

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the complaint of)	
TOTAL PETROLEUM, INC., against)	Case No. U-11516
CONSUMERS ENERGY COMPANY.)	
_____)	

At the March 3, 2000 meeting of the Michigan Public Service Commission in Lansing, Michigan.

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

OPINION AND ORDER

History of Proceedings

On August 19, 1997, Total Petroleum, Inc., (Total) filed a complaint against Consumers Energy Company (Consumers). Although the complaint has four counts, it makes three basic claims: (1) that Consumers refused to provide service under its tariff Rate I at rates and on terms that were acceptable to Total, (2) that Consumers improperly imposed an extraordinary facilities charge of \$8,000 per month for a second feed to the customer’s refinery located in Alma, Michigan, and (3) that the failure of the second feed to ensure continuous, reliable service during an eight-second outage on August 26, 1995 caused Total to sustain damages. Of the complaint’s four counts, the first three pertain to Rate I. Count I alleges that Consumers’ refusal to provide service under Rate I was an unlawful abuse of its monopoly position. Count II alleges that the refusal was

discriminatory in light of Consumers' service under Rate I to other similarly situated customers. Count III alleges that the refusal was in retaliation for Total's participation in efforts to promote the formation of a rival electric utility operated by the City of Alma. Count IV raises the claims regarding the extraordinary facilities charge and the August 26, 1995 outage.¹

On November 14, 1997, Administrative Law Judge Robert E. Hollenshead (ALJ) conducted a prehearing conference, in which he granted leave to intervene to the Attorney General.² The Commission Staff (Staff) appeared and participated. The ALJ conducted evidentiary hearings on April 1-3 and 6, 1998. Thereafter, the parties filed briefs, and, except for the Attorney General, they filed reply briefs.

On June 11, 1998, the ALJ issued a Proposal for Decision (PFD) recommending that the complaint be dismissed in its entirety. Total and the Attorney General filed exceptions. (Consumers also filed exceptions limited to certain procedural rulings.) Total, Consumers, and the Staff filed replies to exceptions.

Rate I

a. Factual background

Beginning in late 1992, Total engaged Consumers in a series of discussions to explore means of lowering the electricity costs that Total incurs in its crude oil refinery operations in Alma.

¹At the same time that Total filed its complaint, it also filed a motion requesting that "the Commission grant it partial and immediate relief based on the pleadings and order Consumers Energy to extend service at the discount of 60% to Total's Alma refinery, pending the Commission's further review of the Complaint." Total's Mot. at 5. However, Total did not cite any legal authority indicating that the Commission should grant relief prior to conducting a contested case hearing. With the issuance of this order, the motion becomes moot.

²On January 1, 1999, Jennifer M. Granholm was sworn in to replace Frank J. Kelley as the Attorney General.

Contemporaneous with these discussions, Total and other large customers in the Alma area were exploring the possibility of forming a municipal electric utility to replace Consumers as their electric provider.

In the May 10, 1994 order in Case No. U-10335, an electric base rate case, the Commission addressed Consumers' tariff Rate I, which was thereafter to become the focal point of the negotiations between Consumers and Total. Although Rate I had been in effect since at least 1983, no customer had been willing to take service under it up to that time. Prior to the order in Case No. U-10335, Rate I provided a 50% rate discount from the Rate D demand charge if the customer was willing to be subject to interruption to maintain system integrity or to avoid the need for Consumers to make emergency purchases. In the order, the Commission modified Rate I by, among other things, increasing the maximum discount to 60% and allowing customers to use a buy-through provision to avoid interruption. The price for the buy-through is the actual cost of replacement power plus 1¢ per kilowatt-hour (kWh). As a result of these modifications, Rate I became much more attractive to large industrial customers, and Consumers approached Total with the concept of placing the Alma refinery on Rate I.

At a meeting on June 30, 1994, Consumers proposed three options for serving Total's 24 megawatt (MW) load. All three options called for 20 MW to be served under Rate K, a proposal then under consideration by the Commission that would have authorized Consumers to sell power at a negotiated discount.³ Two of the options called for 4 MW of load following to be provided under Rate I. Each of the three options required Total to commit to a 15-year contract

³Consumers submitted Rate K for approval in Case No. U-10625. The Commission closed that docket without ruling on its merits in an order issued on January 17, 1995.

term. According to Consumers, the first, and lowest priced, option would have supplied power at slightly more than 4¢ per kWh. Ex. C-4, at 2.⁴

In a letter dated October 21, 1994, Consumers modified its position by proposing to place the entire refinery load under Rate I at the maximum 60% discount. Consumers further proposed to eliminate take-or-pay provisions (requiring the customer to pay for a minimum amount of usage) that had been included in the earlier proposal. It offered to reduce the term of the contract to 10 to 12 years. Consumers estimated that the cost of Total's electricity under the October 1994 proposal would be 3.8¢ per kWh. Id.

Total found Consumers' proposed long-term contract to be unacceptable. In a letter dated January 20, 1995, Susan L. Perkins, Total's Assistant General Counsel and Manager, Business Development, requested that Consumers place the refinery on Rate I on a one-year interim basis beginning January 1, 1995. She stated that, during the one-year interim, Total and Consumers should continue to explore long-term solutions to Total's power needs. Ex. C-5. In a letter dated January 20, 1995, Consumers responded that "the potential to utilize discounts available through Rate I is severely hampered by looking at a one year arrangement." Ex. C-6. In letters dated September 27 and 30, 1996, Total repeated its request for a one-year term. Exs. C-7, C-8. In a letter dated October 18, 1996, David W. Joos, at the time Consumers' Executive Vice President and Chief Operating Officer - Electric, advised Total: "[W]hile we are willing to place the Alma refinery on Rate I, absent a long-term contract or other benefit to Consumers Power, we are unwilling at this time to discount the demand rate to a level that would result in significant savings

⁴According to documents used by Consumers in presenting its rate proposals to Total, Total's rates after Case No. U-10335 were equivalent to 4.64¢ per kWh. Ex. C-2, at 3, 5.

over your current tariff, Rate F.” Ex. C-9, at 2. Total construed Mr. Joos’ response to mean that the negotiations were at an impasse.

Total filed the complaint, in part, to compel Consumers to place the Alma refinery on Rate I and to obtain a billing adjustment incorporating a Rate I discount of 60% retroactive to January 1, 1995.

After hearings on Total’s complaint ended, various media reports indicated that the Alma refinery suspended operations as of October 1, 1999 and that there are no current plans to resume refinery operations. However, neither Total nor the other parties formally communicated this development to the Commission on the record, and the Commission is therefore unable to supplement the record with the refinery’s current operational status. Moreover, there are no indications as to whether any of the issues raised in the complaint are now moot. In the absence of record evidence, the Commission cannot take the refinery’s closure into account in adjudicating the complaint. Instead, the Commission issues its findings and conclusions based on the record, as it now stands, MCL 24.285; MSA 3.560(185), and further assumes that the issues raised by the complaint continue to be disputed.

b. PFD

The ALJ rejected Total’s claim that it was entitled to Rate I on the terms that it demanded. Relying on the Commission’s discussion of Rate I in Case No. U-10335, the ALJ stated that Consumers has the discretion and flexibility to negotiate both the discount (up to 60% of the Rate D on-peak billing demand charge) and the duration of the contract. He added that the rationale for Rate I was not solely based on giving recognition to the cost-of-service savings inherent in a customer’s load characteristics, but rather it was to promote economic development and to attract or retain sales that might otherwise be served through other competitive alternatives available to

that customer. The ALJ stated that, in deciding what terms to offer a prospective customer, Consumers could permissibly consider the individual circumstances that affect the customer's access to competitive alternatives. The ALJ also noted that, in granting Consumers the ability to administer Rate I flexibly, the Commission recognized that Consumers would be obligated to absorb the discounts as a reduction to its revenue requirement. The ALJ cited the Commission's statement in the order in Case No. U-10335, at 189, that "Consumers remains responsible for the allocation of Rate I capacity in a lawful and reasonable fashion," and further observed that the courts have upheld the legality of negotiated tariff rates.

The ALJ found that Consumers did negotiate with Total in good faith and in a lawful and reasonable manner. According to the ALJ, it was Total that would not negotiate, with the result that the parties did not reach agreement on a contract. The ALJ observed that Total resolutely insisted on a 60% discount and a one-year minimum term and that, in contrast, Consumers showed a willingness to moderate the terms of its initial offer. He stated that Consumers' duty to allocate the Rate I capacity in a lawful and reasonable manner did not mean that Total was automatically entitled to the most favorable terms possible. According to the ALJ, it remains unclear whether Consumers would have agreed to a compromise in view of Total's failure to consider terms that would have been less favorable to it. The ALJ also found that the terms demanded by Total were out of proportion to the economic viability of its competitive alternatives, which were long-term in nature.

