *Mathews v. Eldridge* because it does not allow for any meaningful review or deviation from the utility's own rate request.[16] The property interest

---

[15] **Sec. 18. [Due process; equal protection . . .]**
No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. . .

[16] According to section 5B of the ETA, the PRC may not amend, reduce, or disallow rates proposed in the financing order application because the ETA requires approval: Failure to issue an order approving the application or advising of the application's noncompliance pursuant to Subsection E of this section . . . shall be deemed approval of the application for a financing order . . ."

of ratepayers is even greater than the property interest of an investor owned utility company; this is because ratepayers' liability (property interest) is the actual costs (shareholders' liability) plus a return on equity (or, even in the case of securitization, interest on the expenditure). Therefore, if a utility's (shareholders') property interest is great enough to require a trial-like evidence-based hearing to satisfy its right to due process of law, so too does the even greater property interest of ratepayers.

In *Pub. Serv. Co. of N.M. v. N.M. Pub. Regulation Comm'n*, (2019), the NM Supreme Court held that PNM's vested interests in decommissioning costs associated with only a portion its stake in Palo Verde Nuclear Generating Station ("PVNGS") was great enough to require due process of law protection. The Court remanded the case back to the Commission specifically "because [on] the issue of a permanent disallowance of recovery for contributions to the nuclear decommissioning trusts [] PNM was not afforded an opportunity to be heard on the issue";[17] therefore, PNM was "deprived of its right to due process of law."[18]

10. **Financing Orders Must not be Confiscatory**

Considering that PNM's limited decommissioning-cost property interest in the aforementioned ***portion of its stake*** in PVNGS was great enough for the Court to uphold PNM's right to due process and a trial-like evidentiary hearing, then ratepayers' property interest in **stranded, decommission, and reclamation** costs, with either a return on equity or interest, associated with PNM's ***total stake*** in **PVNGS, Four Corners Power Plant, San Juan Generating**

[17] *Pub. Serv. Co. of N.M. v. N.M. Pub. Regulation Comm'n, 2019-NMSC-012*, 2019-NMSC, P.3d, (2019), ¶ 65.
[18] *Id.*

Station and all of its natural gas plants, (which are all covered under the ETA) also require trial-like evidence-based hearings and rate-making processes. Ratepayers' greater property interest cannot be discounted and confiscated by the either the N.M. legislature or by PNM.

> [N]o single ratemaking methodology is mandated by the Constitution, which looks to the consequences a governmental authority produces rather than the techniques it employs. [] I think it important to observe, however, that while "prudent investment" (by which I mean capital reasonably expended to meet the utility's legal obligation to assure adequate service) need not be taken into account as such in ratemaking formulas, it may need to be taken into account in assessing the constitutionality of the particular consequences produced by those formulas. We cannot determine whether the payments a utility has been allowed to collect constitute a fair return on investment, and thus whether the government's action is confiscatory, **unless we agree upon what the relevant "investment" is**. ***For that purpose,* all prudently incurred investment** may well have to be counted.[. . .] (Internal citations omitted.)(Emphasis added.)
> (*Duquesne Light Co. v. Barasch,* 109 S.Ct. at 620., JUSTICE SCALIA, with whom JUSTICE WHITE and JUSTICE O'CONNOR join, concurring.)

As reaffirmed in *Attorney. General v. Public Regulation Com'n,* 258 P.3d 453 (2011) 150 N.M. 174 2011-NMSC-034:

> Only when a rate falls within a "zone of reasonableness... between utility confiscation and ratepayer extortion" can the rate be "just and reasonable." *Behles v. N.M. Pub. Serv. Comm'n (In re Application of Timberon Water Co.),* 114 N.M. 154, 161, 836 P.2d 73, 80 (1992).

The Commission is not supposed to simply rubber-stamp orders written by a utility company; in *New Mexico Indus. Energy v. Public Serv. Com'n,* 808 P. 2d 592, 808 P.2d 592 (1991), 111 N.M. 622, citing *Mountain States,* the N.M. Supreme Court observed:

> The Commission has a duty to be a prime mover in the procedure to see that the public interest is protected by establishing reasonable rates and that the utility is fairly treated so as to avoid confiscation of its property. Considering this broad mandate it could hardly be envisioned that the Commissioners would sit as spectators, like Roman Emperors in the coliseum, and simply exhibit a "thumbs-up or thumbs-down" judgment after the dust of battle settles in the arena. (Footnote omitted.)

11. **ETA Financing Order Approval Procedure is Unconstitutional**

Sections 2H, 5, 11C, and 31C of the ETA require the Commission to approve financing orders for the recovery of energy transition costs as determined by a utility company in its application, as long as the utility satisfies the procedural requirements. Section 22 removes future due process protections and remediation. According to these provisions, the Commission must issue utility specified finance orders without ratepayer recourse:

> **Failure to issue an order** approving the application or advising of the application's noncompliance pursuant to Subsection E of this section within the time prescribed by Subsection A of this section **shall be deemed approval** of the application for a financing order and approval to abandon the qualifying generating facility, if abandonment approval was requested as part of the application for the financing order pursuant to this subsection. **The commission shall issue** an order acknowledging the deemed approvals within seven days of the expiration of the time period described in Subsection A of this section. (Section 5B.) (Emphasis added.)

> **The commission shall issue a financing order approving the application 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. If the commission finds that a qualifying utility's application does not comply with Section 4 of the Energy Transition Act, the commission shall advise the qualifying utility of any changes necessary to comply with that section and provide the applicant an opportunity to amend the application to make such changes. Upon those changes being made, **the commission shall issue a financing order approving the application**. (Section 5E.) (Emphasis added.)

