

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF PUBLIC SERVICE COMPANY)
OF NEW MEXICO'S PETITION FOR DECLARATORY)
ORDER REGARDING THE PURCHASE OF RENEWABLE)
ENERGY CERTIFICATES FROM QUALIFYING)
FACILITIES)
) Case No. 05-00352-UT
PUBLIC SERVICE COMPANY OF NEW MEXICO,)
)
Petitioner.)
_____)

BRIEF-IN-CHIEF OF
THE REGENTS OF THE UNIVERSITY OF NEW MEXICO

Respectfully submitted,

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The Regents of the University of New Mexico (“UNM”) submit this Brief-in-Chief in accordance with the Hearing Examiners August 31, 2006 *Order Concerning Briefs*.

I. THE COMMISSION SHOULD ALLOW UTILITIES TO USE RECs FROM RENEWABLE ENERGY CONSUMED ON-SITE BY A QF TO MEET ITS RPS WITHOUT REQUIRING A “SIMULTANEOUS BUY-SELL AGREEMENT.”

The Hearing Examiner’s March 31, 2006 *Procedural Order* asked the parties to address, among other questions, “[w]hether renewable energy consumed on site by a QF is energy ‘contracted for delivery’ and thus usable to meet a utility’s renewable portfolio standard.” This is a question of statutory interpretation. It arises because a provision in the New Mexico Renewable Energy Act (“REA”) provides that renewable energy certificates (“RECs”) may be traded, sold or otherwise transferred by their owner to another party, and that transfers to or use of an REC by a public utility for compliance with its renewable energy portfolio standard (“RPS”) “shall require the electric energy represented by the certificate to be *contracted for delivery in New Mexico* unless the commission determines that there is a regional market for exchanging renewable energy certificates.” NMSA 1978, § 62-16-5(B)(1)(b) (Emphasis added).

The plain language of § 62-16-5(B)(1)(b), the statutory purpose of the REA and provisions in Commission Rule 571 support a Commission conclusion that renewable energy consumed on site by a QF is energy “contracted for delivery in New Mexico,” and thus usable to meet a utility’s RPS. *See, e.g., State v. Blackhurst*, 106 N.M. 732, 735, 749 P.2d 1111 (1988) (central concern of statutory construction is to determine and give effect to the legislature’s intent; words in statutes should be given their ordinary meaning unless the legislature indicates a different intent).

Moreover, Staff’s recommendation that the Commission require a QF and a utility to enter

into a “simultaneous buy-sell agreement” requiring the QF to sell “the entire output to the utility which simultaneously sells the same quantity of energy to the QF” to satisfy this statutory interpretation is *not* supported by the plain language of § 62-16-5(B)(1)(b) or the purpose of the REA, and is both unnecessary and problematic. *See Staff Ex. 2* (Potturi Direct) at 5-6.

As PNM witness Scharff testified, a QF’s electrical energy is intended primarily to be consumed at the site where it is generated, with some variable amount of excess energy to be transferred to an interconnecting utility. **PNM Ex. 1** (Scharff Direct) at 15. Giving the word “delivery” in § 62-16-5(B)(1)(b) one of its plain meanings (to be brought forth), if renewable electric energy generated in New Mexico is consumed on site, it is delivered in New Mexico.

Commission Rule 571 (which supplements Commission Rule 570, is to be “liberally construed to carry out its intended purposes,” and supercedes Rule 570 in the case of any conflict between the two Rules) requires that public utilities interconnect with any QF which executes a standard interconnection agreement approved by the Commission. 17.9.571.6 and 17.9.571.8 through 17.9.571,10 NMAC. Given the primary function of a QF noted above, UNM believes satisfaction of that interconnection agreement requirement is sufficient to satisfy the plain meaning of “contracted for” in § 62-16-5(B)(1)(b).

The REA’s goals include “the use of renewable energy...to promote energy self-sufficiency, preserve the state’s natural resources and pursue an improved environment in New Mexico.” NMSA 1978, § 62-16-12.A(1). The foregoing interpretation of the “contracted for delivery” requirement in § 62-16-5(B)(1)(b) is entirely consistent with those goals. It also is consistent with the goal of Commission Rule 571 to “encourage the use of small-scale customer-owned renewable or alternative energy in recognition of the beneficial effects the development

of such resources will have on the environment in New Mexico.” 17.9.571.6 NMAC.

A QF owner’s on-site use of the renewable energy generated in New Mexico displaces energy that otherwise would have to be supplied by a public utility in the State. Thus, a public utility’s ability to use RECs associated with such on-site renewable energy use to satisfy its RPS promotes the generation of renewable energy in New Mexico and is consistent with the goals of the REA and Commission Rule 571.

No language in § 62-16-5(B)(1)(b) requires or refers to a “purchase” by, or “sale” or “transfer” of renewable energy to a public utility. Nor does any language there or elsewhere in the REA limit a public utility’s use of RECs to those associated with renewable energy generated by a QF interconnected with that utility. For these reasons, UNM believes the “simultaneous buy-sell agreement” condition recommended by Staff and supported by EPE is not consistent with, or supported by, any established rules of statutory construction.

Staff’s recommended “simultaneous buy-sell agreement” condition would add an unnecessary, extra contract requirement for the transfer of RECs to public utilities that could discourage generation of renewable energy in New Mexico by creating tax and rate-making effects not addressed by Staff or any other party and establishing a limitation on such transfers not imposed by the Legislature. As noted above and described by the Commission’s Electric Engineering Bureau Chief, such a “buy-sell agreement” would create two distinct, legal “sales” of renewable energy (the sale of a QF’s “entire output” to an interconnected utility and a simultaneous sale by the utility of the same energy back to that QF). Those “sales” presumably would have to be recognized by both the QF and the utility as such for both federal and State income tax, and State gross receipts tax purposes.

In that event, QFs would have to pay those federal and State taxes on “sales” of renewable energy never physically delivered to an interconnecting utility. Moreover, since public utilities generally are allowed to recover their income and gross receipts taxes from their customers as a “cost of service” under traditional rate-making principles adopted by the Commission, these artificial energy “sales” could unnecessarily increase customer rates.

Finally, as noted above, nothing in the REA limits a utility’s use of RECs for meeting its RPS to RECs associated with renewable energy from a QF interconnected with that utility. For example, Staff’s recommended “simultaneous buy-sell agreement” condition would prevent a QF interconnected with PNM from transferring its REC to EPE in a situation where PNM needs no more RECs to satisfy its RPS, but EPE or SPS does (or vice versa). This sort of result would discourage the generation of renewable energy in New Mexico and would be contrary to the goals of the REA.

CONCLUSION

For the foregoing reasons, the Commission should conclude that a public utility may use RECs associated with renewable energy consumed on site by a QF to meet its RPS without entering into a “simultaneous buy-sell agreement” with that QF.

Respectfully submitted,

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