

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1992,⁶ among other things, repealed the portion of 468A(e)(4) of the IRC that restricted the types of assets in which a Fund could invest and still qualify for tax benefits.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

⁴ Pub. L. No. 102-486, 106 Stat. 2776, 3024-25 (1992); see 26 U.S.C. §§ 468A(e) (1988) (Energy Policy Act).

⁵ 65 FERC ¶ 61,083 (1993).

⁶ 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.

⁷ 67 FERC ¶ 61,228 (1994).

⁸ 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.

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" 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.¹⁷

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;

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.*

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.