

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.<sup>82</sup>

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.<sup>83</sup>

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.<sup>84</sup>

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.<sup>85</sup>

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.<sup>86</sup> 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.<sup>87</sup>

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.<sup>[88]</sup>

### Commission Rulings

Although Virginia Power suggests that public utilities might fund decommissioning by some mechanism other than a Fund,<sup>89</sup> 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.<sup>90</sup> Electric utilities must supply the NRC with a copy of the financial instruments that support the certification.<sup>91</sup> 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.<sup>92</sup> 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.<sup>[93]</sup>

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.<sup>94</sup>

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.<sup>95</sup>

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

<sup>82</sup> Investment/Trust/Utility Company Comments at 14.

<sup>83</sup> *Id.* at 12-13.

<sup>84</sup> Maine Yankee Comments at 5.

<sup>85</sup> Investment/Trust/Utility Companies Comments at 11.

<sup>86</sup> *Id.* at 11 and n.4.

<sup>87</sup> *Id.* at 16.

<sup>88</sup> Michigan Commission Comments at 3.

<sup>89</sup> Virginia Power Comments at 1-2.

<sup>90</sup> 10 CFR 50.75(b) and (e)(1)(ii).

<sup>91</sup> 10 CFR 50.75(b).

<sup>92</sup> 10 CFR 50.75(e).

<sup>93</sup> 10 CFR 50.75(e)(1)(ii).

<sup>94</sup> See Virginia Power Comments at 1-2.

<sup>95</sup> Edison Electric Institute Comments at 7-8; Mellon comments at 1-2.