

December 4, 1996

To: Dr. Lou Bykoski, NMSS/NRC

From: Matt Borick, Craig Dean, and John Collier, ICF Incorporated

Subject: Review of Trust Agreement Submitted by Public Service Company of Colorado

Public Service Company of Colorado in Platteville, Colorado, submitted an unexecuted draft trust agreement to address remaining decommissioning costs for the Fort St. Vrain Nuclear Generating Station, which is covered under a 10 CFR Part 50 license. The submission indicates that the licensee intends to execute the trust agreement by December 4, 1996, and that, at the time of execution, approximately \$5 million to \$9 million will be placed in the trust.

Upon review of the draft trust agreement, ICF recommends that NRC require the licensee to modify the submission in the following ways:

- (1) Submit a decommissioning cost estimate (10 CFR 50.75; *Regulatory Guide 1.159*, page 1.159-5);
- (2) Submit an executed copy of the trust agreement and evidence that the person signing the agreement for the licensee is authorized to represent the licensee (10 CFR Part 50.75 and *Regulatory Guide 1.159*, page 1.159-12);
- (3) Provide evidence that the trust is fully funded (*Regulatory Guide 1.159*);
- (4) Revise the first paragraph of the trust agreement to include the full address of the trustee (*Regulatory Guide 1.159*, page B-11);
- (5) Revise Section I and Section VI of the trust agreement to delete references to any "fiduciary" (*Regulatory Guide 1.159*, page B-11 through B-16);
- (6) Revise references to the trust's beneficiary in Section III and Section VI of the agreement (*Regulatory Guide 1.159*, pages B-11 and B-12);
- (7) Unless deemed unnecessary by NRC, revise Section IV of the trust agreement to include language limiting withdrawals to no more than 10 percent of the outstanding balance without written NRC approval (*Regulatory Guide 3.66*, page 4-12);
- (8) Revise Section VI of the agreement to clarify the restriction on investments in owners of nuclear generating facilities;
- (9) Revise the express powers of the trustee listed in Section VII of the trust agreement (*Regulatory Guide 1.159*, page B-13);
- (10) Revise Section VIII of the trust agreement to delete the added language (*Regulatory*

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Guide 1.159, page B-14);

- (11) Revise Section IX of the trust agreement to limit the time in which the licensee may object to the valuation of the fund (*Regulatory Guide 1.159, page B-14);*
- (12) Revise the resignation and replacement provisions in Section XII of the trust agreement (*Regulatory Guide 1.159, page B-14);*
- (13) Revise Section XIII of the trust agreement to specify the appropriate representatives of the licensee (*Regulatory Guide 1.159, page B-14);*
- (14) Revise Section XIII of the trust agreement to allow NRC to direct the trustee regarding the trust (*Regulatory Guide 1.159, pages B-14 and B-15);*
- (15) Revise the amendment provisions in Section XIV of the trust agreement (*Regulatory Guide 1.159, page B-15);*
- (16) Revise Section XV of the trust agreement to require NRC approval prior to termination of the trust (*Regulatory Guide 1.159, page B-15);*
- (17) Revise Section XVIII of the trust agreement to include a severability provision (*Regulatory Guide 1.159, page B-15);*
- (18) Revise the trust agreement to reference and include a specimen certificate of events and a specimen certificate of resolution to commence decommissioning (*Regulatory Guide 1.159, pages B-12, B-18 and B-19);* and
- (19) Submit a letter of acknowledgement with the trust agreement (*Regulatory Guide 1.159, page B-20).*

These recommendations and other issues are discussed below.

(1) Submit a Decommissioning Cost Estimate (10 CFR 50.75; *Regulatory Guide 1.159, page 1.159-5*)

NRC regulations (e.g., 10 CFR 50.75) require licensees to submit either a certification statement or a decommissioning cost estimate. The materials provided to ICF do not include either a certification statement or a cost estimate. In order to evaluate the adequacy of the amount of financial assurance provided by the licensee, ICF recommends that NRC require the licensee to submit a certification statement or a decommissioning cost estimate in compliance with the regulations, and to follow the guidance in NRC's *Regulatory Guide 1.159 "Assuring the Availability of Funds for Decommissioning Nuclear Reactors,"* August 1990, pages 1.159-5 through 1.159-7.

