

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

IN THE MATTER OF THE JOINT)
APPLICATION FOR APPROVAL TO)
ACQUIRE NEW MEXICO GAS COMPANY,)
INC. BY SATURN UTILITIES HOLDCO, LLC.) Case No. 24-00266-UT
JOINT APPLICANTS)
_____)

**REBUTTAL TESTIMONY
OF
SUEDEEN KELLY**

MAY 16, 2025

NMPRC CASE NO. 24-00266-UT
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SUEDEEN KELLY

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I. WITNESS IDENTIFICATION AND QUALIFICATIONS

Q. PLEASE STATE YOUR NAME AND OCCUPATION.

A. My name is Suedeen Kelly. I am a partner and co-chair of the energy practice group in the Washington, D.C. office of Jenner & Block LLP.

Q. PLEASE SUMMARIZE YOUR PROFESSIONAL QUALIFICATIONS AND EXPERIENCE AS RELEVANT TO THIS TESTIMONY.

A. I am familiar with state regulation of public utilities, including public utility mergers and acquisitions, from the four years I served as a Commissioner of the New Mexico Public Service Commission (1983-1986), two of which as Chairwoman (1984-1986). In this role, I was responsible for state regulation of gas, electric, and water public utilities. I am also familiar with federal regulation of public utilities from the six years I served as a Federal Energy Regulatory Commission ("FERC") Commissioner (2003-2009). As a FERC Commissioner, I made decisions in approximately 1,300 cases each year, including as relevant to this matter, proceedings regarding proposed mergers, acquisitions, and other change-of-control transactions.

In addition to my practical expertise, I also have academic expertise in state and federal regulation of public utilities from my decades of experience as a law professor. I teach and publish on relevant topics, including public utility regulation, economic regulation of business, and regulation of the energy sector. From 1986 until 2003, I was a professor of law at the University of New Mexico School of Law. Since 2022, I have been an adjunct

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1 professor at the George Washington University Law School, where I currently teach a
2 course on the future of the electric grid.

3
4 My practical experience in regulation of public utilities includes the decades I worked as
5 an attorney in private and public practice in New Mexico and Washington, D.C. From
6 1978 to 1982, I managed a private law practice representing clients in state and federal
7 litigation and regulatory proceedings, with a focus on public utility law. In 1982, I worked
8 in the Consumer Division of the Office of the New Mexico Attorney General, representing
9 residential and small business consumers in matters before the New Mexico Public Service
10 Commission. From 1986 until 2001, I managed a part-time practice in state and federal
11 energy and public utility law representing clients with respect to natural gas and oil
12 intrastate and interstate pipelines and distribution facilities and water and electric public
13 utility regulation. From 2001 to 2003 I created and led the public utility practice at Modrall,
14 Sperling, Roehl, Harris & Sisk in Albuquerque, New Mexico. After serving as a FERC
15 Commissioner, I chaired the energy practice groups at Patton Boggs LLC and Akin Gump
16 Strauss Hauer & Feld LLP in Washington, D.C. before moving to Jenner & Block LLP in
17 2017. I am ranked as a “Band 1” practitioner in energy (electricity – regulatory and
18 litigation) by Chambers and Partners.

19
20 Based on the above experience, I have a thorough understanding of the nature of public
21 utility regulation at the state and federal levels and the key features of regulatory statutes
22 administered by state public utility commissions, with a particularly deep background in
23 New Mexico public utility regulation.

1 A copy of my curriculum vitae is attached as JA Exhibit SK-1 (Rebuttal).

2

3 **Q. HAVE YOU PREVIOUSLY FILED TESTIMONY IN THIS CASE?**

4 A. No, I have not.

5

6 Q. ON WHOSE BEHALF ARE YOU TESTIFYING?

7 A. I am testifying on behalf of the Joint Applicants in support of their Joint Application for
8 New Mexico Public Regulation Commission (“NMPRC” or “Commission”) authorization
9 for the proposed acquisition of TECO Energy, NMGI, and NMGC by Saturn Holdco (the
10 “Transaction”).¹

11

¹ The Joint Applicants are New Mexico Gas Company, Inc. (“NMGC”); Emera Inc. (“Emera”); Emera U.S. Holdings Inc. (“EUSHI”); New Mexico Gas Intermediate, Inc. (“NMGI”); TECO Holdings, Inc. (“TECO Holdings”); TECO Energy, LLC (formerly TECO Energy, Inc.) (“TECO Energy”); Saturn Utilities, LLC (“Saturn Utilities”); Saturn Utilities Holdco, LLC (“Saturn Holdco”); Saturn Utilities Aggregator, LP (“Saturn Aggregator”); Saturn Utilities Aggregator GP, LLC (“Saturn Aggregator GP”); Saturn Utilities Topco, LP (“Saturn Topco”); Saturn Utilities Topco GP, LLC (“Saturn Topco GP”); BCP Infrastructure Fund II, LP (“BCP Infrastructure Fund II”); BCP Infrastructure Fund II-A, LP (“BCP Infrastructure Fund II-A”); and BCP Infrastructure Fund II GP, LP (“BCP Infrastructure II GP,” and together with BCP Infrastructure Fund II and BCP Infrastructure Fund II-A, the “BCP Infrastructure Funds”).

Saturn Aggregator, Saturn Aggregator GP, Saturn Topco, Saturn Topco GP, and Saturn Utilities, Saturn Holdco, and the BCP Infrastructure Funds, collectively, are the “BCP Applicants.”

TECO Energy, NMGI, and NMGC, collectively, are the “NMGC Group.”

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II. INTRODUCTION

Q. WHAT IS THE PURPOSE OF YOUR TESTIMONY?

A. The purpose of my testimony is to respond to testimony submitted by multiple parties in this proceeding regarding (1) the preservation of the Commission’s jurisdiction following consummation of the Transaction, (2) ownership of public utilities by private equity funds, and (3) the acquisition premium in the Transaction. With respect to the Commission’s continuing jurisdiction, I respond to the testimony submitted by Daren K. Zigich and Naomi A. Velasquez on behalf of the NMPRC Utility Division Staff (“Staff”) and the testimony submitted by Christopher K. Sandberg on behalf of New Energy Economy (“NEE”). With respect to private equity ownership of public utilities, I respond to the testimony submitted by Ms. Velasquez on behalf of Staff; the testimony of Mark E. Garrett on behalf of the New Mexico Department of Justice (“NMDOJ”); the testimony submitted by Mr. Sandberg on behalf of NEE; and the testimony submitted by Bradley T. Cebulko on behalf of Western Resource Advocates (“WRA”). With respect to the acquisition premium, I respond to the testimony submitted by Dr. Larry Blank on behalf of Staff; the testimony submitted by Mr. Garrett on behalf of NMDOJ; the testimony submitted by Mr. Sandberg on behalf of NEE; and the testimony submitted by Mr. Cebulko on behalf of WRA.

Q. WHAT ARE YOUR KEY CONCLUSIONS REGARDING THE COMMISSION’S CONTINUING JURISDICTION OVER NMGC?

A. The Commission currently regulates NMGC as a New Mexico public utility and regulates its upstream owners as public utility holding companies. The Commission has powerful

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1 regulatory authority with respect to public utilities like NMGC, including authority to use
2 cost-of-service ratemaking to ensure that NMGC's rates are just and reasonable.

3 One of the factors the Commission considers when reviewing proposed acquisitions of
4 public utilities and amendments to general diversification plans is whether its jurisdiction
5 will be compromised. In this case, the Transaction will not alter or impair the
6 Commission's jurisdiction over NMGC, which will remain a New Mexico public utility
7 subject to the Commission's oversight, or its upstream owners, which will still be public
8 utility holding companies. Joint Applicants also have made commitments to preserve the
9 Commission's jurisdiction, which the Commission can make enforceable through its order
10 in this proceeding. Additionally, the Commission will continue to have sufficient access
11 to information to effectively regulate NMGC, and the Joint Applicants' designation of
12 certain information as confidential does not impair the Commission's ability to effectively
13 regulate NMGC.

14
15 **Q. WHAT ARE YOUR KEY CONCLUSIONS REGARDING PRIVATE EQUITY**
16 **OWNERSHIP OF PUBLIC UTILITIES?**

17 A. Infrastructure investment funds like the BCP Infrastructure Funds focus on capital-
18 intensive infrastructure sectors and attract large institutional investors, such as pension
19 funds, that are looking for stable investments to support long-term financial obligations.
20 Public utilities with regulated rates of return and significant capital needs are a natural fit
21 for such investors.

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1 Contrary to stereotypes about private equity, infrastructure investment funds focus on
2 acquiring and holding for relatively significant periods of time well-managed companies
3 that offer stable returns and long-term financial health, in alignment with the goals of the
4 funds' large institutional investors. Ownership by this type of private equity fund can
5 provide benefits for public utilities and their ratepayers, including insulation from certain
6 short-term financial pressures and interest in the long-term financial health of the utility,
7 reliable access to capital for prudent investments, more direct accountability for utility
8 management, and valuable strategic support from private equity management firms with
9 considerable industry experience and financial expertise.

