



N A R U C
National Association of Regulatory Utility Commissioners

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Secretary
U.S. Nuclear Regulatory Commission
ATTN: Rulemakings and Adjudications Staff
11555 Rockville Pike
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OFFICE OF SECRETARY
RULEMAKINGS AND
ADJUDICATIONS STAFF

Re: 10 CFR Part 50, RIN 3150—AG52: Decommissioning Trust Provisions

Dear Secretary:

Attached, please find the Comments of the National Association of Regulatory Utility Commissioners (NARUC) on 10 CFR Part 50, RIN 3150 – AG52: Decommissioning Trust Provisions.

Should you have any questions or need additional information, please do not hesitate to contact me at 202-898-1350 or sbarklind@naruc.org.

Sincerely,

Sharla M. Barklind
Assistant General Counsel

cc: Charles D. Gray, NARUC Executive Director
J. Bradford Ramsay, NARUC General Counsel

TEMPLATE = SECY- 067

SECY-02

**BEFORE THE
UNITED STATES OF AMERICA
Nuclear Regulatory Commission**

*Public Notice of Proposed Rulemaking
Decommissioning Trust Provisions*
10 CFR Part 50

**Docket No. RIN 3150-AG52
(May 30, 2001)**

**COMMENTS OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS**

The National Association of Regulatory Utility Commissioners (“NARUC”) respectfully files these comments in response to the “Public Notice of Proposed Rulemaking on Decommissioning Trust Provisions” (“Notice”) published by the Nuclear Regulatory Commission (“NRC”) at 66 Federal Register 29,244 (May 30, 2001). NARUC commends the NRC for undertaking this rulemaking to “provid[e] reasonable assurance that adequate funds are available or that lack of funds will not result in delays in decommissioning creating public health and safety problems.” *Id.* at 29, 246. NARUC also appreciates the continued open dialogue the NRC has provided on this very important topic.

NARUC represents the governmental agencies of the fifty States, the District of Columbia, Puerto Rico and the Virgin Islands engaged in the regulation of public utilities and common carriers. NARUC’s members have long recognized the importance of adequately providing for future decommissioning expenses of nuclear power plants and have taken an active role in ensuring such adequate funding. During this period of fundamental change in the structure and operation of utility systems, it is critical that the industry’s economic regulators, *i.e.*, State commissions and the Federal Energy Regulatory Commission (“FERC”), join with safety regulators like the NRC to maintain a continuing dialogue to ensure both that the transition to greater competition does not compromise safety or reliability, and that an adequate amount of decommissioning funds will be available for their intended purpose. NARUC’s members have been active participants in the ongoing discussions and policy decisions that have affected decommissioning funds and will continue to do so.

One of the key considerations that State decision makers have been called upon to address with flexibility and creativity is the effect that industry restructuring initiatives might have upon utilities operating nuclear power plants. Each State regulator grappling with the changing utility industry fully understands the need to ensure that the safety and reliability of nuclear plant operations not be compromised in any way. NARUC has fully supported the NRC's efforts to ensure that a utility industry made more efficient through competition remains a safe and reliable industry.

Regardless of the status of competition in the States, the adoption of diverse regulatory policies by the State commissions and legislatures will not necessarily make it more difficult for the NRC to continue to use generic decommissioning funding requirements. *Cf. Statement of Commissioner Robert Gee, Public Utility Commission of Texas, Hearings Before the U.S. Nuclear Regulatory Commission (December 14, 1995).* The fact that some States may authorize or require that utilities depart from cost-based ratemaking methodologies while others adhere to traditional policies does not prevent the NRC from issuing regulations imposing an obligation on the nuclear utilities to adequately fund decommissioning, nor does it suggest the States are unable or unwilling to ensure that decommissioning funds are adequate and available to achieve their intended purpose.

**NARUC URGES THE NRC TO CONTINUE TO RECOGNIZE THE SEPARATE AND
COOPERATIVE ROLES STATE COMMISSIONS AND THE NRC PLAY IN REGULATING NUCLEAR
UTILITIES AND TO WORK WITH THE STATES ON DEVELOPING MECHANISMS TO PROTECT
DECOMMISSIONING FUNDS**

NARUC supports the NRC's efforts to set rules that ensure funds in the trusts will be available while assuring State commissions retain the flexibility they need to ensure safety and reliability within their jurisdictions.

NARUC has a long-standing interest in decommissioning fund issues. The majority of decommissioning funds are attributable to nuclear generating plants held in retail rate base, and

accordingly, are within the jurisdiction of its State commission members. NARUC continues to strongly support enactment of Federal tax legislation to provide State regulators with the discretion to regulate flexibly such utility decommissioning funds in light of the individualized needs of retail utilities and their local consumers. *See, Resolution Regarding Contributions to Qualified Nuclear Decommissioning Funds*, NARUC Resolution (July 1999)(Attached as Appendix A). NARUC also actively supported the adoption of §1917 of the Energy Policy Act of 1992 (“EPAAct”), which repealed the “Black Lung” limitations on decommissioning investments, leaving utility investment policies to the discretion of utility regulatory commissions. By including this provision within EPAAct, Congress intended that decommissioning investment standards would be established by utility regulatory commissions without strict limitations previously placed on decommissioning investments by §468A(e)(4) of the Internal Revenue Code (which limited decommissioning investments to public debt securities of the United States, obligations of a State or local government which are not in default as to principal or interest, and time or demand deposits in a bank or insured credit union).

Consistent with our previous positions, NARUC believes that the current Rulemaking -- by specifying “that the trust should be an external trust fund in the United States, established pursuant to a written agreement and with an entity that is a State or Federal government agency or an entity whose operations are regulated by a State or Federal agency” -- continues to give State commissions the flexibility that they need to ensure the adequacy of decommissioning funds while protecting consumers within their jurisdiction.

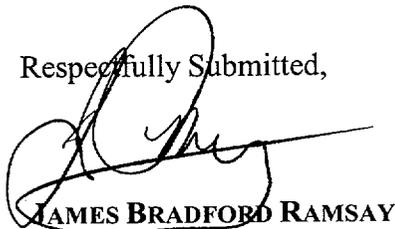
NARUC recognizes that a trust agreement deemed “acceptable to the NRC” does not limit the ability of State commissions “to assure the preservation of the assets of qualified funds” and to “maximize the after-tax yield on the assets of qualified funds.” *See, Resolution Supporting Legislation to Lower the Federal Income Tax Rate on Income of Qualified Nuclear Decommissioning Reserve Funds and to Broaden the Investment Options of Such Funds*, NARUC Resolution (November 1988) (Attached as Appendix B). As NARUC’s resolution makes clear, State regulatory commissioners, who collectively exercise jurisdiction over the bulk of decommissioning investments, are as firmly committed as the NRC to ensuring that adequate funds are available for future decommissioning expenses of nuclear power plants.

The NRC should be careful to assure that State commission authority to achieve these goals is not inadvertently undermined. NARUC continues to believe that that goal can be most readily achieved through flexible standards. As proposed, the NRC's rulemaking appears to provide enough standardization to achieve the goal of ensuring the security of decommissioning funds while allowing enough generality to achieve the goal of maximizing after tax yields.

CONCLUSION

Again, NARUC commends the Commission for this Rulemaking and its continued commitment to ensuring the safety and reliability of our nation's nuclear power plants. NARUC also appreciates the NRC's continued willingness to work with the State commissions to address issues and problems of mutual concern.

Respectfully Submitted,



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September 13, 2001

Appendix A

Resolution Regarding Contributions to Qualified Nuclear Decommissioning Funds

WHEREAS, State regulatory commissioners recognize the importance of adequately providing for future decommissioning expenses of nuclear power plants; and

WHEREAS, State regulatory commissioners realize that the continued funding of qualified nuclear decommissioning funds, which serve to ensure payment of future expenses to decommission nuclear power plants, may be hampered because nuclear decommissioning costs included in rates charged to customers in a nontraditional structure may no longer be considered to meet the traditional definition of cost of service for ratemaking purposes as contemplated by the Internal Revenue Code; and

WHEREAS, State regulatory commissioners further realize that the inability to utilize qualified nuclear decommissioning funds increases overall decommissioning costs to consumers of electricity; and

WHEREAS, State restructuring activities have, in some cases, accelerated or otherwise changed the collection of funds for decommissioning, thereby changing the tax treatment and tax status of those collections; and

WHEREAS, Federal legislation or regulation which permits continued contributions to qualified nuclear decommissioning funds and which updates the Internal Revenue Code to reflect restructuring activities at the State level will, assure that the overall cost for decommissioning nuclear power plants is not increased and will better ensure the availability of sufficient funds for decommissioning; and

WHEREAS, On July 23, 1997, the Executive Committee of the National Association of Regulatory Utility Commissioners (NARUC), adopted a "Resolution Supporting Federal Legislation or Regulation to Enable Electric Utility Companies to Continue Contributions to Qualified Nuclear Decommissioning Funds" endorsing Federal legislation or regulation which benefits electric utility ratepayers by preserving the ability of electric utility companies to deduct for Federal income tax purposes contributions to qualified nuclear decommissioning trust fund for future expenses to decommission nuclear power plants; and

WHEREAS, House of Representatives Bill 2038 and Senate Bill 1308 have been introduced in the 106th Congress to amend Internal Revenue Code Section 468A to insure amounts for nuclear decommissioning will be deductible as paid to a qualified fund and to update the tax code to reflect restructuring initiatives in the states; *now therefore be it*

RESOLVED, That the Board of Directors of the National Association of Regulatory Utility Commissioners (NARUC), convened in its 1999 Summer Meeting in San Francisco, California, supports legislation that would amend the Internal Revenue Code to accommodate tax deductions for nuclear decommissioning; *and be it further*

RESOLVED, That NARUC supports the preservation of the ability of electric utility companies to deduct for Federal income tax purposes contributions to qualified nuclear decommissioning

trust funds for future expenses to decommission nuclear power plants in order to benefit electric utility ratepayers; *and be it further*

RESOLVED, That NARUC supports an amendment to the Internal Revenue Code Section 468A which would reflect ongoing State initiatives to restructure their electricity industries and preserve of the ability of electric utility companies to deduct for Federal income tax purposes contributions to qualified nuclear decommissioning trust funds for future expenses to decommission nuclear power plants in order to benefit electric utility ratepayers.

Sponsored by the Committee on Finance and Technology

Adopted by the NARUC Board of Directors July 23, 1999

Appendix B

Resolution Supporting Legislation to Lower the Federal Income Tax Rate on Income of Qualified Nuclear Decommissioning Reserve Funds and to Broaden the Investment Options of Such Funds

WHEREAS, State regulatory commissioners recognize the importance of adequately providing for future decommissioning expenses of nuclear power plants; and

WHEREAS, State regulatory commissioners realize that the establishment of qualified funds, which serve to ensure payment of future nuclear decommissioning expenses, may be discouraged because the after-tax earnings of qualified funds are restricted by the combined effect of (i) the current maximum Federal income tax rate of thirty-four percent (34%) applicable to the taxable income of qualified funds, and (ii) the "Black Lung" investment limitations on qualified funds; and

WHEREAS, State regulatory commissioners further realize that the combined effect of the thirty-four percent (34%) income tax rate and the "Black Lung" investment limitations on qualified funds increases costs to consumers of electricity; and

WHEREAS, Federal legislation which reduces the Federal income tax rate applicable to taxable income earned by qualified funds to fifteen percent (15%) and removes the existing "Black Lung" limitations on investments by qualified funds would permit investments into taxable securities and thus provide increased flexibility to the fiduciaries responsible for the administration and oversight of the qualified funds; now therefore, be it

RESOLVED, That the National Association of Regulatory Utility Commissioners (NARCUC), assembled in its 100th Annual Convention in San Francisco, California, endorses Federal legislation which would benefit electric utility ratepayers by amending Code section 468A to the Federal income tax rate applicable to taxable income earned by qualified funds to fifteen percent (15%) and to remove the existing "Black Lung" limitations on investments by qualified funds so as to defer the authority over investments to the appropriate state regulatory body; and be it further

RESOLVED, That upon enactment of such Federal legislation, a state commission could adopt and enforce appropriate investment guidelines for qualified funds established by public utility companies which are regulated by the state commission; and be it further;

RESOLVED, That upon enactment of such legislation, if the Federal Energy Regulatory Commission (FERC) either (i) fails to adopt investment guidelines for qualified funds established by public utility companies which are regulated, in whole or in part, by the FERC, or (ii) adopts investment guidelines for such qualified funds which the NARUC determines are improper because they fail to assure the preservation of the assets of the qualified funds or fail to maximize the after-tax yield on the assets of the qualified funds, the NARUC shall petition the FERC to adopt, or amend as the case may be, investment guidelines for such qualified funds.