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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 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. 22-00240-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, NMPRC 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, 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. 22-00240-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, NMPRC Case No. 22-00243-UT.

INTERVENER-APPELLEES' JOINT ANSWER BRIEF

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I. INTRODUCTION

In passing the Community Solar Act (or the "Act") the Legislature created a program to expand utility customer access to solar energy, particularly for low-income customers. NMSA 1978, § 62-16B-7(B)(3).[1] It directed the Public Regulation Commission (the "Commission" or "PRC") to establish rules that "reasonably allow for the creation, financing and accessibility of community solar facilities." NMSA 1978, § 62-16B-7(B)(9). The Legislature intended the program to be deployed expeditiously, directing the Commission to establish its rules by April 1, 2022 and report to the Legislature "on the status of the community solar program" by November 1, 2024. NMSA 1978, § 62-16B-7(B) & (E).

The Commission spent a year on the extensive rulemaking, culminating in the community solar rules, 17.9.573.1–17.9.573.22 NMAC ("Rule 573" or the "Rule") promulgated in the Order Adopting Rule issued on March 30, 2022 and

[1] The record is replete with specific explanations of the community solar concept and the benefits it can provide, *e.g.*, "increased customer access to renewable energy and associated bill savings, including for low-income customers, local economic development through well-paying jobs, opportunities for participation by Native American Tribes and Pueblos and the development of Native Community Solar Projects, long-term tax revenues and lease payments to support farmers and other landowners, avoided grid and generation costs leading to potential savings for all utility customers, and human and environmental health benefits." [**2 RP 0098-99**].

later modified on May 18, 2022 by a Commission order in response to various motions for rehearing ("Rehearing Order"). **[15 RP 2261-2356; 20 RP 3157-87]**

Appellant Southwest Public Service Company ("SPS") and Intervenors-Appellants Public Service Company of New Mexico ("PNM") and El Paso Electric Company ("EPE") (collectively, the "Utilities") actively participated in the rulemaking below, and presenting arguments and evidence for their preferred outcomes on various matters, including the issues before the Court in No. S-1-SC-39432. In issuing its Rule, the Commission considered what the Utilities presented, but in a number of areas, determined that the Utilities' positions were contrary to controlling law or not supported by the weight of the evidentiary record. **[15 RP 2261-2356]** The Commission again duly considered the Utilities' points on rehearing, and largely found they were contrary to legislative intent in the Community Solar Act and/or not supported by the weight of the evidence in the record. **[20 RP 3157-87]**

Notably, the Utilities do not contend in their Brief in Chief that the Rule is invalid for lack of substantial record evidence; their arguments for reversal stand on claims that the Rule is contrary to the Act and that they were deprived of due process by the Commission's rulemaking procedures. SPS also alleges due process deprivations regarding its advice notice proposing new community solar bill credits.

As we show herein, the issues raised by the Utilities regarding the Commission's interpretation of the Act are no more than policy disagreements with the legislation and/or the Commission's record-based determinations, and do not raise actual legal errors. The Utilities' arguments on excluding transmission cost from the community solar bill credit (the lead issue in the Brief in Chief) and their other arguments couched as violating the Act's prohibition on subsidies are unsustainable in the face of the plain language of the Act and the Legislature's delegation to the Commission of any determination on subsidization. The Utilities' allegations that the Commission's rules are incompatible with the Act on utility cost recovery, low-income guidelines, consumer protections, and co-location are also meritless, as demonstrated by a simple comparison of the Act's requirements with Rule 573. The Utilities' additional disagreements with the Commission's resolution of matters not specifically addressed by the Act are mere policy preferences that cannot justify vacating the Rule and disrupting the entire community solar program. Further, SPS's allegations regarding the third-party administrator and the Utilities' arguments regarding the Commission's use of the "Team" misconstrue the nature of the Commission's relationship with its advisory staff, including contracted advisors acting as agents, and fail to allege any actual legal error.

Lastly, in our Answer, Intervenors-Appellees address SPS's appeal of the Commission's orders denying its community solar implementation advice notices ("Advice Notice Orders") simply to note that subsequent Commission actions initiating a hearing proceeding on these advice notices demonstrates that this issue is moot. A reversal of the Advice Notice Orders would have no effect at this point, and certainly would not require vacating the Community Solar Rule.

Because the Utilities fail to show that the Commission's actions were in anyway unreasonable or inconsistent with the law, the Court should reject their appeal in its entirety.[2]

[2] If the Court finds, despite the Utilities insubstantial and unsubstantiated arguments, need to vacate the Commission's Rule, it should reconcile its decision with the Legislature's urgency, as expressed in the Act, to implement a community solar program. First, Intervenors-Appellees request that the Court expedite a decision on this matter to the greatest extent practicable to remove the pall over the community solar program created by this appeal. Second, the Utilities correctly note that the Court has "no power to modify the action or order appealed from." Brief in Chief, p. 2, n. 5; NMSA 1978, § 62-11-5. However, the Court has also explained that it is "not precluded from declaring or determining that parts of a Commission order are unlawful and/or unreasonable (which requires vacating and annulling en toto) but at the same time declaring other parts of the order to be reasonable and lawful. Following remand to the Commission, the Commission may properly enter an order embodying those provisions in the earlier, vacated order that have been declared reasonable and lawful." *Hobbs Gas Co. v. N.M. Pub. Serv. Comm'n*, 1993-NMSC-032, ¶ 6, 115 N.M. 678, 680, 858 P.2d 54, 56. To the extent the Court finds any part of the Rule unlawful, it should declare that other parts are reasonable and lawful and provide specific guidance to the Commission to facilitate an expedited proceeding on remand.

II. STANDARD OF REVIEW

The Court only reverses a final order of the Commission if it is "arbitrary, capricious, not supported by substantial evidence, outside the scope of the agency's authority, or otherwise inconsistent with law, with the burden on the appellant[s] to make this showing." *Citizens for Fair Rates & the Env't v. N.M. Pub. Regulation Comm'n*, 2022-NMSC-010, ¶12.

The Utilities articulate no arguments that the Commission's Rule is arbitrary, capricious, or not supported by substantial record evidence; they only argue the Rule violates the Act or is otherwise unlawful. Thus, the focus of this appeal is on the Commission's statutory interpretation, and on the due process claims.

The Court reviews questions of law *de novo*, but it accords deference to agency interpretations "[w]hen an agency that is governed by a particular statute construes or applies that statute." *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 11, 120 N.M. 579, 583, 904 P.2d 28, 32. "[T]he court will confer a heightened degree of deference to the agency on legal questions that determine fundamental policies within the scope of the agency's statutory function." *N.M. Att'y Gen. v. N.M. Pub. Regulation Comm'n*, 2013-NMSC-042, ¶ 12, 309 P.3d 89, 94 (quoting *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 6).

