

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

\* \* \* \* \*

In the matter of the application of	)	
<b>CONSUMERS ENERGY COMPANY</b> for	)	
a reconciliation of its power supply costs	)	Case No. U-10973-R
and revenues for 1996.	)	
_____	)	

At the August 31, 1999 meeting of the Michigan Public Service Commission in Lansing, Michigan.

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

**OPINION AND ORDER**

History of Proceedings

On March 27, 1997, Consumers Energy Company (Consumers) filed an application to reconcile its 1996 power supply cost recovery (PSCR) revenues with booked costs, pursuant to 1982 PA 304, as amended, MCL 460.6h et seq.; MSA 22.13(6h) et seq. (Act 304). The application states that Consumers underrecovered its 1996 PSCR costs by \$16,704,413.

At a prehearing conference on May 6, 1997, Administrative Law Judge Frank V. Strother (ALJ) granted leave to intervene to the Attorney General,<sup>1</sup> the Midland Cogeneration Venture Limited

---

<sup>1</sup>On January 1, 1999, Jennifer M. Granholm was sworn in to replace Frank J. Kelley as the Attorney General.

Partnership (MCV), the Michigan Power Limited Partnership (MPLP), Energy Michigan, the Residential Ratepayer Consortium (RRC), and the Association of Businesses Advocating Tariff Equity (ABATE).

The Commission Staff (Staff) also appeared and participated.

Evidentiary hearings began June 30, 1997 and concluded on October 17, 1997. The record consists of 10 volumes of transcript totaling 1,019 pages and 73 exhibits that were admitted into evidence.

The parties filed briefs and reply briefs on November 4 and 24, 1997, respectively. Thereafter, on December 8, 1997, the ALJ issued his Proposal for Decision (PFD), in which he recommended that the Commission approve Consumers' proposed reconciliation, with two modifications. In his view, the Commission should disallow \$14,114 of replacement power costs for a 1.8 day outage at Big Rock Point nuclear plant and \$658,097 for an accounting adjustment related to costs incurred in 1994 and 1995. The ALJ concluded that Consumers experienced an underrecovery of \$15,284,647.

By January 9, 1998, Consumers, the MCV, ABATE, the Attorney General, the RRC, and the Staff filed exceptions. By February 2, 1998, Consumers, the MCV, ABATE, the Attorney General, the MPLP, and the RRC filed replies to exceptions.

#### Fossil Fuels Contract

The RRC proposed a \$362,700 disallowance based on its claim that Consumers' unreasonable 1995 nominations for coal delivery under a contract with Fossil Fuels, Inc. (now Pittston Acquisition Company), had ramifications in 1996. Essentially, the RRC claimed that Consumers nominated more coal in 1995 than necessary, which increased 1996 coal costs by \$362,700.

The ALJ concluded that the Commission had already addressed the reasonableness of Consumers' 1995 nominations under the Fossil Fuels contract and rejected the RRC's contention that a disallowance

was warranted. In the ALJ's view, the Commission's September 12, 1997 order in Case No. U-10710-R, Consumers' 1995 PSCR reconciliation case, should be considered dispositive of the issue.

The RRC excepts to the ALJ's recommendation that its proposed disallowance be rejected. Despite its recognition that the Commission rejected similar claims made in Consumers' 1995 PSCR reconciliation, the RRC points out that the Commission's finding rested on the lack of record evidence to substantiate the unreasonableness of Consumers' actions. In this case, the RRC argues, there is new evidence of reasonable alternatives that Consumers could have taken, but did not. Moreover, it states, it provided evidence that Consumers failed to consider or pursue an option that, based on the company's own projections, would have resulted in lower projected fuel costs without affecting the rebates.

Moreover, the RRC states, it presented evidence that Consumers' witness misrepresented the coal price situation that existed in late 1994, at the time the nomination for the first half of 1995 was made. In the RRC's view, Consumers projected higher spot market coal prices than it actually used for its own planning purposes on an exhibit. But more importantly, the RRC states, Consumers' exhibit reflected Fossil Fuels coal at the price that included the anticipated rebates. In the RRC's view, the company should have used the initial price of coal disregarding the projected rebates. Finally, the RRC takes issue with Consumers' calculation of the net present value of the rebates in the 1995 case.

Consumers responds that the Commission properly resolved this issue in its September 12, 1997 order in Case No. U-10710-R. In that order, states Consumers, the Commission found Consumers' Fossil Fuels contract nominations reasonable. Moreover, Consumers argues, the "new" evidence upon which the RRC relies, that the price of Fossil Fuels coal (without rebates) exceeded other options, does not counterbalance Consumers' concern that it nominate sufficient coal to obtain the rebates expeditiously

to avoid the possibility that Pittston would be financially unable to live up to its rebate commitment. It was this approach, says Consumers, that the Commission found reasonable in Case No. U-10710-R. The fact that the rebates were not actually received until January 1996 did not negate the cash benefit realized by the company. Consumers points to Bruce W. Walter's cross-examination testimony in which he acknowledged that Consumers booked the rebates on a monthly basis to match the deliveries of the coal. 7 Tr. 800.

In sum, asserts Consumers, the RRC has merely recast the same facts surrounding the company's decisions for 1995 into a different shape for presentation here. Accordingly, Consumers argues, there is no reason to reconsider this issue.

The Commission finds that the RRC's exception should be rejected. In the September 12, 1997 order in Case No. U-10710-R, following an extensive discussion concerning Consumers' 1995 purchases under the Fossil Fuels contract, the Commission determined that Consumers acted reasonably in making its 1995 nominations for Fossil Fuels contract coal. The appropriate case to determine the reasonableness of Consumers' actions regarding 1995 coal nominations was in Case No. U-11710-R. The Commission is not persuaded that the evidence the RRC claims is new could not have been presented in the previous case. Therefore, the Commission is not persuaded that it should revisit the issue, much less reverse the prior determination.

The Commission rejects the RRC's position that Consumers' presentation of the facts surrounding Consumers' 1995 nomination requires a different response. Even the RRC notes that the difference in projected spot market prices, always subject to some uncertainty, was not significant. Consumers' use of the effective price (the price after rebates) to evaluate the relative economics of its available choices is not

unreasonable, despite the fact that Consumers would not receive the actual rebates until later. Moreover, consistent with the company's accrual accounting method, it accounted for the rebates on a monthly basis as it took the coal. Ratepayers were thus held harmless concerning any cost of delay in obtaining the rebates.

### Karn 3 and 4 Generation

Perhaps the most expensive generating units owned by Consumers are Karn 3 and 4. Consumers proposed that it should recover \$16.8 million for the cost of fuel to generate 463,613 megawatt- hours (MWh) from these units. The Attorney General challenged much of Consumers' use of Karn 3 and 4 on the grounds that their dispatch was not economic when compared with Consumers' top incremental cost (TIC) for the hours that these units operated. In the Attorney General's view, the appropriate comparison for economic dispatch purposes must include the costs for startup, shut down, minimum load, and fixed load fuel, all of which are inherent in committing the units to service. Without starting the units, ratepayers may avoid these substantial costs, according to the Attorney General. The Attorney General contended that only 12 hours of the 8,000 that these units were used were economically justified. The Attorney General proposed a \$6.2 million disallowance to reflect what could have been saved had Consumers not operated these units.

The ALJ recommended that the Commission reject the Attorney General's proposed disallowance. In his view, the Michigan Electric Power Coordination Center (MEPCC) operators were correctly instructed to compare the incremental cost of energy from the Karn units with the current TIC. The ALJ found that the average cost of fuel for Karn 3 and 4 at \$23.92 per MWh was less than the average TIC. Therefore, he reasoned, the dispatch of the Karn units was economic during 1996.

The Attorney General excepts and argues that the ALJ failed to use the proper comparison to determine whether the dispatch of the Karn units was economic. The Attorney General asserts that Consumers' request includes all fuel costs for noneconomic use (including those for startup, etc.), which, when added into the comparison, means the Karn units operated at \$39.20<sup>2</sup> per MWh as compared to \$23.99 per MWh available as purchased power.

The Attorney General urges the Commission to ask whether it is prudent to take incremental power from Karn 3 and 4 at a cost of \$23.92 per MWh when alternative power is available in the market for \$23.99, and when purchasing the latter avoids the various startup costs for Karn 3 and 4.

Finally, the Attorney General asserts, Consumers' engineer, Robert F. Pierce, admitted that the Karn 3 and 4 units were operated at a time when there was cheaper alternative power available. The Attorney General points to Mr. Pierce's testimony concerning net replacement power costs for outages at Karn that were caused and extended by company negligence or mismanagement. Mr. Pierce testified that no disallowance was necessary for those outages because the available replacement power was less expensive than the production at Karn 3 and 4. The Attorney General argues that, based on Mr. Pierce's statements, it is clear that Consumers operated Karn 3 and 4 during 1996 at times when it was not economic to do so.

Consumers responds that the Commission should reject the Attorney General's substitution of Consumers' 1996 average TIC for the average fuel cost of Karn 3 and 4 generation for all hours in which those units were generating with the exception of the 12 hours for which the Attorney General concedes

---

<sup>2</sup>The Attorney General did not use the 463,613 MWh of total production (Exhibit A-79, line 1) for this calculation but rather 428,567 MWh, which is exclusive of generation used for internal purposes.

operations were economic. Consumers points out that all of its dispatching is done by the MEPCC, which is staffed by employees of The Detroit Edison Company and Consumers. According to Consumers, neither the company nor the dispatchers have any interest in uneconomically dispatching the Karn units, or any other unit owned by the company.

Consumers points to the testimony of William C. Keyser, a staff engineer in Consumers' Fuels and Power Transactions Department, who explained why Attorney General witness James P. McGaughy's criticisms were unwarranted. Mr. Keyser stated that the MEPCC uses a unit commitment computer program that explicitly considers the total cost of committing a unit, including startup and no-load costs. 10 Tr. 998. Further, Mr. Keyser explained that the total fuel cost for Karn 3 and 4 includes fuel consumed when the units operate for known uneconomic reasons, such as testing, or in fixed load or minimum load status. He explained that the need for reserve requirements or backup power or the operating conditions of the plant may dictate that a unit be left running rather than ordered to shut down completely.

Consumers further argues that it properly excluded the cost of fuel associated with startup and running the units at minimum or fixed load from the calculation of the incremental cost that is compared with the company's TIC for purposes of ordering the units on. Computing the incremental cost in this manner, Consumers argues, creates a figure properly comparable to the TIC. The cost for actual incremental energy production at these units is close to the average annual TIC on the company's system. Consumers asserts that this demonstrates that Karn 3 and 4 generation was economic when dispatched by the MEPCC. 10 Tr. 999.

Finally, Consumers insists that determining the reasonableness and prudence of total fuel costs for PSCR purposes requires more than merely examining the hourly incremental cost of energy on the company's system. In Consumers' view, the Attorney General's simplistic analysis is misplaced and should be rejected.

The Commission finds that the disallowance proposed by the Attorney General should be rejected. It is not appropriate merely to compare the company's average TIC with the cost per MWh generated (calculated by dividing the generation added to the grid into the total fuel costs for these units) in order to determine the economic use of these units. When units are already on line to provide backup for another purchase or have been determined to be the most economic plant for load-following purposes or spinning reserves, the incremental cost of generating power is the appropriate comparison with the company's TIC. The record reflects that the costs of operating Karn 3 and 4 in 1996, viewed in the appropriate comparison, were reasonable and prudent.

#### Generating Plant Outages

Consumers' witness Pierce detailed the company's nonnuclear plant outages for purposes of this PSCR reconciliation. The only fossil fuel plant outage for which Consumers agrees that a disallowance is appropriate is one at Campbell 3. The ALJ agreed that the Commission should disallow \$29,011 in replacement power costs for that outage.

The ALJ rejected the two other proposed disallowances related to fossil fuel plant outages. The Attorney General proposed a disallowance for four short outages (less than 24 hours in duration). The RRC recommended that the Commission disallow replacement power costs associated with an outage at Weadock 7.

## 1. Short Outages

In accordance with the Staff's traditional position that it would not seek disallowances for net replacement power costs for short outages if the affected plant is available for the year at higher than the national average of like plants (referred to as the 24-hour rule), Consumers requested recovery for costs associated with all of its short outages. The Attorney General argued that even though the outages might be short, if they were caused by the company's negligence, the net replacement power costs should be disallowed, however minor they might be. On cross-examination, Mr. Pierce indicated that there are six such outages. Three of those outages occurred at Karn 3 and 4, for which replacement power costs were likely below the cost to run the plant. Two of the other three were at Cobb 4 for a total of 4.3 hours. The last outage occurred at Weadock 8 and lasted one half hour. Taken together, Consumers replaced 701 MWh at a net replacement cost of less than \$3,000 as a result of these short outages.<sup>3</sup>

The ALJ rejected the Attorney General's proposed disallowances because the Commission had previously allowed Consumers to recover net replacement power costs based on the Staff's evaluation, which employed the 24-hour rule. Thus, in the ALJ's view, the Commission has established precedent for Consumers' recovery of such costs.

The Attorney General excepts and argues that the Commission may not require ratepayers to bear the net replacement power costs for outages caused by the company's negligence, no matter how short the outages may have been. In this case, the Attorney General argues, the ALJ recommends allowing recovery of net replacement power costs during outages that Consumers admits resulted from operator negligence. The Attorney General points to the September 17, 1990 order in Case No. U-8866-R, in

---

<sup>3</sup>Although the Attorney General does not state the amount of the proposed disallowance, data on Exhibit A-33 leads to the conclusion that the total disallowance would be \$2,021.

which the Commission stated: “Act 304 does not provide that negligence or mismanagement should be excused under any circumstances.” *Id.* at p. 41. In the Attorney General’s view, Act 304 requires the Commission to disallow all costs caused by the utility’s negligence.

The Attorney General further argues that the ALJ incorrectly assumed that prior Commission orders establish precedent for allowing net replacement power costs when the conditions of the 24-hour rule were met, without demanding further evidence of prudence. In the Attorney General’s view, the prior Commission orders merely reflect that the parties to those cases were preoccupied with other issues and did not challenge the net replacement power costs attributable to short outages. Prior failure to challenge a practice or specific negligence should not evolve into precedent, argues the Attorney General, particularly when that practice violates Act 304.

Consumers supports the ALJ’s recommendation that the Commission not impose a disallowance for these short outages. Consumers asserts that the Attorney General did not produce any evidence tending to contravene the conclusions reached by the Staff and the company that no disallowance is warranted for these short outages. Consumers argues that the Commission has issued orders after the September 17, 1990 order in Case No. U-8866-R, in which it at least tacitly approved of Consumers’ recovery of net replacement power costs for short outages. It cites a portion of the Commission’s March 30, 1994 order in Case No. U-9960-R in support of its position that the Commission has created precedent allowing net replacement power costs for short outages under certain circumstances.

The Commission finds that the Attorney General’s disallowance should be adopted. The Commission reaffirms its statement in the September 17, 1990 order in Case No. U-8866-R, in which the Commission held that a utility does not carry its burden of proof regarding the reasonableness and

prudence of short outages simply by establishing that the actual availability of its generating plants exceeded a particular availability level or that the disallowance would be for a small amount. Act 304 does not excuse negligence or mismanagement based on such criteria. Consumers bears the burden to prove by a preponderance of the evidence that its outages were not caused or prolonged by the company's negligence or mismanagement. Mr. Pierce's testimony concedes the company's fault regarding these three outages.

The Commission rejects Consumers' argument that there is precedent for ignoring outages that meet the 24-hour rule. The Commission finds that the cited portions of the March 30, 1994 order in Case No. U-9960-R dealt with a challenge by ABATE to the Staff's expert testimony concerning the reasonableness and prudence of outages. The Commission rejected ABATE's argument that the Staff had a duty to scrutinize short outages. In doing so, the Commission noted that other parties are free to cross-examine witnesses concerning outages or to put on their own witnesses and are not limited to pursuing only those issues developed by the Staff. Nowhere did the Commission find that a utility should always recover net replacement power costs for short outages, despite its admitted fault in creating the need for that power.

## 2. Weadock 7 Outage

On November 2, 1996, Weadock 7 was tripped off by a differential relay. The subsequent inquiry revealed that a balance weight had worked its way out of a threaded hole in the rotor, cut a groove on the side of the stator, and then fell out completely. The weight then moved along the air gap until it came to rest about mid-span on the bottom of the stator bore. High electrical flux caused extreme heat to be generated in the weight. It burned through the stator slot wedge and shorted out the stator core laminations. Eventually, the event destroyed the stator winding ground insulation and a winding fault

ensued. There was such extensive damage that the unit was out of service through the end of 1996. Consumers initially classified this as a forced outage. However, when management determined that repairing the damage would require significant time, Consumers prospectively reclassified the outage as a planned one and began work that the company had previously scheduled to begin on February 3, 1997.

Mr. Pierce testified that the root cause of the problem was a failure on the part of the manufacturer (Westinghouse) to properly punch the weight to prevent loosening. Thus, Consumers took the position that Westinghouse was at fault. Mr. Pierce further testified that Consumers' legal department determined that there was no legal basis on which the company could require Westinghouse to pay for replacement power. The contract liability was limited to one year and the rotor had been in place for four years. However, Mr. Pierce stated that, at each opportunity, Consumers expressed its disappointment to Westinghouse over the failure and made clear the company's expectations that Westinghouse should share the burden created by that failure. As a result, Mr. Pierce stated, Consumers was able to obtain certain concessions on the contract for the necessary repairs.

The RRC took the position that Consumers should have requested that Westinghouse reimburse the utility for net replacement power costs, rather than negotiating concessions on the repair of the unit. In the RRC's view, Consumers' failure to make any serious attempt to recover replacement power costs from the manufacturer is unreasonable. Therefore, the RRC argues, the Commission should disallow the net replacement power costs arising from this outage.

The ALJ recommended that the Commission reject the RRC's proposed disallowance. In his view, the RRC had failed to demonstrate on this record that Westinghouse had any legal obligation to reimburse

Consumers for the net cost of replacement power. Thus, the ALJ reasoned, Consumers was reasonable and prudent in obtaining the relief it could receive from Westinghouse.

The RRC excepts and argues that Consumers failed to take all appropriate actions to minimize PSCR costs by failing to attempt to recover all or some of the replacement power costs for the outage from Westinghouse. The RRC further argues that Consumers violated its duty to PSCR customers when it negotiated a deal that benefits only its shareholders. Beyond the question of whether it is within management's discretion to negotiate concessions on the repair contract, the RRC insists that the real question is whether it is reasonable and prudent to do so. The RRC asserts that it was not reasonable for Consumers to fail to use "maximum efforts to obtain at least some recovery of the replacement power costs" for its ratepayers. RRC's exceptions, p. 17. The RRC urges the Commission to impose a \$589,689 disallowance for replacement power costs associated with this outage.

Consumers responds that the ALJ properly rejected the RRC's proposed disallowance based on his finding that there was no evidence to support a legal obligation for Westinghouse to reimburse Consumers for replacement power costs. In Consumers' view, that lack of legal obligation obviates any need for Consumers to have pressed Westinghouse for replacement power costs. Consumers argues that the record contains nothing to suggest that Consumers caused or prolonged the outage or any part of the outage, as required by Section 6j(13) of Act 304, MCL 460.6j(13); MSA 22.13(6j)(13) before a disallowance may be ordered. Moreover, Consumers argues, there is nothing in the statute that requires the company to include a provision concerning replacement power costs in all of its contracts with equipment vendors. Consumers takes the position that there can be no duty to obtain replacement power costs from Westinghouse when the company had no legal right to do so.

The Commission finds that the ALJ properly found no reason to impose the proposed disallowance. There is nothing on this record to support a finding that Consumers acted unreasonably in its relationship with Westinghouse. Mr. Pierce, Senior Engineer in Consumers' Plant Operations Department, testified that Consumers closely monitored the manufacture of the rotor, sending its own personnel with appropriate expertise to witness key testing. He also stated that the company tested the rotor upon arrival without incident, and that there was no warning that something was amiss prior to the breakdown.

The record also reflects that Consumers' management discussed the issue of compensation from Westinghouse with its legal staff, which found no legal basis for imposing liability on Westinghouse for replacement power costs. And no basis for such liability has been placed on this record. The warranty for the rotor had long since expired, and there was no contractual provision for replacement power costs. The Commission finds that Consumers acted reasonably in pushing Westinghouse for concessions on repair to the rotor rather than for consequential damages that were not covered by the contract. Presumably, some of those concessions may benefit customers in the future. For example, in an order issued today in Case No. U-11180-R, the Commission is holding Consumers responsible for the \$100,000 it received from Westinghouse for exceeding the contractual schedule for repairs occasioned by this outage.

The record does not reflect that reason and prudence require Consumers to negotiate net replacement power cost reimbursement clauses for all of its vendor contracts. The availability and likely cost of such provisions have not been established on this record. Accordingly, the Commission finds no basis on which to impose the RRC's proposed disallowance.

### 3. Big Rock Point

In addition to an outage for refueling, Big Rock Point nuclear plant had four forced outages during 1996. Except for 1.5 days of the 91.6-day refueling outage, Consumers seeks recovery of net replacement power costs for all of the outage days. The Staff supported Consumers' analysis that only 1.5 days of the 1996 outages at Big Rock Point were caused or extended by the company's imprudence or mismanagement. The RRC argued that the Commission should also disallow replacement power costs for two other outages, Outage 96-03 (1.8 days) and Outage 96-04 (10.9 days).

a. Outage 96-03

The ALJ determined that Outage 96-03 was caused by a long-standing problem that Consumers should have resolved before the forced outage. He therefore recommended that the Commission disallow \$14,114 in replacement power costs associated with this outage. Consumers did not except to this finding. The ALJ's conclusions are supported by the record, and the Commission accordingly adopts the disallowance recommended by the ALJ.

b. Outage 96-04

William J. Trubilowicz, a staff engineer at Big Rock Point, testified that during the latter part of 1995, Big Rock Point staff was informed by Consumers' Information Systems Department that it would terminate its support for various computer codes<sup>4</sup> installed on the mainframe computer, one of which had been used to predict pressure and temperature in the containment building during accidents involving loss of coolant. The code was purchased for use on personal computers at Big Rock Point in December 1995, after ascertaining that certain tests run with the purchased code conformed to the results using the mainframe code.

---

<sup>4</sup>Computer codes are the programming used to create computer models.

Thereafter, in September 1996, Big Rock Point staff executed additional tests before using the code for analysis purposes. A review of the results demonstrated a discrepancy between the new purchased codes and those used from the mainframe. Especially troubling was that the newly purchased code predicted higher containment temperatures than those predicted by the mainframe code for the same hypothetical accidents. After some analysis, Consumers concluded that the new code might be providing the more accurate results. Because certain safety-related equipment could not be guaranteed to work at the newly predicted temperatures, there was a possibility that Big Rock Point was operating outside of its licensing requirements. Thus, the plant was shut down immediately until it could be determined that it could be operated safely.

On cross-examination, Mr. Trubilowicz testified that the problem with the differences between the two codes originally had been identified by Palisades engineers in 1990, at which time the code vendor had been notified. The code vendor confirmed the error by letter of September 7, 1990, and represented that it would notify all code users. According to Mr. Trubilowicz, the code discrepancies did not require Palisades to shut down because that plant is designed differently from Big Rock Point. Neither Palisades staff nor the code vendor notified Big Rock Point of the discrepancy. At the time, Big Rock Point used the codes under the same license as Palisades.

The RRC argued that replacement power costs should be disallowed for this outage because of Consumers' failure to notify Big Rock Point staff in 1990 of the code discrepancies. In the RRC's view, had that communication been made, the problem could have been corrected concurrently with an outage begun for another purpose.

The ALJ concluded that the RRC's proposed disallowance should be rejected. In his view, the fact that Palisades engineers should have notified Big Rock Point engineers of the code problem in 1990 does not require the Commission to impose a disallowance for this outage. The ALJ found that notification failure, although a safety concern, did not increase costs by necessitating an outage that would not have occurred otherwise. Whenever the problem was discovered, an immediate shutdown would have been required. Further, the ALJ found that the evidence did not support a finding that the problem could have been addressed during another outage.

The RRC excepts and argues that the ALJ's analysis is completely in error. The RRC notes that although the ALJ found that Palisades engineers should have notified Big Rock Point engineers of the code error, "he did nothing to make [Consumers] answer for this negligent action." RRC's exceptions, p. 4. The RRC goes on to say that the fact that the lack of notification is a safety concern does not remove it from consideration in this Act 304 case. The RRC insists that the lack of earlier notification required an unnecessary outage which, in turn, had an economic effect. It asserts that the litmus test must be whether the company acted reasonably and prudently in its management of both the power plant in general as well as the activities involved in the outage.

The RRC further takes issue with the ALJ's statement that there was no record evidence that the outage could have been completed within another outage, had the information been provided to Big Rock Point at the time it was discovered in 1990. It asserts that any failure of proof on this record belongs to Consumers. In the RRC's view, Consumers' responsibility to present sufficient evidence of its reasonable and prudent actions should have dictated its presentation of the 1990 Big Rock Point outage history if the company thought that there was a need.

To support its position that earlier notification concerning the code problem could have obviated the need for a separate shutdown, the RRC points to the cross-examination of Mr. Trubilowicz, who testified that Big Rock Point was near the end of a fuel cycle and did shut down about three weeks after the vendor's confirmatory letter was written. 3 Tr 215. The RRC argues that had the information been passed along at the correct time, Consumers would have moved up the refueling outage and merged the two events together. The RRC states that it is not reasonable to assume that Consumers would have conducted a separate shutdown for refueling three weeks after clearing up the computer code problem.

The RRC objects also to what it perceives as the ALJ's intimation that the RRC did not raise this issue properly because it did not have an expert witness of its own. The RRC states that the Commission has long recognized that an intervening party may argue an issue relying on the record testimony of a witness that the party did not call. Moreover, the RRC argues, there was no reason to present the entire 1990 outage history, because Mr. Trubilowicz testified concerning the refueling outage that occurred near the time that the computer code problem was originally discovered.

The Commission is not persuaded that a disallowance is warranted for this 10.9-day outage, despite several points of agreement with the RRC. Although Consumers argues that the vendor was to notify all code users, the vendor would have record only of licensees. Mr. Trubilowicz testified that Consumers held the license for these computer codes, which were used at Palisades and Big Rock Point. In fact, Mr. Trubilowicz added that in 1990, Palisades and Big Rock Point were operated under the same department of the company. Thus, there would be no reason for the vendor to notify the licensee that had itself notified the vendor, and reliance on the vendor to notify Big Rock Point was not reasonable.

Despite this finding, the Commission agrees with the ALJ that this incident does not require a disallowance.

The Commission finds that a crucial link in the RRC's argument is missing. There is no evidence that, in this instance, the company could have moved up the refueling outage by three weeks. The RRC did not ask Mr. Trubilowicz whether Consumers could have moved up the refueling outage or what factors might have prevented that schedule change. In fact, Mr. Trubilowicz's testimony suggests that combining the two outages would not have been likely.

The Commission agrees with Consumers that a plant shutdown would have been required whenever the problem was recognized at Big Rock Point, regardless of whether that discovery was made in 1990 or 1996. Moreover, the Commission is not persuaded that, had Big Rock Point been informed in 1990, on the date of the vendor's confirmatory letter, Consumers could have immediately begun the refueling outage that was scheduled to occur three weeks later. The Commission therefore concludes that based on this record, no disallowance is warranted.

#### Purchased and Net Interchange Power

The parties raised several issues concerning purchased and net interchange power, all of which involve power taken from the MCV.

##### 1. Leave to Appeal

At the June 30, 1997 hearing, the ALJ granted a motion to strike the testimony of two Consumers witnesses, Michael G. Morris and Thomas M. Cox, concerning the proper allocation of costs for the last 325 megawatts (MW) of capacity from the MCV. On July 14, 1997, Consumers filed an application for leave to appeal the ALJ's ruling. The parties filed responses by July 28, 1997.

In its first exception, Consumers renews its arguments made in its application for leave to appeal and argues that the Commission should admit the disputed evidence and determine that the settlement agreement approved in the November 14, 1996 order in Cases Nos. U-10685, U-10754, and U-10787 (Case No. U-10685 et al.) requires that these costs should be allocated to retail customers, with no allocation to wholesale customers.

Consumers states that its requested underrecovery in the principal amount of \$15,985,869 rests on the premise that the Commission will grant the company's request to recover the costs of the full 325 MW of contract capacity from the MCV solely from retail customers. The ALJ calculated the company's underrecovery by beginning with \$15,985,869 from Exhibit A-1. The company notes that the ALJ struck Consumers' prefiled testimony of Mr. Morris and Mr. Cox, and the related exhibits, including Exhibit A-1, which addressed and explained the company's preferred allocation. Although Consumers states its belief that Exhibit A-1 should be used for calculating its underrecovery, it concedes that the exhibit is not in evidence at this time. Consumers renews its request for the Commission to reverse the ALJ's ruling striking the evidence on this issue. However, Consumers states, Exhibit A-5 shows the 1996 PSCR underrecovery that would result if the costs of the 325 MW is jurisdictionalized, as are all other purchased power costs. That exhibit shows the company's underrecovery to be \$14,857,301. Exhibit A-5, p. 2.

The Attorney General argues that the Commission should reject Consumers' request to use Exhibit A-1 to calculate the underrecovery. The Attorney General asserts that reliance on an exhibit that has been excluded from the record would be contrary to law. Moreover, the Attorney General argues, the allocation of all costs associated with the 325 MW of MCV contract capacity to PSCR customers is

contrary to prior Commission precedent and allocates costs away from those that the Attorney General believes are the true cost causers, special contract customers.

ABATE and the RRC join the Attorney General in urging the Commission to uphold the ALJ's ruling striking the testimonies of Mr. Morris and Mr. Cox. The RRC states that the Commission already has the benefit of nearly identical testimony from Mr. Morris in Case No. U-11180. The RRC commends Consumers for pointing out the ALJ's error in using the base figure from Exhibit A-1, an exhibit that is not included in the record. It states that the correct exhibit from which to obtain the base underrecovery is Exhibit A-5, which was admitted.

The Commission provided Consumers the opportunity to address this issue fully in Case No. U-11180. In an order issued July 24, 1998 in that docket, the Commission reviewed the evidence offered by Consumers and decided the issue against Consumers' position. The ALJ appropriately concluded that the Commission would apply the conclusion that it reached in Case No. U-11180 to all other cases in which the same issue arose, without need for the same testimony to be admitted in each of those cases. The Commission need not provide multiple opportunities to litigate the same issue. Therefore, the Commission concludes, consistent with its discussion and conclusions in the order in Case No. U-11180, Consumers' request for leave to appeal should be denied and the costs associated with the additional 325 MW of contract capacity from the MCV should be jurisdictionalized as are all other power supply costs. Thus, the correct base underrecovery amount is \$14,857,301. Exhibit A-5, p. 2.

2. MCV Capacity Payments

a. Attorney General

The Attorney General argued that costs for the last 325 MW of MCV capacity should be allocated to other than PSCR customers because if Consumers had not entered into special contracts to retain load, the company would not have needed the final 325 MW. Thus, the Attorney General argued that it would be unfair to require PSCR customers to bear the costs of this high priced power. Moreover, the Attorney General contended that to allocate any of these costs to PSCR customers would violate the Commission's orders approving the special contracts, which contain the admonition that ratepayers should be held harmless from excess costs arising from those contracts. The Attorney General proposed a \$51 million disallowance related to this issue.

Consumers countered that Commission acceptance of the Attorney General's proposed disallowance would prevent the company from full recovery of the costs associated with the 325 MW of MCV capacity, which is contrary to the settlement approved by the Commission's November 14, 1996 order in Case No. U-10685 et al.

The ALJ rejected the Attorney General's proposed disallowance because he concluded that the Commission had previously rejected the arguments in the November 14, 1996 order in Case No. U-10685 et al. Further, the ALJ found that the Attorney General's argument was based on erroneous reasoning. In the ALJ's view:

Assuming that absent the special contracts, the customers would have left the system and that the 325 MW of MCV capacity would not have been needed at this time; it does not follow that the 325 MW of MCV capacity should be assigned to the special contract customers. The Commission has made no determination that it should be, there is no precedent for such an assignment, and it would be inconsistent with the long accepted view that all of the loads are served through the totality of the system resources.

If the [Attorney General's] approach were appropriate, then each customer or class of customers, current or future, would be assigned to the source of power added nearest to the time the customers began to take service and have his or her rates based on the

costs associated with that particular source. Such an approach is unworkable and nonsensical.

PF, p. 30. (emphasis in original)

The Attorney General excepts and argues that these costs are properly attributable to special contract customers and that the ALJ failed to recognize Commission precedent on this issue in the orders approving special contracts in which the Commission has been careful to state that costs to serve special contract customers should be considered a separate class of costs. In the Attorney General's view, the ALJ ignored these important Commission-approved safeguards.

The Attorney General quotes at length from the Commission's March 23, 1995 order in Case No. U-10646, in which the Commission set forth the basic principles behind its approval of special contracts and the treatment of costs associated with those special contracts. In that order, the Commission stated in part: "If average PSCR costs (i.e., PSCR costs per [kilowatt-hour]) increase as a result of incremental load attributable to the contracts, the added costs should be treated as any other category of unrecovered costs created by the contract pricing." *Id.* at 22. The Attorney General insists that, in Exhibit I-78, Consumers admits that without the special contracts 50% of those loads would have left Consumers' system. In each of the special contracts, the Attorney General notes, Consumers states that the load is incremental in that it would be lost without the contract. The Attorney General therefore concludes that losing these loads would have obviated the need for the 325 MW of capacity and, thus, these costs should be allocated to special contract customers, not PSCR customers.

Consumers responds that the Attorney General's proposal to assign the costs for the 325 MW of MCV capacity to special contract customers is merely an attempt to relitigate the Commission's approval of that capacity for purposes of Act 304 in Case No. U-10685 et al. In that case, Consumers states, the

Commission rejected arguments that the purchase of the 325 MW of MCV capacity was unreasonable because it would not have been needed without the special contract load and the costs of the 325 MW are higher than the rates offered to special contract customers. In Consumers' view, the Commission has already found that the 325 MW of MCV capacity is needed and that the pricing is appropriate.

In that same vein, Consumers argues that if the Commission were to assign particular capacity to particular customers, it would be more appropriate to assign capacity purchased from Ontario Hydro to special contracts as that capacity was the last added to the system and approved by the Commission. The contract for 325 MW of MCV capacity, on the other hand, was signed in 1987. Consumers insists that the November 14, 1996 order merely resolved the question of rate recovery for that capacity.

Further, Consumers argues, the Commission was aware of the special contracts at the time that it approved cost recovery for the 325 MW of MCV capacity, having approved those contracts in 1995. Additionally, Consumers points out that the Commission rejected the Attorney General's request to present additional evidence on this issue in the July 31, 1997 order in Case No. U-10685 et al.

The company further argues that there is no impermissible subsidy of the special contract customers as intimated by the Attorney General. Rather, Consumers states, special contract customers are allocated the same amount of the company's power supply costs as they would have paid pursuant to the full tariff rates, including the costs of the 325 MW of MCV capacity. If the company's revenues from special contract customers do not cover the allocated costs, Consumers' shareholders will bear that revenue shortfall. Consumers argues that there has been no shift of the costs for special contract customers to PSCR customers.

Finally, the company argues that adoption of the Attorney General's proposed disallowance would negate the Commission's previous approval of these costs for Act 304 recovery.

In its reply to exceptions, the MCV argues that the Attorney General's proposal would violate the Public Utility Regulatory Policies Act of 1978 (PURPA), by denying rate recovery to the utility of costs incurred for power purchased from a qualifying facility. The MCV asserts that it is entitled to full recovery of the agreed avoided cost rate.

The Commission finds that the Attorney General's proposed disallowance should be rejected. In its November 14, 1996 order in Case No. U-10685 et al., the Commission approved these costs for Act 304 recovery as part of the settlement agreement approved in that order. The Commission has already considered these arguments, which the Attorney General and others raised in Case No. U-10685 et al. The Commission further finds that its orders approving special contracts do not require a different result, as the record does not support a finding that ratepayers will be required to absorb higher costs arising from the special contracts. Rather, capacity and energy costs are allocated as usual across rate classes.

b. ABATE

ABATE argued that the Commission should disallow the costs for the 325 MW of MCV capacity based on Consumers' alleged failure to actually provide service under Rate DA to anyone in 1996. According to ABATE, the Commission's approval of the 325 MW of MCV capacity was approved in conjunction with a directive that Consumers implement Rate DA.

Consumers responded that it had complied with all of the requirements to implement Rate DA, and that MCV capacity cost approval was not conditioned on actual provision of Rate DA service during 1996. In fact, Consumers pointed out that although the Commission's order approving the settlement in

Case No. U-10685 et al. was issued late in the PSCR plan year, the order explicitly provided for inclusion of 325 MW of MCV capacity in the 1996 PSCR process.

The ALJ rejected ABATE's proposed disallowance, finding that a fair reading of the Commission's November 14, 1996 order did not require disallowing these costs.

ABATE excepts and argues that the ALJ's reason for rejecting the proposed disallowance was based on his determination that the Commission's November 14, 1996 order in Case No. U-10685 et al. did not contain language evincing an intent that Rate DA be a *quid pro quo* for inclusion of more MCV capacity payments in PSCR costs. ABATE contends that, although the order could have stated it more clearly, the Commission did intend to link recovery of additional MCV capacity costs to the implementation of Rate DA. In ABATE's view, the language from the November 14, 1996 order relied upon by Consumers and the ALJ merely anticipated appeals and sought to insulate the portion of the order approving the MCV capacity costs for Act 304 purposes.

ABATE states that the only means that the Commission has to enforce the settlement agreement to provide Rate DA service is through the PSCR process. It is for that reason, argues ABATE, that the Commission ordered Consumers to file evidence of its compliance in these annual proceedings. In the present case, ABATE asserts, Consumers merely provided evidence that it had completed paper work, provided notice, and conducted a lottery. ABATE contends that the Commission intended that Consumers actually offer and provide Rate DA service before it may recover the costs for additional capacity from the MCV.

Consumers denies that it has delayed the implementation of Rate DA. After the September 8, 1995 filing of the settlement agreement in Case No. U-10685 et al., Consumers asserts, the company has been

committed to the Rate DA program and has taken numerous steps to expeditiously implement the provision of Rate DA service.

Consumers argues that recovery of costs for the 325 MW of additional MCV capacity was not conditioned on the company's provision of service pursuant to Rate DA. To the contrary, Consumers argues, the Commission specifically held that the approved cost recovery was not dependent upon other provisions of the settlement agreement. Moreover, the company points to Paragraph D of the ordering section in the November 14, 1996 order, in which the Commission stated that once Consumers accepted the modified settlement, "the settlement, as modified by this order, shall be implemented for power supply cost recovery purposes for 1996 and subsequent years and shall be implemented prospectively for all other purposes." By that paragraph, Consumers argues, the Commission expressly found that Consumers would be entitled to recover the 325 MW of MCV contract capacity for all of 1996, even though the terms of Rate DA would not be effective until November 14, 1996, and would in all likelihood not be implemented at all in 1996.<sup>5</sup> Thus, Consumers argues, the link between the recovery of 1996 costs and the provision of Rate DA service does not exist.

The Commission finds that ABATE's proposed disallowance should be rejected because it is based on the false premise that the Commission intended to preclude recovery of 1996 costs for the additional 325 MW of MCV capacity until after Consumers actually provided service under Rate DA. At the time that the November 14, 1996 order was issued, it was unlikely that Consumers could implement Rate DA before the end of the year. Despite that fact, the Commission specifically provided that Consumers could

---

<sup>5</sup>In fact, Consumers argues, it would not have been possible to implement Rate DA in 1996, because no suppliers had received a certificate of public convenience and necessity and no retail sales contracts for the provision of Rate DA generation service were approved by the Commission in 1996.

recover MCV capacity costs for all of the 1996 PSCR year. Accordingly, ABATE's proposed disallowance is rejected.

c. The Staff

Staff witness, Ronald J. Ancona, proposed a \$1.8 million disallowance with respect to capacity charges from the MCV. The Staff took the position that because Consumers dispatched the MCV as a single 1,240 MW unit, a composite price should apply for both the 915 MW block approved in Case No. U-10127 and the additional 325 MW block approved in Case No. U-10685 et al. Mr. Ancona testified that the method Consumers used to calculate MCV capacity charges is internally inconsistent. He stated that although Consumers treats the entire 1,240 MW of authorized capacity as one block for purposes of applying the limits from Case No. U-10127, it gives preference to the 915 MW block when pricing the capacity. Mr. Ancona stated that because these two blocks of power were equally available, there is no justification for pricing them differently. In his view, the Commission should assign to all 1,240 MW of capacity a blended price calculated by adding the 915 MW at 3.62 cents per kWh and 325 MW at 2.86 or 3.01 cents per kWh<sup>6</sup> and dividing by 1,240 MW.

In its brief, the Staff responded to Consumers' position that the proposed disallowance ignored the differing availability of the two blocks of power by pointing to Consumers' statements that the power should be considered dispatched as one unit and by stating that if Consumers' argument were adopted, an even larger disallowance would be appropriate. The Staff argued that if the 915 MW block is maintained exactly as approved in Case No. U-10127, the capacity between the appropriate on- or off-

---

<sup>6</sup>The settlement agreement in Case No. U-10685 et al. provided a schedule for increasing the price of the additional 325 MW. Pursuant to that agreement, the weighted average capacity charge through October 1996 was 2.86 cents per kWh; for the remainder of the year it was 3.01 cents per kWh.

peak cap and the 915 MW would be priced at 5 mills before any of the newly approved 325 MW would be assumed to be used. Although the record does not contain a calculation for such a disallowance, the Staff asserted that the disallowance would be approximately \$17 million.

Consumers responded that Mr. Ancona's proposal would alter the rates and method of dispatch for the MCV approved in Case No. U-10127 and Case No. U-10685 et al. In Consumers' view, had the Commission intended a blended rate for MCV capacity, it could have expressly said so, but did not.

The ALJ rejected the Staff's proposed disallowance, based on his conclusion that the Commission foreclosed such a pricing method by failing to adopt it in the earlier orders.

The Staff, ABATE, and the Attorney General except to the ALJ's conclusion. The Staff argues that Consumers misled the ALJ into thinking that dispatching the MCV was a primary consideration when determining the appropriate capacity charges that the company may recover. In contrast, the Staff asserts, the day-to-day operation of the MCV is largely irrelevant to this issue. Rather, the Staff argues, the real issue concerns the appropriate pricing for capacity.

In its exceptions, ABATE argues that the ALJ erred in rejecting the Staff's repricing proposal. ABATE argues that accepting Consumers' position means accepting the proposition that the cheapest portion of the MCV power always comes off line first, before any of the more costly capacity does. In ABATE's view, there is no justification for such a finding.

ABATE argues that the ALJ incorrectly assumed that the Commission had resolved this issue in Case No. U-10685 et al. ABATE points to the testimony of Consumers' witness David Joos, recognizing that Consumers' witness Morris had testified in Case No. U-10685 et al. that it might be an arguable issue between Consumers and the MCV from which block of MCV capacity any derate would be assumed to

come. ABATE further points to Mr. Morris' denial that this issue was covered in the settlement agreement.

The Attorney General joins with the Staff and ABATE in supporting the Staff's proposed disallowance. The Attorney General agrees with ABATE that the record reflects that the parties to the settlement never considered the issue. The Attorney General quotes extensively from Mr. Morris' testimony in Case No. U-10685 et al. to the effect that Consumers would argue that the most expensive power would come off line first and the MCV would probably argue that the least expensive power would come off line first. In fact, the Attorney General asserts, Mr. Morris, the chief negotiator of the settlement in Case No. U-10685 et al., specifically testified in that case that this issue should be resolved in a PSCR reconciliation case.

Consumers responds that the ALJ correctly recommended that the Commission reject the Staff's proposed repricing of energy subject to the settlements approved in Case No. U-10127 and Case No. U-10685 et al. In Consumers' view, those Commission orders already contain determinations concerning the appropriate price for capacity from the MCV.

Consumers argues that the rationale for the Staff's proposal is confusing. Consumers states that Mr. Ancona rationalized his proposed repricing by referencing the manner in which the MCV was dispatched and that the Staff presented an alternative dispatch proposal in its initial brief. The company relates its confusion to the Staff's later claim that its repricing proposal has nothing to do with dispatch of the MCV. Consumers quotes from the testimony of Mr. Joos to the effect that the MCV would be dispatched as a single 1,240 MW unit, with the option 2 availability caps applying to the entire 1,240 MW, but there was no proposal to change the dispatch of the MCV. Based on that record, Consumers asserts, the

Commission approved the settlement agreement, which included capacity rates for an additional 325 MW that are lower than the capacity rate for the 915 MW of capacity approved in Case No. U-10127. Consumers argues that no party to the negotiations attempted to alter the capacity charge for the already approved 915 MW. Consumers asserts that the Staff's late proposal to effectively renegotiate the settlement should be rejected.

Consumers further responds that any reliance on Mr. Morris' testimony from Case No. U-10685 et al. does not justify the Staff's proposal to change the pricing of the MCV capacity charges. According to the company, the Staff's proposal changes the prices for every MWh delivered, regardless of whether a derate of the MCV is involved. It argues that the company will not be able to recover the full amount approved for the 915 MW unless the MCV delivers the entire 1,240 MW. In Consumers' view, the Staff's proposal completely distorts the intended results of the settlements.

Further, Consumers argues, the Staff's assumption that both blocks of power are equally available is not correct. Mr. Joos explained that the 915 MW is more available than the 325 MW additional capacity. Thus, if a derate occurs at the MCV, it would occur first in the 325 MW of contract capacity before the 915 MW is affected. Consumers reasons that (1) the recovery for the capacity costs of the 915 MW block was approved before the capacity costs for the 325 MW block; (2) the company has been prohibited from recovering any of the costs of the 325 MW unless it is delivered in addition to the 915 MW of MCV contract capacity; and (3) in any other 1,240 MW unit, any derate would be assumed to start with the last megawatt (number 1,240), not the first.

The Commission finds that the Staff's proposed disallowance should be adopted. It appears to the Commission that the problem is one of how to "stack" the approved blocks of MCV capacity for cost

recovery purposes, an issue not explicitly covered in the Case No. U-10685 settlement or in the Commission order approving that settlement. Consumers' proposal assumes that cost recovery should be based first on the price for the capacity below the applicable caps (on- and off-peak) for the 915 MW approved in Case No. U-10127, second for the capacity below the caps applicable to the 325 MW, and third for the energy delivered above the caps. The Commission finds that Consumers' position is not consistent with its stated desire to keep intact the approved pricing structure from Case No. U-10127, which includes on-peak and off-peak caps within the 915 MW capacity. The Commission agrees that if it were to treat the MCV deliveries in a fashion that strictly enforces the structure of the settlement in Case No. U-10127, it could mean a much greater disallowance than that originally proposed by the Staff in this case.

On the other hand, the Staff's proposal to use a blended price for below the caps delivery for the entire 1,240 MW before using the price applicable to deliveries above the approved caps is consistent with considering power delivered from the MCV as one approved block of 1,240 MW. The Commission agrees with the Staff that the approved pricing for power taken from the MCV is not dependent upon the actual operation of the MCV or the price that Consumers actually pays for power from that source. Rather, cost recovery is governed by the approved settlement agreements. The Commission finds that the Staff's proposal best maintains the integrity of those settlements. However, it appears that the disallowance must be adjusted to account for amounts that Consumers included in MCV costs that relate to prior years. With that adjustment, the appropriate disallowance is \$1,178,065.

3. Subsidy of Wholesale Sales

The Attorney General argued that Consumers' proposed reconciliation resulted in a subsidy by PSCR customers of wholesale purchases of about \$12 million. The Attorney General stated that during 1996 the average price that wholesale customers paid for both capacity and energy was \$39.75 per MWh. During the same period, the average cost of capacity and energy purchased by Consumers was \$56.54 per MWh. In the Attorney General's view, this disparity meant that "Consumers is buying high, selling low to wholesale customers, and then forcing captive PSCR customers to make up the difference." Attorney General's brief, p. 15.

Quoting from the Commission's June 22, 1989 order in Case No. U-8871 et al., the Attorney General argued that Consumers has fulfilled the predictions that the company would seek to increase the need for capacity to advance the need for purchases from the MCV. The Attorney General states that Consumers entered into wholesale contracts at a time when the utility had excess capacity, but failed to negotiate terms to limit those contracts to the projected duration of that excess capacity. As a result, the Attorney General argues, Consumers created the need for additional capacity. For example, the Attorney General states that in February 1996, at the same time that Consumers asserted a need for additional capacity, the company agreed to increase its firm wholesale capacity commitment to Alpena Power Company. Thus, the Attorney General argues, Consumers grossly undercollects its costs from wholesale purchasers and then seeks to make up the difference from its captive PSCR customers.

Consumers took the position that assigning the average purchased power cost rather than the average overall power supply costs to wholesale customers would result in a large underrecovery of power supply costs, which would also violate prior Commission orders. The company argued that

assigning the average total power supply costs to wholesale customers is consistent with traditional ratemaking treatment of these sales.

The ALJ recommended that the Commission reject the Attorney General's proposed disallowance. In his view, the Attorney General's request essentially asks the Commission to assign a particular power supply source to a group of customers and to alter traditional ratemaking methods without adequate justification on the record.

The Attorney General excepts and argues that the ALJ's conclusion was based solely on the mistaken belief that the Attorney General sought to assign a particular power source to wholesale customers. Rather, the Attorney General argues, the proposal merely seeks to assign appropriate costs to wholesale customers that are not included in the average PSCR costs. The Attorney General reasons that average PSCR costs do not include base or capacity costs attributable to the utility's own generating units,<sup>7</sup> despite the fact that Consumers is selling both capacity and energy to wholesale customers. Therefore, the Attorney General states, appropriate evaluation of the costs to serve those customers must compare prices to the average purchased power costs, which include energy and capacity. In the Attorney General's view, using Consumers' method understates the cost of serving wholesale customers.

Consumers responds that the ALJ properly rejected the Attorney General's proposed disallowance. It asserts that the Attorney General's argument incorrectly assumes that there is a subsidy problem. The company points to the testimony of Mr. Joos, who explained that Consumers assumes wholesale customers pay the same average power supply rate as PSCR customers, which is consistent with

---

<sup>7</sup>PSCR proceedings deal with the company's recovery of fuel and purchased power costs. Other costs to serve customers, including those for operation and maintenance of generating units, are considered in general rate proceedings.

traditional ratemaking principles. Consumers states that contrary to the Attorney General's presumptions, wholesale customers are served by Consumers' total system, including owned generating units, not just purchased power. Consumers states that the tradition of assigning a portion of total operating costs to wholesale customers in general rate cases supports Consumers' position.

Consumers argues that the Attorney General's charge that Consumers has increased firm wholesale sales in order to justify additional capacity from the MCV or other qualifying facilities is false. According to Consumers, firm wholesale sales are a small part of its operations, comprising 2.25% of the company's total system sales during 1996.

In its reply to exceptions, the MPLP asserts that Consumers is obligated to purchase power from qualifying facilities regardless of whether it has any wholesale sales. It states that the Commission-approved contractual obligations do not change depending on the existence of wholesale sales. However, the MPLP states, if the Commission adopts the Attorney General's proposal, it should explicitly determine that its action does not constitute a disallowance.

The Commission finds that the Attorney General's proposed disallowance should be rejected. The proposal is based on a misconception that wholesale customers are properly deemed to be served only from purchased power sources. Rather, wholesale customers are allocated a proportionate burden for generation plant costs in general rate cases. Thus, it would not be appropriate to assign to these customers average purchased power costs rather than average PSCR costs.

#### 4. MCV Delivery Above the Approved Caps

The Attorney General took the position that the Commission should disallow \$237,000 because Consumers had failed to demonstrate that the MCV deliveries above the off-peak caps were truly

economic.<sup>8</sup> This issue arises out of Consumers' failure to identify hour-by-hour deliveries that the utility claimed were economic regardless of the MCV's operating limitations. Consumers' case relied on monthly totals because the company no longer retains in an easily obtainable form information concerning the hourly deliveries. The Attorney General complained that even Consumers' witness Keyser admitted that it is impossible to analyze the economic nature of these deliveries without knowledge of exactly when they occurred. Given this failure of proof, the Attorney General argued, Consumers should be allowed to recover only the average TIC for these deliveries, without the five-mill capacity charge. The result is a \$237,000 disallowance.

Consumers argued that its requested recovery for MCV energy economically delivered above the caps should be accepted. It points to the testimony of its witness Mr. Keyser who explained that the company's request was based upon purchases made from the MCV during off-peak periods when the MCV was the most economic source available to the system. Thus, the company reasoned it is entitled to the requested recovery.

The ALJ agreed with Consumers. He noted that the Attorney General had raised the same issue in Case No. U-10710-R, Consumers' 1995 PSCR reconciliation. The ALJ stated that, in the Case No. U-10710-R proposal for decision, the administrative law judge rejected the Attorney General's arguments, and the Commission did not reverse that portion of the proposal for decision, despite the issue having been raised in the Attorney General's exceptions. Accordingly, the ALJ found that the Commission had considered the issue and rejected the Attorney General's position.

---

<sup>8</sup>Consumers received 88,742 MWh above the 1,041.6 MW off-peak cap. Of that amount, 57,235 MWh were attributed to MCV operating characteristics, for which the company agreed to a price consistent with the Commission direction in Case No. U-10445-R. Thus, the dispute concerns whether the remaining 31,507 MWh were delivered for economic reasons.

The Attorney General excepts and argues that the ALJ recommended that the Commission allow Consumers to recover the five-mill capacity charge for 31,507 MWh despite Consumers' failure to provide evidence to support the economic dispatch of this power. In the Attorney General's view, the only viable means of determining whether the dispatch of the MCV above the caps was indeed economic would be to look at the hourly data, which Consumers failed to provide despite the Attorney General's request. The Attorney General points to the Commission's March 31, 1993 order in Cases Nos. U-10127 and U-8871, in which the Commission placed the burden on the utility to prove that takes above the caps were economically dispatched. The Attorney General argues that Consumers should not be permitted to receive the five-mill capacity charge or the variable energy charge after destroying the evidence that is necessary to determine whether the power was actually economically dispatched.

Consumers argues that the ALJ correctly rejected the Attorney General's arguments that the lack of hourly data should require a disallowance. It states that its request for the variable energy charge and the five-mill capacity charge for this portion of MCV power is consistent with the Commission's order in Case No. U-10445-R, which was reaffirmed in Case No. U-10710-R. Consumers points to the testimony of Mr. Keyser, who explained that the company used the hourly data to compile the monthly data provided to the Attorney General. However, Consumers asserts, it has no business purpose for retaining the hourly data, so the company does not save it in a form that is readily available. Consumers asserts that there is no evidence that the company destroyed any data to avoid scrutiny. Mr. Keyser testified that Consumers has a software program that is capable of computing the hourly values. He further indicated that with the billing data that Consumers provided to the Attorney General, "[s]omeone could write a program and access that data and recompute the hourly data if they wanted to." 4 Tr 486.

Consumers argues that there is no evidence that the company's monthly totals are incorrect. In Consumers' view, the Attorney General's unfulfilled request for hourly data does not negate the company's evidence that it economically dispatched 31,507 MWh of MCV output above the off-peak caps during 1996.

Consumers goes on to note that it has given the Attorney General and other parties hourly data when it was available in previous years. See, e.g., Case No. U-10155-R. However, the company reiterates, there is no business reason for the company to retain that data. In its view, the Commission should not "impose an unnecessary requirement for the company to maintain such hourly data, and should not order a disallowance simply because the accounting data is maintained on a monthly, rather than hourly, basis.

Consumers also disputes the amount of the proposed disallowance. It states that Mr. Keyser testified that Consumers dispatched MCV energy at the sum of the MCV's variable and fixed energy charges, about \$21.00 per MWh. Had cheaper energy been available during the hours that the 31,507 MWh of MCV energy was dispatched, says Consumers, the cheaper energy would have been used instead of the MCV energy. Therefore, Consumers argues, even if the Commission determines that the five-mill capacity charge should be disallowed, the company should still be entitled to recover the variable energy charge that was part of the MCV dispatch price for energy delivered above the caps. If the Commission allows Consumers to recover the variable energy charge for this portion of the MCV energy, Consumers asserts that the appropriate disallowance would be \$157,548.

The Commission is persuaded that the disallowance proposed by the Attorney General should be adopted. Pursuant to prior Commission orders, Consumers is permitted to recover the variable energy charge plus a five-mill capacity charge for energy delivered from the MCV above the off-peak caps only

when that energy is delivered for economic reasons. The burden is on Consumers to demonstrate that deliveries of MCV power above the off-peak caps are economically dispatched, which provides a business reason to retain the data. Consumers' failure to retain the hourly information and to make it available in a reasonable format for parties to review leaves the company unable to sustain that burden in the face of a challenge. The cited Commission orders do not persuade the Commission of a different conclusion.

The Commission's September 12, 1997 order in Case No. U-10710-R found the exceptions to be moot in light of the Commission's May 22, 1997 order in Case No. U-10445-R. The Commission never addressed the issue of whether hourly data must be provided upon request to establish the economic delivery of MCV energy above the off-peak caps. In the Commission's view, the requirement that Consumers' presentation conform with the determinations made in Case No. U-10445-R was sufficient.

Moreover, the Commission is not persuaded that Consumers' calculation of the disallowance should be adopted. Given the lack of evidence that the MCV power taken above the off-peak caps was economically dispatched, the Commission concludes that the appropriate pricing for this energy is the average TIC, as calculated by the Attorney General. Therefore, a \$231,000 disallowance is warranted.

##### 5. 1996 Booked Adjustments from Prior Years

Consumers included in its 1996 booked cost of fuel and purchased power, amounts that it had erroneously not included in its 1994 and 1995 PSCR cases. Consumers stated that, although it had credited revenues to PSCR customers for sales of excess MCV capacity to third parties, it had neglected to impute the associated costs to PSCR customers.

ABATE identified \$658,097 of these MCV costs that were booked in 1996. ABATE took the position that it is inappropriate to include these costs in 1996 and that no provision in Act 304 permits such inclusion. Consumers took the position that it is common for expenses incurred in one year to be booked in the following year and that pursuant to Act 304, it is proper to recover those costs in the year in which they are booked. It cites Section 6j(1)(a) of Act 304, MCL 460.6j(1)(a); MSA 22.13(6j)(1)(a), which refers to the recovery of “booked costs.”

The ALJ recommended that the Commission adopt ABATE’s proposed disallowance. In his view, Consumers’ failure to book these costs in 1994 and 1995 was the result of the company’s own oversight and not the function of accounting timing differences that might occur as a matter of course. He found that Consumers should not be allowed to forever go back and correct prior years, “lest we never close the books on a plan year.” PFD, p. 37.

Consumers excepts and argues that these costs were booked in 1996 and are therefore properly included in this reconciliation. It argues that the record reflects that because the revenues from nonjurisdictional sales were booked as a reduction to power supply costs in previous years, it is necessary to book an equal amount of PSCR costs to ensure that those revenues are treated as nonjurisdictional. Consumers claims that the 1996 adjustments for costs not previously included are consistent with the Commission’s rulings in Case No. U-10127 and Case No. U-10710-R. Consumers asserts that the ALJ’s conclusion that the adjustment was necessary because of Consumers’ oversight or negligence is not correct and is not supported by the record. It insists that the fact that prior years’ costs need adjustment does not render the adjustments unreasonable.

Consumers argues that its proposal is consistent with past practice for estimates that are later corrected when the actual numbers are known. Further, it contends that the concept allows the Commission to recognize cost reductions related to previous years as well as cost increases. These costs were booked in 1996, insists Consumers, and are thus entitled to 1996 recovery.

In response, the Attorney General argues that Consumers' claim that no party objected to the reasonableness of these costs is baseless and misleading because no party had an opportunity to audit or challenge them after the ALJ struck the related evidence. If the Commission determines that these 1994 and 1995 costs should be considered in this case, the Attorney General argues, the case must be reopened to allow an evidentiary review of reasonableness and prudence. Moreover, the Attorney General argues, this case was noticed as one pertaining to 1996 revenues and expenses. Pursuant to Act 304, says the Attorney General, 1994 and 1995 costs are irrelevant to a 1996 PSCR reconciliation.

Finally, the Attorney General argues, the Commission should note the manner in which the inclusion of these costs came to light. The Attorney General asserts that Consumers did not mention the inclusion of these costs until it disputed the Staff's calculation of a disallowance based on 1996 MCV costs. In the Attorney General's view, Consumers should not be rewarded for its "trickery and attempted deceit." Attorney General's reply to exceptions, p. 5.

ABATE agrees that the ALJ properly removed from this case MCV-related costs incurred in 1994 and 1995. ABATE asserts that the record demonstrates that the disputed amount was the result of adjustments made during 1996 for the value of nonjurisdictional MCV power sold during 1994 and 1995, because Consumers failed to correctly account for revenues from third-party sales.

ABATE points out that for the past two plan years, Consumers' witnesses have submitted sworn testimony and exhibits establishing the validity and correctness of the data presented. ABATE challenges Consumers' lack of citation to the previous record for indications that would indicate the previous submissions were only estimates that would need to be corrected when the actual numbers became known. ABATE asserts that the Commission has issued final orders in those previous cases, resolving ratepayers' obligations to Consumers for the cost of power for those years. In ABATE's view, it is simply too late to correct those years now. It states that Act 304's provision for limited exemption from the prohibition against retroactive ratemaking was never intended to allow the utility to search for any accounting error committed by the company and bring it forward as a current year expense. In ABATE's view, there is no statutory authority for the company to present in a later case PSCR expenses that were known but not presented in connection with the proper year's reconciliation case.

The Commission finds that these costs should be removed from consideration in this case. This is not an instance in which actual data is now available to displace a previously estimated amount. Nor is it an amount that was appropriately booked as a 1996 PSCR cost. Rather, these amounts relate to 1994 and 1995 costs. Consumers does not present a persuasive case concerning why these costs could not have been included in the prior cases. The manner in which Consumers treated these costs is also not consistent with correcting a prior error. The company did not separate them out for special treatment. Instead, the company merely included them in a line item together with other MCV costs. The issue arose in rebuttal testimony because of the company's challenge to the Staff's calculation of an unrelated disallowance. Thus, the parties were not put on notice of the nature of these costs until it was too late to

effectively review the amount or propriety in this case. The Commission is not persuaded that under these circumstances it should accommodate Consumers' desire to correct its alleged previous error.

#### 6. Use of MCV Capacity Above Plan Projections

ABATE argued that Consumers dispatched MCV capacity at a higher level than that proposed and approved in the 1996 plan case. Because the MCV is one of the more expensive sources for obtaining power, ABATE argued that the dispatch resulted in \$17.4 million in excess costs. Because the plan that the Commission approved did not reflect the high level of takes from the MCV, ABATE argued, Consumers incurred these costs through actions that were "contrary" to the Commission's order in the plan case. Therefore, ABATE argued, the company must prove by clear and convincing evidence that the excess expenses were beyond the ability of the utility to control through reasonable and prudent actions. MCL 460.6j(15); MSA 22.13(6j)(15). ABATE charged that Consumers directly controlled the amount of power taken from the MCV and that it therefore could not meet the statutory evidentiary burden.

Consumers responded that its dispatch of the MCV was not contrary to any Commission order and was in fact authorized by the Commission's May 26, 1993 order in Case No. U-10127 and the November 14, 1996 order in Case No. U-10685 et al. In the company's view, changing the dispatch percentages from the forecasted availability does not constitute actions precluded by or contrary to a Commission plan order. It claims that such variations will always occur.

The ALJ found that Consumers' dispatch of the MCV above forecasted and approved levels was not contrary to the plan order and that the Commission approved inclusion of MCV costs in the orders in Case No. U-10127 and Case No. U-10685 et al. Therefore, the ALJ reasoned, Consumers need not

prove by clear and convincing evidence that these purchases were outside of its ability to control with reasonable and prudent actions. He thus rejected ABATE's proposed disallowance.

ABATE excepts and argues that Consumers provided less power during the plan year than it anticipated, and yet the cost of that power was higher than projected. In its view, the Commission's order in the plan case cannot be read to authorize Consumers to provide less power at a higher price. It argues that despite the fact that less energy was sold and that more low cost energy was available, Consumers claims to have underrecovered its PSCR costs. Further, ABATE argues, Consumers should not be rewarded for failing to meet its statutory obligation to provide realistic projections of its actual costs in its PSCR plan case. There is no indication, argues ABATE, that these costs were outside of the ability of the utility to control. Thus, ABATE contends, the Commission should disallow \$17.4 million.

Consumers responds that the ALJ properly rejected ABATE's proposed disallowance based on his conclusions that (1) the Commission had given prior approval of the MCV cost levels for Act 304 purposes, (2) Consumers had done nothing contrary to the Commission's order in the plan case, and (3) ABATE presented no expert witness to support its argument.

Consumers argues that the costs ABATE seeks to disallow are not "excess expenses" as that term is used in Subsection 6j(15) of Act 304, MCL 460.6j(15); MSA 22.13(6j)(15), and were not incurred contrary to any Commission order. Rather, Consumers argues, its purchases from the MCV were consistent with several Commission orders.

The Commission finds that ABATE's proposed disallowance must be rejected. The amounts approved for recovery of MCV-related costs are based on prior Commission approval of the settlement agreements and the Commission's prior orders. In the Commission's view, there is no legitimate basis

upon which to impose an enhanced burden of proof on Consumers as proposed by ABATE. ABATE points to no action by Consumers that violates a Commission finding or directive on a contested issue.

### Wheeling Revenues

In Case No. U-9346, the Commission set Consumers' rates based in part on the assumption that the company would realize \$10.6 million of wheeling revenues. The Commission also instituted what is commonly referred to as an 80/20 sharing mechanism for wheeling revenues in excess of the \$10.6 million projected. That mechanism provides that as part of the annual PSCR reconciliation case proceedings, the company must refund to ratepayers 80% of wheeling revenues realized in excess of the base amount established in the rate case. That mechanism was intended to give the company an incentive to build its wheeling revenues, while protecting ratepayers from too low a projection in the rate case. In its next electric general rate case, Case No. U-10335, Consumers directly challenged the 80/20 sharing mechanism and proposed that it be eliminated. In the May 10, 1994 order in Case No. U-10335, the Commission discussed and rejected that proposal. In Case No. U-10685, Consumers' most recent electric general rate case, the company's application, testimony, and exhibits did not challenge the existing 80/20 sharing mechanism. However, the company proposed a lower amount for assumed wheeling revenue for purposes of setting rates. Following the issuance of the February 5, 1996 order in Case No. U-10685, the company ceased providing the reports required under the provisions of the 80/20 sharing mechanism. The Staff took no action concerning the lack of filed reports.

In the present case, Consumers did not propose to refund any wheeling revenues. It took the position that the Commission's silence in Case No. U-10685 on the issue had eliminated the 80/20 sharing mechanism for wheeling revenues.

Staff witness, Ronald J. Ancona, proposed that the Commission adjust Consumers' underrecovery by \$1.28 million to recognize 80% of wheeling revenues over the amount assumed for that item in Consumers' last rate case, Case No. U-10685. ABATE supported the Staff's position.

The ALJ concluded that the Commission must have intended to remove the 80/20 sharing mechanism in the latest rate case order, despite the lack of explicit discussion on the issue.

The Staff, ABATE, and the Attorney General except and argue that the ALJ incorrectly concluded that the Commission reversed itself in silence. ABATE states that Consumers' claim is preposterous. ABATE points out that Consumers admitted that at no time in the context of the application in the last general rate case did Consumers request that the Commission relieve the company from the obligation to share wheeling revenues. At no time in the company's briefs, in the proposal for decision, or in the company's exceptions was the issue of whether the sharing mechanism should remain in place raised.

The Attorney General finds disturbing the ALJ's conclusion that the Commission's silence on an issue that had not been raised resulted in reversing the Commission's prior orders. The Attorney General argues that the Commission may only act through its orders, not through silence. Moreover, although the Commission is free to revise previously adopted mechanisms, it may not legally do so without reasoning or evidentiary support.

The Attorney General argues that suggesting that the issue was implicitly raised in the inclusion of certain numbers in the rate case will add unnecessary complexity to every future rate case. If the Commission finds that it may reverse itself in silence on an issue never explicitly raised in a proceeding, the Attorney General argues, each and every utility document must be subjected to hours of exhaustive and extensive examination in Commission hearings so that no issue is left uncovered again.

Consumers responds that the ALJ reached the correct conclusion. The company insists that the record in Case No. U-10685 was not silent on the issue of wheeling revenues. It asserts that the company presented a calculation of miscellaneous revenues and a projection of wheeling revenues. These figures were then adopted by the Staff in calculating the base amount from which the Staff witness determined the amount he proposed for sharing. Consumers insists that because the Commission did not remove wheeling revenues from miscellaneous revenues, it confirmed the company's approach to the issue.

The Commission finds that Consumers' position should be rejected and that the refund proposed by the Staff should be adopted. The Commission's February 5, 1996 order in Case No. U-10685 did not eliminate the 80/20 sharing mechanism for wheeling revenues, although it did adopt the company's projection of wheeling revenues to be assumed in rates. In establishing the 80/20 sharing mechanism in Case No. U-9346, the Commission recognized that wheeling revenues were difficult to project with certainty. Therefore, the Commission established a base amount of assumed wheeling revenues for purposes of setting rates. If Consumers realized wheeling revenues beyond the assumed amount, 80% of the excess would be returned to ratepayers, while the company would be allowed to keep 20% as an incentive to increase those revenues. As noted above, the Commission explicitly rejected Consumers' proposal to eliminate the mechanism in Case No. U-10335. It borders on the absurd to argue that the Commission reversed itself in Case No. U-10685 without the issue even being raised for discussion.

A review of the record in Case No. U-10685 reflects that the company did not, either implicitly or explicitly, raise a question regarding whether the sharing mechanism should be continued. When the Commission approved the projected value for wheeling revenues as a part of miscellaneous revenues, it

changed only the base amount assumed in rates.<sup>9</sup> It did not alter the existence of and necessity for the sharing mechanism. Thus, there was no need for the Commission to remove wheeling revenues from miscellaneous revenues in order to continue the mechanism it had put in place in one general rate case and reaffirmed in the next general rate case.

Nor can it reasonably be inferred that the sharing mechanism must have been removed because the Staff did not object to the lack of filed revenue reports. Utilities file numerous reports with the Staff on an ongoing basis. It is not surprising therefore that any particular unfiled report might not be missed until needed for some purpose. Failure to object to the nonfiling of a report is not an admission that the report need not be filed. Moreover, the Staff's action or failure to act cannot change the Commission's prior order, which was approved after a contested hearing involving other parties in addition to the Staff.

Accordingly, Consumers' proposed reconciliation should be adjusted to credit \$1.28 million to ratepayers, as calculated by the Staff.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 et seq.; MSA 22.151 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; MSA 22.1 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; MSA 22.13(1) et seq.; 1982 PA 304, as amended, MCL 460.6h et seq.; MSA 22.13(6h) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACCS, R 460.17101 et seq.

---

<sup>9</sup>In fact, Consumers' projection of wheeling revenues, which the Commission adopted, was lower than had been included in rates in Case No. U-10335.

b. Consumers' proposed reconciliation of its 1996 PSCR costs and revenues, as modified by this order, should be approved.

c. Consumers experienced an underrecovery of \$11,842,079, including interest through December 31, 1996.

d. Consumers should be authorized to collect its underrecovery of 1996 PSCR costs, adjusted to reflect unrefunded balances, conservation refunds, and applicable interest, as provided on Exhibit A attached to this order.

e. Consumer's application for leave to appeal the ALJ's June 30, 1997 ruling should be denied.

**THEREFORE IT IS ORDERED that:**

A. Consumers Energy Company is authorized to collect its 1996 PSCR underrecovery, adjusted to reflect unrefunded balances, conservation refunds, and applicable interest, as provided on Exhibit A attached to this order, during its October 1999 billing cycle. Consumers Energy Company shall file the appropriate tariff sheets at least 14 days prior to implementing the surcharge.

B. Consumers Energy Company's application for leave to appeal the Administrative Law Judge's June 30, 1997 ruling is denied.

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

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

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand  
Chairman

( S E A L )

/s/ David A. Svanda  
Commissioner

/s/ Robert B. Nelson  
Commissioner

By its action of August 31, 1999.

/s/ Dorothy Wideman  
Its Executive Secretary

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

MICHIGAN PUBLIC SERVICE COMMISSION

---

Chairman

---

Commissioner

---

Commissioner

By its action of August 31, 1999.

---

Its Executive Secretary

In the matter of the application of )  
**CONSUMERS ENERGY COMPANY** for a )  
reconciliation of its power supply costs )  
and revenues for 1996. )  
\_\_\_\_\_ )

Case No. U-10973-R

Suggested Minute:

“Adopt and issue order dated August 31, 1999 reconciling Consumers Energy Company’s power supply costs and revenues for 1996, as set forth in the order.”