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	)	

JOINT APPLICANTS' RESPONSE TO JOINT MOTION TO DISMISS

June 2, 2025

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The Joint Applicants respond to the "Joint Motion to Dismiss Without Prejudice or for Alternative Relief and Brief in Support" ("Original Motion") and the inclusive of the "Joint Response to the Hearing Examiners' May 28th Order" (the "Additional Brief," with the "Original Motion," the "Motion to Dismiss").

The Joint Applicants filed a complete Joint Application and supporting testimony that meet the standard for approval of a Class II transaction. In the initial procedural order, the Hearing Examiners provided a deadline for any motion to dismiss based on the sufficiency of the Application. No such motion was timely filed. The Movants have now, more than three months after the deadline, filed a Motion to Dismiss centered on arguments about the sufficiency of the Joint Application relative to their interpretation of the applicable legal standard. It is a late-filed motion to dismiss and incorrect on the merits, and should be denied.

The Joint Applicants filed rebuttal testimonies that responded to the direct testimonies of the Movants' and other parties' witnesses by: (1) adding commitments in direct response to requests and proposals in these direct testimonies; (2) providing expert testimony directly responsive to the purported expert testimony of Movants' and other parties' witnesses regarding matters that they are contesting; and (3) making adjustments to post-transaction plans responsive to the expressed preferences of Movants' witnesses. Each is the proper subject matter for rebuttal testimony and is not a basis for dismissal or a "refiling" of the Joint Application. In fact, the cases Movants cite as precedent support that the Joint Applicants have followed proper procedure with respect to the conduct of the case and their rebuttal testimony.

The Movants' proposals to strike testimony are incorrect. First, the addition of new or amended commitments and communication of information (including new information) regarding the post-transaction operation of New Mexico Gas Company, Inc. ("NMGC") are appropriate

matters for rebuttal. Second, New Mexico Public Regulation Commission ("Commission" or "NMPRC") precedent supports the admissibility of testimony on legal matters, particularly from a qualified witness in response to other witnesses' testimony. The portions claimed to be legal testimony are purely responsive to the Staff and intervenor testimony on the same subjects; accordingly, either it is proper testimony or, if it is deemed improper, then the testimonies to which it responds must also be stricken. Third, the testimony argued to be "cumulative" is not; rather, it is new testimony addressed to matters that are in dispute.[1] In particular, expert opinion on a matter another witness testified on, but that is disputed, is not "cumulative."

All of that said, it is clear that the Movants want an opportunity to respond to the Joint Applicants' rebuttal testimony and to delay the upcoming hearing. The Joint Applicants support a thorough proceeding. Accordingly, if the Hearing Examiners determine that some of the Movants arguments have merit or otherwise determine that a testimonial response to the Joint Applicants' rebuttal is appropriate, then the Joint Applicants would not oppose amending the schedule to allow for rounds of surrebuttal and rejoinder testimony and a four-to-six-week delay of the hearing to permit them. In that scenario, the Movants would have more than five weeks from rebuttal to provide surrebuttal. That approach would also be the most reasonable remedy to the Movants' arguments about Joint Applicants' rebuttal testimony. In contrast, requiring a "re-filing of the application" would depart from past Commission cases and waste the resources already expended in the current docket, while not providing any benefit versus the opportunity for surrebuttal (other than delay for the sake of delay).

[1] All of the testimony that the Movants seek to strike as allegedly "cumulative" is, in fact, "evidence which tends to explain, counteract, repel, or disprove evidence submitted by another party or by staff," pursuant to Commission Rule of Procedure 1.2.2.12.B.

For all of the foregoing reasons, the Motion to Dismiss should be denied in its entirety. Given, however, the Joint Applicants' support for a robust review, they would not oppose additional rounds of testimony and a reasonable delay of the hearing.

I. THE MOTION TO DISMISS IS PROCEDURALLY IMPROPER AND SUBSTANTIVELY INCORRECT.

A. Movants Proposed Alternative Relief 1 and 2 of the Motion to Dismiss Are Procedurally Improper and Should Be Rejected.

The Motion to Dismiss is predominantly a late-filed motion to dismiss the Joint Application as filed on grounds the Movants were aware of well before the February 17, 2025 procedural deadline for such a motion. In the Procedural Order, the Hearing Examiners ordered that:

> Any party who wishes to file a dispositive motion – a motion to dismiss, any other motion that would result in dismissal, any motion that would (as a matter of law) resolve some portion of this case or require the applicant to retract and refile the application, or any motion that would result in summary rejection of any portion of the application – must do so by February 17, 2025 . . . Any motion deemed by the hearing examiner to have been filed under such circumstances will be rejected as a late-filed motion.[2]

Of the three forms of relief requested by the Movants, two are fundamentally based on assertions that the Application was, as they put it, "grossly deficient," and they devote the bulk of their Motion to Dismiss providing their analysis of the merits of the contents of the Joint Application as they judge them against their analyses of the contents of final orders in three prior cases. The requests for dismissal of the Joint Application as "grossly deficient" (Alternative 1), or de facto dismissal of the Joint Application on the same grounds by requiring that a new one be filed and the proceeding restart (Alternative 2) are in contravention of the Procedural Order and should be summarily rejected on that basis.

[2] Procedural Order, at ¶ F.

B. The Movants Have Not Met the Standards for Dismissal or Suspension of the Joint Application.

Of the three alternative forms of relief sought by the Movants, their preferred remedy is the dismissal of the Joint Application, without prejudice.[3] The Movants' second proposed alternative remedy is to hold this case in abeyance, i.e. suspension of the Joint Application, and require the Joint Applicants to refile their Joint Application.[4] Because the Motion to Dismiss seeks dismissal or suspension of the Joint Application, the Motion to Dismiss must be considered against the strong New Mexico jurisprudential policy against summary disposition of cases.[5] Motions to dismiss for failure to state a claim are granted infrequently.[6] The burden is on the Movants to prove that no legally cognizable claim for relief exists.[7] The Movants have not demonstrated any valid basis for the dismissal or suspension of the Joint Application.

Motions to dismiss are governed by Rule 1.2.2.12(B) and should be granted rarely, and only when the application is "patently deficient." Rule 1.2.2.12(B) provides:

> Staff or a party to a proceeding may at any time move to dismiss a portion or all of a proceeding for lack of jurisdiction, failure to meet the burden of proof, failure to comply with the rules of the commission, or for other good cause shown. The presiding officer may recommend dismissal or the commission may

[3] Original Motion at 3-4.

[4] *Id.*

[5] *See e.g., Romero v. Philip Morris Inc.,* 2010-NMSC-035, ¶7 8-10, 148 N.M. 713 (refusing to relax the test to be applied to summary judgment motions to match new federal rules); *In re the Estate of George Gushwa,* 2008-NMSC-064, 7 9, 145 N.M. 286, 197 P.3d 1 (stating that resolution on the merits is favored); *Springer Corp. v. Herrera,* 1973-NMSC-057, ¶ 8, 85 N.M. 201, *overruled on other grounds by Southwest Bank v. Rodriquez,* 1989-NMSC-011, 7 12, 108 N.M. 211, (stating "[c]ourts universally favor trial on the merits"); *Ortiz v. Shaw,* 2008-NMCA-136, 7 12, 145 N.M. 58, 193 P.3d 605 (causes should be tried on their merits); *cf_Public Service Company of New Mexico v. New Mexico Public Utility Commission,* 1999-NMSC-040, 77 7,11,128 N.M. 309 (where the Court noted that it had denied a stay of an NMPUC order entered without a full evidentiary hearing and instead vacated the order and remanded it for further proceedings.

[6] *Vigil v. Arzola,* 1984-NMSC-090, ¶ 5, 101 N.M. 687.

[7] *Order on New Energy Economy's Motion to Reject PNM's Application for Revision of its Retail Rates* at 9, (Feb. 3, 2023), *In the Matter of the Application of Public Service Company of New Mexico for Revision of its Retail Electric Rates Pursuant to Advice Notice No. 595,* Case No. 22-00270-UT (citing Wright & Miller, Federal Practice and Procedure § 1357 (3rd ed. Updated April 2022)).

dismiss a proceeding on their own motion.[8]

The New Mexico Supreme Court has recognized the Commission's authority to dismiss cases, but has limited this authority "to situations where the filing is patently defective in substance or form."[9] Relatedly, the Court confirmed that "the authority to suspend proceedings should be limited to those situations in which the application clearly is incomplete or incorrect."[10]

The Commission has ruled that "the appropriate test to be utilized by an administrative agency considering a motion to dismiss a filing is: whether the filing is patently deficient in form or a nullity in substance."[11] In deciding motions to dismiss, the Commission employs a standard similar to the test used by New Mexico courts in reviewing motions to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 1-012(B)(6) NMRA. Under Rule 12(B)(6), a complaint is subject to dismissal only if under no set of facts provable would a plaintiff be entitled to relief.[12] Dismissal under Rule 1.2.2.12(B) NMAC is a legal, not an evidentiary determination.[13]

[8] 1.2.2.12(B) NMAC.

[9] *U.S. West Commc'ns v. New Mexico State Corp. Comm'n*, 1993-NMCA-074, ¶ 13, 116 N.M. 548.

[10] *Id*.

