



UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

October 25, 2010

OFFICE OF THE  
SECRETARY

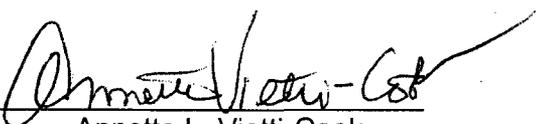
COMMISSION VOTING RECORD

DECISION ITEM: SECY-10-0084

TITLE: EXPLANATION OF CHANGES TO REVISION 2 TO  
REGULATORY GUIDE 1.159, "ASSURING THE  
AVAILABILITY OF FUNDS FOR DECOMMISSIONING  
NUCLEAR REACTORS"

The Commission (with Commissioners Svinicki, Apostolakis, Magwood, and Ostendorff approving in part and disapproving in part and Chairman Jaczko approving) acted on the subject paper as recorded in the Staff Requirements Memorandum (SRM) of October 25, 2010.

This Record contains a summary of voting on this matter together with the individual vote sheets, views and comments of the Commission.

  
Annette L. Vietti-Cook  
Secretary of the Commission

Attachments:

1. Voting Summary
2. Commissioner Vote Sheets

cc: Chairman Jaczko  
Commissioner Svinicki  
Commissioner Apostolakis  
Commissioner Magwood  
Commissioner Ostendorff  
OGC  
EDO  
PDR

VOTING SUMMARY - SECY-10-0084

RECORDED VOTES

	APRVD	DISAPRVD	ABSTAIN	NOT PARTICIP	COMMENTS	DATE
CHRM. JACZKO	X				X	9/28/10
COMR. SVINICKI	X	X			X	9/13/10
COMR. APOSTOLAKIS	X	X			X	10/13/10
COMR. MAGWOOD	X	X			X	10/8/10
COMR. OSTENDORFF	X	X			X	10/14/10

COMMENT RESOLUTION

In their vote sheets, Commissioners Svinicki, Apostolakis, Magwood, and Ostendorff approved in part and disapproved in part and Chairman Jaczko approved the staff's response and provided some additional comments. Subsequently, the comments of the Commission were incorporated into the guidance to staff as reflected in the SRM issued on October 25, 2010.

NOTATION VOTE

RESPONSE SHEET

TO: Annette Vietti-Cook, Secretary  
FROM: Chairman Gregory B. Jaczko  
SUBJECT: SECY-10-0084 – EXPLANATION OF CHANGES TO  
REVISION 2 TO REGULATORY GUIDE 1.159,  
“ASSURING THE AVAILABILITY OF FUNDS FOR  
DECOMMISSIONING NUCLEAR REACTORS”

Approved  Disapproved  Abstain

Not Participating

COMMENTS: Below  Attached  None



\_\_\_\_\_  
SIGNATURE

7/28/00

\_\_\_\_\_  
DATE

Entered on “STARS” Yes  No

**Chairman Jaczko's Comments on SECY-10-0084**  
**Explanation of Changes to Revision 2 to Regulatory Guide 1.159, "Assuring the**  
**Availability of Funds for Decommissioning Nuclear Reactors"**

I approve the changes to the regulatory guidance concerning the assurance of the availability of decommissioning funds for nuclear reactors. Also, I support the staff's position on the use of net present value method. The changes being made by the staff should enhance confidence that adequate decommissioning funding will be available for the safe and timely decommissioning of nuclear reactors.

The changes are consistent with the Commission's rationale for amending the decommissioning trust requirements in 2002 (67 FR 78350). Because of the economic deregulation of electric utilities, the Commission decided to take a more active oversight role of decommissioning funds to increase assurance that an adequate amount of funds will be available for their intended purpose.

The NRC's decommissioning fund requirements for nuclear power reactors afford licensees a variety of options for ensuring that adequate decommissioning funds are accumulated in a timely manner. It is clear from the material provided by the staff that licensees have readily available options at a reasonable cost (e.g., parent company guarantee) to comply with the decommissioning funding requirements without the need for the licensee to make imprudent adjustments in investment portfolios under challenging market conditions. I commend the staff for not letting concerns for market fluctuations and the possible overreliance of some licensees on one option for the accumulation of funds divert their focus from the protection of the public and the environment. The same way that market fluctuations would not relieve a licensee of its obligation to meet safety regulations, market fluctuations should not be used as a basis by licensees to avoid or delay their obligation to accumulate funds consistent with the regulations.

The changes are consistent with the requirements described in 10 CFR 50.75, which account for licensees that are not rate-regulated or do not have access to a non-bypassable charge for decommissioning. Licensees are required to annually estimate the amount of decommissioning funds needed and every two years report to the NRC the status of its decommissioning fund. The regulations are silent on how quickly a licensee should make up any shortfall that is identified during its annual estimation of the amount of funds needed for decommissioning. The changes are consistent with the timeframes in the requirements. If licensees would like to increase the duration to make up a shortfall beyond the timeframes in the current regulations for the accumulation of funds, then licensees should pursue a petition for rulemaking to avoid creating precedence where regulatory guidance is used as a substitute for regulations.



\_\_\_\_\_  
Gregory B. Jaczko

9/28/10

\_\_\_\_\_  
Date

**NOTATION VOTE**

**RESPONSE SHEET**

TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER SVINICKI  
SUBJECT: SECY-10-0084 – EXPLANATION OF CHANGES TO  
REVISION 2 TO REGULATORY GUIDE 1.159,  
“ASSURING THE AVAILABILITY OF FUNDS FOR  
DECOMMISSIONING NUCLEAR REACTORS”

Approved XX In Part Disapproved XX In Part Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

COMMENTS: Below \_\_\_ Attached XX None \_\_\_

  
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09/13 /10  
\_\_\_\_\_  
DATE

Entered on “STARS” Yes  No \_\_\_

**Commissioner Svinicki's Comments on SECY-10-0084**  
**Explanation of Changes to Revision 2 to Regulatory Guide 1.159, "Assuring the**  
**Availability of Funds for Decommissioning Nuclear Reactors"**

I approve in part and disapprove in part the NRC staff's proposed changes to Revision 2 to Regulatory Guide 1.159. I have followed this issue over the past year, received status briefings from the NRC staff on the issue, reviewed the record of public comment on the draft guidance, and participated in the Commission's public meeting in 2009 on the topic of decommissioning funding. I supported the direction to the staff (Staff Requirements Memorandum M100223B) which required that the staff provide to the Commission an information paper explaining any changes proposed to the final Regulatory Guide 1.159 (to be issued as Revision 2) based on staff's review and assessment of the public comment record. Upon receipt of this information paper by the Commission, I requested that the paper be converted to a notation vote because I reach a different conclusion than the staff on two matters where staff proposes to depart from standing practice. Consequently, I disapprove those particular changes and approve the issuance of Regulatory Guide 1.159, subject to the modifications I describe below.

First, I do not support the proposed change directing merchant licensees to adjust decommissioning funds annually and within 3 months of the annual recalculation of the regulatory minimum required by 10 CFR 50.75(b). The current version of Regulatory Guide 1.159 (Revision 1) states that: "In every case, needed adjustments to the amount of funds set aside should be made at least once every two years, in conjunction with the biennial report, for licensees who are no longer rate regulated or do not have access to a non-bypassable charge ...". This guidance has been interpreted to require that shortfalls identified in a biennial report must be corrected by the time the next biennial report is due two years later. Staff assesses that the outcome of the most recent round of biennial reports (March 2009) provides a basis to conclude that this frequency is insufficient and must be increased.

Laying aside that the reports submitted in March of 2009 captured a snapshot of decommissioning fund performance immediately following one of the most significant market downturns in the country's history, I do not accept that these events, even when coupled with comparisons to the 2003 market downturn, provide a basis to conclude that the NRC's current approach is a failure or that the frequency of adjustments must be significantly accelerated. Even the Nation's highest public policymaking body, the U.S. Congress, through its actions providing statutory relief for pension plan mandatory minimum contributions in 2009, acknowledged the unique market circumstances in existence at that time. Regulatory Guide 1.159 should retain its current directive, requiring adjustment of funding amounts by merchant licensees "at least once every two years, in conjunction with the biennial report," which should be interpreted to require that shortfalls identified in a biennial report must be corrected by the time the next biennial report is due two years later.

Second, I do not support a categorical prohibition on the use of the net present value method for parent guarantees, the use of which has been previously approved by the NRC in license transfer cases. Industry comments on the proposed prohibition take exception to the staff's "flawed logic" comparing the guarantee to a box of money buried in the ground and point out that the guarantee amount would not be buried in a box, but rather, it would be deposited in the decommissioning trust fund, where it could generate earnings just like other assets in the fund. The NRC staff also fundamentally rejects the financial burden associated with carrying parent company guarantees. Substantial differences with the NRC staff view on this point emerge in the public comment record, and I will not repeat them here. Upon evaluating this record, I am

not convinced that the staff has given full consideration to the impacts of a prohibition on the use of the net present value method and this proposed change is not supported by the record. Revision 2 to Regulatory Guidance 1.159 should permit the use of the net present value approach, but only in situations where the licensee can demonstrate that such guarantees supply assurance that is effectively equivalent to prepayment, using an existing approach such as annually recalculating the shortfall amount and adjusting the parent company guarantee amount accordingly.

