IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. S-1-SC-39432

SOUTHWESTERN PUBLIC SERVICE COMPANY

Appellant,

v.

NEW MEXICO PUBLIC REGULATION COMMISSION,

Appellee,

**PUBLIC SERVICE COMPANY OF NEW MEXICO,
COALITION FOR COMMUNITY SOLAR ACCESS and
RENEWEABLE ENERGY INDUSTRIES ASSOCIATION OF NEW MEXICO,**

Intervenor-Appellees.

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

NEW ENERGY ECONOMY'S RESPONSE TO APPELLANT SOUTHWESTERN PUBLIC SERVICE COMPANY'S MOTION TO STAY IMPLEMENTATION OF PUBLIC REGULATION COMMISSION ORDERS PENDING APPEAL

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New Energy Economy ("NEE") responds as follows to *Southwestern Public Service Company's Motion to Stay implementation of Public Regulation Commission Orders Pending Appeal* ("Motion") filed on August 17, 2022, pursuant to Rule 12-309(E) NMRA.

I. Introduction.

In 2021, the legislature passed, and the Governor signed, the Community Solar Act. It became effective on June 18, 2021. It is codified as NMSA 1978 62-16B-1 *et seq*., ("The Act"). The Act requires the Public Regulatory Commission ("PRC") to "administer and enforce the rules and provisions of the [Act], including regulation of subscriber organizations in accordance with the [Act] and oversight and review of the consumer protections established for the community solar program." NMSA 1978, § 62-16B-7(A).

The purpose of the Act is to encourage the conversion to solar energy from energy derived from coal and gas by allowing communities, businesses and neighborhoods to directly invest in solar, connect to the grid, and receive a credit on their bills for the solar that is generated resulting from their respective subscriptions. Not only does community solar jump start the conversion from fossil fuels to solar by allowing New Mexicans to take control of their preferred choice of energy it allows groups of people to do so while saving money, because solar is

cheaper than all fossil fuel generated electricity. Community solar is not only more economically efficient, it allows greater access to thousands more New Mexicans, regardless of income or ability to install rooftop solar.[1] Nineteen states and the District of Columbia have by now passed legislation similar to New Mexico's with the objective of enabling and encouraging community solar facilities.[2] It has taken advocates nearly a decade to get the Legislature to adopt the Community Solar Act,[3] a relatively limited yet important effort to help our state advance and implement our clean energy goals.[4]

The Act required that the PRC adopt rules by April 1, 2022 to implement the community solar program required by the legislature. The PRC did so via a public rule-making process that concluded on March 30, 2022. The rules the PRC adopted, as the legislation required, have implemented the necessary guidelines that would allow communities and groups to begin building solar facilities and generating solar power to allow New Mexicans greater access to low-cost solar energy, especially low-income customers. The rules contain no novel or unusual provisions as compared with community solar regulations in other states.

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[1] *See*, Exhibit 1, Affirmation of State Senator Elizabeth Stefanics, *passim.*
[2] *Id.,* p. 3.
[3] *Id.,* p. 3.
[4] *Id., passim.*

The Act has already become a success. The number of applications received by SPS in anticipation of the enabling regulations that New Mexico's monopoly utilities are attempting to stay is an indication of the Act's immediate embrace by the public and solar developers and reflects the resulting boom in economic activity. *See* SPS chart, embedded in Senator Elizabeth Stefanics' Affirmation, attached and incorporated herein as Exhibit 1, p. 8. (showing that as of November 2021, movant SPS, has already seen upwards of 600 applications for interconnection).

Although, as Senator Stefanics explains in her declaration, the Community Solar Act was the product of a collaborative effort on the part of industry, consumer and environmental groups, New Mexico's monopoly utilities (PNM, EPE and SPS) have obstructed the process throughout, and as if SPS drew the short straw, filed the appeal from the PRC's adoption of regulations.

After filing its notice of appeal, SPS moved the PRC to stay implementation of its rules governing community solar. The Commission denied SPS's motion on August 10, 2022. *See*, *Order Denying Southwestern Public Service Company's Motion to Stay Implementation of Rule Pending Appeal*, August 10, 2022, attached to SPS's Motion to Stay as Exhibit A. Thereafter, SPS filed essentially the same with this Court.

By filing its Motion to Stay Implementation of the Community Solar Act, SPS continues the utilities' unabated foot-dragging when it comes to climate change and the conversion to renewables. If SPS's Motion to Stay is successful, it will bring the community solar program to a halt.

In its Motion to Stay, SPS claims that the regulations will cause significant public confusion and commercial uncertainty that will result if Rule 573[5] is implemented while this challenge to the rule remains on appeal[6] and that SPS's appeal has merit because 1) an internal "team" of the PRC " *may* have run afoul the prohibition on *ex parte* communications"[7] and "advised the Commission on rulemaking"[8] (emphasis added); 2) "administering the program should not be subsidized by non-subscribing customers that choose not to subscribe to a community solar facility;"[9] 3) it "does not impose any specific consumer protection standards on subscriber organizations and establishes no consumer protection enforcement procedures"[10] and 4) it delegates almost all substantive decisions for the selection of community solar facility projects and that, therefor,

[5] 17.9.573.1–17.9.573.22 NMAC ("Rule 573"); The Rules became effective on July 12, 2022. The Rules are attached as Exhibit B to SPS's Motion.
[6] SPS Motion to Stay p. 15.
[7] *Id.,* p. 17.
[8] *Id.,* p. 20.
[9] *Id.,* p. 21.
[10] *Id.,* p. 28.

the third-party administrators will, according to SPS, have "unreviewable, *de facto* rulemaking authority."[11]

It is not surprising that New Mexico's monopoly utilities, after having grudgingly participated in the adoption of legislation that will facilitate the long-delayed, crucial conversion away from fossil fuels are now attempting – via SPS's Motion to Stay – to bring the conversion to a grinding halt. If the Court were to grant the stay, it would likely stall the conversion from fossil fuels (whether coal or gas) for years. These are the same utilities that have contrived, over and over, ***for decades,*** to slow and obstruct the conversion to renewables because of the utilities' economic preference for capital-intensive coal, gas and nuclear.[12]

Even if the fate of our planet[13] were not hanging in the balance of the outcome of the thousands of legislative and regulatory actions like these, SPS's

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[11] *Id.,* p. 31.
[12] *See*, Exhibit 1, pp. 9-12.
[13] https://www.ipcc.ch/report/sixth-assessment-report-working-group-3/: In the third part of the Intergovernmental Panel on Climate Change report which was published this 4th of April 2022, it warned that the world is set to reach the 1.5ºC level within the **next two decades** and said that only the **most drastic cuts in carbon emissions** from now would help **prevent an environmental disaster**. The IPCC gave prominence to the most important aspect facing humanity: **Use of fossil fuels**. This kind of fuel should be abandoned as soon as possible, as a matter of urgency, because global temperatures have risen by 1.1ºC so far, and already we are seeing an increase in natural disasters such as **massive wildfires**, **flooding, hurricanes, and other events**.

Motion to Stay would still fail for the more mundane reason that the grounds SPS provides in support are wholly inadequate to satisfy any of the factors this Court considers in determining whether to stay an agency regulation. Most glaring of all of SPS's failings is in the balance of harms. The harms, after all, are those of a monopoly utility having to comply with what it falsely claims to be confusing regulations versus the ability of citizens to do their parts in the conversion from fossil fuels to solar, addressing climate change and its associated impending catastrophes, as well as saving money.

SPS acknowledges that the Community Solar Act requires that the Commission adopt a rule to implement the requirements of the Act and that Rule 573 was issued in response to that directive.[14] Yet it seeks to disrupt the status quo based on "*potential harm* to consumers, the utilities, and solar developers".[15] In its Motion to Stay, SPS makes four arguments in favor of a stay, attempting to satisfy this Court's requirements. First, it argues that it meets the requirement of probability of success on the merits because the PRC's adoption of the rule was tainted by using a "Team" of people to study regulations and make recommendations.[16] SPS raised this issue below and the PRC addressed it in its

[14] SPS Motion for Stay, p. 5.
[15] SPS Motion for Stay, p. 4. (Emphasis supplied.)
[16] SPS Motion for Stay, pp. 17-21; Commenters often made similar rulemaking recommendations as "the Team." For instance, regarding "Comments Relevant to

order adopting the rule. *Order Denying Southwest Public Service Company's Motion to Stay Implementation of Rule Pending Appeal*, 8/10/2022, ¶¶ 34, 46-54. (Attached as Exhibit A, SPS's Motion to Stay.) NEE will not elaborate on the PRC's analysis, adding only that if this Court were to determine that the process of adopting the rule was in some fashion defective, the remedy would be a remand for further proceedings after the appeal, not bringing the development of community solar to a halt until the merits of the utility's appeal is decided.

Second, also on the topic of "probability of success", SPS argues that non-community solar subscribers will be harmed by Rule 573.[17] SPS incorrectly argues that SPS will succeed on appeal because "the Legislature set forth as a foundational principle that the costs associated with administering the program should not be subsidized by non-subscribing customers that choose not to subscribe to a community solar facility." Motion at 21. In fact, however, what the legislation actually states is that there could be cross subsidization "*if the commission determines that it is in the public interest for non-subscribers to*

Program Administration," many commenters agreed that there should be a third party administrator with expertise instead of the utilities. "There was widespread support among the commenters for the Commission to employ a third-party administrator and widespread opposition to utilities administering the program," (including NEE) and the Team. *See*, *Order Adopting Rule,* **15RP2269-2272**, ¶34. SPS has failed to show how "the Team" negatively disturbed the process in any way and relies on baseless innuendo and inapplicable case law.

[17] SPS Motion for Stay, pp. 21-28; Exhibit 1, pp. 5-6, ¶ 9.

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." NMSA 1978, § 62-16B-7(B)(8) (emphasis added). Further, the Commission's Rule, specifically addresses this issue, consistent with the Legislature's requirement. 17.9.573.13 A-D. NMAC.

