



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.**

**CONSOLIDATED REPLY BRIEF OF APPELLANT SOUTHWESTERN
PUBLIC SERVICE COMPANY AND INTERVENOR-APPELLANTS
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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”) have demonstrated that, in adopting and implementing 17.9.573.1–17.9.573.22 NMAC (“Rule 573” or “the Rule”), the New Mexico Public Regulation Commission (“NMPRC” or “Commission”) exceeded its authority under the Community Solar Act, NMSA 1978, Sections 62-16B-1 to -8 (2021) (the “Act”) and violated the Utilities’ due process rights.¹

The Act establishes specific requirements that govern the Community Solar Program, many of which the NMPRC ignored. The Rule improperly delegates the NMPRC’s policymaking authority to a third-party administrator, which the Rule makes responsible for project selection. It also includes requirements that directly contravene express provisions in the Act, including those that prohibit subsidization and co-location of community solar facilities. Further, the Rule omits required consumer protection provisions and low-income guidelines and fails to include required cost recovery mechanisms. Finally, by relying upon non-public recommendations from an unidentified “Team” in developing the Rule, the Commission violated the Utilities’ procedural due process rights.

¹ Pursuant to this Court’s January 18, 2023, Order, Appellant SPS and Intervenor EPE and PNM were directed to file a Consolidated Reply Brief. PNM and EPE join in this Brief.

To defend the fundamentally flawed Rule, the NMPRC and Intervenor-Appellees² (“Intervenors”) (collectively, “Appellees”) inject ambiguity into the Act where none exists, read language into the Act, conflate the Rule’s legal infirmities with factual issues, misuse principles of statutory construction, and generally seek to expand the NMPRC’s authority beyond what the Legislature permitted. The Court should reject Appellees’ novel and unsupported view of the Commission’s rulemaking authority. Because the Rule violates the Act and due process requirements, it should be annulled and vacated.

The Commission’s two Advice Notice Orders must also be annulled and vacated. The First Advice Notice Order rejected SPS’s proposed bill credit rate without a hearing, compelled SPS to file a new rate 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]. The Second Advice Notice 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, which SPS had filed under protest. [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 due process

² Intervenor-Appellees include the Coalition for Community Solar Access, Renewable Energy Industries Association of New Mexico, City of Las Cruces, New Energy Economy, and Coalition of Sustainable Communities New Mexico.

rights. *See id.* The Advice Notice Orders are unlawful and should be annulled and vacated.

II. STANDARD OF REVIEW

This appeal raises questions of law as to whether the Rule is inconsistent with the Act and should be reviewed *de novo*. *See, e.g., N.M. Indus. Energy Consumers v. N.M. Pub. Regul. Comm’n*, 2007-NMSC-053, ¶ 19, 142 N.M. 533. Contrary to Appellees’ assertions, statutory construction is not a matter within the NMPRC’s expertise. *Id.* (“Because statutory construction itself is not a matter within the purview of the Commission’s expertise, we afford little, if any, deference to the Commission on this matter.”) (internal citation omitted). Indeed, the Court is not bound by the NMPRC’s decisions on questions of law and will substitute its own independent judgment if the Commission’s interpretation is unreasonable or unlawful. *New Energy Econ., Inc. v. N.M. Pub. Regul. Comm’n*, 2018-NMSC-024, ¶ 25, 416 P.3d 277. Some deference may be accorded the Commission when construing an ambiguous statute. *Dona Ana Mut. Domestic Water Consumers Ass’n v. N.M. Pub. Reg. Comm’n*, 2006-NMSC-032, ¶ 17, 140 N.M. 6. No such deference is appropriate here, however, where the NMPRC has adopted a Rule and set a rate that violates clear statutory requirements. *See Marbob Energy Corp. v. N.M. Oil Conservation Comm’n*, 2009-NMSC-013, ¶ 5, 146 N.M. 24.

