

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

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'S
POST-HEARING REPLY BRIEF ON ISSUES IDENTIFIED BY COMMISSION

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NM PUBLIC
REGULATION
COMMISSION

Public Service Company of New Mexico ("PNM") submits this Post-hearing Reply Brief in response to Staff's Opening Brief ("Staff's Br.") regarding the issues on which the Hearing Examiner requested legal briefing at the public hearing held in this matter on November 2, 2005.

Issue 1: What is the meaning of § 62-16-4(A)(5)?

Staff agrees with PNM 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". Staff's Br. 20. This would include the NMWEC RECs procured by PNM in 2003 and 2004, which the Commission approved for use in meeting PNM's RPS in NMPRC Case No. 04-00311-UT (PNM's 2004 Procurement Plan proceeding). As approved by the Commission in Case No. 04-00311-UT, PNM will use these RECs beginning in 2006 to meet its RPS.

Issue 2: Could issues in NMPRC Case 05-00352-UT impact the Small PV Program proposed in PNM's 2006 Plan?

In determining whether approval of PNM's proposed Small PV Program could impact the determination of the issues in NMPRC Case 05-00352-UT and vice versa, the Commission needs to make one fundamental legal determination—is PNM the "purchaser" of renewable energy from the net metered, small PV systems interconnected to its system under Rule 571, within the

meaning of that term as used in the REA, § 62-16-5(B)(1)(a)(2)? Although Staff's Brief contains a lengthy discussion of Rule 570, 571 and QFs in general, and although PNM identified the "purchase" issue in Scharff Rebuttal, 2-3, Staff never addresses this issue.¹ If PNM is not deemed to "purchase" energy from net metered small PV systems, the RECs associated with that energy are not owned by the public utility "purchaser" of the energy under § 62-16-5(B)(1)(a)(2), but instead "are owned by the generator of the renewable energy" under § 62-16-5(B)(1)(a). Based on the plain meaning of the term "purchase" and the evidence in the record, PNM cannot be deemed the "purchaser" of energy from the net metered small PV systems that would be eligible to participate in the Small PV Program.

The word "purchase" means "to obtain for money or by paying a price; buy". Webster's New World Dictionary, Second College Edition, p. 1153 (1984). PNM does not "obtain for money or by paying a price; buy" the energy generated by net metered customers, unless and until "the customer leaves the system, [whereupon the] customer's unused credits for excess kilowatt-hours generated shall be paid to the customer at the utility's energy rate pursuant to NMPRC Rule 570.17." Rule 571.11.D; Scharff Rebuttal at 2; Scharff Tr. 132-133, 136, 168-169. To date, no net metered customers have left PNM's system, Scharff, Tr. 139, so the situation has not yet arisen, but PNM agrees that payment for such energy would be "purchased" by PNM and that the RECs associated with that energy would be owned by PNM under § 62-16-5(B)(1)(a)(2), "unless retained by the generator through specific agreement with [PNM]."

Staff argues that "utilities are required to purchase energy offered to them by the QFs." Staff Br. 11. This is not correct with respect to QFs covered by Rule 571, i.e. 10 kW or less, and

¹ The REA, § 62-16-5(B)(1)(a)(2), provides that RECs are owned by the generator of the renewable energy unless "the generator is a qualifying facility, as defined by the federal Public Utility Regulatory Policies Act of 1978, in which case the renewable energy certificates are owned by the public utility *purchaser* of the renewable energy unless retained by the generator through specific agreement with the public utility purchaser of the energy; ..." (emphasis added).

is only partially correct with respect to QFs covered by Rule 570. Although Staff more than once points to the provision of Rule 571.9 that Rule 571 “is intended to supplement NMPRC Rule 570”, it overlooks the second sentence of Rule 571.9 which provides that “in the case of any conflict between this rule and NMPRC 570, the provisions of this rule shall apply.” This is an important provision because the metering options and payment provisions for excess energy for small QFs provided in Rule 571 are inconsistent with the provisions for larger QFs in Rule 570.

Staff is correct that “the provisions in Rule 571 were thus designed to offer additional, streamlined options for hooking-up the smaller customer-owned facilities to the grid”. Staff Br. 9, referring to Rule 571.9. The “streamlined options for hooking-up the smaller customer-owned facilities to the grid” authorized by Rule 571 for QFs of 10 kW or less is net metering. For small QFs governed by Rule 571, a single energy meter is required, unless the utility and customer agree otherwise. Rule 571.10.F. That meter measures the difference between the electricity that is supplied by the utility to the QF and the electricity generated by the QF which is not used by the QF customer and is fed back to the utility, in other words, the net of the energy delivered by the utility to the customer and the energy delivered by the customer to the utility. Rule 571.7.C.

