In the Matter of the Verified Petition of Jersey Central Power & 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(8)
Docket No. EM19111460

Amended Comments of the Division of Rate Counsel

November 5, 2020

Rate Counsel appreciates the opportunity to file comments regarding Jersey Central Power & Light's ("JCP&L" or the "Company") petition ("the Petition") before the Board of Public Utilities ("Board" or "BPU") for approval to sell its interest in the Three Mile Island Unit 2 Nuclear Generating Facility ("TMI-2") and transfer the balance of its nuclear decommission trust to TMI-2 Solutions, LLC ("TMI-2 Solutions" or "Buyer"), a special purpose bankruptcy-remote subsidiary of EnergySolutions, Inc. ("EnergySolutions"). Rate Counsel's comments address the issues potentially affecting New Jersey ratepayers and are not intended to contradict comments filed by other parties in other jurisdictions regarding the facility's regulatory compliance or approvals being concurrently sought as a result of the proposed sale and transfer.

Summary of Facts

JCP&L seeks the Board's approval under N.J.S.A. 48:3-7 to sell its interest in TMI-2, which is a non-operating, nuclear generating plant, located near Middletown, in Dauphin County, Pennsylvania.[1] The plant has not operated since March 28, 1979, when the plant's reactor partially melted down resulting in the worst accident in the nation's history of commercial nuclear power.[2] JCP&L also seeks waiver of the Board's advertising requirements under N.J.A.C. 14:1-5.6(b).[3]

JCP&L jointly owns the plant with the Pennsylvania utilities, Metropolitan Edison Company ("Met-Ed") and Pennsylvania Electric Company ("Penelec")(collectively, the "Joint Owners" or "Sellers"). Each of the Joint Owners holds an undivided percentage share as

[1] Three Mile Island Unit 1 ("TMI-1"), which is located on the same island in the Susquehanna River as TMI-2, is owned by Exelon Generation Company, LLC ("Exelon") and operated until September 20, 2019, when it was permanently shut down.
[2] See U.S. Nuclear Regulatory Commission, Backgrounder on the Three Mile Island Accident, https://www.nrc.gov/reading-rm/doc-collections/fact-sheets/3mile-isle.html
[3] Petition at ¶ 4.

follows: JCP&L (25%); Met-Ed (50%); and Penelec (25%).[4] TMI-2 is maintained by GPU Nuclear ("GPUN"), a FirstEnergy Corp. affiliate, which holds a possession-only license from the Nuclear Regulatory Commission ("NRC").[5]

Pursuant to an Asset Purchase and Sale Agreement ("PSA") between the Joint Owners and TMI-2 Solutions, the Joint Owners agree to transfer the facility to TMI-2 Solutions who will assume all liabilities with respect to the plant's decommissioning[6] in exchange for the Joint Owners' Nuclear Decommissioning Trust ("NDT") balances, which totaled $ 891,758,000 as of March 31, 2020.[7] Notably, JCP&L's NDT balance of $ 257,926,539 comprises approximately 29% of the total NDT balances for TMI-2 to be transferred to the Buyer under the PSA, which is well above its ownership share of TMI-2.[8] There is no provision for customers to be compensated for any "excess" trust fund amount (or surcharged for a deficit) and, under the **[BEGIN CONFIDENTIAL]** Nuclear Decommissioning Trust Agreement, **[END CONFIDENTIAL]** the funds can only be used for TMI-2 decommissioning purposes.[9]

Although the most recent decommissioning cost estimate, performed by EnergySolutions in 2018, projected a total cost estimate of $1.3 billion, EnergySolutions anticipates that the NDT funds will be sufficient to complete the decommissioning.[10] Similarly, JCP&L represents that the NDT balances are "consistent (on a projected basis) with current cost estimates provided to the NRC for the work to be conducted to decommission and decontaminate the TMI-2 plant and the TMI-2 Site."[11] To that end, GPUN and EnergySolutions jointly submitted a new decommissioning plan and associated cost estimate to the NRC. **[BEGIN CONFIDENTIAL]** In this report, the cost estimate was reduced substantially from $1.32 billion (in 2018 dollars) to $1.057 billion (in 2019 dollars).[12] Decommissioning is intended to begin shortly after closing

