(3)

THELEN REID & PRIEST LLP

NEW YORK
SAN FRANCISCO
WASHINGTON, D.C.
LOS ANGELES
SILICON VALLEY
MORRISTOWN, N.J.

ATTORNEYS AT LAW
40 WEST 57TH STREET
NEW YORK, N.Y. 10019-4097
TEL (212) 603-2000 FAX (212) 603-2001
www.thelenreid.com

NEW YORK OFFICE
DIRECT DIAL NUMBER

Gregory G. Pavin
212-603-2558
gpavin@thelenreid.com

DOCKET NUMBER
PROPOSED RULE PR 50
(66FR 29244)

August 8, 2001

DOCKETED
USNRC

'01 AUG -9 P3:50

OFFICE OF SECRETARY
RULEMAKINGS
ADJUDICATIONS STAFF

BY FEDERAL EXPRESS

Ms. Annette L. Vietti-Cook
Secretary of the Commission
U.S. Nuclear Regulatory Commission
11555 Rockville Pike
Rockville, Maryland 20852

Attn: Rulemakings and Adjudications Staff

Re: NRC Proposed Rule, 10 CFR Part 50, Decommissioning Trust Provisions (66 Fed. Reg. 29244, May 30, 2001)

Dear Ms. Vietti-Cook:

Enclosed are the comments of the Utility Decommissioning Tax Group ("Group") to the Proposed Rule of the Nuclear Regulatory Commission concerning Decommissioning Trust Provisions. A listing of the members of the Group is attached to the comments.

We would be pleased to discuss these comments and to respond to any questions the NRC may have. If you have any questions regarding the enclosed comments, please contact the undersigned at (212) 603-2558 or James Mitchell at (202) 508-4002.

Very truly yours,

Gregory G. Pavin

Enclosures

Template = SECY-067

NY #412080 v1

SECY-02

COMMENTS OF UTILITY DECOMMISSIONING TAX GROUP CONCERNING THE PROPOSED RULE ON DECOMMISSIONING TRUST PROVISIONS

Introduction

The Utility Decommissioning Tax Group ("Group") through its attorneys, Thelen Reid & Priest LLP, submits these comments to the Proposed Rule concerning Decommissioning Trust Provisions ("Proposed Rule") published in the Federal Register on May 30, 2001.[1] The Group is comprised of approximately 50 nuclear electric companies and approximately 20 trust companies or investment management/consulting firms involved in the administration and management of external nuclear decommissioning trust funds.[2]

The Utility Decommissioning Tax Group supports the goal of the NRC to maintain regulatory oversight over nuclear decommissioning trust funds, where necessary. Such regulatory oversight will assure that adequate funds will be available when needed to pay the costs of decommissioning nuclear generating stations at the end of their useful lives and will help to maintain public confidence in traditional means of financing decommissioning costs. However, as discussed further below, the NRC should be hesitant to add another layer of regulatory review where existing regulatory safeguards remain sufficient for these purposes. Moreover, there are certain provisions of the proposed rules in which additional clarification would be helpful.

Specific Comments on NRC Proposed Rule

(1) <u>Applicability of proposed revisions to the decommissioning trust provisions</u>

The changes to the decommissioning trust provisions of the NRC rules are being proposed in response to changes that have been occurring within the electric utility industry. Historically, the NRC has relied on regulatory oversight over nuclear decommissioning trust funds that has been provided by Federal and state rate regulatory agencies. However, in some cases, such oversight has been relaxed or eliminated as a result of the introduction of competitive electricity markets and/or the separation of nuclear generation facilities from vertically integrated electric utility systems for which they were built. Nevertheless, many licensees continue to operate as vertically-integrated electric utility systems in states where retail electric service competition has not yet been introduced and rates are subject to cost-of-service regulation. In such circumstances, the maintenance of existing regulatory requirements should continue to provide assurance to the NRC that nuclear decommissioning trust funds will be available when needed.

[1] 66 Fed. Reg. 29,244 – 251 (2001).
[2] Attached is a list of Group members.

