of AD 90–17–18, amendment 39–6702), perform a visual and an ultrasonic inspection of the front spar web between FSS 636 and FSS 675, in accordance with Boeing Alert Service Bulletin 747–57A2259, dated February 15, 1990; or Revision 1, dated September 6, 1990. If no crack is found, repeat these inspections at intervals not to exceed 1,000 landings until the inspections required by paragraph (b) of this AD are accomplished.

(b) For airplanes on which the ''terminating modification'' [between FSS 640 and FSS 670] specified in Boeing Alert Service Bulletin 747–57A2259, dated February 15, 1990; or Revision 1, dated September 6, 1990; has not been accomplished: Prior to the accumulation of 4,000 total landings on the airplane, or within 6 months after the effective date of this AD, whichever occurs later, perform the inspections specified in paragraphs (b)(1), (b)(2), and (b)(3) of this AD to detect cracks in the web between FSS 628 and FSS 675, in accordance with Boeing Alert Service Bulletin 747–57A2259, Revision 2, dated June 9, 1994. Accomplishment of these inspections terminates the repetitive inspection requirement of paragraph (a) of this AD. If no crack is found, repeat these inspections thereafter at intervals not to exceed 1,000 landings.

(1) Perform an ultrasonic inspection in the web under the upper and lower chord footprints; and

(2) Perform a high frequency eddy current inspection in the web in an area one inch below the upper chord and one inch above the lower chord footprints; and

(3) Perform a detailed visual inspection in the forward face of the web of the wing front spar at fastener locations in the web-to-stiffeners and web-to-rib posts.

(c) For airplanes on which the ''terminating modification'' specified in Boeing Alert Service Bulletin 747–57A2259, dated February 15, 1990; or Revision 1, dated September 6, 1990; has been accomplished: Prior to the accumulation of 4,000 total landings on the airplane, or within 6 months after the effective date of this AD, whichever occurs later, perform the inspections specified in paragraphs (c)(1), (c)(2), and (c)(3) of this AD to detect cracks in the web between FSS 628 and FSS 636, in accordance with Boeing Alert Service Bulletin 747–57A2259, Revision 2, dated June 9, 1994. If no crack is found, repeat these inspections thereafter at intervals not to exceed 1,000 landings.

(1) Perform an ultrasonic inspection of the web under the upper and lower chord footprints; and

(2) Perform a high frequency eddy current inspection of the web in an area one inch below the upper chord and one inch above the lower chord footprints; and

(3) Perform a detailed visual inspection of the forward face of the web of the wing front spar at fastener locations in the web-to-stiffeners and web-to-rib posts.

(d) If any crack is found during any inspection required by this AD, prior to further flight, accomplish a terminating modification (between FSS 623 and FSS 670) in accordance with Boeing Alert Service Bulletin 747–57A2259, Revision 2, dated June 9, 1994; or in accordance with a method approved by the Manager, Seattle Aircraft Certification Office (ACO), FAA, Transport Airplane Directorate.

(e) Modification of the wing front spar web between FSS 623 and FSS 670 in accordance with Boeing Alert Service Bulletin 747–57A2259, Revision 2, dated June 9, 1994; or in accordance with a method approved by the Manager, Seattle ACO; or in accordance with AD 95–10–16, amendment 39–9233; constitutes terminating action for the requirements of this AD.

(f) An alternative method of compliance or adjustment of the compliance time that provides an acceptable level of safety may be used if approved by the Manager, Seattle ACO, FAA, Transport Airplane Directorate. Operators shall submit their requests through an appropriate FAA Principal Maintenance Inspector, who may add comments and then send it to the Manager, Seattle ACO.

Note 2: Information concerning the existence of approved alternative methods of compliance with this AD, if any, may be obtained from the Seattle ACO.

(g) Special flight permits may be issued in accordance with sections 21.197 and 21.199 of the Federal Aviation Regulations (14 CFR 21.197 and 21.199) to operate the airplane to a location where the requirements of this AD can be accomplished.

(h) The inspections and modification shall be done in accordance with Boeing Alert Service Bulletin 747–57A2259, dated February 15, 1990; or Boeing Alert Service Bulletin 747–57A2259, Revision 1, dated September 6, 1990; or Boeing Alert Service Bulletin Revision 2, dated June 9, 1994; as applicable. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from Boeing Commercial Airplane Group, P.O. Box 3707, Seattle, Washington 98124–2207 . Copies may be inspected at the FAA, Transport Airplane Directorate, 1601 Lind Avenue, SW., Renton, Washington; or at the Office of the Federal Register, 800 North Capitol Street, NW., suite 700, Washington, DC.

(i) This amendment becomes effective on July 31, 1995. Issued in Renton, Washington, on June 9, 1995.

Darrell M. Pederson,

Acting Manager, Transport Airplane Directorate, Aircraft Certification Service.

[FR Doc. 95–14631 Filed 6–29–95; 8:45 am]

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DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Part 35

[Docket No. RM94–14–000; and Order No. 580]

Nuclear Plant Decommissioning Trust Fund Guidelines; Final Rule

Issued June 16, 1995.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Final rule.

SUMMARY: The Federal Energy Regulatory Commission (Commission) is adopting rules setting forth the guidelines for the formation, organization and purpose of nuclear plant decommissioning trust funds (Fund) and for Fund investments. The rules will give Funds greater investment flexibility. The rules are intended to improve the returns earned on funds contributed through wholesale electric rates and thus decrease the amount collected from ratepayers for decommissioning.

EFFECTIVE DATE: This order is effective July 31, 1995. The incorporation by reference of a publication listed in the regulations is approved by the Director of the Federal Register as of July 31, 1995.

FOR FURTHER INFORMATION CONTACT: Joseph C. Lynch (Legal Information), Federal Energy Regulatory Commission, Office of the General Counsel, 825 North Capitol St., N.E., Washington, D.C. 20426, Telephone: (202) 208–2128

James K. Guest (Accounting Information), Office of Chief Accountant, 825 North Capitol Street, N.E., Washington, D.C. 20426, Telephone: (202) 219–2602

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Before Commissioners: Elizabeth Anne Moler, Chair; Vicky A. Bailey, James J. Hoecker, William L. Massey, and Donald F. Santa, Jr.

I. Introduction

On June 1, 1994, the Federal Energy Regulatory Commission (Commission) issued a Notice of Proposed Rulemaking (NOPR) in which the Commission proposed to amend 18 CFR Part 35 by adding a new Subpart E, setting forth guidelines for the formation, organization and purpose of Funds by public utilities and for the investment of Fund assets.

The Commission proposed to adopt: (a) *General* guidelines for the formation, organization and operation of Funds; and (b) *specific* guidelines governing the quality and quantity of investments that Funds may make. The Commission requested comments on: (a) The proposed general and specific guidelines; (b) the meaning of the reasonable person standard under the general guidelines and under Alternatives 2 and 3 of the specific guidelines; and (c) on two additional issues: (1) The treatment of monies collected in rates for decommissioning before the effective date of the final rule in this proceeding; and (2) whether, and, if so, under what circumstances, the Commission should allow Funds to follow State trust fund standards for that portion of contributions and earnings that are related to Commission-jurisdictional service.[1]

A. General Guidelines Governing the Organization and Operation of Funds

The proposed general guidelines provide that the Fund must be an external trust fund and that the Trustee must be independent of the utility, have a net worth of at least $100 million, and exercise the care that a reasonable person would use in the same circumstances.

Under the NOPR, the Trustee would: (a) Keep accurate and detailed records; (b) open the Fund to inspection and audit; (c) limit Fund investments to those that the Commission allows; and (d) not invest in any securities of the utility that owns the plant, or in the utility's affiliates, associates, successors or assigns.

The Trustee would also use the Fund only to decommission the nuclear power plant to which the Fund relates, and to pay any administrative or other expenses of the Fund. If Fund balances exceed the amount necessary for plant decommissioning, the utility would refund the excess to its customers in a manner that the Commission will determine. The utility would deposit in the Fund at least quarterly all monies that it collects in Commission-jurisdictional rates to fund decommissioning. The proposed general guidelines also provided that establishing a Fund does not relieve a utility of any obligation that it may have to decommission a nuclear power plant.

B. Specific Guidelines Governing the Investment of Fund Monies

The Commission proposed for consideration three alternative approaches to Fund investment:

Alternative No. 1.: No change in present guidelines, *i.e.*, continuation of ''Black Lung'' restrictions;

Alternative No. 2.: A reasonable person standard with no restrictions; and

Alternative No. 3.: A reasonable person standard with certain restrictions on the quality and quantity of Fund investments.

The Commission requested comments on the appropriate alternative. With respect to the general guidelines and with respect to Alternatives 2 and 3 of the specific guidelines, the Commission requested comments on the precise definition and content of the reasonable person standard.

Thirty-three entities (Commenters) submitted comments.[2] The Commission is now adopting a final rule promulgating regulations governing the formation, organization and operation of Funds and permissible Fund investments applicable to amounts collected from Commission-jurisdictional customers for nuclear decommissioning.[3]

[1] Nuclear Plant Decommissioning Trust Fund Guidelines; Notice of Proposed Rulemaking, 59 FR 28297 (June 1, 1994), IV FERC Stats. & Regs., Proposed Regulations ¶ 32,506 (1994).

[2] The Commenters are: Boatmen's Trust Company of Illinois and Boatmen's Trust Company (Boatmen's); Sanford C. Bernstein & Co. (Bernstein); Carolina Power & Light Company (Carolina Power & Light); Connecticut Department of Public Utility Control (Connecticut Commission); Consolidated Edison Company of New York (Consolidated Edison); Consumers Power Company (Consumers Power); Cooperatives (consisting of Old Dominion Electric Cooperative, North Carolina Electric Membership Cooperative, Oglethorpe Power Corporation and the National Rural Electric Cooperative Association); Duke Power Company (Duke); Edison Electric Institute (Edison Electric); Entergy Services, Inc. (Entergy - commenting on behalf of: Arkansas Power & Light Company, Gulf States Utilities Company, Louisiana Power & Light Company, and System Energy Resources, Inc.); Florida Power & Light Company, Texas Utilities Electric Company, and The Washington Public Power Supply System (Companies); Florida Public Service Commission (Florida Commission); Indiana Michigan Power Company (Indiana Michigan); Investment/Trust/Utility Companies; Louisiana Public Service Commission (Louisiana Commission); Maine Yankee Atomic Power Company (Maine Yankee); Mellon Bank (Mellon); Michigan Public Service Commission (Michigan Commission); National Association of Regulatory Utility Commissioners (NARUC); New England Power Company (New England Power); New Hampshire Nuclear Decommissioning Finance Committee (New Hampshire Committee); New York State Department of Public Service (New York State); NISA Investment Advisors, L. L. C. (NISA); Northeast Utilities Service Company (Northeast Utilities); Nuclear Energy Institute (Nuclear Energy); Nuveen-Duff & Phelps Investment Advisors (Nuveen); Pennsylvania Public Utility Commission (Pennsylvania Commission); South Carolina Electric & Gas Company (South Carolina E&G); Union Electric Company (Union Electric); Virginia Electric and Power Company (Virginia Power); Wisconsin Electric Power Company (Wisconsin Electric); and Wisconsin Power and Light Company (Wisconsin Power and Light).

Because the Investment Advisory and Trust Companies' and the Utility Companies' comments are virtually identical, we are treating their comments, although filed separately, as joint comments. Citations to these filings will track the page numbers in the Investment Advisory and Trust Companies' filing. Appendices A and B list the Investment Advisory and Trust Companies and the Utilities Companies respectively.

Note: These Appendices will not appear in the Code of Federal Regulations.

Although Companies filed their Comments one day past the filing deadline, we find good cause to accept them.

[3] The Funds' funding status as of December 31, 1993 appears in Appendix C. Please Note: This

II. Public Reporting Burden

The final rule codifies and clarifies the Commission's requirements regarding the organization and operation of Funds and the investment of Fund assets. The Commission estimates that the public reporting requirements for the information collection requirements contained in this rule average 4 hours per response. Public utilities will submit the information to the Commission on an annual basis. The Commission estimates that the number of respondents is 72. The burden estimate includes the time required to implement the standards, search existing data sources, gather and maintain the data needed, and complete and review the information. The annual burden associated with this information requirement is 288 hours. Interested parties may file comments regarding these burden estimates or any other aspect of this information collection requirement, including suggestions for reducing this burden, with the Federal Energy Regulatory Commission, 941 North Capitol Street, N.E., Washington, D.C. 20426 [Attention: Michael Miller, Information Services Division, (202) 208–1415, FAX (202) 208–2425], and send them to the Office of Information and Regulatory Affairs of OMB (Attention: Desk Officer for the Federal Energy Regulatory Commission—(202) 395–3087; FAX: (202) 395–5167).

III. Background

The Commission set forth the background of the development of its current guidelines for Fund investments in the NOPR. We will repeat that discussion here only to the extent necessary to provide a context for our summary and discussion of the comments received in response to the NOPR.

In *System Energy Resources, Inc. (System Energy I)*[4] the Commission set forth the guidelines for public utilities to use in developing Funds and for investing Fund assets. The Commission based those guidelines, *inter alia*, upon the then applicable Internal Revenue Service (IRS) standards, which imposed on Fund investments the same investment restrictions that the Internal Revenue Code (IRC) imposed on Black Lung Disability Trusts.[5] Subsequently, section 1917 of the Energy Policy Act of 1992,[6] among other things, repealed the portion of 468A(e)(4) of the IRC that restricted the types of assets in which a Fund could invest and still qualify for tax benefits. On December 30, 1992, the IRS amended its regulations to reflect the statutory change.

In response to section 1917 of the Energy Policy Act and the IRS's revised regulations, the Commission, in *System Energy Resources, Inc. (System Energy II)*,[7] issued an order clarifying its policy regarding permissible Fund investments. In that order, the Commission continued to restrict Fund investments to those assets permissible for Black Lung Disability Trusts (Black Lung assets). The Commission's order provided that:

> Except to the extent that a public utility can demonstrate in advance that a proposal [to deviate from the guidelines] offers equal or greater assurance of the availability of funds at the time of decommissioning and is at least as beneficial to consumers as the guidelines specified below, public utilities shall limit the investments in Nuclear Decommissioning Reserve Funds to: (1) public debt securities of the United States; (2) obligations of a state or local government which are not in default as to principal or interest; and (3) time or demand deposits in a bank, as defined in 26 U.S.C. § 581 or an insured credit union, within the meaning of 12 U.S.C. § 1752(7), located in the United States. [8]

A number of parties intervened in *System Energy II*, seeking rehearing of the Commission's decision to continue to require Funds to invest in Black Lung assets; in the alternative, the parties sought a rulemaking proceeding to decide Fund investment standards. In *System Energy III*,[9] the Commission denied rehearing of *System Energy II* and commenced this rulemaking to adopt rules for the formation, organization and operation of Funds and to explore whether the Commission should retain its existing rules or adopt alternative rules governing Fund investments.[10]

IV. Jurisdiction

A. Background

In the NOPR, the Commission stated that it would treat the requests for rehearing of *System Energy II* (Requests for Rehearing) as comments in this proceeding.[11] Several Requests for Rehearing challenged the Commission's jurisdiction over Fund investments, and some of the Commenters reference their Requests for Rehearing in their comments.[12] Companies devoted its comments to the jurisdictional issue; it argues that the Commission has no jurisdiction to dictate the type of investments that a Fund may make.[13]

B. The Energy Policy Act

The Commission adopted the Black Lung restrictions for Fund investments in *System Energy I*.[14] In that order the Commission required ''that a utility adopt the [Black Lung] requirements in [§ 1.468A–5T of the IRS temporary regulations] or any subsequent regulations pursuant to section 468(A) of the IRC in designing its decommissioning fund.''[15]

Once section 1917 of the Energy Policy Act repealed the Black Lung restrictions in the IRC on Fund investments, the IRS regulations had no further legal effect for internal revenue purposes and, on December 20, 1992, the IRS modified its regulations to indicate that the Black Lung restrictions no longer applied.[16] Edison Electric states that the Commission ''explicitly incorporated''[17] the IRS regulations into its decision. From this premise, Edison Electric argues that:

> [R]estrictions of nuclear decommissioning reserve fund investment vehicles ceased when the Internal Revenue Code no longer applied such restrictions.[18]

Edison Electric is mistaken in arguing that Black Lung restrictions on Fund investments terminated when Congress repealed the portion of section 468A(e)(4) of the IRC that restricted the types of assets in which a Fund could invest and still qualify for tax benefits. In *System Energy I* the Commission did not adopt the IRS regulations implementing section 468A of the IRC;

Appendix will not appear in the Code of Federal Regulations.

[4] 37 FERC ¶ 61,261 (1986).

[5] 37 FERC at 61,726–728. Former IRC section 468A(e)(4) imposed investment restrictions on Fund investments by cross-referencing IRC section 501(c)(21), which allowed a deduction for a contribution only to those Black Lung Disability Trusts that met certain investment restrictions.

[6] Pub. L. No. 102–486, 106 Stat. 2776, 3024–25 (1992); *see* 26 U.S.C. §§ 468A(e) (1988) (Energy Policy Act).

[7] 65 FERC ¶ 61,083 (1993).

[8] 65 FERC at 61,514. Duke/TU filed a Request for Rehearing but did not file comments. While the Commission accepts the Requests for Rehearing as comments in this proceeding, the citations in this section, for the sake of clarity, distinguish between the earlier-filed Requests for Rehearing and the later-filed Comments.

[9] 67 FERC ¶ 61,228 (1994).

[10] The Commission accepted the pleadings filed in *System Energy III* as timely-filed comments in this rulemaking proceeding. *See* 59 FR 28299 n. 10, IV FERC Stats. & Regs., Proposed Regulations, at 32,851 n. 10. *See also* 67 FERC at 61,696.

[11] 59 FR at 28299 n. 10, IV FERC Stats & Regs., Proposed Regulations at 32,851 n.10.

[12] *E.g.*, Cooperatives Comments at 2–3; Duke Comments at 2; Edison Electric Comments at 26; Investment/Trust/Utility Companies Comments at 2 n.1.

[13] Companies Comments at, *e.g.*, 2, 14.

[14] 37 FERC ¶ 61,261 (1986).

[15] 37 FERC at 61,726.

[16] Nuclear Decommissioning Fund Qualification Requirements, 57 FR 62198 (December 30, 1992).

[17] Edison Electric Request for Rehearing at 3 n.1.

[18] *Id.*

it merely set forth those regulations as a concise statement of the Black Lung requirements that the *Commission* (not the IRS) was imposing on Fund investments.

The Commission's Fund investment guidelines could not depend upon and be co-terminus with IRC provisions or with IRS regulations, because the Commission draws its authority not from the IRC but from the Federal Power Act (FPA). The Commission's Black Lung guidelines for Fund investments remained in force regardless of Congress's amendment of section 468A of the IRC, because the Commission imposed those guidelines on public utilities through its authority under sections 205 and 206 of the FPA, which Congress did *not* amend in the Energy Policy Act.

In both *System Energy II* and *System Energy III*, the Commission confirmed the independence of its Black Lung guidelines from IRC section 468A. In *System Energy II* the Commission stated:

> [W]e find that the former IRS regulations, limiting the type of investments in which a Nuclear Decommissioning Reserve Fund may invest, *continue* to be appropriate for decommissioning funds subject to our jurisdiction. We continue to believe that the security of a decommissioning fund is of primary importance. Thus, the Commission *reaffirms* the application of the * * * [Black Lung] guidelines to such funds * * *[19]

In *System Energy III* the Commission denied intervenors' requests that it vacate its order in *System Energy II*, stating:

> Were we to vacate that order, there would be no guidelines governing Fund investments. Ensuring that there will be sufficient funds for the decommissioning of nuclear plants is too important to allow Funds to invest without guidelines. * * * [T]he guidelines that currently govern Fund investments, which are contained in *System Energy II, will remain in effect* until completion of the * * * [Final Rule]. [20]

In all of its *System Energy* cases, the Commission was plainly exercising its authority under the FPA. That authority remains unchanged by any modification of IRC section 468A.

Duke maintains that, when removing Black Lung investment restrictions on Fund investments from the IRC, Congress intended to give Funds more leeway for their investments.[21] Edison Electric submits that the Energy Policy Act lowered the cost of decommissioning by lowering the tax rate on Funds and by allowing Funds to invest in common stocks and corporate debt, which have higher returns than Black Lung assets. According to Edison Electric, ''[t]hese two actions need to work in tandem to be highly effective in reducing [decommissioning] costs.''[22] Cooperatives insist that the Commission may not re-impose upon Fund investments the Black Lung guidelines that Congress has repealed.[23]

We disagree with Cooperatives, Duke and Edison Electric that in the Energy Policy Act ''Congress made a specific determination to ease prior investment restrictions[,]''[24] and that the Commission no longer has the option of imposing Black Lung restrictions on Fund investments. In the Energy Policy Act Congress made no decision on the investment guidelines that Funds should follow; instead, Congress, as shown below, intended that Fund investment guidelines would be determined by public utility regulatory Commissions. Both the preamble to the IRS Final Rule modifying the IRS regulations to implement section 1917 of the Energy Policy Act (which modified IRC section 468A) and the statement of the House Ways and Means Committee Report on section 1917 of the Energy Policy Act support this view.

In the preamble to the Final Rule, the IRS stated:

> The Treasury Department and the Internal Revenue Service believe that Congress intended the changes made by section 1917 to shift oversight of the types of investments made by nuclear decommissioning funds to the public utility commissions. [25]

When commenting on the purpose of section 1917 of the Energy Policy Act, the House Ways and Means Committee stated:

> The Committee believes that a nuclear decommissioning fund should be allowed to invest in any asset that is considered appropriate by the applicable public utility commission or other State regulatory body. [26]

As the statement of the House Ways and Means Committee indicates, Congress took no position in the Energy Policy Act on proper Fund investment policy. Rather, Congress referred resolution of that issue to the expertise of the public regulatory commissions. Funds can only invest in those assets that this Commission and the State Commissions (for that portion of Fund investments that is State-jurisdictional) ''consider[] appropriate.''[27]

C. The Federal Power Act

According to Duke/TU, ''[t]here is no provision * * * [in] the * * * [FPA] or [in] any other Act giving this Commission * * * specific authority over decommissioning trust fund dollars.''[28] While we agree with Duke that there is no specific authority in the FPA giving the Commission specific authority over decommissioning trust fund dollars, we disagree that the Commission is without authority to set Fund requirements including investment requirements. We note that the FPA does not, for example, give the Commission specific authority to set requirements for the collection of dollars for construction work in progress (CWIP). Yet our CWIP regulations have been affirmed.[29] We also note that our tax normalization regulations have been affirmed,[30] as have our requirements for post retirement benefits other than pensions(PBOPs).[31] Each of the requirements concern, as with Funds, the timing of the recovery of costs of jurisdictional service from ratepayers. Very simply, under sections 205 and 206 of the FPA,[32] the Commission has sole jurisdiction to determine whether, how, and to what extent a public utility will obtain decommissioning funds through wholesale rates, just as it has authority to regulate the inclusion of all other costs of wholesale service.

The Commission does not have to allow public utilities to collect decommissioning funds in advance of their decommissioning expenditures.[33] The Commission, as with its treatment of PBOPs, *supra* n.31, has allowed public utilities with nuclear units to collect decommissioning funds in advance of decommissioning expenditures because this method better matches the recovery of the costs of decommissioning with the ratepayers who used the nuclear facility's output. However, inclusion in rates of amounts to cover future decommissioning

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[19] 65 FERC at 61,513–514 (emphasis supplied).

[20] 67 FERC at 61,696 (emphasis added).

[21] Duke Request for Rehearing at 3.

[22] Edison Electric Request for Rehearing at 6.

[23] Cooperatives states that ''[t]he Commission's peremptory reimposition of the very investment restrictions which were found by Congress to be unnecessarily inflexible flouts the legislature's considered and deliberate repeal of those restrictions.'' Cooperatives Request for Rehearing at 9. *See also* Investment/Trust/Utility Companies Request for Rehearing at 13.

[24] Duke Request for Rehearing at 3.

[25] 57 FR 62198 (December 30, 1992).

[26] H.R. Rep. No. 474, 102d Cong., 2d Sess., pt. 6, at 47.

[27] *Id.*

[28] Duke/TU Request for Rehearing at 6. *See also* Companies Comments at 4–5, 14.

[29] Mid-Tex Electric Cooperative, Inc. et al. v. FERC, 864 F. 2d 156 (D.C. Cir. 1988).

[30] Public Systems v. FERC, 709 F.2d 73 (D.C. Cir. 1983) (*Public Systems*).

[31] Town of Norwood v. FERC, _____ F. 3d _____ No. 93–1785 (D.C. Cir. May 12, 1995) (*Town of Norwood*).

[32] 16 U.S.C. §§ 824d, 824e.

[33] *See Public Systems* and *Town of Norwood, supra.*

expenditures would not be just and reasonable without additional protection to ensure that the amounts will be used for their intended purpose.[34] In addition, by allowing for collections from customers prior to cash expenditure needs, utilities can certify to the NRC that, upon termination of operations, funds will be available for decommissioning.[35]

By allowing public utilities with nuclear units to collect decommissioning funds in advance of decommissioning expenditures, the Commission has allowed the utilities to become fiduciaries for their ratepayers. The Commission did not have to allow this fiduciary relationship to form. But, having allowed the relationship to develop, the Commission undoubtedly has the authority to impose appropriate conditions upon the fiduciaries' use of ratepayers' funds to ensure that Fund monies will be available for their intended purpose, *i.e.*, to cover the costs of decommissioning.

The bulk of decommissioning expenditures may not take place until many years in the future.[36] If the Commission did not have authority to regulate Fund organization, operation and investments, there would be no one to ensure the security of the many millions of dollars that, by the time decommissioning takes place, the utilities will have collected from their wholesale ratepayers and invested as fiduciaries for their ratepayers.

Companies cite *Board of Public Utility Commissioners v. New York Telephone Company*[37] to the effect that:

> Customers pay for service, not for the property used to render it. * * * Property paid for out of monies received for service belongs to the company, just as does that purchased out of proceeds of its bonds and stock. [[38]]

From this premise, Companies argue that, while the Commission has authority to set just and reasonable rates, it has no jurisdiction over the monies collected for service provided.[39]

Companies are mistaken. Although it is true that the monies that a company collects for the services it renders belongs to the company, that is not the situation that the Final Rule addresses. We are here setting requirements not for monies collected for services rendered, but for monies that the Company is investing on behalf of its ratepayers to meet a future cash expenditure obligation, *i.e.*, decommissioning. In this instance, until the company meets its decommissioning liability, it is holding the monies that it collects for this purpose in trust for its ratepayers. *New York Telephone* is, therefore, inapposite. Under its authority to establish just and reasonable rates, the Commission has jurisdiction to ensure that public utilities prudently invest the monies that they are holding in trust for their ratepayers, so that the amounts that the public utilities collect will be available when the decommissioning obligation comes due.

