**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

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| **IN THE MATTER OF EL PASO ELECTRIC COMPANY'S APPLICATION FOR A CERTIFICATE OF CONVENIENCE AND NECESSITY FOR A TWO-MW SOLAR POWER GENERATION FACILITY AND APPROVAL OF A VOLUNTARY COMMUNITY SOLAR PROGRAM** | ) | |
| **EL PASO ELECTRIC COMPANY,** | ) | **Case No. 18-00099-UT** |
| **Applicant** | ) | |

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**NEW ENERGY ECONOMY'S VERIFIED MOTION AND LEGAL ARGUMENT FOR COMMISSION TO DISMISS EPE's EXPENSIVE COMMUNITY SOLAR PROPOSAL AND TO ORDER EPE TO SELECT A COMMUNITY SOLAR RESOURCE THAT IS THE MOST COST EFFECTIVE AMONG FEASIBLE ALTERNATIVES AND AFFORDABLE FOR LOW INCOME NEW MEXICANS**

New Energy Economy ("NEE"), through undersigned counsel, respectfully moves for an Order dismissing EPE's solar resource proposal because 1) substantial known evidence based on the face of EPE's Application indicates that it made a resource selection without evaluating the most cost effective resource among feasible alternatives and therefore, affordable to low income New Mexicans; and 2) because of EPE's admission that "that EPE could obtain lower bids by reissuing the request for proposals"[1]; and 3) new evidence conclusively confirms EPE's admission that it

[1] "Final Draft for Circulation" and entitled "Motion to Vacate Schedule Pending Amendment to Application and Request for Status Conference," August 27, 2018, pp. 2-3, attached as Exhibit A.

could implement a community solar project that is cheaper for ratepayers, since SPS has recently done so in another case, 18-00308-UT. Indeed, SPS is seeking an application for a community solar project through a power purchase agreement ("PPA") with an Independent Power Producer ("IPP") which will cost ratepayers significantly less, a levelized cost of $45.46 per MWh over the [] PPA's 20-year term,[2] than EPE's utility-owned proposal, a levelized cost of $78.41 per MWh.[3] The fact that EPE's RFP process did not invite or consider PPA bids, which are nearly half the cost of EPE-owned resources, is incontrovertible evidence that the Commission cannot know what the most cost effective resource among feasible resource alternatives might be and hence protect ratepayers, especially low-income ratepayers. In support of this motion, NEE states:

1. On April 24, 2018, EPE filed an Application requesting expedited Commission review and approval of a certificate of public convenience and necessity ("CCN") to construct, own, and operate a two-megawatt ("MW") ground-mounted solar photovoltaic generating facility in Dona Ana County as part of its proposed "community solar program" ("CSP").
2. To support its CCN request and two elements (monthly capacity charges) of the rates proposed in its Application (proposed "Original Rate No. 40) for customers that subscribe to its proposed CSP, EPE's Application relies on its selection of Affordable Solar Installation Inc. ("Affordable Solar") to build and then transfer ownership of its proposed 2 MW solar community solar resource to EPE.
3. EPE selected Affordable Solar based on a Request for Proposal ("RFP") process that only invited and considered proposals for a 2 MW solar resource that would be

[2] 18-00308-UT, SPS Application, p. 12, ¶30 d), 9/28/2018.
[3] 18-00099-UT, *Notice of Proceeding and Hearing*, p. 4, ¶9, 5/25/2018.

owned by EPE and located on EPE-owned land.[4] In other words, EPE only considered proposals for turnkey projects. Only two companies submitted a proposal under this RFP.

4. On May 15, 2018, NEE intervened in this case and protested EPE's Application, explicitly objecting to the RFP which only sought bids for "turnkey" projects, and thus, does not result in the most cost-effective community solar project for ratepayers, and does not comply with the law.[5]

5. As set forth in NEE's Protest, one of the grounds for NEE's Protest is that the 2017 Request for Proposals ("2017 RFP") relied on by EPE to select the community solar facility to supply energy for its proposed "community solar program" and to support EPE's Application for a certificate of public convenience and necessity ("CCN") to own and operate that facility was not competitively fair and was designed to monopolize the market for community solar facilities in EPE's service area; therefore Commission approval of EPE's Application would not be consistent with established Commission standards for approval of such "discretionary"[6] CCN requests and would be contrary to the interests of EPE's customers, including qualifying "low-income" customers, and the

[4] EPE's Application and Direct Testimony of Richard E. Turner, pp. 2-3, 7-8 and Exhibit RT-1.
[5] On July 12, 2018, the Hearing Examiner granted NEE's Motion to Intervene.
[6] Like in Case No. 15-00312-UT, this CCN Application is "discretionary." "[G]iven the discretionary nature of PNM's request, the standard should be higher than for a CCN, and the scope of the Commission's considerations should be broader. The Commission should consider the extent of any public opposition, the extent to which PNM's justifications are not clearly demonstrated, and the extent to which any uncertainties will impact the public interest and create unreasonable risks for ratepayers." Case No. 15-00312-UT, 3/19/2018, Recommended Decision, p. 79, unanimous approval by the PRC in its Final Order, 4/11/2018. (Discussion on discretionary impact of CCN Applications: pp. 74-80.)

public interest.[7]

6. Because the RFP only solicited turnkey projects, the Commission cannot know whether any potential PPA proposals for that site would be more cost-effective than EPE's Proposed Solar Project with Affordable Solar or if Commission approval of that Project would provide a net benefit to EPE's ratepayers and the public considering all feasible alternatives to that Proposed Project. See Affidavit of David Van Winkle, attached as Exhibit B.

7. "EPE estimates the levelized cost of the contract over the life of the project to be $78.41 per MWh." 18-00099-UT, *Notice of Proceeding and Hearing*, p. 4, ¶9, 5/25/2018.

8. On August 27, 2018, one of EPE's legal counsel, Ms. Burns, circulated by email to NEE a motion entitled "Final Draft for Circulation" and entitled "Motion to Vacate Schedule Pending Amendment to Application and Request for Status Conference," requesting the parties' position. See Exhibit A.

9. In that final draft of their motion, EPE explained:

> EPE believes that it is no longer advisable to pursue the other approvals sought in its original Application because the passage of time since issuance of EPE's original request for proposals has changed the context around which the NMCSF would be evaluated if EPE went forward with its request for a CCN.
>
> These changes include the possibility that EPE could obtain lower bids by reissuing the request for proposals. … The merits of an amendment would be addressed in greater detail in EPE's motion to amend.

[7] "EPE expects that Program participation could result in bill *increases* for participating customers in certain months and in the early years of the Program." EPE witness James A. Schichtl, Direct Testimony, p. 22, and Exhibit JS-2, "sample bill" for "average residential customer" indicating that costs would be *higher* with EPE community solar project compared to current rates, not lower, despite no fuel cost volatility.

> EPE believes that it is no longer advisable to pursue the other approvals sought in its original Application because the passage of time since issuance of EPE's original request for proposals has changed the context around which the NMCSF would be evaluated if EPE went forward with its request for a CCN.

*Id.* at pp. 2 – 3.

10. On August 29, 2018, EPE filed its Motion to Vacate Schedule Pending Amendment to Application and Request for Status Conference, but it did not include the language set forth above. Instead, EPE left its reasoning for the motion vague and unclear. The motion was supported by NEE.

11. On August 30, 2018, the Hearing Examiner entered an Order granting in part EPE's motion, including vacating a discovery deadline and setting a status conference.

12. At the status conference, held on September 6, 2018, EPE did not disclose to the Hearing Examiner that it was seeking a change in course in its application because it was possible that it could obtain lower bids by reissuing a request for proposal.

13. At the September 6, 2018 status conference, NEE learned for the first time that EPE wanted the parties to "mediate." While the parties refused to mediate, all the parties did agree to enter into discussions with EPE to reach agreement on a community solar project that will actually comply with the law and benefit ratepayers, should EPE decide to withdraw the faulty application. See Affidavit of Mariel Nanasi, attached as Exhibit C.

14. Subsequently, on September 11, 2018, EPE filed its motion to withdraw its application supported by all intervenors, PRC staff and the Attorney General. In that motion, while EPE did not explicitly state that there was a possibility that it could obtain lower bids for its community solar program, EPE did state that it wished to

consult with the intervenors, and then re-issue its RFP for the community solar program.

15. On September 13th, 2018, the Hearing Examiner recommended that the Commission grant EPE's motion to withdraw its application.
16. On September 26, 2018, the Commission took the unprecedented step of refusing to grant EPE's motion to withdraw its application, essentially forcing EPE to proceed with a project with Affordable Solar, even though EPE has recognized that it may not have obtained the best value for ratepayers.
17. Both at the September 26, 2018 Commission hearing, and at a subsequent October 10th, 2018 Commission hearing, the Commissioners made it clear that they are concerned about starting, without delay, a community solar program that will be accessible for low income New Mexicans.
18. For example, at the September 26, 2018 Hearing, Commissioner Lyons began by stating "This is a volunteer community solar program [with a] 10% discount for low income customers who want solar…This is for people who can't afford big solar panel, expensive solar panel, $25,000 of solar panel on their roof if they've got a roof that can handle it. I don't understand what the people intervened. This seemed like a great program…I want to try to give the low income people a chance to get solar…" September 26, 2018 PRC Hearing Recording, at 10:41 – 42.
19. Also at the September 26, 2018 hearing, Commissioner Hall stated, "I do agree that it is really worthwhile to try to provide an affordable form of solar distributed generation to low income people…" September 26, 2018 PRC Commission Hearing Recording, 10:44.

20. Similarly, Commissioner Jones opined, "if the pricing's right and there's no risk to ratepayers…from what I read, keeps rate payers at no risk… low income component are people who will never have that opportunity; they'll never have the opportunity that the rich guy does because they're not in a tax position to have that…" September 26, 2018 PRC Commission Hearing, 10:48.
21. Likewise, at the October 15, 2018 hearing, Commissioner Lyons said that EPE's proposal was a "volunteer community solar program for low income residents…we want to help some poor people have solar if they can't afford it…let's try to help some low income people here that want solar, believe in solar and want to have opportunity to get it." (October 10, 2018 PRC Hearing Recording, 11:42 – 43.)
22. While EPE's utility-owned Affordable Solar project has a levelized cost of $78.41 per MWh [8] SPS has just filed an application for approval of a community solar program with similar megawatt capacity and it will only cost ratepayers a levelized cost of $45.46 per MWh over the [] PPA's 20-year term.[9] Thus EPE's project is more costly for low income New Mexicans than that of SPS's.
23. NEE sought the position of the parties and they stated:

    a) EPE will file a response in the time provided under Rule 1.2.2.12.
    b) The City of Las Cruces takes no position.
    c) PNE USA, Inc. supports the Commission granting the relief requested in this Motion.
    d) Merrie Lee Soules supports the Motion.

[8] 18-00099-UT, *Notice of Proceeding and Hearing*, p. 4, ¶9, 5/25/2018.
[9] 18-00308-UT, SPS Application, p. 12, ¶30 d), 9/28/2018.

No other party provided their position before the filing of this Motion.

## Legal Argument

### I. The law requires that EPE show that it selected the most cost effective resource among all feasible alternatives.

A section of the NMAC entitled "Renewable Energy for Electrical Utilities," contains a part entitled, Resource Selection which states in full:

> **17.9.572.13 RESOURCE SELECTION:**
>
> **A.** The utility *shall determine all commercially available resources* or purchases of renewable energy certificates available to the utility, *either by ownership or by contract*, for the procurement plan year that will satisfy the RPS and the diversity requirements.
>
> **B.** Of the resources or REC purchases identified above, the company shall use the net present value methodology *to identify the most cost effective additional or new renewable resource(s) necessary and available* to satisfy both the annual renewable portfolio standard and the diversity requirements.
>
> **C.** In the case that the resources required are not required to satisfy diversity requirements those resources must represent the most cost-effective option available.

(emphasis supplied.)

Thus, since EPE chose an RFP process in order to consider the alternatives, EPE's RFP must allow EPE to "determine all commercially available resources or purchases of renewable energy certificates available to the utility" and then chose the "most cost effective option available." Based on EPE's own admission in its draft motion, as well as the evidence from the SPS application, EPE simply cannot meet the requirements of this law.

## II. EPE's RFP, which only permitted turnkey proposals, prevents EPE from meeting the legal requirement that it chose the most cost effective renewable resource from all feasible alternatives.

EPE has sought to withdraw its proposal. EPE has admitted to the parties that there is a possibility of a lower bid. Thus, EPE knows that its application does not comply with the law. SPS's application shows why. EPE could do an RFP similar to SPS, and enter into an agreement with an IPP for a PPA, resulting in cheaper solar energy and truly being accessible to low income New Mexicans, even without a 10% discount.

