

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSION

IIF US Holding 2 LP

Docket No. EC25-119

Motion to Answer and Answer of Public Citizen, Inc.

We submit this answer per 18 CFR § 385.213.

Congress instructs the Commission to only approve Section 203 transactions that are “consistent with the public interest”.¹

Our August 12 Protest questioned whether IIF and JP Morgan compromised the required independence of a designated independent board director seat of El Paso Electric when it negotiated his advancement to become an IIF “owner”. We queried whether conceding Mr. Wynter’s status as an independent director of El Paso Electric violated the terms and conditions of the Commission’s 2020 approval of IIF’s acquisition of El Paso Electric.²

IIF’s August 27 answer claims, at page 3, that “Contrary to Protestors’ contention, there is no requirement that Mr. Wynter be independent in order to continue to be a director of El Paso, a privately owned company.” This claim by IIF is categorically false.

Attached as Exhibit A is the February 12, 2020 *Amended Certification of Stipulation* order of the New Mexico Public Regulation Commission, which details the terms and conditions of IIF’s 2020 acquisition of El Paso Electric. The order mandates roles for El Paso Electric’s independent and disinterested members of its board of directors. Regulatory approval of IIF’s acquisition of El Paso Electric was explicitly conditioned on the existence of a majority of El Paso Electric’s board composed of members independent and disinterested from the interests of IIF and JP Morgan. Therefore, IIF’s tampering of one of the independent directors in order to promote him

¹ 16 USC § 824b(4).

² “Mr. Wynter currently serves as an independent director for El Paso Electric, a FERC-jurisdictional public utility wholly owned by IIF and JP Morgan. Mr. Wynter’s board role is required to be independent from IIF . . . [and] how those negotiations [to be IIF’s owner] conformed with Mr. Wynter’s duties as an independent director of El Paso Electric, as these potential conflicts of interest may violate the public interest and the terms and conditions of the Commission’s 2020 approval of IIF’s acquisition of El Paso Electric.”

to become an IIF owner violates the terms and conditions of IIF’s acquisition of El Paso Electric, es evidenced by the following sections of the order:

- The New Mexico Public Regulation Commission order affirms that a JP Morgan executive (Mr. Gilbert) pledged that IIF would “hold its portfolio companies as separate entities [from IIF] with individual governance structure, including standalone management teams integrated into local communities **and boards of directors made up of a majority of independent directors.**”³
- It stipulates that the “volumes and types of [El Paso Electric] equity and debt issuances will be determined by vote of the EPE Board of Directors including majorities of both the entire EPE Board of Directors and of its Independent and Disinterested Directors. No [IIF or JP Morgan entity] will have the power to alter or override such votes.”⁴
- Section IX details the composition of El Paso Electric’s 10-member Board of Directors, with seven of the 10 (including the role of Chairperson) “will satisfy the definition of New York Stock Exchange (NYSE) Independent Directors. No Independent Directors shall be a then-current officer of any IIF subsidiary ... At least four [of the seven independent directors] will be *Disinterested*”, with footnote 13 expounding that “Disinterested Directors are Independent Directors who are also independent of IIF US 2 and its affiliates and J.P. Morgan, and have no material financial relationship with IIF US 2 and its affiliates and J.P. Morgan currently or within the last five years.”⁵
- The order explains the purpose for four of the Independent Directors be “Disinterested”: it is the result of the PUCT settlement negotiations to strengthen the independence of EPE’s Board of Directors.⁶
- A vote of at least four of the seven independent board directors is needed to approve the appointment of El Paso Electric’s CEO, and requires “at least four of the seven Independent Directors, approve (1) any capital or any expense budget; and (2) any capital project or series of projects that would exceed the approved annual budget by more than 10%”.⁷
- Finally, it outlines ring fencing provisions to protect El Paso Electric ratepayers from affiliate abuses involving IIF and JP Morgan, with “the most important” the requirement of “majority approval of EPE’s Independent and Disinterested Directors of the volumes and types of EPE equity and debt issuances”.⁸

³ At pages 9-10, emphasis added.

⁴ At page 31.

⁵ At pages 33-34.

⁶ At page 34.

⁷ At page 36.

⁸ At page 57.

These regulatory mandates requiring independent and disinterested members of El Paso Electric's board of directors underscore how Mr. Wynter's role as an independent director is essential for compliance with IIF's 2020 acquisition of El Paso Electric. The dearth of detail on how negotiations to promote Mr. Wynter to an IIF owner conformed with his duties as an independent director of El Paso Electric invite questions on whether the discussions created a conflict of interest of Mr. Wynter's obligations as an independent director, thereby violating the public interest and the terms and conditions of the Commission's 2020 approval of IIF's acquisition of El Paso Electric.

Furthermore, applicant's decision to actively mislead the Commission—falsely claiming that “there is no requirement that Mr. Wynter be independent in order to continue to be a director of El Paso” Electric should require FERC to ensure New Mexico and Texas regulators are aware of potential violations of state stipulation agreements of IIF's acquisition of El Paso Electric.⁹

Respectfully submitted,

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⁹ 16 USC § 824b(a)(3).

EXHIBIT A

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

**IN THE MATTER OF THE JOINT APPLICATION)
OF EL PASO ELECTRIC COMPANY, SUN JUPITER)
HOLDINGS LLC, AND IIF US HOLDING 2 LP,)
FOR APPROVAL OF THE ACQUISITION OF EL)
PASO ELECTRIC COMPANY BY SUN JUPITER)
HOLDINGS LLC AND IIF US HOLDING 2 LP;)
APPROVAL OF A GENERAL DIVERSIFICATION)
PLAN; AND ALL OTHER AUTHORIZATIONS)
AND APPROVALS REQUIRED TO CONSUMMATE)
AND IMPLEMENT THIS TRANSACTION)**

Case No. 19-00234-UT

AMENDED CERTIFICATION OF STIPULATION

February 12, 2020

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Carolyn R. Glick, Hearing Examiner for the New Mexico Public Regulation Commission (Commission), submits this Amended Certification of Stipulation to the Commission pursuant to 1.2.2.20(A)(5)(b) NMAC. The Hearing Examiner recommends that the Commission adopt this Amended Certification of Stipulation in its Final Order.

This Amended Certification of Stipulation amends the Certification of Stipulation issued on February 10, 2020. The Certification of Stipulation issued on February 10, 2020, recommended approval of the Unopposed Stipulation subject to the Parties' agreement to modify EPE's General Diversification Plan to identify IIF US 2 as a public utility holding company of EPE. This Amended Certification of Stipulation recommends approval of the Unopposed Stipulation subject to the Parties agreeing to a second modification: to add a paragraph to the Unopposed Stipulation, identical in substance to the Regulatory Commitment stated in Paragraph 70(b) of the Order issued by the Public Utility Commission of Texas (PUCT) in the parallel proceeding before the PUCT.

I. STATEMENT OF THE CASE

On August 3, 2019, El Paso Electric Company (EPE), Sun Jupiter Holdings, LLC (Sun Jupiter), Sun Merger Sub, Inc. (Merger Sub) and IIF US Holding 2 LP (collectively, the Joint Applicants) filed a Joint Application requesting approval of their Agreement and Plan of Merger entered into on June 1, 2019. The Agreement calls for EPE to be acquired by Sun Jupiter, a subsidiary of IIF US 2, and merged into Merger Sub, with EPE being the surviving entity post-merger.

The Joint Applicants ask for approval of the acquisition of EPE, directly by Sun Jupiter and indirectly by IIF US 2, and EPE's General Diversification Plan, along with any other approvals necessary to consummate and implement the acquisition of EPE indirectly by IIF US 2.

On August 21, 2019, the Commission issued its Initial Order Appointing Hearing Examiner, which appointed the Undersigned to preside over this case.

The following persons filed motions for leave to intervene:

- The New Mexico Attorney General (AG);
- Dona Ana County;
- Merrie Lee Soules;
- The City of Las Cruces (the City);
- New Mexico State University (NMSU);
- Western Resource Advocates;
- The Coalition for Clean Affordable Energy; and
- The United States Department of Defense and all Other Federal Executive Agencies.

EPE filed a Proof of Publication, attesting that notice of this case was published in the *Las Cruces Sun-News* on September 13, 2019. EPE also filed the Affidavit of Judith Parsons, attesting that the Joint Applicants mailed notice of this case to all of EPE's New Mexico customers in a bill stuffer, and that EPE posted notice of this case on its website.

On January 3, 2020, an Unopposed Stipulation was filed.

On January 13, 2020 and January 15, 2020, NMSU and Dona Ana County, respectively, filed Notices of Joinder in Unopposed Stipulation and Filings of Signature Page.

A hearing on the Unopposed Stipulation was held on January 16, 2020.

The following witnesses, who filed prefiled testimony, but not testimony in support of the Unopposed Stipulation, were excused from attending the hearing, and their prefiled testimonies were admitted into evidence via stipulation:

- Amanda Wallace, Managing Director, J.P. Morgan Investment Management, Inc.
- Ellen Lapson, Founder and Principal of Lapson Advisory
- Steven Buraczyk, Senior Vice President-Operations, EPE

- Nathan Hirschi, Senior Vice President and Chief Financial Officer, EPE

The following witnesses testified:

For the Joint Applicants:

- Andrew Gilbert, Managing Director, J.P. Morgan Investment Management, Inc.
- James Schichtl, Vice President of Regulatory Affairs, EPE

For the City:

- James Dittmer, Senior Regulatory Consultant, Utilitech, Inc.

For Staff:

- John Reynolds, Utility Division Director and Economics Bureau Chief, Commission Staff

The following exhibits were admitted into evidence:

For the Joint Applicants:

- 1 Agreement and Plan of Merger
- 2 Proxy Statement
- 3 Direct Testimony of Nathan Hirschi
- 4 Direct Testimony of Steven Buraczyk
- 5 Direct Testimony of James Schichtl
- 6 Direct Testimony of Andrew Gilbert
- 7 Direct Testimony of Ellen Lapson (corrected)
- 8 Supplemental Testimony of Amanda Wallace
- 9 Supplemental Testimony of James Schichtl
- 10 Second Supplemental Testimony of Amanda Wallace
- 11 Unopposed Stipulation and Exhibits
- 12 Testimony in Support of Unopposed Stipulation of Andrew Gilbert
- 13 Supplemental Testimony in Support of Unopposed Stipulation of Andrew Gilbert
- 14 Testimony of James Schichtl in Support of Unopposed Stipulation
- 15 Supplemental Testimony of James Schichtl in Support of Unopposed Stipulation

16 Supplemental Response to Bench Request¹

For the City:

1 Direct Testimony of James Dittmer

For Staff:

1 Direct Testimony of John Reynolds

At the end of the hearing, the Hearing Examiner did not require the filing of posthearing briefs, and no party requested the opportunity to file a posthearing brief. Tr. at 102. However, on January 24, 2020, the Hearing Examiner issued an Order on Briefing, in which she ordered the Joint Applicants, and encouraged the Intervenors and Staff, to file a brief answering the following questions:

1. If the Proposed Transaction is approved, would J.P. Morgan Investment Management Inc. (JPMIM) become an affiliated interest of El Paso Electric Company (EPE) under Section 62-3-3(A)(4) of the Public Utility Act? More particularly, would the authority of employees of JPMIM to appoint EPE Board members to the post-closing EPE Board cause JPMIM to possess “the power to direct or cause the direction of the management and policies of” EPE?
2. Do you oppose conditioning approval of the Unopposed Stipulation on amendment of the General Diversification Plan to identify JPMIM as an affiliated interest of EPE?

The Order on Briefing relied on Andrew Gilbert’s testimony at the hearing that the persons who would elect the post-closing EPE Board members would be a majority of the five persons who comprise the Investment Committee of the Infrastructure Investments Group (IIG), who are employees of JPMIM. Tr. at 48, 64-66 (Gilbert).

¹ During the hearing, the Hearing Examiner ordered the Joint Applicants to supplement their response to a bench request. The Joint Applicants filed the Supplemental Response to Bench Request on January 21, 2020. No party objected to admission into evidence of the Supplemental Response to Bench Request as Joint Applicant Exhibit 16. Tr. at 89.

On January 31, 2020, the Joint Applicants filed a Brief in Response to Order on Briefing and an Unopposed Motion to Admit Joint Applicants' Exhibit 16 (Motion). The Motion seeks admission into evidence of the Affidavit of Andrew Gilbert, which is attached to the Motion, as Joint Applicants' Exhibit 16. The Motion should have requested admission into evidence of the Affidavit as Joint Applicants' Exhibit 17 because the Joint Applicants' Supplemental Response to Bench Request was already admitted into evidence as Joint Applicants' Exhibit 16. Mr. Gilbert states in his Affidavit that his testimony at the hearing that IIG's Investment Committee would appoint the post-closing EPE Board of Directors was incorrect. He states that IIG will recommend candidates for EPE's post-closing Board of Directors, but that IIF US 2 GP — the General Partner of IIF US 2 — would appoint the post-closing EPE Board members. He concludes, "Accordingly, neither IIG nor any other employee of JPMIM has the ultimate authority to determine the members of the EPE Board of Directors." In their Brief, the Joint Applicants therefore argue that JPMIM would not become an affiliated interest of EPE because JPMIM would not have the power to direct or cause the direction of the management and policies of EPE. They object to conditioning approval of the Unopposed Stipulation on amendment of the GDP to identify JPMIM as an affiliated interest of EPE.

Staff filed its Brief Addressing Questions Posed in the Order on Briefing on January 31, 2020. Staff states that in light of the new information in Mr. Gilbert's Affidavit, it does not believe that identification of JPMIM as an affiliated interest of EPE is necessary. Staff would not actively oppose identifying JPMIM as an affiliated interest of EPE, but believes "that there are sufficient governance and structural measures already provided in the Stipulation to ensure and preserve the independence of EPE's Board."

On February 10, 2010, the Joint Applicants filed a Notice Regarding the Proposed Stipulation.

II. SUMMARY OF (1) THE PROPOSED TRANSACTION; (2) THE UNOPPOSED STIPULATION; AND (3) THE HEARING EXAMINER’S RECOMMENDATION²

A. THE PROPOSED TRANSACTION

Sun Jupiter Holdings LLC (Sun Jupiter), IIF US Holding 2 LP (IIF US 2) and El Paso Electric Company (EPE) seek approval of a merger transaction that would turn EPE from a publicly owned company into a privately held entity, owned directly by Sun Jupiter and indirectly by Sun Jupiter’s parent, IIF US 2, a private equity investor that raises equity capital from institutional investors such as pension funds and insurance companies. Ownership would change from a group of public shareholders to a single shareholder.

IIF US 2 is a limited partnership and one of three master holding partnerships that hold all of the investments of the Infrastructure Investments Fund (IIF). IIF is an open-ended private investment vehicle. It is not a hedge fund. It was established in 2006 with a long-term investment horizon and invests in infrastructure companies, including regulated utilities. IIF invests in 19 portfolio companies, and these portfolio companies have multiple subsidiaries. If the Proposed Transaction is approved, EPE would become a portfolio company of IIF US 2.

The General Partner and manager of IIF US 2 is IIF US 2 GP, LLC. The General Partner is owned and controlled by three individuals who also comprise the board of directors of IIF US 2 GP. IIF US 2 GP appointed J.P. Morgan Investment Management Inc. (JPMIM) as its investment advisor. IIF 2 GP delegated to JPMIM certain responsibilities for the administration and operation of IIF US 2. The three individuals who comprise the General Partner are unaffiliated with J.P. Morgan.

Utility investments are foundational to IIF’s strategy. IIF was attracted to EPE because EPE exhibits a shared operating philosophy, values and culture based on safety, reliability,

² This Section summarizes the more thorough discussions in Sections III through XII of this Certification of Stipulation.

affordability and compliance, and has a very strong management team operating in vibrant communities.

IIF US 2 and Sun Jupiter would pay \$2.8 billion for all EPE common stock outstanding, at a \$68.25 per share price, a 17% premium to EPE's closing price on May 31, 2019. IIF US 2 would provide \$2.3 billion in cash to Sun Jupiter, and Sun Jupiter is expected to borrow about \$625 million to fund the additional amount. The acquisition premium — the amount by which the purchase price exceeds EPE's book value — is about \$1.63 billion. IIF US 2 and Sun Jupiter have agreed to not seek recovery of this premium through rates.

B. THE UNOPPOSED STIPULATION

The following parties entered into an Unopposed Stipulation:

- The Joint Applicants (EPE, Sun Jupiter and IIF US 2);
- Staff;
- The City of Las Cruces;
- Dona Ana County;
- The New Mexico Attorney General;
- New Mexico State University;
- The United States Department of Defense and all other Federal Executive Agencies;
- Western Resource Advocates;
- The Coalition for Clean Affordable Energy; and
- Merrie Lee Soules.

The Parties agree in the Unopposed Stipulation that the Proposed Transaction should be approved, subject to 79 Final Stipulated Regulatory Commitments set forth in Exhibit A to the Unopposed Stipulation. The Parties also agree that EPE's General Diversification Plan (GDP) attached to the Unopposed Stipulation as Exhibit B should be approved.

The 79 Final Stipulated Regulatory Commitments are integral to the Unopposed Stipulation. The Commitments are listed below in Section VIII. The following are among the Commitments highlighted by the Parties:

- A rate credit to EPE's New Mexico customers of \$8.7 million will be distributed in 36 monthly installments. The Joint Applicants did not submit a proposal for allocating the rate credit among customers, but provided an illustrative example which would result in a \$1.24 monthly rate credit for an average-use residential customer.
- The Joint Applicants will dedicate \$100 million to promote economic development in EPE's service territory.
- The Joint Applicants will maintain EPE's annual charitable giving level for the three-year period ending December 31, 2018, which is about \$1.2 million annually.
- EPE will continue to make minimum capital expenditures equal to EPE's current five-year budget for the five-year period beginning January 1, 2021, subject to adjustments.
- IIF US 2 will maintain a controlling interest in EPE for at least 10 years post-closing.
- EPE's existing headquarters will remain in El Paso, Texas for so long as IIF US 2 owns EPE.
- EPE's Chief Executive Officer and senior management will continue to have day-to-day control over EPE's operations.
- For at least five years after closing, EPE will not implement any material involuntary workforce reductions or changes to wages, benefits and other terms and conditions of employment in effect before the Proposed Transaction.
- The volumes and types of all EPE equity and debt issuances will be determined by vote of the EPE Board of Directors.

Also of significance are 28 ring fencing commitments designed to maintain EPE's financial independence from IIF US 2, its affiliates and JPMIM.

In their Application, the Joint Applicants proposed 43 Original Regulatory Commitments. As a result of settlement negotiations in this case and in a parallel case before the Public Utility Commission of Texas (PUCT), the Original Regulatory Commitments were significantly expanded and strengthened to produce the 79 Final Stipulated Regulatory Commitments. PUCT Staff initially filed testimony opposing the Proposed Transaction, but agreed to a stipulation substantially the same as the Unopposed Stipulation filed in this case, which was approved by the PUCT.

If the Unopposed Stipulation is approved, EPE's post-closing Board of Directors will have ten Directors. One will be EPE's CEO; up to two will be IIF US 2-level representatives; and the remaining seven will be Independent Directors. At least four of the seven Independent Directors will be Disinterested Directors, meaning they will be disinterested from IIF US 2 and its subsidiaries and affiliated interests and J.P. Morgan. A majority of the three individuals who comprise the General Partner of IIF US 2 will appoint EPE's post-closing Board of Directors. After establishment of EPE's post-closing Board of Directors, the Disinterested Directors will be appointed by a majority of a committee comprised of the Disinterested Directors.

EPE's former President and CEO, Mary Kipp, resigned her position effective August 1, 2019. The EPE Board appointed Adrian Rodriguez, Senior Vice President, General Counsel and Assistant Secretary of EPE, as interim CEO. At the January 16, 2020 hearing, IIF US 2/Sun Jupiter witness Gilbert said that it was premature to say whether Mr. Rodriguez would remain CEO if the Unopposed Stipulation is approved.

If the Unopposed Stipulation is approved, IIF US 2 expects no changes in EPE's day-to-day operations. Mr. Gilbert said that "EPE will remain an independently operated, investor-owned regulated utility headquartered in El Paso, Texas." He further said that EPE's focus will remain on providing safe, clean, affordable and reliable service.

According to Mr. Gilbert, IIF's established practice is to hold its portfolio companies as separate entities with individual governance structures, including standalone management

teams integrated into local communities and boards of directors made up of a majority of independent directors. Each IIF portfolio company has its own Board of Directors and management team.

C. ANALYSIS

Six factors should be considered in determining whether to approve a merger:

1. Whether the Proposed Transaction Provides Benefits to Utility Customers

The following commitments would benefit ratepayers: the bill credit; and IIF US 2's commitment to own EPE for at least ten years.

2. Whether Quality of Service Will be Diminished

Many of the Final Stipulated Regulatory Commitments are for the purpose of preventing a decline in EPE's quality of service if the Unopposed Stipulation is approved, and no evidence shows that EPE's quality of service will decline if the Unopposed Stipulation is approved.

3. Whether the Transaction Will Result in the Improper Subsidization of Non-Utility Activities

The ring fencing commitments provide sufficient assurance against the improper subsidization of non-utility activities.

4. Whether There Are Adequate Protections Against Harm to Customers

At the hearing, concern was raised about potential dealings between EPE and J.P. Morgan and EPE's independence from J.P. Morgan. This concern was also raised in the parallel proceeding before the PUCT and was addressed by adding the following regulatory commitment in the stipulation before the PUCT:

Arm's Length Relationship with JP Morgan. EPE and Sun Jupiter will maintain arms-length relationships with all affiliates and with all persons, entities, and interests directly or indirectly owned or controlled by JP Morgan. The applicants agree to apply the Commission's regulations regarding arm's length transactions among affiliates to JP Morgan regardless of whether JP Morgan is an actual affiliate as defined under the Public Utility Act. Nothing in the foregoing is intended to prohibit IIF US 2's management of Sun Jupiter, which is a member-managed entity.

This regulatory commitment should be made a condition of approval of the Unopposed Stipulation in this case as well. This added commitment, along with the Joint Applicants' commitments to not recover the acquisition premium or transaction costs through rates and the other ring fencing commitments, provide adequate protections against harm to customers if the Unopposed Stipulation is approved.

5. *Qualifications and Financial Health of IIF US 2*

As of June 30, 2019, IIF's net asset value was about \$12.2 billion. For the 12 months ending June 30, 2019, IIF invested about \$2.8 billion into new acquisitions and its existing portfolio companies. Over 60% of net capital invested since 2013 has been deployed through existing portfolio company investments to support growth, safety, reliability, compliance and other capital expenditure initiatives.

IIF US 2 invests in two regulated utilities in the United States: (1) Summit Utilities Inc. (Summit), a Colorado-based company with regulated natural gas distribution subsidiaries operating over 5,400 miles of pipeline in Arkansas, Colorado, Maine, Missouri and Oklahoma; and (2) SouthWest Water Company (SWWC), a water and wastewater company operating in Alabama, California, Oklahoma, Oregon, South Carolina and Texas. Summit serves over 100,000 customers. Since IIF US 2 acquired Summit, Summit has acquired and integrated three utilities and a greenfield expansion project, resulting in nearly \$675 million of IIF capital invested since 2013 in growth activities. SWWC operates over 120 water systems and 16 sewer systems in Texas, which are regulated by the PUCT and several cities. SWWC's water and wastewater systems in Texas serve 106,800 and 39,200 customers, respectively.

IIF US 2 is a long-term investor in utility businesses because, unlike most private equity funds, IIF is not a closed-ended vehicle and therefore does not need to exit an investment after a pre-defined holding period. Instead, IIF US 2 continually seeks to raise new capital which it uses to, among other things, provide ongoing financing for the long-term capital requirements of its portfolio companies. IIF has never divested a portfolio company.

6. Whether Approval of the Proposed Transaction Would Preserve the Commission's Jurisdiction

To effectively exercise its jurisdiction, the Commission must have access to the books and records of not just the public utility itself, but also of the entities that exercise control over the utility. Persons who directly or indirectly exercise control over a public utility are “affiliated interests” and “public utility holding companies,” and the Commission has the authority to access their books and records.

A key means of preserving the Commission's jurisdiction is through the requirement in 17.6.450 NMAC for Commission approval of a general diversification plan (GDP) before a public utility may engage in a Class II transaction. A GDP must identify each affiliated interest and public utility holding company that is the subject of the Class II transaction. The Joint Applicants were required to file a GDP because the Proposed Transaction will create a public utility holding company, which is a Class II transaction.

The GDP attached to the Unopposed Stipulation identifies Sun Jupiter Holdings LLC as the holding company of EPE. It does not identify IIF US 2 as a holding company of EPE. Rather, it identifies IIF US 2 as the “master partnership investing in Sun Jupiter.” At the hearing, IIF US 2/Sun Jupiter witness Gilbert and Staff witness Reynolds agreed that if the Unopposed Stipulation is approved, IIF US 2 will become a public utility holding company of EPE, and neither objected to modifying the GDP to identify IIF US 2 as a public utility holding company of EPE.

EPE's GDP should be approved subject to the Parties' agreeing to its modification to identify IIF US 2 as a public utility holding company of EPE. This modification will ensure preservation of the Commission's jurisdiction because the Commission has the authority to review the books and records of a public utility holding company, and the Commission has said that a public utility holding company could be subject to regulation as a public utility.

D. HEARING EXAMINER'S RECOMMENDATION

The GDP should be modified to identify IIF US 2 as a public utility holding company of EPE, and the regulatory commitment from the PUCT stipulation relating to EPE's relationship with J.P. Morgan should be added as a Final Stipulated Regulatory Commitment. With these modifications, the Unopposed Stipulation, subject to the Final Stipulated Regulatory Commitments, is fair, just and reasonable and should be approved.

III. BACKGROUND ON EPE

EPE provides electric utility service to about 429,000 retail and wholesale customers in a 10,000 square mile area of the Rio Grande Valley in west Texas and southern New Mexico. It serves about 90,000 customers in New Mexico. Tr. at 87 (Schichtl). It employs about 1,100 persons. Hirschi Direct at 8. EPE currently is a publicly traded company whose stock is traded on the New York Stock Exchange under the ticket symbol "EE." Gilbert Direct at 6; Hirschi Direct at 9. Approximately 80% of EPE's non-fuel base revenues are generated in Texas; the remaining 20% of its revenues are generated in New Mexico. EPE has generating capacity of 2,085 megawatts, of which about 70% is fueled by natural gas, 30% by nuclear and less than 1% by renewables. Lapson Direct, Exh. EL-4.2.

In EPE's most recent general rate case before this Commission, this Commission, in June 2016, approved a base revenue increase of about \$1.1 million. Case No. 15-00127-UT, Final Order Partially Approving Recommended Decision at 57, ¶ 127 (6-8-16). This Commission has ordered

EPE to file its next general rate case within three months of the disposition of this case. Case Nos. 15-00109-UT & 19-00098-UT, Order Granting Joint Motion for Expedited Order Modifying Filing Date with Modification at 12, ¶ 32 (7-10-19).

EPE has seen solid customer and load growth historically, which is atypical for the utility sector. For the 10-year period from 2006-2016, EPE experienced 10-year compound annual growth rates of 1.62% and 1.24% in residential customer growth and use per residential customer, respectively. This compared favorably to the national industry averages in residential customer growth of 0.86% and use per residential customer of -0.34% over the same period. The increase in residential growth and customer demand in EPE's service territory has been primarily driven by population increases and infrastructure investment associated with the U.S. military's base realignment program at Fort Bliss in Texas, the construction of Union Pacific intermodal rail and the increase in cross-border trade between El Paso and Mexico. Additionally, EPE is benefitting from sizable economic growth from expansion of sectors including industrial, medical and financial services. Lapson Direct, Exh. EL-4.2.

IV. BACKGROUND TO THE MERGER

EPE's Board and senior management regularly evaluate EPE's strategic direction as part of their ongoing efforts to provide long-term value to shareholders. As part of this strategic review, the Board and senior management periodically consider and evaluate potential alternatives to EPE's stand-alone plan. Over the past decade, they have discussed potential acquisitions, mergers and sale transactions as part of these evaluations. JA Exh. 2 at 17. Contributing to the Board's consideration of alternatives to EPE's stand-alone plan are ongoing challenges to EPE's access to funding for capital expenditures. Hirschi Direct at 11, 16.

In November 2018, EPE's Board instructed Lazard Frères & Co. LLC (Lazard), a financial adviser, to contact six parties on a list of potential buyers to gauge their interest in considering a transaction with EPE. These six parties were parties that, in the judgment of EPE's senior

management, best fit criteria sought by EPE, including interest in considering a transaction with EPE, capability of paying a premium to EPE's market price and capability of providing commitments to EPE's customers, employees and communities. Two of the parties were larger utilities and four, including IIF, were infrastructure and utility-oriented investment funds. In January 2019, at the direction of EPE, representatives of Lazard sent a bid instruction letter to each potential buyer (IIF, Company A and Bidders B, C, D and E). Bidder D withdrew from the process in February 2019. IIF, Company A and Bidders B, C and E submitted proposals. Following discussion, EPE's Board authorized management to continue discussions with IIF and Bidders B and E. Company A and Bidder C were not invited to continue because the price and stakeholder commitments included in each's proposal were not viewed by the Board as sufficiently attractive compared to the proposals of IIF and Bidders B and E. Following continued discussions, Bidder B withdrew from the process. On May 10, 2019, IIF and Bidder E submitted final offers to acquire EPE. Following further discussions, EPE's Board instructed management to focus its efforts on negotiating the most favorable transaction possible with IIF. Following a May 31, 2019 meeting, EPE's Board adopted resolutions (i) determining that it was in the best interests of EPE and its shareholders for EPE to enter into the merger agreement with IIF; (ii) adopting the merger agreement and approving EPE's execution, delivery and performance of the merger agreement; and (iii) resolving to recommend that EPE's shareholders approve the merger. JA Exh. 2 at 20-38; Hirschi Direct at 12-13.

V. THE PROPOSED TRANSACTION/REQUIRED APPROVALS

The Proposed Transaction is for Sun Jupiter Holdings, LLC (Sun Jupiter), wholly owned by IIF US 2, to acquire EPE through a merger between Sun Merger Sub Inc. (Merger Sub) and EPE. The Proposed Transaction, if approved, would result in Sun Jupiter replacing EPE's shareholders and IIF US 2 becoming EPE's indirect sole shareholder. Gilbert Direct at 6.

IIF US 2 is a limited partnership and investor in multiple portfolio companies. It is best described as the sole or majority direct shareholder in each of its portfolio companies. If the Proposed Transaction is approved, EPE will become one of IIF US 2's portfolio companies. *Id.* at 2, 6.

Sun Jupiter is an indirect, wholly owned subsidiary of IIF US 2, created to hold 100% of the equity interests in EPE post-closing. *Id.* at 3. Sun Jupiter conducts no business activities other than its ownership of Merger Sub. Sun Jupiter's sole member is Sun Jupiter Parent LLC, which is an indirect wholly-owned subsidiary of IIF US 2 with the sole purpose of owning the shares of Sun Jupiter. Stipulation, Exh. B at 7. There are four "Intermediate Companies," which are also subsidiaries of IIF US 2, that are "up the ladder" from Sun Jupiter. These are newly formed, single purpose subsidiaries. According to Mr. Gilbert, the existence of the Intermediate Companies is desirable to implement debt financing that is non-recourse to EPE and provide structural flexibility during IIF US 2's investment in EPE. None of the Intermediate Companies has any employees or officers and each is managed by its direct parent. Gilbert Direct at 8; Tr. at 35 (Gilbert). An organizational chart illustrating the post-closing ownership structure is Exhibit AEG-1 to Mr. Gilbert's Direct Testimony.

Merger Sub is a wholly-owned subsidiary of Sun Jupiter and was formed by Sun Jupiter solely for the purpose of entering into the Merger Agreement. Under the Merger Agreement, Merger Sub would merge with and into EPE, with EPE continuing as the surviving corporation. Upon completion of the Proposed Transaction, Merger Sub would cease to exist. Gilbert Direct at 6-7. The parties to the Merger Agreement are Sun Jupiter, Merger Sub and EPE.

The formation of a new subsidiary — Merger Sub in this case — by the acquirer to merge with and into the target company is a typical acquisition structure for public companies called a "reverse triangular merger." One of the key benefits of a reverse triangular merger is the lack of impact it has on the ongoing business, including

contracts, permits and licenses of EPE. It minimizes third-party contractual consents needed to effectuate the Proposed Transaction. It also allows Sun Jupiter to acquire 100% of the outstanding shares on closing by operation of law instead of having to collect individual share certificates from a diverse public shareholder base. Wallace 2nd Supp. at 17-18.

IIF US 2 and Sun Jupiter will pay \$2.8 billion for all EPE common stock outstanding, at a \$68.25 per share price, a 17% premium to EPE's unaffected closing price on May 31, 2019, the last trading day before the announcement of the Merger Agreement. IIF US 2 will provide \$2.3 billion in cash to Sun Jupiter pursuant to an Equity Commitment Agreement. Sun Jupiter is expected to borrow about \$625 million to fund the additional amount. All of EPE's outstanding debt, in the approximate amount of \$1.5 billion, will remain outstanding and therefore must continue to be serviced after the acquisition. Dittmer Stip. at 20.

If the Proposed Transaction is approved, Sun Jupiter will have the following amounts and percentages of equity and debt: approximately 78% capitalized by Sun Jupiter Parent LLC and 22% capitalized by \$625 million of third party debt financing. Wallace 2nd Supp. at 17.

EPE's Board of Directors unanimously approved the Merger Agreement and recommended that shareholders approve the Proposed Transaction. EPE's shareholders also voted to approve the Proposed Transaction. The Joint Applicants expect the Proposed Transaction to close in the first half of 2020 if approved. Stipulation, Exh. B at 3.

The Proposed Transaction requires approvals from this Commission, the Public Utility Commission of Texas (PUCT)³, the Federal Energy Regulatory Commission (FERC)⁴, the Federal Communications Commission (FCC)⁵ and the Nuclear Regulatory Commission (NRC)⁶,

³ PUCT approval is required to consummate the merger. JA Exh. 2 at 56.

⁴ The Federal Power Act requires FERC authorization for any direct or indirect merger of a public utility's facilities with those of any other person. *Id.*

⁵ EPE holds FCC licenses for private internal communications and must obtain FCC approval to directly or indirectly transfer control or assignment of those licenses. *Id.* at 57.

⁶ EPE holds possession-only license rights in licenses issued by the NRC with respect to its 15.8% tenant-in-common ownership in each of Palo Verde Nuclear Generating Station Unit Nos. 1, 2 and 3 and the

as well as expiration or termination of the waiting period under the Hart-Scott-Rodino Act to satisfy antitrust requirements⁷. EPE also intends to seek consent from the City of El Paso, Texas to transfer EPE's franchise agreement. Gilbert Direct at 10. The PUCT has approved the Proposed Transaction.⁸ As of January 16, 2020, the Joint Applicants were still awaiting decisions from FERC, the NRC and the City of El Paso. The waiting period under the Hart-Scott-Rodino Act has expired. Tr. at 70-71 (Gilbert).

VI. BACKGROUND ON IIF US 2

IIF US Holding 2 LP (IIF US 2) is a U.S. limited partnership and one of three master holding partnerships that hold all of the investments of the Infrastructure Investments Fund (IIF). The other two master partnerships are IIF US Holding LP, a U.S. limited partnership, and IIF Int'l Holding LP, a non-U.S. limited partnership. IIF is not an actual entity, but is an umbrella name used to refer to the three master partnerships. Each master partnership is an investor in multiple portfolio companies and is generally best characterized as the sole or majority direct shareholder in each of its respective portfolio companies. Gilbert Direct at 2.

IIF is an open-ended private investment vehicle. It is not a hedge fund. Private investment vehicles such as IIF generally acquire a significant interest in illiquid (private) equities that they hold for the long term. In contrast, hedge funds typically acquire small stakes in liquid (public) equities for short time periods. Wallace 2nd Supp. at 14. Because IIF US 2 is not a closed-ended vehicle, it does not need to exit an investment after a pre-defined period. Stipulation, Exh. B. at 18.

PVNGS Independent Spent Fuel Storage Installation facility. EPE must obtain NRC consent to indirectly transfer its NRC licenses resulting from indirectly transferring control of the licenses to Sun Jupiter and IIF US 2. *Id.* at 56.

⁷ The HSR Act provides that certain transactions, including the proposed merger, may not be consummated until required information and materials have been filed with the Department of Justice and the Federal Trade Commission and the applicable waiting period has expired or been terminated. *Id.* at 55.

⁸ Order, Docket No. 49849 (P.U.C.T. 1-28-20), available at http://interchange.puc.texas.gov/Documents/49849_280_1050282.PDF.

IIF was established in 2006 and is a private investment fund with a long-term investment horizon and invests in infrastructure companies, including regulated utilities, transportation infrastructure and contracted energy assets predominantly in developed countries. IIF is a perpetual life vehicle that seeks to raise capital on an ongoing basis that it can deploy into existing and new investments for the long term. Gilbert Direct at 14. IIF invests capital provided predominantly by institutional investors (such as pension funds and life insurance companies) into infrastructure companies in developed countries. IIF invests in 19 portfolio companies, and these portfolio companies have multiple subsidiaries. Stipulation, Exh. B at 1, 5.

The IIF Investors provide capital for the activities of each master partnership and invest pro rata with each other in all three master partnerships. As of June 30, 2019, 517 direct limited partners comprised the IIF Investors, and no limited partner owned more than 10% of IIF. Gilbert Direct at 15-17. The IIF Investors are passive, meaning that they lack the ability to manage or control IIF US 2 or any of its portfolio companies. *Id.* at 17; Stipulation, Exh. B at 6.

Each master holding partnership has a General Partner, tasked with oversight of the partnership on behalf of the limited partners. The General Partner and manager of IIF US 2 is IIF US 2 GP, LLC (IIF US 2 GP). Gilbert Direct at 15-17. The General Partner is owned and controlled by three individuals who are unaffiliated with J.P. Morgan: Dennis Clarke, Rita Sallis and Christopher Ward.⁹ These individuals also comprise the board of directors of IIF US 2 GP. The General Partner has control over the day-to-day management of IIF and authority to make legally binding business decisions. Wallace 2nd Supp. at 3 n.1, 16. IIF US 2 has no officers or employees. *Id.* at 16.

⁹ Dennis Clarke has indicated an intent to terminate his position as an IIF GP Owner, likely in 2020. A replacement will be identified by the IIF GP Owners, and the Commission will be notified at that time. Stipulation, Exh. B at 6,

The General Partner owns all of the non-economic, general partner interests in the applicable master partnership. The economic interests in each master partnership are owned by the indirect limited partners.¹⁰

IIF US 2 GP appointed J.P. Morgan Investment Management Inc. (JPMIM) as its investment advisor. IIF 2 GP delegated to JPMIM certain responsibilities for administration and operation of IIF US 2. This delegation includes fundraising, sourcing and recommending potential investments to IIF 2 GP, administrative functions and financial management of IIF US 2. Significant activities are subject to approval of IIF 2 GP, including all equity investments and dispositions, adoption of financial statements, admission of new investors (limited partners), material shareholder decisions in respect of portfolio companies and distributions to limited partners. Delegated services are carried out by JPMIM's Infrastructure Investments Group (IIG) under the ongoing oversight and control of IIF 2 GP. Stipulation, Exh. B at 6-7. The leadership of IIG is: Paul Ryan, CEO and Portfolio Manager; Matthew LeBlanc, Chief Investment Officer; Brian Goodwin, Head of Portfolio Asset Management; and the Senior Team, a group of seven Managing Directors including Mr. Gilbert. As of June 30, 2019, J.P. Morgan owned less than 0.01% of the limited partnership interests in IIF and is not affiliated with any of the General Partners. Gilbert Direct at 15-17. An IIF US 2 portfolio company could not receive financial services from JPMIM. Tr. at 47 (Gilbert).

VII. STANDARDS OF PROOF

Three interrelated standards of proof are at work in this case:

1. The standard of proof in administrative adjudications which is, unless expressly provided otherwise, the preponderance of the evidence. Case No. 12-00131-UT, Recommended Decision at 16 (11-7-12), adopted in relevant part by Final Order (12-11-12). Preponderance of

¹⁰ Response to Deficiency Letter at 1-2, FERC Docket No. EC19-120-000 (1-6-20), available at <https://elibrary.ferc.gov/idmws/search/results.asp>.

the evidence means the greater weight of the evidence. *Campbell v. Campbell*, 1957-NMSC-001, ¶ 24, 62 N.M. 330. It is evidence that, when weighed with that opposed to it, has more convincing force. It has superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other. *Black's Law Dictionary* 1431 (11th ed. 2019).

2. The standard of proof to support a stipulation, which is that the stipulation must be fair, just, reasonable and in the public interest. Case No. 08-00354-UT, Final Order Conditionally Approving Stipulation at 12-13 (7-14-09). Other criteria applied by the Commission in evaluating stipulations are (i) is the settlement a product of serious bargaining among capable, knowledgeable parties? (ii) does the settlement, as a package, benefit ratepayers and the public interest? and (iii) does the settlement package violate any important regulatory principle or practice? Case No. 08-00273-UT, Final Order Conditionally Approving Stipulation at 10 (5-28-09).

3. The standard of proof under NMSA 1978, Section 62-6-13 for approval of a proposed acquisition, which, as discussed in more detail below, is that the proposed acquisition is neither unlawful nor inconsistent with the public interest.

Taken together, these standards require that the Parties demonstrate by a preponderance of the evidence that the Proposed Transaction, under the terms set forth in the Unopposed Stipulation, is fair, just and reasonable and neither unlawful nor inconsistent with the public interest.

Prior approval of the Proposed Transaction is required under Sections 62-6-12 and 62-6-13 of the Public Utility Act. Section 62-6-13 states that the Commission will approve proposed acquisitions that require Commission approval under Section 62-6-12 “unless the commission will find that the proposed transaction is unlawful or is inconsistent with the public interest[.]”

In addressing the statutory requirements for approval of mergers in Case No. 2678, the Commission considered the standard for determining whether a merger is “inconsistent with the

public interest.” The Commission approved the declaration in the Recommended Decision that “the test is whether the public interest is served by approving the merger as determined by the facts and circumstances of each case. Generally, the complexities of mergers should require a positive benefit to ratepayers if they are to be approved.” Case No. 2678, Recommended Decision at 22 (11-15-96), adopted by Final Order Approving Recommended Decision (1-28-97). This standard was discussed further and reaffirmed in Case No. 3116. Case No. 3116, Recommended Decision at 12 (5-4-00), adopted by Final Order (5-9-00).

In Case No. 04-00315-UT, the Commission identified the following four principal factors as bearing on whether a transaction satisfies the Section 62-6-13 standard for approval:

1. Whether the transaction provides benefits to utility customers;
2. Whether the Commission’s jurisdiction will be preserved;
3. Whether quality of service will be diminished; and
4. Whether the transaction will result in the improper subsidization of non-utility activities.

Case No. 04-00315-UT, Certification of Stipulation at 17 (5-26-05), adopted by Final Order (5-27-05).

In Case No. 11-00085-UT, the Commission applied the four factors identified in Case No. 04-00315-UT and stated that two additional important considerations in a stock purchase case are “careful verification of the qualifications and financial health of the new owner and adequate protections against harm to customers.” Case No. 11-00085-UT, Recommended Decision at 16 (12-2-11), adopted by Final Order (12-22-11). In Case No. 13-00231-UT, the Commission applied these six factors identified in Case Nos. 04-00315-UT and 11-00085-UT to consider the proposed purchase by TECO and the sale by Continental of all of the stock of NMGI, which owned all of the stock of New Mexico Gas Company. While Case Nos. 11-00085-UT and 13-00231-UT both involved stock purchases, the factors considered in those cases also apply to consideration of proposed mergers such as the one in this case.

Also to be considered are the following conditions that the Commission in past acquisition cases has attached to its approvals (but not all conditions in all cases), to ensure that an acquisition is in the public interest:

- *no adverse impact on utility's existing rates:* Case No. 3712, Recommended Decision at 23 (7-22-02), adopted by Final Order (8-20-02); Case No. 3103, Recommended Decision at 20 (1-10-00), adopted by Final Order (1-18-00);
- *maintain current offices for period of time:* Case No. 3103, Recommended Decision at 22; Case No. 04-00315-UT, Certification of Stipulation at 49; Case No. 08-00078-UT, Certification of Stipulation (11-24-08), adopted in relevant part by Final Order Partially Approving Certification of Stipulation at 106-08 (12-11-08), clarified by Order on Request for Clarification (3-30-10);
- *maintain employee wages and benefits:* Case No. 08-00078-UT, Certification of Stipulation at 108;
- *not recover transaction costs from ratepayers:* Case No. 3103, Recommended Decision at 22; Case No. 04-00315-UT, Certification of Stipulation at 42; Case No. 11-00085-UT, Recommended Decision at 27 (12-2-11);
- *hold customers harmless from negative impacts of transaction:* Case No. 2678, Recommended Decision at 85 (11-15-96), adopted by Final Order (1-28-97); Case No. 3103, Recommended Decision at 23; Case No. 3116, Recommended Decision at 40 (5-4-00), adopted by Final Order (5-9-00);
- *require utility to give Commission notice of its intent to pay dividends to the holding company:* Case No. 3103, Recommended Decision at 21; Case No. 3712, Recommended Decision at 20; Case No. 08-00078-UT, Certification of Stipulation at 30;
- *agreement by utility to not recover acquisition adjustment from ratepayers:* Case No. 3103, Recommended Decision at 20; Case No. 3712, Recommended Decision at 21; Case No. 04-00315-UT, Certification of Stipulation at 42; Case No. 08-00078-UT, Certification of Stipulation at 104; Case No. 11-00085-UT, Recommended Decision at 27;
- *Require utility to waive any claims of preemption as a basis for challenging the Commission's disallowance of costs:* Case No. 2678, Recommended Decision at 85; Case No. 3103, Recommended Decision at 21; Case No. 3116, Recommended Decision at 39; Case No. 3712, Recommended Decision at 21;
- *Prohibit utility from recovering increased costs of capital that may result from transaction:* Case No. 3103, Recommended Decision at 20; Case No. 3116, Recommended Decision at 40;
- *File Cost Allocation Manual:* Case No. 04-00315-UT, Certification of Stipulation 48;
- *Hold ratepayers harmless from increases in cost of replacement debt:* Case No. 11-00085-UT, Recommended Decision at 2;
- *Rate freeze:* Case No. 08-00078-UT, Certification of Stipulation at 26;

- *Agreement by acquiring company to not sell for period of time:* Case No. 08-00078-UT, Certification of Stipulation at 26;
- *Agreement by acquiring company to invest certain amount in utility for period of time:* Case No. 08-00078-UT, Certification of Stipulation at 26.

VIII. THE FINAL STIPULATED REGULATORY COMMITMENTS

In their Application, the Joint Applicants made 43 Original Regulatory Commitments in support of the Proposed Transaction, separated into the following five categories: (1) Economic Development and Community Commitments; (2) Rate and Capital Expenditure Commitments; (3) Ring-Fencing Commitments; (4) Local Control and Management Commitments; and (5) Employment Commitments. These Original Regulatory Commitments are listed in Exhibit AEG-3 to Andrew Gilbert's Direct Testimony.

Following the filing of the Application, settlement negotiations occurred in this case and in the parallel case before the Public Utility Commission of Texas (PUCT). These settlement negotiations resulted in 79 significantly expanded and strengthened Final Stipulated Regulatory Commitments, which appear in Exhibit A to the Stipulation. The 79 Final Stipulated Regulatory Commitments are categorized by the five categories in the Original Regulatory Commitments and the following new categories: (1) Duration of Final Stipulated Regulatory Commitments; (2) Governance Limits and Documentation; (3) Additional Capital Commitments; and (4) Other Conditions. There are therefore nine categories of Final Stipulated Regulatory Commitments. Reynolds Stip. at 9-10. The following discussion summarizes the Final Stipulated Regulatory Commitments by category. The Parties request that the Commission adopt the Final Stipulated Regulatory Commitments as conditions to approval of the Unopposed Stipulation. Stipulation, Exh. B at 14.

The Final Stipulated Regulatory Commitments agreed to in this case and the PUCT case are similar. Some of the commitments are unique to New Mexico. Tr. at 72 (Gilbert).

A. DURATION OF FINAL STIPULATED REGULATORY COMMITMENTS

This first category contains a single commitment that says that the Final Stipulated Regulatory Commitments become effective as of closing of the Proposed Transaction and will continue to apply unless and until altered by this Commission. Stipulation, Exh. A, ¶ 1. This commitment was not part of the Original Regulatory Commitments and was developed in PUCT negotiations. Reynolds Stip. at 10; Schichtl Stip. at 11.

B. GOVERNANCE LIMITS AND DOCUMENTATION

This second category requires adoption of a Delegation of Authority as soon as practicable after closing in a form substantially similar to the Delegation of Authority that is Attachment 1 to Exhibit A to the Unopposed Stipulation. The Delegation of Authority will establish that the sole authorized purpose of EPE is to provide retail and wholesale electric utility service and the sole authorized purpose of Sun Jupiter is to own EPE and perform activities reasonably necessary and appropriate to exercise such ownership. Stipulation, Exh. A, ¶¶ 2-3. This second category of commitments was developed in the PUCT case in response to issues raised regarding EPE's ability to act as an independent entity after closing. Schichtl Stip. at 11-12. These commitments are discussed further below in Section IX.

C. ECONOMIC DEVELOPMENT AND COMMUNITY COMMITMENTS

This third category contains the following commitments:

1. The Joint Applicants will dedicate \$100 million to promote economic development in EPE's service territory. Of that amount, \$20 million will be allocated to EPE's New Mexico service territory and disbursed through an independent fund to which Sun Jupiter will contribute \$1 million annually for 20 years, beginning December 15, 2020.

2. The Joint Applicants will maintain EPE's annual amount of charitable giving following the Proposed Transaction at EPE's average annual charitable giving level for the three-year period ending December 31, 2018, which is about \$1.2 million annually.
3. The Joint Applicants will maintain EPE's existing low-income assistance programs and evaluate potential methods to improve such programs.
4. The Joint Applicants will create or enhance programs that provide entry-level training focused on engineering, management and finance skills for the local labor force in collaboration with New Mexico State University, El Paso Community College and the University of Texas at El Paso.
5. The Joint Applicants will create apprenticeship programs for technical and professional positions for students in local high schools and colleges.
6. The Joint Applicants will continue and enhance utility supplier diversity by promoting the inclusion of minority, women, LGBTQ and veteran-owned businesses into EPE's supply chain.
7. The Joint Applicants will study and evaluate growth opportunities related to electric vehicles, distributed generation and battery storage in collaboration with the University of Texas at El Paso, El Paso Community College and New Mexico State University.
8. The Joint Applicants will support implementation and compliance with the New Mexico Energy Transition Act and Texas Renewable Portfolio Standards.
9. The Joint Applicants will report annually to the Commission on the status of efforts during the prior calendar year to add renewable energy to EPE's portfolio and assure compliance with the New Mexico Renewable Energy Act. The report will include a description of efforts to diversify the renewable energy resources considered and an explanation of what determinations were made and the basis of the determinations. Additionally, EPE will study energy market opportunities as they become available and

conduct a cost-benefit analysis of joining a regional energy imbalance market, including at least an analysis of joining California's ISO Western Energy Imbalance Market.

Stipulation, Exh. A, ¶¶ 10-18. These commitments were mostly included in the Original Regulatory Commitments, although additional commitments and changes and clarifications were made as the result of settlement negotiations. Reynolds Stip. at 11; Gilbert Stip. at 8-11.

D. RATE AND CAPITAL EXPENDITURE COMMITMENTS

This fourth category contains the following commitments:

1. A rate credit to EPE's New Mexico customers of \$8.7 million will be distributed in 36 monthly installments starting shortly after closing of the Proposed Transaction. This rate credit consists of the \$4.2 million initially proposed by the Joint Applicants and an additional \$4.5 million agreed to in settlement negotiations. EPE will not seek rate recovery of the credit. The Joint Applicants agreed to the additional \$4.5 million in recognition of the delay in EPE's filing of its general rate case in New Mexico from the originally anticipated filing date. Base rates established in EPE's next New Mexico general rate case will not be impacted by the rate credit. The parties agree that EPE will file no further request for delay in filing its New Mexico general rate case except for a possible request to extend the filing date to no more than 30 days beyond the 150 days allowed for a historical test year period consisting of the 12 months ending on December 31, 2019. The Joint Applicants did not submit a specific proposal for allocating the rate credit among EPE's New Mexico customers because EPE "considers allocation of the rate credit among customers to be a public benefit question more appropriate for the affected parties and the Commission to determine." Schichtl Supp. at 3-4. In response to a Bench Request, EPE provided an "illustrative" example of a reasonable allocation of the rate credit, which it emphasized was not a proposal by the Joint Applicants. The illustrative example allocates the rate credit among rate classes based on each class's

contribution to total base revenues. Dividing each class's credit by forecasted energy sales for the class produces a per kilowatt hour (kWh) rate credit factor. The credit factor would be adjusted annually for sales growth. The table on the next page shows, for the illustrative example, by rate class: (1) the percentage revenue allocator; (2) the rate credit factor; (3) the monthly bill for an average-use customer; and (4) the expected monthly rate credit for an average-use customer.

1		Base	Rate	Average	Monthly	
2	Rate Class	Revenue	Credit	Monthly	Rate	
3		Allocator	(\$/kWh)	Bill	Credit	
4	Residential Service	47.6%	0.001830	\$ 87.22	\$ 1.24	
5	Small General Service	13.8%	0.002399	\$ 786.90	\$ 12.77	See Note A
6	General Service	17.2%	0.001576	\$ 4,545.54	\$ 62.67	
7	Irrigation Service	2.6%	0.001617	\$ 525.25	\$ 7.10	
8	City and County					
9	Service	4.0%	0.001839	\$ 829.90	\$ 12.01	
10	Municipal Pumping	1.6%	0.001280	\$ 20,055.30	\$ 290.99	
11	Large Power Service	5.7%	0.001135	\$ 62,733.81	\$ 745.25	
12	Military R & D -					
13	WSMR	2.2%	0.001012	\$ 391,347.90	\$ 5,314.10	
14	Military R & D -					
15	HAFB	2.3%	0.000954	\$ 465,678.02	\$ 5,447.30	
16	Municipal Street					
17	Lights	0.2%	0.003106	\$ 1,936.72	\$ 28.72	
18	Area Lighting	0.8%	0.004218	\$ 26.27	\$ 0.49	
19	Seasonal Agricultural					
20	Processing	0.6%	0.002076	\$ 2,295.27	\$ 31.71	
21	Outdoor Recreational					
22	Lighting	0.1%	0.003746	\$ 302.69	\$ 8.19	
23	State University					
24	Service	1.3%	0.001046	\$ 234,363	\$ 3,162.23	
25		100.0%				

Note:

A. The Average Monthly Bill and Monthly Rate Credit amounts in the table above are for the Standard Rate. The Average Monthly Bill and Monthly Rate Credit amounts for the Alternate Rate are \$120.96 and \$1.77, respectively.

Schichtl Supp. at 5; Schict Supp. Stip. at 6. The expectation is that the Parties will discuss and attempt to identify an acceptable allocation method for the rate credit. After that, EPE will make a tariff filing to implement the rate credit. Gilbert Stip. at 12.

2. The Joint Applicants will not seek rate recovery of any acquisition premium or goodwill resulting from the Proposed Transaction.

3. The Joint Applicants will not seek recovery of transaction costs in EPE's rates.
4. EPE will continue to make minimum capital expenditures equal to EPE's current five-year budget for the five-year period beginning January 1, 2021, subject to the following adjustments: EPE may reduce capital spending due to conditions not under EPE's control, including, without limitation, siting delays, cancellations of projects by third parties, weaker than expected economic conditions, or if EPE reasonably determines that a particular expenditure would not be prudent.
5. EPE commits that it will not amortize or reduce the regulatory liabilities for excess accumulated deferred income taxes recorded as a result of the Tax Cuts and Jobs Act of 2017 until the amortization is reflected in rates, and EPE agrees that determination of the treatment of this amount will be addressed in EPE's next base rate case.

Stipulation, Exh. A, ¶¶ 19-24. These commitments were mostly included in the Original Regulatory Commitments, a primary exception being the amount of the rate credit. Reynolds Stip. at 12.

E. RING FENCING COMMITMENTS

This fifth category of Ring Fencing Commitments is discussed in below in Section X(E).

F. LOCAL CONTROL AND MANAGEMENT COMMITMENTS

This sixth category contains the following commitments:

1. EPE's existing headquarters will remain in El Paso, Texas for so long as IIF US 2 owns EPE.
2. EPE's Chief Executive Officer (CEO) and senior management will continue to have day-to-day control over EPE's operations, and senior management will continue to reside in the El Paso, Texas and Las Cruces, New Mexico vicinities.
3. EPE's local management will remain the primary point of contact for all regulatory, operational and community engagement matters.

4. EPE's post-closing Board of Directors will be comprised of 10 Directors, described below in Section IX.
5. The compensation of EPE directors will in no manner be tied to, reflect, or be related to the financial, operating or other performance of any entity or interest other than EPE.
6. The EPE Board of Directors will have the power to set the compensation and benefits for EPE directors, in the form and manner it directs, subject to the approval of Sun Jupiter.
7. EPE Board meetings will take place in Las Cruces, New Mexico at least once per year.
8. IIF US 2 will maintain a controlling ownership interest in EPE for at least 10 years post-closing.

Stipulation, Exh. A, ¶¶ 53-63.

G. EMPLOYMENT COMMITMENTS

This seventh category contains the following commitments:

1. For at least five years after closing, EPE will not implement any material involuntary workforce reductions or changes to wages, benefits and other terms and conditions of employment in effect before the Proposed Transaction.
2. EPE will honor the terms of its existing collective bargaining agreements.
3. EPE will enter into good faith bargaining with its represented employees during and after the term of the existing collective bargaining agreements to negotiate new bargaining agreements.
4. EPE will adhere to a Responsible Contractor Policy.
5. The compensation of EPE officers, managers and employees will in no manner be tied to, reflect or be related to the financial, operating or other performance of any entity other than EPE and Rio Grande Resources Trust II.

Stipulation, Exh. A, ¶¶ 64-68. The incremental benefit of these final commitments compared to the original commitments is that the final commitments commit EPE to a contractor policy and

separate compensation decisions from the financial condition of EPE's affiliates. Reynolds Stip. at 14.

