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Internal Revenue Service

Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:
CC:DOM:P&SI:6 PLR-105880-99

Date: AUG 13 1999

Re: Private Letter Ruling Request on Treatment of Costs Associated With Independent Spent Fuel Storage Installation

Taxpayer =

Parent =

Plant =
Location =
Commission A =
Commission B =
District =
Fund =
x =
Date 1 =
Date 2 =
Date 3 =
a =
b =
c =

Dear :

This letter responds to the request of Taxpayer, dated March 15, 1999, for a determination as to whether the costs associated with the construction, operation, and decommissioning of an independent spent fuel storage installation ("ISFSI") can be financed from amounts held in Fund pursuant to § 1.468A-1(b)(5) of the Regulations, and whether such costs are deductible in the taxable year paid or incurred pursuant to § 165 of the Internal Revenue Code.

Taxpayer represents that the facts and information relating to its request are as follows:

Taxpayer has a direct ownership interest of x percent in Plant, as a tenant-in-common with other electric utility companies, which is situated at Location. Taxpayer is under the audit jurisdiction of the District Director of District.

Plant's began commercial operation on Date 1 and was permanently retired from electric service on Date 2. Taxpayer is subject to the jurisdiction of both Commission A and Commission B. The Plant is currently in SAFSTOR, a methodology described by the Nuclear Regulatory Commission ("NRC") in which a nuclear facility is placed and maintained in a condition that allows the nuclear facility to be safely stored and subsequently decontaminated and dismantled to levels that permit release of the land for unrestricted use.

Decommissioning of the Plant will be carried out in three phases. In the first phase, the Plant will be dismantled. This will include the removal and disposal of all contaminated and non-contaminated equipment, components, and buildings. An ISFSI would be constructed and the Plant's spent fuel will be moved from its current location in the spent fuel pool to the ISFSI to allow the Plant's spent fuel pool to be decommissioned. In the second phase, the ISFSI facility will be monitored until the Plant's spent fuel is removed. In the third phase, the ISFSI facility will be dismantled, the NRC license will be terminated, and the final site restoration work will be completed. The spent fuel is scheduled to be transferred off site beginning in Date 3.

The ISFSI will consist of a a square foot reinforced concrete pad on which approximately b casks will be placed. Each cask will hold c spent fuel assemblies depending on the selected design. Taxpayer represents that the ISFSI will not be used to store spent fuel from any of Taxpayer's other nuclear generating facilities. Furthermore, Taxpayer represents that Plant is not being, and cannot be, used to produce additional income, and construction of the ISFSI will not facilitate conversion to another use. The ISFSI will be located in close proximity to the Plant's sphere enclosure building and within a fenced area called the "Protected Area".

Section 1.468A-1(b)(5) of the regulations defines the term "nuclear decommissioning costs" or "decommissioning costs" to mean all otherwise deductible expenses incurred in connection with the entombment, decontamination, dismantlement, removal and disposal of the structures, systems and components of a nuclear power plant that has permanently ceased the production of electric energy. Such term does not include otherwise deductible expenses to be incurred in connection with the disposal of spent nuclear fuel under the Nuclear Waste Policy Act of 1982. Thus, nuclear decommissioning costs are broadly defined to include expenses incurred before, during and after the actual decommissioning process of the nuclear power plant that has ceased operations.

Section 468A(c)(2) provides that in addition to any deduction under section 468A, there shall be allowable as a deduction for any taxable year the amount of the nuclear decommissioning costs with respect to which economic performance (within the

meaning of section 461(h)(2)) occurs during such taxable year. Thus, costs meeting the definition of nuclear decommissioning costs under section 468A of the Code are not automatically deductible. These costs are deductible when economic performance occurs under section 461(h)(2) if the costs are deductible under section 162 (or are otherwise deductible under another provision of the Code).

Section 165 of the Code provides that there shall be allowed as a deduction any loss sustained during the taxable year and not compensated for by insurance or otherwise.

Section 1.165-1(b) of the regulations provides that to be allowable as a deduction under section 165(a), a loss must be evidenced by closed and completed transactions, fixed by identifiable events, and actually sustained during the taxable year.

Section 1.165-1(d)(2)(i) of the regulations provides that if a casualty event occurs which may result in a loss and, in the year of such casualty or event, there exists a claim for reimbursement with respect to which there is a reasonable prospect of recovery, no portion of the loss with respect to such reimbursement may be received is sustained, for purposes of section 165, until it can be ascertained with reasonable certainty whether or not such reimbursement will be received.

Section 1.165-2(c) of the regulations states, "For the allowance under section 165(a) of losses arising from the permanent withdrawal of depreciable property from use in the trade or business or in the production of income, see section 1.167(a)-8." That section provides that in order to qualify for the recognition of loss from physical abandonment, the intent of the taxpayer must be to irrevocably discard the asset so that it will neither be used again nor retrieved for sale, exchange, or other disposition.

The costs of constructing, operating, and decommissioning the ISFSI are incurred in connection with the dismantlement of the Plant. Although the ISFSI is constructed after the Plant has ceased operation, the ISFSI is an integral component of the Plant itself, and construction of the ISFSI is a necessary step in the process of decommissioning the abandoned Plant. The ISFSI is located within the Plant area. The spent fuel to be stored in the ISFSI consists only of spent fuel from the Plant; the ISFSI will not store spent fuel from the other nuclear generating facilities. The Plant is not being, and cannot be, used to produce additional income, and construction of the ISFSI will not facilitate conversion to other uses.

Legal restrictions upon the physical disposition of property will not in themselves preclude a finding of abandonment, if all other facts and circumstances demonstrate an intention to irrevocably retire property from use, and the requisite overt acts related to abandonment have occurred. Therefore, assuming the Plant itself qualifies for an abandonment loss under section 165 of the Code and there exists no claim for reimbursement of the costs associated with the ISFSI with respect to which there is a reasonable prospect of recovery, we conclude that in this unique, heavily-regulated

context, costs associated with the construction, operation, and decommissioning of the ISFSI are deductible under section 165, as these costs are irrevocably committed to the decommissioning process.

Because we have concluded that the ISFSI is an integral component of the Plant, in order to treat the ISFSI as abandoned, the taxpayer must have taken the necessary steps to abandon the Plant itself, such as obtaining a possession only license, deactivating equipment not necessary in order to safely store spent fuel, and any other steps necessary to indicate a non-operation status.

In addition, the ISFSI may be considered abandoned only as it is irrevocably committed to the process of decommissioning the abandoned Plant. Costs related to an asset that can be sold or used for another purpose cannot qualify, even though the taxpayer intends to use it in the decommissioning process. We view the concrete pad as irrevocably committed to the decommissioning process as costs are incurred to build it. We view the casks as irrevocably committed to the decommissioning process as they are filled with spent fuel from the Plant and placed on the concrete pad.

Therefore, costs associated with the construction, operation, and decommissioning of an ISFSI for Plant constitute deductible losses pursuant to § 165 if, in connection with the abandonment of Plant, they are irrevocably committed to the process of decommissioning. In addition, costs associated with the construction, operation, and decommissioning of an ISFSI for Plant may be paid from the Fund because they constitute decommissioning costs pursuant to § 1.468A-1(b)(5) of the regulations.

This letter ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) of the Code provides that this ruling may not be used or cited as precedent.

Pursuant to the power of attorney on file with this office, the original of this letter is being sent to the authorized legal representative.

Sincerely yours,

/S/ Peter C. Friedman

PETER C. FRIEDMAN
Assistant to the Branch Chief, Branch 6
Office of the Assistant Chief Counsel
(Passthroughs and Special Industries)

Enclosure:
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