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Internal Revenue Service

Department of the Treasury
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January 13, 2016

Legend:

Taxpayer =

Seller 1 =

Seller 2 =

Buyer =

State A =
State B =
State C =
Plant A-1 =

Plant A-2 =

Plant B =
Location A =
Location B =
Date =
$A =
$B =
$C =
$D =

$E =
$F =
X% =
Y% =
Z% =

Director =

Dear :

This letter responds to your request for private letter ruling dated October 6, 2015. You requested that we rule on certain tax consequences, under section 468A of the Internal Revenue Code, of the restructuring discussed below.

Facts:

Taxpayer has represented the following facts and information relating to the ruling request:

Taxpayer, a State A corporation, is the common parent of an affiliated group of corporations filing a consolidated federal income tax return. It uses an accrual method of accounting.

Seller 1, a State B corporation, is a wholly-owned subsidiary of Taxpayer and a member of the affiliated group. It is a regulated public utility engaged in the generation and purchase of electricity, and the distribution, transmission, and retail sale of such electricity. It is the sole owner of Plant A-1 and Plant A-2, both of which are nuclear-powered electric generating plants located at Location A. Seller 1 maintains a separate nuclear decommissioning trust for each of these nuclear plants. Each trust is irrevocably committed to the decommissioning of the facility. The nuclear decommissioning trusts each include a fund that meets the requirements of § 468A and Treas. Regs. §§ 1.468A-1 through 1.468A-9 (the Plant A-1 and Plant A-2 Qualified Funds). As of Date, the Plant A-1 and Plant A-2 Qualified Funds maintained with respect to these nuclear plants totaled approximately $A. There is no nonqualified decommissioning fund. As of Date, the total estimated nuclear decommissioning

liability for the Plant A-1 and Plant A-2 is $B, which exceeded the fair market value of the assets held in the Plant A-1 and Plant A-2 Qualified Funds by approximately $C.

Seller 2, a State B corporation, is also a wholly-owned subsidiary of Taxpayer and a member of the affiliated group. It is a single-asset base-load electric generator. It owns X% and leases Y% of Plant B, a nuclear-powered electric generating plant located at Location B. The remaining Z% is owned by an entity unrelated to Taxpayer. Under the lease agreements, Seller 2 is fully and primarily liable for decommissioning the leased interest. It maintains a nuclear decommissioning trust that is irrevocably committed to the decommissioning of the facility. The nuclear decommissioning trust includes a fund that meets the requirements of § 468A and Treas. Regs. § 1.468A-1 through 1.468A-9 (the Plant B Qualified Fund). As of Date, the Plant B Qualified Fund was approximately $D. There is no nonqualified decommissioning fund. As of Date, the estimated nuclear decommissioning liability was $E, which exceeded the fair market value of the assets held in the Plant B Qualified Fund by approximately $F.

The proposed transaction involves Seller 1 and Seller 2 each transferring their assets and liabilities (including the nuclear-powered electric generating plants and the associated nuclear decommissioning trusts) to Buyer in exchange for a member interest. Buyer is currently a subsidiary of Taxpayer, but it is not a member of the affiliated group because Taxpayer does not own sufficient shares of Buyer to satisfy the ownership requirements of § 1504. Buyer has sold voting preferred member interests to the public, and these preferred member interests are entitled to more than 20% of the voting power of all outstanding membership interests. Buyer will not be a member of the Taxpayer affiliated group because Taxpayer and its affiliates will not own the requisite percentage of voting power pursuant to § 1504(a)(1).

Seller 1 represents that its liabilities (including the nuclear decommissioning liability) that are assumed by Buyer will exceed the basis of all of the property that it will transfer to Buyer in the proposed transaction by an amount at least equal to the nuclear decommissioning liability. Seller 2 represents that its liabilities (including the nuclear decommissioning liability) that are assumed by Buyer will exceed the basis of all of the property that it will transfer to Buyer in the proposed transaction by an amount at least equal to the nuclear decommissioning liability. The taxpayers will treat the proposed transfers of their assets and liabilities (including the nuclear-powered electric generating plants and the associated nuclear decommissioning trusts) as taxable transactions, regardless of whether they are governed by § 351. If § 351 does not apply, they will recognize gain under § 1001. If § 351 does apply, the taxpayers will recognize gain under § 357(c) because the transferors are being relieved of liabilities in excess of the adjusted basis of the property transferred.

