IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. S-1-SC-38,041

**STATE OF NEW MEXICO, EX REL.,
REPRESENTATIVE BRIAN EGOLF,
SENATOR JACOB CANDELARIA
SENATOR MIMI STEWART
AND REPRESENTATIVE NATHAN SMALL,**

and

**GOVERNOR MICHELLE LUJAN GRISHAM,
AND NAVAJO NATION PRESIDENT
JONATHAN NEZ,**

Petitioners,

v.

**NEW MEXICO PUBLIC REGULATION COMMISSION,
COMMISSIONER VALERIE ESPINOZA,
COMMISSIONER JEFFERSON L. BYRD,
COMMISSIONER CYNTHIA B. HALL,
COMMISSIONER THERESA BECENTI-AGUILLAR,
AND COMMISSIONER STEPHEN FISCHMANN,**

Respondents,

and

PUBLIC SERVICE COMPANY OF NEW MEXICO,

Intervener-Real Party in Interest.

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STATEMENT OF COMPLIANCE

In conformity with Rule 12-504(G) NMRA, the body of New Energy Economy's Response to Emergency Verified Petition contains 5,994 words.

NEW ENERGY ECONOMY'S AMENDED RESPONSE TO EMERGENCY VERIFIED PETITION

Pursuant to Rules 12-504 and 12-601(D) NMRA and NMSA 1978, § 62-11-1 (1993), and the New Mexico Supreme Court's Order of December 16, 2019, New Energy Economy, Inc. ("NEE"), by counsel, responds to the Petition[1] filed by the Hon. Speaker of the House, Brian Egolf, et al., the Hon. Governor Michelle Lujan Grisham, and Navajo Nation President Jonathan Nez (hereinafter, "Petitioners").

I. Introduction

The Petition paints the New Mexico Public Regulation Commission ("PRC" or "Commission") as a rogue bureaucracy bent on frustrating the will of the Legislature and the Governor by refusing to apply the recently passed 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"). According to Petitioners, the Commissioners manufactured "an empty vessel docket"[2] in early January 2019, in anticipation of the ETA, so that it could invoke

[1] The Petition does not include a Table of Contents, a Table of Authorities, or a Compliance Filing, as required by this Court's rules. Rule 12-318 NMRA.
[2] *Emergency Verified Petition for Writ of Mandamus* (hereafter "Petition"), p.3, ¶2 a).

New Mexico Constitution Art. IV, §34,[3] which precludes applying new laws that affect the outcome of pending cases. *Stockard v. Hamilton,* 1919-NMSC-018, ¶9, 25 N.M. 240, 242-245, 180 P. 294, 295 ("The evident intention of the Constitution is to prevent legislation interference with matters of evidence and procedure in cases that are in the process or course of litigation in the various courts of the state, and which have not been concluded, finished, or determined by a final judgment."); *U.S. West Communications, Inc. v. N.M. Pub. Regulation Commission,* 1999-NMSC- 024, ¶13, 127 N.M. 375, 379, 981 P.2d 789, 793 (quoted with approval).

Petitioners' allegations are baseless and unfair to the PRC Commissioners, who are elected by the citizens of New Mexico to positions established in the state constitution, and are abiding by their oaths of office to uphold New Mexico's Constitution and laws. As the timeline, attached as Exhibit A, demonstrates, Public Service Company of New Mexico ("PNM") co-authored the ETA for its unique benefit, and has manipulated proceedings contrary to the settlement agreement

[3] 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."

(also known as the "modified stipulation") it entered into in 2015 regarding SJGS, and which this Court approved.[4]

Contrary to Petitioners' claims, at this point in time there is no emergency justifying extraordinary, pre-appeal relief. If there is any potential for an emergency, it would occur if this Court granted the writ without full review of the many serious constitutional issues raised by the Petition and the ETA. The PRC would be forced by the terms of the ETA to approve issuance of bonds worth $361 million plus interest on April 1, 2020, which ratepayers will be obligated to pay for the next 25years, or else the bond issuance will simply be approved on that date by operation of law.[5] The bond issuance is meant to "compensate" PNM for abandoning its aging, inefficient and polluting coal plant, which PNM admitted became unprofitable long before the ETA's passage. *See* Exhibits A & C. Ratepayers will be responsible for paying the bondholders without opportunity to object, without regard to fairness or even the accuracy of PNM's claimed amount,

[4] 13-00390-UT, *Certification of Stipulation*, Nov. 16, 2015, adopted by *Final Order*, 12/16/2015, upheld in *New Energy Econ., Inc. v. New Mexico Pub. Regulation Comm'n*, 2018-NMSC-024, 416 P.3d 277, 290, ¶46.

