

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

PUBLIC SERVICE COMPANY OF NEW MEXICO'S)	
NOTICE OF FILING OF)	Case No.
"RENEWABLE ENERGY PROCUREMENT)	05-00356-UT
PLAN FOR 2006")	
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**STAFF'S EXCEPTIONS TO THE RECOMMENDED DECISION
OF THE HEARING EXAMINER**

Pursuant to New Mexico Public Regulation Commission [hereinafter "Commission"] Rule, NMAC § 17.1.2.39 (C), Utility Division Staff ["Staff"] submits the following Exceptions to the Recommended Decision of the Hearing Examiner ["Recommended Decision"] issued on December 9, 2005.

Introduction

Although Staff agrees that the Commission may defer rulings on critical issues in certain circumstances, Staff believes that – in the interim - the Commission must exert its best efforts to enforce the law as it stands. In this matter, Staff fears that the Hearing Examiner may *intend* to defer certain complex issues for determination in Declaratory Order Case No. 05-00352, but in actuality recommends that the Commission rule – in the interim - on those issues in a manner that is contrary to the law. Thus, Staff reasserts its position that the approval of PNM's Small PV Program should await the disposition of the issues pending in Case No. 05-00352, and that the latter case should be expanded to include all Qualifying Facilities whether large or small, whether purportedly operating under Rule 570 or Rule 571.

Exceptions and Argument

Staff identifies with particularity its exceptions to the Recommended Decision in the numbered points below:

1. **THE RECORD DOES NOT SUPPORT THAT THE PREMIUM PRICE FOR RECS PROPOSED BY PNM IS**

**REASONABLE AS REQUIRED BY THE RENEWABLE
ENERGY ACT [REA].**

Staff respectfully disagrees with the finding:

While PNM [Public Service Company of New Mexico, hereinafter “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. Recommended Decision, p. 25.

Staff maintains that the record fails to support the finding that the proposed costs of procuring the small photovoltaic [hereinafter also “PV”] RECs are reasonable [under the Small PV Program portion of the 2006 plan]. Under their agreed methodology, PNM and CCAE [Coalition for Clean and Affordable Energy, hereinafter “CCAЕ”] simply took the reasonable cost threshold [also “RCT”], subtracted PNM’s projected actual costs of running the PV Program, and deemed the balance equivalent to the value of the RECs payable to the Small PV operators. See e.g. Direct Testimony, Patrick K. Scharff, p. 6, lines 8-14. As defined by our Legislature, the RCT represents a ceiling, but is not *per se* equivalent to the *reasonable costs* that the utility must prove under the procurement plan provisions of the Renewable Energy Act [also “REA”]. ***NMSA 1978, § 62-16-4 (D-E).***

Further, PNM’s theory that the \$0.11 per REC is necessary to achieve the desired level of program participation must also fail. Recommended Decision, p. 24, citing Scharff Transcript of Proceedings [hereinafter “Tr.”], 118-120. First, at least half of the projected program participants *in 2006* already have small pv systems; these participants do not need any incentive to buy and operate pv systems. Tr., Scharff, p. 113-114. The REC payments would simply represent a windfall to these existing pv operators.

Secondly, PNM failed to factor the projected increased participation due to federal tax incentives contained in the Energy Policy Act of 2005. Tr., Scharff, p. 120, beginning line 22. Having failed to factor in this vital parallel incentive and the associated increased participation rate, PNM must be deemed to have failed to justify its premium REC valuation, as well.

Finally, the record is completely silent as to the pertinent statutory criteria – that is, “any renewable energy certificate values.” *NMSA 1978, § 62-16-4 (D)*. Mr. Scharff conceded that the small pv systems are expensive - \$10,000 for 1 kW capacity; \$20,000 for 2 kW capacity. Only households with incomes of at least \$75,000 are likely to participate. Tr., Scharff, p. 142, beginning line 25. One might surmise that households with this level of discretionary income behave in economic markets for a myriad of reasons – including moral and political values separate from market incentives. Most relevant, there is no evidence to support that these pv operators would sell their RECs elsewhere if not offered the premium that PNM proposes.

