

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

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

**EL PASO ELECTRIC COMPANY'S POST-HEARING
BRIEF IN CHIEF**

El Paso Electric Company ("EPE") hereby submits its post-hearing Brief in Chief, in accordance with the Hearing Examiner's Order.

BACKGROUND OF PROCEEDINGS

This matter was brought before the New Mexico Public Regulation Commission ("Commission" or "NMPRC") through the Petition for a Declaratory Order filed by Public Service Company of New Mexico ("PNM"). PNM sought an order declaring that: 1) PNM has discretion to determine whether to acquire renewable energy credits ("RECs") from Qualifying Facilities ("QFs") larger than 10 kW from which it purchases renewable energy under its NMPRC Rule 570 avoided cost tariff; and, 2) it is reasonable and prudent for PNM to pay value for the RECs associated with energy generated by those QFs. A petition for declaratory order is permitted in order to "terminate a controversy" or "remove an uncertainty" with respect to the applicability of a statute or rule administered by the Commission. NMAC 17.1.2.24 A.

EPE filed a Motion to Dismiss on the grounds that the issues raised presented no case or controversy and should be addressed through each public utility's annual procurement plan filing. EPE continues to hold this position.

However, the Commission ultimately determined that this case could impact renewable energy policy in New Mexico and set parameters for transactions for the purchase of RECs from QFs by public utilities. The Commission broadened the scope of the case to include EPE and Southwestern Public Service Company ("SPS") and directed the parties to address the following questions:

1. Whether a public utility has discretion to acquire, or not to acquire, RECs from a QF from which it purchases renewable energy under NMPRC Rule 17.9.570 NMAC;
2. Whether it is reasonable and prudent for a public utility to pay value for RECs, whether or not acquired with the associated energy;
3. Whether renewable energy consumed on-site by a QF is energy "contracted for delivery" and thus usable to meet a utility's renewable portfolio standard;
4. Whether the Legislature has authorized the Commission to approve incentives to benefit existing owners of customer-owned renewable energy systems;
5. Whether there are any policy constraints the Commission should consider in approving any unbundling of RECs; and
6. Whether energy and RECs must be obtained by a utility in order for an energy purchase to be considered a purchase from a renewable QF and, if so, what is the avoided cost which utilities should pay for bundled energy and RECs?

ARGUMENT

RECs are a State-created concept. New Mexico law expressly defines RECs and establishes their purposes for demonstrating compliance with the renewable portfolio standards and for trading within a state or regional market. NMSA 1978, Sections 62-16-3 and 5 (2004); Tr. 93-4. When used for compliance with a utility's RPS obligations, RECs must contain the information detailed in the Commission's Renewable Energy Rule, and must further meet the criteria that if acquired without energy, the associated energy be contracted for delivery in New Mexico. NMAC 17.9.572.13; NMSA 1978, Section 62-16-5.

Ownership of RECs is also a State-determined matter and has been expressly addressed and determined by the Legislature. NMSA 1978, Section 62-16-5. State law assigns ownership based on the nature of the wholesale generator, as further conditioned for RECs that were established by contract prior to enactment of the Renewable Energy Act ("REA"). The REA is expressly clear that the ownership of RECs associated with QF energy goes to the utility. NMSA 1978, Section 62-16-5(B)(1)(a) (2004).

(1) renewable energy certificates:

(a) are owned by the generator of the renewable energy unless (2) the generator is a qualifying facility, as defined by the federal Public Utility Regulatory Policies Act of 1978 [16 USCS § 2601 et seq.], 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.

Section 62-16-5(B)(1)(a)(2); *see also* NMAC 17.9.572.13 B.1.b.

The Federal Energy Regulatory Commission ("FERC") has held that ownership of RECs associated with QFs is not addressed by the Public Utilities Regulatory Policies Act ("PURPA"), and that the contracts for sales of QF capacity and energy, entered into

pursuant to PURPA, likewise do not control the ownership of the RECs (absent an express provision in the contract). “States, in creating RECs, have the power to determine who owns the REC in the initial instance, and how they may be sold or traded; it is not an issue controlled by PURPA.” *see also Covanta Energy Group, Montenay Power Corporation, and Wheelabrator Technologies Inc., Order Granting Petition For Declaratory Order*, Docket No. EL03-133-00, 105 F.E.R.C. P61,004 (2003). This is what the New Mexico Legislature has done.

The Commission’s questions are answered within the context of the REA and federal policies and regulations governing QF transactions.

1. THE EXPRESS LANGUAGE OF THE RENEWABLE ENERGY ACT GRANTS A PUBLIC UTILITY DISCRETION TO NOT ACQUIRE RECS WHEN IT PURCHASES RENEWABLE ENERGY FROM A QF UNDER RULE 570.

The utility expressly is granted ownership of QF RECs. Section 62-16-5(B)(1)(a). However, the REA further grants the utility the discretion to reach an agreement by which the QF retains ownership: Where the generator is a QF, the RECs “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.” *Id.* Because the statute allows a utility to exercise its discretion to reach an agreement whereby the QF can retain ownership of the RECs, its is up to the public utility whether to simply take the RECs as part of the QF purchase or voluntarily agree not to acquire the RECs with its mandatory purchase of renewable energy from a QF.

The record in this proceeding reflects the common understanding of the parties that RECs belong to the public utility unless it voluntarily negotiates with the QF to the contrary. Transcript of Proceedings August 21, 2006 (“Tr.”). PNM witness Sharff

testified that energy and RECs from QF are owned by the utility purchaser. Tr. at 19-20; *see also* Tr. at 98 (testimony of Newsom), Tr. at 144-5 (testimony of Butler), Tr. at 162 (testimony of Potturi). PNM also acknowledged in a previous legal brief in this docket that the transfer and ownership of RECs associated with QFs “is a settled question” of state law.¹ In addition, during the rulemaking process to promulgate a renewable energy rule consistent with the REA, no parties challenged the incorporation in the rule of the exact language of Section 5(B) (1) of the REA, and it was specifically addressed in that proceeding. *See, e.g.*, PNM’s Initial Comments Regarding Rulemaking to Amend Rule 572, September 3, 2004, NMPRC Case No. 04-00211-UT.

2. DEPENDING ON THE FACTS, IT MAY BE REASONABLE AND PRUDENT FOR A PUBLIC UTILITY TO PAY VALUE FOR RECS, WHETHER OR NOT ACQUIRED WITH THE ASSOCIATED ENERGY

In general, it may be reasonable and prudent under specific facts and circumstances for a public utility to pay value for RECs acquired independently from the associated energy. There is no requirement that renewable energy associated with a REC must be acquired along the REC. The REA allows public utilities to comply with RPS obligations by acquiring RECs with or without physical delivery of the associated energy, so long as the energy is contracted for delivery in New Mexico. EPE has an approved Procurement Plan, with approved rate recovery, for acquisition of RECs from a non-QF wholesale provider without taking physical delivery of the associated energy. *See* Final Order (December 2005), NMPCR Case No. 05-00355-UT. In that proceeding, EPE

¹ PNM states, “The transfer and ownership of RECs in New Mexico is settled in both statute and rule. The REA and Rule 572 specifically allow a public utility and QF to decide whether ownership of RECs will be transferred. Both statute and rule provide that RECs associated with the renewable energy purchased by a public utility from a QF belong to the utility unless the utility and QF have specifically agreed that the QF will retain the RECs.” Brief in Support of Petition for Declaratory Order, page 6, NMPRC Case 05-00352-UT.

demonstrated that paying value for RECs without also acquiring the associated renewable energy was a reasonable means of complying with the REA and its RPS requirements.

In the case of RECs created from energy production by an interconnected QF, a public utility is required by federal law to purchase the associated energy and the utility owns the RECs as a matter of law, unless it agrees otherwise. The REA's presumption that ownership of RECs from QFs goes to the utility along with the energy is reasonable, because under federal and state law a generator need not choose QF status. If a generator does choose so, utilities are required to interconnect with the QF, and are required to purchase the excess power generated by the QF. Tr. 921-2. If a potential QF chooses to operate commercially and to receive a market price for its energy and or any attributes of that energy, without any guarantee of purchase by a utility, then the REA's initial presumption, that the generator owns the RECs, will apply. Section 62-16-5(B)(1)(a). As a QF, however, the generator is not only guaranteed interconnection and utility service, pursuant to tariff, but it is guaranteed the sale of its excess energy to the utility at a predetermined price approved each year by the Commission.

Neither statute nor rule requires the unbundling of energy and RECs acquired by a public utility from a QF. In fact, the opposite is applicable under the terms of the REA. Federal law has left this issue to the states and the New Mexico Legislature has explicitly addressed the matter by determining that RECs and the associated energy, if produced by a QF, are bundled, unless the public utility that is purchasing QF power exercises its discretion to unbundle them. Because the utility must purchase the QF energy and owns the RECs, the issue of whether it is reasonable or prudent to unbundle the transaction and agree that the QF will retain the RECs is a question of fact. Tr. 92. If a utility agrees to

allow the QF to retain RECs, there is a strong argument that the utility should itself receive value for that agreement. Tr. at 153.

How a public utility acquires RECs to meet its portfolio standard is subject to prior approval of the Commission. Section 62-16-4. Among other things, a utility's annual procurement plan must provide justification for the cost of the procurement plan. The procurement plan filings must provide "testimony and exhibits that demonstrate that the proposed procurement is reasonable as to its terms and conditions considering price, costs of interconnection and transmission, availability, dispatchability, any renewable energy certificate values and diversity of the renewable energy resource." NMSA 1978, Section 62-16-4D (2), NMAC 17.9.572.16.A. Costs that are consistent with Commission approved procurement plans are "deemed reasonable" under the REA, and the utility "shall recover" the "reasonable costs of complying with the RPS." NMSA 1978, Section 62-16-6 (2004). The question of whether it is reasonable and prudent for a public utility to pay value for RECs, whether or not acquired with the associated energy, should properly be answered in a procurement plan proceeding. Tr. at 92 (testimony of Sharff); Tr. at 108 (testimony of Newsom); Tr. at 168 (testimony of Potturi).

3. WHETHER RENEWABLE ENERGY CONSUMED ON-SITE BY A QF MAY BE USED TO MEET A UTILITY'S RENEWABLE PORTFOLIO STANDARD DEPENDS ON METERING AND CONTRACTUAL AGREEMENTS

The REA requires that the electric energy represented by a REC be contracted for delivery in New Mexico unless the Commission has determined that a regional trading market exists (or an individual utility makes certain showings). NMSA 1978, Section 62-16-5(B)(1)(b); NMAC 17.9.572.13. Where energy is consumed by the QF, the mere existence of an interconnection agreement between the QF and the utility does not mean

that a REC's prerequisite that associated energy be "contracted for delivery in New Mexico" is met. RECs must first document that renewable energy has been produced, on a per kilowatt-hour ("kWh") basis. Therefore, the energy produced and consumed on-site by a QF must be metered to even be considered eligible for creating a REC.

Secondly, a contract must be entered that provides for delivery of energy from the QF to the utility. *Cf. PNM v. PUC, City of Gallup*, 128 N.M. 309, 310, 992 P.2d 860, 861 (1999) (delivery points to substation or other facilities established by wholesale contract between PNM and Gallup which did not include distribution line to mining company). Delivery requires transfer of the energy from the supplier to another party, either physically or contractually. Unless a specific contractual agreement is reached to the contrary, consumed energy is not delivered; only energy produced in excess of the QF's consumption that is delivered to the interconnected utility would qualify. *See generally IPL, Inc. v. New Mexico Tax & Rev. Dep't.*, 133 N.M. 447, 455, 64 P.3d 474, 482 (2003) (a buyer must perform some definitive activity within the State that constitutes initial use or acceptance of delivery).

Staff, EPE and SPS provided testimony that the requirement of contractual delivery is met under Commission-approved terms such as simultaneous buy/sell agreements. *See* NMAC 17.9.570.10. Under net metering or load displacement agreements, the consumed power may not be contracted for delivery within the terms and conditions of the interconnection agreement. PNM submitted testimony that power must be contracted for delivery to the grid. Tr. at 36, 73-4.

4. THE LEGISLATURE HAS NOT AUTHORIZED THE COMMISSION TO APPROVE INCENTIVES TO BENEFIT EXISTING OWNERS OF CUSTOMER-OWNED RENEWABLE ENERGY SYSTEMS

The purpose of the REA is to prescribe the amounts of renewable energy resources public utilities include in their resource portfolios, allow utilities to recover costs for procuring or generating renewable energy to comply with the RPS, and to protect utilities and their customers from renewable energy costs above a Commission-established threshold. Section 62-16-2(B). There is no language in the Act that authorizes the Commission to approve incentives to benefit existing owners of customer-owned renewable energy systems. The REA expressly provides that “nothing in the [REA] shall be construed to permit regulation by the commission of the production or sale price at the point of production of the renewable energy.” Section 62-16-4(C)(5). This provision is consistent with the Public Utility Act limitation that subjects the sale, furnishing or delivery of electricity to a utility for resale to or for the public to the Commission’s jurisdiction only for purposes of determining the reasonableness of the cost to the utility. NMSA 1978, Section 62-6-4(B) (2003).

The REA does, however, specifically permit variable treatment of REC values based on the type of renewable resource technology, which arguably creates an incentive to acquire a given type of resource or technology. Section 62-16-5(A). This is the basis of the kilowatt-hour weighting system based on fuel type (wind, hydro, biomass, geothermal and solar). NMAC 17.9.572.14. The REA does not contemplate preferential treatment based on the type of supplier; instead, it only defines the ownership of RECs on this basis. PNM witness Sharff testified that incentives are not mentioned in the Act, and

that the terms of the REA provide the means for encouragement of renewable energy in general. Tr. at 75-76.

5. THE COMMISSION SHOULD CONSIDER THE POLICIES CONTAINED IN THE RENEWABLE ENERGY ACT AND FEDERAL LAW IN APPROVING ANY UNBUNDLING OF RECS AND MUST FOLLOW THE TERMS OF THE REA

The Legislature has made clear that the Commission's oversight of the use of renewable energy by public utilities must be consistent with the REA. Section 62-16-2(A)(2); Section 62-16-9. The Commission should recognize that a utility must purchase energy from a QF under PURPA and NMPRC Rule 570, regardless of whether that energy would otherwise be a resource that the utility would choose to purchase to economically and reliably meet customer needs. The Act designates ownership with the utility, unless the utility in its discretion contracts otherwise with the QF. Mandatory unbundling by the Commission of RECs from QF-provided energy would contradict the Act and would force the utility to pay more for the RPS program because it will either pay extra for an attribute of the energy that it already owns, or will have to acquire additional RECs from other resources if RECs are unbundled from a QF purchase and not delivered to the utility in accordance with the Act.

6. THE RECS MUST BE OBTAINED AS PART OF THE UTILITY'S MANDATORY ENERGY PURCHASE FOR THE PURCHASE TO BE TREATED AS RENEWABLE, AND THE AVOIDED COST WHICH THE UTILITY PAYS FOR BUNDLED ENERGY AND RECS CANNOT EXCEED THE UTILITY'S AVOIDED COST RATES

The REA has established RECs as the means of defining an energy purchase as being from a renewable resource. Section 62-16-5(A); NMAC 17.9.572.13. Because a QF purchase is required as set forth in the Commission's Rule 570, and because the Legislature has determined that RECs are, absent a contract to the contrary, to be

transferred to the public utility purchaser, there must be a REC with the renewable QF purchase for it to be eligible to meet a utility's RPS obligations. EPE's witness Newsom testified that in the context of a QF REC, the utility will pay the avoided cost, and will own the REC with no additional value associated with that REC. Tr. at 98.

The avoided cost is set forth in NMPRC Rule 570 and related tariffs. The Federal Energy Regulatory Commission ("FERC") has made clear that the avoided cost cap under PURPA was intended to:

...put the utility into the same position when purchasing QF capacity and energy as if the utility generated the energy itself or purchased the energy from another source. In this regard, the avoided cost that a utility pays a QF does not depend on the type of QF, *i.e.*, whether it is a fossil-fuel-cogeneration facility or a renewable-energy small power production facility. The avoided cost rates, in short, are not intended to compensate the QF for more than capacity and energy."

Covanta Energy Group, Montenay Power Corporation, and Wheelabrator Technologies Inc., *Order Granting Petition For Declaratory Order*, Docket No. EL03-133-00, 105 F.E.R.C. P61,004 (2003), ¶22. In denying rehearing, FERC emphasized that there are various types of small power producers and co-generation facilities that fall within the definition of QF; only some QFs are renewable energy producers with a separate renewable attribute while others have other separate attributes such as thermal output, but all QF are treated the same and are entitled to the mandatory purchase of their energy at no more than a utility's avoided cost rates. American Ref-Fuel Company, Covanta Energy Group, Montenay Power Corporation, Wheelabrator Technologies, Inc., Docket No. EL03-133-001, *Order Denying Rehearing*, 107 F.E.R.C. P61,0168, ¶¶ 15, 16 (2004).

Both NMPRC Rule 570, Governing Cogeneration and Small Power Production, and NMPRC Rule 571, Net Metering of Customer-Owned Qualifying Facilities of 10kW

or Smaller, apply to QFs as defined by federal law. The objective of NMPRC Rule 570 is to govern the purchase of power from and the sale of power to QFs, and to implement federal regulations for QFs (*see* 18 C.F.R. Section 292) promulgated pursuant to the Public Utility Regulatory Policies Act of 1978 (16 U.S.C. Section 824) and the New Mexico Public Utility Act. NMAC 17.9.570.6. NMPRC Rule 571 states expressly that it is “intended to supplement” NMPRC Rule 570. NMAC 17.9.571.9. Both Rule 570 and 571 provide that the utility shall pay the QF or pay or credit the small customer-owned QF “for the net energy supplied to the utility at the utility's energy rate pursuant to NMPRC Rule 570.17.” Additionally, Rule 570 provides that a utility and QF can reach other agreements as to the price of the energy as long as it does not exceed the avoided cost rates set by the Commission. NMAC 17.9.570.D. A utility cannot be required to pay more than avoided costs, but can pay less. Tr. at 69.

The Commission cannot regulate the production or sale price at the point of production of the renewable energy (Section 62-16-4(C)(5)) and cannot require the utility to pay rates for mandatory QF purchases in excess of the utility's avoided costs. Nor can the Commission require a public utility to pay additional value for RECs that it owns as a matter of law. At hearing, PNM testified that no utility is under a state law obligation to reach an agreement to allow a QF to retain RECs, but is under a federal law obligation to purchase the energy. Tr. at 68-69. Further, a utility always has the ability to take title to the energy and RECs without paying more than avoided cost rates. Tr. at 71. To the extent that a public utility desires to unbundle RECs from the purchased QF energy and to agree that the supplier shall retain the RECs, the reasonableness of any subsequent

value paid for such RECs should be addressed in that utility's procurement plan proceedings.

WHEREFORE, EPE requests that the Hearing Examiner issue a Recommended Decision that adopts the arguments and testimony submitted by EPE.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **El Paso Electric Company's Post-Hearing Brief In Chief** was mailed first class, postage prepaid, hand-delivered or served electronically, to each of the following:

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DATED this 29th day of September, 2006.

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