

**BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN**

Application of Dominion Nuclear Projects, Inc.
and Dominion Energy Kewaunee, Inc.
for Approval of the Sale of Dominion Energy
Kewaunee, Inc.'s Stock to EnergySolutions, LLC

Docket No. 9812-EI-100

INITIAL POST-HEARING BRIEF OF ENERGYSOLUTIONS, LLC

INTRODUCTION

In this proceeding, Dominion Nuclear Projects, Inc. and Dominion Energy Kewaunee, Inc. (DEK) (together, Dominion) seek approval of the proposed transfer of all of DEK's stock, and with it, ownership of the Kewaunee Power Station (KPS), to EnergySolutions, LLC (EnergySolutions) (Stock Purchase).¹ Upon acquiring DEK, EnergySolutions will undertake responsibility for safely decommissioning KPS in accordance with an accelerated schedule to complete decommissioning and release the site (except for stored spent nuclear fuel) in approximately eight years—forty years ahead of the current schedule.

The Stock Purchase presents the Commission with a transaction it foresaw as a possibility in 2005 when it approved the transfer of KPS from the plant's two public utility owners, Wisconsin Public Service Corporation (WPS) and Wisconsin Power and Light (WPL) (together, the Utilities), to DEK, a merchant generator otherwise outside of Commission jurisdiction. In that decision,² the Commission imposed certain conditions on DEK, known as

¹ Application of Dominion Nuclear Projects, Inc., and Dominion Energy Kewaunee, Inc. for Approval of the Sale of Dominion Energy Kewaunee, Inc.'s Stock to EnergySolutions, L.L.C. (with Exhibits A-C) dated May 27, 2021 (PSC REF#: 431942) (Application).

² *In re Application for All Approvals Necessary for the Transfer of Ownership and Operational Control of the Kewaunee Nuclear Power Plant from Wisconsin Public Service Corporation and Wisconsin Power and Light Company to Dominion Energy Kewaunee, Inc.*, No 05-EI-136 (Wis. P.S.C. Apr. 21, 2005) ("2005 Final Decision").

the “Proffered Conditions,” in order to protect Wisconsin ratepayers from risks related to owning and operating a nuclear power plant, while ensuring that the decommissioning would be safely and properly completed.

DEK’s obligation to seek the Commission’s approval for the Stock Purchase derives from Proffered Condition No. 4, which requires DEK to “allow the Commission to approve any subsequent sale...for the purpose of determining whether the new owner has sufficient financial resources to operate the plant.”³ The record demonstrates that all parties, including PSCW staff and the intervenors, agree that this condition has been met because the Nuclear Decommissioning Trust Fund (NDT) contains “sufficient financial resources” to permit *EnergySolutions* to achieve its proposed decommissioning plan. The record also shows that *EnergySolutions* has met all remaining Proffered Conditions and therefore that approval of the Stock Purchase will ensure that KPS will be owned and decommissioned by a company that has the financial and technical wherewithal to decommission the facility safely and efficiently and return the site to productive use years ahead of schedule. In addition, as discussed below, the necessity of NRC approval builds into this proceeding a rebuttable presumption that Proffered Condition No. 4 is satisfied.

Citizens Utilities Board (CUB) intervened and offered expert testimony raising questions about whether the applicants’ risk analyses adequately considered upside potential for returning funds to ratepayers. The record includes extensive evidence regarding *EnergySolutions*’ commitment to return excess funds to ratepayers, while preserving an appropriate level of focus on safety and preserving a certainty of completion. The confidential portions of the record

³ In its Application, DEK indicated that it was prepared to interpret the word “operate” broadly so that it applies to decommissioning, as KPS has not been in operation since 2013 and is subject to a “possession” only license (Application at 1, 4). Commission Staff witness Probst indicated that such an interpretation is reasonable (Direct-PSC-Probst-r-2, line 21 through page 3, line 7).

include ample information regarding the estimated upside potential for ratepayers to recover excess funds.

Another intervenor, NorthStar Group Services, Inc. (NorthStar), is a competitor of *EnergySolutions* that is disappointed it was not chosen by Dominion to decommission KPS. The Proffered Conditions do not contemplate that the Commission would select a future buyer of KPS, yet NorthStar has been free to make unfounded claims throughout this proceeding and propose unsupported and questionable cost estimates in the record without having to be accountable for meeting contractual obligations or adhering to regulatory standards. As a result, NorthStar has been able through its intervention to generate discussion over a proposal to decommission KPS itself for a fixed cost that has no basis in site specific, due diligent cost estimation and that is of dubious integrity, and to ask the Commission (without offering any legal basis for doing so) either to require WPS and WPL to assign their rights of first refusal (ROFR) to NorthStar or to impose NorthStar's proposed fixed cost on whomever decommissions the facility. NorthStar's assertions and proposals have been amply rebutted by both Dominion and *EnergySolutions*, as well as by the Utilities, who rejected NorthStar's offer and prudently chose to waive their ROFR rights rather than reacquire the risks of decommissioning.

The fact remains that neither CUB nor NorthStar have produced any actual evidence that would support a decision by the Commission to deny the proposed Stock Purchase or that calls into question the Commission staff's determination that the Proffered Conditions have been met.

In pointed contrast to the entirely theoretical and speculative assertions made by CUB and NorthStar witnesses, the two company witnesses presented by *EnergySolutions*, Ken Robuck and Greg Wood, presented detailed testimony demonstrating (i) the validity of *EnergySolutions'* cost estimates for decommissioning KPS; (ii) the financial strength of the company; and (iii) the

robustness of the federal regime overseeing the decommissioning process. *EnergySolutions* also presented an expert witness, Adam Levin, who is directly familiar with *EnergySolutions*' work on other large nuclear projects, as well as with NorthStar's work in other jurisdictions. Mr. Levin filed un rebutted testimony on behalf of *EnergySolutions* in support of the proposed sale—detailing *EnergySolutions*' track record and outlining the oversight role performed by the Nuclear Regulatory Commission (NRC).

In addition, Dairyland Power Cooperative and Exelon Generation (now known as Constellation Energy), who entrusted major commercial reactor decommissioning projects to *EnergySolutions* and are now preparing to receive completed decommissioned sites back later this summer, both reported their support for *EnergySolutions*, as did members of the public who represent residents of the area where KPS is actually located.⁴ They, too, support *EnergySolutions*' accelerated decommissioning plan for KPS.

For these reasons, and as more fully discussed below, the Commission should approve DEK's proposed transfer of ownership of all of DEK's stock, and with it, the Kewaunee Power Station, to *EnergySolutions*.

ARGUMENT

The Application was submitted in accordance with the Proffered Conditions imposed by the Commission in its 2005 Final Decision. Of the 12 Proffered Conditions, three are specifically applicable to the Stock Purchase: Proffered Condition 4 addresses whether the proposed transferee (*EnergySolutions*) will have "sufficient financial resources"; Proffered Condition 8 grants a Right of First Refusal (ROFR) to WPL and WPS that requires

⁴ The Wisconsin Laborers District Council also submitted comments in order to request that the Commission condition the proposed transfer on compliance with Wis. Stat. § 196.807, which pertains to the offer of employment to nonsupervisory employees under certain circumstances that *EnergySolutions* does not believe apply to this transaction. The comments are neutral as regards to the Stock Purchase itself.

EnergySolutions to commit contractually to the Proffered Conditions as part of a “Bona Fide Offer,” and gives the Utilities an opportunity to re-acquire KPS on the same terms as the Stock Purchase; and Proffered Condition 11 requires a subsequent purchaser of KPS to intervene in the applicable transfer proceeding and commit to adhere to all Proffered Conditions on the record (Application at 5). EnergySolutions has made this commitment (Direct-ES-Robuck-c-15 and Ex.-ES-Robuck-4).

Significantly, because the proposed transaction is a stock transfer, the Commission is approving a change in the ownership and management of DEK, which will continue to function as the decommissioning licensee under a new name (Direct-ES-Robuck - c - 6). The Commission is therefore *not* approving a decommissioning contract, which would require no Commission approval at all.

The commitment to adhere to all the Proffered Conditions means that EnergySolutions is bound by the terms of the original Asset Sale Agreement (ASA) and must restore the site to greenfield status (Direct-PSC-Kitsebel-2; see also 2005 Final Decision at 14.) It also means that EnergySolutions must return excess decommissioning funds to ratepayers when decommissioning is complete (Rebuttal-ES-Robuck-9 and Tr. 176 : 13-16). That the Proffered Conditions are binding against a purchaser of the KPS through the ROFR and Proffered Condition 11 led the Commission in 2005 “to relinquish its approval authority over the use of KNPP’s decommissioning funds and rely upon federal controls, **because of the overall benefits of the sale and the other safeguards built into the Proffered Conditions.**” 2005 Final Decision at 22 (emphasis added).

In sum, the Stock Purchase meets the Proffered Conditions and should therefore be approved by the Commission.

I. EnergySolutions Will Have Sufficient Financial Resources to Decommission KPS.

Proffered Condition No. 4 states: “Allow the Commission to approve any subsequent sale of the Kewaunee Nuclear Power Plant (“KNPP”), or of Dominion Energy Kewaunee, for the purpose of determining whether the new owner has sufficient financial resources to operate the plant. A decision by the NRC approving the license transfer would constitute a rebuttable presumption that the new owner is creditworthy.” The record evidence shows that EnergySolutions meets this Proffered Condition and therefore has sufficient financial resources to decommission KPS.

A. There are adequate funds in the NDT to decommission KPS on an accelerated timetable.

Gregory Wood is the Chief Financial Officer of EnergySolutions (Direct-ES-Wood-c-1). Mr. Wood testified that the financial resource for decommissioning KPS will be the Kewaunee Nuclear Decommission Trust fund (NDT) and confirmed that EnergySolutions’ submittal to the NRC, which is known as the Post-Shutdown Decommissioning Activities Report Revision 2 (or “PSDAR Rev 2”), demonstrates that there are sufficient financial resources in the NDT (*Id.* at 3). Mr. Wood explained that the NDT will be invested in accordance with NRC rules and the PSDAR assumes earnings at the conservative real rate of return of 2%. He also stated that the “sinking fund analysis”⁵ EnergySolutions submitted with its PSDAR Rev2 demonstrates that there are sufficient resources in the NDT to decommission the plant on an accelerated timetable (*Id.* at 2-3).

⁵ Mr. Wood explains that a “sinking fund” analysis is a tool used to compare decommissioning costs to available resources (plus earnings). The analysis shows the estimated beginning balance of the trust fund each year; the estimated decommissioning costs for that year; the estimated trust fund earnings for that year; any estimated DOE reimbursements for that year; and the estimated available resources at the end of that year (Direct-ES-Wood-c-2 and 3).

EnergySolutions' witness Kenneth W. Robuck went into further detail. Mr. Robuck is President and CEO of the company (Direct-ES-Robuck-c-1). He testified that in the context of decommissioning a nuclear power plant, determining financial sufficiency as required by Proffered Condition No. 4 means demonstrating that there are enough funds in the decommissioning trust fund to allow the decommissioning licensee to perform its proposed decommissioning plan (Direct-ES-Robuck-c-9). Mr. Robuck testified that, under the terms of the Stock Purchase Agreement, the NDT must have at least [REDACTED] at the time of closing (*Id.*) As the proposed licensee, EnergySolutions developed and submitted a detailed decommissioning plan to the NRC that provides for the accelerated decommissioning of KPS at an estimated cost of \$724 million. Per NRC regulations, this estimated cost presumes a 2% (after tax) real rate of return on decommissioning trust fund investments and would allow for decommissioning to the ISFSI⁶-only stage (*Id.* at 9-10). To fully decommission the facility, the ISFSI must be managed until the spent nuclear fuel is accepted by the Department of Energy (DOE), which is estimated to cost another \$231 million (*Id.* at 10 and Ex.-ES-Robuck-2). EnergySolutions' more detailed "sinking fund analysis," which is included in the confidential portion of its NRC submittal, confirms that the estimated trust fund earnings will be more than sufficient to cover the anticipated decommissioning expenditures to complete decommissioning (*Id.* and Ex.-ES-Robuck-3). This includes expenditures necessary to manage spent nuclear fuel through the ISFSI-only stage until accepted by the DOE for disposal.

The record shows there are good reasons to trust the validity of EnergySolutions' decommissioning cost estimate for KPS. First, Mr. Robuck's testimony demonstrates that EnergySolutions is an industry leader in developing decommissioning cost estimates (Direct-ES-

⁶ "ISFSI" means "on-site independent spent fuel installation".

Robuck-c-8). It has unique experience in decommissioning utility-scale nuclear reactors, such as the nuclear reactor at La Crosse, WI; two nuclear reactors at Zion, IL; two nuclear reactors and the remainder of a third nuclear reactor in San Onofre, California (SONGS); the nuclear reactor in Fort Calhoun, Nebraska, and Three Mile Island Unit 2 in Middletown, Pennsylvania (*Id.* at 9; Ex.-ES-Robuck-1). The projects in La Crosse and Zion are especially noteworthy because EnergySolutions has completed physical decommissioning at those sites and submitted final status survey reports to the NRC (Ex-ES-Robuck-1; Rebuttal-ES-Robuck-6-7; Tr. 156 : 14 -157 : 3). Lessons learned from its advanced work on these projects has enabled EnergySolutions to refine its cost estimates (Direct-ES-Robuck-c-8; Tr. 163 : 24 – 165 : 23) and has led to the development of an even more robust decommissioning cost estimate for KPS.

Second, EnergySolutions developed its cost estimate for KPS by performing extensive site-specific work. Mr. Robuck testified that EnergySolutions used a team of estimators and spent almost 7 months developing a “bottoms-up” estimate for KPS (Tr. 164 : 18-24). The site-specific data from the KPS site was compared to data amassed from EnergySolutions’ work on other projects, and included everything from the estimated volume of both contaminated and non-contaminated material to the estimated costs of site restoration, spent fuel management and project management (Direct-ES-Robuck-c-8 and 9).

Finally, EnergySolutions’ track record on its other large nuclear decommissioning projects demonstrates the reliability of its cost estimate for KPS. Mr. Wood testified that he has overseen EnergySolutions’ decommissioning projects at Zion, La Crosse and SEFOR (Direct-ES-Wood-c-3) and stated that EnergySolutions’ estimates have been reliably close to actual costs

(*Id.*). At Zion, the actual decommissioning costs were slightly above project estimates,⁷ but the actual costs for La Crosse and SEFOR were below estimates (*Id.*).

EnergySolutions' experience at Zion is instructive. Both Mr. Levin and Mr. Robuck testified that EnergySolutions' achievements at Zion were a game changer, demonstrating to the industry for the first time that a large nuclear plant could be decommissioned successfully by a non-public utility specialist (Direct-ES-Levin-19; Tr. 154 : 2-7). Dominion witness Avram testified at length at the hearing that when Dominion first contemplated transferring the decommissioning license to another company in 2014, it ultimately decided that the decommissioning industry was still immature and Dominion was not ready to make any commitments to any decommissioning vendor (Tr. 141 : 6-11). Fast forward to 2020, and EnergySolutions' success at Zion persuaded Dominion that the time was right (Tr. 131 : 4-21). The Zion experience was not without setbacks, but Dominion recognized these hurdles could be overcome in the normal course of a decommissioning project. Mr. Robuck explained that EnergySolutions underestimated waste volumes by up to 35% as it became evident that, among other things, unanticipated cross contamination between the soil and concrete was occurring at the site (Tr. 164 : 4-11). These types of lessons learned have been incorporated into revised cost estimation techniques and a more refined risk analysis that will benefit other projects, including KPS (*Id.* 18-24).

In addition, the record shows that EnergySolutions has accomplished its decommissioning work efficiently and with the utmost attention to safety. Mr. Robuck testified

⁷EnergySolutions was able to manage the budgetary miss at Zion with operating funds and without material impact to the company, as explained further below (Direct-PSC-Probst-r-4). Although NorthStar witness State has raised questions about the status of the decommissioning work at Zion, Mr. Robuck has testified that the company has achieved remediation of the site to NRC standards and is working to resolve a few technical issues that should be resolved later in 2022 (Rebuttal-ES-Robuck-5-6).

that the radiation exposure limit permitted by the NRC is 5.0 rem per person per year. During the Zion project, the average annual exposure rate for individuals working at the site was always below 1.0 rem – less than 20 percent of the NRC standard (Direct-ES-Robuck-c-5). This included transfer of highly radioactive spent nuclear fuel from the fuel pool to the ISFSI pad (*Id.*). At La Crosse and at SEFOR, the average annual dose rates were even lower, demonstrating that EnergySolutions has developed and implemented strong and sophisticated organization controls for its decommissioning work (*Id.*)

EnergySolutions’ track record in executing large nuclear decommissioning projects was independently confirmed by the expert testimony of Adam Levin, at the time Director, Spent Fuel and Decommissioning at Exelon Generation, who was Technical and Logistical Lead at Exelon for the Zion project and served on the Zion Project Review Advisory Board (Direct-ES-Levin-16). Mr. Levin also has directly observed EnergySolutions’ work on other projects as a consultant for other companies (*Id.*). Mr. Levin testified that EnergySolutions has unique experience that enables it to manage the enormous volume of low-level radioactive waste generated during the decommissioning process; implement and execute large decommissioning projects; and apply “lessons learned” to keep projects on time and on budget (*Id.* at 17). This testimony was not controverted by any intervening party either in pre-filed written testimony or on cross examination.⁸

⁸ Confirmation of EnergySolutions’ track record was also provided by public comments submitted by (i) Brad Smallridge, who is Vice President and Chief Nuclear Officer at Dairyland Power Cooperative, which owns the La Crosse Boiling Water Reactor (PSC Ref# : 432001); and (ii) David Rhoades, SVP Generation and President & Chief Nuclear Officer for Constellation, which has worked closely with EnergySolutions on decommissioning the Zion Nuclear Project (PSC REF# : 432116).

B. EnergySolutions is on solid financial footing.

Mr. Wood testified that EnergySolutions is a well-established, well run, stable and profitable company (Direct-ES-Wood-c-4). He described the company's organizational structure: EnergySolutions, LLC (ES) is the wholly-owned subsidiary of Rockwell Holdco, Inc., EnergySolutions Inc., and EnergySolutions Finance Holdings, LLC (*Id.*). Mr. Wood stated that the current value of EnergySolutions' parent entity is substantial and that its equity has grown with the recently announced acquisition of EnergySolutions' holdings by TriArtisan Capital Advisors (*Id.* at 5). On rebuttal, Mr. Wood included information from ratings agencies indicating that the financial health of EnergySolutions remains stable after the TriArtisan purchase (Rebuttal-ES-Wood-2). He explained that the company has generated positive cash flow during the past two years that is more than sufficient to cover the company's capital requirements, interest and debt obligations (*Id.* at 3). Mr. Wood also confirmed that the remaining costs of completing decommissioning at Zion and La Crosse will not have a material impact on the health of the company (*Id.* at 2). Staff witness Probst, who analyzed the company's financial statements, agreed (Direct-PSC-Probst-4 and 5).

Commission Staff reviewed EnergySolutions' overall financial position and identified no items that indicated the company had an unfavorable financial position (Direct- PSC-Probst-r-5). Staff witness Adams went into further detail, indicating he had analyzed the long-term debt situation of the company, as well as the sinking fund analysis and decommissioning schedule. He concluded that EnergySolutions had reasonably demonstrated that it had the financial resources needed for decommissioning KPS (Direct-PSC-Adams-4 and 5). Mr. Adams also acknowledged the risk factors identified by EnergySolutions that could affect the cost of decommissioning, such as scheduling delays, supply chain disruption, availability of qualified

staff and unprecedented radiological or environmental conditions, and testified that EnergySolutions had plans to mitigate such risk. His testimony confirms that staff did not identify material deficiencies in the financial capabilities of EnergySolutions with respect to its decommissioning plans (*Id.* at 5).

C. NRC approval creates a rebuttable presumption of creditworthiness.

Proffered Condition No. 4 includes a rebuttable presumption of “creditworthiness” if the proposed license transfer is approved by the NRC. Noting that DEK has applied to the NRC for approval of the transfer of control of KPS to EnergySolutions, Staff witness Jeffrey Kitsembel proposed in his testimony that the Commission consider an order condition that requires the applicants to obtain all necessary federal, state and local permits, including the NRC order approving the transfer of KPS (Direct-PSC-Kitsembel-3). EnergySolutions’ witness Robuck testified that he thought such a condition made sense since it would ensure that the Commission’s order in this proceeding can take effect only after the NRC approves the license transfer and would therefore entitle the Commission to presume that EnergySolutions is “creditworthy” in accordance with the language of Proffered Condition No. 4 (Rebuttal-ES-Robuck-3-4).

There are good reasons why Proffered Condition No. 4 contains the “rebuttable presumption” language. In its 2005 Final Decision, the Commission recognized that NRC rules restrict use of the decommissioning trust fund for anything except ordinary trust fund expenses and “legitimate decommissioning activities” and impose other significant restrictions of use of the DTF. With the Proffered Conditions binding upon Dominion and any subsequent purchaser of KPS, the Commission was willing to relinquish its approval authority over the use of the KPS

decommissioning funds and rely upon “federal controls” because of the overall benefits of the sale and other safeguards built into the Proffered Conditions. (2005 Final Decision at 22).

D. Federal oversight is sufficient to protect the NDT from excessive spending.

Although the Commission decided in 2005 to relinquish its authority over the use of KPS decommissioning funds in favor of federal oversight, abundant evidence and ample legal authority confirm that federal oversight is sufficient to protect the NDT from being used for any purpose other than decommissioning, and is sufficient to protect the NDT from excessive spending. Mr. Levin’s testimony provided an overview of the NRC’s oversight role and included a detailed description of the regulatory framework utilized by the NRC to govern the license transfer and decommissioning process (Direct-ES-Levin-6-9). He further testified that NRC oversight continues after the License Transfer Application is approved and stated that facility decommissioning and financial sufficiency is “intensively regulated” by the NRC to ensure that NDT assets are used appropriately for their intended purpose (*Id.* at 13).

Mr. Robuck testified that NRC regulations require NRC staff to carefully examine the sufficiency of financial resources for both possessing and decommissioning a nuclear facility, as well as for managing and disposing of spent nuclear fuel (Direct-ES-Robuck-c-10). Mr. Robuck further explained that NRC regulations protect the trust fund from being depleted improperly or too early by restricting the use of funds for inappropriate purposes. He described how the rules impose strict reporting requirements and protections on trust fund management, requiring that fund assets be held in an account segregated from license assets and outside the administrative control of the licensee (*Id.* at 11-12). In rebuttal testimony, he further explained that NRC regulations restrict expenditures only to “legitimate decommissioning activities” and imposed strict “prudent investor” standards (Rebuttal-ES-Robuck-15). He described how licensees must

submit annual reports which are available for public comment and how the NRC exercises oversight by comparing the licensee's expenditures and planned activities in its PSDAR, which are also made available to the public (*Id.*).

Mr. Robuck's rebuttal testimony also discussed the critical role played by the Internal Revenue Service (IRS) in decommissioning oversight. The IRS has specific rules that govern the use of a tax-qualified decommissioning trust. These rules limit disbursements and expenditures from qualified trust funds to specific activities associated with decommissioning. They also protect against self-dealing by subjecting a holder of qualified funds to costly penalties in the event funds are used for improper purposes or pay outs to affiliated parties at above-market rates (Rebuttal-ES-Robuck-18). Moreover, the rules are enforced and decommissioning licensees conform to them (*Id.*). Specifically, Mr. Robuck testified that:

The current Treasury regulations make it clear that payments for expenses for decommissioning are limited to reasonable expenses under the tax code and regulations.... requiring that payments to affiliated parties be at market prices considered reasonable and not excessive. The regulations explicitly limit payments for compensation for services to the amount that would ordinarily be paid for like services by like enterprises under the circumstances (Treasury Regulations section 1.162-7).

(Rebuttal-ES-Robuck-18).

NorthStar has attempted to minimize the role of federal controls in decommissioning, notwithstanding its own recognition of the NRC's oversight role when seeking approval of its own license transfer in other jurisdictions,⁹ and notwithstanding its use of affiliates in its own

⁹ As cited in Mr. Robuck's rebuttal testimony, in the Vermont Public Utilities Commission proceeding in which NorthStar sought approval to decommission the Vermont Yankee plant, NorthStar characterized the NRC's decommissioning role as "robust" and cited its "strict oversight and reporting requirements" (Rebuttal-ES-Robuck-14). In his surrebuttal testimony NorthStar witness State suggested these citations were taken out of context, but did not deny them.

decommissioning.¹⁰ Precedent and *EnergySolutions*' actual experience with NRC oversight prove otherwise. In his rebuttal testimony, *EnergySolutions*' witness Robuck cited a decision from the Seventh Circuit Court of Appeals involving the Zion project in which the court expressly recognized that financial matters are squarely within the NRC's jurisdiction, stating that "not only is the [NRC] the designated policeman of decommissioners; its competence to assess the management of the complex, technologically sophisticated process of nuclear decommissioning exceeds that of state or federal judges, who are generalists. Rulings on decommissioning, including rulings on the financial issues involved in decommissioning, are within the [NRC's] primary jurisdiction."¹¹

When cross-examined at the hearing about his own direct experience with the NRC's oversight role, Mr. Robuck made it abundantly clear that the NRC was present at their monthly meetings at Zion, looked at project costs and tracked the project, stating with confidence that this Commission should be absolutely comfortable that the NRC was prepared to exercise its jurisdiction over KPS moving forward (Tr. 175 : 22 - 176 : 12; 177 : 9 - 19). The NRC itself has confirmed that it has "general investigatory and enforcement authority" related to the "reasonableness" of trust fund expenditures.¹²

¹⁰ NorthStar witness State suggested in his direct testimony that the use of affiliates is suspicious and asks the Commission to believe that *EnergySolutions* intends to grossly overpay its affiliates—this despite the fact that NorthStar regularly uses affiliates (Rebuttal-ES-Robuck-16). Mr. Robuck expressly affirmed his commitment to adhere to all federal rules and regulations, including those that pertain to affiliates, at the hearing (Tr. 173 : 18 – 174 : 9).

¹¹ *Pennington v. ZionSolutions LLC*, 742 F.3d 715, 719 (7th Cir. 2014) (cited in Rebuttal-ES-Robuck-16).

¹² *Sequoyah Fuels Corp. and General Atomics* (Gore, Oklahoma Site Decontamination & Decommissioning Funding), 46 N.R.C. 195 (Oct. 8, 1997)(establishing that the NRC has full inspection and enforcement authority to challenge a licensee's improper or unreasonable expenditure of NDT funds).

- E. No credible evidence has been presented that would suggest EnergySolutions' decommissioning cost estimates are unreliable.

In the face of incontrovertible evidence that EnergySolutions has met the financial sufficiency condition required for Commission approval of the Stock Purchase, NorthStar enlisted an expert witness to suggest that EnergySolutions has inflated its estimate of waste disposal costs. Mr. Smith's testimony should be accorded little weight by the Commission. First, Mr. Smith acknowledges that 90% of his work comes from NorthStar, so he can hardly be expected to be unbiased (Tr. 114 : 20-21). Moreover, his prior experience with decommissioning cost estimates is over 15 years old and involved two nuclear decommissioning projects that were significantly over budget (Tr. 160 : 11 - 161 : 8).¹³

More substantively, the analysis Mr. Smith used is highly imprecise and fundamentally flawed. In cross examination, Mr. Smith acknowledged that his range of costs would change if the market price or quantity assumptions changed (Tr. 63 : 19-24), yet he provided no basis for his market price, which he confirmed was derived from a NorthStar facility (WCS) (Tr. 62 : 22 - 63 : 12). Mr. Robuck then demonstrated in his supplemental response to Mr. Smith at the hearing that Mr. Smith inappropriately applies a low contingency factor and lacks any basis for his assumptions on the percentages of waste categories he uses. Mr. Smith also inexplicably presumes that a cost estimate need not concern itself with establishing the basis for the market price it uses (Tr. 168 : 1 - 169 : 20). Mr. Smith further demonstrated the weakness of his estimate when asked whether his estimate would meet PSDAR standards required by the NRC.

¹³ The two projects in question, Maine Yankee and Connecticut Yankee, were overbudget by nearly 50% and 100%, respectively (Rebuttal-ES-Robuck-19).

Mr. Smith indicated that he considers the NRC standard “irrelevant,” an assertion that suggests he may not even know what those standards are.¹⁴

In sum, the record of this proceeding shows unequivocally that EnergySolutions has sufficient financial resources to decommission KPS on an accelerated timetable and federal controls will ensure that the job is done safely and efficiently.

II. EnergySolutions Has Made a Commitment to Return Excess Decommissioning Funds to Ratepayers When the Decommissioning Process is Complete.

- A. Proffered Condition No. 9 does not permit the Commission to require a decommissioning transferee to commit a specific amount of ratepayer funds to be returned.

As indicated above, EnergySolutions has made a commitment to adhere to all the Proffered Conditions. This includes Proffered Condition No. 9, which states as follows: “Upon **final completion** of all decommissioning activities at KNPP, Dominion Energy Kewaunee shall return to Grantees, their successors and assigns, for distribution to their customers, **any and all** excess ratepayer funds contained in Dominion Energy Kewaunee’s Qualified Decommissioning Trust Fund for KNPP. Any excess funds shall be returned to Grantees in proportion to their ownership share on the day of the sale of KNPP to Dominion Energy Kewaunee” (2005 Final Decision at 14) (emphasis added).

The plain language of Proffered Condition No. 9 contemplates that the return of ratepayer funds will occur *after* the decommissioning job is complete. It does not require that the Commission at any time determine *how much* of the NDT funds will be available to return to

¹⁴At the hearing, Mr. Smith was asked whether he thought his analysis would meet NRC standards and he replied “I think it's irrelevant. From a PSDAR perspective, they [EnergySolutions] represented the quantity of waste being disposed at the facility. They don't go into the next step, which is what is the market price, what is the execution price of the work, to my knowledge” (Tr. 117 : 15-20). Asked about this exchange, Mr. Robuck stated that Mr. Smith’s response was incorrect, indicating that “the PSDAR includes the total cost for waste removal including contingency. So it has the quantities times the rates to give you the total cost estimate” (Tr. 168 : 1-10).

ratepayers at the end of the decommissioning process. Neither does it require the Commission to determine what the optimum amount of refunds should be. There is good reason for this – decommissioning is an inherently risky enterprise, something which the Commission itself expressly recognized when it explained why it thought Proffered Condition No. 9 would benefit ratepayers in its 2005 Final Decision:

Proffered Condition No. 9 states that DEK will return to the applicants all excess ratepayer funds contained in the qualified trust fund, after decommissioning has been finally completed. These funds will be distributed to ratepayers. The Commission finds that Proffered Condition No. 9 properly responds to its prior decision, resolving its concern about Wisconsin ratepayers’ right to unused decommissioning funds. The intervenors contend that tracking DEK’s decommissioning trust fund for 30 years to determine what portion of it constitutes “ratepayer funds” and how much should be returned after decommissioning will be very difficult. Proffered Condition No. 9 still **removes any perverse incentive to cut corners when decommissioning, just so the owner can keep unused funds. This alone is a benefit to the state.**

(2005 Final Decision at 23-24 (emphasis added)).

Proffered Condition No. 9 was designed not to maximize the amount of excess decommissioning funds that might be returned to ratepayers, but to ensure that there are sufficient funds available to complete the decommissioning. Nonetheless, *EnergySolutions* expects there to be excess funds available to return to ratepayers when the project is completed.

In his rebuttal testimony and again at the hearing, Mr. Robuck explained why the Commission’s approach in its 2005 Final Decision makes sense. He agreed that excess decommissioning funds “should be” returned to ratepayers when decommissioning is complete, and potentially at a substantial level [REDACTED] if the contingency built into the *EnergySolutions*’ PSDAR Rev 2 estimate turns out to be unneeded (Rebuttal-ES-Robuck-9). He explained that the contingency reserve conforms to regulatory standards and good industry practice because decommissioning entails a host of “unknowns” such as supply chain challenges,

unexpected areas of radiological contamination, changes in regulations, project delays, third-party price increases, unforeseen inflation, transportation challenges, regulatory delays, and new pandemics (*Id.*). He continued by describing how *EnergySolutions*' own experience has taught it that large decommissioning projects are particularly susceptible to such "unknowns," such as increases in the volumes of waste discovered in later stages of a project and indicated that *EnergySolutions* had performed detailed technical evaluation at KPS specifically to account for project-specific risks (*Id.* at 10). The NRC is very mindful of the likelihood of unknowns, and considers a robust contingency fund to be essential, as demonstrated by the NRC's "Requests for Additional Information" specifically focused on contingency. At the hearing, Mr. Robuck returned to these themes and, in response to cross examination, explained that, ultimately, the unknowns will dictate what constitutes "excess" NDT funds: "The market conditions over the next eight years . . . [the] amount of inflation, the amount of escalation will decide what is excess at the end of the job. We will – because we have more experience than anyone else doing this, we will incorporate good plans, good procedures and good programs to maximize the return to ratepayers" (Tr. 176 : 22 - 177 : 5).

B. NorthStar's proposed fixed price approach does not constitute good public policy.

In contrast to this cautious approach, NorthStar has proposed a more risky alternative, which is to establish a fixed decommissioning cost at the outset of the project and tie the decommissioning transferee's hands to that number. Witness Robuck testified that there are many reasons to be wary of NorthStar's approach, irrespective of the fact that it is completely contrary to the plain language of Proffered Condition No. 9 and possibly impermissible.¹⁵ As a

¹⁵ Although NorthStar's approach is not entirely clear, to the extent it entails encumbering decommissioning trust funds with promises to use funds for purposes other than decommissioning, NRC rules would likely prohibit that (Rebuttal-ES-Robuck-12). As referenced in Mr. Robuck's testimony, an intervenor in the SONGS project proposed

threshold matter, the projects in Florida and Vermont are less than half completed (Rebuttal-ES-Robuck-6; Tr. 157 : 6-8). So, NorthStar has manufactured an estimate for KPS based on its estimates for other projects, rather than comparing to actual completed work. Equally important, the regulatory contexts in which the fixed cost concept was authorized for NorthStar in both Florida and Vermont are not analogous to the regulatory context here. In the case of Vermont Yankee, the public utility transferor and other stakeholders were subject to preexisting settlements and agreements (Rebuttal-ES-Robuck-8). At Crystal River 3, NorthStar is only the decommissioning contractor; Duke Energy Florida and its customers remain responsible for ultimate decommissioning, meaning that the risk of potential overruns remains with Florida ratepayers. (*Id.*) At Crystal River, there is no segregated portion of the decommissioning funds that is guaranteed for return to ratepayers. The utility retains the “excess” funds to pay for its own share of the decommissioning work plus any work that is needed should NorthStar fail to perform.¹⁶ This is precisely the risk that the Commission shifted away from ratepayers when it agreed to the Proffered Conditions in its 2005 Final Decision.

In addition, Mr. State’s proposed \$550 million decommissioning estimate is misleading and almost surely inadequate to complete the KPS decommissioning project. The number is not based on a KPS-specific evaluation, so it is not clear whether Mr. State is providing a specific scope-to-scope comparison with the Crystal River project. Weather conditions at Kewaunee and the absence of rail transport are just two major site-specific factors that require careful consideration that Mr. State has not provided (Rebuttal-ES-Robuck-11.) In contrast to

that “excess” trust funds be committed to ratepayers prior to decommissioning activities, and the NRC stated that doing so would not be prudent (*Id.* at 11 and Ex.-ES-Robuck-6).

¹⁶ See Order Approving Transaction for Accelerated Decommissioning Services at CR3, 2020 WL 5095445 at *18 (Fla. P.S.C.) (“If DEF [Duke Energy Florida] determines that the current NDT balance is insufficient to cover the expected cost of decommissioning, and the other contractual remedies against ADP have been exhausted, such that additional funds are needed from customers, DEF would file a petition requesting that we authorize an accrual to be collected from customers for the retail portion.”).

EnergySolutions’ data-driven and comprehensive cost estimate described above, Mr. State offers only his “intimate familiarity” with two other plants, both dissimilar in design to KPS, to validate his estimate (Surrebuttal-NorthStar-State-5r). But those plants are far from being fully decommissioned, so there are no completed actual costs for Mr. State to compare. Since, as Mr. Robuck points out, Mr. State is not accountable for his offer, it is difficult to assign much, if any, weight to these aspects of Mr. State’s testimony (*Id.*).

