

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of)	
WISCONSIN ELECTRIC POWER COMPANY,)	
d/b/a WE ENERGIES, for approval pursuant to)	Case No. U-15220
Section 6j(13)(b) of 1982 PA 304 and eligible facility)	
designation pursuant to Section 1262 of the)	
Public Utility Holding Company Act of 2005.)	
_____)	

At the September 25, 2007 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Orjiakor N. Isiogu, Chairman
Hon. Monica Martinez, Commissioner
Hon. Steven A. Transeth, Commissioner

OPINION AND ORDER

History of Proceedings

On March 19, 2007, Wisconsin Electric Power Company, d/b/a We Energies (Wisconsin Electric), filed an application seeking the following in connection with the proposed sale of its Point Beach Nuclear Plant (Point Beach) to FPL Energy Point Beach, LLC (FPL): (1) approval of a power purchase agreement (PPA) governing FPL’s sale of Point Beach’s electrical output to Wisconsin Electric after the closing of the plant sale; and (2) a determination that Point Beach qualifies as an “eligible facility” for purposes of the Public Utility Holding Company Act of 2005, §§ 1261-77 (PUHCA), which is part of the Energy Policy Act of 2005, PL 109-58.

At a prehearing conference on March 29, 2007, Administrative Law Judge Sharon L. Feldman (ALJ) granted leave to intervene to Tilden Mining Company L.C. and Empire Iron Mining

Partnership (Mines) and to FPL (limited to issues of the treatment of confidential information and the PUHCA determination). The Commission Staff (Staff) also participated. On June 19-20, 2007, the ALJ conducted evidentiary hearings. The parties filed briefs on July 12, 2007 and reply briefs on July 24, 2007. Because the Commission agreed to read the record, the ALJ did not prepare a Proposal for Decision.

Background

a. Parties

At present, Wisconsin Electric owns Point Beach, and Nuclear Management Company operates the nuclear facilities under contract with Wisconsin Electric. FPL, the proposed buyer of the facilities, is a wholly owned subsidiary of FPL Group Inc., a holding company that, together with other subsidiaries, owns and operates 30,000 megawatts (MW) of generation capacity, including six nuclear plants.

The Mines conduct iron ore mining operations in Marquette County, Michigan. Prior to 1988, they purchased electricity produced by the Presque Isle power plant, then owned and operated by Upper Peninsula Generating Company, which was in turn owned by The Cleveland-Cliffs Iron Company and Upper Peninsula Power Company. Wisconsin Electric purchased the Presque Isle plant and began providing electric service to the Mines pursuant to special contracts approved by the December 8, 1987 order in Case No. U-8940. The Mines' current special contracts with Wisconsin Electric, which were approved in the February 22, 1996 order in Case No. U-11032, will expire on December 31, 2007, and the Mines intend to take electric service under Wisconsin Electric's tariff thereafter.

The Mines are Wisconsin Electric's largest retail customers, consuming approximately 2,000 gigawatt-hours (GWh) annually. According to Exhibit MIN-2, the Mines account for 7.3% of Wisconsin Electric's energy sales, other retail Michigan customers account for 2.4% of sales, and the remainder are Wisconsin- or federal-jurisdictional.

b. Point Beach facilities

Located on the west side of Lake Michigan near Two Rivers, Wisconsin, Point Beach's two pressurized-water nuclear reactors have a combined net generation capacity of 1,036 MW. According to Wisconsin Electric, the two Point Beach units' combined net annual electrical output during 2001-05 averaged 7,793 GWh, which equated to an 86.4% capacity factor. The United States Atomic Energy Commission (AEC) issued construction permits for Units 1 and 2, respectively, in 1967 and 1968 and operating licenses in 1970 and 1973. The Nuclear Regulatory Commission (NRC), the AEC's successor agency, issued 20-year renewals of the operating licenses on December 22, 2005, so that Unit 1's license now expires in 2030 and Unit 2's in 2033.¹

c. Proposed sale of plant and power purchase agreement

In accordance with an asset sale agreement (ASA) dated December 19, 2006, Wisconsin Electric agrees to sell Point Beach to FPL for a base price (before any ASA-required adjustments) of \$998 million. Exs. MIN-9, A-6. The ASA further provides that Wisconsin Electric will transfer to FPL a portion of monies set aside in external trusts (both qualified and non-qualified for tax purposes) to fund the eventual decommissioning of the nuclear plant. The amount of transferred decommissioning funding is contingent on a request for a private letter ruling (PLR) from the Internal Revenue Service regarding the tax consequences, but will be no more than \$360 million. Wisconsin Electric will retain the remaining funds as additional proceeds of the

¹On July 31, 2007, the NRC approved the proposed transfer of the operating licenses to FPL in Docket Nos. 50-266 and 50-301.

transaction. In light of the expected PLR outcome, Wisconsin Electric's last record estimate is that it will receive \$968.2 million in proceeds as the adjusted price for Point Beach and retain additional proceeds of \$472.2 million in decommissioning funds (in excess of a \$360 million transfer).² Ex. A-7. Under the ASA, FPL assumes responsibility for decommissioning the Point Beach premises to a condition that permits unrestricted usage and may use the SAFSTOR method³ for that purpose.

In conjunction with the ASA, Wisconsin Electric negotiated two alternative PPAs, either of which would obligate it to purchase, and FPL to sell, Point Beach's entire generation output, including capacity, energy, and ancillary services, after closing. The two alternative PPAs differ by contract duration and price, and it is understood that Wisconsin Electric will choose one of the two at closing. The first alternative is a life-of-license PPA, which runs from the closing until the expiration of each unit's NRC operating license (in 2030 and 2033). The second PPA alternative provides for terms of 16 and 17 years for Units 1 and 2, respectively (until 2023 and 2024). Wisconsin Electric represents that it will choose an alternative on the basis of the expressed preference of the Public Service Commission of Wisconsin (WPSC) in a parallel proceeding (in Docket No. 6630-EI-113) relating to the proposed Point Beach transaction.⁴ On September 18,

²Wisconsin Electric's expectation was based on a similar PLR issued for the sale of the Palisades nuclear plant on April 5, 2007. In light of the Palisades PLR, Wisconsin Electric and FPL negotiated an ASA amendment that adjusted the sales price. Ex. A-6. Wisconsin Electric later received the PLR it expected. Wisconsin Electric's brief, p. 12.

³As defined by the NRC, SAFSTOR is a "method of decommissioning in which the nuclear facility is placed and maintained in such condition that the nuclear facility can be safely stored and subsequently decontaminated to levels that permit release for unrestricted use." <http://www.nrc.gov/reading-rm/basic-ref/glossary/safstor.html>.

⁴*In the Matter of All Approvals Necessary for the Transfer of Ownership and Operational Control of the Point Beach Nuclear Plant from Wisconsin Electric Power Company (d/b/a WE Energies) to FPL Energy Point Beach, LLC, a subsidiary of FPL Group Capital, Inc.*, Docket No. 6630-EI-113. At an open meeting on September 18, 2007, a majority of the WPSC voted orally to approve the application, with conditions, and directed the WPSC staff to prepare an order memorializing their decision.

2007, a majority of the WPSC indicated that they would approve, with conditions, the life-of-license PPA. Subsequent references in this order to the PPA thus assume the life-of-license alternative.

The PPA assesses charges based solely on the quantity of energy delivered, so that there are no fixed charges independent of the plant's energy output. The charges vary by month and on- or off-peak hour, so that higher hourly charges are in effect during peak summer months and on-peak hours. On a yearly basis, the rate schedule escalates rates over the life of the plant, starting at an average of \$31.37 per megawatt-hour (MWh) in 2007 and trending upward to average \$41.62 per MWh by 2010. By 2025, the average life-of-license rates will be \$70.47 per MWh, and will continue to escalate to \$122.45 per MWh in 2033. Ex. S-1.

Wisconsin Electric performed a comparison of the PPA rates with its modeled cost of continuing operations (CCO) of Point Beach based on the assumption that it would retain plant ownership. It concluded that the life-of-license PPA would produce \$75 million of savings, calculated as the net present value (NPV) of the excess of expected PPA payments over the CCO through 2033. Tr. 337. According to Wisconsin Electric, the PPA's benefits are front-end loaded, in that the rates have been structured to achieve most of the savings, measured relative to either CCO or projected market prices, in the earlier years.

During peak usage months of June, July, and August, the PPA obligates FPL to achieve a 97% capacity factor and, in the event of noncompliance, to compensate Wisconsin Electric at the rate of \$20 per MWh of the shortfall in energy production. This rate escalates annually at 3%. FPL and its parent company FPL Group are also obligated, under certain circumstances, to provide a performance guarantee of \$100 million to back the PPA obligations (subject to annual post-2024 escalation at 3%). There are also liquidated damages provisions if FPL fails to meet Point Beach's

resource adequacy obligations under Module E of the Midwest ISO's Open Access Transmission and Energy Markets Tariff.

FPL plans efforts to increase Point Beach's capacity by about 90 MW and may undertake additional capacity uprates. The PPA grants Wisconsin Electric an option to buy the power attributable to the uprates at PPA rates and, in the case of the 90 MW planned uprate, by further reimbursing FPL for the transmission upgrade costs. If Wisconsin Electric declines the uprate option, FPL would be free to sell the power to others.

The PPA confers a right of first offer. This entitles Wisconsin Electric to consider an offer from FPL to extend the power purchases beyond the PPA term before FPL can market the power to another buyer. FPL must make an offer to Wisconsin Electric at least 18 months prior to the term expiration.

Finally, the PPA makes provision for sharing any tradeable credits or other proceeds that might be realized by Point Beach's nuclear generation as a result of a future change in environmental law. For the first seven years of the PPA, Wisconsin Electric would be entitled to the entire benefit of the proceeds; thereafter, Wisconsin Electric and FPL would split the proceeds equally. At the WPSC's September 18, 2007 open meeting, it adopted modifications that create a possibility, under specified circumstances, that Wisconsin Electric will retain all of the environmental credits or proceeds.

d. Requested approvals

The first approval sought in Wisconsin Electric's application relates to the PPA. Section 6j(13)(b) of 1982 PA 304, as amended, provides: "In its order in a power supply cost reconciliation, the commission shall . . . [d]isallow any capacity charges associated with power purchased for periods in excess of 6 months unless the utility has obtained the prior approval of

the commission.” MCL 460.6j(13)(b). As Wisconsin Electric acknowledges, the prospective costs of Point Beach capacity would be embedded in the PPA energy-only rates. It seeks approval to avoid the possibility that some or all of the payments might be subject to disallowance as capacity charges in future power supply cost recovery (PSCR) proceedings. Consumers Energy Company (Consumers) pursued a similar approach regarding the sale of its Palisades plant to Entergy Nuclear Palisades, LLC, and the Commission granted approval of the Palisades PPA in the March 27, 2007 order in Case No. U-14992. Wisconsin Electric is requesting approval that is commensurate with that granted to Consumers, specifically: (1) approval for the limited purposes of Section 6j(13)(b), and (2) a finding that management’s decision to sign the PPA was reasonable and prudent based on the facts and circumstances known or reasonably foreseeable at the time the decision was made.

The Commission agrees that the PPA approval being requested in this case should be limited to, and no more or less co-extensive than, that granted in the order in Case No. U-14992 and does not prohibit continuing Commission review. The Commission further explained in the order, at 63-64:

While Consumers correctly notes that the law is clear that the review of the reasonableness and prudence of a utility’s long-term purchased power arrangements must be resolved in light of the circumstances at the time that the contract was executed, the fact remains that the Commission is required by Act 304 to conduct both an annual PSCR plan proceeding and an annual PSCR reconciliation proceeding. . . .

One of the court decisions cited by Consumers to the Commission as support for Consumers’ request for approval of the PPA sheds some light on the scope of the Commission’s PSCR review process with regards to approvals of PPAs for the purposes of MCL 460.6j(13)(b):

“The Legislature gave the PSC discretion in dealing with requests for approval, with the understanding that any party could dispute the reasonableness and prudence of the purchase at least in a power supply cost recovery case and perhaps in a general rate case.”

Attorney General v Public Service Comm, 220 Mich App 561, 566; 560 NW2d 348 (1996).

Second, Wisconsin Electric seeks certain determinations that are necessary to qualify FPL, as Point Beach's prospective buyer, to be an exempt wholesale generator (EWG) for purposes of PUHCA. An EWG is exempt from certain PUHCA requirements to provide access to books and records, 42 USC 16454, and the ASA requires EWG status as a condition of closing. Under PUHCA, the term "EWG" has the same meaning as in 15 USC 79z-5a, as it existed on the day before PUHCA repealed it. 42 USC 16451(6). 15 USC 79z-5a(a)(1) defined an EWG, in part, as a person who owns or operates an "eligible facility." Under 15 USC 79z-5a(c), a prerequisite for qualifying as an eligible facility is that any state commission with jurisdiction over rates previously used to recover the facility's costs must determine that granting the status "(1) will benefit consumers, (2) is in the public interest, and (3) does not violate State law." Because Point Beach's costs of producing electricity have, to date, been recovered in part through rates approved by the Commission, these determinations are pending in this case.

e. Positions of the parties

Wisconsin Electric offers similar reasons in support of both requests for approval, arguing that the proposed transaction – the ASA and PPA, collectively – would benefit ratepayers and the public interest. It says that the transaction would secure the power for ratepayers under terms that are prospectively more favorable than its retaining ownership of Point Beach. It argues that the CCO analysis makes this clear, even before considering ratepayers' beneficial interest in the net proceeds. It observes that, in several respects, the transaction would eliminate risks of continued ownership of Point Beach. Thus, the PPA's energy-only rate structure means that neither Wisconsin Electric nor its ratepayers would be at risk of paying for plant fixed costs if the plant fails to perform. The PPA rates would protect ratepayers from unexpected escalation in nuclear

production and fuel costs. The monthly shaping of the rates would ensure that FPL has an incentive to run the plant when it is needed most. FPL would assume the responsibility and financial risk of decommissioning. Wisconsin Electric claims that FPL's management has considerable experience as a nuclear operator and would be in a position to use its efficiencies, expertise, and economies of scale for Point Beach's benefit.

FPL supports Wisconsin Electric's request for the PUHCA determinations.

The Staff also largely supports Wisconsin Electric's application, subject to a proposed rate adjustment that is necessary to avoid a double recovery of Point Beach's non-fuel costs. Otherwise, the Staff's position is that the PPA alternatives are reasonable in their own right, independent of any consideration of the proceeds.

For the most part, the Mines do not argue that the Point Beach transaction is flawed in concept. The Mines do oppose approval without their proposed conditions, some of which are aimed at ensuring that they are treated on a comparable basis with other ratepayers in sharing the benefit of the proceeds. Wisconsin Electric is unwilling to give this assurance, arguing instead that the Mines' rights are governed exclusively by their special contracts, which require disputes to be resolved through arbitration.

Rate Adjustment

The Staff proposes to raise Wisconsin Electric's PSCR base point⁵ to reflect the non-fuel revenue requirement attributable to Point Beach in current base rates. Because the post-sale PPA charges will pass through the PSCR factor, adjusting the base point would allow the difference between the Point Beach revenue requirement currently recovered in base rates and the PPA

⁵The PSCR base point represents the PSCR costs that are embedded in base rates. The PSCR factor approved in a plan case accounts for the incremental difference between projected PSCR costs for the plan year and the base point.

charges to be reconciled in PSCR proceedings and would thereby avoid a double recovery of the plant costs. Moreover, it would not be necessary to adjust Wisconsin Electric's base rates prior to the next base rate case. In Exhibit S-2, the Staff computes the increased PSCR base point to be \$0.03891 per kilowatt-hour (kWh). Wisconsin Electric agrees to the Staff's adjustment.

The Mines agree with the concept of adjusting the PSCR base point, but they propose a further adjustment based on their contention that Wisconsin Electric's risk profile, and hence its economic cost of equity capital, will go down after the Point Beach sale. Their risk adjustment would lower, by half a percentage point, Wisconsin Electric's authorized rate of return on common equity of 11%, which was approved in an order dated May 22, 2007, Case Nos. U-15039 and U-15071 (approving settlement agreement of a rate case). The Mines compute an increased PSCR base point of \$0.03943 per kWh. Ex. MIN-4.

Wisconsin Electric and the Staff oppose the risk adjustment as an attempt to raise an issue that more properly belongs in a rate case. Wisconsin Electric further argues that the adjustment is not supported by substantial evidence, is based on a flawed methodology, and fails to account for all risk factors that affect the cost of common equity.

The Commission finds that the Staff's proposed adjustment to the PSCR base is reasonable and should be adopted as a condition to the approvals. The Commission does not agree that the Mines' additional risk adjustment based on potential changes in the cost of common equity is appropriate. Evaluation of the cost of capital is complex and requires an analysis of the company's entire business and financial risk profile in the context of a rate case that undertakes a comprehensive review of all of the utility's costs of providing service. It does not lend itself to an incremental adjustment based on the expected consequences of a single event. Moreover, the Mines' assessment of the risk reduction at half of a percentage point of return is arbitrary.

Disposition of Net Proceeds

As set forth in Exhibit A-7, Wisconsin Electric is estimating that it will receive \$968.2 million as the price for the sale of Point Beach. After offsetting the book value of the assets and transaction costs, it estimates net sales proceeds of \$424.4 million. When combined with retained decommissioning funds of \$472.2 million, the total net proceeds become \$896.5 million, which Wisconsin Electric commits that it will apply entirely for ratepayers' benefit. Tr. 419-20.

However, Wisconsin Electric recommends that the disposition of the proceeds be deferred until a subsequent case, so as to avoid deciding for now the contentious issues raised by the Mines and possibly delaying the closing. In this regard, Wisconsin Electric observes that the ASA provides for reductions in the sales price of the plant if the closing does not occur on time. Moreover, Wisconsin Electric claims that the validity of the transaction does not depend on the proceeds, but that the record shows other benefits, in the form of the CCO analysis and the risks being shifted away from ratepayers, that fully justify the approvals being requested. Wisconsin Electric also claims that it would be premature to address an uncertain amount of proceeds.

Wisconsin Electric argues that the refund mechanism used to return the Palisades proceeds to Consumers' ratepayers in the March 27, 2007 order in Case No. U-14992 – a negative surcharge or credit applied uniformly to energy usage – should not be regarded as precedent. According to Wisconsin Electric, Palisades' circumstances were different, in that a uniform surcharge was necessary to achieve parity between choice and full service customers, Consumers was subject to a securitization condition obligating the return of the net proceeds,⁶ Consumers' rates would have increased abruptly without the credit, and no one raised the treatment of special contract customers who had never taken tariff service. Moreover, Wisconsin Electric says, a uniform energy credit

⁶See order dated October 24, 2005, Case No. U-12505, pp. 13-14.

would ignore the historical cost allocations based on each rate class's relative contribution to both demand and energy usage.

The Staff does not oppose deferring the disposition of the proceeds and recommends that Wisconsin Electric file a case for that purpose within 30 days of the transaction's closing. Wisconsin Electric concurs. If, however, the Commission were to order an immediate refund, the Staff's recommendation would be to use the same refund methodology as in Case No. U-14992. If the Commission were inclined to include the Mines in receiving the refunds, the Staff would recommend deferring the disposition of the proceeds to a later proceeding.

The Mines propose a refund of the proceeds as a uniform negative surcharge assessed on all customers' energy usage (including their own) over a period of 12 to 18 months. They urge the Commission not to defer the issue, but to order the refund now, just as in Case No. U-14992. The Mines say that conditioning the transaction on an immediate refund would foreclose the possibility that Wisconsin Electric could delay issuing refunds or argue later that the Commission lacks refunding authority. The Mines state that the record contains all of the information necessary to order an immediate refund.

The Mines further claim that ratepayers' interest in the proceeds is their principal benefit from the transaction. The Mines say that Wisconsin Electric relies too much on the CCO model, which is sensitive to small changes in inputs and makes speculative projections for too many years into the future. The Mines' witness specifically criticized the post-2024 increase of 1.5 percentage points in the discount factor used for calculating NPV as overstating the CCO savings. The Mines contend that if the proceeds do not benefit ratepayers, the suitability of the transaction for them becomes doubtful. They further observe that, in selecting FPL to buy the plant, Wisconsin Electric used a competitive auction process that attracted other bids, including one that offered a reduced

sales price, but more favorable PPA rates and terms. The Mines say that, minus the proceeds, the economics of the unsuccessful bid become much more attractive for ratepayers.

The Commission agrees with the Mines that there is no reason to defer the refund issue. In keeping with Wisconsin Electric's stated commitment to give the proceeds to ratepayers, the Commission finds that the net proceeds from the sale of the plant (after book value) and the excess decommissioning funds should be refunded to customers now. The circumstances of this case do not justify delay. The record provides a reasonable estimate of the expected proceeds, including excess decommissioning funds, and an adequate basis for ordering a refund. Post-closing adjustments reflecting actual proceeds can be dealt with by true-up.

The Commission further directs that the refund be implemented using the Palisades refund mechanism in Case No. U-14992 as a template. That is, Wisconsin Electric shall implement a uniform negative surcharge, in mills per kilowatt-hour, to issue refunds to its Michigan-jurisdictional end-use customers over an 18-month period. While there are some differences between the Palisades and Point Beach situations, those differences are not so material as to render the Palisades refund methodology inapposite. A uniform credit is administratively simple and certain. It does not precisely track the historical contributions made by each customer or rate class to cost recovery, but that is true for almost any refund methodology, except perhaps one that is entirely retroactive (which would be nearly impossible to implement, given the many years since Point Beach began to run).

The Mines propose that the negative surcharge used to implement the refund be computed with reference to the annual average of Wisconsin Electric's past five years of energy sales, instead of the most recent year, as the denominator. They claim that a five-year average tends to smooth year-to-year anomalies and that Wisconsin Electric's 2006 sales are higher than average.

In keeping with the Palisades template, the Commission directs the use of calendar year 2006 actual data to compute the negative surcharge factor. Given that the purpose is to implement refunds over a relatively short period of time, using somewhat higher sales in one year as a computational matter does not create a material distortion.

The Mines argue that, consistent with the proceeds determinations in Case No. U-14992, the Commission should not allow Wisconsin Electric to deduct \$56 million in transaction costs from the proceeds. The Mines contend that the recovery of those costs should be deferred for a prudence review in a future proceeding.

Wisconsin Electric contends that the prudence of the costs should be deferred until it files a new case relating to the disposition of the proceeds.

In the March 27, 2007 order in Case No. U-14992, at 78, the Commission computed net proceeds without deduction for transaction costs and further directed that the prudence determination and recovery of those costs should await a base rate case. In this case, however, the Commission recognizes the added complexity of completing a transaction that affects multiple state jurisdictions. Therefore, it will defer to the WPSC's determination regarding the treatment of the transaction costs in Docket No. 6630-EI-113 for the limited purpose of determining the amount of net proceeds that will be subject to refund. This order expresses no opinion as to whether those costs are reasonable and prudent.

The Mines seek assurance that they will be entitled to the uniform negative surcharge on equal terms with other jurisdictional customers. The Mines argue that the Commission cannot find the Point Beach transaction to be in the public interest if it forecloses refunds to Wisconsin Electric's two largest customers, who constitute a significant segment of the ratepaying public in their own right. In their view, the Commission cannot grant the PUHCA determination absent a finding that

the transaction and its proceeds will benefit all customers, including them. The Mines say that they account for 300 MW of Wisconsin Electric's system demand, 7% of system energy sales, and almost 75% of Michigan jurisdictional energy sales. Through the cost-based rates they have paid under their special contracts, they say, they have contributed toward the recovery of Point Beach's capital costs and decommissioning funding. They also point out that they will begin taking service under tariff after this year.

The Mines say that their special contracts do not alter their status as jurisdictional ratepayers or their right to receive refunds, as this case does not arise under the terms of those contracts. They contend that Commission-ordered refunds would not contravene any term of their contracts and would be imposed independently from the contracts. They argue that the Commission retains jurisdiction over special contract customers and may thus order refunds to them. In any event, the Mines argue, the *Mobile*⁷-*Sierra*⁸ doctrine enables an agency with ratemaking authority to modify contracts when that is in the public interest.

The Mines estimate that the Michigan-jurisdictional portion of the net proceeds (including excess decommissioning funding) will be \$87 million, of which over \$60 million are allocable to the Mines. If the Mines do not receive refunds, they suggest, either Wisconsin Electric will retain the funds for the benefit of its shareholders, or it will reallocate them to its other retail customers, over 90% of which are Wisconsin-jurisdictional.

In reply, Wisconsin Electric contends that the Mines, who have taken service exclusively under special contracts, must ground their refund claim in those contracts. According to Wisconsin Electric, issuing them refunds would effectively reduce the contract rate. Wisconsin

⁷*United Gas Pipe Line Co v Mobile Gas Service Corp*, 350 US 332; 76 S Ct 373; 100 L Ed 373 (1956).

⁸*Federal Power Comm v Sierra Pacific Power Co*, 350 US 348; 76 S Ct 368; 100 L Ed 388 (1956).

Electric says that the Mines' procedural remedy is to invoke the mandatory arbitration clauses of their special contracts. Wisconsin Electric further contends that the Mines have failed to meet the heightened public interest standard imposed by the *Mobile-Sierra* doctrine, which is more demanding than the reasonableness standard used to evaluate requests for changes in tariff rates.

The Commission finds that it is reasonable and appropriate for all jurisdictional end-use ratepayers to participate in the refund. Customers do not lose their jurisdictional status under 1939 PA 3, as amended, MCL 460.1 *et seq.*, or other Michigan statutes by paying rates approved as just and reasonable under special contracts. Nor can they or the utility exempt the contract from the Commission's statutory jurisdiction by negotiating a provision to that effect. In this respect, special contract customers are similarly situated to tariff customers.

The refund in this case does not arise from the rates or other terms of the special contracts and is not contrary to those contracts. Because the Point Beach cost of service has been recovered through rates that are both tariff- and contract-based, it is reasonable and equitable for the gain on the transaction to be returned to those ratepayers. The legal justification for this action – a condition of the authorizations that the Commission must issue by law if the transaction is to proceed – does not depend on whether the customer takes service under tariff or contract.

To summarize, all Michigan-jurisdictional end-use customers, including special contract customers, shall participate in the refund of that portion of the net sales proceeds and excess decommissioning funds that is allocable to them. (Wisconsin Electric shall perform jurisdictional allocations of the proceeds in accordance with normal ratemaking practices.) In keeping with its refund determinations in Case No. U-14992, the Commission directs Wisconsin Electric to use calendar year 2006 actual data to determine the appropriate uniform negative surcharge factor, in mills per kilowatt-hour, to apply to customers' bills for the 18 monthly billing cycles following

implementation of the refund. Interest shall be added to the unrefunded balance of the refund amount commencing at closing and continuing through the midpoint of the last billing cycle. The rate of interest shall be Wisconsin Electric's short-term borrowing rate.

Within two weeks of closing, Wisconsin Electric shall file a report in this docket describing the amount and jurisdictional allocation of the proceeds and the calculation of the uniform negative surcharge factor for Michigan jurisdictional customers. Any interested person may file comments regarding the accuracy of the calculation within seven calendar days of the filing of Wisconsin Electric's report. Absent further order from the Commission, Wisconsin Electric shall implement the negative surcharge approved by this order at the beginning of the first billing cycle that commences more than 30 days following the filing of the report.

Other Proposed Conditions

The Mines propose a condition to preclude any customer's rates from being adversely affected by the Point Beach transaction in future rate cases. They are concerned that otherwise the Point Beach PPA charges will result in retail rates that collect more of the costs on the basis of customers' energy usage instead of demand, thus shifting more of the costs to customers with high load factors, like themselves.

Wisconsin Electric and the Staff oppose conditions that purport to govern future rate cases.

The Commission rejects the proposed condition. To the extent that it is an attempt to impose constraints on future rate cases, it is improper. Moreover, the underlying premise – that the PPA will alter cost allocation relationships in future rate cases – is not demonstrably correct as a matter of cost allocation methodology, and such issues are premature at present.

The Mines are concerned that the \$360 million of decommissioning funds that the ASA transfers to FPL, together with subsequently accrued earnings, might eventually prove to be more

than necessary to complete decommissioning. Therefore, the Mines propose to require Wisconsin Electric and FPL to amend the ASA by obligating FPL to return any excess funds to Wisconsin Electric for the benefit of ratepayers after decommissioning.

Wisconsin Electric argues that the Commission lacks authority to regulate either FPL or its decommissioning activities once the transfer of the plant takes place. According to Wisconsin Electric, the Mines ignore the overall package of ratepayer benefits, which include FPL's assumption of the risk of a shortfall in funding necessary to fulfill its decommissioning obligations.

The Staff states that the issue is beyond the scope of this case and that the Commission should defer approval of the ASA to the WPSC.

The WPSC has resolved this issue on its merits by requiring the eventual return of any excess decommissioning funds to Wisconsin Electric.⁹ To avoid the possibility of conflicting decisions that could complicate the closing, it is appropriate to adopt the WPSC's determination in Docket No. 6630-EI-113.

Approval of Power Purchase Agreement

Subject to the conditions imposed by this order, the Commission finds that the life-of-license PPA is reasonable and should be approved for purposes of MCL 460.6j(13)(b). The Commission agrees with Wisconsin Electric and the Staff that the transaction as a whole conveys benefits that justify approval. This is true even if elements of the PPA, in isolation, are not as favorable as some would prefer. The CCO analysis projects savings from the PPA relative to Wisconsin Electric's retained ownership of the plant. When the PPA is viewed as a part of the entire

⁹"Point Beach Sale Conditions," Condition 1.i., enclosure with letter from Jennifer E. Nashold, WPSC General Counsel, to service list (Sept. 18, 2007), Docket No. 6630-EI-113.

transaction encompassing the ASA and the net proceeds, the record supports a finding of significant value for ratepayers. Moreover, the right to purchase Point Beach's output pursuant to a fixed schedule of rates is itself a form of protection against the risk of future cost escalation. The energy-only rate structure of the PPA mitigates the risk that ratepayers might otherwise incur capacity and fixed costs of a nuclear plant that fails to perform well in the future. This recital of benefits is not by any means exhaustive.

On September 18, 2007, the WPSC adopted an additional condition requiring Wisconsin Electric to obtain WPSC approval before assigning its rights and responsibilities under the PPA to a third party.¹⁰ This order adopts the same condition and requires the Commission's approval before any similar assignment.

With the conditions imposed by this order, the Mines' substantive objections largely dissipate. Given the benefits they will receive as customers of Wisconsin Electric, it is not likely that they would continue to oppose the transaction on its merits.

Nevertheless, the approval of the PPA is subject to the Point Beach transaction closing on substantially the same terms as set forth in this order. If Wisconsin Electric finds it necessary to adopt any material revisions to the PPA or to make other changes to the overall transaction that could be detrimental to ratepayers' interests, it must secure Commission approval prior to closing.

PUHCA Determination

As explained, Point Beach's eligible facility status under PUHCA requires a Commission determination that the status (1) will benefit consumers, (2) is in the public interest, and (3) does not violate state law.

¹⁰*Id.*, Condition 9.

Wisconsin Electric argues that the benefits of the proposed transaction, as described in relation to the request for PPA approval, also support findings that the transaction will benefit consumers and is in the public interest. Wisconsin Electric represents that no Michigan law would be violated, as the Commission found in similar orders granting approvals related to the sales of the Kewaunee and Palisades nuclear plants. Order dated August 10, 2004, Case No. U-14040 (approving Kewaunee settlement agreement); order dated March 27, 2007, Case No. U-14992 (Palisades).

FPL and the Staff support the determinations necessary to qualify Point Beach as an eligible facility.

The Mines attempt to add a statutory gloss to the eligible facility criteria, arguing that PUHCA requires a showing of significant benefits to the public that are, on balance, sufficient to outweigh any countervailing interests.

The record shows that the proposed transaction, as conditioned in this order, will provide benefits to ratepayers and the public that more than amply support the first two criteria for an eligible facility determination. It is fair to characterize those benefits as significant and as outweighing any disadvantages from the transaction. With respect to the third criterion, Wisconsin Electric and FPL have represented that the transaction does not violate Michigan law, and the Commission is unaware of any law that might be violated. Therefore, the Commission finds that Point Beach qualifies as an eligible facility if the transaction is consummated as set forth in this order.

The Commission FINDS that:

a. Jurisdiction is pursuant to 1909 PA 106, as amended, MCL 460.551 *et seq.*; 1919 PA 419, as amended, MCL 460.51 *et seq.*; 1939 PA 3, as amended, MCL 460.1 *et seq.*; 1982 PA 304, as

amended, MCL 460.6j *et seq.*; 1969 PA 306, as amended, MCL 24.201 *et seq.*; the Energy Policy Act of 2005, PL 109-58, 42 USC 16451 *et seq.*; and the Commission's Rules of Practice and Procedure, as amended, 1999 AC, R 460.17101 *et seq.*

b. The life-of-license PPA between Wisconsin Electric and FPL should be approved, subject to the terms and conditions set forth in this order.

c. Determining Point Beach to be an eligible facility will benefit consumers, is in the public interest, and does not violate Michigan law.

d. Upon the closing of the transfer of ownership of Point Beach, Wisconsin Electric's PSCR base point should be adjusted to \$0.03891 per kWh.

e. Wisconsin Electric should use 2006 calendar year actual sales data to determine the appropriate equal mills per kilowatt-hour negative surcharge factor to apply to customers' bills for 18 monthly billing cycles following the closing. Within two weeks of closing, Wisconsin Electric should file a report in this docket describing the amount of the net proceeds, including excess decommissioning trust funds, the jurisdictional allocation of the net proceeds, and the calculation of the equal mills per kilowatt-hour negative surcharge factor. Any interested person may file comments regarding the accuracy of the calculation within seven days of Wisconsin Electric's filing. Absent further order of the Commission, Wisconsin Electric should implement the negative surcharge for all jurisdictional customers, including special contract customers, in accordance with the methodology approved by this order at the beginning of the first billing cycle that is more than 30 days following the filing of the report regarding the calculation of the equal mills per kilowatt-hour negative surcharge factor.

THEREFORE IT IS ORDERED that:

A. The life-of-license power purchase agreement between Wisconsin Electric Power Company, d/b/a We Energies, and FPL Energy Point Beach, LLC, is approved, subject to the terms and conditions set forth in this order, including ordering paragraphs C and D.

B. The Point Beach Nuclear Plant is an “eligible facility” pursuant to the Public Utility Holding Company Act of 2005.

C. Upon the closing of the transfer of ownership of the Point Beach Nuclear Plant, the power supply cost recovery base point embedded in the base rates of Wisconsin Electric Power Company, d/b/a We Energies, shall be \$0.03891 per kilowatt-hour.

D. Wisconsin Electric Power Company, d/b/a We Energies, shall use 2006 calendar year actual sales data to determine the appropriate equal mills per kilowatt-hour negative surcharge factor to apply to customers’ bills for 18 monthly billing cycles following the closing of the transfer of ownership of the Point Beach Nuclear Plant. Within two weeks of closing, Wisconsin Electric Power Company, d/b/a We Energies, shall file a report in this docket describing the amount of the net proceeds, including excess decommissioning trust funds, the jurisdictional allocation of the net proceeds, and the calculation of the equal mills per kilowatt-hour negative surcharge factor. Any interested person shall file comments regarding the accuracy of the calculation within seven days of the filing of the report. Absent further order of the Commission, Wisconsin Electric Power Company, d/b/a We Energies, shall implement the negative surcharge for all jurisdictional customers, including special contract customers, in accordance with the methodology approved by this order at the beginning of the first billing cycle that is more than 30 days following the filing of the report regarding the calculation of the equal mills per kilowatt-hour negative surcharge factor.

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.

MICHIGAN PUBLIC SERVICE COMMISSION

/s/ Orjiakor N. Isiogu
Chairman

(S E A L)

/s/ Monica Martinez
Commissioner

/s/ Steven A. Transeth
Commissioner

By its action of September 25, 2007.

/s/ Mary Jo Kunkle
Its Executive Secretary

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.

MICHIGAN PUBLIC SERVICE COMMISSION

Chairman

Commissioner

Commissioner

By its action of September 25, 2007.

Its Executive Secretary