D. Nuclear Regulatory Commission (NRC) Regulation of Nuclear Facilities

Duke argues that by adopting Black Lung guidelines for Fund investments the Commission has exceeded its authority. Duke maintains that ''the * * * [NRC], not the Commission, is the agency charged with assuring that adequate funds are available for decommissioning.''[40] Although Duke concedes that ''[t]he Commission has the authority to * * * determine whether recovery of a utility's investment funds will be allowed in wholesale rates[,]''[41] Duke maintains that, by imposing Black Lung requirements on Fund investments, ''the Commission has attempted to establish a rule or policy in an area in which the NRC has responsibility and primary concern.''[42]

We do not agree with Duke that, in setting parameters for Fund investments, we are invading an area in which the NRC has primary jurisdiction.

The Commission's jurisdiction over the utilities' collection of monies for Fund investments does not conflict with the NRC's responsibility, which is, *inter alia*, to protect the radiological health and safety of the public. Although the NRC requires public utilities with nuclear assets to provide reasonable assurances that the necessary funds will be available for decommissioning, the NRC's rules do not address the issue of how public utilities will obtain those funds through rates. For example, the NRC's calculations of the minimum amounts necessary to decommission a facility do not address such issues as intergenerational equity, rate of and procedures for fund collections, taxation effects, regulatory accounting, responsiveness of collection schedules to changing conditions, site restoration, or the additional cost, beyond that necessary to terminate the license, and of demolishing equipment and structures that are not radioactive.[43] These are all concerns intimately associated with decommissioning; and they are all exclusively the province of this Commission and state regulatory commissions. Accordingly, this Commission has ample authority to set reasonable parameters for the collection of decommissioning funds in wholesale rates.

The NRC explicitly recognizes the Commission's authority over the collection of decommissioning funds through wholesale rates. The NRC regulations governing reporting and recordkeeping for decommissioning planning acknowledge that:

> Funding for decommissioning of electric utilities is also subject to the regulation of agencies (*e.g.*, Federal Energy Regulatory Commission * * * and State Public Utility Commissions) having jurisdiction over rate regulation. The requirements of this section * * * are in addition to, and not in substitution for, other requirements * * * [[44]]

The issue in this proceeding, then, is not whether the Commission *can* continue to impose Black Lung restrictions on Fund investments, the issue is whether it *should* continue to do so.

E. Managerial Discretion

Duke/TU submits that, since there are now alternative investment opportunities that do not result in the loss of the current deductibility of Fund collections, it is primarily management's responsibility to assure the availability of funds while minimizing the burden on current customers by achieving maximum return.[45] Duke/TU argues that the Commission has no authority to promulgate guidelines for Fund investment, but must defer to management decisions, which, absent substantial evidence to the contrary, the Commission must presume to be prudent.[46]

We disagree. *Citing West Ohio Gas Company v. Public Utilities Commission*

[34] Most utilities likely will not make decommissioning expenditures for 20 years or longer.

[35] *See* 10 CFR 50.75(b).

[36] *See, e.g.*, Edison Electric Comments at 11 (use of SAFSTOR method of decommissioning could extend the need for a majority of funds about 50 years or so); Nuclear Energy Institute Comments at 2 (in the case of the SAFSTOR option the amount of time before decommissioning would actually commence could be as much as 50 years after the plant has been retired); Consumers Power Comments at 5 (''Because of the lack of storage capacity for spent nuclear fuel, complete decommissioning * * * may not occur as of the license expiration date.'').

[37] 271 U.S. 23 (1926) (*New York Telephone*).

[38] 271 U.S. at 32.

[39] Companies Comments at 4–5, 14.

[40] Duke Request for Rehearing at 4. *See also* Companies Comments at 10–14.

[41] *Id.* at 4–5.

[42] *Id. at 5.*

[43] *See* 10 CFR 50.75, n.1.

[44] 10 CFR 50.75(a).

[45] Duke/TU Request for Rehearing at 10–11.

[46] Duke/TU Request for Rehearing at 11.

of Ohio[47] and *New England Power Company*,[48] Duke/TU refers to:

[T]he longstanding practice and tradition which holds that management decisions are presumed to be prudent until substantial evidence is presented indicating imprudence. [49]

What Duke/TU fails to recognize is that the development and management of Funds differs from ordinary day-to-day management decisions. Decommissioning is a cost,[50] which public utilities must fully fund by accumulating funds through wholesale rates over a long period of time. The NRC and the Commission work in tandem in this area. Although it is the NRC that properly insists on the assurance that there will be sufficient monies to cover decommissioning liabilities, it is the Commission that determines how public utilities will accumulate those monies through wholesale rates. Because decommissioning vitally affects the public health and safety, ''the security of a decommissioning fund is of primary importance.'' [51] The Commission does not intend to relinquish its regulatory oversight in this area through over-broad deference to management.

Duke/TU refers to:

[T]he longstanding regulatory principle that utility commissions are not authorized to make investment decisions and must defer to management in this area. [52]

However, the case to which Duke/TU refers, *New England Power,* has to do not with the investment of ratepayer funds to achieve the twin criteria of safety and maximum return on such funds, but rather with whether a public utility can recover the cost of an abandoned plant. *New England Power* had nothing to do with the investment of capital to fund decommissioning liability.

Moreover, *New England Power* does not say, as Duke/TU suggests, that utility commissions must give utility managers unfettered discretion to invest funds provided by ratepayers in advance of the utility's spending dollars.[53] What *New England Power* says is that:

[M]anagers of a utility have broad discretion in conducting their business affairs and in incurring costs necessary to provide services to their customers. In performing our duty to determine the prudence of specific costs, the appropriate test to be used is whether they are costs which a reasonable utility management * * * would have made, in good faith, under the same circumstances, and at the relevant point in time. [54]

New England Power does not refer to investments of ratepayer advanced funds, but to the recovery of specific costs necessary to provide service to customers. Even in this restricted area, management's discretion is broad; it is not unlimited.[55]

For public utilities subject to our jurisdiction, we use the prudence test to determine whether a utility may recover its expenses in providing jurisdictional service.[56] Fund investment guidelines govern how a Fund may invest monies obtained from ratepayers in advance of the need to pay for decommissioning work. The two are very different. The prudence test is retrospective; the utility has expended funds or committed to expend funds that it may recover from ratepayers if it has acted prudently. Fund investment guidelines are prospective; the utility is acting as a fiduciary to ratepayers from whom it has obtained funds to pay for decommissioning activity that will occur in the future. The Commission does not have to allow present collections to meet future expenditures. But, if it does, then it is well within the Commission's province to insist on appropriate guidelines for a public utility's management of monies that it is holding in trust for its ratepayers.

V. Treatment of Funds (and Earnings on Those Funds) Collected Prior to Effective Date of a Final Rule in This Proceeding

Several Commenters ask that the Commission either make the Final Rule prospective only or allow for a sufficient transition period so that utilities may conform Fund investments to the Final Rule without forced-liquidation losses.[57] For example, Carolina Power & Light states that any immediate liquidation of securities to comply with new investment guidelines will most likely result in a significant premature tax payment. It recommends that, to minimize the payments of taxes and to maximize the after-tax return of the Fund, the final rule should only apply to fund collections taking place after the effective date of the final rule.[58] According to Virginia Power, it was not apparent that the Commission's investment guidelines set forth in *System Energy I* were applicable to non-qualified trusts, given the Commission's reliance on the language in the Internal Revenue Code, section 468A. Virginia Power suggests that, because of what it sees as an ambiguity in the Commission's language, certain utilities may have invested non-qualified trust funds in other than Black Lung assets (*e.g., equities).*[59]

Virginia Power speculates that utilities may also have begun investing qualified trust funds in assets other than Black Lung assets when Congress passed the Energy Policy Act.[60]

Commission Ruling

We do not agree that our order in *System Energy I* was at all unclear. Nor do we agree that the Energy Policy Act changed the *System Energy I* investment requirements and thereby gave public utilities a license to invest in other than Black Lung instruments.[61] However, our adoption of the reasonable investor standard for Fund Investments moots this issue since the standard applies to all fund assets.

VI. Whether, and, if so, and Under What Circumstances the Commission Should Allow State Trust Fund Standards to Govern the Portion of Fund Contributions and Fund Earnings That Are Related to Commission Jurisdictional Service

Several Commenters recommend that, when a State having jurisdiction over a utility's retail rates has Fund investment guidelines and the Commission-jurisdictional portion of a Fund is relatively small (25 percent or less) in comparison to the State-regulated portion, the Commission should either adopt or defer to the State's Fund investment guidelines.[62] These

[47] 294 U.S. 63 at 72 (1935).

[48] 31 FERC ¶ 61,047 (1985), *aff'd, sub nom.,* Violet v. FERC, 800 F.2d 280 (1st Cir. 1986)(*New England Power*).

[49] Duke/TU Request for Rehearing at 11.

[50] Under the Commission's existing Uniform System of Accounts requirements, decommissioning is an estimated removal cost for plant facilities, which is recovered as a component of net salvage in determining depreciation expense. Removal costs are recognized on an accrual basis on the balance sheet over the life of the asset. The Financial Accounting Standards Board has recently undertaken a project which, among other things, examines whether a liability should be recognized for the entire cost of decommissioning at approximately the time the asset is placed in service.

[51] 65 FERC at 61,513.

[52] Duke/TU Request for Rehearing at 11.

[53] Duke/TU Request for Rehearing at 11.

[54] 31 FERC at 61,084, as quoted at 800 F.2d 282–83 (emphasis supplied and deleted).

[55] *Id.*

[56] 800 F.2d at 282.

[57] Carolina Power & Light Comments at 13; Edison Electric Comments at 2, 26 and n.21 (Commission should allow time for prudent transition to new guidelines); Investment/Trust/ Utility Companies Comments at 16; Maine Yankee Comments at 5–6; South Carolina E&G Comments at 2; Pennsylvania Commission Comments at 18–19; Virginia Power Comments at 3; Wisconsin Electric Comments at 3.

[58] Carolina Power & Light Comments at 13.

[59] Virginia Power Comments at 3.

[60] Id. at 3.

[61] *See* discussion under *Jurisdiction, supra.*

[62] *E.g.,* Edison Electric Comments at 3; Entergy Comments at 5; Indiana Michigan Comments at 9; Investment/Trust/Utility Companies Comments at

Commenters emphasize the State's interest in ensuring that Fund investments achieve the highest possible returns consistent with prudence and the administrative costs that utilities would avoid by not having to maintain separate Funds for State and Commission-jurisdictional portions of their decommissioning collections. Union Electric recommends that, when more than one State regulates a Fund, the Commission should afford the utility the option of selecting which State standards to apply to the Commission Fund.[63]

On the other hand, New England Power asks the Commission not to adopt State standards for the investment of Commission-jurisdictional Fund contributions. New England Power submits that there should be one set of national standards for the investment of Commission-jurisdictional Fund contributions rather than many different standards, which may support various State policies.[64]

Commission Ruling

We will not adopt State standards for the Commission-jurisdictional portion of decommissioning Funds. We agree with New England Power that there should be but one national, uniform set of regulations for Fund investments concerning wholesale sales of electric energy in interstate commerce by public utilities. If there are special circumstances that dictate the use of State guidelines for a specific Fund, the utility may bring those circumstances to our attention. We will consider allowing the application of State guidelines in specific instances on a case-by-case basis.

VII. General Guidelines

In the NOPR, the Commission proposed general guidelines for the formation, organization and purpose of Funds. Virginia Power suggests that we narrow the focus of the guidelines, lest we inadvertently summarily prohibit other decommissioning alternatives available to nuclear utilities under the NRC's regulations governing reporting and recordkeeping for decommissioning planning.[65] Besides an external sinking fund, the NRC's guidelines allow nuclear utilities to fund decommissioning by prepayment, surety, insurance or ''other guarantee.''[66]

Many of the other Commenters seek other modifications of the proposed general guidelines. For example, Commenters ask the Commission to clarify what it means by a ''Trustee.'' Commenters state that, under the trust agreement establishing an external Fund, the utility appoints the Trustee to perform certain functions, including recordkeeping, valuation and custodial services. According to Commenters, the utility may also grant the Trustee the responsibility to invest the Fund's assets. Alternatively, the utility may retain the investment responsibilities, or may appoint an outside investment advisor to direct the Trustee in investing the Fund's assets. Commenters suggest that the Commission use the term ''fiduciary'' to designate the party with investment responsibility.[67]

Commenters recommend that the $100,000,000 net worth requirement for a Trustee include the assets of the Trustee's parent corporation and affiliates.[68] Commenters also maintain that a public utility should be able to audit a fund without first notifying the Commission and that the Commission should not be able to direct a utility to perform an audit or inspection, as the Commission has proposed to do in the general guidelines.[69]

With respect to Fund surpluses and shortages, Commenters recommend that the Commission: (a) Give utilities the right to bill current or past customers for Fund shortages;[70] (b) provide for the equitable distribution of excess Fund balances between shareholders and ratepayers in those instances in which a utility has contributed shareholder money to the Fund;[71] (c) provide that the company may receive some portion of any Fund surplus resulting from superior Fund and/or decommissioning-cost management;[72] and (d) allow a company with multiple Funds to retain any excess in a particular Fund until there is no possibility of a decommissioning deficiency in another Fund of the same company.[73]

With respect to Fund management, Commenters suggest that the Commission: (a) Amend its proposed general guidelines to except from the ''exclusion of affiliates provision'' investments in broad market indexes or other mutual funds;[74] (b) revise its rules regarding quarterly deposits to the Funds to allow for annual deposits except when annual contributions would exceed a million dollars;[75] (c) provide that a fiduciary's standard of care under this section is the same standard of care that the Commission adopts under the specific guidelines for Fund investments;[76] (d) state that the Final Rule applies only to Commission-jurisdictional Funds;[77] (e) delete the term ''associates'' from the investment provisions because the meaning is unclear;[78] and (f) state that a fiduciary (other than a utility) does not have any responsibility to ensure that the amount of monies that a Fund contains are adequate to pay for the decommissioning liability.[79]

Edison Electric states that the references to tax maximization and minimization are unclear, and will be unnecessary if the Commission adopts the reasonable person investment standard with no restrictions.[80] Edison Electric suggests, among other things, that the Commission change the term ''liquidity,'' used in the section of the proposed rules regarding after-tax earnings, to state: ''giving due consideration to the timing of the need for the funds.''[81] According to Edison Electric, this change would define the

14–15; Louisiana Commission Comments at 12–13; NARUC Comments at 6; New Hampshire Committee Revised Comments at 1; Northeast Utilities Comments at 21; Union Electric Comments at 2; Virginia Power Comments at 3; Wisconsin Electric Comments at 3.

[63] Union Electric at 2.

[64] New England Power Comments at 2–3.

[65] Virginia Power Comments at 1–2.

[66] 10 CFR 50.75(e)(1)(i)(iii).

[67] Edison Electric Comments at 7–8, 28–29; Investment/Trust/ Utility Companies Comments at 10–11; Mellon Comments at 1–2.

[68] Boatmen's Comments at 1; Edison Electric Comments at 31; Union Electric Comments at 1–2. Michigan Commission asks the Commission to provide that the Trustee shall have assets of at least five times the total of the decommissioning funds that it manages, but in no event less than $100 million. Michigan Commission Comments at 3.

[69] Indiana Michigan Comments at 11; Virginia Power Comments at 2. Virginia Power states that a provision allowing the Commission to direct a public utility to perform an audit or inspection of the Fund is unnecessary, because the Commission has the ability to conduct its own audits of Fund operations at any time, and will receive annual statements showing all Fund activity. Virginia Power Comments at 2.

[70] Edison Electric Comments at 31; Indiana Michigan Comments at 11–12; Wisconsin Electric Comments at 3.

[71] Edison Electric Comments at 31; Entergy Comments at 2; Indiana Michigan Comments at 11; Investment/Trust/Utility Companies Comments at 13; Wisconsin Electric Comments at 3.

[72] Edison Electric Comments at 31–32.

[73] Indiana Michigan Comments at 12.

[74] Northeast Utilities Comments at 15. Northeast Utilities states that this exception is particularly important in the case of a Fund for jointly-owned units, where a dozen or more different utilities can be owners. *Id.*

[75] Entergy Comments at 2; Nuclear Energy Comments at 3; Investment/Trust/Utility Companies Comments at 14.

[76] Investment/Trust/Utility Companies Comments at 12.

[77] Edison Electric Comments at 30.

[78] Investment/Trust/Utility Companies Comments at 12.

[79] Investment/Trust/Utility Companies Comments at 17.

[80] Edison Electric Comments at 29–30. Edison Electric refers to the ''ERISA prudent person standard,'' but it is clear from the context that Edison Electric is referring to proposed Alternative No. 2.

[81] Edison Electric Comments at 32.

type of liquidity needed. Investment/Trust/Utility Companies suggests language that, it submits, would clarify the Commission's intent regarding obtaining optimum tax treatment for the Fund.[82]

Investment/Trust/Utility Companies asks the Commission to define the term ''costs of decommissioning the nuclear power plant,'' and offers a definition of the term.[83]

Maine Yankee states that, in the case of a public utility having but a single asset, which is a nuclear generating unit, the Commission should consider that *all* costs associated with unwinding the affairs of the company are decommissioning costs.[84]

Investment/Trust/Utility Companies suggests that the Commission does not intend to require that a utility establish a *separate* Fund for Commission-jurisdictional decommissioning collections, but only to set aside a percentage of the assets of a Fund equal to the Commission-jurisdictional portion of the total balance of the Fund. Investment/Trust/Utility Companies asks the Commission to explain that it is this portion of the Fund that the utility must administer and invest according to the Commission's rules.[85]

Investment/Trust/Utility Companies also asks the Commission to state that a utility may establish both qualified and non-qualified funds with respect to a utility's interest in a specific nuclear plant. It explains that a qualified fund is an external trust established under section 468A of the Internal Revenue Code (Code). It states that, because there are limits in Code section 468A on amounts that a utility can contribute to a qualified fund, many utilities also establish one or more external, non-qualified funds to hold additional decommissioning collections from customers.[86] Investment/Trust/Utility Companies recommends that the Commission state whether it intends the Final Rule to apply to both ''qualified'' (under Code section 468A) and non-qualified funds.[87]

The Michigan Commission asks that the Commission amend the proposed general guidelines that refer to specific investment limitations to provide that:

(7) [T]he Trustee shall not invest in any securities of the subsidiaries, affiliates, or associates or their successors or assigns of the utility for which it is managing the Fund, or any utility, which, on the date of the investment, has a nuclear plant on its books. [88]

Commission Rulings

Although Virginia Power suggests that public utilities might fund decommissioning by some mechanism other than a Fund,[89] no other Commenter has proposed that public utilities might fund decommissioning in any manner other than by establishing a Fund. The NRC's regulations governing reporting and recordkeeping for decommissioning planning provide that electric utilities must certify that, upon termination of operations, funds will be available for decommissioning.[90] Electric utilities must supply the NRC with a copy of the financial instruments that support the certification.[91] Electric utilities may give adequate assurance that funds will be available for decommissioning through either: (a) Prepayment; (b) an external sinking fund; or (c) surety, insurance or other guarantee.[92] The NRC's regulations provide that an external sinking fund is:

a fund established and maintained by setting funds aside periodically in an account segregated from licensee assets and outside the licensee's administrative control in which the total amount of funds would be sufficient to pay decommissioning costs at the time termination of operation is expected. An external sinking fund may be in the form of a trust, escrow account, government fund, certificate of deposit or deposit of government securities. [93]

The Comments indicate that all of the electric utilities that have nuclear units have elected to furnish the requisite financial assurance to the NRC by establishing external sinking funds. No one suggests otherwise and we have no reason to believe that any public utilities are funding the decommissioning expense by any mechanism other than through an external sinking fund.

The general guidelines governing the formation, organization and purpose of external Funds will apply to all public utilities that employ such a device. However, the guidelines will not exclude any options that may be theoretically possible but have not currently been selected by public utilities. We see no reason, then, to restrict the application of the guidelines. Accordingly, we will reject Virginia Power's recommendation that in the Final Rule we more narrowly focus the application of the general guidelines.[94]

If public utilities *are* using or *intend to use* any of the other options that the NRC allows for funding the decommissioning expense, they should promptly bring those alternatives to our attention.

We appreciate the Commenters' observation that, under a trust agreement establishing a Fund, persons other than a Trustee, such as an investment advisor or an investment fund manager, may invest the Fund's assets, either directly or by directing the Trustee's investments. To clarify, we will use the term ''fiduciary'' throughout the remainder of this Final Rule to refer to both the person(s) or institution(s) that perform the trustee and investment management functions, except where otherwise noted.

As the Commenters have made clear, trust fiduciaries have various duties. The primary duty of the Trustee is custodial. The Trustee holds, manages, cares for and protects Fund assets, maintains records of the Fund's investment activities, receives and delivers securities in accordance with the instructions of the investment managers and collects interest and dividends. Another related duty of a Trustee is disbursement of funds. The Trustee makes distributions from the Fund for decommissioning costs, administrative costs and fees in accordance with the trust agreement, and periodically furnishes statements to the utility setting forth the value of the Fund. A third duty of trust fiduciaries is investment management; this duty may be performed by the Trustee or by another fiduciary. We emphasize, however, that the utility may not serve as investment manager. The investment manager must be independent of the utility and its subsidiaries, affiliates, and associates. As explained below, the utility may provide written general investment policy, but it may not engage in day-to-day management of the Fund. The investment manager directs and implements the Funds' investment program, and executes contracts, agreements and other documents necessary to manage and invest the Fund's assets.[95]

The utility, as sponsor of the decommissioning fund, has overall responsibility to direct the investment program, and appoint trustees and investment managers. We would expect utilities to communicate regularly with the fiduciaries they appoint. For

[82] Investment/Trust/Utility Company Comments at 14.

[83] *Id.* at 12–13.

[84] Maine Yankee Comments at 5.

[85] Investment/Trust/Utility Companies Comments at 11.

[86] Id. at 11 and n.4.

[87] Id. at 16.

[88] Michigan Commission Comments at 3.

[89] Virginia Power Comments at 1–2.

[90] 10 CFR 50.75(b) and (e)(1)(ii).

[91] 10 CFR 50.75(b).

[92] 10 CFR 50.75(e).

[93] 10 CFR 50.75(e)(1)(ii).

[94] *See* Virginia Power Comments at 1–2.

[95] Edison Electric Institute Comments at 7–8; Mellon comments at 1–2.

example, a utility would need to supply to the fiduciary, and to regularly update, essential information about the nuclear unit covered by the Trust Fund Agreement, including its description, location, expected remaining useful life, the decommissioning plan that the utility proposes to follow, the utility's liquidity needs once decommissioning begins, and any other information that the fiduciary would need to construct and maintain, over time, a sound investment plan. A prudent utility would also monitor the fiduciary's performance and, if necessary, replace the fiduciary if the fiduciary is not properly performing its assigned responsibilities.

To ensure that the fund assets are not available to creditors in the event of the bankruptcy of the utility, the Trust assets must be segregated from those of the utility and outside the utility's administrative control. There must be a written trust agreement and the fiduciary or fiduciaries, in fullfilling the various duties, must be completely separate and apart from the utility.[96] The utility may provide general investment policies, but it may do so only in writing and it may not engage in the day-to-day management of the Fund or mandate or itself make individual investment decisions. These criteria accord with the NRC's regulations and the NRC Staff guidelines on the subject of ensuring the availability of funds for decommissioning nuclear reactors.[97]

The $100,000,000 net worth requirement for a fiduciary ensures that the fiduciary will have the necessary assets to adequately self-insure its performance. In calculating the $100,000,000 net worth requirement, we will take into account the net worth of the fiduciary's parent corporation and affiliates *only* if those entities agree to act as guarantors for the fiduciary with regard to its Fund responsibilities. If they do not, then their assets are irrelevant to the purpose of the $100,000,000 net worth requirement, since those assets would not be available to insure the fiduciary's performance.

As an integral part of our oversight function, we will retain the requirement that a utility notify the Commission before auditing a Fund and we will retain our authority to direct a utility to audit or inspect the Fund. There is no need to decide Virginia Power's position that the provision allowing the Commission to direct a public utility to perform an audit or inspection of the Fund is unnecessary since we believe it is appropriate in any event to clearly specify this requirement. Even though we will receive annual statements showing all Fund activity, we must ensure that the statements are correct. We can conduct our own audits. But the Fund oversight function imposes an additional burden on the Commission's resources and it may be necessary to direct public utilities to perform the audits or inspections and forward the results of their monitoring to the Commission.

We will not provide blanket authority for utilities to bill current and past customers for Fund shortages. We hope that there will be no Fund shortages and that utilities are collecting all of their wholesale decommissioning costs through the rates that they have on file with this Commission. However, the actual, total cost of decommissioning will not be known for years. Whether Funds' assets are sufficient, insufficient, or just right will not be known until that time. Accordingly, we will consider requests to bill current and past customers for Fund shortages on a case-by-case basis.

We will not allow utilities to pay shareholders out of Fund assets. It is the ratepayers who are paying for decommissioning through their wholesale rates. Commenters have submitted no evidence that shareholders have contributed to meeting decommissioning expenses. Decommissioning expenses are costs of doing business for which public utilities are entitled to reimbursement from their ratepayers.

Edison Electric asks that we allow a company to receive some portion of any Fund surplus resulting from superior Fund and/or decommissioning-cost management.[98] Edison Electric does not explain what it considers to be superior Fund and/or decommissioning-cost management and offers no norm against which to measure such management.[99] What Edison Electric overlooks is that ratepayers should receive the best Fund and decommissioning-cost management available as a matter of course. Companies should not profit from providing the service that they should provide in the normal course of conducting their business.

We will adopt Commenters' suggestion and not allow a company with multiple Funds to retain any excess in a particular Fund until there is no possibility of a decommissioning deficiency in another Fund of the same company.[100] Companies must meet Fund deficiencies on a unit-by-unit basis. Funds are not generic. Each Fund can only be unit-specific, because the fiduciary duty of Fund managers can only be to the ratepayers who have contributed to the cost of decommissioning the specific unit for which it manages the Fund. A particular fiduciary may administer more than one Fund, but it has a separate fiduciary responsibility to each Fund.

Were a utility able to use excesses in one Fund to offset deficiencies in other Funds, one set of ratepayers would be required to subsidize other ratepayers. The remedy for a Fund deficiency is not to take a surplus from another Fund, but to adjust the collections for the Fund that is deficient.

We reject Investment/Trust/Utility Companies' suggestion that a public utility need not establish a separate Fund for Commission-jurisdictional decommissioning collections, but only set aside a percentage of the assets of a Fund equal to the Commission-jurisdictional portion of the total balance of the Fund.[101] Public utilities must establish a separate Fund for Commission-jurisdictional decommissioning collections. Although this will add to a utility's administrative expenses, it is the only way that we can ensure the integrity of Commission-jurisdictional Funds.

We will adopt Commenters' suggestion that we except investments in broad market indexes or other mutual funds from the ''exclusion of affiliates'' provision. Were we not to make this exception, the ''exclusion of affiliates'' provision would unduly restrict investments in market indexes and other mutual funds, and make such investments inordinately difficult to place and to monitor, especially for Funds that pertain to jointly-owned units, when several different utilities are participating owners of the same nuclear unit.[102]

The reason for the requirement that utilities make deposits to the Funds every quarter is to ensure that utilities promptly deposit into the Funds (and thus begin earning a return on) the monies that they collect for decommissioning. The notion that utilities might make Fund deposits annually, except when annual

[96] *Cf.* In Re: Columbia Gas Systems, Inc., *et al.* 997 F.2d 1039 (3rd Cir. 1993).

[97] 10 CFR 50.75(e)(1)(ii); U.S. Nuclear Regulatory Commission, *Regulatory Guide: Assuring the Availability of Funds for Decommissioning Nuclear Reactors* (1990) at 1.159–4.

[98] Edison Electric Comments at 31–32.

[99] As discussed above, utilities will not manage the Funds. That will be the role of the independent fiduciaries.

[100] *See* Indiana Michigan Comments at 12.

[101] *See* Investment/Trust/Utility Companies' Comments at 11.

[102] *See* Northeast Utilities Comments at 15.

contributions would exceed a million dollars,[103] is unacceptable. Such a rule could deprive Funds of earnings on large amounts of ratepayer-contributed monies. The purpose of collecting decommissioning funds through wholesale rates is solely to fund nuclear decommissioning. Public utilities should be using these funds for no other purpose and they should be depositing these monies into the Funds as promptly as possible. If a public utility faces special circumstances, it may apply for a waiver of this rule. We will consider requests for such waivers on a case-by-case basis.

We agree with Commenters that a fiduciary's standard of care under the general guidelines must be the same standard of care that the Commission adopts under the specific guidelines for Fund investments.[104] We will discuss this standard of care in the next section and will incorporate into the fiduciary's standard of care under the general guidelines the same standard of care that we adopt under the specific guidelines for Fund investments.

We will adopt Edison Electric's recommendation [105] and provide that the Final Rule applies only to Commission jurisdictional Funds. The Final Rule will also provide that it is not the responsibility of the Fund's fiduciary investment manager to ensure that the amount of monies that a Fund contains are adequate to pay for decommissioning [106]

We will not delete the term ''associates'' from the Final Rule. The only reason that Commenters advance for omitting this term from the Final Rule is that, in their view, the meaning of this term is unclear.[107] By the term ''associates'' we mean any companies or persons that directly, or indirectly through one or more intermediaries, control, or are controlled by, or are under common control with, the utility.[108]

We agree with Commenters that the references to tax maximization and minimization in the NOPR are unclear.[109] In the Final Rule we will adopt Commenters' suggested language, slightly modified, as follows:

The utility and Fiduciary shall seek to obtain the best possible tax treatment of amounts collected for nuclear plant decommissioning. In this regard, the utility and Fiduciary shall take maximum advantage of tax deductions and credits, when it is consistent with sound business practices to do so. [[110]]

This modification obviates the need to redefine the word ''liquidity'' to mean ''giving due consideration to the timing of the need for the funds[]'' as Edison Electric recommends.[111]

Investment/Trust/Utility Companies asks the Commission to define the term ''costs of decommissioning the nuclear power plant,'' and offers the following definition of the term:

The term ''cost of decommissioning'' means all 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 that has permanently ceased the production of electric energy, including all costs necessary to bring the plant site to ''greenfield'' status and any other type of cost included in a study accepted by the Commission as a basis for determining the amount to be included in rates charged to customers. Such term includes all expenses incurred in connection with the preparation for decommissioning, such as engineering and other planning expenses, and all expenses to be incurred after the actual dismantlement occurs, such as physical security and radiation monitoring expenses. The term also includes costs of spent fuel storage, disposal and removal and low level waste storage, disposal and removal. For a single asset company, the term includes the winding up costs of the company. The term includes costs whether they are treated as capital items or expense items for regulatory, financial, or tax accounting purposes. [[112]]

Decommissioning nuclear plants and recognition and measurement of the related costs is complex.[113] The Commission has had little experience in examining the actual expenditures required in connection with decommissioning a nuclear power plant. For this reason it would not be appropriate to adopt at this time any definition, either that proposed by Investment/Trust/Utility Companies or otherwise. If we were to do so, we are afraid that costs legitimately part of decommissioning would be excluded because such costs failed to fall within the categories provided by the definition. For the purposes of the Final Rule, we need only define the amounts that are subject to the Final Guidelines that we are adopting. In that regard, the Final Rule provides that all amounts approved by the Commission as decommissioning expenses in public utilities' rates are subject to the Fund requirements of the Final Rule.

However, we do not agree that, in the case of a public utility having but a single asset, which is a nuclear generating unit, *all* costs associated with winding up the affairs of the company are necessary decommissioning costs.[114] In any event, this issue is best addressed on a case-by-case basis.

Several commenters pointed out that public utilities may establish both qualified and non-qualified Funds with respect to a utility's interest in a specific nuclear plant. The Final Rule will apply to both ''qualified'' (under Code section 468A) and non-qualified Funds.[115]

We will partially adopt Michigan Commission's suggestion and provide that fiduciaries shall not invest in any securities of the subsidiaries, affiliates, or associates or their successors or assigns of the utility for which they manage the Fund.[116] The only exception to this restriction will be for investments in mutual funds or in broad market indexes, since such a restriction would virtually preclude such investments.

VIII. Reports

In the NOPR, the Commission proposed that the utility must submit to the Commission by June 30 of each year a copy of the financial report that the fiduciary furnishes to the utility for the most recent 12-month period, showing assets and liabilities and various other information.[117] Indiana Michigan asks the Commission to: (a) change the wording ''the most recent 12-month period'' to ''the prior calendar year;'' and (b) eliminate the word ''liabilities,'' since the Fund should have only assets. Indiana Michigan also asks the Commission to consider allowing the companies to maintain the fiduciary's reports available for inspection by Commission auditors, rather than file the reports with the Commission.[118]

Edison Electric requests that the provision for the filing of reports specify that the reports due by June 30th are or may be for the preceding calendar year rather than for the most recent 12-month period. Edison Electric also suggests that the Commission consider allowing

[103] *See* Entergy Comments at 2; Nuclear Energy Comments at 3; Investment/Trust/Utility Companies Comments at 14.

[104] *See* Investment/Trust/Utility Companies Comments at 12.

[105] *See* Edison Electric Comments at 30.

[106] *See* Investment/Trust/Utility Companies Comments at 17.

[107] *See* Id. at 12.

[108] *See* 18 CFR Part 101, Definition 5A.

[109] Edison Electric Comments at 29–30.

[110] *See* Investment/Trust/Utility Company Comments at 14.

[111] *See* Edison Electric Comments at 32.

[112] Investment/Trust/Utility Companies' Comments at 12–13.

[113] We note that the Financial Accounting Standards Board presently has under consideration a project to address the accounting for nuclear plant decommissioning.

[114] *See* Maine Yankee Comments at 5.

[115] *See* Investment/Trust/Utility Companies Comments at 11 and n.4, and 16.

[116] *See* Michigan Commission Comments at 3.

[117] 59 FR 28302 (June 1, 1994), IV FERC Stats. & Regs., Proposed Regulations at 32,856–58.

[118] Indiana Michigan Comments at 14.

companies to keep the reports on file and open to Commission inspection, rather than requiring the companies to file the reports with the Commission.[119]

Consolidated Edison suggests that the Commission consider allowing utilities to file the Fund annual report as part of the utility's FERC Form No. 1.[120]

Investment/Trust/Utility Companies asks the Commission to state that the required financial report should include only the assets of the Fund (*e.g.*, obligations held by or on behalf of the Fund) and only the liabilities of the Fund (*e.g.*, accrued but unpaid taxes or fiduciaries' fees), and not the liability for decommissioning, which is a liability of the utility, not of the Fund. Investment/Trust/Utility Companies also asks the Commission to specify that the term ''most recent 12 months'' refers to the most recently-completed annual accounting period that the Fund uses.[121]

Duke maintains that the Commission's proposed reporting requirements are an additional, unnecessary burden. Duke submits that the Commission could obtain the same information during its routine audits of the utilities.[122] The Louisiana Commission recommends a comprehensive set of reporting requirements to promote ''a dialogue between consumer representatives * * * and * * * utilities on investment and fund management practices.'' [123] In addition to financial statements, identification of fiduciaries, the manner of their selection, and a statement of their fees, the Louisiana Commission would require, among other things, a comparison of asset returns with the returns of the Standard & Poor's 500 and a narrative description of the Fund's investment strategy.[124]

Commission Rulings

We will adopt Edison Electric's suggestion to report the prior calendar year performance. This will permit the Commission to monitor how a Fund is performing in relation to other Funds and will permit ready identification over time of Funds that may be significantly under-performing. Allowing Funds to report on different time periods would complicate such analysis.[125] We will require utilities to file the reports by March 31 of each year, with the first report due April 1, 1996 (March 31 of that year being a Sunday). This will afford sufficient time for any changes necessary in current reporting systems.[126]

We will also maintain the requirement that utilities submit the annual Fund reports to the Commission, rather than simply retain them, open for inspection. Having to go to each utility to review the Funds' annual reports would unnecessarily burden the Commission's resources.

We will not make the Funds' annual reports part of FERC Form No. 1. To do so would require development and use of a structured format particularly for purposes of our electronic filing requirements for that form. The submission of a copy of the financial reports provided by the Fund fiduciaries will be administratively less burdensome and will be sufficient for our purposes.

We will not omit from the reporting requirements the word ''liabilities.'' We must know if Funds incur liabilities and the amounts of those liabilities or our oversight would be incomplete.[127]

We disagree with Duke that the reporting requirement is unnecessary. Duke's thesis is that the Commission can obtain the required information during its routine audits of the utilities. However, the Commission does not audit each public utility annually. The information will not always coincide with our scheduled audit activity. Moreover, an annual filing requirement will provide the Commission greater flexibility to monitor Funds. The Commission has a responsibility to routinely monitor the Funds in order to protect ratepayer interests.

We reject Louisiana Commission's proposed reporting requirements as unnecessary. The reporting requirements that we adopt are sufficient for our purposes.[128]

We will adopt the recommendation of Investment/Trust/Utility Companies and provide that the required financial report should include only the assets and liabilities of the Fund and not the liability for decommissioning. Investment/Trust/Utility Companies are correct that the decommissioning expense is a liability of the utility and not of the Fund.

IX. The Alternatives

A. Alternative No. 1: No Change in Present Guidelines, I.E., Continuation of Black Lung Restrictions

No Commenter favors adoption of Alternative No. 1 and most parties oppose its adoption. Commenters recognize the need to ensure that the requisite funds will be available at decommissioning. But Commenters argue, among other things, that Black Lung investments are not necessarily as safe as they seem, and that they disadvantage ratepayers, because they do not keep up with inflation and necessitate higher collections to meet the projected decommissioning liability.[129] Commenters also argue that the Black Lung Guidelines are not required, because prudent investment principles and the standard that applies to fiduciaries for private pension plans under section 404 of the Employee Retirement Income Security Act of 1974 (''ERISA'')(29 U.S.C. § 1104) (the ERISA standard) provide ample, tested, and federally-sanctioned protection to ratepayers.[130] But Edison Electric cautions that, if the Commission selects a guideline that allows for investments in other than Black Lung instruments, the Commission should make it clear that investment in a Black Lung instrument is not proscribed, so long as the investment is prudent under the circumstances.[131] While Indiana Michigan opposes the Commission's limiting Fund investments to Black Lung instruments, it states that the Commission should make it clear that Black Lung instruments may form part of a Fund's portfolio depending on the Fund Manager's evaluation of the risk and rewards of such investment.[132]

New York State maintains that certain criticisms of the Black Lung Guidelines are unfounded. First, in its view, arguments that the Black Lung Guidelines are not a guarantee against loss are inapposite. New York State recognizes that, while Black Lung instruments are conservative investments, they are not guaranteed against loss. But New York State notes that Black Lung investments are very low risk, and, barring a national

[119] Edison Electric Comments at 25.

[120] Consolidated Edison Comments at 5.

[121] Investment/Trust/Utility Companies at 9.

[122] Duke Comments at 5.

[123] Louisiana Commission Comments at 10.

[124] Louisiana Commission Comments, Appendix A at 15–16.

[125] We believe, however, that any comparisons of Fund performances must be based on several years' data.

[126] For this reason we reject Nuclear Energy's suggestion that the utility decide the reporting period based on *its* reporting responsibilities to the Commission, State regulators and the NRC. *See* Nuclear Energy Comments at 3.

[127] For example, each fund will probably have unpaid fiduciaries' fees.

[128] Of course, the Louisiana Commission can impose whatever reporting requirements are lawful under its authorities on Funds for retail customers.

[129] *See* Bernstein Comments at 2; Consolidated Edison Comments at 3; Consumers Power Comments at 3; Cooperatives Comments at 6–7; Duke Comments at 2; Edison Electric Comments at 14–15; Investment/Trust/Utility Companies Comments at 3; Louisiana Commission Comments at 4–6; New York State Comments at 4–5; Northeast Utilities Comments at 6–8; Pennsylvania Commission Comments at 3, 13, and 20; Wisconsin Power Comments at 1–2.

[130] *See* Consumers Power Comments at 4.

[131] Edison Electric Comments at 15.

[132] Indiana Michigan Comments at 2.

catastrophe, would be expected to provide a full return of interest and principal. Second, according to New York State, the criticism that the use of Black Lung investments increases the risk that the returns will be insufficient to meet the decommissioning obligation is unfounded. While agreeing that Black Lung investments provide lower returns than investments associated with higher risk, New York State submits that the predictability of the return on Black Lung investments makes it highly unlikely that returns will be insufficient to meet decommissioning obligations. New York State points out that one can more readily project amounts placed in Funds that invest exclusively in Black Lung instruments. According to New York State, less predictable returns are a greater threat to meeting decommissioning obligations, since there is a greater opportunity for lost investment.[133]

New York State recognizes that Black Lung investments may yield returns lower than inflation, and that poorly managed Black Lung investments may incur a loss, because the investments may need to be sold at a discount to face value if their maturities are not carefully timed and interest rates increase subsequent to their purchase.[134]

New York State concludes that continuing the Black Lung Guidelines is ill-advised. New York State submits that Black Lung investments are contrary to modern investment theory.

B. Alternative No. 2: A Reasonable Person Standard With No Restrictions

All but three of the Commenters support adoption of Alternative No. 2.[135] The Commenters urging the Commission to adopt Alternative No. 2 argue that this Alternative will permit Funds to tailor their investment strategies to financial and market conditions during the term of the decommissioning liability as well as to diversify investments into a broad range of asset classes, and provide higher long-term returns. According to these Commenters, by maximizing returns consistent with acceptable risk, Alternative No. 2 will allow the funding of the decommissioning of nuclear units with less contribution from ratepayers than would be the case either under a continuation of the current guidelines (Alternative No. 1) or under a reasonable person standard with express constraints (Alternative No. 3).[136] These Commenters submit that the flexibility that Alternative No. 2 offers will provide the greatest assurance that adequate funds will be available at the time of decommissioning, at the minimum possible cost to ratepayers.[137]

In the NOPR, the Commission asked whether the ''reasonable person'' standard should encompass the ''prudent person'' standard, which has long governed trust investment,[138] or whether it should, for example, embody the ''prudent investor'' standard.[139] The Commission pointed out that the two standards are different. The prudent person standard focuses on each investment individually and proscribes certain investments as too risky.[140] The prudent investor standard, in contrast, does not focus on any single investment, but rather insists on evaluating the entire portfolio (and thus allows more risk for individual investments within a portfolio).[141] The Commission also requested comments on the use of other standards to govern Fund investments.[142]

Several Commenters recommending that the Commission adopt Alternative No. 2 ask the Commission to adopt the ERISA standard. These Commenters support the ERISA standard because it has a precise, statutory definition, has served policymakers well for 20 years, has widespread applicability, has a body of case law that clearly defines its parameters, and is familiar to investors, investment managers and fiduciaries throughout the country.[143]

These Commenters submit that, because the ERISA standard focuses on the entire investment portfolio over which the fiduciary has authority, it is superior to a standard that views reasonableness on an investment-by-investment basis.[144] They note that the ERISA standard imposes a duty to diversify the type of investments. They maintain that this duty is fundamental to prudent investment, because it permits a fiduciary to tailor portfolios to meet the needs and circumstances of each trust. They argue that this perspective is critical to Fund investment, given the variety of variables to consider in connection with implementing a long-term investment program for a nuclear power plant decommissioning fund.[145] They maintain that, for any given level of assumed risk, one may obtain a higher return by investing in different classes of assets than by investing in a single asset class. They contend that, because of the long time span of decommissioning and the inflation sensitivity of decommissioning costs, Funds should invest in common stocks as well as in fixed-income securities.[146]

These Commenters acknowledge that equities are more risky than fixed-income investments, because the return the investor may receive in any given year can vary significantly from the average return.[147] But they submit that, because the value of a fixed-income security declines as interest rates rise, over time, increases in interest rates and inflation can cause the real return (nominal return minus inflation) of a fixed-income portfolio to decline. Commenters submit that, to meet or exceed the rate of inflation, an investment portfolio should offset the lack of inflation protection in fixed-income securities with the inflation protection inherent in common stock investments. That is, a Fund should participate in *both* classes of investments.[148]

These commenters submit that it is fundamental to prudent investment policies and practices that a fiduciary should invest according to the risk and return objectives reasonably suited to the Fund; accordingly, they maintain, the standard of prudence should apply

[133] New York State Comments at 4.

[134] *Id.*

[135] New England Power and the Public Utility Commissions of Michigan and Pennsylvania support Alternative No. 3.

[136] *E.g.*, Carolina Power & Light Comments at 3.

[137] *E.g.*, Carolina Power & Light Comments at 4; Edison Electric Comments at 2–4, 6, 9, 11–13; Consolidated Edison Comments at 5; Cooperatives Comments at 9–14; Duke Comments at 4; Florida Commission Comments at 2; New Hampshire Committee Comments at 1; NARUC Comments at 5, 12; Nuclear Energy Comments at 1–2; Nuveen Comments at 2–10; South Carolina E&G Comments at 1–2.

[138] *See* Restatements (Second) of Trusts § 227 (1959).

[139] *See* Restatement (Third) of Trusts § 227 (1992).

[140] *See* Restatements (Second) of Trusts § 227 & comments a through o (1959).

[141] *See* Restatement (Third) of Trusts § 227 (1992).

[142] 59 FR at 28300, IV FERC Stats. & Regs., Proposed Regulations at 32,854.

[143] *E.g.*, Bernstein Comments at 2; Edison Electric Comments at 11–12; Duke Comments at 3–4; Investment/Trust/Utility Companies Comments at 5–6; NISA Comments at 1–2; Wisconsin Electric Comments at 1–2. According to Carolina Power & Light, at the end of 1993, the ERISA standard governed the management of about $1.2 trillion in corporate pension fund assets. Carolina Power & Light Comments at 5.

[144] *E.g.*, Bernstein Comments at 2; Edison Electric Comments at 2–6; Investment/Trust/Utility Companies Comments at 5–6.

[145] *E.g.*, Bernstein Comments at 2.

[146] *E.g.*, Bernstein Comments at 2; Carolina Power & Light Comments at 8; Cooperatives Comments at 8–12; Edison Electric Comments at 4–7, 9–12; Investment/Trust/Utility Companies Comments at 4–6.

[147] *E.g.*, Carolina Power & Light Comments at 9; New York State Comments at 4; Nuveen Comments at 9 (''[C]ommon stocks are generally regarded as the riskiest asset class.'').

[148] *E.g.*, Carolina Power & Light Comments at 8; Cooperatives Comments at 10–12; Edison Electric Comments at 11–15; New York State Comments at 4–7; Nuveen Comments at 3–10.

to the overall investment portfolio rather than to any single investment.[149]

Wisconsin Electric submits that the Commission should adopt the ERISA standard because that standard provides the flexibility to efficiently manage Fund assets at the lowest possible cost to utility customers, balancing risk and reward, while taking into account such factors as general economic conditions, the expected operating life of the plant, and the expected timing of the cash requirements associated with decommissioning.[150]

While these Commenters refer to the ERISA standard, it is clear that they are really asking the Commission to adopt the ''prudent investor'' standard as delineated in the Restatement (Third) of Trusts (1992). This is obvious because, when these Commenters refer to the ERISA standard, many of them refer to managing risk by focusing on the entire portfolio (the signature characteristic of the prudent investor standard) [151] rather than by examining individual investments (the hallmark of the prudent person standard). For example, Edison Electric submits that, ''[t]he concept of a prudent portfolio has replaced the concept of a prudent investment.'' [152]

Edison Electric states that ''[T]he ERISA * * * standard is * * * based upon the same rationale as the ''prudent investor'' standard of the Restatement (Third) of the Law of Trusts * * * § 227. * * * '' [153] And certain Commenters advocating adoption of the ERISA standard refer to investments by a ''prudent investor,''[154] a ''prudent investment manager''[155] or even by a ''prudent expert.''[156]

Other Commenters advocating adoption of Alternative No. 2 refer directly to the prudent investor standard as it appears in the Restatement (Third) of Trusts,[157] or to ''prudent investment principles''[158] without referring to the ERISA standard. It is clear from all of these references that those advocating adoption of Alternative No. 2 are seeking Commission adoption of the ''prudent investor'' standard.

C. Alternative No. 3: A Reasonable Person Standard With Certain Restrictions on the Quality and Quantity of Fund Investments

Three Commenters support Alternative No. 3.[159] The remaining Commenters oppose this Alternative, arguing that the express limitations are contrary to modern investment practices and reduce the flexibility of fiduciaries. The Commenters opposing Alternative No. 3 maintain that the end of a units's licensed life is not necessarily the appropriate measuring point for determining the need for cash to pay for decommissioning costs. They submit that, depending on the method of decommissioning and the availability of a national spent nuclear fuel repository, many Funds may expend substantial amounts for decommissioning costs long after the expiration of the operating license.[160] They criticize the proposed market capitalization and minimum credit rating standards as unrealistically eliminating from investment consideration more than 60 percent of the stocks listed in the Standard & Poor's 500, as well as large over-the-counter, domestic small capitalization, international and preferred stocks. They also maintain that the proposed single-company and single-industry limitations are too tight.[161]

Edison Electric maintains that if the Commission adopts the prudent investor standard, there will be no need for express guidelines, since modern investment practices and modern investment guidelines allow fiduciaries the flexibility to address specific situations that Funds will face.[162]

Cooperatives and New York State express a similar thought. They criticize Alternative No. 3 not for the restrictions that it contains, ''but, rather, because it contains requirements at all.''[163] They submit that the prudent investor rule would not function efficiently if the Commission were to restrict the quality and type of investments that a fiduciary may make. [164]

Of those favoring the adoption of Alternative No. 3, New England Power supports the Alternative outright, without modification. New England Power maintains that Alternative No. 3 strikes a reasonable balance between the goals of ensuring sufficient funds to safely decommission nuclear power plants and minimizing the cost to the customers.[165] New England Power states that Alternative No. 3 allows for sufficient diversification in investments to provide returns over time that would exceed those derived from investments made under the Black Lung investment guidelines, and will, accordingly, reduce customer contributions for decommissioning. New England Power argues that Alternative No. 3 improves upon Alternative No. 2, by establishing quality and quantity guidelines that would limit the risk associated with various possible investments.[166]

The Michigan Commission supports the Adoption of Alternative No. 3 with certain constraints on management fees and certain additions regarding the Fund's risk-adjusted yield and unit-cost. The Michigan Commission would also require that the fiduciary document the reasons for making various investments. The Michigan Commission also recommends that the aggregate value and Standard & Poor's rating requirements should not apply to investments in index funds.[167]

The Pennsylvania Commission recommends that, under Alternative No. 3, the Commission allow a fiduciary to speculate with not more than 25 percent of the corpus of the Fund. The Pennsylvania Commission recommends that the Commission require that the remaining portion of the Fund's assets remain in Black Lung grade investments.[168]

Commission Rulings

We agree with the majority of commenters that Alternative No. 3: a reasonable person standard with certain restrictions on the quality and quantity of Fund investments, unduly reduces investment flexibility. As Northeast Utilities points out, there is no single set of investment limitations that will adequately take into account the factors affecting decommissioning of each nuclear generating plant. A Fund manager must have sufficient leeway to address a Fund's needs under a variety

[149] *E.g.*, Carolina Power & Light Comments at 10; Cooperatives Comments at 9; Edison Electric Comments at 2, 4, 13.

[150] Wisconsin Electric Comments at 2.

[151] *E.g.*, Bernstein Comments at 2; Carolina Power & Light Comments at 10; Duke Comments at 4; Investment/Trust/Utility Companies Comments at 5; Wisconsin P&L Comments at 1.

[152] Edison Electric Comments at 6, *citing*, Hagin, *Modern Portfolio Theory* (1979) 12.

[153] Edison Electric Comments at 4 (underscoring deleted).

[154] New Hampshire Committee Comments at 1; Nuclear Energy Comments at 2 (''prudent implementation of modern investment practices'').

[155] Nuveen Comments at 9.

[156] Carolina P&L Comments at 10.

[157] Cooperatives Comments at 7–12; New York State Comments at 6 n.4.

[158] Consumers Power Comments at 3.

[159] As noted, these Commenters are New England Power and the Michigan and Pennsylvania Commissions.

[160] *See supra* n.36.

[161] *E.g.*, Bernstein Comments at 3–4; Consolidated Edison Comments at 3–5; Consumers Power Comments at 5; Edison Electric Comments at 2–3, 16, 19–20; Duke Comments at 5; Entergy Comments at 4; Indiana Michigan Comments at 8; Investment/Trust/Utility Companies Comments at 7–8; Northeast Utilities Comments at 11–13; Nuveen Comments at 11–12; Wisconsin Electric Comments at 2–3; Wisconsin Power Comments at 2.

[162] Edison Electric Comments at 17–18.

[163] New York State Comments at 7–8.

[164] Cooperatives Comments at 13.

[165] New England Power Comments at 3.

[166] *Id.* at 4.

[167] Michigan Commission Comments at 1–3.

[168] Pennsylvania Commission Comments at 16.

of circumstances and to balance Fund security while obtaining the maximum possible return under the circumstances.[169] Accordingly, we will not adopt Alternative No. 3.

Nor will we adopt Alternative No. 1: continuation of Black Lung restrictions. Commenters have persuaded us that public utilities' decommissioning requirements can best be funded by permitting investment of ratepayers funds according to Alternative No. 2, a reasonable person standard with no specified investment restrictions. We agree that it is possible to protect the integrity of an investment portfolio *as a whole* by investing in various classes of assets with offsetting risks. This strategy will allow investment managers to adjust quickly to financial and market conditions and should, over time, produce higher returns than Black Lung investments and lower the amount of ratepayer funds necessary for decommissioning.

The reasonable person standard, with its emphasis on a balanced portfolio and offsetting risks, is a very sophisticated investment approach, requiring considerable expertise to implement successfully. Public utilities must choose trained, experienced, professional investment managers who are skilled in the art of offsetting risk, and must ensure that they act with the level of skill, care, diligence and caution expected of a professional planner in light of the purposes, terms, distribution requirements, and other circumstances of the Fund.

Several Commenters observe that Black Lung investments have a place in a balanced portfolio under appropriate circumstances.[170] They state that it would be reasonable for a prudent investor to use these more conservative investments to offset the higher risk of other investments. And Commenters recognize that, as the date at which the utility must meet decommissioning expenses comes closer, greater liquidity and more conservative investments should be the norm of the portfolio balance.[171] We agree that Black Lung investments still have a place in a Fund's investment portfolio under the unconstrained, reasonable person investment approach. We also agree that a reasonable approach would be to decrease the percentage of equity investment in a portfolio, and increase the amount of lower risk investments, as the time for expending the funds approaches.

The Alternative that we are adopting in the Final Rule dictates our choice of the precise definition and content of the reasonable person standard. We will define a ''reasonable person'' as a ''prudent investor.'' We choose the prudent investor standard because it does not focus on any single investment but rather insists on an evaluation of the entire portfolio.[172] This is consistent with the unconstrained reasonable person investment approach. If investment managers are to properly implement the reasonable person investment strategy, without restrictions, they are going to need the flexibility that the prudent investor standard provides.

We see no need to incorporate the ERISA standard into this proceeding. ERISA deals with a fundamentally different liability. Rather, we will adopt Edison Electric's, Cooperatives', and Pennsylvania Commission's recommendation and base the prudent investor standard on the principles set forth in § 227 of the Restatement (Third) of Trusts (1992).[173] This will accomplish the objective of allowing for flexibility of Fund investment, without importing into Fund investment standards all of the law surrounding employee pension funds.

Also, it is unclear that the ERISA standard is sufficiently exact to adequately address the contingencies of nuclear plant decommissioning. ERISA requires of a fiduciary ''familiarity'' not ''expertise'' and requires diversification of investment assets not to prevent but merely to ''minimize'' the risk of large losses to the fund. The Restatement (Third) of Trusts is more rigorous in its demands on a fiduciary.[174]

The prudent person standard, which we also considered in the NOPR, focuses on each investment individually and proscribes certain investments as too risky.[175] This standard is inconsistent with an investment strategy of offsetting risk, which is at the heart of the reasonable person investment approach.

The prudent person investment standard would not allow fiduciaries to rapidly adjust to ever changing market and financial conditions as they must if they are to correctly manage the Fund portfolio as a whole.

X. Conclusion Regarding Selection of Alternative

For the reasons given immediately above, we are adopting for Fund investments Alternative No. 2, the reasonable person standard, without constraints. We define a ''reasonable person'' as a prudent investor, as delineated in the Restatement (Third) of Trusts (1992).

XI. Environmental Statement

Commission regulations require that an environmental assessment or an environmental impact statement be prepared for any Commission action that may have a significant adverse effect on the human environment.[176]

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[169] Northeast Utilities Comments at 10–11.

[170] *E.g.,* Carolina Power & Light Comments at 8 (Because of long time-horizon and sensitivity to inflation, Funds should invest in common stocks as well as in fixed-income securities); Cooperatives Comments at 9 (A diversified portfolio should have its assets dispersed among a variety of equities and fixed-income investments); Indiana Michigan Comments at 2 (Black Lung or other conservative investments are always acceptable components of the Fund); Northeast Utilities Comments, Exhibit C at 1 (trust to maintain a balanced portfolio consisting of equity and fixed-income securities); Nuveen Comments at 3 (Fund portfolio should contain a targeted range of fixed-income and equity securities to manage market risk).

Edison Electric goes further than this and insists that Black Lung investments are not imprudent and continue to be an accepted investment alternative. Edison Electric Comments at 15.

[171] *E.g.,* Duke Comments at 5 (''[I]t would be logical to have higher equity exposure in the early years of the Fund than in the concluding years. . . .''); Entergy Comments at 3 (Equity phase-down should begin five years before expected license termination); New York State Comments at 6; Northeast Utilities Comments at 12 and Exhibit C at 1 (Under normal circumstances equity percentage of Fund portfolio should decrease as decommissioning cash outflow approaches [12]; Phase-out of equity investments to begin five years before the expected need for significant decommissioning expenditures [Exhibit C at 1]); Nuveen Comments at 11 (Percentage of equity investment should decline as date of expenditure of substantial portion of Fund assets approaches); Pennsylvania Commission Comments at 12, Reply Comments at 9 (returns and invested principal should be moved back into relatively secure instruments before decommissioning); Wisconsin Power & Light Comments at 2 (The expected liquidity needs of the Fund should determine the reduction in equity exposure.).

[172] *See* Restatement (Third) of Trusts § 227 (1992).

[173] See Edison Electric Comments at 4–5; Cooperatives Comments at 7–12; Pennsylvania Commission Comments at 15 and Reply Comments at 14.

[174] For example, Section 227 of the Restatement (Third) of Trusts includes ''passive strategies'' as a practical investment alternative that Trustees must consider. The Restatement points out that investing in index funds that track major stock exchanges or widely published lists of publicly traded stocks offers pricing security and economies of purchase in essentially efficient markets. *See* Restatement (Third) of Trusts, § 227, comment h., Prudent Investment: Theories and Strategies (1992).

[175] *See* Restatement (Second) of Trusts § 227 & comments a through o (1959). In the NOPR, the Commission also referenced the standard that it uses to determine the prudence of specific costs, citing *New England Power, supra. See* 59 FR 28,300, IV FERC Stats. & Regs, Proposed Regulations 32,853–54. In the NOPR, we recognized ''that what we are concerned with here is a different factual setting.'' *Id.* We agree with Edison Electric that ''pursuing a prudent investment strategy is not necessarily the same thing as incurring a prudent cost.'' Edison Electric Comments at 16.

[176] Regulations Implementing the National Environmental Policy Act, Order No. 486, 52 FR 47987 (Dec. 17, 1987), FERC Stats. & Regs.,

The Commission has categorically excluded certain actions from this requirement as not having a significant effect on the human environment—such as electric rate filings under sections 205 and 206 of the FPA and the establishment of just and reasonable rates.[177] The Final Rule, regarding the collection and subsequent investment of monies to fund nuclear plant decommissioning, involves such matters. Accordingly, no environmental consideration is necessary.

XII. Regulatory Flexibility Act Certification

The Regulatory Flexibility Act[178] requires rulemakings to either contain a description and analysis of the effect that the proposed rule will have on small entities or to contain a certification that the rule will not have a substantial economic impact on a substantial number of small entities. Most public utilities to which the proposed rule would apply do not fall within the definition of small entity.[179] Consequently, the Commission certifies that this proposed rule will not have ''a significant economic impact on a substantial number of small entities.''

XIII. Information Collection Statement

The Office of Management and Budget's (OMB) regulations[180] require that OMB approve certain information collection requirements imposed by an agency. The information collection requirements in this proposed rule are contained in FERC–516 ''Electric Rate Filings'' (1902–0096).

The Commission uses the data collected in these information requirements to carry out its regulatory responsibilities under the FPA and the Energy Policy Act of 1992. The Commission's Office of Electric Power Regulation uses the data for determination of electric rate filings submitted by industry. The Office of the Chief Accountant uses the data to ensure that jurisdictional companies comply with the Uniform System of Accounts.

Interested persons may send comments regarding collection of information to the Federal Energy Regulatory Commission, 825 North Capitol Street, N.E., Washington, D.C. 20426 [Attention: Michael Miller, (202) 208–1415]; and to the Office of Management and Budget, Washington, D.C. 20503 [Attention: Desk Officer for the Federal Energy Regulatory Commission—(202) 395–3087; FAX: (202) 395–5167].

XIV. Effective Date

This rule is effective July 31, 1995.

List of Subjects in 18 CFR Part 35

Electric power rates, Electric utilities, Incorporation by reference, Reporting and recordkeeping requirements.

By the Commission. Commissioners Hoecker and Massey concurred with a separate statement attached.

Linwood A. Watson, Jr.,

Acting Secretary.

In consideration of the foregoing, the Commission amends Part 35, Chapter I, Title 18, *Code of Federal Regulations*, as set forth below.

PART 35—FILING OF RATE SCHEDULES

1. The authority citation for Part 35 continues to read as follows:

Authority: 16 U.S.C. 791a-825r, 2601–2645; 31 U.S.C. 9701; 42 U.S.C. 7101–7352.

2. 18 CFR Part 35 is amended by adding Subpart E—Regulations Governing Nuclear Plant Decommissioning Trust Funds, consisting of § 35.32 and § 35.33, to read as follows:

Subpart E—Regulations Governing Nuclear Plant Decommissioning Trust Funds

Sec.
35.32 General Provisions
35.33 Specific Provisions

§ 35.32 General provisions

(a) If a public utility has elected to provide for the decommissioning of a nuclear power plant through a nuclear plant decommissioning trust fund (Fund), the Fund must meet the following criteria:

(1) The Fund must be an external trust fund in the United States, established pursuant to a written trust agreement, that is independent of the utility, its subsidiaries, affiliates or associates.

(2) The utility may provide overall investment policy to the Trustee or Investment Manager, but it may do so only in writing, and neither the utility nor its subsidiaries, affiliates or associates may serve as Investment Manager or otherwise engage in day-to-day management of the Fund or mandate individual investment decisions.

(3) The Fund's Investment Manager must exercise the standard of care, whether in investing or otherwise, that a prudent investor would use in the same circumstances. The term ''prudent investor'' means a prudent investor as described in *Restatement of the Law (Third), Trusts § 227* including general comments and reporter's notes, pages 8–101. St. Paul, MN: American Law Institute Publishers, (1992). ISBN 0–314–84246–2. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the American Law Institute, 4025 Chestnut Street, Philadelphia, PA 19104, and are also available in local law libraries. Copies may be inspected at the Federal Energy Regulatory Commission's Library, Room 8502, 825 North Capitol St., N.E., Washington, D.C. or at the Office of the Federal Register, 400 North Capitol St., N.W., Room 700, Washington, D.C.

(4) The Trustee and any other Fiduciary shall have a net worth of at least $100 million. In calculating the $100 million net worth requirement, the net worth of the Fiduciary's parent corporation and/or affiliates may be taken into account only if such entities guarantee the Fiduciary's responsibilities to the Fund.

(5) The Trustee or Investment Manager shall keep accurate and detailed accounts of all investments, receipts, disbursements and transactions of the Fund. All accounts, books and records relating to the Fund shall be open to inspection and audit at reasonable times by the utility or its designee or by the Commission or its designee. The utility or its designee must notify the Commission prior to performing any such inspection or audit. The Commission may direct the utility to conduct an audit or inspection.

(6) Absent the express authorization of the Commission, no part of the assets of the Fund may be used for, or diverted to, any purpose other than to fund the costs of decommissioning the nuclear power plant to which the Fund relates, and to pay administrative costs and other incidental expenses, including taxes, of the Fund.

(7) If the Fund balances exceed the amount actually expended for decommissioning after decommissioning has been completed, the utility shall return the excess jurisdictional amount to ratepayers, in a manner the Commission determines.

(8) Except for investments tied to market indexes or other mutual funds, the Investment Manager shall not invest in any securities of the utility for which

Regulations Preambles 1986–1990 ¶ 30,783 (1987)) (*codified* at 18 CFR Part 380).

[177] 18 CFR 380.4(a)(15).

[178] 5 U.S.C. 601–612.

[179] *See* 5 U.S.C. 601(3), citing to section 3 of the Small Business Act, 15 U.S.C. 632, which defines ''small business concern'' as a business that is independently owned and operated and that is not dominant in its field of operation.

[180] 5 CFR 1320.13.

it manages the funds or in that utility's subsidiaries, affiliates, or associates or their successors or assigns.

(9) The utility and the Fiduciary shall seek to obtain the best possible tax treatment of amounts collected for nuclear plant decommissioning. In this regard, the utility and the Fiduciary shall take maximum advantage of tax deductions and credits, when it is consistent with sound business practices to do so.

(10) Each utility shall deposit in the Fund at least quarterly all amounts included in Commission-jurisdictional rates to fund nuclear power plant decommissioning.

(b) The establishment, organization, and maintenance of the Fund shall not relieve the utility or its subsidiaries, affiliates or associates of any obligations it may have as to the decommissioning of the nuclear power plant. It is not the responsibility of the Fiduciary to ensure that the amount of monies that a Fund contains are adequate to pay for a nuclear unit's decommissioning.

(c) A utility may establish both qualified and non-qualified Funds with respect to a utility's interest in a specific nuclear plant. This section applies to both ''qualified'' (under Internal Revenue Code (26 U.S.C. 468A) or any successor section) and non-qualified Funds.

(d) A utility must regularly supply to the Fund's Investment Manager, and regularly update, essential information about the nuclear unit covered by the Trust Fund Agreement, including its description, location, expected remaining useful life, the decommissioning plan the utility proposes to follow, the utility's liquidity needs once decommissioning begins, and any other information that the Fund's Investment Manager would need to construct and maintain, over time, a sound investment plan.

(e) A utility should monitor the performance of all Fidiciaries of the Fund and, if necessary, replace them if they are not properly performing assigned responsibilities.

(f) These regulations apply only to Commission-jurisdictional funds.

§ 35.33 Specific provisions.

(a) In addition to the general provisions of § 35.32, the Trustee must observe the provisions of paragraph (b) of this section.

(b) The Trustee may use Fund assets only to:

(1) Satisfy the liability of a utility for decommissioning costs of the nuclear power plant to which the Fund relates as provided by § 35.32; and

(2) Pay administrative costs and other incidental expenses, including taxes, of the Fund as provided by § 35.32;

(3) To the extent that the Trustee does not currently require the assets of the Fund for the purposes described in paragraphs (b)(1) and (b)(2) of this section, the Investment Manager, when investing Fund assets, must exercise the same standard of care that a reasonable person would exercise in the same circumstances. In this context, a ''reasonable person'' means a prudent investor as described in *Restatement of the Law, (Third), Trusts § 227,* and including general comments and reporter's notes, pages 8–101. St. Paul, MN: American Law Institute Publishers, 1992. ISBN 0–314–84246–2. This incorporation by reference was approved by the Director of the Federal Register in accordance with 5 U.S.C. 552(a) and 1 CFR part 51. Copies may be obtained from the American Law Institute, 4025 Chestnut Street, Philadelphia, PA 19104, and are also available in local law libraries. Copies may be inspected at the Federal Energy Regulatory Commission's Library, Room 8502, 825 North Capitol St., NE., Washington, DC or at the Office of the Federal Register, 400 North Capitol St., NW., Room 700, Washington, DC.

(c) The utility must submit to the Commission by April 1, 1996 and by March 31 of each year thereafter, a copy of the financial report furnished to the utility by the Fund's Trustee that shows for the previous calendar year:

(1) Fund assets and liabilities at the beginning of the period;

(2) activity of the Fund during the period, including amounts received from the utility, purchases and sales of investments, gains and losses from investment activity, disbursements from the Fund for decommissioning activity and payment of Fund expenses, including taxes; and

(3) Fund assets and liabilities at the end of the period. The report should not include the liability for decommissioning.

(d) If an independent public accountant has expressed an opinion on the report or on any portion of the report, then that opinion must accompany the report.

Appendix A

Investment/Trust/Utility Companies

Ark Asset Management Co., Inc.
Bank of New York
Delaware Investment Advisers
Fidelity Management Trust Co.
J.P. Morgan Co.
Loomis, Sayles & Company
MD SASS Investors Services, Inc.
Mellon Bank
National Investment Services of America, Inc.
NBD Bank, NA
Nuveen Duff & Phelps Investment Company
Payden & Rygel
Pittsburgh National Bank
PNC Bank
Sanford Bernstein & Company, Inc.
Scudder, Stevens & Clark, Inc.
State Street Bank and Trust Company
T. Rowe Price Associates
Wellington Management Co.

Appendix B

Utility Companies

Arizona Public Service Co.
Arkansas Power & Light Co.
Carolina Power & Light Co.
Central Power and Light Co.
Cleveland Electric Illuminating Co.
Commonwealth Edison Co.
Connecticut Light & Power Co.
Connecticut Yankee Atomic Power Co.
Delmarva Power & Light Co.
Detroit Edison Co.
Duke Power Co.
Florida Power & Light Co.
Florida Power Corp.
Gulf States Utilities Co.
Houston Lighting & Power Co.
Illinois Power Co.
Indiana Michigan Power Co.
Iowa Electric Light and Power Co.
Jersey Central Power & Light Co.
Louisiana Power & Light Co.
Madison Gas and Electric Co.
Maine Yankee Atomic Power Co.
Metropolitan Edison Co.
Niagara Mohawk Power Corp.
North Atlantic Energy Co.
Northern States Power Co.
Ohio Edison Co.
Pacific Gas & Electric Co.
Pennsylvania Electric Co.
Pennsylvania Power & Light Co.
Pennsylvania Power Co.
Philadelphia Electric Co.
Public Service Co. of New Hampshire
Public Service Electric and Gas Co.
Rochester Gas and Electric Co.
Southern California Edison Co.
System Energy Resources, Inc.
Texas Utilities Electric Co.
Toledo Edison Co.
Union Electric Co.
Vermont Yankee Nuclear Power Corp.
Virginia Electric Power Co.
Western Massachusetts Electric Co.
Western Resources, Inc.
Wisconsin Electric Power Co.
Wisconsin Power and Light Co.
Wisconsin Public Service Corp.

Appendix C

NUCLEAR DECOMMISSIONING FUNDS—12/31/93 FUNDING STATUS

[Dollars in millions—Ranking by 12/31/93 funds]

Company	License exp (avg. years)	MW Nuclear capacity	Decom cost est by company		12–31–93 fund
			Amt. (base year)	Amt./KW	
Commonwealth Ed	2008–2026(22)	11,638	$4,060(93)	$349	914
SCECorp	2004–2028(21)	2,560	1,000(93)	390	853
Pacific G&E	2015–2016(21)	2,253	1,000(93)	443	576
FPL Group	2007–2023(21)	2,885	935(93)	324	445
Duke Power	2013–2026(26)	5,078	995(90)	188	319
Northern State Power	2010–2014(18)	1,640	750(93)	457	302
Northeast Utilities	2010–2026(24)	2,738	1,127(93)	408	238
Wisconsin Energy	2010–2013(18)	970	280(93)	289	232
Dominion Resources	2012–2020(22)	3,200	1,000(93)	312	226
Carolina P&L	2010–2026(24)	2,711	999(93)	368	222
GPU	2009–2014(18)	2,369	1,044(93)	441	219
Entergy	2014–2024(25)	4,646	1,339	288	193
San Diego G&E	2004–2013(15)	517	322(93)	623	191
Southern Company	2014–2029(28)	3,524	1,123(91)	319	185
PS Enterprise Group	2008–2026(23)	2,842	681(90)	240	175
CMS Energy	2000–2007(10)	846	607(93)	717	171
Am Elec Pi	2014–2017(22)	2,130	1,100(91)	516	170
PEPCO Energy	2008–2029(24)	3,958	643(93)	162	160
Connecticut Yankee	2007(13)	582	309(92)	530	140
Consolidated Ed	2013(19)	1,124	600(93)	534	137
Florida Progress	2016(22)	703	308(93)	438	118
Niagara Mohawk	2009–2026(24)	1,053	541(93)	514	114
Vermont Yankee	2012(18)	528	240(92)	454	100
Yankee Atomic	2000(6)	175	247(92)	1,411	98
Baltimore G&E	2014–2016(21)	1,650	703(92)	428	93
Pennsylvania P&L	2022–2024(29)	1,890	725	384	83
Centerior Energy	2017–2027(28)	1,843	615(92)	334	74
Maine Yankee	2008(14)	900	317(93)	352	69
Boston Edison	2012(18)	670	400(91)	597	66
Rochester G&E	2009–2026(23)	621	185(93)	298	63
Wisconsin PS	2013(19)	220	149(93)	677	61
IES Industries	2014(20)	396	223(93)	563	51
Altantic Energy	2008–2026(23)	374	65(87)	175	46
Union Electric	2024(30)	1,150	372(93)	323	46
Pinnacle West	2024–2026(32)	1,109	407(93)	367	45
WPL Holdings	2013(19)	219	149(93)	677	45
Iowa ILL G&E	2012(18)	394	173(93)	439	40
Texas Utilities	2030–2032(37)	2,300	599(92)	260	38
El Paso Elec	2024–2027(32)	603	221(93)	366	30
Ohio Edison	2016–2027(28)	1,255	382(92)	304	30
Delmarva P&L	2008–2020(20)	321	117(93)	364	29
Madison G&E	2013(19)	95	61(92)	642	25
Scana Corp	2022(28)	593	152(93)	256	25
Detroit Ed	2025(31)	1,100	471(93)	428	24
Houston Ind	2027–2028(33)	770	146(89)	190	19
DOE Inc	2016–2027(28)	712	240(92)	337	18
Illinois Power	2026(32)	823	344(93)	418	17
Central & SW	2027–2028(33)	630	85(86)	135	15
Kansas City P&L	2025(31)	540	174(93)	322	14
Western Resources	2025(31)	540	174(93)	322	13
PS New Mexico	2024–2026(32)	390	142(93)	384	11
Long Island Lighting	2026(32)	194	80(93)	412	7
NY State E&G	2026(32)	194	74(93)	381	6
Central Hudson G&E	2027(33)	97	38(93)	392	5

Source: Nuveen Comments, Exhibit X.

Appendix D—Concurring Statements

HOECKER and MASSEY, Commissioners, *concurring*:

We support today's order. However, the order's reliance on the ''prudent investor'' standard does not spell out sufficiently certain important principles to which we think investment management fiduciaries must adhere. By selecting Alternative 2, which maximizes the investment flexibility of the fiduciary, over Alternative 3, which might specifically limit the investment manager's discretion in some respects, the Commission does not imply that ''anything goes'' in structuring and handling an investment portfolio. The comments make clear, for example, that

indeed certain fundamentals are always followed by prudent investors.[1]

The financial marketplace offers investors many different strategies. Some of these strategies would satisfy the prudent investor standard; others would not. Neither we nor the Commission can anticipate each possible strategy or investment option and decide whether it is prudent. But, a failure to invest in accordance with widely-held and time-honored practices may be irresponsible, if not imprudent. In that regard, we believe implementation of the following two strategies is, in broad terms, required of all investment management fiduciaries.

First, as the time nears when fund assets will be spent on decommissioning work, assets should be phased out of equity investments and into less volatile and more conservative investments. Many commenters endorsed this principle.[2] Similarly, Maine Yankee Atomic Company attached to its comments a financial advisor's report recommending a five-year phase out of equity investments just before the fund assets would be spent on decommissioning work. Today's order acknowledges the validity of this principle.[3] While nuclear plant owners may choose different decommissioning strategies and thus have different timelines for spending fund assets, an appropriately-timed equity phase-out would always appear to be prudent.

Second, just as a prudent investor would invest little or no part of its portfolio in penny stocks and junk bonds, a prudent investor would limit the extent of its investments in derivatives. Derivatives may serve a useful role in offsetting the risk of other investments. For example, if a portfolio contains government or corporate bonds, perhaps the sensitivity of these bonds to interest rate fluctuations could be offset by hedging in derivatives. A prudent investor would, in our view, limit investments in derivatives, if any, solely to such risk-reducing uses.

With these additional thoughts, we concur in today's order.

James J. Hoecker,

Commissioner.

William L. Massey,

Commissioner.

[FR Doc. 95–15303 Filed 6–29–95; 8:45 am]

BILLING CODE 6717–01–P

[1] *See, e.g.*, Order, slip op. at 65 n.175 and accompanying text.

[2] *See Id.*, at 65 n.177.

[3] *Id.*, at 66.

SOCIAL SECURITY ADMINISTRATION

20 CFR Parts 404 and 416

RIN 0960–AE10

Administrative Review Process, Prehearing Proceedings and Decisions by Attorney Advisors

AGENCY: Social Security Administration.

ACTION: Final rules.

SUMMARY: We are adding new rules which modify, on a temporary basis, the prehearing procedures we follow in claims for Social Security or Supplemental Security Income (SSI) benefits based on disability. Under the final rules, attorney advisors in our Office of Hearings and Appeals (OHA) have the authority to conduct certain prehearing proceedings, and where the documentary record developed as a result of these proceedings warrants, to issue decisions that are wholly favorable to the parties to the hearing. Because requests for an administrative law judge (ALJ) hearing have increased dramatically in recent years, and cases pending in our hearing offices have reached unprecedented levels, we have taken a number of actions designed to help us decide these cases more efficiently. These final rules are an important part of our efforts in this regard.

EFFECTIVE DATE: June 30, 1995.

FOR FURTHER INFORMATION CONTACT: Harry J. Short, Legal Assistant, Division of Regulations and Rulings, Social Security Administration, 6401 Social Security Boulevard, Baltimore, Maryland 21235, (410) 965–6243.

SUPPLEMENTARY INFORMATION:

Background

The Social Security Administration (SSA) decides claims for Social Security benefits under title II of the Social Security Act (the Act) and for SSI benefits under title XVI of the Act in an administrative review process that generally consists of four steps. Claimants who are not satisfied with the initial determination we make on a claim may request reconsideration. Claimants who are not satisfied with our reconsidered determination may request a hearing before an ALJ, and claimants who are dissatisfied with an ALJ's decision may request review by the Appeals Council. Claimants who have completed these steps, and who are not satisfied with our final decision, may request judicial review of the decision in the Federal courts.

Generally, when a claim is filed for Social Security or SSI benefits based on disability, a State agency makes the initial and reconsideration disability determination for us. A hearing conducted after we have made a reconsideration determination is held by an ALJ in one of the 132 hearing offices we have nationwide.

Applications for Social Security and SSI benefits based on disability have risen dramatically in recent years. The number of new disability claims SSA received in Fiscal Year (FY) 1994—3.56 million—represented a 40 percent increase over the number received in FY 1990. Requests for an ALJ hearing also have increased dramatically. In FY 1994, our hearing offices had almost 540,000 hearing receipts and the overwhelming majority of these were related to requests for a hearing filed by persons claiming disability benefits. In that year, the number of hearing receipts we received exceeded the number of receipts we received in FY 1990 by more than 70 percent. We expect hearing receipts to increase to more than 590,000 in FY 1995.

Despite management initiatives that resulted in a record increase in ALJ productivity in FY 1994, and the hiring of more than 200 new ALJs and more than 650 new support staff in that year, the number of cases pending in our hearing offices has reached unprecedented levels—more than 480,000 at the end of FY 1994 and more than 540,000 at the end of May 1995.

On September 19, 1994, the Commissioner of Social Security published a *Plan for a New Disability Claim Process* in the **Federal Register** (59 FR 47887). That document sets forth our long term plans for redesigning and fundamentally improving the overall disability claim process. On a separate track from that longer term plan, we have developed a number of short term initiatives to process cases more efficiently and, therefore, to reduce the number of cases pending in our hearing offices. As part of our short term disability process improvements, we are issuing these final regulations that make a temporary change in our administrative review procedures.

Under these final rules, attorney advisors will conduct certain prehearing proceedings and, where appropriate, issue decisions that are wholly favorable to the claimant and any other party to the hearing. These procedures will remain in effect for a period of time not to exceed two years from the effective date of these final rules unless they are extended by the Commissioner of Social Security by publication of a final rule in the **Federal Register**.