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TO:

Vietti-Cook, SECY

FOR SIGNATURE OF : ** GRN ** CRC NO: 04-0076

Virgilio, NMSS

DESC:

Final Rule on Nuclear Decommissioning Trust Fund Provisions

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MCDERMOTT, WILL & EMERY

February 10, 2004

Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555-0001
Attn: Rulemakings and Adjudications Staff

Re: Final Rule on Nuclear Decommissioning Trust Fund Provisions

Dear Sir/Madam:

This letter contains, for your consideration, comments by McDermott, Will & Emery's Energy Tax Group (the "Group")[1] concerning the Final Rule, titled "Decommissioning Trust Provisions," published in the Federal Register on December 24, 2002. (67 Fed. Reg. 78,332, modified at 68 Fed. Reg. 12,571 and 68 Fed. Reg. 65,386). As described below, the Group respectfully suggests that clarification is needed with respect to two material issues that deserve additional consideration by the Nuclear Regulatory Commission ("NRC"). The Group asks that the NRC take appropriate steps to clarify and/or correct these issues.

1. Application of Mandatory Provisions to Licensees that Collect Decommissioning Costs Through a Non-Bypassable Charge

New 10 C.F.R. § 50.75(h)(1) contains mandatory provisions for the trust, escrow account, or government account of licensees using either prepayment or an external

[1] McDermott, Will & Emery's Energy Tax Group is comprised of nuclear electric utility companies, trust companies or investment management/consulting firms, and others involved in the administration and management of external nuclear decommissioning trust funds. The Group focuses primarily on tax and funding issues affecting nuclear decommissioning trust funds.

sinking fund to provide financial assurance. Pursuant to the Final Rule, these provisions apply only to licensees that are not "electric utilities" as defined in 10 C.F.R. § 50.2.[2]

It is unclear, however, based on the definition of electric utility, whether such requirements are imposed on licensees that have access to a non-bypassable charge. The Summary of the Final Rule published in the Federal Register (67 Fed. Reg. 78,332) explains that the NRC is requiring decommissioning trust agreements be in a form acceptable to the NRC for "[l]icensees that are no longer rate-regulated, or no longer have access to a non-bypassable charge for decommissioning." However, licensees that have access to a non-bypassable charge will in most instances fall outside of the regulatory definition of electric utility.

The Group urges the NRC to clarify the Final Rule, and provide that new 50 C.F.R. § 50.75(h)(1) applies only to licensees that are not described in 10 C.F.R. § 50.75(e)(1)(ii)(A) (i.e., licensees that recover the cost of decommissioning through rates established by cost of service or similar ratemaking regulation) or 10 C.F.R. § 50.75(e)(1)(ii)(B) (i.e., licensees that collect decommissioning costs via a non-bypassable charge). The Group asserts that imposing such requirements on licensees that have access to a non-bypassable charge is inconsistent with the purpose of the Final Rule because licensees that have access to a non-bypassable charge continue to have regulatory oversight from a state public utility commission with respect to decommissioning collections.

Although the Final Rule is concerned with providing financial assurance for nuclear decommissioning, as written it does not distinguish between licensees that are subject to regulatory oversight over decommissioning collections and those that do not. Instead, the Final Rule focuses on whether licensees have oversight with respect to rates charged for electricity. Under the Group's proposed changes, application of 10 C.F.R. § 50.75(h)(1) would be limited to those licensees that lack regulatory oversight over decommissioning collections. The Group believes that this change is consistent with the intent and purpose of the Final Rule.

Therefore, in order to clarify that licensees that have access to a non-bypassable charge are not required to comply with the provisions of new 10 C.F.R. § 50.75(h)(1), the Group suggests that new 50 C.F.R. § 50.75(h)(1) be amended to read as follows:

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[2] Electric utility is defined as

> any entity that generates or distributes electricity and which recovers the cost of this electricity, either directly or indirectly, through rates established by the entity itself or by a separate regulatory authority. Investor-owned utilities, including generation or distribution subsidiaries, public utility districts, municipalities, rural electric cooperatives, and State and Federal agencies, including associations of any of the foregoing, are included within the meaning of 'electric utility'.

50 C.F.R. § 50.2

(h)(1) Licensees that are not described in 10 C.F.R. § 50.75(e)(1)(ii)(A) or (B), that use prepayment or an external sinking fund to provide financial assurance shall provide ...

Similarly, new 50 C.F.R. § 50.75(h)(2) should be amended as follows:

(h)(2) Licensees that are described in 10 C.F.R. § 50.75(e)(1)(ii)(A) or (B), that use prepayment or an external sinking fund to provide financial assurance shall provide ...

Alternatively, the Group suggests that this issue be clarified in the Draft Regulatory Guide.

2. Clarifications to Draft Regulatory Guide DG-1106[3]

The Group suggests the Draft Regulatory Guide DG-1106 should provide more guidance with respect to the Final Rule's investment restrictions for non-electric utilities because the de minimis rule is difficult to understand and hard to apply. Further, it would be very helpful to the industry if the following types of questions regarding the implementation of the investment restrictions are more directly addressed in the Draft Regulatory Guide and if examples are provided:

a. Does the 10 percent de minimis exception permit the investment of trust assets in securities of the licensee, and/or its affiliates, subsidiaries, successors and assigns?

b. How does the 10 percent de minimis exception interact with the grandfather provision? For example, do the investments protected by the grandfather provision count towards the 10 percent de minimis amount? If so, is the licensee required to divest investments purchased before December 24, 2002 if the amount of such investments exceeds the 10 percent de minimis amount?

c. Does a licensee's investment in a non-nuclear sector mutual fund count towards the 10 percent de minimis exception if a portion (e.g., 12 percent) of the non-nuclear sector mutual fund consists of securities of owners or operators of nuclear power reactors?

[3] Draft Regulatory Guide DG-1106 (Proposed Revision 1 of Regulatory Guide 1.159), "Assuring the Availability of Funds for Decommissioning Nuclear Reactors" (the "Draft Regulatory Guide").

The Group would like to commend the NRC for its ongoing work regarding clarifications to the Final Rule on Decommissioning Trust Provisions and urges the NRC to continue this important process. If you have any questions please do not hesitate to call me at (202) 756-8391.

Very truly yours,

Martha Groves Pugh

Martha Groves Pugh
Counsel for the Energy Tax Group