September 15, 2009

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

RE: Case No. U-15611 - In the matter of the application of Consumers Energy Company for Reconciliation of Nuclear Power Plant Decommissioning Funds and Expenditures for the Big Rock Point Nuclear Plant and for related relief

Dear Ms. Kunkle:

Enclosed for electronic filing are Consumers Energy Company’s Initial Brief and Proof of Service in the above-captioned case. This case is being filed only in PDF format.

Sincerely,

H. Richard Chambers

cc: Hon. James N. Rigas, ALJ  
Parties per Attachment 1 to Proof of Service
STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of
CONSUMERS ENERGY COMPANY
for Reconciliation of Nuclear Power Plant
Decommissioning Funds and Expenditures
for the Big Rock Point Nuclear Plant and
for related relief
____________________________________)

Case No. U-15611

BRIEF OF CONSUMERS ENERGY COMPANY

September 15, 2009
# TABLE OF CONTENTS

I. INTRODUCTION ...............................................................................................................1

II. BACKGROUND AND DESCRIPTION OF THE BIG ROCK NUCLEAR PLANT DECOMMISSIONING PROJECT.................................................................2

III. MPSC-JURISDICTIONAL COSTS AND FUNDING PROCESS.........................................9

   A. MPSC Jurisdictional Decommissioning Costs ................................................................9
   B. Funding Process for MPSC Jurisdictional Costs.............................................................10
   C. Funding of FERC-Jurisdictional Decommissioning Costs ...........................................11
   D. Calculation of Funding Shortfall ................................................................................12

IV. FUNDS AVAILABLE FOR BIG ROCK DECOMMISSIONING.......................................13

   A. Background and Overview...........................................................................................13
   B. Discussion ....................................................................................................................21
       1. The Plain Meaning of the Relevant Statute Supports Consumers Energy’s Position ..............................................................................................................21
       2. The Interpretation of the Statute and Orders Made During the Relevant Time Period supports Consumers Energy’s Position .........................................25
       3. The $44.1 Million Funding Shortfall Did Not Occur Until After the End of the Rate Freeze Period .................................................................31
          a. Response Regarding Speculation that Consumers Energy “Knew” There Was a Funding Shortfall During the Statutory Rate Freeze Period .................................................31
          b. The $44.1 Million That Consumers Energy Seeks to Recover Was Incurred After 2003 ........................................................................37
       4. Consumers Energy Followed Appropriate Accounting Practices During the Rate Freeze Period .................................................................38
       5. The Relief Sought by Other Parties is Barred by the Prohibition Against Retroactive Ratemaking .................................................................40

V. RECOVERY OF $44.1 MILLION SHORTFALL ............................................................41

VI. CONCLUSION ..................................................................................................................43
STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the Application of
CONSUMERS ENERGY COMPANY for
Reconciliation of nuclear power plant
Decommissioning funds and expenditures
For the Big Rock Point Nuclear Plant and
For related relief

____________________________________

BRIEF OF CONSUMERS ENERGY COMPANY

I. INTRODUCTION

Consumers Energy Company (“Consumers Energy” or “the Company) filed its application in this proceeding seeking approval of the reconciliation of costs incurred in decommissioning the Big Rock Point (“Big Rock”) Nuclear Plant with the revenues (and associated earnings) collected for that purpose. Consumers Energy presented evidence demonstrating that its incurred radiological and site restoration decommissioning costs exceed the collected decommissioning revenues by approximately $44.1 million, and the Company therefore seeks authority to make up the shortfall in one of two ways: (i) by offsetting the shortfall with a portion of the proceeds received from the sale of the Palisades Nuclear Plant, or (ii) by collecting the shortfall from customers through a surcharge.

Based upon the evidence submitted by the other parties, there appears to only be one dispute in this case. No party challenged the amount of costs incurred by Consumers Energy in decommissioning the Big Rock plant. No party challenged the reasonableness or prudence of those costs. No party challenged the manner in which the Company managed the Big Rock decommissioning project. The sole disputed issue concerns the calculation of the amount of revenues that Consumers Energy has collected from customers that were earmarked for Big
Rock plant decommissioning purposes. This single issue is discussed in detail later in this Brief. Before doing so, however, it seems appropriate to provide some background concerning the Big Rock Nuclear Plant, its operational history, and the decommissioning project.

II. BACKGROUND AND DESCRIPTION OF THE BIG ROCK NUCLEAR PLANT DECOMMISSIONING PROJECT

The Big Rock Nuclear Plant was a 67 megawatt single unit boiling water reactor (“BWR”) plant located near Charlevoix, Michigan. It began commercial operation in March 1963, and operated successfully for over 30 years, before being voluntarily shut down by Consumers Energy in 1997. During this period, the plant was operated for the benefit of the Company’s customers, providing them with a reliable supply of electricity at a reasonable cost. 2 TR 83.

The Big Rock Plant was a nuclear energy pioneer; it was the first nuclear reactor in Michigan and the fifth commercial nuclear reactor in the country. At the time of its shutdown, the plant was the longest running commercial nuclear power plant in the United States. The Big Rock Plant began operation as a research and development facility in cooperation with the United State Department of Energy, having a goal of demonstrating that nuclear power could economically generate electricity. In 1977, Big Rock set a world record for boiling water reactors by operating for 343 consecutive days. In 1991, the American Nuclear Society named Big Rock a Nuclear Historic Landmark. 2 TR 85.

The Big Rock Plant had been issued an Operating License for a 40 year period that began with plant construction, and the license was set to expire on May 31, 2000. In 1997, Consumers Energy’s management concluded that the plant’s small size, combined with the increasingly competitive industry environment, the considerable investment that would have been necessary to meet increased nuclear regulatory requirements, and the short period of time
before expiration of the license, made shutdown the most economical option for customers. 2 TR 86.

The Nuclear Regulatory Commission ("NRC") extensively regulates the decommissioning of nuclear power plants, and was involved in essentially all aspects of the decommissioning of the Big Rock Plant. A summary of the applicable regulations, guidelines, reports and standard review plans was provided by Company witness Kurt Haas at 2 TR 87-88. Mr. Haas testified that in addition to these NRC requirements, there were many other federal, state and local requirements with which the Company was obligated to comply during the decommissioning process. 2 TR 89. Mr. Haas was involved with the nuclear industry for 35 years prior to his retirement in May 2007, 31 of which were with Consumers Energy. 2 TR 79. He was the Consumers Energy Site General Manager of the Big Rock Point Nuclear Power Restoration Project from June 2000 until his retirement in 2007. 2 TR 79.

Consumers Energy decommissioned Big Rock using the "DECON" method. This is a method that, upon plant shutdown, removes the equipment, structures, and other parts of the facility and site containing radioactive materials or contaminants to a level that permits the property to be released for use. The Company elected to use this approach for multiple reasons. As explained by Mr. Haas, it is generally less costly than an alternative approach that defers removal of radioactive materials to some time in the future (SAFSTOR). In addition, the DECON method minimizes employee displacement after plant shutdown, and therefore makes it easier to safely and efficiently conduct the decommissioning effort without the need for new hiring and additional training. Further, the DECON method was more efficient in that certain important equipment used in decommissioning the plant, such as plant monitoring and ventilation systems, radioactive waste processing systems, and various cranes on the Big Rock
site, were still in good working order. 2 TR 90-92. Finally, the use of the DECON option for Big Rock allowed the Company to take advantage of the then current availability of two sites for the disposal of low level radioactive waste. As a result, Consumers Energy was able to complete the Big Rock decommissioning process while access to these sites was still available. Access to one of these sites (the Barnwell facility in South Carolina) was effectively terminated shortly after decommissioning was completed. If the Company had not had access to these facilities during the Big Rock decommissioning process, it would have been necessary to store the radioactive materials on site indefinitely. 2 TR 94-95.

Consumers Energy incurred costs totaling $472.8 million in decommissioning the Big Rock Plant. These may be summarized as follows:

- Radiological decommissioning costs $350.0 million
- Site Restoration decommissioning costs $38.2 million
- Spent Nuclear Fuel Storage costs $54.6 million
- Payment to Entergy $30.0 million

Combined Spent Nuclear Fuel Storage costs $84.6 million
Decommissioning Cost Total $472.8 million

2 TR 44; 2 TR 112.

The Company is excluding from its request in this case the costs associated with the storage of spent nuclear fuel; i.e., the $84.6 million amount shown above. Of this amount, $54.6 million represents the booked spent nuclear fuel (“SNF”) storage costs incurred during decommissioning for the period prior to the transfer of the Big Rock Independent Spent Fuel
Storage Installation ("ISFSI")\textsuperscript{1} to Entergy on April 11, 2007. The $30 million figure is the amount of the payment made by Consumers Energy to Entergy in exchange for Entergy accepting title and full responsibility for the Big Rock ISFSI.

In this transaction, Entergy assumed all further Big Rock spent fuel storage responsibilities and liabilities, including all costs associated with any further delays, regulations, reloading of fuel and decommissioning of the ISFSI.\textsuperscript{2} Consumers Energy is not seeking recovery of the $84.6 million of costs associated with storage of spent nuclear fuel in this case because it is currently seeking recovery from the Department of Energy in litigation that was commenced in 2002. In that litigation, the Company alleges that the DOE breached its obligation to take custody of the SNF pursuant to the schedule required by contract. As explained by Company witness Mr. Torrey, the Company intends to continue vigorously pursuing the litigation. If it is ultimately unsuccessful in recovering the costs, the Company will petition the Commission for relief.\textsuperscript{2} Until such time, no further action by the Commission with respect to these costs is required.

The Company had originally projected that the decommissioning of the Big Rock site would not be completed until October 31, 2012. This was, in part, based on the assumption that the DOE would, as it had indicated in a 1997 letter, begin accepting Big Rock spent nuclear fuel in 2011 and 2012. Consumers Energy’s decommissioning activities actually concluded on April 11, 2007, five and one-half years earlier than projected, with the transfer of the ISFSI to Entergy.\textsuperscript{2} The ISFSI stores the spent fuel from the Big Rock Plant and other highly radioactive materials referred to as “Greater than Class C Waste.” The ISFSI was transferred to Entergy in 2007, which now has the sole responsibility for the operation and ultimate decommissioning of the ISFSI. See MPSC Case No. U-14992 for a complete discussion of the transaction involving the sale of the Palisades Plant and the transfer of the Big Rock ISFSI to Entergy. The ISFSI will remain on the current site until the SNF is transferred off-site to a DOE facility or some other licensed storage facility.

\textsuperscript{1} The ISFSI stores the spent fuel from the Big Rock Plant and other highly radioactive materials referred to as “Greater than Class C Waste.” The ISFSI was transferred to Entergy in 2007, which now has the sole responsibility for the operation and ultimate decommissioning of the ISFSI. See MPSC Case No. U-14992 for a complete discussion of the transaction involving the sale of the Palisades Plant and the transfer of the Big Rock ISFSI to Entergy. The ISFSI will remain on the current site until the SNF is transferred off-site to a DOE facility or some other licensed storage facility.
Mr. Haas provided a detailed discussion of the cost control efforts the Company used to manage the decommissioning project. In summary, Consumers Energy followed policies that required competitive bidding of materials purchases over $5,000 and the provision of services over $10,000. 2 TR 125. There was extensive independent oversight of the decommissioning project from federal and state agencies (e.g., NRC, Michigan Department of Environmental Quality, Michigan State Police—Emergency Management Division, OSHA, United States Environmental Protection Agency, Office of Homeland Security). 2 TR 126. A Restoration Safety Review Committee and a Citizens Advisory board were formed to provide additional independent oversight of the project. 2 TR 127-128. The Company retained the services of individuals and organizations with considerable decommissioning experience, including the pre-eminent experts in the field, Thomas LaGuardia and William Manion. 2 TR 128. The Staff of the MPSC was provided updates on the decommissioning project, including cost and schedule information. 2 TR 130.

Consumers Energy submitted to the NRC a Final Site Survey Report and a formal request for release of the non-ISFSI portion of the site in November 2006. 2 TR 109. On January 8, 2007 the NRC released the non-ISFSI portion of the site for unrestricted use. Id. Following review and approval by the NRC, the ISFSI portion of the site was transferred, as noted above, to Entergy on April 11, 2007. Id.

By any measure, the decommissioning of the Big Rock Plant was a success. Numerous engineering awards were received for various aspects of the project. Mr. Haas

---

2 For example, the project was the first in the industry to utilize a new process for decontamination of the reactor cooling system and received the prestigious “R&D Magazine Top 100 Award” as one of 1998’s most technologically significant processes or products. Similarly, the Big Rock decommissioning project was the first to design and install a new plant-wide power system to ensure worker protection and increase efficiency of operations, a project which earned the “Project of the Year 2000” award from Power Engineering Magazine. 2 TR 100-101.
provides a detailed description of the decommissioning process at 2 TR 96-110. He summarized as follows:

“Q. Was decommissioning of the Big Rock Plant completed safely and efficiently?

A. Yes. The NRC’s radiological surveys verified that Consumers Energy had satisfied clean-up criteria and that releasing the site for unrestricted use posed no threat to public health or safety. In January 2007 the NRC released the entire site, except for the portion containing the ISFSI, for unrestricted public use. The decommissioning of the plant was completed safely and efficiently and received praise from local, state and national stakeholders. The project has been referred to as a model of how to successfully decommission a reactor site.

Q. Was safety a priority during decommissioning?

A. Yes. Throughout the decommissioning process, safety and efficient restoration were key goals—goals which were accomplished. Safety was always a top priority as workers faced hazards that included working aloft, confined spaces, radioactive zones, heavy objects, hazardous materials and electricity. Throughout the duration of the project worker injury and near-miss safety incident rates were well below rates typical for construction projects of this magnitude. The project’s commitment to personal, industrial, and environmental safety is reflected in the successful completion of over 3000 shipments of low-level radioactive waste and non-radioactive material offsite for disposal without a single regulatory issue or personal injury to the workers involved. In decommissioning the Big Rock Plant, Consumers Energy set a high standard for future nuclear decommissioning projects in the United States.

Q. Was the Big Rock Plant decommissioned in a reasonable time frame and at a reasonable cost?

A. Yes. Big Rock was shut down by the Company in August 1997 and decommissioning and site restoration work completed in August 2006. Decommissioning occurred under the oversight of the NRC and other regulators using methodologies and processes approved by the NRC. Consumers Energy sought to minimize costs consistent
with NRC requirements, using industry experience and innovative approaches. The NRC, which oversees decommissioning of nuclear plants, concluded that the plant was successfully decommissioned and, in January 2007, released the site (other than the ISFSI, which Consumers Energy no longer owns) for unrestricted use. The MPSC Staff was informed on a regular basis concerning the progress and status of decommissioning and received briefings, typically twice a year, in Lansing and at the Big Rock site. Decommissioning of the plant was successfully accomplished in a reasonable time frame and at a reasonable cost and was returned to truly a natural state with all plant structures including foundations removed.” 2 TR 110-111.

Mr. Haas testified that the decommissioning by Consumers Energy of the Big Rock Plant has been recognized as setting a high standard for future decommissioning efforts. 2 TR 82, 111. He stated that even the NRC staff and Commissioners have repeatedly referred to the Big Rock project as the standard of how to decommission a reactor site. 2 TR 131.

All the evidence presented in this case indicates that the Company prudently and reasonably managed the decommissioning of the Big Rock Plant. There is no evidence in this case that challenges the reasonableness or prudence of any of the costs incurred by the Company in this project. Company witness Michael A. Torrey summarized the Company’s request as follows:

Q. Please discuss why you conclude that the radiological and site restoration decommissioning costs should be recovered from retail electric customers.

A. The Big Rock Plant was owned and operated for the benefit of Consumers Energy’s retail electric customers. The Commission has previously recognized that the radiological and site restoration costs associated with decommissioning of the Big Rock Plant are recoverable from customers. Consumers Energy honored its commitment to restore the Big Rock Nuclear Plant to a greenfield status—returning it to a natural state and free for unrestricted use. Company witness Mr. Haas has presented testimony that in
decommissioning the Plant, Consumers Energy set a high standard for future nuclear decommissioning projects in the United States. In addition, the care with which Consumers Energy restored the site has substantial value to the present and future economic development prospects for Northern Michigan. The greenfield status of the site not only allows a wide variety of possible uses for the site itself, it also helps provide reassurance to surrounding communities that the site will not detract from other potential development opportunities. The radiological and site restoration decommissioning costs were reasonably and prudently incurred decommissioning costs that were necessary in order to decommission the Big Rock nuclear plant. Recovery of the costs incurred by the Company for radiological and site restoration decommissioning is reasonable and appropriate. 2 TR 172-173.

Mr. Torrey is Executive Director of Rates in the Rates and Business Support Department. 2 TR 160. From May 1983 until July 1998, Mr. Torrey was assigned to Consumers Energy’s Nuclear Operations Department. Id.

Thus, the evidence supports the conclusion that the costs incurred by Consumers Energy in decommissioning the Big Rock Plant were reasonably and prudently incurred. There is no evidence challenging this conclusion.

III. MPSC-JURISDICTIONAL COSTS AND FUNDING PROCESS

A. MPSC Jurisdictional Decommissioning Costs

As indicated previously, the total decommissioning costs incurred by Consumers Energy are $472.8 million. 2 TR 44. Mr. Torrey testified that the MPSC-jurisdictional portion of these costs is $457.1 million. 2 TR 166. As noted earlier, excluded from consideration in this case are the SNF-related costs of $84.6 million.

Mr. Torrey calculated the MPSC-jurisdictional portion of the $472.8 million of Big Rock Plant decommissioning costs using a ratio of MPSC-jurisdictional sales of electricity as a percentage of total electric sales during the period that the Big Rock Plant was in operation.
TR 166. The Big Rock Plant began commercial operation in March 1963 and continued in operation until it was shut down by the Company in August 1997. TR 83, 166. Dividing jurisdictional sales into total Company sales for this period resulted in an MPSC jurisdictional percentage of 96.6855%. TR 166, Exhibit A-13. This ratio was applied to the $472.8 million of the Big Rock decommissioning costs booked by the Company, resulting in the MPSC-jurisdictional Big Rock decommissioning cost amount of $457.1 million.3 TR 166.

B. Funding Process for MPSC Jurisdictional Costs

Company witness Jan Anderson is Manager of Depreciation Accounting and Regulatory Services for Consumers Energy in the Corporate Property Accounting Department. TR 39. Ms. Anderson provided considerable information concerning the decommissioning funding process followed by the MPSC and the Company. TR 38-63. In an order issued August 26, 1986 in Case No. U-6150, the Commission directed Consumers Energy to file an application for approval of a mechanism for funding decommissioning of its nuclear plants, Palisades and Big Rock. The Company made such a filing in Case No. U-8536, which resulted in a December 2, 1986 Order authorizing Consumers Energy to establish external trusts to fund decommissioning activities. The Company complied with this direction, establishing a “Section 468A Trust Fund” as provided for in Section 468A of the Internal Revenue Code (sometimes referred to as the “qualified” trust), and a “Non-Section 468A Trust Fund,” (sometimes referred to as the “non-qualified” trust). The distinction between these two trusts is that contributions to the qualified trust, subject to certain requirements and up to certain limits, were permitted as

---

3 Mr. Torrey and Ms. Anderson both testified that it would not be appropriate to apply the jurisdictional percentage separately to individual components of the costs. In order to assure that NRC fund adequacy requirements were being met it was necessary to apply funds first to radiological decommissioning costs. Funds were not pro-rated by category. TR 45, 167.
deductions for federal income tax purposes. Contributions in excess of the amounts permitted to be deposited in the qualified trust were deposited in the non-qualified trust. 2 TR 45-46.

As ordered by the Commission, surcharges were established to collect revenues that were deposited into the trusts. The Company filed reports with the Commission addressing the anticipated costs of decommissioning and the adequacy of the existing surcharges on a periodic basis, which resulted in a series of orders modifying the surcharges over time. 2 TR 46-47. The final deposit into the Big Rock trust funds was made on January 19, 2001, of the billings for Big Rock decommissioning made in December 2000. 2 TR 51-52.

Based upon the actions taken by the Company, the total amount available from the MPSC-jurisdictional Big Rock trusts was $328.2 million, comprised of $245.2 million of deposits and $83.0 million of net earnings/interest. 2 TR 52. This $328.2 million figure does not include a $15.5 million contribution that Consumers Energy made into the non-qualified trust in 2006 in order to maintain compliance with NRC minimum funding criteria. 2 TR 52.

C. Funding of FERC-Jurisdictional Decommissioning Costs

FERC-jurisdictional funds in the amount of $15.9 million were committed to Big Rock decommissioning costs, and this use deserves some further explanation. In FERC Dockets No. EC06-155-000, et al, the FERC authorized Consumers Energy to use the FERC-jurisdictional Palisades decommissioning funds to help cover shortfalls in the decommissioning of the Big Rock Plant, specifically finding that this was an appropriate use of Palisades decommissioning funds. The additional funding authorized in this manner was $11.4 million, which was in addition to $4.5 million of FERC-jurisdictional decommissioning funds already specifically attributable to Big Rock. This authorization from the FERC fully covered the FERC-jurisdictional portion of Big Rock decommissioning costs. 2 TR 174. As will be
explained in more detail later in this Brief, this is exactly the same approach the Company is proposing with respect to a portion of the remaining proceeds made available from the transaction in which Consumers Energy sold the Palisades Plant to Entergy.

D. Calculation of Funding Shortfall

As noted previously, the total amount of costs at issue in this case is $388.2 million, made up of radiological and site restoration costs, and excluding SNF-related costs. The amount of funding available from FERC-jurisdictional decommissioning funds was $15.9 million and reduces the unrecovered costs to $372.3 million. The available amount from the MPSC-jurisdictional trusts was $328.2, thus leaving a $44.1 million shortfall. 2 TR 173.

The calculation of the funding shortfall as summarized on Ms. Anderson’s Exhibit A-4, less the SNF-related costs not being sought in this case, as calculated on Exhibit A-16, note (3), is as follows:

<table>
<thead>
<tr>
<th>COSTS</th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td>NRC Radiological</td>
<td>$350,013,954</td>
</tr>
<tr>
<td>Site Restoration</td>
<td>38,187,282</td>
</tr>
<tr>
<td>Spent Nuclear Fuel (SNF) Storage</td>
<td>54,614,287</td>
</tr>
<tr>
<td>Payment for Assumption of SNF liabilities by Entergy Nuclear Palisades, LLC</td>
<td>30,000,000</td>
</tr>
<tr>
<td><strong>Total Costs</strong></td>
<td>472,815,523</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>FUNDING</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Michigan PSC Jurisdictional Trusts</td>
<td>328,229,589</td>
</tr>
<tr>
<td>FERC Jurisdictional Big Rock Point</td>
<td>4,471,243</td>
</tr>
<tr>
<td>FERC Jurisdictional Amount from FERC 2/21/2007 Order</td>
<td>11,417,884</td>
</tr>
<tr>
<td><strong>Total Funding</strong></td>
<td>344,118,716</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>SHORTFALL</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Total</strong></td>
<td>$128,696,807</td>
</tr>
<tr>
<td>Less booked SNF-related costs</td>
<td>$ 84,614,287</td>
</tr>
<tr>
<td><strong>CASE NO. U-15611 SHORTFALL REQUEST</strong></td>
<td>$ 44,082,520</td>
</tr>
</tbody>
</table>

Source: Exhibits A-4, A-16, note (3).
IV. **FUNDS AVAILABLE FOR BIG ROCK DECOMMISSIONING**

A. **Background and Overview**

As stated in the introduction to this Brief, there appears to only be one issue in dispute in this case. The other parties contend that Consumers Energy has understated the amount of funds that have already been collected by the Company that were, or should have been, earmarked for decommissioning of the Big Rock Plant. No witness for any party disputed that $328.2 million is the total amount of customer provided decommissioning funding available from the MPSC jurisdictional trust funds, including net earnings and interest.\(^4\) Instead, the dispute concerns the contention of other parties that an additional $99.5 million was collected by Consumers Energy that should have been deposited in the Big Rock decommissioning trusts. Due to various earnings and interest calculations, these parties conclude that, even accepting the validity of the Company’s decommissioning costs (which no witness has disputed), the Commission should rule that Consumers Energy actually collected an amount from customers in excess of its costs, and therefore has a refund obligation of somewhere between $58 million and $135 million.

For the most part, the historical facts regarding this single issue are not in dispute. The interpretation of those facts, however, and in particular, the legal conclusions drawn by the parties from those facts, are contested. The pertinent facts are as follows.

As noted above, the Commission authorized Consumers Energy to establish external trusts to fund future decommissioning activities at the Big Rock and Palisades plants in a December 1986 order in Case No. U-8536. 2 TR 167. Surcharges were approved, revenues

---

\(^4\) The $328.2 million is the amount of customer contributions. 2 TR 52-53. It does not include the $15.5 million Company contribution made by Consumers Energy in March 2006 to the decommissioning trust from corporate funds. 2 TR 53, 61. The $15.5 million corporate contribution to the trust funds was segregated from customer funds and was accounted for separately. 2 TR 53, Exhibit A-7, pp. 1-3.
were collected and deposits into the trusts were thereafter made pursuant to a series of Commission orders which reviewed decommissioning costs and fund adequacy at approximately three year intervals. The Commission last adjusted nuclear decommissioning surcharges for the Big Rock plant in an order issued March 22, 1999 in Case No. U-11662. In that order, the Commission specifically ordered that the approval to apply surcharges to customer bills for Big Rock decommissioning costs terminated on December 31, 2000. Pursuant to a recommendation made by the witness appearing on behalf of the Attorney General in U-11662 (who is the same individual testifying on behalf of MEC/PIRGIM in this U-15611 case), the Commission directed Consumers Energy as follows in ordering paragraph G of the March 22, 1999 U-11662 order:

“G. Within 30 days, Consumers Energy Company shall file revised tariff sheets containing the new decommissioning surcharges authorized by this order, and reflecting that the decommissioning surcharges apply to all retail service customers. Additionally, the tariffs shall reflect that the surcharge for the Big Rock Point nuclear plant is authorized through December 31, 2000.” Order, p. 23 (Emphasis added).

Consumers Energy complied with the Commission’s order, 2 TR 168, and included language on the applicable tariff sheet that stated that the Big Rock nuclear decommissioning surcharge was “effective through 12/31/2000.” Id; Exhibit A-15, page 1. During 1999 and early 2000, other aspects of this tariff sheet were amended, and the applicable language concerning the termination date of the Big Rock surcharge was slightly modified to read “effective 4/1/99 through 12/31/2000.” 2 TR 169-170; Exhibit A-15, page 3.

---

5 At page 7 of its March 22, 1999 Order in Case No.U-11662 the Commission stated: “Mr. Peloquin addressed four additional matters. First, he testified that the tariff for the Big Rock decommissioning surcharge should be physically separate from the one for Palisades, and should specifically state that the Big Rock Point surcharge will end on December 31, 2000.” At page 19 of its Order, the Commission noted that Consumers Energy concurred that the surcharge for purposes of decommissioning of Big Rock would terminate on December 31, 2000.
2000 PA 141 (“PA 141”) became effective in June 2000. Two features of PA 141 were a reduction in residential rates of 5%, and a three year rate freeze applicable to all rates. MCL 460.10d(1) states as follows:

“(1) Unless otherwise reduced by the commission under subsection (4), the commission shall 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. Notwithstanding any other provision of law or commission order, rates for each electric utility with 1,000,000 or more retail customers established under this subsection become effective on the effective date of the amendatory act that added this section and remain in effect until December 31, 2003 and all other electric retail rates of an electric utility with 1,000,000 or more retail customers authorized or in effect as of May 1, 2000 shall remain in effect until December 31, 2003, unless otherwise reduced by the commission under subsection (4).”

The Commission took various actions to implement these features of PA 141. Most pertinent to this case are the orders issued in Case No. U-12464.

In an order issued August 4, 2000 in Case No. U-12464, the Commission addressed an issue that had arisen concerning the interpretation of the language of MCL 460.10d(1) that directed that the 5% residential rate reduction and the rate freeze were to be implemented relative to rates “authorized or in effect as of May 1, 2000.” Consumers Energy had contended that an increase in its rates was permissible to reflect a prior order of the Commission in Case No. U-11180-R that had approved an increase at such time as Consumers Energy had attained a specific amount of retail open access customer load. The Company argued that such an increase had been “authorized” as of May 1, 2000, and that the rate freeze language of the act therefore explicitly permitted that increase to go into effect, notwithstanding the rate freeze.

---

6 Subsection (4) of MCL 460.10d concerns the use of potential savings from securitization to reduce rates, and is not relevant to this discussion.
freeze. The Commission Staff, among other parties, disagreed with the Company’s position.

The Commission described the Staff’s position in the August 4, 2000 Order as follows:

“The Staff further reasons that if the Commission were to accept Consumers’ premise that rates may be adjusted upward, it would also be required to reduce rates for decreases that were authorized prior to May 1, 2000. As examples, it cites the expiration of Big Rock nuclear decommissioning surcharges scheduled for the end of 2000 and the completion of amortization for abandoned Midland nuclear plant in 2001.” August 4, 2000 Order, p. 4.

In the August 4, 2000 Order, the Commission rejected the Company’s position and accepted the Staff position, finding that,

“Section 10d(1) freezes rates for Consumers’ customers at their May 1, 2000 levels (95% of those levels for residential customers) and does not provide for any mechanism to change these rates during the freeze period. In the Commission’s view, Consumers’ interpretation is contrary to the statute’s mandate to freeze rates.

“Finally, the Commission must reject Consumers’ argument because it is inherently contradictory. Consumers contends that Act 141 requires future rate increases to occur as they would have absent the statute but prohibits future rate decreases that would have occurred absent the statute. For example, Consumers argues that Act 141 permits an increase in the base rate adjustment that might otherwise occur at some indefinite time in the future, but prohibits a corresponding elimination of that same base rate adjustment that is scheduled to occur on December 31, 2001. This one-way interpretation that allows only rate increases and prohibits all rate reductions is contrary to the clear and obvious intent of the statute

4 Consumers makes a similar argument regarding the removal of the Big Rock surcharge at the end of 2000.” August 4, 2000 Order, pp. 6-7.

Thus, in the August 4, 2000 Order in U-12464, the Commission concluded that the previously ordered termination of the surcharge which was in place for Big Rock nuclear decommissioning on December 31, 2000 had been superseded by PA 141. The order indicates
that this surcharge rate was to continue after December 31, 2000 and extend through the end of the statutory rate freeze period (December 31, 2003).

Consumers Energy’s interpretation and understanding of the rate freeze provisions of PA 141, as guided by the Commission’s Order in Case No. U-12464, was that the amount recovered by Consumers Energy in rates was frozen (subject to the 5% statutory reduction in residential rates) but that the Commission-mandated termination as of December 31, 2000 of Big Rock decommissioning funding was not altered. Nowhere in the statutory provisions or in the Commission’s Case No. U-12464 Order was there any statement indicating that the December 31, 2000 termination date for funding of Big Rock decommissioning established in Case No. U-11662 was in any way being altered.

Given the statutory rate freeze, Consumers Energy reasonably concluded that, pursuant to the MPSC’s Case No. U-11662 Order in combination with the Commission’s Case No. U-12464 Order, the amounts recovered in rates after December 31, 2000 could and should be used for general corporate purposes. Mr. Torrey testified:

“In its August 4, 2000 order in Case No. U-12464, the Commission affirmed that surcharge amounts would continue to be included in rates beyond the scheduled December 31, 2000 termination date. However, commencing January 1, 2000, no portion of the rates in effect were attributable to Big Rock decommissioning, since the earmarked purpose for that surcharge had terminated at December 31, 2000.

* * *

“The revenue collected after December 31, 2000 from the surcharges that had been used to recover Big Rock decommissioning prior to that date was general corporate revenue and was used for general corporate purposes.” 2 TR 169-170.

As will be discussed below, at least two division directors of the Commission Staff were expressly aware of this Company understanding of the Order, and either expressly agreed with, or did not dispute, this understanding. Nor did any other person on the Staff indicate
disagreement with this position during the rate freeze period.\(^7\) Mr. Torrey testified that it was not until December 2006 that the theory offered by the Staff witness in this case was first advanced in any proceeding, 2 TR 187-188, long after the end of the rate freeze.

Following the passage of PA 141, representatives of Consumers Energy engaged in a series of discussions with William Celio, the Director of the Electric Division of the Staff of the MPSC. Mr. Celio appeared as a witness in this case, and provided considerable background concerning the implementation of PA 141. He stated that “[a]s director of the Commission’s Electric Division, it was my responsibility to oversee the electric industry’s compliance with Commission orders and PA 141.” 3 TR 234. Mr. Celio testified as follows regarding his responsibilities, the discussions he had with Consumers Energy, and the impact of the U-12464 Order:

“Q  How did these responsibilities specifically apply to the issue of the decommissioning surcharge for the Big Rock nuclear plant”

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

Q  Did the concept of a ‘freeze is a freeze’ prevent rate increases as well as reductions?

\(^7\) Staff witness Mr. Megginson was not a member of the Staff before or during the relevant period and thus has no first hand personal knowledge. The only present or former Staff member with such knowledge who testified was Mr. Celio, who indicated that it was his position, and the position of Staff at the time, that Consumers Energy’s interpretation of the Order was not only correct, but was the only interpretation that could be reached. Moreover, Mr. Celio testified that he discussed his position with the Commissioners who were then in office and that they were also aware that the surcharge amounts were being used for general corporate purposes. The interpretation advanced by Mr. Megginson was not expressed in any MPSC proceeding until long after the rate freeze had ended.
A Yes. As recognized by the Commission in its August 4, 2000 Order in Case No. U-12464, this approach to the implementation of PA 141 was a two-way street. The rate freeze provisions of the act also operated to prevent upward rate adjustments that would otherwise have gone into effect. Indeed, this same order referred to the fact that the Big Rock surcharge would remain in effect after December 31, 2000 as one of the justifications for prohibiting the upward rate adjustments.” 3 TR 234.

As indicated by Mr. Celio, on September 12, 2000 Consumers Energy filed, in conformance with the Commission’s Case U-12464 Order and Mr. Celio’s direction, a revised tariff sheet that included the following language with respect to the Big Rock surcharge: “Even though the Big Rock Nuclear Decommissioning Surcharge terminates December 31, 2000, the total charges remain the same thereafter due to the rate freeze provisions of 2000 PA 141.” Exhibit A-15, page 5.

Mr. Celio explained that his understanding of the PA 141 rate freeze was that, although the revenue associated with the continued application of the Big Rock surcharge would be collected after December 31, 2000, “[t]here was no Commission action related to the surcharge, however, which would permit Consumers Energy to continue to apply or account for the revenues as decommissioning funds for the Big Rock nuclear plant after December 31, 2000.” 3 TR 233. He was explicit on this point:

“Q Did Consumers Energy ask you how to account for the funds collected by the surcharges during the rate freeze?
A Yes.

Q What was your recommendation?
A Since the Commission orders in Case No. U-12464 were very clear that rates could not be adjusted for short falls or over runs in revenue, I advised them that the surcharge revenue needed to be collected and applied to the general
purpose of the Company. This approach is consistent with the approach that shortfalls in recovery of Company costs were the burden of the Company. Again, a freeze is a freeze.” 3 TR 235.

Thus, by the end of 2000, PA 141 had imposed a freeze on rates that were in effect as of May 1, 2000. The Case U-12464 Order had been issued indicating that the Big Rock surcharges were to continue to be applied to customer’s bills after December 31, 2000. Mr. Celio had given very precise direction to the Company concerning the nature of the tariff sheet revisions that were needed to comply with these Commission orders, and concerning the fact that the revenues associated with the continuation of the surcharges during the statutory rate freeze period were no longer to be deposited in the Big Rock nuclear decommissioning trust, but were to be used for general corporate purposes. Consumers Energy complied with these directions, and made the last deposit into the Big Rock decommissioning trust in January 2001. 2 TR 51, 169.

Consumers Energy received further confirmation that the above direction was consistent with the views of Staff representatives other than Mr. Celio when the Staff issued a report in August/September 2001 concerning the adequacy of decommissioning funds for the Company’s Palisades and Big Rock plants. In that report, the Staff stated as follows:

“Consumers Energy will continue to collect the Big Rock decommissioning surcharge revenues because electric rates have been frozen until 12/31/2003, by Commission Order in Case No. U-12464, in accordance with 2000 PA 141. However, these revenues will be used for general corporate purposes.” Exhibit A-1, page 7 of 7 (also included in the record as Exhibit A-14).

This report was transmitted on September 19, 2001 to Dennis DaPra, Consumers Energy’s Vice President and Controller, by Michel L. Hiser, Director of the MPSC Licensing & Enforcement Division. 2 TR 21, 3 TR 235, Exhibit A-1, p. 1, Exhibit A-14, p. 1. The letter from Mr. Hiser
indicates that copies of the letter and report were sent to MPSC Staff members Dorothy Wideman, Gary Kitts, Bill Celio, and Ron Howe.

**B. Discussion**

As noted previously, the above facts as to what occurred are undisputed. The other parties to this case do dispute, however, that Consumers Energy (and Mr. Celio) properly interpreted PA 141 and the various Commission orders in determining to cease making deposits into the Big Rock decommissioning trust of revenues collected during the three year rate freeze. For the reasons expressed in this section of the Brief, the Company’s actions were appropriate, lawful and consistent with the statute.


Perhaps the most basic and primary rule of statutory construction is that the plain meaning of a statute governs, and that where the language of a statute is clear, no further construction is required. *DiBenedetto v West Shore Hospital*, 461 Mich 394; 605 NW2d 3000 (2000). As noted above, the relevant portion of MCL 460.10d(1) states as follows:

“Nothwithstanding any other provision of law or commission order, rates for each electric utility with 1,000,000 or more retail customers established under this subsection become effective on the effective date of the amendatory act that added this section and remain in effect until December 31, 2003 and all other electric retail rates of an electric utility with 1,000,000 or more retail customers authorized or in effect as of May 1, 2000 shall remain in effect until December 31, 2003, unless otherwise reduced by the commission under subsection (4).” Emphasis added.

As clearly stated, the relevant statute froze “rates” that were authorized or in effect as of May 1, 2000. The applicable dictionary definition of the term “rate” is “the cost per unit of a commodity or service.” American Heritage Dictionary of the English Language. Thus, the plain meaning of MCL 460.10d(1) is that the only things frozen by the statute were “rates.” A necessary element
of the argument presented by the other parties in this case, however, is the claim that the statute froze not only the rate amounts recovered through the Big Rock surcharges, but also “froze” the obligation to deposit the associated revenues into the Big Rock decommissioning trust. This interpretation is inconsistent with the plain meaning of MCL 460.10d(1), which refers only to “rates.”

In the March 22, 1999 Order in Case No. U-11662, the Commission concluded that, based on the information currently available, if the Big Rock surcharge (as adjusted in that case) continued through December 31, 2000, Consumers Energy would have adequate funding to accomplish the decommissioning of the plant.\(^8\) The Commission therefore directed that the surcharge recovery for decommissioning should terminate as of December 31, 2000. The effect of the PA 141 rate freeze was to supersede the U-11662 Order with respect to the termination of the “rates.” PA 141 clearly did not, however, override the Commission’s conclusion that the Big Rock decommissioning trust would be adequately funded as of December 31, 2000, or the corresponding Commission instruction to Consumers Energy to cease making deposits into the trust after that date. For Consumers Energy to continue making deposits into the trust after December 31, 2000 would have been inconsistent with the U-11662 Order, and with the evidence presented and positions taken by every party to that case. Such action would have, based upon the best information available at that time, led to the trust being overfunded.\(^9\)

Notwithstanding the present-day ability to second guess decisions made 9 years ago, the decision

---

\(^8\) The MPSC noted at page 9 of its March 22, 1999 Case No. U-11662 Order, that “surcharges should be calculated in a fashion that, using all of the assumptions found most reasonable, the trust fund end balance is reduced to zero.” Continuing to deposit funds into the trust after the decommissioning funding termination date established by the Commission in the U-11662 Order would have been inconsistent with the MPSC’s determinations in that case.

\(^9\) Further, as discussed later in this Brief, the Company continued to believe throughout the freeze period that the funds collected by December 31, 2000 would be adequate to decommission the Big Rock plant. The March 2004 estimate for radiological and site restoration decommissioning costs was consistent with the March 2001 estimate. 2 TR 135-136.
to cease making deposits into the trust after December 31, 2000 was clearly reasonable, and consistent with the applicable statutes and orders.

The above interpretation of PA 141 and Commission orders is also consistent with the premise underlying the PA 141 rate freeze. Mr. Torrey provided a general description in his rebuttal testimony:

“General rates could not be increased or decreased during the rate freeze. The PSCR mechanism did not operate during the rate freeze. Power supply costs in excess of revenues produced by frozen power supply charges were not recovered from customers. The Company’s rates were fixed. It is important to realize that, during the rate freeze period, revenues were not tied to specific cost of service items. The rate freeze required the Company to manage its overall current costs so as to live within the current revenues produced by its fixed rates. Current rate revenues were applied to current costs as there was no means to increase rates during the rate freeze.” 2 TR 189-190. Emphasis added.

In other words, the revenues produced by individual frozen “rates,” such as the PSCR factor and the Big Rock surcharge, could no longer be characterized as being for the purpose of recovering specific individual costs. There was no reconciliation of costs or revenues contemplated or permitted under the PA 141 rate freeze, either in total or with respect to individual cost/revenue components. The Company was placed in the position where it would either successfully manage its total costs such that its frozen rates would produce revenues sufficient to cover those costs, or not. The position now advocated by the other parties to this case is directly contrary to the premise underlying the PA 141 rate freeze, in that they want to retroactively back up 6-9 years, reclassify approximately $100 million in revenue collected via the frozen rates, and have the Commission conclude that this revenue should have been committed to the decommissioning of the Big Rock plant. Aside from the fundamental unfairness of this position, it is also inconsistent with the applicable statute and Commission orders.
The above description of the manner in which the PA 141 rate freeze operated is confirmed by *Attorney General v MPSC*, 249 Mich App 424; 642 NW2d 691 (2002). That case involved an appeal of the Commission’s decision to dismiss The Detroit Edison Company’s 1999 PSCR reconciliation proceeding on the grounds that to require the PSCR refund determined in that case would be inconsistent with the rate freeze provisions of PA 141. The Court affirmed the Commission action, finding that, “by suspending implementation of pending PSCR proceedings, the MPSC was merely complying with the dictates of subsection 10d(1) [MCL 460.10d(1)] that precluded adjustment of the frozen rates for the specified period.” 249 Mich App at 432. Similarly, with respect to a refund that would otherwise have been made in the same case that arose out of a previously approved settlement agreement concerning the operation of the Fermi plant, the Court also affirmed the Commission’s decision that the rate freeze provisions of PA 141 superseded the obligation to make a refund. 249 Mich App at 434.

This Court of Appeals decision is consistent with Mr. Celio’s view that “a freeze is a freeze” and that the PA 141 freeze operated to prohibit all manner of rate adjustments, whether they related to past periods or current periods, and whether they related to rate increases or decreases. This Court of Appeals decision, in addition, fully contradicts the position taken by other parties to this U-15611 case that the revenues associated with the Big Rock surcharge that were collected during the rate freeze period are somehow subject to reclassification and refund, 6-9 years later. Rates cannot simultaneously be both “frozen” and “subject to refund,” yet that is exactly what is being argued by the other parties.\(^{10}\) This is both illogical, and as recognized by the Court of Appeals, inconsistent with PA 141.

---

\(^{10}\) Mr. Barba makes this point in a discovery answer marked as Exhibit MEC-10, where he states that “rates could not logically both be described as ‘frozen’ and as ‘subject to refund.’” Exhibit MEC-10, Bates 61106843.
2. **The Interpretation of the Statute and Orders Made During the Relevant Time Period supports Consumers Energy’s Position.**

As might be expected, Consumers Energy sought guidance concerning various PA 141 implementation issues, including the manner in which the rate freeze provisions would be implemented. As noted above, the Director of the Electric Division of the MPSC Staff at the time was William J. Celio. He provided confirmation to Consumers Energy that the correct interpretation of PA 141, the U-11662 Order and the U-12464 Order was that the Big Rock surcharge was to remain in effect after the stated termination date of December 31, 2000, and that the revenues associated with the continuation of that rate during the three year rate freeze were no longer earmarked for the decommissioning trust. 3 TR 234-235. He further indicated that he advised the Commission of the direction he had given the Company, testifying that “[t]his was a noteworthy matter and I therefore did inform the Commission of this approach.” 3 TR 236.

The direction that Mr. Celio provided Consumers Energy during the latter half of 2000 was not merely off-hand, “by-the-way” type advice. He was fully engaged in issues concerning the implementation of the rate freeze, and provided detailed and specific instructions on actions the Company should take. For example, with respect to the language added to the tariff sheet stating that the surcharge would continue after December 31, 2000 due to the rate freeze provisions of PA 141, he testified that he determined that tariff language addressing the issue was needed, and that he was “involved in either the creation of it [i.e., the tariff language] or review of it.” 3 TR 248. Mr. Celio further testified that it was (and is) his opinion that:

“...the only thing that Act 141 did was freeze rates. I think, I believe the commission orders terminated the requirement that Consumers Energy deposit funds into the decommissioning fund for Big Rock on December 31, 2000.” 3 TR 253.
The evidence in this case further indicates that Mr. Celio was very consistent in the directions that he gave Consumers Energy. He indicated that his primary contact with the Company was David Joos. 3 TR 249. MEC/PIRGIM marked as Exhibit MEC-1 a series of discovery answers that includes one answered by Mr. Joos. A portion of that answer states as follows:

“Mr. Joos recalls that the initial conversation started with a discussion about whether the rate freeze precluded Consumers Energy from implementing the MCV settlement ramp-in that had been previously approved by the Commission. Mr. Celio’s position was ‘no, a freeze is a freeze.’ Mr. Celio recognized that his position would result in Consumers Energy not recovering MCV costs that had been previously approved by the Commission, but then pointed out that the Big Rock Point decommissioning surcharge was authorized for a set period of time, and when that time expired, the revenue collected under frozen rates would no longer be for Big Rock Point decommissioning. Mr. Celio indicated that that would offset Consumers Energy’s underrecovery of MCV costs along with other cost increases during the freeze period.” Exhibit MEC-1, Bates page 61105791-61105792.

Thus, as noted previously, the direction given by Mr. Celio was consistent and applied to both increases and decreases, and was summed up by his phrase, “a freeze is a freeze.” His view of the nature of a rate freeze was that revenues became essentially fixed (subject only to sales fluctuations), and that it was the responsibility of the Company to manage its overall costs to live within the overall level of fixed revenues. Specifically with respect to the Big Rock surcharge, this meant that the revenues associated with the frozen rate collected after December 31, 2000 (the date that the U-11662 Order had directed termination of the rate to fund the decommissioning trust) lost their earmarked status, and became available for general corporate purposes.
Other parties to this case may be expected to argue that Mr. Celio’s testimony is essentially irrelevant; i.e., that the Commission “speaks only through its orders,” and that Consumers Energy should not have relied upon Mr. Celio’s instructions. Such an argument is based on a faulty premise, distorts the nature of the directions provided by Mr. Celio, and fails to place Mr. Celio’s directions into the necessary legal context. In the first place, Mr. Celio’s directions simply confirmed Consumers Energy’s interpretation of the PA 141 rate freeze and prior Commission orders, and how those statutes and orders interrelated. The underlying determinations were made by the MPSC in its orders. The premise of the argument that Mr. Celio’s testimony is irrelevant is that his interpretation of the act and prior orders was (and is) wrong. As discussed above, however, his interpretation is entirely consistent with the act and orders.

The argument also understates, however, the significance of receiving real time, on-the-spot direction from the one Commission Staff individual who was probably most involved in and responsible for the implementation of PA 141, including the rate freeze provisions of the act. Mr. Celio testified that, “[a]s director of the Commission’s Electric Division, it was my responsibility to oversee the electric industry’s compliance with Commission orders and PA 141.” 3 TR 234. To the extent there was any discretion available to the Commission during 2000 concerning the appropriate classification of the revenues associated with the Big Rock surcharge collected during the rate freeze period, Consumers Energy acted appropriately in obtaining direction from the MPSC’s Director of the Commission’s Electric Division, and in relying upon the directions provided by this individual.

Indeed, it was not as though Mr. Celio was expressing any doubts or misgivings to Consumers Energy about the correct manner of proceeding. He was quite explicit and certain
in his directions, to the point of reviewing and approving, if not personally preparing, the relevant tariff sheet language prior to its filing with the Commission. 3 TR 248. During his cross-examination, Mr. Celio emphasized his belief that additional action by the Company, Staff or Commission on this subject beyond what was done simply was not necessary. In response to questions concerning whether he ever considered directing Consumers Energy to file a formal petition with the Commission asking for direction, or considered having the Staff take other action, Mr. Celio very clearly indicated his belief that such action was not necessary:

“The process would be I could – could have been several. I could have in a formal meeting with the commission, not a commission meeting that would have taken place like your normal scheduled hearings, but in a study session, I could have raised the issue and made a recommendation that they initiate [a] proceeding. I chose not to do that because I felt the commission, their orders were pretty clear. We could have filed some type of complaint at the staff level. I chose not to do that because I felt the commission orders were very clear. The termination of the surcharge, the commission’s implementation in the freeze and the Public Act 141 were quite clear on the issue of the rates.” 3 TR 259.

Thus, in addition to the unequivocal, specific direction Consumers Energy received from Mr. Celio, the Company also took into account the fact that, if the Commission disagreed with that direction, it was fully capable of taking corrective action, either by commencing a proceeding or by directing the Staff to do so. Mr. Celio indicated that he informed the Commission of the direction he had given Consumers Energy, so they clearly had the opportunity to take action countering that direction. 2 TR 236. Instead of contradicting Mr. Celio, however, the Commission issued the U-12464 Order that specifically cited the fact that the Big Rock surcharge would continue past its stated expiration date as one of the justifications for refusing to permit previously authorized rate increases to go into effect. The reference to the Big Rock surcharge in the U-12464 Order is significant because it only makes sense if the
Commission was acknowledging that the revenues associated with the Big Rock surcharge became untied from decommissioning as of December 31, 2000. If that was not their understanding, why would they cite the Big Rock surcharge as an example of Consumers Energy receiving a benefit from the PA 141 rate freeze? Indeed, if the Commission intended the revenue associated with the Big Rock surcharge to continue to be deposited into the decommissioning trust after December 31, 2000, why would it not have noted that fact in either the U-12464 Order, or issued an amendatory order in U-11662 directing that action? Consumers Energy logically concluded that the Commission did not do so because it agreed with Mr. Celio’s direction to the Company, of which the Commission had been informed.

Events occurring after the commencement of the rate freeze provided further confirmation that Consumers Energy’s actions were appropriate. As explained by Mr. Torrey, Consumers Energy’s actions with respect to the Big Rock issue were hardly a secret. See 2 TR 184-188. This is most clearly revealed by Exhibit A-1 (also A-14), which is a report by members of the Commission Staff (not under Mr. Celio’s direction) that recognized that the Big Rock surcharge had continued in effect during the rate freeze and that the associated revenues “will be used for general corporate purposes.” Exhibit A-1, p.7 of 7. As Mr. Celio noted during his cross-examination, 3 TR 257, if these other members of the Staff had thought something was amiss regarding this issue, why did the report not take issue with this conclusion? Why was no action taken?

In addition, responding to allegations of a “subterfuge” by the witness for MEC/PIRGIM, Mr. Torrey cited to a host of tariff sheets (Exhibit A-15), Securities and Exchange Commission filings (Exhibit A-18), MPSC Annual Reports (Exhibit A-19, pages 1-9), and FERC Form No. 1 filings (Exhibit A-19, pages 10-18), all of which disclose the facts that the
surcharge had continued during the rate freeze and that Consumers Energy had ceased to deposit
the associated revenues in the decommissioning trusts. 2 TR 184-187. Clearly, the Commission,
the Commission Staff, and other parties had ample opportunity to raise this issue during the time
the revenue in question was being collected. The fact that the first time the issue was raised was
in December 2006, three years after the end of the PA 141 rate freeze, 2 TR 187, supports the
conclusion that the current objections to the directions given by Mr. Celio are, in his words,
merely “Monday morning quarterbacking.” 3 TR 237.

Mr. Celio’s testimony illustrates a basic principle of utility regulation - that the
review of the reasonableness and prudence of utility decisions must be made in light of the
circumstances that existed at the time the decision was made. See e.g., ABATE v PSC, 208 Mich
App 248, 267; 527 NW2d 533 (1994); Attorney General v PSC, 161 Mich App 506, 517;
411 NW2d 469 (1987). The circumstances that existed during the PA 141 rate freeze included
the following: (i) rates had been frozen by PA 141, (ii) an existing order predating the
commencement of the rate freeze concluded that the Company would have collected sufficient
funds for the decommissioning of the Big Rock plant as of December 31, 2000, and that the
surcharge should therefore be terminated and deposits into the decommissioning trust should be
ceased as of that date, (iii) the Commission had nevertheless concluded that, by virtue of PA 141,
the surcharge rate should remain in effect during the rate freeze, and cited to that fact in the
context of a discussion of how Consumers Energy would receive benefits, as well as detriments,
resulting from the rate freeze, (iv) the Director of the MPSC Staff’s Electric Division had given
explicit directions to the Company concerning the implementation of the rate freeze, including
that the revenue derived from the continuation of the surcharge rate should be treated as
available for general corporate purposes, and how to reflect this status on the Company’s tariff
sheets, (v) Mr. Celio had informed the Commission of the issue, including his directions to the Company, and (vi) the Company’s actions had been fully disclosed to investors, regulators and other interested parties.

Under these circumstances, Mr. Celio’s directions given during 2000 are not irrelevant; indeed, they are an important piece of the overall facts and circumstances existing during 2000-2003 that support the conclusions that the Company acted reasonably, and that, even if the Commission had previously possessed some discretion regarding the accounting for the revenues collected during the rate freeze, it would be grossly unreasonable and unlawful to now, 6-9 years later, reclassify those revenues.

3. **The $44.1 Million Funding Shortfall Did Not Occur Until After the End of the Rate Freeze Period**

   a. **Response Regarding Speculation that Consumers Energy “Knew” There Was a Funding Shortfall During the Statutory Rate Freeze Period**

   One witness in this case speculated that Consumers Energy should have “known” during the three year rate freeze period that it would experience a funding shortfall for radiological and site restoration Big Rock Plant decommissioning costs, and that this is an independent reason why the Company should have continued making deposits into the decommissioning trusts. The record evidence does not support these speculations. To the contrary, the record evidence shows that the shortfalls were not known until after December 31, 2003 (the end of the statutory freeze period), at a time after when collection of the surcharges which had formerly been for Big Rock decommissioning had terminated.

   The primary advocate of the speculation that Consumers Energy should have known that it was experiencing a funding shortfall was Staff’s witness Mr. Megginson. During the time the statutory rate freeze was being implemented, Mr. Megginson was not employed by
the Commission Staff, was not monitoring decommissioning issues, and was not even within the State of Michigan. He was not involved in any decommissioning issues until well after the relevant events had occurred and his opinion regarding this issue is not based on personal knowledge.

Between 1991 and July 2000 Mr. Megginson was a commercial accounts manager for Michigan Consolidated Gas Company in their gas transportation area. 2 TR 271, 289. He recalls no involvement with matters related to electricity during that time. 2 TR 289. Around mid-July 2000 Mr. Megginson left Michigan Consolidated Gas Company to go back to school for a master’s degree. 2 TR 289. During the time he was working on his master’s degree Mr. Megginson was in Georgia and had no ongoing involvement with any matters related to Michigan utility regulation. 2 TR 289. Mr. Megginson began work as a financial analyst for the MPSC Staff in December 2002, around December 22, 2002. 3 TR 271, 290. During the years 2000, 2001, and 2002 until near the end of December he was not employed by the MPSC. 2 TR 290.

Mr. Megginson testified that as a financial analyst for the MPSC Staff he analyzed and reported on financial statistics of regulated Michigan utility companies. 2 TR 290. He stated that, during that time, none of his focus was directly related to decommissioning funding or the decommissioning processes. 2 TR 290. Mr. Megginson indicated that the first time he had primary responsibility for review of a decommissioning trust fund was in February 2007 in connection with the Cook Nuclear Plant. 2 TR 291. Mr. Megginson said that the testimonies he refers to at page 2 of his testimony (2 TR 272) did not involve nuclear decommissioning issues. 2 TR 293-294.
Mr. Megginson testified that he is not currently in a director level position with the MPSC Staff, and has not previously been at a director level. 2 TR 288-289. While he assumed that Staff members at the director level have conversations with the Commissioners regarding regulatory matters, he has no personal knowledge of such conversations. 2 TR 294. In any event, Mr. Megginson testified that he does not provide advice directly to commissioners. 2 TR 294

Mr. Megginson specifically admitted that he had no personal knowledge of what conversations may or may not have taken place between Mr. Celio and Commissioners during the 2000 and 2001 time period. 2 TR 294. The record is clear that Mr. Megginson has no knowledge or basis which would allow him to contradict the testimony and evidence presented by former Electric Division Director William Celio regarding conversations which Mr. Celio had with Commissioners concerning matters at issue in this case. The testimony of Mr. Celio is unrefuted on the record.

Mr. Megginson’s opinions in this case are based on an after-the-fact review of information. He has reached incorrect conclusions. For example, Mr. Megginson asserts that during the time period of January 1, 2001 through December 31, 2003: (i) Consumers Energy “should have anticipated that actual decommissioning expenses were going to be above estimates,” (ii) “The Company should have, at the very minimum set aside one year of surcharge revenues to cover foreseeable cost overruns and contingency,” (iii) “the Company was undoubtedly experiencing the challenges and increased costs associated with green-fielding the site,” and (iv) “any assumed shortfall is due to imprudent actions of the Company” in not applying surcharge revenues to decommissioning costs. However, these statements do not hold
up under scrutiny. Each of these assertions was refuted by Consumers Energy’s witness Mr. Haas.

Unlike Mr. Megginson, Mr. Haas has hands-on decommissioning expertise and was directly and personally involved in Big Rock decommissioning matters contemporaneously with the events at issue in this case. Mr. Haas testified, among other things, that it would not be correct to assume that during the period from January 2001 through December 2003 the Company should have anticipated that then-current estimates for Big Rock radiological and site restoration decommissioning costs were substantially understated. 2 TR 133-134.

Mr. Haas explained that as the decommissioning project progressed, cost estimates were revised based upon actual progress of work in the field and new or changed assumptions resulting from additional information collected during this work at the particular project or industry experience from other decommissioning projects. Until the Big Rock decommissioning project was completed, cost estimates were updated every three years by TLG Services. 2 TR 134. Mr. Haas testified:

“Reference to my Exhibit A-11 (KMH-4) shows that radiological and site restoration costs increased from $268.2 million in year 1997 dollars in the March 1998 TLG estimate to $349.7 million in the March 2001 TLG estimate. The March 2001 TLG estimate showed historical costs in as-spent dollars and future costs in year 2000 dollars. The March 2004 TLG estimate projected costs of $359.8 million with historical costs in as-spent dollars and future costs in year 2003 dollars. The actual Big Rock radiological and site restoration decommissioning costs were $388.2 million. The majority of the cost increases experienced were either related to developments which occurred after 2003 or had already been incorporated into the March 2001 estimate. During the time period of January 1, 2001 through December 31, 2003, overall cost increases above the March 2001 estimate were essentially attributable to inflationary effects. Additionally, actual project performance was continually compared to the current cost estimate and any differences were evaluated for cause and possible corrective action.” 2 TR 134-135.
Thus, Mr. Haas explained that, if the $349.7 million and $359.8 million amounts were stated in the same years dollars, they would be approximately the same. 2 TR 135.

During the 2001-2003 time frame, Consumers Energy reasonably expected that the overall costs for radiological and site restoration decommissioning would be consistent with the March 2001 estimate. This belief was reinforced by the March 2004 cost estimate. 2 TR 135-136.

Mr. Megginson is also incorrect in his assertion that Consumers Energy should have “set aside one year of surcharge revenues to cover foreseeable cost overruns and contingency.” Mr. Haas testified:

“Consistent with industry practice contingencies were applied in preparing decommissioning cost estimates. The ‘foreseeable cost overruns and contingency’ were included in the contingency that was already part of the March 2001 estimate. Based on information available during the 2001-2003 time period, the Company reasonably concluded that the contingencies that were included in the March 2001 TLG cost estimate would adequately address these cost items.” 2 TR 136.

Mr. Megginson’s second rationale does not withstand scrutiny.

Mr. Megginson’s speculation that “the Company was undoubtedly experiencing the challenges and increased costs associated with green-fielding the site” is likewise incorrect. Mr. Haas stated:

“The Company was not during the 2001-2003 time period ‘experiencing the challenges and increased costs associated with green-fielding the site.’ As discussed above, projected site restoration cost increases had been recognized in the March 2001 TLG cost estimate and the Company had concluded that funding would be adequate for radiological and site restoration decommissioning based on the then current assumptions. Site radiological decommissioning through 2003 was progressing smoothly with major milestones, such as the removal and disposal of the reactor vessel, completed close to projected cost.
Regulatory approvals and the set up and operation of hardware needed to support projected radiological waste disposal costs were in place and field data continued to support projections. Actual site restoration did not begin until 2004. This can be seen by reference to my Exhibit A-8 (KMH-1). Consumers Energy did not begin experiencing costs associated with green-fielding the site until after 2003 but there was nothing in the performance of the project or information from field work that indicated any potential problem with cost estimates for this work. Consumers was not incurring any costs during the 2001-2003 time period for site restoration.” 2 TR 137-138.

Since actual site restoration did not begin until 2004 and there was nothing during 2001-2003 to indicate a potential problem with costs estimates, Mr. Megginson’s assumption that the Company was “undoubtedly experiencing the challenges and increased costs associated with green-fielding the site” has no basis in fact.

Mr. Haas testified that costs being experienced during the freeze period were consistent with expectations. 2 TR 138. Mr. Megginson’s own testimony shows the fallacy of his conclusions. Mr. Megginson testified at 3 TR 279:

“The Commission issued no order affecting the use of the revenues collected through the surcharge provision...”

Since the Commission issued no order affecting the use of the revenues collected, and since PA 141 addressed rates and not uses of revenues, then it follows that Consumers Energy had no authority to modify or ignore the Commission’s determination in its Case No. U-11662 Order that the “use of the revenues collected through the surcharge provision” for the purpose of decommissioning must end on December 31, 2000.

Nothing in PA 141 or the Commission’s Order in Case No. U-12464 reversed the requirement in the Case No. U-11662 Order that Consumers Energy was to cease making deposits into the Big Rock trusts as of December 31, 2000. As testified to by Mr. Torrey, “commencing January 1, 2000, no portion of the rates in effect were attributable to Big Rock
decommissioning, since the earmarked purpose for that surcharge had terminated at December 31, 2000.” 2 TR 169. There is no valid legal or factual support for Mr. Megginson’s assertion that the Company was somehow “imprudent” in not depositing surcharge revenues collected after December 31, 2000 in the decommissioning trusts. 2 TR 138.

b. The $44.1 Million That Consumers Energy Seeks to Recover Was Incurred After 2003

As has been discussed above, the costs in excess of available customer-supplied decommissioning funding were incurred after the end of the statutory rate freeze period and after the point in time when the surcharge which had originally been for Big Rock decommissioning had ended. The $44.1 million shortfall is comprised of site restoration decommissioning costs and the portion of radiological decommissioning costs that is in excess of funds provided from customer funded MPSC-jurisdictional trust funds and from FERC-jurisdictional funds. Site restoration costs were approximately $38.187 million. Exhibit A-4. The portion of radiological costs funded by the Company from corporate funds was therefore approximately $5.895 million.\(^{11}\)

Mr. Haas testified that all of the site restoration costs ($38.187 million) were incurred after 2003. 2 TR 138. The Company contributions to the trust fund to meet NRC minimum funding requirements ($15.5 million) occurred in March 2006. 2 TR 52, Exhibit A-5, p. 4, Exhibit A-7, p. 3. These contributions were accounted for separately from customer contributions. Exhibit A-7, p. 1. Thus, costs in excess of $44.1 million were incurred after the end of the statutory rate freeze. Reference to page 1 of Exhibit A-7 shows that over $100 million was expended for radiological and site restoration decommissioning costs after the end of the rate freeze period. (Sum of trust withdrawals for years 2004-2007).

\(^{11}\) $44.082 - $38.187 = $5.895 million.
4. **Consumers Energy Followed Appropriate Accounting Practices During the Rate Freeze Period**

The Attorney General’s witness Mr. Majoros expressed doubt that Consumers Energy followed appropriate accounting procedures with respect to the decision to take the revenues collected from 2001 through 2003 into the Company’s general revenues and whether the Company’s external auditors had reviewed and approved that decision. In response, Consumers Energy’s witness Glenn P. Barba testified that recording these rates as general corporate revenues was consistent with appropriate accounting practices. Mr. Barba is Vice President, Controller, and Chief Accounting Officer for Consumers Energy. 2 TR 18. He stated as follows:

“The Company and its external auditors relied upon the facts that have been set forth by other witnesses in this case. These may be summarized as follows:

1. The Commission had issued an order in Case No. U-11662 that stated the Big Rock surcharge was authorized through December 31, 2000.

2. In its August 4, 2000 order in Case No. U-12464, the Commission made clear that the rate freeze imposed by 2000 PA 141 required the surcharge amounts to continue to be collected beyond the scheduled December 31, 2000 termination date.

3. Tariff sheets filed with the Commission that were subject to their review and approval indicated that, while the Big Rock decommissioning surcharge terminated as of January 1, 2001, the total charges collected by the Company would continue as a result of the PA 141 rate freeze provisions.

4. The above understanding was reflected in the September 19, 2001 MPSC memo issued by Michel Hiser, Director of Licensing and Enforcement Division of the MPSC, to Consumers Energy. See Exhibit A-1(WJC-1).

5. The above understanding was further confirmed by discussions with William J. Celio, who at the time of those
discussions was the Director of the Electric Division of the MPSC.

In addition, rates collected pursuant to the rate freeze imposed by PA141 could not, by definition, be subject to refund.

Based upon these facts, it was the opinion of Consumers Energy and its auditors that the revenues collected after December 31, 2000 should be recorded as general corporate revenues. Such accounting treatment would be consistent with Commission orders and would properly represent the true status of the Company’s financial situation.” 2 TR 20-21.

Mr. Barba testified further that the Company’s treatment of this issue was reviewed by three separate external auditing firms and none of them took issue with the accounting treatment utilized and provided non-qualified opinions that Consumers Energy’s books and records were accurate.

“Q. Did Consumers Energy’s external auditors take issue with the Company’s accounting treatment of these revenue collections after December 31, 2000?

A. No, they did not. The external auditing firms of Arthur Andersen & Co., Ernst & Young LLP, and PricewaterhouseCoopers LLP audited the books and records of Consumers Energy for the years 2001 through 2008. Each year’s audit resulted in an unqualified opinion on the financial statements of the Company, meaning that the Company’s financial statements were prepared in accordance with generally accepted accounting principles. Additionally, the Ernst & Young audit management letter for the years 2001 and 2002 (no report was issued for 2003) did not recommend changes to the accounting treatment for revenues.” 2 TR 22.

Mr. Majoros’ speculations that accounting treatment was inappropriate are without basis or merit and are directly refuted by Mr. Barba’s testimony.
5. **The Relief Sought by Other Parties is Barred by the Prohibition Against Retroactive Ratemaking.**

The relief sought by the other parties in this case is barred by the prohibition against retroactive ratemaking. Indeed, their position is a particularly outrageous form of retroactive ratemaking. As Mr. Torrey stated, those parties are effectively proposing “to match costs from 2004 through 2008 with revenues collected during 2001 through 2003.” 2 TR 190. They might just as well be proposing to use revenues collected during the rate freeze period to offset PSCR costs incurred in 2009; the fact that the other parties are making this argument with respect to nuclear decommissioning costs does not somehow transform a blatantly unlawful action into a lawful one.

There is no dispute that amounts that witnesses for other parties seek to have refunded to customers are attributable to rates that were in effect during the statutory rate freeze period. If rates recovered during the statutory rate freeze period could be ordered to be refunded to customers, then how could rates be considered to be frozen? Such action would clearly be a retroactive adjustment. The arguments of various witnesses that amounts recovered by the Company should be refunded to customers defies logic in addition to being confiscatory and unlawful.

The prohibition against retroactive ratesetting in Michigan arises out of *Michigan Bell Telephone Co. v Public Service Commission*, 315 Mich 533; 24 NW 200 (1946). In that case, the Commission concluded, in an order issued December 28, 1944, that Michigan Bell’s rates charged during 1944 were “excessive,” and therefore directed the company to issue a refund to customers. The Supreme Court held that,

“*[t]here is no express or reasonably implied statutory provision authorizing the commission to alter or readjust telephone rates or charges retroactively,*” 315 Mich at 545,
and that,

“we cannot find that the commission has either express or implied statutory power to retroactively reduce appellee’s rates or its accrued earnings. Instead the commission’s rate-fixing orders are effective only prospectively.” 315 Mich at 547.

In this case, the other parties are asking the Commission to reclassify revenues collected during the 2001-2003 rate freeze that had been accounted for as general corporate revenue, and find that this revenue “should have” instead been used to cover decommissioning costs incurred during 2004-2007. This is a direct attack on the Company’s reported accounting records for the period 2001-2007. The consequences of this action would be to cause an immediate $44.1 million writeoff, 2 TR 22, and an additional refund of $57.61 million (Megginsion, 3 TR 281), or $110.9 million (Majoros, 3 TR 317), or $135.3 million (Peloquin, 3 TR 356 and Exhibit MEC-612). Thus, the total amount of retroactive action urged by the other parties is $101.71 million (Megginsion), $155 million (Majoros), and $179.4 million (Peloquin). The enthusiasm with which these witnesses propose actions that would have catastrophic financial consequences on Consumers Energy is matched only by the brazen illegality of the proposals. It is hard to imagine a more retroactive ratemaking action. Not only do the proposals of these witnesses reach back 6-9 years to reclassify previously booked revenues, they then impute earnings on these retroactively-claimed revenues. In so doing, they have reached a new zenith in illegal ratemaking practices—the retroactive refund of phantom historical earnings.

V. RECOVERY OF $44.1 MILLION SHORTFALL

Mr. Torrey explained that, as a result of the sale of the Palisades Plant to Entergy that was approved by the Commission in Case No. U-14992, a substantial portion of funds initially collected for decommissioning the Palisades Plant were no longer needed for that

---

12 The sum of $55,874,381 (principal) from 3 TR 356 and $79,387,194 (interest) from MEC-6.
purpose. In addition, the transaction produced a sales price in excess of the book value of the plant. Following the Commission’s action in its May 12, 2009 Order in Case No. U-15645, there remain approximately $73 million of proceeds from the Palisades transaction, the use of which has not yet been determined by the Commission. See May 12, 2009 Order in U-15645; pp. 6, 10-11, where the Commission directed that $36.04 million of the remaining $109 million of Palisades proceeds be used to offset the interim rate increase that went into effect in that case, leaving approximately $73 million of those proceeds available for alternative uses. Consumers Energy contends that an appropriate use of $44.1 million of those proceeds would be to offset the Big Rock decommissioning shortfall, and requests that the ALJ recommend, and the Commission approve, that action. 2 TR 175.

Paying for the remaining decommissioning costs in this manner would avoid having to surcharge customers for the remaining $44.1 million, and would better match those customers paying for Big Rock decommissioning with those customers who benefited from operation of the Big Rock Plant. See testimony of Mr. Torrey at 2 TR 175.

The Company maintains that prudent and reasonable ratemaking practices support the use of “windfall” funds, such as those generated through the Palisades transaction, to directly offset other rate increases. This minimizes the impacts on customers of rate changes, and is an appropriate and logical policy for the Commission to follow. The Commission’s decision to utilize $36.04 million of the proceeds to offset the interim increase in Case No. U-15645 indicates that it agrees with this approach to ratemaking.

It should also be noted that using a portion of the Palisades proceeds to offset Big Rock decommissioning costs is consistent with, indeed virtually identical to, the ratemaking treatment adopted by the Federal Energy Regulatory Commission (“FERC”) in connection with
the Palisades transaction. As noted above, in its order issued on February 21, 2007 in Docket Nos. EC06-155-000, ER06-1410-000, and ER06-1411-000, the FERC authorized Consumers to use $11 million of Palisades decommissioning funds attributable to FERC-jurisdictional rates to cover shortfalls in the decommissioning of the Big Rock plant. Consumers Energy Co & Entergy Nuclear Palisades, LLC, et. al., 118 FERC ¶ 61,143 (Feb. 21, 2007.) Such action would be equally appropriate with respect to the MPSC-jurisdictional costs involved in decommissioning the Big Rock Plant.

If, however, the Commission chooses not to use a portion of the Palisades proceeds in this manner, then the Commission should authorize recovery of the $44.1 million through a $0.000422 surcharge. This surcharge is designed to recover the $44.1 million over a three year period. See 2 TR 175; Exhibit A-16.

VI. CONCLUSION

For over 30 years, the Big Rock Nuclear Plant provided reliable and reasonably priced electricity to customers of Consumers Energy. The costs of decommissioning a facility such as Big Rock are an unavoidable and reasonable element of the total costs of providing public utility service. Consumers Energy honored its commitment to restore the Big Rock Nuclear Plant to a greenfield status—returning it to a natural state and free for unrestricted use. The care with which Consumers Energy restored the site has great value to the present and future economic development prospects for Northern Michigan. The greenfield status of the site not only allows a wide variety of possible uses for the site itself, it also helps provide reassurance to surrounding communities that the site will not detract from other potential development opportunities.
As set forth above, Consumers Energy incurred greater costs in decommissioning the Big Rock Plant than it has collected from customers in the amount of $44.1 million. The most straightforward means of recovering this shortfall with essentially no incremental impact on customers is through the use of a portion of the remaining proceeds from the Palisades transaction. Whether the Commission authorizes recovery in this manner, or through a separate surcharge, however, recovery should be permitted.

Respectfully submitted,

CONSUMERS ENERGY COMPANY

Dated: September 15, 2009

By ________________________________________________
Jon R. Robinson (P27953)
H. Richard Chambers (P34139)
One Energy Plaza
Jackson, Michigan 49203
(517) 788-0698
Attorneys for Consumers Energy Company
STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the application of
CONSUMERS ENERGY COMPANY
for Reconciliation of Nuclear Power Plant Decommissioning Funds and Expenditures
for the Big Rock Point Nuclear Plant and
for related relief

Case No. U-15611

PROOF OF SERVICE

Judy A. Jones, being first duly sworn, deposes and says that she is employed in the Legal Department of Consumers Energy Company; that on September 15, 2009, she served a copy of Consumers Energy Company’s Initial Brief upon the persons listed in Attachment 1 hereto, at the e-mail addresses listed therein. Further, she also states that she mailed a hard copy of Consumers Energy Company’s Initial Brief to the Honorable James N. Rigas at the address listed in Attachment 1, with first-class postage prepaid, and deposited the same on September 15, 2009, at the United States Post Office in the City of Jackson, Michigan.

Judy A. Jones
Subscribed and sworn to before me on the 15th day of September, 2009.

Sharon K. Davis, Notary Public
State of Michigan, County of Jackson
My Commission Expires: 07/28/10
Acting in the County of Jackson
ATTACHMENT 1 TO CASE NO. U-15611

Administrative Law Judge (ALJ)
Honorable James N. Rigas
Administrative Law Judge
6545 Mercantile Way, Suite 14
P.O. Box 30221
Lansing, MI 48909
E-Mail: rigasj@michigan.gov

Counsel for the Michigan Public Service Commission Staff
Patricia S. Barone, Esq.
Colleen Ells, Paralegal
Attorney for MPSC Staff
6545 Mercantile Way, Suite 15
Lansing, MI 48911
E-Mail: baronep@michigan.gov
ellsc@michigan.gov

Counsel for the Association of Businesses Advocating Tariff Equity (“ABATE”)
Robert A. W. Strong, Esq.
Clark Hill PLC
151 S. Old Woodward Ave., Suite 200
Birmingham, MI 48009
E-Mail: rstrong@clarkhill.com

Counsel for the Attorney General, Michael A. Cox
Donald E. Erickson, Esq.
Assistant Attorney General
Environment, Natural Resources, and Agriculture Division
6th Floor Williams Building
525 W. Ottawa Street
P.O. Box 30755
Lansing, MI 48909
E-Mail: ericksond@michigan.gov

Consultants for the Attorney General, Michael A. Cox
Michael J. Majoros
Margaret Kenney
Snavely King Majoros O’Connor & Bedell, Inc.
1111 14th Street NW, Suite 300
Washington, DC 20005
E-Mail: mmajoros@snavely-king.com
E-Mail: mkenney@snavely-king.com

Counsel for the Michigan Environmental Council (“MEC”) and Public Interest Research Group in Michigan (“PIRGIM”)
Don L. Keskey, Esq.
Clark Hill PLC
212 E. Grand River Avenue
Lansing, MI 48906-4328
E-Mail: dkeskey@clarkhill.com

Christopher M. Bzdok, Esq.
Olson, Bzdok & Howard, P.C.
420 E. Front Street
Traverse City, MI 49686
E-Mail: chris@envlaw.com

Counsel for Energy Michigan, Inc.
Eric J. Schneidewind, Esq.
Varnum, Riddering, Schmidt & Howlett LLP
201 N. Washington Square, Suite 810
Lansing, MI 48933
E-Mail: ejschneidewind@varnumlaw.com