[4] The Joint Owners are wholly-owned subsidiaries of FirstEnergy Corp.
[5] See Petition at ¶ 6 and S-REV-1.
[6] The decommissioning work will be performed by ES/Jingoli Decommissioning, LLC, a joint venture formed by EnergySolutions and Jingoli, a construction company headquartered in New Jersey. **[BEGIN CONFIDENTIAL]**Jingoli owns a 30% stake in ES/Jingoli Decommissioning, LLC. **[END CONFIDENTIAL]**
[7] See RCR-REV-25.
[8] See S-REV-2 and S-ENG-9.
[9] See **[BEGIN CONFIDENTIAL]** PSA, Exhibit G ¶ 2.2. **[END CONFIDENTIAL]** See also 10 C.F.R. §§ 50.2 & 50.82(a) (stating the use of decommission trust funds is limited to "for expenses for legitimate decommissioning activities").
[10] Petition at ¶¶ 10, 65.
[11] Petition at ¶ 22.
[12] **[BEGIN CONFIDENTIAL]** S-ENG-12 and S-ENG-12, Confidential Attachment 2. **[END CONFIDENTIAL]**

and be completed by 2037, based on an accelerated decommissioning plan schedule proposed by EnergySolutions and GPUN.[13] **[END CONFIDENTIAL]**

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 on JCP&L's books,[14] nor will there be any sales proceeds credited back to customers, since the Joint Owners are receiving a nominal amount of $10,000.[15] 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.[16] JCP&L states it has also collected funds for the Company's NDT from ratepayers through its Nuclear Decommissioning Charge ("NDC") Tariff Rider, however the rider has been set to zero since July 1, 2011.[17] JCP&L further asserts that there is no prospective use of the "TMI-2 Assets" for utility purposes.[18] JCP&L states that it intends to remove the PDMS charges from rates in its next base rate case and eliminate Tariff Rider NDC in its next annual SBC filing.[19]

In JCP&L's Petition, JCP&L asserts 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[20], and the estimated costs of decommissioning."[21] JCP&L further argues that the terms of the PSA are "in the best interest of its customers and shareholders."[22] JCP&L claims 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.[23]

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[13] **[BEGIN CONFIDENTIAL]** <u>See</u> S-ENG-12, Confidential Attachment 2, Enclosure 1B Table 1B-3. **[END CONFIDENTIAL]**

[14] Petition at ¶ 11.

[15] <u>See</u> PSA at <u>Section</u> 3.2.

[16] Petition at ¶ 15.

[17] Petition at ¶ 17.

[18] Petition at ¶ 14.

[19] Petition at ¶ 23.

[20] The "Assumed Liabilities" are described in <u>Section</u> 2.3 of the PSA and includes, among other things, "[a]ll Liabilities with respect to the Decommissioning of TMI-2" and "All Environmental Liabilities (other than Excluded Environmental Liabilities)."

[21] Petition at ¶ 22.

[22] Petition at ¶ 22.

[23] Petition at ¶ 40.

Comments

As set forth more fully below, Rate Counsel has concerns regarding the financial strength and wherewithal of EnergySolutions, the parent guarantor of TMI-2 Solutions. Because EnergySolutions is not subject to the jurisdiction of the Board,[24] Rate Counsel believes it is critical that the Board set safeguards in place to protect New Jersey ratepayers from liability that may arise due to problems during the decommissioning process and afterwards. To this end, Rate Counsel recommends the Board condition its approval upon JCP&L insulating its ratepayers from potential liability related to the decommissioning and environmental remediation of the TMI-2 plant and site.

Sales Process

The selection of EnergySolutions as the buyer warrants comment, because it occurred through an irregular sequence of events and evaluation process, rather than a normal public bidding process. Under the Board's regulation there are certain conditions that must be met by a public utility, prior to the sale of property valued over $500,000. One such condition is the requirement that the property being sold be advertised for sale, presumably to obtain the best price possible.[25]

In this case, GPUN commissioned EnergySolutions to conduct a Decommissioning Cost Estimate in late 2017.[26] Shortly after EnergySolutions delivered its cost estimate in 2018, EnergySolutions extended an apparently unsolicited offer to buy the plant.[27] 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.[28] Thereafter, according to the Petition, FirstEnergy requested further information from the three vendors regarding their respective capabilities and experience.[29]

[24] Petition at ¶26.
[25] See N.J.A.C. 14:1-5.6(b).
[26] Petition at ¶ 52 n.22.
[27] Petition at ¶52.
[28] Petition at ¶ 53.
[29] Petition at ¶ 53.

A consultant was employed to develop an assessment of these vendors.[30] Additionally, a decommissioning expert reviewed the consultant's assessment and ranked the vendors based on, among other things, **[BEGIN CONFIDENTIAL]** directly applicable experience, technical capability and financial capability/credit quality.[31] **[END CONFIDENTIAL]** EnergySolutions was selected **[BEGIN CONFIDENTIAL]** based on its technical capability and applicable experience.[32] **[END CONFIDENTIAL]** EnergySolutions has radiological decommissioning experience including the Zion Nuclear Power Station in Illinois as well as other projects in Wisconsin, Southern California, Nebraska, and Arkansas. [33] Even though it appears to be the weakest of the three firms **[BEGIN CONFIDENTIAL]** in terms of credit quality, **[END CONFIDENTIAL]** JCP&L nonetheless justifies the selection based on the mitigation of credit risk through backstop measures.[34]

Further, in its Petition, JCP&L requests that the Board waive the advertising requirement set forth in N.J.A.C. 14:1-5.6(b), based on unique nature of TMI-2 for which there is a small number of potential buyers.[35] JCP&L asserts that waiver of the advertising requirement is appropriate because the sale will not adversely affect the public interest, nor affect its ability to provide safe adequate and proper service.[36] Because TMI-2 and the TMI-2 Site are unique assets, JCP&L argues the buyer selection process "reasonably surveyed" the market and resulted in a better result than could have been achieved using traditional, public advertising methods.[37]

Under the Board's regulations, waiver of the advertisement requirement is permitted only for specific circumstances. Pursuant to N.J.A.C. 14:1-5.6(i):

> Upon written request by a utility and in accordance with the general purposes and intent of this section, the Board shall grant said utility a waiver to the advertising requirement set out in (b) above if:
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> 1. The waiver shall not adversely affect the public interest;
> 2. The subject property is no longer used or useful for utility purposes;

[30] Petition at ¶ 54.
[31] **[BEGIN CONFIDENTIAL]** S-ENG-6 Confidential Attachment 1 **[END CONFIDENTIAL]**
[32] **[BEGIN CONFIDENTIAL]** Ibid. **[END CONFIDENTIAL]**
[33] Petition at ¶ 28.
[34] See S-REV-21. See also **[BEGIN CONFIDENTIAL]** S-ENG-6 Confidential Attachment 1 **[END CONFIDENTIAL]**
[35] Petition at ¶ 56.
[36] Petition at ¶¶ 57-58.
[37] Petition at ¶¶ 62-63.

3. There is no prospective use of the property for utility purposes or no other likely prospective purchaser;
4. The sale of the property shall not affect the ability of the utility to render safe, adequate and proper service;
5. The selling price represents the fair market value of the property to be sold based on a current independent appraisal;
6. There is no relationship between the parties other than that of transferor and transferee, or lessor and lessee; and
7. The request states the reasons of the utility in seeking the waiver which may include, but are not limited, to the following:

    i. The subject property is unique and requires an unusual sales contract or represents an unusual transaction;
    ii. The advertising and bidding shall not result in a higher sales price;
    iii. The advertising and bidding shall be detrimental to the sale of the property;
    iv. The unlikelihood of the existence of other bona fide purchasers who could meet the requirements of the proposed sales contract;
    v. The development of the property for private use will require extensive environmental permitting due to an existing contamination condition; and
    vi. The inability of any other bidder to obtain the necessary permitting authorization to develop the property.