In the end, NorthStar’s fixed price “offer” is certainly attention grabbing, but it does not constitute good public policy because it speculates exclusively on what the upside amount of ratepayer funds might be without regard to public safety. As Mr. Robuck has testified, EnergySolutions, like any decommissioning licensee, must be—and will be—a good steward of ratepayer funds. What matters most however is making sure that safety remains the first priority (Rebuttal-ES-Robuck-13), which is consistent with the Commission’s 2005 Final Decision.

C. CUB’s testimony does not provide the Commission with a recommendation.

CUB is the only intervenor representing ratepayers that actively participated in this case.¹⁷ It presented testimony by Dr. Steve Kihm, who contrasted NorthStar’s \$550 million fixed-cost proposal with the testimony of EnergySolutions’ expert witness, Adam Levin. Dr. Kihm concluded that NorthStar’s proposal offers customers an opportunity to capture “upside risk” while EnergySolutions appears focused only on insulating ratepayers from “downside risk” (Rebuttal-CUB-Kihm-r-8), with the two utilities ostensibly “indifferent” as to which licensee ultimately completes the decommissioning (*Id.* at 10). After reviewing EnergySolutions’ rebuttal testimony, Dr. Kihm acknowledges that the credibility of NorthStar’s ever-evolving proposal

¹⁷ The Wisconsin Industrial Energy Group intervened but filed no testimony.

appears to be “an issue” (Surrebuttal-CUB-Kihm-5).¹⁸ Rather than offer the Commission a recommendation, however, Dr. Kihm suggests that the Commission hire an outside expert to make an independent evaluation as to what is in the ratepayer’s best interest (*Id.*). This incorrectly presumes, however, that the Commission should step into the shoes of Dominion to select a stock purchaser or seek to pre-determine the amount of excess funds to return to ratepayers as a condition of approving this transfer, neither of which the Commission reserved the authority to do in its 2005 Final Decision.

III. Ratepayers Will Benefit by EnergySolutions’ Commitment to Decommission the Site to Greenfield Status.

As indicated earlier, EnergySolutions has committed to adhere to all of the Proffered Conditions. This includes Proffered Condition No. 12, which requires subsequent purchasers of KPS to decommission the site in accordance with Section 7.17 of the Asset Sale Agreement, dated November 7, 2003. As noted by Mr. Kitsembel in his testimony, this provision requires all subsequent purchasers to complete greenfield decommissioning. To make sure that the record is clear on this point, Mr. Kitsembel suggested that EnergySolutions state its intent to do so clearly in the record (Direct-PSC-Kitsembel-3). Mr. Robuck has done so, testifying that EnergySolutions will decommission the KPS site to greenfield (unrestricted) status (Rebuttal-ES-Robuck-3).

Mr. Robuck continued by explaining exactly what it means to decommission to greenfield status. He explained that to release a nuclear site to “unrestricted use” status, a licensee must demonstrate that residual radioactivity at the site after decommissioning does not

¹⁸ Dr. Kihm identifies other issues, including the potential absence of competition, information asymmetry and negotiations (with NorthStar) occurring in “real time” (Surrebuttal-CUB-Kihm-1). As regards information asymmetry and lack of competition, Dominion witnesses Avram and Robuck both clarified that EnergySolutions’ greater degree of experience, rather than NorthStar’s lack of technical decommissioning qualifications, led to Dominion’s decision to choose EnergySolutions (Tr. 154 : 25 – 155 : 16).

exceed a level of 25 mrem per year under NRC rules (*Id.* at 3). This includes radioactivity from direct exposure to soils, groundwater for drinking, all potential food pathways and a showing that residual radioactivity has been reduced to levels as low as is reasonably achievable (*Id.*). Mr. Robuck indicated that in developing its decommissioning plan for KPS, EnergySolutions has applied the “resident farmer” standard, which is appropriate for the Kewaunee site and its intended future use (*Id.*) This means that a hypothetical farmer is assumed to live on the site and grow a portion of food on the site, using water for drinking, crop irrigation and livestock—an approach that is consistent with NRC guidance (*Id.*).

EnergySolutions’ commitment to decommission to greenfield status – and to do so forty years sooner than is currently required under the plant’s present decommissioning license – is an important reason why there is considerable public support for this proposed transaction in and around the Kewaunee area. Specifically, public comments in support of the project have been filed by Scott Feldt, on behalf of Kewaunee County (PSC REF# : 431804); Ben Nelson, on behalf of the Kewaunee County Economic Development Corporation (PSC REF# : 431758); and Barb LaMue, on behalf of New North, Inc., which is a non-profit regional economic development corporation representing 18 counties in Northeastern Wisconsin (PSC REF# : 431702). All three expressed support for the positive economic impact on the region of EnergySolutions’ accelerated timetable and cited the company’s record of decommissioning safety and success.

IV. WPS and WPL Prudently Waived their ROFR Rights.

The Proffered Conditions also granted the two public utilities that were the former owners of KPS, WPS and WPL, a right of first refusal (ROFR) to purchase KPS on the same terms as a “bona fide” offer. Additional background on the ROFR, how it came to be included

as part of the 2005 Final Decision, how formal notice of a “bona fide” offer came to be provided by DEK and EnergySolutions to the Utilities, how negotiations over an option agreement ensued and why the Utilities decided to waive their ROFR rights is provided in the testimony of utility representatives Jeff Ripp and Dan Krueger and will not be repeated here. Section 6 of the ROFR requires the Utilities to seek a declaratory ruling that their decision to waive their ROFR rights is prudent and is one of the two issues that was set for hearing in this proceeding. For the reasons set forth below, EnergySolutions believes that the record in this case clearly supports a finding that the Utilities’ decision to waive their ROFR rights was prudent.

- A. By waiving their ROFR rights, the Utilities have ensured that utility ratepayers will not once again shoulder the risks of decommissioning.