(2) Submit an Executed Copy of the Trust Agreement and Evidence that the Person Signing the Agreement for the Licensee is Authorized to Represent the Licensee (10 CFR Part 50.75 and *Regulatory Guide 1.159, page 1.159-12*)

The submitted trust agreement is an unexecuted draft and provides no financial assurance in its present form. The trust agreement must specify an execution date and must bear the appropriate signatures. ICF recommends that NRC require the licensee to execute the trust agreement as required by 10 CFR 50.75 and to submit a conformed copy or originally signed duplicate to NRC, along with evidence (e.g., a certified corporate resolution or a copy of the corporate by-laws) that the person signing the agreement for the licensee is authorized to represent the licensee, as recommended in *Regulatory Guide 1.159, page 1.159-12*. Prior to executing the agreement, however, the trust should be revised to address the recommendations discussed below.

(3) Provide Evidence that the Trust is Fully Funded (Regulatory Guide 1.159)

Had the submitted trust been executed (see Recommendation 2), the trust agreement would provide no assurance that the trust fund had been fully funded. For example, Section V of the trust agreement states that

On December __, 1996, the Company will deposit with the Trustee approximately \$ _____ in cash for the fund. In addition, the Fund shall include such cash and any other property subsequently transferred to the Trustee. (emphasis added)

This statement seems to anticipate that (1) the fund may not be funded until some time after it has been executed, (2) the level of funding may only "approximate" the level specified in the trust, and (3) that subsequent transfers of cash may be needed to fully fund the trust. Thus, the statement seems inconsistent with the trust fund being used as a prepayment (i.e., fully-funded) mechanism (as opposed to a trust fund being used as part of an external sinking fund).

To comply with NRC requirements that trusts be fully funded, ICF recommends that NRC require the licensee to submit evidence of the amount of funding along with the revised and executed trust agreement. Evidence may take the form of a written receipt or statement from the trustee which clearly indicates the amount of cash placed in the fund.

(4) Revise the First Paragraph of the Trust Agreement to Include the Full Address of the Trustee (Regulatory Guide 1.159, Page B-11)

The trust agreement does not identify the full address of the trustee, as is recommended in *Regulatory Guide 1.159*, page B-11. The trust identifies the trustee as "Wells Fargo Bank (Colorado) N.A., a national banking association." The trustee's full name and address is important in (1) allowing NRC to determine whether the trustee is qualified to act as trustee, and (2) ensuring that NRC will be able to communicate readily with the trustee (e.g., to order payment for required decommissioning activities). ICF recommends that NRC require the licensee to revise the trust agreement to include the trustee's full address (e.g., street address and zip code).

(5) Revise Section I and Section VI of the Trust Agreement to Delete References to Any "Fiduciary" (Regulatory Guide 1.159, page B-11 through B-16)

Section VI of the trust agreement places conditions on the trustee and any other "fiduciary" (defined in Section I of the agreement) who may be involved with the fund (e.g., in investing, reinvesting, and managing the fund). Fiduciaries other than the trustee could, presumably, be employed by either the trustee or by the licensee. Because such fiduciaries will not be parties to the trust agreement, however, they will not be governed by the agreement. Moreover, the agreement's reference to fiduciaries may reduce or eliminate the responsibility of the trustee in acting on imprudent recommendations (e.g., poor investment advice) or in allowing imprudent actions on the part of such fiduciaries. Thus, the references to fiduciaries may weaken the protections provided by the agreement. ICF recommends that NRC require the licensee to revise Sections I and VI of the trust agreement to delete references to any "fiduciary."

(6) Revise References to the Trust's Beneficiary in Section III and Section VI of the Agreement (Regulatory Guide 1.159, pages B-11 and B-12)

The trust states in Paragraph 2 (prior to Section I) that its purpose is to "provide assurance that funds will be available when needed for required decommissioning activities." Section III states that the trust is established "for the benefit of the decommissioning of the Company's Fort St. Vrain Nuclear Generating Station," which is a purpose rather than a specified beneficiary. Section VI of the agreement, moreover, states that the trustee (or any other fiduciary, as discussed in Recommendation 5) shall discharge its duties with respect to the fund "solely in the interest of and for the benefit of the Fund..." (emphasis added), instead of in the interest of the "beneficiary," as called for in *Regulatory Guide 1.159*, page B-12. Thus, neither Section III nor Section VI states clearly the beneficiary of the trust, and Section VI can be interpreted as not being in accordance with the goals of the fund.

ICF recommends that NRC require the licensee to revise the trust agreement in two ways. First, Section VI should be revised to state that the trustee will act "solely in the interest of the beneficiary of the Fund," as called for in *Regulatory Guide 1.159*, page B-12. This revision will reduce the possibility that the current language in Section VI could be misinterpreted to create a question about the purpose of the trust, or to suggest that the agreement is not enforceable because of vagueness. Second, Section III should be revised to state that the trust is established "for the benefit of the U.S. Nuclear Regulatory Commission and the decommissioning of the Company's Fort St. Vrain Nuclear Generating Station," as suggested in *Regulatory Guide 1.159*, page B-11. This revision will help avoid confusion about whether the trust is intended as a charitable or public trust, with an indefinite beneficiary, which might require it to meet additional legal standards.

(7) Unless Deemed Unnecessary by NRC, Revise Section IV of the Trust Agreement to Include Language Limiting Withdrawals to No More Than 10 Percent of the Outstanding Balance Without Written NRC Approval (*Regulatory Guide 3.66*, page 4-12)

Because the submitted trust agreement was modelled (in general) on guidance in *Regulatory Guide 1.159*, it does not include in Section IV the following provision which is recommended by *Regulatory Guide 3.66*, page 4-12: "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." NRC guidance specifies that the appropriate level to complete the blanks is 10 percent, meaning that no more than 10 percent of the outstanding balance of the trust may be withdrawn at a time without written approval from NRC. This provision provides NRC greater opportunity to monitor the licensee's decommissioning spending by requiring NRC approval for withdrawals larger than the specified amount. Unless NRC believes this provision is not necessary, ICF recommends that Section 5 of the submitted trust agreement be revised to add this provision.

(8) Revise Section VI of the Agreement to Clarify the Restriction on Investments in Owners of Nuclear Generating Facilities

Section VI of the trust agreement appropriately prohibits the trustee from investing funds in securities or other obligations of any owners of the licensed facility (see Other Issue e) or their affiliates. Section VI also restricts the extent to which the trustee may invest trust assets in entities that are owners or partial owners of other nuclear generating facilities to "2% of the Fund at cost or 4% of the Fund at market value." It is unclear, however, whether this restriction is intended to permit investment of a total of two or four percent of trust assets among all such investments, or whether numerous investments of two or four percent apiece may be allowed. In the latter case, it would be possible for 100 percent of the fund to be invested in entities owning nuclear generating facilities (e.g., 50 investments of two percent, or 25 investments of four percent).

To ensure that trust assets are adequately and appropriately diversified outside of the nuclear utility industry, ICF recommends that NRC require the licensee to revise Section VI to clarify that the above restriction applies to the total of all investments in entities owning nuclear generating facilities. For example, the third sentence of Section VI could be revised to include the phrase "in aggregate" as follows:

"Furthermore, at no time shall the Fund contain, *in aggregate*, securities or other obligations of companies or entities that are owners or partial owners of nuclear generating facilities...."

(9) Revise the Express Powers of the Trustee Listed in Section VII of the Trust Agreement (*Regulatory Guide 1.159*, page B-13)

Section VII ("Express Powers of Trustee") lists five express powers of the trustee that are not included in the corresponding section (Section 8) of *Regulatory Guide 1.159*, page B-13. Several of these powers could be problematic from a financial assurance standpoint, as discussed below:

Item 2 states that the trustee is authorized and empowered

To renew or extend the time or payment of any obligation, secured or unsecured, payable to or by this Fund, for as long a period or periods of time and on such terms as the Trustee shall determine...

This language seems redundant relative to similar language in Section VI of the trust. The language in Section VI seems more appropriate, however, because it qualifies that the trustee's authorities are to be exercised as "expedient to accomplish the purposes of the Fund." Item 2 above does not include such a qualification and, therefore, could be interpreted to expressly authorize actions that may in effect delay decommissioning for any period of time determined by the trustee.

Item 3 states that the trustee is authorized and empowered

To hold any stocks, bonds, securities, or other property in the name of a nominee, in a street name, or by other title-holding device, without indication of trust. (emphasis added)

The word "any" is not needed to convey what is probably the intended meaning of Item 3 (i.e., that the trustee may hold trust property in the name of a nominee, in a street name, or by other title-holding device, without indication of trust), and could inappropriately expand the investment options available to the trustee. In particular, if the trustee is expressly authorized to hold any stocks, bonds, securities or other property, then the general investment restrictions in Section VI of the agreement may no longer apply.

