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PROPOSED RULE PR 50

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(66FR29244)

August 10, 2001

The Honorable Annette Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Attn: Rulemakings and Adjudications Staff

Re: **Comments on the Proposed Rule on Decommissioning Trust Provisions
(66 Fed. Reg. 29,244 (May 30, 2001))**

Dear Ms. Vietti-Cook:

The Long Island Power Authority ("Authority") is pleased to respond to the Nuclear Regulatory Commission's ("NRC") request for comments on the proposal to amend the NRC's regulations concerning decommissioning funding for nuclear power plants (10 C.F.R. § 50.75) and on the accompanying Draft Regulatory Guide DG-1106, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors" ("DG-1106").

The proposed rule would amend NRC regulations to require licensees' decommissioning trust agreements to be in a form acceptable to the NRC, in accordance with specific required provisions to be set forth in the rule itself. The NRC's main concern addressed by these proposed amendments is that the "assurance that an adequate amount of decommissioning funds will be available for their intended purposes" may not continue because rate regulators might "cease to exercise direct oversight" over licensee decommissioning trust assets in a deregulated environment.¹ Accordingly, the NRC has determined that prescriptive requirements for decommissioning trust agreements should be adopted as a regulation in order to protect decommissioning trust assets and enable the NRC to exercise direct oversight over the terms and conditions of decommissioning trust agreements.

¹ 66 Fed. Reg. at 29,244.

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As explained below, the Authority believes that its special status as a state entity obviates the NRC's concerns. Accordingly, the Authority recommends that state entities be excluded from the provisions in the proposed rule in view of the adequate controls already in place for their decommissioning trust funds. The Authority also has identified several areas warranting refinement or clarification in the proposed rule.

General Comments on the Proposed Rule

1. *The proposed new decommissioning trust requirements are unnecessary for state entities such as the Authority.*

The Authority is a corporate municipal instrumentality of New York State, created by State legislation enacted in 1986. The Authority is a body corporate and politic and a political subdivision of the State, exercising essential government and public powers.² In May 1998, the Authority acquired all of the common stock of the Long Island Lighting Company ("LILCO"), along with its electric transmission and distribution system and 18 percent undivided ownership interest in Nine Mile Point Nuclear Station Unit 2, among other assets. LILCO, which now does business under the name LIPA, had entered into a decommissioning trust agreement with Mellon Bank, N.A., as the trustee. The agreement was originally executed in May 1990, and was amended in January 2000. LIPA's decommissioning trust is a trust solidly existing under the laws of the State of New York.

With respect to Nine Mile Point Unit 2, the Authority acts by and through LIPA, which has all the privileges, immunities, tax exemptions and other exemptions of the Authority.³ As a state entity, LIPA's statutorily-granted powers and authorities include all the powers necessary or convenient to carry out the purposes and provisions of the LIPA Act. Under the LIPA Act, the Authority's operations and finances are subject to prescribed oversight by the New York Public Authorities Control Board and the State Comptroller,⁴ as well as to rules and regulations adopted by the Authority.⁵ For these reasons, the Authority cannot be considered equivalent to a newly-formed unregulated entity such as a merchant plant licensee or an investor-owned utility that is no longer subject to state regulation. The Authority, as a state entity, should also be presumed by the NRC to take only those actions that are consistent with

² Title 1-A of Article 5 (Section 1020 *et seq.*) of New York Public Authorities Law, known as the LIPA Act.

³ *Id.* at 1020-i.

⁴ *Id.* at §§ 1020-f(aa), 1020-w.

⁵ *Id.* at § 1020-(f)z.

its regulatory responsibilities. In these circumstances, the NRC's concerns about the possible adverse impacts of deregulation do not apply in the case of the Authority or similar state entities. Therefore, the Authority and similar state entities should not be subjected to the proposed new requirements.

The Authority's decommissioning trust assets are protected by additional safeguards. Under New York law, the trustee of the Authority's decommissioning trust funds is subject to prudent investment principles, as embodied in the Uniform Prudent Investor Act adopted in New York.⁶ In this regard, the Authority has adopted conservative investment guidelines for its decommissioning trust funds that are in many respects as stringent as the NRC's suggested provisions.⁷

The NRC, of course, maintains regulatory authority over all licensees as long as they hold an interest in a nuclear power plant. The NRC's regulatory authority extends to the protection of sufficient decommissioning funds, which the NRC ensures in numerous ways, including reviews of periodic decommissioning funding status reports submitted every two years by licensees pursuant to 10 C.F.R. § 50.75(f)(1). If any decommissioning funding problems are identified, the NRC has the authority to take appropriate actions to ensure that adequate funds are made available.

Given the existing controls in place for state entities such as the Authority, the proposed rule would pose an undue administrative burden without any commensurate increase in safety or other regulatory benefits. Numerous provisions in the Authority's current decommissioning trust agreement would need to be revised to conform to the specific terms of the proposed rule, despite the fact that the trust agreement and investment guidelines already meet the intent and substance of many of the NRC's proposed new requirements. In the Authority's case, additional NRC oversight of licensee implementation of the new requirements would also inefficiently consume agency resources by duplicating adequate state oversight. The Authority believes that these burdens outweigh the little, if any, added protection the new requirements would provide in the Authority's case, particularly given the Authority's special status as a state entity and the other safeguards already in place.

⁶ New York adopted substantial portions of the Uniform Prudent Investor Act of 1994, effective January 1, 1995. Specifically, New York Estates, Powers, and Trusts Law, § 11-2.3(a), provides, in pertinent part, that a "trustee has a duty to invest and manage property held in fiduciary capacity in accordance with the prudent investor standard"

⁷ For example, the Authority's Investment Guidelines, adopted in February 2000, limit investments in corporate securities to those that are rated by a rating agency in one of its three highest rating categories at the time of purchase.