10
11 While I do not agree that there are inherent risks to private equity ownership that are
12 additional to publicly traded ownership, I also emphasize that the Commission has at its
13 disposal the regulatory authority needed to address the concerns that have been raised in
14 this proceeding about private equity ownership of NMGC.

15
16 **Q. WHAT ARE YOUR KEY CONCLUSIONS REGARDING THE ACQUISITION**
17 **PREMIUM?**

18 A. The Joint Applicants have committed not to recoup the Transaction's acquisition premium
19 through future rate cases or rate base revaluations. The Commission has—and will
20 continue to have—authority to enforce this commitment and to ensure that NMGC does
21 not use other mechanisms to improperly recover the acquisition premium from customers.
22 Additionally, while Mr. Garrett, Mr. Sandberg, and Dr. Blank have suggested that the
23 acquisition premium in this case should be shared with NMGC customers through a rate

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1 credit or recording of a regulatory liability, such conditions would not be consistent with
2 the public interest.

3
4 **III. THE COMMISSION’S CONTINUING JURISDICTION OVER NMGC**

5 **Q. ARE NMGC AND ITS UPSTREAM OWNERS CURRENTLY SUBJECT TO THE**
6 **COMMISSION’S JURISDICTION?**

7 A. Yes. As explained in the Joint Application, NMGC is a natural gas local distribution
8 company serving over 549,000 customer meters in New Mexico pursuant to a Certificate
9 of Public Convenience and Necessity issued by the Commission in Case No. 08-00078-
10 UT.² As a company that “own[s], operate[s], lease[s] or control[s] ... any plant, property
11 or facility for the manufacture, storage, distribution, sale or furnishing to or for the public
12 of natural or manufactured gas,” NMGC qualifies as a “public utility” subject to the
13 Commission’s jurisdiction.³

14
15 Public utilities like natural gas local distribution companies (1) provide essential services
16 to the public and (2) are or tend toward natural monopoly or otherwise imperfect
17 competition.⁴ As such, New Mexico—like other states—subjects public utilities to
18 extensive regulatory oversight to protect the public interest. As the New Mexico Public
19 Utility Act explains, the Commission “shall have general and exclusive power and

² Joint Application (“JA”) at 2-3.

³ N.M.S.A. 1978, § 62-3-3(G)(2).

⁴ See, e.g., Charles F. Phillips, Jr., *The Regulation of Public Utilities: Theory and Practice* at Ch. 1 (1988); N.M.S.A. 1978, § 62-3-1.

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1 jurisdiction to regulate and supervise every public utility in respect to its rates and service
2 regulations and in respect to its securities....”⁵ The Public Utility Act specifically requires
3 that “[e]very rate made, demanded or received by any public utility shall
4 be just and reasonable.”⁶ The Commission uses cost-of-service ratemaking to ensure the
5 rates of public utilities like NMGC “are neither unreasonably high so as to unjustly burden
6 ratepayers with excessive rates nor unreasonably low so as to constitute a taking of property
7 without just compensation or a violation of due process by preventing the utility from
8 earning a reasonable rate of return on its investment.”⁷ The Commission has various other
9 statutory and regulatory authorities with respect to public utilities, including the authority
10 to require public utilities to provide books, records, accounts, documents, and other
11 information upon request.⁸

12
13 New Mexico law also provides the Commission with certain authority with respect to
14 public utility holding companies, defined as “affiliated interest[s] that control[] a public
15 utility through the direct or indirect ownership of voting securities of that public utility.”⁹
16 NMGC’s current direct and indirect upstream owners qualify as public utility holding

⁵ N.M.S.A. 1978, § 62-6-4(A).

⁶ *Id.* § 62-8-1; *see id.* § 62-8-7.

⁷ *Pub. Serv. Co. of N.M. v. NMPRC*, 2019-NMSC-012, ¶ 10, 444 P.3d 460, 467 (quoting *PNM Gas Servs. v. N.M. Pub. Util. Comm’n (In re PNM Gas Servs.)*, 2000-NMSC-012, ¶ 8, 129 N.M. 1, 1 P.3d 383).

⁸ *See, e.g.*, N.M.S.A. 1978, §§ 62-6-17, 62-6-19.

⁹ *Id.* § 62-3-3(N); *see id.* § 62-3-3(A) (defining “affiliated interest” as “a person who directly or indirectly, through one or more intermediaries, controls or is controlled by or is under common control with a public utility”).

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1 companies. Commission authorization is required for certain transactions involving public
2 utility holding companies, including mergers, consolidations, and specified stock
3 acquisitions.¹⁰

4
5 **Q. IS THE PRESERVATION OF COMMISSION JURISDICTION OVER NMGC**
6 **RELEVANT TO THIS PROCEEDING?**

7 A. Yes. Because public utilities like NMGC provide essential services to the public and tend
8 toward monopoly or otherwise imperfect competition, it is critically important that they
9 remain subject to robust regulatory oversight regardless of any changes in control or
10 ownership. New Mexico law reflects this principle. Acquisitions of public utilities and
11 public utility holding companies—like the Transaction in this proceeding—require prior
12 Commission authorization under Section 62-6-12 of the Public Utility Act. Under the
13 Public Utility Act, the Commission shall approve a proposed transaction subject to Section
14 62-6-12 unless the Commission finds that the transaction “is unlawful or is inconsistent
15 with the public interest.”¹¹ One of the factors the Commission generally considers when
16 determining whether a proposed transaction is consistent with the public interest is
17 “[w]hether the Commission’s jurisdiction will be preserved.”¹²

¹⁰ *Id.* § 62-6-12.

¹¹ *Id.* § 62-6-13.

¹² *In re the Acquisition by EPCOR Water (USA) of the Common Stock of N.M. Am. Water, Inc.*, Case No. No. 11-00085-UT, 2011 WL 11767724 (NMPRC Dec. 2, 2011 recommended decision; adopted Dec. 22, 2011).

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1 **Q. MS. VELASQUEZ STATES THAT STAFF BELIEVES “THAT THERE EXISTS**
2 **UNCERTAINTY AS TO WHETHER THIS TRANSACTION FULLY FULFILLS**
3 **THE RULE [450] REQUIREMENTS” THAT THE “REGULATION AND**
4 **SUPERVISION [OF NMGC] WILL NOT BE OBSTRUCTED, HINDERED,**
5 **DIMINISHED, IMPAIRED, OR OVERCOMPLICATED.” DO YOU AGREE**
6 **THAT THERE IS UNCERTAINTY ON THIS POINT?**

7 **A.** No. After consummation of the Transaction, NMGC will continue to act as a natural gas
8 local distribution company subject to Commission jurisdiction as a New Mexico public
9 utility.¹³ The Joint Application, the Amended General Diversification Plan (“GDP”), and
10 the Direct Testimony of Jeffrey M. Baudier also provide commitments and representations
11 expressly preserving the Commission’s jurisdiction over NMGC¹⁴ and committing that
12 “NMGC will continue to abide by all applicable NMPRC rules, regulations, and orders,
13 including compliance with all Class I transaction requirements.”¹⁵ Accordingly, none of
14 the authority the Commission has today to regulate and oversee NMGC—including its

¹³ See JA at 7 (“NMGC will continue in existence and remain a wholly owned subsidiary of NMGI and subject to the jurisdiction of the NMPRC.”); Amended General Diversification Plan, JA Exh. JMB-3 at 12 (“Amended GDP”) (“Although the ultimate parent of NMGC is changing from Emera to the BCP Infrastructure Funds, the Transaction will not change NMGC’s status as a public utility providing regulated public utility natural gas service to customers in New Mexico pursuant to its existing CCN.”); *id.* at 21 (“NMGC will continue to be a Delaware corporation, registered to do business in New Mexico and certified as a natural gas public utility subject to the jurisdiction of the Commission.”); Direct Testimony of Ryan A. Shell at 7 (“NMGC will continue to serve its customers in essentially the same manner as it has, and will remain subject to the jurisdiction of the NMPRC.”).

¹⁴ JA at 16; Direct Testimony of Jeffrey M. Baudier at 39-40 (“Baudier Direct”); Amended GDP at 27.

¹⁵ JA at 15; Baudier Direct at 39; Amended GDP at 27.

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1 authority to ensure that rates are just and reasonable—will be impaired or altered as a result
2 of the Transaction.

