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April 26, 2006

Ms. Mary Jo Kunkle
Michigan Public Service Commission
6545 Mercantile Way
P.O. Box 30221
Lansing, MI 48909

Re: Case No. U-14526

Dear Ms. Kunkle:

Attached for paperless electronic filing is the Initial Brief of Energy Michigan, Inc.

Thank you for your assistance in this matter.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETTLLP

Eric J. Schneidewind

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cc: ALJ
parties

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of CONSUMERS ENERGY COMPANY for determination of net stranded costs for the year 2004 and approval of net stranded cost recovery charges.	))))))	Case No. U-14526

INITIAL BRIEF OF ENERGY MICHIGAN, INC.

April 26, 2006

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INITIAL BRIEF OF ENERGY MICHIGAN, INC.

I. Introduction and Summary of Position

A. Introduction.

Varnum Riddering Schmidt & Howlett LLP hereby files the Initial Brief of Energy Michigan, Inc. ("Energy Michigan") in this matter pursuant to the schedule adopted by Administrative Law Judge Sharon Feldman ("ALJ").

B. Summary of Position.

1. The Consumers Energy and MPSC Staff calculation of stranded cost are overstated.

Both Staff and Consumers incorporate excessive allocations of generating plant cost responsibility to ROA customers or understate applicable revenues. Staff and Consumers assume that ROA customers are responsible for Production Fixed Costs of 98.366% of generating plant but use only 93% of revenues to pay those production costs.

2. The MPSC Staff calculation of third party sales revenues and the associated concept of calculating stranded costs should be rejected.

There is no record support for the theory behind the Staff method of calculating stranded costs. The calculations on the record were merely presented by Consumers Energy at the request of the MPSC Staff. The Consumers witness did not support the Staff theory. 2 Tr 67, Belknap. For this reason there is no evidence and hence no legal basis for the Commission to adopt the Staff theory. Also the method of presentation which avoided using any sponsoring witness deprived Energy Michigan of its lawful right to conduct discovery, cross examination and rebuttal since there was no position to rebut.

The Staff method leads to absurd results. The Staff calculations in effect assign 98.36% of generating cost responsibility to Choice customers yet restrict funds available to cover those costs to 93% of total revenue. The resulting mismatch guarantees excessive stranded cost. This result would be even worse on the Detroit Edison system where 97% of generating costs are jurisdictional but only 87.5% or less of revenues are jurisdictional. Such absurd results should lead the Commission to conclude that the new Staff method is untenable and that Staff failed to bear its burden incumbent to overturn long standing Commission precedent to the contrary.

3. The stranded cost calculation methodology should be revised to place ROA customers on the same footing as retail customers.

ROA customers pay approximately 1.7 mills/kWh of securitization and nuclear decommissioning costs and get absolutely nothing in return for these payments. See Consumers Tariff Sheet E3.10 Assuming 4 million Mwh of ROA service, this amounts to a $6.8 million subsidy of retail customers by ROA customers. Retail customers pay the same charges and receive power from the Palisades plant at a cost that is net of the securitization payments made to cover the plant.

The imposition of securitization and nuclear decommissioning costs on ROA customers can no longer be justified on the grounds that the Palisades nuclear plant is stranded. In 2004 Consumers sold as many Mwh as it did in the years prior to Electric Choice. The

market price of power is far in excess of the cost of production of Palisades thus guaranteeing Consumers' substantial profits from sale of any excess Palisades power. Also, the Commission Capacity Need Forum Report concluded that Consumers must add generation capacity. Finally, the burden of these uneconomic stranded cost charges has caused a sharp decline in Choice enrollment as noted by the Commission in its Report on Status Of Competition For 2005.

The Commission can eliminate ROA subsidies to retail customers on an equitable basis by delivering an amount of Palisades power to ROA customers that is equivalent to the securitization and nuclear decommissioning payments made by these customers divided by the cost per kWh of Palisades production.

II. The New Staff Method of Allocating Third Party Sales Which Is Incorporated In The Staff Method Of Calculating Stranded Costs Is Flawed and Should Not Be Adopted

A. History of Third Party Sales Issues.

Since passage of PA 141 in 2000, the Commission has used 100% of the net third party sales revenue (non-jurisdictional sales revenue above the $17.4 million contained in frozen PSCR base rates) from Consumers' sales of power to non-retail customers to offset stranded costs. The Commission's theory is that if the departure of retail customers for ROA service causes stranded costs, then that departure also allows the utility to sell unneeded power into the market and thereby partially recover revenue that is lost or stranded when customers leave retail service. U-12639, December 20, 2001, p. 10[1]. In order to apply this offset, the Commission needs to determine both the amount of third party sales revenue freed up by competition and the amount of stranded costs.

B. 2004 Third Party Sales Revenues Resulted From Mwh Freed Up By ROA.

[1] Also see Cases U-13380, U-13720 and U-14098 and Court of Appeals Opinion No. 241990, November 28, 2003 upholding the U-12639 case decision.

Energy Michigan Witness Polich testified that all 2004 third party sales revenue resulted from sale of MWh of power freed up by the ROA program. 2 Tr 90. The discovery response provided by Consumers and Consumers Exhibits from U-13917-R demonstrate that 2004 third party sales were approximately 2.48 million MWh and ROA sales were approximately 4 million MWh. See 14526 EM-CE-4 and 5. Exhibit A-13, U-13917-R. Mr. Polich said, "If Consumers had been serving the load on ROA under full service rates, the amount of third party sales would have disappeared. In addition, Consumers would have been placed in the position of increasing its power purchases since the ROA sales exceed third party sales by 1.6 million MWh. I therefore conclude that all third party sales resulted from MWh freed up by the ROA program". 2 Tr 90.

C. There Is No Basis For Adoption Of The Staff Position On Allocation Of Third Party Sales Or Calculation Of Stranded Cost.

Energy Michigan Witness Polich testified that there is no support on the record for adoption of the Staff's new method of calculating stranded cost. A bare mathematical calculation of stranded costs allegedly resulting under the "new Staff method" was presented by Consumers Energy Witness Belknap in Supplemental Testimony. However, Mr. Polich testified that, "Mr. Belknap's testimony lacks any explanation for the purpose of the calculation." In response to a question as to whether Mr. Belknap provided any rationale, justification, explanation or support for the purpose of the [Staff] calculation, Mr. Polich answered, "No". Polich Rebuttal, 2 Tr 103. In fact, Mr. Polich observed that neither the Commission Staff nor any other party provided testimony which supports the Staff's new method of calculating stranded cost. Id.

A Commission decision may be overturned if it is unlawful or unreasonable. MCL 462.26(8) For that reason, any MPSC Order adopting the Staff position would be unreasonable because it is unsupported by evidence on the record. Associated Truck Lines, Inc v Public Service Commission, 377 Mich 259; 140 NW 2d 515 (1966); Attorney General v Public Service Commission, 231 Mich Ap 76, 77-78; 585 NW 2d 310 (1998). In this case the Commission

would truly lack any substantial justification for allocation of third party sales proposed by MPSC Staff since there is literally no testimony supporting that method on this record.

Because the new Staff concept was placed on the record without supporting testimony, Energy Michigan was deprived of its right to file discovery regarding Staff's theory or application of the Staff theory as to specific factual circumstances. Energy Michigan was deprived of its right to rebut the rationale for Staff's methodology and was denied the right to cross examine the Staff witness regarding that methodology.

For these reasons, Energy Michigan was prejudiced in its ability to disprove or discredit the Staff position. This procedural evasion, together with a lack of any detailed support for a novel and obviously flawed calculational approach literally deprives the Commission of a substantial basis for adopting the methodology.

D. The New Methodology Proposed By Staff To Allocate Third Party Sales Revenues And Calculate Stranded Costs Would Lead To Absurd Results.

III below discusses the specific calculational errors contained in both the MPSC Staff and Consumers Energy presentations as they relate to calculation of generation revenue requirement and revenue. Both Staff and Consumers would make ROA customers responsible for costs associated with 98.366% of generation plant yet would allow only 93.1056% of revenue to cover those costs. Consumers Energy Workpaper CFB WP-1, line 2 proves that generation costs were assigned to ROA customers assuming that 98.3662% of that plant was jurisdictional , e.g. used to serve retail customers and that only about 1.63% was used to serve non-jurisdictional, i.e wholesale customers. Exhibit EM-7, p. 1.