Item 4 states that the trustee is authorized and empowered

To borrow money in such amounts and upon such terms as the Company may authorize in writing as necessary to carry out the purposes of this Fund, and to pledge any securities or other property for the repayment of any such loan as the company may direct. (emphasis added)

This provision is problematic for two reasons. First, it would allow trust assets to be pledged as security or collateral for loans. If trust assets are secured by creditors, the assets may not be available to pay for decommissioning when needed. Thus, one of the primary advantages of trusts for financial assurance purposes (i.e., that they cannot usually be secured by creditors of the licensee) is negated. Second, the loans anticipated by the provision include "any such loan as the company may direct," which could potentially include loans to the licensee that are unrelated to decommissioning or to the NRC license; in this case, the licensee could, in effect, use a loan secured by the trust as a means to tap into the funds in the trust for any purpose. This negates another advantage of financial assurance trusts (i.e., that trust assets must be outside the administrative control of the licensee). Even if the provision clearly applied only to loans on behalf of the trust fund, it is unclear why the trustee of a fully-funded decommissioning trust fund would find it necessary to borrow money to carry out the purposes of the fund.

In order to ensure that the trust provides adequate financial assurance to NRC, ICF recommends that NRC require the licensee to revise Section VII of the trust agreement by (1) eliminating Item 2, (2) deleting the word "any" from Item 3, and (3) eliminating Item 4.

(10) **Revise Section VIII of the Trust Agreement to Delete the Added Language (*Regulatory Guide 1.159*, page B-14)**

Section VIII ("Taxes and Expenses") of the trust agreement submitted by the licensee includes the following sentence that is not part of the recommended wording in *Regulatory Guide 1.159*, page B-14:

All taxes of any kind incurred by the Company due to the inclusion of the Fund's income

on the Company's tax returns shall be reimbursed to the Company from the Fund upon certification of the proper amount by the Company.

Prepayment trusts are generally distinct legal entities that are responsible for paying their own taxes. Consequently, it is not clear why this provision should be necessary from the licensee's perspective. Even if income from the trust is transferred to the licensee (as may be appropriate assuming the amount remaining in the trust is at least equal to the remaining decommissioning costs), the transferred income should be an adequate source of funds from which the licensee could pay its own taxes on the earnings. The purpose of the trust is to ensure that adequate funds will be available to pay for decommissioning costs, not the tax obligations of the licensee. If the trust income is transferred to the licensee as well as additional funds to pay taxes, the amount remaining in the trust may not be adequate to pay for decommissioning costs. ICF recommends that NRC require the licensee to revise Section VIII of the trust agreement to delete the sentence shown above.

(11) Revise Section IX of the Trust Agreement to Limit the Time in which the Licensee May Object to the Valuation of the Fund (Regulatory Guide 1.159, page B-14)

Section IX ("Quarterly Valuation") of the submitted trust agreement contains provisions similar to those called for in the recommended wording in *Regulatory Guide 1.159*, page B-14, but omits the following provision:

The failure of the Grantor to object in writing to the Trustee within ___ days after the statement has been furnished to the Grantor shall constitute a conclusively binding assent by the Grantor, barring the grantor from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement.

This omission could allow the grantor any amount of time to object to matters disclosed in the valuation statement and, in turn, could possibly result in prolonged delays while disputes are settled. To help ensure that such delays do not jeopardize the completion of decommissioning activities in a timely manner, ICF recommends that NRC require the licensee to modify the valuation provisions in Section IX of the trust by adding the omitted provision limiting the time in which the licensee may object to the valuation of the fund.

(12) Revise the Resignation and Replacement Provisions in Section XII of the Trust Agreement (Regulatory Guide 1.159, page B-14)

The recommended wording for trust agreements in *Regulatory Guide 1.159*, page B-14, includes the following language pertaining to resignation or replacement of the trustee:

Upon ___ days notice to the Grantor, the Trustee may resign; upon ___ days notice to the Trustee, the Grantor may replace the Trustee; but such resignation or replacement shall not be effective until the Grantor has either appointed a successor Trustee and this successor accepts the appointment or implements another financial assurance mechanism specified in Title 10, Chapter I, Code of Federal Regulations, Section 50.75(e).

Section XII of the submitted trust agreement replaces this language with the following language: "Upon at least thirty (30) days prior written notice, the Trustee may resign or the Company may remove and replace the Trustee." This modification raises two issues. First, the 30 days afforded by the submitted trust may not allow NRC or the licensee adequate time to secure an alternate trustee or to transfer the trust funds to the successor trustee. Although the recommended wording in *Regulatory Guide 1.159* does not formally specify an appropriate notification period for resignation or replacement of the trustee, *Regulatory Guide 3.66* calls for a notification period of 90 days.

Second, omission of the clause governing when the resignation or replacement will be effective is problematic because this clause ensures that a trustee is continually managing the fund or, if not, that the licensee has secured alternative financial assurance. ICF recommends that NRC require the licensee to modify Section XII of the trust agreement to (1) provide at least 90 days notification of trustee resignation or replacement and (2)

include the conditions on trustee resignation or replacement called for in *Regulatory Guide 1.159*, page B-14.

(13) Revise Section XIII of the Trust Agreement to Specify the Appropriate Representatives of the Licensee (*Regulatory Guide 1.159*, page B-14)

Section 14 ("Instructions to the Trustee") of the recommended wording for trust agreements in *Regulatory Guide 1.159*, page B-14, includes the following language:

All orders, requests, and instructions by the Grantor to the Trustee shall be in writing, signed by such persons as are signatories to this agreement or such other designees as the Grantor may designate in writing. (emphasis added)

The corresponding section (Section XIII) in the submitted trust agreement replaces the underlined wording above with the phrase "proper officers of the Company." The submission does not, however, identify the "proper officers" of the licensee. Consequently, the trustee may not be able to determine whether certain orders, requests, and instructions are authorized. ICF recommends that NRC require the licensee to revise Section XIII of the trust agreement to specify the appropriate representatives of the licensee. Specifically, the licensee should replace the phrase "proper officers of the Company" in Section XIII with a list of the appropriate officers or with the recommended language from *Regulatory Guide 1.159*, page B 14.

(14) Revise Section XIII of the Trust Agreement to Allow NRC to Direct the Trustee Regarding the Trust (*Regulatory Guide 1.159*, pages B-14 and B-15)

Section XIII ("Instructions to the Trustee") of the submitted trust agreement does not provide any role for NRC to issue instructions to the trustee. In contrast, the recommended wording in *Regulatory Guide 1.159*, pages B-14 and B-15, calls for this section to include the following language:

If the NRC or State agency issues orders, requests, or instructions to the Trustee in the event of Grantor default, 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.

Without this sentence, the trust agreement may not allow the trustee to respond to orders, requests, or instructions from NRC. Thus, NRC's powers and protections may be significantly diminished. To ensure the trust functions properly in the event of the default of the licensee, ICF recommends that NRC require the licensee to revise Section XIII to incorporate the language shown above, as called for in *Regulatory Guide 1.159*, pages B-14 and B-15.

(15) Revise the Amendment Provisions in Section XIV of the Trust Agreement (*Regulatory Guide 1.159*, page B-15)

Section XIV ("Amendment of Agreement") of the submitted trust agreement contains the following amendment provision:

This Agreement may be amended by the Company to the extent necessary or helpful to comply with regulators (sic), rules or orders by the Nuclear Regulatory Commission, an agency of the federal government. No amendment may be made, however, by the Company without the written consent of the Trustee if the amendment increases the responsibilities of the Trustee under this Agreement. Any amendment must be made in writing.

This provision is inadequate for two reasons. First, it allows the trust agreement to be amended without NRC's approval of the specific amendment. As a result, the specific wording of amendments could reduce the protections provided to NRC by the trust. Second, it does not provide a means for amending the agreement in the event that the licensee no longer exists.

ICF recommends that NRC require the licensee to replace the wording currently in Section XIV with the following language which is based on the recommended wording in *Regulatory Guide 1.159*, page B-15:

This Agreement may be amended by an instrument in writing executed by the Grantor, the Trustee, and the NRC, or by the Trustee and the NRC if the Grantor ceases to exist.

(16) Revise Section XV of the Trust Agreement to Require NRC Approval Prior to Termination of the Trust (*Regulatory Guide 1.159*, page B-15)

Section XV ("Irrevocability and Termination") of the trust agreement submitted by the licensee states the following:

Subject to the right of the parties to amend this Agreement as provided in Section XIV, this Agreement shall be irrevocable and shall continue until terminated by payment of decommissioning costs for the Fort St. Vrain Nuclear Generating Station from the Fund as provided in Section IV hereof, or upon the written agreement of the Company and the Trustee. Upon termination of the Fund, any remaining trust property in excess of decommissioning expenses contemplated by the terms of the Fund shall revert to the Company. (emphasis added)

This provision is of potential concern to NRC for several reasons. First, it states that the agreement will be "terminated by payment of decommissioning costs," but does not clearly state what this means or how it will be determined. Thus, it is possible that the trust could be terminated earlier than NRC would find appropriate. For example, the trust could be terminated based on a letter or telephone call from the licensee to the trustee stating that decommissioning activities have been completed, even if NRC does not believe that decommissioning activities have been fully completed. Similarly, it allows the agreement to be terminated upon written agreement of the licensee and the trustee, even without NRC's approval. Finally, it does not provide a means for terminating the agreement in the event that the licensee no longer exists.

To ensure that the trust will not be terminated without NRC's knowledge and approval, and to allow for termination of the trust in the event the licensee no longer exists, ICF recommends that NRC require the licensee to replace the wording currently in Section XV with the following language which is based on the recommended wording in *Regulatory Guide 1.159*, page B-15:

This trust agreement shall continue until terminated at the written agreement of the Grantor, the Trustee and the NRC, or by the Trustee and the NRC, if the grantor ceases to exist. Upon termination of the trust, all remaining trust property less final trust administration expenses, shall be delivered to the Grantor or its successor, or transferred to another financial assurance mechanism specified in 10 CFR 50.75(e), as appropriate.

(17) Revise Section XVIII of the Trust Agreement to Include a Severability Provision (*Regulatory Guide 1.159*, page B-15)

The recommended wording for trust agreements in *Regulatory Guide 1.159*, page B-15, includes the following severability clause in Section 19 ("Interpretation and Severability"): "If any part of this agreement is invalid, it shall not affect the remaining provisions which will remain valid and enforceable." The corresponding section (Section XVIII) in the submitted trust agreement, however, does not contain this severability provision. Consequently, the trust agreement may not be enforceable if any part of the agreement is invalid. To avoid this possibility, ICF recommends that NRC require the licensee to revise Section XVIII of the trust agreement to include the severability provision called for in *Regulatory Guide 1.159*, page B-15.

(18) Revise the Trust Agreement to Reference and Include a Specimen Certificate of Events and a Specimen Certificate of Resolution to Commence Decommissioning (*Regulatory Guide 1.159*, pages B-12, B-18 and B-19)

The submission does not reference or include the specimen certificate of events or the specimen certificate of resolution anticipated by *Regulatory Guide 1.159*, pages B-12, B-18 and B-19. Section 5 of the recommended language for trust agreements in *Regulatory Guide 1.159*, page B-12, refers to the specimen certificate of events, which references, in turn, the specimen certificate of resolution to commence decommissioning. The specimen certificates provide the required format for instructing the trustee to release decommissioning funds from the trust.

The submitted trust agreement, in Section IV, replaces the recommended reference to the specimen certificates with a much simpler reference to an attached Exhibit A, which is entitled "Withdrawal Certificate." The withdrawal certificate, however, does not include the following features which are included in the specimen certificates:

A statement certifying that decommissioning is proceeding pursuant to an NRC-approved plan;

A statement certifying that the funds being withdrawn will be expended for activities pursuant to that plan;

An attached copy of a resolution of the licensee's Board of Directors authorizing the commencement of decommissioning activities.

In the absence of at least the first two of these features, NRC has less assurance that withdrawals from the fund will be authorized and appropriate. (The resolution authorizing the commencement of decommissioning may be unnecessary in this case given the current decommissioning status of the facility.) It could also result in related uncertainty on the part of the trustee which could delay implementation of decommissioning activities, despite the financial assurance. ICF recommends that NRC require the licensee to either (1) revise the withdrawal certificate to include at least the first two features listed above, or (2) both revise Section IV of the trust agreement to reference the specimen certificates anticipated by *Regulatory Guide 1.159*, and replace the withdrawal certificate with the specimen certificate of events and the specimen certificate of resolution.

(19) Submit a Letter of Acknowledgement with the Trust Agreement (*Regulatory Guide 1.159*, page B 20)

The submission does not include a letter of acknowledgement with the trust agreement, as recommended by *Regulatory Guide 1.159*, page B-20. The acknowledgement will be needed to verify the execution of the trust agreement and to certify the trustee's signature and authority to enter into the agreement. ICF recommends that NRC require the licensee to submit a letter of acknowledgement with the trust agreement.

Other Issues

Apart from editorial and non-substantive changes to the standard wording provided in *Regulatory Guide 1.159*, the following modifications are noteworthy:

- (a) Paragraph 2 of the trust agreement contains an apparent typographical error. It states the following:

WHEREAS, the U.S. Nuclear Regulatory Commission (the "NRC"), an agency of the U.S. Government, pursuant to the Atomic Energy Act of 1994, as amended, and the Energy Reorganization Act of 1974, has promulgated regulations in Title 10, Chapter I of the Code of Federal Regulations, Part 50. (emphasis added)

According to the recommended wording on page B-11 of *Regulatory Guide 1.159*, the underlined date above should be "1954." ICF does not believe that this error is likely to affect the interpretation of Paragraph 2 or the effectiveness of the agreement. If NRC wishes to avoid any possibility of the error affecting the agreement, NRC could require the licensee to correct the error.

(b) Section II of the trust agreement does not specify the applicable NRC license number for the facility covered by the mechanism. In addition, the agreement does not specify the address of the licensed facility. Specification of the license number and the address of the licensed facility can be important to allow the trustee to properly administer the conditions and requirements of the agreement (e.g., to determine whether a particular withdrawal should be allowed). Omission of this information should not be problematic in this case, however, because the agreement clearly states (in Section II) that it pertains to the licensee's Fort St. Vrain Nuclear Generating Station, which is a large and well-known facility.

(c) Section III of the trust agreement submitted by the licensee includes the following sentence:

The Trustee undertakes no responsibility for the amount or adequacy of, nor any duty to collect from the Company, any payments to discharge liabilities of the Company established by any governmental authority. (emphasis added)

This sentence is not included in the recommended wording for trust agreements in *Regulatory Guide 1.159*. A similar provision, however, is included in the recommended wording for trust agreements in *Regulatory Guide 3.66*, except that the underlined language above is replaced by "the NRC" in the recommended wording. Consequently, the submitted provision should be acceptable.

(d) Section IV of the trust agreement includes language (underlined below) that is not included in the recommended wording for trust agreements in *Regulatory Guide 1.159*, page B-12:

In the event of the Company's default or inability to direct decommissioning activities, which shall be subject to ten (10) days written notice from the NRC to the Trustee and the Company, the Trustee shall . . . (emphasis added)

The added language does not diminish the protections provided to NRC by the agreement. However, the language does impose a notification requirement on NRC that must be satisfied before NRC may direct the trustee due to the licensee's default or inability to direct decommissioning activities.

(e) Section VI of the trust agreement appropriately prohibits the trustee from investing funds in securities or other obligations of any owners (or affiliates) of the licensed facility. It does not prohibit, however, investment by the trust in securities or obligations of operators of the facility, as called for in the recommended wording in *Regulatory Guide 1.159*, page B-12. ICF does not believe this is likely to be a problem assuming that the facility has ceased operations. If the facility still has an "operator" that is not also an owner, however, then NRC should require the licensee to revise Section VI to also prohibit the trustee from investing funds in securities or other obligations of any operator of the licensed facility.

(f) All of the recommended Section 7, titled "Commingling and Investment," is omitted from the trust agreement. This section empowers the trustee to transfer or invest the trust fund at its discretion into assets of other trust funds or investment companies created, managed, underwritten, or advised by the trustee. Deleting this section eliminates the possibility of certain investments that may be acceptable to NRC. However, the change is acceptable because remaining investment options should also be acceptable to NRC.

(g) Section VII, item 5, states that "The trustee may also exercise all the powers in the Colorado Fiduciaries' Power (sic) Act, as amended, after the date of this Agreement." NRC may wish to investigate whether this law has any effect on the trust agreement. Even if the provision were to be removed from the agreement, however, the referenced Colorado law would likely apply nonetheless.