

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the Matter of the Application of	)	
CONSUMERS ENERGY COMPANY	)	
for approval of a power supply cost	)	Case No. U-14701
recovery plan and authorization of	)	Paperless/Efiling
monthly power supply cost recovery	)	
<u>factors for the year 2006.</u>		

**EXCEPTIONS OF THE MICHIGAN ENVIRONMENTAL COUNCIL AND
THE PUBLIC INTEREST RESEARCH GROUP IN MICHIGAN TO THE
PROPOSAL FOR DECISION**

The Michigan Environmental Council (MEC) and the Public Interest Research Group in Michigan (PIRGIM) file these exceptions to the May 25, 2006 Proposal for Decision (PFD) issued by the Administrative Law Judge (ALJ) in these proceedings.

The proceedings in this case are summarized throughout the ALJ's PFD, and particularly at pp 1-6. However, the ALJ summary fails to note that the ALJ, while he ruled (see ALJ's ruling, T 151-155) that he would strike all of the testimony and exhibits of MEC/PIRGIM's witnesses, also ruled that all said pre-filed testimony and exhibits would be preserved in the transcript and filed as a separate record, which is Volume V(a) of the separate transcript record for the hearing held on March 21, 2006 (Testimony—see MPSC Website Docket Entry Item #0095). The related exhibits of MEC/PIRGIM witnesses (MEC-1 through 8) are found on the MPSC Website Docket Entries as #s 0092 and 0093. This separate record preserves MEC/PIRGIM's testimony and exhibits for appeal and other purposes.

I. MEC/PIRGIM's Exceptions to the PFD

Exception 1: The ALJ erroneously failed to find that CECo's PSCR Plan and forecast is deficient, incomplete, and fails to demonstrate reasonableness and prudence, because the Plan and forecast omits any energy efficiency resource planning and programs, and fails to incorporate any impacts from CECo's upcoming sale of the Palisades Nuclear Plant and its entry into a long-term Purchase Power Agreement (PPA) with the plant's purchaser; the PFD also fails to provide any rate reductions or other remedial relief to address these shortcomings as requested by MEC/PIRGIM.

The ALJ erroneously failed to rule, either directly in his PFD or by granting MEC/PIRGIM's Motion for Declaratory Ruling, that: (i) The Commission can and should find that the utility's plan and forecast is deficient, incomplete, and not reasonable and prudent, because it fails to include any resource planning or energy efficiency and conservation programs; and also fails to address the impacts of the imminent sale of the Palisades Nuclear Plant, and CECo's associated entry into a Purchase Power Agreement (PPA) with the plant's purchaser, and (ii) because the rulings and PFD also fail to adopt any corresponding PSCR rate reduction or grant any other remedial relief as requested by MEC/PIRGIM to address these shortcomings, and even fails to require CECo to refile its outdated plan and forecast case.

The ALJ's PFD (pp 12-15) states as follows with respect to these issues:

MEC/PIRGIM's Response to Prior Rulings and Requests for Relief

As with its previously-filed request for interlocutory relief, MEC/PIRGIM contends that the ALJ should reverse all rulings issued at the start of the March 21, 2006 evidentiary hearing. These consist of the ALJ's decisions to deny MEC/PIRGIM's request for a declaratory ruling, grant various motions to strike testimony submitted by its witnesses, and deny MEC/PIRGIM's motion to postpone all further action in this case pending Consumers' preparation and submission of a revised PSCR plan and five-year forecast. Moreover, as noted above, MEC/PIRGIM goes on to assert that the ALJ should recommend ordering Consumers to "implement appropriate resource planning and energy efficiency programs," issue a warning—pursuant to Section 6j(7) of Act 304—to the effect that the utility's "PSCR rate

factors may be reduced in the future” should it fail to implement such conservation-based programs, and reduce Consumers’ PSCR rate request . . . in the amount of \$0.01058 per kWh” to reflect the cost reductions that could have been achieved by undertaking conservation efforts. MEC/PIRGIM reply brief, p. 3. Each of these issues is addressed below.

a. Motion for Declaratory Ruling

MEC/PIRGIM’s first challenge concerns the ALJ’s March 21, 2006 ruling in which he denied the Intervenor’s “Motion for a Declaratory Ruling.” Essentially, MEC/PIRGIM claims that the ALJ should have granted that motion on the grounds that:

[A]n important predicate to the lawfulness and reasonableness standard, and to cost recovery under Act 304, includes the duty of the utility to include in its plan and forecast case alternative resource options and programs to promote minimization of energy costs and greater energy supply reliability through energy efficiency, conservation, and load and peak demand mitigation programs.

MEC/PIRGIM’s brief, p. 16 [emphasis added].

According to MEC/PIRGIM, the above-mentioned “duty” to include conservation-based programs as part of both its 2006 PSCR plan and its five-year forecast is evidenced by: (1) past Commission orders directing utilities to undertake integrated resource planning and implement demand-side management, generally referred to as IRP and DSM; (2) appellate decisions upholding, to a significant degree, the Commission’s rulings advocating such efforts; (3) statutes concerning utility regulation in Michigan; and (4) a recent Staff report endorsing the use of IRP and DSM as a potential means of satisfying the state’s future capacity and energy needs. Moreover, MEC/PIRGIM asserts, the ALJ incorrectly concluded that—based on the language of Rule 701—he lacks the power to rule on this request. MEC/PIRGIM therefore contends that the ALJ’s failure to issue the requested declaratory ruling was in error, and that he should require Consumers to “file adequate plans and forecasts to incorporate these resource options in this and future cases,” as well as recommend that the Commission “reduce [Consumers’] PSCR rates in this case accordingly.” *Id.*, p. 35.

Consumers and the Staff respond by noting (albeit, in their responses to MEC/PIRGIM’s application for leave to appeal) that the Commission’s ruling in Case U-9172 specifically extinguished the duty MEC/PIRGIM now seeks to impose. Moreover, they point out

that Rule 701 vests the Commission, and not the ALJ, with sole discretion to decide whether a request for declaratory ruling should be entertained. Because the ALJ lacks the authority to rule on such matters, they continue, his refusal to grant the declaratory ruling sought by MEC/PIRGIM was entirely correct.

The ALJ agrees with Consumers and the Staff, and again concludes that MEC/PIRGIM's request for a declaratory ruling must be denied. The Commission has, in the past, required utilities to develop IRPs to be used as a guide in preparing their respective Act 304 filings. However, the January 28, 1997 order in Case No. U-9172 specifically relieved Consumers of any obligation to file IRPs for use in developing its PSCR plans and five-year forecasts. Thus, at least at the present time,¹⁰ the utility is under no obligation to include the potential effect of conservation-based programs as part of the filings submitted in this case.

Moreover, and as noted by both Consumers and the Staff, MEC/PIRGIM's current request is procedurally flawed. Notwithstanding this Intervenor's belief to the contrary, Rule 701 does not grant ALJs the power to issue declaratory rulings. Rather, as clearly stated in subsection 3 of that rule, the decision as to whether or not a request for a declaratory ruling should even be addressed is within the sole discretion of the Commission. Furthermore, the overall structure of the Commission's rules of practice and procedure rebuts MEC/PIRGIM's assertion that its request can and should be considered in the context of an existing case. Rather than including requests for declaratory rulings within either Parts 3, 5, or 6 of these rules (which deal with general hearings, complaints, and utility system extension proceedings, respectively), they are addressed separately as part 7. When viewed in conjunction with the fact that Rule 701 provides the potential for both notice and hearing following receipt of such a request, this clearly indicates that declaratory rulings should be dealt with on a stand-alone basis, and not as part of some other Commission proceeding.

For these reasons, the ALJ recommends that the Commission uphold his ruling regarding the March 16, 2006 "Motion for a Declaratory Ruling" filed by MEC/PIRGIM.

¹⁰ As a result of the investigation being conducted in Case No. U-14667, the Commission may ultimately revise its current position regarding the necessity of including conservation-based programs as part of utilities' Act 304 filings. However, unless and until that occurs, the ALJ is bound to adhere to the Commission's most recent directive on this matter, namely that provided in Case No. U-9172.

The PFD (pp 19-20) also further discusses and rejects MEC/PIRGIM's request that the Commission use its ratemaking powers to reduce CEC's PSCR rate factor to account for the unnecessary energy costs incurred, and that could be avoided, with the adoption of reasonable energy efficiency and conservation resource planning and the adoption of cost-effective programs. The PFD states:

d. MEC/PIRGIM's Miscellaneous Requests for Relief

The final matter relating to MEC/PIRGIM is its request that the Commission direct Consumers to immediately implement IRP, DSM, and/or other conservation-related programs, issue a Section 6j(7) warning due to the utility's failure to have already done so, and reduce Consumers' requested PSCR factor for 2006 by \$0.01058 per kWh. However, as repeatedly noted above, the utility is under no current duty to include the potential effect of resource planning and energy efficiency programs as part of its plan case. Moreover, the requested reduction in its 2006 PSCR factor is based entirely on extra-record information (namely, the stricken testimony of Messrs. Crandall and Kushler). See, MEC/PIRGIM's reply brief, p. 2. The ALJ therefore recommends rejecting each of these requests for relief.

The Commission should reverse the ALJ's March 21, 2006, ruling (T 167-169) (and PFD) denying MEC/PIRGIM's March 16, 2006 Motion for Declaratory Ruling. In addition, or alternatively, the Commission should reverse the ALJ's ruling on the merits of these issues separately presented by MEC/PIRGIM in the filings and briefing in this case. The Commission should rule that an important predicate to the lawfulness and reasonableness standard, and to cost recovery under Act 304, includes the duty of the utility to include in its plan and forecast case alternative resource options and programs to promote minimization of energy costs and greater energy supply reliability through energy efficiency, conservation, and load and peak demand mitigation programs. (Section 6j(3), (6), *et seq.*) The Commission should also adopt PSCR rate reductions when a utility fails to undertake said strategies to reduce avoidable PSCR costs, and issue a Section 6j(7) warning to CEC in this case, and also adopt MEC/PIRGIM's witness

Crandall's downward PSCR adjustment, transcript Volume V(a) in this case, (Separate Record, T 43-44, Exhibit MEC-5).

MEC/PIRGIM's Motion for Declaratory Ruling requested the follow rulings:

(a) A proper and comprehensive power supply cost recovery (PSCR) Plan and 5-year forecast filed by a utility under 1982 PA 304, Section 6a, MCL 460.6a *et seq.* and Section 6j *et seq.*, MCL 460.6j *et seq.*, should include as an energy resource the development and implementation of programs to reduce, moderate, or mitigate electric loads over time, through energy conservation, energy efficiency, or demand-supply-management (DSM) efforts and programs (for simplicity, sometimes referred to collectively as energy efficiency programs).

(b) The development and implementation of energy efficiency programs is fully lawful under Act 304, and in fact should be regarded as an ongoing duty of any utility subject to Act 304, as more fully explained in the accompanying brief in support of this motion;

(c) The development and implementation of energy efficiency programs is also directly relevant to the proper functioning of Act 304; the statute was adopted to require the use of comprehensive energy resource and cost planning strategies by utilities, and to avoid many of the abuses that had occurred under automatic fuel adjustment clauses in effect in the 1970's and early 1980's; energy efficiency programs represent a valuable resource to reduce the cost of energy supplies, both in terms of price per unit of energy and through the reduction of energy waste and avoidable consumption; energy efficiency programs can accomplish these results by reducing energy loads and consumption, thereby reducing avoidable fuel and purchased power costs, transmission capacity and congestion charges, and pollution emission costs and allowances, among other costs. Energy efficiency programs directly serve to assist the statutory duty of the utility and the Commission under Act 304 to "minimize" energy costs, to consider all alternative sources of energy (which includes as a resource the reduction in energy waste and conservation), and to assist energy consumers and ratepayers in mitigating the cost of energy on an ongoing and long-term basis.

(d) The implementation and development of energy efficiency programs would also greatly promote the public interests of the state and its citizens as it would assist in ameliorating energy costs, and the attendant outflow of billions of energy-cost dollars out of Michigan, and would also promote economic development and job creation by providing greater financial resources to businesses arising from the energy savings obtained from the more efficient utilization of energy resources in Michigan; said programs would also result in ongoing and long-term

energy savings to the various units of local and state government in Michigan, thereby directly saving scarce taxpayer dollars for more beneficial uses; energy efficiency programs also result in significant other economic and environmental benefits.

The ALJ's March 21, 2006 ruling (and his PFD) deny the motion on the grounds that an ALJ does "not have the power nor the discretion to rule on a motion for declaratory ruling". The ALJ cites Rule 701 of the Commission's Rules of Practice, R 460.17701. However, nothing in that rule excludes making a declaratory ruling request to the agency or Commission within the context of a contested case, and in fact, substantial efficiencies in the formulation of facts and legal issues results from such an approach. Also, submitting a declaratory ruling request within a contested case does not detract from the process (i.e. notice), or from the Commission's discretion as the ultimate decision-maker in all contested cases.

The ALJ's ruling (PFD p 14) that "Rule 701 does not grant the ALJ the power to issue declaratory rulings", also does not relieve the ALJ of his duty to make findings of fact and law based upon MEC/PIRGIM's presentation for an additional reason. MEC/PIRGIM's efforts to present the merits of these issues in the regular contested case process is no different than any other factual or legal issue presented by any other party, or by the utility, in these ratemaking proceedings. The ALJ's in their PFDs make factual and legal findings regarding a host of various kinds of issues. The issues presented by MEC/PIRGIM should not be omitted or ignored merely because MEC/PIRGIM took the additional and separate process of filing a motion for declaratory ruling. Also, nothing in the statutes suggest that the ALJ, besides making proposed findings of fact and law on all ratemaking issues, cannot also issue a proposed ruling on a motion for declaratory ruling, dealing with ratemaking facts and legal issues.

The ALJ's second ground for denying the motion for declaratory ruling (and for striking MEC/PIRGIM's evidence) is also erroneous ("Consumers is currently under no obligation to

address energy efficiency or conservation programs in the context of its PSCR plan filings”). The ALJ’s ruling is inconsistent with the plain language, purposes, and objectives of Act 304, as discussed in Section II of these exceptions, *infra* (e.g. pages 22-51). It may also be emphasized that the issues presented by MEC/PIRGIM directly impact major costs presented by the utility in this case, including the cost of fuel, purchased power, SNF disposal, transmission costs, and Kn_{ox} related costs, or allowances. The plant sale/PPA directly affects the SNF costs, fee collections, and the entire status of CEC’s SNF sites. The energy efficiency planning and program issues would directly ameliorate all of these costs if they were implemented on a long-term basis. It is imprudent and unreasonable for the utility to avoid any such planning or programs if it is to carry out its duties to minimize its costs as required by Act 304.

The ALJ’s finding that the Commission’s ruling in U-9172 “extinguished the duty MEC/PIRGIM now seeks to impose” (PFD p 14) also seriously overstates the finding in that case. The Commission by no means has foreclosed itself in that or other cases from re-implementing such resource planning and programs. Moreover, these planning and program approaches are fully consistent with the plain language of the duties imposed upon the utility and the Commission under Act 304 itself (e.g. Section 6j(3), section 6j(6), section 6j(7) *et seq.*). Finally, of course, the Commission has the authority to change its ratemaking policies or precedent based upon the record and briefs filed in this case (and also the motions noted earlier).

The ALJ’s PFD is not only erroneous for failing to reverse his earlier denial of MEC/PIRGIM’s motion for declaratory ruling, but also because the ALJ has simply refused in his PFD to make the legal findings on the issues presented by MEC/PIRGIM in its briefing “on the merits” in this case. In this respect, the ALJ failed to following the provisions of APA Section 85 to make rulings on proposed issues of law, or facts, as presented by a party to the

proceedings. MEC/PIRGIM requested said legal findings based on the issues presented within the context of this contested case, wholly aside from any rulings on a motion for declaratory ruling. Therefore, MEC/PIRGIM's request for legal findings on the issues presented has nothing to do with procedure, even if the ALJ were correct that he is barred from making findings on motions for declaratory rulings. He was fully capable of making said findings and was required to do so in the context of this case pursuant to MEC/PIRGIM's briefs.

The ALJ also cannot avoid this duty by bootstrapping himself out of any requirement to make legal findings based upon his rulings striking all of MEC/PIRGIM's testimony. This is tantamount to completely ignoring a party's position based upon erroneous procedural rulings striking evidence. This not only violates fundamental Due Process, but also does not remove the viability of the APA's requirement that an agency make legal findings proposed or urged by a full party to a case.

The ALJ has some concept that because of the filing of a Motion for Declaratory Ruling, that he is procedurally precluded from deciding some legal issues "on the merits" as presented in this contested case. MEC/PIRGIM have presented these issues in the pre-filed testimony and exhibits of their expert witnesses, and have fully briefed these issues. Regardless whether the ALJ felt he was not procedurally capable of ruling on the motion for declaration ruling, this does not disable him from ruling on the issues presented in the filings and briefing undertaken as part of this contested case. The motion for declaratory ruling also does not justify or serve as any reason for striking all of the testimony and exhibits of MEC/PIRGIM.

The ALJ's ruling and PFD is also erroneous in rejecting MEC/PIRGIM's issues on the basis that the Commission in a previous case, U-9172, "relieved" CEC of any requirement to undertake energy efficiency or conservation planning, or cost-effective programs. The

Commission in numerous other cases did find such a function comported with a perquisite finding of reasonableness and prudence in plan and forecast cases under Act 304, or in proceedings adjunct to the Act 304 process. Thus, the Commission in this case could similarly find that it should re-institute said planning process and programs.

The ALJ also rejected MEC/PIRGIM's motion for a postponement of proceedings on the vague basis that these Act 304 cases "are time sensitive" (PFD p 5). On a similar basis, the ALJ's PFD rejected the Attorney General's request that CECo be required to refile its plan and forecast case on the basis that all of its data was rendered stale and outdated due to the issuance by the Commission of its rate order in CECo Case U-14347 (PFD pp 36-37).

The most pressing "time sensitive" matters involving CECo at this time, and raised by MEC/PIRGIM in this case, is the imminent sale of the Palisades Nuclear Plant, the corresponding entry by CECo into a PPA with the purchaser, and the substantial cost impacts in this case that will result from said transactions. The Commission must review these transactions and issues on a most urgent and diligent basis, and not after all the transactions have been entered into.

The ALJ's pre-set time schedule for these case proceedings simply are not a rational basis for ignoring the far more compelling time sensitive nature of the sale/PPA issues. The case schedule can readily be postponed to require CECo to undertake a refiling. CECo is already collecting temporary PSCR factors pursuant to the Commission's temporary order in this case. Second, any reconciliation of costs and rate collections are fully provided for in the follow-up reconciliation phase of this case, wherein the utility is made whole for any underrecoveries if they were to exist. Third, it is common to postpone rate or PSCR cases as a result of discovery disputes, the need for supplemental filings or refilings, or other reasons. For example, in CECo's

recent PSCR case, U-13917, the ALJ postponed the proceedings for several or more months, in order to accommodate the discovery process in that case. A similar process could be utilized here. Finally, the fact that the ALJ would like to keep the schedule in this case should not serve as the excuse or “cover” for CECo to escape its responsibility to update its plan and forecast case for major known events and cost changes that render its filing wholly outdated, and which serve as a means to avoid the most important and pressing issues and cost impacts that should be reviewed in this case.

The Commission at the very least has the full ratemaking power to require a utility to demonstrate reasonableness and prudence, (to include implementation of cost-effective resource planning and energy efficiency and conservation programs) or risk an appropriate downward rate adjustment to remove from rates unnecessary, avoidable, or uneconomic costs. The Courts have held that the Commission has full power to disallow such costs from rates, *Union Carbide Corporation v Public Service Commission*, 431 Mich 135; 428 NW2d 322 (1988), and *Consumers Power v PSC*, 196 Mich App 687; 493 NW2d 424 (1992). The Commission may use its ratemaking power to encourage utility action, *Consumers Power Co v PSC*, 460 Mich 148; 596 NW2d 126 (1999), (see also cases cited supra, pp 48-51, and fn 4, 5).

The Commission ratemaking policies or decisions may change over time, and the mere fact that the Commission in one case may have undertaken a particular action does not foreclose full consideration of MEC/PIRGIM’s positions in this case. The ALJ’s ruling simply represents a capitulation of his duty under the APA and the Commission contested case process to make findings of law and of facts presented by a party to the case, merely on the presumption that the Commission has already pre-judged the issue and will not entertain any remedial actions or relief on the issues presented. The ALJ’s ruling and PFD are neither based upon a proper basis for

striking evidence, nor does it serve as a basis for failing to make required findings of law under the APA, and under Due Process.

Exception II: The ALJ's PFD errors in failing to reverse his earlier erroneous ruling striking all of MEC/PIRGIM's expert testimony; the ALJ's ruling and PFD violate the full and complete hearing requirements imposed by Art 6, Section 28; Sections 6a and 6j of Act 304, the APA, and Constitutional Due Process.

The Commission should reverse the ALJ's March 21, 2006 ruling in this case (T-138-143, attached as Appendix B to MEC/PIRGIM's April 14, 2006 appeal) and also the ALJ's PFD reaffirming this ruling, striking all of MEC/PIRGIM's evidence in this case (which is preserved in Volume V(a) of the transcript in this case). The ALJ's PFD (pp 15-18) states:

b. Motions to Strike

On brief, MEC/PIRGIM renews its assertion that the testimony offered by its three witnesses should not have been stricken. According to it, excluding this testimony from the record violates the "full and complete hearing requirements" imposed by Section 6j of Act 304 and Section 6a of 1952 PA 243, as amended, MCL 460.6a, as well as various constitutional principles. MEC/PIRGIM therefore contends that the ALJ should reverse his rulings regarding the other parties' motions to strike and, instead, receive all of the testimony offered by its witnesses.

Consumers and the Staff respond by again noting that, at least with regard to testimony addressing conservation and energy efficiency, recent Commission orders support its exclusive Act 304 cases. As for the rest of the stricken evidence, the utility points out that MEC/PIRGIM "fails to address any of the reasoning articulated by the ALJ for his decision striking the testimony of these witnesses." Consumers' response to the application for leave to appeal, p. 7. "Simply reciting legal platitudes concerning due process," the utility continues, "does not provide a basis for the Commission to reverse the reasoned decision of the ALJ." Id.

The testimony in question relates exclusively to three issues. These are (1) the possible economic benefits that may be derived from conservation, energy efficiency, and DSM projects, (2) the utility's recent announcement that it would like to sell its Palisades nuclear plant during 2007 and buy-back the facility's capacity and energy through some type of power purchase agreement, and (3) MEC/PIRGIM's often-repeated claim that Consumers should

either cease collecting the one mill per kWh surcharge mandated by the Nuclear Waste Policy Act of 1982, 42 USC 10101 et seq., or—at a minimum—cease forwarding the funds collected by that surcharge to the United States Department of Energy (DOE) for use in establishing and operating a permanent spent nuclear fuel (SNF) repository. Upon review of this proposed testimony and the parties' arguments regarding its admissibility, the ALJ remains convinced that the information MEC/PIRGIM sought to introduce through its witnesses is either irrelevant or immaterial to the present Act 304 proceeding.

As noted in the previous discussion regarding MEC/PIRGIM's request for a declaratory ruling, the January 28, 1997 order in Case No. U-9172 relieved Consumers of any duty to file IRPs for use in developing its PSCR plans and five-year forecasts. Furthermore, as part of its March 12, 2003 order in Case No. U-13060, the Commission reasserted that—at least until further notice--testimony regarding energy efficiency and conservation programs should be excluded from Act 304 cases. Thus, because the conservation-based testimony that MEC/PIRGIM sought to introduce was beyond the scope of this proceeding, it was properly stricken.

Turning to the utility's announced desire to sell the Palisades plant in 2007 and buy back at least some portion of its capacity and energy, the problem with MEC/PIRGIM's proposed testimony is not one of relevance, at least in the long term. As stated in the course of the March 21, 2006 hearing, the ALJ concedes that "the effect that the actual sale of the plant and [the] successful signing of a Power Purchase Agreement might have on ratepayers is something that . . . could be investigated in the context of an Act 304 case." 5 Tr. 140-141. However, at the present time, no sale has occurred and no power purchase agreement has been negotiated--let alone approved by the Commission, as would likely be required pursuant to Section 6j(13) of Act 304. Instead, all we have is the utility's announcement that it would "like" to sell the plant at some time following the close of the PSCR plan year at issue in this proceeding.¹¹ Thus, MEC/PIRGIM's currently proposed testimony on this issue--as well as any that might be obtained by requiring Consumers to supplement its current five-year forecast to include the effects of the plant's potential sale--constitutes pure speculation. Due to its overtly speculative nature, the ALJ again finds that all testimony regarding the utility's hoped-for sale of the Palisades generating plant is immaterial to the resolution of Consumers' 2006 PSCR plan case.

With regard to MEC/PIRGIM's proposed testimony concerning SNF disposal costs, it bears noting that the Commission has addressed this issue in numerous PSCR cases. In every instance, it has rejected MEC/PIRGIM's recommendations to either cease

collecting the statutorily-imposed SNF fees or refrain from forwarding them to the DOE. See, the Commission's November 20, 2001 orders in Cases Nos. U-12613 and U-12615, its September 16, 2002 order in Case No. U-12725, the February 28, 2005 order in Case No. U-13917, the April 28, 2005 order in Case No. U-13919, the June 30, 2005 order in Case No. U-14274, the September 20, 2005 order in Case No. U-13771, and the April 13, 2006 order in Case No. U-13919-R. The ALJ therefore recommends upholding the decision to strike this testimony (as well as that concerning the potential effects of conservation and the offer to sell Palisades).

¹¹ Based on statements made in the course of the March 21, 2006 hearing, it appears that no specific purchaser has been identified, no sale price has been established, and no negotiations have been scheduled with regard to a power purchase agreement concerning the plant's electric generation.

The ALJ's ruling that the upcoming sale of the Palisades Nuclear Plant, and the associated entry by CECo into a purchased power agreement (PPA) with the purchaser of the plant, is either immaterial or speculative, is wholly without merit. The Palisades plant sale is imminent, as is the PPA. In this respect, CECo held a meeting at the MPSC on May 10, 2006, to cover details of the proposed plant sale process to interested persons.¹ Moreover, as indicated by MEC/PIRGIM's testimony filed in this case (stricken by the ALJ), the sale of the nuclear plant and the PPA will have immense impacts upon many of the costs in this PSCR case, including purchased power costs, fuel costs, SNF costs, among others. Moreover, the sale and the PPA create substantial issues regarding SNF fee collections (which are collected in Act 304 rates), including who will be the recipient of the substantial SNF fee funds collected by CECo from ratepayers which have never been paid to the federal government (comprising some \$145 million including interest up to the evidentiary filing in this case, see supplemental testimony and exhibit

¹ Second, CECo has also issued a letter to those persons attending the meeting indicating that documents are available for review (on a highly restricted and immobile basis) at CECo's headquarters (which may not be copied or taken from the premises, and therefore are not a substitute for formal discovery in a contested case where review of the documents and submission in evidence under seal could be provided).

of Ronald Callen dated March 17, 2006). Additional questions arise as to the responsibility over SNF, and the substantial costs that may impact Act 304 cases as a result.

The ALJ's finding that CECo should not revise its filing or respond to information in this case concerning the plant's sale and the cost impacts in this case, on the basis that the sale is speculative or not imminent, is based upon no evidence whatsoever and, in fact, defies the reality announced by CECo itself. It is contrary to the announced actions of CECo in its SEC filings, and in its discussions with numerous parties outside of the context of this case. Yet, this case should be the forum in which the immense cost impacts resulting from these imminent transactions should be scrutinized, and on the earliest possible basis. These matters should not simply be ignored until the entire transaction of the plant's sale and the PPA becomes a *fait accompli*, providing the parties and the Commission with no effective options whatsoever to scrutinize the impacts flowing from these transactions.

The ALJ's motion striking MEC/PIRGIM's testimony concerning these issues (and issues concerning energy efficiency resource planning and programs) is also erroneous because it is based upon no sound precedent for striking testimony (e.g. the ALJ's concept that testimony may be restricted based on the ALJ's view that the Commission has pre-judged the issues yet to be presented to the Commission, or because the Commission may have ruled a certain way in one out of many cases in the past) does not represent a basis for striking evidence.

The ALJ's ruling and PFD also comprises a violation of Michigan Constitution, Article 6, Section 28, and Section 85 of the Administrative Procedures Act, MCL 24.285, and also the "full and complete hearing requirements" of Section 6a, MCL 460.6a, and section 6j *et seq.*, MCL 460.6j *et seq.* The resulting one-sided process also violates Due Process principles.

Art 6, Section 28, of the Michigan Constitution guarantees a fair process wherein governmental decisions are made upon competent, material, and substantial evidence based upon the whole record. Art 6, Section 28 states in relevant part:

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 hearing is required, whether the same are supported by competent, material and substantial evidence on the whole record.

The Administrative Procedures Act (APA), § 3(3), MCL 24.203(3), confirms that ratemaking proceedings are to be classified as “contested cases.” Chapter 4 of the APA, § 71 *et al*, MCL 24.271 *et al*, sets forth the mandatory procedures in contested cases, which include notice, the opportunity for hearings, and briefing and exceptions on all factual and legal issues. Section 85, MCL 24.285, requires the agency to actually consider the evidence and legal issues presented by a party, and to make adequate findings on same:

A decision or order shall not be made except upon consideration of the record as a whole or a portion of the record as may be cited by any party to the proceeding and as supported by and in accordance with the competent, material, and substantial evidence.

The notice and hearing requirements established throughout the Commission’s enabling acts and also Act 304 requires prior notice and hearing in cases involving utility rate increase applications. Section 6a, MCL 460.6a, states in relevant part:

. . . There shall be no increase in rates based upon changes in cost of fuel or purchased gas unless notice has been given within the service area to be affected, and there has been an opportunity for a full and complete hearing on the cost of fuel or purchased gas. . . .

* * *

. . . The commission shall not authorize or approve adjustment clauses that operate without notice and an opportunity for a full and complete hearing, and all such clauses shall be abolished. The Commission may hold a full and

complete hearing to determine the cost of fuel, purchased gas, or purchased power separately from a full and complete hearing on general rate case and may be held concurrently with the general rate case. The commission shall authorize a utility to recover the cost of fuel, purchased gas, or purchased power only to the extent that the purchases are reasonable and prudent. . . .

Section 6j(b)(5), MCL 460.6j(b)(5), also expressly mandates that power supply and cost review cases shall be conducted as a contested case under Chapter 4 of the APA.

A PFD and agency decision based upon “the whole record,” including MEC/PIRGIM’s evidence is also consistent with basic precepts of administration law. It is a well-established tenet of administrative law that an agency’s decision must be articulated with sufficient detail and clarity to “facilitate meaningful judicial review.” *Glover v Parole Bd*, 460 Mich 511 526; 596 NW2d 598 (1999). The assurance of a record that will permit such review is a specific purpose that underlies Section 85 of the APA (MCL 24.285). *Consumers Power Co v Michigan Public Service Comm’n*, 78 Mich App 581, 261 NW2d 10 (1977). Although reviewing courts are “indulgent” and may decline to vacate even an opinion that “leaves much to be desired,” this indulgence finds its limit when “the agency has not really taken a ‘hard look’ at the salient problems, and has not genuinely engaged in reasoned decision-making.” *Viculin v Dep’t of Civil Service*, 386 Mich 375, 406; 192 NW2d 449 (1971). Further, under Section 85 of the APA, the agency’s findings must “provide a precise statement of the evidence which supports its ruling and the conclusions of law in order to facilitate appellate review.” *Butcher v Dept of Natural Resources*, 158 Mich App 704, 707; 405 NW2d 149 (1987). **It is elemental that this meaningful review cannot occur when the evidentiary record is truncated and destroyed by unwarranted exclusions of evidence presented by case parties.**

Since the statutes mandate notice and hearing procedures, and meaningful and adequate agency findings based upon the record, the same is therefore mandated by the fundamental

fairness concepts of constitutional Due Process. CECo in this case has invoked Section 6a, MCL 460.6a, and Act 304 (MCL 460.6j *et seq.*) to claim recovery of numerous costs, many of which are the subject of MEC/PIRGIM's opposing testimony. If it is within the scope of remedies under these statutes for a utility to include cost claims and to seek PSCR rate recovery therefore in this case, then it is equally within the scope of remedies under these ratemaking statutes for intervenors and the MPSC itself to meaningfully review, address, and to consider remedies relative to the exact same costs. Any other result would be highly illogical, one-sided, and arbitrary, and so much so that it would constitute a violation of constitutional Due Process principles in the same sense as explained by the Michigan Supreme Court in *Michigan Consolidated Gas Co v Public Service Comm*, 389 Mich 624, 633, 640 (1973).

An administrative agency is also required to proceed, in APA cases, in a way that recognizes and vindicates "basic concepts of procedural fair play and due process." *Lewis v Grand Rapids*, 222 FSupp 349, 378 (1963). Further, "Due process requires that the evidence on which an agency, board, or commission bases its findings be ascertainable." *Dation v Ford Motor Co*, 314 Mich 152, 162; 22 NW 2d 252 (1946).

The Commission should also reverse the ALJ's earlier ruling and PFD because said actions would be consistent with Commission Rule 337(2)(a) and (b). Such a ruling "will materially advance a timely resolution of the proceeding", as it will provide for receipt of the intervenor evidence upon which the Commission can base a decision based upon a proper evidentiary record. It is better to resolve these issues now, rather than on possible remand from a Court appeal. Second, a prompt decision now on the ruling "will prevent substantial harm to the appellant or the public-at-large". Clearly, the striking of all of MEC/PIRGIM's testimony substantially harms intervenors' position in this case relative to the cost issues presented by the

utility. It also harms the ratepayer public represented by the intervenors, and the public interest-at-large. In addition to eliminating intervenor evidentiary positions on the cost issues presented, and a fair determination of the PSCR rates, the violation of the above constitutional and statutory procedures directly harms the public's interest in lawful and fair ratemaking proceedings. Moreover, the wide-sweeping and broad nature of the ruling is clearly unreasonable, and wholly unnecessary. The arguments made by the Staff and CECo against intervenors' testimony goes to the weight of the evidence, not its admissibility. The procedures in the case provide substantial opportunities for CECo and the Staff to challenge the positions of intervenor witnesses through cross-examination, rebuttal testimony, or by submission of their briefs and exceptions. The ALJ's ruling thus must be rejected as an abuse of discretion and as being wholly unreasonable.

In conclusion, the ALJ's earlier ruling and PFD striking all of MEC/PIRGIM's evidence violates Article Section 28, Section 85 of the APA, the "full and complete hearing requirements" of Act 304 (Section 6a and 6j *et seq.*, MCL 460. 6a *et seq.*), and Due Process Principles. The ALJ is respectfully requested to reverse this ruling.

Exception III: The PFD also errors in failing to reverse the ALJ's earlier ruling, and in denying, MEC/PIRGIM's Motion to Postpone these proceedings to require CECo to first file an adequate plan and forecast case that addresses resource planning and energy efficiency programs, and the planned Palisades nuclear plant sale and PPA transactions.

The ALJ's PFD also errors in failing to reverse his earlier ruling (Exhibit A, T 168-169 attached to MEC/PIRGIM's April 14, 2006 appeal) denying MEC/PIRGIM's March 16, 2006 "Motion for Postponement of Hearings Pending the Refiling by CECo of its Plan and Forecast Case". MEC/PIRGIM's motion stated in relevant part:

1. CECo's application and original and supplemental testimony and exhibits sponsored by its witnesses, are incomplete and improper because they fail to incorporate the following: (a) The presentation of the development and implementation of energy efficiency, conservation, and demand supply management programs as an

additional and alternative energy resource to meet CECo's duty to reduce both the price per unit of energy and the cost of energy on both a short-term and long-term basis, and showing the resulting impacts of said programs on its plan and forecast case herein; and (b) CECo's failure to demonstrate the impact on its plan and forecast case of the planned sale of CECo's Palisades nuclear plant, and the contemporaneous signing of a purchased power agreement (PPA) between CECo and the plant's purchaser, providing comprehensive information concerning the planned sale and the terms or conditions of any proposed PPA agreement.

2. Both of these matters identified above involve major issues, and also have major impacts upon CECo's plan and forecast case, and are necessary to present any appropriate and comprehensive plan and forecast as is required under the duties and standards established by 1982 PA 304, MCL 460.6a and 460.6j *et seq.* (Act 304).

The ALJ's PFD (pp 18-19) rules as follows on MEC/PIRGIM's motion for postponement of hearings:

c. Motion for Postponement of Hearings

MEC/PIRGIM also reasserts its claim that, due to Consumers' failure to include as part of its application the potential effects of conservation programs and its desired sale of the Palisades plant, evidentiary hearings in this case should have been postponed and the utility should have been required to submit proofs concerning those matters. According to MEC/PIRGIM, Consumers' decision not to address such issues constitutes a failure "to meet its burden of proof in its plan and forecast case to demonstrate the necessary reasonableness and prudence . . . under Act 304." MEC/PIRGIM's brief, p. 40. As a result, MEC/PIRGIM effectively requests that the Commission reopen the record and order Consumers to file an amended PSCR plan and five-year forecast that includes consideration of conservation-related programs and the possible effect of selling the Palisades plant.

Consumers responds by asserting that, for reasons discussed earlier, the information that MEC/PIRGIM seeks to have added to the record by way of this request is not relevant to the present proceedings. As for the Staff, it questions why—with Consumers' PSCR plan having been filed in September 2005--MEC/PIRGIM waited until only 5 days before the date set for evidentiary hearings before objecting to the alleged deficiency. As such, these parties continue to oppose reopening the record and requiring the utility to refile its PSCR plan.

Once again, the ALJ agrees with Consumers and the Staff, and recommends that the Commission uphold his previous decision denying MEC/PIRGIM's request. As noted earlier, Consumers is currently under no obligation to include (as part of its 2006 PSCR plan or the accompanying five-year forecast) an assessment of energy efficiency, conservation, or DSM programs. As also discussed above, the fact that Consumers has neither identified a buyer for its Palisades plant nor begun negotiations regarding any power purchase agreement necessitated by the plant's potential sale would, at the present time, render testimony on this issue wholly speculative. Moreover, although little, if any, benefit would be derived from granting MEC/PIRGIM's request, a significant detriment could occur; namely, the ultimate resolution of this case would likely be delayed by several months. Because Act 304 plan cases like this are--by nature--time sensitive, such a delay could prove detrimental to the parties and ratepayers alike.

The ALJ's refusal to undertake a curative process of requiring CECo to refile its case and fully reveal the cost impacts on this Plan and forecast case of its imminent sale of the Palisades Nuclear Plant, and its entry into a long-term PPA with the purchaser, is irresponsible and unsupported. The result is that the purpose of Act 304 to require scrutiny of transactions having such an immense cost impact upon CECo's PSCR rate factors, and rate collections, will result in a bypass of Commission review of the transactions, and any meaningful attempt by ratepayer parties, or the Commission, to meaningfully evaluate and rule upon, or require modifications to, either the planned PPA transactions or to make rate adjustments or grant other remedial relief to address whatever transactions CECo fashions for itself. No other entity or process exists other than these MPSC proceedings to protect the rate paying public with respect to these transactions. Moreover, the transactions are by no means speculative, but are imminent, as discussed earlier.

The Commission should reverse the ALJ's rulings and PFD and require said postponement and refiling because CECo has failed to meet its burden of proof in its plan and forecast case to demonstrate the necessary reasonableness and prudence, resource planning, and cost minimization actions, to meet the standards of a sufficient and adequate plan and forecast

case under Act 304. CECo's glaring omission of major issues offsetting its costs, PSCR rates, and forecasts should not be countenanced by the Commission, and undercuts the foundations for a proper Act 304 case.

II. SUMMARY OF EVIDENCE AND LEGAL AUTHORITY IN FURTHER SUPPORT OF MEC/PIRGIM'S CASE POSITIONS AND EXCEPTIONS

A. MEC/PIRGIM'S EVIDENTIARY FILING

MEC/PIRGIM's evidentiary filing demonstrates persuasively the direct relationship between energy efficiency, conservation, and load management resource strategies and programs, and the various duties and standards established by Act 304. Similarly, the MEC/PIRGIM's evidence demonstrated the need for the Commission to review the Palisades plant sale/PPA issues pursuant to this Act 304 case.

1. Summary of Testimony and Exhibits of Geoffrey C. Crandall:

Mr. Crandall's prefiled testimony² (SR,-T 36-37) states that CECo's PSCR plan filing is "deficient and incomplete" for its failure to include demand management and usage reduction strategies, and its failure to consider the impact of the proposed sale of the Palisades nuclear plant, along with the proposed entry by CECo into a long-term purchased power agreement (PPA) as part of the transaction. CECo's proposed PSCR factor is also unnecessarily high (SR-T 36). These are serious drawbacks given the applicant's duty under Act 304 to minimize the cost of electricity, and given CECo's increased rates and the adverse condition of Michigan's economy (SR-T 37-38). A sound energy plan is crucial to Michigan's long-term economic and environmental condition, and to the overall quality of life of its citizens (SR-T 37-38). The Commission itself has indicated the relevance of evaluating the "cost-effectiveness of a range of

² The stricken testimony and exhibits of each MEC/PIRGIM witness are included in a separate record, Vol. V(a) in this case. The testimony and exhibits will be referenced by references to the transcript of the separate record, preceded by the designation ("SR").

resource options, including conservation and other demand-side management and non-utility resource options” (e.g. CEC Co PSCR case, U-9172) (SR-T 38). The Commission in October 2005 (Order, U-14667) also found that “a national energy policy” must include “implementing practical, cost-effective and achievable reductions in energy demand through energy efficiency programs” (SR-T 39). Yet, CEC Co in this case has not developed a plan “in synch” with said “national energy policy” and “has not included significant options and technologies to manage customer demand or usage reduction strategies” (SR-T 39). CEC Co’s plan is “not consistent with the public interest, and therefore is flawed, deficient, and should be rejected.” (SR-T 39). CEC Co “should include significant energy efficiency, conservation, and customer usage reduction strategies in its five-year plan as a means to reduce the PSCR factor, enhanced system reliability, and minimize costs to PSCR customers” (SR-T 39).

Witness Crandall also notes that CEC Co “could offer energy efficiency services . . . to help reduce the PSCR factor as well as the wasteful and environmentally harmful use of electricity” (SR-T 40). CEC Co in the past had beneficial and cost-effective programs in place (SR-T 40) and such programs should be reinstituted.

Witness Crandall also identified specific additional costs included in CEC Co’s filing that would be reduced through energy efficiency programs, including avoided NO_x allowance costs (through reduced burning of fossil fuels) (SR-T 41-42). Energy efficiency programs could also reduce transmission costs and enhance reliability of electric service (SR-T 42). Energy efficiency and usage reduction services, and energy conservation strategies, are also being made available throughout the country (SR-T 42).

Witness Crandall also identifies and calculates fuel and purchased power costs that CEC Co could save in 2006 from energy efficiency and demand management programs (wholly aside

from the additional benefits arising from avoided NO_x allowances and transmission costs), [SR-T 43-44; Exhibit MEC 5, GCC-2]. The calculation establishes a PSCR rate reduction of .01058¢ per Kwh in said costs.

Witness Crandall also discusses the impact on PSCR costs of the CMS Energy/CECo proposal to sell the Palisades nuclear plant, and to have CEC Co enter into a purchase power agreement (PPA) with the purchaser of the plant's capacity and energy (SR-T 44-48). This combined transaction may affect the 2006 Plan year and will affect the 5-year forecast. This combined transaction may drive-up PSCR costs substantially and raises services questions, because the PPA would have to cover in the PSCR not only the plant's operating costs, but also the new and higher capital (purchase price) and new ownership costs and profits engendered from the transaction (SR-T 45-48).

Witness Crandall (SR-T 48-49) makes a number of recommendations for this and subsequent PSCR cases for CEC Co, as follows:

I recommend the Commission find that Consumers proposed five year PSCR plan not be approved as filed due: (1) to the absence of any information regarding the significant impacts that will result from the sale of the Palisades plant and the entry into a long-term PPA contract by CEC Co for energy produced by the plant; and (2) the absence of any meaningful and needed customer energy efficiency and usage reduction program.

The Commission should require CEC Co to file a supplemental 5-year forecast detailing all information and impacts resulting from the Palisades plant sale and the PPA.

The Commission should also require that Consumers immediately develop and initiate a substantial energy efficiency/conservation program and offer it to its PSCR customers as a cost reduction strategy.

The Commission should require that the applicant establish energy efficiency programs and strategies that will result in a new increment of 1% savings of electricity per year for its PSCR customers over the upcoming five years as a cost mitigation strategy for PSCR customers.

The Commission should adopt a similar program development and implementation strategy it used in the U-9346 docket (Consumers) to establish the optimal design and phase-in schedule and overall implementation strategy. This should be created by the Company in conjunction with a collaborative working group made up the Commission staff, intervenors, customers and interested parties.

The Commission should require the applicant to file a progress report within six months of the date of the order in this case.

The Commission should require that the Applicant integrate this program and expected impacts into its ongoing resource planning activities. Also, the Commission should require the Applicant to specifically integrate the projected energy efficiency and conservation impacts in its next five-year PSCR forecast, that's included in its next PSCR plan application.

2. Summary of Testimony and Exhibits of Dr. Martin Kushler:

Dr. Kushler is the Director of the Utility Program for the American Council for an Energy Efficient Economy (ACEEE), a non-profit organization, with headquarters in Washington, D.C., dedicated to research and policy development in the area of energy efficiency (SR-T 53). Dr. Kushler's background (SR-Exhibit MEC-7, MGK-1), includes 20 years in the field of energy and utility programs, including 10 years as the supervisor of an MPSC Staff unit responsible for overseeing the evaluation of energy efficiency programs conducted by Michigan utilities (SR-T 53).

Dr. Kushler's testimony demonstrates the effectiveness of energy efficiency as a low-cost electric resource being widely used in other states to help lower total electric system costs and provide significant dollar savings to utility customers (SR-T 54). He sponsors a 2004 study (SR-MEC Exhibit 8, Report No. U041) that describes energy efficiency programs or efforts that can ameliorate several costs claimed by utilities under Act 304, including costs of fuel, purchased power, transmission, and emission costs (SR-T 54).

Dr. Kushler states that "[E]nergy efficiency is a very low-cost electric system resource" that "customers strongly support" (SR-T 55).

Dr. Kushler sponsors and summarizes the ACEEE report he co-authored that surveys 26 states on their utility-sector efficiency programs (SR-T 55, Exhibit MEC 8, MGK-2). Dr. Kushler (SR-T 56-57) lists the benefits derived from the energy efficiency programs in 18 of the 26 states operating energy efficiency programs in the utility sector:

- Annual savings from these programs range from 0.1% to 0.8% of total state utility electricity sales, sufficient to provide millions to hundreds of millions of dollars in energy cost savings.
- The ten states for which data were available are also together reducing peak electricity demand by 1059 MW each year, equivalent to the capacity of several major power plants. These savings also accrue over time as subsequent years' savings are added.
- These programs are cost effective. Benefit-cost ratios range from 1.0 to 4.3 (based on the "total resource cost" test (or TRC)), and the cost of conserved energy ranges from \$0.023 to \$0.044 per kWh, with a median value of \$0.03 per kWh. This cost is very competitive with today's wholesale power prices, and considerably less than the cost of building, fueling and operating a new power plant.

Dr. Kushler also describes the increasing bi-partisan support energy efficiency programs are receiving, where they are implemented, "as effective approaches to balancing energy markets, reducing the risk of prices spikes and blackouts, and improving air quality." (SR-T 57). Dr. Kushler also states that today's programs are better targeted "in terms of technologies and markets" and that "today's efficiency programs are producing savings at lower costs than in the past" (SR-T 57). Dr. Kushler (SR-T 57) also states:

. . . . Numerous major studies have documented the ability of these programs to save electricity at a cost of 3 cents per kWh or less, including independent evaluations of utility energy efficiency programs in Michigan in the early 1990s.

Dr. Kushler (SR-T 57-61) also provides specific examples of successful utility sector energy efficiency programs in other states, such as:

- The New York State Energy Research and Development Authority (NYSERDA): over forty energy efficiency programs; now saving New Yorkers over \$116 million annually,

with electric energy savings of 780 gWh annually, and a peak load reduction of 790 MW; creation of over 3,700 new jobs.

- The California Energy Commission (CEC): increased commitment to energy efficiency targets and funding; 6.7% reduction in total annual electricity use during electricity crises in 2000 and 2001 (helping to avoid or reduce rolling black-outs); saving in the first six months of demand reductions in 2001 an estimated \$660 million in spot market electricity purchases and helping to avoid up to \$20 billion in projected costs of summertime rolling blackouts; recent California Energy Commission report finds that California's utility energy efficiency programs over the 2000-2004 period saved electricity at an overall levelized cost of 2.9 cents per kWh.
- The Efficiency Maine Small Business (EMSB) program: in first year, significant year-round electricity savings realized at a cost per kWh saved of less than 1 cent per kWh; each dollar spent by program and program participants has realized a benefit of \$6.63 (based on the Total Resource Cost Test); energy efficiency steps estimated to save 3,260,000 kWh annually; electric efficiency improves the profitability of participating Maine small businesses, and reduces polluting emissions from power plants.
- Wisconsin Focus on Energy: statewide success in reducing greenhouse gas emissions by promoting homes and home products that use less energy; program goals to encourage energy efficiency and use of renewable energy, and to enhance the environment and ensure the future supply of energy for Wisconsin; helped businesses and residents realize savings of more than 226 million kilowatt-hours of electricity and more than 7 million therms of natural gas; evaluation results indicate the program saves over \$3 for every \$1 invested in the program.

Dr. Kushler (SR-T 61-62) provides further specifics on the widespread support among

utility customers in Michigan for energy efficiency programs. Dr. Kushler (SR-T 62) concludes

his testimony as follows:

My testimony provides information for the Commission about the demonstrated availability of cost-effective energy efficiency resource programs that have been successfully implemented in a number of states. The MPSC has recently indicated that "Michigan must include efforts towards identifying and implementing practical, cost-effective, and achievable reductions in energy demand through energy efficiency programs" (Order, U-14667). This is a very timely development, because the use of energy efficiency as a resource has the potential to reduce overall electric system costs for all ratepayers.

Dr. Kushler's sponsored and co-authored exhibit (SR-Exhibit MEC-8), containing the April 2004 study entitled "Five Years In: An Examination of the First Half-Decade of Public Benefits Energy Efficiency Policies," Report No. U041, issued by the American Council for an Energy-Efficient Economy, surveys the experience of some 26 states having energy efficiency

programs. This study finds that these programs are very cost-effective, and produce several benefits in terms of reduced costs, reduced pollution, and enhanced system reliability. For example, p 35 of the study, states:

These public benefits energy efficiency programs are also producing significant energy savings impacts. This report summarized and presented the information we were able to obtain on program spending, savings, and cost-effectiveness. The data indicate that current annual spending across these programs is over \$900 million, and annual savings in just the 12 states reporting evaluation data are nearly 2.8 million MWh and 1,060 MW (MW savings data reported by only eight states). We were able to obtain cost-effectiveness estimates from nine of the most active states, and the results show these public benefits energy efficiency programs to be very cost-effective. Estimated benefit/cost ratios range from 1.0 to 4.3 (median in the ~ 2.1 to 2.5 range), and estimates of the cost of conserved energy range from \$.023 to \$.044/kWh (median = \$.03/kWh). Beyond energy savings, we also report estimated air pollution emission reductions provided by a number of states.

Dr. Kushler's study, p vi, also demonstrates the cost benefits resulting from energy efficiency programs:

Savings results are clearly correlated to the amount of funding and program activity. Annual energy efficiency program savings as a percentage of total electricity sales range from about 0.1 to 0.8 percent (that is, the amount of new electricity savings achieved from programs in a reporting year expressed as an annual—not lifetime—amount divided by the total reported electricity sales in the state). The mean value for the ten states for which annual savings data were available is 0.4 percent. Programs are achieving electricity savings, although the savings are still relatively small compared to total electricity sales when viewed on an annual basis. Over a longer period, however, these savings compound and can be significant since most efficiency measures have lives of 10 or more years. Such savings can dampen overall electricity demand growth, reducing the need for new capacity and infrastructure, as well as improving system reliability.

Electricity savings also reduce system demand (megawatts). The combined total incremental demand savings being achieved each year by the eight states reporting these data was 1,059 megawatts

(MW), the size of one very large base-load power plant or 3 medium-size power plants.

Dr. Kushler's study (p viii) also finds energy savings of 2.8 million MWh, and significant reductions in air emissions (p vii, Table 4). Dr. Kushler's study, p 28, describes the environmental benefits arising from these programs:

Another critical benefit of these electricity and other energy savings (some state programs target natural gas efficiency, too) is the reduction achieved in emissions of air pollutants from fossil fuel combustion, including sulfur dioxide (SO₂), nitrous oxides (NO_x), carbon dioxide (CO₂), and mercury. Many of the state public benefits programs were established with clear environmental objectives. Consequently, emission reductions are tracked and reported by many state programs. Those for which we were able to identify reported values are presented in Table 4 below.

Dr. Kushler's study also identifies numerous policy objectives that various states' energy efficiency programs are aimed at addressing, including the following:

- Save energy
- Help ensure electric system reliability
- Help the state's markets for goods and services to be more energy efficient
- Benefit the environment
- Improve the state economy
- Help businesses be more competitive
- Help disadvantaged customers
- Ensure an equitable distribution of program services

3. Summary of Testimony and Exhibits of Ronald C. Callen

Mr. Callen's testimony (SR-T 5-32; Exhibits MEC-1, MEC-2, MEC-3) focused upon the announced plant sale of the Palisades nuclear plant by CEC, and recommended that the Commission require CEC to refile its plan and forecast case to provide more information regarding the intended sale and its impacts upon this plan and forecast case. Mr. Callen also reiterated the need for early review of any plant sale terms, and the attendant purchased power agreement (PPA) between CEC and any purchaser, to determine the impact upon this plan and

forecast case, and its reasonableness, and also to ensure that the ratepayer interests are fully protected with respect to the spent nuclear fuel (SNF) stored at Palisades and with respect to the SNF fees collected by CECo but never transferred to the federal government (which is in excess of \$145 million as of this date including interest (SR-Exhibit MEC-3, p2).

Witness Callen states that CECo's application contains out-of-date and incomplete assumptions and forecasts given the announcement by CMS Energy that it will pursue sale of Palisades by 2007 (SR-T 16). Witness Callen fully detailed major issues and concerns relating to the combined Palisades sale/PPA agreement transactions (SR-T 16-22):

Q. What are your concerns involving the announced plan to sell the Palisades Plant?

A. The announcement by CMS Energy to complete a sale of the plant in 2007 (within the forecast period under review in this case) included the announcement that "any sale will include a long-term agreement between Consumers and the plant's new owner for the utility to continue purchasing the plant's power."² My concerns are several including: (1) impact upon CECo's generating capacity to serve Michigan customers; (2) impact upon the cost of energy to CECo's ratepayers, resulting from the unrevealed proposed Purchased Power Agreement (PPA); (3) fairness of

² "CMS Energy to sell Nuclear Plant Near South Haven; Auction to be Held" by Amy Lane, Crains, December 5, 2005; also CMS Energy SEC Registration Statement No. 333-125553, December 8, 2005, page S-9.

the transaction to ratepayers given the overall context which includes the pay-down of the Palisades Plant investment by ratepayers through the securitization mechanism; and (4) impact upon CECo's responsibility over, and this Commission's jurisdiction with respect to, past and on-going charges for the federal spent nuclear fuel (SNF) fees which relate to disposal of SNF which CECo continues to generate and store at the Palisades Plant site.

Since the present case is a 5-year forecast, and CECo plans to sell the plant in 1997 (easily within that 5-year period), it is imperative that the Commission investigate these matters as a part of this case. Moreover, since the plant sale, including the terms and proceeds from the sale, are necessarily dependent upon the price of power to be purchased under the PPA, the overall transaction has direct cost impacts upon the 5-year forecast, and perhaps even upon the 2006 PSCR plan year. Since Section

6j(13)(b) of Act 304 provides a role for Commission review of this transaction, the Commission should commence this review now, in this case, and not later.

Q. Could you please discuss each of these concerns in more detail?

A. Yes. First, as to capacity, Palisades is a very significant part of the electric generation base in terms of contribution to meeting in-state demand. There will be, according to CECo, a contract for the purchase of the output of the plant. However, the terms of any PPA are not known. Significant issues include, in addition to the sale price of the plant, the cost of purchased energy and the security of availability of the output. The sale of the plant will result in a divestment from CECo of a major portion of its plant capacity, at a time when Commission studies reveal the need for more generating capacity in the very near future.

Second, with respect to the impact on CECo's cost of energy to serve its Michigan customers, the overall transaction including the PPA may well result in an increase in CECo's cost of energy. Certainly, the economic incentive exists for CMS Energy to enter into a relatively "richer" contract (one which provides higher purchased power revenues to the purchaser) in order to increase the sale price of the plant. The proceeds of the plant sale are directly dependent upon the revenue stream provided by the PPA. The higher the revenue stream, the higher the sales price of the plant. This creates a compelling need for prompt Commission review of the proposed terms of the PPA and to evaluate the impact on CECo's cost of energy. This is particularly important because the transactions will be substantially handled on a non-arms-length basis. CMS Energy (or CECo's shareholders) would benefit from a high sales price for the plant. In conflict with that incentive and interest, CECo's ratepayers will be saddled with the long-term cost impacts under the PPA to provide the revenue stream to support a higher sales price.

A timing question also is involved. The Commission's review should not await the finalization by CMS Energy and CECo of a self-serving (non-arms-length) PPA agreement, as the Commission and its ratepayers will then be forced into a "fait accompli" situation – either accept the PPA, no matter how onerous the terms, or be responsible for rejecting and destroying the whole sale transaction. This creates the need for the Commission to open up a review early on, and to avoid this result.

Third, with respect to the fairness of the transaction to ratepayers, several concerns arise in addition to the one just discussed above. Certainly, the transaction should not result in all of the plant sale proceeds going to CMS Energy, (or CECo as its subsidiary), with the ratepayers financing the sale through their rates (including the purchased power costs from the plant). Another question is whether the ratepayers will end up

paying for the plant twice – first through securitization surcharges to the degree the plant investment was paid down from the securitization proceeds authorized in past cases, and now again through PPA costs. The Commission must step in and find a balance between ratepayer and shareholder interests consistent with the spirit by which the Commission blocked CMS Energy's efforts to upsteam the Midland plant proceeds from CECo to CMS Energy in the 1990 timeframe.

Fourth, another concern is the impact of the sale upon SNF fee cost issues which relate to SNF fees collected under Act 304, and forecast to be collected under Act 304 on an ongoing basis. CECo is continuing to pay for SNF fee costs under its defaulted contract with DOE, and includes them under Act 304. A major question exists as to whether these fees should continue to be paid (without any protections or conditions), or whether the Commission should now exercise its independent authority to protect ratepayers. A related concern involving SNF fee costs and rate collections is that CECo selected an allowable option of not paying the federal government for SNF generated before the passage of the NWPA. The option carried with it the buildup of interest on the debt. All these funds have been collected from CECo's ratepayers over the years and CECo currently holds those funds internally, on an unsecured basis. Presently these funds, which includes monies collected for the Big Rock Point and Palisades nuclear power plants, totals \$139.4 million as of March 31, 2004 date. Due to interest accumulation, the amount of this debt continues to grow. This justified an investigation by the Commission to determine just how those funds would be resolved, where they would be transferred and how the ratepayers' financial security can be assured.

Selling the plant arises a host of related questions due to the fact that Palisades is a nuclear power plant. Chief among nuclear issues is the current inventory of SNF at the plant. The central question raised is assurance that the SNF will indeed be removed from the plant site. The NWPA and the Standard Contract contemplated that the SNF would be removed to a repository by the federal government. Considering the sale of the plant, the Commission should investigate the matter to assure no weakening of the contract for removal of SNF from the plant. This concern is for the SNF currently existing as well as that which will be generated after the sale until the end of the plant operating life.

If the contract with the federal government is transferred to the plant purchaser, that results in a separation of control from Commission oversight, since the purchaser will not be a utility regulated by the Commission. At the end of the plant's life, all that would remain would be SNF needing disposal. The plant would be immensely radioactive and ready for decommissioning. The Commission must therefore maintain diligence to ensure the responsible decommissioning of both the plant and the SNF, and to protect the security of the decommissioning fund. It must

also have assured that sufficient funds would have been placed in the reserve to provide an adequately sized fund to decommission the plant and also of SNF sites. This raises a serious issue for conditions at end of the plant's life. The new owner may be without any other financial resource, or may be legally distanced from the SNF liability, or not interested in a careful and successful removal of the plant and disposal of SNF. It is possible, the new owner entity might not then even exist when the plant shuts down and the SNF is left on-site.

SNF is a major constituent of the Palisades plant – or any nuclear power plant. At Palisades, SNF resides in the reactor core (only partially spent), in the spent fuel pool and in dry storage casks located on a concrete pad on the plant site grounds. The question relative to the sale of the plant is the ownership of the SNF, both currently existing and that to be generated. While there is a reserve for plant decommissioning, there is no such parallel reserve for SNF storage and removal.³ (Storage costs are covered as operating expenses.) At the end of the plant's life, all the SNF will be available for removal, presumably to a federal repository or other facility. It thus behooves the Commission to investigate the nature of the sale to determine the assurances that CECo will give as to ownership, safety, and removal of the SNF. It will make a great deal of difference whether CECo remains the owner of the SNF – or not – since the Commission presently has jurisdiction over CECo, which provides the Commission the ability to review any problems concerning SNF costs.

³ In CECo's 2005 nuclear plant decommissioning case for Palisades, case U-14150, I presented testimony recommending MPSC establishment of a separate external "SNF and SNF site Decommissioning Trust."

Witness Callen also detailed several concerns involving the high costs and financial risks placed solely upon ratepayers relative to SNF storage and disposal (SR-T 22-28; T 30-32; Exhibits MEC-2, MEC-3). CECo has exceeded its SNF storage capacity at Palisades and is incurring additional costs to store SNF; the SNF fees paid by ratepayers also are insecure and unprotected. The SNF fees include over \$145 million (debt plus interest) that CECo has collected from ratepayers but has never paid to the federal government (SR-T 22-23; T 30-32; Exhibit MEC-2, MEC-3); the ratepayers continue to pay over \$6 million annually for SNF fees for a program that is in long-term default (SR-T 23-24); Michigan ratepayers or taxpayers may

face a multi-billion dollar liability for SNF disposal if both the utility and federal government fail to dispose SNF (SR-T 24).

Witness Callen also explained how the troubled federal disposal program is “now moribund and in danger of having lost all its direction.” (SR-T 24-28).

Witness Callen’s testimony concludes with the following recommendations (SR-T 21-22):

A. I recommend that the Commission require the initiation of a supplemental phase of this case to require focused review upon CMS Energy’s proposed sale of CEC’s Palisades Plant (and also the related PPA transaction), to include a requirement that CEC file complete details of the transaction and its impact upon Act 304 PSCR costs and forecasts (and the forecast in this case). This review should be ongoing to ensure that the Commission is not simply left with a “fait accompli” at the end of the transaction process. The Commission should also focus specifically upon the concerns I have outlined above.

The Commission should also consider additional remedies such as disallowing SNF fee costs in 2006 PSCR rates pending the above full review, or utilizing its jurisdiction under related statutes to establish mechanisms to protect ratepayer payments for the SNF fees. Among the remedies could be Commission-ordered direction of ratepayer payments of SNF fees collected pursuant to this Act 304 case to a separate external “SNF and SNF site Decommissioning Trust” as I recommended in U-14150.

B. LEGAL ARGUMENTS

1. Energy efficiency, conservation, and demand supply management programs are directly related to energy cost and supply issues under Act 304; CEC’s failure to address these resource alternatives justifies rejection of (and the refiling of) its plan and forecast, or PSCR rate factor reductions.

Energy efficiency, conservation, and demand supply mitigation and management programs are an important alternative and additional resource that can minimize the cost of energy, and increase energy supply reliability, on a short and long-term basis. Higher energy usage and waste, related to the failure to plan for and implement said programs, results in

uneconomical energy costs (and also higher energy prices) which should be deemed unreasonable and imprudent. Any PSCR plan and forecast that addresses only maximizing energy supply and rate collections, and wholly ignores opportunities and resources to minimize energy usage and costs, must be deemed prima facie unreasonable and imprudent, and woefully one-sided.

Yet the plan and forecast cases presented by CEC Co and the Staff seek to emphasize the maximization of rate collections. CEC Co's plan and forecast is deficient on its face, however, since it fails to incorporate any options, programs, or alternatives to stretch energy supplies (thereby enhancing reliability) and moderating or minimizing the cost of energy, both through the reduction of energy consumption and waste, and on a longer term basis by moderating energy prices by flattening the demand curve over time.³ CEC Co's one-sided plan and forecast is glaringly deficient, and not consistent with options available to the Commission through a balanced and proper implementation of Act 304.

Programs to encourage energy efficiency and conservation, reduction in energy waste, and to reduce usage, (and to thereby reduce customer bills and long-term prices of energy) are fully consistent with the goals and objectives of Act 304. These programs in themselves are an important resource option, which represents an alternative to be considered under Act 304. Clearly, Act 304 requires the utility to consider a number of alternative options for the acquisition and provision of energy, and requires the utility to adopt and implement a reasonable and prudent plan, and to minimize costs. Section 6j(3).

³ MEC/PIRGIM have filed the testimony of Geoff C. Crandall and Dr. Martin Kushler (summarized earlier) in support of their position that CEC Co's PSCR plan and forecast case is incomplete and deficient, since it fails to address any programs to minimize the cost of electrical energy and to stretch out supplies through use of energy efficiency, gas conservation, or demand supply mitigation programs. Extensive recent studies have reconfirmed the benefits of energy efficiency and conservation programs generally, and the numerous such programs undertaken by utilities nationally.

In contrast to the Staff and CECo, the proffered testimony and exhibits filed by MEC/PIRGIM indicates the manner in which CECo's plan and forecast is deficient in these respects, and highlights the importance of pursuing such options on behalf of ratepayers given the increasing cost of energy, and the resulting severe impacts on customers under present economic circumstances.

The overall conclusion derived from MEC/PIRGIM's evidentiary filing is that this Commission should now once again take up the reins of leadership, and should declare and require the saving of energy and reduction of energy waste as a resource to be recognized among the alternative resources which are to be considered under Act 304. Energy conservation was a potential great resource when energy prices were much lower. It is unquestionably an even greater resource at the much higher energy cost and rate levels implemented by CECo on a current basis.

2. Energy efficiency, conservation, and demand supply management issues are authorized by Commission statutes, including Act 304.

Michigan law grants general authority to the Commission to oversee the operation of public utilities in this state. 1939 PA 3, MCL 460.6; MSA 22.13(6) states in relevant part as follows:

Sec. 6. Powers and jurisdiction. The public service commission is vested with complete power and jurisdiction to regulate all public utilities in the state. . . The public service commission is vested with the power and jurisdiction to regulate all rates, fares, fees, charges, services, rules, conditions of service, and all other matters pertaining to the formation, operation, or direction of such public utilities. The public service commission is further granted the power and jurisdiction to hear and pass upon all matters pertaining to, necessary, or incident to the regulation of all public utilities, ...

With respect to the conservation of natural gas (which is used directly for heating, but also in part for electrical generation), Michigan law provides in 1929 PA 9, MCL 483.114; MSA 22.1324 as follows:

Sec. 14. The commission shall have authority to prevent the waste of natural gas in producing operations and in the piping and distribution thereof and to make rules and regulations for that purpose. It is hereby authorized and empowered to all things necessary for the conservation of natural gas in connection with the production, piping and distribution thereof and to establish such other rules and regulations as will be necessary to carry into effect this act; to conserve the natural gas resources of the state and to preserve the public peace, safety, and convenience in relation thereto.

With respect to electricity, 1984 PA 49, which amended 1939 PA 3, MCL 460.6n; provides for a restructuring of residential electric rates and mandates that the Commission encourage residential energy conservation in relevant part as follows:

(2) Rates restructured pursuant to this section shall encourage residential energy conservation and shall be based upon cost of services and other relevant factors

* * *

(4) The commission shall take steps necessary to inform the public of the advantages of conservation

The Commission therefore has authority to ensure that both electricity and natural gas is not wasted. As such, the Commission has authority to implement appropriate energy conservation programs.

As a corollary, under Act 304 the Commission can find that a utility's plan and 5-year forecast is deficient and incomplete if it does not include utility proposals to address the reduction of unnecessary and wasteful energy usage, and to promote energy efficiency, conservation, and better energy demand management. Under Act 304, the Commission is required to evaluate the reasonableness and prudence of the Company's plan and forecast and

has authority to disapprove or amend that plan. The statute also requires the Company to acquire and provide energy in a manner that minimizes costs. While the Commission may not direct the Company's management on specific proposals, the Commission can order CECo to implement (as an alternative and additional resource) cost-effective programs as part of its planned "supply arrangements." MCL 460.6j.

The MPSC under Section 6j(1)(a) and (b), MCL 460.6j(1)(a) and (b), has direct authority to disapprove unreasonable or imprudent electrical supply plans and arrangements:

(a) "Power supply cost recovery clause" means a clause in the electric rates or rate schedule of a utility which permits the monthly adjustment of rates for power supply to allow the utility to recover the booked costs, including transportation costs, reclamation costs, and disposal and reprocessing costs, of fuel burned by the utility for electric generation and the booked costs of purchased and net interchanged power transactions by the utility incurred under reasonable and prudent policies and practices.

(b) "Power supply cost recovery factor" means that element of the rates to be charged for electric service to reflect power supply costs incurred by an electric utility and made pursuant to a power supply cost recovery clause incorporated in the rates or rate schedule of an electric utility.

Section 6j(3) requires a utility to file annually:

. . . a complete power supply cost recovery plan describing the expected sources of electric power supply and changes in the cost of power supply anticipated over a future 12-month period specified by the commission The plan shall describe all major contracts and power supply arrangements entered into by the utility for obtaining power supply during the specified 12-month period. The description of the major contracts and arrangements shall include the price of the fuel, the duration of the contract or arrangement, and an explanation or description of any other term or provision as required by the commission. The plan shall also include the utility's evaluation of the reasonableness and prudence of its decisions to provide power supply in the manner described in the plan, in light of its existing sources of electrical generation, and an explanation of the actions taken by the utility to minimize the cost of fuel to the utility.

Along with its plan, the utility is required by Section 6j(4) to also file a 5-year forecast, and any other information the Commission requires:

(4) In order to implement the power supply cost recovery clause established pursuant to subsection (2), a utility shall file, contemporaneously with the power supply cost recovery plan required by subsection (3), a 5-year forecast of the power supply requirements of its customers, its anticipated sources of supply, and projections of power supply costs, in light of its existing sources of electrical generation and sources of electrical generation under construction. The forecast shall include a description of all relevant major contracts and power supply arrangements entered into or contemplated by the utility, and such other information as the commission may require.

In evaluating the utility's plan, the Commission is given broad powers to consider, without limitation, all alternatives to minimize costs, and to require an amendment or change in the plan:

(6) In its final order in a power supply and cost review, the commission shall evaluate the reasonableness and prudence of the decisions underlying the power supply cost recovery plan filed by the utility pursuant to subsection (3), and shall approve, disapprove, or amend the power supply cost recovery plan accordingly. In evaluating the decisions underlying the power supply cost recovery plan, the commission shall consider the cost and availability of the electrical generation available to the utility; the cost of short-term firm purchases available to the utility; the availability of interruptible service; the ability of the utility to reduce or to eliminate any firm sales to out-of-state customers if the utility is not a multi-state utility whose firm sales are subject to other regulatory authority; whether the utility has taken all appropriate actions to minimize the cost of fuel; and other relevant factors. The commission shall approve, reject, or amend the 12-monthly power supply cost recovery factors requested by the utility in its power supply cost recovery plan. The factors shall not reflect items the commission could reasonably anticipate would be disallowed under subsection (13). The factors ordered shall be described in fixed dollar amounts per unit of electricity, but may include specific amounts contingent on future events.

Section 6(m) of Act 304, MCL 460.6m, indicates the public purpose and factors to be considered by the Utility Consumer Participation Board (UCPB) as criteria for accepting grant applications for Act 304 case participants, by stating in part:

For purposes of making grants, the board may consider protection of the environment, energy conservation, the creation of employment and a healthy economy in the state, and the maintenance of adequate energy resources. . . .

Section 6m(13), MCL 460.6m(13), provides that the UCPB shall:

Encourage the representation of the interest of identifiable types of residential utility customers whose interest may differ, including various social and economic classes in areas of the state. . . .

Related statutes applicable to the MPSC grant additional specific authority to approve energy conservation programs. Section 6c(1), MCL 460.6c(1) states that the MPSC “may approve energy conservation programs, including energy conservation load programs, for residential customers of electric and gas utilities.” Section 6n, MCL 460.6n establishes legislative policy in favor of energy conservation. Section 6n(2) and (4) state in part:

(2) Rates reconstructed pursuant to this section shall encourage residential energy conservation and shall be based upon cost of service and other relevant factors.

* * *

(4) The commission shall take steps necessary to inform the public of the advantages of conservation. In addition to requiring the total charges for service to be reflected on a residential customer’s bill, the commission shall require electric utilities to print on each residential customer’s bill the total amount of electricity used the rate for each blocked used by the customers, and the total charge for each block of electrical usage by the customer. All costs incurred by the electric utilities in carrying out the requirements of this subsection shall be included in the cost to serve the residential customers. . . .

3. Past Commission precedent establishes that energy efficiency, conservation, and load management fall within the scope of Act 304.

The Commission in past cases, including Act 304 cases, has found that issues and remedial programs involving energy efficiency, conservation, and demand management (sometimes called demand side management or DSM) fall within the proper purview and scope of the Commission's authority. The Commission has also found that such issues and programs relate to power (or gas) supply arrangements and costs subject to review under Act 304. Accordingly, the MPSC can disapprove of GCR or PSCR plans which fail to take into account reasonable cost-effective DSM or energy conservation alternatives.

The Commission in U-4404, found as follows in its October 5, 1973, order:

The overriding public interest in the conservation of natural gas, as well as alternative forms of energy is indisputable. It is equally clear that the program proposed by Michigan Consolidated will serve the public interest by substantially contributing to the national goal of energy conservation and offering assistance to all of Michigan Consolidated's residential heating customers who own uninsulated or poorly insulated premises, including many low-income persons who are especially in need of means to economize on gas bills. As shown by the evidence of both the Staff and the Company, the program will also benefit Michigan Consolidated's customers as a whole To the extent that conservation measures enable the Company to serve the needs of its service area with less expensive supplies its overall cost of service is reduced, to the benefit of all customers.

The Commission Order in Case No. U-5510 also found:

Finally, it should be noted that under the provisions of Rule 11 of the Standards (R 460.2411), it is not necessary that the Commission arrive at a precise quantitative decision concerning the supply of gas in the future or its cost versus the cost of conserved gas. All that is required under Rule 11 is that:

. . . the commission finds that the energy conservation program is apt to result in the foreseeable future, in lower rates for all utility ratepayers than could be achieved

without the energy conservation program. (Emphasis added in original U-5510 order.)

Based on the evidence in this record and the arguments set forth above, the Commission finds that the proposed program is indeed apt, and is probably almost certain, to result in lower rates for all utility ratepayers than could be achieved without an energy conservation program.

The Commission in its order in Case No. U-6871, June 29, 1982, page 11, stated as follows:

Additionally, the Commission finds that the offering of conservation programs by public utilities is a legitimate public utility function. The Commission, therefore, has the authority to not only authorize the implementation of such a program, but to also authorize the application of a surcharge to customers' bills to recover expenses incurred in carrying out such a program. . . . The Commission is also under the obligation of ensuring that our energy resources are used in the most efficient manner possible. . .

In U-9172, involving Consumers Energy Company (CECo) for 1989, Staff urged that CECe revise its 5-year forecast using integrated resource planning (IRP) methods, or alternatively, alert the utility under MCL 460.6j(7) that factors may be adjusted and costs disallowed in future PSCR proceedings if lower cost DSM options were not selected. While not granting relief for a retroactive version of this plan, the Commission found that it clearly had justification under Act 304 to require certain programs and planning approaches, as follows:

On the other hand, the Commission notes that there is no provision in Act 304 that would exempt an electric utility from a cost adjustment or disallowance should it be found that the utility acted unreasonably or imprudently by failing to use integrated resource planning methods or by failing to incorporate lower cost demand-side resource options in its PSCR plan and five-year forecast.

The Commission finds that in order to evaluate the reasonableness and prudence of the decisions underlying the PSCR plan and five-year forecast by the utility, Consumers' future PSCR plans and forecasts must be derived from and consistent with the company's most recent integrated resource plan.

* * *

Further, the Commission directs the company's future PSCR plans and five-year forecasts . . . must derive from and be consistent with the company's most recently filed integrated resource plan. Documentation of the five-year forecast must include a thorough evaluation of the cost-effectiveness of demand-side management and non-utility resource options relative to other resource options.

* * *

Deriving the company's plan and five-year forecast from its biennially filed integrated resource plan will give the Commission essential information concerning the relative costs and merits of a reasonably broad range of resource options for determining the reasonableness and prudence of decisions underlying the company's PSCR plan and forecast. This information allows the Commission to consider whether Consumers has considered all reasonable options and has formulated its plan and forecasts on the basis of the most cost effective options available. *In re Consumers Power Company*, Opinion and Order, Case No. U-9172, March 29, 1990. (Emphasis added).

In a Michigan Gas Company case, U-9752, the MPSC concluded that DSM is relevant to a GCR plan case and found that:

The major purpose of the hearing was to provide information sufficient for the Commission to evaluate the GCR plan, to set an appropriate GCR factor for the plan period, and to evaluate the decisions underlying the five-year forecast. **The demand-side management activities of Michigan Gas can be relevant in that context.** The MCAAA may be able to develop information designed to show that Michigan Gas has not engaged in reasonable and prudent activities that could lower the cost of gas. **The MCAAA suggests, for example, that greater conservation efforts by Michigan Gas could lower peak-day demand, which might have an effect on peak supply costs for the period. That is a relevant issue in a GCR plan case. It is also relevant in considering the company's five-year forecast.** *In re Michigan Gas Company*, Opinion and Order, Case No. U-9752, February 21, 1991, p. 7. (Emphasis added).

The MPSC has ruled elsewhere that energy efficiency resources obtained through Integrated Resource Planning (IRP) are power supply arrangements and that IRP and DSM fall

within the planning process mandated by Act 304, the omission of which can lead to a rate disallowance in a PSCR proceeding. *In Re Commission's Own Motion to Examine Federal Standards for Electric Utilities*, Opinion and Order, Case No. U-10574, October 12, 1994. The Commission cited Act 304 as being related to the federal IRP standard, described as follows::

. . . a planning and selection process for new energy resources that evaluate the full range of alternatives, **including** new generating capacity, power purchases, **energy conservation and efficiency**, cogeneration and district heating and cooling applications, and renewable energy resources, in order to provide adequate and reliable service to its electric customers at the lowest system cost. The process shall take into account necessary features for system operation, such as diversity, ability to verify **energy savings achieved through energy conservation and efficiency** and the projected durability of such savings measured over time; and **shall treat demand and supply resources on a consistent and integrated basis.**

* * *

IRP issues are considered . . . [in] the PSCR proceedings. . . . Disallowance for fuel or purchase power could be argued . . . if other less costly resource options could have been procured by the company. *Ibid.*, pp. 10-11 and p. 6, emphasis added.

The Commission later terminated the specific DSM program for CECo, however, by its order in U-10554, dated June 19, 1995, which order included positive findings regarding DSM. The Commission in U-10554 found that DSM is a necessary part of the utility planning process so as to encourage the efficient identification of all power supply arrangements and to encourage the development of more cost-effective DSM programs for electric utilities. In particular, the Commission stated that:

. . . one purpose of the planning process is to compare supply-and demand-side options on an equivalent basis so that the most efficient resources can be identified and implemented. . . . The Commission has long recognized that demand-side measures may provide a competitive alternative to the construction of new power plants as a means of meeting the demand for electricity. . . . The fact that DSM provides an alternative to construction of new power

plants provides not only the reason for adoption of DSM programs, but also provides the basis for the design of rates associated with those programs. Savings resulting from the delay or elimination of the construction of new power plants benefit all customers, whether or not they are direct participants in the DSM program. *In Re Consumers Power Company*, Opinion and Order, June 19, 1995, pp. 12-13. (Emphasis added).

The dissenting opinion of Commissioner Russell in U-10554, (June 19, 1995, p 3) summarized the MPSC's approach to DSM in several other cases, and noted that any DSM resource should be evaluated on the basis of total costs avoided:

The appropriate method of assessing the value of a DSM resource is on the basis of total costs avoided, including capacity costs, energy costs, operating costs, and transmission and distribution (T&D) costs. Assessing the value of any resource option, including DSM, on the basis of its effect on total costs is a principle which the Commission has repeatedly endorsed, including the order establishing Integrated Resource Planning (IRP) for Consumers Power in Case No., U-9172 dated March 29, 1990; the orders establishing Consumers Power's DSM programs in Case Nos. U-9346 dated May 7, 1991 and U-10335 dated May 10, 1994, and the order on rehearing in Case No. U-10335 dated August 18, 1994; and the Commission's recent order examining issues related to the 1992 Energy Policy Act and its standards regarding IRP and energy efficiency in Case No. U-10574 dated October 12, 1994.

In its October 12, 1995 order in U-10671, the Commission indicated it did not intend to abandon DSM efforts and encouraged DECo to explore DSM options and program formats that might benefit utility customers. In its September 12, 1996 order in U-10932, where the Commission suspended DECo's DSM program, the Commission likewise encouraged DECo to explore DSM options.

The Commission in substantial past precedent has thus endorsed consideration of such matters. In the same fashion, the Commission can certainly encourage and promote energy efficiency, conservation, and enhanced demand management in its Act 304 orders. In fact, under the specific provisions of Act 304, the Commission can find that a plan which fails to incorporate

such plans and programs is incomplete, and that rate adjustments may result from a utilities' unreasonable and imprudent incurrence of avoidable costs and for failures to minimize costs. The Commission in this PSCR case should thus find that energy efficiency, conservation, and load mitigation and management programs, should be considered and implemented as a means to reduce energy usage, to minimize or moderate fuel and purchased power costs, and to yield related savings such as a reduced transmission and pollution emission and allowance costs.

4. The Commission Staff's 2006 Energy Efficiency and Capacity Needs Reports also supports MEC/PIRGIM's position concerning energy efficiency, conservation, and load management programs.

In addition to Dr. Kushler's study sponsored in this case, the MPSC Staff's January 31, 2006 report concerning energy efficiency programs also endorses the use of said programs as a part of the portfolio of actions to meet the state's future capacity and energy needs (January 31, 2006 cover letter from Gary Kitts to the Commission, also Staff Report, e.g., pp 1-3, 8-10, 24-31).

The Commission Staff's Report of the Capacity Need Forum reaches similar conclusions (January 3, 2006, letter to the Commission from George Stojic, Report, e.g., pp 2, 6, 8, 9, 11, 20-21, 41-46, 54, 58-60). The Commission Staff's Capacity Needs study also finds that energy efficiency programs can reduce fuel and emissions costs (pp 42-42), and that . . . "energy efficiency programs have the potential to be financially beneficial and to mitigate risks associated with both fuel costs and emission standards", and that . . . "energy efficiency should be considered as a resource option for meeting Michigan's growing need for electric generating resources" (p 42). The Staff Capacity Needs Report also concludes that "load management programming" can "help meet peak demand needs" besides relying solely on combustion turbines to meet "peak related capacity need" (p 44). The Staff reports that energy efficiency

measures can meet both demand and energy needs over time (p 44). The Staff's Capacity Needs Report (p 45-46) also states that:

. . . a balanced portfolio of resources consisting, in part, of load management, short-lead time renewable energy projects, and energy efficiency programs could provide insurance against fuel price volatility. Developing these programs in the short-term will provide the added benefits of reducing the exposure to future emissions control costs and long-term fuel price escalation. In short, these resources can and should be used as risk mitigation measures to manage exposure to future contingencies, as well as satisfy reliability needs.

The Staff's Capacity Needs Report also presents proposals and procedures for evaluating utility resource planning without acknowledging that these same approaches can already be undertaken in Act 304 plan and forecast cases. For example, the Staff report (p 59) states:

A contested case public hearing would be held on the utility's application. In the hearing, the utility would need to submit, along with its forecast of demand, a comprehensive electric energy plan including traditional generation sources, load management options, energy efficiency programs, renewable energy projects, and transmission options. The plan would need to demonstrate that the proposed plant is part of a portfolio of options that best meets the needs of its customers.

The Staff's Capacity Need Report (p 50) also states:

Building baseload generation is one method that utilities have used to secure power generation assets for their customers. The other method has been through power purchase contracts with non-utility producers. Contracts that include a payment by the utility to the producers for capacity costs in excess of six months must be approved through the utility's Power Supply Cost Recovery (PSCR) case. Act 304, which requires Commission approval for these capacity costs, requires a hearing in which the utility must demonstrate that the contract results in reasonable and prudent costs. Again, the procedures are intended to place on the utility seeking approval for cost recovery, the burden of demonstrating the need for capacity and showing that the resulting costs are reasonable.

The Report (p 60) also states:

None of the parties submitting documents have opposed energy efficiency. Staff expects a utility's demonstration that a proposed plant is the appropriate resource to meet an identified need would include an analysis and adoption of cost effective energy efficiency and renewable resource options as part of a portfolio of energy resources.

Staff would expect a jurisdictional utility that intends to build new generation and desires to use the reliability option to file a contested case, commensurate with the framework discussed above.

The Staff's Capacity Needs Report fails to recognize an obvious situation – that the framework for the resource planning review described by the Staff already exists pursuant to Act 304's plain language, legislative intent, and procedures.

5. All judicial precedent has generally upheld the Commission's jurisdiction over energy efficiency, conservation, and demand management programs.

Applicable judicial precedent has also held that the Commission possesses the authority to identify cost items associated with a utility's fuel and purchase power costs, which can be disallowed in part if a utility could have reasonably avoided or minimized those costs through alternative power supply arrangements. This principle is clearly established in *Union Carbide v Public Service Commission*, 431 Mich 135; 428 NW2d 322 (1988), which held that the MPSC under Act 304 has the power to disapprove rates based upon expenses it found to have been uneconomical. Similarly, while the MPSC cannot require utilities to enter into contracts, the Commission can under Act 304 disallow unreasonable, imprudent and uneconomic costs association with those contracts. DSM comprises arrangements through which a utility can demonstrably avoid or mitigate increases in gas, or fuel and purchase power costs.

In a review of a Detroit Edison general rate case, U-10202, the Michigan Court of Appeals found in *Detroit Edison Company v Public Service Commission*, 221 Mich App 370, 385; 562 NW2d 224 (1997), that DSM is directly related to electric utilities' power supplies and

that MPSC-approved **DSM program costs can be collected in rates.** The court held that the MPSC could not impinge on “managerial prerogatives”, but found “nothing unlawful regarding the costs associated with [Detroit Edison’s] DSM program” and that the “**program is directly related to power supplied by Detroit Edison.**” The Michigan Court of Appeals defined DSM in the context of this statutory authority, as follows:

Demand-side management is “the planning and implementation of activities designed to influence customer use of electricity in ways that will produce changes in the time pattern and magnitude of a utility’s load

* * *

The fact that MCL 460.6c; MSA 22.13(6c) provides specific authority to develop energy conservation programs for residential customers. . . . does not imply that the PSC has no authority to establish rates on the basis of similar programs for industrial and commercial customers . . . *Detroit Edison, supra.*, pp. 383, 385.

In another case, the Court of Appeals similarly found that the MPSC possessed the authority to order an electric utility to implement DSM generally and also to fund DSM in rates, as follows:

Finally, were we to reach the merits, we would hold that the PSC did not overstep the bounds of its authority [to order an electric utility to implement DSM or to fund DSM in rates]. The PSC informed Consumers of its opinion that the time was ripe to implement DSM programs and outlined the conditions under which the costs of such programs would be approved, leaving Consumers the choice of whether and how to implement such programs. The PSC’s actions are consistent with its authority to establish reasonable rates and charges and did not encroach upon the ultimate managerial authority of the utility. *ABATE v PSC*, 205 Mich App 383, 388-389; ___ NW2d ___ (1994).

In *Consumer Power v PSC*, 460 Mich 148, 158 (1999), the Michigan Supreme Court also found that, while the MPSC had no authority to require an experimental retail wheeling program, the PSC “can encourage a specific management decision through the exercise of its ratemaking

power, but it may not directly order the utility to make the decision”, referencing its previous *Union Carbide* decision. The Commission can thus “encourage” such specific management decisions, such as spending by utilities on operations and maintenance,⁴ or setting standards to encourage improved plant performance under a “system availability incentive provision.”⁵ The Commission could also thus implement a downward PSCR rate reduction to account for a utility’s failure to avoid or mitigate fuel, purchased power, transmission, pollution emission, and other costs by implementing appropriate energy efficiency and conservation programs.

The Ingham Circuit Court, in ruling against an equal protection challenge to a conservation program, stated:

As reasonably found by the PSC, there is an expected benefit to all . . . gas customers of lower gas prices because of lower gas consumption. The Court would note that there is also a public interest in lower consumption of natural resources. Opinion and Order dated Sept 10, 1985, Ingham Circuit Court No. 82-29260-AA, J. Stell.

The Michigan Supreme Court in *City of Detroit v PSC*, 308 Mich 706; 14 NW2d 784 (1944) emphasized that the Commission has the duty in ratemaking to balance the interest of the utility investors and ratepayers, and ensure that ratepayers are not assigned unnecessary costs. In like fashion, the mandating that ratepayers pay for avoidable energy and other costs that result from a lack of energy efficiency, conservation, and demand management programs, constitutes the placing of unnecessary costs upon ratepayers.

In conclusion, no Court has ever held that energy efficiency, conservation, or DSM-type programs are beyond the jurisdiction of the Commission, either generally or under Act 304. On

⁴ *Attorney General v PSC #1*, 133 Mich App 719 (1984); *Attorney General v PSC #1*, 136 Mich App 52 (1984); *Attorney General v PSC*, 141 Mich App 505 (198).

⁵ *SAIP – System Availability Incentive Provisions. Attorney General v PSC #2*, 133 Mich App 790 (1984); *Attorney General v PSC #2*, 136 Mich App 515 (1984).

the other hand, plenty of statutory authority, and Commission and Court precedent, supports the Commission's jurisdiction in this area. Moreover, the encouragement of such programs is greatly in the public interest, as can be seen from the following passage in the MPSC Staff's brief filed in MPSC Case No. U-8528 on August 21, 1987 (p 1-2):

The Commission instituted this proceeding in order to consider on a generic basis, Michigan's utility conservation programs. Staff believes that conservation of electricity and gas is essential for the well being of the State's ratepayers and the State as a whole. Staff has extensively evaluated the conservation efforts undertaken to date by Michigan utilities as authorized by the Michigan Public Service Commission, and asserts that these programs are effective and beneficial and should be continued, and expanded in the future. Those who object to such programs, by and large, are utilizing short-sighted logic which springs no doubt from their own pecuniary interest in preserving maximum profits while ignoring the benefits to the economy and to the people of this State. Such viewpoints should be rejected as the conservation programs operating in Michigan benefit not only the direct participants but the entire populace of the State.

The ALJ and Commission should therefore conclude that CECo's plan and forecast as filed in this case is deficient and incomplete since it fails to incorporate any resource options to minimize the cost of energy and to reasonably and prudently promote energy efficiency, conservation, and the better management of energy usage loads and patterns. In fact, by this omission, CECo's Plan and forecast preordains excessive and unreasonable (avoidable) costs and PSCR rate factors.⁶ The ALJ and Commission should henceforth require CECo to file adequate plans and forecasts to incorporate these resource options in this and future cases.

In absence of any consideration by CECo of these resource options, the ALJ and Commission should also reduce CECo's PSCR rates in this case accordingly.

⁶ Witness Crandall has described specific costs, including fuel, purchased power, transmission, and emission allowance and abatement costs that would be reduced by these programs; witness Kushler has also specifically described the economic, environmental, and avoided cost benefits arising from these programs operating around the nation (prefiled testimony and exhibits, summarized *supra*).

III. CONCLUSION AND RELIEF

MEC/PIRGIM respectfully request the Commission to reverse the ALJ's March 21, 2006 rulings in this case, as requested in MEC/PIRGIM's April 4, 2006 appeal filed in this case, and also to reverse the ALJ's rulings in his PFD which are the subject of these exceptions. MEC/PIRGIM's requested relief is not subject to any procedural limitations, as MEC/PIRGIM has undertaken its requested relief both via the Motion for Declaratory Ruling (and its subsequent appeal) and by presenting these issues on the merits through a full evidentiary case filing and post-hearing briefing. MEC/PIRGIM also request the Commission to grant their Motion for Declaratory Ruling, or to rule on the merits of these issues pursuant to their filings and briefs in this case, and to reject CEC's requested PSCR rates, pending a re-filing by CEC of its plan and forecast case. MEC/PIRGIM also request the Commission to rule that energy efficiency, conservation, and DSM planning and programs should be re-implemented as an important energy resource, and that prompt review of CEC's planned Palisades plant sale/PPA transactions should be undertaken in this case. MEC/PIRGIM request such further and consistent relief which is lawful and reasonable, including all of the remedial relief requested in its motions and briefs in this case.

Respectfully submitted,

CLARK HILL PLC

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By: _____

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STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the Matter of the Application of)
CONSUMERS ENERGY COMPANY)
for approval of a power supply cost)
recovery plan and authorization of)
monthly power supply cost recovery)
factors for the year 2006..

Case No. U-14701
Paperless/Efiling

PROOF OF SERVICE

STATE OF MICHIGAN)
)
COUNTY OF INGHAM) ss.

Mary E. Turney, being duly sworn, deposes and says that she is an employee of Clark Hill PLC, and that on **June 8, 2006**, a copy of **Exceptions of the Michigan Environmental Council and the Public Interest Research Group in Michigan to the Proposal for Decision** in the above-captioned proceeding was served upon:

SEE ATTACHED SERVICE LIST

Service was accomplished by depositing same in a regular United States Post Service mail depository, enclosed in envelopes bearing first-class postage, fully prepaid and properly addressed, and via electronic mail.

Mary E. Turney Digitally signed by Mary E. Turney
DN: CN = Mary E. Turney, C = US, O
= Clark Hill
Date: 2006.06.08 16:44:56 -04'00'

Mary E. Turney

Subscribed and sworn to before me
this 8th day of June 2006.

Patricia A. Tooker Digitally signed by Patricia A. Tooker
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O = Clark Hill PLC
Date: 2006.06.08 16:45:16 -04'00'

Patricia A. Tooker, Notary Public
State of Michigan, County of Eaton
Acting in the County of Ingham
My Commission expires: April 5, 2011

SERVICE LIST
U-14701

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