


Joey D. Moya

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

**NEW ENERGY ECONOMY, INC.,
CITIZENS FOR FAIR RATES & THE
ENVIRONMENT,
FOOD & WATER WATCH,
PHYSICIANS FOR SOCIAL
RESPONSIBILITY-NEW MEXICO,
RIO ARRIBA CONCERNED CITIZENS,
TEWA WOMEN UNITED, and
DANIEL ERNEST TSO,**

S-1-SC-37875

Petitioners,

v.

**NEW MEXICO PUBLIC REGULATION
COMMISSION,**

Respondent,

**PUBLIC SERVICE COMPANY OF
NEW MEXICO,**

Real Party in Interest.

**AMENDED VERIFIED PETITION FOR WRIT OF MANDAMUS
TO DECLARE SPECIFIC PROVISIONS OF THE
“ENERGY TRANSITION ACT” UNCONSTITUTIONAL, TO ENJOIN
ENFORCEMENT AND REQUEST FOR STAY**

Oral Argument Requested

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STATEMENT OF COMPLIANCE

In conformity with Rule 12-504(G) NMRA, the body of this Petition
Contains 5897 words.

REQUEST FOR ORAL ARGUMENT

Because significant public interest is at stake, Petitioners respectfully request oral argument in this Petition.

I. INTRODUCTION

New Energy Economy (“NEE”) et al. challenge seven provisions of the Energy Transition Act (“ETA”)¹ that deprive the New Mexico Public Regulation Commission (“PRC”) of its constitutional power to regulate Public Service Company of New Mexico (“PNM”) and other public utilities in a key area that has a significant impact on rates.² The challenged provisions of the ETA allow utilities to determine for themselves the amount of money they will receive from ratepayers for undepreciated investments and decommissioning costs associated with retiring power plants. These provisions deprive the PRC of its ability to determine whether the amount a utility receives is legitimate, lawful and fair to ratepayers.

Below, in 19-00018-UT, the PRC and the parties are addressing whether the ETA should apply to PNM’s pending application to recover \$360.1 million for closing the aged San Juan Generating Station (“SJGS”).³ If the ETA’s provisions are applied in 19-00018-UT that was pending before passage of the ETA, the PRC’s approval will be ministerial only, and its review will fail to protect ratepayers from wasteful expenditure. The PRC itself and ratepayers will have no meaningful opportunity to object to PNM’s request or submit evidence at a hearing

¹ Exhibit A, ETA with relevant provisions highlighted.

² Petitioners do not challenge the entire ETA and in fact support increasing the Renewable Portfolio Standard. NMSA 1978, §62-15-34.

³ Exhibit B, SJGS Application, p.5.

on the legitimacy of PNM’s demand, and judicial review will be effectively precluded.⁴

PRC oversight is “the cornerstone of New Mexico’s regulatory scheme.” *Pub. Serv. Co. of New Mex. v. New Mexico Pub. Serv. Comm’n*, 1991 NMSC-083, ¶28, 112 N.M. 379, 387. In return for permission to operate a monopoly, utilities must submit to PRC regulation. The ETA conflicts with the N.M. Constitution and with the body of existing law that has been constructed around it, which requires the PRC to determine whether rates are “just and reasonable,” whether they balance consumer and investor interests, and whether costs are prudently incurred in the first place.^{5,6} For these reasons, the Court should declare the challenged sections of ETA unconstitutional.

A. Jurisdiction

This Court has mandamus jurisdiction pursuant to N.M. Const. art. VI, §3. *Taylor v. Johnson*, 1998-NMSC-015, ¶15, 125 N.M. 343, 348, 961 P.2d 768, 773. Mandamus is the proper avenue to challenge the constitutionality of legislation. *Sego v. Kirkpatrick*, 1974-NMSC-059, ¶6, 86 N.M. 359, 524 P.2d 975. Furthermore, this Court has original jurisdiction over legal issues of “great public

⁴ See ETA §§2G, 2H, 2S; 4 A, B; 5; 8B; 11C; 22; and 31C.

⁵ NMSA 1978, §62-8-1; *Pub. Serv. Co. of New Mexico v. New Mexico PRC*, 2019-NMSC-012, 444 P.3d 460, ¶10, citing NMSA 1978, §62-3-1(B).

⁶ *Id.* at ¶¶29-33, 40, 42, 52.

importance.” *In re Adjustments to Franchise Fees Required by Elec. Util. Indus. Restructuring Act of 1999*, 2000-NMSC-035, ¶6, 129 N.M. 787, 14 P.3d 525.

B. A Writ Is Necessary and Proper at this Time

A writ is appropriate now for the following reasons:

1. If PNM obtains a financing order from the PRC under the ETA, the company will issue bonds for \$360.1 million without due process or full judicial review.

2. Petitioners raise purely legal issues that this Court reviews de novo. *TW Telecom of New Mexico v. New Mexico Public Regulation Commission*, 2011-NMSC-029, ¶15, 256 P.3d 24.

3. Resolving the constitutional questions here serves administrative and judicial economy. *Sandel v. N.M. Pub. Util. Comm’n*, 1999-NMSC-019, 127 N.M. 272, ¶11.

4. This petition is necessary because the PRC must grant approval of a financing order for 100% of PNM’s undepreciated investments and decommissioning costs for SJGS. Even though 19-00018-UT predates the ETA, PNM has demanded that the ETA be applied anyway, and filed a petition in this Court seeking a writ to that effect. S-1-SC-37552.

C. The Parties and Real Parties in Interest

1. Petitioners

Petitioners have standing because they participated in the proceeding below, are ratepayers or represent ratepayers, raise issues of great public importance, and will suffer irreparable injury unless the writ is issued. *NEE v. Martinez*, 2011-NMSC-006, ¶9, 149 N.M. 207, 211, 247 P.3d 286, 290.

a. NEE is an environmental and economic justice advocacy organization. NEE is a ratepayer, represents other ratepayers' interests, intervened in 19-00018-UT, 19-00195-UT, and 16-00276-UT, and was an Intervenor-Appellee/Cross-Appellant in S-1-SC-36115 (remand pending 15-00261-UT) and Appellant in S-1-SC-36870.

b. Citizens for Fair Rates and the Environment is a Silver City-based association of PNM residential ratepayers and intervened in 19-00018-UT.

c. Food & Water Watch is a national non-governmental organization.

d. Physicians for Social Responsibility-NM is a chapter of the largest physician-led public health organization (50,000 members nationwide).

e. Rio Arriba Concerned Citizens is a grassroots volunteer organization focused on protecting natural resources in Rio Chama Watershed, Rio Arriba County, and New Mexico.

f. Tewa Women United is a tribal women's collective, some of whom

are ratepayers, in the Tewa homelands of Northern New Mexico.

g. Daniel Ernest Tso is a Navajo Nation Council Delegate representing thousands of Navajo Nation members, including thousands of PNM ratepayers.

2. The Respondent

The PRC is the respondent because its constitutional duties are at issue. *See* N.M. Const. art. XI, §2.

3. Real Party in Interest

PNM, New Mexico's largest electric monopoly utility, is a Real Party in Interest.

D. Grounds Supporting the Petition

Sections 2H, 2S, 5, 8B, 11C, 22, and 31C of the ETA are unconstitutional and violate the N.M. Constitution, specifically art. XI, §2 (PRC authority); art. II §8 (due process); art. IV, §34 (rights and remedies); and art. IV, §§16 and 18 (title of legislation).

II. FACTUAL AND PROCEDURAL BACKGROUND

The undisputed facts and procedural history concern the abandonment of SJGS. In 13-00390-UT, PNM applied to abandon SGJS Units 2 and 3, and entered into a stipulation requiring it to file an application and hold a hearing in 2018

regarding whether SJGS should continue to serve PNM retail customers.^{7,8} PNM made a compliance filing on the last day of the filing period, 12/31/18, announcing that the owners of SJGS would discontinue operating SJGS. “As a result, PNM is not seeking any approvals in its Compliance Filing that would allow PNM to continue to use SJGS after June 2022 to serve retail customers and the issue presented under Paragraph 19 of the Modified Stipulation is essentially moot.” *See Affidavit of Thomas G. Fallgren in Support of PNM’s Verified Compliance Filing Pursuant to Paragraph 19 of Modified Stipulation*, p. 5 (attached to PNM’s Compliance Filing).

In response, on 1/10/2019, the PRC found that PNM “irrevocably committed itself to the abandonment of SJGS over six months ago and is ... proceed[ing] with an orderly closure of SJGS ...” and the PRC opened a docket, 19-00018-UT, to address issues around abandonment of the facility. 13-00390-UT and 19-00018-UT, *Order Requesting Response to PNM’s December 31, 2018 Verified*

⁷ The Commission resolved that case by approving a stipulation reached by PNM and several other parties in an order affirmed by this Court in *NEE v. NMPRC*, 2018-NMSC-024, ¶46, 416 P.3d 277, 284 (affirming a net public benefit “requir[ing] PNM to commit to certain future resource planning obligations” in the 2018 PRC review hearing. *Id.* at ¶20, § (4).)

⁸ *See, Pub. Serv. Co. of New Mexico v. New Mexico PRC*, 2019-NMSC-012, 444 P.3d 460, ¶81 and ¶88 (as this Court noted, “PNM’s argument ignores that it agreed in Case No. 13-00390-UT that it would bear the burden of affirmatively demonstrating [evidence]. Given this prior stipulation ... the Commission [and parties were] ... entitled” to expect and rely on PNM’s required filing).

Compliance Filing Concerning Continue Use of SJGS to Serve New Mexico Customers Pursuant to Paragraph 19 of the Modified Stipulation, 1/10/19, p. 4, ¶10. After briefing, the Commission issued an order requiring PNM to file an abandonment application. Exhibit C, Order Initiating Proceeding On PNM's December 31, 2018 Verified Compliance Filing Concerning Continued Use of And Abandonment of SJGS, 1/30/2019.

PNM took legal action to invalidate the order, filing a petition with this Court on 2/27/2019, arguing that the PRC had acted beyond its authority, violated abandonment policies, and infringed on PNM's First Amendment rights. *Emergency Verified Petition of PNM for Writ of Mandamus, Request for Emergency Stay, and Request for Oral Argument, S-1-SC-37552.*

While PNM's petition was pending, the ETA was passed, signed into law and made effective 6/14/2019. The law authorizes PNM to issue bonds to pay for retiring power plants, including SJGS and the Four Corners Power Plant ("FCPP") and recover up to \$375 million per facility in abandonment and legal compliance costs from ratepayers. §§2H, 2S 5A, B, D and E. The legal instrument used to authorize recovery of such costs is called a "financing order", and the ETA *requires the PRC to approve a financing order as proposed*, or the order is simply deemed approved by operation of law. §5. Financing orders are irrevocable, create

a property interest, and actions taken pursuant to them are valid even if the order is later vacated. §§5E; 7A-C; 12A; 22.

Furthermore, §31C of the ETA grants PNM cost recovery for *any* undepreciated assets and decommissioning costs for gas and coal plants, and nuclear investments, without regulatory oversight, or a meaningful opportunity for ratepayers to be heard. The ETA states that the Commission must allow recovery of costs, even if they were imprudently incurred or resulting rates are not “just and reasonable.” §31C.

Regardless, ratepayers are legally obligated pay the utility for such costs. Approval of a financing order establishes a “non-bypassable charge” for a period of 25 years. §§ 2G, H, P; 4 B(7); 5F(3); 11C; 31C. Ratepayers cannot escape from it even if they change energy providers, or the costs are later found to be the product of wasteful, imprudent, or illegal spending.⁹

Following passage of the ETA, this court denied PNM’s writ petition seeking to invalidate the PRC order to file an abandonment application for SJGS. *Order*, S-1-SC-37552, 6/26/219. PNM then filed the *Consolidated Application for the Abandonment, Financing and Replacement of SJGS Pursuant to the Energy Transition Act* (“Abandonment Application”) on 7/1/2019, in a brand new docket,

⁹ “The prudent investment theory provides that ratepayers are not to be charged for negligent, wasteful or improvident expenditures, or for the cost of management decisions which are not made in good faith.” *Re Pub. Serv. Co. of New Mexico*, 2146 Part II, 101 P.U.R. 4th 126, 1989 WL 418588 (NMPSC Apr. 5, 1989).

19-00195-UT, rather than 19-00018-UT. PNM's Application seeks approval to retire 497 MW of coal-fired generation resources at SJGS.¹⁰

In the *Corrected Order on Consolidated Application*, 7/10/2019, the PRC bifurcated the issues related to SJGS. The original docket, 19-00018-UT, will address PNM's abandonment and securitization requests, and 19-00195-UT will address replacement power issues.¹¹ On 7/25/2019, the PRC required parties to file legal briefs "regarding the issue of the extent to which N.M. Const. Article IV, §34 prevents the application of the ETA." *Procedural Order*, 19-00018-UT. Thereafter, Petitioners filed this Petition.

III. GROUND SUPPORTING THE PETITION

A. THE ETA PRECLUDES THE PRC FROM EXERCISING ITS CONSTITUTIONAL DUTY TO REGULATE UTILITIES

The PRC has a duty to regulate public utilities, N.M. Const. art. XI, §2, and ensure that rates are just and reasonable. NMSA 1978 §62-8-1. However, certain provisions of the ETA eliminate the PRC's discretion to modify or deny rate proposals, and instead requires that they be adopted at face value and the ensuing

¹⁰ See Exhibit B, pp.1-2.

¹¹ See Exhibit D, ¶¶18-19, ¶A.

rates passed on to customers, even when such proposals reward a utility for making “imprudent” investments and expenditures.¹² NMSA 1978, §62-6-4 (2003).

1. The PRC Has a Duty to Regulate Utilities, and the Legislature May Not Eliminate That Duty

Under the N.M. Constitution, art. XI, §2, the PRC must “regulate” public utilities “in such manner as the legislature shall provide.” This constitutional provision “mandates that a public regulation commission set utility rates.” *Blake v. Pub. Serv. Co. of New Mexico*, 2004-NMCA-002, ¶22, 134 N.M. 789, 795, 82 P.3d 960, 966. Commission oversight is “the cornerstone of New Mexico’s regulatory scheme. In return for monopoly market power in its industry, the utility must submit to Commission Regulation.” *Pub. Serv. Co. of New Mex. v. New Mexico Pub. Serv. Comm’n*, 1991 NMSC-083, ¶28, 112 N.M. 379, 387.

To determine the meaning of a constitutional provision, New Mexico courts begin with “the plain meaning of that language.” *Hem v. Toyota Motor Corp.* 2015-NMSC-024, 353 P.3d 1219, 1222. When the meaning is unambiguous, the courts “must give effect to that language and refrain from further ... interpretation.” *Id.* (quoting *Sims v. Sims*, 1996–NMSC–078, ¶17, 122 N.M. 618, 930 P.2d 153).

¹² Particularly concerning are the enormous costs associated with PNM’s imprudent investments in PVNGS and FCPP addressed below in Section III, E, 1 and 3 below.

N.M. Const. art. XI, §2 gives the PRC power over utility rates.¹³ The plain meaning of “regulate” means exercising control.¹⁴ While the legislature has broad constitutional authority to direct the PRC, the N.M. Constitution cannot be read to eliminate the PRC’s role as regulator. Such an interpretation would make N.M. Const. art. XI, §2 meaningless. To be able to regulate, the PRC must control utility rates.

The ETA abrogates the PRC’s duty, allowing PNM to increase rates without PRC oversight. Allowing the legislature to eliminate PRC oversight conflicts with the “regulatory compact” underlying energy monopolies, and contradicts constitutional mandates, established precedent, regulatory custom, and common sense. The practical result will be rate increases that are not just and reasonable or in the public interest.

¹³ Regulation serves the New Mexico statutes’ purpose of preventing “unnecessary duplication and economic waste.” NMSA 1978, §62-3-1(b) (2008). “[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.

¹⁴ The verb “regulate” means: “To control (an activity or process) esp. through the implementation of rules.” “Regulation” means: “Control over something by rule or restriction ...” “Control” is defined as: “To exercise power or influence over” The noun “control” is defined as: “The direct or indirect power to govern the management and policies of a person or entity; the power or authority to manage, direct, or oversee.” Black’s Law Dictionary, 10th ed. (2014).

The ETA is an anomaly among other states' energy transition legislation. NEE expert witness, Steven Fetter, former Chairman of the Michigan Public Service Commission, bond rater for Fitch, general counsel for the Michigan State Senate, and prior PNM expert witness, testified:

I view the ETA as a significant departure from other 'securitization' laws in a way that undermines the core of the PRC's fundamental purpose and role – to regulate on behalf of the public to 'reasonably protect ratepayers from wasteful expenditure ... [It] has allowed a regulated utility to determine the costs it wishes to recover through securitization, with no ability of the regulator to ensure that such costs are appropriately recoverable prior to being locked in through a financing order and bond issuance. Such a process would allow New Mexico public utilities to hold unprecedented power. In essence – intended or not – the ETA serves as a deregulation law.

Exhibit E, Fetter Direct Testimony and Exhibits, 8/6/2019, pp. 4, 17.

2. Traditionally, the PRC Has Adjusted or Denied Utility Rate Requests as Required by the Public Interest

The Public Utility Act states that: "Every rate made, demanded or received by any public utility shall be just and reasonable." NMSA 1978 §62-8-1 (1941). The PRC implements that policy by weighing facts and evidence, NMSA 1978 §62-8-7, and exercising "considerable discretion". *Hobbs Gas Co. v. New Mexico PRC*, 1980-NMSC-005, ¶4, 94 N.M. 731, 733, 616 P.2d 1116, 1118. Just and reasonable rate determinations are "the heart" of energy regulation. *Sandel, supra*, ¶18.

Similarly, the PRC must strike a balance between investor and consumer interests. *Matter of Rates & Charges of Mountain States Tel. & Tel. Co.*, 1982-

NMSC-127, ¶26, 99 N.M. 1, 7, 653 P.2d 501, 507.¹⁵ For example, when PNM requested ratemaking for an advanced metering project, the PRC considered whether it would produce “a net public benefit.” 15-00312-UT, *Recommended Decision*, 3/19/2018, at p. 79, *Final Order*, 4/11/2018. The Commission denied PNM’s request because it did “not, in the context of PNM’s current plan, fairly balance the interests of investors and ratepayers.” *Recommended Decision, supra*, at p. 96.

Similarly, in 16-00276-UT, Hearing Examiners found PNM’s investment in the FCPP coal facility was “imprudent” but the PRC deferred the issue to the next rate case. The PRC concluded “the magnitude of the potential benefit to PNM of deferring the issue . . . requires modification of the terms of the Revised Stipulation to balance the interests of ratepayers and the utility.” Exhibit F, 16-00276-UT, *Revised Order Partially Adopting Certification of Stipulation*, 1/10/2018, at p. 23, ¶67. The PRC later disallowed costs, finding it consistent with PRC’s authority to protect ratepayers. *See also, Pub. Serv. Co. of N.M. v. N.M. Pub. Serv. Comm’n*, 112 N.M. 379, 382-83, 815 P.2d 1169, 1177 (1991). (“the Commission

¹⁵ See also NMPRC 2087, *In the Matter of the Prudence of Costs Incurred by PNM in Construction of Palo Verde Nuclear Generating Station*, *Final Order*, p. 85 (affirmed on appeal, *Attorney Gen. v. New Mexico PRC*, 1991-NMSC-028, ¶28, 111 N.M. 636, 642, 808 P.2d 606, 612) (acknowledging the “public interest” requires “a striking of the proper balance between the interests of all ratepayers and all investors”).

must determine the appropriate distribution of the costs ... between the ratepayers and the utility.”) The ETA changes all of that.

3. ETA Provisions Prevent the PRC From Exercising Its Constitutional Function to Regulate PNM

Sections 2H, 2S, 5, 11C and 31C of the ETA require the PRC to approve financing orders for abandonment costs related to PNM’s coal and gas plants, and nuclear investments, as proposed, eliminating PRC oversight and its discretion to adjust or deny rate proposals. While §5A states that the Commission may approve or deny an application, at the same time, §5E states that the Commission “*shall* issue a financing order approving the application” provided that certain requirements are met. ETA §§4, 5E (emphasis added).

Likewise, §31C states “... no order of the commission shall disallow recovery of any undepreciated investments or decommissioning costs associated with the facility.” In other words, the Commission *must* approve rate proposals to abandon facilities that once served PNM customers, as long as they received a Certificate of Convenience and Necessity (“CCN”) prior to 1/01/2015 (i.e., capturing all of PNM’s coal, gas and nuclear investments), and are replaced with “less or zero carbon dioxide emissions ... ” The utility, not the Commission, decides what rates to impose.

The ETA prevents the PRC from determining whether proposed rates are just and reasonable, whether they balance investor and ratepayer interests, or

whether underlying costs are prudent. The PRC has been relegated to nothing more than a clerical role in a process it would otherwise have substantial authority to control. Because §§5 and 31C of the ETA violate the constitutional structure of utility regulation under art. XI, §2 of the N.M. Constitution, this Court should invalidate them and instruct the PRC to refrain from applying them.

B. THE ETA VIOLATES DUE PROCESS BY FAILING TO PROVIDE FOR A MEANINGFUL HEARING

The fundamental requirements of due process are “reasonable notice and opportunity to be heard and present any claim or defense.” *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm’n*, 2019-NMSC-012, *supra* at ¶63 (internal citations omitted). The right to be heard must be “at a meaningful time and in a meaningful manner.” *New Mexico Indus. Energy Consumers v. New Mexico PRC*, 1986-NMSC-059, ¶ 18, 104 N.M. 565, 568, 725 P.2d 244, 247. In fact, this Court has reversed PRC orders on due process grounds because a party was “not afforded an opportunity be heard on the issue.” *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm’n*, 2019-NMSC-012, *supra* at ¶ 65. Similarly, the Court has vacated PRC orders when parties were not permitted to present evidence and cross-examine witnesses. *See e.g., TW Telecom, L.L.C. v. New Mexico PRC*, 2011-NMSC-029, ¶ 22, 150 N.M. 12, 256 P.3d 24, 29.

The ETA suffers from similar defects. Sections 2H, 5, 11C and 31C require the Commission to approve a financing order without giving ratepayers a

meaningful opportunity to be heard. While the ETA provides ratepayers with the right to a hearing for “good cause” under §5A, the PRC is nonetheless required to approve a financing order as long as the application is complete, pursuant to §§4 and 5E.¹⁶ But the process imposed by §4 is no more than a clerical exercise, it does not matter what ratepayer defenses or evidence are presented, and therefore there is no incentive or reason to submit evidence or build a record. The outcome, regardless of imprudence or unfairness, will not change.¹⁷

Sections 2H(2)(d) and 2H(3) authorize utilities to make whatever investments they wish without allowing the Commission to make a prudence-based adjustment or complete disallowance on behalf of the public interest.¹⁸ Under §§5 and 31C, costs must be allowed, even if the utility were to deliberately contaminate

¹⁶ See Exhibit E, pp. 16-17. (“Probably the most damning is that the Commission is prevented from modifying the financing order in the utility’s application.”)

¹⁷ In *Stow Mun. Elec. Dept. v. Department of Public Utilities*, 426 Mass. 341, 688 N.E.2d 1337 (1997), the court reversed and remanded a decision of the State’s Department of Public Utilities’ because the record lacked substantial evidence of the public interest, including whether stranded costs award would accord with low rates, and protect ratepayers’ interests.

¹⁸ In 16-00276-UT, NEE challenged PNM’s right to recover certain SJGS capital expenditures. PNM stated it was no longer economic to continue relying on SJGS, and NEE disputed PNM’s additional SJGS investment. The Hearing Examiners only permitted recovery of \$9.6 million out of the \$46 million that PNM requested. Exhibit F, *Revised Order Partially Adopting Certification of Stipulation*, 1/10/2018, p. 6, ¶24.

land, groundwater, or streams; ratepayers would be obligated to pay for all clean-up costs.¹⁹

C. THE ETA LIMITS JUDICIAL REVIEW, VIOLATING SEPARATION OF POWERS AND DUE PROCESS

The ETA also obstructs judicial review, violating the separation of powers and interfering with due process. Art. III, §1 of the N.M. Constitution provides for the separation of legislative, judicial, and executive branches. Some overlap of government functions is permissible, for example, administrative agencies can perform adjudicatory functions. *See e.g., Wylie Corp. v. Mowrer*, 1986-NMSC-075, 104 NM 751, 753, 726 P.2d 1381, 383. Nevertheless, “[t]he judiciary thus must maintain the power of check over the exercise of judicial functions by quasi-judicial tribunals in order that those adjudications will not violate our constitution. The principle of check requires that the essential attributes of judicial power, *vis-a-vis* other governmental branches and agencies, remain in the courts.” *Bd. of Educ. of Carlsbad Mun. Sch. v. Harrell*, 1994-NMSC-096, ¶ 46, 118 N.M. 470, 484, 882 P.2d 511, 525.

¹⁹*See*, Exhibit E, p.13 (“According to the Attorney General’s Office (NMAG) analysis of this bill, this requirement ‘potentially [compromises] the commission’s constitutional responsibility of regulating public utilities by precluding it from reviewing the substance and appropriateness of the financing order and instead allows the utility to self-regulate.’”)

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 ...” This provision eliminates the ability of the courts to fashion remedies, violating the separation of powers. This Court loses the power of “check” over the judicial function exercised by the PRC.

In addition, ETA §8B imposes a ten-day time limit to file a notice of appeal once an application for rehearing is denied or a financing order is issued.

Ordinarily, under the PUA, final Commission orders must be appealed within thirty days. NMSA 1978, §62-11-1. The condensed ten-day time period imposed by the ETA compromises the ability of parties to gather information to appeal, making it more likely that such opportunities will be missed, or taken reflexively without due consideration, thus interfering with the due process rights of parties seeking appellate relief. The time limit also encroaches on a judicial process that serves important purposes, including the speedy resolution of disputes and caseload management, as well as the ability of the appellate courts to correct legal errors.

D. THE ETA’S TITLE FAILS TO GIVE NOTICE OF CRITICAL SUBJECTS AND EXISTING LAW THAT IT AMENDS

A bill’s title must give notice of its content. *Martinez v. Jaramillo*, 1974-NMSC-069, 86 N.M. 506, 508, 525 P.2d 866, 868. N.M. Const. art. IV, §§16 and 18 prohibit legislation that does not include essential terms or fails to give notice that it amends existing legislation. Although courts presume legislation is valid, *Martinez, supra* at 508, 525 P.2d at 868, legislation must give reasonable notice of its subject matter. *State v. Ingalls*, 1913-NMSC-068, 18 N.M. 211, 135 P. 1177. Legislation cannot be misleading by including some topics and omitting others. *See City of Albuquerque v. State*, 1984-NMSC-113, ¶9, 102 N.M. 38, 40, 690 P.2d 1032, 1034. If the title of the bill is defective, provisions of the bill that are not accurately described in the title are void. N.M. Const. art. IV, §16.

The ETA has a long title²⁰ but doesn’t reference its alteration of PRC procedures, elimination of PRC rate control, changed appeal procedures, or extensive amendments to the PUA. In fact, the ETA title doesn’t refer to “rates”, “undepreciated investments”, or “decommissioning costs” at all. These are key provisions, without which the title of the ETA is badly misleading. The bill title doesn’t give members of the public adequate notice that the ETA authorizes rate increases for costs without meaningful review.

²⁰ See Exhibit A.

In addition, the ETA's title does not provide notification that it amends or repeals major parts of the Public Utility Act, including: NMSA 1978 §§ 62-3-3(B); 62-3-4(A); 62-2-6(A); 62-6-7; 62-6-14; 62-8-1; 62-10-1; 62-10-2; 62-10-5; and 62-11-3. *Martinez v. Jaramillo*, 1974-NMSC-069, 86 N.M. 506, 508, 525 P.2d 866, 868. Omission of critical subjects and amendment of existing law from the ETA's title is misleading and unconstitutional.

E. THE ETA VIOLATES RATEPAYERS' RIGHTS AND REMEDIES

Art. IV, §34 of the N.M. Constitution states: "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."²¹ Yet the ETA would change the rights and remedies of ratepayers in at least three cases with pending issues when the legislation went into effect.

1. The ETA Potentially Nullifies the Imprudence Finding of this Court in S-1-SC-36115 Related to Palo Verde

On 5/16/2019, this Court held "the Commission's determination that PNM's decisions [regarding PVNGS] were imprudent was supported by substantial evidence." *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012, *supra* at ¶38. The Court's opinion underscored the need to

²¹ See *In re Held Orders of U S W. Communications, Inc.*, 1999-NMSC-024, ¶ 13, 127 N.M. 375, 379, 981 P.2d 789, 793 (holding that the pending case clause applies to administrative proceedings).

protect ratepayers and hold them harmless for imprudent decisions (“a disallowance should equal the amount of the unreasonable investment”). *Id.*, at ¶40 (remanded in pending 15-00261-UT). The ETA, however, prevents the Commission from applying this Court’s imprudence finding and disallowing any costs. Specifically, §31C forbids the Commission from disallowing recovery of “any undepreciated investments or decommissioning costs” regardless of the underlying facts, leaving ratepayers vulnerable to utility mismanagement.