3
4 **Q. WILL THE PROPOSED POST-TRANSACTION OWNERSHIP STRUCTURE**
5 **ALTER OR IMPAIR THE COMMISSION’S JURISDICTION OVER NMGC?**

6 A. No. Following consummation of the Transaction, NMGC’s direct and indirect upstream
7 owners will continue to be subject to Commission regulation as public utility holding
8 companies. Indeed, NMGC’s post-Transaction ownership structure will closely resemble
9 its current structure, with NMGC wholly owned by NMGI, which in turn is wholly owned
10 by TECO Energy, which in turn is wholly owned by upstream intermediary holding
11 companies and then by the ultimate parent company or companies (currently Emera; post-
12 Transaction, the BCP Infrastructure Funds).¹⁶ The Amended GDP and the Direct
13 Testimony of Mr. Baudier also expressly commit that “NMPRC’s jurisdiction over the
14 NMGC Group and the BCP Applicants, as the direct and indirect public utility holding
15 companies of NMGC, will be preserved.”¹⁷ The Transaction thus will not impair or
16 complicate the Commission’s regulation of NMGC or its direct and indirect upstream
17 owners.

18
19 **Q. MS. VELASQUEZ STATES THAT SHE BELIEVES THAT BECAUSE THE “BCP**
20 **JOINT APPLICANTS . . . CONSTITUTE A PRIVATE EQUITY ENTITY, THERE**

¹⁶ See Baudier Direct at 19; JA at 3; Direct Testimony of Karen Hutt at 3.

¹⁷ Amended GDP at 27; *see also* Baudier Direct at 39.

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1 **COULD POSSIBLY EXIST A RISK TO THE SUPERVISION OF REGULATION**
2 **OF [NMGC].” DO YOU AGREE THAT THE STATUS OF THE BCP**
3 **APPLICANTS AS “PRIVATE EQUITY” POSES A RISK TO THE SUPERVISION**
4 **OF NMGC?**

5 A. No. In my opinion, the fact that the BCP Applicants are private equity investors has no
6 bearing at all on the ability of the Commission to supervise NMGC.

7
8 **Q. IF THE PROPOSED TRANSACTION IS CONSUMATED, WILL THE**
9 **COMMISSION CONTINUE TO HAVE SUFFICIENT ACCESS TO**
10 **INFORMATION TO EFFECTIVELY REGULATE NMGC?**

11 A. Yes. The Commission has authority to require public utilities like NMGC to provide
12 books, records, accounts, documents, and other information upon request.¹⁸ The
13 requirement to provide “books, records, accounts or documents” upon Commission request
14 also applies to “any affiliated interest participating in a Class I or II transaction”¹⁹ Because
15 NMGC will remain a public utility subject to Commission jurisdiction, nothing about the
16 Transaction would alter or impair the Commission’s authority under these provisions to
17 access the information it needs to effectively regulate NMGC.

18
19 Reinforcing the Commission’s authority to access information it needs to effectively
20 regulate NMGC, the Joint Applicants have expressly committed that “[t]he NMPRC and

¹⁸ See N.M.S.A. 1978, §§ 62-6-17, 62-6-19.

¹⁹ *Id.* § 62-6-17(B).

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1 its Staff will have access to the books, records, accounts, or documents of NMGC, its
2 affiliates, corporate subsidiaries, or holding companies pursuant to NMSA 1978, Sections
3 62-6-17 and 62-6-19.”²⁰ Furthermore, the BCP Applicants have expressly “agree[d] to the
4 jurisdiction of NMPRC for the purpose of providing the books and records of each, and
5 providing access to testimony of officers and directors for the purposes of NMPRC
6 oversight and regulation of NMGC rates.”²¹ These commitments provide further assurance
7 that the Commission will have sufficient access to information to carry out its regulatory
8 responsibilities with respect to NMGC.

9
10 I understand that certain participants in this proceeding have expressed concern that the
11 BCP Infrastructure Funds, as private equity funds, are not subject to the reporting
12 requirements that apply to Emera as a publicly traded company under U.S. and Canadian
13 securities laws.²² However, this Commission can use its existing authority under the Public
14 Utility Act to obtain the information it needs to effectively regulate NMGC, with whatever
15 frequency is “reasonably required.”²³

16
17 **Q. IN YOUR EXPERIENCE, DO UTILITY COMMISSION REGULATORS RELY**
18 **ON AND REQUIRE ACCESS TO UNITED STATES AND/OR CANADIAN**

²⁰ JA at 9, 15; *see* Baudier Direct at 39, 46; Amended GDP at 20, 26.

²¹ JA at 16; Baudier Direct at 40; Amended GDP at 27.

²² *See* Direct Testimony of Christopher K. Sandberg on Behalf of NEE at 25-26 (“Sandberg Direct”).

²³ N.M.S.A. 1978, § 62-6-17.

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**SECURITIES LAW FILINGS MADE BY PUBLICLY TRADED UTILITY
HOLDING COMPANIES IN ORDER TO REGULATE JURISDICTONAL
UTILITY SUBSIDIARIES?**

A. No. Both state and federal utility commissioners have access to the books and records of the regulated utilities. Accounting and recordkeeping are performed pursuant to the requirements of state law and FERC requirements. Indeed, I note that accounting standards differ under securities law as compared to FERC and state utility commission accounting requirements.

**Q. IN YOUR OPINION, ARE THERE ANY WAYS IN WHICH THE COMMISSION’S
ABILITY TO REGULATE AND SUPERVISE NMGC WOULD BE
“OBSTRUCTED, HINDERED, DIMINISHED, IMPAIRED, OR
OVERCOMPLICATED” DUE TO NOT ACCESSING SECURITIES LAW
FILINGS?**

A. No. I do not believe there is any such consequence or relationship. I note that the Commission currently regulates a major New Mexico utility—El Paso Electric Company—that neither makes nor has a parent that makes such securities law filings.

**Q. IN YOUR OPINION, DOES THE PROPOSED POST-TRANSACTION
STRUCTURE OF ENTITIES PRESENT ANY RISK OF OBSTRUCTING,**

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**HINDERING, DIMINISHING, IMPAIRING, OR OVERCOMPLICATING THE
REGULATION AND SUPERVISION OF NMGC?**

A. No. I believe that the organizational structure the BCP Applicants have presented is straightforward and is comparable to organizational structures with which the Commission has experience.

**Q. CAN THE COMMISSION MAKE THE JOINT APPLICANTS' COMMITMENTS
REGARDING THE PRESERVATION OF COMMISSION JURISDICTION
ENFORCEABLE?**

A. Yes. The Commission can make the Joint Applicants' commitments regarding the preservation of Commission jurisdiction enforceable, including by incorporating them into an order as conditions for authorizing the Transaction and/or by accepting the Amended GDP.²⁴ Notably, the BCP Applicants are parties to this proceeding and thus can be bound by a Commission order on the Joint Application.

**Q. DOES NMGC'S AMENDED GENERAL DIVERSIFICATION PLAN ("GDP")
SATISFY THE REQUIREMENTS OF N.M. ADMIN. CODE 17.6.450.10(C)(3)?**

A. Yes. New Mexico Admin. Code 17.6.450.10(C)(3) provides that when reviewing a general diversification plan, the Commission must find that "the supervision and regulation of the

²⁴ See, e.g., *id.* § 62-12-4 (providing for penalties for any "person or corporation ... which fails, omits or neglects to obey, observe or comply with any lawful order, or any part or provision thereof"); *id.* § 62-19-9(B)(5) (providing for enforcement of lawful Commission orders "by appropriate administrative action and court proceedings"); N.M. Admin. Code 17.6.450.18 (providing for enforcement of orders pursuant to Rule 450 "through any sanction, method, or procedure expressed or implied in the Public Utility Act").

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1 public utility pursuant to the Public Utility Act will not be obstructed, hindered,
2 diminished, impaired, or unduly complicated.” For the reasons explained in greater detail
3 above, the Transaction will not alter or impair the Commission’s jurisdiction over NMGC
4 or its direct and indirect upstream owners. NMGC will remain a public utility, subject to
5 the full scope of Commission regulation under the Public Utility Act, including the
6 requirement that its rates be just and reasonable. The Transaction will not result in a more
7 complicated ownership structure and, as is the case today, NMGC’s upstream owners will
8 be subject to Commission oversight as public utility holding companies. The Commission
9 also will retain the ability to access the information it needs to effectively regulate NMGC.

10
11 The testimony accompanying the Joint Application and the Amended GDP provided a
12 fulsome explanation of how Commission jurisdiction will be preserved, demonstrating that
13 oversight and regulation of NMGC will not be adversely effected.²⁵ Ms. Velasquez has
14 expressed concern that “with the potential sale of NMGC to the BCP Joint Applicants,
15 applicants that constitute a private equity entity, there could possibly exist a risk to the
16 supervision o[r] regulation of the public utility pursuant to the Public Utility Act.”²⁶
17 However, Ms. Velasquez does not identify any specific risks that could affect the
18 Commission’s supervision or regulation of NMGC.²⁷ Based on the representations and

²⁵ See Baudier Direct at 39-40.

²⁶ See Prepared Direct Testimony of Naomi A. Velasquez on Behalf of Staff at 21-22 (“Velasquez Direct”).

²⁷ Ms. Velasquez also does not elaborate on why acquisition by private equity funds would present any particular risks with respect to Commission jurisdiction. Other arguments regarding private equity ownership of public utilities like NMGC are addressed in the subsequent section.

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1 commitments in the Joint Application, supporting testimony, and the Amended GDP, I do
2 not believe the Transaction presents any material risks with respect to the Commission's
3 supervision or regulation of NMGC.

4
5 **Q. RELATED TO MR. SANDBERG'S TESTIMONY, DOES JOINT APPLICANTS'**
6 **DESIGNATION OF CERTAIN INFORMATION AS CONFIDENTIAL WITHIN**
7 **THE SCOPE OF THIS PROCESS IMPAIR THE COMMISSION'S ABILITY TO**
8 **EFFECTIVELY REGULATE NMGC?**

9 A. No. New Mexico law recognizes that Commission proceedings may involve confidential
10 or proprietary information and trade secrets and allows for such information to be protected
11 from public disclosure.²⁸ The Commission's rules on the designation of confidential
12 material allow regulators and stakeholders access to relevant information while shielding
13 confidential and sensitive information from public disclosure.

14
15 **IV. PRIVATE EQUITY OWNERSHIP**

16 **Q. WILL THE PROPOSED TRANSACTION RESULT IN NMGC BEING OWNED**
17 **BY PRIVATE EQUITY FUNDS?**

18 A. Yes. A private equity fund is "a pooled investment vehicle where the adviser pools together
19 the money invested in the fund by all the investors and uses that money to make

²⁸ See N.M.S.A. 1978, §§ 14-2-1(F), (L), and 62-6-17(C).

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1 investments on behalf of the fund.”²⁹ Unlike hedge funds and mutual funds, “private equity
2 firms often focus on long-term investment opportunities in assets that take time to sell with
3 an investment time horizon typically of 10 or more years.”³⁰ If necessary regulatory
4 approvals are secured and the Transaction is consummated, NMGC’s ultimate upstream
5 owners will be the BCP Infrastructure Funds.³¹ The BCP Infrastructure Funds are private
6 equity funds.
7

8 **Q. HAVE OTHER PRIVATE EQUITY FUNDS ACQUIRED OWNERSHIP OF**
9 **PUBLIC UTILITIES?**

10 A. Yes. When NMGC was first formed in 2008, it was owned by a private equity firm,
11 Lindsay Goldberg, LLC.³² More recently, El Paso Electric Company was acquired by IIF
12 US Holding 2 LP, a private equity firm advised by J.P. Morgan Investment Management,
13 Inc., in a transaction approved by this Commission.³³ Other state public utility

²⁹ *Private Equity Funds*, INVESTOR.GOV, <https://www.investor.gov/introduction-investing/investing-basics/investment-products/private-investment-funds/private-equity> (last visited May 14, 2025).

³⁰ *Id.*

³¹ JA at 4.

³² Baudier Direct at 11; *In re Public Service Co. of New Mexico*, No. 08-00078-UT, 2008 WL 5744189 (NMPRC Dec. 11, 2008).

³³ Press Release, El Paso Electric Company, *Public Regulation Commission Approves Acquisition of El Paso Electric* (March 12, 2020); *Joint Application of El Paso Electric Company, Sun Jupiter Holdings LLC, and IIF US Holdings 2 LP, for Approval of the Acquisition of El Paso Electric Company by Sun Jupiter Holding LLC and IIF US Holding 2 LP*, No. 19-00234-UT, 2020 WL 1656367 (NMPRC Mar. 11, 2020).

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1 commissions also have reviewed and approved acquisitions of public utilities by private
2 equity firms.³⁴

3
4 **Q. DO ALL PRIVATE EQUITY FUNDS PURSUE SIMILAR INVESTMENT**
5 **STRATEGIES?**

6 A. No. There is considerable diversity in the business models and investment strategies of
7 private equity funds, which often is overlooked in stereotypes or generalizations about
8 private equity.

9
10 Some private equity firms do target and acquire underperforming businesses and pursue
11 aggressive cost-cutting measures with the goal of reselling the businesses quickly and
12 securing short-term profits.³⁵ However, many other private equity funds—including many
13 funds favored by institutional investors—like BCP, adopt very different strategies.³⁶

³⁴ See, e.g., *Joint Application of Cleco Power LLC and Cleco Partners L.P for: (i) Authorization for the Change of Ownership & Control of Cleco Power LLC & (ii) Expedited Treatment*, No. U-33434, 2016 WL 930119 (La. Pub. Serv. Comm’n Mar. 8, 2016, rehearing denied May 26, 2016); *In the Matter of the Joint Application of Puget Holdings LLC & Puget Sound Energy, Inc., for an Ord. Authorizing Proposed Transaction*, No. U-072375, 2008 WL 5432243 (Wash. Util. & Trans. Comm’n Dec. 30, 2008); *Joint Report & Application of Oncor Elec. Delivery Co. & Tex. Energy Future Holdings Ltd. P’ship Pursuant to PURA § 14.101*, No. 34077, 2008 WL 726395 (Tex. Pub. Util. Comm’n Feb. 22, 2008, order on rehearing April 24, 2008).

³⁵ Robert Hoskisson *et al.*, *The Evolution and Strategic Positioning of Private Equity Firms*, 27 ACADEMY MGMT. EXEC. 22, 25-30 (2013) (discussing sets of efficiency-focused private equity investors that make more short-term investments).

³⁶ *Id.* (discussing sets of private equity investors with a more long-term focus).

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1 Recent years have seen the growth of infrastructure investment funds like the BCP
2 Infrastructure Funds. Infrastructure investment funds focus on capital-intensive
3 infrastructure sectors and attract large institutional investors, such as pension funds, that
4 are looking for stable investments to support long-term financial obligations. Public
5 utilities with regulated rates of return and significant capital needs are a natural fit for such
6 investors.³⁷

7
8 Based on the record in this proceeding, the BCP Infrastructure Funds are infrastructure
9 investment funds that do not fit the “corporate raider” stereotype sometimes associated
10 with private equity. Instead, the BCP Infrastructure Funds work with large, experienced,
11 and sophisticated institutional investors who understand and want to support the business
12 model of well-managed, rate-regulated public utilities like NMGC, recognizing that “this
13 sector requires a patient investment strategy that results in stable and uniform asset growth
14 over the long-term.”³⁸

³⁷ Javier Alonso, Alfonso Arellano & David Tuesta, *Pension Fund Investment in Infrastructure and Global Financial Regulation* 4-5 (Univ. of Pa., Wharton Sch., Pension Rsch. Council Working Paper No. PRCWP2015-22, 2015), <https://pensionresearchcouncil.wharton.upenn.edu/wp-content/uploads/2017/01/WP2015-22-Alonso-et-al..pdf> (stating that, among justifications for pension fund investments in infrastructure are the “neat fit between the long-term time horizon for infrastructure projects to mature and the pension fund portfolio” and the fact that “infrastructure tends to operate like natural, regulated monopolies, or oligopolies, with reduced or non-market competition, resulting in a portfolio with more stable asset values”).

³⁸ Baudier Direct at 9.

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1 **Q. DO PRIVATE EQUITY FUNDS THAT INVEST IN PUBLIC UTILITIES**
2 **NECESSARILY PRIORITIZE SHORT-TERM PROFITS OVER THE LONG-**
3 **TERM HEALTH OF THE UTILITIES THEY OWN?**

4 A. No. As discussed above, private equity funds deploy a wide variety of investment
5 strategies. Some private equity funds—such as infrastructure investment funds—focus on
6 acquiring and holding for relatively significant periods of time well-managed companies
7 that offer stable returns and long-term financial health, in alignment with the goals of the
8 funds’ large institutional investors.

9
10 I understand that Joint Applicants have committed to hold NMGC for at least 10 years,
11 which will provide NMGC with stable ownership for a significant period of time. This
12 commitment aligns with recommendations from NEE and Staff³⁹ and holding period
13 requirements from other recent utility acquisitions,⁴⁰ and will help ensure the BCP
14 Infrastructure Funds remain committed to NMGC’s long-term health. A private equity
15 fund committed to holding a public utility for at least 10 years can be expected to prudently
16 manage that utility to ensure it maintains its operational excellence and sustains its
17 reasonable rate of return over the decade, which will keep it operational and financially
18 healthy and fit for a potential sale at the end of the holding period.

³⁹ Velasquez Direct at 5; Sandberg Direct at 47.

⁴⁰ See, e.g., *Joint Application of El Paso Electric Company, Sun Jupiter Holdings LLC, and IIF US Holdings 2 LP, for Approval of the Acquisition of El Paso Electric Company by Sun Jupiter Holding LLC and IIF US Holding 2 LP*, No. 19-00234-UT, Amended Certificate of Stipulation, at 8 (NMPRC Feb. 12, 2020), *approved*, 2020 WL 1656367 (NMPRC Mar. 11, 2020); *In the Matter of the Merger of S. Jersey Indus., Inc. & Boardwalk Merger Sub, Inc.*, No. GM22040270, 2023 WL 1965663, at *35 (N.J. Bd. of Reg. Comm’rs Jan. 25, 2023).

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1 Additionally, due to the long-term capital commitments from their limited partner
2 investors, private equity firms may be *less* susceptible to short-term financial pressures
3 than publicly traded companies that must publicly report earnings on a quarterly basis and
4 are subject to stock market volatility.

5
6 **Q. DOES OWNERSHIP BY A PUBLICLY TRADED COMPANY INSULATE A**
7 **PUBLIC UTILITY FROM SHORT-TERM FINANCIAL PRESSURES?**

8 A. No. Publicly traded companies are required to publicly report their earnings on a quarterly
9 basis. Although this quarterly reporting requirement has transparency benefits, it can put
10 pressure on publicly traded companies to consistently hit expectations and show sustained
11 quarterly growth. This may discourage publicly traded companies in the short term from
12 pursuing strategies that are in the best long-term interests of a company, in order to, for
13 example, ensure that quarterly earnings reports meet investor expectations.⁴¹

14
15 Publicly traded companies also are subject to volatility in the stock market, which can lead
16 to significant swings in valuation based on daily trading activity and can complicate efforts

⁴¹ John R. Graham, Campbell R. Harvey & Shiva Rajgopal, *The Economic Implications of Corporate Financial Reporting*, 40 J. ACCT. & ECONS. 3 (2005) (survey in which 78% of corporate executives admitted that they would sacrifice long-term value in order to smooth earnings); Benjamin E. Hermalin & Michael S. Weisbach, *Information Disclosure and Corporate Governance*, 67 J. FIN. 195 (2012) (discussing the likelihood that improvement of corporate disclosure requirements would lead to increased myopic behavior by managers); Frank Gigler et al., *How Frequent Financial Reporting Can Cause Managerial Short-Termism: An Analysis of the Costs and Benefits of Increasing Reporting Frequency*, 52 J. ACCT. RSCH. 357 (2014) (increased financial reporting frequency increases probability of inducing managerial short-termism).

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1 to pursue long-term strategic objectives.⁴² Because private equity funds are not subject to
2 the same day-to-day changes in valuation based on stock market swings and are not subject
3 to the same quarterly reporting requirements, they do not face the same short-term financial
4 pressures as publicly traded companies.

5
6 **Q. CAN PRIVATE EQUITY OWNERSHIP PROVIDE BENEFITS FOR PUBLIC**
7 **UTILITIES AND THEIR CUSTOMERS?**

8 A. Yes. In addition to the points discussed above about insulation from short-term financial
9 pressures and interest in the long-term financial health of the public utilities they own,
10 private equity funds can also provide benefits in terms of enhanced accountability and
11 support for public utility management.

12
13 Private equity funds—especially infrastructure investment funds like the BCP
14 Infrastructure Funds—are often funded by large, sophisticated institutional investors,
15 offering reliable access to capital for prudent investments and more direct accountability
16 for public utility management. Because a private equity fund is more closely held than a
17 publicly traded company, each investor has a greater incentive to monitor the performance
18 of companies the fund owns. Additionally, infrastructure investment funds often partner
19 with private equity management firms that have considerable industry experience and

⁴² See, e.g., James Dow, Jungsuk Han & Francesco Sangiorgi, *The Short-Termism Trap: Catering to Informed Investors with Limited Horizons*, HARV. L. SCH. F. CORP. GOVERNANCE (Aug. 13, 2024) (“[O]ur analysis shows how firms will be caught in a vicious circle, initiated by the stock market, that drags down long-term value creation as all firms engage in an ultimately futile attempt to out-do their peers with better short-term results.”).

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1 financial expertise, allowing them to provide valuable strategic support to a public utility's
2 own management.⁴³

3
4 **Q. DOES THE COMMISSION HAVE SUFFICIENT AUTHORITY TO ADDRESS**
5 **RISKS THAT MAY BE ASSOCIATED WITH PRIVATE EQUITY OWNERSHIP?**

6 A. Yes. As an initial matter, I do not agree that there are inherent risks to private equity
7 ownership that are additional to publicly traded ownership. That said, however, even
8 accepting for the sake of argument that there are differences to be addressed, they are
9 exactly the types of issues utility regulation is designed to address. Certain parties to this
10 proceeding have raised concerns about private equity funds becoming the indirect upstream
11 owners of NMGC. However, the Commission has at its disposal the regulatory authority
12 needed to address the concerns raised in this proceeding and ensure that ratepayers are not
13 harmed. As discussed in Section III above, if the Transaction occurs, NMGC will remain
14 a public utility subject to the Commission's jurisdiction; the Transaction will not impair or
15 alter the Commission's ability to oversee and regulate NMGC.

16
17 Some parties have raised concerns about whether a company that is privately owned, rather
18 than a company that is publicly owned (and publicly traded), is an appropriate owner of

⁴³ See, e.g., Stephen D. Prowse, *The Economics of the Private Equity Market*, ECON. & FIN. POL'Y REV. 33 n.13 (1998) ("Intermediaries are ... important because selecting, structuring, and managing private equity investments require considerable expertise. Gaining such expertise requires a critical mass of investment activity that most institutional investors cannot attain on their own. ... [I]ntermediaries play an important role in furnishing business expertise to the firms in which they invest.").

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1 businesses like public utilities that provide essential services to the public.⁴⁴ The concern
2 centers on the goal of the private contributor of capital to the utility to receive a profit on
3 its capital contribution.⁴⁵ Yet, this is the same goal of contributors of capital to a publicly-
4 owned company—that is, shareholders—with respect to their capital. Economic regulators
5 have long-recognized the legitimate need for contributors of capital to be paid—
6 appropriately—for their contribution to the large capital needs of infrastructure-heavy
7 public utilities that provide essential services and are or tend toward natural monopolies or
8 otherwise imperfect competition. And economic regulators have evolved an effective,
9 economic regulatory regime of cost-of-service regulation, to ensure safe and reliable
10 service at the lowest possible cost, including a fair return on the equity contributed by
11 shareholders or private investors.

12
13 This cost-of-service regulatory framework works equally well regardless of whether the
14 public utility’s capital needs are met by shareholders (i.e., a publicly traded company) or
15 by private investors (i.e., a private equity fund).

16
17 Public utility regulation also protects against the more specific concerns about private
18 equity ownership that have been raised by opposing parties in this proceeding. For

⁴⁴ See, e.g., Direct Testimony of Mark E. Garrett on Behalf of the NMDOJ at 23 (“Garrett Direct”) (“Private equity. . . is not a conducive ownership arrangement in an industry that provides an essential service such as natural gas supply to homes and businesses.”); *id.* at 21-25; Direct Testimony of Bradley T. Cebulko on Behalf of WRA at 37, 45 (“Cebulko Direct”); Sandberg Direct at 32-42.

⁴⁵ See Garrett Direct at 23.

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1 instance, Mr. Garrett argues that private equity funds “may be motivated to ‘gold-plate’ the
2 utility system to create growth where it is not actually needed to provide service or to meet
3 customer load.”⁴⁶ However, such investments would, by definition, be imprudent, and the
4 Commission has authority to deny recovery of imprudent investments. In this context,
5 experienced investors like the BCP Investment Funds are not likely to put capital at risk
6 for investments that may not be recoverable—and the Commission has authority to protect
7 ratepayers if they do.

8
9 **Q. WILL THE HOLDING COMPANY DEBT USED TO PURCHASE NMGC HAVE**
10 **AN EFFECT ON NMGC’S CAPITAL STRUCTURE?**

11 A. No. Following the Transaction, Saturn Aggregator, Saturn Aggregator GP, Saturn Topco,
12 Saturn Topco GP, and Saturn Utilities will act as “Intermediate Companies.” These
13 companies will sit below the BCP Infrastructure Funds and above TECO Energy, NMGI,
14 and the underlying public utility, NMGC, in the post-Transaction organizational
15 structure.⁴⁷ As the direct testimony of Mr. Baudier explains, this structure allows the
16 Intermediate Companies “to obtain debt financing for the Transaction without any liability
17 for NMGC or the use of any NMGC assets as collateral. The financial health or operations
18 of NMGC will not be adversely impacted by the existence of the Intermediate Companies
19 post-closing.”⁴⁸ Debt held by the upstream holding companies (*i.e.*, the Intermediate
20 Companies) therefore will not have an effect on NMGC’s capital structure.

⁴⁶ *Id.* at 23-24.

⁴⁷ *See* Baudier Direct at 19.

⁴⁸ *Id.* at 21.

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V. ACQUISITION PREMIUM

Q. WHAT IS AN ACQUISITION PREMIUM?

A. In the context of public utility mergers and acquisitions, the acquisition premium is the portion of the purchase price in excess of the net book value of the public utility's assets.⁴⁹

Q. IN PUBLIC UTILITY MERGERS AND ACQUISITIONS, IS IT UNUSUAL FOR THE PURCHASE PRICE TO INCLUDE AN ACQUISITION PREMIUM?

A. No. In my experience, it is not unusual for the purchase price in a public utility merger or acquisition to include an acquisition premium. What has been referred to as an acquisition premium has been included in the purchase price for recent transactions approved by this Commission, including the purchase of El Paso Electric Company by IIF U.S. Holding 2 LP and the previous purchase of NMGC by Emera.⁵⁰ Other recent public utility mergers and acquisitions have also included acquisition premiums.⁵¹

⁴⁹ See *Mo. Pub. Serv. Comm'n v. FERC*, 601 F.3d 581, 583 (D.C. Cir. 2010) ("Any cost above the depreciated original cost (a term that is alternately referred to as the 'net book value') is known as an acquisition premium").

⁵⁰ Press Release, El Paso Electric Company, *Public Regulation Commission Approves Acquisition of El Paso Electric* (March 12, 2020), <https://www.epelectric.com/news/public-regulation-commission-approves-acquisition-of-el-paso-electric>; Joint Applicants' Response to NMDOJ Interrogatory 3-15(a).

⁵¹ See, e.g., Press Release, Duke Energy, *Duke Energy Partners with GIC to Secure Minority Investment in Duke Energy Indiana, Increases Long-Term EPS Growth Rate* (Jan. 28, 2021), <https://news.duke-energy.com/releases/duke-energy-partners-with-gic-to-secure-minority-investment-in-duke-energy-indiana-increases-long-term-eps-growth-rate> (stating that the deal represented a "significant premium to Duke Energy's current public equity valuation."); Press Release, South Jersey Industries, *South Jersey Industries Enters Into Agreement to be Acquired by the Infrastructure Investments Fund* (Feb. 24, 2022), <https://www.globenewswire.com/news-release/2022/02/24/2391259/0/en/South-Jersey-Industries-Inc-Enters-into-Agreement-to-be-Acquired-by-the-Infrastructure-Investments-Fund.html>.

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Q. DOES THE JOINT APPLICATION INCLUDE PROTECTIONS TO ENSURE THAT JOINT APPLICANTS WILL NOT RECOUP THE ACQUISITION PREMIUM THROUGH FUTURE RATE CASES OR RATE BASE REVALUATIONS?

A. Yes. In the Joint Application and the Amended GDP, the BCP Applicants commit that:

NMGC will not, directly or indirectly, seek to recover in any future rate case, any increased goodwill or the increase in any other intangible asset resulting from the Transaction and allocated to NMGC (“Acquisition Premium”). NMGC agrees not to revalue its assets that are a part of New Mexico regulatory rate base to reflect the Acquisition Premium. NMGC will continue to value such assets for all Commission regulatory purposes based on the original cost, less accumulated depreciation valuation methodology.⁵²

Q. DOES THE COMMISSION HAVE SUFFICIENT AUTHORITY TO PROTECT AGAINST ATTEMPTS TO RECOVER THE ACQUISITION PREMIUM FROM CUSTOMERS?

A. Yes. Because NMGC will continue to be a New Mexico public utility following the Transaction, it will still be subject to extensive economic cost-of-service regulation by the Commission to ensure that its rates are just and reasonable. This authority allows the Commission to ensure that NMGC abides by the commitments in the Joint Application and Amended GDP regarding the acquisition premium.

NMDOJ witness Mark E. Garrett suggests there is a risk that the acquiring funds may “seek to recover the premium paid in some manner,” such as by “(1) moving to a higher equity

⁵² JA at 12, 34-35; Baudier Direct at 34-35; Amended GPD at 17.

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ratio in the capital structure, (2) the use of double leverage in the capital structure, (3) through affiliate contracts, or (4) other indirect recovery methods.”⁵³ Likewise, Mr. Cebulko raises concerns about the acquiring firms attempting to recover the acquisition premium through overinvestment, increases in the rate of return, or a more favorable equity ratio.⁵⁴ However, each of the possible mechanisms Mr. Garrett and Mr. Cebulko identify would be subject to Commission oversight, including through this proceeding, NMGC rate cases, prudence reviews, and/or the Commission’s authority to review affiliate transactions.⁵⁵

Q. DOES THE PUBLIC INTEREST REQUIRE THE ACQUISITION PREMIUM TO BE SHARED WITH RATEPAYERS?

A. No. I understand that certain parties to this proceeding have argued that the acquisition premium in this case should be shared with NMGC customers, either through a rate credit or by requiring NMGC to record the acquisition premium as a regulatory liability.⁵⁶ Such conditions would not be consistent with the public interest.

A public utility’s owners—not its customers—ultimately bear the financial risk for the public utility’s success or failure. As the Supreme Court of New Mexico has explained, “a

⁵³ Garrett Direct at 14-15.

⁵⁴ Cebulko Direct at 13-23.

⁵⁵ *See, e.g.*, N.M.S.A. 1978, §§ 62-3-3(K), 62-8-1, 62-8-7, 62-6-19.

⁵⁶ *See* Garrett Direct at 8, 54; Direct Testimony of Larry Blank on Behalf of Staff at 7-8, 11-12; *see also* Sandberg Direct at 46 (recommending conditioning approval on \$40 to \$90 million rate credit).

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1 utility customer is not a partner or beneficiary of the utility and does not share the profits
2 or risks of the utility or its affiliate.”⁵⁷ In the context of public utility mergers and
3 acquisitions, the acquisition premium is a function of the purchase price, which reflects
4 what the buyer is willing to pay the seller to acquire the public utility based on the buyer’s
5 overall assessment of the utility’s long-term value to it as a going concern. As such, it is
6 appropriate for the exiting owners in a transfer-of-control transaction to be paid the
7 purchase price—including the acquisition premium—that reflects the buyer’s perception
8 of the value to it of the public utility as a going concern, which value the exiting owners
9 were responsible for creating or maintaining during their ownership period. Ratepayers
10 should not be responsible for any *losses* an exiting owner might incur when selling a public
11 utility. By the same token, the Commission should not require that ratepayers share in any
12 of the gains realized by an exiting owner when a public utility is sold for a purchase price
13 above the net book value of its assets.

14
15 The Commission recognized these principles in 2008 when addressing similar arguments
16 regarding the sale of Public Service Company of New Mexico’s (“PNM”) gas utility and
17 the formation of NMGC. There, the Commission explained: “the risks of loss on the sale
18 of an entire utility or utility system falls on the utility’s shareholders, and therefore any
19 gain on the sale of those assets should be allocated entirely to shareholders, absent special

⁵⁷ *Gas Co. of N.M. v. N.M. Pub. Serv. Comm’n*, 1984-NMSC-002, ¶ 13, 100 N.M. 740, 743, 676 P.2d 817, 820.

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1 circumstances that warrant a different allocation.”⁵⁸ There are no special circumstances
2 here that warrant departure from this general principle.

3
4 Other public utility commissions also have rejected similar arguments about sharing
5 acquisition premiums with ratepayers. For instance, the New Hampshire Public Utilities
6 Commission rejected arguments that “ratepayers are entitled to a share of the acquisition
7 premium from this proposed merger,” explaining that nothing in its enabling legislation
8 allowed that commission “as a general proposition to seize on behalf of ratepayers any
9 portion of the capital gains on a utility’s stock reaped by the shareholders of the selling
10 entity.”⁵⁹ More recently, the North Carolina Utilities Commission explained how utility
11 asset and acquisition transactions differ and why it is inappropriate to share an acquisition
12 premium with ratepayers when reviewing Duke Energy Corporation’s proposed
13 acquisition of the stock of Piedmont Natural Gas Company, Inc. The North Carolina
14 Utilities Commission explained:

15 Duke Energy is not purchasing Piedmont’s assets. Rather, Duke Energy is
16 paying an acquisition premium to Piedmont’s shareholders for the purchase
17 of Piedmont’s stock. Piedmont’s assets will remain the property of
18 Piedmont. Further, Piedmont’s rate base will remain the same after Duke
19 Energy’s acquisition of the Piedmont stock as it was while the stock was in
20 the hands of the Piedmont shareholders. Were this an asset acquisition,
21 Piedmont’s rate base in the hands of a new owner would be the lesser of
22 Piedmont’s net original cost or the purchase price on the theory that
23 ratepayers should only be responsible for paying rates on the cost of assets

⁵⁸ *In Re Pub. Serv. Co. of New Mexico*, No. 08-00078-UT, 2008 WL 5744189 (NMPRC Dec. 11, 2008; rehearing denied Jan. 20, 2009).

⁵⁹ *In Re Pub. Serv. Co. of N. H., Joint Applicants: N. Atl. Energy Corp.; N. Atl. Energy Serv. Corp.; Ne. Utils.; Consolidated Edison, Inc.*, No. DE 00-009, 85 N.H.P.U.C. 758, 2000 WL 1930708, at *26 (Dec. 6, 2000), *reh’g denied*, 86 N.H. P.U.C. 31, 2001 WL 427817 (Jan. 19, 2001).

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1 financed by the utility's investors. In this case, a stock acquisition,
2 Piedmont's rate base stays the same. Piedmont's ratepayers bear
3 responsibility for paying a return on rate base and a return of the costs
4 financed by investors. However, the risks of ownership in Piedmont's
5 common equity stock and the increase or decrease in the value of that stock
6 continue to reside with the owners of that stock.⁶⁰
7

8 **Q. IS PRECEDENT ON GAINS ON SALES OF UTILITY ASSETS RELEVANT TO**
9 **THIS PROCEEDING?**

10 A. No. Sales of specific public utility assets—which are part of the utility's rate base—are
11 fundamentally different from mergers or acquisitions of the public utility itself. The
12 Commission has recognized that it may be appropriate to share gains on sales of utility
13 *assets* based on the principle that “economic benefits follow economic burdens,”
14 explaining that “shareholders bear the burden of the risk of loss and/or recovery of their
15 investment while the ratepayers have paid for the assets with depreciation expense and
16 provided the utility with debt and equity return on the rate base.”⁶¹ There is no basis,
17 however, for applying this principle to acquisition premiums in the context of public utility
18 mergers and acquisitions because, as discussed above, customers do not share the risks or
19 burdens of ownership of the public utility.
20

21 The Commission recognized this important distinction in the 2008 decision regarding
22 PNM's sale of its natural gas utility and the creation of NMGC, explaining:

⁶⁰ *In re Application of Duke Energy Corp. & Piedmont Nat. Gas, Inc., to Engage in a Bus. Combination Transaction & Address Regul. Conditions & Code of Conduct*, No. E-2 SUB 1095, 2016 WL 5776232, at *30 (N.C. Utils. Comm'n Sept. 29, 2016).

⁶¹ *In Re Sw. Pub. Serv. Co.*, No. 13-00140-UT, 2013 WL 7987603 (NMPRC Dec. 4, 2013).

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1 As a general rule, utilities are able to recover from its ratepayers the cost of
2 a facility that is prematurely retired due to, for example, a facility being
3 destroyed by hurricane or other reasonably unavoidable circumstance,
4 provided that there is no showing that the facility's destruction was not also
5 attributable to the imprudence of the utility.... It is because ratepayers bear
6 that type of risk that the Commission, as a general rule, ... [has] allocated
7 all or a portion of the gain on the sale of specific assets by a utility made in
8 the course of providing utility service to ratepayers; i.e., they have treated
9 these gains as offsets to other capital-related costs.

10 Here, the risks are not related to the sale of specific assets by a public utility
11 that will continue to provide the same services to its ratepayers. Instead,
12 the transaction at issue here is the sale of an entire business. Thus, the focus
13 here is not the risks and benefits that accompany the acquisition and sale of
14 a utility asset made in the course of business, but the risks and benefits
15 attendant to the acquisition and ultimate disposal of the business itself....
16 [T]he risks of loss on the sale of an entire utility or utility system falls on
17 the utility's shareholders, and therefore any gain on the sale of those assets
18 should be allocated entirely to shareholders, absent special circumstances
19 that warrant a different allocation.

20 ...

21 In light of the foregoing, ... there are sound reasons to differentiate the
22 allocation of gain on the sale of utility assets based on whether the assets
23 are being sold in the course of a utility providing utility service to
24 its customers, or are instead being sold as part of a utility's sale of the utility
25 business itself. Under New Mexico law, the risk of loss upon the sale of a
26 utility's assets shifts from the ratepayers to the shareholders if the sale is of
27 the utility's entire line of business.⁶²

VI. CONCLUSION

30 **Q. DOES THIS CONCLUDE YOUR TESTIMONY?**

31 **A. Yes.**

⁶² *In Re Pub. Serv. Co. of N.M.*, No. 08-00078-UT, 2008 WL 5744189 (NMPRC Dec. 11, 2008; rehearing denied Jan. 20, 2009).

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Co-Chair of Energy Industry Practice

Federal Energy Regulatory Commission, Washington, DC Commissioner (2003 -2009)
Responsibilities included (1) making decisions in approximately 1300 cases each year involving electric and natural gas wholesale markets and interstate transmission, hydroelectric licensees and gas pipeline certificates, oil pipeline rates, electricity reliability, and enforcement; (2) maintaining relations with the U.S. Senate Energy and Natural Resources Committee and the U.S. House Commerce and Energy Committee, including testifying before the committees as required and following legislative developments; (3) maintaining relations with industry and market participants; (4) speaking publicly on energy industry developments and maintaining relations with the press; (5) co-chairing the Smart Grid Collaborative between FERC and the

National Association of Regulatory Utility Commissioners;(6) managing the budget and staff of the Office of the Commissioner.

University of New Mexico School of Law, Albuquerque, NM
Professor of Law, 1986 - 2003

Taught Energy Law, Public Utility Regulation, Legislative Process and Administrative Law, and Administrative Practice. Served as Editor-in-Chief, Natural Resources Journal (1995-2000) (responsibilities included managing all aspects of the publication of four volumes of the Journal each year, its budget and administrative staff, and supervising the student editorial staff). Was the Lewis & Clark Law School Distinguished Visitor (1998) and was awarded the Susan and Ronald Friedman Faculty Excellence in Teaching Award (1995-96) and the Keleher & McLeod Professor of Law Award (1997-99).

Staff of **U.S. Senator Jeff Bingaman**, Washington, DC
Detail to the U.S. Senate Energy and Natural Resources Committee, 1999 (on leave from U. of NM)
Contributed to development of energy and hydroelectric licensing legislation.

California Independent System Operator, Folsom, CA Regulatory Counsel, 2000 (on leave from U. of NM)

CAISO operates much of California's transmission grid and dispatches interconnected generation, which was coordinated with the California Power Exchange until 2001. Responsible for learning and understanding the ISO's protocols and tariff provisions so as to be able to answer day-to-day legal questions. Worked on the regulatory proceeding involving the 70 unresolved issues remaining from the FERC's conditional certification of the ISO.

Modrall, Sperling, Roehl, Harris & Sisk, Albuquerque, NM
Attorney, 2001 - 2003 (on leave from U. of NM)

Responsibilities included creating and heading up the firm's public utility practice. Clients included independent power producers, water utilities, a local gas distribution company, and NM State University in its capacity as a large electricity customer.

Suede G. Kelly, Attorney-at-Law, Albuquerque, NM
Attorney, 1986 - 2001

Managed a part-time practice in federal and state energy and public utility law, representing private and publicly-owned clients in transactions, legislation, rulemakings, and litigation concerning electric, gas and water utility certification, rates and service; electricity assets siting, financing, acquisitions and mergers; electric and gas industry restructuring; and doing business with electric and gas utilities.

New Mexico Public Service Commission, Santa Fe, NM
Chairwoman, 1984 - 1986.
Commissioner, 1983 - 1984.

Responsibilities included regulation of the state's electric, gas and water utilities; management of the agency, its budget and staff; and maintaining relations with the State Legislature, the Governor's Office, the industry, and the public.

New Mexico Office of the Attorney General, Santa Fe, NM

Attorney, Public Utilities Division, 1982 - 1983

Managed cases being litigated in New Mexico state courts and cases before the NM Public Service Commission.

Luebben, Hughes & Kelly, Albuquerque, NM

Partner, 1978-1982

Managed a private law practice, representing clients in state and federal litigation and regulatory agency practice in utility, natural resources, energy, and Indian law.

University of New Mexico Graduate School of Public Administration, Albuquerque, NM

Adjunct Faculty, 1979 - 1982

Taught Administrative Law.

Natural Resources Defense Council, Inc., Washington, DC

Attorney, 1977 - 1978

Law Clerk, 1975

Managed a case load involving environmental litigation in the federal courts, federal agency proceedings and federal legislative developments.

Ruckelshaus, Beveridge, Fairbanks & Diamond, Washington, DC

Associate Attorney, 1976 - 1977

Worked on cases in federal litigation, federal and state agency proceedings, and helped to advise clients regarding legislation. Matters involved environmental, commercial, and constitutional law.

U.S. Environmental Protection Agency, Washington, DC

Law Clerk, 1974

Provided research regarding the Federal Water Pollution Control Amendments of 1972 and federal clean water policy.

EDUCATION

Cornell Law School, J.D., *cum laude*, 1976.

Cornell Law Scholarship; Delaware School Foundation Scholarship; International Law Journal Staff; Director, Cornell Legal Aid (responsible for managing the case load of the Family Division and supervising its student attorneys).

University of Rochester, B.A. in Chemistry, *With Distinction*, 1973.

Bausch & Lomb Science Award and Scholarship; President, University Women's Residence Assistants (responsible for managing women's residential assistance program and supervising the residence assistants).

PUBLICATIONS WITHIN THE LAST TEN YEARS

Partnering with American Indian Tribes to Accelerate Transmission Development On or Near Tribal Lands (Prepared for Clean Grid Initiative) (January 19, 2024) (co-authored with Keith Harper).

Episode 1: Understanding U.S. Energy Markets, American Efficient Podcast Series (Feb. 2, 2022), available at <https://www.americanefficient.com/podcasts/episode-1/>.

Escalating Threats to Infrastructure Confirm Our Need to Harden the Electric Grid (The Hill) (Oct. 30, 2017).

Episode 7: Mysterious Frontiers: The New FERC, Grid Geeks Podcast (August 9, 2017) (with host Alison Clements), available at <http://www.goodgrid.net/blog/2017/8/9/grid-geeks-podcast-episode-7>.

Federal/State Jurisdictional Split: Implications for Emerging Electricity Technologies, Lawrence Berkeley National Laboratory - Energy Analysis and Environmental Impacts Division (December 2016) (co-authored with Jeffery S. Dennis, Robert R. Nordhaus, and Douglas W. Smith), available at <https://www.energy.gov/sites/prod/files/2017/01/f34/Federal%20State%20Jurisdictional%20Split--Implications%20for%20Emerging%20Electricity%20Technologies.pdf>.

A FERC Challenge: Opening up electricity markets to advanced energy technologies, UtilityDive.com (June 30, 2016) (co-authored with Arvin Ganesan), available at <https://www.utilitydive.com/news/a-ferc-challenge-opening-up-electricity-markets-to-advanced-energy-technol/421891/>.

CREATING A REGULATORY FRAMEWORK FOR DEMAND-SIDE INVESTMENT EQUIVALENT TO GENERATION & GRID INVESTMENTS (Akin Gump 2014), <http://cdn.akingump.com/images/content/3/0/v2/30870/ADSM-Regulatory-Equivalent-White-Paper-July-2014-FINAL.pdf> (co-authored with J. Porter Wiseman).

SWORN TESTIMONY

In the Matter of Southwestern Public Service Company's Application For: (1) Revision of its Retail Rates Under Advice Notice No. 312; (2) Authority to Abandon the Plant X Unit 1, Plant X Unit 2, and Cunningham Unit 1 Generating Stations and Amend the Abandonment Date of the Tolk Generating Station; and (3) Other Associated Relief, No. 20-00286-UT (New Mexico Public Regulation Commission). On behalf of Southwestern Public Service Company (2023).

Enable Mississippi River Transmission, LLC v. Linn Energy Holdings, et al., Adversary No. 16-6017, U.S. Bankruptcy Court for the Southern District of Texas Victoria Division. On behalf of Linn Energy Holdings, et al. (2022)

In the Matter of The Electronic Application of East Kentucky Power Cooperative, Inc. For a General Adjustment of Rates, Approval of Depreciation Study, Amortization of Certain Regulatory Assets, and Other General Relief, No. 2021-0010 (Kentucky Public Service Commission). On behalf of AppHarvest Morehead Farm, LLC (2021)

Bandera Master Fund LP, et al. v. Boardwalk Pipeline Partners LP, C.A. No. 2018-0372-JTL, Delaware Court of Chancery. On behalf of Boardwalk Pipeline Partners LP (2020-21).

In the Matter of Southwestern Public Service Company's Application For: (1) Revision of its Retail Rates Under Advice Notice No. 292; (2) Authorization and Approval to Abandon its Plant X Unit 3 Generating Station; and (3) Other Associated Relief, No. 20-00238-UT (New Mexico Public Regulation Commission). On behalf of Southwestern Public Service Company (2021).

In Re: Extraction Oil & Gas, Inc. v. Grand Mesa Pipeline LLC, Case No. 20-11548 (CSS), U.S. Bankruptcy Court for the District of Delaware, Oct. 1, 2020. On behalf of Grand Mesa Pipeline LLC.

In the Matter of Southwestern Public Service Company's Application For: (1) Revision of Its Retail Rates Under Advice Notice No. 282; (2) Authorization and Approval to Shorten the Service Life of and Abandon Its Tolk Generating Station Units; and (3) Other Related Relief, No. 19-00170-UT (New Mexico Public Regulation Commission). On behalf of Southwestern Public Service Company (2019)

In the Matter of the Application of Grain Belt Express Clean Line LLC for a Certificate of Convenience and Necessity, No.EA-2016-0358 (Public Service Commission of the State of Missouri) On behalf of Grain Belt Express Clean Line LLC (2016)

Rockies Express Pipeline LLC v. U.S. Dep't of the Interior, Civilian Board of Contract Appeals, CBCA 3704 (1921)-REM. [REM denotes that the case was on remand from the U.S. Court of Appeals for the Federal Circuit.] On behalf of Rockies Express Pipeline LLC (2015-16)

In the Matter of the Merger of Exelon Corporation and Pepco Holdings, Inc., No. 9361 (Public Service Commission of the State of Maryland). On behalf of Exelon Corporation (2015)

PROFESSIONAL ACTIVITIES

Member, Expert Advisory Board, Initiative on Climate Risk and Resilience Law, www.icrrl.org (2021-Present).

Member, Board of Directors, Advanced Energy Economy Institute (2020-Present)

Member, Energy Insecurity Steering Committee of the Energy Bar Association (2022-2023)

Member, Advisory Board of Directors, American Wind Energy Association (2019-2020)

Member, Board of Advisors, Duke University Nicholas Institute for Energy, Environment & Sustainability (2018-Present)

Member, Dean's Advisory Council, Hajim School of Engineering, University of Rochester, Rochester, NY (2012 - 2020).

Rocky Mountain Mineral Law Foundation, Trustee (1988 - 1993, 2015 - 2017).

Member, Environmental Law Institute Leadership Council (2015 - 2017).

Member, Advisory Board, The Perfect Power Institute, Chicago, IL (2011 – 2015).

Board Member, Charitable Foundation of the Energy Bar Association (2010 - 2013).

Member, Advisory Board, Gridquant, Columbus, OH (2013).

Member, Smart Grid Advisory Committee, National Institute of Standards and Technology (2010 - 2013).

Council Member, American Bar Association, Section of Administrative Law and Regulatory Practice (2010 - 2012).

Advisory Council, Women's Council on Energy and Environment, Washington, DC (2008 – 2012; Chair 2010 - 2012).

Council Member, American Bar Association, Section of Environment, Energy and Resources (2000 - 2003).

New Mexico Women's Bar Association (1991 - 2003).

Barrister, H. Vearle Payne American Inn of Court (1995 - 2003).

Board Member, Santa Fe Diocese Foundation (1999 - 2003).

Founding Board Member, Albuquerque Open Space Alliance (1996 - 1999).

N.M. Legislative Task Force on Management of the Middle Rio Grande Bosque (1993 - 1994).

American Association of Law Schools, Chair of the Executive Committee of the Legislation Section (1994 - 1995).

Border Research Institute of New Mexico State University, Member of the Advisory Committee on its studies (1992 - 1993).

The National Regulatory Research Institute, Ohio State University, Member of the Research Advisory Committee to the Board (1988 - 1992).

Board Member, New Mexico Bar Association, Natural Resources Section (1987 - 1992)

U.S. Consumer Product Safety Commission, Chair of its Advisory Council (1980 - 1981); Member (1979-1981).

U.S. National Air Quality Commission-Four Corners Region Study, Member of Advisory Committee (1979 - 1981).

N.M. Legislative Task Force, Federal Lands Action Group, (1979 - 1981).

Washington D.C. Council of Lawyers, Executive Board Member (1977 - 1978).

Member of the Bars of New Mexico and the District of Columbia; of the U.S. Courts of Appeal for the District of Columbia, 9th and 10th Circuits; and of the U.S. District Courts for the District of Columbia and New Mexico

**IN THE MATTER OF THE JOINT APPLICATION
FOR APPROVAL TO ACQUIRE
NEW MEXICO GAS COMPANY, INC.
BY SATURN UTILITIES HOLDCO, LLC.**

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JOINT APPLICANTS

In accordance with 1.2.2.35(A)(3) NMAC and Rule 1-011(B) NMRA, Suedeon G. Kelly, Attorney and Former Commissioner on the NMPRC and on the Federal Energy Regulatory Commission, affirms and states under penalty of perjury under the laws of the State of New Mexico: I have read the foregoing Rebuttal Testimony and Exhibits. I further affirmatively state that I know the contents of my Rebuttal Testimony and Exhibits and they are true and accurate based on my personal knowledge and belief.

/s/Suede G. Kelly
Suede G. Kelly

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

**IN THE MATTER OF THE JOINT
APPLICATION FOR APPROVAL TO
ACQUIRE NEW MEXICO GAS COMPANY,
INC. BY SATURN UTILITIES HOLDCO,
LLC.**

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Case No. 24-00266-UT

JOINT APPLICANTS

CERTIFICATE OF SERVICE

I CERTIFY that on this date I sent via email a true and correct copy of *Rebuttal Testimony and Exhibits of Suede G. Kelly*

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BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

**Rebuttal Testimony and Exhibits
Of Suede G. Kelly**

Case No. 24-00266-UT

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DATED this May 16, 2025.

/s/Anita Hart

Anita Hart

Director, Regulatory Affairs

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