IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

No. S-1-SC-39432

SOUTHWESTERN PUBLIC SERVICE COMPANY,

Appellant,

and

EL PASO ELECTRIC COMPANY,
PUBLIC SERVICE COMPANY OF NEW MEXICO,

Intervenors-Appellants,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee,

and

COALITION FOR COMMUNITY SOLAR ACCESS, RENEWABLE ENERGY INDUSTRIES ASSOCIATION OF NEW MEXICO, CITY OF LAS CRUCES, NEW ENERGY ECONOMY, AND COALITION OF SUSTAINABLE COMMUNITIES OF NEW MEXICO,

Intervenors-Appellees,

In the Matter of the Commission's Adoption of Rules
Pursuant to the Community Solar Act,
NMPRC Case No. 21-00112-UT.

CONSOLIDATED WITH

NO. S-1-SC-39558

SOUTHWESTERN PUBLIC SERVICE COMPANY,

Appellant,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee,

In the Matter of the Commission's Adoption of Rules Pursuant to the Community Solar Act, NMPRC Case No. 21-00112-UT.

AND

NO. S-1-SC-39611

SOUTHWESTERN PUBLIC SERVICE COMPANY,

Appellant,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee,

In the Matter of Implementation and Administration of the Community Solar Program, NMPRC Case No. 22-00020-UT,

In the Matter of the Compliance Filing of Southwestern Public Service Company Pursuant to 17.9.573.9 NMAC, NMPRC Case No. 22-000240-UT, and

AND

NO. S-1-SC-39678

SOUTHWESTERN PUBLIC SERVICE COMPANY,

Appellant,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee,

In the Matter of Implementation and Administration of the Community Solar Program, NMPRC Case No. 22-00020-UT,

In the Matter of the Compliance Filing of Southwestern Public Service Company Pursuant to 17.9.573.9 NMAC, NMPRC Case No. 22-000240-UT,

JOINT[1] BRIEF IN CHIEF OF APPELLANT SOUTHWESTERN PUBLIC SERVICE COMPANY AND INTERVENOR-APPELLANTS EL PASO ELECTRIC COMPANY AND PUBLIC SERVICE COMPANY OF NEW MEXICO

[1] El Paso Electric Company joins in only Sections I, II (A)-(E), III, IV (A)(1)-(5), and (7) of the Brief, and Public Service Company of New Mexico joins only in Sections I, II (A)-(D), III, IV (A)(1)-(5), and (7) of the Brief.

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ORAL ARGUMENT IS REQUESTED

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I. INTRODUCTION

Southwestern Public Service ("SPS"), El Paso Electric Company ("EPE"), and Public Service Company of New Mexico ("PNM") (collectively "Utilities") appeal the New Mexico Public Regulation Commission's ("NMPRC" or the "Commission") orders adopting and implementing 17.9.573.1–17.9.573.22 NMAC ("Rule 573" or "the Rule").[2] Rule 573 implements the New Mexico community solar program, which was established by the 2021 Community Solar Act, NMSA 1978, Sections 62-16B-1 to -8 (2021) (the "Act"). The Act "allows for the development of community solar facilities and provides customers of a qualifying utility with the option of accessing solar energy produced by a community solar facility." *See* § 62-16B-2(E).[3] The Act requires the Utilities to, among other things, acquire the entire generation output from community solar facilities in their service territory for at least twenty-five years, and it also requires the Utilities to apply bill

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[2] Pursuant to this Court's January 18, 2023, Order, Appellant SPS and Intervenors EPE and PNM were directed to file a Joint Brief in Chief in this consolidated appeal. EPE and PNM do not join this entire Brief. Rather, EPE joins only in Sections I, II (A)-(E), III, IV (A)(1)-(5), and (7) of this Brief, and PNM joins only Sections I, II (A)-(D), III, IV (A)(1)-(5), and (7) of this Brief.

[3] A community solar facility "generates electricity by means of a solar photovoltaic device, and subscribers to the facility receive a bill credit for the electricity generated in proportion to the subscriber's share of the facility's kilowatt-hour output." § 62-16B-2(D). A subscriber is a "retail customer of a qualifying utility that owns a subscription to a community solar facility." § 62-16B-2(L). A subscriber organization is an entity that owns or operates a community solar facility. § 62-16B-2(M).

credits to subscribers' bills based on the electricity generated each month by the subscribed facility. *See id.* § 62-16B-6(A).

This matter consolidates four appeals by SPS arising from four Commission orders. The first appeal, in which EPE and PNM intervened, is an appeal of the Commission's order adopting Rule 573 ("Rulemaking Order"). The other three appeals arise from the Commission's order[4] improperly denying SPS's motion to stay implementation of the Rule pending appeal and two Commission orders implementing the Rule as to SPS (the "Advice Notice Orders") that are contrary to the Act and violate SPS's due process rights.

This Court should annul and vacate the Rulemaking Order because the Rule was adopted without regard for the Utilities' due process rights and violates the Act and other applicable law.[5] Most notably, and contrary to express provisions in the Act, the Rule includes provisions that result in non-subscribers subsidizing costs attributable to the program or its subscribers. The Rule also violates the Act by

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[4] The order denying the stay is not separately addressed in detail herein, because resolution of the Rulemaking Order appeal addressed herein will render moot the appeal of the denial of the stay pending appeal. As explained in SPS's Motion to Stay, which remains pending before this Court as of the time of the filing of this brief, the Commission abused its discretion in denying SPS's requested stay for the same reasons it acted contrary to law in adopting the Rule, as detailed herein.

[5] In accordance with NMSA 1978, Section 62-11-5 of the Public Utility Act ("PUA"), the Court has "no power to modify the action or order appealed from, but shall either affirm or annul and vacate the same." *See, e.g., City of Albuquerque v. N.M. Pub. Reg. Comm'n*, 2003-NMSC-028, ¶ 23, 134 N.M. 472.

omitting required consumer protection provisions and low-income guidelines, by failing to include required cost recovery mechanisms, by creating improper exceptions to requirements in the Act, and by improperly delegating the community solar facility selection process to a third-party. *See* 17.9.573.1–17.9.573.22 NMAC. The Commission also violated due process standards by relying entirely upon non-public recommendations from an unidentified "Team" in promulgating the Rule. *Id.* Therefore, the Rulemaking Order should be annulled and vacated, and this matter should be remanded to the Commission for further proceedings.

The two Advice Notice Orders must also be annulled and vacated. The First Advice Notice Order rejected SPS's proposed bill credit rate without hearing, compelled SPS to file a new tariff in a form mandated by the Commission, and found SPS was not entitled to a hearing required to set new rates under the Public Utility Act ("PUA"). [39611 7 RP 1336-48]. This order violated the Act by requiring transmission costs be credited to subscribers, resulting in an unlawful subsidization. It also violated SPS's due process rights, and the plain language of the PUA, by compelling SPS's filing of a new rate without first holding a hearing. *See* [39611 7 RP 1347].

The Second Advice Notice Order also violated the Act and SPS's due process rights. That order denied SPS's request to stay the unlawful First Advice Notice Order and put into immediate effect the improper rate SPS was ordered to file to

comply with the First Advice Notice Order. [39611 10 RP 1879-1901]. As a result, the Commission set a new rate without first affording SPS its statutory right to a hearing, in direct violation of the PUA and SPS's constitutional right to due process. *See id.*

For these reasons, and set out in detail below, the appealed Commission orders are unlawful and should be annulled and vacated.

II. SUMMARY OF FACTS AND PROCEEDINGS

A. The Community Solar Act

The Act allows customers of a qualifying utility the option of accessing solar energy produced by an unregulated community solar facility through a community solar program. *See* § 62-16B-2(E). SPS, PNM, and EPE are qualifying utilities whose customers will be eligible to participate in the program administered by each utility. *See* § 62-16B-2(K). The Utilities' customers will have the opportunity to "subscribe" to a community solar facility by entering into a contract with, and paying a subscription fee to, a "subscriber organization." § 62-16B-2(D), (M)-(N). Subscribing customers will receive bill credits from the Utilities on their monthly utility bills for an amount that represents the value of their subscribed portion of the energy supplied by the community solar facility. *Id.*

Pursuant to the Act, the Commission was required to adopt a specific set of rules to facilitate the creation of a community solar program in New Mexico.

§ 62-16B-7(B). The Act expressly required the Commission to enact rules that, among other things:

- require thirty percent of electricity produced from each community solar facility to be reserved for low-income customers and low-income service organizations;

- establish a process for the selection of community solar facility projects and allocation of the statewide capacity program cap;

- require a qualifying utility to file the tariffs, agreement or forms necessary for implementation of the community solar program;

- establish reasonable, uniform, efficient and non-discriminatory standards, fees and processes for the interconnection of community solar facilities that are consistent with the commission's rules that allow a qualifying utility to recover reasonable costs for administering the community solar program and interconnection costs for each community solar facility, such that a qualifying utility and its non-subscribing customers do not subsidize the costs attributable to the subscriber organization pursuant to this paragraph;

- provide consumer protections for subscribers, including a uniform disclosure form to ensure fair disclosure of future costs and benefits of subscriptions, key contract terms, security interests and other relevant but reasonable information pertaining to the subscription, as well as grievance and enforcement procedures; and

- provide a community solar bill credit for subscribers derived from the qualifying utility's total aggregate retail rate on a per-customer-class basis, less the commission-approved distribution cost components, and identify all proposed rules, fees and charges; provided that non-subscribers shall not subsidize costs attributable to subscribers; and provided further that if the commission determines that it is in the public interest for non-subscribers to subsidize subscribers, non-subscribers shall not be charged more than three percent of the non-subscribers' aggregate retail rate on an annual basis to subsidize subscribers;

§ 62-16B-7(B)(3)-(8).

The Act further requires the Utilities to take certain actions to implement the program, including: (1) facilitating interconnection of the selected community solar facilities in the utility's service territory to the utility's system; (2) acquiring all of the solar generation output from the community solar facilities connected to the utility's system for at least 25 years; and (3) applying community solar bill credits to subscribers' bills for at least 25 years from the date a community solar facility is interconnected to the utility's system. *See* § 62-16B-6(A).

B. Initiation of the Rulemaking

The Commission commenced the rulemaking process mandated by the Act via an initial order issued on May 12, 2021 (the "Initial Order"). [39432 1 RP 0002-0006]. The Initial Order stated that the Commission had "contracted with Strategen Consulting, LLC ('Strategen'), to advise and assist with regard to the Commission's rulemaking pursuant to the [Community Solar] Act, including substantive issues such as the content of any rule as well as procedural issues such as facilitating stakeholder engagement in the process." [39432 1 RP 0004]. The Initial Order further stated that "Commissioner Joseph Maestas has formed, within the Commission, a Community Solar Action Team (the "Team"), which includes Commissioner Cynthia Hall, as well as representatives of Staff of the Commission's Utilities Division, the Office of General Counsel, and the Chief of Staff, *among others*. The Team will take a leading role in the rulemaking

process, will interface with Strategen, and will endeavor to maximize stakeholder engagement." [39432 1 RP 0005] (emphasis added). Beyond this statement, the Order did not to identify the specific individuals who comprised the Team. *See* [39432 1 RP 0002-0006]. The Initial Order also failed to identify the procedures that would apply to the Team's communications with the Commission or if the Team's communications with the Commission would be public. *See id.*

The Commission subsequently held three public workshops in June, August, and October of 2021. [39432 1 RP 0017-0021]; [39432 3 RP 0326-0328]; [39432 5 RP 0480-0482]. In addition, Strategen filed a report summarizing its findings from a working group process that had also taken place during this time period. [39432 5 RP 0494-0530].

C. Issuance of Notice of Proposed Rulemaking

On October 17, 2021, the Commission issued a Notice of Proposed Rulemaking ("NOPR") for Rule 573. [39432 5 RP 0542-0560]. This order stated that the Team drafted the proposed rule published in the NOPR. [39432 5 RP 0544-45 ¶ 8].

On December 9, 2021, interested parties, including the Utilities and Staff, filed initial comments on the NOPR. [39432 7 RP 0755-0790, 0804-0853]; [39432 8 RP 0867-0888, 0900-0931, 0945-0967, 0969-1033]; [39432 9 RP 1063-1081, 1083-1097, 1109-1113]. On January 6, 2022, the Commission held a public hearing

on the rulemaking. Stakeholders, including the Utilities and Staff, filed response comments on January 12, 2022, followed by reply comments on January 25, 2022. [39432 11 RP 1388-1444, 1458-60, 1474-92, 1507-24, 1538-1561]; [39432 12 RP 1573-1587, 1605-10, 1624-73, 1687-1732, 1745-69]; [39432 13 RP 1785-91, 1805-09, 1824-28, 1842-46, 1892-1904, 1906-10, 1928-34, 1946-65]; [39432 14 RP 1979-85, 1999-2009, 2027-34, 2048-75, 2089-91, 2093-2104, 2118-21, 2135-37, 2152-76, 2191-3]. Notably, the Team did not file any initial comments, or responses or replies thereto.

In their comments, the Utilities raised a number of concerns, including that the proposed rule: 1) improperly allowed for subsidies from non-subscribing customers for costs attributable to community solar projects; 2) lacked required consumer protection provisions; 3) improperly prohibited deduction of transmission costs from the subscriber bill credit in violation of the Act and the prohibition against improper subsidization of subscribers by non-subscribers; 4) failed to adequately address statutorily mandated service to low-income customers; 5) improperly delegated project selection to a third-party administrator; 6) failed to address interconnection issues; and 7) failed to include adequate cost recovery language. [39432 12 RP 1573-1587, 1687-1732] (SPS and PNM response comments); [39432 11 RP 1538-1561] (EPE response comments); [39432 13 RP 1946-65] (EPE

reply comments); [39432 14 RP 1999-2009, 2152-76] (SPS and PNM reply comments).

D. Order Adopting Final Rule

On March 30, 2022, the Commission issued the Order Adopting Rule. [39432 15 RP 2262-2358]. Repeatedly within that order, the Commission indicated that its determinations relied almost entirely on non-record recommendations made by the Team. *See id.* The Team's recommendations regarding the Rule were never made public during the comment period, nor were the Teams recommendations made available as a "Recommended Decision" or some other type of document in advance of an order. Also, the Team members were not identified. *See id.* The record does not include the exact substance or timing of the Team's recommendations or identify related communications with the Commission. *See id.* As a result, stakeholders—including the Utilities—were unable to review or respond to the Team's reasoning or recommendations before the rulemaking record closed.

E. SPS and EPE's Motion for Clarification and Stay of Implementation

In light of the irregular use of the Team by the Commission in the rulemaking, on April 20, 2022, SPS and EPE filed a "Request for Procedural Clarifications and for Stay of Implementation Pending Further Rulemaking," requesting that the NMPRC: 1) clarify the role of the Team; 2) reopen the rulemaking record for supplementation with the Teams' communications; 3) apply proper notice-and-

comment procedures to the rulemaking; and 4) stay the implementation of the Rule until the procedural irregularities associated with the Team could be addressed. [39432 16 RP 2489-96]. This request was denied. *See* [39432 20 RP 3158-3176].

F. Motions for Rehearing

Motions for Rehearing/Reconsideration and/or Motions for Clarification of the Order Adopting Rule were filed by SPS, EPE, PNM, City of Las Cruces ("CLC"), Cypress Creek Renewables ("CCR"), PowerMarket ("PM"), US Solar ("USS"), Renewable Energy Industries Association – New Mexico's ("REIA"). [39432 18 RP 2730-41, 2755-60]; [39432 19 RP 2773-2825, 2838-66, 2883-94], 2883-94, 2947-49, 2964-2970]; [39432 20 RP 2984-87]. Each party identified various flaws in the Rule, and several parties, including the Utilities, raised concerns that the Rule was inconsistent with the Legislature's requirements as set forth in the Act in numerous respects. *See id.*

G. May 18, 2022, Order Partially Granting Motions for Rehearing

The Commission issued an Order Partially Granting Motions for Rehearing, on May 18, 2022. [39432 20 RP 3158-87]. In that order, the Commission denied SPS and EPE's Motion for Clarification and Stay and partially granted the various Motions for Rehearing to address certain concerns raised by the movants. *Id.* As with the Order Adopting Rule, the Order Partially Granting Motions for Rehearing relied on non-record responses and recommendations made by the Team. *See id.*

H. SPS's Appeal of Rulemaking Order and First Motion to Stay

On June 17, 2022, SPS filed a Notice of Appeal of the Rulemaking Order (Case No. S-1-SC-39432).[6] On July 19, 2022, SPS filed with the Commission a Motion to Stay the Commission's implementation of Rule 573 pending resolution of the appeal. [39432 20 RP 3234-44]. The Commission denied the Motion to Stay on August 10, 2022. [39432 SRP 1-19]. On August 17, 2022, SPS filed with this Court a direct Motion to Stay the Commission's further implementation of Rule 573, pursuant to this Court's independent authority under Section 62-11-6. That motion remains pending. Because the Commission disputed this Court's authority to independently issue a stay under Section 62-11-6, SPS also appealed the Commission's order denying SPS's motion to stay (Case No. S-1-SC-39558) out of an abundance of caution; that appeal was consolidated into this matter.[7]

I. SPS's Filing of Advice Notice No. 309

On July 12, 2022, Rule 573 was published in the New Mexico Register and became effective. 17.9.573 NMAC (7/12/2022). Despite SPS's requests for a stay,

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[6] The final order on the rulemaking was the Commission's May 18, 2022, Order Partially Granting Motions for Rehearing. Out of an abundance of caution, SPS appealed both this rehearing order and the Order Adopting Rule.

[7] Because the stay SPS is seeking is requested to be in place only during the pendency of the appeal of the Rulemaking Order, the appeal of the Stay Order, as well as the pending Motion for Stay directly filed with this Court, will be rendered moot by a final decision on the merits in the appeal of the Rulemaking Order.

the Commission proceeded with implementation of the Rule. SPS and the other Utilities were required to file "all tariffs, agreements and forms necessary for implementation of the community solar program" by September 12, 2022. 17.9.573.9 NMAC. SPS complied with this requirement by filing Advice Notice No. 309, which included a tariff setting forth SPS's proposed community solar bill credit rate and a tariff with a proposed subscriber organization agreement. [39611 3 RP 0320-22, 0376-0436].

J. The First Advice Notice Order

On October 12, 2022, in response to the Community Solar advice notices filed by SPS, PNM, and EPE, the Commission issued the First Advice Notice Order, without first holding a hearing. [39611 7 RP 1336-48]. Relevant to this appeal, that order summarily rejected SPS's proposed rate, the bill credit tariff, and ordered SPS to file, within two days of the order, a new bill credit tariff that included transmission costs in the bill credit rate. [39611 7 RP 1347]. The First Advice Notice Order further stated that the NMPRC would not appoint a hearing examiner or schedule a public hearing to resolve the Advice Notices.[8] [39611 7 RP 1346 ¶ 23]. On October

[8] Subsequent to SPS appealing the Advice Notice Orders, the Commission issued an order on March 1, 2023, opening a consolidated proceeding that will allow for a hearing on the issue of the proposed subscriber organization agreements, as well as other matters related to community solar implantation. *See* Order dated March 1, 2023 in Case No. 23-00071-UT. Despite this, the Commission has not reconsidered allowing a hearing on SPS's bill credit tariff. Accordingly, the dispute underlying SPS's appeal of the two Advice Notice Orders remains live.

14, 2022, SPS appealed the First Advice Notice Order, which was docketed in this Court as Case No. S-1-SC-39611.

K. SPS's Motion to Vacate or Stay and Conditional Advice Notice No. 311 Filed Under Protest

On October 14, 2022, SPS filed a Motion to Vacate the First Advice Notice Order on the grounds that the order violated the PUA and SPS's due process rights by compelling SPS to file a particular bill credit rate without an evidentiary hearing. [39611 8 RP 1418-1513]. In the alternative, SPS moved to stay the First Advice Notice Order pending SPS's appeal of that order. To avoid sanctions for noncompliance with the October 12, 2022, Order, SPS attached to its filing a conditional Advice Notice No. 311 with a new bill credit tariff, filed under protest, calculated in the manner ordered by the Commission in the October 12, 2022, Order. *Id.*

L. Second Advice Notice Order and Denial of Second Motion for Stay

On November 2, 2022, the Commission issued the Second Advice Notice Order, which denied SPS's motion to stay the First Advice Notice Order and put into effect, without a hearing, the revised bill credit tariff that SPS had filed under protest. [39611 10 RP 1879-1901]. On November 4, 2022, two days after issuing the Second Advice Notice Order, the Commission circulated a Notice of PRC Staff's Revised Memorandum Regarding SPS's Advice Notice No. 311. [39611 10 RP 1936-41]. In that memorandum, NMPRC staff had recommended that the Commission suspend

SPS's Advice Notice No. 311 and hold a public hearing. On December 2, 2022, SPS appealed the Second Advice Notice Order, which was docketed as Case No. S-1-SC-39678.

On December 22, 2022, SPS filed a direct motion to stay the First and Second Advice Notice Orders with this Court, as well as a motion to consolidate the four pending appeals. On January 18, 2023, the Court granted SPS's motion to consolidate the Appeals; no ruling has issued on the motion to stay.

III. STANDARD OF REVIEW

The Court "shall vacate and annul the [NMPRC] order complained of if it is made to appear to the satisfaction of the court that the order is unreasonable or unlawful." NMSA 1978, § 62-11-5. In evaluating a NMPRC order, the Court will determine whether the agency's determinations are "arbitrary and capricious, not supported by substantial evidence, outside the scope of the agency's authority, or otherwise inconsistent with law." *New Energy Econ., Inc. v. N.M. Pub. Regulation Comm'n*, 2018-NMSC-024, ¶ 24, 142 N.M. 533 (internal quotation marks omitted) (quoting *N.M. Indus. Energy Consumers v. N.M. Public Regulation Comm'n*, 2007-NMSC-053, ¶ 13, 142 N.M. 533). A Commission decision is arbitrary and capricious if it lacks a rational basis, was not the product of reasoned decision-making, and provides no rational connection between the facts found and the choices made or entirely omits consideration of relevant factors. *See Resolute*

Wind 1 LLC v. N.M. Pub. Regulation Comm'n, 2022-NMSC-011, ¶ 26, 506 P.3d 346; *N.M. Indus. Energy Consumers v. N.M. Pub. Regulation Comm'n*, 2019-NMSC-015, ¶ 8, 450 P.3d 393 ("*NMIEC 2019*"). The Court determines the appeal solely on the evidentiary record before the Commission, and the Court cannot permit the introduction of new evidence. NMSA 1978, § 62-11-3. The substantial evidence standard is met where the record as a whole demonstrates the reasonableness of the agency's decision. *DeWitt v. Rent-A-Center, Inc.*, 2009-NMSC-032, ¶ 12, 146 N.M. 453.

The Court reviews questions of law *de novo*. *N.M. Indus. Energy Consumers*, 2007-NMSC-053, ¶ 19. The Court is not bound by the NMPRC's decisions on questions of law and will substitute its own independent judgment if the NMPRC's interpretation is unreasonable or unlawful. *New Energy Econ.*, 2018-NMSC-024, ¶ 25. Statutory construction is a question of law and is not a matter within the NMPRC's expertise. *N.M. Indus. Energy Consumers*, 2007-NMSC-053, ¶ 19. To the extent this appeal concerns whether the Rule adopted by the Commission is inconsistent with the Act, the *de novo* standard of review applies. *See, e.g., N.M. Indus. Energy Consumers v. PRC*, 2007-NMSC-053, ¶ 19 (NMPRC's construction of the Renewable Energy Act and Public Utility Act was not a matter within the NMPRC's expertise that would be afforded deference); *see also Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-13, ¶ 5, 146 N.M. 24 (in

evaluating whether a regulation complied with the delegating statute, the Court applied a *de novo* standard of review).

The Commission has no authority to disregard clear legislative directives set forth in an enabling statute. *Egolf v. N.M. Pub. Regulation Comm'n*, 2020-NMSC-018, ¶ 16, 476 P.3d 896 ("the Commission has a nondiscretionary duty to administer applicable law duly enacted by our Legislature."); *See N.M. Pharmaceutical Ass'n v. State*, 1987-NMSC-054, ¶ 4, 106 N.M. 73 (stating that an "agency has no power to adopt a rule or regulation that is not in harmony with [its] statutory authority"). Public policy considerations do not allow an agency to adopt regulations different in scope or effect from the choices made by the Legislature. *See Aguilera v. Bd. of Educ.*, 2005-NMCA-069, ¶ 24-6, 137 N.M. 642 (conflicts between rules and statutes are resolved in favor of the statute). Additionally, "an administrative agency's discretion may not justify altering, modifying, or extending the reach of a law created by the Legislature." *See Taylor v. Johnson,* 1998-NMSC-015, ¶ 22, 125 N.M. 343; *see also Chalamidas v. Environmental Improvement Div.*, 1984-NMCA-109, ¶ 13, 102 N.M. 63. Indeed, it violates the New Mexico Constitution for an agency to act "in a manner that is beyond the scope of the authority granted to [it] by the Legislature." *Sandel v. N. M. Pub. Util. Comm'n*, 1999-NMSC-019, ¶ 26, 127 N.M. 272. Finally, a general delegation of statutory

authority does not allow an agency to adopt regulations that disregard and render meaningless a specific statute. *See, e.g.*, *Aguilera*, 2005-NMCA-069, ¶ 22.

IV. ARGUMENT

A. The Rule is inconsistent with requirements of the Act and must be annulled and vacated.

The Commission failed to follow a number of mandates set forth by the Legislature in the Act with respect to the required content of the rules the Commission was directed to promulgate. Because the Commission acted outside of its authority in ignoring the requirements of the Act by adopting provisions in the Rule that are inconsistent with the Act, the Rulemaking Order should be annulled and vacated. *See Aguilera*, 2005-NMCA-069, ¶ 24-26.

1. The Rule violates non-subsidization mandates in Section 62-16B-7.[9]

    a. The Rule's requirement that utilities include transmission costs in the subscriber bill credit contradicts the non-subsidization mandates in Section 62-16B-7(B)(8).

In the Act, the Legislature set forth as a foundational principle that the costs associated with the community solar program should not be subsidized by utility customers who choose not to subscribe to it (i.e., "non-subscribers"). With respect

[9] This issue was preserved by the comments and motion for rehearing filed by SPS. [39432 12 RP 1573-1587, 1687-1732] (SPS and PNM response comments); [39432 14 RP 1999-2009, 2152-76] (SPS and PNM reply comments); [39432 19 RP 2773-2825, 2838-66] (PNM and SPS motions for rehearing).

to the community solar bill credits issued to subscribers of the program, the Act required the Commission to promulgate rules that would:

> provide a community solar bill credit rate mechanism for subscribers derived from the qualifying utility's total aggregate retail rate on a per customer-class basis, less the commission-approved distribution cost components…provided that *non-subscribers shall not subsidize costs attributable to subscribers; and provided further that if the commission determines that it is in the public interest for non-subscribers to subsidize subscribers, non-subscribers shall not be charged more than three percent of the non-subscribers' aggregate retail rate on an annual basis to subsidize subscribers.*

See § 62-16B-7(B)(8) (emphasis added). The Act defines the "community solar bill credit" as the "credit *value of the electricity generated* by a community solar facility and allocated to a subscriber to offset the subscriber's electricity bill." *See* § 62-16B-2(B) (emphasis added). Accordingly, to comport with the Act's definition of a bill credit and prevent improper subsidies, a community solar bill credit must credit a subscriber for only the subscriber's share of the "value of the *electricity generated*" by a community solar facility and must not result in passing on costs "attributable to the subscriber" to non-subscribing customers. *See id.*

In contravention of the Act, the Rule provides that a "utility shall not subtract *any* costs of transmission from the solar bill credit rate calculation." 17.9.573.20.D NMAC (emphasis added). This double-negative provision (requiring utilities to "not subtract" any transmission costs from a bill credit) effectively mandates that the Utilities credit to community solar subscribers all transmission costs that are

typically charged to the subscriber for retail utility service.[10] Because the Rule thereby prohibits the Utilities from recovering "any" transmission costs from utility customers that subscribe to the program, the burden to pay those transmission costs necessarily will shift to the remaining, non-subscribing customers of the utility. This result violates the Act's prohibition against improper subsidization by non-subscribers of costs "attributable to" subscribers. *See* § 62-16B-7(B)(8); *Rivas*, *Rivas v. Bd. of Cosmetologists,* 1984-NMSC-076 ¶ 3, 101 N.M. 592, ("administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority").

It cannot be disputed that a utility's transmission-related costs are "attributable to" subscribers in the same manner they are attributable to non-subscribers, because it is axiomatic that a utility's transmission system is necessary for delivery of electricity to *all* of its retail customers; this necessarily includes subscribers.[11] Indeed, because community solar facilities will not produce energy

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[10] Utilities are required to separately state in retail customer bills "the portions of its rates …which are attributable to generation, transmission and distribution functions, respectively." NMAC § 17.9.531.9. "[A]ttributing portions of rates to different functions means separately identifying and disclosing that portion of the utility's rates which reasonably reflect the costs attributable to each of the three functions." NMAC § 17.9.531.7(E). Thus, for purposes of 17.9.573.20.D NMAC, the "cost of transmission" that must be credited to subscribers is that portion of the retail customer billing rate attributable to the utility's transmission function.

[11] Transmission involves "the transmission of electric power from the source or producer of power to the distribution system" and distribution involves "the delivery of electric power from the transmission system through distribution lines to the meter

when the sun is not shining and because a community solar facility and its subscribers can be located anywhere within a utility's service territory, a community solar subscriber will necessarily take electricity, transmitted *via the utility's transmission system*, from other sources of electricity generated by the utility on its system. Given this, if subscribers are credited transmission costs as part of their community solar bill credit in the manner mandated by the Rule, the subscribers will receive the beneficial use of the transmission system without paying for their fair share of it and cause non-subscribers to ultimately subsidize the subscribers' use of the transmission system.

The Commission rejected this subsidization concern and primarily justified the Rule's required inclusion of transmission costs in the bill credit by pointing to language in the Act that only expressly requires deduction of distribution costs from the credit. *See* § 62-16B-7(B)(8). The Act's requirement to remove distribution costs from the credit cannot be reasonably interpreted as a mandate to include transmission costs in the bill credit. *See, e.g., United States v. Vonn*, 535 U.S. 55, 65 (2002) (stating that "the canon that expressing one item of a commonly associated group or series excludes another left unmentioned is only a guide"). Rather, the reference to

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of the retail customer." 17.9.531.7(D) and (G) NMAC. Both transmission and distribution costs are incurred in delivering electricity to a retail utility customer. *See* 17.9.531.7(E) NMAC (providing electric service includes the functions of "generation, transmission and distribution").

removal of distribution costs from the bill credit must be read alongside and reconciled with other parts of the Act, which support the Utility's position that crediting transmission to subscribers is contrary to the Act. *See State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶ 32, 117 N.M. 346 ("all parts of statute must be read together to produce harmonious whole"). First, because crediting transmission costs to subscribers results in subsidization of costs "attributable to subscribers," it violates the non-subsidization mandate in the Act. § 62-16B-7(B)(8). Second, transmission costs are outside the scope of what the Act intended to be included in the bill credit, because the Act expressly defines the bill credit as only the "*value of the electricity generated* by a community solar facility." § 62-16B-2(B) (emphasis added). Transmission costs cannot be reasonably construed as any part of the value of generated electricity.[12]

Further, the Act's allowance for subsidization by non-subscribers up to a three percent cap does not support the Rule's wholesale ban on the deduction of transmission costs. *See* § 62-16B-7(B)(8), The Act provides that the Commission can only permit three percent subsidization by non-subscribers if it first finds that doing so is "in the public interest." Here, however, the Commission refused to

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[12] *See, e.g.*, 17.9.531.7 NMAC (explaining that generation is "production or acquisition of energy supply" whereas transmission is the "the activities involved in the transmission of electric power from the source or producer of power to the distribution system").

address the Utilities' concerns that crediting transmission costs would result in subsidization, and the Commission instead seemingly rejected any possibility that subsidization might occur. Thus, in the Rulemaking Order the Commission made no determination that the subsidization of subscribers' transmission costs was in the public interest. Even if the Commission had made such a public interest finding, the Rule still would not comport with the Act, because the Rule as adopted imposes an *absolute* ban on deducting "any" transmission costs from the bill credit, regardless of the degree of subsidization that may result, instead requiring all transmission costs to be credited back to subscribers through the bill credit.

In justifying this provision of the Rule, the Commission also stated that "it is difficult for the Commission to conceive of any situation in which transmission costs might reasonably be considered to have been *caused by a community solar facility*." [39432 SRP 13-4] (emphasis added). This reasoning reflects a misreading of the Act. The Act's language makes clear that the relevant inquiry when determining if the Rule violates § 62-16B-7(B)(8) is not whether the cost was caused by a community solar *facility*. Rather, the Act prohibits subsidization of "costs *attributable to subscribers*." *See* § 62-16B-7(B)(8) (emphasis added). Because, as discussed above, transmission costs are necessarily "attributable to subscribers" in the same manner they are attributable to other customers of the utility, the Rule violates the Act to the

extent its mandate to credit transmission costs to subscribers results in in uncapped subsidization of those costs by non-subscribers.

For the foregoing reasons, the language of Rule 17.9.573.20.D is directly contrary to the Act, and the Commission abused its discretion in issuing the Order adopting the rule.

b. The Rule's allowance of interconnection cost sharing violates the non-subsidization mandate in Section 62-16B-7(B)(6).

The Rule also violates another non-subsidization mandate in the Act by including a provision that allows costs "necessary to interconnect" a community solar facility to be borne by all ratepayers, including non-subscribers. *See* 17.9.573.13(A) NMAC. This is directly contrary to the Act, because the Act expressly states that interconnection-related costs "attributable to a subscriber organization" cannot be subsidized by non-subscribers. *See* § 62-16B-7(B)(6). If a cost is "necessary to interconnect" a community solar facility, then that cost is also "attributable to the subscriber organization"[13] and must be subject to the bar on subsidization in the Act. Accordingly, Rule 17.9.573.13(A) is directly contrary to § 62-16B-7(B)(6).

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[13] Under the Act, a "subscriber organization" must be the owner or operator of a "community solar facility." § 62-16B-2(M). Thus, a cost needed to interconnect the subscriber organization's community solar facility is necessarily "attributable to a subscriber organization" within the meaning of § 62-16B-7(B)(6).

The Commission sought to remedy this conflict by adding language that states the "commission will consider approving sharing of interconnection costs with nonsubscribing ratepayers only to the extent that the costs borne by such ratepayers are matched or exceeded by demonstrable benefits to such ratepayers, so that there will be no subsidization of interconnection costs by nonsubscribing ratepayers in appropriate cases." 17.9.573.13(C) NMAC. This provision cannot rehabilitate Rule 17.9.573.13(A). First, it provides no guidance as to how the "demonstrable benefits" will be determined, rendering the Rule impermissibly vague. *See Bokum Res. Corp. v. N.M. Water Quality Control Comm'n*, 1979-NMSC-090, ¶ 14, 93 N.M. 546 (rule impermissibly vague when persons "of common intelligence must guess at its meaning and differ as to its application"). Second, Rule 17.9.573.13(A)'s grant of authority to share costs "necessary to interconnect" a community facility with non-subscribers cannot be reconciled with the Act's express prohibition on subsidization of costs "attributable to" a subscriber organization—this is true even if non-subscribers ultimately receive some unknown, undefined "benefit" from the interconnection.

Because NMAC 17.9.573.13(A) directly contradicts the Act, the Commission abused its discretion in issuing the Rulemaking Order.

2. The Rule must be annulled and vacated because it fails to include cost recovery mechanisms required by Section 62-16B-7(B)(6).[14]

The Act required the NMPRC to "establish reasonable, uniform, efficient and non-discriminatory standards, fees and processes for the interconnection of community solar facilities…that allows a qualifying utility to recover reasonable costs for administering the community solar program and interconnection costs for each community solar facility." *See* § 62-16B-7(B)(6). The Rule, however, fails to provide any specific mechanisms to recover costs associated with interconnection of community solar facilities. While the Rule includes language allowing for utilities to apply for a rider to recover "administrative costs of carrying out its responsibilities concerning the community solar program," Rule 17.9.573.13(D), it contains no language addressing how to specifically recover interconnection-related costs. The Rule's failure to address an express mandate of the Act further renders it infirm and subject to being annulled.

3. The Rule fails to include guidelines to achieve goals in serving low-income customers, as required by Section 62-16B-7(B)(3).[15]

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[14] This issue was preserved by the comments and motion for rehearing filed by SPS. [39432 12 RP 1573-1587, 1687-1732] (SPS and PNM response comments); [39432 14 RP 1999-2009, 2152-76] (SPS and PNM reply comments); [39432 19 RP 2773-2825, 2838-66] (PNM and SPS motions for rehearing).

[15] This issue was preserved by the comments and motion for rehearing filed by SPS. [39432 12 RP 1573-1587, 1687-1732] (SPS and PNM response comments); [39432 14 RP 1999-2009, 2152-76] (SPS and PNM reply comments); [39432 19 RP 2773-2825, 2838-66] (PNM and SPS motions for rehearing).

The Act states that a community solar facility must reserve at least 30 percent of available capacity to serve low-income customers. *See* 62-16B-7(B)(3). To that end, the Act required the Commission, in promulgating the Rule, to "issue guidelines to ensure the carve-out is achieved each year and develop a list of low-income service organizations and programs that may pre-qualify low-income customers." *Id.* Yet, the Rule fails to include any such guidelines. Rather, the Rule merely parrots the Act by stating that the Commission "will issue guidelines," at some unknown time in the future, to ensure the Act's goals for serving low-income customers are met. 17.9.573.10(B) NMAC. The Rule's lack of guidelines to facilitate the objective of low-income customer capacity, in contravention of an express requirement of the Act, renders the Rule defective.

4. The Rule fails to include required consumer protections.[16]

The Act required the Commission to include in the Rule "consumer protections for subscribers, including a uniform disclosure form that identifies the information that shall be provided by a subscriber organization to a potential subscriber…as well as grievance and enforcement procedures." § 62-16B-7(B)(7).

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[16] This issue was preserved by the comments and motion for rehearing filed by SPS. [39432 8 RP 0908-20] (PNM Comments and Proposed Revisions to the Draft Rules, Attachment A); [39432 12 RP 1689-90, 1712-13] (PNM Response Comments and Proposed Revisions to the Draft Rules); [39432 14 RP 2153-54] (PNM reply comments); [39432 19 RP 2782-87] (PNM Motion for Rehearing).

The Rule, however, lacks any specific consumer protection standards and establishes no consumer protection enforcement procedures.[17] While the Rule includes a broadly worded provision allowing for the filing of consumer complaints for "informal resolution," NMAC 17.9.573.17(C), this falls far short of the Act's requirement that the Rule include customer "grievance and enforcement *procedures*." Indeed, because the Rule lacks any specific consumer protection standards, it is unclear how a grievance or enforcement process could operate due to the lack of any clear guidelines. By ignoring the mandate to implement consumer protections in the Rule, the Rulemaking Order "unreasonably or unlawfully misinterprets or misapplies" the Act and should be vacated. *See Princeton Place v. N.M. Hum. Services Dep't, Med. Assistance Div.*, 2022-NMSC-005, ¶ 35, 503 P.3d 319.

5. The Rule expressly violates the Act by permitting co-location of community solar facilities.[18]

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[17] The Commission did include a uniform disclosure form in the Rulemaking Order; however, this alone was insufficient to comply with § 62-16B-7(B)(7), because the Act makes clear that the form is but one aspect of the consumer protections the Commission was required to establish. *See id.* (providing the protections "include" but are not limited to the creation of the form).

[18] This issue was preserved by the comments and motion for rehearing filed by PNM. [39432 8 RP 0908-20, 0921-26] (PNM Comments and Proposed Revisions to the Draft Rules, Attachments A and B); [39432 12 RP 1689-90, 1711-12] (PNM Response Comments and Proposed Revisions to the Draft Rules); [39432 14 RP 2153-54] (PNM reply comments); [39432 19 RP 2812] (PNM Motion for Rehearing).

The Act does not permit community solar facilities to be co-located with other community solar facilities. *See* §§ 62-16B-3(A)(4), 62-16B-7(B)(10); 17.9.573.18 NMAC. The Rule defines co-location as a community solar facility being located on the same substation parcel as another community solar facility. In contravention of the Act, the Rule includes an exception to the co-location prohibition that states the Commission "will consider, on a case-by-case basis, allowing more than one community solar facility to be located on the same substation parcel." *See* 17.9.573.18 NMAC. The Commission, however, lacked authority to create this type of *ad hoc* exception to the Act. *See, e.g., Taylor,* 1998-NMSC-015, ¶ 22 (agency's discretion does not permit "altering, modifying, or extending the reach of a law created by the Legislature").

6. The Rule improperly delegates the community solar project selection process to a third-party.[19]

The Act also required the Commission to promulgate rules that "establish a *process* for the selection of community solar facility projects." *See* § 62-16B-7(B)(4) (emphasis added). Rather than establishing a *process* for project selection, the Rule instead makes a wholesale delegation of all aspects of the selection of projects to an

[19] This issue was preserved by the comments and motion for rehearing filed by SPS. [39432 12 RP 1573-1587, 1687-1732] (SPS and PNM response comments); [39432 14 RP 1999-2009, 2152-76] (SPS and PNM reply comments); [39432 19 RP 2773-2825, 2838-66] (PNM and SPS motions for rehearing).

unidentified third-party administrator. *See* 17.9.573.12(A) NMAC. While the Rule does include criteria for how project bids should be scored, it delegates every other aspect of the selection process to the third-party administrator. For example, the Rule states the administrator will select projects based on the bid criteria in the Rule *as well as* other "selection criteria within each qualifying utility's territory." 17.9.573.12(F) NMAC. The Rule provides no guidance on what these criteria may be or who will be charged with determining the criteria, presumably leaving that to the unfettered discretion of the third-party administrator.

