

Written Comments

The Department received one written comment with respect to the notice of proposed exemption and no requests for a public hearing. The written comment was submitted by the trustees of the Plan (the Trustees) and concerns a clarification of the notice of proposed exemption. The Summary of Facts and Representations, Section 9, Paragraph 2 (page 28240, column 3) states:

The income from the Current Lease has provided the Plan with a stable and favorable rate of investment return (over 9% per annum for the period covering the 1980's and the first half of the 1990's, ranking in the top 5% of the Independent Consultants Cooperative database).

The Trustees desired to make the observation that this representation inaccurately understates the performance of the real estate. A letter dated November 16, 1995, from Wurts, Johnson & Company (Wurts, Johnson), investment consultants to the First Interstate Bank of Washington N.A., the independent fiduciary for the Plan, indicates that the rate of return to the Plan of "over 9% per annum" is actually for the five-year period ending June 30, 1995. Extending the return analysis back to January 1, 1983 for a 12-year period ending December 31, 1994, Wurts, Johnson found that the annual rate of return was 12.8%. Moreover, the most recent report from Wurts, Johnson shows that the annual rate of return for the five-year period ending December 31, 1995 was 14.1%. This rate is significantly higher than that for the five-year period ending June 30, 1995 due to a significant increase in the value of the real estate subsequent to June 30, 1995.

FOR FURTHER INFORMATION CONTACT: Ms. Karin Weng of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

The SUP Welfare Plan (the Plan), Located in San Francisco, California

[Prohibited Exemption Transaction 96-61; Exemption Application No. L-10221]

Exemption

The restrictions of sections 406(a), 406(b)(1) and (b)(2) of the Act shall not apply to the sale by the Plan of the remaining term of a one-hundred year pre-paid leasehold interest (the Interest) to the Sailors' Union of the Pacific Building Corporation, a party in interest with respect to the Plan, provided the following conditions are satisfied: (a) the sale is a one-time transaction for cash; (b) the Plan pays no commissions or other expenses in connection with the sale; (c) the Plan receives the greater

of \$438,000 or the fair market value of the Interest as of the date of the sale; and (d) the fair market value of the Interest has been determined by a qualified, independent appraiser.

For a more complete statement of the facts and representations supporting the Department's decision to grant this exemption, refer to the notice of proposed exemption published on June 4, 1996 at 61 FR 28241.

Written Comments: The Department received three written comments (and no hearing requests) with respect to the proposed exemption. Two of the comments were in favor of granting the exemption as proposed. The third commentator disagreed with the Plan's trustees' decision to eliminate its housing program, and also expressed concern that the transaction would have negative impact on the participants' paychecks and affect their retirement plan.

The applicant responded to this comment by stating that the trustees' decision to terminate the housing benefit does not involve the merits of the subject transaction. Nonetheless, the applicant states that the trustees did act prudently and in the best interest of all participants and beneficiaries in terminating the housing benefit. Over the past 40 years, the number of jobs available for West Coast unlicensed deck hands has declined from several thousand to about a hundred. There is a substantial possibility that further shrinkage will occur if Congress fails to enact a maritime subsidy program. As the declining contribution base squeezes the Plan's finances, the applicant represents that the Plan's trustees properly chose to marshal the Plan's assets to provide benefits to the maximum number of eligible participants for as long as possible. The applicant further states that the elimination of the housing benefit will have no impact on any participant's paycheck, nor will it affect any retirement plan.

The Department has considered the entire record, including the comments submitted and the applicant's response thereto, and has made a final determination to grant the exemption as proposed.

FOR FURTHER INFORMATION CONTACT: Gary H. Lefkowitz of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section

4975(c)(2) of the Code does not relieve a fiduciary or other party in interest or disqualified person from certain other provisions to which the exemptions does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(B) of the Act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) These exemptions are supplemental to and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transactional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(3) The availability of these exemptions is subject to the express condition that the material facts and representations contained in each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, D.C., this 26th day of July, 1996.

Ivan Strasfeld,

*Director of Exemption Determinations,
Pension and Welfare Benefits Administration,
Department of Labor.*

[FR Doc. 96-19482 Filed 7-30-96; 8:45 am]

BILLING CODE 4510-29-P

[Application No. D-10189, et al.]

Proposed Exemptions; Westinghouse Savannah River Company

AGENCY: Pension and Welfare Benefits Administration, Labor.

ACTION: Notice of proposed exemptions.

SUMMARY: This document contains notices of pendency before the Department of Labor (the Department) of proposed exemptions from certain of the prohibited transaction restrictions of the Employee Retirement Income Security Act of 1974 (the Act) and/or the Internal Revenue Code of 1986 (the Code).

Written Comments and Hearing Requests

All interested persons are invited to submit written comments or request for a hearing on the pending exemptions,

unless otherwise stated in the Notice of Proposed Exemption, within 45 days from the date of publication of this Federal Register Notice. Comments and request for a hearing should state: (1) the name, address, and telephone number of the person making the comment or request, and (2) the nature of the person's interest in the exemption and the manner in which the person would be adversely affected by the exemption. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing. A request for a hearing must also state the issues to be addressed and include a general description of the evidence to be presented at the hearing.

ADDRESSES: All written comments and request for a hearing (at least three copies) should be sent to the Pension and Welfare Benefits Administration, Office of Exemption Determinations, Room N-5649, U.S. Department of Labor, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Attention: Application No. stated in each Notice of Proposed Exemption. The applications for exemption and the comments received will be available for public inspection in the Public Documents Room of Pension and Welfare Benefits Administration, U.S. Department of Labor, Room N-5507, 200 Constitution Avenue, N.W., Washington, D.C. 20210.

Notice to Interested Persons

Notice of the proposed exemptions will be provided to all interested persons in the manner agreed upon by the applicant and the Department within 15 days of the date of publication in the Federal Register. Such notice shall include a copy of the notice of proposed exemption as published in the Federal Register and shall inform interested persons of their right to comment and to request a hearing (where appropriate).