Further, because this appeal presents questions of law, Intervenor's extensive discussion of their view of the factual record, along with their references to substantial evidence, are misplaced. *See, e.g.*, [Int. AB 7-9, 16-19, 21-23]. They argue the Utilities have not challenged the Rule based on a lack of substantial evidence, and then claim the Rule is supported by substantial evidence. In doing so, Intervenor sets up, and then knock down, a strawman. This distraction from the Rule's legal infirmities is unavailing. The Rule is fundamentally flawed because it violates the Act and, as a matter of law, must be annulled.

III. ARGUMENT

A. **The Rule impermissibly delegates to a third-party administrator the obligation to select community solar projects that will connect to utility facilities.**

The Commission lacks authority to disregard an enabling statute's directives. *See, e.g., Egolf v. N.M. Pub. Regulation Comm'n*, 2020-NMSC-018, ¶ 16, 476 P.3d 896 ("[T]he Commission has a nondiscretionary duty to administer applicable law duly enacted by our Legislature."); *see also Aguilera v. Bd. of Educ.*, 2005-NMCA-069, ¶ 24-6, 137 N.M. 642 (public policy considerations do not allow an agency to adopt regulations different in scope or effect from the choices made by the Legislature). Here, Section 573.12 of the Rule, which delegates the selection of community solar projects to a third-party, should be vacated on the grounds that it

exceeds the scope of the Commission's authority, is not in accordance with law, and is impermissibly vague.

1. Section 573.12 of the Rule exceeds the scope of the Commission's rulemaking authority.

The Supreme Court will vacate an NMPRC decision if it is: “(1) arbitrary, capricious or an abuse of discretion; (2) not supported by substantial evidence in the record; or (3) otherwise not in accordance with law.” *Q Link Wireless LLC v. N.M. Pub. Regulation Comm’n*, No. S-1-SC-38812, ¶ 10 (N.M. Sup. Ct. May 22, 2023) (quoting NMSA 1978, § 63-9H-13(B)). A decision is “not in accordance with law” if it is “outside the scope of the agency’s authority.” *Id.* (quoting *Dona Ana Mut. Domestic Water Consumers Ass’n v. N.M. Pub. Regulation Comm’n*, 2006-NMSC-032, ¶ 9). The Commission is created by statute “and limited to the power and authority expressly granted or necessarily implied by [the] statute.” *Id.*

While the Commission has some discretion to implement the Act, that “discretion is not boundless.” *OS Farms, Inc. v. N.M. Amer. Water Co., Inc.*, 2009-NMCA-113, ¶ 33, 147 N.M. 221. New Mexico courts will “afford a degree of deference to [the Commission’s] interpretation of a statute [it] is charged with administering, [but] such deference does not give the [Commission] the authority to pour any meaning it desires into the statute.” *Id.* To determine whether the Commission has complied with a statute, the Court “view[s] the statute ‘in its

entirety and with a focus on its end result,’ to determine if it is apparent that the Commission has done something outside of its authority.” *Id.* (quoting *State ex rel. Sandel v. N.M. Pub. Utility Comm’n*, 1999-NMSC-019, ¶ 19, 127 N.M. 272, 980 P.2d 55).

The Act requires the Commission to “administer and enforce the rules and provisions of Act” and promulgate rules that “establish a process for the selection of community solar facility projects.” NMSA 1978, § 62-16B-7(A) and (B)(4). Rather than implement these directives, the Commission, stating it “shall have no involvement in the process,” delegates to a third-party the obligation to select community solar projects that will connect to the Utilities’ facilities, with no input from the Utilities or the Commission. *See* 17.9.573.12 NMAC. Nothing in the statute authorizes the Commission to abdicate its duties to a third party.

Appellees largely fail to address the Utilities’ arguments on this issue. Instead, Appellees focus on the Commission’s general statutory authority “to enter into contracts to carry out its powers and duties.” [NMPRC AB at 21] (*citing* § 62-19-9(B)(9)). However, the NMPRC concedes this authority extends only to matters “that do not include the agency’s policymaking or adjudicatory responsibilities.” *Id.* (emphasis added). Unlike a typical third-party contract to perform administrative functions, Rule 573.12 authorizes a third-party administrator to make important policy decisions regarding the selection of community solar projects. For example,

the Rule allows the administrator to “award an additional five points to any bid that, *as determined by the administrator in its discretion*, includes an innovative commitment or provision beneficial to the local community, to potential subscribers, or to the program overall.” 17.9.573.12(E)(9) NMAC. Section 62-19-9(B)(9) of the Act does not empower the Commission to delegate project selection to a third-party administrator in this manner, especially where the selected community solar projects will connect to *the Utilities’* infrastructure rather than any state-owned facilities.

