

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

**IN THE MATTER OF PUBLIC SERVICE )  
COMPANY OF NEW MEXICO'S NOTICE )  
OF FILING OF "RENEWABLE ENERGY )  
PROCUREMENT PLAN FOR 2006," )**

**Case No. 05-00356-UT**

**PUBLIC SERVICE COMPANY OF NEW MEXICO, )  
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 )  
Petitioner. )  
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**RECOMMENDED DECISION OF THE HEARING EXAMINER**

**December 9, 2005**

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Anthony F. Medeiros, Hearing Examiner for this case, submits this Recommended Decision to the New Mexico Public Regulation Commission (“Commission” or NMPRC) pursuant to 17.1.2.32.E(4) and 17.1.2.39.B NMAC. The Hearing Examiner recommends the Commission adopt the following statement of the case, discussion, findings of fact, conclusions of law and decretal paragraphs in its Final Order.

## **I. STATEMENT OF THE CASE**

On September 1, 2005, Public Service Company of New Mexico (PNM or “Company”) filed a Notice of Filing of “Renewable Energy Procurement Plan for 2006” pursuant to the Renewable Energy Act (REA), NMSA 1978, § 62-16-1, *et. seq.* (2004), and the NMPRC rule governing Renewable Energy for Electric Utilities, 17.9.572 NMAC (“Rule 572”). PNM included the direct testimony of PNM representatives Michael A. D’Antonio and Patrick K. Scharff with and in support of its proposed Procurement Plan for 2006 (“2006 Plan,” “Procurement Plan” or “Plan”).

On September 12, 2005, Commissioner Jason Marks issued a Notice of Possible *Ex-Parte* Communication to advise PNM and other parties to this case of a communication which could be considered *ex parte*. This Notice described a meeting on Wednesday, September 7, 2005 with Craig O’Hare, the Special Assistant for Renewable Energy, in the Office of the Secretary of the New Mexico Energy, Minerals and Natural Resources Department (“EMNRD”) at which the Commissioner discussed procurement plans with Mr. O’Hare. Although EMNRD was not then a formal party in this case, Commissioner Marks considered EMNRD to be an interested party, and on that basis he disclosed the communication, even if it may not have been *ex parte* within the

literal meaning of the Commission's rules. Ultimately, EMNRD did not seek leave to intervene in this case.

On September 13, 2005, New Mexico Industrial Energy Consumers (NMIEC) filed a motion to intervene.

On September 13, 2005 the Commission issued an Order Docketing Case. The Commission appointed the undersigned to preside over this matter. The Commission also directed that the following questions should be addressed as part of this case:

- a. if PNM were to meet 20% of its RPS from solar, how much nominal generating capacity would be required?
- b. can and should the Commission require PNM to issue an RFP for 5 to 30 megawatts of solar power to apply toward its RPS as part of its 2006 Plan?
- c. if PNM were required to issue an RFP for 5 to 30 megawatts of solar power to apply toward its RPS, what effect would doing so have on the cost threshold?
- d. comment on increasing the renewable portfolio standard to 20% by 2020 and how that increase could be achieved through the use of demand side management, integrated resource planning and solar power.

On September 14, 2005, the Hearing Examiner issued an Order scheduling a pre-hearing conference for September 21, 2005.

On September 20, 2005 Western Water and Power Production Limited, L.L.C. (WWPP) filed a motion to intervene.

On September 21, 2005 a pre-hearing conference was convened. Participating in the pre-hearing conference were counsel for and/or representatives of PNM, the Attorney General of the State of New Mexico ("Attorney General"), NMIEC, El Paso Electric Company (EPE), the Coalition for Clean Affordable Energy (CCAEE) and the Commission's Utility Division ("Staff").

At the pre-hearing conference, the parties discussed, among other issues, the prospect of extending by sixty days the period for Commission review of PNM's 2006 Plan. The Commission must approve or modify a public utility's procurement plan within sixty days, but may, for good cause, extend the time to approve a plan for an additional sixty days. NMSA 1978, § 62-16-4(E). The parties agreed the proposed expansion of time should be provided for, and no one expressed opposition to the contemplated expansion. The parties also agreed to the schedule and the other procedural details set forth in the Hearing Examiner's Procedural Order and Notice, issued September 22, 2005.

Among other things, the Procedural Order and Notice scheduled a public hearing for November 2, 2005; required PNM to publish the Procedural Order and Notice in the *Albuquerque Journal* by September 29, 2005; required PNM to file supplemental direct testimony by October 5, 2005; provided for the filing of protests pursuant to section 62-6-14(E) of the REA by October 11, 2005; set an intervention deadline of October 19, 2005; required Staff and permitted intervenors to file direct testimony by October 19, 2005; set a rebuttal testimony deadline of October 19, 2005; and concluded good cause existed to extend the time to review PNM's 2006 Plan for an additional sixty days.

On September 22, 2005, the Attorney General filed a motion for leave to intervene.

On September 28, 2005, PNM filed an affidavit of publication stating the Procedural Order and Notice had been published in the *Albuquerque Journal* on September 25, 2005.

On October 4, 2005 EPE filed a motion to intervene. CCAE also filed a motion to intervene on this date.

On October 5, 2005 PNM filed a response to the Commission's questions listed in its Order Docketing Case. PNM also filed the supplemental testimony and exhibits of Michael A. D'Antonio in support of the Company's response.

On October 19, 2005 Staff filed the direct testimony of James A. Brack, and CCAE filed the direct testimonies of Benjamin P. Luce and Randy S. Sadewic.

On October 21, 2005 Jon Spar provided comments in support of PNM's proposed Procurement Plan by email to Commissioner Marks and Staff. Staff filed Mr. Spar's comments on October 26, 2005.

On October 26, 2005, PNM filed the rebuttal testimonies of Michael A. D'Antonio and Patrick K. Scharff.

On October 27, 2005, CCAE filed the rebuttal testimony of Benjamin P. Luce.

On October 31, 2005, CCAE filed a notice of entry of appearance of Steven Sugarman as additional counsel.

Except as indicated above, no other intervenors filed testimony.

This matter was heard at an evidentiary hearing on the merits on November 2, 2005. The following entered appearances:

**For PNM:**

Benjamin Phillips, Esq.  
Rebecca Dempsey, Esq.  
White, Koch, Kelly & McCarthy, P.A.  
PO Box 787  
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**For NMIEC:**

Steven Michel, Esq.  
134 A Martinez Street  
Santa Fe, NM 87501

**For EPE:**

Randall W. Childress, Esq.  
300 Galisteo Street  
Santa Fe, NM 87501

**CCAE**

Aletta Belin, Esq.  
Steven C. Sugarman, Esq.  
Belin & Sugarman  
618 Paseo de Peralta  
Santa Fe, NM 87501

**For Staff:**

Jane L. Yee, Esq.  
Staff Legal Division

The following witnesses appeared at the hearing and were examined on their respective pre-filed testimonies:

**For PNM:**

Michael A. D'Antonio  
Patrick K. Scharff

**For CCAE:**

Benjamin P. Luce  
Randy S. Sadewic

**For Staff:**

James A. Brack

Larry Mapes, president of the Taos chapter of the Taos Solar Energy Association, provided public comment at the hearing.

The Attorney General and WWPP did not appear at the hearing. The Hearing Examiner accordingly struck their interventions in conformity with Commission policy and practice.

At the conclusion of the hearing, the Hearing Examiner asked the parties to submit proposed recommended decisions and legal briefs on two issues: (i) the meaning of section 62-16-4(A)(5) of the REA and (ii) whether the issues in PNM's Petition for Declaratory Order, NMPRC Case No. 05-00352-UT, relating to RECs associated with energy purchased by a utility from a qualifying facility, or QF, could impact PNM's proposed customer-owned solar photovoltaic (PV) incentive program for PV systems with capacity rated at 10 kW or less (the "Small PV Program" or "Program"). The Hearing Examiner also asked the Company to file a statement clarifying whether the costs for the Small PV Program identified in attachment PKS-2 to the Direct Testimony of PNM Witness Scharff, PNM Exhibit 5, included carrying charges. On November 4, 2005, PNM filed its Verified Statement Regarding Carrying Costs in Response To Hearing Examiner's Request affirming carrying charges are not included.

On November 3, 2005, Staff filed its Proposed Statement of the Case.

On November 10, 2005, the Commission issued a Bench Request directing PNM to respond to three questions regarding its Renewables Request for Proposals ("Renewables RFP" or RFP). Additionally, on this date, Commissioner Jason Marks filed a Notice of Comment Hearing scheduling oral comment at the Commission's Open Meeting on November 15, 2005 regarding PNM's Renewables RFP including as to whether the RFP should be amended or reissued.

