



NUCLEAR ENERGY INSTITUTE

Leslie Compton Kass
DIRECTOR, BUSINESS POLICY &
PROGRAMS

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Mr. Mark P. Orr
Acting Chief
Rulemaking, Directives, and Editing Branch
Office of Administration
U.S. Nuclear Regulatory Commission
Washington, DC 20555-0001

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Subject: Revision to Comments on Draft Regulatory Guide DG-1229, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors," June 2009.

Project Number 689

Dear Mr. Orr:

The Nuclear Energy Institute (NEI),¹ on behalf of the nuclear energy industry provided timely comments yesterday on the U.S. Nuclear Regulatory Commission's (NRC) Office of Nuclear Regulatory Research's Draft Regulatory Guide DG-1229, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors." Subsequently, an error has been identified in NEI's proposed revision to the language in Section 2.1.5 of DG-1229 regarding rate-regulated utilities. This text was on page 10 of the enclosure.

This letter provides a revised enclosure, which more accurately addresses our concerns with Section 2.1.5 in the proposed regulatory guide. Please refer to the revised enclosure when considering industry comments on this regulatory guide.

¹ NEI is the organization responsible for establishing unified nuclear industry policy on matters affecting the nuclear energy industry. NEI's members include all utilities licensed to operate commercial nuclear power plants in the United States, nuclear plant designers, major architect/engineering firms, fuel fabrication facilities, nuclear material licensees, and other organizations and individuals involved in the nuclear energy industry.

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*Call = A. 52960 (ALS5)
E. O'Connell (EXD)*

Mr. Mark P. Orr
September 10, 2009
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We apologize for any inconvenience. If you have any questions, please contact me at 202-739-8115; lck@nei.org.

Sincerely,

A handwritten signature in cursive script that reads "Leslie C. Kass".

Leslie C. Kass

Enclosures

c: Mr. Aaron Szabo, RES/DE/RGDB, NRC

Industry comments on NRC's Draft Regulatory Guide DG-1229, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors," June 2009

1. Section 2.1.5: Frequency of Adjustments to Funding Amounts at Merchant Plants

Section 2.1.5 of Draft Regulatory Guide-1229 (DG-1229) modifies the NRC guidance on the frequency of funding adjustments necessary to correct any estimated shortfalls in licensees' decommissioning funds. After explaining that estimates of the amount of financial assurance to be provided for decommissioning must be adjusted annually (a proposition that NEI does not dispute), the NRC states that if shortfalls between fund balances and such estimates are identified for merchant plants¹:

[T]he licensee must adjust the amount of financial assurance being provided, such that it meets or exceeds the required amount.

This adjustment should occur within 3 months of each end-of-year recalculation of the minimum required funding assurance level required (i.e., by March 31 of the following year). If a biennial decommissioning funding status report is filed in a particular year, such report, which is due to be filed by March 31 of the filing year, should indicate that necessary adjustments to the licensee's financial assurance amount(s) and mechanism(s) have been made by the date the report is filed. In any event, pursuant to 10 CFR 50.75(b)(1) and (b)(2), the licensee must make any necessary adjustment annually, which requires that the necessary adjustments to the licensee's financial assurance amount(s) and mechanism(s) have been made no later than by the end of the year (i.e., by December 31 of the following year).²

The current version of Regulatory Guide 1.159 requires such adjustments "at least once every two years, in conjunction with the biennial report."³ As explained in more detail below, this reduction in the amount of time for funding adjustments is not required by 10 CFR § 50.75; is inconsistent with the NRC's historical approach to funding adjustments; and, most important, is ill-advised given the current financial markets and long-term investment horizons applicable to decommissioning funding.

¹ The term "merchant plants" is used to describe nuclear power reactors that are operated by licensees that do not recover total decommissioning costs through cost of service ratemaking, or do not have access to nonbypassable charges sufficient to provide all funds needed for decommissioning.

² DG-1229, at 13.

³ Reg. Guide 1.159, Rev. 1, at 1.159-11 (2003).

NRC's Existing Regulatory Framework is Robust and Effective

In 1988, the NRC amended its requirements for decommissioning nuclear facilities, concluding a deliberative rulemaking process that unfolded over a 10-year period.⁴ Noting that its then-current regulations were not fully adequate to effectively deal with decommissioning, the NRC amended its requirements to assure that decommissioning would be carried out with minimal impact on public health and safety and the environment. Since 1988, the NRC has continued to refine its regulatory framework for decommissioning funding through subsequent rulemakings, and the issuance and updating of relevant guidance.⁵ As a result, NRC licensees must comply with the robust decommissioning framework developed over the past 20 years to assure that adequate funds will be available when needed.

That original rule has served its purpose well, and has been fortified by appropriate amendments that have further enhanced the level of decommissioning funding assurance. In addition, the NRC's decommissioning regulations are supported by regulatory guidance, which has also been the subject of careful NRC evaluation and stakeholder scrutiny. Specifically, the NRC's current regulatory structure provides decommissioning funding assurance through multiple layers of requirements and limitations, including:

- Establishment of a minimum certification amount, which is based on technical studies and serves as a standard to which licensees are to provide decommissioning funding assurance during plant life.⁶
- Requiring adjustment of the minimum certification amount annually to account for inflation over time.
- Limiting funding assurance mechanisms to those considered appropriate by the NRC for assuring that decommissioning funding will be available when needed.
- Limiting the estimated future growth of decommissioning funds over time to a conservative rate of return over inflation, absent allowance of a different rate of return by the rate-setting authority.
- Requiring submittal of a report on the status of decommissioning funds compared to the minimum certification amount on a biennial basis.
- Providing for updating funding levels, if necessary.

⁴ 53 Fed. Reg. 24018, 24019-20; June 27, 1988.

⁵ See, e.g., Self Guarantee as an Additional Financial Assurance Mechanism, Final Rule, 58 Fed. Reg. 68726; Dec. 29, 1993; Decommissioning of Nuclear Power Reactors, Final Rule, 61 Fed. Reg. 39278; July 29, 1996; Financial Assurance Requirements for Decommissioning Nuclear Power Reactors, Final Rule, 63 Fed. Reg. 50465; Sept. 22, 1998; Decommissioning Trust Provisions, Final Rule, 67 Fed. Reg. 78332; Dec. 24, 2002; Assuring the Availability of Funds for Decommissioning Nuclear Reactors, Regulatory Guide 1.159 (August 1990); Assuring the Availability of Funds for Decommissioning Nuclear Reactors, Regulatory Guide 1.159, Revision 1 (October 2003) (RG 1.159, Rev.1).

⁶ This certification amount is not a cost estimate, but rather a standard for use by licensees during plant life.

- Requiring a more precise reporting of ultimate decommissioning costs through a preliminary decommissioning cost estimate at or about five years prior to plant shutdown and a site-specific cost estimate within two years of plant shutdown.
- Prohibiting use of decommissioning funds for any purpose other than decommissioning, both during and after plant shutdown.

The adequacy of the existing regulatory framework is most directly demonstrated by the fact that every power reactor that has shut down, and which has been or is currently being decommissioned, has been able to fund and safely perform required decommissioning activities. This has been the case even in situations in which the licensee did not operate the facility to the end of its license term (i.e., the facility shut down prematurely). For example, the Zion Nuclear Power Station Units 1 and 2 were prematurely shutdown in 1997 and 1998, respectively. Despite the premature shutdown, and the fact that it was caused by economic considerations, the Zion units were safely shut down, defueled, and placed into SAFSTOR status to allow for radioactive decay prior to conduct of DECON activities.⁷ Also, both the Yankee Rowe and Connecticut Yankee facilities shut down prematurely and, despite not having fully funded decommissioning at the time of plant shutdown, were able to obtain additional funding and complete decommissioning.⁸

In addition, the NRC has participated in bankruptcy proceedings, and licensees have continued to make their required payments for decommissioning funding expenses even while in bankruptcy.⁹ For example, when Public Service Company of New Hampshire filed for bankruptcy protection in the 1980s as a result of cost overruns with the Seabrook nuclear plant, the NRC and the bankruptcy court worked together to ensure that Seabrook's operation could commence safely. The NRC also has experience with Enron (Trojan plant) and, most recently, Pacific Gas and Electric Company (Diablo Canyon and Humboldt Bay plants). In all cases, the bankruptcy courts allowed the bankrupt licensee to pay necessary expenses for decommissioning funding and any assets in decommissioning trust funds were not considered utility property and thus not available to pay creditors' claims.

The continuing effectiveness of the NRC's decommissioning funding framework is further supported by the increased interest in license renewal, which extends the operating life of a plant – and hence the time horizon over which decommissioning funds may be accumulated –

⁷ See <http://www.nrc.gov/info-finder/decommissioning/power-reactor/zion-nuclear-power-station-units-1-2.html>.

⁸ See *e.g.*, Yankee Rowe: Letter to NRC, "Final Safety Analysis Report Biennial Update," July 17, 2007, pp. 7-8 ("Decommissioning Cost Estimate," providing background regarding Yankee's continued collection of decommissioning funds through Power Contracts, subject to FERC review and approval); Connecticut Yankee: Letter to NRC, "Haddam Neck Plant, Update of License Termination Plan - Revision 2, August 30, 2004, pp. 7-1 to 7-7 ("Update of Site-Specific Decommissioning Costs," describing the historical efforts to collect, and then to update following shutdown, the Power Contracts with utility customers, as well as the NRC and FERC review processes).

⁹ See Final Policy Statement on the Restructuring and Economic Deregulation of the Electric Utility Industry, Final Policy Statement, 62 Fed. Reg. 44071, 44077; Aug. 19, 1997.

by 20 years. In 1988, when the original decommissioning rule was promulgated, license renewal did not seem to be a viable business option. Specifically, in promulgating the 1988 rule the Commission stated: “[a]lthough decommissioning is not an imminent health and safety problem, the nuclear industry is maturing, in that nuclear facilities have been operating for a number of years, and the number and complexity of facilities that will require decommissioning is expected to increase in the near future.”¹⁰ Since that time, license renewal and continued operation of existing plants for the 20-year renewal period has become a viable and preferred business option. Specifically, the NRC has issued renewed operating licenses for 54 of the 104 currently operating nuclear plants in the United States, is currently reviewing an additional 18 applications for license renewal, and an additional 24 units have expressed intent to renew their operating licenses.¹¹

Thus, unlike the outlook in 1988, very few – if any – power reactors are likely to be prematurely shutdown or undergo decommissioning in the near future. To the contrary, it seems likely that most power reactor licensees will have an additional 20-year time horizon over which to accumulate decommissioning funds. The current outlook therefore provides additional confidence that, over the long-term, decommissioning funding will be adequate when needed.

In addition, after ceasing operations, power reactor licensees may place their facilities in SAFSTOR mode in order to allow shorter-lived radionuclides to decay prior to undertaking substantial decontamination activities.¹² While the primary purpose of SAFSTOR is to enhance health and safety by reducing the occupational exposure of decommissioning workers, it also has the collateral benefit of adding time to a licensee’s investment horizon for accumulating decommissioning funds. In fact, licensees currently may take credit for earnings above inflation on their decommissioning funds during the SAFSTOR period if their decommissioning funding estimate is based on a site-specific cost estimate.¹³ This additional earnings period has a significant beneficial impact on licensees’ level of decommissioning funding assurance.

¹⁰ 53 Fed. Reg. 24019.

