

**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 Dominion, LLC

Docket No 9812-EI-100

INITIAL BRIEF OF NORTHSTAR GROUP SERVICES, INC.

The proposed sale of Dominion Energy Kewaunee, Inc. to EnergySolutions may be the worst proposal ever put before the Commission. For more than four decades, millions of Wisconsin ratepayers have paid, in trust, to decommission the Kewaunee Power Station (“KPS,” formerly referred to as “KNPP”). By design, the Nuclear Decommissioning Trust (“NDT”) has more money in it than is reasonably expected for decommissioning.¹ The NDT has grown substantially over the decades. Dominion Nuclear Projects, Inc. and Dominion Energy Kewaunee, Inc. (collectively “Dominion”) now seek permission to hand over nearly a billion dollars of ratepayer money with no controls, no ongoing Commission supervision, and no protection whatsoever that funds held *in trust* will be spent wisely or prudently.

The Applicants essentially ask the Commission to rubber stamp the deal. Their view of the Commission’s jurisdiction is so extreme that, at least according to Mr. Avram, the Commission does not even need to see the Stock Purchase Agreement, much less review it. It was provided “just as a matter of courtesy.”²

¹ *In the Matter of the 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.*, Docket No. 05-EI-136, Final Decision (PSC REF# 25632) (rel. Dec. 16, 2004) (“Order Denying Transfer”) at 15-16.

² Tr. 212: 10-12.

The Applicants' view of the Commission's role in this proceeding is not reasonable. The quintessential purpose of the Commission is to serve and protect the ratepayers of Wisconsin. The Commission should stand up for Wisconsin's ratepayers and deny the Proposed Transaction or impose conditions upon its approval that ensure excess funds are in fact returned. No one else can or will.

The Proposed Transaction is grossly lacking in basic controls. In similar cases, other states have required the use of a fixed price contract and financial assurances. Those essential contract features guarantee that cost overruns will be the responsibility of the contractor, not the public. More importantly, such guarantees remove any temptation to be careless with ratepayer funds or to funnel ratepayer funds to affiliates. Rather than provide such assurances here, EnergySolutions asserts that giving it a blank check is the only way to ensure the job gets done.³ This is not true and not reasonable.

There is no need for the Commission to give EnergySolutions that blank check. NorthStar has made a binding commitment to undertake the project for a fixed price and to provide financial assurances. NorthStar Group Services, Inc. ("NorthStar") would guarantee that at least \$200 million would be segregated in the trust and returned to the ratepayers when decommissioning is complete, i.e., all amounts over the \$550 million fixed price NorthStar would commit to perform the project for.

Rarely has a case showcased the importance of the Commission to the Wisconsin public. The utilities are not looking out for the public. They have summarily dismissed a serious proposal that, at its absolute worst, would have netted their ratepayers \$25 million. If NorthStar had been able to acquire KPS, that proposal would have saved their ratepayers hundreds of

³ Tr. 157:11-15.

millions of dollars.

Dominion is not looking out for the public. Instead, Dominion seeks to offload significant responsibility to the public without making any effort to be a reasonable caretaker of public funds. Worse still, Dominion seeks to be paid for doing so from the public funds through a side deal shielded from any public scrutiny.

And certainly, EnergySolutions is not looking out for the public. Rather than present the Commission with a detailed, earnest proposal to ensure excess trust funds are returned, it asks the Commission to simply trust that it will use unspecified “good plans”⁴ and to trust that the IRS will monitor spending.

The Commission’s decisions in this docket will determine whether hundreds of millions of dollars held in trust for the public will be spent wisely. If the Commission approves the transaction without any modification or conditions, EnergySolutions will cash its blank check over and over again with no oversight and no accountability. The Commission should give serious consideration to the concerns raised in this proceeding and stop the Proposed Transaction.

I. BACKGROUND

a. The Initial Transaction and the 2005 Order

In 2004, the Commission first considered the sale of KPS to Dominion. At the time, KPS was owned by two regulated public utilities (Wisconsin Public Service Corporation or “WPSC” and Wisconsin Power and Light Company or “WPL,” collectively the “Utilities”). After a contested case proceeding with multiple rounds of filed testimony, a technical hearing, and briefing, the Commission declined to approve the proposed transaction.⁵

⁴ Tr. 177:1-5.

⁵ Order Denying Transfer at 1, 23.

In the 2004 order denying the transfer, the Commission emphasized that it would be contrary to public interest to give up decommissioning oversight, stating:

The Commission also oversees how KNPP's current owners are planning for the future of decommissioning of KNPP by acting jointly with the NRC to create, monitor and protect the decommissioning trust funds of WPSC and WP&L. ... The Commission has actively exercised its legal authority in these areas for many years. ... While DEK is willing to stipulate to a number of conditions in these areas, which it contends will adequately protect the public interest, the proposed terms of sale do not clearly safeguard the Commission jurisdiction over these matters if DEK were to transfer ownership of KNPP to a new buyer. Because a sale that causes the Commission to surrender this authority would be a substantial loss regarding matters of statewide importance, the Commission cannot find that this proposed transaction would be consistent with the public interest.⁶

The Commission further emphasized that under existing Commission orders, decommissioning funds could only be released with advance Commission approval and that the Commission imposes more restrictive conditions than the Nuclear Regulatory Commission ("NRC").⁷

Without such jurisdiction, the Commission found "the proposed sale is not consistent with the public interest because it would deprive Wisconsin's ratepayers of decommissioning funds that are likely not to be needed for actual decommissioning."⁸ Those funds were worth approximately \$405 million at the time⁹ and the NDT was expected to grow to exceed estimated decommissioning costs. As a result, the Commission anticipated a return to ratepayers and determined that the transfer would only be in the public interest if that benefit were retained.¹⁰

When the Utilities and Dominion came before the Commission a second time to propose the transfer of KPS to Dominion, they proffered additional conditions on which any future sale

⁶ Order Denying Transfer at 9-10. (emphasis supplied).

