DF 98-196

MONTAUP ELECTRIC COMPANY, INC.

Petition for Approval of Transfer of Interest in Seabrook Station

Order Approving Transfer

O R D E R N O. 23,239

June 21, 1999

APPEARANCES: Orr and Reno, by Howard M. Moffett, Esq. Connie L. Rakowsky, Esq., and David A. Fazzone, Esq. for Montaup Electric Company, Inc.; McLane, Graf, Raulerson and Middleton by Steven V. Camerino, Esq. and Richard A. Samuels, Esq. for Little Bay Power Corporation; Gerald M. Eaton, Esq. for Public Service Company of New Hampshire, Connecticut Light and Power Company, Inc., North Atlantic Energy Company, Inc. and North Atlantic Energy Service Company, Inc.; Carlos A. Gavilando, Esq. for New England Power Company, Inc.; and Eugene F. Sullivan III, Esq. for the Staff of the New Hampshire Public Utilities Commission.

I. PROCEDURAL HISTORY

On November 5, 1998, Montaup Electric Company, Inc. (Montaup) filed with the New Hampshire Public Utilities Commission (Commission) a Petition for Approval of the Transfer of its Interest in Seabrook Station under RSA 374:30. See, RSA 374-A. Montaup is a Massachusetts corporation wholly owned by Eastern Edison Company, which in turn is wholly owned by Eastern Utilities Associates (EUA), a Massachusetts business trust and a registered public utility holding company under the Public Utility Holding Company Act of 1935. Montaup is EUA's power supply subsidiary, and it generates or purchases virtually all of the electric power needed to serve the customers of EUA's retail distribution subsidiaries in Massachusetts and Rhode Island.

Montaup is one of eleven Joint Owners of Seabrook

Station (Seabrook), a nuclear generating facility located in Seabrook, New Hampshire. Montaup is a public utility within the meaning of RSA 362:2, in that it owns plant and equipment used in the generation and transmission of electricity ultimately sold to the public. Montaup owns an undivided 2.89989% interest in Seabrook and a corresponding entitlement to 2.89989% of the electric power produced at the facility. Other than its ownership interest in Seabrook, Montaup owns no utility property in New Hampshire, nor does it conduct any operations in this State as an electric utility or otherwise.

Under a June 24, 1998, Asset Purchase Agreement, Montaup agreed to sell its Seabrook interest to Great Bay Power Corporation (Great Bay). Great Bay assigned its rights under the Asset Purchase Agreement to its affiliate Little Bay Power Corporation (Little Bay) on August 28, 1998. In its petition, Montaup proposes, pursuant to industry restructuring settlement agreements in Massachusetts and Rhode Island, to transfer its interest in Seabrook to Little Bay. Little Bay and Great Bay are both New Hampshire corporations wholly owned by BayCorp Holdings, Ltd. As a condition of the sale, Montaup is to prefund the decommissioning cost as established by the Nuclear Decommissioning Finance Committee associated with its 2.89989% ownership interest.

By Order of Notice dated December 3, 1998, the Commission scheduled a prehearing conference for December 28,

1998, to address motions to intervene and to establish a procedural schedule to govern its investigation into the proposed transfer.

On November 30, 1998, Little Bay Power Corporation filed a Petition to Intervene. On November 30, 1998, North Atlantic Energy Company, Inc., North Atlantic Energy Service Company, Inc., Connecticut Light and Power Company, Inc. and Public Service Company of New Hampshire, Inc. filed an Assented to Motion for Limited Intervention. On December 21, 1998, New England Power Company, Inc. filed a Motion to Intervene.

On December 31, 1998, New Hampshire counsel for Montaup filed a Motion to Appear Pro Hac Vice on behalf of David A. Fazzone, Esq.

By Order No. 23,112 (January 25, 1999) the Commission adopted a procedural schedule to govern its investigation into the requested transfer, granted the motions to intervene and the Motion to Appear Pro Hac Vice.

On March 19, 1999, Little Bay filed a Motion in limine challenging the Commission's jurisdiction over the proposed transfer. On March 30, 1999, and March 31, 1999, the Commission held hearings on the merits of the petition.

On April 14, 1999, NEP filed a Settlement Agreement (Agreement) which represented a final resolution of the contested issues that had been raised between NEP and Little Bay. On April 19, 1999, the OCA, Little Bay and Montaup filed post-hearing

briefs.

II. POSITIONS OF THE PARTIES AND STAFF

A. Montaup

Montaup took the position that the Commission should apply the "no net harm" test adopted by the New Hampshire Supreme Court for utility transfers pursuant to RSA 374:30 in Grafton County Electric Light and Power Co. v. State, 77 N.H. 539 (1915). Pursuant to that standard Montaup argued that New Hampshire ratepayers would not be harmed by the proposed transfer of its interest in Seabrook to Little Bay.

In support of that position, Montaup pointed to the fact that the proposed transfer included the prefunding of nuclear decommissioning expenses that would be incurred by Little Bay. As noted in the prefiled testimony of Kevin Kirby, and as testified to at the hearing, Montaup will prepay into the Nuclear Decommissioning Trust Fund so as to achieve a total balance of $11.8 million at closing. Based on NRC approved assumptions about the expected rate of investment return this amount is expected to grow to cover Little Bay's entire 2.9% share of Seabrook's eventual decommissioning costs. In addition, Montaup alleged that Little Bay's ability to bundle its sales with that of its affiliate Great Bay, increased the financial viability of Great Bay and, therefore, Great Bay's probability of meeting its decommissioning obligations.

Montaup also argued that the precedent of prefunding the decommissioning obligations of nuclear entitlements established by this transaction was a significant benefit to ratepayers in a deregulated generation market because it set the standard or conditions precedent for any such future transfers.

Montaup also argued that the approval of the transfer was consistent with the legislative policies and directives set forth in RSA 374-F. Montaup also concurred in Little Bay's Motion in Limine.

B. Little Bay

In its Motion in Limine, Little Bay argued that RSA 374:30 was not applicable to the sale of generation facilities following the passage of RSA 374-F deregulating the generation market, and that therefore the Commission had no jurisdiction over the proposed transfer under New Hampshire law.

Alternatively, Little Bay asserted that, based on the principles of federal preemption, the Commission had no authority to review the proposed transfer. Little Bay argued that pursuant to 42 U.S.C. § 2011, et seq.,the Atomic Energy Act, the Commission was explicitly preempted from addressing "net harm" to ratepayers under 374:30. Little Bay also argued that under the doctrine of field preemption the Nuclear Regulatory Commission (NRC) had so occupied this area that the Commission could not rule on this matter without occupying an area already controlled by the NRC.

Little Bay then alleged that even if the Commission had jurisdiction in this matter, the transfer created no net harm to New Hampshire ratepayers.

C. NEP

Initially, NEP objected to the proposed transfer because NEP alleged the transfer placed NEP and the ratepayers of its former requirements customers at risk for Little Bay's allocable portion of expenses at the plant if Little Bay was not economically viable.

However, after the hearing on the merits, NEP and Little Bay entered into an agreement and thereafter, NEP withdrew all objections to the proposed transfer.

Under the agreement, Little Bay agreed to provide security to NEP that it would be able to meet its allocable share of operating expenses at Seabrook. Specifically, the Agreement provides, in relevant part, that Little Bay set aside sufficient funds to meet its allocable portion of the Seabrook budget for a period of six months, to be used to meet Little Bay's cash requirements during periods when Seabrook is not operating. The Agreement provides that this fund shall be replenished each calendar year based on forecasted expenses, and that the fund cannot fall below 50% of that amount at any time.

The Agreement also requires Little Bay to obtain business interruption insurance with respect to its 2.89989% interest in Seabrook as provided by Nuclear Electric Insurance Limited on reasonable terms and conditions so long as such insurance is offered and that Little Bay, Great Bay and their parent would not acquire any greater interest in Seabrook until they meet reasonable financial criteria.

The Agreement and, therefore, the conditions are no longer applicable once NEP disposes of its interest in Seabrook, as agreed to as part of deregulation agreements in Rhode Island, Massachusetts and New Hampshire.

D. OCA

The OCA also argued that "no net harm" was the appropriate standard to be applied to this proposed transaction.

Applying that standard, the OCA argued that the allocable share of nuclear decommissioning costs had not been sufficiently prefunded. The OCA alleged that this failure to fully prefund decommissioning would harm New Hampshire ratepayers should the other joint owners be required to assume Little Bay's allocable share.