Taxpayer has requested the following rulings:

Requested Ruling #1: The Plant A-1 and Plant A-2 Qualified Funds will not be disqualified by the transfer from Seller 1 to Buyer and the Plant B Qualified Fund will not be disqualified by the Seller 2 transfer to Buyer.

Requested Ruling #2: The Plant A-1 Qualified Fund, the Plant A-2 Qualified Fund, and the Plant B Qualified Fund will each continue to be treated as satisfying the requirements of § 468A and § 1.468A-5 following the transfers of the qualified funds to Buyer.

Requested Ruling #3: The Plant A-1 Qualified Fund, the Plant A-2 Qualified Fund, and the Plant B Qualified Fund will not recognize any gain or loss or otherwise take any income or deduction into account by reason of the transfers of the qualified funds to Buyer.

Requested Ruling #4: Seller 1, Seller 2, and Buyer will not recognize gain or loss under § 468A or otherwise take any income or deduction into account under § 468A by reason of transfers of the qualified funds to Buyer.

Requested Ruling #5: Pursuant to § 1.468A-6(c), the tax basis of the assets of the qualified funds will not be changed by the transfers of the qualified funds to Buyer.

Requested Ruling #6: The amount realized by Seller 1 from the transfer of its assets and liabilities in the proposed transaction will include the nuclear decommissioning liabilities associated, respectively, with Plant A-1 and Plant A-2, but not including the portion of the nuclear decommissioning liabilities funded by the Plant A-1 and Plant A-2 Qualified Funds on the date of the transfer.

Requested Ruling #7: The amount realized by Seller 2 from the transfer of its assets and liabilities in the proposed transaction will include the nuclear decommissioning liability associated with Plant B, but not including the portion of the nuclear decommissioning liability funded by the Plant B Qualified Fund on the date of the transfer.

Requested Ruling #8: Seller 1 and Seller 2 will each be entitled to treat their respective nuclear decommissioning liability, to the extent that it is included in

amount realized, as satisfying economic performance under Treas. Reg. § 1.461-4(d)(5).

Law and Analysis

Issues 1-5:

Section 468A(a) of the Code provides that a taxpayer may elect to deduct payments made to a nuclear decommissioning reserve fund that meets the requirements of section 468A (i.e. a fund that is a "qualified nuclear decommissioning fund").

Section 1.468A-1(b)(4) provides that a "qualified nuclear decommissioning fund" is a fund that satisfies the requirements of section 1.468A-5.

Section 1.468A-5(a) of the Income Tax regulations 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.

Section 1.468A-5(a)(1)(iii) provides that an electing taxpayer can establish and maintain only one qualified nuclear decommissioning fund for each nuclear power plant. If a nuclear power plant is subject to the ratemaking jurisdiction of two or more public utility commissions and any such public utility commission requires a separate fund to be maintained for the benefit of ratepayers whose rates are established or approved by the public utility commission, the separate funds maintained for such plant (whether or not established and maintained pursuant to a single trust agreement) shall be considered a single nuclear decommissioning fund.

Section 1.468A-6 provides rules applicable to the transfer of an interest in a nuclear power plant (and transfer of the qualified nuclear decommissioning fund) where certain requirements are met. Specifically, section 1.468A-6(b) provides that section 1.468A-6 applies if--

(1) Immediately before the disposition, the transferor maintained a qualified nuclear decommissioning fund with respect to the interest disposed of; and

(2) Immediately after the disposition--

(i) The transferee maintains a qualified nuclear decommissioning fund with respect to the interest acquired;

(ii) The interest acquired is a qualifying interest of the transferee in the nuclear power plant;

(3) In connection with the disposition, either—

(i) The transferee acquires part or all of the transferor's qualifying interest in the plant and a proportionate amount of the assets of the transferor's fund (all such assets if the transferee acquires the transferor's entire qualifying interest in the fund) is transferred to a fund of the transferee; or

(ii) The transferee acquires the transferor's entire qualifying interest in the plant and the transferor's entire fund is transferred to the transferee; and

(4) 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.

Section 1.468A-6(c) provides that a disposition that satisfies the requirements of section 1.468A-6(b) will have the following tax consequences at the time it occurs:

(1)(i) Neither the transferor nor the transferor's qualified nuclear decommissioning fund will recognize gain or loss or otherwise take any income into account by reason of the transfer of a proportionate amount of the assets of the transferor's qualified nuclear decommissioning fund to the transferee's qualified nuclear decommissioning fund (or by reason of the transfer of the transferor's entire qualified nuclear decommissioning fund to the transferee). For purposes of the regulations under section 468A, this transfer (or the transfer of the transferor's qualified nuclear decommissioning fund) will not be considered a distribution of assets by the transferor's qualified nuclear decommissioning fund.

(ii) Notwithstanding § 1.468A-6(c)(1)(i), if the transferor has made a special transfer under § 1.468A-8 prior to the transfer of the fund or fund assets, any deduction with respect to that special transfer allowable under § 468A(f)(2) for a taxable year ending after the date of the transfer of the fund or fund assets is allowed under § 468A(f)(2)(C) for the taxable year that includes the date of the transfer of the fund or fund assets.

(2) Neither the transferee nor the transferee's qualified nuclear decommissioning fund will recognize gain or loss or otherwise take any income into account by reason of the transfer of a proportionate amount of the assets of the transferor's qualified nuclear decommissioning fund to the transferee's qualified nuclear decommissioning fund (or by reason of the transfer of the transferor's entire qualified nuclear decommissioning fund to the transferee). For purposes of the regulations under section 468A, this transfer (or the transfer of the transferor's qualified nuclear decommissioning fund) will not constitute a payment or a contribution of assets by the transferee to its qualified nuclear decommissioning fund.

(3) Transfers of assets of a qualified nuclear decommissioning fund to which this section applies do not affect basis. Thus, the transferee's qualified nuclear decommissioning fund will have a basis in the assets received from the transferor's qualified nuclear decommissioning fund that is the same as the basis of those assets in the transferor's qualified nuclear decommissioning fund immediately before the distribution.

Under section 1.468A-6(f), 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.

Issues 6 and 7

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) 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.

The decommissioning liabilities from which each seller will be relieved are fixed and determinable for purposes of § 461 and, as discussed below under Issue 8, are described in § 1.461-4(d)(5). These amounts are included in amount realized. See § 1.461-4(d)(5). As an owner and operator of a nuclear-powered plant, each seller is required by law to provide for eventual decommissioning, and the amount of each seller's liability can be determined with reasonable accuracy. Accordingly, the amount of each seller's nuclear decommissioning liability that is assumed by Buyer in excess of the fair market value of the assets in the qualified funds on the date of the transfer will be included in each seller's amount realized and taken into account in computing taxable income in the year of the sale. As discussed above, the proposed transaction

will not result in the disqualification of the qualified funds and each seller will not have any gain or income as a result of the transfer of its interests in the assets of the qualified funds to Buyer. Because the transfer of the qualified funds by each seller to Buyer will not be a taxable transfer, the amount of the liabilities assumed by Buyer that are included in each seller's amount realized will not include the portion of the liability to decommission the plant that is equal to the fair market value of the assets in the qualified fund on the date of the transfer.

Issue 8

Section 1.446-1(c)(1)(ii)(A) 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) provides that, in determining whether an amount has been incurred with respect to any item during any taxable year, the all events test shall not be treated as met any earlier than when economic performance with respect to such item occurs. See also § 1.461-4(a)(1). Section 461(h)(4) provides that the all events test is met with respect to any item if all events have occurred that determine the fact of liability and the amount of such liability can be determined with reasonable accuracy.

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)(i) provides that, except as otherwise provided in § 1.461-4(d)(5), if a liability requires the taxpayer to provide services to another person, economic performance occurs 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 or exchanges 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 that liability occurs as the amount of the liability is properly included in the amount realized on the transaction 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 all events test is satisfied in the instant case for each seller. Here, each seller, as an owner and operator of a

nuclear-powered plant, was required to obtain an operating license before commercial operations begun. 10 C.F.R. § 50.10; see also 10 C.F.R. § 50.33(k)(1). Each seller also has an obligation to seek license termination. 10 C.F.R. §§ 50.82(a)(9) and (10). The license termination process provides that a licensee shall take actions necessary to decommission and decontaminate the facility. 10 C.F.R. §§ 50.51(b)(1) and 50.54(bb); see also 10 C.F.R. § 72.30. The fact of the obligation arose at the time each seller became subject to the decommissioning requirements associated with the plant's license. Moreover, Congress recognized the existence of the decommissioning liability when, in 1984, it enacted § 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 that the amount of the liability can be determined with reasonable accuracy. See § 1.461-1(a)(2)(ii). This prong is also satisfied. In the instant case, the amount of each seller's decommissioning liability has been determined by experts in the nuclear decommissioning industry. Their estimates have been accepted by the Nuclear Regulatory Commission, which is charged with ensuring that sufficient funds are available to decommission the plants. In addition, there is also support in the Internal Revenue Code for finding that the amount of the decommissioning liability can be determined with reasonable accuracy at the time of sale. Section 468A(d) generally permits a current deduction for a "ruling amount," based on estimated future decommissioning expenses. To the extent the decommissioning costs are sufficiently determinable to entitle a utility to a deduction under § 468A, it is reasonable to conclude that the costs must also be sufficiently determinable to satisfy the second prong of the all events test.

Conclusions:

Based on the information submitted by Taxpayer, we reach the following conclusions:

Ruling #1: The Plant A-1 and Plant A-2 Qualified Funds will not be disqualified by the transfer from Seller 1 to Buyer and the Plant B Qualified Fund will not be disqualified by the Seller 2 transfer to Buyer.

Ruling #2: The Plant A-1 Qualified Fund, the Plant A-2 Qualified Fund, and the Plant B Qualified Fund will each continue to be treated as satisfying the

requirements of § 468A and § 1.468A-5 following the transfers of the qualified funds to Buyer.

Ruling #3: The Plant A-1 Qualified Fund, the Plant A-2 Qualified Fund, and the Plant B Qualified Fund will not recognize any gain or loss or otherwise take any income or deduction into account by reason of the transfers of the qualified funds to Buyer.

Ruling #4: Seller 1, Seller 2, and Buyer will not recognize gain or loss under § 468A or otherwise take any income or deduction into account under § 468A by reason of transfers of the qualified funds to Buyer.

Ruling #5: Pursuant to § 1.468A-6(c), the tax basis of the assets of the qualified funds will not be changed by the transfers of the qualified funds to Buyer.

Ruling #6: The amount realized by Seller 1 from the transfer of its assets and liabilities in the proposed transaction will include the nuclear decommissioning liabilities associated, respectively, with Plant A-1 and Plant A-2, but not including the portion of the nuclear decommissioning liabilities funded by the Plant A-1 and Plant A-2 Qualified Funds on the date of the transfer

Ruling #7: The amount realized by Seller 2 from the transfer of its assets and liabilities in the proposed transaction will include the nuclear decommissioning liability associated with Plant B, but not including the portion of the nuclear decommissioning liability funded by the Plant B Qualified Fund on the date of the transfer.

Ruling #8: Seller 1 and Seller 2 will each be entitled to treat their respective nuclear decommissioning liability, to the extent that it is included in amount realized, as satisfying economic performance under Treas. Reg. § 1.461-4(d)(5).

Except as specifically determined above, no opinion is expressed or implied concerning the Federal income tax consequences of the transaction described above. Specifically, we express no opinion on the tax consequences of the transaction under § 351. In addition, the request notes, without requesting any rulings on this matter, that Seller 1 and Seller 2 may reincorporate in another state to facilitate the transfers discussed above and that Taxpayer expects such reincorporation to be a reorganization described in § 368(a)(1)(F). We express no opinion on any aspect or tax consequence of such reincorporations, if undertaken. Also, except as specifically determined above, we express no opinion on the federal income tax consequences to Buyer resulting from the acquisition of assets and liabilities (including the nuclear-powered electric generating plants and the nuclear decommissioning liabilities) of Seller 1 and Seller 2.

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

In addition, a copy of this letter ruling is being sent to the Director.

Sincerely,

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

cc: