

February 14, 1997

Mr. A. Clegg Crawford  
Vice President, Electric Operations  
Public Service Company of Colorado  
P.O. Box 840  
Denver, Colorado 80201-0840

SUBJECT: FINANCIAL ASSURANCE MECHANISM FOR FORT ST. VRAIN DECOMMISSIONING COSTS

Dear Mr. Crawford:

The Nuclear Regulatory Commission staff has reviewed the Public Service Company of Colorado's (PSC) November 11, 1996, submittal (P-96090) entitled, "Financial Assurance Mechanism for Fort St. Vrain Decommissioning Costs." We have identified (enclosed) a number of deficiencies that need to be addressed. PSC has 45 days to remedy the identified deficiencies.

If you have any questions, I can be contacted at (301) 415-6702.

Sincerely,  
[ORIGINAL SIGNED BY:]  
Clayton L. Pittiglio, Project Manager  
Low-Level Waste and Decommissioning  
Projects Branch  
Division of Waste Management  
Office of Nuclear Material Safety  
and Safeguards

Docket No. 50-267  
License No. DPR-34  
Enclosure: As stated  
cc: See attached list

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UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555-0001

February 14, 1997

Mr. A. Clegg Crawford  
Vice President, Electric Operations  
Public Service Company of Colorado  
P.O. Box 840  
Denver, Colorado 80201-0840

SUBJECT: FINANCIAL ASSURANCE MECHANISM FOR FORT ST. VRAIN DECOMMISSIONING COSTS

Dear Mr. Crawford:

The Nuclear Regulatory Commission staff has reviewed the Public Service Company of Colorado's (PSC) November 11, 1996, submittal (P-96090) entitled, "Financial Assurance Mechanism for Fort St. Vrain Decommissioning Costs," and the executed Trust Agreement transmitted to NRC on December 10, 1996. We have identified (enclosed) a number of deficiencies that need to be addressed. PSC has 45 days to remedy the identified deficiencies.

If you have any questions, I can be contacted at (301) 415-6702.

Sincerely,

A handwritten signature in cursive script, reading "Clayton L. Pittiglio".

Clayton L. Pittiglio, Project Manager  
Low-Level Waste and Decommissioning  
Projects Branch  
Division of Waste Management  
Office of Nuclear Material Safety  
and Safeguards

Docket No. 50-267  
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Enclosure: As stated  
cc: See attached list



Fort St. Vrain  
Docket No. 50-267  
License No. DPR-34

Letter dated: February 14, 1997

cc:

Mr. Wayne H. Brunetti  
President, and  
Chief Executive Officer  
Public Service Company  
of Colorado  
P.O. Box 840  
Denver, CO 80201-0840

Regional Administrator, Region IV  
U.S. Nuclear Regulatory Commission  
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Chairman, Board of County Commissioners  
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Regional Representative  
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Radiation Control Division (RCD-DO-B1)  
Colorado Department of Health  
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16805 Weld County Road 19-1/2  
Platteville, CO 80651



These deficiencies in the Trust Agreement submitted on November 11, 1996, (P-5090) by Public Service Company of Colorado are discussed below.

**(1) Revise the First Paragraph of the Trust Agreement to Include the Full Address of the Trustee (*Regulatory Guide 1.159, Page B-11*)**

The trust agreement does not identify the full address of the trustee, as is recommended in *Regulatory Guide 1.159*, page B-11. The trust identifies the trustee as "Wells Fargo Bank (Colorado) N.A., a national banking association." The trustee's full name and address is important in (1) allowing NRC to determine whether the trustee is qualified to act as trustee, and (2) ensuring that NRC will be able to communicate readily with the trustee (e.g., to order payment for required decommissioning activities). The trust agreement should be revised to include the trustee's full address (e.g., street address and zip code).

**(2) Revise References to the Trust's Beneficiary in Section III and Section VI of the Agreement (*Regulatory Guide 1.159, pages B-11 and B-12*)**

The trust states in Paragraph 2 (prior to Section I) that its purpose is to "provide assurance that funds will be available when needed for required decommissioning activities." Section III states that the trust is established "for the benefit of the decommissioning of the Company's Fort St. Vrain Nuclear Generating Station," which is a purpose rather than a specified beneficiary. Section VI of the agreement, moreover, states that the trustee (or any other fiduciary) shall discharge its duties with respect to the fund "solely in the interest of and for the benefit of the Fund," instead of in the interest of the "beneficiary," as called for in *Regulatory Guide 1.159*, page B-12. Thus, neither Section III nor Section VI states clearly the beneficiary of the trust, and Section VI can be interpreted as not being in accordance with the goals of the fund.

The trust agreement should be revised in two ways. First, Section VI should be revised to state that the trustee will act "solely in the interest of the beneficiary of the Fund," as called for in *Regulatory Guide 1.159*, page B-12. This revision will reduce the possibility that the current language in Section VI could be misinterpreted to create a question about the purpose of the trust, or to suggest that the agreement is not enforceable because of vagueness. Second, Section III should be revised to state that the trust is established "for the benefit of the U.S. Nuclear Regulatory Commission and the decommissioning of the Company's Fort St. Vrain Nuclear Generating Station," as suggested in *Regulatory Guide 1.159*, page B-11. This revision will help avoid confusion about whether the trust is intended as a charitable or public trust, with an indefinite beneficiary, which might require it to meet additional legal standards.

[Enclosure]



(3) **Revise the Express Powers of the Trustee Listed in Section VII of the Trust Agreement**  
*(Regulatory Guide 1.159, page B-13)*

Section VII ("Express Powers of Trustee") lists five express powers of the trustee that are not included in the corresponding section (Section 8) of *Regulatory Guide 1.159*, page B-13. Several of these powers could be problematic from a financial assurance standpoint, as discussed below:

- Item 2 states that the trustee is authorized and empowered

To renew or extend the time or payment of any obligation, secured or unsecured, payable to or by this Fund, for as long a period or periods of time and on such terms as the Trustee shall determine...

This language seems redundant relative to similar language in Section VI of the trust. The language in Section VI seems more appropriate, however, because it qualifies that the trustee's authorities are to be exercised as "expedient to accomplish the purposes of the Fund." Item 2 above does not include such a qualification and, therefore, could be interpreted to expressly authorize actions that may in effect delay decommissioning for any period of time determined by the trustee.

- Item 3 states that the trustee is authorized and empowered

To hold any stocks, bonds, securities, or other property in the name of a nominee, in a street name, or by other title-holding device, without indication of trust.

The word "any" is not needed to convey what is probably the intended meaning of Item 3 (i.e., that the trustee may hold trust property in the name of a nominee, in a street name, or by other title-holding device, without indication of trust), and could inappropriately expand the investment options available to the trustee. In particular, if the trustee is expressly authorized to hold any stocks, bonds, securities or other property, then the general investment restrictions in Section VI of the agreement may no longer apply.

- Item 4 states that the trustee is authorized and empowered

To borrow money in such amounts and upon such terms as the Company may authorize in writing as necessary to carry out the purposes of this Fund, and to pledge any securities or other property for the repayment of any such loan as the company may direct.



This provision is problematic for two reasons. First, it would allow trust assets to be pledged as security or collateral for loans. If trust assets are secured by creditors, the assets may not be available to pay for decommissioning when needed. Thus, one of the primary advantages of trusts for financial assurance purposes (i.e., that they cannot usually be secured by creditors of the licensee) is negated. Second, the loans anticipated by the provision include "any such loan as the company may direct," which could potentially include loans to the licensee that are unrelated to decommissioning or to the NRC license; in this case, the licensee could, in effect, use a loan secured by the trust as a means to tap into the funds in the trust for any purpose. This negates another advantage of financial assurance trusts (i.e., that trust assets must be outside the administrative control of the licensee). Even if the provision clearly applied only to loans on behalf of the trust fund, it is unclear why the trustee of a fully-funded decommissioning trust fund would find it necessary to borrow money to carry out the purposes of the fund.

In order to ensure that the trust provides adequate financial assurance, NRC recommends that the licensee revise Section VII of the trust agreement by (1) eliminating Item 2, (2) deleting the word "any" from Item 3, and (3) eliminating Item 4.

**(4) Revise Section IX of the Trust Agreement to Limit the Time in which the Licensee May Object to the Valuation of the Fund (*Regulatory Guide 1.159*, page B-14)**

Section IX ("Quarterly Valuation") of the submitted trust agreement contains provisions similar to those called for in the recommended wording in *Regulatory Guide 1.159*, page B-14, but omits the following provision:

The failure of the Grantor to object in writing to the Trustee within \_\_\_ days after the statement has been furnished to the Grantor shall constitute a conclusively binding assent by the Grantor, barring the grantor from asserting any claim or liability against the Trustee with respect to matters disclosed in the statement.

This omission could allow the grantor any amount of time to object to matters disclosed in the valuation statement and, in turn, could possibly result in prolonged delays while disputes are settled. To help ensure that such delays do not jeopardize the completion of decommissioning activities in a timely manner, modify the valuation provisions in Section IX of the trust by adding the omitted provision limiting the time in which the licensee may object to the valuation of the fund. The licensee and trustee should agree to a reasonable time period within which the licensee must raise any objections.

**(5) Revise the Resignation and Replacement Provisions in Section XII of the Trust Agreement (*Regulatory Guide 1.159*, page B-14)**



The recommended wording for trust agreements in *Regulatory Guide 1.159*, page B-14, includes the following language pertaining to resignation or replacement of the trustee:

Upon \_\_\_ days notice to the Grantor, the Trustee may resign; upon \_\_\_ days notice to the Trustee, the Grantor may replace the Trustee; but such resignation or replacement shall not be effective until the Grantor has either appointed a successor Trustee and this successor accepts the appointment or implements another financial assurance mechanism specified in Title 10, Chapter I, Code of Federal Regulations, Section 50.75(e).

Section XII of the submitted trust agreement replaces this language with the following language: "Upon at least thirty (30) days prior written notice, the Trustee may resign or the Company may remove and replace the Trustee." This modification raises two issues. First, the 30 days afforded by the submitted trust may not allow NRC or the licensee adequate time to secure an alternate trustee or to transfer the trust funds to the successor trustee. Although the recommended wording in *Regulatory Guide 1.159* does not formally specify an appropriate notification period for resignation or replacement of the trustee, *Regulatory Guide 3.66* calls for a notification period of 90 days.

Second, omission of the clause governing when the resignation or replacement will be effective is problematic because this clause ensures that a trustee is continually managing the fund or, if not, that the licensee has secured alternative financial assurance. Modify Section XII of the trust agreement to (1) provide at least 90 days notification of trustee resignation or replacement and (2) include the conditions on trustee resignation or replacement called for in *Regulatory Guide 1.159*, page B-14.

**(6) Revise Section XIII of the Trust Agreement to Specify the Appropriate Representatives of the Licensee (*Regulatory Guide 1.159*, page B-14)**

Section 14 ("Instructions to the Trustee") of the recommended wording for trust agreements in *Regulatory Guide 1.159*, page B-14, includes the following language:

All orders, requests, and instructions by the Grantor to the Trustee shall be in writing, signed by such persons as are signatories to this agreement or such other designees as the Grantor may designate in writing.

The corresponding section (Section XIII) in the submitted trust agreement replaces the underlined wording above with the phrase "proper officers of the Company." The submission does not, however, identify the "proper officers" of the licensee. Consequently, the trustee may not be able to determine whether certain orders, requests, and instructions are authorized. Revise section XIII of the trust agreement to specify the appropriate representatives of the licensee. Specifically, the



licensee should replace the phrase "proper officers of the Company" in Section XIII with a list of the appropriate officers or with the recommended language from *Regulatory Guide 1.159*, page B-14.

**(7) Revise Section XIII of the Trust Agreement to Allow NRC to Direct the Trustee Regarding the Trust (*Regulatory Guide 1.159*, pages B-14 and B-15)**

Section XIII ("Instructions to the Trustee") of the submitted trust agreement does not provide any role for NRC to issue instructions to the trustee. In contrast, the recommended wording in *Regulatory Guide 1.159*, pages B-14 and B-15, calls for this section to include the following language:

If the NRC or State agency issues orders, requests, or instructions to the Trustee in the event of Grantor default, these shall be in writing, signed by the NRC, State agency, or their designees, and the Trustee shall act and shall be fully protected in acting in accordance with such orders, requests, and instructions.

Without this sentence, the trust agreement may not allow the trustee to respond to orders, requests, or instructions from NRC. Thus, NRC's powers and protections may be significantly diminished. To ensure the trust functions properly in the event of the default of the licensee, revise Section XIII to incorporate the language shown above, as called for in *Regulatory Guide 1.159*, pages B-14 and B-15.

**(8) Revise the Amendment Provisions in Section XIV of the Trust Agreement (*Regulatory Guide 1.159*, page B-15)**

Section XIV ("Amendment of Agreement") of the submitted trust agreement contains the following amendment provision:

This Agreement may be amended by the Company to the extent necessary or helpful to comply with regulators (sic), rules or orders by the Nuclear Regulatory Commission, an agency of the federal government. No amendment may be made, however, by the Company without the written consent of the Trustee if the amendment increases the responsibilities of the Trustee under this Agreement. Any amendment must be made in writing.

This provision is inadequate for two reasons. First, it allows the trust agreement to be amended without NRC's approval of the specific amendment. As a result, the specific wording of amendments could reduce the protections provided to NRC by the trust. Second, it does not provide a means for amending the agreement in the event that the licensee no longer exists.

