ELECTRIC AND GAS UTILITY MERGERS AND ACQUISITIONS: TRENDS IN DEAL TERMS, CONTRACT PROVISIONS, AND REGULATORY MATTERS

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Synopsis: Recent economic and competitive factors in the industry have accelerated the long-term trend towards consolidation in the investor-owned electric and gas utility sector, as a result of which a "seller's market" has evolved, with rising valuations and increasingly seller-friendly contract terms. This article explores these developments in the context of mergers and acquisitions announced during the past four years involving investor-owned electric and gas utilities in the United States.

I. INTRODUCTION

United States investor-owned gas and electric utility companies have been consolidating for more than 100 years. In the early twentieth century there were more than one thousand investor-owned utilities in the United States.[1] By 1980

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1. H. Lee Willis & Lorrin Philipson, *Understanding Electric Utilities and De-Regulation* 91 (CRC Press 2006).

there were only 238 investor-owned utilities in the United States.[2] Ten years later, the number had dropped to 206, and by 2000 it was below 190.[3] In 2005, the Public Utility Holding Company Act of 1935 was repealed and the long-term trend toward utility consolidation accelerated. Today, there are approximately fifty-five investor-owned electric utilities and approximately the same number of investor-owned gas utilities in the United States, although the gas companies are, on average, much smaller than the electric companies.[4]

The current wave of consolidation appears to have begun relatively slowly in the late 1980s, and gained momentum during the 1990s, driven in part by the Energy Policy Act of 1992 and electric industry restructuring initiatives that were taking place in many states. This wave of consolidation crested in 1999 when approximately thirty transactions were announced. In the early 2000s, merger and acquisition activity was severely depressed due to the stock market decline, the Enron bankruptcy, and the related dislocations in wholesale power markets, including the power crisis in California. From 2004 to 2008, activity was relatively steady with six to ten major transactions announced each year. Activity declined again in 2009 during the economic downturn, but has recovered modestly since then with approximately four major transactions per year.

During the past four years, there have been over $115 billion of merger and acquisition activity involving publicly traded electric and gas utility companies in the U.S.[5] About 80% of these transactions involved electric or combination electric and gas companies, with the remaining 20% being local gas distribution companies. Several factors are driving this activity. The broader wave of consolidation is being driven by managements and boards of directors in search of new revenue in an era of little or no growth in electrical load and the economic efficiencies available to larger companies, together with a desire for regulatory and geographic diversity. During the past seven or eight years, activity has also been driven by historically low interest rates which facilitated relatively easy acquisition financing. These factors, combined with a shrinking pool of potential acquisition candidates, resulted in a "seller's market" where there are often many potential suitors for each available company. Companies that seek multiple bids before entering into transactions benefit from robust competition among potential acquirers.

This seller's market resulted in significant evolution in market norms for key transaction terms. Perhaps most important from an investor's perspective are valuations, which have risen to unprecedented levels. Another important development is the shift toward highly seller-friendly contract terms. In particular, buyers have assumed progressively more of the regulatory risk associated with these transactions. So-called "reverse break-up fees" that require a buyer to make a substantial payment to the seller in the event a transaction fails to close under circumstances in which all required regulatory approvals have not been obtained

2. *Id*.

3. *Id*.

4. S&P Capital IQ/SNL Energy database.

5. Vincent Kruger, *US Utilities Saw More Mergers and Acquisitions in 2015*, MARKET REALIST (Dec. 18, 2015), http://marketrealist.com/2015/12/us-utilities-see-boosted-mergers-acquisitions-2015/.

have become fixtures in merger agreements. Buyers also have assumed progressively greater amounts of regulatory risk in the covenants and closing conditions relating to regulatory approvals. Exhibits A and B below summarize key provisions of the major mergers and acquisitions involving regulated electric and gas companies that have been announced in the past four years. Key trends associated with these transactions are discussed in more detail below.

II. VALUATION

Valuations can be assessed using a variety of methods. One commonly cited metric is the premium the acquisition price represents relative to the market price of the target company's stock before the transaction was announced. This number is easy to calculate and understand. It tells a shareholder how much more he or she can obtain for a share of stock as a result of the transaction. However, the premium to market is subject to wide variation due to a variety of factors, not the least of which is market expectations about whether a company is likely to enter into a transaction. Consequently, other measures are more meaningful when comparing valuations among different transactions. Acquirers and financial advisers typically assess valuations by comparing the acquisition price to financial metrics of the target company such as historical and expected earnings and EBITDA. Another commonly used method is based on the expected discounted cash flow (DCF) of the target company. Performing a DCF analysis is a complicated process that requires a high degree of financial expertise as well as access to non-public information about a company's business plan and internal financial projections. For purposes of this discussion, we limit our analysis to three commonly used valuation measures that are relatively easy to calculate based on publicly available information: acquisition price as a multiple of (1) expected earnings for the next year, (2) the previous year's earnings and (3) EBITDA for the previous year. The chart below details how these multiples have changed during the past twelve years.

Average Valuation Multiples - Electric and Gas Utility Mergers and Acquisitions (January 1, 2005 - March 1, 2017)				
Year(s)	**Number of Transac-tions**	**Forward 12 Months P/E**	**Last 12 Months P/E**	**Transaction Value/EBITDA**
2017	2	30.5	31.8	13.4
2016	4	22.1	25.5	11.7
2015	4	25.3	28.6	11.5
2014	4	19.6	19.0	9.1
2013	2	19.3	18.9	8.9
2005 - 2012	11	19.0	18.4	10.2

As this chart shows, during the eight years ending in 2012, average multiples were below any of the averages for any subsequent year. In 2015, multiples jumped significantly and have generally held in that range into the beginning of 2017.

III. REVERSE BREAK-UP FEES

Another trend worth commenting on is the appearance of reverse break-up fees in transactions involving regulated companies. These provisions require the buyer to pay a fee to the seller in the event the transaction does not close for specified reasons, typically either a financing failure or a failure to obtain required regulatory approvals. Reverse break-up fees have been common for some time in transactions outside the utility industry. Initially, these provisions were used to provide private equity buyers with a way to get out of a transaction if for some reason their financing was not available when it came time to close. The mechanism spread to transactions involving strategic buyers, where a buyer would be required to pay the fee if it did not obtain the necessary anti-trust clearance for the transaction. Since these fees are generally at least 2.5%, and often more than 5%, of the equity value of the transaction, a reverse break-up fee creates a strong incentive for a buyer to do whatever is necessary to close a transaction, including obtaining antitrust clearance and the other regulatory approvals.

At first, reverse break-up fees were seen in energy and utility transactions only in competitive bidding situations where a buyer intended to obtain financing for the transaction. These fees typically would be triggered only in the event of a financing failure. Beginning with the Pepco/Exelon transaction in 2014, however,

a reverse break-up fee was payable upon the failure to obtain the required regulatory approvals, and since that time this approach has become common in electric and gas utility acquisitions. In the Pepco transaction, the reverse break-up fee was structured as a mandatory purchase by Exelon of a block of preferred stock that was redeemable by Pepco at its original purchase price in the event regulatory approvals were obtained, and for no consideration if all regulatory approvals were not obtained. Since then, eleven of the thirteen major announced transactions (AGL/Southern Company and UIL/Iberdrola being the two exceptions) have included some form of reverse break-up fee, and in the HEI/NextEra transaction it was ultimately triggered when the Hawaiian regulators refused to approve the transaction. Fees have ranged in size from a low of 2.60% of equity value in the Pepco/Exelon deal to a high of 5.35% in Cleco/Macquarie. Exhibit A provides more detail regarding the size of these fees and how they compare to the primary break-up fee for the target company.

IV. CONTRACT TERMS

Another significant trend in the last four years has been the seller-friendly evolution of contract terms. Although this trend is apparent in many provisions in definitive acquisition agreements, it is perhaps most stark in the provisions that specify (1) the efforts that an acquirer must expend in attempting to obtain the necessary regulatory approvals and satisfy any other conditions precedent to closing and (2) the magnitude of adverse terms and conditions that an acquirer is required to accept in the required regulatory orders.