Intervenors’ speculative claim that the Legislature tacitly endorsed the Commission’s delegation of authority because it approved funding for third-party administration of the program lacks any evidentiary or legal basis. [Int. AB 37]. The Legislature provides only that the Commission can charge application fees to cover a portion of its costs to administer the program. *See* § 62-16(B)-7(C). The Act’s funding provisions do not authorize the NMPRC to delegate its authority to a third-party administrator.

2. Section 573.12 of the Rule is void for vagueness and fails to provide a right to review of the third-party administrator’s decisions.

Section 573.12 also lacks important project selection criteria, rendering it impermissibly vague. “A statute is void for vagueness if persons of common intelligence must necessarily guess at its meaning.” *Tri-State Generation and Transmission Assoc., Inc. v. D’Antonio* 2012-NMSC-039, 289 P.3d 1232 *see also*

Bokum Res. Corp. v. N.M. Water Quality Control Comm’n, 1979-NMSC-090, ¶ 14, 93 N.M. 546. While the Rule establishes a system for scoring project bids based on points, it ultimately ties project selection to the “selection criteria within each qualifying utility’s territory” without defining those criteria. 17.9.573.12(F) NMAC. As mentioned above, the Rule also gives the administrator discretion to award extra points to projects that include an “innovative commitment or provision beneficial to the local community, to potential subscribers, or to the program overall” without providing any guidance regarding the types of “innovation” or “benefits” that will be considered or valued.

Additionally, the Rule fails to provide a right to seek review of the third-party administrator’s actions. The Rule provides: “The [C]ommission will have no involvement in the process except to the extent that the administrator or any participant in the process may raise before the [C]ommission *an issue that is not fully addressed in this rule and that the [C]ommission finds, in its discretion, that it should address.*” 17.9.573.12(A) NMAC. In *Old Abe Co. v. N.M. Mining Commission*, the court noted that in determining whether a regulation is vague, an “important aspect of gauging the delegation of discretion” by an administrative agency “is whether the discretion is reviewable.” 1995-NMCA-134, ¶ 34, 121 N.M. 83. In that case, the court upheld regulations challenged for vagueness in part because they included a right of review. *Id.* Here, the Rule only allows for review of

matters the Commission elects to consider, leaving applicants to guess how the Rule will be implemented and then failing to provide recourse. Because Section 573.12 forces parties to guess at its meaning and provides no right of recourse, the Court should annul Section 573.12 as impermissibly vague.

B. The Rule violates the Act’s provisions that prohibit subsidization of costs by non-subscribers.

1. The Rule improperly permits subsidization of interconnection costs.

The Act expressly states that non-subscribers cannot subsidize interconnection-related costs “attributable to a subscriber organization.” *See* § 62-16B-7(B)(6) (the Commission shall establish interconnection standards “*such that a qualifying utility and its non-subscribing customers do not subsidize the costs attributable to the subscriber organization pursuant to this paragraph*”) (emphasis added). Despite this prohibition, Rule 573.13(A) provides, “The commission may determine on a case-by-case basis whether the cost of distribution system upgrades necessary to interconnect one or more community solar facilities may be eligible for some form of cost-sharing.” Intervenor argues that it does not matter that the Rule permits subsidization of interconnection costs because the term “subsidize” is undefined in the Act. [Int. AB 19-20].

In construing statutes, courts will first “turn to the plain meaning of the words at issue, often using the dictionary for guidance.” *State v. Montano*, 2020-NMSC-

009, ¶ 13, 468 P.3d 838. In this case, the term “subsidize” has a plain and unambiguous meaning: “to aid or support by grant of a subsidy.” Merriam-Webster, <https://www.merriamwebster.com/dictionary/subsidize> (visited May 26, 2023). A subsidy, in turn, is “a grant or gift of money,” such as “by a government to a private person or company to assist an enterprise regarded as advantageous to the public.” *Id.* Contrary to Intervenor’s argument, the term “subsidize” is unambiguous and means what it says: that non-subscribers cannot be forced to pay the interconnection costs of subscribers. The NMPRC cannot insert any meaning it likes into a term simply because the Legislature did not define it. *See OS Farms, Inc.*, 2009-NMCA-113, ¶ 33.

The Commission claims that the Rule, which allows cost sharing if the costs are matched or exceeded by “demonstrable benefits,” is not equivalent to subsidization. [NMPRC AB 8-10]. This argument ignores that the Rule is forcing some customers pay expenses incurred by others, which constitutes subsidization. Further, the Rule leaves Utilities to guess at the standards by which the Commission would determine whether “demonstrable benefits” exist that warrant cost sharing. Although the NMPRC claims the regulation is clear because it relies on criteria in the Grid Modernization Act, NMSA 1978, § 62-8-13(B) [NMPRC AB 10], this argument ignores that neither law authorizes subsidizations. Further, the Rule fails to provide guidance on whether or how costs “are matched or exceed by

demonstrable benefits.” Because Section 573.13(A) of the Rule directly contradicts the Act’s prohibition against non-subsidization, the Commission abused its discretion in issuing it.

2. The Rule impermissibly requires utilities to credit transmission costs to subscribers in violation of the Act’s prohibition on subsidization.

As set forth in Appellants’ Brief In Chief, the Rule’s requirement that utilities include transmission costs in the subscriber bill credit contradicts the Act’s clear non-subsidization mandates set forth in Section 62-16B-7(B)(8). Intervenor claim that the Legislature must have included transmission costs in the bill credit because it only excluded distribution costs, [Int. AB 9-12], but this argument violates New Mexico’s canons of statutory construction by reading language into the statute that does not exist and ignoring language the statute includes.

Contrary to Intervenor’s claim, the Legislature did not state that the bill credit “only” excludes distribution costs. As Intervenor recognize, the Court “must not read into a statute any words that are not there, particularly when the statute is complete and makes sense as written.” [Int. AB 9] (*citing Burroughs v. Bd. Of County Comm’rs*, 1975-NMSC-051, ¶ 16, 88 N.M. 303). The Intervenor’s effort to supplement the Legislature’s language with the term “only” should be rejected.

Intervenor also fail to recognize that the Legislature expressly precluded subsidization of costs by non-subscribers. It is well-established that “the

[L]egislature is presumed not to have used any surplus words in a statute; each word is to be given meaning.” *Helman v. Gallegos*, 1994-NMSC-023, ¶ 32, 117 N.M. 346. The Legislature prohibited subsidization of any costs, whether associated with distribution or transmission. Intervenor’s argument that only distribution costs can be excluded from the bill credit effectively removes the subsidization prohibition from the statute.

Intervenor’s reliance on the principle of “*inclusio unius est exclusio alterius*,” [Int. AB 11], is similarly unpersuasive, as the Court has declined to apply this principle when doing so leads to a result that is inconsistent with a statute. *See, e.g., Baker v. Hedstrom*, 2013-NMSC-043, ¶ 29, 309 P.3d 1047 (professional organizations were covered by the Medical Malpractice Act even though the Legislature had not included them in the statute’s definitions).

Finally, excluding transmission costs from the bill credit would not result in double recovery of transmission costs, as the Commission claims. [NMPRC AB 3-4]. The bill credit rate is a refund to subscribers of amounts otherwise included in customer rates that are avoided through community solar subscriptions. The inclusion of transmission costs in the bill credit rate therefore precludes utilities from recovering transmission costs from subscribers. [39432 11 RP 1542]; [39432 12 RP 1574]; [39432 13 RP 1948]. The Commission concludes without evidence that subscribers do not incur transmission costs; that utilities should be required to forego

recovery of these transmission costs until base rates reset; and that non-subscribing customers should pay for those transmission costs, thereby creating a further impermissible subsidy. The Commission provides no support for its speculation that community solar facilities will avoid or not increase transmission costs and that these should be part of a bill credit. [NMPRC AB 6].

