BEFORE THE MINNESOTA OFFICE OF ADMINISTRATIVE HEARINGS
600 North Robert Street
St. Paul, Minnesota 55101

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION
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MPUC Docket No. E-015/PA-24-198
OAH Docket No. 25-2500-40339

In the Matter of the Petition of Minnesota Power for Acquisition of ALLETE by Canada Pension Plan Investment Board and Global Infrastructure Partners

REPLY BRIEF OF THE OFFICE OF THE ATTORNEY GENERAL— RESIDENTIAL UTILITIES DIVISION

May 29, 2025

TABLE OF CONTENTS

The Office of the Attorney General – Residential Utilities Division (OAG) submits this Reply Brief in response to the initial briefs of ALLETE, Inc. and the Partners (collectively, "the Petitioners"). The Petitioners urge approval of the Partners' proposed acquisition of ALLETE—along with its largest division, the regulated utility Minnesota Power—based on claims that ALLETE can no longer finance its capital needs on the public market. The Petitioners argue that the acquisition would result in no harm or material changes other than giving ALLETE access to the Partners' capital.

The Administrative Law Judge and the Commission should view these claims with skepticism. First, contrary to Petitioners' insistence that the acquisition is about furthering customer interests, the record demonstrates that the acquisition's primary purpose is to further private financial interests. Second, Petitioners' claims about the acquisition's harms and benefits should be carefully scrutinized given their witnesses' interest in seeing the acquisition approved. Third, ALLETE's outsized capital forecast, on which the acquisition is premised, is uncertain and likely overstated. Fourth, objective evidence in the record contradicts Petitioners' self-serving claims that relying on the public market is too risky. Finally, the Petitioners' theory that any potential harms can be dismissed due to the Commission's continuing oversight of Minnesota Power reflects an unreasonable interpretation of Minnesota law and ignores that any additional burden on regulation imposed by the acquisition would increase the risk of bad outcomes for ratepayers.

I. THE PROPOSED ACQUISITION IS PRIMARILY ABOUT FURTHERING PRIVATE FINANCIAL INTERESTS.

ALLETE claims to have had a "laser focus on the needs of customers" in pursuing the proposed acquisition.[1] ALLETE further asserts that it "sought out, narrowed down to, and

[1] ALLETE Br. at 1.

ultimately chose partners with the financial capability, dedication, stable operations, commitment to state regulation, aligned vision, and commitment to ALLETE as it exists today."[2] The Partners similarly suggest that ALLETE carefully selected them as "the right fit."[3] The record does not support these contentions. Instead, the record establishes that the proposed acquisition is primarily about monetizing the value of Minnesota Power's protected monopoly for the benefit of private interests—the interests of ALLETE's current shareholders on the one hand and of the Partners and their investors on the other.

For ALLETE, pursuing the transaction was about maximizing value to its shareholders.[4] Its concern for customers' interests was not to affirmatively benefit them but merely to avoid harming them.[5] Throughout the process, ALLETE's board was focused on finding a buyer that could pay a substantial premium.[6] It was on this basis, and this basis alone, that ALLETE narrowed down the field of potential buyers to just two—GIP and CPP.[7] After narrowing down the field to the Partners, ALLETE continued to bargain for a higher premium.[8] It was not until after the Partners had offered a satisfactory premium that ALLETE negotiated additional commitments related to employee matters, regulatory matters, and post-closing governance.[9] ALLETE did not attempt to secure a commitment from the Partners to fund Minnesota Power's

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[2] *Id.* at 1–2.
[3] Partners Br. at 1.
[4] *See* Ex. MP-1, attach. L at 41 (describing board's practice of regularly considering ways to "maximize value to shareholders" and other, unspecified stakeholders).
[5] *See id.* at 42 (describing board's discussion with management of "the implications of a possible transaction, including regulatory approvals and the importance of ensuring that a transaction would not negatively impact the Company's customers").
[6] *See id.* (noting that following initial outreach to pension and infrastructure funds, J.P. Morgan updated ALLETE on "their ability to pay a premium").
[7] *See id.* at 43–44 (relating how parties "A," "B," "C," and "D" dropped out due to inability to reach a sufficient valuation premium).
[8] *See id.* at 49–50 (describing ALLETE's rejection of Partners' first two offers).
[9] *See id.* at 52–53.

capital needs until intervenor testimony made it appear that doing so would improve the chances for regulatory approval.[10]

For the Partners, the acquisition is about balancing their portfolios and maximizing risk-adjusted returns. The Partners have been up-front about this. According to Partner witness Bram, "The regulated nature of Minnesota Power is attractive to GIP because it will provide for a stable stream of returns on the significant investments that must be made in the coming years."[11] This stable stream of returns would help balance the Partners' portfolios.[12] Partners' ultimate goal is not to help improve Minnesota Power's service or achieve the energy transition but to maximize risk-adjusted returns. As witness Bram states, "notwithstanding current investment plans or statutory or regulatory requirements," the Partners' investment decisions for Minnesota Power will be made "based on an assessment of the risk of the given investment and the expectation of the return required for and available from that investment."[13]

Investor-focused concerns permeate the Petitioners' advocacy in this proceeding. In response to the OAG's suggestion that ALLETE could mitigate its capital need by buying more power from third parties, ALLETE protested that doing so "would limit earnings growth prospects for the Company's current and prospective investors."[14] Furthermore, in response to the Department's testimony that ALLETE can obtain necessary equity funding in the public markets, ALLETE countered that "issuing a substantial amount of shares at very low prices . . . would

[10] Tr. vol. 1 at 231–32 (Scissons).
[11] Ex. MP-14 at 31–32 (Bram Direct).
[12] Ex. MP-33 at 33 (Bram Rebuttal).
[13] Ex. MP-14 at 23 (Bram Direct).
[14] Ex. MP-29 at 23 (Taran Rebuttal).

reduce the value of ALLETE to the detriment of our existing shareholders."[15] These arguments do not suggest a strong interest by ALLETE in mitigating its capital needs for customers' benefit.[16]

The Partners also take up the cause of ALLETE's current shareholders, echoing ALLETE's concern that "issuing millions of additional shares on public markets could have a negative impact on shareholders."[17] The Partners even assert that the impact on existing shareholders of new share issuances "must be considered" in determining whether the proposed acquisition is in the public interest,[18] relying on an inapposite case. The Partners cite *In re Request of Interstate Power Company* for the proposition that "the Commission's charter [is] 'balancing the interests of the utility companies, their shareholders, and their customers.'"[19] This requirement to balance interests, however, comes from Minnesota Statutes section 216B.16, subdivision 6, which pertains to the Commission's exercise of ratemaking powers.[20] But section 216B.50 requires a determination that the acquisition is "consistent with the public interest," not simply to balance public and private interests.

The primary purpose of the proposed acquisition is to maximize value for ALLETE's shareholders and the Partners. The ALJ and the Commission should reject ALLETE and the Partners' attempt to spin the acquisition as being about customers' interests or finding a buyer who the "right fit" for Minnesota Power.

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[15] Ex. MP-29 at 18 (Taran Rebuttal).
[16] Ex. OAG-402 at 6 (Lebens Surrebuttal).
[17] Partner Br. at 29.
[18] *Id.*
[19] *Id.*, n.120 (citing 574 N.W.2d 408, 411 (Minn. 1998)).
[20] *See* 574 N.W.2d at 411 (citing Minn. Stat. § 216B.16, subd. 6); Minn. Stat. § 216B.16, subd. 6 ("The commission, in the exercise of its powers under this chapter to determine just and reasonable rates for public utilities, shall give due consideration to the public need for adequate, efficient, and reasonable service and to the need of the public utility for revenue sufficient to enable it to meet the cost of furnishing the service . . . .").

II. IN ASSESSING THE CREDIBILITY OF THE PETITIONERS' WITNESSES, THE ALJ AND THE COMMISSION SHOULD CONSIDER THEIR BIASES AND OTHER SHORTCOMINGS.

Despite failing to challenge the qualifications of any intervenor witnesses, the Partners now argue that these witnesses' testimony should be discounted because they lack sufficient training or experience.[21] The Partners unfavorably contrast these witnesses with Petitioners' witnesses, who they claim have "substantial relevant experience" in utility finance.[22] But the Petitioners' key witnesses have their own credibility problems that the ALJ and Commission need to consider in weighing their testimony. First, witnesses employed by the Petitioners are personally invested in the outcome of this proceeding, leading them to make overstated claims that benefits will occur, but harms will not. Several ALLETE witnesses have other credibility issues. Finally, the outside consultants hired by Petitioners to supply after-the-fact justifications for the transaction have not evaluated a core driver of the acquisition—ALLETE's stated capital need.

All of the Petitioner witnesses are personally invested, to varying degrees, in the outcome of this proceeding. Partner witnesses Bram and Alley are GIP and CPP's principals for the deal[23] and therefore have a strong personal interest in seeing it approved. ALLETE witnesses Cady, Taran, and Scissons are likewise invested in the acquisition's approval because they were involved in pursuing the acquisition[24] or securing its approval through this proceeding and **[TRADE SECRET DATA BEGINS]** [redacted] **[TRADE SECRET DATA ENDS]**[25]

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[21] *See* Partners Br. at 14–15, 31.
[22] Partners Br. at 37.
[23] *See* Ex. LPI-1005, DOC IR 0011.02 Attach HCTS at 14–18 of PDF.
[24] See Ex. MP-1, attach. L at 43, 50, 52 (relating Jeff Scissons' involvement in negotiations).
[25] Ex. DOC-318 at 2.

These witnesses' biases manifest as overconfident claims about what the future holds if the proposed acquisition is approved. For example, ALLETE witness Cady asserts that the proposed acquisition "*will not* result in negative impacts for customers or on Minnesota Power's ability to provide safe and reliable service" and that "[t]here will be *no* adverse impact on customers, service cost or quality, employees, or Minnesota Power's communities."[26] Witness Taran similarly claims that the acquisition "will not cause *any* adverse impacts on customers, utility operations, electric service cost or quality, employees, or communities."[27] Partner witness Bram declares that the acquisition "*will not* reduce the quality of service provided by ALLETE or Minnesota Power."[28] Such categorical claims about the future are not credible, particularly in light of the risks raised by intervening parties.

There are other reasons to discount the opinions of ALLETE's witnesses. Witness Taran has no industry experience outside of ALLETE, having joined the company immediately upon graduating from college, and has been in his current position for only three years.[29] And despite claiming that the benefits of the public market "are outweighed by the uncertainties ALLETE faces getting timely, reliable, economic access to public equity,"[30] witness Taran fails to provide any quantitative analysis to support this claim.[31] Meanwhile, witness Scissons, the only ALLETE witness who was personally involved in negotiating the deal, appeared to misunderstand the Partners' plans for ALLETE when cross-examined regarding them,[32] suggesting a lack of attention to the potential risks of the acquisition.

[26] Ex. MP-9 at 6, 12 (Cady Direct) (emphasis added).
[27] Ex. MP-11 at 9 (Taran Direct) (emphasis added).
[28] Ex. MP-14 at 31 (Bram Direct) (emphasis added).
[29] See MP-11 at 1 (Taran Direct).
[30] Ex. MP-11 at 13 (Taran Direct).
[31] *See* Tr. vol. 1 at 285–93 (Taran).
[32] *See* Tr. vol. 1 at 259–60 (Scissons).

Finally, the Petitioners hired several outside consultants to provide post-hoc support for the acquisition. While these witnesses do not have the same level of personal investment in the acquisition's approval as witnesses employed by the Petitioners, their compensation for testifying comes from the acquisition's proponents. Moreover, the witness that the Petitioners hired to testify specifically about ALLETE's access to capital did not independently verify the company's claimed capital need. He agreed with witness Taran that ALLETE "has outsized capital investment forecasts"[33] but took the reasonableness of those forecasts on faith because he generally finds utility planners "highly professional and credible in developing capital plans."[34]

The Partners' attempt to draw an unfavorable contrast between intervenor and Petitioner witnesses is unavailing. The Petitioners did not challenge the qualifications of any intervenor witnesses, despite having the opportunity to do so.[35] And for good reason—the intervenor witnesses have many years of experience with utility finance, regulation, and private equity.[36] The ALJ and the Commission should not devalue these witnesses' opinions simply because they may not have worked for a utility company, investment bank, or private-equity firm. On the other hand, the ALJ and the Commission must consider Petitioner witnesses' motivations for testifying. As discussed above, the Petitioners' witnesses' bias leads them to overvalue the transaction's benefits

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[33] Ex. MP-12 at 16 (Quackenbush Direct).
[34] Ex. MP-30 at 4 (Quackenbush Rebuttal).
[35] *See* FIRST PREHEARING ORDER at 6 (Oct. 28, 2024) ("Except for good cause shown, objections by any party related to the qualifications of a witness or to that witness' direct, rebuttal, or surrebuttal testimony shall be considered waived unless the objecting party states its objection by motion made to the Administrative Law Judge, and serves a copy of such objections on the parties, no later than 4:30 p.m. on March 28, 2025.").
[36] *See* Ex. DOC-303, sched. CMA-D-1 (Addonizio Direct); Ex. DOC-301, sched. SLV-D-1 (Vavro Direct); Ex. OAG-400 at 1–2 (Lebens Direct); Ex. LPI-1001, sched. 1 (Walters Direct); Ex. CURE-601 at 4 (Ellis Direct); Ex. CURE-600 at 1 (Baker Direct); Ex. SIERRA-1100 at 1–2 (Lane Direct); Ex. CUB-505 at 1–6 (Jester Direct).

and undervalue its risks, making their testimony an unreliable gauge of whether the acquisition is in the public interest.

III. TO THE EXTENT THAT THE ACQUISITION SOLVES A PROBLEM, THAT "PROBLEM" IS ALLETE'S AGGRESSIVE CAPITAL-SPENDING PLAN.

ALLETE dismisses as speculative intervenor concerns about potential negative impacts of the acquisition while insisting that its benefits are "real and tangible."[37] Yet ALLETE has failed to establish that its own capital plan is based on more than speculation—undermining the entire premise of the proposed acquisition.

ALLETE's ambitious capital plan is the basis for the acquisition, but ALLETE has not established that its capital *forecast* amounts to much more than a capital *wish list*. In reality, the true magnitude of ALLETE's future equity capital need is unclear.[38] Every year since 2019, ALLETE has overestimated its capital expenditures by at least **[TRADE SECRET DATA BEGINS]** [redacted] **[TRADE SECRET DATA ENDS]** Most recently, ALLETE prepared a capital forecast in January 2024 for inclusion in the merger proxy statement and then in February prepared a "markedly different" forecast for inclusion in its capital-structure filing with the Commission.[40] These varying and inaccurate capital forecasts demonstrate that predicting ALLETE's future capital needs entails a high degree of uncertainty and subjectivity. Moreover, **[TRADE SECRET DATA BEGINS]** [redacted] **[TRADE SECRET DATA ENDS]** percent of the forecasted capital spending over 2024–2029 relates to nonregulated projects,[41] which deserve no consideration in a public-interest determination under 216B.50 since they have no bearing on Minnesota Power's needs.

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[37] ALLETE Br. 9, 13.
[38] Ex. DOC-303 at 26 (Addonizio Direct).
[39] Ex. DOC-303 at 28 tbl.3 (Addonizio Direct).
[40] Ex. DOC-303 at 26–28 (Addonizio Direct).
[41] *See* Ex. DOC-303 at 27 tbl.2 (Addonizio Direct).

The Partners' internal documents bolster the conclusion that ALLETE's capital plan is uncertain. The Partners do not simply assume that ALLETE's entire capital plan will be approved and go forward as is. For example, in an investor presentation provided to CalPERS, GIP identifies **[HIGHLY CONFIDENTIAL TRADE SECRET DATA BEGINS]** [redacted]

[redacted]

[HIGHLY CONFIDENTIAL TRADE SECRET DATA ENDS]

ALLETE cannot credibly characterize as "speculative" intervenor concerns about the risks of the proposed acquisition while at the same time insisting that the acquisition is necessary to facilitate a capital plan that is itself based on subjective assumptions that are uncertain to occur. The ALJ and the Commission should apply the same scrutiny to ALLETE's claims about its capital

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[42] Ex. OAG-401, sched. BPL-D-8 at 10 (Lebens Direct).
[43] *Id.*

needs and financing challenges that the company is advocating be applied to the intervenors' legitimate concerns about the acquisition.

IV. THE PARTNERS' CLAIM THAT IT WOULD BE "TOO RISKY" TO CONTINUE RELYING ON THE PUBLIC MARKET IS CONTRADICTED BY ALLETE'S STANDALONE PLAN AND ITS REPRESENTATIONS TO PUBLIC INVESTORS.

The Partners assert that an "extensive process" led ALLETE to conclude that "it would be unreasonable and too risky to continue to rely on public markets for this new equity."[44] The Partners further assert that the board, management, and ALLETE's financial advisors "all concluded that the standalone financing plan would be unduly challenging and risky."[45] These self-serving claims are contradicted by the record. First, ALLETE has an alternative plan, known as the "standalone" plan, through which it could meet many of its investment goals while relying on public equity. Second, ALLETE's statements in investor reports contradict the claim that it lacks adequate access to capital. Finally, the merger proxy statement does not support the Partners' contentions.

Partners' claim that relying on the public market is too risky is contradicted by the fact that ALLETE's board was prepared to move forward with the company's standalone financing plan up until the Partners offered a premium that the board considered sufficiently lucrative.[46] Discussion materials presented to the board in January 2024 reveal management's belief that **[HIGHLY CONFIDENTIAL TRADE SECRET DATA BEGINS]** [redacted] **[HIGHLY CONFIDENTIAL TRADE SECRET DATA ENDS]**[47] Again in February, the board was told that ALLETE could reasonably

[44] Partners Br. at 17.
[45] Partners Br. at 19.
[46] *See* Ex. MP-1, attach. L at 51.
[47] Ex. DOC-303, sched. CMA-D-3 at 17 of 19 (Addonizio HCTS Direct).

raise several hundred million dollars of annual equity financing under the standalone plan[48] while **[HIGHLY CONFIDENTIAL TRADE SECRET DATA BEGINS]** [redacted] **[HIGHLY CONFIDENTIAL TRADE SECRET DATA ENDS]**.[49] Thus, contrary to the Partners' claim that relying on public markets is untenably risky, management's analysis of the standalone plan suggests that ALLETE's legitimate capital needs can be financed through the public market.

The idea that ALLETE does not have adequate access to capital on the public markets is also contradicted by ALLETE's representations in its 2023 and 2024 Form 10-K reports filed with the U.S. Securities and Exchange Commission (SEC). False or misleading statements in a Form 10-K or other required SEC filing expose the author to legal liability.[50] Thus, statements in ALLETE's 10-K reports should be given significant weight. ALLETE's 2024 Form 10-K, filed in February 2025, states that ALLETE is "well positioned to meet our financing needs due to adequate operating cash flows, available additional working capital and access to capital markets."[51] While the 2024 Form 10-K was filed after the proposed acquisition was announced, ALLETE's 2023 Form 10-K, filed in February 2024, contains an identical statement.[52] Consistent with these statements in its SEC reports, ALLETE has failed to cite any instances in which it has been unable to raise necessary capital.[53]

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[48] Ex. MP-1, attach. L at 51.
[49] Ex. OAG-404 at 3.
[50] *See* 15 U.S.C. § 78r(a).
[51] Ex. MP-45 at 62.
[52] Ex. Sierra-1100, attach. CL-7 at 58 (Lane Direct).
[53] Ex. Sierra-1100 at 11 (Lane Direct).

Finally, the Partners cite the board's analysis described in the proxy statement for the proposition that relying on public markets is "unreasonably risky."[54] But again, this claim does not bear scrutiny. The passage that the Partners refer to generally recounts factors that the board considered, including ALLETE's share price; impacts to customers, communities, and employees; the standalone plan; management's recommendation; financial-advisor opinions that the merger consideration was fair to shareholders; and other factors.[55] The proxy statement's discussion of the standalone plan states that the board considered the standalone plan, along with "the risks of remaining as a standalone publicly traded company,"[56] but nowhere does it state that relying on the public market or the standalone plan would be unreasonably risky. Instead, after weighing the risks and benefits of a merger, the proxy statement concludes that "overall, the potential benefits of the Merger *to our shareholders* outweigh the risks and uncertainties of the Merger."[57]

The Petitioners' argument that continued reliance on the public markets is too risky is belied by ALLETE's standalone plan and ALLETE's highly credible representations to its investors. The primary reason that companies go public is to get better access to capital,[58] and ALLETE has had no trouble accessing sufficient capital on the New York Stock Exchange in the past.[59] The ALJ and the Commission should view with great skepticism the Petitioners' self-serving effort to frame ALLETE's access to vast pools of public capital as a negative.

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[54] Partner Br. at 25.
[55] Ex. MP-1, attach. L at 55–59.
[56] Ex. MP-1, attach. L at 56.
[57] Ex. MP-1, attach. L at 59 (emphasis added).
[58] Ex. OAG-400 at 13 (Lebens Direct).
[59] Ex. DOC-303 at 41 (Addonizio Direct).

V. THE PETITIONERS EXPECT THE COMMISSION TO MITIGATE ALL HARMS OF THE ACQUISITION.

A major theme throughout the Petitioners' briefing is that the Commission will be the last line of defense against any harm to ratepayers if it approves the acquisition. The Partners, for example, argue that the Commission's regulation of Minnesota Power "fully protects" against any risks raised by intervenors and that there is "no realistic basis for the fears of the Opposing Parties, because the Commission will protect the public interest and customers."[60]

The argument that regulation will mitigate all risks of the proposed acquisition ignores two key points: First, even if the Commission succeeds in detecting and mitigating all the acquisition's adverse impacts, doing so will require greater effort and cost, which is itself a harm to the public interest. Second, Petitioners' reliance on the Commission to mitigate all risks renders the public-interest determination required by section 216B.50 superfluous.

The Petitioners' claim that regulation is a cure-all for the potential ills of the acquisition should give the Commission little comfort. In essence, what the Petitioners are saying is that it will be the Commission's responsibility to single-handedly mitigate the acquisition's adverse impacts. The OAG agrees with the Petitioners that the Commission has been a diligent guardian of the public interest and will continue to be so following any change in ALLETE's ownership. But guarding against ratepayer harms may become more difficult under new ownership due to the Partners' incentives and plans, which the intervenors have highlighted throughout the case.

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[60] Partners Br. 61–62. *See also, e.g.*, *id.* at 62 (stating that Commission "is very diligent in protecting the public interest" and that there "no reason to believe that the Commission—or the Parties in this case—will be any less diligent in the future"), 96 (stating that Commission is "the greatest protection afforded to customers" against Partners' abuse of ALLETE's board); ALLETE Br. at 51 ("even if certain decisions are made by the ALLETE Board, Minnesota Power, its capital structure, its rates, its resource planning, its transmission and distribution planning, and its affiliated interests will all remain subject to the review, oversight, and approval of the Commission").

Nowhere will Commission oversight be more critical than in the area of rates. Confidential documents produced by the Petitioners show that the acquisition is premised on unsustainable rate increases.[61] The Petitioners claim that these projections are "entirely speculative"[62] and argue that for any harm to occur, the Commission would have to "fully abdicate" it duty to set just and reasonable rates by "approving proposals that were directly opposed to the public interest."[63] In other words, if the Petitioners try to achieve rate increases that are contrary to the public interest, it will be on the Commission and other stakeholders to stop them. This is cold comfort for the Commission, stakeholders, and Minnesota Power's ratepayers. Moreover, if preventing unaffordable rate increases means requiring Minnesota Power to temper its investment plans, it could hasten the Partners' exit, resulting in another proposed sale of the utility.

The Petitioners' theory also renders section 216B.50 all but superfluous. If the fact that a utility will continue to be regulated post-transaction negated all potential harms, then the statute would serve no purpose: every transaction would be in the public interest because the risks would be fully mitigated through regulatory oversight.[64] The ALJ and the Commission should instead presume that the Legislature decided to require the public-interest inquiry under section 216B.50 *even though* that the Commission would continue to have oversight of a utility's rates, investments, and service quality after a transaction. Put differently, continued regulation is a baseline assumption in the public-interest analysis, but the Commission can and should consider, as a harm to the public interest, risks that could make effective regulation more difficult.

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[61] *See* OAG Br. at 22–23.
[62] Partners Br. at 119.
[63] Ex. MP-27 at 14 (Cady Rebuttal).
[64] The only situation where this would not be true is if a proposed transaction resulted in a utility ceasing to be regulated, which should presumably be a rare occurrence and, in any event, is not the case here.

VI. THE ADMINISTRATIVE LAW JUDGE SHOULD STRIKE FROM THE PARTNERS' BRIEF FACTUAL CLAIMS FOR WHICH THERE IS NO EVIDENCE.

The Partners' plan for jointly governing ALLETE is a central issue in this case. The only documentary evidence of the Partners' plans is a preliminary term sheet provided in response to a Department of Commerce information request.[65] The Partners provided an updated version of the term sheet with the surrebuttal testimony of Partner witness Jonathan Bram,[66] leaving intervenor witnesses without an opportunity to respond to the updated term sheet through testimony. Then, on the second day of the evidentiary hearing, the Partners indicated that they intended to offer a new version of the term sheet during Mr. Bram's live testimony.[67] After intervenors objected to the introduction of yet another version of the term sheet, the Partners changed course and did not offer the new version.[68]

The Partners' brief makes factual assertions about the withdrawn term sheet that are supported only by the statements of their counsel.[69] Their brief then makes a further assertion, without any citation to the record, about how the Partners' current plans differ from the surrebuttal version of the term sheet.[70] The statements of counsel, whether at a hearing or in a brief, are not evidence.[71] The Administrative Law Judge should strike these sentences from the Partners' brief because they make unsupported factual claims relating to a contested issue.[72]

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[65] *See* Ex. DOC-301, sched. SLV-D-6 (Vavro HCTS Direct).
[66] Ex. MP-41, sched. 1 (Bram HCTS Surrebuttal).
[67] Tr. vol. 2 at 335 (Barlow).
[68] Tr. vol. 2 at 369 (Barlow) ("I first want to clarify that we haven't yet offered the document. . . . But given the objections, we no longer intend to offer it.").
[69] *See* Partners Br. at 89 & n.327 (citing Tr. vol. 2 at 334 (Barlow)).
[70] *See* Partners Br. at 89.
[71] *See State v. McCoy*, 682 N.W.2d 153, 158 (Minn. 2004) ("[T]he 'questions and arguments' of attorneys are not evidence.").
[72] *See* Minn. R. 1400.7300, subp. 2 ("All evidence to be considered in the case, including all records and documents in the possession of the agency or a true and accurate photocopy, shall be

The specific passage that should be stricken is on page 89 of the Partners' brief:

> ~~The Partners discovered a drafting error in that document that implied that the Partners would have the right to approve the budget before the Board considered it.[327] That would be a change from the current structure, does not reflect the Partners' intent and will not be reflected in definitive documentation regarding the governance and the Partners' consent rights.~~

The Administrative Law Judge should strike this portion of the Partners' brief to maintain the integrity of the record.

Dated: May 29, 2025

Respectfully submitted,

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offered and made a part of the record in the case. No other factual information or evidence shall be considered in the determination of the case.").