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