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August 13, 2001

The Honorable Annette Vietti-Cook
Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001

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 Nuclear Regulatory Services Group ("NRSG")¹ is pleased to respond to the Nuclear Regulatory Commission's ("NRC") request for comments on the proposed rule on decommissioning trust provisions for nuclear power plants (10 C.F.R. § 50.75). The proposed rule would amend the NRC's existing regulations by requiring nuclear power plant decommissioning trust agreements to be "in a form acceptable to the NRC in order to increase assurance that an adequate amount of decommissioning funds will be available for their intended purpose." Specific trust provisions would be required to be adopted by licensees to enable the NRC to compensate for the possibility that state and federal rate regulators might cease to exercise direct oversight of the management of licensees' decommissioning trust assets in a deregulated environment.

The NRSG recognizes that the provisions proposed to be adopted for all licensees already

¹ The Nuclear Regulatory Services Group ("NRSG") is a consortium of commercial nuclear power reactor licensees represented by the law firm of Foley & Lardner.

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have been required to be incorporated in decommissioning trust agreements for plants that recently have been the subject of license transfers. Adoption of these provisions was appropriate for the specific circumstances associated with those license transfers, such as transfers to newly-formed unregulated entities whose only assets are their nuclear power plants. However, where those circumstances are absent, the need to require licensees to make similar modifications to existing decommissioning trust agreements is not apparent. Moreover, because no timetable has been provided for licensee implementation of the proposed changes to trust agreements, the NRSRG is concerned that the impact of this proposed rule could be substantial if licensees are not provided with sufficient flexibility to time the selling of assets so as not to incur otherwise avoidable losses. Finally, the NRSRG also questions the NRC's determination that the proposed requirements can be adopted without the performance of a cost-benefit analysis by invoking the "adequate protection" exception to the Backfit Rule. 10 C.F.R. § 50.109(a)(4)(ii).

Comments

- 1. The NRC should more clearly explain its conclusion that the proposed rule is necessary to assure that decommissioning funds will be available when needed.**

The NRC's principal justification for the proposed rule is the observation that deregulation may result in the cessation of direct oversight of the terms and conditions of decommissioning trust agreements by state or federal rate regulators. 66 Fed. Reg. at 29,245. However, the NRC has not explained why this concern applies in the case of most licensees. For example, the NRC has not reviewed current practices by state or federal rate regulators to establish a baseline for evaluating any possible changes in the management of decommissioning trust funds in response to deregulation.

In our view, the NRC's periodic reviews of decommissioning funding status reports filed pursuant to 10 C.F.R. § 50.75(f)(1) should provide sufficient early warning about any funding problems that may arise. Furthermore, the financial institutions that serve as trustees for decommissioning trust funds typically are required to adhere to the legal requirements under state law on the prudent management of trusts. Many states have adopted requirements modeled on the Uniform Prudent Investor Act. The NRC suggests that differences in standards adopted by the states support the NRC's imposition of additional requirements as necessary to provide adequate protection of public health and safety. *See* 66 Fed. Reg. at 29,246. However, the NRC has not explained why additional prescriptive requirements are appropriate when the thrust of the Uniform Prudent Investor Act is to make the standards in this area more performance-based. Some licensees also have adopted conservative guidelines to restrict the investment of trust assets consistent with current NRC guidance. Thus, prescriptive new requirements in this area do not appear warranted.

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Even if the NRC can demonstrate that the proposed requirements are needed in instances where deregulation has substantially reduced state or federal oversight of decommissioning trusts, there is clearly no need to impose these rules where a licensee remains subject to regulation or is a state governmental entity. The NRC's view that a uniform rule would make the regulatory process more efficient should a licensee no longer be subjected to rate regulation does not consider the inefficiencies that are imposed on licensees while they remain subject to regulation or continue to be state entities. The actual need to expend resources to modify a decommissioning trust agreement, to establish any necessary compliance program for the proposed requirements, and to devote resources to an ongoing interaction with the NRC regarding trust management matters must be balanced against any hypothetical need for regulatory efficiency that the NRC may realize should a licensee no longer be subject to regulation or desire to transfer its license.

In short, it would be unfair to burden all licensees in the name of NRC efficiency for the voluntary actions by some licensees that choose to transfer their licenses. We know of no instance where the NRC's case-by-case modification of decommissioning trust agreements has complicated or precluded a license transfer. For these reasons, the NRSRG does not believe that a rule is needed to accomplish the NRC's regulatory purposes.

2. If the proposed rule is adopted, the NRC should establish a clear plan and schedule for implementation in the rule itself.

The NRC has not provided any plan or timetable for licensee compliance with the proposed rule. Under the Administrative Procedure Act, a substantive rule generally cannot be made effective less than 30 days after publication in the *Federal Register*. 5 U.S.C. § 553(d). In the absence of any statement to the contrary by the NRC, the NRSRG must assume that the NRC will make the rule effective 30 days after its publication date. Such a short implementation period could result in substantial hardships to licensees if they are required to divest certain assets at depressed values and to acquire alternative assets at elevated costs. Thus, a short implementation period could result in the very financial challenge to the decommissioning trusts that has motivated the proposed rule. Accordingly, if the NRC adopts this or any other rule that will impose new investment restrictions or require the sale of certain assets in decommissioning trusts, it should provide a sufficiently flexible compliance period that will permit trust managers to preserve trust assets.

3. The NRC has failed to demonstrate that the proposed requirements are necessary for adequate protection of public health and safety.

The NRC would adopt the proposed new requirements without performing any cost-benefit analysis on the grounds that these requirements come within the "adequate protection" exception to the Backfit Rule. 10 C.F.R. § 50.109(a)(4)(ii). The concept of "adequate protection" of public health and safety has never been

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defined explicitly by the NRC. *See* 56 Fed. Reg. 20,603 (June 6, 1988). However, the NRC has established criteria for determining when a new requirement is necessary for adequate protection of public health and safety such that no cost-benefit analysis under the NRC's Backfit Rule is required. The NRC's criteria have included an "unforeseen significant hazard," "substantially greater potential for a known hazard," "insufficient margins or backup capability," and a "significant safety issue." *Id.* The proposed new requirements for decommissioning trust agreements certainly do not seem to meet any of these criteria for an "adequate protection" exception to the Backfit Rule.

Of the many rules affecting power reactors adopted by the NRC since the current Backfit Rule was promulgated in 1985, very few rules have been adopted under the "adequate protection" exception to the Backfit Rule. The NRSRG is concerned that this NRC practice has not been followed in this case. The proposed rule addresses a speculative impact from the possible diminution of some aspects of the extensive oversight of decommissioning trusts. Such an attenuated concern is inconsistent with NRC practice on identifying issues that affect adequate protection of public health and safety.

The NRC indicates that it was motivated to initiate this rulemaking, at least in substantial part, by a desire for efficiency in the modification of decommissioning trust agreements in plant license transfers.² The NRSRG certainly supports efficiency in regulation and for license transfers. But the performance of a backfit analysis in accordance with 10 C.F.R. § 50.109 may well show that the burden of the proposed rule for many licensees outweighs any improvement in efficiency. Therefore, the NRSRG believes that the NRC should not seek to invoke the "adequate protection" exception to the Backfit Rule in this case, but rather should perform the requisite analysis of costs and benefits under the standards of Section 50.109(a)(3).

4. Some of the proposed new requirements would impose undue regulatory burden.

Certain provisions of the proposed rule would, in the NRSRG's view, impose an unnecessary regulatory burden and therefore should be clarified in any final rule. First, proposed new 10 C.F.R. § 50.75(e)(1)(ii) would require that an external trust be "maintained at all times in the United States with an entity that is an appropriate State or Federal agency or an entity whose operations relating to the external sinking fund are regulated and examined by a Federal or State agency." While this requirement appears generally unobjectionable, the NRC should recognize that there may be situations where a foreign financial institution could serve equally well as a

² In the regulatory analysis for the proposed rule, "Regulatory Analysis for Amending Reactor Decommissioning Trust Fund Terms and Conditions," the NRC stated that one of the "beneficial attributes" of the proposed rule would be the "regulatory efficiency" resulting from the expeditious handling of future license transfers by providing regulatory predictability and stability for the transfers."

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trustee, and in fact could do so more economically. Thus, the rule should not preclude foreign financial institutions from serving as trustees if a licensee can demonstrate that there would be an equivalent level of assurance provided.

Second, the 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 should not arbitrarily prohibit investments in an entity merely because it holds an ownership interest (regardless of the size) in a nuclear power plant. Instead, the NRC should defer to applicable investment guidelines under state law or imposed by a state regulatory body for the purposes of defining permissible investments. Also, it is not clear what constitutes a "non-nuclear sector mutual fund." Thus, this term should be clarified in any final rule. The NRC should not prohibit investments in otherwise diversified mutual funds merely because they include one or more entities owning nuclear assets.

Third, in proposed new Section 50.75(h)(1)(i)(D), the NRC would prohibit licensees and their affiliates and subsidiaries from acting as investment managers or directing the investment of decommissioning trust assets on a day-to-day basis. Many licensees already have available their own staff who possess financial management expertise and knowledge of regulatory compliance issues specific to the licensee and are well qualified to manage trust assets. Proposed Section 50.75(h)(1)(i)(D) would require licensees to expend additional costs to use commercial investment management services without an adequate explanation from the NRC as to whether the benefits to be derived from this requirement, if any, would outweigh the added regulatory burden that would result therefrom.

Fourth, under proposed Section 50.75(h)(1)(iii), disbursements from a trust would be prohibited, except for ordinary administrative expenses, until the trustee has given the NRC a prior 30-day written notice. Such a notice requirement would be unduly burdensome for most day-to-day expenditures that would be incurred during the course of decommissioning. Delay in payments resulting from this prior notice requirement also could subject licensees to additional costs, such as interest on outstanding invoices from contractors. Accordingly, this provision should apply, if retained at all, only for major disbursements that could materially affect the availability of funds for decommissioning. Further, the NRC should clarify that the proposed Section 50.75(h)(1)(iii) disbursement restrictions apply to funds held in trust for radiological decommissioning only, not to funds collected by licensees for non-radiological decommissioning or on-site spent nuclear fuel management.

5. Some provisions in Draft Regulatory Guide 1106 require further clarification.

Finally, there is some inconsistency between the language of Draft Regulatory Guide 1106, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors" (May 2001) ("DG 1106") and the existing regulation at 10 C.F.R. § 50.75(e)(1) concerning the 2% real rate of return credit for projected earnings on decommissioning trust funds that licensees may take in

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calculating the amount of decommissioning funds required during plant operation. Specifically, DG 1106, Section 2.2.8, provides in pertinent part:

During plant operation, [the 2% real rate of return credit] should be taken for the remaining years left on the operating license, such that the amount of funds would be sufficient to pay decommissioning costs at the time termination of operation is expected. That is, during plant operation, the 2 percent credit may not be taken for any period, such as extended safe storage, that goes beyond expected termination of operation as specified in the operating license.

Current Sections 50.75(e)(1)(i) and (ii), however, provide that licensees are permitted to take the 2% real rate of return credit "from the time of future funds' collection through the projected decommissioning period" (for the prepayment method) and "from the time of future funds' collection through the decommissioning period" (for the external sinking fund method). For the purposes of both the prepayment and external sinking fund methods, the decommissioning period includes the periods of "safe storage, final dismantlement, and license termination." The NRSRG would presume that the NRC intends to clarify the language in Section 2.2.8 of DG 1106 to permit licensees to use the 2% real rate of return credit through an expected storage and decommissioning period in accordance with Section 50.75(e)(1)(i) and (ii) once licensees have submitted their preliminary decommissioning cost estimates five years prior to the termination of operation in accordance with Section 50.75(f)(2).

* * *

The NRSRG appreciates the opportunity to comment on this important rulemaking. We look forward to working with the NRC on any necessary changes in the NRC regulations concerning decommissioning trust agreements.

Sincerely,

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