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PROPOSED RULE PR 50  
(66 FR 29244)  
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OFFICE OF SECRETARY  
RULEMAKINGS AND  
ADJUDICATIONS STAFF

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:

On May 30, 2001, the Nuclear Regulatory Commission ("NRC") published in the Federal Register and requested comments on a proposed rule to revise provisions in 10 C.F.R. Part 50 relating to decommissioning trust provisions for nuclear power plants. 66 Fed. Reg. 29,244 (2001). The NRC proposes to amend these regulations to require the inclusion of certain terms and restrictions in the trust agreements. The Federal Register notice also seeks comments on a draft revision (DG-1106) to Regulatory Guide 1.159.

## Introduction

Yankee Atomic Electric Company ("YAEC") submits these comments to the Proposed Rule concerning Decommissioning Trust Provisions ("Proposed Rule") published in the Federal Register on May 30, 2001.

YAEC supports the goal of the NRC to maintain regulatory oversight over nuclear decommissioning trust funds, where necessary. However, as discussed further below, the NRC recognizes that in the case of companies regulated by the Federal Energy Regulatory Commission ("FERC") and state public utility commissions, substantial oversight and regulation already exists. NRC should therefore be hesitant to add another potentially conflicting 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.

Template = SECY-067

SECY-02

## *Specific Comments on NRC Proposed Rule*

### A. Applicability of proposed revisions to the decommissioning trust provisions:

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 changed or impacted 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, certain licensees such as YAEC continues to operate as federally (FERC) regulated entities. In such circumstances, the maintenance of existing Federal and state regulatory requirements should continue to provide assurance to the NRC that nuclear decommissioning trust funds will be available when needed.

In as much as the stated purpose of the NRC proposed rule is to take a more active oversight role where other regulatory bodies have reduced or relinquished 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 and/or duplicative regulatory requirements on licensees.

### B. The proposed requirement for “Investment Grade” investments is unnecessary:

The requirement that all investments be “investment grade” or equivalent also goes beyond the conditions that have been imposed in license transfer orders. Given the “prudent investor standard” which would be established by the proposed rule, this additional restriction is unnecessary. Further, if investments held in a decommissioning trust were downgraded below an investment grade rating, the proposed provision could force the immediate liquidation of such investments, potentially with large capital losses and fees. Such a forced course of action might not be consistent with the actions of a “prudent investor”, who, based on market information might reduce holdings in the affected investments gradually to minimize loss.

### C. 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, particularly YAEC, which are already regulated by the FERC. The notice requirement is unduly restrictive and will result in YAEC incurring additional costs unnecessarily. 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, plants active in the decommissioning process, such as YAEC, have already provided this information to the NRC through post shut down activity report filings and other regulations such as FERC rate filings. This rule would only duplicate the amount of effort for YAEC. 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.

D. 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.

E. Mandatory wording for each trust fund agreement:

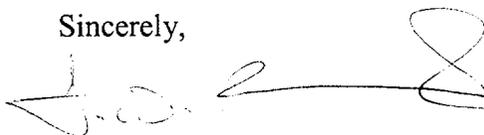
The proposed rule properly recognizes that a wide variety of trust instruments is currently in effect, and that it would be costly to and time-consuming for the NRC to attempt to develop a uniform form of trust fund agreement that would be mandatory for all licensees. In the case of YAEC, the trust design is already oriented to the existing FERC, IRS, and NRC rules in this area. It is sufficient that the NRC is proposing to adopt certain tests to be applied to nuclear decommissioning trust fund agreements to assure that the 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.

F. Restrictions should not apply to funds held in trust for purposes other than radiological decommissioning:

The prohibition on decommissioning trust fund disbursements and other restrictions in the proposed rule should not apply to portions of a fund that were collected to pay the cost of spent fuel storage or non-radiological decommissioning costs. These funds are outside the scope of the NRC’s decommissioning funding regulations. YAEC has collected funds from its customers for spent fuel storage and for site restoration and maintains these funds under the same trust agreement used for radiological decommissioning costs. Applying the proposed restrictions to funds collected from ratepayers and set aside in trust for purposes other than radiological decommissioning would essentially divert the funds from their intended purpose.

We appreciate the opportunity to submit these 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 me.

Sincerely,



Thomas W. Bennet, Jr.  
Vice President and Chief Financial Officer  
YANKEE ATOMIC ELECTRIC COMPANY