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Electronic  
Letterhead

1400 L Street, N.W., Washington, DC 20005-3502  
202-371-5700

35 W. Wacker Drive  
Chicago, IL 60601-9703  
312-558-5600

200 Park Avenue  
New York, NY 10166-4193  
212-294-6700

444 Flower Street  
Los Angeles, CA 90071-2911  
213-615-1700

43 Rue du Rhone  
1204 Geneva, Switzerland  
41-22-317-75-75

21 Avenue Victor Hugo  
75116 Paris, France  
33-1-53-64-82-82

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RULEMAKINGS AND  
ADJUDICATIONS STAFF

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DOCKETED  
USMRC

August 13, 2001

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

ATTN: Rulemakings and Adjudication Staff

Re: Comments on Proposed Rule to Amend Decommissioning Trust  
Fund Provisions (66 Fed. Reg. 29,244; May 30, 2001)

Dear Ms. Vietti-Cook:

On May 30, 2001, the Nuclear Regulatory Commission ("NRC") published in the *Federal Register* a Proposed Rule to amend its regulations related to decommissioning trust fund provisions for nuclear power plants. On behalf of the Utility Decommissioning Group ("UDG" or Group), and the Tennessee Valley Authority, we submit the attached comments on the proposed rule.

Respectfully submitted,



Joseph B. Knotts, Jr.  
William A. Horin  
Carey W. Fleming

Attachment

Template = SECY-067

SECY-02

**Winston & Strawn****Utility Decommissioning Group Comments on Proposed  
Rule to Amend Decommissioning Trust Fund Provisions  
for Nuclear Power Plants (66 Fed. Reg. 29,244)****I. The Proposed Rule Does Not Provide an Applicability Statement or Transition Provisions****NRC Proposal**

The NRC proposes to amend its regulations on decommissioning trust fund provisions by amending its regulations and issuing a revision to an existing regulatory guide ("RG") on the topic. The proposed action states that the trust provisions must be acceptable to the NRC and contain general terms and conditions that the NRC believes are required to ensure that funds in the trusts will be available for their intended purpose. To accomplish this objective, the NRC proposes to modify 10 C.F.R. § 50.75(e)(1)(i) and (ii), and to add a new paragraph, 10 C.F.R. § 50.75(h) to its regulations. The changes in Sec. 50.75(e) specify that the trust should be an external trust fund within the United States, established pursuant to a written agreement and with an entity that is either a State or Federal government agency or an entity whose operations are regulated by a State or Federal agency.

The new paragraph 50.75(h) will reference other provisions of Section 50.75, where necessary, and will discuss the trust terms and conditions that the NRC believes are necessary to ensure that funds in the trusts will be available for their intended purpose. The NRC asserts that these changes are needed to increase assurances that adequate amounts of decommissioning funds will be available for their intended use. The changes are also intended to promote more efficient reviews by the Staff during license renewal and license transfer proceedings.

Additionally, the NRC intends to revise Regulatory Guide 1.159 to include sample trust fund language containing these terms and conditions.

**Comment**

The proposed rule and the accompanying text in the "supplementary information" section appear silent regarding the applicability of the proposed rule. It must be inferred that it will be applicable to all existing and future power reactor licensees. The language in the accompanying supplemental information explains that the need for standardization in trust provisions is derived from concerns related to deregulation and issues arising during recent trust agreement reviews in the context of license renewal and transfer matters. As drafted, it is not clear whether the new rule only applies to licensees in a deregulated environment or licensees who are pursuing renewal or license transfer or all licensees. The rule needs an affirmative statement regarding its applicability.

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Similarly, the proposed rule provides neither a period for an effective date nor any plans for transition from existing trust agreements to the requirements of the proposed rule. The text of the proposed rule discusses only those trust characteristics that it wishes to see present during future Staff reviews of decommissioning trust agreements. The text fails to discuss when the Staff expects existing trust fund agreements to conform with the proposed rule, if at all. A reviewer of the proposed rule may reasonably infer that the NRC will only require the application of the revised provisions prior to an NRC Staff review of the trust provisions (*e.g.*, in the course of a license transfer review). On the other hand, a reviewer of the proposed rule could also conclude that licensees will be expected to revise or modify their trust documents between the published date of the final rule and its effective date. This ambiguity also needs to be addressed.

