IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

PUBLIC SERVICE COMPANY OF NEW MEXICO,

Petitioner,

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

NEW MEXICO PUBLIC REGULATION COMMISSION,

Respondent.

In the Matter of Public Service Company of New Mexico's Abandonment of San Juan Generating Station, NMPRC Case No. 19-00018-UT

NEW ENERGY ECONOMY'S RESPONSE TO PUBLIC SERVICE COMPANY OF NEW MEXICO'S MOTION FOR CLARIFICATION AND SUPPLEMENTAL PETITION FOR WRIT OF MANDAMUS

New Energy Economy ("NEE") responds as follows to Joint Petitioners'[1] *Motion for Clarification of Writ Denial or, in the Alternative, Supplemental Verified Emergency Joint Petition for Writ of Mandamus* ("Motion for Clarification" or "Supplemental Writ Petition"). For the reasons set forth below,

[1] Public Service Company of New Mexico ("PNM"), Western Resource Advocates ("WRA"), Coalition for Clean Affordable Energy ("CCAE"), Sierra Club, IBEW Local 611, San Juan Citizens' Alliance, and Diné Care.

PNM's motion should be denied, and the writ petition should either be dismissed or denied.

INTRODUCTION

Joint Petitioners filed this Motion for Clarification and Supplemental Writ Petition in **No. S-1-SC-37552**. That proceeding was initiated by PNM in the Supreme Court on February 27, 2019, when PNM filed a petition for writ of mandamus requesting that this Court order the New Mexico Public Regulation Commission ("PRC") to refrain from requiring PNM to file PNM's previously-promised plan to abandon Units 1 and 4 of the San Juan Generating Station ("SJGS"), and further requested that this Court stay the PRC proceeding regarding SJGS abandonment.[2] On June 26, 2019, without opinion, this Court denied PNM's petition.[3]

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[2] In its application, PNM sought to prevent the PRC from requiring PNM to file an application by March 1, 2019, in support of its planned abandonment of SJGS. PNM claimed that requiring it to make such a filing a) exceeded PRC's legal authority when it issued the order; b) that PNM had not yet made the decision to abandon and that there was no exigent circumstances that required action; c) violated its first amendment right not to speak; and d) usurped the role of the legislature, which was considering the ETA at the time. *Emergency Verified Petition of PNM for Writ of Mandamus, Request for Emergency Stay, and Request for Oral Argument* ("PNM Writ"), No. S-1-SC-37552.

[3] NEE does not seek to resolve the arguments presented by PNM's motion by reference to technical distinctions between the "denial" of a writ and its "dismissal." It bears note, however, that other courts have recognized a significant difference between the two terms: "The Texas Court of Criminal Appeals has explained the difference between a denial and a dismissal as follows: 'In our writ jurisprudence, a 'denial' signifies that we addressed and rejected the merits of a

On August 29, 2019, sixty-four days after the Court denied PNM's writ petition seeking to prevent the PRC from requiring PNM to address the abandonment of the SJGS units, PNM filed the motion at issue here, namely, a request to clarify that the court's denial of its prior writ petition was made because passage of the Energy Transition Act ("ETA") supposedly rendered the issues in the case moot. Presumably, PNM hopes that such a ruling will enable it to argue that this Court has effectively resolved all of the constitutional, statutory and regulatory issues related to the ETA[4] that New Energy Economy recently brought before this Court on August 26, 2019 in Docket **S-1-SC-37875**. PNM makes no effort to identify a provision of the Rules of Appellate Procedure that permit the filing of motions in a writ case long after denial and long after the period allowed for rehearing, nor does PNM effectively argue that the Court has retained jurisdiction in the prior case to hear such a request. See ¶¶ 1-7, below.[5]

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particular claim while a 'dismissal' means that we declined to consider the claim for reasons unrelated to the claim's merits.' *Ex parte Torres,* 943 S.W.2d 469, 472 (Tex.Crim.App.1997)." *Freeman v. Stephens*, 2014 WL 406836, at *3 (N.D. Tex. Feb. 3, 2014)

[4] "Petitioners seek a Writ from the Court directing Respondents to apply the ETA to the entirety of the Consolidated Application without exception [.]" Motion for Clarification, p. 4.