The ALJ rejected Total's claim that Consumers' treatment of it was unfair when viewed in the context of other customers that successfully negotiated Rate I contracts. The ALJ observed that, unlike Total, Briggs & Stratton Corporation (which signed two Rate I contracts, one with a three-year term and the other five years) presented an economic development opportunity and could have

located its new load outside of Michigan. The ALJ also distinguished TRW, Inc., which chose a 17% Rate I discount instead of immediately commencing service with an existing municipal utility. In the case of Wacker Silicones Corporation, the ALJ said, it obtained its five-year Rate I contract at a 35% discount after presenting Consumers with a study demonstrating the feasibility of a cogeneration project.

c. Discussion

In its exceptions, Total first complains that the ALJ's characterization of Total's evidence was unfair and misleading. Total says that the PFD summarizes much of Total's position with the preface, "Total contends," when in fact the position is supported by the record without contradiction. According to Total, a key aspect of its case that received this treatment in the PFD was the importance of electricity costs to the economic operation of the Alma refinery.

The Staff responds that the ALJ fully considered the evidentiary record and the parties' arguments and made appropriate findings and conclusions in the PFD.

As an initial matter, the Commission rejects Total's claim that the ALJ's summarization of its evidence and arguments was unfair. Although Total presented the most complete version of the communications, meetings, and occurrences comprising its negotiations with Consumers, it is not necessary to make specific findings regarding whether Total's perceptions of those events are correct in their entirety. The actual events and occurrences are not largely in dispute. The core issues are whether Consumers acted reasonably and lawfully in administering Rate I and negotiating with Total. The PFD's treatment of these issues is both comprehensive and fair, and the proposed findings of facts and conclusions of law are more than adequate to enable the Commission to adjudicate this case. Moreover, as explained below, the Commission substantially agrees with the ALJ's evaluation of the negotiations.

Total argues that the ALJ failed to appreciate that Consumers had a legal obligation to make Rate I available. According to Total, the Commission's directive to Consumers in Case No. U-10335 to allocate Rate I capacity "in a lawful and reasonable fashion" did not mean that Consumers could unilaterally decide whether, and under what rates and terms, it would offer Rate I to individual customers. Total claims that the "lawful and reasonable" standard prohibits Consumers from using Rate I in an anticompetitive manner or from insisting on a long-term contract as a means of thwarting competitive alternatives.

Total also takes exception to the ALJ's statement that Total claimed that it "is automatically entitled to the most favorable [Rate I] terms possible." PFD at 13. Total contends that this characterization of its position is prejudicial. Total says that Ms. Perkins accurately stated its position in testifying that a prospective Rate I customer should be entitled to a discount between 50% and 60% and should not be forced to accept a long-term contract. 7 Tr. 552-53, 557.

The Attorney General also argues that Consumers had a legal obligation to make Rate I available to Total. The Attorney General objects to the ALJ's statement that the order in Case No. U-10335 authorized Consumers "to consider the characteristics of individual customers in determining whether Rate I should be granted and, if so, under what terms." PFD at 13. The Attorney General argues that this statement, if true, would violate the statutory prohibition against unjust discrimination, as set forth in MCL 462.16; MSA 22.35. The Attorney General further argues that special contract rates are permissible only if "all such rates shall be open to all shippers

for a like kind of traffic under similar circumstances and conditions.” MCL 462.11; MSA 22.30.⁵

The Attorney General reasons that a customer is similarly situated to another customer with a special contract if the first customer belongs to the same rate class as the other. According to this line of reasoning, Total and all other customers taking service under Consumers’ Rates D or F are similarly situated to those already receiving Rate I service and are therefore entitled to service on the same terms.

In response, Consumers says that both the Rate I tariff and the Commission’s order in Case No. U-10335 make clear that Consumers has the flexibility to negotiate the discount and duration of a Rate I contract. Consumers notes that this flexibility enables it to attract and retain customers with competitive alternatives and is counterbalanced by its obligation to absorb the resulting revenue shortfalls, so that it has the incentive both to maximize the loads it serves and to minimize the discounts. Consumers argues that a tariff rate providing for negotiated discounts is lawful and that the negotiations should produce rates and terms that vary with each customer’s circumstances. Consumers says that a customer’s potential to benefit from competitive alternatives is dependent upon its individual circumstances and that the individual characteristics of the customer’s load affect the risk that it might leave Consumers’ system. Consumers says that nothing in the order suggests that any customer has the right to demand a 60% discount subject to a one-year term. Consumers contends that Total’s competitive alternatives, all of which were long-term in nature, simply did not merit the favorable terms of the contract that it demanded.

⁵The statutes cited by the Attorney General are part of 1909 PA 300, as amended, MCL 462.2 et seq.; MSA 22.21 et seq. (Act 300), which regulates railroad traffic. Subsequent enactments empowered the Commission to exercise the powers provided in Act 300 with respect to public utilities. See MCL 460.54; MSA 22.4, which transferred Act 300 powers to the Michigan Public Utilities Commission, and MCL 460.4; MSA 22.13(4), which subsequently transferred those powers to this Commission.

The May 10, 1994 order in Case No. U-10335 supports Consumers' view that the Commission intended to vest it with the discretion to negotiate Rate I contracts. The order noted: "Consumers can decide how much of that 200 MW [of available Rate I capacity] to offer and can negotiate the amount of the discount. . . . The term of the contract under Rate I will be a matter of negotiation." Order at 184, 189. Because Rate I is not strictly based on cost of service, the Commission determined that Consumers' shareholders must absorb the discounts. This ensures that Consumers does not have an incentive to abuse Rate I by extending it to prospective customers at discounts and on terms that would be too favorable to them and would disfavor the interests of other customers.

The Commission further notes that Consumers, in administering Rate I, is subject to the "lawful and reasonable" standard, which recognizes that there are constraints on Consumers' flexibility to negotiate Rate I contracts. These constraints include the statutes delegating regulatory authority to the Commission as well as the rules promulgated by the Commission pursuant to those statutes. For example, Consumers must comply with MCL 460.557; MSA 22.157, which requires that the rates, rules, and conditions of service be "just and reasonable" and that Consumers provide service to customers in a non-discriminatory manner.

Contrary to the Attorney General's argument, Michigan law does not necessarily require all customers to be treated the same. Instead, the concept of unjust discrimination assumes that a customer obtains more favorable treatment than others for "like contemporaneous service rendered under similar circumstances." MCL 460.557(4); MSA 22.157(4). Because a customer may be able to show that its circumstances are different from other customers within the same rate class, a negotiated arrangement with that customer may not be discriminatory. Thus, the Commission is not persuaded by the Attorney General's contention that a customer with competitive alternatives has no better claim to favorable terms under Rate I than any other customer. The characteristics of

a customer with alternatives are different than those posed by a customer with a similarly sized load, but no alternatives. The order in Case No. U-10335 recognized that the terms on which Consumers would be willing to make Rate I available would vary with the customer's alternatives.

The Commission addressed and rejected many of the legal arguments raised by the Attorney General (and, to a lesser extent, Total) in the May 9, 1995 order in Case No. U-10787, in which it rejected arguments that Consumers' proposed Rate SCS was inherently unlawful. (Rate SCS was a proposed tariff that would have permitted Consumers to make service available at negotiated rates within specified parameters.⁶) In denying various parties' motions to dismiss Consumers' application for approval of Rate SCS, the Commission held:

The Commission concludes that it may lawfully approve a range of rates within which Consumers may negotiate rates that reflect the competitive alternatives available to the individual customers that are eligible for the tariff. . . .

The legal authority for the Commission to take these actions is found in the statutes creating the Commission and its predecessors. . . . [T]he Commission's approval of a range is a decision by the regulatory agency that all of the rates within the range are just and reasonable for the customers eligible for the tariff. The statutes do not require the Commission to review and conclude for each customer that the rate it negotiated is just and reasonable for it. . . . [T]he Commission's approval of variations is a decision by the regulatory agency that different customers may be charged different rates if the customers place different value on the service, if the customers present different risks to the utility, if the customers have different competitive alternatives. That decision also recognizes that, under proper circumstances, negotiation can be an appropriate method of setting a price. The statutes do not require the Commission to ensure that the utility offers service at the same price to customers in different circumstances.

⁶Rate SCS subsequently underwent substantial revisions. Its successor tariff, Rate DA, was approved as a direct access offering competing with Consumers' individual contract service in the November 14, 1996 order in Cases Nos. U-10685, U-10754, and U-10787. The evolution of Rate SCS into Rate DA and the Commission's subsequent efforts to promote a competitive framework for open access customers illustrate how some of the regulatory policies reflected in Case No. U-10335 have changed. In view of the limitations of the record, the Commission cannot say whether alternatives available in its current restructuring would have better accommodated Total's needs.

Order at 3-4. The Commission also rejected claims that a proposed range of rates would per se promote unjust discrimination:

The Commission will not approve a rate proposal that is unlawfully discriminatory, but does not agree that proposed Rate SCS is unlawfully discriminatory on its face. Similarly, the Commission does not agree that cost of service is the only factor that it may consider when setting rates or that any difference in rates necessarily results in unjust discrimination. . . . It is therefore permissible for the Commission to consider a variety of factors in setting rates, including the competitive alternatives available to a customer. As a result, a rate proposal can be lawful and non-discriminatory even though it creates a rate class for which only some customers qualify and even though there are differences in rates among customers within the rate class. Rational differences in classifications and rates can be non-discriminatory, provided appropriate standards are used to differentiate customers. The resulting issues are largely factual. . . .

The Commission does recognize that such a tariff could be designed and implemented in a manner that results in unlawful discrimination. . . . [T]he Commission should try to structure the tariff to minimize the potential for unlawful discrimination. Then, when the tariff is in place, customers remain free to bring complaints against the utility's implementation of the tariff.

Id. at 19-20 (footnote omitted). The Commission concludes that its holding in Case No. U-10787 is dispositive with respect to the suggestions in this case that Rate I was unlawful. The important issue under these circumstances is whether Consumers' negotiations with Total regarding the discount and other terms of a Rate I contract complied with Consumers' statutory and regulatory responsibilities.

Total argues that Consumers' negotiating posture was not lawful and reasonable, as required by the order in Case No. U-10335. Total contends that Consumers' real motivation was inherently anticompetitive—Consumers wanted to frustrate the competitive alternatives available to Total, which might have resulted in Total and possibly other customers in Alma permanently leaving Consumers' system and obtaining power elsewhere. Total alleges that Consumers pursued this objective by insisting on a long-term contract. According to Total, its principal competitive alter-

native was its support for a municipal utility, but it had several others: (1) installation of on-site cogeneration, (2) installation of a steam turbine (which it later implemented, removing 5 MW of load from Consumers' system), and (3) locating 5 MW of new load associated with a planned expansion of refinery operations in another state. Total charges that Consumers, in addition to using the inducement of a long-term contract, sought to preserve its monopoly in Alma by threatening to assess \$106 million in estimated stranded costs to the prospective customers of an Alma municipal utility and by sponsoring a political action committee that spent \$625,000 to oppose municipalization. Total further alleges that Consumers responded to the cogeneration alternative by requesting a 400% increase in its standby rates in Case No. U-10335.⁷

The Attorney General excepts to the ALJ's finding that "Total has not had any economically viable competitive alternative" "since [it] began its request for Rate I treatment," and that "the record in this case [does not] indicate that Total will at any time soon have any economically competitive alternative." PFD at 15. The Attorney General and Total both cite the testimony of Consumers' witnesses in prior Commission cases acknowledging Total's competitive alternatives.

Total argues that Consumers' conduct was unlawful, in part, because it violated federal and state antitrust statutes. Although Total concedes that public utilities have traditionally been shielded from antitrust law when providing regulated services pursuant to filed rates, Total says that Consumers' abuse of the broad flexibility granted it by Rate I for anticompetitive purposes falls within a recognized exception to the general rule.

⁷Consumers' standby service supplies backup power when a customer's cogeneration facility undergoes an outage. The Commission did not grant Consumers' request for a substantial increase in standby rates. May 10, 1994 order in Case No. U-10335, at 206-07.

Consumers responds that simply making rate offers to Total cannot be construed as attempting to destroy Total's competitive alternatives. Consumers says that Total was free to accept or reject those offers and that the utility placed no obstacle in the way of Total's alternatives. Consumers also points to Total witness Perkins' testimony that accepting Rate I on a long-term basis would not have destroyed the economic viability of a municipal utility.

Consumers concedes that cogeneration is theoretically available to Total. However, Consumers notes that cogeneration is a long-term alternative and that Total has not yet taken concrete steps to build a cogeneration facility. Consumers considers municipalization to be Total's most viable competitive alternative.

Consumers says that Total's allegations of antitrust violations are vague and do not identify specific illegal acts. Consumers says that it has a legal right to express its opposition to municipalization, participate in the political process, litigate in protection of its interests, apply for rate increases, and make long-term contract offers. Consumers also claims that it made a number of concessions and accommodations in the course of its dealings with Total, including the upgrade of service from 46 kilovolts (kV) to 138 kV (with a concomitant reduction in demand charges), the waiver of late charges, and frequent meetings to discuss Total's needs.

Initially, the Commission notes that Michigan law does not confer upon it the authority to adjudicate whether a public utility's conduct violates antitrust statutes. Therefore, it is not necessary to address Total's claims that Consumers' proposals violated antitrust law. However, the Commission reaffirms its commitment to promote competitive policies and will continue to take allegations of anticompetitive misconduct seriously.

The record in this case does not support Total's claim that Consumers' Rate I proposals were unreasonable or unlawful. The record shows that Total was considering several competitive

alternatives, but that municipalization was the alternative that both Total and Consumers viewed as the most likely to be implemented. It was Consumers' business judgment that these alternatives could not be implemented without a long-term contractual or financial commitment on Total's part; i.e., each of the alternatives would make economic sense only if Total were willing to forego other alternatives for an extended period of time. The record does not show that Consumers' judgment was erroneous in this respect.

Although Total argued that it was entitled to a proposal that was more favorable to it than the offers presented by Consumers, the Commission finds that Consumers appropriately sought to make the term of its Rate I contract offer congruent with Total's service characteristics and competitive alternatives. The possibility of losing Total's existing load was potentially harmful to Consumers' ratepayers if they would have been required to absorb the revenue shortfall. The Commission designed Rate I to align the interests of Consumers' shareholders with those of its ratepayers. Because Consumers' shareholders must absorb the revenue shortfall associated with the Rate I discount, Consumers' incentive is to offer Rate I on terms that avoid undue favoritism. Because there would have been a time lag before Total could have put either a municipalization or a cogeneration alternative into effect, offering a significant rate discount with a one-year commitment would not have benefitted either Consumers or its ratepayers. If Total were to have left Consumers' system permanently as soon as the interim contract expired, Consumers would have had nothing to show for its willingness to extend short-term discounts. The record does not suggest that Consumers abused its flexibility by refusing to offer Rate I on the terms demanded by Total.

Total argues that Consumers' insistence on a long-term contract was discriminatory because Consumers' ten Rate I customers⁸ obtained contracts with shorter terms. Total observes that all ten customers signed contracts with terms of less than ten years, that four customers' contracts were one year or less, and that three customers (including one receiving a month-to-month term) secured the maximum 60% discount. Ex. C-11. Total further observes that eight of the customers no longer take Rate I service and that Consumers voluntarily released four from their contractual commitments prematurely. (In addition, the four customers with terms of one year or less no longer take their service under Rate I.)

Total contends that its competitive alternatives make it similarly situated to the ten customers that signed Rate I contracts. Total says that it could not proceed with capital projects representing 5 MW of new load, in part, because Consumers' rates were too high. Total also says that its subsequent installation of a steam turbine serving 5 MW of its load demonstrated that this alternative was immediately available.

Total argues that the ALJ erred in finding no discrimination in the context of the Rate I contracts signed with three customers, Briggs & Stratton, TRW, and Wacker Silicones. Total argues that its situation was similar to Briggs & Stratton, in that part of its load growth was an economic development opportunity and that this portion of load could be moved to another state. Total further contends that its municipalization alternative is similar to TRW's alternative of taking service from the City of Portland. Total argues that its option of installing a cogeneration facility made it comparable to Wacker Silicones.

⁸One Rate I customer, Briggs & Stratton, signed two contracts with Consumers.

In response, Consumers explains that it formulates its Rate I proposals by evaluating the technical and economic feasibility of the competitive alternatives available to a prospective customer. Consumers asserts that it used this approach in negotiating with Total as well as the ten customers that signed Rate I agreements.

Consumers characterizes its two contracts with Briggs & Stratton as an economic growth opportunity, in the sense that Briggs & Stratton was deciding where to locate 18.5 MW of new load. Although Total claimed that it planned to add load at its Alma refinery, Consumers argues that Total did not use the possibility of new load to bargain for a Rate I contract specifically tied to that load, but instead sought rate concessions for the entire refinery. Moreover, Consumers adds, if in fact the 5 MW of load was dependent upon rate concessions, Total never communicated that fact to Consumers during the negotiations. According to Consumers, Total did not offer to forego installing its 5 MW steam turbine if Consumers were to make Rate I available on acceptable terms. Consumers says that Total ignored any economic development implications of its situation during their negotiations.

Consumers distinguishes its Rate I contract with TRW on the ground that TRW's competitive alternative was immediately to switch its service to an existing municipal utility. In contrast, Consumers says, the Alma municipalization is not a certainty, and a municipal utility will not be in a position to provide service for some time. Consumers notes that it signed one of its Rate I contracts with Lobdell-Emery Manufacturing Company, which also supports the Alma municipalization effort. Consumers says that this fact undermines Total's claim that Consumers is simply acting to punish it for supporting municipalization.

Consumers explains that it initially did not believe that Wacker Silicones had an economically viable cogeneration option, but that it changed its mind once Wacker Silicones presented a formal

cogeneration study. Unlike Wacker Silicones, Consumers says, Total's cogeneration potential is technically feasible, but it is not likely to be economically viable. Consumers adds that Total has not attempted to refute Consumers' findings or provide any information that would change Consumers' evaluation. Consumers emphasizes that cogeneration is, like municipalization, a long-term alternative and that load retention would therefore require a long-term contract.

Although Consumers has since renegotiated its contractual arrangements with most of the Rate I customers, it explains that their current arrangements retain the contract durations.

The Commission does not find that Consumers engaged in unjust or unlawful discrimination in its dealings with Total. Although it is true that none of Consumers' Rate I customers signed ten-year commitments, each contract must be evaluated in light of all of its provisions. For example, four of the Rate I customers negotiated discounts of less than 50%. It is also important to consider each contract in light of the customer's load characteristics and competitive alternatives. The record does not provide a basis for finding that Total's circumstances were comparable to the Rate I customers. Thus, the Commission is unable to find that Consumers' refusal to grant Total's Rate I request resulted in Total being charged more than other customers "for like contemporaneous service rendered under similar circumstances and conditions." MCL 460.557(4); MSA 22.157(4). See also MCL 462.11; MSA 22.30.

The Commission agrees with the ALJ's specific findings that the circumstances underlying the contracts with Briggs & Stratton, TRW, and Wacker Silicones were dissimilar to Total's circumstances. Consumers explained that the Briggs & Stratton contracts induced the customer to add new load within Consumers' service territory. The record in this case suggests that Total did not focus on economic development as its primary basis in bargaining with Consumers for rate discounts, but instead that it sought rate discounts for the entire refinery, including a substantial

existing load as well as any new load resulting from expansions that were in the planning stage. The record does not provide much detail regarding Total's discussions with Consumers of the possibility of installing a steam turbine.

Unlike the Alma municipalization project, TRW's competitive alternative was an existing municipal utility. Unlike Total's cogeneration potential, which is not described in detail on the record, Wacker Silicones made a more concrete showing that persuaded Consumers to view cogeneration as a feasible alternative. There was no showing that the economic feasibility of Total's cogeneration plans was comparable to Wacker Silicones'.

Total argues that the negotiations failed as a result of Consumers' bad faith. Total says that, after Consumers presented its first Rate I proposal (on June 30, 1994), Total asked Consumers to provide support for the claimed cost savings, but that Consumers waited another four months before responding. Even then, Total says, Consumers did not provide a computation of the cost savings, but instead it put forward an entirely new Rate I proposal (in October 1994). By that time, Total contends, it was apparent that Consumers would not yield in its insistence on a long-term contract, that it sought to frustrate the efforts to form a municipal utility, and that it intended to destroy Total's long-term competitive options. In Total's view, Consumers was merely going through the pretense of negotiating.

Total objects to the ALJ's finding attributing the responsibility for the failure of the negotiations to Total's refusal to yield on any of its demands for a short-term contract with a 60% rate discount. Total says that its attempts to negotiate lower rates over a four-year period ended with Mr. Joos' October 18, 1996 letter. Total further asserts that, prior to the suggestion in that letter that a discount of less than 60% was possible, Consumers never intimated that a lesser discount might have induced it to make concessions on the contract term. Acknowledging Consumers'

claim that it was willing to offer a 5% discount for a one-year term, 10 Tr. 909-10, Total notes that Consumers did not actually communicate this offer during the negotiations.

In reply, Consumers says that, over several years of negotiations, it made multiple offers in an attempt to accommodate Total's demands, without success. Consumers notes that, during the negotiations, it agreed to reduce the contract to ten years, withdrew a proposed take-or-pay clause, and made concessions to Total on the terms of the buy-through provision. Consumers acknowledges that each of its proposals was long-term in duration. However, Consumers also points out that Total did not make any counteroffers except for the one-year contract first mentioned in Ms. Perkins' letter dated November 23, 1994. Consumers says that it has always been willing to sign a short-term contract with Total, although not at a discount approaching 60%. Consumers claims that Total's exceptions in this case are the first time that it intimated that something less favorable to it than a one-year contract at a 60% discount would have been acceptable.

The record indicates that the negotiations were lengthy and eventually reached an impasse. It does not show that either party explicitly raised the possibility of entering into a Rate I contract for a term of between one and ten years, but at a rate discount of less than 60%. However, the overall tenor of the discussions suggests that such an approach would not have produced a compromise acceptable to both sides.

Moreover, it is apparent that Consumers' last, best offer was more reasonable than Total's position, which was that it should receive a one-year Rate I contract at a discount of between 50% and 60%. In the course of the negotiations, Consumers made several concessions, including the offer of a 60% rate discount. In contrast, Total's unyielding insistence on its position probably doomed the negotiations to failure. In addition, there is an unexplained incongruity between Total's demand for discounted interruptible power and its representation (discussed below) that its

refinery operations require a high quality of service that does not tolerate outages. It is doubtful that Total could have obtained power under terms equivalent to those it proposed to Consumers, either as a result of the alternatives then available to it or under the open access environment that is developing today.

d. Conclusion

The Commission concludes that Total's exceptions to the ALJ's findings and recommendations regarding Rate I are not well taken. The claims of the complaint relating to Rate I are not supported by the record.

Outage-related Claims for Refunds and Compensation

a. Factual background

1. Extraordinary facilities charge

Prior to 1993, Consumers used two redundant sources of power to supply electric service at 46 kV to the Alma refinery, which had a load of approximately 20 MW. The redundant facilities included two 46 kV transformers, each having a capability of 21.5 mega-voltamperes. The redundant service also required redundant feeder lines, protective relaying, and meters. According to Total, refinery operations require fully redundant electrical service in order to avoid sudden interruptions in the event that one of the two sources fails. It explained that continuous electric service is necessary to prevent hazardous materials from being released into the environment, to ensure the processing of hydrocarbon products within their specifications, to meet production deadlines, and to operate and maintain plant equipment without damage. 8 Tr. 668-69. Total stated that it made Consumers aware of these concerns. Exs. C-18, C-21.

In a letter dated November 18, 1991, Total advised Consumers that a planned expansion of refinery operations would result in an expected load increase of 13.3 MW over the next five years, including a first phase addition of 4 MW. Given the load increase, Total noted that the existing transformers would not be adequate to maintain redundant service for the entire load. It requested that Consumers provide a proposal to perform the engineering, procurement, and construction activities necessary to upgrade the facilities required to provide redundant service. Ex. C-19.

At first, Consumers proposed to upgrade its existing 46 kV system by replacing the existing transformers with larger ones that would maintain full redundancy for Total's load. Consumers advised Total that its rates do not cover the construction of facilities necessary to provide redundant service and that Total would be obligated to make a non-refundable contribution in aid of construction of \$400,000. The basis for computing the contribution was the estimated cost of one of the two new transformers, which was \$522,500, reduced by a \$122,500 salvage credit. Exs. C-24, C-26, at 3.

In early 1992, Consumers recommended that it replace Total's 46 kV service with upgraded service at the 138 kV level. Consumers represented that one benefit of 138 kV service, in addition to the lower rates,⁹ would be an improvement in reliability. Eventually, Consumers and Total agreed that Consumers would provide the service by constructing duplicate 138 kV feeder lines approaching the refinery from different directions, one from Consumers' Begole substation and the other from its Alma substation. As agreed, Consumers would also construct a new substation on the refinery's premises and install two redundant 138 kV transformers at that substation. The purpose of this configuration was to ensure that Total would have fully redundant 138 kV service

⁹The monthly maximum demand charge for transmission service (138 kV) is 52¢ per kilowatt (kW), compared to 97¢ per kW for subtransmission service (including 46 kV).

for its entire projected load and that service would be continuous even if the source of supply coming from one of the two feeder lines were to fail. Although this work entailed significant modifications to the original proposal to upgrade the 46 kV service, Consumers indicated that it would continue to assess Total's contribution at \$400,000. Consumers continued to characterize the contribution as Total's responsibility for the cost of installing a second transformer. Ex. C-24.

Total was reluctant to pay the contribution. At first, Total questioned whether the cost of redundant facilities would be recovered in Consumers' tariff rate structure. Ex. C-21, p. 2. In March 1993, Consumers and Total negotiated an extraordinary facilities charge¹⁰ in monthly installments of \$8,000 in place of an up front payment. Exs. C-25 to C-27. Thereafter, Consumers constructed the redundant 138 kV facilities as proposed, and Total began paying the charge in October 1993.

As explained in more detail below, Total's redundant sources of electric supply experienced a coincidental failure on August 26, 1995, causing an outage. Because the redundant facilities did not prevent this occurrence, Total's complaint seeks to recover the \$184,000 in extraordinary facilities charges that it paid from October 1993 through August 1995.

¹⁰The extraordinarily facilities charge is authorized in Consumers' tariff Rule B10.4, which provides in part:

The Company reserves the right to charge a monthly extraordinary facilities charge or to make special contractual arrangements when, in the opinion of the Company, extraordinary facilities are required by the customer. Extraordinary facilities include, but are not limited to, the following:

A. Facilities required to accommodate a customer whose capacity requirements exceed 1,000 kW.

.....

C. Facilities required to accommodate a customer's service requirements necessitating unusual investment by the Company and/or not normally provided by the Company. . . .

M.P.S.C. No. 12, Sheet No. B-27.00.

2. August 26, 1995 outage

About 3 a.m. on August 26, 1995, an eight- to ten-second outage caused a complete emergency shutdown of Total's Alma refinery operations. As a result, a fire started underneath the flare at the refinery's emissions stack due to the release of hydrocarbons. All refinery processes had to be restarted, a task that was complicated by the emergency nature of the interruption. Total indicated that most of the refinery's production units took 12 hours to start up and some took longer. According to Total, the shutdown disrupted production and required fuel products then in process to be reprocessed. Total claimed that it sustained monetary damages as a result of the unexpected outage.

A subsequent investigation by Consumers identified the sequence of events that probably caused the outage. The first event was a flashover at an insulator located in the Begole substation. As explained by Consumers witness Steven L. Ray, the insulator acts as a barrier between an energized conductor and the substation's grounded steel structure. Contamination on the insulator tends to erode its insulating value, and, if the contamination accumulates to the point that electricity arcs from the conductor to the grounded steel, a flashover occurs. Mr. Ray explained that it was likely that bird droppings contaminated the insulator, as their residue was found on the insulator after the event. However, he could not be certain of the cause, noting that a flashover tends to burn off at least some of the contamination. In contrast, Mr. Joos, in a letter to Total dated September 18, 1995, was definitive in attributing the cause to bird droppings. Ex. C-30. Mr. Ray noted that Consumers personnel later found a bird nest located above the insulator. Mr. Ray suggested that string, twigs, nesting material, or other foreign material could also have caused the flashover.

Consumers designed the facilities so that, in the event of a flashover, the substation would restore service after a momentary lapse, and the substation's service in fact resumed eight seconds

later. If the redundant facilities serving Total had worked as designed, electricity flowing over the other feeder line from the Alma substation would have cleared the fault in less than one second, thereby ensuring continuous service to the refinery. However, the Alma substation feed also failed immediately after the Begole substation flashover.

The cause of the failure of the second feed is undisputed. A system protection relay, identified in Consumers' records as the Alma 577 OCB zone-1 KD 10 relay, was designed to detect faults on the line connecting the Alma substation to the refinery premises and to trip the line if it detected a fault. Although Consumers calibrated the relay to detect faults limited to an area extending no more than 80% of the distance of the line connecting the substation with the refinery, the relay malfunctioned due to a capacitor that became unstable at high operating temperatures. Consequently, the "reach" of the sensor function became more extensive than its originally calibrated limit and detected faults beyond the refinery substation. The relay detected the interruption at the Begole substation and reacted by tripping the remaining feed supplying the refinery from the Alma substation. Although the Alma substation automatically restored power to the refinery within 11 seconds, the end result of the simultaneous failures of the redundant feeds was a complete shutdown of the refinery's electric supply for 8 to 10 seconds.

b. PFD

The ALJ recommended that Total's claim for recovery of its monthly payments of the extraordinary facilities charge be denied. As an initial matter, he rejected Total's contention that the August 26, 1995 outage violated Consumers' undertaking to provide the refinery with uninterrupted service. He found that, in providing service with redundant facilities, Consumers did not make a promise that the service would never be interrupted. He noted that Consumers' tariff

Rule B10.1 states that Consumers “does not guarantee to furnish a continuous supply of electric energy.” M.P.S.C. No. 12, Sheet No. B-25.00.

The ALJ further found that the amount of the extraordinary facilities charge was reasonable. He noted that a one-time contribution of \$400,000 (the basis for computing the amount of the monthly charge) covered only the cost of a single new 46 kV transformer and further found that it did not cover all of the costs required to upgrade the system to provide redundant 138 kV service. He stated that Consumers would have been entitled to assess Total for all of the costs of upgrading Total’s service.

The ALJ rejected Total’s argument that substandard maintenance on Consumers’ part permitted too much contamination to accumulate at the Begole substation, causing the flashover. He accepted the testimony of Consumers witness Ray that Consumers’ maintenance practices, including inspections of substations once every four weeks and cleanings as necessary, comported with industry standards. He agreed with the witness that Consumers had no reason to conclude that the insulator should be cleaned on a periodic basis. The ALJ further found that the failure of the KD 10 relay at the Alma substation did not result from improper maintenance.

The ALJ recommended that Total’s outage-related claims should be denied. He found that the extraordinary facilities charge was reasonable and that the occurrence of the outage did not violate any service-related obligations on Consumers’ part. He found that Consumers’ maintenance of the facilities that failed during the outage was not lacking and did not fall below industry standards.

c. Discussion

1. Extraordinary facilities charge

Total objects to the ALJ’s finding that Consumers did not guarantee uninterrupted service. Total contends that this finding ignores the critical need of the refinery for the uninterrupted service

that it should have received through the redundant facilities installed by Consumers. Total points out that it emphasized its need for very reliable service throughout its negotiations with Consumers and repeatedly insisted on fully redundant facilities. Total also observes that Consumers, on several occasions, represented that the 138 kV service would be equal, or superior, to the 46 kV service, would result in fewer outages, and would be more reliable and better maintained. Total calls attention to Exhibit C-28, a letter dated November 21, 1994 from Consumers to Total, in which Consumers calculates a statistical frequency of a coincidental failure of both redundant sources as being once every 4,000 years. Total concludes that Consumers effectively represented by this letter that its 138 kV service would not be interruptible.

Consumers responds that Total has not produced any evidence of a promise to provide uninterruptible service. Consumers relies on its tariff Rule B10.1, which provides in part:

[T]he Company shall endeavor, but does not guarantee to furnish a continuous supply of electric energy and to maintain voltage and frequency within reasonable limits.

The Company shall not be liable for interruptions in the service, phase failure or reversal, or variations in the service characteristics, or for any loss or damage of any kind or character occasioned thereby, due to causes or conditions beyond the Company's reasonable control, and such causes or conditions shall be deemed to specifically include, but not be limited to, the following: acts or omissions of customers or third parties; operation of safety devices except when such operation is caused by the negligence of the Company; absence of an alternate supply of service; failure, malfunction, breakage, necessary repairs or inspection of machinery, facilities or equipment when the Company has carried on a program of maintenance consistent with the general standards prevailing in the industry; act of God; war; action of the elements; storm or flood; fire; riot; labor dispute or disturbances; or the exercise of authority or regulation by governmental or military authorities.

M.P.S.C. No. 12, Sheet No. B-25.00 (emphasis added in Consumers' exceptions at 48). Consumers states that its tariffs are part of its contracts with customers and are incorporated by reference in its written contract with Total.

Consumers says that although the 138 kV system is more reliable than the 46 kV system, the statements that it made in comparing the two systems did not promise Total that it would never experience an outage. According to Consumers, Total paid the extraordinary facilities charge to secure the installation and use of the redundant facilities, and not as consideration for a promise of uninterruptible service. Consumers characterizes the occurrence of the eight-second outage as “irrelevant” to the validity of the extraordinary facilities charge. Consumers’ replies to exceptions at 45. Consumers explains that it originally computed the cost of upgrading the facilities serving Total on the assumption that it would replace the existing 46 kV transformers with larger 46 kV transformers. Consumers claims that when it later decided to provide upgraded service to Total at 138 kV, it also decided to retain the charge at the original amount of \$400,000 based on the estimated cost of a single 46 kV transformer.

Consumers explains that the primary purpose of computing the estimated outage rate in Exhibit C-28 was to obtain a basis of comparison with alternative design systems. Consumers says that the outage rate was not meant to convey that Total would in fact experience no more than one outage every 4,000 years. Because the November 21, 1994 date of Exhibit C-28 postdates Total’s agreement to pay the extraordinary facilities charge, Consumers says that Total could not have relied on the computation as a condition of its service. Consumers also notes that Exhibit C-28 excludes the “failure or overtripping of protective equipment which may result in both sources being outaged” as a factor in calculating the outage rate.

Consumers' tariffs establish the rates, terms, and conditions of electric service to customers.¹¹ Thus, tariff Rule B10.1, which provides an express disclaimer that service would be completely free of interruptions, applies to Consumers' service to Total. Moreover, the record does not show that the assertions and representations made by Consumers to Total were necessarily inconsistent with Rule B10.1. The gravamen of Consumers' statements was to provide service with redundant facilities. Although Total insisted on redundant facilities as a means of protecting itself against sudden interruptions, Consumers did not provide a guarantee, warranty, or promise that the service would always be continuous and uninterrupted.

Total objects to the ALJ's findings that the original \$400,000 contribution computed by Consumers (which was the basis for the monthly extraordinary facilities charge) was reasonable and that the actual cost of constructing the redundant facilities used to serve Total exceeded \$400,000. Total contends that the purpose of the charge was to secure a fully redundant service, and not merely to reimburse the cost of one of the two 138 kV transformers. To support this contention, Total points out that Consumers previously used the 138 kV transformer to provide service at a General Motors facility in Saginaw and that the original cost of the transformer in 1963 was \$99,443. Total suggests that Consumers used inflated estimates in itemizing the \$400,000 total cost of installing a second (46 kV) transformer in Exhibit C-26. Total claims that the failure of the redundant service on August 26, 1995 entitles it to a refund of the extraordinary facilities charges it paid to secure the service.

¹¹See Valentine v Michigan Bell Tel Co, 388 Mich 19, 26; 199 NW2d 182 (1972) (“[T]he code or tariff is part of the contract between the parties. . . . Any claim based upon the contractual obligation of the parties is limited to validly promulgated provisions of the tariff or code within the authority of the Public Service Commission.”).

Total argues that Consumers failed to substantiate its representation that base rates do not cover the cost of the facilities that were upgraded in 1993. Total infers that the extraordinary facilities charge was not necessary to recover the facilities' cost. Total says that, in contrast, Consumers did not collect an additional charge for the redundant 46 kV facilities that it used to provide service prior to the upgrade.

Consumers responds that, when it installed the redundant facilities in 1993 and made them available for Total to use, it provided all that Total bargained for in agreeing to pay the extraordinary facilities charge. Consumers explains that the preexisting 46 kV facilities would have been adequate to serve an expanded load of 33 MW, as Total projected, although they would not have provided the redundancy that Total requested. (Full redundancy required each of the two transformers to have enough individual capability to serve all of Total's maximum demand by itself.) Thus, Consumers claims that the redundant facilities are in fact extraordinary facilities within the meaning of tariff Rule B10.4, such that it was entitled to assess the monthly charge.

Consumers further explains that, for ratemaking purposes, the portion of the cost of the upgraded facilities that is not recovered by the charge would be included in setting base rates. Thus, Consumers contends, Total is in effect seeking to shift more of the cost of the extraordinary facilities to other ratepayers. Consumers acknowledges that it did not assess a similar extraordinary facilities charge to Total when it agreed to provide the original redundant 46 kV system and adds that it does not know why.

Consumers argues that it could have charged Total more than \$400,000 to collect the cost of upgrading all of the redundant 46 kV facilities, including both transformers, but that it chose to limit the charge to cover only one of the two 46 kV replacement transformers in light of its expectation that it would earn additional revenues from the load increase. Consumers adds that its

eventual decision to provide service at 138 kV meant that the actual upgrade was more expensive than the original plan to upgrade the 46 kV system. Thus, Consumers disputes Total's contention that the \$400,000 contribution covered the cost of the entire upgrade to the 138 kV system. However, Consumers also argues that identifying the particular facilities that served as the basis for the charge is unnecessary, given that Total received the use and benefit of all of the upgraded 138 kV facilities and cannot use the circumstances of the charge or the subsequent outage as a basis for claiming that it is entitled to a refund.

Consumers argues that the amount of the charge was reasonable. Consumers explains that the amount reflects replacement value, which is the cost to replace a 46 kV transformer in current dollars. Thus, Consumers reasons, the original cost that it paid for the 138 kV transformers in 1963 is not applicable. Consumers asserts that it is prudent to reuse existing transformers instead of buying new ones. Consumers also explains that replacement value is the appropriate basis for calculating a customer's contribution because the utility will be required to replace the transformer at no additional charge to the customer if it fails or becomes obsolete.

The Commission finds that the assessment of an extraordinary facilities charge was appropriate under Consumers' tariffs. Consumers installed fully redundant transformers, feeder lines, and other facilities at Total's specific request to meet the specialized demands of its refinery operations. Consumers undertook the specialized configuration of its equipment even though its existing facilities were adequate to provide the character and quality of service normally made available to its customers. Thus, the facilities were extraordinary facilities within the meaning of tariff Rule B10.4, and it would have been inequitable for Total to expect Consumers to collect their cost from other ratepayers through base rates.

The Commission finds that the monthly extraordinary facilities charge was reasonable. The basis for computing Total's share of the cost was the estimated cost of replacing one of the two existing 46 kV transformers with a larger 46 kV transformer. Consumers' computation excluded other costs that Consumers incurred to make fully redundant facilities available to serve Total's expected increase in load. (It is also apparent that much of the load increase projected by Total did not materialize.) Although Total argued that the original cost of one of the 138 kV transformers was less than \$100,000 in 1963, original cost is not an appropriate basis for estimating the cost of a transformer in current dollars. Given that Consumers retains a continuing obligation to maintain the transformer in working condition and to replace it when necessary, replacement cost is a reasonable basis for computing the charge. Moreover, it is not clear that the original cost of the transformer included the engineering, services, and other costs that were necessary to install the transformer. See Ex. C-26, at 3. Total did not otherwise present evidence regarding what it believes to be a valid estimate of the costs.

Given the purpose of the extraordinary facilities charge, the Commission is unable to find that Total was entitled to a refund as a consequence of the August 26, 1995 outage. Total had the benefit of the redundant facilities. As discussed in more detail later in this order, the redundant facilities reduced the likelihood of a sudden outage, but they did not guarantee that a coincidental failure of both sources would never occur.

2. Responsibility for the outage

Total claims that the outage on August 26, 1995 occurred, in part, due to Consumers' inadequate maintenance of the Begole substation. Specifically, Total claims that if Consumers had adhered to a reasonable timetable for inspecting and cleaning insulators, it would have prevented the accumulation of bird droppings that caused the flashover and started the chain of events that

interrupted the refinery's power. Although Consumers witness Ray suggested that the source of contamination may have been something other than bird droppings, Total states that there was no documentary evidence, other than the witness's speculation, to support another cause.

In claiming that Consumers' maintenance practices were unreasonable, Total relies on the "IEEE^[12] Guide for Cleaning Insulators," which both parties acknowledge as a source of electric industry standards. The standards provide that bird dropping deposits "may present serious problems of system reliability" and that "[i]nsulators should be washed prior to reaching the critical contamination level." Ex. R-45, at 4-5. Total says that Consumers admitted that it had not cleaned the Begole substation insulators at least since 1987 (as far back as Consumers retains records) and was unable to provide evidence indicating that it had ever cleaned the insulators. Total argues that Consumers' purported practice of visually inspecting the insulators on a monthly basis is inadequate because the insulators are located 15 to 30 feet above the ground and may be situated so that the substation structure precludes a clear view.

Total argues that Consumers failed to show that its maintenance standards are consistent with the standards of the electric industry, as is required for Consumers to invoke tariff Rule B10.1. The rule exempts Consumers from liability for "interruptions in the service . . . due to causes or conditions beyond the Company's reasonable control, . . . includ[ing] . . . failure, malfunction, breakage, necessary repairs or inspection of machinery, facilities or equipment when the Company has carried on a program of maintenance consistent with the general standards prevailing in the industry." M.P.S.C. No. 12, Sheet No. B-25.00.¹³ According to Total, Consumers witness

¹²The IEEE is the Institute of Electrical and Electronics Engineers.

¹³A more complete excerpt of Rule B10.1 is quoted in this order supra p. 27.

Ray based his opinion regarding compliance with industry standards on Exhibit R-44, a document purporting to be a survey of industry practices, but he did not demonstrate which utilities responded to the survey or how the data was collected or verified. As such, Total contends, the document lacks a foundation that would demonstrate the survey's credibility and accuracy.

Total observes that Consumers does not regularly clean 98% of its substation insulators. Total contends that this practice is neglectful and, if it is in fact consistent with industry standards, then the industry standards are inadequate.

In response, Consumers asserts that Rule B10.1 precludes it from being liable for the outage. Consumers contends that its maintenance practices were reasonable and consistent with industry standards. Consumers says that Total, as the complainant, did not present any evidence of the standards prevailing in the industry and thus did not carry its burden of presenting a prima facie case.

Consumers responds to Total's claim of inadequate maintenance by explaining its substation maintenance procedures. Consumers says that its personnel visit substations on a monthly basis to conduct inspections that identify any equipment or facilities requiring maintenance. According to Consumers, its personnel may visit the substations for other purposes outside of the monthly cycle, in which case they make a visual check of the substation's facilities. Consumers relies on Exhibits R-42 and R-43, which are copies of the monthly substation inspection reports and log book for the Begole substation for periods immediately preceding August 26, 1995. The exhibits do not indicate that the insulators were contaminated.

Consumers asserts that its insulator cleaning practices are reasonable. As explained by Consumers witness Ray, Consumers' reliance on rain to clean most of the insulators finds support in the "IEEE Guide," which states: "Ordinarily, wind and rain provide sufficient washing action to

remove most of the common deposits.” Ex. R-45, at 3. Consumers further explains that it identifies those insulators that require mechanical cleaning on the basis of the presence of airborne contaminants and past operating history. In practice, Consumers says, it cleans about 25 of its 1,250 substations on a periodic basis. According to Consumers, its 1,250 substations experienced only two outages attributable to bird droppings over the six years prior to the outage. Consumers argues that it had no reason to believe that there was contamination approaching the critical level at the Begole substation prior to August 26, 1995.

Consumers relies on the testimony of Mr. Ray to demonstrate its compliance with industry maintenance standards. Consumers says that Mr. Ray, who sponsored the survey of industry practices as Exhibit R-44, testified that he uses the survey to gauge the reasonableness of Consumers’ own maintenance practices. Consumers further relies on its compliance with the “IEEE Guide” and concludes that Total’s claims are nothing more than an inference of a violation of industry standards drawn from the occurrence of the flashover itself.

Consumers witness Ray was the engineering witness appearing in this case who was most qualified by experience to give an opinion regarding the adequacy of Consumers’ electric utility maintenance practices. As Consumers’ Manager of System Operations - Electric Transmission, Mr. Ray had job responsibilities related to the oversight of transmission and distribution systems. In contrast, Total’s expert witness was Larry Alexander, who is Total’s Manager of Project Engineering. Although Mr. Alexander is also an electrical engineer by training, he does not have comparable experience in maintaining the distribution facilities of a public utility and could not be expected to be as knowledgeable about electric utility standards.

To support his opinion that Consumers’ maintenance practices are reasonable and consistent with industry standards, Mr. Ray cited the “IEEE Guide” as an authoritative source of electric

utility standards. As Consumers notes, the “IEEE Guide” indicates that the action of wind and rain may be sufficient to remove contamination and may obviate the need for regular cleanings in many instances. The excerpt related to bird droppings advises:

Insulators located in the vicinity of roosts of birds are subject to contamination by defecation. These deposits are usually washable and are often cleansed by heavy rain, but may present serious problems of system reliability.

Ex. R-45, at 4. Thus, Consumers’ position that it is not necessary to clean all of its insulators on a regular basis finds corroboration in the “IEEE Guide.” Conversely, Total is unable to support its implication that any industry standard that does not require regular cleanings of all insulators is inadequate. The record does not show that Consumers’ maintenance practices related to the inspection and cleaning of insulators were something less than “consistent with the general standards prevailing in the industry,” as set forth in Rule B10.1.

The record also does not show that Consumers had reason to suspect that the Begole substation insulators were prone to an undue accumulation of bird droppings prior to August 26, 1995. As Consumers says, nothing in the operating history or surrounding environment of the substation led it to believe that bird droppings presented a threat of contamination or that it should have implemented a program of regular cleaning at that substation. Although the occurrence of the flashover probably resulted from an accumulation of contamination caused by birds, the record does not provide support for a further inference that the accident could have been prevented if Consumers had adopted and implemented more rigorous standards for inspecting, cleaning, and maintaining the insulators on its system.

Total excepts to the ALJ’s finding that the failure of the KD 10 relay near the Alma substation did not indicate that Consumers’ service was less reliable than promised. Total attributes the failure of the relay to substandard maintenance. Total contends that Consumers’ Mr. Joos

promised that the relay would be replaced after it failed on August 26, 1995. Ex. C-30, at 2.

However, Total continues, Consumers eventually decided not to replace the relay, which had served a backup function in support of two primary relays. Consumers' subsequent determination was that the two primary relays would be adequate to provide service prospectively. 9 Tr. 861-62. Total questions why Consumers installed the a superfluous backup relay in the first place and suggests that the incident shows that Consumers' practices are not consistent with its promises that it would maintain the facilities to ensure reliability.

Consumers responds that Total did not challenge the adequacy of the maintenance of the relay during the hearings, but waited until the briefing stage of this case. Consumers says that its maintenance practices were reasonable and that there is no evidence to the contrary.

The Commission finds that the record does not support a finding of substandard maintenance on Consumers' part with respect to the KD 10 relay. As Consumers asserted, it properly calibrated and tested the relay when it installed it in 1993. Although there are 14 identical relays in operation on Consumers' system, none had experienced a failure within the preceding 20 years. During the hearings, Total focused its claims of substandard maintenance on the Begole substation insulators and did not directly challenge Consumers' maintenance of the relay. Consumers' decision not to replace the relay after it failed does not shed light on whether Consumers' actions prior to the failure were reasonable. There is no evidence to rebut Consumers' proofs that its maintenance of the relay was adequate.

d. Conclusion

The record does not support a finding that Consumers assumed an obligation to provide Total with a quality of service that would be uninterrupted or that the configuration of the redundant facilities, coupled with Consumers' maintenance, would guarantee that Total's service would be

fully protected from sudden interruptions. Moreover, the record does not show that the August 26, 1995 outage can be attributed to causes that were within Consumers' reasonable control or that Consumers caused the outage by failing to follow a reasonable program of maintenance that is consistent with industry standards. Therefore, the Commission concludes that Total's claims for both a refund of the extraordinary facilities charge and for a remedy for the damages it incurred in the outage should be denied.

Procedural and Evidentiary Rulings

a. Consumers' motion to dismiss

At the time that Consumers filed its answer to Total's complaint, it also filed a motion to dismiss the complaint, arguing that the complaint failed to state a claim upon which relief can be granted. On November 12, 1997, Total filed a response. At the prehearing conference on November 14, 1997, the ALJ granted the motion to dismiss in part, striking Total's request for an award of money damages as compensation for the August 26, 1995 outage. In so ruling, the ALJ stated that he was not precluding Total from submitting evidence that it in fact incurred damages caused by the outage. 1 Tr. 40-46.

On November 26, 1997, Consumers filed an application for leave to appeal the ALJ's ruling. In the application, Consumers argued that the Commission should also dismiss Total's claims that Consumers violated antitrust law and that Total is entitled to litigate its claim for damages. On December 10, 1997, Total filed a response.

In light of the Commission's findings of fact and conclusions of law on the merits of the complaint, Consumers' application for leave to appeal requests relief that is moot and need not be addressed.

b. Total witness Heinze

On January 29, 1998, Consumers filed a motion to strike the prefiled testimony and exhibits of William Heinze, the Manager of Refinery Operations at Total's Alma refinery. Mr. Heinze's testimony asserts that Total incurred \$327,000 in damages as a result of the August 26, 1995 outage. On February 4, 1998, Total filed a response to the motion to strike. At a motion hearing on February 5, 1998, the ALJ ruled that evidence as to the dollar amount of Total's damages was impermissible. He struck portions of Mr. Heinze's prefiled testimony as well as the exhibits (which provided computations supporting the damages) because they attempted to litigate the amount of damages. 2 Tr. 68-72. On February 19, 1998, Total filed an application for leave to appeal the ALJ's ruling granting in part Consumers' motion to strike Mr. Heinze's testimony. On March 5, 1998, Consumers filed a response.

In its exceptions, Total renews its argument that the ALJ erred in striking evidence of the amount of damages incurred as a result of the outage.

As already noted, the finding and conclusions reached on the merits in this order makes the issue of damages moot. Therefore, it is not necessary to resolve the jurisdictional or factual issues presented by Total's request for compensation or by Mr. Heinze's testimony supporting the claim for damages.

c. Discovery

On January 27 and February 3, 1998, Consumers filed motions to compel responses to a number of its discovery requests. On February 10, 1998, Total filed a response to both motions. At hearings on February 17 and 25, 1998, the ALJ made rulings regarding each of the discovery requests raised in Consumers' motions to compel. On March 2, 1998, Total filed an application for

leave to appeal certain of the rulings that required it to provide discovery. On March 3, 1998, Consumers filed an application for leave to appeal certain of the rulings denying it discovery.

Because the record provides an adequate basis for adjudicating the complaint, the applications seeking either to compel or reduce the scope of discovery are now moot.

d. Total witness Perkins

At the beginning of the evidentiary hearings commencing on April 1, 1998, the ALJ granted Consumers' motion to strike portions of the prefiled testimony of Total witness Perkins, in which she addressed the effect of electric rates on the economic competitiveness of the Alma refinery. The ALJ ruled that evidence related to the refinery's competitiveness was irrelevant to the complaint, as Total's counsel had stated in earlier opposing Consumers' efforts to compel discovery.¹⁴ 7 Tr. 375-77. On April 15, 1997, Total filed an application for leave to appeal the ALJ's ruling. On April 29, 1998, Consumers filed a response.

In its application, Total asserts that electric costs are critical to the economic viability of the refinery. Total argues that the fact that it communicated this information to Consumers on numerous occasions, but that Consumers persisted in discriminating against Total while favoring other customers with Rate I contracts, is highly relevant. According to Total, the effect of Consumers' actions on the refinery's competitive posture goes to the core of this dispute.

In Total's view, evaluating the adverse cost effect of electric rates on the refinery's economic viability is exclusively its own managerial prerogative. Therefore, Total asserts, it was justified in opposing the overly broad, intrusive discovery sought by Consumers into the information and details relied upon by Total's management in reaching the undisputed conclusion that Consumers'

¹⁴Total's counsel stated, "The issue of the economic viability of the refinery is not in issue." 4 Tr. 233.

rates were eroding its competitiveness. Total argues that the ALJ compounded his error by refusing to accept, as an offer of proof, various discovery responses provided by Total to Consumers, which indicated that Total had in fact disclosed information related to the economic viability and competitiveness of the refinery.

Consumers responds that it is disingenuous for Total to argue that competitiveness is irrelevant in the context of a discovery dispute, but that it is relevant in deciding whether testimony is admissible. Consumers claims that the ALJ's ruling precluding discovery on the competitiveness issue would have placed it at a disadvantage if Total had been permitted to introduce evidence on the issue. If that had happened, Consumers continues, it could not have challenged Total's allegations that Consumers' conduct was destroying the competitiveness of the refinery.

Consumers argues that the ALJ properly denied Total's offer of proof consisting of discovery responses. Consumers says that a proper offer of proof is the prefiled testimony that was stricken.

The ALJ did not err in striking references to the refinery's competitiveness. The stricken testimony does not specifically show that Consumers' rates placed undue or unusual cost pressures on the Alma refinery relative to its competitors or presented a significant risk of forcing Total to remove load from Consumers' system. Instead, the stricken testimony consisted of vague, generalized suggestions that Consumers' rates were too high for Total to operate the refinery. This type of evidence would not have been helpful in resolving a claim of unjust discrimination. Consumers demonstrated with specificity that other customers that signed Rate I contracts had circumstances that were materially different than Total's. Total's unsupported allegation that Consumers' rates hurt Total's competitiveness does nothing to rebut Consumers' showing that its treatment of Total was not unjustly discriminatory. To the extent that Total's claim simply means that changes in

electricity costs affect the overall cost of producing goods or services, this observation sheds little, if any, light on the specific issues raised in the complaint.

The ALJ also did not err in rejecting Total's submission of discovery responses as an offer of proof in addition to the stricken testimony. The discovery responses have no value as an offer of proof. That Total may have provided some discovery related to competitive issues does not necessarily mean that Total afforded Consumers an adequate opportunity for discovery.¹⁵ Moreover, Total could not legitimately expect to withhold responses to some of the other discovery requests on this issue and then present unsupported statements that Consumers' rates hurt the refinery's competitiveness.

e. Total witness Alexander

At the hearing on April 1, 1998, the ALJ struck excerpts of Total witness Alexander's testimony relating to Consumers' internal procedures and standards applicable to the maintenance of substations. The stricken testimony suggested that Consumers did not meet its own standards in inspecting and cleaning its insulators. In striking this testimony, the ALJ accepted Consumers' argument that Michigan law does not permit a company's internal standards to be used to establish the standard of conduct for liability purposes. 7 Tr. 409-10.

In its exceptions, Total argues that Consumers witness Ray agreed in a deposition that Consumers' internal standards are consistent with the industry standards. Total says that the policy rationale of the rule cited by Consumers is to avoid penalizing a company that voluntarily promulgates internal standards that are more demanding than the standard of care imposed by law.

¹⁵The discovery responses found to be unacceptable as an offer of proof were marked as Exhibit C-14. They deal primarily with the comparative cost of electricity (expressed on a per-kilowatt-hour basis) at various refineries operated by Total or its corporate parent.

According to Total, the rule does not apply when the evidence establishes the obligations that an industry standard imposes (and not a higher standard). Therefore, Total says, it should have been permitted to introduce evidence of Consumers' non-compliance with internal standards to demonstrate that Consumers failed to carry out a program of maintenance consistent with the general standards of the industry.

Consumers argues in response that well established law precludes the use of a company's internal standards to establish the applicable standard of care. Addressing Mr. Ray's statement that Consumers' internal standards are consistent with industry standards, Consumers says that consistency is not the same as being identical to the industry standards. Consumers urges that its internal standards are more specific and comprehensive than the "IEEE Guide" that sets forth industry standards.

The ALJ's ruling was correct. As Consumers contends, a company's internal procedures are not admissible to establish the standard of care owed to others. Gallagher v Detroit-Macomb Hosp Ass'n, 171 Mich App 761, 764-68; 431 NW2d 90 (1988). Moreover, under Gallagher, Total cannot avoid this principle on the ground that Consumers' internal maintenance procedures are merely evidence of the industry standard. Exhibit R-45, the "IEEE Guide," discusses insulator cleaning without imposing a timetable. In contrast, Consumers' substation procedures manual indicates, under the heading of "General Work Procedures - Substation Equipment Maintenance Schedule," that the "Program Description" for insulators is to "Clean and Inspect" at ten-year intervals. Ex. C-32, at 8.¹⁶ In this sense, the manual may well be consistent with industry standards, even though it prescribes a specific task that is not recognized as an industry standard. If

¹⁶The document, an exhibit stricken by the ALJ, is in the format of a chart and provides no additional narrative description regarding the "Clean and Inspect" procedure.

admitted into the record as evidence of Consumers' "program of maintenance consistent with the general standards prevailing in the industry," the manual would impermissibly supplement, and perhaps heighten, the industry standard used to evaluate Consumers' maintenance practices at the Begole substation.

f. Consumers witness Rasmussen

At the April 1, 1998 hearing, the ALJ addressed Total's motion to strike the prefiled testimony of Ronn J. Rasmussen, the Director of Pricing and Rate Administration in Consumers' Rate Department. Although the ALJ struck excerpts of the testimony, he denied Total's motion to strike the testimony in its entirety on the grounds that Mr. Rasmussen was not competent to testify to matters in which he had no personal involvement and that his testimony consisted primarily of hearsay statements made by other Consumers employees. 7 Tr. 451-53.

In its exceptions, Total argues that Mr. Rasmussen's testimony was incompetent because he formed his opinions and conclusions on the basis of conversations with the Consumers employees who actually conducted the negotiations with Total concerning Rate I and the extraordinary facilities charge. According to Total, the limited, selective investigation conducted by Mr. Rasmussen was a device used by Consumers to shield other employees with direct knowledge from cross-examination. Total points out that Mr. Rasmussen did not meet in person with Total's employees or representatives and thus did not have first-hand knowledge of the facts discussed in his testimony.

Consumers asserts that Mr. Rasmussen's professional responsibilities include oversight of Consumers' tariffs as well as negotiations of Rate I and special contracts. Consumers says that Mr. Rasmussen, acting in this capacity, provided internal evaluations and analyses of the various contract options that Consumers discussed with Total. Consumers argues that it offered

Mr. Rasmussen's testimony, not to provide a factual account of its dealings with Total, but rather to present Consumers' position, as supported by the facts of this case. Consumers says that the basic facts, as distinguished from Total's interpretation of them, are simple and undisputed. Consumers contends that Total did not incur an unfair disadvantage due to the absence of a Consumers witness with direct involvement in the negotiations, but that Total had the opportunity to conduct discovery and to present rebuttal evidence.

The ALJ ruled appropriately in denying Total's motion to strike Mr. Rasmussen's testimony in its entirety. As the complainant charged with the burden of proof, Total presented witnesses who testified in detail regarding the meetings and communications comprising its negotiations with Consumers, and the strictly factual content of those events and occurrences (i.e., who? what? when? where?) are not in serious dispute. (Much of the detail is in the form of written correspondence that was admitted into the record as exhibits.) Because Consumers for the most part accepted Total's factual chronology (although it disputed some of Total's conclusions drawn from the facts), it was not necessary for Consumers to present evidence of different or contradictory facts to support its own positions on the issues. Moreover, if Total deemed any of Consumers' employees to be necessary witnesses, it could have sought to compel their testimony.

Mr. Rasmussen was an appropriate witness to explain Consumers' practices and policies, to discuss the company's rationales for its treatment of various Rate I customers, and to present Consumers' position in its dispute with Total. Therefore, the Commission rejects Total's contention that Mr. Rasmussen was not competent to testify.

g. Consumers' evidentiary objections

In its exceptions, Consumers argues that the ALJ erred in striking several parts of its witnesses' prefiled testimony and in denying motions to strike parts of the Total witnesses' testimony. How-

ever, Consumers prefaces these exceptions by stating that it agrees with the overall recommendation of the PFD and is filing the exceptions simply to preserve its position. Because this order adopts the recommended disposition in the PFD, it is not necessary to address these exceptions.

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 AACCS, R 460.17101 et seq.

b. The complaint should be dismissed.

THEREFORE, IT IS ORDERED that the complaint is dismissed with prejudice.

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 March 3, 2000.

/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 March 3, 2000.

Its Executive Secretary

In the matter of the complaint of)
TOTAL PETROLEUM, INC., against)
CONSUMERS ENERGY COMPANY.)
_____)

Case No. U-11516

Suggested Minute:

“Adopt and issue order dated March 3, 2000 dismissing a complaint filed by Total Petroleum, Inc., against Consumers Energy Company, as set forth in the order.”