⁷ Order Denying Transfer at 13-14.

⁸ Order Denying Transfer at 16.

⁹ Order Denying Transfer at 6.

¹⁰ Order Denying Transfer at 15-16.

would be contingent (the “Proffered Conditions”).¹¹ The proposal included five additional conditions beyond what Dominion included in its prior filings.¹² Included in the final list of Proffered Conditions was original Proffered Condition 4, which requires Dominion to receive Commission approval for any subsequent sale of KPS or Dominion itself so the Commission may determine the proposed new owner has sufficient financial resources; new Proffered Condition 9, which requires return of excess NDT funds to ratepayers; new Proffered Condition 8, granting the Utilities a Right of First Refusal (“ROFR”) for KPS; and new Proffered Condition 11, requiring any subsequent purchaser of KPS or Dominion to intervene as a party in any Commission proceeding initiated under Proffered Condition 4.¹³ On April 21, 2005, the Commission issued its decision in docket no. 05-EI-136 authorizing the transfer of KPS from the Utilities to Dominion subject to the Proffered Conditions.¹⁴

b. NorthStar’s Relationship to Dominion

In May 2013, Dominion permanently shut down KPS as an operating power plant.¹⁵ Shortly after, in 2014, NorthStar’s relationship with Dominion as a prospective partner for accelerated decommissioning KPS began.¹⁶ NorthStar approached Dominion seeking to acquire the plant to decommission it. While Dominion now claims that NorthStar is not qualified to

¹¹ *In the Matter of the 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.*, Docket No. 05-EI-136, Final Decision (PSC REF# 32803 (rel. Apr. 21, 2005) (“2005 Order”), 3.

¹² 2005 Order at 3, 13-14.

¹³ 2005 Order at 13-14.

¹⁴ *In the Matter of the 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.*, Docket No. 05-EI-136, Final Decision (PSC REF# 32803 (rel. Apr. 21, 2005) (“2005 Order”), 13-14.

¹⁵ Ex.-Dominion-Avram-1pr, 1.

¹⁶ Surrebuttal-NorthStar-State-3r:6-21; Tr. 121:17-122:14.

decommission KPS, at the time Dominion flew senior managers to Wisconsin to present a proposed decommissioning plan with NorthStar to the Commission.¹⁷ Dominion presented NorthStar to the Commission, stating it had determined NorthStar to be “technically and financially capable to deconstruct/decommission” with “[e]xtensive experience in nuclear decommissioning activities.”¹⁸ In sworn testimony in this proceeding, Dominion claims that the 2014 proposal was abandoned because the decommissioning industry was not sufficiently mature (a claim it did not share with the Commission when it pitched the 2014 deal).¹⁹ But after NorthStar’s CEO, Scott State, shared what Dominion told NorthStar at the time, Dominion now admits that the project was abandoned at least in part due to the retirement of the plant leaving a \$500 million asset retirement obligation on their books that needed to be dealt with over time.²⁰

c. Dominion, EnergySolutions, and the Proposed Transaction now before the Commission

Dominion now seeks Commission approval for a Proposed Transaction in which it would transfer ownership of KPS and its NDT via sale of Dominion Energy Kewaunee, Inc. to an EnergySolutions affiliate.²¹ The transaction also requires approval of a license transfer application at the NRC.²² If the Proposed Transaction receives state and federal approval, then EnergySolutions would undertake decommissioning and deconstruction activity and in turn have access to the massive excess funding of the NDT.²³ Dominion did not seek bids for this decommissioning project or engage in any sort of competitive process, but instead summarily

¹⁷ Tr. 121:17-122:14; Surrebuttal-NorthStar-State-3r:9-16; Ex.-NorthStar-State-13r.

¹⁸ Ex.-NorthStar-State-13r, 4.

¹⁹ Ex.-NorthStar-State-13r.

²⁰ Surrebuttal-NorthStar-State-4r; Tr. 79:3-11.

²¹ Ex.-Dominion-Avram-1pr.

²² Ex.-Dominion-Avram-1pr, 2.

²³ Direct-NS-State-5.

chose EnergySolutions as the sole source of its work regardless of costs to ratepayers.²⁴ Nor did Dominion make any efforts to determine that the Proposed Transaction with EnergySolutions would lead to the prudent expenditure of NDT funds,²⁵ despite the fact that excess ratepayer funds remaining in the NDT after completion of decommissioning must be returned to ratepayers under Proffered Condition 9. The NDT contains significantly more funds than necessary to decommission KPS.²⁶

d. NorthStar's qualifications and offer to purchase the ROFR

NorthStar is the world's largest demolition company.²⁷ Over the last 30 years, NorthStar has successfully completed more than 100,000 projects across all 50 states covering any manner of highly technical infrastructure and environmental services including nuclear decommissioning and low-level radioactive waste disposal.²⁸ NorthStar performed the majority of those projects on a fixed price basis.²⁹

NorthStar was selected to decommission the Vermont Yankee nuclear plant in Vermont and a NorthStar partnership was selected to decommission Crystal River 3 in Florida.³⁰ Both are guaranteed fixed price, competitively bid projects.³¹ In addition to those projects, NorthStar has been involved in several NRC license termination proceedings.³² NorthStar engaged in regulatory processes in Vermont and Florida to configure fair and equitable transfers.³³ Those

²⁴ Ex.-NorthStar-Discovery Responses-6, 4.

²⁵ Ex.-NorthStar-Discovery Responses-6, 6.

²⁶ Direct-NS-State-13.

²⁷ Direct-NS-State-2.

²⁸ Direct-NS-State-2.

²⁹ Direct-NS-State-2.

