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**DOCKET NUMBER**  
**PROPOSED RULE PR 50**  
(66 FR 29244)

**MCDERMOTT, WILL & EMERY**

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August 13, 2001

OFFICE OF SECRETARY  
RULEMAKING AND  
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DOCKETED  
USNRC

Ms. Annette Vietti-Cook  
Office of the Secretary  
U.S. Nuclear Regulatory Commission  
11555 Rockville Pike  
Mail Stop O16C1  
Rockville, Maryland 20852

Re: Proposed Rule on Nuclear Decommissioning Trust Fund Provisions

Dear Ms. Vietti-Cook:

This letter contains, for your consideration, comments by McDermott, Will & Emery's Energy Tax Group (the "Group") to the Nuclear Regulatory Commission (the "NRC") concerning the proposed rule on nuclear decommissioning trust provisions (the "Proposed Rule")<sup>1</sup> and Draft Regulatory Guide DG-1106 (Proposed Revision 1 of Regulatory Guide 1.159), "Assuring the Availability of Funds for Decommissioning Nuclear Reactors" (the "Regulatory Guide"). The Group is comprised of nuclear electric utility companies, trust companies or investment management/consulting firms, and others involved in the administration and management of external nuclear decommissioning trust funds. Because the Group focuses primarily on tax and funding issues affecting nuclear decommissioning trust funds, these comments are limited to those sections of the Proposed Rule and Regulatory Guide dealing with these issues.

The Group would like to commend the NRC on releasing the Proposed Rule and the Regulatory Guide to establish objectives and criteria to ensure that all licensees understand what trust provisions are acceptable to the NRC. The Proposed Rule, if adopted, would provide uniform decommissioning trust terms and conditions applicable to all nuclear power reactor licensees. The Group believes that the uniform criteria imposed on trust funds by the NRC will increase assurance of the protection of public health and safety by ensuring that adequate funds will be available for decommissioning nuclear power plants.

<sup>1</sup> 66 FR 29244 (May 30, 2001).

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This letter contains a description of certain of the provisions of the Proposed Rule and Regulatory Guide, followed in each instance by the Group's comments on such provision. If at any point below the Group recommends a change to the Proposed Rule, the Group also recommends that conforming changes be incorporated into the Regulatory Guide if necessary.

A. Investment Provisions

Proposed Rule

The trust agreement must prohibit trust investments in securities or other obligations of the reactor owner or its affiliates, successors, or assigns.<sup>2</sup> The trust agreement must prohibit investments in any entity owning one or more nuclear power plants, except for investments tied to general market indices or non-nuclear sector mutual funds.

The Regulatory Guide states that investments selected with the approval or guidance from the State public utility commission ("PUC") with jurisdiction over the licensee or from the Federal Energy Regulatory Commission ("FERC") would be acceptable to the NRC staff.<sup>3</sup> Licensees not subject to PUC or FERC jurisdiction should limit investments to "investment-grade" securities, such as investment-grade bonds and preferred stocks. Investment-grade securities are rated at least "BBB" or the equivalent by a national rating service. Speculative issues of common stocks (e.g., "bulletin board" stocks on the NASDAQ exchange, "pink sheet" stocks, and stocks not traded on major exchanges) and high yield ("junk") bonds should be avoided.

Group Comments

The Group requests guidance from the NRC as to what an appropriate mechanism would be for nuclear decommissioning trust funds ("Funds") that currently have investments that are prohibited under the investment provisions of the Proposed Rule. For example, if a Fund currently invests in securities or other obligations of other reactor owners, the Group requests guidance as to whether the trustee of such Fund would be required to sell off such securities, notwithstanding the fact that the sale could trigger sizable taxable gains for the Fund, therefore unnecessarily depleting Fund assets.

The Group respectfully suggests adding a de minimis exception to the prohibition against investing in any entity owning one or more nuclear power plants. Because many Funds currently invest in nuclear-owning utility companies, requiring an outright ban upon such investments is a significant change in investment strategy for such Funds. The Group believes that allowing such an investment in a de minimis amount

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<sup>2</sup> The terms affiliate, subsidiary, successor and assignee are defined in Regulatory Guide section 2.2.3.2.

