catastrophe, would be expected to provide a full return of interest and principal. Second, according to New York State, the criticism that the use of Black Lung investments increases the risk that the returns will be insufficient to meet the decommissioning obligation is unfounded. While agreeing that Black Lung investments provide lower returns than investments associated with higher risk, New York State submits that the predictability of the return on Black Lung investments makes it highly unlikely that returns will be insufficient to meet decommissioning obligations. New York State points out that one can more readily project amounts placed in Funds that invest exclusively in Black Lung instruments. According to New York State, less predictable returns are a greater threat to meeting decommissioning obligations, since there is a greater opportunity for lost investment.[133]

New York State recognizes that Black Lung investments may yield returns lower than inflation, and that poorly managed Black Lung investments may incur a loss, because the investments may need to be sold at a discount to face value if their maturities are not carefully timed and interest rates increase subsequent to their purchase.[134]

New York State concludes that continuing the Black Lung Guidelines is ill-advised. New York State submits that Black Lung investments are contrary to modern investment theory.

B. Alternative No. 2: A Reasonable Person Standard With No Restrictions

All but three of the Commenters support adoption of Alternative No. 2.[135] The Commenters urging the Commission to adopt Alternative No. 2 argue that this Alternative will permit Funds to tailor their investment strategies to financial and market conditions during the term of the decommissioning liability as well as to diversify investments into a broad range of asset classes, and provide higher long-term returns. According to these Commenters, by maximizing returns consistent with acceptable risk, Alternative No. 2 will allow the funding of the decommissioning of nuclear units with less contribution from ratepayers than would be the case either under a continuation of the current guidelines (Alternative No. 1) or under a reasonable person standard with express constraints (Alternative No. 3).[136] These Commenters submit that the flexibility that Alternative No. 2 offers will provide the greatest assurance that adequate funds will be available at the time of decommissioning, at the minimum possible cost to ratepayers.[137]

In the NOPR, the Commission asked whether the ''reasonable person'' standard should encompass the ''prudent person'' standard, which has long governed trust investment,[138] or whether it should, for example, embody the ''prudent investor'' standard.[139] The Commission pointed out that the two standards are different. The prudent person standard focuses on each investment individually and proscribes certain investments as too risky.[140] The prudent investor standard, in contrast, does not focus on any single investment, but rather insists on evaluating the entire portfolio (and thus allows more risk for individual investments within a portfolio).[141] The Commission also requested comments on the use of other standards to govern Fund investments.[142]

Several Commenters recommending that the Commission adopt Alternative No. 2 ask the Commission to adopt the ERISA standard. These Commenters support the ERISA standard because it has a precise, statutory definition, has served policymakers well for 20 years, has widespread applicability, has a body of case law that clearly defines its parameters, and is familiar to investors, investment managers and fiduciaries throughout the country.[143]

These Commenters submit that, because the ERISA standard focuses on the entire investment portfolio over which the fiduciary has authority, it is superior to a standard that views reasonableness on an investment-by-investment basis.[144] They note that the ERISA standard imposes a duty to diversify the type of investments. They maintain that this duty is fundamental to prudent investment, because it permits a fiduciary to tailor portfolios to meet the needs and circumstances of each trust. They argue that this perspective is critical to Fund investment, given the variety of variables to consider in connection with implementing a long-term investment program for a nuclear power plant decommissioning fund.[145] They maintain that, for any given level of assumed risk, one may obtain a higher return by investing in different classes of assets than by investing in a single asset class. They contend that, because of the long time span of decommissioning and the inflation sensitivity of decommissioning costs, Funds should invest in common stocks as well as in fixed-income securities.[146]

These Commenters acknowledge that equities are more risky than fixed-income investments, because the return the investor may receive in any given year can vary significantly from the average return.[147] But they submit that, because the value of a fixed-income security declines as interest rates rise, over time, increases in interest rates and inflation can cause the real return (nominal return minus inflation) of a fixed-income portfolio to decline. Commenters submit that, to meet or exceed the rate of inflation, an investment portfolio should offset the lack of inflation protection in fixed-income securities with the inflation protection inherent in common stock investments. That is, a Fund should participate in *both* classes of investments.[148]

These commenters submit that it is fundamental to prudent investment policies and practices that a fiduciary should invest according to the risk and return objectives reasonably suited to the Fund; accordingly, they maintain, the standard of prudence should apply

[133] New York State Comments at 4.

[134] *Id.*

[135] New England Power and the Public Utility Commissions of Michigan and Pennsylvania support Alternative No. 3.

[136] *E.g.*, Carolina Power & Light Comments at 3.

[137] *E.g.*, Carolina Power & Light Comments at 4; Edison Electric Comments at 2–4, 6, 9, 11–13; Consolidated Edison Comments at 5; Cooperatives Comments at 9–14; Duke Comments at 4; Florida Commission Comments at 2; New Hampshire Committee Comments at 1; NARUC Comments at 5, 12; Nuclear Energy Comments at 1–2; Nuveen Comments at 2–10; South Carolina E&G Comments at 1–2.

[138] *See* Restatements (Second) of Trusts § 227 (1959).

[139] *See* Restatement (Third) of Trusts § 227 (1992).

[140] *See* Restatements (Second) of Trusts § 227 & comments a through o (1959).

[141] *See* Restatement (Third) of Trusts § 227 (1992).

[142] 59 FR at 28300, IV FERC Stats. & Regs., Proposed Regulations at 32,854.

[143] *E.g.*, Bernstein Comments at 2; Edison Electric Comments at 11–12; Duke Comments at 3–4; Investment/Trust/Utility Companies Comments at 5–6; NISA Comments at 1–2; Wisconsin Electric Comments at 1–2. According to Carolina Power & Light, at the end of 1993, the ERISA standard governed the management of about $1.2 trillion in corporate pension fund assets. Carolina Power & Light Comments at 5.

[144] *E.g.*, Bernstein Comments at 2; Edison Electric Comments at 2–6; Investment/Trust/Utility Companies Comments at 5–6.

[145] *E.g.*, Bernstein Comments at 2.

[146] *E.g.*, Bernstein Comments at 2; Carolina Power & Light Comments at 8; Cooperatives Comments at 8–12; Edison Electric Comments at 4–7, 9–12; Investment/Trust/Utility Companies Comments at 4–6.

[147] *E.g.*, Carolina Power & Light Comments at 9; New York State Comments at 4; Nuveen Comments at 9 (''[C]ommon stocks are generally regarded as the riskiest asset class.'').

[148] *E.g.*, Carolina Power & Light Comments at 8; Cooperatives Comments at 10–12; Edison Electric Comments at 11–15; New York State Comments at 4–7; Nuveen Comments at 3–10.