Internal Revenue Service

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Taxpayer =
Buyer =
State A =
Common Parent =

Dear

This letter responds to your request for a private letter ruling on behalf of Taxpayer.

Taxpayer is a regulated public utility that owns an undivided fee simple interest as a tenant in common in a nuclear power plant (the plant) and certain other facilities and assets associated therewith and ancillary thereto. For federal income tax purposes Taxpayer files a consolidated return with an affiliated group which includes Common Parent (the consolidated group). Taxpayer maintains a decommissioning fund (qualified fund) that satisfies the requirements necessary to be treated as a "nuclear decommissioning reserve fund" within the meaning of section 468A(a)[1], and as a "nuclear decommissioning fund" and a "qualified nuclear decommissioning fund" within the meaning of Treas. Reg. § 1.468A-1(b)(3). Taxpayer also maintains a nonqualified decommissioning fund (nonqualified fund) that is a valid trust under State A law and which is considered a grantor trust under sections 671-677. Taxpayer holds the funds for the purpose of decommissioning the plant.

[1] Unless provided otherwise, all section references are to the Internal Revenue Code of 1986 as applicable to the taxable years in question.

Taxpayer has contracted to sell its interest in the plant and assets related thereto to Buyer. Specifically, Taxpayer has contracted to sell, assign, convey, transfer, and deliver to Buyer its ownership share of the assets held for the use in the operation of the plant, which include the following: the real property; all spent nuclear fuel; machinery and equipment, etc.; leasehold interests and subleases relating to the real property; all permits; certain contracts and agreements; certain documents, correspondence, books, and records; personnel records; intellectual property related to a certain name; Nuclear Regulatory Commission licenses; rights in nuclear fuel; and the assets comprising any qualified or nonqualified funds maintained by Taxpayer with regard to the plant, including all income interest and earnings thereon, together with all related tax accounting, decommissioning studies and cost estimates, and all other books and records related thereto.

In conjunction with the sale Buyer will make certain payments of cash and will assume certain Taxpayer liabilities including decommissioning liabilities with respect to the plant, certain environmental liabilities and encumbrances on acquired assets. On the sale closing date Taxpayer will transfer the assets in its qualified fund to a decommissioning fund Buyer will establish and which Buyer intends to qualify as a qualified decommissioning fund within the meaning of Treas. Reg. § 1.468A-1(b)(3) and a “Nuclear Decommissioning Reserve Fund” within the meaning of section 468A(a). On the sale closing date Taxpayer will also transfer any funds in its nonqualified fund to a nonqualified decommissioning fund that Buyer will establish. Buyer will hold both its qualified fund and nonqualified fund solely for the purpose of decommissioning the plant and any monies or other properties remaining in such funds following the decommissioning of the plant will be distributed to Buyer.

Taxpayer requests a ruling that the portion of any net operating loss that it incurs as a result of the assumption by Buyer of its obligation to decommission the plant will qualify as a specified liability loss within the meaning of section 172(f)(1) that will be eligible for a 10-year carryback under section 172(b)(1)(C).

Section 172(a) allows a net operating loss deduction equal to the aggregate of the net operating loss carryovers and net operating loss carrybacks to a taxable year. With certain modifications, section 172(c) defines a net operating loss as the excess of deductions permitted by Chapter 1 of the Internal Revenue Code (the Code) over gross income.

Section 172(b)(1)(A) provides that generally, a net operating loss is carried back to each of the 2 taxable years preceding the year of the loss and carried forward to each of the 20 taxable years following the year of the loss. Section 172(b)(1)(C) provides that in the case of a specified liability loss, the loss is carried back to each of the 10 taxable years preceding the loss year, rather than 2 years.

Section 172(f)(1)(B)(i) defines a specified liability loss in part as any amount taken into account in computing the net operating loss for the taxable year and that is allowable as a deduction under Chapter 1 of the Code (other than sections 468(a)(1) or

468A(a)) which is in satisfaction of a liability under a federal or state law requiring the decommissioning of a nuclear power plant (or any unit thereof).

We have previously ruled that Taxpayer will be entitled to a deduction in the year of sale for the amount of its decommissioning liability associated with the plant expressly assumed by Buyer and included in Taxpayer's amount realized. To the extent the consolidated group incurs a net operating loss in the taxable year of the sale that loss may be attributable in whole or in part to Taxpayer's deduction for its decommissioning liability assumed by Buyer and included in Taxpayer's amount realized.

To generate a section 172(f)(1)(B)(i) specified liability loss the amount of Taxpayer's deduction for the decommissioning liability assumed by Buyer must be in satisfaction of a liability under federal or state law requiring the decommissioning of a nuclear power plant. Prior to the sale Taxpayer has the obligation to decommission the plant. This obligation arose years ago when Taxpayer obtained its license to operate the plant. In addition, the requirement to decommission the plant is imposed by the Nuclear Regulatory Commission (NRC) and thus arises under federal law. See 10 C.F.R. §§ 50.33, 50.82.

As part of the sale of the plant, the operating licence for the plant will be transferred to Buyer, decommissioning funds held by Taxpayer will be transferred to Buyer, and Buyer will expressly assume Taxpayer's obligation to decommission the plant. The express assumption of the decommissioning liability by Buyer as part of the sale of the plant satisfies the economic performance requirement under Treas. Reg. § 1.461-4(d)(5), thereby entitling Taxpayer to a deduction for its decommissioning liability. In addition, as a result of the sale of the plant and Buyer's assumption of the decommissioning liability, Taxpayer's liability under federal law to decommission the plant will be extinguished. Taxpayer has represented that after the sale and licence transfers are complete (including the transfer of the decommissioning funds), the NRC will no longer look to Taxpayer to decommission the plant. To the extent the decommissioning funds are insufficient to fully decommission the plant, Buyer will be responsible for funding the shortage. Thus, the transfer of the plant and related assets to Buyer and the assumption by Buyer of the decommissioning liability results in Taxpayer no longer being required under federal law to decommission the plant.

Further, the deduction allowed to Taxpayer for Buyer's assumption of the liability to decommission the plant is in satisfaction of Taxpayer's liability under federal law requiring the decommissioning of a nuclear power plant. Black's Law Dictionary (Seventh Edition, 1999) defines the term "satisfaction" as, among other things, "the giving of something with the intention, express or implied, that it is to extinguish some existing legal or moral obligation." In this case, Taxpayer has, as part of the sale of the plant, transferred the operating licence and decommissioning funds to Buyer. Taxpayer represents that because of this transfer and Buyer‘s assumption of the decommissioning liability, the NRC, the regulatory agency that imposes the legal obligation to decommission nuclear power plants, will no longer look to Taxpayer to

decommission the plant. Thus, Taxpayer's liability under federal law to decommission the plant will be "satisfied" because it has transferred certain assets to Buyer in order to extinguish this legal obligation. The amount of the decommissioning liability assumed by Buyer and included in Taxpayer's amount realized is allowed as a deduction to Taxpayer. To the extent the deduction generates a net operating loss for the taxable year, that portion of the net operating loss will be a specified liability loss under section 172(f).

We conclude that the portion of any consolidated net operating loss the consolidated group incurs in the year the plant is sold, attributable to the deduction allowed to Taxpayer for Buyer's assumption of Taxpayer's liability to decommission the plant, will be a consolidated specified liability loss that may be carried to each of the consolidated group's 10 taxable years preceding the loss year under section 172(b)(1)(C).

Section 172(f)(3) generally provides that the portion of a specified liability loss that is attributable to amounts incurred in the decommissioning of a nuclear power plant (or any unit thereof) may be carried back to each of the taxable years during the period (i) beginning with the taxable year in which the plant (or unit thereof) was placed in service, and (ii) ending with the taxable year preceding the loss year.

This case does not involve a request for a ruling under section 172(f)(3). Therefore, we make no determination as to whether any portion of any specified liability loss is attributable to amounts incurred in the decommissioning of a nuclear power plant (or any unit thereof) and thus eligible for the carryback provision set forth in section 172(f)(3).

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely yours,
Associate Chief Counsel
(Income Tax & Accounting)
By: William A. Jackson
Chief, Branch 5

cc: