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Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Att'n: Rulemaking and Adjudications Staff

In the Matter of
Proposed Rule on Decommissioning Trust Provisions
10 C.F.R. Part 50 (66 Fed. Reg. 29244)

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.

In response to this proposed rule, we are submitting these comments on behalf of FirstEnergy Corporation, GPU Nuclear, Inc., and Vermont Yankee Nuclear Power Corporation. The companies operate and/or own commercial nuclear power plants and maintain decommissioning trusts which would be affected by the proposed rule.

A. The Proposed Rule Should Not Apply to Licensees that Remain Subject to FERC or PUC Jurisdiction

The proposed rule seeks to impose new terms and restrictions in decommissioning trust agreements because, with deregulation, the Federal Energy Regulatory Commission (FERC) and State Public Utility Commissions (PUCs) may no longer be exercising oversight over the trusts. See 66 Fed. Reg. at 29,245, 29,248. However, the proposed rule would make these new requirements applicable to all decommissioning trusts irrespective of the status of deregulation for a particular licensee, and the NRC does not explain why such changes are necessary for trusts that remain subject to FERC and PUC oversight.

If these new requirements are promulgated, they should apply only to trusts that are no longer subject to FERC or PUC jurisdiction. The NRC has considered FERC and PUC oversight to be adequate since the initial NRC regulations governing decommissioning trusts,[1] and the

[1] See, e.g., U.S. NRC, Regulatory Guide 1.159, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors" (Aug. 1990) ("Reg. Guide 1.159) at 1.159-13 ("Any trust

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to be adequate since the initial NRC regulations governing decommissioning trusts,[1] and the proposed rule offers no justification for imposing an additional layer of NRC regulation on trusts that remain under state or FERC control. FERC, for example, has extensive regulations in 18 C.F.R. Part 35, Subpart E governing decommissioning trusts subject to its jurisdiction.

Moreover, duplicative regulation will result not only in added administrative costs for licensees forced to comply with multiple sets of requirements, but also in potential conflicts between NRC and state regulations. The NRC should not place licensees in a position of having to choose between potentially conflicting requirements. Thus, if the NRC does apply these new rules to all licensees, including those still regulated by FERC and PUCs, the NRC must address how potential conflicts between its regulations and state requirements should be resolved, and in particular, whether state requirements are preempted.

B. The Proposed Rule Would Impose Requirements Beyond Those Determined Necessary in License Transfer Cases

The proposed rule would impose several requirements that go beyond the conditions that have been determined by the NRC to be appropriate in orders approving transfer of nuclear plant licenses to unregulated entities. In all of the license transfer cases, the conditions were considered carefully by the NRC staff, supported by a Safety Evaluation Report, and reviewed by NRC management and the Office of General Counsel. The proposed rule does not explain why additional restrictions are now appropriate. In the absence of some compelling justification, previously issued orders establishing appropriate conditions should be afforded finality.

The NRC's proposal does not address how the new provisions will apply to licensees already subject to similar license conditions as a result of previous license transfer orders. In particular, it is not clear whether these provisions in the proposed rule will supersede license conditions previously imposed in license transfer proceedings, or whether licensees with existing license conditions governing decommissioning trusts must apply to amend their licenses and whether such amendment applications would then be subject to hearings. We suggest that any new requirements should not apply automatically to licensees with existing decommissioning trust conditions, but instead, such licensees should be given the option of making conforming changes. If licensees exercise this option, the rule should make clear that the implementation of such changes would not provide an opportunity for public hearing. No hearing should be necessary where a change simply implements a generic NRC rule.

1. Licensees Should Be Permitted to Manage and Direct the Investment of Nuclear Decommissioning Trust Funds

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[1] See, e.g., U.S. NRC, Regulatory Guide 1.159, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors" (Aug. 1990) ("Reg. Guide 1.159) at 1.159-13 ("Any trust investments complying with IRS Code Section 468A or with approval of or guidance from a utility's State PUC, other State agency, or FERC would be acceptable to the NRC staff."