[5] Although PNM brought the petition for writ by itself, it has added additional parties without motions to intervene or other identifiable mechanism, apparently in the view that adding environmental organizations who, like NEE, espouse an end to coal, it will provide "atmospherics" sufficient to obviate the need to address the serious due process and other issues raised by the ETA's provisions.

PNM has requested, in the alternative, that this Court issue a writ of mandamus to the PRC on different grounds than PNM sought a writ in its first application. Through this filing, which PNM seeks on an "emergency" basis, PNM asks this Court to require that the PRC apply the very provisions of the ETA whose legality has been placed at issue in the *Verified Petition for an Emergency Writ of Mandamus to Declare Specific Provisions of the "Energy Transition Act" Unconstitutional, to Enjoin Their Enforcement and Request for Stay,* filed by NEE and other co-petitioners in Docket S-1-SC-37875.

In the 64 days between this Court's denial of PNM's earlier filing and its current filing, PNM did not file any motion for reconsideration or for "clarification," which this Court's rules require to be filed within 15 days of a decision. Instead, PNM has decided that it will treat the prior case as a receptacle for any additional disputes that PNM has with the PRC that in any way touch on the decommissioning of Units 1 and 4 of the San Juan Generating Station.

PNM's request that this Court issue a writ of mandamus to the PRC to prevent it from proceeding to consider the abandonment of the SJGS units is also problematic because, as PNM well knows, the PRC has not decided whether it should apply the ETA to the SJGS abandonment case, in light of the fact that the case has been pending since before the ETA was introduced in the legislature. Indeed, the PRC has requested that the parties brief that issue in light of the New

Mexico Constitution's prohibition on the passage of legislation that will affect the outcome of any pending case. PNM Motion for Clarification, pp. 10-11; PNM Attachment I, *Procedural Order*, Case No. 19-00018-UT, July 25, 2019.

As PNM is additionally aware, on August 26, 2019, NEE and others filed a Petition for a Writ of Mandamus in which they raise not only the issue of whether the ETA can change the rights and remedies of ratepayers in light of the New Mexico Constitution's art. IV, §34, but also raised several other constitutional and legal issues related to this important but deeply flawed legislation, including whether the ETA violates ratepayers' due process rights and removes the constitutionally mandated requirement that PRC regulate public utilities; whether the title of the ETA failed to give reasonable notice of its subject matter, including any reference to the repeal of the Public Utility Act; and whether the ETA is special legislation in violation of N.M. Const. art. IV, §24.

On the basis of the foregoing facts and the argument below, NEE respectfully requests that this Court:

- Dismiss or deny PNM's motion for clarification as untimely and without legal basis. 12-404(A) NMRA.
- Even if PNM's motion for clarification were timely, which it is not, the Court should deny it because it i) presents new issues that were not included in the original writ petition and could not have

been because the ETA was not yet law; and ii) seeks to completely recast this court's denial of PNM's earlier application for a writ as a decision on the merits that would give PNM an unearned victory and would resolve all legal and constitutional issues relating to the ETA in PNM's favor, without briefing, oral argument or other due process.

- Dismiss or deny PNM's request for a writ of mandamus directing the PRC to apply ETA to the entirety of PNM's Consolidated Application pending in the PRC because i) the PRC is now considering whether to apply the ETA or not, and is affording parties including the Joint Petitioners, due process; ii) PNM's Writ relies on facts that are in dispute which violates the criteria for writs of mandamus; and iii) requiring application of the ETA that would effectively impose hundreds of millions of dollars of costs on ratepayers without due process of law and without considering the additional constitutional problems associated with the ETA.

FACTS AND ARGUMENT

1. On February 27, 2019, PNM filed its *Emergency Verified Petition of Public Service Company of New Mexico for Writ of Mandamus, Request for*

Emergency Stay, and Request for Oral Argument ("Original Writ Petition"), docketed as S-1-SC-37552 in this Court.

2. On June 26, 2019, this Court after "consider[ing] the petition for writ of mandamus and responses thereto" denied PNM's Original Writ Petition.[6]

3. On August 29, 2019, Joint Petitioners[7] filed their *Motion for Clarification of Writ Denial or, in the Alternative, Supplemental Verified Emergency Joint Petition for Writ of Mandamus* ("Motion for Clarification") in S-1-SC-37552.

4. New Mexico's Rules of Appellate Procedure do not explicitly provide for motions for clarification, although New Mexico appellate courts have clarified their decisions in response to such motion. *See, e.g., Rodriguez v. Brand West Dairy,* 2016-NMSC-006, --- P.3d ---- 2016, February 15, 2016, WL 716423 (Mem) (granting motion for clarification and suspending precedential value of decision

[6] This Court also vacated oral argument previously scheduled, lifted the stay and denied the June 25, 2019 motion to supplement the record filed by NEE as moot. For comprehensive timeline, see Exhibit A, attached and incorporated herein.

[7] Joint Petitioners Coalition for Clean Affordable Energy ("CCAE"), Sierra Club, IBEW Local 611, San Juan Citizens' Alliance, and Diné Care are not intervenors or parties in the case herein and there was no Motion filed by these entities to intervene. Further, as of the filing of or denial of PNM's Writ, IBEW Local 611, San Juan Citizens' Alliance, and Diné Care were not intervenors or parties in any NM PRC Case Nos. 13-00390-UT (PNM's San Juan Generating Station abandonment filing, "Phase I"), 17-00174-UT (PNM's Integrated Resource Plan), or 19-00018-UT (Abandonment and financing of PNM's San Juan Generating Station). These parties have no standing to file the PNM Motion for Clarification. *NEE v. Martinez,* 2011-NMSC-006, 149 N.M. 207, 247 P.3d 286.

pending further order). Although no New Mexico appellate decision has identified the proper rule for such motions, and PNM identified none in its motion, other appellate courts have unsurprisingly treated motions for clarification as motions for reconsideration. *See, e.g., Fuller v. Fuller*, 706 So. 2d 57, 59 (Fla. Dist. Ct. App. 1998) ("It is well settled that a motion for clarification is the equivalent of a motion for rehearing."); *Hodgdon v. Fuller*, 398 A.2d 798, 799 (Me. 1979) ("Although Hodgdon denominates her motion as one for clarification, we have, in similar circumstances, viewed such a motion as one made for rehearing for the purpose of recalling and amending the mandate.")

5. In New Mexico, a motion to rehear a decision by an appellate court must be filed within 15 days of disposition.[8] 12-404(A) NMRA. The Florida Court, in *Fuller,* ruled that a motion for "clarification" that was not timely filed under the rule for reconsideration was untimely and should be denied on that basis. *Fuller*, *supra* at 59. In New Mexico, the 15-day period for filing a rehearing motion is recognized as a tolling period. *Serrano v Williams*, 383 F.3d 1181 (10th Cir. 2004). With regard to a denial of writ (certiorari) the allotment of 15 days to move for rehearing applies to the New Mexico Supreme Court. *Id*. Accordingly,

[8] *Rivera v. American Gen. Financial Services, Inc*., 2011-NMSC-033, 259 P.3D 803, ¶12 ("Under Rule 12-404(A) NMRA, a party must file a motion for rehearing within fifteen days of the appellate court's disposition of a case unless the time is shortened or enlarged by order.")

PNM's motion for clarification should be interpreted as a motion for reconsideration, and denied as untimely.

6. The rule of finality applies to a Writ of Mandamus, and our Court of Appeals settled the issue in *Bd. of Trustees of Vill. of Los Ranchos de Albuquerque v. Sanchez,* 2004-NMCA-128, ¶ 11, 136 N.M. 528, 101 P.3d 339. Addressing the rule of finality as it applies to mandamus actions, the court stated: "The mandamus statutes contemplate that a mandamus proceeding be treated in the same way as any civil action. Section 44-2-14. We do not delve into the merits to treat the issuance of a writ of mandamus differently." *Id.; See also*, *City of Sunland Park v. Paseo Del Norte Ltd. P'ship*, 1999-NMCA-124, 128 N.M. 163, 170, 990 P.2d 1286, 1293 (declining to deviate from general rule of finality); *Hamman v. Clayton Mun. Sch. Dist. No. 1*, 74 N.M. 428, 429, 394 P.2d 273, 274 (1964) (stating that "[a] case is moot … [w]here the issues involved … no longer exist"); *Insure N.M., LLC v. McGonigle*, 2000-NMCA-018, ¶¶ 24, 25, 128 N.M. 611, 995 P.2d 1053 (refusing to issue an advisory opinion where a defendant's claim had been rendered moot).

7. When the Supreme Court denied PNM's Writ on June 26, 2019, that was a final judgment, and the requirements of finality apply, meaning that any PNM Motion for Clarification or Rehearing had to be filed within fifteen days. Our Court of Appeals has treated the denial of a writ is a "final order." *State v.*

Gutierrez, 2016-NMCA-077, ¶ 25, 380 P.3d 872, 879, citing *Trenkler v. United States*, 536 F.3d 85, 95 (1st Cir. 2008).

8. The Motion for Clarification "request[s] 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 … rendered the case moot." PNM Motion for Clarification at 1. By making such a request, PNM asks this Court to address issues and render a decision that go beyond what PNM requested in its original writ petition.[9] Joint Petitioners seek to use the closed docket herein, S-1-SC-37552, as a means to bootstrap its current arguments rather than address them in Docket S-1-SC-37875. It is an understatement to say that PNM is dramatically overreaching by using the guise of asking for "clarification" to seek a ruling from this Court that the recently passed ETA (which was not law when PNM filed its earlier writ) applies to Case 19-00018-UT, regardless of New Mexico Constitution's art. IV, §34; and applies to Case 19-00018-UT, even if the ETA denies ratepayers due process protections and contains other constitutional and legal defects, including the significant repeal of certain sections of the Public Utility Act. New arguments may not be presented

[9] PNM requested that the Court "vacate the [PRC's] Abandonment Order" issued on January 30, 2019 and "[p]rohibit the NMPRC from compelling PNM to file SJGS-related applications [.]" PNM Original Writ, p. 1.

in a petition for rehearing. *State v. Curlee*, 1982-NMCA-126, 98 N.M. 576, 651 P. 2d 111; *See also*, *Pitek v. McGuire*, 1947-NMSC-053, 51 N.M. 364, 184 P.2d 647.

9. Whether the ETA contains unconstitutional provisions and related issues are at the core of NEE's application for a Writ of Mandamus in S-1-SC-37875. PNM is now seeking to have this Court decide the issues summarily by attempting to "clarify" its dismissal of PNM's earlier writ application by an announcement, apparently that "PNM wins!"[10]

10. There is no procedural basis on which PNM can expect this Court to "clarify" a decision that did not contain an opinion or address the merits of the case. Even if PNM could find a rule that would permit it to file its motion for clarification more than 45 days late, there still would be no basis for clarification because this Court's decision denying a writ is not necessarily a decision on the merits. *State v. House*, 1999-NMSC-014, ¶ 25, 127 N.M. 151, 159, 978 P.2d 967, 975:

[10] While it is true that this court's denial of PNM's Original Writ Petition was not on the merits, it is notable that this Court denied the writ within 24 hours after NEE presented evidence to this Court that PNM appeared to be misleading the Court about whether or not it had or had not decided to abandon the San Juan Generating Station. *See NEE's Motion Pursuant to Rule 801(d)(2) and 804(b)(3) NMRA to Supplement the Record and Take Judicial Notice of Three Pages in the Federal Register and Statement by Party Opponent*, June 25, 2019.

> Our denial of House's petition for a writ of superintending control does not preclude appellate review of the trial court's action and does not necessarily reflect upon the merits of House's contentions for purposes of this appeal. *See* Rule 12-504(C)(1) NMRA 1998 (providing that the Court may deny a petition without hearing if it "is without merit, concerns a matter more properly reviewable by appeal, or seeks relief prematurely").

Id.

11. Furthermore, in the Motion for Clarification and Supplemental Writ Petition, PNM relies on disputed facts, which this Court has said disqualifies issues for resolution by writ of mandamus. *State ex rel. Taylor v. Johnson,* 1998-NMSC-015, ¶ 22, 125 N.M. 343, 961 P.2d 768, discusses criteria relevant to the exercise of original jurisdiction and cites to *State ex rel. Clark v. Johnson,* 1995-NMSC-051, 120 N.M. 562, 569, 904 P.2d 11, 18. In that case, two state legislators and a taxpayer sought a declaratory judgment and either a writ of mandamus or a writ of prohibition to preclude Governor Johnson from implementing Indian gaming compacts and revenue-sharing agreements that were entered without legislative consent. *See State ex rel. Clark,* 1995-NMSC-051, 120 N.M. at 566, 904 P.2d at 15. This Court exercised original jurisdiction because: 1) the issue presented a fundamental question of great public concern; 2) *the relevant facts were virtually undisputed and no further factual questions existed for the district court to decide*; 3) the purely legal issue eventually would have come before this Court; and 4) the

petitioners and the respondents desired an early resolution of the dispute. *State ex rel. Clark,* 1995-NMSC-051, 120 N.M. at 569, 904 P.2d at 18 (emphasis added).

