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WILLIAM F. CONWAY
EXECUTIVE VICE PRESIDENT
NUCLEAR

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September 7, 1989

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6/14/89

Regulatory Publications Branch, DFIPS
Office of Administration and Resources Management
U. S. Nuclear Regulatory Commission
Washington, D. C. 20555

Dear Sir:

Subject: Draft Regulatory Guide on Assuring the Availability of Funds for Decommissioning Nuclear Reactors
File: 89-057-026

The attached comments of Arizona Public Service Company, Southern California Edison Company, Public Service Company of New Mexico, El Paso Electric Company and, to a limited extent, Salt River Project Agricultural Improvement and Power District, who are Participants in the Arizona Nuclear Power Project and licensees of Palo Verde Nuclear Generating Station Units 1, 2, and 3, respond to the request for public comment on the Draft Regulatory Guide on Assuring the Availability of Funds for Decommissioning Nuclear Reactors (the "Draft Guide").

These comments were prepared by counsel and financial experts of such Participants/licensees, respectively, who are knowledgeable of existing arrangements for the accumulation of decommissioning funds and reviews thereof by the several state utility regulatory commissions that have jurisdiction over the various aspects of decommissioning.

If you have any questions respecting such comments or a need for further information, please contact A. C. Rogers of my staff at (602) 371-4041.

Sincerely,

WFConway

WFC/GS/jle

Attachment

cc: T. L. Chan
M. J. Davis
T. J. Polich
A. C. Gehr

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ATTACHMENT

These comments respond to the U.S. Nuclear Regulatory Commission (the "NRC") Office of Nuclear Regulatory Research request for public comment on the Draft Regulatory Guide On Assuring The Availability Of Funds For Decommissioning Nuclear Reactors (the "Draft Guide"), and are submitted on behalf of Arizona Public Service Company, Southern California Edison Company, Public Service Company of New Mexico, El Paso Electric Company, and, to a limited extent, Salt River Project Agricultural Improvement and Power District,[1/] who are Participants in the Arizona Nuclear Power Project ("ANPP") and licensees of Palo Verde Nuclear Generating Station ("Palo Verde") Units 1, 2 and 3.

We recognize the need to promptly provide guidance in implementing the decommissioning regulations recently promulgated and we appreciate the opportunity given us to comment on the Draft Guide. The statements of most of the Regulatory Positions set forth in the Draft Guide are correct and supportable. These comments only address those Regulatory Positions that we consider to be incorrectly stated or unsuitable or that require clarification.

1/ The Salt River Project ("SRP") is a political subdivision of the State of Arizona. Although it concurs with most of the comments herein, SRP specifically does not concur with, and these comments are not submitted on its behalf to the extent of, comments in respect of a §468A tax-qualified decommissioning trust, compliance with regulation by state utility commissions, Tax Qualified Trust Funds (Section III.I.1), and Requirements of Various Sale and Leaseback Transactions (Section III.I.2). SRP is submitting to the NRC under separate cover its own supplemental comments addressing concerns unique to SRP among the above identified Participants. SRP understands that Southern California Public Power Authority and the Department of Water and Power of the City of Los Angeles, who are also ANPP Participants, are independently submitting their own comments.

The inability of all ANPP Participants to comment jointly demonstrates that a form trust agreement cannot possibly serve the needs of every entity with decommissioning obligations and underscores the need for flexibility.

I. General Comment

Because of the complexity of the decommissioning regulations and the structure of the Draft Guide that focuses Regulatory Positions on subject matters, i.e., Amount of Funding and Funding Methods, it would be very helpful if a matrix chart or table were added to the Draft Guide showing the applicability of each Regulatory Position to each of the numerous categories of licensees, e.g., an electric utility licensee who elects to use the external sinking fund method based upon a facility-specific decommissioning cost estimate; a non-electric utility who elects to use the surety bond method or a parent company guarantee.

Such a matrix will assist every licensee in identifying those Regulatory Positions that are applicable to it. It also will assist the NRC staff in assuring itself that its Regulatory Positions reach all elements of the complex decommissioning regulations, e.g., the restriction that a licensee who uses a parent company guarantee method may not use such method in combination with any other method that would otherwise be permitted under paragraphs 50.75(b) and (d).

II. Regulatory Position 1.

A. Suggested Revision of Regulatory Position 1.2

The first sentence of Regulatory Position 1.2 is inaccurate and conflicts with Regulatory Position 1.5.1. The adjustment of "funds set aside" is applicable only in the situation where the total decommissioning fund has been "set aside," e.g. where a licensee has elected to use either the prepayment method or the surety method, insurance, or other guarantee method of providing financial assurance of decommissioning.

If an electric utility licensee has elected to use the external sinking fund method and has certified that the amounts to be accumulated under such method will be equal to or greater than the amount calculable pursuant to paragraph 50.75(c), then the "funds set aside" in any year would never equal such calculable amount until the end of the license term.

It is suggested that the substance of the following statements be substituted in lieu of the first sentence of Regulatory Position 1.2:

"Any electric utility licensee who certifies that financial assurance for decommissioning will be provided in an amount which may be more but not less than the amount stated in the table in paragraph 50.75(c)(1) and elects to use the external sinking fund method shall be prepared to demonstrate at any time that the funds set aside at such time are equal to or more than (A) such amount adjusted annually using a rate at least equal to that stated in paragraph 50.75(c)(2) multiplied by (B) the ratio obtained by dividing (C) the number of years and any portion thereof after July 27, 1990 to such time by (D) the number of years and any portion thereof after July 27, 1990 to the expiration of the term stated in the license for such licensee's facility.2/

"Any electric utility licensee who provides the same certification, but elects to use either the prepayment method or the surety method, insurance or other guaranty method must annually adjust the amount of the funds set aside under either such method to an amount not less than the minimum amount determined under paragraphs 50.75(c)(1) and (c)(2).

2/ The use of the date "July 27, 1990" is justified by the following statements in the Supplementary Information explaining the final rule on decommissioning:

"In reaching its conclusion not to permit use of internal reserve for decommissioning, the Commission believes it important not to impose inordinate financial burdens on licensees. The modification to the proposed rule is not expected to impose such a burden for several reasons. First, licensees have 2 years from the effective date of the final rule before they have to submit information regarding financial assurance . . . Finally, the rule does not require funds accumulated to date to be transferred to external reserves."

"Any electric utility licensee who certifies that financial assurance will be provided in an amount that is not less than that stated in the table in paragraph 50.75(c)(1) based on a facility-specific decommissioning cost estimate which meets Regulatory Positions 1.4 and 1.5 and elects to use the external sinking fund method shall adjust such cost estimate in accordance with Regulatory Position 1.5. Annual deposits to be made in the external sinking fund after each such adjustment shall meet Regulatory Position 2.4.5.[3/]

"All non-electric utility licensees must annually adjust the amount of the funds set aside under the prepayment method or the amount assured under the surety bond, insurance or other guarantee method."

B. Conforming Revisions to Regulatory Position 1.5

If Regulatory Position 1.2 is modified in a manner that meets the substance of the recommended statements set forth in Section II.A above, then the introductory paragraph of Regulatory Position 1.5 should be modified to read in substance as follows:

"Cost estimates of decommissioning used as a basis for certifications provided by electric utility licensees pursuant to paragraph 50.75(b) or provided by non-electric utility licensees pursuant to paragraph 50.75(d) or provided by any licensee pursuant to paragraphs 50.75(f) and 50.82(b) should be reviewed and adjusted, during both operation and any storage periods, as provided in the following Regulatory Positions 1.5.1, 1.5.2 and 1.5.3, and the funding provisions necessary to comply with any method described in paragraph 50.75(e) should be modified as appropriate to provide the required

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3/ Regulatory Position 2.4.5 is improperly numbered in the Draft Guide and should have been numbered 2.2.5, although it should be renumbered 2.2.4 if Regulatory Position 2.2.1 is deleted as recommended in Sections III.D through III.I of these comments.

financial assurance of decommissioning based on cost estimates so adjusted."

Additionally, the second sentence of Regulatory Position 1.5.1 should be deleted since the substance thereof is adequately dealt with in the suggested revisions of Regulatory Position 1.2.

III. Regulatory Position 2

A. Definition of "Financial Instrument"

Regulatory Positions 2.1.3 and 2.1.4 use the undefined term "financial instrument." The same term also appears in paragraph 50.75(b) which is applicable to electric utility licensees. It is suggested that the Draft Guide should include a definition of the term.

Such definition should include certificates of deposit, surety bonds, letters of credit, insurance and guarantees. Trust agreements and escrow agreements should be excluded from the definition, since, in normal parlance, trust agreements and escrow agreements are custodial agreements that impose fiduciary obligations upon a trustee or an escrow agent. As such, they are distinguishable from a promise to pay stated sums of money which is the primary characteristic of certificates of deposit, surety bonds, letters of credit, insurance and guarantees. It is noted that the difference between "financial instruments" and trust or escrow agreements appears to be acknowledged in Regulatory Position 2.2.2 where the term "fund instrument" is used to describe both trust agreements and escrow agreements.

B. Amount of External Sinking Funds Available at Removal from Service.

It is recommended that Regulatory Position 2.1.5 be modified in a manner that makes explicit that the amount of decommissioning funds required to be accumulated by an electric utility licensee and available when a licensed facility is permanently removed from service may be less than the then current decommissioning estimate if such licensee can demonstrate that the earnings that may reasonably be expected on the accumulated funds available at the time of permanent removal will exceed the effects of inflation that may reasonably be expected during the period from such permanent removal to the completion of decommissioning work (a "positive earnings spread"). This adjustment appears to be implicit in Regulatory Position 2.1.5, but should be made explicit for several reasons.

First, it is not unlikely that the rate of earned income on investments of an accumulation of funds that is almost sufficient to pay the costs of decommissioning will exceed the rate of inflation during the last years of operation, during any storage period and during the period from the commencement to completion of decommissioning work. Second, the amount by which aggregate earned income may exceed the aggregate effects of inflation during such periods could result in significant overfunding of actual decommissioning costs.4/ Third, in all likelihood, any overfunding that has been recovered from customers of an electric utility licensee will have to be returned to the utility's customers through cash refunds or rate reductions or both. In any case, the customers receiving the benefit of refunds or rate reductions will not be the same customers as those who provided the overfunding. Fourth, if the fact that earned income will exceed inflation after removal from service can be reasonably demonstrated to the satisfaction of the NRC, it would be unreasonable to require that the amount of the funds to be accumulated at the time of permanent removal from service must equal the then estimated decommissioning costs that may not be expended for many years. Fifth, Regulatory Positions 1.5 and 2.4.5 (sic) will provide opportunities to take compensatory measures if the estimated positive earning spread is proven excessive or if actual income spread is proven to be negative.

C. Regulatory Position 2.1.6

Regulatory Position 2.1.6.2 requires that if ownership of a facility is transferred, the existing funding method is to be maintained until the new owner has submitted a certificate of financial assurance. This concept does not adequately recognize that decommissioning responsibility has been effectively separated from ownership in the case of many sale and leaseback transactions entered into by public utilities since 1985. See discussion of sale and leaseback transactions in Section III.I.2 of these comments. The NRC should, therefore, limit the guidance of Regulatory Position 2.1.6.2 to a situation in which a new owner also becomes a substitute licensee for

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4/ Arizona Public Service Company has estimated that if it is required to fully fund its share of the estimated termination costs at the date of removal of all three of the Palo Verde units, overfunding resulting from the excess of investment income over inflation could amount to $100 million.

all or a portion of a nuclear facility and has responsibility for decommissioning and financial assurance thereof.

In addition, Regulatory Position 2.1.6.1 contemplates the ability of licensees to change a funding method with the approval of the NRC. Regulatory Position 2.1.6.3, however, states merely that "[t]he funding method is to be maintained until the license is terminated." We believe this apparent inconsistency should be corrected and that Regulatory Position 2.1.6.3 should be revised to read:

> "Except as contemplated in Regulatory Position 2.1.6.1, the funding method is to be maintained until the license is terminated."

D. <u>There is No Regulatory Basis for Regulatory Position 2.2.1</u>.

There is no basis in the decommissioning regulations for Regulatory Position 2.2.1 which would require electric utility licensees who elect to use either the prepayment method or the external sinking fund method to provide financial assurance for decommissioning to use the recommended form for trust agreements or escrow agreements. In the absence of any regulatory basis for this Position, it should be deleted in its entirety.

Sections III.E through III.I of these comments address the problems inherent in this Regulatory Position and Appendix B.3 of the Draft Guide. But putting aside these problems, there is nothing in either paragraph 50.75(e)(1) or 50.75(e)(3) that requires, explicitly or implicitly, that a trust agreement used for holding external sinking funds must conform to some specified language and form or that the form or language is even a matter subject to NRC staff review.

The provisions of subparagraph (B) of paragraph 50.75(e)(1)(iii) demonstrate that when the NRC wants to exercise a power to review, accept or reject either a trustee or a trust agreement, it does so explicitly. The contrast between the explicit statement in said subparagraph (B) that in the case of a <u>standby trust</u> "the trustee and trust must be acceptable to the

Commission"[5/] and the absence of any similar statement in paragraphs 50.75(e)(1) (i) or (ii) is sound, intrinsic evidence that the NRC did not intend to require any specific form or language of trust agreements for external sinking funds or prepayments. The sole criteria respecting such trusts set forth in such paragraphs are that the funds be set aside "in an account segregated from licensee assets and outside the licensee's administrative control."

The comment has previously been made that the term "financial instrument" used in 50.75(b) and Regulatory Positions 2.1.3 and 2.1.4 should be defined to exclude trust agreements. But even if such comment is rejected and 50.75(b) is interpreted as requiring the submission of a copy of the trust agreement used "to satisfy requirements of paragraph (e)," the requirements of subparagraph (ii) of such paragraph only go to (i) the segregation of the trust fund from licensee assets and (ii) the prohibition of administrative control of the trust account by the licensee. Therefore, any trust agreement that meets these criteria must be acceptable irrespective of its form or language.

Consequently, Regulatory Position 2.2.1 appears to be an engagement in rule-making that has not been sanctioned by and is impermissible under the NRC's rule-making procedures in 10 CFR Part 2. The Position also violates the basic premise supporting the development of Regulatory Guides, i.e., that they should provide guidance in implementing existing regulations and not become regulations themselves.

E. Existing Regulations Provide Sufficient Assurance of Adequate Funding for Decommissioning

The NRC regulations at paragraph 50.75(e)(3) provide that, for an electric utility, acceptable methods of providing financial assurance for the decommissioning of a nuclear power plant include an external sinking fund. Pursuant to paragraph 50.75(e)(1)(ii), an external sinking fund may be in the form of a trust. Regulatory Position 2.2 of the Draft Guide, however, provides for specific characteristics that a satisfactory trust fund "should" possess. We would request that the NRC

5/ See also 10 CFR 30.35(f)(2)(ii); 10 CFR Part 30, Appendix A, paragraph III.D; 10 CFR 40.36(e)(2) (ii); 10 CFR 70.25(f)(2)(ii); and 10 CFR 72.18(c)(2)(ii).

reconsider and/or clarify certain of these characteristics for the reasons discussed herein. Although these comments will focus particularly on NRC guidelines relating to decommissioning funding through use of a trust agreement, thoughts and considerations contained herein may be equally applicable to other methods of satisfying funding obligations for decommissioning.

We believe that existing NRC regulations provide sufficient assurance that utilities will properly meet their decommissioning funding requirements. Specifically, paragraph 50.75(b), which sets forth required funding obligations, and paragraph 50.75(e), which prescribes several alternative mechanisms for accumulating the required funding, should provide the NRC with adequate assurance that decommissioning funds will be available when needed.

Paragraph 50.75(b) requires that each electric utility submit a decommissioning report containing a certification that financial assurance for decommissioning will be provided in an amount that may be more but not less than the amount stated in subparagraph (c)(1), adjusted annually pursuant to the formula in subparagraph (c)(2), and using one of the funding mechanisms described in subparagraph (e) of that rule. These are established mandatory funding levels enforceable by the NRC. Paragraph 50.75(b) of the regulations also requires the licensee to submit to the NRC a copy of the financial instrument obtained to satisfy the requirement of paragraph 50.75(e). As noted above in Section III.A of these comments, the meaning and effect of the term "financial instrument" is unclear and, we believe, should not include a trust agreement. If our comments in Section III.A are rejected, however, and paragraph 50.75(b) of the regulations is interpreted to require submittal of trust agreements utilized by utility/licensees, the NRC will thus have the opportunity to review such agreements and may determine at such time if additional regulations are necessary with respect thereto.

Paragraph 50.75(e)(3) allows use of an external sinking fund to provide financial assurance for decommissioning. Such a fund is defined in paragraph 50.75(e)(1)(ii) as follows:

> An external sinking fund is a fund established and maintained by setting funds aside periodically in an account segregated from licensee assets and outside the licensee's administrative

> control in which the total amount of funds would be sufficient to pay decommissioning costs at the time termination of operation is expected.

This definition, and particularly the requirement that the account be segregated from the licensee's assets and outside of its administrative control, adequately addresses the NRC's concern that, once funded, account assets will be protected and will be available for the purposes for which they are intended, i.e., to fund decommissioning.

In addition, the Draft Guide suggests additional guidelines and criteria for decommissioning trust agreements in Regulatory Positions 2.2.2 through 2.4.5 (sic), which if slightly revised as suggested in these comments should adequately protect the valid interests of the NRC, while not presenting insurmountable problems to complying utilities. For example, Regulatory Position 2.2.2 deals with authorization of the individual signing the fund instrument and maintenance of that instrument in the licensee's records, and Regulatory Position 2.2.3 contains requirements for selecting a trustee for an external sinking fund. Regulatory Positions 2.2.4 and 2.4.5 (sic) also deal with matters of obvious concern to the NRC, but require certain revisions as discussed herein.

In light of the above, we feel that the NRC has already given the industry sufficient guidance as to the drafting and structuring of decommissioning trust fund agreements, and has adequately assured that its concerns and interests in that process will be protected.

F. Any Mandatory or "Recommended" Wording for Trust Fund Agreement is Improper and Inadvisable

Notwithstanding the above, Regulatory Position 2.2.1 of the Draft Guide provides that an applicant or licensee using a trust fund "to satisfy paragraph 50.75(c) should use the recommended wording" for such a fund contained in Appendix B.3 of the Draft Guide.[6/] In contrast, the introductory language to Appendix B provides

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6/ Although the ANPP Participants who are participating in these comments are particularly concerned with the trust agreement language of Appendix B.3, these arguments are equally applicable to all "recommended" language in Appendix B.

that while the recommended language "is not required, its use will simplify the submittal process and expedite NRC review." Regulatory Position 2.2.1, when read in conjunction with the introductory comments to Appendix B, may, in effect, make the language in the sample trust fund agreement mandatory. Even if the sample language is consistently characterized as being merely "recommended," however, in practical effect, utilities may feel compelled to utilize such language and/or other regulatory bodies may impose such "recommended" language upon a utility, and this could result in substantial uncertainties and additional expense for some utilities and serious problems for others.

It is our recommendation that the NRC not attempt to dictate or even recommend a standardized form of decommissioning trust agreement or other financial assurance instrument like those contained in Appendix B of the Draft Guide. As to utilities that are subject to state utility commission regulation, we believe that the NRC should recognize and accept trust agreement language that has been reviewed and approved (explicitly or otherwise) by state public utility commissions. In circumstances where state approval is not required, we believe that existing regulations, as well as acceptable portions of the Draft Guide, already provide adequate guidance to utilities and provide the NRC with all the protection it needs in the area. Furthermore, as indicated above in Section III.D of these comments, the Regulatory Guide may not impose a requirement to use "recommended" trust agreement language unless 10 CFR 50.75 is duly amended in accordance with the NRC's rule-making procedures.

A requirement of particular wording for decommissioning trust fund agreements is overly restrictive and will not result in benefits even remotely commensurate with the burdens imposed upon complying utilities. Any benefits gained by the NRC through uniformity and ease of review of trust agreement language are greatly outweighed by (i) the fact that the draft trust agreement language is simply insufficient in a number of respects to deal with major concerns of utility licensees and does not at all reflect the current practices and trends being utilized and developed in the industry for existing decommissioning trust agreements; (ii) the fact that it would be almost impossible to develop a single, all-inclusive, satisfactory form of trust agreement that would adequately satisfy the needs of all utilities and the concerns of all state regulatory agencies; and (iii) the fact that the flexibility of utilities in drafting even minor terms of a trust agreement and their ability to

deal with particular and unique circumstances and concerns would be seriously restricted. The reluctance of the Participants in Palo Verde, a single nuclear facility, to join in a common response to the proposed form trust agreement demonstrates undeniably that any required form would be inadequate.

A number of electric utility licensees already have existing decommissioning trust agreements in place. Of the five ANPP Participants who are participating in these comments, for example, four of such utilities have already begun the process of funding for decommissioning under an existing trust agreement and the fifth has begun to fund internally and is preparing a request for an Internal Revenue Service private letter ruling to guide its drafting of an appropriate trust agreement. For the NRC to require or even "recommend" particular wording for such an agreement may in effect require each of such utilities to go through considerable trouble and expense in renegotiating its agreement with the various parties thereto and, if the sample language in the Draft Guide is to be utilized, may actually result in a lesser degree of protection to the utility and the decommissioning fund than was provided for in the original agreement. Further elucidation of how such a result may occur is provided below in discussions of particular provisions of the sample trust agreement.

Furthermore, in certain cases, a utility will have already received approval from its state regulatory commission for specific language in an existing decommissioning trust agreement. Such an approved agreement that is not in violation of the regulations, and otherwise complies with valid purposes of the NRC, should be acceptable to the NRC. A state regulatory body will generally have the same concerns respecting decommissioning and assuring the availability of funds therefor as does the NRC and may have additional concerns. A trust fund satisfactory to a state regulatory agency may, therefore, detail many requirements and responsibilities over and above those stated by the NRC. Thus, use of language approved (explicitly or otherwise) by a state utility commission would accomplish the intent of the regulations and the Draft Guide, i.e., to assure that adequate funds are available for decommissioning of nuclear facilities, while maintaining flexibility. We, therefore, request that, if the NRC intends to maintain any control over the language or content of decommissioning trust agreements, it include language in the final version of the Draft Guide (the "Final Guide") specifically recognizing, in respect of utilities subject

to state commission regulation, its acceptance of trust agreement language that has been approved (explicitly or otherwise) by a state utility commission.

Notwithstanding regulation at both the federal and state level, electric utilities generally are not government owned entities. Accordingly, they are accustomed to a competitive business environment and to the negotiation of the terms of their own agreements. Because a decommissioning trust entails the accumulation of an unusually large amount of capital, even the apparently minor terms of a trust fund agreement may be extremely important. Provisions in such an agreement that do not affect the security of the fund or impair the purposes for which it is formed, but that may have a significant impact on a utility licensee or that may give the utility licensee additional comfort in an area of concern, should be allowable. A utility should be able to freely negotiate such terms in order to ensure that the needs of both the utility and the trust fund are satisfied.

As noted above, the utility industry has gained a great deal of experience in the past few years concerning, among other things, what is and is not appropriate for coverage in a decommissioning trust fund agreement, how to establish such an agreement in compliance with rules of the NRC, state regulatory bodies, and the Internal Revenue Service, and what responsibilities and liabilities a trustee of such a trust is willing to bear. The NRC may wish to request voluntary early submittal of existing trust agreements to sample current industry standards in this area. To date, the industry has not found it problematic to obtain high quality decommissioning trustees who are willing and able to satisfy the needs of utilities in this area. We feel that it would be extremely detrimental to the industry, the NRC, and the public, if the NRC were effectively to preclude any further growth of knowledge and experience in the area of decommissioning funding by prescribing static trust agreement language. No single form of nuclear decommissioning trust agreement can adequately serve the needs of every utility, the NRC, the public, and the states in all circumstances.7/

7/ On page 5 of the Draft Guide, the NRC notes that the recommended language for financial assurance instruments is taken from NUREG-1336, "Interim Guidance on the Standard Format and Content of Financial Assurance

[Cont'd on next page]

We suggest, therefore, that the Final Guide delete any form of mandatory or "suggested" sample trust agreement language and that the NRC instead rely on criteria already presented to the industry in the regulations and in acceptable portions of the Draft Guide. No additional guidelines or criteria should be included without comment and review by affected parties.

G. Commission or State Agency as Beneficiary of Trust Fund

Before discussing particular provisions of the sample trust agreement that may cause concern or uncertainty to particular utilities, we note that a "Trust Fund" is defined in Appendix A to the Draft Guide as

> [a]n irrevocable three-party agreement whereby the licensee or applicant, called the grantor or trustor, transfers assets at least equal to the cost of decommissioning to a trustee, such as a bank, to hold on behalf of the beneficiary, the Commission, or a State agency. (Emphasis supplied)

The designation of the NRC or a state agency as a beneficiary of a decommissioning trust is improper and unnecessary. Neither should have any beneficial interest in the trust funds because neither has any decommissioning obligation. The only persons who could properly be beneficiaries of a trust established for funding the decommissioning of a nuclear power plant are the licensee, who is by law responsible for such decommissioning, and the owner(s) of the plant to be decommissioned, if different from the licensee.

The current NRC regulations discussed above and other provisions of the Draft Guide give the NRC

7/ [Cont'd from previous page]

Mechanisms Required for Decommissioning under 10 CFR Parts 30, 40, and 70." NUREG-1336, however, relates to materials licensees whose funding obligations are more than two to three orders of magnitude less than those required of reactor licensees. These two types of entities present significantly different concerns and language appropriate to one may not be satisfactory to the other.

substantial control over decommissioning and the funding therefor. It is not necessary, for example, for the NRC or any state agency to be beneficiary of the trust in order to assure that funds be used solely for the purpose of paying for decommissioning costs. If the NRC feels that further guidance in this area is necessary, it could require by gereral regulations or other guidelines that, until final completion of decommissioning, the trust funds may not be used for any purpose other than to pay for trust expenses and decommissioning costs, as specified in the regulations, and, for those trusts that may provide for funding of additional costs associated with decommissioning activities beyond those required for license termination, for such additional costs.

Finally, declaring the NRC or a state agency to be the beneficiary of the trust would make it appear as if the NRC or state agency is responsible for carrying out decommissioning. The process of decommissioning, however, is the responsibility of the licensee, and trust disbursements for decommissioning are made to, or at the direction of, the licensee, not the NRC or any state agency. In addition, upon completion of decommissioning, any residual value left in the trust belongs to the licensee or its successors and assigns. Accordingly, because the NRC and the states do not play a direct role in decommissioning, but rather act only in a supervisory or regulatory capacity, the licensee, but not the NRC or a state agency, should be the trust beneficiary. (In addition, in certain circumstances, where necessary to satisfy sale and leaseback obligations, a trustee of an owner-trust may also be a limited beneficiary. See discussion of sale and leaseback transactions in Section III.I.2 below.) In light of the above, any requirement or criteria that the NRC or a state agency be the beneficiary of the trust would be extremely inappropriate.

H. Specific Comments on Sample Trust Fund Agreement Language -- Appendix B.3.1

As discussed above, we do not believe it possible to draft a single, standard form of trust agreement or other financial assurance instrument that will adequately protect the interests and provide for the needs and concerns of all persons in all circumstances. We also do not believe that a standardized form of trust agreement should be preferred over one which is separately negotiated on terms that will not only satisfy a utility's decommissioning funding requirements, but that will also best serve the particular needs of the utility.

The following comments on specific language of the NRC recommended sample trust agreement will illustrate a number of concerns of utilities that are not adequately addressed in the sample agreement, and further, that we believe cannot be adequately addressed in a single, all-inclusive and mandated document. Such comments will also indicate areas in which current industry decommissioning arrangements have developed greater protections to licensees, decommissioning funds, the public, and regulatory bodies than are provided in the NRC sample trust agreement.

We obviously cannot comment on every word of the sample agreement and any failure to comment on particular language or sections should not be taken to mean that we agree with such language or sections, that such language or sections adequately provide for all circumstances or concerns of a utility, or that such language or sections correspond conceptually or word-for-word with language in existing or contemplated trust agreements of the various ANPP Participants participating in these comments. The following comments, therefore, should not be taken as approving any sample language. As noted above, we do not feel it appropriate for the NRC to suggest or prescribe any trust agreement language, whether on major or minor issues that should be treated in a decommissioning trust agreement.

We also note that the administrative and substantive provisions of the sample trust agreement and the sample escrow agreement are inconsistent in a number of respects. For example, Paragraph 6(b) of the escrow agreement permits investments in time or demand deposits to the extent insured by an agency of the Federal government, while Section 6(b) of the sample trust agreement only refers to insured time or demand deposits of the trustee. Similarly, Paragraph 6(c) of the escrow agreement authorizes the escrow agent to hold cash without investing it "for a reasonable time," without any limit, while Section 6(c) of the trust agreement specifies a 60 day limit. These are only two illustrations of the problem of inconsistency; we have not attempted to describe every such inconsistency. We believe, however, that to the extent the NRC insists upon the use of recommended forms or recommended language, the forms and language should be identical except for those differences mandated by the nature of the instrument involved, in order to avoid unnecessary ambiguity and confusion for licensees attempting to comply with NRC requirements.

The section numbers referenced below refer to the section designations of the sample trust fund agreement (which may be referred to as the "Agreement") contained in Appendix B.3.1 of the Draft Guide.

1. Section 4

Section 4 of the Agreement allows payments to the trustee to be made in cash, securities, or other liquid assets acceptable to the trustee. We note that the NRC has indirectly recognized that utilities may decide to avail themselves of the benefits to be obtained by utilizing a tax-qualified "Nuclear Decommissioning Reserve Fund" referred to in Section 468A of the Internal Revenue Code of 1986, as amended (the "Code"). See Regulatory Position 2.2.4 of the Draft Guide. Only payments in cash are allowed for a tax-qualified trust. Treas. Reg. §1.468A-5(a)(2). This restriction would likely be specified in the trust instrument for such a trust.

Moreover, we do not believe it is necessary to limit the form of the deposits to the fund. The necessity for flexibility is illustrated by the decommissioning program of Public Service Company of New Mexico ("PNM"). Because of various logistical concerns, PNM's initial deposit to its decommissioning trust was in the form of existing insurance policies.

In any event, we do not believe that the standard for acceptability of trust deposits should be the discretion of the trustee. This is one more example of the excessive authority, discretion, and protection afforded the trustee by the Agreement, as will be discussed in further detail below.

2. Section 5

Section 5 of the Agreement deals with payment from the fund for decommissioning activities. Initially, we note that the word "Depositor" in the second line of Section 5.a is not defined or used elsewhere in the Agreement. We presume that the word "Grantor" (who would be a licensee of the facility being decommissioned) is intended. Similarly, we presume that the word "escrow" in the third line of Section 5.b.(3) is intended to read "trust."

We do not believe that it should be necessary for the NRC to specifically prescribe the contents of a certificate to be presented to the trustee of a decommissioning trust fund in order to authorize payments from the fund.

For instance, we fail to see that the NRC has any interest in requiring that the Secretary, as opposed to the Treasurer, a Vice President, or any other officer of a licensee, sign such a certificate. As to the matters prescribed in Section 5.b.(1)-(3), while we do not question the interest of the NRC as to such matters, they are issues between the NRC and the licensee, rather than between the licensee and the trustee of the trust fund. The NRC has already adequately provided for regulation of the licensee as to adoption and implementation of a plan of decommissioning and it is not necessary for the trust agreement to provide for such matters.

Furthermore, the requirement of 30 days' prior notice to the NRC as to any withdrawal of funds from the trust, as contained in Section 5.b.(3), is unduly restrictive. The licensee is required to decommission its facility in accordance with a specific plan of decommissioning to be approved by the NRC. It is in the interest of the NRC and the public that the licensee maintain flexibility to implement that plan and make payments for decommissioning in accordance therewith without undue notice restrictions for each and every withdrawal of funds. The likely results of such a restriction are increased decommissioning costs, due to additional financing costs associated with the disbursement delay, and/or delays of the actual decommissioning work.

Similarly, we question the necessity for the restrictions imposed by the second paragraph of Section 5, which states, "No withdrawal from the fund can exceed _____ percent of the outstanding balance of the Fund or _____ _____ dollars, whichever is greater, unless NRC approval is attached." We do not know what percentage or dollar limitations the NRC is contemplating in this regard, but we submit that a licensee who is proceeding with decommissioning in accordance with its NRC approved plan should not be subject to additional restrictions for specific payments out of the trust fund that are made pursuant to that approved plan. And further, we believe that if the NRC feels it necessary to impose such restrictions, it can best be accomplished by requiring specific provisions in the plan and not through the mechanism of a trust agreement that must be established substantially in advance of actual decommissioning.