Because details of the selection process are omitted from the Rule, the process is not subject to meaningful review and is impermissibly vague. For example, Commission Staff announced at the Commission's August 10, 2022, open meeting that Staff—not the Commissioners—had entered into a contract with the third-party administrator to oversee the project selection process.[20] Because no Commission order ever issued related to this selection, stakeholders could not seek review of it.

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[20] *See* NMPRC Weekly Open Meeting 8/10/2022, YOUTUBE, https://www.youtube.com/watch?v=t9lcpMT31Vw. The Commission issued the Request for Proposals (RFP) for the third-party administrator prior to the effective date of the rule, and proposals were also required to be submitted prior to the effective date of the rule. *See* Administrator of the New Mexico Community Solar Program, *Request for Proposals*, N.M. PUB. REGULATION COMM'N, Apr. 6, 2022, https://www.nmprc.org/wp-content/uploads/2022/04/Administrator-of-Community-Solar-Program-RFP-2023-0001.pdf.

This opaque process is contrary to Section 62-16B-7(B)(4) of the Act, which expressly required the Commission to set forth a facility selection process within the Rule itself. *See Rivas*, 1984-NMSC-076, ¶ 3 ("administrative agency has no power to create a rule or regulation that is not in harmony with its statutory authority").

The Commission's delegation to a third-party administrator was also in error because the Rule lacks a clear mechanism for review of the third-party administrator's actions. *See, e.g., Old Abe Co. v. N.M. Min. Comm'n*, 1995-NMCA-134, ¶ 34, 121 N.M. 83 (noting that "important aspect of gauging the delegation of discretion" by an administrative agency "is whether the discretion is reviewable" in determining whether a rule is improperly vague). Whether, when, or how the Commission will engage in review is set out in the Rule in wholly vague terms, as the Rule states the Commission will review a project selection matter only to the extent "the administrator or any participant in the process may raise before the commission an issue that is not fully addressed in this rule and that the commission finds, in its discretion, that it should address." 17.9.573.12(A) NMAC. This leaves stakeholders to merely guess at how the Rule may or may not be implemented or enforced, rendering it impermissibly vague. *See, e.g., Bokum Res. Corp.*, 1979-NMSC-090, ¶ 14, 93 N.M. 546 (a "regulation which either forbids or requires the doing of an act in terms so vague that men of common intelligence must guess at its meaning…lacks the first essential of due process of law").

The Rule's broad delegation to a third-party is also contrary to the Act because the Act: (1) does not authorize any third-party administration of the community solar program; (2) instead expressly delegated *to the Commission* the responsibility to "administer and enforce the rules and provisions of the [Act]"; and (3) also assigned *to the Commission* the responsibility to "establish a process for the selection of community solar facility projects." *See* § 62-16B-7(B)(4). Moreover, the Rule lacks any detail as to the scope of authority of the third-party administrator, as the Rule's sole reference to a "third-party administrator" provides only that "[t]he commission will engage a third-party administrator to manage an unbiased and nondiscriminatory process for selection of proposed projects for building and operating community solar facilities." 17.9.573.12(A) NMAC. The Rule does not explain how the third-party administrator will be selected, the extent of the third-party administrator's authority, or how disputes concerning the third-party administrator will be resolved. The Rule further lacks any detail as to the legal relationship, if any, between the third-party administrator, the NMPRC, subscriber organizations, and the utilities.

The Commission's failure to set forth details of the selection process in the Rule itself, coupled with its wholesale delegation of that function to an unidentified third-party, renders the Rule in violation of the Act and void for vagueness.

7. The Commission violated due process by relying on non-record recommendations from a "Team" of unidentified individuals.[21]

In adopting the Rule, the Commission acted contrary to due process guarantees by relying almost entirely upon nonpublic, non-record recommendations made by a group referred to as the "Team." *See, infra* at 6-10. This reliance on recommendations from an unknown Team, which were never included in the record of the proceeding or presented as a whole in a "Recommended Decision" or other form of recommendation, violated the Utilities' due process rights.[22]

The "[Commission] is authorized only to make its decision based upon the evidence adduced at the hearing *and made a part of the record.*" *TW Telecom of N.M., L.L.C. v. N.M. Pub. Regulation Comm'n*, 2011-NMSC-029, ¶ 20, 150 N.M. 12 (emphasis added). In the *TW Telecom* case, this Court reversed a final order of the Commission because the Commission violated the appellant's constitutional due process rights by basing its decision on evidence from a separate case without

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[21] This issue was preserved by the comments and motions for rehearing filed by SPS. [39432 19 RP 2812-16] (PNM Motion for Rehearing).

[22] The final rulemaking order references various recommendations from the "Team," but it is unclear whether this final order references all information weighed or considered by the Team. *See* [39432 RP 1-19]. Also, the final rulemaking order does not always provide context to the "Team" recommendations, in that many of the Team recommendations are conclusory and do not weigh the record evidence. *See, e.g.*, [39432 15 RP 2300 ¶¶ 138-9] (Team concurring with the interpretation of the Act as put forth by the Renewable Energy Industries Association ("REIA") without any explanation as to the Utilities' legal arguments).

providing the appellant the opportunity to present evidence and cross-examine witnesses on the impact of that evidence. *Id.* at ¶¶ 17-20. Similarly in this matter, the Commission based its Rulemaking Order on evidence provided by the Team that was never made part of the record or disclosed prior to close of the record.

The Commission's reliance on the Team's undisclosed recommendations deprived the Utilities of any opportunity to respond on the record to the Team's recommendations before the record closed. This lack of notice and opportunity to comment violated procedural due process standards and warrants reversal of the Commission's orders. *See id.* at ¶ 17 ("fundamental requirements of due process in an administrative context are reasonable notice and opportunity to be heard and present any claim or defense"); *see also Rivas*, 1984-NMSC-076, ¶ 9 (acknowledging that "the minimum protections upon which administrative action may be based, are according to interested parties a simple notice and right to comment").

The Commission also never clarified the identities and roles of *all* the persons who comprised the Team, despite requests by the Utilities to do so.[23] By failing to

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[23] The Commission named some members of the "Team" (by job title/description, not name) in its initial order and later provided additional identifications in the order denying SPS's Motion to Stay. *See*, [39432 21 SRP 1-19]. However, throughout the rulemaking the Commission continued to state the "Team" also included "others" that have never been identified. *See, e.g.*, *id.* (referring in the order denying SPS's Motion to Stay to the "Team" members as including "Commissioners, expert consultants, ***and others***") (emphasis added).

clarify the identity of all Team members, the Commission prevented the Utilities from ascertaining if the Commission complied with *ex parte* communication prohibitions; this deprived the Utilities of their right to raise possible defenses arising from such communications. *See Santa Fe Expl. Co. v. Oil Conservation Comm'n of State of N.M.*, 1992-NMSC-044, ¶ 14, 114 N.M. 103 ("procedural due process requires that before being deprived of life, liberty, or property, a person or entity be given notice of the possible deprivation and an opportunity to defend").

It is well established that the Commission and its advisory staff cannot communicate with "a party or his representative outside the presence of the other parties concerning a pending rulemaking" after the record is closed. NMSA 1978, § 62-19-23 1.2.3.8 NMAC. Here, it is undisputed that the Commission communicated with the Team after the record closed, as the rehearing order is replete with references to nonpublic recommendations given by the Team to the Commission related to the motions for rehearing. *See* [39432 SRP 1-19]. Thus, knowing exactly who comprised the Team is critical to determining whether improper *ex parte* communication may have occurred.