Third, SPS argues that the rule imposes no consumer protection standards on subscriber organizations and establishes no consumer protection enforcement.[18] Wholly apart from SPS's crocodile tears, the two responses to its bogus claim are as follows: 1) the Community Solar Act does not contain a single sentence about Commission regulation of subscriber organization and does not require a regulatory scheme similar to the Public Utility Act; it is consistent with community solar laws nationwide – allowing for and benefiting from economic regulation of community solar subscriber organizations via the market through competition, (a direct threat to the utilities' monopoly power, and that's in part *the* point) and 2) "SPS has apparently overlooked the procedures provided in 17.9.573.17(C) NMAC. These procedures clearly comply with the Act, and to the extent that SPS's challenge is merely a difference in preferred policy, the Commission's

[18] SPS Motion for Stay, pp. 37-38 (falsely claiming: "lack of adequate consumer protections … does not ensure the program will adequately serve low-income consumers.")

policy choice is very likely to be upheld on the Court's review for abuse of discretion." *Order Denying Southwest Public Service Company's Motion to Stay Implementation of Rule Pending Appeal*, 8/10/2022, ¶¶ 42. (Attached as Exhibit A, SPS's Motion to Stay.) Further, in addition to the private resolution of disputes, complaints may be pursued via the New Mexico Attorney General.[19]

Lastly, SPS argues that the regulations' provision creating a position for a neutral third party administrator to select community solar facilities is "unreviewable, *de facto* rulemaking".[20] Agencies regularly contract with outside experts to administer tasks. There is nothing out of the ordinary or nefarious about delegating tasks such as this. Utilities often hire third-parties to perform discrete tasks, including request-for-proposal ("RFP") response evaluation and assessment. (When PNM retired the San Juan Generating Station it contracted with a third party to review RFP bid responses for replacement power. "The bid evaluation team included representatives from PNM, HDR Engineering, Inc. (HDR), … [which] served as a third-party evaluator to review, summarize, and evaluate proposal information in a consistent and controlled manner to facilitate PNM modeling and decision making, as well as to provide support for the later phases of

[19] https://www.nmag.gov/consumer-complaint-instructions.aspx
[20] SPS Motion for Stay, pp. 31-34. (At p. 31: "the rule as adopted delegates *almost all* substantive decisions regarding this selection process to a "third-party administrator.") (emphasis added).

the evaluation and negotiation." NMPRC Case No. 19-00195-UT *Recommended Decision on Replacement Resources, Part II*, June 24, 2020, p. 21.) Most importantly, the legislature endorsed the Commission's decision to do this by specifically providing the Commission with additional funding for third-party administration of the community solar program. The Commission responded by immediately soliciting proposals from contractors to perform the routine tasks that SPS demands that the PRC itself carry out. *See*, *Order Adopting Rule,* **15RP2272**, ¶36-37. Legislative financing of the third-party administration of the community solar program is a tacit endorsement of the Commission's chosen method of implementation. Finally, SPS has no basis for characterizing the third-party administrator's decisions as "unreviewable." The rule delegating administration provides an extremely detailed set of criteria to be considered as well as specific point weighting for each criterion for the third-party administrator to apply. *See* 17.9.573.12 NMAC. To the extent that any questions arise that are not answered by the detailed provisions of the rule, the administrator or any participant in the process may raise such questions before the commission. 17.9.573.12(A) NMAC. *Order Denying Southwestern Public Service Company's Motion to Stay Implementation of Rule Pending Appeal*, on August 10, 2022, ¶ 45.

It is difficult not to infer that, given the weakness of its motion, SPS's purpose in filing it is to create economic uncertainty to chill the thriving business

activity instigated by the Community Solar program.[21] SPS argues that "a stay is warranted in light of the significant public confusion and commercial uncertainty that will result if the rule is implemented[.]"[22] This is a "look who is calling the kettle black" situation because it is not the PRC that is causing the confusion and commercial uncertainty (which the many applications for interconnection already refute), it is SPS and the other utilities who are peddling disinformation (*ie.,* non-community solar subscribers will be harmed[23]); creating boogeymen (*ie.,* stating, without specificity, that the PRC should not have created and relied on an internal "team" to assess the appropriate rules that should be adopted[24]), fear mongering (*ie.,*community solar developers will be left free to rip off consumers[25]) and, the final red herring, that an unreviewable autocrat (rather than the utilities themselves)[26] will be determining the selection of the eligible community solar projects. If SPS cared about its customers, especially its low-income customers, and their consumer rights, it would work to assist the development of community solar, including expeditious interconnections of those arrays onto the grid. It would not erect barriers to needed change.

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[21] *See* Exhibit 1, p. 11, ¶ 14.
[22] SPS Motion for Stay, p.15.
[23] SPS Motion for Stay, pp. 21-28.
[24] SPS Motion for Stay, pp. 17-21.
[25] SPS Motion for Stay, pp. 28-31.
[26] SPS Motion for Stay, pp. 31-34.

II. SPS's Request for A Stay Does Not Meet the Requisite *Tenneco* Standards

In its Motion for Stay, at p. 16, SPS recites, as it must, the criteria our Supreme Court laid out in *Tenneco Oil Co. v. New Mexico Water Quality Control Comm'n*, 1986-NMCA-033, ¶ 10, 105 N.M. 708 for staying an administrative order such as this one. The movant must show (1) a likelihood that the applicant will prevail on the merits; (2) irreparable harm to the applicant; (3) evidence that no substantial harm will result to other interested persons; and, (4) no harm will ensue to the public interest.

SPS cannot meet any of the four factors favoring a stay: (1) It is unlikely that SPS will persuade the Court to allow it to prevent the implementation of New Mexico's measured community solar rule, especially when it has cautious restrictions in place and the trend nation-wide is to loosen restrictions on individual solar array size and expand the overall size of the community solar program; (2) SPS only claims "potential harm," but even if all harms were realized they would be negligible because of the limitations inherent in the Community Solar Act. And because SPS has other administrative and legislative remedies at its disposal to ameliorate the alleged harm, short of imposition by this Court of forbidding the fulfillment of a Legislative requirement to promulgate and administer agency rule SPS cannot prove "irreparable harm"; (3) New Mexicans will be harmed if the

Court grants a stay and delays implementation of Rule 573 because that would frustrate the Community Solar Act's entire purpose, which is to offer another means to access solar-generated electricity[27]; (4) the public interest will be deleteriously impacted if a stay is granted because it will slow progress on necessary climate action, stall the growth of New Mexico's renewable energy economy, and suspend energy savings for commercial, industrial, municipal, and residential customers, especially low-income ratepayers.[28]

A. SPS has Not Made the Requisite Showing that it Would be Irreparably Harmed if Rule 573 is Implemented

SPS must first make the threshold showing of irreparable harm before any of the remaining three factors will be considered. *Tenneco* at ¶ 11. As is demonstrated in this Response, SPS's Motion for Stay does not meet the threshold test of showing irreparable harm. Nor does it satisfy any of the other *Tenneco* factors.[29]

[27] *See* Exhibit 1, p. 2, ¶ 5.
[28] *See* Exhibit 1, *passim.*
[29] NEE adopts the arguments, and will not reargue the refutations already made by the City of Las Cruces ("CLC"), the Coalition for Community Solar Access, Coalition of Sustainable Communities New Mexico, and Renewable Energy Industries Association – New Mexico's ("REIA"), which were referenced and carefully considered by the PRC, as reflected in the case below in the *Order Partially Granting Motions for Rehearing* and *Order Adopting Rule* and *Order Denying Southwestern Public Service Company's Motion to Stay Implementation of Rule Pending Appeal*.

SPS's Motion for Stay should be denied not because it hasn't "precisely calculate[d] the amount of damage plaintiff will suffer"[30] but because its entire argument is based on speculation and innuendo. After a year of rulemaking (preceded by a year of stakeholder engagement on this very topic) SPS could not convince the Commission, produce any evidence, an affidavit, or verification of any kind, of the "potential" harm that it claims it will suffer from. The harms SPS imagines are not tangible or foreseeable, and to the extent they are, would be negligible and redressable. First, as Senator Stefanics' Affirmation clearly states the Community Solar Act is narrowly defined in scope, both in terms of size and time:

> The Community Solar Act by definition narrows the scope of solar development to approximately a total of approximately 2.5% of each IOUs entire generation load. For instance, in 2018, PNM had 8,853,054 MWh in annual sales. Using a capacity factor of 20%, 125 MW of solar would generate 219,000 MWh (0.2 x 125 MW x 8760 hrs) which is 2.5% of PNM's annual sales in that year total in the first two years of the program. The Community Solar Act also limits the size of each individual solar array thereby negatively impacting beneficial economies of scale that drive down cost (ie., larger solar arrays cost subscribers less per kilowatt of electricity). Consequently, the size limitation also serves to reduce actual competition between subscriber organization electricity costs compared to IOU electricity costs. Lastly, the Community Solar Act requires an assessment of the effectiveness of the community solar program in 2024 and has a built-in process for adjustment at the PRC. This time-bound evaluation process allows for tweaking the rules to modify or correct any "*potential harm* to consumers, the utilities, and solar developers" that they may experience. Because the built-in restrictions of the Community Solar Act itself moderate the impact to electricity generation and cost, serving more like a pilot program than transformative market

[30]SPS Motion to Stay, p. 36.

> competition for energy generation sales, it is disingenuous for SPS to claim that even if SPS's speculation about all the alleged harms that might occur, it is highly improbable that, even if they were somehow to take place, they could have any meaningful consequence on utility cost or reputation.[31]

The maximum impact of the Act is 2.5% on a utility's generation portfolio. Further, because the Act requires an evaluation period the utilities will have the opportunity to amend the rule, administratively and/or legislatively. Sufficient guardrails are embedded in the Community Solar Act to protect consumers, developers and the utility. Even if all of the imagined harms come to pass the Rule is sufficiently constrained and the likelihood of *irreparable* harm ensuing is entirely remote. SPS has hardly presented enough of a case of irreparable harm to warrant a stay.

B. SPS's Motion to Stay If Granted Would Disrupt the Status Quo and Extinguish the Positive Economic Activity Associated with Community Solar Rule Implementation

The limited function of a stay is to preserve the status quo and to minimize the harm to all parties pending full consideration on the merits. *Khalsa v. Levinson*, 62 P.3d 297, 133 N.M. 206, 2003 NMCA 18 (N.M. App. 2002). SPS argues that, "because there is yet no community solar program established in New Mexico,

[31] *See* Exhibit 1, p. 6, ¶ 9. (footnotes omitted.)

granting of a stay will merely ensure the *status quo* is maintained while this matter is being considered on appeal."[32] SPS's claim that a stay would preserve the status quo is incorrect.

