

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of)	
CONSUMERS ENERGY COMPANY for)	
reconciliation of nuclear power plant)	Case No. U-15611
decommissioning revenues and expenses for)	
the Big Rock Point Nuclear Plant.)	
_____)	

At the February 8, 2010 meeting of the Michigan Public Service Commission in Lansing, Michigan.

PRESENT: Hon. Orjiakor N. Isiogu, Chairman
Hon. Monica Martinez, Commissioner
Hon. Greg R. White, Commissioner

OPINION AND ORDER

History of Proceedings

On July 7, 2008, Consumers Energy Company (Consumers) filed an application requesting approval of a reconciliation of the costs and revenues associated with decommissioning the Big Rock Point Nuclear Plant (Big Rock). The case was filed pursuant to the Commission’s June 10, 2008 order in Case No. U-15245. According to its application, Consumers completed decommissioning of Big Rock in 2007 and calculated an underrecovery of decommissioning costs of \$44.1 million.

A prehearing conference was held on September 4, 2008 before Administrative Law Judge James N. Rigas (ALJ). At the prehearing conference, the ALJ granted petitions to intervene filed by the Association of Businesses Advocating Tariff Equity, Attorney General Michael A. Cox

(Attorney General), Michigan Environmental Council and Public Interest Research Group in Michigan (MEC/PIRGIM), and Energy Michigan. The Commission Staff (Staff) also participated in the proceedings. Evidentiary hearings were held on July 28 and 29, 2009. Consumers, the Staff, the Attorney General, and MEC/PIRGIM filed briefs and reply briefs on September 15 and October 6, 2009, respectively.

The ALJ issued his Proposal for Decision (PFD) on November 9, 2009. Consumers filed exceptions on December 4, 2009. The Staff, MEC/PIRGIM, and the Attorney General filed replies to exceptions on December 18, 2009. The record in this case consists of 366 pages of transcript and 30 exhibits admitted into evidence.

Positions of the Parties

Consumers stated that Big Rock was a 67 megawatt single unit boiling water reactor plant located near Charlevoix, Michigan. Big Rock began commercial operation in 1963, and operated successfully for over 30 years before it was shut down by Consumers in 1997. According to Consumers, it was no longer cost effective to continue operation of the plant beyond 2000 when the plant's license was set to expire.

Consumers decommissioned Big Rock using the DECON method. This method removes the equipment, structures, and other parts of the facility and site containing radioactive materials or contaminants to a level that permits the property to be released for use. Consumers explained that it used the DECON method because it is generally less costly than the alternative approach that defers removal of radioactive materials to some time in the future.

In decommissioning Big Rock, Consumers calculated that it incurred costs totaling \$472.8 million, \$457.1 million on a jurisdictional basis, including radiological and site restoration decommissioning costs, and spent nuclear fuel (SNF) storage costs. Consumers stated that it

excluded \$84.6 million from its request in this case, which were the costs associated with the storage of SNF.¹ Consumers stated that there was decommissioning funding of \$328.2 million available from jurisdictional trusts, leaving a shortfall of \$44.1 million for decommissioning activities.

Consumers contended that it had originally projected that the decommissioning of the Big Rock site would not be completed until October 31, 2012; however, the company's decommissioning activities actually concluded on April 11, 2007, with the transfer of the Big Rock independent spent fuel storage installation to Entergy Nuclear Palisades, LLC (ENP).

Consumers maintained that all the evidence presented in this case indicates that the company reasonably and prudently managed the decommissioning of Big Rock and that there is no evidence or argument challenging this conclusion.

Consumers stated that the December 2, 1986 order in Case No. U-8536 authorized the company to establish external trusts to fund future decommissioning activities at Big Rock. In subsequent orders, the Commission approved surcharges to be collected from ratepayers and deposited into the trusts. Consumers added that the Commission reviewed decommissioning costs and decommissioning trust fund adequacy at approximately three-year intervals and that the Commission last adjusted decommissioning surcharges for Big Rock in an order issued on March 22, 1999 in Case No. U-11662 (March 22 order.) In that order, the Commission determined that the surcharge for Big Rock decommissioning should end on December 31, 2000. Specifically, in the March 22 order, the Commission directed Consumers in ordering paragraph G:

¹Consumers stated that it is seeking recovery of SNF storage costs from the Department of Energy (DOE) in litigation that was commenced in 2002. In that litigation, Consumers alleges that the DOE breached its obligation to take custody of SNF pursuant to a schedule required by contract. Consumers stated that it intends to pursue the litigation; however, if it is ultimately unsuccessful in recovering the costs, the company will petition the Commission for relief.

Within 30 days, Consumers Energy Company shall file revised tariff sheets containing the new decommissioning surcharges authorized by this order, and reflecting that the decommissioning surcharges apply to all retail service customers. Additionally, the tariffs shall reflect that the surcharge for the Big Rock Point nuclear plant is authorized through December 31, 2000.

Consumers asserted that it complied with the order and included language on the applicable tariff sheets stating that the Big Rock nuclear decommissioning surcharge was “effective through 12/31/2000.” Exhibit A-15.

Consumers observed that after the beginning of the rate freeze mandated by 2000 PA 141 (Act 141) the company filed tariff sheets in Case No. U-12464 that included an increase its rates to reflect the findings in the August 31, 1999 order Case No. U-11180-R, which had approved a rate increase at a point when Consumers attained a specific amount of retail open access customer load. In response to a request for comments in Case No. U-12464, Consumers argued that Act 141 froze rates at the level “authorized or in effect as of May 1, 2000.” Consumers claimed that because the rate increase was “authorized” before May 1, 2000, a rate increase was permissible when the load conditions were met.

The Commission disagreed with the company’s argument finding:

[T]he Commission must reject Consumers’ argument because it is inherently contradictory. Consumers contends that Act 141 requires future rate increases to occur as they would have absent the statute but prohibits future rate decreases that would have occurred absent the statute. For example, Consumers argues that Act 141 permits an increase in the base rate adjustment that might otherwise occur at some indefinite time in the future, but prohibits a corresponding elimination of that same base rate adjustment that is scheduled to occur on December 31, 2001. This one-way interpretation that allows only rate increases and prohibits all rate reductions is contrary to the clear and obvious intent of the statute.

August 4, 2000 order in Case No. U-12464 (August 4 order), pp. 6-7.

Consumers argued that in the August 4 order, the Commission concluded that the previously ordered termination of the surcharge for Big Rock nuclear decommissioning had been superseded

by Act 141. Consumers stated that its understanding of the rate freeze provisions of Act 141, as interpreted by the Commission in the August 4 order, was that the amount recovered by Consumers in rates was frozen, but that as of December 31, 2000, the company was still expected to terminate the funding of the Big Rock decommissioning trusts. Consumers argued that it reasonably concluded that, pursuant to the March 22 order (ending the Big Rock decommissioning surcharge on December 31, 2000) coupled with the August 4 order (finding that no rate increases or decreases could take effect during the rate freeze period), the amounts recovered in rates after December 31, 2000 should be used for general corporate purposes.

Consumers argued that the prohibition on rate increases or decreases during the rate freeze was confirmed by the Court of Appeals in *Attorney General v Michigan Public Service Comm*, 249 Mich App 424; 642 NW2d 691 (2002). In that case, the Commission dismissed The Detroit Edison Company's (Detroit Edison's) 1999 power supply cost recovery (PSCR) reconciliation proceeding on the grounds that requiring a PSCR refund would be inconsistent with the rate freeze provisions of Act 141. The Court affirmed the Commission's action, finding that, "by suspending implementation of pending PSCR proceedings, the MPSC was merely complying with the dictates of subsection 10d(1) that precluded adjustment of the frozen rates for the specified period." 249 Mich App at 432. Thus, according to Consumers, the Court of Appeals confirmed that the Act 141 rate freeze prohibited adjustments, whether they related to past periods or current periods, and whether they related to rate increases or decreases. Consumers added that this decision contradicts the argument that Big Rock surcharge revenues collected during the rate freeze are subject to refund years later because rates cannot simultaneously be both frozen and at the same time subject to refund.

Consumers further claimed that after the passage of Act 141, the company held discussions with a division director at the Commission concerning the company's interpretation of Act 141. William J. Celio, President of William J. Celio Consulting, L.L.C. and Director of the Commission's Electric Division from March 1999 through October 2002, testified:

I met with executives of Consumers Energy to discuss the issue of the surcharges. A common phrase I used in managing the implementation of Act 141 at the Staff level was "A freeze is a freeze." I directed Consumers Energy to file tariffs which kept the surcharges in place, but to have those tariffs note that, as of December 31, 2000, the surcharge no longer applied to fund decommissioning of the Big Rock nuclear plant. The Nineteenth Revised Sheet No. E-2.00 and Twentieth Revised Sheet No. E-2.00 of Consumers Energy Electric tariff 12 filed with the Commission are consistent with my directions to Consumers Energy.

3 Tr 234.

And in response to the question, "Did Consumers Energy ask you how to account for the funds collected by the surcharges during the rate freeze?" Mr. Celio testified:

Since the Commission orders in Case No. U-12464 were very clear that rates could not be adjusted for short falls or over runs in revenue, I advised them that the surcharge revenue needed to be collected and applied to the general purpose of the Company. This approach is consistent with the approach that shortfalls in recovery of Company costs were the burden of the Company. Again, a freeze is a freeze.

3 Tr 235.

Consumers asserted that it filed tariff sheets with revisions that were needed to conform with the Commission orders and that it complied with the directions provided by Mr. Celio indicating that the revenues associated with the surcharges during the rate freeze were no longer to be deposited in the Big Rock nuclear decommissioning trust but were to be used for general corporate purposes. Consumers stated that it made the last deposit into the Big Rock decommissioning trust in January 2001.

Consumers maintained that it had further confirmation that its actions were consistent with the views of other Staff representatives when the Staff issued a report in August/September 2001 concerning the adequacy of decommissioning funds for Consumers' Palisades Nuclear Power Plant (Palisades) and Big Rock. Consumers pointed to the fact that the report stated, "Consumers Energy will continue to collect the Big Rock decommissioning surcharge revenues because electric rates have been frozen until 12/31/2003, by Commission Order in Case No. U-12464, in accordance with 2000 PA 141. However, these revenues will be used for general corporate purposes."

Consumers proposed that the most straightforward means of recovering the \$44.1 million shortfall, with no incremental impact on customers, is through an offset to a portion of the remaining proceeds from the sale of Palisades. Alternatively, Consumers recommended that the Commission authorize the company to levy a \$0.000422 per kilowatt hour (kWh) surcharge over three years to collect the additional decommissioning funds.

The Staff stated that it did not dispute the amount of total costs associated with decommissioning Big Rock, nor was it disputing the reasonableness and prudence of those costs. The Staff argued, however, that there is no shortfall in the decommissioning trust because any purported shortfall was due to the imprudent acts of the company.

According to the Staff, the Commission authorized a decommissioning surcharge for Big Rock in Case No. U-8536. Subsequently, Act 141 and the Commission's interpretation of the Act required Consumers to continue to assess the Big Rock surcharge to customers throughout the rate freeze period, even though the March 22 order provided that the surcharge was authorized only through December 31, 2000. The Staff observed that before the order in Case No. U-15245 that directed Consumers to file this decommissioning reconciliation case, no further order was issued

with regard to the revenue collected pursuant to the Big Rock surcharge since the order in Case No. U-12464.

The Staff contended that the Commission speaks only through its orders and that a member of the Staff does not have legal authority to authorize Consumers to divert decommissioning surcharge revenue to general corporate purposes. The Staff argued that the Commission sets rates only through its orders, and utilities are required to only charge approved rates until changed by a subsequent rate order. In this case, Consumers, without Commission approval, directed funds that were authorized for a specific purpose to general revenues to be used for general corporate purposes. The Staff concluded that the Commission should therefore find that there was no shortfall in the Big Rock decommissioning trusts and order an appropriate refund, with interest, to Consumers' ratepayers of the excess decommissioning funds that were collected during the rate freeze and never deposited in the Big Rock trusts.

The Staff recommended that the Commission determine that surcharge revenues collected from January 1, 2001 to December 31, 2003 be applied to the decommissioning of Big Rock and that the 1-year T-bond rate of interest be applied to the proceeds for the 3-year period in which they were collected. The Commission should then net any costs Consumers experienced in final decommissioning of the Big Rock plant and refund to ratepayers any over-collection of surcharge revenues, with interest at the company's short-term debt rate.

According to the Staff, Consumers reported decommissioning revenues of \$99,494,710 from 2001-2003. The Staff then applied one-year T-bond yield rates from 2001 to 2003 to each year's revenues, resulting in a total recovery of \$101,709,540. Netting that amount against the \$44.1 million decommissioning shortfall resulted in \$57.61 million available to refund to

customers, plus interest at the company's short-term debt borrowing rates, from 2004 until the refund is completed.

The Staff recommended that the Commission direct Consumers to file a final Big Rock reconciliation within 30 days of the date of the Commission's order. The reconciliation should address final amounts of transaction costs, identify all decommissioning revenue and other funds related to Big Rock plant, apply an appropriate rate of interest to all amounts deemed decommissioning funds from 2001 to 2003, apply an appropriate rate of interest to any amounts subject to refund, and set forth a computation of an equal mills per kilowatt hour negative surcharge to spread the refund over a six-month period. The negative surcharge should be applied to all sales for bundled and choice customers, excluding rate E-1 customers.

Alternatively, the Staff contended that even if the Commission determines that Consumers acted lawfully in failing to deposit Big Rock decommissioning surcharge revenues in the Big Rock decommissioning trust funds, or by failing to use the funds for decommissioning in the years they were collected, the Commission should nevertheless deny the company's request to recover an additional \$44.1 million from its ratepayers because the company had the funds necessary to decommission the plant due to the collection of the surcharge revenue during the rate freeze.

The Attorney General argued that during the rate freeze from 2001 through 2003, Consumers collected \$99,494,709 in surcharge revenue, with additional interest of \$55.5 million, that the company failed to deposit into the Big Rock decommissioning trusts. *See*, Exhibit AG-2.

According to the Attorney General, the primary dispute in this case concerns whether or not those additional funds should have been paid into the Big Rock trust funds to earn interest pending Consumers' use of the funds for future decommissioning costs.

The Attorney General argued that Consumers' failure to continue to deposit decommissioning surcharge revenues into the Big Rock trusts during the rate freeze violated the plain meaning of MCL 460.10d(1), as the statute read in 2001. According to the Attorney General, the statute provided that rates shall remain in effect until December 31, 2003, but the statute did not provide that the terms and conditions imposed upon Commission-approved rates were canceled. The Attorney General concluded that Consumers' reading of Section 10d(1) as an extension of the approved Big Rock surcharge rate, without also continuing the terms and conditions connected with that rate, was unlawful.

The Attorney General added that MCL 460.57 states that a schedule of rates shall not be effective until it has been approved by the Commission and that any change shall not be made in schedules except upon Commission approval. The Attorney General maintained that the changes in the tariff sheets relied upon by Consumers, although processed under Mr. Celio's direction, were without approval by the Commission. Thus, Consumers' reliance on its filing of tariff sheets containing changes that were not approved by the Commission was improper and violated MCL 460.57.

Finally, the Attorney General argued that the Commission should not authorize Consumers to defer recovery of \$54,614,287 of SNF storage costs or \$30 million for a payment to ENP to assume liability for future disposal of nuclear fuel from Big Rock. According to the Attorney General, Consumers' proposal effectively amounts to a request under Financial Accounting Standard 71 for an assurance of future recovery of the \$84.6 million for SNF storage. The Attorney General claimed that regulated entities such as Consumers cannot book a deferred asset unless a regulatory commission provides an assurance of future recovery of the deferred amount. The Attorney General argued that the Commission should provide no such assurance because

ratepayers have already paid for SNF storage and assuring future recovery would commit the Commission to authorizing ratepayers to pay twice.

MEC/PIRGIM argued that Consumers collected over \$99,956,901 million in revenues through special purpose surcharges for Big Rock decommissioning during the period 2001 through 2003 that the company never deposited into the decommissioning trusts. According to MEC/PIRGIM, Consumers had a duty to deposit these funds into the trusts, and its failure to do so was a violation of the August 4 order and of the settlement in Case No. U-6150 that established a regulatory framework and special purpose surcharges to be collected from ratepayers specifically to fund nuclear plant decommissioning. MEC/PIRGIM asserted that Consumers is now obligated to account for the principal amount of the surcharge collections for this period, plus appropriate accumulated interest, to be recognized as decommissioning funds in this case.

MEC/PIRGIM argued that Act 141 altered the March 22 order by freezing and extending the Big Rock decommissioning surcharges through 2003, thus reversing the provision that the surcharges would end as of December 31, 2000. Instead, the surcharges did not terminate and the corresponding purpose for the surcharges remained.

According to MEC/PIRGIM, nothing in Act 141 provided authority for Consumers to cease depositing surcharge revenues in the decommissioning trusts or to redefine the surcharge revenues for general corporate purposes. MEC/PIRGIM added that nothing in the August 4 order, in the company's conversations with Mr. Celio, or in the company's tariff filings provided authority for Consumers to repurpose the decommissioning surcharges.

MEC/PIRGIM recommended that the Commission recognize \$99.9 million in decommissioning costs that were not deposited in the trusts, plus \$50,952,704 of additional earnings at 7% compounded annually, with the total netted against the \$44.1 million shortfall in decommissioning

trust funds. MEC/PIRGIM noted that this interest rate approximates Consumers' overall rate of return and is thus a reasonable rate to be applied to the refund.

Proposal for Decision

The ALJ found that the parties did not contest that there was a total of \$344.1 million available in various trusts to cover the costs of decommissioning and restoration of Big Rock, nor did the parties dispute that the net \$388.2 million in decommissioning and restoration costs for Big Rock were reasonably and prudently incurred or that there was a shortfall of approximately \$44.1 million in the trusts. The ALJ also found that the relevant historical facts, statutes and Commission orders were not in dispute, but the interpretation of those facts, orders, and statutes was contested by the parties.

The ALJ determined that the sole question² for resolution in this matter was whether Act 141, and various Commission orders, authorized Consumers to use Big Rock surcharges collected from 2001 through 2003 for general corporate purposes, or whether the company was required to continue to deposit these funds in the Big Rock trusts. After review of the relevant statutes, caselaw, and orders, the ALJ concluded that there was nothing in the plain language of Act 141 that suggested that the requirement to deposit the Big Rock decommissioning surcharges into a trust, set forth in the settlement agreement in Case No. U-6150, was abrogated by the enactment of Act 141. The ALJ also rejected Consumers' argument that the company's interpretation of Act 141 was confirmed by the August 4 order. According to the ALJ, the August 4 order does not state or imply that the Big Rock decommissioning surcharge should be converted to general corporate funds.

²The ALJ agreed with Consumers that regulatory treatment of the \$84.6 million in SNF costs is not at issue in this case and that it is unnecessary for the Commission to address these costs at this time. The Commission agrees.

The ALJ agreed that although Consumers' conversations with Mr. Celio confirmed the company's interpretation of Act 141, these conversations did not substitute for a Commission order expressly authorizing the company to redefine surcharge revenues collected in 2001 through 2003 as general revenues. The ALJ added that the Staff report on the adequacy of decommissioning funds for Palisades and Big Rock provided no support for Consumers' position. The ALJ observed that the document simply reported the information Consumers had filed and did not take any position or make any recommendations regarding the Big Rock surcharge.

The ALJ also rejected Consumers' argument that because the Commission accepted various tariffs containing language that referenced the decommissioning funds, the company's actions in reallocating the funds to general corporate purposes were approved by the Commission. The ALJ noted that although the Commission has various rules for the filing and acceptance of tariffs, these rules do not supplant the statutory requirement that a utility may only charge rates that are by order approved by the Commission.

The ALJ found no merit in Consumers' argument that the suspension of PSCR reconciliations was analogous to the circumstances surrounding the Big Rock surcharge. The ALJ noted that the suspension of PSCR cases for Consumers and Detroit Edison during the rate freeze was accomplished through Commission orders specifically addressing that issue. The ALJ added that the suspension of PSCR reconciliations during this period was quite different from the decades-long framework and process established for the decommissioning of nuclear plants. According to the ALJ, under the nuclear decommissioning framework and process, a one-time reconciliation was to take place after decommissioning was completed. The ALJ therefore concluded that the decommissioning trusts reconciliations bear no reasonable resemblance to the short-term annual reconciliations of fuel costs under the PSCR process.

The ALJ also rejected Consumers' assertion that because the Commission was aware of the company's decision to convert the Big Rock surcharge revenues to general corporate purposes and failed to take any corrective action, the Commission tacitly approved the company's actions. According to the ALJ, this is the first case in which the Commission has been asked to address the issue of the company's obligation to deposit the surcharge revenue into the Big Rock trusts, and the fact that the Commission did not *sua sponte* address the issue previously does not constitute approval of the company's actions nor does it preclude the Commission from rejecting Consumers' position in this case.

The ALJ found unpersuasive Consumers' argument that requiring the company to refund the surcharge revenue from 2001-2003 was retroactive ratemaking. The ALJ observed that the Commission established external decommissioning trusts and provided for a final reconciliation of costs and revenues so that there would be no over- or underrecovery of decommissioning costs. The ALJ concluded that as such, there was no retroactive ratemaking in this circumstance.

Finally, the ALJ found that the record showed that Consumers collected \$99.5 million in decommissioning surcharge revenues from 2001 through 2003 and that the application of interest was appropriate. The ALJ found that the Staff's proposal to apply interest at the 1-year Treasury bond rate, without compounding, was inappropriate because it did not reflect the historical earnings of the decommissioning trusts and because it rewarded the company for unauthorized conversion of ratepayer funds. The ALJ evaluated a range of interest rates and determined that a 7% interest rate was reasonable. Accordingly, the ALJ calculated cumulative interest of \$50.6 million as of December 31, 2009. The ALJ recommended that the Commission order Consumers to apply the surcharge revenues of \$99.5 million collected from 2001 through 2003, plus accrued interest of \$50.6 million, less \$44.1 million for the decommissioning shortfall for a total refund of

approximately \$106 million, plus interest at the cost of short-term debt applied to the unrefunded amount. The ALJ recommended that the Commission direct Consumers to calculate an equal mills per kilowatt-hour negative surcharge to spread the refund over 6 months to all sales for bundled and choice customers, except for rate E-1 customers.

Exceptions and Replies

As a preface to its specific exceptions to the PFD, Consumers argues that if the Commission adopts the ALJ's recommendations, this action "would have a catastrophically negative financial impact on Consumers Energy." According to Consumers, adoption of the ALJ's recommendations would cause an immediate \$44.1 million write-off of the decommissioning shortfall and would require an additional refund of \$106 million to its customers.

Consumers takes exception to the ALJ's primary finding, that the company had improperly discontinued depositing Big Rock surcharge revenue into the decommissioning trust fund during the rate freeze. According to Consumers, the plain meaning of MCL 460.10d(1), in effect in 2000, clearly stated that rates that were authorized or in effect as of May 1, 2000 were frozen.

Consumers argues that the ALJ's finding that Consumers' obligation to continue to pay into the Big Rock decommissioning trust was also "frozen" was error because the statute only refers to "rates" and not to the company's obligation to continue depositing Big Rock decommissioning revenues into the trusts. According to Consumers, the Act 141 rate freeze superseded the March 22 order with respect to "rates," but Act 141 did not override the Commission's conclusion that the Big Rock decommissioning trust would be adequately funded as of December 31, 2000.

Consumers argues that to continue making deposits into the trust after December 31, 2000 would have been inconsistent with the March 22 order and with the evidence presented and positions taken by every party to that case.

Consumers argues that the ALJ misinterpreted the August 4 order. Consumers asserts that in that order, the Commission concluded that the previously ordered termination of the decommissioning surcharge for Big Rock had been superseded by Act 141, but there was no indication that the Commission intended to modify the directive that Big Rock decommissioning trust funding was to terminate as of December 31, 2000. According to Consumers, there was no valid basis upon which the Commission could have reasonably done so.