Inasmuch as the stated purpose of the NRC proposed rule is to take a more active oversight role where other regulatory bodies have abandoned their oversight, NRC regulatory requirements should only apply to the extent the rate regulators have relinquished their authority over the trust funds. A limitation of the applicability of the proposed rules in this manner would avoid imposing potentially conflicting or duplicative regulatory requirements on licensees.

(2) Investment Standards

The proposed rule implements both a "prudent investor" standard for trust investments and mandates that all investments be "investment grade." The interplay of these two provisions is not clear. We recommend that the "investment grade" standard be eliminated, and that the prudent investor standard, as imposed by Federal Energy Regulatory Commission regulations, be adopted where a different standard is not imposed by other governmental regulators.

The proposed rule also prohibits investments in any entity owning one or more nuclear power plants, except for investments tied to general market indices of non-nuclear sector mutual funds. In this regard, it is worth noting that many funds currently invest in nuclear-owning utility companies. As such, adding a de minimis exception to this prohibition (say a limit of 5% to 10% of trust assets) would permit the retention of those investments while satisfying the NRC's concerns relating to risk diversification.

(3) Requirement for 30 days notice to be given to the NRC prior to certain disbursements or payments from the trust

This notice requirement is not in the best interest of the decommissioning trusts. Test 2 for decommissioning trust fund agreements as set forth in the proposed rules would require the agreement to limit the use of decommissioning trust funds to payment for decommissioning costs and routine and minor administrative expenses. There is no basis for presuming that an independent trustee will disburse amounts held in the decommissioning trust fund for purposes other than specified trust purposes. Moreover, trust vendors or service providers will not appreciate a 30-day waiting period prior to their being paid with the accompanying risk that payment for their services may be disallowed by the NRC. For that reason, such a requirement could hamper the ability of licensees to contract for necessary services at reasonable prices.

The proposed rule would permit the trustee to pay for "ordinary administrative" expenses without notifying the NRC in advance; however, the proposed rule does not define what is an "ordinary administrative" expense for this purpose (although NRC guidance does state that "examples of ordinary expenses are set out in the Internal Revenue Code Section 468A). At a minimum, the proposed language should be clarified in order to provide better guidance regarding the kinds of expenses that could be paid from the fund without advance notification to the NRC, and should contain the reference to the tax law provisions relating to "ordinary administrative expenses."

It is our belief that all ordinary expenses that are paid periodically from the trust should be exempt from the requirement for the trustee to provide specific advance notification to the NRC. Examples of such payments include quarterly estimated tax payments, investment

manager fees, and trustees fees. More generally, Section 468A of the Internal Revenue Code permits qualified nuclear decommissioning trust funds to be used, inter alia, "to pay administrative costs (including taxes) and other incidental expenses of the Fund (including legal, accounting, actuarial, and trustee expenses) in connection with the operation of the Fund. Modification of the language of the proposed rule to state expressly that the trustee could, at a minimum, pay all such expenses without prior NRC review is in the best interest of the decommissioning trusts. Adoption of a clear definition of "ordinary administrative" expense that may be paid by the trustee that is broad enough to encompass all reasonably anticipated expenditures of the trust fund (other than payments made toward decommissioning of a nuclear plant) should prevent this 30 day notice requirement from hampering the activities of the trust.

Also, a plant active in decommissioning already provides this information to the NRC through post shut down activity report filings and other regulations. This rule would only duplicate the amount of effort for such plants. Draft Regulatory Guide DG-1106 suggests that after decommissioning has begun and withdrawals from the decommissioning fund are being made pursuant to 10 CFR §50.82(a)(8)(i), no further notification would need to be made to the NRC. Such an exception should be incorporated in the final rules in order to permit expenditure of trust funds pursuant to an approved decommissioning plan without further notification to the NRC.

Finally, we recommend that the rules acknowledge the potential of transfers from non-qualified portions of the trust to the qualified portions (i.e., trusts meeting the requirements of Internal Revenue Code Section 468A) without NRC notice or approval. Since such assets remain in trust (the non-qualified trust as compared to the qualified trust), the transfer should not be viewed as a payment or a disbursement.

