Internal Revenue Service

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Person To Contact:
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Refer Reply To:
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Date:
July 01, 2004

Legend:

Seller 1 =

Seller 2 =

Buyer =

Plant =
Closing Date =
Seller 1's Parent =
Seller 2's Parent =
Buyer's Parent =
Commission =
Location =
State =

a =
b =
c =
d =
e =
f =
g =
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i =
j =
k =

Dear :

This letter responds to a letter, dated January 13, 2004, requesting a private letter ruling concerning the tax consequences of the sale of Plant and associated assets and liabilities, including nuclear decommissioning liability, between Seller 1, Seller 2, and Buyer. Specifically, you have requested rulings regarding the tax consequences under section 468A of the Internal Revenue Code to the Sellers' nuclear decommissioning funds and Buyer's nuclear decommissioning fund as well as rulings regarding the proper realization and recognition of gain and loss on the sale of Plant and associated assets.

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

Seller 1, a regulated public utility company, is a wholly-owned subsidiary of Seller 1's Parent, an exempt public utility holding company. Seller 1 is a member of Seller 1's Parent's consolidated group and joins in filing a consolidated return on a calendar year basis using the accrual method of accounting. Seller 1 and Seller 1's Parent are under the audit jurisdiction of the Industry Director, Natural Resources (LM:NR). Immediately prior to the Closing Date, Seller 1 owns as a tenant-in-common a a percent undivided interest in the Plant.

Seller 2, a regulated public utility company, is a wholly-owned subsidiary of Seller 2's Parent, a public utility holding company. Seller 2 is a member of Seller 2's Parent's consolidated group and joins in filing a consolidated return on a calendar year basis using the accrual method of accounting. Seller 2 and Seller 2's Parent are under the audit jurisdiction of the Industry Director, Natural Resources (LM:NR). Immediately prior to the Closing Date, Seller 2 owns as a tenant-in-common a b percent undivided interest in the Plant.

Seller 1 and Seller 2 have each established with respect to Plant a nuclear decommissioning fund qualifying under § 468A and a nuclear decommissioning fund that did not meet the requirements of § 468A. After the sale, the Sellers will no longer be engaged in the trade or business of nuclear generation at Plant or any other nuclear facility.

Buyer is an indirect subsidiary of Buyer's Parent, a public utility holding company. Buyer is a member of Buyer's Parent's consolidated group and will join in filing a consolidated return on a calendar year basis using the accrual method of accounting. Buyer and Buyer's Parent are under the audit jurisdiction of the Industry Director, Natural Resources (LM:NR). Immediately following the Closing Date Buyer will own a c percent undivided interest in the Plant. Following the transfer of the Plant to Buyer, Buyer's wholesale electric power sales will be subject to the jurisdiction of Commission

and its ownership and operation of Plant will be subject to the jurisdiction of the Nuclear Regulatory Commission.

Plant is located in Location, in State, and consists of a single unit and associated assets located together on a single property. Plant began commercial service in d.

On e, Buyer entered into an Asset Sale Agreement ("ASA") with the Sellers. The ASA obligates the Sellers to transfer to Buyer at closing of the transaction the Sellers' entire respective interests in the Plant, including all assets necessary to operate the Plant. In addition, the Sellers agree to transfer all assets of the qualified nuclear decommissioning funds maintained by Seller 1 and Seller 2 with respect to the Plant to a qualified nuclear decommissioning fund established by Buyer solely for the purpose of decommissioning Plant. The agreement contemplates that Buyer pay a cash purchase price to the Sellers and assume all decommissioning liabilities associated with the Plant. The Sellers and the Buyer represent that they will treat the transaction as an asset purchase for tax purposes, subject to section 1060 of the Code, and will agree to an allocation of the Purchase Price among the Purchased Assets (excluding the assets comprising the qualified nuclear decommissioning funds) that is consistent with the allocation methodology provided by sections 1060 and 338 and the regulations thereunder. As part of the ASA, Buyer has also agreed to enter into power purchase agreements with each of the Sellers.

The aggregate amount transferred from the Sellers' qualified nuclear decommissioning funds to the Buyer's qualified nuclear decommissioning fund may not be less than f dollars on a net cash value basis. The estimated cost of decommissioning Plant is g dollars. Pursuant to the ASA, Buyer agrees to complete, at its expense, all decommissioning of the Plant including final restoration of the site after termination of its use for power generation in a manner consistent with the decommissioning study dated h submitted as part of the request for this letter ruling.

The minimum transferred amount, f, represents i percent of the current cost of decommissioning Plant. Buyer estimates that it will need to provide an additional j dollars to commission Plant. Prior to the sale, the Sellers each had a qualifying percentage under section 1.468A-3(d) of k. Thus, it is clear that the portion of the cost of decommissioning the Plant funded by the minimum transferred amount reasonably relates to the qualifying percentages of the Sellers prior to the sale.

Each Seller is the grantor of its respective nonqualified nuclear decommissioning fund. Each of the Sellers' nonqualified nuclear decommissioning funds is managed by an independent trustee. All distributions from the Sellers' nonqualified nuclear decommissioning funds are made by their respective Trustees. Prior to the sale, under the terms of each Seller's nonqualified nuclear decommissioning fund trust agreement, all income, as well as principal of that Seller's nonqualified nuclear decommissioning fund was held to satisfy that Seller's legal obligation to decommission Plant and, upon completion of the decommissioning, any remaining assets would be distributed to their respective grantors. However, as part of the sale, Sellers' nonqualified nuclear

decommissioning fund trust agreements will be amended to permit the release of the Sellers' nonqualified nuclear decommissioning funds from their obligation to the future decommissioning of Plant. Therefore, the Sellers' nonqualified nuclear decommissioning funds will no longer be retained for the purpose of decommissioning Plant. The assets held by the Sellers in their respective nonqualified nuclear decommissioning funds will be retained by the Sellers and disposed of as required by the applicable regulatory entities.

Requested Rulings #1 and #4: *Neither of the Sellers' qualified nuclear decommissioning funds will become disqualified on the closing date by reason of the transfer of the assets in the qualified nuclear decommissioning funds to Buyer's 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 satisfying the requirements of section 468A of the Code.*

Section 468A(a) of the Code 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(e)(4) provides, in pertinent part, that the assets in a qualified fund shall be used exclusively for satisfying the liability of any taxpayer contributing to the qualified fund.

Section 1.468A-5(a) of the Federal Income Tax Regulations sets out the qualification requirements for nuclear decommissioning funds. It provides, in part, that a qualified 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 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 § 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 § 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 transaction, under § 1.468A-6(g), as a disposition qualifying under the general

provisions of § 1.468A-6. This exercise of discretion, however, applies to the provisions of § 1.468A-6 except those outlined in § 1.468A-6(e) with respect to the calculation of a schedule of ruling amounts subsequent to a sale. Thus, under § 1.468A-6 the Sellers' qualified nuclear decommissioning funds will not be disqualified upon the transfer of the assets of those funds to Buyer's qualified nuclear decommissioning fund, and Buyer's qualified nuclear decommissioning fund will be treated as a qualified nuclear decommissioning fund as defined in section 468A.

Requested Rulings #2 and #3: *The Sellers' qualified nuclear decommissioning funds will not recognize gain or loss upon the transfer of their assets to Buyer's qualified nuclear decommissioning fund upon the sale of the Plant on the Closing Date. The Sellers will not recognize income attributable to the assets of the Sellers' qualified nuclear decommissioning funds upon the transfer of the assets of the Sellers' qualified nuclear decommissioning funds to Buyer's qualified nuclear decommissioning fund on the Closing Date. The transfer will not constitute a payment or contribution of assets by Buyer to the 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 fund to a transferee's qualified fund. Thus, neither the Sellers nor the qualified nuclear decommissioning funds maintained by the Sellers for Plant will recognize gain or loss or otherwise take any income or deduction into account by reason of the transfer of the qualified nuclear decommissioning funds assets to Buyer's qualified nuclear decommissioning fund.

