**Julie Parsley**
**Commissioner**

**Paul Hudson**
**Chairman**

**W. Lane Lanford**
**Executive Director**



# *Public Utility Commission of Texas*

RQ-0212-GA

April 15, 2004



*CERTIFIED MAIL RETURN RECEIPT REQUESTED*
The Honorable Greg Abbott
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

FILE # ML-43643-GA
I.D. # 43643

Dear Mr. Attorney General Abbott:

Pursuant to TEX. GOV'T CODE § 402.042, the Public Utility Commission of Texas (Commission) respectfully requests an opinion of the Attorney General on the following question:

> If funds are held in a separate trust account pursuant to the requirements of an order or rule of the Commission, would the exception stated in § 2256.004(b) of the Texas Public Funds Investment Act, TEX. GOV'T CODE Chapter 2256,[1] apply to (i) funds for investment in a nuclear decommissioning trust that are collected pursuant to regulation from the customers of an entity that has transferred its interest in a nuclear generating plant to a local government entity (a municipally-owned utility) whose investments are otherwise subject to the restrictions of the Act; and (ii) the decommissioning trust funds accumulated by the transferee entity prior to the transfer which are acquired by the local government entity in connection with its acquisition of the transferred interest in the nuclear generating plant?

This question has arisen in connection with the Commission's pending development and adoption of a rule relating to the transfer of the decommissioning trust established by an electric utility, following the sale or transfer of an interest in a nuclear generating plant. The rule is expected to prescribe the utility's responsibility for charging rates for the collection of funds for a nuclear decommissioning trust in the event of a sale and establish standards for the administration of the trust by the buyer of the nuclear plant asset.

[1] The statute provides that "This subchapter does not apply to an investment *donated* to an investing entity *for a particular purpose or under terms of use* specified by the donor" (emphasis supplied).

**Background**

Amendments to the Public Utility Regulatory Act (PURA)[2] were enacted in 1999 that have introduced retail competition in the sale of electricity in much of the state. In introducing retail competition, the Legislature recognized that certain electric generating plant assets would not be competitive, and the amendments included provisions for utilities that owned uneconomic generating plants to recover their "stranded costs." The Commission made an initial estimate of stranded costs in setting rates for the delivery of electricity in the competitive market in 2001, and certain utilities have an obligation to true-up their stranded costs in 2004. To determine their stranded costs, the utilities must compare the book value of their generating plant assets with the market value. PURA generally requires that the market value of these assets be determined through a market-based mechanism, such as the sale of the assets to a third party or the sale of shares in a company that owns the generation assets. The question that we are posing in this request for an opinion relates to the sale of one of the generating plant assets of AEP Texas Central Company (AEP), namely, its interest in the South Texas Nuclear Project (STP).

**Responsibility for Collecting Decommissioning Costs**

The rules of the Nuclear Regulatory Commission require the safe decommissioning of such facilities after they cease operating and permit utilities to fund the decommissioning costs over the life of the asset, through an external trust. The Public Utility Commission rule that is being developed is expected to deal with the administration of a decommissioning trust when the nuclear plant asset for which the trust was established is transferred to another entity. The purpose of the rule will be to protect such trust funds so that the amounts collected from customers plus amounts earned from investment of the funds will be available for their intended purpose when the generating plant is decommissioned. One of the objectives of the rule is to provide regulatory guidance in connection with a pending potential sale of AEP's share in STP. The purchasers may include, through exercise of a contractual right of first refusal, one or more existing participants in STP that are municipally-owned utilities.[3]

Under PURA § 39.205, costs associated with nuclear decommissioning obligations are subject to cost of service rate regulation and are to be included as a nonbypassable charge to retail customers. This provision appears to contemplate that decommissioning costs, after the sale of a nuclear plant asset, will be collected through non-bypassable charges assessed to the customers of the seller, that is, AEP in this case. As is noted above, the rule is expected to address the administration of trust funds accumulated by the selling utility prior to the sale of the asset and would also address funds that are collected after the sale of the nuclear plant asset.

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[2] TEX. UTIL. CODE ANN. §§ 11.001-64.158 (Vernon 1998 & Supp. 2003).

[3] STP is owned jointly by four current participants, AEP Texas Central, Texas Genco, L.P., and two municipally owned utilities--the City of San Antonio acting by and through the City Public Service Board (San Antonio), and the City of Austin d/b/a Austin Energy. San Antonio has participated in the Commission's rulemaking proceeding and has informed the Commission that it is actively considering exercise of its right of first refusal.