SUPPLEMENTARY INFORMATION: The proposed exemptions were requested in applications filed pursuant to section 408(a) of the Act and/or section 4975(c)(2) of the Code, and in accordance with procedures set forth in 29 CFR Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). Effective December 31, 1978, section 102 of Reorganization Plan No. 4 of 1978 (43 FR 47713, October 17, 1978) transferred the authority of the Secretary of the Treasury to issue exemptions of the type requested to the Secretary of Labor. Therefore, these notices of proposed exemption are issued solely by the Department.

The applications contain representations with regard to the proposed exemptions which are summarized below. Interested persons are referred to the applications on file with the Department for a complete statement of the facts and representations.

Westinghouse Savannah River Company/Bechtel Savannah River, Inc. Pension Plan (the Plan) Located in Aiken, South Carolina

[Application No. D-10189]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and section 4975(c)(2) of the Code and in accordance with the procedures set forth in 29 C.F.R. Part 2570, Subpart B (55 FR 32836, 32847, August 10, 1990). If the exemption is granted, the restrictions of section 406(a)(1)(A), 406(a)(1)(D), 406(b)(1), and 406(b)(2) of the Act and the sanctions resulting from the application of section 4975 of the Code, by reason of section 4975(c)(1)(A), 4975(c)(1)(D), and 4975(c)(1)(E) of the Code,¹ shall not apply, effective October 15, 1994, to the past and future use by the U. S. Department of Energy (DOE)², acting on behalf of Westinghouse Savannah River Company (WSRC) and Bechtel Savannah River, Inc. (BSRI), parties in interest with respect to the Plan, of portions of DOE's interest in Group Annuity Contract GR-409 (GR-409) issued by Connecticut General Life Insurance Company (CGLIC), an insurance company headquartered in Hartford, Connecticut, to purchase interests for the Plan in CGLIC Group Annuity Contract IN-16111 (IN-16111) for the purpose of funding the benefits under the Plan; provided that:

(1) the use by DOE, acting on behalf of WSRC and BSRI, of portions of DOE's interests in GR-409 to purchase additional interests in IN-16111 on behalf of the Plan has benefited and will benefit the Plan to the same extent, as contributions of cash by DOE to such Plan;

(2) the fair market value of the debits to GR-409 that have occurred or will occur, as a result of the use of portions of GR-409 by DOE to purchase additional interest in IN-16111 on behalf of the Plan, has exactly matched

and will exactly match the fair market value of the credits to IN-16111 acquired by the Plan as a result of such purchase transactions;

(3) the Plan has received and will receive interests in IN-16111 that have a fair market value equal to the fair market value of the interests the Plan would have received had DOE or WSRC acquired additional interests in IN-16111 for the Plan for cash;

(4) the value of the earnings received by the Plan from the interests in IN-16111 purchased by DOE with portions of GR-409 have been and will be the same, as if those interests were or are purchased with cash;

(5) the named fiduciary of the Plan has determined that the transactions have been and will be prudent, feasible, and in the interest of and protective of the Plan;

(6) CGLIC, an independent, qualified third party, has determined and will continue to determine the fair market value of the interests in GR-409, as of the date of each purchase transaction;

(7) the actuary for the Plan has determined and will continue to determine the minimum funding requirement of the Plan and has determined and will continue to determine the extent to which the amount credited to the Plan's funding standard account by virtue of the use of the interest in GR-409 satisfies the minimum funding requirement;

(8) the actuary of the Plan has monitored and will continue to monitor the transactions on behalf of the Plan, as well as the terms and conditions of the exemption at all times;

(9) no more than 25% of the assets of the Plan have been or will be involved in the transactions;

(10) the Plan has not, nor will the Plan in the future, incur any fees, costs, or other charges or expenses as a result of the transactions; and

(11) if, by the required filing date of the Form 5500 (including extensions) for any year, the aggregate book value³ of the interests in IN-16111 purchased for the Plan is less than the aggregate amount credited to the Plan's funding standard account as a result of such purchases, DOE will (by the filing date of the Form 5500 for such year) purchase an additional interest in IN-16111 for the Plan that has a book value equal to the shortfall or contribute to the

¹ For purposes of this exemption, references to specific provisions of Title I of the Act, unless otherwise specified, refer also to the corresponding provisions of the Code.

² References to DOE include, where applicable, DOE's predecessors, the Energy Research and Development Administration and the Atomic Energy Commission.

³ It is represented that the book value of an annuity contract represents the amount contributed to such contract, plus accumulated interest credited to date, less amounts withdrawn from such contract. Fair market value, on the other hand, represents the market value of the general account assets in which a contract is deemed to be invested for accounting purposes.

Plan cash in the amount of such shortfall.

EFFECTIVE DATE: If the proposed exemption is granted, the exemption will be effective, as of October 15, 1994, the date DOE first used, on behalf of WSRC and BSRI, portions of its interests in GR-409 to acquire additional interests in IN-16111 for the Plan.

Summary of Facts and Representations

1. The Plan is a non-contributory multiple-employer defined benefit pension plan established, as of April 1, 1989, and maintained by WSRC and BSRI for their employees. As of January 1, 1995, the Plan covered 19,316 participants and beneficiaries. Of these individuals, 16,973 were active, laid-off, or transferred participants, 1,303 were deferred vested participants, and 1,040 were retirees or their beneficiaries in pay status.

The named fiduciary of the Plan is a committee (the Benefits Committee) which is composed of four (4) senior WSRC managers and a representative from BSRI. The Benefits Committee is responsible for the general administration of the Plan and for carrying out the provisions of the Plan. Acting in its fiduciary capacity, the Benefits Committee has appointed seven (7) independent asset management companies which serve as investment managers with respect to certain assets of the Plan, other than the Plan's interests in IN-16111.

It is represented that the assets of the Plan are well diversified. As of January 1, 1995, approximately 47 percent (47%) or \$176,259,918 of the Plan's assets is invested in a broad range of equities; 36.6 percent (36.6%) or \$137,526,560 is invested in IN-16111; 8.1 percent (8.1%) or \$30,319,763 is invested in a variety of fixed income securities managed by the investment advisors; 5.8 percent (5.8%) or \$21,954,535 is held in cash and cash equivalents; and the balance consists of accounts receivable and unsettled trades.

