

**BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION**

IN THE MATTER OF THE PETITION OF )  
PPC NEW ENERGY, CHABERTON ENERGY, )  
AND PROSPERITY WORKS FOR DECLARATORY ) Case No. 24-00078-UT  
ORDER ON COMMISSION RULE 17.9.573.12(C) )  
\_\_\_\_\_)

**PETITION OF PPC NEW ENERGY,  
CHABERTON ENERGY, AND PROSPERITY WORKS  
FOR DECLARATORY ORDER ON COMMISSION  
RULE 17.9.573.12(C)**

Pursuant to New Mexico Administrative Code (“NMAC”) § 1.2.2.21, PPC New Energy, and Chaberton Energy, and Prosperity Works (together, “Petitioners”), by and through undersigned counsel, hereby petition the New Mexico Public Regulation Commission (“Commission”) for a declaratory order on 17.9.573.12(C) NMAC and enforce the 20% developer cap as written in the Rule.

**PARTIES AND JURISDICTION**

1. PPC New Energy is a for-profit organization and community solar developer. PPC New Energy was involved in the working and stakeholder groups that helped inform the development of the New Mexico Community Solar Program Rules. PPC New Energy has multiple Selected Bids and Waitlisted Bids in the New Mexico Community Solar Program, in both SPS and PNM utility service territories.

2. Chaberton Energy (CE) is a for-profit organization and national solar developer bringing renewable energy projects to local communities with creativity, excellence, and humanity. CE has been developing renewable energy projects in New Mexico for over three years and has offices and staff in Santa Fe. CE was involved in the working and stakeholder groups that helped inform

the development of the New Mexico Community Solar Program Rules. CE has one project in the New Mexico Community Solar Program, a PNM Waitlisted Bid (rank 59).

3. Prosperity Works (PW) is a 501(c)(3) statewide nonprofit organization doing business in New Mexico whose mission is supporting economic prosperity, including minimizing the impact of energy burden on limited income New Mexicans. PW has been involved in the implementation of community solar and co-wrote a guide for the Commission titled “Strategies for Low-Income Participation in New Mexico’s Solar Program” in 2022. PW has held multiple presentations and listening sessions with nonprofit organizations to gather feedback from New Mexicans about the best way to implement community solar in New Mexico. PW is an awardee of the U.S. Department of Energy Community Power Accelerator Prize. The Community Power Accelerator Prize is a \$10 million, three-phase prize designed to fast-track the efforts of new, emerging, and expanding solar developers and co-developers to learn, participate in, and grow multiple successful community solar projects. PW has five projects on the PNM Waitlisted Bids list in the New Mexico Community Solar Program (ranks 32, 35, 36, 38, 39).

4. The Commission has jurisdiction in this matter pursuant to New Mexico Statutes, Section 62-16B-7(A) and Section 62-19-9(A).

## **I. BACKGROUND**

5. Section 62-16B-7(B) of the Community Solar Act required the Commission to adopt rules to establish a community solar program by April 1, 2022.

6. The Commission adopted Community Solar Rules (“Rules”) at 17.9.573 NMAC on March 30, 2022 in order to implement the terms of the Community Solar Act.

7. 17.9.573.12(C) NMAC states that, “The program administrator shall limit consideration of bids by any one bidder to a maximum total for such bids of twenty percent of the statewide capacity cap allocated to the applicable utility.”

8. 17.9.573.12(H) NMAC states that “The program administrator shall identify sets of proposed projects to comprise utility-specific wait lists of proposed projects that would be eligible and able to participate in the program should a project or multiple projects be withdrawn after being selected to go forward. The wait lists shall be comprised of projects that received total scores immediately below the scores of the projects that were selected. The program administrator shall maintain a wait list for each qualifying utility, including projects with combined capacities for each utility equal to the utility’s allocated capacity cap. Each bidder proposing a wait-listed project shall pay the \$2,500/MW application fee within 30 days of moving from the wait list into the queue of selected projects.”

## **II. DISCUSSION**

9. 1.2.2.21(A) NMAC states that any person may petition the commission for a declaratory order to terminate a controversy or to remove an uncertainty with respect to the applicability to the petitioner of any statute or rule administered by the commission or any commission order. A petition for declaratory order shall set forth:

- (1) the statute, rule, or order of which an interpretation is requested;
  - (2) the nature of the controversy or uncertainty which is the subject of the petition;
  - (3) the manner in which the controversy or uncertainty affects the petitioner;
  - (4) a complete statement of the facts and grounds prompting the petition;
- and
- (5) the names and addresses of any other persons directly involved in the controversy or directly affected by the uncertainty.

*Id.*

10. A petition for declaratory order shall be accompanied by a brief in which the petitioner sets forth their position and all facts and arguments known in support of and in opposition to that position (1.2.2.21(B)(1) NMAC). The petition shall also be accompanied by affidavits attesting to the facts alleged in the petition or brief (1.2.2.21(B)(2) NMAC).

**a. 17.9.573.12(C) NMAC limits the consideration of bids of a single bidder to twenty percent of the statewide capacity cap allocated to the applicable utility.**

11. 17.9.573.12(C) NMAC was recommended by program stakeholders to be included in the Final Rule to ensure that no single developer could be awarded most or all of the program capacity, as such an outcome would undermine the Program’s intent to develop a healthy and robust community solar market. Along with the desire to ensure that the benefits of the program would be shared among multiple subscriber organizations, stakeholders also expressed concern that entities affiliated with New Mexico utilities may have an unfair project development advantage and would monopolize awarded program capacity in the absence of a cap. After robust discussion, it was decided that no individual subscriber organization should be awarded more than 20% of a utility’s allocation of the statewide program capacity cap.

12. 17.9.573.12(C) NMAC was also recommended by program stakeholders to be included in the Final Rule as it was widely understood that a robust and diverse set of subscriber organizations would better ensure the long-term viability of the program by securing additional public and private capital for the program. The stakeholders were also cognizant of the benefits the New Mexico Program may realize from multiple Federal programs including the Inflation Reduction Act, Solar for All, and the Community Power Accelerator.

13. The Petitioners participated in the Commission stakeholder process required to be established by Section 62-16B-7(D) of the Community Solar Act: “The commission shall solicit input from relevant state agencies, public utilities, low-income stakeholders, disproportionately

impacted communities, potential owners or operators of community solar facilities, Indian nations, tribes and pueblos and other interested parties in its rulemaking process.”

14. The Program Administrator did not participate in the stakeholder process that helped inform the Rules.

15. As stated above, 17.9.573.12(C) NMAC limits on the number of “bids” that the Program Administrator may consider for awards to a maximum of “twenty percent of the statewide capacity cap allocated to the applicable utility.” These limits were not imposed in the final selection of initial awards and waitlisted projects as posted on the program website <https://csnewmexico.com/project-selection-and-waitlists/>.

16. The Petitioners engaged the Program Administrator through emails and direct conversations to clarify how the Program Administrator plans to implement 17.9.573.12(C) NMAC, because some Subscriber Organizations have enough projects on the Selected and Waitlisted Bids lists to potentially exceed the 20% cap of program capacity.

17. The Program Administrator stated that it interprets the rule such that: 1) the developer cap of 20% of a utility’s capacity allocation only applies to the initial awards/project selection phase and not to any subsequent awards; 2) after the “initial award phase”, there are no limitations on how much capacity can be ultimately awarded to a single developer; 3) waitlisted projects are not part of the body of “consideration” when applying the 20% developer cap. Specific statements included: “the developer cap is only applied during the selection process of awarded capacity. Once the initial selection was announced, the cap was no longer enforced” and “20% developer cap applied specifically to the capacity of projects **awarded** [Program Administrator highlight] to each developer”.

18. When asked the question “Does the Developer Cap apply after project selection?” in the program FAQs, posted at <https://csnewmexico.com/learn-more/faqs/>, the Program Administrator responded, “The developer cap will be applied through project selection. After project selection, the developer cap will no longer be applied. After project selection, projects may be purchased and sold in excess of the 20% developer cap.”

19. When asked the question “Does the 20% Developer Cap apply to submitted bids or awarded capacity?” in the program FAQs, posted at <https://csnewmexico.com/learn-more/faqs/>, the Program Administrator responded, “The 20% developer cap applies to the capacity of project applications awarded in each utility service territory, not to the number of bids submitted.”

20. The Program Administrator has stated that it intends to implement 17.9.573.12(C) NMAC according to its own interpretation.

21. The Petitioners disagree with the Program Administrator’s interpretation of the rule and believe that its interpretation represents an arbitrary and capricious construction of 17.9.573.12(C) NMAC.

22. 17.9.573.12(C) NMAC does not mention the word “award” at all but does use the word “bid” twice. A reasonable interpretation of this rule is that the Program Administrator should have only accepted “bids by any one bidder to a maximum total for such bids of twenty percent of the statewide capacity cap allocated to the applicable utility,” as the rule clearly states.

23. 17.9.573.12(C) also does not distinguish between initial awards and subsequent awards from potential waitlisted projects. A reasonable interpretation of the rule is that waitlisted projects are part of the “consideration” that the rule contemplates.

24. A reasonable interpretation of 17.9.573.12(H) NMAC, which establishes a waitlist, is that the Commission intended for waitlisted projects to be part of the “consideration” of selected projects.

25. The Program Administrator’s interpretation of 17.9.573.12(C) NMAC that there are no limits to how much capacity a single developer can be awarded after the “initial award phase” is clearly contrary to the express language and intent of the rule and the intent of the stakeholder process.

26. The Program Administrator has indicated that the 20% cap should not apply after the project selection phase. However, as projects on the Selected Bids lists undergo the interconnection study process and final project development, some projects may not move forward in the program, which will allow the next project on the Waitlisted Bids list to move up to the Selected Bids list. In this way the project selection process is still in progress and should not be considered complete until all of the projects on the Selected Bids list have completed their full interconnection study and are committed to moving forward. In other words, although the initial selection phase has concluded, the “consideration of bids” phase is still in process as long as Waitlisted projects can still be moved to the Selected Bids list. Therefore, the 20% cap should continue to be enforced at this time, as the project selection phase is still effectively ongoing.

27. The Petitioners have consulted on the interpretation of 17.9.573.12(C) NMAC with a wide array of New Mexico Community Solar Program stakeholders including Coalition for Community Solar Access (“CCSA”). CCSA and many of their members have concerns about the Program Administrator’s interpretation of this rule.

28. CCSA has put forward to the Program Administrator a proposal that splits the difference between the two extreme interpretations of 17.9.573.12(C) NMAC (One extreme is that the

Program Administrator should have put a 20% limit on the capacity of bids they accepted from a single bidder, and the other extreme is that the Program Administrator believes there are no ultimate limits on the amount of program capacity the Program Administrator can award to a single bidder). CCSA's proposal reads:

*When a project is withdrawn from the Selected Bids list, the next project on the waitlist should automatically be moved to the Selected Bids List, except if the developer cap will be exceeded. Therefore, when a project is withdrawn from the Selected Bids list, a Subscriber Organization's ("SO") next project on the Waitlist may only move from the Waitlist to the Selected Bids List if the total capacity of (1) that SO's projects from the Selected Bids list which have not been withdrawn, plus (2) the capacity of the waitlisted project in question, does not exceed that utility's 20% developer cap. If moving the waitlisted project in question to the Selected Bids list would cause the Subscriber Organization to exceed the utility's developer cap, the project will remain on the waitlist but may not move to the Selected Bids List. The next project on the waitlist will be given the opportunity to move to the Selected Bids List. The Program Administrator will implement this process each time a project from the Selected Bids list is withdrawn from the program or capacity of a project is reduced and shall update the Selected Bids List accordingly within five Business Days of notification of a project's withdrawal or downsizing. This process will maintain the spirit and intent of the regulations, ensuring that the benefits of the program are not concentrated among just a few Subscriber Organizations.*

Managing the Community Solar program in accordance with this proposal will not only enforce the 20% cap as the Rule and stakeholder process intended, but also will ensure that Subscriber Organizations have the information they need to make informed decisions during the

interconnection study process by clarifying that the Program Administrator must update the Selected Bids page in a timely manner after any project drops out of the program.

