Agenda Date: 12/02/20
Agenda Item: 2B

STATE OF NEW JERSEY

Board of Public Utilities
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ENERGY

IN THE MATTER OF THE VERIFIED PETITION OF JERSEY CENTRAL POWER AND LIGHT COMPANY SEEKING APPROVAL OF THE TRANSFER AND SALE OF THE COMPANY'S 25% INTEREST IN THE THREE MILE ISLAND UNIT 2 NUCLEAR GENERATING FACILITY AND THE TRANSFER OF ITS ASSOCIATED NUCLEAR DECOMMISSIONING TRUST, PURSUANT TO N.J.S.A. 48:3-7, AND A WAIVER OF THE ADVERTISING REQUIREMENTS OF N.J.A.C. 14:1-5.6(B)	)	ORDER APPROVING SALE OF REAL PROPERTY DOCKET NO. EM19111460

Parties of Record:

Michael J. Connolly, Esq., Cozen O'Connor, on behalf of Jersey Central Power and Light Company
Stefanie A. Brand, Esq., **Director,** New Jersey Division of Rate Counsel

BY THE BOARD:

BACKGROUND

By Summary and Final Orders dated December 15, 1999 and March 4, 2003, respectively, the New Jersey Board of Public Utilities ("Board") approved the sale of the 25% interest of Jersey Central Power and Light Company ("JCP&L" or "Company") in the Three Mile Island Unit 1 ("TMI-1") nuclear generating facility to AmerGen Energy Company, LLC.[1] The purchase price of TMI-1 was approximately $100 million, which consisted of a $23 million closing payment for the TMI-1 plant, and approximately $77 million for the nuclear fuel in the reactor's core at closing. Further, as part of the TMI-1 sale, the sellers agreed to fund the Nuclear Decommissioning Trust ("NDT")

[1] In re the Matter of the Verified Petition of Jersey Central Power and Light Company, Doing Business as GPU Energy, Seeking Approval of the Sale of the Company's Interest in the Three Mile Island Unit 1 Nuclear Generating Facility Pursuant to N.J.S.A. 48:3-7, a Specific Determination Allowing the Three Mile Island Unit 1 Nuclear Generating Facility to be an Eligible Facility Pursuant to Section 32 of the Public Utility Holding Company Act of 1935 and a Waiver of the Advertising Requirements of N.J.A.C. 14:1-5.6(b), BPU Docket No. EM98121409, Orders dated December 15, 1999 ("Summary Order") and March 4, 2003 ("Final Order").

for the TMI-1 facility up to a maximum of $320 million, of which JCP&L's share was approximately $80 million.[2]

The Three Mile Island Unit 2 ("TMI-2") nuclear generating facility is located near Middletown, Dauphin County, Pennsylvania and has not operated since a 1979 accident. Since the completion of post-accident cleanup in 1993 (including the removal of an estimated 99% of the radioactive material associated with the damaged fuel core), the TMI-2 plant has been maintained by GPU Nuclear, Inc. ("GPU Nuclear"), a FirstEnergy Corporation ("FirstEnergy") affiliate, under a possession-only license from the Nuclear Regulatory Commission ("NRC").

TMI-2 remained in a deferred decommissioning state awaiting the expiration of the operating license for TMI-1. In September 2019, TMI-1 permanently shut down with current plans to implement SAFSTOR, a form of deferred dismantling, as its intended decommissioning methodology.

TMI-2 PETITION

On November 13, 2019, JCP&L filed a petition seeking Board approval of: (1) the sale of its 25% interest in the TMI-2 nuclear generating facility, (2) the transfer of its associated NDT, (3) the waiver of the advertising requirements set forth in N.J.A.C. 14:1-5.6(b), and (4) the transfer of all liabilities, including those related to the decommissioning of the TMI-2 plant and site ("Assumed Liabilities"), excepting the liabilities existing prior to the closing date of the sale ("Excluded Liabilities").

JCP&L's 25% interest in the TMI-2 plant and site has been fully depreciated and has a book value of $0 on the Company's books. Further, the TMI-2 plant and site are not income producing and the assessed value of the TMI-2 site is $0.

JCP&L entered into an Asset Purchase and Sale Agreement ("PSA") on October 15, 2019 along with Metropolitan Edison Company ("Met-Ed"), Pennsylvania Electric Company ("Penelec") (collectively, "Joint Owners") and affiliate GPU Nuclear to sell the TMI-2 plant and site to TMI-2 Solutions, LLC ("Buyer"), a subsidiary of Energy*Solutions*, Inc. ("Energy*Solutions*"), for a nominal cash consideration of $10,000.[3] Under the terms of the PSA, the Buyer would undertake the decommissioning of TMI-2 with the goal of completing major decommissioning activities by 2037. The Joint Owners would transfer their cumulative NDT balance of approximately $900 million to the Buyer, of which JCP&L's share is approximately $259 million.[4] According to Energy*Solutions*' decommissioning cost estimate, if the Joint Owners undertake the decommissioning, it is estimated that major decommissioning activities would cost at least $1.3 billion and would be complete by approximately 2053.

As described in the PSA, the Joint Owners would convey to the Buyer all NRC licenses, related easements, and transferable permits, among other deliverables. The Buyer would provide a Disposable Capacity Easement providing an assured disposal site for all low level waste at the TMI-2 site. Additionally, the Buyer agreed to take responsibility for all Assumed Liabilities, which

[2] The TMI-1 facility was jointly owned by JCP&L, Met-Ed, and Penelec in percentages of 25%, 50%, and 25%, respectively, and was operated by GPU Nuclear.
[3] Ownership of the TMI-2 plant is divided among the Joint Owners as follows: JCP&L (25%); Met-Ed (50%); and Penelec (25%). The Joint Owners are wholly-owned subsidiaries of FirstEnergy.
[4] As of May 30, 2020, the market value of the assets in the NDT were as follows: JCP&L ($259,824,550.39), Met-Ed ($415,843,424.32), and Penelec ($223,328,539.46).

includes the liabilities associated with the decommissioning of TMI-2, environmental liabilities, and the ownership of the remaining waste. The Joint Owners would retain the Excluded Liabilities denoted in the PSA, which include environmental liabilities existing prior to the closing date of the sale. The Buyer would also commit to various financial assurance instruments in the event that the NDT funds are not sufficient to complete the decommissioning process.

According to JCP&L, there are no stranded costs to recover from ratepayers because JCP&L's interest in the plant and site has been fully depreciated and has a book value of $0, nor will there be any sales proceeds credited back to customers since the Joint Owners are receiving a nominal amount of $10,000. However, the Company's base rates currently include approximately $740,000 per year for the recovery of JCP&L's share of the annual costs used to maintain the plant's Post Defueling Monitored Storage ("PDMS") status with the NRC. JCP&L further asserted that there is no prospective use of the "TMI-2 Assets" for utility purposes and that it intends to remove the PDMS charges from rates in its next base rate case and eliminate Tariff Rider Nuclear Decommissioning Clause in its next annual Societal Benefits Charge filing.

In the petition, JCP&L asserted that the transfer of the "TMI-2 Assets" for the $10,000 purchase price "is appropriate consideration based upon an assessment of the unique circumstances of the damaged TMI-2 plant, the scope of the Assumed Liabilities, and the estimated costs of decommissioning." JCP&L further argued that the terms of the PSA are "in the best interest of its customers and shareholders." JCP&L claimed that, under the terms of the PSA, the Buyer is required "to protect New Jersey ratepayers against cost obligations related to decommissioning" beyond the funds transferred from the Joint Owners' NDTs.

In regard to the vendor selection process, FirstEnergy requested information from three (3) nuclear industry vendors related to their capabilities and experience. FirstEnergy then retained the services of an independent consultant and a decommissioning expert to assess the vendors. The vendors were evaluated based on several criteria, such as technical approach and qualifications, ability to handle nuclear waste, financial assurance, organizational qualifications and company experience, and regulatory margin. As a result of this process, FirstEnergy determined that Energy*Solutions* was the preferred vendor to undertake the decommissioning and a non-binding term sheet was executed in May 2019.

In addition to Board approval, the closing of the sale is contingent upon the following: (1) NRC approval of the transfer of the Joint Owners' possession-only license (held by GPU Nuclear) to the Buyer; and (2) the obtainment of a satisfactory private letter ruling from the Internal Revenue Service ("IRS"). Following the closing of the sale, JCP&L will have certain limited rights to monitor decommissioning progress through an Independent Manager.

RATE COUNSEL COMMENTS

On October 28, 2020, the New Jersey Division of Rate Counsel ("Rate Counsel") submitted comments in this matter.[5] Rate Counsel expressed concern about the financial strength of Energy*Solutions*, the parent guarantor of the Buyer. Therefore, Rate Counsel requested that approval of the sale be conditioned upon JCP&L safeguarding its ratepayers from potential liability related to the decommissioning and environmental remediation of the TMI-2 plant and site.

[5] On November 5, 2020, Rate Counsel amended its comments due to an error regarding the designation of confidential information.

Rate Counsel also commented on the selection of Energy*Solutions* as the buyer, asserting that it occurred through an irregular sequence of events and evaluation process, rather than a normal public bidding process. Under the Board's regulations, there are certain conditions that must be met by a public utility, prior to the sale of property valued over $500,000, including that the property being sold be advertised for sale, presumably to obtain the best price possible. In this case, GPU Nuclear commissioned Energy*Solutions* to conduct a Decommissioning Cost Estimate in late 2017, after which Energy*Solutions* extended an apparently unsolicited offer to buy the plant. Concurrently, FirstEnergy was approached by another firm expressing similar interest in such a transaction, and in 2019, FirstEnergy and the Joint Owners solicited a bid from a third company believed to be potentially qualified. Thereafter, according to the petition, FirstEnergy requested further information from the three (3) vendors regarding their respective capabilities and experience.

Notwithstanding JCP&L's assertion that its novel solicitation process yielded a superior result, Rate Counsel argued that it is unclear whether a better price could have been achieved through open competitive bidding as the petition neglected to provide an independent appraisal of the sale as required by N.J.A.C. 14:1-5.6(i)(5). Rate Counsel also asserted that the financial strength of Energy*Solutions* appears to have been undervalued in the bid evaluation process. Rate Counsel maintained that the financial strength of TMI-2 Solutions, and its parent Energy*Solutions*, is critical to ensuring that the terms of the PSA are met. Based upon the unusual solicitation process and the questions surrounding the financial strength of the Buyer, Rate Counsel believes the interests of JCP&L ratepayers may be affected by an agreement which does not wholly release them from future liabilities related to the TMI-2 plant and site. Accordingly, Rate Counsel recommended additional safeguards be set in place by the Board as a condition of approval.

With regard to NDT contributions, Rate Counsel argued that the Company's analysis ignored the time value of money. According to Rate Counsel, the time-adjusted contribution of JCP&L's NDT represented 26.3% of the total NDT which exceeds JCP&L's ownership share. Further, Rate Counsel questioned the Company's distinction between shareholder contributions and ratepayer contributions. In particular, Rate Counsel noted that half of the shareholder contributions to the NDT were reimbursed by ratepayers. Despite these concerns, Rate Counsel did not request a refund of any NDT funds to customers.

Additionally, Rate Counsel cautioned that JCP&L, as a former owner of TMI-2, could still be liable for remediation costs under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") if the Buyer or its parent guarantor fail to meet the environmental obligations set out in the PSA. Moreover, Rate Counsel noted that the Joint Owners will have an independent manager on the TMI-2 Solutions Board to oversee the decommissioning activities. According to Rate Counsel, this continued involvement with TMI-2 may expose JCP&L to potential operator, arranger, or transporter liability, which is separate and apart from past owner liability, should environmental issues arise.

Based upon its analysis, Rate Counsel emphasized that the Board must set safeguards in place to protect ratepayers from liability for unanticipated problems that may occur during the decommissioning process and afterward. Specifically, Rate Counsel suggested that the Board require any liability for TMI-2 post-closing to be absorbed by the Joint Owners and that, if any such cost is ultimately assigned to JCP&L, the Company must agree not to seek to recover such costs from its utility customers.

JCP&L REPLY COMMENTS

On November 2, 2020, JCP&L submitted reply comments. While JCP&L did not object to the recommendations provided by Rate Counsel, the Company argued that it was necessary to clarify the conclusions that Rate Counsel had made.

JCP&L stated that Rate Counsel discounted the measures agreed upon in the PSA to convey the decommissioning obligations and protect against future ratepayer liability. The Company contended that these measures are consistent with industry standards and will adequately protect New Jersey ratepayers. In response to Rate Counsel's criticism of the Company's NDT contributions and earning analysis, JCP&L maintained that its analysis was consistent with previous Board directives.

JCP&L contended that Rate Counsel unnecessarily speculated regarding risks associated with the continued involvement of the Joint Owners in the decommissioning process through the independent manager on the TMI-2 Solutions' Board of Managers. JCP&L argued that the authority of the Joint Owners' independent manager is limited to certain consent rights over extraordinary matters and excludes the day-to-day management control that could give rise to CERCLA "operator" liability.

Notwithstanding these differing views, JCP&L did not object to Rate Counsel's request that the Board condition its approval of the proposed sale. Additionally, the Company provided two (2) additional conditions for the Board's consideration aimed at protecting New Jersey ratepayers from liabilities associated with the decommissioning of TMI-2. First, JCP&L stated that the Board could require the execution and delivery at closing of various assets and agreements, as set forth in the PSA, to protect New Jersey ratepayers from obligations related to the cost of decommissioning TMI-2. JCP&L further indicated that it would not object if the Board barred the Company from seeking recovery of any costs associated with any future CERCLA claims resulting from the decommissioning of TMI-2.

DISCUSSION AND FINDINGS

After careful review and consideration of the petition, exhibits, discovery and comments submitted in this matter, the Board **FINDS** that the sale of JCP&L's 25% interest in TMI-2 to the Buyer will not adversely affect the public interest and will not affect the Company's ability to render safe, adequate and proper service. Further, the Board is cognizant of the unique situation surrounding TMI-2 and recognizes that there is a limited existence of bona fide purchasers who could meet the requirements of the PSA. Nonetheless, FirstEnergy made reasonable efforts to contact potential purchasers that were qualified to decommission TMI-2 before ultimately selecting the Buyer. Therefore, the Board having found good cause, **HEREBY APPROVES** the Company's request for a waiver of the advertising requirements as set forth in N.J.A.C. 14:1-5.6(b).

As a condition of the sale, the Joint Owners propose to transfer their respective NDT balances totaling approximately $900 million to the Buyer, with JCP&L's NDT balance being valued at approximately $259 million. This approach is consistent with the sale of TMI-1 and is favorable to the potential alternatives. If the Joint Owners undertook the decommissioning, it is estimated that the decommissioning would cost at least $1.3 billion and would extend until 2053. Under the terms of the PSA, however, the Buyer would complete the decommissioning on an accelerated basis, with all major decommissioning activities projected to be completed by 2037.

Additionally, the Board recognizes that the sale, as proposed, will result in JCP&L contributing a greater portion of the total NDT (approximately 29%) than its respective ownership share in TMI-2 (25%). However, the Board notes that NDTs are governed by NRC regulations, which limit their use to "legitimate decommissioning activities".[6] As such, the use of NDT funds for activities other than decommissioning, including returning funds to ratepayers, would be prohibited under these regulations. JCP&L has maintained that its ratepayers and shareholders have actually contributed approximately 23% of the total NDT, but investment performance has resulted in greater growth of JCP&L's NDT relative to the NDTs of the other Joint Owners. Further, the Board acknowledges the concerns expressed by Rate Counsel that ratepayer contributions exceed JCP&L's ownership share when accounting for the time value of the contributions. Nonetheless, the Board believes that JCP&L's NDT, as presently constituted, is reasonably representative of the Company's approximate ownership share. Therefore, the Board **FINDS** that the transfer of JCP&L's NDT to the Buyer is reasonable.

Additionally, the sale is contingent upon the Buyer bearing responsibility for various Assumed Liabilities designed to provide additional protection for JCP&L's ratepayers. As more fully detailed in the PSA, the Buyer shall assume responsibility for all liabilities arising after the closing date of the sale, including those associated with the decommissioning of TMI-2. Meanwhile, the Joint Owners will retain responsibility for the Excluded Liabilities existing prior to the closing date of the sale. Thus, the Board is **SATISFIED** that the assignment of Assumed Liabilities to the Buyer will provide protection to ratepayers by relieving them of the risks associated with the decommissioning of TMI-2. However, the Board agrees with Rate Counsel that the tremendous uncertainty associated with the decommissioning warrants additional protections for ratepayers, which are incorporated herein.

The Board also considered the additional conditions offered by JCP&L. With respect to the JCP&L proposed condition that the Board require the execution and delivery of certain assets and agreements, the Board does not believe that this condition would provide any incremental protections to ratepayers, as these requirements are already included in the PSA. The Company also indicated that it would not object if approval of the sale was conditioned upon New Jersey ratepayers being shielded from any future CERCLA claims against JCP&L related to TMI-2. The Board agrees that this condition will further protect JCP&L's ratepayers from potential environmental liabilities that may arise from the decommissioning of TMI-2. As such, the Board has incorporated this condition herein.

Accordingly, the Board **HEREBY APPROVES** the sale and transfer of JCP&L's 25% interest in TMI-2, together with the associated facilities, machinery, and equipment, the possession-only NRC license, and certain material contracts and transferable permits associated with the ownership, possession, use and maintenance of TMI-2. For the reasons stated above, the Board further **APPROVES** the transfer of JCP&L's NDT balance to the Buyer, as well as the assignment of Assumed Liabilities and Excluded Liabilities as denoted in the PSA.

The approval granted hereinabove shall be subject to the following provisions:

1. To the extent the Buyer or its parent guarantor, Energy*Solutions* fails to fulfill its responsibility for the Assumed Liabilities as denoted in the PSA, the associated costs of such obligations shall not be borne by JCP&L's customers and JCP&L shall not seek to recover any such costs from ratepayers.

[6] See 10 CFR §§50.75(h)(1)(iv) and 50.82(a)(8)(i)(A).

2. In the event of any successful future CERCLA claim, if any, against JCP&L, as a former Joint Owner, for completion of decommissioning or for any other TMI-2 Site environmental liability, JCP&L shall not seek to recover from New Jersey ratepayers any remaining costs of TMI-2 decommissioning or any other TMI-2 Site environmental liability.

3. Any further or additional liability for TMI-2 post-closing shall be absorbed by the Joint Owners and, if any such cost ultimately is assigned to JCP&L, the Company shall not seek to recover such costs from ratepayers.

4. This Order is based upon the specific and particular facts of this transaction and shall not have precedential value in future property transactions that may come before the Board and shall not be relied on as such.

5. JCP&L shall notify the Board and Rate Counsel if it anticipates any material changes in the Asset Purchase and Sale Agreement.

6. The Board and Rate Counsel retain all rights to review all costs and proceeds related to the purchase, sale, and decommissioning of TMI-2 in JCP&L's future base rate cases or other appropriate proceedings.

7. This Order shall not affect nor in any way limit the exercise of the authority of the Board or of this State, in any future petition or in any proceedings with respect to rates, franchises, service, financing, accounting, capitalization, depreciation, or in any other matters affecting JCP&L.

8. This Order shall not be construed as directly or indirectly fixing for any purposes whatsoever any value of any tangible or intangible assets or liabilities now owned or hereafter to be owned by the Company.

9. Within 30 days of the date of the closing on this transaction, the Company shall file with the Board proof of the closing, net transaction costs, and final journal entries along with a detailed calculation, including selling expenses, of the sale.

The Company's costs remain subject to audit by the Board. This Order shall not preclude, nor prohibit, the Board from taking any actions determined to be appropriate as a result of any such audit.

This Order shall be effective on December 12, 2020.

DATED: December 2, 2020

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BY:

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COMMISSIONER

DIANNE SOLOMON
COMMISSIONER

UPENDRA J. CHIVUKULA
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ATTEST:

AIDA CAMACHO-WELCH
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