VARNUM
RIDDERING SCHMIDT HOWLETT LLP
ATTORNEYS AT LAW

201 N. WASHINGTON SQUARE • SUITE 810
LANSING, MICHIGAN 48933

TELEPHONE 517 / 482-6237 • FAX 517 / 482-6937 • WWW.VARNUMLAW.COM

ERIC J. SCHNEIDEWIND E-MAIL ejschneidewind@varnumlaw.com

June 20, 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 Energy Michigan's Exceptions. Also attached is the original Proof of Service indicating service on counsel.

Thank you for your assistance in this matter.

Very truly yours,

VARNUM, RIDDERING, SCHMIDT & HOWLETTLLP

Eric J. Schneidewind

Digitally signed by Eric J. Schneidewind
DN: cn=Eric J. Schneidewind, c=US, o=Varnum Riddering Schmidt Howlett
Date: 2006.06.20 10:03:26 -04'00'

Eric J. Schneidewind

EJS/mrr

cc: ALJ
parties

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

****

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

EXCEPTIONS OF ENERGY MICHIGAN, INC. TO THE PROPOSAL FOR DECISION

NOW COMES Energy Michigan, Inc. ("Energy Michigan") through its attorneys Varnum Riddering Schmidt & Howlett LLP and hereby files Exceptions to the Proposal For Decision ("PFD") issued by Administrative Law Judge Sharon Feldman ("ALJ") on June 6, 2006. Failure to except to any specific recommendation in the PFD should not be taken as concurrence with that recommendation.

I. Exception #1: ROA and Retail Customers Should Receive The Same Benefits For Paying Securitization And Nuclear Decommissioning Charges

A. The PFD.

Energy Michigan proposed that ROA customers receive the same benefits for payment of securitization and nuclear decommissioning charges that are received by retail customers. Currently, both retail and ROA customers pay securitization bond and tax charges and nuclear decommissioning charges related to the Palisades nuclear plant. These charges cover most of the capital costs of Palisades and all nuclear decommissioning costs. In return for paying these charges, retail customers receive power from the Palisades plant at essentially variable cost such as labor and fuel. Retail customers pay little additional capital cost and no additional nuclear

decommissioning cost. ROA customers receive absolutely nothing in return for making securitization and nuclear decommissioning payments.

The ALJ rejected the proposal of Energy Michigan that ROA customers receive an amount of power from the Palisades plant which would be equivalent in value to the securitization and nuclear decommissioning payments made by ROA customers. PFD, p. 29. The ALJ rejected this proposal on two specific grounds:

1) The ALJ concluded that previous Commission decisions had required securitization and nuclear decommissioning payments to be collected from ROA customers because Act 142 requires that securitization charges be non-bypassable and thus must be imposed upon and collected from all cuctomers. The ALJ also quoted decisions of the Commission to the effect that the Commission had long standing policy that nuclear decommissioning charges should be paid by all customers. PFD, p. 28.

2) The ALJ also found that Energy Michigan had failed to establish that the Court of Appeals decision in Consumers Energy v MPSC, 268 Mich Ap 171; 707 NW2d 633 (2005) had a bearing on the case. Id.

B. Energy Michigan Exception # 1: ROA and Retail Customers Should Receive The Same Benefits For Paying Securitization And Nuclear Decommissioning Charges

1. Background On Securitization

a. PA 142 requirements.

Pursuant to law all ROA and retail customers are assessed securitization bond and tax charges which mainly comprise the capital costs for the Palisades nuclear plant and other generation related costs. MCL 460.10h, et seq. ROA and retail

customers also pay nuclear decommissioning costs associated with the Palisades plant[1].

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.

b. Two Energy Michigan proposals for securitization credits have been rejected by the Commission.

i. U-13808.

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 Fermi 2 power minus variable costs. This credit was based on the fact that retail customers pay securitization and nuclear decommissioning charges and receive Fermi 2 power at variable cost. 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.

[1] 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.

In a rehearing Order Case U-13808 the Commission rejected the Energy Michigan proposal finding it to be a bypass of the obligation to pay securitization charges. U-13808, Rehearing Order, 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.

ii. U-14347.

In Consumers Energy Case U-14347, ABATE and Energy Michigan proposed to allocate all securitization bond and tax charges using the same method used to allocate generation plant costs. This proposal would have allocated all such costs to retail customers and relieved Choice customers of all obligation to pay securitization and nuclear decommissioning costs. The Commission rejected this proposal on the grounds that securitization charges are non-bypassable and thus must be imposed on all customers. The Commission also stated that it, "…has likewise had a longstanding policy that nuclear decommissioning should be paid by all customers." U-14347, December 22, 2005, p. 75.

2. The Court of Appeals has upheld use of credits to offset securitization charges.

On September 13, 2005 in an appeal of Consumers' stranded cost Case U-13380, the Michigan Court of Appeals issued an Opinion regarding (among other things) the issue of whether credits to ROA customers which offset securitization charges were an illegal bypass of such charges. Among the issues considered by the Court was an argument by Consumers that the Commission lacked authority to order a credit to offset securitization charges for ROA customers.

Consumers contended that the securitization offset implemented by the Commission 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 A.

The Court found that an illegal bypass did not exist because ROA customers were still being billed for securitization charges and were still being required to pay those charges "even if the amount is refunded to them via the securitization offset." 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 securitization offset credits that are not specifically authorized by statute. Id., p. 9. This position is supported by additional language 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. 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. 8-9 (emphasis supplied).

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., p. 9. (Emphasis supplied).

The ruling of the Court can fairly be construed to state that an illegal bypass or offset of securitization charges does not exist where the obligation for all customers to pay

securitization charges is left intact, but an offsetting credit from another source is utilized. The Energy Michigan proposals provide an offsetting credit through the sale of Palisades power or the actual delivery of Palisades power to ROA customers.

3. The Palisades nuclear plant is not stranded, therefore ROA customers should not be forced to subsidize its operation.

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

As of 2004, Consumers retail full service sales were within .34% of the sales 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 retail full service 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 the Palisades generating plant was not stranded pursuant to the sales levels used in Order U-10685, then it should not be stranded as of 2004 with the same level of full service sales.

b. Excess Palisades 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. Also, 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. Polich Direct, 2 Tr 98.

c. 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 to retail service 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.

d. 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. 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.

4. 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, should receive energy and capacity from the

Palisades power plant at a cost equivalent to the cost currently being paid by retail customers. Mr. Polich stated, "We are asking [that] 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 ROA 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 cited decision of the Michigan Court of Appeals.

II. Exception #2: The ALJ Erred By Adopting a New Unsupported Method of Calculating Stranded Costs

A. The PFD.

The PFD contains inconsistent findings regarding the calculation of stranded costs. First, the ALJ determined that Consumers Energy had no stranded costs. The ALJ adopted a theory advanced by the Attorney General that Consumers Energy failed to demonstrate that its claimed revenue deficiency was caused by competition. Using this theory, the ALJ found that Consumers' failure to pursue timely rate relief and operation of PA 141 rate caps had caused the revenue deficiency claimed as stranded cost. PFD, p. 14.

However, in a later portion of the PFD relating to PSCR costs, the ALJ concluded that stranded costs should be calculated by eliminating PSCR costs from the revenue requirements calculation of stranded costs. This is the method described in Exhibit A-8 that was presented by Consumers at the request of MPSC Staff but was unsupported by any witness. PFD, p. 27. The specific rationale used by the ALJ for adoption of this second method of calculating stranded cost was that, "…there is no obvious link between the treatment of PSCR costs in the revenue requirements calculation and the allocation of third party revenues" and that, "…[Energy Michigan Witness] Polich testified that PSCR costs should be eliminated from the revenue requirements calculation." PFD, p. 27.

Based on this reasoning, the ALJ concluded that Consumers does not object to the removal of PSCR costs from the stranded cost calculation and presented no argument in favor of continuing to include PSCR costs in that calculation. The ALJ therefore recommended that the stranded cost reflected in Exhibit A-8 be used as the appropriate measure of the Company's unrecovered fixed costs should the Commission reject her proposal of no stranded costs pursuant to the Attorney General's theory. Id.

B. Energy Michigan Exception #2: The ALJ Erred By Adopting a New Unsupported Method of Calculating Stranded Costs

1. There is no testimony of record supporting removal of all PSCR and revenue costs from the stranded cost calculation.

Under the subject of PSCR cost issues, the ALJ has, in essence, adopted the MPSC Staff method of calculating stranded costs which was also presented (but not supported) by Consumers Energy, not Staff, in the U-14274 case. In this case, Consumers Energy Witness Belknap presented (but did not support) the calculations which would result from implementation of the Staff theory of calculating stranded costs (exclusion of PSCR costs). However, in his direct testimony for Consumers Energy, Mr. Belknap supported

the traditional form of calculating stranded costs not the method presented in Exhibit A-8. Staff did not address the proper treatment of PSCR costs in its Brief or Reply Brief. PFD, p. 26.

Contrary to the statement of the ALJ, Energy Michigan Witness Polich did not support exclusion of all PSCR costs from the stranded cost calculation. Rather, Energy Michigan Witness Polich supported exclusion of the PSCR variable cost from the stranded cost calculation but favored retaining consideration of long term fixed PSCR costs. Polich Direct, 2 Tr 91, lines 13-14 and Rebuttal, 2 Tr 105. Thus, no party to this case supported the Exhibit A-8 calculation of stranded costs which reflected exclusion of all PSCR costs and revenues.

2. The Commission has no evidentiary basis to adopt the Staff position on stranded cost calculation

The Orders of the Commission must include findings of fact and conclusions of law. "Findings of fact shall be based exclusively on the evidence and on matters officially noticed." See MCL 24.285 § 85.

In an appeal of a Commission Order, the burden of proof is upon the appellant to show by clear and satisfactory evidence that the Order of the Commission complained of is unlawful or unreasonable. MCL 462.26(8).

There is no support on the record for adoption of Staff's alleged method of calculating stranded costs by removing all PSCR costs which is more thoroughly discussed below. It may be, as claimed by the Staff, that the method of third party sales allocation will be decided in Case U-13917-R. However, there is no evidentiary basis in this case for adoption of the Staff's stranded cost calculation proposal.

Since there is no testimony supporting Staff's position on calculation of stranded costs by removing all PSCR costs, any decision adopting that proposal or decision may be

overturned as unreasonable. See Associated Truck Lines, Inc. v Public Service Commission, 377 Mich 259; 140 NW 2d 515 (1996); Attorney General v Public Service Commission, 231 Mich Ap 76, 77-78; 585 NW 2d 310 (1998)

The Energy Michigan Initial Brief and Reply Brief demonstrate that there is utterly no evidentiary basis for adoption of the Staff method of calculating stranded costs set forth in Exhibit A-8, p. 1 and 2 of 2. See Energy Michigan Initial Brief, p. 4-5, Reply Brief, p. 7-8. Without testimony or evidence supporting the methodology applied by Mr. Belknap, parties to this case were deprived of the ability to file discovery and rebuttal or conduct cross examination regarding the theory itself or application of that theory to the facts at hand. For reasons fully stated in the Energy Michigan Initial Brief, there is no evidentiary basis to adopt Staff's method of calculating stranded costs.

Also, as noted above, the new Staff theory of calculating stranded costs would overturn substantial MPSC precedent and a Court of Appeals ruling upholding the U-12639 methodology.

For the reasons stated above and because it is both unnecessary and premature to adopt a new form of stranded cost calculation with no support from any witness, the Commission should reject the findings of the ALJ recommending that all PSCR costs and revenues should be excluded from future stranded cost calculation.

III. Prayer For Relief

WHEREFORE, Energy Michigan respectfully requests that the Commission:

A. Adopt the Energy Michigan credit mechanism giving ROA customers the same benefits for securitization and nuclear decommissioning charges as are received by retail customers; and

B. Reject the proposed finding that all PSCR costs should be excluded from the calculation of stranded costs.

Respectfully submitted,

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

June 20, 2006

By: Eric J. Schneidewind

Digitally signed by Eric J. Schneidewind
DN: cn=Eric J. Schneidewind, c=US, o=Varnum Riddering Schmidt Howlett
Date: 2006.06.20 10:06:07 -04'00'

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

ATTACHMENT A

Energy Michigan, Inc.
Exceptions Case U-14526
June 20, 2006

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

Official Reported Version

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 costs claimed 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, MCL 460.10 *et seq.*, 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 Co v Pub Service Comm No 2*, 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, imposed securitization charges on its retail electric customers. But the PSC directed in its order authorizing the bonds that Consumers' ROA customers, i.e., customers who selected an alternative electric supplier, 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 Telecom 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. *In re MCI, supra* at 365. 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 Telecom Ass'n Complaint*, 239 Mich App 686, 690; 609 NW2d 854 (2000).

Questions of statutory interpretation remain subject to review de novo. *Id.* 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 Pub Service Comm*, 231 Mich App 699, 708; 588 NW2d 153 (1998), a court should not abandon or delegate its responsibility to determine legislative intent, *Miller Bros v Pub 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 Act 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 [MCL 460.10d(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 Consumers' position is inconsistent with the plain language of MCL 460.10d(4). The term "generation-related" does not appear in that statutory provision, which in relevant part 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.

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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.

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

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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 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.

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

Construction and application of MCL 460.10d(6) and (7)[4] are critical to resolution of this issue. MCL 460.10d(6) and (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 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 be used first 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 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'

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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) and (6). In addressing this matter, the PSC referred to the current 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."

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 the recovery of "stranded costs," so that 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 the resolution of this issue is the meaning of "qualified costs" as opposed to that of "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 and other similar costs, (2) capital costs of nuclear plants, (3) contract capacity costs arising from power purchase agreements, (4) employee retraining costs, and (5) costs related to the implementation of restructuring. *In re Electric Utility Industry Restructuring,* unpublished opinion and order of the Public Service Commission, issued June 5, 1997 (Case No. U-11290), pp 6-14.

The differing meanings of qualified costs and stranded costs are 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 category separate 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(6) 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 on the basis of 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. Consistently 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 charges 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 granted with regard to amounts already improperly paid 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 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(6) 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 through the securitization offset. Further, MCL 460.10d(6) specifically authorizes 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.

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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 requires the PSC to completely abolish the securitization offset at issue as opposed to limiting it to providing an offset for only that portion of the qualified costs constituting stranded costs.

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

> 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 commission, 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 460.10i(4).

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 20th day of June 2006 she served a copy of the Exceptions of Energy Michigan, Inc. to Proposal For Decision upon the individuals listed on the attached service list by e-mail and first class 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: 2006.06.20 10:06:23 -04'00'

Monica Robinson

Subscribed and sworn to before me
This 20th day of June 2006.

Eric J. Schneidewind

Digitally signed by Eric J. Schneidewind
DN: cn=Eric J. Schneidewind, c=US, o=Varnum Riddering Schmidt Howlett
Date: 2006.06.20 10:06:34 -04'00'

Eric J. Schneidewind, Notary Public
Eaton County, Michigan
Acting in Ingham County, Michigan
My Commission Expires: April 24, 2012

U-14526 SERVICE LIST

Jon R. Robinson
jrrobinson@cmsenergy.com
Consumers Energy Company

Kristin Smith
smithkm@michigan.gov
Larry Bak
lsbak@michigan.gov
MPSC Staff

Michael Moody
moodyme@michigan.gov
MI Dept of Attorney General

John Dempsey
jdempsey@dickinson-wright.com
Jennifer Frye
jfrye@dickinson-wright.com
NEM

Robert Strong
rstrong@clarkhill.com
ABATE

Michael Brown
mbrown@plunkettcooney.com
Gary Pasek
gbpasek@midcogen.com
MCV