(4) Requirement for 30 days notice to be given to the NRC prior to material modification of the trust fund agreement

Although the proposed rule would preclude amendment of the trust fund agreement "in any material respect" without advance written notification to the NRC, it does not provide any guidance between a "material" modification and a modification that is not deemed to be material. Draft Regulatory Guide DG-1106 suggests that an amendment is material "if it revises any key provision of the trust, particularly including the investment provisions, terms relating to the provision of information to NRC, terms relating to payments from the trust, and terms relating to amendments to the trust." However, it further advises licensees to interpret the phrase "amended in any material respect" broadly. The practical effect of failing to provide better guidance regarding the nature of amendments to the trust fund agreement for which advance notification is not required will be to preclude any modification of the trust fund agreement without such advance notification to the NRC.

(5) Mandatory wording for each trust fund agreement

The proposed rule properly recognizes that a wide variety of trust instruments is currently in effect, and that it would be costly to and time-consuming for the NRC to attempt to develop a

uniform form of trust fund agreement that would be mandatory for all licensees. It is sufficient that the NRC is proposing to adopt certain tests to be applied to nuclear decommissioning trust fund agreements to assure that funds will be available when required to pay for decommissioning activities. As long as those tests are met, licensees and trustees should be permitted to adapt the provisions of their trust fund agreements to reflect individualized concerns and preferences.

UTILITY DECOMMISSIONING TAX GROUP (2001)

(* = Member Representative)

1. Alliance Capital Management, L.P.
   *Joseph C. Rice

2. Alliant Energy
   *Laura L. Vogel

3. American Electric Power Service Corp.
   Jacinta Albrecht (Central Power & Light)
   Roger Mayer (Central and South West)
   *Tim A. King
   Steve Kiser (Central and South West)

4. Ameren Services Company
   *Gregory L. Nelson

5. Bank of New York, The
   *Richard J. Barry

6. BancOne Investment Advisors
   *Peter Kurrie (Detroit, MI)
   Michael Edwards (Dallas, TX)

7. Bernstein Investment Research and Management
   R.B. Davidson III
   *Michael DePalma
   Ann Heilakka
   Jean Margo Reid

8. BlackRock Inc.
   *Richard Shea

9. Brown & Brown
   *Lou Balducci

10. Capital Guardian Trust Company
    Mike Burik
    *George L. Romine, Jr.

11. Capital Strategy Research Inc.
    *Jeffrey P. Brown

12. Central Power & Light Company
    *Jacinta Albrecht

13. CMS Energy Corporation
    *Thomas L. Simonsen
    Ted Vogel

14. Commonwealth Edison Company
    Annie Caputo
    *Richard P. Roling
    Michael J. Simon

15. Conectiv, Inc.
    *Garry Musto
    Kathy Graham

16. Consolidated Edison Company of New York
    *Stephen Ianello

17. Constellation Power Source, Inc.
    *J. Randolph Respess
    Edward J. Stoltz
    Susan Fenimore (Constellation Investments, Inc.)
    David Watts (e-mail only)

18. Czepluch, Ralf W.K.
    *Ralf W.K. Czepluch

19. Delaware Investment Advisors
    *Joseph E. McLane

20. Detroit Edison Company, The
    *Ann Marie Wambeke
    Cynthia Lesnick

21. Deutsche Asset Management (formerly Bankers Trust Company)
    *Tom Ticciochi

22. Dominion Resources Inc.
    *James E. Robertson
    Herbert M. Smith
    Frances Baker

23. Dresdner RCM Global Invsetors
    *Jim Meehan, Jr.

24. Duff & Phelps Investment Management Co.
    *David A. Krause
    Shalini Sharma

25. Duke Energy Corporation
    Cary Flynn
    Matt Gordon
    *Rick McCarver
    Jane McManeus
    Steve Sobell
    Todd Walker
    Tani Sherman

26. Duquesne Light Company
    *James D. Fornof
    Morgan O'Brien

27. El Paso Electric Company
    *Bill Pinkerton
    Kim Smith
    Richard Turner

28. Entergy Services, Inc.
    *Michael A. Caruso
    Greg Copeland
    Nathan Langston
    Pam Pecquet
    Patricia A. Schaub