³⁰ Direct-NS-State- 9-12.

³¹ Surrebuttal-NorthStar-State-6r.

³² Direct-NS-State-6, Ex.-NorthStar-State-3 – Ex.-NorthStar-State-7.

³³ Direct-NS-State-9.

processes assured that project performance risk was transferred to the decommissioning company and not to ratepayers.³⁴ The projects' costs were market competitive costs, thus ensuring the return of excess ratepayer money.³⁵ In short, the bidding processes for Vermont Yankee and Crystal River 3 made sure that ratepayer funds were not wasted.³⁶

With this experience and an interest in working to decommission KPS, NorthStar approached the Utilities with an offer of \$25 million to purchase an assignment of the Utilities' ROFR for KPS.³⁷ Purportedly concluding that the ROFR was not assignable (in fact, it is), the Utilities gave no further consideration to the proposal and declined it.³⁸ Instead, the Utilities waived their ROFR and, as the ROFR required, intervened in the Proposed Transaction to request a declaratory judgment from the Commission that their actions were reasonable and prudent.³⁹

Since then, NorthStar has continued to make clear it is willing to step into the transaction at \$550 million through assignment of the ROFR by identifying parameters for project costs and for defining excess funds, i.e., retain for refund to ratepayers, any amount in the NDT in excess of \$550 million transferred to a segregated account.⁴⁰

II. ARGUMENT.

The Applicants ask the Commission to ignore the lack of a competitive process, the lack of a fixed price, and the lack of meaningful financial assurances in this proceeding. Instead of looking out for the Wisconsin public, the Applicants hope that the Commission will grant

³⁴ Direct-NS-State-9.

³⁵ Direct-NS-State-9.

³⁶ Direct-NS-State-9-12.

³⁷ Direct-NS-State-23:22-24:20.

³⁸ Direct-WPL-Ripp-11:18-21; Direct-WPSC-Krueger-r-6:16-18.

³⁹ Ex.-WPSC-Krueger-2; Ex.-Dominion-Avram-1pr, 100.

⁴⁰ Direct-NS-State-28-29; Surrebuttal-NorthStar-State-8r-9r.

EnergySolutions *carte blanche* to use the hundreds of millions of dollars in the NDT however the company might see fit. The transaction is proposed without an evaluation of or limitation on the ultimate cost of the project or risk to Wisconsin ratepayers.⁴¹ Despite claims that Proffered Condition 9 will be respected, there is absolutely nothing in the Proposed Transaction that ensures or requires EnergySolutions to manage spending to *necessary* levels.⁴² In other words, while EnergySolutions nominally recognizes its legal obligation to return excess funds, it opposes any effort to identify what are actually excess funds.

“The market” should determine what excess is according to Mr. Robuck.⁴³ While “the market” might have helped to protect excess ratepayer funds had a competitive market process been involved in structuring the transaction, how exactly “the market” will help in the context of an agreement allowing completely unconstrained spending is far from clear. Will “the market” require EnergySolutions to use the least cost waste storage facility rather than its own facility? Will “the market” determine whether the significant sums of money EnergySolutions has committed to pay Dominion out of the trust fund are reasonable? Will the market audit trust withdrawals? Of course not. Those are the jobs of state regulators.

At the core of the problem is a lack of guaranteed cost and return of ratepayer funds.⁴⁴ Dominion’s decision to not pursue a competitive process for KPS decommissioning can only be explained by complete indifference to ratepayer interests or by the consideration paid to Dominion through the side agreements that Applicants do not desire the Commission to review. Dominion could have engaged multiple qualified suppliers and in turn assured the best terms for

⁴¹ Direct-NS-State-4.

⁴² *Id.* at 5, 12-13.

⁴³ Tr. 176:17 - 177:5.

⁴⁴ Surrebuttal-NorthStar-State-6.

stakeholders, specifically Wisconsin ratepayers.⁴⁵ It did not. Instead, Dominion seeks Commission approval of a transaction that includes little to prevent EnergySolutions from needless excess spending and fails to protect ratepayers from bearing the risk of poor project execution.⁴⁶ NorthStar's proposal for KPS, which is informed by industry experience including its nuclear decommissioning projects underway in Florida and Vermont and benefited by a cost efficient and self-performance strategy, addresses those flaws.

a. The Commission's 2005 Order did not relinquish jurisdiction over the NDT.

Motion after motion and brief after brief throughout this case, Dominion and EnergySolutions insist that Commission review of this proceeding is perfunctory. Their theory of the case is based on a single sentence in the Commission's 2005 Order: "[t]he Commission is willing to relinquish its approval authority over the use of KNPP/KPS'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."⁴⁷ From this single sentence, Dominion and EnergySolutions extrapolate that the Commission completely gave up its authority over hundreds of millions of ratepayer dollars in 2005. It is inconceivable that the Commission would have done so; this theory will not hold.

It is true that in 2005 the Commission acknowledged it was giving up *some* oversight over the NDT because it had put other "safeguards" in place. These so-called "safeguards" included the requirement that excess funds be returned to ratepayers and a requirement that the Commission approve subsequent transfers of KPS. If the requirement to return excess funds allows the plant owner to unilaterally determine what is excess with no reporting or

⁴⁵ Direct-NS-State-12, -23.