Section 1.468A-6(c)(2) provides that, for purposes of the regulations under section 468A, the transfer of a transferor's qualified nuclear decommissioning fund will not constitute a payment or a contribution of assets by a transferee to its qualified nuclear decommissioning fund. Consequently, the transfer of the assets of the Sellers' qualified nuclear decommissioning funds to Buyer's qualified nuclear decommissioning fund will not constitute a payment or contribution of assets by Buyer to Buyer's qualified nuclear decommissioning fund.

Requested Ruling #5: *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 of the Sellers' qualified nuclear decommissioning funds to Buyer's qualified nuclear decommissioning fund. After the Closing Date Buyer's qualified nuclear decommissioning fund will retain the same basis in the assets received as those assets had in the Sellers' qualified nuclear decommissioning funds prior to the Closing Date.*

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. Thus, 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 of the Sellers' qualified nuclear decommissioning funds to Buyer's qualified nuclear decommissioning fund.

Section 1.468A-6(c)(3) provides that transfers of assets of a qualified nuclear decommissioning fund to which § 1.468A-6 applies do not affect basis. Thus, Buyer's qualified nuclear decommissioning fund will have a basis in the assets received from the Sellers' qualified nuclear decommissioning funds that is the same as the basis of those assets in the Sellers' funds immediately before the date of transfer.

Requested Ruling #6: *Buyer will not recognize any gain or otherwise take any income into account by reason of the purchase of the Plant and its associated assets.*

Section 1060 provides that in the case of an "applicable asset acquisition," the consideration received for such assets 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, sellers and purchasers must allocate the consideration 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 is determined wholly by reference to the consideration paid for such assets.

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 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 sections 1001 and 461(h). 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 rules of tax accounting.

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 such as 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 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 section 197, except goodwill and going concern value), and Class VII (goodwill and going concern value, whether or not they qualify as section 197 intangibles).

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

If under general tax principles there is a subsequent adjustment to the consideration, e.g., if it is later determined that the actual amount of the liability assumed differs from the value that the parties assigned to such liability on the date of the applicable asset acquisition, 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. See sections 1.1060-1(a), 1.1060-1(c)(2), and 1.338-7.

The Plant, together with its related equipment and operating assets, constitutes a trade or business in its Sellers' hands and the gain or loss recognized by each Seller with respect to those assets will be determined wholly by reference to each Seller's amount realized. Thus, Sellers' transfer of the Plant, its equipment, and operating assets to Buyer in exchange for cash and the assumption of certain liabilities and obligations, including the decommissioning liability (except to the extent funded by the qualified fund) is an applicable asset acquisition as defined in section 1060 and the regulations thereunder. As such, the Federal tax treatment of the Plant's acquisition is determined under section 1060 and the regulations thereunder.

The following example illustrates the operation of section 1060 for a seller: On Date 1, an applicable asset acquisition is made. 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, half of which are section 1231 assets with a fair market value of $60 and a basis of $70, and the other half of which are not section 1231 assets with a fair market value of $40 and a basis of $50; and Class VI assets, which are section1231 assets with a fair market value of $50 and a basis of $0. 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 $775 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 a $10 loss on the section 1231 assets and a $10 loss on the non-section 1231 assets); $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).

Therefore, each Seller's gain or loss on each of the purchased assets (excluding the assets of Sellers' qualified funds) will be the difference between each Seller's basis in the asset and the amount realized with respect to that asset, taking into account the allocation of consideration pursuant to section 1060 and the regulations thereunder.

In general, a taxpayer does not realize income upon its purchase of a business' assets, even where those assets include cash or marketable securities and, in connection with the purchase, the taxpayer assumes liabilities of the seller. See Commissioner v. Oxford Paper, 194 F.2d 190 (2d Cir. 1952); Rev. Rul. 55-675, 1955-2 C.B. 567. In this case, Buyer cannot acquire an interest in the Plant without assuming the decommissioning liabilities, which are inextricably associated with the ownership and operation of the Plant. There is no indication that the transaction is other than a bona fide purchase of the business and its associated assets and liabilities. The exception to the general rule set forth in Rev. Rul. 71-450, 1971-2 C.B. 78, does not apply. In Rev. Rul. 71- 450, unlike the present situation, the purchaser agreed to assume a prepaid subscription liability in return for a separate cash payment, and the liability was not reflected in the sales price of the business.

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

Accordingly, Buyer will not realize income from its acquisition of the Plant, except to the extent that, under the rules of section 1060, the amount of cash and other Class I

assets received by Buyer exceeds the amount of consideration provided by Buyer and taken into account in the year of the acquisition. Therefore, we conclude that, in the taxable year of closing, Buyer will not recognize any gain or otherwise currently take any income into account by reason of the transfer of the Sellers' Plant assets to Buyer, provided the Class I assets Buyer receives do not exceed its total cost for the Plant.

Requested Ruling #7: *The Buyer will have a tax basis in the assets purchased (excluding the Buyer's qualified nuclear decommissioning funds) equal to the sum of the purchase price and the assumed liabilities that will be taken into account as liabilities for federal income tax purposes as of the Closing Date.*

Section 1012 of the Code provides in part that the basis of property shall be the cost of such property. In cases similar to the instant case, taxpayers have argued that the cost of acquiring the Seller's interests in a nuclear power plant and the related assets (including the decommissioning funds) includes the amount of the assumed decommissioning liability. In those similar cases, taxpayers have cited Crane v. Commissioner, 331 U.S. 1 (1947), and Commissioner v. Oxford Paper Co., 194 F.2d 190 (1952), as support for the proposition that for purposes of determining basis, the cost of property generally includes assumed liabilities to which the acquired property is subject to the extent such liabilities can be accurately valued and are not contingent at the time of purchase. Since Buyer will pay cash and assume the liabilities and obligations of the Sellers, which includes the decommissioning liabilities in connection with the acquisition of the Plant, its total cost of the purchased assets (excluding the qualified nuclear decommissioning funds) will equal the cash paid plus the assumed liabilities and obligations.

However, the assumed decommissioning liability cannot be treated as incurred for any federal income tax purpose -- including basis -- until economic performance occurs with respect to that liability. Section 1.446-1(c)(1)(ii)(A). Thus, critical to determining whether Buyer is entitled to treat the future decommissioning liability as a component of its cost basis in the purchased assets at the time of the closing is deciding whether the liability will be incurred for tax purposes as of the closing. It will not. Economic performance does not occur with respect to a service liability such as the decommissioning obligation until and to the extent that costs are incurred in satisfaction of that liability. Section 1.461-4(d)(4). Because Buyer will not have performed any services relating to the decommissioning liability at the time of the purchase of the Plant, economic performance will not have occurred, and the liability will not have been incurred at that time for any purpose under the Code, including the cost basis provisions of section 1012.

Accordingly, at the time of closing, Buyer will have a tax basis in the assets purchased (excluding Buyer's qualified nuclear decommissioning funds) equal to the sum of the purchase price and the assumed liabilities that will be taken into account as liabilities for federal income tax purposes. The purchased assets and the liabilities incurred do not include the assets in the qualified nuclear decommissioning funds or the

liability attributable to the qualified nuclear decommissioning funds, because the tax effect of the qualified nuclear decommissioning funds is determined under section 468A. Buyer will not be entitled to treat as a component of its cost basis at the time of the closing any amount attributable to the future decommissioning liability.

Because the transfer of the Plant is an applicable asset acquisition as defined under section 1060(c) of the Code on the acquisition date, Buyer's basis in the assets acquired must be determined by allocating its costs (i.e., the consideration provided by Buyer on the acquisition date, which includes 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.

The following example illustrates the operation of section 1060 for a purchaser: On Date 1, an applicable acquisition is made. 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 asserts 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. The consideration paid consists of $150 cash and an assumed liability for which economic performance has not occurred. On Date 1, the purchaser has provided $150 of consideration that may be allocated as basis; first, it 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 Date 2, 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 Date 3, 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 assets (as goodwill). The last amount is allocated to goodwill even though goodwill was not identified as a separate asset having value on Date 1. If, on Date 3, instead of an addition to purchaser's consideration, there is a $100 decrease in consideration, the consideration previously allocated to the Class III assets 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).

Accordingly, with respect to the Plant, Buyer will first reduce the consideration paid by the amount of the Class I assets it receives in the transaction; to the extent the Class I assets received exceed the consideration Buyer provides, Buyer will recognize

income. To the extent Buyer's consideration paid exceeds the Class I assets it receives, such excess will be allocated to the Class II assets, pro rata according to the fair market value of those assets, up to their total fair market value. Any excess remaining after allocation to Class II assets will be allocated to Class III, IV, V, VI, and VII assets in accordance with sections 1.1060-1(c)(2) and 1.338-6. When and to the extent additional amounts are paid or incurred for the assets acquired in the applicable asset acquisition, such amounts will be taken into account as increases to Buyer's consideration paid and allocated in the same manner and subject to the same conditions as though they were paid or incurred on the acquisition date. See sections 1.1060-1(a)(1), 1.1060-1(c)(2), 1.338-6, and 1.338-7.

Therefore, we conclude that Buyer's total consideration will be allocated among the purchased assets of the Plant (excluding the qualified funds) for purposes of determining Buyer's tax basis in any specific asset included in the purchased assets (determined immediately after the closing and excluding the qualified funds) pursuant to the residual method as required by section 1060 and the regulations thereunder.

Requested Ruling #8: *The Sellers' nonqualified nuclear decommissioning funds, to the extent not dissolved at closing, will be treated as grantor trusts under sections 671 through 678 of the Code, and each respective Seller will be treated as the grantor of such Seller's nonqualified nuclear decommissioning fund, and the Buyer will not be in constructive receipt of the Sellers' nonqualified nuclear decommissioning funds.*

Section 671 of the Code provides that where it is specified in sections 673 through 678 that the grantor or another person shall be treated as the owner of any portion of a trust, there shall be included in computing the taxable income and credits of that person those items of income, deduction, and credits against tax of the trust which are attributable to that portion of the trust to the extent that such items would be taken into account in computing taxable income or credits against the tax of an individual.

Section 1.671-2(e)(1) of the Income Tax Regulations provides that for purposes of part I of subchapter J, chapter 1 of the Code, a grantor includes any person to the extent such person either creates a trust, or directly or indirectly makes a gratuitous transfer (within the meaning of § 1.671-2(e)(2)) of property to a trust. For purposes of § 1.671-2, the term *property* includes cash.

Section 677 provides that the grantor shall be treated as the owner of any portion of a trust, whether or not he is treated as such under section 674, whose income without the approval or consent of any adverse party is, or, in the discretion of the grantor or a nonadverse party, or both, may be distributed to the grantor, or held or accumulated for future distribution to the grantor.

Section 1.677(a)-1(d) provides that under section 677 a grantor is, in general, treated as the owner of a portion of a trust whose income is, or in the discretion of the

grantor or a nonadverse party, or both, may be applied in discharge of a legal obligation of the grantor.

Accordingly, each of the Sellers is treated as the grantor and owner of its respective nonqualified nuclear decommissioning fund under sections 671and 677 of the Code, and under § 1.677(a)-1(d). Each Seller shall include in computing its taxable income and credits all items of income, deduction, and credits against tax of that Seller's nonqualified nuclear decommissioning fund to the extent that such items would be taken into account in computing taxable income or credits against the tax of that Seller.

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

In accordance with the powers of attorney, we are sending copies of this ruling to authorized representatives of Buyer and the Sellers. We are also sending a copy of this letter ruling to the Industry Director, Natural Resources (LM:NR).

Sincerely,

Peter C. Friedman
Senior Technician Reviewer
Office of Associate Chief Counsel

(Passthroughs & Special Industries)

cc: