

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of)	
CONSUMERS ENERGY COMPANY for certain)	
ratemaking approvals in connection with the)	Case No. U-11941
MCV power purchase agreement auction process.)	
_____)	

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 ON REHEARING

I.

HISTORY OF PROCEEDINGS

On April 30, 1999, the Commission issued an order (April 30 order) in this proceeding concerning the requests by Consumers Energy Company (Consumers) for accounting and ratemaking treatment regarding its March 5, 1999 power purchase agreement (agreement) with PECO Energy Company (PECO). The agreement provided that Consumers would be the direct purchaser of power from the Midland Cogeneration Venture Limited Partnership (MCV), an affiliate of Consumers, pursuant to its power purchase agreement (PPA) with MCV, but would then resell capacity and energy from the MCV to PECO. The Commission gave conditional approval to some of Consumers' requests for accounting and ratemaking treatment to the extent that those requests do not increase customer rates from their level

absent the agreement, but did not grant other requests because the heavily redacted copy of the agreement filed by Consumers made it impossible to determine the impact and because future true-up proceedings would be negatively affected.

On June 1, 1999, petitions for rehearing or clarification were filed by Consumers, the Association of Businesses Advocating Tariff Equity (ABATE), Attorney General Jennifer M. Granholm (Attorney General), and the Michigan Petroleum Association and Michigan Association of Convenience Stores (MPA/MACS). By June 22, 1999, responses were filed by Consumers, ABATE, the Attorney General, Energy Michigan, and the Michigan Chamber of Commerce (Michigan Chamber).¹ A response was filed by MPA/MACS on June 30, 1999. On July 2, 1999, MPA/MACS filed a reply to Consumers' response.

II.

POSITIONS OF THE PARTIES

Consumers

In its petition, Consumers indicates that the Commission conditionally granted its requests that the contract residual cost in the agreement be a recoverable cost of service item in any future rate proceeding and that rates be approved to allow recovery of the retail open access customers' share of the contract residual cost amounts--the condition being that the approvals were granted only to the extent that the resulting rates are lower than or equal to the amount that they would have been absent the agreement.

¹ABATE filed both a response on June 15, 1999, and a supplemental response on June 22, 1999.

Consumers indicates that it seeks clarification of whether the ratemaking treatment described in its petition is consistent with the standard in the April 30 order, and, if so, that the Commission adopt that treatment.

Specifically, Consumers requests that the Commission freeze, for the term of the agreement, the applicable level of approved-for-recovery costs from the PPA and other power purchase agreements, based on the record in the pending 1997 power supply cost recovery (PSCR) reconciliation proceeding, Case No. U-11180-R. Consumers indicates that this is identical to the relief that the company has asked for in that proceeding, except that the power purchase agreement costs would be segregated from other costs and the freeze would extend until September 15, 2007. According to Consumers, this approach guarantees that bundled service customers would not experience any rate increase as a result of the agreement. Consumers also states that this approach addresses the concern expressed in the April 30 order that capacity rates in the agreement might be higher than those approved by the Commission since the freeze would only apply to Commission-approved cost levels. Consumers indicates that the company “would bear the risk that the PECO transaction leads to the incurrence of costs which exceed what is included in the frozen rate for bundled customers.” Consumers’ petition, p. 3.

Consumers also states that the inclusion of the agreement in the annual true-up of stranded costs would be acceptable to the company with the following clarifications: “(i) that the Commission still intends for the true-up methodology for the marketprice variations to operate as described in item 2 on page 18 of the January 14, 1998 Order in Case No. U-11290 et al., and (ii) for true-up purposes, the market value of the PPA capacity is to be compared against the cost of the PPA capacity reflected in the stranded cost calculation adopted by the Commission in the January 14, 1998 order in Case No. U-11290 et al.” Consumers’ petition, pp. 3-4.

In its reply, Consumers notes that, in their petitions, ABATE and MPA/MACS argue that the April 30 order could have the effect of permitting recovery of amounts for MCV capacity above the avoided cost. According to Consumers, the proposed rate freeze will ensure that only Commission-approved power purchase costs will be recovered. In addition, Consumers contends that the freeze will address concerns expressed by ABATE and the Attorney General that customers will be exposed to higher replacement power costs.

With regard to the Attorney General's argument concerning a new category of stranded cost, Consumers "believes that the Attorney General's contention is more about metaphysical speculation than it is about substantive, real rate impacts." Consumers' reply, p. 3. Consumers indicates that it proposes to "pass along the [retail open access] customer's share of the cost savings from the PECO transaction to those [retail open access] customers through a reduction in the transition charge." Consumers' reply, pp. 3-4. Accordingly, Consumers contends that, although there are cost savings for customers, there is no new category of stranded cost resulting from the agreement.

Finally, Consumers contends that the MPA/MACS simply repeats arguments about the auction process that the Commission had previously heard and rejected.

ABATE

ABATE contends that the conditional approval granted in the April 30 order might have "the unintended consequence of contradicting a long line of Commission decisions regarding the ratemaking treatment accorded to MCV capacity and denying [Consumers] the ability to recover capacity costs exceeding Commission determinations of the avoided cost of such power." ABATE's petition, p. 3.

ABATE notes that the Consumers' contract capacity payment obligation under the PPA is greater than

the avoided cost that the Commission has determined to be recoverable from Consumers' customers. According to ABATE, if the April 30 order allowed Consumers to collect more than the previously determined avoided cost, then the result would be in conflict with numerous prior Commission orders and would be in violation of the Public Utility Regulatory Policies Act of 1978. ABATE requests that the Commission clarify that that was not the intent of the April 30 order.

ABATE also requests that the Commission clarify the statement in the April 30 order that the agreement's impact on rates will be determined in conjunction with the annual true-up proceedings. ABATE notes that the suspension of Consumers' PSCR clause is scheduled to end on January 1, 2002. Accordingly, "ABATE seeks clarification from the Commission that pursuant to PSCR proceeding, PSCR customers of [Consumers] would not be required to pay more for capacity and/or energy for any re-purchases from the MCV or for any capacity and/or energy [Consumers] purchased to replace any portion of the assigned MCV power than would be the case absent the agreement." ABATE's petition, p. 9.

In its response to Consumers' petition, ABATE argues that Consumers has mischaracterized the April 30 order. According to ABATE, the Commission determined that the contract residual costs could be included in determining future revenue requirements only if the total cost of the agreement results in lower rates for customers than would occur absent the agreement and if the agreement, taken as a whole, helps to develop a well-functioning electric market, consistent with the goals of retail open access.

With respect to Consumers' request to freeze power purchase agreement rates through September 15, 2007, ABATE indicates that it opposed the proposed freeze through 2001 in Case No. U-11180-R and that the current Consumers proposal is worse. First, ABATE claims that the proposed freeze will

deprive customers of the benefits of obtaining power at costs lower than the frozen level and will freeze into customer rates costs of MCV power that customers will not receive. Second, ABATE argues that it would be unreasonable to freeze into rates costs associated with all power purchase agreements when the only rationale for doing so relates to the MCV costs. Third, ABATE indicates that rates should not be frozen prior to performing an analysis of whether customers benefit as a whole from the agreement. Fourth, ABATE claims that a freeze will result in the over-recovery of capacity costs based upon the actual dispatch of MCV capacity in 1997. Finally, ABATE notes that the Commission has expressly denied approval of any MCV capacity costs pursuant to MCL 460.6j(13); MSA 22.13(6j)(13), and argues that a freeze is an attempt to avoid that determination.

With respect to Consumers' requested clarifications of the true-up process, ABATE indicates that the first one is unnecessary because there is nothing in the April 30 order suggesting an alteration of the true-up process. According to ABATE, the second clarification is vague and confusing because it is unclear what Consumers means by the market value of the PPA capacity. ABATE claims that Consumers' requested clarification could have the effect of removing mitigation or netting of costs from the true-up proceeding and that the Commission should reject the requested clarifications.

In its supplemental response, ABATE expands its objection to Consumers' proposed clarifications. ABATE notes that the Commission's original calculation of stranded cost was based on an estimate of 2.9¢ per kilowatt-hour (kWh) for the market price of power. According to ABATE, Consumers' request for a clarification "is merely a sly back-door attempt to undo the Commission's decisions in its prior orders and to lock in that **estimate** as the market price for the MCV PPA. The Commission should not be so misled." ABATE's supplemental response, p. 2, (emphasis in the original).

Attorney General

The Attorney General contends that the April 30 order is either in conflict with prior Commission orders or creates an unintended ambiguity. Because Consumers was not required to enter into the agreement, the Attorney General claims that any costs arising out of the agreement do not meet the definition of stranded costs if they are different from pre-existing costs. The Attorney General requests that the Commission clarify that the April 30 order was not intended to create a new category of stranded cost or to amend prior Commission orders.

The Attorney General argues that it is not clear from the April 30 order whether the comparison of costs under the agreement with the costs that would have occurred absent the agreement includes the total costs of any needed replacement capacity and energy. According to the Attorney General, the Commission should “clarify that all calculations must be performed on a consistent, directly comparable basis, so that at a minimum the average residual cost charge cannot exceed what the average MCV-related stranded cost charge would have been absent the PECO agreement.” Attorney General’s petition, p. 4. In addition, the Attorney General argues that the April 30 order did “not clearly indicate that the sum of the Contract Residual Costs and replacement power costs must be equal to or lower than the MCV costs absent the PECO agreement for [Consumers] to recover the full amount of the Contract Residual Costs.” Attorney General’s petition, p. 5.

Finally, the Attorney General requests that the Commission issue an order clarifying that recovery of costs under the agreement cannot be fixed in advance because the annual market price for use in a true-up proceeding is unknown at this time.

In her response to Consumers' petition, the Attorney General argues that the company's PSCR rate freeze is a new proposal without any evidence to support it. The Attorney General contends that the Commission cannot freeze rates at a level that includes MCV capacity and energy costs when Consumers' customers will not be receiving power from that transaction. According to the Attorney General, "the Court of Appeals has just ruled that specious descriptions of offsetting transactions which have no immediate formal change in tariff rates does [sic] not avoid the requirements of MCL 460.6a(1); MSA 22.13(6a)(1)." Attorney General's response, p. 2. The Attorney General argues that the proposed rate freeze does not satisfy the contested case requirements for the term of the agreement and that MCL 460.6j(12); MSA 22.13(6j)(12) will require a reconciliation in future years.

With respect to Consumers' requested clarifications, the Attorney General argues that the company is seeking Commission concurrence in new positions rather than clarification of prior orders.

MPA/MACS

MPA/MACS argue that the Commission should clarify that the April 30 order did not grant Consumers any ratemaking or accounting authority to recognize costs above the overall avoided costs for the PPA that the Commission had previously determined. MPA/MACS claim that Consumers is attempting to recover the differential between the avoided cost determined by the Commission and the higher costs in the PPA. MPA/MACS argue that the Commission may not legally grant Consumers' request even if there is no immediate rate increase. According to MPA/MACS, the effect of Consumers' proposal is to increase the cost of service, which requires prior notice and hearing pursuant to MCL 460.6a(1); MSA 22.13(6a)(1). Moreover, MPA/MACS argue that it would be bad public policy for the Commission to suddenly reverse its long-held precedent of not allowing recovery of costs above avoided

costs. MCA/MACS request that the Commission clarify that it has not authorized recovery of MCV costs above the avoided cost previously authorized by the Commission and that it has not approved recovery of cost increases incurred for replacement power costs to make up for the loss of capacity and energy sold to PECO.

MMPA/MACS claim that the Commission's conditional approval of contract residual costs under the agreement is difficult to enforce because it would require a "redispatch" of Consumers' costs assuming retention of all MCV capacity at avoided cost rates in order to determine if the rates with the agreement are no higher than those without the agreement.

Finally, MPA/MACS argue that the Commission should defer ruling on Consumers' request and on motions for rehearing and clarification until completion of Consumers' stranded cost true-up proceeding and the complaint filed by ABATE in Case No. U-11560.

Energy Michigan

Energy Michigan argues that Consumers' proposed rate freeze should be rejected because it includes non-MCV power agreements and no explanation has been given why this is necessary or appropriate. Energy Michigan claims that the rate freeze will allow Consumers to buy out the contracts of suppliers in the future when power costs are higher and keep the profits from the difference between the frozen PSCR payments and the discounted cost of the buyout. According to Energy Michigan, this scheme would allow Consumers to avoid the mitigation requirements contained in the Commission's stranded cost true up process.

Michigan Chamber

The Michigan Chamber argues that Consumers' petition fails to meet the standard for rehearing. According to the Michigan Chamber, the April 30 order did not grant the requested approvals without qualification because there was insufficient information to calculate the total cost of the agreement and Consumers has not provided the necessary information in its petition. Hence, the Michigan Chamber claims that the "Commission's questions are no more answerable today than they were on April 30." Michigan Chamber's response, p. 4. Accordingly, the Michigan Chamber argues that Consumers' proposal to freeze purchased power agreement rates should be denied because it fails to address the preconditions that the Commission laid out for determining whether customers will benefit from the agreement.

The Michigan Chamber requests that Consumers' proposed clarifications be denied because they are unclear. In addition, the Michigan Chamber claims that they are worded in such a way that, if taken out of context, the proposed clarifications could be interpreted as modifying the Commission-approved true-up process.

III.

DISCUSSION

Standard for Rehearing

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

incorrect or improper because of errors, newly discovered evidence, or unintended consequences of the decision, the Commission will not grant a rehearing.

Impact on Rates and Cost of Service

Although they differ in specific details, all of the petitions for rehearing express concerns regarding the impact of the April 30 order as it relates to rates and cost of service to Consumers' customers.

Consumers notes that the approvals in the April 30 order are conditioned upon there being no rate increases for the company's customers from what they would have been absent the agreement. To assure that no rate increase occurs, Consumers proposes to extend the PSCR rate freeze proposed in Case No. U-11180-R, as it relates to purchased power agreements, from the period ending December 31, 2001 to September 15, 2007, which is the end of the agreement. Consumers argues that this will "guarantee that bundled service customers will not experience any rate increase as a result of the PECO transaction."

Consumers' petition, p. 2.

ABATE and MPA/MACS acknowledge that the April 30 order limits its approval to those situations where the resulting rates with the agreement are equal to or less than those without the agreement, but argue that that condition alone is insufficient because, even if the condition were met, the cost of service with the agreement could still exceed the avoided cost previously approved by the Commission, resulting in an increase in the cost of service. The parties argue that the April 30 order violates existing state law.

For example:

The MPA/MACS urges that the Commission may not legally grant [Consumers'] request for accounting and ratemaking authority to include these amounts even if there is no immediate rate increase. First, MPA/MACS urges that the effect of [Consumers']

proposal is to increase the cost of service to ratepayers in a manner which requires prior notice and hearing under Section 6a. This case is distinguishable from other cases in which the Commission granted recognition of certain costs in situations where there was not a rate increase. In those cases, the Commission was not overturning previous precedent affirmed by the courts in undertaking its action. Instead, it was approving recognition of an expense in the context of offsetting expenses or in the context of obtaining lower overall rates (or at least no rate increase). That is not true here, as the effect of allowing [Consumers'] accounting and ratemaking authority to include in its cost of service amounts above the avoided costs for the MCV does represent an increase in the cost of service and ultimately in rates.

MPA/MACS's petition, p. 13.

The Attorney General notes that the sale of power to PECO pursuant to the agreement may require the purchase of replacement power at a higher price than the Commission had allowed for MCV, which would result in higher costs. The Attorney General requests that the Commission rule that the total cost of replacement power must be taken into account before allowing recovery of the contract residual costs in the agreement.

The issue in the context of this proceeding largely involves the interpretation of existing state law regarding ex parte approval. MCL 460.6a(1); MSA 22.13(6a)(1) provides in part:

When a finding or order is sought by a gas or electric utility to increase its rates and charges or to alter, change, or amend any rate or rate schedules, the effect of which will be to increase the cost of services to its customers, notice shall be given within the service area to be affected. The utility shall place in evidence facts relied upon to support the utility's petition or application to increase its rates or charges, or to alter, change, or amend any rate or rate schedules. After first having given notice to the interested parties within the service area to be affected and affording interested parties a reasonable opportunity for a full and complete hearing, the commission, after submission of all proofs by any interested party, may in its discretion and upon written motion by the utility make a finding and enter an order granting partial and immediate relief. A finding or order shall not be authorized or approved ex parte, nor until the commission's technical staff has made an investigation and report. An alteration or amendment in rates or rate schedules applied for by a public utility that will not result in an increase in the cost of service to its customers may be authorized and approved without notice or hearing.

In the April 30 order, the Commission noted that it “has consistently held that this provision permits ex parte approval if it does not result in increased rates for the utility’s customers.” April 30, 1999 order, p. 20. Consistent with that policy, the Commission granted various approvals in the April 30 order, “but only to the extent that the resulting rates are lower than or equal to the amount they would be absent the agreement.” April 30, 1999 order, pp. 22-23.

On June 11, 1999, the Court of Appeals issued an opinion in Docket No. 207993. That opinion involved the appeal of the Commission’s November 25, 1997 order (November 25 order) in Case No. U-11588. In that order, the Commission, consistent with its long-held interpretation of state law, granted ex parte approval of an application by The Detroit Edison Company for a \$38 million rate reduction. In its opinion, the Court of Appeals held that the Commission could not give ex parte approval, even though it resulted in a rate reduction, because the effect was to increase the cost of service from that previously authorized in a 1988 settlement.

This opinion of the Court of Appeals, issued after the April 30 order, is clearly on-point with respect to the issues in this proceeding. The Court of Appeals concluded that the November 25 order had the effect of increasing the cost of service above the level previously approved by the Commission in the 1988 settlement. The parties contend that the conditional approvals granted in the April 30 order have the effect of increasing the cost of service above the avoided cost previously approved by the Commission in numerous PSCR and other proceedings. Hence, the parties contend that the Commission may not grant approvals, even conditional approvals, ex parte based on the Court of Appeals decision.

Because of the Court of Appeals decision, the Commission concludes that the April 30 order needs to be modified to avoid the possibility that ex parte approvals could be granted for recovery of MCV

power above the previously-authorized avoided cost. This can be accomplished by adopting, with modification, Consumers' proposal that the PSCR rate freeze being addressed in Case No. U-11180-R be extended through September 15, 2007. That proceeding was initiated as a result of a proposal by Consumers in Case No. U-11290 et al. to suspend its PSCR clause during the phase-in period for retail open access and substitute a base rate adjustment during that period. In the January 14, 1998 order (January 14 order) in Case No. U-11290 et al., the Commission ruled that Consumers' PSCR clause should be suspended beginning with the first billing cycle in the month after the open access load reaches 150 megawatts (MW), using an interim base rate adjustment of 0.27¢/kWh proposed by the Commission Staff. Subsequently, Consumers proposed an alternative PSCR suspension process, as follows:

Consumers indicates that the PSCR suspension process in the January 14 order will require substantial duplicative litigation and proposes the following alternative process: (1) establish an interim base rate adjustment of 0.27¢/kWh effective January 1, 1998; (2) suspend the PSCR clause immediately; (3) have the interim base rate adjustment remain in effect until the first billing cycle in the month after open access load reaches 150 MW; (4) determine the permanent base rate adjustment in the 1997 PSCR reconciliation proceeding; (5) have the permanent base rate adjustment go into effect in the first billing cycle in the month after open access load reaches 150 MW; (6) if the permanent base rate adjustment is less than 0.27¢/kWh, then Consumers would refund the difference for the period from January 1, 1998 to the implementation of the permanent base rate adjustment; (7) the 1998 PSCR plan reconciliation proceeding would be terminated; (8) Consumers would file the 1997 PSCR reconciliation on an expedited basis.

February 11, 1998 order in Case No. U-11290 et al., pp. 9-10.

In its February 11, 1998 order on Case No. U-11290 et al., the Commission reconsidered its decision in the January 14 order in light of a subsequent Court of Appeals order, as follows:

Consumers raises a valid concern regarding the PSCR suspension process in the January 14 order, especially in light of the opinion by the Court of Appeals issued on January 20, 1998 in Dockets Nos. 191946, 192000, 192001, and 192515. In that opinion, the Court held that the Commission had authority to suspend PSCR clauses without holding contested case hearings if the suspension does not result in rate increases.

The Court found that a potential reduction in a PSCR factor, which may result in a future rate reduction, does not constitute a rate increase and that parties have an adequate opportunity for an investigation if power supply costs decline. In addition, the Court held that the Commission properly allowed a utility to withdraw its PSCR plan which had been filed prior to the suspension of the PSCR clause. The Court reasoned that, because the clause had been suspended, no purpose would have been served by conducting a hearing on that plan. Finally, the Court noted that ratemaking is a legislative rather than a judicial function and that the concepts of res judicata and collateral estoppel do not preclude the Commission from changing methods to establish proper rates.

This decision, issued after the Commission issued the January 14 order, significantly impacts the PSCR suspension policies articulated therein. Although the Attorney General argues that the Court of Appeals opinion is unpublished and therefore not binding precedent, the Commission would be well-advised to conform its policy-making decisions to those that have found support in the courts, even if there is an argument that the Commission is not legally obligated to do so. The alternative process set forth by Consumers conforms with the opinion of the Court and has much to recommend it. The proposal will result in an immediate rate reduction for customers from the existing PSCR factor of 0.285¢/kWh to the interim base rate adjustment of 0.27¢/kWh. Consumers estimates that this will result in a monthly rate reduction of \$400,000. All interested parties will have an opportunity for a hearing in the 1997 PSCR reconciliation case to determine the appropriate base rate adjustment. In addition, hearings on the 1998 PSCR plan will no longer be required. Because the proposal will result in rate reductions for customers and will adequately protect their rights to a hearing, the Commission finds that Consumers' PSCR suspension process should be adopted.

February 11, 1998 order in Case No. U-11290 et al., pp. 10-11.

In this case, Consumers has proposed that the PSCR suspension and resulting rate freeze, as they relate to purchased power costs, be extended from the end of the retail open access phase-in period on December 31, 2001 to the end of the agreement on September 15, 2007. According to Consumers, this will address the concerns that bundled service customers will experience higher rates because of the purchase of higher cost power to replace MCV power sold under the agreement.

ABATE, the Attorney General, Energy Michigan and the Michigan Chamber oppose the rate freeze based on the following arguments:

1. The freeze will deprive customers of the benefits of obtaining lower priced power in the future and will freeze into customer rates the costs of MCV power that customers will not receive.
2. The freeze should not include all power purchase agreements because the issue only involves the MCV PPA.
3. The freeze will allow Consumers to buy out the power purchase agreements in the future, when power prices are higher, and retain the profit. This would avoid the mitigation requirements of the true-up process.
4. The freeze is a new proposal and there has been no contested case hearing on the freeze as required by MCL 460.6a(1); MSA 22.13(6a)(1).
5. The freeze should not be implemented prior to conducting an analysis of whether customers benefit from the agreement as a whole.
6. The freeze would allow over-recovery of costs based upon the actual dispatch of the MCV in 1997.
7. The freeze would reverse the Commission's prior determination to deny recovery of some MCV costs.

After reviewing the arguments for and against the proposed freeze, the Commission has determined that it should grant Consumers' proposal with modification. The April 30 order was based on the premise that the Commission could issue the order ex parte provided that there was no rate increase as a result. Subsequently, the Court of Appeals ruled that ex parte approval could not be granted where the result is an increase in the cost of service, even if there is no resultant rate increase. ABATE and MPA/MACS have argued that the April 30 order would increase the cost of service with the agreement above the avoided cost previously approved by the Commission, even if there was no resulting increase in rates. Indeed, this argument formed the basis for their petitions for rehearing of the April 30 order.

The rate freeze of the MCV costs for the life of the agreement will comply with the Court of Appeals ruling and will address the arguments made by ABATE and MPA/MACS in their petitions for rehearing.

A hearing has been conducted in Case No. U-11180-R regarding a proposal to suspend the PSCR clause and to freeze rates. In that case, Consumers proposed to freeze rates through the use of a base rate adjustment for the period through 2001.

The Commission's order in Case No. U-11180-R, based on the record developed in the hearing in that proceeding, addresses the concern that the agreement will allow Consumers to recover more than the avoided cost previously approved by the Commission. The calculation of the base rate adjustment in Case No. U-11180-R includes only those costs that the Commission had previously included in the calculation of avoided costs.

In this case, Consumers "proposes to translate the applicable level of approved-for-recovery PPA costs into a per kWh rate, based upon the record in the pending 1997 PSCR reconciliation proceeding, Case No. U-11180-R. The rate so determined would remain frozen for the entire term of the PECO transaction; i.e., through September 15, 2007." Consumers' petition, p. 2. Although Consumers proposes to use the record in Case No. U-11180-R to calculate the per kWh rate, the record in that proceeding is inadequate to do so. Consequently, the calculation of the per kWh rate proposed by Consumers cannot be done in the context of the 1997 PSCR reconciliation proceeding and would more appropriately be done in the PSCR plan filing that Consumers is required to make in 2001 to reinstate the PSCR effective January 1, 2002. In that proceeding, base rates and the PSCR can be recalculated to remove the previously approved MCV costs and a separate per kWh rate calculated to recover those costs.²

²This assumes that Consumers is unconditionally implementing in good faith the retail open access program approved by the Commission in Case No. U-11290 et al.

With one exception, the arguments that have been presented in this proceeding have not convinced the Commission that Consumers' proposal, with the necessary modification in the forum for performing the calculation, is unreasonable. Obviously, the arguments regarding ex parte approval do not apply since the order in Case No. U-11180-R was issued after a contested case hearing and the order in the 2002 PSCR plan will be issued after a contested case hearing, unless the parties reach a settlement in that docket. The Commission is not convinced by the argument that the freeze will deprive Consumers' customers of the benefits of obtaining lower priced power in the future because that contention conflicts with the parties' prior argument that the agreement should be rejected because it would expose Consumers' customers to the cost of higher priced power in the future. Arguments regarding the calculation are appropriately considered in Case No. U-11180-R or in the 2002 PSCR plan, rather than in this proceeding. Arguments regarding the potential for over-recovery of MCV costs will be discussed later in this order.

The one argument that the Commission finds convincing is the following scenario presented by Energy Michigan:

1. Consumers attempts to persuade the Commission to adopt a fixed charge [that] will guarantee [to] Consumers Energy recovery of current PURPA contract costs through 2007 even if the market price of power changes significantly.
2. Consumers waits for a run up in the long term price of power.
3. When the market price run up occurs and it is anticipated that there will be a drop in the Consumers customer load due to open access, Consumers buys out the contract terms of its PURPA suppliers at some discount of the net present value of the remaining contract stream of payments. The higher price available for power on the open markets could allow these PURPA projects to sell their power on the open market at a rate that will more than offset the discount extracted from the PURPA projects by Consumers. Since the Consumers retail customer load has dropped,

Consumers can remove or reduce the amount of high cost QF power in its supply mix.

4. Consumers continues to receive a stream of payments from its remaining customers which is sufficient to pay the “frozen” PURPA contract obligations. But, since PURPA suppliers have been paid only some fraction of those contract costs to abandon their sales to Consumers, the utility is able to pocket the difference between customer frozen PSCR payments and Consumers’ discounted buyout of PURPA projects.

Energy Michigan’s response, pp. 3-4, emphasis in the original.

Energy Michigan argues that this scenario would allow Consumers to use the rate freeze to eliminate from the true-up proceeding an opportunity to take into account mitigation of stranded cost. Mitigation is a critical component of the overall retail open access program. A compelling reason for the Commission to approve Consumers’ application is the company’s agreement to “pass along the [retail open access] customer’s share of the cost savings from the PECO transaction to those [retail open access] customers through a reduction in the transition charge.” Consumers’ reply, pp. 3-4. Thus, Energy Michigan’s scenario is not a concern with respect to MCV because Consumers has already agreed to incorporate mitigation for that contract. However, with respect to other purchase power agreements, under the scenario laid out by Energy Michigan, a long-term rate freeze could result in the avoidance of mitigation.³ Accordingly, the Commission has determined that the rate freeze for non-MCV power purchase agreements should be limited to the period ending in 2001.

³The Commission’s decision regarding Energy Michigan’s scenario should not be read as an indication that the Commission would allow Consumers or any other utility to avoid the mitigation requirements in the Commission’s prior orders, but rather as a pragmatic action to avoid future disputes. Utilities have an obligation to mitigate stranded cost and mitigation will be taken into account in the true-up process. For example, if Consumers were to sell one or more of its fossil fuel plants, the excess above book value would be used as a mitigation offset to stranded cost.

Clarifications

Consumers has requested two clarifications of the April 30 order. First, the company requests clarification “that the Commission still intends for the true-up methodology for the marketprice variations to operate as described in item 2 on page 18 of the January 14, 1998 Order in Case No. U-11290 et al.” Consumers’ petition, pp. 3-4.

Consumers’ requested clarification is opposed by ABATE, the Attorney General, Energy Michigan, and the Michigan Chamber. ABATE’s response is typical:

With respect to the first clarification, [Consumers] cites to nothing in the Commission’s April 30th Order which would appear to alter the description of item 2 at page 18 of its January 14, 1998 Order in Case No. U-11290 et al, and, in the absence of it articulating what it is about the April 30th Order which in fact changes that determination and how, it is disingenuous for [Consumers] to seek clarification of that earlier Commission determination here, more than 15 months after the Commission issued that Order.

ABATE’s response, p. 7.

On the one hand, the Commission is being asked to grant the requested clarification because the Commission meant what it said in the January 14 order and has done nothing to change it. On the other hand, the Commission is being asked to deny the requested clarification because the Commission meant what it said in the January 14 order and has done nothing to change it. The Commission declines to enter this regulatory Wonderland (where nothing is what it seems) in search of an elusive White Rabbit. The January 14 order is clear on its face, and, to the extent any clarification was needed, it was provided in

the February 11 order.⁴ If the parties determine that they have any substantive difference regarding this issue, they should bring that matter to the Commission for resolution.

Consumers' second requested clarification is that "for true-up purposes, the market value of the PPA capacity is to be compared against the cost of the PPA capacity reflected in the stranded cost calculation adopted by the Commission in the January 14, 1998 order in Case No. U-11290 et al." Consumers' petition, p. 4. If the rhetoric in the pleadings is any indication, this request for clarification involves a significant conceptual disagreement between the parties.

In its response, ABATE indicated that this clarification is vague and confusing. In its supplemental response, ABATE characterizes Consumers' request as a "sly back-door attempt to undo the Commission's decisions in its prior orders." ABATE's supplemental response, p. 2. The Attorney General contends that Consumers is not seeking clarification, but rather Commission concurrence in new positions that the company is advocating. Energy Michigan contends that the clarification is an attempt to eliminate issues, such as netting and mitigation, from the true-up proceeding and to lock into the true-up process "a set of numerical values which are unrealistic in today's economic environment." Energy Michigan's response, p. 6. The Michigan Chamber indicates that Consumers' requested clarification is itself unclear, but that "Consumers may be asking the Commission to clarify the true-up in such a way that any potential reduction in stranded costs caused by the sale of Consumers fossil assets would not be realized."

Michigan Chamber's response, p. 5.

⁴After the January 14 order was issued, various parties sought clarification on whether the true-up discussion was intended to restrict issues that had previously been included. That matter does not appear to be at issue here, but to the extent that it is, the parties are referred to the February 11 order on clarification.

The Commission agrees with the parties who claim that Consumers' requested clarification is itself unclear. Nonetheless, in light of the contention between the parties regarding the manner in which the true-up will work, the Commission concludes that it would be helpful to provide a detailed description of the process in light of the ratemaking treatment granted by this order.

As previously indicated, Consumers' power purchase capacity costs will be recovered as part of a frozen PSCR and base rate adjustment through 2001 and thereafter through application of a separate per kWh rate through 2007. In the annual true-up proceeding, revenues collected from bundled service customers for power purchase capacity costs will be compared with the annual capacity costs utilized in the January 14 order. If revenues collected from the bundled service customers exceed the capacity costs assumed to be collected from those customers in the January 14 order, the difference, offset by the market cost of power purchases made to serve incremental bundled service load, will be credited against stranded costs. If revenues collected from bundled service customers are less than the capacity costs in the January 14 order, the difference represents stranded costs to be recovered from retail open access customers through the transition charge. This difference will be adjusted based upon the market value of the capacity freed up due to retail open access load, with this market value calculated in a manner consistent with the original stranded cost calculation. The Commission wishes to emphasize that the purpose underlying this true-up calculation is to ensure that Consumers' revenues and costs are accurately measured and that no over- or under-recovery occurs.

Other Matters

The agreement, which is the subject of the April 30 order and this order, would result in Consumers selling approximately 15% of its capacity to an out-of-state utility. At a time when there are substantial

concerns about the availability of power and the reliability of electric service in Michigan, this action can only be justified if the retail open access program previously authorized by this Commission is implemented so that customers will have the ability to shop around for alternative electric suppliers. In the April 30 order, the Commission emphasized that a crucial question to be evaluated was “does the agreement, taken as a whole, help to develop a well-functioning electric market, consistent with the goals of retail open access?” April 30, 1999 order, p. 19. Furthermore, the base rate adjustment approved in Case No. U-11180-R, which was discussed previously in this order, is contingent upon reaching a level of 150 MW of retail open access load.

Given the interrelated nature of the approvals needed for the agreement and the retail open access program, the Commission concludes that this order should be conditioned on Consumers’ unconditional agreement to implement the retail open access program. By the order of August 17, 1999 in Case No. U-11290 et al., Consumers is required to notify the Commission by September 1, 1999, if it chooses to implement the retail open access program. Making the approvals in this order conditional on Consumers’ unconditional agreement is consistent with the Commission’s December 28, 1998 order in Case No. U-11726.

In addition, the sale of MCV power to PECO may, depending upon the number of customers who choose retail open access, require Consumers to solicit other capacity to meet the needs of its customers.

In the June 10, 1999 order in Case No. U-11954, the Commission noted that utilities had not been following the capacity solicitation approved in Case No. U-9586 and that, as a result, there had been repeated last-minute requests for special ratemaking treatment and the potential for power shortages in Michigan had been increased. Accordingly, in that order, the Commission directed Consumers to either

initiate a capacity solicitation consistent with the procedures adopted in Case No. U-9586 or file a proposal for a revised process. Although Consumers has indicated that it considers the procedures in Case No. U-9586 to be outmoded and unworkable, it has not filed an application for a revised process.

Because the PECO agreement could increase the need to solicit capacity, the Commission concludes that this order should also be conditioned on Consumers' initiation, within 30 days, of a capacity solicitation pursuant to Case No. U-9586 or Consumers' filing, within 30 days, an application for and Commission approval of a revised capacity solicitation process.⁵ This condition is consistent with the need to assure that the ratemaking approvals granted herein do not disadvantage the company's customers.

The Commission FINDS that:

- a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 et seq.; MSA 22.151 et seq.; 1919 PA 419, as amended, MCL 460.51 et seq.; MSA 22.1 et seq.; 1939 PA 3, as amended, MCL 460.1 et seq.; MSA 22.13(1) et seq.; 1969 PA 306, as amended, MCL 24.201 et seq.; MSA 3.560(101) et seq.; and the Commission's Rules of Practice and Procedure, as amended, 1992 AACR, R 460.17101 et seq.
- b. The April 30 order should be modified and clarified as discussed in this order.
- c. The approvals granted in the April 30 order and in this order should be conditioned upon Consumers filing by September 1, 1999 an unconditional agreement to implement the retail open access program contained in the orders in Case No. U-11290 et al. and on the initiation within 30 days of a

⁵To expedite the filing, the Commission suggests Consumers to consult with the Commission Staff and other interested parties before the filing date.

capacity solicitation pursuant to Case No. U-9586 or filing within 30 days an application for and Commission approval of a revised capacity solicitation process.

THEREFORE, IT IS ORDERED that:

A. The April 30, 1998 order is modified and clarified as discussed herein.

B. The approvals granted in the April 30, 1998 order and in this order are contingent upon Consumers Energy Company filing by September 1, 1999 an unconditional agreement to implement the retail open access program contained in the orders in Case No. U-11290 et al. and on the initiation within 30 days of a capacity solicitation pursuant to Case No. U-9586 or filing within 30 days of an application for and Commission approval of a revised capacity solicitation process.

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

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

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ John G. Strand
Chairman

(S E A L)

/s/ David A. Svanda
Commissioner

/s/ Robert B. Nelson
Commissioner, concurring.

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, concurring.

By its action of August 31, 1999.

Its Executive Secretary

In the matter of the application of)
CONSUMERS ENERGY COMPANY for certain)
ratemaking approvals in connection with the)
MCV power purchase agreement auction process.)
_____)

Case No. U-11941

Suggested Minute:

“Adopt and issue order dated August 31, 1999 modifying and clarifying the April 30, 1999 order regarding Consumers Energy Company’s request for ratemaking approvals in connection with the sale of its rights under a power purchase agreement with the Midland Cogeneration Venture, as set forth in the order.”

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

* * * * *

In the matter of the application of)	
CONSUMERS ENERGY COMPANY for certain)	
ratemaking approvals in connection with the)	Case No. U-11941
MCV power purchase agreement auction process.)	
_____)	

CONCURRING OPINION OF COMMISSIONER ROBERT B. NELSON

(Submitted on August 31, 1999 concerning order issued on same date.)

I concur with my colleagues in the result reached today in this proceeding. I was not a member of the Commission when the April 30 order conditionally granting the application for various ratemaking approvals in connection with a power purchase agreement between MCV and PECO Energy was issued. However, I believe today's order more directly relates that agreement to the overall electric restructuring program in Michigan than was the case with the April 30 order. Specifically, today's order conditions the approval of the PECO contract on Consumers Energy's implementation of a retail choice program and its filing of and approval by the Commission of an RFP for new capacity that conforms with the procedures outlined in the Commission's order in Case U-9586 (June 12, 1992) or with an alternative process as provided in Case U-11954 (June 10, 1999). Although the execution of the PECO contract should mitigate Consumers' stranded costs, it also exacerbates an already tenuous supply outlook for the company. Accordingly, I believe it is essential that, pending the creation of a truly competitive retail market for electricity in this State, significant new capacity acquisitions by Consumers be made in a manner that fairly considers all legitimate supply options. Once a competitive retail market is functioning, the need for Commission oversight of the capacity solicitation process disappears. It is my hope that Consumers Energy begins moving toward a competitive market for electricity by voluntarily agreeing to implement a customer choice program on September 1, 1999 and filing an RFP for new capacity acquisitions by September 30, 1999.

Some observers might suggest that requiring Consumers to subject any of its supply planning to Commission review constitutes an intrusion into the management prerogatives of the company, contrary to the recent Michigan Supreme Court opinion in Consumers Power Co., et al v. MPSC, ___ Mich ___, WL462507, slip opinion issued June 29, 1999. However, in its opinion, the Court specifically noted that the Commission's statutory authority could be used to "encourage a specific management decision." (slip opinion, p.11) In the current case, we are not seeking to encourage any such specific decision as to

which capacity should be utilized, merely that there be a reasonable process established for making such a decision.⁶ Our action today is based, in part, on our authority under Section 6j(13) of 1982 PA 304, which requires “prior approval” by the Commission of capacity purchases exceeding six months. Since we are allowing Consumers, as part of the restructuring program, to suspend, until 2002, the operation of the power supply cost recovery review in which this provision would ordinarily be enforced, it is incumbent on the Commission to establish some other method for accomplishing this “up front” review during the transition period. At the end of the transition period, Act 304 itself may be ripe for repeal.

If Consumers wishes to challenge this Commission’s ability to require the filing of an RFP for new capacity additions, it does so at the risk of our rejection of the PECO contract. Unfortunately, such a course would most likely bring to a halt six years of effort to bring retail choice to the customers of Consumers Energy.

Robert B. Nelson, Commissioner

⁶In Midland Cogeneration Venture v. MPSC, 199 Mich App 286, 297, 313 (1993), the Court of Appeals upheld the Commission’s ability to require access to the books and records of the holding company and the affiliates of Consumers as a condition of its continued operation in a new corporate structure. The Commission can similarly require an open competitive process for capacity additions as a condition of operating in the period of transition to competition to ensure compliance with Act 304 and R460.3503 of the Michigan Administrative Code.