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OFFICE OF CHIEF COUNSEL, IRS

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COMMENTS:
Please see attached.

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Third Party Communication: None
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T. Cooper Monroe, III
Vice President - Tax
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Charlotte, North Carolina 28202

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Date:
January 15, 2020

LEGEND:

Taxpayer	=	Progress Energy, Inc. (EIN: 56-2155481)
Parent	=	Duke Energy Corporation (EIN: 20-2777218)
X	=	Duke Energy Florida, LLC
Y	=	Florida Progress Energy, LLC
Contractor	=	ADP CR3, LLC
Affiliate	=	ADP SF1, LLC
Unit	=	Crystal River 3 Nuclear Power Plant
State	=	North Carolina
Site	=	Crystal River, Florida
Date 1	=	March 13, 1977
Date 2	=	September 26, 2009
Date 3	=	December 2, 2013
Date 4	=	March 11, 2015
Date 5	=	January 15, 2018
Director	=	Director, Eastern Compliance (Large Business & International)

Dear Mr. Monroe:

This letter responds to your request for private letter ruling dated July 17, 2019. You requested rulings regarding the tax consequences under section 468A of the Internal Revenue Code and the regulations promulgated thereunder to Taxpayer's qualified nuclear decommissioning fund.

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

Taxpayer is a public utility holding company that, through its wholly owned subsidiaries, is principally engaged in the generation, transmission, distribution, and sale of electric energy. Taxpayer is a wholly-owned subsidiary of Parent that is incorporated in State. Parent and its affiliated group of corporations, including Taxpayer, file a consolidated federal income tax return on a calendar year basis using the accrual method of accounting.

The Unit is located at Site and is wholly owned and operated by X, a disregarded entity that is wholly owned by Y. Both X and Y are disregarded entities of Taxpayer. The Unit began commercial operations on Date 1 and was shut down on Date 2. X filed its Post Shutdown Decommissioning Activities Report (PSDAR) with the Nuclear Regulatory Commission (NRC) on Date 3 and it was accepted by the NRC on Date 4. The PSDAR accepted by the NRC provides that the decommissioning status of Unit is SAFSTOR. Taxpayer has represented that it will seek from the NRC all approvals necessary to perform the decommissioning activities described herein. As of Date 5, the reactor was defueled and all spent fuel was transferred and stored in the on-site independent spent fuel storage installation (ISFSI).

The Unit and surrounding site (Unit Site) are regulated by the NRC under a license to own and possess the Unit (NRC License). X, as owner of the Unit, is obligated to fund and remains liable for the safe and timely decommissioning of the Unit under the NRC License. X maintains a qualified nuclear decommissioning fund (Qualified Fund) for the decommissioning of the Unit in accordance with § 468A.

X has entered into a Decommissioning Services Agreement (Agreement) with the Contractor and its Affiliate. Contractor is generally engaged in the business of decommissioning nuclear reactors, to completely decommission the Unit and restore the Unit Site. The Contractor's work will be divided into two separate stages. In the first stage, the Contractor will decommission the entire Unit, except for the ISFSI, and will restore the Unit Site, except for the portion where the ISFSI is located. As part of this stage, X has applied to the NRC to permit Contractor to possess the Unit for purposes of decommissioning. In the second stage, the Contractor and its Affiliate will take title and control of the ISFSI and spent nuclear fuel (but not the associated real property). The Contractor will operate and maintain the ISFSI until all spent nuclear fuel is removed to an interim or permanent storage facility. The Contractor will then decommission the ISFSI and restore the remaining portion of the Unit Site. At all times, X will retain ownership of the Unit and Unit Site, except for the ISFSI and spent nuclear fuel, which will be transferred to the Affiliate. The Agreement and transactions related to the acquisition of the spent nuclear fuel and ISFSI are collectively referred to as the Decommissioning Arrangement.

Pursuant to the Agreement, the Contractor has agreed to provide services to completely decommission the Unit and restore the Unit Site. In exchange for the Contractor's services, X will pay an Agreed Amount under a fixed-price contract. Taxpayer has represented that neither Contractor nor Affiliate are "disqualified persons," as defined in §§ 468A(e)(5), 4951(d), 4951(e), and 1.468A-5(b)(3). Within the Qualified Fund, X will create a subaccount with the Agreed Amount, which will be increased by all earnings and decreased by all losses, taxes, and other ratable expenses of the subaccount. Taxpayer represents that all payments made to Contractor are made for decommissioning services which payments, it further represents, are for decommissioning costs as defined in §1.468A-1(b)(6).

