

**BEFORE THE ATTORNEY GENERAL OF THE STATE OF NEW MEXICO**

**Open Meetings Act Complaint**  
**Regarding Misleading Meeting Agenda Notices**  
**for Santa Fe County's Consideration and Approval of the**  
**2022 Community Solar Ordinance**

**Ashley C. Schannauer**

**[REDACTED]**  
**Santa Fe, NM 87508**  
**[REDACTED]**

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## I. BACKGROUND

This is an Open Meetings Act complaint regarding Santa Fe County's use of the 2022 Community Solar Ordinance to change the definition of Commercial Solar Energy Production Facility in the County's Sustainable Land Development Code (SLDC). The Santa Fe County Board of County Commissioners and Planning Commission acted on the 2022 Community Solar Ordinance in meetings of May 31, 2022 (Board meeting), June 16, 2022 (Planning Commission meeting), and July 12, 2022 (Board meeting) in which the meeting agendas provided inadequate notice of the change to the definition of Commercial Solar Energy Production Facility that was included in the Ordinance. The change to the definition made the Rancho Viejo Solar Energy Project newly eligible for permitting as a Conditional Use in a Rural Fringe zoning district, which lies between the residential communities of Rancho San Marcos, Eldorado and Rancho Viejo. (The Community Solar Ordinance is attached as Exhibit 1.)

My wife and I are residents of the Eldorado subdivision in Santa Fe County. Eldorado is located east of the site where AES Corporation (AES) seeks to build an 800 acre solar farm, a four acre complex of lithium-ion battery storage facilities, a substation, and a transmission line connecting the solar farm, battery storage facilities, and substation to a Public Service Company of New Mexico (PNM) transmission line.<sup>1</sup>

We oppose AES's request to include the four acre 48 MW lithium-ion battery storage complex in the Rancho Viejo Solar Energy Project.

I first learned of the large 96 MW utility-scale Rancho Viejo Solar Energy Project in May of this year from a news article in the *New Mexican*. I grew concerned because I knew of the fire risks of the lithium-ion battery storage facilities included in the proposed Rancho Viejo project. I knew of the fire risks based upon my 17 years of work as an attorney and hearing examiner at the New Mexico Public Regulation Commission (PRC). The proposed siting of the project among three residential areas in dry, windy grassland could put the community of Eldorado, where I am a resident, at significant risk for fire.

Through public records requests, I learned that the County, over three meetings held in May through July of last year, changed the definition of Commercial Solar Energy Production Facility in the SLDC to include storage facilities. The definition per the 2016 SLDC is as follows: "Commercial Solar Energy Production Facility: is a renewable energy production facility that uses sunlight to generate energy for sale or profit." The revised definition as stated in the 2022 Community Solar Ordinance reads "Commercial Solar Energy Production Facility: is a renewable

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<sup>1</sup> The exact distance between the perimeter of the battery storage area and Eldorado is unclear. Citizen measurements place the distance at one mile or less. The Environmental Impact Report submitted by AES with its January 2023 Application states that the Eldorado subdivision is located 1.9 miles east of the "main solar facility," but AES has not submitted a clear map drawn to scale that would show the distance between the eastern perimeter of the 800 acre site and the edge of the Eldorado subdivision. The AES review also states that "the gen-tie [line] and substation border the subdivision to the north." Environmental Impact Report for the Rancho Viejo Solar Project, January 2023, at 3-69. A more recent map provided informally to a group of residents measures a 1.45 mile distance between the edge of the battery storage facilities and the nearest house in Eldorado. This more recent map also shows a closer distance between the project and the Gallina Arroyo which forms a greenbelt in Eldorado that would provide a fast corridor for a fire to reach additional homes in Eldorado.

energy production facility that uses sunlight to generate, *and may store*, energy for sale or profit.” (Emphasis added.) The Community Solar Ordinance added those three words “*and may store*.” Since the County SLDC specifies that a Commercial Solar Production Facility may be permitted with a Conditional Use Permit in a Rural Fringe district, this change in the definition is significant because it made the Rancho Viejo Project newly eligible for permitting in the area at issue as a Conditional Use.

Yet despite the significance of this change, the notices in the County’s meeting agendas did not inform the public of the change. The process violated Section 10-15-1(F) of the Open Meetings Act because the notices that were provided in the meeting agendas were misleading.<sup>2</sup> The notices were specific: they repeated the title of the Community Solar Ordinance, which identified specific measures the County was adopting for Community Solar projects. However, the notices omitted any mention of commercial solar facilities, despite the fact that the County was proposing to change the definition of commercial solar facilities in a way that would facilitate the AES proposal for the Rio Rancho solar project to include battery storage.

On August 14, 2023, I sent a Notice of Violation of Open Meetings Act (Exhibit 2) to the County Manager and the County Attorney, with copies to each of the Commissioners. Under Section 10-15-3(B) of the Open Meetings Act, the County was required to act on the Notice within fifteen days of receiving it, i.e., by August 29, 2023.<sup>3</sup>

On August 24, 2023, the County Attorney prepared a memorandum for the Board of County Commissioners (Exhibit 3) meeting on August 29, 2023. The memorandum presented an analysis of the Notice of Violation for the Commissioners’ consideration.

On August 28, 2023, I sent a letter to the County Manager and County Attorney with copies to each of the Commissioners (Exhibit 4), responding to the County Attorney’s memorandum of August 24, 2023.

On August 29, 2023, prior to the Commissioners’ action, 15 members of the public addressed the Notice of Violation during the period set aside for public comment and urged the Commissioners to be more open and transparent. Later in the meeting, however, after a discussion in closed session, the Commissioners considered and denied the claims in the Notice of Violation.

On August 30, 2023, the County Attorney sent an email to me informing me of the County’s action. He said the Board denied the claims in the Notice of Violation for the reasons stated in the August 24 memorandum.

The following discussion has four sections. Section II summarizes the Complaint. Section III describes the Open Meetings Act Violation and why the violation is significant. Section IV rebuts the County’s response to the claims in the Notice of Violation. Section V concludes with a final description of the violation and the questions the County has not addressed. Answers to those questions would likely add to the violation’s significance.

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<sup>2</sup> NMSA 1978, Section 10-15-1(F).

<sup>3</sup> NMSA 1978, Section 10-15-3(B).

## II. SUMMARY OF COMPLAINT

The 2022 Community Solar Ordinance added an entirely new topic -- Community Solar -- to the Santa Fe County Sustainable Land Development Ordinance (SLDC). The Ordinance established siting and other regulations for the relatively small (5 MW maximum) size of Community Solar energy projects authorized by the 2021 Community Solar Act.

Buried in the County's Community Solar Ordinance, however, was an unrelated change to the definition of Commercial Solar Energy Production Facilities, which had been a topic of the SLDC since the SLDC's adoption in 2016. In contrast to Community Solar Facilities, Commercial Solar Energy Production Facilities are utility-scale solar energy projects, the 2016 definition of which included only the generation of solar energy for sale, with no mention of battery storage. The change in the Community Solar Ordinance added the three words "and may store" to the definition of Commercial Solar Energy Production Facility.

The definitional change was significant. It had the effect of making eligible for a Conditional Use Permit the proposed utility-scale 96 MW Rancho Viejo Solar Energy Project, which included a 48 MW lithium-ion battery storage facility. The County and AES, the project's developer, had been discussing the project for several months prior to the change.<sup>4</sup> The project would create a fire risk for the adjacent residential communities of Rancho San Marcos, Eldorado and Rancho Viejo. In fact, two AES storage facilities with lithium-ion batteries caused dangerous fires in Arizona in 2019 and 2022.

The agenda notices for the three meetings at which the County considered and acted on the Community Solar Ordinance, however, identified only the provisions pertaining to Community Solar. The notices were specific and narrowly drawn. And it was the notices' specificity, coupled with the complete omission of any reference to the change of the unrelated definition of Commercial Solar Energy Production Facility, that made the notices misleading. The misleading agenda notices violated Section 10-15-1(F) of the Open Meetings Act.

Further, the proposed Community Solar Ordinance was introduced to the Board of County Commissioners on May 31, 2022, only weeks after the project's developer experienced a battery storage facility fire that lasted from April 18 to May 1, 2022 at a 10 MW Arizona solar energy and battery storage facility which required the evacuation of nearby businesses.

Furthermore, the County's public explanation for expanding the definition of Community Solar Energy Production Facilities is that it was "syncing" that definition with its newly created definition of Community Solar Facility. The County claims that this "syncing" was in line with its attempt to implement the 2021 Community Solar Act. But the County's definition of Community

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<sup>4</sup> Through public requests, I learned that representatives of AES and the County appeared to have met at least on November 4, 2021 for a discussion with the County's Technical Advisory Committee, on March 29, 2022 for a discussion of the Technical Advisory Committee letter informing AES of the reports and information the County would require in AES's application for a Conditional Use Permit, and on May 18, 2022, a few weeks before the County adopted the 2022 Community Solar Ordinance, for a discussion, the purpose of which the responses to my document requests did not disclose.

Solar Facilities went beyond the scope of Community Solar projects as defined and authorized by the Act. The battery storage facilities authorized by the County’s Community Solar Ordinance are not authorized in the Act.

The County appears to have been intent on accommodating battery storage facilities with solar energy projects, perhaps also including the Rancho Viejo project. But they were apparently not interested in informing the public about their intentions.

### **III. THE COUNTY’S VIOLATION**

#### **A. The New Mexico Open Meetings Act requirements for meeting agenda notices**

The New Mexico Open Meetings Act requires that meetings of public bodies, such as the Board and Planning Commission, provide public notice of meetings and that the notices shall include an agenda containing a list of specific items of business to be discussed or transacted at the meeting. The Act also requires that, except for emergency matters, a public body shall take action only on items appearing on the agenda.<sup>5</sup> Further, the Act states that “[N]o resolution, rule, regulation, ordinance or action of any board, commission, committee or other policymaking body shall be valid unless taken or made at a meeting held in accordance with the requirements of NMSA 1978, Section 10-15-1.”<sup>6</sup>

The Compliance Guide for the Open Meetings Act published by the New Mexico Attorney General states that each agenda must contain a list of specific items to be discussed or transacted at the meeting. The descriptions should not mislead the public about the business the public body intends to transact:

The agenda must contain a list of “specific items” of business to be discussed or transacted at the meeting. The requirement for a list of specific items of business ensures that interested members of the public are given reasonable notice about the topics a public body plans on discussing or addressing at a meeting. A public body should avoid describing agenda items in general, broad or vague terms, which might be interpreted as an attempt to mislead the public about the business the public body intends to transact. This is an especially important consideration when a public body intends to act on an agenda item.<sup>7</sup>

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<sup>5</sup> NMSA 1978, 10-15-1(F). The Open Meetings Act defines “emergency” as “unforeseen circumstances that, if not addressed immediately by the public body, will likely result in injury or damage to persons or property or substantial financial loss to the public body.” Id.

<sup>6</sup> NMSA 1978, 10-15-3.

<sup>7</sup> A Compliance Guide for New Mexico Public Officials and Citizens, Open Meetings Act, NMSA 1978, Chapter 10, Article 15, Eighth Edition 2015, at p. 17, Commentary 3, attached as Exhibit 6.

**B. The agenda notices provided by the County for the meetings at which the 2022 Community Solar Ordinance was considered and approved were misleading in violation of the Open Meetings Act.**

The proposed 2022 Community Solar Ordinance was presented to the Board for consideration on May 31, 2022. The Board then sent the proposed Ordinance to the Planning Commission, which conducted a hearing on the Ordinance on June 16, 2022 and voted to recommend its approval. The Board approved the Ordinance on July 12, 2022.<sup>8</sup>

The agenda notices for the Community Solar Ordinance were substantially the same for each of the three meetings. The notice for the May 31 meeting stated under Item 6.D Miscellaneous Action Items:

D. Request (1) Authorization to Publish Title and General Summary of Ordinance No. 2022-\_\_\_\_\_, An Ordinance Amending the Sustainable Land Development Code, Ordinance No. 2016-9, to Add a Definition of Community Solar and Add a New Section 10.25 to Address Standards for Community Solar Facilities and (2) Discussion and Potential Direction Concerning Resolution No. 2022-\_\_\_\_\_, A Resolution Adopting the Santa Fe County Community Solar Letter of Support Criteria and Template. (Growth Management and Community Developments/Penny Ellis-Green, Paul Olafson, Nathaniel Crail, and Adeline Murthy)

The notice for the June 16 meeting stated the following under Item 4. New Business:

B. Recommendation on Ordinance No. 2022-\_\_\_\_\_, An Ordinance Amending The Sustainable Land Development Code, Ordinance No. 2016-9, To Add A Definition Of Community Solar, To Add A New Section 10.25 to Address Standards For Community Solar Facilities And To Add A New Clause To Section 8.11.3.5.2 To Prohibit A Community Overlay District From Restricting The Location And Procedures For Installing Community Solar Facilities. (Growth Management and Community Development Departments/Penny Ellis-Green, Paul Olafson, Nathaniel Crail, and Adeline Murthy).

The notice for the July 12 meeting stated the following under “Item 12. Public Hearing on Proposed Ordinance and Other Matters Related to Community Solar – To be Heard No Earlier than 5:00 p.m. (Action Items)”:

A. Ordinance No. 2022-\_\_\_\_\_, An Ordinance Amending the Sustainable Land Development Code (SLDC), Ordinance No. 2016-9, to Add a Definition of Community Solar, to Add a New Section 10.25 to Address Standards for Community Solar Facilities and to Add a New Clause to Section 8.11.3.5.2 to Prohibit a Community Overlay District from Restricting the Location and

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<sup>8</sup> The Community Solar Ordinance is attached as Exhibit 1.



Procedures for Installing Community Solar Facilities. (Growth Management Department/Lucy Foma)

The agenda notices substantially repeat the title of the proposed Community Solar Ordinance:

AMENDING THE SUSTAINABLE LAND DEVELOPMENT CODE,  
ORDINANCE NO. 2016-9, TO ADD A DEFINITION OF COMMUNITY  
SOLAR, TO ADD A NEW SECTION 10.25 TO ADDRESS STANDARDS FOR  
COMMUNITY SOLAR FACILITIES AND TO ADD A NEW CLAUSE TO  
SECTION 8.11.3.5.2 TO PROHIBIT A COMMUNITY OVERLAY DISTRICT  
FROM RESTRICTING THE LOCATION AND PROCEDURES FOR  
INSTALLING COMMUNITY SOLAR FACILITIES

The title lists three items that the ordinance addresses, and the text of the Ordinance addresses each of those items. The **only** subject that the text of the Ordinance addresses that is not identified in the title is the changed definition of Commercial Solar Energy Production Facility.

The Ordinance contains five sections. Section 1 states the Board’s findings with regard to Community Solar. Section 1 states nothing about an intent to change the definition of Commercial Solar Energy Production Facility:

1. The Board makes the following findings with regard to community solar.
  - a. The Board adopted and restated the Santa Fe County Sustainable Land Development Code (“SLDC”) on December 13, 2016, via Ordinance No. 2016-9.
  - b. Community solar is a use not specifically enumerated in Use Tables and Use Matrix in Appendix B of the SLDC.
  - c. The SLDC identifies Commercial Solar within Use Matrix in Appendix B. However, the SLDC does not currently identify Community solar within the Use table.
  - d. The New Mexico Governor signed the Community Solar Act, or SB84, into law on April 5, 2021.
  - e. The New Mexico Public Regulation Commission’s Community Solar Rule was adopted on March 30, 2022.
  - f. The Board has determined that community solar should have different Use Tables and Use Matrix than Commercial Solar to accommodate the needs of community solar development.

Section 2 includes the first item identified in the title of the Community Solar Ordinance: “to add a definition of Community Solar.” But Section 2 also contains, for the first and only time in the

Ordinance, an action regarding Commercial Solar Energy Production Facility, i.e., the changed definition of Commercial Solar Energy Production Facility:

2. Appendix A of the SLDC is hereby amended to include the following definition:

**Community Solar Facility:** is a facility governed by the 2021 New Mexico Community Solar act (as may be amended) that generates, and may store, electricity by means of a solar photovoltaic device; subscribers to the facility receive a bill credit for the electricity generated in proportion to the subscriber's share of the facility's kilowatt-hour output.

**Commercial Solar Energy Production Facility:** is a renewable energy production facility that uses sunlight to generate, and may store, energy for sale or profit.

**Again, the changed definition of Commercial Solar Energy Production Facility is the only action item in the Ordinance that is not identified in the Ordinance title or in the description of the Ordinance that was included in the three meeting agendas of May 31, June 16 and July 12, 2022.**

Section 3 of the Ordinance adopts the second item identified in the title of the Community Solar Ordinance: "to add a new Section 10.25 to address standards for Community Solar Facilities":

3. Chapter 10 of the SLDC is hereby amended to add a new section as follows:

#### 10.25 Community Solar

10.25.1 Purpose and Findings -- The purpose of regulating community solar is to facilitate the development of renewable resources to serve the County's constituents and to meet the goals of the Sustainable Growth Management Plan. The County aims to accommodate the needs of community solar development and to only require the minimum standards to attempt to minimize the adverse effects on neighboring properties.

10.25.2 Applicability.  
Community solar projects are considered a permitted use in all zoning Districts.

#### 10.25.3 Standards.

1. Buffering and screening is not required for ground mounted facilities. If fencing is proposed for security purposes, agricultural fencing with six (6) inch knots for wildlife is recommended.

2. External access roads for ground mounted facilities may reduce the road easement width for off-site and on-site driveways to no less than twenty (20) feet if adequate drainage control is provided and may allow the surface to be hardpacked dirt with compaction of 95% of the maximum density. If the access road adjoins a paved road, an asphalt or concrete apron of ten (10) feet in width will be required to protect the pavement.
3. On-site driveways for ground-mounted facilities may reduce standards as identified in Section 7.11.12.2 (additional standards for residential driveways), as access will be minimal for this type of development.
4. Disturbed area shall be reseeded with drought tolerant native plant species for pollinator friendly habitat. Weeds and plant materials shall be properly managed to reduce fire risks.
5. Utility lines shall comply with Section 7.12 of the SLDC. The connection between the community solar facility and the electric utility infrastructure shall be considered a local distribution facility.
6. A five (5) foot setback is required on all sides of a community solar facility that is twenty (20) feet in height or less. A community solar facility that is over twenty (20) feet in height shall meet the setback requirements of the zoning district in which the facility is located.
7. Community solar facilities located on a non-residential or multifamily rooftop shall be allowed to be eight (8) feet higher than the building on the rooftop of which the community solar facilities are located but in no event more than eight feet (8') above the height limit otherwise imposed on structures in that zoning district. Rooftop community solar facilities shall be set back five (5) feet from the sides of the building.
8. State approval shall be submitted prior to development permit issuance.
9. Community solar facilities shall be set back three hundred (300) feet from rivers, streams, wetlands and all riparian areas.
10. Decommissioning:
  - a. The owner/operator shall, at its expense, complete decommissioning of the community solar facility within

twelve (12) months after the end of the useful life of the facility. Decommissioning must occur in the event the facility is not generating electricity for twelve (12) consecutive months.

b. Decommissioning shall include removal of all solar panels, structures, cabling, electrical components, roads, and foundations to a depth of thirty-six (36) inches, as well as any other associated facilities/equipment with satisfactory disposal and recycling of equipment. Disturbed earth shall be graded and reseeded with drought-tolerant native plant species.

c. An independent and New Mexico state certified professional engineer shall be retained to estimate the total cost of decommissioning ("Decommissioning Costs") without regard to salvage value of the equipment, and the cost of decommissioning net of salvage value of the equipment ("Net Decommissioning Costs"). Said estimates shall be submitted to the County after the first year of operation and every fifth year thereafter.

d. The owner/operator shall provide assurances that financial resources will be available to fully decommission the site.

e. The owner/operator is required to post a bond, letter of credit, or the establishment of an escrow account to ensure proper decommissioning.

Section 4 of the Ordinance adopts the third **and final item** identified in the title of the Community Solar Ordinance: "to add a new clause to Section 8.11.3.5.2 to prohibit a Community Overlay District from restricting the location and procedures for installing Community Solar Facilities":

4. Section 8.11.3.5.2 is hereby amended by deleting "or" from subparagraph j; replacing the "." in subparagraph k with "; or"; and adding the following new subparagraph l:

"l. location of and procedure for approving and installing a community solar facility."

The Ordinance concludes in Section 5 with a statement of the effective date of the amendments:

5. The effective date of the amendments to the SLDC adopted by this Ordinance shall be 30 days after this Ordinance is recorded with the County Clerk.

**The title of the Community Solar Ordinance (and the description of the proposed action in each meeting agenda) contained every item in the proposed Ordinance – except the change to the definition of Commercial Solar Energy Production Facility.**

Thus, the problem with the notices in the meeting agendas is not that the descriptions were too broad and were therefore misleading. The problem is that the notices were misleading because the notices (reflecting the title of the Community Solar Ordinance) were so specific. Everything -- everything -- in the proposed Ordinance was described in the title of the Ordinance and in the description of the proposed action in the meeting agenda – except the changed definition of Commercial Solar Energy Production Facility.

The New Mexico Supreme Court in *State ex rel Salazar v. Humble Oil & Ref. Co.*, 1951-NMSC-059, 55 N.M. 395, 234 P.2d 339, held that a legislative Act with a title that was explicit about the specific amendments it was making to existing statutes was invalid with respect to additional amendments that were not identified in the title:

{81} It is noted that the title of the amendment is not phrased in general or broad terms but is very restrictive and specifies it is to amend Secs. 1, 2 and 20 of Ch. 103 of the Session Laws of 1937. But the act itself goes further than the title and including a specific and important amendment to Sec. 4 of Ch. 103 of the Session Laws of 1937. This amendment, which is in no way shown or referred to in the title of the 1949 act, is the last section, that is, Sec. 4 of Ch. 65 of the Session Laws of 1949, which very materially amended Sec. 4 of the Session Laws of 1937.

{82} The title of the amending act could have been in general terms and yet would have been sufficient but here there was an attempt to amend specifically by pinpointing in the title of the amending act of 1949 the sections in the 1937 act which were to be changed and amended. The title of the 1949 amending act certainly was misleading, because the act itself went far beyond anything revealed by the title when it amended Sec. 4.<sup>9</sup>

The decision in *State ex rel Salazar v. Humble Oil & Ref. Co.*, was based on a provision in the New Mexico Constitution which states that “The subject of every bill shall be clearly expressed in its title, and no bill embracing more than one subject shall be passed except general appropriation bills and bills for the codification or revision of the laws; but if any subject is embraced in any act which is not expressed in its title, only so much of the act as is not so expressed shall be void.” NM Const. Art. IV, section 16.

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<sup>9</sup> *Humble Oil*, 1951-NMSC-059, at paras. 81-82.

The provision does not apply to ordinances, but the analogy is clear. The specificity of the title of the Community Solar ordinance did not give the public any notice about the amendment to the definition of Commercial Solar Energy Production Facilities that added the opportunity to include storage facilities. The public was not made aware of this significant definitional change, and it lacked a meaningful opportunity to participate in the County's review of the change.

### **C. The violation was significant**

#### **1. Generation and storage technologies are different and pose different risks to the public.**

Based upon my 17 years of experience as an attorney and hearing examiner with the PRC, it is clear to me that the County's change of the definition of Commercial Solar Energy Production Facility was, in fact, significant. Production facilities, such as photovoltaic solar arrays, are technologies that generate electricity. They are completely different from technologies that store it and later release it. They involve different risks and they deserve different siting considerations.

Utilities such as PNM and regulatory agencies such as the PRC recognize this difference and treat generation facilities and storage facilities as separate energy resources for permitting and contracting.

Solar and other renewable energy facilities generate electricity. They have been used by electric utilities in New Mexico for many years. Battery storage facilities store electricity from renewable resources and other generating resources. They are relatively new.

Battery storage facilities can be co-located with solar facilities, but they can also be co-located with coal-fired, natural gas and wind resources. And they can be located independently at other strategic locations on a utility's grid.

As an example of their differences, PNM first proposed the use of battery storage facilities in its 2019 request to the PRC to approve a portfolio of solar and natural gas generating facilities to replace the coal-fired generating facilities at the San Juan Generating Station.

PNM also proposed that the battery storage facilities be limited in size. PNM proposed two projects that would be located at the sites of the two solar facilities from which it was proposing to buy electricity and two projects that would be built by PNM and located as standalone facilities. The battery storage facilities would be sized at no greater than 40 MW each. They would not be located in densely populated areas:

- A Purchased Power Agreement for the output from a 50 MW solar facility to be located on Jicarilla Apache tribal lands in northwest Rio Arriba County;
- A 20 MW Energy Storage Agreement for a battery storage facility to be built at the Jicarilla solar site;
- A Purchased Power Agreement for the output from the 300 MW Arroyo solar facility to be located in northern McKinley County;

- A 40 MW Energy Storage Agreement for a battery storage facility to be built at the Arroyo solar site;
- Authorization to build a standalone 40 MW utility-owned Sandia battery storage system at an existing PNM substation in Bernalillo County;
- Authorization to build a standalone 30 MW utility-owned Zamora battery storage system at an existing PNM substation in Bernalillo County.

PNM also proposed to install 280 MW of PNM-owned natural gas-fired generating units and a PNM-owned 20 MW solar facility, without battery storage, at the existing San Juan coal plant site.

PNM opposed the larger sizes and number of battery storage facilities proposed by other parties, based, in part, upon the record of accidents in the industry. In support of its cautious approach, PNM presented the July 1, 2019 testimony of an expert witness, who testified about the history of fires at such systems, including the April 2019 fire and explosion at the Arizona Public Service Company facility operated by AES:

Q. HAVE THERE BEEN BATTERY FIRES AT U.S.-BASED BATTERY ENERGY STORAGE SYSTEMS?

A. Yes. There have been at least two well-publicized fires at utility-scale battery energy storage systems in the United States. In August 2012, a 15 Megawatt (MW) battery installed by Xtreme Power on the Hawaiian island of Oahu burned for seven hours before firefighters could extinguish it. More recently, a battery fire at a 2 MW Phoenix-area project owned by Arizona Public Service sent several emergency responders to the hospital after suffering chemical burns.

Q. HAVE THERE BEEN BATTERY FIRES OUTSIDE THE UNITED STATES?

A. Yes. There have been at least 15 fires in battery energy storage systems in Korea so far in 2019, and there was a fire at a lithium-ion battery energy storage system in Belgium in November 2018.<sup>10</sup>

Significantly, too, the approval process entailed separate contracts – Purchased Power Agreements for the solar facilities and Energy Storage Agreements for the battery storage facilities – and separate reviews and approvals for each agreement by the PRC.<sup>11</sup>

I served as a PRC hearing examiner in the case, which was litigated by 26 parties over 8 days of hearings.

