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
COMMUNITES 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, Case No. 22-00020-UT,

In the Matter of the Compliance Filing of Southwestern Public Service Company Pursuant to 17.9.573.9 NMAC, Case No. 22-00240-UT,

In the Matter of the Application of El Paso Electric Company for Approval of Tariffs Necessary for Implementation of the New Mexico Community Solar Program and Accounting Order, Case No. 22-00243-UT.

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, Case No. 22-00020-UT,

In the Matter of the Compliance Filing of Southwestern Public Service Company Pursuant to 17.9.573.9 NMAC, Case No. 22-00240-UT,

In the Matter of the Application of El Paso Electric Company for Approval of Tariffs Necessary for

Implementation of the New Mexico Community Solar Program and Accounting Order, Case No. 22-00243-UT

CONSOLIDATED ANSWER BRIEF OF NEW MEXICO PUBLIC REGULATION COMMISSION

Oral Argument Requested

Russell R. Fisk, Esq.
Associate General Counsel,
Attorney for New Mexico Public Regulation Commission
P.O. Box 1269
Santa Fe, New Mexico 87504-1269
(505) 412-5042
Russell.fisk@prc.nm.gov

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I. INTRODUCTION

The three qualifying utilities (the "Utilities") challenging the orders at issue in these consolidated appeals rely upon misinterpretations of the Community Solar Act (the "Act") as well as misinterpretations and misrepresentations of the Commission's Community Solar Rule (the "Rule") in arguing that the Rule and subsequent orders violate the Act. The Utilities further rely on inapplicable legal authorities and misstatements of the underlying facts in arguing that the Commission violated applicable statutes and Due Process principles in the underlying proceedings.

II. ARGUMENT

A. The Rule Prohibits the Deduction of Transmission Costs from the Community Solar Bill Credit in Accordance with the Act

The Utilities misrepresent the effect of 17.9.573.20(D) NMAC. This provision of the Rule reads, "The utility shall not subtract any costs of transmission from the solar bill credit rate calculation." 17.9.573.20(D) NMAC. The Utilities falsely conclude that they are thereby prohibited from recovering any "transmission costs from utility customers that subscribe to the program." **[BIC 19]** This is

nonsense.[1] 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 on the qualifying utility's monthly billing cycle as required by the Community Solar Act*. NMSA 1978, § 62-16B-2(B).

A utility customer who is also a subscriber to a community solar facility will receive a monthly bill on which she will be charged the rates approved by the Commission for her rate class in the utility's most recent rate case as well as any pass-through costs approved by the Commission for application through the utility's fuel and purchased power cost adjustment clause ("FPPCAC") and any other approved riders, monthly charges and other rates and charges applicable to her rate class. Her bill will thus charge her fully for the costs that the Commission has held to be attributable to her rate class through the application of cost causation principles, statutory policies and policies of the Commission. Such costs necessarily include transmission costs attributable to her rate class. This portion of the bill remains the same when a utility customer becomes a community solar subscriber.

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[1] The absurdity of the Utilities' interpretation of the Rule is highlighted by their characterization of the phrase "shall not subtract" in 17.9.573.20(D) NMAC as a "double negative," apparently because they consider "subtract" to have the same effect as a second "not" or perhaps because subtraction is represented by a minus sign.

As described in the above definition of the community solar bill credit, the credit is an offset to the subscribing customer's ordinary rates and charges. Thus, the calculation of the credit does not and should not account for costs caused by the subscribing customer's consumption of energy and the need for generation, transmission and distribution capacity resulting from the load attributable to the customer's rate class. The function of the credit is to compensate the subscribing customer for the energy generation that her subscription to a community solar facility provides to the utility. This is why the Act requires that each subscriber organization "on a monthly basis and in a standardized electronic format, provide to the qualifying utility a list indicating the kilowatt-hours of generation attributable to each subscriber." NMSA 1978, § 62-16B-6(B). The credit addresses the subscribing customer's role as a generator of energy, not as a consumer of energy.

Deduction of transmission costs from a subscribing customer's community solar bill credit based upon the customer's consumption of energy, as proposed by the Utilities, would result in double charging the customer for costs already recovered in the rates charged to the customer's rate class. Costs related to the customer's consumption of energy are recovered through rates, including FPPCAC pass-through charges that are applied to each kilowatt-hour (KwH) of energy consumed by the customer. Attempting to recover costs related to the customer's *consumption* of energy through the community solar bill credit would be misguided

and unlawful as the community solar bill credit is based upon the KwH of energy *generated* by the customer, not the KwH of energy *consumed* by the customer.

Only costs specifically attributable to the generation of energy by community solar facilities should be deducted from the credit. Any cost deductions from the credit must be for the purpose of ensuring that the customer is not overcompensated for the value of the energy she has provided to the utility grid as a community solar facility subscriber. If there are costs to the utility that arise due to the presence and operation of community solar facilities, such costs should be charged entirely to community solar subscribers through deductions from their community solar bill credits.[2]

The Act requires the Commission to determine "the dollar-per-kilowatt-hour rate determined by the commission that is used to calculate a subscriber's community solar bill credit," which the Act refers to as the "community solar bill credit rate."

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[2] There are two exceptions to this statement. First, the Rule includes a special provision for utility recovery of administrative costs attributable to the Community Solar Program outside of the community solar bill credit mechanism. Subpart 17.9.573.13(D) of the Rule allows a utility to "recover administrative costs of carrying out its responsibilities concerning the community solar program through a rate rider from which nonsubscribing ratepayers are exempt." 17.9.573.13(D) NMAC. Second, costs of interconnection with the utility grid, which are generally due and payable by a subscriber organization to a utility prior to interconnection, may be collected by the utility from the subscriber organization through the utility's usual interconnection billing procedure, pursuant to Commission Rule 17.9.568, Interconnection of Generating Facilities with a Nameplate Rating up to and Including 10 MW Connecting to a Utility System. 17.9.568 NMAC.

NMSA 1978, § 62-16B-2(C). The Act also requires the Commission to adopt rules that "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* . . .." NMSA 1978, § 62-16B-7(B)(8) (italics added). The Act defines "total aggregate retail rate" as follows:

> the total amount of a qualifying utility's demand, energy and other charges converted to a kilowatt-hour rate, including fuel and power cost adjustments, the value of renewable energy attributes and other charges of a qualifying utility's effective rate schedule applicable to a given customer rate class, but does not include charges described on a qualifying utility's rate schedule as minimum monthly charges, including customer or service availability charges, energy efficiency program riders or other charges not related to a qualifying utility's power production, transmission or distribution functions, as approved by the commission, franchise fees and tax charges on utility bills;

NMSA 1978, § 62-16B-2(O).

Thus, the Act requires that the community solar subscriber be credited for her generation of energy at a rate that is based upon but not identical to the rate that she is charged for consumption of energy. As described above, the Act requires the Commission, when calculating the total aggregate retail rate, to deduct every component of the rates and charges charged to members of the customer's rate class that is not related to the utility's "power production, transmission or distribution functions." To the extent that the calculation of the community solar bill credit is based upon the total aggregate retail rate, the credit compensates subscribing

customers for the energy they generate at a lower rate than they pay for the energy they consume.

The Act requires the Commission to derive its community solar bill credit rate mechanism "from the qualifying utility's total aggregate retail rate on a per-customer-class basis, *less the commission-approved distribution cost components . . .*" NMSA 1978, § 62-16B-7(B)(8) (italics added). As the Commission stated in orders challenged by the Utilities in this consolidated appeal, the Act's express provision for the deduction of "commission-approved distribution cost components" from community solar bill credits and the Act's omission of any mention of the deduction of transmission costs is a compelling indicator of the Legislature's intent to prohibit any transmission-cost deduction. NMSA 1978, § 62-16B-7(B)(8). This interpretation is also consistent with the Commission's understanding of community solar facilities. Community solar facilities bring generation within the distribution level of the grid, closer to customers than a typical generating plant, which may be hundreds of miles away. In the long run, the local generation provided by community solar facilities may allow utilities to avoid having to construct additional transmission lines to bring energy to customers from distant generation plants. It is difficult to conceive of a situation in which the operation of community solar facilities would have the effect of *increasing* a utility's transmission costs.

The Utilities failed to identify any such situation in their comments and motions before the Commission in the matters underlying this appeal. Similarly, they fail to identify any such situation in their brief in chief. Their argument that the Commission's prohibition of transmission-cost deductions from the credit will result in cross-subsidization is based entirely upon the false premise that the prohibition will prevent subscribing customers from paying their fair share of such costs attributable to their *consumption* of energy.

In sum, the Utilities' misinterpretation of the Act has led them to misinterpret the Commission's reasoning. The Utilities take issue with the Commission's reference to costs "caused by a community solar facility," noting that the Act prohibits subsidization of "costs attributable to subscribers," not costs attributable to facilities (citing NMSA 1978, § 62-16B-7(B)(8)). The Commission's reference to costs caused by community solar facilities is a reference to costs attributable to subscribers, *i.e.*, costs that are chargeable to subscribers through the bill credit because they are costs specifically attributable to the generation of energy by community solar facilities. The Utilities' conflation of the subscribing utility customer's two distinct roles corresponds to their conflation of the two distinct functions of a utility's rates, on the one hand, and the community solar bill credit, on the other. The Commission, by recognizing these distinct roles and distinct

functions, has issued a rule that prevents cross-subsidization while avoiding double charging of costs to the subscribing customer.

B. The Rule Ensures that Any Interconnection Cost Sharing that May Be Allowed by the Commission Will Not Result in Cross-Subsidization

The Rule imposes upon any subscriber organization seeking to share costs of interconnection with ratepayers the burden of proving to the Commission that such cost sharing will not result in subsidization by nonsubscribing ratepayers. A subscriber organization may petition the Commission for an order requiring that a portion of any system upgrade costs be borne by utility ratepayers. The organization bears the burden of proving to the Commission that "the costs borne by [nonsubscribing] 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.

It is likely that there will be instances in which a subscriber organization will, when applying for interconnection to a utility, will be informed by the utility that substantial upgrades will be required before the interconnection can be made. Though any particular community solar facility will add, at most, five megawatts (MW) of capacity to the grid, an unfortunate interconnection applicant may well be informed that its five MW will cause the local feeder line to exceed capacity or

otherwise overburden the system in the area of the proposed interconnection. The interconnection costs charged to the applicant could thus include the very high costs of a system upgrade that the applicant cannot bear. Such an upgrade would likely increase the capacity of the grid in the relevant area by significantly more than the five MW that the applicant seeks to interconnect. Thus, the total benefits to the grid of the upgrade would exceed, perhaps greatly exceed, the benefit to the applicant.

There may be other subscriber organizations with community solar facility projects that seek interconnection to the grid in the same area as the applicant, and thus, would benefit from the system upgrade. The Rule also allows the applicant to request cost sharing with "other subscriber organizations using the same distribution facilities." 17.9.573.13(A)(1) NMAC. The Utilities do not object to this type of cost sharing. However, there may well be instances in which there are no other community solar facilities proposed to interconnect in the area or instances in which the cost of the upgrade is high enough to be prohibitive even when shared among multiple subscriber organizations.

It is thus reasonable for the Commission to consider, "on a case-by-case basis," the extent to which there would be demonstrable benefits to the utility's ratepayers from the upgrade. Indeed, a major upgrade is very likely to provide benefits to utility customers, subscribing and nonsubscribing customers alike. There may be situations in which the utility was planning to upgrade the system in the near

or medium term, and the particular community solar facility applying for interconnection merely caused the scheduled upgrade to move up on the schedule. In this time of transition from fossil-fuel generation to renewable and carbon-free generation, the Community Solar Program will certainly not be the sole driver of system upgrades. It would be unfair to any subscriber organization to be compelled to bear all of the costs of an upgrade that would benefit ratepayers generally or that would eventually have been borne by ratepayers in any event. Such outcomes would also discourage participation in the Community Solar Program, contrary to the Act's direction to the Commission to "reasonably allow for the creation, financing and accessibility of community solar facilities . . .." NMSA 1978, § 62-16B-7(B)(9).