As the Contractor completes defined tasks for decommissioning, it may request that X make payments based on the percentage of work completed. Upon achievement of the ISFSI-Only Interim End-State Conditions, X will direct the Qualified Fund to pay the amount remaining in the subaccount to the Contractor as the final payment for decommissioning services. The amount payable by X to the Contractor will be limited to the Agreed Amount as adjusted by earnings, losses, fees, and taxes.

The Contractor will take physical possession of the Unit during decommissioning for the limited purpose of performing the decommissioning services under a Possession License, but X will retain legal ownership and title to the Unit and Unit Site. X will also remain the sole owner of the Unit on the NRC License while the Contractor will act as an agent for X.

Pursuant to the Agreement, during the second stage of the Decommissioning Arrangement the Contractor and Affiliate will be responsible for the operation and maintenance of the ISFSI until the spent nuclear fuel is removed and the ISFSI is decommissioned, including providing NRC-mandated security. During this stage the Contractor will work to achieve End-State Conditions.

To facilitate the storage and ultimate removal of the spent nuclear fuel and the decommissioning of the ISFSI, X will transfer legal title and possession of the spent nuclear fuel, high-level waste, greater than Class C waste from the Unit, and the ISFSI to Affiliate. Additionally, X will transfer its rights and obligations under the Standard Contract with the Department of Energy (DOE Standard Contract), including any rights to proceeds from any breach of contract litigation, to Affiliate. Additionally, under a license transfer application, X will transfer the general license to operate and maintain the ISFSI to the Contractor.

The Contractor will enter into a Spent Fuel Services Agreement with Affiliate pursuant to which the Contractor will possess and maintain the spent nuclear fuel and high-level waste until it can be removed from the Unit Site. The Contractor will decommission the ISFSI once the spent nuclear fuel is completely removed. After decommissioning the ISFSI and restoration of the remaining portion of the Unit Site, the Contractor will apply for complete license termination from the NRC. When the NRC terminates the NRC License, X will take possession of the Unit Site.

Requested Rulings

1. The Decommissioning Arrangement will not cause a disqualification, in whole or in part, of the Qualified Fund under §1.468A-5.

2. Payments made to Contractor from the Qualified Fund pursuant to the Decommissioning Arrangement are a permissible use of the Qualified Fund under § 1.468A-5(a)(3).

3. The sale of the spent nuclear fuel and the ISFSI, and the transfer of the DOE contract will not constitute a disposition of any qualified interest in a nuclear power plant under §1.468A-6 or otherwise cause a disqualification of any portion of the Qualified Fund.

Law and Analysis

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

Section 468A(e)(1) requires each taxpayer who elects the application of § 468A to establish a Nuclear Decommissioning Reserve Fund for each nuclear power plant to which that election applies.

Section 1.468A-1(b)(4) defines the terms "nuclear decommissioning fund" and "qualified nuclear decommissioning fund" as a fund that satisfies the requirements of § 1.468A-5. The term "nonqualified fund" means a fund that does not satisfy those requirements.

Section 1.468A-5(a) sets out the qualification requirements for a qualified nuclear decommissioning fund. 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)(i) provides that a qualified nuclear decommissioning fund must be established exclusively for the purpose of funding the costs associated with decommissioning one or more nuclear facilities. Under this provision a single trust agreement may establish multiple funds for the exclusive purpose of providing funds for the decommissioning of a nuclear power plant. Thus, for example, a fund to be used for decommissioning that does not qualify as a nuclear decommissioning fund under § 1.468A-5(a) may be established and maintained under a trust agreement that governs a nuclear decommissioning fund.

Section 1.468A-5(a)(1)(ii) requires an electing taxpayer to have a separate nuclear decommissioning fund for each nuclear power plant with respect to which the electing taxpayer possesses a qualifying interest. Additionally, § 1.468A-5(a)(1)(iii) limits an electing taxpayer to establishing and maintaining only one qualified nuclear decommissioning fund for each nuclear power plant.

Section 1.468A-5(a)(2) provides that except as otherwise provided in § 1.468A-8 (relating to special transfers under § 468A(f)), a qualified nuclear decommissioning fund is not permitted to accept any contributions in cash or property other than cash payments with respect to which a deduction is allowed under § 468A(a) and § 1.468A-2(a).

Section 468A(e)(4) limits the use of the amounts in a Fund to satisfying any liability of any person contributing to the Fund for the decommissioning of a nuclear power plant, the payment of administrative and other incidental expenses of the Fund, and making investments.

Section 1.468A-5(a)(3)(i) provides that the assets of a qualified nuclear decommissioning fund are to be used exclusively (A) to satisfy, in whole or in part, the liability of the electing taxpayer for decommissioning costs of the nuclear plant to which the fund relates; (B) to pay administrative and other incidental costs of the fund; and (C) to the extent not currently required for the purposes described in (A) and (B) above, to make investments. For purposes of this paragraph, § 1.468A-5(a)(3)(ii) defines the term administrative costs and other incidental expenses of a nuclear decommissioning fund to mean all ordinary and necessary expenses incurred in connection with the operation of the nuclear decommissioning fund.

Section 1.468A-1(b)(6) states, in part, that "nuclear decommissioning costs" means all otherwise deductible expenses to be incurred in connection with the entombment, decontamination, dismantlement, removal and disposal of the structures, systems and components of a nuclear power plant, whether that nuclear power plant will continue to produce electric energy or has permanently ceased to produce electric energy. Such term includes all otherwise deductible expenses to be incurred in connection with the preparation for decommissioning, such as engineering and other planning expenses, and all otherwise deductible expenses to be incurred with respect to the plant after the actual decommissioning occurs, such as physical security and radiation monitoring expenses. Such term also includes costs incurred in connection with the construction, operation, and ultimate decommissioning of a facility used solely to store, pending acceptance by the government for permanent storage or disposal, spent nuclear fuel generated by the nuclear power plant or plants located on the same site as the storage facility. Such term does not include otherwise deductible expenses to be incurred in connection with the disposal of spent nuclear fuel under the Nuclear Waste Policy Act of 1982 (P.L. 97-425). An expense is otherwise deductible for purposes of this paragraph (b)(6) if it would be deductible under chapter 1 of the Internal Revenue Code without regard to § 280B.

Section 1.468A-6 describes the Federal income tax consequences of a transfer of the assets of a nuclear decommissioning fund (Qualified Fund) within the meaning of § 1.468A-(1)(b)(4) in connection with a sale, exchange or other disposition by a taxpayer (transferor) of all or a portion of its qualifying interest in a nuclear power plant to another taxpayer (transferee). For purposes of this section, a nuclear power plant includes a plant that previously qualified as a nuclear power plant and that has permanently ceased to produce electricity.

Section 468A(e)(5) prohibits qualified nuclear funds from engaging in self-dealing, within the meaning of §1.468A-5(b). Self-dealing is generally defined as any act described in

§ 4951(d) between a qualified nuclear decommissioning fund and a disqualified person. Section 468A(e)(6) provides that in any case in which the Fund violates any provision of this section or § 4951, the Secretary may disqualify such Fund from the application of this section. Section 1.468A-1(b)(4) provides that a "qualified nuclear decommissioning fund" is a Fund that satisfies the requirements of § 1.468A-5.

Section 1.468A-5(c)(1) provides that if at any time during the taxable year a qualified nuclear decommissioning fund does not satisfy a requirement of § 1.468A-5(a), or the fund and a disqualified person engage in an act of self-dealing, the Service may, in its discretion, disqualify all or a portion of the fund as of the date that the fund does not satisfy such requirements. If all or any portion of a nuclear decommissioning fund is disqualified under this subparagraph, then, pursuant to § 1.468A-5(c)(3), the portion of the nuclear decommissioning fund that is disqualified is treated as distributed to the electing taxpayer on the date of disqualification. The effects of disqualification are further explained by § 1.468A-5(c)(3) and (4).

Section 1.468A-5(b)(1) provides that, except as otherwise provided in paragraph (b), the excise taxes imposed by § 4951 apply to each act of self-dealing between a disqualified person and a nuclear decommissioning fund. Further, § 1.468A- 5(b)(2) provides that (with exceptions not relevant to this analysis), for purposes of paragraph (b), the term self-dealing means any act described in § 4951(d).

Section 4951(d)(1) provides, in relevant part, that the term "self-dealing" means any direct or indirect sale, exchange, or leasing of real or personal property between a trust described in § 501(c)(21) and a disqualified person. Section 1.468A-5(b)(3) provides that, for these purposes, the term "disqualified person" includes each person described in § 4951(e)(4) and § 53.4951-1(d).

The Decommissioning Arrangement consists of the Agreement and all actions taken under the Agreement, as well as transactions related to the spent nuclear fuel and the ISFSI among the Taxpayer (and its disregarded entities), Contractor, and Affiliate. Under the terms of the Agreement, the Contractor will decommission the Unit and restore the Unit Site, and X will pay the Contractor an Agreed Amount plus any earnings and less any losses, expenses, or taxes over time.

In the second phase of the Decommissioning Arrangement, the Contractor will enter into a Spent Fuel Services Agreement with Affiliate pursuant to which the Contractor will possess and maintain the spent nuclear fuel and high-level waste until it can be removed from the Unit Site. X will transfer the general license to operate and maintain the ISFSI to the Contractor who will operate and maintain the ISFSI until all spent nuclear fuel is removed to an interim or permanent storage facility. The Contractor will then decommission the ISFSI and restore the remaining portion of the Unit Site.

At all times, X will retain legal ownership of the Unit and Unit Site. X will remain the sole owner of the Unit on the NRC License while the Contractor will act as an agent for X.

X engaged the Contractor and the Contractor's Affiliate to completely decommission the Unit and restore the Unit Site. Taxpayer has represented that neither the Contractor nor the Contractor's Affiliate are a disqualified person. Therefore the Decommissioning Arrangement will not result in an act of self-dealing as defined in § 1.468A-5(b)(2).

Under the Decommissioning Services Agreement, X will compensate the Contractor by creating a subaccount within the Qualified Fund to hold the Agreed Amount, which will be increased by all earnings and decreased by all losses, taxes, and other ratable expenses of the subaccount. Taxpayer has represented that all payments made to the Contractor from the Qualified Fund pursuant to the Agreement are for "decommissioning costs" within the definition of § 1.468A-1(b)(6), and the payments represent a permissible use of the Qualified Fund under § 1.468A-5(a)(3). Because funds are being used for a permissible purpose under § 1.468A-5(a)(3), the segregation of assets in a subaccount within the Qualified Fund will not violate the requirements of § 468A and will not cause a disqualification, in whole or in part, of the Qualified Fund under § 1.468A-5(c).

Because X is not selling, exchanging, or otherwise disposing of all or a portion of its qualifying interest in the Unit, the sale of the spent nuclear fuel and the ISFSI, and the transfer of the DOE Standard Contract will not constitute a "disposition" of any qualifying interest in a nuclear power plant under § 1.468A-6.

Rulings

1. Execution of the Decommissioning Arrangement and transfer of possession of the Unit to Contractor under the Possession License will not cause a disqualification, in whole or in part, of the Qualified Fund under §1.468A-5. All Actions to be taken and payments made pursuant to that Arrangement, except as specifically described and analyzed herein, are beyond the scope of this ruling and we specifically do not rule regarding all possible future actions taken under the Decommissioning Arrangement.

2. The Taxpayer has represented that all payments made to the Contractor from the Qualified Fund are made for decommissioning services, which, it further represents, constitute decommissioning costs as defined in §1.468A-1(b)(6). In addition, Taxpayer represents that neither the Contractor or the Affiliate are disqualified persons under §1.468A-5(b) and (c). Relying on those representations, we conclude that payments made to Contractor from the Qualified Fund pursuant to the Decommissioning Arrangement are a permissible use of the Qualified Fund under § 1.468A-5(a)(3).

3. The sale of the spent nuclear fuel and the ISFSI, and the transfer of the DOE contract, as described herein and considered only as represented by Taxpayer, will not constitute a disposition of any qualified interest in a nuclear power plant under §1.468A-6 or otherwise cause a disqualification of any portion of the Qualified Fund.

Except as specifically determined above, no opinion is expressed or implied concerning

the Federal income tax consequences of the Decommissioning Arrangement described above. In addition, this ruling concerns only the Federal income tax consequences of a disqualification based on the facts represented. We express no opinion on the permissibility of disqualification under any facts not discussed by Taxpayer or not addressed in this ruling. We express no opinion on the permissibility of the disqualification under any other statute, rule, or administrative decision.

This ruling is specifically conditioned on any necessary approvals of the transaction, in whole or in part, by any regulatory body, state or Federal, having jurisdiction over such transaction. Specifically, the ruling request states that the PSDAR accepted by the NRC was based on the use of the SAFSTOR method to decommission the Unit. As described by Taxpayer, the decommissioning activities discussed in this ruling may be inconsistent with the SAFSTOR method (as described by Taxpayer). This ruling is conditioned upon Taxpayer making and the NRC accepting a revision of the method used to decommission the Unit to the DECON method.

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 representative. We are also sending a copy of this letter ruling to the Director.

Sincerely,

Patrick S. Kirwan
Chief, Branch 6
(Passthroughs & Special Industries)

cc: Internal Revenue Service
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