29. The Program Administrator rejected the proposal from CCSA and stated again that it intends to implement 17.9.573.12(C) NMAC according to its incorrect interpretation.

**b. The Petitioners are directly affected, or injured, by the Program Administrator's interpretation of 17.9.573.12(C) NMAC because petitioners will not have a fair opportunity to have waitlisted projects receive capacity awards and it may disrupt petitioners ability to develop project at all, compromising funding available to projects.**

30. The Petitioners, all of whom are Subscriber Organizations with varying ranks of awarded projects, are each directly affected by the Program Administrator's interpretation of the Rule, because allowing awards beyond the 20% developer cap is likely to undermine petitioner's fair opportunity to have waitlisted projects receive capacity awards. The Program Administrator's interpretation of the Rule is also likely to concentrate awards to a small number of developers, undermining the intent of the Rule to limit any single developers to a combined 20% cap of project capacity for all projects awarded.

31. Prosperity Works (PW) has a particular interest in ensuring that 17.9.573.12(C) NMAC is implemented according to the rule's intent as they are a recipient of U.S. Department of Energy's Community Power Accelerator Prize. If the Program Administrator allows individual bidders to exceed the 20% developer cap, then there is the possibility that PW will not have a fair opportunity to develop a community solar project per their waitlisted rank in the program (waitlisted positions are currently 3<sup>rd</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup>). This would harm PW as they would not be eligible for any additional Community Power Accelerator federal funds to develop community solar projects with meaningful benefits in New Mexico. This would be a loss of \$350,000 to support community solar growth in New Mexico.

### **III. CONCLUSION**

1. For the foregoing reasons Petitioners respectfully request that the Commission issue a declaratory order on their interpretation of 17.9.573.12(C) NMAC.

2. Specifically, Petitioners respectfully recommend that the Commission require the Program Administrator to adopt the Coalition for Community Solar Access' proposed protocol for administering the community solar program. This proposal would prevent a community solar project on the Waitlist from moving up to the Selected Bids list if that project would cause the Subscriber Organization to exceed the 20% developer cap. In the view of Petitioners, the Program Administrator's current interpretation of the developer cap effectively eliminates the 20% limitation, whereas the proposal suggested by the Coalition for Community Solar Access is easy to implement and comports with the spirit of the Rule.

Respectfully submitted,

/s/ Cara R. Lynch

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**SELF AFFIRMATION**

**Kristin Peterson, Senior Market and Policy Analyst, PPC New Energy**, upon penalty of perjury under the laws of the State of New Mexico, affirm and state I have read the foregoing: **Petition of PPC New Energy, Chaberton Energy, and Prosperity Works for Declaratory Order on Commission Rule 17.9.573.12(C).**

I further affirmatively state that I know the content thereof and that they are true and correct to the best of my knowledge and belief.

Date this 23<sup>rd</sup> Day of February 2024.

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Kristin Peterson

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**SELF AFFIRMATION**

**Philip Watkins, Director of Development, Chaberton Energy**, upon penalty of perjury under the laws of the State of New Mexico, affirm and state I have read the foregoing: **Petition of PPC New Energy, Chaberton Energy, and Prosperity Works for Declaratory Order on Commission Rule 17.9.573.12(C).**

I further affirmatively state that I know the content thereof and that they are true and correct to the best of my knowledge and belief.

Date this 23<sup>rd</sup> Day of February 2024.



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Philip Watkins

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**SELF AFFIRMATION**

**Dr. Ann Lyn Hall, Chief Executive Officer, Prosperity Works**, upon penalty of perjury under the laws of the State of New Mexico, affirm and state I have read the foregoing: **Petition of PPC New Energy, Chaberton Energy, and Prosperity Works for Declaratory Order on Commission Rule 17.9.573.12(C).**

I further affirmatively state that I know the content thereof and that they are true and correct to the best of my knowledge and belief.

Date this 23<sup>rd</sup> Day of February 2024.

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Dr. Ann Lyn Hall