PNM's Motion for Clarification, at ¶29, states that the ETA should apply to the pending NM PRC Case No. 19-00018-UT, ignoring the plain language of N.M. Const. art. IV, § 34, because "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 … " But the record evidence reveals a vastly different story. Exhibit B to this response lists the filings made by party, and the issues they raised, in Case 19-00018-UT, between January 10, 2019 the date the PRC opened the docket, through March 22, 2019, the date the ETA was signed into law by the Governor. There were 31 different pleadings by a dozen parties[11,12] (not counting 19 public comments) raising procedural and substantive issues. The Public Regulation Commission solicited these responses from parties who had intervened in the Phase 1 part of this case, 13-00390-UT and 17-00174-UT

[11] 1.2.2.7 Q NMAC "**party** means a person who initiates a commission proceeding by filing an application, petition or complaint, or *whom the commission or presiding officer names as a respondent*, or whom the commission or presiding officer grants leave to intervene; unless the context indicates otherwise, the term "party" may also refer to counsel of record for a party; staff shall have the status of a party, without being required to file a motion to intervene, but shall not have a right to appeal." (emphasis supplied.)

[12] PNM, NEE, PRC Staff, San Juan County Entities, NMIEC, Sierra Club, Interwest Energy Alliance, ABCWUA, CCAE, WRA, the NM Attorney General and SWG.

(PNM's Integrated Resource Plan case, similar to this Court solicitation for responses to PNM's Writ, Order of March 1, 2019). *See also* Exhibit C, which is attached: *Order Requesting Response to PNM's December 31, 2018 Verified Compliance Filing Concerning Continued Use of San Juan Generating Station to Serve New Mexico Customers Pursuant to Paragraph 19 of the Modified Stipulation, 13-00390-UT and 19-00018-UT*, 1/10/2019. ("In light of the fact that PNM's filing confirms that PNM has essentially irrevocably committed itself to the abandonment of SJGS over six months ago and is currently already involved in the steps necessary under its Exit Agreement with its co-owners to proceed with an orderly closure of SJGS, the Commission finds that it should open a new docket to address the issue of PNM's abandonment of SJGS and seek the input of the signatories to the Modified Stipulation and the other *parties* in the 13-00390-UT and 17-00174-UT [cases]." At p. 4, ¶10 (emphasis added). Essentially these were parties who had been granted status as intervenors in both the earlier cases, and were parties for all intents and purposes (also called "respondents"[13] at p. 4, ¶11) in 19-00018-UT.

12. The parties raised a variety of substantive and procedural issues in response to the Commission's Orders as evidenced by Exhibit B. For example,

[13] 1.2.2.7 X NMAC: "… **respondent** means any party against whom any complaint is filed or any party subject to the jurisdiction of the commission to whom the commission issues notice instituting a proceeding, investigation, or inquiry of the commission."

one respondent, Sierra Club stated: "Sierra Club was an active party-participant in Case No. 17-00174-UT, concerning the acceptance of PNM's 2017 Integrated Resource Plan, which inter alia found that retiring the two remaining units at San Juan Generating Station (SJGS) in June 2022 was more cost-effective than extending their lives. Sierra Club intends to seek to formally intervene and become a party to this present case, and any other abandonment and/or replacement resource dockets concerning SJGS." *Sierra Club's Response to Order Requesting Responses to PNM's December 31, 2018 Compliance Filing, 1/18/2019*.

13. There are a number of other disputed factual issues, or mixed issues of law and fact, also raised by the Motion for Clarification:

a. "The Abandonment Order would have required PNM to file an application for abandonment of SJGS by March 1, 2019, *in order* to prevent the application of proposed new energy legislation pending in the 2019 legislative session." Motion for Clarification, pp. 2-3. Many of the

respondents[14] to the PRC January 10, 2019 Order made a variety of arguments about the need to commence the abandonment proceedings.[15]

[14] *See,* responses of New Energy Economy, PRC Staff, NMIEC, New Mexico Attorney General, ("SWG") Generation Operating Company, Inc., Albuquerque Bernalillo County Water Utility Authority ("ABCWUA"), San Juan County Entities, and Interwest Energy Alliance, Exhibit B.

[15] Joint Petitioners argue that the PRC manipulated the process with its "thinly-disguised purpose of creating a 'pending case' under Article IV, Section 34 of the New Mexico Constitution" when it opened a docket under 19-00018-UT. Motion for Clarification, p. 9. However a primary reason that the PRC gave for commencing the abandonment docket was the critical issue of timing, that it raised, as did the parties. See, Exhibit C, ¶¶ 10&11, and *Order Initiating Proceeding on December 31, 2018 Verified Compliance Filing Concerning Continued Use of And Abandonment of San Juan Generating Station,* pp.11-12, ¶18, attached as Exhibit A to PNM's Emergency Petition. ("The Commission recognizes that the need for early action was a significant motivating factor behind the proposed expedited 2018 Review Hearing, especially in light of the fact that any approved replacement resources will likely not only need to be approved, but constructed before the anticipated June 30, 2022 exit from SJGS. WRA witness Dirmeier expressly pointed this out: … A decision much later than early 2019 could make it difficult to procure the needed replacement resources. Again, it is highly troubling that PNM waited for over 6 months to make its required filing under Paragraph 19 when it was able to do so before the end of June 2018, and certainly no later than the end of July 2018. PNM now vehemently argues the Commission should continue to delay initiating a proceeding for an additional six months – up to the end of June 2019 – when testimony in support of Paragraph 19 had stressed the need for having concluded a proceeding on this issue by that time, makes PNM's current position highly suspect. This potentially legitimizes the concerns raised by NEE that PNM may be seeking to gain an advantage and box in parties that oppose PNM's choices with a time limit.") Unfortunately, and not surprisingly, the warnings raised by parties and the PRC in its January orders that time is of the essence and the evaluation process must initiate, particularly with respect to replacement power, have been borne out. PNM testified on September 5, 2019 in response to a bench request in both cases 19-00018-UT and 19-00195-UT: "Delaying action on the replacement resources [ ] creates additional uncertainties in the event parties wish to propose alternative portfolios or the Commission determines alternative projects must be considered. As shown in Case No. 13

b. "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." Motion for Clarification, p. 3, ¶3. This is unsupported argument that is speculative at best. It can be equally argued that the PRC has simply taken steps to protect ratepayers from being saddled with hundreds of millions of dollars in a non-bypassable charge on PNM's customers' bills for a twenty-five-year period without regulatory review or oversight, contrary to constitutional protections, especially related to N.M. Const. art. IV, § 34.

c. The PRC is "violating the due process rights of the parties to the Proceedings by refusing to timely apprise them of what laws are being applied." Motion for Clarification, pp. 3-4, ¶3. This statement also

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00390-UT, these types of negotiations [on fuel supply] can take many months or even years to complete." PNM now argues that their proposed preferred replacement resource power must be adopted because if not it would threaten "the system operating within required reliability standards." Further, that "[d]elays in any part of the process place additional risks including financial exposure." These time delays are of PNM's own making. It is PNM who is manipulating the system: PNM argued that there were "no compelling or exigent circumstances require PNM to immediately apply for abandonment" and told this Court that it in order to avoid "harm" to PNM and ratepayers PRC action to regulate should be stayed. (PNM's Emergency Writ pp. 4, 23.) But now PNM testifies that we must live with PNM's replacement power decisions or else the lights will go out and there would be financial risk if the PRC doesn't approve its preferred plan. These disingenuous actions of PNM should not be endorsed by this Court.