The dictate in these provisions that as long as the application is complete the Commission "shall" issue financing orders or they will be deemed approved regardless, deprives ratepayers of a meaningful opportunity to be heard and the Commission the opportunity to perform its "duty"[19] because according to these provisions the Commission may not make any adjustments based upon

[19] See *Matter of Rates & Charges of Mt. States Tel.*, 653 P.2d 501,1982.; *New Mexico Indus. Energy v. Public Serv. Com'n*, 808 P. 2d 592, 808 P.2d 592 (1991), 111 N.M. 622.

an evidence-based hearing or imprudence determination to ensure that the rates are balanced, just, and reasonable. PNM determines the amount it imposes on ratepayers, thus avoiding regulatory oversight.

In *Morgan v. United States*, 298 U.S. 468, 56 S.Ct. 906, 80 L.Ed. 1288 (1936), the U.S. Supreme Court determined that although hearings were held before issuing rate orders it had been done without consideration of relevant evidence. This is similar to the process prescribed in the ETA in that PNM itself would state the facts and essentially write the order, without consideration to other affected parties' evidence and argument. The Court held that '"[t]he 'hearing' is the hearing of evidence and argument. If the one who determines the facts which underlie the order has not considered evidence or argument, it is manifest that the hearing has not been given."'

As previously pointed out, the ETA placed the Commission in the unfortunate position of deciding which legal mandates it will uphold and which it will forgo. The preponderance of legal mandates, both constitutional and legislative (which were unconstitutionally amended or repealed by the ETA), and ***the controlling nature of those existing mandates*** as well as the accompanying vast body of legal precedence, ***require that the Commission give preference to conventional modes and procedures*** **in determining the final amounts for which Financing orders be issued**. Therefore, in order to prevent unnecessary delay in implementation of the prescribed transition to renewable energy, the Commission would best fulfill this policy objective by disregarding only the limited offending provisions and enforcing the declared objectives as provided for in the bulk of the Act.

If time frames or other procedures prescribed in the ETA do not allow the Commission to perform its function, then those provisions are unconstitutional[20] and may be disregarded by the Commission to the extent that would allow for the Commission to perform its function.

12. **ETA Violates Separation of Powers**

The Following are examples of ETA interference in the separation of powers:[21]

i. ETA provisions such as § 5B and § 5E, which require financing orders to be approved without meaningful hearings and subsequent remediation ("regulation"), disincentivize a process in which a full record is developed. This severely restricts the ability for judicial review because according to NMSA 1978 § 62-11-3, any review must be based "on [the case] the record."

ii. ETA § 8B provides for a ten-day time limit to file a notice of appeal after denial of an application for rehearing or issuance of a financing order. (This further conflicts with NMSA 1978, §62-11-1., which allows 30 days from a final order.)

iii. Section 2H(2)(a) attempts to set procedures which restrict agency function by setting unrealistic deadlines that affect the Commission, the Supreme Court, and affected parties.

iv. ETA §22, provides that:

> if any provision of that act is invalidated, superseded, replaced, repealed or expires for any reason, that occurrence shall not affect the validity of any action allowed pursuant to that act that is taken by the commission, a qualifying utility, . . . or any other person …

---

[20] *Lovelace Medical Center v. Mendez*, 111 N.M. 336, 805 P. 2d 603, (1991), ftnt. #3.

[21] Article III **Sec. 1. [Separation of departments; . . .]**
The powers of the government of this state are divided into three distinct departments, the legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others. . .

This provision attempts to usurp judicial power by ensuring that any action taken pursuant to the ETA will remain valid even if the ETA, its provisions, or a financing order is later invalidated by the PRC or by a court.

The forgoing provisions violate the separation of powers because they restrict judicial and/or Commission review or attempt to prescribe function restricting procedures for the Court and/or the Commission and are therefore unconstitutional.[22]

13. **ETA Location Requirements for Replacement Resources are Unconstitutional**

ETA mandates imposed by Section 3(F) are unconstitutional in that they so limit resource placement that they undermine Commission responsibility to ensure that investor and ratepayer interests are balanced and rates are just and reasonable. For example, 3(F) requires replacement resources for abandoned facilities be "located in the school district in New Mexico where the abandoned facility is located[.]" These provisions limiting where new generation resources can be located do not allow for consideration of whatever the most cost-effective option may be. Until these special-favor provisions were buried within the ETA, consideration of the most cost-effective resources among feasible alternatives was a basic and essential requirement.[23] Thus, 3(F)

---

[22] ". . . *See also* State ex rel. Bliss v. Greenwood, 63 N.M. 156, 162, 315 P.2d 223, 227 (1957) (statutory regulation invalid if it does not enable court effectively to administer its judicial functions); Southwest Underwriters v. Montoya, 80 N.M. 107, 109, 452 P.2d 176, 178 (1969) (legislation unconstitutional if it touches upon rules of pleading, practice and procedure essential to performance of courts' constitutional duties)."
(As cited in Lovelace Medical Center v. Mendez, 111 N.M. 336, 805 P. 2d 603, (1991), ftnt. #3.)

