PROJECT NO. 34888

RULEMAKING TO IMPLEMENT PURA §39.206 RELATING TO NUCLEAR DECOMMISSIONING COSTS AND REQUIREMENTS FOR CERTAIN UNITS CONSTRUCTED BY A POWER GENERATION COMPANY	**§ § § § § §**	**PUBLIC UTILITY COMMISSION OF TEXAS**

ORDER ADOPTING NEW §25.304
AS APPROVED AT THE FEBRUARY 22, 2008 OPEN MEETING

The Public Utility Commission of Texas (commission) adopts new §25.304, relating to the funding of Nuclear Decommissioning funding and requirements for Power Generation Companies (PGCs), with changes to the proposed text as published in the January 4, 2008 issue of the *Texas Register* (33 TexReg 36). The new rule implements the requirements of §39.206 of the Public Utility Regulatory Act (PURA), Texas Utilities Code Annotated (Vernon 2007), as added by the 80th Texas Legislature. The new rule establishes the minimum financial assurance standard for PGCs constructing nuclear generation power plants as well as the funding, administration, and monitoring requirements for nuclear decommissioning trust funds. This rule is a competition rule subject to judicial review as specified in PURA §39.001(e). Project Number 34888 is assigned to this proceeding.

The commission received comments on the proposed new rule from Exelon Generation (Exelon), Luminant Energy Company LLC (Luminant), NRG Texas LLC (NRG), the Steering Committee of Cities served by Oncor (Cities), and Texas Industrial Energy Customers (TIEC). The commission received reply comments from Cities, Exelon, NRG and TIEC.

§25.304(a) Purpose

TIEC observed that the rule assumes that the PGC eligible to establish a decommissioning trust is the holder of the license granted by the Nuclear Regulatory Commission (NRC). TIEC stated that although this is implied in the rule, this should be explicit. Accordingly, TIEC suggested that subsection (a) of the proposed rule be revised.

Commission response

The commission agrees with TIEC and has added the suggested language to the rule.

§25.304(b) Applicability and (c) Definitions

Exelon commented that the term "under construction" is not defined in subsection (b) and the term could be subject to misinterpretation. Therefore, Exelon recommended that a definition of the term be added as §25.304(c)(5), which defines the term consistent with the definition of "Commencement of Construction" used by the Department of Energy for the Standby Support Program. Exelon advised that a similar definition has been adopted by the Department of Treasury in its initial rules for production tax credits applicable to new nuclear plants.

NRG commented that the definition of "external sinking fund" in subsection (c) should be deleted as a stand-alone definition and that the substance of the definition be incorporated into the definition of "PGC decommissioning trust." NRG stated the term external sinking fund is used only once in the rule, which is in the definition of PGC decommissioning trust; therefore, it is unnecessary to include a separate definition.

Commission response

The commission agrees with Exelon's proposal to add clarity to the rule and NRG's proposal to incorporate the definition of external sinking fund into the definition of "PGC decommissioning trust," and has made the suggested changes.

§25.304(e) Commission Review

Cities advised that subsection (e) does not clearly provide for participation by any party, aside from commission staff and the PGC, in reviewing a PGC's application for setting annual decommissioning funding and for approving financial agreements to implement trust requirements. Cities stated that while the rule does provide that a request for hearing may be made, it does not provide that interested parties can participate in that hearing.

Exelon commented that the expense and delay of a formal hearing is unnecessary and ill-suited to the types of findings that are to be made by the commission and commission staff when reviewing an application to set the annual amounts to be funded in the decommissioning trusts. Moreover, Exelon advised, the rule includes prescriptive requirements that already provide for adequate assurance of decommissioning funding. Exelon commented that unlike the procedures applicable to existing nuclear plants in Texas (where decommissioning funds are collected from retail customers), the annual contributions to be made under the proposed rule will be funded by the PGCs. Thus, any person or entity that has a remote interest in the adequacy of the amount of annual funding to be made by the PGCs can meaningfully express those concerns in written comments that can be considered by the commission and commission staff. Exelon recommended that the rule be revised to provide for the opportunity to submit comments with

respect to any initial or periodic application filed to establish the annual decommissioning funding amount and the state assurance obligation. Exelon stated that the opportunity for hearing should be provided for in the remote circumstance where collections from retail electric customers may be ordered to provide funding for decommissioning.

TIEC provided two suggestions. First, TIEC suggested that a notice provision should be added so that interested parties are apprised of these filings. Second, TIEC suggested that subsection (e)(5) be deleted because administrative approval of applications is reserved for those types of cases that are routine and do not require commission-level scrutiny. TIEC commented that the importance of the issues and the magnitude of dollars involved in these proceedings merit a review by the commission, even if they are ultimately unopposed.

NRG commented that the language in subsection (e)(1) should be changed from "will endeavor to" to "will" because such a change would provide the certainty of an absolute date and would be consistent with the similar, existing provisions in §25.303(d)(6)(E) and §25.303(g)(3). Also, NRG stated that an unqualified request for a hearing, as set out in subsection (e)(2), is unnecessary given the nature of the decommissioning fund requirements and the commission staff's active participation. NRG advised that no hearing is required by statute for approval of a decommissioning fund, and the issues associated with this type of application are not suited for resolution through a contested evidentiary proceeding. NRG maintained that the rule sets out clear, non-discretionary requirements that must be satisfied and provides a mechanism for review by commission staff to ensure that the requirements are met as a condition of maintaining a decommissioning fund. Moreover, NRG stated, commission staff must affirmatively approve an

application before it is presented to the commission for final approval (unless the applicant demonstrates its entitlement to approval through a contested case hearing). Rather than soliciting requests for hearing in subsection (e)(2), NRG recommended that the commission acknowledge that comments may be filed and require that commission staff respond to comments in its recommendation to the commission.

In their reply comments, TIEC and Cities disagreed with the suggested revisions proposed by Exelon and NRG because they would inappropriately limit customers' ability to participate in the proceedings to establish and review a decommissioning trust fund. TIEC advised that, aside from being contrary to administrative law, the proposal made by NRG and Exelon is bad public policy that would result in an initial "fast-track" review of the establishment of billions of dollars of potential liability of customers, and the subsequent review of funds, without providing customers the ability to test the evidence upon which an application is based. TIEC stated that if customers will ultimately be responsible for funding any shortfall of a decommissioning fund, they must be allowed to fully participate in the proceedings that establish and review the fund.

Commission response

In response to Cities' comments about interested parties and TIEC's comments about notice to interested parties, the commission declines to make any changes to the rule. Notice and standing to intervene are addressed by the commission's procedural rules and therefore need not be addressed in this rule. The commission also does not agree with Exelon's and NRG's request to limit or eliminate the right to a hearing. The commission agrees with the reply comments of TIEC and Cities, because the collection of funds and the

subsequent maintenance and disposition of the decommissioning obligation could have a significant financial impact on customers.

The commission declines to delete subsection (e)(5), as proposed by TIEC. TIEC appears to be concerned with the possibility that an application could be approved by a presiding officer pursuant to §22.35(b)(1) of this title rather than by the commissioners. However, §22.35 and §25.304 contain a number of safeguards to ensure that applications filed pursuant to §25.304 are adequately scrutinized and, if necessary, approved by the commissioners, while avoiding unnecessary delays and burdens.

The commission disagrees with NRG that a strict 120-day deadline is warranted. The substantive rule that NRG cites allows a 120-day period for review of an applicant's decommissioning collection and fund agreements filed pursuant to §25.303(d)(1)(A) or (d)(3), and a separate 120-day period to review the annual decommissioning funding amount and trust fund balances. The rule in this project requires the commission to review and approve both the decommissioning funding agreements and the annual funding amount. Given the magnitude of the dollars involved and the importance of the decommissioning trusts being properly funded, it is vital that adequate time be given to carefully review an applicant's information without imposing a strict time limit on the review process.

§25.304(g) Annual Reports

TIEC commented that subsection (g) of the proposed rule requires a PGC to file an annual report outlining the status of the trust, any changes in the administration of the trust, and an update of the PGC's ability to fund the trust. TIEC suggested that this information does not allow the commission to appropriately evaluate the creditworthiness of a PGC (or its guarantor, if applicable) and that the use of audited financial statements and Securities and Exchange Commission (SEC) filings will provide the commission additional assistance in the credit review process, supplementing the credit rating agencies' assessments. TIEC also suggested that non-publicly held companies should provide audited financial information, credit references and other indicia of their ability to make payments in a timely manner. In its reply comments, NRG stated that the annual reporting suggested by TIEC is unnecessarily broad and would produce irrelevant information in many situations.

Commission response

The commission will address what additional information must be included in the annual report when it adopts the form for the annual report. The commission has amended subsection (g) to make it clear that the information that must be included in the annual report is not limited to the information specifically identified in subsection (g).

§25.304(h) Periodic Commission Review

TIEC suggested that there is a deficiency with the proposed rule because the review established in subsection (h) does not provide for an annual review of the PGC's creditworthiness and any

guarantor identified by the PGC. TIEC argued that such review was necessary to ascertain that the appropriate collateral is in place and that the PGC and any guarantor are able to fulfill their obligations to the decommissioning fund. TIEC also requested the rule be strengthened to require a submission by the PGC in the event of an unusual credit occurrence during the time between annual reports. TIEC stated that the PGC must be obligated to report any credit downgrades or changes in its financial condition that may impact its credit standing. TIEC also advised that the rule should provide for an interim review triggered by certain credit events.

In its reply comments, Cities voiced its support for TIEC's proposal to enhance the oversight of a PGC's financial condition through the reporting process.

Exelon, in its reply comments, stated that TIEC's suggestion that there is a need for exhaustive and burdensome annual reviews and "triggers" in the event of any drop in the credit quality of a PGC misses the point that a PGC is not be expected to have high credit quality. Exelon replied that the submission of multiple annual reports to the commission is duplicative and unnecessary because by definition the types of reports suggested by TIEC are already filed with the SEC or Federal Energy Regulatory Commission (FERC), and as such they are already publicly available. Exelon stated that making annual payments to the decommissioning trust fund is a condition for operating the plant, and there is every expectation that even a bankrupt PGC would continue to make such annual payments. Thus, Exelon advised, TIEC' s implication that customers are more at risk or more likely to be harmed based upon the overall financial success of the project is incorrect because customers would only be called upon to fund decommissioning if the nuclear

plant is unable to generate revenue from the production of electricity, and this risk does not correlate with the PGCs financial condition.

NRG replied that TIEC's suggested annual review of PGC creditworthiness is also unnecessary because it would do nothing more than create additional expense for the PGC without providing the commission with useful information and that the information sought by TIEC is not germane to the trust funding or financial assurance methods at issue. As part of the annual reporting process, commission staff will include appropriate reporting requirements to ensure compliance.

Commission response

The commission will address what information must be included in the annual report when it adopts the form for the annual report. As discussed more fully below, the commission does not agree that the creditworthiness collateral mechanism and investment grade standard TIEC has proposed, and Cities' has supported, are appropriate standards to measure and enforce a PGC's creditworthiness for the purpose of PURA §39.206(k)(5) so it has not incorporated TIEC's suggested reporting language in the rule. The commission agrees with TIEC that a PGC should be obligated to report any changes in its financial condition but only to the extent that changes may impact its ability to meet the state assurance obligation; however, this information should be reported under subsection (k). The commission also agrees with TIEC that upon the occurrence of financial events affecting a PGC's ability to meet the state assurance obligation, the rule should provide an opportunity for the commission to conduct a review of the financial condition of a PGC and has added the appropriate language to subsection (k) of the rule.

The commission disagrees with Exelon that a PGC's financial condition does not have an impact on its ability to meet the state assurance obligation and would not affect customers. The commission believes it is important to monitor a PGC's ability to meet the state assurance obligation. Accordingly, the commission has revised the rule to enhance its ability to monitor the PGC's financial condition.

§25.304(i) Annual Decommissioning Funding Amount

TIEC suggested that other interested parties should be allowed to request the initiation of a proceeding to examine either the trust balances or the annual funding amounts because those serving as the ultimate guarantors (*i.e.*, customers) have a substantial interest in the fund balance and the amount of the contributions.

NRG, in its reply comments, stated that such a provision is unnecessary and will disrupt the administrative process the rule sets in place. NRG advised that all interested parties have the right, at any time, to suggest to the commission or commission staff that decommissioning funding issues should be reviewed, but such parties should not have the power to force a review when neither the commission nor commission staff believes that such review is warranted.

Commission response

While customers may serve as the ultimate guarantors of decommissioning funding, the commission disagrees with TIEC's suggestion that customers should be explicitly allowed to initiate a review of the trust balances. The commission believes that if any interested parties have issues with a PGC's trust balances or funding amounts they can petition the commission for a review of the status of the trust. At that point, the commission could decide to proceed with a formal proceeding relating to the status of the trust, investigate its status by informal means, or take no further action. Therefore, the commission believes that TIEC's suggested change is unnecessary and has not incorporated it.

§25.304(j) Creditworthiness of PGC

TIEC commented that combining the creditworthiness standards and the state assurance obligation is inappropriate under the statute and that separate creditworthiness standards must be established in the rule. TIEC opined that the creditworthiness standard outlined in PURA §39.206(k)(5) must be evaluated separate and apart from the 16-year state assurance obligation found in PURA §39.206(1). TIEC advised that key to this distinction is the use of the word "before" in §39.206(k)(5). Thus, "before" a PGC can be eligible to establish a nuclear decommissioning trust, it must meet minimum creditworthiness standards. TIEC stated that once a PGC is determined to be creditworthy, it must then provide financial assurances that it can satisfy 16 years of annual decommissioning funding pursuant to §39.206(1). TIEC offered that the appropriate minimum standard should be an investment grade rating from one of the major rating agencies (such as Fitch, Standard & Poor's, or Moody's). TIEC stated that this eligibility standard satisfies the statutory mandate that the commission adopt up-front credit standards that

restrict access to the rule's mechanisms to only those PGCs that have the financial ability to minimize the funding risk to customers. Moreover, TIEC advised, having an investment grade credit rating makes some of the options provided under §39.206(1) more reasonable.

In its reply comments, Cities voiced support for TIEC's position on the establishment of a minimum creditworthiness standard for PGCs based on an investment grade credit rating.

Exelon, in its reply comments, stated that TIEC's interpretation of PURA §39.206(k)(5) as requiring exhaustive creditworthiness standards and periodic reviews by the commission ignores the plain language of PURA §39.206(1) which states that the very existence of the 16-year state assurance obligation under the proposed rule is "for purposes of Subsection (k)." Exelon commented that this language reflects the legislative compromise that was reached, *i.e.*, that a form of financial assurance in an amount to cover "16 years of annual decommissioning funding" would satisfy any concerns regarding the creditworthiness of a PGC. Moreover, Exelon offered, the mandate in §39.206(1) that "risk factors and creditworthiness attributes" be considered in establishing the "acceptable forms of assurance" confirms the statutory intent that the provisions of §39.206(1) be the means of implementing the requirements of §39.206(k)(5). Similarly, Exelon advised in its reply comments that the investment-grade credit rating standards proposed by TIEC are contrary to the purpose of the legislation, which was to provide alternative means of providing for decommissioning funding assurance by PGCs that are not large, traditional vertically integrated utilities with investment grade credit ratings.

In its reply comments, NRG echoed Exelon's position. NRG advised that TIEC's interpretation of §39.206(k)(5) as requiring exhaustive creditworthiness standards and periodic reviews by the commission in addition to meeting the state assurance obligation is in direct conflict with the plain language of §39.206(1) which states that the existence of the 16-year financial assurance requirement (the state assurance obligation) under the proposed rules is "for purposes of subsection (k)," *i.e.*, demonstrating creditworthiness. NRG argued that this language reflects the legislative direction that the financial assurance in an amount to cover "16 years of annual decommissioning funding" is the test to be used to satisfy any concerns regarding the creditworthiness of a PGC. Furthermore, NRG commented, the mandate to rely upon the state assurance obligation is reflected in §39.206(1) directing that "risk factors and creditworthiness attributes" be considered in establishing the "acceptable forms of assurance" further confirming the statutory intent that the provisions of §39.206(1) be the only means of implementing the reference to creditworthiness in §39.206(k)(5).

NRG also replied that in TIEC's initial comments it proposed to limit application of the entire rule to only PGCs with an investment-grade credit rating. NRG said it believes that no nuclear-PGC operating in Texas will have an investment grade credit rating, because these PGCs will likely be project-specific operating companies. NRG offered that the legislation enabling this rule was developed to provide an alternative means of providing for decommissioning funding assurance by PGCs, which are not large, traditional vertically integrated utilities that could be expected to have investment grade credit ratings and most will likely not have such entities as corporate parents. NRG opined that under TIEC's proposal PGCs in the Electric Reliability Council of Texas (ERCOT) would be able to satisfy the NRC's decommissioning requirements

only by pre-funding all estimated decommissioning costs at the time of license issuance. This would be an enormous upfront burden of equity capital and effectively eliminate this program.

NRG replied that the fact that the PGC might not have investment-grade credit was fully recognized when the legislation was enacted through the addition of the separate and specific state assurance obligation. This fact also was recognized and addressed in the development of the proposed rule by increasing the requirements for satisfying the state assurance obligation, as compared to a similar test used by NRC, contained in 10 CFR Part 30 Appendix A. NRG advised that the NRC's licensing requirements go even further to ensure that a PGC operating a nuclear reactor will be sufficiently liquid to meet its short- and mid-term operating requirements and that an applicant can be deemed "financially qualified" to receive a license to operate a nuclear power plant without maintaining an investment grade credit rating or comply with Edison Electric Institute (EEI) Credit Index standards.

Commission response

The commission disagrees with TIEC's and Cities' proposal to require an investment grade credit rating for PGCs and therefore declines to change the proposed language. In passing House Bill (HB) 1386, the Legislature recognized the need to encourage the development of new nuclear projects in the ERCOT deregulated energy market to obtain the many benefits of new nuclear capacity, such as significantly increasing baseload capacity for the state, adding needed fuel diversity, and generating zero greenhouse gases. The Legislature appears to have been fully aware that prospective nuclear operating companies might not have investment-grade credit ratings and crafted the bill to account for that fact by adding

the "stand alone" state assurance obligation. The commission believes the proposed rule mirrors the statute to account for PGCs that do not have investment grade credit ratings by increasing the NRC requirements for satisfying the state assurance obligation. The financial health standard of the PGC was drafted based on a similar test contained in the NRC's decommissioning rules (10 CFR Part 30 Appendix A) but strengthened to account for PGCs that do not have investment grade ratings. Specifically, the proposed rule increases the level of tangible net worth from 6 times to 10 times, and increases the minimum tangible net worth from $10 million to $500 million. These changes are adequate to address the additional risk resulting from a PGC's lack of investment-grade ratings. The commission is concerned that utilizing TIEC's approach could lead to the failure of this program and effectively halt development of nuclear projects in Texas because interested entities that are not investment grade would not be allowed to participate.

§25.304(k) State Assurance Obligation

TIEC outlined the ways in which the assurance obligation can be satisfied under the proposed rule. TIEC advised that to the extent that the PGC has posted the full assurance amount in cash to establish its creditworthiness under subsection (j) and maintains the full amount as assurance under subsection (k), it would have a lower level of concern. However, TIEC also stated that, to the extent that the PGC relies on one of the other methods, issues may well arise with respect to the level of financial assurance actually provided. Therefore, to provide the appropriate level of assurance, TIEC suggested that the commission adopt standards similar to those used by ERCOT in its protocols, the EEI Electric Master Agreement, and the International Swaps and Derivatives Association (ISDA) Master Agreement and Credit Annex. TIEC advised that these methods

permit the establishment of a threshold dollar amount, which is the equivalent of an unsecured line of credit, based upon the creditworthiness of the entity providing the assurances. The threshold amount, if greater than zero, TIEC stated, is compared to the amount of the liability. In this instance, the liability is the state assurance obligation described in subsection (k) as "the discounted value of the annual decommissioning funding for the relevant period up to 16 years," TIEC stated. To the extent that the state assurance obligation exceeds the threshold amount, collateral must be posted (as contemplated under subsection (k)(1) of the proposed rule), TIEC advised.

TIEC commented that the threshold amount and the creditworthiness of the PGC or any guarantor would not be set in stone; rather, each would be subject to a periodic review of the adequacy of the level of assurance and the need for collateral. The approach that TIEC suggested is modeled after the ERCOT Protocols (creditworthiness standards), and would be applied in selecting which of the options are appropriate for a particular PGC. TIEC stated that to the extent an entity falls below investment grade, then there would be no unsecured line of credit, and the full amount of the obligation must then be supported by collateral. TIEC commented that, for this reason, it is inappropriate to allow a sub-investment-grade company to participate in these mechanisms as an initial matter. In addition, TIEC offered that because of liquidity issues related to market-valued financial instruments, the additional acceptable collateral be limited to short-term and long-term Treasury instruments. TIEC also stated that the same criteria governing the PGC should apply to any guarantor at all times, including when the guarantor first provides the guarantee, annually at the time of the filing of the annual report and in the event of any material change. TIEC also offered proposed language that, to the extent an

entity does not have an investment grade credit rating, it must establish that its creditworthiness is at least equivalent to the financial standards that support an investment grade credit rating, based upon its audited financial statements, to be entitled to consideration for a threshold amount in excess of zero.

In their reply comments, both Exelon and NRG disagreed with TIEC's proposal. Exelon stated that TIEC's entire method for importing EEI Credit Index standards for swaps and derivatives as an overlay to the state assurance obligation hinges on the false premise that a PGC developing a nuclear plant in Texas would be expected to have an investment grade credit rating. Exelon stated this is not accurate because the parent companies of PGCs developing nuclear plants in Texas may or may not have investment grade credit ratings and PGCs that are not investment grade would not be able to meet the requirements suggested by TIEC. As a result, Exelon stated, TIEC is effectively arguing for a requirement that the prepayment of the state assurance obligation is the only acceptable mechanism, which is in conflict with the statutory mandate of PURA §39.206(1) that the available mechanisms "shall include, but not be limited to, parent guarantees and support agreements, letters of credit, surety or insurance." Exelon advised that the phrase "support agreement" is a reference to the type of existing financial support arrangement that NRG Energy, Inc., currently provides to its subsidiary NRG South Texas LP which provides assurance to the NRC that this PGC will have adequate funds available to pay for the operation and maintenance of its 44% interests in South Texas Project Nuclear Generating Station. Exelon stated that, in connection with this support agreement, the NRC does not require that NRG Energy, Inc., maintain an investment grade credit rating or comply with EEI Credit Index standards, and such requirements are similarly inappropriate for the proposed rule.

NRG replied that the type of test suggested by TIEC was designed primarily to protect creditors operating in a volatile trading market in which their risks are substantial because of the dollar amounts involved and the rapidity with which credit exposure can change. In contrast, NRG advised, decommissioning obligations are clearly established, predictable, annual payments that are only periodically adjusted based on the funding requirements of the trust (and expected decommissioning costs), with concurrent adjustment to the assurance obligation under the proposed rule. NRG also stated the approach proposed by TIEC lacks the stability and certainty necessary for the type of long-term commitment required for decommissioning as well as the certainty needed today by nuclear developers in understanding with precision the costs of the decommissioning obligation for purposes of financial modeling to determine if a project is viable.

NRG also argued that in considering the reasonableness of the assurance methods, it is important to clearly recognize that any risk of default is mitigated by several factors: (1) failure to meet funding obligations is a violation of PURA and NRC requirements, subject to enforcement and operating license suspension; (2) even in bankruptcy (the ultimate creditworthiness concern), decommissioning payments must be made for the plant to generate revenue (and protect creditors); (3) any risk to customers will not be incurred until the plant is fully licensed, constructed, and loaded with nuclear fuel, such that all other risks (regulatory, costs, financing, power sales) have been resolved and a valuable capital asset is in operation; (4) only six nuclear units can use this program; (5) the NRC has its own thorough financial review of nuclear owners to ensure financial viability as a condition to build and operate nuclear units (a much broader and fundamental concern than decommissioning funding); (6) the commission has strong oversight

of the trust funds; (7) decommissioning funds cannot be used for any other purposes; (8) any defaulted payments must be replenished before a plant may resume operations (with either the same or a new operator); and (9) a solid history, over 40 years, of safe and reliable operations at nuclear plants including no defaults on decommissioning obligations.

In its reply comments, Cities voiced its support for TIEC's position on the requirement of the appropriate collateral or assurances by the PGC to protect retail customer interests from the impact of potential decommissioning shortfall events.

TIEC also suggested that subsection (k)(4), the provision allowing a PGC to satisfy the state assurance obligation "using any other acceptable method," should be deleted because of its concern with having to review and evaluate potentially complicated financial proposals in these cases. TIEC commented that it would be better for all parties to have the acceptable methods specifically delineated in the rule.

Exelon, in its reply comments, advised that the commission should reject TIEC's request that the rule eliminate flexibility for approving alternative methods of providing for the state assurance obligation. Exelon commented that the NRC includes similar flexibility in its decommissioning funding assurance rules, 10 CFR 50.75(e)(vi) and that TIEC's claim of burden attributable to "a myriad of cases" involving complex proposals is not accurate in light of the fact that PURA §39.206 applies only to the first six nuclear plants under construction before January 1, 2015.

Similarly, NRG replied that subsection (k)(4) is required by the statute, which sets out a non-exclusive list of assurance methods and that the NRC includes comparable flexibility in its decommissioning funding assurance rules.

Finally, TIEC advised that the provision in subsection (k) that allows the state assurance funds to be used for other similar purposes needs to be clarified to ensure that the state assurance necessary under the rule is superior to any other obligation. TIEC advised that this is necessary because, in the case of a distressed company, there might not be any mechanism to replenish the funds if they were called upon by another obligation.

Luminant commented that subsection (k)(2)(A)(i)-(iv) provides four requirements for the parent company of a PGC to meet to satisfy the state assurance obligation as a guarantor. Luminant stated that if a PGC can demonstrate that it, on its own, meets the four criteria, it should be considered to satisfy the intent of the proposed rule. Luminant suggested that the commission revise the proposed rule to allow for a PGC to directly demonstrate satisfaction of the state assurance obligation by complying with the criteria in subsection (k)(2)(A)(i)-(iv) on its own, in addition to allowing for the option of showing that a corporate parent or other entity offering a guarantee or financial support agreement meets those four criteria.

In its reply comments, TIEC stated that it does not disagree that the PGC could meet the state assurance obligation itself without a financial guarantee by the corporate parent. However, TIEC maintained, if the PGC seeks to directly meet this criteria, it must still meet a minimum threshold level of creditworthiness, as outlined in TIEC's initial comments above. In keeping with its

original position, TIEC reiterated that, in addition to meeting this minimum threshold, which TIEC recommends be an investment grade credit rating, the PGC (or its parent or guarantor) must meet the state assurance obligation, which requires measuring the assurance obligation versus the size and credit rating of the entity attempting to make the assurance. Any shortfall in the credit of the entity must then be secured by the posting of collateral and this process should apply regardless of whether it is the PGC or some other entity seeking to meet the state assurance obligation, TIEC advised.

Commission response

The commission disagrees with TIEC and Cities. The Legislature established the concept of a buffer for customer risk in the event of funding default through the state assurance obligation. As proposed in the rule, the state assurance obligation is economically valuable and provides a sufficient buffer against default. Moreover, the financial assurance mechanisms are designed to be stable, clear, and attainable for the entities for which they are designed. The commission believes the state assurance obligation should not be burdened with financial tests that are unstable and unnecessarily restrictive and that would effectively defeat the program and minimize its usefulness. The rule provides alternate mechanisms with criteria for each without raising financial barriers to entry that would limit participation to a minority of PGCs. Similarly, the commission does not agree with TIEC that requiring PGCs to maintain the same financial metrics as those of investment grade entities is the proper solution either. The commission believes that the concept of the state assurance mechanism implies that there should be less restrictive credit standards for nuclear decommissioning obligations than an investment grade credit rating.

Therefore, the commission declines to make any changes in the financial requirements of the state assurance obligations.

The commission agrees with TIEC that it is critically important that the state assurance obligation requirement be met for a PGC to be in compliance with PURA §39.206(l) and subsection (k) of the rule. However, the commission believes the rule provides adequate restrictions and gives it the opportunity to initially approve and monitor the replenishment of any amounts withdrawn for any other purpose. Therefore, the commission declines to incorporate TIEC's suggested language.

The commission disagrees with TIEC that subsection (k)(4) should be deleted because of a concern with having to review and evaluate potentially complicated financial proposals in these cases. One objective the commission has long embraced is that competition in the electric industry will lead to innovation. Such innovation should not be automatically rejected merely because it may require additional thought and examination by regulators to assure that it is in compliance with the law. Innovation that facilitates the growth of competition without causing harm and that is subject to initial and ongoing commission oversight should be encouraged. Subsection (k)(4) is consistent with these objectives. Therefore, the commission will not delete subsection (k)(4) as TIEC suggested.

The commission agrees with Luminant's recommendation to allow a PGC to directly demonstrate satisfaction of the state assurance obligation by complying with the criteria in

subsection (k)(2)(A)(i)-(iv) on its own and has added the appropriate language to the subsection as requested.

§25.304(l) Annual Funding Obligation

TIEC stated that the proposed rule, while allowing the commission to direct the trustee to seek remittance of the funding from the entity providing a guarantee or surety, does not require the trustee to seek payment from the collateral or guarantor should the PGC fail to make the payment within 60 days after notice of default. Thus, TIEC requested that the rule be revised to require the trustee to withdraw payment from collateral held, or to exercise a claim against any guarantee or surety of the PGC. Furthermore, TIEC noted, to the extent that an entity has an established threshold in excess of zero under its proposed creditworthiness mechanism as a result of the most recent credit review, in the event of default, the rule must provide that the threshold amount be immediately reduced to zero, and the PGC must post within a reasonable time (not more than 15 days) sufficient collateral to cover future funding obligations up to the full net present value of 16 years' worth of payments.

Commission response

The commission disagrees with TIEC that the trustee should be given the authority in the rule to seek payment from the collateral or guarantor should the PGC fail to make the payment within 60 days after notice of default. Once the commission has been notified of the failure to make payment, it can decide whether to commence a formal proceeding, or undertake any other actions it deems appropriate. Allowing the trustee to seek payment when seeking payment might not be consistent with the commission's objectives would

limit the commission's ability to consider all available alternatives. As discussed above, the commission does not agree with TIEC's creditworthiness rating mechanism; therefore, it has not incorporated TIEC's suggested language.

§25.304(m) Funding Shortfall and Unspent Funds

Cities commented that PURA §39.206(p) provides that, if retail customers are required to pay a portion of the costs of decommissioning a nuclear generating unit that remains operational, the PGC or any new owner of the generating unit "shall repay the costs the electric customers incurred" over a period established by the commission. Cities advised the rule as proposed does not implement the PURA §39.206(p) requirement, and that proper implementation would allow for repayment of funds contributed by retail customers to be conducted on an ongoing basis so that no un-refunded, unspent funds would remain after the unit is decommissioned, thereby eliminating the need to deal with this issue in subsection (m)(2). Cities also suggested deleting the language of the rule pertaining to funds that remain unspent after decommissioning. Finally, Cities provided additional language on the allocation of any shortfall to retail customers of any municipally-owned utility or electric cooperative.

In its reply comments, TIEC agreed with Cities' comments that the proposed rule lacks adequate procedures to address the repayment of any shortfall amounts paid by customers and that PURA § 39.206(p) specifically provides for the repayment of costs incurred by customers. Therefore, TIEC commented that the commission should insert language to ensure that shortfalls be repaid as required by the statute.

NRG, in its reply comments, advised that the language of the proposed subsection mirrors the language of the statute and that the additions and deletions proposed by Cities would change the language of the statute. NRG also stated that, to the extent Cities want the language from §39.206(p) to be included in the rule, NRG suggests that the statutory language be added to §25.304(m) as a new subsection.

Commission response

The commission agrees with Cities and TIEC that the repayment of retail customers' funds contributed by retail customers while the nuclear generating unit is operational should not be contingent upon the conclusion of decommissioning. Therefore, the commission has incorporated Cities' proposed language into the rule. The commission does not agree with Cities that its proposed language for funds that remain unspent after decommissioning should be deleted. The language of proposed subsection (m)(2) is consistent with PURA §39.206(r)(2). Similarly, the commission does not agree with Cities that additional language on the allocation of any shortfall to retail customers of any municipally-owned utility or electric cooperative is consistent with PURA §39.206(o) and has not included Cities' suggestion.

All comments, including any not specifically referenced herein, were fully considered by the commission. In adopting §25.304, the commission makes other minor modifications for the purpose of clarifying its intent.

This new section is adopted under the Public Utility Regulatory Act, Texas Utilities Code Annotated §14.002 and §39.206 (Vernon 2007 & Supp. 2007) (PURA). PURA §14.002 provides the commission with the authority to make and enforce rules reasonably required in the exercise of its power and jurisdiction. PURA §39.206 requires the commission to adopt rules governing the nuclear generating unit decommissioning cost plan.

Cross Reference to Statues: PURA §14.002 and §39.206.

§25.304. Nuclear Decommissioning Funding and Requirements for Power Generation Companies.

(a) **Purpose.** The purpose of this section is to establish the terms for power generation companies (PGCs) that are licensed by the Nuclear Regulatory Commission for using a PGC decommissioning trust to satisfy the financial assurance requirements for decommissioning a nuclear generating unit and to delineate the rights and obligations of PGCs electing to use a commission-approved method for providing funds from Texas customers for decommissioning a nuclear generating unit, as a means of complying with nuclear decommissioning financial assurance requirements.

(1) A PGC is not required to use the methods set out in this section and may discontinue the use of the methods set out in this section, if it chooses to satisfy the financial assurance requirements of the federal Nuclear Regulatory Commission by using other methods acceptable to the Nuclear Regulatory Commission.

(2) A PGC decommissioning trust established in accordance with this section is separate from a Nuclear Decommissioning Trust created under §25.303 of this title (relating to Nuclear Decommissioning Following the Transfer of Texas Jurisdictional Nuclear Generating Plant Assets).

(b) **Applicability.** A PGC owning all or a portion of a qualifying nuclear generating unit may use a PGC decommissioning trust as an external sinking fund in compliance with this section, provided that the use of the methods of financial assurance set out in this section shall be available only to the first six nuclear generating units under construction

after January 1, 2007 and before January 15, 2015, that elect to use a PGC decommissioning trust.

(c) **Definitions.**

(1) Decommissioning—includes the safe decommissioning and decontamination of a nuclear generating unit, equipment, and materials consistent with federal Nuclear Regulatory Commission requirements.

(2) PGC decommissioning trust—Funds that are contained in one or more external and irrevocable trusts created for the purpose of protecting and holding revenue collected from a PGC to cover the costs of decommissioning a Texas jurisdictional nuclear generating plant at the end of its useful life. A PGC decommissioning trust is a type of external sinking fund that is established and maintained by setting aside funds periodically in an account segregated from the PGC's assets and outside the PGC's administrative control in which the total amount of funds would be sufficient to pay decommissioning costs at the time termination of operations is expected.

(3) Retail electric customer—A retail electric customer in a geographic area of Texas in which retail customer choice has been implemented, or a retail electric customer of a municipally-owned utility or electric cooperative that has an agreement to purchase power from a nuclear generating unit.

(4) Under construction—A nuclear generating unit for which the PGC has initiated the pouring of safety-related concrete for the reactor building.

(d) **Application.** If a PGC elects to use a PGC decommissioning trust, the PGC shall submit an application to the commission for an order establishing the amount of annual

decommissioning funding and approving trust agreements. A PGC may combine applications for more than one qualifying nuclear generating unit. An application must contain the following information:

(1) Identification of each nuclear generating unit included in the application;

(2) Quantification of the PGC's percentage of ownership of each unit;

(3) Decommissioning cost study using the most currently available information on the cost of decommissioning each unit as set out in subsection (h)(2) of this section;

(4) Funding analysis identifying the expected amount of annual decommissioning funding determined as set out in subsection (i) of this section;

(5) Description of the method to be used to satisfy the state assurance obligation set forth in subsection (k) of this section, including any guarantee agreements, support agreements, credit agreements, or letters of credit or surety bonds;

(6) Agreements with an institutional trustee and investment manager to manage the PGC decommissioning trust that are consistent with this section and the terms and conditions required by the federal Nuclear Regulatory Commission; and

(7) Projected date for beginning funding of the PGC decommissioning trust, which must be prior to the commencement of initial fuel load and commercial operation of the nuclear generating unit.

(e) **Commission Review.**

(1) The commission staff will endeavor to recommend approval, amendment, or disapproval of an application setting annual decommissioning funding and financial agreements to implement the trust requirements within 120 days of receipt of a sufficient application, unless a hearing on the application is required.

(2) A request for hearing shall be filed by the date specified by the presiding officer which shall be no more than 60 days after the filing of the application. If a hearing is scheduled, the commission will endeavor to issue a final order within 180 days after the filing of a request for hearing.

(3) If no hearing is requested, the commission staff concludes that the application setting annual decommissioning funding and the trust agreements meet all requirements of this section, and the commission staff recommends approval, the application may be approved administratively or informally pursuant to §22.35 of this title (relating to Informal Disposition).

(4) If the commission staff recommends an amendment to the funding or trust agreements, within 14 days after filing of staff's recommendation, the PGC shall either file an amended application incorporating the staff's proposed amendments or request a hearing.

(5) If no hearing is requested and the PGC files an amended application that meets all requirements of this section and incorporates the staff recommendations, the application may be approved administratively or informally pursuant to §22.35 of this title.

(6) If the commission staff recommends denial and the PGC requests a hearing, or if the PGC does not file an amended application incorporating staff's recommendations within 14 days, the request shall be docketed as a contested case proceeding to approve, modify, or reject the application.

(f) **Order.** An order approving the application shall establish the amount of annual funding necessary to meet the decommissioning obligations for the nuclear generating unit over the unit's operating license period as established by the federal Nuclear Regulatory Commission or over a shorter period of time at the election of the PGC.

(g) **Annual Reports.** On or before May 1 of each year, each PGC for which the commission has approved a funding amount and trust agreements under this section shall file an annual report for the prior year using a form approved by the commission. The report shall provide the status of the PGC's decommissioning trusts and any changes in the administration of the trusts, an update of its ability to fund the PGC decommissioning trust; and other information specified by the commission in the form.

(h) **Periodic Commission Review.** At least once every three years the PGC shall file a decommissioning cost study and funding analysis or updates of previous studies using the most current information reasonably available to the PGC.

(1) The commission shall review the studies submitted by a PGC and other currently available information using the procedure provided in subsection (e) of this section.

(2) During the initial and each periodic review of decommissioning costs, the following information shall be provided:

(A) The decommissioning cost study and funding analysis accompanied by a report and testimony supporting the analysis and the requested annual funding amount. The funding analysis shall be based on the most current information reasonably available concerning the cost of decommissioning, an allowance for contingencies of not more than 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. In no event will the cost estimate for basic radiological decommissioning be less than the minimum amount required by the federal Nuclear Regulatory Commission. 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.

(B) A demonstration that the decommissioning funds are being or will be invested prudently and in compliance with the investment guidelines in subsection (o) of this section.

(C) A demonstration of efforts to achieve optimum tax efficiency as defined in subsection (o)(2)(C) 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 the PGC’s taxable PGC decommissioning trusts.

(D) Confirmation that the federal Nuclear Regulatory Commission either has made, or will make, a finding that there is reasonable assurance of the financial qualifications of the PGC, as required by federal regulations.

(E) Compliance with the state funding assurance obligation set forth in subsection (k) of this section.

(3) The commission shall ensure that the amount of annual decommissioning funding is consistent with the most recent decommissioning cost study and funding analysis, and that the PGC decommissioning trust is adequately funded. The PGC shall update its state assurance obligation to reflect changes in the annual decommissioning funding amount.

(i) **Annual Decommissioning Funding Amount.** The amount of annual decommissioning funding for a PGC decommissioning trust shall be an amount that, based on such factors as the balance of funds in the decommissioning trust, anticipated escalation rates, and anticipated after-tax return on funds in the decommissioning trust, will cover the cost of decommissioning a nuclear generating unit at the end of its operating license period. The amount shall be calculated based on the most current reasonably available information, consistent with the most recent decommissioning cost study, and divided by the remaining years of the license or a shorter period of time at the election of the PGC. The decommissioning cost study and funding analysis shall include the information required by subsection (h)(2)(A) of this section. The commission, on its own motion or on the motion of the commission staff, may initiate a proceeding to review the PGC's trust balances or the annual funding amount. The PGC shall provide any information required to conduct the review in accordance with the commission's procedural rules.

(j) **Creditworthiness of PGC.** For the purposes of the initial application under this section, creditworthiness of the PGC will be established primarily through satisfying the State Assurance Obligation as provided for in subsection (k) of this section.

(k) **State Assurance Obligation.** A PGC using a commission approved PGC decommissioning trust shall provide additional financial assurances that funds will be available to satisfy 16 years of annual decommissioning funding, based on the most recent annual decommissioning funding amount approved by the commission (the state assurance obligation amount). If the remaining funding contribution period is less than 16 years, the state assurance obligation will be based on the remaining number of years of annual decommissioning funding. The state assurance obligation amount will be the discounted value of annual decommissioning funding for the relevant period up to 16 years. Any arrangement for satisfying the state assurance obligation shall permit the trustee of a decommissioning trust to demand payment by any company holding funds or providing an assurance and require the company holding funds or providing an assurance to remit funds to the trust, in accordance with this section. The PGC shall include in its annual report a demonstration of compliance with the requirements of this subsection. The state assurance may be used to provide assurance required by state or federal law for other similar purposes relating to the operation of the facility, such as assurance for the funding to cover estimated operation costs, provided that adequate terms are included to replenish the amounts available under the assurance mechanism if funds are withdrawn for any such other purpose. The state assurance obligation may be accomplished by using one or more of the following methods at the election of the PGC, in the form approved by the commission:

(1) A PGC may satisfy the state assurance obligation by depositing the required amount of funds into an escrow account, a government fund, a nuclear decommissioning trust subject to the commission's investment standards set out in this title, or other type of acceptable agreement with an entity whose operations are regulated and examined by a federal or State agency.

(2) A PGC may satisfy the state assurance obligation by obtaining a written guarantee or financial support agreement from a direct or higher-tier parent corporation or a corporation with a substantial business relationship with the PGC or by meeting the following standards itself. The guarantee or financial support agreement must be payable to the PGC decommissioning trust. The parent or supporting corporation, or PGC must meet one of the following standards:

(A) The parent or supporting corporation, or PGC must have:

(i) Tangible net worth of at least 10 times the state assurance amount, excluding the net book value of the nuclear units subject to the state assurance obligation;

(ii) Tangible net worth of at least $500 million;

(iii) Net working capital of at least 10 times the annual decommissioning funding amount; and

(iv) Assets located in the United States amounting to at least 90% of the total assets or at least 10 times the state assurance amount.

(B) The parent or supporting corporation, or PGC must be otherwise financially qualified, based upon a finding by the commission that there is reasonable assurance that the parent or supporting corporation will be able to meet its obligations under the guarantee or other agreement.

(3) A PGC may satisfy the state assurance obligation by providing an adequate surety, insurance, or other guarantee method that meets the following minimum requirements:

(A) A guarantee that the state assurance obligation will be paid to the PGC decommissioning trust upon any default by the PGC in satisfying its annual funding obligation.

(B) A surety method may be in the form of a surety bond, letter of credit, or line of credit. Any surety method or insurance used to satisfy the state assurance obligation must contain the following conditions:

(i) The surety method or insurance must be open-ended, or, if written for a specified term, such as five years, must be renewed automatically, unless 90 days or more prior to the renewal day the issuer notifies the commission and the PGC of its intention not to renew. The surety or insurance must also provide that the full face amount will be paid to the PGC decommissioning trust automatically prior to the expiration without proof of forfeiture if the PGC fails to provide a replacement acceptable to the

commission within 30 days after receipt of notification of cancellation.

(ii) The issuer must have a minimum rating of A- by Standard and Poor's Corporation, A3 by Moody's Investor's Service or the equivalent rating from A.M. Best.

(iii) The surety or insurance must be payable to the PGC decommissioning trust.

(4) A PGC may satisfy the state assurance obligation using any other method acceptable to the commission considering the relative risk factors and creditworthiness attributes of the applicant's financial characteristics to minimize exposure of retail electric customers to default by power generation companies.

(5) A PGC shall notify the commission within 10 days of the date of any material change in its ability to meet its state assurance obligation and provide a plan to cure any deficiency if the material change results in a PGC's inability to meet the state assurance obligation. Upon receipt of such notice, the commission may initiate a formal proceeding to review the PGC's ability to meet the state assurance obligation, or take any other action it deems appropriate. The PGC shall provide any information required to conduct the review in accordance with the commission's procedural rules.

(l) **Annual Funding Obligation**. A PGC using a PGC decommissioning trust shall remit annually to the fund the most recent annual decommissioning funding amount required

by the commission. A PGC shall make periodic payments according to a schedule submitted to the commission and shall notify the trustee of the decommissioning trust and the commission within 10 days of the date of any failure to make a scheduled payment. The commission shall not consider a PGC to be in default of its annual funding obligation unless it fails to remit the necessary amounts within 60 days of notice of potential default. If a PGC is in default of its annual funding obligation, it shall notify the trustee of the decommissioning trust and the commission within 10 days of the date of the default. If the PGC fails to cure its failure to make scheduled payment within 60 days of the commission notice, the commission may direct the trustee to request that any entity providing state assurance remit annually to the fund the most recent annual decommissioning funding amount required by the commission in accordance with the schedule approved by the commission, including any payments that the PGC has failed to make, until the PGC is not in default or until the assurance is depleted.

(m) **Funding Shortfall and Unspent Funds.**

(1) If the PGC fails to meet its annual funding requirements and if the state assurance obligations are insufficient to meet the annual funding obligations or are otherwise not honored, the commission shall determine the manner in which any shortfall in the cost of decommissioning a nuclear generating unit shall be recovered from retail electric customers in the state. For retail electric customers of a municipally-owned utility or an electric cooperative that has an agreement to purchase power from a nuclear generating unit, the amount of the shortfall in the cost of decommissioning the nuclear generating unit that the customers are responsible for is limited to a portion of that shortfall that bears the same

proportion to the total shortfall as the amount of electric power generated by the nuclear generating unit and purchased by the municipally-owned utility or electric cooperative bears to the total amount of power generated by the nuclear generating unit.

(2) Decommissioning funds that remain unspent after decommissioning of the nuclear generating unit is complete shall be returned to the PGC and the retail electric customers based on the proportionate amount, in real terms, that the PGC and retail electric customers paid into the fund.

(3) While the nuclear generating unit is operational, as a condition of operating the generating unit, the PGC or any new owner shall repay the costs the electric customers incurred in a manner determined by the commission. The PGC shall be responsible for accounting for the need for repayment of any decommissioning shortfall amounts paid by customers and shall report such amounts pursuant to subsection (g) of this section. The PGC shall submit a proposal to repay shortfall amounts paid by customers pursuant to subsection (h) of this section. The commission shall review this information using the procedure described in subsection (e) of this section.

(n) **Administration of the PGC Decommissioning Trust Funds.**

(1) The PGC shall assure that the PGC decommissioning trust is managed so that the funds are secure and earn a reasonable return; and that the funds provided from the PGC's operating revenues, plus the amounts earned from investment of the funds, will be available at the time of decommissioning.

(2) The PGC shall appoint an institutional trustee and may appoint one or more investment managers. Unless otherwise specified in this section, the Texas Trust Code controls the administration and management of the PGC decommissioning trusts, except that the appointed trustees need not be qualified to exercise trust powers in Texas.

(3) The PGC shall retain the right to replace the trustee with or without cause. In appointing a trustee, the PGC 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 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 that may bear on whether the trustee is suitable.

(4) The PGC shall retain the right to replace the investment manager with or without cause. In appointing an investment manager, the PGC 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 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.

(5) The PGC shall execute an agreement with the institutional trustee. The agreement shall be consistent with this section and may include additional restrictions on the trustee. A PGC 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. The agreement shall include the restrictions set forth in this section and may include additional restrictions on the trustee.

(A) The interest or other earnings of the trust become part of the trust corpus.

(B) A trustee owes the same duties with regard to the interest and other earnings of the trust as are owed with regard to the corpus of the trust.

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

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

(E) A trustee shall not invest or reinvest PGC decommissioning trusts in instruments issued by the trustee, except for time deposits, demand deposits, or money market accounts of the trustee. However, investments of a PGC decommissioning trust may include mutual funds that contain securities issued by the trustee if the securities of the trustee constitute no more than 5% of the fair market value of the assets of such mutual funds at the time of the investment.

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

(6) The PGC 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. A PGC 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. The agreement shall include the restrictions set forth in this section and may include additional restrictions on the manager.

(A) An investment manager shall, in investing and reinvesting the funds in the trust, comply with this section.

(B) The interest and other earnings of the trust become part of the trust corpus.

(C) An investment manager owes the same duties with regard to the interest and other earnings of the trust as are owed with regard to the corpus of the trust.

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

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

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

(7) Prior to executing an 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 Division and Rate Regulation Division or successor divisions.

(8) 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 shall be provided to appropriate commission staff and the Office of Public Utility Counsel.

(o) **Trust investments.**

(1) The funds in a PGC decommissioning trust should be invested consistent with the following goals. The PGC 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.

(B) In keeping with prudent investment practices, the portfolio of securities held in the PGC 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 this section, the investment emphasis when the remaining life of the liability 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) The following requirements shall apply to all PGC decommissioning trusts under this section. Where a PGC 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) The total trustee and investment manager fees paid on an annual basis by the PGC for the entire portfolio including commingled funds shall not exceed 0.7% of the entire portfolio's average annual balance.

(B) For the purpose of this subsection, 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 PGC decommissioning trusts 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) The PGC may invest the decommissioning funds by means of qualified or unqualified PGC decommissioning trusts; however, the PGC shall, to the extent permitted by the Internal Revenue Service, invest its decommissioning funds in "qualified" PGC decommissioning trusts, in accordance with the Internal Revenue Service Code §468A. The PGC shall avoid, whenever possible, the investment of taxable decommissioning funds in "unqualified" PGC decommissioning trusts.

(D) 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.

(F) 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) of this subparagraph, 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 2.5 years, the equity cap shall be 30%;

(iii) When the weighted average remaining life of the liability is less than 2.5 years, the equity cap shall be 0%. Additionally, during all years in which expenditures for decommissioning the nuclear units occur, the equity cap shall also be 0%;

(iv) For purposes of this subsection, 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 PGC 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.

(vi) A PGC decommissioning trust shall not invest in securities issued by the PGC collecting the funds or any of its affiliates or any company providing security for the state assurance obligation; however, investments of a PGC decommissioning trust may include commingled funds that contain securities issued by the PGC if the securities of the PGC 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) The following restrictions shall apply to all PGC decommissioning trusts. Where a PGC 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) A PGC 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 any 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, that is 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) 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 PGC shall as soon as practicable and prudent to do so, increase the quality level of the equity portfolio to the required level. A PGC decommissioning trust shall not invest in equity securities where the issuer has a capitalization of less than $100 million.

(C) The following guidelines shall apply to the investments made through commingled funds. Examples of commingled funds appropriate for investment by PGC decommissioning trusts include equity-indexed funds, actively managed equity funds, balanced funds, bond funds, and real estate investment trusts.

(i) The commingled funds should be selected consistent with the goals of this section.

(ii) In evaluating the appropriateness of a particular commingled fund, the PGC 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 PGC 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 PGC decommissioning trust investment portfolio.

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

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

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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 §25.304, relating to Nuclear Decommissioning Funding and Requirements for Power Generation Companies, is hereby adopted with changes to the text as proposed.

SIGNED AT AUSTIN, TEXAS the 28th day of FEBRUARY 2008.

PUBLIC UTILITY COMMISSION OF TEXAS

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BARRY T. SMITHERMAN, CHAIRMAN

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JULIE PARSLEY, COMMISSIONER

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PAUL HUDSON, COMMISSIONER

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