mischaracterizes the facts and is unsupported argument. The PRC has in fact protected the due process rights of ratepayers and required in its July 25, 2019 Procedural Order, PNM Attachment I, that: "PNM shall file a legal brief on or before August 23, 2019 regarding the issue of the extent to which 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 this case. PNM may also file supplemental testimony regarding the foregoing issue on or before August 23, 2019." Procedural Order, Case No. 19-00018-UT, pp 4-5, ¶3. The Order further stated: "The following testimony shall be filed by Staff and may be filed by intervenors on or before October 18, 2019: (a) testimony responsive to the testimony in PNM's Application; (b) testimony responsive to the issues addressed in the legal brief and supplemental testimony filed by PNM on August 23, 2019 regarding the applicability of the Energy Transition Act to the current proceeding; and (c) in the event the Energy Transition Act is ultimately determined not to apply to this proceeding, testimony on the merits of Staff and Intervenors' claims (if any) regarding the abandonment of the San Juan Units 1 and 4 and the allocation of the costs associated with the abandonment (including any

undepreciated investment in the San Juan Generating Station)." *Id.* at p. 5, ¶8.

14. Disputed facts aside, PNM is now seeking to obtain relief without having raised the issues prior to filing its Motion for Clarification and Supplemental Writ. New issues cannot be raised for the first time in a motion for rehearing. *State v. Curlee*, 1982-NMCA-126, 98 N.M. 576, 651 P. 2d 111; *Pitek v. McGuire*, 1947-NMSC-053, 51 N.M. 364, 184 P.2d 647. Mootness was not argued in PNM's Original Writ Petition, and the Court may not now grant relief on an issue that was never raised. "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." Motion for Clarification, p. 4, ¶4. PNM, however, never raised the issue of mootness.[16] PNM argued that it had not decided to abandon SJGS, that the PRC had exceeded its authority to require PNM to file an abandonment application, that there were "no exigent circumstances"

[16] Joint Petitioners argue in footnote 1 of the Motion for Clarification: "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." This interpretation of mootness appears to conflict with the requested action in PNM's Original Writ Petition, which was denied. Any explanation of "mootness" is more consistent with the fact that PNM planned to abandon its interest in SJGS and was ready to file its application for abandonment, than the passage of the ETA, which had not been passed at the time, and therefore could not have been an issue in PNM's Original Writ Petition because the ETA didn't become law until months *after* the petition for writ was filed.

requiring PRC regulatory oversight, and that PNM had a first amendment right to remain silent. *See* PNM Original Writ.

15. Joint Petitioners also argue that they are being deprived of their due process rights because the PRC has refused "to timely apprise the parties that the ETA is the applicable law in this case …" Motion for Clarification at pp. 22-23, ¶41. However, this is belied by the facts, including the fact that PNM filed its Abandonment Application on July 1, 2019 (a full year after PNM announced to the SJGS co-owners that it would not continue SJGS operation),[17] and in its *first* Procedural Order of July 25, 2019, the PRC required briefing on the subject matter. In fact, the PRC has not committed to either apply or deny application of the ETA until the PRC hears from parties on the question. *See*, *Procedural Order*, Case No. 19-00018-UT, July 25, 2019 (PNM Attachment I). Similarly, the Motion for Clarification "seek[s] a Writ from the Court directing Respondents to apply the ETA to the entirety of the Consolidated Application without exception." PNM Motion for Clarification, p. 4. Joint Petitioners refer to "Respondents' efforts to invalidate the ETA" yet the PRC has done nothing of the sort. PNM Motion for Clarification, p. 21. What the PRC has done is require briefing on the issue of whether N.M. Const. art. IV, § 34 applies to Case No. 19-00018-UT. This is exactly what the PRC and other administrative agencies typically do to establish a

[17] *See*, Exhibit C, p.2, ¶ 4.

record for this Court's review. Even PNM later concedes that the application of the ETA is unresolved in Case No. 19-00018-UT, observing that the Corrected Bifurcation Order "does not provide a definite statement regarding the critical issue of ETA applicability."[18] While it is true that "Respondents [have not] apprise[d] the parties that the ETA is the applicable law in this case," Motion for Clarification at pp. 22-23, ¶41, that is because the PRC has afforded parties their due process rights by setting the matter for briefing prior to making a ruling.

16. Joint Petitioners also contend that the PRC's actions in this case violate the separation of powers under art. III Section 1 of the N.M. Constitution. PNM Motion for Clarification at 17. To the contrary, the PRC is acting pursuant to the N.M. Constitution's grant of regulatory authority[19] and the statutory authority that the Legislature established when it adopted the Public Utility Act ("PUA") and related laws.[20] The ETA is not a constitutional amendment, nor does not explicitly

[18] PNM Motion for Clarification, p. 11, *Order on Motion for Clarification*, Case No. 19-00195-UT, July 24, 2019. (PNM Attachment H.)