Notwithstanding JCP&L's assertion that its novel solicitation process yielded a superior result, it is unclear whether a better price could have been achieved through open competitive bidding. The Company's petition neglected to provide an independent appraisal of the sale as required by N.J.A.C. 14:1-5.6(i)(5). Further, the financial strength of EnergySolutions appears to have been undervalued in the bid evaluation process. As explained further below, the financial strength of TMI-Solutions, and its parent EnergySolutions, is critical to ensuring that the terms of the PSA are met. As JCP&L concedes, if TMI-Solutions or its parent company are unable to fulfill their obligations, the liability will revert back to the Joint Owners' ratepayers.[38] Based on the unusual solicitation process and the questions surround 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

[38] See S-REV-7, RCR-ENG-33 Confidential.

and site. Accordingly, Rate Counsel recommends additional safeguards be set in place by the Board as a condition of approval.

Terms of the Agreement

Under the PSA, TMI Solutions assumes "all of the Liabilities of Sellers" other than the "Excluded" liabilities.[39] Pursuant to Section 2 of the PSA, the "Assumed Liabilities" include, among other things:

- All "Liabilities" with respect to the Decommissioning of TMI-2 and the TMI-2 Site, including any obligations under applicable Laws and the NRC License;
- All "Environmental Liabilities" (other than "Excluded Environmental Liabilities"); and
- the ownership, possession, use or maintenance of the TMI-2 Assets with respect to, among other things, the "Remaining Accident Generated Solid Waste."[40]

TMI-2 Solutions' assumption of the Assumed Liabilities is backed by a Parent Guarantee, which obligates EnergySolutions to perform or pay for any of the obligations of TMI-2 Solutions.[41] **[BEGIN CONFIDENTIAL]** The Parent Guarantee is further backed by a $100 million Financial Support Agreement, whereby EnergySolutions agrees to pay for TMI-Solutions' decommissioning costs up to $100 million dollars.[42] The $100M credit capacity requirement is an aggregate amount.[43] Therefore, EnergySolutions' obligation is $100M minus the amounts set aside in a separately backed Back-up and Provisional Nuclear Decommissioning Trust Agreement.[44] Pursuant to the Decommissioning Completion Agreement, a $55 million letter of credit must be delivered to the Back-up Trust as well as $10 million credit representing the value of a Disposal Capacity Easement. Additionally, the Provisional Trust account will be

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[39] See PSA Section 2.3
[40] Ibid.
[41] Petition at ¶ 65; PSA Section 6.16; and PSA Ex. E, Form of Parent Guarantee.
[42] See **[BEGIN CONFIDENTIAL]** Ex. J, Form of Financial Support Agreement at ¶ 1. **[END CONFIDENTIAL]**
[43] See Ibid. See also Financial Support Agreement is defined as **[BEGIN CONFIDENTIAL]**"[(i) One Hundred Million Dollars ($100,000,000); minus (ii) the amount of funds held in the Provisional Trust Account; minus (iii) Ten Million Dollars ($10,000,000) representing the value assigned to the Disposal Capacity Easement; minus (iv) the amount of any letter of credit posted by Buyer in accordance with the Decommissioning Completion Agreement] **[END CONFIDENTIAL]**. . . ." PSA Section 1.1.
[44] Ibid.

funded up to $35 million. [45]**[END CONFIDENTIAL]** However, following the end of the **[BEGIN CONFIDENTIAL]** "Phase I"[46] **[END CONFIDENTIAL]** decommissioning activities, the letter of credit may be reduced **[BEGIN CONFIDENTIAL]** to zero, if the Provisional Trust account maintains the $35 million dollar balance and certain milestones are met.[47] **[END CONFIDENTIAL]** Essentially, the **[BEGIN CONFIDENTIAL]** $100 million **[END CONFIDENTIAL]** financial assurance may be significantly reduced based on the letter of credit and Provisional and Back up Trust account balances.[48]

