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December 19, 2003

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Michigan Hall of Justice
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Re: Consumers Energy Company v Michigan Public Service Commission
Supreme Court No. _____; and
Consumers Energy Company and The Detroit Edison Company
v Michigan Public Service Commission
Court of Appeals Nos. 241990 and 241991; and
Michigan Public Service Commission Case No. U-12639

Dear Mr. Davis:

Enclosed for filing in the above-referenced matter are an original and seven copies of Consumers Energy Company's "Application for Leave to Appeal" and a "Notice of Hearing." I have also enclosed a Proof of Service, a check in the amount of $375.00, for the filing fee, and one extra copy of this filing to be date stamped. I would appreciate if you would date stamp the extra copy and return the same to our courier.

Sincerely,

Jon R. Robinson

cc: Ms. Mary Jo Kunkle, MPSC
Parties per Attachment 1
to Proof of Service

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S T A T E O F M I C H I G A N

IN THE SUPREME COURT

CONSUMERS ENERGY COMPANY,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee.
_____/

Supreme Court No. _____

Court of Appeals Nos. 241990 and 241991

MPSC Case No. U-12639

APPLICATION FOR LEAVE TO APPEAL

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Dated: December 19, 2003

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STATEMENT OF JUDGEMENT OR ORDER APPEALED FROM AND RELIEF SOUGHT

Consumers Energy Company ("Consumers Energy") appeals from the decision of the Court of Appeals issued on November 18, 2003 in Court of Appeals Docket Nos. 241990 and 241991. The decision is attached to this Application as Appendix A.

Consumers Energy seeks review by this Court and reversal of those portions of the decision where the Court of Appeals (i) ruled that the appropriate standard of review to be applied to the review of decisions of the Michigan Public Service Commission ("MPSC" or "the Commission") requires that the Court give "due deference" to the Commission's interpretation of a statute, (ii) ruled that the MPSC did not violate the provisions of 2000 PA 142 when it adopted a rate structure that allowed retail open access customers to "bypass" securitization charges, and (iii) ruled that the MPSC did not violate 2000 PA 141 and prior established law when it refused to issue an unconditional order authorizing the full recovery of implementation costs, and instead stated that the prudence of these costs would be determined based upon the "success" of the ROA program.

STATEMENT OF QUESTIONS PRESENTED

A. DID THE COURT OF APPEALS APPLY THE APPROPRIATE STANDARD OF REVIEW TO ITS REVIEW OF THE ORDER OF THE MICHIGAN PUBLIC SERVICE COMMISSION?

THE COURT OF APPEALS SAYS "YES."

CONSUMERS ENERGY SAYS "NO."

B. DID THE MICHIGAN PUBLIC SERVICE COMMISSION VIOLATE 2000 PA 142 WHEN IT REQUIRED CONSUMERS ENERGY TO PROVIDE RETAIL OPEN ACCESS CUSTOMERS WITH AN "OFFSET" TO SECURITIZATION CHARGES, THEREBY ALLOWING THOSE CUSTOMERS TO BYPASS SECURITIZATION CHARGES?

THE COURT OF APPEALS SAYS "NO."

CONSUMERS ENERGY SAYS "YES."

C. DID THE MICHIGAN PUBLIC SERVICE COMMISSION VIOLATE 2000 PA 141 WHEN IT REFUSED TO ISSUE AN ORDER THAT PROVIDED FOR THE FULL RECOVERY OF IMPLEMENTATION COSTS?

THE COURT OF APPEALS SAYS "NO."

CONSUMERS ENERGY SAYS "YES."

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

This appeal concerns the interpretation of certain provisions of the "Customer Choice and Electricity Reliability Act," 2000 PA 141 and 2000 PA 142, MCL 460.10 et seq, and the lawfulness of orders issued by the Michigan Public Service Commission ("MPSC" or "Commission") on December 20, 2001 and May 16, 2002 in MPSC Case No. U-12639. These orders are attached to this Application as Appendices B and C, respectively. Some background is necessary to an understanding of the issues of law involved in this appeal.

On June 29, 1999, the Michigan Supreme Court issued its decision in Consumers Power Company v Public Service Commission, 460 Mich 148; 596 NW2d 126 (1999). In that decision, the Court held that the MPSC did not possess the necessary statutory authority to mandate that electric utilities implement a "retail open access" program. A retail open access ("ROA") program allows retail customers of an electric utility to purchase electricity generation service from alternative electric suppliers, with the utility still responsible for delivering that electricity to the customer.[1] Subsequent to the Supreme Court's decision, the legislature passed the Customer Choice and Electricity Reliability Act, 2000 PA 141 and 2000 PA 142, which consist of amendments to the Public Service Commission Act. 1939 PA 3. See MCL 460.10 et seq.

2000 PA 141 and 2000 PA 142 went into effect June 5, 2000. These acts require the MPSC to issue orders that "allow all retail customers of an electric utility or provider to choose an alternative electric supplier;" i.e., to adopt ROA programs for each

[1] This Application will refer to "full service" customers and "ROA" customers. Full service customers are those customers who continue to purchase generation service from the incumbent utility, as well as distribution (or delivery) services. ROA customers only purchase delivery service from the utility, and purchase generation service from an Alternative Electric Supplier. See MCL 460.10g(a).

electric utility. MCL 460.10a(1). While the acts also contain a variety of other requirements and provisions, this appeal relates to two specific requirements. The first concerns the provisions that require securitization charges to be "nonbypassable," i.e., payable by all customers regardless of the customer's generation supplier. MCL 460.10h(f) and 460.10k(2). The second concerns the provision that requires the Commission to issue an order by January 1, 2002 that "shall provide for full recovery" of the costs incurred in implementing the ROA program ("implementation costs"). MCL 460.10a(1).

Non-bypassability of Securitization Charges

2000 PA 142 allows electric utilities to use a financing technique called "securitization" to finance certain "qualified" costs. Securitization is a financing approach that allows for the issuance of bonds that, due to various assurances provided in the statute, can be issued with higher bond ratings and lower interest rates than would otherwise be possible, thereby generating cost savings that will reduce rates to customers. The securitization process results in the establishment of securitization charges to pay off the bonds. Critical to the higher bond ratings and lower interest rates is the requirement that securitization charges be "nonbypassable", that is, payable by all customers regardless of the identity of the customers' electricity supplier. MCL 460.10h(f) and 460.10k(2).

In an order issued October 24, 2000 in MPSC Case No. U-12505, the Commission authorized Consumers Energy to issue approximately $469 million of securitization bonds. The assets that were refinanced, or "securitized", were made up of generation-related assets for which the Commission had previously authorized rate recovery, and the costs of which were already included in full service rates. The largest component of these generation-related assets was the capital cost of the Palisades Nuclear Plant. A further

order in Case No. U-12505 was issued January 4, 2001 that addressed matters raised in a rehearing petition. These orders were affirmed by the Court of Appeals in Attorney General v Michigan Public Service Commission, 247 Mich App 35; 634 NW2d 710 (2001). The October 24, 2000 and January 4, 2001 orders in Case No. U-12505 are attached to this Application as Appendices D and E, respectively.

In the Case No. U-12505 orders, the Commission approved securitization charges that were to be applied to all customer bills to allow for the collection of sufficient amounts to make the necessary payments of principal and interest on the securitization bonds. In the October 24, 2000 U-12505 order, the Commission required that an "offset" (or credit) be applied to the bills of all customers in an amount that was equal to the securitization charge. The purpose of this offset was to ensure that the costs that customers pay through the securitization charge did not duplicate costs that are also being paid (i) by full service customers through their full service rates, and (ii) by ROA customers through the transition charge that was, at that time, in effect.[2] In its rehearing petition in U-12505, Consumers Energy sought clarification from the Commission that the offset for full service customers would only continue until rates for full service customers had been adjusted to remove the costs associated with the assets that had been securitized. It was recognized that such an adjustment would not be made until the rate freeze put in place by 2000 PA 141 ended. See MCL 460.10d(2). That clarification with respect to full service customers was granted by the Commission and the offset for full service customers is not in dispute in this appeal.

[2] The "transition charge" that was in effect in 2000 and 2001 for Consumers Energy was intended to allow recovery of stranded costs, and had been originally established in the voluntary ROA program that was in effect prior to the passage of 2000 PA 141 and PA 142. See March 8, 1999 MPSC order in Case No. U-11290, et al., 191 PUR4th 523 (1999).

In its rehearing petition in U-12505, Consumers Energy also, however, sought clarification regarding the term of the offset for ROA customers. The Commission's January 4, 2001 order accurately describes this clarification request, and the Commission's response:

> "As for its ROA customers, Consumers wants to confirm that the offset would be discontinued immediately following either the Commission's issuance of a decision in Case No. U-12639 establishing the methodology for computing the utility's transition charge or the completion of any proceeding establishing a revised transition charge for use beginning January 1, 2002, whichever occurs first.
>
> "The Commission finds that Consumers' request for clarification should be granted with regard to the term of the securitization and tax charge offset. In issuing the financing order,[3] the Commission assumed (as it still does) that the offset for ROA customers would become unnecessary beginning January 1, 2002. This assumption is based on the Commission's belief that, before that date, an order will be issued in Case No. U-12639 from which a transition charge can be derived that recognizes the effect of securitization on Consumers' total stranded costs. However, in the event that no such transition charge is in place for Consumers by January 1, 2002, the Commission will impose a temporary transition charge equal to the sum of the then-effective securitization and tax charges. The offset would continue to be applied to this charge to ensure equality between bundled sales [i.e., full service] and ROA customers until such time as a revised transition charge is adopted." January 4, 2001 Opinion and Order, Case No. U-12505, p. 7; Appendix E. Emphasis added.

Thus, in the U-12505 October 24, 2000 order authorizing the issuance of securitization bonds, the Commission directed that the securitization offset should be applicable to ROA customers because they were at that time paying a positive transition charge that had been determined including consideration of the assets that had been securitized. In the U-12505 January 4, 2001 rehearing order, the Commission agreed that the

[3] "Financing order" is the term used in 2000 PA 142 to describe the MPSC order authorizing the issuance of securitization bonds. In this context, the term refers to the October 24, 2000 order in U-12505.

securitization offset for ROA customers should be discontinued upon the issuance of an order in Case No. U-12639 (or any earlier case) establishing a revised transition charge to be effective January 1, 2002.

In the December 20, 2001 and May 16, 2002 orders in U-12639 (the orders on appeal in this case), the Commission refused to follow its own U-12505 decision, and instead required Consumers Energy to continue providing the securitization charge offset for ROA customers after January 1, 2002. The Commission took this action notwithstanding its decision to approve a zero transition charge payable by ROA customers commencing January 1, 2002. That is, the original justification for the offset was to avoid imposing duplicative charges on ROA customers for the cost of the securitized assets—once through the transition charge, and once through the securitization charge. The Commission's decision, however, resulted in ROA customers avoiding paying even once for the securitized assets. The following chart illustrates the impact of the Commission's U-12639 order:

RATES EFFECTIVE PRE-JANUARY 1, 2002	WHAT MPSC DID IN U-12639 ORDERS EFFECTIVE JANUARY 1, 2002
Full Service Customers	Full Service Customers
Generation charge	Generation charge
Delivery charge	Delivery charge
Securitization charge	Securitization charge
Offset equal to securitization charge	Offset equal to securitization charge
Retail Open Access Customers	Retail Open Access Customers
~~Generation charge~~*	~~Generation charge~~*
Transition charge	~~Transition charge~~*
Delivery charge	Delivery charge
Securitization charge	Securitization charge
Offset equal to securitization charge	Offset equal to securitization charge

* The charges lined out indicate those charges that are not paid by ROA customers.

Thus, the rate treatment accorded full service customers with respect to the securitization charge and offset was unchanged by the Commission's orders in U-12639. To ensure that full service customers did not in effect pay twice for the same securitized assets (once through the generation charge and once through the securitization charge), Consumers Energy agrees that it was appropriate to provide those full service customers with an offset for the securitization charge. The rate treatment for ROA customers, however, resulted in such customers avoiding making any payment for the securitized assets. That is, ROA customers do not pay the utility any generation-related charges because they are purchasing their generation service from an alternative electric supplier. While ROA customers were, prior to January 1, 2002, paying a transition charge that included consideration of the securitized assets, the Commission reduced the transition charge to zero for ROA customers in the U-12639 orders. Thus, effective January 1, 2002, ROA customers were also not paying for any of the securitized assets through a transition charge. The combination of a zero generation charge, a zero transition charge, and a securitization charge that is fully offset by an equal credit creates a situation where ROA customers completely bypass the securitization charge, in violation of 2000 PA 142. The effect of the MPSC orders under appeal is to require full service customers (i.e., those customers who continue to purchase both generation and delivery services from the utility) to pay all of the securitization charges (i.e., all of the amounts necessary to pay principal and interest on the securitization bonds). This is a subsidy of ROA customers by full service customers.

In its opinion, the Court of Appeals never addressed the legal issue raised by Consumers Energy--that the offset for ROA customers violated the statute by allowing those customers to bypass the securitization charge. While the rationale for the Court's opinion is

not clear, it stated that the Commission's U-12639 order "merely preserves the status quo," and that "Appellants have failed to show a change in circumstances that has led to a violation of the Act." Appendix A, p. 5. These statements not only fail to address the legal issue, they are also factually incorrect.

Recovery of Implementation Costs

The second provision of 2000 PA 141 relevant in this appeal directs the MPSC to issue orders by January 1, 2002 that "shall provide for full recovery of a utility's net stranded costs[4] and implementation costs as determined by the commission." MCL 460.10a(1). Implementation costs are costs incurred by the utility to accommodate retail open access, such as the efforts to design and implement new metering, billing, power scheduling and other business systems, the design of regional transmission organizations ("RTO's"; see MCL 460.10w), and various employee-related restructuring costs. At the time the record was made before the Commission in Case No. U-12639, Consumers Energy had incurred approximately $15 million of implementation costs in 1997 and 1998, $30 million in 1999, and $25 million in 2000. 7 TR 207. Instead of following the statutory direction, and issuing an order that provides for full recovery of such costs, the Commission ruled that Consumers Energy's recovery of these implementation costs "is conditioned upon the success of the utilities in implementing the ROA programs." Appendix B, p. 28. No explanation of how the Commission intended to measure "success" was provided.

[4] No issues concerning "net stranded costs" are at issue in this appeal.

In its opinion, the Court of Appeals appeared to confuse issues concerning "net stranded costs" with issues concerning "implementation costs," and ultimately held that "the evidence was insufficient to allow the PSC to accurately determine the proper amount of implementation costs and whether those costs were prudently incurred." Appendix A, p. 7. The Court never addressed the issue that had actually been raised on appeal—whether the Commission's imposition of a "success" condition on recovery of these costs was consistent with the statutory directive that the Commission issue an order that "shall provide for full recovery" of implementation costs.

ARGUMENT

A. GROUNDS FOR APPEAL

MCR 7.302(B) lists the grounds for evaluating an application for leave to appeal. At least the following grounds are present in the instant appeal:

> "(B) Grounds. The application must show that
>
> * * *
>
> (2) the issue has significant public interest and the case is one by or against the state or one of its agencies or subdivisions or by or against an officer of the state or one of its agencies or subdivisions in the officer's official capacity;
>
> (3) the issue involves legal principles of major significance to the state's jurisprudence;
>
> * * *
>
> (5) in an appeal from a decision of the Court of Appeals, the decision is clearly erroneous and will cause material injustice or the decision conflicts with a Supreme Court decision or another decision of the Court of Appeals;"
>
> * * *

This case is against a state agency—the Michigan Public Service Commission. Further, the case has significant public interest because it concerns the implementation of a recent statute that provides for retail open access for all electric customers in the state. Every person, business and governmental body in the state is an electric customer and is heavily dependent upon safe and reliable electricity for maintenance of physical safety and economic health. The decisions of the MPSC (and the Court of Appeals affirming the MPSC) result in one group of customers (full service customers) subsidizing a different group of customers (ROA customers). In addition to simply being unjust, this subsidization has a significant adverse impact on the implementation of the Customer Choice and Electricity Reliability Act. By requiring full service customers to subsidize ROA customers, the Commission's action creates a competitive advantage for alternative electric suppliers, and a competitive disadvantage for utilities such as Consumers Energy. This is directly inconsistent with one of the major purposes of the act—"to promote financially healthy and competitive utilities in this state." MCL 460.10(2)(e). Every one of the 1.7 million retail customers of Consumers Energy (and the over 2 million customers of Detroit Edison) is affected by the Commission's decision. There is clearly significant public interest in these issues.

The Court of Appeals decision also involves legal principles of major significance to the state's jurisprudence. The interpretation of the nonbypassability provisions of 2000 PA 142 is an issue that will arise each time a securitization proposal is filed with the Commission. Indeed, an application filed with the MPSC in March 2003 in MPSC Case No. U-13715 by Consumers Energy that proposed the securitization of certain assets remains pending at the Commission as of the date of this Application. The length of time it has taken to resolve the issues in that case is, at least in material part, due to the legal and financial

uncertainty associated with the interpretation of the same non-bypassability provisions that are at issue in this appeal.[5] By affirming the Commission's devising of a scheme that allows ROA customers to evade and bypass securitization charges, the Court of Appeals decision will create additional financial uncertainty and make it more difficult, if not impossible, to utilize one of the major features of the Customer Choice and Electricity Reliability Act—the securitization provisions. This will prevent utilities from achieving significant cost savings that can be passed on to customers and that will allow utilities to remain competitive and "financially healthy".

In addition, the Court of Appeals has applied sometimes conflicting standards of review in reviewing decisions of the MPSC. In many cases, including the instant case, the Court of Appeals has shown such extreme deference to the Commission's orders that it has effectively immunized the MPSC from judicial review. Such deference is especially inappropriate when, as in the instant appeal, the issues are of law. It simply makes no sense for the Courts to grant such extraordinary deference to the MPSC's interpretation of statutes, especially a new statute. Guidance from the Supreme Court on this matter is desperately needed.

Finally, the decision of the Court of Appeals is clearly erroneous. The Court of Appeal's opinion reflects a misunderstanding of basic facts, and fails to even address the

[5] In fact, the Attorney General appealed the initial MPSC order in Case No. U-13715, claiming that it was unlawful for the Commission to have exempted ROA customers from all or most of the securitization charges approved in that order. See Court of Appeals Docket No. 249549; attached as Appendix F is the Attorney General's Docketing Statement in that docket. The Attorney General's appeal was dismissed due to the pendency of a rehearing petition at the Commission addressing the same issue. See September 18, 2003 order of Court of Appeals, attached as Appendix G. The U-13715 proceeding has, as of the date of this Application for Leave to Appeal, not been resolved by the Commission. Regardless of its disposition, the legal issue concerning the interpretation of the statutory non-bypassability requirement will remain a contentious issue until addressed and resolved by the Courts.

statutory interpretation issues that had been raised by Consumers Energy. In addition, the Court of Appeals decision directly conflicts with a previous decision of the Court of Appeals (see Argument C) and does so concerning an important issue that could affect many MPSC orders—i.e., the appropriate standard for reviewing the prudence of utility costs.

B. THE COURT OF APPEALS FAILED TO APPLY THE APPROPRIATE STANDARD OF REVIEW.

In its opinion, the Court of Appeals applied a highly deferential standard of review to the Commission's decision. That is explicitly evidenced by the standard that it stated it was following, and implicitly evidenced by the opinion's lack of any analysis addressing the legal issues raised by Consumers Energy. The application of such a highly deferential standard of review in appeals of decisions from the Public Service Commission and the extraordinary burden that standard places on appellants effectively immunizes the Commission from judicial review, in violation of Section 26(8) of the Railroad Act, MCL 462.26(8), the Administrative Procedures Act, MCL 24.201 et seq, the Michigan Constitution, and common sense.

Section 26 of the Railroad Act, MCL 462.26(8), sets forth the statutorily-prescribed standard of review applicable to decisions of the MPSC:

> "(8) In all appeals under this section the burden of proof shall be upon the appellant to show by clear and satisfactory evidence that the order of the commission complained of is unlawful or unreasonable." Emphasis added.

The Court of Appeals stated the standard of review it would apply in this case as follows:

> "Appellate review of PSC orders is narrow in scope. All rates, fares, regulations, practices and services prescribed by the PSC are deemed prima facie to be lawful and reasonable. MCL 462.25. The party attacking an order of the PSC bears the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8). A decision of the PSC is unlawful when it involves an erroneous interpretation or application of the law and it is unreasonable when it is unsupported by the evidence. ABATE v PSC, 219 Mich App 653, 659; 557 NW2d 918 (1996). To the extent

> that the decision is based on findings of fact, the challenger must show that those findings are not supported by competent, material and substantial evidence on the whole record. Id. This Court gives due deference to the administrative expertise of the PSC, and will not substitute its judgment for that of the PSC. Id." Appendix A, p. 3.

This standard of review is unlawful and defective on its face; in addition, the manner in which the Court of Appeals applied this standard in this appeal compounded the legal error. The legal errors committed in the Court of Appeals opinion with respect to the standard of review are summarized below:

1. The Court of Appeals failed to review the issues of law *de novo*.

The issues raised by Consumers Energy in this appeal are issues of law. They concern the interpretation of new statutes, 2000 PA 141 and 2000 PA 142. Specifically, they concern the interpretation of (1) MCL 460.10k(2) and 460.10h(f), which require that securitization charges be "nonbypassable," (i.e., paid by all customers), and (2) MCL 460.10a(1) which requires the Commission to issue an order by January 1, 2002 that provides for the "full recovery" of all implementation costs. This Court has previously ruled that "[q]uestions of statutory interpretation are questions of law, which will be reviewed de novo." In re MCI Telecommunications Complaint, 460 Mich 396, 413; 596 NW2d 164 (1999). See also Cardinal Mooney High School v Michigan High School Athletic Association, 437 Mich 75, 80; 467 NW 2d 21 (1991). Black's Law Dictionary defines an "appeal de novo" as follows: "[a]n appeal in which the appellate court uses the trial court's record but reviews the evidence and law without deference to the trial court's rulings." Black's Law Dictionary, Seventh Edition.[6] Emphasis added. Because the issues raised before

[6] See also DCR v Silver Dollar Cafe, 441 Mich 110, 115-116; 490 NW2d 337 (1992), where the Supreme Court provided a comparable interpretation of the term "de novo" as used in the Michigan Constitution.

the Court of Appeals are issues of law,[7] they were required to be reviewed de novo, without giving any deference to the MPSC's decision. Deference is particularly inappropriate when the issue concerns a new interpretation of a new statute, as is the case here. In re Telecommunications Tariffs, 210 Mich App 533, 538-539; 534 NW 2d 194 (1995).

2. The Court of Appeals misconstrued MCL 462.25 and applied an incorrect standard of appellate review when it stated that the Commission's orders were "prima facie lawful and reasonable."

The Court of Appeals stated that the order of the Commission was prima facie lawful and reasonable, citing Section 25 of the Railroad Act, 1909 PA 300, MCL 462.25 in support of this standard. The Court of Appeals misunderstood and misapplied this statute. MCL 462.25 states, in relevant part, as follows:

> "Sec. 25. All rates, fares, charges, classification and joint rates fixed by the commission and all regulations, practices and services prescribed by the commission shall be in force and shall be prima facie, lawful and reasonable until finally found otherwise in an action brought for the purpose pursuant to the provisions of section 26 of this act, or until changed or modified by the commission as provided for in section 24 of this act." Emphasis added.

This section clearly does not establish a standard applicable to the judicial review of Commission orders. It is merely stating that Commission orders are considered in force and effect until the Commission changes them, or the Courts reverse them. It does not impose any requirement on the courts that they defer to Commission orders, or that appellate courts must assign great weight to the legal analysis set forth in a Commission order. The only reference to a standard for judicial review that is contained in the Railroad Act is that stated in

[7] Consumers Energy is not contending in this appeal that appellate review of issues of fact is necessarily de novo.

Section 26; i.e., that "the order of the commission complained of is unlawful or unreasonable." MCL 462.26(8).

3. No deference is appropriate where the Commission fails to provide a reasoned analysis of the legal issues.

It seems obvious that no deference is appropriate with respect to an administrative agency's legal conclusion where the agency fails to provide any reasoned analysis to which to defer. Notwithstanding the Commission's failure to address the issues of law raised by Consumers Energy in this appeal, the Court of Appeals nevertheless determined that deference to an unsupported conclusion was appropriate. With respect to the issues concerning the securitization charge offset and the recovery of implementation costs that have been raised by Consumers Energy, the Commission's orders do not provide any analysis of the sections of the Customer Choice and Electricity Reliability Act, 2000 PA 141 and 2000 PA 142, MCL 460.10 et seq, that concern these matters.[8] Nowhere in the Commission's discussion of the securitization offset issue (pages 22-26 of December 20, 2001 U-12639 order) does the Commission ever address why the "nonbypassability" requirement of MCL 460.10k(2) does not prohibit the imposition of the offset for ROA customers. Nowhere in the Commission's discussion of the implementation cost recovery issue (pages 28-29 of the December 20, 2001 U-12639 order) does the Commission address how its action is consistent with the direction set forth in MCL 460.10a(1) that the Commission shall issue orders that "shall provide for full recovery" of implementation costs. It clearly makes no sense to insist that a reviewing court must defer to the Commission's analysis and interpretation of a statute

[8] Indeed, the Commission took these actions in conflict with its prior decisions (U-12505 orders) and applicable statutory requirements, and did so without notice that it was contemplating changing those prior decisions or ignoring statutory requirements.

when the Commission order fails to make any such analysis or interpretation. This common sense principle has been repeatedly stated by the federal courts with respect to review of decisions issued by the Federal Energy Regulatory Commission (FERC). In Noram Gas Transmission Co. v FERC, 331 US App DC 304; 148 F3d 1158, 1165 (1998), the Court repeated its previously-stated standard, that "it most emphatically remains the duty of this court to ensure that an agency engage the arguments raised before it—that it conduct a process of reasoned decisionmaking", citing KN Energy v FERC, 297 US App DC 13; 968 F2d 1295, 1303 (1992). These decisions in turn are based upon the Supreme Court decision in SEC v Chenery, 332 US 194; 67 SCt 1575; 91 LEd 1995 (1946), reh den 332 US 783; 68 S Ct 26; 92 L Ed 367 (1947) where the Court emphasized the need for clarity in an agency's decision:

> "If the administrative action is to be tested by the basis upon which it purports to rest, that basis must be set forth with such clarity as to be understandable. It will not do for a court to be compelled to guess at the theory underlying the agency's action; nor can a court be expected to chisel that which must be precise from what the agency has left vague and indecisive. In other words, 'we must know what a decision means before the duty becomes ours to say whether it is right or wrong.'" [citation omitted] 91 LEd at 1999.

In this case, the Court of Appeals failed to follow this common sense principle. The Commission's orders failed to articulate any reasoned basis for its conclusions. Indeed, they failed to even address the statutory provisions that applied to the issue. In such a case, no deference is appropriate; indeed, reversal is required.

Further, the Commission's failure to address the applicable statutes violates Section 85 of the Administrative Procedures Act, MCL 24.285, which requires an administrative agency to make "findings of fact" and "conclusions of law." Each conclusion

of law must be "supported by authority or reasoned opinion." Id. In Armstrong v CFTC, 12 F3d 401 (CA 3 1993), the Court stated as follows concerning the similar provision of the federal Administrative Procedures Act, 5 USC 557(c):

> "The purposes of the APA provision requiring specific findings and conclusions are to prevent arbitrary agency decisions, provide parties with a reasoned explanation for those decisions, settle the law for future cases, and furnish a basis for effective judicial review." 12 F3d at 403.

The Commission's orders under appeal fail to make conclusions of law that are supported by authority or reasoned opinion.

4. An administrative agency decision can only be upheld, if at all, on the grounds stated by the agency.

Closely related to the above principle is the accepted principle that a decision of an administrative agency can only be upheld, if at all, on the grounds stated by the agency. The after-the-fact legal rationales offered by an administrative agency in its appellate briefs are not entitled to deference by a reviewing court; indeed, they cannot be relied upon to support the Commission's decision at all. See, e.g., SEC v Chenery, 318 US 80; 63 SCt 454; 87 LEd 626 (1943), where the Supreme Court stated that ". . . an administrative order cannot be upheld unless the grounds upon which the agency acted in exercising its powers were those upon which its action can be sustained." 87 L Ed2d at 637. See also KN Energy v FERC, supra, where the Court stated that, "[i]t is a well-established and equally wise principle that 'courts may not accept appellate counsel's post hoc rationalizations for agency action." 968 F2d at 1303. The KN Energy Court further held that SEC v Chenery, supra, "requires

that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself." Id.[9]

As noted above, the Commission never provided any analysis of the relevant statutes to support its decision to require provision of an offset to the securitization charge for ROA customers, or to support its failure to provide for unconditional full recovery of implementation costs. Without any supporting legal analysis in the orders, the Court of Appeals not only had nothing to which it could defer, there was no lawful basis upon which to uphold the Commission's decision.

5. Conclusion

The Court of Appeals failed to review the Commission's decision de novo, improperly relied upon MCL 462.25, gave deference to a non-existent legal analysis in the Commission's orders, and upheld the Commission's decision notwithstanding the failure of the Commission to provide any reasoned analysis that supported the lawfulness of that decision. The effect of the standard of review that was applied by the Court of Appeals is that the MPSC is effectively immunized from appellate review, in violation of MCL 462.26(8), Sections 85 and 101[10] of the Administrative Procedures Act, and the Michigan Constitution.[11]

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[9] See also Burlington Truck Lines v United States, 371 US 156; 83 S Ct 239; 9 L Ed2d 207 (1962), where the Supreme Court emphasized the need for the administrative agency to clearly set forth its findings and conclusions, so that judicial review can proceed in an appropriate manner: "Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion'", citing New York v United States, 342 US 882, 884; 72 S Ct 152; 96 L Ed 662, 663, (1951) dissenting opinion.

[10] MCL 24.301 states that a final decision or order of an administrative agency "is subject to direct review by the courts as provided by law."

[11] Article 6, Section 28 of the Michigan Constitution of 1963 states as follows:

"Sec. 28. All final decisions, findings, rulings and orders of any administrative officer or agency existing under the constitution or by law, which are judicial or quasi-judicial and affect private rights or licenses, shall be subject to direct review by the courts as provided by law. This review shall include, as a minimum, the determination whether such final decisions, findings, rulings and orders are authorized by law; and, in cases in which a hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record." Emphasis added.

C. THE COMMISSION VIOLATED THE STATUTORY NONBYPASSABILITY REQUIREMENT.

The factual background essential to an appreciation of the Commission's legal error is set forth above in the Statement of Material Proceedings and Facts. The critical fact is that, as a result of the Commission's U-12639 orders, retail open access customers do not pay securitization charges. See chart on page 5 of this Application.

2000 PA 142 directs that securitization charges are to be "nonbypassable"; that is, payable by all customers regardless of the identity of the customers' generation service supplier. MCL 460.10k(2) states that "[a] financing order shall include terms ensuring that the imposition and collection of securitization charges authorized in the order are a nonbypassable charge." MCL 460.10h(f) defines "nonbypassable charge" as a "charge in a financing order payable by a customer to an electric utility or its assignees or successors regardless of the identity of the customer's electric generation supplier." Emphasis added. This definition makes it clear that both full service and ROA customers must pay securitization charges. In the U-12505 financing order authorizing Consumers Energy to issue $469 million of securitization bonds, the Commission claimed that it would comply with this statutory direction and stated that the securitization charges were "nonbypassable." See Appendix D, p. 61.

In the U-12639 orders that are the subject of this appeal, however, the Commission directed Consumers Energy to provide ROA customers with an "offset" (or credit) equal to the amount of the securitization charge. See Appendix B, pp. 22-26. That is, although the securitization charges would appear on an ROA customer's bill, there would also be an equal and offsetting credit to other charges applied on the bill. The net result, of course, would be that an ROA customer would not pay any securitization charges. For example, if

the securitization charge totaled $0.002 per kWh, the charge would be shown on customer bills, but the Commission's order would also require Consumers Energy to include a $0.002 per kWh credit on ROA customer bills, thereby fully offsetting the amount of the securitization charges. The offset ordered by the Commission allowed ROA customers to "bypass" the securitization charges that had been made nonbypassable by 2000 PA 142.

The Commission provided no lawful justification in the orders under appeal for requiring the offset credit to be applied to ROA customer bills. The discussion in the order suggests that the Commission had a "goal" of treating ROA and full service customers in an equal manner, and that the Commission concluded this goal supported application of the offset credit to ROA customer bills. See Appendix B at p. 25. This is an argument that fails upon examination. As noted above in the Statement of Material Proceedings and Facts, the offset credit may make sense with respect to full service customers, since they are paying frozen full service generation rates that already include the costs of the generation-related assets that were securitized.[12] Therefore, application of the offset credit to full service customer bills simply avoids having those customers pay twice for the same assets—once through the generation charge, and once through the securitization charge. The same situation, however, is not present with respect to ROA customers. ROA customers pay rates to Consumers Energy for delivery service that do not contain any of the generation-related costs associated with the securitized assets. ROA customers do not pay generation charges to the utility, and, after the U-12639 order, they no longer paid a transition charge. See chart on

[12] PA 141 imposed a rate freeze upon Consumers Energy's retail electric rates until December 31, 2003. See MCL 460.10d(1). Because the Company's full service rates were frozen in 2000-2003, they could not be adjusted to remove the generation-related costs of the securitized assets until the completion of the rate freeze period.

page 5 of this Application. Therefore, application of the securitization charges to ROA customers without an offset would not result in a double payment; rather, it would simply result in ROA customers paying their share of securitization charges—exactly what 2000 PA 141 and 2000 PA 142 contemplate and require.

The Commission also states (at page 26 of the December 20, 2001 U-12639 order) that the offset for ROA customers is justified because of its finding that Consumers Energy fully recovered all of its fixed generation costs in 2000, which includes the costs that were securitized. This statement misses the point of the statutory requirement that securitization charges be nonbypassable. 2000 PA 142 makes it crystal clear that all customers, including ROA customers, are required to pay securitization charges. Applying securitization charges to ROA customers without an offset will not allow Consumers Energy to recover and retain excess securitization charges; indeed, the total dollar amount of the securitization charges applied to customer bills will remain the same. Consumers Energy does not keep any of the revenues produced by the securitization charges; they are all utilized to pay principal and interest on the securitization bonds.[13] Because the total amount needed to pay principal and interest on the securitization bonds remains the same, the only impact applying securitization charges to ROA customers without an offset will have is to reduce the amount that must be paid by other customers. Under the Commission's approach, full service customers will be forced to pay more to make up the amount that should have been, but was not, paid by ROA customers. This is directly contrary to the clear direction given by the legislature; i.e. that all customers must pay securitization charges.

[13] See page 61 of Appendix D, which states, in paragraph kk that, "The securitization charges authorized in this order shall be billed, collected, and delivered to the trustee by Consumers . . . ."

The results of the Commission's unlawful action were (1) to artificially reduce the charges properly payable by ROA customers, thereby making that service more economically attractive to customers, inducing more customers to switch to ROA service, and decreasing Consumers Energy's generation-related revenues, and (2) to shift responsibility for producing the revenues required to pay the principal and interest on the securitization bonds away from ROA customers, and to full service customers. To remedy this situation, the Court should direct the Commission to cease requiring the offset on ROA customers bills, and require that ROA customers pay the securitization charges effective from the date of the orders that are the subject of this appeal.

The Court of Appeals decision regarding this issue is difficult to understand. The Court recognizes, at page 4 of Appendix A, that "securitization charges must be paid by both full service and ROA customers." The Court then incorrectly states that "[t]he PSC found that the credit [i.e., the offset to securitization charges] was necessary to give both full service and ROA customers the benefit of the 5% rate reduction mandated by MCL 460.10d(1)." Id. This statement is simply wrong. In the first place, the MPSC never made that claim. In the second place, such a claim would make no sense. The 5% rate reduction mandated by MCL 460.10d(1) is only with respect to residential customers, was applied to both full service residential rates and ROA residential rates, and is completely independent of the securitization charge offset issue. Any claim that MCL 460.10d(1) required the Commission to allow all ROA customers to bypass securitization charges cannot be sustained.

The Court of Appeals then quotes from the Commission order where the Commission made the statement that, since it found that Consumers Energy was recovering

all of its fixed generation costs, including the costs that were securitized, "there is no basis for requiring ROA customers to pay the securitization and tax charges without a full offset." Appendix A, p. 5. This contention was addressed above. It simply misses the point that the statute requires all customers to pay securitization charges. Even if it was true that all fixed generation costs were being recovered from full service customers through their payment of generation charges, the point is that providing ROA customers with an offset to the securitization charge allows ROA customers to bypass the securitization charge, and transfers their share of the responsibility for paying such charges to full service customers.

The Court of Appeals then states that the "PSC opinions in the securitization cases provide that full service customers will continue to receive the offset to the securitization charge until a full rate case removes the qualified securitized assets from the rate base." Appendix A, p. 5. Emphasis added. This statement is correct, but irrelevant. The issue on appeal is the lawfulness of the offset for ROA customers, not full service customers.

The Court of Appeals then relies upon this irrelevant statement to conclude that the securitization charge offset is lawful, because it "merely preserves the status quo," and there has been no showing of a "change in circumstances that has led to a violation of the Act." Appendix A, p. 5. To the extent this reasoning is based upon the irrelevant comment concerning full service customers, it is fallacious. In addition, it is simply factually incorrect to claim that the continuation of the offset for ROA customers ordered in the U-12639 orders merely preserved the status quo, because, as explained above, the U-12639 orders changed the status quo by reducing the transition charge payable by ROA customers to zero. Finally, the Court of Appeal's reasoning appears to start with the presumption that the offset was lawful, and therefore concludes that continuing it must also be lawful. Such reasoning illogically

avoids even addressing the issue of whether the offset amounts to an unlawful bypass of the securitization charge in violation of the statute. For these reasons, the Court of Appeal's decision is defective and clearly erroneous.

D. THE COMMISSION VIOLATED THE STATUTE REQUIRING IT TO PROVIDE FOR FULL RECOVERY OF IMPLEMENTATION COSTS.

Consumers Energy has incurred significant costs in connection with the implementation of the ROA program. As noted above, implementation costs are costs incurred by incumbent utilities to accommodate retail open access, such as (i) the efforts to design and implement new metering, billing, power scheduling and other business systems, (ii) the design of regional transmission organizations (RTO's), and (iii) various employee-related restructuring costs. These costs for Consumers Energy have been substantial, totaling over $15 million in 1997 and 1998, $30 million in 1999, and $25 million in 2000. 7 TR 207.[14]

Consumers Energy began incurring these costs in reliance upon the Commission's statement that they would be recoverable. In its June 5, 1997 Opinion and Order in Case No. U-11290, the Commission held with respect to implementation costs:

> "These are costs that would not be incurred absent a direct access program...If the costs are prudently incurred, it would also be inappropriate to disallow recovery by the utility. Thus the only remaining option is to include these costs in the transition charge if they are prudently incurred." June 5 Order, pp. 12-13.

[14] Since the record was made in Case No. U-12639, Consumers Energy has continued to incur additional implementation costs. It has yet to recover one dollar of these costs.

2000 PA 141 both confirmed this prior Commission finding, and expanded this finding into a statutory directive that implementation costs are fully recoverable. MCL 460.10a(5) states as follows:

> "(5) The orders issued by the commission before the effective date of the amendatory act that added this section that allow customers to choose an alternative electric supplier, including orders that determine and authorize recovery of net stranded costs and implementation costs and that confirm any voluntary commitments of electric utilities, are in compliance with this act and enforceable by the commission."

Lest there be any doubt about the legislative intent, MCL 460.10a(1) states as follows:

> "(1) No later than January 1, 2002, the commission shall issue orders establishing the rates, terms, and conditions of service that allow all retail customers of an electric utility or provider to choose an alternative electric supplier. The orders shall provide for full recovery of a utility's net stranded costs and implementation costs as determined by the commission."

Notwithstanding these clear statements directing the Commission to issue an order granting "full recovery" of implementation costs "no later than January 1, 2002," the Commission stated in the December 20, 2001 U-12639 order that "recovery of implementation costs is conditioned upon the success of the utilities in implementing the ROA programs." Appendix B, p. 28.

Making recovery of implementation costs "conditional" upon some undefined standard of "success" of the ROA programs that will be revealed only at some undefined time in the future is inconsistent with 2000 PA 141 and therefore unlawful in several respects. First, it is unlawful because MCL 460.10a(1) explicitly requires the Commission to authorize "full recovery" of implementation costs. The statute cannot reasonably be construed as allowing the Commission to deny recovery on the basis that the ROA program is not considered sufficiently "successful" for some reason. For example, customers obviously

choose to participate or not in the ROA program for a variety of reasons over which Consumers Energy generally has no control (e.g., the price offered by alternative electric suppliers, the desire of customers to deal with alternative electric suppliers). Adopting a standard based on customer participation rates would clearly be inconsistent with the statutory requirement that the Commission "shall provide" for "full recovery" of implementation costs.

Second, the order is unlawful because it conflicts with the statutory directive to issue an order that provides for full recovery of implementation costs "no later than January 1, 2002." By deferring the issuance of an order that provides for full recovery of implementation costs, the Commission has clearly failed to comply with the statutory directive orders to do so no later than January 1, 2002. Regardless of the Commission's intentions with respect to the future recovery of implementation costs, its failure to issue an order by January 1, 2002 that provides for full recovery is a violation of the statute. Making recovery of implementation costs conditional exacerbates the statutory violation, because doing so implies a Commission intention to deny full recovery under some undefined circumstances. This is clearly contrary to the legislative direction set forth in the statute.

Third, making recovery conditional is unlawful because determining the prudence of costs based upon the "success" of the ROA program, with success evaluated in "hindsight," is inconsistent with Michigan law. In ABATE v Public Service Commission, 208 Mich App 248; 527 NW2d 533 (1994), lv den 450 Mich 890; 539 NW2d 507 (1995) the Michigan Court of Appeals explicitly held that, when the prudence test is used, the end result is not determinative:

> "The Attorney General's argument is inconsistent with the prudent investment test under which the end result of a utility's efforts do not determine how much is recoverable. Rather, utilities are compensated for prudent investments at their actual

> costs when made regardless of whether the investments are deemed necessary or beneficial in hindsight." 208 Mich App 260. (Emphasis added)

Indeed, the Court explicitly recognized that prudent costs may include unsuccessful investments. 208 Mich at 262. The Court of Appeals emphasized this legal principle:

> "The PSC merely permitted Consumers to recover its prudent investment, and that investment was not made imprudent by Consumers' subsequent decisions. Under the prudent investment test, the end result does not dictate what can be recovered. The utility is compensated for prudent investments when made, irrespective of whether the investments are deemed necessary or beneficial in hindsight. [citation omitted]." 208 Mich App at 267. (Emphasis added)

Thus, a prudent investment is not made imprudent by subsequent events, and the end result, or degree of "success" of that investment, does not dictate what can be recovered. The Commission's statement that recovery of implementation costs is "conditioned" upon some undefined standard to be applied in the future based upon the success of the ROA program is clearly an attempt at "hindsight" regulation, and is therefore unlawful and unreasonable.

In its opinion, the Court of Appeals ignored its own previous decision concerning application of the prudent investment test, and held that the MPSC's decision to determine the prudence of the implementation cost "in light of the success of the ROA program" did not pose a "greater than normal risk to the utilities" and was therefore lawful. Appendix A, p. 6. This decision is directly in conflict with the holding in ABATE v Public Service Commission, supra. Basing an evaluation of prudence upon events beyond the control of the utility after the investments are made is exactly what the Court of Appeals said in that prior case was unlawful. The Court of Appeals made no attempt to distinguish the prior decision, nor is there any meaningful distinction to be made. Further, the claim that the

imposition of a condition of "success" did not create any "greater than normal risk" was never made by the Commission in the U-12639 orders. The Court of Appeals appeared intent on deferring to the Commission's decision, notwithstanding (i) the lack of any reasoned analysis supporting that decision, and (ii) the fact that the decision conflicts with prior established law.

The Court of Appeals also failed to address the basic statutory interpretation issue that was presented regarding MCL 460.10d(1). Although the Court notes that Consumers Energy argued that the Commission's action violated that section of 2000 PA 141, the Court responds to that contention by quoting from an unrelated portion of the Commission's order concerning the establishment of net stranded cost charges. Appendix A, p. 7.[15] That quote concerning the recovery of net stranded costs has nothing to do with the issue actually raised by Consumers Energy concerning implementation costs, and therefore cannot be relied upon to support the Commission's decision. The Court of Appeals never offered any explanation for how the Commission's creation of a condition of "success" is consistent with MCL 460.10a(1).

Further, the Court of Appeals concludes that the Commission's decision "does not constitute retroactive ratemaking." Appendix A, p. 7. Consumers Energy never argued in this appeal that the Commission's failure to comply with the provisions of MCL 460.10a(1) concerning implementation cost recovery constituted retroactive ratemaking, so the Court of Appeals statement is puzzling, to say the least. Indeed, the Commission effectively refused to take <u>any</u> ratemaking action, prospective or retroactive.

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[15] The Court quoted the following Commission statement: "The Commission agrees that it is necessary to establish the stranded cost charges to be in effect as of January 1, 2002 and sets the charge at zero for both Consumers and Detroit Edison." This statement has nothing to do with the implementation cost recovery issue.

Finally, the Court of Appeals states that "the evidence was insufficient to allow the PSC to accurately determine the proper amount of implementation costs and whether those costs were prudently incurred. . . ." Appendix A, p. 7. This statement is both wrong and misleading. The evidence that was admitted in the case on this issue consists of testimony from a Consumers Energy witness, and states as follows:

> "The Company has incurred significant ROA implementation costs in the conscientious, good faith development and implementation of ROA. The Commission in Case No. U-11955 determined that $15.4 million of 1997 and 1998 implementation costs were prudently incurred. ALJ Rigas determined in Case No. U-12358 that the Company's 1999 prudently incurred implementation costs were $30 million. In addition, the Company filed in March 2001 an application in Case No. U-12891 to recover $25.1 million of 2000 implementation costs. All of these costs have been prudently incurred incremental costs in the development of the Company's ROA program and are recoverable." 7 TR 207.

Thus, there was evidence identifying the amounts of implementation costs that Consumers Energy had incurred as of the time the record in this case was made. More importantly, however, the references in the above testimony to other MPSC case numbers are to annual cases that the Commission directed Consumers Energy to file for the purpose of reviewing the amount and prudence of the implementation costs that the Company had incurred. In each of those cases, hearings were held, evidence was received from all interested parties, and the Commission issued orders that imposed the same "condition" on recovery that is in dispute in this case. See Appendices H, I, and J, which are the Commission orders issued in these cases. Because of the splintered nature of the Commission's action on this issue, Consumers Energy has been forced to take multiple appeals of Commission orders, all of which raise the same legal issue, and all of which seek judicial assistance in requiring the Commission to comply with the statute directing it to provide for full recovery of

implementation costs. See Court of Appeals Docket Nos. 243360, 245309, and 249822. The instant appeal does not concern one of the annual review cases, but is the first case appealed in which the Commission imposed the unlawful condition, and is therefore the first case that has reached a decision point by the Court of Appeals. For the Court of Appeals to claim that there is insufficient evidence to determine the proper amount of implementation costs is simply wrong, given the uncontradicted evidence in the U-12639 record that identified the costs that had been incurred at the time that record was made, and given the extensive evidentiary hearings conducted in other proceedings concerning implementation costs. Similarly, for the Court of Appeals to claim that there is insufficient evidence to determine whether these costs were prudently incurred is equally wrong, since there have been multiple opportunities to review the prudence of these costs in the already conducted multiple hearings. Finally, the issue raised in this appeal is whether the condition imposed by the Commission on recovery of these costs—i.e., whether the ROA program is sufficiently "successful"—is lawful and consistent with MCL 460.10a(1). A specific determination of the amount of implementation costs is not even required to answer that question, and the Court of Appeals' claim that there was insufficient evidence serves merely as a device to avoid addressing the actual issue of law that was raised on appeal.

REQUESTED RELIEF

WHEREFORE, Consumers Energy respectfully requests the Court to:

A. Grant this Application for Leave to Appeal;

B. Find that the Court of Appeals failed to apply the appropriate standard of review to its review of the Commission order;

C. Find that the Commission acted unlawfully in directing Consumers Energy to apply an offset to the securitization charge for retail open access customers;

D. Find that the Commission acted unlawfully in imposing a condition on the recovery of implementation costs;

E. Reverse the Court of Appeals November 18, 2003 decision and the MPSC's orders consistent with the above findings.

Respectfully submitted,

CONSUMERS ENERGY COMPANY

Dated: December 19, 2003

By: _____

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APPENDIX A

STATE OF MICHIGAN

COURT OF APPEALS

CONSUMERS ENERGY COMPANY,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, MIDLAND COGENERATION VENTURE LIMITED PARTNERSHIP, ABATE, ENERGY MICHIGAN, INC, DETROIT EDISON COMPANY, WISCONSIN PUBLIC SERVICE CORPORATION, UPPER PENINSULA POWER COMPANY, WISCONSIN ELECTRIC POWER COMPANY, WE ENERGIES, EDISON SAULT ELECTRIC COMPANY, NORTHERN STATES POWER COMPANY WISCONSIN, XCEL ENERGY, DOW CORNING CORPORATION, HEMLOCK SEMICONDUCTOR CORPORATION, CITIZENS FOR POWER AND RELIABILITY, and ATTORNEY GENERAL,

Appellees.

UNPUBLISHED
November 18, 2003

No. 241990
PSC
LC No. 00-012639

DETROIT EDISON COMPANY,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, ABATE, ENERGY MICHIGAN, INC, WISCONSIN PUBLIC SERVICE CORPORATION, UPPER PENINSULA POWER COMPANY, WISCONSIN ELECTRIC POWER COMPANY, WE ENERGIES, EDISON SAULT ELECTRIC COMPANY, NORTHERN STATES POWER COMPANY WISCONSIN, XCEL ENERGY, CONSUMERS ENERGY COMPANY,

No. 241991
PSC
LC No. 00-012639

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DOW CORNING CORPORATION, HEMLOCK SEMICONDUCTOR CORPORATION, CITIZENS FOR POWER AND RELIABILITY, and ATTORNEY GENERAL,

Appellees.

Before: O'Connell, P.J., and Jansen and Wilder, JJ.

PER CURIAM.

In these consolidated appeals, appellants Consumers Energy Company and Detroit Edison Company appeal as of right the order of the Public Service Commission (PSC) implementing provisions of the Customer Choice and Electricity Reliability Act, MCL 460.10a(1). We affirm.

This case arises out of a significant restructuring of Michigan utilities law to allow retail customers of electric utilities to purchase electricity from alternative suppliers. The retail open access (ROA) program began as an experimental program offered by Detroit Edison and Consumers Energy under the direction of the PSC. After a number of orders were issued implementing the program, the Supreme Court found that the PSC exceeded its statutory authority in establishing the program. *Consumers Power Co v Public Service Comm,* 460 Mich 148; 596 NW2d 126 (1999).

Partly in response to the Supreme Court's decision, the Legislature passed the Customer Choice and Electricity Reliability Act, 2000 PA 141 and 2000 PA 142. The purposes of the act are to ensure choice of electric suppliers, to encourage the PSC to foster competition in the provision of electric supply, encourage the development and construction of merchant plants, to ensure that all persons are provided safe, reliable power at a reasonable rate, and to promote economic development. MCL 460.10(2). The act provides that previous PSC orders concerning alternative electricity providers are enforceable by the PSC. MCL 460.10a(5).

In the prior cases, the PSC considered how to handle certain stranded costs incurred by utilities in instituting the ROA program. In PSC Case No. U-11290, the PSC defined these costs as costs incurred during the regulated era that will be above market prices, and costs necessary to facilitate the transition to competitive markets. Five categories of stranded costs were identified: (1) Regulatory assets consisting of unrecovered costs of demand side management programs, (2) capital costs of nuclear plants, (3) contract capacity costs arising from power purchase agreements, (4) employee retaining costs, (5) and costs related to the implementation of restructuring.

In addition to validating the prior PSC orders concerning alternative electric suppliers, the Legislature included specific provisions concerning stranded costs. MCL 460.10a(1) provides:

> No later than January 1, 2002, the commission shall issue orders establishing the rates, terms, and conditions of service that allow all retail

customers of an electric utility or provider to choose an alternative electric supplier. The orders shall provide for full recovery of a utility's net stranded costs and implementation costs as determined by the commission.

The PSC initiated this action to determine net stranded costs as required by MCL 460.10a(1). The Legislature granted the PSC broad power to determine stranded costs:

> (10) The commission shall consider the reasonableness and appropriateness of various methods to determine net stranded costs, including, but not limited to, all of the following:
>
> (a) Evaluating the relationship of market value to the net book value of generation assets and purchased power contracts.
>
> (b) Evaluating net stranded costs based on the market price of power in relation to prices assumed by the commission in prior orders.
>
> (c) Any other method the commission considers appropriate. [MCL 460.10a(10)].

The PSC adopted its staff's proposal for determining net stranded costs by using historical information. Stranded costs would be the difference between each year's revenue requirement associated with fixed generation assets, generation-related regulatory assets, and capacity payments associated with PPAs (power purchase agreements) and that year's revenues available to cover those costs. Variable costs would be excluded, as they are avoidable. Net stranded costs were defined as costs that would have been recovered under regulation that cannot be recovered under competition, offset by mitigation and stranded benefits.

Appellants object to three aspects of the PSC decision. The PSC retained a securitization credit for ROA customers that appellants believe violates the statute and provides an unreasonable subsidy, discriminating against full service customers. The PSC rejected appellants' proposal to make an adjustment for the skewing of rates, so that residential and commercial customers have equal incentive to use the ROA program. Finally, appellants assert that the PSC adopted a deferred method for recovering stranded costs that violates the statute and constitutes improper retroactive ratemaking.

Appellate review of PSC orders is narrow in scope. All rates, fares, regulations, practices and services prescribed by the PSC are deemed prima facie to be lawful and reasonable. MCL 462.25. The party attacking an order of the PSC bears the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. MCL 462.26(8). A decision of the PSC is unlawful when it involves an erroneous interpretation or application of the law and it is unreasonable when it is unsupported by the evidence. *ABATE v PSC,* 219 Mich App 653, 659; 557 NW2d 918 (1996). To the extent that the decision is based on findings of fact, the challenger must show that those findings are not supported by competent, material, and substantial evidence on the whole record. *Id.* This Court gives due deference to the administrative expertise of the PSC, and will not substitute its judgment for that of the PSC. *Id.*

I.

Along with authorizing the ROA program, the Legislature simultaneously enacted other measures to reorganize the utility industry. 2000 PA 142 allowed the PSC to issue financing orders authorizing Detroit Edison and Consumers Energy to issue securitization bonds to refinance certain qualified costs. MCL 460.10i. Qualified costs include the utility's regulatory assets plus costs the utility will not be able to recover in a competitive market, including ROA implementation costs, costs of restructuring, costs of buying out or buying down power purchase contracts, and the costs of the securitization process. MCL 460.10h(g). Appellants were authorized to collect securitization charges from their customers under financing orders. MCL 460.10h(i); MCL 460.10j. Implementation costs of the ROA program for the years before 2000 were recovered through securitization.

MCL 460.10d(1) provides for a 5% rate reduction from rates in effect for appellants on May 1, 2000. These reduced rates are frozen until December 31, 2003, unless otherwise reduced by the PSC. The rate reduction was enabled by the securitization financing of qualified costs provided for by MCL 460.10i. MCL 460.10d(6) states:

> (6) Except for savings assigned to the low-income and energy efficiency fund under subsection (7), securitization savings greater than those used to achieve the 5% rate reduction under subsection (1) shall be allocated by the commission to further rate reductions or to reduce the level of any charges authorized by the commission to recover an electric utility's stranded costs. The commission shall allocate approved securitization, transition, stranded, and other related charges and credits in a manner that does not result in a reallocation of cost responsibility among the different customer classes.

Securitization bonds are to be paid off through a securitization charge that is not bypassable. MCL 460.10k(2). A nonbypassable charge is a charge in a financing order payable by a customer to an electric utility regardless of the identity of the customer's electric generation supplier. MCL 460.10h(f). Thus, securitization charges must be paid by both full service and ROA customers.

An offsetting credit, effectively eliminating the securitization charge, was established in the previous cases involving the securitization orders. The PSC found that the credit was necessary to give both full service and ROA customers the benefit of the 5% rate reduction mandated by MCL 460.10(d)(1). The former rates were based on assets for which the securitization charge was also assessed, creating the possibility of charging twice for the same service.

The PSC noted that it had assumed in the securitization case that a transition charge would be imposed before January 1, 2002, rendering the securitization offset unnecessary. The PSC found that the determination of a transition charge, that recognized the effect of securitization on stranded costs, had yet to be made.

> Because neither utility has stranded costs at this time, the Commission has found that each is recovering all of its fixed generation costs, including the costs that

were securitized. Thus, there is no basis for requiring ROA customers to pay the securitization and tax charges without a full offset.

The PSC opinions in the securitization cases provide that full service customers will continue to receive the offset to the securitization charge until a full rate case removes the qualified securitized assets from the rate base. This case merely preserves the status quo. Appellants have failed to show a change in circumstances that has led to a violation of the Act. Although appellants expected the PSC to make changes, there is no showing that the decision of the PSC was unreasonable or unlawful. See MCL 462.26(8); *ABATE, supra* at 659.

II.

Electricity rates in Michigan are skewed to the benefit of residential customers. Consumers Energy proposed to adjust for this skewing to equalize the incentive for all customers to participate in ROA, and to balance its loss of lucrative commercial accounts with a loss of residential accounts.

MCL 460.10(2)(a) states that one of the purposes of the act is "[t]o ensure that all retail customers in this state of electric power have a choice of electric suppliers." Another purpose is to "promote financially healthy and competitive utilities in this state." MCL 460.10(2)(e). MCL 460.10a(1) requires the commission to issue orders "establishing the rates, terms, and conditions of service that allow all retail customers of an electric utility or provider to choose an alternative electric supplier..." MCL 460.10d(6) provides in part:

> The commission shall allocate approved securitization, transition, stranded, and other related charges and credits in a manner that does not result in a reallocation of cost responsibility among the different customer classes.

Rates were skewed before 2000 PA 141 was adopted. The Legislature is presumed to be aware of the prior rulings of an administrative agency when it enacts legislation. *Parker v Byron Center Public Schools Bd of Education,* 229 Mich App 565, 570; 582 NW2d 859 (1998). Had the Legislature intended to eliminate skewing, it would not have included language in the statute barring the reallocation of cost responsibility among the customer classes. Therefore, the PSC properly interpreted § 10d(6), and rejected the proposed skewing adjustment. See *ABATE, supra* at 659.

III.

MCL 460.10a(1) provides:

> No later than January 1, 2002, the commission shall issue orders establishing the rates, terms, and conditions of service that allow all retail customers of an electric utility or provider to choose an alternative electric supplier. The orders shall provide for full recovery of a utility's net stranded costs and implementation costs as determined by the commission.

Appellants read this provision as requiring the PSC to enter an order allowing them to recover all their stranded costs by January 1, 2002. The PSC made the future recovery contingent on the success of the ROA program.

The PSC is given wide power to determine stranded costs by MCL 460.10a(10). In ruling on implementation costs, the PSC stated:

> The commission rejects Consumers' and Detroit Edison's proposals to use a portion of the securitization savings to pay implementation costs. The Commission has addressed the recovery of implementation costs in prior orders, and finds no reason to change those determinations at this time. The Commission has ruled that recovery of implementation costs is conditioned upon the success of the utilities in implementing the ROA programs. July 11, 2001 order, Case No. U-12358, p. 10, and October 24, 2002 order, Case Nos. U-11955 and U-12956, p. 5. The record in this case does not provide a basis for concluding that the utilities' programs have been sufficiently successful to merit full recovery of previously reviewed implementation costs, must less costs that are at issue in pending cases or costs that have not even been incurred.
>
> The Commission reaffirms that it will permit the utilities to recover prudently incurred implementation costs as provided for in the Commission's prior orders. It expects to provide recovery at the conclusion of the rate freeze. Except for any costs that should be assigned solely to ROA customers, implementation costs will be recovered from all customers. The Commission may provide for residual securitization savings to fund all or a portion of the recovery.

The PSC held that the parties did not present sufficient record evidence to make the calculation. Appellants have not shown that this decision was erroneous. See *ABATE, supra* at 659.

Appellants argue that the PSC improperly deferred a recovery, and made it contingent on factors outside of their control. However, the methodology used by the PSC is in accord with standard utility rate determination practice.

Retroactive ratemaking in utility cases is prohibited. *Detroit Edison Co v PSC,* 416 Mich 510, 523; 331 NW2d 159 (1982). Utility rates are set on the basis of estimates of costs. When the estimates prove inaccurate, the previously set rates cannot be changed to correct the error. *Id.* The only step the PSC can take is to prospectively revise rates in order to better estimate costs. *Id.*

The reasonableness of a utility's costs cannot always be predetermined. A utility runs the risk that the PSC will determine after the fact that costs were not prudently incurred, and that a recovery will be denied. The PSC held that it would determine the prudence of implementation expenses in light of the success of the ROA program. There is no showing that this poses a greater than normal risk to the utilities.

Appellants argue that the deferral of a ruling violates § 10a(1), requiring the PSC to issue orders by January 1, 2002, providing for the full recovery of net stranded costs and implementation costs. The PSC stated:

> The Commission agrees that it is necessary to explicitly establish the stranded cost charges to be in effect as of January 1, 2002, and sets the charge at zero for both Consumers and Detroit Edison. The record shows both utilities to have stranded benefits at this time. The utilities bear the burden of proof to establish any charge greater than zero, and neither has carried that burden in this case. Rather, they have offered methodologies that the Commission finds fundamentally flawed, and have not offered data upon which to make revised calculations.

Appellants are entitled to a full recovery of their implementation costs. The PSC could reasonably conclude that the evidence presented was insufficient to support the implementation cost claim. The PSC order allows the utilities to recover appropriate costs in the future:

> The Commission reaffirms that it will permit the utilities to recover prudently incurred implementation costs as provided for in the Commission's prior orders. It expects to provide recovery at the conclusion of the rate freeze. Except for any costs that should be assigned solely to ROA customers, implementation costs will be recovered from all customers. The Commission may provide for residual securitization savings to fund all or a portion of the recovery.

The decision of the PSC was consistent with the statute, and does not constitute retroactive ratemaking. Where the evidence was insufficient to allow the PSC to accurately determine the proper amount of implementation costs and whether those costs were prudently incurred, the PSC properly deferred that determination.

Affirmed.

/s/ Peter D. O'Connell
/s/ Kathleen Jansen
/s/ Kurtis T. Wilder

APPENDIX B

S T A T E O F M I C H I G A N

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter, on the Commission's own motion, to implement the provisions of Section 10a(10) of 2000 PA 141.	))))	Case No. U-12639

At the December 20, 2001 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Laura Chappelle, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

I.

HISTORY OF PROCEEDINGS

On October 24, 2000, the Commission issued an order commencing this case to implement Section 10a(10) of 2000 PA 141 (Act 141), MCL 460.10a(10), which requires the Commission to determine the net stranded costs created by permitting customers to purchase generation services from alternative electric suppliers.

On November 27, 2000, a prehearing conference was held before Daniel E. Nickerson, Jr. (ALJ), who granted petitions for leave to intervene filed by Consumers Energy Company (Consumers), The Detroit Edison Company (Detroit Edison), the Association of Businesses Advocating Tariff Equity (ABATE), Energy Michigan, Attorney General Jennifer M. Granholm (Attorney General), the Midland Cogeneration Venture Limited Partnership (MCV), Indiana

Michigan Power Company, Northern States Power Company-Wisconsin, d/b/a Xcel Energy, Wisconsin Electric Power Company, Edison Sault Electric Company, Wisconsin Public Service Corporation, Upper Peninsula Power Company, Citizens for Power and Reliability (CPR), Unicom Energy, Inc., Alpena Power Company, the Michigan Independent Power Producers Association, CMS Marketing, Services and Trading Company, and CMS MS&T Michigan L.L.C. The Commission Staff (Staff) also participated in the case.

At the prehearing conference, the ALJ ruled that the scope of the case was to determine a methodology for determining stranded costs and not to determine the stranded costs for any particular utility. ABATE and the Attorney General appealed that ruling. On January 4, 2001, the Commission issued an order clarifying that the case was to address both the methodology for determining stranded costs and the computation of stranded costs for Consumers and Detroit Edison.

On January 19, 2001, the ALJ granted late petitions for leave to intervene filed by Dow Corning Corporation, Hemlock Semiconductor Corporation, North American Natural Resource, Inc., Genesee Power Station, L.P., Viking Energy of Lincoln, Inc., Viking Energy of McBain, Inc., Hillman Power Company, LLC, Adrian Energy Associates, LLC, Grayling Generating Station Limited Partnership, Michigan Cogeneration Systems, Inc., Sumpter Energy Associates Limited Partnership, Granger Electric Company, Riverview Energy Systems, Cadillac Renewable Energy, LLC, and Michigan Power Limited Partnership.

On July 16, 2001, the evidentiary hearing was held. The parties stipulated to bind in the testimony of all witnesses and to waive cross-examination. The record consists of 722 pages of transcript and 73 exhibits.

On August 20, 2001, Consumers, Detroit Edison, the Staff, the Attorney General, ABATE, Energy Michigan, and CPR filed briefs. On September 4, 2001, Consumers, Detroit Edison, the Staff, the Attorney General, ABATE, Energy Michigan, and the MCV filed reply briefs.

On November 8, 2001, the ALJ issued a Proposal for Decision (PFD). On November 26, 2001, the Staff, Consumers, Detroit Edison, ABATE, Energy Michigan, and CPR filed exceptions. On December 3, 2001, the Staff, Consumers, Detroit Edison, Energy Michigan, CPR, and the Attorney General filed replies to exceptions. ABATE filed its replies a day late.

II.

PROPOSED METHODOLOGIES

Consumers

Consumers proposed that the Commission compute net stranded costs using the methodology adopted in Case No. U-11290, updated with more current forecasts of load, retail open access (ROA) participation, and market prices. Consumers proposed to calculate the annual revenue requirement associated with generation-related regulatory assets, nuclear plant capital costs, and above-market contract capacity costs of power purchase agreements (PPA). The transition charge set in Case No. U-11290 would be adjusted to reflect the difference between the actual market price for the year and the market price assumed in Case No. U-11290. For 2002, Consumers calculated a stranded cost transition charge of 0.88¢ per kilowatt-hour (kWh) for all ROA sales.

Detroit Edison

Detroit Edison proposed that the Commission compute net stranded costs on the basis of the economic harm it experiences from the loss of generation revenues when customers take service from alternative electric suppliers. It proposed to measure the harm as the difference between the

full service generation rate and the market price at which it sells the power. It acknowledged that there would be a net economic benefit if it sells the power in the wholesale market at a price above the full service generation rate. It proposed to calculate the net harm or benefit for each customer class month-by-month, and proposed a 10% deadband within which it would absorb the economic harm and retain the economic benefit, up to $25 million in economic harm per year. For 2002, Detroit Edison proposed a stranded cost transition charge of zero. For 2003, it proposed that the charge to be calculated on the basis of the actual harm or benefit experienced in 2002.

Staff

The Staff proposed that the Commission annually compute net stranded costs on a historical basis. Stranded costs would be the difference between each year's revenue requirement associated with fixed generation assets, generation-related regulatory assets, and capacity payments associated with PPAs and that year's revenues available to cover those costs. In calculating the revenue requirement, it excluded variable costs because those can be avoided when customers take service from alternative electric suppliers. In calculating revenues available to cover fixed generation costs, it included the generation component of current rates and net revenues from third-party sales. The Staff used cost of service studies from Consumers' and Detroit Edison's most recent rate cases, with test years of 1993 and 1994, respectively, to estimate the portion of rates that covers fixed generation costs. When the revenue requirement for a specific year exceeds the revenues available to cover those costs, the utility has stranded costs for that year. For Consumers in 2000, the Staff calculated negative stranded costs (or stranded benefits) of $97 million. For Detroit Edison in 2000, it calculated negative stranded costs (or stranded benefits) of $320 million. The Staff recognized that there would be a delay in the recovery of stranded costs

due to the historical nature of its methodology, although it did not intend for the delay to inhibit the utilities' ability to recover any costs that could be shown to be stranded.

ABATE

ABATE proposed that the Commission compute net stranded costs as the difference between the market value of the utilities' generating assets and the book value of those assets. It used the discounted cash flow methodology and the comparable asset sale approach to determine the market value of the assets. Under both approaches, it concluded that Consumers and Detroit Edison have net stranded benefits. For Consumers, ABATE calculated stranded benefits of $31 million without Palisades. For Detroit Edison, it calculated stranded benefits of $3.1 billion excluding Fermi 2 and $760 million including Fermi 2. It recommended that the Commission approve a stranded benefit credit of 4.18 mills per kWh for all of Detroit Edison's ROA customers.

Energy Michigan

Energy Michigan argued that stranded costs can occur only if current utility sales are less than the sales level used in the utility's last rate case and current revenues associated with generation assets are less than the revenue requirement established for fixed generation assets in the last rate case. When there are stranded costs, it proposed that the Commission compute net stranded costs as the difference between the generation revenue requirement from the last rate case and current generation revenues collected from full service customers, plus revenue from sales of wholesale power and any stranded benefits created when customers choose an alternative supplier. Energy Michigan concluded that neither Consumers nor Detroit Edison had any stranded costs in 2002 and 2003 because sales in 2000 and 2001 exceeded the sales levels used in the last rate cases.

Attorney General

The Attorney General did not propose a specific stranded cost methodology. Rather, the Attorney General urged the Commission to consider all generation assets and PPAs, not just those evaluated in previous stranded cost recovery cases. The Attorney General recommended that stranded benefits be included in the calculation of the net stranded cost and be allocated to all customers. The Attorney General proposed to defer the credits and to amortize them after the rate freeze ends.

CPR

CPR did not advocate a specific methodology for determining stranded costs. Instead, it argued, based on its members' experience in the marketplace, that the utilities have stranded benefits that enabled them to recover their costs and substantial profits while charging rates that are below the rates that other suppliers can offer.

III.

DISCUSSION

Methodology

MCL 460.10a(1) provides as follows:

> No later than January 1, 2002, the commission shall issue orders establishing the rates, terms, and conditions of service that allow all retail customers of an electric utility or provider to choose an alternative electric supplier. The orders shall provide for full recovery of a utility's net stranded costs and implementation costs as determined by the commission.

With respect to the determination of net stranded costs, Act 141 provides as follows:

> The commission shall consider the reasonableness and appropriateness of various methods to determine net stranded costs, including, but not limited to, all of the following:

(a) Evaluating the relationship of market value to the net book value of generation assets and purchased power contracts.

(b) Evaluating net stranded costs based on the market price of power in relation to prices assumed by the commission in prior orders.

(c) Any other method the commission considers appropriate.

MCL 460.10a(10).

The ALJ concluded that the statute provides the Commission with almost complete latitude in determining stranded costs, provided that the costs are netted and the utilities are afforded full recovery of their stranded costs and implementation costs. He recognized that the Commission must strike a balance among the purposes of the act, which include providing full recovery of stranded costs and implementation costs, ensuring safe and reliable power at reasonable rates, and promoting financially healthy and competitive utilities. He concluded that the conflict among the purposes of Act 141 significantly narrowed the choice of methodologies. Further, he concluded that a definition of net stranded costs helped in resolving the issue, and adopted the definition from Case No. U-11290: "costs incurred during the regulated era that will be above market prices and those costs necessary to facilitate the transition to competitive markets." June 5, 1997 order, Case No. U-11290, p. 7.

Among the competing proposals, the ALJ found the Staff's methodology to be the most fair and reasonable, although he recommended several modifications. He said that the Staff's approach determined stranded costs when the costs were in fact stranded and correctly required the Commission to review all of the utilities' generating facilities. The ALJ rejected the argument that the methodology would result in protracted litigation and controversial true-up cases each year.

Consumers excepts to the ALJ's failure to recommend that the Commission reaffirm the methodology approved in Case No. U-11290. It says that the Legislature ratified that stranded cost methodology when it provided, in MCL 460.10a(5), that the "orders issued by the

commission before the effective date of . . . this section . . ., including orders that determine and authorize recovery of net stranded costs and implementation costs . . ., are in compliance with this act and enforceable by the commission." Because it says that its proposal is the same as previously approved and is the only approach that has been legislatively approved, its proposal has a clear advantage over all other proposals. It says that, as intended by the Commission when it first adopted this methodology, netting occurs because the market clearing price adjustment captures the full market value of all of the generation that is available to be marketed when customers switch to ROA service.

Consumers also argues that the Staff's methodology, even if modified as recommended by the ALJ, is still a second-best solution. It says that the Staff's methodology has a fundamental flaw in that it computes stranded costs independent of the amount of ROA load and market prices, which it says casts great doubt on the reasonableness of the proposal. On the other hand, it acknowledges that the ALJ's recommendation may be the closest thing to a compromise that is possible, and says that his recommendation would represent a workable approach if further modified.

Detroit Edison excepts to the ALJ's failure to adopt its methodology. It says that its proposal properly determines stranded costs when the costs are stranded, as the ALJ said was necessary, and calculates net stranded benefits or costs based on actual, verifiable data. It says that its methodology is economically sound and could be universally applied, but also suggests that the Commission could use different methodologies for different utilities to assure full recovery of stranded costs.

Detroit Edison criticizes the other proposals as result-driven. It says that most of the intervenors would have the Commission disregard the crucial goals of ensuring safe and reliable power at reasonable rates and maintaining healthy and competitive utilities. Detroit Edison

criticizes the Staff's methodology as inconsistent with Act 141 in failing to isolate the direct effects of ROA sales and failing to recognize that an increase in ROA sales causes a decrease in revenues needed to cover the utility's costs. It says that the Staff's proposal unreasonably takes part of the benefit of market rates that are above full service rates to mitigate stranded costs, while leaving all of the risk of market rates below full service rates with the utility. It says that there is nothing in Act 141 that was intended to change the longstanding practice of permitting utilities to use new revenues to offset cost increases. Detroit Edison also criticizes the Staff's proposal because it uses a 1992 estimate of Detroit Edison's cost of service for 1994 and ignores changes in plant investment, operating expenses, and fuel costs. Finally, Detroit Edison says that there are errors in the Staff's calculations.

ABATE excepts to the ALJ's rejection of its proposal. It says that it proposed to determine net stranded cost by comparing the market value of utility assets to the book value of those assets, as permitted by Section 10a(10)(a). It says that its methodology is the best supported on the record and should therefore be adopted. It also says that its proposal, unlike the Staff's, promotes certainty about rates, which it says is important to the development of competition. It says that recalculating stranded costs each year for anything other than changes in sales, as the Staff's methodology requires, makes it extremely difficult for customers to evaluate potential contracts with alternative suppliers because they do not know what the utilities' rates will be over the term of the contract.

ABATE also criticizes the Staff's methodology as so vague that it should not be adopted, even if modified as recommended by the ALJ. It notes that the ALJ recommended that the Commission use more current cost of service data when available, but says that there are no more current data on the record to support either a choice of methodology or a calculation. Further, it says that the

Staff acknowledged that some of the information that was necessary for its analysis was not available, that some items in the regulatory asset category were not components of the cost of service studies in the last rate cases, and that factors had changed since those studies were completed. ABATE says that even if more accurate information could be obtained, the Staff's proposed methodology is subject to abuse because any cost of service study requires decisions about the proper allocation of costs. It says that for the Commission to even consider the Staff's methodology as a reasonable alternative to its own proposal, there would have to be a fully litigated case to establish the proper allocation of costs.

The Commission finds that it should adopt the Staff's proposed methodology for determining net stranded costs. The Staff has proposed the most direct approach to determining net stranded costs, i.e., costs that would have been recovered under regulation that cannot be recovered under competition, offset by mitigation (such as market sales of capacity and energy that are freed up when customers choose alternative suppliers) and stranded benefits (such as generation assets with below-market costs). The Staff's proposal also has the advantage of using the same approach for both utilities.

The Staff's approach does not require annual rate cases or cost of service studies. The amount of revenues in current rates to cover fixed generation costs can be based on data from prior cases. The Staff's approach does not violate the prohibition against retroactive ratemaking. As in traditional ratemaking, it relies upon data from a historical period to compute a charge that will be assessed prospectively. The Staff's proposal does not violate the rate freeze because it does not change any of the rates that have been frozen. The Staff's approach does not reduce the amount the utilities may earn from third-party sales, although it reasonably requires that the utilities use those sales to mitigate their stranded costs.

The Commission need not adopt Consumers' proposal merely because it approved that methodology in Case No. U-11290. Consumers cannot square its argument that Act 141 requires the Commission to use that methodology with MCL 460.10a(10), which permits the Commission to consider other approaches. Having looked at alternatives, the Commission now concludes that the approach approved in Case No. U-11290 is not preferable to the Staff's proposal in this case. One flaw with the prior approach is that it fails to account adequately for generation assets with below-market costs. The assumption that those plants would have costs equal to the market price by the end of the transition period may no longer be warranted. Consumers seems to concede as much at page 17 of its reply brief, where it says that if it were to divest its generating units or were to sell the power on the market, "the only way it could continue to meet its regulated obligation to serve would be to replace that power from different sources, presumably at market prices that are likely to be higher than regulated prices." Consumers asserts that its approach results in netting, although it is not apparent that it does so under all likely scenarios

The Commission rejects Detroit Edison's proposal because it measures lost revenues rather than stranded costs. The essential difference between the Staff's methodology and Detroit Edison's is that the Staff's approach asks whether Detroit Edison is recovering, in the aggregate, the fixed costs of its generation assets. Detroit Edison's approach asks whether the utility is recovering, for each kilowatt-hour of ROA sales, the same contribution to the fixed costs of its generation assets as it recovers from full service sales. As Energy Michigan points out, even as full service sales increase, Detroit Edison's approach, under most circumstances, results in all ROA sales creating stranded costs, regardless of whether Detroit Edison has stranded generation assets. Detroit Edison's approach will produce a finding of stranded costs unless there are no ROA sales or the market price of power is above the full service price of generation, regardless of

the aggregate amount of stranded costs. As the Staff argues, Detroit Edison seems to want to ensure that it remains in at least the same financial condition after the introduction of competition.

The Commission rejects the other parties' proposals as well. ABATE's discounted cash flow analysis depends on myriad inputs and assumptions, many of which are subject to volatility and uncertainty and are inconsistent with actual data. The comparable sales approach is based on limited data and does not account for the effects of the utilities' rates being frozen and customers' having the right to return to full service. With rates frozen and the utilities obligated to provide full service at regulated rates, the utilities cannot realize the market value that ABATE calculates by selling the plants at market prices or by selling the electricity generated at market rates. At a minimum, the utilities would have to enter into contracts to purchase power at rates that would permit them to recover the costs embedded in the frozen rates or expose themselves to the same price squeeze that utilities in California faced. Further, despite the uncertainty and volatility underlying its calculations, ABATE seeks to determine stranded costs, on a one-time basis, and to credit those amounts to ROA customers. It bears noting that its witnesses' firm previously estimated the value of Detroit Edison's generation assets to be $2.4 billion and now estimates a value of $5.4 billion. 7 Tr. 339-340. Energy Michigan's approach suffers from a lack of specificity, and Energy Michigan now conditionally supports the Staff's proposal, which is similar to its own.

Proposed Modifications

Although the ALJ recommended that the Commission adopt the Staff's methodology, he concluded that changes were required.

a. Updated Data

The ALJ concluded that the Staff's approach was flawed in its reliance on data that was not current. He recommended that the Commission use more current cost of service studies when they are available.

The Staff excepts, and argues that the modification is inconsistent with the methodology. It says that the cost of service studies from the last rate cases were used because the purpose of the analysis was to determine the amount of fixed generation costs embedded in the rates that customers are currently paying. It argues that the fact that those rates were approved years ago does not change the fact that customers are currently paying those rates, and hence, the cost of service studies used in setting those rates determine the amount that those rates contribute to fixed costs.

Energy Michigan excepts, and argues that there is no evidence that any more recent data are available that could or should be used.

In its replies to exceptions, Consumers says that the February 5, 1996 order in Case No. U-10685, its last rate case, indicates that the Commission used a 1996 projected cost of service study rather than the 1993 study that the Staff relied upon in this case. February 5, 1996 order, Case No. U-10685, pp. 5-6. It also argues that actual PPA costs for 2000 are not reflected in its current rates because its power supply costs have been frozen at 1997 levels. It says that the Staff also double counted a portion of its PPA costs. In a footnote in its exceptions, it had raised this claim less clearly, and alleged that the Staff should have calculated net stranded costs of $25 million. It now calculates net stranded costs of $54 million. If the Commission adopts the Staff's methodology, it says that the Commission must provide an opportunity to correctly calculate its stranded costs.

In its replies to exceptions, Detroit Edison also argues that the rates set in Case No. U-10102, its last rate case, reflected an updated cost of service study, not the study that the Staff relied upon in this case.

The Commission agrees with the Staff that the modification is not consistent with its methodology. On the other hand, some adjustment to the data from the last rate case might be appropriate, and the actual studies that were used in those cases should be used in calculating net stranded costs. The difficulty is that both utilities seek, at this very late stage of the case, to offer argument and data that should have been offered on the record and in their briefs. Given the procedural status of the case, the relatively low level of ROA participation at this time, and abundant reason to conclude from the record that neither utility has stranded costs in 2000, the Commission defers the issues of refining the methodology, and recalculating net stranded costs for 2000, to the case where the transition charges for 2001 will be calculated. This is a further demonstration that this is an evolving process, and checks should not be written for refunds at this time.

b. Increased Sales

The ALJ concluded that the utilities should be allowed, as in the past, to retain the margin (revenue less cost) from increased sales to fund the investment required to serve those increased sales, to provide financial incentives to do so, and to offset the effects of inflation. The ALJ therefore recommended that there be a mechanism to segregate the revenues that result from well-managed business endeavors. He recognized that this would complicate the calculation of net stranded costs and the annual true-up cases. However, he found that this modification was essential to promote financially healthy and competitive utilities.

The Staff excepts, and argues that the modification is actually a repudiation of its methodology. It argues that if sales to new customers and increased sales to existing customers are

ignored, the utilities can claim that they have stranded costs even when they recover all of their costs. It says that there cannot be stranded costs if new sales replace sales that are lost to customers who choose to take ROA service.

Energy Michigan excepts, and notes that, from 1997 through 2000, Consumers' sales increased by 7% and Detroit Edison's by 11%. Exhibit I-66. It says that if revenues from increased sales are excluded, stranded costs will be unreasonably increased. It notes that when sales increase, costs and revenues also increase, but that if the Staff methodology is modified, cost increases will not be matched by revenue increases.

ABATE excepts, and argues that this modification discriminates against customers. It says that actual sales are used to calculate the securitization charges and actual sales should likewise be used to determine stranded costs. Further, it says that there is nothing in the record that would support the ALJ's conclusion that this modification is necessary to protect the financial health of the utilities. It also notes that Consumers and Detroit Edison have not engaged in any recent construction, and asserts that encouraging utilities to construct new generating capacity by allowing them to remove from the calculation of stranded costs the margins that result from increased sales is inconsistent with the purpose of Act 141 to encourage the construction of merchant power plants.

Detroit Edison excepts to the ALJ's failure to specify the mechanism for making this adjustment.

The Commission agrees with the Staff that the modification is not consistent with its methodology. If the utilities recover all of their fixed generation costs, they do not have stranded costs that they need to recover. For this purpose, it does not matter whether they recover costs that might otherwise be stranded from existing or new customers, from increased sales to existing

customers, or from sales to third parties. If they recover all of their costs, they do not have stranded costs. There is nothing in Act 141 that requires a contrary conclusion, particularly when there is no evidence that either utility's financial health has been impaired. Furthermore, the combined utilities have enjoyed the benefits of billions of dollars from securitization that makes them whole for recovery of the securitized assets.

c. Variable Costs

The ALJ concluded that it was necessary to include "all-in" generation costs (all fixed and variable costs) when computing net stranded costs because the fixed and variable components change over time. He recommended that an accurate split be made between fixed and variable costs, and found Consumers' approach in Exhibits CE-4, CE-5, and CE-6 to be a well-reasoned and practical solution.

The Staff excepts, and argues that the ALJ's recommendation amounts to a rejection of the Staff's proposal. It argues that the ALJ's acceptance of Consumers' approach amounts to approval of a variation on Detroit Edison's approach, which the ALJ had rejected. It says that the flaw in those approaches is that they equate stranded costs to the difference between the full service cost of generation and the market price without providing an offset for the benefits of sales growth and third-party sales.

Energy Michigan and ABATE except to the ALJ's recommendation as incompatible with the Staff's proposal and illogical in including variable costs in the calculation. They say that, with this modification, the transition charge plus the market price always equals the utility's cost of production, and customers would not choose ROA service because there would be no savings. Further, they say that the modification permits the recovery of costs that are not stranded because it

includes variable costs that can be avoided and the costs of short-term purchases that can be foregone.

The Commission agrees with the Staff that the recommended modification is inconsistent with its methodology. Variable costs are avoidable, and thus not stranded. Likewise, contracts for the purchase of unneeded capacity and energy are avoidable, and thus not stranded. Furthermore, the modification would result in a methodology that would likely defeat the introduction of competition. The result of the modification would be to effectively equate the utilities' costs to the sum of the market price and the transition charge, which would eliminate any incentive for customers to consider ROA service, unless they can find a source of supply at less than the market price. This is hardly a prescription for a successful ROA program.

d. Other Modifications

Detroit Edison excepts to the ALJ's failure to address what it sees as shortcomings in the Staff's proposal. In particular, it says that the ALJ failed to correct the inclusion of the effects of securitization in the Staff's determination of the company's cost of capital and the recognition of revenues from sales to third parties. It says that the issuance of the securitization bonds resulted in a rate decrease for all customers. It says that further reducing the company's rates to capture the effect of this financing, as the Staff proposes, amounts to double counting the same benefit. It also argues that because its frozen rates include a frozen power supply cost recovery (PSCR) factor, and that frozen PSCR factor includes a credit for the third-party sales, its rates already reflect a credit for third-party sales.

The Commission finds that it should make one of the changes that Detroit Edison requests. The updated rate of return should not be used because it reflects changes that occurred after 2000, the year for which the calculation of stranded costs is being made. On the other hand, it is not

likely that the Staff has significantly double-counted revenues from third-party sales. Although the frozen PSCR factor includes some amount for those sales, the revenues from third-party sales can be expected to increase as customers choose ROA service and the utilities sell the freed-up capacity and energy on the market. More important, Detroit Edison could have offered evidence on the record to support its position, but did not.

Calculation of Stranded Costs and Setting the Charge

The ALJ noted that the Staff recommended that the net stranded cost or benefit be rolled over to the next year. He found that the Staff's proposal was reasonable, and he therefore did not calculate any net stranded cost or benefit for 2002 and did not specify a transition charge for 2002, which had the effect of recommending a charge of zero.

Energy Michigan excepts to the ALJ's failure to adopt the Staff's stranded benefit calculations. It also excepts to his failure to recommend that the Commission implement a zero transition charge for 2002 and carry forward the stranded benefits to offset any future stranded costs. It notes that no one advocated a transition charge above zero for Detroit Edison in 2002. As for Consumers, it argues that all parties, except Consumers, advocated a transition charge of zero or less. Because it argues that Consumers' approach does not comply with Act 141, it asks that the Commission adopt a zero charge for Consumers in 2002 as well.

ABATE excepts to the ALJ's failure to calculate the stranded benefit. It also excepts to the ALJ's recommendations that there not be a negative transition charge in 2002 and that the net stranded benefit be rolled over.

CPR excepts to the ALJ's failure to establish stranded cost credits. It says that the Commission should quantify once and for all the utilities' stranded benefits and establish credits to allow ratepayers to recover those benefits, with annual true-up proceedings to reflect changes in sales. It

argues that MCL 460.10a(1) establishes January 1, 2002 as the deadline for setting the charges and does not permit the Commission to issue orders annually addressing net stranded costs on a year-to-year basis. It argues that setting the stranded cost transition charges once and for all would provide customers with more certainty about future energy costs and would avoid the time, expense, and controversy inherent in annual reassessments of stranded costs. In the alternative, if the Commission decides that there should be annual proceedings, it proposes that the Commission apply the credit due for 2002 in 2002 rather than roll it over.

In its exceptions, Consumers says that the Staff's methodology is deficient in that it defers recovery of the current year's stranded costs. It says that this can result in stranded costs being paid by customers different from those responsible for the costs and makes it more difficult to predict the likely stranded cost charge in the future. It argues that the Legislature did not intend the Commission to adopt a stranded cost methodology that deferred collection of the current year's stranded costs and did not intend the true-up mechanism to do more than adjust past collections to reflect actual results. Consumers therefore argues that the Staff's methodology should be modified to provide for the development of a surcharge based upon estimated stranded costs, with a subsequent true-up to reconcile the transition charge based on actual levels of ROA participation and actual market prices. Further, Consumers says that if the Commission decides to use the Staff's approach, it must recognize the accounting issues that would be presented. It asserts that to avoid impairing utility earnings, the stranded cost formula must be stated clearly enough that calculations can readily be made, and there must be a clear commitment to permit recovery of the amounts produced by those calculations.

The Commission agrees that it is necessary to explicitly establish the stranded cost charges to be in effect as of January 1, 2002, and sets the charge at zero for both Consumers and Detroit

Edison. The record shows both utilities to have stranded benefits at this time. The utilities bear the burden of proof to establish any charge greater than zero, and neither has carried that burden in this case. Rather, they have offered methodologies that the Commission finds fundamentally flawed, and have not offered data upon which to make revised calculations. Furthermore, Detroit Edison has requested that the Commission approve a charge of zero for 2002 in any event. The utilities are free to offer and support adjustments, consistent with the methodology adopted in this order, for calculating the stranded cost charges or credits for 2001.

The Commission acknowledges that the Staff's methodology does not seek to estimate 2002 stranded costs for recovery in 2002, but rather calculates stranded costs for 2000 and provides for recovery in 2002, subject to a reconciliation in 2003 pursuant to MCL 460.10a(9). By not seeking to estimate 2002 stranded costs, the calculation is made less complex. By providing for a reconciliation, the methodology assures that the utilities will collect the amount calculated. The result may be, to some extent, that stranded costs will be paid by customers different from those responsible for the costs. In light of the advantages of the Staff's methodology, that is not a reason to adopt another methodology. MCL 460.10a(10) requires the Commission to consider the "reasonableness and appropriateness" of alternative net stranded cost methodologies. In the context of the gas cost recovery mechanism, the Court of Appeals upheld the Commission's choice of a refund methodology because it was reasonable. The Court held that the statute did not require the Commission to adopt the most precise methodology because it was appropriate for the Commission to consider other consequences of a more precise approach. Attorney General v Public Service Comm, 215 Mich App 356, 369-370; 546 NW2d 266 (1996). To ensure recovery of plant that is in fact stranded as mandated by Act 141 and so as not to have an adverse effect on the financial books of the companies, the Commission authorizes Consumers and Detroit Edison to

use deferred accounting to recognize future recovery of plant determined to be stranded by application of the Staff's methodology.

The Commission recognizes that not setting the transition charges once and for all leaves uncertainty about future rates. The Commission would only point out that certainty is not possible when customers evaluate the choices made available under Act 141. The transition charges, implementation costs, utility rates after the rate freeze, and future market prices, among other things, are all subject to more or less uncertainty. The risks associated with permanently setting the transition charges at the wrong level are not warranted in light of the uncertainties that customers will face anyway and the benefits of being able to adjust the charges as circumstances warrant. In reaching that conclusion, the Commission rejects the argument that Act 141 requires that the charges be unchangeable after January 1, 2002. Rather, it concludes that Act 141 requires only that the methodology be established and that the charges be established for 2002.

The Commission also rejects the arguments that it should set the transition charges at a negative amount so as to credit to ROA customers the stranded benefits that result from the Staff's calculations. It is not necessary to establish a negative charge to accomplish the competitive purposes of Act 141. Furthermore, because rates are frozen, granting a credit to ROA customers when a credit cannot be granted to full service customers would create an inducement to choose ROA service that is not based on competitive market conditions. In addition, there is no assurance that the methodology will not yield a finding of stranded costs in a later evaluation. It would be poor policy, not required by Act 141, and inconsistent with the principle of gradualism in rate-making to establish credits now only to later impose charges. Finally, the Commission believes that there are other legal and policy issues about the granting of credits to customers and the roll-over of the stranded benefits to later years that the parties should address in greater detail in future

proceedings. The Commission thus concludes, to preserve the issues for further consideration, that the net stranded benefits calculated by the Staff for 2000 should be rolled over to the 2001 calculation, and should not be credited to customers at this time. Proponents of any alternative method would inject unnecessary volatility into Michigan's infant market.

Offset for Securitization and Tax Charges and Rate Reduction Equalization

Energy Michigan, ABATE, and CPR except to the ALJ's failure to address their proposals that the Commission continue to offset fully the securitization and tax charges with a credit and continue to grant ROA customers the same rate reductions that other customers have received under Act 141.

Consumers' and Detroit Edison's full service and ROA customers pay securitization and tax charges for each kilowatt-hour of energy. In approving those charges, the Commission ruled that the charges would be offset by an equal credit and that the rate reductions that securitization produced for full service customers would also be granted to ROA customers through a credit. October 24, 2000 order, Case No. U-12505 (Consumers' securitization case), p. 42 (securitization offset) and pp. 43-44 (rate reduction equalization); November 2, 2000 order, Case No. U-12478 (Detroit Edison's securitization case), p. 29 (securitization offset), pp. 32-33 (rate reduction equalization). The net effect of securitization was thus the same for full service and ROA customers. In its prior orders, the Commission assumed that this case would establish a transition charge before January 1, 2002 that would recognize the effect of securitization on stranded costs and render the securitization offset unnecessary. January 4, 2001 order, Case No. U-12505, p. 7; January 4, 2001 order, Case No. U-12478, p. 7.

Energy Michigan says that if the Commission continues these two adjustments, it can support the Staff's methodology for calculating stranded costs. It argues that the offset for the

securitization and tax charges does not require a funding source because when fixed generation revenues are adequate to pay all fixed generation costs, including securitization bond and tax charges, as implied by the finding that there are no stranded costs, collecting the securitization and tax charges from ROA customers without the offset would give the utilities surplus revenues. It argues that the rate reduction equalization can be funded with the negative stranded costs and Consumers' and Detroit Edison's residual securitization savings.

CPR says that if the Commission decides not to establish final transition charges in this case that reflect the value of the credits that offset the securitization and tax charges, the Commission must extend the credits. It says that the offsetting credits should be larger than the securitization and tax charges because securitization reduced the utilities' costs, as the utilities have represented and as common sense suggests. Further, it notes that the Commission lacked statutory authority to approve securitization unless there were net benefits to customers. Thus, it argues that ratepayers, including ROA customers, are entitled to a credit that more than offsets the securitization and tax charges. At a minimum, it argues that the Commission must extend the existing credits.

ABATE recommends that the Commission establish an offset to the securitization charges so as not to severely impede the development of a competitive electric utility market. ABATE asserts that the stranded benefit credit for ROA customers should be larger than the securitization and tax charges. If the Commission is unwilling to implement that larger credit, ABATE recommends that the Commission implement a credit that is equal to the securitization and tax charges.

In its replies to exceptions, Detroit Edison opposes the continuation of both the securitization offset and the rate reduction equalization. In support, it quotes its petition for rehearing in Case No. U-12478:

> The reduction in revenue requirement resulting from the securitization of qualified costs is what enables Edison to reduce all bundled rates by the

> 5% approved in the Order. This reduction in revenue requirement will be reflected in the determination of net stranded cost and will ultimately flow through as a reduction to the transition charge for choice customers.
>
> Therefore, once the transition charge is established, choice customers will receive an equal benefit from securitization to that which they would have received had they remained bundled customers. Once the transition charge is established reflecting that reduction, the equalization adjustment will no longer be necessary and will either be set to zero or eliminated. This interpretation is essential to Edison's acceptance of the Commission's November 2, 2000 financing order.

Detroit Edison's November 22, 2000 petition for rehearing, Case No. U-12478, p. 9. It says that the Commission approved Detroit Edison's interpretation, and made all of the terms of the order irrevocable. January 4, 2001 order, Case No. U-12478, pp. 6, 8-9. It therefore asserts that the Commission may not continue the securitization offset and rate reduction equalization.

Detroit Edison has argued that the Commission cannot lawfully continue the offset for the securitization and tax charges and the rate reduction equalization because the Commission irrevocably committed to end them as of January 1, 2002. However, that commitment depends on a finding that the transition charge fully reflects the effects of securitization and gives ROA customers at least the same benefits as full service customers receive from securitization. Detroit Edison has not offered any computation that would demonstrate that to be the case, much less documentation consistent with the methodology approved in this order. Instead, it bases its claim on a comparison of its proposed transition charge and the charge approved in Case No. U-11290, which was based on very preliminary and highly qualified estimates and a different methodology. Moreover, the Commission's commitment, at least with regard to securtization and tax charges, was dependent on the Commission's determination of a transition charge that recognized the effect of securitization on "total stranded costs," a determination that has yet to be made.

Nonetheless, the Commission need not continue the operation of the rate reduction equalization adjustment and the securitization and tax offset in the present form. Section 10d(5) of Act 41 allows the Commission to use securitization proceeds not specifically allocated to other purposes "to further rate reductions or to reduce the level of any charges authorized by the commission to recover an electric utility's stranded costs."

The Commission intended in its order on rehearing in Cases Nos. U-12478 and U-12505 to incorporate into the transition charge, from Janurary 1, 2002 forward, whatever offsets were necessary to keep ROA customers on an equal footing with bundled customers. Since we have determined that the transition charge for both Consumers and Detroit Edison is zero, we will do so by use of a Section 10d(5) adjustment to the transition charge. Since the finding in this order establishing a transition charge is predicated on the use of 2000 actual experience, which did not include the effects of securitization, this adjustment will only be applied until the transition charge for both companies is revisited in the next stranded cost proceeding. The adjustment will encompass both the securitization and tax charge offset and the rate reduction equalization previously ordered for the period preceding January 1, 2002.

The Commission finds that there is nothing about the recovery of stranded costs that changes the policy goal in the prior orders to treat ROA and full service customers on an equal basis. At least with respect to the securitization and tax charges, Consumers recognizes this fact because it has agreed that ROA customers should receive an offset for the securitization charges. 7 Tr. 177. In the absence of a clear showing that the calculation of the transition charges gives ROA customers the same benefits from securitization as full service customers, the offset and equalization adjustment should continue for now. Thus, ROA customers will be treated the same as full service customers after January 1, 2002, just as they were before that date.

The Commission declines to address the issue that CPR raised in its replies to exceptions, where it requests that the Commission rule that Consumers' special contract customers are entitled to the offset for securitization and tax charges. To the extent that there may be a dispute about whether the Commission's prior orders resolve the question, it is improper for CPR to raise an issue that is unrelated to the calculation of net stranded costs and to do so at this late stage of the case.

The Commission concludes that the Section 10d(5) adjustment, at least insofar as it incorporates the securitization and tax charge offset, does not require a funding source. Because neither utility has stranded costs at this time, the Commission has found that each is recovering all of its fixed generation costs, which includes the costs that were securitized. Thus, there is no basis for requiring ROA customers to pay the securitization and tax charges without a full offset. The portion of the Section 10d(5) adjustment that encompasses the previous rate equalization adjustment should be funded to the extent possible by proceeds securitization not specifically allocated for other purposes, as provided by Section 10d(5).

Residual Securitization Savings and Accounting Authority

Detroit Edison excepts to the ALJ's failure to address issues related to the recovery of ROA implementation costs, the use of residual savings from securitization, and the accounting for the economic harm or benefit for 2002. It says that the Commission must rule on the company's proposals because these matters must be decided by January 1, 2002 pursuant to MCL 460.10a(1). Detroit Edison proposes to recover the implementation costs for 2000 by using the residual savings associated with the issuance of the company's securitization bonds. It acknowledges that the details and accounting for those costs are presently under review in Case No. U-12892, but says that its proposal complies with the statutory requirement that it recover the costs and also reduces

the transition charge without causing any retail customers to incur additional charges to implement retail access through 2000. In addition, Detroit Edison says that it will be able to use additional residual savings to recover post-2000 regulatory assets as well as other categories of stranded costs previously approved by the Commission. If the residual savings are not sufficient to cover those costs, it proposes to seek recovery consistent with the expiration of the rate freeze. Finally, Detroit Edison requests accounting authority to record the net economic harm or benefit in 2002 and 2003 as regulatory assets for future rate recovery.

Energy Michigan excepts to the ALJ's failure to address its proposal to use securitization savings to fund transition charge reductions and rate equalization reductions rather than to pay implementation costs. It argues that the proposal to use securitization savings to pay implementation costs is inconsistent with the Commission's prior orders. It also notes that the Commission has already stated that recovery of implementation costs is conditioned upon the success of the utilities in implementing ROA programs, and argues that recent Staff audits of both Consumers and Detroit Edison have concluded that neither program is functional. It thus argues that approval to recover the implementation costs should be denied at this time. It also says that the Commission should be aware that, at some future date, the utilities may have stranded costs that would justify positive transition charges and that the residual securitization savings could be used to offset any future transition charges.

ABATE excepts to the ALJ's failure to address its recommendation that all of Detroit Edison's residual securitization savings be returned to retail customers. ABATE notes that it recommended that there be a credit equal to the stranded costs, so that the only remaining use of the residual securitization savings under Act 141 would be to reduce rates further. ABATE recommends that the Commission require Detroit Edison to separately account for any residual

securitization savings and to accrue an annual carrying charge equal to its weighted cost of capital until rates are reduced.

In its replies to exceptions, Consumers indicates its understanding that, to the extent the savings already allocated to reduce transition charges exceed the amount of stranded costs, the balance would be applied toward recovery of implementation costs.

The Commission has addressed, consistent with MCL 460.10d(5), the uses of the residual securitization savings in prior orders, and finds no reason to change those determinations at this time. Act 141 provides that securitization savings beyond those needed to fund the 5% residential rate reduction and the low-income and energy efficiency fund may be used for "further rate reductions or to reduce the level of any charges authorized by the Commission to recover an electric utility's stranded costs." MCL 460.10d(5). The Commission has ordered Consumers to use 50% of the savings to reduce distribution charges for non-residential customers and 50% to reduce the transition charge imposed on ROA customers. October 24, 2000 order, Case No. U-12505, p. 32. The Commission has ordered Detroit Edison to use residual securitization savings to reduce transition charges. November 2, 2000 order, Case No. U-12478, p. 25. As discussed above, the utilities may use a portion of the residual savings, or the net stranded benefits, to fund the rate equalization adjustment. The Commission will address the use of any additional residual savings to fund further reductions in transition charges at a later time.

The Commission rejects Consumers' and Detroit Edison's proposals to use a portion of the securitization savings to pay implementation costs. The Commission has addressed the recovery of implementation costs in prior orders, and finds no reason to change those determinations at this time. The Commission has ruled that recovery of implementation costs is conditioned upon the success of the utilities in implementing the ROA programs. July 11, 2001 order, Case

No. U-12358, p. 10, and October 24, 2000 order, Cases Nos. U-11955 and U-12956, p. 5. The record in this case does not provide a basis for concluding that the utilities' programs have been sufficiently successful to merit full recovery of previously reviewed implementation costs, much less costs that are at issue in pending cases or costs that have not even been incurred.

The Commission reaffirms that it will permit the utilities to recover prudently incurred implementation costs as provided for in the Commission's prior orders. It expects to provide recovery at the conclusion of the rate freeze. Except for any costs that should be assigned solely to ROA customers, implementation costs will be recovered from all customers. The Commission may provide for residual securitization savings to fund all or a portion of the recovery.

Although the Commission has rejected Detroit Edison's stranded cost methodology, it has determined that stranded benefits will not be credited to customers at this time. Therefore, as discussed above, Consumers and Detroit Edison may use deferred accounting for the net stranded benefits or costs calculated through the Staff's methodology.

Future Rate Reductions

ABATE excepts to the ALJ's failure to address its recommendation that the Commission order automatic rate reductions when the funding requirement for the low-income and energy efficiency fund expires in 6 years.

The Commission finds no reason to rule at this time on how those securitization savings will be used.

Future Stranded Cost Recovery

In its exceptions, Consumers argues that the Commission must make clear that, after the rate freeze ends, any stranded cost methodology adopted in this order will be supplemented by, if not completely superseded by, standard ratemaking procedures.

The Commission finds no reason to rule at this time on the precise mechanism by which utilities will be permitted to recover their prudently incurred costs after the rate freeze expires. At an appropriate time, the Commission will resolve those questions in full conformity with all legal and policy considerations.

Removal of Skewing Adjustment and Equalization Transition Charge Adjustment

Consumers and Detroit Edison proposed to adjust the transition charges to remove the effects of rate skewing. They said that the purpose is to provide all customer classes with similar savings when considering ROA service and to prevent customers from shifting responsibility for the subsidies in full service rates to other customers by choosing ROA service. Consumers used the phrase "removal of skewing adjustment" (ROSA), and Detroit Edison used the phrase "equalization transition charge adjustment" (ETCA).

The ALJ found that the adjustments were contrary to the plain language of the act as well as anticompetitive. He also rejected the notion that the ROSA and ECTA were necessary to provide for the recovery of stranded costs.

Consumers and Detroit Edison except, and argue that the adjustments are necessary because residential customers pay less than the cost of service, while secondary and primary customers pay more than the cost of service. As a result, they say, residential customers have relatively less incentive to switch to ROA service, while commercial customers have a greater incentive to do so, and the utilities experience a disproportionate loss of generation revenues when commercial

customers switch to ROA service. They assert that the effect of the adjustments is to provide each class of customers with an equal opportunity and incentive to participate in ROA, and thereby to neutralize the anticompetitive effect of skewing.

They also contend that, far from precluding adoption of the adjustments as the ALJ found, Act 141 requires the adjustments: "The commission shall allocate approved securitization, transition, stranded, and other related charges and credits in a manner that does not result in a reallocation of cost responsibility among the different customer classes." MCL 460.10d(5). They say that the adjustments actually preserve existing cost allocations by ensuring that the amount of the skewing by which each customer class is currently benefited or burdened continues even under ROA service. Consumers says that if the Commission does not approve the adjustment, then the calculation of stranded costs must be performed on a customer class basis.

The Commission concludes that MCL 460.10d(5) does not permit the proposed adjustments. It is difficult to square the language of the statute with the utilities' claim that the Legislature intended the Commission to eliminate any rate skewing that might exist in current rates, at least for customers considering ROA service, and it is clear that the adjustments reallocate cost responsibility. The Legislature must be presumed to have been aware of the relationship of existing rates to the cost of service. If it had intended that the Commission move rates to the cost of service, it would have so indicated. Rather, the Legislature provided that the Commission was to leave any subsidies unchanged. Further, the adjustments are anticompetitive because they increase rates to the customer classes most likely to consider ROA service. Finally, the adjustments are not related in any fashion to the statutory requirement that the Commission approve recovery of net stranded costs, and thus violate the rate freeze. If the adjustments are to be made, that should occur in a full rate case.

Bundled Rate Stranded Benefit Credit

Detroit Edison excepts to the ALJ's failure to explicitly reject the Attorney General's proposal that a stranded benefit credit be applied to full service customers as well as ROA customers.

The Commission has rejected the argument that stranded benefits should be credited to ROA customers in 2002, and will consider the issue more fully at a later date. It therefore rejects the Attorney General's proposal at this time as well.

Valuation of the River Rouge Unit No. 1

Detroit Edison asked the Commission to affirm the $6.6 million valuation for the transfer of its ownership of the River Rouge Unit No. 1 Power Plant to an affiliate. Initially, the Commission had required that the transfer price be redetermined if legislation were enacted in 2000 specifying methodologies for valuing generating plants. February 3, 2000 order, Case No. U-12266, p. 9. Act 141 did not address the issue. Later, the Commission deferred the valuation issue to this case. October 24, 2000 order, Case No. U-12266, p. 2.

Detroit Edison argued that there is no single approach to determining the value of power plant, and suggested that each plant be valued on a case-by-case basis. It asserted that the previously approved valuation of $6.6 million is fair and reasonable.

There was no opposition to Detroit Edison's request, and the ALJ recommended that the Commission affirm the valuation.

The Commission adopts that recommendation.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; 1969 PA 306, as

amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. The Staff's methodology for calculating net stranded costs should be adopted.

c. Neither Consumers nor Detroit Edison had stranded costs in 2000.

d. The stranded cost transition charges for Consumers and Detroit Edison are zero for 2002, and the offset for the securitization and tax charges and the rate reduction equalization should continue.

e. The net stranded benefits or costs for Consumers and Detroit Edison should be carried forward, and the utilities should be permitted to use deferred accounting for those amounts.

f. Implementation costs should continue to be deferred for later recovery.

g. Consumers' ROSA and Detroit Edison's ETCA should be rejected.

h. The $6.6 million valuation of the River Rouge Unit No. 1 Power Plant should be affirmed.

THEREFORE, IT IS ORDERED that:

A. The Commission Staff's methodology for calculating net stranded costs is adopted.

B. The stranded cost transition charges for Consumers Energy Company and The Detroit Edison Company are zero for 2002, and the offset for the securitization and tax charges and the rate reduction equalization shall continue to be included in customers' bills.

C. The net stranded benefits or costs calculated by the approved methodology for Consumers Energy Company and The Detroit Edison Company shall be carried forward. The utilities may use deferred accounting to recognize the timing difference in the determination and recovery of the stranded costs.

D. Consumers Energy Company and The Detroit Edison Company shall continue to defer recovery of implementation costs for future recovery.

E. Consumers Energy Company's removal of skewing adjustment and The Detroit Edison Company's equalization transition charge adjustment are rejected.

F. The $6.6 million valuation of The Detroit Edison Company's River Rouge Unit No. 1 Power Plant is affirmed.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ Laura Chappelle
Chairman, concurring in part in a separate opinion.

(S E A L)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner

By its action of December 20, 2001.

/s/ Dorothy Wideman
Its Executive Secretary

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter, on the Commission's own motion, to implement the provisions of Section 10a(10) of 2000 PA 141.	))))	Case No. U-12639

CONCURRING OPINION OF CHAIRMAN LAURA CHAPPELLE

(Submitted December 20, 2001)

The issue of stranded cost, and the related issue of securitization, have long been the subjects of often-heated public policy debates regarding electric restructuring in Michigan. Today's order sets forth a stranded cost calculation methodology and determines the initial transition charge to recover stranded costs. I fully concur in these determinations.

The purpose of this concurring opinion is to set forth clearly my position regarding an issue that predates my appointment to the Commission. In the order on rehearing dated January 4, 2001, in Case No. U-12478, the Commission agreed with Detroit Edison that, as of January 1, 2002, the corresponding credit related to securitization should be eliminated. This decision was premised on Detroit Edison's argument, in its petition for rehearing in that case, that the costs associated with the securitized assets would be removed from the calculation of stranded cost and the transition charge reduced accordingly. This premise has not been met. The stranded cost calculation does not remove costs associated with securitized assets and the transition charge has not been reduced to reflect the removal.

Under these circumstances, it would clearly be inequitable to charge retail open access customers a securitization charge without providing either a corresponding credit or a reduced

transition charge that reflects the effect of securitization, even though Detroit Edison has argued that a selective, out-of-context reading of the order in Case No. U-12478 could be made to stand for that proposition. It would be manifestly unfair to charge customers once through the securitization charge and a second time for the same cost through the stranded cost calculation. Today's order removes this unfairness by authorizing an adjustment pursuant to Section 10d(5) of 2000 PA 141.

I wish to emphasize that this Section 10d(5) adjustment is a temporary approach for 2002 only. I expect that the parties to the next stranded cost proceeding will present cases that fully recognize the effects of securitization and will recommend transition charges that fully reflect this.

The use of a temporary Section 10d(5) adjustment resolves the dilemma and maintains the status quo by ensuring that retail open access customers do not receive a rate increase in violation of PA 141. At the same time, this approach allows the utilities to experience the benefits of securitization and in all other respects maintains PA 141's basic premises: that all retail customers in Michigan have a choice of electric suppliers, that competition is fostered in the state, that electric generation ownership is diversified, and that opportunities for economic development in Michigan are improved, while promoting financially healthy and competitive utilities.

MICHIGAN PUBLIC SERVICE COMMISSION

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Chairman, Laura Chappelle

APPENDIX C

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter, on the Commission's own motion, to implement the provisions of Section 10a(10) of 2000 PA 141.	))))	Case No. U-12639

At the May 16, 2002 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Laura Chappelle, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

On December 20, 2001, the Commission issued an order adopting a methodology for calculating net stranded costs, as required by MCL 460.10a(10). The Commission found that neither Consumers Energy Company (Consumers) nor The Detroit Edison Company (Detroit Edison) had stranded costs in 2000. The Commission therefore approved a transition charge of zero for the two companies, and continued the offset for the securitization and tax charges and the rate reduction equalization.

On January 18, 2002, Consumers filed a petition for rehearing. On January 22, 2002, Detroit Edison and Citizens for Power and Reliability (CPR) filed petitions for rehearing. Attorney General Jennifer M. Granholm (Attorney General) filed a response to each petition. Energy Michigan filed a joint response to the petitions. The Association of Businesses Advocating Tariff

Equity filed a response to Consumers and Detroit Edison. Consumers and Detroit Edison each filed a response to CPR. CPR filed a response to Detroit Edison.

Rule 403 of the Commission's Rules of Practice and Procedure, 1992 AACS, R460.17403, provides that a petition for rehearing may be based on claims of error, newly discovered evidence, facts or circumstances arising after the hearing, or unintended consequences resulting from compliance with the order. A petition for rehearing is not merely another opportunity for a party to argue a position or to express disagreement with the Commission's decision. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant a rehearing.

Consumers

Consumers asks the Commission to clarify the precise calculation that is required by the methodology adopted in the order. It also asks for confirmation that the order left open the correct manner of implementing the methodology, that the order authorized a recalculation of the stranded costs or benefits for 2000 to correct errors in the calculation, and that the order did not definitively determine that stranded benefits of $97 million exist for 2000. It also asks the Commission to confirm that it did not intend the calculation to exclude capacity costs associated with power supply option arrangements or to double count revenues from third-party sales.

The Commission recognized in the December 20 order that the record was not adequate to support a definitive calculation of stranded costs for 2000. The Commission thus deferred "the issues of refining the methodology, and recalculating net stranded costs for 2000, to the case where the transition charges for 2001 will be calculated." December 20, 2001 order, p. 14. The order also stated that the utilities were "free to offer and support adjustments, consistent with the methodology adopted in this order, for calculating the stranded cost charges or credits for 2001."

Id., p. 20. Consumers' concerns about capacity costs associated with power supply option arrangements and double counting of revenues from third-party sales are within the scope of the issues that the Commission deferred. Because Consumers filed an application on April 22, 2002 in Case No. U-13380 for approval of stranded cost calculations for 2000, 2001, and 2002, and that case provides an opportunity for the parties to address fully the issues raised by Consumers' petition for rehearing, the Commission concludes that the petition should be dismissed as moot.

Detroit Edison

Detroit Edison asks the Commission to clarify that it has not made a definitive determination of the amount or disposition of any net stranded costs or benefits and that there are no specific limitations on the refinements that a utility may propose for the methodology. It also asks the Commission to take official notice of newly discovered evidence of substantially lower wholesale market prices. It says that those lower prices, when coupled with the credits approved by the order, will result in significantly more customer load migrating to retail open access service. It says that the likely greater than expected loss of bundled sales, and the associated revenues, requires the Commission to permit the company to initiate an expedited proceeding to update and refine the stranded cost calculation for the purpose of estimating, and then collecting, the stranded costs to be incurred in 2002. Finally, Detroit Edison seeks rehearing on the offset for the securitization and tax charges, the recovery of implementation costs, and the potential for credits to bundled service customers.

The Commission denies Detroit Edison's petition for rehearing. For the most part, it merely expresses disagreement with the December 20 order. Further, as noted above, the December 20 order did not make a definitive determination of Detroit Edison's stranded costs, but the order also does not permit Detroit Edison to offer adjustments that are inconsistent with the methodology

approved by the Commission. The Commission declines to take notice of new facts because the alleged facts are not judicially cognizable, the alleged facts are subject to change, and the likely effects are debatable. Finally, unlike Consumers, Detroit Edison has not filed an application seeking a recalculation of stranded costs for 2000 or a calculation for 2001. Detroit Edison may request expedited action once it has filed such an application.

CPR

CPR asks the Commission to clarify that it intended all securitization charges, securitization tax charges, transition charges, and offsets to net to zero during 2002 as they had in 2001. It also asks the Commission to state that future cases to establish transition charges will be completed no later than June 30 of the year before the charges will be imposed so that customers have adequate time to evaluate their electric supply options.

The Commission denies CPR's petition for rehearing. It has not shown how the order is unclear or will have unintended consequences with respect to the securitization and tax charges, transition charges, and offsets. In fact, its request is itself unclear. If CPR has reason to believe that a utility has misapplied the order, it may raise that issue in an appropriate manner. As to CPR's request to have all stranded cost calculations completed by June 30, the Commission agrees that the goal is laudable, but the schedule is unrealistic, at least until the parties have had more experience with the stranded cost methodology.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; 1969 PA 306, as

amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. Consumers' petition for rehearing should be dismissed as moot.

c. The petitions for rehearing filed by Detroit Edison and CPR should be denied.

THEREFORE, IT IS ORDERED that:

A. The petition for rehearing filed by Consumers Energy Company is dismissed.

B. The petitions for rehearing filed by The Detroit Edison Company and Citizens for Power and Reliability are denied.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

(S E A L)

/s/ Laura Chappelle
Chairman

/s/ David A. Svanda
Commissioner

By its action of May 16, 2002.

/s/ Dorothy Wideman
Its Executive Secretary

/s/ Robert B. Nelson
Commissioner

amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. Consumers' petition for rehearing should be dismissed as moot.

c. The petitions for rehearing filed by Detroit Edison and CPR should be denied.

THEREFORE, IT IS ORDERED that:

A. The petition for rehearing filed by Consumers Energy Company is dismissed.

B. The petitions for rehearing filed by The Detroit Edison Company and Citizens for Power and Reliability are denied.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

Chairman

Commissioner

By its action of May 16, 2002.

Its Executive Secretary

Commissioner

APPENDIX D

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application of **CONSUMERS ENERGY COMPANY** for a financing order approving the securitization of certain regulatory assets and other qualified costs.	)))))	Case No. U-12505

At the October 24, 2000 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

I.

BACKGROUND

In order for Michigan's customers to begin receiving the benefits of a competitive electric generation market, the Commission issued an order on June 5, 1997 in Case No. U-11290 setting forth the framework for implementing retail open access (ROA) in this state. Among other things, that order accomplished the following: First, it established a schedule for phasing-in customers' eligibility for ROA service such that all customers would have the option of choosing their respective power suppliers by the start of 2002. Second, it identified five categories of stranded costs that, if prudently incurred, could be recovered by the utilities, namely: (1) capital costs of nuclear power plants, (2) regulatory assets, (3) capacity costs in excess of market value that arise from

power purchase agreements, (4) employee retraining costs, and (5) costs related to the implementation of restructuring. Third, it commenced development of a mechanism to true-up (on an annual basis) the amounts collected through transition and implementation surcharges paid by customers electing to use ROA, on the one hand, and each utility's actual stranded costs, on the other. Fourth, it established December 31, 2007 as the last day for recovering stranded costs. During the subsequent three years, the Commission issued several additional orders--in Case No. U-11290 as well as in other dockets--regarding the implementation of ROA.

On June 5, 2000, the Customer Choice and Electricity Reliability Act, 2000 PA 141 (Act 141) and 2000 PA 142 (Act 142), which amended 1939 PA 3, MCL 460.1 et seq.; MSA 22.13(1) et seq., took effect. In addition to codifying the Commission's prior orders regarding ROA--See, Section 10a(5) of Act 141--this new law required Consumers Energy Company (Consumers) and The Detroit Edison Company (Detroit Edison) to reduce by 5% the rates in effect for their residential rate classes as of May 1, 2000, imposed various rate freezes and caps for these and other rate classes, and allowed certain utilities[1] the option of reducing their costs through the use of securitization.[2]

[1]As noted in Section 10h(c) of Act 142, the only entities eligible for securitization are those falling within the definition of "electric utility" in Section 2(d) of the Electric Transmission Line Certification Act, 1995 PA 30, MCL 460.562(d); MSA 22.150(2)(d). Both Consumers and Detroit Edison satisfy that definition.

[2]Securitization is the process by which a utility--following the issuance of a financing order by the Commission--replaces relatively high-cost debt and equity with lower-cost debt in the form of securitization bonds.

II.

HISTORY OF PROCEEDINGS

On July 5, 2000, Consumers filed an application, with supporting testimony and exhibits, seeking a financing order authorizing the issuance of securitization bonds covering approximately $472,549,000 in after-tax qualified costs. The application further requested authority to (1) create one or more special purpose entities (SPEs) to which it could transfer securitized property for the purpose of minimizing bankruptcy risks and maximizing the ratings on its securitization bonds, (2) implement securitization charges--and related tax charges--to be collected from its customers, as well as a mechanism for undertaking periodic true-ups of those charges, (3) proceed, at its sole discretion, with the sale of the securitization bonds authorized in this case, and (4) employ appropriate methodologies to account for these transactions and to eventually refund or retire any or all of its securitization bonds.

Pursuant to due notice, a prehearing conference was held on July 17, 2000 before Administrative Law Judge George Schankler (ALJ). In the course of the prehearing conference, the ALJ granted intervenor status to Attorney General Jennifer M. Granholm (Attorney General); the Association of Businesses Advocating Tariff Equity (ABATE); Energy Michigan; the Michigan Environmental Council and the Public Interest Research Group in Michigan (collectively, MEC); Unicom Energy, Inc. (Unicom); The Dow Corning Corporation and Hemlock Semiconductor Corporation (collectively, Dow); the Michigan Community Action Agency Association (MCAAA); the Michigan Chamber of Commerce (Chamber of Commerce); Midland Cogeneration

Venture Limited Partnership; the Michigan Electric and Gas Association; PG&E Corporation and the Midwest Independent Power Suppliers Coordination Group; and the Commission Staff (Staff).[3]

The ALJ further established a schedule for this case that, as mandated by Section 10i(6) of Act 142, would result in the completion of all proceedings and the issuance of the Commission's order within 90 days after the filing of the application. However, because Consumers subsequently amended its supporting testimony and exhibits, the parties stipulated that the 90-day period should commence on July 26, 2000 (the date that Consumers filed its revised testimony and exhibits). The ALJ accepted the parties' stipulation and established an amended schedule calling for a Commission order by October 24, 2000.

Evidentiary hearings were conducted on August 14, as well as September 5, 6, 7, 8, and 13, 2000. The record consists of 924 pages of transcript and 55 exhibits, 46 of which were received into evidence.

Consumers, the Attorney General, ABATE, Energy Michigan, MEC, Unicom, MCAAA, the Staff, and Dow filed briefs on September 29, 2000. Reply briefs were filed by Consumers, the Attorney General, ABATE, Energy Michigan, MEC, Unicom, MCAAA, the Staff, and the Chamber of Commerce on September 29, 2000. On October 3, 2000, the Staff filed a motion to strike the Chamber of Commerce's reply brief. The Commission agreed to read the record, thus dispensing with the need for a proposal for decision, exceptions, and replies to exceptions.

[3]Although Windpower, L.L.C., filed a late petition to intervene on July 24, 2000, no hearing was requested or scheduled, and Windpower took no further action with regard to its petition.

III.

OVERVIEW OF CONSUMERS' PROPOSAL

Robert H. Hoffman, a Vice President in the Securitized Products Group of Morgan Stanley & Co., Incorporated, described the securitization process and provided an overview of Consumers' proposal. As stated by Mr. Hoffman, securitization involves the "delinking of the credit quality of the issued bonds from that of the utility in order to achieve higher credit ratings and lower financing costs." 3 Tr. 169. In order to accomplish this, he continued, Consumers proposes to sell the securitization property and other collateral to a bankruptcy remote SPE in what constitutes a "true sale" for bankruptcy purposes. Id. This "true sale" sale is designed to insulate the collateral from the credit risk of the utility.[4] The SPE will then issue bonds backed by the underlying collateral to various investors.[5] According to Mr. Hoffman, an indenture trustee (trustee) will also be appointed to (1) act as a representative on behalf of the investors, (2) remit payments to these bondholders, and (3) ensure that their rights are protected in accordance with the terms of the financing documents. In addition to the bankruptcy remote status of the SPE, he continued, "credit enhancements, such as capital contributions, overcollateralization, and a true-up mechanism," will be used to obtain the desired "AAA" rating for the securitization bonds. 3 Tr. 170.

Mr. Hoffman went on to state that "the securitization property that is sold to the [SPE] is the right to impose, collect, and receive from Consumers' wires customers amounts necessary to pay

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[4]Pursuant to Section 10*l*(2) of Act 142, this designation as a "true sale" applies regardless of whether the purchaser has any recourse against the seller, or any other term of the parties' sales agreement, including the seller's retention of an equity interest in the securitization property, the fact that Consumers may act as the collector of securitization charges, or the treatment of the transfer as a financing for tax, financial reporting, or other purposes.

[5]As stated in Section 10n(1) of Act 142, these bonds are not a debt or obligation of the state, and do not constitute a charge on its full faith and credit or taxing power.

principal and interest on the securitization bonds, as well as other amounts," including the ability to receive adjusted amounts of securitization charges through the periodic use of a true-up mechanism.[6] 3 Tr. 170-71. According to Mr. Hoffman, the phrase "other amounts" refers to certain "qualified costs related to the issuance of securitization bonds that will be payable from the securitization charge collections over the life of the financing transaction." Id., at 171. These include credit enhancement expenses, servicing fees, trustee fees, legal fees, administrative fees, rating agency fees, independent manager fees, and other operating expenses incurred by the SPE. With regard to Consumers' proposal, these anticipated fees and expenses (with the exception of credit enhancement expenses) are set forth on Exhibit CE-18.

When put into effect, Consumers' proposal is designed to establish non-bypassable securitization charges expressed in cents per kilowatt-hour (kWh). These securitization charges, which are to be applied and billed to all (or nearly all) customers taking service over Consumers' system, will be stated as a separate charge on the bill and each customer's otherwise applicable rate will be reduced by an equal amount. Thus, the utility notes, the imposition of the securitization charge will neither increase nor decrease the total amount of the bill. Consumers further proposes a

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[6]As stated in Section 10j(2) of Act 142, securitization property shall constitute a present property right even though the imposition and collection of securitization charges depends on further acts of the electric utility or others that have not yet occurred. Moreover, pursuant to Sections 10m(2) and 10m(4) of that act, the lien and security interest created by this financing order and held by the SPE shall attach automatically once value is received for the bonds, shall constitute a continuously perfected lien and security interest, and shall not be impaired by any later modification of the order or by the commingling of funds arising from securitization charges with other funds. Moreover, as stated in Section 10n(2) of the act, the State of Michigan pledges not to take or permit any action that would impair the value of the securitization property or that would reduce or alter--except as allowed in the context of a true-up procedure undertaken pursuant to Section 10k(3) of the act--or otherwise impair the revenue stream produced by any securitization charges approved in this order. Finally, as set forth in Section 10m(8), any changes in either the order or the securitization charges do not affect the validity, perfection, or priority of the security interest.

system of periodic true-ups intended to ensure that the dedicated revenue stream from the securitization charge is adequate to pay, in a timely manner, the principal and interest on the securitization bonds, as well as all related costs. At least initially, Consumers will act as the servicer for the SPE. In that capacity, the utility will bill and collect the securitization charge, perform the periodic true-ups and calculate any necessary adjustment to that charge, and undertake related activities.

Mr. Hoffman went on to stress that any order approving Consumers' proposal must contain certain elements. First, he asserted that it should specifically "reserve to Consumers the sole discretion as to whether and when to issue securitization bonds." 3 Tr. 197. According to Mr. Hoffman, this discretion is critical to the utility's achieving the lowest financing cost possible because receptive market conditions do not always exist. Likewise, he continued, Consumers should be allowed to seek Commission authority to refinance outstanding securitization bonds if interest rates fall sufficiently to allow for the creation of additional savings. Second, the "finality and irrevocability of the financing order should be affirmed subject to Act 142 with regard to true-ups," thus assuring bondholders that their rights and benefits will be upheld. 3 Tr. 201. Third and finally, he stated that the financing order should reaffirm the state's pledge--as set forth in Section 10n(2) of Act 142--that it will neither take nor permit any action that would impair the value of the securitization property authorized in that order nor, except as permitted by Section 10k(3) of that act, reduce, alter, or impair the securitization charges.

IV.

DISCUSSION

Act 141 sets forth the general authority and duties of the Commission with regard to helping convert Michigan's electric industry from one that is based on intensive regulation to one that relies, in many aspects, on competition. The range of activities covered by Act 141 runs from the general (i.e., issuing orders, making reports, holding contested case proceedings, and protecting ratepayers from unfair business practices) to the specific (i.e., addressing utilities' requests for stranded cost recovery, approving annual true-up adjustments for each utility's transition charge,[7] imposing temporary rate freezes and caps, and establishing an immediate 5% rate reduction for all residential customers in Consumers' and Detroit Edison's service territories). In contrast, Act 142 deals with a narrower set of issues. Specifically, it is limited to establishing the legal framework by which the Commission may authorize the issuance of securitization bonds.

This raises six significant issues to be resolved by the Commission. First, it must determine what (if any) amount of Consumers' proposed qualified costs should be deemed recoverable through securitization. Second, it must decide whether the utility's proposal satisfies the statutory requirements of Act 142. Third, it must rule on the reasonableness of Consumers' proposals regarding the use to which all securitization-related savings will be put. Fourth, it must decide whether the various amortization, accounting, and ratemaking approvals requested by the utility to effectuate the proposed securitization of its qualified costs are reasonable and should be approved.

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[7]In the context of this order, "transition charge" refers to the fee or fees imposed by a utility to recover stranded costs arising from ROA, other than those that are recovered through securitization. Securitization charges are designed to recover qualified costs, which may include some stranded costs. Although there is significant overlap between "stranded costs" and "qualified costs," the terms are not synonymous.

Fifth, it needs to determine whether the utility's proposed securitization and tax charges (namely, the fees Consumers seeks to impose on customers to fund repayment of the securitization bonds and any related tax liability, respectively) are reasonable both in amount and form. Sixth, it must rule on whether the utility's proposed securitization charge true-up mechanism is reasonable and should be approved.

These issues will be addressed seriatim.

Qualified Costs

Key to the issuance of a financing order like that requested by Consumers is the Commission's determination of the amount of qualified costs to be recovered. Qualified costs are defined in Section 10h(g) of Act 142 as follows:

> "Qualified costs" means an electric utility's regulatory assets as determined by the commission, adjusted by the applicable portion of related investment tax credits, plus any costs that the commission determines that the electric utility would be unlikely to collect in a competitive market, including, but not limited to, retail open access implementation costs and the costs of a commission approved restructuring, buyout or buy-down of a power purchase contract, together with the costs of issuing, supporting, and servicing securitization bonds and any costs of retiring and refunding the electric utility's existing debt and equity securities in connection with the issuance of securitization bonds. Qualified costs include taxes related to the recovery of securitization charges.

MCL 460.10h(g); MSA 22.13(10h)(g).

According to Dennis DaPra, Consumers' Vice President and Controller, the qualified costs that the utility seeks to securitize fall into two classes. The first (with a remaining book value of approximately $714,499,000) consists of six regulatory assets, the largest of which relates to Consumers' Palisades Nuclear Generating Plant (Palisades), and one regulatory liability. The second (totaling $12,500,000) reflects the estimated initial cost of preparing, underwriting, registering, and issuing the securitization bonds, along with the estimated cost of retiring and

refunding Consumers' existing debt and equity securities. As shown on Exhibit CE-7, these costs can be broken down as follows:

Palisades Capital Costs (Net of Depreciation Reserve)	$405,455,000
Income Taxes Due From Customers	198,477,000
Post-Retirement Benefits Other Than Pensions	84,168,000
Decontamination and Decommissioning Reserve	15,543,000
Ludington Pumped Storage Plant Settlement	7,716,000
Unamortized Loss on Reacquired Debt	5,180,000
Clean Air Act Sulfur Dioxide Allowances	(2,041,000)
SUBTOTAL	$714,499,000
Initial Securitization Issuance Costs (estimated)	8,500,000
Debt and Equity Retirement Costs (estimated)	4,000,000
TOTAL	$726,999,000

Mr. DaPra went on to state that because the resulting amount reflects the "total remaining book value" of the regulatory assets and liabilities that Consumers seeks to recover through securitization, the utility "is proposing to reduce this amount by the tax effect, i.e., 35%, and to securitize the remainder, $472,549,237." 2 Tr. 71.

In addition to the initial securitization issuance costs and the debt and equity retirement costs included in that $472,549,237, Consumers notes that other qualified costs will be incurred throughout the life of the securitization bonds. These ongoing costs include an annual servicing fee of up to 0.25% of the principal amount of all outstanding securitization bonds if Consumers serves as the servicer or up to 1.5% of that amount if some other entity is designated to be the servicer. They also include, among other things, the payment of all operating expenses incurred by the SPE and contributions to the overcollateralization subaccount. The utility estimates that although these ongoing expenses will total approximately $1.7 million per year at the onset of securitization, the annual total will decline each year as ratepayers pay down the principal amount owed on the securitization bonds. See, Exhibit CE-8, column (h). Consumers seeks to recover these qualified costs through its securitization charge, but not as a part of the amount to be

securitized. Specifically, it proposes that "the actual amount of ongoing costs . . . be recovered through the securitization charge by means of operation of the true-up mechanism for which Consumers is seeking approval in the financing order." Consumers' initial brief, p. 15.

Gerald F. Geml, Supervisor of the Auditing Section within the Commission's Electric Division, testified that he "performed a review of the books and records of the company to verify the amounts the company requested for securitization." 4 Tr. 565. Mr. Geml further indicated that he reviewed prior orders issued by the Federal Energy Regulatory Commission and this Commission to ensure that the ratemaking treatment underlying Consumers' proposed level of qualified cost securitization was reasonable and consistent with those orders. Based on his review, the Staff supports the amount of qualified costs for which Consumers seeks securitization, with one adjustment. Specifically, the Staff notes that Consumers' gross figure of $726,999,000 did not recognize the effect of $6,088,000 in investment tax credits related to Palisades. See, Exhibit S-41. Thus, consistent with the definition of qualified costs set forth in Section 10h(g) of Act 142 (which specifies that a utility's regulatory assets must be "adjusted by the applicable portion of related investment tax credits"), the Staff recommended reducing the utility's gross figure for qualified costs to $720,910,000 and its after-tax figure to $468,592,000. Id., lines 12 and 14.

Consumers, as specifically expressed in footnote 2 on page 11 of its initial brief, agrees that the Staff's recommended adjustment is proper and now requests Commission approval to securitize qualified costs in the amount of $468,592,000.

The only parties opposing that request, ABATE and the Attorney General, contend that none of the $405,455,000 in booked capital costs from Palisades can be included in the computation of qualified costs. These parties offer two primary reasons in support of that contention. First, they assert that Palisades has yet to be designated as a regulatory asset, either directly or indirectly, by

Commission order. Second, ABATE claims, "absent from this proceeding is any request by Consumers that Palisades be converted to a regulatory asset by the Commission, or that the Commission make any such determination." ABATE's reply brief, p. 11. Thus, these two parties contend, all costs relating to Palisades must be excluded from the Commission's determination regarding the amount of qualified costs to be securitized in this case.

In addressing this issue, the Commission notes that the second argument offered by these parties--to the effect that Consumers has yet to request that Palisades be deemed a regulatory asset--is incorrect. Notwithstanding ABATE's claims to the contrary, Consumers has specifically asked that the Commission "take any and all necessary regulatory steps to confirm that Palisades is a regulatory asset [in] accordance with the orders in Case No. U-11290 et al." Consumers' reply brief, p. 32. Moreover, because nothing in Act 142 precludes contemporaneously ruling on (1) whether something is a regulatory asset and (2) whether, and to what extent, that regulatory asset should be included in the determination of qualified costs, the Commission finds unpersuasive the first argument offered by ABATE and the Attorney General.

Thus, the salient issue is whether Consumers' investment in Palisades constitutes a regulatory asset. The Commission concludes that it does. This conclusion is based on the following two factors.

First, the Commission has consistently expressed its commitment to allowing recovery of nuclear capital costs as part of its ROA program. This began with the June 5, 1997 order in Case No. U-11290, which specifically listed "capital costs of nuclear plants" as one of the five categories of recoverable stranded costs (June 5, 1997 order, pp. 7 and 12), and continued throughout the issuance of subsequent restructuring orders. The rationale for that treatment was, and continues to be, that because Michigan's electric utilities "made significant investments in order to

meet their obligations" to serve customers residing in this state, they should be given a reasonable opportunity to recover that investment. Id., at 11.

Second, when faced with a nearly identical situation involving Detroit Edison's Fermi 2 Nuclear Generating Plant (Fermi), the Commission granted that utility's request to remove Fermi from plant in service and to book it as a regulatory asset. See, the Commission's December 28, 1998 order in Case No. U-11726, pp. 17-22. In that case, as here, (1) a significant portion of the utility's Commission-approved investment in the plant remained on the books, (2) there was insufficient time to recover that investment before all of the utility's customers would become eligible for ROA, and (3) the plant in question, being a nuclear plant, was an unlikely candidate for sale to another entity at or near its existing net book value.

The Commission therefore finds that its repeated commitment to the full recovery of nuclear capital costs that were expended to serve Michigan residents, when coupled with the similarities between Fermi and Palisades (at least from a cost recovery standpoint), justify granting Consumers' request to specifically deem Palisades a regulatory asset. However, the Commission likewise finds that two of the conditions imposed on Detroit Edison in Case No. U-11726 should be applied to Consumers in this case.

Specifically, should Consumers elect to sell Palisades, any profit arising from the plant's treatment as a regulatory asset designated for securitization must be passed on to the utility's customers. As noted by Brian L. Ballinger, a senior economist in the Commission's Licensing and Enforcement Division, doing otherwise would place customers at risk of paying twice for the capital costs of the plant (once through the non-bypassable securitization charge and again through any power purchase contract necessitated by the plant's sale). See, 4 Tr. 584. Thus, if Consumers sells Palisades for more than its book value following the plant's treatment as a regulatory asset, or

if the utility itself is purchased, Consumers (or its successor utility) shall immediately initiate a proceeding designed to compute and promptly return to the utility's ratepayers all economic benefit arising from Palisades' treatment as a regulatory asset. Similarly, if Consumers (or any successor utility) seeks to abandon Palisades subsequent to its being treated as a regulatory asset, the utility must first initiate a contested case proceeding to evaluate the effect of the proposed abandonment on its customers.

In addition to her arguments regarding Palisades, the Attorney General objects to the proposal to include, as part of the utility's $1.7 million per year in ongoing costs, the potential 0.25% fee that would be paid to Consumers if it operates as the servicer for the bonds.[8] According to the Attorney General's witness, William A. Peloquin, that fee should not be considered a qualified cost of securitization. Rather, Mr. Peloquin contends that it "represents Consumers' cost for billing, collecting, and remitting ratepayer funds" to the SPE and that the utility's tariffs already recover these costs in the form of "customer accounts expense." 5 Tr. 743. Mr. Peloquin further notes that, because it will be hired by Consumers, the SPE will lack adequate incentive to challenge the amount of that servicing fee throughout the respective lives of the securitization bonds.

The Commission finds that the Attorney General's objection to the collection of these ongoing securitization expenses should be rejected. Although it is true that Consumers' existing tariffs provide for the recovery of customer accounts expenses (i.e., those related to metering, billing, and payment collection), the onset of securitization will impose additional duties on the utility if it also operates as the servicer for the bonds. Specifically, Consumers will be required to separate from

[8]Interestingly, neither the Attorney General nor any other party challenges the legitimacy of the proposed 1.5% fee that would be paid if some entity other than Consumers is the servicer.

all of its customers' payments, and forward to the SPE, the amounts received from each customer that pertain to the repayment of the securitization bonds. It is only logical that the performance of those additional duties will give rise to increased costs, a fact that appears to have been recognized by the Legislature in its decision to specifically include "the costs of . . . servicing securitization bonds" within the definition of qualified costs. Section 10h(g) of Act 142. Moreover, testimony provided by Mr. Hoffman indicates that (1) the amount of the annual servicing fee proposed by the utility is consistent with customary commercial levels, and (2) rating agencies will be unwilling to rate Consumers' securitization bonds unless they can be convinced that the servicer will be compensated at such a commercially acceptable level. See, 3 Tr. 209-10. Therefore, the Commission concludes that Consumers' proposal regarding recovery of all ongoing costs of securitization is reasonable and should be approved.

Due to the findings expressed above, Palisades' capital costs (net of the plant's depreciation reserve and all related income tax credits) can properly be included in the computation of qualified costs. The Commission therefore concludes that the total after-tax amount to be securitized in this proceeding is $468,592,000.[9] The Commission further concludes that it should approve Consumers' request to recover through its securitization charge (but not as a part of the amount to be securitized) the ongoing expenses of securitization, including the maximum 0.25% servicing fee paid to Consumers or the maximum 1.5% fee paid to a third-party servicer.

[9]Unicom notes that Consumers has additional items that the utility could have included within the quantifiable costs for which it currently seeks securitization. Unicom expresses concern that the utility may, at some future date, attempt to recover these other costs "in a manner that would provide Consumers with a competitive advantage" over other energy providers. Unicom's initial brief, p. 4. Notwithstanding Unicom's apparent belief to the contrary, this issue is not ripe for Commission action.

Satisfaction of Statutory Criteria

Act 142 establishes several criteria that must be satisfied before the Commission is required to grant a utility's request for authority to issue securitization bonds. These criteria are set forth in Sections 10i(1) and 10i(2) of Act 142, which read as follows:

> (1) Upon the application of an electric utility, if the commission finds that the net present value of the revenues to be collected under the financing order is less than the amount that would be recovered over the remaining life of the qualified costs using conventional financing methods and that the financing order is consistent the standards in subsection (2), the commission shall issue a financing order to allow the utility to recover qualified costs.
>
> (2) In a financing order, the commission shall ensure all of the following:
>
> (a) That the proceeds of the securitization bonds are used solely for the purposes of the refinancing or retirement of debt or equity.
> (b) That securitization provides tangible and quantifiable benefits to customers of the electric utility.
> (c) That the expected structuring and expected pricing of the securitization bonds will result in the lowest securitization charges consistent with market conditions and the terms of the financing order.
> (d) That the amount securitized does not exceed the net present value of the revenue requirement over the life of the proposed securitization bonds associated with the qualified costs sought to be securitized.

MCL 460.10i(1) and (2); MCL 22.13(10i)(1) and (2).

Consumers' witnesses offered substantial testimony and exhibits describing the manner in which they believed that the utility's securitization proposal satisfied these criteria. For the sake of consistency, these criteria will be referred to as "statutory tests," as they are in the parties' briefs and reply briefs.

a. Section 10i(1)

Francis A. Ernst, Jr., Consumers' Executive Director of Rates and Electric SBU Planning, described how the utility's proposal satisfies the statutory test set forth in Section 10i(1) of

Act 142. Mr. Ernst began by examining the regulatory assets and liabilities that will be removed from rates due to securitization, and then computed the net present value of the annual revenue requirement that would be necessary for their rate recovery pursuant to conventional financing methods. As reflected on pages 1 and 2 of Exhibit CE-6, this produced a figure of $619,746,000. He then computed the net present value of the "revenue requirement associated with the securitized bond payments" that ratepayers would make if securitization was undertaken pursuant to a financing order along the lines proposed by the utility. 3 Tr. 257. This resulted in a figure of $538,587,000. Exhibit CE-6, p. 1. Consumers therefore asserts that because Mr. Ernst's analysis shows that the present value of the revenues to be collected under the financing order is less than the net present value of those that would be recovered under conventional financing, its proposal satisfies the statutory test set forth in Section 10i(1) of Act 142.

The Staff concurs in Consumers' assessment. According to the Staff, one of its witnesses, Mr. Ballinger, performed a similar analysis (set forth on Exhibit S-42) and reached the same conclusion as Mr. Ernst. Namely, Mr. Ballinger found that the net present value of the revenue requirement arising under Consumers' securitization proposal would be significantly less than that arising from conventional financing over the remaining lives of the qualified costs. See, 4 Tr. 586-89.

The only party to challenge this assessment is the Attorney General, who argues that both Consumers and the Staff were wrong to use analyses based on revenue requirements. According to the second of her two witnesses, Charles W. King, the more appropriate analysis would be to compare the actual cash flows that Consumers would collect under a financing order with those that would be recovered under conventional financing. See, 5 Tr. 671. Because Consumers' plan fails

the Section 10i(1) test if actual cash flows are used, she asserts, the utility's request for securitization should be rejected.

The Commission does not find the Attorney General's assertion persuasive. As noted by Consumers, and conceded by Mr. King (5 Tr. 706), a utility's cash flows can fluctuate greatly from one period to another. This is due, among other things, to weather-related changes in sales, the movement of customers from one rate class to another, and the migration of customers into or out of the utility's service territory. In contrast, a utility's revenue requirements are relatively stable from one period to the next. The Commission therefore finds the analyses relied upon by Consumers' and the Staff are superior to the analysis developed by Mr. King and relied upon by the Attorney General. Because the former analyses show the net present value of the revenue requirement resulting from securitization to be significantly less than that arising from conventional financing, the Commission concludes that the statutory test set forth in Section 10i(1) is satisfied.

b. Sections 10i(2)(a) and 10i(2)(c)

As noted above, Section 10i(2)(a) of Act 142 requires that the proceeds derived from the sale of Consumers' securitization bonds be used solely for the purposes of refinancing or retiring the utility's existing debt or equity. Moreover, Section 10i(2)(c) requires that the securitization bonds be structured and priced in a manner that will result in the lowest securitization charges possible. Consumers asserts that, based on information provided by two of its witnesses, both of these statutory tests should be deemed satisfied.

Consumers cites testimony offered by John J. Murphy, the utility's Director of Corporate Finance, as showing that appropriate use will be made of all securitization bond proceeds, as

demanded by Section 10i(2)(a). According to Mr. Murphy, the utility will utilize those proceeds "solely to pay down Company debt and equity." 2 Tr. 113. He went on to state that, in deciding precisely when and in what proportion to refinance Consumers' current debt and equity, the utility will consider, among other factors:

> [T]he amount of equity to retire while keeping sufficient equity in its capital structure to maintain or improve its credit quality and credit ratings. It will also need to consider the cost of each of its debt securities outstanding at the time that it receives the proceeds from the sale of the securitization property . . ., the mandatory cost of retiring each of those existing securities, market conditions which might impact tender offer opportunities for existing securities, and near-term new capital requirements, including environmental capital expenditure requirements.

Id. Mr. Murphy concluded by stating that Consumers would, within 12 months following its receipt of proceeds from the sale of its securitization bonds, file a report specifying the principal amount of those bonds, the initial securitization issuance costs, all debt and equity retirement costs incurred, and the respective amounts of debt and equity that were retired. See, 2 Tr. 114.

With regard to satisfying the requirements of Section 10i(2)(c), Consumers relies on a detailed description of the securitization bond marketing plan provided by Mr. Hoffman. Specifically, Mr. Hoffman indicated that, among other things, the following steps would be used to minimize Consumers' securitization charges: (1) All securitization bonds will be rated by at least two nationally-recognized rating agencies. (2) No legal maturity of any series or class of securitization bonds will exceed 15 years from the date of issuance, and all tranches[10] will have expected maturities of less than 15 years. (3) Several tranches of bonds will be developed to present offerings across a wide spectrum of potential demand. (4) An extensive investor education program will be provided by the utility and the bonds' underwriters. (5) A minimum of two experienced

[10] "Tranches" refers to individual classes of bonds having different maturity dates and average lives.

underwriters will be used to market the bonds, each having wide experience in the marketing of asset-backed securities and specific experience in the marketing of stranded cost securitization bonds. (6) The underwriters, exercising professional judgement based on the number of orders received and with Consumers' express concurrence, may adjust the bond prices and coupon rates as necessary to ensure maximum distribution of the bonds at the lowest possible bond yields. (7) The underwriters must offer to purchase the bonds for their own portfolios at specified prices and coupon rates in the event that one or more tranches of Consumers' securitization bonds generates insufficient investor orders. See, 2 Tr. 186-88.

The Staff agrees with Consumers' assessment that the utility's proposal, as explained by Messrs. Murphy and Hoffman, satisfies the requirements of Sections 10i(2)(a) and 10i(2)(c). However, to ensure that Consumers adheres to all prudent and efficient practices concerning the actual issuance of securitization bonds and the use of those bonds' proceeds to reduce the utility's overall capital costs, Staff witness Ballinger recommended requiring Consumers to implement a more stringent reporting schedule than the one proposed by Mr. Murphy. Specifically, Mr. Ballinger testified that Consumers should file its initial report regarding the utility's use of its securitization bond proceeds "within 30 days of the bonds' issuance . . . [and] each quarter thereafter demonstrating that the proceeds have been used for the intended purposes." 4 Tr. 592. In addition to Mr. Ballinger's recommendation, the Staff requests (1) that all reports regarding the use of the bond proceeds should detail the use that Consumers' parent company, CMS Energy Company (CMS), makes of those proceeds, (2) that Consumers be required to file a report immediately following any refinancing of its securitization bonds due to a decline in interest rates, and (3) that the Commission initiate a hearing in those situations to determine the appropriate use of all cost savings arising from such refinancing.

For its part, Unicom asserts that Consumers' securitization proposal generally satisfies all of the statutory tests set forth in Act 142. Nevertheless, Unicom raises one issue with regard to Section 10i(2)(c). Noting that Consumers seeks a "securitization charge recovery period lasting fourteen years, rather than the fifteen years allowed by statute," (Exhibit I-24, p. 1) it suggests that the Commission require the utility to collect its securitization charges over 15 years.

In contrast to Consumers, the Staff, and Unicom, the Attorney General contends that Section 10i(2)(a) has not been satisfied. This is based on the Attorney General's belief that securitization bond proceeds could be used to repurchase Consumers' equity that is held by CMS, instead of equity held by public investors. As a result, she continues, those proceeds might be used to "finance unregulated ventures for potential anti-competitive purposes" by funneling them to "unregulated entities through the subterfuge of the utility's holding company structure." Attorney General's initial brief, pp. 16-17.

Notwithstanding the Attorney General's assertions to the contrary, the Commission finds that Consumers' securitization proposal satisfies Sections 10i(2)(a) and 10i(2)(c) of Act 142. Through the testimony provided by Mr. Murphy, Consumers specifically and unequivocally states that all of the proceeds from the sale of the securitization bonds will be used to refund or retire Consumers' existing debt and equity, thus reducing the utility's capital costs. That is sufficient to meet the requirements imposed by Section 10i(2)(a).[11] Similarly, the detailed marketing plan developed by the utility and described by Mr. Hoffman shows that Consumers plans to take all reasonable steps

[11]Although the Attorney General raises a legitimate concern, and despite the Commission's concurrence that CMS should be encouraged to use the securitization bond proceeds to repurchase publicly-held equity, the issue of whether Consumers' parent might ultimately use securitization of the utility's qualified costs to gain an unfair competitive advantage is better left to another case.

to achieve the lowest possible securitization charges to repay the bonds. Thus, the utility's proposal satisfies Section 10i(2)(c).

Nevertheless, the Commission agrees with the Staff that certain changes should be made to Consumers' proposal as it relates to these issues. First, the utility should revise its reporting schedule in the manner recommended by Mr. Ballinger. Thus, Consumers must file its first report regarding its use of securitization bond proceeds within 30 days of the bonds' initial issuance (or any portion of their issuance), and quarterly from that date until all bond proceeds have been disbursed. Second, the reports should be structured to also include information detailing CMS's use of those proceeds. Third, in the event that a decline in interest rates leads Consumers to refinance any of its securitization bonds, the utility should file--within 7 days of that refinancing--a report notifying the Commission of that fact. Following completion of the refinancing and receipt of the report, the Commission will initiate a hearing to determine the appropriate use of all cost savings arising from that refinancing. Fourth, to ensure continued adherence to the requirements set forth in Section 10i(2)(c) of Act 142, Consumers should file--again, within 7 days--a report (1) notifying the Commission of any reduction in applicable interest rates or other charges in the bond market that might make refinancing economically advantageous, and (2) advising the Commission of what, if any, steps the utility intends to take in light of that reduction or change.

Finally, the Commission finds that it should decline Unicom's proposal to make the utility extend its securitization charge recovery period from its proposed 14 years to 15 years. As noted by the Staff, the statutory language relied upon by Unicom is permissive. Thus, rather than mandating that recovery be spread over 15 years, Act 142 merely authorizes a utility to request repayment over any period not to exceed 15 years.

c. Section 10i(2)(b)

Section 10i(2)(b) demands that Consumers' securitization proposal be shown to provide tangible and quantifiable benefits to the utility's customers. In satisfaction of this requirement, Consumers cites Exhibit CE-5, a chart developed by Mr. Ernst to show the effect of securitizing approximately $470 million in after-tax qualified costs (as Consumers proposes to do in this case). According to that exhibit, the utility would use proceeds derived from the sale of its securitization bonds to retire over $135 million of its most expensive short-term debt and approximately $325 million of its common equity. The chart goes on to indicate that those reductions will serve to reduce Consumers' weighted average cost of capital from its current level of 10.96% to a post-securitization level of 10.48%. Exhibit CE-5, lines 13 and 30.

According to Mr. Ernst, that reduction of 0.48% in the utility's weighted cost of capital "demonstrates that the Company's issuance of the securitization bonds meets the test described in §10i(2)(b)." 3 Tr. 256. Specifically, he continued, the utility's "cost of capital will be decreased and, under traditional . . . ratemaking principles, will be flowed through to electric customers in the form of reduced electric rates, all other things being equal." Id. Based on this evidence, Consumers asserts, the Commission should find this statutory test to be satisfied.

The Staff agrees with that assertion and joins Consumers in requesting that the Commission find that Section 10i(2)(b) has been satisfied. According to the Staff's witness on this issue, Mr. Ballinger, "satisfaction of this criteria is achieved as the Company's capital cost rate declines." 4 Tr. 593. He went on to testify that, "to the degree that this permits a rate reduction, there would indeed appear to be a tangible benefit." Id.

In contrast, the Attorney General and ABATE contend, among other things, that the benefits claimed as a result of securitization are speculative and, as a result, can be deemed neither tangible

nor quantifiable. These parties further contend that, even assuming the existence of tangible benefits due to securitization, those benefits cannot be passed on to Consumers' customers because (according to Act 141) the utility's rates are frozen until 2004.

The Commission disagrees with the Attorney General and ABATE, and finds adequate support in the record for concluding that the statutory test set forth in Section 10i(2)(b) is satisfied. The stated goal of securitization, and one that several witnesses--including Mr. Hoffman--view as eminently achievable in this case, is to issue bonds with a AAA rating and a correspondingly low interest rate. As reflected on numerous exhibits, the expected interest rate for the utility's securitization bonds (which Consumers predicts to be 7.73%) will be significantly lower than the utility's authorized rate of return on common equity (which presently stands at 12.25%). Due to this significant differential, it is clear that by using even a portion of its securitization bond proceeds to retire common equity, Consumers' proposal will produce quantifiable and tangible benefits.

Moreover, a full reading of Act 141 indicates that, notwithstanding the imposition of the temporary rate freeze referred to by the Attorney General and ABATE, benefits derived from securitization can be immediately passed on to Consumers' ratepayers. Specifically, although Section 10d(1) purports to freeze Consumers' retail rates at their May 1, 2000 level until the close of 2003, that provision concludes by stating "unless otherwise reduced by the commission under subsection (4)." MCL 460.10d(1); MSA 22.13(10d)(1). The "subsection (4)" referred to above states, in pertinent part, that:

> (4) If the commission authorizes an electric utility to use securitization financing under section 10i, any savings resulting from securitization shall be used to reduce retail electric rates from those authorized or in effect as of May 1, 2000 as required under subsection (1).

MCL 460.10d(4); MSA 22.13(10d)(4). Thus, because today's order grants Consumers' request to securitize up to $468,592,000 in after-tax qualified costs and directs the utility to use its securitization cost savings to implement additional rate reductions (beyond the 5% residential rate cut imposed by the June 5, 2000 order in Case No. U-12464),[12] the Commission concludes that the requirements of Section 10i(2)(b) have been satisfied.

d. Section 10i(2)(d)

As noted above, the last of these statutory tests requires the Commission to find that the amount securitized does not exceed the net present value of the revenue requirement for those qualified costs over the life of the securitization bonds. Based on computations performed by Mr. Ernst, Consumers concludes that it met this test. As set forth on Exhibit CE-6, Mr. Ernst computed the net present value of the 14-year revenue requirements to be $639.5 million when discounted at 7.73%, and $577.4 million when discounted at 10.34%. Because both of these net present value figures exceed the utility's proposed after-tax securitization bond issue of $472.5 million, Mr. Ernst stated that the statutory test spelled out in Section 10(2)(d) of Act 142 has been satisfied. See, 2 Tr. 257.

The Staff agrees with Consumers' conclusion. However, its analysis differs slightly from that performed by the utility. Specifically, Staff witness Ballinger stated that neither of the discount rates used by Mr. Ernst was entirely appropriate for purposes of this statutory test. Instead, he suggested using a discount rate of 10.63%, which results in a net present value figure of $549.4 million. Exhibit S-43. Nevertheless, because this figure is still well in excess of the proposed

[12] See, infra, the Commission's discussion regarding the "Proposed Use of Securitization Costs Savings."

$472.5 million bond issue, the Staff asserts that the requirements of Section 10i(2)(d) have been satisfied.

The Attorney General challenges the overall assessment reached by both Consumers and the Staff, and contends that the utility's proposal fails to pass this statutory test. The Attorney General begins by asserting (as did the Staff) that the appropriate discount rate for use in this test is the utility's composite cost of capital, rather than either of the reduced discount rates relied on by Mr. Ernst. More importantly, she argues that Consumers' calculation "grossly understates the amount actually being securitized." Attorney General's initial brief, p. 23. According to one of her witnesses, Mr. Peloquin, this is because the utility incorrectly reduced the gross amount of its qualified costs ($727 million) by $254.5 million in deferred income taxes when establishing the amount of its proposed $472.5 million bond issue. The Attorney General claims that once this mistake is corrected, thus restoring the amount to be securitized to its original level of $727 million, none of the net present value figures developed by Consumers or the Staff exceeds that level and the requirements of Section 10i(2)(d) cannot be met.

The Commission finds that the Attorney General's challenge, at least as it pertains to the $254.5 million adjustment to the gross amount of Consumers' qualified costs, is not well taken. As pointed out in the section of this order dealing with the computation of Consumers' qualified costs, supra, the difference between the $727 million gross amount of those costs and the $472.5 million face value of the proposed securitization bonds corresponds solely to the income tax effect arising from Consumers' future collection of securitization charges. It has nothing to do with deferred income taxes currently on Consumers' books. This is confirmed by the fact that the computation of the $727 million gross amount of the utility's proposed qualified costs specifically accounts for $198.5 million in deferred income taxes. Thus, both the utility and the Staff were

correct to compare their respective net present value figures to the $472.5 million after-tax figure. Moreover, because each of those net present value figures greatly exceeds $472.5 million, the Commission concludes that Section 10i(2)(d) has also been satisfied.

Based on the findings set forth above, Consumers' proposal has met each of the criteria established by Section 10i(1) and 10i(2) of Act 142. The Commission therefore concludes that the utility's request for authority to issue securitization bonds should be granted.

Proposed Use of Securitization Cost Savings

The next issue to be addressed is the utility's proposed use of its estimated cost savings from securitization. Consumers' position on this issue was described by Mr. Ernst and set forth on Exhibit CE-7.

According to Mr. Ernst, the issuance of securitization bonds along the lines of the utility's proposal would result in an annual cost savings of approximately $58.7 million. See, 3 Tr. 259. He arrived at this figure by subtracting the total annualized revenue requirement associated with the qualified costs that will be securitized pursuant to this order ($75.8 million) from the annual levelized revenue requirements that would have arisen from those qualified costs in the absence of securitization ($134.5 million). Id. Mr. Ernst went on to note that, as reflected on Line D of Exhibit CE-7, approximately $49.8 million of that $58.7 million annual cost savings will go toward offsetting the 5% residential rate reduction required by Section 10d(1) of Act 141 and implemented pursuant to the Commission's June 5, 2000 order in Case No. U-12464.

None of the parties dispute the reasonableness of Consumers' estimated annual cost savings.[13] Likewise, none of them object to the utility's plan to use a significant portion of those savings to underwrite Consumers' previously initiated residential rate cut. Nevertheless, significant disagreement exists regarding what use should be made of the remaining $8.9 million per year of securitization-related savings.

For example, Consumers proposes applying the remaining annual savings to "the reduction of the other qualified costs shown on lines F-1 through F-5" of Exhibit CE-7. Id. These costs include, among other things, approximately $32.9 million in "revenue lost due to the difference in the timing" between the implementation of the 5% residential rate cut (which took effect on June 5, 2000) and the issuance of securitization bonds (which Consumers assumes will occur on approximately January 1, 2001). Consumers' initial brief, p. 75. The utility cites Section 10d of Act 141 in support of its proposal to recover that lost revenue. According to Consumers, that section clearly indicates that all revenue reductions resulting from the 5% residential rate cut must be recovered through securitization. This is only logical, the utility asserts, because Act 142 makes implementation of the 5% residential rate reduction contingent upon securitization. Moreover, Consumers notes that the total dollar value of the year 2000 revenue reduction and the other components of what it refers to as "Section F Qualified Costs" vastly exceeds the remaining $8.9 million in estimated securitization-related savings. Consumers' initial brief, p. 73. The utility

[13]The Commission recognizes that the estimates discussed in Mr. Ernst's testimony and set forth on Exhibit CE-7 do not reflect the Palisades investment tax credit adjustment that was proposed by Mr. Ballinger and adopted earlier in this order. However, because that adjustment will have only minimal effect on the estimated figures being discussed in this section and more precise figures will be calculated once securitization has actually occurred, Mr. Ernst's estimated figures are sufficiently accurate to warrant their use in this context.

therefore requests that the Commission give it "reasonable discretion in applying what may be a limited amount of excess securitization savings" to those costs. Id.

In contrast, the MEC and MCAAA contend that the Commission is statutorily obligated to use the estimated $8.9 million in annual excess savings to provide the funding necessary to establish and operate the low-income and energy efficiency fund (LI/EE fund) described in Section 10d(6) of Act 141. According to these parties, "a common sense interpretation" of Act 141 requires that all excess savings above the 5% residential rate reduction mandated in Section 10d(1) must go, "as a matter of priority," to the LI/EE fund. MEC's initial brief, p. 4. They therefore propose that the Commission specifically order Consumers to file an application to establish such a fund.

Several parties object to these proposals. For example, Unicom, ABATE, and the Staff each contend that Consumers' proposal conflicts with both the wording and the intent of Act 141. According to Unicom, there is nothing in the statute "that would justify the Commission in leaving the application of such amounts to Consumers' 'reasonable discretion'." Unicom's reply brief, p. 3. Rather, Unicom continues, the application of excess securitization savings is a matter governed in very specific terms under Sections 10d(5) and 10d(6) of Act 141. As for ABATE, it points out that Consumers' request is illogical. According to ABATE, any use of securitization-related savings to fund the 5% residential rate cut can occur (if at all) only after the securitization bonds have been sold. This is because, ABATE continues, "there is no benefit to customers until such time as the bonds have been issued and the savings generated." ABATE's reply brief, p. 16. The Staff agrees with ABATE, noting that Consumers' proposal would require "the retroactive allocation of prospective savings, which the Commission cannot legally effectuate." Staff's reply brief, p. 10.

Likewise, Consumers objects to the proposal offered by the MEC and MCAAA. According to the utility, that proposal is based on the premise that Act 141 mandates the assignment to the LI/EE fund of all securitization savings beyond those used to achieve the 5% residential rate reduction. That premise, Consumers contends, directly conflicts with the clear language found in Section 10d of Act 141. The utility therefore argues that the proposal developed by the MEC and MCAAA must be rejected.

As can be seen from these arguments, the resolution of this issue depends on the wording of Section 10d. This section states, in pertinent part:

> (1) Unless otherwise reduced by the commission under subsection (4), the commission shall establish the residential rates for each utility with 1,000,000 or more retail customers in this state as of May 1, 2000 that will result in a 5% rate reduction from the rates that were authorized or in effect on May 1, 2000.
>
> * * *
>
> (4) If the commission authorizes an electric utility to use securitization financing under section 10i, any savings resulting from securitization shall be used to reduce retail electric rates from those authorized or in effect as of May 1, 2000 as required under subsection (1).
>
> * * *
>
> (5) Except for savings assigned to the low-income and energy efficiency fund pursuant to subsection (6), securitization savings greater than those used to achieve the 5% rate reduction under subsection (1) shall be allocated by the commission to further rate reductions or to reduce the level of any charges authorized by the commission to recover an electric utility's stranded costs.
>
> * * *
>
> (6) If securitization savings exceed the amount needed to achieve a 5% rate reduction for all customers, then, for a period of 6 years, 100% of the excess savings, up to 2% of the electric utility's commercial and industrial revenues, shall be allocated to the low-income and energy efficiency fund . . ..

MCL 460.10d; MSA 22.13(10d).

Based on its reading of this statutory language, the Commission finds that it must reject Consumers' proposal regarding the use of excess securitization savings, as well as the proposal submitted by the MEC and MCAAA.

Notwithstanding Consumers' assertions to the contrary, Act 142 did not make implementation of the 5% residential rate reduction contingent on the utility's issuance of securitization bonds. Rather, as can be derived from the Legislature's use of the word "shall" in Section 10d(1), each Michigan electric utility having over 1 million customers--namely, Consumers and Detroit Edison--was mandatorily required to reduce by 5% the residential rates that were authorized or in effect as of May 1, 2000. In contrast, all decisions regarding when (or even whether) to undertake securitization were left to the discretion of each utility's management. Thus, the so-called "timing difference" for which Consumers seeks compensation never actually arose.

Similarly, the MEC and MCAAA are mistaken in their belief that Act 142 requires a mandatory contribution to the LI/EE fund at this time. By its own terms, the mandatory contribution provision set forth in Section 10d(6) does not take effect until "securitization savings exceed the amount needed to achieve a 5% rate reduction for all customers," rather than just those customers taking service on the utility's residential rates. MCL 460.10d(6); MSA 22.13 (10d)(6). [Emphasis added.] Thus, because several classes of customers on this utility's system have not received rate cuts of at least 5%, the MEC and MCAAA cannot yet lay claim to the excess savings produced by Consumers' proposed securitization.

Having rejected these proposals as being inconsistent with Section 10d of Act 142, the Commission must now decide how the $8.9 million in excess securitization savings can best be used. It finds that the key to this determination resides in the second clause of Section 10d(5), which states that securitization savings in excess of those used to achieve the 5% residential rate reduction

"shall be allocated by the commission to further rate reductions or to reduce the level of any charges authorized by the commission to recover an electric utility's stranded costs." MCL 460.10d(5); MSA 22.13(10d)(5).

Based on that language, the Commission concludes that the most appropriate use for Consumers' excess securitization savings is to (1) apply 50% of the estimated excess--approximately $4.5 million--to a reduction in the distribution charge of each non-residential customer on Consumers' electric system, and (2) designate the remaining 50% for use in reducing the transition charge developed in the context of Consumers' stranded cost recovery true-up proceedings and charged to the utility's ROA customers. Unlike the mandatory 5% residential rate cut, which had immediate effect, implementation of the rate reductions arising from excess securitization savings should be held in abeyance pending Consumers' initial receipt of securitization bond proceeds and shall commence contemporaneously with the initiation of the utility's securitization and tax charges.

Proposed Amortization, Accounting, and Ratemaking Approvals

According to its lead witness, Mr. DaPra, Consumers' request for a financing order specifically seeks authorization to establish an amortization schedule "on the same basis as the recovery of the principal amounts of the securitized qualified costs." 2 Tr. 69. In addition, the utility claims that it seeks two sets of proposed accounting and ratemaking authorizations, each covering a separate aspect of securitization.

The first set of these authorizations, described on pages 11 and 12 of Mr. DaPra's direct testimony (2 Tr. 76-77) and illustrated on Exhibit CE-2, concerns the authority necessary to record on Consumers' books all financial transactions necessary to undertake securitization, including

those between the utility and the proposed SPE. This authority would permit, among other things, all accounting entries needed to record (1) the securitized qualified costs on Consumers' books, (2) the issuance of the securitization bonds, (3) the use of the securitization bond proceeds to retire existing debt and equity, (4) the receipt of revenues arising from Consumers' proposed securitization charge and securitization-related tax charge, (5) the payment of principal, interest, and expenses relating to the bonds, and (6) the amortization of securitized qualified costs. According to Mr. DaPra, "the amount securitized will be recorded as a financing of the SPE for financial reporting purposes and, because the SPE will be consolidated with [Consumers] for financial reporting purposes," the amounts financed will also appear as a financing in the utility's consolidated financial statements. 2 Tr. 77.

The second set of authorizations concerns Consumers' request for "ratemaking and accounting approval" from the Commission regarding the utility's "ability to seek future recovery of . . . other qualified costs as set forth at Section F, lines 3, 4, and 5 of Exhibit CE-7." 2 Tr. 82. Specifically, Mr. DaPra notes that the costs appearing on lines F-1 and F-2 of that exhibit (and which pertain to ROA implementation costs and related customer education costs) are already being deferred in accordance with prior Commission orders. Thus, Consumers is now requesting the "same deferral treatment and the establishment of a regulatory asset for accounting purposes" for the costs set forth on lines F-3, F-4, and F-5 of that exhibit. Id.

The only substantive dispute concerning this issue involves Consumers' request to treat the figure on line F-4 of Exhibit CE-7 (the year 2000 revenue reduction arising from Act 141's mandatory 5% residential rate cut) as a regulatory asset. The Staff, ABATE, and the Attorney General oppose that treatment on the grounds that (1) a rate reduction cannot, by definition, constitute a regulatory asset, and (2) granting the utility's request would mean that Acts 141 and 142 were "a

sham" under which the Legislature intended "to give ratepayers a guaranteed 5% rate reduction with one hand, and then take it away with the other." Attorney General's initial brief, p. 13. These three parties therefore argue that the Commission should reject Consumers' proposed treatment of that revenue reduction.

The Commission agrees with the Staff, ABATE, and the Attorney General, and finds that it must reject Consumers' proposal as it relates to the figure set forth on line F-4 of Exhibit CE-7.

According to testimony offered by one of the utility's own witnesses, Mr. DaPra, a regulatory asset is created when the Commission issues a ruling making it "probable that a regulated utility's incurred cost will be recovered through future revenue." 2 Tr. 70-71 [Emphasis added]. Unlike an investment in an abandoned or economically uncompetitive generating plant, a rate cut does not constitute an incurred cost. Thus, the 5% residential rate reduction mandated by Section 10d(1) of Act 141 falls outside the definition of a regulatory asset. Moreover, granting Consumers the authority to treat this amount as either a regulatory asset or a qualified cost could result in its recovery, albeit over time, from utility customers. This would have the illogical effect of requiring ratepayers to pay for their own rate cut.

The Commission therefore concludes that although Consumers' other requests for amortization, accounting, and ratemaking authority are reasonable and should be approved, no such approval should be given with regard to the amount listed on line F-4 of Exhibit CE-7.

Before moving on, one other issue (more procedural than substantive) must be addressed. Specifically, Energy Michigan argues that the amortization, accounting, and ratemaking approvals included in the Commission's financing order should not be given immediate effect. Instead, Energy Michigan contends, the effect of these approvals--as well as any other authorizations

granted in this order--should be tolled pending Consumers' express acceptance of all conditions and limitations that this order places on the utility.

In addition, and as previously noted in this order, the 5% residential rate reduction was not contingent on the issuance of securitization bonds and, thus, securitization cannot be applied retroactively to fund that rate reduction. Consumers' proposal to retroactively create a regulatory asset is just a variant of its "timing difference" argument that the Commission has rejected.

The Commission finds Energy Michigan's argument persuasive. If Consumers elects not to pursue securitization due to its failure to prevail on some issue addressed in this order, the basis for granting the utility's myriad requests for amortization, accounting, and ratemaking authority disappears. The Commission thus concludes that its grant of all such authority shall not become effective until Consumers submits a written acceptance of the Commission's financing order. Upon the filing of that acceptance with the Commission, the financing order and the securitization charges approved in the order, shall be considered irrevocable as directed under Section 10i(4) of Act 142--except as provided under Section 10k(3) of that act.

Securitization and Tax Charges

Due to its earlier finding that Consumers' request for authority to issue securitization bonds should be granted, the Commission must now rule on how costs relating to those bonds shall be recovered.

Consumers proposes to recover those costs by imposing a uniform per kWh securitization charge, as well as a uniform per kWh tax charge,[14] on each customer's energy usage. The utility gives three reasons in support of this approach. First, it notes that this is consistent with the Commission's decision--set forth in numerous orders in Case No. U-11290 et al.--to collect ROA transition charges through the application of a uniform energy surcharge. Second, it points out that structuring its securitization and tax charges in this manner makes them "easier to track for true-up purposes and promotes cross-collateralization among rate classes, which makes the bonds more marketable." Consumers' initial brief, p. 18, quoting 3 Tr. 264. Third, the utility contends that this avoids creating complex administration and implementation issues with regard to its billing systems.

The utility goes on to note that its proposed securitization and tax charges will only be assessed to a customer during billing months in which the customer actually takes delivery of electricity over some portion of Consumers' system. For example, the utility continues, customers that have contracted for auxiliary or stand-by service will only be required to pay securitization and tax charges during periods in which they take deliveries of electricity on the applicable rate schedules.

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[14]As previously indicated in this order, the tax charge is designed to recover all tax liability arising from Consumers' assessment and collection of its securitization charge. The need for a tax charge was explained by Mr. Ernst, as follows:

> In order for the Company to make each $1 in annual principal payments to the trustee for the bondholders, the Company needs to collect $1.5747 in revenues from customers for the principal component of the annual payment. In other words, the Company has to pay [federal income tax] and [Michigan Single Business Tax] on the revenues it receives to repay principal due to the fact that the principal does not have a tax deduction associated with it. If the Company did not charge the $1.5747, it would not collect enough revenue to pay taxes and to pay the entire amount of its debt obligations.

3 Tr. 262.

Nevertheless, for bundled sales customers and ROA customers alike (each of whom requires use of Consumers' transmission and distribution systems on a regular basis), the only way to "avoid paying the securitization charge and the tax charge would be to physically disconnect itself" from Consumers' facilities. Id. For this reason, Consumers points out, these charges are non-bypass-able for any electric customers that remain connected to the utility's system.

Although the actual per kWh charges will change over time depending on the principal balance of the outstanding bonds and the composite interest rate at which they are being held, among other things, Consumers computed the maximum securitization and tax charge rates that it seeks to impose beginning with the first billing cycle after securitization bonds are sold by the SPE. According to Mr. Ernst, these maximum rates, for which Consumers seeks Commission approval in this order, are $0.00205 per kWh for the securitization charge and $0.00025 per kWh for the tax charge. Because the computation of these charges (which is shown on Exhibit CE-8) was based on an assumed aggregate bond yield of 10.34%, and because the average expected yield for the various tranches of Consumers' securitization bonds is only 7.73%, the actual rates charged to Consumers' customers are expected to be significantly below the ceiling rates for which the utility now seeks approval.

In recognition of this fact, Consumers proposes adding a new rule to its electric tariff, desig-nated as Rule B-18. This proposed tariff language, which is set forth on Exhibit CE-10, "describes the process [that] the Company will use to initially implement and adjust periodically the securiti-zation charges and the tax charges during the term of the securitization bonds." 3 Tr. 269. Consumers goes on to state that once the initial securitization charge is computed (following issuance of the first tranche or tranches of bonds), the amount of that charge (1) will be deducted from the respective energy charge shown on each of its current rate sheets, and (2) a line will be

added to each of the affected rate sheets listing the per kWh securitization charge. Thus, even though the securitization charge will be collected through a separate line item on each customer's bill, "the revised rate sheets will reflect a total kWh energy charge to customers equal to those in effect today." 3 Tr. 271. As for the tax charge, the utility proposes to simply recover it through the amounts billed and collected under the energy charge shown on each existing rate sheet.

As for customers taking ROA service, the proposed payment structure is slightly more complex because certain rules governing ROA will change on January 1, 2002. Prior to that date, the transition charge owed to Consumers is the price offered in a successful bid and is to be submitted to the utility by the ROA customer's retail energy provider. In contrast, the post-2001 transition charge will be a uniform rate established by Commission order and will be paid directly by the customer to the utility. For ROA service received before January 1, 2002, Consumers proposes to bill the retail energy suppliers for the full amount of the bid price and separate each payment into three parts following its receipt: (1) the securitization charge, which will be forwarded to the trustee for the bondholders; (2) the tax charge, which will be retained by the utility; and (3) the transition charge, which will be applied against the utility's stranded costs. In cases where the sum of the securitization and tax charges exceeds the bid price paid by the retail energy provider, a "negative transition charge will be reflected in the stranded cost computation." Id. As for ROA service received after the start of 2002, Consumers proposes to send each bill directly to the customer, setting forth the securitization charge on a line separate from the combined tax and transition charge.

Consumers' proposals concerning the computation and collection of its securitization and tax charges have given rise to several areas of dispute.

a. Uniform per kWh charges

ABATE, Unicom, and Energy Michigan object to the utility's proposal to recover its securitization-related costs through the use of uniform per kWh charges. According to these parties, applying per kWh charges would be disadvantageous to high load factor customers. As a result, they contend that Consumers' proposal will result in an overallocation of securitization-related costs to industrial customers and an underallocation to residential customers. They go on to assert that the Commission has consistently allocated costs like those to be recovered by the securitization charge through the application of a 12 coincident peak, 75% demand/25% energy allocation factor. Because no such allocation was performed by any of the parties to this case, ABATE, Unicom, and Energy Michigan recommend that the Commission reject the utility's proposal to use uniform per kWh charges and, instead, order Consumers to develop new rates based on the 12 coincident peak, 75% demand/25% energy methodology.

Consumers, joined by the Attorney General and the Staff, oppose that recommendation for several reasons. First, they point out that because no such cost allocation has been performed--much less offered into evidence--with regard to these securitization costs, mandating the use of the 12 coincident peak method would significantly delay the start of securitization. Second, noting that it would require the utility to develop different securitization and tax charges for each customer class, use of that allocation methodology would make all future securitization and tax charge reconciliations unnecessarily complex and time-consuming. Third, claiming that "the primary beneficiaries of base load plants [like Palisades] are high energy use customers," they contend that the demand-based allocation sought by ABATE, Unicom, and Energy Michigan would assign far too little of the qualified costs to those customers. Staff's reply brief, p. 5. For

these and other reasons, Consumers, the Attorney General, and the Staff support the use of uniform per kWh charges.[15]

The Commission agrees and finds that Consumers' proposal should be adopted in this regard. A similar situation arose in Case No. U-11290, where the Commission had to determine the best method for recovering stranded costs. Due, in large part, to the fact that it would help expedite the true-up of all transition and implementation charges imposed on ROA customers, the Commission authorized the use of a uniform per kWh charge. Because Section 10k(3) requires that securitization charges "be reviewed and adjusted by the Commission at least annually," ease of administration likewise weighs heavily in favor of applying per kWh charges in the present case. Moreover, as discussed by both Mr. Ernst and Mr. Hoffman, the utility's proposal promotes the concept of full cross-collateralization between and among customers regardless of rate class. See, 2 Tr. 196-97 and 264-65. As noted by those witnesses, this cross-collateralization makes all customers jointly and severally responsible for payment of the principal, interest, and all related costs of securitization. Thus, as pointed out by Mr. Hoffman, the use of per kWh charges "will be favorably received by the rating agencies" and help ensure the highest possible rating for Consumers' securitization bonds. 2 Tr. 197.

Moreover, notwithstanding some parties' claims to the contrary, use of uniform per kWh securitization and tax charges will not change existing cost allocations among customer classes. This is because a corresponding reduction in each customer's distribution or transition charge will be made, thus assuring that no customer pays more as a result of securitization. This is in contrast to the demand-based allocation methodology proposed by ABATE, Unicom, and Energy

[15]Dow joins with these parties and supports the use of per kWh charges, at least as they apply to the provision of stand-by power.

Michigan, which (because Palisades is a base load plant whose principal beneficiaries are high energy use customers) would likely result in a reallocation of cost responsibility in violation of Section 10d(5) of Act 141.

For these reasons, the Commission concludes that the utility's proposal to recover its securitization-related costs through the use of uniform per kWh securitization and tax charges should be approved.

b. Post-2001 treatment of ROA customers

Energy Michigan raises a concern regarding whether ROA customers will be treated fairly under Consumers' proposal after the close of 2001. Specifically, it notes that although the utility plans to reduce the tariffed rate paid by each bundled sales customer by the sum of the securitization and tax charges, and despite the fact that it likewise plans to reduce the bid-based transition charge applied to ROA customers on or before December 31, 2001, it appears that no similar reduction will be made to ROA customers' bills after the start of 2002. According to Energy Michigan, this would have an inequitable (and, it claims, intentionally anticompetitive) effect on ROA. Specifically, Energy Michigan continues, it would deprive those ROA customers of something that is being offered to similarly-situated sales customers, namely the right to offset their other rates by the amount paid in securitization and tax charges.

In response, Consumers contends that there is no hidden agenda behind its proposed recovery of securitization and tax charges. Specifically, the utility asserts that it "is not trying to double count these stranded costs and recover the same categories of stranded costs once through securitization charges and once through transition charges" imposed on ROA customers. Consumers' reply brief, p. 24. Rather, Consumers contends, its failure to state that all securitization and tax

charges paid by ROA customers after the start of 2002 will be used as an offset to the transition charges appearing on their bills is based on the utility's assumption that the transition charge computed by the Commission for use on and after January 1, 2002 "will take into account the assets that have been securitized and not include them in the development of that transition charge." Id., p. 25. The Staff agrees with Consumers, relying on the same assumption.

Although it is true that the transition charge applied to ROA customers after December 31, 2001 could be structured to recognize the reduction in Consumers' stranded costs due to securitization, the importance of this issue (from a competitive standpoint) justifies taking immediate action rather than adopting a "wait-and-see" approach. The Commission therefore finds that its approval of Consumers' application should be conditioned upon the utility's express agreement that, for all bills rendered after the close of 2001, the utility will reflect on bundled sales and ROA customers' bills alike an offset equal to the sum of each customer's securitization and tax charges payable for that same billing period.

c. Proposed equalization of the residential rate reduction

Energy Michigan contends that despite providing welcome relief, the 5% residential rate cut mandated by Section 10d(1) of Act 141 unfairly benefits bundled sales customers. Specifically, it states that although the 5% reduction in bundled residential rates produces a net reduction of 0.375¢ per kWh, it only reduces the rates charged to ROA residential customers by 0.22¢ per kWh. According to Energy Michigan, the 5% reduction in ROA residential rates yields less savings because it applies only to transmission and distribution costs and not to generation-related expenses. Energy Michigan therefore recommends, among other things, ordering Consumers to subtract "the equivalent of the 0.375¢ per kWh bundled sales reductions in dollars per kWh (and

not as a percentage) from ROA bid transition charges." Energy Michigan's initial brief, p. 10. Unless this occurs, Energy Michigan continues, residential customers will have an incentive to remain on Consumers' bundled rates instead of switching to ROA.

Consumers opposes Energy Michigan's proposal for several reasons. Principal among these is the fact that any residential ROA customer "already had the lowest residential rate for the type of distribution service it received from Consumers prior to the passage of Act 141." Consumers' reply brief, p. 20. After the passage of Act 141, Consumers continues, that already low rate was reduced further. Moreover, the utility notes that although the Legislature could have enacted a residential rate cut on a dollars per kWh basis if it so desired, it chose instead to enact equal percentage rate reductions. Thus, claiming that it would effectively overturn the Legislature's decision, Consumers questions the legality of any Commission order granting Energy Michigan's request.

The Commission finds Energy Michigan's arguments on this issue persuasive. Act 141 requires a 5% reduction in residential rates from those authorized or in effect on May 1, 2000. For a bundled sales customer, this reduced rates by approximately 0.375¢ per kWh effective June 5, 2000. There were no ROA residential customers on that date, nor are there any today. In the future, if the equalization adjustment proposed by Energy Michigan is not made, then residential customers switching to ROA will receive a lower rate reduction than those that do not. The Commission finds that this outcome would be inconsistent with the legislative intent that all residential customers receive a 5% rate reduction.

Moreover, even if Act 141 did not require the equalization adjustment, there are significant policy reasons that call for its adoption. As previously noted, Section 10d(5) of Act 141 requires that securitization proceeds in excess of those needed to fund the 5% residential rate reduction

"shall be allocated by the commission to further rate reductions or to reduce the level of any charges authorized by the commission to recover an electric utility's stranded costs." MCL 460.10d(5); MSA 22.13 (10d)(5). Thus, even if Act 141 did not require the equalization adjustment, the Commission would be authorized to implement it. The record clearly indicates that, without the equalization adjustment, residential customers who switch to an alternative supplier will be unfairly disadvantaged. This is inconsistent with the policy of promoting a competitive market. Thus, the Commission finds that Energy Michigan's proposed equalization adjustment should be adopted for policy reasons as well as because it is required by Act 141.

d. Implementation of direct billing

Consumers' proposal provides that, prior to January 1, 2002, the utility would collect its securitization and tax charges from each ROA customer's retail energy provider and rely on the provider to pass those charges on to the customer. However, starting January 1, 2002, Consumers would begin billing ROA customers directly. According to Energy Michigan, initiating one billing system and promptly replacing it with another will lead to needless confusion, create billing problems for those providers, and increase implementation costs. It therefore recommends that Consumers simply rely on direct billing from the start.

Consumers opposes this recommendation. According to the utility, the Commission's orders in Case No. U-11290 placed responsibility on the retail service provider for paying the winning bid price for ROA service, and the desire to shift this responsibility to the ROA customers is an insufficient basis for making the recommended change.

The Commission disagrees with the utility and finds that Energy Michigan's request should be granted. Consumers anticipates that, if everything goes as planned, the SPE will begin issuing its

securitization bonds at the start of 2001. Thus, the period during which the utility plans to bill retail energy providers, instead of the underlying ROA customers, would last for no more than 12 months. The Commission therefore concludes that, to avoid the needless confusion that could result from changing the billing system after such a short time, Energy Michigan's recommendation to implement direct billing from the outset should be adopted.

e. Billing for securitization and tax charges

As noted above, Consumers proposes to set out the securitization charge as a separate line item on its customers' bills, while collecting the tax charge as part of the bundled energy charge. Energy Michigan's witness, Richard A. Polich, recommends including all securitization costs (including taxes) in a single, unified charge. Claiming that this should make things easier from an accounting, billing, and reconciliation standpoint, Energy Michigan asks the Commission to adopt Mr. Polich's recommendation.

Consumers disagrees with that recommendation. According to the utility, the reason for collecting the securitization charge separately is that those funds need to be passed on to the SPE. This is not the case with the funds collected by the tax charge. The utility concludes by stating that if the Commission is concerned about accounting, billing, and true-up issues, the better solution would be "for the securitization charge and the tax charge to remain separate charges as proposed by the company and for each of the two charges to be stated as separate line items on all customer bills, including customers taking ROA service." Consumers' reply brief, p. 18.

The Commission finds that good reason exists for keeping the securitization charge separate from the tax charge. Specifically, collecting the securitization charge separately will, according to testimony provided by Mr. Hoffman, make it easier to determine precisely what portion of

Consumers' revenue stream corresponds to the payments that the utility must make to the SPE (or, more precisely, the trustee). See, 3 Tr. 213. Moreover, because both the securitization charge and the tax charge will be the subject of periodic true-ups, the Commission finds that stating them each as separate line items on customers' bills (instead of rolling the tax charge into the energy charge, as Consumers initially recommended) will likely prove beneficial. The Commission therefore rejects Energy Michigan's request to consolidate these two charges and adopts the revised billing structure discussed in Consumers' reply brief.

f. Range of securitization and tax charge liability

Dow asserts that the Commission should specifically include within this order the following statement:

> Nothing in this order authorizes [Consumers] or any other entity to impose any securitization charge, securitization tax charge, or any other similar charge on self-service power or on a person engaged in affiliate wheeling.

Dow's initial brief, p. 1. Dow bases its assertion on certain provisions set forth in Act 141. Dow cites Section 10a(6), which states that "this act does not prohibit or limit the right of a person to obtain self-service power, and it does not impose a transition, implementation, exit fee, or any other similar charge on self-service power." MCL 460.10a(6); MSA 22.13(10a)(6). Similarly, it cites Section 10a(7), which states that "this act does not prohibit or limit the right of a person to engage in affiliate wheeling and does not impose a transition, implementation, exit fee, or any other similar charge on a person engaged in affiliate wheeling." MCL 460.10a(7); MSA 22.13(10a)(7).

Consumers agrees with Dow that the securitization and tax charges approved in this order fall within the "any other similar charge" clause set forth in both Sections 10a(6) and 10a(7) of

Act 141. However, the utility goes on to assert that "this does not automatically mean" that every customer who claims to have obtained self-service power or engaged in affiliate wheeling is "entitled to an exemption from the securitization charge and related tax charge proposed in this proceeding." Consumers' reply brief, p. 45. According to Consumers, there are other provisions within Act 141 that may come into play for a specific customer. The utility therefore contends that the language proposed by Dow is overly broad and that the following statement should be used in its place:

> For purposes of this financing order, securitization charges and the related tax charges are a "similar charge" as that term is used in Subsections 10a(6) and 10a(7) of Act 141.

Id. at 47. None of the other parties to this case addressed this issue.

Due to the lack of dispute among the parties, and in light of its reading of Act 141, the Commission finds that Dow's proposed language (as amended by Consumers) should be approved and included in the findings of this order.

Periodic True-ups

According to Mr. Ernst, two factors necessitate the periodic adjustment of securitization and tax charges. First, he noted that because these charges are applied prospectively to bills rendered during the next period, the revenues collected are unlikely to ever exactly match the cash required by the SPE or the trustee for the purpose of making the scheduled principal and interest payments on the bonds and reimbursing the SPE's ongoing operating costs. Thus, he continued, "the next period's charges must reflect not only the cost attributable to the upcoming period, but also any over- or under-collections from the previous period." 3 Tr. 268. Second, he stated that even absent any over- or under-collections from the prior period, these charges must be adjusted to

reflect changes in such things as forecasted sales, expenses, and customer payment patterns for the upcoming period. Mr. Ernst concluded by pointing out that because establishing an expedited true-up procedure to make these adjustments increases the certainty that the securitization bonds will be paid-off in a timely manner, it will "greatly enhance the receipt of a AAA rating" for those bonds. Id.

Consumers therefore developed a proposed system for conducting a securitization and tax charge true-up at least once a year (except that starting 12 months prior to the last expected maturity date of the securitization bonds, true-ups would be undertaken at least quarterly). The utility's proposed system was designed to allow Consumers to analyze the past period's actual revenues and expenses, maintain the appropriate amount in the overcollateralization subaccount, roll over any over- or underrecovery to the upcoming period, compute new levels for its securitization and tax charges, and automatically begin implementing those charges at their revised levels. Consumers went on to provide a hypothetical example, set forth on Exhibit CE-9, of how its system would operate.

The utility's proposal was strongly supported by the Staff. However, it was challenged, in part, by Energy Michigan and the Attorney General. For example, Energy Michigan argued that the periodic true-ups should not occur more than once annually (at least until 12 months prior to the bonds' last expected maturity date). Any more frequent occurrence, it contended, would merely serve to confuse customers. As for the Attorney General, she recommended that each true-up be exposed to rigorous examination by all interested parties (likely in the form of a contested case proceeding) and that all overrecoveries be returned--with interest--to Consumers' ratepayers instead of being rolled over to the next period. Finally, Energy Michigan and the Attorney General

argued that the utility must be precluded from implementing revised securitization and tax charges without first receiving Commission approval of those new charges.

The record clearly shows that not only are periodic securitization and tax charge true-ups necessary, but (to provide the certainty needed to obtain a AAA bond rating) they need to be undertaken in a way that allows for their swift and certain resolution. For this reason, the Commission finds that Consumers' proposal should be approved, but with two relatively minor changes. First, based on recent indications by the utility that annual true-ups would be sufficient until one year prior to the bonds' final maturity date (See, Consumers' initial brief, p. 9), the utility should be limited to undertaking no more than one routine true-up per year until the final year that securitization is in place. Moreover, during that final year, true-ups shall be limited to no more than one per quarter. Second, Consumers should initiate each routine true-up by filing an application that (1) explains the basis for its proposed revision of the securitization and tax charges, (2) shows the computation of its revised charges, and (3) seeks Commission approval--on an expedited basis--of those new charges before they can be implemented. All proceedings must be completed and a final Commission order regarding the utility's request for a routine true-up must be issued within 45 days after Consumers files its application.[16]

Miscellaneous Issues

In addition to those discussed above, six additional issues have been raised by the parties. Three of these issues address evidentiary and procedural questions, while the remainder involve various substantive concerns.

[16]As mentioned in Consumers' proposal, a dramatic and unforeseen change in circumstance could result in a request for a non-routine true-up. Because it would necessitate a complex contested case proceeding, resolution of that request would not be subject to the 45-day deadline.

First, ABATE argues that the ALJ erroneously struck a majority of the rebuttal testimony offered by one of its witnesses, Nicholas Phillips, Jr., on the grounds that it constituted improper rebuttal. ABATE notes that one of the Staff witnesses, Mr. Ballinger, testified that the Staff supports Consumers' proposal to impose its securitization charge on a per kWh basis. According to ABATE, Mr. Phillips' stricken testimony "rebuts both whether a per kWh charge satisfies the requirements of Acts 141 and 142 and whether it is an appropriate policy position for the Staff to take in this case." ABATE's initial brief, p. 12. Claiming that these issues could not have been addressed in its direct testimony because the Staff had not, at that time, taken a position on the utility's proposal, ABATE asserts that the stricken testimony constitutes proper rebuttal and should be considered by the Commission in deciding this case.

The Commission finds that ABATE's assertion should be rejected. Nowhere in the stricken testimony does Mr. Phillips truly address how it is that the Staff's policy is faulty. Instead, as noted by the ALJ in rejecting that testimony, the actual target of Mr. Phillip's rebuttal is Consumers' position regarding the use of a per kWh securitization charge. Because he had adequate opportunity to address the utility's proposal in the context of his direct testimony (which Mr. Phillips did to a great extent, as shown on 6 Tr. 840-46), his rebuttal testimony on this issue represents nothing more than an attempted second bite of the apple. Thus, the Commission concludes, the ALJ's decision to strike that rebuttal testimony was fully justified.

Second, ABATE claims that the ALJ erred in excluding testimony offered by Mr. Phillips and Dr. Richard D. Tabors regarding the market value of Consumers' generating plants and other issues relating to the computation of net stranded costs. Although agreeing that stranded cost issues are generally covered by Act 141, ABATE claims that the fact that Acts 141 and 142 were "tie-barred" by the Legislature supports their consideration in the context of the present Act 142

application case. ABATE goes on to assert that regardless of the treatment given to that proposed testimony, the nexus between the two acts justifies addressing--in this financing order--the effect of stranded benefits and excess earnings on the computation of Consumers' stranded costs.

Again, the Commission disagrees with ABATE and finds that the ALJ's various rulings on this issue should be upheld. None of the stricken testimony concerns matters to be addressed pursuant to Act 142, such as the book value of the regulatory assets that Consumers seeks to securitize, the statutory tests to be satisfied before securitization can be authorized, the mechanics to be used in implementing Consumers' securitization proposal, or the appropriate use of either the proceeds produced by the sale of securitization bonds or the cost savings arising from replacing current debt and equity with those lower-cost bonds. Moreover, the issue that the stricken testimony does address, namely Consumers' net stranded cost recovery, lies exclusively within the realm of proceedings to be conducted under Sections 10a(1), 10a(9), and 10a(10) of Act 141. Thus, ABATE's claims concerning net stranded costs (and the effect of excess earnings on their computation) should be addressed in one of those proceedings,[17] rather than in this Act 142 case.

Third, as noted earlier, the Staff filed a motion on October 3, 2000 seeking to strike portions of the Chamber of Commerce's reply brief. According to the Staff, the comments that it seeks to strike constitute an improper attempt by the Chamber of Commerce to circumvent the hearing process and present substantive evidence on brief.

[17]In the course of its argument, ABATE asserted that "should the Commission determine not to examine net stranded costs (and stranded benefits) here, it must take action to assure that they are examined promptly." ABATE's initial brief, p. 15. This has been accomplished by the issuance of today's order in Case No. U-12639 initiating a contested case proceeding, pursuant to Section 10a(10) of Act 141, to establish procedures for determining net stranded costs.

The Commission agrees with the Staff's characterization of those comments as factual assertions, rather than argument. As a result, the Chamber of Commerce should have presented them through the testimony of someone with first-hand knowledge and made that person or persons available for cross-examination by the other parties. Because this did not occur, the comments constitute extra-record evidence and should be stricken. The Commission therefore grants the motion to strike portions of pages 1 and 2 of the Chamber of Commerce's reply brief as indicated on Attachment 1 to the Staff's motion.

Fourth, Energy Michigan notes that through December 31, 2001, open bids will be used to allocate capacity among customers seeking to participate in Consumers' existing ROA program. It further notes that the first four rounds of bidding have been completed (the fifth will occur on November 20, 2000) and that each winning bidder has been required to provide a bid deposit to be retained by the utility. Energy Michigan argues that the Commission should cancel the bid requirements for the winning residential ROA bidders in the first four rounds and offer to refund those deposits. According to Energy Michigan, this action is necessary because those that successfully bid for residential capacity in rounds 1 through 4 could not have anticipated that bundled rates for that service would be reduced by 5%, pursuant to Section 10d(1) of Act 141, and that therefore "competition in the residential class would be made less economic." Energy Michigan's initial brief, p. 12.

The Commission disagrees and finds that this request should not be adopted. As noted by Consumers, the terms applicable to the winning residential ROA bids were established at a time when the parties "were on notice that the terms were under consideration." Consumers' reply brief, p. 41. It can further be assumed that the bids submitted in those first four rounds contain rates and terms that the successful bidders found acceptable; otherwise, their bids would not have

been voluntarily submitted. Because requiring Consumers to refund the bid deposits under these circumstances would be inequitable, the Commission concludes that this proposal must be rejected.

Fifth, MEC sponsored testimony on a set of "guiding principles" that it felt should be used when setting spending priorities for the money accumulated in the LI/EE fund. It thus requested that the Commission take time in this order to establish the appropriate standards and guidelines to be followed during the future operation of the fund.

As noted in this order's earlier discussion regarding the use of securitization cost savings, no funding is currently available to establish and operate the LI/EE fund. The Commission thus finds that, at the current time, it would be premature to establish the directional guidelines and standards for the use of this fund.

Sixth, based on testimony offered by Mr. Peloquin, the Attorney General raises two final concerns regarding the transfer of securitization charge revenues from Consumers (acting as the servicer) to the trustee. Mr. Peloquin reported that the utility proposes to make that transfer "to the trustee at some unspecified time interval" following Consumers' receipt of those payments from the customers. 5 Tr. 740. Based on that testimony, the Attorney General asserted that the utility's proposal was unreasonably vague and should be replaced by the requirement that securitization revenues "be forwarded to the trustee no later than 45 calendar days after the billing date of the customer's bill." Attorney General's initial brief, p. 26. According to her, this would remove some uncertainty and thus increase the likelihood that the securitization bonds would receive a AAA rating. Mr. Peloquin went on to indicate that although Consumers witness DaPra proposed sending securitization funds to the trustee "net of uncollectibles," approving that proposal would provide the utility with "a double recovery of bad debt expense from the ratepayer." 5 Tr. 741.

The Attorney General therefore asserted that the Commission should reject that portion of the utility's proposal and specifically bar Consumers from retaining any portion of the securitization revenues as an offset to bad debt expense.

The Commission finds that both of those assertions are incorrect and that the changes requested by the Attorney General should be rejected. As Consumers witness Hoffman stated with regard to the transfer of funds from Consumers to the trustee:

> [T]he rating agencies ultimately control the timetable by which the servicer will be required to remit collections to the trustee. This is not a decision left to the discretion of the servicer, whether that servicer is Consumers or a replacement servicer. In fact, the servicer of the securitization bonds will remit securitization charge collections to the trustee based upon a rating agency timetable for remittance consistent with achieving the highest possible credit ratings for the transaction. . . . Since Consumers' customers are required to pay within 18-22 days of the billing date and the vast majority of customers pay on time, that average remittance period should be expected to be much shorter than Mr. Peloquin's proposed 45-day period . . . and will, therefore, be better for securitization bondholders and more acceptable to rating agencies.

3 Tr. 204-205. This testimony indicates that a somewhat vague timetable like that set forth in the utility's proposal will make the proposed structure more attractive to the bond market than would an arbitrary, albeit more specific, timetable. Thus, the Attorney General's request to implement a 45-day payment requirement is denied.

Similarly, the Attorney General's opposition to Consumers' proposal to forward all securitization revenues to the trustee "net of uncollectibles" is based on an incorrect interpretation of Mr. DaPra's statement regarding those revenues. As pointed out by Mr. DaPra:

> [The Attorney General's witness] gives a different meaning to the phrase "net of uncollectibles," as used in my testimony, than was intended. Consumers will remit 100% of all securitization revenue collected to the trustee (there will be no subtraction from the amounts collected for uncollectibles). By definition, therefore, the amount collected is "net of uncollectibles."

2 Tr. 88. The fact that this dispute arose from a simple misunderstanding of the phrase "net of uncollectibles" was confirmed by Mr. Hoffman. See, 3 Tr. 206-207. The Commission therefore finds that the Attorney General's second request should also be rejected and that the utility's proposal should be approved instead.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 et seq.; MSA 22.151 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; MSA 22.1 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; MSA 22.13(1) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. Consumers is an electric utility as defined by Section 10h(c) of Act 142 and it had 1,000,000 or more retail customers in this state as of May 1, 2000.

c. As agreed to by the parties, Consumers' complete, revised application was filed on July 26, 2000, thus requiring issuance of this financing order by October 24, 2000, pursuant to Section 10i(1) of Act 142.

d. Consumers' unrecovered investment in Palisades constitutes a regulatory asset and, therefore, the plant's capital costs (net of the plant's depreciation reserve and all related income tax credits) constitute qualified costs, as defined in Section 10h(g) of Act 142.

e. Consumers' generation-related regulatory assets (net of certain regulatory liabilities), for which recovery was sought in the application, constitute qualified costs that may be recovered through a securitization charge, together with a related tax charge, assessed against all of Consumers' bundled sales and ROA customers through Commission-approved rate schedules.

f. Consumers should be allowed to establish one or more SPEs, capitalize and direct the administration of each such SPE, and sell (directly or indirectly) to each SPE some or all of the securitization property discussed in this order. Each SPE will be an assignee as defined in Section 10h(a) of Act 142 once an interest in securitization property is transferred to the SPE.

g. Consumers' and any SPE's up-front other qualified costs identified in this financing order, including Consumers' costs of retiring existing debt and equity securities and the Commission's costs of financial and legal services to assist in the issuance of this financing order, are all qualified costs pursuant to Section 10h(g) of Act 142 and are therefore recoverable by Consumers through securitization.

h. The holders (otherwise known as the purchasers) of the securitization bonds and their respective trustees will each be a financing party as defined in Section 10h(e) of Act 142.

i. The SPE may issue securitization bonds in accordance with this financing order and may pledge all of its interest in the securitization property and related assets to secure those bonds.

j. The securitization transaction approved in this financing order satisfies the requirements of Section 10i(2)(a) of Act 142 because the proceeds of the securitization bonds shall be used solely for the purposes of the refinancing or the retirement of debt or equity.

k. The securitization transaction approved in this financing order satisfies the requirements of Section 10i(2)(b) of Act 142 because it provides tangible and quantifiable benefits to customers of the electric utility.

l. The SPE's issuance of securitization bonds in compliance with this financing order will satisfy the requirements of Section 10i(2)(c) of Act 142 because the expected structuring and pricing of the securitization bonds will result in the lowest securitization charges consistent with market conditions and the terms of this order.

m. The amount of qualified costs approved for securitization in this financing order does not exceed the net present value of the revenue requirement over the life of the securitization bonds associated with the qualified costs sought to be securitized, as required by Section 10i(2)(d) of Act 142.

n. The securitization transaction approved in this financing order satisfies the requirements of Section 10i(1) of Act 142 because the net present value of the revenues to be collected under this order will be less than the amount that would be recovered over the remaining life of the qualified costs using conventional financing methods.

o. This financing order adequately details the amount of qualified costs to be recovered ($468,592,000 after taxes) and the period over which Consumers will be permitted to recover non-bypassable securitization charges (not more than 15 years), as required by Section 10i(3) of Act 142.

p. The tax charge does not constitute securitization property within the meaning of Section 10j of Act 142.

q. As provided in Section 10i(4) of Act 142, the securitization charges authorized by this financing order are irrevocable and not subject to reduction, impairment, or adjustment by further action of the Commission, except by use of the true-up procedures approved in this order.

r. The methodology set forth in Rule B-18 and approved in this financing order to implement the initial securitization and tax charges, and the methodology set forth in Rule B-18 and approved (with modifications) in this order to implement adjustments to the securitization and tax charges through use of an expedited true-up mechanism, each satisfy the requirements of Section 10k(3) of Act 142.

s. Consumers should be allowed to establish securitization property, including a non-bypassable securitization charge, from which the utility's securitization bonds are to be paid.

t. Consistent with Section 10j(1) of Act 142, the securitization property established by Consumers should be deemed to include without limitation (1) the right to collect, impose, and receive securitization charges in an amount necessary to allow for the full recovery of all qualified costs, (2) the right to obtain periodic adjustments of securitization charges, and (3) all revenue, collections, payments, money, and proceeds arising out of those rights.

u. Consistent with Section 10j(2) of Act 142, all securitization property arising as a result of this financing order should be deemed to constitute a present property right even though the imposition and collection of securitization charges depends on further acts by Consumers or others.

v. Consistent with Section 10m(2) of Act 142, any lien and security interest created in the securitization property (through the execution and delivery of a security agreement with a financing party) should be deemed to attach automatically from the time that value is received for the bonds and, further, should be deemed a continuously perfected lien and security interest in the securitization property.

w. The priority of any lien and security interest in the securitization property arising from this financing order should not be considered impaired by any later modification of this order or by the commingling of the funds arising from securitization charges with any other funds, consistent with Section 10m(4) of Act 142.

x. Any SPE created by Consumers pursuant to the authority granted in this financing order should be authorized to enter into hedge arrangements when issuing securitization bonds having a variable rate of interest.

y. Consistent with Section 10i(2)(a) of Act 142, all securitization bond proceeds arising from the authority granted in this financing order shall be used solely for the purpose of retiring or refinancing debt or equity.

z. Except as otherwise provided for in this order, the general structure of the securitization transactions, the expected terms of the securitization bonds, and the use of the securitization bond proceeds, as proposed by Consumers, are reasonable and should be approved.

aa. If and when Consumers transfers the securitization property to the SPE, including the right to impose, collect, and receive the securitization charges, the servicer will be authorized to recover the securitization charges only for the benefit of the SPE in accordance with the servicing agreement.

bb. If and when Consumers transfers the securitization property to the SPE under an agreement that expressly states that the transfer is a sale or other absolute transfer in accordance with the "true sale" provisions of Section 10*l*(1) of Act 142, that transfer will constitute a "true sale" and not a secured transaction or other financing arrangement, and title (both legal and equitable) to the securitization property will immediately pass to the SPE. As provided by Section 10*l*(2) of Act 142, this "true sale" shall apply regardless of whether the purchaser has any recourse against the seller, or any other term of the parties' agreement, including the seller's retention of an indirect equity interest in the securitization property by reason of its equity interest in the SPE, the fact that Consumers acts as the collector of securitization charges relating to the securitization property, or the treatment of the transfer as a financing for tax, financial reporting, or other purposes.

cc. As provided in Section 10m(5) of Act 142, if the servicer defaults on its obligation to remit revenues arising with respect to the securitization property, on application by or on behalf of the financing parties, the Commission or a court of appropriate jurisdiction shall order the

sequestration and payment to those parties of revenues arising with respect to the securitization property.

dd. Pursuant to Section 10n(2) of Act 142, the State of Michigan pledges, for the benefit and protection of all financing parties and Consumers, that it will not take or permit any action that would impair the value of the securitization property, reduce or alter, except as allowed under Section 10k(3) of Act 142, or impair the securitization charges to be imposed, collected, and remitted to the financing parties, until the principal, interest, and premium, as well as any other charges incurred and contracts to be performed in connection with the securitization bonds, have been paid and performed in full. The SPE, when issuing securitization bonds, is authorized, pursuant to Section 10n(2) of Act 142 and this financing order, to include this pledge in any documentation relating to the securitization bonds.

ee. The financing order, as well as Consumers' written acceptance of all conditions and limitations imposed by the order, will remain in effect and unabated notwithstanding the bankruptcy or insolvency of Consumers, its successors, or its assignees, as required by Section 10k(1) of Act 142.

ff. Consumers retains sole discretion regarding whether or when to assign, sell, or otherwise transfer the securitization property or other rights and interests created by this financing order, or any interest therein, or to cause the issuance of any securitization bonds authorized by this order.

gg. Because adequate savings will arise from the securitization authorized in this financing order to cover the 5% rate reduction required under Section 10d(1) of Act 141, the order likewise satisfies the requirements of Section 10d(4) of Act 141.

hh. Any securitization bonds issued pursuant to the authority granted in this financing order are not a debt or obligation of the state and are not a charge on its full faith and credit or taxing power.

ii. As required by Section 10m(8) of Act 142, any subsequent changes in this financing order or in the customer's securitization charges do not affect the validity, perfection, or priority of the security interest in the securitization property.

jj. As required by Section 10j(2) of Act 142, the financing order shall remain in effect and all securitization property shall continue to exist until the securitization bonds authorized for issuance by this order, as well as all expenses related to those bonds, have been paid in full.

kk. The securitization charges authorized in this order shall be billed, collected, and delivered to the trustee by Consumers, as the initial servicer, or any successor servicer pursuant to a servicing agreement. Any payment of the securitization charge by a customer to the SPE, or to the servicer on behalf of the SPE, will discharge the customer's obligations regarding that charge to the extent of that payment, notwithstanding any objection or direction to the contrary by Consumers.

ll. As required by Section 10k(2), the imposition and collection of the securitization charges authorized in this financing order are non-bypassable charges.

mm. Consumers should file a report, within 30 days following the receipt of any proceeds from the sale of its securitization bonds and quarterly thereafter until all bond proceeds have been disbursed, specifying (1) the gross amount of proceeds arising from the sale of those bonds, (2) any amounts expended for payment of initial other qualified costs relating to that sale, (3) the amount of proceeds remaining after payment of those costs, and (4) the precise type and amount of debt or equity, originally held by Consumers or CMS, that was retired through use of those proceeds.

nn. In the event that a decline in interest rates or other change in market conditions leads Consumers to refinance any of its securitization bonds, Consumers should file, within 7 days, a report disclosing the details of that refinancing.

oo. Consumers should continually monitor the bond market and notify the Commission, within 7 days, of (1) any reduction in applicable bond rates or other change in market conditions that might make refinancing its securitization bonds economically advantageous, and (2) what steps, if any, Consumers intends to take as a result of that reduction or change.

pp. All amortization, accounting, and ratemaking approvals, as well as all other authorizations, provided for in this financing order should be tolled pending Consumers' express written acceptance of all conditions and limitations that the order places on the utility.

qq. This financing order is final and is not subject to rehearing by this Commission, except as provided in Section 10i(7) of Act 142, and is not subject to review or appeal, except as expressly provided in Section 10i(8) of Act 142.

THEREFORE, IT IS ORDERED that:

A. With the modifications provided for in this order, the general structure of the securitization transactions, the expected terms of the securitization bonds, and the use of the securitization bonds' proceeds, as proposed by Consumers Energy Company, is approved, and Consumers Energy Company is authorized to proceed, at its sole discretion, with the sale of securitization bonds as set forth in this order.

B. Consumers Energy Company is authorized to treat its unrecovered investment in the Palisades Nuclear Generating Plant as a regulatory asset.

C. Consumers Energy Company is authorized to proceed with securitization for up to $468,592,000 of its regulatory assets (net of certain regulatory liabilities) and other qualified costs, as detailed in this order.

D. Consumers Energy Company, or any successor servicer, shall impose and collect from customers, in the manner provided by this financing order, securitization charges and tax charges in amounts sufficient to provide for the full and timely recovery of the amount securitized, the ongoing other qualified costs of the Special Purpose Entity, and federal, state, and local taxes related to the securitization charge.

E. Consumers Energy Company shall include, as part of its electric tariffs and before any securitization bonds are issued, new language like that found in its proposed Rule B-18, as modified by this order. Consumers Energy Company shall also file, no less than seven days prior to the initial imposition and billing of its securitization and tax charges, revised tariff sheets reflecting all other changes required by this order, including those necessary to implement reductions in base rates, the transition charge, and non-residential customers' distribution charge.

F. Consumers Energy Company, and any successor servicer, is authorized to bill to its customers, following the sale of securitization bonds, an initial securitization charge of not more than $0.00205 per kilowatt-hour and an initial tax charge of not more than $0.00025 per kilowatt-hour. The procedure described in the testimony and exhibits of Francis A. Ernst, Jr., shall be used to determine the precise securitization charge and tax charge to be billed initially by Consumers Energy Company. Following that determination, the initial securitization charge and the initial tax charge shall be placed on customers' bills beginning with the first billing cycle after the sale of the securitization bonds and shall be subject to subsequent true-ups in the manner directed in this

order. Corresponding reductions shall be made to customers' distribution or transition charges contemporaneously with the billing of all securitization and tax charges.

G. The securitization and tax charges related to Consumers Energy Company's securitization bonds shall be billed to each customer for recovery over a period of not greater than 15 years after the beginning of the first complete billing cycle during which the securitization and tax charges were initially placed on any customer's bill. However, Consumers Energy Company may continue to collect any billed but uncollected securitization charges or tax charges after the close of this 15-year period. Amounts of the securitization and tax charges remaining unpaid after the close of this 15-year period may be recovered through use of collection activities, including the use of the judicial process.

H. Routine true-ups of the securitization charges and the tax charges shall be conducted periodically, in accordance with the 45-day schedule and the methodology approved in this order.

I. Consumers Energy Company is authorized to create one or more special purpose entities to which it may transfer securitized property. In turn, each special purpose entity is authorized to issue securitization bonds in the manner specified in this financing order. All securitization bonds shall be binding in accordance with their terms, regardless of whether this order is later vacated, modified, or otherwise held to be invalid, in whole or in part. Each special purpose entity shall be funded with sufficient capital to carry out its intended functions and to obtain the desired ratings for the securitization bonds that it issues.

J. Consumers Energy Company is authorized to initiate and complete the refinancing of its securitization bonds when justified by financial market conditions.

K. All securitization property and other collateral shall be pledged by the special purpose entity to the indenture trustee for the benefit of the holders of the securitization bonds and the other parties specified in the indenture.

L. Consumers Energy Company is authorized to enter into a servicing agreement with each special purpose entity that it creates and to perform the servicing duties contemplated by this financing order in return for an annual servicing fee not to exceed 0.25% of the principal amount of all outstanding securitization bonds. If some other entity is selected to serve in place of Consumers Energy Company, that replacement servicer shall perform the servicing duties in return for an annual fee not to exceed 1.5% of the bonds' outstanding principal amount. The servicer shall remit all collections of the securitization charges to the indenture trustee for the special purpose entity's account, in accordance with the terms of the servicing agreement.

M. Upon the issuance of securitization bonds, the special purpose entity shall pay the proceeds from the sale of the securitization bonds (after payment of the special purpose entity's up-front other qualified costs) to Consumers Energy Company as the purchase price of the securitization property. The proceeds from the sale of the securitization property (after payment or reimbursement of all up-front other qualified costs) shall be applied to retire Consumers Energy Company's existing debt or equity.

N. Consumers Energy Company has the continuing, irrevocable right to cause the issuance of securitization bonds in one or more series (in accordance with the terms of this financing order) for a period of two years following the later of the date upon which this order becomes final and no longer appealable or, if appealed, is no longer subject to further judicial review.

O. Immediately upon its receipt, Consumers Energy Company shall deliver to the Commission a copy of each private letter or other ruling issued by the Internal Revenue Service with respect to

the proposed securitization transaction, the securitization bonds, or any other related matter. Similarly, Consumers Energy Company shall provide the Commission with a copy of each registration statement, prospectus, or any other closing documents filed with the Securities and Exchange Commission as part of its securitization transaction immediately following the filing of the original document.

P. This financing order, together with the securitization charges authorized by the order, shall be binding upon Consumers Energy Company and any of its successors or affiliates that provide distribution service directly to customers in Consumers Energy Company's service area as of the initial date of issuance of the securitization bonds, as well as any other entity that provides distribution services to customers within that service area. This order is also binding upon any servicer or other entity responsible for billing and collecting securitization charges on behalf of the owners of securitization property, and upon any successor to the Commission.

Q. Subject to compliance with the requirements of this financing order, Consumers Energy Company and each special purpose entity that it creates shall be afforded flexibility in establishing the terms and conditions of the securitization bonds, including the final structure of the special purpose entity as either a business trust or limited liability company, repayment schedules, term, payment dates, collateral, credit enhancement, interest rates swaps, other hedging arrangements, required debt service, reserves, interest rates, indices, other reasonable and necessary financing costs, and the ability of Consumers Energy Company, at its option, to issue one or more series of securitization bonds. Notwithstanding the fact that Consumers Energy Company and each of its special purpose entities are authorized to use interest rate swaps and other hedging arrangements to obtain the best rates possible for the securitization bonds, the resulting securitization charge shall

be converted to, and billed as, a fixed charge subject to true-up in the manner approved by this order.

R. All regulatory approvals within the jurisdiction of the Commission that are necessary for the securitization of the qualified costs identified in this financing order, and all related transactions, are granted.

S. Consistent with the terms of this financing order, Consumers Energy Company shall first use the cost savings arising from securitization to cover the 5% residential rate reduction initiated pursuant to the Commission's June 5, 2000 order in Case No. U-12464. The remaining cost savings shall then be applied, in equal proportion, to reduce by up to 5% the distribution charge of each non-residential customer on Consumers Energy Company's electric system and the transition charge imposed (or to be imposed) on its retail open access customers. If the overall cost savings exceed the amount needed to achieve a 5% rate reduction for all customers, the excess savings shall be designated for use in funding the low-income and energy efficiency fund. Unlike the mandatory 5% residential rate reduction, which had immediate effect, implementation of the rate reductions arising from the remaining securitization savings shall be held in abeyance pending Consumers Energy Company's initial receipt of securitization bond proceeds.

T. Consumers Energy Company shall file a report, within 30 days following the receipt of all or any portion of the proceeds from the sale of its securitization bonds and quarterly thereafter until all bond proceeds have been disbursed, specifying (1) the gross amount of proceeds arising from the sale of those bonds, (2) any amounts expended for payment of initial other qualified costs relating to that sale, (3) the amount of proceeds remaining after payment of those costs, and (4) the precise type and amount of debt or equity, originally held by Consumers Energy Company or its parent company, CMS Energy Company, retired through use of those proceeds. The initial report

filed following each receipt of securitization bond proceeds shall include a copy of the closing documents (generally referred to as the "closing transcript") arising from the sale of those bonds.

U. In the event that a decline in interest rates or other change in market conditions leads Consumers Energy Company to refinance any of its securitization bonds, Consumers Energy Company shall file, within 7 days, a report disclosing the details of that refinancing.

V. Consumers Energy Company shall continually monitor the bond market and notify the Commission, within 7 days, of (1) any reduction in applicable bond rates or other change in market conditions that might make refinancing its securitization bonds economically advantageous, and (2) what steps, if any, Consumers Energy Company intends to take as a result of that reduction or change.

W. All amortization, accounting, and ratemaking approvals, as well as all other authorizations, provided for in this financing order shall be tolled pending Consumers Energy Company's express written acceptance of all conditions and limitations that the order places on the utility.

X. Following Consumers Energy Company's express written acceptance of all conditions and limitations established by this financing order, the order--and each of its terms--shall be irrevocable. Consumers Energy Company's acceptance likewise shall be irrevocable and, therefore, shall survive bankruptcy or any other change in the utility's legal or economic structure.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand
Chairman

(S E A L)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner, concurring in part, and dissenting in part.

By its action of October 24, 2000.

/s/ Dorothy Wideman
Its Executive Secretary

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application of **CONSUMERS ENERGY COMPANY** for a financing order approving the securitization of certain regulatory assets and other qualified costs.	)))))	Case No. U-12505

OPINION OF COMMISSIONER ROBERT B. NELSON
CONCURRING IN PART AND DISSENTING IN PART

(Submitted on October 24, 2000 concerning order issued on same date.)

I join my colleagues today on virtually all aspects of today's order in this proceeding, including (1) the rejection of Consumers Energy Company's (Consumers) request to retroactively securitize a portion of the residential rate reduction ordered by the Legislature (2) the implementation of a base rate reduction for retail customers to offset securitization and tax charges, and (3) equalization of the 5% rate reduction for retail access customers. However, I do not need to reach these conclusions because I cannot agree with the majority when they find (1) that the Palisades nuclear plant constitutes a regulatory asset, (2) that the net present value of revenues to be collected under this order is less than revenues that would be collected using conventional financing methods, and (3) that there are tangible and quantifiable benefits to securitization for Consumers' customers. Accordingly, I would find that Consumers has not met the requirements of the new law, and a financing order approving the issuance of securitization bonds should not be issued.

Section 10i(1) of 2000 PA 142 (Act 142) requires the Commission to issue a financing order to allow a utility to recover "qualified costs" if the Commission finds that the net present value of the revenues to be collected under the financing order is less than the amount that would be recovered over the remaining life of the qualified costs using conventional financing and if the order is consistent with other standards enunciated in Act 142. The first inquiry of the Commission with regard to any request for a financing order is whether the request involves "qualified costs." "Qualified costs", under Section 10h(g) of Act 142, are defined as an electric utility's "regulatory assets" as determined by the Commission and any costs that the Commission "determines that the electric utility would be unlikely to collect in a competitive market . . ." Neither Act 142, nor its companion, 2000 PA 141 (Act 141), defines regulatory asset. However, since Act 142 refers to regulatory assets "as determined" by the Commission, prior Commission orders are relevant. In particular, the Commission's orders in Case No. U-11290, cited by some of the parties in this proceeding, should be examined.

COMMISSION RESTRUCTURING ORDERS REGARDING REGULATORY ASSETS

Case No. U-11290 was the primary docket for the Commission's electric restructuring program and hence clearly falls within the purview of Section 10a(5) of Act 141, which affirms that all Commission orders issued before the effective date of Act 141 that allowed customers to choose an alternative electric supplier and authorized recovery of net stranded costs are enforceable. The Commission took great pains to indicate, in its January 14, 1998 order, that:

> The Commission wishes to emphasize that these stranded cost calculations are heavily dependent upon the assumptions used. For example, if only half of the customers choose open access, then Consumers' stranded costs will be reduced to approximately $880 million and Detroit Edison's stranded costs to approximately $1,242 million. If the market price of power were to change by more than 0.5¢/kWh from the assumed level of 2.9¢/kWh, then the estimated stranded costs

> would change by more than $750 million. These facts suggest that caution should be exercised in the use of the stranded cost estimates.

Case No. U-11290, Order dated January 14, 1998, p. 15.

In a subsequent order dated February 11, 1998, the Commission again noted, in response to a request for clarification by Consumers:

> As the Commission indicated in the January 14 order, the stranded cost information contained therein provides initial estimates that are heavily dependent upon uncertain assumptions. The Commission noted that even modest changes in these assumptions could easily change the stranded cost estimates by $750 million to $1 billion or more. In light of this uncertainty, it would be fruitless to attempt to "fine-tune" the estimate in the manner that Consumers proposes. Such minor details are more appropriate for consideration in the true-up proceeding."

Case No. U-11290, Order dated February 11, 1998, p. 7.

The January 14 and February 11 orders, in estimating the amount of stranded costs that might be included in a transition charge to be applied to retail access customers in 2002, based on early 1998 assumptions, included five so-called "buckets" or categories of stranded costs. These buckets remained distinct and separate throughout the numerous restructuring orders issued by the Commission, before and after 1998. One such bucket was labeled "Nuclear Plant" and another bucket was labeled "Regulatory Assets." The January 14 order estimated that Consumers' "Nuclear Plant" bucket included $231 million in stranded costs and its "Regulatory Assets" bucket included $68 million in stranded costs.

Regulatory assets had been defined previously in Case No. U-11290, in an order issued on June 5, 1997:

> First, regulatory assets consist of unrecovered costs of demand side management programs, plant abandonment costs, unfunded pension and health benefit liabilities, deferred tax liabilities, and other similar costs. These costs have been approved by

> the Commission and collection of these costs [has] been deferred to future time frames.

Case No. U-11290, Order issued June 5, 1997, p. 7.

With regard to the "Nuclear Plant" bucket, the Commission stated:

> Second, [stranded] costs include the capital costs of certain existing power supply facilities. Included in this category are the capital costs (net book) of nuclear facilities.. . . Given the need to ensure adequate financial resources for nuclear plants, the entire net capital cost of the facilities should be included as stranded costs because it is unlikely that the market value of the energy produced will be able to offset the operating and maintenance costs for some time to come, let alone make a contribution towards capital recovery. As a general rule, it is not necessary to recognize capital costs of hydroelectric, coal, oil, or gas power production facilities that are owned by the utility because they should be at market value by the end of the transition period, provided that the combination of the performance based regulation and the utility's stranded cost mitigation efforts produces the necessary capital recovery.

Case No. U-11290, Order dated June 5, 1997 p. 7.

In each of the orders in Case No. U-11290, from June 5, 1997 on, the Commission maintained the distinction between Nuclear Plant and Regulatory Assets. In fact, even one of Consumers' own exhibits in this case preserves this distinction. (Exhibit CE-7). The exhibit indicates that the "Revenue Requirements" for the Palisades Net capital costs are $405,455,000. This is the amount that Consumers seeks to securitize in this case, based on what it projects the balance in the Palisades account will be on December 31, 2000. Not only does classifying the net book capital costs of Palisades contravene all previous Commission restructuring orders, but the amount sought to be securitized vastly exceeds the amount of net stranded costs the Commission <u>estimated</u> to be attributable to Palisades in 1998. Accordingly, prior Commission restructuring orders provide no support for classifying Palisades as a regulatory asset.

Consumers has argued that the January 14, 1998 order, by its terms, created the underlying regulatory asset for Palisades. This ignores the fact that regulatory assets, however they are

created, require changes in accounting that must be approved by the Commission. As the Attorney General points out, Consumers has never requested the accounting changes necessarily associated with obtaining a regulatory asset. In fact, despite Consumers' assertion that it is merely a matter of fulfilling the proper "bureaucratic process" to obtain regulatory asset designation, the application in this case did not even seek such treatment. It merely assumes that the net book capital costs of Palisades should be deemed a regulatory asset. Although the majority points to Consumers' request for regulatory asset treatment for Palisades in its reply brief, this did not provide any notice to parties that may dispute the appropriateness of such treatment. Consumers has made no claim that it is no longer required to comply with the Uniform System of Accounts as applied by the Commission or the FERC. As will be seen in examining other precedent, the Commission has consistently required approval of the necessary accounting changes before "determining" regulatory assets. The reasons for requiring these approvals were not, in my view, entirely bureaucratic.

OTHER COMMISSION PRECEDENT REGARDING REGULATORY ASSETS

Detroit Edison sought accounting authority in Case No. U-11726 in association with its intention to classify the net book capital costs of its Fermi II nuclear plant as a regulatory asset and accelerate the amortization of the plant. The Commission conducted a contested case to determine whether Detroit Edison could make these accounting changes and concluded, after a thorough review, that it could. As the Attorney General points out, as a result of the record established in that case, the Commission ordered Detroit Edison to comply with six enumerated conditions in connection with the approved accounting authority. Moreover, the record contained a review of the projected market value of Fermi II in 2008, the end of the transition period.

As ABATE points out, there is no record in this proceeding that would allow us to evaluate the projected market value of Palisades in 2008 or to impose on Consumers the conditions that were

imposed on Detroit Edison. Indeed, one of the conditions imposed on Detroit Edison was an earnings sharing mechanism, something that the Commission would have difficulty implementing today in the context of frozen rates. Two of the other conditions deal with ratepayer protection in the event of a sale or abandonment of the plant. Although the Commission is today attempting to impose conditions on Consumers in the event of a sale or abandonment of Palisades, the record in this proceeding did not address such contingencies, as the record in Case No. U-11726 did, and such conditions may not be supported on appeal. The majority's conclusion that the Commission's order in Case No. U-11726 established a precedent for all net book nuclear plant costs ignores the considered review conducted with regard to Detroit Edison's application. Moreover, the similarities cited by the majority between the Fermi II plant and Palisades are not as compelling as they suggest. The remaining lives of the plants are considerably different and Palisades may have a significant market value. If Palisades is sold before the end of the rate freeze, there will be no way to immediately pass any benefits on to ratepayers. At the end of the rate freeze, the Commission's ability to do so may be compromised by whatever regulatory structure emerges.[1]

In Case No. U-10083, the Commission conducted a contested case hearing (required by the Uniform System of Accounts) to determine whether regulated electric and gas utilities would be granted general authorization to use specified accounts for temporary book/tax-timing differences and to use deferred tax accounting pursuant to SFAS 109. In granting the requested authorizations, the Commission indicated that affected utilities were "assured of continued recovery of regulatory

[1]It is significant, in my view, that regulatory assets, under Section 10h(g) must be those assets previously determined by the Commission, whereas the Commission can determine other qualified costs in the context of this case. The majority is therefore attempting to support a regulatory asset determination that should have been established for Palisades in a previous case.

assets.. . . " Order dated February 8, 1993, in Case No. U-10083. Consumers has correctly listed the balance in its SFAS 109 account as a regulatory asset.

In Case Nos. U-10040 and U-10040-A, the Commission required Michigan utilities to begin accounting for post-retirement benefits (other than pensions) and to employ SFAS 106. In this order, the Commission found that a utility should be allowed to recover "its reasonable and prudent SFAS 106 costs through rates.. . . " Pursuant to this authority, Consumers has correctly listed the balance in its OPEB account (as it relates to generation) in this proceeding as a regulatory asset, which was defined in the proceeding as one for which "the regulator has given reasonable assurance that the incurred cost will be recovered in future rates." [2] Order dated December 8, 1992 in Cases Nos. U-10040 and U-10040-A, p.7.

In each of the cases cited above, the Commission had the benefit of a full record to conclude that regulatory assets should be established. We have no such record with regard to Palisades and these cases are not appropriate precedent.

OTHER REQUIREMENTS FOR SECURITIZATION

Even if it is not a regulatory asset, Palisades could still be a "qualified cost" and eligible for securitization if Consumers had made an effort to establish that the net book capital costs of the

[2]The Commission's order relied on SFAS 71, which Consumers apparently now asserts is no longer applicable to its electric utility assets, in light of Case No. U-11290. If Consumers is no longer adhering to SFAS 71, the Commission may not be in a position to approve regulatory assets. If so, the only available way for Consumers to justify classifying Palisades as a "qualified cost" under PA 142 is to prove that the costs of Palisades could not be collected in a competitive market. As noted elsewhere in this opinion, the record is devoid of any attempt to offer such proof. The FERC defines "regulatory asset" as one resulting from the "rate action" of a regulatory agency for which it is probable that the asset would be included in a different period than traditional ratemaking. Case No. U-11290's treatment of stranded costs was not a specific rate action since it dealt with costs that could only be recovered from retail access customers and did not affect, for ratemaking purposes, other customers.

plant were costs that it would unlikely "collect in a competitive market." Consumers chose not to make the effort. The lack of effort may be due to the fact that Palisades' current market value is such that it would be competitive in today's volatile market. Without any record on this issue, the test of Section 10h(g) cannot be satisfied.[3] Consumers seems to be arguing that it is the Attorney General's responsibility to prove why the Palisades net book nuclear plant cost is not a qualified cost. In fact, it is Consumers' responsibility to prove that it is. This the company has failed to do.

Having concluded that Consumers has not demonstrated that Palisades is a regulatory asset and hence not a qualified cost under PA 142, I would deduct the $405 million from Consumers' list of qualified costs (Exhibit CE-7) and find that only $322 million of the $727 million sought to be securitized should be considered qualified costs. After taking into account income tax effects, only $209 million will be securitized. However, $209 million is not a sufficient amount to finance the residential rate reduction ($49,783,000 annually). Under the terms of Section 10d(4) of PA 141, a rate reduction funded pursuant to that subsection shall not be less than the 5% rate reduction under subsection (1). Since the removal of Palisades net book capital costs from Consumers' qualified costs does not allow for the financing of a 5% residential rate reduction, none of the reduction can be financed through securitization and securitization is not permitted.

I read the last clause in Section 10d(4), which provides that the Commission cannot preclude the issuance of an amount of securitization bonds sufficient to fund the 5% rate reduction to mean that if the Commission concludes that securitization should be permitted, it must securitize at least that amount. Section 10d of Act 141 is only operative, by its terms, if "the commission authorizes

[3]The absence of a record on this issue is significant in view of the recent sales of generation units throughout the country, detailed by the Attorney General, and the fact that the Commission's 1998 "estimate" of stranded costs was based on uncertain assumptions.

an electric utility to use securitization financing under section 10i." It is also questionable that the benefits of securitization will be forthcoming if only $209 million in securitization bonds were to be issued. If Consumers is correct that the last clause in subsection 10d(4) requires us to authorize securitization, regardless of the amount of qualified costs involved, absurd results would follow. A utility could seek to securitize only a 20 year old transformer with a market value of less than .1% of the amount needed to fund the rate reduction and, on that basis, require ratepayers to be obligated to pay a securitization charge for 14 years. The courts have consistently held that legislation should be construed to avoid absurd interpretations. See Salas v Clements, 399 Mich 103, 109 (1976). If Consumers subsequently demonstrates that it has sufficient qualified costs to finance, prospectively, the 5% residential rate reduction, this Commission will be precluded from allowing it to securitize an amount less than that.[4]

There are those who would argue that the Legislature clearly intended to allow Consumers to avail itself of securitization. The Legislature could have indicated that all net stranded costs would be subject to securitization, as the Texas legislature did. They did not. The Legislature could have said that all nuclear capital costs would be subject to securitization. They did not. The Legislature could have provided that all of the five buckets that the Commission established in Case No. U-11290 would be subject to securitization. They did not. The Legislature clearly delineated the terms by which securitization is available. Consumers did not meet them. We are not allowed to rewrite legislation and must accept the clear and unambiguous meaning of the words in the statute. See In re MCI Telecommunications Complaint, 460 Mich 396, 414 (1999).

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[4]Consumers has relied on Section 10cc of Act 141 in support of its position. This provision, which could void the 5% rate reduction if a court invalidates any part of Act 141, is not triggered by a Commission finding that a utility has failed to meet the requirements of Act 142.

NET PRESENT VALUE OF REVENUES WITH AND WITHOUT SECURITIZATION

Consumers has predicated its compliance with Section 10i(1) of Act 142 on a comparison of the "revenue requirements" that would be collected under this financing order with the revenue requirements that would be recovered under conventional financing methods. As the Attorney General points out, such a comparison does not square with the statutory language, which requires an examination of the "revenues to be collected" under a financing order with the revenues that would be recovered using conventional methods. The Attorney General has correctly noted that, for at least three years (five years for residential customers), the revenues collected under the financing order will be exactly the same as the revenues collected under conventional methods because of the rate freeze imposed by Section 10(d) of Act 141. The Attorney General's witness King concluded that, after the rate freeze, the revenues collected under the financing order would exceed the revenues that would be collected under conventional financing by more than $96 million (Exhibit I-46). Accordingly, Consumers would not satisfy the requirements of Section 10i(1) and securitization would not be permitted. The only responses given by Consumers to this analysis are (1) that the rate reduction is contingent on securitization, which, as the majority properly finds, is not a valid interpretation of the statute and (2) that "revenue requirements" should be used to determine compliance with the Act. In its reply brief, Consumers argues, in this connection, that no one "could ever predict" what the "revenues to be collected" under the statute would be and the Attorney General's reliance on "cash flows" as opposed to "revenue requirements" is misplaced. I disagree.

The new statute, by requiring an examination of revenues "to be collected" inherently calls for a "prediction" of future revenues. I believe the Attorney General's analysis, which utilizes "cash flows," is more consistent with the intent of the Legislature than an analysis based on revenue

requirements. By ignoring the effects of the rate freeze mandated by the Legislature and examining "revenue requirements", Consumers and the majority have attempted to contrive a new test for securitization. The statutory test has not been met.

BENEFITS TO RATEPAYERS

Perhaps the most critical test in Act 142 is found in Section 10i(2)(b), which requires that in any financing order, the Commission must ensure that there will be "tangible and quantifiable benefits" to customers from securitization. Given the previous discussion and in view of the evidence presented in this proceeding, I do not believe the Commission can ensure such benefits.

For residential ratepayers who choose to continue to buy generation service from Consumers, the lack of such benefits is painfully evident. For five years, the rates for these customers will be frozen and whether the assets listed in Consumers' application are securitized or not, they will be unaffected. This is because the securitization charge will be offset by a base rate reduction to ensure that rates remain frozen. If conventional financing is used, years six and seven would be the only possible years that these customers could, pursuant to the terms of Commission orders in Case No. U-11290, be required to pay in excess of the frozen rate levels toward the recovery of stranded assets. The Attorney General has estimated that residential customers would pay approximately an additional $74 million toward such recovery in 2006 and 2007 (Exhibit I-49). In contrast, under Consumers' securitization proposal, these same residential ratepayers would pay

securitization charges for a 14 year period that on a net present value basis amounts to considerably more than they would pay under Case No. U-11290 (Exhibit I-46).[5]

Although not as striking, small commercial customers would also pay well in excess for recovery of securitized assets than they would for recovery of the same assets under conventional financing. As ABATE notes, there is no assurance that any of the benefits from securitization will inure to ratepayers because after the rate freeze, CMS Energy may have disposed of any such benefits for its own purposes. Based on the fact that the majority of Consumers' customers would not benefit from securitization (and would in fact be harmed considerably), I am unable to conclude that Consumers has met the statutory test necessary for approval of its application. This does not mean that Consumers may not have stranded costs and indeed that the assets it seeks to securitize in this application may provide the basis for the recovery of stranded costs. However, those costs should be recovered in the manner prescribed by the Commission in Case No. U-11290 and be subject to a true-up proceeding every year. The new statutes make it clear that in looking at stranded costs, this Commission must focus on "net" stranded costs, only those stranded costs that remain after stranded benefits are subtracted from stranded assets. (See Sections 10a(1, 5, 9, and 10) of Act 141). The Commission today has commenced a generic proceeding to deal with the statutory mandate to develop a method for determining net stranded costs. I fully support the commencement of that proceeding and believe it will provide us with the basis to determine whether Consumers has sufficient net stranded costs to warrant recovery from ratepayers through

[5]The majority asserts that "benefits derived from securitization can be immediately passed on to Consumers' ratepayers." (Order, p. 24.) However, none of the securitization savings beyond the 5% rate reduction required by law are being passed on to captive (bundled) residential ratepayers. (Order, p. 32.) Moreover, some of the benefits of realigning Consumers' debt and equity may be accomplished without securitization.

securitization or other means. Although Act 142 does allow for securitization of certain qualified costs prior to a determination of a given utility's net stranded costs, the flaws in Consumers' application are such that its approval at this time, with the associated commitment by customers to pay well over $1 billion for 14 years, would be ill-advised and unlawful.

MICHIGAN PUBLIC SERVICE COMMISSION

Robert B. Nelson, Commissioner

APPENDIX E

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application of **CONSUMERS ENERGY COMPANY** for a financing order approving the securitization of certain regulatory assets and other qualified costs.	)))))	Case No. U-12505

At the January 4, 2001 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. John G. Strand, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

On October 24, 2000, the Commission issued its order in this case (referred to as the financing order) authorizing Consumers Energy Company (Consumers) to securitize up to $468,592,000 of its after-tax qualified costs, pursuant to certain terms and conditions. Among other things, that order, issued pursuant to the Customer Choice and Electricity Reliability Act, 2000 PA 141 (Act 141) and 2000 PA 142 (Act 142), allowed the utility to (1) create one or more special purpose entities for use in issuing its securitization bonds, (2) apply appropriate accounting and amortization methodologies, (3) implement and collect securitization and tax charges, and (4) use the cost savings from securitization to reduce the rates charged to its bundled sales and retail open access customers. Furthermore, it required Consumers to file its "express written acceptance of all conditions and limitations that the order places on the utility." Financing order, p. 68.

On November 9, 2000, Consumers submitted a written acceptance in which the utility stated that it "fully accepts the terms and conditions" of the financing order "based upon certain interpretations and understandings" set forth in that acceptance. Specifically, the utility's acceptance letter listed, as paragraphs A through D, four areas where Consumers seeks confirmation that it has correctly interpreted the financing order. Consistent with that letter, Consumers filed a petition seeking rehearing or clarification of those four issues. On November 30, 2000, Attorney General Jennifer M. Granholm (Attorney General), the Association of Businesses Advocating Tariff Equity (ABATE), Energy Michigan, and the Michigan Chamber of Commerce filed responses to Consumers' petition.[1]

Rule 403 of the Commission's Rules of Practice and Procedure, 1992 AACS, R 460.17403, provides that a petition for rehearing may be based on claims of error, newly discovered evidence, facts or circumstances arising after the hearing, or unintended consequences resulting from compliance with the order. A petition for rehearing is not merely another opportunity for a party to argue a position or to express disagreement with the Commission's decision. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant a rehearing.

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[1] In addition to addressing the requests set forth in Consumers' petition, some of these responses effectively seek rehearing of other issues discussed in the financing order. However, MCL 460.10i(7); MSA 22.13(10i)(7), which was adopted as part of Act 142, specifically precludes any party other than "the applicant for securitization"--Consumers, in this case--from requesting rehearing of a financing order. The Commission is therefore prohibited from addressing any issues beyond the four raised in Consumers' petition, and has thus disregarded all discussions set forth in the responses that concern other issues. The Commission is further prohibited from addressing the issue of the constitutionality of Section 10i(7) of Act 142, an issue raised by the Attorney General and ABATE. See, Universal Am-Can Limited v Attorney General, 197 Mich App 34, 37-38; 494 NW2d 787 (1992).

Periodic True-ups

The financing order issued in this case, as well as that provided for The Detroit Edison Company (Detroit Edison) by the Commission's November 2, 2000 order in Case No. U-12478, established a system for periodically adjusting securitization and tax charges. In each instance, the Commission approved a true-up methodology that differed slightly from the respective utility's initial proposal. The changes adopted in both cases were designed to alleviate various parties' concerns regarding the frequency, scope, and potential complexity of future true-up proceedings.

In paragraph A of its acceptance letter, Consumers expresses its belief that the Commission intended the true-up mechanisms approved for itself and Detroit Edison to be the same. Nevertheless, Consumers notes, the language used by the Commission differs from one case to the other. The utility therefore contends that, assuming the Commission wanted these two utilities to use identical true-up methodologies, language like that found on pages 37 and 38 of Detroit Edison's order should be substituted for that found on page 49 of the financing order issued in Consumers' case.

The Commission agrees with this contention. It was, as Consumers correctly assumes, the Commission's intention to establish identical true-up procedures for use by both of these utilities. The Commission therefore finds that it should resolve any and all potential confusion on this issue by adopting the language proposed on pages 1 and 2 of Consumers' acceptance letter, albeit with one small correction. Specifically, the revised language to be included as part of Consumers' financing order should reflect that, as discussed in the financing order, some other entity may ultimately succeed Consumers as the servicer of its securitization bonds. Thus, the language set forth on page 49 of the financing order, lines 5 through 16, as well as in footnote 16, should be revised to read as follows:

For this reason, the Commission finds that Consumers' proposal for a true-up mechanism should be approved, but with two relatively minor changes. First, the servicer (whether Consumers or a successor servicer) should be limited to undertaking no more than one routine true-up per year until 12 months prior to the last expected maturity date of the securitization bonds. Moreover, during the period from the beginning of those 12 months prior to the last expected maturity date, routine true-ups shall be limited to no more than one per quarter. Second, the servicer of the securitization bonds should initiate each routine true-up pursuant to Section 10k(3) of Act 142 by filing a request for adjustment that (1) explains how its proposed revision of the securitization and tax charges will ensure the expected recovery of amounts sufficient to timely provide all payments of debt service and other required amounts and charges in connection with the securitization bonds, (2) shows the computation of the proposed adjustments to the securitization charge and the tax charge currently in place, and (3) seeks Commission review and approval--on an expedited basis--of the arithmetic computations contained in the proposed adjustments before they can be implemented. All reviews conducted by the Commission of the computations shall be consistent with the requirements of Section 10k(3) of Act 142 for a true-up mechanism. This review must be completed regarding the servicer's request for adjustments to the securitization charge and the tax charge pursuant to a routine true-up within 45 days after the servicer files its request for adjustment.[16] The determination of the Commission in response to a request for adjustment shall be provided by the Commission to the servicer within the aforementioned 45-day period. The adjustments by the Commission will be to the securitization charge and the tax charge in effect prior to the filing of the request for adjustment and those charges shall remain in place until the adjustments have become effective and are being billed to customers.

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[16] As mentioned in Consumers' proposal, a dramatic and unforeseen change in circumstances could result in a request for a non-routine true-up. The Commission is approving Consumers' request for the availability of a non-routine true-up process to a servicer of securitization bonds. Because it, unlike a routine true-up, would have a scope that goes beyond verification of arithmetic computations and would necessitate a complex contested case proceeding, resolution of a request by a servicer for a non-routine adjustment to the securitization charge and the tax charge would not be subject to the 45-day deadline.

The Mandatory 5% Residential Rate Cut

Section 10d of Act 141 required Consumers and Detroit Edison to reduce by 5% the rates in effect for their residential rate classes as of May 1, 2000. It also provided those utilities an oppor-

tunity to use at least a portion of any savings arising from securitization to offset that 5% residential rate reduction. However, noting that a significant amount of time would likely elapse between the implementation of that rate cut (during the summer of 2000) and the issuance of Consumers' securitization bonds (which the utility estimated would not occur before the start of 2001), Consumers requested authority to treat as a regulatory asset the entire year 2000 revenue reduction arising from that 5% residential rate cut. In the financing order, the Commission rejected Consumers' request on the grounds that, among other things, "securitization cannot be applied retroactively to fund that rate reduction." Financing order, p. 35.

In paragraph B of its acceptance letter, Consumers states that it understands the Commission's ruling disallowing the retroactive application of securitization to mean that although the revenue reduction occurring prior to the October 24, 2000 issuance of the financing order cannot be recovered, the same is not true with regard to any portion of the revenues lost between that date and the actual issuance of Consumers' securitization bonds. In support of this interpretation, Consumers cites statements in Detroit Edison's financing order to the effect that "the Legislature did not intend that the cost of the residential rate reduction prior to [a] financing order be securitized" and that Commission rejection was required for any utility's "proposal to treat the rate reduction as a regulatory asset prior to the issuance of [a financing] order." Consumers' acceptance letter, p. 2; citing the Commission's November 2, 2000 order in Case No. U-12478, pp. 13 and 27. Consumers therefore requests that the Commission specifically confirm its understanding regarding its ability to recover, through the operation of the utility's securitization program, all revenues lost on and after October 24, 2000, and to concurrently authorize treatment of those lost revenues as a regulatory asset.

The Commission finds that it should grant Consumers' request, in part. It is the Commission's intention that Consumers have an opportunity to recover from its securitization savings the full cost of the residential rate reduction beginning with the date that the financing order was issued (namely, October 24, 2000). To rule otherwise, and thus forever preclude recovery for rate reductions provided prior to the actual issuance of the utility's securitization bonds, would merely give the other parties to this case an incentive to delay--through unwarranted appeals and other means--the initiation of Consumers' securitization program. Any such delays would conflict with the Legislature's intent that securitization be implemented in whatever reasonable manner provides the maximum cost savings. The Commission therefore confirms Consumers' understanding that the utility is authorized to recover, through its securitization program, all reductions in its revenues beginning October 24, 2000. Nevertheless, the Commission finds no compelling reason at this time to formally declare those lost revenues a regulatory asset. As ABATE notes, making a declaration of regulatory asset at this time would imply a "full funding" of the rate reduction, contrary to the terms of the financing order.

Offsets for All Securitization and Tax Charges

Consumers notes that, on page 42 of the financing order, the Commission required the utility to reflect an offset on the bills of its bundled sales and retail open access (ROA) customers alike equal to the sum of each customer's securitization and tax charges for the billing period in question. The utility further notes that the reason given for imposing that requirement, namely to ensure that Consumers' bundled sales rates or ROA transition charges do not include costs that are duplicative of those recovered through the issuance of securitization bonds, is valid.

Nevertheless, in paragraph C of its acceptance letter, Consumers seeks to clarify whether that requirement should continue indefinitely or whether (as the utility believes) the offset is intended to remain in effect only until certain actions are taken by the Commission to remove those potentially duplicative costs from the base rates paid by bundled sales customers and from the transition charge paid by ROA customers. Consumers therefore seeks confirmation that, for bundled sales customers, the offset would be in effect only from the date of issuance of the securitization bonds to the conclusion of a rate case that "removes from bundled sales rates the revenue requirement associated with the assets approved for securitization." Acceptance letter, p. 3. As for its ROA customers, Consumers wants to confirm that the offset would be discontinued immediately following either the Commission's issuance of a decision in Case No. U-12639 establishing the methodology for computing the utility's transition charge or the completion of any proceeding establishing a revised transition charge for use beginning January 1, 2002, whichever occurs first.

The Commission finds that Consumers' request for clarification should be granted with regard to the term of the securitization and tax charge offset. In issuing the financing order, the Commission assumed (as it still does) that the offset for ROA customers would become unnecessary beginning January 1, 2002. This assumption is based on the Commission's belief that, before that date, an order will be issued in Case No. U-12639 from which a transition charge can be derived that recognizes the effect of securitization on Consumers' total stranded costs. However, in the event that no such transition charge is in place for Consumers by January 1, 2002, the Commission will impose a temporary transition charge equal to the sum of the then-effective securitization and tax charges. The offset would continue to be applied to this charge to ensure equality between bundled sales and ROA customers until such time as a revised transition charge is adopted. This

will ensure the collection of all revenue necessary to pay the securitization bond holders and should, in turn, enhance the marketability of the bonds.

Creation of Lien and Security Interest

Section 10m(1) of Act 142 establishes the requirements for creating a valid and enforceable lien and security interest in a utility's securitization property. Specifically, this section states that they "may be created only by a financing order and the execution and delivery of a security agreement with a financing party in connection with the issuance of securitization bonds." MCL 460.10m(1); MSA 22.13(10m)(1). According to paragraph D of its acceptance letter, Consumers interprets ordering paragraph R on page 67 of the financing order to mean that the Commission has taken all of its necessary steps with regard to approving the utility's request for securitization and that, as a result, Consumers now only needs to execute and deliver the applicable security agreement. The utility seeks confirmation that its interpretation is accurate.

The Commission finds Consumers' interpretation to be correct. Ordering paragraph R states that "[a]ll regulatory approvals within the jurisdiction of the Commission that are necessary for the securitization of the qualified costs identified in this financing order, and all related transactions, are granted." Financing order, p. 67. The Commission's use of such broad language was intended to advise all interested parties (and, particularly, the financial markets) that, following Consumers' submission of an unconditional acceptance letter, the utility will be deemed to have satisfied all state-imposed prerequisites to the execution of a security agreement. Thus, pursuant to Act 142, a valid and enforceable lien and security interest in the securitization property will be created following the execution and delivery of the applicable security agreement.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 et seq.; MSA 22.151 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; MSA 22.1 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; MSA 22.13(1) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. Consumers' petition for rehearing or clarification should be granted in part and denied in part, as discussed in this order.

THEREFORE, IT IS ORDERED that:

A. Consumers Energy Company's November 9, 2000 petition for rehearing or clarification is granted in part and denied in part, as discussed in this order.

B. If Consumers Energy Company desires to undertake securitization, it shall file, within 7 days following issuance of this order, a document expressing its unconditional acceptance of all conditions and limitations imposed on the utility by this order and the October 24, 2000 financing order.

C. All amortization, accounting, and ratemaking approvals, as well as all other authorizations, provided for in the Commission's October 24, 2000 financing order and clarified in this order shall be tolled pending Consumers Energy Company's unconditional acceptance of all conditions and limitations that those orders place on the utility.

D. Following Consumers Energy Company's unconditional acceptance of all conditions and limitations established by the Commission's October 24, 2000 financing order and clarified in this order, these orders--and each of their terms--shall be irrevocable. Consumers Energy Company's

acceptance likewise shall be irrevocable and, therefore, shall survive bankruptcy or any other changes in the utility's legal structure.

E. This order and its anticipated unconditional acceptance by Consumers Energy Company shall be incorporated by reference into the Commission's October 24, 2000 financing order, shall be deemed to relate back to the date of issuance of that financing order, and shall be treated as being in full force and effect as of that date.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand
Chairman

(S E A L)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner, concurring in a separate opinion.

By its action of January 4, 2001.

/s/ Dorothy Wideman
Its Executive Secretary

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application of **CONSUMERS ENERGY COMPANY** for a financing order approving the securitization of certain regulatory assets and other qualified costs.	)))))	Case No. U-12505

CONCURRING OPINION OF COMMISSIONER ROBERT B. NELSON

(Submitted on January 4, 2001 concerning order issued on same date.)

I issued a separate opinion on October 24, 2000 when the majority approved a financing order in this case. I concluded at that time that a financing order should not be issued because Consumers Energy Company (Consumers) had not met the requirements of 2000 PA 142. I stand by that opinion today. However, I am compelled to review the motion for rehearing on its merits, taking the financing order as I find it. In this context, I concur with the majority's decision to continue the offsetting adjustment detailed on page 42 of the October 24 order on the bills of retail access customers after 2001. I believe that, in the absence of the establishment of a revised transition charge, continuation of this adjustment beyond 2001 is critical in the Commission's efforts to foster a competitive retail market.

I also concur with my colleagues in concluding that the October 24 order did not create a regulatory asset, a creation that may depend on a timely issuance of securitization bonds in accordance with the overall intent of Act 142 to expedite the securitization process.

MICHIGAN PUBLIC SERVICE COMMISSION

_____

Robert B. Nelson, Commissioner

APPENDIX F

STATE OF MICHIGAN Public Service Commission Chappelle, Svanda, & Nelson Commissioners	DOCKETING STATEMENT MCR 7.204(H)	CASE NO. MPSC U-13715 Court of Appeals: 249549

ourt s Court telephone no.

Instructions:

- MCR 7.204(H) requires appellant to file a docketing statement in a civil appeal.
- The purpose of the docketing statement is to facilitate the efficient processing of appeals by allowing the Court of Appeals to quickly identify jurisdictional problems, other related cases, and appropriate settlement conference cases, among other things.
- Appellee may respond by filing a separate docketing statement if desired.
- The requirement that appellant identify issues in the docketing statement will not limit appellant's presentation of issues in appellant's brief. Omission of an issue from the docketing statement will not provide an appropriate basis for a motion to strike any portion of appellant's brief. However, early and accurate identification of issues is critical to the success of the Court's settlement conference program and improved case processing.
- Please type or print. Appellant must complete the statement fully and accurately.
- Two copies must be filed with the clerk of the Court of Appeals within 28 days after the claim of appeal is filed or the application for leave to appeal is granted, and a copy must be served on the opposing parties. Failure to timely file this document may lead to dismissal of your appeal.

1. Case title

Plaintiff name, address, and telephone no.		Defendant name, address, and telephone no.
X Appellant _ Appellee		_ Appellant X Appellee
/ ey General Michael A. Cox P. O. Box 30212 Lansing, MI 48909 (517) 373-1123	V	Michigan Public Service Commission P. O. Box 30221 Lansing, MI 48909 (517) 241-6011
Plaintiff attorney name, address, telephone no. and bar no.		Defendant attorney name, address, telephone no. and bar no.
Donald E. Erickson (P13212) Special Litigation Division, Williams Building, Sixth Floor P. O. Box 30212 Lansing, MI 48909 (517) 373-1123		David A. Voges (P25413) Public Service Division 6545 Mercantile Way, Suite 15 Lansing, MI 48911 (517) 241-6680

2. Additional appellees

Name of appellee.		Name of appellee
Consumers Energy Company	V	See attached list
Attorney name, address, telephone no., and bar no.		Attorney name, address, telephone no., and bar no.
Jon R. Robinson (P27953) Consumers Energy Company One Energy Plaza Jackson, MI 49201 (517) 788-0698		

continued on page 2

Names of all other parties to the action who will not, or are not expected to, participate in the appeal.

Name of party and designation		Name of party and designation
See attached list	V	
Attorney name, address, telephone no. and bar no.		Attorney name, address, telephone no. and bar no.

4. ___ A bankruptcy petition has been filed in another court which affects this court's jurisdiction over this appeal as follows:
___ Another proceeding has been commenced which affects this court's jurisdiction over this appeal as follows:

Name of proceeding(s)

5. ___ a. There are pending appeals in the Court of Appeals or Supreme Court which arose out of the same transaction, lower court case or between the same parties.

Case name	Lower court no.	Docket no(s).	Citation

___ b. There are prior appeals arising out of the same transaction, lower court case, or between the same parties.

Case name	Lower court no.	Docket no(s).	Citation

___ c. I am aware of the following pending appeals in the Court of Appeals or Supreme Court raising the same or closely related issues.

Case name	Lower court no.	Docket no(s).	Citation

continued on page 3

6. The following are **all** lower court trial, motion, and other hearing proceedings and the dates held.
Instructions: Follow up with the lower court clerk's office to make sure that **all** transcripts are forwarded to the Court of Appeals with the lower court record [MCR 7.210(B)]. Missing transcripts will cause the case to be delayed or dismissed. If some transcripts have not been ordered, explain why.

Type of proceeding	Dates	Court reporter	Judge	Explanation if transcripts not ordered
Prehearing Conference	March 21, 2003	Ripka, Boroski & Assoc	ALJ James N Rigas	
Evidentiary Hearings	April 21-24, 2003	Ripka Boroski & Assoc	ALJ James N. Rigas	

7. Nature of case (check the categories which describe the matters on appeal)

a. Procedural posture of case:

_ arbitration _ bench trial _ jury trial _ declaratory judgment
_ interlocutory matter _ original action in Court of Appeals _ post judgment action _ summary disposition
X administrative proceeding (specify agency involved) Michigan Public Service Commission
_ writ (mandamus, superintending control) _____
_ other _____

b. Substantive nature of case:

_ banking law
_ civil procedure
  ontempt
  osts and attorney fees
  _ discovery
  _ civil rights
  (non-employment related)
_ commercial transactions
_ condemnation/eminent domain
_ conflicts of law
_ contracts (non-employment related)
_ corporations and partnerships
_ domestic relations
  _ alimony
  _ child support
  _ custody/parenting time
  _ property division
  _ paternity
  _ termination of parental rights
_ dramshop
_ drug forfeiture
_ elections
_ employment law
  _ labor relations/collective bargaining
  _ public employment (PERA)
  _ unemployment compensation
  _ wrongful discharge
  _ breach of contract
  _ civil rights/discrimination
    _ age
    _ gender
    _ handicap
    _ race
_ Toussaint
_ governmental immunity
_ insurance
  _ automobile (no fault)
  _ environmental cleanup
  _ homeowners
  _ other _____
_ landlord-tenant
_ malpractice
  _ legal
  _ medical
  _ professional - other _____
_ natural resources/environmental law
_ prisoner appeal
  _ parole
  _ prisoner rights
  _ other _____
_ real property
_ schools
_ taxation
_ teachers
_ torts/negligence/strict liability
  _ liability
  _ general negligence
  _ premises liability
  _ products liability
  _ torts _____
X utilities
_ wills, estates, trusts
_ workers' compensation
_ zoning
_ other _____

c. Other dispositive claim:

_ damages
  _ amount/calculation
  attorney fees and costs
  interest
  _ mitigation
  _ other _____
_ jurisdiction (lower court)
_ law of the case
_ mootness
_ res judicata/collateral estoppel
_ statute of limitation
_ venue
_ other _____

continued on page 4

Instructions: Items 8 through 11 are primarily for settlement conference purposes [MCR 7.213(A)]. Attach additional pages if necessary.

8. Brief description of the nature of the action and the result in the trial court (General conclusory statements such as "the judgment of the trial court is not supported by the law or fact" are unacceptable.)

See attached description.

9. Brief statement of all issues to be raised in this appeal. (This information will also be used to place cases on different processing tracks so it is important to be as accurate as possible.)

See attached description.

10. Settlement negotiations. (Check all boxes that apply.)

- ___ Settlement negotiations have been conducted among the parties since the verdict.
- ___ Settlement negotiations have been scheduled.
- X Settlement is unlikely.
- ___ Other

11. The amount and terms of the judgment appealed are: The MPSC has authorized securitization totaling $554 million.

July 30, 2003 — Donald E. Erickson

Date — Signature

PROOF OF SERVICE

I certify that copies of this docketing statement and any attachments were served on all opposing parties/attorneys by regular mail at their last known addresses.

July 30, 2003 — Donald E. Erickson

Date — Signature

Additional appellees

Cadillac Renewable Energy LLC, Genesee Power Station Limited Partnership, Grayling Generating Station Limited Partnership, Hillman Power Company LLC, Tondu Corporation, Viking Energy of Lincoln Inc, and Viking Energy of McBaim Inc:

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3. Names of all other parties to the action who will not, or are not expected to, participate in the appeal.

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lichigan Environmental Council an
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Residential Ratepayer Consortium:
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Dow Corning Corporation
Hemlock Semiconductor
Enbridge Energy Ltd. Partnership:

Mr. David E. S. Marvin (P26564)
Fraser, Trebilcock, Davis & Dunlap, PC
12 W. Allegan Street, Suite 1000
L ng, MI 48933

Brief description of the nature he action and the result in the trial co (General conclusory statements such as "the judgment of the trial court is not supported by the law or fact" are unacceptable.)

The administrative proceeding below was initiated by an application filed by Consumers Energy Company CE or the Company) pursuant to provisions of 2000 PA 304. CECo requested authorization from the Michigan ublic Service Commission to securitize (refinance) $1.084 billion. Several parties, including Attorney General fichael A. Cox, intervened in the case and opposed CECo's application. The parties submitted testimony, briefs and eply briefs, and on June 2, 2003, the MPSC issued its final order within the 90-day time limit required by statute.

The MPSC's order finds that the record read as a whole justified authorizing CECo to securitize approximately capped sum of $554.323 million subject to numerous terms and conditions. MCL 460.10i(7) allows only applicants or securitization to seek rehearing of MPSC orders issued under MCL 460.10i. On June 1, 2003, CECo filed a etition for rehearing. Since the Attorney General was not legally entitled to seek rehearing, since MCL 460.10i(8) stablishes a 30-day time limit for filing a claim of appeal, and since MCR 7.204(A) makes that time limit urisdictional, the Attorney General filed a claim of appeal in this case on July 2, 2003. In addition, orders and pinions issued by the Court of Appeals indicate that a cross appeal cannot be filed from MPSC orders after the 30 lays have passed.

The Attorney General is working with the appellees in this case on a joint motion to hold this appeal in beyance pending issuance of the MPSC's order in response to CECo's rehearing petition.

. Brief statement of all issues to be raised in this appeal. (This information will also be used to place cases on different processing tracks so it is important to be as accurate as possible.)

I. Is it lawful to exempt retail open access (ROA) customers from the major part of the securitization charges approved in the Commission's order?

The Attorney General may raise additional issues in his appellant's brief, but will wait until the MPSC issues its order responding to the rehearing petition filed by CECo to determine whether additional objections to the June 2, 2003, order should be appealed. As noted above, the Attorney General is working with the appellees to hold this appeal in abeyance until after the rehearing order is issued.

APPENDIX G

FILED

SEP 19 2003

PUBLIC SERVICE COMMISSION

IN THE MICHIGAN COURT OF APPEALS

ORDER

Re: **Attorney General v MPSC**
Docket No. **249549**
L.C. No. **00-013715**

William C. Whitbeck, Chief Judge, acting under MCR 7.203(F)(1) and 7.216(A), orders:

The claim of appeal filed July 2, 2003, is DISMISSED because a motion for rehearing was filed by another party prior to the filing of this claim of appeal. As such, this claim of appeal was premature. See MCR 7.204(A). This dismissal is without prejudice to any party filing a claim of appeal within 30 days after disposition of the motion for rehearing that was filed. MCR 7.204(A)(1)(b) does not require that it be the appellant who files the motion for rehearing in order for that appellant to file a subsequent claim of appeal.

The motion to hold appeal in abeyance is DENIED as moot.

A true copy entered and certified by Sandra Schultz Mengel, Chief Clerk, on

STATE OF MICHIGAN COURT OF APPEALS

SEP 18 2003
Date

Sandra Schultz Mengel
Chief Clerk

APPENDIX H

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application of **CONSUMERS ENERGY COMPANY** to recover implementation costs for the 12-month period ended December 31, 1999.	)))))	Case No. U-12358

At the July 11, 2001 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Laura Chappelle, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

On March 31, 2000, Consumers Energy Company (Consumers) filed an application seeking authorization to recover from its ratepayers $30,152,000 in expenditures made during the 12-month period ended December 31, 1999 to implement a retail open access program in accordance with previous orders of the Commission in Cases Nos. U-11290 et al. Subsequently, Energy Michigan, Attorney General Jennifer M. Granholm (Attorney General), and the Association of Businesses Advocating Tariff Equity (ABATE) filed petitions to intervene. The Commission Staff (Staff) also participated in the proceedings.

Pursuant to due notice, a prehearing conference was conducted on July 6, 2000 by Administrative Law Judge James N. Rigas (ALJ). At the prehearing conference, the petitions to intervene filed by Energy Michigan, the Attorney General, and ABATE were granted without objection and

a schedule for the hearing was established. In addition, statements were placed on the record by Brian Bellville and Victor Mier of Prescott, Michigan concerning their service quality concerns.

The evidentiary hearing was conducted on January 10, 2001. Five witnesses testified and six exhibits were received into evidence. On January 31, 2001, briefs were filed by Consumers, ABATE, and the Staff. On February 14, 2001, reply briefs were filed by Consumers and ABATE.

On April 4, 2001, the ALJ issued a Proposal for Decision (PFD), which recommended that Consumers should be authorized to recover $30,152,000 from its ratepayers for its 1999 implementation expenditures. On April 18, 2001, ABATE and the Staff filed exceptions to the PFD. On April 30, 2001, Consumers filed a reply to exceptions.

Labor Costs

William J. Kusiak, a public utility auditor in the Commission's Electric Division, proposed that $4,996,000 of Consumers'1999 implementation expenses be disallowed. According to Mr. Kusiak, this adjustment would remove all of Consumers' labor expenses and related overheads. He stated that Consumers' 1999 labor-related implementation expenses should not be considered to be incremental because Consumers' current rates, which were established by the February 5, 1996 order in Case No. U-10685, include $524,000,000 for other operation and maintenance (other O&M) expenses, whereas Consumers' 1999 other O&M expenses amounted to only $516,610,000 on a non-jurisdictional basis. In addition, Mr. Kusiak observed that Consumers' rates are based on a test year that contained an employee count of 8,938 employees, whereas Consumers' actual year end 1999 employee count was only 8,736 employees. Finally, Mr. Kusiak noted that his testimony on this issue is consistent with the Staff's position in Case No. U-11955,

which involved Consumers' request for recovery of implementation expenses incurred through 1998.

Carl A. Gilzow, Consumers' electric restructuring implementation project manager, supported his company's claim for full recovery of all labor-related implementation costs incurred during 1999. He maintained that Mr. Kusiak's calculations need to be restated in order to understand the flaws in the Staff's position. According to Mr. Gilzow, the Staff's proposed disallowance of $4,996,000 should be broken down as follows:

Labor (excluding employee impact expenses)[1]	$3,369,000
Employee impact expenses-Labor component	$1,150,000
Employee impact expenses-Non-labor component	$331,000
Total employee impact expenses	$1,481,000
Carrying costs	$146,000
Total Staff adjustment	$4,996,000

Mr. Gilzow explained that 57 of Consumers' employees worked either full or part-time on the implementation project. Consumers' total labor expense of $3,369,000 represents 100,007 hours of labor, which is comprised of 66,157 direct labor hours and 33,850 chargeback[2] hours. According to Mr. Gilzow, all of these labor hours should be considered to be incremental because they involved either newly hired employees (10,000 hours), transferred employees whose old positions were backfilled with newly hired replacements (26,421 hours), the payment of overtime (452

[1]"Employee impact expense" is Consumers' terminology. Although not explicitly defined, the record evidences that this category of expenses includes costs associated with the retention, retraining, and relocation of Consumers' employees.

[2]Chargeback labor is performed by Consumers' internal support organizations, which then charge the cost of their labor to the electric restructuring project.

hours), an employee transferred from the company's Gas Division (2,080 hours), chargeback labor (33,850 hours), or use of existing employees whose existing work was either deferred, performed by other employees, or subject to non-paid overtime (27,204 hours).

Further, Mr. Gilzow contended that Mr. Kusiak's comparison of the test year and 1999 year-end employee counts was flawed. Mr. Gilzow stated that a more appropriate comparison would be between Consumers' 1998 and 1999 year-end employee counts, which demonstrates a net increase of 133 employees during 1999.

Next, Mr. Gilzow criticized Mr. Kusiak's unexplained disallowance of all $1,481,000 of Consumers' proposed employee impact costs. Mr. Gilzow testified that this category of expenses is comprised of a labor-related component ($1,150,000) and a non-labor component ($331,000). According to Mr. Gilzow, the most significant portion of the labor-related component of the employee impact costs was due to the elimination of Consumers' Traveling Repair Crew (TRC), which was a constant workforce that would travel from site to site to perform maintenance tasks during scheduled outages. He explained that the TRC was eliminated because electric restructuring has changed the way that outages are scheduled. Whereas outages were formerly scheduled throughout the year, they are now being scheduled for off-peak periods in the spring and fall, which makes maintenance of a year-round workforce noneconomic. Rather, Consumers opted to replace the TRC with outside contractors.

Mr. Gilzow stated that the elimination of the TRC necessitated transferring 43 employees into substation construction jobs. Six other TRC employees became meter readers. Citing Section 10p(2) of 2000 PA 141 (Act 141), MCL 460.10p(2); MSA 22.13(10p)(2), Mr. Gilzow insisted that the $924,000 cost of retraining and relocating these TRC employees cannot be disallowed.

Mr. Gilzow also contended that the restructuring of the electric industry has made certain of Consumers' employees more valuable due to their expertise in the scheduling and controlling of bulk power flows. According to Mr. Gilzow, Consumers was forced to pay such employees a premium in order to retain their services. Therefore, he argued that the $344,000 in signing and retention bonuses and additional compensation paid to these 28 employees during 1999 is recoverable in this proceeding.

Finally, Mr. Gilzow explained that the $331,000 non-labor component of employee impact costs relates to materials and other expenses associated with the elimination of the TRC and the retention of the 28 power transmission experts.

The Commission finds that Consumers' request for recovery of the $3,369,000 of labor expenses (excluding employee impact expenses) should be denied. After weighing the evidence, the Commission is not persuaded those labor expenses were incremental to Consumers' restructuring implementation efforts.

In its October 24, 2000 order in Cases Nos. U-11955 and U-11956, the Commission disallowed the same types of expenses as are involved in this proceeding. Despite claims in that case by Consumers that these types of labor costs should have been determined to be incremental because they related to added employees, transferred employees whose old jobs were backfilled, the payment of overtime, and the use of chargeback labor, the Commission found that Consumers failed to prove that the challenged costs were in addition to the employee-related costs typically incurred by a utility operation in providing electric service in a reasonable, efficient manner.

The Commission finds that the evidence proffered by Consumers in this proceeding is remarkably similar to that submitted in Cases Nos. U-11955 and U-11956. Again, the vast majority of the contested labor expenses stem from the transfer of resources from other areas

within Consumers' corporate structure. In Cases Nos. U-11955 and U-11956, the Commission stated:

> The redeployment of members of an existing workforce is not necessarily an unusual occurrence in large organizations. A reassignment can be short-term, temporary, or routine in nature. It may reflect efficiencies attained in preexisting work functions or the elimination of redundant positions. Unless the cost would not have been incurred, and represents a task or activity that would not have been performed, but for restructuring, it is more properly classified as the type of expense assigned to base rates.

October 24, 2000 order, Cases Nos. U-11955 and U-11956, pp. 9-10.

Moreover, in Cases Nos. U-11955 and U-11956, the Commission also clearly indicated that "implementation costs are non-recurring costs that the utilities incur in addition to the operational costs that they already recover in their base rates and are necessary to accomplish the changes required by restructuring." Order, p. 3, (emphasis added). The necessary implication of this language is that a utility not only must demonstrate that its labor expenditures were reasonably and prudently incurred in furtherance of its implementation program, but also must prove that such labor expenditures are not already being recovered in its existing rates. Accordingly, the Staff's analysis weighs heavily against allowing Consumers to recover the labor expenses at issue in this proceeding. Mr. Kusiak's testimony confirms that Consumers' 1999 other O&M expenses were over $7 million less than the amount collected in its current rates. Further, Mr. Kusiak established that the actual number of employees working for Consumers as of December 31, 1999 was 202 less than the number of employees reflected in its current rates. Therefore, the Commission finds that the $3,369,000 reduction proposed by Mr. Kusiak should be adopted.

The Commission also finds that the $1,481,000 reduction proposed by Mr. Kusiak that is associated with the labor and non-labor components of Consumers' 1999 employee impact expenses should be adopted. The burden is on Consumers to establish that an expense for which it

seeks recovery is related to electric restructuring. The Commission is not persuaded that Consumers has met this burden with regard to the disputed employee impact expenses.

In his testimony, Mr. Gilzow argued that all of the retraining and relocation costs associated with Consumers' decision to eliminate its TRC are recoverable pursuant to Section 10p(2) of Act 141 because the decision to change its methodology for performing outages was attributable to electric restructuring. The Commission disagrees.

Section 10p(2) of Act 141 does not guarantee the recovery of all of a utility's employee retraining and relocation costs. Rather, this legislation is limited to "audited and verified employee-related restructuring costs that are incurred as a result of the amendatory act that added this section or as a result of prior commission restructuring orders, including employee severance costs, employee retraining programs, early retirement programs, outplacement programs, and similar costs and programs, that have been approved and found to be prudently incurred by the commission." MCL 460.10p(2); MSA 22.13(10p)(2), (emphasis added). Nothing in Act 141 or the Commission's prior restructuring orders in any way obligates an electric utility to alter its methodology for performing scheduled outages. Further, the Commission is not persuaded by Mr. Gilzow's testimony that the commencement of electric restructuring constituted the impetus for Consumers' 1999 decision to eliminate its TRC. It is more likely, based on evidence developed in other Commission proceedings[3] that Consumers abandoned year-round scheduled outages due to the tight summertime electric supply situation in this state during recent years.

[3] See, the April 14, 1998 orders in Cases Nos. U-10840, U-11677, and U-11678, the January 19, 1999 order in Case No. U-11889, the January 19, 2000 order in Case No. U-12292, and the November 2, 2000 order in Case No. U-12702.

The Commission made a similar determination in Cases Nos. U-11955 and U-11956. In response to Consumers' contention that severance expenses attributable to a workforce reduction at three of its power plants were recoverable as implementation costs, the Commission stated:

> Thus, Consumers had an ongoing responsibility to its ratepayers to implement efficiency measures to reduce its cost of service prior to restructuring, and the advent of restructuring does not discharge the company of this responsibility. Consumers does not explain any connection between its efforts to reduce its employee count and the Commission's initiation of restructuring proceedings. Absent a showing that restructuring caused the costs to be incurred, a utility could use restructuring as an opportunity to recoup out-of-pocket costs for efficiency measures that it would have undertaken in any event.

October 24, 2000 order, Cases Nos. U-11955 and U-11956, pp. 10-11.

Accordingly, the Commission finds that Consumers' request for recovery of the $924,000 associated with Consumers' decision to eliminate its TRC should be denied.

Additionally, the Commission is not convinced that Consumers should be permitted to recover the $344,000 in signing and retention bonuses and additional compensation paid to the 28 employees with expertise in the scheduling and controlling of bulk power flows. The Commission finds that the ability of these employees to command higher salaries is not related to Consumers' implementation of a retail open access program. Rather, the Commission concludes that these employees were performing preexisting work functions and that the expenses of retaining them more properly should be assigned to base rates.

Given that the Commission rejected Consumers' attempt to recover the labor component of its proposed employee impact expenses, the Commission finds that recovery of the $331,000 non-labor component should also be denied.

Conditional Recovery

In its October 24, 2000 order in Cases Nos. U-11955 and U-11956, the Commission explicitly indicated that the incurrence of implementation costs for activities that prove to be ineffective, inefficient, or unworkable may not entitle a utility to recover the costs of those activities. Accordingly, the Commission cautioned the parties that its findings were conditional. In so doing, the Commission stated:

> If subsequent events reveal that costs were incurred for projects or systems that ultimately prove to be ineffective, inefficient, or unworkable or otherwise impede the progress to retail open access, the Commission reserves the right to undertake another review of those costs and may foreclose their recovery.

October 24, 2000 order, Cases Nos. U-11955 and U-11956, pp. 4-5.

ABATE's effort to have a similar condition incorporated into the PFD was rejected. The ALJ indicated that the Commission's June 5, 1997 order in Case No. U-11290 embraced the use of the prudence standard for determining whether implementation would be recoverable. According to the ALJ, use of the prudence standard "requires that decisions be evaluated based on what was known at the time the decisions were made, not on circumstances that become known after the fact." PFD, pp. 7-8.

In its exceptions, ABATE contends that the ALJ ignored the Commission's order in Cases Nos. U-11955 and U-11956 and the similar ruling in the March 29, 2001 order in Case No. U-12359, which involves a request by The Detroit Edison Company (Detroit Edison) for recovery of its 1999 implementation costs. According to ABATE, the recovery of Consumers' 1999 implementation costs should be conditional.

In response, Consumers contends that the Commission's determination to make recovery of Consumers' pre-1999 implementation costs conditional in Cases Nos. U-11955 and U-11956 was

specific to that case. Further, Consumers insists that the fact that the Commission took a similar approach in Case No. U-12359 is irrelevant. According to Consumers, because the evidence presented in this proceeding establishes that the decisions underlying its 1999 implementation expenditures were prudent, there is no reason for the Commission to make the recovery of those costs conditional.

The Commission finds that its prior decisions on this issue are not irrelevant and that they should have been heeded by the ALJ. In reserving the right to undertake another review of implementation costs at issue in Cases Nos. U-11955, U-11956, and U-12359, the Commission observed:

> Because very little retail open access load is currently being served, it is difficult for the Commission to judge the effectiveness of Consumers' and Detroit Edison's implementation programs at this time. The Commission notes, however, that it expects Consumers and Detroit Edison to file information in their 2000 and 2001 true-up cases from which the Commission can determine the effectiveness of the implementation costs that the companies seek to recover.

October 24, 2000 order, Cases Nos. U-11955 and U-11956, p. 5.

The reasons for the Commission to reserve judgment in Cases Nos. U-11955, U-11956, and U-12359 still remain. Therefore, the Commission agrees with ABATE that the Commission should indicate in its final order in this proceeding that it again reserves the right to undertake another review of Consumers' 1999 implementation expenditures.

Methodology for Cost Recovery

In its October 24, 2000 order in Cases Nos. U-11955 and U-11956, the Commission also indicated that a final determination of the methodology for cost recovery should be deferred "until pending questions regarding the stranded cost recovery mechanism are resolved." Order, Cases

Nos. U-11955 and U-11956, p. 12. Issues related to the determination of Consumers' and Detroit Edison's net stranded costs are being litigated in Case No. U-12639.

ABATE requested the ALJ to defer determination of a recovery mechanism for Consumers' 1999 implementation costs until Case No. U-12639 is completed. The ALJ rejected this request. In so doing, he reasoned that consideration of the proper method for determining net stranded costs should not preclude the Commission from addressing proposals related to a surcharge methodology.

In its exceptions, ABATE contends that the ALJ ignored the Commission's order in Cases Nos. U-11955 and U-11956 and a similar ruling on this issue embodied in the March 29, 2001 order in Case No. U-12359. According to ABATE, a final determination regarding the recovery methodology should be made in Case No. U-12639, not this case.

Consumers defends the ALJ's ruling by arguing that information that was not available at the time that the record was developed in Cases Nos. U-11955 and U-11956 is now available. Citing the testimony of Francis A. Ernst, Jr., its Executive Director of Rates and Electric Strategic Business Unit Planning, Consumers argues that the record in this proceeding is sufficient for a determination regarding the effects that the passage of Act 141 and 2000 Public Act 142 (Act 142), MCL 460.10 et seq.; MSA 22.13(10) et seq., might have on the outcome of this proceeding. According to Mr. Ernst, because Consumers has not sought to securitize any of its implementation costs, Consumers' situation is distinguishable from Detroit Edison's. For this reason, Consumers insists that there is no reason to delay determination of the recovery mechanism for Consumers' 1999 implementation costs until Case No. U-12639 is completed.

The Commission finds that Consumers' request for immediate determination of a recovery mechanism for its 1999 implementation costs should have been rejected by the ALJ. In its

October 24, 2000 order in Cases Nos. U-11955 and U-11956, the Commission clearly stated that determination of the methodology for cost recovery of Consumers' and Detroit Edison's implementation costs should await resolution of questions regarding the stranded cost recovery mechanism. Further, there is no urgent need to address this issue. It is undisputed that Consumers is currently statutorily precluded by Section 10d(1) of Act 141 from increasing its current retail rates for at least 2 ½ years. MCL 460.10d(1); MSA 22.13(10d)(1). Accordingly, the Commission finds that the relief requested in ABATE's exception should be granted. The Commission's decision to delay determination of the methodology for cost recovery eliminates any need to address ABATE's third exception, which concerns the reasonableness of the specific cost recovery methodology recommended by the ALJ.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 et seq.; MSA 22.151 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; MSA 22.1 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; MSA 22.13(1) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. Implementation costs of $25,156,000 incurred by Consumers during 1999 should be approved for deferred recovery, subject to the conditions stated in this order.

THEREFORE, IT IS ORDERED that implementation costs of $25,156,000 incurred by Consumers Energy Company during 1999 are approved for deferred recovery, subject to the conditions stated in this order.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26; MSA 22.45.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ Laura Chappelle
Chairman

(S E A L)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner

By its action of July 11, 2001.

/s/ Dorothy Wideman
Its Executive Secretary

S T A T E O F M I C H I G A N

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application of **CONSUMERS ENERGY COMPANY** to recover implementation costs for the 12-month period ended December 31, 1999.	)))))	Case No. U-12358

At the July 23, 2002 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Laura Chappelle, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

On August 8, 2001, Consumers Energy Company (Consumers) filed a petition seeking rehearing of the Commission's July 11, 2001 order (the July 11 order) that approved Consumers' deferred recovery of $25,156,000 for expenditures made during the 12-month period ended December 31, 1999 to implement a retail open access program in accordance with previous orders of the Commission in Cases Nos. U-11290 et al.

On August 31, 2001, the Association of Businesses Advocating Tariff Equity (ABATE) filed a response to Consumers' petition.

Rule 403 of the Commission's Rules of Practice and Procedure, 1992 AACS, R460.17403, provides that a petition for rehearing may be based on claims of error, newly discovered evidence, facts or circumstances arising after the hearing, or unintended consequences resulting from compliance with the order. A petition for rehearing is not merely another opportunity for a party

to argue a position or to express disagreement with the Commission's decision. Unless a party can show the decision to be incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant a rehearing.

Conditional Recovery

Consumers insists that the Commission has no basis for making recovery of any amount of the implementation costs contingent upon additional events or further reviews. Further, Consumers argues that it is entitled to recover an additional $4,996,000 of labor expenses, employee retraining costs, and other related expenditures that it incurred during 1999.

According to Consumers, all $30,152,000 of its expenditures to implement a retail open access program should be fully recoverable from its ratepayers without further review. Citing the June 5, 1997 order in Cases Nos. U-11290 et al. and Section 10a(1) of 2000 PA 141 (Act 141), MCL 460.10a(1), Consumers contends that it would be confiscatory to determine the prudence of such expenditures, which it made in good faith, on an after the fact basis. Consumers maintains that the proper application of a prudence review ignores end results and that the case of Ass'n of Businesses Advocating Tariff Equity v Public Service Comm, 208 Mich App 248; 527 NW2d 533 (1994), establishes that prudently incurred costs may include amounts spent on investments that prove to be unsuccessful in the long run. Therefore, Consumers insists that the Commission cannot re-review its implementation expenditures at some later date and disallow costs then determined to be ineffective, inefficient, or unworkable. Indeed, Consumers argues that the July 11 order infringes on its constitutional rights and ignores Consumers' voluntary reliance on past Commission pronouncements regarding its ability to recover the implementation costs. Accordingly, Consumers asserts that the Commission should amend the July 11 order by striking all provisions that make recovery of its 1999 implementation costs subject to further review.

ABATE contends that the Commission properly determined that Consumers' right to recover its 1999 implementation costs should be subject to further review by the Commission. Citing the October 24, 2000 order in Case No. U-11955, ABATE maintains that the Commission explicitly placed Consumers on notice that subsequent events could foreclose recovery of its implementation costs. In any event, ABATE argues that Consumers' petition for rehearing should be denied because it does not meet the standards set forth in Rule 403. According to ABATE, Consumers' rehearing arguments are simple restatements of positions that were considered and rejected by the July 11 order.

The Commission finds that Consumers' arguments regarding alleged illegality of the Commission's conditional approval of the recovery of its 1999 implementation costs are not well taken. As noted in the July 11 order, the October 24, 2000 order in Cases Nos. U-11955 and U-11956, which concerned review of the 1997 and 1998 implementation expenses of Consumers and The Detroit Edison Company (Detroit Edison), respectively, explicitly indicates that the incurrence of implementation costs for activities that prove to be ineffective, inefficient, or unworkable may not entitle a utility to recover the costs of those activities. Further, although approving deferred recovery of implementation expenses by Consumers in the amount of $15,376,000, the Commission clearly indicated that its determination was conditional and subject to additional review. Indeed, the Commission recently reiterated its ruling in this regard in its December 20, 2001 order in Case No. U-12639:

> The Commission rejects Consumers' and Detroit Edison's proposals to use a portion of the securitization savings to pay implementation costs. The Commission has addressed the recovery of implementation costs in prior orders, and finds no reason to change those determinations at this time. The Commission has ruled that recovery of implementation costs is conditioned upon the success of the utilities in implementing the ROA programs. July 11, 2001 order, Case No. U-12358, p. 10, and October 24, 2000 order, Cases Nos. U-11955 and U-12956, p. 5. The record in this case does not provide a basis for concluding that the utilities' programs have been sufficiently successful to merit full recovery of previously

> reviewed implementation costs, much less costs that are at issue in pending cases or costs that have not even been incurred.
>
> The Commission reaffirms that it will permit the utilities to recover prudently incurred implementation costs as provided for in the Commission's prior orders. It expects to provide recovery at the conclusion of the rate freeze. Except for any costs that should be assigned solely to ROA customers, implementation costs will be recovered from all customers. The Commission may provide for residual securitization savings to fund all or a portion of the recovery.

December 20, 2001 order in Case No. U-12639, pp. 28-29. Accordingly, the Commission finds that the July 11 order should not be revised to delete the references to the conditional nature of the Commission's determination. However, nothing in the July 11, 2001 order or in this order should be viewed as foreclosing Consumers from seeking a determination from the Commission at an appropriate time in the future that assures recovery of all or a portion of its implementation costs at the conclusion of the rate freeze. To seek such a determination, Consumers should file an application and supporting documentation that provides the Commission with a factual basis for reviewing the success of Consumers' implementation efforts. Specifically, the Commission is looking for evidence that any component, system, or procedure that is necessary for a retail access program to fully function is in place, completely operational, and capable of seamlessly performing its role in conjunction with the other necessary components, systems, and procedures. Simply spending funds on a new component, system, or procedure is not sufficient to demonstrate that the expenditure furthered the utility's ability to conduct a retail access program in a manner that promotes customer choice and fair competition among suppliers. Notice of the application should be provided in accordance with the directions of the Commission's Executive Secretary. Any interested party may request a hearing as provided in the notice.

Labor Expenses

Consumers argues that the Commission erred in denying recovery of implementation costs totaling $3,369,000 for certain labor costs. In so doing, Consumers raises myriad issues. Consumers insists that rebuttal evidence proffered in this proceeding by Carl A. Gilzow, its electric restructuring implementation project manager, contains a detailed hourly labor analysis that was not presented in Cases Nos. U-11955 and U-11956, which it maintains is adequate support for a finding that the disputed labor costs were incremental.

Consumers also complains that the Commission erroneously denied recovery of these expenses on the basis of inappropriate and unlawful standards adopted subsequent to the occurrence of the expenditures. Specifically, Consumers maintains that the first hint that the Commission intended to use Consumers' overall company headcount as the basis for determining whether labor costs might be recoverable came in the October 24, 2000 order in Cases Nos. U-11955 and U-11956. Moreover, Consumers insists that the July 11 order in this proceeding ignores the guidelines established in the October 24, 2000 order in Cases Nos. U-11955 and U-11956 for whether implementation expenditures are recoverable.

Further, Consumers argues that the Commission effectively found that labor costs can never be incremental unless overall operation and maintenance (O&M) expense is higher and the number of employees is at a level greater than at the time that its base rates were established. Consumers also contends that comparison of its 1996 and 1999 staffing levels constitutes a form of retroactive ratemaking and violates the statutory rate freeze imposed by Section 10d(1) of Act 141, MCL 460.10d(1). According to Consumers, its employee count and O&M expense levels in 1996 are not proper criteria for determining whether labor costs incurred during 1999 for implementation of retail open access are incremental. Rather, Consumers insists that the Commission may

only consider whether (i) the labor costs would not have been incurred but for restructuring and (ii) represent activities that would not have been performed but for restructuring.

In response, ABATE contends that Consumers' arguments on rehearing mirror the arguments previously considered and rejected in the July 11 order. According to ABATE, Consumers' petition for rehearing is nothing more than an attempt at a second bite of the apple. In any event, ABATE insists that the rationale underlying the disallowance of the implementation costs set forth by the Commission Staff supports the determination contained in the July 11 order.

The Commission finds that Consumers' argument should be rejected. The rebuttal testimony of Mr. Gilzow that was received into evidence in this proceeding was thoroughly discussed in the July 11 order. In rejecting Mr. Gilzow's contention that all of the disputed costs were incremental, the Commission reaffirmed the observation made in its October 24, 2000 order in Cases Nos. U-11955 and U-11956 that the mere redeployment of members of any large organization's workforce is a routine occurrence and that such a redeployment in the context of Consumers' restructuring efforts could reflect efficiencies attained in preexisting work functions or the elimination of redundant positions. Moreover, the Commission notes that in Cases Nos. U-11955 and U-11956 it was determined that in order to be recoverable, implementation costs should be limited to non-recurring costs necessary to accomplish the changes required by restructuring that a public utility incurs in addition to the operational costs that it already recovers in its base rates. In so doing, the Commission stated that "a utility not only must demonstrate that its labor expenditures were reasonably and prudently incurred in furtherance of its implementation program, but also must prove that such labor expenditures are not already being recovered in its existing rates." July 11 order, p. 6.

In the July 11 order, the Commission observed that Consumers' attempts to recover labor costs in Case No. U-11955 and in this proceeding were similar. In Case No. U-11955, at 4 Tr. 523, Mr. Gilzow supported recovery of labor costs associated with new employees that were added to fill new positions. Mr. Gilzow made the same claim at 3 Tr. 63-64 of this proceeding. In both cases, Consumers sought recovery of labor costs associated with moving existing employees from their current jobs and backfilling those positions with replacements.[1] The same is true of Consumers' claims for recovery of chargeback[2] hours and overtime.[3] Finally, the other two types of labor costs described by Mr. Gilzow in this proceeding--transferring one employee from Consumers' Gas Division to its electric restructuring project and utilizing existing employees whose existing tasks were either deferred, performed by other existing employees, or subject to non-paid overtime--involve a redeployment of its workforce that the Commission determined in Cases Nos. U-11955 and U-11956 "is more properly classified as the type of expense assigned to base rates." October 24, 2000 order, Cases Nos. U-11955 and U-11956, p. 10.

The primary rationale underlying the October 24, 2000 order in Cases Nos. U-11955 and U-11956 and the July 11 order is the need to ensure that the utility's ratepayers will not be required to compensate the utility twice for the same expense. Nothing in the Commission's prior orders in Cases Nos. U-11290 et al. or Act 141 suggests that double recovery of labor costs by a utility would be appropriate under any circumstance.

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[1] See, Case No. U-11955 at 4 Tr. 523 and Case No. U-12358 at 3 Tr. 64.

[2] Chargeback labor is performed by Consumers' internal support organizations, which then charge the cost of their labor to the electric restructuring project.

[3] See, Case No. U-11955 at 4 Tr. 524 and Case No. U-12358 at 3 Tr. 64-65.

Finally, because the Commission's ruling in this case did not change Consumers' rates, Consumers' arguments concerning retroactive ratemaking and the alleged violation of the rate freeze imposed by Section 10d(1) of Act 141 lack merit.

Therefore, the Commission is not persuaded that its prior determination regarding the $3,369,000 of labor costs should be reversed.

Employee Impact Expenses

Consumers also argues that it should be entitled to recover all of the $1,481,000 associated with the labor and non-labor components of Consumers' 1999 employee impact expenses.[4] According to Consumers, its 1999 employee impact costs relate to two initiatives. One involved the retention of certain critical electric transmission controllers. The other involved the retention, relocation, and associated expenses related to elimination of a traveling repair crew (TRC).

With regard to the transmission controllers, Consumers asserts that the Commission's rejection of Consumers' recovery of such costs is not supported by record evidence. Rather, Consumers maintains that the record establishes that (i) on December 31, 1996, Detroit Edison gave Consumers notice of its intent to terminate their electric coordination agreement, (ii) the existence of electric restructuring necessitated a program to retain critical employees, (iii) as a result of electric restructuring, jobs of energy controllers are more complex and more in demand, (iv) the 28 employees who were part of this initiative have highly specialized skills that are critical to the transmission function of the Michigan Electric Power Coordination Center, (v) in order to assure retention through 2001, it was necessary to offer a comprehensive retention package, and (vi) these costs are directly related to electric restructuring and are incremental.

[4]"Employee impact expense" is Consumers' terminology and refers to costs associated with the retention, retraining, and relocation of its employees.

In rejecting Consumers' arguments, the Commission stated:

> Additionally, the Commission is not convinced that Consumers should be permitted to recover the $344,000 in signing and retention bonuses and additional compensation paid to the 28 employees with expertise in the scheduling and controlling of bulk power flows. The Commission finds that the ability of these employees to command higher salaries is not related to Consumers' implementation of a retail open access program. Rather, the Commission concludes that these employees were performing preexisting work functions and that the expenses of retaining them more properly should be assigned to base rates.

July 11 order, p. 8.

In reaching this determination, the Commission was not persuaded by Mr. Gilzow's contention that Consumers' need to use incentives to retain these employees was caused in any way by Consumers' implementation of a retail open access program. Mr. Gilzow attributed the increase in demand for these employees to the general reconfiguration of the electric industry that is occurring due to electric restructuring programs being implemented in other states, which would affect Consumers regardless of whether Consumers was also in the process of restructuring. The Commission concluded that these employees became more valuable because demand for their specialized services increased independently of whether Consumers implemented retail open access. The Commission finds that nothing in Consumers' petition for rehearing presents a basis for changing that conclusion.

With regard to the TRC issue, Consumers maintains that the Commission's rejection of Consumers' recovery of $924,000 associated with elimination of the TRC is an error of law and fact. Consumers insists that the Commission erred by rejecting Mr. Gilzow's testimony that the TRC employees were retrained and transferred to other activities because the move to retail open access "has resulted in changing the way outages are scheduled." 3 Tr. 68. Further, Consumers maintains that the Commission improperly observed that recent Commission investigations indicated that Consumers abandoned year-round scheduled outages due to the tight summertime

electric supply situation in this state during recent years. Moreover, Consumers asserts that the retraining and relocation expenses associated with Consumers' elimination of the TRC involve exactly the types of costs that the Legislature envisioned in Section 10p(1) of PA 141, MCL 460.10p(1), when it referred to a worker transition program that would provide skills upgrades and in Section 10p(2), MCL 460.460.10p(2), when it referred to employee retraining programs. The Commission disagrees.

In rejecting Mr. Gilzow's testimony regarding the TRC expenses, the Commission stated:

> Section 10p(2) of Act 141 does not guarantee the recovery of all of a utility's employee retraining and relocation costs. Rather, this legislation is limited to "audited and verified employee-related restructuring costs that are incurred as a result of the amendatory act that added this section or as a result of prior commission restructuring orders, including employee severance costs, employee retraining programs, early retirement programs, outplacement programs, and similar costs and programs, that have been approved and found to be prudently incurred by the commission." MCL 460.10p(2); MSA 22.13(10p)(2), (emphasis added). Nothing in Act 141 or the Commission's prior restructuring orders in any way obligates an electric utility to alter its methodology for performing scheduled outages. Further, the Commission is not persuaded by Mr. Gilzow's testimony that the commencement of electric restructuring constituted the impetus for Consumers' 1999 decision to eliminate its TRC. It is more likely, based on evidence developed in other Commission proceedings,[3] that Consumers abandoned year-round scheduled outages due to the tight summertime electric supply situation in this state during recent years.
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> [3] See, the April 14, 1998 orders in Cases Nos. U-10840, U-11677, and U-11678, the January 19, 1999 order in Case No. U-11889, the January 19, 2000 order in Case No. U-12292, and the November 2, 2000 order in Case No. U-12702.

July 11 order, p. 7, (emphasis in original).

Additionally, citing the October 24, 2000 order in Cases Nos. U-11955 and U-11956, the Commission indicated that it would be appropriate to reject Consumers' recovery of the $924,000 for the retraining and relocation expenses because of Consumers' ongoing responsibility to its ratepayers to implement efficiency measures to reduce its cost of service prior to restructuring. Indeed, in Cases Nos. U-11955 and U-11956, the Commission observed that the advent of

restructuring did not relieve Consumers of that responsibility and that absent requiring a utility to demonstrate that restructuring caused the costs to be incurred, a utility could use restructuring as an opportunity to recoup out-of-pocket costs for efficiency measures that it would have otherwise undertaken in any event.

The Commission is not required to rely upon a witness's testimony, if the Commission's experience, technical competence, and specialized knowledge are at odds with the testimony. Moreover, the courts have repeatedly upheld the Commission's reliance on information available in its records.[5] In the July 11 order, the Commission explained why it rejected Mr. Gilzow's opinion regarding his company's motivation for eliminating the TRC, and nothing in Consumers' petition for rehearing convinces the Commission that it should reverse that determination.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. Consumers' petition for rehearing should be denied.

THEREFORE, IT IS ORDERED that the petition for rehearing filed by Consumers Energy Company on August 8, 2001 is denied.

The Commission reserves jurisdiction and may issue further orders as necessary.

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[5] See, City of Ishpeming v Public Service Comm, 370 Mich 293; 121 NW2d 462 (1963); Ass'n of Businesses Advocating Tariff Equity v Public Service Comm, 173 Mich App 647; 434 NW2d 648 (1988); and Attorney General v Public Service Comm, 136 Mich App 52, 355 NW2d 640 (1984).

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

Laura Chappelle
Chairman

Commissioner

Robert B. Nelson
Commissioner

By its action of July 23, 2002.

Its Executive Secretary

APPENDIX I

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application of **CONSUMERS ENERGY COMPANY** to recover electric restructuring implementation costs for the 12-month period ended December 31, 2000.	)))))	Case No. U-12891

At the November 7, 2002 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Laura Chappelle, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

On March 30, 2001, Consumers Energy Company (Consumers) filed an application for authorization to recover $25,149,000 of electric restructuring implementation costs incurred in calendar year 2000,[1] plus post-2000 carrying costs.[2]

At a prehearing conference on June 18, 2001, Administrative Law Judge James N. Rigas (ALJ) granted leave to intervene to the Association of Businesses Advocating Tariff Equity (ABATE) and Attorney General Jennifer M. Granholm (Attorney General). The Commission Staff (Staff) also participated. On October 29, 2001, the ALJ conducted an evidentiary hearing, at which Consumers

[1] The proposed implementation costs for 2000 include $150,000 actually incurred in 1999. Those costs are related to Consumers' restructuring of its dispatch coordination with The Detroit Edison Company upon the discontinuation of their power pool arrangement, the Michigan Electric Coordinated Systems.

[2] The proposed implementation costs for 2000 include carrying costs accrued up to the end of 2000.

presented four witnesses in support of its application and the Staff presented a witness proposing to disallow $5,048,000 of direct labor costs and $341,000 of employee retraining costs (plus $173,000 of carrying costs related to both disallowances). The Staff's disallowance related to labor (including overhead) that, in its view, duplicated the operation and maintenance (O&M) expense recovered in Consumers' base rates. Consumers, the Staff, and ABATE filed briefs, and Consumers, the Staff, and the Attorney General filed reply briefs.

On January 22, 2002, the ALJ issued a Proposal for Decision recommending adoption of the Staff's disallowance and conditional approval of the other implementation costs for deferred recovery. On February 5, 2002, Consumers filed exceptions. On February 20, 2002, the Attorney General and the Staff filed replies to exceptions.

In its exceptions, Consumers argues that the ALJ erred in recommending disallowance of the labor costs. Consumers says that it is undisputed that those costs were both prudently incurred and directly related to electric restructuring. Consumers further asserts that the Staff's reasoning regarding whether the costs were incremental to the O&M expense recovered in base rates is flawed. According to Consumers, declines in overall electric O&M expense and employee headcounts since its last base rate case do not indicate whether the labor resources assigned to the implementation functions were incremental in nature. Consumers says that the aggregate O&M expense numbers cited by the Staff are far more encompassing in scope and mask changes in specific types of cost. Moreover, Consumers observes, the Staff's analysis included gas as well as electric employees in its headcount comparisons, but Consumers' electric-only headcount increased from 1998 to 2000.

Consumers contends that the costs at issue are recoverable under the October 24, 2000 order in Cases Nos. U-11955 and U-11956 (addressing 1998 implementation costs for Consumers and The

Detroit Edison Company [Detroit Edison], respectively) and the July 11, 2001 order in Case No. U-12358 (Consumers' 1999 implementation costs), reh den order dated July 23, 2002. It says that the standard set forth in those orders requires "an adequate showing that [the labor] costs were in addition to the employee-related costs typically incurred by a utility operation in providing electric service in a reasonable, efficient manner." Order dated October 24, 2000, Cases Nos. U-11955 and U-11956, at 9. It argues that it would not have incurred the costs, or undertaken the underlying activities, but for restructuring. It further argues that MCL 460.10p explicitly acknowledges its right to recover labor costs that it incurred to retrain displaced employees.

Consumers explains that 70 of its employees working on restructuring activities, on either a full- or part-time basis, accounted for 116,608 hours in 2000, of which 84,017 were direct labor hours and 32,591 were chargeback hours. It further classifies the direct labor hours in terms of whether they represent new hires, the transfer of an employee from the gas business to an electric restructuring function, backfilling jobs of reassigned electric employees by hiring new employees, paying overtime, and reallocating the workload of existing employees. It explains that chargeback hours represent services performed by either the Information Services and Technology unit or the Meter Technology Center and Meter Services unit, both of which are internal support organizations staffed by persons that do not report to Consumers' electric operation. It says that chargeback services are no different than contracting for outside consulting services. Consumers asserts that it did not present this type of evidence in Case No. U-11955, but that the additional detail and analysis it presented in this case support full recovery of the labor costs.

In reply, the Attorney General argues that the Staff's proposed disallowance is consistent with prior orders that provide for recovery of incremental costs only. The Attorney General further

contends that MCL 460.10p(2) classifies employee retraining costs as stranded costs, which Consumers cannot recover as implementation costs.

The arguments advanced by Consumers to support its claim that some of its workforce costs should be allocated to restructuring functions and recovered as implementation costs are not different in any material respect from those it made in Cases Nos. U-11955 and U-12358, in which the Commission disallowed the same types of expenses. Despite claims by Consumers that the labor costs relate to added employees, transferred employees whose old jobs were backfilled, the payment of overtime, and the use of chargeback labor, the prior orders held that Consumers had failed to prove that the challenged costs were incremental to the employee-related costs typically incurred by a utility operation in providing electric service in a reasonable, efficient manner. In Cases Nos. U-11955 and U-11956, the Commission stated:

> The redeployment of members of an existing workforce is not necessarily an unusual occurrence in large organizations. A reassignment can be short-term, temporary, or routine in nature. It may reflect efficiencies attained in preexisting work functions or the elimination of redundant positions. Unless the cost would not have been incurred, and represents a task or activity that would not have been performed, but for restructuring, it is more properly classified as the type of expense assigned to base rates.

October 24, 2000 order at 9-10 (footnote omitted). The order further emphasized that "implementation costs are non-recurring costs that the utilities incur in addition to the operational costs that they already recover in their base rates and are necessary to accomplish the changes required by restructuring." Id. at 3. The Commission reaffirms those determinations and finds that they apply with equal force to this case.

The mere fact that Consumers labels some costs as retraining costs does not automatically qualify them for recovery. As noted in the July 11, 2001 order in Case No. U-12358, at 7, the Customer Choice and Electricity Reliability Act, MCL 460.10 et seq., "does not guarantee the

recovery of all of a utility's employee retraining and relocation costs." Rather, the statute provides for recovery of only those "audited and verified employee-related restructuring costs that are incurred as a result of the amendatory act that added this section [2000 PA 141, or Act 141] or as a result of prior commission restructuring orders, including . . . employee retraining programs . . . that have been approved and found to be prudently incurred by the commission." MCL 460.10p(2). Incurring costs to retrain employees formerly assigned to year-round outage-related tasks, as claimed by Consumers, is consistent with improving the electric utility's operational efficiency and achieving cost savings through the elimination of redundant positions. As further noted in Case No. U-12358, "[n]othing in Act 141 or the Commission's prior restructuring orders in any way obligates an electric utility to alter its methodology for performing scheduled outages." July 11, 2001 order at 7. Thus, the retraining costs do not qualify as implementation costs, absent the requisite showing that they were "a result of" a restructuring mandate imposed by Act 141 or Commission order.

Consumers argues that the analytical detail it provided for its labor costs in this case was not on the record in Case No. U-11955. Nevertheless, it is remarkably similar to the evidence that the Commission rejected in Case No. U-12358, and Consumers has presented nothing that would justify a different treatment for what appear to be essentially the same types of costs. Any difference or elaboration in the arguments marshaled by Consumers in this case is not adequate to persuade the Commission that the labor costs are incremental, that they would not have been incurred but for restructuring, or that the underlying activities would not have been performed but for restructuring.

Consumers makes an additional argument that diverting part of the revenue requirement in its current base rates to cover its implementation costs would be retroactive ratemaking and would thus

have the effect of reducing rates in violation of the rate freeze imposed in MCL 460.10d. The Commission finds no merit in this argument, as Consumers' base rates will not change in consequence of this order. See order dated July 23, 2002, Case No. U-12358, at 8. Foreclosing recovery of non-incremental costs does not violate either the statutory rate freeze or the retroactive ratemaking prohibition. The rate freeze provisions in MCL 460.10d do not create an entitlement on Consumers' part to a deferred recovery of all labor costs, whether incremental or not, that it incurs during the freeze.

The ALJ's recommendation to make the recovery of implementation costs conditional incorporates prior Commission rulings. In the order in Cases Nos. U-11955 and U-11956, at 5, the Commission stated: "If subsequent events reveal that costs were incurred for projects or systems that ultimately prove to be ineffective, inefficient, or unworkable or otherwise impede the progress to retail open access, the Commission reserves the right to undertake another review of those costs and may foreclose their recovery." The Commission reaffirmed this determination in the July 11, 2001 and July 23, 2002 orders in Case No. U-12358 as well as the July 23, 2002 order in Case No. U-12892 (Detroit Edison's 2000 implementation costs).

Consumers seeks a determination that it has an unconditional right to recover its implementation costs. It says that it has proven, without dispute, that it prudently incurred the costs. It contends that making the costs subject to future disallowance is incompatible with the prudence standard because recovery cannot be made to depend upon the ultimate success or failure of an undertaking in hindsight. It says that a conditional recovery of prudent costs would violate its federal and state constitutional rights to due process, which protect it against arbitrary or unfair ratemaking.

The Commission provided the rationale for imposing conditions on the deferred recovery of implementation costs in Cases Nos. U-11955 and U-11956, as follows:

> [T]he Commission would emphasize that simply incurring costs to implement Michigan's retail open access program is not a sufficient justification for their recovery. Expenditures associated with the implementation of the retail open access programs must produce results. Procedures, policies, methods, or electronic data interfaces that prove to be ineffective, inefficient, or unworkable may not entitle the company to recover the costs of those systems.
>
> Because very little retail open access load is currently being served, it is difficult for the Commission to judge the effectiveness of Consumers' and Detroit Edison's implementation programs at this time. The Commission notes, however, that it expects Consumers and Detroit Edison to file information in their 2000 and 2001 true-up cases from which the Commission can determine the effectiveness of the implementation costs that the companies seek to recover.

Order at 4-5; see order dated July 11, 2001, Case No. U-12358, at 10. Neither Michigan public utility statutes nor prior Commission orders recognize an unqualified right to recover any or all costs that a utility may attempt to classify as related to implementation. The Commission is not proposing to disallow prudent costs with the benefit of hindsight, but rather it is recognizing that it is not possible to undertake a piecemeal review of costs incurred in each year of a project spanning multiple years. An informed evaluation of prudence requires the project to be reviewed in its entire context.

However, nothing in this or prior orders should be viewed as foreclosing Consumers from seeking a determination from the Commission at an appropriate time in the future that assures recovery of all or a portion of its implementation costs at the conclusion of the rate freeze. To seek such a determination, Consumers should file an application and supporting documentation that provides the Commission with a factual basis for reviewing the success of Consumers' implementation efforts. Specifically, the Commission is looking for evidence that any component, system, or procedure that is necessary for a retail access program to fully function is in place,

completely operational, and capable of seamlessly performing its role in conjunction with the other necessary components, systems, and procedures. Simply spending funds on a new component, system, or procedure is not sufficient to demonstrate that the expenditure furthered the utility's ability to conduct a retail access program in a manner that promotes customer choice and fair competition among suppliers. Notice of the application should be provided in accordance with the directions of the Commission's Executive Secretary. Any interested party may request a hearing as provided in the notice.

Consumers proposes to recover its implementation and carrying costs through a surcharge assessed to all retail customers, including full service and open access customers, over a five-year period after the rate freeze expires. It says that there is no reason why the Commission should defer a decision approving its proposal.

As stated in the July 11, 2001 order in Case No. U-12358, at 11-12, and the October 24, 2000 order in Cases Nos. U-11955 and U-11956, at 12, it is not necessary or appropriate to address a cost recovery mechanism at this time.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACS, R 460.17101 et seq.

b. Implementation costs of $19,587,000 incurred by Consumers for 2000, including carrying charges accrued through year-end 2000, should be approved for deferred recovery, subject to the conditions stated in this order.

THEREFORE, IT IS ORDERED that implementation costs of $19,587,000 incurred by Consumers Energy Company for 2000, including carrying charges accrued through year-end 2000, are approved for deferred recovery, subject to the conditions stated in this order.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ Laura Chappelle
Chairman

(S E A L)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner

By its action of November 7, 2002.

/s/ Dorothy Wideman
Its Executive Secretary

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application of **CONSUMERS ENERGY COMPANY** to recover electric restructuring implementation costs for the 12-month period ended December 31, 2001.	)))))	Case No. U-13340

At the June 16, 2003 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Laura Chappelle, Chairman
Hon. David A. Svanda, Commissioner
Hon. Robert B. Nelson, Commissioner

OPINION AND ORDER

On March 28, 2002, Consumers Energy Company (Consumers) filed an application for authorization to recover $7,947,000 of electric restructuring implementation costs incurred in calendar year 2001, which included $266,000 in carrying costs.

At a prehearing conference on September 26, 2002, Administrative Law Judge James N. Rigas (ALJ) granted leave to intervene to the Association of Businesses Advocating Tariff Equity (ABATE) and Attorney General Jennifer M. Granholm[1] (Attorney General). The Commission Staff (Staff) also participated.

On October 21, 2002, the parties entered into a stipulation that established all of the following:

1. Subsequent to the filing of Case No. U-13340, the Staff undertook an audit of electric restructuring implementation costs incurred by Consumers in 2001.

[1] On January 1, 2003, Michael A. Cox replaced Ms. Granholm as Attorney General.

2. The Staff concluded that during 2001 Consumers incurred the $7.947 million of electric restructuring implementation costs that it seeks to recover in this case.

3. The Staff did not find that any of these costs were imprudently incurred.

4. The Staff is not recommending any disallowance of implementation costs in this case.

5. The parties waived cross-examination of Consumers' witnesses.

6. The parties reserved the right to take any position not inconsistent with the stipulation.

7. The Attorney General and ABATE would not file testimony in this case.

On November 21, 2002, the ALJ conducted an evidentiary hearing, at which Consumers presented three witnesses in support of its application and six exhibits were received into evidence. Thereafter, Consumers, the Staff, the Attorney General, and ABATE filed briefs and reply briefs.

On February 3, 2003, the ALJ issued a Proposal for Decision (PFD). On February 18, 2003, Consumers filed exceptions. On February 28, 2003, the Staff, the Attorney General, and ABATE filed replies to exceptions.

In its exceptions, Consumers expressed full support for the ALJ's recommendation that the utility be allowed to recover $7,947,000 of implementation costs for the 12-month period ended December 31, 2001. However, Consumers disagreed with two aspects of the PFD. First, Consumers argues that the ALJ incorrectly recommended that its recovery of $7,947,000 of implementation costs should be subject to a further review by the Commission. Consumers seeks a determination that it has an unconditional right to recover its implementation costs. It says that it has proven, without dispute, that it prudently incurred the costs. It contends that making the costs subject to further review is incompatible with the prudence standard because hindsight cannot form the basis for a disallowance. Consumers also maintains that the conditional recovery of prudent

costs would violate its federal and state constitutional rights to due process, which protect it against arbitrary or unfair ratemaking.

Moreover, Consumers asserts that implementation of its retail open access program has been successful. As of January 1, 2002, all of Consumers' residential, commercial, and industrial customers became eligible to participate in the program. According to Consumers, during 2001 the number of open access customers increased from 30 to over 330 and the load served increased from less than 70 megawatts (MW) to over 230 MW. This dramatic growth continued during the first two months of 2002, which saw participation increase by over 30% to 308 MW.

Consumers states that its enrollment system is capable of entering up to 25,000 enrollments per week. Also, its meter testing and initialization departments are staffed to handle up to 175 switches per week, which is adequate to meet the current demand because no meter work is necessary to switch residential or commercial customers with loads under 20 kilowatts (kW). Consumers indicates that subsequent to issuance of the December 20, 2001 order in Case No. U-12488, which established a 45-day requirement for completion of the enrollment process, it has processed over 99% of enrollments within 45 days.

Consumers contends that the evidence that its system is fully functional and capable of meeting all current needs of customers seeking to switch to open access service justifies a determination that Consumers' right to recover its implementation costs should be unconditional.

The Staff, the Attorney General, and ABATE respond that Consumers has confused the statutory concept of full recovery embodied in MCL 460.10a(1) with the concept of immediate recovery, which is neither appropriate nor lawful at this time. According to them, MCL 460.10a(1) very clearly provides that Consumers' recovery of its implementation costs is subject to the discretion of the Commission. They insist that the Commission's decision to

defer Consumers' recovery of its implementation costs is not tantamount to a denial of recovery. Indeed, citing myriad rules of statutory construction, they contend that the Commission has statutory discretion to subject Consumers' recovery of its implementation costs to further review. Moreover, they assert that the Commission's decision to make the recovery of implementation costs conditional does not unconstitutionally impair Consumers' property rights.

The Commission finds that Consumers' first exception should be rejected. The ALJ's recommendation that Consumers' recovery of implementation costs should be conditional is consistent with prior Commission rulings. In the October 24, 2000 order in Cases Nos. U-11955 and U-11956, the Commission expressed concern that subsequent events could reveal that costs were incurred for projects or systems that ultimately prove to be ineffective, inefficient, or unworkable or otherwise impede the progress to retail open access, and that the Commission reserved the right to undertake another review of those costs and may foreclose their recovery. The Commission reaffirmed this determination in the July 11, 2001 and July 23, 2002 orders in Case No. U-12358 as well as in the July 23, 2002 order in Case No. U-12892 (Detroit Edison's 2000 implementation costs) and the November 7, 2002 order in Case No. U-12891.

However, nothing in this or prior orders should be viewed as foreclosing Consumers from seeking a determination from the Commission, at an appropriate time in the future, that assures recovery of all or a portion of its implementation costs at the conclusion of the rate freeze. To seek such a determination, Consumers should file an application and supporting documentation that provides the Commission with a factual basis for reviewing the success of Consumers' implementation efforts. Specifically, the Commission is looking for evidence that any component, system, or procedure that is necessary for a retail open access program to fully function is in place, completely operational, and capable of seamlessly performing its role in conjunction with the other

necessary components, systems, and procedures. Simply spending funds on a new component, system, or procedure is not sufficient to demonstrate that the expenditure furthered the utility's ability to conduct a retail open access program in a manner that promotes customer choice and fair competition among suppliers. Notice of the application should be provided in accordance with the directions of the Commission's Executive Secretary. Any interested party may request a hearing as provided in the notice.[2]

In its second exception, Consumers complains that the ALJ should have addressed its proposal for the establishment of a mechanism for the future recovery of its implementation and carrying costs. According to Consumers, there is no reason why the Commission should defer a decision approving its proposal. Consumers notes that in less than one year the statutory provisions precluding increased retail rates will expire. Consumers contends that this proceeding may be the Commission's final opportunity to craft the cost recovery mechanism before the end of the rate freeze.

The Staff, the Attorney General, and ABATE argue that Consumers will not be harmed by the ALJ's recommendation that the Commission postpone establishment of a methodology for recovery of the implementation costs. Further, they maintain that establishment of a recovery mechanism is premature at this time. According to them, the continuing rate freeze obviates the need to establish a recovery mechanism at this time.

The Commission finds that Consumers' second exception should also be rejected. Consistent with the November 7, 2002 order in Case No. U-12891, the July 11, 2001 order in Case No. U-12358, and the October 24, 2000 order in Cases Nos. U-11955 and U-11956, it is not necessary or appropriate to address Consumers' proposed cost recovery mechanism at this time.

[2] In its June 2, 2003 order in Case No. U-13715, the Commission authorized Consumers to securitize its 1998-2000 implementation costs.

Finally, the Commission is persuaded that it should use this proceeding as a vehicle to announce case completion objectives, attached to this order as Exhibit A, for the processing of implementation cost cases and stranded cost cases within eight months from application to final order. This proceeding took almost 15 months to complete. The Commission finds that it would be in the public interest to establish case completion objectives that will provide applicants with an opportunity to receive a more timely regulatory response to applications in implementation cost cases and stranded cost cases.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 et seq.

b. Implementation costs of $7,947,000 incurred by Consumers for 2001, including carrying charges accrued through year-end 2001, should be approved for deferred recovery, subject to the conditions stated in this order.

C. Case completion objectives should be established for implementation cost cases and stranded cost cases.

THEREFORE, IT IS ORDERED that:

A. Implementation costs of $7,947,000 incurred by Consumers Energy Company for 2001, including carrying charges accrued through year-end 2001, are approved for deferred recovery, subject to the conditions stated in this order.

B. Case completion objectives, attached to this order as Exhibit A, shall be adopted for implementation cost cases and stranded cost cases.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so in the appropriate court within 30 days after issuance and notice of this order, pursuant to MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ Laura Chappelle
Chairman

(S E A L)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner

By its action of June 16, 2003.

/s/ Robert W. Kehres
Its Executive Secretary

STATE OF MICHIGAN

IN THE SUPREME COURT

CONSUMERS ENERGY COMPANY,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee.

Supreme Court No. _____

Court of Appeals Nos. 241990 and 241991

MPSC Case No. U-12639

/

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Jon R. Robinson (P27953)
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Attorneys for Consumers Energy Company

/

NOTICE OF HEARING

To: All Parties of Record

PLEASE TAKE NOTICE that the Application for Leave to Appeal of Consumers Energy Company will be heard before the Michigan Supreme Court, Michigan Hall of Justice, 925 W. Ottawa Street, Lansing, Michigan on Tuesday, January 13, 2004.

Respectfully submitted,

CONSUMERS ENERGY COMPANY

Dated: December 19, 2003

By: _____

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STATE OF MICHIGAN

IN THE SUPREME COURT

CONSUMERS ENERGY COMPANY,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION,

Appellee.

Supreme Court No. _____

Court of Appeals Nos. 241990 and 241991

MPSC Case No. U-12639

PROOF OF SERVICE

STATE OF MICHIGAN)
) SS
COUNTY OF JACKSON)

Margaret Hillman, being first duly sworn, deposes and says that she is employed in the Legal Department of Consumers Energy Company; that she served a copy of the "Application for Leave to Appeal" and a "Notice of Hearing" upon the persons listed in Attachment 1 hereto, at the addresses listed therein by depositing the same on December 19, 2003, in the United States mail in the City of Jackson, Michigan with first-class postage thereon fully paid.

Margaret Hillman

Margaret Hillman

Subscribed and sworn to before me this 19th day of December, 2003.

Holly J. Allen

Holly J. Allen
Notary Public, Jackson County, Michigan
My Commission Expires: 05/01/2006

Attachment 1 – To Supreme Court No. _____
(MPSC Case No. U-12639)

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