¹¹ See NEI, “Resources and Stats,”

http://www.nei.org/resourcesandstats/nuclear_statistics/licenserenewal.

¹² See 10 CFR 50.82(a)(3). SAFSTOR is defined as “the method in which the nuclear facility is placed and maintained in a condition that allows the nuclear facility to be safely stored and subsequently decontaminated (deferred decontamination) to levels that permit release for use in accordance with the NRC’s definition of decommissioning.” RG 1.159, Rev. 1, at 1.159-2.

¹³ See 10 CFR §§ 50.75(e)(1)(i) and (ii); 50.82(a)(3).

Decommissioning Regulations Do Not Require Annual Funding Adjustments

The proposed guidance in DG-1229 states that 10 C.F.R. §§ 50.75(b)(1) and (b)(2) require annual adjustments to decommissioning funding amounts to correct any identified shortfalls. Not only is this reading not compelled by § 50.75, but – contrary to this view – the NRC’s long-standing position has been to handle the frequency of adjustments to decommissioning funding levels through guidance. Specifically, in the Supplementary Information accompanying its 1988 Final Rule the Commission declined to prescribe the frequency of funding adjustments by rule, stating:

The frequency for these updates is not included in the rule but would be included in regulatory guidance under consideration. This will provide more flexibility in dealing with different types of licensees and financial considerations. It is expected that regulatory guidance will indicate the frequency of adjustment for cost estimate and funding levels.¹⁴

Thus, from the beginning, the Commission recognized the benefits of taking a flexible approach to the frequency of funding adjustments. As described above, the NRC’s current guidance on this issue states:

In every case, needed adjustments to the amount of funds set aside should be made at least once every two years, in conjunction with the biennial report, for licensees who are no longer rate-regulated or do not have access to a non-bypassable charge, [i.e., merchant plants] and at least once every 6 years for licensees who are rate-regulated (see Regulatory Position 1.4).¹⁵

In developing this language the Commission specifically considered and rejected annual funding adjustments for licensees that were no longer rate-regulated. The Proposed Revision 1 of Regulatory Guide 1.159 (DG-1106) included guidance suggesting annual funding adjustments for non-rate-regulated licensees.¹⁶ This proposed change prompted the following stakeholder comment:

The annual adjustment frequency in Section 2.1.5 for licensees that are no longer rate regulated or do not have access to a non-bypassable charge is too frequent. Short-term market fluctuations could lead to more frequent adjustments than truly necessary and result in greater administrative costs. Because decommissioning is normally a long-term investment, frequent changes could lead to losses and increased investment costs. Although the fund’s adequacy should be evaluated annually, annual adjustments may not be prudent.¹⁷

¹⁴ 53 Fed. Reg. 24034.

¹⁵ RG 1.159, Rev. 1, at 1.159-12.

¹⁶ See *Decommissioning Trust Provisions*, Proposed Rule, 66 Fed. Reg. 29244; May 30, 2001; *Proposed Rule on Decommissioning Trust Provisions*, SECY-01-0049 (March 23, 2001).

¹⁷ *Decommissioning Trust Provisions*, Final Rule, 67 Fed. Reg. 78332, 78344; December 24, 2002

In response to this comment, the NRC changed the language in DG-1106 to reflect the “at least once every two years” guidance currently provided in RG 1.159. Thus, it is evident that the NRC has previously considered and rejected the concept of annual funding adjustments. Notably, neither DG-1229, nor the Federal Register Notice announcing its availability, provide any explanation or basis for this significant change in the NRC’s interpretation of 10 C.F.R. § 50.75(b).

Although courts generally give substantial deference to an agency’s interpretation of its own regulations,¹⁸ they have also held that the Administrative Procedure Act requires notice and comment rulemaking when an agency substantially modifies such interpretations.¹⁹ So while an agency’s initial interpretation of its regulations is entitled to substantial judicial deference, once an agency gives its regulation one definitive interpretation, it can only change that interpretation as it would formally modify the regulation itself – through the process of notice and comment rulemaking.²⁰ Accordingly, the Supreme Court has recognized that if an agency adopts “a new position inconsistent with” an existing regulation, or effects a “substantive change in the regulation,” notice and comment are required.²¹

As explained above, over the past 20 years the NRC has purposefully addressed the frequency of funding adjustments in guidance, and specifically considered and rejected annual funding adjustments in its 2002 revision to Reg. Guide 1.159. Now, without explaining the basis for the changed interpretation or even recognizing that such a change is being implemented, NRC is taking the position that annual funding adjustments are *required by* § 50.75(b). This is a substantial modification to NRC’s long-standing interpretation of § 50.75 and – consistent with the case law discussed above – may be imposed on licensees only after meaningful notice and an opportunity to comment have been provided. Imposing such a changed interpretation before, or without any, meaningful notice (i.e., notice that explains the basis for the change) and an opportunity to comment undermines the notice and comment process and is inconsistent with the requirements of the Administrative Procedure Act.

Flexibility Is Required to Manage Long-Term Investments Prudently

The guidance proposed in Section 2.1.5 of DG-1229, which interprets § 50.75(b) as requiring licensees to adjust funds annually to address any deficiencies, would limit the flexibility allowed by 10 CFR 50.75. The current economic crisis highlights the need for increased flexibility, not additional restrictions. If the proposed guidance were applied to the current situation, the NRC effectively would be forcing utilities to pay an unnecessary premium for decommissioning funds that will not be used for decades. This premium would likely be paid at the expense of other programs that would have an immediate impact on the company’s financial health and

¹⁸ See *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504 (1994).

¹⁹ See *Paralyzed Veterans of America v. D.C. Arena L.P.*, 117 F.3d 579, 586 (DC Cir. 1997); *National Family Planning & Reproductive Health Assn. v. Sullivan*, 979 F.2d 227, 240 (DC Cir. 1992).

²⁰ *Alaska Professional Hunters Ass’n v. FAA*, 177 F.3d 1030 (DC Cir. 1999); See also *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d at 586.

²¹ *Shalala v. Guernsey Mem’l Hosp.*, 514 U.S. 87, 100 (1995).

operations. Instead, the NRC should maintain the flexibility to work with licensees to address decommissioning assurance fund shortfalls in a reasonably expeditious manner, informed by factors such as the amount of the shortfall, the date the funds will be necessary, and market conditions at the time.

To illustrate this point, the funds for those merchant nuclear plants that were identified as having a shortfall in the most recent reporting period ending December 31, 2008, have collectively increased in value by well over \$300 million through July of this year with no action on the part of the NRC or the licensees. If the NRC had required a "true-up" of this shortfall amount by March 31 of this year, as the guidance proposes, the companies would have been forced to take swift action, before any market improvements were realized, at significant expense. For example, the cost of a letter of credit is approximately 4% of the assured value on an annual basis. Therefore a \$300 million letter of credit collectively would have cost the licensees \$12 million per year with no benefit to safety, operations or maintenance. The indirect costs of a parent guarantee are also significant. The licensee must set aside assets worth 6 times the value of the guarantee and may not pledge these assets as collateral for any other obligation.²² In this example, a \$300 million guarantee ties up \$1.8 billion in assets which can lead to stress on credit quality, and possibly even a ratings downgrade, due to reduced liquidity. If licensees had been forced to "true up" their funds, as the proposed guidance would require, the decommissioning funds would have been over-funded by this amount less than seven months later. The additional money would have been expended during a time of extremely tight liquidity and, possibly, at the expense of other more immediate priorities. Moreover, the additional funds could not be reallocated to other uses when market conditions improved and the additional funds were no longer necessary to meet minimum funding requirements.²³

As illustrated above, given the long-term time horizon for decommissioning, requiring immediate adjustments to funding assurance is unnecessary and may be counterproductive. Immediate adjustments could have the unintended consequence of decreasing fund quality over the long term. Specifically, requiring adjustments over a short period of time could invite poor fund investment behavior and create distortions in investment strategy – e.g., more frequent conversion of stable, long-term investments into higher-risk, shorter-term investments in an effort to increase near-term earnings and regain liquidity tied-up by funding mechanisms such as parent guarantees. In turn, this type of investment behavior could result in significant tax consequences and potential negative impacts on corporate credit ratings, thereby placing licensees in a less stable financial position.

