BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE COMMISSION ESTABLISHING A STANDARD METHOD FOR CALCULATING THE COST OF PROCURING RENEWABLE ENERGY, APPLYING THAT METHOD TO THE REASONABLE COST THRESHOHLD, AND CALCULATING THE RATE IMPACT DUE TO RENEWABLE ENERGY PROCUREMENTS	)	**Case No. 11-00218-UT**

RESPONSE BRIEF OF

RENEWABLE ENERGY INDUSTRIES ASSOCIATION OF NEW MEXICO

Respectfully submitted,

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The Renewable Energy Industries Association of New Mexico ("REIA") responds here to the initial post-hearing briefs ("BIC") by the New Mexico Industrial Energy Consumers ("NMIEC"), Attorney General ("AG"), Utility Division Staff ("Staff"), Public Service Company of New Mexico ("PNM") and the Albuquerque Bernalillo County Water Utility Authority ("ABCWUA") in this case.

I. Adoption of Staff's Proposed Rule 572 Changes Without Staff's Inseparable RCT Increases Will Frustrate Achievement of the State's RPS.

The effects that Staff's proposed inseparable changes to Rule 572 would have on the ability of the State's largest (investor-owned) electric utilities to satisfy the Renewable Portfolio Standard ("RPS") in the Renewable Energy Act ("REA") in the future are clear from the record. Under existing Rule 572, *only* PNM has claimed Reasonable Cost Threshold ("RCT)" reductions to the RPS to date. If the Commission applied Staff's proposed methods for estimating RPS costs to each of those utilities' latest renewable energy procurement plans without also increasing the inseparable RCT percentage increases proposed by Staff, El Paso Electric Co. ("EPE") and Southwestern Public Service Co. also would be unable to satisfy their 10% RPS within that proposed RCT "today" and will have greater difficulty satisfying their *higher* RPS in the future.[1]

Stripped to their essence, the BICs by NMIEC, the AG, PNM and ABCWUA ask the Commission to make it substantially more difficult if not impossible for those utilities to satisfy their statutory RPS in the future by urging the Commission to adopt changes to Rule 572 proposed by Staff, opposed by REIA in its Comments,[2] that would significantly reduce the amounts utilities can spend to meet those statutory requirements but reject

[1] Tr. 50-51 (Lamberson); 243 (Evans); Recommended Decision, Case No. 12-00217-UT (p. 23).
[2] Primarily, "annual bill impact" interpretation of RCT and removal of cost-levelization and consideration of potential avoided capacity cost and environmental benefits when estimating life-cycle RPS costs.

Staff's proposed RCT percentage increases that Staff makes clear are legally inseparable from those changes. REIA believes Commission adoption of changes to Rule 572 that would have that result would effectively gut future achievement of the Legislatures' RPS requirements in a manner that is not only predictable, but unlawful.

Staff's BIC confirms the *legal* basis for Staff's proposed RCT percentage increases, which EPE supports. It also explains why Staff has insisted since proposing its "Revised Rule 572" that its proposed RCT percentage increases "cannot be separated from Staff's proposed standard methodology for calculating RCT costs, applying the method to the RCT, and calculating bill impacts due to REA procurements."[3]

Addressing "applicable law," Staff's BIC (at 4-5) maintains its proposed RCT increases are based on and consistent with the criteria in §§ 62-16-4.C(1)-(5) and argues "the Commission has historically used as its primary standard 'the impact of the cost of renewable energy on overall retail customer rates,'" citing § 62-16-4.C, Rule 572.11.A and Commission descriptions of the RCT in Case Nos. 08-00084-UT and 07-00157-UT as "the existing overall bill impact RCT" and "rate-cap RCT." That argument, however, pours meaning and reads language into § 62-16-4.C, Rule 572.11 and those Commission orders *that simply is not there*, contrary to *State ex rel. Sandel v. NMPUC*, 1999-NMSC-019, ¶ 17, 980 P.2d 55, 61-62 ("*Sandel*"). *Accord Burroughs v. Bd. of County Com'rs of Bernalillo Cty*, 88 N.M. 303, 306, 540 P.2d 233, 236 (1975) ("*Burroughs*").

The plain language in § 62-16-4.C and Rule 572.11 does *not* say that the Commission shall make 'the impact of the cost of renewable energy on overall retail customer rates,'" the "primary standard" or criteria to be applied when establishing or

[3] Staff BIC, p. 2, n. 1.

modifying the RCT. Nor do the Commission's Final Orders in Case Nos. 08-00084-UT or 07-00157-UT state that.

The plain language in § 62-16-4.C and Rule 572.11 states that the customer rate impact of renewable energy is simply *one* of the five factors enumerated therein that the Commission "shall" and "will" "take into account" when establishing or modifying the RCT. That language, quite clearly, requires the Commission to reasonably balance all of those factors without any such short-term and short-sighted rate impact primacy.

Likewise, the Commission's discussion of the RCT and Rule 572.11 in its Final Order in Case No. 07-00157-UT (pp. 55-57) did not interpret § 62-16-4.C to mean, as Staff and others argue, that renewable energy "plan year" bill impacts are the "primary standard" or criteria the Commission must or should apply when establishing or modifying its RCT. The Commission made clear in that Order (p. 34) that it interpreted § 62-16-4.C and other provisions in REA to mean that it was not charged with the responsibility of simply rubber-stamping utilities' focus "on minimizing initial costs, to the exclusion of both the long-term benefits of diversification that are set out in the REA and the factors other than cost that are enumerated in the Act." Likewise, the Final Order in Case No. 08-00084-UT (pp. 11-13) expressly recognized the Commission's statutory obligation "to balance the public interest in developing an increasing amount of renewable energy in the state against the need to not overly inflate electric rates." There simply is no legal or other basis for the Commission to depart from that long-standing Commission interpretation of the REA now, in this case.

No language in § 62-16-4.C(3) states or suggests that, to protect utility customers against unreasonable renewable energy procurement costs, the Commission should

implement rules that establish the RCT as an annual customer "bill impact" limit that excludes consideration of "the overall diversity, reliability, availability, dispatch flexibility, cost per kilowatt-hour and life-cycle cost on a net present value basis of renewable energy resources available" and "other factors, including public benefits, that the Commission deems relevant" as provided in §§ 62-16-4.C(4) and (5). Staff's BIC (at 1) inaccurately describes Staff's annual "bill impact" interpretation of the RCT as a "transparent" "'what you see is what you get proposal.'" As discussed in REIA's BIC (at 6-7), it is undisputed that, under the Commission's established ratemaking practices, utility customers do not "see" or pay for their utility's annual RPS compliance costs in their utility bills during a utility's "plan year." Moreover, to the extent renewables procurements do provide demonstrable avoided capacity cost and environmental benefits to utility customers and the public, Staff's approach ensures that customers will "get" those benefits without "seeing" them in their utility bills or in the Commission's records concerning utility renewable portfolio procurement plans. For these reasons, Staff's "transparent ratepayer protection mechanism" and "no "contemporaneous benefit" arguments (and similar arguments by PNM, NMIEC and the AG) for Rule 572 provisions that, absent a variance, would no longer require utilities to address, or the Commission to consider, any possible avoided capacity costs or other public benefits, such as environmental benefits, of renewables except for avoided fuel costs ring very hollow.[4]

Staff's arguments, joined by the AG, NMIEC and PNM,[5] that its "compromise"

[4] The hearing testimony by PNM witness Ortiz (Tr. 267) quoted in Staff's BIC (at 7) that "[i]f you start talking about avoided costs...you are going to give a credit for costs that certainly will not be reflected in customer's [sic] bills during the year covered by the renewable procurement plan" does not support Staff's "transparency" argument and is nonsensical. Obviously, a capacity or other cost that is *avoided* by a utility due to its procurement of renewables will not be reflected in customers' bills. How could it be?

[5] AG BIC at 4; NMIEC BIC at 8-9; PNM BIC at 3.

Approach should be approved by the Commission because it is simpler and avoided costs are difficult to quantify and often contentious do not provide legitimate reasons for the Commission to adopt RCT rules that are not consistent with § 62-16-4.C(4) and other requirements and objectives in the REA. As Vote Solar rightly notes in its BIC (at 5-7), those arguments are inconsistent with the Commission's *essential* function and responsibility as an agency that is supposed to have special expertise concerning public utility matters that routinely present difficult and contentious issues concerning the quantification of utility costs and benefits. The Commission should not abandon that function and responsibility in utility renewable energy procurement plan cases.

