

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 OPENING BRIEF

Introduction

In this case, the New Mexico Public Regulation Commission [hereinafter "the Commission"] is presented with yet another opportunity to decide the role that renewable energy certificates [RECs] will play in promoting the use of renewable energy in the state. In this case, the critical issues include the valuation of RECs and their disposition in transactions between Qualifying Facilities and utilities. Whether under Rule 570 or under Rule 571,¹ Qualifying Facilities enjoy unique privileges granted by state and federal law – including mandated interconnection. Thus the regulatory treatment of any RECs that might flow from QFs to the utilities should be considered within the regulatory framework as a whole to avoid inconsistent, discriminatory outcomes.

Summary of Relevant Proceedings
And Legal and Factual Issues

The Public Service Company of New Mexico [hereinafter "PNM" or "the Company"] filed a Petition for Declaratory Order [hereinafter, "Case 05-00352"]

¹ Rule 570 governs cogeneration and small power production. Rule 571 governs net metering of customer-owned facilities 10 kW or smaller. They are currently codified at *NMAC* § 17.9.570 and § 17.9.571.

or “Declaratory Order case”] on August 31, 2005. In the Declaratory Order case, PNM requests the Commission to clarify the transfer and payment obligations in its transactions with Qualifying Cogeneration and Small Power Facilities [also “QFs”] under the Renewable Energy Act [REA]. *NMSA 1978, § 62-16-1 et seq*; see also Commission Rules 570 and 571, codified at *NMAC §17.9.570* and *NMAC § 17.9.571* for Commission rules governing Qualified Facilities. Among other things, PNM asked the Commission to rule on “its discretion” to decide whether to acquire renewable energy certificates [“RECs”] with the purchase of the associated energy, and the reasonableness and prudence of paying value for RECs, whether or not acquired with energy. *In the Matter of Public Service Company of New Mexico’s Petition for Declaratory Order Regarding the Purchase of Renewable Energy Certificates from Qualifying Facilities*, Case No. 05-00352, Petition for Declaratory Order, p.1.

The next day, September 1, 2005, PNM filed this case, also under the REA, for approval of its procurement plan for 2006. The principal feature of PNM’s 2006 plan comprises the Company’s Small Photovoltaic Program [also “Small PV Program”]. Under this proposed program, PNM would pay Qualifying Facilities for RECs, representing *all* energy produced on-site by customer-owned generating facilities, at the rate of eleven cents (\$.11) per kWh. PNM and Intervener Coalition for Clean and Affordable Energy now propose – post-

hearing – that the Commission approves payment at the rate of thirteen cents (\$.13) per kWh of electricity produced.

The parties have stipulated that the entities eligible to participate in PNM’s “Small PV Program” are Qualifying Facilities. Transcript of Proceedings [hereinafter “Tr.”], Benjamin Phillips, Counsel for PNM, at hearing on merits. Qualifying Facilities are a class of alternative power producers with special privileges, created and defined by federal law, though regulated in some aspects by state law. The New Mexico Legislature expressly provided that renewable energy certificates are transferred *by operation of law* in transactions between Qualifying Facilities and public utilities. *NMSA § 62-16-5*. The Commission acknowledged this in its rule-making last year. See *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*, Case No. 04-00211-UT, and Argument below in *Staff’s Brief*. In New Mexico, QFs are governed by two administrative rules, intertwined both historically and substantively. *NMAC § 17.9.570* and *§ 17.9.571*, *Governing Cogeneration and Small Power Production and Net Metering of Customer-Owned Qualifying Facilities of 10 KW or Smaller* respectively; these rules are also known as Commission Rules 570 and 571. *NMAC § 17.9.570* and *§ 17.9.571*.

As provided in the rule itself, Rule 571 is simply “intended to supplement” Rule 570. *NMAC § 17.9.571.9*. Together, Rules 570 and 571 supply a continuum of metering and other options that are applicable to QFs. See, e.g., *NMAC § 17.9.570.10* and *NMAC § 17.9.571.10(F)*. However, as Staff will explain below, the menus of options provided in these rules are not mutually exclusive. As one supplements the other and, as important, both apply to one category of producer – Qualifying Facilities, Rules 570 and 571 must be read together for a coherent, non-discriminatory effect.