The provision that specifies the level of effort that must be expended is typically a covenant that applies to both parties. As a practical matter, however, the burden of these efforts falls largely on the acquirer. A corollary provision specifies the circumstances under which the acquirer will not be required to move forward with the transaction in the event that one or more of the regulatory approvals contains materially adverse terms and conditions.

As the Exhibit B chart attached shows, until the TECO/Emera transaction in September 2015, the standard in the regulatory approvals covenant was almost always to use "reasonable best efforts to take all actions and to do all things necessary, including [a litany of specified actions]" in order to obtain the necessary regulatory approvals and satisfy the other conditions to closing. Beginning with the TECO/Emera transaction and continuing with several others since that time, this formulation has changed slightly to require the acquirer to "take all actions and do all things necessary" including "using reasonable best efforts" to eliminate any specified litany of impediments to closing the transaction. Coupled with changes that were simultaneously taking place in triggers for paying reverse break-up fees, these changes arguably constitute a significant change in the level of regulatory risk being assumed by acquirers.

The discussion above highlights the trend towards reverse break-up fees in the case where the parties fail to obtain the required regulatory approvals. But what happens when the approvals are obtained but impose significant unwanted burdens on the company going forward? There are three basic outcomes here, and again the recent trend has favored the sellers.

Historically, the closing conditions in the acquisition agreement typically provided that if the regulatory orders contained what was often referred to as a "burdensome condition" (effectively conditions in the regulatory order that would result in a material adverse effect on the target company), the acquirer would not have any obligation to close. The concept of a burdensome condition is similar to the concept of a Material Adverse Effect (MAE), which is a more general protection against material adverse developments that gives acquirers some protection in virtually every acquisition agreement. Courts interpreting these so-called MAE clauses have been consistent in finding that an MAE is a high standard to satisfy. There are few if any cases where a court has concluded that an MAE has occurred; all of the major cases have found that no MAE has occurred.[6] Carrying this principle over to the concept of burdensome condition, although there is little or no judicial guidance about how to determine what constitutes a burdensome condition, there is certainly a basis for arguing that a burdensome effect must be something of major significance, probably much more than merely "material." Consequently, the typical provisions in definitive agreements relating to the required regulatory approvals were seller-friendly to begin with. That being said, the typical approach until recently had been that if a burdensome condition was imposed, not only did the acquirer not have any obligation to close, it also would not have any liability for failure to close. Recently, this approach has evolved with two alternatives, both of which impose greater risk on the acquirer.

The first alternative approach was originally seen in the Pepco/Exelon transaction in April 2014, which was the first transaction to contain a reverse break-up fee. There, the acquirer was not obligated to close if one or more of the regulatory orders contained a burdensome condition, but if the transaction ultimately terminated because the so-called "drop dead date" passed, then the acquirer was obligated to pay the reverse break-up fee. The effect of this approach is to give the acquirer time to attempt to obtain modifications to the order, but the risk of a regulatory order containing a burdensome condition still lies with the acquirer. Essentially, payment of the reverse break-up fee is a "hell or high water" provision.

In the next three transactions with reverse break-up fees that followed the Pepco/Exelon transaction, Integrys/WEC, Cleco/Macquarie, and HEI/NextEra, the approach taken reverted to the more typical formulation seen historically: i.e., even though a reverse break-up fee was included in these deals, there was no liability for the acquirer if the regulatory orders were obtained, but the transaction did not close because one or more of them contained a burdensome condition. This formulation evolved yet again in the TECO/Emera transaction. There, the entire concept of a burdensome condition was absent, and as a result the acquirer had to accept whatever burdens the regulators imposed in the regulatory approvals, without the ability to defer closing in hopes of obtaining a revised order with better terms. Not only did the reverse break-up fee have to be paid if the acquirer refused to close due to the conditions in the approval, the acquirer's liability was not limited to the fee in this circumstance—rather the seller could also sue for damages on top of the reverse break-up fee.

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6. *See, e.g.*, IBP v. Tyson Foods, 2001 Del. Ch. LEXIS 81 (June 15, 2001); Hexion Specialty Chemicals v. Huntsman, C.A No. 3841-VCL, 2008 WL 4457544 (Del. Ch. Sept. 29, 2008).

Since the TECO/Emera transaction, the approach taken for deals with reverse break-up fees has followed either the Pepco/Exelon approach or the TECO/Emera approach, with Piedmont/Duke, Questar/Dominion, Empire District/Algonquin, and Westar/Great Plains following the approach taken in Pepco/Exelon, and ITC/Fortis following TECO/Emera. The effect of this evolution is that acquirers are assuming even more regulatory risk than was the case just a few years ago.

V. CONTRACT PROVISIONS RELATING TO DAMAGES AND WILLFUL BREACH

Although there is no clear trend apparent in the evolution of provisions relating to breaches and remedies in the past few years, an interesting question in any transaction is what remedies are available in the event of a breach of the agreement by one of the parties. As discussed above, most agreements provide for payment of a break-up fee or a reverse break-up fee in the event that certain closing conditions are not satisfied. However, the triggers for payment of these fees do not encompass all of the possible problems that might arise.

A preliminary issue is what remedies should be available for a breach of the agreement. While one might think that any breach necessitates a remedy, the typical approach in these transactions has been to state that if the agreement is terminated, there are no remedies unless there has been a willful (or some similar formulation) breach. Attached as Exhibit C is a chart that details the relevant provisions relating to willful breach and the remedies available, including whether break-up or reverse break-up fees are payable. As shown in the chart, the concept of willful breach was often not defined, but after the issue was the subject of some judicial decisions in the Delaware Court of Chancery (in a non-utility context),[7] parties began to focus on defining what willful breach means. While the definitions have varied, they tend to focus on situations where the acts of the breaching party appear to indicate that the breaching party knew that a breach would follow as a consequence of its actions. As a result, in these transactions it appears that, for example, in the event of a breach of the seller's representations and warranties that is not willful (e.g. a mistake or a breach that simply evolves because of changed circumstances) but is nonetheless quite significant, the buyer does not have any remedy beyond terminating the transaction.

Also shown in the chart is that if a willful breach has occurred, it often has an effect on what remedies may be available. For example, in some agreements in circumstances where there has been a willful breach and a break-up fee or reverse break-up fee is payable, the other party may be entitled to seek damages in addition to the fee. See, for example, Westar/Great Plains and Empire District/Algonquin, although in the latter agreement this "adder" of damages on top of the fee only applies to the Reverse Break-up Fee.

In several transactions, the existence of a willful breach allows the seller to seek to recover the lost premium to its shareholders as part of its damages claim if a willful breach occurs. This feature first appeared in the TECO/Emera transaction and was also used in ITC/Fortis, Empire District/Algonquin, and Westar/Great Plains.

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7. *See, e.g.*, *Hexion Specialty Chemicals*, 2008 WL 4457544.

As noted above, it is difficult to discern a pattern with these provisions beyond the use of greater specificity around defining willful breach and the general trend towards more seller-friendly terms. What can be said is that there are various permutations to these provisions that should be carefully evaluated during the negotiations.

VI. REGULATORY ORDERS

Although not necessarily definitive trends, there also are some developments worth commenting on with respect to the regulatory proceedings relating to utility mergers. With the exception of 2014, when a particularly difficult set of transactions appears to have been announced (which are discussed in more detail below), the regulatory approval process for electric and gas utility mergers seems to have become much more expeditious. Anecdotally, we believe that this is because regulators have become more accepting that the benefits of mergers are real, that they understand the most significant risks associated with mergers, and that they have become more comfortable with regulatory mechanisms for capturing benefits and mitigating risks. In a similar vein, a somewhat standard menu of commitments by the acquirers in these transactions has developed such that, while not all of them are present in any particular transaction, the parties and the regulators know and expect that certain types of commitments will be made.

The regulatory approvals typically required in connection with a merger or acquisition of two regulated utilities include clearance from the Department of Justice or the Federal Trade Commission under the Hart Scott Rodino Antitrust Improvements Act of 1976, the approval of FERC under the Federal Power Act (generally required only if an electric utility is involved in the transaction)[8], approval from the Nuclear Regulatory Commission under the Atomic Energy Act of 1954 (only if a nuclear licensee is involved in the transaction), approval from the Federal Communications Commission (FCC) (required because most utilities have radio licenses subject to FCC jurisdiction) and the approval of one or more state commissions. The commitments made in connection with obtaining state regulatory approval often include some of the following commitments:

- Maintaining the target's headquarters in its current location;
- Agreeing to a rate freeze for a specified time period;
- Committing to no-layoffs among the target's work force for a specified time period;
- Committing to maintain compensation and benefit levels for the target's employees;
- Ring fencing the target from financial risk associated with the acquirer's other business activities;
- Agreeing that transaction costs and premiums can't be recovered in rates;
- Agreeing to maintain the existing management structure at the target;

8. A number of predominately gas companies have interests in electric generating companies that are considered to be public utilities and thus trigger FERC approval requirements under the Federal Power in the event of a merger of acquisition. (E.g., ETE/Southern Union).

- Committing to rate credits for the target's customer base; and
- Agreeing to maintain community organizations/commitments of the target.

Most of the twelve transactions that have been completed since 2012 went through the regulatory approval process relatively smoothly, but a handful of them seemed to have been more contentious, and another transaction (NextEra/HEI) was eventually terminated due to an inability to obtain the requisite approvals. These are discussed briefly below.

A. Pepco/Exelon

Exelon Corporation and Pepco Holdings announced their proposed combination in April of 2014.[9] The transaction required approval from utility regulatory commissions in the District of Columbia, Delaware, Maryland, New Jersey and Virginia. By August 2015, the transaction seemed to be on course to close well before year-end, having obtained all approvals except the District of Columbia Public Service Commission (DCPSC). However, on August 27, 2015 the DCPSC issued an order denying approval for the transaction.[10]

In its order the DCPSC expressed concerns that the proposed management structure would diminish Pepco's role and ability to make decisions responding to the needs of D.C. ratepayers and policy directives, and that the proposed merger, taken as a whole, did not meet the District's threshold for a net public benefit, rather than a simple no harm standard.[11] The Commission acknowledged that there would be benefits associated with the merger, but also expressed concern about potential harms that could result from the transaction.[12] On balance, the Commission concluded that the potential benefits did not outweigh the potential harms and consequently rejected the transaction.[13] One Commissioner dissented on the grounds that the other Commissioners had not sufficiently explored the potential to mitigate deficiencies in the merger by imposing conditions on the parties and did not provide guidance regarding how the Commission's concerns could be addressed.[14]

Not surprisingly, the companies launched an intensive effort to obtain approval of the transaction, including filing a request for rehearing on September 28th, and, following that up in October, with a settlement agreement with the Mayor of the District and other key constituencies that included significant enhancements to the proposed package of benefits to customers and others in the

9. Press Release, Pepco Holdings, Exelon to Acquire Pepco Holdings, Inc., Creating the Leading Mid-Atlantic Electric and Gas Utility (Apr. 30, 2014), http://www.pepcoholdings.com/library/templates/Interior.aspx?Pageid=87&id=6442454881.

10. Opinion and Order at 171, In re Joint Application of Exelon Corp., Pepco Holdings, Inc., Potomac Elec. Power Co., Exelon Energy Delivery Co. LLC And New Special Purpose Entity, LLC, Formal Case No. 1119 (D.C. Pub. Serv. Comm'n 2015), http://edocket.dcpsc.org/pdf_files/commorders/orderpdf/orderno_17947_FC1119.pdf.

11. *Id.* at 170.

12. *Id.* at 158-59.

13. *Id.* at 160.

14. *Id.* at Attachment Pg. No. 7.

District.[15] Following the settlement, the Mayor, the D.C. Council and numerous others came out in public support of the transaction.[16] Opponents of the transaction also weighed in, causing the Commission to reopen the record in the proceeding so that it could consider additional evidence regarding the settlement agreement. The Maryland Attorney General also made an unsuccessful effort to have the Maryland PSC's approval of the transaction vacated.

On February 26, 2016, the DCPSC, by a two to one vote, rejected the proposed settlement, but also presented a series of conditions that, if accepted by the parties would result in automatic approval of the deal.[17] An intense few weeks followed. After some of the parties said they would not agree to the conditions, Exelon and Pepco offered additional benefits. On March 23rd, in a vote that surprised many observers, the Commission voted, again with one dissent, to approve the merger, subject to the conditions that it had offered in its February 26th order.[18] The transaction closed later that day.

In order to obtain the DCPSC's approval, Exelon committed, among other things, to the following:

- Rate credits to customers totaling some $39.6 million, of which $14 million would be paid out within sixty days of closing with the remainder used to offset any distribution rate increases that may be approved in the future;
- Exelon agreed to establish a fund of approximately $47.2 million to subsidize grid modernization projects and energy efficiency and conservation initiatives;
- Any transaction costs and premiums cannot be recovered in Pepco's rates;
- For a period of ten years following the closing, Exelon agreed to make charitable contributions and maintain traditional local community support activities that exceed the levels provided by Pepco in 2014;
- Pepco is to forgive all residential customer accounts in arrears for more than two years;
- Implementation of ring-fencing measures to insulate Pepco and its customers from risks associated with Exelon's non-regulated operations;
- Exelon is to honor Pepco's existing commitments to workforce diversity and all existing collective bargaining agreements;

15. Press Release, Pepco Holdings, Exelon And Pepco Holdings File For Reconsideration of Their Merger (Sep. 28, 2015), http://www.pepcoholdings.com/library/templates/Interior.aspx?Pageid=87&id=6442457994; Press Release, Pepco Holdings, Pepco Holdings And Exelon Reach Merger Settlement With D.C. Gov't (Oct. 6, 2015), http://www.pepco.com/library/templates/interior.aspx?pageid=6442454157&id=6442458056.

16. Press Release, Pepco Holdings, Pepco Holdings And Exelon Reach Merger Settlement With D.C. Gov't (Oct. 6, 2015), http://www.pepco.com/library/templates/interior.aspx?pageid=6442454157&id=6442458056.

17. Suzanne Herel, *DCPSC: Will OK Exelon-Pepco Deal for Additional Concessions*, RTO INSIDER (Feb. 26, 2016), https://www.rtoinsider.com/dc-psc-oks-exelon-pepco-22536/.

18. Press Release, Exelon Corp., Pepco Holdings And Exelon Close Merger Following Approval By The Pub. Serv. Comm'n Of The D.C. (Mar. 23, 2016), http://www.exeloncorp.com/newsroom/merger-close.

- For a period of five years Exelon committed that there would be no net involuntary workforce reductions at Pepco;
- Exelon committed $5.2 million to fund development programs in the District for employees;
- Exelon will re-locate its corporate headquarters to the District by January 1, 2018; and,
- Exelon committed to facilitate the development of 7 MW of solar generation in DC by December 31, 2018, and to purchase 100 MW of wind energy in the PJM Interconnection LLC.[19]

B. CLECO/Macquarie/BCIMC

The Cleco transaction was announced in October of 2014 and required the approval of the Louisiana Public Service Commission (LPSC).[20] As part of its initial filing with the LPSC, Cleco, its public utility subsidiaries and the investor group making the acquisition proposed ring-fencing commitments intended to insulate Cleco Power from its parent companies and affiliates, and confirmed that Cleco Power President Darren Olagues would become President and CEO of Cleco.[21] They also committed that the company's headquarters would remain in Pineville, Louisiana following completion of the transaction, and that Cleco would continue to operate as an independent company led by local management, with no changes to the company's operations, staffing levels, compensation levels or employee and retiree benefits programs as a result of the transaction.[22]

The parties were initially optimistic that they could close the transaction during 2015; however, the LPSC staff did not file its testimony in the proceeding until the end of July 2015, more than five months after Cleco and the investor group filed the initial application. Moreover, the staff recommended that the transaction not be approved, although it offered a litany of conditions that might mitigate its concerns.[23] Many of these conditions were directed at mitigating financial risks to Cleco. Subsequent to the staff's testimony, Cleco and the investors proffered two rounds of enhanced commitments to customers and other constituencies. The cumulative additional enhancements included a $125 million rate credit, a series

19. Pub. Serv. Comm'n of the D.C., Matrix of Commitments From the Pepco-Exelon Merger FC 1119 2016-E-1615 Order No. 18160 Attachment B (2016), http://dcpsc.org/PSCDC/media/PDFFiles/MergerConditionTrackingMatrix10172016.pdf.

20. Press Release, Cleco Co., Cleco Enters Agreement to be Acquired by North Am. Inv. Group Led by Macquarie Infrastructure and Real Assets and Brit. Colum. Inv. Mgmt. Corp. (Oct. 20, 2014), https://www.cleco.com/newsroom/-/asset_publisher/BUN21WHLp8es/content/cleco-enters-agreement-to-be-acquired-by-north-american-investor-group-led-by-macquarie-infrastructure-and-real-assets-and-british-columbia-investment.

21. *Id.*

22. *Id.*

23. Press Release, Cleco Co., Cleco and North Am. Inv. Group Led by Macquarie Infrastructure and Real Assets and Brit. Colum. Inve. Mgmt. Corp. Near Final Stages of State Reg. Approval Process (Oct. 2, 2015), https://www.cleco.com/newsroom/-/asset_publisher/BUN21WHLp8es/content/cleco-and-north-american-investor-group-led-by-macquarie-infrastructure-and-real-assets-and-british-columbia-investment-management-corporation-near-fi.

of financial undertakings designed to preserve Cleco Power's investment grade credit rating and protections for employees.[24]

Notwithstanding the additional concessions, the LPSC rejected the transaction in February of 2016.[25] The parties sought a rehearing of the decision and simultaneously offered up additional commitments in connection with the merger. The key additional commitments offered up included the following:

- $136 million in ratepayer credits (an increase from the $100 million initially offered), translating to an average of $500 for every residential and small business customer; and,
- A guaranty that Cleco would not file for a rate case prior to June 30, 2019, with any new rates not taking effect until July 1, 2020[26].

On March 28, 2016, the LPSC approved the transaction on the basis of the revised commitments, and the transaction proceeded to closing on April 13, 2016.[27]

C. UIL/Iberdrola

Iberdrola USA's proposed acquisition of UIL Holdings Corporation was unveiled on February 25, 2015.[28] The transaction was subject to approval by the public utility commissions in Connecticut and Massachusetts. Filings were made in Connecticut and Massachusetts on March 25, 2015, and the proceedings appeared to be moving along quickly at first, with hearings scheduled within a few weeks after the filings.[29] Then at the end of June, the Connecticut Public Utilities Regulatory Authority (PURA) issued a draft of a decision denying approval of the transaction.[30] Key reasons cited by the PURA for its position were concerns about whether the utility would be locally managed following the merger, a lack of concrete benefits for customers and the absence of any studies regarding potential

24. Press Release, Cleco Co., Cleco and Inv. Group Enhance Commitments to Create Additional Value for Customers and Obtain Approval of the La. Pub. Serv. Comm'n (Jan. 4, 2016), https://www.cleco.com/newsroom/-/asset_publisher/BUN21WHLp8es/content/cleco-and-investor-group-enhance-commitments-to-create-additional-value-for-customers-and-obtain-approval-of-the-louisiana-public-service-commission.

25. Press Release, Cleco Co., Cleco and North Am.-led Inv. Group Issue Statement in Response to La. Pub. Serv. Comm'n's Decision Regarding Transaction (Feb. 24, 2016), https://www.cleco.com/newsroom/-/asset_publisher/BUN21WHLp8es/content/cleco-and-north-american-led-investor-group-issue-statement-in-response-to-louisiana-public-service-commission-s-decision-regarding-transaction.

26. Cheryl Kaften, *Louisiana PSC Approves Sale of Cleco, Conditional on $136M in Customer Credits*, ENERGY MANGER TODAY (Apr. 4, 2016), https://www.energymanagertoday.com/louisiana-psc-approves-sale-of-cleco-conditional-on-136-million-in-customer-credits-0122879/.

27. Press Release, Cleco Co., State regulators approve sale of Cleco (Mar. 28, 2016), https://www.cleco.com/newsroom/-/asset_publisher/BUN21WHLp8es/content/state-regulators-approve-sale-of-cleco.

28. Press Release, Iberdrola USA, Inc., Iberdrola USA to Combine with UIL (Feb. 25, 2015).

29. Letter from Bob Kump, CCO Iberdrola USA Inc., to Iberdrola USA Inc. employees (March 26, 2015) (on file with the Securities Exchange Commission).

30. Emmett N. Ellis, Monica W. Sargent & Steven C. Friend, *The Evolving Public Interest-Recent Decisions in Utility Merger Proceedings*, 55 INFRASTRUCTURE 4, 8 (2016).

savings that would result from the merger.[31] The regulator also wanted more information about the potential benefits and harm that could result from the merger as well as stronger ring-fencing provisions.[32]

Shortly after the draft decision came out, the companies withdrew their application and refiled a few weeks later. The revised proposal included enhanced benefits for customers, including:

- A rate credit of approximately $20 million within the first year following closing to customers of United Illuminating (UI), Connecticut Natural Gas (CNG) and Southern Connecticut Gas Company (SCG);
- Additional rate credits payable over ten years of (1) $12.5 million for customers of CNG and (2) $7.5 million for customers of SCG;
- A commitment to increase spending on the replacement of cast iron piping from $11 million to $22 million, without seeking rate recovery on the increased spending until the next general rate case;
- A rate freeze for UI until January 1, 2017, and for CNG and SCG until January 1, 2018;
- Funding of $6 million to the Connecticut Department of Energy and Environmental Protection for purposes of encouraging investment in energy efficiency projects, renewable energy, electric vehicles and clean technologies;
- Creation of a multi-year system resiliency plan that limits cost recovery for storm resiliency spending to $50 million in the first year of implementation; and,
- Hiring 150 people in Connecticut in the first three years following closing.[33]

In September 2015, the companies reached a settlement with the Connecticut consumer counsel, and then in October settled with the Massachusetts Attorney General and the Massachusetts Department of Energy Resources.[34] As a result, the transaction was back on track and it proceeded to closing in mid-December after receiving shareholder approval and authorization from Connecticut and Massachusetts regulators.[35]

D. HEI/NextEra

The NextEra/HEI transaction was announced on December 3, 2014, and, among other conditions, it required the approval of the Hawaii Public Utilities

31. Joint Application of Iberdrola, S.A.,Et Al., And UIL Holdings Corporation for Approval of a Change of Control, Docket No. 15-03-45 (Conn. Pub. Utils. Reg. Auth. June 30, 2015).

32. *Id.*

33. Joint Application of Iberdrola, S.A., et al., And UIL Holdings Corporation for Approval of a Change of Control, Docket No. 15-07-38 (Conn. Pub. Utils. Reg. Auth. Dec. 9, 2015).

34. *Id.*

35. *Id.*

Commission (HPUC).[36] The initial application with the HPUC was filed on January 29, 2015, and included commitments that Hawaiian Electric would not submit any applications seeking a general base rate increase and would forego recovery of the incremental operations and maintenance revenue adjustment under its decoupling rate mechanism for at least the first four years following the transaction's closing.[37] The companies asserted that these undertakings would result in approximately $60 million in cumulative savings for Hawaiian Electric's customers.[38] NextEra also committed not to seek to recover through Hawaiian Electric rates any acquisition premium, transaction or transition costs that may arise from the acquisition, and that there would be no "involuntary reductions" to Hawaiian Electric's workforce as a result of the transaction for at least two years after the deal closes.[39] NextEra also proposed a series of ring-fencing provisions designed to ensure that Hawaiian Electric and its customers are not impacted by the activities and businesses of NextEra's other activities.[40]

Despite these commitments, the proceeding before the HPUC bogged down in a debate about what Hawaii's energy policy should be during the next several decades. On the day before the companies filed their application for approval, the Hawaii Senate leader introduced a bill that would require Hawaii to obtain 100% of its power from renewable energy sources by 2040.[41] The measure was subsequently enacted by the legislature with an almost unanimous vote.[42] Hawaii already has deeper penetration of renewable energy from distributed generation than any other state.[43]

The companies advocated that the transaction be approved on the basis that the combination would let them implement a shared vison of increasing renewable energy in Hawaii, modernize the islands' electric grid, reduce Hawaii's dependence on imported oil, integrate more rooftop solar energy and generally lower customer bills. Nevertheless, opposition persisted. The consumer advocate attempted to slow the proceedings down, but the effort was rejected by the PUC. Various political groups on the islands were reported to be considering ways to convert Maui Electric Co. and other HEI utility subsidiaries into government-owned public utilities. The Governor also came out against the combination, and various legislative initiatives were launched that would impose additional hurdles to completion of the merger. The companies pressed on despite the opposition, citing the potential for $1 billion in merger-related savings, boosted their proposed commitments to customers and emphasized that the company would continue to be locally

36. Company PowerPoint, Hawaiian Electric Industries, Inc., NextEra Energy and Hawaiian Electric Industries to Combine (Dec. 3, 2014).