[19] This Court has recognized that 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 Mexico v. New Mexico Pub. Serv. Comm'n*, 1991-NMSC-083, ¶28, 112 N.M. 379, 387, 815 P.2d 1169, 1177. Just and reasonable rate determinations are "the heart" of the regulatory system. *Sandel, supra,* ¶18.

[20] *See* NMSA 1978 § 62-3-3(B) (Policy of New Mexico is that the public interest requires the regulation and supervision of utilities); NMSA 1978 § 62-3-4(A) (PRC "shall have general and exclusive power and jurisdiction to regulate and supervise every public utility in respect to its rates…and its securities…"); NMSA § 62-2-6(A) (Utility issuance of securities is subject to supervision and control of PRC);

repeal the PUA, and until the law is changed, the PRC is bound to follow it. Furthermore, any interpretation of the ETA by this Court or the PRC that leaves the provisions of the law at issue intact must be consistent with the prohibition on legislative interference with pending cases under art. IV, §34 of the N.M. Constitution, which draws a bright line between the branches of government and provides explicit guidance about how conflicts between the branches should be resolved.

17. Finally, while NEE agrees with the PNM and the Joint Petitioners that the constitutionality of the ETA is a matter is of great public importance, the Motion for Clarification or Supplemental Writ must fail. Of course, PNM and other Joint Petitioners have another venue to raise their claims or defenses: They can respond to the Writ of Mandamus filed by New Energy Economy, Citizens for Fair Rates and the Environment, Food & Water Watch, Physicians for Social Responsibility-NM, Rio Arriba Concerned Citizens, Tewa Women United, and

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NMSA 1978 62-6-7 (PRC to hold hearings on utility securities to determine if issuance is consistent with the public interest); NMSA 1978 § 62-6-14 (valuing utility property requires utility to provide all information utility needs to investigate the value ascribed by utility); NMSA 1978 § 62-8-1 (rates made or demanded by utility "shall be just and reasonable."); NMSA § 62-10-1 (any person may complain that any utility "rate" or "practice" is "unfair" or "unjust" and the commission may proceed to hold hearings on the complaint); NMSA § 62-10-2 (PRC may conduct "such other hearings" as may be required in the administration of its duties"); NMSA § 62-10-5 (PRC must give at least twenty days' notice" of all its hearings at which any matters determined).

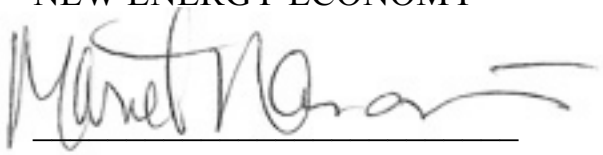
Navajo Nation Council Delegate Daniel Ernest Tso in pending Docket No. S-1-SC-37875.[21]

CONCLUSION

WHEREFORE, New Energy Economy respectfully requests that this Court reject the Motion for Clarification on grounds that it is untimely as a matter of law and the Court no longer has jurisdiction to entertain such a motion. Furthermore, the Court should deny the Joint Petitioners Supplemental Writ because it does not comply with the criteria for a petition for writ of mandamus, relies upon issues of disputed fact, and otherwise fails on the merits. In the alternative, if this Court finds that Joint Petitioners Motion for Clarification and/or petition can survive, that this case be consolidated with pending Docket No. S-1-SC-37875.

Respectfully submitted this 12th day of September, 2019.

NEW ENERGY ECONOMY



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[21] Mandamus is "a proper proceeding in which to question the constitutionality of legislative enactments." *Sego v. Kirkpatrick*, 1974-NMSC-059, ¶6, 86 N.M. 359, 524 P.2d 975.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was e-mailed on September 12, 2019, to the following individuals:

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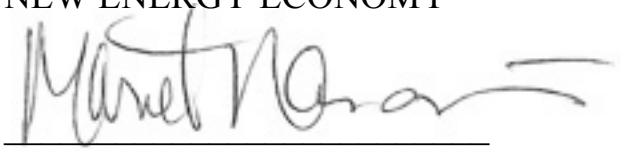

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