In general, the Authority does not object to the NRC's providing sample clauses and suggested language as guidance for acceptable trust agreements. As noted, the Authority's decommissioning trust agreement and investment guidelines already meet the intent and substance of the provisions proposed to be adopted by the NRC in important respects. However, the NRC should not impose specific terms that go beyond what is necessary to adequately address the NRC's regulatory concerns. Where a trust agreement has been drafted in a way that sufficiently addresses these concerns and state law imposes prudent investment standards on the trustee, as in the Authority's case, there is no reason for the NRC to impose the unnecessary regulatory burden of revising trust terms to conform to the NRC's specific language.

2. *In any case, adequate time should be provided to permit licensees to adopt a modified trust agreement and to allocate their trust resources in accordance with the new requirements.*

The proposed rule does not discuss an implementation period for the new requirements. Under the Administrative Procedure Act, a final substantive rule generally cannot be made effective less than thirty days after it is published in the *Federal Register*. 5 U.S.C. § 553(d). Given the lack of an effective date for the new requirements in the language of the proposed rule, it can be presumed that the NRC intends to make the new requirements effective thirty days after publication of the final rule. However, thirty days would not provide licensees sufficient time to modify existing trust agreements and to establish a new compliance program.

In particular, it is important to provide all affected licensees with a reasonable implementation period to enable the trustee of the decommissioning assets to make any necessary changes to the existing fund portfolios in a way that would minimize, or avoid altogether, any investment losses. The implementation period should be no shorter than 90 days, and should permit case-by-case extensions where there is good cause (*i.e.*, in cases where there is potential for a significant loss or devaluation of decommissioning trust funds). It also should be noted that because no plan, schedule, or timetable has been provided by the NRC for implementation of the new requirements, all licensees, including the Authority, have not been allowed an opportunity to comment meaningfully on the schedule needed to comply with the proposed new requirements.

Specific Comments

Some of the proposed new requirements would, in our view, be unduly restrictive and should be clarified to provide additional flexibility. These provisions are as follows:

- Proposed new 10 C.F.R. § 50.75(h)(1)(i)(A) would prohibit investment in securities of any "entity owning one or more nuclear power plants, except for investments tied to market indices or non-nuclear sector mutual funds" The NRC has not provided a clear basis for categorically

excluding investments in any entity with an ownership interest in a nuclear power plant. This provision would restrict investment in financially stable utilities that hold even a minority interest in a nuclear plant. There is no reason to conclude that all such investments should be restricted if investments in entities owning one or more nuclear power plants would otherwise be prudent in accordance with a licensee's investment guidelines or other state controls.

- Proposed new 10 C.F.R. § 50.75(h)(1)(i)(B) would require that all investments be “investment grade’ or [its] equivalent.” The NRC should defer to applicable standards under state law on permissible investments by trustees, such as the prudent investor standard. This requirement also appears unnecessary in light of the NRC’s own proposed requirement in Section 50.75(h)(1)(i)(C) that trustees adhere to the prudent investor standard. Such a restriction could result in potentially significant losses to, or devaluation of, decommissioning trust fund assets where trustees would be required to liquidate downgraded assets.
- The term “non-nuclear sector mutual funds” with respect to permissible investments also needs clarification. Investment in diversified mutual funds (*e.g.*, an energy-sector mutual fund), the holdings of which include entities owning nuclear assets, should be permissible. In addition, investments in bank-maintained Common Trust Funds, which are similar to mutual funds but are not open to general public investment, should be permitted.
- Proposed new Section 50.75(h)(1)(ii) would require a thirty-day notification to the NRC, with opportunity for NRC objection within that time period, before any material amendments may be made to decommissioning trust agreements. Occasionally, state or federal regulatory changes will mandate trust revisions (*e.g.*, legislative changes to Internal Revenue Code Section 468A). If such required changes do not affect the NRC’s fundamental regulatory interest in protecting decommissioning trust funds in a material way, licensees should not be required to report such amendments to the NRC in advance.
- Proposed new Section 50.75(h)(1)(iii) would prohibit any disbursements from a trust, with the exception of ordinary administrative expenses, until the trustee has given the NRC a prior thirty-day written notice of the disbursement and the NRC fails to object in writing within that period. There may be instances in which relatively minor day-to-day expenses are incurred or where expenses must be paid promptly and NRC review is not required to meet the agency’s regulatory concerns. In these

circumstances, notification of the NRC would be unnecessary and/or impracticable.

- Proposed 10 C.F.R. § 50.75(h)(1)(i)(D) would require that the terms of the trust agreement explicitly prohibit the trustee or investment manager from “engaging the licensee or its affiliates or subsidiaries as investment manager for the funds or from accepting day-to-day management direction of the funds’ investments or direction on individual investments by the funds from the licensee or its affiliates or subsidiaries.” Because a trustee would not typically engage a licensee in this manner, it would be clearer to revise the restriction to state, “The licensee, its affiliates, and its subsidiaries are prohibited from acting as investment manager for the funds or from giving day-to-day management direction of the funds’ investment or direction on individual investments by the funds.” (This revision may require re-numbering of the subparagraphs of Section 50.75(h)(1).)

The Authority recommends that the final rule provide additional flexibility for licensees and trustees in these areas. These provisions should be limited in scope or applicability consistent with clearly articulated NRC concerns so as to avoid imposing unnecessary burdens on licensees and trustees.

The Authority appreciates the opportunity to comment on this important rulemaking. We look forward to working with the NRC to develop and implement positive changes in the NRC regulations concerning decommissioning trust agreements.

Sincerely,



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