PNM and CCAE now propose in their Joint Recommended Decision that PNM pay for RECs at the rate of thirteen cents (\$.13) to Qualifying Facilities. As a post-hearing proposition, these parties assert that \$0.13 is the amount that will create the necessary “incentive.” It would appear that the goal here is to maximize the REC premium; evidentiary support is secondary.

2. **CASE 05-00352 WILL IMPACT THE SMALL PV PROGRAM, AND NO DECISION ON THE SMALL PV PROGRAM SHOULD BE MADE IN THIS CASE UNTIL THE COMMISSION ISSUES THE FINAL ORDER IN 05-00352.**

Staff respectfully disagrees:

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 is neither necessary nor practicable to decide those issues in this case. Recommended Decision, p. 34. [and, more]

.... 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 ...”

On this general issue, Staff maintains that approval of PNM’s Small PV Program in this case – bifurcated from the consideration of issues posed in PNM’s Declaratory Judgment case – will lead to undesirable results. By approving the small pv program, the Commission must necessarily approve, as well, the unbundling of RECs in transactions between utilities and Qualifying Facilities [“QFs”]. Unbundling, here, simply means that the Commission is approving PNM paying added value for RECs.

This outcome would be contrary to the REA, § 62-16-5, mandating the bundling of RECs in transactions between utilities and QFs. First, as Staff has argued elsewhere – transactions between small QFs under Commission Rule 571 do represent purchases of power by PNM. To determine otherwise would be a legal fiction. See Staff’s Opening Brief, pp. 12-15 citing *NMSA 1978, 62-16-5, Petition of the Utility Division Staff for a Rulemaking to Amend Rule 572 to Conform to the New Mexico Renewable Energy Act*, Case No. 04-00211-UT, Final Order, p. 7, and administrative history of Commission Rules 570 and 571. Next, the Legislature intended that RECs pass to the utility without value added; this is the intent of §62-16-5. Staff did not intend to argue that REC transfers could not ever occur – only that if they did, the law presumes that the original transfer of the REC to the utility was without value. To read it otherwise would render the two clauses in § 62-16-5 (B) (1)(a)(2) surplusage.

In addition, by adopting the Recommended Decision the Commission would necessary decide that energy consumed on site is eligible for compliance with the renewable

energy portfolio [RPS]. The REA specifies that – although physical delivery is not necessary – eligible RECs must represent energy “*contracted for delivery.*” **NMSA 62-16-5.** Reading the REA as a whole, one must conclude that the Legislature intended utilities to replace/displace traditional fuels with renewable energy. The Legislature was indifferent as to which utility sold the actual energy to its retail customers – as long as the energy was contracted for delivery in New Mexico. The question here is whether customer generated and consumed energy displaces the traditional energy resources as contemplated by the Legislature – that is, whether this energy is “contracted for delivery.”

Summary of Exceptions

Staff respectfully submits its summary points:

1. Rule 571 facilities are Qualifying Facilities. In fact, participation in PNM’s Small PV Program – necessitating as it does the use of a second meter – removes the QF from operation under Rule 571 to Rule 570. Rule 570 is a global rule – that applies to all QFs, large and small.
2. PNM purchases energy from QFs under net metering arrangement described in Rule 571.
3. Adoption of the Recommended Decision would deprive the Commission of the thoughtful deliberation required to examine the interaction, limits and other related aspects of QFs and RECs.
4. The focus of procurement of energy is the focus of REA. RECs are a tracking mechanism, first and foremost. The policies that the Commission adopts regarding the valuation and trading of RECs must promote the use of renewable energy. This must be the outcome of a thoughtful policy-making deliberation. It cannot be assumed.

5. The Commission could possibly approve payment of RECs to small pv operators by approving a variance to Rule 572 – without necessarily deciding the merits of the legal issues outlined above. In any event, Case 05-00352 could be decided expeditiously – within three to six months.

Respectfully Submitted

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