The prohibition on licensees acting as investment managers or directing investments (proposed section 50.75(h)(1)(i)(D)) is one of the provisions that goes beyond the conditions that have been imposed in previous license transfer orders and appears unnecessary. Many licensees administer pension and other employee benefits funds and have sophisticated staff able to manage the assets of the funds without incurring additional investment management fees. Further, managing the investment of nuclear decommissioning trust funds involves knowledge and compliance with the requirements of the Internal Revenue Service, the Securities and Exchange Commission, NRC, FERC, and PUCs. A utility's staff often has greater familiarity with these requirements than a commercial investment manager. The prohibition in the proposed rule would prevent a licensee from using its internal resources, while at the same time increasing the cost of administering the trusts.

Further, there does not appear to be any benefit justifying this additional cost. Nowhere in the proposed rule is the benefit or necessity of an independent investment manager explained.

The NRC has previously explained that the existing requirement in 10 C.F.R. § 50,75(e)(1)(i) that a decommissioning trust be "segregated licensee assets and outside the licensee's administrative control" is intended to ensure the integrity of decommissioning trust funds, especially with respect to protection against creditors in a bankruptcy situation. Reg. Guide 1.159 at 1.159-4. Since there is already an existing requirement intended to protect decommissioning trusts against creditors in bankruptcy, the need for additional provisions is not apparent.

Moreover, a licensee's ability to act as an investment manager does not in itself subject a trust to the reach of creditors in bankruptcy. The Bankruptcy Code, at 11 U.S.C. § 541(a)(1), provides that a debtor's estate includes all legal and equitable interests of the debtor in property as of the commencement of a bankruptcy case, subject to exclusions provided in section 541(b) and (c). Section 541(c)(2) provides that a restriction on the transfer of a beneficial interest of the debtor in a trust that is enforceable under non-bankruptcy law is enforceable in a case under the Bankruptcy Code. A licensee's use of decommissioning funds, and hence any beneficial interest it may have, is restricted by the NRC's regulation at 10 C.F.R. § 50.82(a)(8) (as well as by the terms of the trust agreements themselves) to withdrawals for expenses for legitimate decommissioning activities. If the NRC wants greater assurance, it should use its broad authority in section 161(p) of the Atomic Energy Act to issue a regulation providing explicitly that, except pursuant to a license transfer authorized by the NRC pursuant to 10 C.F.R. § 50.80, no interest of a licensee or trustee in a decommissioning trust subject to the NRC's jurisdiction may be transferred to or reached by any creditor in bankruptcy. Such a provision would provide direct protection to decommissioning trusts, without impairing a licensee's ability to manage its decommissioning funds in the most efficient and cost-effective manner.

Nor is prohibiting a licensee from directing investments necessary in order to implement the current NRC requirement that trusts be outside a licensee's administrative control. The NRC's current guidance states that a case-by-case reasonableness standard will be applied, and that "if a trustee is unable to act as an investment manager, use of a professional investment manager is encouraged, although not required." Id. (emphasis added). The proposed rule offers no explanation why a change in the current requirements is necessary.

We recognize that FERC's regulation include a provision, at 18 C.F.R. § 35.32(a)(2), prohibiting a utility from acting as the investment manager or mandating individual investments decisions for decommissioning funds subject to FERC's jurisdiction.[2] The NRC, however, should not follow FERC's lead. FERC adopted its restriction on a utility acting as investment manager for decommissioning funds based on a misinterpretation of NRC requirements. FERC explained that its criteria were in accord with NRC's regulations and criteria (see 60 Fed. Reg. 34,109, 34,117 (1995)), when in fact the NRC only encourages but does not require independent investment managers (Reg. Guide 1.159 at 1.159-4). FERC also cited In Re Columbia Gas Systems, Inc., 997 F.2d 1039 (3d Cir. 1993) for the proposition that fiduciaries fulfilling trust duties must be completely separate from the utility. 60 Fed. Reg. at 34,117. The Columbia Gas case does not support this assertion. There, funds were protected even though they were held by the utility in a combined cash management system, invested by the utility. 997 F.2d at 1053, 1061. As discussed above, if the NRC wants greater assurance that decommissioning funds cannot be reached by creditors in bankruptcy, it should provide such assurance directly by invoking its authority under section 161 of the Atomic Energy Act to prohibit any transfer of a licensee's interest in decommissioning trust to a creditor in bankruptcy. Attempting to protect decommissioning trusts by restricting a licensee's investment authority simply misses the mark.

The proposed prohibition on licensees acting as investment managers could also be interpreted as prohibiting directed investment in mutual funds.[3] This prohibition might therefore require existing decommissioning trusts to sell and reinvest holdings in mutual funds, subjecting the funds unnecessarily to additional transaction costs and capital gains.[4] The proposed prohibition would also be an impediment to tax planning during the purchase and sale of nuclear plants, where purchasers may need to provide investment instructions to ensure that decommissioning trust funds and top-off amounts are invested in specified assets that minimize tax liability when the assets are transferred at closing.

2. The Proposed Requirement for "Investment Grade" Investments is Unnecessary

The requirement that all investments be "investment grade" or equivalent (proposed section 50.75(h)(1)(i)(B)) also goes beyond the conditions that have been imposed in license transfer orders. Given the "prudent investor standard" which would be established by section 50.75(h)(1)(i)(C) of the proposed rule, this additional restriction is unnecessary. Moreover, the

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[2] The FERC regulations do not apply decommissioning funds that are subject to PUC jurisdiction or to the funds of entities that are not regulated by FERC.

[3] FERC has interpreted its regulation at 18 C.F.R. § 35.32(a)(2) (discussed previously in this comment letter) as prohibiting a utility from selecting the specific mutual funds in which decommissioning trust fund are to be invested. See 62 Fed. Reg. at 33,347.

[4] At a minimum, the NRC should make it clear that a prohibition on a licensee acting as investment manager would not require any liquidation or reinvestment of securities purchased at a licensee's direction before the effective date of the rule.

NRC should not automatically disqualify any class of investment, because such a position will necessarily limit the ability of the fund manager to diversify its investment portfolio by allocating assets across the entire risk/return spectrum, which is the key for any "prudent investor" to increase the portfolio earnings while reducing its risk. 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. The 30-Day Notice Requirement for Disbursements Is Unnecessary and Unduly Burdensome

The prohibition on decommissioning trust fund disbursements absent 30-days prior notice to the NRC (proposed section 50.75(h)(1)(iii)) is unduly restrictive and will result in licensees incurring additional costs unnecessarily. As a commercial matter, decommissioning contractors customarily require payment of interest if their invoices are not paid within thirty days. The 30-day notice period would prevent timely payment of such invoices and cause licensees to incur substantial interest charges. For example, for a $400 million decommissioning project and assuming a 7 percent interest rate, a delay in payment of only a couple of weeks would still result in the licensee incurring over $1 million in interest over the life of the project (and cost the industry collectively over $100 million). Perhaps licensees might be able to avoid these costs by requiring decommissioning contractors to agree to longer grace periods for payment of invoices, but this would merely shift the cost to the contractors, who would incur the expense as carrying costs, and would ultimately increase their prices to compensate.

In contrast to this large financial impact, there is little benefit in the 30-day prior notification requirement. The proposed rule does not identify any instance where improper disbursements have been made from a decommissioning trust, despite the fact that such trusts have existed for many years and about 20 nuclear plants with such trusts have been or are being decommissioned. Moreover, deregulation has not resulted in nuclear plants being acquired by untrustworthy licensees. To the contrary, deregulation has resulted in consolidation of the industry, with more plants being owned and operated by large, reputable, financially sound entities.

Further, the NRC does not appear to have considered the impact that the 30-day notification may have on the NRC staff. The NRC staff is not particularly well equipped to review invoices from decommissioning contractors. It is unclear whether notifying the NRC staff of payments would accomplish anything other than an increase in paperwork.

D. Restrictions Should Not Apply to Funds Held in Trust for Purposes Other Than Radiological Decommissioning

The prohibition on decommissioning trust fund disbursements and the other restrictions in the proposed rule should not apply to portions of a fund that were collected to pay the costs of spent fuel storage or non-radiological decommissioning costs. These funds are outside the scope of the NRC's decommissioning funding regulations.[5] Many licensees have collected funds from ratepayers for spent fuel storage and for site restoration and maintain 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 and negate the intention of the state PUCs.

To avoid appropriating funds collected from ratepayers and set aside for other purposes, the NRC should specify that its restrictions do not apply to funds collected for purposes other than decommissioning as defined in 10 C.F.R. § 50.2 (i.e., radiological decommissioning). If the NRC determines that such funds should be placed in separate trusts[6] or sub-accounts to avoid the proposed restrictions, the NRC should provide licensees an opportunity to move such funds into separate trusts or accounts prior to implementation of the new restrictions.

E. If the Proposed Rule is Promulgated, a Transition Period is Needed

The proposed rule could require a number of actions that may be time consuming, including the need to revise trust agreements, obtain state approvals (if required in a state still regulating decommissioning fund collection), and perhaps select and retain a new investment manager. Therefore, if the NRC promulgates the proposed regulations, it should provide at least a six-month transition period before the new requirements are made effective.

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[5] See 53 Fed. Reg. 24,018, 24,021, 24,031, 24,038 (1998) ("The decommissioning rule will not apply to the disposal of non-radioactive structures and materials beyond that necessary to terminate the NRC license. . . . The rule does not deal with costs of demolition of nonradioactive structures and equipment or site restoration after termination of the NRC license.") Spent fuel storage costs are also outside the scope of the NRC's decommissioning funding regulations. NUREG-1221, "Summary, Analysis and Response for Public Comments on Proposed Amendments to 10 CFR Parts 30, 40, 50, 51, 70 and 72: Decommissioning Criteria for Nuclear Facilities" (May 1988) at B-3. See also North Atlantic Energy Service Corp. (Seabrook Station, Unit 1), CLI-99-6, 49 N.R.C. 201, 218 n.9 (1999).

[6] Tax regulations prohibiting more than one qualified decommissioning trust for a nuclear plant may prevent some licensees from establishing separate trusts.

F. Regulatory Guide 1.159 Is Inconsistent With and Should Not Be Used to Alter the Regulations

The guidance in section 2.2.8 of the draft regulatory guide is inconsistent with the NRC's existing regulations. The draft guidance states that in calculating the amount of funds needed under the external sinking fund or prepayment methods during plant operation, a licensee may not credit a 2 percent real rate of return beyond the expected term of operation (i.e., no credit may be taken for any period, such as safe storage, that goes beyond expected termination of operation). In contrast, 10 C.F.R. § 50.75(e)(1)(i) and (ii) specifically state that a licensee may take credit for a two- percent real rate of return "through the decommissioning period" which "includes the periods of safe storage, final dismantlement, and license termination." A regulatory guide should not be used to alter a regulation. Further, such a restriction would increase the financial burden on any new plant applicant, creating an unnecessary obstacle to new plants. There is no economic or financial reason why earnings during the extended period should not be credited.

G. A Backfit Analysis is Required

The proposed rule should include a backfit analysis. While the notice states that a backfit analysis is not required because the proposed rule is necessary to ensure adequate protection for the public health and safety (65 Fed. Reg. at 29,249), the basis for this statement is not apparent. The NRC's existing rules already require that a decommissioning fund be segregated from a licensee's assets and outside its administrative control (10 C.F.R. 50.75(e)(1)) and permit withdrawals only for legitimate decommissioning expenditures (10 C.F.R. 50.82(a)(8)(i)(A)), and the NRC is capable of imposing additional conditions when necessary in license transfer proceedings, so the proposed rules do not appear necessary to protect the public health and safety. Further, there is no justification for applying the proposed rules to licensees that remain subject to FERC or PUC regulation, and some of the proposed provisions, such as the investment manager restrictions, do not appear to provide any protection to the public health and safety. Accordingly, the NRC should prepare a full backfit analysis that balances any need for the proposed rule against the significant costs that the rule would cause licensees to incur.

We appreciate the opportunity to submit these comments. If you have any questions or need further information, please contact me at 202-663-8474.

Sincerely,

David Lewis
Counsel for Licensees