The NRC needs to clearly state its expectations regarding when licensees are expected to modify their trust documents to conform to the proposed rule. To allow for administrative processes and an adequate opportunity for licensees to address trust laws and possible utility commission involvement, we propose that for plants not undergoing license transfer or license renewal, a two-year period should be specified to allow for a smooth transition to the rule, following its effective date.

## **II. The Proposed Thirty-Day Notice Prior to Withdrawal Requirement Is Unnecessary and In Any Event It Would Be Overly Burdensome for Plants That Are Undergoing Decommissioning Activities — An Adequate Backfit Analysis Has Not Been Performed**

### NRC Proposal

The proposed rule would add 10 C.F.R. § 50.75(h)(1)(iii) to require that “[n]o disbursement or payment may be made from the trust, escrow account, Government fund, or other account used to segregate and manage the funds, other than for payment of ordinary administrative expenses, until written notice of the intention to make a disbursement or payment has been given the Director, Office of Nuclear Reactor Regulation, or the Director, Office of Nuclear Material Safety and Safeguards, as applicable, at least 30-days prior to the date of the intended disbursement or payment.” 66 Fed. Reg. 29,244 at 29,250, to be codified at 10 C.F.R. § 50.75(h)(1)(iii) (May 30, 2001). The reasoning stated in the supplementary information section of the proposed rule is that this provision “would ensure that the funds can be used only for certain key activities.” *Id.* at 29,248.

### Comment

This prohibition on decommissioning trust fund disbursements without prior notice to the NRC imposes unnecessary requirements beyond current regulatory restrictions on decommissioning fund withdrawals. Current regulation in §50.82(a)(8)(ii) allows 3 percent of the generic amount specified in §50.75 to be used for decommissioning planning without NRC approval. In addition, following submittal of certifications required under §50.82(a)(1) and commencing 90 days after the NRC has received the PSDAR, an additional 20 percent may be used without NRC approval. The current regulations already limit the fund to use for decommissioning activities and impose restrictions on the effect of any withdrawals (*See* 10

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C.F.R. § 50.82(a)(8)). Further, the review of the PSDAR and any revisions to it are additional mechanisms by which the NRC Staff may accomplish the oversight of decommissioning fund disbursements. In short, the current regulations already reasonably address NRC restrictions on decommissioning fund use.

The intent of the new provision is to safeguard decommissioning trust funds for the period prior to their proper use. As noted above, NRC regulations already impose reasonable restrictions related to trust fund use. In addition, a requirement for 30-days prior notice during active decommissioning activities will be unduly burdensome during the conduct of decommissioning tasks. The proposed regulatory language in 10 C.F.R. § 50.75(h)(1)(iii) does not specifically allow for the same latitude as is given in Section 2.2.2.4 of the regulatory guide, related to disbursements following commencement of decommissioning activities. Two main issues arise under this concern. First, ongoing activities may give rise to a need for additional work that was not anticipated at the time of the last "request." In this instance, workers and equipment may sit idle while waiting for the additional authorization. The second issue involves the level of detail associated with the request for use of the funds. Guidance does not appear to exist regarding specificity requirements associated with the required fund use requests. Overly broad requests may defeat the purpose of the rule while more specific requests may exclude emergent work activities for 30 days. In summary, the proposed rule and its guidance document are inconsistent with respect to expectations relative to the new 30-day disbursement requirement.

In addition, this provision of the proposed rule has not been adequately justified as a backfit, pursuant to 10 C.F.R. § 50.109. The backfit analysis in the proposed rule provides merely conclusory statements and does not mention how this 30-day notice prior to fund use during actual decommissioning activities will adversely affect licensees. Additionally, the reliance on the effect of the loss of PUC/FERC jurisdiction and oversight due to deregulation<sup>1</sup> fails to acknowledge or consider that many licensees are not deregulated and may never be fully deregulated. The lack of a true cost-benefit discussion calls into question the "adequate protection" backfit justification provided in the proposed rule.

### III. Clarification is Needed Regarding Prohibited Investments

#### NRC Proposal

A proposed new provision is that licensees using prepayment or an external sinking fund shall provide in the terms of the fund that the "trustee, manager, investment advisor, or other person directing investment of the funds [I]s prohibited from investing the funds in securities or other obligations of the licensee or any other owner or operator of the power reactor

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<sup>1</sup> Refer to the discussion in the *Federal Register* notice at 66 Fed. Reg. 29,244, 29,245 (May 30, 2001) — first bullet under Section IV.

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or their affiliates, subsidiaries, successors or assignees, or in securities of any other entity owning one or more nuclear power plants, except for investments tied to market indices or non-nuclear sector mutual funds.” 66 Fed. Reg. 29,244 at 29,250, to be codified at 10 C.F.R. § 50.75(h)(1)(i)(A) (May 30, 2001).

### Comment

The term “non-nuclear sector” needs clarification. One may reasonably infer that the rule attempts to protect decommissioning funds from market reaction to a nuclear incident; however, the term “non-nuclear sector” is not well defined. The basis upon which some investments are prohibited in the new rule is not provided. Additionally, this prohibition regarding the nuclear-sector investments has the effect of modifying or selectively directing the application of the “prudent investor” standard, which is already provided in the proposed 10 C.F.R. § 50.75(h)(1)(i)(C).<sup>2</sup> Accordingly, the NRC should either clarify its intent or simply rely upon the prudent investor standard as providing adequate protection of and guidance for fund investments.

## IV. The NRC Should Permit Credit for Earnings Following Shutdown

### NRC Proposal

The draft Regulatory Guide indicates (DG-1106, at Section 2.2.8) that the NRC interprets its regulations to generally prohibit credit - during operation - for the earnings on the fund applying the 2% real rate of return during the decommissioning period. That guidance indicates that only after the licensee has filed its preliminary decommissioning cost estimate (approximately 5 years prior to the projected end of operations) would the NRC permit a licensee to credit earnings on the fund anticipated following shutdown.

### Comment

This interpretation of NRC regulations does not take into account the actual processes by which decommissioning will occur. As a consequence a licensee could end up collecting substantially more money than would be necessary for decommissioning funding simply because of unrealistic assumptions concerning the timing of decommissioning and expenditures for decommissioning following shutdown.

<sup>2</sup> The proposed new provision in 10 C.F.R. § 50.75(h)(1)(i)(C) requires that licensees using prepayment or an external sinking fund shall provide in the terms of the trust that the “trustee, manager, investment advisor, or other person directing investment of the funds “[I]s obligated at all times to adhere to a prudent investor standard in investing the funds.”

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An interpretation of the regulations that would allow for such credit could save licensees substantial sums of money during operation and would be wholly consistent with the actual process by which decommissioning will occur. With respect to that process, the NRC should recognize that a licensee will, upon permanent shutdown, commence decommissioning activities only in a manner consistent with NRC regulations. A licensee is not going to expend all decommissioning funds immediately after shutdown. Rather, even where the licensee adopts an immediate dismantlement option for decommissioning, that process will still require several years to complete decommissioning.

Further, during this period withdrawals from the decommissioning fund would be made on an ongoing basis, not all at once at the commencement of decommissioning. At the same time, the assets that are retained in the fund would continue to grow. Yet the NRC's apparent interpretation of its regulations would not permit the licensee to take credit (during operation) for those earnings (at least not until at least five years prior to the projected end of operations). Thus, potentially millions of dollars in earnings on the funds remaining in the trust during the decommissioning period will not be credited until, at best, five years before shutdown. Thus, licensees are being *compelled to collect millions of dollars more* during plant operation than will be necessary even under the most conservative assumptions regarding the timing of decommissioning.

Accordingly, we recommend that the NRC reconsider its interpretation of its regulations concerning the credit for the 2% rate of return. Specifically, the NRC should permit all licensees to take credit during operation for expected earnings using the 2% figure during the decommissioning period, at least for the period coincident with DECON (i.e., approximately 10 years). This interpretation should also apply for a greater period if the licensee submits appropriate preliminary site-specific cost estimates and/or decommissioning planning information to the NRC. Arguably, such an interpretation is consistent with current regulations. Because decommissioning can not occur immediately following shutdown, the accumulation of funds considering a 2% real rate of return into the decommissioning period (and accounting for anticipated fund withdrawals) will in fact "be sufficient to pay decommissioning costs at the time termination of operation is expected." 10 C.F.R. §50.75(e)(1)(i). The NRC should revise its guidance consistent with this comment.

### V. Miscellaneous Editorial Comments on The Draft Revision to RG 1.159 (DG-1106)

#### A. Introduction

No comments.

#### B. Discussion

Last sentence in the Section (page 5) states: "Because of the more extensive economic regulation faced by power reactor licensees as opposed to materials licensees, the sample wording is provided for illustration and is not recommended for use by any individual licensee." We concur that for power reactor licensees, use of the general sample trust wording in

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the regulatory guide is not expected to be adopted — verbatim — by the licensees. We believe that the NRC should be clear, however, that directions in the current proposed rule that certain trust provisions should be included by power reactor licensees in their trusts does not imply that the overall general language of the regulatory guide sample trust should be used by power reactor licensees.

### C. Regulatory Position

#### Section 1.1.2

The last sentence should state “The level of detail necessary to support the cost estimate is discussed in Regulatory Position 1.3.” The details were previously in Section 1.4.4, but are now located in Section 1.3.

#### Section 1.2

In the second paragraph, the guidance indicates that the value of “L” may be calculated for each region by multiplying the 1989 base index value for that region by the scaling factor (converting the 1989 and the 1981 base value scales) and then dividing by the reference 1986 value (1981 base value).

Because this information is given as a “regulatory position,” one may reasonable interpret this paragraph as generally instructive. However, when viewed with the current version of NUREG-1307, it is clear that the text of the DG/RG is merely an example for the year 1999. We believe it would be more beneficial to refer the reader to the guidance provided in the most current revision of NUREG-1307 and then expressly state that the example given in the DG/RG text is an example of a 1999 calculation only. The prior (*i.e.*, current) version of the regulatory guide did not get into the level of detail as provided in draft guide. As written, we can foresee conflicting guidance between the NUREG and the RG in future years if each is not revised at the same time. A simple reference in the RG to the guidance in the NUREG should eliminate confusion.

#### Section 1.2

The last paragraph incorrectly refers to Regulatory Position 1.5. Regulatory Position 1.5 does not exist. The reference should be to Regulatory Position 1.4.

#### Section 1.4.3

The last sentence incorrectly references Regulatory Position 2.2.5. The correct reference is to Regulatory Position 2.1.5.

#### Section 2.1.5

The first sentence incorrectly references Regulatory Position 1.5. The correct reference is to Regulatory Position 1.4.

#### Section 2.2.1

The first sentence references Appendices B.1, B.2, and B.3. The appendices are labeled as B-1, B-2 and B-3. The titles should be consistent. In addition, the methods should be

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identified in the same order as they are listed in the appendices (*i.e.*, escrow account should be listed first since it is B-1, and trust agreement should be listed last since it is B-3).

### Section 2.3.1

The first sentence references Appendices B.4, B.5, and B.6. The appendices are labeled as B-4, B-5, and B-6. The titles should be consistent.

### Section 2.4.2

The appendix is incorrectly identified in this section. The appendix referred to should be B-3.2.

### Section 2.4.3

The reference to Regulatory Position 2.2.2 is incorrect. The correct reference is to Regulatory Position 2.2.5.

### Section 2.6.1

The information which the report must include incorrectly states "any contracts upon which the licensee is relying pursuant to 10 CFR 50.75(e)(1)(ii)(C)." We believe that the more appropriate reference is 10 C.F.R. § 50.75(e)(1)(v). Additionally, this appears to be an ideal location to reiterate the guidance provided in RIS 2001-07 for the biennial reports.

### Section 2.6.2

Next to last sentence should read "...as provided in 10 CFR 50.75(e)(1)(i) or (ii)."

## **D. Implementation**

Delete the first sentence since it says the same thing as the first sentence of the next paragraph.

Appendix B.3.2.2 and B.3.3 should be changed to B-3.2.2 and B-3.3 to be consistent with titles of other appendices.

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