Thus, the questions posed by PNM in Case No. 05-00352 are extremely material and relevant in this case, too. As important, the Commission’s Utility Division Staff [“Staff”] respectfully submits that to open the discussion of the questions framed by PNM in Case 05-00352 – is to open a “*Pandora’s Box*” of tightly packed subissues, some factual, and each as important as the next. These issues include – but are not limited to:

- How should RECs be valued, in general?
- What are the indicia that the proposed valuation is prudent and a reasonable procurement cost?
- Has the Legislature authorized the Commission to approve costs and rates based on *incentives* targeted to benefit existing and potential developers and owners of photovoltaic systems?

- Whether energy generated and consumed on-site is energy “contracted for delivery”?
- Whether public utility cash payments for the purported RECs are in violation of the Renewable Energy Act and its legislative intent?
- What policy constraints should the Commission consider in approving any unbundling of RECs?

Although this Pandora’s Box contains difficult questions, it is one that should be opened and its contents examined carefully – without fear, but with the realistic hope that the Commission will continue to develop the coherent, non-discriminatory policies that will best promote the objectives of the REA.

Argument

- I. **THE COMMISSION’S ADOPTION OF PNM’S PROPOSED DECISION WILL RESULT IN EITHER ERRONEOUS OR INCONSISTENT, DISCRIMINATORY RULINGS IN PENDING CASE 05-00352.**
 - A. **RULE 571, ON NET-METERING, SUPPLEMENTS RULE 570, GOVERNING PURCHASES AND SALES BETWEEN UTILITIES AND QUALIFYING FACILITIES, THUS, IN THE DEVELOPMENT OF NEW POLICY THE TWO RULES MUST BE CONSIDERED TOGETHER.**

Congress gave birth to “Qualifying Facilities” in the Public Utility Regulatory Policies Act [hereinafter “PURPA”] of 1978 in response to a “perceived national electric energy crisis.” Steven Ferrey, *Nothing but Net:*

Renewable Energy and the Environment, MidAmerican Legal Fictions, and

Supremacy Doctrine, 14 Duke Envtl. L. & Pol’y F. 1, 17 (Fall 2003). The term “Qualifying Facilities” refers to cogeneration and small power production facilities qualified to enjoy certain privileges, including exemption from many federal and state regulations. According to Professor Ferrey:

The Congressional impetus for PURPA Title II – authorizing Qualifying Facilities (QFs) – was to encourage: (1) conservation of energy, (2) optimization of efficient use of electric utility facilities and resources, and (3) equitable electric rates to consumers. Congress’ goal was to accomplish greater diversity in the supply of electric power by providing incentives for development of small alternative power and cogeneration resources. Steven Ferrey, *Nothing but Net: Renewable Energy and the Environment, MidAmerican Legal Fictions, and Supremacy Doctrine*, 14 Duke Envtl. L. & Pol’y F. 1, 17 (Fall 2003).

Cogeneration optimizes efficient use of electric resources by producing electric energy and useful thermal energy such as heat or steam; both types of energy are used for industrial, commercial, heating, or cooling processes in sequential fashion. *18 CFR § 292.202(c)*. Qualifying small power production facilities conserve depleting energy resources by primarily using renewable resources such as solar, wind, waste, and geothermal input. *18 CFR § 292.204*.

Professor Ferrey further explained that the sanctioned “incentives” in this context include the imposition of mandatory obligations on the electric utilities to interconnect with eligible QFs, purchase power from them at prescribed rates – i.e., the utility’s “avoided costs,” and provide back-up electricity as needed.

Duke Envtl. L. & Pol’y F. at 17 and 42; see also *16 U.S.C.A. § 824a-3*, and *18 C.F.R. §§ 292.303 – 292.304*. In order to qualify for QF status and enjoy its benefits, small alternative energy producers are required to meet certain fuel, size, and ownership criteria. *18 C.F.R. §§ 292.203-292.204*.