37. Press Release, NextEra Energy, NextEra Energy and Hawaiian Electric File Joint Application with the Hawaii Public Utilities Commission (Jan. 29, 2015).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Governor Signs Bill Setting Hawaii's Renewable Energy Goal at 100%*, HAWAII CLEAN ENERGY INITIATIVE (June 9, 2015), http://www.hawaiicleanenergyinitiative.org/governor-signs-bill-setting-hawaiis-renewable-energy-goal-at-100/.

42. *Id.*

43. *Id.*

managed following the merger.[44] The companies also extended the termination date under the Merger Agreement to accommodate additional delay in the proceeding.

These efforts were to no avail, as on July 15, 2016 the Hawaii Public Utilities Commission dismissed the companies' application for approval of the merger.[45] The Commission's decision concluded that, while NextEra was fit, willing and able to perform the services that would be required of the owner of the Hawaiian Electric Companies, the applicants had failed to demonstrate that the transaction was reasonable and in the public interest.[46] In reaching its conclusion, the Commission focused on five fundamental areas of concern: benefits to ratepayers, risks to ratepayers, applicants' clean energy commitments, the proposed change of control's effect on local governments and the proposed change of control's effect on competition in local energy markets.[47] The Commission provided a detailed list of concerns and uncertainties associated with each of these categories. Although, the dismissal was without prejudice, the tone of the order was quite negative.

After reviewing the order, on July 18, 2016, the companies announced that they had terminated their merger agreement.[48] Upon termination, NextEra also paid to Hawaiian Electric Company a break-up fee of $90 million plus reimbursed expenses of up to $5 million.[49] As noted above, this appears to be the first instance in the electric and gas utility industries of a reverse breakup fee being paid following termination of an acquisition agreement upon failure to obtain regulatory approvals.

VII. CONCLUSION

The last four years have seen a continuation of the long-standing trend towards consolidation in the electric and gas utility space. During this time, the increasingly smaller pool of targets has combined with other factors (little or non-existent load growth, the desire for scale and a low interest rate environment) to create a seller's market. The result has been an increase in realized valuations together with a shift towards markedly seller-friendly deal terms. While there may be some moderation of these trends in a rising interest rate environment, structural elements of the electric and gas utility industry will continue to incentivize consolidation. As a result, the long-standing trend towards consolidation seems likely to continue.

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44. *Id.*

45. *NextEra Energy and Hawaiian Electric Industries announce termination of Merger Agreement*, NEXTERA ENERGY (July 18, 2016), http://www.nexteraenergy.com/news/contents/2016/071816.shtml.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

Exhibit A: Selected Electric and Gas Utility Mergers and Acquisitions

January 1, 2013 – March 1, 2017

Date Announced (Closed)	Parties	Total Transaction Value (millions)	Equity Value (millions)	Consideration	Premium to Market Price (days prior to announcement)	P/E NTM	Break-Up Fee (% of Equity Value)	Reverse Break-Up Fee (% of Equity Value)	Management Structure/Other Undertakings	Required Regulatory Approvals	Nature of Process
2/21/17 (pending)	Delta Natural Gas/PNG Companies	$269.1	$218.7	Cash	17.4% (1 day)	34.9x	$4.34M (1.6%)	$4.34M (1.6%)	Maintain headquarters in KY; one Delta director will be an independent representative of Delta's constitutents' interests	HSR; KY	N/A
1/25/17 (pending)	WGL Holdings/ AltaGas	$6,324.34	$4,520.08	Cash	27.9% (11/28/16 unaffected)	26.2x	$136M (3.0%)	$205M, $182M or $68M (4.5%, 4.0% & 1.5%)	Maintain headquarters in Washington, D.C.; WGL management to manage all AltaGas US operations	HSR, FERC, CFIUS, DC, MD and VA	Competitive
5/13/16 (pending)	Westar/ Great Plains	$12,193.75	$8537.88	Cash	13.4% (1 day) 36.1% (3/9/16 unaffected)	25.0x	$280M (3.28%)	$380M (4.45%)	Maintain headquarters in Topeka, KS; one Westar director to be appointed to board of combined company	HSR, FERC, KS, NRC and FCC	Competitive
2/9/16 (1/1/17)	Empire District/ Algonquin	$2,389.81	$1,487.95	Cash	21.3% (1 day)	23.2x	$53M (3.56%)	$65M (4.37%)	Empire District management to head regional management team; no changes to management or employees at Empire	HSR, FERC, CFIUS, AR, KS, MO, OK and FCC	Competitive

Date Announced (Closed)	Parties	Total Transaction Value (millions)	Equity Value (millions)	Consideration	Premium to Market Price (days prior to announcement)	P/E NTM	Break-Up Fee (% of Equity Value)	Reverse Break-Up Fee (% of Equity Value)	Management Structure/Other Undertakings	Required Regulatory Approvals	Nature of Process
2/9/16 (10/14/16)	ITC Holdings/ Fortis, Inc.	$11,426.90	$6,945.86	Cash/Stock	15.5% (1 day)	21.9x	$245M (3.53%)	$280M/$245M (4.03%/3.53%)	Maintain headquarters in MI, no force reductions	HSR, FERC, CFIUS, IL, KS, MO, OK and WI	Competitive
2/1/16 (9/16/16)	Questar/ Dominion	$5,982.94	$4,396.74	Cash	23.2% (1 day prior)	19.1	$99M (2.25%)	$154M (3.5%)	One Questar representative to be appointed to each of Dominion and Dominion Midstream's boards; maintenance of headquarters in Salt Lake City	HSR, UT, WY, ID	Bilateral
10/26/15 (10/3/16)	Piedmont/ Duke	$6,589.35	$4,794.90	Cash	40% (1-day prior)	30.9x	$125M (2.61%)	$250M (5.21%)	One Piedmont representative will be added to Duke's Board of Directors; an existing member of Piedmont's management team will lead Duke's natural gas operations.	HSR, NC, FCC	Competitive
9/4/15 (7/1/16)	TECO/ Emera	$10,422.48	$6,481.18	Cash	48% (unaffected price as of 7/15/15)	24.7x	$212.5M (3.28%)	$326.9M (5.04%)	Tampa Electric and NM Gas to maintain existing headquarters in Tampa and Albuquerque	HSR, CFIUS, FERC, NM, FCC	Competitive