Utility witnesses Krueger and Ripp both emphasized in their testimony that the utilities regard the ROFR as a “binary” decision, meaning that the Utilities can either waive the right, or assume the contractual obligations of the proposed transferee under the bona fide offer. In this case, that means undertaking the responsibility for decommissioning KPS under the terms of the Stock Purchase (Direct-WPL-Ripp-11-12; Direct-WPS-Krueger-r-4). Such a decision would therefore mean that the Utilities would be undoing the benefits of the 2005 Final Decision from a ratepayer standpoint since the Utilities would be compelled to reassume the ultimate responsibility for decommissioning the site and doing so without the requisite experience or technical capability (*Id.*).

EnergySolutions’ witnesses Robuck and Levin analyzed the issue in precisely the same way. Mr. Levin testified that nuclear power plant decommissioning began approximately fifty years ago and was initially performed largely by the owners and operators of the nuclear plants themselves (Direct-ES-Levin-18). That practice has now changed as owner-operators have become aware that decommissioning introduces risk since it must be performed generally with a

fixed amount of assets. As the ownership of plants has been assumed by merchant operators (like DEK), state commissions have shifted focus to protect ratepayers and customers from the downside risks of decommissioning cost overruns—precisely as the Commission did in its 2005 Final Decision (*Id.* at 18-19). At the same time, the responsibility for decommissioning has increasingly been taken over by decommissioning specialists because they can do the job safely and more efficiently. Mr. Levin indicated that this occurred with Exelon Generation when it decided to transfer the Zion Nuclear Power Station decommissioning license to EnergySolutions (*Id.*) The result is that ratepayers are better protected from cost overruns, yet still have access to excess decommissioning funds at the end of the decommissioning process. Moreover, specialists are incentivized to decommission as soon as practicable, in accordance with applicable regulations, and thereby reduce the risk of radioactive contamination potentially migrating off site over time (*Id.* at 19-20). For these reasons, Mr. Levin concluded that the Utilities’ decision to waive their ROFR rights was prudent (*Id.*).

Mr. Robuck agreed, testifying that the management of decommissioning, in his experience, “is not a core competency of utility companies and decommissioning is nothing like the management of an operating plant (Direct-ES-Robuck-c-13). Companies recently have therefore demonstrated a clear preference for transfer to decommissioning specialists (*Id.*) In this case, had WPS and WPL exercised their ROFR rights they would have “unraveled” what they accomplished in their 2005 transfer, once again exposing the utilities and their ratepayers to decommissioning risk, only this time, without the benefit of generating any power (*Id.*).

The prudence of the Utilities waiving their ROFR rights to shield ratepayers from future risk was also recognized by Staff witness Probst, who stated that “exercising the ROFR could

directly impact ratepayers as the Utilities would be reacquiring some of the nuclear risk” (Direct-PSC-Probst-r-5).

B. The Utilities have obtained value on behalf of their ratepayers.

Beyond shielding their ratepayers from decommissioning risk, WPL and WPS also succeeded in negotiating an additional benefit for their ratepayers in the form of an option agreement with EnergySolutions. Under the terms of the option, which was provided as an exhibit to the testimony of Mr. Krueger, the Utilities have the right to acquire the KPS site at fair market value. The option is actually provided in two pieces, beginning with the portion of the site expected to be decommissioned first, followed by the portion of the site where the spent fuel facility is located (Direct-WPS-Krueger-r-4). This provided the Utilities with flexibility and no risk, with potential benefits for ratepayers that include the siting of future generation or other utility uses (*Id.*).

C. The Utilities were right to reject NorthStar’s offer.

Utility witnesses Ripp and Krueger both testified that they received an offer from NorthStar to “buy” their ROFR rights and both quickly rejected the offer for several reasons, including concern that the ROFR itself did not appear to be assignable (Direct-WPSC-Krueger-r-6; Direct-WPL-Ripp-11-12). Mr. Robuck testified that, in his opinion, it would have been reckless for the two utilities to be allowed to be used by NorthStar as a conduit in such a manner since they would have opened themselves up to an uncertain regulatory outcome and other potential legal issues given the uncertainty around the assignability of the ROFR (Direct-ES-Robuck-c-14).

In this regard, it is important to consider the contractual timeline restricting the Utilities’ prudence in decision-making. The ROFR imposed by the Proffered Conditions only allowed the

utilities 60 days to make a decision. It would have been impossible to obtain a judicial determination of the ROFR's assignability in that timeframe. The Utilities were, therefore, left to assess the risk of non-assignability. NorthStar may argue about whether a hypothetical Wisconsin court would have ruled the ROFR assignable if litigated, but an extensive review of many authorities on the subject confirms that the risk of non-assignability cannot be brushed aside.¹⁹ In fact, given the specific terms of the ROFR, which require the Utilities to file a request for a declaratory ruling as to their decision to exercise or waive the ROFR, the risk was very high. In that context, the fact that there is legal uncertainty about whether the ROFR is in fact transferable is in itself sufficient to demonstrate that it was prudent for the Utilities to reject NorthStar's offer.

Similarly, NorthStar's subsequent "offer" to deed the KPS property at no cost to the local community, which was made in the context of Mr. State's direct testimony, cannot factor in to the prudence determination since it was not made at the time the utilities were evaluating the waiver. A prudence review cannot introduce facts from hindsight, but must investigate "whether the utility applied good judgment at the time it made the decision at issue."²⁰ The Utilities negotiated a better deal for ratepayers by preserving the ability of the Utilities to control this infrastructure-strategic site for the Utilities' future use.

For the reasons stated above, the record is clear that the Utilities prudently waived their ROFR rights.

¹⁹ *Can a Right of First Refusal be Assigned?* 68 U. Chi.L.Rev. 985.

²⁰ (PSC REF# : 420182) at 6. That Mr. State would make such an offer, and thereby further detract from the issues in this proceeding by introducing what CUB witness Kihm refers to as "negotiations in real time" underscores just how highly unusual NorthStar's role in this proceeding has been.

CONCLUSION

EnergySolutions has met the financial sufficiency condition required by the Commission's 2005 Final Decision and all parties in the proceeding agree. EnergySolutions has also agreed to the other Proffered Conditions meaning that ratepayers can be assured that KPS will be decommissioned in an accelerated timetable to greenfield status and that any and all excess decommissioning trust funds will be returned to them when the decommissioning is complete. For these reasons, EnergySolutions respectfully requests that the Commission approve the proposed Stock Sale.

Dated this 18th day of March, 2022.

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