For these reasons, 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), and should be vacated.

C. The Rule violates the Act's prohibition on co-location of community solar facilities.

As set forth in the Utilities' Brief in Chief, two separate provisions of the Act prohibit co-location of community solar facilities. *See* §§ 62-16B-3(A)(4), 62-16B-7(B)(10). The Rule, however, states the Commission will permit co-location "on a case-by-case basis, allowing more than one community solar facility to be located on the same parcel." *See* 17.9.573.18 NMAC. The Rule further provides that as long as community solar facilities are not situated on the same "parcel," they are not co-located. The Commission lacks authority to create this type of *ad hoc* exception to the Act. *See Taylor v. Johnson*, 1998-NMSC-015, ¶ 22, 125 N.M. 343 (agency's discretion does not permit "altering, modifying, or extending the reach of a law created by the Legislature").

Intervenors and the NMPRC claim the Commission could define co-location however it liked because the Legislature did not do so. [Int. AB 18-20]; [NMPRC AB 30-32]. But the term “co-location” is not ambiguous and must be interpreted according to its ordinary meaning. *See State v. Montano*, 2020-NMSC-009, ¶ 13. It means, simply, “to locate (two or more things) together or be located together;” Merriam Webster, <https://www.merriamwebster.com/dictionary/colocate> (visited May 26, 2023). Because the Rule allows multiple community solar facilities to be located on one parcel, it violates the Act’s prohibition on co-location and should be vacated.

D. The Rule fails to implement the Act’s provisions that provide for utility recovery of interconnection costs.

The Act requires 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 mechanisms that allow utilities to recover costs associated with interconnection of community solar facilities.

Intervenors’ argument that the Commission’s interconnection rule, 17.9.568.1 through 17.9.568.30 NMAC (“Rule 568”) governs interconnection of community

solar facilities fails to address the Act's requirements regarding recovery of interconnection costs. Rule 568 is insufficient to address the Legislative mandate that the Commission establish a mechanism for utilities to recover interconnection costs. The Rule's failure to do so, or even to reference Rule 568 as the means for recovering interconnection costs, constitutes reversible error.

E. The Rule fails to adopt low income and consumer protection requirements in accordance with the Act.

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. The Rule fails to include any such guidelines, merely parroting the Act's directive that the Commission “will issue guidelines” at some unknown time in the future. 17.9.573.10(B) NMAC. The Rule's omission of guidelines to facilitate the thirty percent low-income carveout contravenes the Act and renders the Rule defective.

Appellees' argument that the Act requires the Commission to promulgate guidelines, but not to do so *in the Rule*, defies logic. Section 62-16B-7B is clear: in enacting the Rule, the Commission must create a thirty-percent low-income carveout *and* issue “guidelines” to achieve annual compliance of that carve-out. These two

sentences must be read together and not artificially parsed. *See Baker v. Hedstrom*, 2013-NMSC-043, ¶ 26, 309 P.3d 1047 (“[A]ll provisions of a statute, together with other statutes *in pari materia*, must be read together to ascertain the legislative intent.”). Appellees’ attempt to sever the guidelines from inclusion in the Rule ignores basic principles of statutory interpretation and should be rejected.

F. The Commission improperly relied on the recommendations of the “Team” in promulgating the Rule.

The Commission violated due process by relying almost entirely on nonpublic recommendations made by a group referred to as the “Team.” 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,” violated Appellants’ due process rights.

Intervenors defend the NMPRC’s non-disclosure by arguing that due process protections do not apply in a rulemaking proceeding. [Int. AB 37-38]. That argument is incorrect, as New Mexico law expressly requires the Commission to provide notice and an opportunity to be heard with respect to the adoption of regulations. *See* NMSA 1978, § 62-19-21 (“Unless otherwise provided by law, no rule affecting a person outside the commission shall be adopted, amended or repealed except after public notice and public hearing before the commission or a hearing examiner designated by the commission”).