Until December 31, 1992, Wilmington Trust Company (Wilmington) served as trustee for the Plan. The current trustee of the Plan (the Trustee) is NationsBank (Carolinas), N.A. It is represented that the assets of the Plan, including IN-16111, are held in trust by the Trustee. As of January 1, 1995, the Plan was funded above the required minimum funding level. In this regard, as of January 1, 1995, the value of assets held by the Plan was \$375,411,740. As of the same date, liabilities of the Plan totaled \$340,770,268. It is represented that as of January 1, 1995, the Plan's liability percentage was 110.2 percent (110.2%).

Buck Consultants (Buck) serves as the Plan actuary. It is represented that Buck is an unrelated third party that is independent of parties involved in the transactions which are the subject of this request for exemption. In this regard, Buck is unaffiliated with DOE, WSRC, or BSRI.

2. WSRC is a Delaware corporation headquartered at 1993 Centennial Avenue, in Aiken, South Carolina. WSRC is a wholly-owned subsidiary of Westinghouse Electric Corporation, a public company incorporated in Pennsylvania and headquartered in Pittsburgh, Pennsylvania.

3. BSRI is a subcontractor to WSRC. BSRI is a private company incorporated in Delaware and headquartered in South Carolina. BSRI is a wholly-owned subsidiary of Bechtel Operating Services Corporation, a private company incorporated in Delaware and headquartered in California.

4. The applicants on behalf of whom exemption relief is sought are WSRC and BSRI, the sponsors of the Plan, and the members of the Benefits Committee. In this regard, WSRC and BSRI are parties in interest in that each is an employer any of whose employees are covered by the Plan, pursuant to section 3(14)(C) of the Act.

5. In 1950, DOE awarded E.I. du Pont de Nemours and Company (Du Pont) a contract to manage the U.S. owned nuclear facility in Aiken, South Carolina. During Du Pont's management of the facility from 1950 until 1989, employees of Du Pont were participants in the Du Pont Pension and Retirement Plan (the Du Pont Plan), a defined benefit pension plan sponsored and maintained by Du Pont for all eligible employees of Du Pont and its wholly-owned subsidiaries. Under the terms of a management contract between DOE and Du Pont, DOE was obligated to reimburse Du Pont for the cost of funding benefits under the Du Pont Plan for employees who worked at the nuclear facility.

6. It is represented that to fulfill its obligations under the management contract with Du Pont, DOE purchased GR-409 from CGLIC in 1950. GR-409, as amended, is an immediate participation guarantee group annuity contract issued by CGLIC. Amounts contributed under GR-409 are invested in the defined benefit plan segment of CGLIC's general account. Under the terms of GR-409, DOE is entitled, subject to certain limitations, to make annual withdrawals without effecting the book value of remaining funds. Although only DOE made contributions to GR-409, the group annuity contract

originally named both DOE and Du Pont as contractholders.

It is represented that GR-409 was not an asset of the Du Pont Plan. Rather, cash payments from GR-409 received by DOE from CGLIC were used by DOE for more than forty (40) years to reimburse Du Pont or to directly reimburse the Du Pont Plan for benefit payments made to retired employees who had worked at the facility and to their beneficiaries.

7. In 1989, Du Pont's contract to manage the facility expired, and subsequently in 1991, DOE and Du Pont agreed on a lump sum settlement of retiree benefit costs. Under the terms of the settlement, cash and a portion of GR-409 were transferred to the Du Pont Plan to settle DOE's contractual obligation respecting the funding of the Du Pont Plan and other retiree benefits. It is represented that DOE at that time became the sole contractholder of the remaining balance in GR-409.

8. Subsequent to the termination of the contract with Du Pont, in 1989, DOE selected WSRC to manage and operate the nuclear facility. At that time, WSRC established the Plan which is the subject of this exemption request. As the Plan was intended to provide continuity for former Du Pont employees who had agreed to remain at the nuclear facility as employees of WSRC (the Transferred Employees), WSRC designed the Plan to replicate the benefits structure of the Du Pont Plan. In this regard, it is represented that in material respects, the Plan generally provides the same benefits, rights, and features as the Du Pont Plan did in 1989, subject to statutorily mandated revisions. At the same time, DOE became obligated, under the terms of a management contract between DOE and WSRC (the Prime Contract), to reimburse WSRC for all funding contributions made by WSRC to the Plan.

9. In order to preserve the benefits and service credits of Transferred Employees, benefits accrued by Transferred Employees under the Du Pont Plan (and liabilities attributable thereto) were spun-off to the Plan. In this regard, it is represented that full participation, vesting, and accrual credit was granted under the Plan for service rendered to Du Pont by the Transferred Employees. In order to accomplish the spin-off, on December 30, 1990, the Du Pont Plan entered into a trust-to-trust transaction with the Plan that involved \$246 million worth of assets. It is represented that the mechanics of the trust-to-trust transfer were as follows. DOE, which was responsible for funding the Du Pont Plan for employees at the site, instructed CGLIC to issue an annuity contract with a book value of

\$246 million, designated GR-AA, to the Du Pont Plan trust in exchange for DOE's surrender of a portion of its annuity contract GR-409. Du Pont then immediately instructed Wilmington, the trustee of the Du Pont Plan trust, to surrender GR-AA and directed CGLIC to issue IN-16111, an immediate participation guarantee group annuity contract, to the Plan's trust. Finally, WSRC instructed Wilmington, who until 1993 was also the trustee of the Plan's trust, to accept IN-16111 from CGLIC.

10. It is represented that the Trustee is currently the contractholder of IN-16111. Under the terms of such contract, CGLIC is obligated to pay retirement benefits provided under the Plan, to the extent requested by the Trustee, up to an aggregate amount not to exceed the book value of IN-16111. In this regard, the book value of IN-16111 is equal to the sum of all contributions to such contract, plus accumulated interest, less the sum of all amounts withdrawn from IN-16111.

It is represented that shortly after the acquisition by the Plan of IN-16111, a portion of IN-16111 with a book value of \$50 million was liquidated and the proceeds invested by the Plan in equity securities, leaving a remaining book value of \$196 million for IN-16111. It is represented that CGLIC has advised that the book value of IN-16111, as of December 31, 1994, was \$137.5 million.

11. It is represented that WSRC manages the nuclear facility and BSRI, a subcontractor to WSRC, provides engineering services and manages the construction program at the facility. In this regard, the annual budget at the facility totals approximately \$1.6 billion, of which \$900 million represents payroll costs.

12. Since 1989, pursuant to the terms of the Prime Contract between DOE and WSRC, DOE has been obligated to reimburse WSRC for reasonable compensation expenses, including all legally required funding contributions of the Plan. In this regard, DOE's reimbursement obligation extends to both contributions for which WSRC is responsible as an employer and contributions which WSRC is required to make on behalf of BSRI under WSRC's subcontract with BSRI. DOE is also obligated to reimburse WSRC for "reasonable costs arising from any past or future prohibited transaction" resulting from DOE's actions.

13. It is represented that DOE originally fulfilled its responsibility under the Prime Contract by funding the Plan directly, rather than by reimbursing WSRC. In 1989 when the Plan was established, DOE contributed

cash in the amount of \$1.63 million to the Plan to cover start-up and other interim costs of the Plan. In this regard, it is represented that the initial cash contribution by DOE, plus the amount involved in the trust-to-trust transfer, adequately funded the Plan for a number of years without any additional contribution. Thereafter, in September 1993, in connection with a special early retirement program, DOE made, on behalf of WSRC, a cash contribution of \$16,500,000 to the Plan. Subsequently, DOE made a cash contribution of \$8,031,573 on April 14, 1994; a cash contribution of an equal amount on July 15, 1994; and a cash contribution of \$15,293,573 on September 15, 1994.

14. Rather than continue to make cash contributions to the Plan, beginning in mid-October 1994, DOE in four (4) instances has fulfilled its responsibility under the Prime Contract by purchasing from CGLIC additional interests in IN-16111 for the Plan. However, on those occasions, DOE did not purchase such additional interests in IN-16111 with cash, but rather surrendered to CGLIC portions of GR-409, as consideration for such purchase.

The mechanics of each of the past transactions was accomplished in the following steps. Before a contribution was due, Buck advised WSRC of the minimum funding requirement for the Plan. WSRC, in turn, notified DOE of the amount of the required contribution. When the contribution became due, DOE instructed CGLIC that it wished to surrender a portion of its interest in GR-409 with a book value equal to the amount of the minimum funding requirement of the Plan to purchase additional interests in IN-16111 for the Plan. It is represented that both GR-409 and IN-16111 represent derivative interests in assets held in the defined benefit segment of the general account of CGLIC. Accordingly, when instructed by DOE, CGLIC obliged by shifting the interest in a *pro rata* portion of the assets underlying GR-409 (with a book value equal to the amount of the required contribution) to IN-16111. In this regard, each transfer increased the book value of the Plan's interest in IN-16111 by the amount of the required funding contribution. The applicants are concerned that these transactions may be viewed as contributions by DOE, on behalf of WSRC and BSRI, of interests in GR-409 in consideration of the purchase of interests in IN-16111 for the Plan.

It is represented that in this manner, the following transactions totaling \$29,811,336 were executed: (1) a quarterly contribution of \$920,106 due October 15, 1994; (2) a quarterly

contribution of \$5,707,777 due January 15, 1995; (3) a voluntary contribution of \$6,900,000 due April 14, 1995; and (4) a voluntary contribution of \$16,283,453 paid on July 17, 1995. At the time of the contributions for the plan year of 1994, the book value of the interests in GR-409 exceeded the fair market value of the assets underlying GR-409. In order to bring the Plan's funding standard account into balance for the 1994 plan year based on the fair market value of the transferred interests in GR-409, on July 17, 1995, \$4,323,800 of interests at book value in GR-409 were used as consideration to purchase additional interests in IN-16111 for the Plan. In this regard, it is represented that Buck determined this amount based on the fair market value of the underlying assets of GR-409, as determined by CGLIC.

DOE wishes to continue, over the next two (2) years until GR-409 is exhausted (projected to be towards the end of 1997), to use GR-409 to satisfy its obligations under the Prime Contract to reimburse WSRC for the cost of funding the Plan. In this regard, the same procedure, as described with respect to the past transactions, will be employed in the future, except that all prospective transactions will be based on fair market value of the interests at the time of the contribution.⁴ As it did in the past transactions, the Plan in the future will assume the book value of the respective interests in GR-409 which are used as consideration to acquire additional interest in IN-16111 for the Plan. However, if by the required filing date of the Form 5500 (including extensions) for any year, the aggregate book value of the interests in IN-16111 purchased for the Plan to date is less than the aggregate amount credited to the Plan's funding standard account as a result of such purchases, DOE will (by the filing date of the Form 5500 for such year) purchase an additional interest in IN-16111 for the Plan that has a book value equal to the shortfall. In this regard, DOE would make a cash contribution to the Plan to the extent there were insufficient annuity interests to cover the shortfall. This will ensure that the aggregate book value of annuity interests in IN-16111 purchased for the Plan are at least equal to the book value of the

⁴The applicants represent that regardless of the fact that interests in GR-409 and IN-16111 will be valued for funding purposes on the fair market value of the underlying assets, all of the general account assets of CGLIC stand behind IN-16111. Thus, CGLIC is at all times obligated to pay retirement benefits to the Plan, as contractholder of IN-16111, to the extent requested by the Trustee, up to an aggregate amount not to exceed the book value of IN-16111.

interests in IN-16111 that could have been purchased for the Plan with cash for the purpose of satisfying the minimum funding requirements of the Plan.

15. It is represented that neither DOE nor any of the parties on behalf of whom the exemption is sought participated in the past transactions knowing that such might be prohibited under the Act or under the Code. In the opinion of the applicants, the Plan is not actually receiving a contribution of interests in GR-409; instead the GR-409 interests are consideration used by DOE to purchase additional interests in IN-16111 for the Plan. The funding mechanism in this case differs from an "in-kind contribution" wherein the thing of value that is contributed by the plan sponsor is what in fact the plan receives. In this regard, the applicants point out that the interests in GR-409 which DOE has surrendered and will surrender to CGLIC, as consideration for the purchase of additional interest in IN-16111 for the Plan, are not in themselves "contributions."

WSRC and BSRI, acting in their settlor capacities, have elected to make contributions to the Plan through the purchase of annuity interests. However, rather than purchasing additional annuity interests with cash for the Plan, WSRC and BSRI have permitted the purchases by DOE in the past and will permit purchases by DOE in the future of additional interests in IN-16111 for the Plan. Accordingly, the applicants believe that the purchases by DOE of IN-16111 for the Plan on behalf of WSRC and BSRI, the sponsors of such Plan, are not properly characterized as "sales or exchanges" between the plan sponsors and the Plan any more than contributions in cash would be so characterized. Further, the applicants maintain that the surrenders of portions of GR-409 by DOE to CGLIC are not transactions between DOE and the Plan within the meaning of section 406(a) of the Act or section 4975(c) of the Code.

With respect to the prohibition against fiduciary conflicts of interest, as set forth in section 406(b) of the Act, the applicants believe that the transactions which are the subject of this exemption do not raise conflict of interest issues. In this regard, the applicants maintain that WSRC and BSRI are acting in their settlor or corporate capacities and not as fiduciaries, in permitting DOE to surrender on behalf of WSRC portions of DOE's interests in GR-409 to purchase interests in IN-16111 for the Plan. The applicants are also of the view that no conflict of interest arises with respect to the decision of the Benefits Committee to accept the transactions, because the

Benefits Committee takes such action solely on behalf of the Plan and in the interest of the participants and beneficiaries.

Notwithstanding the reasoning described in the paragraphs above, it is represented that the Benefits Committee and WSRC became concerned in March of 1995 that there was a possibility that the transactions could be considered to be prohibited. As a result, WSRC promptly sought guidance as to the propriety of the transactions and expressed its concerns to CGLIC and to DOE. As the Benefits Committee represents that it was by no means certain that the transactions were prohibited, it was not clear that the Plan had a basis to object. It is further represented that the Benefits Committee had no reason to complain of the past transactions, as the Plan did not have a stake in whether CGLIC collected cash from WSRC or from DOE or in whether CGLIC debited a portion of GR-409, as either way the value of the Plan's interest in IN-16111 increased by the same amount. Accordingly, the applicants are aware that the prohibited transaction issue is not entirely free from doubt, and that DOE's interests in GR-409 which are used to purchase interests in IN-16111 on behalf of WSRC and BSRI may be viewed as contributions to the Plan. As a result, the applicants seek retroactive and prospective exemption relief from section 406(a)(1)(A) and 406(a)(1)(D) of the Act and from section 4975(c)(1)(A) and 4975(c)(1)(D) of the Code, for past and future transactions involving DOE's use of portions of GR-409 for the purpose of purchasing additional interests in IN-16111 for the Plan. Further, because the decision of the Benefits Committee arguably benefits DOE—by permitting DOE to satisfy its obligations under the Prime Contract with interests in GR-409 rather than with cash, the applicants seek both retroactive and prospective relief from section 406(b)(1) and 406(b)(2) of the Act and from section 4975(c)(1)(E) of the Code.

16. At the request of WSRC, DOE did not make the contribution scheduled for October 15, 1995, and has temporarily suspended further transactions involving GR-409, pending disposition of the requested exemption. Under present law funding requirements, funding for the 1995 Plan year must be completed by September 15, 1996.

It is represented that although not a party in interest with respect to the Plan, DOE believes its budget would be adversely affected if the exemption were not granted. In this regard, if the requested exemption is not granted,

DOE could not use GR-409 as a source of Plan funding. This would upset DOE's settled expectation and saddle DOE with an asset that serves no other useful purpose. As a result, DOE would be forced to divert scarce resources (*i.e.*, congressional appropriations) from other areas of its shrinking budget. In addition, it would be particularly disruptive, if DOE were required to undo the transactions which have already occurred and to contribute cash instead.

17. It is represented that the past and future transactions for which relief is requested represent a relatively small percentage of the Plan's assets. In this regard, the four (4) contributions by DOE of portions of GR-409 which have already taken place represent less than 8.1 percent (8.1%) of the total fair market value of the assets of the Plan. Further, the sum of the nominal book value of the four (4) transactions completed to date equals \$29.8 million. With respect to future transactions, it is represented that, based on CGLIC's valuation and Buck's reasonable projection of WSRC's minimum funding obligations, that the sum of the nominal book values of such future transactions will equal approximately \$94.9 million. In this regard, it is anticipated that future uses by DOE of portions of GR-409 will increase the total percentage of Plan assets involved in the transactions to approximately 24 percent (24%). It is represented that as neither the past nor future transactions represents a significant percentage of Plan assets, the risk is minimal that any one of them could have impaired or will impair the ability of the Plan to pay benefits and expenses when due.

18. It is represented that the Plan has accepted transactions which are the subject of this exemption in the past and intends to accept such transactions in the future, because it is in the interest of the Plan and its participants and beneficiaries to do so. In this regard, it is represented that the Benefits Committee has thoroughly reviewed the transactions and has concluded that it is prudent and in the interest of the Plan and its participants and beneficiaries to accept such transactions. Among the elements that the Benefits Committee relied upon in support of this conclusion are that: (1) The interests have had and will have a fair market value at least equal to WSRC's minimum funding obligation and equal to the interests that WSRC could otherwise have purchased with cash; (2) the interests have consistently generated competitive risk-adjusted rate of returns and are reasonably expected to continue to do so; (3) the interests are invested in

a diversified group of investment grade fixed-income securities and commercial mortgages and as such balance the equity portfolio held by the Plan's trust; and (4) pursuant to the annual withdrawal provisions in IN-16111, the Plan is able to cash out a significant portion of such interests each year with no market value adjustment, adding a degree of liquidity not generally available under an immediate participation guarantee group annuity contract. In addition, it is represented that CGLIC is consistently ranked by the major ratings organizations in the top echelon of insurance companies.

19. WSRC maintains that both past and future transactions have been structured to protect the interests of the Plan and its participants and beneficiaries consistent with the objectives of the Act. In this regard, it is represented that Buck, a skilled and reputable pension actuarial consulting firm, providing services for employee benefit plans with more than \$100 million in assets, has determined and will determine the amount creditable under the Plan's funding standard account. Although Buck does provide actuarial and benefits consulting services to WSRC and BSRI, and before 1995, did provide such services to Westinghouse Electric Corporation and its plans, it is represented that these accounts represented only about 1.5 percent (1.5%) of Buck's annual gross revenue in 1994 and less than one percent (1%) in 1995.

With respect to the transactions which are the subject of this exemption, it is represented that as the actuary for the Plan, Buck is a service provider to the Plan. In this regard, it is represented that Buck's allegiance is to the Plan and that it has carried out and will carry out its responsibilities solely in the interest of the Plan and its participants and beneficiaries.

Further, protections are provided in that the fair market value of the interests in GR-409 surrendered by DOE have been and will be established by CGLIC, a qualified third party. It is represented CGLIC has advised that as of December 31, 1994, and July 17, 1995, the book value of GR-409 was, respectively, \$163.3 million and \$110.1 million and that the fair market value of GR-409 was \$154.4 million, as of December 31, 1994, and \$109.8 million, as of July 17, 1995.

It is represented that CGLIC is the entity most qualified to make the determination of value of GR-409, because it best understands the intricacies of its general account and cell accounting methods, and because CGLIC has a well-developed expertise in valuing the fixed income securities,

commercial mortgage interests, and other interests in which the general account is invested. Further, it is represented that CGLIC has no motivation to misvalue the interests, because the value of the debits to GR-409 have matched and will match exactly the value of the credits to IN-16111 received by the Plan. In this regard, CGLIC's aggregate liability under the contracts will not change as a result of the transfers. Accordingly, it is represented that the interests will be fairly valued by CGLIC in a way that protects the participants and beneficiaries of the Plan.

20. The applicants maintain that the transactions which are the subject of this exemption are feasible in that the WSRC will bear the cost of filing the application for exemption, the cost of notifying interested persons, and the expenses associated with the proposed transaction. In addition, it is represented that there will be no need for the Department to monitor or supervise the transactions, as independent qualified third parties have determined and will determine the value of the interests and the amount of the minimum funding requirements.

Further, the applicants assert that the facts supporting their application are highly unusual and are not likely to be replicated. In this regard, it is represented that insurance companies as a rule do not offer to non-plan entities annuity contracts that are invested in the defined benefit plan segment of such insurance companies separate account. As a result, it is not generally possible for a sponsor to contribute an annuity interest to a plan that would provide the same benefit to the plan as had the sponsor purchased an interest in cash. It is represented that to the best of CGLIC's knowledge GR-409, which was purchased by DOE in 1950 prior to the passage of the Act, is the only group annuity contract issued by CGLIC to a non-plan entity that is invested in the defined benefit segment of CGLIC's general account. Moreover, neither CGLIC or Buck is aware of any such contract issued by any other insurance company.

21. In summary, the applicants represent that the transactions meet the statutory criteria of section 408(a) of the Act because:

(a) the use by DOE, acting on behalf of WSRC and BSRI, of portions of DOE's interests in GR-409 to purchase additional interests in IN-16111 on behalf of the Plan has benefited and will benefit the Plan to the same extent, as contributions of cash by DOE to such Plan;

(b) the fair market value of the debits to GR-409 that have occurred or will occur, as a result of the use of portions of GR-409 by DOE for the benefit of the Plan, has exactly matched and will exactly match the fair market value of the credits to IN-16111 acquired by the Plan as a result of such use;

(c) the Plan has received and will receive interests in IN-16111 that have a fair market value equal to the fair market value of the interests the Plan would have received had DOE or WSRC purchased additional interests in IN-16111 for the Plan for cash;

(d) the value of the earnings received by the Plan from the interests in IN-16111 purchased by DOE with portions of GR-409 has been and will be the same, as if those interests were purchased with cash;

(e) the named fiduciary of the Plan has determined that the transactions have been and will be prudent, feasible, and in the interest of and protective of the Plan;

(f) an independent, qualified third party has determined and will continue to determine the fair market value of the interests in GR-409, as of the date of each purchase transaction;

(g) the actuary for the Plan has determined and will continue to determine the minimum funding requirement of the Plan and has determined and will continue to determine the extent to which the amount credited to the Plan's funding standard account satisfies the minimum funding requirement;

(h) the actuary of the Plan has monitored and will continue to monitor the transactions on behalf of the Plan, as well as the terms and conditions of the exemption at all times;

(i) no more than 25% of the assets of the Plan have been or will be involved in the transactions;

(j) the Plan has not, nor will the Plan in the future, incur any fees, costs, or other charges or expenses as a result of the transactions; and

(k) if, by the required filing date of the Form 5500 (including extensions) for any year, the aggregate book value of the interests in IN-16111 purchased for the Plan is less than the aggregate amount credited to the Plan's funding standard account as a result of such purchases, DOE will (by the filing date of the Form 5500 for such year) purchase an additional interest in IN-16111 for the Plan that has a book value equal to the shortfall or contribute cash in the amount of such shortfall.