As to the last paragraph of Section 5, generally, the problem of grantor default or inability to direct decommissioning would only arise in extreme situations where, for example, the grantor has ceased to exist. In such circumstances, the grantor's successor in interest

would take over the direction of decommissioning activities on behalf of the grantor. There may also exist various other mechanisms in any particular case that would provide for the continuation of decommissioning where the grantor is unable to act. See, for example, the protections provided in certain sale and leaseback transactions as described in Section III.I.2 of these comments. In any event, any concern of the NRC in this regard would be best dealt with through general regulations or guidelines and not by specifying all terms of a mandatory or recommended trust agreement. We further note that the last two sentences of the last paragraph of Section 5 are apparently intended to apply only in the event of default by the grantor in directing, or inability of the grantor to direct, decommissioning as described in the first sentence of that paragraph. As drafted, however, the meaning and intent of those sentences is far from clear. One possible interpretation is that the NRC will, in effect, have the authority to require licensees to pay for decommissioning costs as they are incurred and seek reimbursement from the decommissioning trust fund, reserving to the NRC the right to determine the amount of reimbursement allowed. As noted above, it is both unnecessary and inappropriate for the NRC to have these powers, even in the case of grantor default.

3. Section 6

Section 6 of the Agreement deals with trustee management and investment of the trust fund. First of all, we note that this section provides that the trustee is to discharge its duties with respect to the fund "solely in the interest of the beneficiary." (Emphasis added) We submit that this limitation is unnecessarily restrictive. We believe that the trustee should discharge its duties in the best interest of the beneficiary, which, as noted above, should be the licensee, and the trust fund itself.

As recognized by the NRC, the Code prescribes specific investments allowable for a tax-qualified trust. See Regulatory Position 2.2.4 of the Draft Guide. A utility that has established such a tax-qualified trust will be likely to impose specific restrictions and obligations on the trustee of such a trust in the area of allowable investments, etc. By stating that the trustee must discharge its duties "solely in the interest of the beneficiary" (emphasis added), the NRC could, depending on the circumstances, effectively limit the trustee's obligations to maintain the tax-qualified nature of the fund. This argument is particularly relevant in the NRC sample

agreement, where the NRC or a state agency is inappropriately specified as beneficiary of the trust. Moreover, the Internal Revenue Service could question whether the word "solely" in this context runs afoul of the requirement in the tax regulations that a qualified fund be established for the "exclusive purpose" of providing funds for the decommissioning of a nuclear power plant.

In addition, Section 6 assumes that the trustee will be the only person authorized to manage the fund's investments. It is presently a common practice in the industry for a utility to hire a professional investment manager or managers to invest and reinvest decommissioning trust fund assets. A decommissioning trust agreement should specifically allow for the hiring of a separate investment manager or managers to manage the trust fund's portfolio if the grantor so chooses. The Agreement currently contains no such provisions.

Section 6 also states that the trustee shall make investments for the fund "in accordance with general investment policies and guidelines which the Grantor may communicate in writing to the Trustee from time to time." We believe that as long as a licensee has no authority to use decommissioning trust funds for other than the payment of decommissioning costs (including, for certain trust funds, costs associated with decommissioning activities not required for license termination) and administrative costs associated with the fund, and particularly risky investment vehicles are prohibited, there is no reason why the licensee should not be allowed to direct individual investments from time to time, rather than merely establishing "general investment policies and guidelines."

Although a more in depth discussion of allowable investments for the fund is presented below in Section III.K.2 of these comments, we will briefly note here that the language of Regulatory Position 2.2.4 of the Draft Guide, the definition of "External Sinking Fund" in Appendix A, and the somewhat inconsistent language of Paragraph 6 and Section 6, respectively, of the recommended escrow agreement and trust agreement, create confusion about whether the NRC is purporting to mandate a list of <u>permitted</u> investments or <u>disallowed</u> investments, and the precise content of such list. It is our view that, if the NRC feels it necessary to regulate this area, the appropriate approach would be for it to clearly and unambiguously state only the <u>disallowed</u> investments, which should be clearly and narrowly drawn, in order to give the professional managers of the fund the necessary flexibility

to respond to changing market conditions over a long period of time.

Section 6 of the Agreement illustrates the confusion created by the current NRC approach, and the difficulties associated with requiring any particular language in a decommissioning trust agreement. Section 6 generally authorizes the trustee to invest and reinvest the trust funds, in accordance with investment policies and guidelines supplied by the licensee, using a "prudent man" standard. However, the trustee is prohibited from investing in (a) securities or other obligations of the grantor or any other owner or operator of the facility, or (b) time or demand deposits of the trustee to the extent they are not federally insured. We have no objection to prohibiting investments in the obligations of the licensee and other owners who are responsible for decommissioning the facility in question. The language of Section 6(a) would, however, also prohibit investments in the securities of financial institutions that may have acquired a technical ownership interest in the nuclear facility, but no responsibility for decommissioning, in connection with a sale and leaseback transaction. We do not believe that the latter prohibition is necessary or appropriate.

With respect to the prohibition on uninsured time or demand deposits of the trustee, we are not sure of the NRC's focus of concern. If the trustee has discretionary investment authority, the licensee might want to restrict self-dealing by the trustee, but we believe that decision should be left to the licensee. Over time, the funds in a decommissioning trust will amount to tens or hundreds of millions of dollars, while the maximum insured amount at one institution is $100,000. Requiring investments in $100,000 increments would prove to be overly restrictive. This same comment applies to Section 8(d) of the Agreement, which allows deposits in federally insured, interest-bearing accounts of the trustee or its affiliates. Moreover, this language raises the question of whether investments in the securities or other obligations of the trustee or other insured financial institutions, including repurchase agreements (some of which may be collateralized by U.S. government securities), which are frequently used by investment managers for short-term cash management purposes, are allowable even though not insured.

In addition, Section 6(c) of the Agreement provides that, "for a reasonable time, not to exceed 60 days, the trustee is authorized to hold uninvested cash, awaiting investment or distribution, without liability for

the payment of interest thereon." This provision grants a trustee unduly broad discretion. Not only is it unsound business practice to allow funds of this magnitude to go uninvested for a lengthy period of time, but such a practice would not be consistent with the general fiduciary duties of a trustee. In cases where funds are held in anticipation of investment or distribution, it would not be unreasonable to impose upon a trustee the duty to invest such funds in demand deposits or other short-term financial instruments, as specified in the trust agreement. Liquid investments of this nature would not restrict the trustee's ability to timely distribute funds or take advantage of other more favorable investment vehicles. We would also note that Section 6(b) of the Agreement specifically authorizes a trustee to invest in insured demand deposits.

As mentioned earlier in this letter, utilities have in fact been able to negotiate agreements on more favorable terms than those contained in the Agreement. This provision is a good example. It is unlikely that a private utility would allow a trustee to hold cash for up to two months without investment. Not only is this harmful from the utility's perspective, it is also a waste of the trust assets.

4. Section 7

This section allows the trustee to transfer assets to "any common, commingled, or collective trust fund." In contrast, Treas. Reg. §1.468-5(a)(3)(ii)(D) explicitly prohibits a tax-qualified trust from investing in "common or collective trust funds." The trustee is also permitted in Section 7(b) of the Agreement to invest in a registered investment company, while this is not allowed for tax purposes. We believe that it should be left to the licensee to determine whether such investments should be allowed.

5. Section 8

This section specifies the express powers of the trustee, including authority to dispose of trust property, deliver documents of conveyance, deal with securities in various ways, deposit cash in interest-bearing accounts of the trustee, and compromise claims in favor of or against the fund. While many or all of these provisions may be appropriate in a particular case, we believe that the need for such provisions should be left to negotiations between the licensee and trustee. None of these provisions are

necessary to protect the interests of the NRC or the public.

6. Section 9

Section 9 provides that all taxes, brokerage fees, and trustee expenses (except compensation of the trustee, which may be paid by the grantor) are to be paid from the fund. We believe that requiring such payments to be made from the fund does not provide adequate flexibility from either a funding or tax standpoint. Although we agree that the fund should be liable for the payment of most of such taxes, fees, costs, and expenses, the grantor may desire and should, at its option, be authorized to pay directly certain of the fees, costs or other expenses incurred by the trust. Such additional flexibility will not only benefit the grantor by allowing it to structure the payment of fees and expenses in whatever way is most advantageous to it, but could also benefit the trust, and certainly would not harm it.

There may also arise a situation in which a tax may be asserted against the fund that the utility/grantor believes to be unlawful or unwarranted. The utility may therefore desire to include language in its trust agreement allowing a challenge to any such tax as long as the trust fund would not be harmed thereby. Unless violative of a particular regulation or policy of the NRC, a utility should be freely able to adopt language in its trust agreement alleviating such concerns.

7. Section 10

Section 10 of the Agreement requires an annual valuation of the trust at least 30 days prior to the anniversary date of receipt of payment into the trust fund. This section is another example of a provision best left to negotiation of individual utilities. Although we definitely agree that at least an annual valuation of the trust assets should be required from a trustee, we strongly feel that an annual valuation is not sufficient. In order to properly evaluate the performance of the trustee or investment manager(s) with respect to the fund, the grantor may quite properly require quarterly or even monthly financials or reports showing investments made with fund assets during such period. It may also wish to provide that certain of such financial statements be audited. The utility may request and receive performance measurement reports for certain periods showing comparative index performance information with respect to the fund. A utility may also desire copies of each

confirmation of an execution of an order with a broker. Moreover, we see no reason why the annual report should be keyed to the anniversary date of establishment of the fund. A licensee might determine, for example, that the end of the licensee's fiscal year is more appropriate for financial accounting and tax reasons.

In addition, a tax-qualified decommissioning trust is a separate tax-paying entity required to make estimated income tax payments. Consequently, statements of trust operations will be required at least quarterly, and preferably monthly, if the trust is to meet such obligations. Such periodic information and reports also allow a grantor to be in a position to catch, and mitigate the consequences of, any violation of Code investment restrictions for a tax-qualified fund.

In sum, for the NRC to restrict the ability of a utility to require various kinds of reports and notifications from its trustee or investment manager(s) will seriously limit the ability of the grantor, as well as its regulatory agencies, to evaluate on an ongoing basis the performance of the fund and the manager thereof. We submit that it is not in the interest of the NRC, the public, or the grantor to limit the flexibility of a grantor to require various types of reports and information from managers of the fund.

Section 10 also provides that the failure of the grantor to file a written objection with the trustee within 90 days of the annual valuation shall constitute conclusive assent to the valuation by the grantor. We believe such a mandated waiver provision is unnecessary and does not provide any additional benefit to the NRC. Again, such terms are best left to negotiation between the utility and the trustee. In addition, the Agreement fails to adequately address the various reporting obligations that may be required with respect to the trust. For example, any trust agreement should, at least, contain a provision specifying who will prepare and file the appropriate tax returns and other reports that may be required under applicable law.

As described above, the provisions of the Agreement concerning reports required from the trustee provide an excellent example of why it would be wiser for the NRC to avoid suggesting language for financial assurance instruments and illustrate an area in which existing trust agreements of various utilities provide for substantially greater protection to the fund than does the NRC recommended language.

8. Section 11

This section broadly exculpates the trustee from actions taken upon the advice of counsel. While we have no objection to the general concept, we believe that the precise language of such paragraph is too broad and should be left to negotiation between the utility and the trustee.

9. Section 13

Section 13 of the Agreement provides that the trustee may resign, and the grantor may replace the trustee, only upon 90 days notice to the NRC or state agency. We note first of all that this provision does not call for any notice at all of trustee resignation to the grantor of the trust. Secondly, we submit that a 90-day period may be unnecessarily long for notice of trustee resignation. A 60-day period may be sufficient time in which to appoint a successor trustee particularly in light of the fact that the resignation may not, in any event, take effect until a successor is appointed. A utility should have flexibility to determine what notice period would best suit its needs under circumstances unique to it. In any event, as long as adequate provision is made in the trust agreement for continuation of trustee function, the particular terms of trustee resignation and successor appointment should be left to negotiation of the parties.

Furthermore, and consistent with our comments above in this letter, we feel that advance notice to the NRC or a state agency should not necessarily be required in all circumstances and for all parties. Although the provision, as written, does not permit the NRC or state agency to object to the resignation or appointment of a successor, such a notice provision may unduly restrict the ability of the grantor to quickly act to appoint a successor trustee. Although certain utilities may clearly be required to provide notice to a state regulatory body of any trustee resignation or of trustee removal, this is a matter between the state agency and the utility and need not be regulated by the NRC. If the NRC also desires any such notice, this is best provided for in regulations or other guidelines rather than through mandatory trust agreement language.

Similarly, we submit that any prescribed notice period for grantor removal of a trustee, with or without cause, is too restrictive. The grantor should be free to remove and replace a trustee at any time that it considers such action in the best interest of, or not detrimental to, the fund and itself. For instance, there may arise

situations in which the grantor feels that trust assets are being dissipated or endangered through improper or unauthorized investment of a trustee, or in which a trustee becomes insolvent, or is otherwise financially weakened to a point at which continuation of the fund with the trustee would not be prudent. The grantor must be in a position to act quickly when necessary to protect the fund and its own investments therein.

10. Section 14

Section 14 is also troublesome in the context of our comments earlier in this letter. Specifically, the third sentence of this section provides as follows:

> If the NRC or State agency issues orders, requests, or instructions to the Trustee these shall be in writing, signed by the NRC, State agency, or their designees, and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests, and instructions.

There is nothing in the Agreement that unambiguously states those circumstances in which the NRC or a state agency may give orders or instructions to a trustee. The provision quoted above may, in effect, be interpreted to grant the NRC or state agency discretion to control the trust and issue binding instructions to the trustee. This interpretation necessarily raises the issue of whose instructions or orders, i.e., the grantor's or NRC's, would have priority. Consistent with our analysis earlier in this letter, the NRC has adequate protection with respect to funding and administration of the trust and with respect to approval and implementation of a plan of decommissioning, such that it need not be a party to, nor beneficiary of, or otherwise have control over, the trust.

11. Section 15

Section 15 requires NRC or state agency approval to amend the Agreement. Consistent with our previous comments that the NRC need not have a direct interest in, or control over, the trust, neither NRC nor state agency approval for an amendment should be required. There may be situations in which a state regulatory body will assert the right to approve an amendment to a decommissioning trust agreement of a utility within its jurisdiction, but again, this is a matter between the utility and its state

supervisory organization. As to any NRC approval requirement, we note that the NRC is not required to execute or give its advance written approval even to the sample Agreement. Although unclear, NRC regulations currently in effect could be interpreted to require the submittal to the NRC of any decommissioning trust agreement. If the NRC feels that amendments to such an agreement should also be so submitted and that this is not already adequately provided for in the regulations, the NRC could specifically require such submittal through regulations. To require advance NRC approval for any such amendment, however, would be unduly burdensome and restrictive for the grantor, which should be in a position to act quickly to remedy any problems with the agreement or the trust fund.

Similarly, certain types of amendments should clearly not require NRC approval in any event. For example, in Section 6 of the Agreement, the NRC has recognized the right of the grantor to provide general investment policies and guidelines to the trustee from time to time. If such policies are provided initially as part of the trust agreement, any change therein may require amendment of such agreement. Change in investment guidelines may be required upon a change in tax law or otherwise. The grantor should have flexibility to implement such changes quickly without approval of the NRC. Amendments to a trust agreement executed solely for the purpose of complying with additional regulations of the NRC or a state regulatory body also should not require NRC approval.

12. Section 16

Section 16 of the Agreement again implies that the NRC or a state agency will be a party to the decommissioning trust agreement. As noted before in these comments, any such requirement is clearly inappropriate. If the NRC is concerned about premature termination of the trust, it can require the licensee to obtain its or an appropriate state agency's prior approval for trust termination. Any such requirement, however, would be best dealt with through general regulations or guideline criteria. It is not necessary that the NRC or state agency be a party to the trust agreement.

Furthermore, this section states that the trust must be irrevocable. Depending upon the particular tax and accounting consequences desired by a licensee, it may be advantageous for a decommissioning trust to be consolidated with the utility for accounting or tax purposes. A trust which is technically "irrevocable" may

cloud the ability of the licensee to consolidate the trust with its other operations for tax purposes. We do not believe that it is necessary to make the trust "irrevocable," since the NRC's interests are adequately protected by existing regulations. As noted above, the NRC may also require, through its rule making powers, that the trust may not be terminated without its consent and that trust funds may be expended only to pay decommissioning and associated costs.

13. Section 17

Section 17 of the Agreement provides the trustee with an excessive and unnecessary degree of protection from liability for its conduct and that of its agents and employees. Such protections will not benefit the NRC, the public, or any state agency, but will have a significant impact on the grantor and the trust.

The first sentence of Section 17 provides as follows:

> The Trustee shall not incur personal liability of any nature in connection with any action, made in good faith, in the administration of the trust, or in carrying out any direction by the Grantor, the NRC, or State agency, issued in accordance with this Agreement.