A stay may issue when it appears that the commission or continuance of some act, in this case, implementation of the community solar rule, during the appeal would produce a great or irreparable injury to the appellant. An applicant for a stay must establish a *prima facie* case, or show that s/he will suffer irreparable injury before her rights can be fully litigated.

Upon the requisite showing, a stay is issued to maintain the status quo pending final outcome, which is defined as the last actual, peaceable non-contested condition which preceded the pending controversy. *Sandrock v. DeTienne*, 210 MT 237, ¶ 16, 358 Mont. 175, 243 P. 3d 1123.

Appellant contends that the rule implementation will cause subscriber bill credits to be improperly calculated and that the utility would not be able to recoup lost money because of a legal "prohibition against retroactive rate making and against recouping losses retroactively."[33] As more fully stated above *if* this were to happen it would be a miniscule financial amount because SPS's required exposure

[32] SPS Motion for Stay, p. 37.
[33] SPS Motion for Stay, p. 34.

is both time and size limited (55 MW[34]). Because the Community Solar Act has a November 2024 evaluation requirement, including a report to the Legislature, SPS could make its "improper calculation" complaint known and offer any solution it deems necessary to ameliorate the problem. Additionally, if there was *one* subscriber bill miscalculation, way short of 55 MW worth of projects, SPS always has the right to seek immediate redress before the Commission. 17.9.573.17(C) NMAC. The activity Appellants seek to enjoin is specifically authorized by the express terms of the statute: the Commission "shall administer and enforce the rules and provisions of the [Act], including regulation of subscriber organizations in accordance with the [Act] and oversight and review of the consumer protections established for the community solar program." NMSA 1978, § 62-16B-7(A). After an extensive informal proceeding and painstakingly thorough formal rulemaking proceeding the Commission issued Rule 573.[35] Therefore, there is an unequivocal statutory mandate to promulgate the rules at issue.

In essence SPS's entire stay request rests on what it believes are rules that more liberally grant the right of consumers and solar developers to enjoy community solar, contrary to SPS's monopoly status to control the provision of energy. The Legislature, clearly wanted the Commission to promulgate rules to do

[34] *See*, Exhibit 1, p. 5, ¶¶ 8-9.
[35] *See*, *Order Adopting Rule,* pp. 1-5, ¶¶1-16.

just that. The nuances of whether a third party should oversee the community solar facilities selection process and not the utilities themselves or whether "whether a facility selected under the invalidated selection process should even be permitted to remain interconnected to SPS's system"[36] *may* give rise to judiciable issues on appeal (though NEE questions the validity of these complaints) the potential harms are overblown, unsubstantiated, inconsistent with industry norms and even if they were to cause inconvenience and associated costs, these *potential harms* certainly don't constitute irreparable injury.[37] A diminution in projected profit in and of itself is insufficient to justify a stay; As our Supreme Court stated:

> The mere fact that an administrative regulation or order may cause injury or inconvenience to applicant is insufficient to warrant suspension of an agency regulation by the granting of a stay. An administrative order or regulation will not be stayed pending appeal where the applicant has not made the showing of each of the factors required to grant the stay.

Tenneco Oil Co. v N.M. Water Qual. Cont. Comm'n, 1986-NM-033, 105 N.M. 708, 710, 736 P.2d 986, 988. (internal citations omitted.) Yet, without Rule 573, the Community Solar Act cannot be enacted and that will thwart the intent of the Legislature.

[36] SPS Motion to Stay, p. 35.
[37] *See* Exhibit 1, p. 5, ¶ 9.

In considering how to produce the minimum harm to all parties the Court must preserve the status quo established by the legislature, allow its mandate to be fulfilled, and if modifications to Rule 573 are necessary – based on the monopoly utility's perspective *at that time* – allow the regulatory agency to consider refinement and adjustment, as the Community Solar Act procedure provides. SPS acknowledges that when it has asked for rule changes beforehand at the Commission in this case, not only did the Commission entertain those concerns but "[t]he Commission also amended the language of the final rule[.]"[38] SPS's arguments that it will be irreparably harmed as a result of the negative consequences of Rule 573 implementation and the Commission's imagined disregard of that future harm because it has expressed "an intent to move forward 'in earnest' and have material components of the community solar program implemented by December 2022 "[39] is undermined by SPS's acknowledgement that the Commission has already accommodated "concerns raised by movants."[40] The conscientiousness with which the PRC has acted is consistent with effective administration; any insidious implication to the contrary is without support in the record. This Court reviews the Commission's determinations to decide whether they are arbitrary and capricious, not supported by substantial evidence, out-side

[38] SPS Motion, p.14, ¶g.
[39] SPS Motion, p. 3.
[40] SPS Motion, p.14, ¶g.

the scope of the agency's authority, or otherwise inconsistent with law, with the burden on the appellant to make this showing." *Citizens for Fair Rates & the Env't v. N.M. Pub. Regulation Comm'n* ("*CFRE*"), 2022-NMSC-010, ¶ 12, 503 P.3d 1138, *citing*, *New Energy Econ., Inc. v. N.M. Pub. Regul. Comm'n,* 2018-NMSC-024, ¶ 24, 416 P.3d 277 (internal quotation marks and citation omitted). SPS has not met this high bar.

