After the Administrative Law Judge heard responses, conducted a hearing, and accepted supplemental briefing on UPPCo’s motion for summary disposition, the Commission issued an order in Case No. U-18333 that is relevant to the disposition of the present case. *In re Indiana Michigan Power Co (In re I&M)*, MPSC Case No. U-18333, 12/20/2018 Order Denying Rehearing (December Order). The December Order undermines UPPCo’s position that the Commission cannot require it to issue refunds for the unlawful Revenue Decoupling Mechanism (RDM) surcharges it collected from its customers. (UPPCo’s 8/7/2018 Motion for Summary Disposition, p 3; UPPCo’s 9/28/2018 Consolidated Reply, p 5.) The parallels between Case No. U-18333 and the present case are obvious, so the Commission’s orders in Case No. U-18333 likely telegraph what it will do in this case.

Case No. U-18333 stemmed from I&M’s appeal of two Commission orders preventing I&M from continuing to collect a net lost revenue tracker (NLRT) surcharge that lapsed when the Company did not renew it. The NLRT was approved in a settlement agreement in I&M’s 2010 rate case (Case No. U-16180) to recover revenue that I&M lost when it implemented energy-efficiency measures.
But when I&M failed to include the NLRT in its next rate case, the Commission refused to reconcile the Company’s lost revenue and terminated the Company’s NLRT surcharge. *In re I&M’s Application to Reconcile its Energy Optimization Plan*, MPSC Case No. U-17283, 9/26/2014 Opinion and Order, p 21. I&M appealed the Commission’s decision and later decisions denying I&M’s attempts to revive the RDM surcharge.

While these appeals were pending, the Court of Appeals issued its decision in *Enbridge Energy, LP v Upper Peninsula Power Co*, 313 Mich App 669 (2015) holding that UPPCo’s RDM surcharge, which was also the product of a settlement, was unlawful. In light of *Enbridge Energy*, the Court remanded I&M’s appeals for reconsideration. *In re Application of I&M to Reconcile Costs*, unpublished per curiam opinion of the Court of Appeals, issued November 29, 2016 (Docket Nos. 326405 and 327716), p 8. The Court directed the Commission to consider “whether the NLRT is factually distinct from RDMs approved by the PSC in other cases.” *Id.* Notably, the Court also held, “To have the PSC rule on the validity of the NLRT in light of *Enbridge Energy* would provide guidance for future cases.” *Id.* In Case No. U-18333, the Commission took up the Court’s remand.

On remand, the Commission held that the NLRT it had approved in Case No. U-16180 was unlawful under *In re Application of Detroit Edison Co*, 296 Mich App 101 (2012) and the *Enbridge Energy* decision. Because the Commission found that I&M’s NLRT was a decoupling mechanism, the Commission held that the Court of Appeals’ holdings invalidating these mechanisms applied equally to the NLRT,
meaning it was void *ab initio*. *In re I&M*, 9/13/2018 Order on Remand, pp 14–16 (September Order). And since the NLRT was an unlawful mechanism, the corresponding surcharge was likewise unlawful. *Id.* at 18. The Commission, therefore, required I&M to account for the amounts it had unlawfully collected and to refund these amounts as part of another case. *Id.*

In its September Order, the Commission disagreed with I&M that requiring the Company to refund surcharges it had unlawfully collected amounted to retroactive ratemaking. *Id.* The Commission was also not convinced that invalidating the Company’s NLRT in Case No. U-18333 would amount to an improper “collateral attack” on a previously approved settlement agreement. *Id.* at 17. Staff relied on the September Order in its response to UPPCo’s motion for summary disposition, but Staff acknowledged that the September Order was still subject to possible petitions for rehearing and appeals. (2 TR 31–32.) Now that I&M’s petition for rehearing has been resolved and no appeal filed, however, it is safe to say that the Commission has conclusively resolved the matter.

The Commission is likely to resolve this case in the same way. Like Case No. U-18333, this case stems from the *Enbridge Energy* decision. Indeed, while *Enbridge Energy* and Case No. U-18333 involved *similar mechanisms* and *different utilities*, *Enbridge Energy* and the present case involve the *same mechanism* and *same utility*. UPPCo responds that this case is different than Case No. U-18333 because this is a complaint case whereas Case No. U-18333 was not. (UPPCo’s 2/22/2019 Response to Staff’s Motion to Present Supplemental
Authority, p 2.) But there is nothing in the text of the *Enbridge Energy* decision to suggest that the Court intended to limit its remand to parties to the complaint. The Court foresaw the potential for multiple proceedings and orders: “We . . . remand for proceedings consistent with this opinion.” *Enbridge Energy*, 313 Mich App at 678 (emphasis added).

Given the obvious parallels between Case No. U-18333 and this case, the Commission’s holdings in Case No. U-18333 are persuasive precedent. *In re Pub Serv Comm for Transactions Between Affiliates*, 252 Mich App 254, 267 (2002) (“[A]n order resulting from a contested case proceeding has binding effect on the parties to the case, *yet also serves as precedent in cases with identical or closely related facts*.”) (emphasis added). So when the Commission affirmed its earlier holding that the rule against retroactive ratemaking “does not apply where the rates or charges are subsequently deemed unlawful,” it will likely reach the same conclusion here. *In re I&M*, 12/20/2018 Order, p 10. And since the Commission rejected I&M’s argument that “a Commission-ordered refund would invalidate the settlement agreement approved in Case No. U-16739 rendering the entire rate order ‘infirm,’” it is not likely to reach the opposite conclusion now. *Id.* at 11.

The Commission held in Case No. U-18333 that the Court of Appeals, by not retaining jurisdiction, effectively “washed its hands of the whole matter and delegated the case to the Commission to resolve in its entirety.” *Id.* at 9. The same is true in this case since the *Enbridge Energy* Court did not retain jurisdiction. *Enbridge Energy*, 313 Mich App at 678 (“We do not retain jurisdiction.”).
The Commission also held in Case No. U-18333 that “a full resolution of the matter necessitates a determination of the amounts to be refunded,” and the same is true here. *In re I&M*, 12/20/2018 Order, p 11. This case should be allowed to move forward so that the parties can determine whether UPPCo owes its customers a refund, and if so, how much.

Respectfully submitted,

MICHIGAN PUBLIC SERVICE COMMISSION STAFF

[Signature]

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DATED:  April 12, 2019
STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the complaint of
CITIZENS AGAINST RATE EXCESS
against UPPER PENINSULA POWER COMPANY.

PROOF OF SERVICE

STATE OF MICHIGAN  )
COUNTY OF EATON  ) ss

Cherie A. Richie, being first duly sworn, deposes and says that on
April 12, 2019, she served a true copy of The Michigan Public Service
Commission Staff's Brief Presenting Supplemental Authority and Proof of
Service upon the following parties via e-mail only:

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Subscribed and sworn to before me this 12th day of April, 2019.

Cherie A. Richie

De Ann M. Payne, Notary Public
State of Michigan, County of Eaton
Acting in the County of Eaton
My Commission Expires: 11-29-24