When there are interpretive gaps in a statute, "it is presumed, in the context of administrative matters that the Legislature has delegated to an agency, that the Legislature intended for the agency to interpret legislative language, in a reasonable manner consistent with legislative intent, in order to develop the necessary policy to respond to unaddressed or unforeseen issues." *City of Albuquerque v. N.M. Pub. Regulation Comm'n*, 2003-NMSC-028, ¶ 16, 134 N.M. 472, 79 P.3d 297, 306; *see also New Energy Econ., Inc. v. N.M. Pub. Regulation Comm'n*, 2018-NMSC-024, ¶ 25, 416 P.3d 277, 285-86 ("if it is clear that our Legislature delegated to the PRC (either explicitly or implicitly) the task of giving meaning to interpretive gaps in a statute, we will defer to the PRC's construction of the statute as the PRC has been delegated policy-making authority and possesses the expertise necessary to make sound policy."). This Court's "deference to an agency is at its height when . . . presented with an ambiguous statute, administered by an agency which has been granted relevant policy-making authority, and implicating the expertise of the agency. *Dona Ana Mut. Domestic Water Consumers Ass'n v. N.M. Pub. Regulation Comm'n*, 2006-NMSC-032, ¶ 17, 140 N.M. 6. Further,

> [w]hen [the Legislature] drafts a statute that does not resolve a policy dispute that later arises under the statute, some institution must resolve that dispute. The institution called upon to perform this task is not engaged in statutory interpretation. It is engaged in statutory

> construction. It is not resolving an issue of 'law.' Rather, it is resolving an issue of policy.

Gila Res. Info. Project ex rel. Balderas v. N.M. Water Quality Control Comm'n, 2018-NMSC-025, ¶ 34, 417 P.3d 369, 377 (quoting I Richard J. Pierce, Jr., *Administrative Law Treatise* § 3.3, at 160-61 (5th ed. 2010)).

Relatedly, this Court will not "lightly disregard" an agency's decision once the agency has weighed competing interests and has come to a conclusion. *Groendyke Transport, Inc. v. N.M. State Corp. Comm'n*, 1984-NMSC-067, ¶ 14, 101 N.M. 470. This standard of review is key to this appeal because the Utilities ask this Court to reverse the Commission's weighing and balancing of competing interests. This Court has repeatedly refused to second-guess the Commission's decisions in cases in which the Commission weighed competing interests to determine what decision would be in the public interest. *See, e.g., Pub. Serv. Co. of N.M. v. N.M. Pub. Serv. Comm'n*, 1991-NMSC-083, ¶¶ 28-30, 112 N.M. 379 (affirming the Commission's determination of the appropriate distribution of the costs of PNM's overcapacity between ratepayers and shareholders).

III. ARGUMENT

A. The Rule's Treatment of Transmission Costs Follows Statute; the Utilities Argue for a Result that Conflicts with the Plain Language of the Community Solar Act

The Utilities' first point on appeal is that the Commission erred when it followed the plain language of the Act, providing that the community solar bill

credit is to be determined from a "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) (emphasis added), because the Rule does not also deduct transmission costs from the credit, as the Utilities desired. The Utilities argue that, despite the plain language of the statute specifying only "distribution cost" as a deduction from the credit, the statute actually requires that transmission costs also be deducted in order to prevent a violation of the Act's prohibition on subsidization, and because not deducting transmission costs would be inconsistent with the term "credit value of the electricity generated by a community solar facility." **[BIC 18]** (citing NMSA 1978, § 62-16B-2(B) & 7(B)(8)).

The Utilities' subsidization arguments are not just contrary to the canons of statutory construction; they lack any factual support. The Commission, based on record evidence, found that excluding transmission costs from the credit would not lead to subsidization. **[39432 SRP 13-4]** The Utilities, in the Brief, mount no attack on the substantial evidence underlying that finding and merely make conclusory statements with no concrete proof.[3]

The Utilities' alternative argument, based upon their unique interpretations of the Act's undefined terms "credit value of the electricity" is equally meritless.

[3] For example, the Utilities argue that "[i]t cannot be disputed that a utility's transmission-related costs are 'attributable to' subscribers in the same manner they are attributable to non- subscribers…." BIC at 19.

Again, the substantial evidence that would be needed to support such a claim is missing, and instead this argument is also entirely based on nothing more than conjecture. *In re PNM Gas Servs.*, 2000-NMSC-012, ¶ 66, 129 N.M. 1, 24, 1 P.3d 383 (conjecture is not a substitute for evidence). The Utilities' claims are contrary to the plain language of the Act and the Commission's factual findings below and therefore must be rejected.

1. The Plain Language of the Act Demonstrates Legislative Intent to Only Exclude Distribution Costs from the Bill Credit.

The "primary objective" of statutory interpretation "is to give effect to the Legislature's intent," which is derived from the plain meaning of the language used in the statute. *State v. Trujillo*, 2009-NMSC-012, ¶ 11, 206 P.3d 125. In order to understand the Legislature's intent, 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. *Burroughs v. Bd. of County Comm'rs of Bernalillo County*, 1975-NMSC-051, ¶ 16, 88 N.M. 303, 306, 540 P.2d 233, 236 (1975). Further, the Court must read entire the statute as a whole, considering statutory provisions in relation to one another, *State v. Jade G.*, 2007-NMSC-010, ¶ 15, and statutory interpretation gives effect to all provisions of a statute so as to render no part inoperative or surplusage. *See GandyDancer, LLC v. Rock House CGM, LLC*, 2019-NMSC-021, ¶ 22, 453 P.3d 434, 441. Next, if a specific statute conflicts with

a more general statute, the more specific statute generally will prevail. *State v. Santillanes*, 2001-NMSC-018, ¶ 7, 27 P.3d 456, 459-60.

Rule 17.9.573.20(D) provides that a "utility shall not subtract any costs of transmission from the solar bill credit rate calculation." In making this determination, the Commission implemented the plain language of the Community Solar Act at Section 62-16B-7(B)(8), which states that the bill credit shall be determined from a "utility's total aggregate retail rate on a per-customer-class basis, *less the commission-approved distribution cost components*." (Emphasis added.) There is no debate that transmission costs represent a separate cost component from "distribution cost components."[4] The Utilities' argument is not that the Legislature intended "distribution" in Subsection 7(B)(8) to also encompass the transmission function; rather, the Utilities argue that the Court should disregard the specific direction the Legislature gave in Subsection 7(B)(8) about which costs to exclude from the credit because of other, less specific language in the Act directing the Commission to avoid cross-subsidies, and that the bill credits represents the credit value of the electricity generated by the

[4] A fundamental concept within electric utility regulation is that costs are separated into three distinct utility functions – generation (*i.e.*, power production), transmission, and distribution. **[2 RP 0116]** That the Legislature understood the distinction between transmission and distribution costs when it drafted the Community Solar Act is clear. *See* NMSA 1978, § 62-16B-2(O) (providing that the "total aggregate retail rate" includes charges "related to a qualifying utility's power production, transmission or distribution functions.").

community solar facility. The Utilities' arguments fail because the Legislature provides clear and specific direction for how to calculate the bill credit and the canons of statutory interpretation require the Commission, and this Court, to give effect to the plain language of statute and to prioritize specific statutory directives over less specific ones.

Other canons of statutory construction further demonstrate that the Legislature intended to exclude only distribution costs from the bill credit. As this Court has explained, "the inclusion of one thing is the exclusion of the other." *State v. Nick R.*, 2009-NMSC-050, ¶ 23, 147 N.M. 182, 187, 218 P.3d 868, 873 (discussing the Latin phrase "*inclusio unius est exclusio alterius*"). "The legislature did not see fit to include it in the statute, therefore it is excluded." *Id.*

The Utilities argue that the "Act's requirement to remove distribution costs from the credit cannot be reasonably interpreted as a mandate to include transmission costs in the bill credit." **[BIC 20]** They quote *United States v. Vonn*, that "the canon that expressing one item of a commonly associated group or series excludes another left unmentioned is only a guide." 535 U.S. 55, 65 (2002). However, *Vonn* goes on to hold that "[a]n inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent." *Id*. (quoting *Burns v. United States*, 501 U.S. 129, 136 (1991)).

