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.