Although we do not disagree that trustees, under certain circumstances, may be entitled to some degree of protection when acting as a fiduciary of a trust, the degree of protection offered here is excessive. Acts or omissions in "good faith" could be construed to cover negligent or even grossly negligent acts or omissions of the trustee. We strongly feel it inappropriate for the NRC to require that a trustee be relieved from liability for its own negligence or that of its agents and employees. This is a matter that should be left to negotiation between the trustee and the grantor.

The second sentence of Section 17 provides as follows:

> The Trustee shall be indemnified and saved harmless by the Grantor or from the trust fund, or both, from and against any personal liability to which the Trustee may be subjected by reason

> of any act or conduct in its official capacity, including all expenses reasonably incurred in its defense in the event the Grantor fails to provide such defense. (Emphasis supplied)

As this provision is presently written, there is no limitation on the scope of indemnification to be provided to the trustee. The grantor or the trust fund will be required to indemnify the trustee for "any" act or conduct in its official capacity.

Arguably, indemnification under this provision could be required as to negligence, gross negligence, recklessness, or even intentional misconduct on the part of the trustee. The consequences to the grantor and the fund could be significant. As noted above, we feel that a trustee should be liable for the acts and omissions of itself and its agents and employees even when due merely to negligence. The trustee may have almost full control over the fund and should have responsibility therefor. Of course, no matter what the trustee does or does not do with respect to the fund, the grantor/licensee will still be responsible for decommissioning and its funding obligations therefor. By allowing the utility the right to freely negotiate terms in a trust agreement that place additional liability on the trustee for its own misconduct or negligence, the fund can only be benefitted.

The trustee could also become liable for an excise tax imposed under section 4951 of the Code for self-dealing by, for example, purchasing a security of its affiliate. Neither the trust nor the grantor should be required to indemnify the trustee for such a tax, even if the trustee arguably acted in "good faith." In addition, the trust cannot indemnify the trustee without violating the tax requirement that trust assets be used exclusively to pay decommissioning costs, administrative expenses, and make qualified investments. *See* Treas. Reg. §1.468-5(a)(3).

At this point we believe it is pertinent to point out that the overall tenor of the Agreement is unnecessarily biased in favor of the trustee. We fail to see the need for such bias inasmuch as it is not only disadvantageous to the grantor, but also the trust itself. Such a bias is clearly not the current industry standard.

14. Form of Certificate of Resolution and Acknowledgment

The Draft Guide contains a form Certificate of Resolution (Appendix B.3.2.2). While we do not object to a requirement that the board of directors of the utility approve the commencement of decommissioning activities, we do not believe that the NRC should specify the form of the resolution.

Appendix B.3.4 contains a draft form of the acknowledgment "that must accompany the trust agreement." While we do not object in principle to a requirement that the trust agreement be notarized, we believe the proper form of acknowledgment should be left to local law, and that a waiver or other adequate provision should be made for existing trust agreements that were not notarized at the time of their original execution.

I. Other Considerations Relating to Sample Trust Agreement Language

1. Tax-Qualified Trust Funds

The sample trust agreement contains no provisions to protect the tax-qualified nature of any tax-qualified fund. Section 468A of the Code provides substantial tax benefits with respect to payments made into a Nuclear Decommissioning Reserve Fund. However, section 468A and related provisions contain certain requirements and limitations on investments, contributions, disbursements, and other matters, which must be followed in order to maintain the fund's section 468A status. Accordingly, any trust agreement utilizing a tax-qualified fund should contain limitations and requirements consistent with section 468A to ensure that the tax-qualified nature of the fund is protected.

Although section 468A is designed to provide tax incentives for setting up a decommissioning trust fund, the funding limitations and other restrictions of section 468A are not consistent with the NRC regulations dealing with decommissioning trusts. For example, section 468A limits the amount that can be contributed to a tax qualified trust to the amount of decommissioning expense included in the utility's cost of service for rate-making purposes. The NRC regulations, on the other hand, require a decommissioning report to be submitted at the time an operating license is granted and adjustments to funding to be made annually over the life of the facility. These amounts will rarely be the same.

By itself, differing regulatory and tax requirements for funding are not a problem, because the income tax regulations provide that a tax-qualified fund can be supplemented with one or more non-qualified funds. *See* Treas. Reg. §1.468A-5(a)(1)(iii). It has therefore become quite common to provide for separate funds -- one tax-qualified and one non-qualified -- within a single trust agreement. The recommended form of trust agreement contained in Appendix B.3 of the Draft Guide, however, contains none of the required language necessary to accomplish this structure. Because the situations of different utilities will require different approaches to meeting both the tax and regulatory requirements, no single form of language can satisfactorily handle all situations.

2. Requirements of Various Sale and Leaseback Transactions

Since late 1985, a number of utilities, including three of the ANPP Participants (Arizona Public Service Company ("APS"), El Paso Electric Company ("El Paso") and PNM), have entered into sale and leaseback transactions with respect to certain of their interests in Palo Verde. In such transactions, generally described, an undivided percentage interest in a particular unit is sold to an owner-trust, the beneficiary of which is the equity participant for the transaction, and is then leased back by the utility. Thus, ownership of, and title to, the interest is in the trust/equity participant, while the utility/lessee remains the licensee and operator of the unit. In each of the sale and leaseback transactions entered into by APS, El Paso, and PNM, the NRC license for the particular Palo Verde unit being affected was amended to reflect such licensee's right to possess the unit as a lessee. In connection with such license amendments, the NRC received substantial information concerning the contemplated sale and leaseback transactions.

The sale and leaseback documents of APS, El Paso, and PNM all contain provisions that relate to the utility/lessee's obligation to decommission the affected unit and the funding therefor. For example, certain of the documents for APS' and El Paso's sale and leaseback transactions require full funding of estimated decommissioning costs by the end of the lease term, which is substantially in advance of the license expiration date. Additionally, such documents require that the trustee of the owner-trust be given a security interest in the fund. Other requirements for the fund and the determination of funding therefor are also specified. These requirements are in general more stringent and

conservative than those required by law, and all of them are designed to assure that adequate funds will be on hand and will be used solely to pay for decommissioning.

The security interest required to be given to the trustee of the owner-trust in the APS and El Paso transactions is intended to mandate application of the funds to pay decommissioning costs if the licensee/lessee defaults in doing so. These and similar provisions giving the owner-trusts the right to enforce provisions of the decommissioning trust in order to assure that the trust funds are adequate and are never used for any purpose other than decommissioning do not permit the NRC or a state agency to also be a beneficiary or have similar rights or powers.

Any decommissioning trust agreement established by APS, El Paso, and/or PNM must deal with these or similar terms and requirements. Other utilities that have entered into sale and leaseback transactions on their nuclear facilities will have similar concerns. The Agreement obviously does not contain language respecting sale and leaseback transaction obligations.

J. Definitions of Certain Terms (Appendix A)

1. The definition of "Certificate of Deposit" contained in Appendix A of the Draft Guide, coupled with the "Recommended Wording for Certificates of Deposit" (set forth in the Draft Guide as Appendix B.2) makes it unclear whether a "Certificate of Deposit" is intended to include demand deposits and other time deposits and whether a "certificate of deposit" issued by a financial institution other than a bank is acceptable. In addition, we believe it is unnecessary and counter-productive to specify particular wording for a certificate of deposit.

Banks and other financial institutions have, through experience and the advice of their own legal counsel, developed their own forms of certificates of deposit, which they are likely to be reluctant to modify. There is, in addition, an existing body of law that adequately addresses the operation and interpretation of certificates of deposit, as well as demand deposits. The creation by the NRC of its own subset of rules is unnecessary and will only create confusion.

Moreover, it is unclear whether the certificate of deposit rules and sample language are intended or could be interpreted to apply to a certificate of deposit purchased by a trustee of a decommissioning trust fund or an

escrow agent under an escrow agreement. In this regard, the security concerns of the NRC are adequately addressed by the existence of the trust or escrow arrangement itself, which would by its nature require that certificates of deposit be issued in the name of the trustee or the escrow holder and held for the benefit of the trust or the escrow.

2. The definition of "External Sinking Fund" contained in Appendix A of the Draft Guide states that the external sinking fund "can be in the form of a trust or escrow account using government securities, certificates of deposit, or deposits of investment grade corporate securities." If this language is interpreted as restricting allowable investments for a trust or escrow account, it appears to be inconsistent with the trust investments allowed under Regulatory Position 2.2.4 of the Draft Guide, and with the general flexibility allowed the trustee under the NRC's recommended form of trust agreement. Moreover, as will be discussed further in Section III.K.2 hereof, we believe that it is unnecessary and inappropriate for the NRC to dictate allowable investments. At least one of the ANPP participants, PNM, has already established a decommissioning funding program that is funded in large part through the use of corporate owned life insurance. There are also many other alternate investments in existence today or that may be developed over time, that provide a high degree of security.