Even accepting that this canon is only a guide, the Utilities do not even attempt to apply it in that manner. Rather, they completely ignore this canon and the "other textual and contextual evidence of [legislative] intent" that conflicts with their reading of the Act. *Id*.

The result the Utilities seek is wholly implausible. The Legislature knew that there were three main categories of cost of in the retail rate: power production, transmission, and distribution, *see* n. 4, *supra*, and chose to expressly direct that the Commission calculate bill credits from the "total aggregate retail" less only the distribution cost component. It is difficult to imagine that in stating a formula that starts with the total amount, and then subtracts one specific category, the Legislature actually intended that the Commission exclude other cost categories from the credit. *Nick R.*, 2009-NMSC-050 at ¶ 23 ("It is difficult to imagine that the Legislature could have meant to include all pocketknives when it not only did not name them but at the same time expressly named only one narrowly specialized type of folding pocketknife").

Moreover, to interpret the Act as also permitting the exclusion of generation or transmission costs would render the specific identification of distribution costs superfluous. *See, e.g.*, *Holguin v. Fulco Oil Servs. L.L.C.*, 2010-NMCA-091, ¶ 23, 149 N.M. 98, 245 P.3d 42, 48 ("If the Legislature intended for the statute to apply to all services . . ., there would be no need to include the specific list of activities in

subsection B. Construing the statute in this manner is inconsistent with the rules of statutory interpretation that require that a statute must be construed so that no part of the statute is rendered surplusage or superfluous.") (internal quote and brackets omitted).

Beating a dead horse further, if the Legislature simply intended for "distribution cost components" to be merely an example of costs the Commission may exclude, then it would have chosen language indicating as much. *Bettini v. City of Las Cruces*, 1971-NMSC-054, ¶¶ 10-11, 82 N.M. 633, 635, 485 P.2d 967, 969 (explaining that if the Legislature wanted to authorize a "mode of doing" not provided by statute where other modes are provided, it "could easily have done so by the use of simple language."); *see also State v. Salazar*, 2018-NMCA-030, ¶ 33 (explaining that the Legislature can use the word "including" to express legislative intent that it is providing an example that is not exclusive).

Here, the Legislature used the term "total aggregate retail rate," which includes power production, transmission, and distribution costs and then directed that only distribution costs be excluded when calculating the bill credit. NMSA 1978, § 62-16B-2(O) & 7(B)(8). If it wanted to also exclude transmission costs it could have easily said so. Accordingly, the Court need not look past the plain language of the Act to discern legislative intent here, as the Legislature clearly defined the bill credit to exclude only distribution costs.

2. The Commission's Definitions of Subsidization and Value of Community Solar Facilities are Consistent with the Act and Supported by the Record.

The Utilities claim that reading the statute as a whole supports their position, but that can only be true if the Court accepts the Utilities' extra-statutory interpretations of "subsidiz[ed] costs attributable to subscribers" and "credit value of the electricity generated by a community solar facility." **[BIC 17-23]** To accept the Utilities' argument would require the Court find that the non-specific language in the Act prohibiting subsidies and discussing the credit value of electricity negates the Legislature's plain language that only distribution costs be subtracted from the bill credit, contrary the rules of statutory construction. *Santillanes*, 2001-NMSC-018 at ¶ 7. The Utilities would have to surmount a steep burden, showing that the Act was ambiguous as written, the provisions stood in conflict with each other, and the only way to harmonize the Act's provisions is to not give effect to the plain language in Section 62-16B-7(B)(8). *State ex rel. Helman v. Gallegos*, 1994-NMSC-023, ¶¶ 28-29, 117 N.M. 346, 871 P.2d 1352, 1360. At a minimum, the Utilities would need to show that the provisions in the Act conflicted; *i.e.*, that there would be subsidies in excess of *the three percent cap* established in the Act in Section 62-16B-7(B)(8) – the section that details the bill credit.

To sustain their appeal on this point, the Utilities would have show the three percent cap will be exceeded, using citations to record evidence, and demonstrate

the Commission lacked substantial evidence when it determined otherwise. But the Utilities cite no record evidence in this portion of their Brief to substantiate that the unlawful subsidization they claim will result from the rule. Evidence supporting the absence of a subsidy, or a material subsidy, appears at 14 RP 205859; 20 RP 3034, 3133-34, among other places.

Given the specific and clear guidance provided by the Act to exclude only distribution costs form the bill credit, the Court need not reach the question of how to define subsidization and the credit value of the electricity generated by a community solar facility. However, even if it does, the Commission's interpretation of these terms is consistent with the Act and reasonable based on the record before it.

Unlike the terms "total aggregate retail rate" and "community solar bill credit," the Act does not define subsidization or value of the electricity generated by a community solar facility. The Act provides that community solar facilities must be "interconnected to the *electric distribution system* of [the] qualifying utility" and serve customers that are interconnected to the distribution system of the qualifying utility. NMSA 1978, § 62-16B-3(A)(4) (emphasis added). The Legislature understood that subscribers would be using various system resources to augment the services supplied by a community solar facility. It specifically identified distribution system costs as a deduction from the bill credit because

community solar facilities need to use utility distribution facilities to deliver power. **[14 RP 2058]** The Legislature also understood that by interconnecting at the distribution level, the community solar facility provides a locational value by avoiding transmission costs.[5] Accordingly, "the credit value of the electricity generated by a community solar facility", as provided under the Act, includes transmission costs, but not distribution costs. NMSA 1978, § 62-16B-2(B) & 7(B)(8). Because the Legislature specifically prescribed a bill credit methodology that includes the transmission costs, the Court should assume that the Legislature did not believe that its prescribed methodology would result in a subsidization of costs by non-subscribers. The specific direction regarding calculation of the bill credit cannot be ignored.

Moreover, the Commission, not the Utilities, are tasked with determining the factual question of whether a policy results in subsidization, or what the value of electricity generated by community solar is. When the Commission is exercising its statutory function and technical expertise, the court gives a heightened

[5] Utilities' counsels' argument that subscribers will use system transmission resources to receive power at night and other times when solar facilities is producing is a red herring. **[BIC 19-20]** As material in the record explains, the community solar facilities do not themselves transmit over the transmission system, **[12 RP 1751]**, but instead avoid burdening that system by interconnecting at the distribution level and by often providing power during system peaks, which is when the utility incurs its transmission costs. **[20 RP 3133-34]** Notably, the Utilities must also provide generation services at night when the community solar facility is not producing, but even they do not argue that the bill credit should exclude generation costs.

deference to the agency's determinations on the matter. *Morningstar Water Users Ass'n v. N.M. Pub. Util. Comm'n*, 1995-NMSC-062, ¶ 11,120 N.M. 579, 583, 904 P.2d 28, 32.

