

PNM  
Alvarado Square  
Albuquerque, NM 87158-0920  
505 241-2700  
Fax 505 241-2386  
www.pnm.com

October 20, 2006



*A personal commitment  
to New Mexico*

Mr. Ronald X. Montoya  
New Mexico Public Regulation Commission  
224 East Palace Avenue  
Santa Fe, NM 87501

*RE: Case No. 05-00352-UT*

Dear Mr. Montoya:

Enclosed please find the Reply Brief of Petitioner, Public Service Company of New Mexico in the above referenced proceeding.

The original and fourteen copies are for filing. Please conform the extra copy for our files and return with our courier. If you have any questions regarding this filing, please contact me at 505-241-2479.

Respectfully,

A handwritten signature in black ink that reads "Thomas J. Wander".

Thomas J. Wander  
Director, Regulatory Projects

**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, )  
 )  
PUBLIC SERVICE COMPANY OF )  
NEW MEXICO, )  
 )  
Petitioner. )  
\_\_\_\_\_ )

Utility Case No. 05-00352-UT

**REPLY BRIEF OF PETITIONER  
PUBLIC SERVICE COMPANY OF NEW MEXICO**

MILLER STRATVERT, P.A.

Robert H. Clark  
500 Marquette, N.W., Suite 1100  
Post Office Box 25687  
Albuquerque, New Mexico 87125  
Telephone: (505) 842-1950  
Fax: (505) 243-4408

Attorneys for Petitioner Public Service  
Company of New Mexico

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Utility Case No. 05-00352-UT

**REPLY BRIEF OF PETITIONER**  
**PUBLIC SERVICE COMPANY OF NEW MEXICO**

This reply brief is submitted by Petitioner Public Service Company of New Mexico ("PNM" or the "Company"). Its purpose is to address certain points raised in the initial briefs of the Utility Division Staff ("Staff") of the New Mexico Public Regulation Commission ("NMPRC" or the "Commission"), El Paso Electric Company ("EPE"), Southwestern Public Service Company ("SPS"), the Regents of the University of New Mexico ("UNM") and the Coalition for Clean Affordable Energy ("CCAEE").

**Issue 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**

Staff's initial brief states (pp. 3-4) that all of the parties, save PNM, agree that a public utility has discretion to acquire, or not to acquire, renewable energy certificates ("RECs") from a qualifying facility ("QF") from which it purchases energy under NMPRC Rule 570 (17.9.570 NMAC). However, as PNM's initial brief makes clear (pp. 6-9), PNM does not disagree with the proposition that a utility has this discretion. Quite the contrary, PNM's August 31, 2005 Petition specifically asked the Commission to

make a declaration that PNM has the discretion to determine whether to acquire RECs in this circumstance. *See* Petition, p. 4. To reiterate, PNM's position is that a utility should not be required, but rather should have the discretion, to acquire or not to acquire RECs from any specific renewable energy producer, including from a QF.

If the Commission determines that public utilities do have the discretion to acquire, or not acquire, the RECs associated with a QF's energy sold to the utility, the Commission should not find it imprudent if a utility declines to purchase RECs associated with a QF energy purchase and subsequently purchases RECs from another source that better fits the utility's renewable energy portfolio. *See* PNM's Brief in Support of Petition for Declaratory Order, August 30, 2005, p. 11.

**Issue 2: Whether it is Reasonable and Prudent for a Public Utility to Pay Value for RECs, whether or not acquired with the Associated Energy**

PNM's position on this issue may be restated in the following manner. RECs have value independent of the associated renewable energy. If a utility acquires RECs from a QF as part of a mandated energy purchase from the QF, then the price paid for the acquired RECs should be over and above the avoided cost rate defined in the Public Utility Regulatory Policies Act of 1978 ("PURPA"), but the total price of the energy, plus the RECs, should be less than the Reasonable Cost Threshold ("RCT") established by the Commission.