Date Announced (Closed)	Parties	Total Transaction Value (millions)	Equity Value (millions)	Consideration	Premium to Market Price (days prior to announcement)	P/E NTM	Break-Up Fee (% of Equity Value)	Reverse Break-Up Fee (% of Equity Value)	Management Structure/Other Undertakings	Required Regulatory Approvals	Nature of Process
8/24/15 (7/1/16)	AGL/ Southern	$12,001.74	$7,924.74	Cash	36.3% (20-day VWAP)	21.8x	$201M (2.54%)	N/A	AGL to maintain separate board and management team	HSR, CA, GA, IL, MD, NJ, VA, FCC	Bilateral
2/26/15 (12/16/15)	UIL/ Iberdrola (USA)	$4,847.02	$3,040.02	Stock/Cash	24.6% (est. 1-day prior)	21.6x	$75M (2.47%)	N/A	UIL CEO to be CEO of combined entity; UIL CEO and two others to join Iberdrola (USA) board of directors	HSR, CFIUS, CT, MA, FCC	Bilateral
12/3/14 (terminated 7/16/16)	HEI/ NextEra	$4,567.39	$2,601.37	Stock	21% (est. 20-day VWAP)	15.9x	$90M (3.46%)	$90M (3.46%)	HEI to maintain local headquarters and be managed locally	HSR, FERC, HA, FCC	Bilateral
10/20/14 (4/13/16)	CLECO/ Macquarie/ BCIMC	$4,703.54	$3,365.13	Cash	14.7% (1-day prior)(strategic process had been previously disclosed)	20.3x	$120M (3.57%)	$180M (5.35%)	CLECO to maintain local headquarters and management; CLECO President to become CEO upon closing	HSR, CFIUS, FERC, LA	Competitive
6/23/14 (6/29/15)	Integrys/ WEC	$9,114.57	$5,684.47	Stock/Cash	17.3% (1 day prior)	19.5x	$175M (3.08%)	$175M (3.08%)	Three Integrys Directors to join WEC Board upon closing	HSR, FERC, WIA, IL, MI, MN, FCC	Bilateral
4/30/14 (3/23/16)	Pepco/ Exelon	$12,605.43	$6,912.43	Cash	19.6% (1 day prior); 29.5% (20-day VWAP)	22.4x	$293M (4.24%)	$180M (2.60%)	Maintenance of local and regional headquarters and management	HSR, FERC, DE, DC, MD, NJ, VA, FCC	Competitive

Date Announced (Closed)	Parties	Total Transaction Value (millions)	Equity Value (millions)	Consideration	Premium to Market Price (days prior to announcement)	P/E NTM	Break-Up Fee (% of Equity Value)	Reverse Break-Up Fee (% of Equity Value)	Management Structure/Other Undertakings	Required Regulatory Approvals	Nature of Process
12/11/13 (8/15/14)	UNS/Fortis	$4,343.11	$2,502.68	Cash	30.1% (1 day prior)	18.4x	$63.9M (2.55%)	N/A	UNS management team to remain in place, UNS headquarters to remain in Tucson and four current directors of UNS to remain on UNS Board of Directors following closing	HSR, CFIUS, FERC, AZ, FCC	Bilateral
5/29/13 (12/19/13)	NV/ Berkshire	$10,688.83	$5,664.63	Cash	20.3% (1 day prior)	18.0x	$56.6M (1st 6 weeks) (1.0%)/$169.7 M (3.0%)	N/A	NV to continue to operate as a separate subsidiary and maintain local headquarters	HSR, FERC, NV, FCC	Bilateral

Exhibit B: Risk Allocation re Regulatory Approvals in Selected Utility Mergers and Acquisitions

January 1, 2013 – March 1, 2017

Transaction Announcement Date (Closing Date)	Required Regulatory Approvals	Regulatory Approvals Condition Precedent "Gauge"	Efforts Required	Effect of Failure to Obtain
Delta Natural Gas/PNG Companies 2/21/17 (pending)	HSR; KY	Burdensome Condition based on Company MAE or Combined Company MAE	Reasonable best efforts to consummate the transaction, including: • agreeing to divestitures (except in the case of anti-trust approvals) • defending through litigation, including appeals • terminating or relinquishing or modifying any existing relationships, ventures or contractual rights of Buyer • creating new relationships, ventures, and contractual rights	Payment of Reverse Break-up Fee ($4.34M) if failure to obtain approvals is due to a breach by Buyer of its covenants to obtain regulatory approvals. Otherwise, no liability if terminated due to failure to obtain approvals or imposition of a burdensome condition by approvals. Either Party may extend drop dead date by three months if all other Conditions Precedent have been satisfied or waived.
WGL/AltaGas 1/25/17 (pending)	HSR, FERC, CFIUS, DC, MD and VA	Burdensome Condition based on Company MAE or Buyer MAE	Reasonable best efforts to consummate the transaction. Take any and all steps that may be required, including: • agreeing to divestitures • terminating or relinquishing or modifying any existing relationships, ventures or contractual rights of Buyer • creating new relationships, ventures, and contractual rights	"Hell or High Water" Payment of Regulatory Termination Fee ($68M), unless a Burdensome Condition is imposed. Payment of Parent Termination Fee ($182M) if Buyer failed to comply with its covenants as regards seeking to obtain the required regulatory approvals. Either Party may extend drop dead date by six months if all other Conditions Precedent have been satisfied or waived.

Transaction Announcement Date (Closing Date)	Required Regulatory Approvals	Regulatory Approvals Condition Precedent "Gauge"	Efforts Required	Effect of Failure to Obtain
Westar/Great Plains 5/31/16 (pending)	HSR, FERC, KS, NRC and FCC	Regulatory MAE based on a company the size of Westar for purposes of the closing conditions, but none for termination and the reverse break-up fee	Take all actions and do all things necessary. Reasonable best efforts to eliminate all impediments, including (subject to the condition precedent "gauge"): • defending through litigation, including appeals • agreeing to divestitures • agreeing to conduct limitations • taking any action required by a Governmental Entity	"Hell or High Water" Payment of Reverse Break-up Fee ($326.9M). Either Party may extend drop dead date by six months if all other Conditions Precedent have been satisfied or waived.
Empire District/Algonquin 2/9/16 (1/1/17)()	HSR, FERC, CFIUS, AR, KS, MO, OK and FCC	Burdensome Condition is based on Combined Company MAE	Take all actions and do all things necessary. Reasonable best efforts to eliminate all impediments, including (subject to the condition precedent "gauge"): • defending through litigation, including appeals • agreeing to divestitures • agreeing to conduct limitations • taking any action required by a Governmental Entity	"Hell or High Water" Payment of Reverse Break-up Fee ($65M), even if due to an order that would impose a Burdensome Condition on Algonquin. Automatic six month extension if all other Conditions Precedent have been satisfied or waived.

Transaction Announcement Date (Closing Date)	Required Regulatory Approvals	Regulatory Approvals Condition Precedent "Gauge"	Efforts Required	Effect of Failure to Obtain
ITC Holdings/Fortis 2/9/16 (10/14.16)	HSR, FERC, CFIUS, IL, KS, MO, OK and WI	None	Proceed diligently and in good faith, and use best efforts. Take all actions and do all things necessary, including: • taking any action and agreeing to any concession or condition requested or required by a Governmental Entity • agreeing to divestitures • terminating or restructuring existing relationships contracts or governance	"Hell or High Water" Payment of Reverse Break-up Fee ($280M). Either Party may extend drop dead date by up to six months if all other Conditions Precedent have been satisfied or waived.
Questar/Dominion 2/1/16 (9/16/16)	HSR, UT, WY, ID	Company MAE or Combined Company MAE (with Combined Company deemed to be only the size of the Company)	Reasonable best efforts generally. Take all steps necessary to remove impediments and obtain approval, including: • agreeing to divestitures • terminating or modifying existing relationships, ventures, contract rights or other arrangements • creating relationships, ventures or arrangements Reasonable best efforts to defend through litigation, including appeals.	"Hell or High Water" Payment of Reverse Break-up Fee ($154M), even if due to an order that would impose a Burdensome Condition on Dominion. Either Party may extend drop dead date by six months if all other Conditions Precedent have been satisfied or waived. Company may extend an additional three months if all conditions satisfied (including re receipt of approvals) but an injunction has been issued preventing Closing.