The Utilities argue that the Rule provides no guidance as to how the "demonstrable benefits" will be determined, rendering the Rule impermissibly vague. However, the Commission has integrated standards derived from the Grid Modernization Act into this portion of the Rule, as these standards have been adopted by the Legislature as indicators of the public benefits of system upgrades. NMSA 1978, § 62-8-13(B); 17.9.573.13(B) NMAC. These standards provide clear guidance as to the benefits of a system upgrade that would be considered by the Commission upon an appropriate petition for cost sharing.

Moreover, the Utilities' citation to *Bokum Res. Corp. v. N.M. Water Quality Control Comm'n*, 1979-NMSC-090, 93 N.M. 546, is unavailing. The Utilities fail

to mention that the vagueness standard applied in that case was the standard applicable to "a penal statute or regulation which either forbids or requires the doing of an act," which is not applicable to this provision of the Rule. *Id.* at ¶ 14 (citing *Balizer v. Shaver*, 82 N.M. 347, 481 P.2d 709 (Ct. App. 1971); *Connally v. General Construction Co.*, 269 U.S. 385, 46 S. Ct. 126, 70 L. Ed. 322 (1926)). This subpart of the Rule neither forbids the Utilities from taking a particular action nor requires them to take a particular action. Moreover, the language that the Court found unconstitutionally vague was the phrase "*on the basis of information available to the director or the commission*, cause death, disease, behavioral abnormalities, genetic mutation, physiological malfunctions or physical deformations in such organisms or their offspring" in the definition of "toxic pollutants." *Id.* at ¶ 7 (italics added). The Court agreed with the petitioners that this language did not provide sufficient notice as to which substances would be considered toxic pollutants, and thus water users could not determine what the regulations commanded or forbade. *Id.* at ¶¶ 9, 33. The rule at issue in Bokum is thus not comparable to the Rule as the standards that will be applied for the identification of "demonstrable benefits" are clearly stated.

Moreover, the Utilities do not need to adjust their behavior in accordance with this portion of the Rule as they are not in any danger of being found to have violated the Rule by taking an action forbidden by the Rule. The application of the term to which the Utilities object, "demonstrable benefits," would occur only in the context

of a proceeding to determine the propriety of a cost-sharing proposal, a proceeding to which the relevant utility would be a party and in which the utility would have an opportunity to argue the likelihood and the value of any claimed demonstrable benefits.

C. Section 62-16B-7(B)(3) of the Act Does Not Require the Low-Income Customer Carve-Out Guidelines to Be Included in the Rule, though the Commission Has Also Included Guidance in the Rule

In arguing that the Commission failed to include guidelines in the Rule to achieve goals in serving low-income customers, the Utilities misinterpret the Act. Subsection 62-16B-7(B) of the Act begins, "The Commission shall adopt rules to establish a community solar program . . .. The rules shall: . . .." NMSA 1978, § 62-16B-7(B). This introductory phrase applies to the ten numbered subparts that follow, each of which begins with a verb corresponding to the phrase "[t]he rules shall . . .." *Id.* However, subpart (3) includes two sentences. The first sentence reads, including the introductory phrase of subpart (B), "The rules shall: . . . (3) require thirty percent of electricity produced from each community solar facility to be reserved for low-income customers and low-income service organizations." NMSA 1978, § 62-16B-7(B)(3). That sentence ends with a period, and then a second sentence begins, which reads as follows: "The commission shall 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.* This second sentence addresses a separate requirement for the Commission to fulfill, a requirement that is not part of the required content of the rules to be issued by the Commission. The introductory phrase "The rules shall . . ." clearly does not apply to the second sentence, which is a complete sentence in and of itself. Further, the use of the term "guidelines" indicates that the requirement in the second sentence is something separate from the rulemaking requirements. Thus, the statement in the Rule that the Utilities argue "parrots the Act" is an appropriate statement of commitment by the Commission to fulfill the requirement to issue such guidelines separately from the Rule. 17.9.573.10(B) NMAC.