Unlike large QFs using the Separate Load Metering (simultaneous buy/sell) Option under Rule 570.10.D, the utility is not required to pay the Rule 571 customer for all energy produced by the small QF. Nor is the utility required to pay the Rule 571 customer for energy not consumed by the QF which is delivered to the utility, such as with large net metered QFs using the Net Metering Option under Rule 570.10.C. Nor is the utility even required to pay the Rule 571 customer for the monthly net difference between the energy supplied to the QF by the utility and delivered from the QF to the utility. Instead, under Rule 571.11.C, the utility has the option

to either (1) credit or pay the customer for the net energy supplied to the utility at the utility's avoided costs or (2) provide the customer a credit for any net kilowatt-hours supplied to the utility, with unused credits carried over from month to month. Only when the small QF leaves the system entirely does Rule 571 require the utility to pay the customer for any net excess energy generated by the QF and delivered to the utility. Rule 571.11.D: "If a utility opts to credit customers under [17.9.571.11(C)(2) NMAC], and the customer leaves the system, customer's unused credits for excess kilowatt-hours generated *shall be paid* to the customer at the utility's [avoided costs]." (emphasis added). Thus, utilities are not required to purchase any energy from small QFs covered by Rule 571, except any net energy delivered by the QF to the utility existing when the customer leaves the system. The language from the Recommended Decision in Case No. 2847 quoted at Staff Br. 11 explains this express limitation placed on utilities' obligation to purchase energy from Rule 571 small QFs; it does not support, but clearly contradicts, Staff's interpretation that utilities must purchase all energy generated by Rule 571 QFs or even all energy delivered by those QFs to utilities.

At the hearing, PNM Witness Pat Scharff explained that PNM uses the option provided in Rule 571.11.C.2 and D, i.e. rather than paying its small QF customers for any net excess energy delivered to PNM at the end of each billing period, PNM allows the customers a credit, which carries over from month to month, and only pays the customers for any net excess energy when and if the customers leave the system. Scharff Rebuttal at 2; Scharff Tr. 132-133, 136. Under the express provisions of Rule 571.11.C, Rule 571 customers cannot require PNM to purchase energy generated by their PV system, with the limited exception of any net excess energy that exists when the customer leaves the system. Scharff Tr. 168-169. In fact, with the single meter required by Rule 571.10.F for small PV systems, there is no measurement of either the total

energy produced by the small QF or the total energy delivered by the QF to PNM. *Id.* at 169-170. The only measurement provided by the single net meter under Rule 571.10.F is the monthly net “difference between the electricity that is supplied by an electric utility and the electricity that is generated by a Qualifying Facility and fed back to the utility over a billing period.” Rule 571.7.C.

Thus, it is not correct that “utilities are required to purchase energy offered to them by the QFs”, as Staff asserts. Staff Br. 11. To the limited extent Rule 570 requires such purchase, the expressly contrary provisions of Rule 571.11.C for QFs that are 10 kW or less apply to the small PV systems that would be eligible for PNM’s Small PV Program. Rule 571.9. Moreover, Staff’s assertion is not even correct with respect to all Rule 570 QFs. Staff discusses the three different metering options available for QFs under Rule 570.10.B, C and D —Load Displacement Option, Net Metering Option and Separate Load Metering (simultaneous buy/sell) Option—but fails to acknowledge the different requirements for the purchase of energy from QFs under each of those metering options. For QFs using the Load Displacement Option, “there will be ... no payment by the utility for any excess energy which might be generated by the qualifying facility.” Rule 570.10.B. For QFs using the Net Metering Option, the QF is only required to be paid “for energy supplied above the amount consumed”, i.e. the monthly excess. Rule 570.10.C. (Again, this is contrary to the express option given the utility in Rule 571.11.C to either purchase the monthly net excess or provide a rolling credit, with any excess to be purchased by the utility when the customer leaves the system.) Only under the Separate Load Metering Option is the utility required to “purchase all energy produced” by the QF. Rule 570.10D.

The provision in Rule 570.9.G cited by Staff regarding utilities’ obligation to purchase power from interconnected QFs at their avoided cost clearly is not intended to nullify the

different metering options and limitations on purchase obligation set out in Rule 570.10; rather, Rule 570.9.G simply establishes that the price utilities must pay for the energy they purchase from QFs depending on the metering option used is “the utility’s avoided cost.”

Staff poses several questions that it argues must be addressed before the Small PV Program can be approved and which cannot or should not be answered in this proceeding, but have to be addressed in Case No. 05-00352. Staff Br. 4-5, 15. The questions are either irrelevant to consideration of the Small PV Program or can and should be decided on the record in this proceeding. First, “*What are the indicia that a proposed REC valuation is prudent?*” The Commission need not decide here all the types of evidence that can be used to show a purchase price for a REC is reasonable and prudent; it need only determine whether the record here shows that the price proposed under the Small PV Program for solar RECs of \$0.13 per kWh is reasonable and prudent. Mr. Scharff testified that he 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 obtain the desired participation level, the REC price proposed is required. *Id.* Mr. Scharff readily agreed that accurate determination of the appropriate price for RECs from small PV systems is difficult since, at present, no program has been approved in New Mexico for purchase of these RECs and, for this reason, PNM would propose modification of the Small PV Program to increase or decrease the REC payment price if experience indicates that an adjustment would be appropriate. Scharff Rebuttal 6; Scharff Tr. 112, 116-117. Mr. Scharff also testified that the cost for the Small PV Program 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. These facts support the reasonableness and prudence of the proposed \$0.13 per kWh purchase price for RECs under the Small PV Program.