[11] *Order Denying Motion to Dismiss*, at 7 (Dec. 11, 2012), *In the Matter of the Filing of New Rates by Continental Divide Electric Cooperative, Inc*, Case No. 12-00219-UT, (citing *Re Gas Co. of New Mexico*, Order, Case No. 1429, 24 P.U.R. 4th 635, 637 (N.M. Pub. Serv. Comm'n Apr. 12, 1978)).

[12] *Rio Grande Kennel Club v. City of Albuquerque*, 2008-NMCA-093, ¶ 10, 144 N.M. 636; *Healthsource, Inc. v. X-Ray Assoc's*, 2005-NMCA-097, ¶ 16, 138 N.M. 70; *Walsh v. Montes*, 2017-NMCA-015, ¶ 6, 388 P.3d 262.

[13] *Order Denying Motion to Dismiss* at 5 (Feb. 12, 2014), *In the Matter of the Application of TECO Energy, Inc., New Mexico Gas Co. and Continental Energy Systems, LLC for Approval of TECO Energy, Inc.'s Acquisition of New Mexico Gas Intermediate, Inc. and for All Other Approvals and Authorizations Required to Consummate and Implement the Acquisition*, Case No. 13-00231-UT.

Both the Commission and the New Mexico courts adhere to a standard by which "[m]otions to dismiss for failure to state a claim upon which relief can be granted are granted infrequently."[14] The allegations pleaded must be accepted as true.[15] A motion to dismiss "is not a vehicle to dispose of a matter on the merits,"[16] nor is it a means "for resolving a contest between the parties about the facts or the substantive merits of the applicant's case."[17] Instead, the purpose is to weed out wholly deficient filings.[18]

To support their Motion, the Movants rely on two cases involving rate case filings which were dismissed as non-compliant with the data requirements of the Commission's Future Test Year Rule (17.1.3 NMAC).[19] The cases relied upon by the Movants are clearly distinguishable because they deal with dismissal under Rule 17.1.3.9 NMAC (Failure to Comply) of the Future Test Year rule, and not under Rule 1.2.2.12(B) NMAC.[20] Unlike the Future Test Year Rule, there is no statute or Commission rule that lists particular information that an applicant must submit to show that

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[14] *Order Denying NEE's Motion to Dismiss* (Aug. 11, 2017) at 3, *In the Matter of Public Service Company of New Mexico's Renewable Energy Act Plan for 2018 and Proposed 2018 Rate Rider under Rate Rider No. 36*, Case No. 17-00129-UT, (citing *Vigil v. Arzola*, 1984-NMCA-090, ¶ 5, 101 N.M. 687).

[15] *Vigil v. Arzola*, 1984-NMSC-090, ¶ 5, 101 N.M. 687.

[16] *Order Denying NEE's Motion to Dismiss* (Aug. 11, 2017), *In the Matter of Public Service Company of New Mexico's Renewable Energy Act Plan for 2018 and Proposed 2018 Rider Rate Under Rate Rider No. 36*, Case No. 17-00129-UT, at 4 (citing *Johnson v. Francke*, 1987-NMCA-029, ¶ 5, 105 N.M. 564 (addressing a motion under Rule 1-012(B)(6)).

[17] *Id*. (citations omitted).

[18] *Order Denying Motion to Dismiss* at 5 (Feb. 12, 2014), *In the Matter of the Application of TECO Energy, Inc., New Mexico Gas Co. and Continental Energy Systems, LLC for Approval of TECO Energy, Inc.'s Acquisition of New Mexico Gas Intermediate, Inc. and for All Other Approvals and Authorizations Required to Consummate and Implement the Acquisition*, Case No. 13-00231-UT.

[19] Original Motion at 5.

[20] *See Final Order Partially Adopting Recommending Decision and Dismissing and Ordering SPS to Re-File Application* at 8 (April 19, 2017), *In the Matter of the Application of Southwestern Public Service Company for Revision of its Retail Rates Pursuant to Advice Notice No. 265*, Case No. 16-00269-UT; *Final Order Adopting Initial Recommended Decision Completeness of PNM's Filed Application* at 12 (May 13, 2015), *In the Matter of the Application of Public Service Company of New Mexico for Revision of its Retail Electric Rates Pursuant to Advice Notice No. 507*, Case No. 14-00332-UT.

granting an application approval of a utility acquisition is in the public interest.[21] This is because what is in the public interest is not susceptible to being defined by compliance with a list of particular information.[22]

The Joint Application and supporting evidence constitute a *prima facie* showing entitling the Joint Applicants to the requested relief. A *prima facie* showing is sufficient to defeat a motion to dismiss.[23] The Movants' requests that the Joint Application either be dismissed or suspended must be denied.

C. The Joint Applicants' Rebuttal Testimonies Are Proper and Not Grounds for Dismissal Nor Should the Testimonies Be Stricken

The Commission and its hearing examiners have taken a flexible approach to applying the Rules of Evidence.[24] There is no challenge to the Joint Applicants' rebuttal testimony based on lack of relevance or lack of competence on the part of the witnesses. Rather, the Movants allege that the Joint Applicants' rebuttal testimony is not proper rebuttal testimony and amounts to "gaming" the system by not including this testimony with the initial filing of the Joint Application. The Movants' third and their least preferred alternative for relief is to strike portions of the Joint

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[21] *Order Denying Motion to Dismiss* at 9 (Feb. 12, 2014), *In the Matter of the Application of TECO Energy, Inc., New Mexico Gas Co. and Continental Energy Systems, LLC for Approval of TECO Energy, Inc.'s Acquisition of New Mexico Gas Intermediate, Inc. and for All Other Approvals and Authorizations Required to Consummate and Implement the Acquisition*, Case No. 13-00231-UT.

[22] *Id*.

[23] *Order on New Energy Economy's Motion to Reject PNM's Application for Revision of its Retail Rates* at 9 (Feb. 3, 2023), Case No. 22-00270-UT, *In the Matter of the Application of Public Service Company of New Mexico for Revision of its Retail Electric Rates Pursuant to Advice Notice No. 595* (citing Case No. 17-00179-UT, Order Denying NEE's Motion to Dismiss at 3 (08/11/2017)

[24] *Order on Public Service Company of New Mexico's Motion to Strike the Testimony of Pro Se Intervenor William Bruno's Expert Witness Dick Wilkinson* at 2 (Mar. 2, 2023), *In the Matter of Public Service Company of New Mexico's Application for Authorization to Implement Grid Modernization Components that Include Advanced Metering Infrastructure and Application to Recover the Associated Costs Through a Rider, Issuance of Related Accounting Orders, and Other Associated Relief*, Case No. 22-00058-UT (Citing Case No. 17-00129-UT, *Order Partially Granting and Partially Denying in Part PNM's Motin to Strike Sections of the Direct Testimony of Nicholas G. Muller*, at 2 (09/14/2017).

Applicants' rebuttal testimony.[25] However, the Movants failed to demonstrate valid grounds dismissal of the Joint Application or for striking the Joint Applicants' rebuttal testimony. This is because the Joint Applicants' rebuttal testimony directly responds to the issues raised by Staff and intervenors in their respective direct testimonies.

Rule 1.2.2.35(N) NMAC defines rebuttal evidence as: "evidence which tends to explain, counteract, repel, or disprove evidence submitted by another party or by staff. Evidence which is merely cumulative or could have been more properly offered in the case in chief is not proper rebuttal evidence."[26] As discussed in more detail below, the rebuttal testimony filed by the Joint Applicants is proper because it directly responds to specific issues raised by Staff and the intervenors. Moreover, the rebuttal testimony could not have been more properly offered in the Joint Applicants' case in chief because the need for the rebuttal was not known until Staff and Intervenors made their positions known through their direct testimonies. For the reasons discussed below, the Movants' request to strike the Joint Applicants' rebuttal testimony should be denied.

D. The Applicants' Addition of Commitments and Responsive Changes Are Fully Aligned With Prior Transaction Proceedings on Which Movants Otherwise Rely.

This proceeding, to date, has followed the well-established process of consideration of an application for approval of a Class II transaction of this type, whereby there is an application, parties provide feedback via a combination of discovery, discussions, and/or testimony, and the applicants offer additional commitments responsive to the parties' feedback:

- The Joint Applicants filed their Joint Application asserted to meet the required standards and, as several prior applicants have done, including commitments in their application beyond those required by 17.6.450.10(C) NMAC. There is opportunity and a deadline to seek dismissal if an application is argued to be deficient as a matter of law.

[25] Original Motion at 3-4.

[26] Rule 1.2.2.35(N) NMAC.

- The Movants conducted discovery on the Joint Application. In this proceeding, the Movants and the other parties conducted a substantial amount of written discovery. There have been more than 700 interrogatories (including subparts) direct to the Joint Applicants. The Movants and the other parties have additionally taken the depositions of three of the Joint Applicants' initial witnesses and the Movants have indicated that they plan to take the depositions of at least six of the Joint Applicants' rebuttal witnesses.

- The Movants and the other intervenors sponsored reply testimony from twelve witnesses, providing feedback on the Joint Application, proposing additional commitments, and arguing in favor of changes in approach to post-Transaction NMGC operations.
- The Joint Applicants filed rebuttal testimony, where the Joint Applicants adopted some of the reply witnesses' proposals, and rebutted other of the reply witnesses arguments. As a result of the Joint Applicants' agreement with certain of the proposals of Staff and the intervenors, the issues to be resolved in this case have been narrowed.

Based on prior Commission practice, the foregoing is not an "attempt to game the Commission's procedures" – rather, it is *pursuant to established practice*.

The Movants cite and discuss three prior Class II cases, which were resolved through stipulations, that they assert establish the "legal standard" against which the Joint Application should be evaluated.[27] The Movants seek to use these prior cases as support for their late-filed Motion to Dismiss based on alleged deficiencies in the Joint Application. In the context of their arguments for dismissal, they problematically ignore both (1) that all of the final orders in those stipulated proceedings vary from one-another and so can hardly be said to establish a single "standard;" and (2) the extent to which the conditions in those final orders resulted from stipulations and were explicitly non-precedential.

The Movants discussion also ignores *the processes* in those proceedings, even though their Motion to Dismiss is ostensibly about process. Pertinent aspects of the processes in those proceedings are set forth as follows. In each, the commitments that the Movants highlight in their Motion to Dismiss differ from those that had been proposed in the initial application.

[27] Original Motion at 7-11.

In Case No. 13-00231-UT, five witnesses testified in support of the application. There was reply testimony from five witnesses. In rebuttal, the applicants offered twelve rebuttal witnesses (the original five, plus seven additional). The rebuttal case introduced new commitments, including a de facto rate credit (framed as a temporary rate reduction). It also included additional information on how the utility would be operated post-transaction.[28] There were fourteen days between the rebuttal testimony and the contested-case hearing that lasted nine days. The process in this proceeding has substantial parallels, but has actually offered far more time for more scrutiny and more pre-hearing preparation time by the Movants and other parties than was available in Case No. 13-00231-UT.

Case No. 15-00327-UT did not proceed to reply and rebuttal testimony. Notably, however, the final commitments expanded on the commitments in the application. Also, the procedural schedule adopted in that proceeding had allowed for only thirteen days between rebuttal and hearing.

Case No. 19-00234-UT also did not proceed to reply and rebuttal testimony. There, however, the number of commitments expanded from 38 in the initial application to 80 final commitments. And, the procedural schedule adopted in that proceeding had allowed only fourteen days between rebuttal and hearing.

The Movants did not address Case No. 08-00078-UT, but there too, what was approved differed substantially from the original application.[29]

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[28] *Application of TECO Energy, Inc., New Mexico Gas Company, Inc. and Continental Energy Systems LLC, for Approval of TECO Energy, Inc.'s Acquisition of New Mexico Gas Intermediate, Inc. and for All Other Approvals and Authorizations Required to Consummate and Implement the Acquisition*, Case No. 13-00231-UT, Rebuttal Testimony of Annette Gardiner at 2-17; *see also* Case No. 13-00231-UT, Rebuttal Testimony of Deirdre Brown at 2-4 (referencing Case No. 13-00231-UT, Supplemental Testimony in Response to the Bench Request of Deirdre A. Brown).

[29] The stipulation in that case included no fewer than 30 commitments; by comparison, the application offered only a single commitment to provide transition services for one year. *In the Matter of the Applications of Public Service*

It is clear from the foregoing that it is the rule, not the exception, that additional and different commitments are made as the cases progress after the filing of an application and that the transaction conditions that are ultimately approved are not as set forth in the original application. And, Case No. 13-00231-UT, relied upon by the Movants, has particularly significant parallels to the current proceeding; here, however, the Movants are benefitting from substantially more process. While Case Nos. 15-00327-UT and 19-00234-UT were not fully litigated, the fact remains that the applications were not approved as-filed; there were modifications. Indeed there was *no* discovery on, nor contested litigation of, what became the as-approved transaction. This all reinforces that the Movants are not prejudiced by the Applicants' additions and modifications to their regulatory commitments.

E. Dismissal or De Facto Dismissal Would Be an Extreme Remedy and Significant Departure from Standard Commission Practice Without Prior Notice, Particularly In Light of the Availability of a Viable Remedy to Which the Joint Applicants Would Consent

The Joint Applicants have proceeded in a manner entirely consistent with Commission past practice. As discussed above, it is standard practice in Commission proceedings for Staff and Intervenors to file direct testimony that suggests changes to an applicant's proposals, and for the applicant to file rebuttal testimony that agrees to certain recommendations or includes proposals that address Staff and Intervenor concerns. The Movants ignore this well-established practice and fail to cite a single case where the Commission dismissed an application or struck rebuttal testimony because the testimony included agreements to Staff and Intervenor proposals. To change

Company of New Mexico and New Mexico Gas Company, Inc. for the Abandonment, Purchase and Sale of Gas Utilty Assets and Services and for Related Authorizations and Variances, Case No. 08-00078-UT, Stipulation at 3-13; Case No. 08-000780-UT, Direct Testimony of Patricia K. (Vincent) Collawn at 2.

this process without prior notice – which would be the effect of granting the Motion – would violate the Joint Applicants' due process rights.

In an administrative proceeding, the fundamental requirements of due process are reasonable notice and opportunity to be heard and present any claim or defense.[30] As a result, "regulatory treatment that radically departs from past practice without proper notice will not be sustained."[31]

The New Mexico Supreme Court has held that the following factors should be considered in evaluating whether an agency's decision establishes a new policy that should only apply prospectively: (1) whether the particular case is one of first impression; (2) whether the new rule represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law; (3) the extent to which the party against whom the new rule is applied relied on the former rule; (4) the degree of the burden a retroactive order imposes on a party; and (5) the statutory interest in applying a new rule despite the reliance of a party on the old standard.[32] Here, these factors demonstrate it would be improper to depart from established practice and dismiss the Application or strike the Joint Applicants' rebuttal testimony.

Regarding the first factor, as mentioned above, the Movants have not identified any prior decisions in which the Commission dismissed an application or struck rebuttal testimony on the ground that it accepted parties' recommendations or included proposals to address their concerns. As a result, the Movants' novel request presents an issue of first impression.

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[30] *See, e.g., TW Telecom of N.M., LLC v. N.M. Pub. Regul. Comm'n*, 2011-NMSC-029, ¶ 17, 150 N.M. 12.

[31] *Hobbs Gas Co. v. N.M. Pub. Serv. Comm'n*, 1993-NMSC-032, ¶ 7, 115 N.M. 678; *see also Hobbs Gas Co. N.M. Pub. Serv. Comm'n*, 1980-NMSC-005, ¶ 13 94 N.M. 731; *Gen. Tel. Co. v. Corp. Comm'n*, 1982-NMSC-106, ¶¶ 33-34, 98 N.M. 749.

[32] *Hobbs Gas Co.*, 1993-NMSC-032, ¶ 14.

The second factor similarly weighs against the Movants' requests. As discussed above, it is a well-established practice for parties to file direct testimony that suggests changes to an applicant's proposals, and for the applicant to file rebuttal testimony that agrees to certain recommendations or includes proposals that address Staff and Intervenor concerns. There is no doubt that dismissing the Joint Application or striking the Joint Applicants' rebuttal testimony would constitute an abrupt departure from that practice.

The Movants' requests should also be denied under the third and fourth factors. The Joint Applicants proceeded in a manner that has been accepted in other cases and relied on the Commission's longstanding processes in submitting their rebuttal testimony. It is difficult to overstate the burden on the Joint Applicants that would result from dismissing the Application or striking that testimony. The Joint Applicants have invested significant time and resources to pursue their Joint Application. They have responded to approximately 700 written discovery requests, participated in depositions, and submitted legal briefing on a variety of matters. Dismissing the Joint Application at this late stage would subject the Joint Applicants to an extraordinary burden, especially considering that: (1) the Movants' concerns could be easily addressed by extending the procedural schedule and hearing date; and (2) the rebuttal testimony they seek to strike *directly responded to the Movants' concerns and agreed to many of their proposals*.

Regarding the fifth factor, there is no statutory interest in applying a new rule despite the Joint Applicants' reliance on the Commission's well-established procedures. The Public Utility Act requires the Commission to regulate utilities in a manner that balances the interests of investors, customers, and the public and encourages investment in the state.[33] The Movants' unprecedented request that the Commission dismiss an application that seeks to transfer ownership of a utility

[33] *See* NMSA 1978, § 62-3-1(B).

simply because the Joint Applicants agreed to Staff and Intervenor proposals and sought to resolve their concerns harms customers, the public, and the utility, and discourages investment in New Mexico. The Movants' requests controvert the PUA and must be denied.

Moreover, there is an alternative remedy to which the Joint Applicants would consent and that would avoid due process complications. This is described below.

II. THE JOINT APPLICANTS FILED PROPER REBUTTAL TESTIMONY, DIRECTLY RESPONSIVE TO THE TESTIMONIES AND RECOMMENDATIONS BY STAFF AND THE INTERVENORS.

In addition to arguing that the Joint Applicants' rebuttal testimony should form the basis for a dismissal which has been addressed above, the Movants' third alternative request for relief is to strike portions of the Joint Applicants' rebuttal testimony. Here again, the Movants have failed to demonstrate valid grounds for striking the Joint Applicants' rebuttal testimony which directly responds to the issues raised by Staff and intervenors in their respective testimonies.

A. Staff and the Intervenors Expressly Requested Additional or Modified Regulatory Commitments to Which the Joint Applicants Responded in Their Rebuttal Testimonies.

The direct testimonies filed by Staff and the intervenors included several recommendations which they asserted were necessary or desirable as conditions for approval of the Joint Application. As reflected in the Rebuttal Testimony of Joint Applicant Witness Baudier:

> Several of the parties suggest proposed conditions for approval of the Transaction. The Joint Applicants have been willing to listen and carefully consider any legitimate and reasonable concerns with the Joint Application. As a result of the response testimony of Staff and intervenors, the Joint Applicants are committing to implement many of the suggested conditions proposed for approval of the Transaction.[34]

[34] Baudier Rebuttal at 4:9-13.

Remarkably, the Movants now allege prejudice because the Joint Applicants agreed in their rebuttal testimony to several of the conditions specifically recommended by parties in their direct testimonies. The responses of the Joint Applicants to these proposed conditions are entirely proper rebuttal as they explain and counteract the direct testimony of the Staff and the intervenors. Moreover, it would be unsound policy to preclude an applicant from adopting recommendations, in whole or in part, from other parties as this would unnecessarily preclude the narrowing the issues in dispute in a proceeding leading to increased costs and inefficiencies in the resolution of cases.

The Movants provide a list of several conditions to which the Joint Applicants have committed in their rebuttal.[35] As confirmed below, these commitments by the Joint Applicants are in direct response to the issues raised in the direct testimonies of Staff and the intervenors.

1. The $15 million customer rate credit.

Several parties recommended that a customer rate credit of some amount be required as condition of approval of the Joint Application. Among the parties advocating rate credits were NMDOJ,[36] Staff, FEA,[37] NEE[38] and WRA.[39] As confirmed by Joint Applicant witness Baudier, the $15 million rate credit is in direct response to the recommendations of the parties.[40] It is proper rebuttal testimony.

[35] Original Motion at 13-14.

[36] Garrett Direct at 8:18-20.

[37] Etheridge Direct at 12:8-10.

[38] Sandberg Direct at 46:24-25.

[39] Cebulko Direct at 15:1-7.

[40] Baudier Rebuttal at 7:4-9:2.

2. Rate case filing delay through September 30, 2026.

The Joint Applicants have committed[41] to delay filing any new base rate case until September 30, 2026, in response to the direct testimonies of Staff,[42] NEE,[43] WRA,[44] and FEA[45] recommending a rate freeze. The issue of a rate freeze was raised in the direct testimonies of the parties and is a proper subject of rebuttal.

3. Commitment to retain NMGC for at least ten years.

A consistent recommendation among several parties was that the BCP Applicants should commit to retain their interests in NMGC for at least ten years, instead of the five years as initially proposed. Parties proposing a longer retention period include NEE,[46] Staff,[47] WRA,[48] CCAE,[49] and FEA.[50] The BCP Applicants committed to retain their interests in NMGC for at least ten years in response to the recommendations of Staff and the foregoing intervenors as confirmed by Joint Applicant witness Baudier.[51] This commitment is proper rebuttal testimony.

[41] Baudier Rebuttal at 9:19-11:4.

[42] Velasquez Direct at 9:1-18.

[43] Sandberg Direct at 47:1-2.

[44] Cebulko Direct at 32:5-6, 33:16-34:10.

[45] Ethridge Direct at 4:14-16.

[46] Sandberg Direct at 40:11-13, 47:9-10

[47] Velasquez Direct at 18:15-20.

[48] Cebulko Direct at 9:16-13:13.

[49] Kenny Direct at 8:3-8.

[50] Etheridge Direct at 35:9-11.

[51] Baudier Rebuttal at 11:6-18.

4. Increase to $10 Million in economic development investments.

Certain parties, including NEE,[52] WRA,[53] and Staff,[54] raised issues about the Joint Applicants' initial economic development commitment of $5 million to be invested over five years. As a condition to approval of the Joint Application, NEE recommended that the economic development investments should be $40 million.[55] In response to these recommendations the Joint Applicants proposed an increase in the total economic development investments to $10 million over seven years, with $5 million to be invested to advance or develop renewable energy projects in New Mexico.[56] The additional $5 million in economic development investments in renewable energy responds to the direct testimonies filed by NEE,[57] CCAE[58] and WRA[59] in favor of renewable energy and reduction in carbon emissions. Under these circumstances, this commitment is a proper subject for rebuttal testimony.

5. Funding for Education and Apprenticeship Training.

The Joint Applicants committed to shareholder funding of educational and apprenticeship training as a further enhancement to their economic development commitments.[60] This is in partial response to NEE's proposal for economic development funding for scholarships in New Mexico.[61]

[52] Sandberg Direct at 47:3-10.

[53] Cebulko Direct at 27:5-23

[54] Velasquez Direct at 1:4-14.

[55] Sandberg Direct at 47:3-10.

[56] Baudier Rebuttal at 13:11-16:17.

[57] Sandberg Direct at 30:20-31:5, 47:3-10

[58] Kenny Direct at 9:13-16.

[59] Vitulli Direct at 3:6-4:7.

[60] Baudier Rebuttal at 14:17-15:4.

[61] Sandberg Direct at 47:3-10.

This commitment in the Joint Applicant's rebuttal is proper in response to the issues raised in the direct testimony of NEE witness Sandberg.

6. Maintain Shareholder Funding for Low Income Customer Programs.

In the Joint Application, the Joint Applicants committed to make charitable contributions, at shareholder expense, of a minimum of $2.5 million over five years in cash or in-kind contributions to qualified tax exempt organizations.[62] Staff[63] raised issues concerning this commitment and NEE[64] proposed that the commitment be extended to ten years. In rebuttal to these recommendations, the Joint Applicants committed to maintain the approximately $190,000 annual shareholder funding for the existing low income customer programs as an enhancement to their charitable giving commitment.[65]

7. Commitment to Additional Ring-Fencing Approved in Case No. 19-00234-UT.

In their rebuttal testimony, the Joint Applicants committed to adopt several of the ring-fencing and other customer protections that were approved in Case No. 19-00234-UT involving the acquisition of El Paso Electric Company.[66] The Joint Applicants' commitment to incorporate certain of the ring-fencing and customer protections approved in Case No. 19-00234-UT was in direct response to recommendations by NEE, NMDOJ and Staff.[67] Therefore, it is proper rebuttal testimony.

[62] Baudier Rebuttal at 16:19-17:3.

[63] Velasquez Direct at 18:4-14.

[64] Sandberg Direct at 47:13-17.

[65] Baudier Rebuttal at 17:5-12.

[66] Baudier Rebuttal at 18:15-21:11, JA Exhibit JMB-1 (Rebuttal).

[67] Sandberg Direct at 48:1-3; Garrett Direct at 71:9-13; Blank Direct at 5:6-9.

8. Transition Plan for Shared Services.

Staff and certain intervenors raised concerns about the loss of shared services provided by Emera affiliates to NMGC and the relocation of these services to New Mexico, including the feared absence of synergies from the Transaction.[68] NEE specifically recommended that the Joint Applicants be required to submit a detailed transition plan evaluating the economics and benefits of transitioning shared services functions back to NMGC or to a third-party provider.[69] In response to these concerns, the Joint Applicants developed a transition plan for partial shared service for NMGC.[70] The specific details of the shared services transition plan is addressed in the Rebuttal Testimony of Joint Applicant witnesses Tumminello and Miko.[71] Because the Joint Applicants' testimony concerning a transition plan for shared services is in direct response to issued raised by certain parties in their direct testimony, it is proper rebuttal.

9. Extension of the Transition Services Agreement ("TSA") to two years.

The Movants incorrectly state that the current TECO shared services agreement is being extended from 18 months to two years.[72] The Joint Applicants are extending the proposed TSA to two years so that any needed shared services from Emera affiliates will be available to NMGC for two years following the closing of the acquisition transaction in order to ensure there is sufficient time to stand up the shared services within NMGC.[73] This is in direct response to the concerns as outlined above about the shared services transition plan. This proposal is also made in response to

[68] Blank Direct at 17:3-9; Ethridge Direct at 4:9-12, 7:15-22, 10:13-16, 31:7-11, 32:3-5, 34:6-10; Sandberg Direct at 10:10-20, 23:3-12, 29:8-12; Jojola Direct at 6:8-13; Velasquez Direct at 11:3-8, 12:10-12; Garrett Direct at 28:1-29:18.

[69] Sandberg Direct at 47:20-23.

[70] Baudier Rebuttal at 22:19-30:4.

[71] *See* Tumminello Rebuttal and Miko Rebuttal.

[72] Original Motion at 14.

[73] Baudier Rebuttal at 23:12-18.

concerns raised over the BCP Applicants' lack of experience.[74] For the same reasons, this commitment is proper rebuttal testimony.