The staff has taken a very deliberate approach to these two issues, but in weighing the arguments and exercising my policy judgment, I simply reach a different conclusion on whether a change is merited at this time. In the two instances I have outlined here, I assess that the public comment record advances a more fulsome analysis of the issues based on more robust data. Consequently, I do not support the changes advocated by the staff.

Lastly, I am concerned that the overall tone of the staff's response to public comment and the defense of the proposed changes, which occasionally stretched thin data to questionable lengths and which, in one instance, quoted William Shakespeare to justify its rationale, potentially leave the NRC open to charges that it has lost its dispassionate, fact-based perspective in evaluating this issue. These dramatic flourishes clearly depart from the agency's "plain language" objectives when communicating with the broader public about complex regulatory issues and, I fear, leave a dim view of the agency's professionalism in this instance.



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Kristine L. Svinicki

9/13 /10

**NOTATION VOTE**

**RESPONSE SHEET**

**TO:** Annette Vietti-Cook, Secretary  
**FROM:** Commissioner Apostolakis  
**SUBJECT:** SECY-10-0084 – EXPLANATION OF CHANGES TO  
REVISION 2 TO REGULATORY GUIDE 1.159,  
“ASSURING THE AVAILABILITY OF FUNDS FOR  
DECOMMISSIONING NUCLEAR REACTORS”

Approved XX Disapproved XX Abstain \_\_\_\_\_

Not Participating \_\_\_\_\_

**COMMENTS:** Below XX Attached \_\_\_ None \_\_\_

I approve in part and disapprove in part the NRC staff's proposed changes to Revision 2 to Regulatory Guide 1.159. I approve issuance of RG 1.159, Revision 2 once the changes proposed by Commissioner Magwood have been incorporated. I support Commissioner Magwood's recommendation that staff engage stakeholders and relevant experts in a workshop to develop an option paper on the use of the net present value approach for Commission consideration.

  
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10/13/10  
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DATE

Entered on “STARS” Yes X No \_\_\_

**NOTATION VOTE**

**RESPONSE SHEET**

TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER MAGWOOD  
SUBJECT: SECY-10-0084 – EXPLANATION OF CHANGES TO  
REVISION 2 TO REGULATORY GUIDE 1.159,  
“ASSURING THE AVAILABILITY OF FUNDS FOR  
DECOMMISSIONING NUCLEAR REACTORS”

Approved  Disapproved  Abstain

Not Participating

COMMENTS: Below  Attached  None

  
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SIGNATURE

8 October 2010  
\_\_\_\_\_  
DATE

Entered on “STARS” Yes  No

**Commissioner Magwoods's Comment ON SECY-10-0084**  
**Explanation of Changes to Revision 2 to Regulatory Guide 1.159, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors"**

The public has a right to expect that licensees that have been provided authorization to operate nuclear power plants in this country have taken appropriate measures to assure that the ultimate disposition of those facilities will be fully funded whether the plants are shut down this year or fifty years from now. Given that, the agency currently requires licensees to report the status of their decommissioning funds every two years. Any shortfalls in the funds at any given time (which are predicated on regular contributions and growth of investments to achieve stated targets that are generally several decades in the future) must be remediated every six years in the case of rate regulated utilities, or every two years in the case of merchant plants.

Evidence that numerous licensees experienced shortfalls in the face of falling stock prices in recent years (which has been exacerbated by the global recession of 2008-2009) made it appropriate that the agency review its policies and guidelines with respect to D&D funds and, as needed, make appropriate adjustments. In response, staff has recommended several changes to Regulatory Guide 1.159.

I appreciate the staff's efforts to address the challenges associated with assuring the adequacy of decommissioning funds. I believe that the analysis and the engagement with stakeholders has been most helpful in assisting the Commission's evaluation of this matter. That said, I do have concerns with some of the conclusions reached by the staff.

In particular, I note one comment made by the staff in response to an industry comment:

*Using future market gains to pay for decommissioning transfers the cost from the current beneficiaries of energy production to a future generation. The issue of intergenerational equity argues against heavy reliance on capital gains to fund decommissioning.*

*Finally, as a technical point, reliance on market gains would be difficult to use as a regulatory mechanism. Hope springs eternal that the market will rise quickly in the near future. Waiting for the markets to "sort themselves out" does not appear to have an obvious endpoint to select as regulatory deadline.<sup>1</sup>*

This passage raises a variety of issues. First, I must wonder how any industrial activity in the United States could be planned and implemented if one does not expect economic growth. All licensees operate in a context that anticipates continued (*though certainly not continual*) economic growth in the U.S. I would object to an approach that is predicated on unrealistic

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<sup>1</sup> Response to Comments on Draft Guidance DG-1229, "Assuring the Availability of Funds for Decommissioning Nuclear Reactors"

growth projections. But I am loath to accept an approach that is predicated on long-term economic decline.

Moreover, it is obvious that the entire structure of D&D funds is based on the precept that licensees will rely, to some measure, on long-term expansion of the markets and long-term growth of the investments that comprise the fund. We might have otherwise applied a different model for the funds, such as the approach used for Nuclear Waste Fund or by requiring licensees to purchase government bonds. We did not make this choice and despite the recent contraction of the markets and all the tribulations this has wrought, it would be, in my view, inappropriate to slowly rewrite the rules such that the benefits of the current market-based approach are eroded.

I am also concerned by the approach the staff brings to the question of the frequency of adjustments. Staff, for example, proposes to increase the frequency for merchant plants from the current two years to one, based largely on the problems encountered during the recent economic downturn. Based on the staff's analysis of the problem and the logic it presents, I am not certain why we do not consider monthly or weekly adjustments rather than annual adjustments.

As a result of these considerations, I approve publication of the revised regulatory guide but disapprove the proposed change directing merchant licensees to adjust decommissioning funds annually and within 3 months of the annual recalculation of the regulatory minimum required by 10 CFR 50.75(b). I do, however, approve an adjustment for public utility licensees with the understanding that the required adjustment frequency is to be tied to utility rate cases.

Finally, while I believe the staff's analysis is compelling with regard to the use of the net present value approach, I do not feel that the Commission yet has a complete view on this element of the issue. We would benefit from a wider perspective on this complex issue before reaching a final conclusion. Therefore, I recommend that staff engage stakeholders and relevant experts in a workshop to develop an option paper for Commission consideration.

 10/8/10  
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William D. Magwood, IV      Date

**NOTATION VOTE**

**RESPONSE SHEET**

TO: Annette Vietti-Cook, Secretary  
FROM: COMMISSIONER OSTENDORFF  
SUBJECT: SECY-10-0084 – EXPLANATION OF CHANGES TO  
REVISION 2 TO REGULATORY GUIDE 1.159,  
“ASSURING THE AVAILABILITY OF FUNDS FOR  
DECOMMISSIONING NUCLEAR REACTORS”

Approved  X  Disapproved  X  Abstain

Not Participating

COMMENTS: Below   Attached  X  None

   
SIGNATURE

10/14/10   
DATE

Entered on “STARS” Yes  X  No

**Commissioner Ostendorff's Comments on SECY 10-0084**  
**Explanation of Changes to Revision 2 to Regulatory Guide 1.159,**  
**"Assuring the Availability of Funds for Decommissioning Nuclear Reactors"**

I approve in part and disapprove in part the NRC staff's proposed changes to Regulatory Guide 1.159 guidance. I approve Revision 2 of Regulatory Guide 1.159 with two specific exceptions. In assessing the proposed changes and associated Commission direction to address decommissioning fund shortfalls, I appreciate the staff's diligence to address shortfalls in light of the recent deep economic recession. While in the midst of the market decline in 2009, the NRC could not have been omnisciently aware of the magnitude of the economic downturn, the global dependencies involved, and the effectiveness of domestic and international efforts to stabilize financial markets. In retrospect, this economic event was of historic proportions and in comparison to the 2003 recession is not appropriate to gauge the effectiveness of our decommissioning fund assurance expectations of licensees, especially given that recovery has already occurred for the vast majority of reported fund shortfalls. Arguably, the 27 licensees who experienced temporary shortfalls did not jeopardize adequate protection of public health and safety. Hence, some of the proposed changes to Regulatory Guide 1.159 noted below are not fully supportable at this time.

Overall, I concur with Commissioner Svinicki's assessment and recommendation to disapprove the staff's proposed changes in regulatory guidance to have (1) merchant licensees make annual adjustments to reactor decommissioning funds and within 3 months of the annual recalculation of the regulatory minimum required by 10 CFR 50.75(b) and (2) categorical exclusion of net present value (NPV) methods for parent guarantees. The staff should consider whether NRC guidance should provide criteria for reasonable timeframes to resolve shortfalls when a common economic event affects multiple licensees. In the interim, Regulatory Guide 1.159 Revision 2 should retain the current guidance from Revision 1 expecting merchant licensees who need adjustment of funds set aside should make their adjustments at least once every two years, in conjunction with the biennial report. This guidance should be interpreted that reported shortfalls identified in a biennial report should be corrected by the time the next biennial report is issued. Lastly, future Federal Register Notices (*FRNs*) soliciting public comments on guidance for 10 CFR 50.75 should provide a clear summary of major changes to the guidance. The staff's June 30, 2009 *FRN* on proposed revisions to R.G. 1.159 and the regulatory guide itself did not contain a clear summary of major changes and basis so stakeholders may provide meaningful feedback to the NRC without extensive and detailed examination to identify substantive matters.

  
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William C. Ostendorff      10/14/10