Here, Appellants did not receive adequate notice and opportunity to be heard because the “Team” – on whose advice the Commission relied – communicated all of its recommendations off the record, without any public oversight. The “Team” filed no comments or responses to Appellants’ comments. If Appellants can cite no evidence in the record regarding the Team’s communications with the Commission, it is precisely because those communications occurred *ex parte*. As a result, Appellants had no opportunity to address the Team’s recommendations or present countervailing evidence.

Further, the Commission cannot designate anyone it sees fit as “advisory staff.” Rather, individuals designated as “advisory staff” must meet specific criteria. *See* NMSA 1978, § 62-19-19. Here, the Commission has not identified all members of the Team or explained how they all meet the definition of “advisory staff”.

The Commission cites *Qwest Corp. v. NMPRC*, 2006-NMSC-042, ¶ 55, 140 N.M. 440, for the proposition that it has no obligation to publicly disclose the Team’s recommendations. [NMPRC AB 24]. But in *Qwest*, the consultant fell “within the requirements of advisory staff.” *Id.* ¶ 60. That has not been established here because the Commission has provided almost no identifying information about the Team. Additionally, the *Qwest* Court specifically held that under another set of facts, the consultant might have been a “non-party expert” subject to increased disclosure requirements. *Id.* Appellants could not reasonably determine necessary disclosure

requirements without knowing whether Team members constituted other parties, advisory staff or non-party experts. The Commission's reliance on the Team violated due process and renders the rulemaking decision defective.

G. The Commission's Advice Notice Orders are unlawful and must be reversed.

Finally, the PUA plainly requires that a rate different from that proposed by the utility can only be approved "after a hearing." *See* § 62-8-7(D). Procedural due process also required a hearing on the rates set forth in the Advice Notice Orders. *See, e.g., TW Telecom v. N.M. Pub. Regul. Comm'n*, 2011-NMSC-029, ¶ 17, 150 N.M. 12 ("the fundamental requirements of due process in an administrative context are reasonable notice and opportunity to be heard and present any claim or defense").

Here, the Commission issued the Advice Notice Orders, which compelled SPS's filing of a different rate, without holding a hearing. The Commission's failure to hold a hearing before rejecting and then setting SPS's bill credit rate renders the Advice Notice Orders void. *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").

Contrary to Intervenor's argument, [Int. AB 42-43], the question of whether the Advice Notice Orders were unlawful or otherwise violated SPS's due process rights is ripe for review. Because the Commission refused to stay the Rule pending

appeal, the SPS bill credits set forth in the Orders have now gone into effect. SPS's concerns regarding the Advice Notice Order are not "hypothetical or remote." *See ACLU v. City of Albuquerque*, 2007-NMCA-092, ¶ 7, 142 N.M. 259 ("[T]he purpose of ripeness is to 'conserve judicial machinery for problems which are real and present or imminent, not to squander it on abstract or hypothetical or remote problems.'). Intervenor's argument that the Utilities' Advice Notices related to the bill credit rate may be considered in a pending Community Solar implementation proceeding does not negate the unlawful action of the Commission in placing into effect the SPS bill credit rate through the Advice Notice Orders, which are final and ripe for review.

Although the Commission argues it was not required to hold a hearing before issuing the Advice Notice Orders because SPS's First Advice Notice violated the Rule, and the Commission merely accepted the Second Advice Notice, this position ignores that SPS was expressly ordered to file the Second Advice Notice without first being granted a hearing on either advice notice, could have faced penalties for not complying with that order, and filed the Second Advice Notice under protest. [NMPRC AB 25-26]; [39611 8 RP 1418-1513]. The Commission effectively argues that utilities have no right to appellate review. Even if the Commission believed the First Advice Notice violated a rule, it was still required to grant SPS a hearing before ordering SPS to file a new rate; the record is plain the Commission afforded SPS no

such right. Therefore, the Advice Notice Orders are fundamentally flawed and should be vacated.

IV. 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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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 4,371 words using 14-point Times New Roman typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2023, I caused a true and correct copy of the foregoing Reply Brief to be filed and served on all counsel of record through the Court's Electronic Filing System.

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