PROJECT NO. 29169

RULEMAKING ON NUCLEAR DECOMMISSIONING FOLLOWING THE TRANSFER OF TEXAS JURISDICTIONAL NUCLEAR GENERATING PLANT ASSETS	**§ § § § § §**	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER ADOPTING NEW §25.303
AS APPROVED AT THE SEPTEMBER 30, 2004 OPEN MEETING

The Public Utility Commission of Texas (commission) adopts new §25.303, relating to Nuclear Decommissioning Following the Transfer of Texas Jurisdictional Nuclear Generating Plant Assets with changes to the proposed text as published in the May 14, 2004 issue of the *Texas Register* (29 TexReg 4632). These amendments are intended to delineate the rights and obligations of companies involved in a transfer of nuclear generating plants assets for which decommissioning funds will continue to be collected from retail customers. The amendments 1) provide a clear procedure for the review of transfer agreements and requests for transfer of administration of the nuclear decommissioning trust fund; 2) allow a separate nonbypassable charge for nuclear decommissioning to be set in a limited scope proceeding that is not a general rate case; 3) modify the definition of Transferee Company to include municipal utilities and electric cooperatives; 4) recognize the tax exempt status of certain Transferee Companies; and 5) exclude from the scope of the rule certain nuclear decommissioning trust funds that contain funds that have not been provided under cost-of-service regulation of a regulated utility. This new section is adopted under Project Number 29169.

The commission received written comments on the proposed rule from Cameco South Texas Project, L.P. (Cameco), AEP Texas Central Company (AEP), San Antonio City Public Service

Board (San Antonio), CenterPoint Energy and Texas Genco, L.P. (collectively, CenterPoint), and TXU Electric Delivery Company and TXU Generation Company (collectively, TXU). Reply comments were filed by AEP, TXU, CenterPoint and San Antonio; AEP subsequently revised its comments.

A public hearing on the proposed section was held at commission offices on July 13, 2004. Representatives from Cameco, CenterPoint, Navigant Consulting, Incorporated (Navigant), and AEP attended the hearing and provided comments. To the extent that these comments differ from the submitted written comments, such comments are summarized herein. Following the public hearing CenterPoint, Cameco, and AEP filed supplemental comments on issues raised during and after the public hearing. To the extent that comments received orally at the meeting differ from or supplement submitted written comments, such comments are summarized herein.

All of the commenting parties were in general support of the proposed rule, though each had concerns regarding discrete issues raised in the proposed rule. None of the commenting parties opposed adoption of the rule.

Comments on the "Two Sets of Ratepayers" issue

In the strawman phase of the rulemaking process, Staff asked for comments on what group of ratepayers should pay for decommissioning if the nuclear plant was built by one set of ratepayers but was then subsequently sold to an entity, such as a municipality, that has its own set of captive ratepayers who would be using the power from the plant. In its comments on the proposed rule,

CenterPoint reiterated its support for the position taken by San Antonio and AEP Texas Central in their comments on the strawman proposal that the original body of ratepayers should continue to have that responsibility. Because the power from individual generating plants is no longer tied to specific ratepayer groups in the ERCOT wholesale market, CenterPoint took the position that the original set of ratepayers is the only group of retail ratepayers that can realistically be identified with these costs and that a fair reading of PURA §39.205 is that the original ratepayer group would have the continuing responsibility for funding decommissioning.

The commission agrees with CenterPoint, San Antonio, and AEP that in the case of the "two sets of ratepayers" situation, the decommissioning obligation should remain with the original set of ratepayers as set out in the proposed rule and that this conclusion is consistent with the intent of PURA §39.205.

Purpose of rule, subsection (a)(4)

Proposed subsection (a)(4) sets forth a general goal in the rule: minimizing the amounts collected from ratepayers by maximizing net earnings through prudent investment of the trust funds in accordance with the guidelines set out in subsection (e), including achieving optimum tax efficiency. TXU expressed concern about the word "maximize," because maximizing earnings involves increased risks, and stated that the phrase "maximizing net earnings" is a different standard than that found in Substantive Rule 25.301(a)(1), which, TXU asserted, more properly reflects the investment goals of the commission: "that the funds are secure and earn a reasonable return." TXU also pointed to language in Substantive Rule 25.301(c)(1) which states

that the funds should be invested "with a goal of earning a reasonable return commensurate with the need to preserve the value of the assets of the trust." TXU stated that the phrase "optimum tax efficiency" is vague and should be deleted because the rule already requires investment in "qualified" funds to the maximum extent possible and requires taxes to be considered in the selection of investments. In the selection of investments, TXU asserted that "optimum tax efficiency" may be inconsistent with such goals diversity of investments, high net return, and preservation of the trust assets. In its reply comments, San Antonio concurred with TXU that the phrase "optimum tax efficiency" is ambiguous and unnecessary. San Antonio added that it is a tax-exempt entity and that there may not be a financial advantage to maintaining the acquired trust's "qualified" status.

The standards discussed by TXU are two of the commission's investment goals, and are included verbatim in the proposed rule in subsections (e)(3)(A), subparts (i) and (iv). The "maximization of net earnings" goal is more precisely defined in subsection (e)(3)(A)(iii) of the rule. The overarching goal stated in subsection (a)(4) is included to emphasize to Transferee Companies two areas that directly affect the level of ratepayer contributions and are a priority for the commission: the net earnings accrued on the fund and the taxes paid on the trust funds. These issues may take on heightened importance with the transfer of the trust funds to an unregulated Transferee Company. The commission disagrees that maximizing the trusts' earnings necessarily entails increasing the investment risk beyond the constraints clearly set forth in subsection (e).

In the case of a tax-exempt municipal Transferee Company, the funds will not be subject to income taxes but may be subject to investment restrictions that are more stringent than the commission's standards, which would hinder future investment earnings on the fund. In response to San Antonio's comment, in deciding whether to seek qualified status, assuming there is an option, the rule states that the impact on both net earnings and tax efficiency should be considered. In the case of Transferee Companies subject to taxation, income taxes could significantly reduce net earnings of the trust funds going forward if the company is unable to obtain tax qualified status from the Internal Revenue Service for future contributions. The language in the proposed rule provides a general purpose statement in support of new provisions in subsections (d)(5), relating to the remittance methodology employed for decommissioning contributions and (f)(4)(C), relating to efforts to obtain relief from restrictive investment guidelines, and it highlights the existence of certain investment guidelines contained in section (e) of the rule. The commission has modified the language of this subsection to point more precisely to the sections that should guide the Transferee Company, namely subsection (e)(3)(A)(iii) and (e)(3)(B)(iii). Subsection (e)(3)(B)(iii) has also been modified to address TXU's concern regarding the vagueness of "optimum tax efficiency."

Definitions, subsection (c)

TXU recommended modifying the definition of "Collecting Utility" to include a municipality or an electric cooperative, because either such entity may be a Collecting Utility. San Antonio

replied that TXU's proposed change in the definition is inconsistent with the intended scope of the rule and its "jurisdictional basis." In its revised reply comments, AEP disagreed that the definition of "Collecting Utility" should be changed but recommended a revision to the definition of "Transferee Company" to include electric cooperatives and municipal utilities.

TXU also objected to the definition of "Collecting Utility" insofar as the definition specifies that the Collecting Utility deposits the decommissioning funds it receives into the decommissioning trusts. TXU suggested instead that the definition specify the funds be transmitted to the fund administrator that is fully responsible for the administration of the trusts. In its reply comments, San Antonio did not object to TXU's clarification that the Collecting Utility should remit funds to the trust administrator. CenterPoint replied that favorable tax treatment can best be assured if the funds collected from retail ratepayers are transferred directly to the decommissioning trust and suggested that the best course may be to allow the Collecting Utility and Transferee Company involved in a transfer the discretion to choose the best deposit methodology based on their joint assessment of the merits.

The commission declines to adopt TXU's suggested change to the proposed definition of "Collecting Utility." The limits of the commission's jurisdiction are established in PURA §39.205, which provides for continued cost-of-service rate regulation treatment for any remaining nuclear decommissioning costs following the conclusion of the freeze period. The only significant difference in rate regulation that occurs following the freeze period is that decommissioning revenues would be collected as a nonbypassable charge of the

respective transmission and distribution utilities. The apparent intent of the statutory provision is to carry the commission's jurisdiction over the collection of nuclear decommissioning revenues through the transition to competition essentially without change, except for recognizing that the revenues would be collected as a nonbypassable charge after the transition. The commission takes the position that the intent of PURA §39.205 was not to expand the scope of the commission's pre-competition jurisdiction over the collection of nuclear decommissioning revenues. Therefore, adding municipal utilities and electric cooperatives to the definition of "Collecting Utility" is inappropriate. As proposed in the rule, the Collecting Utilities will continue to be the utilities collecting decommissioning revenues today, namely, AEP Texas Central, TXU Energy Delivery, CenterPoint Energy Houston Electric, El Paso Electric, Entergy Gulf States, or their successors.

The commission has amended the definition of "Transferee Company" to include electric cooperatives and municipal utilities, as suggested by AEP. A transfer of Texas jurisdictional nuclear generating plant assets makes the Transferee Company eligible to receive its remaining decommissioning funding for the transferred plant from the Collecting Utility's ratepayers. The revised definition is inclusive of any subsequent transfers of Texas jurisdictional nuclear plant assets by any Transferee Company.

The commission declines to amend the proposed rule to adopt TXU's proposal that the definition specify the Collecting Utility remit the funds to the administrator rather than

deposit them directly to the trust. The administrator has the authority to direct the trustee on the appropriate handling of the funds without actually holding the funds. Direct deposit of the funds into the trust is a more efficient procedure from the perspective of the ratepayers than the alternative proposed by TXU. If direct deposits into the trust result in additional tax liability, however, the commission would consider a request for a good cause exception to this provision of the rule based on the rule's stated goal of "optimum tax efficiency."

TXU proposed a new definition for "Texas Jurisdictional Nuclear Generating Plant Assets" that would purportedly clarify that only nuclear plants built and in rates as of May 1, 1999, are included within the scope of the rule. In reply comments, San Antonio objected that TXU's proposed definition was too broad in that it includes the portions of the South Texas Project owned by San Antonio and Austin Energy as "jurisdictional" which was not the intent of the rule as understood by San Antonio.

The commission declines to add this definition to the proposed rule as requested by TXU and AEP. Instead, the commission clarifies the intent of the rule in the preamble. Texas jurisdictional nuclear generating plant assets are nuclear generating plants, or portions thereof, owned by a regulated utility in Texas and providing service to ratepayers within the state as of May 1, 1999. Thus, the definition includes portions of the following plants: Comanche Peak Steam Electric Station, River Bend Station, South Texas Project Electric Generation Station and Palo Verde Nuclear Generation Station but does not include the

portion of these plants owned by municipalities or other non-jurisdictional entities on May 1, 1999. New plants built by power-generating companies cannot be considered jurisdictional since power-generating companies assets are not subject to cost-of-service regulation. However, a power-generating company, electric cooperative or municipality comes within the scope of the rule if it is a Transferee Company that acquires an existing Texas jurisdictional nuclear generating plant asset; the power-generating company, electric cooperative, or municipality, as long as it retains an ownership interest in such an asset, remains subject to the rule through the end of decommissioning process.

Transfer of Nuclear Decommissioning Trust Funds, subsection (d)

In its general comments, TXU asserted that certain parts of the rule pertaining to the commission's review of decommissioning funds collection agreement and other agreements are unclear. In particular, TXU stated that subsection (d)(1)(A), involving "proposed agreements," seems to contemplate agreements that have been signed but that will not come into force until after the transfer transaction has closed; that subsection (d)(3), involving "proposed amendments to agreements," seems to contemplate filing agreements for review that have not been signed; and subsection (d)(4), relating to the filing of "final agreements reviewed pursuant to subsection (d)(1) or (d)(3)," seems to contemplate agreements that are not final. TXU states that, taken together, these subsections do not specify when the review is to take place or whether the agreements to which those subsections refer are executed, unexecuted, or in effect.

TXU's comments on subsections (d)(1) and (d)(3) generally exaggerate the lack of clarity in these sections. TXU has identified language in subsection (d)(4) that would benefit from clarification, and the commission has moved the language to clarify the intent of the subsection. Subsection (d)(1) refers to agreements that have been signed but that will not come into force until after the transfer transaction has been completed. Any transfer agreement will include or reference a proposed collection agreement and proposed agreements with fund trustees and investment managers, and the commission is interested in reviewing those agreements. Subsection (d)(3) relates to amended collection or fund management agreements, which necessarily presupposes existing agreements; the rule requires that, prior to an amended agreement becoming effective, the commission have an opportunity to review the agreement. The question TXU appears to raise, whether such a document would represent an actual agreement, is merely semantic and can be easily remedied, for example, by including a clause conditioning effectiveness on commission approval. Subsection (d)(4) is intended to apply to those agreements that, having been reviewed and approved by the commission, are subsequently executed or otherwise become effective; subsection (d)(4) requires that those final agreements, in the form in which they ultimately become effective, be filed.

Cameco expressed concern that the term "use of funds" in subsection (d)(1)(B) may be too expansive and suggested that the commission may not have authority to enforce certain rules regarding the "use of the funds." Cameco pointed out that the commission must not infringe on the Nuclear Regulatory Commission's exclusive regulatory jurisdiction over radiological,

operational, construction, and safety issues and suggested that the subsection (d)(1)(B) be revised to require only an agreement by the Transferee Company not to challenge a commission rule regarding non-radiological use of funds. At the public hearing, Cameco reported that the Internal Revenue Service had expressed some concern over differences between the commission's view of decommissioning and the federal regulatory authorities' definition of decommissioning. Cameco was concerned that the commission would order decommissioning funds returned to ratepayers before the decommissioning was completed in accordance with the federal regulations. Navigant stated that the Nuclear Regulatory Commission's definition of decommissioning covers only radiological decommissioning, while the Texas commission may adopt a more expansive definition that includes non-radiological decommissioning, as other jurisdictions within the United States have done.

The commission acknowledges the Nuclear Regulatory Commission's authority over the areas listed by Cameco. The commission will defer to federal regulatory authority on these aspects of decommissioning. The commission's requirement that Transferee Companies agree to commission rules regarding use of decommissioning funds is intended to ensure that Transferee Companies use such funds only for the decommissioning activities and costs that have been contemplated, reviewed, and approved by the commission in rate cases over the years, and to ensure that any funds remaining after decommissioning, including federal decommissioning requirements (whatever those might be at the time of decommissioning as established by the Nuclear Regulatory Commission and other

regulatory authorities), are returned to ratepayers. With this clarification, the commission declines to amend the rule as suggested by Cameco.

TXU commented that subsection (d)(1)(B)'s requirement that the Transferee Company will not challenge the authority of the commission to enforce its rules is overly broad and may be read as requiring the Transferee Company to waive its right to challenge the substance of the commission's actions. TXU proposes alternative language be added that "but [the Transferee Company] may challenge the substance of the commission's enforcement decisions and may challenge whether the commission's actions are authorized by its rules."

The commission disagrees that the rule is overly broad and declines to make TXU's requested change. Because the commission has been charged by the Texas legislature with ensuring the collection of reasonable and necessary funds for decommissioning and because the language of PURA §39.205 does not provide the commission with express authority to regulate otherwise non-utility Transferee Companies, the (d)(1)(B) requirement is necessary to provide the commission the confidence that Transferee Companies will subject themselves to the commission's oversight over the decommissioning funds. A Transferee Company may submit alternative language to the commission for review during the review of the transfer agreements pursuant to subsection (d)(6) or may request a good cause exception to this requirement.

TXU proposed two changes to subsection (d)(2). The first would prevent companies from having to file agreements that have already been filed with the commission. TXU's second suggested change removes the requirement that current agreements be amended, if necessary, to comply with the new rule.

The commission agrees with TXU's first requested change to subsection (d)(2). This change is consistent with current commission practice under Substantive Rule 25.73(d) for electric utilities that information already on file with the commission need not be resubmitted. However, the commission declines to adopt TXU's second suggested change. The suggested change would effectively grandfather existing agreements into the rule until they are amended. The commission declines to grandfather previously negotiated agreements that may not be in compliance with the rule. The proposed rule clearly covers transfers related to unbundling. If previously negotiated agreements must be amended, the proposed rule requires that they be effective before the next rate proceeding for the Collecting Utility or the next proceeding under subsection (g). This requirement would give a Collecting Utility a reasonable time to amend its agreements to conform to the rule. Moreover, a Collecting Utility may request a waiver if the amendment is considered to be non-substantive or if the utility needs additional time to comply due to a rate case initiated by (or as a consequence of an action by) an entity other than the utility.

TXU, AEP, and Cameco requested more clarity on the commission's two levels of review in subsections (d)(7)(A) and (B) and on how those subsections relate to filings of proposed or final

agreements for commission review. TXU also suggested that the "standard of review" in subsection (d)(7)(B), (referring, presumably, to the criteria listed in that subsection) apply to both types of reviews in (d)(7). Cameco proposed that the commission administratively review the Decommissioning Funds Collection Agreement for compliance with the rule and provide notice of intent to initiate a contested case to approve, reject, or modify the agreement within 45 days of receipt. AEP, in its reply comments, proposed a process in which Staff would provide a recommendation within 45 days followed by an opportunity for the filing parties to file revised agreements complying with Staff recommendations which could then be administratively approved. In AEP's proposal, a 120-day contested case proceeding would be initiated if Staff denied the request for approval of the documents or if the applicants disagreed with the Staff's recommendation. In its reply comments, TXU supported Cameco's proposed revision as a valid approach. Cameco and TXU urged that the contested case have a deadline for completion of 120 days after filing. TXU and Cameco further recommended that the rule provide that if no order is issued within 120 days, the agreements would be deemed approved and the commission would administratively issue an order to that effect. AEP suggested other minor revisions to clarify the review process, *inter alia*, moving subsection (d)(4) to the end of subsection (d).

The commission has revised this subsection of the rule in a manner similar to that suggested by AEP. However, 45 days is insufficient time to make a recommendation on complex, interlocking agreements in a meaningful way. Under the revised procedure, the commission staff will have 60 days to review and make a recommendation on the request, followed by a contested case proceeding if necessary, though the agreements will not be

deemed approved if an order is not issued within 120 days. The revised procedure provides the clarity and certainty that TXU, AEP, and Cameco considered lacking in the proposed rule, but it provides slightly more time for the commission's initial review and imposes a 120-day deadline on the contested case proceeding. An agreement might raise significant rate issues that affect customers, and it should not be deemed approved simply because the issues have not been resolved within this deadline. The commission declines to adopt TXU's recommendation that the same criteria apply to both the initial staff review and the contested case proceeding because the revision is unnecessary. If the applicants believe that staff recommendations are inappropriate, they have the opportunity to challenge those recommendations in a contested case proceeding, during which the criteria specified in the rule will be applied. It bears noting that the list of criteria in subsection (d)(6)(e) is not exhaustive or exclusive of other relevant considerations and that the commission does not consider the criteria to constitute a "standard of review."

CenterPoint stated that subsection (d)(7) of the proposed rule appears to condition approval of a Decommissioning Funds Collection Agreement on the favorable outcome of an Internal Revenue Service ruling. CenterPoint stated that this is problematic as the ruling might not be received within the 120-day deadline for the proceeding, and the commission does not have authority to deny the transfer of assets based on tax considerations.

AEP requested a modification in subsection (d)(7)(E) to allow a tax-exempt Transferee Company to recover any transitional costs associated with transferring a tax "qualified" fund to a municipality.

The tax implications of a decommissioning trust transfer are an appropriate concern for the commission to address in the proceeding as they directly impact ratepayer contributions. While taxes are primarily a rate issue, the commission will at a minimum want to be sure that appropriate private letter ruling requests have been made. The Internal Revenue Service and possibly other regulatory agencies will be making rulings on fact situations that are unique to the Texas restructuring law, and the outcome cannot be certain. No other state allows decommissioning to continue under cost-of-service regulation after a transfer of nuclear plant assets to an unregulated entity. There is a potential that the private letter rulings or other regulatory approvals may affect the documents being reviewed by the commission. The commission has no desire to delay the transaction but cannot definitively say in advance whether it might be appropriate to consider delaying issuance of its final order until other regulatory agencies have concluded their reviews, so that the commission can make a decision on all of the relevant facts. The commission therefore declines to revise the rule to remove the consideration of income taxes. The commission also declines to revise the rule specifically to provide that transitional costs be recovered as requested by AEP. Decommissioning costs are the subject of periodic rate proceedings, and the transitional costs must be reviewed for reasonableness and necessity prior to recovery.

All parties opposed having the Collecting Utility continue to administer the Nuclear Decommissioning Trust Fund following transfer of a nuclear generating asset interest until the Collecting Utility is released by the commission from that administration obligation as set out in subsection (d)(8) of the proposed rule. TXU opined that the Collecting Utility should not be the fund administrator unless the Collecting Utility is an integrated electric utility that is serving both functions or the Collecting Utility is currently acting as fund administrator pursuant to a commission-approved unbundling plan. TXU proposed that the existing fund administrator (which in TXU's particular case is not the utility) continue performing until released by a commission order. CenterPoint urged the commission to adopt its conclusion that the commission has adequate jurisdiction under PURA §39.205 over the decommissioning trust funds to obtain adequate assurances from Transferee Companies that decommissioning funds will be prudently managed. AEP urged the commission to amend subsection (d)(8) to provide a deadline for the transfer of administration of the fund on the fifth anniversary of the transfer of the nuclear plant if not approved by the commission prior to that date. AEP stated that an indefinite, open-ended delay in transferring responsibility for administration of the fund will introduce unnecessary and undesirable uncertainty into the transfer of a nuclear plant. TXU replied that it shared AEP's concern but that there should not be a five-year delay in transfer of administration.

As previously discussed, the commission declines TXU's suggestion to amend the rule to grandfather existing administration agreements. The commission also declines to put a

deadline into the rule for transfer of administration and declines to revise the rule to provide that administration responsibility transfers at the time of asset transfer. The commission desires that the transfer of administration obligation take place as soon as the commission's jurisdiction to promulgate and enforce its rules concerning the decommissioning trust funds with respect to a Transferee Company is clearly established; because establishing the commission's jurisdiction may require a change in legislation, it is not possible to predict how long such a process may take. A transferee's company's agreement to be bound by the commission's rules regarding the collection, investment and use of decommissioning funds pursuant to subsection (d)(1)(B) is the minimum assurance the commission would require, and, depending on the facts of a given situation, additional assurances may be necessary.

CenterPoint urged that the commission approval of transfer of ownership, of transfer documents, and of the transfer of administration of the decommissioning trust funds take place in the same proceeding. CenterPoint stated that severance of the administration from the ownership of the decommissioning trust funds raises numerous questions, *e.g.*, 1) whether a party that does not own the decommissioning assets can enter into a valid trust and investment management agreements; 2) whether the Collecting Utility that is not the owner of the decommissioning trust funds can seek private letter rulings from the Internal Revenue Service; and 3) while the Collecting Utility is acting as administrator, whether it will be allowed a higher rate of return that encompasses risks associated with decommissioning a nuclear generating plant.

First, the transfer of the administration of the decommissioning trust funds may be the subject of a contested case proceeding as stated in revised subsection (d)(1)(a), if such as transfer is requested. Second, the commission believes that CenterPoint's concerns are overstated. Even though a Collecting Utility may no longer own a decommissioning trust fund, the Transferee Company and the Collecting Utility could arrange contractually for the Collecting Utility's continued fund management. With respect to CenterPoint's second concern, the Transferee Company can request the private letter rulings on behalf of the Collecting Utility. In response to CenterPoint's third concern, decommissioning is the legal liability of the owner of the plant and not that of the decommissioning fund administrator, whose function is to see that the funds are properly managed and invested. Therefore, the administrator has the fiduciary duty of administering the trust funds but does not bear the greater obligations of overseeing the decommissioning process or assuring the adequacy of the trust funds. The commission assumes that the administrator will be paid reasonable fees for the performance of its duties, taking into account any duties and risk that it bears. Further, while the rule does not place a deadline for the transfer of administration, it is the commission's desire that the transfer of administration occur as soon as possible and well before the commencement of decommissioning.

In supplemental comments, CenterPoint stated that failure to transfer supervision over nuclear decommissioning funds held in trust would be inconsistent with both Internal Revenue Service regulations and the oversight responsibilities of the Nuclear Regulatory Commission. In particular, CenterPoint commented that Internal Revenue Service regulation §1.468A-5(a)(1)(iii)

allows only one qualified trust for each nuclear generating unit. This creates a problem for a co-owner who has an existing trust for the same nuclear generating unit being transferred because the commission's rule requires the Collecting Utility to administer the transferred portion of the trust. CenterPoint said the problem might be addressed contractually but that the owner of the nuclear facilities has a stronger incentive to assure the decommissioning funds are properly invested than the Collecting Utility. CenterPoint also expressed concern that the Nuclear Regulatory Commission's rule, published at 10 C.F.R. §50.75, may conflict with the commission's rule. In §50.75(h), the Nuclear Regulatory Commission has specified that it has decommissioning fund oversight authority with respect to an otherwise unregulated buyer of an interest in a nuclear generating asset and has imposed certain restrictions on the trust funds which, *inter alia*, (1) restrict certain investments of the trust; (2) restrict the involvement of the licensee and its affiliates in the day-to-day management of the fund; (3) require that notice be given to the Nuclear Regulatory Commission of any material amendment to the trust agreement; and (4) require that notice be given to the Nuclear Regulatory Commission regarding certain withdrawals from the trust. CenterPoint explained that if the licensed buyer is not the administrator of the trust funds, as is the case in the proposed rule, it would be difficult for the buyer to comply with the restrictions, and it would be difficult for the Nuclear Regulatory Commission to enforce its regulations since it has no jurisdiction over collecting utilities that are no longer licensees. The commission should be satisfied that the Transferee Company, once licensed by the Nuclear Regulatory Commission, will also be qualified to perform oversight responsibilities over the decommissioning trust funds, asserted CenterPoint.

The commission staff has consulted with staff of the Nuclear Regulator Commission and several tax attorneys specializing in decommissioning fund issues regarding the issues that CenterPoint has raised. With respect to Internal Revenue Service regulation §1.468A, it is likely that the restriction of a single qualified trust can be overcome through a private letter ruling or, alternatively, that separate subaccounts under one trust can be used. The combined elements of proportionate funding by two sets of ratepayers for a single generating unit, which will occur in the case of the purchase of a nuclear plant by a co-owner, and a commission rule that requires separate accounting and separate administrators will likely be sufficient grounds for the Internal Revenue Service to issue a favorable private letter ruling for separate qualified trusts. Therefore, the commission has added language to the rule to require Transferee Companies that have existing trusts for a generating unit(s) that is being transferred to maintain separate decommissioning trusts or separate subaccounts for decommissioning revenues acquired from separate ratepayer groups. Although the commission is admittedly not able to obtain assurance from the Internal Revenue Service of such treatment, it is also evident that the Internal Revenue Service did not design its rule with Texas' unique legislative framework for continued cost-of-service rate treatment for decommissioning in mind. In the alternative, separate subaccounts, while less desirable than separate trusts, can provide adequate tracking of each ratepayer group's contributions and the earnings on each portion of the trust. In any case, it is important to understand that §1.468A does not bar the ownership of two separate decommissioning funds related to the same plant; rather, the rule bars the tax-preferred

election available under Internal Revenue Code §468A for two funds, *i.e.*, in the worst-case scenario, the owner of the two funds would have to decide which fund would be qualified.

In adopting §50.75(h) in December 2002, the Nuclear Regulatory Commission addressed its own concern that, with the advent of deregulation in the electric utility industry throughout the country, state utility commissions would abdicate their traditional roles overseeing nuclear decommissioning funds administered by integrated utilities and that otherwise unregulated power generation companies would acquire these funds. Section 50.75(h) imposes, therefore, on a new licensee certain restrictions. In adopting the proposed rule, the commission is, in fact, addressing the Nuclear Regulatory Commission's own concern, though there is a tension between the mechanics of the commission's rule and the assumption underlying §50.75 that the trust administration responsibilities would transfer immediately to unregulated power generation companies. Following discussion with staff counsel for the Nuclear Regulatory Commission of the aims of both the commission's rule and §50.75(h), staff believes that the Nuclear Regulatory Commission will be satisfied that, due to the continuing cost-of-service rate regulation for the collecting utilities, the commission's investment requirements, and the commission's periodic review to ensure that projected decommissioning costs are reasonable and accurate, the commission's rule provides essentially unchanged commission oversight for the decommissioning trust funds. Given these circumstances, it is very likely that the Nuclear Regulatory Commission will provide a waiver of any conflicting provisions of §50.75.

Administration of the Nuclear Decommissioning Trust Funds, subsection (e)

San Antonio objected to subsection (e)(3)(C) of the proposed rule, which applies the investment restrictions to all trusts in the aggregate for each generating unit. While this treatment may be appropriate for a Transferee Company whose other trusts relate to a Texas jurisdictional nuclear generating asset, San Antonio stated, it is not appropriate for an entity that already has an existing trust that is not subject to the commission's rate setting jurisdiction. AEP, in its revised reply comments, appeared to support San Antonio's objection.

The commission concurs with San Antonio's comments and has revised the rule so that only Texas jurisdictional nuclear generating units are covered by this subsection.

Periodic Review of Decommissioning Costs and Nuclear Decommissioning Trust Funds, subsection (f)

TXU felt that subsection (f)(1) was unclear insofar as it does not clearly state when the commission would review and approve nuclear decommissioning costs and whether the commission intends the transfer process to require such a review. TXU proposed a simpler process in which the commission would review decommissioning costs as part of the transfer process under subsection (d)(1), along with a proposal to modify or implement a separately stated nuclear decommissioning fund charge, and that a joint application be filed every three to five years thereafter by the Transferee Company and the Collecting Utility to review the costs and modify the charge as necessary. TXU also proposed that such proceedings be completed within 120 days. Cameco agreed with TXU's proposal.

In its reply comments, AEP disagreed that the costs should be reviewed as part of the proceeding to review decommissioning trust agreements under subsection (d)(1). AEP opined that such a procedure would unnecessarily delay transfer and introduce potentially complicated issues to the proceeding. AEP disagreed with TXU that the rule needs further clarification.

Attendees at the public hearing on July 13, 2004, orally commented that the proposed subsection (f)(6) was rendered redundant by other provisions of subsection (f). The parties commented that regulatory proceedings are not likely to be filed too frequently by a Transferee Company because of the administrative burden that accompanies the proceedings, and no further threshold requirement need be included in the proposed rule.

The commission has added clarifying language to subsection (f)(1) to indicate that a commission review will occur periodically pursuant to the provisions of subsections (f)(3) and (g)(4). While the three- to five-year periodic reviews suggested by TXU may appear simpler, a change in the decommissioning charge may be unnecessary if the costs have not changed significantly since the last review. Thus, the commission declines to change the rule as suggested by TXU. Subsection (f)(3) allows the commission or other affected party, including the Transferee Company, to initiate a review, or by the Transferee Company alone under subsection (g)(4). The commission agrees with the oral comments regarding subsection (f)(6) and eliminates it.

AEP recommended recognizing in subsection (f)(4)(D) that optimum tax efficiency can be achieved through maintenance of a tax-exempt status.

The commission agrees with AEP and has revised the rule accordingly. In addition, this section has been revised to reference the revised goal in subsection (e)(3)(B)(iii).

Collecting utility rate proceedings for decommissioning charges, Subsection (g)

Consistent with its comments on subsection (c), TXU urged that the Collecting Utility remit the decommissioning fund revenues to the fund administrator rather than directly to the trust in subsection (g)(2). The administrator then can determine the timing of any deposits and the correct trust account into which the monies should be deposited.

As previously discussed, the commission declines to amend the rule as suggested by TXU.

TXU requested that the commission delete the phrase at the end of subsection (g)(2) that states "provided, however, the parties to the decommissioning funds collection agreement shall demonstrate that the selected remittance procedure achieves optimum tax efficiency in connection with the nuclear decommissioning trusts."

As previously discussed, tax liability should be considered when selecting a remittance methodology because it directly impacts ratepayers' future contributions. The rule requires that taxable decommissioning funds be invested in "tax qualified" funds to the

maximum extent possible in subsection (e)(3)(B)(iii). The Transferee Company and the administrator of the trust funds should be required to demonstrate how its selected methodology achieves optimum tax efficiency, as proposed by the rule.

CenterPoint commented that a general rate case is unnecessary to remove decommissioning from a utility's base rates and to state it as a separate nonbypassable charge. The initiation of a general rate case within 30 days as required in subsection (g)(1)(A) would be both impractical and an unnecessary expenditure of resources. CenterPoint proposed that, if the commission retained the requirement that the utility file a rate case, that the scope of any rate case be limited in scope to the issue of separately stating the decommissioning charge at its current level and reducing the base rate by the same amount. In its supplemental comments, CenterPoint provided a description of its current rate schedules to demonstrate that the decommissioning charge is a separate line item and that it would be a simple matter to separate the decommissioning charge from its transmission and distribution charges. In addition, CenterPoint provided examples of other proceedings where discrete rate changes, rate additions and other tariff revisions were approved outside of a system-wide rate case. San Antonio and AEP agreed with CenterPoint in their reply comments.

In supplemental comments, AEP asserted that the creation of a separately stated charge would not violate the principle against "piecemeal ratemaking." AEP notes that PURA does not contain any explicit prohibition against piecemeal ratemaking, and that the legislature has created numerous exceptions in §§36.202, 36.203, and 36.205 to allow rates to change separate

from a general rate case. AEP submitted that PURA §39.205 may effectively be read as creating a similar exception. Further, AEP noted that the commission has established a standard tariff 6.1.1.5 for all transmission and distribution utilities, in which nuclear decommissioning charges are separately stated. AEP asserted it is more practical to create a separate nuclear decommissioning charge than to leave it part of bundled rates because decommissioning costs are distinct from other transmission and distribution utility costs. AEP contended that it is not practical to require a transmission and distribution utility to go through the cost and effort of a general rate case whenever an owner of a nuclear plant needs a change in the decommissioning charge; nor is it practical for a nuclear plant owner to have to participate in every transmission and distribution rate case in order to protect the decommissioning charge.

The commission agrees that a general rate case is not required in order to remove decommissioning from base rates and state it as a separate nonbypassable charge, provided the costs and the allocation methodology to various rate classes remain the same. The commission revises subsection (g)(1)(A). The commission believes it is practical and in the public interest to allow a nuclear decommissioning charge to be changed when necessary in a proceeding that is not a general transmission and distribution rate case. Decommissioning costs are not related to the Collecting Utility's other costs, may increase at a higher rate of inflation, and may need more frequent adjustment as the projected costs become more certain. Under the proposed rule, the nuclear plant owner may, but is not required to, request a change in the decommissioning charge in a general transmission and distribution rate case.

Decommissioning Over/Under-recovery Balances, (g)(2)(B)

AEP in its initial comments and TXU and Cameco in their reply comments proposed that the reconciliation provision apply regardless of the transfer methodology employed, rather than only in the case of levelized payments. Cameco also urged, and AEP concurred, that the reconciliation be required rather than optional. TXU replied that, rather than make the request mandatory, Transferee Companies be able to request a reconciliation.

The commission agrees with the parties that the reconciliation should be mandatory but disagrees that the reconciliation should apply to other remittance methodologies. The purpose of this subsection is not to correct the level of decommissioning funding for changes in costs or funding assumptions, which occurs in periodic rate cases. Rather, this provision is to make an adjustment to the decommissioning charge if the Collecting Utility has collected materially more or less revenue than it has remitted to the decommissioning trust fund, which can only occur in a case of a levelized remittance methodology. The Collecting Utility should not be a significant lender to or cash manager for the trust fund and should be able to request a reconciliation separate from a periodic rate case if a material mismatch exists between collections and remittances. The Transferee Company will not be motivated to request a change in the decommissioning rate under a levelized remittance methodology because the variance in collections (assuming all other things are equal) will not affect the trust balance. A change in the decommissioning charge under this provision does not involve the Transferee Company or an examination of the cost or

funding assumptions underlying the decommissioning charge. If the fund becomes materially over- or under-funded for reasons other than the remittance methodology, the affected party can request a review under subsections (f)(3) or (g)(4) of the rule.

AEP suggested that in the reconciliation provision, the materiality standard should be same as in the fuel rule, which requires that over- or under-collections be projected to continue.

The commission agrees that the same material standard should apply and has amended subsection (g)(2)(B) accordingly.

Collecting Utility rate proceedings for decommissioning charges, subsection (g).

AEP proposed that the language regarding alternative methods of payments to the trust fund (levelized, actual, or other) in subsection (g)(2) be moved to subsection (d) as the payment methodology will be part of the Decommission Fund Collection Agreement and can be reviewed at that time.

The commission agrees and moves slightly revised language relating to remittance methodologies to subsection (d).

Cameco recommended that the rule explicitly require the commission to hold a hearing prior to ordering the discontinuance of deposits into the decommissioning trust fund under subsection

(g)(2)(A). TXU replied that the Administrative Procedure Act requires notice and opportunity for hearing and supported Cameco's proposal.

The commission will hold a hearing if significant compliance issues arise and will in all respects comply with the Administrative Procedure Act. The commission amends the rule to provide that a hearing can be initiated by the commission or any affected party.

TXU urged that the frequency of deposits that triggers the imputed interest calculation in subsection (g)(2)(C) be changed to monthly rather than weekly, as the amount of implied interest is minor. TXU Delivery currently transfers the nuclear decommissioning charge revenues to TXU Generation on a monthly basis, without interest. TXU estimated that annual implied interest on its $1 million of monthly decommissioning revenues, assuming a 1.0% annual interest rate, is about $6,000, and prefers not to amend its current collection agreement.

The purpose of this subsection of the rule is to encourage frequent deposits to the decommissioning trust funds. As TXU stated several times in its comments, the delivery company is simply a "collecting agent" for the Transferee Company and should not hold these monies any longer than is necessary. Any benefit of interest, however small, will compound and accrue for 20 or more years and should benefit ratepayers, not the Collecting Utility. The commission declines TXU's suggestion.

Several parties suggested non-substantive changes to correct minor errors or improve the clarity of the rule.

A number of non-substantive revisions have been made in response to these comments.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting this section, the commission makes other minor modifications for the purpose of clarifying its intent.

This section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 (Vernon 1998, Supplement 2005) (PURA) which provides the commission with the authority to make and enforce rules reasonably required in the exercise of its powers and jurisdiction; and specifically, §39.001(d), which requires that the commission adopt rules that are both practical and limited so as to impose the least impact on competition.

Cross Reference to Statutes: Public Utility Regulatory Act §14.002, §14.052, §39.001, and §39.205.

§25.303. Nuclear Decommissioning Following the Transfer of Texas Jurisdictional Nuclear Generating Plant Assets.

(a) **Purpose.** The purpose of this rule is to:

(1) delineate the rights and obligations of the transferor and the Transferee Companies involved in a transfer of Texas jurisdictional nuclear generating plant assets for which decommissioning funds will continue to be collected from retail customers pursuant to Public Utility Regulatory Act (PURA) §39.205, as well as the obligations of the utility responsible for collecting the decommissioning funds;

(2) prescribe a utility's continuing responsibility for collecting funds through its rates for nuclear decommissioning trust funds for the benefit of the Transferee Company;

(3) protect the nuclear decommissioning trust funds so that the funds collected from customers through the Collecting Utility's nonbypassable charge, plus the amounts earned from investment of the funds, will be available for decommissioning, in the event of a transfer of the nuclear decommissioning trust funds;

(4) minimize the amounts collected from customers for nuclear decommissioning by maximizing net earnings on the nuclear decommissioning trust funds through prudent investment of such funds, in accordance with the guidelines set out in subsection (e)(3)(A)(iii) of this section, and achieving optimum tax efficiency, in accordance with subsection (e)(3)(B)(iii) of this section.

(b) **Application.** This rule supersedes §25.231(b)(1)(F) of this title (relating to Cost of Service) and §25.301 of this title (relating to Nuclear Decommissioning Trusts) for electric utilities that have completed their business separation pursuant to PURA §39.051 or that otherwise transfer Texas jurisdictional nuclear generating plant assets, including the associated nuclear decommissioning trust funds, to another entity. This rule applies to:

(1) an electric utility or a power generation company that transfers its Texas jurisdictional nuclear generating plant assets, including any associated nuclear decommissioning trust funds, to another entity;

(2) a utility that is responsible for collecting revenue for the decommissioning of Texas jurisdictional nuclear generating plant assets that have been transferred to another entity; and

(3) a Transferee Company.

(c) **Definitions.**

(1) Transferor Company—An electric utility, its successor in interest, or any power generation company that transfers Texas jurisdictional nuclear generating plant assets, including any associated nuclear decommissioning trust funds collected from customers.

(2) Transferee Company—An entity or its successor in interest to which Texas jurisdictional nuclear decommissioning generating plant assets, including the associated nuclear decommissioning trust funds, are transferred from a Transferor

Company. For purposes of this section, a municipality or an electric cooperative may be a Transferee Company.

(3) Collecting Utility—The electric utility or transmission and distribution utility responsible for collecting the decommissioning funds from customers and depositing them into the nuclear decommissioning trust funds. The Collecting Utility may or may not be the Transferor Company.

(4) Nuclear Decommissioning Trust Funds—Funds that are contained in one or more external and irrevocable trusts created for the purpose of protecting and holding revenue collected under cost-of-service rate regulation to cover the costs of decommissioning a Texas jurisdictional nuclear generating plant at the end of its useful life.

(5) Decommissioning Funds Collection Agreement—An agreement between or agreements among the Collecting Utility, the Transferor Company (if different from the Collecting Utility), and the Transferee Company that govern the transfer of responsibility for administration of the nuclear decommissioning trust funds, the collection of decommissioning revenues from utility customers, and the remittance of the funds to the nuclear decommissioning trust.

(d) **Transfer of Nuclear Decommissioning Trust Funds.**

(1) Prior to the closing of any transaction involving the transfer of nuclear decommissioning trust funds:

(A) The Collecting Utility, the Transferor Company (if different from the Collecting Utility), and the Transferee Company shall jointly submit for the commission's review the proposed decommissioning funds collection agreement(s) and the proposed agreements with the institutional trustee and investment manager(s) of the decommissioning trust, and copies shall be provided to the commission's Legal and Enforcement Division and Financial Review Division. The Collecting Utility or Transferee Company may request the transfer of responsibility for administration of the nuclear decommissioning trust funds to the Transferee Company in a contested case proceeding pursuant to subsection (d)(6)(E) of this section at the time of submission of such agreements or anytime thereafter.

(B) In connection with the submission required in subparagraph (A) of this paragraph, the Transferee Company shall submit an affidavit, signed under oath by an authorized officer of the Transferee Company, certifying that once the transfer of administration of the Nuclear Decommissioning Trust Funds is ordered by the commission, the transferred funds and the future contributions to the funds will be administered in accordance with subsection (e) of this section and that the company will not challenge the authority of the commission to enforce its rules that shall be adopted from time to time relating to the collection, investment and use of the funds provided by Collecting Utility customers for nuclear decommissioning.

(2) For transfers of Nuclear Decommissioning Trust Funds that occurred before this rule took effect, the executed decommissioning funds collection agreement(s) and agreements with the institutional trustee and investment manager(s) shall be filed at the commission within 15 days of the effective date of this rule, unless such agreements have previously been filed with the commission. If such agreements must be amended to comply with this section, the amended agreements must take effect on or before the Collecting Utility's next general rate proceeding or a rate proceeding under subsection (g) of this section, whichever occurs first.

(3) Prior to executing an amended decommissioning funds collection agreement or amended agreement with the institutional trustee or investment managers, the proposed amended agreement shall be filed at the commission for review along with a redlined version showing all changes made since the document was reviewed by the commission, and copies shall be provided to the commission's Legal and Enforcement Division and Financial Review Division.

(4) A Transferee Company shall maintain one or more irrevocable trusts external to the Transferee Company for the purpose of receiving the nuclear decommissioning revenues collected under cost-of-service rate regulation. The Transferee Company shall be named as beneficiary of each such trust. If the Transferee Company has an existing trust for the same generating unit in which an interest is being transferred that is funded by a set of ratepayers entirely distinct from that of the Collecting Utility's ratepayers, or funded by other sources, a separate trust or separate subaccount shall be maintained that will

segregate the decommissioning funds received from the Collecting Utility, and any earnings thereon, from the nuclear decommissioning trust funds received from other sources. There shall be no commingling of any decommissioning funds received from the Collecting Utility with any other trust or subaccount containing nuclear decommissioning trust funds received from any other set of ratepayers or other sources. If a single trust with subaccounts is utilized to hold the decommissioning funds, the Transferee Company shall cause to be performed an independent audit of all said subaccounts and shall otherwise act to recognize the interests of different sets of ratepayers as may reasonably be requested by the commission.

(5) The Collecting Utility, the Transferor Company (if different from the Collecting Utility) and the Transferee Company shall execute a decommissioning funds collection agreement. The agreement shall provide that the Transferor Company's rights to accumulated and future decommissioning funds and the responsibilities for decommissioning of the nuclear plant shall be transferred to the Transferee Company upon closing of the transaction. The decommissioning funds collection agreement may provide for the remittance by the Collecting Utility of levelized periodic payments based on the most recent annual decommissioning funding amount approved by the commission or the actual amounts of nonbypassable decommissioning charges collected by the Collecting Utility during each applicable remittance period, or for such other remittance arrangement as the commission concludes is reasonable and consistent with the

purposes of this section. In the selection of a remittance arrangement, the parties to the decommissioning funds collection agreement shall consider the impact on optimum tax efficiency pursuant to subsection (e)(3)(B)(iii).

(6) After the Collecting Utility, the Transferor Company (if different from the Collecting Utility), and Transferee Company have filed a request for a commission review of the agreements filed pursuant to subsection (d)(1)(A) or (d)(3) of this section:

(A) The commission staff will recommend approval, amendment, or disapproval of the agreements within 60 days of receipt of the request.

(B) If the commission staff recommends approval, and no motions for intervention have been filed, the commission shall promptly approve the request;

(C) If the commission staff recommends amendment, within 14 days after staff's recommendation the filing parties shall either file amended agreements incorporating the amendments, request review of alternative language, or request a hearing.

(D) If the applicants file amended agreements incorporating the staff recommendations, and there is no motion to intervene filed, the commission shall promptly approve the amended request.

(E) If the commission staff recommends denial, if the applicants request a hearing, or if the applicants do not file amended agreements incorporating staff's recommendations within 14 days pursuant to subsection (d)(6)(C),

the request shall be docketed as a contested case proceeding to approve, modify, or reject the agreements. The commission will issue an order within 120 days of the initiation of a contested case proceeding. In considering whether or not to approve the decommissioning funds collection agreement, the commission may consider the impact on customers including any impact on federal income taxes related to the nuclear decommissioning trust funds, the ability of the Transferee Company to administer the trust, any investment restrictions on the Transferee Company, the ability of the commission to enforce its rules over the administrator of the funds, and any other relevant factors.

(F) An agreement filed pursuant to subsection (d)(1)(A) and (d)(3) of this section shall be filed at the commission within 15 days of the execution of the agreement.

(7) Absent a commission order to the contrary, the Collecting Utility shall be the administrator of the nuclear decommissioning trust funds established or maintained by the Transferee Company and shall be responsible for administering the funds in accordance with subsection (e) of this section.

(8) Upon the issuance of an order from the commission releasing the Collecting Utility from the obligation to administer the nuclear decommissioning trust funds, the Transferee Company that owns the nuclear decommissioning trust funds shall become the administrator of such funds in accordance with subsection (e) of this section.

(e) **Administration of the Nuclear Decommissioning Trust Funds.**

(1) **Duties of funds administrator.**

(A) Each funds administrator of Nuclear Decommissioning Trust Funds shall assure that the Nuclear Decommissioning Trust Funds are managed so that the funds are secure and are invested consistent with the goals in this subsection; and so that the funds provided from the Collecting Utility's nonbypassable charge, plus the amounts earned from investment of the funds, will be available at the time of decommissioning.

(B) The funds administrator shall appoint one or more institutional trustees and may appoint one or more investment managers. Unless otherwise specified in paragraph (2) of this subsection, the Texas Trust Code controls the administration and management of the Nuclear Decommissioning Trust Funds, except that the appointed trustees need not be qualified to exercise trust powers in Texas. If the Collecting Utility is the acting funds administrator, the selection or replacement of such trustees and investment managers shall be made in consultation with the Transferee Company. The agreements with such trustees and investment managers shall require that any reports regarding the trust funds given to the fund administrator shall also be given to the Transferee Company, if different from the fund administrator.

(C) The funds administrator shall retain the right to replace the trustees with or without cause. In appointing a trustee, the funds administrator shall have the following duties, which will be of a continuing nature:

(i) A duty to determine whether the trustee's fee schedule for administering the trust is reasonable, when compared to other institutional trustees rendering similar services, and meets the requirement of paragraph (3)(B)(i) of this subsection;

(ii) A duty to investigate and determine whether the past administration of trusts by the trustee has been reasonable;

(iii) A duty to investigate and determine whether the financial stability and strength of the trustee is adequate;

(iv) A duty to investigate and determine whether the trustee has complied with the trust agreement and this section as it relates to trustees; and,

(v) A duty to investigate any other factors which may bear on whether the trustee is suitable.

(D) The funds administrator shall retain the right to replace the investment managers with or without cause. In appointing an investment manager, the funds administrator shall have the following duties, which will be of a continuing nature:

(i) A duty to determine whether the investment manager's fee schedule for investment management services is reasonable, when

compared to other such managers, and meets the requirement of paragraph (3)(B)(i) of this subsection;

(ii) A duty to investigate and determine whether the past performance of the investment manager in managing investments has been reasonable;

(iii) A duty to investigate and determine whether the financial stability and strength of the investment manager is adequate for purposes of liability;

(iv) A duty to investigate and determine whether the investment manager has complied with the investment management agreement and this section as it relates to investments; and,

(v) A duty to investigate any other factors which may bear on whether the investment manager is suitable.

(2) **Agreements between the fund administrator and the institutional trustee or investment manager.**

(A) The fund administrator shall execute an agreement with each institutional trustee. The agreement shall include the restrictions in subparagraphs (A)(i)-(v) of this paragraph and may include additional restrictions on the trustee. A fund administrator shall not grant such trustee powers that are greater than those provided to trustees under the Texas Trust Code or that are inconsistent with the limitations of this section.

(i) The interest earned on the corpus of the trust becomes part of the trust corpus. A trustee owes the same duties with regard to the interest earned on the corpus as are owed with regard to the corpus of the trust.

(ii) A trustee shall have a continuing duty to review the trust portfolio for compliance with investment guidelines and governing regulations.

(iii) A trustee shall not lend funds from the decommissioning trust to itself, its officers, or its directors.

(iv) A trustee shall not invest or reinvest decommissioning trust funds in instruments issued by the trustee, except for time deposits, demand deposits, or money market accounts of the trustee. However, investments of a decommissioning trust may include mutual funds that contain securities issued by the trustee if the securities of the trustee constitute no more than five percent of the fair market value of the assets of such mutual funds at the time of the investment.

(v) The agreement shall comply with all applicable requirements of the Nuclear Regulatory Commission.

(B) The fund administrator shall execute an agreement with each investment manager. (If the trustee performs investment management functions, the contractual provisions governing those functions must be included in either the trust

agreement or a separate investment management agreement.) The agreement shall include the restrictions set forth in subparagraphs (B)(i)-(v) of this paragraph and may include additional restrictions on the manager. A funds administrator shall not grant the manager powers that are greater than those provided to trustees under the Texas Trust Code or that are inconsistent with the limitations of this section.

(i) An investment manager shall, in investing and reinvesting the funds in the trust, comply with paragraph (3) of this subsection.

(ii) The interest earned on the corpus of the trust becomes part of the trust corpus. An investment manager owes the same duties with regard to the interest earned on the corpus as are owed with regard to the corpus of the trust.

(iii) An investment manager shall have a continuing duty to review the trust portfolio to determine the appropriateness of the investments.

(iv) An investment manager shall not invest funds from the decommissioning trust with itself, its officers, or its directors.

(v) The agreement shall comply with all applicable requirements of the Nuclear Regulatory Commission.

(3) **Trust investments.**

(A) **Investment portfolio goals.** The Nuclear Decommissioning Trust Funds should be invested consistent with the following goals. The funds

administrator may apply additional prudent investment goals to the funds so long as they are not inconsistent with the stated goals of this subsection.

(i) The funds should be invested with a goal of earning a reasonable return commensurate with the need to preserve the value of the assets of the trusts.

(ii) In keeping with prudent investment practices, the portfolio of securities held in the decommissioning trust shall be diversified to the extent reasonably feasible given the size of the trust.

(iii) Asset allocation and the acceptable risk level of the portfolio should take into account market conditions, the time horizon remaining before the commencement and completion of decommissioning, and the funding status of the trust. While maintaining an acceptable risk level consistent with the goal in subparagraph (A)(i) of this paragraph, the investment emphasis when the remaining life of the liability, as defined in subparagraph (B)(vi)(IV) of this paragraph, exceeds five years should be to maximize net long-term earnings. The investment emphasis in the remaining investment period of the trust should be on current income and the preservation of the fund's assets.

(iv) In selecting investments, the impact of the investment on the portfolio's volatility and expected return net of fees, commissions, expenses, and taxes should be considered.

(B) **General requirements.** The following requirements shall apply to all Nuclear Decommissioning Trust Funds. Where a Transferee Company has multiple Nuclear Decommissioning Trust Funds for a single generating unit, the restrictions contained in this subsection apply to all such trusts in the aggregate for that generating unit. For purposes of this section, a commingled fund is defined as a professionally managed investment fund of fixed-income or equity securities established by an investment company regulated by the Securities Exchange Commission or a bank regulated by the Office of the Comptroller of the Currency.

(i) Fees limitation. The total trustee and investment manager fees paid on an annual basis by the fund administrator from the trust for the entire portfolio including commingled funds shall not exceed 0.7% of the entire portfolio's average annual balance.

(ii) Diversification. For the purpose of this subparagraph, a commingled or mutual fund is not considered a security; rather, the diversification standard applies to all securities, including the individual securities held in commingled or mutual funds. Once the portfolio of securities (including commingled funds) held in the decommissioning trust(s) contains securities with an aggregate value in excess of $20 million, it shall be diversified such that:

(I) no more than 5.0% of the securities held may be issued by one entity, with the exception of the federal government, its agencies and instrumentalities, and;

(II) the portfolio shall contain at least 20 different issues of securities. Municipal securities and real estate investments shall be diversified as to geographic region.

(iii) Optimum tax efficiency. The fund administrator may invest the decommissioning funds by means of tax exempt, "qualified" or "unqualified" nuclear decommissioning trusts; however, the fund administrator shall, to the extent permitted by the Internal Revenue Service, invest any taxable decommissioning funds in "qualified" nuclear decommissioning trusts, in accordance with the Internal Revenue Code §468A (or any successor thereto). The fund administrator shall avoid, whenever possible, the investment of taxable decommissioning funds in "unqualified" nuclear decommissioning trusts.

(iv) Derivatives. The use of derivative securities in the trust is limited to those whose purpose is to enhance returns of the trust without a corresponding increase in risk or to reduce risk of the portfolio. Derivatives may not be used to increase the value of the portfolio by any amount greater than the value of the underlying securities. Prohibited derivative securities include, but are not limited to, mortgage strips; inverse floating rate securities; leveraged investments or internally leveraged securities;

residual and support tranches of Collateralized Mortgage Obligations; tiered index bonds or other structured notes whose return characteristics are tied to non-market events; uncovered call/put options; large counter-party risk through over-the-counter options, forwards and swaps; and instruments with similar high-risk characteristics.

(v) The use of leverage (borrowing) to purchase securities or the purchase of securities on margin for the trust is prohibited.

(vi) Investment limits in equity securities. The following investment limits shall apply to the percentage of the aggregate market value of all non-fixed income investments relative to the total portfolio market value.

(I) Except as noted in subclause (II) of this clause, when the weighted average remaining life of the liability exceeds five years, the equity cap is 60%.

(II) When the weighted average remaining life of the liability ranges between five years and two and a half years, the equity cap shall be 30%. Additionally, during all years in which expenditures for decommissioning the nuclear units occur, the equity cap shall also be 30%.

(III) When the weighted average remaining life of the liability is less than two and a half years, the equity cap shall be 0%.

(IV) For purposes of this subparagraph, the weighted average remaining life in any given year is defined as the weighted average of years

between the given year and the years of each decommissioning outlay, where the weights are based on each year's expected decommissioning expenditures divided by the amount of the remaining liability in that year.

(V) Should the market value of non-fixed income investments, measured monthly, exceed the appropriate cap due to market fluctuations, the fund administrator shall, as soon as practicable, reduce the market value of the non-fixed income investments below the cap. Such reductions may be accomplished by investing all future contributions to the fund in debt securities as is necessary to reduce the market value of the non-fixed income investments below the cap, or if prudent, by the sale of equity securities.

(vii) A decommissioning trust shall not invest in securities issued by the Transferee Company or the Collecting Utility collecting the funds or any of their respective affiliates; however, investments of a decommissioning trust may include commingled funds that contain securities issued by the Transferee Company or Collecting Utility if the securities of such company or utility constitute no more than 5.0% of the fair market value of the assets of such commingled funds at the time of the investment.

(C) **Specific investment restrictions.** The following restrictions shall apply to all decommissioning trusts. Where a Transferee Company has multiple Nuclear Decommissioning Trust Funds for a single generating unit, the restrictions

contained in this subsection apply to all such trusts in the aggregate for that generating unit.

(i) Fixed-income investments. A decommissioning trust shall not invest trust funds in corporate or municipal debt securities that have a bond rating below investment grade (below "BBB-" by Standard and Poor's Corporation or "Baa3" by Moody's Investor's Service) at the time that the securities are purchased and shall reexamine the appropriateness of continuing to hold a particular debt security if the debt rating of the company in question falls below investment grade at some time after the debt security has been purchased. Commingled funds may contain some below-investment-grade bonds; however, the overall portfolio of debt instruments shall have a quality level, measured quarterly, not below an "AA" grade by Standard and Poor's Corporation or "Aa2" by Moody's Investor's Service. In calculating the quality of the overall portfolio, debt securities issued by the federal government shall be considered as having an "AAA" rating.

(ii) Equity investments.

(I) At least 70% of the aggregate market value of the equity portfolio, including the individual securities in commingled funds, shall have a quality ranking from a major rating service, such as the earnings and dividend ranking for common stock by Standard and Poor's or the quality rating of Ford Investor Services. Further, the overall

portfolio of ranked equities shall have a weighted average quality rating equivalent to the composite rating of the Standard and Poor's 500 index assuming equal weighting of each ranked security in the index. If the quality rating, measured quarterly, falls below the minimum quality standard, the fund administrator shall as soon as practicable and prudent to do so, increase the quality level of the equity portfolio to the required level.

(II) A decommissioning trust shall not invest in equity securities where the issuer has a capitalization of less than $100 million.

(iii) Commingled funds. The following guidelines shall apply to the investments made through commingled funds. Examples of commingled funds appropriate for investment by nuclear decommissioning trust funds include United States equity-indexed funds, actively managed United States equity funds, balanced funds, bond funds, real estate investment trusts, and international funds.

(I) The commingled funds should be selected consistent with the goals specified in paragraph (1) and the requirements in paragraph (2) of this subsection.

(II) In evaluating the appropriateness of a particular commingled fund, the fund administrator has the following duties, which shall be of a continuing nature:

(-a-) A duty to determine whether the fund manager's fee schedule for managing the fund is reasonable, when compared to fee schedules of other such managers;

(-b-) A duty to investigate and determine whether the past performance of the investment manager in managing the commingled fund has been reasonable relative to prudent investment and utility decommissioning trust practices and standards; and

(-c-) A duty to investigate the reasonableness of the net after-tax return and risk of the fund relative to similar funds, and the appropriateness of the fund within the entire decommissioning trust investment portfolio.

(III) The payment of load fees shall be avoided.

(IV) Commingled funds focused on specific market sectors or concentrated in a few holdings shall be used only as necessary to balance the trust's overall investment portfolio mix.

(f) **Periodic Reviews of Decommissioning Costs and Nuclear Decommissioning Trust Funds.**

(1) Following a transfer of Texas jurisdictional nuclear generating plant assets, including the associated Nuclear Decommissioning Trust Funds, any remaining costs associated with nuclear decommissioning obligations shall remain subject to

cost-of-service regulation based on a periodic review of such costs pursuant to subsections (f)(3) or (g)(4) of this section. The reasonable and necessary nuclear decommissioning costs as periodically approved by the commission shall continue to be included as a nonbypassable charge of the Collecting Utility associated with the Texas jurisdictional nuclear plant asset. Subsection (g) of this section shall apply to such charges by a Collecting Utility.

(2) The Transferee Company shall periodically perform, or cause to be performed, a study of the decommissioning costs of each Texas jurisdictional nuclear generating unit it owns or in which it leases an interest. A study or re-determination of the previous study shall be performed at least every five years, starting from the date of the most recent decommissioning cost study for the plant on file with the commission. The study or re-determination shall consider the most current and reasonably available information on the cost of decommissioning. A copy of the study or re-determination along with an updated funding analysis shall be filed with the commission and copies provided to the commission's Financial Review Division and the Office of Public Utility Counsel. The funding analysis shall be based on the most current information reasonably available for the cost of decommissioning, an allowance for contingencies of 10% of the cost of decommissioning, the balance of funds in the decommissioning trusts, anticipated escalation rates, the anticipated after-tax return on the funds in the trust, and other relevant factors. The funding analysis shall be accompanied by a description of the assumptions used in the analysis and

shall calculate the required annual funding amount necessary to ensure sufficient funds to decommission the nuclear generating plant at the end of its useful life.

(3) The commission, on its own motion or on the motion of the Legal and Enforcement Division, the Office of Public Utility Counsel, or any affected person, may initiate a proceeding to review the Transferee Company's trust balances, compliance with this section, or the annual funding amount. The Transferee Company shall provide any information required to conduct the review upon request in accordance with the commission's procedural rules.

(4) During each periodic review of decommissioning costs, the following evidence shall be provided:

(A) The Transferee Company shall file the periodic cost study described in paragraph (2) of this subsection, along with an updated decommissioning funding analysis described in paragraph (2) of this subsection, within 90 days of completion of the periodic cost study. The cost study and funding analysis shall be accompanied by a report or testimony supporting the analyses and the requested annual funding amount.

(B) The Nuclear Decommissioning Trust Funds administrator shall demonstrate that the decommissioning funds are being invested prudently and in compliance with the investment guidelines in subsection (e) of this section.

(C) To the extent the Transferee Company is subject to investment restrictions that are more restrictive than the decommissioning investment guidelines

in subsection (e) of this section, the Transferee Company (or the funds administrator and the Transferee Company, if different) shall demonstrate their efforts to obtain relief from such investment restrictions in order to permit investments in accordance with the guidelines in subsection (e) of this section.

(D) The Transferee Company (or the funds administrator and the Transferee Company, if different) shall demonstrate efforts to achieve optimum tax efficiency as defined in subsection (e)(3)(B)(iii) of this section, including, as applicable, maintenance of tax-exempt status or efforts to achieve "qualified" status in accordance with Internal Revenue Code §468A (or any successor thereto) with respect to its taxable nuclear decommissioning trust funds.

(5) Within 90 days after completion of decommissioning the nuclear generating plant, the Transferee Company shall file a request for a final reconciliation proceeding at the commission. Any funds remaining in the trust after the completion of decommissioning shall be refunded to customers in a manner determined by the commission. If the reasonable and necessary costs of decommissioning exceed the amount available in the trust, the excess costs will be recovered through a nonbypassable charge approved by the commission if the Transferee Company has substantially complied with this section and prudently managed the decommissioning process.

(6) The Transferee Company shall file an annual report on May 15 of each year to report the status of the decommissioning trust fund using a form approved by the commission.

(7) The Collecting Utility, as part of its annual earnings report, shall report the amounts and dates of the deposits into the Nuclear Decommissioning Trust Funds and, if different, the revenues received from customers for the time intervals corresponding to each deposit.

(g) **Collecting Utility rate proceedings for decommissioning charges.**

(1) A Collecting Utility that has decommissioning expenses embedded as part of a bundled rate shall apply to have its current level of decommissioning funding removed from its general rates and stated as a separate nonbypassable charge.

(A) In the case of a transfer of Texas jurisdictional nuclear generating plant assets to a non-affiliated entity, the request shall be made no later than 30 days following the closing of the transaction. The nonbypassable charge shall be based on the funding level and the rate class allocation methodology as approved in the Collecting Utility's last general rate proceeding. Such proceeding to remove the decommissioning charge from the Collecting Utility's general rates and state it as a separate nonbypassable charge will not constitute a general rate case.

(B) In the case of a transfer of Texas jurisdictional nuclear generating plant assets to an affiliated power-generating company, the request for a

separate nonbypassable charge shall be made during the first general rate case following the transfer.

(2) The Collecting Utility shall deposit the decommissioning revenues into the Nuclear Decommissioning Trust Funds consistent with the terms of the decommissioning funds collection agreement on file with the commission and the most recent commission order authorizing decommissioning collections from customers.

(A) The commission may on its own motion or on the motion of the Legal and Enforcement Division, the Office of Public Utility Counsel or any other affected person, initiate a proceeding to discontinue the deposit of decommissioning revenues to the Nuclear Decommissioning Trust Funds if the Transferee Company substantially or repeatedly fails to comply with any provision of this section.

(B) If levelized deposits are made into the fund, the following provisions apply.

(i) The Collecting Utility shall keep records of its daily receipts from customers once a separate nonbypassable charge is set by the commission.

(ii) Once the Collecting Utility has implemented a separate nonbypassable charge, it shall request an adjustment in the nonbypassable charge if there is, and is projected to continue to be, a material cumulative over- or under-collection of revenues,

including interest, greater than or equal to 15% of the most recent annual nuclear decommissioning funding amount approved by the commission. The request shall be based on the difference between the actual cumulative decommissioning charge revenues collected from customers and the cumulative amount authorized to be collected since the last rate adjustment, including interest calculated in accordance with §25.236(e)(1) of this title (relating to Recovery of Fuel Costs). The calculated over- or under-recovery amount will be applied to the commission-authorized annual amount to determine the required nonbypassable charge.

(C) If deposits to the nuclear decommissioning trust funds are less frequent than weekly, an implied interest calculation shall be used in setting the decommissioning charge to account for the Collecting Utility's short term use of the funds.

(3) Upon the issuance of a commission order under subsection (f)(3) or (g)(4) of this section in which the commission determines that the annual funding amount required for nuclear decommissioning for a particular plant has increased or decreased and should be adjusted, the Collecting Utility shall file a rate application within 45 days solely to adjust the nonbypassable charge. The filing shall provide sales data, a proposed allocation methodology, a proposed tariff, and any other information necessary to implement the commission's order. The commission will issue a final order within 120 days of receipt of the filing. Such

rate proceeding will be conducted separately from the Collecting Utility's general rate proceedings.

(4) The Transferee Company may elect to request a change in the decommissioning funding level during a general rate case of the Collecting Utility. The Collecting Utility shall give the Transferee Company at least 90 days' notice of an anticipated rate application for its general rates to allow the Transferee Company to prepare a funding analysis to be filed jointly with the Collecting Utility's application.

(h) **Good cause exception.**

Upon a showing of good cause, an applicant under this section may request that the commission waive or grant an exception to any requirement of this section.

This agency hereby certifies that the adoption has been reviewed by legal counsel and found to be a valid exercise of the agency's legal authority. It is therefore ordered by the Public Utility Commission of Texas that §25.303, relating to Nuclear Decommissioning Following the Transfer of Jurisdictional Nuclear Generating Plant Assets, is hereby adopted with changes to the text as proposed.

ISSUED IN AUSTIN, TEXAS ON THE _____ DAY OF _____ 2004.

PUBLIC UTILITY COMMISSION OF TEXAS

_____

JULIE PARSLEY, COMMISSIONER

_____

PAUL HUDSON, CHAIRMAN

_____

BARRY T. SMITHERMAN, COMMISSIONER

Q:\PD\TXR-Rules Management\Rules\Rulemaking Projects\Electric\29169\29169adt.doc