Notice to Interested Persons

Those persons who may be interested in the pendency of the requested

exemption include, but are not limited to, all active WSRC employees participating in the Plan, all retired or separated participants either receiving or entitled to receive benefits, all beneficiaries of deceased participants who are receiving or are entitled to receive benefits, and all unions representing active BSRI employees who participate in the Plan. It is represented that these various classes of interested persons will be notified within four (4) business days from the date of the publication of the Notice of Proposed Exemption (the Notice) in the Federal Register, either by mailing first-class or by posting a photocopy of the Notice, plus a copy of the supplemental statement (the Supplemental Statement), in the form set forth in the Department's regulations under 29 CFR 2570.43(b)(2). In this regard, notification will be provided to all retired or separated participants either receiving or entitled to receive benefits, and to all beneficiaries of deceased participants who are receiving or are entitled to receive benefits, by first-class mail to their last known mailing address of a copy of the Notice and a copy of the Supplemental Statement. Active participants will be provided with notification by posting a copy of the Notice and a copy of the Supplemental Statement at all WSRC locations, in areas that are customarily used for notices to employees with regard to employee benefits or labor relations matters. WSRC shall also seek to post a copy of the Notice and a copy of the Supplemental Statement at the offices of the unions that represent BSRI active employees who participate in the Plan.

FOR FURTHER INFORMATION CONTACT: Angelena C. Le Blanc of the Department, telephone (202) 219-8883 (This is not a toll-free number.)

Operating Engineers Local 150
Apprenticeship Fund (the Plan) Located
in Plainfield, Illinois

[Application No. L-10279]

Proposed Exemption

The Department is considering granting an exemption under the authority of section 408(a) of the Act and in accordance with the procedures set forth in 29 C.F.R. Part 2570, Subpart B (55 F.R. 32836, 32847, August 10, 1990). If the exemption is granted the restrictions of sections 406(a), 406 (b)(1) and (b)(2) of the Act shall not apply to the proposed sale by the Plan of a parcel of unimproved real property in Will County, Illinois (the Property) to the International Union of Operating Engineers Local 150, AFL-CIO (the Union), a party in interest with respect

to the Plan; provided the following conditions are satisfied:

(A) All terms of the transaction are at least as favorable to the Plan as those which the Plan could obtain in an arm's-length transaction with an unrelated party;

(B) The Plan incurs no costs or expenses related to the transaction; and

(C) The Plan receives a purchase price no less than the greater of (1) \$65,000, or (2) the fair market value of the Property as of the sale date.

Summary of Facts and Representations

1. The Plan is an employee welfare plan as described in section 3(c) of the Act with total assets of approximately \$6,492,242 as of December 31, 1995. The Plan provides training and skill improvement for members of the Union, and during 1995 the Plan provided such services to approximately 600 apprentices and 5,493 journeymen. The Plan is sponsored by the Union and several employer associations, all of which appoint trustees to the Plan. The Plan's board of trustees (the Trustees) consists of an equal number of representatives of the Union and representatives of participating employers.

2. Among the assets of the Plan are two adjacent parcels of land located in the Lockport Township of Will County, Illinois, constituting approximately 104.11 acres (the Land). The Land consists of Parcel 1, consisting of 8.54 acres, and Parcel 2, consisting of 95.57 acres. The Land was purchased by the Trustees for the Plan from unrelated parties in 1978 at \$2,401.30 per acre, for a total purchase price of \$250,000.

3. The Trustees represent that all of the Land except Parcel 1 has been utilized in the Plan's training program for the operation of heavy equipment, garages for equipment repair and maintenance, and classroom/administration buildings. The Trustees represent that the physical configuration of Parcel 1 renders it too narrow for the operation of heavy equipment and that, accordingly, Parcel 1 has been utilized solely to provide convenient access to the Land from Weber Road, a major thoroughfare which is east of the Land. Parcel 1 has remained vacant and unimproved since its acquisition by the Plan. Adjacent to Parcel 1 on the north is a parcel of land owned by the Union (the Union Land), on which the Union intends to build a new administration building (the New Building). The Union would like to utilize part of Parcel 1 for the New Building and has asked the Trustees to sell a portion of Parcel 1 for this purpose. The Union is proposing to purchase 7.02 acres of Parcel 1 (the

Property) from the Plan, leaving the Plan with ownership of the remaining 1.52 acres necessary for continued access between Parcel 2 and Weber Road. The Trustees have adopted a resolution providing for the sale of the Property to the Union, and are requesting an exemption to enable this sale transaction under the terms and conditions described herein.

4. After the Trustees received the request of the Union to purchase the Property, the Property was appraised for its fair market value by independent professional real property appraisers. According to an appraisal performed by Gadd, Tibble & Associates, Inc. (Gadd Tibble), as of October 30, 1995 the Property had a fair market value of \$65,000, or approximately \$9259.26 per acre. In another appraisal, Shetina Appraisal Company determined that as of December 20, 1995 the Property had a fair market value of \$45,630, or \$6,500 per acre.

The Union proposes to purchase the Property for cash in the amount of no less than \$65,000, the Property's fair market value determined in the Gadd Tibble appraisal. In a supplement to the Gadd Tibble appraisal, Roger F. Tibble, MAI, states that the Union's ownership of adjacent property, and the intention to use the Property in the construction project on the Union Property, do not warrant a higher valuation of the Property to the Union as purchaser, as opposed to an unrelated purchase, because the Property is not necessary for the intended construction project and the Union is able to proceed with construction of the intended improvements without the Property. Mr. Tibble represents that while the Property would provide the new Union building with additional access to Weber Road, the Union Property already has sufficient access to Weber Road for the project.

Commensurate with the sale transaction, the Gadd Tibble appraisal shall be updated as of the sale date, and the purchase price will be increased accordingly if Gadd Tibble determines that the Property's fair market value has increased since its appraisal of October 30, 1995. The Plan will not incur any expenses in relation to the purchase transaction.

5. In summary, the applicant represents that the proposed transaction satisfies the criteria of section 408(a) of the Act for the following reasons: (a) The sale will be a one-time cash transaction and the Plan will incur no expenses related to the sale; (b) The Plan will receive a purchase price for the Property in the amount of no less than its fair market value as of the sale

date, and in no event less than \$65,000; and (c) The transaction will enable the Plan to liquidate most of Parcel 1, which is too narrow for training uses, while retaining enough of Parcel 1 for continued use as Parcel 2 access to a major thoroughfare.