However, in 2004, Consumers' actual sales show a much different story. Out of approximately 36 million Mwh of total retail and wholesale transactions, 2.48 million Mwh were wholesale and about 33.5 million were retail. See Exhibit A-13 (2.48 million Mwh wholesale) and A-22 (33.5 million Mwh of retail sales), U-13917-R. Using these figures, approximately 93% of Consumers' sales were jurisdictional, i.e. to retail customers and 7% to wholesale customers.

Looking at Consumers' 2004 MPSC Annual Report there were 36 million Mwh of sales and over 2.9 million Mwh listed as wholesale transactions. P. 310-311.1. See Attachment A. Using this data, it can be seen that less than 92% of Consumers' sales in 2004 were to retail customers and more than 8% were to wholesale, i.e. non-jurisdictional customers.[2]

Consider that the difference between 98.366% and 93% plant responsibility is over $13 million of total revenue requirement, e.g. stranded costs. See Attachment B, line 20. Compare that reduction to the Staff and Consumers presentation that total stranded costs were $23.7 million and $24.1 million respectively.

Looked at another way, if ROA customers are to be held responsible for 98.366% of generating costs, they should receive 98.366% of revenue as an offset to stranded costs. Use of 98.366% of the total 2004 sales of electricity would have increased gross revenue used to calculate Production Fixed Cost revenue by $114 million and the 30.24% of that increase which Consumers claims is the percent of sales represented by generation fixed costs would have resulted in an additional $34.5 million to offset stranded costs. See Exhibit EM-7, p. 3. Use total revenues on line 13 instead of total on line 10. This adjustment would literally eliminate stranded costs under the new Staff theory.

Consider the results of Staff's theory if applied to Detroit Edison. In Case U-13808-R Detroit Edison attempted to charge Choice customers for 97.24% of generating assets on the grounds that that percentage of generating assets was involved in sales of power sold to retail customers (i.e. jurisdictional). U-13808-R, Exhibit A-24. In reality, out of Detroit Edison's 48 million Mwh of sales in 2004, over 6,084 Gwh of sales were to wholesale customers. See Byron Exhibits A-5 and A-1 in Case U-13808-R. Thus, more than 12.5% of Edison's total sales were to wholesale customers yet the Staff method presented in this case would require Electric Choice

[2] Consumers Witness Kurzynowski testified that Consumers native generating plants produced 24,283,806 Mwh of power and 2,243,600 Mwh of the output were sold to third parties. Exhibit A-7, p. 1 of 1. In other words, 9.24% of the power produced by Consumers' generating plant was sold to third parties and only 90.76% was delivered to and used by jurisdictional customers.

customers on the Edison system to pay for 97.24% of generation costs instead of the 87.5% or 82.5% that would be justified by actual sales data.

What if 50% of generating plant output were used for third party sales? Would Staff claim that ROA customers should be responsible for 98% of the costs when the only 50% of the output was used to serve jurisdictional customers? The inaccurate results produced by the new Staff method in this case become completely absurd results when they are applied to Detroit Edison Company or to a wide range of assumptions.

The new Staff method of allocating third party sales revenues charges ROA customers with significantly higher cost responsibility than actually justified by sales data. For this reason the new Staff method is not a credible substitute for the existing U-12639 methodology that has been repeatedly approved by the Commission on the basis of a sound and well documented factual record. This glaring flaw of the Staff plan alone should render the theory unacceptable for adoption even if it were supported by substantial evidence and testimony, which it is not.

Conclusion

The Commission should allocate all net third party sales revenue above the $17.4 million in the base PSCR to mitigate 2004 stranded cost. The balance should be used to offset stranded costs from Cases U-13720 and U-14098. 2 Tr 91.

III. The Consumers Energy And MPSC Staff Presentations Overstate Stranded Costs.

A. Background - The Current U-12639 Method Of Calculating Stranded Costs.

In Case U-12639, the Commission established the basic mechanism for calculating and recovering stranded costs. The Commission ruled that the annual Production Fixed Costs including generation plant capital costs and capacity costs contained in the PSCR should be calculated each year (PFC revenue requirement). The PFC revenue available to offset the PFC revenue requirement is calculated by determining the percentage of overall revenues which is

comprised of generation and PSCR fixed costs. That percentage is multiplied by the total revenue in any given year to determine the Production Fixed Cost revenue (PFC revenue) available to pay the PFC revenue requirement. The basic formula in place now is that Production Fixed Costs revenue requirement minus Production Fixed Cost revenue equals stranded cost. U-12639, December 20, 2001, p. 4. In the same case, the Commission specifically ruled that all third party sales revenue created by Mwh freed up by the departure of ROA customers should be used to offset stranded costs. Id., p. 10.

It is extremely important to understand the theory behind this concept. The Commission's PFC revenue requirement and revenue were calculated using jurisdictional sales to retail customers and the revenue that those sales produced. Jurisdictional revenue specifically excludes sales related to non-retail wholesale type customers. Thus, if in a given year Consumers sold 36 million Mwh and historically 1.5% of those sales were to wholesale customers, the stranded cost revenue and revenue requirement would be calculated by using 98.5% of the generating plant and costs incurred by Consumers to serve the retail market. The Commission would then determine the portion of the 1.5% of sales (1.5% x 36 million = 540,000 Mwh) that were freed up by Choice and use this revenue (minus variable cost) to offset stranded costs.

This precedent was confirmed in all succeeding stranded cost cases applicable to Consumers Energy: U-13380, U-13720 and U-14098. The Court of Appeals Case also confirmed the U-12639 method of calculating stranded costs. Case No. 241990, PSC LC No. 00-012639, November 18, 2003.

B. The Numbers In This Case Do Not Add Up.

1. The Consumers case.

The Consumers presentation found about $24 million of stranded costs under circumstances that Energy Michigan believes should have yielded little or no stranded cost. Exhibit A-1.

Energy Michigan's initial critique of the Consumers filing focused on a mismatch in revenues as the cause of the stranded costs. Energy Michigan Witness Mr. Polich testified that the jurisdictional factor used by Consumers to assign costs collectible from retail customers (and hence from ROA customers as stranded costs) was about 98.3662% of Consumers' sales. This number was derived from the U-10685 rate case jurisdictional factor for the rates in effect 2004. Polich, 2 Tr 87. However, an examination of Exhibit A-22 from the U-13917-R reconciliation case (Exhibit EM-5) showed that Consumers PSCR sales of approximately 30 million Mwh were only 89.6143% of the 36 million Mwh of total sales. Id.; Exhibit EM-5. This seemed to indicate that Consumers had assigned 98.36% of cost to ROA customers but only utilized 89% of revenues to cover such costs.

However, further review as well as the Consumers Rebuttal demonstrated that the PSCR sales totaled approximately 30 million Mwh but Special Contract sales comprised an additional 3.5 million of the total 33.353 million Mwh of jurisdictional sales. See Exhibit EM-5, CE A-22. Thus, Energy Michigan's initial theory regarding the mismatch between cost responsibility and revenue was mistaken because it focused on the numbers that did not include the impact of Special Contract sales.

2. Consumers' calculation for the MPSC Staff.

The Consumers Supplemental Testimony purported to implement the Staff's concept of stranded cost calculation. The data in that calculation was equally troubling because the same mismatch of revenue and costs appeared and the cause at first appeared to be that Consumers had subtracted PSCR revenues for Special Contract customers twice in its calculation of total revenue from sales to ultimate customers that was available to cover stranded costs. Polich Rebuttal, 2 Tr 104-05.

Subsequent discovery sent to Consumers Energy and responses from Consumers revealed that in fact the SMC revenue had not been subtracted twice.

C. So What Was The Problem?

1. The Consumers case.

a. Consumers assigned 98.366% of generation costs to stranded cost but only used 93% of revenue to offset those costs.

Consumers Workpaper CFB WP-1 shows that Consumers assigned 98.3662% of generation related fixed costs to Choice customers in their stranded cost calculation because this was the percent of the plant assumed to serve jurisdictional (retail) load. See Exhibit A-1, line 1 and Workpaper 1, line 2; Exhibit EM-7, p. 1. Thus the assumption is that 98.3662% of generation asset costs were used to calculate stranded costs and only 1.63% of sales were excluded from this calculation because those assets were used to serve wholesale markets.