TMI-2 Solutions also must "indemnify, defend upon request, and hold harmless" each of the Sellers from the Assumed Liabilities and any third party claims regarding the decommissioning of the TMI-2 Site after closing.[49] The claims for indemnification are limited to a minimum threshold of **[BEGIN CONFIDENTIAL]** $10 million dollars **[END CONFIDENTIAL]**and each individual loss must be at least **[BEGIN CONFIDENTIAL]** $1 million.[50] **[END CONFIDENTIAL]**

JCP&L also asserts that the Buyer is required to protect New Jersey ratepayers against cost obligations related to decommissioning under the PSA, because it states that:

> To the extent required by applicable Pennsylvania or New Jersey Governmental Authorities, Buyer shall, and as applicable shall cause the Parent Guarantor to enter into such agreements as required by such Governmental Authorities to protect ratepayers from any obligations related to the costs of the Decommissioning of TMI-2 and the TMI-2 Site.[51]

These measures are helpful to an extent, but it is difficult to fully evaluate their adequacy. If, for example, EnergySolutions declares bankruptcy, it is not clear how helpful a parental guarantee will be. In response to RCR-REV-32, JCP&L concedes that no written analysis could

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[45] The Disposal Capacity Easement is the value of the right to space at EnergySolutions' facility in Clive, Utah for disposal of any or all of the "Low Level Waste" at the TMI-2 Site. Low Level Waste is radioactive waste "radioactive not classified as Spent Nuclear Fuel, high level waste, transuranic waste, or byproduct material . . . ." PSA Section 1.1.
Ex. D, Decommissioning Completion Agreement.

[46] **[BEGIN CONFIDENTIAL]** Phase I includes the remediation of the radioactive material from the TMI-2 plant and site. Ex. D., Section 1.1, at 9. **[END CONFIDENTIAL]**

[47] **[BEGIN CONFIDENTIAL]** PSA Ex. D at Sections 3.2 and 3.9.1(b). **[END CONFIDENTIAL]**

[48] Ibid.

[49] PSA Section 8.1.

[50] Ibid.

[51] PSA Section 6.16.

be provided regarding the adequacy or effectiveness of the Buyer's and parent company's financial support assurances. Rather, the Company's discovery response merely states that these financial support assurances are what they were able to negotiate with the Buyer.[52] In other words, it is the best they could do.

Despite the negotiated financial assurance conditions contained in the PSA and EnergySolutions' prior experience with decommissioning the Zion Nuclear plant, the risk of the EnergySolutions' financial adequacy to complete decommissioning of TMI-2 persists and cannot be wholly eliminated, especially in light of the uniqueness of the TMI-2 plant, as conceded by JCP&L. Rate Counsel therefore recommends that JCP&L's ratepayers be insulated from any additional costs associated with the decommissioning and remediation of the TMI-2 plant and site.

<u>Trust Fund Contributions</u>

As stated above, the total NDT fund amount is currently at approximately $900 million, with JCP&L's share being about 29 percent of the total. Since JCP&L's ownership share of TMI-2 is only 25 percent, there arises a concern that JCP&L ratepayers are contributing more under the PSA than is appropriate based on their ownership share.[53] Further complicating matters, the PSA does not include a provision for customers to be compensated for any "excess" Trust Fund amount (or surcharged for a deficit).

Through discovery responses, JCP&L argues that its customers have not been overcharged for decommissioning, nor have they paid more than JCP&L's ownership share.[54] The Company acknowledges that the JCP&L Trust Fund balance at this time materially exceeds the 25 percent ownership share of TMI-2, but denies that this means customers have paid an excessive amount.[55] In providing updated and corrected calculations, the Company asserts that JCP&L cash contributions to the Trust Fund amount to just 22.7 percent of the total NDT.[56] This calculation counts both customer payments over time (1991 to 2011) plus shareholder "contributions" to the Trust Fund for all three co-owners.[57] The Company further explains that

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[52] RCR-REV-32
[53] <u>See</u> S-REV-2 (stating JCP&L is responsible for 25% of the decommissioning total).
[54] S-ENG-9; RCR-REV-8.
[55] RCR-REV-37.
[56] S-ENG-9.
[57] S-ENG-9; RCR-REV-37.