Finally, we note also that the definition of "External Sinking Fund" in Appendix A of the Draft Guide is not consistent with the definition of that term contained in paragraph 50.75(e)(1)(ii) of the regulations.

3. The definition of "Trust Fund" in Appendix A requires an "irrevocable" agreement in favor of "the beneficiary, the Commission, or a state agency." As discussed in further detail above, we believe it is unnecessary that the trust arrangement be "irrevocable" or that the NRC or a state agency be named a beneficiary of the trust.

K. Other Miscellaneous Requirements for a Decommissioning Trust Fund Contained in Regulatory Position 2.2

1. Selection of Trustee

Regulatory Position 2.2.3 provides that the trustee of the fund should be an appropriate State or Federal government agency or an entity that has the authority to act as a trustee and whose trust operations are

regulated and examined by a Federal or State agency. The NRC sample trust agreement, however, in the first paragraph thereof, specifies that the trustee will be a national bank or other trustee acceptable to the NRC or state regulatory agency. This apparent inconsistency makes it difficult for a licensee to select an appropriate trustee in advance. We believe that the lang[illegible] of Regulatory Position 2.2.3 is satisfactory and, as argued above in this memorandum, the sample trust agreement language should be deleted in toto.

2. Allowable Trust Investments

Regulatory Position 2.2.4 of the Draft Guide states that the trust investments acceptable to the NRC are those investments that (1) comply with Section 468A of the Code or (2) are authorized by explicit instructions from a utility's state public utility commission or the Federal Energy Regulatory Commission ("FERC"). We do not think it appropriate for the NRC to prescribe the types of investments that are permissible for a decommissioning trust fund. There already exist adequate assurances that the trust fund will be protected and will be adequate to pay decommissioning costs when needed.

The interests of the NRC, the public, state regulatory bodies, and utilities on this issue are not diverse. A utility has no interest whatsoever in risking the assets of its decommissioning trust fund through imprudent investments, especially when the investment decisions for the trust are within the sole control of the trustee or investment manager(s) thereof. The investment guidelines established for a decommissioning trust fund are, therefore, likely to be quite conservative.

We clearly agree that investments allowable under section 468A of the Code should be allowable by the NRC. Investments specifically approved by a state regulatory body or FERC should also be acceptable. It is overly restrictive, however, to require explicit approval of allowable investments from FERC or the applicable state public utility commission. Some utilities will be regulated as to such investments by state law, rather than by a state utility commission or FERC. This is the case, for example, in the State of California. In addition, even where a state utility commission asserts jurisdiction over decommissioning fund investments, it may not be such commission's practice to issue explicit instructions regarding such matters. Investment guidelines may be submitted to a state agency responsible for public utility regulation, which may neither approve nor object to the

guidelines submitted. For example, the New Mexico Public Service Commission ("NMPSC") expressly authorized PNM's investment in insurance policies as part of its decommissioning funding program. However, other investment guidelines were specified in PNM's trust agreement, which was required to be submitted for review after the decommissioning program was approved by the NMPSC. The NMPSC did not object to the guidelines contained in the trust agreement, but declined to take any formal action approving the trust agreement.

Any state regulatory body or FERC interest in reviewing and approving such investment guidelines will be asserted by such bodies. Any investments that the NRC wishes to specifically preclude can be specified through appropriate regulations. See discussion above in Section III.H.3 of these comments. It is, however, unduly restrictive for the NRC to establish advance, strict, and generalized limitations on proper investment vehicles.

To the extent that Sections 6 and 7 of the NRC sample trust agreement language purport to establish guidelines or parameters regarding permissible investments, the foregoing comments equally apply to those sections.

3. Annual Deposits

First of all, we note that the formula contained in Regulatory Position 2.4.5 (sic) is extremely vague and is subject to varying interpretations. It appears to be an oversimplification which does not adequately address the concept that, in one common sinking fund arrangement, the annual deposits by the utility may remain equal, but the earnings on an ever-increasing fund will result in large total annual deposits (including earnings) in the later years. If the NRC's concern expressed in this Position is over the length of the allowable funding period, that concern can be addressed more directly than in this ambiguous formula.

In addition, this Position should specifically permit licensees to accumulate funds using a method approved or, in some cases, required by a state public utilities commission, since minor variations may occur from the proposed language of this subparagraph. For a utility that is funding for decommissioning in amounts that satisfy the required certification amounts stated in paragraph 50.75(b), there is little reason for the NRC to object to any appropriate method of funding.

For example, Regulatory Position 2.2.5 appears to mandate a funding methodology requiring deposits that will cause an accumulation at least as fast as that achieved by level amortization. If so, it is unduly restrictive. Some utilities recover decommissioning costs in rates by a skewed stream so that each year's ratepayers bear the same economic burden, taking into account deflation in the purchasing power of the dollar. Under current studies that means that decommissioning costs recovered in rates in each year is slightly higher than the decommissioning costs recovered in rates in the immediately preceding year. Since the state rate-making agency requires the utility subject thereto to deposit in its decommissioning trust fund the costs it recovers, the deposit stream is similarly skewed, with deposits in the early years being slightly less than they would be with level amortization and deposits in the later years being slightly higher.

Other utility commissions may approve level amortization, but may have additional restrictions or requirements. Flexibility in this area that does not preclude satisfaction of the minimum certification amounts specified by the NRC in paragraph 50.75(b) of the regulations should be acceptable to the NRC. As long as a utility is funding in amounts that give reasonable assurance of the availability of monies for decommissioning when needed, the interest of the NRC in this regard will be satisfied. We suggest that it would be appropriate for the NRC to survey the requirements of the various states as to funding schedules and other deposit obligations and assumptions before attempting to unilaterally specify a single funding method for decommissioning. Otherwise, occasions may arise in which there would be conflicts between NRC and state regulation.

Finally, the arguments made in Section III.B of these comments concerning the acceptability of an assumed positive earnings spread also apply to Regulatory Position 2.4.5 (sic).

We would suggest, therefore, that Regulatory Position 2.4.5 (sic) of the Draft Guide be removed or revised to read generally as follows:

> "2.2._ Annual deposits in an external sinking fund including projected earnings, should be at least sufficient to satisfy the utility's obligation under paragraphs 50.75(b) and (f). Any method of funding approved (explicitly or otherwise) or required by a state

regulatory commission, or otherwise not in violation of the regulations in paragraph 50.75 is acceptable. In addition, a utility may utilize an assumed positive earnings spread, if such spread is demonstrated to be reasonable, through the termination of decommissioning work."

IV. Conclusion

For the reasons outlined above, it is our recommendation that the NRC not attempt to dictate or even recommend a standardized form of decommissioning trust agreement or other financial assurance instrument. We believe that the NRC should recognize and accept trust agreement language that has been reviewed and approved (explicitly or otherwise) by a state public utility commission. In circumstances where state approval is not required, we believe that existing regulations, as well as acceptable portions of the Draft Guide, already provide adequate guidance to utilities and provide the NRC with all the protection it needs in the area. No additional guidelines or criteria should be included without the opportunity for comment and review by affected parties.

We also believe it unnecessary and inappropriate for the NRC or a state agency to be the beneficiary of a decommissioning trust. Because it is the licensee's responsibility to decommission a nuclear facility, and because it will be the licensee who will be supervising decommissioning and disbursements from the fund for such costs, the licensee, and, in some circumstances, other owners of the plant to be decommissioned, if different than the licensee, should be the beneficiary(ies) of the trust.

With respect to investments for a nuclear decommissioning trust, investments other than those allowable under the Code or explicitly approved by a state regulatory body should be allowable. The NRC may also wish to specify particular investments that would not be allowable.

We also respectfully request that the NRC indicate its further intentions with respect to the Draft Guide as soon as possible. The submittal of the certification documents required by paragraph 50.75(b) of the regulations for existing licensees is required by July 26, 1990. It is our understanding that the NRC may not be issuing the Final Guide until shortly before such time.

This unfortunately imposes upon the industry a substantial degree of uncertainty as to how to comply with NRC intentions, especially in light of the various problems with the Draft Guide and sample trust agreement language discussed above. Another round of public comment before issuance of the Final Guide may also be appropriate.