⁴⁶ *Id.*

⁴⁷ 2005 Order at 22.

accountability to the Commission, the “safeguard” would not be protecting much. Similarly, if a transaction can be approved that has no meaningful controls over the use of NDT funds, that requirement to seek Commission approval prior to a sale is cold comfort to the ratepayer. Those conditions must have significance and must be applied as actual safeguards consistent with the Commission’s language and its intent to address its concerns for the NDT. One of the most significant, if not *the* most significant reason that the 2004 proposal was rejected was concern for the disposition of the trust fund.⁴⁸ The Commission did not suddenly determine a mere several months later that handing hundreds of millions of dollars to an unregulated entity was acceptable without controls. Rather, the much more reasonable interpretation of that sentence is that the Commission was no longer going to require Commission pre-approval for each and every trust fund withdrawal.⁴⁹ Reading it to mean, as the Applicants do, that the Commission entirely abrogated any concern for or control over the dispositions of the trust funds is not reasonable. The Commission *required* Proffered Condition 9 as a fundamental condition to approval in 2005. The Commission has the authority to ensure that Proffered Condition 9 is applied in a meaningful manner – as a safeguard.

b. The NRC will not supervise how EnergySolutions spends money in the NDT.

The NRC does not regulate whether trust funds are spent prudently. The Applicants’ testimony on this subject appears to deliberately conflate different regulatory concerns to confuse what the NRC’s actual role is. In their view, the fact that the NRC regulates the total amount required to be in a trust means that the Commission need not worry about whether funds are spent wisely. Those are simply two separate concepts.

⁴⁸ Order Denying Transfer at 15-16.

⁴⁹ 2005 Order at 22 (“Currently, the owners of KNPP must receive the Commission’s approval before they use decommissioning trust funds for any reason.”) *citing Docket 05-EI-14 Order*, page 15 (December 5, 1985).

The NRC is not a ratemaking agency. It does not have plenary jurisdiction over the companies that hold licenses. By its own words, the NRC is focused on guaranteeing the safety and security of nuclear material. Its mission statement is: “The NRC licenses and regulates the Nation's civilian use of radioactive materials to provide reasonable assurance of adequate protection of public health and safety and to promote the common defense and security and to protect the environment.”⁵⁰

EnergySolutions’ witness Mr. Levin cites a plethora of NRC regulations and guidance documents to give the impression that the NRC’s jurisdiction is all encompassing.⁵¹ But none of those regulations or guidance documents indicate that the NRC reviews costs for prudence or reasonableness. For example, Mr. Levin points to the regulation that describes application filing requirements for the NRC, 10 C.F.R. 50.33. To the extent that the application requirements discuss finances at all, the rules simply require “information sufficient to demonstrate to the Commission the financial qualification of the applicant to carryout . . . the activities for which a permit or license is sought.” In other words, consistent with Mr. State’s testimony, the NRC will endeavor to ensure there is enough money to complete the task, not whether it was spent wisely.

Mr. State provided a number of *actual* decisions from the NRC or filings that license holders such as NorthStar are required to provide. NorthStar has terminated licenses at the University of Washington, the University of Arizona, the University of Illinois, the University at Buffalo, and the VA Blotcky. Each of those final NRC decisions are in the record and none of them indicate that the NRC has required prudence reviews or made any findings regarding prudence.⁵² Similarly, Mr. State explained the supervision exercised by the NRC when projects

⁵⁰ Direct-NS-State-5; Ex.-NorthStar-Stat-2.

⁵¹ Direct-ES-Levin- 6 - 8.

⁵² Direct-NS-State-6; Ex.-NorthStar-State-3 to 7.

are ongoing:

Q. What does ongoing NRC supervision entail with respect to trust funds?

A. The required NRC annual filings do not address the prudence or reasonableness of any expenditures. Attached as Ex.-NorthStar-State-8 is NorthStar's latest funding status report required by the NRC for Vermont Yankee. The report simply shows, at a high level, that the expected decommissioning funds will be sufficient to pay for expected expenses. NRC staff has never requested any supporting documentation regarding the prudence or cost-effectiveness of any costs described in our reports for Vermont Yankee.

Ex.-NorthStar-State-9 is the NRC's decision determining that our annual reporting obligations were satisfied. It has no determination as to the appropriateness of any particular expense. It simply notes that "As of the date of this letter"... the NRC has determined that NorthStar has satisfied the decommissioning funding assurance requirements of 10 CFR 50.82." In other words, the NRC simply found that the trust fund is adequately funded. The only other regular financial reporting is a monthly notice regarding the planned withdrawal from the NDT, which does not contain any line-item detail, an example of which is attached hereto as Ex.-NorthStar-State-10.

Despite assertions that the NRC has "the right" to review prudence, the record shows that the NRC does not do so.⁵³ The NRC, true to its mission, and consistent with its regulations, focuses on safety and ensuring that the total trust fund exceeds the expected costs.

EnergySolutions has not provided a single example where they or any other company has had to make a showing of prudence. They have not done so because the NRC does not perform that function. State regulators are supposed to.⁵⁴ If \$550 million is enough money to complete decommissioning, so is \$955 million,⁵⁵ and the NRC is not concerned with the difference.

- c. The Proposed Transaction contains no protections to ensure that excess trust funds will be returned to the ratepayers and should be denied as a result.

Proffered Condition 9 requires that any and all excess ratepayer funds contained in the

⁵³ Tr. 174:17-18.

⁵⁴ Direct-NorthStar-State-8-9.

⁵⁵ Ex.-ES-Robuck-2.

NDT be returned to WPSC and WPL for return to their ratepayers.⁵⁶ The 2005 order recognized that WPSC and WPL customers made payments into decommissioning trust funds for decades and that their efforts should not be a windfall for Dominion or a subsequent plant owner. As described above, the commitment to return unused funds to ratepayers rather than allow Dominion to retain the excess was a significant factor in the Commission's decision to approve transfer in 2005 after the 2004 denial.⁵⁷ But the Applicants have made no effort whatsoever to give meaning or effect to that fundamental safeguard. Instead, they have gone to great lengths to convince the Commission that nothing more than a general promise could or should be required to ensure that hundreds of millions of ratepayer dollars are spent appropriately. While there is far more money in the NDT than is needed for decommissioning, Dominion and EnergySolutions will not commit to any amount of NDT funds being returned to ratepayers, instead relying on a definition of "excess" that amounts to whatever happens to be left after decommissioning.

This approach to excess funds, which fails to set meaningful parameters for quantifying "excess," is unreasonable and casts doubt on the likelihood of NDT funds being returned to ratepayers for a number of reasons. First, the proposed decommissioning cost estimates are typically conservative, or high estimates of cost.⁵⁸ That means the estimates are inflated which gives assurance that adequate funding is set aside for decommissioning, but when the projects are complete, the required resources are far less.⁵⁹ Related to this, NDT funds exceed what will be needed to decommission KPS.⁶⁰ That fact was anticipated as far back as the Commission's 2004 order denying KPS transfer.⁶¹ Despite this, the Proposed Transaction fails to identify a

⁵⁶ Transfer Conditional Acceptance at 14.

⁵⁷ *Id.* at 23-24.

⁵⁸ Direct-NS-State-20.

⁵⁹ *Id.*

⁶⁰ Direct-NS-State-4; Surrebuttal-NorthStar-State-5r.

⁶¹ Order Denying Transfer at 5.

minimum amount of NDT funds that will be guaranteed to be returned.

Meanwhile, there are avenues – arguably incentives – for EnergySolutions to spend on costs above competitive market prices, such as excessive spending on waste disposal that it will pay to *its affiliate*. The Proposed Transaction also includes side agreements to the Stock Purchase Agreement between Dominion and EnergySolutions. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

What is good for the goose is apparently not good for the gander.

EnergySolutions claims that its spending of NDT funds will be monitored by the NRC or Internal Revenue Service regulations. However, when pressed at the party hearing, the President and CEO of EnergySolutions was unable to say whether the NRC would evaluate the prudence of the company’s spending.⁶³ Instead, EnergySolutions simply asserts that it will adhere to IRS regulations limiting expenses to “reasonable expenses”.⁶⁴ This statement is not reassuring given the lack of safeguards built into the Proposed Transaction. If the IRS were a sufficient regulator of utility trust funds and the prudent expenditure of those funds, EnergySolutions can give no explanation why state utility regulators are typically involved in oversight or why the Vermont Utility Commission and the Florida Public Service Commission nevertheless required a fixed price contract and financial assurances.⁶⁵ Despite EnergySolutions’s arguments to the contrary,

⁶² Ex.-NorthStar-Discovery Responses-8c; Confidential Tr. 100:13-18, 101:14-17; Tr. 178:21-23.

⁶³ Tr. 171, 174, 175:16 – 176:7.

⁶⁴ *Id.* at 174.

⁶⁵ Tr. 172:11-24.

state utility commissions do not and should not abrogate their essential responsibilities to protect local utility ratepayers to a federal taxing authority.

NorthStar is the only party, including Commission Staff, to identify concrete steps the Commission can take to guarantee that NDT funds will be preserved for return to ratepayers. Rather than incentivize EnergySolutions to manage spending such that NDT funds will remain after decommissioning, the Proposed Transaction allows for EnergySolutions to draw down the entire NDT. If that occurs, Wisconsin ratepayers would lose out on more than \$200 million in excess funds.⁶⁶ EnergySolutions has a track record of doing just that. For example, EnergySolutions has not achieved NRC license termination at the Zion or La Crosse plant sites, and it has exhausted the NDT for Zion and is now funding continued cleanup out of its own pocket.⁶⁷

- d. The Commission cannot determine from the evidence in the record that all excess funds will be returned to the ratepayers.

At the hearing in this proceeding, NorthStar moved into evidence four additional agreements – the D&D, ISFSI, Planning, and Transition – between Dominion and EnergySolutions that are listed as Exhibits to the Stock Purchase Agreement in the Proposed Transaction.⁶⁸ Before NorthStar entered them as evidence, neither Dominion nor EnergySolutions provided these agreements to the Commission. Instead, they buried their offer to provide the additional agreements “as necessary to for the Commission’s consideration”⁶⁹ in a footnote to the Application. Dominion Vice President Emil Avram admitted these side agreements between Dominion and EnergySolutions were important enough to Dominion that it

⁶⁶ Direct-NS-State-17.

⁶⁷ Direct-NS-State-16.

⁶⁸ Ex.-NorthStar-Discovery Responses-8p (confidential version contains unredacted copies of the agreements)

⁶⁹ Ex.-Dominion-Avram-1p pg. 7 of 115, fn. 2.

likely would not have entered the Stock Purchase Agreement with EnergySolutions if those agreements were not included.⁷⁰ He further admitted that the Commission would need to know the full scope of the transaction to determine if the Utilities had acted reasonably and prudently in waiving their ROFR rights.⁷¹ Commission Staff Public Utilities Financial Analyst Justin Adams confirmed at the hearing he had not reviewed those additional agreements and could not give an opinion on whether they were reasonable.⁷²

Without an understanding of the entire Stock Purchase Agreement between the two Applicants, the Commission does not have enough evidence before it to determine whether excess funds will be returned to ratepayers after EnergySolutions and Dominion are through dividing up the NDT under these side agreements, and whether the Utilities' decision to waive the ROFR was reasonable and prudent. Dominion has been entirely clear it does not think the Commission needs to have such an understanding. Mr. Avram underscored this sentiment at the hearing when he testified that EnergySolutions provided part of the Stock Purchase Agreement "just as a matter of courtesy," and "[t]he Commission is not in this proceeding looking to make a decision on whether the contract is acceptable or not. That's a matter between obviously EnergySolutions and Dominion."⁷³ Despite both Applicants constantly using the Stock Purchase Agreement as a shield during discovery disputes,⁷⁴ Dominion made it clear at the hearing it

⁷⁰ Tr. 89:19-90:14.

⁷¹ Tr. 92:15-93:11.

⁷² Tr. 204:6-205.

⁷³ Tr. 212:10-17.

⁷⁴ "the Stock Purchase Agreement "embodies the entire agreement and understanding of the Parties hereto in respect of the subject matter [of the transaction]" and "supersedes all prior agreements and understandings among the Parties" including "any letters, memoranda or other documents or communications..." Dominion's Brief in response to NorthStar Motion to Compel (PSC Ref#425925) citing Application (PSC REF#: 413732), Exhibit A (Stock Purchase Agreement), Section 11.5; *see also* Dominion's motion for interlocutory review: "The Transaction under review is the Stock Purchase Agreement; the communications which led to its finalization and execution are not".

[REDACTED]

The Commission Staff did not review these agreements or dollar amounts before they gave their testimony.⁸⁰ Staff Financial Analyst Justin Adams confirmed at the hearing that he was not aware of how much money Dominion proposed to receive from the NDT under its side agreements with EnergySolutions until he heard Mr. Avram testify to those numbers.⁸¹ These agreements deserve to be considered with heavy skepticism, but that has not happened on the

⁷⁸ Ex.-NorthStar-Discovery Responses-8c, p. 101 of 204.
⁷⁹ *Id.* at p. 84.
⁸⁰ Tr. 204:9-17.
⁸¹ Tr. 204:18-25.

record in this case apart from NorthStar’s cross examination of Dominion and EnergySolutions witnesses. The record in this case is not one that should allow the Commission to approve the Proposed Transaction.

e. The Utilities’ waiver of the ROFR was unreasonable and imprudent.

Section 6 of the ROFR requires WPL and WPSC to seek from the Commission “a declaratory ruling on the reasonableness and prudence of exercising or waiving” their rights under the ROFR.⁸² “Prudence” is defined by the Wisconsin courts and past Commission decisions as “Carefulness, precaution, attentiveness, and good judgement, as applied to action or conduct.”⁸³ In this docket, the Utilities claim⁸⁴ that they acted reasonably and prudently – or acted with care, precaution, and good judgment – in accordance with § 6 of the ROFR. The Commission should deny that request for declaratory judgment. Neither WPL nor WPSC acted reasonably or prudently when they summarily decided to waive the ROFR in favor of EnergySolutions or ignored NorthStar’s proposal for assignment.

i. The ROFR is assignable on its face.

To avoid scrutiny from the Commission and to shield their apparent lack of concern for ratepayer funds, the Utilities seek the simple solution of claiming their hands were tied. The ROFR was not assignable, they argue, thus they could not even consider NorthStar’s proposal. The question of assignability is in fact *simple*, but not in the way the Utilities would like.

Paragraph 10 of the ROFR, titled “Successors and Assigns,” reads: “The Right of First Refusal shall be binding upon and inure to the benefit of, the parties hereto and their successors

⁸² Ex.-Dominion-Avram-1p at 102 of 115.

⁸³ *Wis. Pub. Serv. Corp. v. Pub. Serv. Comm’n of Wis.*, 156 Wis. 2d 611, 617, 457 N.W.2d 502 (Ct. App. 1990).

⁸⁴ *Request of Wisconsin Public Service Corporation and Wisconsin Power and Light Company for a Declaratory Ruling on Prudence of Waiver of Rights of First Refusal*, Docket No. 9812-EI-100 (PSC REF# 415591) (July 9, 2021) at 3.

and *assigns*.”⁸⁵ This language unambiguously contemplates that the benefit of the ROFR (i.e., the right held by the utilities) is assignable. It could not be more evident. In property instruments, as in other forms of contracts, such unambiguous language should be taken at its face value.⁸⁶

Moreover, unless expressly stated otherwise, property interests are generally considered to be transferable even where the instrument fails to refer to “assigns”.⁸⁷ For example, the Wisconsin Supreme Court found that a right to remove sand was assignable where the instrument was silent as to assignability of that interest but otherwise clearly expressed assignability (referring to “heirs, and assigns”) as to other property interests.⁸⁸ The Court explained that Wis. Stat. § 706.10(3) creates a presumption that a grant of the property right includes all rights, including assignability, unless the language of the grant indicates otherwise.⁸⁹ Here, the same express language – “assigns” – is included in the instrument itself so there is no need to rely on the presumption of § 706.10(3).

Finally, the Restatement (Third) of Property: Servitudes, § 1.5 provides a clear example of an assignable option to purchase, demonstrating that the ROFR in this case is undeniably assignable:

Rose, the owner of Blackacre, granted Alice and her heirs and assigns an option to purchase Blackacre... The recorded option agreement provided that... it ran with the land and was binding on Rose and her heirs and assigns. Alice owned no land at the time she acquired the option. Three years later, Alice sold the option to Delia and Rose transferred Blackacre to Tina. Delia then notified Tina that she exercised the option to

⁸⁵ Ex.-Dominion-Avram-1p at 102 of 115 (emphasis supplied).

⁸⁶ See *Gilbert v. Geiger*, 2008 WI App 29, ¶10, 307 Wis. 2d 463, 747 N.W.2d (explaining that property instruments should be construed within the four corners of the instrument).

⁸⁷ *Wisconsin Public Service Corp. v. Marathon County*, 75 Wis. 2d 442, 446, 249 N.W.2d 543 (“Assignability is a characteristic of rights in or connected with property”).

⁸⁸ *Borek Cranberry Marsh Inc. v. Jackson County*, 2010 WI 95, 328 Wis. 2d 613, 785 N.W.2d 615.

⁸⁹ *Id.* at ¶¶3, 37.

purchase... Delia is entitled to a conveyance of Blackacre... The benefit held by Alice was in gross and transferrable. The burden ran with the land to Tina.⁹⁰

Like Alice in the illustration, the Utilities hold a transferable property interest in gross.

The fact that the ROFR was part of the Commission's 2005 order does not render the otherwise clearly assignable instrument unassignable. In its testimony, WPL makes clear it believes (as NorthStar does) that the Commission intended for the ROFR to serve as a jurisdictional hold and to ensure regulated entities still had some control over the KNPP; however, the Utilities erroneously conclude that the Commission's use of their regulated status to retain jurisdiction over KNPP means they could not then assign the ROFR to an unregulated entity like NorthStar.⁹¹ This conclusion ignores a key fact: even if the ROFR was assigned to an unregulated entity as its language permits, there would still be no regulated or unregulated entity that could acquire KNPP *without being bound by the Proffered Conditions* or the terms of the ROFR requiring reasonableness and prudence in exercising or waiving the ROFR.⁹² This, of course, includes Proffered Condition 4, requiring Commission approval for any transfer of the KNPP. Additionally, no matter who the assignee was, Paragraph 6 of the ROFR would still be in place, requiring the ROFR holder go before the Commission to request a declaratory ruling on any exercise or waiver of its rights. Finally, if the Utilities were truly concerned that obligation was personal to them, they could have petitioned the Commission with NorthStar as their assignee to avoid any possible risk of misinterpreting the ROFR.

⁹⁰ Restat 3d of Prop: Servitudes, § 1.5 (3rd 2000) Illustration 4; Cited with approval in *Gojmerac v. Mahn*, 2002 WI App 22, ¶18 n.5, 250 Wis. 2d 1, 640 N.W.2d 178.

⁹¹ "the ROFR requires a declaratory ruling when it is exercised or waived, and WPL did not believe the ROFR could be transferred to a third-party that is not regulated by the Commission." Direct-WPL-Ripp-12:3-5.

⁹² "...any transferee of a Permitted Transfer must petition the PSCW to reopen any final order in PSCW Docket 05-EI-136 for the purpose of obtaining an amended order finding that the transferee has agreed to be bound by all of the conditions proffered..." ROFR, par. 2 Ex.-Dominion-Avram-1p at 101 of 115.

- ii. The Utilities not only acted unreasonably and imprudently in reaching their erroneous conclusion the ROFR was not assignable, they also made no effort to assess whether the failure to assign would cost their customers hundreds of millions of dollars.

The Utilities efforts to wash their hands of the transaction through their undeveloped and unsubstantiated assignability arguments are a distraction from the standard they were supposed to meet – that their waiver of the ROFR was reasonable and prudent. In conducting prudence reviews, the Commission investigates whether management of the utility applied good judgment given the situation at the time the utility made the reviewable decision.⁹³ The key question then is whether the Utilities applied good judgment given the situation at the time they waived the ROFR. They did not.

Instead, the Utilities sought to avoid exercising any judgment at all by hiding behind a patently faulty legal argument. In doing so, they failed to even consider the disposition of NDT funds or the impact on their ratepayers.⁹⁴ When faced with credible information that the proposed transaction would cost their ratepayers hundreds of millions of dollars, the utilities took the easy way out. They turned down the \$25 million NorthStar offer for the ROFR⁹⁵ and relied simply instead on “representations set forth in the Dominion/[EnergySolutions] Application [that EnergySolutions] has the technical and financial qualifications to undertake and complete the decommissioning of the KNPP.”⁹⁶

The Commission has found utilities imprudent when it has made contracting decisions based on unsupported and unsupportable sets of assumptions that they will be saving ratepayers

⁹³ *In re Wisconsin Power and Light Co.*, 2001 Wisc. PUC LEXIS 11, 16, 2001 WL 969109 (2001), 210 P.U.R.4th 339 (6680-UR-110 RockGen Contract) *citing* *Waukesha Gas & Electric Co. v. Railroad Commission*, 181 Wis. 281, 304 (1923).

⁹⁴ Ex.-NorthStar-DiscoveryResponses 3,7; Direct-WPSC-Krueger-R-4.

⁹⁵ Direct-NS-State-24.

⁹⁶ Direct-WPSC-Krueger-r-5:1-5.

money.⁹⁷ It is the Utilities' ratepayers who stand to lose hundreds of millions of dollars from the NDT if the decommissioning is not done efficiently or wisely. Unlike the speculative and *de minimus* benefit the Utilities claim they negotiated for their customers through the Option to Purchase the land underneath the KNPP following decommissioning⁹⁸, the money in the NDT is substantial and not theoretical.

The Commission did not issue an advisory opinion when it required the Utilities to return for a declaratory ruling on their decision to exercise or waive the ROFR; it would not have put this requirement in its 2005 Order without good reason. The NorthStar offer is still valid to pay the Utilities for the ROFR subject only to obtaining necessary approvals and closing on the transaction.⁹⁹ It would seem prudent to allow as many legally defensible options to be explored as possible that could benefit the citizens that have paid for the decommissioning of the Kewaunee Power Station via ratemaking for decades.¹⁰⁰

NorthStar proposes that if it is assigned the ROFR and it successfully acquires KPS, it would agree to be bound by the following conditions which are missing from the Proposed Transaction.

- NorthStar will guarantee that no more than \$550 million will be transferred to a subaccount of the NDT for NorthStar's use in decommissioning, verifiably tied to actual work performed.

⁹⁷ *In re Wisconsin Power and Light Co.*, 2001 Wisc. PUC LEXIS 11, 21-22, 2001 WL 969109 (2001), 210 P.U.R.4th 339 (6680-UR-110 RockGen Contract) (finding imprudence in the decision to assume high market energy prices would decrease in the future without conducting any quantitative analysis before entering a power purchase agreement).

⁹⁸ Ex.-WPSC-Krueger-1.

⁹⁹ Direct-NS-State-29.

¹⁰⁰ *Id.* at 29-30.