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<sup>10</sup> *In the Matter of Public Service Company of New Mexico's Consolidated Application for Approvals for the Abandonment, Financing, and Resource Replacement for San Juan Generating Station Pursuant to the Energy Transition Act, Application*, Case No. 19-00195-UT, Direct Testimony of William Kemp, July 1, 2019, pp. 10-11.

<sup>11</sup> I, Order on Recommended Decision on Replacement Resources, Part II, Case No. 19-00195-UT, July 29, 2020.

In the end, on July 29, 2020, the PRC approved a modified portfolio that rejected several of PNM's proposals and accepted certain of the projects recommended by other parties.<sup>12</sup> Most of the projects are still in the process of construction, so there is no record of their performance.

AES has indicated that it has submitted the proposed Rancho Viejo solar and battery storage facilities as a project in response to a competitive Request for Proposals issued by PNM for generating and storage resources. If PNM accepts AES's proposal, AES and PNM will likely enter into separate contracts for each resource, and each contract will be submitted to the PRC for approval.

Because of the unique characteristics of generating and storage resources, and because of the documented risks posed by battery storage facilities, the County's 2022 change in the Production definition to include storage facilities deserved more attention than to be buried in the middle of an unrelated ordinance dealing with Community Solar facilities.

**2. The County's omission of notice for the change in the definition of Commercial Solar Energy Production Facility took place as the County and AES Corporation were discussing the permit application for the Rancho Viejo Solar Energy Project and shortly after a fire at an AES battery storage facility in Arizona.**

In the months of May through July 2022, two independent reviews by County staff involving solar energy projects in Santa Fe County intersected. The intersection also occurred almost immediately after AES's April 2022 fire at its Chandler, Arizona battery storage facility and shortly after AES's April 2019 fire and explosion at its Surprise, Arizona battery storage facility.

First, AES representatives had been engaging since September 2021 with the County staff in the "pre-application review" required by the Conditional Use process in the SLDC for the utility-scale 96 MW Rancho Viejo Solar Energy Project. AES and County staff conducted the Technical Advisory Committee (TAC) review on November 4, 2021, and, on March 29, 2022, the County

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<sup>12</sup> The PRC approved agreements for the Jicarilla projects as proposed, approved an agreement for the Arroyo solar facility as proposed, and approved an agreement for a larger battery storage system (150 MW) than PNM had proposed. The PRC rejected PNM's proposals for the standalone battery storage facilities and the natural gas turbines and solar facility at the San Juan Generating Station. But, in their place, it approved proposals from two other developers:

- Purchased Power Agreement from "Bidder 2" for the output from a 200 MW solar facility to be built in San Juan County;
- A 100 MW Energy Storage Agreement with "Bidder 2" for a battery storage facility to be located at the site of the 200 MW solar facility in San Juan County;
- Purchased Power Agreement from "Bidder 5" for the output from the 100 MW solar facility to be located in San Juan County; and
- A 30 MW Energy Storage Agreement with "Bidder 5" for a battery storage facility to be located at the site of the 200 MW solar facility in San Juan County.



staff issued the TAC summary letter based on the November 2021 meeting. The timeline for this first set of events was as follows:

**Rancho Viejo Solar Energy Project**

<b>April 19, 2019</b>	<b>AES battery storage fire and explosion, Surprise AZ</b>
September 2021	AES Corporation requests Technical Advisory Committee (TAC) review
November 4, 2021	AES-County TAC meeting
March 29, 2022	County issues TAC summary letter
March 30, 2022	AES-County Staff meeting
<b>April 18-May 1, 2022</b>	<b>AES battery storage fire, Chandler, AZ</b>

Second, the County was separately developing a Community Solar ordinance to determine siting regulations for the small (up to 5 MW) solar facilities authorized under the Community Solar Act of 2021 and the March 30, 2022 PRC regulations implementing the Act. The timeline for this second set of events was as follows:

**Community Solar**

<b>April 19, 2019</b>	<b>AES battery storage fire and explosion, Surprise AZ</b>
April 5, 2021	Community Solar Act signed into law
March 30, 2022	PRC Community Solar Rule
<b>April 18-May 1, 2022</b>	<b>AES battery storage fire, Chandler, AZ</b>

The Community Solar and Rancho Viejo Solar Energy Project reviews converged in the Community Solar Ordinance. After a final meeting between AES and the County staff on May 18, 2022, County staff presented the proposed Community Solar ordinance to the Board of County Commissioners on May 31, 2022. The ordinance, which was ultimately adopted on July 12, 2022, established siting regulations for the small Community Solar facilities.

But, without notice, the County also included in the Community Solar ordinance an unrelated amendment to the SLDC that facilitated the Rancho Viejo Solar Energy Project. The amendment made newly eligible as a Conditional Use the inclusion of battery storage units with Commercial Solar Energy Production Facilities. The Community Solar ordinance, which applies to small solar facilities (up to 5 MW), changed the then-current definition of Commercial Solar Energy Production Facilities, which, at that time, did not allow the battery storage units AES was proposing in its much larger 96 MW utility-scale Rancho Viejo Solar Energy Project. The timeline of events is as follows:

<b>April 19, 2019</b>	<b>AES battery storage fire and explosion, Surprise AZ</b>
<b>April 18-May 1, 2022</b>	<b>AES battery storage fire, Chandler, AZ</b>
<b>May 18, 2022</b>	<b>AES-County Staff meeting</b>

May 31, 2022	Introduction of Community Solar ordinance to Board of County Commissioners
June 16, 2022	County Planning Commission recommends approval of Community Solar ordinance
July 12, 2022	Board of County Commissioners approves Community Solar ordinance, which includes the revised definition of Commercial Solar Production Facility
October 4, 2022	“Pre-Application Meeting” between AES and San Marcos residents
January 2023	AES files Conditional Use Application for Rancho Viejo Solar Project with County

The May 18, 2022 meeting between AES and County Staff took place only weeks after the fire at AES’s battery storage facility in Chandler, Arizona. As is noted in the timeline above, the fire started on April 18 and was extinguished to the local fire department’s satisfaction on May 1. It is unclear whether the Chandler fire was discussed at the May 18 meeting, whether AES notified the County staff of the fire or whether the County staff learned of the fire independently. It is also unclear what County staff was told or knew about the April 2019 fire and explosion at the AES battery storage facility in Surprise, Arizona.

The inclusion of battery storage facilities at utility-scale solar farms represented a significant change to the definition of Commercial Solar Energy Production Facilities, especially given the history of fires at AES battery storage facilities and battery storage facilities of other companies. The changed definition was buried without explanation in the unrelated Community Solar ordinance and was adopted without adequate notice to the public in violation of the New Mexico Open Meetings Act.

**3. The addition of the words “and may store” made the battery storage facilities in the proposed Rancho Viejo Solar Energy Project newly eligible for consideration as a Conditional Use.**

AES’s proposed battery storage facilities were not eligible for a Conditional Use Permit under the 2016 definition of Commercial Solar Energy Production Facility in effect at the time it first approached the County to discuss the project. The addition of the words “and may store” to that definition in the 2022 Community Solar Ordinance made the battery storage facilities eligible. After the definitional change of Commercial Solar Energy Production Facilities on July 12, 2022, AES proceeded with the “Pre-Application Meeting” required by the SLDC with residents on October 4, 2022 and filed an Application for a Conditional Use Permit for the Rancho Viejo Solar Energy Project in January 2023.

This is significant because the SLDC contains no provisions that address the siting of Commercial Solar Energy Production Facilities, including facilities that contain battery storage units. The only standard the County has to rely on is the general standard for Conditional Use Permits that the

proposed use will not “be detrimental to the health, safety and general welfare of the area” and will not “create a potential hazard for fire, panic, or other danger.”<sup>13</sup>

The foundational issues here -- and the questions the County was able to avoid by not giving adequate notice to the public -- are whether battery storage units should be eligible for a Conditional Use Permit in a Rural Fringe zone, whether the fire risks of a solar facility with battery storage units requires that such projects be regulated as separate uses for zoning purposes, whether they should be regulated as Electric Power Generation Facilities which are allowed only in industrial and institutional districts, or whether they should be regulated as Developments of Countywide Impact (DCIs).

Commercial Solar Energy Production Facilities certainly have the attributes that the SLDC finds as warranting DCI designation:

Developments of Countywide Impact (DCIs) are those developments that have potential for far-reaching effects on the community, place major demands on public facilities and the County’s capital improvement plan and budget, and have the potential to affect the environment and public health, safety, and welfare beyond the impacts on immediately neighboring properties, including adverse noise, light, odor and vibration; explosive hazards; traffic congestion; and burdens on County emergency response services.<sup>14</sup>

Designation of an activity as a DCI enables the County to develop activity-specific siting and other regulations to protect the public interest.

Indeed, with the adoption of the 2022 Community Solar Ordinance, even the much smaller sized category of Community Solar Facilities are regulated as separate uses, with their own siting and other standards. The County also adopted siting “preferences” to be used as a guide for the County to issue Letters of Support to be sent to the PRC to assist the PRC in determining which Community Solar projects the PRC should approve from the limited number of applications it receives. And the much larger commercial Rancho Viejo solar project, with its proposed siting among residential communities, even conflicts with several of the County’s preferences for much smaller Community Solar projects -- that projects be sited in brownfield sites, built environment, degraded land, or rooftop locations, and that projects should not be located on land with healthy, intact ecosystems.

As the County has done for Community Solar Facilities, it should have also established siting and other standards openly and transparently for Commercial Solar Energy Production Facilities. When compared to the County’s adoption of the standards for Community Solar Facilities, the County’s three-word amendment of the definition of Commercial Solar Energy Production Facilities to allow storage facilities to be eligible as a Conditional Use is significant. And the change, which was approved by the County without adequate notice, violated the Open Meetings Act.

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<sup>13</sup> SLDC, section 4.9.6.5.

<sup>14</sup> SLDC, section 11.1.

#### **IV. THE COUNTY'S RESPONSE TO THE AUGUST 14, 2023 NOTICE OF VIOLATION**

##### **A. The County's response was defensive, not explanatory.**

County Commissioner Anna Hansen, as Board Chair, started the public comment session of the August 29, 2023 meeting which preceded the County's consideration of the Notice of Violation, by immediately shortening the time for each comment from the normal three minutes identified in the meeting agenda to two minutes. She provided no explanation.

Fifteen members of the public provided comments on the Notice of Violation. All but one said the County's meeting agenda notices were improper. They all agreed that the County's action on the changed definition for Commercial Solar Energy Production Facilities should have been more open and transparent.

I also commented. I referred the Commissioners to the August 28 letter I sent them responding to the County Attorney's August 24 memorandum. Then I also posed the questions from my letter directly to the Commissioners and requested that they provide answers in the discussion they would have later in the meeting when they were to consider and act on the Notice of Violation:

-- Was the change [in the definition of Commercial Solar Production Facility] intended to facilitate the Rancho Viejo project?

-- Why was the change done in such a covert way?

-- Why not inform the public?

-- Was the County aware, at the time it considered and adopted the changed definition, that an AES battery storage facility in Arizona experienced a fire that required the evacuation of nearby businesses just a few weeks earlier in April 2022? It appears that County Staff had a meeting with AES on May 18 shortly after the April 2022 fire and shortly before the changed definition was presented to the Board on May 31. Did AES inform the County of the fire?

-- Why was there no discussion of the AES fire or the fire risks of battery storage units as the County was considering the changed definition?<sup>15</sup>

Following the closed session in which the agenda indicated the Commissioners would discuss the Notice of Violation, they reconvened in open session and presented a defensive discussion. They did not attempt to explain why the definition change in the Ordinance was written without adequate notice to the public. They did not attempt to explain the extent to which the Ordinance was

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<sup>15</sup> See the discussion in the archive of the August 29 Board meeting at <https://www.youtube.com/watch?v=zxFCQOY4c8k> , 2:39:00 -2:40:09.

addressed to the Rancho Viejo Solar Energy Project, nor did they address whether they were aware of the Rancho Viejo developer's recent record of fires when they adopted the Ordinance.

With one exception, their response simply defended what they did. They argued that the agenda notices were sufficient and that it was the residents' fault if they were not diligent enough to know what the County was doing. The one exception was the County Attorney's statement that the definition of Commercial Solar Energy Production Facility was changed to "sync" with the authorization for storage facilities in the definition of Community Solar Facilities included in the Community Solar Ordinance.

The County Attorney, however, did not explain why the Board did not provide notice of the change in its meeting agendas. That question remains, as do the other questions I and others asked.

In addition, as is discussed below, battery storage facilities, as components of Community Solar Facilities, go beyond the authorization for such facilities in the 2021 Community Solar Act. So the definition in the Community Solar Ordinance that authorizes storage facilities is actually contrary to the Community Solar Act, and there was no need to "sync" the definition of Commercial Solar Energy Production with the definition of Community Solar Facility.

## **B. The County's justifications are not persuasive.**

The County Attorney's August 30, 2023 email to me stated that the Board rejected the claims in my Notice of Violation for the reasons stated in his August 28, 2023 memorandum. But it appears that the rejection was also based upon additional statements made by the County Attorney and Commissioners during the Board's discussion of the issue in their August 29, 2023 meeting. This section addresses the County Attorney's legal memorandum and the statements made at the Board meeting.

### **1. The violation is not "much ado about nothing."**

The County Attorney wrote in the August 24 memorandum that the amendment to the definition of Commercial Solar Energy Production Facility "may be much ado about nothing." He wrote that the words "and may store" were included "to avoid any arguable ambiguity over whether either type of facility could include storage." He said it is the Land Use Administrator's opinion that storage would be allowed under the prior definition, because "BESS [Battery Energy Storage Systems] are often an integral element of a solar production facility, as are fire suppression systems, roads, security systems, electrical lines, and other elements, none of which need to be included in the definition to be allowed as part of a facility."

None of this is accurate. It is true that utilities do not enter into separate contracts for fire suppression systems, roads, security systems and electrical lines, because those items may actually be considered "integral" to power generation facilities. However, as I noted previously, utilities do contract separately for generation and battery storage resources, demonstrating that they do not consider battery storage systems as "integral" to solar or other energy production facilities.

**Equally important, however, the County Attorney did not explain why the County provided no public notice in its meeting agendas of the changed definition. That question remains, as do the other unanswered questions.**

**2. The County Attorney conceded the need to change the definition of Commercial Solar Energy Production Facility and the effect of the change.**

The County Attorney's August 24 memorandum states that renewable energy projects frequently include battery storage systems as a component, and County staff recommended that the definitions of both Community Solar and Commercial Solar Energy Production Facility include language allowing storage "to avoid any arguable ambiguity over whether either type of facility could include storage."

The elimination of the "arguable ambiguity," however, is, in fact, significant. It clears up any doubt over the issue of whether the battery storage component of a Commercial Solar Energy Production Facility will be eligible for a Conditional Use Permit. It also avoids litigation in the review of a future permit application, such as the Rancho Viejo solar project, on the issue of whether the project's battery storage component is eligible for a Conditional Use Permit. For those reasons, the County's omission of the required agenda notice of the change in definition is also significant and violative of the Open Meetings Act.

**3. The Notice of Violation claims that the narrow specificity of the meeting agenda notices coupled with the omission of any notice was misleading -- not that the notices were "overbroad."**

The County Attorney's August 24 memorandum characterizes the Notice of Violation as claiming that the title of the ordinance was defective because it did not specifically state that it would amend the definition of Commercial Solar Energy Production Facility. The memorandum argues that the title of the ordinance and the meeting agenda notices were not "overbroad."

The memorandum relied on a commentary in the Attorney General's Open Meetings Act guidance that criticized the use of agenda notices that are improperly drafted in such broad terms that they conceal the specific actions items on which the public body is acting.

The County Attorney's memorandum, however, addresses the wrong argument. Overbreadth is not the issue here. The issue is the misleading nature of the agenda notice. The agenda notice included the narrow and specific identification of action items for Community Solar Facilities, but it then omitted a very significant item with significant consequences on the unrelated matter of Commercial Solar Energy Production Facilities.

The decision in *State ex rel Salazar v. Humble Oil & Ref. Co.*, discussed in Section III.B above, provides an illustration of a case in which the New Mexico Supreme Court found a similar notice in a statute to be misleading:

The title of the amending act could have been in general terms and yet would have been sufficient but here there was an attempt to amend specifically by

pinpointing in the title of the amending act of 1949 the sections in the 1937 act which were to be changed and amended. The title of the 1949 amending act certainly was misleading, because the act itself went far beyond anything revealed by the title when it amended Sec. 4.<sup>16</sup>

The *Humble Oil* decision might not be directly controlling in this case, because it deals with the enactment of a statute rather than an ordinance, but it is certainly analogous on the question of what types of notice language can be misleading.

**4. The notice requirements under the Open Meetings Act and the statutes governing newspaper notice are separate and independent, and both are enforceable.**

The County Attorney's memorandum argues that the County's Legal Notices published in newspapers comply with the statutes governing the legal notice of proposed county ordinances and that the County complies with the Open Meetings Act "when it lists the title of the proposed ordinance about which it gave specific legal notice on relevant agendas."

To comply with the Open Meetings Act, the definitional change for Commercial Solar Energy Production Facility required more public notice than the Legal Notices published in the newspaper. The County Attorney's argument that the statutes that require the publication of Legal Notices in newspapers control over the requirement in the Open Meetings Act that notice be included in meeting agendas is based upon his assumption that the statutes are in conflict. They are not. The agenda notices required by the Open Meetings Act and the newspaper notices required by other statutes are separate and independent, and both are enforceable.

Section 3-17-3 of the New Mexico Municipal Code and other statutes require the County to publish a legal advertisement in a newspaper of general circulation in the county when it considers a proposed ordinance. The notice is required to include the title and subject matter of the proposed ordinance. The notice is required to be published at least two weeks prior to consideration of final action upon the ordinance, except in emergencies.<sup>17</sup>

Section 3-17-5 also requires, after adoption of an ordinance, that the ordinance be published in its entirety or by the title and a general summary of the subject matter contained in the ordinance. The ordinance is not effective until five days after it has been published.<sup>18</sup>

A Legal Notice for the *proposed 2022 Community Solar ordinance* was published in the Santa Fe New Mexican on June 9, 20 and 27 before the June 16 Planning Commission and July 12 Board meetings. A further Legal Notice was also published *after the Board approved the Community Solar ordinance* at the July 12 Board meeting. The second Legal Notice for the adoption was published in the Santa Fe New Mexican on July 26 and August 2. Both Legal Notices included the same limited title that was contained in the meeting agendas discussed above, but to comply

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<sup>16</sup> *Humble Oil*, 1951-NMSC-059, at para. 82.

<sup>17</sup> NMSA 1978, 3-17-3.

<sup>18</sup> NMSA 1978, 3-17-5.

with the notice requirement of the Municipal Code, it also included a “general summary.” The “general summary” stated that the ordinance, among other things, included an amendment to Appendix A, Part 2 of the SLDC (Definitions) “to amend the definition of ‘Commercial Solar Energy Production Facility.’”

**However, the newspaper notices required by the Municipal Code do not supersede or replace the Open Meetings Act requirement for notice in meeting agendas or excuse the County’s failure to provide notice in the agendas for the May 31 Board meeting, the June 16 Planning Commission meeting and the July 12 Board meeting. The Open Meetings requirement is a separate and independent requirement with its own purpose.**

It is reasonable to ask why the County more specifically described in the Legal Notices that the Ordinance was amending the current definition of Commercial Solar Energy Production Facility when it considered it unnecessary to do so in the meeting agendas. Agenda notices with the titles of proposed ordinances are more likely to be noticed by interested members of the public than the legal notices in the classified sections of a newspaper.

In addition, the General Summary in the Legal Notice still leaves a reader with the task of figuring out what the amendment to the definition of Commercial Solar Energy Production Facility is. Neither the Legal Notice nor the text of the Community Solar ordinance identifies what the amendment is. This omission in the Legal Notice contributes to the appearance that the County was attempting to make this definitional change without adequate notice to the public.

#### **5. The Community Solar ordinance amended the definition of Commercial Solar Energy Production Facility without indicating that it was doing so.**

In addition to the misleading nature of the title of the Community Solar Ordinance, the Ordinance’s text is equally misleading. The text also does not clearly indicate that the ordinance is re-defining the term “Commercial Solar Energy Production Facility” to allow such facilities to include battery storage units.

Nothing in the ordinance -- neither its title nor its text -- indicated that the Community Solar ordinance was amending the then existing definition of Commercial Solar Energy Production Facility in Appendix A of the SLDC. The Ordinance says that “Appendix A of the SLDC is hereby amended to include” the definition of a Commercial Solar Energy Production Facility. But it does not acknowledge that a definition of the term already existed, and the language of the Ordinance does not state that it is amending the definition.

The language is also confusing, because the language states that it is amending Appendix A of the SLDC to “include the following definition,” but it then lists two definitions:

2. Appendix A of the SLDC is hereby amended to include the following definition:

**Community Solar Facility:** is a facility governed by the 2021 New Mexico Community Solar Act (as may be amended) that generates, and may store, electricity by means of a solar photovoltaic device; subscribers to the facility



receive a bill credit for the electricity generated in proportion to the subscriber's share of the facility's kilowatt-hour output.

**Commercial Solar Energy Production Facility:** is a renewable energy production facility that uses sunlight to generate, and may store, energy for sale or profit.

Perhaps most important, the ordinance also does not state what the extent of the amendment might entail, i.e., what is being changed in the original 2016 definition. Since the ordinance establishes regulations for Community Solar facilities, the singular reference (i.e., “the following definition . . .”) might be interpreted as suggesting that the Ordinance was establishing the Community Solar Facility definition, and that the definition of Commercial Solar Energy Production Facility was an existing definition that was being provided for comparison purposes.

A standard practice for amendments of ordinances and legislation is to set forth the new definition with the changes underlined to note the amendments. Thus, the County could have underlined the phrase “and may store” to note the amendment.

Further, the Community Solar ordinance’s failure to identify the phrase “and may store” as an amendment to an existing definition for a Commercial Solar Energy Production Facility contrasts sharply with the same ordinance’s treatment of a different amendment to the SLDC. The language in section 4 of the ordinance states specifically that it is amending Section 8.11.3.5.2 of the SLDC and it includes the exact language being added.

4. Section 8.11.3.5.2 is hereby amended by deleting “or” from subparagraph j; replacing the “.” in subparagraph k with “; or”; and adding the following new subparagraph l:
  - “l. location of and procedure for approving and installing a community solar facility.”

The Community Solar Ordinance’s differing treatment of attempts to amend existing provisions of the SLDC made it very difficult for the public to understand what the County was doing. It suggests that the County was not interested in providing adequate notice to the public of the Commercial Solar Energy Production Facility amendment.

**6. The title of the Community Solar Ordinance was not sufficient to put the public on notice to inquire whether it also related to Commercial Solar Energy Production Facilities.**

The County Attorney’s memorandum states that the title of the Community Solar Ordinance gives clear notice that it “concerned solar facilities” and that anyone interested in solar facilities, which increasingly include battery storage facilities, was thus on notice to inquire further.

This is logical gymnastics.

On the one hand, the County Attorney (as discussed in Section IV.B.3 above) cites the criticism in the Attorney General’s Compliance Guide of broadly drafted agenda notices as misleading and violative of the Open Meetings Act, and claims that the County’s meeting agendas were not “overbroad.” On the other hand, the County Attorney states the public should adopt a broad interpretation of an agenda item that is drafted narrowly. The Attorney General, however, would also likely find that an agenda notice “concerning solar facilities” was overly broad, misleading and violative of the Open Meetings Act.

Further, as is discussed elsewhere in this Complaint, most people interested in solar facilities know that solar facilities and battery storage facilities are different. In particular, battery storage facilities can be co-located with solar facilities, but they can also be co-located with coal-fired, natural gas and wind resources. And they can be located independently at other strategic locations on a utility’s grid.

**7. The materials attached to the meeting agendas did not cure the defective agenda notice.**

The County Attorney’s memorandum states that, even if the notice language in the meeting agendas is insufficient, the materials attached to the meeting agendas identified the amendment to the Commercial Solar Energy Production Facility definition.

Not all versions of the meeting agendas, however, identify those materials. Meeting agendas appear on several different pages of the County’s website, and they are physically posted in other locations. Some of the agendas include references to the materials that the County staff will discuss with the Commissioners. Some do not.

Indeed, one of the meeting agendas I attached to the Notice of Violation included references to the material to be considered. The other two meeting agendas listed only the titles of the ordinances and the members of the County staff who would be making the presentations.

**8. According to the County, the words “and may store” were added to the definition of Commercial Solar Energy Production Facilities to “sync” it with the scope of the Community Solar definition, but storage facilities are not even authorized for Community Solar Facilities under the 2021 Community Solar Act.**

Following the Board’s executive session on the Notice of Violation, the County Attorney told the Commissioners that County staff included the definition change to Commercial Solar Energy Production Facility in the 2022 Community Solar Ordinance to “sync” with the definition of Community Solar Facility:

So I would also say that with respect to the question about whether the commercial solar definition why it was changed in this particular case, this predates my time a little bit in the development of this ordinance as County Attorney. So I don’t, you know, I wasn’t involved in the development particularly of this ordinance. But I understand from County staff that basically in researching the Community Solar ordinance which had just been authorized by the legislature recently that they

discovered that the definition of Community Solar also included this battery storage component in other ordinances they compared in their research. So they said well we need to have the Commercial Energy Solar Facility definition in sync with that and so that it's consistent. So that is why they included it. There was not a nefarious purpose as far as I understand related to this change in definition.<sup>19</sup>

This is an explanation that raises more questions than it answers.

The first question is what is being "synced" to what?

Was the Community Solar Ordinance drafted to "sync" with the 2021 Community Solar Act? This cannot be the case. The New Mexico Legislature appears to recognize both the difference between solar generation and storage and the significance of the difference. The definition of Community Solar Facility in the 2021 Community Solar Act is similar to the County's 2016 definition of Commercial Solar Energy Production Facility (before the 2022 Community Solar Ordinance) in its reference solely to "generation" and the omission of any reference to "storage." The Community Solar Act defines "community solar facility" as follows:

D. "community solar facility" means a facility that generates electricity by means of a solar photovoltaic device, and subscribers to the facility receive a bill credit for the electricity generated in proportion to the subscriber's share of the facility's kilowatt-hour output.

NMSA 1978, Section 62-16B-2(D).

The County's definition of Community Solar Facility in the 2022 Community Solar Ordinance fairly tracks the definition in the 2021 Community Solar Act – with one significant exception. The County's definition includes "and may store":

**Community Solar Facility:** is a facility governed by the 2021 New Mexico Community Solar act (as may be amended) that generates, **and may store**, electricity by means of a solar photovoltaic device; subscribers to the facility receive a bill credit for the electricity generated in proportion to the subscriber's share of the facility's kilowatt-hour output.

(Emphasis added).

The storage language that the County added to the definition of Community Solar Facility raises the question of whether storage facilities actually qualify as components of a Community Solar Facility authorized by the Act. The County's authority to expand the scope of a legislatively established program is doubtful.

So, if storage is not allowed for Community Solar Facilities in the Community Solar Act, what is the need to "sync" the definitions of Community and Commercial facilities by adding storage to

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<sup>19</sup> See the discussion in the archive of the August 29 Board meeting at <https://www.youtube.com/watch?v=zxFCQOY4c8k> , 5:25:45.

the Commercial definition? Also, why did the County believe it so important to add the “and may store” language to both the definitions of Community Solar Facility and Commercial Solar Energy Production Facility? Someone apparently thought the additional language was important. And someone also thought the additional language was not sufficiently important to warrant informing the public that the County was expanding the scope of both the legislatively established definition of Community Solar Facility and the definition of Commercial Solar Energy Production Facility that was previously established by the County. Who was responsible for this? Why did they do it?

**9. The County should establish “best practices” and other siting standards for Commercial Solar Energy Production Facilities before they proceed further with the permitting of the Rancho Viejo Solar Energy Project – *not after*.**

Commissioner Hank Hughes is elected to represent constituents in the area in which the Rancho Viejo Solar Energy Project is proposed for siting. After listening to his constituents’ complaints about the changed definition of Commercial Solar Energy Production Facilities that made the Rancho Viejo Solar Energy Project eligible for a Conditional Use Permit, he made three remarkable and ironic comments:

First, he announced, during the time allocated for general Commissioner comments, that he was sponsoring a forum on September 7, 2023 with Assistant Fire Chief Martin Vigil at the Eldorado homeowners association headquarters to discuss evacuation planning in the case of fire. He said there that recently been two fires in his district that “sort of scared a few people,” so he thought “it’s good to know how to be prepared if we get something even a little worse going on.”<sup>20</sup>

Second, Commissioner Hughes then went on to say that he and Commissioner Hamilton want to try to develop siting standards for Commercial Solar Energy Production Facilities after the County acts on the Conditional Use request for the Rancho Viejo Solar Energy Project:

Commissioner Hamilton and I are working on a resolution asking the staff to sort of come lay out the process for evaluating large scale solar projects realizing that these are different animals than other things that we permit and, you know, what we might do differently how we can be sure we are using the best practices for that permitting.<sup>21</sup>

And then, third, he appeared to acknowledge that the County’s methods of providing notice to residents about projects that affect them may be inadequate:

And, finally, I don’t know if anybody is still listening, but, if you are not on the County’s list to get information about upcoming hearings on solar projects, my liaison, Gabe Bustos, is maintaining that list and this is sort of trying to go above and beyond what the Open Meetings Act required because not everybody has time to read the legal notices or even look at our agenda online every other week. So

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<sup>20</sup> Id., at 3:36:41 to 3:37:28.

<sup>21</sup> Id., at 3:37:28.

this would be a way we could email you if there is something coming up regarding that that you may want to comment on.<sup>22</sup>

Instead of acknowledging that the County is processing the Rancho Viejo Conditional Use Permit application **before** he is confident about the County's permitting process and **before** residents had been given adequate notice of the changes the County made to the definition of Commercial Solar Energy Production Facilities, Commissioner Hughes wants to consider better standards later.

Standards should, instead, have been established **before** the County changed the definition of Commercial Solar Energy Production Facilities to make the Rancho Viejo solar project eligible for a Conditional Use Permit. Standards should also be developed now for the siting of Commercial Solar Energy Production Facilities **before** the County issues permits for them, just as the County acted to establish standards for Community Solar Facilities **before** permitting them.

### **C. Resident inquiries demonstrate that the agenda notices were misleading.**

A Rancho San Marcos resident, Camilla Brom, spoke in the public comment period of the August 29 Board meeting about her communications with the Commissioners generally and with Commissioner Hughes and his constituent liaison, Olivia Romo, regarding the proposed Community Solar Ordinance during the period from June 24 through July 11, 2022 when the Board and Planning Commission were considering the ordinance:

County Attorney Jeff Young's response to this Notice of Violation were things such as it's incumbent upon the public to exercise diligence and to educate themselves as to what this is going to be about. I'm skipping some of your comments, Mr. Young. We should have recognized the word "solar" and pursued whatever there was going to be discussed despite it only mentioning Community Solar in the agenda.

So that brings me to what my pursuit in finding out and being involved was about. I sent multiple emails starting in June 24<sup>th</sup> of last year to all five County Commissioners asking that I wanted more information on this AES Commercial Solar project. Then, on July 11, I emailed Hank Commissioner Hughes saying I wanted to find out more because I had concerns about AES and I wanted to see if he could meet with me. Okay, I'm going to have to skip some of this stuff, but the bottom line is on July 6, six days before the July 12<sup>th</sup> meeting, I emailed Olivia Romo saying I hear there's a discussion regarding a solar community project on July 12, 2022. I'm wondering about if you all were going to discuss the AES commercial solar, because I want to know which meeting I can be present for. I don't want to miss any meeting that I could have a voice in. Her response was, yes, that is correct. The County Commissioners will be considering an ordinance as it pertains to Community Solar.

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<sup>22</sup> Id., at 3:37:28 through 3:38:30.

So my bottom line is the AES Rancho Viejo Solar project is considered a Commercial Solar Facility by Santa Fe County and there was a significant change during the same time I was sending emails, but nothing was told to me. And based on the emails and me not thinking you were going to discuss anything pertaining to this project, I didn't participate. So, it's obvious I did diligence in communicating with Commissioner Hughes and Olivia Romo, and I would have 100 percent participated in these meetings had it been more open that that was part of the change in the Community Solar Ordinance was to include battery storage for Commercial solar facilities.<sup>23</sup>

A copy of the email string is attached as Exhibit 5. It shows that on July 6, 2022 Camilla Brom inquired to Olivia Romo specifically about the then upcoming July 12, 2022 meeting at which the Community Solar Ordinance would be discussed and approved. Ms. Romo informed Ms. Brom that this meeting would pertain only to Community Solar and stated that the Rancho Viejo commercial solar project would not be discussed until a later meeting, perhaps in August. In fact, however, the July 12 meeting directly involved the Rancho Viejo commercial solar project because it included discussion and approval of the amendment to the definition of Commercial Solar Energy Production Facility, and this amendment in turn would help to facilitate the permitting of the Rancho Viejo commercial solar project as a Conditional Use.

Ms. Brom's comment at the August 29, 2023 meeting and her email exchange with County staff member Olivia Romo in June and July 2022 illustrate the confusion regarding what the Community Solar Ordinance was intended to accomplish, both on the part of the public and the County officials themselves. Ms. Brom stated that if she had known what the County was considering and its ramifications, she "would have 100 percent participated" in the meetings. This is a clear example of how a failure to comply with the Open Meetings Act prevents public participation in the actions of a governing body such as the Santa Fe Board of County Commissioners and Planning Commission.

## **V. CONCLUSION – VIOLATION AND UNANSWERED QUESTIONS**

The County Attorney said that one purpose of the 2022 Community Solar Ordinance was to facilitate battery storage projects with Community Solar facilities. He said this in spite of the fact that storage facilities are not authorized under the 2021 Community Solar Act. The County Attorney said the 2022 Community Solar Ordinance was also intended to "sync" the storage component of the Ordinance with the then-existing definition in the SLDC for Commercial Solar Energy Production Facilities. Since the County and the developer of the Rancho Viejo Solar Energy Project had already been in discussions regarding a Conditional Use Permit for that facility, it is also reasonable to assume that the Ordinance was intended to facilitate that project, too.

But why authorize storage facilities for Community Solar facilities when they are not authorized under the 2021 Community Solar Act? And why authorize storage facilities with Commercial Solar Energy Production Facilities with so little public notice? Was it done to avoid the public

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<sup>23</sup> (Emphasis added) Id., at 2:51:35 through 2:54:30.

opposition to the fire risk of lithium-ion batteries? Was it done because of AES's recent record of fires and an explosion at its battery storage facilities in Arizona?

The Open Meetings Act requires public notice of the actions of public bodies so that questions such as these, which are currently unanswered, can be addressed before the bodies make decisions on such projects.

No one doubts that renewable energy and storage technologies are important to address the problems of global warming and climate change, and that New Mexico can contribute to this effort. But it is also important as these technologies are deployed to site them in a way that is open and transparent and that employs careful consideration of public safety and the local natural environment. An 800 acre project is large. It translates into a 1.25 square mile project. The proposed siting is on dry, windy grassland shoehorned in among three residential communities that would be at risk if a fire breaks out at the battery storage facility.

The County should have acted openly and transparently when it amended the definition of Commercial Solar Energy Production Facility just weeks after the April 2022 AES battery storage fire in Arizona. **Instead, the agenda notices for the three meeting agendas of May 31, June 16 and July 12, 2022 were misleading. The changed definition of Commercial Solar Energy Production Facility is the only action item in the Community Solar Ordinance that was not identified in the meeting agendas and in the title of the Ordinance.** The County's addition of "and may store" to the SLDC's definition of Commercial Solar Energy Production Facility in actions taken in May-July 2022, on which AES relies to include battery storage units within its Conditional Use request, is therefore invalid as a violation of the New Mexico Open Meetings Act.