**Impact of the Texas Public Funds Investment Act**

In developing its rule, the Commission has identified as a potential concern the possibility that the continuing obligation on ratepayers of the selling utility to fund the decommissioning trust would be different if the buyer were a local government subject to the investment restrictions of the Public Funds Investment Act than if the buyer were not subject to such restrictions.[4] The Commission has experience in regulating investor-owned utilities that are not subject to the restrictions of this Act, and its rules and ratemaking decisions concerning the appropriate level of the decommissioning charge are based on the view that the appropriate investments for a decommissioning trust include a mix of both equity and debt securities. A mix of securities would normally be expected to result in a higher return for the trust, with a minimal increase in risk. If the buyer is a municipality, however, and the Act applies, the buyer would be limited to investments in debt securities, which likely would mean a lower overall return on the invested funds than would be recognized by a buyer that is not subject to the restrictions in the Act.[5] Consequently, acquisition of a nuclear plant asset by a municipally-owned utility could require a significantly higher non-bypassable charge to customers of the selling utility, compared to the charge that would be required if the asset were transferred to an entity that is not subject to the investment restrictions.

This potential impact would be partially or wholly mitigated, however, if the decommissioning funds that originate with the customers of the selling utility and are collected for the municipally-owned utility that buys the asset are deemed to constitute a "donated investment" for a "particular purpose" or under "terms of use specified by the donor" within the scope of the exception to the Public Funds Investment Act set out in § 2256.004(b) of that Act.[6] These decommissioning funds include funds collected by the selling utility and deposited in the trust fund before the sale of the plant asset and funds collected by the selling utility for the buyer for deposit in the trust fund after the transfer.

The Commission notes that these funds have been and will continue to be collected pursuant to a non-bypassable charge established by the Commission, and Commission rules and orders will continue to specify how the funds are to be used. The funds in the trust are accumulated for the purpose of safely decommissioning the generating plant and are governed by

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[4] TEX. GOV'T CODE § 2256.003(a) provides that "each governing body of the following entities may purchase, sell, and invest its funds and funds under its control in investments authorized under this subchapter in compliance with investment policies approved by the governing body and according to the standard of care prescribed by Section 2256.006: (1) a local government;...."

[5] The Texas Public Funds Investment Act limits authorized investments of entities within its scope to specified categories including obligations of or obligations guaranteed by governmental entities, certificates of deposit and share certificates, collateralized repurchase agreements based on government or government-guaranteed obligations, high-grade commercial paper, and similar investments. TEX. GOV'T CODE § 2256.009, *et seq.* (Vernon 2004). Private entities are not subject to these restrictions and generally may be expected to achieve higher returns through inclusion of equity investments in their portfolios.

[6] TEX. GOV'T CODE § 2256.004(b) provides: "This subchapter does not apply to an investment donated to an investing entity for a particular purpose or under terms of use specified by the donor."

a trust agreement, NRC rules, and Commission rules. Furthermore, the Commission orders and rules are expected to specify that funds in excess of actual decommissioning costs are to be refunded to the customers of the seller of the nuclear asset.

**Request for Expedited Decision**

The Commission requests that its question be addressed by the Attorney General on an expedited basis. The Commission intends to approve a proposal for its pending rule not later than April 29, 2004 and to adopt the rule as soon thereafter as is feasible, consistent with providing an appropriate period for public comment on the proposed rule. Early proposal and adoption of the rules is intended to provide guidance in connection with the pending AEP transaction, providing clarity concerning the responsibility for collecting decommissioning funds and administering the trust. The Commission is also aware, of course, that municipally-owned utility participants in STP have rights of first refusal in connection with the sale of AEP's interest, and that the decision whether to exercise these rights may be affected by the answer to the submitted question. It is our understanding that these rights may be interpreted as expiring on or about May 30, 2004 and that the governing board for San Antonio will be meeting on May 24 to consider whether to exercise its right of first refusal. A response to the question issued prior May 24 would be very helpful to the Commission and to the affected parties.

The Commission voted in an open meeting on April 15, 2004 to request this opinion. In order to expedite the filing of briefs by persons who may have an interest in this matter, we are posting this request on the PUC web site and providing a copy of this request to persons who have filed comments in the rulemaking proceeding relating to nuclear decommissioning and to parties to the AEP rate case that is currently pending at the Commission.

If you have any questions about this opinion request, please contact Jess Totten at 936-7235.

Respectfully submitted,

Paul Hudson
Chairman

Julie Parsley
Commissioner