the discrepancy between the cash contribution percentages and the individual co-owner Trust Fund current balances (i.e., the 22.7 percent and 29 percent) is due to differences in earnings achieved on the Trust Fund balances over the last 20 years.[58] Specifically, JCP&L's earnings are on the order of 32.4 percent of the total Trust Fund earnings realized over that time period.[59] Moreover, JCP&L further points out that the majority of those earnings were attributable to the shareholder contributions (about 61 percent of the total), not customer contributions. In this case, for JCP&L customer payments were about $45 million and shareholder contributions were $30 million.[60]

However, the $30 million in shareholder contributions took place in 1990, whereas customer payments occurred very gradually over 1991 to 2011.[61] Hence, timing explains why shareholder contributions account for the majority of the JCP&L Trust Fund earnings. This is not as true for Met-Ed and Penelec, where shareholder contributions occurred later, in 1993 and 1999, according to the data response.[62]

The Company's argument explaining why the transfer of the JCP&L NDT is proper and fair to customers can be separated into two parts. First, JCP&L believes that the focus should be on cash payments into the NDT – not trust fund balances. By using that metric, JCP&L's contribution to the NDT is lower than its ownership share of 25 percent. Second, JCP&L argues that, if the total balances are to be used for comparative purposes (i.e. inclusive of accrued earnings), then it should be recognized that JCP&L's balance is mostly due to shareholder contributions. In other words, in that context, the Company makes a distinction between shareholder contributions and customer contributions and essentially "wants credit" for the shareholder contributions.

1. Cash Payments into the NDT

Regarding the Company's first argument, Rate Counsel believes that JCP&L's analysis of its ratepayers' contributions is flawed. The Company ignores the time value of money associated with those contributions. The timing of when contributions to the NDT were made can have a significant impact. Based on Rate Counsel's analysis, which assumes a uniform

[58] S-ENG-9; RCR-REV-37.
[59] RCR-REV-37.
[60] Ibid.
[61] Ibid.
[62] Ibid.

escalation factor of 6.1 percent,[63] the time-adjusted contributions for each of the Joint Owners is as follows: JCP&L – 26.3 percent, Met Ed – 46.7 percent and Penelec – 27.1 percent. These results still show that JCP&L ratepayer contributions exceed their ownership share. Therefore, the Board should not accept the Company's argument that cash payments are indicative of lower contributions by JCP&L ratepayers into the NDT relative to the Company's ownership share, because it does not account for the time-value of money.

2. Shareholder and Customer Contributions

Regarding the Company's second argument, Rate Counsel believes it unreasonable to make a distinction between shareholder contributions and ratepayer contributions. The shareholder contributions were the result of various considerations that went into the settlements of contested cases and therefore should not be distinguished from ratepayer contributions. Those dollars are simply part of JCP&L's NDT needed to meet the decommissioning obligation, and shareholders have no claim on them.

Moreover, the line between ratepayer contributions and shareholder contributions is blurry. Of the $30 million in JCP&L shareholder contributions, ratepayers reimbursed JCP&L for $15 million (albeit over 12 years at zero interest).[64] In the case of Penelec, the Company classifies $49.5 million of generation divestiture proceeds deposited into its NDT in 1999 as a shareholder contribution, even though such proceeds are normally credited to customers. Finally, JCP&L's own analysis which examines co-owner shares of the total NDT, excluding earnings, makes no distinction between shareholder and customer cash contributions. This distinction is only introduced in the earnings analysis.

Rate Counsel acknowledges that there are alternative perspectives on evaluating the JCP&L customer contributions to the total TMI-2 NDT amount. One valid perspective is that the JCP&L NDT balance is 29 percent of the total, materially exceeding the ownership share of 25 percent. Based on this perspective, the JCP&L customer contribution is excessive. Conversely, in its discovery responses, the Company argues that its customer contributions are not excessive because of the large role of trust fund earnings and the historic "shareholder contributions" to NDT which it asserts result in cash customer contributions for JCP&L

[63] This is the average after-tax earnings rate of return reported by JCP&L for the Trust Fund over the time period 1991 – 2019 reported to the Board in JCP&L's annual filing.
[64] RCR-REV-36

customers actually less than the 25 percent ownership share. While Rate Counsel does not support JCP&L's analysis of this issue, we do not seek a refund to customers of any of the NDT amounts. Rather, as discussed below, this is an additional factor supporting Rate Counsel's recommendation that JCP&L must agree, as a condition of approval of the Petition, to not to seek any future payments from customers for TMI-2 decommissioning liabilities.

Environmental Liability under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")

CERCLA imposes strict, joint and several liability on a retroactive basis whenever hazardous substances exist or have been released.[65] Since September 8, 1983, EPA has generally deferred listing on the CERCLA National Priorities List ("NPL") those sites that are subject to NRC's licensing authority; in recognition that the NRC's actions are believed to be consistent with the CERCLA requirement to protect human health and the environment.[66] However, EPA will still be the primary federal agency to resolve any CERCLA concerns involving hazardous substances outside of NRC's jurisdiction. Similarly, NRC licensed sites subject to Resource Conservation and Recovery Act ("RCRA") corrective action are expected to meet EPA standards for chemical contamination within EPA's jurisdiction.[67]

As a past owner, JCP&L could still find itself strictly liable for the remediation costs on the TMI-2 site, if TMI-2 Solutions or its parent, EnergySolutions, fail to meet the environmental obligations set out in the PSA. In response to S-REV-21(b), JCP&L acknowledges the argument that "the Joint Owners may retain liability" under CERCLA in the event EnergySolutions is unable to complete the decommissioning. Likewise, in response to RCR-ENG-33 (Confidential), JCP&L states:

> **[BEGIN CONFIDENTIAL]** In the unlikely event that decommissioning of TMI-2 is not completed by the Buyer and Energy*Solutions* and, notwithstanding the additional financial assurance Energy*Solutions* has provided to the NRC and the additional financial assurance required under the Asset Purchase

[65] See 42 U.S.C.A. 9601(32). See also N.J. Tpk. Auth. v. PPG Indus., 197 F.3d 96, 104 (3d Cir. 1999)(stating CERCLA imposes strict liability and joint and several liability on potentially responsible parties for costs associated with cleanup and remediation).
[66] Memorandum of Understanding between the Environmental Protection Agency and the Nuclear Regulatory Commission, Consultation and Finality on Decommissioning and Decontamination of Contaminated Sites (Oct. 9, 2002).
[67] Id. at 5.

> and Sale Agreement (Appendix B to the Petition and referred to therein as the "PSA") and its ancillary agreements, the financial resources of the Buyer and Energy*Solutions* are exhausted and the Buyer fails to fully remediate the hazardous substance contamination at the site, the remaining waste could be viewed as a release or threatened release to the environment. In such a case, CERCLA claims against a former licensee (owner or operator) such as GPU Nuclear and the Joint Owners could potentially be made to recover the cost of final remediation. **[END CONFIDENTIAL]**[68]

Of additional concern, the Joint Owners will have an independent manager on the TMI-2 Solutions Board to oversee the decommissioning activities. The independent manager has power "to veto any attempt by Buyer to enter into voluntary bankruptcy or to cease decommissioning operations for an extended period."[69] JCP&L explains the reason for the Joint Owners' continued involvement is to protect against "reputational risk" due to the highly publicized history of the TMI-2 plant.[70] However, under CERCLA, this continued involvement may expose JCP&L to operator, arranger, or transporter liability, if a release occurs.[71] This would be a separate liability in addition to its past owner liability.[72] This additional liability could expose JCP&L, as well as the other Joint Owners, to costs associated with the remediation of hazardous contamination released during the decommissioning or remediation process, which it would not be otherwise.

<u>The Need for Protective Conditions</u>

Based on the forgoing, Rate Counsel believes it is critical that the Board set safeguards in place to protect ratepayers from liability for unanticipated problems that may occur during the decommissioning process and afterwards. JCP&L argues that the PSA protects ratepayers from any costs related to decommissioning and that the Joint Owners have attempted to mitigate the financial weakness of EnergySolutions with financial assurance supplemental measures, such as,

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68 RCR-ENG-33 Confidential. <u>See</u> <u>also</u> S-REV-7.
69 S-REV-7
70 <u>See</u> S-REV-7; S-REV-21(f).
71 <u>See</u> 42 <u>U.S.C.</u> § 9607.
72 <u>See</u> <u>e.g.</u> <u>Lansford-Coaldale Joint Water Authority v. Tonolli Corp.</u>, 4 F.3d 1209, 1221 (3rd Cir. 1993)(finding a company is liable under CERCLA when it plays an active role in the management of a another corporation, that was responsible for environmental wrongdoing).

structuring TMI-2 Solutions as bankruptcy remote, the Parent Guarantee, the Letter of Credit, and maintaining a long-term and ongoing monitoring function.[73] Nonetheless, New Jersey ratepayers may remain liable for subsequent decommissioning or environmental remediation if EnergySolutions fails to complete the "Assumed Liabilities" set forth in the PSA. Substantial cost overruns and unforeseen circumstances for a project this large and complex certainly are possible and therefore represent a risk to JCP&L's ratepayers.

JCP&L does not necessarily dispute that the risk exists, but it insists that no liability can be shifted back to the Joint Owners. Specifically, JCP&L states: "PSA transfers all risks relating to decommissioning and decontamination of TMI-2 from the Company and ratepayers to TMI-2 Solutions and its parent guarantor, EnergySolutions. However . . . others may argue that the Joint Owners retain potential liability under [CERCLA] as prior owners of TMI-2 if TMI-2 Solutions or EnergySolutions were to fail to complete decommissioning and decontamination."[74]

Moreover, any benefit associated with completing decommission under budget inures solely to the Buyer under the terms of the PSA. There is no provision for refunding any remaining NDT funds back to the Joint Owners. As such, the risk of an unfinished project potentially could flow back to the Joint Owners. In turn, this could result in JCP&L seeking rate recovery for its share of some or all of such costs from its customers without any corresponding benefit to utility ratepayers, which at the end of the day, leaves ratepayers holding the bag. Ratepayers obviously have no entitlement to any of the savings if TMI-2 Solutions completes the decommissioning under budget (or for less than the NDT transferred to it).

Further, the protection that JCP&L argues is afforded to ratepayers from decommissioning costs through the PSA is contingent on the Board requiring such protection. Specifically, the section states: "<u>To the extent required</u> by applicable Pennsylvania or New Jersey Governmental Authorities, Buyer shall, and as applicable shall cause the Parent Guarantor to, enter into such agreements <u>as required by such Governmental Authorities</u> to protect ratepayers from any obligations related to the costs of the Decommissioning of TMI-2 and the TMI-2 Site."[75] Accordingly, it is critical that Board approval be conditioned to fully address the uncertainties associated with the operation of the financial assurances accompanying the PSA and the relative financial weakness of EnergySolutions. This can be done by requiring, as a

[73] Petition at ¶ 65.
[74] S-REV-21(b). <u>See</u> <u>also</u> RCR-ENG-33 Confidential.
[75] Petition at ¶ 40; PSA <u>Section</u> 6.16 (emphasis added).

condition of approval of the Petition, that that any liability for TMI-2 post-closing be absorbed by the Joint Owners and that, if any such cost ultimately is assigned to JCP&L, the Company must agree not seek to recover such costs from its utility customers. This would ensure that the claims of customer protection and insulation from risk emphatically stated in the Petition are accurate.

These conditions of approval are needed by the Board due to the legal uncertainty regarding potential future liability under CERCLA and unanswered questions concerning the adequacy of the negotiated financial assurances included in the PSA. Although extensive guarantees are assumed by the Buyer, TMI-Solutions, the strength of those claims is only as good as the Buyer's ability to carry them out. Board approval conditioned in this manner will ensure that customers benefit from the transaction, and more importantly, are not harmed. Further, such conditions are fair and proper given JCP&L ratepayers' greater contribution into the NDT relative to its ownership share.

Accordingly, Rate Counsel recommends that the Board only approve JCP&L's Petition on the condition that any liability for TMI-2 be absorbed by the Joint Owners and that JCP&L should agree not seek to recover any such costs from its utility customers.