to the overall investment portfolio rather than to any single investment.[149]

Wisconsin Electric submits that the Commission should adopt the ERISA standard because that standard provides the flexibility to efficiently manage Fund assets at the lowest possible cost to utility customers, balancing risk and reward, while taking into account such factors as general economic conditions, the expected operating life of the plant, and the expected timing of the cash requirements associated with decommissioning.[150]

While these Commenters refer to the ERISA standard, it is clear that they are really asking the Commission to adopt the ''prudent investor'' standard as delineated in the Restatement (Third) of Trusts (1992). This is obvious because, when these Commenters refer to the ERISA standard, many of them refer to managing risk by focusing on the entire portfolio (the signature characteristic of the prudent investor standard)[151] rather than by examining individual investments (the hallmark of the prudent person standard). For example, Edison Electric submits that, ''[t]he concept of a prudent portfolio has replaced the concept of a prudent investment.''[152]

Edison Electric states that ''[T]he ERISA * * * standard is * * * based upon the same rationale as the ''prudent investor'' standard of the Restatement (Third) of the Law of Trusts * * * § 227. * * * ''[153] And certain Commenters advocating adoption of the ERISA standard refer to investments by a ''prudent investor,''[154] a ''prudent investment manager''[155] or even by a ''prudent expert.''[156]

Other Commenters advocating adoption of Alternative No. 2 refer directly to the prudent investor standard as it appears in the Restatement (Third) of Trusts,[157] or to ''prudent investment principles''[158] without referring to the ERISA standard. It is clear from all of these references that those advocating adoption of Alternative No. 2 are seeking Commission adoption of the ''prudent investor'' standard.

C. Alternative No. 3: A Reasonable Person Standard With Certain Restrictions on the Quality and Quantity of Fund Investments

Three Commenters support Alternative No. 3.[159] The remaining Commenters oppose this Alternative, arguing that the express limitations are contrary to modern investment practices and reduce the flexibility of fiduciaries. The Commenters opposing Alternative No. 3 maintain that the end of a units's licensed life is not necessarily the appropriate measuring point for determining the need for cash to pay for decommissioning costs. They submit that, depending on the method of decommissioning and the availability of a national spent nuclear fuel repository, many Funds may expend substantial amounts for decommissioning costs long after the expiration of the operating license.[160] They criticize the proposed market capitalization and minimum credit rating standards as unrealistically eliminating from investment consideration more than 60 percent of the stocks listed in the Standard & Poor's 500, as well as large over-the-counter, domestic small capitalization, international and preferred stocks. They also maintain that the proposed single-company and single-industry limitations are too tight.[161]

Edison Electric maintains that if the Commission adopts the prudent investor standard, there will be no need for express guidelines, since modern investment practices and modern investment guidelines allow fiduciaries the flexibility to address specific situations that Funds will face.[162]

Cooperatives and New York State express a similar thought. They criticize Alternative No. 3 not for the restrictions that it contains, ''but, rather, because it contains requirements at all.''[163] They submit that the prudent investor rule would not function efficiently if the Commission were to restrict the quality and type of investments that a fiduciary may make.[164]

Of those favoring the adoption of Alternative No. 3, New England Power supports the Alternative outright, without modification. New England Power maintains that Alternative No. 3 strikes a reasonable balance between the goals of ensuring sufficient funds to safely decommission nuclear power plants and minimizing the cost to the customers.[165] New England Power states that Alternative No. 3 allows for sufficient diversification in investments to provide returns over time that would exceed those derived from investments made under the Black Lung investment guidelines, and will, accordingly, reduce customer contributions for decommissioning. New England Power argues that Alternative No. 3 improves upon Alternative No. 2, by establishing quality and quantity guidelines that would limit the risk associated with various possible investments.[166]

The Michigan Commission supports the Adoption of Alternative No. 3 with certain constraints on management fees and certain additions regarding the Fund's risk-adjusted yield and unit-cost. The Michigan Commission would also require that the fiduciary document the reasons for making various investments. The Michigan Commission also recommends that the aggregate value and Standard & Poor's rating requirements should not apply to investments in index funds.[167]

The Pennsylvania Commission recommends that, under Alternative No. 3, the Commission allow a fiduciary to speculate with not more than 25 percent of the corpus of the Fund. The Pennsylvania Commission recommends that the Commission require that the remaining portion of the Fund's assets remain in Black Lung grade investments.[168]

Commission Rulings

We agree with the majority of commenters that Alternative No. 3: a reasonable person standard with certain restrictions on the quality and quantity of Fund investments, unduly reduces investment flexibility. As Northeast Utilities points out, there is no single set of investment limitations that will adequately take into account the factors affecting decommissioning of each nuclear generating plant. A Fund manager must have sufficient leeway to address a Fund's needs under a variety

149 *E.g.*, Carolina Power & Light Comments at 10; Cooperatives Comments at 9; Edison Electric Comments at 2, 4, 13.

150 Wisconsin Electric Comments at 2.

151 *E.g.*, Bernstein Comments at 2; Carolina Power & Light Comments at 10; Duke Comments at 4; Investment/Trust/Utility Companies Comments at 5; Wisconsin P&L Comments at 1.

152 Edison Electric Comments at 6, *citing*, Hagin, *Modern Portfolio Theory* (1979) 12.

153 Edison Electric Comments at 4 (underscoring deleted).

154 New Hampshire Committee Comments at 1; Nuclear Energy Comments at 2 (''prudent implementation of modern investment practices'').

155 Nuveen Comments at 9.

156 Carolina P&L Comments at 10.

157 Cooperatives Comments at 7–12; New York State Comments at 6 n.4.

158 Consumers Power Comments at 3.

159 As noted, these Commenters are New England Power and the Michigan and Pennsylvania Commissions.

160 *See supra* n.36.

161 *E.g.,* Bernstein Comments at 3–4; Consolidated Edison Comments at 3–5; Consumers Power Comments at 5; Edison Electric Comments at 2–3, 16, 19–20; Duke Comments at 5; Entergy Comments at 4; Indiana Michigan Comments at 8; Investment/Trust/Utility Companies Comments at 7–8; Northeast Utilities Comments at 11–13; Nuveen Comments at 11–12; Wisconsin Electric Comments at 2–3; Wisconsin Power Comments at 2.

162 Edison Electric Comments at 17–18.

163 New York State Comments at 7–8.

164 Cooperatives Comments at 13.

165 New England Power Comments at 3.

166 *Id.* at 4.

167 Michigan Commission Comments at 1–3.

168 Pennsylvania Commission Comments at 16.