By not identifying the full membership of the Team, the Commission obscured whether the Team had improper *ex parte* communications with the

Commission.[24] Of note, the record reflects that Utility Division Staff were members of the Team. [39432 SRP 15 ¶ 49].While the Commission can engage in *ex parte* communications with its advisory staff, Utility Division Staff cannot engage in such communications. § 62-19-23(C)(2) (detailing the organizational units that compose the commission). Thus, to the extent Utility Division Staff were on the Team, any communications the Team had with the Commission after the record closed violated § 62-19-23. In apparent recognition of this infirmity, the order disposing of SPS's Motions for Rehearing and SPS's Motion to Stay states that Utility Division Staff members did not participate in the Team after closure of the record. [39432 20 RP 3164]. The original Order Adopting Rule, however, reflects that the *entire* Team advised the Commission on the rulemaking following close of the record. *See* [39432 15 RP 2266]. Thus, the Commission's after-the-fact representation regarding Utility Division Staff should not be deemed to cure the infirmity evident in the original order adopting the Rule. Regardless, because the Commission has never identified all members of the Team, the Utilities have no way of knowing

[24] To the extent the Commission may argue that the Team communications were permissible because the Team was made up of non-party experts, the Commission was required to publicly disclose the advice provided by any such Team members and afford the parties a reasonable opportunity to respond. *See* § 62-19-23(C)(4). However, no public disclosure of the Team's advice, or time to respond to such advice, was permitted during the rulemaking.

whether there were other Team members that were prohibited from communicating with the Commission after the record closed that did so nonetheless.

In summary, the Rulemaking Order should be annulled and vacated because it was adopted in contravention of due process and the Rule contains numerous provisions that are either directly contrary to the Act or are impermissibly vague.

B. The Advice Notice Orders should be annulled and vacated because they violate the Community Solar Act, the Public Utility Act, and due process requirements.[25]

1. The Advice Notice Orders violated the PUA and procedural due process by setting a bill credit rate without a required hearing.

When the Commission disagrees with a rate proposed by a utility and wishes to set another rate, the Public Utility Act provides:

> If ***after a hearing*** the commission finds the proposed rates to be unjust, unreasonable or in any way in violation of law, the commission shall determine the just and reasonable rates to be charged or applied by the utility for the service in question and shall fix the rates by order to be served upon the utility or the commission by its order shall direct the utility to file new rates respecting such service that are designed to produce annual revenues no greater than those determined by the commission in its order to be just and reasonable.

§ 62-8-7(D) (emphasis added). Thus, the PUA plainly requires that a rate different than that proposed by the utility itself can be ordered by the Commission only "after a hearing." *Id.*

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[25] This issue was preserved by SPS's Notices of Appeal. [39432 SRP 1-19].

In this matter, however, the Commission issued the First Advice Notice, which rejected SPS proposed bill credit rate and compelled the filing of a different rate within two days of the order, without ever holding a hearing. The Commission then issued the Second Advice Notice Order, which put into effect—also without holding a hearing—the bill credit rate that SPS filed *under protest* to comply with the First Advice Notice. The Commission's failure to hold a hearing before rejecting and then setting SPS's bill credit rate renders both Advice Notice Orders void.[26] *See, e.g., State v. Mountain States Tel. & Tel. Co.*, 1950-NMSC-055, ¶ 31, 54 N.M. 315 ("rates fixed or approved by the commission without a hearing are void"); *see also Tri-State Generation & Transmission Ass'n, Inc. v. N.M. Pub. Regulation Comm'n*, 2015-NMSC-013, ¶ 35 (order violated PUA when it rejected advice notices without a hearing).

The First Advice Notice Order also violated SPS's right to due process by compelling SPS to refile its bill credit rate in a manner expressly dictated by the Commission without first holding a hearing. *See, e.g., TW Telecom*, 2011-NMSC-029, ¶ 17 ("the fundamental requirements of due process in an administrative context are reasonable notice and opportunity to be heard and present

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[26] Tellingly, subsequent to SPS's appeal of the Advice Notice Orders, the Commission issued an order allowing for a hearing on PNM's proposed bill credit tariff. *See* Order dated March 1, 2023 in Case No. 23-00071-UT at 11. There is no reasoned basis why SPS should not also be afforded a hearing on its bill credit tariff.

any claim or defense"). For example, in *Resolute Wind 1*, the Court held that the Commission violated due process by using a summary disposition procedure that precluded a party from presenting evidence and developing a record. 2022-NMSC-011, ¶ 28. The Court cautioned the NMPRC that its use of a "one-sided procedural approach" that deprives parties of a fair opportunity to be heard "fail[s] to comport with traditional notions of fairness," and that a "peremptory fact-finding process imposed by the Commission" may be deemed "arbitrary, capricious, or an abuse of discretion." *See id.* Here, the Advice Notice Orders suffer from the same constitutional infirmity as that found in *Resolute Wind*, because the NMPRC summarily disposed of disputed issues surrounding SPS's bill credit tariff without first allowing for a hearing to permit SPS to present evidence and develop a record on contested issues.

To cure the violation of both the PUA and due process, the Court should vacate the Advice Notice Orders and require the NMPRC to set a hearing before fixing or dictating SPS's bill credit rate.

2. <u>The Advice Notice Orders are invalid because they seek to enforce an unlawful provision of the Rule.</u>

The reasoning underlying the Commission's ruling on SPS's bill credit rate tariff in both Advice Notice Orders was that SPS could not propose a bill credit that failed to include a credit for transmission costs, because that was contrary to the Rule's requirement that "utility shall not subtract any costs of transmission from the

solar bill credit rate calculation." 17.9.573.20.D NMAC. As detailed above, however, this Rule language is in violation of the Act because it results in improper subsidization of subscribers by non-subscribers and violates the Act's definition of bill credit. *See* § 62-16B-7(B)(8); *see also* § 62-16B-2(B). Accordingly, to the extent the Court determines that the Rule should be annulled and vacated, the Advice Notice Orders should be treated similarly because they are based entirely upon the Commission's enforcement of the infirm Rule. *See Att'y Gen. v. N.M. Pub. Regulation Comm'n*, 2011-NMSC-034, ¶ 9, 150 N.M. 174 (court will vacate agency order that is "otherwise inconsistent with law").

V. CONCLUSION

For the foregoing reasons, the Court should annul and vacate the Rulemaking Order and Advice Notice Orders, and remand this matter to the Commission for further proceedings.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Oral argument is requested to afford the parties an opportunity to provide information regarding the complex issues presented in these appeals, which raise issues that affect the public interest.

STATEMENT OF COMPLIANCE

I hereby certify that the foregoing brief complies with the word limitation set forth in Rule 12-318(F)(3) NMRA and that the body of the brief contains 9,438 words using 14-point Times New Roman typeface.

/s/ Dana S. Hardy
Dana S. Hardy

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 2023, I caused a true and correct copy of the foregoing Brief in Chief to be filed and served on all counsel of record through the Court's Electronic Filing System.

/s/ Dana S. Hardy
Dana S. Hardy