In the PNM Ojo Line Extension ("*OLE*") Case No. 2382,[10] for example, the PRC affirmed PNM's obligation to reasonably identify and evaluate all of its feasible resource alternatives in a resource acquisition case to satisfy its burden of proof even earlier and prior to issuance of its IRP Rule. The Hearing Examiner in a recent resource procurement case stated that the Commission's Final Order in PNM's *OLE* case "established a precedent pertinent to the use of RFPs in CCN cases" that, "in the absence of other statutory or regulatory guidance … should be applied to the facts of similar cases."[11] Order Partially Granting PNM's Motion to Vacate and Addressing Joint Motion to Dismiss ("December 22, 2015 Order"), Case No. 15-00205-UT. As summarized in that Order, the Commission restated the holding in the PNM *OLE* case as follows:

> … a utility carries the burden in a resource acquisition case to show that the resource it proposes is the most cost-effective among feasible alternatives. The Commission there rejected PNM's request for a CCN for a transmission line based on the Commission's determination that "PNM's alternatives analysis is not sufficiently reliable" and that "PNM has not properly shown that OLE is the best alternative even among those alternatives that PNM considered. Thus even assuming a need on the transmission system for the sake of argument, the Commission remains unconvinced that the public convenience and necessity require or will require the OLE Project as the proper response to such a need." Recommended Decision, pp. 98, 102, 166 P.U.R. 4th at 355-356. The Commission found

[10] *In Re Public Service Co. of New Mexico*, 166 P.U.R. 4th 318, 337, 355-356 (1995).
[11] Case No. 15-00205-UT, December 22, 2015 Order, p. 10.

that it has the authority to examine alternatives to utility proposals to satisfy needs identified by a utility, that there may be various solutions for such needs and that it would not be in the public interest for the Commission to grant a CCN for a proposed project which might meet a utility's needs but is the worst among a range of alternatives. Recommended Decision, p. 49, 166 P.U.R. 4th at 337.[12]

The Hearing Examiner's December 22, 2015 Order in Case No. 15-00205-UT stated:

Instead of specifying in advance the alternatives that a utility must analyze to support its CCN application, the Commission's practice has been to allow utilities to develop and attempt to justify the reasonableness of their proposals. After receiving the proposal, the Commission holds hearings in which the reasonableness of the utility's proposal is evaluated, with input from Staff and Intervenors.

Applying the OLE analysis to the facts of this case, it is possible that the restrictive nature of the RFP recently issued by PNM may unreasonably limit the alternatives to be evaluated and compared to PNM's proposal. Although no statutes or rules currently require the use of RFPs in resource acquisition cases, the use of RFPs appears to be becoming *a reasonable practice to ensure compliance with the standard in OLE*. In some cases, such as the San Juan abandonment case at Case No. 13-00390-UT, the use of RFPs may not be needed due to time constraints or the demonstrated narrow nature of the resource need to be satisfied. In other cases, it might be found that the failure to use an RFP or the use of an unreasonably restrictive RFP may unreasonably limit the alternatives evaluated by the utility.

… PNM carries the burden of proof to show that its proposed resource is the most cost effective choice among feasible alternatives to serve PNM's resource needs.[13]

The Commission affirmed the Hearing Examiner's Recommendation Order in Case No. 15-00205-UT.[14] In 2016, PNM re-filed and then again withdrew its second CCN for a gas. The Hearing Examiner's Recommendation Order again allowed for withdrawal and again the Commission adopted the Hearing Examiner's decision and stated unequivocally: "The

[12] *Id*., pp. 10-11. The "most cost effective" test in utility CCN cases addressed by the Commission in the *OLE* case was subsequently incorporated into the Commission's IRP Rules, 17.7.3.6, 17.7.3.7.I and 17.7.3.9.G(1) NMAC.
[13] *Id*., p. 12.
[14] Case No. 15-00205-UT, Final Order, May 18, 2016.

Commission reiterates that PNM bears the burden of demonstrating that its proposed resource choice is the most cost effective resource among feasible alternatives."[15] The Commission is not free to disregard its own rules and prior ratemaking decisions or "to change its position without good cause and prior notice to the affected parties." *Hobbs Nat. Gas v. NMPSC,* 115 N.M. 678, 681, 858 P.2d 54, 57 (1993).

Now that the Commission has become aware of another community solar project application which demonstrates there are better alternatives for low income New Mexicans, the Commission could expedite this process by dismissing EPE's application and letting them start over now, before they take more time and expense trying to hold up a project that simply cannot meet the requirements of the law.

WHEREFORE, New Energy Economy respectfully requests that the Commission grant EPE's Motion to Withdraw its application or dismiss EPE's application for a community solar project without prejudice and reaffirm this Commission's long-standing precedent that a utility must consider all feasible alternatives and choose the one that is most cost effective for New Mexicans.

Respectfully submitted this 16th day of October 2018.

NEW ENERGY ECONOMY

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[15] Case No. 16-00105-UT, Final Order, May 24, 2017, ¶ 10.