Evaluating facts in the record, the Commission found it is "difficult . . . to conceive of any situation in which transmission costs might reasonably be considered to have been caused by a community solar project. On the contrary, community solar projects bring generation within the distribution level of the grid." **[39432 SRP 13-4]**[6] EPE even acknowledged that "the Community Solar facilities do not use the transmission system." **[11 RP 1543]** The Utilities' Brief in Chief fails to raise a substantial evidence challenge to the Commission's findings and, in fact, the record provides substantial evidence that non-subscribers do not subsidize the transmission costs of subscribers and that the community solar program provides value to the transmission system.[7] Therefore, even putting aside

[6] The necessary complement to this finding is the community solar facility avoids the transmission system when delivering electricity to subscribers, thereby avoiding cost responsibility for that transmission system. [14 RP 2058]. Contrary to the Utilities contentions, such avoided costs can reasonably be considered a "value of the electricity generated by a community solar facility." NMSA 1978, § 62-16B-2(B).

[7] *See, e.g.*, **[12 RP 1751]** ("Since they are required to be connected to a utility's distribution grid, community solar facilities avoid use of transmission systems entirely. There are real and significant benefits to avoided transmission that accrue to all New Mexican utility consumers. Moreover, local generation within distribution grids can reduce wear-and-tear on expensive equipment, such as substations, as well as avoid other distribution system upgrades."); **[14 RP 2058]**

the plain and specific language of the Act, the factual record provides support for the Commission's decision to reject the Utilities' wholly speculative alternatives for defining "subsidize[d] costs attributable to subscribers" and "the credit value of the electricity generated by a community solar facility." **[BIC 18]** (citing NMSA 1978, § 62-16B-2(B) & 7(B)(8)).

Accordingly, based on the plain language of the Act and the record in the rulemaking proceeding, the Commission correctly found that the bill credit must include transmission costs. The Utilities offer no reason to disturb this finding other than their self-serving interpretations of undefined terms in the Act.[8] The

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("The Community Solar Program will also reduce transmission costs for non-participating ratepayers by making more transmission capacity available to the utilities because more power will be generated locally."); **[20 RP 3033-36]** (the significant value offered by community solar includes "reduced utility-scale capacity and generation, high-voltage transmission, distribution infrastructure deferments, utility-observed peak load reduction, and increased utility-observed load factors."); **[20 RP 3133-34]** (nighttime use of transmission facilities to serve community solar subscribers does not affect transmission cost recovery through rates because transmission costs are allocated based on summer daytime peak loads).

[8] Even accepting the Utilities' definitions of what constitutes a "subsidy" and "value", that is not currently an issue. The Commission has an ongoing adjudicatory proceeding to determine, *inter alia*, "the calculation of the three-percent subsidization limit for each of the Qualifying Utilities." Docket No. 22-00020-UT, *et al., Order Opening New Docket for Two-Phase Proceeding; Order Consolidating Docket Nos. 22-00240-UT and 22-00243-UT Into New Docket; Order Delegating Authority to the Chief Hearing Examiner Regarding Proceeding in New Docket; Order Taking Administrative Notice of Relevant Commission Records and Order Setting Deadline for Filing of Any Proposed Interconnection Forms and Agreements Specific to Community Solar Facilities*, ¶ 36 (N.M. P.R.C.,

Utilities' policy positions do not represent a valid basis to negate Legislative intent and must be rejected.

B. The Commission's Determination on Interconnection Costs is supported by Substantial Evidence and is Consistent with Law.

With regard to interconnection costs, the Utilities again simply disagree with the Commission's determinations, and seek that this Court supplant the Commission's policy findings with their own. The Act requires that "a qualifying utility and its non-subscribing customers do not subsidize the [interconnection] costs attributable to the subscriber organization." NMSA 1978, § 62-16B-7(B)(6). The Commission captured this mandate in Rule 573, providing that "there will be no subsidization of interconnection costs by nonsubscribing ratepayers." 17.9.573.13(C) NMAC. Generally, owners and operators of community solar facilities will be required to pay the costs of interconnection pursuant to the Commission's interconnection rules. **[20 RP 3167]** However, in certain circumstances when the facts of a given interconnection demonstrate that the benefits of that interconnection to ratepayers will exceed the costs, such that there

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Mar. 1, 2023). If the Court determines that including transmission costs in the bill credit may constitute a subsidy, despite determinations by the Legislature and Commission that it does not, the Commission should be able to determine in this evidentiary proceeding whether such a subsidy is in the public interest and, if so, whether it is within the three-percent subsidization limit. Both are factual determinations that should be made by the Commission in the first instance. Such an approach would also avoid vacating the Rule and disrupting the community solar program, contrary to Legislative intent.

is no subsidization, the Commission may allow socialization of interconnection costs among ratepayers. 17.9.573.13(C) NMAC.

If the Legislature wanted to strictly prohibit non-subscribers from paying any interconnection costs of community solar facilities, it could have said just that. *State ex rel. Duran v. Anaya*, 1985-NMSC-044, ¶ 10, 102 N.M. 609, 611, 698 P.2d 882, 884 ("[T]his Court will not read into a statute language which is not there, particularly if it makes sense as written."). Instead, the Legislature provided that non-subscribers should not "subsidize" the subscriber organizations' interconnection costs, an undefined term that the Legislature left to the Commission to interpret. Accordingly, the Commission chose to define subsidies using a net benefit methodology that was widely supported by commenters in the rulemaking, other than the Utilities. **[2 RP 0124, 0196; 7 RP 0774; 9 RP 1076; 11 RP 1515, 1518; 12 RP 1652, 1666, 1756, 1760; 14 RP 2057]**

The Commission accepted these comments in light of the statutory mandate that its rules "reasonably allow for the creation, financing and accessibility of community solar facilities," recognizing the potential barrier that interconnection costs could pose to the community solar program. **[17 RP 2308]** (citing NMSA 1978, § 62-16B-7(B)(9)). Because the Legislature left interpretation of the term "subsidy" to the Commission and the Commission reasonably interpreted this term consistent with the record evidence and the goals of the Act, this Court should not

disturb the Commission's decision. *Dona Ana Mut. Domestic Water Consumers Ass'n v. N.M. Pub. Regulation Comm'n*, 2006-NMSC-032, ¶ 17, 140 N.M. 6, 12, 139 P.3d 166, 172 ("Our deference to an agency is at its height when . . . we are presented with an ambiguous statute, administered by an agency which has been granted relevant policy-making authority, and implicating the expertise of the agency.").

Further, it is difficult to discern on what basis the Utilities believe the term "demonstrable benefits" is vague, as they identify a legal standard for vagueness but decline to apply it to this term. **[BIC 24]** A similar "net public benefit" standard is frequently employed by the Commission in other contexts. *See, e.g.*, *New Energy Econ., Inc. v. N.M. Pub. Regulation Comm'n*, 2018-NMSC-024, ¶¶ 14, 43, 416 P.3d 277, 283 (affirming Commission's application of net public benefit test as "a quintessential policy determination with which we will not interfere").

Agency rules frequently must afford some discretion in their application, particularly on fact-intensive questions. As this Court has recognized, it is "well settled that it is not always necessary that statutes and ordinances prescribe a specific rule of action, but on the other hand, some situations require the vesting of some discretion in public officials, as, for instance, where it is difficult or impracticable to lay down a definite, comprehensive rule." *State ex rel. Sofeico v.*

Heffernan, 1936-NMSC-069, ¶ 33, 67 P.2d 240, 245; *see also Climax Chem. Co. v. New Mexico Envtl. Improvement Bd.*, 1987-NMCA-065, ¶ 15, 738 P.2d 132, 136 ("it has long been recognized that it is impossible to anticipate every factual situation that might arise under a given set of regulations.").

Consistent with the rulemaking record, the Commission found that calculating subsidies, including both benefits and costs, requires proceedings beyond the rulemaking. From the outset, the Strategen Working Group Report summarizing the pre-rulemaking stakeholder process, in which the Utilities participated, stated that "the Commission is advised that there was *general consensus among stakeholders* that it is premature to consider how to calculate and apply the limitation on cross-subsidization due to the lack of data, and that more information and data around the performance, costs, *and benefits* of Community Solar projects once they are deployed in New Mexico is needed until a comprehensive discussion can be had on the topic." **[5 RP 0517]** (emphasis added)[9] Even PNM argued in comments that additional proceedings would be necessary following the rulemaking to determine how to calculate subsidization. Specifically, PNM recommended a separate proceeding to consider, *inter alia*, "the

[9] To the extent there are questions over how a facility's interconnection could provide benefits to non-subscribing ratepayers, the Court may consult the Rule itself, as well as the Legislature's Grid Modernization statute, NMSA 1978, § 62-8-13(B), for examples in the evaluation criteria that the Commission must consider to determine whether cost sharing is reasonable.

costs that all customer classes (non-subscribers) should be asked to contribute towards the success of the community solar program, whether those costs are part of the three-percent cap on subsidization or are additional rate base or other costs that result from the cost-sharing principles introduced by the Commission in Section 13 of the draft rules." **[8 RP 0943]** It is disingenuous for the Utilities to now argue that the Commission's allowance for such a proceeding is now somehow "vague." **[BIC 24]**

The Utilities argue that the Commission's determination of subsidy cannot include the benefits provided by community solar facility interconnection, but they fail to explain why not. This Court should not vacate the Commission's Rule, which is not ripe for a challenge in the absence of a showing of actual factual circumstances claimed to represent unlawful subsidization, based on nothing more than the Utilities' policy opposition to potential interconnection cost sharing.

C. The Utilities' Argument that the Rules Does Not Address Cost Recovery Ignores Existing Law and Specific Findings by the Commission.

The Utilities' claim that the Rule is infirm because it fails to address interconnection-related cost recovery is particularly baffling. **[BIC 25]** As the Utilities are aware, mechanisms for recovery of interconnection-related costs, including for the interconnection of community solar facilities, are provided in the Commission's interconnection rules, which will apply to all community solar

facilities. *See* 17.9.568.1-30 NMAC. After SPS and PNM raised this issue for the first time in their respective motions for rehearing, the Commission explained that "[t]he utilities currently bill interconnection applicants for the costs of interconnection studies and the costs of interconnection under the Commission's rules for interconnection. The same practice should apply here." **[20 RP 3167]** It is therefore incorrect to argue that Commission's rules do not allow for recovery of their interconnection costs.

Although not clearly expressed because the Utilities fail to acknowledge the interconnection rules, it is possible that their position is that those rules are not sufficient and that the Commission must separately address interconnection costs specific to community solar facilities.[10] However, such an interpretation is not consistent with a plain reading of the Act. The statute simply requires that the rules "establish reasonable, uniform, efficient and non-discriminatory standards, fees and processes for the interconnection of community solar facilities that are consistent with the commission's existing interconnection rules and interconnection manual that allows a qualifying utility to recover reasonable costs for . . . interconnection costs for each community solar facility." NMSA 1978, § 62-16B-7(B)(6). The Act does not require that these standards be specific to

[10] The other explanation for the Utilities' argument, as implausible as it may seem, would be that the Utilities are simply unaware of the cost recovery mechanisms in the Commission's interconnection rules.

community solar facilities. In fact, the Commission's clarification that the generally applicable interconnection rules apply helps ensure that the community solar interconnection standards are "reasonable, uniform, efficient and non-discriminatory . . . [and] are consistent with the commission's existing interconnection rules and interconnection manual." NMSA 1978, § 62-16B-7(B)(6).

D. The Act Does Not Require that the Rule Include Guidelines to Facilitate the Objective of Low-Income Customer Capacity.

The Utilities read language into the Act that does not exist when they argue that the "Rule's lack of guidelines to facilitate the objective of low-income customer capacity, in contravention of an express requirement of the Act, renders the Rule defective." **[BIC 26]** Nothing in the Act requires the Commission's rules include such guidelines. Rather, the Act only mandates that the rules "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). The Commission's Rule indisputably includes such a requirement. 17.9.573.10(B) NMAC.

The Act does also direct the Commission 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." NMSA

1978, § 62-16B-7(B)(3) (emphasis added). However, nothing in the plain language of the Act requires that such *guidelines* be included in the *Rule* itself.

A "guideline" is not ordinarily the same as a "rule;" if the Legislature had wanted this material promulgated in the administrative code as a rule, it would have said so expressly. *See State ex rel. Duran v. Anaya*, 1985-NMSC-044, ¶ 10, 102 N.M. 609, 611, 698 P.2d 882, 884 ("this Court will not read into a statute language which is not there, particularly if it makes sense as written."). The Legislature has used the term "guidelines," standing alone, to mean operational procedures that are not tantamount to rules. *Compare, e.g.*, NMSA 1978, § 75-2-4 (directing the Interstate Stream Commission "adopt guidelines for project preparation, review, application and approval), *with* NMSA 1978, § 75-1-3(C) (directing the Secretary of Environment to "establish, by regulation, guidelines for the ranking of projects for top priority based on public health need.").

Here, the fact that the Legislature expressly required "rules" for the low-income carveout, and "guidelines" for how to achieve this carveout indicates that the "guidelines" are separate and distinct from the "rules" and are not subject to the same requirements as the community solar rulemaking. *See State v. Farish*, 2021-NMSC-030, ¶ 11, 499 P.3d 622, 627 ("The Legislature 'is presumed not to have used any surplus words in a statute; each word must be given meaning. This Court must interpret a statute so as to avoid rendering the Legislature's language

superfluous.'"). The Commission's reference to the forthcoming guidelines in its Rule was entirely appropriate and consistent with the Act. 17.9.573.10(B) NMAC.

E. The Commission's Rule Includes All Consumer Protections Required by the Act.

The Utilities fail to explain why the Rule's consumer protection and enforcement procedures "fall[] far short of the Act's requirement", and only offer conclusory arguments that this must be true. **[BIC 27]**

What the Act requires is that the Commission's rules "provide consumer protections for subscribers, including a uniform disclosure form that identifies the information that shall be provided by a subscriber organization to a potential subscriber . . ., as well as grievance and enforcement procedures." NMSA 1978, § 62-16B-7(B)(7). This provision is all that the Act requires regarding consumer protections. As discussed below, the Rule includes all consumer protection standards required by the Act. But even if the Utilities were correct, the remedy would be something other than what they seek in this appeal, perhaps an application for a writ of mandamus directing the Commission to complete that rulemaking. The Utilities' argument that a gap in an agency's rulemaking is grounds for invalidation of all the rules the agency did issue is not only novel, it is absurd. The Utilities provide no authority for this novel argument that the Commission's final community solar rules must be vacated for what they (allegedly) do not include.

The extent of the community solar consumer protections and enforcement procedures that are appropriate and within the Commission's authority were debated throughout the rulemaking. The results of the Commission's consideration and reconciliation of the various recommendations before it are captured by the rules. **[15 RP 2273-91]**[11] Specifically, consistent with the Act, Rule 573 adopts a uniform disclosure form requirement, including the contents of that form and the manner by which it is provided to customers. 17.9.573.16(A) NMAC. The Rule also provides grievance and enforcement procedures through the Commission's existing complaint process, referring serious consumer issues to the attorney general. 17.9.573.17(C) NMAC. Rule 573 goes beyond the specific consumer protections requirements of the Act by prescribing certain terms and conditions that subscriber organizations must include in their agreements with subscribers. 17.9.573.17(A) NMAC. Still further, subscriber organizations must register with the Commission and will lose their authorization to operate under certain conditions. 17.9.573.14 NMAC. Rule 573 also requires subscriber organizations to maintain a certain amount of general liability insurance. 17.9.573.16(B) NMAC.

[11] Although the Rule provides consumer protections that meet and exceed those required by the Act, the Commission explained that the Rule "refrains from micromanagement of the relationship between the subscriber organization and the subscriber" consistent with the "limited authority over subscriber organizations" provided by the Act, as well as "the Commission's strained resources." [15 RP 2284-85, 87-89].

These provisions not only meet, but exceed the specific consumer protection and enforcement procedure requirements of the Community Solar Act.

The Utilities, however, argue that the Rule "misinterprets or misapplies" the Act by failing include "specific" consumer protections or "guidelines" for the enforcement procures. The Utilities do not explain what "specific" consumer protections or enforcement procedure "guidelines" the Act requires or how the Rule fails to provide them. The Utilities' argument therefore fails on its face because it does not meet the Utilities' burden to show that Rule is unlawful. NMSA 1978, § 62-11-5; *see also Public Serv. Co. v. N.M. Pub. Regulation Comm'n*, 2019-NMSC-012, ¶ 77, 444 P.3d 460, 481 (finding that a "bare assertion" was not sufficient to meet "the burden of demonstrating that the [Commission's] decision was unreasonable or unlawful.").

Further, an administrative agency is prohibited from enacting rules which exceed statutory authority. *Marbob Energy Corp. v. N.M. Oil Conservation Comm'n*, 2009-NMSC-013, ¶ 5, 146 N.M. 24, 206 P.3d 135, 138. The Commission's Rules clearly provide consumer protections and enforcement and grievance procedures, and it appears that even the Utilities do not dispute this. The Utilities cite no provisions that mandate anything more that the consumer protection and enforcement and grievance procedures the Rule provides. The Commission adopted consumer protection and enforcement and grievance

procedures as required by the Act and supported by an expansive record on this issue.

F. The Rule Forbids Co-Location, as Required by the Act, but Allows Further Fact Finding to More Precisely Define that Ambiguous Term.

Regarding co-location, the Act simply requires that the Rules "provide requirements for the siting and co-location of community solar facilities with other energy resources; provided that community solar facilities shall not be co-located with other community solar facilities." NMSA 1978, § 62-16B-7(B)(10).[12] The Act does not define co-location; nor does it provide any clues within the body of the statute as to the intended meaning of this term. Accordingly, the Commission found "the co-location requirement somewhat ambiguous in meaning as well as in purpose." **[15 RP 2342]** The Commission therefore included a "safe harbor provision" whereby subscriber organizations could site facilities on different parcels without implicating the co-location prohibition and elected to address case-by-case basis whether locating facilities on the same parcel constituted co-location. 17.9.573.18 NMAC. **[15 RP 2342-43; 20 RP 3170 & 3174]**[13]

[12] Elsewhere the Act also provides that a community solar facility shall "have the option to be co-located with other energy resources, but shall not be co-located with other community solar facilities." NMSA 1978, § 62-16B-3(A)(4).

[13] The Commission's approach to prohibiting co-location was supported by comments in the record explaining that co-location prohibitions in community solar programs were generally intended to prevent gaming by developers to get around the size cap on individual facilities, but that some exception to a parcel

The Commission did not, as the Utilities claim, create an "*ad hoc* exception to the Act." **[BIC 28]** The Rule flatly provides that community solar facilities "shall not be co-located with other community solar facilities." 17.9.573.10(A)(4) NMAC. Given the lack of definition regarding co-location in the Act, the Commission provided a definition and general rule, but allowed for a "case-by-case" determination to account for a myriad of various circumstances that could arise. 17.9.573.18 NMAC.

As this Court has explained, "[i]t is a settled principle of administrative law that the Legislature, when 'through express delegation or the introduction of an interpretive gap in the statutory structure, has delegated policy-making authority to an administrative agency, the extent of judicial review of the agency's policy determinations is limited.'" *Gila Res. Info. Project ex rel. Balderas v. N.M. Water Quality Control Comm'n*, 2018-NMSC-025, ¶ 34, 417 P.3d 369, 377 (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696, 111 S. Ct. 2524, 115 L. Ed. 2d 604 (1991)). Under the circumstances and given the Commission's uncertainty regarding how projects might present, it makes sense for the Commission to retain some discretion regarding how the co-location prohibition is applied under

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prohibition was warranted given the large size of many parcels in New Mexico. **[19 RP 2919-22]** The Commission originally understood the co-location prohibition as "to avoid overburdening the grid at any particular point in the grid and to limit the extent of any upgrades needed at any particular point in the grid," but modified its Rule based on these comments. **[20 RP 3170]**

currently unknown future factual scenarios. *Climax Chem. Co. v. New Mexico Envtl. Improvement Bd.*, 1987-NMCA-065, ¶ 15, 106 N.M. 14, 738 P.2d 132, 136 (quoting *New Mexico Mun. League, Inc. v. New Mexico Envtl. Imp. Bd.*, 539 P.2d 221, 229 (Ct.App.1975)) ("it has long been recognized that it is impossible to anticipate every factual situation that might arise under a given set of regulations."). The Commission's approach fits squarely within its authority.

Finally, given that the Commission will consider whether a community solar facility violates the co-location prohibition on a case-by-case basis, the Utilities' appeal of this issue is premature. As explained above, the Rule is facially consistent with the Act, as it does not permit the co-location of community solar facilities and the Utilities do not argue that the Commission's general rule forbidding co-location violates the Act. The Utilities' claims that the case-by-case determination allows co-location in violation of the Act cannot be addressed until the facts of the given case are known and the issue is resolved by the Commission. Until then, the Utilities' argument is not ripe for review. *Public Serv. Co. v. N.M. Public Serv. Comm'n (In re Alternatives to the Inventorying Ratemaking Methodology)*, 1991-NMSC-018, ¶ 25, 111 N.M. 622, 808 P.2d 592, 600 ("the basic rational of the ripeness doctrine . . . [is] to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from

judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties."); *see also New Energy Economy v. Shoobridge*, 2010-NMSC-049, ¶¶ 16-18, 149 N.M. 42 ("the mere possibility or even probability that a person may be adversely affected in the future by official acts' fails to satisfy the actual controversy requirement.") (internal citations and quotations omitted).

G. Under the Law, the Third-Party Administrator Is Part of the Commission's Advisory Staff and the Rule Provides Precise Guidelines and Review Authority Over Its Actions.[14]

SPS contends that the Commission's Rule fails to adopt a complete selection process for community solar projects **[BIC 29]**, despite the detailed selection process provisions contained in Rule 573. As relevant here, all the Act requires is that the Commission "establish a process for the selection of community solar facility projects."[15] NMSA 1978, § 62-16B-7(B)(4). The Act prescribes no details of this selection process absent from the Rule that SPS can identify; nor does the Act forbid a third-party administrator of the solicitation.

