Internal Revenue Service

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Department of the Treasury
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Person To Contact:
, ID No.

Telephone Number:

Refer Reply To:
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Date:
April 20, 2017

Legend:

Seller	=
Parent	=
Operator	=
Taxpayer-Buyer	=
Disregarded Entity	=
Unit	=
State	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
a	=
b	=
c	=
d	=
e	=
f	=

Dear :

This letter responds to your request for private letter ruling dated October 21, 2016. You requested that we rule on certain tax consequences of the proposed transaction discussed below.

Taxpayer has represented that, at the time that the private letter ruling was submitted, the facts were as follows:

Seller is a limited liability company that is wholly-owned, indirectly, by Parent. Seller elected to be treated as an association taxable as corporation and is an accrual

method taxpayer that files its federal income tax returns on a calendar year basis. Seller owns all of the interests in the Unit, its sole electricity generation asset. The Unit is operated by Operator, a corporate affiliate of Seller. With respect to the Unit, Seller is subject to the jurisdiction of the Federal Energy Regulatory Commission ("FERC"), the Nuclear Regulatory Commission ("NRC"), and the State Public Service Commission.

Taxpayer, a corporation, is a holding company and the sole member of Disregarded Entity, a limited liability company that is disregarded for federal income tax purposes. Taxpayer is an accrual method taxpayer that files a consolidated return on a calendar year basis. With respect to the Unit, Taxpayer will also be subject to the jurisdiction of FERC, NRC, and the State Public Service Commission. Through its subsidiaries, Taxpayer is engaged in two businesses: (i) energy delivery, and (ii) generation and sale of electricity at wholesale and retail. Disregarded Entity owns and operates electric generation facilities, both directly and through other limited liability companies that are wholly-owned by Disregarded Entity and are also disregarded for federal income tax purposes.

Seller maintains a master nuclear decommissioning trust, which currently holds assets dedicated to the decommissioning of the Unit, in two separate subsidiary trusts: one that meets the requirements for a qualified fund within the meaning of § 468A of the Internal Revenue Code (the Qualified Fund) and one that does not meet those requirements (the Nonqualified Fund). As of Date 1, the Qualified Fund totaled approximately $a and the Nonqualified Fund totaled approximately $b. As of Date 2, the date of the proposed transaction, the estimated nuclear decommissioning liability is $c, which exceeds the fair market value of the assets held in the Qualified Fund and the Nonqualified Fund by approximately $d. On the date of the proposed transaction, the master nuclear decommissioning trust is expected to hold the assets valued at approximately $a plus $b.

On Date 3, Seller and Taxpayer entered into an agreement regarding the sale of the Unit and the transfer of the assets of the master nuclear decommissioning trust (the Purchase Agreement). Pursuant to the Purchase Agreement, Seller will contribute cash held in the Nonqualified Fund to the Qualified Fund. To the extent that Seller contributes an amount to the Qualified Fund that is less than the full amount in the Nonqualified Fund, such remainder shall continue to be held in the Nonqualified Fund. At closing of the transaction, Seller will transfer the assets of the master nuclear decommissioning trust for the Unit, including those in the Qualified Fund and those in the Nonqualified Fund, to corresponding qualified and nonqualified funds in a master nuclear decommissioning trust established and maintained by Taxpayer with respect to the Unit.

Pursuant to the Purchase Agreement, Seller agrees to sell, assign, transfer, convey and deliver to Taxpayer and Taxpayer agrees to purchase, assume and accept

from Seller, all of Seller's respective rights, title and interest in the transferred assets, including the Unit and all of the assets in the master nuclear decommissioning trust for the Unit. Taxpayer also agrees to assume, pay, perform and discharge any and all liabilities that arise out of the operation of the Unit. Specifically, Taxpayer agreed to (i) purchase the transferred assets, including the Unit and the assets of the master nuclear decommissioning trust for the Unit, from Seller for $e and (ii) pay to Seller a $f nonrefundable signing fee on Date 4.

Taxpayer, as the sole owner of Disregarded Entity represents that the purchase and sale of the transferred assets, including the Unit and the master decommissioning trust for the Unit that will be transferred to Taxpayer's trust, pursuant to the Purchase Agreement, is a taxable asset acquisition of a trade or business for federal income tax purposes. As such, Taxpayer also represents that it will take a basis in the transferred assets (other than the assets in Taxpayer's Qualified Fund) equal to the cash paid to Seller, plus any liabilities that are otherwise incurred and taken into account for federal income tax purposes. For this purpose, Taxpayer will not treat the nuclear decommissioning liability as incurred.

Rulings Requested:

1) The Qualified Fund will not be disqualified by reason of the proposed transaction.

2) The Taxpayer's Qualified Fund will be treated as a qualified fund that satisfies the requirements of section 468A and Treas. Reg. § 1.468A-5 after the proposed transaction.

3) The Seller's Qualified Fund and the Taxpayer's Qualified Fund will not recognize any gain or loss or otherwise take any income or deduction into account by reason of the proposed transaction.

4) Neither Taxpayer nor Seller will be required to recognize gain or loss or take any income or deduction into account as a result of the transfer of the assets of the Seller's Qualified Fund to the Taxpayer's Qualified Fund as part of the proposed transaction.

5) Pursuant to Treas. Reg. § 1.468A-6(c)(3), after the Transaction, the Taxpayer's Qualified Fund will have a tax basis in each of its assets that is the same as the tax basis that the Seller's Qualified Fund had in those assets immediately prior to the proposed transaction.

6) The amount realized by Seller from the proposed transaction will include the nuclear decommissioning liability associated with the Unit, but not including the portion

of the nuclear decommissioning liability funded by the Seller's Qualified Fund on the date of the proposed transaction.

7) Seller will be entitled to treat the nuclear decommissioning liability as satisfying economic performance under Treas. Reg. § 1.461-4(d)(5) to the extent that Seller includes the nuclear decommissioning liability in the amount realized from the proposed transaction.

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 § 468A.

Issue 6

Section 1001(b) provides that the amount realized from the sale or other disposition 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 the amount realized from the sale or other disposition of property includes the amount of liabilities from which the transferor is discharged as a result of the sale or disposition.

The decommissioning liabilities from which Seller will be relieved are fixed and determinable for purposes of § 461 and, as discussed below under Issue 7, are described in § 1.461-4(d)(5). These amounts are included in the amount realized. As an owner of a nuclear-powered plant, Seller is required by law to provide for eventual decommissioning, and the amount of Seller's liability can be determined with reasonable accuracy. Accordingly, the amount of Seller's nuclear decommissioning liability that is assumed by Taxpayer in excess of the fair market value of the assets in the Qualified Fund on the date of the transfer will be included in Seller's amount realized and taken into account in computing taxable income in the year of the proposed transaction. As discussed above, the proposed transaction will not result in the disqualification of the Qualified Fund, and Seller will not have any gain or income as a result of the transfer of its interests in the assets of the Qualified Fund to Taxpayer. Because the transfer of the Qualified Fund from Seller to Taxpayer will not be a taxable transfer, the amount of the liabilities assumed by Taxpayer that are included in Seller's amount realized will not include the portion of the liability to decommission the Unit that is equal to the fair market value of the assets in the Qualified Fund on the date of the transfer.

Issue 7

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 Seller. Here, Seller, as an owner 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). 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 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 be determined with reasonable accuracy. See § 1.461-1(a)(2)(ii). This prong is also satisfied. In the instant case, the amount of Seller's decommissioning liability has been determined by experts in the nuclear decommissioning industry. The estimate has 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 a 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 Seller and Taxpayer, we reach the following conclusions:

1) The Qualified Fund will not be disqualified by reason of the proposed transaction.

2) The Taxpayer's Qualified Fund will be treated as a qualified fund that satisfies the requirements of section 468A and Treas. Reg. § 1.468A-5 after the proposed transaction.

3) The Seller's Qualified Fund and the Taxpayer's Qualified Fund will not recognize any gain or loss or otherwise take any income or deduction into account by reason of the proposed transaction.

4) Neither Taxpayer nor Seller will be required to recognize gain or loss or take any income or deduction into account as a result of the transfer of the assets of the Seller's Qualified Fund to the Taxpayer's Qualified Fund as part of the proposed transaction.

5) Pursuant to Treas. Reg. § 1.468A-6(c)(3), after the Transaction, the Taxpayer's Qualified Fund will have a tax basis in each of its assets that is the same as the tax basis that the Seller's Qualified Fund had in those assets immediately prior to the proposed transaction.

6) The amount realized by Seller from the proposed transaction will include the nuclear decommissioning liability associated with the Unit, but not including the portion of the nuclear decommissioning liability funded by the Qualified Fund on the date of the proposed transaction.

7) Seller will be entitled to treat the nuclear decommissioning liability as satisfying economic performance under Treas. Reg. § 1.461-4(d)(5) to the extent that Seller includes the nuclear decommissioning liability in the amount realized from the proposed transaction.

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. Also, except as specifically determined above, we express no opinion on the federal income tax consequences to Taxpayer resulting from the acquisition of assets and liabilities (including the nuclear-powered electric generating plants and the nuclear decommissioning liabilities) of Seller.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) of the Code provides it may not be used or cited as precedent. In accordance with the power of attorney on file with this office, a copy of this letter is being sent to your authorized representatives. We are also sending a copy of this letter ruling to the Director.

Sincerely,

Peter C. Friedman
Senior Technician Reviewer, Branch 6
Office of the Associate Chief Counsel
(Passthroughs & Special Industries)

cc: