

BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

**IN THE MATTER OF NEW MEXICO GAS COMPANY,)
INC.'S APPLICATION FOR THE ISSUANCE OF A)
CERTIFICATE OF PUBLIC CONVENIENCE AND)
NECESSITY TO CONSTRUCT A LIQUEFIED NATURAL)
GAS FACILITY)**

Docket No. 22-00309-UT

FINAL ORDER

THIS MATTER comes before the New Mexico Public Regulation Commission (the “Commission”) on the Recommended Decision issued by Hearing Examiner Anthony Medeiros on February 21, 2024, concerning New Mexico Gas Company Inc.’s (“NMGC”) Application for Issuance of a Certificate of Public Convenience and Necessity (“CCN”).

The Commission **ADOPTS, APPROVES, and ACCEPTS** the Recommended Decision with modifications as discussed below.

JURISDICTION AND PROCEDURAL HISTORY

1. The Commission has jurisdiction over this matter. *See* NMSA 1978, §§ 62-6-4(A) (2003), 62-9-1(A) (2019).
2. On December 16, 2022, NMGC filed an Application for Issuance of a Certificate of Public Convenience and Necessity (“Application”). The Application requested that the Commission authorize NMGC to construct and operate a liquified natural gas (“LNG”) storage facility (the “LNG Facility”) in Rio Rancho, New Mexico. *See* Application at 1.
3. Hearing Examiner Anthony Medeiros presided over the matter and issued the Recommended Decision on February 21, 2024.¹
4. In the Recommended Decision, the Hearing Examiner summarized his recommendation on the merits of NMGC’s Application as follows:

¹ The Recommended Decision summarizes the significant procedural background information. *See* Recommended Decision at 5–7. The full electronic record of this proceeding is available at <https://edocket.prc.nm.gov>.

The Hearing Examiner, having considered the record as a whole, finds that the preponderance of the evidence weighs decisively against approving a CCN for the LNG Facility. The record lacks clarity on whether the primary rationale for the LNG Facility is to enhance NMGC's reliability and thereby decrease the risk of supply disruptions like the 2011 severe winter event or to promote price spike mitigation like the extreme price volatility experienced during Storm Uri in 2021. Irrespective of the confusion in the record, the preponderance of record evidence shows that the proposed LNG Facility is not required for NMGC to provide reliable service or that the alleged problems with Keystone Storage's performance and dependability that the Company cites are increasing or unmanageable; to the contrary, if anything, the evidence suggests the Keystone Storage's performance has improved. Furthermore, NMGC has not shown that the LNG Facility can provide meaningful price volatility protection or that the Facility is the most cost-effective among feasible alternatives. As to NMGC's evaluation of alternatives, the record shows that NMGC failed to perform the rigorous investigation that a prudent utility should perform prior to making a significant resource decision and committing to substantial, longterm capital investment expenditures. Moreover, NMGC failed to update time-sensitive elements of its analyses of alternatives. Accordingly, the Hearing Examiner finds that the LNG Facility would not provide a net public benefit. The Hearing Examiner therefore recommends that the Commission disapprove NMGC's Application.

Applying the heightened standard of scrutiny to the discretionary LNG project, the Hearing Examiner finds that NMGC's primary justifications for the LNG Facility are not clearly demonstrated given the confusion propagated in the record by virtue of NMGC's contradictory and unfounded claims regarding enhancing reliability, on the one hand, and mitigating price volatility on the other. Furthermore, the Hearing Examiner finds that NMGC's failure to provide an objective quantification of benefits versus costs of the proposed LNG project was contrary to the public interest, particularly where, while the record shows a substantial benefit to Emera shareholders in terms of after-tax ROE and enhanced earnings with the LNG Facility in rate base, NMGC neglected to provide a corresponding quantification of benefits to ratepayers and, critically, failed to show that the Facility would be cost-effective for ratepayers. Moreover, the preponderant public opposition expressed against the proposed siting of the LNG Facility coupled with the significant unaddressed issues and concerns over the potential safety effects and environmental impacts associated with locating the Facility at NMGC's predetermined location counsel against approval of the Application.

Accordingly, considering that the LNG Facility would not provide a net public benefit, the additional public interest considerations reinforce the Hearing Examiner's findings and conclusions that the LNG Facility would not promote the public interest.

Recommended Decision at 142–144 (footnote omitted).

5. Based on those conclusions and others discussed throughout the 148-page Recommended Decision, the Hearing Examiner recommended that the Commission adopt the following into its final order:

A. The findings, conclusions, decisions, rulings, and determinations in this Recommended Decision are adopted, approved, and ordered by the Commission.

B. NMGC's Application is disapproved.

C. Any conclusion or recommendation included in this Recommended Decision not specifically stated herein is adopted by the Commission as if it were and the full legal consequence of those conclusions or orders is imposed.

D. NMGC's responses to Bench Bequest Nos. 1-6 are admitted into evidence of record in this case consistent with 1.2.2.35(A) and 35(K) NMAC.

E. Consistent with 1.2.2.35(D) NMAC, the Commission has taken administrative notice of all Commission orders, rules, decisions, and other relevant materials in all Commission proceedings cited in this Order.

F. Any matter not specifically ruled on during the hearing or in this Recommended Decision is resolved consistent with this decision.

G. The Certificate of Service attached hereto, as amended, shall be the official service list in this case. Accordingly, effective immediately and subject to subsequent amendment, service of pleadings and other documents shall be made upon all persons whose email addresses are listed on the Certificate of Service.

H. Copies of this Recommended Decision will be provided to the official service list per the Commission's electronic filing and service rules.

Recommended Decision at 147–148.

6. On February 21, 2024, the Commission filed an Order Limiting Exceptions. This Order set February 28, 2024 as the deadline for exceptions and March 5, 2024 as the deadline for responses to exceptions.

7. On February 28, 2024, NMGC filed Exceptions to the Recommended Decision

(“NMGC’s Exceptions”).

8. On March 5, 2024, Intervenor New Energy Economy (“NEE”), Western Resource Advocates (“WRA”), and the New Mexico Department of Justice (“NMDOJ”) filed Responses to NMGC’s Exceptions (“NEE’s Response” and “WRA and NMDOJ’s Joint Response”).

9. On March 13, 2024, the Hearing Examiner filed a Notice of Errata to Recommended Decision and Order correcting non-substantive errors and omissions in the Recommended Decision.

DISCUSSION

10. The Public Utility Act requires public utilities to obtain a CCN before constructing or operating any new utility plant or system. NMSA 1978, § 62-9-1(A).

11. When assessing whether to issue a CCN, the Commission must consider whether the new public utility plant or system is consistent with the public convenience and necessity. NMSA 1978, §§ 62-9-1(A), 62-9-6.

12. To meet this standard, the applicant seeking a CCN must establish: (1) that the project provides “net public benefit,” (2) that the applicant considered alternatives before going forward with the project, and (3) that the project is the most cost-effective among feasible alternatives. *See, e.g., New Energy Econ., Inc. v. New Mexico Pub. Regulation Comm’n*, 2018-NMSC-024, ¶ 14; Docket 16-00105-UT, Order Denying Motion to Dismiss (Aug. 25, 2016) at 7; Docket 19-00349-UT, *Recommended Decision* (Nov. 16, 2020) at 16–17, *adopted by* Order Adopting Recommended Decision with Additional Instructions (Dec. 16, 2020) at 11.

13. The Commission must apply this standard consistent with the policies declared by

the Public Utility Act:

It is the declared policy of the state that the public interest, the interest of consumers and the interest of investors require the regulation and supervision of public utilities to the end that reasonable and proper services shall be available at fair, just and reasonable rates and to the end that capital and investment may be encouraged and attracted so as to provide for the construction, development and extension, without unnecessary duplication and economic waste, of proper plants and facilities and demand-side resources for the rendition of service to the general public and to industry.

NMSA 1978, § 62-3-1(B) (2008).

14. For the reasons discussed in this Order and the Recommended Decision, NMGC has failed to establish that the LNG Facility provides a net public benefit, that NMGC adequately considered alternatives to the LNG Facility, or that the LNG Facility is the most cost-effective among feasible alternatives. *See, e.g.*, Recommended Decision at 7–9, 39–66, 75–126, 142–143.²

15. The Commission, therefore, finds that NMGC’s proposed LNG Facility is not consistent with the public convenience and necessity and will deny NMGC’s CCN Application.

16. The Commission provides the additional discussion below to address issues raised in exceptions and points of departure from the Recommended Decision.

I. The Commission does not reach the issue of whether any heightened standard should apply to NMGC’s LNG CCN.

17. The Recommended Decision concluded that NMGC’s CCN should be subject to

² The Hearing Examiner observed that “[t]he record lacks clarity on whether the primary rationale for the LNG Facility is to enhance NMGC’s reliability and thereby decrease the risk of supply disruptions like the 2011 severe winter event or to promote price spike mitigation like the extreme price volatility experienced during Storm Uri in 2021.” *Id.* at 142. Nevertheless, he found that “[i]rrespective of the confusion in the record . . . the LNG Facility would not provide a net public benefit.” *Id.* at 142–143. With respect to NMGC’s rationales for the project, the Hearing Examiner based his conclusion on findings that “the proposed LNG Facility is not required for NMGC to provide reliable service or that the alleged problems with Keystone Storage’s performance and dependability that the Company cites are increasing or unmanageable” and that “NMGC has not shown that the LNG Facility can provide meaningful price volatility protection.” *Id.* In other words, NMGC’s Application was not deficient on this point because it presented multiple rationales for the project. Instead, it was deficient because the project was not a necessary, adequate, or cost-effective means to resolve NMGC’s purported needs.

the heightened standard of review applied in Case No. 15-00312-UT³ because it is a discretionary project. *See, e.g.*, Recommended Decision at 9–12.

18. Applying this heightened standard of review, the Recommended Decision expanded its review of NMGC’s CCN beyond the net public benefit standard that the Commission would regularly consider when assessing a CCN application:

Therefore, in addition to proof by a preponderance of the evidence that the LNG Facility will produce a net public benefit and that NMGC has conducted an evaluation of reasonable alternatives to its proposal, the Commission should also carefully evaluate the public interest and ensure a fair balancing of the interests of investors and ratepayers consistent with the regulatory compact that governs the utility’s provisioning of a monopoly service in a specified territory. Furthermore, the Commission should consider the extent of any public opposition, the extent to which NMGC’s justifications are not clearly demonstrated, and the extent to which any uncertainties will impact the public interest and create unreasonable risks for ratepayers.

Recommended Decision at 12 (footnotes omitted).

19. Ultimately, the Hearing Examiner found that NMGC’s LNG Facility did not meet this heightened standard. *See* Recommended Decision at 143–144.

20. As discussed above, the Commission finds that the LNG Facility is not consistent with the public convenience and necessity because NMGC has failed to establish that the LNG Facility provides a net public benefit, that it adequately considered alternatives to the LNG Facility, or that the LNG Facility is the most cost-effective among feasible alternatives.

21. These are sufficient grounds to deny NMGC’s CCN Application.

22. Because the Commission possesses sufficient grounds to conclude that the LNG Facility is not consistent with the public convenience and necessity, the Commission declines to

³ *See generally* Docket No. 15-00312-UT, Recommended Decision (Mar. 19, 2018), *adopted by* Final Order (April 11, 2018) at 2.

adopt the Recommended Decision’s analysis regarding whether a heightened standard should apply to the CCN application. *See* Recommended Decision at 9–12.

23. The Commission similarly declines to adopt the Recommended Decision’s analysis and conclusions applying the heightened standard. *See* Recommended Decision at 126–144.⁴

24. Because the Commission does not reach the issue of whether the heightened standard applies to NMGC’s CCN, it need not address the arguments raised by NMGC’s exceptions regarding this standard. *See* NMGC’s Exceptions at 4–10, 16–17.⁵

II. The Commission will not admit the testimony appropriately excluded by the Hearing Examiner.

25. Records, including testimony, from prior Commission cases are not automatically admitted as evidence in another case. Instead, the Commission must affirmatively take administrative notice of these records to admit them as evidence in a pending proceeding. *See* 1.2.2.35(D)(1)(d) NMAC (“The commission or presiding officer *may* take administrative notice of [decisions, records, and transcripts in other commission proceedings] if otherwise admissible under Subsection A of 1.2.2.35 NMAC.”) (emphasis added).

26. Parties before the Commission may request that the Commission take this administrative notice. *See* 1.2.2.35(D)(2) NMAC.

27. When a party seeks to introduce as evidence documents or portions of documents through administrative notice, however, the party “must submit those documents or portions of

⁴ The Commission, however, adopts the first paragraph of Section 4.5, *see* Recommended Decision at 142–143, as those recommendations and conclusions address the Commission’s well-established CCN standard.

⁵ NMGC Exceptions at 4 n.1 (“Exception I takes exception to Section 3.1 (pp. 7-13), Section 4.4.5 (pp. 126-142), and Section 4.5 (pp. 143-144) of the Recommended Decision.”), 16 n.40 (“Exception IV takes exception to Section 4.4.5 (pp. 126-128), Section 4.4.6 (pp.128-130), and Section 4.5 (pp. 142-144).”).

documents to the commission or presiding officer in the form of exhibits except as may otherwise be provided in this rule.” 1.2.2.35(D)(2) NMAC.

28. Moreover, “any evidence offered in whatever form shall be subject to appropriate and timely objection.” 1.2.2.35(L)(1) NMAC.

29. The parties before the Commission in this proceeding dispute whether the Commission should admit as evidence testimony provided by Tom C. Bullard, NMGC’s Vice President of Engineering, Gas Management, and Technical Services, in a prior Commission docket. *See, e.g.*, NMGC’s Exceptions at 10–11; NEE’s Response at 8–10; WRA and NMDOJ’s Joint Response at 5–7.

30. This testimony was attached to a compliance filing that was filed “*after* the Commission’s issuance of the Final Order in Case No. 21-00095-UT and subsequently was not subjected to cross-examination in any hearing.” *See* Recommended Decision at 42; *see generally* Docket No. 21-00095-UT, NMGC’s Compliance Filing and Supporting Testimony (Mar. 31, 2022), Direct Testimony of Tom C. Bullard.

31. The Hearing Examiner appropriately resolved this dispute by excluding some but not all of Mr. Bullard’s prior testimony. *See* Recommended Decision at 41–43; *see also id.* at 42 n.140.

32. As the Recommended Decision explains, the Hearing Examiner admitted portions of this testimony that NMGC witnesses referenced in their testimony in this case. In other words, the Hearing Examiner admitted Mr. Bullard’s testimony to the extent that it was cited in other testimony admitted in this case. *See id.* at 42 n.140.

33. By contrast, the Hearing Examiner did not admit testimony that NMGC neither

cited by reference through other testimony nor requested that the Commission admit under Rule 1.2.2.35(D). *Id.* at 42.

34. This treatment appropriately balanced the admission of these materials consistent with Commission rules.

III. The Commission’s long-standing CCN analysis necessarily considers the timeliness of evidentiary support.

35. The Recommended Decision identified NMGC’s “failure to update time-sensitive elements of its analyses” as one of its bases for denying NMGC’s Application. *See, e.g.*, Recommended Decision at 125. The Recommended Decision alternatively frames these concerns as NMGC’s failure to provide “time-sensitive” analyses, “reasonably contemporaneous” information and documentation, and “contemporaneous evidentiary support.” *See id.* at 40, 48, 124–125.

36. NMGC takes exception to the Recommended Decision’s assessment of the timeliness of its analysis on several grounds. NMGC argues that it was improper for the Recommended Decision to consider timeliness because (1) NMGC “lacked proper notice [of] a new evidentiary burden,” (2) the requirement is vague, and (3) the requirement is “untenable.” *See* NMGC’s Exceptions at 13.

37. None of these arguments prevents the Commission from considering the timeliness of NMGC’s evidence.

38. The Commission rejects NMGC’s argument that assessing timeliness represents a “new evidentiary burden” because the Commission’s well-established CCN analysis necessarily requires the Commission to consider the timeliness of a party’s evidence. For instance, a utility cannot claim to have considered alternatives if the passage of time introduced new potential

alternatives or rendered previously considered alternatives unworkable. *See, e.g.*, Docket 16-00105-UT, Order Denying Motion to Dismiss (Aug. 25, 2016) at 7 (“Under Commission precedent, utilities must consider alternatives before going forward with a project. . . .”). Similarly, a reasonably timely analysis may, in some cases, elevate a previously dismissed alternative as “the most cost-effective resource among feasible alternatives.” *See, e.g.*, Docket 19-00349-UT, *Recommended Decision* (Nov. 16, 2020) at 16–17, *adopted by* Order Adopting Recommended Decision with Additional Instructions (Dec. 16, 2020) at 11. Indeed, it is in the public interest for the utility and the Commission to consider timely information when making decisions that have a significant financial impact on ratepayers. The Commission, therefore, cannot and should not ignore timeliness concerns when assessing whether to approve a CCN.

39. NMGC itself concedes that “in general any evidence presented in any case may be subject to an attack on timeliness.” NMGC’s Exceptions at 14–15. “Any evidence” would, of course, include evidence regarding NMGC’s consideration of alternatives.

40. The Commission also rejects NMGC’s contention that the Commission’s assessment of timeliness is impermissibly vague because it “provides no clarity about whether utilities are afforded days, months, or years between their analysis of alternatives and their decision to pursue a project.” *See* NMGC’s Exceptions at 14.

41. Any assessment of timeliness will necessarily depend on the facts and circumstances of a particular resource procurement decision as well as the nature of the evidence itself.⁶ For this reason, whether a party’s evidence is sufficiently timely cannot be distilled into a

⁶ NMGC itself notes that the timeliness standards appropriate for this case would “not [be] the same as evaluating a wind farm versus a solar farm.” *See id.* at 15.

measure of days, months, or years. The fact-intensive nature of this analysis, however, does not render it impermissibly vague.

42. NMGC’s argument that the Commission’s consideration of timeliness would be “untenable” is similarly wanting. *See id.* at 15. To be clear, the Commission’s assessment of timeliness in this case has not created a standard “requiring continuously updated analyses of numerous options.” *See id.* It is similarly not a standard that requires a utility to complete its analyses on the same day it makes resource procurement decisions. Instead, the Commission will consider whether evidence proposed by utilities concerning their assessment of alternatives is reasonably timely in the context of the decision the utility intends to support. *See id.* at 40, 48, 124–125. This is not a standard that should require utility applicants to “continuously update the cost of every alternative project” nor is it one that should impose costs that would “discourage regulated utilities in New Mexico from proposing CCNs that provide a public benefit.” *See NMGC’s Exceptions* at 15.

43. That said, the Commission diverges from the Recommended Decision’s analysis regarding timeliness in two respects. First, the Commission here does not establish or affirm an absolute requirement of “contemporaneous evidentiary support”⁷ as part of a utility’s burden for approval of a CCN. As discussed above, the Commission will consider whether evidence proposed by utilities concerning their assessment of alternatives is reasonably timely in the context of the decision the utility intends to support. Second, the Commission does not adopt the Recommended Decision’s finding that the timeliness of NMGC’s analyses is “determinative.”⁸ In other words,

⁷ *See, e.g.,* Recommended Decision at 48

⁸ *See* Recommended Decision at 125.

the timing concerns identified by the Intervenor and the Recommended Decision are not a sufficient stand-alone basis for or the but-for cause of the Commission’s result. Even absent these concerns, the Commission would deny the NMGC’s Application based on other deficiencies identified in the Recommended Decision and adopted by this Order. *See* Recommended Decision at 75–126 (discussing deficiencies related to reliability, price mitigation, cost-effectiveness, and evaluation of alternatives).