The ETA violates art. IV, §34 by creating an unacceptable conflict between this Court’s imprudence ruling in S-1-SC-36115 and the ETA’s alteration of ratepayers’ rights and remedies and modification of procedures in a pending case.

2. The ETA Unconstitutionally Amends the Rights of Ratepayers in the PRC’s Pending SJGS Proceeding

Similarly, in the case below, on 1/10/2019, the PRC initiated a SJGS abandonment docket, 19-00018-UT, ordering PNM to file an “[a]pplication with supporting testimony ... addressing all relevant abandonment issues.” *Order Requesting Response to PNM’s December 31, 2018 Verified Compliance Filing*, pp. 14-16 ¶B 1-13, C. Following an unsuccessful attempt to avoid PRC regulation through a petition to this Court, PNM filed its Application in a new docket, 19-00195-UT, rather than in 19-00018-UT. In the new docket, PNM requested cost recovery of ETA-defined energy transition costs of approximately \$360.1 million, including \$283 million for undepreciated investments. Exhibit C, p. 5.

The ETA changes ratepayers' rights in this case dramatically. Before the ETA was passed, the PRC could make an equitable distribution of undepreciated assets, and it previously did just that, determining that a 50/50 split for SJGS Units 2 and 3 was just and reasonable and in the public interest.²² 13-00390-UT. Now, the PRC must approve 100% of PNM's request, or \$360.1 million. §§2G, H, S; 4; 5E and 11C. The unavoidable conclusion is that the ETA violates art. IV, §34 by changing the rights of ratepayers in a pending action. *See Edwards v. City of Clovis*, 1980-NMSC-039, ¶7, 94 N.M. 136.

3. The ETA Eliminates Ratepayers' Vested Rights

The ETA also compromises the vested rights of ratepayers in 16-00276-UT, which concerned the Four Corners Power Plant.²³ In that case, the PRC deferred "the issue of PNM's prudence in continuing its participation in FCPP..." until PNM's 2019 rate case and informed the parties that administrative notice of

²² Sixteen months after PNM received its CCN for SJGS, it announced SJGS was uneconomic. PNM's abrupt about-face throws into question the utility's decision-making process and is relevant to whether PNM's capital investment in SJGS was prudently incurred. *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012, *supra* at ¶32 ("the decision-making process of the utility is properly included in the prudence analysis.") A prudence analysis is required to determine the percentage of recoverable undepreciated assets to ensure rates are fair, just and reasonable.

²³ The PRC agrees, stating that "Section [2]H(2)(c) of SB 489 appears to now eliminate the Commission's power to address PNM's imprudence at FCPP by requiring that the expenses at issue be included in amounts securitized in bond offerings." *Response of PRC in Opposition to Verified Petition for Writ of Mandamus Filed by PNM*, S-1-SC-37552, 3/19/2019, p.12, fn. 6.

evidence from 16-00276-UT would be taken in a future proceeding.²⁴ NEE appealed the Commission’s decision, arguing that the imprudence determination should not have been reversed and the cost disallowance deferred. S-1-SC-36870. The parties answering NEE’s brief acknowledged that the Commission Order would “suffice to protect ratepayers for the limited time that the Revised Stipulation would remain in effect before the need for any additional disallowances can be addressed.” S-1-SC-36870, *Joint Response Brief of Albuquerque Bernalillo County Water Utility Authority, City of Albuquerque, Bernalillo County, and New Mexico Industrial Energy Consumers*, 10/12/2018, p. 13; *Answer Brief of Intervener – Appellee PNM*, 10/12/2018, p. 10. NEE thereafter withdrew its appeal, in reliance on its right to challenge PNM’s imprudent FCPP investment in the next rate case. *See* Exhibit F, p. 11.

PNM made investments in FCPP without any contemporaneous financial analysis – the epitome of imprudence. Based on that evidence, the PRC could hold ratepayers harmless for any undepreciated FCPP investments, but under the ETA, ratepayers would be forced to pay for all FCPP investments. *See Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012, *supra*, ¶¶8-10, 21, 32, 39-42, 47, 52. Under the vested rights approach, or the more

²⁴ 16-00276-UT, *Revised Order Partially Adopting Certification of Stipulation*, 1/10/2018, p. 35, B, Exhibit F.

traditional “pending case” analysis, the ETA alters the rights of ratepayers to be shielded from wasteful expenditures.

F. UNCONSTITUTIONAL PROVISIONS OF THE ETA ARE SEVERABLE

The unconstitutional ETA provisions are severable from the remainder of the legislation, including the part of the bill that increases the RPS, meeting the requirements of *Bradbury & Stamm Const. Co. v. Bureau of Revenue*. 1962-NMSC-078, ¶7, 70 N.M. 226, 230–31, 372 P.2d 808, 811. Not only are the challenged provisions completely unrelated to or substantively different from the other provisions of the ETA, they can be severed without impairing the force and effect of the remaining provisions. The Court should invalidate the unconstitutional parts of the ETA and leave the rest of the bill intact.