To implement the U-12639 method of calculating stranded costs, the total retail revenue from sales to ultimate customers (wholesale sales) used in line 15 of Exhibit A-1 excludes all wholesale sales in the revenue used to offset generation fixed costs. See Workpaper CFB-2 line 7 which shows the revenue used to develop the adjusted revenue from ultimate customers used on line 15 of Exhibit A-1. EM-7, p. 2. Then go to Workpaper CFB WP-17 which shows that this figure was derived from 2004 total sales by removing all sales for resale wholesale sales on line 11. Exhibit EM-7, p. 3.

In other words, Consumers' calculation of the revenue available to cover the 98.3662% of generating costs should exclude all wholesale revenue. However, data from this case show that in the year 2004, total Consumers sales to all wholesale and retail customers equaled approximately 35,980,000 Mwh of which only 33,500,000 Mwh were sales to Special Contract and retail customers and the remaining 2,480,000 Mwh were wholesale sales (Exhibit A-13, and Exhibits A-22 of U-13917-R). See also Exhibit EM-5 and Attachment A showing 2004 sales of

36 million Mwh including 2.9 million Mwh of wholesale sales. Attachment A, Consumers 2004 MPSC Annual Report, p. 301, lines 10-12.

The simple math shows that in 2004 Consumers' wholesale sales were approximately 7% of Consumers' total sales, not the 1.6% that would have been expected. The consequence of this set of facts is clear: the Consumers calculation of stranded costs assigns 98.3662% of generation and PSCR fixed costs to ROA customers as a revenue requirement but only uses 93% of the actual revenue to cover these costs[3].

This impact is aggravated by the fact that ever since enactment of PA 141, Consumers rate base has been growing substantially and many of these costs cannot be passed on to retail customers. In fact, any rate base increases that were included in the 2004 stranded cost case would show up as stranded costs. This is because many rate base increases are not recoverable through PA 141 § 10d(4) or at retail because of the rate freeze and caps on residential and small commercial customers or because Consumers did not receive a base rate increase until December 22, 2005. See PA 141 § 10d(2) re rate caps.

These same factors are present in the Consumers calculation of stranded cost under the Staff method except that PSCR fixed costs are removed as is the revenue to cover those costs. But the fact remains that using the Staff calculation, 98.3662% of generation costs are assigned to ROA customers and only 93% of revenue is available to cover those costs. Using Ms. Kurzynowski's data, ROA is responsible for 98.366% of native generating costs but only 90.76% of the revenue is jurisdictional and thus available to cover those costs. Exhibit A-7 and n 2.

[3] Consumers Witness Kurzynowski testified that Consumers native generating plants produced 24,283,806 Mwh of power and 2,243,600 Mwh were sold to third parties. Exhibit A-7, p. 1 of 1. In other words, 9.24% of the power produced by Consumers' generating plant was sold to third parties and only 90.76% was delivered to and used by jurisdictional customers.

Under the U-12639 theory of calculating stranded costs there is the potential that third party sales revenues freed up by Choice can be used to offset stranded costs and indeed the $29 million of such revenues available would more than offset the stranded cost calculated under either Consumers or Staff method. See Consumers Exhibit A-1, lines 18 and 19.

In fact, Energy Michigan has testified in this case that all such third party sales revenue should be used to offset stranded costs. This position is reinforced by data showing that in 2004 with 4 million Mwh of ROA sales the wholesale transactions increased on the Consumers system from 1.6% prior to ROA (the non-jurisdictional factor in the U-10685 rate case) to about 7% after ROA was fully in effect. This is clear proof that the vast majority of third party sales revenue should be used to offset stranded costs because those sales occurred as a result of Mwh freed up by the ROA program. Neither Consumers nor Staff rebutted this conclusion.

b. The Consumers stranded costs are overstated and should be recalculated.

It is fundamentally wrong to calculate stranded costs using 98% of costs and only 93% of revenue. Consumers Exhibits A-1 and A-2 can be revised to incorporate this logical and necessary change. Attached to this Brief are Attachments B and C which modify the Consumers calculations in Exhibit A-1 and A-2 to cover one basic change: since wholesale transactions were actually 93.1056% of sales rather than the assumed 98.3662%, Attachment B reduces the jurisdictional factor used to allocated fixed generation and PSCR costs to the 93.1056% level[4]. To accomplish this change in a fair manner the percentage allocation mechanism used to determine the percent of revenue attributable to Fixed Generating and

[4] These exhibits assign only 93.1056% of generating costs to the stranded cost calculation and assign the remaining 6.8944% to non-jurisdictional sales.

PSCR costs must also be modified and this calculation is presented in Attachment C which lowers that percentage from 30.24% to 29.07%.

The net result of these revisions in calculation is that an assignment of 93.1056% of generating costs to match the 93.1056% of jurisdictional generating revenue lowers Consumers calculated stranded cost from $24.126 million to $12,449,000. See Attachment B, line 20. Consumers would then mitigate these reduced stranded costs with the available $29 million of third party sales revenue.

In the alternative, stranded costs could equitably be calculated by using the existing 98.3662% jurisdictional factor but also assigning that same percentage to all revenue collected by Consumers (see Exhibit EM-7, p. 3, Workpaper 17) increase the revenue available to cover stranded costs on line 17 would be increased by 76% of the $29 million of net third party sales revenue available after the amounts contained in the PSCR base are subtracted or $22 million[5].

This approach would virtually eliminate stranded costs.

c. Conclusion regarding Consumers calculation of stranded costs.

The Consumers calculation of stranded costs is fundamentally flawed because it allocates over 98% of costs to ROA customers but allocates only 93% of revenue to cover those costs. This is what actually happened in 2004 as opposed to the incorrect assumption contained in Consumers Exhibits A-1 and A-2 that 98% of generating costs were jurisdictional and were covered by over 98% of revenue.

This assumption can be corrected by using increased third party sales revenue to recognize this disparity or by reallocating costs. However, the fundamental fact

[5] This could be calculated by assuming that Choice increase non-jurisdictional sales from 1.644% (100% - 98.366%) to 6.8944% (100% - 93.1056%)

that the current case filing of Consumers contains an inequitable mismatch between revenue and expense should produce one of the following two results:

1) Either recalculate stranded costs using the same jurisdictional factor of 93. 1056% for both revenue and costs as shown in Attachment A, or

2) Concede that the ROA program sales of 4 million Mwh created a significant increase in the normal wholesale sales levels of about 1.6% to approximately 7%. Since that increase was caused by the ROA program, the bulk of third party sales revenue created by these Mwh of ROA sales should be dedicated to stranded cost reduction.

2. Conclusion regarding MPSC Staff calculation.

The MPSC Staff calculation presented by Consumers uses most of the numbers for jurisdictional generation (but not PSCR) costs used in the Consumers presentation on Exhibit A-8, p. 1 of 2, lines 1-14. Thus, the Staff calculation suffers from the same mismatch between cost responsibility at 98+% but retail revenues that only represent about 93% of total. For this reason, there is a fundamental flaw in the application of the new Staff theory to a factual situation.

The testimony of Consumers Witness Kurzynowski shows the illogical outcome of the Staff inspired calculations. By limiting the scope of stranded cost to generation (rather than PSCR costs) Staff assigns 98+% of generating costs to ROA customers. However, Ms. Kurzynowski shows that the Consumers generating plant produced 24,283,808 Mwh of power yet 9.24% of the power from those plants (2,243,600 Mwh) was sold to third parties. Thus, only 90.76% of the power generated by Consumers served jurisdictional retail customers. Because of the simple and fundamental inequity involved in assigning 98% of costs and only 93% (or 90%) of revenue to cover those costs, the Staff method should be rejected.

An additional reason to reject the Staff theory is that it was not backed by any testimony whatsoever on this record. For that reason, pursuant to MCL 462.26(8) any MPSC Order adopting this position would be unreasonable because it is unsupported by evidence on the record. Associated Truck Lines, Inc v Public Service Commission, 377 Mich 259; 140 NW 2d 515 (1966); Attorney General v Public Service Commission, 231 Mich Ap 76, 77-78; 585 NW 2d 310 (1998).

An unreasonable decision of the Commission adopting the new Staff method would not be upheld upon appeal.

IV. ROA Credit For Securitization And Nuclear Decommissioning Charges

A. Background On Securitization

1. PA 142 requirements.

Pursuant to PA 142 all ROA customers are assessed securitization bond and tax charges which mainly comprise the capital costs for the Palisades nuclear plant and other generation related costs. ROA customers also pay nuclear decommissioning costs associated with the Palisades plant[6]. Full service customers buying generation from Consumers pay exactly the same charges.

Consumers' retail customers receive power from the Palisades plant as part of their electric generation service but, since Palisades capital costs are paid through the securitization mechanism, the Palisades power is priced at variable cost to the retail customer. ROA customers receive absolutely nothing in return for the securitization and nuclear decommissioning charges which they are lawfully obliged to pay.

[6] Assuming 4 million Mwh of 2004 ROA sales and securitization and nuclear decommissioning costs of $1.7/Mwh, ROA customers subsidized retail customers in the amount of $6.7 million during 2004.

2. The first Energy Michigan proposal for securitization credits was rejected by the Commission.

In Detroit Edison Case U-13808 Energy Michigan proposed that Detroit Edison Electric Choice customers who are paying securitization charges and nuclear decommissioning costs of the Fermi 2 nuclear plant receive a credit in return for their payments. The proposed credit was designed to place Choice customers in the same position as retail customers by crediting Choice customers with a monetary amount equal to the market value of the power minus Fermi 2 variable costs. In essence, this credit was based on the fact that retail customers pay securitization and nuclear decommissioning charges and receive Fermi 2 power at variable costs. Energy Michigan proposed that Choice customers who pay the same securitization and nuclear decommissioning charges should receive the market value of the capital costs associated with Fermi. In the alternative, Choice customers should be allowed to buy Fermi 2 power at variable cost. U-13808, November 23, 2004, p. 101.

In a rehearing Order Case U-13808 the Commission rejected this proposal finding it to be a bypass of the obligation to pay securitization charges (U-13808, preharing June 30, 2005 p. 5). The Commission reasoned that the legal obligation to pay securitization charges would be frustrated if a credit were given to offset that obligation. Id.

3. The Court of Appeals upheld securitization credits.

On September 13, 2005, the Michigan Court of Appeals considered basically the same issue in an appeal of Consumers' stranded cost Case U-13380. Among the issues considered by the Court was an argument by Consumers contending that the Commission lacked the authority to order any portion of a securitization offset for ROA customers. Consumers contended that that the securitization offset improperly allowed ROA customers to bypass securitization charges in violation of MCL 460.10k(2) which provides, "A financing order shall include terms ensuring that the imposition and collection of securitization charges authorized in the order are a non-bypassable charge."

Consumers Energy Co v MPSC, et al, No. 253316, MPSC LC No. 00-013380, September 13, 2005, p. 8. Attachment D. The Court found that a bypass did not exist because ROA customers were still being billed for securitization charges and were still being required to pay them "even if the amount is refunded to them via the securitization offset." While the Court went on to note that a statute (MCL 460.10d(6)) specifically authorizes the MPSC to use securitization savings to reduce charges authorized by the PSC, additional language discussed below can be seen to approve credits that are not specifically authorized by statute.

This argument is reinforced by further passages in the Court Opinion.

The Court stated, "Consumers further asserts that the securitization offset violates MCL 460.10n(2) which provides that the State pledges that there will not be an impairment of the value of the securitization property." In response to that argument, the Court stated, "However, we see no basis for concluding that the securitization offset violates this provision. Specifically, despite this offset, securitization charges are collected from ROA customers and used for securitization purposes, but then ROA customers are in effect credited or refunded the same amount *from another source, i.e. excess securitization savings.* Thus, the securitization offset does not impair the imposition, collection or remitting of securitization funds and accordingly does not violate MCL 460.10n(2)." Id., p. 9.

The Court went on to consider Consumers' argument that a securitization offset would violate MCL 460.10i(4) which makes securitization charges irrevocable. In response the Court stated, "However, as discussed above, the securitization charges are actually collected from ROA customers with Consumers being required to refund an offsetting amount from another source. Thus, the securitization offset does not violate MCL 460.10k(3)". Id.

The ruling of the Court can fairly be construed to state that an illegal bypass or offset does not exist where the obligation for all customers to pay securitization charges is left intact, but then an offsetting credit from another source is utilized.

B. The Palisades Nuclear Plant Is Not Stranded.

1. Consumers retail sales are at pre-PA 141 levels.

As of 2004, Consumers retail sales were within .34% of the level assumed in Rate Case U-10685 when the base rates in effect for 2004 were set. Polich, Direct, 2 Tr 98. In fact, the average sales utilized in preceding Consumers rate orders before PA 141 were 33,151,660 Mwh. U-10685, February 5, 1996, p. 30. But Consumers' average full service sales for 2003 through 2004 were 33,639,144 Mwh. Id. Thus, Consumers' sales levels under the ROA program have reached the point that existed prior to competition. If generating plants were not stranded pursuant to the sales levels used in Order U-10685, then they should not be stranded as of 2004.

2. Excess power can be sold at a price exceeding cost of production.

In 2005, average wholesale power costs reached levels of $68.54/Mwh, a level significantly in excess of Consumers' cost to produce power. Finally, the Capacity Need Forum Report issued by MPSC Staff concluded that Consumers Energy currently needs more power plants or generating capacity as soon as possible. Id.

3. The ROA program lowers average retail costs.

Since Consumers is currently selling excess power at a price greater than the cost of production, the loss of load to ROA is increasing not decreasing profitability and return on investment. Conversely, the market price of power is so expensive that customers returning to ROA from retail service must be served with power purchases that cost more than Consumers' average production cost. Thus, the return of Choice customers has the

effect of raising rates while Choice customers who leave the Consumers system have the effect of lowering average costs. Polich, 2 Tr 100.

4. No stranded costs exist.

Based on these facts, Mr. Polich concluded that no stranded costs exist when retail sales are equal to or greater than the sales levels assumed to set rates prior to competition. If generating plant costs were fully compensated at rates and sales levels before competition, similar sales levels with similar rates should yield the same results. Under these conditions there should be no stranded plant or stranded costs. 2 Tr 99. Moreover, as of January 1, 2006 the U-14347 rate Order and expiration of all rate caps under PA 141 should produce revenue entirely sufficient to pay all of Consumers variable and fixed costs of production. Indeed, under these circumstances the Commission itself stated that there would be no more stranded costs. U-14347, December 22, 2005, p. 89 and 92.

C. ROA Customers And Retail Customers Should Receive The Same Benefits From The Palisades Plant In Return For Paying The Same Costs.

Energy Michigan Witness Polich proposed that ROA customers be placed in exactly the same position as retail customers regarding benefits received from payment of securitization and nuclear decommissioning charges. Specifically, Mr. Polich proposed that Choice customers, like retail customers, receive deliveries from the Palisades power plant at a cost equivalent to the cost currently being paid by retail customers. Mr. Polich stated, "We are asking the Commission Order Consumers to provide ROA customers with an amount of power based on the amount of securitization bond and tax and nuclear decommissioning charges paid by an ROA customer." 2 Tr 101.

Like retail customers, ROA customers who pay securitization and nuclear decommissioning charges should receive power in return for the payments made. In the alternative, if the Commission wishes to reconsider its decision in U-13808 based upon the above referenced Court

of Appeals decision, the same result could be achieved by selling an amount of Palisades power equivalent to the value of the securitization and nuclear decommissioning charges paid by ROA customers and remitting the balance minus variable costs to those customers. This credit would in effect compensate ROA customers for the fixed production costs paid for the Palisades plant and place them on the same economic footing as retail customers.

The Energy Michigan securitization credit proposal is supported by the facts on record and a reading of the law supported by the Court of Appeals.

V. Prayer For Relief

WHEREFORE, Energy Michigan respectfully requests that:

A. The MSPC Staff proposal for allocation of third party sales be rejected;

B. The calculation of stranded cost placed on the record by Consumers Energy at the request of MPSC Staff be rejected;

C. The calculation of stranded costs presented by Consumers Energy be reduced as set forth above and be completely offset with third party sales revenues. The balance of third party sales revenue should be used to reduce stranded costs awarded by the Commission in Cases U-13720 and U-14098; and

D. The Commission order Consumers Energy to supply a Palisades power credit to ROA customers as described above or provide a credit to ROA customers in the amount of the market price of Palisades power minus variable costs.

Respectfully submitted,

Varnum, Riddering, Schmidt & Howlett LLP
Attorneys for Energy Michigan, Inc.

Eric J. Schneidewind

Digitally signed by Eric J. Schneidewind
DN: cn=Eric J. Schneidewind, c=US, o=Varnum Riddering Schmidt Howlett
Date: 2006.04.26 11:22:03 -04'00'

April 26, 2006 By: _____

Eric J. Schneidewind (P20037)
The Victor Center, Suite 810
201 N. Washington Square
Lansing, Michigan 48933
517/482-6237

Name of Respondent	This Report Is:	Date of Report (Mo, Da, Yr)	Year/Period of Report
Consumers Energy Company	(1) [X] An Original (2) [ ] A Resubmission	/ /	End of 2004/Q4

ELECTRIC OPERATING REVENUES (Account 400)

1. The following instructions generally apply to the annual version of these pages. Do not report quarterly data in columns (c), (e), (f), and (g). Unbilled revenues and MWH related to unbilled revenues need not be reported separately as required in the annual version of these pages.
2. Report below operating revenues for each prescribed account, and manufactured gas revenues in total.
3. Report number of customers, columns (f) and (g), on the basis of meters, in addition to the number of flat rate accounts; except that where separate meter readings are added for billing purposes, one customer should be counted for each group of meters added. The -average number of customers means the average of twelve figures at the close of each month.
4. If increases or decreases from previous period (columns (c),(e), and (g)), are not derived from previously reported figures, explain any inconsistencies in a footnote.

Line No.	Title of Account (a)	Operating Revenues Year to Date Quarterly/Annual (b)	Operating Revenues Previous year (no Quarterly) (c)
1	Sales of Electricity		
2	(440) Residential Sales	996,750,374	1,005,246,998
3	(442) Commercial and Industrial Sales		
4	Small (or Comm.) (See Instr. 4)	817,839,440	826,733,863
5	Large (or Ind.) (See Instr. 4)	527,064,400	562,252,314
6	(444) Public Street and Highway Lighting	23,063,179	22,597,782
7	(445) Other Sales to Public Authorities		
8	(446) Sales to Railroads and Railways		
9	(448) Interdepartmental Sales	3,179,000	3,170,081
10	TOTAL Sales to Ultimate Consumers	2,367,896,393	2,420,001,038
11	(447) Sales for Resale	115,757,563	75,698,488
12	TOTAL Sales of Electricity	2,483,653,956	2,495,699,526
13	(Less) (449.1) Provision for Rate Refunds	3,792,355	7,452,599
14	TOTAL Revenues Net of Prov. for Refunds	2,479,861,601	2,488,246,927
15	Other Operating Revenues		
16	(450) Forfeited Discounts	8,967,526	9,560,449
17	(451) Miscellaneous Service Revenues	2,378,060	2,016,068
18	(453) Sales of Water and Water Power		
19	(454) Rent from Electric Property	21,472,797	22,688,028
20	(455) Interdepartmental Rents		
21	(456) Other Electric Revenues	30,099,090	21,398,332
22			
23			
24			
25			
26	TOTAL Other Operating Revenues	62,917,473	55,662,877
27	TOTAL Electric Operating Revenues	2,542,779,074	2,543,909,804

Energy Michigan, Inc.
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Page 2 of 2

Name of Respondent	This Report is:	Date of Report (Mo, Da, Yr)	Year/Period of Report
Consumers Energy Company	(1) [X] An Original (2) [ ] A Resubmission	/ /	End of 2004/Q4

ELECTRIC OPERATING REVENUES (Account 400)

5. Commercial and Industrial Sales, Account 442, may be classified according to the basis of classification (Small or Commercial, and Large or Industrial) regularly used by the respondent if such basis of classification is not generally greater than 1000 Kw of demand. (See Account 442 of the Uniform System of Accounts. Explain basis of classification in a footnote.)
6. See pages 108-109, Important Changes During Period, for important new territory added and important rate increase or decreases.
7. For Lines 2,4,5,and 6, see Page 304 for amounts relating to unbilled revenue by accounts.
8. Include unmetered sales. Provide details of such Sales in a footnote.

MEGAWATT HOURS SOLD		AVG.NO. CUSTOMERS PER MONTH		Line No.
Year to Date Quarterly/Annual (d)	Amount Previous year (no Quarterly) (e)	Current Year (no Quarterly) (f)	Previous Year (no Quarterly) (g)	
				1
12,346,200	12,462,333	1,542,527	1,530,540	2
				3
10,785,207	11,161,411	208,015	200,148	4
9,677,929	10,382,772	8,576	8,795	5
181,710	180,565	1,762	1,914	6
				7
				8
48,272	51,889			9
33,039,318	34,238,970	1,760,880	1,741,397	10
2,941,428	1,771,417	4	10	11
35,980,746	36,010,387	1,760,884	1,741,407	12
				13
35,980,746	36,010,387	1,760,884	1,741,407	14

Line 12, column (b) includes $ -12,964,156 of unbilled revenues.
Line 12, column (d) includes -224,666 MWH relating to unbilled revenues

Energy Michigan, Inc.
Replies to Exceptions
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Attachment B
Page 1 of 2

ENERGY MICHIGAN
Consumers Energy Company's 2004 Stranded Cost Case
STRANDED COST CALCULATIONS

Line No.	Description	CONSUMERS' METHOD Exhibit A-1	CONSUMERS' METHOD Adj for current Jurisdictional	
	(a)	(b)	(c)	
	Direct Costs			
1	Net Production Plant	$1,602,201	$1,516,516	Multiplied Consumers' figure by the ratio of Line 24 to Line 25
2	Pre-Tax Rate of Return	10.63%	10.63%	
3	Return Required	$170,314	$161,206	
4	AFUDC Offset @10.63%	($19,404)	($18,366)	Multiplied Consumers' figure by the ratio of Line 24 to Line 25
5	Depreciation	$66,327	$62,780	Multiplied Consumers' figure by the ratio of Line 24 to Line 25
6	Property Taxes	$43,263	$40,949	Multiplied Consumers' figure by the ratio of Line 24 to Line 25
7	Insurance	$3,516	$3,328	Multiplied Consumers' figure by the ratio of Line 24 to Line 25
8	PPA Capacity Charges	$498,361	$471,709	Multiplied Consumers' figure by the ratio of Line 24 to Line 25
9	Revenue Required of Fixed Gen.	$762,377	$721,605	
10	Net Cost of Summer Capacity (Options)	$14,108	$13,354	Multiplied Consumers' figure by the ratio of Line 24 to Line 25
11	**Total Generation Related Reg Assets**	**$776,485**	**$734,959**	
12	**Remove Clean Air Act Rev Req**	**($37,420)**	**($35,419)**	Multiplied Consumers' figure by the ratio of Line 24 to Line 25
13	**Remove 10d(4) Revenue Recovery**	**($11,791)**	**($11,160)**	Multiplied Consumers' figure by the ratio of Line 24 to Line 25
14	**Total Revenue Requirement**	**$727,274**	**$688,379**	
	Fixed Generation Related Revenue			
15	Total Revenue from Sales to Ultimate Customers	$2,325,190	$2,325,190	
16	Remove 2004 Non-P&I Capacity PSCR Revenues	$0	$0	
17	Adjusted revenue from Sales to ultimate customer	$2,325,190	$2,325,190	
18	Generation Related Rev Req as a % of Revenues from Ult Customers	30.2405%	29.0699%	Revised via sheet two
19	Contribution to Fixed Costs of Direct Generation	$703,148	$675,930	
20	**Total Stranded Costs/(Benefits)**	**$24,126**	**$12,449**	
	Jurisdictional Factor Calculation			
21	Total System Sales - U-13917-R, Exhibit A-22, Line 5		33,500,143,234	
22	Wholesale Sales - U-13917-r, Exhibit A-13, pg 1, line 7		2,480,664,000	
23	TOTAL SALES		35,980,807,234	
24	Current Jurisdictional Factor -line 21/line 23		0.931056	
25	Consumers Jurisdictional Factor		0.983662	

ENERGY MICHIGAN

Consumers Energy Company's 2004 Stranded Cost Case

CALCULATION OF FIXED GENERATION % OF TOTAL SALES

Line No.	Description	CONSUMERS' METHOD	CONSUMERS' METHOD Adj for current Jurisdictional	
	(a)	(b)	(c)	
1	Net Plant	$1,366,572,000	$1,293,487,944	Multiplied Consumers' figure by the ratio of Line 24 to Line 25
2	Return	10.63%	10.63%	
3	Return Requirement	$145,266,604	$137,497,768	
4	P&I Capacity	$501,006,796	$474,213,031	Multiplied Consumers' figure by the ratio of Line 24 to Line 25
5	Depreciation Expense	$73,719,000	$69,776,519	Multiplied Consumers' figure by the ratio of Line 24 to Line 25
6	R&PP Tax	$44,467,000	$42,088,912	Multiplied Consumers' figure by the ratio of Line 24 to Line 25
7	Property Insurance	$1,905,257	$1,803,364	Multiplied Consumers' figure by the ratio of Line 24 to Line 25
8	Total Revenue Requirement	$766,364,657	$725,379,595	
9	Remove Palisades Return Of and On	($88,405,903)	($88,405,903)	Multiplied Consumers' figure by the ratio of Line 24 to Line 25
10	Total Revenue Requirement	$677,958,754	$641,701,626	
11	Total Revenue	$2,325,666,000	$2,289,408,872	Adjusted Consumers' figure by difference in total revenue req on line 10
12	Remove Palisades Return Of and On	($88,405,903)	($83,677,969)	Multiplied Consumers' figure by the ratio of Line 24 to Line 25
13	Remove Nuclear Decommissioning Revenue	($49,955,000)	($49,955,000)	
14	Less: 96 Fuel	($267,873,000)	($253,547,194)	Multiplied Consumers' figure by the ratio of Line 24 to Line 25
15	Less: 96 P&I	($727,264,000)	($688,370,035)	Multiplied Consumers' figure by the ratio of Line 24 to Line 25
16	Sub Total	$1,192,168,097	$1,213,858,674	
17	Plus: 2004 Fuel	$309,258,160	$292,719,082	
18	Plus: 2004 P&I (col b) & 2004 PSCR Revenues (col c)	$740,466,689	$700,866,646	
19	1996 Revenue Adjusted for 2004 PSCR Costs/Revenues	$2,241,892,946	$2,207,444,402	
20	Fixed Generation as a % of Total Sales	30.2405%	29.0699%	
	Jurisdictional Factor Calculation			
21	Total System Sales - U-13917-R, Exhibit A-22, Line 5		33,500,143,234	
22	Wholesale Sales - U-13917-r, Exhibit A-13, pg 1, line 7		2,480,664,000	
23	TOTAL SALES		35,980,807,234	
24	Current Jurisdictional Factor -line 21/line 23		0.931056	
25	Consumers Jurisdictional Factor		0.983662	

STATE OF MICHIGAN

COURT OF APPEALS

CONSUMERS ENERGY COMPANY,

Appellant,

v

MICHIGAN PUBLIC SERVICE COMMISSION, ENERGY MICHIGAN, INC., MIDLAND COGENERATION VENTURE LIMITED PARTNERSHIP, NATIONAL ENERGY MARKETERS ASSOCIATION, ATTORNEY GENERAL, ASSOCIATION OF BUSINESSES ADVOCATING TARIFF EQUITY, ADRIAN ENERGY ASSOCIATION, LLC, GENESEE POWER STATION LIMITED PARTNERSHIP, GRANGER ELECTRIC COMPANY, GRAYLING GENERATING STATION LIMITED PARTNERSHIP, HILLMAN POWER COMPANY, LLC, MICHIGAN COGENERATION SYSTEMS, INC., RIVERVIEW ENERGY SYSTEMS, SUMPTER ENERGY ASSOCIATION LIMITED PARTNERSHIP, VIKING ENERGY OF LINCOLN, INC., VIKING ENERGY OF McBAIN, INC., and CADILLAC RENEWABLE ENERGY, LLC,

Appellees.

FOR PUBLICATION
September 13, 2005
9:10 a.m.

No. 253316
MPSC
LC No. 00-013380

Before: Cooper, P.J., and Bandstra and Kelly, JJ.

PER CURIAM.

Consumers Energy Company appeals as of right an opinion and order of the Public Service Commission regarding Consumers' application for determination of its net stranded costs for 2000 and 2001. We affirm in part, reverse in part, and remand for further proceedings.

I. Background

This appeal involves two aspects of the PSC's decisions. First, Consumers challenges the PSC's conclusion that certain claimed costs for compliance with the federal Clean Air Act were statutorily required to be accrued and deferred for recovery rather than recovered as part of a recovery of net stranded costs for 2000 and 2001.

The second issue relates to competition in the provision of electric generation services in Michigan introduced through a retail open access (ROA) program. As background, in 2000, the Legislature enacted the Customer Choice and Electricity Reliability Act (the Act), 2000 PA 141 and 2000 PA 142, which authorized the establishment by the PSC of ROA programs under which retail electric customers could buy electric generation services from alternative suppliers as opposed to incumbent utilities such as Consumers. See generally *Detroit Edison v Public Service Comm*, 261 Mich App 448, 449-450; 683 NW2d 679 (2004). Essentially in connection with Consumers' ROA program and as contemplated by the Act, Consumers issued securitization bonds, with the PSC's authorization, to provide funding for certain costs and, correspondingly, assessed securitization charges to its retail electric customers. But the PSC directed in its order authorizing the bonds that Consumers' ROA customers, i.e., customers who selected an alternate electric supplier for electric generation services, were to receive a credit to offset their securitization charges. Consumers challenges the legality of the PSC's decision to continue this securitization offset for ROA customers.

II. Applicable Standards of Review

The scope of appellate review of PSC orders is narrow. *In re MCI Telecommunications Complaint*, 255 Mich App 361, 365; 661 NW2d 611 (2003). Under MCL 462.26(8), a party challenging an order of the PSC has the burden of proving by clear and satisfactory evidence that the order is unlawful or unreasonable. *Id.* A PSC decision is unlawful when it involves an erroneous interpretation or application of the law. *Id.* An order is unreasonable if it is not supported by the evidence. *Id.* Also, a reviewing court should give due deference to the PSC's administrative expertise and should not substitute its judgment for that of the PSC. *In re Michigan Cable Telecommunications Ass'n Complaint*, 239 Mich App 686, 690; 609 NW2d 854 (2000).

Questions of statutory interpretation remain subject to de novo review. *In re Michigan Cable, supra* at 690. While courts should nevertheless give great weight to any reasonable construction by the PSC of a regulatory scheme that it is empowered to administer, *Champion's Auto Ferry, Inc v Public Service Comm*, 231 Mich App 699, 707-708; 588 NW2d 153 (1998), a court should not abandon or delegate its responsibility to determine legislative intent. *Miller Bros v Public Service Comm*, 180 Mich App 227, 232; 446 NW2d 640 (1989).

III. Clean Air Act Costs

Consumers first argues that the PSC erred by excluding Clean Air Costs from the calculation of Consumers' stranded costs for 2000 and 2001. We disagree.

MCL 460.10d(4)[1] provides:

> Beginning January 1, 2004, *annual return of and* on *capital expenditures in excess of depreciation levels incurred during and before the time period described in subsection (2)*, and expenses incurred as a result of changes in taxes, laws, or other state or federal governmental actions incurred by electric utilities during the period described in [MCL 460.10d(2)], *shall be accrued and deferred for recovery*. After notice and hearing, the commission [the PSC] shall determine the amount of reasonable and prudent costs, if any, to be recovered and the recovery period, which shall not exceed 5 years, and shall not commence until after the expiration of the period described in [MCL 460.10d(2)]. [Emphasis added.]

The term "shall" unambiguously denotes mandatory, rather than discretionary action. *Roberts v Mecosta Co Gen Hosp*, 466 Mich 57, 65; 642 NW2d 663 (2002). Accordingly, by the plain language of MCL 460.10d(4), Consumers' "capital expenditures in excess of depreciation levels" had to be accrued and deferred for recovery on or after January 1, 2004. It is undisputed that the Clean Air Act costs at issue were capital expenditures.[2] Further, Consumers does not argue that those costs were not in excess of depreciation levels. Thus, it is manifest that the Clean Air Act costs at issue were subject to MCL 460.10d(4). It follows that, contrary to Consumers' position, those costs could not have been included in the calculation of stranded costs in the PSC order being appealed, which was entered in 2002, because MCL 460.10d(4) provides for the PSC's determination of the amounts of such costs in proceedings to begin on or after January 1, 2004. Because of this, the PSC was not obligated to determine the amount of Clean Air Act related capital expenditures attributable to 2000 and 2001 that would or might be eventually recoverable by Consumers under MCL 460.10d(4). Consumers' argument that the PSC allowed or would have allowed recovery of Clean Air Act costs of the type at issue in another case is simply immaterial.

Consumers contends that the PSC erred because its exclusion of capital expenditures for Clean Air Act costs was not limited to "*generation-related* capital expenditures in excess of depreciation" (emphasis added). But Consumer's position is inconsistent with the plain language of MCL 460.10d(4). The term "generation-related" does not appear in that statutory provision,

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[1] When the PSC opinion and order on appeal was issued, this statutory provision was codified with identical language as MCL 460.10d(3). We refer to this statutory provision by its current codification as MCL 460.10d(4).

[2] In this regard, the PSC's analysis specifically treated the Clean Air Act costs at issue as entirely involving capital expenditures, and Consumers does not challenge that characterization on appeal.

but rather in relevant part it applies to all "capital expenditures in excess of depreciation," i.e., it encompasses capital expenditures regardless of whether they are "generation-related." Thus, we reject this argument as well.

In sum, given the plain language of MCL 460.10d(4), Consumers has not established any error based on the PSC's exclusion of the Clean Air Act costs at issue in its determination of Consumers' net stranded costs for 2000 and 2001.

IV. Securitization Offset for ROA Customers

Consumers next argues that the PSC erred in its continuation of a credit for ROA customers to offset the securitization charge imposed on those customers. We agree in part and disagree in part.

A. Inapplicability of Res Judicata and Collateral Estoppel

Contrary to the Attorney General's position, the doctrines of res judicata and collateral estoppel are inapplicable in this ratemaking context. The doctrine of res judicata "applies to quasi-judicial administrative decisions." *Wayne Co v Detroit*, 233 Mich App 275, 277; 590 NW2d 619 (1998). Similarly, the doctrine of collateral estoppel applies to "unappealed administrative determinations *that are adjudicatory in nature* and where . . . a method of appeal is provided." *Champion's Auto Ferry, supra* at 712 (emphasis added). In *Pennwalt Corp v Public Service Comm*, 166 Mich App 1, 7-9; 420 NW2d 156 (1988), this Court determined that the doctrines of res judicata and collateral estoppel were inapplicable to the fixing and regulating of rates by the PSC because this is a legislative function, not a judicial one.[3] Thus, because the relevant determinations by the PSC regarding the securitization offset for ROA customers were part of its ratemaking function, i.e., they directly related to the overall rates to be paid by ROA

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[3] The *Pennwalt Corp* panel stated that "res judicata and collateral estoppel cannot apply in the pure sense" in the ratemaking context. *Pennwalt Corp, supra* at 9. Read in isolation that might seem to imply that the doctrines apply to some limited extent. But the panel previously stated that these doctrines only apply to administrative decisions that are "adjudicatory in nature." *Id.* at 7. The panel thereafter stated that "[f]ixing and regulating rates is a legislative function, not a judicial one." *Id.* at 8. Thus, we read *Pennwalt Corp* as holding that the doctrines of res judicata and collateral estoppel are inapplicable to ratemaking decisions by the PSC. The panel in that case also stated that an issue regarding the reasonableness of certain costs did not have to be "completely relitigated" where that precise issue was litigated in a prior PSC case, but that it was appropriate to place the burden on the plaintiff to establish by new evidence or evidence of changed circumstances that the costs were unreasonable. *Id.* at 9. But, as will be explained, in contrast to the factual issue in *Pennwalt Corp* regarding the reasonableness of certain costs, the present issue regarding the securitization offset for ROA customers turns on a question of law. Thus, a requirement for Consumers to come forward with new evidence cannot sensibly be applied to this issue. Rather, the critical point is simply that the doctrines of res judicata and collateral estoppel are inapposite to make any explicit or implicit resolution by the PSC in a prior case of the permissibility of some or all of the securitization offset for ROA customers binding in this case.

customers, any prior determination of the matter by the PSC cannot be binding under the doctrines of res judicata and collateral estoppel.

B. MCL 460.10d(6)-(7)

Construction and application of MCL 460.10d(6)-(7)[4] is critical to resolution of this issue. MCL 460.10d(6)-(7) provide:

> (6) Except for savings assigned to the low-income and energy efficiency fund under subsection (7), securitization savings greater than those used to achieve the 5% rate reduction under subsection (1) [i.e., the five percent rate reduction for residential customers mandated by MCL 460.10d(1)[5]] shall be allocated by the commission [the PSC] to further rate reductions or to reduce the level of any charges authorized by the commission to recover an electric utility's stranded costs. The commission shall allocate approved securitization, transition, stranded, and other related charges and credits in a manner that does not result in a reallocation of cost responsibility among the different customer classes.
>
> (7) If securitization savings exceed the amount needed to achieve a 5% rate reduction for all customers, then, for a period of 6 years, 100% of the excess savings, up to 2% of the electric utility's commercial and industrial revenues, shall be allocated to the low-income and energy efficiency fund administered by the commission. The commission shall establish standards for the use of the fund to provide shut-off and other protection for low-income customers and to promote energy efficiency by all customer classes. The commission shall issue a report to the legislature and the governor every 2 years regarding the effectiveness of the fund.

We disagree with Consumers' argument that MCL 460.10d(7) requires all securitization savings in excess of those needed to fund a five percent residential rate reduction to first be used to achieve a five percent rate reduction for all customers. MCL 460.10d(6) plainly allows the PSC to allocate such "excess" securitization savings "to further rate reductions *or* to reduce the level of any charges authorized by the commission to recover an electric utility's stranded costs" (emphasis added). Further, nothing in MCL 460.10d(7) requires excess securitization savings to first be used to achieve a five percent rate reduction for all customers. Rather, MCL 460.10d(7) merely requires that, if securitization savings "exceed the amount needed to achieve a 5% rate

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[4] This is the current codification of these statutory provisions as they went into effect on December 20, 2002, notably the same date as the PSC opinion and order being appealed in this case. Substantively identical statutory language was previously codified as MCL 460.10d(5)-(6). In addressing this matter, the PSC referred to the present codification of these statutory provisions.

[5] MCL 460.10d(1) requires the PSC to "establish the residential rates for each electric utility with 1,000,000 or more retail customers in this state as of May 1, 2000 that will result in a 5% rate reduction from the rates that were authorized or in effect on May 1, 2000."

reduction for all customers," then a certain amount of such securitization savings must be allocated to the Low-income and Energy Efficiency Fund. Accordingly, we reject Consumers' argument because it is contrary to the plain language of MCL 460.10d(6) and (7). See *Nastal v Henderson & Assoc Investigations, Inc*, 471 Mich 712, 720; 691 NW2d 1 (2005).

We agree, however, with Consumers that, as a matter of law, the PSC in effect improperly treated ROA customers' securitization charges in their entirety as flatly involving recovery of "stranded costs" as to which securitization savings could be used to offset those charges. As a starting point, the overall framework for securitization involves incumbent electric utilities recovering their "qualified costs" through the imposition of securitization charges on their customers (including ROA customers). See MCL 460.10i(3); MCL 460.10j(1)(a). Critical to resolution of this issue is the meaning of "qualified costs" as opposed to "stranded costs" and particularly, as will be set forth, our conclusion that not all qualified costs constitute stranded costs. MCL 460.10h(g) defines "qualified costs" as:

> an electric utility's regulatory assets as determined by the commission, adjusted by the applicable portion of related investment tax credits, plus any costs that the commission determines that the electric utility would be unlikely to collect in a competitive market, including, but not limited to, retail open access implementation costs and the costs of a commission approved restructuring, buyout or buy-down of a power purchase contract, together with the costs of issuing, supporting, and servicing securitization bonds and any costs of retiring and refunding the electric utility's existing debt and equity securities in connection with the issuance of securitization bonds. Qualified costs include taxes related to the recovery of securitization charges.

In contrast to this express statutory definition of qualified costs, we have found no express statutory definition of "stranded costs." However, the Legislature granted the PSC broad power to determine stranded costs in MCL 460.10a(1), and we defer to any reasonable construction of this term by the PSC, *Champion's Auto Ferry, supra* at 708. In PSC Case No. U-11290, the PSC defined stranded costs as costs incurred during the regulated era that will be above market prices, and costs necessary to facilitate the transition to competitive markets. The PSC identified five categories of stranded costs: (1) regulatory assets consisting of unrecovered costs of demand side management programs, (2) capital costs of nuclear plants, (3) contract capacity costs arising from power purchase agreements, (4) employee retaining costs, and (5) costs related to the implementation of restructuring. U-11290 PSC opinion 6/5/97, pp 7-14.

The differing meaning of qualified costs and stranded costs is important because, as set forth above, MCL 460.10d(6) authorizes the use of excess securitization savings for "further rate reductions" or "to reduce the level of any charges authorized by the [PSC] to recover an electric utility's stranded costs," but does not include any language authorizing the use of excess securitization savings to reduce the recovery of qualified costs that do not constitute stranded costs. We note that it appears undisputed, and we consider it beyond reasonable dispute, that use of excess securitization savings to offset securitization charges, which consist of qualified costs, does not constitute a "rate reduction" within the meaning of MCL 460.10d(6). Specifically, MCL 460.10d(6) treats a rate reduction as a separate category from a reduction in other charges, so that the term "rate reduction" as used in that subsection can only reasonably be considered to refer to a reduction in an electric utility's base rates. Thus, use of securitization savings to offset

securitization charges, i.e., to offset customers' payment of qualified costs, is only authorized by MCL 460.10d(1) to the extent that those qualified costs involved a recovery of stranded costs. It follows that the PSC's decision to use securitization savings to completely offset securitization charges for Consumers' ROA customers can only be justified if the qualified costs that make up those securitization charges consist entirely of stranded costs. However, as we will explain, the PSC improperly treated all qualified costs as constituting stranded costs while refusing to consider whether some of the qualified costs at issue were not stranded costs.

In addition, the last sentence of MCL 460.10d(6) provides further support for our conclusion that qualified costs are not identical to stranded costs. Specifically, that sentence provides for the PSC to allocate "approved securitization, transition, stranded, and other related charges and credits" in a certain manner. Importantly, this language enumerates "securitization" and "stranded" charges separately. Thus, to consider securitization charges, i.e., the qualified costs that a utility may recover related to securitization, and stranded costs as identical would be contrary to the principle that statutory language should not be rendered nugatory because doing so would render superfluous the use of the term "securitization" in addition to the term "stranded" as a modifier to "charges and credits" in the last sentence of MCL 460.10d(6). See *Franchino v Franchino*, 263 Mich App 172, 185-186; 687 NW2d 620 (2004).

In this case, the PSC did not determine that the qualified costs, i.e., securitization charges, imposed on Consumers' ROA customers, for which it directed the use of securitization charges to provide an offset, consisted entirely of stranded costs. Indeed, in its order denying rehearing, the PSC referred to stranded costs and qualified costs as being "closely related, if not always the same." Put simply, the PSC has taken the position that because qualified costs are closely related or similar to stranded costs, it may treat all qualified costs as stranded costs for purposes of ordering the securitization offset at issue based on its authority under MCL 460.10d(6) to use excess securitization savings to reduce the recovery of charges authorized to recover stranded costs. We reject this position because, as explained above, under MCL 460.10d(6), while excess securitization savings may be used for further rate reductions or to reduce the level of charges to recover stranded costs, there is no statutory authorization to use such securitization savings to reduce the recovery of qualified costs that do not constitute stranded costs even if such costs are "closely related" to stranded costs. The PSC's position regarding this matter is contrary to the principle that "a court may read nothing into an unambiguous statute that is not within the manifest intent of the Legislature as derived from the words of the statute itself." *Roberts, supra* at 63. Thus, the PSC erred by directing the use of excess securitization savings to flatly reduce ROA customers' securitization charges rather than limiting that reduction to the portion of securitization charges attributable to stranded costs.

Thus, we hold that the PSC erred in allowing the securitization offset for ROA customers at issue to the extent that it was based on qualified costs that did not constitute stranded costs. Consistent with the due deference given to the PSC's administrative expertise, *In re Michigan Cable, supra* at 690, we conclude that we must remand this case to the PSC for it to decide as an initial matter how to modify its treatment of this matter in light of this legal error. Specifically, on remand, the PSC first must decide to either (1) determine the part of the securitization offset for ROA customers attributable to stranded costs and only provide an offset for the portion of the securitization charge based on stranded costs or (2) abolish the securitization offset for ROA customers altogether. We also consider it appropriate for the PSC to initially determine what

redress, if any, should be taken with regard to amounts already improperly paid out to Consumers' ROA customers from excess securitization savings.

Consumers also argues that, in ordering the securitization offset for ROA customers, the PSC violated the last sentence of MCL 460.10d(6), which requires the PSC to "allocate approved securitization, transition, stranded, and other related charges and credits in a manner that does not result in a reallocation of cost responsibility among the different customer classes." However, in light of our decision to remand this case to the PSC, it would be premature to reach this argument. Rather, in deciding on its course of action with regard to the securitization offset at issue on remand, the PSC must be mindful of its duty under MCL 460.10d(7) to avoid a reallocation of cost responsibility among different customer classes.

C. Other Arguments Advanced by Consumers

Consumers also contends that the PSC lacked the authority to order any portion of the securitization offset for ROA customers at issue. We disagree.[6]

First, Consumers argues that the securitization offset improperly allows ROA customers to bypass securitization charges in violation of MCL 460.10k(2). MCL 460.10k(2) provides:

> A financing order shall include terms ensuring that the imposition and collection of securitization charges authorized in the order are a nonbypassable charge.

In this regard, MCL 460.10h(f) defines a "nonbypassable charge" as "a charge in a financing order payable by a customer to an electric utility or its assignees or successors regardless of the identity of the customer's electric generation supplier." We disagree with Consumers' argument regarding MCL 460.10k(2) because ROA customers are still being billed for securitization charges and are still being required to pay them even if the same amount is refunded to them via the securitization offset. Further, MCL 460.10d(6) specifically authorized the PSC to use securitization savings to reduce charges authorized by the PSC to recover an electric utility's stranded costs, at least some of which would constitute qualified costs subject to securitization. Thus, MCL 460.10k(2) cannot reasonably be read as precluding the PSC from providing an offset for securitization charges when MCL 460.10d(6) specifically authorizes the PSC to do so with regard to a category of securitization charges.

Consumers further asserts that the securitization offset violates MCL 460.10n(2), which provides:

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[6] We address these arguments, despite our decision to remand this case to the PSC, to make clear that none of these arguments require the PSC to completely abolish the securitization offset at issue as opposed to limiting it to providing an offset for only that portion of qualified costs constituting stranded costs.

> The state pledges, for the benefit and protection of the financing parties and the electric utility, that it will not take or permit any action that would impair the value of securitization property, reduce or alter, except as allowed under [MCL 460.10k(3)], or impair the securitization charges to be imposed, collected, and remitted to financing parties, until the principal, interest and premium, and any other charges incurred and contracts to be performed in connection with the related securitization bonds have been paid and performed in full. Any party issuing securitization bonds is authorized to include this pledge in any documentation relating to those bonds.

However, we see no basis for concluding that the securitization offset violates this provision. Specifically, despite this offset, securitization charges are collected from ROA customers and used for securitization purposes, but then ROA customers are in effect credited or refunded the same amount *from another source*, i.e., excess securitization savings. Thus, the securitization offset does not impair the imposition, collection, or remitting of securitization funds and, accordingly, does not violate MCL 460.10n(2).

Similarly, Consumers argues that the securitization offset violates MCL 460.10i(4), which provides:

> A financing order is effective in accordance with its terms, and the financing order, together with the securitization charges authorized in the order, shall be irrevocable and not subject to reduction, impairment, or adjustment by further action of the [PSC], except as provided under [MCL 460.10k(3)].

However, as discussed above, the securitization charges are actually collected from ROA customers with Consumers being required to refund an offsetting amount from another source. Thus, the securitization offset does not violate MCL 460.10k(3).

Affirmed in part, reversed in part, and remanded to the PSC for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ Richard A. Bandstra
/s/ Kirsten Frank Kelly

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

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In the matter of the application of CONSUMERS ENERGY COMPANY for determination of net stranded costs for the year 2004 and approval of net stranded cost recovery charges.	))))))	Case No. U-14526

PROOF OF SERVICE

Monica Robinson, duly sworn, deposes and says that on this 26th day of April 2006 she served a copy of the Initial Brief of Energy Michigan, Inc. upon the individuals listed on the attached service list by e-mail at their last known addresses.

Monica Robinson

Digitally signed by Monica Robinson
DN: cn=Monica Robinson, c=US, o=Varnum Riddering Schmidt Howlett
Date: 2006.04.26 11:22:19 -04'00'

Monica Robinson

Subscribed and sworn to before me
This 26th day of April 2006.

Eric J. Schneidewind

Digitally signed by Eric J. Schneidewind
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