44. The Commission finds that timeliness is an appropriate consideration in a CCN application but does not establish nor apply a “contemporaneous” evidence standard. It therefore does not address the alternate argument raised by NMGC’s exceptions that its analyses were sufficiently contemporaneous. *See* NMGC’s Exceptions at 15–16.

IV. The Commission may consider benefit-cost analyses or other similar empirical economic modeling when assessing CCN applications.

45. A benefit-cost or similar analysis is not a strict requirement for approval of a CCN in New Mexico, and the Commission does not deny NMGC’s Application because NMGC failed to provide one.

46. That said, such analyses—as is true of other evidence presented in a CCN case—may assist utility applicants in meeting their burden to establish that the project provides a net public benefit, that the applicant considered alternatives before proceeding with the project, and that the project is the most cost-effective among feasible alternatives. *See, e.g., New Energy Econ., Inc. v. New Mexico Pub. Regulation Comm’n*, 2018-NMSC-024, ¶ 14; Docket 16-00105-UT, Order Denying Motion to Dismiss (Aug. 25, 2016) at 7; Docket 19-00349-UT, *Recommended Decision* (Nov. 16, 2020) at 16–17, *adopted by* Order Adopting Recommended Decision with Additional Instructions (Dec. 16, 2020) at 11.

47. In future cases, the Commission may consider such analyses as part of its long-standing CCN analysis.

FINDINGS AND CONCLUSIONS

48. The Recommended Decision is well taken and should be ADOPTED, APPROVED, and ACCEPTED as the Order of the Commission except as modified herein.⁹

49. NMGC's Application is not consistent with the public convenience and necessity and should be denied.

50. Any finding not expressly mentioned here but stated in the body of this order is embraced by the Commission. Similarly, any fact rejected in the body of this order not expressly identified hereunder is rejected by the Commission.

51. The Commission considered each of NMGC's exceptions and the Intervenor's respective responses. For clarity and brevity, this Final Order does not summarize every argument raised by the parties before the Commission.

IT IS THEREFORE ORDERED:

A. The Recommended Decision is ADOPTED, APPROVED, and ACCEPTED with modifications and is incorporated herein by reference as part of this Final Order except as modified.

B. NMGC's Application is DENIED.

⁹ Consistent with the discussion above, the Final Order does not incorporate the Recommended Decision's findings and conclusions that apply the heightened standard in Sections 3.1, 4.4.5, 4.4.6, 4.4.7, and 4.5. *See* Recommended Decision at 9–12, 126–144. In addition, the Final Order does not incorporate the Recommended Decision's discussion of timing in Section 4.4.4 to the extent that the Section could be construed to create an absolute requirement of contemporaneous evidentiary support for a CCN application or to imply that the Commission finds the timing concerns identified in the Recommended Decision determinative. *See id.* 123–126.

C. Any matter not specifically ruled on during the hearing or in this Final Order is disposed of consistently with this Final Order.

D. This Order is effective immediately.

E. If no motion for rehearing is filed pursuant to NMSA 1978, Section 62-10-16 (1953), this Docket shall close by operation of law.

F. A copy of this Order shall be served upon all persons listed on the attached Certificate of Service via e-mail if their e-mail addresses are known; otherwise, via regular mail.

ISSUED under the Seal of the Commission at Santa Fe, New Mexico, this 14th day of March, 2024.

NEW MEXICO PUBLIC REGULATION COMMISSION

/s/ Gabriel Aguilera, electronically signed

GABRIEL AGUILERA, COMMISSIONER

/s/ James F. Ellison, Jr., electronically signed

JAMES F. ELLISON, JR., COMMISSIONER

/s/ Patrick J. O'Connell, electronically signed

PATRICK J. O'CONNELL, COMMISSIONER



BEFORE THE NEW MEXICO PUBLIC REGULATION COMMISSION

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Docket No. 22-00309-UT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing *Final Order* was e-mailed on this date to the parties listed below.

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DATED this 14th day of March, 2024.

NEW MEXICO PUBLIC REGULATION COMMISSION

/s/ LaurieAnn Santillanes, electronically signed
LaurieAnn Santillanes, Law Clerk