

ETA CONSTITUTIONAL CHALLENGE

Filed on August 26th the Writ of Mandamus filed by New Energy Economy And Co-Petitioners Food And Water Watch, Physicians For Social Responsibility – NM, Citizens For Fair Rates & The Environment, Rio Arriba Concerned Citizens, Tewa Women United, and Daniel Ernest Tso challenges specific provisions of the Energy Transition Act that violate New Mexico consumers' constitutional rights to public regulation, due process, separation of powers, prohibition from log-rolling and special legislation, and freedom from interference in pending cases.

The New Mexico Constitution provides that the Commission has a duty to regulate public utilities: **The public regulation commission shall have responsibility for regulating public utilities**...N.M. Const. art. XI, § 2 (emphasis added).

According to the New Mexico Supreme Court, 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.

Petitioners bring this action in order to prevent the New Mexico Public Regulatory Commission (NMPRC or PRC) from applying unconstitutional and unlawful provisions of the ETA in PNM’s case 19-00018-UT as well as other pending and future cases.

The Petition limits its challenge to seven specific provisions of the ETA that remove PRC oversight and authority to regulate on behalf of New Mexican ratepayers and the public interest. Some of the specific issues raised in the Petition include:

- a. Review By The Regulatory Authority: Under The Eta The Utilities Set The Rates In Abandonment Cases, The Prc No Longer Has The Authority To Decide:** The Petition challenges provisions that allow monopoly utilities like PNM to set the amount they want to recoup for decommissioning for instance, and ratepayers have to pay the PNM-determined amount. Under these provisions the PRC does not have the ability to amend PNM’s requested amount at all for either 100% undepreciated investments or for decommissioning costs up to \$375 Million for its coal plants and an unidentified amount, (which could mean whatever the utility asks for), for gas plants and nuclear investments.
- b. Under The Eta There Is No Longer A Requirement Or Oppportunity For The Prc To Ensure Rates Are Just, Fair, And Reasonable.**
- c. Under The Eta There Is No Longer A Requirement Or Oppportunity For The Prc To Protect Against Wasteful Spending.**
- d. Under The Eta There Is No Longer A Requirement Or Oppportunity For The Prc To Balance The Interests Of Investor Shareholders & Ratepayers:** Regulatory law requires a balancing of interests between the shareholders and ratepayers. The ETA eliminates this fundamental statutory duty of the Public Regulation Commission.

e. Under The Eta The Utility Can Recover Costs Even If The Costs Were Found To Be “Imprudent”: Even if the company’s investments that it is asking to recover have been found to be imprudent (irresponsibly incurred) and even if the costs of cleanup are due to negligence on the part of the company, New Mexican ratepayers have to pay and incur a non-bypassable surcharge added to their bill for twenty-five years.

The Petition asks the Court:

- To issue an Immediate Stay of NM PRC Case No. 19-00018-UT to prevent the financing order from issuing by operation of law;
- To strike as unconstitutional Section 2H; Section 2S; Section 5; Section 8B; Section 11C; Section 22; Section 31C;
- To mandate the PRC to refuse to enforce the unconstitutional provisions, and
- To direct the PRC in its application of the ETA, to revert to the exercise of its traditional regulatory review of all of the matters dealing with undepreciated investments, abandonment and decommissioning, and the setting of reasonable rates for ratepayers.

The Petition argues to preserve the Renewable Portfolio Standard that establishes new minimum requirements for the conversion to renewable energy resources by severing Sections 26-35.

The Petition argues in support of the abandonment of SJGS and the concept of securitization as well as the legislature’s authority to adopt this financing tool to facilitate the abandonment of power plants. Replacement power for the San Juan Generating Station (“SJGS”) is not challenged in this Petition and is currently being considered by the PRC in a separate docket, Case No. 19-00195-UT, which should be unaffected by the Petition. Petitioners also support the creation of special funds for workers and economic recovery and development programs, especially for impacted Indigenous communities, Section 16.

The purpose of the Petition is to preserve the regulatory authority and safeguards codified in New Mexico’s Constitution in order to defend the people of New Mexico, the public interest, due process, and the environment.