PNM perceives some lack of consistency in Staff's position on the issue of payment for RECs. In direct testimony, Staff argued that if a utility exercises its discretion to acquire RECs along with the QF energy, "then the price paid for the combination should be less than or equal to the [RCT]." Staff Exh. 2, p. 3; *see also* Tr. 178. This language seems to support the proposition that a utility could properly pay a

QF something more than the PURPA avoided cost for the renewable energy if bundled with the associated RECs, *i.e.*, that there is additional value to be paid for the RECs over and above the energy avoided cost payment. However, at another point during the hearing, Staff's witness questioned why a utility would pay for something, like a REC, when it could get the REC by buying the QF's energy: "Why then pay extra for when you've got everything, I can't fathom why anybody would do it." Tr. 162. PNM urges the Commission to adopt the position that Staff advanced in its filed direct testimony.

PNM also takes issue with several statements in Staff's brief. Staff states (brief, p. 4) that all parties agree that it could be reasonable and prudent for a utility to pay value for RECs, whether or not acquired with the associated energy. While the parties apparently agree that a PURPA avoided cost payment does not include any consideration for RECs, Staff, EPE and SPS all took the position that they could not conceive of any situation in which a utility should pay a value for RECs associated with the energy purchased from a QF. *See* Tr. 92, 108-09 (EPE); 145 (SPS); 162 (Staff).

Staff further suggests (brief, pp. 5-6) that it might be reasonable for a utility to pay value for RECs if, among other things, the associated QF energy has been sold at retail by the utility to New Mexico electric customers. In support of this proposition, Staff cites several provisions of the Renewable Energy Act ("REA"), as well as testimony of PNM and EPE witnesses. *Id.* PNM finds no support in the cited statutory references for the proposition that there must be a retail sale of renewable energy to create a REC or for the REC to be eligible for RPS compliance. Further, PNM disagrees with the characterization (*Id.*, p. 6) of Mr. Scharff's testimony concerning retail energy sales as being a requirement for RECs to be eligible for RPS compliance. In his rebuttal

testimony, Mr. Scharff specifically disagreed with Staff's contention that the purchase of RECs for RPS compliance is prudent only if the RECs are associated with energy delivered in New Mexico *and sold to retail customers* (emphasis added). PNM Exh. 2, p. 5; *see also*, Tr. 42-44.

El Paso Electric Company, in addressing the question of whether a utility's ability to pay value for RECs should be deferred to individual procurement plan proceedings, made reference to a statement attributed to PNM witness Scharff that was, in fact, made by EPE witness Newsom. *See*, EPE initial brief, p. 7, line 15 ("Tr. at 92 (testimony of Scharff)"). As noted on pages 3-4 of its initial brief, PNM is asking that a declaratory order be entered in this case establishing that a utility may make such payments, and that this issue not be deferred to individual procurement plan proceedings. However, PNM does believe that the amount paid for such REC purchases from QFs is appropriate for consideration in individual procurement plan proceedings.

**Issue 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**

PNM agrees with and concurs in the discussion of this issue in SPS's initial brief (pp. 12-13) and in CCAE's initial brief (pp. 4-7). RECs associated with QF energy that is consumed on-site meet all of the requirements for compliance with the renewable portfolio standard ("RPS").

Staff continues to argue against the PNM, SPS and CCAE position. Staff argues, among other things (brief, p. 8) that because energy consumed is not metered and contracted for delivery, those kWh are not usable for a utility's RPS. Underlying Staff's argument appears to be the proposition that the energy consumed on-site is not measured

at all. If the energy produced by the QF generator, whether consumed on-site or sold to the utility, is not measured at all, there is clearly no basis for claiming the creation of a REC. A REC is, after all, by definition, “a document evidencing that the enumerated renewable energy kilowatt-hours have been generated from a renewable energy generating facility.” 17.9.572.7E. However, if the energy is measured, as in the case of PNM’s small photovoltaic (“PV”) program, the RECs thus generated satisfy all the requirements of the REA and Rule 572 (17.9.572 NMAC).

Staff asserts (brief, pp. 6-7) that PNM’s position is based on Rule 571 (17.9.571 NMAC), a rule promulgated before the enactment of the REA. The basis for PNM’s citation to Rule 571 is set forth in Mr. Scharff’s direct testimony (PNM Exh. 1, pp. 15-16) and was also addressed at the hearing. During cross-examination, Mr. Scharff clarified that the “contracted for delivery” provision of the REA could be interpreted in a manner consistent with Rule 571 and Rule 570 (Tr. 37-38). More particularly, the language in the standard form interconnection agreements made a part of Rule 571 and Rule 570 is helpful in construing the requirements of the REA.

Staff states that it arrived at its position concerning the “contracted for delivery” issue after reviewing the language of several statutory provisions, enumerated at page 9 of its brief. However, PNM fails to perceive how the cited statutory references compel Staff’s conclusions, or address what is required to satisfy the “contracted for delivery in New Mexico” requirement. As SPS points out (brief, p. 13), the REA and Rule 572 place only two restrictions on RECs associated with renewable energy: (1) there must be a contract for the renewable energy; and (2) the contract must provide for delivery in New Mexico.

Finally, Staff asserts (brief, p. 9) that RECs establish compliance with the “RCT” and that the “RCT” requires that a percentage of the retail sales made by a public utility be supplied from renewable energy. This reference appears to be erroneous – “RPS” or perhaps “REA” should be understood in place of “RCT.”

The “contracted for delivery in New Mexico” issue has been extensively analyzed in this case, but to further address the policy implications of how this issue is resolved, PNM offers the following additional considerations. The economics of small scale renewable energy systems are highly dependent on system costs and removing the eligibility of RECs created from energy consumed on-site will assign these RECs a value of zero and thereby discourage the installation of renewable energy systems in the near term. If RECs from energy consumed on-site cannot be sold for use in satisfying a utility’s RPS, the effect could be to stop or at least discourage the installation of smaller scale customer-owned renewable energy systems that mainly displace customer load. Additionally, denial of QF renewable energy consumed on-site to qualify for RPS would be contrary to the intent and spirit of the REA, at variance with the Governor’s announced commitment to the development of renewable energy generation in New Mexico, and could place into question innovative programs like PNM’s small PV REC purchase program approved by the Commission in NMPRC Case 05-00356-UT.

In the future, if the Commission determines pursuant to § 62-16-5B(1)(b) that there is a regional market for exchanging RECs, a determination that renewable energy consumed on-site by a QF is not eligible for compliance with New Mexico’s RPS could place New Mexico’s public utilities at an economic disadvantage in meeting their RPS.

Even without a regional market for RECs, if New Mexico's RPS compliance rules do not allow the use of RECs associated with QF energy consumed on-site, New Mexico utilities would be placed at an economic disadvantage relative to out-of-state REC aggregators that can sign REC purchase agreements with New Mexico QFs for RECs created from energy consumed on-site and utilize these RECs for compliance with RPS or green energy programs in other states. For example, Colorado already allows RECs associated with energy consumed on-site to be used for RPS compliance. *See* C.R.S. § 40-2-124 (1) (e) ("Electricity generated under this program shall be eligible for the qualifying retail utility's compliance with this article"). If RECs are sold out-of-state by New Mexico QFs, New Mexico utilities could be placed in the position having to spend more to procure the same number of RECs from other resources due to the ineligibility of New Mexico RECs created from the on-site consumption by QFs.

Furthermore, § 62-16-4A(4) requires that a public utility's renewable energy portfolio be diversified as to the type of renewable resource, taking into consideration the overall reliability, availability, dispatch flexibility and cost of the various renewable energy resources made available by suppliers and generators. Staff's proposal would effectively restrict New Mexico's public utilities from using renewable energy generated and consumed by net metering customers to enhance their resource diversity as part of meeting the RPS.

**Issue 5: Whether there are any Policy Constraints the Commission should Consider in Approving any Unbundling of RECs**

In its initial brief (p. 11), Staff reiterates its recommendations that RECs be procured principally for meeting utility RPS requirements and that utilities be required to adopt strategies to minimize cost impact to ratepayers. PNM has already addressed the

first of these recommendations in detail in its initial brief (pp. 14-18). As to Staff's second recommendation, PNM believes that no such requirement is warranted because cost issues will be addressed in utilities' annual procurement plan filings.

**Issue 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**

PNM disagrees with Staff's statement (brief, p. 13) that all parties agree that Rules 570 and 571 govern the avoided cost that utilities pay for bundled renewable energy and RECs. Quite the contrary, it is clear that avoided cost payments as defined by PURPA and implemented through utility avoided cost rate schedules (such as PNM's Rate 12) do not include a value for RECs and that Rules 570 and 571 do not address RECs at all. This issue was addressed in detail in the brief that PNM filed in support of its Petition (pp. 7-9) and also in Mr. Scharff's direct testimony (PNM Exh. 1, p. 7).

### CONCLUSION

A declaratory order should be entered to resolve the issues presented in this case. Among other things, the Commission should declare that: (1) utilities have discretion to determine whether to acquire RECs from QFs from which they purchase renewable energy under Rule 570; (2) it is reasonable and prudent for utilities to pay value for RECs, whether or not acquired with the associated energy; (3) renewable energy consumed on-site by a QF is energy "contracted for delivery" in New Mexico and thus the associated RECs are usable to meet a utility's RPS; and (4) nothing in the REA requires a utility to procure RECs for the sole or principal purpose of satisfying its RPS.

Respectfully submitted,

MILLER STRATVERT, P.A.

By 

Robert H. Clark  
Post Office Box 25687  
Albuquerque, New Mexico 87125-0687  
Telephone: (505) 842-1950

Attorneys for Petitioner Public Service  
Company of New Mexico

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\_\_\_\_\_ )****

**Case No. 05-00352-UT**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the **Reply Brief of Petitioner, Public Service Company of New Mexico** was mailed first-class, postage paid, this 20th day of October 2006, to each of the following persons:

Warren Salomon  
AARP  
535 Cerrillos Rd, Suite A  
Santa Fe, NM 87501

Jeffrey L. Fornaciari, Esq.  
The Hinkle Law Firm  
PO Box 2068  
Santa Fe, NM 87504-2068

Daniel Najjar, Esq.  
Virtue Najjar & Brown PC  
PO Box 22249  
Santa Fe, NM 87502-2249

Ben Luce  
Coalition for Clean Affordable Energy  
135 Harvard Drive SE  
Albuquerque, NM 87106

Steven S. Michel, Esq.  
2025 Senda de Andres  
Santa Fe, NM 87501

Bruce C. Throne, Esq.  
1440B South St. Francis Dr.  
Santa Fe, NM 87505

Western Water and Power Production  
Limited, L.L.C.  
c/o Jack Maddox, Vice President  
809 Suzanne Lane, SE  
Albuquerque, NM 88340

Carolyn S. Fudge, Esq.  
City of Albuquerque  
PO Box 2248  
Albuquerque, NM 87103

Randall W. Childress, Esq.  
Law Offices of Randall W. Childress, PC  
300 Galisteo Street, Suite 205  
Santa Fe, NM 87501

Peter Gould, Esq.  
PO Box 31326  
Santa Fe, NM 87594-1326

Jeff Taylor, Esq.  
Assistant Attorney General  
PO Drawer 1508  
Santa Fe, NM 87504-1508

Alletta Belin  
618 Paseo de Peralta  
Santa Fe, NM 87501

Kevin Groenewold  
NM Rural Electric Cooperative  
614 Don Gaspar Avenue  
Santa Fe, NM 87501

Jose F. Provencio  
Manager, Economic & Rate Research  
123 W. Mills Ave.  
El Paso, TX 79901

Dr. John C. Tysseling  
One Sycamore Plaza, Ste. 225  
5600 Wyoming Blvd. NE  
Albuquerque, NM 87109

David S. Cohen  
Jane C. Cohen  
Cohen & Cohen, P.A.  
P.O. Box 789  
Santa Fe, NM 87504-0789

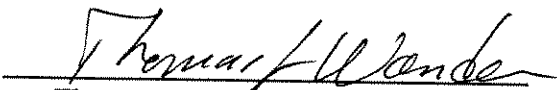
**And hand-delivered to:**

Dahl Harris, Esq.  
Staff Counsel  
NM Public Regulation Commission  
224 East Palace Ave, Marian Hall  
Santa Fe, NM 87501

John Curl  
Utility Division  
NM Public Regulation Commission  
224 East Palace Avenue, Marian Hall  
Santa Fe, NM 87501

R. Prasad Potturi  
Utility Division Engineering Manager  
NM Public Regulation Commission  
224 East Palace Ave, Marian Hall  
Santa Fe, NM 87501

Dated this 20<sup>th</sup> day of October 2006.

By   
Thomas J. Wander  
Director, Regulatory Projects

GCG #81810