The Legislature enacted the REA in order to encourage development of renewable resources, because of the anticipated benefits from increased use of renewable energy, including energy self-sufficiency, preservation of natural resources, an improved environment and economic benefits. § 62-16-2(A). The statutory provision for establishment of the Reasonable Cost Threshold (“RCT”) and the Commission’s adoption of technology specific RCTs of \$0.15 for solar projects less than 10 kW shows that the Legislature and Commission accepted and approved that “incentives” in the form of higher prices must be paid by utilities in order to achieve the purpose of the REA to encourage development and utilization of renewable energy resources.

Staff asks “*Is energy that is generated and consumed by a customer on-site “contracted for delivery?”*” The answer is “yes” for all QFs connected to a utility under either Rules 570 or 571. Every QF is required to execute the standard interconnection agreements set forth in either Rule 570.15 or Rule 571.17, whichever is applicable. Upon execution of the applicable interconnection agreement and interconnection of the QF with PNM’s system, any energy produced by that customer, whether consumed on-site or delivered to PNM, is “contracted for delivery in New Mexico”, either to the on-grid PNM customer or PNM itself. Staff asks “*What policy constraints should the Commission consider in approving any unbundling of RECs?*” The “policy constraints” were determined by the Legislature in § 62-16-5(B)(1)(b)—RECs can be traded, sold or otherwise transferred apart from the associated energy, and when that occurs and a utility seeks to use the RECs to meet its RPS, the energy must be contracted for delivery in New Mexico in the absence of a regional market acknowledged by the Commission, as well as

meet the other requirements for proposed renewable resource procurements in § 62-16-4(D)(2). The Commission mirrored this provision in its Rule 572.13.B.2. Staff asks “*What is the effect of adding a second meter to measure total output at the Small PV Facilities?*” PNM is unclear as to the import of this question, but Mr. Scharff testified that the second meter allows PNM to measure the total output of the Small PV system in order to accurately determine the amount of renewable energy delivered to the customer and the utility by the system and the number of RECs associated with that energy. Scharff Direct 9.

Although it is not clear, Staff appears to suggest on page 16 of its Brief that PNM may try to double count the renewable energy produced by the Small PV systems and the RECs associated with that energy. That is not PNM’s intent and there is no evidence in the record to support this suspicion. Further, PNM must demonstrate that any REC it proposes to use for compliance with the RPS “has not been retired, traded, sold or otherwise transferred to another party.” § 62-16-5(B)(2). Nothing in the REA or Rule 572 suggests that utilities can double count by using *both* the energy generated from a renewable resource and the associated RECs and it would be obvious if PNM or any other utility attempted to do so.

Staff asserts “that RECs cannot be unbundled in transactions between utilities and QFs”. Staff Br. 16. This ignores the express exception in § 62-16-5(B)(1)(a)(2) for RECs associated with energy generated by QFs which are owned by the public utility purchaser of the energy “unless retained by the generator through specific agreement with the public utility purchaser of the energy;” That is also an argument on the merits of Case No. 05-00352 that Staff should raise in that proceeding and not here, where § 62-16-5(B)(1)(a)(2) is not even applicable because PNM is not “the public utility *purchaser* of the renewable energy” produced by its net metered Rule 571 customers. Staff is concerned that approval of the Small PV Program could

establish precedent that would limit the Commission's determinations in Case No. 05-00352. Staff Br. 17. That is potentially true for every Commission decision in every case. As Staff acknowledges, the Commission must adhere to its precedents. The issue is whether there is sufficient evidence in the record in this case to decide the issues that are fairly raised and need to be addressed. Where those conditions are met, the issue should be decided here.

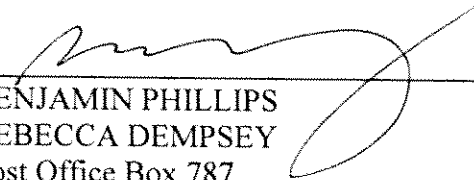
Staff also suggests that larger QFs covered by Rule 570 could use approval of \$0.13 per kWh REC payments to small PV systems in this proceeding to argue that they must be given the same regulatory treatment. Staff Br. 17. Staff's concern is unfounded because this would run contrary to the requirement of the REA, § 62-16-4(D)(2) and (3), that every "proposed renewable resource procurement be "reasonable as to its terms and conditions considering price, availability, dispatchability, any REC values and diversity of the renewable energy resource" or otherwise be in the public interest. It would also be contrary to the \$0.10 per kWh RCT for solar projects larger than 10 kW.

Respectfully submitted,

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**PUBLIC SERVICE COMPANY OF NEW MEXICO'S)
NOTICE OF FILING OF "RENEWABLE ENERGY)
PROCUREMENT PLAN FOR 2006")
_____)**

Case No. 05-00356-UT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Public Service Company Of New Mexico's Post-Hearing Reply Brief On Issues Identified By Commission** was e-mailed and mailed, first-class, postage paid, or hand-delivered this 5th day of December 2005, to each of the following persons as indicated:

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Dated this 5th day of December 2005.

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