new energy economy
Addressing the Climate Challenge
With Bold Solutions

Contact: Mariel Nanasi (505) 469-4060
Executive Director, New Energy Economy
mariel@seedsbeneaththesnow.com

January 3, 2020

For Immediate Release

New Energy Economy Files Response to Governor Michelle Lujan Grisham and Speaker Egolf's Request to Have Supreme Court Order PRC to Implement Energy Transition Act

SANTA FE, N.M. — New Energy Economy (NEE) has filed a response in the New Mexico Supreme Court challenging the "Emergency Verified Petition for Writ of Mandamus" ("Petition") filed by Governor Lujan Grisham, Speaker Egolf, et al., opposing the petition as premature, a "non-emergency" and relies on disputed facts. The Governor's Petition seeks an Order from the NM Supreme Court requiring the New Mexico Public Regulation Commission ("PRC") to implement the Energy Transition Act ("ETA") in pending cases 19-00018-UT and 19-00195-UT involving PNM's abandonment of the San Juan Generating Station ("SJGS").

"The facts, the N.M. Constitution and 100 years of legal precedent is on the public's side but the strong arm of corporate politics is on the other - the public trust hangs in the balance," said Mariel Nanasi, Executive Director of New Energy Economy.

NEE seeks to dismiss the Petition or stay it until the underlying case pending at the New Mexico Public Regulation Commission, 19-00018-UT, is resolved and consolidated with an appeal of Case No. 19-00018-UT, which will happen before April 1, 2020.

NEE's position is that 1) there is no emergency justifying extraordinary, pre-appeal relief and 2) there is no "irreparable" harm that will ensue if the ETA is not applied.

The potential for an emergency, only arises if the Supreme Court grants the Governor's Petition without full review of the many serious constitutional issues raised by the Petition and the ETA. If this Court grants the writ, the PRC would be forced to approve issuance of bonds worth $361 million plus interest (at an unknown rate), which ratepayers will be obligated to pay for the next 25-28 years.

According to Petitioners, the New Mexico Public Regulation Commissioners manufactured "an empty vessel docket"[1] in early January 2019, in anticipation of the ETA, so that it could invoke New Mexico Constitution Art. IV, §34,[2] which precludes applying new laws that affect the outcome of pending cases.

[1] *Emergency Verified Petition for Writ of Mandamus* (hereafter "Petition"), p.3, ¶2 a).
[2] N.M. Const. Art. IV, §34: "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."

Petitioners' allegations are baseless and unfair to the PRC Commissioners because they are simply abiding by their oaths of office to uphold New Mexico's Constitution and laws in determining how much money PNM is entitled to extract from its customers as compensation for abandoning their coal plant.

In December 2015, when no other U.S. public utility was doubling down on coal, PNM bought the coal shares from other exiting co-owners. PNM swore to the PRC that its coal plant would "*continue indefinitely* with this 132 megawatts [at SJGS]"[3] and that its replacement power portfolio would be "the most cost-effective portfolio" for ratepayers for twenty-years.

Only one year later PNM's own modeling demonstrated what NEE had been saying all along, that a shutdown of SJGS was more cost effective for ratepayers than continued operation. As a result, on 2/24/2017, PNM Board of Directors determined at a Board meeting that a shutdown of San Juan would make the company more profits including investing in replacement resources.

As part of the settlement agreement made with parties and approved of by the PRC in 2015, PNM promised to initiate a proceeding between July 1 – December 31, 2018 regarding its future plans for SJGS. At 3pm on December 31, 2018 PNM made a filing and said that it was going to abandon San Juan. Under the law abandonment is not to proceed without PRC approval, NMSA 1978 §62-9-5: "No utility shall abandon all or any portion of its facilities subject to the jurisdiction of the commission, or any service rendered by means of such facilities, without first obtaining the permission and approval of the commission. The commission shall grant such permission and approval, after notice and hearing…"

Days later, on 1/10/2019, the PRC opened a case that had the Phase 1 abandonment case no. 13-00390-UT, where PNM had agreed to have a hearing about the future of San Juan, and a new case no. 19-00018-UT. The PRC asked parties two things: 1) did PNM meet its obligation under the old case to make a filing that initiates a hearing and 2) should the PRC proceed with an abandonment case because it appeared that PNM (and all the other partners, besides Farmington) had already decided to abandon its interests in the plant.

A dozen parties responded to the PRC's questions with close to two dozen filings.

PNM didn't want to go before, literally the same Hearing Examiner, and the same parties, and testify that even though it made the wrong decision in 2015 to re-invest in coal and extend the life of San Juan, it still wanted all its money for "undepreciated assets." Assets that PNM has on its accounting books until 2053.

So, PNM did an end run around the PRC, to the legislature, and got the legislators to give PNM a bail out, not only for San Juan, but while they were at it, for ALL their other coal, gas and nuclear investments IN EXCHANGE FOR A HIGHER RENEWABLE PORTFOLIO

[3] 13-00390-UT, TR., PNM Vice President of Regulatory Affairs Ortiz, 10/13/15 pp. 4059-4060.) (emphasis supplied.)

STANDARD. PNM snuck language into the ETA which removes PRC authority to modify or change "any" amount PNM requested.

"New Mexicans have only one shield against monopoly predation," said Mariel Nanasi, Executive Director of New Energy Economy, "and that's review and regulation by the PRC. That constitutional protection cannot be bargained away by legislators, no matter how noble their overall goals. The ETA exposes ratepayers to hundreds of millions of dollars in costs that would, under its provisions, escape regulatory oversight and be arbitrarily assigned to ratepayers rather than utility stockholders. This would be unconstitutional, costly and unfair."

Now the Governor is asking the NM Supreme Court to force the PRC to implement the ETA even though there was a case pending at the PRC dealing with this very subject.

Not only does the ETA violate the pending case clause of the NM Constitution to forbid legislative interference in a pending case, it also violates Art. II §19 of the NM Constitution, forbidding the impairment of the obligation of contracts." The ETA impairs PNM's prior obligation under the settlement to resolve the future of San Juan in a hearing because the ETA doesn't allow the PRC to change PNM's 100% request for "undepreciated assets."

Further, the ETA violates separation of powers: The New Mexico Supreme Court has described the distinction between a properly judicial function and a properly legislative function as follows:

> [L]egislative action reflects public policy relating to matters of a permanent or general character, is not usually restricted to identifiable persons or groups, and is usually prospective; quasi-judicial action, on the other hand, generally involves a determination of the rights, duties, or obligations of specific individuals on the basis of the application of currently existing legal standards or policy considerations of past or present facts developed at a hearing conducted for the purpose of resolving the particular interest in question.

Albuquerque Commons P'ship v. City Council of City of Albuquerque, 2008-NMSC-025, ¶ 32, 144 N.M. 99, 109, 184 P.3d 411, 421.

Attached is NEE's Response and Exhibits, and the Governor's Petition.