Transaction Announcement Date (Closing Date)	Required Regulatory Approvals	Regulatory Approvals Condition Precedent "Gauge"	Efforts Required	Effect of Failure to Obtain
Piedmont/Duke 10/26/15 (10/3/16)	HSR, NC, FCC	Company MAE or Combined Company MAE (with Combined Company deemed to be only the size of the Company)	Reasonable best efforts generally. Take all steps necessary to remove impediments and obtain approval, including: • agreeing to divestitures • terminating or modifying existing relationships, ventures, contract rights or other arrangements • creating relationships, ventures or arrangements Reasonable best efforts to defend through litigation, including appeals.	"Hell or High Water" Payment of Reverse Break-up Fee ($250M), even if due to an order that would impose a Burdensome Condition on Duke. Either Party may extend drop dead date by six months if all other Conditions Precedent have been satisfied or waived.
TECO/Emera 9/4/15 (7/1/16)	HSR, CFIUS, FERC, NM, FCC	None	Take all actions and do all things necessary. Reasonable best efforts to eliminate all impediments, including (subject to the condition precedent "gauge"): • defending through litigation, including appeals • agreeing to divestitures • agreeing to conduct limitations • taking any action required by a Governmental Entity	"Hell or High Water" Payment of Reverse Break-up Fee ($326.9M). Either Party may extend drop dead date by six months if all other Conditions Precedent have been satisfied or waived.
AGL/Southern 8/24/15 (7/1/16)	HSR, CA, GA, IL, MD, NJ, VA, FCC	Combined Company MAE or a requirement to divest of a Company subsidiary or a Buyer subsidiary that constitutes more than 25% of the respective operations of the Company and its subsidiaries or Buyer and its subsidiaries	Reasonable best efforts to take all actions and do all things necessary, including: • defending through litigation, including appeals • eliminate all impediments to obtaining approvals • agreeing to divestitures • taking any action required by a Governmental Entity • agreeing to conduct limitations	No liability if terminated due to failure to obtain approvals or imposition of a burdensome condition by approvals. Either Party may extend drop dead date by six months if all other Conditions Precedent have been satisfied or waived.

Transaction Announcement Date (Closing Date)	Required Regulatory Approvals	Regulatory Approvals Condition Precedent "Gauge"	Efforts Required	Effect of Failure to Obtain
UIL/Iberdrola (USA) 2/26/15 (12/16/15)	HSR, CFIUS, CT, MA, FCC	Company MAE (with Company deemed to be 150% of its size)	Reasonable best efforts to take all actions and do all things necessary, including: • defending through litigation, including appeals • agreeing to divestitures • taking any action required by a Governmental Entity • agreeing to conduct limitations	No liability if terminated due to failure to obtain approvals or imposition of a burdensome condition by approvals. Either Party may extend drop dead date by up to two successive three month periods if all other Conditions Precedent have been satisfied or waived.
HEI/NextEra 12/3/14 (terminated - 7/16/16)	HSR, FERC, HA, FCC	Buyer MAE (with Buyer deemed to be the size of the Company) or Company MAE, in each case after giving effect to the related spin transaction	Reasonable best efforts to take all actions and do all things necessary, including: • defending through litigation, including appeals • agreeing to divestitures • taking any action required by a Governmental Entity • agreeing to conduct limitations	Payment of Reverse Break-up Fee ($90M). Issuance of a regulatory approval that imposes a Burdensome Condition does not require payment of the Reverse Break-up Fee. Automatic six month extension if all other Conditions Precedent have been satisfied or waived.
CLECO/Macquarie/BCIMC 10/20/14 (4/13/16)	HSR, CFIUS, FERC, LA	Company MAE or Combined Company MAE, in each case with the Company deemed to be 50% of its size	Reasonable best efforts to take all actions and do all things necessary, including: • defending through litigation, including appeals • agreeing to divestitures • taking any action required by a Governmental Entity • agreeing to conduct limitations	Payment of Reverse Break-up Fee ($180M), but only if terminated by Purchaser. Issuance of a regulatory approval that imposes a Burdensome Condition does not require payment of the Reverse Break-up Fee. Automatic six month extension if all other Conditions Precedent have been satisfied or waived.

Transaction Announcement Date (Closing Date)	Required Regulatory Approvals	Regulatory Approvals Condition Precedent "Gauge"	Efforts Required	Effect of Failure to Obtain
Integrys/WEC 6/23/14 (6/29/15)	HSR, FERC, WIA, IL, MI, MN, FCC	Combined Company MAE (with Combined Company deemed to be only the size of the Company)	Reasonable best efforts to take all actions and do all things necessary, including: • defending through litigation, including appeals • eliminate all impediments to obtaining approvals • agreeing to divestitures • taking any action required by a Governmental Entity • agreeing to conduct limitations	No liability if terminated due to failure to obtain approvals or imposition of a burdensome condition by approvals. Either Party may extend drop dead date by six months if all other Conditions Precedent have been satisfied or waived.
Pepco/Exelon 4/30/14 (3/24/16)	HSR, FERC, DE, DC, MD, NJ, VA, FCC	Company MAE (with Company deemed to be 50% of its size and matters imposed on Buyer deemed to be imposed on the Company)	Reasonable best efforts to take all actions and do all things necessary, including defending through litigation.	"Hell or High Water" Payment of Reverse Break-up Fee ($180M), even if due to an order that would impose a Burdensome Condition on Exelon. Fee is paid via redemption for $0 of Preferred Stock purchased by Exelon at signing of Merger Agreement. Either Party may extend drop dead date by three months if all other Conditions Precedent have been satisfied or waived.
UNS/Fortis 12/11/13 (8/15/14)	HSR, CFIUS, FERC, AZ, FCC	Company MAE or Combined Company MAE (with Combined Company deemed to be only the size of the Company)	Reasonable best efforts to take all actions and do all things necessary, including: • defending through litigation, including appeals • eliminate all impediments to obtaining approvals • agreeing to divestitures • taking any action required by a Governmental Entity • agreeing to conduct limitations	No liability if terminated due to failure to obtain approvals or imposition of a burdensome condition by approvals. Automatic six month extension if all other Conditions Precedent have been satisfied or waived.

Transaction Announcement Date (Closing Date)	Required Regulatory Approvals	Regulatory Approvals Condition Precedent "Gauge"	Efforts Required	Effect of Failure to Obtain
NV/Berkshire 5/29/13 (12/19/13)	HSR, FERC, NV, FCC	Company MAE or Combined Company MAE (with Combined Company deemed to be only the size of the Company)	Reasonable best efforts to take all actions and do all things necessary, including: • defending through litigation, including appeals • eliminate all impediments to obtaining approvals • agreeing to divestitures • taking any action required by a Governmental Entity • agreeing to conduct limitations	No liability if terminated due to failure to obtain approvals or imposition of a burdensome condition by approvals. Either Party may extend drop dead date by three months if all other Conditions Precedent have been satisfied or waived.

Exhibit C: Effect of Willful Breach in Selected Utility Mergers and Acquisitions

January 1, 2013 – March 1, 2017

Transaction Announcement Date (Closing Date)	Applicable Break-Up Fees	Willful Breach Definition	Effect of Willful Breach on Available Remedies
Delta Natural Gas/PNG Companies 2/21/17 (pending)	Break-up Fee payable in specified circumstances Reverse Break-up Fee payable in specified circumstances	Willful and material breach not defined.	No damages remedy unless a willful and material Breach occurs In cases where the Break-up Fee is payable, the Break-up Fee is sole remedy In cases where the Reverse Break-up Fee is payable, the Reverse Break-up Fee is sole remedy If a willful and material breach occurs, the company can pursue damages, including lost premium to shareholders
WGL Holdings/AltaGas 1/25/17 (pending)	Break-up Fee payable in specified circumstances Reverse Break-up Fee payable in specified circumstances	"Willful and Material Breach" means a material breach that is a consequence of an action undertaken or failure to act by the breaching party with the actual knowledge that the taking of such action or such failure to act would constitute a breach of this Agreement. "Regulatory Failure Willful and Material Breach" means (a) a Willful and Material Breach by Parent of its obligations under Section 5.4 and (b) Parent acted in bad faith.	No damages remedy unless a Willful and Material Breach occurs or, in the case of the buyer's obligations to seek the regulatory approvals, a Regulatory Failure Willful and Material Breach occurs. In cases where the Break-up Fee is payable, the Break-up Fee is sole remedy unless a Willful and Material Breach occurs In cases where the Reverse Break-up Fee is payable, the Reverse Break-up Fee is sole remedy unless a Regulatory Failure Willful and Material Breach occurs If a Willful and Material Breach occurs (or, in the case of buyer's covenants to obtain the regulatory approvals), a Regulatory Failure Willful and Material Breach occurs, the company can pursue damages