H. ADDITIONAL CAPITAL COMMITMENTS

This eighth category contains the following commitments:

1. A majority of EPE directors, including at least one IIF US 2-level representative and four Independent and Disinterested Directors, must approve any capital or any expense budget.
2. If EPE management seeks approval of a capital project or a series of projects that would exceed the approved annual budget by more than 10%, such projects or series of projects must be approved by a majority of EPE's Board of Directors, including at least one IIF US 2-level representative and four Independent and Disinterested Directors.
3. The volumes and types of EPE equity and debt issuances will be determined by vote of the EPE Board of Directors including majorities of both the entire EPE Board of Directors and of its Independent and Disinterested Directors. No Sun Jupiter Entity (defined as entities between Sun Jupiter and IIF US 2) will have the power to alter or override such votes.
4. The General Partner of IIF US 2 will have the power to decline to make provision for such equity issuances as the EPE Board of Directors approves. If IIF US 2 declines to provide equity for a project that (a) EPE management has recommended, (b) the EPE Board has determined is in keeping with Good Utility Practice, and (c) such project is approved by a majority of EPE's Board of Directors, EPE is authorized to issue non-voting, non-convertible preferred equity at then prevailing market terms solely to secure the equity portion of a capital project subject to Commission approval to the extent required. EPE shall not sell a primary issuance of preferred equity to IIF US 2, J.P. Morgan, or any of their respective affiliates.

Stipulation, Exh. A, ¶¶ 69-72. These commitments are a result of the PUCT settlement negotiations. Reynolds Stip. at 15.

I. OTHER CONDITIONS

This ninth category contains the following commitments:

1. Neither EPE nor IIF US 2 nor IIF US 2's affiliates will assert before this Commission or a New Mexico court that the Commission is preempted under the Federal Power Act (e.g., under a FERC tariff) from making a determination regarding the cost recovery of affiliate costs sought to be allocated to EPE.
2. For a period of five years after the closing date of the Proposed Transaction, EPE will make annual reports to the Commission regarding its compliance with the terms stated in the order approving the proposed transaction.
3. EPE will report its actual system-level SAIDI and SAIFI statistics to the Commission.¹¹
4. If EPE and the Sun Jupiter entities seek to modify the final order entered in this case before five years after the date of the Final Order, then in any such proceeding, Commission Staff may hire independent consultants selected by the Commission and paid for by EPE and the Sun Jupiter Entities in an amount not to exceed \$300,000 per proceeding. EPE will not seek recovery of these costs.
5. EPE will continue to operate in the State of New Mexico as a public utility subject to the continuing jurisdiction of the Commission.
6. EPE shall file in this docket a copy of the Final Order from the PUCT within seven days of its issuance. If this Commission has yet to act on the Proposed Stipulation in this case when EPE files the PUCT Final Order, EPE and the Parties will have seven days to determine if the PUCT Final Order, taken in its totality, provides greater benefits to

¹¹ SAIDI is the System Average Interruption Duration Index and measures the duration of outages. SAIFI is the System Average Interruption Frequency Index and measures the frequency of outages. Tr. at 88 (Schichtl).

Texas ratepayers than what has been proposed in New Mexico and warrants any modifications to the Proposed Stipulation. If the Parties agree, the Proposed Stipulation will be modified by a stipulation addendum. If the Parties do not agree, then EPE and each party may, within ten days from the date the PUCT Final Order is filed, submit its comments and recommendations on the PUCT Final Order for consideration in any final action taken in this proceeding.¹²

7. EPE commits that it will comply with all service regulations and standards established by the Commission pursuant to NMSA 1978, Section 62-6-19. EPE further commits to working with the Commission to design solutions to improve current levels of quality of customer service and system reliability in accordance with prudent industry standards for as long as Sun Jupiter owns EPE.

Stipulation, Exh. A, ¶¶ 73-79. These commitments were the result of PUCT settlement negotiations. Reynolds Stip. at 15.

IX. PROPOSED POST-MERGER GOVERNANCE, MANAGEMENT AND EMPLOYEE COMPENSATION AND BENEFITS

If the Unopposed Stipulation is approved, EPE's post-closing Board of Directors will be comprised of ten Directors, of which:

- One will be EPE's Chief Executive Officer (CEO);
- Up to two will be IIF US 2-level representatives (members of the Infrastructure Investments Group); and
- **The remaining seven, including the Board's Chairperson, will satisfy the definition of New York Stock Exchange (NYSE) Independent Directors. No Independent Directors**

¹² On February 10, 2020, the Joint Applicants filed a Notice Regarding the Proposed Stipulation, giving notice that the Parties agree that no modification to the Proposed Stipulation is warranted based on the PUCT Final Order.

shall be a then-current officer of any IIF subsidiary. Of the seven NYSE Independent Directors:

- At least two will reside within EPE's service territory;
- At least two will be individuals who either served on EPE's Board of Directors immediately before the closing of the Transaction, are local business/community leaders or are from a university within EPE's service territory; and
- At least four will be "Disinterested."¹³ The initial terms of the Disinterested Directors will be staggered such that in each year no more than two Disinterested Directors will be up for renewal. A Disinterested Director may only be removed by majority vote of the remaining Disinterested Directors and cannot be removed by a shareholder vote.

Stipulation, Exh. A, ¶¶ 56, 58-59.

The requirement that four of the Independent Directors be "Disinterested" is the result of the PUCT settlement negotiations. This requirement strengthens the independence of EPE's Board of Directors. Reynolds Stip. at 14.

EPE's post-closing Board members will be elected by EPE's shareholders. After closing, EPE's direct shareholder will be Sun Jupiter and EPE's indirect shareholder will be IIF US 2. Wallace 2nd Supp. at 18-19. The persons who will appoint the EPE Board members on behalf of IIF US 2 will be a majority of the three persons who comprise IIF US 2's General Partner. JA Exh. 17. With the exception of the Disinterested Directors, the majority of these three persons will also have authority to remove EPE Board members.

The initial Disinterested Directors will be appointed by the shareholder and will be identified in a compliance filing made by EPE within 30 days after closing of the Proposed Transaction. Tr. 74 (Gilbert). After establishment of EPE's initial post-closing Board of

¹³ Disinterested Directors are Independent Directors who are also independent of IIF US 2 and its affiliates and J.P. Morgan, and have no material financial relationship with IIF US 2 and its affiliates and J.P. Morgan currently or within the last five years. Schichtl Stip. at 32-33.

Directors, the Disinterested Directors will be appointed by a majority of a committee comprised of the Disinterested Directors. Stipulation, Exh. A, ¶ 57.

If the Unopposed Stipulation is approved, IIF US 2 expects no changes in EPE's day-to-day operations. Mr. Gilbert said that "EPE will remain an independently operated, investor-owned regulated utility headquartered in El Paso, Texas." Gilbert Direct at 8-9. He further said that EPE's focus will remain on providing safe, clean, affordable and reliable service. *Id.* at 9.

According to Mr. Gilbert, IIF's established practice is to hold its portfolio companies as separate entities with individual governance structures, including standalone management teams integrated into local communities and boards of directors made up of a majority of independent directors. Each IIF portfolio company has its own Board of Directors and management team. *Id.* at 9-10, 15.

EPE's former President and CEO, Mary Kipp, resigned her position effective August 1, 2019, to become the President of Puget Sound Energy, Inc. and Puget Energy, Inc. The EPE Board appointed Adrian Rodriguez, Senior Vice President, General Counsel and Assistant Secretary of EPE, as interim CEO. JA Exh. 2 at 59. EPE witness Hirschi said that this change in CEOs was not due to the Proposed Transaction, but to Ms. Kipp's personal decision. Hirschi Direct at 27. At the January 16, 2020 hearing, Mr. Gilbert said that it was premature to say whether Mr. Rodriguez would remain CEO if the Unopposed Stipulation is approved. Tr. at 75.

As soon as practicable following closing of the Proposed Transaction, a Delegation of Authority declaring the duties of the EPE Board of Directors and Sun Jupiter shall be adopted, in a form substantially similar to the Delegation of Authority attached as Attachment 1 to Stipulation Exhibit A. The Delegation of Authority shall bind Sun Jupiter and EPE and shall be filed with this Commission. Stipulation, Exh. A at 1, ¶ 2. IIF US 2 acknowledges and accepts the Delegation of Authority. Stipulation, Exh. A, Att. 1 at 3.

Under the Delegation of Authority, the following matters (among others) are exclusively reserved to the EPE Board, and the EPE Board has no obligation to obtain Sun Jupiter's approval before taking actions on these matters:

- Cause EPE's CEO and EPE's senior management to continue to have day-to-day control over EPE's operations;
- Cause EPE's local management to remain the primary point of contact for all regulatory, operational and community engagement matters;
- **Appoint the EPE CEO and his or her executive officer direct reports, subject to the requirement that the IIF Representatives and at least four of the seven Independent Directors on the EPE Board approve these appointments as well.** The EPE Board shall have sole responsibility for appointing all other officers of EPE, provided that the EPE Board may delegate the appointment of specified officers to EPE management upon a majority vote of the EPE Board;
- Ensure that a majority of the entire EPE Board, including at least one IIF Representative and at least four of the seven Independent Directors, approve (1) any capital or any expense budget; and (2) any capital project or series of projects that would exceed the approved annual budget by more than 10%;
- Determine the volumes and types of EPE equity and debt issuances, subject to approval of the majorities of both the entire EPE Board and of its Independent and Disinterested Directors; and
- Issue non-voting, non-convertible preferred equity at then-prevailing market terms solely to secure the equity portion of a capital project (a) which EPE management has recommended; (b) which the EPE Board has determined is in keeping with Good Utility

Practice; (c) which has been approved by a majority of the EPE Board; and (d) for which IIF US 2 has declined to provide the equity.¹⁴

Stipulation, Exh. A, Att. 1 at 4-12.

Under the Delegation of Authority, the following matters (among others) require shareholder approval:

- After appointment of the initial EPE Board, appointing any future Director to the EPE Board except for Disinterested Directors;
- Setting the compensation benefits of EPE officers;
- Changing the number of directors that constitute the EPE Board;
- Removing any Director on the EPE Board except for Disinterested Directors;
- Changing the certificate of formation, by-laws or other EPE organizational documents;
- Issuing any debt by EPE that is not contemplated by the annual budget approved by the EPE Board; and
- Making (i) any decisions, commitments or actions related to entering into any merger, consolidation, amalgamation, share purchase or other business combination transaction, or any sale of all or substantially all of the assets of EPE; (ii) any decisions and actions that would reasonably be expected to lead to or result in (a) a material change in the nature of the business of EPE or (b) the carrying out by EPE of any business other than its current business as of the date on which the Proposed Transaction is approved; and (iii) taking any steps to wind up, terminate or dissolve the corporate existence of EPE or institute an EPE bankruptcy filing.

Id. at 13-16.

¹⁴ The General Partner of IIF US 2 would decide whether to provide equity. Tr. at 23, 29, 40 (Gilbert).

The Merger Agreement contains several agreements relating to employee compensation and benefits. First, Sun Jupiter will, and will cause EPE to, honor the terms of EPE's existing collective bargaining agreements. JA Exh. 1, § 6.10(c).

Second, for two years following the effective time¹⁵, Sun Jupiter will, and will cause EPE to, provide each EPE nonunion employee who continues employment with EPE as of the effective time with (1) the same or a better employment position in the same location as held by the EPE employee immediately before the effective time, unless such change in position or location is consented to by the EPE employee; (2) a base salary or wage rate that is no less favorable than that provided to the EPE employee immediately before the effective time; (3) aggregate incentive compensation opportunities that are substantially comparable, in the aggregate, to those provided to the EPE employee immediately before the effective time; and (4) employee benefits that are substantially comparable, in the aggregate, to those provided to the EPE employee immediately before the effective time. However, these protections will not alter the at-will employment relationship of Sun Jupiter and each EPE employee. *Id.*, § 6.10(a).

Third, for two years following the effective time, Sun Jupiter will, and will cause EPE to (1) maintain post-retirement arrangements that are no less favorable than those post-retirement welfare arrangements in place for EPE's current or former employees as of the effective time; and (2) provide each continuing EPE employee who experiences a termination of employment with EPE severance benefits that are no less favorable than those provided pursuant to agreed severance guidelines. *Id.*

Fourth, as soon as practicable following the effective time, but in no event later than March 15th following the year in which the effective time occurs, Sun Jupiter will, or will cause EPE to, pay each eligible EPE employee who remains employed at the time of payment an annual cash bonus for the closing year in an amount based on the better of target or actual

¹⁵ "The Effective Time" is the time the merger becomes effective. JA Exh. 1, § 1.02.

performance; provided that in the event the employment of any EPE employee is terminated following the effective time and before the payment of the annual bonus for the closing year by the EPE employee for good reason or by Sun Jupiter or a subsidiary for reasons other than cause, such EPE employee will be entitled to an annual bonus for the closing year payable in the same manner and at the same time as other bonuses for the closing year are payable, but pro-rated for the period during the performance year that the EPE employee was employed. *Id.*, § 6.10(b).

Fifth, with respect to all employee benefit plans of Sun Jupiter or EPE, each EPE employee's service with EPE will be treated as service with Sun Jupiter or EPE for all purposes, including determining eligibility to participate, level of benefits, vesting and benefit accruals, except (1) to the extent that such service was not recognized under EPE's Benefit Plan before the effective time; (2) for purposes of any defined benefit plan accruals or (3) to the extent that such recognition would duplicate benefits for the same period of service. *Id.*, § 6.10(e).

Additionally, Final Stipulated Regulatory Commitment No. 64 provides, for at least five years after closing, EPE will not implement any material involuntary workforce reductions or changes to wages, benefits or other terms and conditions of employment in effect before the Proposed Transaction. Stipulation, Exh. A, ¶ 64.

X. ANALYSIS

A. WHETHER APPROVAL OF THE PROPOSED TRANSACTION WOULD PROVIDE BENEFITS TO UTILITY RATEPAYERS

Whether a commitment is a benefit to ratepayers has been the subject of dispute. Case No. 13-00231-UT involved the proposed purchase by TECO and the sale by Continental of all of the stock of NMGI, which owned all of the stock of New Mexico Gas Company (NMGC). In that case, in prefiled testimony and in testimony at the hearing, the AG and Staff argued that not all

commitments made by the Joint Applicants should be considered “benefits” that would result from approval of the Proposed Transaction. Staff did not consider benefits to be continued features of the status quo. According to Staff in that case, benefits are improvements over the status quo, while hold harmless provisions are protections that ensure the status quo. Similarly, the AG viewed some commitments, not as benefits to ratepayers, but as “hold-harmless provisions,” meaning that ratepayers are no worse off than they would be in the absence of the transaction. Case No. 13-00231-UT, Certification of Stipulation at 54-55 (6-30-14), adopted by Final Order (8-13-14). The Commission in that case did not decide whether every commitment of the Proposed Transaction was a benefit, but found that the following features and commitments of the Proposed Transaction provided sufficient benefits to ratepayers to satisfy the Section 62-6-13 standard:

1. Bill credits;
2. A rate freeze;
3. TECO’s agreement to own NMGC for at least ten years;
4. TECO’s desire to own NMGC in light of Continental’s winding down of its utility operations and desire to sell NMGC; and
5. TECO’s sharing of best practices with NMGC.

Certification of Stipulation at 55-58.

In this case, Mr. Gilbert identified the following features and commitments of the Uncontested Stipulation as providing benefits to EPE customers:

1. IIF US 2 and Sun Jupiter’s commitment to long-term ownership of EPE;
2. EPE’s likely access to capital at lower cost;
3. The rate credit;
4. The economic development fund;
5. Maintenance of EPE’s current levels of charitable contributions;

6. Creation of new and enhanced programs to provide entry-level training for the local labor force; and
7. Creation of new or enhanced apprenticeship programs.

Gilbert Stip. at 32-37.

Mr. Dittmer identified the rate credit as a ratepayer-specific benefit of the Uncontested Stipulation. He identified the economic development funding commitment as a financial benefit “for EPE’s New Mexico service territory.” Dittmer Stip. at 28-30.

Mr. Reynolds identified the rate credit as the single tangible positive benefit to ratepayers. He believes that it is more likely than not that IIF US 2’s commitment to maintain a controlling interest in EPE for at least ten years is an intangible positive benefit to ratepayers to the extent any future dilution of IIF US 2’s indirect ownership interest in EPE remains subject to Commission review and approval. He views IIF US 2’s ownership of EPE as possibly more stable than EPE’s current form of ownership. Tr. at 98. Mr. Reynolds said that while the remaining commitments are constructive, his review suggests that they largely serve to address matters that would otherwise be moot in the absence of the Proposed Transaction. Reynolds Stip. at 17-19.

The bill credits are a known and quantifiable ratepayer benefit. Schichtl Direct at 13-14. They would not be given if the Unopposed Stipulation is not approved. Tr. at 87 (Schichtl). IIF US 2’s commitment to not sell its interest in EPE for at least 10 years after closing indirectly benefits ratepayers because it provides an incentive for IIF US 2 to effectively manage EPE over a longer-term horizon.

B. WHETHER APPROVAL OF THE PROPOSED TRANSACTION WOULD PRESERVE THE COMMISSION'S JURISDICTION/REQUEST FOR APPROVAL OF EPE'S GENERAL DIVERSIFICATION PLAN

One of the criteria that must be examined in determining whether to approve a transfer of ownership of a utility is whether the transfer will impair or limit the Commission's oversight of, and jurisdiction over, the services being provided. "In order to effectively exercise its statutory responsibilities, the Commission must have access to the books and records of not just the public utility itself, but also of the entities that exercise control over the utility." Case No. 08-00078-UT, Final Order Partially Approving Certification of Stipulation at 27, ¶ 60 (12-11-08).

A key means of preserving the Commission's jurisdiction is through the requirement in 17.6.450 NMAC (Rule 450) for Commission approval of a general diversification plan (GDP) before a public utility may engage in a Class II transaction. The Joint Applicants request Commission approval of EPE's GDP for EPE to engage in the Class II transaction of forming a public utility holding company. Lapsen Direct at 22.

The purpose of filing a GDP is to:

1. Assure reasonable and proper utility service at fair, just and reasonable rates;
2. Require reasonable access to the books and records of a utility and its affiliates so that such an assurance can be made;
3. Assure that appropriate cost allocations are made; and
4. Assure that no cross-subsidization occurs between the utility and an affiliated interest.

Rule 450.6.

Rule 450.10 lists the information and representations that a utility must include in a GDP. The Commission will approve a GDP if it contains the required information in detail acceptable to the Commission and if the Commission finds that approval is in the public interest. Approval is in the public interest if the Commission finds that the level of investment

appears reasonable and that it appears that a utility's ability to provide reasonable and proper utility service at fair, just and reasonable rates will not be adversely and materially affected by the Class II transaction and its resulting effect, and if the utility represents and the Commission, based upon such representations, finds that:

1. The books and records of the utility will be kept separate from those of nonregulated business and in accordance with the Uniform System of Accounts;
2. The Commission and its staff will have access to the books, records, accounts or documents of the affiliate, corporate subsidiary or holding company;
3. The supervision and regulation of the public utility will not be obstructed, hindered, diminished, impaired or unduly complicated;
4. If a holding company is formed, the utility will not pay excessive dividends to such holding company, and the holding company will not take any action which will have an adverse and material effect on the utility's ability to provide reasonable and proper service at fair, just and reasonable rates;
5. The public utility will not without prior approval of the Commission:
 - a. Loan its funds or securities or transfer similar assets to any affiliated interest; or
 - b. Purchase debt instruments of any affiliated interests or guarantee or assume liabilities of such affiliated interests;
6. All applicable statutes, rules or regulations, federal or state, have been or will be complied with;
7. When required by the Commission, the utility will have an allocation study performed by a consulting firm chosen by and under the direction of the Commission to determine whether there are any adverse effects of Class II transactions upon the utility; and
8. When required by the Commission, the utility will have a management audit performed by a consulting firm chosen by and under the direction of the Commission to determine whether there are any adverse effects of Class II transactions upon the utility.

The Commission may require modification of a GDP and may attach conditions to its approval to make the GDP consistent with the public interest or to avoid material and adverse effects on the utility's ability to provide reasonable and proper service at fair, just and reasonable rates. Rule 450.10(E).

Mr. Gilbert made, on behalf of IIF US 2, the representations required by Rule 450. Gilbert Direct at 41-46. EPE witnesses Hirschi and Schichtl made, on behalf of EPE, the representations required by Rule 450. Hirschi Direct at 43-46; Schichtl Stip. at 44-45. Mr. Reynolds testified that EPE's GDP complies with the requirements of Rule 450. Reynolds Stip. at 17. Mr. Dittmer and Mr. Reynolds recommend that the Commission approve the GDP. Dittmer Stip. at 35; Reynolds Stip. at 17.

Rule 450.10(B)(1) requires a GDP to identify each affiliate, corporate subsidiary, holding company or person which is the subject of the Class II transaction. The GDP attached to the Unopposed Stipulation identifies Sun Jupiter Holdings LLC as the holding company of EPE. Stipulation, Exh. B at 9. It does not identify IIF US 2 as a holding company of EPE. Rather, it identifies IIF US 2 as the "master partnership investing in Sun Jupiter." *Id.*

The PUA defines a "public utility holding company" as "an affiliated interest that controls a public utility through the direct or indirect ownership of voting securities of that public utility[.]" NMSA 1978, § 62-3-3(N) (2009). At the hearing, Mr. Gilbert acknowledged that IIF US 2 will become an indirect holding company of EPE and said that IIF US 2 and Sun Jupiter do not have a problem with amending the GDP to identify IIF US 2 as a public utility holding company of EPE. Tr. at 78-79. Mr. Reynolds agreed that IIF US 2 would become a public utility holding company of EPE and also did not object to amending the GDP to identify IIF US 2 as a public utility holding company of EPE.

In Case No. 08-00078-UT, the Commission considered whether to approve a stipulation providing for Public Service Company of New Mexico to sell its Gas Utility to New Mexico Gas Company (NMGC). NMGC acknowledged that the Commission would have access to its books

and records, but not necessarily the books and records of its parent (Continental Energy Systems LLC) or the private investment firm whose affiliates owned Continental (Lindsay Goldberg LLC). Final Order Partially Approving Certification of Stipulation, ¶ 59 (12-11-08). To ensure that it would have access to the books and records of Continental and Lindsay Goldberg, the Commission conditioned its approval of the stipulation on the parties' agreement that the Commission would have access to the books, records, accounts or documents of any NMGC affiliate to the extent the Commission deemed it necessary to investigate any matter before the Commission. *Id.*, ¶ 60.

EPE's GDP should be approved subject to modifying it to identify IIF US 2 as a public utility holding company of EPE. This modification will ensure preservation of the Commission's jurisdiction because the Commission has the authority to review the books and records of a public utility holding company, and the Commission has said that a public utility holding company could be regulated as a public utility. *E.g.*, Case No. 08-00078-UT, Certification of Stipulation at 126 (11-24-08), adopted in relevant part by Final Order Partially Approving Certification of Stipulation. With this modification, approval of EPE's GDP is in the public interest under the standards in Rule 450, and the Commission's jurisdiction over EPE will not be diminished if the Unopposed Stipulation is approved.

C. WHETHER EPE'S QUALITY OF SERVICE WOULD BE DIMINISHED IF THE PROPOSED TRANSACTION IS APPROVED

Mr. Gilbert said that IIF US 2 understands the obligation of a utility to its customers to provide reliable service. He said that IIF US 2 has a track record of investing in reliability and safety projects and looks forward to supporting EPE in its efforts to continue providing reliable service. Gilbert Direct at 45-46.

Mr. Schichtl said, “EPE’s ability and obligation to continue to provide reasonable and proper utility service at fair, just and reasonable rates will remain and not be adversely or materially affected by the Proposed Transaction and its resulting effects.” Schichtl Direct at 22.

Mr. Buraczyk believes that approval of the Proposed Transaction will not adversely affect how the Operations Division functions. Buraczyk Direct at 34. The Operations Division is responsible for (1) supplying power through generation or wholesale power purchases; (2) transmitting that power through EPE’s transmission system; (3) delivering that power to customers via the distribution system; and (4) performing these tasks safely, reliably and efficiently. *Id.* at 6-7. Among the evidence relied on by Mr. Buraczyk to support his belief are the following alleged benefits of approval of the Proposed Transaction: enhanced access to capital; job training and apprenticeship programs; a long-term investment horizon; access to expertise in renewables; and a commitment to the health and safety of employees, customers and local communities. *Id.* at 8. He also relied on the following Original Regulatory Commitments:

- EPE’s CEO and senior management will continue to have day-to-day control over EPE’s operations and senior management will continue to reside in the El Paso and Las Cruces areas.
- EPE’s local management team will remain the primary point of contact for regulatory, operational and community engagement matters.
- For at least five years post-closing, EPE will not implement any material involuntary workforce reductions or changes to wages, benefits and other terms and conditions of employment.
- EPE will honor the terms of its existing collective bargaining agreements.
- EPE will continue to make minimum capital expenditures equal to EPE’s current five-year budget for the five-year period beginning January 1, 2021, subject to adjustments.

Id. at 9-10. Mr. Buraczyk said that these commitments ensure that approval of the Proposed Transaction will not affect the amount or allocation of capital to meet growing customer demand. In fact, it is anticipated that EPE will have enhanced access to capital to invest in system safety and reliability. *Id.* at 13, 16. Mr. Buraczyk believes that if the Proposed Transaction is approved, EPE “can and will continue to successfully operate and maintain its system so that availability of service to customers remains at a reasonable level, consistent with EPE’s obligation as a regulated utility.” *Id.* at 33. EPE will continue to be subject to the rules imposed by this Commission, the Federal Energy Regulatory Commission, the Western Energy Coordinating Council and the North American Electric Reliability Corporation. *Id.* at 33, 35.

The commitments identified by Mr. Buraczyk are similar to those that the Commission has attached to its approvals of acquisitions. For example, in Case No. 08-00078-UT, NMGC and Continental made the following commitments, intended to ensure that NMGC would maintain the existing quality of service and a stable work force:

- To make average capital expenditures of \$21.6 million annually through the three-year rate freeze;
- To maintain corporate headquarters in Albuquerque for as long as Continental owned NMGC;
- To obtain Commission approval before outsourcing call center operations;
- To maintain, for three years after closing, PNM’s then current field offices and field service employees except for reductions due to attrition, voluntary severance, retirement or for cause;
- To offer wages, benefits and other terms and conditions of employment substantially comparable in the aggregate to those enjoyed by employees at closing; and
- To not sell NMGC nor NMGI for at least five years after closing.

Case No. 08-00078-UT, Certification of Stipulation at 106-08.

In Case No. 13-00231-UT, TECO and NMGC made the following commitments designed to ensure that NMGC’s quality of service would not decline as a result of the proposed acquisition:

1. To maintain 650 full-time positions in New Mexico for three years after closing;
2. To not eliminate any NMGC “customer-facing” positions for three years after closing except through attrition, retirement, voluntary severance or for cause;
3. To keep all existing gas field offices open for at least one year after closing and to not close any field offices without Commission approval;

4. To maintain NMGC's call center operations in New Mexico for at least one year after closing and to not move call center operations out of New Mexico without Commission approval;
5. To keep NMGC Gas Control in New Mexico for at least three years after closing;
6. To report to the Commission on a quarterly basis for three years after closing, the number of NMGC position reductions, by function;
7. To file annual reports, for three years after closing, that show NMGC's performance under certain performance metrics;
8. To keep NMGC corporate headquarters in New Mexico for as long as TECO owns NMGC; and
9. To invest a minimum of \$30 million on an average annual basis in the NMGC system as needed to ensure reliability and safety, until the issuance of a final order in NMGC's next general rate case.

Case No. 13-00231-UT, Certification of Stipulation at 61.

Finally, it should not be overlooked that EPE is required by statute to furnish "adequate, efficient and reasonable service." NMSA 1978, § 62-8-2 (1953). And, EPE is required to comply with detailed service standards for electric utilities contained in 17.9.560 NMAC and detailed residential customer service standards contained in 17.5.410 NMAC. The Commission may at any time issue an order to show cause if it believes that EPE is not complying with a provision of either Rule, 1.2.2.22 NMAC, and EPE may be fined for violating these Rules, NMSA 1978, § 62-12-4.

Many of the Final Stipulated Regulatory Commitments are for the purpose of preventing a decline in EPE's quality of service if the Unopposed Stipulation is approved, and no evidence shows that EPE's quality of service will decline if the Unopposed Stipulation is approved.

D. WHETHER APPROVAL OF THE PROPOSED TRANSACTION WOULD RESULT IN THE IMPROPER SUBSIDIZATION OF NON-UTILITY ACTIVITIES

A potential adverse consequence to ratepayers that can result when a standalone utility is acquired by, or merged with, another company, is an unjustifiable increase in rates because the utility enters into transactions with affiliates that do not result in the lowest long term cost of providing utility service. Dittmer Stip. at 25. Such affiliate transaction "abuse" can occur in the following ways:

1. Payments to affiliates for goods and services above market rates obtainable from non-affiliates;
2. Unnecessary or excessive purchases of goods and services from affiliates;
3. Using the favorable, relatively less risky financing capabilities of the utility to securitize the financing of more risky unregulated affiliate investments;
4. Permitting the utility, with its relatively risk-free lower cost financing, to own riskier unregulated utilities; and
5. Subsidization of unregulated affiliates through unfair or inequitable assignments and allocations of joint or common costs.

Id. at 26.

Commission Rule 450 contains requirements designed to prevent such abuses, and the Joint Applicants must comply with these requirements. However, the Joint Applicants have made commitments that require additional reporting, and, as necessary, require documentation explaining pricing policies or methods regarding affiliate transactions. *Id.* at 26-27.

A standard method to prevent improper subsidization of non-utility activities is through proper cost allocations, with the utility bearing the burden of proof to justify its allocation methods and factors and amounts allocated. Case No. 13-00231-UT, Certification of Stipulation at 65. The Commission has required the filing of a Cost Allocation Manual (CAM) in other cases to guard against the improper subsidization of non-utility activities. The purpose of a CAM is to formalize the collection of allocation methods into a book so that interested persons have notice of the methods. Case No. 3170, Recommended Decision at 24. In the future, if EPE's administrative and general functions are combined or merged with those of IIF US 2 or any IIF US 2 subsidiary or affiliate, EPE agrees to prepare and file a CAM with the Commission in its next general rate application. Stipulation, Exh. A, ¶ 44.

To guard against the improper subsidization of non-utility activities, the Commission has in other cases conditioned its approvals on restrictions relating to the payout of dividends. *See,*

e.g., Case No. 13-00231-UT, Certification of Stipulation at 66. The purpose of dividend-related conditions is to prevent funneling of a utility's earnings through a holding company to pay debts related to the holding company's diversified, non-regulated activities, and to ensure that the utility retains sufficient funds to operate a reliable and stable regulated utility operation. Case No. 3170, Recommended Decision at 29 (6-14-01), adopted in relevant part by Order Approving Formation of Holding Company (6-28-01); Case No. 3137, Recommended Decision at 28 (6-11-01), adopted in relevant part by Order Approving Formation of a Holding Company (6-28-01).

The Joint Applicants have agreed that, if the Unopposed Stipulation is approved, the Disinterested Directors on the EPE Board of Directors can prevent EPE from making any dividends or other distributions, other than contractual tax payments, if they determine in good faith that it is in the best interests of EPE to retain such amounts to meet the expected future requirements of EPE as follows:

- a. For so long as EPE's credit rating remains at BBB (Baa2) at two of the major credit rating agencies (Moody's, S&P and Fitch), no dividend shall be paid by EPE, except for contractual tax payments, unless such dividend is approved by a majority vote of the EPE Board of Directors, including at least two Disinterested Directors.
- b. If EPE's credit rating falls to BBB- (Baa3) at one of the major credit rating agencies, no dividend shall be paid by EPE, except for contractual tax payments, unless approved by a majority vote of EPE's Board of Directors including all four Disinterested Directors, until EPE's credit rating at two of the major credit rating agencies returns to BBB (Baa2), at which point the above provisions of subclause (a) apply.
- c. If EPE's credit ratings at two of the major credit rating agencies falls to BBB- (Baa3), no dividends shall be paid, except for contractual tax payments, until otherwise ordered by the Commission or EPE's credit rating at one of the major credit rating agencies returns to BBB (Baa2), at which point the above provisions of subclause (b) apply.

- d. If EPE's credit rating at one of the major credit rating agencies falls below BBB- (Baa3), no dividends shall be paid, except for contractual tax payments, until otherwise ordered by the Commission or EPE's credit rating returns to BBB- (Baa3), at which point the above provisions of subclause (c) apply.

Stipulation, Exh. A at 7, ¶ 27.

Additionally,

- EPE will suspend payment of dividends or other distributions, except for contractual tax payments, until otherwise allowed by the Commission and the PUCT, if issuance of the dividend or distributions, except for contractual tax payments, would cause the equity ratio of EPE's total capital for ratemaking purposes to fall below that established from time to time by the Commission and the PUCT for EPE ratemaking purposes; and
- EPE will limit its payment of dividends, except for contractual tax payments, to an amount not to exceed its net income.

Id., ¶¶ 47-48.

Any amendments to the dividend policy shall be approved by a majority of the EPE Board, including at least a majority of the Disinterested Directors. *Id.*, ¶ 28.

These restrictions on the payout of dividends, along with the additional reporting requirements and EPE's agreement to file a CAM in its next rate case if EPE's administrative and general functions are combined or merged with those of IIF US 2 or any IIF US 2 subsidiary or affiliate, provide sufficient assurance against the improper subsidization of non-utility activities.

E. WHETHER THERE ARE ADEQUATE PROTECTIONS AGAINST HARM TO CUSTOMERS

A potential harm to customers from approval of the Uncontested Stipulation is if an EPE affiliate suffers financial distress, such as a bankruptcy, and EPE suffers financial distress as well because of its relationship with the affiliate. Lapson Direct at 7.

The Joint Applicants initially proposed 22 “ring fencing” commitments designed to insulate EPE from any liabilities of Sun Jupiter, IIF US 2 and their affiliates. Ms. Lapson explained that ring fencing measures have been successfully used to protect utilities from risky parents or affiliates. Without adequate protections, she said, a utility’s credit worthiness and access to the debt market could be impaired if its owner is in default or bankruptcy. *Id.* at 21.

The Unopposed Stipulation contains 28 ring fencing commitments, some with subparts. The following are among the ring fencing commitments designed to maintain EPE’s financial independence from IIF US 2 and its affiliates:

1. EPE will maintain an existence separate and distinct from Sun Jupiter, IIF US 2 and any of its affiliates or subsidiaries.
2. EPE and IIF US 2 will take the actions necessary to ensure the existence of EPE’s stand-alone credit and debt ratings. EPE will except as otherwise approved by this Commission and the PUCT, be registered with at least two major nationally and internationally recognized credit rating agencies.
3. Restrictions on EPE’s payment of dividends depending on EPE’s credit ratings.
4. EPE will not guarantee the debt or credit instruments of Sun Jupiter, IIF US 2 or any other affiliate.
5. EPE’s assets, revenues or stock will not be pledged by Sun Jupiter, IIF US 2 or any of its affiliates or subsidiaries for the benefit of any entity other than EPE.
6. Neither EPE nor Sun Jupiter will enter into any inter-company debt transactions with IIF US 2 or any of its affiliates or subsidiaries unless approved by the Commission.

7. Neither EPE nor Sun Jupiter will lend money to or borrow money from IIF US 2 or any of its affiliates or subsidiaries.
8. EPE will not include in any of its debt or credit agreements cross-default provisions relating to Sun Jupiter or IIF US 2 or any of its affiliates or subsidiaries. Neither EPE nor Sun Jupiter will include in any of its debt or credit agreements cross-default provisions relating to the securities of IIF US 2 or any of its affiliates or subsidiaries.
9. Without approval of this Commission and the PUCT, Sun Jupiter will not incur any third-party debt in excess of the amount in place at closing, which will not exceed \$700 million. All third-party debt held at Sun Jupiter will be extinguished within five years of closing.
10. Neither EPE nor Sun Jupiter will seek to recover from EPE's customers any costs incurred as a result of bankruptcy of IIF US 2 or any of its affiliates.
11. Following closing, EPE's CEO and other senior management will hold no positions with IIF US 2 or any of its affiliates or subsidiaries.
12. IIF US 2 will obtain a non-consolidation legal opinion that provides that, in the event of a bankruptcy of IIF US 2, Sun Jupiter or any of its affiliates, a bankruptcy court would not consolidate the assets and liabilities of EPE with IIF US 2, Sun Jupiter or any of their affiliates.
13. It is envisioned that EPE will continue to operate independently as a standalone utility, and that no EPE executive, management or administrative and general functions will be combined with those of any IIF US 2 subsidiary or affiliate.
14. IIF US 2 will provide the Commission access to its books and records, as well as those of its applicable affiliates, as necessary to facilitate the Commission's audit or review of any affiliate transactions.

15. EPE will suspend payments of dividends if issuance of the dividends would cause the equity ratio of EPE's total capital for ratemaking purposes to fall below that established from time to time by this Commission and the PUCT for EPE ratemaking purposes.

16. The equity ratio of EPE's total capital for ratemaking will not fall below that established from time to time by this Commission for EPE ratemaking purposes.

Stipulation, Exh. A, ¶¶ 25-52.

In addition to the above commitments, EPE is to establish and maintain an arms-length relationship with Sun Jupiter and IIF US 2 and its affiliates consistent with the Commission's affiliate standards. EPE will continue to maintain the detailed, accurate and appropriate books and financial records of an independent public utility. Charges for goods, assets and services exchanged between EPE and IIF US 2's subsidiaries or affiliates, if any, will be clearly designated and separately maintained for review or audit.¹⁶ However, Mr. Gilbert does not anticipate EPE entering into transactions with affiliates if the Unopposed Stipulation is approved. Tr. at 81.

The ring fencing commitments added through settlement negotiations solidified the ongoing independence of EPE. Reynolds Stip. at 13; Schichtl Stip. at 24.

At the hearing, concern was raised about potential dealings between EPE and J.P. Morgan and EPE's independence from J.P. Morgan. See Tr. at 81-82. At the hearing, Mr. Gilbert was asked, "If . . . we find there's some protections that are there for affiliates that don't seem to apply to J.P. Morgan, would you find that to be a problem if we suggested that they do apply?" Mr. Gilbert responded, "No." Tr. at 82. Also at the hearing, the Hearing Examiner asked Mr. Gilbert whether the Final Stipulated Regulatory Commitments in this case are the

¹⁶ For illustration purposes, Novatus Energy (Novatus) is one of five portfolio companies wholly owned by IIF US 2. Novatus directly owns and operates 1.6 gigawatts of wind and solar capacity in the United States. Mr. Reynolds said that it is very likely that EPE will need to acquire significant amounts of renewable energy to meet New Mexico's Renewable Portfolio Standard, and Novatus appears to be an active developer of renewable energy generation. Staff understands that the ring fencing commitments will ensure that any relationship between EPE and Novatus will be on an arms-length basis and that Novatus would be unable to take advantage of the relationship to EPE's detriment. Reynolds Stip. at 13 n.4.

same regulatory commitments made in the stipulation filed before the PUCT. He responded that some commitments are unique to New Mexico, but that “all of the ring-fencing provisions, the protections relative to independence, those are all the same.” *Id.* at 72. However, the Hearing Examiner, on her own initiative, discovered the following ring-fencing provision in the PUCT stipulation and Order that is not one of the Final Stipulated Regulatory Commitments in this case:

Arm’s Length Relationship with JP Morgan. EPE and Sun Jupiter will maintain arms-length relationships with all affiliates and with all persons, entities, and interests directly or indirectly owned or controlled by JP Morgan. *The applicants agree to apply the Commission’s regulations regarding arm’s length transactions among affiliates to JP Morgan regardless of whether JP Morgan is an actual affiliate as defined under PURA.* Nothing in the foregoing is intended to prohibit IIF US 2’s management of Sun Jupiter, which is a member-managed entity.

Order at 23-24, ¶ 70(b) (emphasis added). No Party, in response to the Hearing Examiner’s Order on Briefing — which specifically asked whether JPMIM would become an affiliated interest of EPE if the Proposed Transaction is approved — brought this PUCT regulatory commitment to the Hearing Examiner’s attention. And, no Party asked that this provision be added to the Unopposed Stipulation as permitted by the Most Favored Nation Clause in Paragraph 78 of the Unopposed Stipulation. The Joint Applicants, in their Brief in Response to Order on Briefing, identified three Final Stipulated Regulatory Commitments in the Unopposed Stipulation designed to assure EPE’s independence from J.P. Morgan, but did not point out the much broader regulatory commitment in the PUCT stipulation and Order relating to EPE’s relationship with J.P. Morgan. This commitment, modified to replace “PURA” with “the Public Utility Act,” should be made a condition of approval of the Unopposed Stipulation in this case.

Another potential adverse consequence to ratepayers that can result when a standalone utility is acquired by, or merged with, another company, is an unjustifiable increase in rates as the acquiring company attempts to directly or indirectly recover the premium being paid above the standalone utility’s (1) investment in the net depreciated original cost book value of its Plant in Service; or (2) book value of common stock outstanding. Dittmer Stip. at 6-7.

Mr. Gilbert calculated the acquisition premium to be \$1,631,507,146. JA Exh. 16. The Joint Applicants will not seek recovery of the acquisition premium through rates. Stipulation, ¶ 20. Mr. Dittmer said that in a case such as this in which a utility does not seek direct or indirect recovery of an acquisition premium, state commissions have found a commitment by a utility to not recover the acquisition premium through rates to be sufficient protection to customers from an unreasonable increase in rates. Tr. at 92-93.

Because IIF US 2 and Sun Jupiter have pledged not to recover the acquisition premium through rates, their actual return on the purchase price, including the premium, can be expected to be lower than the targeted return on equity that the Commission establishes in an EPE base rate case. Furthermore, the incremental debt financing at the intermediary Sun Jupiter parent level would require interest payments beyond the interest payments required to service EPE's standalone debt. The combination of additional debt at the intermediary Sun Jupiter parent level and the inability to earn a return on the premium being paid for the EPE common stock could cause EPE/Sun Jupiter/IIF US 2 to experience financial stress in the forms of reduced internal cash flow and interest coverages. Mr. Dittmer said that while EPE may not legally be required to service debt at the Sun Jupiter level, "this Commission should have concerns for the undue pressure that Sun Jupiter could place upon EPE to extract dividends or other payments from EPE to ensure that the Sun Jupiter debt would also be fully serviced." Dittmer Stip. at 21.

Mr. Dittmer explained that with increased exposure to financial stress, it is important that EPE maintain a reasonable common equity ratio that can act as a shock absorber when the utility experiences the need to finance significant capital additions or experiences short term periods of shortfalls in achieving EPE's targeted regulatory return. With the increased exposure to financial stress created by the inability to earn a return on the premium being paid for EPE common stock and the additional debt financing at the Sun Jupiter level, Mr. Dittmer said it becomes imperative that EPE be able to raise common equity or restrict common stock dividends if and when its standalone common equity ratio begins to fall below reasonable

industry standards. Several of the ring fencing commitments ensure these conditions. According to Mr. Dittmer, among the most important are those that (1) limit EPE from making dividend payments to its parent when its standalone credit ratings have fallen to marginally acceptable industry standards; (2) require majority approval of EPE's Independent and Disinterested Directors of the volumes and types of EPE equity and debt issuances; and (3) allow EPE to issue non-voting, non-convertible preferred equity if IIF US 2 should reject a request to provide equity funding to EPE. *Id.* at 22-23.

Another potential adverse consequence to ratepayers that can result when a standalone utility is acquired by, or merged with, another company, is an unjustifiable increase in rates as the acquiring company attempts to directly or indirectly recover transaction costs of the acquisition or merger. *Id.* at 7. The estimated transaction costs of the Proposed Transaction are \$93 million. *Id.* at 16. No portion of this amount is being paid to J.P. Morgan or the IIG. Tr. at 27-28 (Gilbert). The Joint Applicants will not seek recovery of the transaction costs of the Proposed Transaction through rates. Stipulation, Exh. A, ¶ 22. Mr. Dittmer said that in a case such as this in which a utility does not seek direct or indirect recovery of transaction costs, state commissions have found a commitment by a utility to not recover transaction costs through rates to be sufficient protection against harm to customers from an unreasonable increase in rates. Tr. at 92-93.

With the addition of the regulatory commitment relating to EPE's relationship with J.P. Morgan, the Joint Applicants' commitments to not recover the acquisition premium or transaction costs through rates, along with the other ring fencing commitments, provide adequate protections against harm to customers if the Unopposed Stipulation is approved.

F. QUALIFICATIONS AND FINANCIAL HEALTH OF IIF US 2

As of June 30, 2019, IIF, through its three master holding partnerships, owned a portfolio with a gross asset value over \$25 billion across 19 portfolio companies. IIF's net asset

value as of that date was about \$12.2 billion. For the 12 months ending June 30, 2019, IIF received \$5.4 billion in new commitments and reinvested distributions from investors and invested about \$2.8 billion of equity in new acquisitions and into its existing portfolio companies. Gilbert Direct at 15. Over 60% of net capital invested since 2013 has been deployed through existing portfolio company investments to support growth, safety, reliability, compliance and other capital expenditure initiatives. In 2018, this figure was about 80%. *Id.* at 23. IIF's current leverage consolidated across its portfolio companies is 52%. *Id.* at 40. As of June 30, 2019, IIF had raised \$16.6 billion of capital from investors since its inception in 2006, relative to \$1.9 billion in redemptions paid over that time. In 2018, IIF raised \$4.1 billion in capital relative to \$421 million in redemptions, a 9.8x multiple. IIF has access to a \$2 billion credit facility, none of which was drawn down as of June 30, 2019. As of June 30, 2019, the total capital available to be invested by IIF was about \$6.1 billion. All of the capital available to the IIF umbrella is available to be deployed through IIF US 2. *Id.* at 41. Mr. Gilbert said, "This track record of stable, consistent capital inflows from a broadly diversified and growing investor base should provide confidence in IIF US 2's financial health and ongoing ability to access and provide equity capital to Sun Jupiter and EPE." *Id.*

IIF has investments in six utility companies in the United States and Western Europe, which collectively serve over 11 million electric, gas, water and heating customers. As of June 30, 2019, 29% of IIF's investments were in utilities and distribution companies. IIF also owns renewable and natural gas power generation assets, including interests in more than 3.6 gigawatts of gross generating capacity in the United States. *Id.* at 15-16.

IIF US 2 has invested in two regulated utilities in the United States: (1) Summit Utilities Inc. (Summit), a Colorado-based company with regulated natural gas distribution subsidiaries operating over 5,400 miles of pipeline in Arkansas, Colorado, Maine, Missouri and Oklahoma; and (2) SouthWest Water Company (SWWC), a water and wastewater company operating in Alabama, California, Oklahoma, Oregon, South Carolina and Texas. *Id.* at 19.

Summit serves over 100,000 customers. Since IIF US 2 acquired Summit, Summit has acquired and integrated three utilities and a greenfield expansion project, resulting in nearly \$675 million of IIF capital invested since 2013 in growth activities. In addition to growth expenditures, IIF US 2 supports investments in capital projects. For example, following Summit's acquisition of Arkansas Oklahoma Gas (AOG), Summit, with IIF US 2's support, decided to preserve AOG's Fort Smith office, retain AOG's management team and create additional jobs through its investments in the AOG system, which included significant and accelerated system integrity and reliability improvements. Before Summit's acquisition of AOG, spending on pipeline integrity projects was about \$2.2 million during AOG's fiscal year ending 2016. In 2019, Summit expects to spend \$14.9 million on pipeline safety enhancements in the AOG system in accordance with prudent utility investment standards. *Id.* at 19-20.

SWWC's water and wastewater systems in Texas serve 106,800 and 29,200 customers, respectively. SWWC operates over 120 water systems and 16 sewer systems in Texas, which are regulated by the PUCT and several cities. SWWC employs 235 persons in Texas and has invested \$49 million in Texas over the past five years. The team intends to spend over \$71 million over the next five years in new investments in Texas. *Id.* at 20.

Mr. Gilbert said that IIF US 2 is a long-term investor in utility businesses because, unlike most private equity funds, IIF is not a closed-ended vehicle and therefore does not need to exit an investment after a pre-defined holding period. Instead, he said, IIF continually seeks to raise new capital which it uses to, among other things, provide ongoing financing for the long-term capital requirements of its portfolio companies. He further said that, unlike the public equity markets that focus on quarterly returns, IIF has a long-term approach to its investments. He advised, "This long-term hold philosophy should give comfort to EPE's local communities and the Commission that IIF is a dedicated, long-term partner." *Id.* at 12-13.

IIF has never invested in a speculative derivative and doing so would require the General Partner's approval. Wallace 2nd Supp. at 3-4. IIF also has never invested in any asset it

considered a “troubled infrastructure asset,” defined as an asset that is experiencing material operational or financial difficulties or other material difficulties at the time of investment. *Id.* at 12. IIF has never divested a portfolio company. *Id.* at 15.

IIF targets a return of 8% to 12% net of fees and taxes. The inception to date net return as of June 30, 2019 was 5.8% on an annualized basis. The lowest net return for a calendar year was -5.9% in 2009, and the highest was 9.2% in 2015. Because IIF was formed in 2006, certain assets were acquired just prior to, and materially impacted by, the global financial crisis of 2007 to 2009. Nevertheless, IIF was able to continually raise capital and satisfy investor redemptions throughout the financial crisis. *Id.* at 9-10, 13-14.

To Ms. Wallace’s knowledge, none of the three master partnerships comprising IIF has been the subject of any lawsuit or regulatory investigation, inquiry or action other than (1) routine audits by regulators; and (2) EPE shareholder lawsuits in connection with the Proposed Transaction in this case. *Id.* at 10.

IIF uses reasonable efforts to ensure that its maximum aggregate indebtedness does not, on average over a fiscal year, exceed 75% of IIF’s gross asset value. The straight average inception to date aggregated indebtedness for IIF as of June 30, 2019 was 57% of IIF’s gross asset value. As of June 30, 2019, the aggregate indebtedness for IIF was 52%. The highest for a quarter was 66% as of December 31, 2007. The lowest for a quarter was 36% as of June 30, 2007. *Id.* at 11. The level of debt of each IIF portfolio company varies and is determined by the portfolio company’s management in consultation with its board of directors and in accordance with industry averages. The average leverage across IIF’s portfolio companies was 52% as of June 30, 2019. *Id.* at 15.

XI. REQUEST FOR VARIANCES FROM 17.6.450.10 AND 17.6.450.13 NMAC

Rule 450.10(B) requires a GDP to include:

- name, home office address, and chief executive officer of each affiliate;
 - anticipated capital structure of affiliates;
 - contemplated annual and cumulative investment in each affiliate for the next five years;
- and
- an explanation of how the affiliates(s) will be financed, by whom, and the type and amounts of capital or instruments of indebtedness.

Rule 450.13 requires that, following approval of a GDP, a utility must provide to the Commission, unless otherwise ordered, a verified annual report covering the last calendar year to be filed as an addendum to the annual report required by 17.3.510, 17.3.610 or 17.12.720 NMAC, which shall include:

- an explanation and description of all affiliates, their relationship to each other and the utility, the types of business in which they are involved, and a listing of their exact names and home office addresses;
 - the total investment in each affiliate;
 - the names of the officers and managers of each affiliate;
 - the most recent balance sheet and income statement from each of the utility's affiliates;
- and
- the end-of-year consolidated capital structure of the utility's affiliates.

The Joint Applicants request variances from the reporting requirements of Rule 450, Subsections 10 and 13, for any affiliated interest that is not (i) a portfolio company owned by IIF US 1 or IIF US 2 or (ii) a special purpose entity owned by IIF US 1 or IIF US 2 that is a regulated public utility. Stipulation, ¶ 11. If the requested variances are granted, the reporting

requirements would apply only to EPE affiliates that are portfolio companies owned by IIF US 1 and US 2 and each of their special purpose entities that are public utilities subject to regulation and supervision by a state or federal agency. Gilbert Stip. at 4, 32.

In support of the requested variances, Mr. Gilbert explained that IIF's three partnerships own 19 portfolio companies and each portfolio company owns special purpose entities. The special purpose entities typically are legal entities that do not have employees or independent management but are governed at the portfolio company level. In total, there are hundreds of these special purpose entities. *Id.* at 30.

The Joint Applicants believe that there is little value to the Commission in obtaining a list of the hundreds of special purpose entities because the control and management of the special purpose entities is at the portfolio level and there is little, if any, information on the officers and senior management of the special purpose entities to provide. They further state that the ring fencing commitments contained in the Final Stipulated Regulatory Commitments are sufficient to achieve the objectives of Rule 450. *Id.* at 30-32. The other Parties concur in granting of the requested variances. Stipulation, Exh. A, ¶ 11. Mr. Gilbert emphasized that if any affiliate engages in a transaction with EPE, the Joint Applicants will comply with Rule 450 requirements; the Joint Applicants "are only seeking to avoid having to make annual filings about entities that will not impact EPE in any way." Gilbert Stip. at 32.

The requested variances should be granted.

XII. HEARING EXAMINER'S RECOMMENDATION

The analysis in Section X shows that the Unopposed Stipulation, subject to the Final Stipulated Regulatory Commitments, the modification to the GDP and the addition of the regulatory commitment relating to EPE's relationship with J.P. Morgan, is fair, just and reasonable and in the public interest and should be approved. In summary, the analysis shows that approval of the Unopposed Stipulation will generate a quantifiable benefit — the bill credit

— and an unquantifiable benefit — IIF US 2’s commitment to not sell its interest in EPE for at least 10 years after closing — to EPE customers. No evidence shows that EPE’s quality of service would fall under IIF US 2/Sun Jupiter ownership; in fact, it is in IIF US 2 and Sun Jupiter’s best interest to continue EPE’s good quality of service and work well with this Commission. In any event, IIF US 2 and Sun Jupiter have made numerous commitments designed to ensure that approval does not cause a deterioration in EPE’s quality of service. The Joint Applicants have made commitments that the Commission has viewed in other cases as ensuring no loss of Commission jurisdiction and protecting customers against harm.

The Unopposed Stipulation is the result of intensive litigation and negotiation among knowledgeable parties represented by experienced and capable counsel. The Intervenors, all of whom are Parties to the Unopposed Stipulation, include representatives for most parties who typically intervene in EPE rate cases. These parties represent substantially all of EPE’s major rate classes and large governmental customers, Schichtl Stip. at 5-6, along with residential and small business customers, who are represented by the AG.¹⁷ Staff, which represents the public interest¹⁸, is too a Party to the Unopposed Stipulation. The Final Stipulated Regulatory Commitments, developed in settlement negotiations before this Commission and the PUCT, provide customers with substantially greater benefits and protections than the Original Regulatory Commitments.

The Unopposed Stipulation does not violate any important regulatory principle or practice. The Final Stipulated Regulatory Commitments include many provisions designed to protect traditional regulatory principles and practices. Reynolds Stip. at 24; Schichtl Stip. at 7.

¹⁷ NMSA 1978, § 8-5-17(A) (1998).

¹⁸ *Id.*, § 8-8-12(C) (2003).

XIII. FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Hearing Examiner recommends that the Commission **FIND AND CONCLUDE** as follows:

1. All findings of fact and conclusions of law contained in all Sections of this Amended Certification of Stipulation are adopted as findings of fact and conclusions of law of the Commission.
2. Reasonable, proper and adequate notice of this case has been provided.
3. The Commission has jurisdiction over the parties and the subject matter of this case.
4. If modified in accordance with Finding of Fact and Conclusion of Law Nos. 5 and 6, the Unopposed Stipulation, subject to the Final Stipulated Regulatory Commitments, is fair, just and reasonable and should be approved. The Unopposed Stipulation is Exhibit 1 to this Amended Certification of Stipulation.
5. The General Diversification Plan, attached as Exhibit B to the Unopposed Stipulation, should be modified to identify IIF US 2 as a public utility holding company of EPE.
6. The following regulatory commitment should be added to the Final Stipulated Regulatory Commitments in Exhibit A to the Unopposed Stipulation:

Arm's Length Relationship with JP Morgan. EPE and Sun Jupiter will maintain arms-length relationships will all affiliates and with all persons, entities, and interests directly or indirectly owned or controlled by JP Morgan. The applicants agree to apply the Commission's regulations regarding arm's length transactions among affiliates to JP Morgan regardless of whether JP Morgan is an actual affiliate as defined under the Public Utility Act. Nothing in the foregoing is intended to prohibit IIF US 2's management of Sun Jupiter, which is a member-managed entity.

XIV. DECRETAL PARAGRAPHS

The Hearing Examiner recommends that the Commission order as follows:

- A. The findings, conclusions and rulings contained in this Amended Certification of Stipulation are adopted and approved as findings, conclusions and rulings of the Commission.

B. The Unopposed Stipulation, subject to the Final Stipulated Regulatory Commitments, and if modified consistent with Finding of Fact and Conclusion of Law Nos. 5 and 6, is approved.

C. If the Signatories agree to amend the Unopposed Stipulation consistent with Finding of Fact and Conclusion of Law Nos. 5 and 6, they shall file an amended Unopposed Stipulation within five business days of issuance of the Final Order.

D. The Joint Applicants shall file in this docket the adopted Delegation of Authority within ten business days of its adoption.

E. The Joint Applicants' request for variances from 17.6.450.10 and 17.6.450.13 NMAC are granted.

F. The Joint Applicants shall notify the Commission via a letter filed in this docket of any change in ownership of IIF US 2 GP within ten business days of a change in ownership.

G. Within 30 days after closing of the Proposed Transaction, the Joint Applicants shall make a filing in this docket that identifies the Disinterested Directors.

H. Within five business days of closing of the Proposed Transaction, the Joint Applicants shall make a filing in this docket that notifies the Commission of the closing.

I. The Joint Applicants' Unopposed Motion to admit into evidence the Affidavit of Andrew Gilbert is granted. Mr. Gilbert's Affidavit is admitted into evidence as Joint Applicants' Exhibit 17.

J. This Order is effective immediately.

K. This Docket is closed.

ISSUED at Santa Fe, New Mexico on February 12, 2020.

NEW MEXICO PUBLIC REGULATION COMMISSION



Carolyn R. Glick
Hearing Examiner