The Utilities also ignore the set of provisions in the Rule concerning the low-income subscriber carve-out, subsection 17.9.573.15, "Special Subscriber Provisions." 17.9.573.15 NMAC. This subsection contains a list of state and federal programs for low-income households, participation in which will prequalify such households for inclusion in the 30-percent statutory carve-out. 17.9.573.15(A) NMAC. This list satisfies the requirement in the second sentence of subsection 62-16B-7(B)(3) of the Act that the Commission "develop a list of . . . programs that may pre-qualify low-income customers. NMSA 1978, § 62-16B-7(B)(3). This leaves the other two requirements of the second sentence, the requirements to "issue guidelines to ensure the carve-out is achieved each year" and to "develop a list of

low-income service organizations and programs that may pre-qualify low-income customers," for the Commission to fulfill outside of the Rule.

The three subparts that follow the list of prequalifying state and federal programs provide other ways for households and low-income service organizations to qualify for inclusion. 17.9.573.15(B), (C) and (D) NMAC.

In the final subpart, the Commission commits to "contract with an experienced service provider to partner with community organizations and to manage an outreach program to attract low-income subscribers to the program." 17.9.573.15(E) NMAC.

In addition to the helpful guidance to subscriber organizations in the Rule and the commitments to assist subscriber organizations going forward, the Rule also includes reporting requirements concerning compliance with the carve-out requirement. The Rule requires:

> Each subscriber organization's ongoing authorization to operate community solar facilities shall be dependent upon the organization's compliance with the statutory thirty-percent low-income subscription minimum for each facility operated by the subscriber organization. Each subscriber organization shall report to the program administrator on a monthly basis upon the organization's progress toward meeting the requirement. Subscriber organizations that have reached the required level shall report on a quarterly basis to verify that the requirement continues to be met. Subscriber organizations that fail to reach the required level within one year of project selection may be subject, at the commission's discretion, to penalties up to and including suspension or revocation of the subscriber organization's authorization to operate.

17.9.573.14(B) NMAC. The Commission designed this provision to provide flexibility in the event that subscriber organizations reasonably require substantial amounts of time to meet the carve-out requirement, to allow the Commission and the Program Administrator to monitor any progress or lack thereof, and to place subscriber organizations on notice that there may be serious consequences in the event of a failure to meet the requirement.

D. The Rule Includes the Consumer Protection Provisions Required by the Act while Avoiding Excessive Regulation of Subscriber Organizations

To begin with, the Commission interprets the term "consumer protection," as used in the Act, to refer to measures designed to protect subscribers as the Act expressly states that the consumer protections will be "for subscribers." NMSA 1978, § 62-16B-7(B)(7). The Act is, understandably, focused upon the protection of subscribers as a newly arising group under the Act.

As noted by the Utilities, the Act includes only two specific subscriber protection requirements for the Commission rules: (1) a uniform disclosure form satisfying Section 62-16B-7(B)(7) of the Act and (2) grievance and enforcement procedures. NMSA 1978, § 62-16B-7(B)(7). As the Commission stated in its Order Adopting Rule, the Commission does not believe that the Legislature intended for

the Commission to extend its regulatory reach far beyond disclosure requirements and to establish an extensive regulatory regime for subscriber organizations.

The Commission issued a uniform disclosure form when the Commission issued its Order Adopting Rule, and the Rule contains a corresponding section requiring that subscriber organizations use this form. 17.9.573.16(A) NMAC. The Rule requires, "The subscriber organization shall provide the form to a potential subscriber and allow them a reasonable time to review the form's disclosures and sign the form before entering into a subscription agreement." 17.9.573.16(A) NMAC. The Rule further requires, "The subscriber organization shall maintain in its files a signed form for each subscriber for the duration of the subscriber's subscription, plus one year, and shall make the form available to the commission upon the commission's request." *Id.* The Utilities do not argue that the Commission has failed to fulfill any requirement of the Act regarding the uniform disclosure form.

The Utilities do claim, however, that the Rule "lacks any specific consumer protection standards," which is patently false. In addition to the requirements regarding the uniform disclosure form described above, the Rule specifically requires that subscriber organizations maintain minimum levels of general liability insurance, corresponding to the capacity of the relevant community solar facility. 17.9.573.16(B) NMAC. These requirements are included in the same section of the Rule that contains the uniform disclosure form requirements, which is titled

"Subscriber Protections." 17.9.573.16 NMAC. The section that follows, "Subscriber Agreements," requires each subscriber organization to "develop and implement a written subscriber agreement containing the organization's terms and conditions for subscribing to its project." 17.9.573.17 NMAC. The section then proceeds to list 11 terms that must be included in the written subscription agreement. 17.9.573.17(A) NMAC. The subsection that follows notes that "[t]he commission may consider additional required terms in a future proceeding." 17.9.573.17(B) NMAC.

The Utilities do not identify any particular type of consumer protection provision that is required by the Act that the Commission has failed to include in the Rule. The only specific argument made by the Utilities concerns the *adequacy* of the grievance and enforcement procedures in the Rule. The Rule provides:

> Complaints by subscribers against subscriber organizations may be submitted to the commission's consumer relations division for informal resolution. The commission may, in its discretion, refer serious issues to the attorney general to pursue enforcement proceedings.

17.9.573.17(C) NMAC.

As the Commission stated in its Order Adopting Rule, the Commission reads that Act as providing the Commission with limited authority over subscriber organizations. Thus, the Commission's approach to grievance and enforcement procedures is consistent with the adoption of a regulatory regime for subscriber

organizations that focuses upon disclosure and refrains from micromanagement of the relationship between the subscriber organization and the subscriber. The Commission anticipates that the vast majority of disputes between subscribers and subscriber organization will be able to be resolved through informal means by the Commission's Consumer Relations Division, as are the vast majority of disputes between ratepayers and utilities.

Of course, the Commission has also included an important enforcement mechanism regarding particularly serious disputes that cannot be resolved informally. This mechanism is referral by the Commission to the New Mexico Office of the Attorney General (the "NMAG") for enforcement proceedings. The NMAG's statutory role and expertise as a consumer advocate are well suited to vindicating the rights and interests of subscribers vis-à-vis subscriber organizations.

E. The Commission's Co-location Provision Does Not Violate the Act as the Act Does Not Define Co-location

The Utilities argue that the statement in section 17.9.573.18 of the Rule that "[t]he Commission will consider, on a case-by-case basis, allowing more than one community solar facility to be located on the same parcel," violates the Act and the Rule.[3] 17.9.573.18 NMAC. However, while the Act prohibits the co-location of

[3] The Utilities misquote the Rule, inserting the word "substation" between "same" and "parcel." **[BIC 28]**

community solar facilities with other community solar facilities, the Act does not define "co-location." NMSA 1978, § 62-16B-7(B)(10). Neither does the Rule.[4]

In light of the Act's lack of a definition of "co-location," the Commission adopted language in the Rule recommended by a group of commenters who had moved the Commission to reconsider the language that the Commission had initially adopted in its Order Adopting Rule. The group of commenters argued that the purpose of the Act's prohibition upon co-location is to prevent "gaming" by developers, such as subdividing a parcel to accommodate multiple five-MW facilities that effectively amount to one facility that far exceeds the Act's five-MW limit on community solar facilities. The Commission found this a compelling interpretation of the Act's prohibition and adopted the flexible language proposed by the group of commenters.

The first sentence of section 17.9.573.18 of the rule is a "safe harbor" provision, providing that any community solar facility that is not located on the same parcel as another community solar facility is safe from being found unlawfully co-located with another community solar facility. 17.9.573.18 NMAC. The second sentence is specifically aimed at preventing a developer of community solar facilities from gaining an unfair advantage from gaming the Community Solar Program by

[4] The Utilities' reference to a definition of "co-location" in the Rule is baffling as the Rule contains no special definitions. 17.9.573.7 NMAC.

having a parcel subdivided for the purpose of allowing multiple facilities to be located very close together and attaining a total capacity exceeding the five-MW capacity limit while serving a very limited area. *Id.* The final sentence provides for a case-by-case determination where more than one community solar facility is to be located on a single parcel, recognizing that some parcels are vastly larger than others, so there may be appropriate instances in which two community solar facilities should be allowed to be located on the same parcel.

F. The Commission Has the Authority to Delegate Purely Administrative Duties to a Third-Party Contractor and Clearly Described the Program Administrator's Duties

Regarding the Utilities' objections to the Commission's use of a third-party contractor to administer aspects of the Community Solar Program, the Commission first notes that, in the rulemaking proceeding, there was widespread support among the commenters for the Commission to employ a third-party administrator. In contrast, there was widespread opposition to the Utilities' primary proposal, which was not to have the Commission administer the program but to have the Utilities themselves administer the program. For the Utilities to argue that the Commission is not empowered to delegate authority to a contactor working under the Commission's direction and control but would be empowered to delegate such authority to the Utilities is disingenuous, to say the least.

The Utilities provide no legal authority to support their argument that the Commission did not have the power to delegate any administrative duties under Act. The Public Regulation Commission Act, effective at the time that the Commission adopted the Rule and at the time that the Commission contracted with InClime, Inc., to be the Program Administrator, provided the Commission with the power to "enter into contracts to carry out its powers and duties." NMSA 1978, § 8-8-4(B)(9) (1998).

It is common for state agencies to hire contractors to assume responsibilities that do not include the agency's policymaking or adjudicatory responsibilities. That is precisely what the Commission did. The Commission contracted with a consultant with extensive experience in administering community solar programs in other states. The Commission entered into the contract pursuant to a request for proposals compliant with the state's Procurement Code.

The Utilities' argument that the Rule does not provide a process for selection of proposed community solar projects is ludicrous, likewise the argument that the Rule is impermissively vague on these issues. The Utilities simply ignore the detailed criteria for scoring projects provided in the Rule, the detailed description of the points to be allocated for each of the scoring criteria in the Rule, the detailed minimum requirements for any application to be scored provided in the Rule, the detailed provisions concerning the list of selected projects to be established for each

of the Utilities' territories in the Rule and the detailed provisions concerning the waitlist of projects to be established for each of the Utilities' territories in the Rule. 17.9.573.12 NMAC.

The most baseless of all of the Utilities'' arguments rests upon a bizarre misstatement of the content of the Rule. The Utilities misrepresent the Rule as stating that "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'." **[BIC 29 (quoting 17.9.573.12(F) NMAC)]** That subpart of the Rule actually reads, "The program administrator shall select projects *based upon these qualifications and selection criteria* within each qualifying utility's territory until the allocated capacity cap for each utility has been reached." 17.9.573.12(F) NMAC (italics added). This subpart does not refer to any unidentified "selection criteria within each qualifying utility's territory," as the Utilities claim, but to the selection of projects based upon the criteria and scoring described in the same section of the Rule. The subpart requires that the administrator create a list of selected projects for each of the three Utilities, with the upper limit on each list being the allocated capacity cap.

G. The Commission Disclosed More than Was Required by Law Concerning the Team's Recommendations to the Commission

The Utilities' claims concerning the role of the Community Solar Action Team (the "Team") are vague and legally baseless. To begin with, it is baffling that

the Utilities refer to the Team's recommendations as "non-public." The reason that the Utilities are aware of the Team's recommendations to the Commission is that they were made publicly, in Commission orders issued throughout the rulemaking proceeding and discussions of such recommendations in open meetings.

The irony of the Utilities' claim that the Commission's process in this rulemaking proceeding was opaque is that the Utilities apply this claim to the Commission's efforts to be even more transparent than usual and more transparent than applicable law requires.

The Utilities repeatedly and falsely claim that the Commission did not identify the members of the Team. The Commission announced the membership of the Team in the Commission's Initial Order. The Commission also stated the purpose of the Team, stating that "[t]he Team will take a leading role in the rulemaking process, will interface with Strategen, and will endeavor to maximize stakeholder engagement." Nearly every Commission order issued in this proceeding included specific recommendations from the Team to the Commission. The claim that this process lacked transparency is baseless.

As for the Utilities' claims concerning ex parte communications, the Commission stated in orders challenged in this appeal that members of the Team that were also members of Staff of the Utility Division of the Commission ("Staff") did not participate in Team discussions after the closing of the record. Staff's

recommendations to the Commission regarding the rule were entirely contained within Staff's filed comments. The Utilities did not seek from the Commission and do not include in the record before the Court any public records of the Commission to support their baseless claims. They rely entirely on unsupported allegations.

The use of the Team approach was very helpful in the rulemaking proceeding as it allowed for the development of knowledge among a group within the Commission specifically dedicated to the community solar rulemaking and implementation of the Community Solar Program. The Commission had no experience with and only limited knowledge of community solar programs at the beginning of the rulemaking proceeding. The use of a specialized team, including Commissioners, expert consultants, and others, was an efficient and effective way to build knowledge, conduct a proceeding compliant with the requirements of the Act, and allow other Commissioners and employees of the Commission to specially focus upon other responsibilities that had recently been delegated by the Legislature.

The Team also included advisory staff, who provided invaluable advice to the Commission based upon their expertise and experience regarding community solar programs in other states. The Commission has no legal obligation to disclose the substance of an advisor's advice to the Commission. *Qwest Corp. v. New Mexico Public Regulation Commission*, 2006-NMSC-042, ¶ 60 (holding that the

Commission has no obligation to disclose the substance of advice that it receives from its advisory staff).

Through the Commission's public disclosure of the Team's recommendations and the public involvement of Team members in the rulemaking proceeding, the Commission voluntarily provided greater transparency to the public than is required by law. That the Utilities would allege that the Team's involvement in the underlying rulemaking proceeding calls into question the validity of the proceeding reveals either the Utilities' misunderstanding of the applicable law or their willingness to pursue groundless arguments.[5]

H. The Advice Notice Orders Did Not Violate the Public Utility Act or any Requirement of Due Process

Neither of the Advice Notice Orders violated any provision of law by failing to include a provision for hearing. In the First Advice Notice Order, the Commission simply rejected Southwestern Public Service Company's ("SPS") proposed community solar bill credit rate calculation as clearly in violation of the Rule's prohibition upon the deduction of transmission costs from the credit. The Rule was fully effective at the time of the order as it has been through the present. No stay of

[5] The Commission does not address the numerous, inapplicable Due Process cases cited by the Utilities as the Utilities themselves do not even attempt to connect those cases to the matter before the Court. It is the Utilities' burden to present the applicable law and explain its application to the present matter, yet they fail to include a discussion of a single case that they cite.

the Rule has been entered by the Commission or the Court. There was no hearing required for the Commission to make the simple observation, which was clear on the face of SPS's advice notice and undisputed by SPS, that the advice notice violated the Rule. The Commission, accordingly, ordered SPS to file an advice notice that simply did not violate the Rule.

Upon SPS's filing of an advice notice compliant with the Rule, the Commission found the advice notice compliant with the Rule and fully acceptable, allowing it to become effective. Again, there was no need for a hearing. The only dispute was as to whether SPS should be required to follow the Rule. There were no factual disputes requiring an evidentiary hearing. The Rule was effective and remains effective. No hearing was necessary to determine that this was so.

III. CONCLUSION

In conclusion, the Commission asks the Court to affirm the Commission orders challenged by the Utilities.

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IV. STATEMENT REGARDING REQUEST FOR ORAL ARGUMENT

The Commission requests oral argument due to the number and complexity of the issues in this appeal.

Respectfully submitted this 11th day of May 2023.

NEW MEXICO PUBLIC REGULATION COMMISSION

/s/ Russell Fisk, electronically signed
Russell Fisk, Associate General Counsel
Attorney for New Mexico Public Regulation Commission
P.O. Box 1269
Santa Fe, New Mexico 87504-1269
(505) 412-5042
Russell.fisk@prc.nm.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 11, 2023, a true and correct copy of the foregoing CONSOLIDATED ANSWER BRIEF OF NEW MEXICO PUBLIC REGULATION COMMISSION was electronically filed in the Supreme Court's Odyssey filing system, which in turn has caused service upon counsel for all parties of record.

NEW MEXICO PUBLIC REGULATION COMMISSION

/s/ Russell Fisk, electronically signed
Russell Fisk, Associate General Counsel
Attorney for New Mexico Public Regulation Commission
P.O. Box 1269
Santa Fe, New Mexico 87504-1269
(505) 412-5042
Russell.fisk@prc.nm.gov