10. Reduction in new jobs in New Mexico.

The reduction in estimated new jobs in New Mexico from 51 to 61, to 20, is a byproduct of the NMGC shared services transition plan discussed above.[75] It is also directly responsive to a suggestion from NEE Witness Sandberg, who criticized the offer of 51-61 jobs as illusory and suggested "in the alternative, it might be more cost effective and productive to hire 20 New Mexican (properly trained) employees and take advantage of shared services elsewhere, where synergies could actually *improve* services."[76] The Joint Applicants considered the issues raised by the parties and it has been determined that it is more cost effective and beneficial for the IT shared services functions be provided to NMGC through Delta Utilities in Louisiana.[77] Again, this is result of the positions in the parties' direct testimonies expressing preference for a shared services model over direct New Mexico jobs, the claimed absence of synergies associated with the proposed transactions, and the lack of a specific shared services transition plan.[78] This change in the estimated new jobs in New Mexico is the result of the direct testimonies of certain parties and is proper rebuttal.

[74] Sandberg Direct at 41:23-25.

[75] Baudier Rebuttal at 21:14-22:2.

[76] Sandberg Direct at 23:10-12.

[77] Baudier Rebuttal at 22:19-23:10, 25:8-12, 25:21-26:6, 27:4-29:9.

[78] Blank Direct at 17:3-9; Ethridge Direct at 4:9-12, 7:15-22, 10:13-16, 31:7-11, 32:3-5, 34:6-10; Sandberg Direct at 10:10-20, 23:3-12, 29:8-12, 47:20-23; Jojola Direct at 6:8-13; Velasquez Direct at 11:3-8, 12:10-12; Garrett Direct at 28:1-29:18.

11. Commitment to maintain current level of NMGC employees from 36 months.

The Joint Applicants committed to maintain the current NMGC employee count for 18 months after closing on the proposed transaction in the Joint Application.[79] NEE proposed that the Joint Applicants extend this commitment for 36 months,[80] and Staff also recommended an extension of this commitment.[81] In direct response to NEE and Staff, the Joint Applicants revised their commitment so that there would be no workforce reduction for at least 36 months after closing.[82] This is proper rebuttal testimony.

12. BCP Management's experience and resources related to natural gas utilities.

In their direct testimonies, NEE and NMDOJ questioned whether the BCP Management and the BCP Applicants possessed sufficient experience with natural gas utilities.[83] The Joint Applicants rebutted these questions by detailing the depth of natural gas utility and other utility experience within NMGC, and BCP Management and the newly established Delta Utilities, which does and will own major natural gas utilities in Louisiana and Mississippi.[84] This same information was provided to Staff and the intervenors in response to discovery.[85] The Joint Applicants response to the claims by NEE and NMDOJ about the alleged lack of experience in the natural gas utility industry is proper rebuttal testimony pursuant to 1.2.2.35(N) NMAC.

[79] Baudier Direct at 31:14-32:6.

[80] Sandberg Direct at 47:11-12.

[81] Jojola Direct at 5:14-19; Zigich Direct at 9:19-10:5.

[82] Baudier Direct at 22:10-16.

[83] Sandberg at 24:17-25:4, 41:23-25; Garrett 21:8-10, 25:13-27:17.

[84] Baudier Rebuttal at 32:12-37:10.

[85] Baudier Rebuttal at 37:12-18.

The foregoing discussion confirms that the revised commitments and responses in the Joint Applicants' rebuttal testimonies are in direct response to issues raised by Staff and the intervenors in their testimonies. As a result, these commitments and responses are proper rebuttal and there is no basis to dismiss or suspend this case, or to strike the Joint Applicants' rebuttal testimonies. Moreover, the fact that the revised commitments were specifically requested by the parties as conditions for approval of the proposed transaction disproves any of the claimed prejudice by the Movants. The Movants are not harmed in any way by having their demands met. To the contrary, they benefit from the revised commitments set out the Joint Applicants' rebuttal testimonies.

B. There Are No Proper Grounds to Strike the Joint Applicants' Rebuttal Testimonies.

As the third and least preferred alternative remedy proposed by the Movants, they seek to strike portions of the Joint Applicants' rebuttal testimonies. For the reasons described above, the Joint Applicants' rebuttal testimonies are properly responsive to issues raised for the first time in the direct testimony filed by Staff and intervenors, and would not, therefore, be expected to have been filed in support of the original application. The Movants' interpretation of what is impermissible rebuttal is contrary to the case law on this issue and should be rejected by the Commission.

In their Motion to Dismiss, the Movants largely failed to identify specific portions of the Joint Applicants' rebuttal testimony that the Movants claim should be stricken. As a result, the Hearing Examiners ordered that the Movants "shall comprehensively identify and list all of the

Joint Applicants' Rebuttal Testimony by witness name, page number, and substance lines that Joint Movants propose to have stricken pursuant to 1.2.2.35.N NMAC."[86]

On May 29, 2025, the Movants filed their Supplemental Brief. However, the Movants' Supplemental Brief does not fully comply with the Deadline Order. This is because the Movants fail to provide any comprehensive list with page number and substance lines of the rebuttal testimony to be stricken for several Joint Applicant witnesses. Instead the Movants make the unsupported and conclusory claim that *all* testimony of certain witnesses should be stricken. Further, in Movants' Supplemental Brief, they fail to identify any portions of the Rebuttal Testimony of Joint Applicant witness Talley which the Movants contend should be stricken. As discussed below, there is no proper grounds to strike the Joint Applicants' rebuttal testimonies and the request to strike the Joint Applicants' rebuttal testimonies should be denied.

1. Rebuttal Testimony of Jeffrey M. Baudier.

The Movants fail to comply with the Deadline Order and make the conclusory assertion that all of the Baudier Rebuttal should be stricken because it is allegedly used to describes "new amendments" to the Joint Application.[87] This is incorrect as discussed above. The Baudier Rebuttal directly addresses specific recommendations and criticism raised in the direct testimonies of Staff and the intervenors, such as rate credits, rate freezes, the retention period for NMGC, enhanced economic development investments, enhanced charitable contributions, enhanced ring-fencing, a shared services transition plan, extension of the TSA to 24 months, a revision in the estimate of new jobs in New Mexico, maintaining NMGC's current employee count for 36 months, and the utility

[86] *Order Setting Response and Reply Deadlines to Joint Motion to Dismiss or for Alternative Relief,* ¶A at 2 (May 28, 2025) ("Deadline Order").

[87] Supplemental Brief at 2.

expertise of NMGC, BCP Management and Delta Utilities. All of these matters were placed at issue by Staff and the intervenors, and Joint Applicant witness Baudier properly responded.

The Movants challenge to the Baudier Rebuttal is also patently overbroad. Mr. Baudier covers myriad issues not challenged by the Movants as "new amendments" to the Joint Application. These issues include preliminary matters such as the identification of the parties filing direct testimony in response to the Joint Application,[88] and the introduction of the other Joint Applicant witnesses filing rebuttal testimony.[89]

The unchallenged substantive issues covered in the Baudier Rebuttal include: continued evaluation of the development of lower carbon natural gas;[90] the response to NEE's proposed condition that Joint Applicants should be required to spend $40 million for solar installations and scholarships for people of color and low income individuals;[91] NEE's proposed condition that NMGC's economic development expenditures be administered by an independent and compensated committee;[92] NEE's proposal that NMGC's $500,000 in annual charitable contributions be extended to ten years and exclude any fossil fuel-related activities and instead focus on renewable energy or education for people of color or who are low income;[93] the criticism that the customer protections in the Joint Application allegedly only preserve that status quo;[94] recommendations on caps and increases to NMGC's capital spending;[95] Joint Applicants' commitments concerning

[88] Baudier Rebuttal at 2:19-3:2,

[89] Baudier Rebuttal at 4:15-6:12.

[90] Baudier Rebuttal at 15:4-9.

[91] Baudier Rebuttal at 15:17-16:9.

[92] Baudier Rebuttal at 16:11-17

[93] Baudier Rebuttal at 17:14-18:3.

[94] Baudier Rebuttal at 18:6-13.

[95] Baudier Rebuttal at 20:1-17.

minimum capital investments;[96] the adequacy of the BCP Applicants' financial resources;[97] criticisms of private equity ownership of public utilities;[98] incorrect claims that customers will be required to pay for any acquisition premium;[99] speculation that NMGC's service quality will suffer;[100] and confirmation that NMGC's tax treatment will not be impacted by the proposed transaction.[101]

All of the issues in the Baudier Rebuttal were raised in direct testimonies of Staff and the intervenors and are the proper subject of rebuttal testimony by the Joint Applicants. Moreover, the Movants failed to comply with the Deadline Order requiring specific identification of portions of witnesses' testimony to be stricken. For these reasons, the Movants request to strike the Baudier Rebuttal should be denied.

2. Rebuttal Testimony of Dr. Christopher A. Erickson.

The Movants assert that the portions of the Erickson Rebuttal at Section VI relating to the 2025 Addendum to his October 2024 Analysis, and the 2025 Addendum attached to his testimony as JA Exhibit CAE-1(Rebuttal) should be stricken because they are a financial analysis of new proposals that should have been filed with the Joint Application.[102] The challenged portion of the Erickson Rebuttal provides an economic analysis of: (1) a third scenario where 20 jobs are located to New Mexico; (2) a $15 million rate credit provided to NMGC customers over a twelve month

[96] Baudier Rebuttal at 20:19-21:11.

[97] Baudier Rebuttal at 30:8-32:10.

[98] Bauder Rebuttal at 38:6-43:13.

[99] Baudier Rebuttal at 43:15-44:11.

[100] Baudier Rebuttal at 44:14-45:18.

[101] Baudier Rebuttal at 47:2-14.

[102] Supplemental Brief at 2.

period; and (3) an additional $5 million in targeted economic development investments in renewable energy projects.[103]

Contrary to the claims of the Movants, the 2025 Addendum and associated Erickson Rebuttal Testimony are the result of issues raised in the direct testimonies of Staff and the intervenors. The economic analysis of a third scenario involving twenty new jobs in New Mexico is due to the shared services transition plan and the reduction of estimated new jobs in New Mexico under the hybrid shared services model whereby Delta Utilities will provide IT shared services to NMGC.[104] The shared services transition plan and hybrid IT shared services model were developed in response to the concerns of Staff and certain intervenors about the loss of shared services provided by Emera affiliates to NMGC and the relocation of these services to New Mexico, including concerns about the lack of synergies from the proposed transaction.[105] They are also in response to NEE's recommendation that the Joint Applicants be required to submit a detailed transition plan evaluating the economics and benefits of transitioning shared services functions back to NMGC or to a third-party provider.[106] The third scenario involving twenty new jobs in New Mexico arose only after the filing of the Joint Application which assumed that all shared services function would be relocated to New Mexico. The 2025 Addendum and the associated Erickson Rebuttal Testimony provide an analysis of the economic impacts to New Mexico of the twenty new jobs that were not contemplated at the time the Joint Application was filed.

[103] Erickson Rebuttal at 2:1-5.

[104] Baudier Rebuttal at 21:14-22:2.

[105] Blank Direct at 17:3-9; Ethridge Direct at 4:9-12, 7:15-22, 10:13-16, 31:7-11, 32:3-5, 34:6-10; Sandberg Direct at 10:10-20, 23:3-12, 29:8-12; Jojola Direct at 6:8-13; Velasquez Direct at 11:3-8, 12:10-12; Garrett Direct at 28:1-29:18.

[106] Sandberg Direct at 47:20-23.

Similarly, the $15 million rate credit was developed after the filing of the Joint Application and in response to the direct testimonies of Staff and the intervenors.[107] The 2025 Addendum and the associated Erickson Rebuttal Testimony provide an analysis of the economic impacts to New Mexico of the $15 million customer rate credit. They could not have been filed at the time of Joint Application because no rate credit was initially proposed.

Likewise, the additional $5 million in economic development investments targeted at renewable resources was the result of the parties' positions in their direct testimony seeking a larger economic development investment amount, and more initiatives related to the reduction of carbon emissions.[108] The 2025 Addendum and the associated Erickson Rebuttal Testimony provide an analysis of the economic impacts to New Mexico of the additional $5 million in economic development investments in renewable energy projects. Because the commitment for the additional $5 million in economic development investments only arose in the context of the Joint Applicants' rebuttal testimonies, the 2025 Addendum and associated Erickson Rebuttal could not have been filed at the time of the Joint Application.

The foregoing demonstrates that the 2025 Addendum and the challenged portion of the Erickson Rebuttal are proper rebuttal and should not be stricken.

3. Rebuttal Testimony of Karen Hutt.

The Movants seek to strike the Hutt Rebuttal from page 9, line 8 through page 10, line. 3.[109] The Movants' argument to strike this portion of the Hutt Rebuttal is that it involves a brief discussion of extending the TSA in furtherance of the shared services transition plan that allegedly

[107] Baudier Rebuttal at 7:4-9:2.

[108] Sandberg Direct at 30:20-31:5, 47:3-10; Cebulko Direct at 27:5-23; Velasquez Direct at 1:4-14; Kenny Direct at 9:13-16.

[109] Supplemental Brief at 2.

should have been filed as part of the Joint Application.[110] However, as confirmed above, the shared services transition plan arose only after the Joint Application was filed and in response to the Staff and intervenor testimony that such a plan would be necessary before they would reconsider their opposition to the Joint Application as filed.[111] The Joint Applicants' testimony concerning the shared services transition plan is proper rebuttal to the direct testimony filed by Staff and the intervenors. Accordingly, there is no valid basis to strike this portion of the Hutt Rebuttal.

4. Rebuttal Testimony of Mark S. Miko and Rebuttal Testimony of Peter I. Tumminello.

The Joint Applicants address the Miko Rebuttal and the Tumminello Rebuttal together as the Movants seek to strike these testimonies on the same grounds. Once again, the Movants fail to comply with the Deadline Order in their challenge to the Miko Rebuttal and Tumminello Rebuttal because the Movants do not provide any comprehensive list with page number and substance lines of the testimony is to be stricken. Instead they make the conclusory assertions that all the Miko Rebuttal and all the Tumminello Rebuttal should be stricken because these testimonies should have been filed as part of the initial Joint Application.[112]

The Movants' claims that the shared services transition plan should have been filed with the Joint Application is the same grounds raised with respect to portions of the Hutt Rebuttal that Movants seek to strike. As noted previously, the Joint Applicants' rebuttal testimony addressing the shared services transition plan is in response to the direct testimonies of Staff and intervenors

[110] *Id.*

[111] *See* Blank Direct at 17:3-9; Ethridge Direct at 4:9-12, 7:15-22, 10:13-16, 31:7-11, 32:3-5, 34:6-10; Sandberg Direct at 10:10-20, 23:3-12, 29:8-12, 47:20-23; Jojola Direct at 6:8-13; Velasquez Direct at 11:3-8, 12:10-12; Garrett Direct at 28:1-29:18.

[112] Supplemental Brief at 2-3.

claiming that such a plan is necessary and that the proposed transaction lacked beneficial synergies.[113]

Joint Applicant witness Miko confirms that his rebuttal testimony is in response to the direct testimonies of Staff, NMDOJ, NEE and the FEA concerning the proposal to transition shared IT services back to New Mexico.[114] Mr. Miko presents the Joint Applicants' rebuttal proposal that Delta Utilities provide shared IT services to NMGC as means of achieving synergies, cost savings and technology upgrades that provide benefits to NMGC's customers.[115] He also details the benefits of the IT shared services model to NMGC and its customers in response to the concerns raised by Staff and certain intervenors.[116] Thus, the Miko Rebuttal is entirely appropriate rebuttal testimony.

Similarly, the Tumminello Rebuttal responds to the direct testimony filed by Staff and certain intervenors regarding the transfer of IT shared services from Emera affiliates to NMGC, and the Joint Applicants' rebuttal proposal to provide shared IT services to NMGC through Delta Utilities.[117] Mr. Tumminello addresses the IT shared services model from and business and utility operations perspective, while Mr. Miko addresses the mechanics of the IT shared services model from an IT perspective.[118]

The Tumminello Rebuttal responds to the concerns raised by Staff, NMDOJ, NEE and FEA regarding a claimed lack of synergies and a concern about increased costs associated with the

[113] Baudier Rebuttal at 22:19-30:4.

[114] Miko Rebuttal at 3:2-4:2.

[115] Miko Rebuttal at 4:8-11.

[116] Miko Rebuttal at 21:14-26:15.

[117] Tumminello Rebuttal at 3:7-16.

[118] Tumminello Rebuttal at 3:16-18.

relocation of IT shared services to NMGC.[119] Mr. Tumminello explains that the Joint Applicants revised their original plan regarding IT services the Joint Application as a result of these concerns raised by Staff and certain intervenors.[120] He further explains that as the NMGC transition planning process progressed, it became apparent that NMGC would be required to make significant investments to its existing IT technology.[121] Mr. Tumminello confirms that the IT shared services plan will result in synergies, cost savings and technology upgrades that provide net benefits to NMGC's customers.[122] The Tumminello Rebuttal details the benefits of the IT shared services plan for NMGC and its customers, including increases operational efficiencies, creation of non-IT jobs in New Mexico, and lower transition risks due to existing familiarity with the shared IT system.[123] In response to the concerns by Staff and intervenors that the loss of shared services from the Emera affiliates will increase costs to customers, Mr. Tumminello testifies that the current estimated annual costs under the new shared services plan for both IT and non-IT services is $10.1 million, which compares to $11.8 million that Emera charged to NMGC for shared services in 2024.[124]

Like the Miko Rebuttal, the Tumminello Rebuttal is proper because it directly responds to the concerns about shared services in the Staff and intervenor testimonies. For this reason and because the Movants failed to comply with the Deadline Order, the request to strike the Miko and Tumminello rebuttal testimonies should be denied.

[119] Tumminello Rebuttal at 3:20-4:10.

[120] Tumminello Rebuttal at 7:7-11.

[121] Tumminello Rebuttal at 7:11-21.

[122] Tumminello Rebuttal at 4:12-5:2.

[123] Tumminello Rebuttal at 17:14-21.

[124] Tumminello Rebuttal at 18:7-8.

5. Rebuttal Testimony of Suedeen Kelly.

The Movants seek to strike portions of the Kelly Rebuttal on the grounds that it constitutes legal argument.[125] The Movants also assert that portions of the Kelly Rebuttal should be stricken as cumulative of other testimony. The Movants' claims are misplaced as the Kelly Rebuttal is neither impermissible legal argument, nor impermissible cumulative evidence.

The Commission routinely accepts testimony that touches on matters of law – often even from non-lawyers. There is recent case law discussed below on motions to strike testimony as based on claims of inappropriate rebuttal legal argument; a Commission hearing examiner wrote of having "been down this road several times before."[126] That hearing examiner opinion and its underlying analysis and discussion of case history, as well as the Movants' own experts' lengthy legal arguments, clearly demonstrate that Ms. Kelly's testimony is proper testimony and not subject to being stricken. Should, however, the Hearing Examiners determine to strike Ms. Kelly's testimony as inadmissible legal analysis, then the Joint Applicants respectfully request that the Hearing Examiners accordingly strike the legal argument to which Ms. Kelly is responding, as identified below.

The 2021 Order on Motion to Strike summarized the "legal principles applicable to th[e] dispute" as:

> At common law courts do not allow opinion on a question of law, even from an experts in law, such as law professors. The purpose of excluding testimony on pure matters of law is to prevent a witness from usurping 'the province of the court by expounding on New Mexico statutes, case law, and relevant jury instructions.' Courts themselves determine the content of the law and generally do so by interpreting cases, statutes, and secondary sources. 'This process,' legal scholars have explained, 'involves a kind of judicial notice that is unregulated and

[125]Supplemental Brief at 3-4.

[126] *In the Matter of the Application of Pub. Serv. Co. Of New Mexico for Approval of the Abandonment of the Four Corners Power Plant and Issuance of a Securitized Financing Order*, 2021 WL 3838672, N.M. P.R.C. Case No. 21-00017-UT, Hearing Examiner's Order Addressing Prehearing Motions (August 24, 2021) ("2021 Order on Motion to Strike")

> does not require formal testimony, and deciding the content of law is itself [a] matter of law.' 'Of course lawyers play critical roles in the process of arguing (even briefing) points of doctrine.' When a judge has questions about the applicable law, those questions may be resolved after considering briefs and arguments of counsel. When a party offers expert testimony on the content of law during the course of trial, it is properly rejected. Courts have excluded expert testimony when it 'reads more like a legal brief than an expert opinion.'
>
> While the distinction between fact and legal conclusion can be fine and making the distinction is not always straightforward, by now, it is fair to say the Hearing Examiner has had extensive experience in separating the wheat from the chaff in terms of, on the admissible end, allowing expert testimony to reference terminology from applicable law and to apply legal terms to the factual dispute and, on the other inadmissible one, barring pure legal conclusions from the evidentiary record. Moreover, whether to exclude testimony on the basis that it states an impermissible legal opinion is within a presiding officer's discretion. And, given that administrative agencies may consider evidence that would not be admissible under the rules of evidence, doubts regarding admissibility should be resolved in favor of admission.

In analyzing the motion to strike, the hearing examiner stated that "[a]lthough [the witness] undoubtedly expresses legal opinions in her rebuttal testimony, she is doing so in response to legal opinions given by intervenor witnesses in direct testimony." The hearing examiner further identified that the witness appeared "sufficiently qualified to testify as an expert in regulatory policy," "certainly no less qualified than some of her counterparts rendering legal analyses in intervenor testimony." And, legal opinion was not all that the witness offered. The hearing examiner accordingly accepted the testimony in its entirety and would give "her rebuttal testimony and the testimonies to which she responds the weight they are due."

So, too, here. First, while Ms. Kelly expresses opinions that include discussion of law, she does so entirely in response to legal opinions given by intervenor witnesses in their direct testimony. The Movants' own witnesses offer extensive purportedly "expert" legal analysis.[127]

[127] *See e.g.*, Sandberg Direct at 12-14 (relying on Commission case law to argue that the complexity of the Transaction requires a per se positive benefit to ratepayers); Blank Direct at 7 (proposing legal text for the Commission to adopt in a final order); *Id*. at 12 (citing to Case No. 19-00234-UT as supporting the inclusion of additional ring-fencing

Should Movants' testimonies be accepted, it follows that Ms. Kelly's be accepted as rebuttal. Conversely, should Ms. Kelly's be stricken as impermissible legal expert testimony, then it follows that the testimony of Movants' witnesses and the other witnesses offering legal analysis and conclusions should, too, be stricken.

Second, Ms. Kelly is "certainly no less qualified than some of her counterparts rendering legal analyses in intervenor testimony." Ms. Kelly has taught law in New Mexico, has interpreted utility regulatory law both as a New Mexico Commissioner and as a commissioner at the Federal Energy Regulatory Commission (and now as a specialist attorney in private practice), and has provided regulatory legal and policy expert testimony. She is eminently qualified.

Moreover, Ms. Kelly also offers regulatory policy testimony, and testifies from her first-hand experience as a regulator. For all of these reasons, none of Ms. Kelly's testimony should be stricken on the basis of being legal expert testimony. In the alternative, however, if the Hearing Examiners decide not to allow testimony on legal matters, then the legal analysis in the Movant's testimony also must be stricken.[128]

The Movants are also incorrect that portions of the Kelly Rebuttal should be stricken as cumulative. "Cumulative" evidence is "[a]dditional evidence that supports a fact established by the existing evidence (esp. that which does not need further support)."[129] Evidence is not "cumulative" in the instance of an expert testifying on the same issue as someone asserted to lack

provisions); Velasquez Direct at 14-22 (interpreting Rule 17.6.450.10 NMAC to analyze the General Diversification Plan proposed by Joint Applicants); Jojola Direct at 4-5 (Describing regulatory approvals required in connection with the Transaction.) ; Etheridge Direct at 11-13. In addition, many of the Movants' testimonies analyze New Mexico statutes and Commission precedent to propose and apply a six-factor test used in approving utility acquisitions. Garrett Direct at 18-71; Sandberg Direct at 12-49; Zigich Direct at 6-13; Cebulko at 6-36;

[128] Joint Applicants will separately identify a proposed list of Movants' testimony to be stricken.

[129] Black's Law Dictionary (12th ed. 2024), evidence.

the expertise to make such judgments or of an expert interpreting other evidence.[130] And, cumulative testimony can be admitted in the discretion of the finder of fact.

Regarding the portions of Ms. Kelly's testimony that Movants seek to strike as "cumulative," all of it is appropriate rebuttal testimony. Each passage expresses expert opinion on a contested matter, states a basis for such expert opinion, or provides necessary context for the discussion:

- Page 5: This simply identifies that Ms. Kelly is testifying on behalf of the Joint Applicants. Ms. Kelly did not previously file testimony in this matter, and it is standard to identify this information.

- Page 7 - 8: This is testimony from Ms. Kelly as an expert witness providing her opinion (and basis for such opinion) rebutting testimony from Movants' purported expert witnesses.

- Page 9: This simply provides fact information on which Ms. Kelly relied in providing her analysis and opinions, and context for the surrounding testimony.

- Page 13: This is testimony from Ms. Kelly as an expert witness providing her opinion (and basis for such opinion) rebutting testimony from Movants' purported expert witnesses.

- Page 14 - 15: This is testimony from Ms. Kelly as an expert witness providing her opinion (and basis for such opinion) rebutting testimony from Movants' purported expert witnesses.
- Page 17: This is testimony from Ms. Kelly as an expert witness providing her opinion (and basis for such opinion) rebutting testimony from Movants' purported expert witnesses.

- Page 23, Lines 10-18. Movants' fundamental complaint with this passage is that it discusses material that was not contained in the Joint Application. It cannot, by its nature, be "cumulative."

- Page 19 - 26: This is testimony from Ms. Kelly providing analysis and opinion, with supporting underlying facts and law on which Ms. Kelly relied.

- Page 28: This is testimony from Ms. Kelly providing analysis and opinion, with supporting underlying facts and law on which Ms. Kelly relied.

[130] *Martinez v. New Mexico Dept. of Trans,*, 150 N.M. 204, 258 P.3d 483, 493-94, 2011-NMCA-082 (N.M. Ct. of App. 2011) rev'd on other grounds, 296 P.3d 468, 2013 NMSC-005. There, a police officer testified on a defendant's impairment. An expert witness then also testified on the defendant's impairment; the court found that not to be cumulative. And, the expert's testimony interpreting a toxicology report was also not cumulative.

- Page 30: This is testimony from Ms. Kelly identifying material on which she relies for her opinion.

To the extent this has overlap in subject matters above to prior evidence, the Movants have contested these facts and opinions and have not deemed them as "established by the evidence" previously submitted. If the Movants and all other parties will stipulate to the contents as established, uncontested facts and opinions, then the Joint Applicants can withdraw the testimony; absent such a stipulation, it is appropriate rebuttal and is not cumulative.

Lastly, the Movants seek to strike the portion of the Kelly Rebuttal that references the Joint Applicants' commitment to retain their interests in NMGC for a longer period than originally proposed on the grounds that this commitment should have been included in the initial Joint Application.[131] Again, as confirmed above, NEE,[132] Staff,[133] WRA,[134] CCAE,[135] and FEA[136] all advocated that the BCP Applicants should be required to commit to retain its interests in NMGC for a longer period than the five years proposed in the Joint Application. The BCP Applicants committed to retain their interests in NMGC for at least ten years in response to the recommendations of Staff and the foregoing intervenors as confirmed by Joint Applicant witness Baudier.[137] There are no proper grounds to strike any portions of the Kelly Rebuttal.

[131] Supplemental Brief at 4.

[132] Sandberg Direct at 40:11-13, 47:9-10

[133] Velasquez Direct at 18:15-20.

[134] Cebulko Direct at 9:16-13:13.

[135] Kenny Direct at 8:3-8.

[136] Etheridge Direct at 35:9-11.

[137] Baudier Rebuttal at 11:6-18.

6. Rebuttal Testimony of Ryan A. Shell.

As with other Joint Applicant witnesses, the Movants seek to strike any reference in the Shell Rebuttal to proposals presented by the Joint Applicants in their rebuttal testimony in response to proposals made by Staff and intervenors in their testimony. This includes the Joint Applicants' proposed shared services plan,[138] and proposed delay in the filing a new rate case.[139] These sections of the Shell Rebuttal relating to proposals made in response to suggestion introduced in Staff and intervenor's direct testimonies are proper rebuttal and should not be stricken.

Additionally, the Movants seek to strike any reference in the Shell Rebuttal to the performance metrics NMGC currently follows on the grounds that such testimony is not in response to any direct testimony filed by Staff and intervenor.[140] This is simply incorrect. NEE witness Sandberg testified that under private equity ownership, the incentive is to cut costs which could "negatively impact the costs, safety, reliability, and longevity of NMGC's operations."[141] Performance metrics currently in place speak directly to the current state, and testimony that current performance metrics will continue regardless of ownership, speaks directly to the future state of NMGC's operations and the ready availability of data the Commission can use to monitor, and if need be, act upon, the quality of service customers receive. No portions of the Shell Rebuttal should be stricken.

7. Rebuttal Testimony of Lisa M. Quilici.

The Movants seek to strike portions of the Quilici Rebuttal on the grounds that it is legal arguments and cumulative of other testimony.[142] Ms. Quilici addresses the claims that customers

[138] Shell Rebuttal at 3:15 – 4:8, 13:1 – 13:5.

[139] Shell Rebuttal 4:10 -5:4.

[140] Shell Rebuttal at 8:10 – 10:3, 11:22 -12:11.

[141] Sandberg Direct at 36:26-37:2.

[142] Supplemental Brief at 5.

should benefit when a utility is acquired because the utility franchise is somehow transferred. This is directly in response to testimony from Staff witness Blank and NMDOJ witness Garrett. Staff witness Blank claims that NMGC possess on intangible asset of "captured customers of the government-created and government protected monopoly held by the regulated utility."[143] Dr. Blank continues this argument on page 7 of his Direct Testimony.[144] Likewise, Witness Garrett testifies that "a utility's service territory and its captive customers comprise a governmentally-bestowed monopoly franchise that should not be sold at a profit at ratepayers' expense."[145] Ms. Quilici rebuts these claims.[146]

On pages 10 and 11 of her testimony, Ms. Quilici provides her perspective as an expert witness that testifies across the country as to the adoption of the types of arguments advocated by Staff witness Blank. Her experience is that other regulatory bodies across the nation have rejected these types of arguments. That is based on her experience and is not a legal argument.

The same principles discussed above apply to the portions of Ms. Quilici's testimony alleged to be cumulative to the Baudier Direct and the Hutt Direct.[147] Ms. Quilici is testifying as an expert on issues that are currently in dispute. Ms. Quilici must, therefore, rely on facts provided by other witnesses such as Joint Applicant witnesses Baudier and Hutt, to provide her expert opinion. Joint Applicant witness Quilici is not simply repeating testimony from Joint Applicant witnesses Baudier and Hutt, but is properly describing the basis or support for her expert opinions.

[143] Blank Direct at 6:13-15.

[144] Blank Direct at 6:19-7:3.

[145] Garrett Direct at 66:14-16.

[146] While Ms. Quilici provides in her testimony a quote from a New Mexico Supreme Court case, this is no different that information contained in the Direct Testimony of NMDOJ witness Garrett on pages 18 and 19 where he cites statues and prior Commission decisions.

[147] Motion at 5.

Joint Applicant witness Quilici's expert opinions are clearly stated in each section that Joint Movants' seek to strike as cumulative:

- Page 15, lines 1-11 (Baudier 27-29 and GDP) : This is testimony from Ms. Quilici stating facts on which she is relying to form her expert opinion, and then stating her expert opinion.

- Page 16, lines 1-17 (Baudier 34) This testimony from Ms. Quilici is stating her expert opinion on matters contested by Movants' witnesses.

- Page 17, line 18 - Page 19, 15 (Hutt pages 4-8 and pages 2-6) » This testimony from Ms. Quilici describes what steps she took to formulate her expert opinion, describes facts on which she relied on forming her expert opinion, and states her expert opinion.

Because this is all expert opinion rebutting testimony from Movants' (and others') purported experts, none is "cumulative" to the Applicants direct case. None should be stricken as cumulative evidence.

8. Rebuttal Testimony of Eric L. Talley.

The Movants omitted the Talley Rebuttal from Movants' Response. However, in their Motion, the Movants make the conclusory claim that the Talley Rebuttal as cumulative of the Baudier Direct and Supplemental Testimonies on the structure of the proposed transaction and private equity ownership.[148] Once again the Movants fail to comply with the Deadline Order because they do not provide any comprehensive list with page number and substance lines of the testimony is to be stricken. As with the Kelly Rebuttal and the Quilici Rebuttal, the Movants' objections to the Talley Rebuttal as cumulative are unavailing.

The Tally Rebuttal is not cumulative of the Baudier testimonies because it provides expert opinion on the structure of the proposed transaction and the benefits of a private equity ownership. The Tally Rebuttal specifically responds to the direct testimonies of Staff, NMDOJ and NEE

[148] Original Motion at 16-17.

relating to the structure and funding of the proposed transaction.[149] Joint Applicant Witness Talley refutes the claims by the Staff and NEE witnesses that the structure of the proposed transaction is overly complex or unusual.[150] He also confirms that the financing for the proposed transaction presents no concerns.[151] Dr. Talley also rebuts the direct testimony of NMDOJ witness Garrett concerning alleged double-leverage due to the financing structure for the proposed transaction.[152]

The Talley Rebuttal also responds to claimed risks of private equity ownership by NEE and NMDOJ in their direct testimonies.[153] Dr. Talley confirms through data that utility ownership through private equity is neither unusual or new contrary, to the assertions of NMDOJ witness Garrett.[154] He also discusses the advantages of private equity ownership.[155] Additionally, he confirms that the capital structure of the proposed transaction is sufficient to protect against the risks of private equity ownership alleged by the intervenors.[156]

The Talley Rebuttal is in no way cumulative to the Baudier testimonies. The Movants' request to strike the Talley Rebuttal should be denied for failure to comply with the Deadline Order and because there is no merit to the Movants' arguments.

III. TO THE EXTENT A REMEDY IS APPROPRIATE, IT SHOULD CONSIST OF A DEFINED EXTENSION OF THE SCHEDULE AND AN OPPORTUNITY FOR SURREBUTTAL AND REJOINDER TESTIMONIES.

[149] Talley Rebuttal at 6:6-15.

[150] Talley Rebuttal at 7:2-:11:2.

[151] Talley Rebuttal at 13:6-16:5.

[152] Talley Rebuttal at 16:7-18:10.

[153] Talley Rebuttal at 18:13-16.

[154] Talley Rebuttal at 19:15-21:18.

[155] Talley Rebuttal at 21:20-24:7.

[156] Talley Rebuttal at 24:9-26:4.

If the Hearing Examiners consider that the Movants (and other intervenors) should have the opportunity to address the rebuttal commitments and testimony that addressed their reply testimony, then the Joint Applicants propose that the proper approach – one to which the Joint Applicants would consent – would be: (a) the addition of surrebuttal and rejoinder testimonies; and (b) a reasonable delay of the hearing (four to six weeks) to accommodate them.

Such an approach would give the Movants (and other intervenors) a reasonable opportunity to respond to the Joint Applicants' rebuttal, while still providing the Joint Applicants with the "last word" as the parties with the burden of proof. Subject to the Hearing Examiners' availability, such process could consist of a schedule along the lines of:

	Options 1A and 1B	Options 2A and 2B
Surrebuttal	June 30, 2025	July 14, 2025
Rejoinder	July 18, 2025	August 1, 2025
Hearing	July 22, 2025 – August 1, 2025 or July 29, 2025 – August 8, 2025	August 5, 2025 – August 15, 2025 or August 12, 2025 – August 22, 2025

Either schedule would give the Movants more time for their surrebuttal than the Applicants had for rebuttal.

While Movants' allegations and arguments in their Motion to Dismiss are incorrect and without merit, it is abundantly clear that the Movants want some form of delay to evaluate the Joint Applicants' rebuttal testimony prior to hearing and that they would also like the opportunity to respond. The Joint Applicants seek to work with the Movants on that and believe that the above

would constitute a more than reasonable accommodation, particularly compared with prior proceedings.

IV. CONCLUSION

The Movants' proposed dismissal of the Joint Application or striking of the Joint Applicants' rebuttal testimony are unfounded and should be denied. However, the Joint Applicants are amenable to a reasonable extension of the hearing date to allow for additional proceedings on the issues addressed in the Joint Applicants' rebuttal testimonies.

Respectfully submitted,

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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	)	

CERTIFICATE OF SERVICE

I CERTIFY that on this date I sent via email a true and correct copy of the ***Joint Applicants' Response to Joint Motion to Dismiss***

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