[14] PNM and EPE do not join in this section of the Utilities' Brief in Chief.

[15] This section of the Act also requires that the Commission establish a process for the allocation of the statewide capacity program cap and that these processes be consistent with NMSA 1978, § 13-1-21. NMSA 1978, § 62-16B-7(B)(6). Appellants raise no issues regarding whether the Rule meets either of these requirements.

The details of the community solar facility selection process and solicitation administration were the product of extensive rulemaking on this issue. The final Rule includes a lengthy section titled "Process for Selection of Community Solar Facilities", 17.9.573.12 NMAC, specifying the selection process in great detail, including detailed scoring criteria and minimum projects requirements.

SPS offers no actual argument as to why the provisions of Rule 573 do not "establish a process for the selection of community solar facility projects." **[BIC 28]** Rather, SPS's arguments relate only to the Commission's decision to engage a third-party to administer the community solar solicitation process.

The Commission's approach, beginning with its notice of proposed rulemaking adheres to the basic premise that the "Act makes it clear that the [Commission] has sole authority to administer and enforce rules and provisions of the Act." **[5 RP 0556]** The Commission solicited comments as to the community solar program should be administered by (1) the Commission solely with internal staff; (2) a contracted third-party; or (3) the Utilities. Parties overwhelmingly recommended that the Commission use a third-party to administer the solicitation process. **[15 RP 2269-71]**[16] Notably, throughout the rulemaking, SPS

[16] Reasons for parties recommending third-party administration of the solicitation process included competitiveness concerns if the Utilities both administered and participated in the solicitation process and capacity constraints for both the Commission and the Utilities. **[15 RP 2269-71]**

recommended that the Utilities administer the solicitation process, a position incompatible with its current position that the Act only permits Commission administration. **[15 RP 2271]** Ultimately, the Commission agreed with the "widespread" commenter support for the third-party administrator option. **[15 RP 2272]**

The Commission's approach is within its authority. Importantly, SPS fails to understand the Legislature expressly permitted the Commission to carry out its duties using contractors. NMSA 1978, § 62-19-9(B)(9) (the Commission may "enter into contracts to carry out its powers and duties"); *see also* NMSA 1978, § 62-19-19(A) (commission may engage "on a . . . contract basis such . . . experts or staff as the commission requires for a particular case").[17] SPS's argument that the Commission improperly delegated its responsibilities under the Act is therefore baseless.

Further, despite SPS's claims, Rule 573 clearly delineates the third-party administrator's responsibilities and the mechanism by which the Commission steps

[17] In addition, as agents of the Commission hired to administer the community solar solicitation, the third-party administrator is coextensive with Commission advisory staff, not some separate unaccountable entity as SPS maintains. *Qwest Corp. v. N.M. Public Regulation Comm'n (In re Investigation of Qwest Corp.)*, 2006-NMSC-042, ¶ 58, 140 N.M. 440, 455-56, 143 P.3d 478, 493-93 (explaining that advisory staff includes contracted consultants).

back in when an issue arises requiring a non-ministerial determination.[18] SPS contends that Rule 573 affords the third-party administrator "unfettered discretion" to select projects based on some undetermined "other" selection criteria. **[BIC 29]** This is simply not what the Rule says. Rule 573 lays out the minimum requirements and criteria for project selection in extensive detail and then directs the third-party administrator to "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 (emphasis added). The "other" selection criteria to which SPS alludes do not exist in the actual language of Rule 573.

SPS's claim that the Commission's rules do not provide a mechanism for meaningful review of the third-party administrator's actions is likewise undercut by the actual language of the Rule. The Rule specifically provides that "the administrator or any participant in the process may raise before the commission an issue that is not fully addressed in this rule and that the commission finds, in its discretion, that it should address." 17.9.573.12(A) NMAC. Rule 573 therefore requires the third-party administrator to administer the selection process in accordance with the rule and, to the extent an issue arises that is not fully

[18] Intervenors-Appellees do no concede that the Commission was required to specifically identify the responsibilities or mechanism for review of the third-party administrator. Regardless, the Rule does so. 17.9.573.12(A) NMAC.

addressed by the rule, the administrator or parties can present that issue to the Commission for review. It is not clear what SPS finds "vague" about this process. Indeed, prior to the closing of the record on appeal, at least one such request for clarification was vetted before the Commission without procedural ambiguity. **[15 RP 2371-86; 16 RP 2454-71, 2472-87; 18 RP 2691-2711]**

Lastly, the Legislature endorsed the Commission's decision 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. **[15 RP 2272]** Legislative financing of the third-party administration of the community solar program is a tacit endorsement of the Commission's chosen method of implementation.

H. There is No Legal Error in the Commission's Use of the Team.

The final issue regarding Rule 573 in the Utilities' Brief is that the Commission's use of the "Team" violated their due process rights and *may* have violated *ex parte* prohibitions. The first claim confuses the nature and development of the proceeding below and the second lacks any basis on its face for this Court to vacate the Rule.

The due process requirements of a rulemaking and an adjudicatory case are distinguishable, but the Utilities' arguments are premised on applying adjudicatory

standards that are inapplicable in the context of a rulemaking. "[T]he distinction between individualized fact-based deprivations, that are protected by procedural due process, and policy-based deprivations of the interests of a class, that are not protected by procedural due process . . . underlies both the distinction between legislation and judicial trial and the distinction between rulemaking and adjudication." *Miles v. Bd. of Cnty. Comm'rs of Cnty. of Sandoval*, 1998-NMCA-118, ¶ 8, 125 N.M. 608, 964 P.2d 169, 172 (quoting Kenneth Culp Davis & Richard J. Pierce, Jr., Administrative Law Treatise § 9.2, at 3 (3d ed.1994)); *see also Rayellen Res., Inc. v. New Mexico Cultural Properties Rev. Comm.*, 2014-NMSC-006, ¶ 51, 319 P.3d 639, 649. This Court and the United States Supreme Court have held that "[t]here is no fundamental right to notice and hearing before the adoption of a rule; such a right is statutory only." *Livingston v. Ewing*, 1982-NMSC-110, ¶ 14, 98 N.M. 685, 652 P.2d 235; *cf. Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 549, 98 S.Ct. 1197, 55 L.Ed.2d 460 (1978) (a court cannot overrule rulemaking on the basis of procedural devices employed or not employed if the agency employed the statutory minima).

Accordingly, the Commission could not have violated the Utilities' individualized due process rights, as those rights do not attach to a rulemaking absent a statutory conferral. For a PRC rulemaking, the statutory due process requirements are notice of the proposed rules and an opportunity to be heard.

NMSA 1978, § 62-19-21. The Utilities do not dispute that the notice of proposed rulemaking was proper or that they had multiple opportunities to present their facts and legal and policy arguments to the Commission. What they ultimately object to is that they were (allegedly) denied the opportunity to respond to the comments and positions of the "Team." The Utilities did in fact have such an opportunity, but even if they did not, they point to no authority showing that an interested person in a rulemaking has a right to file responsive comments, and there is no such authority.

