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*

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[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.