Where the Legislature has delegated to the NMPRC (in this case, explicitly) the role of interpreting and administering statutes, the Court defers to the NMPRC's statutory construction in areas of policy-making authority and where the NMPRC possesses necessary expertise to make sound policy. *New Energy Econ., Inc. v. N.M. Pub. Regulation Comm'n*, 2018-NMSC-024, ¶ 25, 416 P.3d 277 (citations omitted).

While Appellant SPS correctly cites the law, it has failed to meet the legal requirement to demonstrate that the PRC is lacking in expertise in the way it administered its delegated authority and did so in an arbitrary or capricious manner.

WHEREFORE, New Energy Economy requests that the Court deny SPS's frivolous Motion for Stay.

Respectfully submitted this 1st day of September, 2022.

New Energy Economy

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I HEREBY CERTIFY that a true and correct copy of the foregoing Answer Brief was electronically served on all counsel of record through the New Mexico Supreme Court's Odyssey filing system on September 1, 2022.

And the Records department at the New Mexico Public Regulation Commission

prc.records@state.nm.us

DATED: 1st day of September, 2022.

NEW ENERGY ECONOMY

Mariel Nanasi, Esquire

Exhibit 1

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO

NO. S-1-SC-39432

SOUTHWESTERN PUBLIC SERVICE COMPANY

Appellant,

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**In the Matter of the
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**AFFIRMATION OF
SENATOR ELIZABETH STEFANICS**

I, Elizabeth Stefanics, hereby file this Affirmation in support of *New Energy Economy's Response to Appellant Southwestern Public Service Company's Motion to Stay implementation of Public Regulation Commission Orders Pending Appeal* and state as follows:

1. I am a duly elected Senator representing New Mexico District 39, which consists of parts of Bernalillo, Lincoln, San Miguel, Santa Fe, Torrance and Valencia counties.
2. I was a Senator from 1993-1996; and have been a Senator since 2017.
3. In the 55th Legislature, along with Senator Linda M. Lopez and Representative Patricia Roybal Caballero, I lead the passage of Senate Bill 84 ("SB 84"), the Community Solar Act, which was approved by the Legislature and signed into law by the Governor in 2021. The Community Solar Act is codified into law as NMSA 1978 §62-16-B-1 to -8 (2021).
4. What is community solar? Through community solar, individuals subscribe to a portion of a nearby solar array and get credits on their energy bill for the electricity it produces. This way, people without the financial means for solar on their rooftops and people who don't own suitable rooftops can still reap the benefits of renewable energy.
5. The purpose of community solar: to deploy more solar, expand access – especially for low-income subscribers, stimulate a robust clean energy market, create competition in the New Mexico market, and carve out protection for customers of all kinds to invest in low-cost solar as a hedge against rising utility rates. The benefits of community

solar (already enjoyed in other states) include: faster progress on climate, air quality and other environmental benefits, lower cost, local job development and community control.

6. A brief history of community solar in New Mexico: For several years, bills have been introduced to authorize a community solar program for New Mexico. Despite the failures of these previous bills to pass, the interest shown by legislators and members of the public and various organizations led the Senate to adopt Senate Memorial 63 ("SM 63") in the 2020 regular legislative session. SM 63 asked the Legislative Council Service to convene a working group of stakeholders to review initiatives and "develop recommendations for implementation of those initiatives that result in a sustainable and scalable market-based program for the state of New Mexico." A facilitator was hired to work with a volunteer coordinating team. Many stakeholders, including legislators, all three investor-owned-utilities[1] ("IOU"), rural cooperatives, renewable energy industry representatives, Indian nations, tribes and pueblos, low-income service providers, local governments, representatives of relevant state agencies, and

[1] Southwestern Public Service Company ("SPS"); Public Service Company of New Mexico ("PNM"); and El Paso Electric ("EPE").

environmental advocates participated in a rigorous process that included two-hour bimonthly meetings from mid-July through early November in 2020. The stakeholder working group process helped inform the legislation that was ultimately signed into law in 2021.

7. The consensus bill, SB 84, that was introduced in 2021, included IOUs' demands to:

- Limit individual solar array project size (from 10 megawatt ("MW") maximum to 5MW maximum[2]);
- Limit the overall size of the program (from no cap to 200MW total cap for all three IOUs[3]);
- Permit participation by investor-owned-utilities to be a subscriber organization[4];
- Permit ownership of renewable energy certificates associated with a community solar facility by the IOU to whose electric distribution system the community solar facility is interconnected[5];

[2] NMSA 1978 §62-16-B-3 A(1).
[3] NMSA 1978 §62-16-B-7 B(1).
[4] NMSA 1978 §62-16-B-2 M. ("'subscriber organization' means an entity that owns or operates a community solar facility and may include a qualifying utility[.]")
[5] NMSA 1978 §62-16-B-6 D(1).

- Require the Commission to issue a report on the status of the community solar program by November 2024, "and an evaluation of the effectiveness of the commission's rules to implement the Community Solar Act and any recommended changes."[6]

8. My understanding is that the total cap of 200MW for the community solar program is divvied up between the IOUs as follows: In PNM territory there may be a total of 125MW; 55MW in SPS territory and 35MW in EPE territory.

9. The Community Solar Act by definition narrows the scope of solar development to approximately a total of approximately 2.5% of each IOUs entire generation load. For instance, in 2018, PNM had 8,853,054 MWh in annual sales.[7] Using a capacity factor of 20%,[8] 125 MW of solar would generate 219,000 MWh (0.2 x 125 MW x 8760 hrs[9]) which is 2.5% of PNM's annual sales in that year total in the first two years of the program. The Community Solar Act also

[6] NMSA 1978 §62-16-B-7 E.
[7] https://www.eia.gov/electricity/data.php
[8] Comparing solar generating capacity with fossil fuel generation is not comparing apples to apples since solar has a capacity factor (the percent of capacity at which it produces over a given time period) of 0.2-0.25 here in New Mexico whereas coal has a capacity factor typically of 0.6-0.8. Using a 20% capacity factor for solar in New Mexico is a conservative industry standard.
[9] The number of hours in a year.

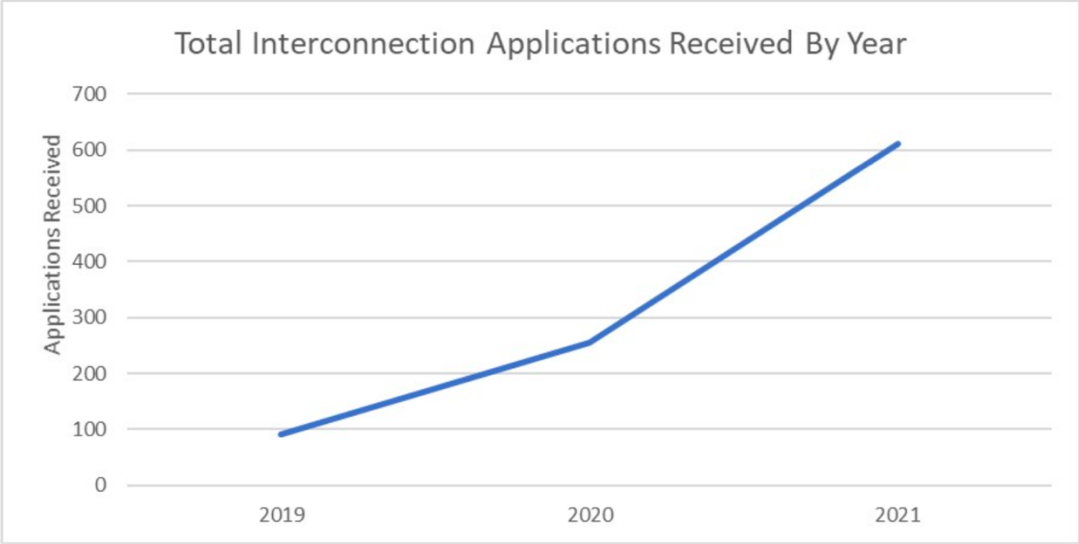
limits the size of each individual solar array thereby negatively impacting beneficial economies of scale that drive down cost (ie., larger solar arrays cost subscribers less per kilowatt of electricity). Consequently, the size limitation also serves to reduce actual competition between subscriber organization electricity costs compared to IOU electricity costs. Lastly, the Community Solar Act requires an assessment of the effectiveness of the community solar program in 2024 and has a built-in process for adjustment at the PRC. This time-bound evaluation process allows for tweaking the rules to modify or correct any "*potential harm* to consumers, the utilities, and solar developers"[10] that they may experience. Because the built-in restrictions of the Community Solar Act itself moderate the impact to electricity generation and cost, serving more like a pilot program than transformative market competition for energy generation sales, it is disingenuous for SPS to claim that even if SPS's speculation about all the alleged harms that might occur, it is highly improbable that, even if they were somehow to take place, they could have any meaningful consequence on utility cost or reputation.

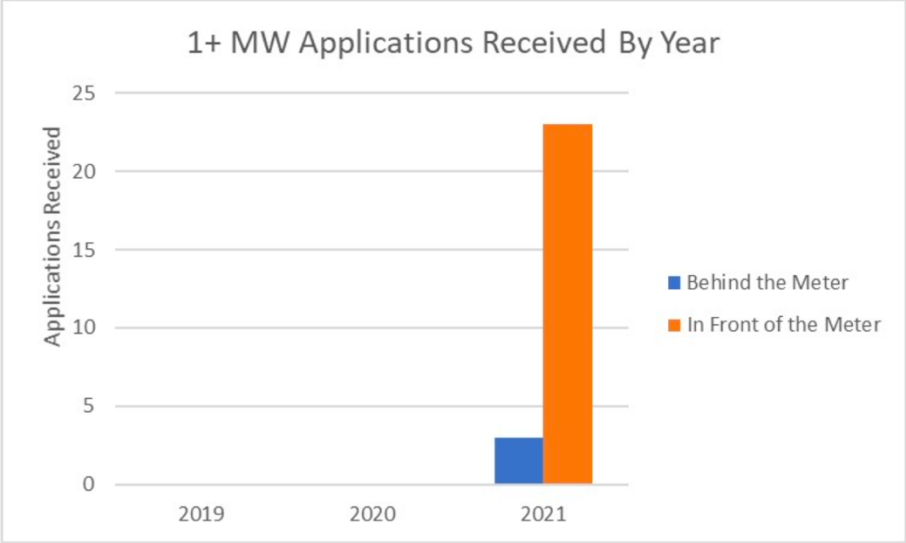
[10] SPS Motion for Stay, p. 4. (Emphasis supplied.)

10. Twenty states and the District of Columbia have adopted legislation fully supporting community shared solar. Each state's community solar program has been constantly evolving. Several of the programs have had to loosen restrictions, increase individual project size limits, and expand the overall size of their programs. In the first quarter of 2022, Minnesota's community solar program had resulted in 426 completed projects with 830 total megawatts of operational sales. At the same time, Massachusetts's community solar program hit 411 completed projects with 704 total megawatts of operational sales and New York's program has 615 completed projects with 867 total megawatts of operational sales. Even though they do not have New Mexico's abundant renewable rich resources, it is my understanding that these three states are in the lead nationally for installed community solar, both for number of total projects and highest number of total megawatt capacity.

11. Interconnection is the approval process by which utilities study a solar project to ensure system reliability and generation deliverability to all customers. During the rulemaking process information provided by the IOUs, pursuant to a bench request of November 5, 2021, revealed that there was a surge of interconnection applications after the

Community Solar Act became law. If SPS's Motion for Stay was granted it would lock out all this community solar business interest in New Mexico. This is a graph presented by SPS in its 11/22/21 response to the query: "A graph indicating annual total numbers of applications that you have received comparing years 2019, 2020, and 2021 (to date)."





12. The utilities see customer rooftop solar and community solar as a threat to their monopoly business. For the IOUs it means customers are buying less electricity from them. The "cost shift" from solar system owners to other utility customers is an IOU propagated myth. In a study by the Lawrence Berkeley National Lab, researchers found that customer-owned solar might not impose any costs on other ratepayers; the analysis concluded that distributed solar could bring no more than a .03 cent per kilowatt-hour ($0.0003/kWh) long-run increase in retail utility prices, but that the result could just as well be a decrease of the same magnitude.[11] However, the larger long-term impact of customer-owned solar falls on utility shareholders. With more fulsome adoption, solar may mean modest revenue reductions for electric utilities, but by offsetting the need for new, large-scale power plants, solar's real threat is in reducing the for-profit utility's source of shareholder returns, also known as return on equity (ROE),

[11] "Putting the Potential Rate Impacts of Distributed Solar into Context", Galen Barbose, January 2017, https://emp.lbl.gov/publications/putting-potential-rate-impacts. (The same author explains utility alternatives for increasing shareholder returns when there is significant solar penetration on a utility's system: "Benefits and costs of a utility-ownership business model for residential rooftop solar photovoltaics", August 2020, https://escholarship.org/content/qt8kn4p4dp/qt8kn4p4dp.pdf?t=qfz4dw

a primary source of which is a utility's ability to make large investments in new power plants, which are becoming unnecessary as legislatures and regulators undertake efforts like ours to introduce more decentralized renewable energy. I believe this to be the true source of SPS's move to stall implementation of the Community Solar Act.

13. In communities across New Mexico, people are seeking alternatives to conventional energy sources. Whether they aim to increase energy independence, hedge against rising fuel costs, cut carbon emissions, or provide local jobs, they are looking to community-scale renewable energy projects for solutions. In response, the Governor issued *Executive Order on Addressing Climate Change and Energy Waste Prevention*,[12] the Legislature increased the Renewable Portfolio Standard embedded in the Energy Transition Act, and enacted the Community Solar Act. The Community Solar Act is a tempered measure, perhaps even too conservative, but it is the policy of the state. With its Motion for Stay, SPS seeks to undermine the law and disrupt the status quo which required the Commission to "adopt rules

[12] https://www.governor.state.nm.us/wp-content/uploads/2019/01/EO_2019-003.pdf

to establish a community solar program"[13] and "administer and enforce the rules and provisions of the Community Solar Act."[14] It is my understanding that SPS and the other utilities participated fully in the rulemaking process. If SPS or any of the other IOUs actually experience the harm they raise fears about the companies can move to amend the rules in November 2024 (or before), seek legislative changes in the Community Solar Act, or pursue other legal modifications, but granting what amounts to a pre-emptive stay is contrary to the public interest.

14. SPS' and the other IOU's purpose is to slow deployment and implementation of community solar because it introduces competition with the monopoly utility business model. If the Supreme Court grants SPS' Motion to Stay it will thwart the progress the Legislature has made to address the climate crisis in New Mexico.

[13] NMSA 1978 §62-16-B-7 B.
[14] NMSA 1978 §62-16-B-7 A.

I hereby affirm in writing under penalty of perjury under the laws of the State of New Mexico that the statements contained in the foregoing Affirmation are true and correct to the best of my knowledge, information, and belief.

Executed on September 1, 2021.

/s/ Elizabeth Stefanics
Elizabeth Stefanics (electronically signed)
P.O. Box 720
Cerrillos, NM 87010