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Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:
CC:PSI:6 PLR-128610-02
Date:
September 19, 2002

Legend:

Buyer =

Seller1 =

Seller2 =

Seller3 =

Seller4 =

Seller5 =

Seller6 =

Seller7 =

Seller8 =

Plant =
State =
Committee =

a =
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Dear :

This letter responds to your request, dated May 20, 2002, and subsequent correspondence, on behalf of Seller3 ("Taxpayer"), that we rule on certain tax consequences of the sale of Plant and related assets and liabilities from the Sellers to Buyer. Specifically, Taxpayer has requested rulings regarding the tax consequences under section 468A of the Internal Revenue Code to the Sellers' qualified nuclear decommissioning funds and Buyer's qualified nuclear decommissioning funds as well as rulings regarding the proper realization and recognition of gain and loss on the sale of Plant and related assets and liabilities.

The Sellers and Buyer, in a jointly-filed ruling request, have represented the following facts and information relating to the ruling request:

The Sellers (except Seller1 and Seller2 which are exempt wholesale generators) are utilities regulated by various state public utility commissions and the Federal Energy Regulatory Commission (FERC). As a result of deregulation, and under the encouragement of the state public utility commissions and FERC, the Sellers are in the process of withdrawing from the electric power generation business (except Seller1 and Seller2) and intend to sell Plant and related assets to Buyer.

Each Seller, except Seller5, owns as tenant-in-common a fee simple ownership interest in Plant and certain facilities and assets associated with the Plant. Seller5 owns a portion of interest in fee simple and operates the rest of its interest under the terms of a lease. Seller1 and Seller2 are members of the same consolidated group. Seller3 and Seller4 are members of a different consolidated group. Seller1, Seller2, Seller3, Seller4, Seller5, Seller6, Seller7, and Seller8 own respectively a, b, c, d, e, f, g, and h percent of Plant, for a total of i percent. The remaining ownership interest in Plant is owned by j other entities who are not a part of this ruling letter.

Each of the Sellers, except Seller1 and Seller6, maintains qualified nuclear decommissioning funds for Plant pursuant to section 468A and the regulations thereunder. All of the qualified nuclear decommissioning funds are trusts under the laws of State. In addition, each of the Sellers maintains nonqualified nuclear decommissioning funds for Plant which are trusts under the laws of State and which are considered grantor trusts under sections 671-677 of the Internal Revenue Code. All of the qualified and nonqualified nuclear decommissioning funds are held by the Sellers solely for the purpose of decommissioning Plant.

According to the terms of the Purchase and Sale Agreement for Plant between the Sellers and Buyer, dated k, the Sellers will sell, assign, convey, transfer, and deliver to Buyer the Sellers' ownership shares of the assets held for use in the operation of Plant, including the assets comprising both the qualified and nonqualified nuclear decommissioning trust funds maintained by the Sellers along with all income, interest and earnings accrued thereon, together with all related tax accounting, decommissioning studies and cost estimates, and all other books and records related thereto. Buyer will assume certain liabilities associated with Plant, including decommissioning liabilities, certain environmental liabilities, and encumbrances of acquired assets. Buyer will pay l as cash consideration for Plant (subject to certain adjustments at closing) and will pay Sellers m for nuclear fuel attributable to Plant.

The Sellers will transfer the assets in each of the qualified nuclear decommissioning funds to a corresponding decommissioning fund that Buyer will establish for Plant and which Buyer intends to qualify as a qualified nuclear decommissioning fund pursuant to section 468A. Additionally, the Sellers will transfer the assets in each of the nonqualified nuclear decommissioning funds to a corresponding nonqualified decommissioning fund that Buyer will establish for Plant. The Buyer will hold both the qualified and nonqualified nuclear decommissioning funds solely for the purpose of decommissioning Plant. The funds will be under the general supervision of Committee, FERC, and the Nuclear Regulatory Commission (NRC). NRC approval is required to remove the nuclear decommissioning funds from the trusts. Buyer will not make additional contributions to the qualified nuclear decommissioning funds unless permitted by future legislative changes to section 468A. Any funds that exceed the amount necessary to satisfy all decommissioning liabilities will be distributed to Buyer or customers in accordance with the Purchase and Sale Agreement. Moreover, the Sellers will contribute an additional amount, if needed, to Buyer's nonqualified nuclear decommissioning fund so that the total amount in the qualified and nonqualified nuclear decommissioning funds will equal the amount required to be on deposit to fully decommission Plant based on the calculation methodology and assumptions formulated by Committee.

Requested Ruling #1: The Sellers' qualified nuclear decommissioning funds will not be disqualified on the date of closing when the assets in the funds are transferred to Buyer's qualified nuclear decommissioning fund.

Section 468A(a) provides that a taxpayer may elect to deduct payments made to a nuclear decommissioning reserve fund (the qualified fund). Section 468A(b) limits the annual deduction of the electing taxpayer to the lesser of the ruling amount or the amount of decommissioning costs included in the electing taxpayer's cost of service for ratemaking purposes for the taxable year.

Section 468A(d) provides that the ruling amount means the amount determined

by the Service to be necessary to (A) fund that portion of the nuclear decommissioning cost with respect to the nuclear power plant that bears the same ratio to the total nuclear decommissioning costs with respect to such nuclear power plant as the period for which the fund is in effect bears to the estimated useful life of the nuclear power plant, and (B) prevent any excessive funding of such costs or the funding of such costs at a rate more rapid than level funding.

Section 468A(e)(2) provides that the rate of tax on the income of a qualified nuclear decommissioning fund is 20 percent. Section 468A(e)(4) provides, in pertinent part, that the assets in a qualified nuclear decommissioning fund shall be used exclusively for satisfying the liability of any taxpayer contributing to the qualified fund.

Section 1.468A-1(b)(1) of the Federal Income Tax Regulations provides that an eligible taxpayer is a taxpayer that possesses a qualifying interest in a nuclear power plant. Section 1.468A-1(b)(2) provides that a qualifying interest is a direct ownership interest or a leasehold interest meeting certain additional requirements. Section 1.468A-1(b)(4) provides, in part, that a nuclear power plant is any nuclear power reactor that is used predominantly in the trade or business of the furnishing or sale of electric energy, if the rates for such furnishing or sale, have been established or approved by a public utility commission.

Section 1.468A-5(a) sets out the qualification requirements for nuclear decommissioning funds. It provides, in part, that a qualified nuclear decommissioning fund must be established and maintained pursuant to an arrangement that qualifies as a trust under state law. An electing taxpayer can establish and maintain only one qualified nuclear decommissioning fund for each nuclear power plant. Section 1.468A-5(c)(1)(i) provides that if, at any time during the taxable year, a nuclear decommissioning fund does not satisfy the requirements of section 1.468A-5(a) the Service may disqualify all or a portion of the fund as of the date that the fund does not satisfy the requirements. Section 1.468A-5(c)(3) provides that if a qualified fund is disqualified the fair market value (with certain adjustments) of the assets in the fund is deemed to be distributed to the electing taxpayer and included in that taxpayer's gross income for the taxable year.

Section 1.468A-6 generally provides rules for the transfer of an interest in a nuclear power plant (and transfer of the qualified fund) where after the transfer the transferee is an eligible taxpayer. Under section 1.468A-6(g), the Service may treat any disposition of an interest in a nuclear power plant occurring after December 27, 1994, as satisfying the requirements of the regulations if the Service determines that such treatment is necessary or appropriate to carry out the purposes of section 468A.