[23] In Case No. 16-00105-UT, *Order Recommending Grant of PNM's Motion to Withdraw Application,* the Hearing Examiner stated: "The Commission has stated that a utility carries the burden in a resource acquisition case to show that the resource it proposes is the most cost effective resource among feasible alternatives." Citing, *Corrected Recommended Decision*, Case No. 15-00261-UT, August 15, 2016, pp. 89, 96-99, approved in *Final Order Partially Adopting Corrected Recommended Decision*, Case No. 15-00261-UT, September 28, 2016; *Final Order*, Case No. 13-00390-UT, December 16, 2015, pp. 5-11; *Order Partially Granting PNM Motion to Vacate and Addressing Joint Motion to Dismiss*, Case No. 15-00205-UT, December 22, 2015, pp. 10- 11; In *Re Public Service Company of New Mexico*, Case No. 2382, 166 P.U.R.4th 318, 337, 355- 356 (1995). The Commission adopted the Hearing Examiner's

provisions undermine regulatory authority and prevent serious review and consideration of efficiency and lowest cost alternatives. The restrictive location requirement, based upon school districts, would, in the instant case, require facilities to be located in the San Juan area; this would effectively exclude wind resources as these resources are more productive and cost-efficient if sited the eastern part of the state. Wind resources are often most cost-effective among alternatives.[24]

14. ETA Restrictions on Energy Storage Systems are Unconstitutional

ETA § 25(D) unreasonably disallows the PRC from review and regulation of energy storage systems by allowing for exclusionary request for proposal ("RFP") process that may limit the proposals to utility-owned-eligible bids. This violates ratepayers' due process rights as well as Commission's responsibility to regulate electric utilities because private options such as Purchase Power Agreements may be the most cost-effective options among all feasible alternatives. Competitive procurement processes are essential to balance interests and to ensure just and reasonable rates.

15. The Intention of the Pending Case Clause is to Prevent Legislative Interference in Judicial Review

The Commission's bifurcation of PNM's abandonment filing into two proceedings appears to have been done as part of an attempt by the Commission to adhere to the N.M. constitutional

---

decision in it's final order and stated in Case No. 16-00105-UT, *Order Granting PNM's Motion to Withdraw Application*, 5/24/2017, ¶10: "[T]he Commission reiterates that PNM bears the burden of demonstrating that its proposed resource choice is the most cost effective resource among feasible alternatives."

[24] See 18-00009-UT, wherein PNM and Facebook found wind (coming from eastern N,M,) to be cost-effective.

mandate to preserve the "rights and remedies"[25] of the parties as guaranteed by N.M. Const. art. IV, § 34; however, this approach, focusing on the case number and/or the initiation date of an adjoining legal proceeding, will be insufficient as an approach to preserve and protect parties' rights and remedies in other pending case/s.

PNM, by means of its significant influence on N.M.'s legislature and the consequent inclusion of the offending provisions (provisions that were masked by the complexity of the Act as well as the intention of the declared policy objective) has procured legislative interference in the final remediation, not only of the instant case, but of PRC cases 15-00261-UT and 16-00276 as well.

Certainly, if final remediation of a case has been postponed and declared to take place in further proceedings, then that case has yet to be resolved, i.e., final remediation is pending. In case 15-00261-UT, the PRC could potentially utilize the same procedural approach as in the instant case in order to preserve ratepayers' rights and remedies, i.e., by continuing the case under its current case number rather than postponing final resolution to a future rate case. However, in case 16-00276-UT this approach will not be sufficient since the remediation has already been postponed to a future case with a date and number yet to be determined. Regardless of both case numbers and the PNM influenced legislative interference, the Commission must preserve ratepayers' constitutional rights.

A. **Case 19-00018-UT**

[25] "No act of the legislature shall affect the right or remedy of either party, or change the rules of evidence or procedure, in any pending case." (N.M. Const. art. IV, § 34.)

Provisions in the ETA affect the potential remedy of ongoing proceedings related to closure of SJGS Units 1 and 4. Specifically, the balancing of ratepayer versus PNM interests would be disallowed under provisions in Sections 2H, 3F, 5, 11C, 22, 31C.

On January 10, 2019, the Commission initiated SJGS abandonment docket 19-00018-UT.[26] Despite the new case number, this act itself was a continuation of previously required (i.e., pending) further proceedings because, as the Commission noted, PNM apparently sought to avoid the "2018 Review" hearing to address continuation of and alternative resource portfolios for SJGS.[27] Therefore, the PRC ordered PNM to file an "application with supporting testimony… addressing all relevant issues."[28] Proceedings in the instant case are in process.

B. **Case 15-00261-UT**

In *Pub. Serv. Co. of N.M. v. N.M. Pub. Regulation Comm'n, (2019)*, the NM Supreme Court held that PNM's vested interests in decommissioning costs associated with a portion its stake in Palo Verde Nuclear Generating Station was great enough to necessitate due process of law protection. The Court remanded the case back to the Commission specifically "because [on] the issue of a permanent disallowance of recovery for contributions to the nuclear decommissioning trusts [] PNM was not afforded an opportunity to be heard on the issue";[29] therefore, PNM was "deprived of its right to due process of law."[30]

---

[26] *Order Requesting Response to PNM's December 31, 2018 Verified Compliance Filig Concerning Continued Use of San Juan Generating Station to Serve New Mexico Customers Pursuant to Paragraph 19 of the Modified Stipulation*, (1/10/2019).
[27] *Order Initiating Proceeding on PNM's December 31, 2018 Verified Compliance Filing Concerning Continued Use of and Abandonment of San Juan Generating Station*, (1/30/2019), ¶¶ 5-6, 7-20.
[28] *Id.*, ¶¶ B 1-13, C.
[29] *Pub. Serv. Co. of N.M. v. N.M. Pub. Regulation Comm'n, 2019-NMSC-012*, 2019-NMSC, P.3d, (2019), ¶ 65.
[30] *Id.*

Final remediation of the case, including the Court required further proceedings, are pending. The Commission has yet to determine whether they will prevent any potential prejudice to ratepayers by proceeding within the current case and before finalizing a portion of the remediation for PNM's imprudence. If pushed to a future proceeding the Commission would potentially finalize portions of the remedy for PNM's imprudence **before** further testimony on that very issue is litigated.[31] The ETA adds another potential prejudice to ratepayers in case 15-00261-UT; if it were true that a case number was actually relevant to the preservation of rights and remedies as required by N.M. Const. art. IV, § 34, then the Commission's decision of how to proceed in 15-00261-UT must consider this issue and reinforce ratepayers' rights under IV, § 34 in addition to preventing undue prejudices such as those currently under consideration and awaiting an order by the Commission.

C. **16-00276-UT**

In 16-00276-UT, the Hearing Examiners found PNM's reinvestment in the Four Corners Power Plant ("FCPP") to be "imprudent"; however, the Commission deferred final remediation of this pending issue to the next rate case.[32]

> Since our Constitution forbids an act of the Legislature from affecting a right or remedy . . . . it follows that the statute in effect when this became a pending case is applicable. (Hillelson v. Republic Ins. Co., 627 P. 2d 878 (1981), 96 N.M. 36, 880.)

Therefore, in order to enforce the controlling interests guaranteed by N.M. Const. art. IV, § 34, the PRC must disregard provisions in the ETA that would change the rights and remedies in

---

[31] See *Motion to Reopen Proceedings [and Supporting Brief]*, 7/23/2019; and, *Motion of Citizens for Fair Rates and the Environment for Leave to File a Reply to The Response Of PNM In Opposition to Motion to Reopen Proceedings* (8/12/20).

[32] . . . this Order would now defer the issue of imprudence to PNM's next rate case. . ." (*Revised Order Partially Adopting Certification of Stipulation*, 16-00276-UT, 1/10/2018, at p. 23, ¶67.)

this instance, even though the further proceedings will likely be under a different case number and at a later date.

16. The Legislature and the Public Were Not Properly Notified About the ETA's Contents

A. The ETA Violates Article IV, § 16 of New Mexico's Constitution

> **Sec. 16. [Subject of bill in title; appropriation bills.]**
> ***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; but if any subject is embraced in any act which is not expressed in its title, **only so much of the act as is not so expressed shall be void**.[. . .] (Emphasis added.)

Since the single-subject requirement and a title requirement are not included in the U.S. Constitution but they are common in state constitutions, the N.M. Supreme Court has over the years cited numerous other states in their review of these provisions. The following discussion is from the Iowa Supreme Court:

> The first provision is referred to as the single-subject requirement. It exists to "facilitate concentration on the meaning and wisdom of independent legislative proposals or provisions." (single-subject requirement keeps legislators apprised of pending bills); (single-subject rule provides for an orderly legislative process and allows the legislature to better grasp and more intelligently discuss legislative proposals). **The requirement forces "each legislative proposal to stand on its own merits by preventing the 'logrolling' practice of procuring diverse and unrelated matters to be passed as one 'omnibus'" due to "the consolidated votes of the advocates of each separate measure, when no single measure could have been passed on its own merits."** Likewise, the single-subject rule "prevents the attachment of undesirable 'riders' on bills certain to be passed because of their popularity or desirability."
>
> The second provision requires the subject of a bill to be expressed in the title. The primary purpose of this provision is to provide reasonable notice of the purview of the act to the legislative members and to the public. The title provides an easy "means for concerned parties to find out what a bill or act is about without reading it in full." The provision ultimately serves to prevent surprise and fraud from being visited on the legislature and the public. **Thus, the title requirement is directed more to the integrity of the legislative process by preventing laws from being surreptitiously passed with "provisions**

> **incongruous with the subject proclaimed in the title."** ([The] title provision [is] primarily directed at legislative process). It surfaced as a constitutional requirement as a result of public demand derived from a prevailing sense that **bills giving substantial grants to private parties were often "smuggled through the legislature under an innocent and deceptive title."** (Citations and footnotes omitted.)
> *Godfrey v. State*, 752 NW 2d 413 - Iowa: Supreme Court (2008), at 427.

i) Inclusion of Aid to Specific Constituencies to Consolidate Support is Unconstitutional

The following discussion addresses some seemingly unconstitutional aspects of the ETA that are not so obvious and unquestionable such that the Commission should venture to take it upon itself to resolve, but rather the following conflict must be left to the courts to decide should these issues ever be pursued thereby. Furthermore, this constitutional conflict may not be "politically correct" or popular to point out; however, we believe it a pertinent legal conflict presented by ETA enactment that deserves to be noted:

While addressing energy transition affected workers and communities certainly does fit within the broad subject of energy transition, and as such there is an argument for inclusion in an energy transition act, nonetheless, these policies are tangential and not essential to the "nuts and bolts" of transitioning the energy sector and as such are in violation of the intention of the single-subject provision. The sponsors of the ETA certainly "consolidated votes of the advocates of [] separate measure[s]" in order to pass the ETA rather than putting each broad and separate policy proposal into separate legislation; this is evident in Section 16 of the Act. Take for example the "energy transition Indian affairs fund," the "energy transition economic development assistance fund," and the "energy transition displaced worker assistance fund"; there are communities affected and workers laid off when any business closes. In Grant county we have seen hundreds of jobs lost when copper mines have either closed or laid off workers. With all due respect and

empathy for both the affected communities and the laid off workers near closing coal mines or electric generation plants, if the state of N.M. wants to assist these communities then let the state do so, and let the coffers of the state pay for this assistance.

The ETA effectively **taxes** a select group of citizens (PNM customers) to give job training and community assistance benefits to certain select constituencies; it does this in order to consolidate support for the Act (which covertly deprives us of our constitutional right to due process and to ensure just rates). If legislators want to enact a policy to give laid off workers job training assistance, why are energy transition-affected workers any more deserving or in need of assistance than a clerk at a closed down Family Dollar store (who has been making far less salary and likely has far less assets and savings)? The sponsors of the ETA logrolled these special policy directives to benefit select groups in order to consolidate support and get the votes needed for policies that may not have passed on their own merits. If the N.M. legislature wants to help laid off workers, then legislators should help all of N.M.'s laid off workers by putting a general policy proposal to address laid off workers in a stand-alone one-subject bill. If N.M. legislators want to help communities that are affected by large industry closures then legislators should address that general policy proposal in a bill that would address the problem of large industry closure on small communities in a stand-alone one-subject bill.

ii) **Single-Subject Title Test**

In *State v. Ingalls*, 18 N.M. 211, 135 P. 1177 (1913), the N.M. Supreme Court set forth the test to be applied in judging an alleged violation of art. IV, § 16 of the N.M. Constitution. The court held:

> In our opinion, the true test of the validity of a statute under this constitutional provision is: Does the title fairly give such reasonable notice of the subject-matter of the statute itself as to prevent the mischief intended to be guarded against?"[33]

While the ***long title*** of the ETA[34] clearly "expresse[s]" three broad intentions of the Act: 1) for N.M. electric utilities to transition to renewable energy generation, 2) utilization of securitization as a financing mechanism, and 3) assistance to affected communities, the title certainly fails to "prevent the mischief intended to be guarded against"; the title fails to give notice of the mischievous deregulation and deprivation of due process rights provisions which are obscured by the expressed policy objectives. It would take quite a stretch of the imagination to believe that the while the constructive policy directives were each expressed with multiple references noting various specific aspects, it was somehow merely an oversight that the

---

[33] id. at 219, 135 P. at 1178.

[34] ETA's title: AN ACT RELATING TO PUBLIC UTILITIES; ENACTING THE ENERGY TRANSITION ACT; AUTHORIZING CERTAIN UTILITIES THAT ABANDON CERTAIN GENERATING FACILITIES TO ISSUE BONDS PURSUANT TO A FINANCING ORDER ISSUED BY THE PUBLIC REGULATION COMMISSION; PROVIDING PROCUREMENT OF REPLACEMENT RESOURCES, INCLUDING LOCATION OF THE REPLACEMENT RESOURCES; AUTHORIZING THE COMMISSION TO IMPOSE A FEE ON THE QUALIFYING UTILITY TO PAY COMMISSION EXPENSES FOR CONTRACTS FOR SERVICES FOR LEGAL COUNSEL AND FINANCIAL ADVISORS TO PROVIDE ADVICE AND ASSISTANCE FOR PURPOSES RELATED TO THE ACT; PROVIDING PROCEDURES FOR REHEARING AND JUDICIAL REVIEW; PROVIDING FOR THE TREATMENT OF ENERGY TRANSITION BONDS BY THE COMMISSION; CREATING SECURITY INTERESTS IN CERTAIN PROPERTY; PROVIDING FOR THE PERFECTION OF INTERESTS IN CERTAIN PROPERTY; EXEMPTING ENERGY TRANSITION CHARGES FROM CERTAIN GOVERNMENT FEES; CREATING THE ENERGY TRANSITION INDIAN AFFAIRS FUND, THE ENERGY TRANSITION ECONOMIC DEVELOPMENT ASSISTANCE FUND AND THE ENERGY TRANSITION DISPLACED WORKER ASSISTANCE FUND; PROVIDING FOR NONIMPAIRMENT OF ENERGY TRANSITION CHARGES AND BONDS; PROVIDING FOR CONFLICTS IN LAW; PROVIDING THAT ACTIONS TAKEN PURSUANT TO THE ENERGY TRANSITION ACT SHALL NOT BE INVALIDATED IF THE ACT IS HELD INVALID; REQUIRING THE PUBLIC REGULATION COMMISSION TO APPROVE PROCUREMENT OF ENERGY STORAGE SYSTEMS; PROVIDING NEW REQUIREMENTS AND TARGETS FOR THE RENEWABLE PORTFOLIO STANDARD FOR RURAL ELECTRIC COOPERATIVES AND PUBLIC UTILITIES; AMENDING CERTAIN DEFINITIONS IN THE RENEWABLE ENERGY ACT AND RURAL ELECTRIC COOPERATIVE ACT; REQUIRING THE HIRING OF APPRENTICES FOR THE CONSTRUCTION OF FACILITIES THAT PRODUCE OR PROVIDE ELECTRICITY; ALLOWING COST RECOVERY FOR EMISSIONS REDUCTION; PROVIDING POWERS AND DUTIES FOR THE PUBLIC REGULATION COMMISSION OVER VOLUNTARY PROGRAMS FOR PUBLIC UTILITIES AND RURAL ELECTRIC COOPERATIVES; REQUIRING THE PROMULGATION OF RULES TO IMPLEMENT THE RENEWABLE ENERGY ACT; REQUIRING THE ENVIRONMENTAL IMPROVEMENT BOARD TO PROMULGATE RULES TO LIMIT CARBON DIOXIDE EMISSIONS OF CERTAIN ELECTRIC GENERATING FACILITIES.

mischievous[35] special-favor intentions were omitted from the long and short titles. These include 1) undermining due process protections, 2) undermining regulatory oversight, and 3) a partial deregulation of public utilities. These three unexpressed and obscured objectives together intend to implement an extraordinary special favor likely worth hundreds of millions of dollars for PNM.[36]

iii) **"Log-rolling" is Forbidden in Order to Prevent Fraud**

The Act included the mischievous provisions by "log-rolling" these disruptive policy directives, which are not required to accomplish the expressed long-title policy objectives, nor the primary front and center policy directive expressed in the short title, "The Energy Transition Act."

In State ex rel. *Clark v. State Canvassing Bd.*, 888 P. 2d 458 - (1995) 119 N.M. 12, 461., in reference to Article XIX of the N.M. Constitution which covers the amendment process, the N.M. Supreme Court defined the:

> abusive practice of "logrolling" [as] the legislature join[ing] two or more independent measures to ensure that voters who support any one of the measures will be coerced into voting for the entire package in order to secure passage of the individual measure they favor . . . We noted in *Sproule* that "the particular vice in '**logrolling**,' or the presentation of double propositions to the voters, lies in the fact that such **is 'inducive of fraud**,' and that it becomes '**uncertain whether either [of] two or more propositions could have been carried by vote had they been submitted singly**.'" (Internal citations omitted.) (Emphasis added.)

---

[35] (and frankly bordering on, if not directly, corrupt)

[36] Article IV, Section 24 of the New Mexico Constitution prohibits special legislation: **Sec. 24. [Local or special laws.]** The legislature shall not pass local or special laws in any of the following cases: . . . the practice in courts of justice; the rate of interest on money; . . . the assessment or collection of taxes . . . the management of public schools; . . ., forfeitures or taxes; or refunding money paid into the state treasury, or relinquishing, extending or extinguishing, in whole or in part, any indebtedness or liability of any person or corporation, to the state or any municipality therein; creating, increasing or decreasing fees, . . . granting to any corporation, . . . any special or exclusive privilege, immunity or franchise, or amending existing charters for such purpose; changing the rules of evidence in any trial or inquiry; . . .; and the creation, extension or impairment of liens. In every other case where a general law can be made applicable, no special law shall be enacted.

Although the long title of an act cannot detail every aspect of the legislation, in *City of Albuquerque v. State*, 690 P. 2d 1032, 102 N.M. 38 (1984), the N.M. Supreme Court found that the title was misleading "because the act itself went far beyond anything revealed by the title[.]" Such is the case with the ETA.

The effort to misinform and manipulate public opinion by giving an incomplete representation of the ETA's contents was not limited to the lack of full disclosure about the ETA's contents in its title; this very same omission consistently occurred in communications by certain politicians, PNM, and certain special interest groups to their members and to the public through both the media outreach and e-blasts as they mobilized to gain public support for the bill.

Whatever the method, be it the failure to notify in the title, or be it the accompanying P.R. campaign, therein both lied the mischief and fraud: What if the tables had been turned and the short title and the information campaigns highlighted only the unmentioned aspects of the bill and failed to mention the "expressed" aspects? What if the short title had been the "Undermine Monopoly Oversight and Citizens' Due Process Rights Act" - would the bill have garnered public and legislative support and become law?

B. The ETA Violates Article. IV, § 18 of New Mexico's Constitution

> **Sec. 18. [Amendment of statutes.]**
> No 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.
> . . .

In violation of NM Const. art. IV, Sec. 18,[37] the ETA amends or repeals a number of existing statutory provisions in the Public Utility Act without "set[ting] out in full" each revised section. The following is a limited sample:

- "The commission shall have general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates and service regulations and in respect to its securities . . . and to do all things necessary and convenient in the exercise of its power and jurisdiction. . ." NMSA 1978, § 62-6-4(A).

- A public utility cannot change its rates without first obtaining the Commission's approval; NMSA 1978 § 62-8-7(A)-(F).

- At any hearing involving an increase in rates, the public utility carries the burden of proving that the increase "is just and reasonable." NMSA 1978 § 62-8-7(A).

- When a public utility requests a rate change, the Commission "may" conduct a hearing concerning the reasonableness of the rates; and the proposed rates are suspended until the Commission determines reasonable rates; NMSA 1978 § 62-8-7(C).

- Hearings must be held to ensure that changes in rates are just and reasonable Section NMSA 1978 § 62-8-7(A)-(F).

- Judicial review must be based "on [the case] the record." NMSA 1978 § 62-11-3

Since the N.M. Constitution dictates that "[n]o law shall be revised or amended [. . . without] each section thereof as revised, amended or extended [being] set out in full[,]" it seems

[37] "No 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.)

obvious that Commission should disregard any such changes and give deference to existing law when such contradictions occur. Such amendments or revisions are **unquestionably unconstitutional** and **corroboration requires only the mere clerical task** of searching the Act, to see if provisions or, "each section" of the PUA, "as revised" have been "set out in full."

The legislature apparently has confidence in the Commission's ability to perform such clerical tasks as that is what Sections 4 and 5E together try to reduce the Commission's regulation authority "responsibility" to in its reviewing of stranded, decommissioning, and reclamation costs. The dictate that as long the utility complies with § 4, then the Commission shall approve the financing orders as per § 5E is more complicated than the following conformational task: Search the Act to see whether "each section" of the PUA "as revised," has been "set out in full." With the N.M. Const. art. IV, § 18 mandate as the controlling authority in any conflict of this sort, there can be no mistaking the fact that the ETA amended substantial and very significant long-standing wide-reaching utility regulation policy objectives without setting out each amendment in full. Adhering to this art. IV, § 18 requirement would have drastically improved notification to both the public and to the legislature of the broad policy changes obscured within the Act.

17. **The Unconstitutional Provisions ARE Severable**

As cited above N.M. Const. art IV, § 16 provides that if provisions have not been "expressed" in the title then "only so much of the act as is not so expressed shall be void." In the instant case as in the often-reaffirmed case, (*Huntington v. Worthen*, 120 US Supra. 97, (1887), 102.) certain provisions of the act were ***clearly*** unconstitutional:

> When, therefore, . . . the Board of Railroad Commissioners treated as invalid the direction of the statute, . . . it obeyed the constitution, rather than the legislature. It may not be a wise

> thing, as a rule, for subordinate executive or ministerial officers to undertake to pass upon the constitutionality of legislation prescribing their duties, and to disregard it if in their judgment it is invalid. This may be a hazardous proceeding to themselves, and [potentially] productive of great inconvenience to the public; but still the determination of the judicial tribunals can alone settle the legality of their action. **An unconstitutional act is not a law; it binds no one**, and protects no one. **Here the conflict between the constitution and the statute was obvious . . . The unconstitutional part of the statute was separable from the remainder**. . . [T]hat clause being held invalid, the rest remained unaffected, and could be fully carried out. [That] which was invalid, was alone taken from it. **It is only when different clauses of an act are so dependent upon each other that it is evident the legislature would not have enacted one of them without the other** — as when the two things provided are necessary parts of one system — that the whole act will fall with the invalidity of one clause. **When there is no such connection and dependency, the act will stand, though different *parts* of it are rejected.**[38]
>
> . . . **If the act was . . . unconstitutional**, as the Supreme Court of the state afterwards held, [therefore,] **there was no just ground of complaint that the [] Commissioners had refused to follow its directions**. (Emphasis added.)

In the instant case the far greater possibility "of great inconvenience to the public" would arise if the Commission were to acquiesce to the conspirators of the "mischief" and their enabling associates (a number of whom filed or will be filling briefs in the instant case) rather than enforcing the controlling legal mandates.

While it would be extremely hard to overlook the ETA's obvious deprivation of due process of law in violation of the U.S. and N.M. constitutions, and it would also be very hard to dismiss the thinly veiled attempt to install special favors to PNM contained within provisions which were not noted in the Act's title, the determination that said provisions violate N.M. Constitution's Article. IV, § 18 is irrefutable.

---

[38] These principles of *Huntington v. Worthen* were clearly reaffirmed by the N.M. Supreme Court in Bradbury & Stamm Const. Co. v. Bureau of Revenue, 372 P. 2d 808, (1962), 70 N.M. 226, and thereafter.

> It is well established in this jurisdiction that a part of a law may be invalid and the remainder valid, where the invalid part may be separated from the other portions, 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. (Citations omitted.) (Emphasis added.)
> *Bradbury & Stamm Const. Co. v. Bureau of Revenue*, 1962-NMSC-078, ¶ 7, 70 N.M.226, 230–31, 372 P.2d 808, 811

> An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed.
> *Norton v. Shelby County*, 118 US 425, supra,118 U.S. 425 (1886), 442.

18. **Conclusion**

The unconstitutional provisions in the act are those: 1) which deprive ratepayers (and others) of due process of law, 2) and which deprive the Commission of the ability (including time dictates and any other procedural obstacles) to fulfill its "duty" to "regulate" (i.e., to ensure that interests are balanced such that the rates produced are "just and reasonable"); these two covert objectives are contained in the provisions that 3) were both not noted in the title and not "set out in full" to the extent that they revise or amend preceding statutes.

Citizens for Fair Rates and the Environment urges the New Mexico Public Regulation Commission to adhere to the Energy Transition Act to the greatest extent practicable without infringing upon the citizens of New Mexico's constitutional rights. Therefore, any financing orders which will affect our rates must be adjusted, after evidentiary hearings, as consistent with the Commission's responsibility to ensure that rates are balanced, just and reasonable.

Replacement resource alternatives must be unencumbered by prejudicial conditions, analyzed, considered, procured, and approved in a regulated, interest balancing processes which produce just and reasonable rates. Any provisions that conflict with the constitutional mandates that ensure this approach must be disregarded to the degree that they deprive we the people of New Mexico of said rights.

Respectfully submitted this 18th day of October, 2019,

Citizens for Fair Rates and the Environment

Thomas Manning, Director
406 S. Arizona St.
Silver City N.M. 88061
cfrecleanenergy@yahoo.com
575-538-2123

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF PUBLIC SERVICE COMPANY OF NEW MEXICO'S ABANDONMENT OF SAN JUAN GENERATION STATION UNITS 1 AND 4	))))	**Case No. 19-00018-UT**

CERTIFICATE OF SERVICE

I certify that on October 18, 2019, I sent via email only to the people listed below, a true and correct copy of **Citizens for Fair Rates and the Environment's Response Brief on Legal Conflicts Presented by the Energy Transition Act** which was issued on October 18, 2019.