As authorized by federal law, the New Mexico Commission² promulgated Rule 570 in June 1988, “with the express purpose of implementing the regulations of the Federal Energy Regulatory Commission [“FERC”]. *In the Matter of the Adoption of A Rule to Allow Net Metering for Customer-Owned Renewable Energy, Distributed Generation and Alternative Technology Generation Resources*, Utility Case No. 2847, Recommended Decision, p. 9-10, see also *18 CFR §§ 292.304 to 292.306*, and *NMAC § 17.9.570.6(B)*. The rule was enacted to govern the purchase of power from and sale of power to qualifying facilities, as defined by federal regulations, “by (1) enabling the development of a market for the power produced by qualifying facilities, (2) establishing guidelines for the calculation of utilities’ avoided costs, and (3) providing meaningful access to critical cost information from utilities.” *NMAC § 17.9.570.6(B)*.

In implementing federal directives through Rule 570³, the Commission constructed matrices establishing fairly complex and burdensome interconnection requirements, rate calculations, and metering options. For

² At the time, the Public Utility Commission was the regulatory agency in operation.

³ Rule 570 was originally codified in the Public Utility Commission rules as *General Order 37*.

example, interconnection requirements include proof of the facility's capacity to safely deliver electricity up to industry standards onto the grid via the utility's system. *NMAC § 17.9.570.9(B)*. Facilities applying for QF status must provide a certification from a licensed electrical engineer that the design and interconnection equipment meet all requisite standards. *NMAC § 17.9.570.9(B)(8)*. Equipment must include isolation transformers and disconnection switches. *NMAC § 17.9.570.12(H)*.

Rule 570 metering options depend on whether the QF will receive payments for avoided capacity costs. If the QF has "not contracted to receive capacity payments," then the utility would offer the following:

- (1) Load Displacement Option consisting of a single meter measuring flow from the utility to the QF, that is, if the QF "wishes primarily to serve its own load," and thus the utility would not pay for excess energy.
- (2) Net Metering Option consisting of "an additional meter to measure separately the energy generated by the qualifying facility and then calculate net energy consumed or supplied by the [QF]." The QF would be paid for energy supplied above the amount consumed at the utility's energy rate.
- (3) Separate Load Metering – also known as "simultaneous buy/sell – consisting of an additional meter to measure separately all the energy

produced and power consumed by the QF. The utility shall purchase all energy produced at its energy rate. The QF purchases all power consumed at its normally applicable rate. *NMAC § 17.9.570.10.*

However, regardless of the metering option chosen, the “electric utility is obligated to purchase power from [the] qualifying facility at the utility’s avoided cost regardless of whether the electric utility making such purchase is simultaneously selling power to the [QF].” NMAC § 17.9.570.9.

Ten years after the Commission initially promulgated Rule 570, it launched a rulemaking to “*simplify the interconnection requirements for Qualifying Facilities of 10 kW or smaller and encourage the use of small-scale customer-owned renewable or alternative energy resources in recognition of the beneficial effects the development of such resources will have on the environment of New Mexico.*” *NMAC § 17.9.571.6*, emphasis added. The new rule, known initially as Rule 571, was intended to *supplement* the existing rule on cogeneration and small production facilities. *NMAC § 17.9.571.9*, emphasis added.

The provisions in Rule 571 were thus designed to offer additional, streamlined options for hooking-up the smaller customer-owned facilities to the grid. Guided by Staff recommendations, the Commission adopted several features that simplified the engineering and technical requirements imposed on these smaller facilities. *In the Matter of the Adoption of A Rule to Allow Net Metering*

for Customer-Owned Renewable Energy, Distributed Generation and Alternative Technology Generation Resources, Utility Case No. 2847, Recommended Decision, p. 7. See also *NMAC § 17.9.571.10* eliminating the requirements for the engineering certification, isolation transformers, and disconnection switches.

The metering option offered in Rule 571 was also crafted to simplify 570 requirements, and lower costs as well. Thus, “[u]nder Rule 570.13 the installation of an *additional meter* [to separately calculate energy generated by the qualifying facility and net energy consumed from or supplied to the grid] is required in order to implement net metering. Rule 571 *would eliminate the cost of an additional meter*, making the application of net metering direct and relatively simple.” *Adoption of A Rule to Allow Net Metering for Customer-Owned Renewable Energy*...., Utility Case No. 2847, Recommended Decision, p. 12. A single energy meter would be the norm, except if the customer requested demand or time-of-use energy pricing, for example. *NMAC § 17.9.571.10(F)*.

Finally, the Draft Rule provided that electricity generated by the customer would continue to offset electricity supplied to the customer by the utility. *Adoption of A Rule to Allow Net Metering for Customer-Owned Renewable Energy*...., Utility Case No. 2847, Recommended Decision, p. 21. Two options were to be available to the utility for excess generation: “1) the utility would pay the [QF] for the net energy supplied to the utility at the utility’s energy rate under Rule

570.17; or 2) the utility would credit the net energy [in] kWh to the next monthly bill." *Id.*

In reviewing the Recommended Decision in Case No. 2847, the Commission notably declined to adopt one streamlined feature, that is, the prohibition of carrying over credits for excess generation from year to year. Instead, the Commission added a substantive amendment, an amendment that is significant to the analysis in the instant case. As the Commission concluded then:

Those Sections [i.e., the Commission's amendments to the Draft Rule] now permit the carryover of unused credits and provide that if a customer leaves the system, the utility shall pay the customer for unused credits in accordance with the utility's avoided cost energy rate established under NMPRC Rule 570. The Commission believes that this change is necessary to avoid any conflict with PURPA requirements. Based on the comments, the previous provisions appeared to be an administrative convenience for the utilities, which the Commission believes is outweighed by the need to avoid regulatory conflict, as well as by the direct benefit to customers. Adoption of A Rule to Allow Net Metering for Customer-Owned Renewable Energy...., Utility Case No. 2847, Final Order, p. 3 emphasis added.

Thus, the Commission ratified its intention to implement the federal requirement that it had been entrusted to carry out. More specifically, utilities are required to purchase energy offered to them by the QFs. As the reader will recall, this federal mandate is reiterated in Rule 570.9(G). See also **18 CFR 292.303-304**. As the Commission concluded, Rule 571 – as a supplement to Rule 570 - could

simplify the implementation of the requirement, but it could not do away with it entirely.

B. IN THIS CASE AND PENDING CASE NO. 05-00352, PNM PETITIONS FOR APPROVAL OF ITS CASH PAYMENTS TO QUALIFYING FACILITIES FOR RENEWABLE ENERGY CERTIFICATES IN POTENTIAL VIOLATION OF THE RENEWABLE ENERGY ACT, § 62-16-5.

As January 1, 2006 and its deadline for compliance with the first phase of the REA's renewable portfolio standard [also "RPS"] fast approaches, issues regarding how REC policies can and should be crafted will loom ever larger. Ownership configurations are outlined in the section setting out the characteristics of RECs in the REA. *NMSA 1978 § 62-16-5*. As Staff pointed out in its Brief-in-Chief in the El Paso Electric Company Cost Recovery case,

.... [T]he Commission *should not* approve the use of unbundled RECs in every instance. Both legal and policy constraints guarantee circumspection in this regard. For example, the diversity requirement ensures that the utilities will not indefinitely rely on unbundled RECs to comply with their RPSs. In addition, state law in New Mexico arguably precludes the unbundling of RECs in transactions between qualifying facilities and utilities. On the policy horizon, one commentator recently noted that "minority and low-income communities would most likely be the first to fall victim" to the consequences of an "unfettered" REC market. *Considering Environmental Justice in the Decision to Unbundle Renewable Energy Certificates*, Comment, Ida Martinac, Environmental Law Journal Symposium Edition, 35 Golden Gate U.L. Rev. 491, 526 (Spring 2005). *In the Matter of El Paso Electric Company's Cost Recovery Mechanism for Renewable Energy Costs under the Renewable Energy Act*, Case No. 05-00231-UT.

Much more importantly, the Commission itself has spoken on the issue of the transfer of RECs in transactions between QFs and utilities – though in general terms. This occurred last year in the Commission’s Rule 572 rulemaking case. *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*, Case No. 04-00211-UT. In that case, CCAE recommended that language indicating the automatic transfer of RECs by operation of the law in transactions be deleted from the Draft Rule. *Petition of the Utility Division Staff of the Public Regulation Commission for a Rulemaking to Amend Rule 572*, CCAE Comments, September 3, 2004, p. 5. CCAE argued that “[I]t believes that it is appropriate for any transfer of RECs to be specified in a contract, not automatically transferred with the purchase of energy.” *Id.* As the Commission noted in its Final Order, Southwestern Public Service Company [“SPS”] disagreed with CCAE’s analysis and stated the following:

CCAЕ notes that the Federal Energy Regulatory Commission expressly provided that ‘while a state may decide that a sale of power at wholesale automatically transfers ownership of the state-created RECs, that requirement must find its authority in state law, not PURPA.’ This is precisely what the New Mexico Legislature did when it passed the Act [the REA] – it specified that in certain circumstances the purchaser owns the RECs associated with renewable energy production. *Petition of the Utility Division Staff of the Public Regulation Commission for a Rulemaking to Amend Rule 572*, SPS Comments, p. 5.

In declining to adopt CCAE's proposed amendment, the Commission succinctly stated that SPS was correct about the legislative intent expressed in *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.

The salient question then is the New Mexico Legislature's intent in enacting *NMSA 1978, § 62-16-5*. As PNM noted in the Declaratory Order case, "PURPA does not govern the matter of REC transfer and ownership." REC transfer and ownership is a question of state law. Therefore, the question of the intent behind the pertinent state law is much more relevant here than any analysis – necessarily *dicta* - found in FERC decisions. Staff would add here that the existing, related laws and administrative rules would shed more light on the true legislative intent as the Legislature is presumed to know existing laws and their significance when it passes new legislation. *Chavez v. American Life and Cas. Ins. Co. of Fargo N.D.*, 117 N.M. 393, 396, 872 P.2d 366, 396 (1994). Thus, the Commission's consistent reaffirmations of the utilities' obligation to buy excess generation from QFs may indicate the Legislature's view, as well, of the transactions between QFs and utilities referred to in *NMSA § 62-16-5*.

In addition, Staff would respectfully submit that the parties have not established the evidentiary record with which the Commission could grapple

with the questions itemized in Staff's summary. *What are the indicia that a proposed REC valuation is prudent? Is energy that is generated and consumed by a customer on-site "contracted for delivery"? What policy constraints should the Commission consider in approving any unbundling of RECs? What is the effect of adding a second meter to measure total output at the Small PV Facilities?* These questions must be answered not just for QFs currently governed by Rule 570, but those under Rule 571, as well. These two rules are integrally related – 571 simply supplements 570. As Staff discusses below, inconsistent and disparate treatment is a likely outcome of bifurcation and, of course, ill advised.

C. THE COMMISSION IS BOUND BY PRINCIPLES OF DUE PROCESS, AS WELL AS NON-DISCRIMINATORY POLICY-MAKING.

[T]he Commission is not free to disregard its own rules and prior ratemaking decisions or 'to change its position without good cause and prior notice to the affected parties.'" *The Petition of PNM Gas Services v. Public Utility Commission*, 129 N.M. 1, 9, 1 P.3d 383, 391 (2000) citing *Hobbs Gas Co. v. New Mexico Pub. Serv. Comm'n*, 115 N.M. 678, 681, 858 P.2d 54, 57 (1993). Earlier, New Mexico courts had applied principles of collateral estoppel and *res judicata* in reversing inconsistent agency decisions. See, e.g., *Hobbs Gas Company v. New Mexico Public Service Commission*, 94 N.M. 731, 735, 616 P.2d 1116, 1120 (1980). In the 1993 *Hobbs Gas Co.* case, however, the Supreme Court

clarified, “An agency that creates law could be ‘estopped’ from departing from that law with respect to a party who has relied and who has had insufficient notice of the contemplated change; the customary language is not ‘estopped’ but retroactive lawmaking.” *Hobbs Gas Co.*, 115 N.M. at 682, 858 P.2d at 58 citing 4 Kenneth C. Davis, *Administrative Law Treatise* § 20:7 (2nd ed. 1983).

Thus, the controlling principle is one of due process – the right of affected parties to adequate notice of policy changes.

In the case at hand, if the Commission were to approve PNM’s Small PV Program, it would necessarily approve the use of two components of renewable resources generated by the affected QFs for compliance with PNM’s renewable portfolio standard [also “RPS”]. As the PNM would “claim” the renewable attributes of *all energy* generated by the Small PVs, PNM would claim (1) the energy consumed by the QF on-site, and (2) the excess energy transported to the grid. With regard to the first component, Commission approval of the proposed program would presumably decide that energy consumed on-site by the QF is “contracted for delivery” and therefore an eligible RPS resource. In deciding that the second component is an eligible RPS resource, Commission approval would appear to decide that RECs could be unbundled from the associated energy.

Without even considering, for a moment, the mandate of *NMSA* § 62-16-5 – that RECs cannot be unbundled in transactions between utilities and QFs, the

Commission's approval of the Small PV Program in this case would necessarily limit the scope of the Commission's decision-making in the Declaratory Judgment case [Case No. 05-00352]. PNM has already argued in the Declaratory Judgment matter that RECs are separate commodities from the associated energy; and should therefore be unbundled whenever it is economically advisable to do so. Thus, approval of PNM's Small PV Program would appear to provide case-law support for PNM's positions in the Declaratory Judgment case. Further, customer-owned generators operating under Rule 570 could argue reliance on Commission approval of REC payments at the rate of thirteen cents per kWh, and legitimately claim the same regulatory treatment for themselves.

No public utility shall, as to rates or services, make or grant any unreasonable preference or advantage to any corporation or person within any classification or subject any corporation or person within any classification to any unreasonable prejudice or disadvantage. *NMSA 1978, § 62-8-6*. In interpreting this statute, our state Supreme Court concluded:

Although the Commission has been granted broad rate making powers by the New Mexico Constitution, the power to effect social policy through preferential rate making is not permitted. To find otherwise would empower the Commission to create a special rate *for any group it determined to be deserving*. The Commission lacks the authority to effect social programs through its rate making process. ... Establishing social programs to aid the elderly and indigent *or any other segment of our society* is the proper function of the Legislature. *Mountain States Legal Foundation v. New Mexico*

State Corporation Commission, 101 N.M. 657, 687 P.2d 92 (1984), emphasis added.

PNM and the Coalition for Clean and Affordable Energy [also “CCAЕ”] propose in their Joint Recommended Decision that PNM’s cash payments for RECs at the rate of thirteen cents (\$.13) to Qualifying Facilities in the Company’s Small PV Program will create the necessary “incentive” to existing and potential developers and owners of small photovoltaic systems to purchase and maintain these systems. Yet, the Legislature has not authorized such an incentive program.

Moreover, the evidentiary record in this case does not support the finding that the proposed costs of procuring these RECs are reasonable. In fact, it appears that under the agreed methodology adopted by PNM and CCAE, the parties 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. As defined by our Legislature, the RCT represents a ceiling, but is not *per se* equivalent to *reasonable costs* recoverable under the REA, that is, without additional supporting evidence. The record in the instant case contrasts rather sharply with the record in the rulemaking case discussed above under Argument

1. *Adoption of A Rule to Allow Net Metering for Customer-Owned Renewable*

Energy...., Utility Case No. 2847. In that case, Staff and other parties provided PNM Renewable Energy Procurement 05-00356-UT Staff’s Opening Brief

the Commission with data comparing the increased costs of tracking energy used and sold by customer-owned generators with the increased costs of crediting the customer at retail rates. Staff concluded that the tracking costs would probably exceed the marginal costs of offering the retail rate. As such, Staff maintained that the utility should at least be allowed to offer the option. *Adoption of A Rule to Allow Net Metering for Customer-Owned Renewable Energy....*, Utility Case No. 2847, Recommended Decision, p. 21.

In summary, PNM and CCAE are proposing a program that may award the operators of small photovoltaic systems an unreasonable preference – unauthorized by our Legislature and unsupported in the record.

II. ELIGIBLE RENEWABLE RESOURCES MUST BE AVAILABLE FOR FUTURE USE IN THE UTILITY'S ENERGY SUPPLY PORTFOLIO ON JULY 1, 2004 (OR AFTER) TO BE COUNTED TOWARD ITS RENEWABLE PORTFOLIO STANDARD [RPS].

Although the REA does not require compliance with its RPS until January 1, 2006, it also appears to assume that public utilities would take action before then to ensure timely compliance. Thus, the Legislature appears to have set July 4, 2005 as the date on which each utility would know with certainty that it would either be able or unable to comply with its RPS. For example, if a utility were in all-requirements contract that would reasonably permit it to procure renewable energy on *July 1, 2004*, the utility would petition for an exemption for the time

period during which it would be unable to procure renewable resources. *NMSA* §

62-16-7, NMAC S 17.572.10. On the other hand, if the utility were able to comply, then it would be able to count renewable resources in its energy supply portfolio on July 1, 2004 or any time thereafter. This means that any renewable resources that were available for use on *July 1, 2004* or anytime after that date could count toward its RPS. This would also result in the usability of any RECs associated with the renewable resources in the utility's energy supply portfolio on that date. Pursuant to the REA, the usability of those RECs for RPS compliance would survive the use of the energy itself for four years. In other words, 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 that the energy was generated. *NMSA § 62-16-5.* The Commission noted in its 572 rulemaking case that the long lead time for electric generation projects necessitates certain adjustments – such as the definition of "procure," and notification by the utility's intentions in advance, too. Other interpretations of the July 1, 2004 date – such as all resources procured before that date – would tend to swallow the rule

Conclusion

The Commission's approval of PNM's Small PV Program in this case – bifurcated from the consideration of issues posed in PNM's Declaratory Judgment case – is likely to lead to one of two results, neither desirable. First, in

the interests of consistency, the Commission may approve PNM's proposals to unbundle RECs for larger Qualifying Facilities operating under Rule 570. This outcome would be contrary to the REA, § 62-16-5, mandating the bundling of RECs in transactions between utilities and QFs. In the other outcome, the Commission could disapprove or limit the unbundling of RECs in the transactions between larger customer-owned generating facilities and utilities. This would represent an unwarranted discriminatory treatment of two classes of QFs. Either outcome would violate either the REA or the Public Utility Act.

The dilemma is not irresolvable, however. The REA offers the flexibility that will allow the Commission to craft the optimal policy and maintain the delicate balance it has strived to achieve in the Rule 571 and Rule 572 rulemaking. The Commission has succeeded in the past in finding and maintaining the delicate balance necessary to promote the use of renewable energy, while treating all affected parties in a fair, non-discriminatory manner. Further as Professor Ferrey pointed out, net metering is the type of program that warrants well-articulated policy-making with widespread participation in the decision-making process. Steven Ferrey, *Nothing but Net: Renewable Energy and the Environment, MidAmerican Legal Fictions, and Supremacy Doctrine*, 14 Duke Envtl. L. & Pol'y F. 1, Conclusion at 116. (Fall 2003). This is because the operations of net metering are not transparent; they do not show up on the

typical rate-payer's bill. Generally, only the utility and its beneficiaries understand the operations of the program and its substantial subsidies.

For these reasons and the ones set out above, Staff urges the Commission to expand the scope of Declaratory Order case, Case No. 05-00352 to include all QFs, under both Rules 570 and 571, and defer approval of PNM's Small PV Program until those issues can be decided.

Respectfully Submitted

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