Under the specific facts herein, the Service will exercise its discretion to treat this sale, under section 1.468A-6(g), as a disposition qualifying under the general provisions of section 1.468A-6. This exercise of discretion is specifically based on the continued

general supervision of the qualified nuclear decommissioning fund by Committee, FERC, and the NRC. This exercise of discretion, however, applies to the provisions of section 1.468-6 except those outlined in section 1.468A-6(e) with respect to the calculation of a schedule of ruling amounts subsequent to a sale. Thus, under section 1.468A-6, the Sellers' qualified nuclear decommissioning funds will not be disqualified upon the sale when the assets are transferred to Buyer's corresponding qualified nuclear decommissioning fund and that fund will be treated as a qualified nuclear decommissioning fund of Buyer.

Requested Ruling #2: The Sellers' qualified nuclear decommissioning funds will not recognize gain or loss upon the transfer of their assets on the date of closing to Buyer's qualified nuclear decommissioning fund.

Requested Ruling #3: The Sellers will not recognize income attributable to the assets in the qualified nuclear decommissioning funds upon the transfer of the assets on the date of closing to Buyer's qualified nuclear decommissioning fund.

Section 1.468A-6(c)(1) provides that neither a transferor nor its fund will recognize gain or loss or otherwise take any income or deduction into account by reason of the transfer of the assets from a transferor's qualified nuclear decommissioning fund to a transferee's qualified nuclear decommissioning fund. Thus, neither the Sellers nor the Sellers' qualified nuclear decommissioning funds will recognize gain or loss or otherwise take any income into account by reason of the transfer of the Sellers' qualified nuclear decommissioning funds assets to Buyer's qualified nuclear decommissioning funds.

Requested Ruling #4: Each Seller's gain or loss on the sale of Plant and its associated assets (other than the qualified nuclear decommissioning funds) will be the difference between such Seller's basis in such assets and its amount realized.

Section 1001(a) provides that a taxpayer's gain from the sale of property is the excess of the amount realized over the taxpayer's adjusted basis provided in section 1011 for determining gain and that the taxpayer's loss from the sale of property is the excess of the taxpayer's adjusted basis provided in section 1011 for determining loss over the amount realized.

Section 1060 provides that, in the case of an "applicable asset acquisition," the consideration received shall be allocated among the acquired assets in the same manner as amounts are allocated to assets under section 338(b)(5). Section 1.1060-1(a)(1) provides that, in the case of an applicable asset acquisition, the seller and the purchaser each must allocate the consideration paid or received in the transaction under the residual method as described in sections 1.338-6 and 1.338-7 in order to determine, respectively, the amount realized from, and the basis in, each of the transferred assets.

Section 1060(c) defines the term “applicable asset acquisition” as the transfer of assets constituting a trade or business if the acquirer’s basis in the transferred assets is determined wholly by reference to the consideration paid for such assets.

Section 1.1060-1(c)(1) defines a purchaser’s consideration as the amount, in the aggregate, of its cost of purchasing the assets in the applicable asset acquisition that is properly taken into account in basis. Section 1060 provides no independent basis for determining a taxpayer’s cost of acquired assets; cost is determined solely under generally applicable tax accounting principles. Section 1.1060-1(c)(1) defines a seller’s consideration as the amount, in the aggregate, realized from selling the assets in the applicable asset acquisition under section 1001(b). Section 1060 also provides no independent basis for determining the amount a taxpayer realizes on the sale of assets or the time such amount may be taken into account. The amount realized and the time such amount is taken into account are determined solely under generally applicable tax accounting principles. See section 1001.

The residual method is based on a division of assets into seven classes: Class I (generally consisting of cash, and general deposit accounts held in banks, savings and loan associations, and other depository institutions), Class II (generally consisting of actively traded personal property like U.S. government securities and publicly traded stock, but also including certificates of deposit and foreign currency even if they are not actively traded personal property), Class III (accounts receivable, mortgages, and credit card receivables from customers which arise in the ordinary course of business), Class IV (stock in trade of the taxpayer or other property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year, or property held by the taxpayer primarily for sale to customers in the ordinary course of its trade or business), Class V (all assets other than Class I, II, III, IV, VI, and VII assets), Class VI (all section 197 intangibles, as defined in that section, except goodwill and going concern value), and Class VII (goodwill and going concern value, whether or not it qualifies as a section 197 intangible). Section 1.338-6.