Stacey Goodwin	Stacey.Goodwin@pnmresources.com;	**Anna Sommer**	ASommer@energyfuturesgroup.com;
Ryan Jerman	Ryan.Jerman@pnmresources.com;	**Chelsea Hotaling**	CHotaling@energyfuturesgroup.com;
Richard Alvidrez	Ralvidrez@mstlaw.com;	**Tyler Comings**	tyler.comings@aeclinic.org;
Dan Akenhead	DAkenhead@mstlaw.com;	**Don Hancock**	sricdon@earthlink.net;
Mark Fenton	Mark.Fenton@pnm.com;	**Stephen Curtice**	stephen@youtzvaldez.com;
Carey Salaz	Carey.salaz@pnm.com;	**Shane Youtz**	shane@youtzvaldez.com;
Steven Schwebke	Steven.Schwebke@pnm.com;	**James Montalbano**	james@youtzvaldez.com;
Heather Allen	Heather.Allen@pnmresources.com;	**Barry W. Dixon**	bwdixon953@msn.com;
Mariel Nanasi	Mariel@seedsbeneaththesnow.com;	**Kyle J. Tisdel**	tisdel@westernlaw.org;
David Van Winkle	Davidvanwinkle2@gmail.com;	**Erik Schlenker-Goodrich**	eriksg@westernlaw.org;
Aaron El Sabrout	Aaron@newenergyeconomy.org;	**Thomas Singer**	Singer@westernlaw.org;
Joan Drake	jdrake@modrall.com;	**Mike Eisenfeld**	mike@sanjuancitizens.org;
Lisa Tormoen Hickey	lisahickey@newlawgroup.com;	**Sonia Grant**	sonia@sanjuancitizens.org;
Jason Marks	lawoffice@jasonmarks.com;	**Carol Davis**	caroljdavis.2004@gmail.com;
Matthew Gerhart	matt.gerhart@sierraclub.org;	**Robyn Jackson**	chooshgai.bitsi@gmail.com;
Katherine Lagen	Katherine.lagen@sierraclub.org;	**Thomas Manning**	cfrecleanenergy@yahoo.com;
Ramona Blaber	Ramona.blaber@sierraclub.org;	**Debra S. Doll**	Debra@doll-law.com;
Camilla Feibelman	Camilla.Feibelman@sierraclub.org;	**Katherine Coleman**	Katie.coleman@tklaw.com;
Michel Goggin	MGoggin@gridstrategiesllc.com;	**Thompson & Knight**	Tk.eservice@tklaw.com;
Nann M. Winter	nwinter@stelznerlaw.com;	**Jeremy Cottrell**	jcottrell@westmoreland.com;
Keith Herrmann	kherrmann@stelznerlaw.com;	**Jane L. Yee**	jyee@cabq.gov;
Dahl Harris	dahlharris@hotmail.com;	**Larry Blank, Ph.D.**	lb@tahoeconomics.com;
Peter Auh	pauh@abcwua.org;	**Saif Ismail**	sismail@cabq.gov;
Jody García	JGarcia@stelznerlaw.com;	**David Baake**	david@baakelaw.com;
Andrew Harriger	akharriger@sawvel.com;	Germaine R. Chappelle	Gchappelle.law@gmail.com;
Donald E. Gruenemeyer	degruen@sawvel.com;	**Senator Steve Neville**	steven.neville@nmlegis.gov;
Joseph A. Herz	jaherz@sawvel.com;	**Senator William Sharer**	bill@williamsharer.com;
Steven S. Michel	smichel@westernresources.org;	**Rep. James Strickler**	jamesstrickler@msn.com;
April Elliott	April.elliott@westernresources.org;	**Rep. Anthony Allison**	Anthony.Allison@nmlegis.gov;
Pat O'Connell	pat.oconnell@westernresources.org;	**Rep. Rod Montoya**	roddmontoya@gmail.com;
Douglas J. Howe	dhowe@highrocknm.com;	**Rep. Paul Bandy**	paul@paulbandy.org;

Bruce C. Throne	bthroneatty@newmexico.com;
Rob Witwer	witwerr@southwestgen.com;
Jeffrey Albright	JA@Jalblaw.com;
Amanda Edwards	AE@Jalblaw.com;
Michael I. Garcia	mikgarcia@bernco.gov;
Greg Sonnenfeld	greg@sonnenfeldconsulting.com;
Charles F. Noble	Noble.ccae@gmail.com;
Stephanie Dzur	Stephanie@Dzur-law.com;
Vicky Ortiz	Vortiz@montand.com;
Peter J. Gould	pgouldlaw@gmail.com;
Kelly Gould	kellydarshan@gmail.com;
Jim Dauphinais	jdauphinais@consultbai.com;
Michael Gorman	mgorman@consultbai.com;
Randy S. Bartell	rbartell@montand.com;
Sharon T. Shaheen	sshaheen@montand.com;
John F. McIntyre	jmcintyre@montand.com;
Marvin T. Griff	Marvin.Griff@thompsonhine.com;
David Ortiz	DOrtiz@montand.com;
Jennifer Breakell	jbreakell@fmtn.org;
Lorraine Talley	ltalley@montand.com;
Patrick J. Griebel	patrick@marrslegal.com;
Richard L. C. Virtue	rvirtue@virtuelaw.com;
Carla R. Najjar	Csnajjar@virtuelaw.com;
Philo Shelton	Philo.Shelton@lacnm.us;
Robert Cummins	Robert.Cummins@lacnm.us;
Kevin Powers	Kevin.Powers@lacnm.us;
Steven Gross	gross@portersimon.com;
Martin R. Hopper	mhopper@msrpower.org;
Cholla Khoury	ckhoury@nmag.gov;
Gideon Elliot	gelliot@nmag.gov;
Robert F. Lundin	rlundin@nmag.gov;
Elaine Heltman	Eheltman@nmag.gov;
Andrea Crane	ctcolumbia@aol.com;
Douglas Gegax	dgegax@nmsu.edu;
Michael C. Smith	Michaelc.smith@state.nm.us;
Bradford Borman	Bradford.Borman@state.nm.us;
John Bogatko	John.Bogatko@state.nm.us;
Marc Tupler	Marc.Tupler@state.nm.us;
Beverly Eschberger	Beverly.Eschberger@state.nm.us;
Georgette Ramie	Georgette.Ramie@state.nm.us;
Dhiraj Solomon	Dhiraj.Solomon@state.nm.us;
Anthony Sisneros	Anthony.Sisneros@state.nm.us;

DATED this **18th day of October, 2019.**

Citizens for Fair Rates and the Environment

Thomas Manning, Director