29. Exelon Corporation
    David C. Brown
    Drew B. Fetters
    *Chuck Mannix
    Paul T. Patterson
    George Shicora

30. Fidelity Management Trust Company
    Andy Dudley
    George Fischer
    *Timothy Heffernan

31. First Energy Company
    *Joseph M. Marulli
    Randy Scilla
    Eugene J. Sitarz

32. Florida Power Corporation
    *Penney Develle
    Alex Glenn

33. FP&L
    Don Babka
    Michael Wilson (DC)

34. FPL Group, Inc.
    *James Higgins
    Bill Grolle

35. Glenmede Trust Company, The
    *James S. Lobb

36. GPU, Inc.
    *George Klacik, Jr.
    Jeffrey Loveng
    Cynthia Mansfield Stinger

37. Kansas City Power & Light Company
    *Philip M. Burright

38. LCG Associates Inc.
    *Kathleen A. Crowley
    Michael Lubin
    Adam Laubacker

39. Loomis Sayles & Company, L.P.
    Tim Haarmann
    *Martha Hodgman

40. Maine Yankee
    *Joseph D. Fay
    Arthur Stimpson
    Michael E. Thomas

41. Mellon Bank
    *Gerard McDermott
    Earl Kleckner

42. MetLife
    *Anthony Buonaguro
    Ted Payne
    Alexander G. Scheitlin

43. MidAmerican Energy Company
    *Steven R. Evans

44. Niagara Mohawk Power Corporation
    *Don Campanaro
    Patrick Piscitelli
    Arthur H. Rees

45. NISA Investment Advisors, L.L.C.
    *Mary Jo Dempsey
    William J. Marshall

46. North Atlantic Energy Services Company
    Dave Mercer
    *Brad Jacobson

47. PanAgora Asset Management
    *Fraser Blakely
    William Zink

48. Pinnacle West Capital Corporation
    *Jeffrey L. Barnett
    Robert Hayoz

49. PP&L Inc.
    *John H. Yardley

50. Prime, Buchholz & Associates, Inc.
    *Ramelle M. Hieronymus
    Gregory C. DeSisto

51. Progress Energy, Inc.
    *Carol Guyer

52. Public Service Company of New Mexico
    Ed Jeung
    John R. Loyack
    Matthew F. Harland

53. Public Service Electric & Gas Company
    *Tom Bannon
    Steven M. Lapidus
    Michael Tuosto
    Mark Kahrer
    Michael Moscufo
    Peter W. Caruso
    Joseph V. Graziano

54. Reliant Energy, Inc.
    Charles Smith
    *Heidi Crockett

55. Scudder, Stevens & Clark, Inc.
    *Jeremy L. Ragus

56. Sempra Energy (formerly San Diego Gas & Electric Company
    Marina Vengrin
    Wayne Hitt
    Denis Patton

57. Southern California Edison Company
    Dave E. Ertel
    Fred Lopez
    *Anthony L. Smith
    Les Starck

58. Southern Company Services, Inc.
    *Tim L. Fallaw
    Roger S. Steffens
    Richard Downs [Georgia Power]

59. State Street Bank and Trust Company
    Margaret Hohler
    Miriam Librach
    Patrice Minor
    *Catherine Shavell
    Denise Ulibarri
    Alistair Lowe (State Street Global Advisors)

60. T. Rowe Price Associates
    Sam Beardsley
    *Eric G. Knauss
    Mary Miller

61. TXU (formerly Texas Utilities Services, Inc.)
    John Thompson
    *Peter B. Tinkham
    Tommy Dubberly
    Richard Shamblin

62. Twenty-First Securities Corporation
    *Anthony J. Cetta
    Robert N. Gordon

63. Vermont Yankee Nuclear Power Corp.
    *Bruce W. Wiggett
    John Boguslawski

64. Wellington Management Company
    *Jim Frost
    Julie Jenkins

65. Western Resources
    *Jim Martin
    Michael Stadler
    Carolyn Starkey

66. W.H. Reaves & Co., Inc.
    Lloyd B. Karp
    Mark D. Luftig
    *Everett L. Morris

67. Wisconsin Energy Corporation
    *Ralph Kane

68. Xcel Energy, Inc.
    *Lisa Perkett

69. Yankee Atomic Electric Company
    *Thomas J. Bennet, Jr.

* * *