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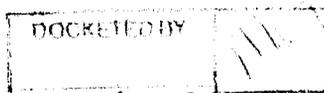
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Arizona Corporation Commission

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ADMITTED TO PRACTICE IN:
ARIZONA, COLORADO, MONTANA,
NEVADA, TEXAS, WYOMING,
DISTRICT OF COLUMBIA

OF COUNSEL TO
MUNGER CHADWICK, P.L.C.

January 5, 2010

Docket Control
Arizona Corporation Commission
1200 West Washington
Phoenix, Arizona 85007

Re: SolarCity Corporation
Docket No. E-20690A-09-0346

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To Whom It May Concern:

Enclosed for filing in the above-referenced proceeding are fourteen (14) copies of a Supplement to Late-Filed Exhibit SunPower-3.

This Supplement to Late-Filed Exhibit SunPower-3 consists of the following document:

| Description | Agency | Number |
|---|---|--|
| In The Matter of A Declaratory Order Regarding Third-Party Arrangements for Renewable Energy Generation | New Mexico Public Regulation Commission | Declaratory Order Case No. 09-00217-UT |

The aforesaid Declaratory Order was issued on December 17, 2009 by the New Mexico Public Regulation Commission in Santa Fe, New Mexico, and it partially adopts and modifies the Recommended Decision in the New Mexico proceeding which was included in the original filing of Late-Filed Exhibit SunPower-3 on October 29, 2009.

Also enclosed are two (2) additional copies of aforesaid Supplement. I would appreciate it if you would "filed" stamp the same and return them to me in the enclosed stamped and addressed envelope. Thank you for your assistance. Please advise me if you have any questions.

Sincerely,

Angela R. Trujillo

Secretary

Lawrence V. Robertson, Jr.

cc: Hon. Jane L. Rodda
All Parties of Record

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AT THE COMMISSION
DOCKET CONTROL

Supplement To Exhibit SunPower-3 (Late-filed)

Docket No. E-20690A-09-0346

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

**IN THE MATTER OF A DECLARATORY ORDER)
REGARDING THIRD-PARTY ARRANGEMENTS)
FOR RENEWABLE ENERGY GENERATION)**

Case No. 09-00217-UT

**DECLARATORY ORDER PARTIALLY ADOPTING AND MODIFYING
RECOMMENDED DECISION**

THIS MATTER comes before the New Mexico Public Regulation Commission (“Commission”) upon the Recommended Decision (“RD”) of the Hearing Examiner, Carolyn R. Glick, issued on October 23, 2009. Having considered the RD (attached hereto as Exhibit 1 and incorporated by reference herein), the Exceptions and the Responses thereto and the oral arguments of the parties in this case, the record in this case and being fully informed in the premises,

THE COMMISSION FINDS AND CONCLUDES:

1. The Statement of the Case, Discussion, and Findings of Fact and Conclusions of Law contained in the RD is hereby incorporated by reference and adopted by the Commission except to the extent expressly modified or supplemented herein.
2. The Commission adopts the description of third-party arrangements presented in the RD, and in doing so clarifies the description in the Commission’s original docketing order.
3. Pursuant to 1.2.2.37.C NMAC five parties filed Exceptions¹ to the Recommended Decision, six Responses and Replies² were filed, and pursuant to the

¹ Exceptions were filed by Public Service Company of New Mexico (“PNM”), El Paso Electric Company (“EPE”), New Mexico Rural Electric Cooperative Association, Inc. (“NMRECA”) the Utility Division Staff of the Public Regulation Commission (“Staff”) and the City of Las Cruces.

Commission's November 19, 2009 Order requesting supplemental briefing, four Supplemental Briefs were filed.

4. On November 19, 2009, the Commission granted a motion requesting oral argument and on December 3, 2009, granted a motion requesting an expanded scope of oral argument.

5. On December 9, 2009, the parties were afforded an opportunity to present oral argument. Four parties generally opposing the RD and six parties generally favoring the RD appeared and argued.

DISCUSSION

Issues on Exceptions

6. The Commission has reviewed the many specific issues raised by the parties' Exceptions, Responses and Replies and finds that many of the issues raised present subtle variations of the same argument. Generally, PNM, EPE, NMRECA, and Staff argue on exception against Findings 3, 4, and 5 in the RD; i.e., these parties argue that a developer owning one or more distributed generation systems will always be a public utility if the developer sells power to the system's host on a kilowatt-hour basis. Las Cruces, VAWT, and

² Responses or Replies were filed by EPE, Las Cruces, IREC, VAWT Power Management, Inc. ("VAWT"), Coalition for Clean Affordable Energy along with Western Resource Advocates, the NM Conference of Churches, the Rio Grande Chapter of the Sierra Club and the Natural Resource Defense Council (hereinafter collectively "CCAEC") and PNM.

CCAEC generally take positions in support of the RD.³ The issues raised by the RD, exceptions and responses are so inextricably interwoven as to make it impractical to view each exception in isolation from the all others. Therefore, the Commission addresses selected exceptions specifically but addresses the remainder of the Exceptions, Responses, Replies and related issues as a whole in the broader context of its analysis of the RD and of the issues.

Staff Exception to Declaratory Order

7. Staff asserts, for the first time, in its Exceptions and as clarified through oral argument that issuance of a declaratory order would amount to an impermissible advisory opinion, that such an order would violate the commission rule 1.2.2.21 NMAC regarding declaratory orders, that to the extent the RD seeks to “facilitate” the development of renewable energy resources such an order is beyond the Commission’s statutory authority, and that the fact specific nature of the determination of an entity’s status as a public utility renders issuance of a declaratory order a source of administrative inefficiency.

8. Notably, none of the other parties took exception to the RD’s statement of the appropriateness of the issuance by the Commission of a Declaratory Order.⁴ IREC filed a

³ However, it is also the case that even parties that urge generally the same outcome in this matter disagree about scope of their exceptions or about some of application of the law to the assumed facts. For example, Interstate Renewable Energy Council (“IREC”) acknowledges that private power lines may be duplicative of utility service and arguably are not permissible while Las Cruces urges that the construction of private power lines is permissible but could under some circumstances cause a developer to become a public utility. (IREC Oral Argument by J. Keyes and Las Cruces Oral Argument by A. Stevens)

⁴ The New Mexico Rural Electric Cooperative Association (“NMRECA”) submitted exceptions which “endorse and adopt” the Staff’s Exceptions. However NMRECA focused on only two of Staff’s Exceptions and did not brief the issues raised by Staff’s exception to the issuance of a declaratory order.

responses to Staff's exception which supported the authority of the Commission to issue a declaratory order and addressed each one of the Staff's arguments directly (IREC Response to Exceptions at 2 - 4).

9. Moreover, during oral argument, Staff did not take exception to the Commission entering a declaratory order, if that order was narrowly structured to retain regulatory oversight.

10. Thus it appears to this Commission that Staff's Exception is really directed to the outcome of this matter rather than the appropriateness of issuing a declaratory order in this case.

11. The Hearing Examiner, in her RD has aptly stated that it is within the power of the commission to issue a declaratory order to remove uncertainty and provide the public – including regulated entities – with a clear understanding of the laws and rules administered by the Commission.

12. To the extent that Staff's concern is that the RD uses the term "facilitate" in a way that suggests to Staff an intent of the Commission in this proceeding to support any particular outcome, the point merits clarification. The Commission has neither prejudged this matter nor sought to bolster any particular industry in favor of any other industry. However, this Commission supports and joins with the Legislature in encouraging growth of renewable energy industry so long as it is in accordance with the laws of the State. Further, Commission understands and adopts the RD's use of the term facilitate to refer only to the duty and authority of the Commission to interpret the Public Utilities Act. (IREC Response to

Exceptions at 2 – 3). To the extent that Staff takes exception to the Commission’s issuance of a declaratory order on the grounds that the determination of whether an entity is a public utility is always a fact specific inquiry requiring the development of a factual record through an adjudication, the Commission finds otherwise, as discussed below.

PNM, NMRECA, and Staff’s Exception To Conclusions No. 3, 4, and 5

13. PNM, NMRECA, and Staff take generally exception to the findings of fact and conclusions of law in the RD that reach the conclusion that a third-party developer selling supplemental renewable energy to a single customer is not a public utility within the meaning of the law regardless of the number of customers served and the manner of service.⁵

Essentially, these parties contend – for slightly differing reasons – that under the statutory definition of “public utility” and case law applying that definition, a developer who provides electricity to one or more hosts is a public utility.

14. PNM argues that a single developer servicing only a single host is a public utility because the developer does not fit within any of the statutorily enumerated exceptions (1978 NMSA Sec. 62-3-.4 and 62-4-4.1) to those otherwise included within the definition of “public utility” set forth at 1978 NMSA Sec. 62-3-3.G NMSA. (PNM Exceptions at 3.) In support of this argument PNM paraphrases the Supreme Court in *Griffith v. New Mexico Public Service Commission*, 86 N.M. 113, 115, 520 P. 2d 269 (1974) as follows:

⁵ EPE did not take exception to Finding of Fact and Conclusion of Law number 3 that states that a developer who owns a distributed generation system at its host’s premises and who sells electricity generated by the DG system to the host for only the host’s use is not a public utility.

What the [PUA] declares in this case is that in order to preserve the public welfare, any person not engaged solely in interstate business, who operates a facility which [sells or furnishes electricity] to the public for [light, heat or power], is a public utility unless he [furnishes electricity] only to himself, his tenants, or his employees [or the facility is leased to a public utility or other lessee].(PNM Exceptions at 3)

15. While the paraphrasing of the quoted language is fair, as far as it goes, PNM fails to address the central question which is implicit in the quoted language and expressly addressed by the hearing Examiner's RD. "The contested issue is whether a developer provides these services 'to or for the public'" (RD at 7). A public utility within the meaning of 1978 NMSA 62-3-3.G holds itself out as providing service "to the public." *Griffith, supra.* at 115. PNM's Exception simply assumes Developers to be public utilities and then argues that they are not within any statutory exceptions. On the other hand, EPE's Exceptions challenge the RD's analysis and application of the phrase "to the public" to the determination of the developers status.

EPE, NMRECA, PNM And Staff's Exceptions to Conclusion of Law No. 4 and 5

16. EPE, NMRECA, PNM and Staff took exception to the RD's discussion and the RD's Conclusion of Law number 4. Essentially, their arguments are a continuation of the exceptions PNM, NMRECA, and Staff took to Conclusion of Law number 3. They argue that a developer that offers its services to multiple customers is effectively "holding itself out" as a provider to "the public." See, e.g., PNM Exceptions at 8.

The Commission's Analysis of the Exceptions to Conclusions 3, 4, and 5

17. The Commission finds that the exceptions from Staff, EPE, PNM, and NMRECA should not be granted either in whole or in part, as discussed below.

18. The question presented by this declaratory order case is under what circumstances might a developer contracting with an electric utility customer to provide supplemental electricity become an electric utility within the meaning of the Public Utility Act.⁶ The key element to answering this question is the meaning of the phrase “to the public” in Section 62-3-3(G) of the Act. The Commission must analyze and apply the five cases in which the Supreme Court construed this portion of the law. In four of these cases, the Supreme Court found that the activities and circumstances at issue were not sufficient to make the entity in question a public utility within the meaning of the Act. *Socorro Elec. Coop. Inc. v. Pub. Svc. Co.*, 66 N.M. 343, 348 P.2d 88 (1959); *Llano, Inc. v. Southern Union Gas Co.*, 75 N.M. 7, 399 P.2d 646 (1964); *El Vadito de los Cerrillos Water Assoc. v. N.M. Pub. Svc. Comm’n*, 115 N.M. 784, 858 P.2d 1263 (1993); *Morningstar Water Users Assoc. v. N.M. Pub. Util. Comm’n*, 120 N.M. 579, 904 P.2d 28 (1995). In only one instance, *Griffith v. N.M. Pub. Svc. Comm’n*, 86 N.M. 113, 520 P.2d 269 (1974), does the Court declare that the entity question was a public utility.

19. As a preliminary matter, the Commission finds that the number of customers served is not a bright line test under New Mexico law for when a utility becomes a public

⁶ As the RD explains, the fact that it is *renewable energy* that is at issue in this declaratory order buttresses the conclusion that the transactions in question do not constitute public utility services, based on the purposes and policies stated in the Renewable Energy Act. However, we reach the same conclusion without reference to the REA by applying Supreme Court precedent interpreting the PUA to the other characteristics of the transactions in question, in particular that the electric sales are supplemental.

utility.⁷ In *El Vadito*, for example, the existence of 45 non-affiliated customers taking retail service from the water utility did not make the utility into a “public utility” within the meaning of the law. It cannot be maintained that going from one customer (*Llano*) to two or several makes an entity a public utility. Indeed, New Mexico case law explicitly holds that “the public or private character of the enterprise does not depend on the number of persons by whom it is used.” *Llano*, 75 N.M. at 18, quoting *Socorro*, 66 N.M. at 347.

20. Rather than the number of customers, the public utility designation turns on whether its use is open to “*all members of the public who may require it*,” including whether “*the public generally has a right to such use*.” *Id.* (emphasis in the original). A utility becomes a public utility by beginning to “act like a public utility.” *Morningstar*, 120 N.M. at 587, 904 P.2d at 36. For example, in *Griffith*, a real estate developer constructed a water system to serve homes on lots he had sold in a subdivision, and charged a monthly water service fee. 86 N.M. at 114, 520 P.2d at 270. As a utility commission, we know intuitively (as well as from our understanding of New Mexico case law) that the *Griffith* scenario constitutes “acting like” a public utility. By the same account, we understand that Griffith’s operation of his water utility in this manner make it untenable for him to unreasonably deny an individual homeowner access to the subdivision’s water supply service after an unrelated, private dispute.

See id.

⁷ This case comes to us with the parties on each side taking absolute positions; however, the Commission has considered in its deliberations whether the law might support a single customer relationship (RD Finding 3) but not multiple customer relationships. As discussed herein, the Commission concludes that numbers are not the determining factor.

21. As the United States Supreme Court held in the seminal case *Munn v. State of Illinois*, 94 U.S. 113 (1876):

“Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore one devotes his property to a use in which the public has an interest, he, in effect grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.”⁸

22. In *Griffith*, our Supreme Court echoes this principle, quoting cases from two other jurisdictions concerned with the question of when private property became characterized by public use. From a similar case in New Jersey: “As the character and extent of use [serving all lot owners and making them dependent on the utility for a necessity of life] make it public, we conclude the Association is operating a water system for ‘public use.’” *Griffith*, 86 N.M. at 116, 520 P.2d at 272, quoting from *Lewandowski v. Brockwood Musconetcong River, etc., Ass'n*, 37 N.J. 433, 181 A.2d 506 (1962). And from an Iowa case: “to the public means ... sales to sufficient of the public to clothe the operation with a public interest and doesn't mean willingness to sell to each and every one of the public without discrimination.” *Id.*, quoting from *Iowa State Commerce Com'n v. Northern Nat. Gas Co.*, 161 N.W.2d 111, 115 (1968). From these cases, our Court concludes that the public utility designation turns on “sales to sufficient of the public to clothe the operation with a public interest.” *Id.*

⁸ See also *Arnold v. Bd. of Barber Examiners*, 45 N.M. 57, 109 P.2d 779, 785 (1941) (“There is no magic in the phrase ‘clothed with affected with a public interest.’ Any business is affected with by a public interest when it reaches such proportions that the interests of the public demands that it be reasonably regulated to conserve the rights of the public.”)

23. In each of the five cases that have come before the New Mexico Supreme Court to construe the meaning of “public utility” and “sales to the public,” the Court’s determination turned on whether character of the operation has clothed it with a public interest by creating an expectation that regulation as a public utility is needed to protect consumer interests: Have the actions of the proto-utility created amongst the members of the public that are its potential customers a reasonable expectation that they are legally entitled to the utility’s services if they should demand or require those services?⁹

24. *Llano*, the one case in which, as in our declaratory order, the extent of an existing utility’s protection from competition is implicated, not only applies this principle, it holds that creating such an expectation is *the principle determinative feature* of the public utility designation. *El Vadito*, 115 N.M. at 790, 858 P.2d at 1269 (“In *Llano* we noted that *the principle determinative feature* of a public utility is that of service or readiness to serve, an indefinite public (or portion thereof) *which has a legal right to demand and receive its services.*”) citing *Llano*, 75 N.M. at 18, 399 P.2d at 653 (internal quotation marks omitted; emphasis added).

25. *Llano* also instructs us that the Public Utility Act does not protect a public utility from *all* competition, such as losing sales and revenues to a non-public utility entity engaged in

⁹ And by implication, but not explicitly in our case law, if they should require those services, do the customers have a reasonable expectation that they will be protected by regulation from being charged an unreasonable price.

retail sales.¹⁰ The customer at issue in *Llano* not only represented a significant amount of the public utility's revenue, the operators of the competing distribution system evinced an intention to cherry-pick additional large customers from the utility system. 75 NM at 9-10, 399 P.2d at 648. More importantly, if infringement on an existing utility's monopoly was to be a determining factor in the legal analysis, infringing sales to a single customer of whatever size would be as fatal to one's exemption from the PUA as sales to a score of the indefinite public.

26. Under the circumstances in this declaratory order, the third-party renewable developers are not public utilities within the meaning of the PUA. As the RD points out, these renewable developers are offering a supplemental service. If one or more third-party developers refuse to contract for services with a particular customer, whether its because the customer's premises are not well suited for a system, or for any other reason, that customer is not going to be without electric service. There is no obvious public policy basis for the Commission to regulate these third-party developers as public utilities so as to provide potential customers with a "legal right to demand and receive [the] services" of a third-party developer. *El Vadito*, 115 N.M. at 790, 858 P.2d at 1269. There is no obvious public policy that would require the Commission to step in and regulate the prices charged by the third-party developers: if a potential customer doesn't like what is being quoted, the customer may shop around or simply continue to rely exclusively on their rate-regulated public utility. And while some

¹⁰ In the current case, where only supplemental services are at issue, the PRC has the ability to use rate design to ensure that utilities retain the ability to recover their fixed costs from all customers, including an appropriate share from those having third-party suppliers.

customers of third-party developers may find it convenient to have recourse to the Commission in the event of a dispute with their provider, there's no obvious public policy calling for the Commission to be inserted into such a dispute (any more than in any other long-term commercial lease not involving a regulated monopoly). The third-party developer scenario is not *Griffith*, it's not even *Llano*.

27. Because we find that the meaning of "holding out" to an indefinite public in our New Mexico cases turns on whether a supplier or utility positions itself to give potential customers a legal right to demand and receive services, we reject the contentions that a third-party developer's general advertising of the possible availability of services or its contracting with multiple hosts constitutes holding out to the general public within the meaning of our laws.

28. In summary, whether or not they place advertisements in the *Albuquerque Journal* or elsewhere, or whether or not they attract significant numbers of contracted customers, by the nature of what they are providing, third-party developers will not have clothed their operations in the public interest to the extent that public policy demands that they be regulated as public utilities. The Hearing Examiners Recommended Decision should be upheld on these points.

Exceptions of the City of Las Cruces to Findings 6 and 7.

29. The Recommended Decision should be modified in order to partly grant the exceptions of the City of Las Cruces, which correctly points out that under *Llano*, an entity that is not a public utility may operate a distribution system. However, the Recommended

Decision is correct in finding that requiring a public utility to “wheel” the power of a third-party on a compulsory basis is impermissible.

30. The Commission adopts the RD’s discussion of *State of N.M. ex rel Sandel v. N.M. Pub. Util. Comm’n*, 1999-NMSC-019, 127 N.M. 272, and rejects PNM’s arguments on exception based on that case.

31. The RD at Section II.D.5, Net Metering and Incentive Payments, and Decretal Paragraph E goes beyond the scope of the issues which the Commission’s Initial Order and Supplemental Order required the regulated utilities and interested interveners to brief. The Commission should not make findings of fact nor conclusion of law with regard to the implications of the present order on net-metering tariffs.

IT IS THEREFORE ORDERED AND DECLARED:

A. A third party developer that owns renewable generation equipment that is installed on a utility customer’s premises, pursuant to a long term contract with the customer to supply a portion of that customer’s electricity use, payments for which are based on a kilowatt-hour charge, is not a public utility subject to regulation by the Commission.

B. A third party developer who owns renewable generation equipment, which is installed on a utility customer’s premises, and uses this equipment to serve multiple customers for a portion of each customer’s electricity use and, payments for which are based on a kilowatt-hour charge, is not a public utility subject to regulation by the Commission. However, a third

party developer may not use a public utility's distribution lines or equipment in order to route electricity to multiple customers.

D. This Order is effective immediately.

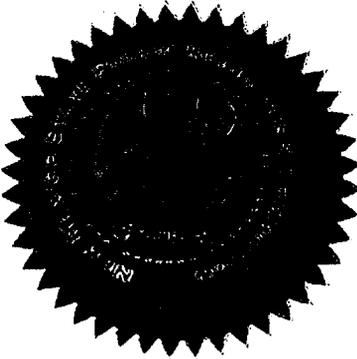
E. Copies of this Order shall be served on all persons listed on the attached Certificate of Service. A copy of the RD shall not be served with this Order due to the length of the document, and because the parties already have a copy of the RD.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this 17th day of
December, 2009.

NEW MEXICO PUBLIC REGULATION COMMISSION

Voted no

SANDY JONES, CHAIRMAN



Telephonically approved

DAVID W. KING, VICE-CHAIRMAN

Jason Marks

JASON MARKS, COMMISSIONER

Approved

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Approved

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BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF A DECLARATORY ORDER)
REGARDING THIRD-PARTY ARRANGEMENTS) **Case No. 09-00217-UT**
FOR RENEWABLE ENERGY GENERATION.)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of **Declaratory Order Partially Adopting and Modifying Recommended Decision** issued December 17, 2009, was forwarded on December 30th, 2009, by first-class postage prepaid mail, and/or e-mailed to the following parties:

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NEW MEXICO PUBLIC REGULATION COMMISSION



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