Even accepting the claim that the Utilities were somehow entitled to individualized due process rights, they identify no specific rule or issue for which they did not have an opportunity to respond. Indeed, each of the Utilities were actively involved throughout the rulemaking, including a pre-rulemaking stakeholder process and three rounds of comments on the notice of proposed rulemaking which extensively detailed each of the issues raised by the rules. The Commission provided the Utilities an opportunity to respond to the specific recommendations of the Team, despite their contentions to the contrary. Consistent with statute, the Order Adopting Rule provided an opportunity to file "motions for rehearing or reconsideration of this matter." **[15 RP 2344]** This is the very same Order that contained the Team's recommendations of which the Utilities now

complain. Each utility subsequently filed a motion for reconsideration, which motions were then thoroughly vetted by the Commission.[19]

Based only on conjecture and no evidence, the Utilities also allege that the Commission's reliance on the Team's recommendations may have violated prohibitions against *ex parte* communications. **[BIC 33-36]** Again, such bare assertions are insufficient to carry the Utilities' burden on appeal. *Public Serv. Co. v. N.M. Pub. Regulation Comm'n*, 2019-NMSC-012, ¶ 77, 444 P.3d 460, 481. The Utilities' specific allegations contain no actual wrongdoing by the Commission. In particular, the Utilities cite no law supporting their claim that they were entitled to the identities of the Team. The Commission routinely relies on advisory staff, including contracted third parties, and it is not legally required under the *ex parte* laws to disclose the details of those communications. *Qwest Corp. v. N.M. Public Regulation Comm'n (In re Investigation of Qwest Corp.)*, 2006-NMSC-042, ¶ 59, 140 N.M. 440, 456, 143 P.3d 478, 494 ("Because [a contracted consultant's] relationship with the PRC and his advice fall within the definition of advisory staff, *see* Section 8-8-13(A), we conclude that the PRC need not provide Qwest and other parties with the substance of [the contracted consultant's] advice.").

[19] Indeed, on each of the substantive issues raised by the Utilities on appeal, they were provided a robust opportunity to respond and they do not assert otherwise. The Commission simply did not agree with their responses as a matter of policy.

As the Utilities' note, the Commission may freely communicate with parties, including Utility Division Staff, until the record closes. NMSA 1978, § 62-19-23(A). Not only did the Utilities fail to provide evidence the Commission communicated with anyone other than advisory staff after the rulemaking was closed, the record demonstrates there were no such communications. The Commission stated, "members of Staff of the Utility Division of the Commission ('Staff') did not participate in Team discussions" occurring after the record closed, and that all Utility Division Staff recommendations on the Rule were included in their comments filed during the rulemaking. **[20 RP 3163-64]** Likewise, the Utilities cite no evidence that the Commission consulted "non-party experts," particularly as contracted consultants are considered part of that advisory staff and not subject to *ex parte* prohibitions. NMSA 1978, § 62-19-19(A) & 23(C)(2).

The Utilities carry the burden on appeal and cannot rely on unsupported insinuations to meet that burden.[20] Accordingly, the Utilities' allegations regarding the Team do not amount to legal error because they were not entitled to, yet still

[20] Even if the Court somehow finds that prohibited *ex parte* communications occurred, the remedy is not for the Court to vacate the rule in its entirety. Rather the *ex parte* statute provides that the remedy is to disclose the communication to all parties to the rulemaking and provide an opportunity to respond. NMSA 1978, § 62-19-23(D). It is then within the Commission's discretion whether to vacate the Rule. NMSA 1978, § 62-19-23(E).

provided, individualized due process rights and can identify no support in relevant law or facts for a claim of prohibited *ex parte* communications.

I. SPS's Appeal of the Advice Notice Orders Is Not Ripe for Review.

The Court should reject SPS's arguments to annul and vacate the Advice Notice Orders as not ripe, and also inconsistent with the law. In order for this Court to review any administrative action, "the issues . . . must be ripe for judicial review, with a final resolution of the relevant issues by the agency and with a concrete, developed factual record." *Public Serv. Co. v. N.M. Public Serv. Comm'n (In re Alternatives to the Inventorying Ratemaking Methodology)*, 1991-NMSC-018, ¶ 7, 111 N.M. 622, 808 P.2d 592, 596.

SPS argues that the Advice Notice Orders violated NMSA 1978, § 62-8-7(D) because the Commission ordered SPS to refile its bill credit tariff without first holding a hearing. **[BIC 37]** However, SPS's claim that "the NMPRC summarily disposed of disputed issues surrounding SPS's bill credit tariff" is factually incorrect. **[*Id.* 38]** The Commission's Advice Notice Orders were not final decisions on the bill credit tariff. The Commission subsequently issued an order establishing hearing procedures to examine, *inter alia*, "the calculation of the community solar bill credits." Case No. 22-00020-UT, *et al.*, *Order Opening New Docket for Two-Phase Proceeding; Order Consolidating Docket Nos. 22-00240-UT and 22-00243-UT Into New Docket; Order Delegating Authority to the Chief*

Hearing Examiner Regarding Proceeding in New Docket; Order Taking Administrative Notice of Relevant Commission Records and Order Setting Deadline for Filing of Any Proposed Interconnection Forms and Agreements Specific to Community Solar Facilities, ¶ 36 (N.M. P.R.C., Mar. 1, 2023).

SPS's assertion that the Commission did not afford SPS a hearing on its bill credit is inconsistent with the language of this order, which provides that "[t]hough EPE's and SPS's community solar bill credit calculations have been allowed to go into effect, these should also be considered for review in the second phase of the proceeding." *Id*., ¶ 37. The procedural schedule for the second phase of this proceeding includes a public hearing starting on January 17, 2024. Case No. 23-00071-UT, *Procedural Order*, p. 7 (N.M. P.R.C., Mar. 31, 2023). Accordingly, the issues of whether SPS was afforded a hearing on its bill credit tariff and whether the bill credit tariff ultimately approved by the Commission violates the law have not reached their final resolution below and are therefore not ripe for review by this Court.

Notably, the Commission ordered SPS to refile its bill credit tariff because its original filing excluded transmission costs from the bill credit in open defiance of the Commission's Rule, which, absent a stay from this Court, was (and is) in effect. NMSA (1978), § 62-11-6. There was no factual dispute over whether

SPS's tariff violated the Rule which might have necessitated an evidentiary hearing.

Requiring a hearing before the Commission may order a utility to file a compliant tariff where the utility knowingly and flagrantly violates the Commission's rules is an unreasonable interpretation of NMSA 1978, § 62-8-7(D), as a utility could simply file noncompliant tariffs and demand hearings into perpetuity to avoid implementing Commission decisions with which it disagreed. The Court should reject SPS's argument that the Commission was required to provide a hearing before correcting a tariff that flagrantly disregarded the Commission's rules, as well as the Act as interpreted by the Commission. *See City of Albuquerque v. N.M. Pub. Regulation Comm'n*, 2003-NMSC-028, ¶ 16, 134 N.M. 472, 480, 79 P.3d 297, 305 ("The Legislature grants agencies the discretion of promulgating rules and regulations which have the force of law.") (internal quotation marks and citations omitted).

IV. CONCLUSION

For the foregoing reasons, the Commission's Order Adopting Rule, Rehearing Order, and Advice Notice Orders should each be upheld.

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 10,520 words (counted using Microsoft Word) using 14-point Times New Roman typeface.

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May, 2023, I caused a true and correct copy of the foregoing Brief in Chief to be filed and served on all counsel of record through the Court's Electronic Filing System.

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