Respectfully submitted,

/s/ Ashley C. Schannauer

Ashley C. Schannauer

[REDACTED]  
Santa Fe, NM 87508

[REDACTED]

**DECLARATION**

I, Ashley C. Schannauer, upon penalty of perjury under the laws of the State of New Mexico, affirm and state that the foregoing Complaint is true and correct based on my personal knowledge and belief.

DATED this 6th day of September, 2023.

*/s/ Ashley C. Schannauer*  
ASHLEY C. SCHANNAUER



**BEFORE THE ATTORNEY GENERAL OF THE STATE OF NEW MEXICO**

**CERTIFICATE OF SERVICE**

I certify that I have this 6<sup>th</sup> day of September, 2023 served a copy of the foregoing Complaint upon the following by email:

Chairperson Anna C. Hansen  
[ahansen@santafecountynm.gov](mailto:ahansen@santafecountynm.gov)

Commissioner Justin S. Greene  
[jsgreene@santafecountynm.gov](mailto:jsgreene@santafecountynm.gov)

Commissioner Camilla Bustamante  
[cbustamante@santafecountynm.gov](mailto:cbustamante@santafecountynm.gov)

Commissioner Anna T. Hamilton  
[athamilton@santafecountynm.gov](mailto:athamilton@santafecountynm.gov)

Commissioner Hank Hughes  
[hhughes@santafecountynm.gov](mailto:hhughes@santafecountynm.gov)

Gregory S. Shaffer, Santa Fe County Manager  
[gshaffer@santafecountynm.gov](mailto:gshaffer@santafecountynm.gov)

Jeffrey S. Young, Santa Fe County Attorney  
[jyoung@santafecountynm.gov](mailto:jyoung@santafecountynm.gov)

DATED this 6th day of September, 2023.

*/s/ Ashley C. Schannauer*  
ASHLEY C. SCHANNAUER

THE BOARD OF COUNTY COMMISSIONERS  
OF SANTA FE COUNTY

ORDINANCE NO. 2022- 05

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AN ORDINANCE  
AMENDING THE SUSTAINABLE LAND DEVELOPMENT CODE, ORDINANCE NO.  
2016-9, TO ADD A DEFINITION OF COMMUNITY SOLAR, TO ADD A NEW  
SECTION 10.25 TO ADDRESS STANDARDS FOR COMMUNITY SOLAR  
FACILITIES AND TO ADD A NEW CLAUSE TO SECTION 8.11.3.5.2 TO  
PROHIBIT A COMMUNITY OVERLAY DISTRICT FROM RESTRICTING THE  
LOCATION AND PROCEDURES FOR INSTALLING COMMUNITY SOLAR  
FACILITIES

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BE IT ENACTED BY THE BOARD OF COUNTY COMMISSIONERS  
("BOARD") OF SANTA FE COUNTY ("COUNTY"):

1. The Board makes the following findings with regard to community solar:
  - a. The Board adopted and restated the Santa Fe County Sustainable Land Development Code ("SLDC") on December 13, 2016, via Ordinance No. 2016-9.
  - b. Community solar is a use not specifically enumerated in Use Tables and Use Matrix in Appendix B of the SLDC.
  - c. The SLDC identifies Commercial Solar within Use Matrix in Appendix B. However, the SLDC does not currently identify Community Solar within the Use table.
  - d. The New Mexico Governor signed the Community Solar Act, or SB84, into law on April 5, 2021.
  - e. The New Mexico Public Regulation Commission's Community Solar Rule was adopted on March 30, 2022.
  - f. The Board has determined that community solar should have different Use Tables and Use Matrix than Commercial Solar to accommodate the needs of community solar development.

2. Appendix A of the SLDC is hereby amended to include the following definition:

**Community Solar Facility:** is a facility governed by the 2021 New Mexico Community Solar Act (as may be amended) that generates, and may store, electricity by means of a solar photovoltaic device; subscribers to the facility receive a bill credit for the electricity generated in proportion to the subscriber's share of the facility's kilowatt-hour output.

SFC CLERK RECORDED 07/19/2022

**Commercial Solar Energy Production Facility:** is a renewable energy production facility that uses sunlight to generate, and may store, energy for sale or profit.

3. Chapter 10 of the SLDC is hereby amended to add a new section as follows:

**10.25 Community Solar**

**10.25.1 Purpose and Findings-** The purpose of regulating community solar is to facilitate the development of renewable resources to serve the County's constituents and to meet the goals of the Sustainable Growth Management Plan. The County aims to accommodate the needs of community solar development and to only require the minimum standards to attempt to minimize the adverse effects on neighboring properties.

**10.25.2 Applicability**

Community solar projects are considered a permitted use in all zoning Districts.

**10.25.3 Standards**

1. Buffering and screening is not required for ground mounted facilities. If fencing is proposed for security purposes, agricultural fencing with six (6) inch knots for wildlife is recommended.
2. External access roads for ground mounted facilities may reduce the road easement width for off-site and on-site driveways to no less than twenty (20) feet if adequate drainage control is provided and may allow the surface to be hardpacked dirt with compaction of 95% of the maximum density. If the access road adjoins a paved road, an asphalt or concrete apron of ten (10) feet in width will be required to protect the pavement.
3. On-site driveways for ground-mounted facilities may reduce standards as identified in Section 7.11.12.2 (additional standards for residential driveways), as access will be minimal for this type of development.
4. Disturbed area shall be reseeded with drought tolerant native plant species for pollinator friendly habitat. Weeds and plant materials shall be properly managed to reduce fire risks.
5. Utility lines shall comply with Section 7.12 of the SLDC. The connection between the community solar facility and the electric utility infrastructure shall be considered a local distribution facility.
6. A five (5) foot setback is required on all sides of a community solar facility that is twenty (20) feet in height or less. A community solar facility that is over twenty (20) feet in height shall meet the setback requirements of the zoning district in which the facility is located.

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7. Community solar facilities located on a non-residential or multifamily rooftop shall be allowed to be eight (8) feet higher than the building on the rooftop of which the community solar facilities are located but in no event more than eight feet (8') above the height limit otherwise imposed on structures in that zoning district. Rooftop community solar facilities shall be set back five (5) feet from the sides of the building.

8. State approval shall be submitted prior to development permit issuance.

9. Community solar facilities shall be set back three-hundred (300) feet from rivers, streams, wetlands and all riparian areas.

10. Decommissioning

- a. The owner/operator shall, at its expense, complete decommissioning of the community solar facility within twelve (12) months after the end of the useful life of the facility. Decommissioning must occur in the event the facility is not generating electricity for twelve (12) consecutive months.
- b. Decommissioning shall include removal of all solar panels, structures, cabling, electrical components, roads, and foundations to a depth of thirty-six (36) inches, as well as any other associated facilities/equipment with satisfactory disposal and recycling of equipment. Disturbed earth shall be graded and reseeded with drought-tolerant native plant species.
- c. An independent and New Mexico state certified professional engineer shall be retained to estimate the total cost of decommissioning ("Decommissioning Costs") without regard to salvage value of the equipment, and the cost of decommissioning net of salvage value of the equipment ("Net Decommissioning Costs"). Said estimates shall be submitted to the County after the first year of operation and every fifth year thereafter.
- d. The owner/operator shall provide assurances that financial resources will be available to fully decommission the site.
- e. The owner/operator is required to post a bond, letter of credit, or the establishment of an escrow account to ensure proper decommissioning.

4. Section 8.11.3.5.2 is hereby amended by deleting "or" from subparagraph j; replacing the "." in subparagraph k with "; or"; and adding the following new subparagraph l:

"l. location of and procedure for approving and installing a community solar facility."

5. The effective date of the amendments to the SLDC adopted by this Ordinance shall be 30 days after this Ordinance is recorded with the County Clerk.

SFC CLERK RECORDED 07/19/2022

PASSED, APPROVED AND ADOPTED THIS 17<sup>th</sup> DAY OF July, 2022.

THE BOARD OF COUNTY COMMISSIONERS  
OF SANTA FE COUNTY

By: Anna Hamilton  
Anna Hamilton, Chairperson

ATTEST:  
Katharine E. Clark  
Katharine E. Clark  
County Clerk

APPROVED AS TO FORM:  
Jeff Young  
Jeff Young  
Santa Fe County Attorney



SFC CLERK RECORDED 07/19/2022

COUNTY OF SANTA FE )  
STATE OF NEW MEXICO ) ss BCC ORDINANCE  
PAGES: 7

I Hereby Certify That This Instrument Was Filed for  
Record On The 19TH Day Of July, 2022 at 02:22:31 PM  
And Was Duly Recorded as Instrument # 1993281  
Of The Records Of Santa Fe County

Witness My Hand And Seal Of Office  
Katharine E. Clark  
Deputy Destiny Romero County Clerk, Santa Fe, NM