[5] Vice President and Treasurer of PNM Resources, Elisabeth A. Eden testified as follows:
Q. (Nanasi) "If the PRC fails to act by April 1st, 2019, the financing order is simply deemed approved by operation of law. Is that correct?"
A. (Eden) "That's what the Energy Transition Act specifies, yes."
19-00018-UT, 12/13/2019 TR., p. 961.

without due process for ratepayers and without substantive regulatory review. ETA §§ 5, 7B, 7C, 8B, 11C, 22, and 31C.

Besides the issue of whether the PRC case was pending before the ETA passed, there are constitutional issues that NEE respectfully urges this court to consider. The ETA withdraws the PRC's quasi-judicial power to decide, based on evidence and following a public evidentiary hearing, the amount of money PNM is entitled to take from ratepayers when it closes a plant. Sections 2H, 2S, 5, 7B, 7C, 8B, 11C, 22, and 31C of the ETA also eliminate this Court's power to review the validity of such a transfer of money from ratepayers to PNM. This violates separation of powers because the determination of how much money a utility is entitled to extract from its customers as compensation for, say, abandoning a plant, is a judicial or quasi-judicial matter, not a legislative matter. PNM's ability to compensate itself for abandoning a plant without regulatory review will inflate rates and violate ratepayers' due process rights and the fundamental precept that if a utility is permitted a monopoly, which PNM has, its rates and behavior must be regulated. *See* Exhibit B.

The ETA also violates separation of powers (and the principle of vested rights) by overturning key provisions of the four-year old stipulated settlement *approved by this Court* in a previous case concerning the retirement of SJGS. *New Energy Econ., Inc. v. New Mexico Pub. Regulation Comm'n*, 2018-NMSC-024,

416 P.3d 277. *See* argument below, at pp.22-26. In that stipulated settlement, approved on December 16, 2015, PNM agreed to make a filing during 2018 regarding its plans for SJGS, to supply the data supporting its decision, to provide discovery and to initiate the hearing process on what turned out to be its decision to abandon SJGS. 13-00390-UT, Modified Stipulation, ¶19, attached to the last page of Exhibit A. This Court approved the settlement because among other things the 2018 hearing process provided a "net public benefit." *New Energy Econ., Inc. v. New Mexico Pub. Regulation Comm'n*, 2018-NMSC-024, 416 P.3d 277, 290, ¶46.

The ETA is also unconstitutional for other reasons, including:

1) The ETA commits ratepayers to pay PNM's undepreciated assets and abandonment and decommissioning costs without meaningful opportunity to be heard and present a claim or defense, in violation of the Due Process clauses of the New Mexico and U.S. Constitutions;[6]

[6] New Mexico Constitution Art. II, §18 states, in parallel with U.S. Const. Amendment 14, that "No person shall be deprived of life, liberty or property without due process of law …"
These constitutional provisions have been interpreted to guarantee that no individual shall have property taken from them by the government or using government processes without opportunity for hearing. "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U. S. 385, 394 (1914). The hearing must be "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U. S. 545, 552 (1965).
Elisabeth A. Eden, Vice President and Treasurer of PNM Resources, testified:
Q. (Nanasi) "If the ETA's provisions are applied in this case, the PRC's approval will be ministerial only. Essentially, if the requirements of Section 4 are met, then the Commission has no choice but to issue a financing order. Is that correct?"

2) It obstructs court review of financing orders and bond issuances by imposing an unreasonably short period for parties to appeal a financing order, and allowing PNM to issue bonds that are beyond the reach of the judiciary, even if the financing order was unlawful, in violation of N.M. Const. Art. III, §1;

3) Its title, while verbose, fails to identify ETA's purpose and its significant amendments to the Public Utility Act, violating N.M. Const. Art. IV, §18;[7]

4) It violates our Constitution's ban on logrolling by including numerous subjects that are omitted from its title;[8]

A. (Eden) "Well, the Energy Transition Act specifies the role of the Commission and what needs to be -- the conclusion needs to be a non-appealable financing order, yes." 19-00018-UT, 12/13/2019 TR. p.959.

[7] N.M. Const. Art. IV §18 states: "No law shall be revised or amended, or the provisions thereof extended by reference to its title only; but each section thereof as revised, amended or extended shall be set out in full." Testimony below addresses how the ETA, without identifying its amendments of the PUA, effectively amends it:

Elisabeth A. Eden, Vice President and Treasurer of PNM Resources, testified:

Q. (Nanasi) "The ETA has a long title, but doesn't reference its amendment to the Public Utility Act, and specifically 62-6-6, the requirement to file a separate financing application. Is that also correct?"

A. (Eden) "Yes."

19-00018-UT, 12/13/2019 TR. p. 960.

[8] N.M. Const. Art. IV §16. The purpose of the rule against log-rolling is to ensure that the legislature and the public have adequate notice about the contents of legislation. *Martinez v. Jaramillo*, 1974-NMSC-069, 86 N.M. 506, 508, 525 P.2d 866, 868.

5) It violates N.M. Const. Art. II, §19, forbidding laws that impair the obligation of contracts, in this case the settlement that PNM agreed to in 13-00390-UT;

6) It impairs vested rights of ratepayers and others in violation of N.M. Const. Art. IV, §34; and

7) Because the relevant provisions of the ETA relate only to PNM's resources, it is "special" legislation forbidden by N.M. Const. Art. IV §24.

Judicial economy will be served by either dismissing Petitioners' writ or staying it and consolidating the writ with an appeal from the PRC. More importantly, the public interest requires holistic consideration of these constitutional issues.[9]

II. The ETA Cannot Apply to Case No. 19-00018-UT Because It Was Subject to a Stipulation and Well Underway When the Law Was Passed

The timeline attached as Exhibit A and record references attached as Exhibit D clearly demonstrate that the proceeding below was no "empty vessel".[10] To the contrary, the proceeding was underway[11] when the ETA passed:

- During the October 2015 hearing, in Phase I of PNM's SJGS abandonment hearing for Units 2 & 3, in 13-00390-UT, PNM testified that it intended to

[9] NEE requests that this Court take judicial notice of the record in S-1-SC-37875.
[10] *Petition*, p. 3, ¶2a). In that document, however, Petitioners justified the use of that phrase by stating that the docket that the PRC opened had no parties, no requested outcome, no activity, etc. and no filings. *Petition*, p. 8, ¶9. In fact, the docket had 12 parties, 28 filings, and 19 public comments. See Exhibits A & D.
[11] NEE requests that this Court take judicial notice of the record in S-1-SC-37552.

"*continue indefinitely* with this 132 megawatts [at SJGS]"[12] and that its replacement power portfolio would be "the most cost-effective portfolio",[13] even as other co-owners sold their ownership stake.

- That 13-00390-UT proceeding ended with a stipulated settlement. **Under ¶19 of the stipulated settlement, PNM committed to file, between July 1 – December 31, 2018, its proposal for the long-term future of SJGS.** PNM agreed to provide firm coal pricing and other terms for coal supply, incorporate information from recent RFPs, provide stakeholders and parties access to its economic modeling, comparisons of alternative replacement power scenarios among other things.[14]
- On 12/16/2015, the PRC made PNM's obligation clear in its *Final Order*: "The Modified Stipulation at ¶19 requires PNM to make the first filing in the 2018 Review, a recommendation as to whether all of SJGS … should continue serving its customers after June 30, 2022." Citing WRA's and CCAE's responses to NEE's Exceptions, the Commission further stated: "[M]ore important than the burden of proof in the Modified Stipulation's 2018 ***proceeding***, and what is undisputed, is that PNM is tasked with initiating that ***proceeding*** and providing sufficient initial evidence to support

[12] 13-00390-UT, TR., PNM Vice President of Regulatory Affairs Ortiz, 10/13/15 pp. 4059-4060.) (emphasis supplied.)
[13] 13-00390-UT, *Certification of Stipulation,* November 16, 2015, p.29.
[14] 13-00390-UT, Modified Stipulation, ¶19.

the outcome [.]" (emphasis supplied.) 13-00390-UT, *Final Order*, p.3, ¶4. The proceeding envisioned by the stipulation is the proceeding Petitioners (and PNM) now seek to enjoin via mandamus.[15]

- NEE appealed the PRC's ruling approving the stipulated settlement, Case No. S-1-SC-35,697. In response, PNM argued to this Court– strenuously – that the settlement was fair to all, because it provided: 1) 50% recovery of PNM's undepreciated investments in SJGS Units 2 and 3, rather than the requested 100% (an outcome that the PNM-drafted ETA now precludes in favor of 100% recovery for SJGS Units 1 and 4 and all of PNM's future fossil and nuclear abandonment cases); and, 2) a filing and hearing process, to be initiated by PNM and to begin before the end of 2018, to address the future of SJGS. PNM argued to this Court: "*there will be ample opportunity to address the continued desirability of SJGS as a generation resource in 2018."* S-1-SC-35,697, *Answer Brief of Intervener-Appellee Public Service Company of New Mexico,* 11/2/2016, p.43.[16]

[15] PNM's regulatory expert of 30+ years, Frank Graves, explained his understanding of the meaning of the 2018 Review proceeding as stated in the 13-00390-UT *Final Order*: "[I]n general, to demonstrate the economic credibility of a plan, you would submit some system simulations that show the benefits compared to alternatives, and they would be subject to review in a public hearing." 19-00018-UT, 12/11/2019, TR., p.545.

[16] The PNM law firm and lawyer who argued that this Court should accept the stipulated settlement because of the future SJGS hearing process that would occur, Keleher and McLeod (Thomas Bird, Esq.), is the same law firm and lawyer

- On appeal, this Court upheld the *Final Order,* agreeing with PNM that the stipulation's required "2018 review" of SJGS "provided a net public benefit." *New Energy Economy v. New Mexico Public Regulation Comm'n*, 2018-NMSC-024, *supra*.
- Between 11/2016–1/2017, within 11 months of the PRC's decision ratifying the stipulated settlement, PNM's financial modeling repeatedly demonstrated that it would be more cost effective for ratepayers and more profitable for PNM to abandon SJGS entirely. Exhibit A. As a result, on 2/24/2017, PNM's Board of Directors determined that shutting down SJGS would make the company more profits. Exhibit C.
- Notwithstanding its early 2017 determination that SJGS was unprofitable for PNM, and notwithstanding the fact that in the summer of 2018 all but one SJGS owners (PNM, TEP, UAMPS, and Los Alamos County) notified each other that they 1) didn't want to extend the coal supply agreement and 2) decided not to continue the SJGS partnership agreement (aka "Exit Date Agreement"), PNM did nothing regarding abandonment.[17] Undoubtedly,

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representing Legislator Petitioners in this case, taking the position that the promised hearing should be disregarded and that the ETA's requirement of 100% of PNM's desired compensation for retiring Units 1 and 4 must be enforced without PRC's ability to adjust or modify that amount for any reason.

[17] *13-00390-UT, Public Service Company of New Mexico's Verified Compliance Filing Pursuant to Paragraph 19 of the Modified Stipulation,* 12/31/2018, Exhibits

PNM stalled its filing until the very last day (12/31/2018) to allow for passage of its ETA, which would guarantee that there would be no scrutiny of the amount that PNM would seek as compensation for the abandonment, resulting in 100% recovery of hundreds of millions of dollars that the PRC would be powerless to scrutinize and that ratepayers would be powerless to avoid paying. Predictably, in its "compliance filing," PNM informed the PRC that the promised hearing was "essentially moot" and that it would file for abandonment later in 2019.[18]

- On 1/10/19, a few days after receiving PNM's "sleight of hand" filing, the PRC initiated a docket to determine PNM's compliance with ¶19 of the modified stipulation, and because "PNM has essentially irrevocably committed itself to the abandonment of SJGS over six months ago," to determine whether the Commission "should not delay the proceeding any longer and should instead set a procedural schedule [ ] requiring PNM to file testimony in support of already pending abandonment of SJGS."[19]

TGF-4 - TGF-7, attached by Affiant, PNM's Vice President of Generation, Thomas G. Fallgren.

[18] *Id.*, at p.2.

[19] *13-00390-UT & 19-00018-UT 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*, 1/10/2019, p. 10.

- On 1/30/2019, after receiving filings from a dozen respondents,[20] the PRC ordered "an abandonment proceeding under NMSA 1978 §62-9-5[21] of the Public Utility Act … to address the abandonment of PNM's interest in SJGS Units 1 and 4. The scope of the proceeding shall include all issues relevant to an abandonment proceeding under NMSA 1978 §62-9-5 and any other applicable statutes and NMPRC rules, including §62-6-12." 19-00018-UT, *Order Initiating Proceeding On PNM's December 31, 2018 Verified Compliance Filing Concerning Continued Use of And Abandonment of SJGS*, 1/30/2019, ¶A. PNM was ordered to file testimony relating to SJGS abandonment, including "the proper treatment and financing of undepreciated investments, decommissioning costs and reclamation costs," and replacement resources. The Commission ordered PNM to file its abandonment application by 3/1/2019. *Id.*, at ¶B, ¶B5, and ¶¶B11-13.

[20] 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.)

[21] 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…"

- On 2/7/2019, the ETA, which PNM had been working on for months, was introduced in the Senate.
- On 2/27/2019, PNM petitions this Court for relief to stay the PRC proceeding.[22] The Court orders a stay on 3/1/2019.
- On 3/22/2019, the Governor signs the ETA into law.
- On 6/14/2019, the ETA becomes effective.
- On 6/26/2019, the Court denies PNM's Petition and lifts the stay .
- On 7/1/2019, PNM files a Consolidated Application in a new PRC docket, 19-00195-UT, *not* the previously established docket , 19-00018-UT.

  On 7/10/2019, the PRC issues a *Corrected Order on Consolidated Application*, providing for two proceedings regarding the issues raised in PNM's Application. PNM's request for approval to abandon SJGS and a financing order, are being considered in the original case, 19-00018-UT.

[22] In PNM's Emergency Petition it states: "No compelling or exigent circumstances require PNM to immediately apply for abandonment" (p.4); "no 'irrevocable' steps have been taken to abandon SJGS"(pp. 7-8). PNM's claim to this Court conflicts with *PNM's Verified Compliance Filing Pursuant to Paragraph 19 of the Modified Stipulation,* 12/31/2018, filed at the PRC, which stated: ""Because the majority of SJGS owners have given notice not to continue SJGS operations and there are no agreements that would allow it to operate beyond 2022, *SJGS will not be available to serve PNM customers after 2022*. 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 [.]" *Attached Affidavit of Thomas G. Fallgren in Support PNM's Verified Compliance Filing Pursuant to Paragraph 19 of Modified Stipulation,* p.2.

The replacement power aspects of the Application would be considered in a new case, 19-00195-UT.

- On 7/25/2019, Hearing Examiners issued a *Procedural Order*, requiring briefing "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." pp. 4-5, ¶¶3 & 8.

Throughout the 19-00018-UT proceeding, the PRC has been methodical, including taking extensive testimony regarding closure and cost-recovery, etc., as envisioned by the 2015 stipulated settlement.

It is one thing for Petitioners to argue that there was no pending case before the PRC when the ETA passed, but it is quite another to accuse *the PRC* of attempting to manipulate and avoid the law. Ratepayers have had a vested interest because of the 13-00390-UT contractual settlement agreement in effect when PNM made its "compliance filing" on December 31, 2018, before the legislature was even in session. Accordingly, this case was pending before ETA was introduced. Petitioners have also sworn to uphold our constitution, and cannot rightly argue that this Court should ignore its duty to observe Art. IV §34. Worse, Petitioners are seeking through an "empty vessel" shibboleth to get this Court to eliminate due process consideration of the fairness, accuracy and appropriateness of PNM's demand and to simply stick the ratepayers with the tab.

Hearing testimony below has established the following, which pertain to the outcome and constitutional issues in this case:

1. PNM was the principal drafter of the ETA;[23]
2. The ETA was predicated on the assumption that there was an economic benefit to ratepayers. However, the 19-00018-UT hearing showed that:
    a. The Energy Transition Act would cost ratepayers $20 million more compared to traditional ratemaking that was deployed in 13-00390-UT, SJGS abandonment of Units 2 & 3.[24]
    b. PNM's draft financing order includes more than the ETA requires, and those additional paragraphs may be necessary to achieve a AAA bond rating, without which the bond may not be possible to earn AAA bond rating.[25] The AAA bond rating, hence lower interest rate, is the ETA's primary selling point.
    c. Ratepayers could be stuck with an "extremely steep yield curve where -- where interest rates in the longer years are quite, quite high."[26]
3. "The claim that PNM should not be allowed to recover 50 percent of the

[23] 19-00018-UT, 12/10/2019 TR. Ronald N. Darnell, PNM Senior Vice President, pp.117-118.
[24] Questioning by Hearing Examiner Ashley Schannauer of WRA expert witness, former Commissioner Douglas J. Howe, 12/17/2019, p. 246.
[25] 19-00018-UT, 12/13/2019 TR. Charles Atkins, PNM's expert witness on securitization, pp.1106-1118.
[26] 19-00018-UT, 12/13/2019 TR. Charles Atkins, PNM's expert witness on securitization, pp.1056-1057.

undepreciated value of SJGS Units 2 and 3, as recommended in the April and November certifications is rejected. … [T]he certification's recommendation of 50 percent is reasonable, perhaps even generous."[27,28]

III. Argument

A. Petitioners Correctly State the Requirements for Mandamus, but Misapply Them

NEE agrees that this case presents issues of great public importance, which is one reason the Court should not decide them in this truncated fashion. No emergency exists unless the PRC actually applies the ETA to SJGS abandonment. *See* Exhibit B, Fetter Declaration, pp.6-7.

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[27] 13-00390-UT, *Final Order*, p.21, ¶56.

[28] In 19-00018-UT, New Mexico Attorney General expert witness, Andrea Crane, testified:
"I recommend that the NMPRC approve the abandonment of SJGS Units 1 and 4, but deny the Company's request to recover 100% of its stranded costs from ratepayers. In fact, a possible result is that 100% of any stranded costs are allocated to shareholders, rather than New Mexico ratepayers."
New Mexico Attorney General, Exhibit 1, p.57.
Sierra Club expert witness, Jeremy Fisher, also testified: "While the Company's going-in position is that ratepayers should bear 100% of all stranded costs, ratepayers going-in position should be that the Company bears 100% of all stranded costs." Sierra Club, Exhibit 1, JIF-2, p.15.
When questioned about the fairness of customers bearing 100% of the burden for PNM's wrong decision, testifying in late 2015 that further investment in SJGS was economic yet in early 2017 admitting that SJGS is uneconomic, WRA expert witness, former PRC Commissioner, Douglas Howe, testified: "They should have some responsibility for that bad bet." 19-00018-UT, 12/17/2019 TR. p.147.

NEE agrees that the PRC may have a non-discretionary duty, but its duty is to refrain from applying the ETA to a case which even PNM testified was pending before its passage.[29]

The facts in this case are as set forth above in NEE's timeline, not in the *Petition*. Thus, the Petition is based on disputed facts.

NEE disputes that the matters raised by Petitioners must be taken up now, rather than on appeal from the PRC's decision. If the PRC refuses to apply the ETA to the present proceeding, there is no emergency because no financing order will issue without due process, a regular appeal to this Court can be pursued, and no financing bonds to "compensate" PNM for its abandonment will issue until the process is complete, consistent with due process. On the other hand, if the Court grants the writ before addressing all issues and without a full record, there will be an emergency because the ETA allows PNM to summarily obtain a financing order and issue bonds in the amount of $361 million plus an unknown interest rate, with the opportunity for *the utility* to seek an "upwards adjustment" per ETA §7B and C. These issues must be resolved for the public, the ratepayers, and the

[29] Senior Vice President of PNM, Ronald N. Darnell, testified as follows:
Q. (Nanasi) "Sir, I'm asking you if there was ever a proceeding pursuant to paragraph 19 [of the Modified Stipulation in the 13-00390-UT case]?"
A. (Darnell) "That's not what we're in now?"
19-00018-UT, 12/10/2019 TR. p.81.

bondholders to have confidence that the application or non-application of ETA is settled.

Petitioners fail to substantiate their claims of irreparable harm. To invoke the original jurisdiction of this Court in a Petition for Writ of Mandamus, a party must show (1) a likelihood that they will prevail on the merits of their appeal; (2) a showing of irreparable harm to applicant unless the Petition is granted; (3) evidence that no substantial harm will result to other interested persons; and (4) a showing that no harm will ensue to the public interest. *Associated Securities Corp. v. Securities & Exchange Commission*, 283 F.2d 773 (10th Cir. 1960). In *Tenneco Oil v. N.M. Water Quality Control Commission*, 736 P.2d 986, 105 N.M. 708 (NMCA 1986), the Court of Appeals stated that "[m]ere allegations of irreparable harm are not, of course, sufficient. A showing of irreparable harm is a threshold requirement in any attempt by applicants to obtain a stay." *Id* at 988. Petitioners' writ states that the PRC's actions are "causing immediate and irreparable harm," *Petition* at p. 11. Petitioners further append affidavits that state "[t]hese circumstances create a perception of uncertainty and risk"[30] and that "[t]he financial aid, assistance and protections for workers, which were a fundamental part of this legislation, are now at risk …"[31] These allegations, without more, do

[30] Affidavit of David Paul, attached to Petitioners' *Writ*, at 1.
[31] Affidavit of Navajo Nation President Johnathan Nez, attached to Petitioners' *Writ*, at 1.

not substantiate Petitioners' claim of irreparable harm. *See* Exhibit B, Fetter Declaration, p. 6.

Moreover, the worker assistance provisions President Nez addresses will not come due until July 2022, when the plant is proposed to be abandoned. Thus, none of Petitioners' allegations of harm actually address immediate or irreparable harms.

B. It Is Undisputed that the PRC Case Was Pending before the ETA was Introduced or Became Law

Petitioners ask this Court to accept the notion that Art. IV §34 should not prevent the application of ETA to the pending abandonment proceeding because the PRC commenced the abandonment proceeding to improperly avoid applying the forthcoming ETA. The *undisputed* facts demonstrate otherwise. Pursuant to the stipulation, the future of SJGS was to be the subject of a filing that PNM was to make in 2018, followed by a hearing on the appropriateness of PNM's position. PNM's obligation in the SJGS case, have been pending since 2015. The PRC, in response to PNM's flagrant avoidance of its obligation under the Stipulation, initiated the hearing itself, before passage of the ETA. It did what was called for.

The issue before this Court is not the one Petitioners raise. Rather, it is this: If a party enters into a settlement and promises to engage in a particular process, in the future, to determine the outcome of a matter in controversy, should that party be permitted to escape its obligation by drafting and promoting a law that nullifies the settlement? Further, should this Court allow legislators to override the

constitutional prohibition of laws that relieve parties of the consequences of agreements they made and on which courts, including this one, relied?

C. The ETA is Unconstitutional for Many Reasons Not Raised in the Petition

It is axiomatic that a court should not enforce, by Mandamus, a statute that is unconstitutional. "An unconstitutional act is not a law; it confers no rights; it imposes no duties; it affords no protection; it creates no office; it is, in legal contemplation, as inoperative as though it had never been passed." *Norton v. Shelby County*, 118 U.S. 425, 442, 6 S. Ct. 1121, 1125, 30 L. Ed. 178 (1886), *See* also, *Com. v. Wolfe*, 636 Pa. 37, 48, 140 A.3d 651, 658 (2016) (Courts have no power to enforce unconstitutional statutes). NEE has raised a series of serious, legitimate constitutional challenges to the ETA.

The 6,000 word limit for responses to the Petition precludes anything other than listing those issues as was done in the Introduction, but because the Petitioners focus on separation of powers, *Petition*, pp.8-11, NEE responds as follows: The ETA violates separation of powers because it eliminates judicial and quasi-judicial assessment of what PNM is entitled to receive from ratepayers when it abandons the SJGS. This issue involves the rights of individuals in a specific property context, not a matter of general policy. This 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. Under the ETA, ratepayers simply pay up, without oversight, analysis, application of legal standards,[32] or any other safeguard.

Furthermore, the ETA violates separation of powers because it impairs the obligation of the contract PNM entered into when it agreed to the Stipulation in 13-00390-UT and agreed to initiate a hearing, before the end of 2018, to determine the future of SJGS. Settlement agreements are contracts. As the New York Court of Appeals explained:

> Stipulations of settlement are favored by the courts and not lightly cast aside. It is well settled that a stipulation of settlement is an independent contract subject to the principles of contract interpretation and a party will be relieved from the consequences of a stipulation made during litigation only where there is cause sufficient

[32] *Pub. Serv. Co. of New Mexico v. New Mexico Pub. Regulation Comm'n*, 2019-NMSC-012*, supra* at ¶¶8-11: requiring 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, citing, NMSA 1978, §§ 62-6-4(A), 62-8-1, 62-8-7(A) and 62-3-1(B).

> to invalidate a contract, such as fraud, collusion, mistake or accident. Municipalities are treated no differently from private parties with respect to contractual obligations.

Ecogen Wind LLC v. Town of Prattsburgh Town Bd., 112 A.D.3d 1282, 1284–85, 978 N.Y.S.2d 485, 487–88 (2013) (citations omitted).