- NorthStar will provide financial assurances that NorthStar itself, rather than Wisconsin ratepayers, will bear the risk of any costs above \$550 million transferred to the subaccount (plus any earnings thereon after transfer to the subaccount).
- NorthStar will fund an escrow account up to a value of \$50 million, seeded with \$20 million at the closing of the transaction with NorthStar’s own funds, plus 10% of all NorthStar billings on the KPS project going into the escrow until it reaches \$50 million.
- NorthStar will offer a parent support agreement/parent guarantee, a pollution policy covering unknown non-radiological environmental contamination and performance bonds where appropriate for additional assurance of performance.¹⁰¹

By segregating \$550 million of NDT funds for decommissioning and retaining the excess for return to ratepayers, NorthStar’s proposal gives meaning to “excess” NDT funds and ensures that funds will be returned to Wisconsin ratepayers.¹⁰² Ratepayers will also be protected from management risk by making the owner/contractor, and not the public, responsible for costs exceeding \$550 million.¹⁰³ Furthermore, placing funds in escrow gives a meaningful guarantee to the fixed price and mitigates against default as funds would be available to cover unexpected cost overruns.¹⁰⁴

By outlining the fixed price structure and financial assurances that NorthStar would provide if it acquires KPS, Mr. State provided the Commission with potential terms and conditions for it to apply to the Proposed Transaction.¹⁰⁵ NorthStar expects that if adopted by the Commission these terms and conditions would result in a net sum of over \$200 million being

¹⁰¹ Direct-NS-State-3.

¹⁰² Direct-NS-State-13, Surrebuttal-NorthStar-State-5.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ Direct-NS-State-3-4.

returned to Wisconsin ratepayers.¹⁰⁶

- f. The Commission should deny the Proposed Transaction or, at a minimum, condition its approval of the Proposed Transaction in a manner that ensures excess funds will be returned to the ratepayers as required by Proffered Condition 9.

Proffered Condition 9 requires that all excess funds be returned to the ratepayers at the completion of decommissioning. There is no evidence in the record that establishes this commitment is met by the proposed transaction. As explained by Mr. State, any amounts in the trust over \$550 million are excess and therefore should be segregated for return to the ratepayers upon completion of the decommissioning:

“Excess” means more than necessary. It does not mean, as EnergySolutions appears to contend, “whatever happens to be leftover”. NorthStar is willing to guarantee that the decommissioning could be completed for \$550,000,000 transferred to a segregated fund at closing. NorthStar has the experience and expertise to do the job at that price. Any “costs” that EnergySolutions may claim beyond the amount a competitor could decommission the plant are, by definition, excess of what is necessary. As a result, the Commission should find that EnergySolutions must refund the ratepayers of Wisconsin any amount in the trust currently in excess of \$550,000,000 which amount will likely increase over time.¹⁰⁷

EnergySolutions is clear. It will not segregate funds in excess of what is required. It will not commit to give any fixed amount back to Wisconsin ratepayers. It desires no Commission oversight of any kind. It did not even disclose to the Commission that it has agreed to give a significant portion of the NDT right back to Dominion, presumably in exchange for Dominion’s consent to a sole source transaction that has no protection whatsoever for the public’s interest in the NDT. The Commission should not simply trust that EnergySolutions will appropriately determine what excess funds are. EnergySolutions has no incentive whatsoever to be a good caretaker of the public’s monies and there are no meaningful controls upon the use of NDT funds

¹⁰⁶ Direct-NS-State-4.

¹⁰⁷ Direct-NorthStar-State-13.

if the Commission does not act now. The Commission should deny the transaction because it fails to adequately ensure that Proffered Condition 9 will be satisfied.

Alternatively, the Commission should do one of two things. First, the Commission could make an express finding that any values in the trust fund currently over \$550 million are excess and require effective mechanisms for the eventual return of those monies to the public. As Florida has done, and as NorthStar is willing to do, the Commission should condition any approval of the Proposed Transaction upon:

1. A condition that EnergySolutions guarantee that no more than \$550 million will be transferred to a subaccount of the NDT for use of decommissioning and verifiably tied to actual work performed, with all other amounts segregated for return to the ratepayers
2. A condition requiring EnergySolutions provide significant financial assurances such that the contractor or owner itself will bear the risk of any costs above \$550 million, rather than the ratepayers.
3. A condition requiring EnergySolutions to fund an escrow account up to a value of \$50 million, seeded with \$20 million at the closing of the transaction with the EnergySolutions' own funds, plus 10% of all its billings on the Kewaunee project going into the escrow until it reaches \$50 million.
4. A condition requiring EnergySolutions to provide a parent support agreement/parent guarantee, a pollution policy covering unknown non-radiological environmental contamination and performance bonds where appropriate for additional assurance of performance.

Finally, the Commission could require the Utilities to assign the ROFR to NorthStar, subject to NorthStar accepting the same conditions it proposes be imposed upon EnergySolutions and closing of the transaction to acquire KPS. Any of these approaches will prevent the substantial waste of ratepayer funds.

III. CONCLUSION

The Commission has a rare opportunity to save the Wisconsin public \$200 million. The

proposed sole source sweetheart deal is not reasonable. When a company takes nearly a billion dollars held in trust for the public, it should expect oversight. Instead, the Applicants have deliberately designed a transaction that gives every incentive for the public's monies to be used for their private gain. It is no wonder they take such an unreasonably narrow view of the Commission's jurisdiction. No meaningful review of this transaction would result in its approval. It is a bad deal for the Wisconsinites who have been funding the NDT for forty years. The Commission should deny the Proposed Transaction or take other action to ensure that the public's interest in excess funds is protected.

Dated: March 18, 2022

Respectfully submitted,

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By: Electronically signed by Justin W. Chasco
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