IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

PUBLIC SERVICE COMPANY OF NEW MEXICO, WESTERN RESOURCE ADVOCATES, COALITION FOR CLEAN AFFORDABLE ENERGY, SIERRA CLUB, IBEW LOCAL 611, SAN JUAN CITIZENS' ALLIANCE and DINÉ CARE

Joint-Petitioners,

v. **Case No. S-1-SC-37552**

NEW MEXICO PUBLIC REGULATION COMMISSION,

Respondent,

MOTION FOR CLARIFICATION OF WRIT DENIAL OR, IN THE ALTERNATIVE, SUPPLEMENTAL VERIFIED EMERGENCY JOINT PETITION FOR WRIT OF MANDAMUS

August 29, 2019

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STATEMENT OF COMPLIANCE

In conformity with Rule 12-504(G) NMRA, the body of this Supplemental Petition contains 5965 words.

REQUEST FOR ORAL ARGUMENT

Because of the significant matters of public interest at stake in the matter, Petitioners respectfully request oral argument on this Petition.

Petitioner, Public Service Company of New Mexico ("PNM") files this *Motion for Clarification of Writ Denial or, In the Alternative, Supplemental Verified Emergency Petition for Writ of Mandamus* ("Supplemental Petition") requesting that the Court clarify that the reason underlying its July 26, 2019 Order lifting the stay and denying the writ of mandamus in this proceeding was that the passage and enactments of the Energy Transition Act ("ETA" or "Act"), L. 2019, Ch. 65, §§ 1 through 23, rendered the case moot.[1] Further, Petitioners request clarification that the ETA applies to any application to the New Mexico Public Regulation Commission ("NMPRC") by a public utility made pursuant to the ETA, and filed after the stay was lifted. This clarification has become necessary because the NMPRC and the individual named NMPRC Commissioners (collectively "Respondents") have refused to acknowledge that the ETA will be applied to PNM's July 1, 2019 application for abandonment, financing, and replacement of San Juan Generating Station. The uncertainty created by Respondents' refusal is likely to cause irreparable harm to Petitioners. Because of the urgency of this situation, Petitioners also request a shortened response time.

In the alternative, Petitioners request an emergency writ of mandamus directed to Respondents mandating that they comply with their duties under the

[1] This clarification appears to be consistent with a notation in the Court's "Register of Actions" which explains vacating the oral argument with "Case Has Become Moot," presumably because the ETA was effective as of June 14, 2019.

New Mexico Constitution and apply the ETA to the Proceedings on PNM's proposed abandonment of the San Juan Generating Station ("SJGS") and related approvals.[2]

Counsel for PNM sought the position of the parties in this docket and apprised them of the relief being sought and was advised by counsel for the other parties that they could not state a position until they review this Supplemental Petition.

I. INTRODUCTION

1. This is the second time it has been necessary to seek this Court's intervention due to the actions of Respondents relating to the proposed abandonment of SJGS. PNM previously sought[3] and obtained, in this docket, an emergency stay[4] of Respondents' Abandonment Order.[5] The Abandonment Order would have required PNM to file an application for abandonment of SJGS by March 1, 2019, in

[2] The proceedings are: *In the Matter of Public Service Company of New Mexico's Abandonment of San Juan Generating Station*, NMPRC Case No. 19-00018-UT ("Case No. 19-00018-UT"); and *In the Matter of Public Service Company of New Mexico's Consolidated Application for Abandonment, Financing, and Resource Replacement for San Juan Generating Station Pursuant to the Energy Transition Act*, NMPRC Case No. 19-00195-UT ("Case No. 19-00195-UT"). Case Nos. 19-00018-UT and 19-00195-UT are collectively referred to as the "Proceedings."

[3] *Emergency Verified Petition of Public Service Company of New Mexico for Writ of Mandamus, Request for Emergency Stay, and Request for Oral Argument* ("Emergency Petition"), Case No. S-1-SC-37552 (Feb. 27, 2019).

[4] *Order*, Case No. S-1-SC-37552 (March 1, 2019).

[5] *See Order Initiating Proceeding*, Case No. 19-00018-UT (Jan. 30, 2019) ("Abandonment Order") (initiating an abandonment proceeding and ordering PNM to file its application by March 1, 2019). Attached as Exhibit A to PNM's Emergency Petition.

order to prevent the application of proposed new energy legislation pending in the 2019 legislative session.

2. Following the lifting of the stay and the dismissal of PNM's Emergency Petition, PNM filed its Consolidated Application[6] pursuant to the ETA on July 1, 2019, in a new NMPRC docket, Case No. 19-00195-UT. In its application PNM seeks NMPRC approval: (a) to abandon Units 1 and 4 of SJGS as "qualifying facilities" under the ETA; (b) to procure replacement resources that comport with the ETA's standards; and (c) of a financing order authorizing the issuance of energy transition bonds for SJGS abandonment costs and to fund economic development for affected communities, and severance and job training benefits for impacted plant and coal mine workers.

3. This Supplemental Petition is necessary because Respondents have engaged in procedural maneuvers and delay tactics with respect to the Consolidated Application, which are intended to avoid the full application of the ETA to the Proceedings. Is so doing, Respondents are once again seeking to usurp the role of the Legislature in setting energy policy for New Mexico, and are also violating the

[6] *Public Service Company of New Mexico's Consolidated Application for the Abandonment, Financing and Replacement of the San Juan Generating Station Pursuant to the Energy Transition Act* ("Consolidated Application"), Case No. 19-00195-UT (July 1, 2019). **[ATTACHMENT A]**

due process rights of the parties to the Proceedings by refusing to timely apprise them of what laws are being applied.

4. PNM files its Supplemental Petition in this docket because these issues are directly related to PNM's prior Emergency Petition including the existing record in this docket. PNM is now joined in this proceeding by Co-Petitioners Western Resource Advocates ("WRA"), the Coalition For Clean Affordable Energy, Sierra Club, IBEW Local 611, San Juan Citizens' Alliance and Diné Care.[7] Co-Petitioners are directly affected by these issues as parties to the NMPRC Proceeding or stakeholders that are adversely impacted should the ETA not be applied.

5. For their request for relief, Petitioners seek an order from this Court clarifying that PNM's Consolidated Application, filed after the lifting of the Court's Stay and after the effective date of the ETA, is subject to the ETA. In the alternative, Petitioners seek a Writ from the Court directing Respondents to apply the ETA to the entirety of the Consolidated Application without exception and regardless of the NMPRC case to which the application is assigned.

II. STATEMENT OF JURISDICTION

6. This Supplemental Petition is filed pursuant to Rules 12-309 and 12-504 NMRA governing motions and extraordinary writs. The Court has jurisdiction over this Joint Petition pursuant to Article VI, Section 3 of the New Mexico

[7] PNM and the Co-Petitioners are collectively referred to as "Petitioners."

Constitution, which confers original jurisdiction in mandamus against all state commissions and authority to issue writs as necessary for the complete exercise of its jurisdiction. *See State ex rel. Sandel v. N.M. Pub. Util. Comm'n* ("*Sandel*"), 1999-NMSC-019, ¶10, 127 N.M. 272 (Court's power to vacate NMPRC orders by issuing a writ of mandamus derives from Article VI, Section 3 of the New Mexico Constitution).

III. GROUNDS FOR EXERCISE OF ORIGINAL JURISDICTION

7. This case presents fundamental constitutional questions of great public importance, justifying the Court's exercise of original jurisdiction over this matter. *See Sandel*, 1999-NMSC-019, ¶11. By failing to clearly apply the laws enacted by the Legislature and signed into law by the Governor, Respondents are violating the separation of powers among the branches of government. *Id*. (the exercise of original jurisdiction is appropriate to prevent one branch of government from unduly encroaching or interfering with the authority of another branch and where the issue concerns "the non-discretionary duty of a government official"). Although state district courts have concurrent original jurisdiction pursuant to NMSA 1978, Section 62-12-2 (1941), this Court has previously exercised its original jurisdiction over the NMPRC on the same underlying matter. A separate petition seeking different relief on the underlying matter is also pending before this Court in Case No. S-1-SC-37875.

8. The depth and urgency of harm caused by the Respondent's actions warrant immediate correction by this Court. The orders of concern issued by the NMPRC are not final orders subject to appeal pursuant to NMSA 1978, Section 62-11-1 (1993), because not "all issues of law and fact have been determined" and the case has not been "disposed of to the fullest extent possible." *Tri-State Generation & Transmission Ass'n, Inc. v. N.M. Pub. Reg. Comm'n*, 2015-NMSC-013, ¶ 36, 347 P.3d 274 (internal quotation marks and citation omitted). Waiting to appeal at the conclusion of the Proceedings would fail to prevent the harm to Petitioners resulting from a refusal to apply the ETA to an application filed pursuant to its terms.

9. Obtaining an immediate determination that the ETA applies to the Proceedings is imperative because:

a. The parties to the Proceeding cannot properly prepare their cases in a meaningful way without knowing what law will apply to their interests, in contravention of due process principles.

b. Replacement resources for SJGS may not be available when needed or will cost more if applicable federal tax credits expire during the pendency of an appeal taken at the conclusion of the Proceedings.

c. Certainty concerning an ETA financing order is required or the resulting regulatory cloud will render energy transition bonds

unmarketable, and imperil the timely deployment of millions of dollars in severance and retraining benefits to coal mine workers that could be impacted as soon as the summer of 2020. Thus, a primary purpose of the ETA can be defeated through Respondents' evasion and delay.

IV. FACTUAL AND PROCEDURAL BACKGROUND

A. The Energy Transition Act.

10. The Legislature passed the ETA with bipartisan support on March 12, 2019, the Governor signed it into law on March 22, 2019, and the ETA became law on June 14, 2019.

11. Through the ETA, the Legislature has established a comprehensive energy policy that provides an orderly transition of the state's electricity supply needs away from fossil fuel generation to renewable sources of energy. The ETA advances existing renewable energy goals through increased renewable portfolio standards and new zero-carbon emission requirements for utilities. In order for utilities to transition away from fossil-fueled resources to meet these new standards, the ETA provides for the use of securitized, low interest financing to fund the economic early retirement of coal-fired power plants, provide for recovery of defined abandonment costs, and mitigate impacts to affected communities.

12. These legislative directives address industry changes and social and economic impacts to affected communities that go beyond the current regulatory jurisdiction of the NMPRC under the New Mexico Public Utility Act ("NMPUA").

13. Utilities that retire generation plants for economic or policy reasons, prior to the end of their operating lives, are typically authorized to recover the undepreciated investment on their books at the time of retirement.[8] The ETA provides that undepreciated investments in abandoned plants will be financed through the issuance of "energy transition bonds," commonly known as "securitization." This allows utilities to retire coal plants at lower costs to customers when compared to conventional rate recovery at the utility's cost of capital. The ETA also requires that securitization include the financing of funds to mitigate impacts on affected plant and coal mine workers and impacted communities.

B. Procedural Background

14. A detailed discussion of the procedural background of the Proceedings illustrates the great lengths that Respondents have gone to avoid the application of

[8] *See, e.g., Town of Norwood v. FERC*, 80 F.3d 526, 531 (D.C. Cir. 1996) (denying full recovery gives investors the incentive to operate a plant until full investment is recouped, even if closing the plant would save ratepayers money); *see also In re Application of Pub. Serv. Co of Oklahoma*, 2018 WL 704312, at *2 (Jan. 31, 2018) (explaining that allowing a return "provides confidence in the financial integrity of the company" and "balances the interests of both the investor and the consumer"); *In re Alabama Power Co*., Docket No. U-5033, 2011 WL 4826138 (Sept. 7, 2011).

the ETA.[9] Case No. 19-00018-UT was to be a case to determine the extent, if any, that SJGS should provide service to customers after 2022. The scope of this case was established by final order of the NMPRC authorizing the retirement of two of four units at SJGS (Case No. 13-00390-UT). Rather than engaging in this limited determination or inquiry, however, Respondents issued an order requiring PNM to file an application to abandon SJGS by March 1, 2019, before the end of the 2019 legislative session.[10] Included in that NMPRC-required application was an extensive list of issues never contemplated by the Case No. 13-00390-UT requirements, including cost recovery for undepreciated investment. As attested to by Senator Jacob Candelaria, Respondents docketed Case No. 19-00018-UT for the thinly-disguised purpose of creating a "pending case" under Article IV, Section 34 of the New Mexico Constitution, in order to block any new energy legislation from applying to regulatory approvals that might be sought by PNM for the abandonment of SJGS.[11]

15. PNM obtained an emergency stay of the Abandonment Order in Case No. 19-00018-UT, which lasted through June 26, 2019. PNM filed its Consolidated

[9] *See* Chronology of Events Relating to ETA Applicability Issues. **[ATTACHMENT B]**
[10] *See* Abandonment Order, ¶ B at 14.
[11] *See* Affidavit of Jacob R. Candelaria, ¶¶ 4-6. **[ATTACHMENT C]**

Application in Case No. 19-00195-UT on July 1, 2019, after the ETA became law (June 14, 2019).

16. Respondents' first action on the Consolidated Application at their July 10, 2019 open meeting was to bifurcate the application. The bifurcation of the Consolidated Application is not of particular concern by itself. However, the motives of certain Respondents underlying the bifurcation are of serious concern. At the NMPRC's July 10, 2019 open meeting, Respondents indicated the Consolidated Application should be assigned to Case No. 19-00018-UT because "we should proceed under that prior law and not the new Energy Transition Act legislation".[12] Respondents voted to re-assign the issues of abandonment and the financing order to Case No. 19-00018-UT, and to leave the issue of the SJGS replacement resources in Case No. 19-00195-UT where the Consolidated Application was originally filed.[13] The Corrected Bifurcation Order was reworded from the Original to prevent the Respondents' orders from being read as an acknowledgment that the ETA was the applicable law. Respondents are clearly

[12] *See* Transcript of NMPRC July 10, 2019 Open Meeting, at 11:5-25, 12:1-4, 21:9-24. **[ATTACHMENT D]**

[13] *See Order Concerning Consolidated Application* ("Original Bifurcation Order") **[ATTACHMENT E]**; *Corrected Order on Consolidated Application* ("Corrected Bifurcation Order"), Case No. 19-00195-UT (July 10, 2019). **[ATTACHMENT F]**

attempting to limit ETA applicability by selectively placing abandonment and financing issues in the pre-ETA docket, Case No. 19-00018-UT.

17. Through their orders, Respondents have deliberately created confusion about the applicable law by specifically invoking the ETA on several procedural issues and case deadlines while refusing to state the ETA was applicable.

18. In an attempt to gain necessary clarification of Respondents' intentions with respect to the ETA, WRA filed a Motion for Clarification on July 22, 2019,[14] which was summarily denied by a single Commissioner Order on July 24, 2019.[15] The Denial Order expressly acknowledges that the Corrected Bifurcation Order "does not provide a definite statement regarding the critical issue of ETA applicability."[16] The Denial Order states, however, that "[n]o further clarification on the Commission's Corrected Order is necessary" because the issue of the applicability of the ETA would be addressed through the hearing examiners' scheduling order.[17] The scheduling orders set an unusually extended briefing schedule that could leave the issue of ETA applicability undecided for the duration

[14] *Western Resource Advocates' Motion for Clarification and Reconsideration, and Request for Oral Argument and Shortened Response Time* ("WRA Motion for Clarification"), Case No. 19-00018-UT (July 22, 2019). **[ATTACHMENT G]**
[15] *Order on Motion for Clarification* ("Denial Order"), Case No. 19-00195-UT (July 24, 2019). **[ATTACHMENT H]**
[16] *Id.* ¶ D.
[17] *Id*. ¶¶ E- G.

of the case.[18] Petitioners and other parties are in the untenable position of having to prepare their cases and file testimony without knowing what law the NMPRC intends to apply.

19. WRA filed a Motion for Interlocutory Appeal[19] of the Denial Order, which was included on the NMPRC's agenda for August 14, 2019, but was tabled by Respondents, causing further delay of the resolution of the question of whether the ETA applies. Under NMPRC rules, the Motion for Interlocutory Appeal was deemed denied by NMPRC inaction within fifteen days.[20] Respondents nevertheless considered WRA's Motion for Interlocutory Appeal at their open meeting on August 21, 2019, and issued a formal order denying the motion.[21]

20. Significantly, the Interlocutory Order required PNM to make a filing by 4:00 pm Friday, August 23, 2019, indicating whether PNM would agree to toll the applicable statutory deadlines in the Proceedings. If PNM agreed to toll the deadlines, Respondents stated that they would suspend the current procedural

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[18] *Procedural Order*, Case No. 19-00018-UT (July 25, 2019) **[ATTACHMENT I];** *Procedural Order*, Case No. 19-00195-UT **[ATTACHMENT J]**.

[19] *Western Resource Advocates' Motion to Permit Interlocutory Appeal of Order on Motion for Clarification and Request for Expedited Response Time* ("Motion for Interlocutory Appeal"), Case No. 19-00195-UT (July 29, 2019). **[ATTACHMENT K]**

[20] Rule 1.2.2.31(B)(5) NMAC.

[21] *Order on WRA's Motion to Permit Interlocutory Appeal of Order for Clarification* ("Interlocutory Order"), Case Nos. 19-00018-UT and 19-00195-UT (Aug. 21, 2019). **[ATTACHMENT L]**

schedule and implement "a process to determine in an expedient fashion whether Section IV, Art. 34 of the New Mexico Constitution bars application of the ETA to PNM's application as indicated above."[22] The Interlocutory Order improperly placed PNM in the position of having to waive the deadlines under the NMPUA and the ETA applicable to PNM's Consolidated Application, in exchange for a potentially earlier determination by the NMPRC on the legal issue of what law controls these proceedings. The Interlocutory Order exposes that the NMPRC's refusal to decide ETA applicability was, at least in part, a "bargaining chip" to secure an extension of statutory deadlines.

21. The foregoing procedural history shows the effort that has been made to have Respondents answer a fundamental legal question that controls the Proceedings. Petitioners have exhausted their administrative remedies.

V. GROUNDS IN SUPPORT OF PETITION

A. The Energy Transition Act Applies to the Consolidated Application.

22. The Legislature enacted the ETA, and courts are to presume that the Legislature is well-informed regarding existing statutory and common law and does not intend to enact a nullity. *N.M. Atty. Gen. v. N.M. Pub. Reg. Comm'n*, 2013-NMSC-042, ¶ 27, 309 P.3d 89. Statutes are presumed to be valid and upheld against constitutional challenge unless it is beyond all reasonable doubt that the Legislature

[22] Interlocutory Order, ¶ C at 12.

exceeded its constitutional authority. *State ex rel. Udall v. Pub. Emps. Ret. Bd.,* 1995-NMSC-078, ¶ 7, 120 N.M. 786; *see also Bounds v. State ex rel. D'Antonio*, 2013-NMSC-037, ¶ 11, 306 P.3d 457.

23. Generally, the issue of a statute's constitutionality is an issue for the courts, and administrative agencies lack the authority to refuse to apply existing law unless and until a court invalidates the law. *Victor v. N.M. Dep't of Health*, 2014-NMCA-012, ¶ 24, 316 P.3d 213 (constitutional challenges are within the original jurisdiction of the district court and beyond the scope of the administrative tribunal's jurisdiction); *El Castillo Retirement Residences v. Martinez*, 2015-NMCA-041, ¶ 6, 346 P.3d 1164 (confirming that constitutional challenges that exceed the scope of an administrative agency's review are subject to the jurisdiction of the courts). Although the NMPRC has in prior proceedings examined Article, IV, Section 34 on a limited basis in applying statutory and regulatory changes to proceedings (discussed below), it does not appear that any party to those cases questioned the NMPRC's authority to do so.

24. This Court confirmed that the authority of the NMPRC to address the validity of laws is limited. In *El Paso Elec. Co v. N.M. Pub. Regulation Comm'n*, 2010-NMSC-048, 149 N.M. 174, the NMPRC attempted to exercise jurisdiction over county franchise ordinances by ruling that counties could not impose franchise fees and ordered a utility to stop collecting county franchise fees from customers.

This Court invalidated the NMPRC's order as beyond the agency's jurisdiction and stated that ordinances are subject to court challenge, and that the issue of whether ordinances "are lawful or unreasonable . . . is for a body other than the Commission to decide." *Id.* ¶¶ 16, 17. Our Constitution confers on the NMPRC the responsibility for regulating public utilities only "in such manner as the legislature shall provide." N.M. Const. art. XI, § 2. Accordingly, Respondents must presume that the ETA is valid and apply it to the present proceedings.

25. Likewise, Article IV, Section 34 of the New Mexico Constitution does not preclude the application of the ETA. This constitutional provision is intended to prevent legislative interference with matters of evidence and procedure in cases that are in the process or course of ongoing litigation. *Stockard v. Hamilton,* 1919-NMSC-018, ¶ 9, 25 N.M. 240. The constitutional protection established in Article IV, Section 34 is for litigants only and is limited in scope. It is not intended to protect a state agency's desire to second-guess or to circumvent duly enacted changes to the agency's controlling statutes passed by the Legislature.

26. Article IV, Section 34 does not prevent the application of the ETA to these proceedings because there was no pending case until PNM filed its Consolidated Application in Case No. 19-00195-UT. What constitutes a "pending case" within the meaning of Article IV, Section 34 "var[ies] with the construction of each particular statute." *Stockard*, 1919-NMSC-018, ¶ 9. The mere opening of

a docket by Respondents in Case No. 19-00018-UT does not constitute a "pending case" under NMSA 1978, Section 62-9-5 relating to the abandonment of utility facilities which requires the filing of an application pursuant to NMSA Section 62-9-6. Respondents necessarily conceded there was no pending application when ordering PNM to file an abandonment application by March 1, 2019.

27. New Mexico courts recognize that, by itself, an application for administrative approval is not a "pending case" for purposes of Article IV, Section 34. *See, Mandel v. City of Santa Fe*, 1995-NMCA-052, ¶ 4 , 119 N.M. 685 (holding that an application for approval of subdivision plat to zoning authorities did not create a "pending case"); *Brazos Land , Inc. v. Bd. of County Commissioners,* 1993-NMCA-013, ¶ 14, 115 N.M. 168 (concluding that Article IV, Sec. 34 did not apply because "the only administrative action [applicant] took was to submit a preliminary plat application, which the Board had the legal discretion to consider and approve or disapprove.").

28. The NMPRC itself has previously recognized that the mere docketing of a case, even upon filing of an application by a party, is not necessarily a "pending case" for purposes of Article IV, Section 34. In two instances where the NMPRC examined the applicability of Article IV, Section 34 to cases that were on the NMPRC's docket at the time new laws or regulations went into effect, the NMPRC declined to find that the cases should be reviewed pursuant to the prior laws or

requirements rather than the new law or regulation. Instead, the NMPRC either proceeded under the new law or required that a matter, filed in advance of a known rule amendment's actual effective date, be refiled.[23]

29. Importantly, until PNM's Consolidated Application was filed July 1, 2019, and after the effective date of the ETA, there were no intervenors or parties to Case 19-00018-UT, and no action by the NMPRC had been taken other than establishing a broad scope of inquiry designed to preclude legislative initiatives. Article IV, Section 34 specifically refers to the interests of a "party" to a pending case.

B. Respondents' Conduct Infringes upon the Legislature's Authority.

30. Respondents' ongoing procedural maneuvers and repeated delays and refusals to definitively apply the ETA confirm that the NMPRC is attempting to undermine the Legislature's role in setting energy policy for the state.

31. The Constitution of the State of New Mexico commands that "[t]he 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

[23] *See, In the Matter of the Application of American Medical Response Ambulance Service, Inc., d/b/a American Medical Response, Emergicare for a Certificate to Provide Ambulance Service and for Temporary Authority*, 2014 WL 3943779, at *4 (NMPRC April 2, 2014); *In the Matter of Public Service Company of New Mexico's Filing of Advice Notices for Revision to Energy Efficiency Tariff Riders Pursuant to NMAC 17.7.2.9K*, 2010 WL 10113255, at *2 (NMPRC May 4, 2010).

charged with the exercise of powers properly belonging to one of these departments, shall exercise any powers properly belonging to either of the others[.]" N.M. Const. art. III, § 1. The balance and maintenance of governmental powers is of great public concern. *State ex rel. Taylor v. Johnson,* 1998-NMSC-015, ¶ 17, 125 N.M.

32. The separation of powers clause "articulates one of the cornerstones of democratic government: that the accumulation of too much power within one branch poses a threat to liberty." *Id.* ¶ 20. Respondents are encroaching on the Legislature's and the Governor's joint power and authority to establish and enact law and policy for New Mexico. Article XI, Section 2 of the New Mexico Constitution specifically requires that the NMPRC regulate utilities in the manner prescribed by the Legislature.

33. The NMPRC typically defends a sweeping view of its regulatory power by quoting the Court's declaration that the NMPRC has "a duty to be a prim[e] mover" in protecting the public interest and Commissioners should not "sit as spectators, like Roman Emperors in the coliseum, and simply exhibit a 'thumbs-up or thumbs-down' judgment[.]" *Mountain States Tel. & Tel. Co. v. N.M. State Corp. Comm'n,* 1997-NMSC-032, ¶ 19, 90 N.M. 325. However, this Court has also made abundantly clear that the NMPRC, although a constitutionally created body, "may exercise only its statutorily authorized jurisdiction." *El Paso Elec. Co. v. N.M. Pub. Reg. Comm'n,* 2010-NMSC-048, ¶ 6, 149 N.M. 174. This Court's authority to vacate

the NMPRC orders by issuing a writ of mandamus derives from Article VI, Section 3 of the New Mexico Constitution. *Sandel*, 1999-NMSC-019, ¶ 10.

34. This Court has frequently exercised its extraordinary writ authority as a tool for preserving the separation and protection of powers delegated to the three branches of government. *State ex rel. Clark v. Johnson*, 1995-NMSC-048, ¶¶ 18-20, 120 N.M. 562 (concluding that prohibitory mandamus is a proper remedy to enjoin unconstitutional acts by the executive branch, and noting that, in cases presenting questions of great public importance, the Court has never insisted on a technical approach to the application of mandamus). This Court "will not be reluctant to intervene" through the grant of extraordinary writs "where one branch of government unduly encroaches or interferes with the authority of another branch." *State ex rel. Taylor*, 1998-NMSC-015, ¶ 23.

35. Examples of this Court exercising its writ authority to preserve separation of powers include *State ex rel. Taylor,* 1998-NMSC-015, (granting a writ of mandamus issued to prevent the Governor from encroaching on the authority of the Legislature by administratively overhauling New Mexico's public assistance programs); *Sandel,* 1999-NMSC-019 (issuing a writ of mandamus to vacate the NMPRC's orders implementing retail wheeling in the electric utility industry, which invaded the policy making authority of the Legislature); *In re Extradition of Martinez*, 2001-NMSC-009, 130 N.M. 144 (issuing a writ of superintending control

to remedy the district court's injunction against the Governor's extradition warrant); and *State ex rel. Clark*, 1995-NMSC-048, ¶¶ 18-20 (issuing a writ of prohibitory mandamus to prevent the Governor from entering into gaming compacts without legislative authorization).

36. In *Sandel*, this Court explained the conduct of the NMPRC intrudes on the policy making authority of the Legislature when the NMPRC's "administrative policymaking conflicts with or infringes upon what is the essence of legislative authority—the making of law." *Sandel*, 1999-NMSC-019, ¶ 12 (internal quotation marks and citation omitted). "Such an unlawful conflict or infringement occurs when an administrative agency goes beyond the existing New Mexico statutes or case law it is charged with administering and claims the authority to modify this existing law or to create new law on its own." *Id.* ¶12; *see also Taylor*, 1998-NMSC-015, ¶ 24; *Clark*, 1995-NMSC-048, ¶¶ 31-33.

37. The *Sandel* case illustrates that NMPRC action is unlawful when it purports to override and repeal, through administrative action, the policy choices articulated in controlling legislation. The petitioners in *Sandel*, a group that included nine legislators, sought mandamus relief to vacate NMPRC rulings deregulating the retail electric power industry in New Mexico without authorization from the Legislature. *Sandel*, 1999-NMSC-019, ¶ 1. The *Sandel* petition resulted from the conflict between the NMPRC's order and the "regulated monopoly" regime

effectuated in the NMPUA. *Id.* ¶¶ 3-8. The Court addressed whether the NMPRC's order exceeded its authority and violated the constitutionally required separation of powers "by effectively deregulating the retail side of the electric power industry in New Mexico in the absence of a statutory mandate from the Legislature." *Id.* ¶ 9. This Court concluded that the NMPRC, while purporting to exercise the broad authority conferred by the NMPUA, actually aimed to "carry out broad changes in public policy by replacing regulation under the 'just and reasonable' standard with competition in an open marketplace." *Id.* ¶ 19. In doing so, the NMPRC violated Article III, Section 1 of the New Mexico Constitution by undertaking retail electric deregulation in New Mexico without legislative authorization. *Id.* ¶ 26.

39. Respondents' efforts to invalidate the ETA, in this case by purposeful indecision, strongly resemble the NMPRC's unconstitutional conduct in *Sandel*. The NMPRC has arrogated to itself, as it did in *Sandel*, an important policy choice about public utility regulation in New Mexico, in contravention of the choices the Legislature made in enacting the ETA. In selectively choosing whether to reject or apply the ETA to different elements of the Consolidated Application, the NMPRC is modifying, not administering, the applicable law. By disregarding the legitimacy of the Legislature's policy choices, the NMPRC flouts the essence of legislative authority—"the making of law." *Sandel*, ¶ 12.

40. The will of the Legislature and the power of the Court's Stay have been subverted by Respondents' actions, and affected stakeholders, including Joint Petitioners, will suffer irreparable harm. The ETA's statutory time frames are compromised if Respondents are allowed to arbitrarily condition their actions on the waiver of those time frames, as well as if resolution of the threshold legal determination of the ETA's applicability is delayed until the end of the proceeding and then wrongly decided. That outcome will compromise important features of the new law, such as acquisition and location of replacement resources, bond issuance dates, and the provision of worker retraining and economic development funds to regions impacted by the abandonment of SJGS.

C. Respondents' Deliberate Delays Harm the Parties and Violate their Due Process Rights.

41. Respondents have intentionally created and perpetuated ambiguity over whether it will apply the ETA to the abandonment and financing portions of the Consolidated Application, and the Commissioner that advocated the ultimately-accepted bifurcation maneuver to create that ambiguity was unequivocal that the motivation for the maneuver was to have the ETA not apply. Constitutional due process principles apply to administrative proceedings where, as here, the agency adjudicates the rules that affect the legal rights of individuals or entities. *Santa Fe Expl. Co. v. Oil Conservation Comm'n of N.M.*, 1992-NMSC-044, ¶ 14, 114 N.M. 103. Due process safeguards are particularly important in administrative agency

proceedings because many of the customary safeguards adhered to by the courts may be foregone or relaxed "in the interest of expedition and a supposed administrative efficiency." *Id.* Among other due process protections, parties are entitled to reasonable notice and an opportunity to be heard that affords them a fair opportunity to present their case. *See Alb. Bernalillo Co. Water Util. Auth. v. NMPRC*, 2010-NMSC-013, ¶ 21, 148 N.M. 21. Parties to the Proceedings cannot adequately prosecute or defend their positions in a legal vacuum. *See Bounds*, 2013-NMSC-037, ¶¶ 16-18 (explaining that the Court may exercise discretion to decide important constitutional issues rather than force parties to litigate with the legal question of constitutionality left unanswered, affording respect to an agency's public-interest preference for judicial resolution). The refusal of Respondents to timely apprise the parties that the ETA is the applicable law in this case, while at the same time creating that uncertainty by their statements and actions, and the attempt to force parties to waive statutory timeframes for action, is highly prejudicial to the parties and falls far short of applicable due process guarantees Action by this Court is needed to prevent the ongoing harm caused by the NMPRC's evasive rulings and to avoid exacerbated harm should the NMPRC decide months from now that it will not apply the ETA to Case No. 19-00018-UT. The provisions and benefits of the ETA will be compromised if the NMPRC effectively orchestrates a nine-month false-start.

42. The parties have been denied needed clarity. As admitted in the Denial Order, the Corrected Bifurcation Order "does not provide a definite statement regarding the critical issue of ETA applicability."[24] Due process necessarily includes "the right to be heard at a meaningful time and in a meaningful manner." *N.M. Indus. Energy Consumers v. N.M. Pub. Serv. Comm'n,* 1986-NMSC-059, ¶ 18, 104 N.M. 565. With no notice or knowledge about what law the NMPRC will apply, parties are denied due process. Moreover, the added resources needed to litigate two very different legal scenarios, and the attendant costs of that litigation, are not trivial in a case of this importance. Because New Mexico law requires parties to bear their own costs, NMSA 1978, §62-13-3, the Joint Petitioners will be irreparably harmed if the NMPRC is permitted to force parties into parallel litigation realms or face adverse consequences of litigating under the "wrong" law on a given issue.

43. Finally, it is important to consider the implications of allowing the NMPRC's purposeful obstruction of legislative authority to stand. In this instance, the NMPRC has misused its status as a "prime mover" to thwart the Legislature by attempting to manufacture a "pending case" as a purported constitutional bar against applying the ETA. The NMPRC has split PNM's requests for abandonment, financing, and replacement resource approvals into three separate hearings and two

[24] Denial Order, ¶ D.

separate dockets all while refusing to inform the parties which laws (past or current) will be applied.

44. This Court previously rejected procedural moves intended to preclude the application of a new law and has held that Article IV, Section 34 is not to be used "as a sword to prevent what would otherwise be legitimate governmental action." *Santa Fe Trail Ranch II, Inc. v. Bd. of County Comm'rs of San Miguel County*, 1998-NMCA-099, ¶ 11, 125 N.M. 360 (rejecting the attempt by a real estate developer to thwart a County Commission's moratorium on development by filing a pre-emptive lawsuit). Case 19-00018-UT, the docket into which the NMPRC is placing issues presumably to avoid ETA applicability, was not "pending litigation" brought by an applicant. Rather, it was docketed for the purpose of precluding legislative action. If this action by Respondents is validated, then any state agency, in anticipation of pending legislation with which it may disagree, can open a docket by its own motion, populate the scope of that docket with whatever issues it wants to prevent the Legislature from acting upon, and thereby divest the Legislature of its law and policymaking authority. This is not the purpose of Article IV, Section 34.

VI. CONCLUSION

45. The NMPRC's procedural tactics and refusal to unambiguously apply the ETA to the Consolidated Application is an affront to the power of the Legislature to set energy policy for New Mexico and a deprivation of the due process rights of

the parties to this proceeding. Time is of the essence and a prompt order is required to effectuate the law and policy outcomes embodied in the ETA, protect the due process rights of the parties, ensure that proposed replacement resources are not lost, and comply with the statutory timing requirements under the ETA. For these reasons, the Petitioners respectfully request the Court to clarify that PNM's Consolidated Application, filed after the lifting of the Court's Stay and the effective date of the ETA, is subject to the ETA. In the alternative, Petitioners seek a Writ of Mandamus from the Court directing Respondents to apply the ETA to the entirety of the Consolidated Application without exception and regardless of the NMPRC case to which the application is assigned.

Respectfully submitted this 29th day of August 2019.

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VERIFICATION

I, Stacey J. Goodwin, Associate General Counsel for PNM Resources Services Company and counsel for Public Service Company of New Mexico, being duly sworn upon my oath state that I have read the attached *Motion for Clarification of Writ Denial, or in the Alternative, Supplemental Verified Emergency Joint Petition for Writ of Mandamus* and the factual statements contained therein are true and correct to the best of my knowledge, information and belief.

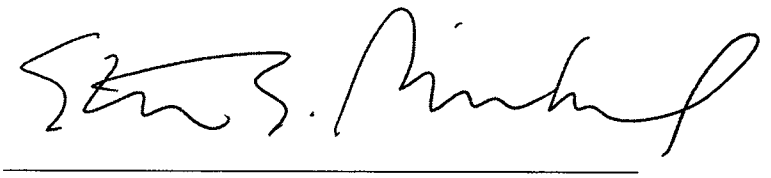
Date: August 29, 2019

Stacey J. Goodwin, Esq.

VERIFICATION

I, Steven S. Michel, attorney for Western Resource Advocates, being duly sworn upon my oath state that I have read the attached *Motion for Clarification of Writ Denial, or in the Alternative, Supplemental Verified Emergency Joint Petition for Writ of Mandamus* and the factual statements contained therein are true and correct to the best of my knowledge, information and belief.

Date: August 29, 2019



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VERIFICATION

I, Charles Noble, attorney for the Coalition for Clean Affordable Energy, being duly sworn upon my oath state that I have read the attached *Motion for Clarification of Writ Denial, or in the Alternative, Supplemental Verified Emergency Joint Petition for Writ of Mandamus* and the factual statements contained therein are true and correct to the best of my knowledge, information and belief.

Date: August 29, 2019

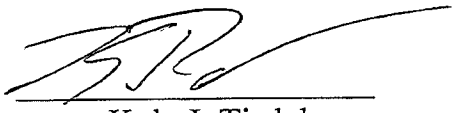
charles noble

Charles Noble

VERIFICATION

I, Kyle J. Tisdel, the counsel for San Juan Citizens Alliance and Diné Citizens Against Ruining Our Environment, being duly sworn upon my oath state that I have read the attached *Motion for Clarification of Writ Denial, or in the Alternative, Supplemental Verified Emergency Joint Petition for Writ of Mandamus* and the factual statements contained therein are true and correct to the best of my knowledge, information and belief.

Date: August 29, 2019



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