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NUCLEAR REGULATORY COMMISSION

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Decommissioning Trust Provisions)

Docket No. RIN 3150-AG52

OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

COMMENTS OF THE PUBLIC SERVICE COMMISSION
OF THE STATE OF NEW YORK

On May 30, 2001 the NRC adopted a NOPR proposing to amend its regulations on decommissioning trust provisions to further safeguard decommissioning trust funds from investment risks; to ensure that licensees provide adequate information to the NRC about their trusts; and to provide safeguards against improper payments from the trusts. The Public Service Commission of the State of New York ("PSCNY") respectfully submits these comments on the Notice of Proposed Rulemaking ("NOPR") issued by the Nuclear Regulatory Commission ("NRC").¹

The NRC proposes that the funds can only be used for "reactor decommissioning and specified administrative costs of the trust, rather than for a broad range of conflicting uses."² The NRC seeks to implement this objective by requiring 30 days written notice to the NRC before any funds can be withdrawn from the trust.³

¹ New York's stake in the future of nuclear generation and decommissioning trusts is substantial. Currently, New York's six nuclear generating facilities are owned by a combination of regulated utilities and competitive market participants. These plants produce approximately 18% of New York's electric energy. In addition, New York hosts two retired, but not yet fully decommissioned nuclear facilities. There are sales pending between Consolidated Edison Company of New York, Inc. and subsidiaries of Entergy Corporation for Indian Point Units 1 and 2; between Niagara Mohawk Power Corporation and Constellation Nuclear, LLC for Nine Mile Point Unit 1; and between Niagara Mohawk Power Corporation and New York State Electric & Gas Corporation, Central Hudson Gas and Electric Corporation and Rochester Gas and Electric Corporation (collectively the "co-tenants") for Nine Mile Point Unit 2. New York State Public Service Law section 70 requires PSCNY approval prior to any transfer.

² NRC's NOPR p. 8

³ Id.

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The PSCNY fully supports the goal of insuring adequate funding of decommissioning trusts and shares the NRC's concern that adequate funding mechanisms be available to insure responsible decommissioning. We would also suggest, however, that the NRC clarify that decommissioning trust funds may be used for the decommissioning of non-radiological substances and structures associated with nuclear facilities.

The NRC's Rules on the Use of Decommissioning Trust Funds Should Permit Cleanup of Non-radiological Substances and Structures

Dual jurisdiction over the nuclear power industry gives states authority over the economics of nuclear generation costs.⁴ New York State has exercised this authority by permitting utilities to collect monies from ratepayers to be placed in the decommissioning trust funds to pay for both the radiological and non-radiological segments of the decommissioning process. New York State utility decommissioning trusts have been funded to assure the removal of non-radiological substances and structures required to restore sites back to greenfield conditions.⁵

Further, the asset purchase agreements ("APAs") for Indian Point and Nine Mile require Entergy and Constellation respectively to restore those sites to greenfield

⁴ Pacific Gas and Electric Co. vs. State Energy Resources Conservation and Dev. Comm'n, 461 U.S. 190, 211-212 (1983); 42 U.S.C. § 2011, et seq. The Atomic Energy Act ("AEA") also reveals that the NRC has exclusive authority to regulate radiation hazards associated with the materials and activities covered by the AEA, but allows states to regulate non-radiation hazards. Illinois v. Kerr-McGee, 677 F2d 571, 580-581 (7th Cir. 1982).

⁵ The agreements between Constellation and Niagara Mohawk Power Corporation and between Constellation and the co-tenants, which the NRC recently approved, reflect this commitment. In the Matter of Niagara Mohawk Power Corp., et al. Order Approving Transfer of Licenses and Conforming Amendments, Docket Nos. 50-220 and 50-410.

conditions upon decommissioning.⁶ It is contemplated and understood by the parties to the transfer proceedings, and interested parties, that the decommissioning trusts will be used as a source of money for those activities.⁷

A literal reading of the NRC's rules would limit the use of the trust funds to radiological purposes. In general, the decommissioning trust funds must first be used to clean-up radiological materials. However, once the radiological materials are removed, the NRC should clarify that the funds may be used to remove non-radiological substances and structures and restore the sites back to greenfield conditions. Moreover, the NRC should provide plant owners the flexibility to withdraw funds for non-radiological purposes, prior to the completion of radiological decommissioning activities, if such action is consistent with sound/standard industry practice at that time. These recommendations are consistent with federal law and New York policy. Accordingly, it is imperative that any order promulgated by the NRC clarifies the permissibility of funding for the non-radiological costs of decommissioning nuclear stations.

⁶ In the Con Edison Indian Point Asset Purchase and Sale Agreement, "greenfield" means the "complete decontamination, dismantlement, and removal of a generating facility such that the NRC operating license for such facility is terminated and the site at which such facility is located is restored to an unrestricted and natural state."

⁷ § 6.08 of the Entergy APA.

CONCLUSION

The PSCNY respectfully asks the NRC to remove any doubt that decommissioning trust funds may be used for non-radiological decommissioning as well as radiological decommissioning.

Respectfully Submitted,

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