

CHAPTER 25. SUBSTANTIVE RULES APPLICABLE TO ELECTRIC SERVICE PROVIDERS.

Subchapter L. NUCLEAR DECOMMISSIONING.

§25.301. Nuclear Decommissioning Trusts.

(a) Duties of electric utilities.

- (1) Each electric utility collecting funds for a nuclear decommissioning trust shall assure that the nuclear decommissioning trust is managed so that the funds are secure and earn a reasonable return; and, that the funds provided from the utility's cost of service, plus the amounts earned from investment of the funds, will be available at the time of decommissioning.
- (2) Each electric utility collecting funds for a nuclear decommissioning trust shall place the funds in an external, irrevocable trust fund. The utility shall appoint an institutional trustee and may appoint an investment manager(s). Unless otherwise specified in subsection (b) of this section, the Texas Trust Code controls the administration and management of the nuclear decommissioning trusts, except that the appointed trustee(s) need not be qualified to exercise trust powers in Texas.
- (3) The utility shall retain the right to replace the trustee with or without cause. In appointing a trustee, the electric utility shall have the following duties, which will be of a continuing nature:
 - (A) 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 subsection (c)(2)(A) of this section;
 - (B) A duty to investigate and determine whether the past administration of trusts by the trustee has been reasonable;
 - (C) A duty to investigate and determine whether the financial stability and strength of the trustee is adequate;
 - (D) A duty to investigate and determine whether the trustee has complied with the trust agreement and this section as it relates to trustees; and,
 - (E) A duty to investigate any other factors which may bear on whether the trustee is suitable.
- (4) The utility shall retain the right to replace the investment manager with or without cause. In appointing an investment manager, the utility shall have the following duties, which will be of a continuing nature:
 - (A) 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 subsection (c)(2)(A) of this section;
 - (B) A duty to investigate and determine whether the past performance of the investment manager in managing investments has been reasonable;
 - (C) A duty to investigate and determine whether the financial stability and strength of the investment manager is adequate for purposes of liability;
 - (D) 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,
 - (E) A duty to investigate any other factors which may bear on whether the investment manager is suitable.

(b) Agreements between the electric utility and the institutional trustee or investment manager.

- (1) The utility shall execute an agreement with the institutional trustee. The agreement shall include the restrictions in subparagraphs (A) - (E) of this paragraph and may include additional restrictions on the trustee. An electric utility shall not grant the 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.
 - (A) 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.

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- (B) A trustee shall have a continuing duty to review the trust portfolio for compliance with investment guidelines and governing regulations.
 - (C) A trustee shall not lend funds from the decommissioning trust with itself, its officers, or its directors.
 - (D) 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.
 - (E) The agreement shall comply with all applicable requirements of the Nuclear Regulatory Commission.
- (2) The utility shall execute an agreement with the 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 (A) - (E) of this paragraph and may include additional restrictions on the manager. An electric utility 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.
- (A) An investment manager shall, in investing and reinvesting the funds in the trust, comply with subsection (c) of this section.
 - (B) 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.
 - (C) An investment manager shall have a continuing duty to review the trust portfolio to determine the appropriateness of the investments.
 - (D) An investment manager shall not invest funds from the decommissioning trust with itself, its officers, or its directors.
 - (E) The agreement shall comply with all applicable requirements of the Nuclear Regulatory Commission.
- (3) A copy of the trust agreement, any investment management agreement, and any amendments shall be filed with the commission within 30 days after the execution or modification of the agreement, and copies provided to the commission's Office of Regulatory Affairs' Legal Division and Financial Review Division and the Office of Public Utility Counsel. All previously executed agreements and amendments must be filed within 30 days of the effective date of this section.
- (4) Within 90 days after the effective date of this section, a utility that is a party to a trust agreement or an investment management agreement that is not in compliance with this section shall revise the agreement to comply with this section.
- (c) **Trust investments.**
- (1) **Investment portfolio goals.** The funds should be invested consistent with the following goals. The utility may apply additional prudent investment goals to the funds so long as they are not inconsistent with the stated goals of this subsection.
 - (A) 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.

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- (B) 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.
 - (C) 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) of this paragraph, the investment emphasis when the remaining life of the liability, as defined in paragraph (2)(F)(iv) of this subsection, 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.
 - (D) 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.
- (2) **General requirements.** The following requirements shall apply to all decommissioning trusts. Where a utility has multiple trusts for a single generating unit, the restrictions contained in this subsection apply to all 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.
- (A) Fees limitation. The total trustee and investment manager fees paid on an annual basis by the utility for the entire portfolio including commingled funds shall not exceed 0.7% of the entire portfolio's average annual balance.
 - (B) 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.
 - (C) Qualified trusts. The utility may invest the decommissioning funds by means of qualified or unqualified nuclear decommissioning trusts; however, the utility shall, to the extent permitted by the Internal Revenue Service, invest its decommissioning funds in "qualified" nuclear decommissioning trusts, in accordance with the Internal Revenue Service Code §468A.
 - (D) 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.
 - (E) The use of leverage (borrowing) to purchase securities or the purchase of securities on margin for the trust is prohibited.

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- (F) 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 clause (ii), when the weighted average remaining life of the liability exceeds 5 years, the equity cap is 60%;
 - (ii) When the weighted average remaining life of the liability ranges between 5 years and 2.5 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 2.5 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; and
 - (v) Should the market value of non-fixed income investments, measured monthly, exceed the appropriate cap due to market fluctuations, the utility 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.
- (G) A decommissioning trust shall not invest in securities issued by the electric utility collecting the funds or any of its affiliates; however, investments of a decommissioning trust may include commingled funds that contain securities issued by the electric utility if the securities of the 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.
- (3) **Specific investment restrictions.** The following restrictions shall apply to all decommissioning trusts. Where a utility has multiple trusts for a single generating unit, the restrictions contained in this subsection apply to all trusts in the aggregate for that generating unit.
- (A) 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 a "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 a "AAA" rating.
 - (B) 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

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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 utility 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.
- (C) 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 utility has the following duties, which shall be of a continuing nature:
 - (I) 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;
 - (II) 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
 - (III) 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.