On November 14, 2005, PNM filed its Response to Bench Request.

On November 18, 2005 PNM filed its Motion to Supplement Renewables Request for Proposals, PNM Exhibit 4.

On November 21, 2005 the transcript of the hearing held November 2, 2005 with admitted exhibits was filed by the Court Reporter, Betty J. Lanphere.

On November 23, 2005, Staff filed an unopposed motion for extension of time to file its brief-in-chief. The Hearing Examiner granted the motion by email to the parties on that date.

On November 23, 2005, PNM and CCAE filed their joint proposed recommended decision and motion to amend attachments PKS-1 and PKS-2 to the Direct Testimony of Patrick K. Scharff, PNM Exhibit 5.

On November 28, 2005, Staff filed its opening brief and proposed recommended decision.

On November 28, 2005, PNM filed its post-hearing brief.

On November 30, 2005, PNM and CCAE filed a supplement to their joint proposed recommended decision and motion to amend attachments PKS-1 and PKS-2 to PNM Exhibit 5. In addition, on this date CCAE filed a motion to extend the time for filing response briefs on this date. The Hearing Examiner granted CCAE's motion on December 1, 2005.

On December 5 2005, PNM, CCAE and EPE filed reply briefs and Staff filed its response brief.

On December 6, 2005, the Commission filed a letter addressed to Commission Chairman Ben R. Lujan dated November 9, 2005 from Paul Benson in which Mr. Benson provided comments regarding PNM's proposed Procurement Plan. Additionally, on this date the Commission filed an email transmitted November 23, 2005 to Chairman Lujan from Joe Montoya in which Mr. Montoya provided comments regarding PNM's proposed Procurement Plan.

On December 8, 2005, PNM filed its Recommended Corrections to the Transcript of Proceedings for this case and Request for Leave to File Out of Time for Good Cause Shown.

## **II. DISCUSSION**

### **A. Regulatory Framework**

The REA, at section 62-16-4(D), requires New Mexico's investor-owned electric utilities to file a renewable energy procurement plan each year by September 1, for review and approval by the Commission. The plan describes the cost of procurement for any renewable energy resource in the next calendar year required to comply with the renewable portfolio standard (RPS) established by the REA. The plan must be reasonable as to its terms and conditions considering price, availability, dispatchability, any renewable energy certificate (REC) values and diversity of the resource, or should otherwise demonstrate it is in the public interest. NMSA 1978, § 62-16-4(D)(2).

The REA, at section 62-16-6(A), provides a public utility procuring or generating renewable energy "shall recover, through the rate-making process, the reasonable costs of complying with the [RPS]." This cost recovery provision provides costs consistent with Commission approval of a procurement plan "shall be deemed to be reasonable."

Finally, the Commission may approve or modify a utility's proposed procurement plan, section 62-16-4(E), or may reject a proposed plan if it does not contain the required information, section 62-16-4(F).

The REA thus establishes a regulatory framework within which utilities propose plans for procuring renewable resources to meet their respective RPS requirements and demonstrate to the Commission the reasonable costs of the proposed procurement.

## **B. PNM's proposed Procurement Plan**

### **1. PNM's and CCAE's joint position**

After agreeing to post-hearing modifications to PNM's Small PV Program, CCAE now joins PNM in requesting that the Commission approve the entirety of the Company's 2006 Plan.

PNM's 2006 Plan reveals that PNM's projected RPS requirements for 2006 and 2007 are 380,029 MWh and 503,992 MWh, respectively, after reductions in the RPS from 5% to 4.7% in 2006, and from 6% to 5.7% in 2007, in accordance with the REA, section 62-16-4(A)(3) for non-governmental customers with annual consumption exceeding 10 million kilowatt-hours. PNM's 2006 Plan, p. 2, Table 1; D'Antonio Direct 5-6<sup>1</sup>. These calculations are based on the assumptions that PNM uses solely RECs from the New Mexico Wind Energy Center (NMWEC) to meet its RPS and that those RECs are priced, as valued by PNM, at \$5.00 per MWh. Based on those same assumptions, PNM estimates there would be no reduction in the RPS due to the Reasonable Cost Threshold (RCT) established in NMPRC Case No. 04-00253-UT, which limits overall customer rate increases to 1% in 2006 and 1.2% in 2007. *Id.*

PNM's Plan proposes that for 2006, PNM will primarily retire banked RECs from the NMWEC to demonstrate compliance with the RPS. D'Antonio Direct 2. PNM began banking RECs as authorized by section 13.B(4) of Rule 572 in 2003. PNM will continue to bank approximately 360,000 MWh of NMWEC RECs during 2006 and will book the banked RECs as a regulatory asset consistent with the Stipulation approved by the Commission in Utility Case No.

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<sup>1</sup> Citations to pre-filed direct testimony will be designated by the surname of the witness followed by "Direct" and the page number(s); citations to pre-filed rebuttal testimony will be designated by the surname of the witness followed by "Rebuttal" and the page number(s); citations to pre-filed supplemental testimony will be designated by the surname of the witness followed by "Supp." and the page number(s).

3137 (“Case 3137 Stipulation”). *Id.* 3. Although PNM will have a little over 1 million MWh equivalent NMWEC RECs banked by the end of 2005 to use for RPS compliance beginning in 2006, PNM states this does not represent an “excess” supply of RECs, since the Company indicates it will recover costs only for those RECs it uses to meet the RPS and it will need additional renewable resources in order to meet its RPS requirement by 2008-2009. D’Antonio Direct 6; D’Antonio Tr.<sup>2</sup> 31-33, 88.

PNM has been recording the cost of the NMWEC RECs on its financial statements as a regulatory asset at \$5.00 per MWh, or \$0.005 per kilowatt-hour (“kWh”), which according to the Company, represents the lowest price it has obtained for NMWEC RECs in the market. 2006 Plan, p. 3. Pursuant to the 2004 Renewables Stipulated Agreement (the “Stipulation”) approved in NMPRC Case No. 04-00311-UT, determination and recovery of the costs for the NMWEC RECs procured in 2006 will be deferred until the Company’s next general electric rate case. Based on its assumption that a cost of \$5.00 per MWh will be authorized for recovery in PNM’s next electric rate case, PNM anticipates the total cost of compliance with the RPS during 2006, if only NMWEC RECs are used for such compliance, will be about \$1.9 million. *Id.* 4. PNM seeks Commission approval in this proceeding to continue to acquire and bank approximately 360,000 NMWEC RECs during 2006.

PNM anticipates by 2008-2009 the NMWEC RECs will not be sufficient to meet its RPS, which will be growing due to the increasing annual RPS requirement, customer load growth, and addition of the TNMP retail load that will become subject to the RPS beginning 2007. *Id.* The

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<sup>2</sup> Citations to the transcript of the November 2, 2005 hearing will be designated by the surname of the speaker followed by “Tr.” and the page number(s) of the transcript reference.

Company's 2006 Plan consequently provides for the issuance of the Renewables RFP and for the pursuit of Commission approval and acquisition of new resource(s) during 2006 based on its evaluation of the responses to the RFP and comparison of those responses with PNM's assessment of a self-build biomass resource conducted pursuant to the Stipulation in Case No. 04-00311-UT. *Id.* Because of the lead-time required for construction of renewable projects, PNM believes it is necessary to issue the Renewables RFP at this time in order to meet the target in-service date of 2009 for the new renewable resource(s) selected. D'Antonio Tr. 73-75.

PNM issued the Renewables RFP on October 21, 2005, by posting the RFP on its website, issuing a press release regarding the RFP and direct mailing it to over ninety regional and national parties. D'Antonio Rebuttal 2; D'Antonio Tr. 38; PNM's Response to Bench Request, Attachment 1. The RFP solicits responses for solar, biomass and other non-wind renewable resources, and will accommodate responses for solar resources from 5-30 MW, as well as larger and smaller sizes. D'Antonio Rebuttal 2; D'Antonio Tr. 78-79. In response to the Renewables RFP, PNM received notices of intent to submit proposals from ten renewable resource providers. PNM's Response to Bench Request, p. 3. On November 16, 2005, PNM extended the deadline for submission of notices of intent and proposals in response to the RFP, advised potential respondents fully developed projects were not required and indicated respondents should submit as detailed responses as possible. PNM Exhibit 4-Supp.

PNM states it has engaged an independent third-party, Navigant Consulting, Inc. (NCI), to evaluate the RFP responses to determine the most cost-competitive resources which, according to the Company, will enable it to meet the RPS and system reliability needs and to diversify its renewable energy portfolio, within the RCT. PNM Response to Bench Request, p. 2. The

Company states NCI will evaluate the Renewables RFP responses for suitability as to price, availability, dispatchability, REC values and diversity. D'Antonio Direct 9. PNM indicates it will compare the top RFP response selected by NCI with its self-build biomass assessment to determine what it considers will be the optimum resource(s) with respect to price, availability, dispatchability, any renewable energy certificate REC values, diversity of the resource and integration with PNM's overall supply portfolio. The Company has pledged to file a supplement to the 2006 Plan for Commission approval to procure the proposed renewable resource(s) for purposes of meeting its RPS requirement. 2006 Plan, p. 5; D'Antonio Direct 2-3.

Depending on whether PNM determines a power purchase agreement (PPA) for a renewable resource proposed in response to the Renewables RFP or a self-build biomass project is the optimal renewable resource, the Company plans on either requesting procurement cost approval in a supplement to the 2006 Plan and/or seeking determination of the ratemaking principles and treatment for the project in an application for a certificate of public convenience and necessity (CCN) filed in accordance with section 62-9-1 of the Public Utility Act, NMSA 1978, § 62-3-1, *et seq.* 2006 Plan, p. 6.

In addition, PNM states if it receives responses to the Renewables RFP for what it considers to be reasonably priced non-solar, renewable projects less than 5 MW which could provide energy and/or RECs beginning in 2006 or 2007, PNM may procure those resources and include appropriate information about the projects, including cost information, in its Renewable Energy Portfolio Procurement Plan for 2007. *Id.*

The third part of PNM's 2006 Plan is a proposed customer-owned solar PV incentive program, the Small PV Program. *Id.* 7. Under the Small PV Program, PNM will begin

purchasing RECs from customer-owned solar PV facilities beginning in March 2006, and will use the RECs to meet its RPS starting in 2006. D'Antonio Direct 3. Initially, the Company will purchase RECs from PV systems with capacity rated at 10 kW or less. The Company may expand the program to include larger PV systems, depending on the outcome of NMPRC Case No. 05-00352-UT, which concerns PNM's Petition for Declaratory Order. PNM and CCAE assert that case implicates only PV systems larger than 10kW, which are covered by 17.9.570 NMAC, the NMPRC rule Governing Cogeneration and Small Power Production ("Rule 570"), and does not impact PV systems eligible to participate in the Small PV Program, *i.e.*, systems 10kW or smaller, which are covered by 17.9.571 NMAC, the rule governing Net Metering of Customer-Owned Qualifying Facilities of 10kW or Smaller rule ("Rule 571" or "net metering" rule). Scharff Rebuttal 2; Luce Rebuttal 1-5.

PNM and CCAE report that in light of the post-hearing changes to which they have agreed, the Small PV Program will enable the Company to add approximately 18,701,280 kWh of solar energy to its electric system over twelve years, at a total cost of \$2,781,166, including costs to procure RECs at a payment price of \$0.13 per kWh and for customer education about solar energy and promotion of the program (\$350,000), a total Program cost that would result in an average total cost per REC of \$0.15 per kWh. 2006 Plan p. 7; D'Antonio Direct 3; PNM Exhibit 5 (PKS-2 Amended). As filed, PNM's 2006 Plan proposed a REC payment price of \$0.11 per kWh and inclusion of costs of \$375,000 for changes to PNM's customer information system (CIS) to implement the Small PV Program. CCAE, however, submitted testimony questioning the inclusion of the CIS modification costs and proposed that this amount be used, instead, to raise the payment price per REC from \$0.11 to \$0.13 per kWh. Luce Direct 14. After the hearing, PNM

and CCAE submitted a joint proposed recommended decision in which the parties made known their agreement that PNM's proposed Small PV Program should be modified as suggested by CCAE to eliminate the costs for the CIS modifications and to apportion those costs to the annual budgets for REC payments. The parties represent that this modification will increase the payment price per REC from \$0.11 to \$0.13 per REC. PNM Exhibit 5 (PKS-2 Amended). PNM and CCAE believe elimination of CIS costs will not adversely affect the Small PV Program because the Company has determined the required CIS modifications will be performed in-house, with no incremental cost. During the life of the twelve-year Program, if total REC payments in a year are less than the budgeted amount for REC payments in that year, the parties state the unspent budgeted amount will be carried forward and available for additional purchases of RECs in subsequent years. The parties agreed that all other aspects of the Small PV Program should remain the same.

The Small PV Program will be open to all PV systems interconnected with PNM in accordance with Rule 571. The Company's proposed budget for the Program assumes that all existing PV systems currently interconnected with the Company in accordance with Rule 571 will participate in the Program. Scharff Direct 4. At present, there are approximately 51 or 52 such systems generating a total of 81 kW. Scharff Tr. 114, 144, 157-8. The vast majority of these systems are 2 kW or less. However, two PV systems, one at SIPI and the other at the Pueblo Indian Cultural Center, are rated at approximately 10 kW in capacity; another, in Deming, is approximately 5 kW; and there are a "few" other two and one-half to three and one-half kW systems in operation. *Id.* 157.

After estimating the expenses for REC purchases from existing Program participants, applications for new participants will be accepted on a first-come, first-served basis during each of the twelve years of the Program, up to the limit of the Program's budget for that year's REC purchases. Scharff Direct 4. The Program is budgeted for approximately 1,080 kW of newly installed PV systems. At an estimated average of 2 kW per participant, PNM's Small PV Program will result in 540 newly installed PV systems, or 45 new systems generating 90 kW annually. *Id.* 5; Scharff Tr. 110-111. Participating small PV systems will generate approximately 18,701,280 kWh or 18,701,280 RECs over the twelve year period of the Program, such that with the three-times multiplier for solar RECs provided by Rule 572, the Small PV Program will provide the equivalent of approximately 56,103,840 RECs toward PNM's compliance with its RPS requirements. Scharff Direct 11.

PNM developed the proposed annual and overall budget for the Small PV Program based on its estimate of the potential statewide market for PV systems, which was based in turn on analysis of participation in PV incentive programs in California and Arizona, with adjustments for differences in New Mexico's demographic profile and available incentives. *Id.* 13; Scharff Tr. 111, 118-119, 138-39.

As agreed by PNM and CCAE, the Company will pay Program participants \$0.13 per kWh for RECs under one-year contracts which will continue year-to-year until the end of the twelve-year program unless terminated earlier on sixty days prior notice by either PNM or the participant. Scharff Direct 6. The Company estimates the \$0.13 per kWh REC payment plus the \$350,000 for program education and promotion costs results in an average price of \$0.15 per kWh,

which is at the RCT for renewable resources from solar systems rated at 10 kW or less established by the Commission in Case No. 04-00253-UT. *Id.* 6, 12-13.

RECs will be purchased by PNM from each participant as part of the regular monthly billing process. Participants will receive a monthly invoice documenting the number of kWh produced by the PV system, the number of RECs purchased by PNM, the purchase price per REC and the total price of RECs purchased from the participant by PNM that billing period. *Id.* 7-8. REC purchase payments will be applied as a credit to each participant's electric bill on a monthly basis. If the amount paid for the RECs is greater than the total of the customer's monthly electric service plus kWh charges, the balance of the REC payment will be carried forward as a credit for the following month's bill if \$20 or less. If the REC payment balance, after credits to the customer's electric bill have been made, is greater than \$20, the entire REC payment balance will be paid directly to the customer. *Id.* 8; Scharff Tr. 161-162.

PNM will charge Small PV Program participants a one-time non-refundable application fee of \$150 for residential customers and \$275 for non-residential customers to defray the costs for processing the net metering application for interconnection and contract, processing the Small PV Program application and contract, inspecting the PV system for interconnection compliance and for the second meter required to measure REC production. If the applicant is already a net metering customer, the fee will be \$100 for residential customers and \$225 for non-residential customers. Scharff Direct 8-9. Small PV Program participants will be responsible for installing the meter socket and all wiring for the second meter. *Id.* 9.

PNM plans on using print advertising, direct mail and broadcast media to promote the Small PV program. *Id.* 11. In addition to PNM's existing customer communication channels,

PNM states it will create new materials including brochures, video clips and solar program calculators for advertising and customer education imparting information about renewable energy generally and awareness of PNM's Small PV Program in particular. *Id.* Mr. Scharff testified he determined the promotion costs based on discussions with PNM's marketing department and his own experience managing the marketing and advertising budgets for demand side management and energy conservation programs. Scharff Tr. 165-166. PNM represents in its experience \$350,000 for program information and consumer education materials over the twelve-year life of the Program amounts to "very low cost marketing." *Id.*

PNM proposes to treat the costs for the Small PV Program (the cost of RECs and customer information) as a regulatory asset to be recovered through rates established in future rate proceedings consistent with Paragraph 12 of the Case 3137 Stipulation. D'Antonio Direct 11. The Program costs included in PNM's proposed 2006 Plan do not include carrying charges as allowed under Paragraph 12 of the Case 3137 Stipulation. PNM's Verified Statement Regarding Carrying Costs in Response to Hearing Examiner's Request (filed Nov. 4, 2005). The Company seeks Commission approval of the \$2.8 million in costs for the Small PV Program in this proceeding.

In the seventh year of the Program (*i.e.*, 2012), PNM states it will assess the viability of the Program based on participation rates, costs and other resources included in the Company's renewable portfolio at that time, and will submit the results of its assessment to the Commission for review in the Company's Renewable Energy Portfolio Procurement Plan to be filed on September 1, 2012. If PNM determines the Program should be continued beyond the initial twelve-year period, PNM states it will request Commission approval in the 2012 Plan to continue to accept

applications for new program participants and/or to continue to purchase RECs from existing participating PV systems. Scharff Direct 16.

PNM has committed to filing the details of its proposed REC purchase program for solar PV systems rated over 10 kW in a supplement to its 2006 Plan after the Commission's adjudication of the issues in Case No. 05-00352-UT. *Id.* 16-17.

PNM also proposes to use RECs from its existing 5 kW PV solar system and a PNM-owned 25 kW PV resource that it hopes to have installed in the first quarter of 2006. 2006 Plan, p. 9; Scharff Tr. 155-56. Other than the costs previously approved by the Commission in the Stipulation approved in Case No. 04-00311-UT, PNM is not at this time requesting Commission approval of additional costs related to these facilities during 2006. *Id.*

In sum, PNM claims the 2006 Plan includes resource diversity of wind, biomass and solar or other resources and is a reasonable approach to meeting the RPS requirements of the REA. D'Antonio Direct 7, 11-12. CCAE supports the 2006 Plan and recommends the Commission approve it, with the agreed modification to the Small PV Program specified in PNM's and CCAE's proposed recommended decision. Luce Direct 18.

## **2. Staff's position**

For its part, Staff believes PNM's Plan satisfies the substantive and reporting requirements of Rule 572 and reflects PNM's attempt to move toward an energy portfolio which includes a progressively greater percentage of service from diversified renewable resources. Brack Direct 10-11.

Staff views the Small PV Program as the only new renewable energy resource for which PNM is specifically seeking approval in its 2006 Plan. *Id.* 12. However, as elaborated on below,

Staff believes the Commission should include in the scope of Case No. 05-00352-UT all qualifying facilities under both Rules 570 and 571 and defer approval of PNM's Small PV Program until all pertinent issues are decided.

Staff nevertheless endorses the other portions of the 2006 Plan. Staff concurs in PNM's plan to continue to bank NMWEC RECs in 2006 and to file a supplement to the 2006 Plan after completion of the Renewables RFP process and comparison with PNM's biomass assessment. Brack Tr. 197. Staff therefore recommends approval of the 2006 Plan excluding the Small PV Program.

Finally, Staff maintains if in the future PNM determines to proceed with other programs discussed in its 2006 Plan, the company should seek approval through a supplement to this 2006 Plan, or through some future plan.

### **3. Analysis**

Consistent with the findings below, PNM's amended 2006 Plan is a reasonable approach to satisfying the approval requirements of the REA. The Plan demonstrates PNM's proposed procurement of renewable resources for 2006 is reasonable as to its terms and conditions considering price, availability, dispatchability, REC values and diversity of renewable resources. Moreover, the Plan is in the public interest. It comports with the goals of the REA to the extent that the Company's proposed use of renewable energy is an important first step in the direction of promoting energy self-sufficiency, preserving natural resources and pursuing an improved environment. NMSA 1978, §§ 62-16-2(A)(1) & (2). Therefore, PNM's 2006 Plan as modified after the hearing should be approved in accordance with the terms and conditions of this decision.

The first component of the 2006 Plan is PNM's proposal to comply with the RPS primarily by banking retired RECs from the NMWEC wind energy program. This proposal is reasonable and consistent with the REA. The Company therefore should be authorized to continue to bank the NMWEC RECs during 2006 and record the RECs as a regulatory asset in conformity with the Case 3137 Stipulation.

Pursuant to the Stipulation approved in Case No. 04-00311-UT, determination and recovery of the costs for NMWEC energy and RECs procured for 2006 has been deferred until PNM's next general rate case. PNM has assumed a cost of \$5.00 per MWh for the NMWEC RECs, based on their market value in few sales to, among others, EPE. D'Antonio Tr. 25-27. Valuing RECs at \$5.00 per MWh results in a total cost of RPS compliance for 2006 of approximately \$1.9 million and lowers PNM's RPS for 2006 from 5.0% to 4.7% due to the operation of the REA's limit on incremental costs to individual large customers. PNM's 2006 Plan, p. 2, Table 1; D'Antonio Direct 5-6. A lesser valuation for the RECs (used in the PNM Plan as a stand-in for the cost of compliance with the REA) would decrease or even eliminate the reductions in the RPS that result from application of the cost limits. The Commission will consider methods for establishing cost and/or value of RECs in Case No. 05-00352-UT or some other appropriate proceeding. Consequently, consistent with the terms of the Stipulation approved in Case No. 04-00311-UT, the Commission's approval of the 2006 Plan is not intended to be, nor should it be construed or interpreted as, an endorsement of PNM's assumed NMWEC REC valuation.

The second component of the 2006 Plan is the Renewables RFP. Since PNM anticipates NMWEC RECS will not be sufficient to meet its RPS by 2008-2009, the Plan includes the

issuance of the Renewables RFP, and consequent pursuit of Commission approval of and acquisition during 2006 of new non-wind renewable energy resources, including solar, biomass and geothermal, during 2006. The RFP was issued on October 21, 2005 and originally required submission of notices of intent by November 2, 2005 and responses by November 18, 2005. PNM Exhibit 4. PNM received notices of intent to submit proposals from ten renewable resource providers. However, given concerns expressed about, among other things, its RFP process and evaluation criteria, on November 16, 2005, PNM extended the deadline for submission of notices of intent to December 9, 2005 and responses to December 22, 2005, advised potential respondents fully developed projects were not required and indicated respondents should submit as detailed responses as possible, but noted in its press release that some of the RFP's requests, such as information regarding credit worthiness, engineering plans, and environmental and siting plans, should not discourage interested suppliers from submitting responses. D'Antonio Tr. 65-71; PNM Exhibit 4-Supp.

PNM plans on comparing the best RFP response chosen by its third-party consultant, NCI, with its self-build biomass evaluation to ascertain what it considers to be the optimum resource mix in relation to price, availability, dispatchability, any REC values, diversity and integration with PNM's overall supply portfolio. PNM has committed to completing its analysis by February 24, 2006 and subsequently notifying the respondent or respondents selected by March 18, 2006. Shortly thereafter, PNM will file a supplement to its 2006 Plan for Commission evaluation and approval to procure the proposed renewable resource or resources it has selected for purposes of satisfying its RPS requirement.

PNM's RFP as supplemented and its commitment to subsequently file a supplement to the 2006 Plan for Commission evaluation and approval after its bid evaluation, self-build biomass comparison and resulting renewable resource(s) selection processes have been completed is reasonable and appropriate and, therefore, should be approved. However, the Commission's approval in this decision should not be read as either constituting or connoting any judgment or conclusion as to the reasonableness, justness or prudence of PNM's and NCI's RFP evaluation, comparison and selection processes. PNM should be required to show in its 2006 Plan supplement proceeding to the Commission's full and complete satisfaction after close scrutiny that the processes and the results flowing from them were conducted and effected in a reasonable, prudent and just manner.

The third and final component of the 2006 Plan entails PNM's commitment to continue to develop solar energy resources as part of the Company's energy portfolio. PNM proposes to use RECs from its existing 5 kW PV solar facility. It also plans to have installed in the first quarter of 2006 a PNM-owned 25 kW solar PV system to meet its 2006 RPS. Scharff Tr. 155-56. Other than the costs approved by the Commission in Case No. 04-00311-UT, PNM is not requesting Commission approval of the additional costs associated with these facilities during 2006.

The principal element of PNM's solar program for 2006 is its customer-owned solar PV initiative, the Small PV Program. As described above in greater detail, and as amended by the post-hearing agreement between PNM and CCAE, the Small PV Program will enable PNM to add approximately 18,701,280 kWh of solar energy to its electric system over twelve years. PNM will provide participating customers a kWh credit of \$0.13 per REC for the net excess energy they generate. The credit will be carried forward from month to month. In accord with Rule

571.11(D), a customer will only be paid for excess energy supplied to PNM when the customer leaves the system, if there is a net excess at that time.

PNM estimates the Small PV Program will cost \$2,781,166 over twelve years, resulting in an average total cost per REC of \$0.15 per kWh, which meets the RCT established in Case No. 04-00253-UT for renewable resources from solar systems rated at 10 kW or less. The costs fall into two categories: \$2,431,166 to procure RECs at \$0.13 per kWh, and \$350,000 for customer education and promotional purposes. PNM requests the Commission's determination that the Program costs are reasonable and recoverable in rates.

PNM stresses that upon the Commission's approval of a proposed or modified procurement plan, the REA provides a utility is assured recovery of the costs for the procurement in the plan approved by the Commission. PNM's position is based primarily on the cost recovery provision of the REA, section 62-16-6, which states in subsection A that costs consistent with Commission approval of a procurement plan "shall be deemed to be reasonable."

In its response brief, Staff asserts PNM has overstated its case for recovery of Program costs. Staff believes in enacting the REA the Legislature envisioned bifurcated proceedings: the annual procurement plan case and a subsequent rate case. In the procurement proceeding, a utility must file an annual procurement plan which incorporates the elements specified in sections 62-16-4(D) and (E). Staff emphasizes the utility bears the burden of demonstrating its proposed procurement "is reasonable as to its terms and conditions considering price, availability, dispatchability, any renewable energy certificate values and diversity of the renewable energy resource." NMSA 1978, § 62-16-4(D)(2). Thus, Staff continues, a utility must prove the reasonableness of price in addition to the other prescribed attributes of an acceptable plan. Costs

“deemed to be reasonable” in the context of approving a plan in a procurement proceeding are, consistent with the Commission’s rate-making authority under the Public Utility Act, nevertheless subject to being rebutted in the subsequent rate proceeding.

While Staff’s position is in general well taken, there is no actual controversy in this case regarding either the burdens of proof borne by utilities under the REA or the Commission’s ratemaking authority. In fact, PNM recognizes the bifurcated process Staff postulates. As it expressly acknowledged at the hearing, PNM bears the burden of establishing in a subsequent rate proceeding the prudence of all Program expenditures and must show all program costs have actually been incurred. Scharff Tr. 171-72. Moreover, in the Stipulation approved by the Commission in Case No. 04-00311-UT, PNM agreed to defer determination of the reasonableness of the valuation of the renewable energy resources from the NMWEC until PNM’s next general rate case. The Stipulation provides on page 2, “If, in its next general rate case, PNM seeks to recover the costs of the renewable resources from the NMWEC to meet the RPS, PNM will be required to establish the reasonableness of such costs, which the Signatories are entitled to contest.”

Turning to the costs of the Small PV Program, the Commission should find the Program’s costs reasonable and recoverable in the context of this procurement proceeding. In establishing the costs of procuring Program RECs at \$0.13 per kWh, PNM witness Scharff studied PV programs in California and Arizona to determine the level of participation that could be expected in New Mexico at the REC prices he considered for use in the Small PV Program. Scharff Direct 13; Scharff Tr. 118-120. In order to achieve the desired level of Program participation, Mr. Scharff testified a REC price of \$0.11 per kWh was required. *Id.* However, in furtherance of enhancing the prospects for Program participation, at CCAE’s urging PNM agreed after the hearing to

eliminate the costs for CIS modifications and apportion those costs to the annual budgets for REC payments, which raises the payment price per REC from \$0.11 to the proposed \$0.13 per REC and keeps the overall cost of the Program at the RCT for small solar systems.

As for the Program's customer information and promotion costs, PNM stated it will use print advertising, direct mail and broadcast media to promote the Small PV program. Scharff Direct at 11. In addition to its existing customer communication channels, PNM elaborated it plans on developing materials such as brochures, video clips and solar program calculators for advertising and customer education respecting renewable energy and awareness of PNM's Small PV Program. *Id.* Mr. Scharff testified he determined the information and promotion costs based on his experience managing the marketing and advertising budgets for demand side management and energy conservation programs as well as discussions he had with PNM's marketing department. Scharff Tr. 165-166. Further, PNM states in its experience \$350,000 for program information and consumer education materials over the twelve-year term of the Small PV Program represents low cost marketing. *Id.* While PNM could and perhaps should have submitted additional data or other information in justification of its customer information and education costs, such as, for example, a comparison to other analogous marketing programs, there nevertheless is sufficient evidence of record to find the costs reasonable for purposes of approving the 2006 Plan under the REA. Additionally, as found above, PNM bears the burden of establishing in its next general rate case the prudence of all Program expenditures and that all Plan costs have actually been incurred.

Finally, in terms of the overall cost of the Small PV Program, Mr. Scharff testified the total cost is less than a PNM-owned PV system that would produce a comparable amount of solar energy (\$0.15 per kWh versus \$0.25 per kWh). Scharff Direct 12.

Accordingly, the Small PV Program should be approved. The Program advances the 2006 Plan's reasonableness with respect to advancing and promoting, in addition to the other elements specified in section 62-16-4(D), the availability of solar energy as a renewable energy resource and diversity of renewable resources, and is otherwise in the public interest.

### **C. PNM's Responses to Commission Questions**

PNM responded as follows to the Commission's four questions in its Order Docketing Case and CCAE agrees with those responses:

*If PNM were to meet 20% of its RPS from solar, how much nominal generating capacity would be required?* PNM responded that based on the load forecast used in PNM's July 6, 2005 Electric Supply Plan, approximately 10.3 MW would be needed beginning in 2006 to meet 20% of PNM's RPS. D'Antonio Supplemental 1; Luce Direct 2. PNM estimated this will increase to over 28 MW in 2020. *Id.*

*Can and should the Commission require PNM to issue an RFP for 5 to 30 megawatts of solar power to apply toward its RPS as part of its 2005 renewable energy procurement plan?* PNM responded that although the Commission has the authority to require PNM to issue an RFP for 5 to 30 MW, if the decision is supported by substantial evidence in the record and is neither arbitrary nor capricious and is within the Commission's scope of authority, a separate RFP for solar resources alone should not be required, since the Company has already issued the

Renewables RFP for all types of renewable resources except wind, which allows for responses for solar resources both larger and smaller than 5-30 MW. PNM's Response to the Commission's Questions Listed in Order Docketing Case, p. 2; D'Antonio Supplemental 2; Luce Direct 3; D'Antonio Tr. 78-79. In addition, the Company related its 2006 Plan already proposes a Small PV Program that will add approximately 1,160 kW of solar PV from new PV systems rated at 10 kW or less by 2017. Moreover, PNM added that in its 2006 Plan the Company plans on filing a supplement to the Plan requesting approval to expand the PV Program to include purchases of RECs from PV systems rated at more than 10 kW, which should allow it to add approximately 1,300 kW of solar PV to its system by 2013. D'Antonio Supplemental 3.

*If PNM were required to issue an RFP for 5 to 30 megawatts of solar power to apply toward its RPS, what effect would doing so have on the cost threshold?* PNM responded that the costs for issuance of the Renewables RFP were approved for recovery pursuant to the Stipulation approved by the Commission in Case No. 04-00311-UT, and the Company does not believe the costs for issuing the RFP would exceed either the RCT for solar projects or the RCT for increases on overall customer rates. *Id.* 4. Further, the Company responded that the effect of the costs for procuring a 5-30 MW solar project on the individual resource RCT for large solar projects would depend on the cost of the proposal. The Company stated that it anticipates the average energy cost for a 5 to 30 MW solar project would be \$274/MWh, which it estimates is more than two and one-half times the RCT of \$100/MWh for solar projects over 10 kilowatts in size established by the Commission in Case No. 04-00253-UT. *Id.* 5. PNM stated the effect of the costs for procuring a 5-30 MW solar project on the RCT for increases in overall customer rates would depend on the cost of the proposed project, overall customer rates, the cost for other renewable resources

procured to satisfy the balance of the RPS and other factors. *Id.* 5-6. Additionally, PNM submitted calculations showing that the potential percentage increases in overall non-large customer rates range from 1.9% to 2.4% for a 5 MW solar facility to 5.2% to 5.5% for a 30 MW facility. *Id.* 6.

*Comment on increasing the renewable portfolio standard to 20% by 2020 and how that increase could be achieved through the use of demand side management, integrated resource planning, and solar power.* PNM and CCAE commented that this would require amendment of the REA by the Legislature. *Id.* 6; Luce Direct 6. Further, the parties indicated neither demand side management nor integrated resource planning can contribute directly toward meeting an increase in the RPS, although they can contribute indirectly by reducing a utility's load. D'Antonio Supplemental 7-9; Luce Direct 6. The Company added that it would be required to supply an additional 1,118 GWh to satisfy a 20% rather than a 10% RPS, in 2020, which would require about 142 MW of solar generation if that amount were met entirely with solar energy. D'Antonio Supplemental 9.

#### **D. Meaning of Section 62-16-4(A)(5)**

##### **1. PNM'S position**

Section 62-16-4(A)(5) of the REA provides, "renewable energy resources that are in a public utility's electric energy supply portfolio on July 1, 2004 shall be counted in determining compliance with this section."

PNM interprets this language to denote that any renewable energy resource owned by a public utility on or before July 1, 2004 must be allowed by the Commission to be included in the utility's renewable energy portfolio for purposes of satisfying its RPS. To PNM then, the phrase

“on July 1, 2004” signifies *as of* July 1, 2004. Thus, as PNM puts it, section 62-16-4(A)(5) allows renewable resources owned by a utility on July 1, 2004 to be “grandfathered” into the utility’s renewable portfolio.

PNM maintains the legislative intent supporting its position can be discerned from the process provided in section 62-16-4 for development of utilities’ renewable portfolios, in the context of the timing of the enactment of the REA. The REA became effective May 19, 2004, ninety days after adjournment of the 2004 Legislative session. Section 62-16-4 established the RPS and the procedure for Commission approval of annual proposed renewable energy procurement plans. Beginning in September 2004, utilities were required to file proposed procurement plans “reasonable as to its terms and conditions considering price, availability, dispatchability, any renewable energy certificate values and diversity of the renewable energy resource.” NMSA 1978, § 62-16-4(D)(2).

PNM believes absent section 62-16-4(A)(5), the status of renewable resources owned by a utility prior to July 1, 2004 would be uncertain. PNM posits two rhetorical questions in support of its belief: (1) could a utility seek Commission approval to use a renewable resource it already owned to meet the RPS? and (2) must it seek Commission approval to do so? PNM suggests in the absence of the grandfather provision, section 62-16-4(D)(1) (*viz.*, “the cost of procurement for any new renewable energy resource in the next calendar year required to comply with the [RPS]”) could be construed to allow inclusion of only *new* renewable energy resources acquired in 2005, the next “calendar year” after enactment of the REA or thereafter, and to require disallowance of previously acquired renewable resources. PNM contends that even if section 62-16-4(D)(1) were construed to allow utilities to propose inclusion in their renewable portfolio renewable resources

owned on July 1, 2004 for purposes of satisfying the RPS, it would be unclear whether the Commission would retain the authority to reject or modify the proposed inclusion of those resources. PNM thus asserts that through section 62-16-4(A)(5), the Legislature provided, if a utility proposes to include such a resource in a portfolio plan filed pursuant to section 62-16-4(D), the resource has to be included in determining compliance with the RPS.

PNM thus avers that, read in the context of section 62-16-4 as a whole, it is clear that the Legislature intended to provide utilities with a short grace period within which renewable resources already in a utility's portfolio, or in the process of being procured, would be eligible for use by utilities in meeting the RPS. The Legislature's selection of July 1, 2004 as the cutoff date for the grace period was, according to the Company, intended to allow a short interval after the effective date of the REA for utilities to complete any renewable resource acquisition in progress at the time the Legislature enacted the REA, for example, in response to Rule 572, which had been in effect since December 17, 2002. After July 1, 2004, however, PNM concedes utilities must obtain Commission approval for procurement of any proposed renewable resource, and must satisfy the elements set forth in section 62-16-4(D)(2) for all such procurements. Nevertheless, for renewable resources utilities already owned or in the process of being acquired when the Legislature was considering enactment of the REA, PNM believes it was appropriate to create a grandfather clause that would require the Commission to count those resources in determining whether the utility has satisfied its RPS.

PNM therefore insists that since 62-16-4(A)(5) allows the NMWEC RECs procured by PNM in 2003 and 2004 to be counted in determining PNM's compliance with the RPS, its 2004 procurement plan included those RECs as well as those to be acquired in 2005. To this end, PNM

points out the Stipulation approved by the Commission in Case No. 04-00311-UT correctly applies and is consistent with the intent behind section 62-16-4(A)(5). The Stipulation acknowledges at ¶ A.1 that “PNM has procured in 2003 and 2004 . . . renewable energy resources, both the renewable wind energy and the [RECs] related to that energy.” The Stipulated Agreement further provides at ¶ A.2 that PNM will “use either the wind energy generated from the NMWEC with the RECs related to that energy *or* may use the NMWEC RECs *procured in 2003, 2004 and 2005, . . . to meet the RPS beginning in 2006.*” (emphasis added). The parties to the Stipulation accordingly agreed and the Commission confirmed that NMWEC RECs owned by PNM or in the process of being procured on July 1, 2004 should be counted in determining PNM’s compliance with its RPS requirement.

In its reply brief, PNM claims Staff agrees with PNM, quoting in support of its claim Staff’s statement in its opening brief that “any renewable resources that were available for use on July 1, 2004 or anytime after that date could count toward its RPS” including “any RECs associated with the renewable resources *in the utility’s portfolio* on July 1, 2004.” (emphasis added). PNM maintains this would include the NMWEC RECs procured by PNM in 2003 and 2004. PNM concludes that, in conformity with the Commission’s endorsement in Case No. 04-00311-UT, its 2006 Plan includes the use of the NMWEC RECs to meet its RPS.

## **2. Staff’s position**

Staff interprets the significance of “on July 1, 2004” differently. Staff construes section 62-16-4(A)(5) as providing that any renewable resources available for use on July 1, 2004 or any time thereafter could count toward a utilities’ RPS, which would also result in the usability of any RECs connected to the renewable resources in the utility’s energy supply portfolio on or after that date.

Staff points out that pursuant to the REA, inclusion of those RECs for RPS compliance survives the use of the energy itself for four years. Staff continues that, stated another way, pursuant to section 62-16-5 any RECs associated with the renewable resources in the utility's portfolio on July 1, 2004 or anytime thereafter would have a "shelf-life" of four years from the time the energy was generated. Staff states that the Commission noted in its 572 rulemaking that the long lead-time for electric generation projects necessitated certain adjustments such as the definition of "procure," and notification by the utility's intentions in advance, as well. Staff thus contends other interpretations of the significance of the July 1, 2004 date – such as all resources procured before that date – would tend to "swallow" Rule 572.

In its response brief, Staff shifts its focus to the importance of RECs in the overall scheme of the REA. Staff emphasizes the REA mandates the percentage of retail sales that must be supplied by "renewable energy," as defined by section 62-16-3(E), used in section 62-16-4, and as intended in furthering the REA's goal of increasing the use of renewable energy by the state's public utilities. Though Staff concedes that RECs are a "vital component of the statutory scheme," it believes RECs are little more than a "tracking mechanism" which prevents double counting. Staff consequently disagrees with PNM that all RECs in the utility's portfolio as of July 1, 2004 are usable for RPS compliance. Staff thus frames the question before the Commission as being whether the RECs in question represent energy available for *future use* as of July 1, 2004. Staff answers the question in the negative. In Staff's view, RECs representing renewable energy already used as of July 1, 2004 do not represent renewable energy in a utility's portfolio. To Staff, then, RECs are "just pieces of paper."

### 3. Analysis

Viewed from a global perspective of the REA's scheme, "on July 1, 2004," as the phrase is used in section 62-16-4(A)(5), evinces the Legislature's intent to afford jurisdictional utilities a small window of time inside which they would be allowed to include renewable energy resources and RECs procured or in the process of being procured on or *before* July 1, 2004 in furtherance of satisfying their respective renewable portfolio standards. A significant connotation of that date is that a utility might have or was already endeavoring to procure renewable energy resources in its portfolio before July 1, 2004 in reaction to and in conformity with, among other potential existing regulatory mandates, Rule 572, which had been in effect since December 2002.

Moreover, of particular importance here is the Legislature's use of the compulsory phrase "*shall* be counted" in reference to demonstrating compliance with section 62-16-4 in 2005 and beyond. To hold that section 62-16-4(A)(5) provides, as Staff would have it, that only renewable resources acquired on or after July 1, 2004 count towards compliance with the RPS would create an unnecessary conflict with section 62-16-4(D)(1).<sup>3</sup> That section requires a utility to submit, beginning September 2004, for Commission approval (or modification or rejection, at the Commission's discretion) a procurement plan that includes, among other things, "the cost of procurement for any *new* renewable energy resource in the *next calendar* year required to comply with the renewable portfolio standard." (emphasis added). It follows then that "on July 1, 2004" can only be reasonably construed as representing a cutoff date, *i.e.*, renewable energy resources acquired or in the process of being procured *after* July 1, 2004 (*i.e.*, resources procured after July 1,

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<sup>3</sup> It should also be noted that Staff's position appears to be odds with its express endorsement of PNM's plan to primarily use the NMWEC RECs to satisfy its 2006 RPS. *See, e.g.*, Brack Tr. 197.

2004 and in 2005, the “next calendar year” after the passage of the REA), are subject to potentially being discounted for whatever rational reason for RPS purposes, but resources acquired on or *before* that date must be “counted,” *i.e.*, included, “in determining compliance with [section 62-16-4],” *i.e.*, the RPS; otherwise the word “shall” as used in section 62-16-4(A)(5) would be shorn of its plain and ordinary meaning, a result it is unlikely the Legislature intended.

Finally, that the Stipulation approved in Case No. 04-00311-UT gave PNM the option of using NMWEC RECs procured in 2003 and 2004 as well as in 2005 to meet the RPS beginning with the PNM’s 2006 procurement plan<sup>4</sup> is of particular probative value in construing section 62-16-4(5) as affording utilities a grace period for renewable energy resources acquired before the cut-off date. The Commission’s endorsement of PNM’s use of RECs procured in 2003 and 2004 strongly suggests that section 62-16-4(A)(5) should be interpreted as permitting a utility to use, in demonstrating compliance with its RPS, renewable energy resources in its portfolio as of July 1, 2004.

**E. Potential Impact of Case No. 05-00352-UT on the Small PV Program and Vice Versa**

The parties have submitted numerous opening and response briefs which address manifold significant issues of first impression. In light of the conclusion, discussed in greater detail below, that it is neither necessary nor practicable to decide those issues in this case, what follows is a brief summary of the parties’ more salient positions.

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<sup>4</sup> Paragraph A.2 of the Stipulation approved in Case No.04-00311-UT states in its entirety: **Use of NMWEC Resources:** Beginning in 2006, PNM will use renewable resources procured from the NMWEC to meet its [RPS]. PNM may use either the wind energy generated from the NMWEC with the RECs related to that energy or may use the NMWEC RECs procured in 2003, 2004 and 2005, without delivery to jurisdictional customers of the energy represented by the RECs, provided the energy is contracted for delivery in New Mexico pursuant to § 62-16-5 NMSA, to meet the RPS beginning in 2006.

## **1. PNM's position**

PNM claims in deciding whether approval of the Small PV Program could impact the determination of issues in Case No. 05-005352-UT and vice versa, the Commission must determine one fundamental legal issue: whether PNM is the “purchaser” of renewable energy from the net metered small PV systems interconnected to its system under Rule 571, as that term is used in section 62-16-5(B)(1)(a)(2) of the REA. That section provides RECs are owned by the generator of the renewable energy unless the generator is a QF, in which case the RECs are owned by the public utility purchaser of the renewable energy unless retained by the generator through agreement with the public utility. PNM concedes the parties agree PV systems with a capacity of 10 kW or less are QFs, as defined by the federal Public Utility Regulatory Policies Act of 1978. PNM contends, however, the Small PV Program will not be impacted by the Commission’s final determination in Case No. 05-00352-UT, the Declaratory Order case, because PNM does not “purchase” renewable energy from any of its customers owning PV systems which are 10 kW or less.

PNM distinguishes PV systems which are the subject of its Declaratory Order Petition, systems larger than 10 kW that are covered by Rule 570 from systems, less than 10 kW, eligible to participate in the Small PV Program pursuant to Rule 571. PNM points out that under Rule 571.11(C), if the electricity generated during a billing period exceeds the electricity supplied to the customer, PNM may either purchase the net excess energy from the QF or provide a kWh credit for the net excess energy that is carried forward from month to month. PNM has chosen the latter option for each of its customers covered by Rule 571. PNM thus asserts it does not “pay” net metered customers for excess energy supplied to PNM at the end of each billing period. Scharff

Rebuttal 2; Scharff Tr. 132-133, 136. PNM states pursuant to Rule 571.11(D) a customer-generator is only paid for excess energy supplied to PNM when the customer leaves the system, if there is a net excess at that time. According to PNM, Rule 571 customers cannot require PNM to purchase energy generated by their PV systems. Scharff Tr. 168-169. PNM maintains it does not even know how much energy is generated by the Rule 571 small PV systems. *Id.* 169-170. Consequently, PNM avers it does not purchase energy from QFs covered by Rule 571 during the term of the net metering contract, within the meaning of that term in section 62-16-5(B)(1)(a)(2) of the REA.

In contrast with Rule 571, PNM relates under Rule 570 utilities must purchase at their avoided cost the net energy exported from QFs larger than 10 kW. PNM's Petition for Declaratory Order in Case No. 05-00352-UT thus requests that the Commission issue an order finding (i) PNM retains the discretion to determine whether to acquire RECs from QFs larger than 10 kW from which it purchases renewable energy under NMPRC Rule 570, and (ii) it is reasonable and prudent for PNM to pay value for the RECs associated with energy generated by these QFs, whether or not the RECs are acquired along with the associated energy.

In sum, PNM claims since it does not purchase energy from the QFs which are small PV systems rated at 10 kW or less and are thus governed by the provisions of Rule 571, the Commission's determinations in Case No. 05-00352-UT will not impact the Small PV Program and, accordingly, the Commission should not defer approval of that Program in this proceeding.

## **2. Staff's position**

Staff's position for deferring approval of the Small PV Program pending the outcome of the Declaratory Order case is essentially three-pronged.

First, Staff argues Rule 571 on net metering supplements and is closely intertwined with Rule 570 on cogeneration and small power production and, thus, in the development of new policy regarding RECs, the two rules should be considered together since the “menus of options” provided in these rules are not mutually exclusive. Staff contends Rule 571, as adopted and promulgated in Utility Case No. 2847,<sup>5</sup> was designed to offer additional streamlined options for hooking up small customer-generator facilities to the grid, *i.e.*, net metering. Staff thus argues this Case No. 05-00352-UT and this proceeding are intertwined because Rule 571 implements avoided cost payments in one particular instance – to pay for unused net-metering credits at the time of system disconnection. Staff further alleges the avoided cost reality it perceives for net-metering credits on disconnection is related to satisfying federal rules for QFs, implying Rule 571 is related to Rule 570 because the latter also deals with implementing federal rules for QF power purchases at avoided cost.

Second, Staff argues that in enacting the REA, the Legislature expressly provided that RECs are transferred by operation of law in transactions between QFs and public utilities pursuant to section 62-16-5 and, therefore all REC transfers do not occur pursuant to contract, a conclusion Staff maintains the Commission acknowledged in its rule-making last year.<sup>6</sup> Hence, Staff’s argument continues, PNM’s petitioning for approval of cash payments to QFs for RECs in Case No. 05-00352-UT as well as in this case potentially violates section 62-16-5.

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<sup>5</sup> Utility Case No. 2847 was captioned *In the Matter of the Adoption of a Rule to Allow Net Metering for Customer-Owned Renewable Energy, Distributed Generation and Alternative Generation Resources*.

<sup>6</sup> Case No. 04-00211-UT, *Petition of the Utility Division Staff of the Public Regulation Commission for a Rulemaking to Amend Rule 572 to Conform to the New Mexico Renewable Energy Act*.

Third, Staff counsels that due process principles and non-discriminatory policy considerations militate against approving the Small PV Program at this time. That is, if the Commission approves PNM's Small PV Program, it would be impliedly endorsing a sea change in policy without adequate notice to affected parties. Staff claims the policy changes inhering from approval of the Small PV Program would concomitantly entail (i) a Commission decision that excess energy transported to the grid is an eligible RPS resource, and (ii) a Commission decision that energy consumed on-site by the customer-generator is "contracted for delivery" and therefore also an eligible RPS resource. Staff asserts these implicit decisions embedded in approval of the Small PV Program would, in the first instance, lend credence to PNM's position in Case No. 05-00352-UT that RECs are separate commodities from the associated energy and therefore may be unbundled whenever economically advantageous to do so, and in the second instance, afford customer-generators in the Program a tenable claim that in having approved REC payments at \$0.13 per kWh, they are entitled to the same regulatory treatment for themselves.

### **3. CCAE's position**

Consistent with its position that the Small PV Program should be approved as modified by its post-hearing agreement with PNM, CCAE believes Staff has failed to establish a nexus between this case and Case No. 05-00352-UT. In its reply to Staff's opening brief CCAE offers, among other things, a comprehensive point-by-point rebuttal of Staff's arguments, offers its views regarding certain overarching issues respecting RECs and PNM's 2006 Plan raised in Staff's brief, and provides contextual comments regarding the background of and its active involvement in the evolution of the 2006 Plan.

#### **4. EPE's position**

EPE takes a somewhat different tack than those taken by the other parties. First, EPE argues Case No. 05-00352-UT should be dismissed on the grounds that there is no actual controversy in that case. EPE contends the REA and Rule 572 already afford PNM discretion to determine whether to acquire RECs from QFs larger than 10 kW from which it purchases renewable energy pursuant to its Rule 570 avoided cost tariff. EPE claims PNM's concern that Rule 572.13.B(1)(b) may be unconstitutional is barred because PNM supported the Rule as adopted, did not raise any questions regarding the constitutionality in its motion for rehearing of the Final Order the Case No. 04-00211-UT rulemaking, did not appeal the rule, and acknowledges in its legal brief in support of its petition in Case No. 05-00352-UT that the transfer and ownership of RECs associated with QFs is settled law both under the REA and Rule 572.

Thus, given its position that there is no actual dispute that the discretion PNM seeks already exists under the REA and Rule 572, EPE argues the only "controversy" or "uncertainty" PNM has raised in its petition is whether, as a matter of law, it is reasonable or prudent for PNM to pay additional value for QF RECs, a question EPE believes can only be answered by examining the facts and circumstances of PNM's proposed procurement plan actions to contract at a premium for RECs from QFs, which necessarily involves a reasonableness determination respecting the requisite elements of a specific proposed annual procurement plan.

In short, EPE asserts the issues raised in Case No. 05-00352-UT are specific to PNM's procurement plan proposals and consequently should be decided based on the facts presented in this case. EPE contends that neither the distinction between large and small QFs that PNM has drawn in part to buttress approval of the Small PV Program nor PNM's professed unease

regarding the constitutionality of receiving ownership of RECs from a QF when purchasing QF energy at avoided cost reveal the actual purpose behind PNM's Petition for Declaratory Order. Instead, EPE suggests the unspoken motive is PNM's concern that it faces a risk that the Commission may determine PNM acted unreasonably or imprudently should it decide to enter into an agreement to not take ownership of the RECs or to pay additional value for the RECs.

EPE concludes if the Commission believes a docket should be convened to address "more generic issues" concerning, consistent with Staff's position, the relationship of its existing rules, EPE suggests the Commission might initiate a statewide proceeding divorced from what it believes are PNM's fact-specific procurement issues, issues EPE believes should only be addressed in the context of this proceeding.

## **5. Analysis**

As should be apparent from the foregoing, the parties have raised a myriad of significant and potentially far-reaching legal and policy issues of first impression. Having carefully surveyed the parties' positions, it is impossible to forecast at this time with any degree of precision or certitude what impact, if any, the Declaratory Order case may have on the Small PV Program, and if so, how those ramifications may play out more generally with respect to PNM's and other utilities' current and future renewable energy procurement plans and/or the interplay between and operation of Rules 570, 571 and 572 in the context emerging from the debate in the Declaratory Order case.

Given these realities, what is equally apparent is that it is neither practicable nor necessary to decide any of the issues in determining whether the Commission should approve the Small PV Program at this time. It is not practicable because, among other things, the pressing deadline

imposed by the REA, at section 62-16-4(E), for final Commission action on the 2006 Plan and other jurisdictional utilities' renewable energy procurement plans affords the Commission precious little, if any, time to vet these complex issues, the resolution of which may have important and wide-ranging policy implications.

Nor is it necessary to decide any Declaratory Order issues before approving the Small PV Program. Should the Commission ultimately determine in Case No. 05-00352-UT or some other suitable docket that there is some impact on or conflict with the Small PV Program stemming from the resolution of an issue or issues in Case No. 05-00352-UT or another proceeding, the Commission may, from among other considerable tools at its disposal, elect to modify the Plan after notice and hearing pursuant to section 62-16-4(E) or even disapprove it within the framework of the Commission's consideration of PNM's 2007 renewable energy procurement plan or in some other intervening proceeding.

As found above, the Small PV program promotes the 2006 Plan's reasonableness regarding, in addition to the other elements specified in section 62-16-4(D), the availability of solar energy as a renewable energy resource and diversity of renewable resources, and is otherwise in the public interest. While it is at least conceivable that the resolution of one or more issues in the Declaratory Order case *could* impact the Small PV Program or vice versa, on balance approval of the Small PV Program at this time is appropriate given the facts and circumstances.

### III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Hearing Examiner recommends that the Commission **FIND** and **CONCLUDE** that:

1. The foregoing Statement of the Case, Discussion, and all findings and conclusions contained therein, are incorporated by reference herein as findings of fact and conclusions of law of the Commission.

2. PNM is authorized to conduct the business of providing public utility service within the State of New Mexico and is a public utility as defined in the Public Utility Act, NMSA 1978, § 62-3-1, *et seq.* (the “Act”). PNM is subject to the jurisdiction and authority of the Commission.

3. As a public utility, PNM is required to furnish adequate, efficient and reasonable service at just and reasonable rates pursuant to the Act. NMSA 1978, §§ 62-8-1 & 62-8-2.

4. The Commission has jurisdiction over the parties and the subject matter of this case.

5. PNM’s 2006 Plan was timely filed in accordance with the requirements of the REA.

6. Due and proper notice of this case has been given.

7. The 2006 Plan and supporting testimony and exhibits, as amended per the agreement between PNM and CCAE as set forth herein, satisfy the approval requirements of the REA by demonstrating that the proposed procurement of renewable resources by PNM in accordance with the 2006 Plan is reasonable as to its terms and conditions considering price, availability, dispatchability, any REC values and diversity of the renewable resources or, alternatively, that the 2006 Plan is otherwise in the public interest.

8. PNM's procurement of NMWEC RECs during 2006 as proposed in the 2006 Plan is reasonable and in the public interest and should be approved. PNM should continue to bank the NMWEC RECs during 2006 and to book them as a regulatory asset consistent with the Case 3137 Stipulation. Pursuant to the Stipulation approved in Case No. 04-00311-UT, determination and recovery of the costs for the NMWEC RECs procured in 2006 will be deferred until PNM's next general electric rate case.

9. PNM's RFP plan as supplemented and its commitment to subsequently file a supplement to the 2006 Plan for Commission evaluation and approval after its bid evaluation, self-build biomass comparison and resulting renewable resource(s) selection processes have been completed is reasonable and appropriate and, therefore, should be approved. However, this approval neither constitutes nor connotes any judgment or conclusion as to the reasonableness, justness or prudence of PNM's and NCI's RFP evaluation, comparison and selection processes. PNM will be required to show in its 2006 Plan supplement proceeding to the Commission's full and complete satisfaction after searching examination that the processes and the results flowing from them were conducted and effected in a reasonable, prudent and just manner.

10. PNM's procurement of the RECs associated with the energy from the planned PNM-owned 25 kW solar PV resource and PNM's existing 5 kW solar PV system at the Aztec Building in Albuquerque and use of those RECs to meet the RPS for 2006 is reasonable and in the public interest and should be approved.

11. PNM's proposed Small PV Program, as amended per the agreement between PNM and CCAE as set forth herein, is reasonable and in the public interest and should be approved.

12. The costs of \$2,781,166 for the 12-year Small PV Program are reasonable and recoverable through rates established in future rate proceedings consistent with Paragraph 12 of the Case 3137 Stipulation and, accordingly, should be approved; provided, however that in any such proceeding PNM bears the burden of proving the prudence of those costs, that the costs have actually been incurred and that they have not been otherwise recovered in retail rates.

13. PNM should file by February 1, 2006, an Advice Notice with the Commission of a sample form of contract to be executed by PNM and Small PV Program participants.

#### **IV. DECRETAL PARAGRAPHS**

The Hearing Examiner recommends that the Commission **ORDER** that:

A. PNM's 2006 Plan as modified by the post-hearing agreement of PNM and CCAE with respect to the Small PV Program described herein and recovery of \$2,781,166 for Program costs are approved consistent with, and subject to, the terms and conditions of this Order.

B. PNM and CCAE's motion to amend PKS-1 and PKS-2 to PNM Exhibit 5 is granted. Accordingly, PNM Exhibit 5, PKS-1 Amended and PKS-2 Amended are admitted into the record.

C. PNM's Motion to Supplement Renewables Request for Proposals, PNM Exhibit 4, is granted, and as so supplemented is admitted into the record.

D. PNM's request for leave to file out of time its Recommended Corrections to the Transcript of Proceedings for this case is granted for good cause shown.

E. PNM shall file by February 1, 2006, an Advice Notice with the Commission of a sample form of contract to be executed by PNM and Small PV Program participants.

F. Any exceptions shall be filed by December 14, 2005. Responses to exceptions shall be filed by December 16, 2005.

G. Exceptions shall be hand-served or transmitted by facsimile or email to all other counsel of record and the Commission on the date of filing.

H. This Order is effective immediately.

I. Copies of this Order shall be sent to all persons on the attached certificate of service.

J. This docket is closed.

**ISSUED** at Santa Fe, New Mexico this 9<sup>th</sup> day of December 2005.

**NEW MEXICO PUBLIC REGULATION COMMISSION**

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**Anthony F. Medeiros, Hearing Examiner**