Legislation that has the effect of setting aside a settlement agreement or setting aside the decision of a court violates our constitution's Art. II §19[33] because it impairs the obligation of a contract, and violates separation of powers.

A settlement will not be set aside just because it later proves to have been unwise or unfortunate for one party to enter into the agreement. *Envtl. Control, Inc.,* 2002–NMCA–003, ¶ 19, 131 N.M. 450, 38 P.3d 891. Once a settlement is negotiated, the parties are bound by its provisions and must accept both the burdens and benefits of the contract. *Montano v. NM Real Estate Appraiser's Bd*., 2009-NMCA-009, ¶ 12, 145 N.M. 494, 497, 200 P.3d 544, 547.

In *Wayne J. Stellhorn, et al., Plaintiffs, v. The Allen County Council, et al., Defendants.*, 2001 WL 35965194 (Ind.Cir.) the Court held that the Order of Relief is a final decree, approved by the parties and entered by the Court, and any application of subsequent legislation to overturn or set aside the Order of Relief would violate the prohibitions in the Constitution of the State of Indiana against the

[33] N.M. Const. Art. II, §19: "No…law impairing the obligation of contracts shall be enacted by the legislature."

infringement of and encroachment upon one tribunal branch of government upon another, (See, Article 3, Sec. 1); *see* also *Thorpe v. King,* 227 N.E.2d 169 (Ind. 1967) (statute cannot be applied to set aside court's final judgment); *Progressive Improvement Assoc. of Downtown Terra Haute v. Catch All Corp.,* 258 N.E.2d 403 (Ind. 1970) (legislature may not impair court's control over judgments).

The terms of the Order of Relief were agreed to by the parties and adopted by the Court, and subsequent legislation does not moot it, make it disappear, authorize Defendants to violate it, or make continued compliance with the terms of the Order of Relief illegal or contrary to public policy. *Id.*

The Order of Relief is a judgment which constitutes a contract. *Heath v. Fennig,* 40 N.E.2d 329 (Ind. 1942). Application of subsequent legislation to invalidate or circumvent the Order of Relief would violate the mandate of Article 1, Section 24 of the Constitution of the State of Indiana requiring that "No *ex past facto* law, or law impairing the obligation of contracts, shall ever be passed" and of Article 10, Section 1 of the Constitution of the United States that "No state shall... pass any... law impairing the obligations of contracts." *See Pulos v. James,* 302 N.E.2d 768 (Ind. 1973) (while legislature may prohibit contracts against public policy it may not impair vested rights under contract).

The Constitution is concerned with means as well as ends. The Government has broad powers, but must use them "consist[ent] with the letter and spirit of the

constitution." *McCulloch v. Maryland,* 4 Wheat. 316, 421, 4 L.Ed. 579 (1819). As Justice Holmes noted, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way." *Pennsylvania Coal,* 260 U.S., at 416, 43 S.Ct. 158. *Horne v. Dep't of Agric.,* 135 S. Ct. 2419, 2428, 192 L. Ed. 2d 388 (2015).

The ETA cannot be construed to nullify a stipulated settlement relied upon and upheld by this Court, because it would constitute legislative interference with ratepayers' vested rights or pending case application of Art. IV §34 or legislative impairment of a stipulated settlement under Art. II §19. If this Court held otherwise, it would be endorsing a legislative right to usurp judicial review. *Thorpe v. King*, 248 Ind. 283, 285, 227 N.E.2d 169, 170 (1967).

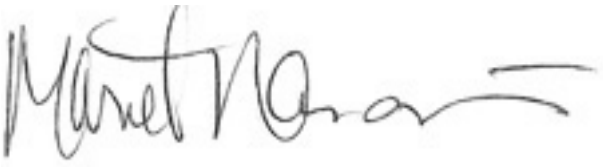
IV. Conclusion

WHEREFORE, New Energy Economy requests that this Honorable Court order 1) a Stay of this Proceeding 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 is sure to happen on or about March 2020; or 2) dismissal of the Emergency Petition of Writ of Mandamus in favor of addressing all issues on appeal. No prejudice will come to Petitioners to wait until a full record is developed and a decision is made before the

PRC and these issues come before this Court in an appeal, which will happen before April 1, 2020. New Energy Economy is seeking equitable relief because deciding the Petition based on disputed facts would be manifestly unjust and violate the public interest.

Respectfully submitted this 6th day of January 2019,

New Energy Economy



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