BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF EL PASO ELECTRIC COMPANY'S 2009 PROCUREMENT PLAN PURSUANT TO THE RENEWABLE ENERGY ACT AND 17.9.572.16 NMAC	)))))	**Case No. 09-00259-UT**

RECOMMENDED DECISION OF THE HEARING EXAMINER

Elizabeth C. Hurst, Hearing Examiner for this case, submits this Recommended Decision to the New Mexico Public Regulation Commission ("Commission" or "NMPRC") pursuant to 1.2.2.29(D)(4) NMAC and 1.2.2.37.(B) NMAC. The Hearing Examiner recommends that the Commission adopt the following Statement of the Case and Discussion, Findings and Conclusions, and Decretal Paragraphs.

STATEMENT OF THE CASE

On July 1, 2009, El Paso Electric Company ("EPE" or "Company") filed its 2009 Annual Procurement Plan ("2009 Plan" or "Application") pursuant to the New Mexico Renewable Energy Act NMSA 1978, Section 62-16-1 *et seq.* (the "REA") and NMPRC Rule 17.9.572 NMAC ("Rule 572"). EPE's 2009 Plan was supported by the direct testimonies and attached exhibits of EPE witnesses Ricardo Acosta and Evan D. Evans also filed on July 1, 2009.

On July 16, 2009, an Initial Order Extending Time and Appointing Hearing Examiner was issued extending for good cause the time period for resolution of this matter an additional ninety (90) days, through December 27, 2009, pursuant to NMSA 1978, Section 62-16-4(E) and appointing Elizabeth Hurst, hearing examiner, to preside over this matter.

On July 21, 2009, a Procedural Order, with an attached Notice, was issued setting: a public hearing for October 1, 2009, a protest deadline of August 21, 2009; an

intervention deadline of August 21, 2009; a direct testimony deadline of September 11, 2009, for Staff of the Commission's Utility Division ("Staff") and any interveners; setting a rebuttal testimony deadline of September 23, 2009; and requiring EPE by July 31, 2009, to publish the attached Notice one time in a newspaper of general circulation in the area in New Mexico where EPE provides utility service.

On July 26, 2009, the City of Las Cruces filed a Motion for the City of Las Cruces for Leave to Intervene and Request for Discovery.

On July 30, 2009, the Commission issued an Order for Supplemental Testimony.

On August 7, 2009, EPE filed proof of publication of Notice pursuant to the Hearing Examiner's order demonstrating that the required notice was published one time on July 26, 2009 in the *Las Cruces Sun-News*.

On August 14, 2009, EPE filed the Supplemental Direct Testimony of Evan D. Evans.

On August 18, 2009, an Official Protest was filed by renewable energy industry and citizen and environmental advocacy organizations.

On August 21, 2009, a Motion for Leave to Intervene by Mark A. Westbrock was filed by Mark A. Westbrock.

On August 21, 2009, a Protest, Motion for Leave to Intervene and Request for Discovery of the Coalition for Clean Affordable Energy was filed by the Coalition for Clean Affordable Energy ("CCAE").

On September 11, 2009, the Prepared Direct Testimony of R. Dwight Lamberson was filed on behalf of Staff.

On September 11, 2009, the Prepared Direct Testimony of Mark A. Westbrock was filed by Mark A. Westbrock.

On September 25, 2009, EPE filed the Rebuttal Testimony of Evan D. Evans.

On October 1, 2009, the public hearing in this matter commenced. The following counsel were present: Randall Childress and Stacey Goodwin for EPE; Helga Schimkat for CCAE; and Nancy Burns for Staff. Mr. Westbrock appeared *pro se*. Written and oral testimonies were received from EPE witnesses Ricardo Acosta and Evan Evans; Mr. Westbrock; and Staff witness Dwight Lamberson. The Hearing Examiner admitted the following exhibits into evidence: Direct Testimony and Exhibits of Ricardo Acosta (EPE Exhibit ("Ex.") 1); Direct Testimony and Exhibits of Evan D. Evans (EPE Ex. 2); Supplemental Testimony of Evan D. Evans (EPE Ex. 3); Rebuttal Testimony and Exhibits of Evan D. Evans (EPE Ex. 4); Direct Testimony of Mark A. Westbrock (Westbrock Ex. 1); Direct Testimony of Dwight Lamberson (Staff Ex. 1). There were no public comments made at the Hearing. However, an Official Protest in opposition to EPE's 2009 Plan was filed by ten renewable energy industry, citizen, and environmental advocates.

The Hearing Examiner took under advisement EPE's unopposed request to admit EPE's Ex. 5, Response to Interrogatories from Westbrock to EPE, after due consideration, the Hearing Examiner **DENIES** EPE's request to admit EPE Ex. 5.

At the close of hearing, the Hearing Examiner directed the parties to submit proposed Findings and Conclusions within ten days from the filing of the Transcript of Proceedings of October 1, 2009 ("Tr."). The Hearing Examiner further directed the parties, to the extent possible, to file joint Findings and Conclusions.

The Transcript was filed on October 10, 2009.

Pursuant to an e-mail request on October 15, 2009, parties were given until

October 21, 2009, to file post-hearing findings and conclusions.

On October 21, 2009, EPE submitted the Joint Proposed Recommended Decision of EPE and Staff, and Mr. Westbrock submitted the Proposed Findings and Conclusions of Mark A. Westbrock. CCAE has taken no position on EPE's 2009 Plan.

On October 29, 2009, EPE filed an Objection to Mr. Westbrock's Proposed Findings of Fact ("Motion to Strike"). After due consideration, EPE's Motion to Strike is **DENIED**.

DISCUSSION

Background

The REA requires a public utility to include renewable energy in its electric energy supply portfolio and to meet the REA's renewable portfolio standard ("RPS"). The RPS is the percentage of retail sales by a public utility to electric consumers in New Mexico that is required to be supplied by renewable energy. Under the REA, for public utilities other than rural electric cooperatives and municipalities, the RPS is 5 percent by January 1, 2006, 10 percent by January 1, 2011, 15 percent by January 1, 2015, and 20 percent by January 1, 2020. NMSA 1978, § 62-16-4(A)(1). Under Rule 572, however, the Commission set the minimum RPS for calendar years 2007 through 2010 at 6 percent. 17.9.572.10(B) NMAC; Case No. 07-00157-UT, *Final Order*, August 7, 2007, at p. 53. A public utility is not required to add renewable energy to its electric energy supply portfolio above a statutorily-mandated Reasonable Cost Threshold ("RCT") to be established by the Commission. NMSA 1978, § 62-16-4(C); 17.9.572.11 NMAC.[1]

[1] The reasonable cost threshold for 2010 is 1.8 percent of all customers' aggregated overall annual electric charges, increasing on January 1, 2011, to 2 percent. 17.9.572.11(B) NMAC.

Compliance with the RPS is demonstrated through the retirement of renewable energy certificates ("RECs"). 17.9.572.13(A) NMAC. Each REC has a minimum value of one kWh of renewable energy. NMSA 1978, § 62-16-5(A). Use of a REC by a public utility for compliance with the RPS does not require physical delivery of the electric energy represented by the REC to a public utility. 17.9.572.13(C)(2) NMAC. Under Section 62-16-5 of the REA, use of a REC for compliance with the RPS does require that the electric energy represented by the REC be contracted for delivery, or consumed or generated by an end-use customer of the public utility in New Mexico unless the Commission determines that there is a national or regional market for exchanging RECs. NMSA 1978, § 62-16-5(B)(1)(b). RECs are required to be registered through the Western Renewable Energy Generation Information System ("WREGIS"). 17.9.572.13.E NMAC.

A public utility's renewable portfolio "shall be diversified as to the type of renewable energy resource, taking into consideration the overall reliability, availability, dispatch flexibility and cost of the various renewable energy resources made available by suppliers and generators." NMSA 1978, § 62-16-4(A)(3). Prior to its amendment in 2007, Rule 572 promoted diversity by varying the value of RECs depending on the technology used to produce the electricity. It provided that a kWh of electricity produced by biomass and related technologies or geothermal generation counted as two kWh for the purpose of the RPS, and a kWh of solar energy counted as three. Wind and hydropower were valued one-to-one. 17.9.572.14 NMAC (2005). In its 2007 Order amending Rule 572 (NMPRC Case No. 07-00157-UT), the Commission prospectively eliminated the weighted valuation language, while grandfathering in existing resources

with weighted values. The Commission also set minimum percentage standards for specified renewable energy resources beginning in 2011. Under the amended Rule, a public utility will be required to meet the RPS using at least 20 percent wind energy, 20 percent solar energy, 10 percent other renewable energy technologies, and 1.5 percent distributed generation for calendar years 2011 through 2014 and 3 percent distributed generation beginning in calendar year 2015. 17.9.572.7(G), 17.9.572.14 NMAC.

Section 62-16-4(D) of the REA and Rule 572 require a public utility to file annually with the Commission a procurement plan that includes:

1. the cost of procurement in the next calendar year for any new renewable energy resource required to comply with the renewable portfolio standard;
2. the amount of renewable energy the public utility plans to provide in the calendar year commencing sixteen months later, to satisfy the percentages specified in Rule 572, less any reductions authorized by Rule 572 or by law;
3. an explanation and exhibits demonstrating how the amount specified in Paragraph 2 was determined;
4. the reductions, if any, to the renewable portfolio standard for procurements for nongovernmental customers with consumption exceeding ten million kilowatt hours per year and/or due to the reasonable cost threshold, including an explanation and exhibits demonstrating how the reduction was determined;
5. testimony and exhibits that demonstrate that the proposed procurement is reasonable as to its terms and conditions considering price, costs of interconnection and transmission, availability, dispatchability, renewable energy certificate values and portfolio diversification requirements; or
6. demonstration that the plan is otherwise in the public interest.

NMSA 1978, § 62-16-4(D); 17.9.572.16(A) NMAC. A public utility must file the annual portfolio procurement plan on July 1, 2008, and July 1 of each year thereafter. 17.9.572.16(A) NMAC. Beginning with the procurement plans filed in 2008, the Commission has required that utilities demonstrate how they will bring their existing portfolios into compliance with amended Rule 572 by 2011. Case No. 07-00157-UT,

Final Order at 39. The Commission can reject or even modify a utility procurement plan for, among other reasons, failure to provide for resource diversity, and if rejected, may then suspend the utility's obligation to procure additional resources for the time necessary to file a revised plan, provided that the total amount of renewable energy to be procured by the utility shall not change. NMSA 1978, § 62-16-4(E) and (F); Case No. 07-00157-UT, *Final Order* issued on August 7, 2007, at 22.

EPE's 2009 Plan

EPE's 2009 Plan requests a Commission order approving: the 2009 Plan together with the costs associated with the 2009 Plan; recovery of the costs of bundled renewable energy and associated RECs through EPE's Fuel and Purchases Power Cost Adjustment Factor ("FPPCAC"); and deferral of all other costs incurred by EPE to meets its RPS obligations with carrying charges for recovery in a general rate cases.

EPE's 2009 Plan proposes to increase the amount of energy and associated RECs purchased under a Commission-approved, long-term Purchased Power Agreement ("PPA") with eSolar's New Mexico Sun Tower concentrating solar power project from 66 MW to 92 MW. EPE further proposes to voluntarily contract with the Camino Real Landfill Gas to Energy Facility ("CRLEF") to provide payment of $0.015 per kWh for RECs that EPE obtains as owner of qualifying facility ("QF") RECs under the REA, and to recover these additional costs as part of its RPS procurement costs. The 2009 Plan also proposes to implement additional programs to acquire RECs associated with customer-installed renewable energy QF generation that is interconnected with EPE's systems, to modify its existing program, and to expand its existing small-scale Purchase Program to include QF wind facilities of 10kW or less and

to offer a new program for medium sized solar and wind QFs (10kW to less than 100kW) interconnected under the Commissions NMPRC Rule 570.

A. EPE's Application for Approval of 2009 Procurement Plan

EPE seeks approval of the 2009 Plan's actions and estimated costs for 2010 and 2011 to meet the RPS requirements of the Act, including the diversity targets detailed in Rule 572. Application (July 1, 2009). EPE's 2009 Plan is designed to meet the full RPS requirement of 6 percent of EPE's jurisdictional retail energy sales for 2010 and 10 percent beginning in 2011, as set forth in EPE Ex. 1 at Exhibit RA-1. EPE's 2009 Plan covers the overall RPS requirements for 2010 and 2011, and diversity targets in 2011. *See generally,* EPE Ex. 1 and 2. Using an April 2009 long-term Load Forecast, EPE's estimated RPS requirement for 2010 (six percent of New Mexico retail energy sales) is 101,954 megawatt-hours ("MWh"), and for 2011 (ten percent) is 176,915 MWh. EPE Ex. 1 at 6.

In addition to the increased percentage requirement that begins in 2011, Rule 572 requires that the RPS obligation must be met from minimum percentages from wind (20 percent), solar (20 percent), "other" such as biomass (10 percent), and distributed generation (1.5 percent) resources. EPE anticipates it will meet its 2011 obligation from these resources as follows: 41.48 percent from wind; 45.55 percent from solar; 10 percent from biomass; and 2.97 percent from renewable distributed generation. EPE Ex. 1 at 14-15, and Exhibit RA-3.

1. EPE's Procurement Actions and Compliance with RPS and Diversity Requirements

EPE has asserted that it will meet the majority of its RPS requirements in 2010 and 2011 through:

- contracts to purchase wind RECs from Public Service Company of New Mexico ("PNM") and Southwestern Public Service Company ("SPS");
- RECs acquired from Camino Real Landfill Gas to Energy Facility ("CRLEF"), a biomass energy Qualifying Facility ("QF") interconnected with EPE's system in accordance with NMPRC Rule 570;
- energy and RECs under a long-term purchased power agreement ("PPA") with Southwestern Environmental Center ("SWEC") from a 6 kW solar photovoltaic project;
- energy and RECs under a long-term PPA with NRG[2] (a joint developer with eSolar) from a new commercial concentrating solar power project known as the New Mexico Sun Tower Project ("Sun Tower") to be completed in 2011; and
- RECs obtained through QF interconnections under EPE's existing and new small-scale and medium-scaled customer-owned REC Purchase Programs.

These contracts and projects (with the exception of the proposed expansion of the Small System REC Purchase Program and the newly proposed Medium System REC Purchase Program) have all been approved by the Commission in EPE's previous annual procurement plan proceedings. *See generally* NMPRC Case Nos. 05-00355-UT, 06-00365-UT, 07-00360-UT, and 08-00219-UT. EPE Witness Acosta provides information regarding the specific RECs from each of these resources that EPE anticipates will be used to meet the RPS requirements for 2010 and 2011, and the diversity targets beginning in 2011. EPE Ex. 1 at Exhibits RA-1 and RA-2.

[2] On June 1, 2009, NRG Energy (NYSE: NRG) took control of the project company as part of a joint development agreement between eSolar and NRG to ensure financing. As a result, NRG owns the project company, New Mexico SunTower, LLC, that will develop, own and operate the SunTower solar project. EPE Ex. 1, Acosta Direct at 15-16. Mr. Acosta testified that NRG's ownership and contract take over would not lead to a delay of the project. Tr. at 13-15.

2. EPE's Proposed Modifications and Additions to Existing Plans

As part of its 2009 Plan, EPE proposes to increase the amount of energy and associated RECs purchased under the PPA with the Sun Tower Project from 66 MW to 92 MW. EPE Ex. 1 at 13-14. As discussed below, EPE has included the entire cost of the Sun Tower Project in calculating the impact to customers. Based on the project's finalized location in the Santa Teresa area, the cost of the bundled energy and RECs is estimated to be approximately $128.00 per megawatt-hour. EPE Ex. 1 at Exhibit RA-2. EPE claims that increasing the amount of energy and RECs from the Sun Tower Project will increase EPE's diversity of resources and allow EPE more flexibility in meeting its overall RPS requirements by allowing excess RECs to be banked for resource diversity and to ensure economical RECs are available in the future. EPE Ex. 1 at 14-15.

EPE's purchase of energy and acquisition of associated RECs from CRLEF, a renewable energy qualifying facility ("QF"), was approved by the Commission in Case No. 06-00365-UT, and EPE pays avoided cost for excess energy generated at CRLEF and pays no amount for RECS associated with that energy.[3] EPE now proposes to voluntarily contract with CRLEF to provide payments of $0.015 per kWh for RECs. EPE Ex. 1 at 12-13. If approved by the Commission, EPE would pay CRLEF for RECs delivered on or after July 1, 2009, and would recover these additional REC costs as part of its total cost for RPS compliance. EPE Ex. 1 at 13; EPE Ex. 2 at 6. The energy purchased from CRLEF, however, is not included in EPE's RPS compliance costs; EPE is required to purchase this energy at EPE's avoided cost rates because CRLEF is interconnected as a QF. EPE Ex. 2 at 6. EPE Witness Acosta testified that providing CRLEF with payment for the RECs will keep the project viable and is important because

[3] Case 08-00219-UT, Tr. at 210; Acosta Direct at 14-15.

of the diversity added to EPE's portfolio by CRLEF. EPE asserted that CRLEF has consistently been losing money and seeks payments that are equivalent to the amount it loses each month, and that EPE based the price per REC at an amount intended to keep CRLEF from operating at a loss and potentially shutting down. EPE Ex. 1 at 12-13; Tr. at 19. The payments would total approximately $138,000 in 2010 and $159,000 in 2011 ($11,000 to $12,000 per month), or $0.015 per REC. EPE Ex. 1 at 13; Tr. at 18-19. Because of the weighted value of the RECs, the cost for compliance purposes is the equivalent of $0.0075 per REC. Staff Ex. 1 at 11.

EPE also proposes to implement two additional programs to acquire RECs associated with customer-installed renewable energy QF generation that interconnect with EPE's system ("REC Purchase Programs"). First, EPE proposes to expand its existing small-scale solar REC Purchase Program to include customer-installed QF wind facilities of 10 kW or less. Second, EPE proposes to offer a new REC Purchase Program for medium-sized, customer-installed solar and wind QFs (10kW to less than 100 kW) interconnected under NMPRC Rule 570. The proposed customer-installed small-scale wind REC Purchase Program would be offered under the same terms and conditions as the previously approved small-scale solar REC Purchase Program, but would pay a smaller incentive amount of $0.08 per kWh for a twelve-year period, reflecting lower costs of installation for wind technology. EPE Ex. 2 at 13-14, Exhibits EDE-6; Tr. at 55-56, 70-71. EPE also clarified that its existing, small-scale, solar REC Purchase Program is not limited to specific types of solar renewable generation such as only PV. EPE Ex. 3 at 3.

The proposed REC Purchase Program for medium-sized wind and solar systems

also follows the same terms and conditions as the previously approved small-scale solar REC Purchase Program, with two exceptions; namely: (1) the proposed incentive prices paid; and (2) a proposed installation size limitation. EPE Ex. 2 at Exhibit EDE-8. EPE proposes incentive prices of $0.155 per kWh for solar facilities and $0.028 per kWh for wind facilities for a twelve-year period, reflecting EPE's claimed installation costs and differences in tax credits available to businesses. EPE Ex. 2 at 20, and Exhibit EDE-10. EPE also proposes that the maximum rate output for the systems connected to an existing single customer be limited to the average monthly demand of the customer for the 12 months prior to installation of the system. EPE Ex. 2 at 18; Tr. at 39-40. In other words, EPE proposes to limit the maximum rated output to the average monthly maximum demand the customer would experience without the installation. EPE Ex. 2 at 18. EPE asserts that the reason for the proposed limitation is to avoid encouraging customers to oversize their renewable QF installations relative to their loads resulting in inefficiently sized facilities. EPE Ex. 2 at 19. EPE also asserted its concern that a handful of oversized facilities, which produce the highest cost RECs in EPE's portfolio, could result in a future need to limit the number of participants from this resource type. Tr. at 69.

Finally, EPE proposes to reduce the price paid for RECs for new participants in EPE's existing, small-scale solar REC Purchase Program, from $0.13 per REC to $0.10 per REC. EPE claims that its reason for proposing to update its incentive price is that the proposed price is derived from a cost-based methodology, and EPE asserts that the cost of solar PV systems has declined since the program was approved last year. EPE Ex. 4 at 9 and Exhibit EDE-1R and 2R. According to EPE's references, prices remained

stable from April 2006 until January 2009, but have declined by 9.3 percent from January 2009 through September 2009. EPE Ex. 4 at 8-9.

EPE utilizes the same approach to calculating the small-scale solar PV REC Purchase Program that the Commission approved in EPE's 2008 Plan. EPE Ex. 4 at 3-4; Tr. at 61. EPE calculated an incentive price to reflect a simple payback period of approximately twelve years for an average size system of 3.3 kW with a 20-25 year system life expectancy, using an estimated current cost of $7.20 per Watt for small PV facilities, and taking into account combined federal and state tax credits of 40 percent. EPE Ex. 2 at 13 and Exhibit EDE-5; Tr. at 61-62. EPE's cost estimate for PV facilities is based on Fact Sheet No. 19 – Feasibility of Photovoltaic Systems, from the Texas State Energy Conservation Office's website InfinitePower.org. EPE Ex. 4 at 9-10. EPE asserted that it chose the Fact Sheet because it was prepared by a governmental agency, is a public document readily available and verifiable, and is developed within the region that EPE serves when its Texas retail customers are considered. EPE Ex. 4 at 10. EPE further testified that the government agency's estimate compared with information and prices that EPE has received for solar systems to be connected to EPE's system. Tr. at 35. EPE also cites to solar industry websites that perform industry pricing surveys to support its assertion that prices are trending downward at this time. EPE Ex. 4 at 8-9 and Exhibits EDE-1R and 2R; Tr. at 76-77; Tr. at 104-106.

3. EPE's Procurement Plan Costs and Cost Recovery

The estimated costs for each resource to meet EPE's 2010 and 2011 RPS obligations are provided in EPE Ex. 1 at Exhibit RA-2. The total costs for 2010 are estimated at $935,288; and for 2011 at $11,434,194. EPE Ex. 1 at 18. EPE states that

these costs are reasonable given the level of the RPS obligations and the overall results of EPE's Diversity RFP processes. EPE Ex. 1 at 18. The net total cost of the 2009 Plan and total net cost impact applicable to EPE's New Mexico retail kWh sales are shown in EPE Ex. 2 at Exhibit EDE-2.

EPE claims that the significant increase in costs from 2010 to 2011 is due to the increased RPS obligation and the addition of energy and related REC purchases from the Sun Tower Project. Tr. at 23-24.[4] EPE proposes to recover the costs of RECs acquired with the purchase of renewable energy through its FPPCAC, and will defer, with carrying costs, all other costs associated with its 2009 Plan for recovery in a general rate proceeding. EPE Ex. 2 at 6.

According to EPE Witness Evans, EPE's costs to meet the RPS requirements for 2010 and 2011 will not exceed the Commission's RCT. EPE Ex. 2 at 7-10, Exhibits EDE-2 and 3. To evaluate the RCT impact to customers, EPE included the entire incremental costs of RECs only, plus the incremental cost of bundled energy and RECs based on the levelized cost of the renewable resource less the levelized costs associated with a comparable non-renewable technology. EPE Ex. 2 at 7-8. EPE based its RCT methodology on a proposal pending before the Commission in NMPRC Case No. 08-00198-UT[5], regarding a standard method for determining such costs under Rule 572. EPE Ex. 2 at 8.

[4] Through 2010, EPE meets its RPS obligations primarily through REC only purchases from PNM and SPS, which unlike the Sun Tower Project do not include the purchase and delivery of associated energy to EPE. EPE Ex. 1 at Exhibit RA-2.

[5] In the Matter of an Inquiry into a Standardized Methodology for Determining Renewable Energy Costs for the Purpose of 17.9.572.11.NMAC. The Commission sponsored workshops in 2008 to develop a methodology for determining the incremental cost of renewable energy resources. A consensus rule was drafted, The Commission issued a Notice of Proposed Rulemaking on November 10, 2009.

Using this methodology, EPE asserted that its calculations show that the RCT will not be exceeded for customers in general or for large, nongovernmental customers. EPE Ex. 2 at 9, Exhibits EDE-2 and 3. EPE used general costs associated with a combined-cycle natural gas generating resources for the comparable non-renewable energy technology. EPE Ex. 2 at 8. EPE's calculations assume its procurement actions have a positive impact on customer bills (a reduction to costs) because the levelized Sun Tower Project cost is less than the levelized cost of a comparable gas-fired resource. EPE Ex. 2 at Exhibits EDE-1 through 3; *see also* Tr. at 65-66. EPE assumed, as required by Rule 17.9.572.10.D NMAC, that customers' rates applied in 2010 and 2011, would be based on existing rates[6] currently in effect since July 2007, with the inclusion of FPPCAC charges for 2008. EPE Ex. 2 at 10. EPE asserted that the projects in its 2009 Plan are reasonably priced, fit within EPE's dispatch flexibility parameters as applicable (for those projects that are not RECs only), and add the necessary diversity to its renewable energy portfolio. EPE Ex. 1 at 5-6, 14-15, 20.

B. Staff's Position

Staff supports EPE's 2009 Plan and recommends its approval, with certain additions to EPE's Purchase Program tariffs, which EPE has accepted. Staff Ex. 1 at 20; Tr. at 119-121; EPE Ex. 4 at 4.

Staff witness Lamberson concurs with EPE's proposal to voluntarily contract to pay for RECs it receives from the existing large-scale biomass QF customer, CRLEF. Staff testified that the level of incentive payment is nominal for a biomass or distributed generation ("DG") technology that provides EPE with the ability to meet at least one

[6] Case No. 09-00171-UT, an EPE rate case, is currently under consideration before the Commission.

aspect of the 2011 diversity criteria, with little impact on customer rates. Staff Ex. 1 at 11; Tr. at 135-136.

Staff does not oppose EPE's proposal to increase the amount of solar energy and associated RECs that EPE includes in its RPS from the previously approved 66 MW to 94 MW, at a cost of approximately $0.13 per kWh for the bundled energy and RECs. Staff Ex. 1 at 11.

Staff supports EPE's proposal for a new REC incentive payment for customer-installed DG wind facilities, based on EPE's testimony that wind facility installations have significantly lower costs than those for solar PV installations. Staff Ex. 1 at 16; *see* EPE Ex. 2 at exhibits EDE-5 and EDE-6.

Staff also supports EPE's proposed customer-installed medium-sized QF (10 kW to 100 kW) REC Purchase Program, including certain conditions and the offer of an incentive price of $0.15 per REC. Staff Ex. 1 at 14, 20. Additionally, Staff supports EPE's proposal to limit the size of medium-sized systems to either the lesser of 100 kW AC or the participating customer's average monthly load. Staff Ex. 1 at 19; Tr. at 126. Staff testified that the limit will help prevent net generators, whose purpose could be to sell excess electricity, because Staff claimed that they (net generators) are not in the public interest. Staff Ex. 1 at 19.

With regard to EPE's proposed reduction to the REC incentive price to be paid to new participants in EPE's small-scale solar REC Purchase Program, Staff supports the reduced incentive price. Staff also testified that the incentive prices proposed by EPE for its proposed small-scale wind REC Purchase Program and its proposed medium-sized solar and wind REC Purchase Program are appropriate and fair. Staff Ex. 1 at 17.

Staff notes that EPE's calculation for REC incentives does not result in a 100 percent return of the net present value of the QF installation within the 12 year period, but instead recovers the nominal cost of the total investment over the twelve-year period. Staff Ex. 1 at 15. Staff concluded that because the customer would receive a full payback, including the time-value of money within 14 to 17 years, and continue to receive benefits from the system thereafter, that EPE's proposed REC incentive payments are reasonable and should be adopted. Staff Ex. 1 at 15-16; Tr. at 123-125.

As to determining incremental renewable energy costs for the purpose of applying the RCT to a utility renewable energy portfolio, Staff also concludes that it is appropriate to use a straightforward methodology that can be readily applied on an annual basis going forward, and that allows for an easily calculated and adjusted REC incentive that can prospectively reflect changing costs of various technologies. Staff Ex. 1 at 18. According to Staff, EPE's methodology, adjusted to recover the time value of money, assures a fair calculation for customers in evaluating their return on their investment or payback period for their DG renewable energy installations, and results in a positive approach for the program that is easily understood by utilities, customers, and vendors. Staff Ex. 1 at 18. Finally, Staff supports EPE's proposed methodology, as adjusted, because it should result in declining incentive payments as the technologies mature and become more cost-effective. Staff Ex. 1 at 18. Staff believes that as technology costs drop, the incentive payments for new participants should reflect the change in technology pricing. Staff Ex. 1 at 16-17.

Staff recommended that EPE address specific criteria or progress that must be met prior to year end in order for a system to qualify for current year incentive

payments, as part of the tariff language for its REC Purchase Programs. Staff Ex. 1 at 19-20. Staff was concerned that customers who are planning to participate in one of the programs at the end of the year may not be aware that the incentive payments may change from year to year and may not know how much progress they must make to qualify for the current year's program. In response, EPE provided the following specific tariff language in the Rebuttal Testimony of Evan D. Evans. EPE Ex. 4 at 4. In order to qualify for the current year incentive program, EPE believes that participants must meet the following requirements before the end of the calendar year: complete the Application for Sale of Small System Renewable Energy Certificates, including submission of full payment of the application fee; provide EPE a fully executed Interconnection Agreement; and provide EPE a copy of the qualifying facility self certification form filed with the FERC. *Id*. At the hearing, Staff witness Lamberson testified that EPE's proposed tariff language addressed Staff's concerns and should adopted. Tr. at 119-120.

Staff concludes that EPE has met the RPS criteria, the RCT cap, and the compliance requirements of NMPRC Rule 572. Staff Ex. 1 at 9-10, 20. Staff supports EPE's methodology for calculating whether the RCT would be exceeded as a result of EPE's proposed procurement actions. Staff Ex. 1 at 9; Tr. at 133-134. Staff further concludes that EPE will satisfy its 2010 RPS obligation and will be able to satisfy the increased 2011 RPS, and diversity requirements. Staff Ex. 1 at 20. With the amendments to EPE's REC Purchase Programs' tariff language, Staff recommends approval of EPE's 2009 Plan and associated cost recovery. Tr. at 119-121, 128.

C. Mr. Westbrock's Position

Mr. Westbrock is a *pro se* Intervener in this case. He is an employee of Positive Energy, Inc., a New Mexico Company headquartered in Santa Fe that specializes in the design and installation of PV systems. Westbrock Ex. 1 at 3. Mr. Westbrock is the manager of Positive Energy's Las Cruces office, and his duties include PV system design and installation. He testified that the vast majority of Positive Energy's business conducted out of the Las Cruces office is in the service territory of EPE. Mr. Westbrock's qualifications and education include: an A.A.S. in Renewable Energy (PV System Design and Installation emphasis) from San Juan College, Farmington, New Mexico; an M.S. in Biology from Wake Forest University, Winston-Salem, North Carolina; and he is a NABCEP Certified PV Installer. *Id*. Mr. Westbrock testified that as a concerned citizen of New Mexico, he is interested in seeing increased investment in renewable energy, due primarily to the issues of climate change, resource depletion and exploitation, air quality, creation of jobs that cannot be outsourced, and energy security. *Id*. at 4. He asserted his belief that helping to guide our utilities to adopt practices that will help them to meet the state Renewable Portfolio Standard will further this goal. *Id*.

Mr. Westbrock's opposition to EPE's 2009 Plan focuses on EPE's REC Purchase Programs, and additionally, he proposes that: all REC Purchase Programs should have assurances that the terms of the original agreement will continue in the case of a sale of the property or system expansion by the original or subsequent owner; and a limit should be placed on the percentage of the DG requirement that may be fulfilled by any one facility. *Id*. at 5.

Mr. Westbrock objects to EPE's proposed reduction from $0.13/kWh to

$0.10/kWh to the incentive price to be paid to small-scale solar participants in EPE's small-scale QF REC Purchase Program. *Id*. at 6. Mr. Westbrock testified that PV prices are volatile and the current low cost to install PV is largely due to the global economic downturn which caused reduced demand and therefore excess supply of PV equipment on the market. He asserts that there is no guarantee that these lower prices will be sustained. *Id*. at 7.

Mr. Westbrock claimed that EPE's justification for lowering this incentive is flawed for several reasons, including: the time that the program has been available is too short to access its effectiveness; EPE's failure to justify the reduction; EPE's failure to prove that continuation of the current incentive will approach or exceed the RCT; and EPE's failure to include any interest payment costs for customers who are financing their PV systems. *Id*.

Mr. Westbrock claimed that EPE's payback analysis also appears flawed. *Id*. at 8. He asserts that because calculating the time for complete financial payback for a PV system is complicated by installation specific variables and by unknown future variables, there is little chance that multiple parties will agree upon all assumptions. Therefore, he did not take issue with most of the assumptions used by EPE in their payback analysis. He did however, question their assumption of installed cost per watt. EPE uses an installed cost of $7.20 per watt both for systems under 10 kW (Evans Direct, 10 Exhibit EDE-5) and for their proposed program for systems from 10-100 kW (Evans Direct, Exhibit EDE-9), even though Mr. Westbrock claimed that there is a significant difference in installed cost per watt between a 1 kW system and a 100 kW system. *Id*.

Mr. Westbrock testified that EPE's stated source for their assumed cost of

$7.20/watt is “InfinitePower.org, Texas SECO, Fact Sheet No. 24” (later corrected to “19”)(Evans Direct, Exhibit EDE-5), and that he could find no information about PV installation costs in this document. Additionally, he testified that another document from the same source, Fact Sheet No. 9, gives an expectation of “$8 to $12 per Watt for complete systems” (http://infinitepower.org/newfact/new96-816No09.pdf). Mr Westbrock further testified that within the state of New Mexico, PNM estimates $8 per installed watt in the brochure for their Solar PV Program, dated July 2009 (Exhibit MAW-1). *Id*. He also claimed that he initiated a follow-up phone call to PNM revealed that this number was arrived at after conducting an informal survey of PV installers in their service territory. *Id*. at 8-9. He asserted that PNM noted that they expect PV costs to decrease but that this number was the best snapshot of current costs in their service territory as of July 2009. *Id*.

Mr. Westbrock’s alternative proposal if the Commission determines that the price paid for solar PV RECs be reduced to reflect reductions in the costs of the facilities, then Mr. Westbrock suggests that the payback period be shortened, so that the price per REC remain at the higher amount. *Id*. at 10. Mr. Westbrock testified that the basis of his position is his belief that the state legislature decided to increase the amount of state tax credits, sending a signal that the legislature wanted to increase the level of available incentives. *Id*.

Mr. Westbrock also proposed two suggested changes to EPE’s tariffs for the Small System REC Program (No. 33; Evans Direct, Exhibit EDE-4) and Medium System REC Program (No. 34; Evans Direct, Exhibit EDE-7). Mr. Westbrock proposed that EPE’s Tariff Numbers 33 and 34 should be amended so that system owners may

expand their systems and remain under the terms of the original REC Contract that was signed for each system. Mr. Westbrock also proposed that EPE's Tariff Numbers 33 and 34 should be amended so that if a system owner sells the property on which the system is installed, the new property owner may continue under the terms of the original REC Contract that was signed for that system. Westbrock Ex. 1 at 17-18. He asserted that these changes were designed to reassure a homeowner who is a potential owner of a renewable energy system that their investment would be a safe one, thus making them more likely to install the system. *Id*. Mr. Westbrock proposed to modify his proposals based upon testimony at the hearing, he amended his proposals in that the last sentence of each should be changed to read "The term of the agreement shall expire 12 years after the signing of the original REC Program Contract" or the equivalent (modifying Westbrock Direct, p. 18 lines 1-2 and lines 15-16).

Mr. Westbrock also testified that a limit should be placed on the 15 percentage of the DG requirement that may be fulfilled by any one facility.

Mr. Westbrock also opposed EPE's proposed restriction, contained in EPE's Medium System REC Program, that systems cannot exceed the average monthly maximum demand of the customer for the 12 consecutive months prior to installation of the facility. Westbrock Ex. 1 at 15-16. Mr. Westbrock testified regarding potential problems with this capacity limitation, for example, he hypothesized that if a building had a large, intermittent load, then the maximum demand could be quite high, while the monthly energy use remains low, and that this customer could have an oversized system relative to their actual use. *Id*. Further, during the hearing, both EPE and PRC Staff conceded that under the proposed restriction, it was possible that a customer

could be limited to a PV system size that is not large enough to offset their annual energy use. Tr. at 40, 127. Mr. Westbrock asserted that placing a PV system capacity limit based on historical power demand would be inappropriate because the restriction not only unfairly limits system size for certain customers, but does not accomplish EPE's stated goal of limiting system size relative to a customer's loads. Westbrock Ex. 1 at 16.

Mr. Westbrock's alternative proposal to limit the size of individual projects eligible for the medium-size program is to use only the hard limit of 100 kW. *Id*. He testified that an oversized system will generate more renewable energy to be put onto EPE's grid, at the avoided cost plus REC payment, thus supplying EPE with more RECs to help meet their RPS requirements. *Id*. at 16-17. He also claimed that the 100 kW limit prevents any gross abuse of this program but that if EPE required a safeguard against oversized systems in this program, they could bill the customer for their net excess generation multiplied by the REC incentive rate. *Id*. at 17.

Mr. Westbrock alleges that all of his proposals are to encourage more property owners to use their available capital to install renewable energy systems on their property. Mr. Westbrock argues that EPE's emphasis on minimizing costs of complying with the RPS to protect its ratepayers is contrary to the spirit of the Renewable Energy Act, which states that "a public utility should have incentives to go beyond the minimum requirements of the renewable portfolio standard" NMSA 1978, § 62-16-2-A(5).

D. EPE's Annual Renewable Energy Portfolio Report for 2008

Rule 572 requires that each public utility file with the Commission by July 1, 2008, an Annual Renewable Energy Portfolio Report on its renewable energy

generation or purchases during the prior calendar year, including REC purchases, sales, and retirements. *See* 17.9.572.17 NMAC.

Staff testified that on July 1, 2009, EPE filed its 2009 Annual Renewable Energy Report for Compliance Year 2008 ("Compliance Report") pursuant to the REA and 17.9.572.17 NMAC. Staff further testified that EPE's Compliance Report provides the detailed results of EPE's 2008 Renewable Energy Plan, and that EPE met its 2008 RPS obligation. Staff Ex. 1 at 20.

Based upon the testimony above, the Hearing Examiner finds that there is sufficient evidence that EPE's Compliance Report adheres to the applicable requirements.

E. The Commission's Order Requiring Supplemental Testimony

On July 30, 2009, the Commission issued an Order for Supplemental Testimony. The Commission found that El Paso Electric Company ("EPE"), Public Service Company of New Mexico ("PNM"), and Southwestern Public Service Company ("SPS") filed renewable energy procurement plans and supporting direct testimony, and that matters raised in the Order are applicable to all three utilities having a renewable energy procurement plan currently under consideration by the Commission. The Commission required each utility to file supplemental testimony on the following questions:

A. For each solar distributed generation incentive program currently offered by the utility, state whether installations using solar thermal technologies are eligible to participate, assuming all other requirements are met.

B. For any program that is currently limited to photovoltaic technology, explain why such a restriction furthers the objectives of the Renewable Energy Act, or in

the alternative, explain any benefits and/or detriments from removing such a restriction and opening the program to solar thermal technologies.

C. For any program that is currently limited to photovoltaic technology, explain what would be necessary to open the program to solar thermal technologies.

D. Address whether projects that have been substantially paid for with federal or state grants should be eligible for incentive payments under any of the distributed generation incentive programs offered or proposed by the utility, including, at a minimum:

i. Whether incentive payments are still necessary to encourage the purchase and installation of distributed generation equipment, if that equipment has been funded with a grant;

ii. Whether prohibiting incentive payments to grant-funded projects would make more utility funding available for other distributed generation projects and whether that in turn would result in a greater amount of distributed renewable energy generation in the state;

iii. Whether the likely intent of grants provided through the American Recovery and Reinvestment Act of 2009 (ARRA) and State of New Mexico Energy Grants is to increase the supply of renewable energy in the United States and New Mexico, and if so, is this intent furthered or frustrated if projects funded by grants substitute for projects that would otherwise have been procured to comply with the New Mexico renewable portfolio standard;

iv. If the Commission were to distinguish grant-funded projects

with respect to eligibility for distributed generation incentives, the level of grant subsidy as a percentage of total system cost that could be used to identify ineligible projects; and

v. Any legal obstacles to excluding such projects from eligibility for distributed generation incentives.

On August 14, 2009, EPE filed the Supplemental Direct Testimony of Evan D. Evans (EPE Ex. 3) that set forth EPE's testimony in compliance with the Commission's Order. Mr. Evan's testified that EPE's current Small Systems REC Purchase Program contains no provision that limits participation to specific types of solar renewable generation. EPE Ex. 3 at 3. Similarly, EPE's proposed new Medium System REC Purchase Program contains no provision that limits participation to specific types of solar renewable generation. *Id*.

Mr. Evans further testified that, at this time, it was EPE's belief that projects receiving government grants that qualify for EPE's DG programs should be eligible for incentive payments. *Id*. at 4. EPE has not proposed to restrict participation by projects that receive federal or state grants. EPE asserted that it would be inconsistent to restrict payments of incentives to projects that receive such grants while not restricting payments of incentives to projects that receive federal or state tax credits. EPE notes that the federal grant program allows taxpayers eligible for the federal business energy investment tax credit ("ITC") to take this credit or to receive a grant from the U.S. Treasury Department instead of taking the business ITC for new installations. It does not allow taxpayers to use more than one of the federal incentives. Tax credits allowed under the ITC with respect to progress expenditures on eligible energy property will be

recaptured of the project receives a grant. Consequently, EPE concludes that the grants and the ITC are alternative incentives. *Id*.

EPE asserted that it did not know whether incentive payments are still necessary to encourage the purchase and installation of distributed generation equipment, if that equipment has been funded with a grant. *Id*. at 5. EPE's answer was based upon the variability among customers in: the level of incentives necessary to encourage the purchase and installation of distributed generation among customers; the levels of the grant received; the required payback periods; and the required internal rates of return. *Id*.

EPE also testified that if renewable energy projects have been specifically designated as targets for the ARRA and State of New Mexico grants, it is reasonable to assume that a likely intent of these grants is to promote renewable energy development. *Id*. EPE asserted that the intent to increase the supply of renewable energy is neither further nor frustrated if the projects funded by the grants substitute for projects that would otherwise have been procured to comply with the New Mexico Renewable Portfolio Standard, as long as the total number of projects and renewable energy produced by the projects are equal. *Id*. at 5-6. Further, Mr. Evans opined that both grants and tax credits are alternative, temporary approaches to promote the development of distributed renewable energy generation that is not currently economical. *Id*. at 6.

In response to the Commission's inquiry regarding a potential distinction in grant-funded projects as to eligibility for distributed generation incentives, and what level of grant subsidy as a percentage of total system cost should be used to identify ineligible

projects, EPE claimed that such a distinction should be based upon grants that exceed 30 percent of project costs. *Id*. However, EPE further testified that it was not proposing that grant subsidies cause projects to be ineligible to participate in distributed generation incentive programs. Additionally, EPE reiterated its prior position that it would be inconsistent to restrict payments of incentives to projects that receive such grants while not restricting payments of incentives to projects that receive federal or state tax credits. *Id*. Mr. Evans also points out that the incentive calculations presented in his Direct Testimony, reflect the inclusion of a 30% tax credit, an alternative to grant funds. *Id*. at 6-7.

Finally, EPE claimed that it had not identified any legal obstacles for the Commission to make a policy decision to limit eligibility for incentives to projects that do not receive federal or state grant funds. *Id*. at 7.

No other testimony or comment was filed with regard to these issues. [7]

F. Recommendations of the Hearing Examiner

1. Overall Plan

Most of EPE's 2009 Plan is unopposed, with the exception of EPE's proposed incentive price for small solar systems, and the limitation requiring medium sized systems to be sized not to exceed the average monthly demand for the customer installing the system.

There is evidence that EPE's proposal to pay an additional amount to CRLEF for RECs from that biomass QF is reasonable and should be approved. CRLEF appears to

[7] On June 21, 2009, the Procedural Order was issued requiring EPE to publish the Notice one time in a newspaper of general circulation in the area in New Mexico where EPE provided utility service. EPE filed proof of publication demonstrating that the required notice was published one time on July 26, 2009 in the *Las Cruces Sun-News*.

be a valuable resource for meeting diversity requirements, and even with the additional costs, is among the lowest-cost renewable energy resource in EPE's portfolio.

Although EPE's proposal to increase the amount of energy and associated RECs from the Sun Tower Project results in a significant increase in RPS costs, there is testimony that the Sun Tower Project displaces other resources and will potentially result in fuel savings for EPE customers.

There is evidence in the record sufficient to support findings that EPE's proposals to voluntarily pay for RECs received from CRLEF, to increase the amount of solar energy obtained from the Sun Tower Project, and to recover these costs in accordance with previous Commission approvals to recover the costs of RPS obligations are reasonable and should be approved.

2. Revised REC Price for Small-Scale Solar REC Purchase Program

EPE has an assumed installed cost of $7.20 per Watt for small PV facilities is based on Fact Sheet No. 19. Mr. Westbrock testified that Positive Energy, his employer, used $7.53 installed cost per Watt as a standard ball park cost estimate given to potential clients to give them an idea of how much a system costs. Tr at 84. However, he used the $8.00 installed cost per Watt number that he received from the head of PNM's renewable energy department because he thought that it was more fair to use an estimate from multiple installers rather than from one. *Id*. at 112. No party disputes that PV prices are lower.

Mr. Westbrock concluded that according to EPE, they now has 66 PV systems completed, under construction, or planned and that a survey of the installers of these

systems in their territory to come up with an estimated installed cost, might have been a much more accurate method for estimated installed cost.

While EPE's and Mr. Westbrock's methodology is essentially the same, the differences in their calculations ultimately come down to the assumed per Watt installation costs of the facilities. EPE's payback analysis was based upon Fact Sheet 19 and EPE asserted that installation costs were included in Fact Sheet 19 under "The Balance of System Costs" of EDE-3, where a 20% factor was used to cover the balance of system cost. Tr. at 32. This Section 2.D sets forth that besides PV modules and batteries, complete PV systems also use wire, switchers, fuses, connector and other miscellaneous parts. *Id*. at 33. There is no specific mention of the inclusion of installation costs and Mr. Westbrock raises that the possibility that the Fact Sheet/guideline was intended for self installation and therefore does not include any installation costs which, he claims are a significant portion of the total cost of any PV system. Tr. at 35, 32-34.

Additionally, there are questions concerning the age of the Fact Sheet, (Exhibit EDE-3R, at page 4, potentially August 2006), especially in light of EPE's reliance on the Fact Sheet to develop its PV cost, and EPE's assertion as to the importance of using the most current publicly available calculation. *Id*. at 35. However, Mr. Evans testified that the Fact Sheet compares with prices that EPE had recently received and that he analyzed for connective systems. *Id*.

Staff endorses the simplified methodology used by EPE and Mr. Westbrock, adjusted to recover the time value of money, without changing the contract period of twelve years. Staff Ex. 1 at 18; Tr. at 120. Staff supports the periodic review and

updating of incentive payments based on the average cost of installed systems. EPE concedes that were system prices to increase, it would be appropriate for incentive prices to be updated to reflect those increased costs. Tr. at 80-81.

Mr. Westbrock also argues that even if prices may be declining, it is important to leave incentive payments untouched to ensure that EPE's REC Purchase Program is successful. Westbrock Ex. 1 at 6-7. EPE argues that Mr. Westbrock has not accounted for the rate of growth in customer participation since EPE initiated the REC Purchase Program in 2009. EPE Ex. 4 at 6. EPE asserts that it has experienced an increase of 32 percent in the number of completed systems (an addition of 16 systems) since it filed its testimony in July 2009, and that EPE has already exceeded its projections and continues to experience high levels of interest. EPE Ex. 4 at 6-7. EPE's claimed that its overall REC accounting shows that it will exceed the minimum percentage for distributed generation resources in 2011, with an anticipated 2.97 percent. EPE Ex. 1 at 14-15, and Exhibit RA-3. Staff opposes the shortening of the payback period, as does EPE, and supports continuing the payback period as previously approved of twelve years, given the life expectancy of the systems. Tr. at 120; EPE Ex. 4.

In EPE's 2008 procurement proceeding, NMPRC Case No. 08-00219-UT, the Commission noted that, "If the market price for PV systems decreases, it may be appropriate for EPE to reduce the incentive for new program participants, but not for existing participants who relied on a particular financial structure when making their investment." *Final Order* at 13. Thus, it appears that the Commission has recognized a potential relationship between project costs and new participant incentives that might allow changing prices to be considered, among other factors, on a prospective basis,

when determining incentives for new participants in REC Purchase Programs.

The Hearing Examiner finds that both EPE's and Mr. Westbrock's proof concerning PV installation costs per Watt appears to be flawed. EPE's information may not include all costs nor contain recent data. Further, the information is from Texas, which may or may not be comparable to EPE's New Mexico service area. Mr. Westbrock's information is from PNM who serves in a different service area, and Mr. Westbrock's own employer, Positive Energy uses a lower number than the PNM number. The most persuasive and credible number discussed in this case appears to be the $7.53 utilized by Positive Energy because it can be verified as relatively recent (September 2009) and is used in the EPE service area. Tr. at 94. Therefore, in an effort to provide a proposed installed cost per Watt estimate that contains current and presumably complete costs that appear to be applicable to EPE's service territory in New Mexico, the Hearing Examiner recommends that the Commission accept $7.53 per Watt as the updated Small PV installation cost, and order EPE to develop an incentive based on it. EPE's proposal as modified above with regard to formulating the incentive paid to new participants of the small solar REC purchase program is reasonable, and should be approved, subject to periodic review by the Commission in subsequent procurement plan proceedings.

3. Expansion of REC Purchase Program

EPE's proposals for incentive payments for customer-installed small-scale and medium-scale wind projects and for medium-scale solar projects are unopposed and supported by cost estimated calculations. Based upon the evidence provided in the record, the Hearing Examiner finds that these proposals should be approved as set forth in the Discussion.

EPE has proposed a size limitation on medium-sized solar projects, based on the average monthly demand of the customer's system. Mr. Evans testified the limitation would prevent the possible high cost of potential net generators, and would allow for diverse program participation. Tr. at 68. Mr. Westbrock opposes the limitation, claiming that the limitation does not accomplish the purpose for which it is intended, and asserts that it may have the negative consequences, *i.e*. causing a customer to be limited to a PV system size that is not large enough to offset their annual energy use.

EPE also argues that the alternative proposal results in EPE being required to make large incentive and avoided cost energy payments in months in which customers experience low loads. EPE Ex. 4 at 17-19. Staff also disagrees with Mr. Westbrock's proposal and supports the limitation proposed by EPE. Tr. at 126.

Staff's and EPE's argument that net generators could lead to increased renewable energy costs for other customers has some merit. However, there is some hesitancy at setting an initial limitation that might negatively affect program participants and/or program participation. The alternative proposed by Mr. Westbrock may not provide a uniform approach to preventing oversizing of net metering QF systems. In an effort to avoid potential irreversible negative effects on EPE's ratepayers that net generators may have, and based upon the evidence in the record, the Hearing Examiner recommends that the Commission allow this program restriction at this time, subject to review in subsequent procurement plans, or other proceedings as the Commission finds appropriate.

4. Language Changes for REC Tariffs

There is evidence in the record sufficient to find that the proposed tariff language

and applications set forth in EPE Ex. 2, Exhibits EDE-4, 7 and 8 (as corrected at the hearing, including Tr. at 136-137), together with the language recommended by Staff and provided in rebuttal testimony by EPE for inclusion in the tariffs (EPE Ex. 4 at 4), are reasonable and should be approved. EPE should be required to file a compliance advice notice, subject to Staff review, containing the approved amendments and corrections to EPE's tariffs and applications.

EPE opposes Mr. Westbrock's proposal for an automatic contract opt-in by subsequent owners arguing that the language does not fulfill the purpose of acquiring RECs under the customer REC purchase program, but merely requires EPE's other customers to ensure increased property values in the event the customer-owner who installs a QF chooses to sell their property, even if the participant has essentially received a payback on most or all of the system investment. EPE Ex. 4 at 20. EPE claimed that it is more appropriate for subsequent owners to be required to enter into a new contract with EPE, as occurs for the provision of electricity service, rather than assuming the previous owner's contract. Tr. at 42-43.

The Hearing Examiner finds that Mr. Westbrock's proposed changes to EPE's tariff's are beyond the scope of this proceeding, and were neither noticed nor fully vetted in this proceeding, and therefore should be rejected. These proposals may be more appropriate for some future proceeding.

Based upon the foregoing Statement of the Case, and Discussion, the Hearing Examiner recommends that the Commission **FIND** and **CONCLUDE** as follows:

1. The Statement of the Case, Background, and Discussion contained in the Recommended Decision of the Hearing Examiner are incorporated by reference herein

as Findings of Fact and Conclusions of Law.

2. EPE is a public utility certified and authorized to provide service within the State of New Mexico and is a public utility as defined in NMSA 1978, § 62-3-1, *et seq.* of the New Mexico Public Utility Act, and, therefore, EPE is subject to the jurisdiction and authority of the Commission.

3. The Commission has jurisdiction over the parties and the subject matter of this case.

4. Due and proper notice of this case was given by publication of the Procedural Order and Notice in the *Las Cruces Sun-News.*

5. EPE's report on its annual purchases of renewable energy in 2008 satisfies the requirements of NMSA 1978, § 62-16-4(D) of the Renewable Energy Act and 17.9.572.17 NMAC and should be accepted by the Commission.

6. EPE's 2009 Plan meets the requirements of the Renewable Energy Act, § 62-16-1 et seq. and 17.9.572 NMAC.

7. EPE's proposal to reduce its current small-scale solar REC Purchase Program incentive payment for new customer participants will be based upon a presumed installation cost of $7.53 per Watt. EPE is ordered to develop an incentive based on $7.53 per Watt and provide the results to the Commission immediately, as part of its tariff compliance as set forth in the Commission Order. The presumed installation cost of $7.53 per Watt is reasonable and should be approved. EPE should be required to review its incentive amounts in its next procurement plan filing and should support any proposed increase or decrease, if appropriate, based on the most recent available cost data for installed systems in its New Mexico service territory.

8. EPE's proposed tariff language for its REC Purchase Programs as corrected at the hearing, and amended, is reasonable and should be approved.

9. EPE's 2009 Plan, with the modifications to EPE's tariff language as set forth in the Discussion, should be approved.

10. Pursuant to Section 62-16-4(A)(2) of the REA, to the extent EPE incurs costs for bundled energy and associated RECs acquired through approved PPAs or from CRLEF, EPE is authorized to recover those costs through its FPPCAC. EPE is authorized to defer the remaining costs associated with the 2009 Plan, together with carrying costs, and including costs associated with registration of RECs with WREGIS as required by 17.9.572.13.E NMAC, for recovery in a future rate case. In the future rate case, EPE shall have the burden of demonstrating that the costs are consistent with this Order, that they have been actually incurred and that they have not been otherwise recovered.

11. By its own admission, much of EPE's 2009 Plan is being filed for informational purposes, and therefore, the approval and relief provided in this Order should be specifically limited.

12. EPE should be required to file any advice notices, tariff revisions, and/or any other documents that are required to comply with this Order's findings and authorizations, within ten days of the issuance of the Final Order in this case.

The Hearing Examiner recommends that the Commission **ORDER** as follows:

A. The findings, conclusions and determinations, and the decretal paragraphs contained in the Recommended Decision are adopted, approved and ordered by the Commission.

B. EPE's 2009 Plan is approved as set forth in this Order.

C. EPE is authorized to recover its costs associated with the 2009 Plan as set forth in this Order.

D. EPE shall make an advice notice compliance filing within ten days after issuance of the Final Order in this case that contains the amended rates and tariffs as approved.

E. Any outstanding matter not specifically ruled on is disposed of consistent with this Final Order.

F. This Order is effective immediately.

G. Copies of this Order shall be sent to all persons on the attached Certificate of Service.

H. This Docket is closed.

I S S U E D at Santa Fe, New Mexico this 24th day of November, 2009.

NEW MEXICO PUBLIC REGULATION COMMISSION

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Elizabeth C. Hurst
Hearing Examiner