IV. REQUEST FOR IMMEDIATE STAY

Petitioners request an immediate stay of 19-00018-UT, pursuant to NMSA §62-11-6. Petitioners seeking a stay must show they meet the requirements of *Tenneco Oil Co. v. NM Water Quality Control Comm’n*. 1986-NMCA-033, ¶ 10, 105 N.M. 708, 710, 736 P.2d 986, 988. “An injury that is irreparable is without adequate remedy at law.” *State ex rel. State Highway & Transp. Dept. of N.M. v. City of Sunland Park*, 2000-NMCA-044, ¶19, 129 N.M. 151, 157, 3 P.3d 128, 134. All four *Tenneco* factors support a stay.

Petitioners are likely to prevail because the ETA is unconstitutional for the reasons set forth above. Furthermore, a financing order is irrevocable, cannot be amended except by the utility, creates a property interest, and any actions taken pursuant to it are legally valid, even if the order is later vacated by a court. §§5 E, 6, 7A-C, 12 A, 22. Under the ETA, the PRC would be required to impose \$360.1 million in rate increases on ratepayers, without the ability to amend or deny the request. §§2H, 2S, 5 E, 11C and 31C. Customers will be responsible for this non-bypassable charge for twenty-five years, even if they switch utility providers. §§2G, H, P; 4 B(7); 5F(3); 11C; 31C. The legal and economic hardship that such a decision would impose on ratepayers, among the poorest in the country, are irreparable.²⁵

A stay will not result in substantial harm to other interested persons. PNM and other parties to 19-00018-UT will not be prejudiced because the PRC has bifurcated the issues in PNM's application and extended the time for review.²⁶ While a financing order for SJGS will be deemed approved as a matter of law under the ETA in April 2020 without the possibility of modification by the PRC, ratepayers will not start paying for the bonds until 2022. If this Court finds the

²⁵ 19.7% of New Mexicans live in poverty <https://www.census.gov/quickfacts/NM>. 2018 Talk Poverty report (N.M.) Ranked: 49th in U.S., <https://talkpoverty.org/state-year-report/new-mexico-2018-report/>.

²⁶ See Exhibit D, at ¶18-19, ¶A.

ETA’s securitization provisions unconstitutional, a new securitization bill may be passed before summer 2022 that does not infringe upon the PRC’s regulatory authority.²⁷

V. CONCLUSION

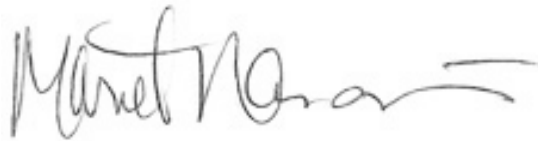
For the foregoing reasons, Petitioners request that this Court:

1. Grant an Immediate Stay in 19-00018-UT;
2. Set an expeditious time for responses and oral argument;
3. Issue a Writ of Mandamus:
 - a. Holding the challenged sections of the ETA to be unconstitutional and void:
 - §2H (1)-(3);
 - §2S;
 - §5;
 - §8B;
 - §11C;

²⁷ Senator William Soules introduced SB 492 on 2/8/2019, entitled the “Ratepayer Relief Act,” available at <https://www.nmlegis.gov/Legislation/Legislation?Chamber=S&LegType=B&LegNo=492&year=19>, that did not grant special privileges or immunities to one electric monopoly, but provided for securitization financing upon abandoning generation facilities operated or leased by any electric utility, and did not remove the PRC’s authority, but rather enhanced its authority to determine whether securitization financing results in just and reasonable rates.

- §22;
 - §31C; and
- b. Requiring the PRC to apply the Public Utility Act and other applicable statutes as required by law.

Respectfully submitted this 18th day of September 2019,



/s/ Ty Tosdal

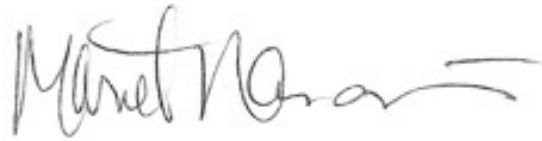
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VERIFICATION

I, Mariel Nanasi, President of and Attorney for New Energy Economy, being duly sworn upon my oath, state that I have read the attached Amended Verified Petition and the statements contained in the Petition are true and correct to the best of my knowledge, information and belief.

A handwritten signature in black ink, appearing to read "Mariel Nanasi", with a horizontal flourish extending to the right.

Mariel Nanasi, Esq.

CERTIFICATE OF SERVICE

I CERTIFY that on this day I sent, via email only, to the parties listed below a true and correct copy of:

AMENDED VERIFIED PETITION FOR WRIT OF MANDAMUS TO DECLARE SPECIFIC PROVISIONS OF THE “ENERGY TRANSITION ACT” UNCONSTITUTIONAL, TO ENJOIN ENFORCEMENT AND REQUEST FOR STAY

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NEW ENERGY ECONOMY



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