II. Additional Flaws in NMIEC's, the AG's and PNM's Legal Arguments.

The fundamental legal problem with virtually all of NMIEC's arguments, some of which are joined in the AG's BIC, is that they are inconsistent with established rules of statutory construction and also pour meaning and read language into the REA that simply is not there, contrary to *Sandel* and *Burroughs*, *supra*. NMIEC's BIC (at 3) asserts, somewhat misleadingly, that "[t]he RCT is the only factor in the REA that allows a utility to set aside the requirement to meet the...RPS...mandates." But as NMIEC well knows, pursuant to § 62-16-4.A(2), a utility's annual RPS is *reduced* by the annual large non-governmental customer cap on RPS costs to those customers. That provision lowers the rate impacts of a utility's annual RPS obligations on its large non-governmental customers *as well as on its other customers* in two distinct ways. It reduces the total amount of renewable energy a utility must procure annually, thereby reducing RPS compliance costs for *all* customers of a utility. It further reduces the amounts those large

customers must pay for their shares of a utility's *reduced* RPS compliance obligation despite demanding 10 million kWhs or more of power from their utility annually.

Building on that misleading RCT claim, NMIEC's BIC (at 3-4) argues that, in §§ 62-16-4.A(2) and A(3) (mis-cited as §§ 62-16-2.A(2) and A(3)), "the Legislature has established an overall 'zone of reasonableness' for the RCT percentage...in the range of 2%-2 ½%."[6] NMIEC argues further that the phrase "annual electric charges" in those sections of the REA shows "the Legislature intended the RCT to reflect the actual bill impact on consumers" and that "it is also instructive" that the Legislature established a spending limit on renewable resources for rural electric cooperatives of no greater than 1% of their gross receipts in a different statute, § 62-15-34.B.

None of those NMIEC contentions are supported by the plain language in the *distinct* section of the REA (§ 62-16-4.C) addressing the factors the Commission must consider when modifying the RCT. NMIEC's transposition of language from other sections in the REA and other statutes to ascribe unexpressed legislative intent to § 62-16-4.C is exactly the sort of manipulation of legislative language that *Sandel, Burroughs* and established canons of statutory construction instruct the Commission to reject.

When interpreting statutes, the Commission must give their plain language its ordinary meaning, unless the Legislature indicates a different one was intended. *NMIEC v. NMPRC*, 2007-NMSC-053, ¶ 20, 169 P.3d 105. The Commission must "read related statutes in harmony so as to give effect to all provisions" and "'under the presumption that the legislature acted with full knowledge of relevant statutory and common law...." *Id.* When a statute is clear and unambiguous, the Commission must interpret it as written. *State v. Jonathan M*, 109 N.M. 789, 790, 791 P.2d 64, 65 (1990). Statutes must

[6] The AG makes a similar unsupported "zone of reasonableness" claim. AG BIC at 9.

be construed so that none of their parts is redundant or superfluous. *Katz v. New Mexico Dep't of Human Servs., Income Support Div.*, 95 N.M. 530, 534, 624 P.2d 39, 43 (1981). Specific statutory provisions prevail over more general provisions. *City of Albuquerque v. Redding*, 93 N.M. 753, 605 P.2d 1156, 1158 (1980).

As noted in the Commission's Final Order in Case No. 08-00084-UT (p. 12), the Legislature has not increased the 2%/$99,000 annual large customer rate cap in § 62-16-4.A(2) proportionately with the 5% RPS *increases* in 2015 and 2020 established in § 62-16-4.A(1). One may question the wisdom and fairness of that. If the Legislature had intended the rate cap in §§ 62-16-4.A(2) to establish "an overall 'zone of reasonableness' for the RCT percentage...in the range of 2%-2 ½%" applicable to all other utility customers, however, it could have included language saying so. *See, e.g., Regents of Univ. of N.M. v. N.M. Federation of Teachers,* 1998-NMSC-020, ¶ 32, 125 N.M. 401, 962 P.2d 1236 ("we can see no point to construct the language of statutory provisions that were never enacted."); *State v. Block*, 2011 NMCA-101, ¶ 19, 263 P.3d 940 (courts won't read limiting language into statutes that isn't there). The Legislature has not done that.

Moreover, the Legislature did not enact the political subdivision exemption in § 62-16-4.A(3) until 2011--four years *after* Rule 572.11.B was issued, increasing the RCT to 3% beginning 2015. The Legislature is presumed to have been aware of that regulation at that time. There simply is no language in that section stating or suggesting that it was intended to establish a "zone of reasonableness" or upper limit for the RCT.

NMIEC's "zone of reasonableness" claim is, at bottom, based on its argument (BIC at 4) that an RCT that does not establish a 2-2½% limit on the amount all customers' rates may increase *at any future time* due to a utility's compliance with its

annual RPS "imposes unjust and discriminatory rates on customers who are not protected by other rate caps." In other words, NMIEC, which obtained from the Legislature the discriminatory rate cap in § 62-16-4.A(2) for its members and no other customers, now asks the Commission to provide a remedy for that *statutory* discrimination between different customers which the Legislature did not provide in the REA.

The Public Utility Act does not prohibit all rate differences between utility customers. It only prohibits rate differences between similarly situated customers that have no reasonable basis. *See, e.g., City of Albuquerque v. N.M. Public Service Com'n*, 115 N.M. 521, 854 P.2d 348, 358 (1993). The Legislature is the appropriate place to address whether and how to cure such *statutory* discrimination in light of its increasing RPS, particularly where the remedy NMIEC (and the AG) advocates would make it virtually impossible for the State's largest electric utilities to satisfy those legislative mandates in future years.

NMIEC's argument (BIC, 4-7) that the existing diversity requirements established in Case No. 07-00157-UT are "contrary to the REA" likewise is based on reading meaning and language into the REA that is not there. It is not much different than NMIEC's argument challenging those requirements in Case No. 07-00157-UT which the Commission addressed and rejected five years ago.[7]

NMIEC's principal new argument now is that the Commission's diversity requirements are inconsistent with language in § 62-16-5.A providing that "[t]he kilowatt-hour value of renewable energy certificates may be varied by renewable energy resource or technology," which NMIEC claims (without citation) "has been commonly referred to as 'REC multipliers'" and is the "specific mechanism the Commission must

[7] *Final Order*, Case No. 07-0157-UT, pp. 19-20. NMIEC did not appeal that Order.

follow to achieve [the] diversity" required in §§ 62-16-4.A(4) and C(4). However, that section of the REIA (addressing the Commission's establishment of a system of RECs to be used by utilities to show their compliance with the RPS) makes no mention of "diversity" and contains no other language indicating the Commission must use "REC multipliers" to satisfy the Legislature's diversity mandate in other sections of the REA.

NMIEC's BIC (at 7) criticizes the Commission's diversity requirements as "quotas" supported "mainly" by groups representing the solar industry. However, consistent with the Commission's findings in its Final Order in Case No. 07-00157-UT (at 34), Staff recommends retention of the Commission's existing 20% solar requirement because "[w]ithout specified diversity criteria, a utility would attempt to satisfy the RPS requirements with the least cost resource options, rather than diversifying its renewable portfolio and considering all required REA criteria in § 62-16-4.A(4)." PNM also supports that 20% solar requirement, stating (BIC at 4) that the "diversity targets in the current Rule 572 are lawful and appropriate" and noting they "are not properly characterized as strict 'quotas'" due to the provisions in Rule 572.14.B and "provide a useful framework for the development and consideration of utility procurement plans."

NMIEC's BIC (8-9) and PNM's BIC (at 4) endorse Staff's recommendation that utilities should be required to obtain a variance before they can show any avoided capacity costs from renewable procurements which, NMIEC argues, "should be limited to resources that are dispatchable." Requiring utilities to obtain a variance to address whether their procurements of renewables in a procurement plan provide any avoided capacity cost benefits is unreasonable because it is based on an unsubstantiated legal presumption that avoided capacity costs are not demonstrable and would erect a new

procedural hurdle that would discourage utilities from even presenting such assessments for review by the Commission and interested parties. Limiting such assessments to dispatchable renewable resources also is unreasonable because, as noted in REIA's BIC (at 4, n.8), EPE witness Evans acknowledged (Tr. 238-239) that renewable resources need not be dispatchable to provide avoided capacity cost benefits to utilities.

The AG's BIC (at 6) argues the Commission should "relax" its existing 20% solar diversity requirement "[i]n light of the fact that solar costs are decreasing almost exponentially." That "fact," however, should make it easier—not more difficult—for utilities to satisfy that requirement in the future. Having recommended Rule changes that would virtually eliminate Commission consideration of any "life-cycle cost" and benefits of renewable energy procurements other than avoided fuel costs, the AG argues inconsistently that diversity in utility procurement plans "should be based on the technical and economic costs *and benefits* facing a particular utility during a given time period." (Emphasis added). The AG's argument there also ignores the lack of diversity in utility procurement plans prior to 2008 that was one of the bases for the Commission's existing diversity requirements in its Final Order in Case No. 07-00157-UT (at 34). The Commission therefore should reject NMIEC's and the AG's diversity arguments.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **Response Brief of the Renewable Energy Industries Association of New Mexico** in the above-captioned case was sent on **December 10, 2012** by electronic mail to the following:

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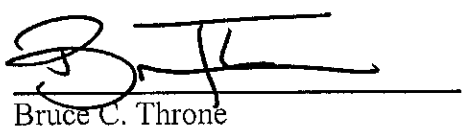

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