Consideration is first reduced by the amount of Class I assets transferred by the seller. The remaining consideration is then allocated to the Class II assets (pro rata, to the extent of their fair market value), then to the Class III assets (pro rata, to the extent of their fair market value), then to the Class IV assets (pro rata, to the extent of their fair market value), then to the Class V assets (pro rata, to the extent of their fair market value), then to the Class VI assets (pro rata, to the extent of their fair market value), and, finally, any remaining consideration is allocated to the Class VII assets. Sections 1.338-6(b)(1) and (2) and 1.1060-1(c)(2).

The following examples illustrate the operation of section 1060 from a seller's and a buyer's perspective, respectively:

1) On Date1, an applicable asset acquisition is made. The consideration consists of $375 cash and an assumed liability of $400 that, under applicable tax accounting principles, is taken into account at the time of the applicable asset acquisition. The assets sold consist of Class I assets in the amount of $50; Class II assets with a fair market value of $250 and a basis in the hands of the seller of $100; Class III assets with a fair market value of $100 and a basis of $100; Class IV assets, with a fair market value of $150 and a basis of $50; Class V assets with fair market value of $100 and a basis of $100; and Class VI assets, with a fair market value of $50 and a basis of $0. The consideration first will be reduced by $50 (the amount of Class I assets). The remaining consideration will be allocated as follows: $250 to Class II assets (pro rata according to fair market value, resulting in a $150 gain); $100 to the Class III assets (pro rata according to fair market value, resulting in no gain or loss); $150 to the Class IV assets (pro rata according to the fair market value, resulting in a $100 gain); $100 to the Class V assets (pro rata according to the fair market value, resulting in no gain or loss); $50 to the Class VI assets (pro rata according to the fair market value, resulting in a $50 gain); and the remaining $75 to the Class VII assets (pro rata according to the fair market value, resulting in a $75 gain). The character of the amounts of gain or loss recognized by the seller, as well as any applicable holding periods, is determined by the nature of the underlying assets. Sections 1.338-6, 1.1060-1(a)(1), and 1.1060-1(c)(2).

2) On Date1, an applicable asset acquisition is made. The consideration consists of $150 cash and an assumed liability for which economic performance has not occurred. The assets acquired consist of Class I assets in the amount of $50, Class II assets with a fair market value of $350, Class III assets with a fair market value of $100, Class IV assets with a fair market value of $150, and Class V assets with a fair market value of $100. There are no Class VI or VII assets. On Date1, the purchaser has provided $150 of consideration that may be allocated as basis; it first will be reduced by $50 (the amount of Class I assets); the remaining $100 will be allocated to Class II assets (pro rata according to fair market value); nothing is allocated to Class III or below. On Date2, economic performance occurs with respect to the liability to the extent of $300; at that time, the purchaser has an additional $300 of basis that may be taken into account. Of that amount, $250 is allocated to Class II assets (which will then have been allocated their full $350 fair market value – as determined on the acquisition date), and the remaining $50 is allocated to the Class III assets (pro rata according to fair market value – as determined on the acquisition date). On Date3, economic performance occurs to the extent of an additional $400, which is then taken into account as basis. Of that amount, $50 will be allocated to the Class III assets (which will then have been allocated their full $100 fair market value – as determined on the acquisition date), $150 will be allocated to the Class IV assets (which will then have been allocated their full $150 fair market value – as determined on the acquisition date), $100 will be allocated to

the Class V assets (which will then have been allocated their full $100 fair market value – as determined on the acquisition date), and the remaining $100 will be allocated to the Class VII (as goodwill). The last amount is allocated to goodwill even though goodwill was not identified as a separate asset having value on Date1. If, on Date3, instead of an addition to purchaser's consideration, there is a $100 decrease in consideration, the consideration previously allocated to the Class III assets ($50) would be reduced to zero, and the consideration previously allocated to the Class II assets would be reduced by the remaining $50 (pro rata according to fair market value).

If, under general tax principles, there is a subsequent adjustment to the consideration, that amount is allocated in a manner that produces the same allocation that would have been made at the time of the acquisition had such amount been paid or incurred on the acquisition date. Sections 1.338-7, 1.1060-1(a)(1), and 1.1060-1(c)(2).

The Federal tax treatment of the qualified nuclear decommissioning funds is determined exclusively under section 468A and the regulations thereunder. With respect, however, to the Plant (including equipment and operating assets) and the assets of the nonqualified nuclear decommissioning funds, these assets comprise a trade or business in the Sellers' hands and the basis Buyer takes in these assets will be determined wholly by reference to Buyer's consideration. Thus, the Sellers transfer of Plant (including equipment and operating assets) and assets of the nonqualified nuclear decommissioning funds to Buyer in exchange for cash and the assumption of the decommissioning liability (except to the extent funded by the qualified nuclear decommissioning funds) is an applicable asset acquisition as defined in section 1060(c). As such, its Federal tax treatment is determined under section 1060 and the regulations thereunder.

Accordingly, Sellers must allocate the consideration in the applicable assets in accordance with the provisions of section 1060 and the regulations thereunder. Specifically, Sellers will first reduce the consideration received by the amount of Class I assets it transfers in the transaction (including any Class I assets held in the nonqualified nuclear decommissioning funds). To the extent Seller's consideration exceeds the Class I assets it transfers, such excess will be allocated to the Class II assets, then to the Class III assets, then to the Class IV assets, then to the Class V assets, then to the Class VI assets, and finally to the Class VII assets. Such consideration is allocated to each class of assets pro rata according to the fair market value of those assets, up to their total fair market value. The character and other attributes of the amounts of gain and loss are determined by that of the underlying assets.

Accordingly, on the sale of Plant and each Seller's interests in the assets in the nuclear decommissioning trust funds (other than the assets in the qualified nuclear

decommissioning funds), each Seller's gain or loss on each transferred asset is the difference between the basis of the asset and the amount realized with respect to that asset, taking into account the allocation of consideration pursuant to section 1060 and the corresponding regulations.

Requested Ruling #5: Each Seller's amount realized on the sale of Plant and its associated assets will include the cash consideration received from Buyer and the amount of its liabilities assumed by Buyer, including its liability to decommission Plant, but reduced by the amount of such liability to be funded by such Seller's qualified nuclear decommissioning funds.

Section 1001(b) provides that a seller's amount realized from the sale of property is the sum of any money received plus the fair market value of the property (other than money) received. Section 1.1001-2(a)(1) of the Regulations provides that a seller's amount realized from the sale of property includes the amount of liabilities from which the seller is discharged as a result of the sale. This may include debt and non-debt liabilities. See Fisher Co. v. Commissioner, 84 T.C. 1319, 1345-47 (1985) (assumption of lessee's repair liability was part of amount realized on sale of leasehold).

As set forth with respect to Requested Ruling #8, the decommissioning liability from which Sellers will be relieved is fixed and determinable. As owners and operators of a nuclear plant, Sellers are required by law to provide for eventual decommissioning. See 10 CFR sections 50.33, 50.75. The amount in the decommissioning funds represents the present value of that liability, as established by decommissioning cost studies, and confirmed by regulatory approval and the terms of the Sellers' transaction, under which the decommissioning funds will be transferred to Buyer in connection with Buyer's assumption of the liability. Cf. United States v. Davis, 370 U.S. 65 (1962) (amount realized as result of relief from liability presumed equal to value of property given up in arm's-length exchange).

Accordingly, each Seller's amount realized on the sale of Plant and the assets in the decommissioning trust funds includes the cash received from Buyer and the assumed liabilities, to the extent these liabilities are taken into account for federal income tax purposes. The liabilities taken into account would include the amount of the decommissioning liability assumed by Buyer, not including the portion of the liability to decommission Plant attributable to the qualified nuclear decommissioning fund on the date of closing.

Requested Ruling #6: Buyer's qualified nuclear decommissioning fund established to hold the assets transferred from the Sellers' qualified nuclear decommissioning funds will be treated as a qualified nuclear decommissioning fund under section 468A.

Section 468A(a) provides that a taxpayer may elect to deduct payments made to a nuclear decommissioning reserve fund (the qualified fund). Section 468A(b) limits the

annual deduction of the electing taxpayer to the lesser of the ruling amount or the amount of decommissioning costs included in the electing taxpayer's cost of service for ratemaking purposes for the taxable year.

Section 468A(d) provides that the ruling amount means the amount determined by the Service to be necessary to (A) fund that portion of the nuclear decommissioning cost with respect to the nuclear power plant that bears the same ratio to the total nuclear decommissioning costs with respect to such nuclear power plant as the period for which the fund is in effect bears to the estimated useful life of the nuclear power plant, and (B) prevent any excessive funding of such costs or the funding of such costs at a rate more rapid than level funding.

Section 468A(e)(4) provides, in pertinent part, that the assets in a qualified nuclear decommissioning fund shall be used exclusively for satisfying the liability of any taxpayer contributing to the qualified fund. Section 1.468A-1(b)(1) provides that an eligible taxpayer is a taxpayer that possesses a qualifying interest in a nuclear power plant. Section 1.468A-1(b)(2) provides that a qualifying interest is a direct ownership interest or a leasehold interest meeting certain additional requirements. Section 1.468A-1(b)(4) provides, in part, that a nuclear power plant is any nuclear power reactor that is used predominantly in the trade or business of the furnishing or sale of electric energy, if the rates for such furnishing or sale, have been established or approved by a public utility commission.

Section 1.468A-5(a) sets out the qualification requirements for nuclear decommissioning funds. It provides, in part, that a qualified nuclear decommissioning fund must be established and maintained pursuant to an arrangement that qualifies as a trust under state law. An electing taxpayer can establish and maintain only one qualified nuclear decommissioning fund for each nuclear power plant. Section 1.468A-5(c)(1)(i) provides that if, at any time during the taxable year, a nuclear decommissioning fund does not satisfy the requirements of section 1.468A-5(a) the Service may disqualify all or a portion of the fund as of the date that the fund does not satisfy the requirements. Section 1.468A-5(c)(3) provides that if a qualified fund is disqualified the fair market value (with certain adjustments) of the assets in the fund is deemed to be distributed to the electing taxpayer and included in that taxpayer's gross income for the taxable year.

Section 1.468A-6 generally provides rules for the transfer of an interest in a nuclear power plant (and transfer of the qualified fund) where after the transfer the transferee is an eligible taxpayer. Under section 1.468A-6(g), the Service may treat any disposition of an interest in a nuclear power plant occurring after December 27, 1994, as satisfying the requirements of the regulations if the Service determines that such treatment is necessary or appropriate to carry out the purposes of section 468A.

As indicated with respect to Requested Ruling #1, above, the Service will exercise its discretion to treat the sale, under section 1.468A-6(g), as a disposition qualifying under the general provisions of section 1.468A-6. This exercise of discretion applies to the provisions of section 1.468-6 (including the requirement under section 1.468A-6(b)(iv) that the transferee continues to satisfy the requirements of section 1.468A-5(a)(iii) which permits an electing taxpayer to maintain only one qualified nuclear decommissioning fund for each plant) except those outlined in section 1.468A-6(e) with respect to the calculation of a schedule of ruling amounts subsequent to a sale.

Thus, so long as Buyer establishes only one qualified nuclear decommissioning fund, Buyer's qualified nuclear decommissioning fund established to hold the assets transferred from the Sellers' qualified nuclear decommissioning funds will be treated as a qualified nuclear decommissioning fund of Buyer when Buyer obtains a qualifying interest upon the transfer of Plant to Buyer.

Requested Ruling #7: Neither Buyer nor Buyer's qualified nuclear decommissioning fund will recognize gain or loss or otherwise take any income or deduction into account by reason of the transfer of the assets from the Sellers' qualified nuclear decommissioning funds to Buyer's qualified nuclear decommissioning fund and after the date of closing, Buyer's qualified nuclear decommissioning fund will retain the same basis in the assets received as the Sellers' qualified nuclear decommissioning funds had prior to the date of closing.

Section 1.468A-6(c)(2) provides that neither a transferee nor its fund will recognize gain or loss or otherwise take any income or deduction into account by reason of the transfer of the assets from a transferor's qualified fund to a transferee's qualified fund. Additionally, section 1.468A-6(c)(3) provides that transfers of assets of a qualified fund to which section 1.468A-6 applies do not affect basis. Thus, Buyer will not recognize gain or loss or otherwise take any income or deduction into account by reason of the transfer of the assets from the Sellers' qualified nuclear decommissioning funds to Buyer's qualified nuclear decommissioning fund. Also, Buyer's qualified nuclear decommissioning fund will have a basis in the assets that is the same as the basis of those assets in the qualified nuclear decommissioning funds of the Sellers immediately prior to the transfer.

Requested Ruling #8: Each Seller will be entitled to a deduction equal to the amount of its liability to decommission Plant expressly assumed by Buyer and included in the Seller's income in the year the liability is assumed, reduced by the amount of the liability to be funded by such Seller's qualified nuclear decommissioning funds.

Section 1.446-1(c)(1)(ii)(A) of the Income Tax Regulations provides that under an accrual method of accounting, a liability is incurred and generally taken into account for federal income tax purposes in the year in which all the events have occurred that

establish the fact of the liability, the amount of the liability can be determined with reasonable accuracy, and economic performance has occurred with respect to the liability.

Section 461(h)(1) makes clear that generally the all events test is not treated as having been met any earlier than the taxable year in which economic performance has occurred with respect to the liability. See also section 1.461-4(a)(1).

Section 461(h)(2)(B) provides that in the case of a liability that requires the taxpayer to provide services, economic performance occurs as the taxpayer provides the services. Section 1.461-4(d)(4) provides that economic performance occurs with respect to such service liabilities as the taxpayer incurs costs in connection with the satisfaction of the liability.

Section 1.461-4(d)(5) provides an exception to the general economic performance rule for services where the taxpayer sells a trade or business. Where the purchaser expressly assumes a liability arising out of the taxpayer's trade or business that the taxpayer, but for the economic performance requirement, would have been entitled to incur as of the date of the sale, economic performance with respect to the liability occurs as the amount of the liability is properly included in the amount realized on the sale by the taxpayer.

The first prong of the all events test requires that the fact of the liability be established at the time of the deduction. This prong of the test is satisfied in this case. Here, the Sellers have the obligation to decommission the plant. The fact of the obligation arose many years ago, at the time the Sellers obtained their license to operate the Plant. See 10 C.F.R. sections 50.33 and 72.30, requiring the operator of a nuclear power plant to decommission it. Moreover, Congress recognized the existence of the decommissioning liability when, in 1984, it enacted sections 461(h) and 468A, noting that "[g]enerally, under Federal and State laws, utilities that operate nuclear power plants are obligated to decommission the plants at the end of their useful lives." H.R. Conf. Rep. No. 98-861, 877 (1984). See also S. Prt. No. 169, Vol. 1, 98th Cong., 2d Sess. 277 (1984).

The second prong of the all events test requires the amount of the liability to be determined with reasonable accuracy. Section 1.461-1(a)(2)(i). This prong is also satisfied. In this case, the amount of the Sellers' decommissioning liability has been determined by experts in the nuclear decommissioning industry. Their calculations have been reviewed and accepted by both the FERC or the state public utility having jurisdiction (in this case, the Committee), and the NRC, which is charged with ensuring that sufficient funds are available to decommission the plant. In addition, there is also support in the Code for finding that the amount of the decommissioning liability is reasonably determinable at the time of sale. Section 468A generally permits a current deduction for a "ruling amount," based on estimated future decommissioning liabilities.

To the extent decommissioning costs are sufficiently determinable to entitle the utility to a deduction under section 468A, it is reasonable to conclude that the cost must also be sufficiently determinable to satisfy the second prong of the all events test.

Given that the first two prongs of the all events test are satisfied, economic performance with respect to the decommissioning liability occurs as of the date of the sale to the extent the liability is included in each Sellers' amount realized. At that time, each Seller will be entitled to a deduction for the amount of its decommissioning liability associated with the plant, expressly assumed by the Buyers and included in that Sellers' amount realized.

Requested Ruling #9: The Buyer will not recognize any gain or otherwise take any income into account by reason of the purchase of Plant and its associated assets (including, without limitation, the transfer of the assets of the Sellers' nonqualified nuclear decommissioning funds to Buyer's corresponding nonqualified nuclear decommissioning fund), except to the extent that the aggregate amount of cash and other Class I assets received from all Sellers exceeds the aggregate amount of consideration provided by Buyer to all Sellers.

With respect to the acquisition of Plant (including its equipment and operating assets) and the nonqualified nuclear decommissioning funds' assets, Buyer will not recognize income except to the extent the Class I assets (as defined in section 1.338-6(b)(1)) it receives exceed its total cost determined under section 1012 (which will be the sum of its cash consideration and the fair market value of any other consideration it provides to the Sellers that is, under applicable tax principles, taken into account on the date of the applicable asset acquisition). If Buyer is thus required to take an amount into account as income, then, when, under general principles of tax law, Buyer is permitted to take additional consideration into account (e.g., when it satisfies the economic performance requirement with respect to the decommissioning liability assumed), Buyer will be entitled to deduct currently (and will not be required to capitalize) such amount. Arrowsmith v. Commissioner, 344 U.S. 6 (1952).

Additionally, on the date of closing, Buyer's basis in the assets acquired must be determined by allocating its cost (i.e., the consideration provided by Buyer on the acquisition date, which includes the cash but not the assumption of the decommissioning liability) among the acquired assets in accordance with the provisions of section 1060 and the regulations thereunder. Specifically, Buyer will first reduce its consideration by the amount of the Class I assets it receives in the transaction (including any Class I assets held in the NQFs); to the extent the Class I assets received exceed the consideration Buyer provides, Buyer will recognize income. To the extent Buyer's consideration exceeds the Class I assets it receives, such excess will be allocated in accordance with the provisions of section 1060 and the regulations thereunder, as described above. When and to the extent additional amounts are paid or incurred for the assets acquired in the applicable asset acquisition (e.g., when and to

the extent the nonqualified nuclear decommissioning funds pay or incur decommissioning expenses), such amounts will be taken into account as increases to Buyer's consideration and allocated in the same manner and subject to the same conditions as though they were paid or incurred on the acquisition date. Sections 1.338-6, 1.338-7, 1.1060-1(a)(1), and 1.1060-1(c)(2).

This letter ruling is directed only to Taxpayer who requested it. Section 6110(k)(3) provides that this ruling may not be used or cited as precedent. Except as specifically determined above, no opinion is expressed or implied concerning the Federal income tax consequences of the transaction described above.

In accordance with the powers of attorney, the original of this letter is being sent to Taxpayer's authorized representative. Also in accordance with the powers of attorney, a copy is being sent to Taxpayer as well as Taxpayer's other authorized representative. We are also sending a copy of this letter to the appropriate Industry Director, LMSB.

Sincerely,

PETER C. FRIEDMAN
Senior Technician Reviewer, Branch 6
Office of Associate Chief Counsel
(Passthroughs and Special Industries)