Consumers argues that the ALJ erred in discounting the testimony of Mr. Celio and in dismissing the Staff report on the status of decommissioning funds. Consumers points out that Mr. Celio's directions were consistent and applied to both revenue increases and decreases. Consumers adds that the PFD failed to recognize the significance "of receiving real time, on-the-spot direction from the one Commission Staff individual who was probably most involved in and responsible for the implementation of PA 141, including the rate freeze provisions of the act." Consumers' exceptions, p. 13. Consumers maintains that in addition to the specific direction the company received from Mr. Celio, it also took into account the fact that if the Commission disagreed with that direction it could have taken corrective action either by commencing a proceeding or by directing the Staff to do so. According to Consumers, Mr. Celio indicated that he informed the Commission of the directions he had given the company, so the Commission had the opportunity to take action if it disagreed. Consumers concludes that in light of the facts and circumstances at the time, Mr. Celio's directions were correct, and the company acted reasonably.

Consumers argues that the ALJ erred in finding that the company's tariff filings, and the Commission's acceptance of those filings, did not substitute for the statutory requirements for rate adjustments. According to Consumers, MCL 460.57 clearly provides the Commission with authority to adopt rules for the filing and acceptance of tariff sheets and the company complied

with 1999 AC, R 460.2021, which contains the Commission rule governing how tariffs are filed and accepted.

Consumers argues that the ALJ misconstrued the significance of the Court of Appeals' decision in *Attorney General v Public Service Comm, infra*. According to Consumers, the suspension of the PSCR clause during the rate freeze was accomplished by statute and not by order as the ALJ found. Consumers asserts that the Commission order in Case No. U-12464 simply recognized what was imposed by Act 141. Consumers claims that the *Attorney General* decision is directly applicable to this Big Rock case because both involved the effect of the Act 141 rate freeze on the collection of revenues. Consumers argues that:

Under the PFD's logic, the Court of Appeals decision was only valid during the rate freeze, and Detroit Edison should have been required to reconcile 1999 PSCR costs and revenues and issue refunds for that period after the end of the rate freeze. That clearly minimizes and misconstrues the true thrust of that decision. The Court of Appeals held that, once the rate freeze was effective, the revenues produced by the PSCR charge were no longer tied to power supply costs, and were no longer subject to reconciliation. The same conclusion is necessarily so with respect to the Big Rock surcharge rate: after December 31, 2000, the revenues produced by the surcharge rate were no longer tied to decommissioning costs, and were no longer subject to reconciliation.

Consumers' exceptions, p. 22.

Consumers argues that the ALJ erred in finding that the refund ordered in this case does not constitute retroactive ratemaking. According to Consumers, the costs for which it is seeking recovery were not incurred until after 2003, and the PFD "effectively proposes 'to match costs from 2004 through 2008 with revenues collected during 2001 through 2003.'" Consumers' exceptions, p. 23. Consumers reasserts that if revenues collected during a rate freeze can subsequently be ordered to be refunded, then rates cannot have been truly frozen and that a refund clearly constitutes an unlawful retroactive adjustment.

Finally, Consumers argues that the PFD recommends a refund that is not supported by the record. According to Consumers, the ALJ simply assumed that, had the surcharge revenues been deposited in the decommissioning trust, those deposits would have earned at an annual rate of 7% from 2001 to 2009 despite the fact that the actual rate at which the trust balances earned during that period of time was far less than 7%. Consumers adds that the ALJ failed to take into account mark to market adjustments that were made during that time, the effect of taxes, and the timing of withdrawals on the performance of the trusts.

In its replies to exceptions, the Staff asserts that it agrees with the ALJ's conclusions and points out that in Case No. U-12464, Consumers had the opportunity to request a finding from the Commission that it was no longer obligated to place the decommissioning surcharge revenues in the decommissioning trust fund, but Consumers failed to do so. Therefore, according to the Staff, no Commission order authorized the company to cease depositing the decommissioning surcharge revenues in the decommissioning trust fund or to use the funds for purposes other than decommissioning the plant.

The Staff adds that Consumers mischaracterizes the nature of this case. According to the Staff, this case is a reconciliation of Consumers' actual reasonable and prudent costs of decommissioning the plant and its collection of revenues pursuant to its decommissioning surcharge; it is not a case about the meaning of the word "rates" in Act 141.

The Attorney General and MEC/PIRGIM likewise reply that neither the plain meaning of MCL 460.10d(1) nor any Commission order terminated the previously-approved terms and conditions of the Big Rock surcharge, as Consumers claims. The Attorney General adds that the Court of Appeals' opinion cited by Consumers did not address the effect of the language in Act 141 on allowing rates to remain in effect upon prior Commission-approved terms and conditions.

The Attorney General further replies that the ALJ properly discounted Mr. Celio's testimony, essentially because the testimony interprets MCL 460.10d(1) and prior Commission orders. According to the Attorney General, expert opinion testimony interpreting applicable law is not permissible. MEC/PIRGIM and the Staff also reply that Mr. Celio had no authority to substitute his interpretation in place of the Commission's long-standing regulatory framework and the duties and processes established in Case No. U-6150.

The Attorney General reasserts that the refund of excess decommissioning revenues does not constitute retroactive ratemaking, as Consumers contends. The Attorney General points out that in the case where the Commission decides to adjust rates subject to certain future conditions, subsequent rate adjustments pursuant to the decision do not constitute unlawful retroactive ratemaking.

Finally, the Attorney General asserts that the ALJ's determination of Consumers' refund obligation was based on competent, material, and substantial evidence to support the recommendation regarding the interest calculation.

MEC/PIRGIM replies that the outcome of this case is governed by the August 26, 1986 order in Case No. U-6150, approving a settlement agreement to which Consumers was a party.

MEC/PIRGIM points out that the order and settlement agreement provided for the establishment of nuclear plant decommissioning trusts, for surcharges to be applied to customer bills to fund the trusts, and for an ultimate reconciliation of the trusts upon the completion of decommissioning of a plant. MEC/PIRGIM adds that the settlement agreement contemplated surcharges or refunds based on the results of the final reconciliation and no subsequent Commission order, legislative act, or court case, changed the framework established by the settlement.

Findings of Fact and Conclusions of Law

The Commission finds the PFD well reasoned and adopts most of its findings and conclusions, with changes discussed below.

Consumers continues to assert that the revenue collected through the Big Rock surcharges during the rate freeze period from 2001 through 2003 did not need to be paid into the Big Rock decommissioning trust, and instead became a source of general corporate revenues after January 1, 2001. Consumers supports its position primarily based on its understanding of the Commission's March 22, 1999 order in U-11662, the enactment of Act 141, and the Commission's August 4, 2000 order in U-12464. Consumers essentially argues that the combined effect of the above authority was to permit the company to redefine the surcharge collections as general corporate revenue.

Consumers also claims that its interpretation of the statutes and Commission orders was confirmed by a member of the Staff, and the company's decision to stop paying surcharge revenues into the Big Rock decommissioning trust was likewise authorized by that same Staff member. Consumers further claims that by accepting tariff sheets that contained language referencing the termination of decommissioning surcharges, the Commission effectively approved Consumers' actions.

As the other parties and the ALJ point out, the Commission speaks only through its orders, and utilities may only charge rates that are approved by the Commission. Consumers never sought any accounting change or interpretation, alteration of previous Commission orders, or request for authority or clarification with respect to what should be done with the decommissioning surcharge revenue after the enactment of Act 141. Indeed, it appears that Consumers went out of its way to avoid placing this issue squarely before the Commission. As the Staff points out, Consumers had

the opportunity to request clarification regarding the use of the decommissioning surcharge revenue when the company filed its comments in Case No. U-12464, but it failed to do so. In addition, if the Commission were to agree with Consumers' claim (i.e., that the company's actions were reasonable because they were directed by a Staff member) it would set a dangerous precedent for the way that regulatory matters must be addressed by this Commission and may constitute an abdication of responsibility imposed on the Commission by statute.

The Commission agrees with MEC/PIRGIM that the regulatory framework for the collection of decommissioning surcharges, the deposit of those surcharges into separate trusts, and the ultimate reconciliation of costs and revenues after decommissioning was completed was established in the settlement agreement approved by the August 26, 1986 order in Case No. U- 6150. Specifically, paragraph 13 of the settlement agreement provided:

- c. No part of the assets of the trust may be used for or diverted to any purpose other than to fund, in whole or in part, the costs of nuclear plant decommissioning or to pay administrative and other incidental expenses, including taxes, if applicable, of the fund.
- d. If any part of any contribution made to the trust is determined by the Commission to be in excess of the amount actually expended for decommissioning, after decommissioning has been completed, the excess jurisdictional amount shall be refunded to Michigan ratepayers, as determined by the Commission. Should the amount contributed to the trust be insufficient to cover the cost of decommissioning the utility may petition the Commission for relief.

Thus, the settlement agreement clearly contemplated the possibility that the decommissioning trust funds could be overfunded and specifically prohibited the use of trust funds for purposes other than nuclear decommissioning. Although subsequent Commission orders amended the Big Rock surcharge amounts, and at one point found the surcharge should be terminated, none of these orders altered the basic framework for managing and reconciling decommissioning costs and revenues.

The Commission is also mindful of the potential policy implications presented if the Commission were to shield, or partially shield, the company from the consequences of its actions. The result could be that Consumers, or another utility, might decide to behave in a similar fashion, with some assurance that the imprudent behavior will be excused by the regulatory agency.

The Commission finds without merit Consumers' argument that ordering a refund of decommissioning trust funds constitutes retroactive ratemaking. As discussed by the Staff and the ALJ, the entire procedure for funding the decommissioning trusts and reconciling decommissioning costs and revenues after decommissioning is completed is an exception to the retroactive ratemaking doctrine.

The Commission agrees with the ALJ, the Attorney General, and the Staff that Consumers collected \$99.5 million in additional decommissioning revenues from 2001-2003. However, the Commission agrees with Consumers that the application of an interest rate of 7% compounded annually for 2001-2003 overstates the returns for the trusts during that period. The Commission also agrees with the ALJ that the Staff's recommended T-bond interest rate understates those returns. The Commission finds that unadjusted historical rates of return for the Section 468A trust, as shown in Exhibit A-20, Table 4.2, p. 6, compounded annually, are more appropriate for application here. Had Consumers deposited the surcharge revenue in the trusts, the trust principal would not have been reduced to the extent that it was in 2001-2003 and would have continued to earn interest.

The Commission also finds that the application of interest at a rate of 7% from 2004 through 2009, as recommended by the ALJ, goes beyond the Commission's objective to make ratepayers whole for their contributions for Big Rock decommissioning. The Commission therefore determines that from January 1, 2004 until the refund is completed, interest should be applied to

the remaining funds for refund at the company's annual short-term debt borrowing rate. The Commission adds that the use of the company's short-term debt borrowing rate is consistent with the method used in calculating interest for the refund of excess Palisades decommissioning funds in Case No. U-14992.

In summary, the Commission estimates that applying the appropriate interest rates for 2001-2003, compounded annually, results in approximately \$108 million in additional decommissioning funds available on January 1, 2004. These funds should accrue interest at the company's actual annual short-term debt borrowing rate, during the accrual period, compounded annually. The calculation should also recognize annual deductions for the timing of the \$44.1 million of additional decommissioning expenditures.³

Beginning January 1, 2010, Consumers should continue to accrue and apply interest on a monthly basis at the company's short-term debt borrowing rate authorized in the November 2, 2009 order in Case No. U-15645, until the refund is completed. Consumers is further directed to show the calculation of the negative surcharge for this period in the same format presented in Attachment B to its April 25, 2007 letter in Case No. U-14992.

The Commission finds that Consumers should be directed to file, within 30 days of the date of this order, a computation of an equal mills per kilowatt-hour negative surcharge to spread the refund to all customers, excluding Rate E-1, over a period not to exceed 18-months.⁴ Consumers shall use projected sales for determining the negative surcharge. Consumers shall also include associated tariff sheets with its filing. The negative surcharge shall remain in effect until the

³The Commission estimates that this results in a total refund obligation of approximately \$86 million as of December 31, 2009.

⁴The 18-month refund period ordered here is consistent with the refund periods for excess decommissioning funds set forth in the March 27, 2007 order in Case No. U-14992 and the September 25, 2007 order in Case No. U-15220.

amount to be returned to customers is fully refunded through one or more billing cycles. In accordance with the above discussion, Consumers shall accrue and apply interest throughout the refund period. Absent further order of the Commission, Consumers shall implement the negative surcharge at the beginning of the first billing cycle that is more than 30 days from its filing of the computation of the negative surcharge factor. Within 15 days of the termination of the negative surcharge, Consumers shall file a final reconciliation in this docket stating that the negative surcharge has been terminated and identifying any residual amount remaining. Any residual amounts shall be reflected in the company's next electric rate case filed after the termination of the negative surcharge.

Finally, the Commission takes an exceptionally dim view of Consumers' offensive characterizations of the opposing witnesses and testimony in this case. As the Staff pointed out, Consumers' *ad hominem* attacks on well-qualified professionals does nothing to advance the Commission's understanding and resolution of the issues presented. The Commission expects that those responsible for the inclusion of such unprofessional and inflammatory language in pleadings filed with this Commission will cease this offensive conduct in the future. As Consumers is aware, although the Commission's Rules of Practice and Procedure, 1999 AC, R 460.17101 *et seq.* do not specifically address the matter of civility and respect toward opposing parties, Administrative Law Judges, and the Commission, the Commission's rules are supplemented by the Michigan Court Rules as provided in R 460.17103(1). Consumers' counsel should be mindful of the Commission's discretion under MCR 2.115(B);

On motion by a party or on the court's own initiative, the court may strike from a pleading redundant, immaterial, impertinent, scandalous, or indecent matter, or may strike all or part of a pleading not drawn in conformity with these rules.

THEREFORE, IT IS ORDERED that Consumers Energy Company shall file, within 30 days of the date of this order, a computation of an equal mills per kilowatt-hour negative surcharge to spread the refund of excess revenues for decommissioning the Big Rock Point Nuclear Power Plant to all customers, excluding Rate E-1, over a period not to exceed 18-months. Consumers Energy Company shall use projected sales for determining the amount of the negative surcharge. The negative surcharge shall remain in effect until the amount to be returned to customers is fully refunded through one or more billing cycles. In accordance with the directives in this order, Consumers Energy Company shall accrue and apply interest to the remaining funds for refund throughout the refund period. Absent further order of the Commission, Consumers Energy Company shall implement the negative surcharge at the beginning of the first billing cycle that is more than 30 days from its filing of the computation of the negative surcharge factor. Within 15 days of the termination of the negative surcharge, Consumers Energy Company shall file a final reconciliation in this docket stating that the negative surcharge has been terminated and identifying any residual amount remaining. Any residual amounts shall be reflected in the company's next electric rate case filed after the termination of the negative surcharge.

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, under MCL 462.26.

MICHIGAN PUBLIC SERVICE COMMISSION

Orjiakor N. Isiogu, Chairman

Monica Martinez, Commissioner

Greg R. White, Commissioner

By its action of February 8, 2010.

Mary Jo Kunkle, Executive Secretary