Transaction Announcement Date (Closing Date)	Applicable Break-Up Fees	Willful Breach Definition	Effect of Willful Breach on Available Remedies
Westar/Great Plains 5/31/16 (pending)	Break-up Fee payable in specified circumstances Reverse Break-up Fee payable in specified circumstances	"Willful Breach" means a breach that is a consequence of a deliberate act or deliberate failure to act undertaken by the breaching Party with the Knowledge that the taking of, or failure to take, such act would, or would reasonably be expected to, cause or constitute a material breach of any covenants or agreements contained in this Agreement; provided that, without limiting the meaning of Willful Breach, the Parties acknowledge and agree that any failure by any Party to consummate the Merger and the other transactions contemplated hereby after the applicable conditions to the Closing set forth in Article VII have been satisfied or waived (except for those conditions that by their nature are to be satisfied at the Closing, which conditions would be capable of being satisfied at the time of such failure to consummate the Merger) shall constitute a Willful Breach of this Agreement.	No damages remedy unless a Willful Breach occurs In cases where the Break-up Fee is payable, the Break-up Fee is sole remedy unless a Willful Breach occurs In cases where the Reverse Break-up Fee is payable, the Reverse Break-up Fee is sole remedy unless a Willful Breach occurs If a Willful Breach occurs, the company can pursue damages, including lost premium to shareholders
Empire District/Algonquin 2/9/16 (1/1/17)	Break-up Fee payable in specified circumstances Reverse Break-up Fee payable in specified circumstances	"Willful Breach" means a breach that is a consequence of an act or omission undertaken by the breaching Party with the Knowledge that the taking of or the omission of taking such act would, or would reasonably be expected to, cause or constitute a material breach of this Agreement; provided that, without limiting the meaning of Willful Breach, the Parties acknowledge and agree that any failure by any Party to consummate the Merger and the other transactions contemplated hereby after the applicable conditions to the closing set forth in Article VII have been satisfied or waived (except for those conditions that by their nature are to be satisfied at the Closing, which conditions would be capable of being satisfied at the time of such failure to consummate the Merger) shall constitute a Willful Breach of this Agreement.	No damages remedy unless a Willful Breach occurs. In cases where the Break-up Fee is payable, the Break-up Fee is sole remedy In cases where the Reverse Break-up Fee is payable, the Reverse Break-up Fee is sole remedy unless a Willful Breach occurs If a Willful Breach occurs, the company can pursue damages, including lost premium to shareholders

Transaction Announcement Date (Closing Date)	Applicable Break-Up Fees	Willful Breach Definition	Effect of Willful Breach on Available Remedies
ITC Holdings/Fortis 2/9/16 (10/14.16)	Break-up Fee payable in specified circumstances Reverse Break-up Fee payable in specified circumstances	"Willful Breach" means with respect to any breaches or failures to perform any of the covenants or other agreements contained in this Agreement, a material breach that is a consequence of an act or failure to act undertaken by the breaching Party with actual knowledge that such Party's act or failure to act would, or would reasonably be expected to, result in or constitute a breach of this Agreement. For the avoidance of doubt, a Party's failure to consummate the Closing when required pursuant to Section 1.2 shall be a Willful Breach of this Agreement.	No damages remedy unless a Willful Breach occurs. In cases where the Break-up Fee is payable, the Break-up Fee is sole remedy In cases where the Reverse Break-up Fee is payable, the Reverse Break-up Fee is sole remedy In cases where the Reverse Break-up Fee is not payable but a Willful Breach has occurred, damages may include lost premium to shareholders
Questar/Dominion 2/1/16 (9/16/16)	Break-up Fee payable in specified circumstances Reverse Break-up Fee payable in specified circumstances	Willful and material breach not defined	No damages remedy unless a willful and material breach occurs Break-up Fees are sole and exclusive remedy
Piedmont/Duke 10/26/15 (10/3/16)	Break-up Fee payable in specified circumstances Reverse Break-up Fee payable in specified circumstances	Willful and material breach not defined	No damages remedy unless a willful and material breach occurs Break-up Fees are sole and exclusive remedy unless there is a willful and material breach

Transaction Announcement Date (Closing Date)	Applicable Break-Up Fees	Willful Breach Definition	Effect of Willful Breach on Available Remedies
TECO/Emera 9/4/15 (7/1/16)	Break-up Fee payable in specified circumstances Reverse Break-up Fee payable in specified circumstances	"Willful Breach" means a breach that is a consequence of an act or omission undertaken by the breaching Party with the Knowledge that the taking of or the omission of taking such act would, or would reasonably be expected to, cause or constitute a material breach of this Agreement; provided that, without limiting the meaning of Willful Breach, the Parties acknowledge and agree that any failure by any Party to consummate the Merger and the other transactions contemplated hereby after the applicable conditions to the Closing set forth in Article VII have been satisfied or waived (except for those conditions that by their nature are to be satisfied at the Closing, which conditions would be capable of being satisfied at the time of such failure to consummate the Merger) shall constitute a Willful Breach of this Agreement.	No damages remedy unless a Willful Breach occurs. In cases where the Break-up Fee is payable, the Break-up Fee is sole remedy In cases where the Reverse Break-up Fee is payable, the Reverse Break-up Fee is sole remedy unless a Willful Breach occurs, in which case the company can pursue damages as well, including lost premium to shareholders.
AGL/Southern 8/24/15 (7/1/16)	Break-up Fee payable in specified circumstances No Reverse Break-up Fee	Intentional breach not defined. "Willful" breach will be deemed to have occurred if the Company took or failed to take action with knowledge that such action or inaction constituted a breach of such obligation	No damages remedy unless an intentional breach occurs. Break-up Fee is sole remedy unless a Willful breach occurs and relates to (1) calling shareholders meeting/proxy or (2) covenant not to solicit alternative transaction
UIL/Iberdrola (USA) 2/26/15 (12/16/15)	Break-up Fee payable in specified circumstances No Reverse Break-up Fee	Knowing and intentional breach not defined	No damages remedy unless knowing and intentional breach occurs, except for breach of representations, warranties and covenants If termination is due to breach (apparently without regard to whether knowing and intentional or not) of representations, warranties or covenants, Acquirer may collect Break-up Fee and also sue for damages
HEI/NextEra 12/3/14 (terminated - 7/16/16)	Break-up Fee payable in specified circumstances Reverse Break-up Fee payable in specified circumstances	Willful breach not defined	No damages remedy unless a willful breach occurs Break-up Fees are sole and exclusive remedy unless there is a willful breach

Transaction Announcement Date (Closing Date)	Applicable Break-Up Fees	Willful Breach Definition	Effect of Willful Breach on Available Remedies
CLECO/Macquarie/BCIMC 10/20/14 (4/13/16)	Break-up Fee payable in specified circumstances Reverse Break-up Fee payable in specified circumstances	Knowing and intentional breach not defined	No damages remedy unless knowing and intentional breach occurs Acquirer's maximum liability cannot exceed the amount of the Reverse Break-up Fee
Integrys/WEC 6/23/14 (6/29/15)	Break-up Fee payable in specified circumstances Reverse Break-up Fee payable in specified circumstances	Willful breach not defined	No damages remedy unless a willful breach occurs Break-up Fees not explicitly stated to be sole remedies
Pepco/Exelon 4/30/14 (3/24/16)	Break-up Fee payable in specified circumstances Reverse Break-up Fee payable in specified circumstances	Willful and intentional material breach not defined	No damages remedy unless willful and intentional material breach occurs Break-up Fees are sole and exclusive remedy
UNS/Fortis 12/11/13 (8/15/14)	Break-up Fee payable in specified circumstances No Reverse Break-up Fee	Willful and material breach not defined	No damages remedy unless willful and material breach occurs Break-up Fee is a liquidated damage unless there is willful and material breach
NV/Berkshire 5/29/13 (12/19/13)	Break-up Fee payable in specified circumstances No Reverse Break-up Fee	Willful and material breach not defined	No damages remedy unless willful and material breach occurs Break-up Fee is a liquidated damage unless there is willful and material breach