<sup>3</sup> Regulatory Guide sections 2.2.3.4. and 2.2.3.5.

would alleviate the NRC's concerns regarding investment risk, and at the same time would allow some maintenance of the status quo. The Group suggests changing the rule to prohibit a Fund from investing more than ten percent (10%) of the principal amount of its assets in entities owning one or more nuclear power plants.

The Group respectfully suggests that the NRC remove the requirement from the Proposed Rule that Funds must invest in securities that are investment-grade. The Group believes that the "prudent investor" standard also required by the Proposed Rule sufficiently addresses the type of securities that may be held by the Funds, subject to the Group's comments below. The Group believes that the investment-grade requirement is unnecessarily duplicative and confusing. The term "investment-grade" is subject to dispute, and does not have the same established body of law to resolve conflicts and to provide guidance as the prudent investor standard, which is defined in Restatement (Third) of Trusts § 227 (1992). For these reasons the Group suggests removing the investment-grade standard from the Proposed Rule. If the NRC disagrees with this suggestion, in the alternative the Group suggests adding a de minimis exception to the prohibition against investing in securities that are not investment-grade.

The de minimis rules suggested by the Group would be tested on an aggregate basis per Fund. Therefore, in the case of Funds that govern more than one unit of a nuclear power plant, the 10% rule would be imposed on the total principal amount of the Funds, and not tested on a per unit basis.

B. Trust Management

Proposed Rule

The trust agreement must stipulate that the trustee, investment advisor, or anyone else directing investments made by the trust should adhere to a "prudent investor" standard.

Group Comments

The Group notes that conflicts may arise between the "prudent investor" standard and state PUC requirements. As such, the Group requests guidance from the NRC as to the proper method for resolving such conflicts. The Group suggests that the "prudent investor" standard apply in situations where other regulators have not mandated an investment standard or specific investment restrictions.

C. Trust Disbursements

Proposed Rule

The trust agreement must provide that no disbursements or payments from the trust may be made by the trustee until the trustee has first given the NRC thirty days prior written notice, and that no disbursements or payments from the trust may be made if the trustee receives written notice of objection from the NRC within the notice period (other than for payment of routine administrative expenses).

Group Comments

Again, the Group respectfully suggests adding a de minimis exception to the Proposed Rule governing trust disbursements. The Group believes that the requirement of notifying the NRC thirty days prior to disbursing monies from a Fund is cumbersome and administratively burdensome. The Group respectfully suggests that the requirement for notifying the NRC of disbursements should be limited to any disbursements in an amount equal to or greater than a certain percentage of the trust principal (for example one percent). The NRC could prohibit a Fund from disbursing amounts in small increments in order to avoid the notification requirement. For example, a Fund could not make two or more simultaneous disbursements of 0.99% of trust principal in order to avoid the notification requirement of the Proposed Rule.

In addition to adding a de minimis exception to the Proposed Rule governing trust disbursements, the Group respectfully suggests that the NRC clarify which specific expenses paid from the Fund would require NRC notification. For example, the exception from the notification requirement for routine administrative expenses could be broadened or defined to specifically include general administrative expenses such as manager and trustee fees, federal, state and local tax payments, legal expenses, accounting expenses and actuarial expenses.

D. General Group Comments

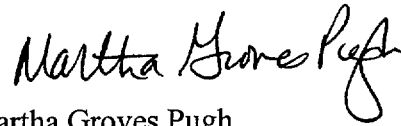
In addition to the comments set forth above, the Group requests guidance from the NRC as to how the NRC will monitor compliance with the Proposed Rule. The Group notes that trust agreements may include arbitration provisions governing disputes between the trustee and the grantor. The Group requests guidance from the NRC as to what its expectations are with respect to such arbitration provisions. Finally, the Group notes that certain of the amendments to trust agreements required by the Proposed Rule may require approval by a PUC. The NRC should be aware of this fact when testing compliance with the Proposed Rule.

Again, the Group commends the NRC for issuing the Proposed Rule and Regulatory Guide. The Group believes that the Proposed Rule and Regulatory Guide

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generally provide prudent guidelines for Funds to follow, and will serve to protect public healthy and safety. The Group appreciates the opportunity to comment on the Proposed Rule and Regulatory Guide. If you have any questions please do not hesitate to call Martha Pugh at (202) 756-8391.

Very truly yours,

A handwritten signature in black ink that reads "Martha Groves Pugh". The signature is written in a cursive style with a large, looping initial "M".

Martha Groves Pugh  
Counsel for the Energy Tax Group