Replace the wording currently in Section XIV with the following language which is based on the recommended wording in *Regulatory Guide 1.159*, page B-15:



This Agreement may be amended by an instrument in writing executed by the Grantor, the Trustee, and the NRC, or by the Trustee and the NRC if the Grantor ceases to exist.

- (9) **Revise Section XV of the Trust Agreement to Require NRC Approval Prior to Termination of the Trust (*Regulatory Guide 1.159*, page B-15)**

Section XV ("Irrevocability and Termination") of the trust agreement submitted by the licensee states the following:

Subject to the right of the parties to amend this Agreement as provided in Section XIV, this Agreement shall be irrevocable and shall continue until terminated by payment of decommissioning costs for the Fort St. Vrain Nuclear Generating Station from the Fund as provided in Section IV hereof, or upon the written agreement of the Company and the Trustee. Upon termination of the Fund, any remaining trust property in excess of decommissioning expenses contemplated by the terms of the Fund shall revert to the Company.

This provision is of potential concern to NRC for several reasons. First, it states that the agreement will be "terminated by payment of decommissioning costs," but does not clearly state what this means or how it will be determined. Thus, it is possible that the trust could be terminated earlier than NRC would find appropriate. For example, the trust could be terminated based on a letter or telephone call from the licensee to the trustee stating that decommissioning activities have been completed, even if NRC does not believe that decommissioning activities have been fully completed. Similarly, it allows the agreement to be terminated upon written agreement of the licensee and the trustee, even without NRC's approval. Finally, it does not provide a means for terminating the agreement in the event that the licensee no longer exists.

To ensure that the trust will not be terminated without NRC's knowledge and approval, and to allow for termination of the trust in the event the licensee no longer exists, replace the wording currently in Section XV with the following language which is based on the recommended wording in *Regulatory Guide 1.159*, page B-15:

This trust agreement shall continue until terminated at the written agreement of the Grantor, the Trustee and the NRC, or by the Trustee and the NRC, if the grantor ceases to exist. Upon termination of the trust, all remaining trust property less final trust administration expenses, shall be delivered to the Grantor or its successor, or transferred to another financial assurance mechanism specified in 10 CFR 50.75(e), as appropriate.

- (10) **Revise Section XVIII of the Trust Agreement to Include a Severability Provision (*Regulatory Guide 1.159*, page B-15)**



The recommended wording for trust agreements in *Regulatory Guide 1.159*, page B-15, includes the following severability clause in Section 19 ("Interpretation and Severability"): "If any part of this agreement is invalid, it shall not affect the remaining provisions which will remain valid and enforceable." The corresponding section (Section XVIII) in the submitted trust agreement, however, does not contain this severability provision. Consequently, the trust agreement may not be enforceable if any part of the agreement is invalid. To avoid this possibility, revise Section XVIII of the trust agreement to include the severability provision called for in *Regulatory Guide 1.159*, page B-15.

**(11) Revise the Trust Agreement to Reference and Include a Specimen Certificate of Events and a Specimen Certificate of Resolution to Commence Decommissioning (*Regulatory Guide 1.159*, pages B-12, B-18 and B-19)**

The submission does not reference or include the specimen certificate of events or the specimen certificate of resolution anticipated by *Regulatory Guide 1.159*, pages B-12, B-18 and B-19. Section 5 of the recommended language for trust agreements in *Regulatory Guide 1.159*, page B-12, refers to the specimen certificate of events, which references, in turn, the specimen certificate of resolution to commence decommissioning. The specimen certificates provide the required format for instructing the trustee to release decommissioning funds from the trust.

The submitted trust agreement, in Section IV, replaces the recommended reference to the specimen certificates with a much simpler reference to an attached Exhibit A, which is entitled "Withdrawal Certificate." The withdrawal certificate, however, does not include the following features which are included in the specimen certificates:

- A statement certifying that decommissioning is proceeding pursuant to an NRC-approved plan;
- A statement certifying that the funds being withdrawn will be expended for activities pursuant to that plan;
- An attached copy of a resolution of the licensee's Board of Directors authorizing the commencement of decommissioning activities.

In the absence of at least the first two of these features, NRC has less assurance that withdrawals from the fund will be authorized and appropriate. (The resolution authorizing the commencement of decommissioning may be unnecessary in this case given the current decommissioning status of the facility.) It could also result in related uncertainty on the part of the trustee which could delay implementation of decommissioning activities, despite the financial assurance. Either (1) revise the withdrawal certificate to include at least the first two features listed above, or (2) both revise Section IV of the trust agreement to reference the specimen certificates anticipated by *Regulatory Guide 1.159*, and replace the withdrawal certificate with the specimen certificate of events and the specimen certificate of resolution.