

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of)
CONSUMERS ENERGY COMPANY for a)
financing order approving the securitization of)
certain of its qualified costs.)
_____)

Case No. U-13715

Concurring Opinion of Commissioner Robert B. Nelson

(Submitted on June 2, 2003)

I concur with the decision of the Commission today to authorize Consumers Energy Company (Consumers) to proceed with the issuance of securitization bonds covering up to \$554,323,000. I write separately for two reasons: (1) to distinguish my decision to join this opinion with my decision to dissent, in part, in Consumers' first securitization case (U-12505) and (2) to distinguish the authorization of Clean Air Act expenditures as qualified costs from the decision not to allow such authorization for the capital improvements at the Palisades plant.

With respect to my opinion concurring in part and dissenting in part in U-12505, I indicated that "the Commission has consistently required approval of the necessary accounting changes before 'determining' regulatory assets." I was referring to the statutory requirement in Section 10h(g) of Act 142 that, regulatory assets of a utility, before they can be deemed "qualified costs" and eligible for securitization, should be "determined" to be so by the Commission. My contention was that, unlike other costs that the Commission may "determine" to

be unlikely to be collected in a competitive market, the use of the past tense with regard to regulatory assets required some previous approval by the Commission. The Michigan Court of Appeals, in Attorney General v PSC, 247 Mich App 35 (2001) specifically rejected this contention. The Court indicated, at p. 42 of its opinion:

“Thus, because the plain language of the statute expressly authorizes the PSC to determine whether a particular item is a qualified cost under sub-section 10h(g), our inquiry is at an end. Contrary to appellant’s contentions, the statute does not indicate that there is a time limit requirement on this determination”

The Court thus affirmed this Commission’s decision to authorize the securitization of the pre-2001 investment in Palisades, even though there was no previous determination that the plant was a regulatory asset. I am bound by this opinion and therefore recognize that the Commission can, in the context of the proofs provided in this proceeding, make regulatory asset determinations.¹ However, it is important to emphasize, as the financing order issued today does, that Act 142 provides the Commission with broad discretion to make these determinations. In exercising our discretion, we should look at Acts 141 and 142 in concert. When this is done, it is clear that pre-2003 Clean Air Act costs incurred by Consumers should be classified as qualified costs² and capital improvements at Palisades should not be so classified.

¹ Act 142 is unique among Commission statutes in authorizing regulatory asset determinations by the Commission. My opinion in this case should not be construed to address the process for recognizing regulatory assets outside of Act 142. See my separate opinion In Re Mich Con U-13060, December 20, 2001.

² The authorization of recovery of Clean Air Act compliance costs under PA 142 is not dispositive of whether the Commission should permit the recovery of stranded costs incurred after the enactment of PA 141.

When we examine Acts 141 and 142, we find specific reference to implementation costs and costs “incurred as a result of . . . federal governmental actions”. We find no such reference to capital improvements at nuclear plants, which tells me that the Legislature preferred that these costs should be dealt with in the traditional ratemaking process. In fact, some of the Palisades improvements may be eligible for recovery under another process, the one dictated by 2002 PA 609.

In my view, Consumers has demonstrated on this record that it incurred costs, prior to 2003, that were necessary to meet the emissions requirements of Title I of the Clean Air Act. In contrast, the record does not demonstrate that the Palisades investment after 2000 was mandated by federal law. Although the record in this case was limited by the constraints of the statute, the Commission’s interpretation of Section 10i(2)(d) that the amount securitized is capped at a level below that sought by Consumers provides further assurance that only reasonable and prudent Clean Air Act expenses are being securitized.

Finally, the fact that the Commission has previously foreclosed Consumers from seeking recovery of Clean Air Act compliance costs in stranded cost proceedings distinguishes them from the Palisades capital improvements. Consumers is free to demonstrate in this proceeding, or in a stranded cost case, that because of these capital improvements, power generated at Palisades is not marketable. It has failed to do so. In my separate opinion in Detroit Edison’s securitization case, U-12478, November 2, 2000, where I disagreed with the

majority's finding that capital improvements at Fermi II should be securitized, I indicated that Detroit Edison had also failed to do so and stated:

“Moreover, Edison has made no attempt to demonstrate that these capital additions would be costs it would be unlikely to ‘collect in a competitive market’, per the test in Section 10h(g) of Act 142.”

The Commission has authorized the securitization of those portions of the investments in Fermi II and Palisades that were thoroughly audited and reviewed in rate case proceedings. The post-2000 capital investments in those plants have not been thoroughly audited and reviewed.

Accordingly, I concur with the opinion issued today.

MICHIGAN PUBLIC SERVICE COMMISSION

Robert B. Nelson, Commissioner