FOR FURTHER INFORMATION CONTACT:

Ronald Willett of the Department, telephone (202) 219-8881. (This is not a toll-free number.)

General Information

The attention of interested persons is directed to the following:

(1) The fact that a transaction is the subject of an exemption under section 408(a) of the Act and/or section 4975(c)(2) of the Code does not relieve a fiduciary or other party in interest of disqualified person from certain other provisions of the Act and/or the Code, including any prohibited transaction provisions to which the exemption does not apply and the general fiduciary responsibility provisions of section 404 of the Act, which among other things require a fiduciary to discharge his duties respecting the plan solely in the interest of the participants and beneficiaries of the plan and in a prudent fashion in accordance with section 404(a)(1)(b) of the act; nor does it affect the requirement of section 401(a) of the Code that the plan must operate for the exclusive benefit of the employees of the employer maintaining the plan and their beneficiaries;

(2) Before an exemption may be granted under section 408(a) of the Act and/or section 4975(c)(2) of the Code, the Department must find that the exemption is administratively feasible, in the interests of the plan and of its participants and beneficiaries and protective of the rights of participants and beneficiaries of the plan;

(3) The proposed exemptions, if granted, will be supplemental to, and not in derogation of, any other provisions of the Act and/or the Code, including statutory or administrative exemptions and transitional rules. Furthermore, the fact that a transaction is subject to an administrative or statutory exemption is not dispositive of whether the transaction is in fact a prohibited transaction; and

(4) The proposed exemptions, if granted, will be subject to the express condition that the material facts and representations contained in each application are true and complete, and that each application accurately describes all material terms of the transaction which is the subject of the exemption.

Signed at Washington, DC, this 26th day of July, 1996.

Ivan Strasfeld,

*Director of Exemption Determinations,
Pension and Welfare Benefits Administration,
U.S. Department of Labor.*

[FR Doc. 96-19481 Filed 7-30-96; 8:45 am]

BILLING CODE 4510-29-P

**NUCLEAR REGULATORY
COMMISSION**

[Docket No. 50-440]

**Cleveland Electric Illuminating
Company, et al.; Order Approving
Transfer of License for Perry Nuclear
Power Plant**

I

Cleveland Electric Illuminating Company (CEI), Centerior Service Company (CSC), Duquesne Light Company, Ohio Edison Company (Ohio Edison), OES Nuclear, Inc. (OES), Pennsylvania Power Company, and Toledo Edison Company are the licensees of Perry Nuclear Power Plant, Unit No. 1 (PNPP Unit 1). CEI and CSC act as agents for themselves and the other licensees and have exclusive responsibility for and control over the physical construction, operation, and maintenance of PNPP Unit 1 as reflected in Facility Operating License No. NPF-58. The Nuclear Regulatory Commission (NRC) issued License No. NPF-58 on March 18, 1986, pursuant to Part 50 of Title 10 of the *Code of Federal Regulations* (10 CFR Part 50). Ohio Edison leases 12.58 percent of PNPP Unit 1 pursuant to the sale and leaseback transactions previously authorized by Amendment 2 to License No. NPF-58. The facility is located on the shore of Lake Erie in Lake County, Ohio, approximately 35 miles northeast of Cleveland, Ohio.

II

Under cover of a letter dated December 29, 1995, from Shaw, Pittman, Potts and Trowbridge, Ohio Edison submitted its request dated December 28, 1995, for approval of its intended transfer of its 12.58-percent ownership interest in the "common facilities" regarding the PNPP Unit 1 to its wholly owned subsidiary, OES. The "common facilities" include fuel-handling and storage facilities and equipment, radioactive waste processing facilities and equipment, service equipment (including laboratory equipment, computer equipment, and machine shop equipment), site security systems equipment, health physics equipment, makeup and discharge water

systems, tunnels and equipment, furniture, training equipment, and the reactor simulator. This request supplements an earlier request to transfer a 17.42-percent ownership interest in PNPP Unit 1 from Ohio Edison to OES, which the NRC approved by order dated December 20, 1995. The other licensees would remain the same and would not be affected by the proposed transfer. On May 8, 1996, a notice of proposed ownership transfer was published in the Federal Register (61 FR 20840), and on June 25, 1996, an Environmental Assessment and Finding of No Significant Impact was published in the Federal Register (61 FR 32860).

The transfer of License No. NPF-58 is subject to the consent of the NRC as described in 10 CFR 50.80(a). Ohio Edison and OES will remain licensees of PNPP Unit 1. Ohio Edison would make sufficient payments to OES for OES to pay its expenses and would retain full responsibility for the costs of operating, maintaining, and decommissioning the interest in PNPP Unit 1 "common facilities" transferred to OES. OES is an "electric utility" as defined in 10 CFR 50.2 and thus is exempt from further financial qualifications review as specified in 10 CFR 50.33(f). Ohio Edison will continue to be an "electric utility" as defined in 10 CFR 50.2 and thus is also exempt from any further financial qualifications review. Given the financial arrangement between Ohio Edison and OES, and that both are licensees, the transfer will result in no adverse impact with respect to financial qualifications.

Since CEI and CSC are the only authorized operators and the transfer would not affect their staff, plant operations would not be affected by the transfer. OES is bound by the existing antitrust license conditions, and Ohio Edison will remain obligated to these same antitrust license conditions after the proposed transfer. Ohio Edison has also asserted that it and OES are not owned, controlled, or dominated by an alien, a foreign corporation, or a foreign government.

On the basis of a review of the information in the letter of December 29, 1995, and the application of December 28, 1995, and other information before the Commission, the NRC staff finds that the transfer of Ohio Edison's 12.58-percent ownership interest in the "common facilities" to OES will not be inimical to the common defense and security or to the health and safety of the public. Therefore, the NRC staff concludes that OES is qualified to hold the license to the extent and for the purposes that Ohio Edison is now authorized to hold the