Federal law recognizes the need for flexibility in an analogous situation – pension funding. When faced with a significant decline in retiree benefits last year due to the crisis in the financial markets, Congress quickly amended the relevant laws to provide flexibility to

²² See Appendix A to 10 C.F.R. Part 30.

²³ See 10 C.F.R. 50.82(a)(8).

employers. In response to the impact on long-term savings accounts such as pensions and other retirement benefits, Congress passed the Worker, Retiree, and Employer Recovery Act of 2008, without objection in the House and by unanimous consent in the Senate. This law changes the Pension Protection Act of 2006, reducing mandatory contributions and allowances and allowing employers to use alternative asset valuation methods for 2009 without prior IRS consent to ease the impact of market declines. Congress recognized that the short-term goals of the Pension Protection Act of 2006 were no longer valid and would potentially place unsustainable pressure on employers, resulting in job losses rather than achieving the worker security the law had intended.

Because of the long operating life of nuclear reactors, decommissioning funds, even more so than pension funds, are long-term investments that will grow over time to fulfill a future obligation. Over the investment period, market fluctuations are inevitable and the current NRC regulations are written to allow flexibility in responding to unfavorable market conditions. Despite the worst financial crisis since the Great Depression, the decommissioning funds for 70 percent of the operating nuclear reactors remained at or above the NRC required minimum levels. The conservatism applied to the NRC's decommissioning funding assurance program is clearly effective.

Suggested Revision to Section 2.1.5 for Merchant Plants

Given the arguments presented above, NEI recommends that Section 2.1.5 be revised to read:

[T]he licensee must adjust the amount of financial assurance being provided, such that it meets or exceeds the required amount.

~~This adjustment should occur within 3 months of each end-of-year recalculation of the minimum required funding assurance level required (i.e., by March 31 of the following year). If a biennial decommissioning funding status report is filed in a particular year, such report, which is due to be filed by March 31 of the filing year, should indicate that necessary adjustments to the licensee's financial assurance amount(s) and mechanism(s) have been made; or include a plan describing when such adjustments will be made and the financial assurance mechanisms the licensee anticipates using to make such adjustments. by the date the report is filed. In any event, pursuant to 10 CFR 50.75(b)(1) and (b)(2), the licensee must make any necessary adjustment annually, which requires that the necessary adjustments to the licensee's financial assurance amount(s) and mechanism(s) have been made no later than by the end of the year (i.e., by December 31 of the following year). The NRC will review such plans to correct estimated shortfalls on a case-by-case basis to determine whether the timing and financial assurance mechanisms proposed by the licensee provide adequate decommissioning funding assurance. The NRC will consider factors, such as the amount of the estimated shortfall, the date the funds will likely be necessary, and current market conditions to evaluate the proposed timing of such adjustments.~~

2. Sections 2.1.5 and 2.2.8.1: Frequency of Funding Adjustments for Regulated Plants

Section 2.1.5 also addresses the adjustment of funding amounts by regulated plants²⁴, stating:

A licensee that is an electric utility or that has access to nonbypassable charges sufficient to provide all funds needed for decommissioning, is not required by the NRC regulations to have a specific amount of financial assurance at the end of any given year, since such licensees are allowed to use external sinking funds exclusively as their financial assurance mechanisms. However, such a licensee must recalculate, on an annual basis, the minimum formula decommissioning cost estimate, using 10 C.F.R. § 50.75(c), and should adjust the schedule of future collections in connection with every rate case before its public utility commission, such that there is reasonable assurance of adequate decommissioning funding.²⁵

The current guidance allows rate-regulated licensees up to six years to make necessary adjustments to decommissioning funds.²⁶ As discussed at the August 20, 2009, public meeting, significant unintended consequences may arise if licensees are forced to address decommissioning funding "in every rate case before [their] public utility commission[s]." Specifically, such an approach could result in decommissioning funding assurance for regulated utilities being under constant review since many utilities have open dockets with their public utility commissions (PUCs) or other rate-regulating authority for a variety of issues at any given time. This would distract the PUCs from the business at hand and destabilize the decommissioning funding assurance process.

As NEI has proposed for merchant companies, flexibility should be provided for the rate-regulated utilities to work with the NRC and their rate-regulating authority to determine the most prudent path to restoring the decommissioning fund to the minimum balance in the event of a shortfall.

²⁴ The term "regulated plants" refers to nuclear power reactors operated by licensees that are "electric utilities" or have access to nonbypassable charges sufficient to provide all funds needed for decommissioning.

²⁵ DG-1229, at 13-14.

²⁶ Reg. Guide 1.159, Rev. 1, at 11-12.

NEI proposes revising the third paragraph in section 2.1.5 to read:

A licensee that is an electric utility or that has access to nonbypassable charges sufficient to provide all funds needed for decommissioning, is not required by the NRC regulations to have a specific amount of financial assurance at the end of any given year, since such licensees are allowed to use external sinking funds exclusively as their financial assurance mechanisms. However, such a licensee must recalculate, on an annual basis, the minimum formula decommissioning cost estimate, using 10 C.F.R. § 50.75(c). ~~and should adjust the schedule of future collections in connection with every rate case before its public utility commission.~~ Adjustment of the schedule for future collections should be made in connection with decommissioning-related rate determinations before the licensee's rate-setting authority such that there is reasonable assurance of adequate decommissioning funding.

In Section 2.2.8.1, the third sentence from the previous revision of Regulatory Guide 1.159 has been omitted. The sentence stating, "A reasonable time may be used to make up any deficit, consistent with the good-faith efforts to obtain appropriate rate relief," should be added back to the text. This is consistent with allowing the rate-regulating authority to exercise judgment in assessing fees from ratepayers.

3. Section 2.1.2: Use of the Current Value Method

Section 2.1.2 states:

The applicant or licensee should indicate that the method used provides, or will provide, at the projected cessation of operations, an amount at least equal to the estimated or certified decommissioning cost for the facility, when earnings are taken into account, as permitted by 10 CFR 50.75(e)(1)(i) and (ii). If a licensee uses a combination of different methods for assuring decommissioning funds, the combined total of the methods being used should equal the certification amount, plus adjustments projected to be needed. At its discretion, a licensee may use an assurance method to provide funds for the adjusted certification amount plus non-NRC-required decommissioning costs, as long as each portion can be identified.

The proposed Section 2.1.2 states that funding assurance in an amount equal to the certification amount plus projected "adjustments" must be provided if a combination of funding methods is used. The industry is unaware of a regulatory requirement for funding in excess of the certification amount, unless the licensee is using a site specific cost estimate. Although it is unclear what "adjustments" are being contemplated in Section 2.1.2, in recent discussions with licensees the NRC has asserted that they intend to calculate decommissioning funding shortfalls in a manner that ignores methods that have been acceptable to the NRC in the past, and would result in significantly higher expectations for guarantee funding mechanisms, including parent company guarantees and letters of credit.

NRC decommissioning funding precedent has been premised on consideration of current value funding obligations. In several licensing actions involving license transfers, the NRC has accepted the use of current values (i.e., the amount that would be necessary to put in a fund today to assure full decommissioning funding at the time of plant shutdown). In the examples listed below, the NRC accepted the current value amount as the necessary funding assurance, whether in the form of an additional payment or in the form of a parent company guarantee, subject to annual updating of the guarantee amount.

Beaver Valley and Perry – License transfers to First Energy (December 16, 2005)

Nine Mile Point – License transfers to Constellation Energy (June 22, 2001)

Millstone Station – License transfers to Dominion (March 9, 2001)

As an example, assume that a plant required \$100 million per the NRC's minimum decommissioning formula and the plant's license expires on December 31, 2028. This plant would have required a minimum certification amount of \$67.3 million at the last biennial update assuming no future planned contributions to the fund and 2% real rate of return. If the plant had only \$47.3 million in the fund as of the last certification, then a parent guarantee of \$20 million would be sufficient to cover the shortfall. In such a case, use of the guarantee would be conditioned on annual review and updating to ensure that the parent guarantee keeps pace with the shortfall amount in the event that the fund did not grow in excess of the assumed 2% real rate of return.

To the contrary, the NRC has proposed an approach where the amount of the guarantee would have to be escalated at 2% to the date of decommissioning. If the NRC's proposed future value approach were used, the plant in the above example would have to provide a parent guarantee for \$29.7 million, instead of \$20 million. Importantly, as explained above, a \$20 million parent guarantee would restrict the use of \$120 million in assets, whereas a \$29.7 million parent guarantee would restrict the use of \$178 million in assets. This approach assumes that the value of the parent guarantee would never be adjusted and yet the rest of the decommissioning fund would still grow at the assumed 2% real rate of return. However, this assumption is inconsistent with past practice where use of parent guarantees has been conditioned on performing an annual review and update.

In addition to being impractical and overly conservative, the use of non-current value figures for decommissioning funding assurance is misleading and can have important implications related to financial reporting obligations. Mixing current and future values for the same obligation is at odds with generally accepted accounting practices regarding statements of guarantee obligations since a single method is commonly used to avoid confusion.

NEI recommends that Section 2.1.2 be revised to read:

The applicant or licensee should indicate that the method used provides, or will provide, at the projected cessation of operations, an amount at least equal to the estimated or

certified decommissioning cost for the facility, when earnings are taken into account, as permitted by 10 CFR 50.75(e)(1)(i) and (ii). ~~If a licensee uses a combination of different methods for assuring decommissioning funds, the combined total of the methods being used should equal the certification amount, plus adjustments projected to be needed.~~ If a licensee uses a combination of different methods for assuring decommissioning funds, the combined total of the methods being used should equal the current value of the certification amount. Use of a parent guarantee may require an annual review and update of the guarantee amount. At its discretion, a licensee may use an assurance method to provide funds for the adjusted certification amount plus non-NRC-required decommissioning costs, as long as each portion can be identified."

4. Section 2.3.1

In Section 2.3.1 on page 18 of DG-1229, the references to the appendices appear to be incorrect. For instance, the parent guarantee example document is shown on page A-31 as A-6.5 not Appendix B-6. The same issue applies to the appendix referenced in 2.4.2.

5. Section B

The last paragraph of Section B on page 8, references NUREG-1727, "NMSS Decommissioning Standard Review Plan," dated September 2000. This NUREG is no longer a current NRC document. NUREG-1727 was superseded by NUREG-1757, "Consolidated Decommissioning Guidance," dated September 2003. Volume 3 of NUREG-1757, titled "Financial Assurance, Recordkeeping, and Timeliness," Page 1-7, Section 1.3.3 contains the list of documents superseded by NUREG-1757, Volumes 1, 2, and 3, which includes NUREG-1727. It is also noted that NUREG-1757, Volume 3, is currently in the process of being revised by the NRC in support of the NRC's Proposed Rule on Decommissioning Planning (RIN 3150-AH45). The reference should be updated to the latest approved applicable NRC guidance at the time of publication of revision 2 of Regulatory Guide 1.159.