The OCA also objected to the transfer because it placed its clients, New Hampshire's residential ratepayers, at greater financial risk than Montaup's continued ownership. The OCA pointed to the fact that Montaup has a secure customer base, through its distribution affiliates, from which to collect its allocable portion of Seabrook operating costs, while Little Bay has no such security and must rely on its ability to effectively sell power in the open markets to meet its financial requirements to Seabrook both during operation and outages. Thus, to the extent Little Bay is unable to meet its obligations, the rest of the joint owners, including GSE and the New Hampshire Electric Cooperative, Inc. (NHEC), and their ratepayers, and PSNH ratepayers under the terms of the Seabrook Power Contract and the Fuel and Purchased Power Adjustment Clause (FPPAC), would bear the risk of assuming their allocable portion of Little Bay's unpaid costs.

Applying the no net harm standard, the OCA concluded that the transfer as proposed brought about a net harm to ratepayers through the increased risk brought about by Little

Bay's ownership.

The OCA did not object to the proposed transfer, provided the residential ratepayers of NHEC and PSNH were provided with the same protections from financial risk that NEP received under its Settlement with Little Bay, Great Bay and its parent, and a similar additional reserve was created to prefund nuclear decommissioning.

E. Staff

Staff generally concurred with the OCA, excluding its position on nuclear decommissioning funding.

III. COMMISSION ANALYSIS

The issue for our consideration is whether the proposed transfer is for the public good. See RSA 374:30. We concur with the parties that the public good standard for a transaction pursuant to RSA 374:30 was established by the New Hampshire Supreme Court in Grafton County Electric Light and Power Co. v. State, 77 N.H. 539 (1915). In Grafton County the Court found that a transfer of utility property was for the public good if "not forbidden by law . . ." and the public would not be harmed by the transaction. Grafton County Electric Light and Power Co. v. State, 77 N.H. 539, 540.

With regard to the prefunding of nuclear decommissioning expenses, we do not believe New Hampshire ratepayers will be harmed in any way based on the level of

prefunding and the expected growth in those funds over the projected life of the plant.

Based on the record before us, however, we concur with the OCA and NEP that absent certain guarantees by Little Bay, such as those contained in the Agreement, the proposed transfer does harm the ratepayers of GSE, NHEC and PSNH by increasing the level of risk that rates will increase in the event Little Bay is unable to meet its financial obligations because of market forces or an extended outage. Thus, we will approve the transfer of Montaup's 2.89989% interest in Seabrook only if Little Bay continues to apply the terms of the Agreement to NHEC and PSNH ratepayers until the ratepayers are not at risk of assuming expenses incurred to operate Seabrook, or until this Commission orders otherwise.

That is, the terms of the Agreement, which protect NEP and GSE customers from this risk must continue beyond NEP's divestiture of its interest in Seabrook to protect the other similarly situated New Hampshire ratepayers of NHEC and PSNH.

With regard to Little Bay's contention that we are preempted from engaging in this analysis, we disagree. We do not believe it was the intent of Congress in enacting the Atomic Energy Act to totally preclude state regulation of the transfer of interests in nuclear generating facilities, particularly, where as in this case, the State has merely placed financial conditions upon the transfer to protect its ratepayers.

Congress specifically provided that,

> [n]othing in this chapter [42 U.S.C.A. § 2011, et seq.] shall be construed to affect the authority or regulations of any . . . State, or local agency with respect to the generation, sale or transmission of electric power produced through the use of nuclear facilities. Provided,That [sic] this section shall not be deemed to confer upon any Federal, State or local agency any authority to regulate, control, or restrict any activities of the [NRC].

42 U.S.C.A. §2018 (emphasis in original).

Thus, we conclude it was Congress' intent to maintain state control over ratemaking issues such as those addressed herein.

Based upon the foregoing, it is hereby

ORDERED, that Montaup Electric Company, Inc.'s proposed transfer of its 2.89989% interest in the Seabrook Nuclear Generating Station to Little Bay Power Corporation is APPROVED, provided that the terms and conditions of the Settlement Agreement entered into between Little Bay Power Company, Inc., Great Bay Power Corporation, and Baycorp Holdings, Ltd., and New England Power Corporation, Inc. shall continue to apply to NHEC

and PSNH ratepayers so long as they bear the risk of Little Bay's failure to meet its allocable share of the operating expenses of Seabrook Station.

By order of the Public Utilities Commission of New Hampshire this twenty-first day of June, 1999.

Douglas L. Patch	Susan S. Geiger	Nancy Brockway
Chairman	Commissioner	Commissioner

Attested by:

Thomas B. Getz
Executive Director and Secretary